

1 1 TOWNSHIP OF WEST ORANGE 2 DEPARTMENT OF PLANNING AND DEVELOPMENT 3 WEDNESDAY, FEBRUARY 25, 2026 4 6:30 P.M. 5 FINAL SUMMATIONS 6 7 RE; PB-24-01 WEST ESSEX HIGHLANDS, INC. 8 BOARD MEMBERS: 9 ROBERT BAGOFF, Chairman 10 JERRY GUARINO, Vice Chairman 11 SUSAN MCCARTNEY, Mayor 12 KEN ALPER 13 JOHN CARDOZA 14 LORI KAPFERER 15 SUSAN SCARPA, Councilwoman 16 17 18 19 20 21 22 23 FISHMAN COURT REPORTING AGENCY 24 89 HEADQUARTERS PLAZA NORTH 25 4 SPEEDWELL AVENUE, SUITE 1440 MORRISTOWN, NEW JERSEY 07960 (973) 285-5331 - FAX - (732) 605-9391	3 1 2 INDEX OF EXHIBITS 3 <u>EXHIBIT</u> <u>DESCRIPTION</u> <u>PAGE</u> 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
2 1 A P P E A R A N C E S: 2 HUTT, SHIMANOWITZ & PLOCKER, ESQS. 3 BY BRYAN D. PLOCKER, ESQ. 4 Bplocker@huttshim.com 5 459 AMBOY AVENUE 6 WOODBRIDGE, NEW JERSEY 07095 7 Appearing on behalf of the Applicant 8 9 10 GACCIONE & POMACO, ESQS. 11 BY DIANA P. McGOVERN, ESQ. 12 ONE BOLAND DRIVE, SUITE 102 13 WEST ORANGE, NEW JERSEY 07052 14 Appearing on behalf of the Board 15 16 17 18 19 20 21 22 23 24 25 BRUCE I. AFRAN, ESQ. 10 BRAEBRUN DRIVE PRINCETON, NEW JERSEY 08540 Appearing on behalf of the Objector, We Care NJ Corp.	4 1 CHAIRMAN BAGOFF: Welcome back, ladies and 2 gentleman, both here and on zoom. 3 We now have an application before you, PB-24-01 4 West Essex Highlands, Inc., Block: 179 Lot 32, Zone 5 IH-1, Warner Road. The applicant is proposing to 6 develop a 496 inclusionary multifamily residential 7 development on a vacant 120 acre property in the 8 northwest corner of the Township of West Orange. 9 This evening, ladies and gentlemen, we will hear 10 the final summation of the attorney for the applicant, 11 Mr. Plocker, and the attorney for the objector, Mr. 12 Afran. 13 Mr. Afran has the floor first, sir. 14 MR. AFRAN: Thank you. Just give me one 15 moment, Mr. Chairman, please. 16 CHAIRMAN BAGOFF: Sure. 17 MR. AFRAN: Just give me one moment, Mr. 18 Chairman. 19 CHAIRMAN BAGOFF: Sure. 20 MR. AFRAN: This pile is not as fearsome as 21 it looks. 22 Good evening. We are at the penultimate phase of 23 our case. And, you know, we were talking before, it's 24 almost as if, trials are funny things. This is a trail. 25 You know, even adversaries become family after a while.

5 1 So, you know, you're together to long that, you know, 2 you're -- what you start out with is not exactly what 3 you end up with, in terms of who you know and your 4 experiences, and so I feel that as well. 5 We are not in an ordinary land use case. I 6 think we're in the 28th session today, I'm not exactly 7 certain. Some of the sessions didn't have a lot of the 8 necessary testimony, but this has been a very 9 substantive case and you have all been sitting through, 10 as has the community and those watching, an unusual 11 situation in which, you know, there have been two sets 12 of witnesses fairly equally matching each other in 13 general, in experience, in credentials and in knowledge 14 and in what they have had to say. And the reason for 15 all that is that what's at stake here is actually 16 extremely important. We're not talking about an 17 ordinary project. We're not talking about an ordinary 18 supermarket in a mall or in a strip mall. We're not 19 talking about an ordinary office building along side a 20 well developed corridor. We're talking about a very 21 rare thing, that is an old growth forest in the center 22 of New Jersey. 23 Now, you've heard Dr. DeVito speak about the age 24 of these trees, and that's not what we're speaking of, 25 we're speaking of other aspects of the plan. But to	7 1 whether the height will be visible, what will be visible 2 of the building. It wasn't done, and I think it was Mr. 3 Appel, it could have been Mr. Anderson, forgive me if 4 I'm incorrect Mr. Anderson, but I believe Mr. Appel 5 said, we didn't do it because we couldn't do it. And 6 the reason we couldn't do it is because the balloons 7 can't penetrate the canopy. The canopy of this forest 8 is so dense that they could not do the balloon test. 9 Now, we didn't complain about that because we 10 understood the reason. Sometimes you have an agreement 11 and it says you'll do a balloon test or other test, you 12 may not be able to do it, but that is a very telling 13 point. 14 Now, Mr. Appel being an architect, I think it was 15 him, didn't really necessarily perceive the point we 16 would derive from it. But the canopy is so dense in 17 this forest you can't even send the balloon up. One of 18 the reasons the understory is relatively minimal, and 19 this comes through Mr. DeFeo, and I think Ms. Lafar 20 also, is the canopy is so dense. In a mature forest 21 very little sunlight reaches the fall. So of course we 22 have deer browse, deer do get to some of the understory 23 that grows. But as it was made clear in some of the 24 professional testimony from Dr. DeVito, when you have a 25 very dense canopy and little sunlight reaching the floor
6 1 begin with, we're speaking of that. We're speaking of 2 really something that almost never exists anywhere in 3 this state, except in some small corners perhaps. 4 Somehow this 120 acres, it's actually 140 when you add 5 in the pieces in the corner that are not part of this 6 lot. The lots 120 acres. I think Dr. DeVito pointed 7 out that the total size of the forest is 140 or so. 8 It's all contiguous of course. As Dr. DeVito said, the 9 trees on this site alone are generally, on average, 10 about 100 years old. That in itself is rare, a 11 collection of trees on a large property of that acreage. 12 One of the reasons that there is a relatively small 13 understory, of course we have deer browse, as Mr. DeFeo 14 said. We have that everywhere. 15 Another reason, and that comes right from Dr. 16 DeVito's testimony, actually Mr. Appel alluded to it 17 indirectly, though being an architect he didn't realize 18 his reference referred to the environmental issues. 19 You may recall way back, Mr. Appel, the architect 20 who was here July, I think, of 2024 was asked by 21 someone, may have been a member of the public, I'm not 22 sure, why the balloon test was not done. And that 23 balloon test, for those who don't know, is the test 24 where you send a balloon up at the height of the 25 building so that from a certain point one can see	8 1 of the forest, very little grows on the floor of the 2 forest. That's not a sign, as Mr. DeFeo tried to 3 suggest, that this is not a healthy forest. That's a 4 sign of a mature forest from old growth trees. I don't 5 know if anyone has ever heard this before, but when you 6 study the history of the eastern seaboard, Europeans 7 first came, I won't say to settle, I'd probably say to 8 invade, the eastern areas, the reports were that they 9 often ride a horse through woods, and that's because the 10 woodlands were so developed and so mature that there was 11 relatively little understory. And this is a point we 12 need to understand. That this is not a forest that is 13 unhealthy, this is not a degrading forest, it is not a 14 degenerative forest. This forest is like the way it is, 15 is because it is so rare an entity. It is an old growth 16 forest in the center of one of the most dense suburban 17 areas in the world. 18 Now, we'll see the images from the exhibits in a 19 few minutes and you can see how this 120 acres, and I 20 think you all know this, is surrounded by an enormous 21 settled area, and there are very few other areas like it 22 nearby. Off to the right of the image you'll see 23 there's a park, which is a little bigger than this area. 24 And then to the left is a smaller triangular piece of 25 green, and some scattered pieces here and there. But in

9 1 general this is a fully developed suburban urban area. 2 As is much of the areas beyond the photos we have. In 3 fact all of them. It is a rarity of this forest that 4 prompts a lot of this case. 5 Now, the settlement agreement in 2020, which is 6 really primarily between the township and the developer, 7 and I think the association was a part of it for certain 8 purposes, was essentially settling a would be builders 9 remedy case. Now, you all know what a builders remedy 10 case is. It's when a builder says a towns not meeting 11 its affordable housing duties, we will do that for you. 12 We'll pick up the burden, give us permission to build 13 500 unites and you'll get 100 affordable out of it. And 14 that litigation is what led to the settlement agreement. 15 It's in a sense sort of a gun is held to the township, 16 I'm not criticizing fellow lawyers, that is what 17 litigation involves, and it said, that gun says, look, 18 if you don't do a deal with us we will sue you. And the 19 town doesn't want to be sued. I'm not giving away any 20 secrets, West Orange isn't rolling in litigation dollars 21 it wants to spend, I assume Mayor, that's correct. And 22 so the town is concerned, What do we do. So a 23 settlement arises. And that settlement requires 24 approval by the Planning Board, this body, of this plan. 25 Doesn't mandate approval. It requires approval. And	11 1 a matter of checking things off on the ordinance, we 2 wouldn't have to go through this whole evidentiary 3 process. Excuse me. I'm sorry 4 Now, in the settlement agreement, something 5 very unusual happened. The ordinance purports to 6 eliminate practically all environmental regulations that 7 otherwise apply to site plan applications in this town 8 and in most other towns. We know what those are, in 9 general, an environmental impact statement has to be 10 produced, and various other considerations. There's a 11 tree ordinance that needs to be followed, that was set 12 aside in the settlement agreement. And there is a ban 13 on certain construction at steep slopes, that was set 14 aside in the settlement agreement. And it proposed in 15 the settlement agreement an ordinance that took those 16 things out, and I'll have to acknowledge that the 17 ordinance purports to do just that. It removes the 18 environmental protection. Mr. Plocker and I had some 19 good back and forth at times and also with some 20 witnesses as to what the ordinance and settlement 21 agreement provided. 22 Now, there is one provision, certainly, it 23 required Mr. DeFeo be hired. That was Wayne DeFeo who 24 sat here for a couple of days, and I think he's a very 25 nice person, he was very gracious in cross-examination.
10 1 those two things are very different obviously. You are 2 an independent body, you're independent of the township. 3 A very good example of that is Mr. McGovern who cannot 4 serve as township counsel. She is absolutely barred by 5 law from serving as township counsel, because this body 6 must be independent by law of counsel. Of course 7 they're members on the Planning Board who are also on 8 the Governing Body, you wear two hats, but both hats 9 have to fend separately. There's a duty on council and 10 there's a truly separate duty here. Councils a 11 political body, it's a legislature. As you know, this 12 is a court. This is a quasi judicial body and your duty 13 is truly to be independent. You are not governed, we 14 had a lot colloquy about this, Dr. Bagoff sometimes 15 jumped in on the discussion also. You are not bound by 16 this settlement agreement. The settlement agreement 17 does not bind this body. It can not legally. And so 18 when it says, there must be approval of the site plan by 19 the board, it doesn't mean the board will approve it. 20 It means the applicant must go through approval and 21 prove it's case and it must prove to the satisfaction of 22 this board that this plan not only meets the bare rule 23 of the ordinance, but protects the public health, safety 24 and welfare. That's the fundamental duty of the 25 Planning Board. That's why we're here. If it were only	12 1 He was hired by the direction of the settlement 2 agreement and the ordinance, essentially to give a 3 report on the value and manner in which deer fencing can 4 be placed on those two side portions and what value that 5 would have. And the idea is obvious, that if you put a 6 deer fence surrounding a forest, or at least separating 7 a forest in certain areas, you will get less deer and 8 hopefully less deer browse and hopefully over a period 9 of years, more regeneration of the understory. And if 10 you can achieve that that's a perfectly good thing to 11 achieve. That's what Mr. DeFeo was hired to talk about. 12 Now, who is Mr. DeFeo. He's a decent guy, I 13 like him. We had great talks in the hall, but he is not 14 an expert on forestry, and he doesn't have true 15 credentials. He did say that he has, I think it was an 16 environmental science master's degree. I think he went 17 to Montclair. That's fine. And he said he had a class 18 or part of a class on forestry. Well, he didn't really 19 know and offer very much on the subject outside of the 20 idea that if you fence out deer you may get more growing 21 inside. Well, you don't need a master's from Montclair 22 to say that. To some degree it's an obvious point. If 23 you fence out deer you won't get as many deer inside and 24 you'll get less browse and over three or four years you 25 may get more growth. In reality you won't get that much

13 1 because of the very dense canopy in this mature forest, 2 but the goal was, you'll get some. As far as it goes 3 that's fine. So what is the bargain that you're being 4 asked to approve. You're being asked to approve a 5 project that will decimate most of the forest. The 6 entire central portion of that forest will be clearcut. 7 And we know that the fragmentary parts around the 8 development will also be severely impaired. In exchange 9 for a bargain, that bargain is that the developer will 10 pay a relatively heavy cost of a couple hundred thousand 11 dollars for deer fencing. Deer fencing to go on the two 12 side pieces that will be left over. The town can't 13 really afford deer fencing, the developers not going to 14 do it on their own, unless they're getting something in 15 return, so to avoid deer browse there's a compromise 16 offer. That's the essence of that settlement agreement. 17 Let us build a 500 unit development in a place no one 18 ever built before, in a place that's never had 19 construction of almost any kind, in an old growth forest 20 that's almost unheard of in central New Jersey, and in 21 an urban area. And in return we'll put up a couple 22 hundred thousand dollars on this project in which will 23 take hundreds of millions of revenue so we can maybe 24 stop some additional deer browse on the two fragmentary 25 pieces that are left. And they call that an	15 1 His credentials vastly outweigh, and I mean no criticism 2 of Mr. DeFeo, and I can't quite see if he's here today, 3 but I mean no criticism of him personally. His 4 credentials vastly outweigh Mr. DeFeo's. Mr. DeFeo 5 acknowledged, and he is in fact the town's recycling 6 supervisor, his company does the recycling and the 7 transfer of trash in the town. That's fine, it's an 8 important field, but it's not expertise in ecology or 9 forestry. Dr. DeVito has that. Mr. Farr has that. 10 Sean Walsh and Mark Gallagher have that. Mr. DeFeo's 11 knowledge went very -- to a very limited extent. Namely 12 what will happen if you fence off a forest and reduce 13 deer browse. And frankly, again, I mean no disrespect, 14 you don't need any level of expertise to know that if 15 you fence in woods deer can't get in. And if deer can't 16 get in they can't eat what may grow. That is not proof 17 of the absence of massive environmental harm on this 18 property. 19 Now, we'll go through the evidence and we'll 20 see what would happen once this project is built. And 21 environmental issues are only one dimension of the 22 problem. I am not going to propose to go through the 23 technical evidence in any detail, for good reason. 24 Number one, it's just beyond the scope of doing a 25 summary, a summation. And two, it may not get us
14 1 environmentally sound project. Well, it's not. And we 2 know it's not because of the testimony we offered 3 through Mr. Farr and primarily Dr. DeVito, as well as 4 Sean Walsh and Mark Gallagher. 5 Now, they were experts in ecology and hydrology. 6 Dr. DeVito is a PhD in ecology from University of 7 Wisconsin. He worked in the field of forestry his whole 8 entire life. He is the lead ecologist and forester for 9 the New Jersey Conservation Fund, which is the body that 10 has been most responsible for preserving forests in New 11 Jersey. 12 You may remember the Great Swamp where an airport 13 was proposed on the Great Swamp. Figured it was a 14 swamp, it was a waste of a place. It was the 15 Conservation Fund that historically fought that, and 16 Newark Airport was built where it is today because of 17 the successful fight to protect the Great Swamp, which 18 is today one of the great ecological resources in the 19 state, and that's why we are here now. Those battles 20 occur in rooms like this, and they occur through a lot 21 of commitment of time and money and human resources and 22 a lot of your time. And the only way those battles are 23 won is to go through this process. So Dr. DeVito is the 24 chief ecologist and forester for the entity that is most 25 responsible in New Jersey for preservation of forests.	16 1 anywhere, because experts can always disagree with each 2 other. You'll have to go through the transcripts and 3 see for yourself whether certain questions are answered 4 to your minds or not. 5 Before I get to the forest issues, I do want 6 to address that in one general way. We had a lot of 7 testimony on the geostructural issues, primarily 8 concerning Building D, which is just at or near the 9 ridge, and it comes up to a point of about seven feet to 10 the top and it goes back a little bit. Now, we offered 11 Geof Goll, who said there are significant problems with 12 the engineering in connection with the ridge. And he 13 also recommended using a factor of safety of 2.0 because 14 of the risk of significant problems if there's 15 structural failure in the substrate. This board was 16 sufficiently concerned that it took the position in 17 asking CME that they have a, so-called, independent 18 review of Langan and the applicants expert and from an 19 engineering point of view and our expert. And both are 20 qualified experts, from the objectors and the applicants 21 perspective. So CME came in and did an independent 22 review circle. Now, we went through and I regret we had 23 to put Mr. Kleinberg through three nights or so of 24 cross-examination, although he and I wrangled quite a 25 lot because I felt he wasn't answering questions, he

17 1 took it well and I appreciate that. But nevertheless it 2 was very serious and even though I may have shaken his 3 hand afterwards and wished him well going home, it 4 doesn't change the primary seriousness of the issues. 5 Your primary duty as a board is to determine whether or 6 not the public health and safety, or welfare in certain 7 instances, is protected by this project. Ultimately 8 after all the ordinances are done, after all the 9 variances that may be sought are done, after all the 10 expert testimony, your primary task has to be, is the 11 public health and safety protected. Health, safety and 12 welfare. Welfare comes more in the aesthetic questions. 13 But health and safety certainly are related to the 14 engineering problems. So you have to ask yourself, are 15 you satisfied that the evidence shows that the public 16 health and safety, with respect to Building D, because 17 that's really all we were talking about on that issue, 18 is protected. Is the public health and safety protected 19 by this plan based on the evidence you saw. 20 Now, I repeatedly asked Mr. Kleinberg questions 21 about things that were in his report. And when you go 22 through the transcripts you'll see those. And every 23 time I got to a place in his report where I said, Well, 24 you said this here and you indicate you don't have 25 enough information, or this is a problem or potential	19 1 he's not telling me these things. We had that dialogue. 2 E-mail after e-mail is sent to Langan. Never copied me 3 or my engineer, even though his task was to 4 independently evaluate the two sets of experts. He goes 5 on a field trip on the site, doesn't bother telling me 6 or my engineer that they're doing it. So he's sitting 7 there walking around the site, as much as one can there, 8 and he's in constant contact with the applicants 9 engineers doing a "independent" evaluation. This was 10 not an independent evaluation, and it didn't happen just 11 once. The inspection happened once, the e-mail contact, 12 the phone meetings happened over and over and over, and 13 he didn't even own up to it in his report. I had to 14 pull it out of him through cross-examination and that's 15 why he had to keep coming back, because he had to keep 16 supplying what was not produced. 17 Now, I have no doubt that he understands 18 engineering, and at certain points he answered questions 19 succinctly and clearly, but whenever I got to the crux 20 of the question of his own opinion to criticize the 21 geostructural engineering, he backpedals and goes back 22 the other way, and then we learn he's in constant 23 contact with the applicants engineers, never my 24 engineer. Never me. Was it truly an independent 25 report, I don't think so. Not as you understood it
18 1 problem, and almost without exception every time I asked 2 about those provisions in his report, Mr. Kleinberg's 3 answer was, Well, I didn't really have to write that. 4 I'm not sure that's really necessary to have said. 5 Maybe we didn't need that in there. And he did this 6 several times. And this was the whole reason he was 7 there. Was to give an independent appraisal of the two 8 expert views from the applicant and the objector and 9 give a report and his criticisms of significance. And 10 then when I asked him about them, each time he said, 11 Well, maybe I didn't need to say that. I don't know why 12 I said it. Well, it was said by an engineer, a licensed 13 engineer, many years of experience, hired to give an 14 independent evaluation, he puts it in his report. And 15 you have to say to yourselves, Why did he back off. Why 16 did he continuously backpedal. Whenever I asked him 17 about these aspects of his opinion, he backs off. Says, 18 nah, they weren't really necessary to say. Not 19 important enough. I don't know why he kept doing that. 20 I do know that he may have had a little bit of a 21 Stockholm syndrome impact, in which the victims sort of 22 identifies with the torturer, because he kept 23 communicating with the applicants engineers over and 24 over and over. Never communicated with me. Didn't even 25 communicate with Ms. McGovern in an open way telling her	20 1 would have. I'm sure none of you assumed the engineer 2 for CME, the independent engineer, would be having 3 constant contact ex parte with the applicant without the 4 objector ever knowing. His job was to evaluate my 5 report versus Mr. Plocker's clients report, and he 6 didn't do that. He did a one sided analysis with input 7 only from the applicant. On no occasion did he even ask 8 my engineer, What do you think about Langan's 9 supplementation. That was not an independent report, 10 you should not rely on. You have to ask yourselves, 11 after all of that testimony, are you satisfied that the 12 public health and safety is protected with respect to 13 Building D. If you can't honestly say, I feel assured, 14 then you must vote this plan down. That's your 15 fundamental responsibility. 16 There other aspects to Building D that are 17 troubling. I'm sorry. The fire chief -- I'm sorry, I 18 have to find it. The fire chief issued a report that's 19 been filed in this case dated August 1, 2024, shortly 20 after we began. It's from Fire Chief Anthony Vecchio, 21 and he noted the questions raised by certain parties, 22 and perhaps some of it came through my 23 cross-examination, I don't know if he had seen that yet. 24 Certainly there are comments made in various quarters, 25 this is very early in the case, remember. And he made

21 1 the point of noting -- of answering these questions. 2 Now, one of them was, as you know, there's only one 3 major means of ingress and egress, the other plan of 4 means of ingress and egress is for an emergency access 5 road of going to the north to Howell, which we'll talk 6 about in terms of zoning later, and also possibly if 7 Kuzak gets opened up for emergency purposes. But 8 there's no other means of ingress and egress, other than 9 Oval Road. Warner goes into Oval. That's the only 10 means of ingress and egress. So the fire chief was 11 addressing a question, number one, about direct access 12 to the rear of the building. Now, the only building 13 that this applies to is Building D. Remember, we had 14 some discussion early in the case when Mr. Appel was 15 testifying, about is there enough room for emergency 16 vehicles in the back of Building D along the ridge. And 17 someone actually asked, probably some member of the 18 public, I don't think I asked the question, someone 19 asked Mr. Appel, Well, can you get a vehicle back there? 20 You know, how close to the building could you go. Mr. 21 Appel replied, and I remember, I think Mr. Klein raised 22 the issue, I remember Mr. Klein and Mr. Appel were 23 having dialogue, and Mr. Appel said, Well, no, you 24 wouldn't want to get right up to the building anyway. 25 And Mr. Klein said, Because of the fall zone, the drop	23 1 How do we get protected in case of an emergency. So now 2 we learn, there's no rear access, that's not debated. 3 And the fire chief says, Rear access would be ideal. 4 But notes, he doesn't even explain though, how we get 5 around the problem of having no rear access. What he 6 said was very interesting. He says, I will repeat it, 7 "However, our traditional tactics include entry through 8 the front door of a residential structure to protect the 9 means of egress for fleeing occupants." Well, what 10 happens if the fire is in the front door? What happens 11 if the fire is in the front of the building and you 12 can't get in and there's no rear access? That's why 13 having rear access is ideal, as he says. Do we approve 14 a project where the geosstructural evidence is weak, or 15 highly debatable and never really independently 16 reviewed. And do we approve that same project where the 17 four story building on top of a ridge with rear access 18 for emergency vehicles, or fire vehicles, is 19 unavailable. How do we protect the people in this 20 house, four story structure, if there's a fire in front 21 and firefighters can't get in and no one can get around 22 the back? Are you comfortable approving a multistory 23 apartment complex on a ridge where there's no access in 24 the entire rear of the structure, and we'll put the 25 pictures on, and I'm sure you'll remember, it's a very
22 1 zone of course. If the parts of building are dropping 2 down onto trucks, you don't want a truck next to it. 3 But there's no other room for a truck back there. That 4 factors not contested. You can't go right up to the 5 building, its illegal in a fire. And after the fall 6 zone or the drop zone, there's no room for fire 7 vehicles. They're going right over the edge. And so 8 the fire chief was asked these questions, about access 9 to the rear of the building, the rear of the four story 10 building, and his answer was, "Having rear access is 11 ideal. However, our traditional tactics include entry 12 through the front door of a residential structure to 13 protect the means of egress for fleeing occupants." But 14 his important phrase is the first clause. "Having rear 15 access is ideal." 16 Now, when we design a building, a four story 17 building sitting on top of a ridge, or just next to it 18 with no access for emergency vehicles, and the fire 19 chief says, "Having rear access is ideal." What do we 20 do? Do we say, well, ideal means you could do without 21 it. You're dealing with lives of hundreds of people who 22 live in this building and these questions have been 23 raised repeatedly by members of the public also, because 24 members of the public live in multifamily dwellings all 25 over this area and everyone lives with these questions.	24 1 long structure. The entire length of that structure is 2 unavailable in the rear, and the only way of entering 3 the building, according to the fire chief otherwise, is 4 through the front door. If the fires in the front, what 5 do we do? You have to say to yourselves, am I 6 comfortable approving the project. Do I believe I'm 7 meeting my duty as a Planning Board in those 8 circumstances. 9 Now, there's other aspects to his report in 10 which he says, "Because there's only one means of 11 ingress and egress" other than emergency access on the 12 -- in the back and possibly Kuzak. He says, "Response 13 time may be delayed." He then goes and says, but we can 14 get in. I'm going to read exactly what he says in 15 response to this question. "Review of the plans show 16 emergency access from Kuzak Drive and Howell Drive." 17 The question is, "Is that sufficient for emergency 18 access in addition to the normal means entering on 19 Warner Road." The answer is, "As with any development 20 setback from arterial roadways response may be delayed, 21 but access should not be in question." So we have a 22 couple of things working here. We know response may be 23 delayed, because we're off an arterial road and we don't 24 have any other means of ingress and egress, except the 25 Oval/Warner structure.

25 1 Now, we saw through graphic evidence, it was 2 last year, there was a fire on Oval and nobody could get 3 in or out. And we saw the videos, and it went on for 4 several hours and people testified, one woman said, "I 5 couldn't even get to my mother who is elderly and ill. 6 I couldn't even get out of my complex to get to her." 7 And another woman said, "I couldn't get back in the 8 hours that was blocked. One to two hours at least." 9 And the only means of ingress or egress is that 10 structure. 11 Now, Mr. Litwornia quotes the applicants 12 engineer in his report as acknowledging that if there is 13 a blockage or accident at Oval, access to the complex 14 will be impeded. We all know that, it's logical. We 15 also saw it happening, because when the fire occurred 16 and the smoking trees were blocking entrances this past 17 year, nobody could get off Oval. Now, there's no 18 development here yet, but if there was a development 19 here no one could get into it or out of it if Oval's 20 blocked. That means the only means of emergency 21 entrance are these emergency access drives, possibly 22 Kuzak, which would have to get open, and Howell would 23 have to get opened. 24 Now, would you approve -- you feel it's 25 appropriate to approve a 500 unit complex, 496 units,	27 1 makes no difference about affordable housing. It makes 2 no difference about the settlement agreement and it 3 makes not a damn bit of difference about the ordinance. 4 You can not legally approve a project if you believe the 5 public health and safety is not adequately protected. 6 You cannot do so. So I ask you to think about that. I 7 know you are. It's probably the most important issue 8 here. 9 Some people may be wondering, Mr. Plocker's 10 letters to council sort of alluded to this and we talked 11 about that colloquy, whether the town is in trouble 12 legally in the courts if this board denies the project. 13 I know some people have been thinking about that. The 14 answer is, no. And the answer is no for a very simple 15 reason. The town met its obligation. Council approved 16 the ordinance pursuant to the settlement agreement, it 17 did exactly what the settlement agreement said. It did 18 not deviate one iota. Not one dotted I, not one crossed 19 T is missing. Council approved that settlement 20 agreement, the ordinance went into force, and by the 21 requirements of the settlement agreement of the 22 ordinance it comes to this body. The township, and you 23 are not, the township, legally the township met its 24 obligation under that settlement agreement. So if you 25 decline to approve this for any of the good reasons we
26 1 which will have between 1000 and 2000 people living 2 there, assuming they all rent, with this type of tenuous 3 emergency access available. This is one of those 4 wake-up moments. God forbid a tragedy occurs and people 5 die. Five, ten, 20 people die and everyone says, What 6 happened? There was no way to the back of the building. 7 We couldn't get in to the complex because Oval was 8 blocked, and then someone goes back to the Planning 9 Board file or the town file and they see this report, 10 and they see that the fire chief himself said, "Well, 11 rear access would be ideal." We don't have it. The 12 fire chief says himself, "access may be delayed because 13 we only have one means of ingress and egress." And the 14 engineers acknowledge that if Oval is blocked, and the 15 evidence shows if Oval is blocked, nobody gets in or 16 out. So God forbid some tragedy happens, and they do 17 happen, we saw it in California this past year from 18 other causes. Ordinary suburban towns went down. 19 People are going to go back and look at the file of this 20 case and say, there was a reason to believe this should 21 not have been approved. Yet it would have been approved 22 and built. So your duty is to say, can I protect the 23 public by approving this project, at least as it's 24 presented here tonight. The answer has to be, no. 25 There's no possible way you can approve it. And it	28 1 talked about right now which require a denial, aside 2 from what else we talked about, the township is not in 3 legal jeopardy, because if the township met its duty to 4 approve the plan, to approve the ordinance, then it 5 comes here. And it is not your job to worry about 6 whether the township gets sued, it could. Towns get 7 sued every day of the week. Our brethren and sisters in 8 the law makes sure that happens, but that's because 9 there are issues at risk. Your job is not to worry 10 about that. And in any event, the town met its 11 obligation. The town cannot be sued for breach of 12 contract because you're separate jurisdiction denying 13 this plan. And I hope you'll think that through, 14 because I know you thought about it. And I know Mr. 15 Plocker's letter alluded to it. He wrote two letters 16 about it. You should not be threatened with lawsuits, 17 the township should not be threatened with lawsuits 18 because this body doesn't vote. You can't protect the 19 public if you have a litigation gun to your head from an 20 applicant. 21 Now, I'd like to go to the beginning of our 22 PDF. I'm sorry, I get short of breath sometimes. I 23 apologize. We'll start with this. I may start and 24 stop. This is not meant to be strictly chronological 25 necessarily and it's not containing every exhibit in the

29 1 case. It also is 85 slides, but we're only using a few. 2 Some of them are larger because some of the resolutions 3 are attached to the 89 pages. 4 All right. This is just the front page and 5 let me get to my summary. 6 Now, I want to start with this excerpt from 7 one of the leading Mount Laurel decisions, actually the 8 leading decision. 9 Now, a lot of people have an understanding 10 that affordable housing means other things go down the 11 drain. They get dropped off our radar screen. They 12 don't. This decision from South Burlington County NAACP 13 v. Mount Laurel, 92N.J.158(1983) makes the following 14 statement. And this is the Supreme Court of New Jersey. 15 "We reassure all concerned that Mount Laurel is not 16 designed to sweep away all land use restrictions or 17 leave our open spaces and natural resources prey to 18 speculators. Municipalities consisting largely of 19 conservation, agricultural, or environmentally sensitive 20 areas will not be required to grow because of Mount 21 Laurel." And here's the final line that's of great 22 significance as well. "No forests or small towns need 23 be paved over and covered with high-rise apartments as a 24 result of today's decision." No forests need be paved 25 over and covered with high-rise apartments as a result	31 1 districts, open space, energy resources and valuable 2 natural resources in the state and to prevent urban 3 sprawl and degradation of the environment through 4 improper use of land." To prevent urban sprawl and 5 degradation of the environment through proper use of the 6 land. Nothing more carefully and closely matches that 7 band than this project, and we'll talk about that next. 8 And the remainder of the Municipal Land Use Law contains 9 similar provisions governing the nature of how projects 10 can be approved. 11 If you're still reading I'll leave it up, 12 But may I proceed? We can go back to it. 13 That's the site. The plot. The gray area in the 14 center obviously is the plot we're dealing with. That's 15 the 120 acres. I hope I do this correctly. I don't 16 normally use these. 17 Over here, you don't see it on this map, but 18 that's part of the forest. Over here there's additional 19 forest and there's some strips of it here and you'll see 20 that on the later exhibits. That's why Dr. DeVito came 21 up with about 140 acres for the total forest. The 22 square or rectangle rather, represents only about 120. 23 So the actual lot that this will be built on is 120 24 acres. The actual total forest is about 140. We will 25 see the exact figures shortly. And you can see just on
30 1 of today's decision. This is the governing law of the 2 state and it remains the governing law of the state. 3 And anyone who says that inclusionary housing or 4 affordable housing comes at the expense of the 5 environment, is wrong. Quite frankly, council should 6 never have made this deal it made. It made it, it's 7 there. It need never pass this ordinance because a 8 proper understanding of Mount Laurel would have told the 9 town that no speculator can force it to destroy a forest 10 to build affordable housing. This decision could not be 11 clearer. It is the governing law of the state. And the 12 notion of destroying this forest or large parts of it 13 and degrading the rest that's left, is absolutely 14 antithetical and contrary to Mount Laurel Doctrine. I 15 don't know why council didn't know about this when it 16 made this deal, I wasn't involved, but this deal need 17 never have been made. And you have no obligation to 18 approve this site plan simply to create affordable 19 housing. Not if it comes at the expense of the other 20 aspects of your jurisdiction. 21 Now, we know that among the purposes of the 22 Municipal Land Use Law are protection of the 23 environment, Section 40:55D-2. Two -- well, multiple 24 provisions, J in particular, states, "Among the purposes 25 are to promote the conservation of historic sites and	32 1 this tax map it's surrounded by a completely developed 2 area. So if we move further, that is what you're used 3 to seeing. And this is the general -- this is one of 4 the various engineering drawings, I think, that's the 5 overall site plan. 6 Now, we see Building D here obviously, and we see 7 wetland here. I'd like you to bear in mind where the 8 wetlands are because this is going to become important. 9 To the right of the project, to the western side is a 10 wetland, in the center there's a wetland and to the left 11 is a wetland. To the far left, you see this line here, 12 that's one of the deer fences that Mr. DeFeo proposes. 13 And the other deer fence is here, around that area. 14 If Mr. Fagan can pull it back a little. Thank 15 you. 16 You can see here the deer fence area on the 17 western side. The deer fence proposed on the eastern 18 side. All the rest of it, besides the wetlands and 19 buffers, will be developed areas of disturbance. 20 Now, bear that in mind. Bear in mind where the 21 wetlands are in relation to where proposed buildings 22 are. And of course you see Building D here, and the 23 entire area behind it is impermeable, so to speak, from 24 rescue vehicles. 25 Now, there's going to be an emergency access

33 1 road, and I might as well address this issue right now 2 since we have the map up, and you'll see up here, this 3 represents on the plot itself a small part of an access 4 drive. Lots 8 and 9 in the neighboring R-3 district, 5 where my laser is pointing -- that's perfect. Has the 6 extension of that access drive that the applicant 7 proposes. Now, they own those two lots so they can 8 build if they ever get approval. 9 Now, the interesting problem is that there's no 10 ordinance that authorizes that access drive in the R-3 11 through Lots 8 and 9. It's an important issue, it's not 12 a major issue, but important legally. That is a 13 residential single family home district, it allows 14 driveways as an accessory use, the driveways going to a 15 house. It does not provide for uses in driveways or 16 access ways or roads to a multifamily complex in another 17 district. And the law is very clear on this as well, 18 that in order to add -- did I do something. In order to 19 add that piece of road, that emergency access drive in 20 Lots 8 and 9 in the R-3, a use variance has to be 21 obtained. No use variance is sought as part of this 22 application. No notice to the residents of the R-3 that 23 a use variance would be sought has been served and the 24 application is not actually legally complete. Now, you 25 may wonder, well, why didn't the developer, who's	35 1 You can't gain approval without a use. And if you don't 2 have it, you got to go to the Zoning Board first. They 3 didn't do that and they didn't do it for very good 4 reason. They would never get through. And this plan 5 can't actually be approved because of that. Because of 6 that problem right there. 7 Now, I want you to bear in mind that issue, it's 8 a legal issue. I didn't call a planner because I felt 9 we were given very good guidance on the point, but I 10 felt as a legal issue I could address it in this way. 11 Now, it's a pure question of law. Can a use 12 variance -- can a project requiring a different use in a 13 neighboring zone, this zoning district, be approved by 14 this board without a use variance? It can't. And it 15 hasn't been done, and you have not heard the applicant 16 offer a single legal authority, not one that allows a 17 project to go forward that would require a use variance 18 in the adjoining zoning district. And they didn't offer 19 that authority because none exists. That alone is a 20 reason why it must be denied. 21 I'd like to move forward. We're back to the 22 other map where I was pointing to. Okay. Just bear in 23 mind to the locations of the wetlands, the gray shaded 24 areas. This is another view of the development. Now, 25 it shows not only the buildings but it highlights in
34 1 obviously spent an enormous amount of money, I don't 2 criticize that, it's expensive to do this work, I'm 3 proposing this. Why didn't the developer seek a use 4 variance? Go to the Zoning Board and seek a use 5 variance. Well, it's pretty obvious why. That's a 6 single family home residential district and will be 7 subject to an emergency access way serving a complex of 8 about 2000 people, potentially hundreds of families. 9 Hundreds of vehicles. And so the ability to prove the 10 negative criteria, to prove out the negative criteria, 11 almost certainly doesn't exist. And that's why the 12 applicant hasn't gone to the Zoning Board for that use 13 variance, because the community, number one, would have 14 to be given notice in that zoning district, and two, the 15 Zoning Board would have a great deal of problems 16 overcoming the negative criteria. They're involved with 17 allowing hundreds, even more vehicles to leave that site 18 through a residential neighborhood into a tiny local 19 street. The negative criteria that are required for a 20 use variance almost certainly would never be achieved. 21 That is why it has not been done. But it renders this 22 application legally incomplete, and that in and of 23 itself is a variance approval, and it can't be a 24 condition of approval when you go get a use variance. 25 You got to have the use in order to provide the project.	36 1 essentially brown color, a lot of the parking areas, 2 roadways and turnabouts and other areas of disturbance. 3 So you can see this entirety of the disturbed area, it 4 essentially goes, I'm sorry I keep -- my apologies. I 5 keep meaning to hit the laser. It essentially means 6 that this entire area is an area of disturbance, minus 7 the wetlands right here. 8 Now we can go further. You may recall this 9 exhibit. You can't see it here and I'm not going to 10 pretend we can see it. This was the tree survey 11 document from the 2006 proposal the West Essex Highlands 12 Corporation offered when they were trying to develop 136 13 single family homes, and you recall the testimony and 14 the evidence was really very clear. Here they proposed 15 that the tree population per acre was something on the 16 order of about 550 trees per acre. Now they claim it's 17 212 trees. Now, where'd the other trees go? You heard 18 testimony -- where did they go. They just up and left. 19 I mean, as you recall Lord of the Rings there's a whole 20 population of intelligent species that were trees, they 21 could actually walk around. Well, these trees can't do 22 that. They're still there. And we know they're there 23 because the canopies unchanged. Mr. DeFeo conceded the 24 point, Dr. DeVito made the point. The tree cover is 25 exactly the same, though a little older and probably

37 1 little taller today as it was in 2000 -- this is a 2010 2 document, I believe, as it was in 2010 when another 3 proposal was made by the developer. Those trees still 4 exist in the same census numbers that the applicant 5 itself offered for another version of the development on 6 this site. Now suddenly the tree population is in half, 7 and that means that the number you've been given, I 8 believe somewhere in the order of 7000 trees are to be 9 lost, is vastly inaccurate. The real number is probably 10 two-and-a-half to three times greater based on the 11 mathematical calculation using that tree survey. Not 12 the tree survey that's more than cut in half that's 13 offered on this application. The applicant is bound by 14 its own admissions. It has not offered a single shred 15 of evidence as to why that tree count was wrong back at 16 the time of this drawing. And so the actual tree loss 17 is probably going to be three times higher. I think 18 when you check the testimony we offered calculations of 19 that on cross-examination. So to begin with, the bare 20 figure you've been given of 7000 something trees to be 21 lost, is wrong. It's actually two and a half to three 22 times larger and many of those are serious trees. 23 Elderly trees, old trees, trees that are valuable 24 ecologically. Dr. DeVito said the trees are about 90 to 25 100 years old, many of them have another 100 to 200	39 1 heard 27, 28 sessions, at almost every one of them there 2 was public comment. Some of it had been vociferous. 3 There was not a single person, not one person in a year 4 and a half in 28 sessions, that spoke in favor of this 5 project. There was not one government official who came 6 in and spoke in favor. There was not one neighboring 7 agency, neighboring municipality that spoke in favor, 8 and not one individual came forward to endorse this 9 project and support it. Now, I've never been in case 10 like that. Every time I've been in a case where there's 11 serious environmental issues, there's always somebody 12 who endorses it. There's always somebody who agrees 13 with the notion of building it. I've never seen a case 14 where 28 meetings take place, Ms. McGovern, if I'm wrong 15 it's 27 or 28, I'm not sure. I've never been in a case 16 where there are 28 hearings, I'll us that number, and no 17 one has ever spoken in favor of the application, except 18 the applicant. That tells you something. And under the 19 MLUL, one of the objectives is respecting the interests 20 of neighboring governments and municipalities. You 21 can't pass ordinances, you can't approve plans that will 22 injure the interests as expressed by neighboring 23 communities. And many have said, sewer capacity is at 24 risk. There's no sufficient water capacity. We're 25 worried about flooding from this project, we're already
38 1 years of life left. So bear that in mind. Trees that 2 will be knocked down and not even acknowledged because 3 of the extreme undercount on this current application 4 are going to be lost. Trees of that vintage, which have 5 another 100 or 200 years of life left. They're an 6 extraordinarily rare entity. 7 This is an example of one of the many 8 letters and statements you've received. This is from 9 Boswell Engineering on behalf of Verona. I'll just note 10 very quickly, we have them throughout here, I don't want 11 to go through the pages, it's very difficult to read 12 anyway. They're in the record, you've heard testimony, 13 often they were cited by representatives of the 14 different towns. They're reports from the West Orange 15 Planning Board, Verona Town, Verona Planning Board 16 through it's engineer, Verona Environmental Commission, 17 South Orange Environmental Commission, West Orange 18 Environmental Commission, County of Essex Environmental 19 Commission, County of Essex Commissioners, and I believe 20 there are others that were cited on the record, not just 21 documents that were submitted. So bear in mind many of 22 you neighboring municipal agencies and municipalities 23 have objected. You heard Mayor Ed Davis speak and there 24 are other political officials who spoke, officials who 25 spoke in here. Remember all the public comment, we	40 1 experiencing it and you heard testimony about that. So 2 bear in mind that there's been an extraordinary deposit 3 of documents from other agencies opposing this project 4 and giving their reasons, and you never heard a single 5 person endorse this project, other than of course the 6 applicant. 7 I'll just scroll through these. I'm sorry. 8 Let me go back. 9 The next document we have is the hydrology 10 report from the engineering firm Princeton Hydro, which 11 represented the objectors. Now, I'm not going to go 12 through all of what he testified to, his reports 13 available to you. His testimony, I think, was very 14 clear. I frankly think he was both clear, concise, and 15 kind of modest in his presentation. He said, this is 16 our knowledge. This is what we have to offer, that was 17 Sean Walsh. What I'd like to do is take you to his 18 analysis of wetlands impacts. 19 Now, Mr. Fagan, if you could just please 20 enlarge that. Thank you. A little less if you can. 21 Perfect. Thank you. 22 Now, this is at Page 4 of his report, and it 23 was a, an engineering drawing that he created using what 24 you saw earlier. The parking areas, the other areas of 25 disturbance, and the buildings themselves in the site

41 1 plan. It doesn't include Building D, because Building D 2 is not directly implicated by this particular issue. 3 Now, you heard about recharge and you heard 4 that DEP said recharge is okay on the site. We will 5 achieve recharge. Now, what does recharge mean. I 6 think you all know it, but just to summarize. It simply 7 means stormwater runoff will be returned to the riverine 8 system so it can serve in the drinking water supply. 9 That's all it means. We're recharging the system with 10 the natural stormwater runoff that has to be diverted 11 and we're going to make sure it gets back into the 12 rivers, because that's where we get our water from. 13 Canoe Brook is one the places this community and 14 neighboring communities get their water. And the runoff 15 from this site goes into Canoe Brook, and we'll see that 16 later in Professor Hasse's exhibit. You'll see that 17 this forest is actually the headwater, the only 18 headwater of the Canoe Brook, for good reason, it's a 19 ridge. 20 Now, on this chart Mr. Walsh has included 21 blue arrows and red arrows, they may be purple arrows. 22 Now, look at the purple arrows on the left 23 side, they go to that long wetland that I pointed out 24 earlier that's on the left side of the, western side of 25 the site. And that -- the purple arrows show the	43 1 You can see in the center the contour lines lie down 2 towards the center bottom of the site right into the 3 wetlands, and you can see towards the right side or the 4 eastern side, there are contour lines that direct water 5 to the eastern side of the wetlands on the lower 6 right-hand corner. The upper wetlands are not really 7 implicated in this analysis, because their water is not 8 coming from this side. So the purple lines in each case 9 show the existing conditions now and the water movement 10 that goes naturally to the wetlands. 11 Now, what happens after the project is 12 built. Well, that's what the red lines show. And so we 13 can see the red lines are now taking a different course. 14 They're naturally bringing the water to where the 15 engineering will direct it. And you can see in the 16 center there's a contour and the red lines in the 17 central part are no longer going to the left, to the 18 western wetlands. They're now being redirected down 19 into a conduit that will lead to where my arrow is 20 pointing -- my laser is pointing, right to the proposed 21 detention basin. And over here as well. And so the 22 wetlands that normally would go towards the western 23 side, the water that would normally go to the western 24 wetlands, is now going into a conduit bypassing entirely 25 the wetland and going into a detention basin. All of
42 1 natural stormwater movement under existing conditions as 2 the forest exists today, and it's based frankly only on 3 the contour lines and the presence of the wetlands. 4 Now, why are the wetlands there. They're 5 there for a very good reason. We have wetlands on the 6 western side, we have wetlands in the center on the 7 bottom, and we have wetlands right here on the eastern 8 side. In the right-hand corner, eastern side here. 9 Now, why are the wetlands there. They're there for one 10 simple reason. Gravity puts the water there, because 11 the contour lines are going down in altitude, and we're 12 starting from a high point in the center, and you can 13 see the lines narrow, and in each case the lines narrow 14 in the direction where the wetlands are. That's why the 15 wetlands are there. Because over thousands of years 16 water has accumulated and gradually soils change, 17 because of the presents of the water, and we get hydric 18 soils. Clay develops, we get other types of conditions 19 that lead to the creation of wetlands. A wetland always 20 appears, almost always, because gravity sends the water 21 there naturally. That's the natural direction of the 22 water on this site. That's what those blue lines do -- 23 the purple lines do. And you can see on the western 24 side, the purple lines are going directly to these 25 western wetlands. I'm using my pointer to show that.	44 1 that water that now goes to the western wetlands is 2 going to be diverted into a detention basin and then out 3 back into the Canoe Brook here in the bottom left hand 4 corner. So -- and the same phenomenon is happening 5 everywhere else. We have the water that would normally 6 flow into the wetland in the center is also being 7 diverted away, and you can see the arrow being pointed. 8 And similarly on the eastern side, where it would 9 normally have been diverted into these wetlands is going 10 this way and out. 11 Now, what does this mean. It means that 12 recharge is achieved. That's why DEP gives it a permit. 13 Because recharge is achieved, the water will go back 14 into the riverine system. It will go back into the 15 Canoe Brook and we can drink it. But what is happening 16 is something entirely different. The wetlands are being 17 deprived of the natural water supply, and that's what a 18 recharge permit does not analyze. 19 Now, your duty is to understand the 20 ecological implications of a proposed project. It's not 21 enough to say, I don't have to worry about this because 22 DEP gave a permit for recharge purposes. That's all 23 that means. You have an independent jurisdiction to 24 understand the environmental and ecological harm the 25 project will cause. And all of that water will be

45 1 diverted from those wetlands. Those wetlands will lose 2 that natural water runoff. 3 Now, Mark Gallagher -- now this diagram was 4 created by Sean Walsh of Princeton Hydro. Mark 5 Gallagher, who testified in detail as to the substance 6 of at what this means, I don't have him on the slide, 7 but you'll be able to check the testimony. On the 8 western side he said there's two drainage areas here, 9 and you'll see in one of the later pictures, I believe, 10 a dark green. I'll just use a laser pointer again, on 11 roughly this side is a drainage area going to the left. 12 That'd be in dark green on one of the engineering 13 drawings. On -- to the right has a drainage area this 14 way. Now, Mr. Gallagher calculated that the western 15 drainage area to the left will lose 32 acres, which is 16 presently 32 acres will be reduced by 9 acres. Will be 17 reduced, excuse me, by 9 acres. It will lose 28 percent 18 of the existing drainage area, which means 28 percent of 19 the water supply to the wetlands will be lost. It is 20 not being returned to the wetlands. We see very clearly 21 it's being diverted away from the wetlands into the 22 detention basin and back to the Canoe Brook. So while 23 it gets to the Canoe Brook it is being diverted from 24 it's natural course into the wetlands. On the eastern 25 side there are 48.4 acres in the eastern drainage area.	47 1 on that process. Our system is based on checks and 2 balances. That's why, to the degree it creaks along, it 3 works, because a system of checks and balances are here. 4 That is what you are part of. This project will 5 inevitably destroy or severely damage those wetlands. 6 Did you hear anyone come back after Mr. Walsh and Mr. 7 Gallagher testified and say, no, that it's not going to 8 happen. Did you hear a single witness from the 9 applicant come back and say, no, that won't happen. Did 10 anyone refute this testimony. The answers, no. Not one 11 witness came back to refute this testimony. No one. 12 That's pretty telling. Hundreds of millions of dollars 13 of profit will come from this project and yet the 14 applicant did not find a witness to come back and 15 dispute this irrefutable evidence. And I think our 16 common sense tells us if they could have they would 17 have, and they didn't. So we now know the wetlands will 18 be severely damaged. And it's not just a matter of 19 losing 30 percent of the water, it's a matter of all the 20 ecological losses that come with that. 21 We can move on. This is the remainder of -- 22 well, let me go back to one point. 23 At Page 4 of his report where the chart is, 24 I think it's Page 4. He has a paragraph that discusses 25 this issue. All right. I don't want to trouble you to
46 1 Mr. Gallagher testified that it will be reduced by 16 2 acres or 33 percent. So on the western side we will 3 lose 28 percent of the drainage to the wetlands, that's 4 28 percent of that surface water. And on the eastern 5 side we will lose 33 percent of the drainage to the 6 eastern wetland, or wetlands on the eastern side and 7 that's 33 percent of their surface water all gone. 8 These wetlands are very fragile, as you all know, and 9 we've, over the last 40 or 50 years, respect wetlands. 10 Remember the Great Swamp, people wanted to put an 11 airport there because it was a wetland. We don't do 12 that anymore. We wouldn't build the Meadowlands Stadium 13 any longer on a wetland as we did. We don't do this 14 anymore. It's happening because a litigation gun was 15 put to the councils head, that's why it's happening. 16 This is a dinosaur. It is contrary to modern thinking. 17 It is contrary to scientific thinking. No municipality 18 would allow this to happen if it wasn't forced into it. 19 You are a brake on that problem. You are a check and -- 20 part of the check and balances. If this will destroy 21 the ecology or severely damage it, you have the ability 22 to say no. That is why we call it planning. You are a 23 check on the political process. The political process 24 that we don't want to be sued, we don't have the money 25 to be sued, we're going to yield. But you are a check	48 1 be reading now. It says approximately what I said. And 2 so you can go back and you could see what he said in 3 characterizing the problem and Mr. Gallagher testified 4 in detail as to the actual losses that will be 5 experienced. 6 Now, this is part of a series of exhibits, 7 you probably remember this. This is an engineering 8 drawing created by Mr. DeVito. It's not an engineering 9 drawing, it's a demonstrative exhibit measuring certain 10 areas. 11 Now, in the red you see the area of 12 disturbance. That roughly matches what we saw in the 13 earlier engineering drawing of the overall plan. And 14 the red outlines the area of disturbance and the area of 15 disturbance is not just the building. The area of 16 disturbance is the parking areas. It's the roadways. 17 It's the manicured lawns. It's the detention basins. 18 You see them bulging on the bottom there. That's what 19 those bulges sticking out at the very bottom of the 20 drawing are in red. All of the area of construction, 21 development of all kind, pipe, conduits, all of that is 22 the area of disturbance and that's in red. 23 Now, what you see on the outside in yellow 24 is the outline of the project site itself. Now, I want 25 to just direct your attention to the right-hand corner

49 1 where there's a small square outlined in lighter green. 2 Mr. Fagan has just brought that forward and if you can 3 go back we can show the other one like that. That's 4 part of a contiguous forest. And there's another small 5 square like that on the lower right-hand corner. And 6 then there are a couple smaller areas like that 7 elsewhere. Right over here in the left hand corner and 8 then a little bit over here in the upper left. Lower 9 left and upper left. So when -- and there is a bit of 10 that right here in the center on the top. So when we 11 calculate the forest, what Dr. DeVito did was take a 12 conservative approach. If he just took the 120 acres he 13 would have had a much greater loss of core forest 14 percentage-wise, but he chose not to do that because he 15 didn't think it would be fair. It's fairer to the 16 applicant to include the areas of contiguous forest that 17 will remain. They're not part of project site, but 18 they're part of the forest. So we'll go to that in a 19 moment. So Dr. DeVito calculates 143 acres of forest, 20 and that includes those additional areas that are off 21 this lot outside the yellow line. And he calculates the 22 existing core forest, or the interior forest, at 58 23 acres. 24 Now, this is not the best drawing for that, 25 there will be better one to show. You can see here	51 1 ice, snow, wind. The interior of the forest is 2 protected from that. As a result we have a core forest 3 of much denser trees that grow in a different way. 4 Anyone who's ever hiked along the river knows this. You 5 see trees that are gnarled and bent over and shorter, 6 but the same trees 200 feet inland are different. 7 Species respond to the conditions they live in. The edge 8 of a forest is always different than the interior. 9 That is the existing forest site from an 10 aerial view. That is what is there right now. This is 11 very important. It's not the brightest green, I think 12 it was taken in the late fall probably and you can see 13 the evergreen areas, but the forest is more of a muted 14 gray. That is the existing forest. It's a contiguous 15 vast forest for our area, 143 acres. And please 16 remember that image, because this is a very rare thing. 17 Look what's around it. Thousands, literally, of houses. 18 And this pictures only a part of the image. And when 19 you expand the view -- we don't have a larger aerial -- 20 we all know what's around the town. Other towns, other 21 subdivisions. 22 This is a better image of the interior 23 versus the edge forest. Now, the bright green 24 crosshatching is the existing interior forest, as Dr. 25 DeVito calculated. You see the word 300 in that small
50 1 there's the green crosshatching across. There's little 2 circular insets and then there's the crosshatching. 3 That's matching what he has testified as the core or 4 interior forest as it currently exists and there's a 5 little bit down over here as well. 6 Now, you may recall what he described core 7 forest as. There's two kinds of forests. There's the 8 edge and there's the core. 9 Now, the edge of a forest protects the 10 interior in exactly the same way as a barrier island 11 protects the mainland. Anyone that's been to a barrier 12 island, Long Beach Island, etc., understands this. You 13 have the surf and the intertidal zone. The barrier 14 island protects the bay on the other side and the 15 mainland from the impacts of the surf, and as a result 16 you get an estuary for marine life to thrive and grow 17 and move out into the ocean, and you get wetlands that 18 are not disturbed by rough surf. The edge of a forest 19 does exactly same thing, but for a forest. 20 So we'll see the next drawing, and just 21 before we get there. The edge is this part here on the 22 outside before the green hatching and he's measured the 23 edge as 300 feet, you'll that see on another chart. And 24 so what he's testified to is that the edge of a forest 25 absorbs certain impacts, it absorbs excess light, rain,	52 1 orange line. That's measuring the perimeter which is 2 the edge forest. And wherever you have a cutout, you 3 have more edge. So you don't have edge only in the 4 exterior -- I'm sorry. We have edge here because 5 there's already some existing disturbance. If you 6 recall the area maps, that's a cleared area right there. 7 Long ago they did some houses there, a mansion or 8 something there. That area is not treed and therefore 9 it creates an edge here, and so this becomes the 10 interior core right there. But basically we have 58 11 acres of core forest out of that square 120, and out of 12 the total 144. There's a little core there because this 13 edge ends and you get a core there. So he's calculated 14 the core at -- sorry. There. The core at 58 acres. 15 Now, superimposed on top of the area of 16 development you can see what's going to happen. The 17 area of development looks a bit like a congressional 18 district and it occupies an enormous amount of area. 19 This is not a small project, and no project is just its 20 buildings. It has all of the additional things you all 21 know about. And so, and the area of disturbance also 22 includes those detention basins, because they're going 23 to -- because forest will be ripped out to make them. 24 Now, what we have here -- thank you, Mr. 25 Fagan, is the actual calculations. Existing forest

53 1 area, 143 areas. Percent reduction right now, none. 2 Because it's not touched. It's completely -- it's 3 untouched. Existing forest core, 58 acres. Post 4 development forest core, 114. Acres lost in the core -- 5 I'm sorry. Post development of forest area, 114. Acres 6 lost in the forest, 28. That's the area of disturbance, 7 28 acres. Post development forest core is now down to 8 9. What is lost, 48. And we'll see in the next image 9 as we go through what happens. 10 Could you pull back. I'm sorry for those 11 watching, I do tend to move around. I'm making everyone 12 dizzy online. I'm sorry about that. Oh, good. Okay. 13 Now, we'll move to the next chart. There we 14 see the 300 feet of edge referenced. Now, when you look 15 at the core forest in the green crosshatching, and you 16 look at the area of disturbance, what's left are two 17 corridors on either side, I'll point them out. Here is 18 the first new edge area. When you cut into the forest 19 with the area of disturbance, what you're doing is 20 you're creating new edge. The existing edge is the 21 yellow line, that's the edge of the forest. And so 300 22 feet in gives us our core. This is more degraded on the 23 exterior. It's still got ecological functions, but not 24 as many as a core forest. 25 Now, when we put the area of disturbance in,	55 1 magenta small structures of about 9 acres. 2 That's the drainage areas that exist, I 3 referred to them earlier. There's the western and the 4 eastern drainage area. And the western was in dark 5 green and the eastern was in light green. 6 And there you see superimposed the area of 7 disturbance on top of the two drainage sectors, and 8 drainage sectors are very simple concept. You're 9 familiar with the term Continental Divide. Well, the 10 Continental Divide is the place where drainage changes, 11 right. Some rivers go to the Pacific and some go to the 12 Mississippi. You have a peak on a continent or on the 13 part of the land that forms our drainage area. It's 14 exactly the same concept as the Rocky Mountains, and so 15 drainage will go in one direction to the west, one 16 direction to the east or southeast, depending on the 17 contour. 18 Now, this is Dr. Butler's slideshow, I have 19 most of his slideshow here, I think. And he's an 20 ornithologist working at The College of, I believe, The 21 College of New Jersey, and he testified as to the 22 impacts of this project on local fauna, primary birds. 23 And I don't need to go over everything he said, but this 24 is where he did his observations, and you see a good 25 summertime image of the forest, it's more dark green,
54 1 we have to measure a new edge. That's what Dr. DeVito 2 testified to. That new edge will come from the edge of 3 the area of disturbance out 300 feet. That means the 4 core forest all through here's lost. The red as well as 5 the green crosshatched that's now the new edge. And 6 what we get is that. The new core forest, after 7 development, will be those magenta areas. The total of 8 9 acres. That is the new core forest from that. That's 9 our existing core. A rare jewel in this part of the 10 world, and that's what will be left, what's in purple. 11 Magenta. The rest will be developed. 12 Now, after the project is built the edge 13 won't disappear instantly obviously. It will degrade 14 over time. The core forest remains intact, as long as 15 we don't build new edge. Once we build new edge, the 16 edge grows, it intrudes into the center of the forest 17 and the edge will degrade. The edge is not interior 18 forest, it is not core forest. And we heard from Dr. 19 Luke Butler, that for example just with bird species 20 alone you get a totally different type of species 21 present. You get invasives entering the edge pushing 22 out the normal inhabitants of the interior. So we'll go 23 further. 24 So bear that image in mind. After this is 25 built the only interior core forest left is within those	56 1 because now our non -- our deciduous trees are now in 2 full leaf. He had four observation points on several 3 different days. In yellow, on the bottom, are the three 4 squares we observed, and on the top, that long 5 rectangle, is where he observed. And did so, from my 6 reading about it, about 20 minutes at a time. And/or 7 half hour at a time depending on the day. For example, 8 on April 25 he went from 5:55 in the morning to 6:15. 9 And April 29 from 12:30 in the afternoon to 1:30. On -- 10 to 1306. So, yeah 1:30. On Kuzak Drive on the 29th he 11 went from, I think I'm saying this correctly, 11:00 12 o'clock to 11:45 in the morning. And on Warner he went 13 on the same day just afterwards at the Center Square 14 location and Bayowski Road, he did something similar. 15 So these were his observation points he testified to. 16 Now, he observed the following subset of 17 bird life. I can't really read all the names, unless we 18 go in on it. I don't think we need each name, what's 19 important is the next slide. Sorry. This is just a 20 chart of his observation minutes and the species 21 observed. Percent of the total and obviously he saw 22 more species as he spent more time observing, which is 23 natural. This describes 20 species were observed, 14 24 families were observed, meaning families of species and 25 one migratory species.

57 1 Now, here's the forest subset that he 2 observed. Remember he said he observed 20 species and 3 of those 20 there were 7 forest species. And can you 4 just hone in a little bit on that, just to get a sense 5 of it. The actual squares, I'm sorry. Oh, I did that. 6 There's 7 species that are forest species. Now, that's 7 very important for his testimony, because he testifies 8 later -- did I do that or did you. Thank you. Okay. 9 So 7 forest species observed, and that's important, 10 because you're in a suburban area, so the question might 11 arise, well, he's observing 20 bird species, big deal, 12 they're all over the place, right. This is why this 13 slide is important. Seven of those were forest species. 14 He wasn't only looking at species everyone sees in their 15 backyard. He's looking at those who live in this 16 community but are forest species. They're only going to 17 live in the forest or neighboring forest, you know, a 18 half mile down there is one park. So we go further. 19 Now, he also said there were two others that 20 likely will occur based on the habitat. He didn't 21 happen to see them on those occasions. 22 Now, he said, based on what he observed in 23 the time he had allotted to it, it is very likely that 24 more than 100 species of birds inhabit this forest. He 25 didn't see all of them because birds are migratory.	59 1 Now, here's what he says about a Wood Thrush 2 as one example. An area of forest as it decreases, it 3 decreases the likelihood of occupancy by the Wood Thrush 4 in the forest. So when you go down from 5 acres -- from 5 58 acres to approximately 5, remember we said there are 6 9 acres of core left, but they're divided into two 7 pieces. So it's about 4 to 5 acres in each piece. So 8 he's saying, when you go down from 58 acres of core to 5 9 acres of what's left, the Wood Thrush likelihood of 10 occupancy in this forest declines by 30 percent or more. 11 And he says bluntly, when you do this the likelihood 12 these species remain changes. And of course this 13 applies to all species, he's a bird -- an ornithologist, 14 he's speaking of birds. 15 Here he does the same analysis for four 16 other -- for three other species in addition to the Wood 17 Thrush, the Red-Eyed Vireo, Scarlet Tanager and Ovenbird 18 and says in each case has we have similar interferences 19 and their likelihood of occupancy in the core forest 20 that are left once we decline and decrease the forest. 21 And so this is an example of the ecological impact in a 22 very direct way on this property. 23 Now, you'll see later -- well, bear with me 24 one moment. You'll see in Dr. Hasse's graphs that there 25 is connectivity corridors and that's a fundamental part
58 1 Sometimes you have to see them at night, sometimes 2 different seasons. He said it is more than likely that 3 there's more than 100 species of birds. Now, he's 4 probably the leading expert in the state on this 5 subject. And, again, you heard nobody testify this is 6 wrong. 7 Now, what he says here and he testified, 8 "Interior species are likely to decline or disappear, 9 and edge/open habit species are likely to increase or 10 appear newly." He means after construction. Build this 11 and your species interchange. 12 Now, he said some species are not sensitive 13 to forest size, others are. Now, a pocket forest in the 14 city might have certain number of species. Some species 15 require larger areas. You know, all animals actually 16 that forage, for example, or hunt require certain amount 17 of space. Deer, for example, usually require half a 18 mile square per family. Human farming societies require 19 certain number of acres per family unit. All species 20 require a certain amount of territory if they're 21 foraging or hunting. We don't because we industrialize. 22 We make our food but in a state of nature, a certain 23 amount of space is needed for species to survive. Some 24 are not sensitive, like the Eastern Wood Peewee, some 25 are, like the Wood Thrush are, he says.	60 1 of maintaining ecology. Much of our wildlife requires 2 connectivity. I can tell you in Princeton we worked on 3 a project to keep a ring of forests around the exterior 4 of the town to prevent loss of connectivity. Because as 5 you break forests up you interfere with migration of 6 animals. You interfere with genetic adversity and you 7 interfere with the area you need to live. And so 8 connectivity is vital. So you'll see when we get to Dr. 9 Hasse's document, that this forest is smack in the 10 middle of a connectivity corridor. And so when you 11 eliminate this and one or two others, you've broken up 12 the connectivity that's necessary for the ecological 13 system. 14 He also says here that: Invasive and 15 common species --" well, "Common and exotic invasive 16 will increase in occurrence and abundance as forest 17 patch size declines." And so if you could just hone in 18 on the graph itself. Thank you. Let's do that one 19 first. It's a little more, so we see the bottom. The 20 bottom vector. Thank you. 21 The European Starling. So you see it's 22 probability of occurrence on the left-hand vector. Then 23 you see it declining drastically as the forest size 24 declines. It's very clear. And the same applies to the 25 American Robin. So forest species will decline,

61 1 absolutely, once you eliminate the core forest and 2 reduce it down. 3 This is a scattergraph which shows something 4 similar. That the nesting success of species change. 5 For example, as the forest is larger on the bottom 6 vector, you see the scattergraph showing -- sorry. You 7 see the scattergraph showing high levels of nesting 8 success with the high dots as the forest area is larger. 9 But as the forest area is smaller, nesting success 10 declines, and the scattergraph shows that very clearly. 11 So not only do you have decrease in occupancy but you 12 have a decrease, and he's only using the Wood Thrush as 13 one example. You have a decrease in the ability of 14 these creatures to reproduce. So we get a double 15 whammy. We destroy the core forest, the resulting 16 patches are not really enough to ensure major occupancy 17 by species, and those that do occupy will have little 18 success or less success reproducing. We -- this is 19 really a kind of roller coaster downward in terms of 20 ecology. This is one of those things that causes 21 ecology to collapse. We're seeing it in microcosm 22 through Dr. Butler's testimony. That's what we offered 23 him for. Not only because of birds, this is an example 24 of what will happen with all species based on whether 25 they need core forest to survive.	63 1 historically. 2 Okay. This is part of his discussion, I 3 didn't include his entire exhibit because it's lengthy. 4 He gave a discussion on smart growth, if you recall, and 5 he was using various factors that are fundamental to the 6 notion of smart growth, which I think we all ascribe to. 7 And what he has is a map showing the developed sites, 8 basically the house placement and if we could just move 9 it up a little, I think there's a code. Well, stop 10 there for a moment. Thank you. So right there in the 11 center -- I did it again. Sorry. Right there in the 12 center, right there in the center is our site. You can 13 see it's surrounded almost entirely by suburban housing 14 subdivisions. Now, there's a park here. There's some 15 undeveloped area there and there's a little bit of it 16 here and there's some there. This is right in the 17 center of this area 18 Now, what we have is staggering bits of 19 woods left. Many of them severely degraded. Look here. 20 This is all edge, for example. You know, all that's 21 edge, for example. A lot of this is edge here. This is 22 a piece that's left, it's almost primeval, which is 23 remarkable. And you heard Chief Mann speak during the 24 public comment about, you know, the real emotional need 25 that he and the Lenape nation feel for preserving, when
62 1 Also, there are threats to interior species. 2 As the exotic and common invasives enter, they will be 3 depositing eggs in nests and knocking out eggs of the 4 forest species. This is a common problem. You actually 5 see this in a lot of species that domesticate. They 6 knock out the wild species. You see it in salmon for 7 example that escape from salmon farms. They actually 8 affect the population of wild salmon negatively. This 9 happens here, where invasives enter, they will colonize 10 core birds nests and destroy members of the species. 11 So this is his summary, but I think I've 12 given that. 13 This is Dr. Hasse's presentation. Now, that 14 is his placement of the structures only on the existing 15 forest. He used that as his cover. And you could see 16 clearly the subdivisions around. 17 This is on a higher altitude view and you 18 see in the center that -- oh, I'm sorry. You see in the 19 center that cleared area, that's what gave rise to that 20 interior bump on the 58 acres. There obviously had been 21 a house or a mansion there at some point. 22 Now, that is a very good depiction of the 23 forest, it's showing it's surrounded by this enormous 24 developed area. And we'll see some of the maps as they 25 came through, if you recall the presented maps	64 1 we can, these old growth forests. 2 Now, if we can pull out, I think there's a 3 code there. 4 Now here's the connectivity. And he has a 5 depiction of hubs and connectors. And so we're seeing 6 some of those same green areas that we saw on the other 7 drawing, or the other chart. Our property at issue is 8 right in the middle here. You see it's really smack in 9 the center of a connecting branch. Here's an area of 10 some undeveloped area. Here's one. This is smack in 11 the center. These corridors tend to allow some 12 communication of species. Remember I mentioned in 13 Princeton we're trying to preserve that ring of forest 14 for that very reason. When you take a forested area of 15 several hundred acres and you put a housing development 16 in the middle, what you do is you lose the connectivity. 17 Species can no longer migrate, they can no longer 18 multiply and they gradually diminish. So this is an 19 example of a connectivity forest. There really aren't 20 that many left. So this is a major piece of the 21 connectivity corridor forest, and he spoke to that 22 issue. 23 Now, again, this is another depiction of the 24 forest core with which you're familiar. And this is a 25 very stark demonstration of what we have and it's a

65 1 pulled out version, an aerial photograph, and it shows 2 what we're surrounded by. You have bit of that other 3 forest -- sorry. You have a bit of that other forested 4 area here, but this is remarkable. It's a remarkable 5 survivor. And so the question of what development takes 6 place must take place in the context of the ecological 7 destruction. If you don't have that as a fundamental 8 part of your analysis, then the boards not doing it's 9 duty under the law. It must be considered. 10 Protecting water quality. This is a very 11 important drawing and engineering chart. The center is 12 our property. What do we see in the left-hand side or 13 western side of that square? Well, actually in the 14 center too. We see the headwaters of the Canoe Brook. 15 Mr. Fagan, can you hone in on that. Thank you. 16 We see inside the site, the two branches that 17 form the Canoe Brook. This property is the headwater of 18 the Canoe Brook. This is not just a little stream, it's 19 part of the drinking water supply of several 20 communities, and you heard people testify the concern 21 they had about this. So when we degrade the forest 22 we're doing other things. Remember, water is not 23 supplied only by stormwater runoff. It's also supplied 24 by water that percolates through the soil. There was 25 testimony about this. And when we damage the soil, when	67 1 And so bear in mind, this is really the core 2 feeding area for that -- for the Canoe Brook. And when 3 you pull back you see that. So this project is not only 4 going to destroy fauna on the site, we use the 5 ornithology as an example. It's not only going to 6 destroy the waters that supply the wetlands, it's not 7 only going to destroy the trees, it's actually going to 8 damage the drinking water supply of the community. 9 This is another aspect of the productivity 10 and smart growth factors in development we spoke to. 11 Protecting the productive soil classes. 12 Now, you can see here the project site is in 13 the magenta area. That's the second highest level of 14 productivity. This whole area is in that second highest 15 level. Dr. DeVito testified to something very 16 significant. Remember he talked about the forest soils, 17 and he testified it takes thousands of years for those 18 soils to develop and once they degrade they do not come 19 back. It sounds like it's a renewable resource, 20 something that can regrow, soil. He testified it 21 literally takes thousands of years for soils to 22 regenerate. So once they lose their supplying fauna, 23 once they loose their water supply and dry out, once 24 flooding becomes more prominent, the soils erode. They 25 disappear. And so the soils that are fundamental to the
66 1 damage the plant life by creating edge forest and 2 eliminating core, we damage the natural return of water. 3 We dry out wetter areas. You heard testimony from Dr. 4 DeVito or Mr. Farr as to the impact of losing water to 5 these areas. They dry out. And when waters dry out -- 6 what was the testimony. I don't know if anyone recalls, 7 it's quite awhile. The ironic factor is that when land 8 dries because it loses the water that supplies the 9 wetlands, flooding arises and increases. And Dr. DeVito 10 or Mr. Farr, I frankly forget which one, were very clear 11 on this point. That as we dry naturally wet areas out, 12 and there's a lot of wet area here that we will dry, the 13 land loses it's absorptive capacity. And the water 14 instead of dropping down and percolating out, runs 15 across rapidly and it destroys natural features, and it 16 also brings with it sentiment and other pollutants into 17 the Canoe Brook and other tributaries on other sites 18 where this happens. So this is the headwaters of the 19 Canoe Brook. I mean, water is really our most precious 20 resource. So we're going to build a project that we 21 know will degrade and virtually destroy the entirety of 22 the ecology of the site and this site is headwaters of 23 this brook. That's why this demonstration from Dr. 24 Hasse was very important. 25 So if you could pull back on that a minute.	68 1 health of the forest, which also hold water and let it 2 percolate into the water supply, dry out and die. They 3 don't come back. They don't come back in any time frame 4 any of us can envision. The soils that are there now 5 existed 5000 -- were created thousands of years ago, 6 probably 5000 years ago. It'll take that long to 7 regenerate the soils. So this is another example of the 8 destructive nature of this project. 9 He spoke about the smart growth aspects of 10 creating community green spaces. Now, remember we saw 11 this forest in the center of that vast subdivision. So 12 we have this horrible development, which we all need to 13 live, but we have the remarkable presence of a natural 14 area in the center of it. And that's what he's talking 15 about. He's saying smart growth says, rehabilitate 16 structures. Don't just open up new lands to massive 17 construction, when we can be looking at rehabilitative 18 -- rehabilitating structures. Yes, we want some 19 affordable housing, does it have to be in a pristine, 20 virtually pristine virgin forest. Is that smart growth? 21 It's not. You know, what are we going to say 20 years 22 from now, 40 years from now when we wake up and the 23 forest didn't regenerate, as Mr. DeFeo rather blithely 24 said it would, by putting up fences. What are we going 25 to say to the next generation when we tell them, you

69 1 know, there was once a pristine old growth forest right 2 in the middle of West Orange and we destroyed it. How 3 do we answer that question. 4 Now, are you convinced from the evidence you've 5 seen, that Mr. DeFeo is right or that the experts the 6 objectors marshaled have the better argument. If you're 7 convinced that objectors evidence has the better case, 8 you have to recognize the economic -- the ecological 9 destruction of this site that will ensue. And therefore 10 the only answer has to be, no. 11 That's a satellite -- here, we're going to get to 12 some aerial photos. 13 I'm actually getting close to the end. I 14 don't know, Mr. Chairman, when it's appropriate for a 15 break. I'll leave it in your hands. 16 CHAIRMAN BAGOFF: Keep going. 17 MR. AFRAN: Okay. 18 This is a 2024 satellite view. This is part of 19 Dr. Hasse's presentation. Remember, he's basically the 20 states cartographer. He maintains all of the data for 21 the state on all of this collection of information. 22 This, he testified, is a 2024 satellite image of the 23 site. I think it's a beautiful picture. It shows the 24 intense development in this area. And you can see the 25 site is surrounded literally by thousands of buildings.	71 1 Vermule Maps, those are done by the US Geological Survey 2 back in the 1880s by a man named Vermule, the entire 3 area was undeveloped. Now, the brown areas generally 4 deemed farmland. The green areas are forested. So you 5 can see where our project is in the center. Sorry. Our 6 project is in the center and it's surrounded by woods. 7 Those woods have largely disappeared over time. So what 8 we have from Dr. Hasse is a demonstration of what there 9 was and what there is left. And you're being asked to 10 decide whether to literally destroy what is left, or 11 large part what is left. There's very little of this 12 left. 13 Now, we're not talking about the destruction 14 of an endangered species per se. We are talking about 15 something equally rare. The destruction of old growth 16 forest in the middle of central northern New Jersey. 17 This is a rare entity and what's at stake is whether it 18 survives or is destroyed. And as I said, Dr. -- the 19 environmental evidence offered, and I won't say the 20 applicant offered Dr. DeFeo, he's really mandated by the 21 town as a board expert, but the only other environmental 22 evidence offered was Dr. DeFeo. All he spoke about was 23 if you put deer fences up you'll get some regrowth. He 24 never got back on the stand and rebutted his testimony, 25 nor could he. He didn't have the background. And no
70 1 And we have, and you can actually see a little bit of 2 that connectivity corridor developing. I'm sorry. You 3 can see it right here, that one area. You see over here 4 above Ms. McGovern there. And then you see the center 5 area. There's one, two, three. We are in the center. 6 This is a vital point of connectivity for many species, 7 particularly bird species that migrate and move from 8 place to place. Take this away, destroy it and we wiped 9 away one of the last remaining pieces of natural area in 10 this community. Really in the whole northern area of 11 the state. And you can see the intense development, 12 that little bit, plus a little bit elsewhere, is all 13 that's left of this. That's 1930 era. Again, our site 14 Dr. Hasse placed in the center. This is most likely a 15 winter or late fall picture. And you could see in 1930 16 there's very little development. And if I use above Ms. 17 McGovern as a guiding point, right above there is some 18 subdivision development back in the '30s. Some sand 19 mining it looks like here. That may be why there's an 20 open area shown, because it may be the remnants of that. 21 And basically there's a little bit here, but most of 22 it's open. This whole area. And if you go back you can 23 see that this whole area is mostly developed. 1930 it 24 was mostly undeveloped. 25 Now, if we go further to what's known as	72 1 other witness came forward. None of this ecological 2 evidence, the forest evidence, the hydrology, the loss 3 of wetlands, the injury to wetlands, the loss of 4 species, none of it was refuted by the applicant, or Mr. 5 DeFeo. 6 I'm not sure if this is the end of this 7 exhibit or not. 8 These are more of the documents submitted by 9 the different towns. 10 I do want to speak now about Mr. Litwornia. 11 Now, you recall Mr. Litwornia, he was a 12 traffic engineer. He's actually a very knowledgeable 13 man, but he was very ill. So if you recall his testimony 14 he had difficulty physically speaking at times, and he 15 couldn't always be heard and he couldn't always hear. 16 He has a serious illness, but he testified and issued a 17 report. When you read the transcript, his report and 18 testimony, it's quite logical. He was a little hard to 19 follow at times, but he made some very salient points. 20 And the primary point he raised is, is that this project 21 is a cul-de-sac. 22 Now, this is -- let me just go to my notes 23 for a moment, if I can. I just want to scroll through 24 to make sure there's nothing else before I end the, I 25 may shut this for a moment, but this is Chief Mann's

73 1 statement that he came and made here. "The man who cuts 2 down all of the trees and kills all of the animals will 3 find that he has nothing left to eat." He quoted that, 4 and he says, "Nature sustains us. It feeds us. You 5 will be reaping the aftermath of this decision, your 6 decision for years to come. Do the right thing. Show 7 that you care." I disagree with Chief Mann in one way. 8 It's not a matter of showing that you care. You can't 9 do that. You're not allowed to rule because you care. 10 You have to rule based on the facts before you. The 11 facts before you show ecological environmental 12 destruction and degradation of virtually an entirety of 13 this forest. And there is not evidence against the 14 objectors case of any substance on this point. There's 15 no evidence. But the rest of what Chief Mann says is 16 vital. We can not continue to destroy that bit of 17 nature that's left, and the law says we have a duty to 18 protect it. And the Municipal Land Use Law say we have 19 the duty. And your fundamental task is protecting the 20 public, health, safety, welfare, and morals. That's the 21 task of the Planning Board. Are you going to be able to 22 do that by approving this project and no amount of minor 23 mitigation, such as putting up a sign about what 24 wildlife and plant life used to be there, and no amount 25 of signage -- there was one drawing on one of the	75 1 here when he was here, I sitting Shiva. I don't know 2 his reactions, he may have been angry, he may have been 3 emotional, I don't know, when he spoke. But I can tell 4 you this, if he was here there's a reason for that, 5 because his people are still here. They have a 6 community in northern New Jersey where they've always 7 been, but they've lost everything else, as we have too. 8 His loss, which is ethnic in terms of the Lenape 9 people's loss of land and nature, his loss is our loss. 10 They lost lands as they owned 250 years ago, 200 years 11 ago, but we've also lost it too, and that's why he came, 12 because his piece is still here. And if he was 13 emotional or angry, I think we can forgive that because 14 he lives this very deeply, as we should be. 15 Mr. Litwornia testified on certain points, 16 this a completely different issue. It relates to 17 traffic questions. 18 Now, the law regulates the Residential Site 19 Improvement Standards -- sorry. I was trying to say 20 RSIS, I must be getting tired. Thank you. The 21 Residential Site Improvement Standards is a statute. It 22 is the law that governs. There's no way around it. 23 It's not an ordinance of the town, it's not a regulation 24 or some agency like the Delaware and Raritan Canal 25 Commission. It's the statutory law of the state. It
74 1 engineering drawings that had model signs to show birds 2 that would live there. No amount of that, that's what 3 developers do, they pull that out all the time. They 4 say, we'll put signage up. We'll say the birds that 5 used to be here. Or the birds we think are there that 6 may be left. We'll show what the Canoe Brook -- where 7 the Canoe Brook was. We'll have a sign, the Canoe Brook 8 was here. No amount of mitigation of that minor nature 9 can even remotely address the issues raised here by the 10 objectors. And there's no condition of approval that 11 can eliminate any of these harms, which have been 12 testified to. 13 Dr. DeVito, Mr. Farr, Mr. Gallagher, Mr. 14 Walsh on the environmental issues have made it utterly 15 clear, and no one refutes this, and there's no 16 mitigation that can be offered to challenge that 17 evidence. And you heard no testimony about mitigation 18 that can achieve that. All we've heard is Dr. -- Dr. 19 DeFeo. Mr. DeFeo, who said if you build the fences 20 you'll get some regrowth. Undoubtedly true. But that 21 doesn't address the issues that have been raised. 22 Now, I'd like to talk -- we can shut that, I 23 think. Anyone wants to go back to it just let me know 24 and we'll put it back on. But I just want to end with 25 Chief Mann's statement. And he came here, and I wasn't	76 1 binds this board. The question he raises is whether 2 it's being violated. 3 Now, the RSIS standards apply to the 4 cul-de-sac. Now, this was an interesting legal issue 5 that arose. Now, we certainly have a cul-de-sac in 6 terms of the existing condo and the association. 7 There's one way into it and one way out, that's Oval 8 Road. That's a cul-de-sac. No one disputes that. And 9 the RSIS standards for a cul-de-sac govern. The 10 interesting thing that the developers doing, is it's 11 adding to the cul-de-sac. Right. It's adding a 12 cul-de-sac onto the cul-de-sac. It's really growing the 13 cul-de-sac. You know, yeast grows and gets a bubble on 14 the yeast, and it expands. Well, that's what's 15 happening. The cul-de-sac is growing. The development 16 tries to say, no, no, no. And with respect to CME, they 17 took that position, we strongly disagree. This is two 18 cul-de-sacs. It's a cul-de-sac on top of a cul-de-sac, 19 but they're separate cul-de-sacs. So think about that. 20 We have the existing development, there's only one way 21 in through Oval, partly through Warner and not through 22 Oval. The only way in is through Oval, the only way out 23 is through Oval. It's a cul-de-sac by law, no one 24 doubts that. What's happening is that this is a new 25 project that's proposed immediately behind or on top of

77 1 the existing development. 2 Now, what is the way into this project. We 3 had a lot of testimony on this and we absolutely 4 incontestably shown there's only one way into this new 5 project, that's Oval Road through Warner. You enter 6 Oval, you go up Warner and you're in the project. There 7 is no other way in. The way into this new project is 8 exactly the way into the existing project. It's the 9 same road. They have to extend Warner to kind of 10 connect up to. But you're going from Oval to Warner in, 11 that's it. If the first is a cul-de-sac then the second 12 is part of the cul-de-sac. Now, I recall questioning, I 13 think it was our engineer from the board, and the 14 question I asked was, Well, if this new project had been 15 built as part of the original rather than two phases, 16 would it all have been one big cul-de-sac? If you 17 recall the answer was, yes. So you want to get one set 18 of average daily lives, one set of cars and trips per 19 unit in a cul-de-sac, you can't double it because you 20 wait 30 years and make a bubble of the cul-de-sac on top 21 of the existing one. It's one cul-de-sac. And the 22 concession by the engineer was that Well, if it had all 23 been built at one time it would have been one giant 24 cul-de-sac. The RSIS standards would apply. But 25 somehow through some miraculous and manipulation of	79 1 existing traffic conditions now. And, you know, I asked 2 this question a few times and everyone said, oh, that's 3 de minimis. We're having an enormous increase in 4 traffic of about 2500 per day, I think. The existing is 5 2700 something, I'll get the exact figures. And we're 6 going to more than double or double it. Now, they want 7 to close Kuzak as a de minimis exception and use it only 8 for emergency access. That avoids the issue. That's 9 the book juggling I'm talking about. They're saying 10 well, if we have Kuzak we have two ways into this 11 cul-de-sac. Yeah, if the only development was this, 12 that might work. It's not. And it doesn't really work 13 anyway because what does Kuzak feed into? Warner. What 14 does Warner feed into? Oval. The only way in and out 15 doesn't work out. So even if you didn't have the de 16 minimis exception and you force them to open Kuzak, it 17 doesn't work. Because Kuzak is still feeding into 18 Warner and into Oval. It's not a separate way into this 19 development. They're still stuck with the RSIS, and no 20 one has explained any provision in the statute that 21 allows you to simply expand an existing cul-de-sac and 22 then start the bean counting over from scratch and 23 ignore all the other traffic that exists from the 24 existing part of it. There's no statute, no regulation 25 offered. So the idea of de minimis exception, it means
78 1 geography the applicants trying to sell you on the fact 2 that this is a separate cul-de-sac. Goes in through 3 Oval and Warner, goes out through Oval and Warner. It's 4 simply an expansion of the existing cul-de-sac. And 5 just because you decide to hold back and build this in 6 two phases, doesn't mean you get credit for doubling the 7 amount of cars, vehicles, units and trips. The law is 8 the law. One way in, one way out, there's a limit to 9 the number of trips available. Period. You cannot 10 exceed it. There is no dispute that they exceed it. 11 Mr. Litwornia's testimony was very clear. The only way 12 they have around this problem is equivalent to juggling 13 the books, so to speak. The only way they have around 14 this problem, is Kuzak. Right. They can say well, we 15 have, and maybe we can put the engineering drawing back 16 on before we leave this. Thank you. I think this will 17 work. 18 Basically what we have is Kuzak is going to 19 be closed and used only for emergency access, we know 20 that, that's the proposal. Yet, they can't really do 21 that. Well -- and they want a de minimis exception. 22 They say there's really not a lot of extra traffic, 23 therefore we don't need a second road inside the 24 project. It says, de minimis exception. Well, there's 25 going to be 7000 car rides per day than under the	80 1 that -- well, if you -- we had to do Kuzak we would and 2 that would solve the cul-de-sac problem. It doesn't. 3 Because it all feeds right back into Warner which feeds 4 back into Oval. There's only one way in and one way out 5 and the fire chief made this very clear. You know, he 6 said, he admitted in his report, we only have one means 7 of ingress and egress except for those emergency ways. 8 So there's no possibility that Kuzak is a separate way 9 into this development. Under the RSIS the only way to 10 avoid the cul-de-sac minimums or maximums rather, is you 11 have two separate ways in and out of the development. 12 One here going to some arterial road, one here going to 13 a road. When the two go into one that's one way in and 14 out. It is not two ways. This is common sense. Why 15 does the RSIS exist? It exists to protect people. It 16 exists to minimize traffic problems. It exists to 17 maximize the ability to access the site. It exists to 18 minimize too many cars passing in front of houses, 19 ruining the life of the people who live in them and it 20 exists to minimize traffic jams at a single way in and 21 out. That's why if you want more trips per day, more 22 trips per unit in a multifamily development, you got to 23 have two separate ways in and out and you no longer have 24 a cul-de-sac. They don't have it. So even if you say 25 the hell with the de minimis exception, that's a lot of

81 1 crap, because you got thousands of extra rides, it 2 doesn't help them. Because if you open Kuzak it's still 3 going into the same way in and out, Warner to Oval. 4 There's no way around this problem. The law does not 5 allow this project. Period. 6 Now, I'm not an expert, so I'm going to 7 recite the calculations and I may have, I believe I'm 8 correct. Give me one moment, please. I'm sorry. 9 Mr. Chairman, I just need one more moment. I'm sorry. 10 A street -- a cul-de -- a development 11 system, a cul-de-sac under the RSIS -- I'm wrapping up 12 actually. This is fundamentally legally. Under the 13 RSIS the maximum ADT, average daily trips, into and out 14 of a cul-de-sac is 1000 for multifamily developments. 15 Mr. Litwornia calculates, and no one disputes the 16 figure, I think it's the applicants figure, 2228 trips 17 per day for ADT. All right. That's almost three times 18 the maximum permitted in a cul-de-sac. They don't have 19 a second road in and out. Kuzak, even if you open it, 20 is not a second way in and out. Simply goes right back 21 into the only way in and out. It's not going to get 22 them around the RSIS. There's almost three times more 23 trips permitted from this development alone. Then Mr. 24 Litwornia adds in the trips from the existing 25 developments. We're about five times in excess of the	83 1 connections shown on this plan? Well, we don't. Take 2 the sewer issue for example. There's a conduit built in 3 somewhere. Doesn't go anywhere. Doesn't connect 4 anywhere on these plans to any sewer line, and doesn't 5 do that for very -- and you heard Bill Greene's 6 testimony very clearly stating, did you hear any witness 7 explain that it does connect up with a sewer line? Did 8 you get any witness to testify as to the feasibility of 9 adding this rather large amount of waste into the 10 existing sewer lines and conduits. You heard no 11 evidence of that. What was the answer? The answer was, 12 we'll go to the authorities and get permission. Can't 13 do that. And you can't do it for a very good reason. 14 The law says you can't. There's a case, and it's been 15 upheld repeatedly by the Appellate Division, known as 16 Field v. Franklin. Franklin Township. It's actually 17 Jack Field, give him credit, versus the Mayor and 18 Council of The Township of Franklin. And in this 19 decision the Appellate Division states reported decision 20 at 190 New Jersey Super 326, and it's a 1983 Appellate 21 Division decision. It has been repeatedly cited as 22 recently as, I think, 2013 by the Appellate Division and 23 it is good law in the state, and it says very simply, "A 24 municipality cannot guide the use and development of 25 lands in this state if fundamental elements of the
82 1 maximum permitted average daily trips under RSIS for a 2 cul-de-sac. 3 Now, this is much more serious than mere 4 aesthetics. It's a safety issue and quality of life 5 issue. We're going to literally have 5000 average daily 6 trips or more, in a place where the law says only 1000 7 are allowed. And the reason for that is the quality of 8 life and safety of the people who live here. We're 9 adding more than five times the average daily trips by 10 the sheer fiction of claiming it's not a cul-de-sac, 11 because you could open Kuzak, but all Kuzak does is loop 12 right around to the same way in and out. It's no 13 different than juggling the books when you're trying to 14 evade your taxes. It's exactly what it is. You can't 15 approve it. It's illegal, and there's not a single 16 shred of authority offered by anybody. By your engineer 17 who analyzed it or by the applicants very qualified 18 engineers or their planner or their attorney to show how 19 RSIS is not being violated. The only argument they have 20 is well, if you theoretically open Kuzak you got two 21 roads, but you don't, as we all know. RSIS is being 22 violated. 23 Now, there is one other area I want to 24 address very briefly on. It's a discrete issue but it's 25 important. Do you have feasibility of utility	84 1 development plan are left unresolved before preliminary 2 approval, leaving them instead for an unspecified later 3 day." And the court cites some cases and I'll go on 4 with the text of the decision. "Certain elements, for 5 example, drainage, sewage disposal and water supply, may 6 have such a pervasive impact on the public health and 7 welfare in the community that they must be resolved at 8 least as to feasibility of specific proposals or 9 solutions before preliminary approval is granted. If 10 the Applicant fails to provide sufficient information on 11 the fundamental elements of this plan, preliminary 12 approval should be denied." It doesn't say, the 13 applicant should be allowed to come back later and give 14 you a certificate that such and such sewage authority 15 granted them connectivity. It says, "Preliminary 16 approval must be denied." Meaning they cannot do it 17 later. This is preliminary approval. Field v. Franklin 18 is the binding law of the state. It's been recognized 19 repeatedly in other cases. We don't have any evidence 20 of feasibility of utilities. We don't even have pumping 21 stations in the plans to show how the waters going to 22 get up there. You heard Bill Greene testify we don't 23 even have a water tower that's necessary in order to 24 supply water for firefighting purposes. Where is it 25 going to go? Can the water get up the ridge? There's

85 1 no evidence of that. No one testified to it. We have 2 no evidence of sewage feasibility. No one testified to 3 it. We don't even know if water actually can go in 4 here, and where the pumping stations going to go. 5 There's no land left. We can't stick them on the 6 wetlands, we can't stick them next to the wetlands 7 because the buffer zones are there. All of these 8 things, as Bill Greene testified and it was almost 9 entirely unrefuted, are not shown. And the court is 10 very clear. "Feasibility must be resolved prior to 11 preliminary approval." And you can't say, we'll leave 12 it for a condition of approval. The law doesn't allow 13 it. We've given you a multiplicity of reasons why this 14 plan should be denied. Those reasons will stand up in 15 court. 16 In the end, and there's a lot more we could 17 talk about, but frankly I've spoken long enough, and I 18 think you get the idea of this case. In the end you've 19 got to decide, are you satisfied that the adequate proof 20 as to all of these very necessary questions are shown. 21 If adequate proof is not shown to satisfy you public 22 health, safety, welfare, and in many cases the law, are 23 satisfied, you have to say, no. And I can tell you 24 based on this evidence, no court in this state is going 25 to overturn that decision. And we'll be right there	87 1 Thank you, Chairman Bagoff, Vice Chairman 2 Guarino, Mayor McCartney, Council President Scarpa and 3 the rest of the board members. 4 My client and I recognize that the 5 conducting of so many special meetings required 6 additional time away from lives and your families and it 7 was obvious that all of you put in the commitment 8 required to not only be here but take these proceedings 9 seriously. Even taking the time to review the 10 transcripts or listen to the audio from meetings you 11 couldn't attend. 12 Now, not once was I notified that we had to 13 cancel the meeting at the last minute because we didn't 14 have a quorum, and that's commendable for so many 15 meetings over a year and half. I can tell you from 16 experience it does not always happen that way in other 17 towns. Even for regular meetings, so it really is 18 extraordinary. It really shouldn't go unnoticed because 19 this board does play an important role as set forth in 20 the Municipal Land Use Law. The law. That may be a 21 dirty word to some people in this room, but planning 22 boards are a creation of and bound by the law. 23 Including established judicial precedent. You're 24 required to public hearings on-site plan applications, 25 you review evidence, you hear the facts, you hear
86 1 defending it. If you're not satisfied you must vote no, 2 it's not an option. 3 I want to thank you for listening, I was a 4 little longer than I thought, I apologize. Thank you 5 for these 28 meetings, a year and a half of time here. 6 Ms. McGovern and I were talking, you know, what do we do 7 on these Wednesday's, Dr. Bagoff I know doesn't know 8 what to do one way or the other. So thank you very much 9 and I'm open for questions. 10 I thank our supporters. 11 CHAIRMAN BAGOFF: Thank you very much, Mr. 12 Afran. 13 We're going to take a five-minute break. 14 (Whereupon, a short recess is taken.) 15 CHAIRMAN BAGOFF: Thank you. 16 Welcome back, ladies and gentlemen here and 17 on zoom. 18 Mr. Plocker for the applicant, closing 19 remarks, sir. 20 MR. PLOCKER: All right. Thank you very 21 much and I'm going to do my very best. I'm trying to 22 decide whether I'm going to wear my readers or not, and 23 it's probably going to make me look awkward at times, 24 but I guess I'm old and I have to come to that 25 realization, so we'll figure that part out.	88 1 testimony from the applicants witnesses, from the 2 objectors witnesses, and in this case the board took the 3 additional step of asking its own professionals to weigh 4 in and offer testimony after it heard from both sides. 5 That is also not something that happens every day. 6 There is no doubt that this board took extraordinary and 7 meaningful efforts to understand all aspects of my 8 clients application so it could comprehend the facts 9 within the context of its legal duties, the law and the 10 facts. There is a famous quote by Carl Sandberg, which 11 has been somewhat prevalent in the news lately. "If the 12 facts are against you, argue the law. If the laws 13 against you, argue the facts. If the law and facts are 14 against you, pound on the table and yell like hell." 15 During public comment we heard a lot of, Do the right 16 thing. Save the forest. The town should buy the 17 property. Yelling about how the application before you 18 is so incomplete that it should have never even had a 19 hearing in the first place. They screamed, there's no 20 sewer plan. There's no water plan. Mr. Afran just said 21 there's no sewer plan, no water plan. I'm going to show 22 how very wrong he is. It wasn't a mischaracterization, 23 it's just wrong. Those assertions are not based in law 24 or in fact. 25 During the last two meetings the board heard

89 1 some yelling and figurative pounding through the pleas 2 of passion fueled by a desire of many whose goal it is 3 to not see a single thing built on this property. Look, 4 and the public should be commended. You have a very 5 engaged citizenry, which you're all a part of. They're 6 your neighbors and that doesn't go unnoticed or not 7 appreciated. However, just as it's your job at the end 8 of the day to weigh the credibility of witnesses 9 testimony, it's your job to weigh the credibility of the 10 statements and testimony of the public, and Mr. Afran, 11 in light of the facts and the law, are the comments 12 supported by the record. While the public should 13 certainly be recognized for their passion and 14 commitment, such zeal and enthusiasm have no bearing on 15 this boards duty to evaluate the applicants proposed 16 development. 17 To the contrary standing before you this 18 evening, I'm proud to state that I will not be pounding, 19 I will not be yelling, because both the law and the 20 facts unequivocally mandate the approval of this 21 application. Except for one bulk variance the 22 application fully complies with the standards set forth 23 in the IH-1 zoning ordinance. An ordinance adopted more 24 than five years ago by the council which was fully aware 25 of the characteristics of this property and the proposed	91 1 applicability of those regulations. 2 The township voluntarily included the 3 property as a significant compliance mechanism in it's 4 third round affordable housing plan. The required 5 Master Plan amendment was adopted by this board and the 6 zoning ordinance was also endorsed by this board before 7 it was adopted. 8 So let's look at the governing zoning 9 ordinance. I could easily stand here for a few minutes, 10 go over the ordinance provisions and say, we comply 11 except for the one variance we're seeking. Thank you 12 very much. The board should grant the application. 13 Good night. But it's apparent that the objector group 14 and the public, they don't like or they have a hard time 15 comprehending or accepting the zoning ordinance, and 16 that's okay. And they also just don't understand why it 17 provides certain relief from the towns land use code. 18 While that's not relevant to these proceedings, as this 19 board is not a legislative body, I think it is important 20 to the Planning Board to understand the relevancy of the 21 circumstances under which the ordinance was adopted and 22 the time and the effort that went into its adoption. I 23 can't stress enough that my client wasn't just some fly 24 by developer who walked in off the street and 25 willy-nilly convinced the town to rezone this property
90 1 development, including its physical features that up to 2 30 acres would be disturbed, while the remaining 90 3 acres would be forever preserved. The permitted density 4 allowing 496 units, the area of disturbance. The fact 5 that the property contains a forest, the slopes, the 6 access via Eagle Rock Avenue, Oval Road and Warner Road. 7 The proposed road connecting Kuzak Drive to the 8 development. The emergency access easement that would 9 be permitted through two single family lots on Howell 10 Drive. Knowing that a traffic signal would be required 11 at the intersection of Eagle Rock and Oval, and that my 12 client had agreed to install that traffic signal. All 13 of these things were known when the town zoned the 14 property. The township was no stranger to this 15 property. It was the culmination of a four year 16 mediation process, during which it was advised by a team 17 of professionals. The township engineer, consulting 18 site and traffic engineers. The township planner. An 19 affordable housing planner and legal counsel. By 20 adopting the ordinance it did, which does include many 21 exemptions from the typical zoning and environmental 22 code requirements, it did so because it felt that the 23 long negotiated development could be built in a safe, 24 appropriate manner that did not have a detrimental 25 effect on the public welfare, even in the absence of the	92 1 sight unseen and to exempt the site from many ordinance 2 provisions that typically govern site plan applications. 3 To be clear, the Affordable Housing settlement was 4 resolved by litigation filed by the township, not by my 5 client, not by any other developer, but which West 6 Orange sought voluntary compliance with it's Third Round 7 Mount Laurel obligations. 8 Mr. Afran, I must correct you, this was not 9 a builders remedy lawsuit. There was no gun to the 10 townships head. The town had historically sought 11 compliance in the past, we all know that didn't really 12 happen with the Fourth Round, but this was the towns 13 only Declaratory Judgment lawsuit. But it was a 14 settlement of their Third Round Declaratory Judgement 15 action which led to this ordinance and the ordinance 16 incorporated into the settlement agreement between West 17 Orange and the applicant and as a result of that 18 litigation the town received a great benefit. The court 19 granted the town a Final Judgement of Compliance and 20 Repose. Meaning that West Orange had complete 21 protection from builders remedy lawsuits through July 22 2025. In connection with that settlement, this board 23 had a hearing on November 17, 2020, at which the 24 townships then Affordable Housing planner, Shirley 25 Bishop, presented the plan and the board unanimously

93 1 approved the plan by a vote of eight to nothing. The 2 board subsequently memorialized its decision in 3 resolution 20-08 adopted on December 20, 2020. On Page 4 9 of the approved Fair Share Plan, the West Essex 5 Highlands development is identified as the third 6 compliance mechanism providing 100 affordable units 7 pursuant to which the town also received 51 bonus 8 credits for a total of 151 credits towards it's overall 9 third round obligation. That fair share plan 10 specifically states on Page 9 that the property shall 11 contain 496 family rentals, including 100 affordable 12 units. That there is an executed settlement agreement 13 that contains a concept plan, zoning amendment, design 14 terms and conditions and West Essex Highlands 15 condominium terms and conditions. The numerous 16 mediation sessions occurred with both WEHI, the Township 17 and the Condominium Association. And that the 18 settlement agreement is the result of those sessions. 19 The plan also states that the site is available insofar 20 that it's owned by my client. The site is approvable in 21 that there's an executed settlement agreement that 22 contains the proposed zoning. The site is developable, 23 that it has access to public water by New Jersey 24 American Water Company and sewer from West Orange. 25 The site is suitable that it's surrounded by	95 1 compliance and repose. So with that backdrop let's look 2 at the IH zoning ordinance. 3 Knowing that the entire property is 120 and 4 a half acres, a review of the ordinance reveals that the 5 township had two overarching goals in restricting 6 development. One, limit the disturbance of the property 7 to a maximum of 30 acres. And two, do not disturb the 8 eastern slope at all. Stay west of a certain lot. To 9 be clear, it is not a setback line. Just stay west of 10 what we affectionately refer to as the Lenny Line, a 11 line named for Mr. Lapore, the former township engineer 12 who was part of the towns team at the time. The plan 13 meets these requirements, while disturbing only 27.7 14 acres of the property. And what happens to remaining 15 undisturbed 93 acres, it will be forever preserved and 16 deed restricted as open space. Meaning nothing may be 17 built on the remainder of the property in the future. 18 Now, it's obvious that the objector and the 19 public don't like the zoning ordinance. They don't like 20 the settlement the township made, and that's okay. But 21 those items went through a lawful public process that 22 went unchallenged. This Planning Board is not the farm 23 to object to the ordinance or to the settlement 24 agreement or to the Court's 2020 judgment which approved 25 the settlement and sanctioned the rezoning of the
94 1 residential uses, has Warner Road as it's primary 2 access. 3 Now, many people here, I know, they've done 4 it during the hearings, they've questioned why the site 5 was chosen as a third round compliance mechanism, but 6 it's not this boards role to question, revisit or 7 relitigate the townships affordable housing obligation. 8 There was a public process for that, which culminated 9 five years ago due to the townships settlement efforts, 10 including the rezoning of this property and the township 11 should be commended. They fought hard, they bent over 12 backwards to preserve as much of this property as 13 possible. 14 The township filed its litigation in July of 15 2015, my client became involved at the end of '15. The 16 settlement occurred in April of 2020, this was not a 17 quick process. There was much thought, review and 18 investigation by the township and its full team of 19 professionals which resulted in a settlement reached and 20 ultimate adoption of the zoning ordinance. The 21 settlement which incorporated the zoning ordinance was 22 mediated by a court appointed special master approved by 23 the court at a publicly noticed variance hearing and by 24 fulfilling its obligations under the court approved 25 settlement, the town received its final judgment	96 1 property. With the exception of a bulk provision 2 regarding the percentage of foundation exposure, which 3 requires a C variance, the application fully complies 4 with the ordinance requirements. Again, many people 5 don't like the ordinance, they don't agree with its 6 requirements and question why it was adopted, or why the 7 ordinance treats this property differently. However, 8 has a developer ready, willing and able to develop 9 inclusionary housing on the site, the town had an 10 obligation to treat this property differently. 11 The applicable affording housing regulations 12 recognize, "The Fair Housing Act incorporates the need 13 to eliminate unnecessary cost generating features from 14 Municipal Land Use ordinances as a requirement of 15 substantive certification" or in this case, Court 16 approval. "In order to receive and approval of its plan 17 municipalities shall eliminate development standards and 18 requirements that are not essential to protect the 19 public welfare and shall design municipal ordinances to 20 expedite municipal decisions on affordable housing 21 development applications." That is NJAC5:97-10.1. 22 Some cost generative items specifically 23 identified in the regulations are, "building setbacks, 24 height and/or stories, spacing between buildings, 25 impervious surface standards, excessive open space,

97 1 recreation, landscape, buffering, tree replacement and 2 reforestation requirements and excessive road width, 3 pavement specifications and parking requirements." 4 That's NJAC5:97-10.2a. 5 Moreover, the regulations go one step 6 further. They actually provide, "Failure to remove 7 unnecessary cost generative requirements on an 8 affordable housing development application, shall be 9 considered a reason for dismissal from COAH, or in this 10 case, the Courts jurisdiction or revocation of 11 substantive certification." That's 5:97-10.2d. 12 It is important to note that in providing 13 relief from the tree ordinance, the steep slope 14 ordinance, the towns environmental regulations, the 15 township necessarily considered the impact on public 16 welfare as the regulations required. After vetting the 17 site with a team of professionals during four plus years 18 and in light of the limitations on development set forth 19 in the settlement agreement, the town was well aware 20 that public welfare could have been a reason to not 21 provide such relief in the ordinance or not to include 22 the site, or as much of the site in its housing plan. 23 They could have advocated for that. But after such a 24 lengthy period of review and negotiation, the town 25 adopted the ordinance, they inherently determined that	99 1 The purpose. Purpose of the district is to 2 provide for inclusionary development that contributes to 3 the regions fair share of affordable housing, in 4 accordance with a Court settlement agreement which 5 outlines the provisions for same. It cannot be disputed 6 that the application before you fulfills that purpose. 7 All though the Planning Board is not a party to the 8 settlement party settlement agreement, and in no way has 9 it ever been the applicants position that the board is 10 obligated to vote one way or the other, the ordinance 11 acknowledges and the board should acknowledge that the 12 intent and purpose of the ordinance was the product of a 13 negotiated settlement and that my client and the 14 township have certain obligations and duties under that 15 agreement, such as the general layout of the buildings. 16 My clients obligation to install the anticipated traffic 17 signal. The townships obligation to cooperate with us 18 regarding off-tract utility issues and its overall 19 obligation to support and defend the application from 20 any challenges. Even before these hearings began the 21 Planning Board implicitly acknowledged the settlement 22 agreement by deciding to hold special meetings, which 23 we're very thankful for, which were provided for in the 24 agreement. In his opening statement Chairman Bagoff 25 recognized this, specifically noting that the board
98 1 those ordinance requirements were not essential to 2 protect the public welfare under these particular 3 circumstances. 4 All though the board is bound by the zoning 5 ordinance, I've referenced these regulations to place 6 things in improper context and explain why the township 7 agreed to certain items in the settlement and the zoning 8 ordinance. This board on October 7, 2020, voted 7-0 in 9 favor of recommending the adoption of the ordinance. On 10 November 17, 2020, after the councils adoption of the 11 ordinance, this board adopted the housing element and 12 fair share plan, which I alluded to before, which 13 included this development by a vote of 8-0. This was 14 all part of the public process. 15 At this juncture the third round regulations 16 are clear, NJAC:97-10.3a provides "Affordable housing 17 developments that are included in housing elements and 18 fair share plan have proceeded through a public process. 19 Therefore the focus of municipal development application 20 review shall not be whether the sites are properly 21 zoned. The focus shall be whether the design of the 22 affordable housing development is consistent with the 23 municipal zoning subdivision and site plan ordinances." 24 So with that being said, let's look at the 25 particulars of the IH-1 zone and ordinance.	100 1 would consider the settlement agreement, which is part 2 of the application materials. 3 General Provision C-5. Development of the 4 tract shall be exempt from all bulk design and 5 environmental regulations of the West Orange Land Use 6 Regulations ordinance, unless otherwise indicated herein 7 and further provided that nothing herein shall 8 circumvent or contravene the procedural requirements of 9 the MLUL, nor the regulatory requirements of outside 10 agencies, including but not limited to, the New Jersey 11 Department of Environmental Protection and the 12 Hudson-Essex Passaic Soil Conservation District. 13 The town, including the input of its various 14 engineering and planning professionals, determined that 15 it could exempt this inclusionary development from many 16 of the provisions of the townships land use code, 17 including the steep slope ordinance. By adopting the 18 ordinance for this property, which is part of the 19 townships police power, the township essentially made 20 the determination that such code provisions, in this 21 instance, in connection with a proposed development 22 reviewed over a four-year period, were not essential to 23 protect the public welfare. Again, this property, this 24 applicant was no stranger to the town and my client just 25 didn't come in off the street and appear out of nowhere.

101 1 After vetting this site and a proposed development 2 during negotiation period the Governing Body agreed to 3 this provision, which also in good faith complied with 4 the towns obligation to eliminate cost generative items, 5 which is the regulation I was just referring to. 6 This board does not have the authority to 7 second guess the Governing Body about what was included 8 and what was not included in the ordinance. Just like 9 the Planning Board can't revisit the reasons why the 10 property was included as an affordable housing site 11 compliance mechanism. The board had a role back in that 12 process back in 2020 and unanimously voted to include 13 this site in the plan. However, the plain language of 14 the ordinance is clear, unambiguous, speaks for itself 15 and governs this application. 16 The use regulations. The permitted 17 principal uses, multifamily residential and open space. 18 The application clearly complies. 19 Permitted accessory uses. I'm not going to 20 go through them all, but there are many amenity type 21 uses that are listed that are permitted by the 22 ordinance. But one that is included, it includes the 23 rooftop amenity for Building D. Now, does that mean we 24 can violate the townships nuisance laws, absolutely not. 25 All though there was lot of yelling and proverbial	103 1 construction should any issue arise. 2 The bulk regulations. Total number of 3 units, 496. We comply. 20 percent affordable housing 4 set aside. We comply. No minimum lot size requirement. 5 We comply. Development is limited to a maximum 6 disturbance of 30 acres out the 120 and a half. The 7 site plan proposes the disturbance of 27.7 acres and the 8 remaining 92.2 acres, as I said before, will forever be 9 deed restricted as open space. We comply. Unrestricted 10 site access, ingress and egress shall be permitted from 11 Warner Road and Kuzak Drive. We comply. 12 Recall that as submitted the site plan 13 proposes full regular access to and from the proposed 14 development via Kuzak Drive. As the board is aware 15 pursuant to my clients agreement with the condominium 16 association as provided for in the settlement agreement, 17 we are making a request for RSIS de minimis exception to 18 have Kuzak gated to serve as a emergency access only, 19 which would only be able to be accessed by and used and 20 regulated at then discretion of the townships emergency 21 professionals. I'm going to get into that request in a 22 little more detail shortly where I address traffic 23 generally, but I would like to stress something. 24 Regardless of whether the exception is granted, the road 25 connecting Kuzak Drive to the rest of the development
102 1 pounding during public comment, I do want to make clear 2 that doesn't apply to Mr. Weisleder. Throughout the 3 hearings, as one of our physically closest neighbors, 4 Mr. Weisleder attended regularly and asked thorough, 5 rational questions of the witnesses. As someone who was 6 one of the most involved and respectful members of the 7 public to participate, I would have been fine if the 8 board gave him 30 minutes to speak during public 9 comment. That's not an invitation because I think he 10 deserved that respect. His comments and concerns 11 regarding residents of the development possibly being 12 able to see him and his family from those northern 13 terraces or the rooftop amenities, it did not go 14 unnoticed and we do take them seriously. Please don't 15 take this the wrong way Mr. Weisleder, but as much as 16 you don't want any residents seeing you, we don't want 17 them seeing you either. All though the sight lines are 18 rather lengthy and there will be an undisturbed forest 19 on the eastern slope, we will absolutely agree to a 20 condition of approval that imposes an obligation which 21 appropriately screens any areas which could create such 22 an issue, and that doesn't extend through the Planning 23 Board or a resolution compliance process, that extends 24 in the future. We will agree to interact with Mr. 25 Weisleder or any of our neighbors in good faith post	104 1 will be constructed as provided for on the site plan 2 which shows Kuzak as open. You will first need to vote 3 on the granting of the exception, if granted, then the 4 road will be built and granted for -- gated for 5 emergency access only. If the exception is not granted, 6 then the project would be approved with Kuzak open to 7 regular traffic. In other words, the granting or denial 8 of the de minimis exception has no effect on the project 9 one way or another. 10 Emergency access. Ingress and egress shall 11 be permitted to Block 179.17, Lots 8 and 9 to the north 12 and Bayowski Road to the south. We comply. There is no 13 access proposed to Bayowski Road, but as the board is 14 aware, this site proposes emergency access only via the 15 two single family lots on Howell Drive located in the 16 R-3 zoning district. Those lots are owned by an entity 17 having a common ownership interest with the applicant. 18 Someday there will be single family homes built on those 19 lots and nothing else. Any argument that emergency 20 access is a use which requires a use variance and 21 violates the zoning code, Verona's site plan approval, 22 West Orange's site plan approval for those homes, is 23 wholly unsupported by the facts of the law. Emergency 24 access isn't even defined in West Orange's ordinances, 25 so you won't find it as a permitted or prohibited use,

105 1 accessory or otherwise, in the code book. Does that 2 mean there is no emergency access in town? Of course 3 not. The Governing Body may determine it needs 4 emergency access anywhere in town and can take the 5 necessary steps to make that happen, including the use 6 of it's condemnation powers. Also the emergency access 7 proposed here, it may never even be used. It is there 8 for emergencies, and the use of the access will be 9 determined by West Orange's emergency personnel, if 10 necessary. It is simply not a use. There will of 11 course need to be emergency access, even recorded for an 12 potential purchasers of those two lots, but this issue 13 is nothing but red herring that several people are 14 trying to use to just say, you can't build anything on 15 this site. 16 To put things in perspective, let's assume 17 you have a residential subdivision behind a commercially 18 zoned property, and the relevant zoning ordinances and 19 approved subdivision and site plans don't mention 20 emergency access at all. Are you telling me that if the 21 police or fire department needed access to the 22 commercial property through one or more of those 23 residential properties in an extreme emergency, is 24 someone from the neighborhood going to run out in front 25 of an emergency vehicle, shake their finger and say, no	107 1 future, so if this board were to act favorably on the 2 application we will respectfully ask that that be 3 recognized in the resolution. 4 Next ordinance provision. The affordable 5 units shall consist of moderate, low income, units in 6 accordance with the requirements of the settlement 7 agreement, which actually models the UHAC regulations in 8 affect at the time, and establishes minimum size units 9 for one-bedrooms at 650 square feet, two-bedrooms at 10 875, and three-bedrooms at 1150 square feet. We comply. 11 Maximum building height shall be 75 feet, subject to the 12 specific standards in this particular ordinance. We 13 come in at 47.5 feet. We comply. Maximum building 14 height, four stories. Same thing, we comply. The 15 maximum exposure of perimeter walls for basements, 16 cellars or building foundations shall not exceed 50 17 percent total surface area of such walls, which shall be 18 based on the aggregate area of all perimeter walls. 19 This is the one ordinance provision for which we are 20 seeking the bulk variance. Our engineer, Paul Anderson, 21 testified on July 30, 2024, on Pages 28 and 29 of the 22 transcript that the proposed foundation exposure 23 percentages are as follows, 76.5 for Building A. 76.4 24 for Building B. 69.1 for Building C, and 54.8 for 25 Building D. As Mr. Anderson explained, because the
106 1 way. This property is only zoned for single family 2 homes. Mr. Firefighter or Mr. Policeman, you're not 3 allowed to cut through here to help the man having a 4 heart attack in the convenience store behind my house. 5 It just shows you how much of a nonissue this is. 6 Furthermore the proposed Howell Drive 7 emergency access will also benefit the residents of the 8 condominium. 9 Finally, there is one more important thing 10 to note about the emergency access to Howell Drive. It 11 is not required, as Mr. Pehnke testified, we think it's 12 a great idea to have that access for an extreme 13 emergency. It could only serve to benefit the general 14 welfare of the residents, including those living in the 15 condominium. However, neither RSIS, nor the zoning 16 ordinance, nor any other regulation requires it. Mr. 17 Pehnke made clear that the development complies with 18 RSIS, because there is access via Warner Road and Kuzak 19 Drive. If this board was to grant the de minimis 20 exception and permit the closure of Kuzak Drive to 21 regular traffic and if it was determined in the future 22 that the Howell Drive emergency access was not 23 permitted, the development would still comply with RSIS. 24 If that scenario occurred, we would want to retain the 25 option of opening Kuzak to regular traffic in the	108 1 property undulates he used the existing topography to 2 build the buildings into the slope in order to minimize 3 disturbance and to reduce the amount of clearing 4 required around each building, which was of course 5 consistent with the townships goal of limiting 6 disturbance as much as possible. He confirmed that due 7 to the distance from adjoining properties, our neighbors 8 would be seeing the portions of the exposed foundations. 9 Our architect, Larry Appel, added on July 31, 2024 on 10 Page 132 and 202, that the increased foundation exposure 11 eliminated the need to disturb more of the property, use 12 additional retaining walls and add more mechanical 13 ventilation, which would have also required grading of 14 the property, he said, in an awkward manner. We agreed 15 to screen those exposed portions with landscaping, green 16 wall technology, and similar mechanisms. The record 17 confirms that this was an aesthetics issue and that the 18 granting of the Bulk C variance would be appropriate. 19 The boards planner, Ms. Apte, in her testimony on 20 October 29 of this year, noted that the settlement 21 agreement recognizes at the time of settlement the 22 project was not fully engineered and that it may become 23 necessary to seek variance or other relief upon the full 24 engineering of the site plan, except for use variances 25 of course.

109 1 Moreover, the township agreed that the 2 applicant would be entitled to such minor relief as may 3 be necessary to develop the subject property, that's at 4 the settlement agreement Pages 11 and 12, Paragraph 3.1. 5 In addition to bulk variance standards set 6 forth in the land use law, testified to by our planner, 7 John McDonough, on January 28, 2025, the applicable 8 regulations require a towns cooperation with granting 9 variance relief. Specifically, "Municipalities shall 10 cooperate with developers of affordable housing 11 developments in granting reasonable variances and 12 waivers necessary to construct the affordable housing 13 development. That's NJAC 597-10.3b. 14 Again, this condition is aesthetic in nature 15 and the applicant is committed to installing the 16 appropriate screening. 17 There's no substantial detriment resulting 18 from this variance condition and it allows us to limit 19 the disturbance and clearance of the property. 20 The minimum buffer is 100 feet. We comply. 21 The east face of the Watchung Mountain shall remain 22 undisturbed from the peak of the ridge line, except that 23 utility construction shall be permitted east of the 24 ridge line. I'm not going to use any demonstrative 25 exhibits, but I think I have an explanation that	111 1 the Lenny Line. Mr. Kleinberg confirmed numerous times 2 in his testimony that the building is not proposed to be 3 on the slope. He was clear. The concept plan attached 4 to the settlement agreement and the site plan both show 5 that line, the Lenny Line, that we need to stay west of. 6 The line is shown on the overall grading plan, which is 7 sheet SP-11. It's not hard to find and follow. It's a 8 hashed line, it's a bit darker than the topographic 9 lines that it traverses. It starts along the northern 10 property boundary to the north of the roundabout by 11 Building D, and just west of the emergency access to 12 Howell Drive. It initially travels in an east-southeast 13 direction north of the building, after which it turns to 14 the south and generally follows the eastern face of the 15 building before heading in a southerly direction where 16 it ends at our property line just to the north of the 17 Bakley Terrace cul-de-sac. To see a blown up image of 18 that line as it runs along Building D, which I encourage 19 you to do, look at Sheet SP-17 for the northern portion 20 of the building and Sheet SP-16 for the southern 21 portion. The blowups are important, they more clearly 22 show Building D in fact complies with the ordinance 23 requirement by staying west of the line, but they do 24 something else. They show the flatter ground to the 25 east of the line but prior to the actual slope, which
110 1 explains it quite carefully. I will give the board an 2 opportunity to go back in the next week and review the 3 site plan. 4 First, the building layout for all 5 buildings, including Building D, is substantially 6 consistent with the location of the buildings shown on 7 the concept plan attached to the settlement agreement, 8 which is what was required. Obviously, the plan as I 9 said was not fully engineered at the time of the concept 10 plan, that's the definition. Concept plans are not 11 fully engineered. The settlement agreement recognized 12 that, so the precise layout, orientation, shape of the 13 buildings have changed. That is not unusual for those 14 differences to happen between concept phase and a fully 15 engineered site plan. They're all in the same area of 16 disturbance contemplated by the site plan and neither 17 the board nor the boards professionals during the past 18 two years since the application was filed, have called 19 the building placement into question. 20 With respect to Building D. As required by 21 the ordinance it's not located on the eastern slope and 22 the application complies with the ordinance. Again, 23 neither the board nor it's professionals throughout this 24 entire public process questioned whether the building 25 placement violated the requirement that we stay west of	112 1 you could see further to the east where the topographic 2 lines all kind of start to crowd together. They get 3 extremely close indicating the steep slope over to the 4 east. By taking a close look it's not -- it is obvious 5 that this was not some arbitrary line. It meanders from 6 north to south and you can see that it basically follows 7 the midpoint of this generally flat area, so that there 8 is relatively flat ground to the east, which we're not 9 permitted to build on. The equivalent of a buffer 10 between the Lenny Line and the actual slope. Even where 11 the pinch point, which has been referred to several 12 times is located, where it's about 7 feet from the line, 13 it is not 7 feet from the slope. There is still 14 approximately 20 to 30 feet where the ground actually 15 ascends a bit before the topo lines get very close 16 together and the slope starts. This was also recognized 17 by Mr. Kleinberg during his testimony. Whether it was 18 intentional or not, there was a clear misconception by 19 many people who attended these hearings by claiming we 20 were building only 7 feet from the slope. That is 21 clearly not the case. The line was a negotiated line, 22 the requirement was that we needed to stay west of it, 23 which we do. And there's no development or disturbance 24 proposed on the eastern slope. We comply with that 25 ordinance requirement.

113 1 Parking regulations is controlled by RSIS. 2 RSIS requires 966 spaces, 1070 are proposed. Plus for 3 the buildings, plus another 102 other spaces that we 4 have on the site plan. 5 Tree removal and replacement. Nobody is 6 trying to hide the fact that trees need to be removed. 7 We are disturbing 27.7 acres of a forest, which the 8 ordinance permits. This was fully contemplated by the 9 township. As I stated earlier, the township is more 10 than familiar with the site and had a team of 11 professionals advise it in connection with the 12 settlement agreement and the ordinance. It's also no 13 secret that my client agreed in the settlement 14 agreement, and the ordinance requires, the applicant 15 forever deed restrict the remaining 92 plus acres as 16 open space. 17 As part of the settlement, as seen in the 18 ordinance, the township agreed to give us credit for 19 each acre of trees removed in exchange for each acre of 20 undisturbed property with fencing and deer fencing. The 21 212 trees per acre was estimated by the town and the 22 boards own expert, Mr. DeFeo, and the team of arborists 23 and foresters. I believe he said they were Amy Greene 24 and Davey Tree Service. He employed them. Mr. DeFeo 25 was not our expert, the town asked him to independently	115 1 Line 6. 2 A your counsel advised at the December 11, 3 2024 meeting, "Case law says the Planning Board has no 4 jurisdiction to override the ordinance." She also 5 advised, "So they have to take the ordinance, enforce 6 the ordinance, and see if the application that's 7 submitted is in keeping and matches up to the 8 ordinance." There's no DEP rule or regulation which 9 renders the tree removal and replacement section in the 10 ordinance invalid or which requires certain provisions 11 in the tree ordinance. 12 The current tree ordinance, which was 13 adopted after the settlement and rezoning of this 14 property is not applicable. The settlement advises that 15 ordinance requirements for this property, this third 16 round inclusionary housing site, may not be changed 17 without the consent of Lehigh. The township intended 18 the new tree ordinance to apply, it would have been a 19 breach of the settlement agreement. The IH-1 zoning 20 ordinance specifically addresses tree removal and 21 replacement. It was not challenged, it wasn't 22 subsequently modified, and it's the ordinance under 23 which this board must evaluate the application. 24 Mr. DeFeo also made clear that he and his 25 professionals did their own study in 2019 at the
114 1 assess the quality of the forest and get an estimated 2 tree count and he did deem the quality of the forest 3 poor because of excessive deer browse. The township 4 understood that it had an obligation to act in good 5 faith and eliminate cost generative items such as, 6 excessive tree replacement and reforestation 7 requirements. Mr. DeFeo and his team did the estimated 8 count, not my client. Mr. Afran wants to rely on a more 9 than 15 year old document which states a higher number 10 of trees, but that document doesn't reveal the 11 methodology behind that number or whether there was even 12 a methodology. Whether it represented an estimate, a 13 guess, an actual count. Mr. DeFeo in his testimony on 14 December 11, 2024 called the 2010 tree plan, 15 statistically invalid. Statistically flawed. And he 16 discounted it completely. That is generally located on 17 Page 8 to 11 of the transcript. He said, "I discount 18 every bit of data in there." On Page 37, "The report is 19 statistically invalid and therefore, are you familiar 20 with GIGO, garbage in garbage out. There is garbage 21 data in and garbage data out. I do not give any 22 credibility to this report, because the data is flawed. 23 The methodology is flawed. The study area is flawed. 24 Ergo, it is statistically invalid and the numbers are 25 meaningless." That's on Page 38, Line 25 to Page 39,	116 1 townships direction. He and his team arrived at an 2 estimate of 212 trees per acre. After being retained by 3 the Planning Board in connection with this application, 4 Mr. DeFeo advised -- revisited the site and observed no 5 change in condition. The methodology and the ordinance 6 that one acre of deer fencing satisfies the obligation 7 to replace one acre of tree removal. Again, the public 8 may not like that the township adopted the ordinance it 9 did, but by adopting it the town determined that in this 10 particular situation, application of the towns tree 11 ordinance was not essential to protect the public 12 welfare where the remaining 92 undisturbed acres would 13 be forever preserved. The ordinance speaks for itself. 14 We're disturbing between 27 and 28 acres and we're 15 fencing in over 30 acres of undisturbed property with 16 deer fencing. We comply with the ordinance and this 17 board does not have the power or jurisdiction to 18 disregard the ordinance which applies to this 19 application. 20 So that's pretty much the zoning ordinance 21 and I am actually making some pretty good progress. I 22 was slower when I was going through this earlier today, 23 but I'm going to shift a little bit and I'm going to get 24 to the site plan detail and the utilities, which you 25 heard Mr. Afran speak about.

117 1 The overall utility plan for the development 2 is on Sheet SP-18 of the site plan, and that's the plan 3 that is revised 10/28/2024. And then individual 4 sections of the site are broken down and blown up on 5 Sheets 19 through 24. Please look at them carefully. 6 Zoom in on them on your computers, put on a great pair 7 of reading glasses, everything on-site is shown in 8 detail. Stormwater, sewer, water. 9 We'll start with stormwater. 10 We've repeatedly heard comments, the 11 development will worsen stormwater runoff and flooding 12 in the surrounding areas. The comments generally state, 13 we have issues now, putting the buildings on site will 14 make things worse. Those comments did not take into 15 consideration the detailed stormwater management plan 16 shown on the site plan and testified to by Mr. Anderson 17 on July 30 on Pages 33 to 35. As the board is aware, 18 the stormwater management plan was fully approved by the 19 DEP in November of 2024. Those permits and the 20 extension of the wetlands Letter of Interpretation, 21 they're all part of this record. 22 Now, those regulations are very technical 23 and I'm not going to get into them, but when it comes to 24 stormwater and runoff, those regulations have an 25 overarching requirement, that when comparing the	119 1 east, after Building D, before it flattens out and 2 ultimately slopes to the east. 3 The stormwater management system approved by 4 the DEP is designed to direct any stormwater around 5 Building D to the west. The presence of Building D will 6 not affect the stormwater runoff on the eastern slope. 7 Mr. Anderson testified to this on July 30 at our very 8 first hearing. 9 The approved stormwater management system, 10 which will control runoff for the rest of the site is 11 comprised of four surface basins and a porous pavement 12 system to which water from the building roof will be 13 directed. This results in a reduction in flow from the 14 site, which the DEP approved. 15 Importantly, the DEP had the objectors 16 comments and the comments of the objectors expert, it 17 was Mr. Walsh from Princeton Hydro. Mr. -- he confirmed 18 this in his own testimony on October 22, 2025 at Pages 19 37 to 39. Those comments were considered by the DEP and 20 they were rejected. The permits have been issued and 21 the boards own expert deferred to the DEP. 22 At the June 30, 2025 hearing, Mr. MacNeill 23 testified at Pages 140 to 144, that the application 24 meets the DEP requirements for runoff quantity, quality, 25 groundwater recharge and drain infrastructure. He
118 1 no-build condition to the fully developed project, there 2 must be a net negative runoff for the site. Meaning the 3 overall runoff from the site is lessened after the 4 product is built than today under no-build conditions. 5 The DEP has already determined that we meet that 6 standard and your own engineer addressed the objectors 7 comment and confirmed that the system meets DEP 8 requirements. There is an August 15, 2025 memo, I 9 believe from Mr. Hasse, and Mr. Rizzo testified on 10 October 22, 2025 beginning on Page 14, in which he 11 defers to the DEP approvals in response to Princeton 12 Hydro's comments. 13 Mr. Anderson's stormwater report, revised 14 October 28, 2024, the same report was reviewed and 15 considered by the DEP and it's also part of these 16 application materials, shows on Page 7, 11 and 12 the 17 significant reduction in runoff and recharge under 18 as-built conditions compared to what exists today. 19 With respect to the eastern slope. As per 20 the ordinance there is no building or disturbance east 21 of the peak of the ridge line. Whatever stormwater 22 falls there today it will have the same condition after 23 the project is built. 24 Building D is being developed to the west of 25 the peak and remember the peak goes up a bit to the	120 1 addressed Princeton Hydro's comments and discounted 2 their arguments. Essentially your own expert deferred 3 to the DEP, which has granted all permits required for 4 this project. Mr. Walsh of Princeton Hydro conceded 5 that he wrote the DEP on several occasions during the 6 lengthy application process and that the DEP had 7 Princeton Hydro's comments and objections, which were 8 obviously discounted because the DEP granted the 9 permits. 10 Finally, this was brought up during the 11 hearings. The newer stormwater standards are not an 12 issue to be dealt with. We are proceeded as determined 13 by the DEP under the previous stormwater rules pursuant 14 to their own regulations. I'm not going to go into 15 detail, but the regulation is NJAC 7:8-1.6B4i. The DEP 16 evaluated the application under the prior regulations 17 and the board engineer, your board engineer, agrees. 18 Sewer. Again, we've heard comments that we 19 don't have a sewer plan. Nothing could be further from 20 the truth. As testified to by Mr. Anderson and as shown 21 in detail on the site plan, there will be a gravity flow 22 system which flows from Building A, B, and C in the 23 middle of the site, down past the road circle to a low 24 point to the west of Building D. Building D also flows 25 to that point, at which if you'll look, there is a small

121 1 sewer pump station which is colored in orange just to 2 the south of the road leading to Building D. All of the 3 on-site sewer lines consist of solid lines, occasionally 4 broken up by a letter S designation for sewer. They're 5 all over the map. Lines lead from the building to the S 6 lines, which you can trace all the way to the pump 7 station. You can see these lines by zooming in on 8 SP-18, which is the overall utility plan, or by looking 9 at any of the other sheets, SP-19 to SP-24, which show 10 blown up portions for the smaller sections of the site. 11 The blown up portions of the pump station is located on 12 Utility Plan E, which is SP-23 of the site plan. From 13 the pump station heading to the southeast, you'll see it 14 right on the plan, is a line with the designation FM 15 through the hash line. Out of the pump station is a 16 force main, which will travel through a sanitary sewer 17 easement to a manhole in Bakley Terrace to the south of 18 the site. This connects the on-site sewer 19 infrastructure to the West Orange sanitary sewer system, 20 which will transport the sewage from Bakley Terrace into 21 the system. Any allegation that there is no sewer plan 22 is simply disingenuous. Not supported by the site plan. 23 It's standard that all third-party approvals, including 24 sewer, are applied for and obtained as a condition of 25 approval.	123 1 applicant to pay it's pro rata share for any required 2 off-tract improvements under the Land Use Law. However, 3 pursuant to the settlement agreement the township agreed 4 that the only off-tract improvement that the developer 5 would be responsible for is the traffic light at the 6 intersection of Eagle Rock and Oval Road. So that's 7 specifically carved out in the settlement agreement. 8 The bottom line is that the plan fully shows 9 how on-site sewage will be conveyed to the township 10 sewer system. Fortunately a connection to the sewer 11 system exists adjacent to the site in the Bakley Terrace 12 manhole. My client will continue to work in good faith 13 with the town in seeing to it that the township engineer 14 will sign off on the TWA application, that is a 15 customary condition of approval and should be one here. 16 This was confirmed by the boards engineer on July 30, 17 2025 on Pages 75 to 78 of the transcript. 18 He also surmised that the plans contained 19 adequate water and sewer design. 20 Now, Mr. Afran brought up the Field v. 21 Franklin Township case. It presented a very different 22 situation, Mr. Afran didn't tell you the facts of the 23 case, but I'm going to go there. There the Appellate 24 Division needed to determine whether the Planning Board 25 record was sufficient to determine whether, "The
122 1 So, what needs to be done for sewer. The 2 ultimate requirement is that the applicant will be 3 required to submit a Treatment Works Approval. A TWA 4 application to the DEP. Something that is customarily 5 done post Planning Board resolution as a condition of 6 approval. The TWA process is not something handled by 7 the Planning Board, but it's done administratively by 8 working with the township engineers, and applications 9 made to the DEP after site plan approval is obtained. 10 In this case the township and the settlement agreement 11 has agreed to cooperate with my client in connection 12 with obtaining all required third-party approvals as set 13 forth in Section 2.2 of the agreement. Also the town 14 specifically agreed to cooperate with my client in 15 connection with providing all utilities, including 16 sewer, water, electric, and gas. That's in Section 2.3 17 of the settlement agreement. So the township must see 18 to it that any and all required improvements to the 19 off-site public sewer systems are performed. This is 20 consistent with the requirement of the affordable 21 housing regulations that municipalities shall cooperate 22 with developers expeditiously by endorsing applications 23 to other governmental agencies that require review and 24 approval of that agency. That's NJAC 5:97-10.3c. 25 Now, this board could normally require an	124 1 physical design of the various proposed sanitary 2 facility is adequate or feasible." The applicant in 3 that case and, you know, sometimes, Ms. McGovern may 4 know, sometimes Appellate Divisions don't do, panels 5 don't do a great job of giving all the facts, they tend 6 to rely on some, they ignore others. But in that case, 7 it can be gleaned from that case, and please take a look 8 at it, the applicant actually had suggested three 9 potential options for sewers. One was a connection to a 10 neighboring town, South Brunswick's sanitary sewer 11 system. The other was having an on-site package plant 12 and the third was a spray irrigation system. However, 13 the applicant in Field they didn't even have an 14 agreement with the neighboring township and they 15 conceded they hadn't even commenced negotiations with 16 that township, which obviously had no independent 17 obligation to provide service. The applicant also 18 didn't provide enough information on the record 19 regarding the other two options. That is not the case 20 here. We plainly show the on-site sewer infrastructure 21 and how we connect to the town sewer system. As an 22 aside, and I believe he was mentioned by Mr. Afran, the 23 objector called a witness, William Green, an engineer 24 from Mr. Litwornia's office, to testify on July 30, 25 2025. He claimed to have reviewed the plans and

125 1 testified that he did not see any sewer infrastructure 2 on the plans, including the manhole in Bakley Terrace. 3 It is just demonstrative the lack of credibility on this 4 issue by the objector. 5 Water. Water is serviced by New Jersey 6 American Water. As testified to by Mr. Anderson, we're 7 proposing to create a loop water system tying into the 8 waterlines coming from the condominium under Warner Road 9 and Kuzak Drive. If you look closely at the utility 10 plan sheets I previously referenced, you'll see that the 11 waterlines on the site plan are marked with a W, for 12 water. Those lines end at the property boundary at 13 Warner Road and Kuzak Drive. As we advised the board, 14 an easement agreement exists pursuant to which the 15 applicant has the full right to connect in all the 16 condominium utility systems, including water. The 17 connection to water requires an agreement with New 18 Jersey American Water. They're obviously not going to 19 allow us to hook up to the water system if sufficient 20 capacity doesn't exist for potable water, fire hydrants 21 and the sprinkler systems in the buildings. So they 22 obviously need to review the plans, issue a Will Serve 23 letter and require an agreement and an escrow with the 24 applicant for the required improvements. Like off-site 25 sewer and other utilities, the ability to obtain water	127 1 twice, once was on September 11, 2024, and then on 2 September 17, 2025, in response to Mr. Litwornia's 3 report and testimony. As the board is aware it may not 4 consider or base a denial on off-site traffic impact, if 5 the proposed use is permitted by the zoning ordinance. 6 That case is the infamous Dunkin Donuts of New Jersey, 7 Inc., v. North Brunswick Township Planning Board, 193 NJ 8 Super 513, Appellate Division 1984. In that case, the 9 applicant was a retail bakery shop seeking site plan 10 approval at the busy intersection of State Highways 1 11 and I30. The use was permitted by the zoning ordinance. 12 In denying the application for site plan approval the 13 North Brunswick Planning Board relied, "Solely upon the 14 anticipated detrimental impact of the proposed use on 15 traffic congestion and safety." The resolution of 16 denial noted that the intersection was a traffic circle 17 having a high accident rate, which was apparently the 18 fourth most dangerous intersection in the state. 19 Patrons would be prone to making illegal turns or 20 dangerous maneuvers and that it was difficult to police, 21 and that the Dunkin peak business hours coincided with 22 the peak morning traffic. The Appellate Division was 23 clear in holding, that where a proposed use is permitted 24 by a zoning ordinance, a planning board, "Is without 25 authority to deny such site plan approval because
126 1 from the sewer company, or the water company, is a 2 typical condition of approval, which my client would 3 need to satisfy. It is not a reason to withhold an 4 approval. 5 However, I am happy to report that New 6 Jersey American has in fact issued a Will Serve letter 7 and has agreed to provide water service to the 8 development. New Jersey American and my client signed 9 an agreement on February 13, 2026 for the installation 10 of the waterline extensions from Warner Road and Kuzak 11 Drive. This agreement was recently provided to your 12 engineering and planning departments, so we would've 13 already satisfied that condition of approval if the 14 board was to vote favorably on this application. Again, 15 there is a water plan and any allegation to the contrary 16 is just disingenuous. 17 Another required third-party approval is 18 approval of our soil erosion and sediment control plan. 19 Again, I'm happy to report that the Essex-Hudson, 20 Passaic Soil Conservation granted that approval, which 21 we also recently provided to the township engineering 22 and planning departments. As with water service, we're 23 already able to satisfy that customary third-party 24 approval condition. 25 Traffic. If you recall Mr. Pehnke testified	128 1 off-site traffic conditions." All though the court 2 confirmed that "A planning board should consider 3 off-site traffic flow and safety in reviewing proposals 4 for vehicular ingress to and egress from the site and 5 that a planning board could condition the site plan 6 approval upon necessary off-site contributions, the 7 Appellate Division was clear, "The authority to prohibit 8 or limit uses generating traffic into already congested 9 streets or streets with a high rate of accidents, is an 10 exercise of the zoning power vested in the municipal 11 governing body." Here we know that the proposed use and 12 density is fully permitted by the zoning ordinance as 13 adopt by the council. Accordingly the board cannot 14 consider off site traffic impact in it's decision. 15 Regarding safe ingress and egress. 16 Installation of the traffic light at the intersection of 17 Oval Road and Eagle Rock Avenue, which is under stop 18 sign control today, will provide a fairly substantial 19 safety and operational movement as testified to by Mr. 20 Pehnke on September 11. It will operate at an overall A 21 level of service. This sites proposed internal roadways 22 are minor collector roads under RSIS, which would 23 require a 20-foot cartway. That standard is met. 24 Finally, Oval Road and Warner Road have 40 25 foot wide cartways and provide safe ingress and egress.

129 1 This becomes even safer with the installation of the 2 traffic signal. 3 As previously stated the site proposes 4 regular vehicular access via Warner Road and Kuzak 5 Drive. This job does not present a cul-de-sac, as the 6 ultimate goal is getting to Oval and Eagle Rock to get 7 out. Oval and 100 percent. But Mr. Afran is right, you 8 need to look at RSIS. And under RSIS these are looped 9 minor collector roads, not a multifamily cul-de-sac, 10 like Mr. Pehnke testified to and which your engineer 11 agreed with. 12 As loop minor collector roads, like the 13 application proposes, the total traffic volume conveyed 14 on the loop should not exceed 3500 ADT. That's NJAC 15 5:21-4.1 and Table 4.2. Accordingly, the 2728 trips per 16 day falls well within what's permitted by RSIS. The 17 board's engineer in the CME memo dated October 29, 2025, 18 agreed. This is not a cul-de-sac under RSIS. Trips 19 generated by the condominium are not to be counted. The 20 DCA RSIS, clarification number 3, plainly states that, 21 "The ADT should be limited solely to the proposed 22 development. Not the ADT generated for both the 23 proposed development and an adjacent existing 24 development built prior to the adoption of RSIS, which 25 happened to be June 3, 1997, like the comment made.	131 1 feel comfortable granting the exception, that's okay, 2 Kuzak will remain open to regular traffic. It would 3 have no effect on the development. 4 As Mr. Pehnke went over, we are also seeking 5 a de minimis exception from the RSIS standard regarding 6 sidewalks on both sides of the high intensity minor 7 collector streets with off street parking. That 8 requirement is contained in NJAC5:21-4.2, Table 4.3. 9 The plan proposes two sidewalks everywhere, 10 except for the eastern side of Warner Road from the 11 property boundary by the condominium up to the traffic 12 circle and then on one side of Road D, which is the road 13 that goes from the circle to access Building D. The 14 condominium doesn't have sidewalks at all, so even the 15 one sidewalk on Warner Road would be a sidewalk to 16 nowhere, so to speak. That one sidewalk is located on 17 the side of Warner Road that pedestrians would want to 18 use because it's on the side of the clubhouse. 19 Also the plan proposes a more direct walking 20 boardwalk from Building D to the clubhouse and other 21 amenities located in the center of the site. You can 22 see that on sheet SP-4, the overall site plan. And of 23 course there are compliant crosswalks provided in two 24 locations where a single sidewalk ends in order to 25 access the sidewalk on the other side of the street.
130 1 As the board is aware the road connecting to 2 Kuzak Drive is proposed and will be built regardless 3 whether the board grants our request for a de minimis 4 exception to have Kuzak gated and serve as emergency 5 access only. As Mr. Pehnke explained his opinion and 6 RSIS exception is not even required to close Kuzak to 7 regular access, because the road will exist and will 8 still provide its access to emergency vehicles. 9 However, we filed the site plan with Kuzak open and 10 requested the de minimis exception because we agreed to 11 do so in the settlement agreement in response to a 12 request made by our neighbors at the condominium 13 association. We feel that there is substantial evidence 14 in the record to satisfy the RSIS criteria for the 15 exception by allowing Kuzak to serve as a emergency 16 access only. The intent of RSIS is still met. It's 17 reasonably limited and not unduly burdensome. It meets 18 the needs of the public health and safety, because one, 19 it will eliminate the traffic on Kuzak and the 20 condominium to address any hardship to the residents who 21 live in that area of the condo. And two, Kuzak will 22 remain open to emergency access. 23 Finally, the exception request takes into 24 account the existing infrastructure and the adjacent 25 condominium development. However, if the board doesn't	132 1 This allowed us to avoid the practical difficulty 2 regarding environmental limits from wetlands and 3 floodplain crossings. It'll also further limit the 4 overall disturbance of the site. 5 Mr. Pehnke testified in detail that the 6 sidewalk system/boardwalk from Building D to the 7 clubhouse and robust walking paths will properly and 8 safely serve the residents of the community. 9 Finally, Mr. Pehnke in his testimony on 10 September 17, 2025, validly and completely refuted Mr. 11 Litwornia's conclusion that the road system constitutes 12 a cul-de-sac. That testimony is on Pages 74 through 89 13 of the transcript and it's supported by the law. Mr. 14 Litwornia's conclusions regarding the road 15 characterization as a cul-de-sac, the counting of ADT, 16 the slopes of the roads, 10 percent maximum is 17 permitted, and the ADA guidelines, were simply wrong and 18 not supported by the governing regulations. Even his 19 comments about the proposed signal at Oval Road and 20 Eagle Rock, like the alleged lack of a left-turn lane on 21 Eagle Rock Avenue and the widening of the road that 22 would be required. It was quite a apparent from Mr. 23 Litwornia's testimony he simply didn't carefully review 24 the documents submitted by the applicant. The boards 25 own engineering expert had the chance to review Mr.

133 1 Pehnke's reports and testimony in addition to that of 2 Mr. Litwornia, and CME agreed with Mr. Pehnke. In the 3 October 29, 2025 memo they agreed the proposed roads for 4 the development are not a cul-de-sac and we meet RSIS 5 standards. CME agreed with Mr. Pehnke and disagreed 6 with Mr. Litwornia on all these issues. 7 Street characterization. Meeting the RSIS 8 requirement for ADT, roadway width, roadway slopes, and 9 the proposed configuration for the traffic signal at 10 Oval and Warner. 11 We also agreed to comply with all 12 recommendations in CME's July 26, 2024 review letter and 13 per Mr. Guarino's request, we will work in good faith to 14 comply with complete streets, in addition to working 15 with the townships engineers regarding the installation 16 of additional handicapped ramps, which were discussed 17 earlier on in these hearings. 18 Okay. Geotechnical regarding Building D. 19 So this is the point of the evening where it really gets 20 exiting, where I conduct a four level course on 21 geotechnical engineering. Just kidding. The board has 22 it's own expert, Mr. Kleinberg for that. It became 23 apparent that Mr. Kleinberg considered many different 24 scenarios and conditions, some of which he, you know, 25 threw in the report or conceded were highly unlikely or	135 1 He said that there is no rock fall hazard 2 associated with this property. 3 He advised that when excavating the 4 applicant should dewater the excavation area, and if 5 there's a fissure or crack, grout it. We agreed to this 6 as a part of normal construction practice which happens 7 all over the State of New Jersey. 8 We agreed no excavation equipment would go 9 east of the area of disturbance. On November 10 Mr. 10 Kleinberg repeatedly confirmed that the building be 11 properly designed and that the full building design and 12 engineering plans were not warranted at this stage of 13 design. We are subject to the building code, we need to 14 demonstrate that the building and plans comply with that 15 code and of course that is not a Planning Board 16 function, especially where it's own geotechnical 17 engineer and expert has repeatedly testified that the 18 building can be designed safely in the proposed 19 location. 20 Mr. Kleinberg also confirmed that a blasting 21 plan be done during construction and which takes place 22 later in the development of this project. Absolutely 23 agree to it. It is a requirement. 24 He also opined that blasting can be done in 25 a controlled manner in conjunction with other types of
134 1 even impossible to occur. So I'm not going to delve 2 into the technical detail. That testimony was more 3 recent, he was here three nights, the board members were 4 here, you can read the transcripts, you can read the 5 reports. But for all the back and forth, and for all 6 Princeton Hydro's instances that Building D should be 7 held to a factor of safety standard required for the 8 Hoover Dam, Mr. Kleinberg's ultimate conclusions were 9 clear. Building D is not being going built on the steep 10 slope. It's going to be built west of the Lenny Line, 11 and Langan demonstrated that the influence of the 12 structure will not extend on to the slope. The 13 appropriate factor of safety for a slope not being 14 developed is 1.5. And both Langan and Princeton Hydro 15 calculated the factor of safety at 1.7, concluding that 16 the results of both parties professionals indicate 17 stability. 18 Mr. Kleinberg opined that the 2.0 factor of 19 safety proposed by the objector was not reasonable for 20 this application. 21 Mr. Kleinberg opined that the grading plan 22 keeps water from flowing over the top of the slope. The 23 actual slope to the east, as I alluded to before, he 24 testified it starts to drop anywhere from 40 to 100 feet 25 away from the building.	136 1 special rock splitting equipment. Neither the Langan 2 nor Princeton Hydro's reports analysis indicated that 3 there would be a slope failure he testified to. He also 4 acknowledged he didn't know of a seepage problem through 5 extreme rain events would even occur on-site. He also 6 conceded that the infinite slope seepage condition is an 7 unusual event and that he didn't see any evidence of 8 that. He said the slope has been there for ions. It is 9 a worse case evaluation that he's not sure will even 10 occur on this site. 11 Mr. Kleinberg refused to characterize the 12 site as a non hazard zone based on the calculations and 13 the appearance of the site. 14 And finally when pushed by Mr. Afran, Mr. 15 Kleinberg stated, "This this is not an extremely heavy 16 building." When pushed further he confirmed that in New 17 Jersey, "We are building buildings on the ridge lines. 18 Mr. Kleinberg even testified that if someone had asked 19 him to design Building D in that location he would 20 design it. He noted that building on ridge lines is not 21 an exception in New Jersey. 22 Mr. Kleinberg's ultimate conclusions were 23 crystal clear. The building not being on the steep 24 slope, it's proposed in the location permitted by the 25 ordinance and may be built safely in that location.

137 1 Regarding fire. Actually, pull up that 2 document. One, it should be noted, as Mr. Appel 3 testified to, our architect, the buildings are fully 4 sprinklered. Sprinklered. 5 Mr. Afran referenced a bullet point about 6 there -- give me one second. Regarding access to the 7 rear of the building. Mr. Afran read to you the first 8 bullet point where it does say having rear access is 9 ideal. However, our traditional attack tactics include 10 entry through the front door. 11 But the second bullet point he reaffirms, 12 "Again, we traditionally enter structures from the front 13 door. If hoses are to be deployed to a different 14 location, we carry sufficient lengths on each apparatus 15 to accommodate such situation. We have the ability to 16 create a water supply with large diameter hose to 17 stretch further than we traditionally would." 18 And the final thing I just want to note, 19 this job complies with the fire code and it complies 20 with RSIS. So I'll just state that for the record. 21 Just to address some of the other witnesses 22 offered by the objector that Mr. Afran referenced this 23 evening. Mr. DeVito testified on April 30, 2025 about 24 forestry and forest ecology. Mr. DeVito offered no 25 testimony regarding items which are regulated. His	139 1 code, including the obligation to provide an EIS. As 2 previously stated, the township and my client had an 3 extended period of time during discussions, and the 4 township agreed to zone the property in a particular 5 way. The settlement agreement provides that my client 6 quote, and Mr. Afran read the same provision, "Shall 7 submit all plans to DeFeo and Associates, the Townships 8 environmental consultant, for review and comment." The 9 proposed ordinance, which was adopted word for word 10 after the recommendation of the Planning Board, was 11 attached to that settlement agreement. There is no 12 reading of the ordinance or the settlement agreement 13 which required the submission of an EIS and the board 14 followed that ordinance and never required it of us. 15 Notwithstanding, Mr. Butler testified about birds which 16 may or may not be present on the property. In response 17 to a direct question by the boards engineer on Page 103 18 of that transcript, Mr. Butler confirmed that none of 19 the species he observed were listed as endangered or 20 threatened. Mr. Butler did not testify to any matters 21 regulated by the ordinance or otherwise prohibited by 22 the state. 23 Mark Gallagher, the wetlands scientist, the 24 ecologist, he testified on June 4, 2025. The 25 regulations of wetlands is within the exclusive
138 1 analysis regarding core forest and edge forest concerned 2 items which are not regulated by the state outside of 3 the Highlands and the Pinelands possibly. And they're 4 not regulated by this town. 5 When asked by Dr. Bagoff, What would you do? 6 Meaning what's the solution for this site. Mr. DeVito 7 responded that he would, "Find the money and save it." 8 This fits in with the true intent of many people here 9 who don't want to see a single thing built, but we have 10 zoning and there is no legal justification to preserve 11 100 percent of the property. The township was fully 12 aware of the acreage of disturbance and the general 13 areas of disturbance, which was vetted by its own 14 professionals. The ordinance permits us to proceed with 15 this development and nothing testified to by Mr. DeVito 16 changes that. 17 Mr. DeVito also confirmed on Pages 18 and 20 18 of his testimony, that there are no threatening or 19 endangered species present at the site. 20 Luke Butler, the avian zoologist and 21 biologist, he testified on April 30, 2025. Mr. Afran 22 incorrectly takes the position that an ecological study 23 was required for this application. The ordinance 24 explicitly exempts this application from all 25 environmental regulations of the townships land use	140 1 jurisdiction of the DEP, not the municipality. The DEP 2 issued a valid LOI, which was extended during the 3 pendency of this application, along with the DEP 4 issuance of the required stormwater permits approving 5 the proposed stormwater design. The objector disagreed, 6 they filed an appeal in the Appellate Division, they 7 told you many times that's for that farm. They even 8 filed a request to suspend the permits, and that request 9 was denied. 10 The board's engineer on Page 56 of the 11 transcript, confirmed that wetlands are regulated by the 12 DEP and that it is not something the board can comment 13 on. On Page 57 he confirmed, "It would just be a 14 condition of approval that the applicant would have to 15 obtain the necessary LOI as well as any development 16 permits, general permits related to freshwater 17 wetlands." 18 Also there were allegations by the public 19 that the property -- strike that. 20 And it's important, by the DEP granting the 21 LOI, that allows us to develop the buildings where they 22 are proposed on the site and this board should not 23 overlook that. 24 Mr. Hasse, who Mr. Afran also referred to. 25 He testified on August 25, 2025, the geology professor

141 1 and the mapping expert. Testimony had to do with smart 2 growth planning and mapping, as Mr. Afran showed you. 3 It had nothing to do with the ordinance, it had nothing 4 to do with the site plan. If anything, one of his maps 5 showed that the single family homes on Howell Drive were 6 built on steep slopes. 7 Finally, the applicant called Ms. Michele 8 Byers on August 25 of last year. She is the retired 9 executive director of the New Jersey Conservation 10 Foundation. Her testimony had nothing to do with the 11 ordinance or the site plan. She testified about land 12 preservation and the value of land. The board attorney, 13 on Page 87, rightfully questioned that this seemed to 14 relate to a challenge of the ordinance. Ms. McGovern 15 correctly noted, "The board can't void out this 16 ordinance because environmentally they think it has a 17 better idea what should have been there or what should 18 have been done." So -- I'm going to wrap up shortly. 19 You've heard the facts, you're familiar with the law. 20 There's no question that, except for the bulk variance 21 regarding building foundation exposure, the application 22 fully complies with the IH-1 zoning ordinance. That one 23 bulk variance, as I alluded to, should be granted 24 pursuant to Section 70C of the Land Use Law and the DCA 25 regulations requiring municipalities to cooperate with	143 1 Application Rule. That's Section 10.5 of the Land Use 2 Law. 3 The applicant fully recognizes that the rule 4 provides an exception for those subsequently adopted 5 ordinances regarding public health and safety. However, 6 there have been no subsequent changes to the IH-1 zone 7 ordinance which provides that all other provisions of 8 the Land Use code are inapplicable. It specifically 9 states, "Any other regulation pursuant -- pertaining to 10 tree removal and replacement in the township code, shall 11 not apply to the property." Regardless, as already 12 addressed, all the evidence presented supports that the 13 that property condition has not changed between the 2020 14 rezoning of the property and the present. The township 15 was well aware of the physical characteristics of the 16 property when it entered into the settlement agreement 17 and adopted the ordinance. The Governing Body 18 inherently considered any potential effect on public 19 welfare in providing that relief. It determined that in 20 this case for a property the township vetted for more 21 than four years, where disturbance was being limited to 22 only one fourth of the property, and the remaining 92 23 acres would be forever preserved, the ordinance 24 provisions which don't apply were not essential to 25 protect the public welfare. So even if there was a
142 1 affordable housing developers in granting reasonable 2 variances. 3 The boards obligation under the law is 4 clear, it doesn't have the power or jurisdiction to 5 disregard the zoning ordinance in place since October of 6 2020, only the Governing Body has the power to adopt, 7 amend or repeal zoning ordinances. The MLUL defines the 8 term, Governing Body, as "The chief legislative body of 9 the municipality." And the laws clear that it's the 10 Governing Body which may adopt or amend the zoning 11 ordinance, not the board. 12 Here the town council adopted the zoning 13 ordinance and it was the Planning Board adopted the 14 Third Round Fair Share plan which included this property 15 as a compliance mechanism. 16 And two, recommended the adoption of the 17 zoning ordinance to the council. 18 Importantly, ordinances enacted pursuant to 19 the -- enacted pursuant to the police power are 20 presumptively valid. That's New Jersey Shore Buildings 21 Association v. Township of Jackson, 1990 NJ 38 Supreme 22 Court case 2009. 23 It's black letter law that a planning board 24 must apply the ordinances that in are effect at the time 25 the application is submitted under the Time Of The	144 1 subsequently adopted ordinance for this property, which 2 there is not, the public health and safety exception 3 would not apply. 4 The MLUL is clear. Section 46B states, "The 5 Planning Board shall, if the proposed development 6 complies with the ordinance and the MLUL, grant 7 preliminary site plan approval." Likewise Section 50A 8 plainly states, "The Planning Board shall grant final 9 approval if detailed drawings, specifications and 10 estimates of the application for final approval conform 11 to the standards established by the ordinance." The 12 word 'shall' "included in these statutes show that 13 approval with a fully conforming application is not a 14 discretionary decision." This is supported by the New 15 Jersey Supreme Court decision in Pizzo Manton Group v. 16 Township of Randolph, 137 NJ216 1994. All though that 17 case concerned a subdivision application, as I just 18 pointed out, the MLUL has corresponding "shall" grant 19 language for site plan approval. The Pizzo court held 20 that approval must be granted if the application 21 complies with the ordinance. Noting that it's the 22 Governing Body that's, the entity, which devises public 23 health or safety standards. The zoning ordinance 24 combined with the MLUL, shall grant provision, is what 25 provides the framework within which planning boards must

145 1 act. 2 Any argument that the plans are incomplete 3 is without merit. The application was filed more than 4 two years ago. There hasn't been a single instance in 5 which the Planning Boards professionals have alleged or 6 even questioned the completeness of the plans. The 7 plans clearly show the stormwater drainage system, which 8 has been fully approved by the DEP, the sewer system and 9 the waterlines. My client has an agreement with New 10 Jersey American Water to service the property and 11 approval from the Soil Conservation District, which 12 would in any event be required as conditions of 13 approval. 14 We've actually made the board and the towns 15 job a lot easier. We have them all. All of those items 16 are customary and normal conditions of approval and we 17 satisfied them, like I said. The only item remaining is 18 the TWA application in connection with the sewer, which 19 is a routine third-party condition of approval. 20 This board doesn't grant or agree to sign 21 TWA applications. 22 My client has met with and will continue to 23 meet with township engineers who have a good faith duty 24 to cooperate with us so that the township engineer may 25 sign off on that application.	147 1 First, there were not multiple denials, 2 there was one. There were two other subsequent 3 applications filed, but they were never heard to 4 conclusion. 5 Second, this boards denial was overturned by 6 the Superior Court. On April 10, 2008 Judge Goldman 7 entered an order reversing the denial and remanding the 8 application to this board. Again, that application and 9 the boards original denial should have no relevancy 10 here. So I won't go into details. However, in ordering 11 the remand, Judge Goldman noted, "There should be no 12 doubt that this development will be built. The possible 13 hopes of some neighbors that the property will remain 14 virgin forest forever will likely not come to pass. The 15 board cannot use its discretion over subdivisions to 16 stop construction of a project that conforms to all 17 relevant zoning ordinances. The board has a duty to 18 work with, cooperate with, and interact with WEHI to see 19 to it that the property is developed in accordance with 20 the zone plan, zoning ordinance and subdivision 21 requirements." 22 So, again, thank you for your time. Thank 23 you for your dedication. I also look forward to many 24 free Wednesday nights in the coming weeks and months, 25 but as I will leave you, I will say one last time,
146 1 There is no doubt that the proposed 2 development with the one bulk variance exception fully 3 complies with the IH-1 zone and ordinance. 4 Accordingly, the board should approve the 5 application as is it's duty under the law. 6 In the coming week before you deliberate and 7 vote, look at the facts. Look at the details set forth 8 in the application materials, including the site plan, 9 specifically the pages that I referenced. Importantly 10 look at your own experts opinions and reports regarding 11 stormwater, traffic, sewer, water and geotech. All of 12 which support the granting of the application. 13 Finally, and Mr. Afran didn't mentioned it, 14 but I will, because it was said a lot during these 15 proceedings. There's been a reliance by many in the 16 public on the boards April 5, 2006 denial of my clients 17 subdivision application for the old application of 136 18 single family homes. Obviously that was a completely 19 different application at the time when the zoning 20 ordinance permitted single family residential. So it 21 should have no relevancy here. However, I need to clear 22 up the record because this board was presented with many 23 inaccuracies or incomplete misrepresentations regarding 24 the history of the site and the applications that came 25 before this board.	148 1 follow the facts. Follow the law. If you do from a 2 legal standpoint it's not a difficult decision. The 3 board should grant preliminary and final site plan 4 approval. Thank you very much. 5 CHAIRMAN BAGOFF: Thank you, Mr. Plocker. 6 MR. AFRAN: Can I just note an objection. 7 CHAIRMAN BAGOFF: Wait. Whoa, whoa, whoa. 8 Hold it. Hold it. Hold it. 9 Tell me what you want to do? Because we're 10 not looking for -- any objection now has to be done in 11 writing. There's nothing else for the board to 12 consider. 13 MR. AFRAN: Let me say, in response to -- 14 well, there's two things. First of all, we've never 15 seen this letter from the water company. My -- it was 16 done in response to my own experts testimony, we should 17 have been given a copy. I'd like to get a copy. 18 CHAIRMAN BAGOFF: Was that, was that 19 presented to the township from New Jersey American 20 Water? 21 MR. PLOCKER: The New Jersey Water agreement 22 was entered into a week or two ago. 23 MR. AFRAN: Yeah, I need a copy. 24 MR. PLOCKER: I have no problem doing that. 25 CHAIRMAN BAGOFF: Okay.

149 1 MS. McGOVERN: If you want a copy -- 2 CHAIRMAN BAGOFF: Okay. He'll present it to 3 the board attorney and we'll get you a copy. 4 MR. AFRAN: The other point is that it's 5 possible Mr. Green may have been mistaken in saying 6 there was nothing on the drawing. My argument was under 7 Field you have to show your connection is feasible, not 8 merely that you've drawn it. Field is the same case, 9 and I think legally we may have some debate about it's 10 applicability. 11 The other point is the quotation from Judge 12 Goldman is not appropriate for this courts reliance. I 13 have been repeatedly told we cannot rely on anything 14 from that decision of this board because it's a separate 15 case. Judge Goldman's statement about what the board 16 needs to do in 2006 was a different plan with different 17 evidence. I want to point out the environmental 18 evidence we discussed here was not in that case, so it's 19 not appropriate for the board to be asked to rely on 20 Judge Goldman's direction in another case 16 years ago. 21 CHAIRMAN BAGOFF: I'll answer that. I sat 22 on the board during that time. We're not going to rely 23 on Judge Goldman's decision. It was remanded back to 24 reevaluate, so both sides would work together. The 25 applicant did not come back to the Planning Board, there	151 1 agree. 2 Thank you both gentlemen. We thank you both 3 for all the meetings and the public who came here and 4 listened with us, provided comment and everybody on zoom 5 and -- no sir, thank you very much. 6 MR. AFRAN: Mr. Chair, you may want to know, 7 a member of the public was asking from the public to 8 speak, you may want to address that issue yourself. 9 CHAIRMAN BAGOFF: No. Thank you though. 10 All testimony for this application is now 11 complete. 12 The process now will be that the board at 13 our next meeting will start deliberating this 14 application. We'll go over everything that the board 15 members have to say, any questions. We'll talk amongst 16 ourselves. We'll ask or attorney for guidance. We'll 17 review the documents, review everything that has been 18 said here this evening, all the public comments and we 19 will have at least one meeting, possibly two before we 20 vote on the application. 21 So to that end, our next regular meeting of 22 the Planning Board will held Wednesday, March 4, 2026 at 23 6:30 PM in person and you can watch via zoom. The 24 meeting will be dedicated to review of this application 25 and no additional notice will be required.
150 1 was no working together after that. So we're not 2 relying on that decision. 3 MR. AFRAN: That's all I wanted to point 4 out. 5 CHAIRMAN BAGOFF: Absolutely. And the board 6 will be reminded during our discussion that we will not 7 rely on that decision. 8 MR. AFRAN: That's all I wanted to say. 9 CHAIRMAN BAGOFF: Absolutely. 10 MR. AFRAN: No need to respond to anything 11 else. 12 CHAIRMAN BAGOFF: Thank you. 13 Mr. Plocker. 14 MR. PLOCKER: I just want to say for the 15 record, I don't think this board should rely on that 16 decision per se either. But there were many comments 17 that, during these proceedings, that characterized the 18 prior denial and they weren't correct. So I offered it 19 just to clear that up. And as far as the document 20 itself, just like the cases we cited, all though it's 21 not a reported decision or the regulations I cited, we 22 didn't put those in the record, it is a publically filed 23 document with the Superior Court. So I just want to 24 note that for the record. 25 CHAIRMAN BAGOFF: Absolutely. Okay. We	152 1 (Hearing concludes at 10:46 PM.) 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

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C E R T I F I C A T E

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and before me at the time, place and on the date
hereinbefore set forth, to the best of my ability.

I DO FURTHER CERTIFY that I am neither a

relative nor employee nor attorney nor counsel of any of
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relative nor employee of such attorney or counsel; and
that I am not financially interested in the action.



ERIC S. FISHMAN, S.R.

Dated: 3/11/2021

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	119:23 1440 [1] - 1:24 15 [2] - 114:9, 118:8 151 [1] - 93:8 16 [2] - 46:1, 149:20 17 [4] - 92:23, 98:10, 127:2, 132:10 179 [1] - 4:4 179.17 [1] - 104:11 18 [1] - 138:17 1880s [1] - 71:2 19 [1] - 117:5 190 [1] - 83:20 193 [1] - 127:7 1930 [3] - 70:13, 70:15, 70:23 1983 [1] - 83:20 1984 [1] - 127:8 1990 [1] - 142:21 1994 [1] - 144:16 1997 [1] - 129:25 1:30 [1] - 56:10	109:7, 118:8, 118:10, 119:18, 119:22, 123:17, 124:25, 127:2, 129:17, 132:10, 133:3, 137:23, 138:21, 139:24, 140:25 2026 [3] - 1:2, 126:9, 151:22 212 [3] - 36:17, 113:21, 116:2 22 [2] - 118:10, 119:18 2228 [1] - 81:16 24 [1] - 117:5 25 [5] - 1:2, 56:8, 114:25, 140:25, 141:8 250 [1] - 75:10 2500 [1] - 79:4 26 [1] - 133:12 27 [3] - 39:1, 39:15, 116:14 27.7 [3] - 95:13, 103:7, 113:7 2700 [1] - 79:5 2728 [1] - 129:15 28 [16] - 39:1, 39:4, 39:14, 39:15, 39:16, 45:17, 45:18, 46:3, 46:4, 53:6, 53:7, 86:5, 107:21, 109:7, 116:14, 118:14 285-5331 [1] - 1:25 28th [1] - 5:6 29 [5] - 56:9, 107:21, 108:20, 129:17, 133:3 29th [1] - 56:10	3500 [1] - 129:14 37 [2] - 114:18, 119:19 38 [2] - 114:25, 142:21 39 [2] - 114:25, 119:19	6:15 [1] - 56:8 6:30 [2] - 1:2, 151:23
'15 [1] - 94:15 '30s [1] - 70:18 'shall' [1] - 144:12				7
0				7 [8] - 57:3, 57:6, 57:9, 98:8, 112:12, 112:13, 112:20, 118:16 7-0 [1] - 98:8 7000 [3] - 37:8, 37:20, 78:25 70C [1] - 141:24 732 [1] - 1:25 74 [1] - 132:12 75 [2] - 107:11, 123:17 76.4 [1] - 107:23 76.5 [1] - 107:23 78 [1] - 123:17 7:8-1.6B4i [1] - 120:15
07052 [1] - 2:7 07095 [1] - 2:4 07960 [1] - 1:24 08540 [1] - 2:10				8
1				8 [5] - 33:4, 33:11, 33:20, 104:11, 114:17 8-0 [1] - 98:13 85 [1] - 29:1 87 [1] - 141:13 875 [1] - 107:10 89 [3] - 1:23, 29:3, 132:12
1 [2] - 20:19, 127:10 1.5 [1] - 134:14 1.7 [1] - 134:15 10 [4] - 2:10, 132:16, 135:9, 147:6 10.5 [1] - 143:1 10/28/2024 [1] - 117:3 100 [13] - 6:10, 9:13, 37:25, 38:5, 57:24, 58:3, 93:6, 93:11, 109:20, 129:7, 134:24, 138:11 1000 [3] - 26:1, 81:14, 82:6 102 [2] - 2:7, 113:3 103 [1] - 139:17 1070 [1] - 113:2 10:46 [1] - 152:1 11 [7] - 109:4, 114:14, 114:17, 115:2, 118:16, 127:1, 128:20 114 [2] - 53:4, 53:5 1150 [1] - 107:10 11:00 [1] - 56:11 11:45 [1] - 56:12 12 [2] - 109:4, 118:16 120 [11] - 4:7, 6:4, 6:6, 8:19, 31:15, 31:22, 31:23, 49:12, 52:11, 95:3, 103:6 12:30 [1] - 56:9 13 [1] - 126:9 1306 [1] - 56:10 132 [1] - 108:10 136 [2] - 36:12, 146:17 137 [1] - 144:16 14 [2] - 56:23, 118:10 140 [5] - 6:4, 6:7, 31:21, 31:24, 119:23 143 [3] - 49:19, 51:15, 53:1 144 [2] - 52:12,	2			9
	2.0 [2] - 16:13, 134:18 2.2 [1] - 122:13 2.3 [1] - 122:16 20 [11] - 26:5, 56:6, 56:23, 57:2, 57:3, 57:11, 68:21, 93:3, 103:3, 112:14, 138:17 20-08 [1] - 93:3 20-foot [1] - 128:23 200 [4] - 37:25, 38:5, 51:6, 75:10 2000 [3] - 26:1, 34:8, 37:1 2006 [3] - 36:11, 146:16, 149:16 2008 [1] - 147:6 2009 [1] - 142:22 2010 [3] - 37:1, 37:2, 114:14 2013 [1] - 83:22 2015 [1] - 94:15 2019 [1] - 115:25 202 [1] - 108:10 2020 [10] - 9:5, 92:23, 93:3, 94:16, 95:24, 98:8, 98:10, 101:12, 142:6, 143:13 2024 [12] - 6:20, 20:19, 69:18, 69:22, 107:21, 108:9, 114:14, 115:3, 117:19, 118:14, 127:1, 133:12 2025 [16] - 92:22,			9 [12] - 33:4, 33:11, 33:20, 45:16, 45:17, 53:8, 54:8, 55:1, 59:6, 93:4, 93:10, 104:11 90 [2] - 37:24, 90:2 92 [3] - 113:15, 116:12, 143:22 92.2 [1] - 103:8 92N.J.158(1983) [1] - 29:13 93 [1] - 95:15 966 [1] - 113:2 973 [1] - 1:25
				A
				ability [7] - 34:9, 46:21, 61:13, 80:17, 125:25, 137:15, 153:6 able [7] - 7:12, 45:7, 73:21, 96:8, 102:12, 103:19, 126:23 absence [2] - 15:17, 90:25
				6
				6 [1] - 115:1 605-9391 [1] - 1:25 650 [1] - 107:9 69.1 [1] - 107:24

absolutely [9] - 10:4, 30:13, 61:1, 77:3, 101:24, 102:19, 135:22, 150:9, 150:25 Absolutely [1] - 150:5 absorbs [2] - 50:25 absorptive [1] - 66:13 abundance [1] - 60:16 accepting [1] - 91:15 access [69] - 21:4, 21:11, 22:8, 22:10, 22:15, 22:18, 22:19, 23:2, 23:3, 23:5, 23:12, 23:13, 23:17, 23:23, 24:11, 24:16, 24:18, 24:21, 25:13, 25:21, 26:3, 26:11, 26:12, 32:25, 33:3, 33:6, 33:10, 33:16, 33:19, 34:7, 78:19, 79:8, 80:17, 90:6, 90:8, 93:23, 94:2, 103:10, 103:13, 103:18, 104:5, 104:10, 104:13, 104:14, 104:20, 104:24, 105:2, 105:4, 105:6, 105:8, 105:11, 105:20, 105:21, 106:7, 106:10, 106:12, 106:18, 106:22, 111:11, 129:4, 130:5, 130:7, 130:8, 130:16, 130:22, 131:13, 131:25, 137:6, 137:8 accessed [1] - 103:19 accessory [3] - 33:14, 101:19, 105:1 accident [2] - 25:13, 127:17 accidents [1] - 128:9 accommodate [1] - 137:15 accordance [3] - 99:4, 107:6, 147:19 according [1] - 24:3 accordingly [3] - 128:13, 129:15, 146:4 account [1] - 130:24 accumulated [1] - 42:16 accuracy [1] - 154:22 accurate [1] - 153:3 achieve [4] - 12:10,	12:11, 41:5, 74:18 achieved [3] - 34:20, 44:12, 44:13 acknowledge [3] - 11:16, 26:14, 99:11 acknowledged [4] - 15:5, 38:2, 99:21, 136:4 acknowledges [1] - 99:11 acknowledging [1] - 25:12 acre [9] - 4:7, 36:15, 36:16, 113:19, 113:21, 116:2, 116:6, 116:7 acreage [2] - 6:11, 138:12 acres [48] - 6:4, 6:6, 8:19, 31:15, 31:21, 31:24, 45:15, 45:16, 45:17, 45:25, 46:2, 49:12, 49:19, 49:23, 51:15, 52:11, 52:14, 53:3, 53:4, 53:5, 53:7, 54:8, 55:1, 58:19, 59:4, 59:5, 59:6, 59:7, 59:8, 59:9, 62:20, 64:15, 90:2, 90:3, 95:4, 95:7, 95:14, 95:15, 103:6, 103:7, 103:8, 113:7, 113:15, 116:12, 116:14, 116:15, 143:23 Act [1] - 96:12 act [3] - 107:1, 114:4, 145:1 action [3] - 92:15, 153:9, 153:11 actual [10] - 31:23, 31:24, 37:16, 48:4, 52:25, 57:5, 111:25, 112:10, 114:13, 134:23 ADA [1] - 132:17 ADAMS [1] - 1:13 add [4] - 6:4, 33:18, 33:19, 108:12 added [1] - 108:9 adding [4] - 76:11, 82:9, 83:9 addition [5] - 24:18, 59:16, 109:5, 133:1, 133:14 additional [11] - 13:24, 31:18, 49:20, 52:20, 87:6, 88:3, 108:12, 133:16, 151:25, 154:7 address [10] - 16:6,	33:1, 35:10, 74:9, 74:21, 82:24, 103:22, 130:20, 137:21, 151:8 addressed [3] - 118:6, 120:1, 143:12 addresses [1] - 115:20 addressing [1] - 21:11 adds [1] - 81:24 adequate [4] - 85:19, 85:21, 123:19, 124:2 adequately [1] - 27:5 adjacent [3] - 123:11, 129:23, 130:24 adjoining [2] - 35:18, 108:7 administratively [1] - 122:7 admissions [1] - 37:14 admitted [1] - 80:6 adopt [3] - 128:13, 142:6, 142:10 adopted [16] - 89:23, 91:5, 91:7, 91:21, 93:3, 96:6, 97:25, 98:11, 115:13, 116:8, 139:9, 142:12, 142:13, 143:4, 143:17, 144:1 adopting [3] - 90:20, 100:17, 116:9 adoption [6] - 91:22, 94:20, 98:9, 98:10, 129:24, 142:16 ADT [7] - 81:13, 81:17, 129:14, 129:21, 129:22, 132:15, 133:8 adversaries [1] - 4:25 adversity [1] - 60:6 advise [1] - 113:11 advised [6] - 90:16, 115:2, 115:5, 116:4, 125:13, 135:3 advises [1] - 115:14 advocated [1] - 97:23 aerial [4] - 51:10, 51:19, 65:1, 69:12 aesthetic [2] - 17:12, 109:14 aesthetics [2] - 82:4, 108:17 affect [3] - 62:8, 107:8, 119:6 affectionately [1] -	95:10 afford [1] - 13:13 Affordable [3] - 92:3, 92:24, 98:16 affordable [24] - 9:11, 9:13, 27:1, 29:10, 30:4, 30:10, 30:18, 68:19, 90:19, 91:4, 93:6, 93:11, 94:7, 96:20, 97:8, 98:22, 99:3, 101:10, 103:3, 107:4, 109:10, 109:12, 122:20, 142:1 affording [1] - 96:11 Afran [1] - 141:2 AFRAN [13] - 2:9, 4:14, 4:17, 4:20, 69:17, 148:6, 148:13, 148:23, 149:4, 150:3, 150:8, 150:10, 151:6 afran [20] - 4:12, 4:13, 86:12, 88:20, 89:10, 92:8, 114:8, 116:25, 123:20, 123:22, 124:22, 129:7, 136:14, 137:5, 137:7, 137:22, 138:21, 139:6, 140:24, 146:13 aftermath [1] - 73:5 afternoon [1] - 56:9 afterwards [2] - 17:3, 56:13 age [1] - 5:23 agencies [4] - 38:22, 40:3, 100:10, 122:23 AGENCY [1] - 1:23 agency [3] - 39:7, 75:24, 122:24 aggregate [1] - 107:18 ago [10] - 52:7, 68:5, 68:6, 75:10, 75:11, 89:24, 94:9, 145:4, 148:22, 149:20 agree [6] - 96:5, 102:19, 102:24, 135:23, 145:20, 151:1 agreed [21] - 90:12, 98:7, 101:2, 108:14, 109:1, 113:13, 113:18, 122:11, 122:14, 123:3, 126:7, 129:11, 129:18, 130:10, 133:2, 133:3, 133:5, 133:11, 135:5, 135:8, 139:4 agreement [59] - 7:10, 9:5, 9:14, 10:16, 11:4, 11:12, 11:14,	11:15, 11:21, 12:2, 13:16, 27:2, 27:16, 27:17, 27:20, 27:21, 27:24, 92:16, 93:12, 93:18, 93:21, 95:24, 97:19, 99:4, 99:8, 99:15, 99:22, 99:24, 100:1, 103:15, 103:16, 107:7, 108:21, 109:4, 110:7, 110:11, 111:4, 113:12, 113:14, 115:19, 122:10, 122:13, 122:17, 123:3, 123:7, 124:14, 125:14, 125:17, 125:23, 126:9, 126:11, 130:11, 139:5, 139:11, 139:12, 143:16, 145:9, 148:21 agrees [2] - 39:12, 120:17 agricultural [1] - 29:19 airport [2] - 14:12, 46:11 Airport [1] - 14:16 allegation [1] - 126:15 allegations [1] - 140:18 alleged [2] - 132:20, 145:5 alligation [1] - 121:21 allotted [1] - 57:23 allow [5] - 46:18, 64:11, 81:5, 85:12, 125:19 allowed [5] - 73:9, 82:7, 84:13, 106:3, 132:1 allowing [3] - 34:17, 90:4, 130:15 allows [5] - 33:13, 35:16, 79:21, 109:18, 140:21 alluded [6] - 6:16, 27:10, 28:15, 98:12, 134:23, 141:23 almost [14] - 4:24, 6:2, 13:19, 13:20, 18:1, 34:11, 34:20, 39:1, 42:20, 63:13, 63:22, 81:17, 81:22, 85:8 alone [4] - 6:9, 35:19, 54:20, 81:23 ALPER [1] - 1:9
--	---	---	--	---

altitude [2] - 42:11, 62:17 AMBOY [1] - 2:3 amend [2] - 142:7, 142:10 amendment [2] - 91:5, 93:13 AMENDMENT/REASON [1] - 154:8 amendments [1] - 154:23 amenities [2] - 102:13, 131:21 amenity [2] - 101:20, 101:23 American [8] - 60:25, 93:24, 125:6, 125:18, 126:6, 126:8, 145:10, 148:19 amount [12] - 34:1, 52:18, 58:16, 58:20, 58:23, 73:22, 73:24, 74:2, 74:8, 78:7, 83:9, 108:3 Amy [1] - 113:23 analysis [7] - 20:6, 40:18, 43:7, 59:15, 65:8, 136:2, 138:1 analyze [1] - 44:18 analyzed [1] - 82:17 AND [1] - 1:1 anderson [1] - 119:7 Anderson [7] - 7:3, 7:4, 107:20, 107:25, 117:16, 120:20, 125:6 anderson's [1] - 118:13 angry [2] - 75:2, 75:13 animals [3] - 58:15, 60:6, 73:2 answer [12] - 18:3, 22:10, 24:19, 26:24, 27:14, 69:3, 69:10, 77:17, 83:11, 149:21 answered [2] - 16:3, 19:18 answering [2] - 16:25, 21:1 answers [1] - 47:10 Anthony [1] - 20:20 anticipated [2] - 99:16, 127:14 antithetical [1] - 30:14 anyway [3] - 21:24, 38:12, 79:13 apartment [1] - 23:23 apartments [2] -	29:23, 29:25 apologies [1] - 36:4 apologize [2] - 28:23, 86:4 apparatus [1] - 137:14 apparent [3] - 91:13, 132:22, 133:23 appeal [1] - 140:6 appear [2] - 58:10, 100:25 appearance [1] - 136:13 Appearing [3] - 2:4, 2:8, 2:11 appel [9] - 6:16, 7:3, 7:4, 7:14, 21:14, 21:19, 21:21, 21:22, 21:23 Appel [3] - 6:19, 108:9, 137:2 Appellate [10] - 83:15, 83:19, 83:20, 83:22, 123:23, 124:4, 127:8, 127:22, 128:7, 140:6 applicability [2] - 91:1, 149:10 applicable [3] - 96:11, 109:7, 115:14 applicant [42] - 4:5, 4:10, 10:20, 18:8, 20:3, 20:7, 28:20, 33:6, 34:12, 35:15, 37:4, 37:13, 39:18, 40:6, 47:9, 47:14, 49:16, 71:20, 72:4, 84:13, 86:18, 92:17, 100:24, 104:17, 109:2, 109:15, 113:14, 122:2, 123:1, 124:2, 124:8, 124:13, 124:17, 125:15, 125:24, 127:9, 132:24, 135:4, 140:14, 141:7, 143:3, 149:25 Applicant [2] - 2:4, 84:10 applicants [12] - 16:18, 16:20, 18:23, 19:8, 19:23, 25:11, 78:1, 81:16, 82:17, 88:1, 89:15, 99:9 application [62] - 4:3, 33:22, 33:24, 34:22, 37:13, 38:3, 39:17, 88:8, 88:17, 89:21, 89:22, 91:12, 96:3, 97:8, 98:19,	99:6, 99:19, 100:2, 101:15, 101:18, 107:2, 110:18, 110:22, 115:6, 115:23, 116:3, 116:10, 116:19, 118:16, 119:23, 120:6, 120:16, 122:4, 123:14, 126:14, 127:12, 129:13, 134:20, 138:23, 138:24, 140:3, 141:21, 142:25, 144:10, 144:13, 144:17, 144:20, 145:3, 145:18, 145:25, 146:5, 146:8, 146:12, 146:17, 146:19, 147:8, 151:10, 151:14, 151:20, 151:24 Application [1] - 143:1 applications [9] - 11:7, 87:24, 92:2, 96:21, 122:8, 122:22, 145:21, 146:24, 147:3 applied [1] - 121:24 applies [4] - 21:13, 59:13, 60:24, 116:18 apply [9] - 11:7, 76:3, 77:24, 102:2, 115:18, 142:24, 143:11, 143:24, 144:3 appointed [1] - 94:22 appraisal [1] - 18:7 appreciate [1] - 17:1 appreciated [1] - 89:7 approach [1] - 49:12 appropriate [8] - 25:25, 69:14, 90:24, 108:18, 109:16, 134:13, 149:12, 149:19 appropriately [1] - 102:21 approvable [1] - 93:20 approval [51] - 9:24, 9:25, 10:18, 10:20, 33:8, 34:23, 34:24, 35:1, 74:10, 84:2, 84:9, 84:12, 84:16, 84:17, 85:11, 85:12, 89:20, 96:16, 102:20, 104:21, 104:22, 121:25, 122:6, 122:9, 122:24, 123:15, 126:2, 126:4, 126:13,	126:17, 126:18, 126:20, 126:24, 127:10, 127:12, 127:25, 128:6, 140:14, 144:7, 144:9, 144:10, 144:13, 144:19, 144:20, 145:11, 145:13, 145:16, 145:19, 148:4 Approval [1] - 122:3 approvals [3] - 118:11, 121:23, 122:12 approve [16] - 10:19, 13:4, 23:13, 23:16, 25:24, 25:25, 26:25, 27:4, 27:25, 28:4, 30:18, 39:21, 82:15, 146:4 approved [19] - 26:21, 27:15, 27:19, 31:10, 35:5, 35:13, 93:1, 93:4, 94:22, 94:24, 95:24, 104:6, 105:19, 117:18, 119:3, 119:9, 119:14, 145:8 approving [5] - 23:22, 24:6, 26:23, 73:22, 140:4 April [7] - 56:8, 56:9, 94:16, 137:23, 138:21, 146:16, 147:6 Apte [1] - 108:19 arbitrary [1] - 112:5 arborists [1] - 113:22 architect [5] - 6:17, 6:19, 7:14, 108:9, 137:3 area [80] - 8:21, 8:23, 9:1, 13:21, 22:25, 31:13, 32:2, 32:13, 32:16, 32:23, 36:3, 36:6, 45:11, 45:13, 45:15, 45:18, 45:25, 48:11, 48:14, 48:15, 48:20, 48:22, 51:15, 52:6, 52:8, 52:15, 52:17, 52:18, 52:21, 53:1, 53:5, 53:6, 53:16, 53:18, 53:19, 53:25, 54:3, 55:4, 55:6, 55:13, 57:10, 59:2, 60:7, 61:8, 61:9, 62:19, 62:24, 63:15, 63:17, 64:9, 64:10, 64:14, 65:4, 66:12, 67:2, 67:13, 67:14, 68:14, 69:24, 70:3,	70:5, 70:9, 70:10, 70:20, 70:22, 70:23, 71:3, 82:23, 90:4, 107:17, 107:18, 110:15, 112:7, 114:23, 130:21, 135:4, 135:9 areas [32] - 8:8, 8:17, 8:21, 9:2, 12:7, 29:20, 32:19, 35:24, 36:1, 36:2, 40:24, 45:8, 48:10, 48:16, 49:6, 49:16, 49:20, 51:13, 53:1, 54:7, 55:2, 58:15, 64:6, 66:3, 66:5, 66:11, 71:3, 71:4, 102:21, 117:12, 138:13 argue [2] - 88:12, 88:13 argument [5] - 69:6, 82:19, 104:19, 145:2, 149:6 arguments [1] - 120:2 arise [2] - 57:11, 103:1 arises [2] - 9:23, 66:9 arose [1] - 76:5 arrived [1] - 116:1 arrow [2] - 43:19, 44:7 arrows [5] - 41:21, 41:22, 41:25 arterial [3] - 24:20, 24:23, 80:12 as-built [1] - 118:18 ascends [1] - 112:15 ascribe [1] - 63:6 aside [5] - 11:12, 11:14, 28:1, 103:4, 124:22 aspect [1] - 67:9 aspects [7] - 5:25, 18:17, 20:16, 24:9, 30:20, 68:9, 88:7 assertions [1] - 88:23 assess [1] - 114:1 associated [1] - 135:2 Associates [1] - 139:7 association [4] - 9:7, 76:6, 103:16, 130:13 Association [2] - 93:17, 142:21 assume [2] - 9:21, 105:16
---	---	---	--	--

assumed [1] - 20:1 assuming [1] - 26:2 assured [1] - 20:13 attach [1] - 154:7 attached [5] - 29:3, 110:7, 111:3, 139:11, 154:23 attack [2] - 106:4, 137:9 attend [1] - 87:11 attended [2] - 102:4, 112:19 attention [1] - 48:25 attorney [8] - 4:10, 4:11, 82:18, 141:12, 149:3, 151:16, 153:8, 153:10 audio [1] - 87:10 August [4] - 20:19, 118:8, 140:25, 141:8 authorities [1] - 83:12 authority [7] - 35:16, 35:19, 82:16, 84:14, 101:6, 127:25, 128:7 authorizes [1] - 33:10 available [4] - 26:3, 40:13, 78:9, 93:19 AVENUE [2] - 1:24, 2:3 Avenue [3] - 90:6, 128:17, 132:21 average [6] - 6:9, 77:18, 81:13, 82:1, 82:5, 82:9 avian [1] - 138:20 avoid [3] - 13:15, 80:10, 132:1 avoids [1] - 79:8 aware [9] - 89:24, 97:19, 103:14, 104:14, 117:17, 127:3, 130:1, 138:12, 143:15 awhile [1] - 66:7 awkward [2] - 86:23, 108:14	94:12 backyard [1] - 57:15 BAGOFF [18] - 1:8, 4:1, 4:16, 4:19, 69:16, 86:11, 86:15, 148:5, 148:7, 148:18, 148:25, 149:2, 149:21, 150:5, 150:9, 150:12, 150:25, 151:9 Bagoff [4] - 10:14, 87:1, 99:24, 138:5 bagoff [1] - 86:7 bakery [1] - 127:9 Bakley [5] - 111:17, 121:17, 121:20, 123:11, 125:2 balances [3] - 46:20, 47:2, 47:3 balloon [6] - 6:22, 6:23, 6:24, 7:8, 7:11, 7:17 balloons [1] - 7:6 ban [1] - 11:12 band [1] - 31:7 BAQUERIZO [1] - 1:12 bare [2] - 10:22, 37:19 bargain [3] - 13:3, 13:9 barred [1] - 10:4 barrier [3] - 50:10, 50:11, 50:13 base [1] - 127:4 based [12] - 17:19, 37:10, 42:2, 47:1, 57:20, 57:22, 61:24, 73:10, 85:24, 88:23, 107:18, 136:12 basements [1] - 107:15 basin [4] - 43:21, 43:25, 44:2, 45:22 basins [3] - 48:17, 52:22, 119:11 battles [2] - 14:19, 14:22 bay [1] - 50:14 Bayowski [3] - 56:14, 104:12, 104:13 Beach [1] - 50:12 bean [1] - 79:22 bear [11] - 32:7, 32:20, 35:7, 35:22, 38:1, 38:21, 40:2, 54:24, 59:23, 67:1 bearing [1] - 89:14 beautiful [1] - 69:23 became [2] - 94:15, 133:22	become [3] - 4:25, 32:8, 108:22 becomes [3] - 52:9, 67:24, 129:1 bedrooms [3] - 107:9, 107:10 began [2] - 20:20, 99:20 begin [2] - 6:1, 37:19 beginning [2] - 28:21, 118:10 behalf [4] - 2:4, 2:8, 2:11, 38:9 behind [5] - 32:23, 76:25, 105:17, 106:4, 114:11 below [1] - 154:7 benefit [3] - 92:18, 106:7, 106:13 bent [2] - 51:5, 94:11 best [3] - 49:24, 86:21, 153:6 better [5] - 49:25, 51:22, 69:6, 69:7, 141:17 between [8] - 9:6, 26:1, 92:16, 96:24, 110:14, 112:10, 116:14, 143:13 beyond [2] - 9:2, 15:24 big [2] - 57:11, 77:16 bigger [1] - 8:23 Bill [3] - 83:5, 84:22, 85:8 bind [1] - 10:17 binding [1] - 84:18 binds [1] - 76:1 biologist [1] - 138:21 bird [5] - 54:19, 56:17, 57:11, 59:13, 70:7 birds [11] - 55:22, 57:24, 57:25, 58:3, 59:14, 61:23, 62:10, 74:1, 74:4, 74:5, 139:15 Bishop [1] - 92:25 bit [21] - 16:10, 18:20, 27:3, 49:8, 49:9, 50:5, 52:17, 57:4, 63:15, 65:2, 65:3, 70:1, 70:12, 70:21, 73:16, 111:8, 112:15, 114:18, 116:23, 118:25 bits [1] - 63:18 black [1] - 142:23 blasting [2] - 135:20, 135:24	blithely [1] - 68:23 Block [2] - 4:4, 104:11 blockage [1] - 25:13 blocked [5] - 25:8, 25:20, 26:8, 26:14, 26:15 blocking [1] - 25:16 blown [4] - 111:17, 117:4, 121:10, 121:11 blowups [1] - 111:21 blue [2] - 41:21, 42:22 bluntly [1] - 59:11 BOARD [1] - 1:7 board [82] - 10:19, 10:22, 16:15, 17:5, 27:12, 35:14, 71:21, 76:1, 77:13, 87:3, 87:19, 88:2, 88:6, 88:25, 91:5, 91:6, 91:12, 91:19, 92:22, 92:25, 93:2, 98:4, 98:8, 98:11, 99:9, 99:11, 99:25, 101:6, 101:11, 102:8, 103:14, 104:13, 106:19, 107:1, 110:1, 110:17, 110:23, 115:23, 116:17, 117:17, 120:17, 122:25, 125:13, 126:14, 127:3, 127:24, 128:2, 128:5, 128:13, 130:1, 130:3, 130:25, 133:21, 134:3, 139:13, 140:12, 140:22, 141:12, 141:15, 142:11, 142:23, 145:14, 145:20, 146:4, 146:22, 146:25, 147:8, 147:15, 147:17, 148:3, 148:11, 149:3, 149:14, 149:15, 149:19, 149:22, 150:5, 150:15, 151:12, 151:14 Board [34] - 1:12, 2:8, 9:24, 10:7, 10:25, 24:7, 26:9, 34:4, 34:12, 34:15, 35:2, 38:15, 73:21, 91:20, 95:22, 99:7, 99:21, 101:9, 102:23, 115:3, 116:3, 122:5, 122:7, 123:24, 127:7, 127:13, 135:15, 139:10, 142:13,	144:5, 144:8, 149:25, 151:22 board's [2] - 129:17, 140:10 Boards [1] - 145:5 boards [16] - 65:8, 87:22, 89:15, 94:6, 108:19, 110:17, 113:22, 119:21, 123:16, 132:24, 139:17, 142:3, 144:25, 146:16, 147:5, 147:9 boardwalk [1] - 131:20 body [12] - 9:24, 10:2, 10:5, 10:11, 10:12, 10:17, 14:9, 27:22, 28:18, 91:19, 128:11, 142:8 Body [9] - 10:8, 101:2, 101:7, 105:3, 142:6, 142:8, 142:10, 143:17, 144:22 BOLAND [1] - 2:7 bonus [1] - 93:7 book [2] - 79:9, 105:1 books [2] - 78:13, 82:13 Boswell [1] - 38:9 bother [1] - 19:5 bottom [10] - 42:7, 43:2, 44:3, 48:18, 48:19, 56:3, 60:19, 60:20, 61:5, 123:8 bound [4] - 10:15, 37:13, 87:22, 98:4 boundary [3] - 111:10, 125:12, 131:11 Bplocker@huttshim.com [1] - 2:3 BRAEBRUN [1] - 2:10 brake [1] - 46:19 branch [1] - 64:9 branches [1] - 65:16 breach [2] - 28:11, 115:19 break [3] - 60:5, 69:15, 86:13 breath [1] - 28:22 brethren [1] - 28:7 briefly [1] - 82:24 bright [1] - 51:23 brightest [1] - 51:11 bringing [1] - 43:14 brings [1] - 66:16
B				
backdrop [1] - 95:1 background [1] - 71:25 backpedal [1] - 18:16 backpedals [1] - 19:21 backs [1] - 18:17 backwards [1] -				

broken [3] - 60:11, 117:4, 121:4 Brook [16] - 41:13, 41:15, 41:18, 44:3, 44:15, 45:22, 45:23, 65:14, 65:17, 65:18, 66:17, 66:19, 67:2, 74:6, 74:7 brook [1] - 66:23 brought [3] - 49:2, 120:10, 123:20 brown [2] - 36:1, 71:3 browse [8] - 6:13, 7:22, 12:8, 12:24, 13:15, 13:24, 15:13, 114:3 BRUCE [1] - 2:9 Brunswick [2] - 127:7, 127:13 Brunswick's [1] - 124:10 BRYAN [1] - 2:2 bubble [2] - 76:13, 77:20 buffer [3] - 85:7, 109:20, 112:9 buffering [1] - 97:1 buffers [1] - 32:19 build [16] - 9:12, 13:17, 30:10, 33:8, 46:12, 54:15, 58:10, 66:20, 74:19, 78:5, 105:14, 108:2, 112:9, 118:1, 118:4 builder [1] - 9:10 builders [4] - 9:8, 9:9, 92:9, 92:21 Building [34] - 16:8, 17:16, 20:13, 20:16, 21:13, 21:16, 32:6, 32:22, 41:1, 101:23, 107:23, 107:24, 107:25, 110:5, 110:20, 111:11, 111:18, 111:22, 119:1, 119:5, 120:22, 120:24, 121:2, 131:13, 131:20, 132:6, 133:18, 134:6, 134:9, 136:19 building [49] - 5:19, 6:25, 7:2, 21:12, 21:20, 21:24, 22:1, 22:5, 22:9, 22:10, 22:16, 22:17, 22:22, 23:11, 23:17, 24:3, 26:6, 39:13, 48:15, 96:23, 107:11, 107:13, 107:16,	108:4, 110:4, 110:19, 110:24, 111:2, 111:13, 111:15, 111:20, 112:20, 118:20, 118:24, 119:12, 121:5, 134:25, 135:10, 135:11, 135:13, 135:14, 135:18, 136:16, 136:17, 136:20, 136:23, 137:7, 141:21 Buildings [1] - 142:20 buildings [17] - 32:21, 35:25, 40:25, 52:20, 69:25, 96:24, 99:15, 108:2, 110:5, 110:6, 110:13, 113:3, 117:13, 125:21, 136:17, 137:3, 140:21 built [27] - 13:18, 14:16, 15:20, 26:22, 31:23, 43:12, 54:12, 54:25, 77:15, 77:23, 83:2, 89:3, 90:23, 95:17, 104:4, 104:18, 118:4, 118:18, 118:23, 129:24, 130:2, 134:9, 134:10, 136:25, 138:9, 141:6, 147:12 bulges [1] - 48:19 bulging [1] - 48:18 Bulk [1] - 108:18 bulk [9] - 89:21, 96:1, 100:4, 103:2, 107:20, 109:5, 141:20, 141:23, 146:2 bullet [3] - 137:5, 137:8, 137:11 bump [1] - 62:20 burden [1] - 9:12 burdensome [1] - 130:17 Burlington [1] - 29:12 business [1] - 127:21 busy [1] - 127:10 Butler [5] - 54:19, 138:20, 139:15, 139:18, 139:20 Butler's [2] - 55:18, 61:22 buy [1] - 88:16 BY [2] - 2:2, 2:6 Byers [1] - 141:8 bypassing [1] - 43:24	C C-5 [1] - 100:3 calculate [1] - 49:11 calculated [4] - 45:14, 51:25, 52:13, 134:15 calculates [3] - 49:19, 49:21, 81:15 calculation [1] - 37:11 calculations [4] - 37:18, 52:25, 81:7, 136:12 California [1] - 26:17 Canal [1] - 75:24 cancel [1] - 87:13 cannot [10] - 10:3, 27:6, 28:11, 78:9, 83:24, 84:16, 99:5, 128:13, 147:15, 149:13 Canoe [16] - 41:13, 41:15, 41:18, 44:3, 44:15, 45:22, 45:23, 65:14, 65:17, 65:18, 66:17, 66:19, 67:2, 74:6, 74:7 canopies [1] - 36:23 canopy [6] - 7:7, 7:16, 7:20, 7:25, 13:1 capacity [4] - 39:23, 39:24, 66:13, 125:20 car [1] - 78:25 CARDOZA [1] - 1:10 care [3] - 73:7, 73:8, 73:9 Care [1] - 2:11 carefully [4] - 31:6, 110:1, 117:5, 132:23 Carl [1] - 88:10 carry [1] - 137:14 cars [3] - 77:18, 78:7, 80:18 cartographer [1] - 69:20 cartway [1] - 128:23 cartways [1] - 128:25 carved [1] - 123:7 case [45] - 4:23, 5:5, 5:9, 9:4, 9:9, 9:10, 10:21, 20:19, 20:25, 21:14, 23:1, 26:20, 29:1, 39:9, 39:10, 39:13, 39:15, 42:13, 43:8, 59:18, 69:7, 73:14, 83:14, 85:18, 88:2, 96:15, 97:10, 112:21, 122:10, 123:21, 123:23,	124:3, 124:6, 124:7, 124:19, 127:6, 127:8, 136:9, 142:22, 143:20, 144:17, 149:8, 149:15, 149:18, 149:20 Case [1] - 115:3 CASE [1] - 154:3 cases [4] - 84:3, 84:19, 85:22, 150:20 causes [2] - 26:18, 61:20 cellars [1] - 107:16 census [1] - 37:4 Center [1] - 56:13 center [30] - 5:21, 8:16, 31:14, 32:10, 42:6, 42:12, 43:1, 43:2, 43:16, 44:6, 49:10, 54:16, 62:18, 62:19, 63:11, 63:12, 63:17, 64:9, 64:11, 65:11, 65:14, 68:11, 68:14, 70:4, 70:5, 70:14, 71:5, 71:6, 131:21 central [4] - 13:6, 13:20, 43:17, 71:16 certain [23] - 5:7, 6:25, 9:7, 11:13, 12:7, 16:3, 17:6, 19:18, 20:21, 48:9, 50:25, 58:14, 58:16, 58:19, 58:20, 58:22, 75:15, 84:4, 91:17, 95:8, 98:7, 99:14, 115:10 certainly [7] - 11:22, 17:13, 20:24, 34:11, 34:20, 76:5, 89:13 certificate [1] - 84:14 certification [2] - 96:15, 97:11 certify [1] - 153:3 CERTIFY [1] - 153:7 chair [1] - 151:6 Chairman [7] - 1:8, 1:8, 4:18, 81:9, 87:1, 99:24 CHAIRMAN [17] - 4:1, 4:16, 4:19, 69:16, 86:11, 86:15, 148:5, 148:7, 148:18, 148:25, 149:2, 149:21, 150:5, 150:9, 150:12, 150:25, 151:9 chairman [2] - 4:15, 69:14 challenge [2] - 74:16, 141:14 challenged [1] -	115:21 challenges [1] - 99:20 chance [1] - 132:25 change [4] - 17:4, 42:16, 61:4, 116:5 CHANGE [1] - 154:8 changed [3] - 110:13, 115:16, 143:13 changes [4] - 55:10, 59:12, 138:16, 143:6 characteristics [2] - 89:25, 143:15 characterization [2] - 132:15, 133:7 characterize [1] - 136:11 characterized [1] - 150:17 characterizing [1] - 48:3 chart [7] - 41:20, 47:23, 50:23, 53:13, 56:20, 64:7, 65:11 check [6] - 37:18, 45:7, 46:19, 46:20, 46:23, 46:25 checking [1] - 11:1 checks [2] - 47:1, 47:3 chief [12] - 14:24, 20:17, 20:18, 21:10, 22:8, 22:19, 23:3, 24:3, 26:10, 26:12, 80:5, 142:8 Chief [6] - 20:20, 63:23, 72:25, 73:7, 73:15, 74:25 chose [1] - 49:14 chosen [1] - 94:5 chronological [1] - 28:24 circle [5] - 16:22, 120:23, 127:16, 131:12, 131:13 circular [1] - 50:2 circumstances [3] - 24:8, 91:21, 98:3 circumvent [1] - 100:8 cited [5] - 38:13, 38:20, 83:21, 150:20, 150:21 cites [1] - 84:3 citizenry [1] - 89:5 city [1] - 58:14 claim [1] - 36:16 claimed [1] - 124:25 claiming [2] - 82:10,
---	--	---	---	---

112:19 clarification [1] - 129:20 class [2] - 12:17, 12:18 classes [1] - 67:11 clause [1] - 22:14 clay [1] - 42:18 clear [29] - 7:23, 33:17, 36:14, 40:14, 60:24, 66:10, 74:15, 78:11, 80:5, 85:10, 92:3, 95:9, 98:16, 101:14, 102:1, 106:17, 111:3, 112:18, 115:24, 127:23, 128:7, 134:9, 136:23, 142:4, 142:9, 144:4, 146:21, 150:19 clearance [1] - 109:19 clearcut [1] - 13:6 cleared [2] - 52:6, 62:19 clearer [1] - 30:11 clearing [1] - 108:3 clearly [9] - 19:19, 45:20, 61:10, 62:16, 83:6, 101:18, 111:21, 112:21, 145:7 client [19] - 87:4, 90:12, 91:23, 92:5, 93:20, 94:15, 99:13, 100:24, 113:13, 114:8, 122:11, 122:14, 123:12, 126:2, 126:8, 139:2, 139:5, 145:9, 145:22 clients [5] - 20:5, 88:8, 99:16, 103:15, 146:16 close [7] - 21:20, 69:13, 79:7, 112:3, 112:4, 112:15, 130:6 closed [1] - 78:19 closely [2] - 31:6, 125:9 closest [1] - 102:3 closing [1] - 86:18 closure [1] - 106:20 clubhouse [3] - 131:18, 131:20, 132:7 CME [7] - 16:17, 16:21, 20:2, 76:16, 129:17, 133:2, 133:5 CME's [1] - 133:12 COAH [1] - 97:9 coaster [1] - 61:19 code [14] - 63:9, 64:3, 90:22, 91:17,	100:16, 100:20, 104:21, 105:1, 135:13, 135:15, 137:19, 139:1, 143:8, 143:10 coincided [1] - 127:21 collapse [1] - 61:21 collection [2] - 6:11, 69:21 collector [4] - 128:22, 129:9, 129:12, 131:7 College [2] - 55:20, 55:21 colloquy [2] - 10:14, 27:11 colonize [1] - 62:9 color [1] - 36:1 colored [1] - 121:1 combined [1] - 144:24 comfortable [3] - 23:22, 24:6, 131:1 coming [5] - 19:15, 43:8, 125:8, 146:6, 147:24 commenced [1] - 124:15 commendable [1] - 87:14 commended [2] - 89:4, 94:11 comment [11] - 38:25, 39:2, 63:24, 88:15, 102:1, 102:9, 118:7, 129:25, 139:8, 140:12, 151:4 comments [16] - 20:24, 89:11, 102:10, 117:10, 117:12, 117:14, 118:12, 119:16, 119:19, 120:1, 120:7, 120:18, 132:19, 150:16, 151:18 commercial [1] - 105:22 commercially [1] - 105:17 Commission [5] - 38:16, 38:17, 38:18, 38:19, 75:25 Commissioners [1] - 38:19 commitment [3] - 14:21, 87:7, 89:14 committed [1] - 109:15 common [6] - 47:16,	60:15, 62:2, 62:4, 80:14, 104:17 Common [1] - 60:15 communicate [1] - 18:25 communicated [1] - 18:24 communicating [1] - 18:23 communication [1] - 64:12 communities [3] - 39:23, 41:14, 65:20 community [10] - 5:10, 34:13, 41:13, 57:16, 67:8, 68:10, 70:10, 75:6, 84:7, 132:8 company [4] - 15:6, 126:1, 148:15 Company [1] - 93:24 compared [1] - 118:18 comparing [1] - 117:25 complain [1] - 7:9 complete [4] - 33:24, 92:20, 133:14, 151:11 completely [6] - 32:1, 53:2, 75:16, 114:16, 132:10, 146:18 completeness [1] - 145:6 complex [7] - 23:23, 25:6, 25:13, 25:25, 26:7, 33:16, 34:7 compliance [9] - 91:3, 92:6, 92:11, 93:6, 94:5, 95:1, 101:11, 102:23, 142:15 Compliance [1] - 92:19 compliant [1] - 131:23 complied [1] - 101:3 complies [12] - 89:22, 96:3, 101:18, 106:17, 110:22, 111:22, 137:19, 141:22, 144:6, 144:21, 146:3 comply [17] - 91:10, 103:3, 103:4, 103:5, 103:9, 103:11, 104:12, 106:23, 107:10, 107:13, 107:14, 109:20, 112:24, 116:16,	133:11, 133:14, 135:14 comprehend [1] - 88:8 comprehending [1] - 91:15 comprised [1] - 119:11 compromise [1] - 13:15 computers [1] - 117:6 conceded [5] - 36:23, 120:4, 124:15, 133:25, 136:6 concept [8] - 55:8, 55:14, 93:13, 110:7, 110:9, 110:10, 110:14, 111:3 concern [1] - 65:20 concerned [5] - 9:22, 16:16, 29:15, 138:1, 144:17 concerning [1] - 16:8 concerns [1] - 102:10 concession [1] - 77:22 concise [1] - 40:14 concludes [1] - 152:1 concluding [1] - 134:15 conclusion [2] - 132:11, 147:4 conclusions [3] - 132:14, 134:8, 136:22 condemnation [1] - 105:6 condition [20] - 34:24, 74:10, 85:12, 102:20, 109:14, 109:18, 116:5, 118:1, 118:22, 121:24, 122:5, 123:15, 126:2, 126:13, 126:24, 128:5, 136:6, 140:14, 143:13, 145:19 conditions [13] - 42:1, 42:18, 43:9, 51:7, 79:1, 93:14, 93:15, 118:4, 118:18, 128:1, 133:24, 145:12, 145:16 condo [2] - 76:6, 130:21 condominium [12] - 93:15, 103:15, 106:8, 106:15, 125:8,	125:16, 129:19, 130:12, 130:20, 130:25, 131:11, 131:14 Condominium [1] - 93:17 conduct [1] - 133:20 conducting [1] - 87:5 conduit [3] - 43:19, 43:24, 83:2 conduits [2] - 48:21, 83:10 configuration [1] - 133:9 confirmed [13] - 108:6, 111:1, 118:7, 119:17, 123:16, 128:2, 135:10, 135:20, 136:16, 138:17, 139:18, 140:11, 140:13 confirms [1] - 108:17 conform [1] - 144:10 conforming [1] - 144:13 conforms [1] - 147:16 congested [1] - 128:8 congestion [1] - 127:15 congressional [1] - 52:17 conjunction [1] - 135:25 connect [5] - 77:10, 83:3, 83:7, 124:21, 125:15 connecting [4] - 64:9, 90:7, 103:25, 130:1 connection [12] - 16:12, 92:22, 100:21, 113:11, 116:3, 122:11, 122:15, 123:10, 124:9, 125:17, 145:18, 149:7 connections [1] - 83:1 connectivity [13] - 59:25, 60:2, 60:4, 60:8, 60:10, 60:12, 64:4, 64:16, 64:19, 64:21, 70:2, 70:6, 84:15 connectors [1] - 64:5 connects [1] - 121:18
---	---	--	--	--

consent ^[1] - 115:17 conservation ^[2] - 29:19, 30:25 Conservation ^[6] - 14:9, 14:15, 100:12, 126:20, 141:9, 145:11 conservative ^[1] - 49:12 consider ^[5] - 100:1, 127:4, 128:2, 128:14, 148:12 consideration ^[1] - 117:15 considerations ^[1] - 11:10 considered ^[7] - 65:9, 97:9, 97:15, 118:15, 119:19, 133:23, 143:18 consist ^[2] - 107:5, 121:3 consistent ^[4] - 98:22, 108:5, 110:6, 122:20 consisting ^[1] - 29:18 constant ^[3] - 19:8, 19:22, 20:3 constitutes ^[1] - 132:11 construct ^[1] - 109:12 constructed ^[1] - 104:1 construction ^[10] - 11:13, 13:19, 48:20, 58:10, 68:17, 103:1, 109:23, 135:6, 135:21, 147:16 consultant ^[1] - 139:8 consulting ^[1] - 90:17 contact ^[4] - 19:8, 19:11, 19:23, 20:3 contain ^[1] - 93:11 contained ^[2] - 123:18, 131:8 containing ^[1] - 28:25 contains ^[4] - 31:8, 90:5, 93:13, 93:22 contemplated ^[2] - 110:16, 113:8 contested ^[1] - 22:4 context ^[3] - 65:6, 88:9, 98:6 contiguous ^[4] - 6:8, 49:4, 49:16, 51:14 continent ^[1] - 55:12	Continental ^[2] - 55:9, 55:10 continue ^[3] - 73:16, 123:12, 145:22 continuously ^[1] - 18:16 contour ^[6] - 42:3, 42:11, 43:1, 43:4, 43:16, 55:17 contract ^[1] - 28:12 contrary ^[5] - 30:14, 46:16, 46:17, 89:17, 126:15 contravene ^[1] - 100:8 contributes ^[1] - 99:2 contributions ^[1] - 128:6 control ^[3] - 119:10, 126:18, 128:18 controlled ^[2] - 113:1, 135:25 convenience ^[1] - 106:4 conveyed ^[2] - 123:9, 129:13 convinced ^[3] - 69:4, 69:7, 91:25 cooperate ^[8] - 99:17, 109:10, 122:11, 122:14, 122:21, 141:25, 145:24, 147:18 cooperation ^[1] - 109:8 copied ^[1] - 19:2 copy ^[5] - 148:17, 148:23, 149:1, 149:3 core ^[37] - 49:13, 49:22, 50:3, 50:6, 50:8, 51:2, 52:10, 52:11, 52:12, 52:13, 52:14, 53:3, 53:4, 53:7, 53:15, 53:22, 53:24, 54:4, 54:6, 54:8, 54:9, 54:14, 54:18, 54:25, 59:6, 59:8, 59:19, 61:1, 61:15, 61:25, 62:10, 64:24, 66:2, 67:1, 138:1 corner ^[8] - 4:8, 6:5, 42:8, 43:6, 44:4, 48:25, 49:5, 49:7 corners ^[1] - 6:3 Corp ^[1] - 2:11 Corporation ^[1] - 36:12 correct ^[4] - 9:21,	81:8, 92:8, 150:18 corrections ^[2] - 154:7, 154:23 correctly ^[3] - 31:15, 56:11, 141:15 corresponding ^[1] - 144:18 corridor ^[4] - 5:20, 60:10, 64:21, 70:2 corridors ^[3] - 53:17, 59:25, 64:11 cost ^[6] - 13:10, 96:13, 96:22, 97:7, 101:4, 114:5 council ^[9] - 10:9, 27:10, 27:19, 30:5, 30:15, 89:24, 128:13, 142:12, 142:17 Council ^[3] - 27:15, 83:18, 87:2 councils ^[3] - 10:10, 46:15, 98:10 Councilwoman ^[1] - 1:11 counsel ^[7] - 10:4, 10:5, 10:6, 90:19, 115:2, 153:8, 153:10 count ^[4] - 37:15, 114:2, 114:8, 114:13 counted ^[1] - 129:19 counting ^[2] - 79:22, 132:15 County ^[3] - 29:12, 38:18, 38:19 couple ^[5] - 11:24, 13:10, 13:21, 24:22, 49:6 course ^[17] - 6:8, 6:13, 7:21, 10:6, 22:1, 32:22, 40:5, 43:13, 45:24, 59:12, 105:2, 105:11, 108:4, 108:25, 131:23, 133:20, 135:15 court ^[11] - 10:12, 84:3, 85:9, 85:15, 85:24, 92:18, 94:22, 94:23, 94:24, 128:1, 144:19 COURT ^[1] - 1:23 Court ^[7] - 29:14, 96:15, 99:4, 142:22, 144:15, 147:6, 150:23 Court's ^[1] - 95:24 courts ^[2] - 27:12, 149:12 Courts ^[1] - 97:10 cover ^[2] - 36:24, 62:15 covered ^[2] - 29:23,	29:25 crack ^[1] - 135:5 crap ^[1] - 81:1 creaks ^[1] - 47:2 create ^[4] - 30:18, 102:21, 125:7, 137:16 created ^[4] - 40:23, 45:4, 48:8, 68:5 creates ^[1] - 52:9 creating ^[3] - 53:20, 66:1, 68:10 creation ^[2] - 42:19, 87:22 creatures ^[1] - 61:14 credentials ^[4] - 5:13, 12:15, 15:1, 15:4 credibility ^[4] - 89:8, 89:9, 114:22, 125:3 credit ^[3] - 78:6, 83:17, 113:18 credits ^[2] - 93:8 criteria ^[5] - 34:10, 34:16, 34:19, 130:14 criticism ^[2] - 15:1, 15:3 criticisms ^[1] - 18:9 criticize ^[2] - 19:20, 34:2 criticizing ^[1] - 9:16 cross ^[5] - 11:25, 16:24, 19:14, 20:23, 37:19 cross-examination ^[5] - 11:25, 16:24, 19:14, 20:23, 37:19 crossed ^[1] - 27:18 crosshatched ^[1] - 54:5 crosshatching ^[4] - 50:1, 50:2, 51:24, 53:15 crossings ^[1] - 132:3 crosswalks ^[1] - 131:23 crowd ^[1] - 112:2 crux ^[1] - 19:19 crystal ^[1] - 136:23 cul ^[42] - 72:21, 76:4, 76:5, 76:8, 76:9, 76:11, 76:12, 76:13, 76:15, 76:18, 76:19, 76:23, 77:11, 77:12, 77:16, 77:19, 77:20, 77:21, 77:24, 78:2, 78:4, 79:11, 79:21, 80:2, 80:10, 80:24, 81:10, 81:11, 81:14, 81:18, 82:2, 82:10, 111:17, 129:5, 129:9,	129:18, 132:12, 132:15, 133:4 cul-de ^[1] - 81:10 cul-de-sac ^[39] - 72:21, 76:4, 76:5, 76:8, 76:9, 76:11, 76:12, 76:13, 76:15, 76:18, 76:23, 77:11, 77:12, 77:16, 77:19, 77:20, 77:21, 77:24, 78:2, 78:4, 79:11, 79:21, 80:2, 80:10, 80:24, 81:11, 81:14, 81:18, 82:2, 82:10, 111:17, 129:5, 129:9, 129:18, 132:12, 132:15, 133:4 cul-de-sacs ^[2] - 76:18, 76:19 culminated ^[1] - 94:8 culmination ^[1] - 90:15 current ^[2] - 38:3, 115:12 customarily ^[1] - 122:4 customary ^[3] - 123:15, 126:23, 145:16 cut ^[3] - 37:12, 53:18, 106:3 cutout ^[1] - 52:2 cuts ^[1] - 73:1
D				
daily ^[5] - 77:18, 81:13, 82:1, 82:5, 82:9 Dam ^[1] - 134:8 damage ^[6] - 46:21, 47:5, 65:25, 66:1, 66:2, 67:8 damaged ^[1] - 47:18 damn ^[1] - 27:3 dangerous ^[2] - 127:18, 127:20 dark ^[4] - 45:10, 45:12, 55:4, 55:25 darker ^[1] - 111:8 data ^[5] - 69:20, 114:18, 114:21, 114:22 date ^[2] - 153:5, 154:6 Date ^[1] - 154:25 dated ^[2] - 20:19, 129:17 Dated ^[1] - 153:19 Davey ^[1] - 113:24				

Davis [1] - 38:23 days [2] - 11:24, 56:3 DCA [2] - 129:20, 141:24 de [55] - 72:21, 76:4, 76:5, 76:8, 76:9, 76:11, 76:12, 76:13, 76:15, 76:18, 76:19, 76:23, 77:11, 77:12, 77:16, 77:19, 77:20, 77:21, 77:24, 78:2, 78:4, 78:21, 78:24, 79:3, 79:7, 79:11, 79:15, 79:21, 79:25, 80:2, 80:10, 80:24, 80:25, 81:10, 81:11, 81:14, 81:18, 82:2, 82:10, 103:17, 104:8, 106:19, 111:17, 129:5, 129:9, 129:18, 130:3, 130:10, 131:5, 132:12, 132:15, 133:4 deal [6] - 9:18, 30:6, 30:16, 34:15, 57:11 dealing [2] - 22:21, 31:14 dealt [1] - 120:12 debatable [1] - 23:15 debate [1] - 149:9 debated [1] - 23:2 December [3] - 93:3, 114:14, 115:2 decent [1] - 12:12 decide [4] - 71:10, 78:5, 85:19, 86:22 deciding [1] - 99:22 deciduous [1] - 56:1 decimate [1] - 13:5 decision [23] - 29:8, 29:12, 29:24, 30:1, 30:10, 73:5, 73:6, 83:19, 83:21, 84:4, 85:25, 93:2, 128:14, 144:14, 144:15, 148:2, 149:14, 149:23, 150:2, 150:7, 150:16, 150:21 decisions [2] - 29:7, 96:20 Declaratory [2] - 92:13, 92:14 decline [4] - 27:25, 58:8, 59:20, 60:25 declines [4] - 59:10, 60:17, 60:24, 61:10 declining [1] - 60:23 decrease [4] - 59:20, 61:11, 61:12, 61:13 decreases [2] - 59:2, 59:3	dedicated [1] - 151:24 dedication [1] - 147:23 deed [3] - 95:16, 103:9, 113:15 deem [1] - 114:2 deemed [1] - 71:4 deeply [1] - 75:14 deer [28] - 6:13, 7:22, 12:3, 12:6, 12:7, 12:8, 12:20, 12:23, 13:11, 13:13, 13:15, 13:24, 15:13, 15:15, 32:12, 32:13, 32:16, 32:17, 58:17, 71:23, 113:20, 114:3, 116:6, 116:16 defend [1] - 99:19 defending [1] - 86:1 deFeo [8] - 11:23, 32:12, 74:19, 113:22, 113:24, 114:7, 115:24, 116:4 DeFeo [17] - 6:13, 7:19, 8:2, 11:23, 12:11, 12:12, 15:2, 15:4, 36:23, 68:23, 69:5, 71:20, 71:22, 72:5, 74:19, 114:13, 139:7 DeFeo's [1] - 15:4 deFeo's [1] - 15:10 deferred [2] - 119:21, 120:2 defers [1] - 118:11 defined [1] - 104:24 defines [1] - 142:7 definition [1] - 110:10 degenerative [1] - 8:14 degradation [3] - 31:3, 31:5, 73:12 degrade [5] - 54:13, 54:17, 65:21, 66:21, 67:18 degraded [2] - 53:22, 63:19 degrading [2] - 8:13, 30:13 degree [3] - 12:16, 12:22, 47:2 Delaware [1] - 75:24 delayed [4] - 24:13, 24:20, 24:23, 26:12 deliberate [1] - 146:6 deliberating [1] - 151:13 delve [1] - 134:1 demonstrate [1] -	135:14 demonstrated [1] - 134:11 demonstration [3] - 64:25, 66:23, 71:8 demonstrative [3] - 48:9, 109:24, 125:3 denial [9] - 28:1, 104:7, 127:4, 127:16, 146:16, 147:5, 147:7, 147:9, 150:18 denials [1] - 147:1 denied [5] - 35:20, 84:12, 84:16, 85:14, 140:9 denies [1] - 27:12 dense [6] - 7:8, 7:16, 7:20, 7:25, 8:16, 13:1 denser [1] - 51:3 density [2] - 90:3, 128:12 deny [1] - 127:25 denying [2] - 28:12, 127:12 DEP [29] - 41:4, 44:12, 44:22, 115:8, 117:19, 118:5, 118:7, 118:11, 118:15, 119:4, 119:14, 119:15, 119:19, 119:21, 119:24, 120:3, 120:5, 120:6, 120:8, 120:13, 120:15, 122:4, 122:9, 140:1, 140:3, 140:12, 140:20, 145:8 Department [1] - 100:11 department [1] - 105:21 DEPARTMENT [1] - 1:1 departments [2] - 126:12, 126:22 depiction [3] - 62:22, 64:5, 64:23 deployed [1] - 137:13 deposit [1] - 40:2 depositing [1] - 62:3 deprived [1] - 44:17 derive [1] - 7:16 described [1] - 50:6 describes [1] - 56:23 DESCRIPTION [1] - 3:3 deserved [1] - 102:10 design [12] - 22:16, 93:13, 96:19, 98:21,	100:4, 123:19, 124:1, 135:11, 135:13, 136:19, 136:20, 140:5 designation [2] - 121:4, 121:14 designed [4] - 29:16, 119:4, 135:11, 135:18 desire [1] - 89:2 destroy [12] - 30:9, 46:20, 47:5, 61:15, 62:10, 66:21, 67:4, 67:6, 67:7, 70:8, 71:10, 73:16 destroyed [2] - 69:2, 71:18 destroying [1] - 30:12 destroys [1] - 66:15 destruction [5] - 65:7, 69:9, 71:13, 71:15, 73:12 destructive [1] - 68:8 detail [10] - 15:23, 45:5, 48:4, 103:22, 116:24, 117:8, 120:15, 120:21, 132:5, 134:2 detailed [2] - 117:15, 144:9 details [2] - 146:7, 147:10 detention [6] - 43:21, 43:25, 44:2, 45:22, 48:17, 52:22 determination [1] - 100:20 determine [4] - 17:5, 105:3, 123:24, 123:25 determined [8] - 97:25, 100:14, 105:9, 106:21, 116:9, 118:5, 120:12, 143:19 detriment [1] - 109:17 detrimental [2] - 90:24, 127:14 develop [6] - 4:6, 36:12, 67:18, 96:8, 109:3, 140:21 developable [1] - 93:22 developed [13] - 5:20, 8:10, 9:1, 32:1, 32:19, 54:11, 62:24, 63:7, 70:23, 118:1, 118:24, 134:14, 147:19 developer [9] - 9:6, 13:9, 33:25, 34:3, 37:3, 91:24, 92:5,	96:8, 123:4 developers [6] - 13:13, 74:3, 76:10, 109:10, 122:22, 142:1 developing [1] - 70:2 development [76] - 4:7, 13:8, 13:17, 24:19, 25:18, 35:24, 37:5, 48:21, 52:16, 52:17, 53:4, 53:5, 53:7, 54:7, 64:15, 65:5, 67:10, 68:12, 69:24, 70:11, 70:16, 70:18, 76:15, 76:20, 77:1, 79:11, 79:19, 80:9, 80:11, 80:22, 81:10, 81:23, 83:24, 84:1, 89:16, 90:1, 90:8, 90:23, 93:5, 95:6, 96:17, 96:21, 97:8, 97:18, 98:13, 98:19, 98:22, 99:2, 100:3, 100:15, 100:21, 101:1, 102:11, 103:5, 103:14, 103:25, 106:17, 106:23, 109:13, 112:23, 117:1, 117:11, 126:8, 129:22, 129:23, 129:24, 130:25, 131:3, 133:4, 135:22, 138:15, 140:15, 144:5, 146:2, 147:12 DEVELOPMENT [1] - 1:1 developments [4] - 81:14, 81:25, 98:17, 109:11 develops [1] - 42:18 deviate [1] - 27:18 devises [1] - 144:22 DeVito [24] - 5:23, 6:6, 6:8, 7:24, 14:3, 14:6, 14:23, 15:9, 31:20, 36:24, 37:24, 48:8, 49:11, 49:19, 51:25, 54:1, 66:4, 66:9, 67:15, 74:13, 137:24, 138:6, 138:15, 138:17 deVito [1] - 137:23 deVito's [1] - 6:16 dewater [1] - 135:4 diagram [1] - 45:3 dialogue [2] - 19:1, 21:23 diameter [1] - 137:16 DIANA [1] - 2:6 die [3] - 26:5, 68:2
---	---	---	---	---

difference [3] - 27:1, 27:2, 27:3 differences [1] - 110:14 different [20] - 10:1, 35:12, 38:14, 43:13, 44:16, 51:3, 51:6, 51:8, 54:20, 56:3, 58:2, 72:9, 75:16, 82:13, 123:21, 133:23, 137:13, 146:19, 149:16 differently [2] - 96:7, 96:10 difficult [3] - 38:11, 127:20, 148:2 difficulty [2] - 72:14, 132:1 dimension [1] - 15:21 diminish [1] - 64:18 dinosaur [1] - 46:16 direct [8] - 21:11, 43:4, 43:15, 48:25, 59:22, 119:4, 131:19, 139:17 directed [1] - 119:13 direction [9] - 12:1, 42:14, 42:21, 55:15, 55:16, 111:13, 111:15, 116:1, 149:20 directly [2] - 41:2, 42:24 director [1] - 141:9 dirty [1] - 87:21 disagree [3] - 16:1, 73:7, 76:17 disagreed [2] - 133:5, 140:5 disappear [3] - 54:13, 58:8, 67:25 disappeared [1] - 71:7 discount [1] - 114:17 discounted [3] - 114:16, 120:1, 120:8 discrete [1] - 82:24 discretion [2] - 103:20, 147:15 discretionary [1] - 144:14 discussed [2] - 133:16, 149:18 discusses [1] - 47:24 discussion [5] - 10:15, 21:14, 63:2, 63:4, 150:6 discussions [1] - 139:3	disingenuous [2] - 121:22, 126:16 dismissal [1] - 97:9 disposal [1] - 84:5 dispute [2] - 47:15, 78:10 disputed [1] - 99:5 disputes [2] - 76:8, 81:15 disregard [2] - 116:18, 142:5 disrespect [1] - 15:13 distance [1] - 108:7 district [10] - 33:4, 33:13, 33:17, 34:6, 34:14, 35:13, 35:18, 52:18, 99:1, 104:16 District [2] - 100:12, 145:11 districts [1] - 31:1 disturb [2] - 95:7, 108:11 disturbance [32] - 32:19, 36:2, 36:6, 40:25, 48:12, 48:14, 48:15, 48:16, 48:22, 52:5, 52:21, 53:6, 53:16, 53:19, 53:25, 54:3, 55:7, 90:4, 95:6, 103:6, 103:7, 108:3, 108:6, 109:19, 110:16, 112:23, 118:20, 132:4, 135:9, 138:12, 138:13, 143:21 disturbed [3] - 36:3, 50:18, 90:2 disturbing [3] - 95:13, 113:7, 116:14 diverted [7] - 41:10, 44:2, 44:7, 44:9, 45:1, 45:21, 45:23 Divide [2] - 55:9, 55:10 divided [1] - 59:6 Division [9] - 83:15, 83:19, 83:21, 83:22, 123:24, 127:8, 127:22, 128:7, 140:6 Divisions [1] - 124:4 dizzy [1] - 53:12 DO [1] - 153:7 Doctrine [1] - 30:14 document [9] - 36:11, 37:2, 40:9, 60:9, 114:9, 114:10, 137:2, 150:19, 150:23 documents [5] - 38:21, 40:3, 72:8,	132:24, 151:17 dollars [4] - 9:20, 13:11, 13:22, 47:12 domesticate [1] - 62:5 done [16] - 6:22, 7:2, 17:8, 17:9, 34:21, 35:15, 71:1, 94:3, 122:1, 122:5, 122:7, 135:21, 135:24, 141:18, 148:10, 148:16 Donuts [1] - 127:6 door [6] - 22:12, 23:8, 23:10, 24:4, 137:10, 137:13 dots [1] - 61:8 dotted [1] - 27:18 double [4] - 61:14, 77:19, 79:6 doubling [1] - 78:6 doubt [4] - 19:17, 88:6, 146:1, 147:12 doubts [1] - 76:24 down [18] - 20:14, 22:2, 26:18, 29:10, 38:2, 42:11, 43:1, 43:18, 50:5, 53:7, 57:18, 59:4, 59:8, 61:2, 66:14, 73:2, 117:4, 120:23 downward [1] - 61:19 Dr [38] - 5:23, 6:6, 6:8, 6:15, 7:24, 10:14, 14:3, 14:6, 14:23, 15:9, 31:20, 36:24, 37:24, 49:11, 49:19, 51:24, 54:1, 54:18, 55:18, 59:24, 60:8, 61:22, 62:13, 66:3, 66:9, 66:23, 67:15, 69:19, 70:14, 71:8, 71:18, 71:20, 71:22, 74:13, 74:18, 86:7, 138:5 drain [2] - 29:11, 119:25 drainage [17] - 45:8, 45:11, 45:13, 45:15, 45:18, 45:25, 46:3, 46:5, 55:2, 55:4, 55:7, 55:8, 55:10, 55:13, 55:15, 84:5, 145:7 drastically [1] - 60:23 drawing [13] - 37:16, 40:23, 48:8, 48:9, 48:13, 48:20, 49:24, 50:20, 64:7, 65:11,	73:25, 78:15, 149:6 drawings [4] - 32:4, 45:13, 74:1, 144:9 drawn [1] - 149:8 dries [1] - 66:8 drink [1] - 44:15 drinking [3] - 41:8, 65:19, 67:8 drive [4] - 33:4, 33:6, 33:10, 33:19 DRIVE [2] - 2:7, 2:10 Drive [21] - 24:16, 56:10, 90:7, 90:10, 103:11, 103:14, 103:25, 104:15, 106:6, 106:10, 106:19, 106:20, 106:22, 111:12, 125:9, 125:13, 126:11, 129:5, 130:2, 141:5 drives [1] - 25:21 driveways [3] - 33:14, 33:15 drop [3] - 21:25, 22:6, 134:24 dropped [1] - 29:11 dropping [2] - 22:1, 66:14 dry [7] - 66:3, 66:5, 66:11, 66:12, 67:23, 68:2 due [2] - 94:9, 108:6 Dunkin [2] - 127:6, 127:21 during [20] - 63:23, 88:15, 88:25, 90:16, 94:4, 97:17, 101:2, 102:1, 102:8, 110:17, 112:17, 120:5, 120:10, 135:21, 139:3, 140:2, 146:14, 149:22, 150:6, 150:17 duties [3] - 9:11, 88:9, 99:14 duty [16] - 10:9, 10:10, 10:12, 10:24, 17:5, 24:7, 26:22, 28:3, 44:19, 65:9, 73:17, 73:19, 89:15, 145:23, 146:5, 147:17 dwellings [1] - 22:24	early [2] - 20:25, 21:14 easement [3] - 90:8, 121:17, 125:14 easier [1] - 145:15 easily [1] - 91:9 east [13] - 55:16, 109:21, 109:23, 111:12, 111:25, 112:1, 112:4, 112:8, 118:20, 119:1, 119:2, 134:23, 135:9 east-southeast [1] - 111:12 eastern [23] - 8:6, 8:8, 32:17, 42:7, 42:8, 43:4, 43:5, 44:8, 45:24, 45:25, 46:4, 46:6, 55:4, 55:5, 95:8, 102:19, 110:21, 111:14, 112:24, 118:19, 119:6, 131:10 Eastern [1] - 58:24 eat [2] - 15:16, 73:3 ecological [12] - 14:18, 44:20, 44:24, 47:20, 53:23, 59:21, 60:12, 65:6, 69:8, 72:1, 73:11, 138:22 ecologically [1] - 37:24 ecologist [3] - 14:8, 14:24, 139:24 ecology [9] - 14:5, 14:6, 15:8, 46:21, 60:1, 61:20, 61:21, 66:22, 137:24 economic [1] - 69:8 Ed [1] - 38:23 edge [36] - 22:7, 50:8, 50:9, 50:18, 50:21, 50:23, 50:24, 51:7, 51:23, 52:2, 52:3, 52:4, 52:9, 52:13, 53:14, 53:18, 53:20, 53:21, 54:1, 54:2, 54:5, 54:12, 54:15, 54:16, 54:17, 54:21, 63:20, 63:21, 66:1, 138:1 edge/open [1] - 58:9 effect [5] - 90:25, 104:8, 131:3, 142:24, 143:18 effort [1] - 91:22 efforts [2] - 88:7, 94:9 eggs [2] - 62:3 egress [16] - 21:3, 21:4, 21:8, 21:10,
---	--	---	--	--

E

e-mail [3] - 19:2, 19:11

Eagle [7] - 90:6, 90:11, 123:6, 128:17, 129:6, 132:20, 132:21

22:13, 23:9, 24:11, 24:24, 25:9, 26:13, 80:7, 103:10, 104:10, 128:4, 128:15, 128:25 eight [1] - 93:1 EIS [2] - 139:1, 139:13 either [3] - 53:17, 102:17, 150:16 elderly [2] - 25:5, 37:23 electric [1] - 122:16 element [1] - 98:11 elements [4] - 83:25, 84:4, 84:11, 98:17 eliminate [9] - 11:6, 60:11, 61:1, 74:11, 96:13, 96:17, 101:4, 114:5, 130:19 eliminated [1] - 108:11 eliminating [1] - 66:2 elsewhere [2] - 49:7, 70:12 emergencies [1] - 105:8 emergency [43] - 21:4, 21:7, 21:15, 22:18, 23:1, 23:18, 24:11, 24:16, 24:17, 25:20, 25:21, 26:3, 32:25, 33:19, 34:7, 78:19, 79:8, 80:7, 90:8, 103:18, 103:20, 104:5, 104:10, 104:14, 104:19, 104:23, 105:2, 105:4, 105:6, 105:9, 105:11, 105:20, 105:23, 105:25, 106:7, 106:10, 106:13, 106:22, 111:11, 130:4, 130:8, 130:15, 130:22 emotional [3] - 63:24, 75:3, 75:13 employed [1] - 113:24 employee [2] - 153:8, 153:10 enacted [2] - 142:18, 142:19 encourage [1] - 111:18 end [11] - 5:3, 69:13, 72:6, 72:24, 74:24, 85:16, 85:18, 89:7, 94:15, 125:12, 151:21 endangered [3] - 71:14, 138:19, 139:19	endorse [2] - 39:8, 40:5 endorsed [1] - 91:6 endorses [1] - 39:12 endorsing [1] - 122:22 ends [3] - 52:13, 111:16, 131:24 energy [1] - 31:1 enforce [1] - 115:5 engaged [1] - 89:5 Engineer [1] - 1:12 engineer [29] - 18:12, 18:13, 19:3, 19:6, 19:24, 20:1, 20:2, 20:8, 25:12, 38:16, 72:12, 77:13, 77:22, 82:16, 90:17, 95:11, 107:20, 118:6, 120:17, 123:13, 123:16, 124:23, 129:10, 129:17, 135:17, 139:17, 140:10, 145:24 engineered [4] - 108:22, 110:9, 110:11, 110:15 engineering [23] - 16:12, 16:19, 17:14, 19:18, 19:21, 32:4, 40:10, 40:23, 43:15, 45:12, 48:7, 48:8, 48:13, 65:11, 74:1, 78:15, 100:14, 108:24, 126:12, 126:21, 132:25, 133:21, 135:12 Engineering [1] - 38:9 engineers [9] - 18:23, 19:9, 19:23, 26:14, 82:18, 90:18, 122:8, 133:15, 145:23 enlarge [1] - 40:20 enormous [5] - 8:20, 34:1, 52:18, 62:23, 79:3 ensue [1] - 69:9 ensure [1] - 61:16 enter [4] - 62:2, 62:9, 77:5, 137:12 entered [3] - 143:16, 147:7, 148:22 entering [3] - 24:2, 24:18, 54:21 enthusiasm [1] - 89:14 entire [10] - 13:6, 14:8, 23:24, 24:1, 32:23, 36:6, 63:3,	71:2, 95:3, 110:24 entirely [4] - 43:24, 44:16, 63:13, 85:9 entirety [3] - 36:3, 66:21, 73:12 entitled [1] - 109:2 entity [6] - 8:15, 14:24, 38:6, 71:17, 104:16, 144:22 entrance [1] - 25:21 entrances [1] - 25:16 entry [3] - 22:11, 23:7, 137:10 environment [4] - 30:5, 30:23, 31:3, 31:5 Environmental [5] - 38:16, 38:17, 38:18, 100:11 environmental [20] - 6:18, 11:6, 11:9, 11:18, 12:16, 15:17, 15:21, 39:11, 44:24, 71:19, 71:21, 73:11, 74:14, 90:21, 97:14, 100:5, 132:2, 138:25, 139:8, 149:17 environmentally [3] - 14:1, 29:19, 141:16 envision [1] - 68:4 equally [2] - 5:12, 71:15 equipment [2] - 135:8, 136:1 equivalent [2] - 78:12, 112:9 era [1] - 70:13 ergo [1] - 114:24 ERIC [2] - 153:1, 153:15 erode [1] - 67:24 erosion [1] - 126:18 ERROR [1] - 154:8 errors [1] - 154:6 escape [1] - 62:7 escrow [1] - 125:23 especially [1] - 135:16 ESQ [3] - 2:2, 2:6, 2:9 ESQS [2] - 2:2, 2:6 essence [1] - 13:16 essential [5] - 96:18, 98:1, 100:22, 116:11, 143:24 essentially [7] - 9:8, 12:2, 36:1, 36:4, 36:5, 100:19, 120:2 Essex [8] - 4:4, 36:11, 38:18, 38:19,	93:4, 93:14, 100:12, 126:19 ESSEX [1] - 1:6 Essex-Hudson [1] - 126:19 established [2] - 87:23, 144:11 establishes [1] - 107:8 estimate [2] - 114:12, 116:2 estimated [3] - 113:21, 114:1, 114:7 estimates [1] - 144:10 estuary [1] - 50:16 etc [1] - 50:12 ethnic [1] - 75:8 European [1] - 60:21 Europeans [1] - 8:6 evade [1] - 82:14 evaluate [4] - 19:4, 20:4, 89:15, 115:23 evaluated [1] - 120:16 evaluation [4] - 18:14, 19:9, 19:10, 136:9 evening [6] - 4:9, 4:22, 89:18, 133:19, 137:23, 151:18 event [3] - 28:10, 136:7, 145:12 events [1] - 136:5 evergreen [1] - 51:13 everywhere [3] - 6:14, 44:5, 131:9 evidence [30] - 15:19, 15:23, 17:15, 17:19, 23:14, 25:1, 26:15, 36:14, 37:15, 47:15, 69:4, 69:7, 71:19, 71:22, 72:2, 73:13, 73:15, 74:17, 83:11, 84:19, 85:1, 85:2, 85:24, 87:25, 130:13, 136:7, 143:12, 149:17, 149:18 evidentiary [1] - 11:2 ex [1] - 20:3 exact [2] - 31:25, 79:5 exactly [10] - 5:2, 5:6, 24:14, 27:17, 36:25, 50:10, 50:19, 55:14, 77:8, 82:14 examination [5] - 11:25, 16:24, 19:14, 20:23, 37:19	example [19] - 10:3, 38:7, 54:19, 56:7, 58:16, 58:17, 59:2, 59:21, 61:5, 61:13, 61:23, 62:7, 63:20, 63:21, 64:19, 67:5, 68:7, 83:2, 84:5 excavating [1] - 135:3 excavation [2] - 135:4, 135:8 exceed [4] - 78:10, 107:16, 129:14 except [10] - 6:3, 24:24, 39:17, 80:7, 89:21, 91:11, 108:24, 109:22, 131:10, 141:20 exception [25] - 18:1, 78:21, 78:24, 79:7, 79:16, 79:25, 80:25, 96:1, 103:17, 103:24, 104:3, 104:5, 104:8, 106:20, 130:4, 130:6, 130:10, 130:15, 130:23, 131:1, 131:5, 136:21, 143:4, 144:2, 146:2 excerpt [1] - 29:6 excess [2] - 50:25, 81:25 excessive [4] - 96:25, 97:2, 114:3, 114:6 exchange [2] - 13:8, 113:19 exclusive [1] - 139:25 excuse [2] - 11:3, 45:17 executed [2] - 93:12, 93:21 executive [1] - 141:9 exempt [3] - 92:1, 100:4, 100:15 exemptions [1] - 90:21 exempts [1] - 138:24 exercise [1] - 128:10 exhibit [6] - 28:25, 36:9, 41:16, 48:9, 63:3, 72:7 EXHIBIT [1] - 3:3 exhibits [4] - 8:18, 31:20, 48:6, 109:25 exist [6] - 34:11, 37:4, 55:2, 80:15, 125:20, 130:7 existed [1] - 68:5 existing [28] - 42:1,
--	--	--	---	--

43:9, 45:18, 49:22, 51:9, 51:14, 51:24, 52:5, 52:25, 53:3, 53:20, 54:9, 62:14, 76:6, 76:20, 77:1, 77:8, 77:21, 78:4, 79:1, 79:4, 79:21, 79:24, 81:24, 83:10, 108:1, 129:23, 130:24 exists [13] - 6:2, 35:19, 42:2, 50:4, 79:23, 80:15, 80:16, 80:17, 80:20, 118:18, 123:11, 125:14 exiting [1] - 133:20 exotic [2] - 60:15, 62:2 expand [2] - 51:19, 79:21 expands [1] - 76:14 expansion [1] - 78:4 expedite [1] - 96:20 expeditiously [1] - 122:22 expense [2] - 30:4, 30:19 expensive [1] - 34:2 experience [3] - 5:13, 18:13, 87:16 experienced [1] - 48:5 experiences [1] - 5:4 experiencing [1] - 40:1 expert [17] - 12:14, 16:18, 16:19, 17:10, 18:8, 58:4, 71:21, 81:6, 113:22, 113:25, 119:16, 119:21, 120:2, 132:25, 133:22, 135:17, 141:1 expertise [2] - 15:8, 15:14 experts [7] - 14:5, 16:1, 16:20, 19:4, 69:5, 146:10, 148:16 explain [3] - 23:4, 83:7, 98:6 explained [3] - 79:20, 107:25, 130:5 explains [1] - 110:1 explanation [1] - 109:25 explicitly [1] - 138:24 exposed [2] - 108:8, 108:15 exposure [5] - 96:2, 107:15, 107:22, 108:10, 141:21	expressed [1] - 39:22 extend [3] - 77:9, 102:22, 134:12 extended [2] - 139:3, 140:2 extends [1] - 102:23 extension [2] - 33:6, 117:20 extensions [1] - 126:10 extent [1] - 15:11 exterior [3] - 52:4, 53:23, 60:3 extra [2] - 78:22, 81:1 extraordinarily [1] - 38:6 extraordinary [3] - 40:2, 87:18, 88:6 extreme [4] - 38:3, 105:23, 106:12, 136:5 extremely [3] - 5:16, 112:3, 136:15 Eyed [1] - 59:17	faith [6] - 101:3, 102:25, 114:5, 123:12, 133:13, 145:23 fall [6] - 7:21, 21:25, 22:5, 51:12, 70:15, 135:1 falls [2] - 118:22, 129:16 familiar [5] - 55:9, 64:24, 113:10, 114:19, 141:19 families [4] - 34:8, 56:24, 87:6 family [15] - 4:25, 33:13, 34:6, 36:13, 58:18, 58:19, 90:9, 93:11, 102:12, 104:15, 104:18, 106:1, 141:5, 146:18, 146:20 famous [1] - 88:10 far [3] - 13:2, 32:11, 150:19 farm [2] - 95:22, 140:7 farming [1] - 58:18 farmland [1] - 71:4 farms [1] - 62:7 farr [1] - 74:13 Farr [4] - 14:3, 15:9, 66:4, 66:10 fauna [3] - 55:22, 67:4, 67:22 favor [5] - 39:4, 39:6, 39:7, 39:17, 98:9 favorably [2] - 107:1, 126:14 FAX [1] - 1:25 fearsome [1] - 4:20 feasibility [6] - 82:25, 83:8, 84:8, 84:20, 85:2, 85:10 feasible [2] - 124:2, 149:7 features [3] - 66:15, 90:1, 96:13 February [1] - 126:9 FEBRUARY [1] - 1:2 feed [2] - 79:13, 79:14 feeding [2] - 67:2, 79:17 feeds [3] - 73:4, 80:3 feet [16] - 16:9, 50:23, 51:6, 53:14, 53:22, 54:3, 107:9, 107:10, 107:11, 107:13, 109:20, 112:12, 112:13,	112:14, 112:20, 134:24 fellow [1] - 9:16 felt [4] - 16:25, 35:8, 35:10, 90:22 fence [8] - 12:6, 12:20, 12:23, 15:12, 15:15, 32:13, 32:16, 32:17 fences [4] - 32:12, 68:24, 71:23, 74:19 fencing [9] - 12:3, 13:11, 13:13, 113:20, 116:6, 116:15, 116:16 fend [1] - 10:9 few [5] - 8:19, 8:21, 29:1, 79:2, 91:9 fiction [1] - 82:10 field [5] - 14:7, 15:8, 19:5, 84:17, 149:8 Field [5] - 83:16, 83:17, 123:20, 124:13, 149:7 fight [1] - 14:17 figurative [1] - 89:1 figure [4] - 37:20, 81:16, 86:25 figured [1] - 14:13 figures [2] - 31:25, 79:5 file [3] - 26:9, 26:19 filed [10] - 20:19, 92:4, 94:14, 110:18, 130:9, 140:6, 140:8, 145:3, 147:3, 150:22 FINAL [1] - 1:4 final [7] - 4:10, 29:21, 94:25, 137:18, 144:8, 144:10, 148:3 Final [1] - 92:19 finally [8] - 106:9, 120:10, 128:24, 130:23, 132:9, 136:14, 141:7, 146:13 financially [1] - 153:11 fine [4] - 12:17, 13:3, 15:7, 102:7 finger [1] - 105:25 fire [22] - 20:17, 20:18, 21:10, 22:5, 22:6, 22:8, 22:18, 23:3, 23:10, 23:11, 23:18, 23:20, 24:3, 25:2, 25:15, 26:10, 26:12, 80:5, 105:21, 125:20, 137:1, 137:19 Fire [1] - 20:20 Firefighter [1] - 106:2	firefighters [1] - 23:21 firefighting [1] - 84:24 fires [1] - 24:4 firm [1] - 40:10 first [14] - 4:13, 8:7, 22:14, 35:2, 53:18, 60:19, 77:11, 88:19, 104:2, 110:4, 119:8, 137:7, 147:1, 148:14 FISHMAN [3] - 1:23, 153:1, 153:15 fissure [1] - 135:5 fits [1] - 138:8 five [6] - 26:5, 81:25, 82:9, 86:13, 89:24, 94:9 five-minute [1] - 86:13 flat [2] - 112:7, 112:8 flattens [1] - 119:1 flatter [1] - 111:24 flawed [4] - 114:15, 114:22, 114:23 fleeing [2] - 22:13, 23:9 flooding [4] - 39:25, 66:9, 67:24, 117:11 floodplain [1] - 132:3 floor [3] - 4:13, 7:25, 8:1 flow [4] - 44:6, 119:13, 120:21, 128:3 flowing [1] - 134:22 flows [2] - 120:22, 120:24 fly [1] - 91:23 FM [1] - 121:14 focus [2] - 98:19, 98:21 follow [4] - 72:19, 111:7, 148:1 followed [2] - 11:11, 139:14 following [2] - 29:13, 56:16 follows [3] - 107:23, 111:14, 112:6 food [1] - 58:22 foot [1] - 128:25 FOR [1] - 154:8 forage [1] - 58:16 foraging [1] - 58:21 forbid [2] - 26:4, 26:16 force [4] - 27:20, 30:9, 79:16, 121:16 forced [1] - 46:18 foregoing [1] - 153:3
--	---	--	---	--

forest [131] - 5:21, 6:7, 7:7, 7:17, 7:20, 8:1, 8:2, 8:3, 8:4, 8:12, 8:13, 8:14, 8:16, 9:3, 12:6, 12:7, 13:1, 13:5, 13:6, 13:19, 15:12, 16:5, 30:9, 30:12, 31:18, 31:19, 31:21, 31:24, 41:17, 42:2, 49:4, 49:11, 49:13, 49:16, 49:18, 49:19, 49:22, 50:4, 50:7, 50:9, 50:18, 50:19, 50:24, 51:1, 51:2, 51:8, 51:9, 51:13, 51:14, 51:15, 51:23, 51:24, 52:2, 52:11, 52:23, 52:25, 53:3, 53:4, 53:5, 53:6, 53:7, 53:15, 53:18, 53:21, 53:24, 54:4, 54:6, 54:8, 54:14, 54:16, 54:18, 54:25, 55:25, 57:1, 57:3, 57:6, 57:9, 57:13, 57:16, 57:17, 57:24, 58:13, 59:2, 59:4, 59:10, 59:19, 59:20, 60:9, 60:16, 60:23, 60:25, 61:1, 61:5, 61:8, 61:9, 61:15, 61:25, 62:4, 62:15, 62:23, 64:13, 64:19, 64:21, 64:24, 65:3, 65:21, 66:1, 67:16, 68:1, 68:11, 68:20, 68:23, 69:1, 71:16, 72:2, 73:13, 88:16, 90:5, 102:18, 113:7, 114:1, 114:2, 137:24, 138:1, 147:14 forested [3] - 64:14, 65:3, 71:4 forester [2] - 14:8, 14:24 foresters [1] - 113:23 forestry [5] - 12:14, 12:18, 14:7, 15:9, 137:24 forests [8] - 14:10, 14:25, 29:22, 29:24, 50:7, 60:3, 60:5, 64:1 forever [7] - 90:3, 95:15, 103:8, 113:15, 116:13, 143:23, 147:14 forget [1] - 66:10 forgive [2] - 7:3, 75:13 form [1] - 65:17	former [1] - 95:11 forms [1] - 55:13 forth [9] - 11:19, 87:19, 89:22, 97:18, 109:6, 122:13, 134:5, 146:7, 153:6 fortunately [1] - 123:10 forward [6] - 35:17, 35:21, 39:8, 49:2, 72:1, 147:23 fought [2] - 14:15, 94:11 foundation [4] - 96:2, 107:22, 108:10, 141:21 Foundation [1] - 141:10 foundations [2] - 107:16, 108:8 four [14] - 12:24, 22:9, 22:16, 23:17, 23:20, 56:2, 59:15, 90:15, 97:17, 100:22, 107:14, 119:11, 133:20, 143:21 four-year [1] - 100:22 fourth [2] - 127:18, 143:22 Fourth [1] - 92:12 fragile [1] - 46:8 fragmentary [2] - 13:7, 13:24 frame [1] - 68:3 framework [1] - 144:25 Franklin [5] - 83:16, 83:18, 84:17, 123:21 frankly [6] - 15:13, 30:5, 40:14, 42:2, 66:10, 85:17 free [1] - 147:24 freshwater [1] - 140:16 front [12] - 22:12, 23:8, 23:10, 23:11, 23:20, 24:4, 29:4, 80:18, 105:24, 137:10, 137:12 fueled [1] - 89:2 fulfilling [1] - 94:24 fulfills [1] - 99:6 full [6] - 56:2, 94:18, 103:13, 108:23, 125:15, 135:11 fully [20] - 9:1, 89:22, 89:24, 96:3, 108:22, 110:9, 110:11, 110:14, 113:8,	117:18, 118:1, 123:8, 128:12, 137:3, 138:11, 141:22, 143:3, 144:13, 145:8, 146:2 function [1] - 135:16 functions [1] - 53:23 Fund [2] - 14:9, 14:15 fundamental [9] - 10:24, 20:15, 59:25, 63:5, 65:7, 67:25, 73:19, 83:25, 84:11 fundamentally [1] - 81:12 funny [1] - 4:24 FURTHER [1] - 153:7 furthermore [1] - 106:6 future [4] - 95:17, 102:24, 106:21, 107:1	G GACCIONE [1] - 2:6 gain [1] - 35:1 Gallagher [8] - 14:4, 15:10, 45:3, 45:5, 45:14, 47:7, 48:3, 139:23 gallagher [2] - 46:1, 74:13 garbage [4] - 114:20, 114:21 GARY [1] - 1:13 GARY-ADAMS [1] - 1:13 gas [1] - 122:16 gated [3] - 103:18, 104:4, 130:4 general [10] - 5:13, 9:1, 11:9, 16:6, 32:3, 99:15, 100:3, 106:13, 138:12, 140:16 generally [7] - 6:9, 71:3, 103:23, 111:14, 112:7, 114:16, 117:12 generated [2] - 129:19, 129:22 generating [2] - 96:13, 128:8 generation [1] - 68:25 generative [4] - 96:22, 97:7, 101:4, 114:5 genetic [1] - 60:6 GENIECE [1] - 1:13 gentleman [1] - 4:2 gentlemen [3] - 4:9,	86:16, 151:2 Geof [1] - 16:11 geography [1] - 78:1 Geological [1] - 71:1 geology [1] - 140:25 geostructural [3] - 16:7, 19:21, 23:14 geotech [1] - 146:11 geotechnical [3] - 133:18, 133:21, 135:16 giant [1] - 77:23 GIGO [1] - 114:20 given [7] - 34:14, 35:9, 37:7, 37:20, 62:12, 85:13, 148:17 glasses [1] - 117:7 gleaned [1] - 124:7 gnarled [1] - 51:5 goal [4] - 13:2, 89:2, 108:5, 129:6 goals [1] - 95:5 god [1] - 26:4 God [1] - 26:16 Goldman [3] - 147:6, 147:11, 149:12 Goldman's [3] - 149:15, 149:20, 149:23 Goll [1] - 16:11 govern [2] - 76:9, 92:2 governed [1] - 10:13 governing [7] - 30:1, 30:2, 30:11, 31:9, 91:8, 128:11, 132:18 Governing [9] - 10:8, 101:2, 101:7, 105:3, 142:6, 142:8, 142:10, 143:17, 144:22 government [1] - 39:5 governmental [1] - 122:23 governments [1] - 39:20 governs [2] - 75:22, 101:15 gracious [1] - 11:25 grading [3] - 108:13, 111:6, 134:21 gradually [2] - 42:16, 64:18 grant [8] - 91:12, 106:19, 144:6, 144:8, 144:18, 144:24, 145:20, 148:3 granted [12] - 84:9, 84:15, 92:19, 103:24, 104:3, 104:4, 104:5,	120:3, 120:8, 126:20, 141:23, 144:20 granting [9] - 104:3, 104:7, 108:18, 109:8, 109:11, 131:1, 140:20, 142:1, 146:12 grants [1] - 130:3 graph [1] - 60:18 graphic [1] - 25:1 graphs [1] - 59:24 gravity [3] - 42:10, 42:20, 120:21 gray [3] - 31:13, 35:23, 51:14 great [8] - 12:13, 14:18, 29:21, 34:15, 92:18, 106:12, 117:6, 124:5 Great [4] - 14:12, 14:13, 14:17, 46:10 greater [2] - 37:10, 49:13 Green [1] - 124:23 green [18] - 8:25, 45:10, 45:12, 49:1, 50:1, 50:22, 51:11, 51:23, 53:15, 54:5, 55:5, 55:25, 64:6, 68:10, 71:4, 108:15, 149:5 Greene [3] - 84:22, 85:8, 113:23 Greene's [1] - 83:5 ground [3] - 111:24, 112:8, 112:14 groundwater [1] - 119:25 group [1] - 91:13 Group [1] - 144:15 grout [1] - 135:5 grow [4] - 15:16, 29:20, 50:16, 51:3 growing [3] - 12:20, 76:12, 76:15 grows [4] - 7:23, 8:1, 54:16, 76:13 growth [15] - 5:21, 8:4, 8:15, 12:25, 13:19, 63:4, 63:6, 64:1, 67:10, 68:9, 68:15, 68:20, 69:1, 71:15, 141:2 GUARINO [1] - 1:8 Guarino [1] - 87:2 Guarino's [1] - 133:13 guess [3] - 86:24, 101:7, 114:13 guidance [2] - 35:9, 151:16
---	---	---	--	--	--

guide ^[1] - 83:24 guidelines ^[1] - 132:17 guiding ^[1] - 70:17 gun ^[5] - 9:15, 9:17, 28:19, 46:14, 92:9 guy ^[1] - 12:12	17:16, 17:18, 20:12, 27:5, 68:1, 73:20, 84:6, 85:22, 130:18, 143:5, 144:2, 144:23 healthy ^[1] - 8:3 hear ^[7] - 4:9, 47:6, 47:8, 72:15, 83:6, 87:25 heard ^[30] - 5:23, 8:5, 35:15, 36:17, 38:12, 38:23, 39:1, 40:1, 40:4, 41:3, 54:18, 58:5, 63:23, 65:20, 66:3, 72:15, 74:17, 74:18, 83:5, 83:10, 84:22, 88:4, 88:15, 88:25, 116:25, 117:10, 120:18, 141:19, 147:3 hearing ^[6] - 88:19, 92:23, 94:23, 119:8, 119:22, 152:1 hearings ^[8] - 39:16, 87:24, 94:4, 99:20, 102:3, 112:19, 120:11, 133:17 heart ^[1] - 106:4 heavy ^[2] - 13:10, 136:15 height ^[5] - 6:24, 7:1, 96:24, 107:11, 107:14 held ^[4] - 9:15, 134:7, 144:19, 151:22 hell ^[2] - 80:25, 88:14 help ^[2] - 81:2, 106:3 hereby ^[1] - 153:2 herein ^[2] - 100:6, 100:7 hereinbefore ^[1] - 153:6 hereto ^[1] - 154:23 herring ^[1] - 105:13 hide ^[1] - 113:6 high ^[8] - 29:23, 29:25, 42:12, 61:7, 61:8, 127:17, 128:9, 131:6 high-rise ^[2] - 29:23, 29:25 higher ^[3] - 37:17, 62:17, 114:9 highest ^[2] - 67:13, 67:14 HIGHLANDS ^[1] - 1:6 Highlands ^[5] - 4:4, 36:11, 93:5, 93:14, 138:3 highlights ^[1] - 35:25 highly ^[2] - 23:15,	133:25 Highways ^[1] - 127:10 hiked ^[1] - 51:4 himself ^[2] - 26:10, 26:12 hired ^[4] - 11:23, 12:1, 12:11, 18:13 historic ^[1] - 30:25 historically ^[3] - 14:15, 63:1, 92:10 history ^[2] - 8:6, 146:24 hit ^[1] - 36:5 hold ^[6] - 68:1, 78:5, 99:22, 148:8 holding ^[1] - 127:23 home ^[3] - 17:3, 33:13, 34:6 homes ^[6] - 36:13, 104:18, 104:22, 106:2, 141:5, 146:18 hone ^[3] - 57:4, 60:17, 65:15 honestly ^[1] - 20:13 hook ^[1] - 125:19 Hoover ^[1] - 134:8 hope ^[2] - 28:13, 31:15 hopefully ^[2] - 12:8 hopes ^[1] - 147:13 horrible ^[1] - 68:12 horse ^[1] - 8:9 hose ^[1] - 137:16 hoses ^[1] - 137:13 hour ^[1] - 56:7 hours ^[4] - 25:4, 25:8, 127:21 house ^[5] - 23:20, 33:15, 62:21, 63:8, 106:4 houses ^[3] - 51:17, 52:7, 80:18 Housing ^[3] - 92:3, 92:24, 96:12 housing ^[30] - 9:11, 27:1, 29:10, 30:3, 30:4, 30:10, 30:19, 63:13, 64:15, 68:19, 90:19, 91:4, 94:7, 96:9, 96:11, 96:20, 97:8, 97:22, 98:11, 98:16, 98:17, 98:22, 99:3, 101:10, 103:3, 109:10, 109:12, 115:16, 122:21, 142:1 Howell ^[10] - 21:5, 24:16, 25:22, 90:9, 104:15, 106:6, 106:10, 106:22,	111:12, 141:5 hubs ^[1] - 64:5 Hudson ^[2] - 100:12, 126:19 Hudson-Essex ^[1] - 100:12 human ^[2] - 14:21, 58:18 hundred ^[3] - 13:10, 13:22, 64:15 hundreds ^[6] - 13:23, 22:21, 34:8, 34:9, 34:17, 47:12 hunt ^[1] - 58:16 hunting ^[1] - 58:21 HUTT ^[1] - 2:2 hydrants ^[1] - 125:20 hydric ^[1] - 42:17 Hydro ^[5] - 40:10, 45:4, 119:17, 120:4, 134:14 Hydro's ^[5] - 118:12, 120:1, 120:7, 134:6, 136:2 hydrology ^[3] - 14:5, 40:9, 72:2	127:14, 128:14 impacts ^[4] - 40:18, 50:15, 50:25, 55:22 impaired ^[1] - 13:8 impeded ^[1] - 25:14 impermeable ^[1] - 32:23 impervious ^[1] - 96:25 implicated ^[2] - 41:2, 43:7 implications ^[1] - 44:20 implicitly ^[1] - 99:21 important ^[22] - 5:16, 15:8, 18:19, 22:14, 27:7, 32:8, 33:11, 33:12, 51:11, 56:19, 57:7, 57:9, 57:13, 65:11, 66:24, 82:25, 87:19, 91:19, 97:12, 106:9, 111:21, 140:20 importantly ^[3] - 119:15, 142:18, 146:9 imposes ^[1] - 102:20 impossible ^[1] - 134:1 improper ^[2] - 31:4, 98:6 Improvement ^[2] - 75:19, 75:21 improvement ^[1] - 123:4 improvements ^[3] - 122:18, 123:2, 125:24 inaccuracies ^[1] - 146:23 inaccurate ^[1] - 37:9 inapplicable ^[1] - 143:8 INC ^[1] - 1:6 Inc ^[2] - 4:4, 127:7 include ^[10] - 22:11, 23:7, 41:1, 49:16, 63:3, 90:20, 97:21, 101:12, 137:9, 154:22 included ^[10] - 41:20, 91:2, 98:13, 98:17, 101:7, 101:8, 101:10, 101:22, 142:14, 144:12 includes ^[3] - 49:20, 52:22, 101:22 including ^[16] - 87:23, 90:1, 93:11, 94:10, 100:10, 100:13, 100:17, 105:5, 106:14, 110:5, 121:23, 122:15, 125:2, 125:16, 139:1,
H			I	
habit ^[1] - 58:9 habitat ^[1] - 57:20 half ^[12] - 37:6, 37:10, 37:12, 37:21, 39:4, 56:7, 57:18, 58:17, 86:5, 87:15, 95:4, 103:6 hall ^[1] - 12:13 hand ^[9] - 17:3, 42:8, 43:6, 44:3, 48:25, 49:5, 49:7, 60:22, 65:12 handicapped ^[1] - 133:16 handled ^[1] - 122:6 hands ^[1] - 69:15 happy ^[2] - 126:5, 126:19 hard ^[4] - 72:18, 91:14, 94:11, 111:7 hardship ^[1] - 130:20 harm ^[2] - 15:17, 44:24 harms ^[1] - 74:11 hash ^[1] - 121:15 hashed ^[1] - 111:8 hasse ^[2] - 71:8, 140:24 Hasse ^[3] - 66:24, 70:14, 118:9 Hasse's ^[3] - 41:16, 59:24, 60:9 hasse's ^[2] - 62:13, 69:19 hatching ^[1] - 50:22 hats ^[2] - 10:8 hazard ^[2] - 135:1, 136:12 head ^[3] - 28:19, 46:15, 92:10 heading ^[2] - 111:15, 121:13 HEADQUARTERS ^[1] - 1:23 headwater ^[3] - 41:17, 41:18, 65:17 headwaters ^[3] - 65:14, 66:18, 66:22 health ^[17] - 10:23, 17:6, 17:11, 17:13,			ice ^[1] - 51:1 idea ^[6] - 12:5, 12:20, 79:25, 85:18, 106:12, 141:17 ideal ^[8] - 22:11, 22:15, 22:19, 22:20, 23:3, 23:13, 26:11, 137:9 identified ^[2] - 93:5, 96:23 identifies ^[1] - 18:22 ignore ^[2] - 79:23, 124:6 IH ^[1] - 95:2 IH-1 ^[7] - 4:5, 89:23, 98:25, 115:19, 141:22, 143:6, 146:3 ill ^[2] - 25:5, 72:13 illegal ^[3] - 22:5, 82:15, 127:19 illness ^[1] - 72:16 image ^[9] - 8:22, 51:16, 51:18, 51:22, 53:8, 54:24, 55:25, 69:22, 111:17 images ^[1] - 8:18 immediately ^[1] - 76:25 impact ^[9] - 11:9, 18:21, 59:21, 66:4, 84:6, 97:15, 127:4,	

146:8 inclusionary [6] - 4:6, 30:3, 96:9, 99:2, 100:15, 115:16 income [1] - 107:5 incomplete [4] - 34:22, 88:18, 145:2, 146:23 incontestably [1] - 77:4 incorporated [2] - 92:16, 94:21 incorporates [1] - 96:12 incorrect [1] - 7:4 incorrectly [1] - 138:22 increase [3] - 58:9, 60:16, 79:3 increased [1] - 108:10 increases [1] - 66:9 independent [15] - 10:2, 10:6, 10:13, 16:17, 16:21, 18:7, 18:14, 19:9, 19:10, 19:24, 20:2, 20:9, 44:23, 124:16 independently [3] - 19:4, 23:15, 113:25 indicate [2] - 17:24, 134:16 indicated [3] - 100:6, 136:2, 154:7 indicating [1] - 112:3 indirectly [1] - 6:17 individual [2] - 39:8, 117:3 industrialize [1] - 58:21 inevitably [1] - 47:5 infamous [1] - 127:6 infinite [1] - 136:6 influence [1] - 134:11 information [4] - 17:25, 69:21, 84:10, 124:18 infrastructure [5] - 119:25, 121:19, 124:20, 125:1, 130:24 ingress [14] - 21:3, 21:4, 21:8, 21:10, 24:11, 24:24, 25:9, 26:13, 80:7, 103:10, 104:10, 128:4, 128:15, 128:25 inhabit [1] - 57:24 inhabitants [1] - 54:22	inherently [2] - 97:25, 143:18 injure [1] - 39:22 injury [1] - 72:3 inland [1] - 51:6 input [2] - 20:6, 100:13 insets [1] - 50:2 inside [4] - 12:21, 12:23, 65:16, 78:23 insofar [1] - 93:19 inspection [1] - 19:11 install [2] - 90:12, 99:16 installation [4] - 126:9, 128:16, 129:1, 133:15 installing [1] - 109:15 instance [2] - 100:21, 145:4 instances [2] - 17:7, 134:6 instantly [1] - 54:13 instead [2] - 66:14, 84:2 INSTRUCTIONS [1] - 154:5 intact [1] - 54:14 intelligent [1] - 36:20 intended [1] - 115:17 intense [2] - 69:24, 70:11 intensity [1] - 131:6 intent [3] - 99:12, 130:16, 138:8 intentional [1] - 112:18 interact [2] - 102:24, 147:18 interchange [1] - 58:11 interest [1] - 104:17 interested [1] - 153:11 interesting [4] - 23:6, 33:9, 76:4, 76:10 interests [2] - 39:19, 39:22 interfere [3] - 60:5, 60:6, 60:7 interferences [1] - 59:18 interior [13] - 49:22, 50:4, 50:10, 51:1, 51:8, 51:22, 51:24, 52:10, 54:17, 54:22, 54:25, 62:1, 62:20	Interior [1] - 58:8 internal [1] - 128:21 Interpretation [1] - 117:20 intersection [6] - 90:11, 123:6, 127:10, 127:16, 127:18, 128:16 intertidal [1] - 50:13 intrudes [1] - 54:16 invade [1] - 8:8 invalid [4] - 114:15, 114:19, 114:24, 115:10 Invasive [1] - 60:14 invasive [1] - 60:15 invasives [3] - 54:21, 62:2, 62:9 investigation [1] - 94:18 invitation [1] - 102:9 involved [4] - 30:16, 34:16, 94:15, 102:6 involves [1] - 9:17 ions [1] - 136:8 iota [1] - 27:18 ironic [1] - 66:7 irrefutable [1] - 47:15 irrigation [1] - 124:12 island [3] - 50:10, 50:12, 50:14 Island [1] - 50:12 issuance [1] - 140:4 issue [28] - 17:17, 21:22, 27:7, 33:1, 33:11, 33:12, 35:7, 35:8, 35:10, 41:2, 47:25, 64:7, 64:22, 75:16, 76:4, 79:8, 82:4, 82:5, 82:24, 83:2, 102:22, 103:1, 105:12, 108:17, 120:12, 125:4, 125:22, 151:8 issued [5] - 20:18, 72:16, 119:20, 126:6, 140:2 issues [13] - 6:18, 15:21, 16:5, 16:7, 17:4, 28:9, 39:11, 74:9, 74:14, 74:21, 99:18, 117:13, 133:6 it'll [2] - 68:6, 132:3 item [1] - 145:17 items [8] - 95:21, 96:22, 98:7, 101:4, 114:5, 137:25, 138:2, 145:15	itself [10] - 6:10, 33:3, 34:23, 37:5, 48:24, 60:18, 101:14, 116:13, 150:20, 154:6 J Jack [1] - 83:17 Jackson [1] - 142:21 jams [1] - 80:20 JAMILET [1] - 1:12 January [1] - 109:7 jeopardy [1] - 28:3 JERRY [1] - 1:8 Jersey [27] - 5:22, 13:20, 14:9, 14:11, 14:25, 29:14, 55:21, 71:16, 75:6, 83:20, 93:23, 100:10, 125:5, 125:18, 126:6, 126:8, 127:6, 135:7, 136:17, 136:21, 141:9, 142:20, 144:15, 145:10, 148:19, 148:21, 153:2 JERSEY [4] - 1:24, 2:4, 2:7, 2:10 jewel [1] - 54:9 job [9] - 20:4, 28:5, 28:9, 89:7, 89:9, 124:5, 129:5, 137:19, 145:15 John [1] - 109:7 JOHN [2] - 1:10, 1:13 Judge [5] - 147:6, 147:11, 149:11, 149:20, 149:23 judge [1] - 149:15 Judgement [2] - 92:14, 92:19 judgment [2] - 94:25, 95:24 Judgment [1] - 92:13 judicial [2] - 10:12, 87:23 juggling [3] - 78:12, 79:9, 82:13 July [10] - 6:20, 92:21, 94:14, 107:21, 108:9, 117:17, 119:7, 123:16, 124:24, 133:12 jumped [1] - 10:15 junction [1] - 98:15 June [3] - 119:22, 129:25, 139:24 jurisdiction [8] - 28:12, 30:20, 44:23, 97:10, 115:4, 116:17, 140:1, 142:4	justification [1] - 138:10 K KAPFERER [1] - 1:10 Keep [1] - 69:16 keep [5] - 19:15, 36:4, 36:5, 60:3 keeping [1] - 115:7 keeps [1] - 134:22 KEN [1] - 1:9 kept [2] - 18:19, 18:22 kidding [1] - 133:21 kills [1] - 73:2 kind [6] - 13:19, 40:15, 48:21, 61:19, 77:9, 112:2 kinds [1] - 50:7 klein [2] - 21:21, 21:22 Klein [1] - 21:25 Kleinberg [5] - 16:23, 111:1, 133:22, 133:23, 134:21 Kleinberg [8] - 17:20, 112:17, 134:18, 135:10, 135:20, 136:11, 136:15, 136:18 Kleinberg's [1] - 18:2 kleinberg's [2] - 134:8, 136:22 knock [1] - 62:6 knocked [1] - 38:2 knocking [1] - 62:3 knowing [3] - 20:4, 90:10, 95:3 knowledge [3] - 5:13, 15:11, 40:16 knowledgeable [1] - 72:12 known [3] - 70:25, 83:15, 90:13 knows [1] - 51:4 Kuzak [41] - 21:7, 24:12, 24:16, 25:22, 56:10, 78:14, 78:18, 79:7, 79:10, 79:13, 79:16, 79:17, 80:1, 80:8, 81:2, 81:19, 82:11, 82:20, 90:7, 103:11, 103:14, 103:25, 104:2, 104:6, 106:18, 106:20, 106:25, 125:9, 125:13,
--	---	--	--	---

126:10, 129:4, 130:2, 130:4, 130:6, 130:9, 130:15, 130:19, 130:21, 131:2	28:8, 30:1, 30:2, 30:11, 33:17, 35:11, 65:9, 73:17, 75:18, 75:22, 75:25, 76:23, 78:7, 78:8, 81:4, 82:6, 83:14, 83:23, 84:18, 85:12, 85:22, 87:20, 87:22, 88:9, 88:12, 88:13, 88:23, 89:11, 89:19, 104:23, 109:6, 115:3, 132:13, 141:19, 142:3, 142:23, 146:5, 148:1	27:4, 27:12, 27:23, 33:12, 33:24, 34:22, 81:12, 149:9 legislative [2] - 91:19, 142:8 legislature [1] - 10:11 Lehigh [1] - 115:17 Lenape [2] - 63:25, 75:8 length [1] - 24:1 lengths [1] - 137:14 lengthy [4] - 63:3, 97:24, 102:18, 120:6 Lenny [5] - 95:10, 111:1, 111:5, 112:10, 134:10 less [5] - 12:7, 12:8, 12:24, 40:20, 61:18 lessened [1] - 118:3 letter [7] - 28:15, 121:4, 125:23, 126:6, 133:12, 142:23, 148:15 Letter [1] - 117:20 letters [3] - 27:10, 28:15, 38:8 level [5] - 15:14, 67:13, 67:15, 128:21, 133:20 levels [1] - 61:7 licensed [1] - 18:12 lie [1] - 43:1 life [10] - 14:8, 38:1, 38:5, 50:16, 56:17, 66:1, 73:24, 80:19, 82:4, 82:8 light [6] - 50:25, 55:5, 89:11, 97:18, 123:5, 128:16 lighter [1] - 49:1 likelihood [4] - 59:3, 59:9, 59:11, 59:19 likely [7] - 57:20, 57:23, 58:2, 58:8, 58:9, 70:14, 147:14 likewise [1] - 144:7 limit [5] - 78:8, 95:6, 109:18, 128:8, 132:3 limitations [1] - 97:18 limited [6] - 15:11, 100:10, 103:5, 129:21, 130:17, 143:21 limiting [1] - 108:5 limits [1] - 132:2 line [26] - 29:21, 32:11, 49:21, 52:1, 53:21, 83:4, 83:7,	95:9, 95:11, 109:22, 109:24, 111:5, 111:6, 111:8, 111:16, 111:18, 111:23, 111:25, 112:5, 112:12, 112:21, 118:21, 121:14, 121:15, 123:8 Line [8] - 95:10, 111:1, 111:5, 112:10, 114:25, 115:1, 134:10, 154:9 lines [27] - 42:3, 42:11, 42:13, 42:22, 42:23, 42:24, 43:1, 43:4, 43:8, 43:12, 43:13, 43:16, 83:10, 102:17, 111:9, 112:2, 112:15, 121:3, 121:5, 121:6, 121:7, 125:12, 136:17, 136:20, 154:7 listed [2] - 101:21, 139:19 listen [1] - 87:10 listened [1] - 151:4 listening [1] - 86:3 literally [5] - 51:17, 67:21, 69:25, 71:10, 82:5 litigation [8] - 9:14, 9:17, 9:20, 28:19, 46:14, 92:4, 92:18, 94:14 litwornia [6] - 25:11, 72:10, 75:15, 81:15, 133:2, 133:6 Litwornia [2] - 72:11, 81:24 Litwornia's [2] - 132:11, 132:23 litwornia's [4] - 78:11, 124:24, 127:2, 132:14 live [11] - 22:22, 22:24, 51:7, 57:15, 57:17, 60:7, 68:13, 74:2, 80:19, 82:8, 130:21 lives [5] - 22:21, 22:25, 75:14, 77:18, 87:6 living [2] - 26:1, 106:14 local [2] - 34:18, 55:22 located [7] - 104:15, 110:21, 112:12, 114:16, 121:11, 131:16, 131:21 location [7] - 56:14,	110:6, 135:19, 136:19, 136:24, 136:25, 137:14 locations [2] - 35:23, 131:24 logical [2] - 25:14, 72:18 LOI [3] - 140:2, 140:15, 140:21 look [23] - 9:17, 26:19, 41:22, 51:17, 53:14, 53:16, 63:19, 86:23, 89:3, 91:8, 95:1, 98:24, 111:19, 112:4, 117:5, 120:25, 124:7, 125:9, 129:8, 146:7, 146:10, 147:23 looking [5] - 57:14, 57:15, 68:17, 121:8, 148:10 looks [3] - 4:21, 52:17, 70:19 loop [4] - 82:11, 125:7, 129:12, 129:14 looped [1] - 129:8 loose [1] - 67:23 Lord [1] - 36:19 LORI [1] - 1:10 lose [7] - 45:1, 45:15, 45:17, 46:3, 46:5, 64:16, 67:22 loses [2] - 66:8, 66:13 losing [2] - 47:19, 66:4 loss [9] - 37:16, 49:13, 60:4, 72:2, 72:3, 75:8, 75:9 losses [2] - 47:20, 48:4 lost [11] - 37:9, 37:21, 38:4, 45:19, 53:4, 53:6, 53:8, 54:4, 75:7, 75:10, 75:11 low [2] - 107:5, 120:23 lower [3] - 43:5, 49:5, 49:8 luke [1] - 138:20 Luke [1] - 54:19
L				
I30 [1] - 127:11 I:30 [1] - 56:9 lack [2] - 125:3, 132:20 ladies [3] - 4:1, 4:9, 86:16 Lafar [1] - 7:19 land [15] - 5:5, 29:16, 31:4, 31:6, 55:13, 66:7, 66:13, 75:9, 85:5, 91:17, 100:16, 109:6, 138:25, 141:11, 141:12 Land [10] - 30:22, 31:8, 73:18, 87:20, 96:14, 100:5, 123:2, 141:24, 143:1, 143:8 lands [3] - 68:16, 75:10, 83:25 landscape [1] - 97:1 landscaping [1] - 108:15 lane [1] - 132:20 Langan [5] - 16:18, 19:2, 134:11, 134:14, 136:1 Langan's [1] - 20:8 language [2] - 101:13, 144:19 lapore [1] - 95:11 large [5] - 6:11, 30:12, 71:11, 83:9, 137:16 largely [2] - 29:18, 71:7 larger [6] - 29:2, 37:22, 51:19, 58:15, 61:5, 61:8 Larry [1] - 108:9 laser [4] - 33:5, 36:5, 43:20, 45:10 last [7] - 25:2, 46:9, 70:9, 87:13, 88:25, 141:8, 147:25 late [2] - 51:12, 70:15 lately [1] - 88:11 Laurel [7] - 29:7, 29:13, 29:15, 29:21, 30:8, 30:14, 92:7 Law [7] - 30:22, 31:8, 73:18, 87:20, 123:2, 141:24, 143:2 law [40] - 10:5, 10:6,	lawful [1] - 95:21 lawns [1] - 48:17 laws [3] - 88:12, 101:24, 142:9 lawsuit [2] - 92:9, 92:13 lawsuits [3] - 28:16, 28:17, 92:21 lawyers [1] - 9:16 layout [3] - 99:15, 110:4, 110:12 lead [4] - 14:8, 42:19, 43:19, 121:5 leading [4] - 29:7, 29:8, 58:4, 121:2 leaf [1] - 56:2 learn [2] - 19:22, 23:2 least [5] - 12:6, 25:8, 26:23, 84:8, 151:19 leave [7] - 29:17, 31:11, 34:17, 69:15, 78:16, 85:11, 147:25 leaving [1] - 84:2 led [2] - 9:14, 92:15 left [41] - 8:24, 13:12, 13:25, 30:13, 32:10, 32:11, 36:18, 38:1, 38:5, 41:22, 41:24, 43:17, 44:3, 45:11, 45:15, 49:7, 49:8, 49:9, 53:16, 54:10, 54:25, 59:6, 59:9, 59:20, 60:22, 63:19, 63:22, 64:20, 65:12, 70:13, 71:9, 71:10, 71:11, 71:12, 73:3, 73:17, 74:6, 84:1, 85:5, 132:20 left-hand [2] - 60:22, 65:12 left-turn [1] - 132:20 legal [9] - 28:3, 35:8, 35:10, 35:16, 76:4, 88:9, 90:19, 138:10, 148:2 legally [9] - 10:17,	legislative [2] - 91:19, 142:8 legislature [1] - 10:11 Lehigh [1] - 115:17 Lenape [2] - 63:25, 75:8 length [1] - 24:1 lengths [1] - 137:14 lengthy [4] - 63:3, 97:24, 102:18, 120:6 Lenny [5] - 95:10, 111:1, 111:5, 112:10, 134:10 less [5] - 12:7, 12:8, 12:24, 40:20, 61:18 lessened [1] - 118:3 letter [7] - 28:15, 121:4, 125:23, 126:6, 133:12, 142:23, 148:15 Letter [1] - 117:20 letters [3] - 27:10, 28:15, 38:8 level [5] - 15:14, 67:13, 67:15, 128:21, 133:20 levels [1] - 61:7 licensed [1] - 18:12 lie [1] - 43:1 life [10] - 14:8, 38:1, 38:5, 50:16, 56:17, 66:1, 73:24, 80:19, 82:4, 82:8 light [6] - 50:25, 55:5, 89:11, 97:18, 123:5, 128:16 lighter [1] - 49:1 likelihood [4] - 59:3, 59:9, 59:11, 59:19 likely [7] - 57:20, 57:23, 58:2, 58:8, 58:9, 70:14, 147:14 likewise [1] - 144:7 limit [5] - 78:8, 95:6, 109:18, 128:8, 132:3 limitations [1] - 97:18 limited [6] - 15:11, 100:10, 103:5, 129:21, 130:17, 143:21 limiting [1] - 108:5 limits [1] - 132:2 line [26] - 29:21, 32:11, 49:21, 52:1, 53:21, 83:4, 83:7,	95:9, 95:11, 109:22, 109:24, 111:5, 111:6, 111:8, 111:16, 111:18, 111:23, 111:25, 112:5, 112:12, 112:21, 118:21, 121:14, 121:15, 123:8 Line [8] - 95:10, 111:1, 111:5, 112:10, 114:25, 115:1, 134:10, 154:9 lines [27] - 42:3, 42:11, 42:13, 42:22, 42:23, 42:24, 43:1, 43:4, 43:8, 43:12, 43:13, 43:16, 83:10, 102:17, 111:9, 112:2, 112:15, 121:3, 121:5, 121:6, 121:7, 125:12, 136:17, 136:20, 154:7 listed [2] - 101:21, 139:19 listen [1] - 87:10 listened [1] - 151:4 listening [1] - 86:3 literally [5] - 51:17, 67:21, 69:25, 71:10, 82:5 litigation [8] - 9:14, 9:17, 9:20, 28:19, 46:14, 92:4, 92:18, 94:14 litwornia [6] - 25:11, 72:10, 75:15, 81:15, 133:2, 133:6 Litwornia [2] - 72:11, 81:24 Litwornia's [2] - 132:11, 132:23 litwornia's [4] - 78:11, 124:24, 127:2, 132:14 live [11] - 22:22, 22:24, 51:7, 57:15, 57:17, 60:7, 68:13, 74:2, 80:19, 82:8, 130:21 lives [5] - 22:21, 22:25, 75:14, 77:18, 87:6 living [2] - 26:1, 106:14 local [2] - 34:18, 55:22 located [7] - 104:15, 110:21, 112:12, 114:16, 121:11, 131:16, 131:21 location [7] - 56:14,	110:6, 135:19, 136:19, 136:24, 136:25, 137:14 locations [2] - 35:23, 131:24 logical [2] - 25:14, 72:18 LOI [3] - 140:2, 140:15, 140:21 look [23] - 9:17, 26:19, 41:22, 51:17, 53:14, 53:16, 63:19, 86:23, 89:3, 91:8, 95:1, 98:24, 111:19, 112:4, 117:5, 120:25, 124:7, 125:9, 129:8, 146:7, 146:10, 147:23 looking [5] - 57:14, 57:15, 68:17, 121:8, 148:10 looks [3] - 4:21, 52:17, 70:19 loop [4] - 82:11, 125:7, 129:12, 129:14 looped [1] - 129:8 loose [1] - 67:23 Lord [1] - 36:19 LORI [1] - 1:10 lose [7] - 45:1, 45:15, 45:17, 46:3, 46:5, 64:16, 67:22 loses [2] - 66:8, 66:13 losing [2] - 47:19, 66:4 loss [9] - 37:16, 49:13, 60:4, 72:2, 72:3, 75:8, 75:9 losses [2] - 47:20, 48:4 lost [11] - 37:9, 37:21, 38:4, 45:19, 53:4, 53:6, 53:8, 54:4, 75:7, 75:10, 75:11 low [2] - 107:5, 120:23 lower [3] - 43:5, 49:5, 49:8 luke [1] - 138:20 Luke [1] - 54:19
M				
macNeill [1] - 119:22 MacNEILL [1] - 1:12 magenta [4] - 54:7, 54:11, 55:1, 67:13 mail [3] - 19:2, 19:11 main [1] - 121:16 mainland [2] - 50:11,				

50:15 maintaining [1] - 60:1 maintains [1] - 69:20 major [4] - 21:3, 33:12, 61:16, 64:20 mall [2] - 5:18 man [4] - 71:2, 72:13, 73:1, 106:3 management [4] - 117:15, 117:18, 119:3, 119:9 mandate [2] - 9:25, 89:20 mandated [1] - 71:20 maneuvers [1] - 127:20 manhole [3] - 121:17, 123:12, 125:2 manicured [1] - 48:17 manipulation [1] - 77:25 Mann [3] - 63:23, 73:7, 73:15 Mann's [2] - 72:25, 74:25 manner [4] - 12:3, 90:24, 108:14, 135:25 mansion [2] - 52:7, 62:21 Manton [1] - 144:15 map [6] - 31:17, 32:1, 33:2, 35:22, 63:7, 121:5 mapping [2] - 141:1, 141:2 Maps [1] - 71:1 maps [4] - 52:6, 62:24, 62:25, 141:4 March [1] - 151:22 marine [1] - 50:16 Mark [3] - 14:4, 15:10, 45:3 mark [3] - 45:4, 139:23, 154:6 marked [1] - 125:11 marshaled [1] - 69:6 massive [2] - 15:17, 68:16 master [1] - 94:22 Master [1] - 91:5 master's [2] - 12:16, 12:21 matches [3] - 31:6, 48:12, 115:7 matching [2] - 5:12, 50:3 materials [3] - 100:2, 118:16, 146:8	mathematical [1] - 37:11 matter [4] - 11:1, 47:18, 47:19, 73:8 matters [1] - 139:20 mature [4] - 7:20, 8:4, 8:10, 13:1 maximize [1] - 80:17 maximum [9] - 81:13, 81:18, 82:1, 95:7, 103:5, 107:11, 107:13, 107:15, 132:16 maximums [1] - 80:10 Mayor [5] - 1:9, 9:21, 38:23, 83:17, 87:2 McCartney [2] - 1:9, 87:2 McDonough [1] - 109:7 McGovern [9] - 2:6, 10:3, 18:25, 39:14, 70:4, 70:17, 124:3, 141:14, 149:1 mcGovern [1] - 86:6 Meadowlands [1] - 46:12 mean [11] - 10:19, 15:1, 15:3, 15:13, 36:19, 41:5, 44:11, 66:19, 78:6, 101:23, 105:2 meanders [1] - 112:5 meaning [7] - 36:5, 56:24, 84:16, 92:20, 95:16, 118:2, 138:6 meaningful [1] - 88:7 meaningless [1] - 114:25 means [28] - 10:20, 21:3, 21:4, 21:8, 21:10, 22:13, 22:20, 23:9, 24:10, 24:18, 24:24, 25:9, 25:20, 26:13, 29:10, 36:5, 37:7, 41:7, 41:9, 44:11, 44:23, 45:6, 45:18, 54:3, 58:10, 79:25, 80:6 meant [1] - 28:24 measure [1] - 54:1 measured [1] - 50:22 measuring [2] - 48:9, 52:1 mechanical [1] - 108:12 mechanism [5] - 91:3, 93:6, 94:5, 101:11, 142:15	mechanisms [1] - 108:16 mediated [1] - 94:22 mediation [2] - 90:16, 93:16 meet [3] - 118:5, 133:4, 145:23 meeting [9] - 9:10, 24:7, 87:13, 115:3, 133:7, 151:13, 151:19, 151:21, 151:24 meetings [10] - 19:12, 39:14, 86:5, 87:5, 87:10, 87:15, 87:17, 88:25, 99:22, 151:3 meets [5] - 10:22, 95:13, 118:7, 119:24, 130:17 member [3] - 6:21, 21:17, 151:7 members [8] - 10:7, 22:23, 22:24, 62:10, 87:3, 102:6, 134:3, 151:15 MEMBERS [1] - 1:7 memo [3] - 118:8, 129:17, 133:3 memorialized [1] - 93:2 mention [1] - 105:19 mentioned [3] - 64:12, 124:22, 146:13 mere [1] - 82:3 merely [1] - 149:8 merit [1] - 145:3 met [7] - 27:15, 27:23, 28:3, 28:10, 128:23, 130:16, 145:22 methodology [4] - 114:11, 114:12, 114:23, 116:5 Michele [1] - 141:7 microcosm [1] - 61:21 middle [6] - 60:10, 64:8, 64:16, 69:2, 71:16, 120:23 midpoint [1] - 112:7 might [4] - 33:1, 57:10, 58:14, 79:12 migrate [2] - 64:17, 70:7 migration [1] - 60:5 migratory [2] - 56:25, 57:25 mile [2] - 57:18, 58:18	millions [2] - 13:23, 47:12 mind [10] - 32:7, 32:20, 35:7, 35:23, 38:1, 38:21, 40:2, 54:24, 67:1 minds [1] - 16:4 minimal [1] - 7:18 minimis [13] - 78:21, 78:24, 79:3, 79:7, 79:16, 79:25, 80:25, 103:17, 104:8, 106:19, 130:3, 130:10, 131:5 minimize [4] - 80:16, 80:18, 80:20, 108:2 minimum [3] - 103:4, 107:8, 109:20 minimums [1] - 80:10 mining [1] - 70:19 minor [7] - 73:22, 74:8, 109:2, 128:22, 129:9, 129:12, 131:6 minus [1] - 36:6 minute [3] - 66:25, 86:13, 87:13 minutes [5] - 8:19, 56:6, 56:20, 91:9, 102:8 miraculous [1] - 77:25 mischaracterization [1] - 88:22 misconception [1] - 112:18 misrepresentations [1] - 146:23 missing [1] - 27:19 Mississippi [1] - 55:12 mistaken [1] - 149:5 mitigation [4] - 73:23, 74:8, 74:16, 74:17 MLUL [7] - 39:19, 100:9, 142:7, 144:4, 144:6, 144:18, 144:24 model [1] - 74:1 models [1] - 107:7 moderate [1] - 107:5 modern [1] - 46:16 modest [1] - 40:15 modified [1] - 115:22 moment [9] - 4:15, 4:17, 49:19, 59:24, 63:10, 72:23, 72:25, 81:8, 81:9 moments [1] - 26:4 money [4] - 14:21,	34:1, 46:24, 138:7 Montclair [2] - 12:17, 12:21 months [1] - 147:24 morals [1] - 73:20 moreover [2] - 97:5, 109:1 morning [3] - 56:8, 56:12, 127:22 MORRISTOWN [1] - 1:24 most [12] - 8:16, 11:8, 13:5, 14:10, 14:24, 27:7, 55:19, 66:19, 70:14, 70:21, 102:6, 127:18 mostly [2] - 70:23, 70:24 mother [1] - 25:5 Mount [7] - 29:7, 29:13, 29:15, 29:20, 30:8, 30:14, 92:7 Mountain [1] - 109:21 Mountains [1] - 55:14 move [8] - 32:2, 35:21, 47:21, 50:17, 53:11, 53:13, 63:8, 70:7 movement [3] - 42:1, 43:9, 128:19 MR [16] - 4:14, 4:17, 4:20, 69:17, 86:20, 148:6, 148:13, 148:21, 148:23, 148:24, 149:4, 150:3, 150:8, 150:10, 150:14, 151:6 MS [1] - 149:1 multifamily [7] - 4:6, 22:24, 33:16, 80:22, 81:14, 101:17, 129:9 multiple [2] - 30:23, 147:1 multiplicity [1] - 85:13 multiply [1] - 64:18 multistory [1] - 23:22 Municipal [5] - 30:22, 31:8, 73:18, 87:20, 96:14 municipal [6] - 38:22, 96:19, 96:20, 98:19, 98:23, 128:10 Municipalities [2] - 29:18, 109:9 municipalities [5] - 38:22, 39:20, 96:17,
---	---	--	--	--

122:21, 141:25 municipality [5] - 39:7, 46:17, 83:24, 140:1, 142:9 must [20] - 10:6, 10:18, 10:20, 10:21, 20:14, 35:20, 65:6, 65:9, 75:20, 84:7, 84:16, 85:10, 86:1, 92:8, 115:23, 118:2, 122:17, 142:24, 144:20, 144:25 muted [1] - 51:13	123:24 needs [5] - 11:11, 105:3, 122:1, 130:18, 149:16 negative [5] - 34:10, 34:16, 34:19, 118:2 negatively [1] - 62:8 negotiated [3] - 90:23, 99:13, 112:21 negotiation [2] - 97:24, 101:2 negotiations [1] - 124:15 neighborhood [2] - 34:18, 105:24 neighboring [11] - 33:4, 35:13, 38:22, 39:6, 39:7, 39:20, 39:22, 41:14, 57:17, 124:10, 124:14 neighbors [6] - 89:6, 102:3, 102:25, 108:7, 130:12, 147:13 nesting [3] - 61:4, 61:7, 61:9 nests [2] - 62:3, 62:10 net [1] - 118:2 never [22] - 6:2, 13:18, 18:24, 19:2, 19:23, 19:24, 23:15, 30:6, 30:7, 30:17, 34:20, 35:4, 39:9, 39:13, 39:15, 40:4, 71:24, 88:18, 105:7, 139:14, 147:3, 148:14 nevertheless [1] - 17:1 new [16] - 53:18, 53:20, 54:1, 54:2, 54:5, 54:6, 54:8, 54:15, 68:16, 76:24, 77:4, 77:7, 77:14, 115:18, 126:8 NEW [4] - 1:24, 2:4, 2:7, 2:10 New [26] - 5:22, 13:20, 14:9, 14:10, 14:25, 29:14, 55:21, 71:16, 75:6, 83:20, 93:23, 100:10, 125:5, 125:17, 126:5, 127:6, 135:7, 136:16, 136:21, 141:9, 142:20, 144:14, 145:9, 148:19, 148:21, 153:2 Newark [1] - 14:16 newer [1] - 120:11 newly [1] - 58:10	news [1] - 88:11 next [14] - 22:2, 22:17, 31:7, 40:9, 50:20, 53:8, 53:13, 56:19, 68:25, 85:6, 107:4, 110:2, 151:13, 151:21 nice [1] - 11:25 night [2] - 58:1, 91:13 nights [3] - 16:23, 134:3, 147:24 nilly [1] - 91:25 NJ [3] - 2:11, 127:7, 142:21 NJ216 [1] - 144:16 NJAC [4] - 109:13, 120:15, 122:24, 129:14 NJAC5:21-4.2 [1] - 131:8 NJAC5:97-10.1 [1] - 96:21 NJAC5:97-10.2a [1] - 97:4 NJAC:97-10.3a [1] - 98:16 no-build [2] - 118:1, 118:4 nobody [5] - 25:2, 25:17, 26:15, 58:5, 113:5 non [2] - 56:1, 136:12 none [6] - 20:1, 35:19, 53:1, 72:1, 72:4, 139:18 nonissue [1] - 106:5 normal [4] - 24:18, 54:22, 135:6, 145:16 normally [6] - 31:16, 43:22, 43:23, 44:5, 44:9, 122:25 North [2] - 127:7, 127:13 north [6] - 21:5, 104:11, 111:10, 111:13, 111:16, 112:6 NORTH [1] - 1:23 northern [6] - 70:10, 71:16, 75:6, 102:12, 111:9, 111:19 northwest [1] - 4:8 Notary [1] - 153:2 note [7] - 38:9, 97:12, 106:10, 137:18, 148:6, 150:24, 154:6 noted [8] - 20:21, 108:20, 127:16,	136:20, 137:2, 141:15, 147:11, 154:23 notes [2] - 23:4, 72:22 nothing [15] - 31:6, 72:24, 73:3, 93:1, 95:16, 100:7, 104:19, 105:13, 120:19, 138:15, 141:3, 141:10, 148:11, 149:6 notice [3] - 33:22, 34:14, 151:25 noticed [1] - 94:23 notified [1] - 87:12 noting [3] - 21:1, 99:25, 144:21 notion [3] - 30:12, 39:13, 63:6 November [4] - 92:23, 98:10, 117:19, 135:9 nowhere [2] - 100:25, 131:16 nuisance [1] - 101:24 number [13] - 15:24, 21:11, 34:13, 37:7, 37:9, 39:16, 58:14, 58:19, 78:9, 103:2, 114:9, 114:11, 129:20 numbers [2] - 37:4, 114:24 numerous [2] - 93:15, 111:1	30:17, 93:9, 94:7, 96:10, 99:16, 99:17, 99:19, 101:4, 102:20, 114:4, 116:6, 124:17, 139:1, 142:3 obligations [3] - 92:7, 94:24, 99:14 observation [3] - 56:2, 56:15, 56:20 observations [1] - 55:24 observed [12] - 56:4, 56:5, 56:16, 56:21, 56:23, 56:24, 57:2, 57:9, 57:22, 116:4, 139:19 observing [2] - 56:22, 57:11 obtain [2] - 125:25, 140:15 obtained [3] - 33:21, 121:24, 122:9 obtaining [1] - 122:12 obvious [6] - 12:5, 12:22, 34:5, 87:7, 95:18, 112:4 obviously [13] - 10:1, 31:14, 32:6, 34:1, 54:13, 56:21, 62:20, 110:8, 120:8, 124:16, 125:18, 125:22, 146:18 occasion [1] - 20:7 occasionally [1] - 121:3 occasions [2] - 57:21, 120:5 occupancy [5] - 59:3, 59:10, 59:19, 61:11, 61:16 occupants [2] - 22:13, 23:9 occupies [1] - 52:18 occupy [1] - 61:17 occur [6] - 14:20, 57:20, 134:1, 136:5, 136:10 occurred [4] - 25:15, 93:16, 94:16, 106:24 occurrence [2] - 60:16, 60:22 occurs [1] - 26:4 ocean [1] - 50:17 October [8] - 98:8, 108:20, 118:10, 118:14, 119:18, 129:17, 133:3, 142:5 OF [2] - 1:1, 1:1 off-site [6] - 122:19,
N				
NAACP [1] - 29:12 nah [1] - 18:18 name [1] - 56:18 named [2] - 71:2, 95:11 namely [1] - 15:11 names [1] - 56:17 narrow [2] - 42:13 nation [1] - 63:25 natural [13] - 29:17, 31:2, 41:10, 42:1, 42:21, 44:17, 45:2, 45:24, 56:23, 66:2, 66:15, 68:13, 70:9 naturally [4] - 42:21, 43:10, 43:14, 66:11 nature [7] - 31:9, 58:22, 68:8, 73:17, 74:8, 75:9, 109:14 Nature [1] - 73:4 near [1] - 16:8 nearby [1] - 8:22 necessarily [3] - 7:15, 28:25, 97:15 necessary [13] - 5:8, 18:4, 18:18, 60:12, 84:23, 85:20, 105:5, 105:10, 108:23, 109:3, 109:12, 128:6, 140:15 need [30] - 8:12, 12:21, 15:14, 18:5, 18:11, 29:22, 29:24, 30:7, 30:16, 55:23, 56:18, 60:7, 61:25, 63:24, 68:12, 78:23, 81:9, 96:12, 104:2, 105:11, 108:11, 111:5, 113:6, 125:22, 126:3, 129:8, 135:13, 146:21, 148:23, 150:10 needed [4] - 58:23, 105:21, 112:22,				
O				
o'clock [1] - 56:12 object [1] - 95:23 objected [1] - 38:23 objection [2] - 148:6, 148:10 objections [1] - 120:7 objectives [1] - 39:19 objector [10] - 4:11, 18:8, 20:4, 91:13, 95:18, 124:23, 125:4, 134:19, 137:22, 140:5 Objector [1] - 2:11 objectors [10] - 16:20, 40:11, 69:6, 69:7, 73:14, 74:10, 88:2, 118:6, 119:15, 119:16 obligated [1] - 99:10 obligation [17] - 27:15, 27:24, 28:11,				

125:24, 127:4, 128:1, 128:3, 128:6 off-tract [3] - 99:18, 123:2, 123:4 offer [6] - 12:19, 13:16, 35:16, 35:18, 40:16, 88:4 offered [17] - 14:2, 16:10, 36:12, 37:5, 37:13, 37:14, 37:18, 61:22, 71:19, 71:20, 71:22, 74:16, 79:25, 82:16, 137:22, 137:24, 150:18 office [2] - 5:19, 124:24 Official [1] - 1:13 official [1] - 39:5 officials [2] - 38:24 often [2] - 8:9, 38:13 old [13] - 5:21, 6:10, 8:4, 8:15, 13:19, 37:23, 37:25, 64:1, 69:1, 71:15, 86:24, 114:9, 146:17 older [1] - 36:25 on-site [8] - 87:24, 117:7, 121:3, 121:18, 123:9, 124:11, 124:20, 136:5 once [13] - 15:20, 19:11, 54:15, 59:20, 61:1, 67:18, 67:22, 67:23, 69:1, 87:12, 127:1 one [128] - 4:14, 4:17, 6:12, 6:25, 7:17, 8:16, 11:22, 13:17, 14:18, 15:21, 15:24, 16:6, 19:7, 20:6, 21:2, 21:11, 23:21, 24:10, 25:4, 25:8, 25:19, 26:3, 26:13, 27:18, 29:7, 32:3, 32:12, 34:13, 35:16, 38:7, 39:1, 39:3, 39:5, 39:6, 39:8, 39:17, 39:19, 41:13, 42:9, 45:9, 45:12, 47:10, 47:11, 47:22, 49:3, 49:25, 55:15, 56:25, 57:18, 59:2, 59:24, 60:11, 60:18, 61:13, 61:20, 64:10, 66:10, 70:3, 70:5, 70:9, 73:7, 73:25, 74:15, 76:7, 76:8, 76:20, 76:23, 77:4, 77:16, 77:17, 77:18, 77:21, 77:23, 78:8, 79:20, 80:4,	80:6, 80:12, 80:13, 81:8, 81:9, 81:15, 82:23, 85:1, 85:2, 86:8, 89:21, 91:11, 95:6, 97:5, 99:10, 101:22, 102:3, 102:6, 104:9, 105:22, 106:9, 107:9, 107:19, 116:6, 116:7, 123:15, 124:9, 130:18, 131:12, 131:15, 131:16, 137:2, 137:6, 141:4, 141:22, 143:22, 146:2, 147:2, 147:25, 151:19 ONE [1] - 2:7 one-bedrooms [1] - 107:9 online [1] - 53:12 open [23] - 18:25, 25:22, 29:17, 31:1, 68:16, 70:20, 70:22, 79:16, 81:2, 81:19, 82:11, 82:20, 86:9, 95:16, 96:25, 101:17, 103:9, 104:2, 104:6, 113:16, 130:9, 130:22, 131:2 opened [2] - 21:7, 25:23 opening [2] - 99:24, 106:25 operate [1] - 128:20 operational [1] - 128:19 opined [3] - 134:18, 134:21, 135:24 opinion [3] - 18:17, 19:20, 130:5 opinions [1] - 146:10 opportunity [1] - 110:2 opposing [1] - 40:3 option [2] - 86:2, 106:25 options [2] - 124:9, 124:19 OR [1] - 154:8 ORANGE [2] - 1:1, 2:7 Orange [12] - 4:8, 9:20, 38:14, 38:17, 69:2, 92:6, 92:17, 92:20, 93:24, 100:5, 121:19 orange [2] - 52:1, 121:1 Orange's [3] - 104:22, 104:24, 105:9 order [10] - 33:18,	34:25, 36:16, 37:8, 84:23, 96:16, 108:2, 131:24, 147:7 ordering [1] - 147:10 ordinance [116] - 10:23, 11:1, 11:5, 11:11, 11:15, 11:17, 11:20, 12:2, 27:3, 27:16, 27:20, 27:22, 28:4, 30:7, 33:10, 75:23, 89:23, 90:20, 91:6, 91:9, 91:10, 91:15, 91:21, 92:1, 92:15, 94:20, 94:21, 95:2, 95:4, 95:19, 95:23, 96:4, 96:5, 96:7, 97:13, 97:14, 97:21, 97:25, 98:1, 98:5, 98:8, 98:9, 98:11, 98:25, 99:10, 99:12, 100:6, 100:17, 100:18, 101:8, 101:14, 101:22, 106:16, 107:4, 107:12, 107:19, 110:21, 110:22, 111:22, 112:25, 113:8, 113:12, 113:14, 113:18, 115:4, 115:5, 115:6, 115:8, 115:10, 115:11, 115:12, 115:15, 115:18, 115:20, 115:22, 116:5, 116:8, 116:11, 116:13, 116:16, 116:18, 116:20, 118:20, 127:5, 127:11, 127:24, 128:12, 136:25, 138:14, 138:23, 139:9, 139:12, 139:14, 139:21, 141:3, 141:11, 141:14, 141:16, 141:22, 142:5, 142:11, 142:13, 142:17, 143:7, 143:17, 143:23, 144:1, 144:6, 144:11, 144:21, 144:23, 146:3, 146:20, 147:20 ordinances [12] - 17:8, 39:21, 96:14, 96:19, 98:23, 104:24, 105:18, 142:7, 142:18, 142:24, 143:5, 147:17 ordinary [5] - 5:5, 5:17, 5:19, 26:18	orientation [1] - 110:12 original [2] - 77:15, 147:9 ornithologist [2] - 55:20, 59:13 ornithology [1] - 67:5 otherwise [5] - 11:7, 24:3, 100:6, 105:1, 139:21 ourselves [1] - 151:16 outline [1] - 48:24 outlined [1] - 49:1 outlines [2] - 48:14, 99:5 outside [6] - 12:19, 48:23, 49:21, 50:22, 100:9, 138:2 outweigh [2] - 15:1, 15:4 Oval [29] - 21:9, 25:2, 25:13, 25:17, 26:7, 26:14, 26:15, 76:7, 76:21, 76:22, 76:23, 77:5, 77:6, 77:10, 78:3, 79:18, 80:4, 81:3, 90:6, 90:11, 123:6, 128:17, 128:24, 129:6, 132:19, 133:10 oval [2] - 79:14, 129:7 Oval's [1] - 25:19 Oval/Warner [1] - 24:25 Ovenbird [1] - 59:17 overall [11] - 32:5, 48:13, 93:8, 99:18, 111:6, 117:1, 118:3, 121:8, 128:20, 131:22, 132:4 overarching [2] - 95:5, 117:25 overcoming [1] - 34:16 overlook [1] - 140:23 override [1] - 115:4 overturn [1] - 85:25 overturned [1] - 147:5 own [19] - 13:14, 19:13, 19:20, 33:7, 37:14, 88:3, 113:22, 115:25, 118:6, 119:18, 119:21, 120:2, 120:14, 132:25, 133:22, 135:16, 138:13,	146:10, 148:16 owned [3] - 75:10, 93:20, 104:16 ownership [1] - 104:17
P				
P.M [1] - 1:2 Pacific [1] - 55:11 package [1] - 124:11 PAGE [1] - 3:3 page [2] - 29:4, 154:6 Page [17] - 40:22, 47:23, 47:24, 93:3, 93:10, 108:10, 114:17, 114:18, 114:25, 118:10, 118:16, 139:17, 140:10, 140:13, 141:13, 154:9 PAGE/ERRATA [1] - 154:1 pages [3] - 29:3, 38:11, 146:9 Pages [8] - 107:21, 109:4, 117:17, 119:18, 119:23, 123:17, 132:12, 138:17 pair [1] - 117:6 panels [1] - 124:4 Paragraph [1] - 109:4 paragraph [1] - 47:24 park [3] - 8:23, 57:18, 63:14 parking [6] - 36:1, 40:24, 48:16, 97:3, 113:1, 131:7 part [36] - 6:5, 9:7, 12:18, 31:18, 33:3, 33:21, 43:17, 46:20, 47:4, 48:6, 49:4, 49:17, 49:18, 50:21, 51:18, 54:9, 55:13, 59:25, 63:2, 65:8, 65:19, 69:18, 71:11, 77:12, 77:15, 79:24, 86:25, 89:5, 95:12, 98:14, 100:1, 100:18, 113:17, 117:21, 118:15, 135:6 parte [1] - 20:3 participate [1] - 102:7 particular [6] - 30:24, 41:2, 98:2,				

107:12, 116:10, 139:4 particularly [1] - 70:7 particulars [1] - 98:25 parties [3] - 20:21, 134:16, 153:9 partly [1] - 76:21 parts [3] - 13:7, 22:1, 30:12 party [7] - 99:7, 99:8, 121:23, 122:12, 126:17, 126:23, 145:19 pass [3] - 30:7, 39:21, 147:14 Passaic [2] - 100:12, 126:20 passing [1] - 80:18 passion [2] - 89:2, 89:13 past [5] - 25:16, 26:17, 92:11, 110:17, 120:23 patch [1] - 60:17 patches [1] - 61:16 paths [1] - 132:7 patrons [1] - 127:19 Paul [1] - 107:20 paved [2] - 29:23, 29:24 pavement [2] - 97:3, 119:11 pay [2] - 13:10, 123:1 PB-24-01 [2] - 1:6, 4:3 PDF [1] - 28:22 peak [7] - 55:12, 109:22, 118:21, 118:25, 127:21, 127:22 pedestrians [1] - 131:17 Peewee [1] - 58:24 pehnke [7] - 106:11, 126:25, 129:10, 130:5, 131:4, 132:5, 132:9 Pehnke [4] - 106:17, 128:20, 133:2, 133:5 Pehnke's [1] - 133:1 pendency [1] - 140:3 penetrate [1] - 7:7 penultimate [1] - 4:22 people [23] - 22:21, 23:19, 25:4, 26:1, 26:4, 26:5, 26:19, 27:9, 27:13, 29:9, 34:8, 46:10, 65:20,	75:5, 80:15, 80:19, 82:8, 87:21, 94:3, 96:4, 105:13, 112:19, 138:8 people's [1] - 75:9 per [17] - 36:15, 36:16, 58:18, 58:19, 71:14, 77:18, 78:25, 79:4, 80:21, 80:22, 81:17, 113:21, 116:2, 118:19, 129:15, 133:13, 150:16 perceive [1] - 7:15 percent [16] - 45:17, 45:18, 46:2, 46:3, 46:4, 46:5, 46:7, 47:19, 53:1, 56:21, 59:10, 103:3, 107:17, 129:7, 132:16, 138:11 percentage [2] - 49:14, 96:2 percentage-wise [1] - 49:14 percentages [1] - 107:23 percolate [1] - 68:2 percolates [1] - 65:24 percolating [1] - 66:14 perfect [2] - 33:5, 40:21 perfectly [1] - 12:10 performed [1] - 122:19 perhaps [2] - 6:3, 20:22 perimeter [3] - 52:1, 107:15, 107:18 period [7] - 12:8, 78:9, 81:5, 97:24, 100:22, 101:2, 139:3 permission [2] - 9:12, 83:12 permit [4] - 44:12, 44:18, 44:22, 106:20 permits [10] - 113:8, 117:19, 119:20, 120:3, 120:9, 138:14, 140:4, 140:8, 140:16 permitted [22] - 81:18, 81:23, 82:1, 90:3, 90:9, 101:16, 101:19, 101:21, 103:10, 104:11, 104:25, 106:23, 109:23, 112:9, 127:5, 127:11, 127:23, 128:12, 129:16, 132:17, 136:24,	146:20 person [5] - 11:25, 39:3, 40:5, 151:23 personally [1] - 15:3 personnel [1] - 105:9 perspective [2] - 16:21, 105:16 pertaining [1] - 143:9 pervasive [1] - 84:6 phase [2] - 4:22, 110:14 phases [2] - 77:15, 78:6 PhD [1] - 14:6 phenomenon [1] - 44:4 phone [1] - 19:12 photograph [1] - 65:1 photos [2] - 9:2, 69:12 phrase [1] - 22:14 physical [3] - 90:1, 124:1, 143:15 physically [2] - 72:14, 102:3 pick [1] - 9:12 picture [2] - 69:23, 70:15 pictures [3] - 23:25, 45:9, 51:18 piece [6] - 8:24, 33:19, 59:7, 63:22, 64:20, 75:12 pieces [6] - 6:5, 8:25, 13:12, 13:25, 59:7, 70:9 pile [1] - 4:20 pinch [1] - 112:11 Pinelands [1] - 138:3 pipe [1] - 48:21 Pizzo [2] - 144:15, 144:19 place [17] - 13:17, 13:18, 14:14, 17:23, 39:14, 55:10, 57:12, 65:6, 70:8, 82:6, 88:19, 98:5, 135:21, 142:5, 153:5 placed [2] - 12:4, 70:14 placement [4] - 62:14, 63:8, 110:19, 110:25 places [1] - 41:13 plain [1] - 101:13 plainly [3] - 124:20, 129:20, 144:8 plan [94] - 5:25, 9:24,	10:18, 10:22, 11:7, 17:19, 20:14, 21:3, 28:4, 28:13, 30:18, 32:5, 35:4, 41:1, 48:13, 83:1, 84:1, 84:11, 85:14, 87:24, 88:20, 88:21, 91:4, 92:2, 92:25, 93:1, 93:9, 93:13, 93:19, 95:12, 96:16, 97:22, 98:12, 98:18, 98:23, 101:13, 103:7, 103:12, 104:1, 104:21, 104:22, 108:24, 110:3, 110:7, 110:8, 110:10, 110:15, 110:16, 111:3, 111:4, 111:6, 113:4, 114:14, 116:24, 117:1, 117:2, 117:15, 117:16, 117:18, 120:19, 120:21, 121:8, 121:12, 121:14, 121:21, 121:22, 122:9, 123:8, 125:10, 125:11, 126:15, 126:18, 127:9, 127:12, 127:25, 128:5, 130:9, 131:9, 131:19, 131:22, 134:21, 135:21, 141:4, 141:11, 142:14, 144:7, 144:19, 146:8, 147:20, 148:3, 149:16 Plan [3] - 91:5, 93:4, 121:12 planner [7] - 35:8, 82:18, 90:18, 90:19, 92:24, 108:19, 109:6 PLANNING [1] - 1:1 Planning [29] - 9:24, 10:7, 10:25, 24:7, 26:8, 38:15, 73:21, 91:20, 95:22, 99:7, 99:21, 101:9, 102:22, 115:3, 116:3, 122:5, 122:7, 123:24, 127:7, 127:13, 135:15, 139:10, 142:13, 144:5, 144:8, 145:5, 149:25, 151:22 planning [11] - 46:22, 87:21, 100:14, 126:12, 126:22, 127:24, 128:2, 128:5, 141:2, 142:23, 144:25 plans [16] - 24:15, 39:21, 83:4, 84:21,	105:19, 110:10, 123:18, 124:25, 125:2, 125:22, 135:12, 135:14, 139:7, 145:2, 145:6, 145:7 plant [3] - 66:1, 73:24, 124:11 play [1] - 87:19 PLAZA [1] - 1:23 pleas [1] - 89:1 Plocker [1] - 150:13 PLOCKER [6] - 2:2, 2:2, 86:20, 148:21, 148:24, 150:14 plocker [4] - 4:11, 11:18, 86:18, 148:5 plocker's [2] - 27:9, 28:15 Plocker's [1] - 20:5 plot [3] - 31:13, 31:14, 33:3 plus [5] - 70:12, 97:17, 113:2, 113:3, 113:15 PM [2] - 151:23, 152:1 pocket [1] - 58:13 point [31] - 6:25, 7:13, 7:15, 8:11, 12:22, 16:9, 16:19, 21:1, 35:9, 36:24, 42:12, 47:22, 53:17, 62:21, 66:11, 70:6, 70:17, 72:20, 73:14, 112:11, 120:24, 120:25, 133:19, 137:5, 137:8, 137:11, 149:4, 149:11, 149:17, 150:3 pointed [4] - 6:6, 41:23, 44:7, 144:18 pointer [2] - 42:25, 45:10 pointing [4] - 33:5, 35:22, 43:20 points [5] - 19:18, 56:2, 56:15, 72:19, 75:15 police [4] - 100:19, 105:21, 127:20, 142:19 Policeman [1] - 106:2 political [4] - 10:11, 38:24, 46:23 pollutants [1] - 66:16 POMACO [1] - 2:6 poor [1] - 114:3 population [4] -
---	---	--	---	--

36:15, 36:20, 37:6, 62:8
porous [1] - 119:11
portion [3] - 13:6, 111:19, 111:21
portions [5] - 12:4, 108:8, 108:15, 121:10, 121:11
position [4] - 16:16, 76:17, 99:9, 138:22
possibility [1] - 80:8
possible [5] - 26:25, 94:13, 108:6, 147:12, 149:5
possibly [6] - 21:6, 24:12, 25:21, 102:11, 138:3, 151:19
post [5] - 53:3, 53:5, 53:7, 102:25, 122:5
potable [1] - 125:20
potential [4] - 17:25, 105:12, 124:9, 143:18
potentially [1] - 34:8
pound [1] - 88:14
pounding [3] - 89:1, 89:18, 102:1
power [6] - 100:19, 116:17, 128:10, 142:4, 142:6, 142:19
powers [1] - 105:6
practical [1] - 132:1
practically [1] - 11:6
practice [1] - 135:6
precedent [1] - 87:23
precious [1] - 66:19
precise [1] - 110:12
preliminary [7] - 84:1, 84:9, 84:11, 84:17, 85:11, 144:7, 148:3
Preliminary [1] - 84:15
presence [3] - 42:3, 68:13, 119:5
present [6] - 54:21, 129:5, 138:19, 139:16, 143:14, 149:2
presentation [3] - 40:15, 62:13, 69:19
presented [7] - 26:24, 62:25, 92:25, 123:21, 143:12, 146:22, 148:19
presently [1] - 45:16
presents [1] - 42:17
preservation [2] - 14:25, 141:12
preserve [3] - 64:13, 94:12, 138:10
preserved [4] - 90:3,

95:15, 116:13, 143:23
preserving [2] - 14:10, 63:25
President [1] - 87:2
presumptively [1] - 142:20
pretend [1] - 36:10
pretty [4] - 34:5, 47:12, 116:20, 116:21
prevalent [1] - 88:11
prevent [3] - 31:2, 31:4, 60:4
previous [1] - 120:13
previously [3] - 125:10, 129:3, 139:2
prey [1] - 29:17
primarily [3] - 9:6, 14:3, 16:7
primary [6] - 17:4, 17:5, 17:10, 55:22, 72:20, 94:1
primeval [1] - 63:22
Princeton [12] - 40:10, 45:4, 60:2, 64:13, 118:11, 119:17, 120:1, 120:4, 120:7, 134:6, 134:14, 136:2
PRINCETON [1] - 2:10
principal [1] - 101:17
pristine [3] - 68:19, 68:20, 69:1
pro [1] - 123:1
probability [1] - 60:22
problem [15] - 15:22, 17:25, 18:1, 23:5, 33:9, 35:6, 46:19, 48:3, 62:4, 78:12, 78:14, 80:2, 81:4, 136:4, 148:24
problems [5] - 16:11, 16:14, 17:14, 34:15, 80:16
procedural [1] - 100:8
proceed [2] - 31:12, 138:14
proceeded [2] - 98:18, 120:12
proceedings [4] - 87:8, 91:18, 146:15, 150:17
process [17] - 11:3, 14:23, 46:23, 47:1, 90:16, 94:8, 94:17, 95:21, 98:14, 98:18, 101:12, 102:23, 110:24, 120:6, 122:6,

151:12
produced [2] - 11:10, 19:16
product [2] - 99:12, 118:4
productive [1] - 67:11
productivity [2] - 67:9, 67:14
professional [1] - 7:24
professionals [13] - 88:3, 90:17, 94:19, 97:17, 100:14, 103:21, 110:17, 110:23, 113:11, 115:25, 134:16, 138:14, 145:5
Professor [1] - 41:16
professor [1] - 140:25
profit [1] - 47:13
progress [1] - 116:21
prohibit [1] - 128:7
prohibited [2] - 104:25, 139:21
project [59] - 5:17, 13:5, 13:22, 14:1, 15:20, 17:7, 23:14, 23:16, 24:6, 26:23, 27:4, 27:12, 31:7, 32:9, 34:25, 35:12, 35:17, 39:5, 39:9, 39:25, 40:3, 40:5, 43:11, 44:20, 44:25, 47:4, 47:13, 48:24, 49:17, 52:19, 54:12, 55:22, 60:3, 66:20, 67:3, 67:12, 68:8, 71:5, 71:6, 72:20, 73:22, 76:25, 77:2, 77:5, 77:6, 77:7, 77:8, 77:14, 78:24, 81:5, 104:6, 104:8, 108:22, 118:1, 118:23, 120:4, 135:22, 147:16
projects [1] - 31:9
prominent [1] - 67:24
promote [1] - 30:25
prompts [1] - 9:4
prone [1] - 127:19
proof [3] - 15:16, 85:19, 85:21
proper [2] - 30:8, 31:5
properly [3] - 98:20, 132:7, 135:11
properties [2] -

105:23, 108:7
property [60] - 4:7, 6:11, 15:18, 59:22, 64:7, 65:12, 65:17, 88:17, 89:3, 89:25, 90:5, 90:14, 90:15, 91:3, 91:25, 93:10, 94:10, 94:12, 95:3, 95:6, 95:14, 95:17, 96:1, 96:7, 96:10, 100:18, 100:23, 101:10, 105:18, 105:22, 106:1, 108:1, 108:11, 108:14, 109:3, 109:19, 111:10, 111:16, 113:20, 115:14, 115:15, 116:15, 125:12, 131:11, 135:2, 138:11, 139:4, 139:16, 140:19, 142:14, 143:11, 143:13, 143:14, 143:16, 143:20, 143:22, 144:1, 145:10, 147:13, 147:19
proposal [3] - 36:11, 37:3, 78:20
proposals [2] - 84:8, 128:3
propose [1] - 15:22
proposed [42] - 11:14, 14:13, 32:17, 32:21, 36:14, 43:20, 44:20, 76:25, 89:15, 89:25, 90:7, 93:22, 100:21, 101:1, 103:13, 104:13, 105:7, 106:6, 107:22, 111:2, 112:24, 113:2, 124:1, 127:5, 127:14, 127:23, 128:11, 128:21, 129:21, 129:23, 130:2, 132:19, 133:3, 133:9, 134:19, 135:18, 136:24, 139:9, 140:5, 140:22, 144:5, 146:1
proposes [9] - 32:12, 33:7, 103:7, 103:13, 104:14, 129:3, 129:13, 131:9, 131:19
proposing [3] - 4:5, 34:3, 125:7
protect [13] - 14:17, 22:13, 23:8, 23:19, 26:22, 28:18, 73:18, 80:15, 96:18, 98:2, 100:23, 116:11,

143:25
protected [8] - 17:7, 17:11, 17:18, 20:12, 23:1, 27:5, 51:2
protecting [3] - 65:10, 67:11, 73:19
Protection [1] - 100:11
protection [3] - 11:18, 30:22, 92:21
protects [4] - 10:23, 50:9, 50:11, 50:14
proud [1] - 89:18
prove [4] - 10:21, 34:9, 34:10
proverbial [1] - 101:25
provide [13] - 33:15, 34:25, 84:10, 97:6, 97:21, 99:2, 124:17, 124:18, 126:7, 128:18, 128:25, 130:8, 139:1
provided [9] - 11:21, 99:23, 100:7, 103:16, 104:1, 126:11, 126:21, 131:23, 151:4
provides [6] - 91:17, 98:16, 139:5, 143:4, 143:7, 144:25
providing [4] - 93:6, 97:12, 122:15, 143:19
Provision [1] - 100:3
provision [8] - 11:22, 79:20, 96:1, 101:3, 107:4, 107:19, 139:6, 144:24
provisions [11] - 18:2, 30:24, 31:9, 91:10, 92:2, 99:5, 100:16, 100:20, 115:10, 143:7, 143:24
Public [1] - 153:2
public [56] - 6:21, 10:23, 17:6, 17:11, 17:15, 17:18, 20:12, 21:18, 22:23, 22:24, 26:23, 27:5, 28:19, 38:25, 39:2, 63:24, 73:20, 84:6, 85:21, 87:24, 88:15, 89:4, 89:10, 89:12, 90:25, 91:14, 93:23, 94:8, 95:19, 95:21, 96:19, 97:15, 97:20, 98:2, 98:14, 98:18, 100:23, 102:1, 102:7, 102:8, 110:24, 116:7, 116:11, 122:19, 130:18, 140:18,

143:5, 143:18, 143:25, 144:2, 144:22, 146:16, 151:3, 151:7, 151:18 publically [1] - 150:22 publicly [1] - 94:23 pull [8] - 19:14, 32:14, 53:10, 64:2, 66:25, 67:3, 74:3, 137:1 pulled [1] - 65:1 pump [5] - 121:1, 121:6, 121:11, 121:13, 121:15 pumping [2] - 84:20, 85:4 purchasers [1] - 105:12 pure [1] - 35:11 purple [7] - 41:21, 41:22, 41:25, 42:23, 42:24, 43:8, 54:10 purports [2] - 11:5, 11:17 purpose [4] - 99:1, 99:6, 99:12 purposes [6] - 9:8, 21:7, 30:21, 30:24, 44:22, 84:24 pursuant [10] - 27:16, 93:7, 103:15, 120:13, 123:3, 125:14, 141:24, 142:18, 142:19, 143:9 pushed [2] - 136:14, 136:16 pushing [1] - 54:21 put [16] - 12:5, 13:21, 16:23, 23:24, 46:10, 46:15, 53:25, 64:15, 71:23, 74:4, 74:24, 78:15, 87:7, 105:16, 117:6, 150:22 puts [2] - 18:14, 42:10 putting [3] - 68:24, 73:23, 117:13	94:4, 110:24, 141:13, 145:6 questioning [1] - 77:12 questions [15] - 16:3, 16:25, 17:12, 17:20, 19:18, 20:21, 21:1, 22:8, 22:22, 22:25, 75:17, 85:20, 86:9, 102:5, 151:15 quick [1] - 94:17 quickly [1] - 38:10 quite [7] - 15:2, 16:24, 30:5, 66:7, 72:18, 110:1, 132:22 quorum [1] - 87:14 quotation [1] - 149:11 quote [2] - 88:10, 139:6 quoted [1] - 73:3 quotes [1] - 25:11	reading [5] - 31:11, 48:1, 56:6, 117:7, 139:12 ready [1] - 96:8 reaffirms [1] - 137:11 real [2] - 37:9, 63:24 reality [1] - 12:25 realization [1] - 86:25 realize [1] - 6:17 really [29] - 6:2, 7:15, 9:6, 12:18, 13:13, 17:17, 18:3, 18:4, 18:18, 23:15, 36:14, 43:6, 56:17, 61:16, 61:19, 64:8, 64:19, 66:19, 67:1, 70:10, 71:20, 76:12, 78:20, 78:22, 79:12, 87:17, 87:18, 92:11, 133:19 reaping [1] - 73:5 Rear [1] - 23:3 rear [16] - 21:12, 22:9, 22:10, 22:14, 22:19, 23:2, 23:5, 23:12, 23:13, 23:17, 23:24, 24:2, 26:11, 137:7, 137:8 reason [20] - 5:14, 6:15, 7:6, 7:10, 15:23, 18:6, 26:20, 27:15, 35:4, 35:20, 41:18, 42:5, 42:10, 64:14, 75:4, 82:7, 83:13, 97:9, 97:20, 126:3 reasonable [3] - 109:11, 134:19, 142:1 reasonably [1] - 130:17 reasons [7] - 6:12, 7:18, 27:25, 40:4, 85:13, 85:14, 101:9 reassure [1] - 29:15 rebutted [1] - 71:24 receive [1] - 96:16 received [4] - 38:8, 92:18, 93:7, 94:25 recent [1] - 134:3 recently [3] - 83:22, 126:11, 126:21 recess [1] - 86:14 recharge [10] - 41:3, 41:4, 41:5, 44:12, 44:13, 44:18, 44:22, 118:17, 119:25 recharging [1] - 41:9 recite [1] - 81:7 recognize [3] - 69:8, 87:4, 96:12 recognized [6] -	84:18, 89:13, 99:25, 107:3, 110:11, 112:16 recognizes [2] - 108:21, 143:3 recommendation [1] - 139:10 recommendations [1] - 133:12 recommended [2] - 16:13, 142:16 recommending [1] - 98:9 record [13] - 38:12, 38:20, 89:12, 108:16, 117:21, 123:25, 124:18, 130:14, 137:20, 146:22, 150:15, 150:22, 150:24 recorded [1] - 105:11 recreation [1] - 97:1 rectangle [2] - 31:22, 56:5 recycling [2] - 15:5, 15:6 Red [1] - 59:17 red [10] - 41:21, 43:12, 43:13, 43:16, 48:11, 48:14, 48:20, 48:22, 54:4, 105:13 Red-Eyed [1] - 59:17 redirected [1] - 43:18 reduce [3] - 15:12, 61:2, 108:3 reduced [3] - 45:16, 45:17, 46:1 reduction [3] - 53:1, 118:17, 119:13 reevaluate [1] - 149:24 refer [1] - 95:10 reference [1] - 6:18 REFERENCE [1] - 154:3 referenced [6] - 53:14, 98:5, 125:10, 137:5, 137:22, 146:9 referred [4] - 6:18, 55:3, 112:11, 140:24 referring [1] - 101:5 reforestation [2] - 97:2, 114:6 refused [1] - 136:11 refute [2] - 47:10, 47:11 refuted [2] - 72:4, 132:10 refutes [1] - 74:15	regarding [18] - 96:2, 99:18, 102:11, 124:19, 128:15, 131:5, 132:2, 132:14, 133:15, 133:18, 137:1, 137:6, 137:25, 138:1, 141:21, 143:5, 146:10, 146:23 regardless [3] - 103:24, 130:2, 143:11 regenerate [3] - 67:22, 68:7, 68:23 regeneration [1] - 12:9 regions [1] - 99:3 regret [1] - 16:22 regrow [1] - 67:20 regrowth [2] - 71:23, 74:20 regular [9] - 87:17, 103:13, 104:7, 106:21, 106:25, 129:4, 130:7, 131:2, 151:21 regularly [1] - 102:4 regulated [6] - 103:20, 137:25, 138:2, 138:4, 139:21, 140:11 regulates [1] - 75:18 regulation [7] - 75:23, 79:24, 101:5, 106:16, 115:8, 120:15, 143:9 regulations [25] - 11:6, 91:1, 96:11, 96:23, 97:5, 97:14, 97:16, 98:5, 98:15, 100:5, 101:16, 103:2, 107:7, 109:8, 113:1, 117:22, 117:24, 120:14, 120:16, 122:21, 132:18, 138:25, 139:25, 141:25, 150:21 Regulations [1] - 100:6 regulatory [1] - 100:9 rehabilitate [1] - 68:15 rehabilitating [1] - 68:18 rehabilitative [1] - 68:17 rejected [1] - 119:20 relate [1] - 141:14 related [2] - 17:13, 140:16 relates [1] - 75:16
R				
R-3 [5] - 33:4, 33:10, 33:20, 33:22, 104:16 radar [1] - 29:11 rain [2] - 50:25, 136:5 raised [6] - 20:21, 21:21, 22:23, 72:20, 74:9, 74:21 raises [1] - 76:1 ramps [1] - 133:16 Randolph [1] - 144:16 rapidly [1] - 66:15 rare [8] - 5:21, 6:10, 8:15, 38:6, 51:16, 54:9, 71:15, 71:17 Raritan [1] - 75:24 rarity [1] - 9:3 rata [1] - 123:1 rate [2] - 127:17, 128:9 rather [6] - 31:22, 68:23, 77:15, 80:10, 83:9, 102:18 rational [1] - 102:5 RE [1] - 1:6 reached [1] - 94:19 reaches [1] - 7:21 reaching [1] - 7:25 reactions [1] - 75:2 read [10] - 24:14, 38:11, 56:17, 72:17, 134:4, 137:7, 139:6, 154:6, 154:22 readers [1] - 86:22				
Q				
qualified [2] - 16:20, 82:17 quality [6] - 65:10, 82:4, 82:7, 114:1, 114:2, 119:24 quantity [1] - 119:24 quarters [1] - 20:24 quasi [1] - 10:12 questioned [4] -				

relation ^[1] - 32:21 relative ^[2] - 153:8, 153:10 relatively ^[5] - 6:12, 7:18, 8:11, 13:10, 112:8 relevancy ^[3] - 91:20, 146:21, 147:9 relevant ^[3] - 91:18, 105:18, 147:17 reliance ^[2] - 146:15, 149:12 relied ^[1] - 127:13 relief ^[7] - 91:17, 97:13, 97:21, 108:23, 109:2, 109:9, 143:19 relitigate ^[1] - 94:7 rely ^[8] - 20:10, 114:8, 124:6, 149:13, 149:19, 149:22, 150:7, 150:15 relying ^[1] - 150:2 remain ^[6] - 49:17, 59:12, 109:21, 130:22, 131:2, 147:13 remainder ^[3] - 31:8, 47:21, 95:17 remaining ^[8] - 70:9, 90:2, 95:14, 103:8, 113:15, 116:12, 143:22, 145:17 remains ^[2] - 30:2, 54:14 remand ^[1] - 147:11 remanded ^[1] - 149:23 remanding ^[1] - 147:7 remarkable ^[4] - 63:23, 65:4, 68:13 remarks ^[1] - 86:19 remedy ^[4] - 9:9, 92:9, 92:21 remember ^[18] - 14:12, 20:25, 21:13, 21:21, 21:22, 23:25, 38:25, 46:10, 48:7, 51:16, 57:2, 59:5, 64:12, 65:22, 67:16, 68:10, 69:19, 118:25 reminded ^[1] - 150:6 remnants ^[1] - 70:20 remotely ^[1] - 74:9 removal ^[5] - 113:5, 115:9, 115:20, 116:7, 143:10 remove ^[1] - 97:6 removed ^[2] - 113:6, 113:19 removes ^[1] - 11:17	renders ^[2] - 34:21, 115:9 renewable ^[1] - 67:19 rent ^[1] - 26:2 rentals ^[1] - 93:11 repeal ^[1] - 142:7 repeat ^[1] - 23:6 repeatedly ^[9] - 17:20, 22:23, 83:15, 83:21, 84:19, 117:10, 135:10, 135:17, 149:13 replace ^[1] - 116:7 replacement ^[6] - 97:1, 113:5, 114:6, 115:9, 115:21, 143:10 replied ^[1] - 21:21 report ^[29] - 12:3, 17:21, 17:23, 18:2, 18:9, 18:14, 19:13, 19:25, 20:5, 20:9, 20:18, 24:9, 25:12, 26:9, 40:10, 40:22, 47:23, 72:17, 80:6, 114:18, 114:22, 118:13, 118:14, 126:5, 126:19, 127:3, 133:25 reported ^[2] - 83:19, 150:21 Reporter ^[1] - 153:1 REPORTING ^[1] - 1:23 reports ^[7] - 8:8, 38:14, 40:12, 133:1, 134:5, 136:2, 146:10 Repose ^[1] - 92:20 repose ^[1] - 95:1 representatives ^[1] - 38:13 represented ^[2] - 40:11, 114:12 represents ^[2] - 31:22, 33:3 reproduce ^[1] - 61:14 reproducing ^[1] - 61:18 request ^[8] - 103:17, 103:21, 130:3, 130:12, 130:23, 133:13, 140:8 requested ^[1] - 130:10 require ^[12] - 28:1, 35:17, 58:15, 58:16, 58:17, 58:18, 58:20, 109:8, 122:23, 122:25, 125:23,	128:23 required ^[31] - 11:23, 29:20, 34:19, 87:5, 87:8, 87:24, 90:10, 91:4, 97:16, 106:11, 108:4, 108:13, 110:8, 110:20, 120:3, 122:3, 122:12, 122:18, 123:1, 125:24, 126:17, 130:6, 132:22, 134:7, 138:23, 139:13, 139:14, 140:4, 145:12, 151:25, 154:7 requirement ^[12] - 96:14, 103:4, 110:25, 111:23, 112:22, 112:25, 117:25, 122:2, 122:20, 131:8, 133:8, 135:23 requirements ^[18] - 27:21, 90:22, 95:13, 96:4, 96:6, 96:18, 97:2, 97:3, 97:7, 98:1, 100:8, 100:9, 107:6, 114:7, 115:15, 118:8, 119:24, 147:21 requires ^[10] - 9:23, 9:25, 60:1, 96:3, 104:20, 106:16, 113:2, 113:14, 115:10, 125:17 requiring ^[2] - 35:12, 141:25 rescue ^[1] - 32:24 residential ^[11] - 4:6, 22:12, 23:8, 33:13, 34:6, 34:18, 94:1, 101:17, 105:17, 105:23, 146:20 Residential ^[2] - 75:18, 75:21 residents ^[7] - 33:22, 102:11, 102:16, 106:7, 106:14, 130:20, 132:8 resolution ^[5] - 93:3, 102:23, 107:3, 122:5, 127:15 resolutions ^[1] - 29:2 resolved ^[3] - 84:7, 85:10, 92:4 resource ^[2] - 66:20, 67:19 resources ^[5] - 14:18, 14:21, 29:17, 31:1, 31:2 respect ^[7] - 17:16, 20:12, 46:9, 76:16,	102:10, 110:20, 118:19 respectful ^[1] - 102:6 respectfully ^[1] - 107:2 respecting ^[1] - 39:19 respond ^[2] - 51:7, 150:10 responded ^[1] - 138:7 Response ^[1] - 24:12 response ^[9] - 24:15, 24:20, 24:22, 118:11, 127:2, 130:11, 139:16, 148:13, 148:16 responsibility ^[1] - 20:15 responsible ^[3] - 14:10, 14:25, 123:5 rest ^[7] - 30:13, 32:18, 54:11, 73:15, 87:3, 103:25, 119:10 restrict ^[1] - 113:15 restricted ^[2] - 95:16, 103:9 restricting ^[1] - 95:5 restrictions ^[1] - 29:16 result ^[6] - 29:24, 29:25, 50:15, 51:2, 92:17, 93:18 resulted ^[1] - 94:19 resulting ^[2] - 61:15, 109:17 results ^[2] - 119:13, 134:16 retail ^[1] - 127:9 retain ^[1] - 106:24 retained ^[1] - 116:2 retaining ^[1] - 108:12 retired ^[1] - 141:8 return ^[3] - 13:15, 13:21, 66:2 returned ^[2] - 41:7, 45:20 reveal ^[1] - 114:10 reveals ^[1] - 95:4 revenue ^[1] - 13:23 reversing ^[1] - 147:7 review ^[19] - 16:18, 16:22, 24:15, 87:9, 87:25, 94:17, 95:4, 97:24, 98:20, 110:2, 122:23, 125:22, 132:23, 132:25, 133:12, 139:8, 151:17, 151:24 reviewed ^[4] - 23:16,	100:22, 118:14, 124:25 reviewing ^[1] - 128:3 revised ^[2] - 117:3, 118:13 revisit ^[2] - 94:6, 101:9 revisited ^[1] - 116:4 revocation ^[1] - 97:10 rezone ^[1] - 91:25 rezoning ^[4] - 94:10, 95:25, 115:13, 143:14 ride ^[1] - 8:9 rides ^[2] - 78:25, 81:1 ridge ^[13] - 16:9, 16:12, 21:16, 22:17, 23:17, 23:23, 41:19, 84:25, 109:22, 109:24, 118:21, 136:17, 136:20 right-hand ^[4] - 42:8, 43:6, 48:25, 49:5 rightfully ^[1] - 141:13 ring ^[2] - 60:3, 64:13 Rings ^[1] - 36:19 ripped ^[1] - 52:23 rise ^[3] - 29:23, 29:25, 62:19 risk ^[3] - 16:14, 28:9, 39:24 river ^[1] - 51:4 riverine ^[2] - 41:7, 44:14 rivers ^[2] - 41:12, 55:11 rizzo ^[1] - 118:9 road ^[21] - 21:5, 24:23, 33:1, 33:19, 77:9, 78:23, 80:12, 80:13, 81:19, 90:7, 97:2, 103:24, 104:4, 120:23, 121:2, 130:1, 130:7, 131:12, 132:11, 132:14, 132:21 Road ^[26] - 4:5, 21:9, 24:19, 56:14, 76:8, 77:5, 90:6, 94:1, 103:11, 104:12, 104:13, 106:18, 123:6, 125:8, 125:13, 126:10, 128:17, 128:24, 129:4, 131:10, 131:12, 131:15, 131:17, 132:19 roads ^[7] - 33:16,
---	---	--	--	--

82:21, 128:22, 129:9, 129:12, 132:16, 133:3 roadway [2] - 133:8 roadways [4] - 24:20, 36:2, 48:16, 128:21 ROBERT [1] - 1:8 Robin [1] - 60:25 robust [1] - 132:7 Rock [7] - 90:6, 90:11, 123:6, 128:17, 129:6, 132:20, 132:21 rock [2] - 135:1, 136:1 Rocky [1] - 55:14 role [3] - 87:19, 94:6, 101:11 roller [1] - 61:19 rolling [1] - 9:20 roof [1] - 119:12 rooftop [2] - 101:23, 102:13 room [4] - 21:15, 22:3, 22:6, 87:21 rooms [1] - 14:20 rough [1] - 50:18 roughly [2] - 45:11, 48:12 Round [4] - 92:6, 92:12, 92:14, 142:14 round [5] - 91:4, 93:9, 94:5, 98:15, 115:16 roundabout [1] - 111:10 routine [1] - 145:19 RSIS [33] - 75:20, 76:3, 76:9, 77:24, 79:19, 80:9, 80:15, 81:11, 81:13, 81:22, 82:1, 82:19, 82:21, 103:17, 106:15, 106:18, 106:23, 113:1, 113:2, 128:22, 129:8, 129:16, 129:18, 129:20, 129:24, 130:6, 130:14, 130:16, 131:5, 133:4, 133:7, 137:20 ruining [1] - 80:19 Rule [1] - 143:1 rule [5] - 10:22, 73:9, 73:10, 115:8, 143:3 rules [1] - 120:13 run [1] - 105:24 runoff [13] - 41:7, 41:10, 41:14, 45:2, 65:23, 117:11, 117:24, 118:2, 118:3,	118:17, 119:6, 119:10, 119:24 runs [2] - 66:14, 111:18 RYAN [1] - 1:12 S S.R [1] - 153:15 sac [39] - 72:21, 76:4, 76:5, 76:8, 76:9, 76:11, 76:12, 76:13, 76:15, 76:18, 76:23, 77:11, 77:12, 77:16, 77:19, 77:20, 77:21, 77:24, 78:2, 78:4, 79:11, 79:21, 80:2, 80:10, 80:24, 81:11, 81:14, 81:18, 82:2, 82:10, 111:17, 129:5, 129:9, 129:18, 132:12, 132:15, 133:4 sacs [2] - 76:18, 76:19 safe [3] - 90:23, 128:15, 128:25 safely [3] - 132:8, 135:18, 136:25 safer [1] - 129:1 safety [25] - 10:23, 16:13, 17:6, 17:11, 17:13, 17:16, 17:18, 20:12, 27:5, 73:20, 82:4, 82:8, 85:22, 127:15, 128:3, 128:19, 130:18, 134:7, 134:13, 134:15, 134:19, 143:5, 144:2, 144:23 salient [1] - 72:19 salmon [3] - 62:6, 62:7, 62:8 sanctioned [1] - 95:25 sand [1] - 70:18 Sandberg [1] - 88:10 sanitary [4] - 121:16, 121:19, 124:1, 124:10 sat [2] - 11:24, 149:21 satellite [3] - 69:11, 69:18, 69:22 satisfaction [1] - 10:21 satisfied [7] - 17:15, 20:11, 85:19, 85:23, 86:1, 126:13, 145:17 satisfies [1] - 116:6 satisfy [4] - 85:21, 126:3, 126:23, 130:14	save [2] - 88:16, 138:7 saw [10] - 17:19, 25:1, 25:3, 25:15, 26:17, 40:24, 48:12, 56:21, 64:6, 68:10 Scarlet [1] - 59:17 Scarpa [1] - 87:2 SCARPA [1] - 1:11 scattered [1] - 8:25 scattergraph [4] - 61:3, 61:6, 61:7, 61:10 scenario [1] - 106:24 scenarios [1] - 133:24 science [1] - 12:16 scientific [1] - 46:17 scientist [1] - 139:23 scope [1] - 15:24 scratch [1] - 79:22 screamed [1] - 88:19 screen [2] - 29:11, 108:15 screening [1] - 109:16 screens [1] - 102:21 scroll [2] - 40:7, 72:23 se [2] - 71:14, 150:16 seaboard [1] - 8:6 Sean [4] - 14:4, 15:10, 40:17, 45:4 seasons [1] - 58:2 second [10] - 67:13, 67:14, 77:11, 78:23, 81:19, 81:20, 101:7, 137:6, 137:11, 147:5 secret [1] - 113:13 Secretary [1] - 1:12 secrets [1] - 9:20 Section [6] - 30:23, 122:13, 122:16, 141:24, 143:1, 144:7 section [2] - 115:9, 144:4 sections [2] - 117:4, 121:10 sectors [2] - 55:7, 55:8 sediment [1] - 126:18 see [97] - 6:25, 8:18, 8:19, 8:22, 15:2, 15:20, 16:3, 17:22, 26:9, 26:10, 31:17, 31:19, 31:25, 32:6, 32:11, 32:16, 32:22, 33:2, 36:3, 36:9, 36:10, 41:15, 41:16,	42:13, 42:23, 43:1, 43:3, 43:13, 43:15, 44:7, 45:9, 45:20, 48:2, 48:11, 48:18, 48:23, 49:25, 50:20, 50:23, 51:5, 51:12, 51:25, 52:16, 53:8, 53:14, 55:6, 55:24, 57:21, 57:25, 58:1, 59:23, 59:24, 60:8, 60:19, 60:21, 60:23, 61:6, 61:7, 62:5, 62:6, 62:15, 62:18, 62:24, 63:13, 64:8, 65:12, 65:14, 65:16, 67:3, 67:12, 69:24, 70:1, 70:3, 70:4, 70:11, 70:15, 70:23, 71:5, 89:3, 102:12, 111:17, 112:1, 112:6, 115:6, 121:7, 121:13, 122:17, 125:1, 125:10, 131:22, 136:7, 138:9, 147:18 seeing [7] - 32:3, 61:21, 64:5, 102:16, 102:17, 108:8, 123:13 seek [3] - 34:3, 34:4, 108:23 seeking [4] - 91:11, 107:20, 127:9, 131:4 seepage [2] - 136:4, 136:6 sees [1] - 57:14 sell [1] - 78:1 send [2] - 6:24, 7:17 sends [1] - 42:20 sense [4] - 9:15, 47:16, 57:4, 80:14 sensitive [3] - 29:19, 58:12, 58:24 sent [1] - 19:2 sentiment [1] - 66:16 separate [9] - 10:10, 28:12, 76:19, 78:2, 79:18, 80:8, 80:11, 80:23, 149:14 separately [1] - 10:9 separating [1] - 12:6 September [4] - 127:1, 127:2, 128:20, 132:10 series [1] - 48:6 serious [5] - 17:2, 37:22, 39:11, 72:16, 82:3 seriously [2] - 87:9, 102:14 seriousness [1] - 17:4	serve [7] - 10:4, 41:8, 103:18, 106:13, 130:4, 130:15, 132:8 Serve [2] - 125:22, 126:6 served [1] - 33:23 Service [1] - 113:24 service [5] - 124:17, 126:7, 126:22, 128:21, 145:10 served [1] - 125:5 serving [2] - 10:5, 34:7 session [1] - 5:6 sessions [5] - 5:7, 39:1, 39:4, 93:16, 93:18 set [12] - 11:11, 11:13, 77:17, 77:18, 87:19, 89:22, 97:18, 103:4, 109:5, 122:12, 146:7, 153:6 setback [2] - 24:20, 95:9 setbacks [1] - 96:23 sets [2] - 5:11, 19:4 settle [1] - 8:7 settled [1] - 8:21 settlement [65] - 9:5, 9:14, 9:23, 10:16, 11:4, 11:12, 11:14, 11:15, 11:20, 12:1, 13:16, 27:2, 27:16, 27:17, 27:19, 27:21, 27:24, 92:3, 92:14, 92:16, 92:22, 93:12, 93:18, 93:21, 94:9, 94:16, 94:19, 94:21, 94:25, 95:20, 95:23, 95:25, 97:19, 98:7, 99:4, 99:8, 99:13, 99:21, 100:1, 103:16, 107:6, 108:20, 108:21, 109:4, 110:7, 110:11, 111:4, 113:12, 113:13, 113:17, 115:13, 115:14, 115:19, 122:10, 122:17, 123:3, 123:7, 130:11, 139:5, 139:11, 139:12, 143:16 settling [1] - 9:8 seven [2] - 16:9, 57:13 several [8] - 18:6, 25:4, 56:2, 64:15, 65:19, 105:13, 112:11, 120:5 severely [5] - 13:8,
---	--	---	---	---

46:21, 47:5, 47:18, 63:19 sewage [5] - 84:5, 84:14, 85:2, 121:20, 123:9 sewer [34] - 39:23, 83:2, 83:4, 83:7, 83:10, 88:20, 88:21, 93:24, 117:8, 120:18, 120:19, 121:1, 121:3, 121:4, 121:16, 121:18, 121:19, 121:21, 121:24, 122:1, 122:16, 122:19, 123:10, 123:19, 124:10, 124:20, 124:21, 125:1, 125:25, 126:1, 145:8, 145:18, 146:11 sewers [1] - 124:9 shaded [1] - 35:23 shake [1] - 105:25 shaken [1] - 17:2 shall [23] - 93:10, 96:17, 96:19, 97:8, 98:20, 98:21, 100:4, 100:7, 103:10, 104:10, 107:5, 107:11, 107:16, 107:17, 109:9, 109:21, 109:23, 122:21, 143:10, 144:5, 144:8, 144:18, 144:24 Shall [1] - 139:6 shape [1] - 110:12 Share [2] - 93:4, 142:14 share [5] - 93:9, 98:12, 98:18, 99:3, 123:1 sheer [1] - 82:10 SHEET [1] - 154:1 sheet [3] - 111:7, 131:22, 154:6 Sheet [3] - 111:19, 111:20, 117:2 sheets [3] - 121:9, 125:10, 154:7 Sheets [1] - 117:5 shift [1] - 116:23 SHIMANOWITZ [1] - 2:2 Shirley [1] - 92:24 Shiva [1] - 75:1 shop [1] - 127:9 Shore [1] - 142:20 short [2] - 28:22, 86:14 shorter [1] - 51:5	Shorthand [1] - 153:1 shortly [4] - 20:19, 31:25, 103:22, 141:18 show [22] - 24:15, 41:25, 42:25, 43:9, 43:12, 49:3, 49:25, 73:6, 73:11, 74:1, 74:6, 82:18, 84:21, 88:21, 111:4, 111:22, 111:24, 121:9, 124:20, 144:12, 145:7, 149:7 showed [2] - 141:2, 141:5 showing [5] - 61:6, 61:7, 62:23, 63:7, 73:8 shown [11] - 70:20, 77:4, 83:1, 85:9, 85:20, 85:21, 110:6, 111:6, 117:7, 117:16, 120:20 shows [11] - 17:15, 26:15, 35:25, 61:3, 61:10, 65:1, 69:23, 104:2, 106:5, 118:16, 123:8 shred [2] - 37:14, 82:16 shut [2] - 72:25, 74:22 side [34] - 5:19, 12:4, 13:12, 32:9, 32:17, 32:18, 41:23, 41:24, 42:6, 42:8, 42:24, 43:3, 43:4, 43:5, 43:8, 43:23, 44:8, 45:8, 45:11, 45:25, 46:2, 46:5, 46:6, 50:14, 53:17, 65:12, 65:13, 131:10, 131:12, 131:17, 131:18, 131:25 sided [1] - 20:6 sides [3] - 88:4, 131:6, 149:24 sidewalk [6] - 131:15, 131:16, 131:24, 131:25, 132:6 sidewalks [3] - 131:6, 131:9, 131:14 sight [2] - 92:1, 102:17 sign [9] - 8:2, 8:4, 73:23, 74:7, 123:14, 128:18, 145:20, 145:25, 154:6 signage [2] - 73:25, 74:4	signal [6] - 90:10, 90:12, 99:17, 129:2, 132:19, 133:9 SIGNATURE [1] - 154:1 signature [1] - 154:25 signed [1] - 126:8 significance [2] - 18:9, 29:22 significant [5] - 16:11, 16:14, 67:16, 91:3, 118:17 signs [1] - 74:1 similar [5] - 31:9, 56:14, 59:18, 61:4, 108:16 similarly [1] - 44:8 simple [3] - 27:14, 42:10, 55:8 simply [10] - 30:18, 41:6, 78:4, 79:21, 81:20, 83:23, 105:10, 121:22, 132:17, 132:23 single [21] - 33:13, 34:6, 35:16, 36:13, 37:14, 39:3, 40:4, 47:8, 80:20, 82:15, 89:3, 90:9, 104:15, 104:18, 106:1, 131:24, 138:9, 141:5, 145:4, 146:18, 146:20 sisters [1] - 28:7 Site [2] - 75:18, 75:21 site [120] - 6:9, 10:18, 11:7, 19:5, 19:7, 30:18, 31:13, 32:5, 34:17, 37:6, 40:25, 41:4, 41:15, 41:25, 42:22, 43:2, 48:24, 49:17, 51:9, 63:12, 65:16, 66:22, 67:4, 67:12, 69:9, 69:23, 69:25, 70:13, 80:17, 87:24, 90:18, 92:1, 92:2, 93:19, 93:20, 93:22, 93:25, 94:4, 96:9, 97:17, 97:22, 98:23, 101:1, 101:10, 101:13, 103:7, 103:10, 103:12, 104:1, 104:14, 104:21, 104:22, 105:15, 105:19, 108:24, 110:3, 110:15, 110:16, 111:4, 113:4, 113:10, 115:16, 116:4,	116:24, 117:2, 117:4, 117:7, 117:13, 117:16, 118:2, 118:3, 119:10, 119:14, 120:21, 120:23, 121:3, 121:10, 121:12, 121:18, 121:22, 122:9, 122:19, 123:9, 123:11, 124:11, 124:20, 125:11, 125:24, 127:4, 127:9, 127:12, 127:25, 128:1, 128:3, 128:4, 128:5, 128:6, 128:14, 129:3, 130:9, 131:21, 131:22, 132:4, 136:5, 136:10, 136:12, 136:13, 138:6, 138:19, 140:22, 141:4, 141:11, 144:7, 144:19, 146:8, 146:24, 148:3 sites [5] - 30:25, 63:7, 66:17, 98:20, 128:21 sitting [4] - 5:9, 19:6, 22:17, 75:1 situation [4] - 5:11, 116:10, 123:22, 137:15 size [6] - 6:7, 58:13, 60:17, 60:23, 103:4, 107:8 slide [3] - 45:6, 56:19, 57:13 slides [1] - 29:1 slideshow [2] - 55:18, 55:19 slope [25] - 95:8, 97:13, 100:17, 102:19, 108:2, 110:21, 111:3, 111:25, 112:3, 112:10, 112:13, 112:16, 112:20, 112:24, 118:19, 119:6, 134:10, 134:12, 134:13, 134:22, 134:23, 136:3, 136:6, 136:8, 136:24 slopes [6] - 11:13, 90:5, 119:2, 132:16, 133:8, 141:6 slower [1] - 116:22 smack [3] - 60:9, 64:8, 64:10 small [10] - 6:3, 6:12, 29:22, 33:3, 49:1,	49:4, 51:25, 52:19, 55:1, 120:25 smaller [4] - 8:24, 49:6, 61:9, 121:10 smart [7] - 63:4, 63:6, 67:10, 68:9, 68:15, 68:20, 141:1 smoking [1] - 25:16 snow [1] - 51:1 so-called [1] - 16:17 societies [1] - 58:18 soil [5] - 65:24, 65:25, 67:11, 67:20, 126:18 Soil [3] - 100:12, 126:20, 145:11 soils [9] - 42:16, 42:18, 67:16, 67:18, 67:21, 67:24, 67:25, 68:4, 68:7 Solely [1] - 127:13 solely [1] - 129:21 solid [1] - 121:3 solution [1] - 138:6 solutions [1] - 84:9 solve [1] - 80:2 someday [1] - 104:18 someone [7] - 6:21, 21:17, 21:18, 26:8, 102:5, 105:24, 136:18 sometimes [7] - 7:10, 10:14, 28:22, 58:1, 124:3, 124:4 somewhat [1] - 88:11 somewhere [2] - 37:8, 83:3 sorry [22] - 11:3, 20:17, 28:22, 36:4, 40:7, 52:4, 52:14, 53:5, 53:10, 53:12, 56:19, 57:5, 61:6, 62:18, 63:11, 65:3, 70:2, 71:5, 75:19, 81:8, 81:9 sort [3] - 9:15, 18:21, 27:10 sought [5] - 17:9, 33:21, 33:23, 92:6, 92:10 sound [1] - 14:1 sounds [1] - 67:19 south [5] - 104:12, 111:14, 112:6, 121:2, 121:17 South [3] - 29:12, 38:17, 124:10 southeast [3] - 55:16, 111:12, 121:13
---	---	---	--	--

southerly ^[1] - 111:15 southern ^[1] - 111:20 SP-11 ^[1] - 111:7 SP-16 ^[1] - 111:20 SP-17 ^[1] - 111:19 SP-18 ^[2] - 117:2, 121:8 SP-19 ^[1] - 121:9 SP-23 ^[1] - 121:12 SP-24 ^[1] - 121:9 SP-4 ^[1] - 131:22 space ^[8] - 31:1, 58:17, 58:23, 95:16, 96:25, 101:17, 103:9, 113:16 spaces ^[4] - 29:17, 68:10, 113:2, 113:3 spacing ^[1] - 96:24 speaking ^[6] - 5:24, 5:25, 6:1, 59:14, 72:14 speaks ^[2] - 101:14, 116:13 special ^[4] - 87:5, 94:22, 99:22, 136:1 species ^[49] - 36:20, 51:7, 54:19, 54:20, 56:20, 56:22, 56:23, 56:24, 56:25, 57:2, 57:3, 57:6, 57:9, 57:11, 57:13, 57:14, 57:16, 57:24, 58:3, 58:8, 58:9, 58:11, 58:12, 58:14, 58:19, 58:23, 59:12, 59:13, 59:16, 60:15, 60:25, 61:4, 61:17, 61:24, 62:1, 62:4, 62:5, 62:6, 62:10, 64:12, 64:17, 70:6, 70:7, 71:14, 72:4, 138:19, 139:19 specific ^[2] - 84:8, 107:12 specifically ^[9] - 93:10, 96:22, 99:25, 109:9, 115:20, 122:14, 123:7, 143:8, 146:9 specifications ^[2] - 97:3, 144:9 speculator ^[1] - 30:9 speculators ^[1] - 29:18 SPEEDWELL ^[1] - 1:24 spend ^[1] - 9:21 spent ^[2] - 34:1, 56:22	splitting ^[1] - 136:1 spoken ^[2] - 39:17, 85:17 sprawl ^[2] - 31:3, 31:4 spray ^[1] - 124:12 sprinkler ^[1] - 125:21 sprinklered ^[2] - 137:4 Square ^[1] - 56:13 square ^[8] - 31:22, 49:1, 49:5, 52:11, 58:18, 65:13, 107:9, 107:10 squares ^[2] - 56:4, 57:5 stability ^[1] - 134:17 Stadium ^[1] - 46:12 stage ^[1] - 135:12 staggering ^[1] - 63:18 stake ^[2] - 5:15, 71:17 stand ^[3] - 71:24, 85:14, 91:9 standard ^[5] - 118:6, 121:23, 128:23, 131:5, 134:7 Standards ^[2] - 75:19, 75:21 standards ^[12] - 76:3, 76:9, 77:24, 89:22, 96:17, 96:25, 107:12, 109:5, 120:11, 133:5, 144:11, 144:23 standing ^[1] - 89:17 standpoint ^[1] - 148:2 stark ^[1] - 64:25 Starling ^[1] - 60:21 start ^[8] - 5:2, 28:23, 29:6, 79:22, 112:2, 117:9, 151:13 starting ^[1] - 42:12 starts ^[3] - 111:9, 112:16, 134:24 State ^[3] - 127:10, 135:7, 153:2 state ^[21] - 6:3, 14:19, 30:2, 30:11, 31:2, 58:4, 58:22, 69:21, 70:11, 75:25, 83:23, 83:25, 84:18, 85:24, 89:18, 117:12, 127:18, 137:20, 138:2, 139:22 statement ^[6] - 11:9, 29:14, 73:1, 74:25, 99:24, 149:15	statements ^[2] - 38:8, 89:10 states ^[10] - 30:24, 69:20, 83:19, 93:10, 93:19, 114:9, 129:20, 143:9, 144:4, 144:8 stating ^[1] - 83:6 station ^[5] - 121:1, 121:7, 121:11, 121:13, 121:15 stations ^[2] - 84:21, 85:4 statistically ^[4] - 114:15, 114:19, 114:24 statute ^[3] - 75:21, 79:20, 79:24 statutes ^[1] - 144:12 statutory ^[1] - 75:25 stay ^[5] - 95:8, 95:9, 110:25, 111:5, 112:22 staying ^[1] - 111:23 steep ^[7] - 11:13, 97:13, 100:17, 112:3, 134:9, 136:23, 141:6 stenographically ^[1] - 153:4 step ^[2] - 88:3, 97:5 steps ^[1] - 105:5 stick ^[2] - 85:5, 85:6 sticking ^[1] - 48:19 still ^[13] - 31:11, 36:22, 37:3, 53:23, 75:5, 75:12, 79:17, 79:19, 81:2, 106:23, 112:13, 130:8, 130:16 Stockholm ^[1] - 18:21 stop ^[5] - 13:24, 28:24, 63:9, 128:17, 147:16 store ^[1] - 106:4 stories ^[2] - 96:24, 107:14 stormwater ^[22] - 41:7, 41:10, 42:1, 65:23, 117:8, 117:9, 117:11, 117:15, 117:18, 117:24, 118:13, 118:21, 119:3, 119:4, 119:6, 119:9, 120:11, 120:13, 140:4, 140:5, 145:7, 146:11 story ^[4] - 22:9, 22:16, 23:17, 23:20 stranger ^[2] - 90:14, 100:24 stream ^[1] - 65:18 street ^[7] - 34:19,	81:10, 91:24, 100:25, 131:7, 131:25, 133:7 streets ^[4] - 128:9, 131:7, 133:14 stress ^[2] - 91:23, 103:23 stretch ^[1] - 137:17 strictly ^[1] - 28:24 strike ^[1] - 140:19 strip ^[1] - 5:18 strips ^[1] - 31:19 strongly ^[1] - 76:17 structural ^[1] - 16:15 structure ^[9] - 22:12, 23:8, 23:20, 23:24, 24:1, 24:25, 25:10, 134:12 structures ^[5] - 55:1, 62:14, 68:16, 68:18, 137:12 stuck ^[1] - 79:19 study ^[4] - 8:6, 114:23, 115:25, 138:22 subdivision ^[8] - 68:11, 70:18, 98:23, 105:17, 105:19, 144:17, 146:17, 147:20 subdivisions ^[4] - 51:21, 62:16, 63:14, 147:15 subject ^[6] - 12:19, 34:7, 58:5, 107:11, 109:3, 135:13 submission ^[1] - 139:13 submit ^[2] - 122:3, 139:7 submitted ^[6] - 38:21, 72:8, 103:12, 115:7, 132:24, 142:25 subscribed ^[1] - 154:22 subsequent ^[2] - 143:6, 147:2 subsequently ^[4] - 93:2, 115:22, 143:4, 144:1 subset ^[2] - 56:16, 57:1 substance ^[2] - 45:5, 73:14 substantial ^[3] - 109:17, 128:18, 130:13 substantially ^[1] - 110:5 substantive ^[3] - 5:9, 96:15, 97:11	substrate ^[1] - 16:15 suburban ^[5] - 8:16, 9:1, 26:18, 57:10, 63:13 success ^[5] - 61:4, 61:8, 61:9, 61:18 successful ^[1] - 14:17 succinctly ^[1] - 19:19 suddenly ^[1] - 37:6 sue ^[1] - 9:18 sued ^[6] - 9:19, 28:6, 28:7, 28:11, 46:24, 46:25 sufficient ^[6] - 24:17, 39:24, 84:10, 123:25, 125:19, 137:14 sufficiently ^[1] - 16:16 suggest ^[1] - 8:3 suggested ^[1] - 124:8 suitable ^[1] - 93:25 SUITE ^[2] - 1:24, 2:7 summarize ^[1] - 41:6 summary ^[3] - 15:25, 29:5, 62:11 summarization ^[2] - 4:10, 15:25 SUMMATIONS ^[1] - 1:4 summertime ^[1] - 55:25 sunlight ^[2] - 7:21, 7:25 Super ^[2] - 83:20, 127:8 superimposed ^[2] - 52:15, 55:6 Superior ^[2] - 147:6, 150:23 supermarket ^[1] - 5:18 supervisor ^[1] - 15:6 supplementation ^[1] - 20:9 supplied ^[2] - 65:23 supplies ^[1] - 66:8 supply ^[11] - 41:8, 44:17, 45:19, 65:19, 67:6, 67:8, 67:23, 68:2, 84:5, 84:24, 137:16 supplying ^[2] - 19:16, 67:22 support ^[3] - 39:9, 99:19, 146:12 supported ^[5] - 89:12, 121:22,
---	---	---	--	--

132:13, 132:18, 144:14 supporters [1] - 86:10 supports [1] - 143:12 Supreme [3] - 29:14, 142:21, 144:15 surf [3] - 50:13, 50:15, 50:18 surface [5] - 46:4, 46:7, 96:25, 107:17, 119:11 surmised [1] - 123:18 surrounded [8] - 8:20, 32:1, 62:23, 63:13, 65:2, 69:25, 71:6, 93:25 surrounding [2] - 12:6, 117:12 Survey [1] - 71:1 survey [3] - 36:10, 37:11, 37:12 survive [2] - 58:23, 61:25 survives [1] - 71:18 survivor [1] - 65:5 SUSAN [2] - 1:9, 1:11 suspend [1] - 140:8 sustains [1] - 73:4 Swamp [4] - 14:12, 14:13, 14:17, 46:10 swamp [1] - 14:14 sweep [1] - 29:16 syndrome [1] - 18:21 system [24] - 41:8, 41:9, 44:14, 47:1, 47:3, 60:13, 81:11, 118:7, 119:3, 119:9, 119:12, 120:22, 121:19, 121:21, 123:10, 123:11, 124:11, 124:12, 124:21, 125:7, 125:19, 132:11, 145:7, 145:8 system/boardwalk [1] - 132:6 systems [3] - 122:19, 125:16, 125:21	talks [1] - 12:13 taller [1] - 37:1 Tanger [1] - 59:17 task [4] - 17:10, 19:3, 73:19, 73:21 tax [1] - 32:1 taxes [1] - 82:14 team [8] - 90:16, 94:18, 95:12, 97:17, 113:10, 113:22, 114:7, 116:1 technical [3] - 15:23, 117:22, 134:2 technology [1] - 108:16 ten [1] - 26:5 tend [3] - 53:11, 64:11, 124:5 tenuous [1] - 26:2 term [2] - 55:9, 142:8 terms [7] - 5:3, 21:6, 61:19, 75:8, 76:6, 93:14, 93:15 Terrace [5] - 111:17, 121:17, 121:20, 123:11, 125:2 terraces [1] - 102:13 territory [1] - 58:20 test [6] - 6:22, 6:23, 7:8, 7:11 testified [48] - 25:4, 40:12, 45:5, 46:1, 47:7, 48:3, 50:3, 50:24, 54:2, 55:21, 56:15, 58:7, 67:15, 67:17, 67:20, 69:22, 72:16, 74:12, 75:15, 85:1, 85:2, 85:8, 106:11, 107:21, 109:6, 117:16, 118:9, 119:7, 119:23, 120:20, 125:1, 125:6, 126:25, 128:19, 129:10, 132:5, 134:24, 135:17, 136:3, 136:18, 137:3, 137:23, 138:15, 138:21, 139:15, 139:24, 140:25, 141:11 testifies [1] - 57:7 testify [6] - 58:5, 65:20, 83:8, 84:22, 124:24, 139:20 testifying [1] - 21:15 testimony [50] - 5:8, 6:16, 7:24, 14:2, 16:7, 17:10, 20:11, 36:13, 36:18, 37:18, 38:12, 40:1, 40:13, 45:7,	47:10, 47:11, 57:7, 61:22, 65:25, 66:3, 66:6, 71:24, 72:13, 72:18, 74:17, 77:3, 78:11, 83:6, 88:1, 88:4, 89:9, 89:10, 108:19, 111:2, 112:17, 114:13, 119:18, 127:3, 132:9, 132:12, 132:23, 133:1, 134:2, 137:25, 138:18, 141:1, 141:10, 148:16, 151:10, 153:4 text [1] - 84:4 thankful [1] - 99:23 that'd [1] - 45:12 themselves [1] - 40:25 theoretically [1] - 82:20 therefore [5] - 52:8, 69:9, 78:23, 98:19, 114:19 they've [4] - 75:6, 75:7, 94:3, 94:4 thinking [3] - 27:13, 46:16, 46:17 Third [3] - 92:6, 92:14, 142:14 third [12] - 91:4, 93:5, 93:9, 94:5, 98:15, 115:15, 121:23, 122:12, 124:12, 126:17, 126:23, 145:19 third-party [5] - 121:23, 122:12, 126:17, 126:23, 145:19 thorough [1] - 102:4 thousand [2] - 13:10, 13:22 thousands [7] - 42:15, 51:17, 67:17, 67:21, 68:5, 69:25, 81:1 threatened [3] - 28:16, 28:17, 139:20 threatening [1] - 138:18 threats [1] - 62:1 three [13] - 12:24, 16:23, 37:10, 37:17, 37:21, 56:3, 59:16, 70:5, 81:17, 81:22, 107:10, 124:8, 134:3 three-bedrooms [1] - 107:10 threw [1] - 133:25	thrive [1] - 50:16 throughout [3] - 38:10, 102:2, 110:23 Thrush [6] - 58:25, 59:1, 59:3, 59:9, 59:17, 61:12 tiny [1] - 34:18 tired [1] - 75:20 TO [1] - 154:5 today [11] - 5:6, 14:16, 14:18, 15:2, 37:1, 42:2, 116:22, 118:4, 118:18, 118:22, 128:18 today's [1] - 29:24 today's [1] - 30:1 together [5] - 5:1, 112:2, 112:16, 149:24, 150:1 tonight [1] - 26:24 took [7] - 11:15, 16:16, 17:1, 49:12, 76:17, 88:2, 88:6 top [11] - 16:10, 22:17, 23:17, 49:10, 52:15, 55:7, 56:4, 76:18, 76:25, 77:20, 134:22 topo [1] - 112:15 topographic [2] - 111:8, 112:1 topography [1] - 108:1 torturer [1] - 18:22 total [10] - 6:7, 31:21, 31:24, 52:12, 54:7, 56:21, 93:8, 103:2, 107:17, 129:13 totally [1] - 54:20 touched [1] - 53:2 towards [4] - 43:2, 43:3, 43:22, 93:8 tower [1] - 84:23 town [39] - 9:19, 9:22, 11:7, 13:12, 15:7, 26:9, 27:11, 27:15, 28:10, 28:11, 30:9, 51:20, 60:4, 71:21, 75:23, 88:16, 90:13, 91:25, 92:10, 92:18, 92:19, 93:7, 94:25, 96:9, 97:19, 97:24, 100:13, 100:24, 105:2, 105:4, 113:21, 113:25, 116:9, 122:13, 123:13, 124:10, 124:21, 138:4, 142:12 Town [1] - 38:15 towns [18] - 9:10,	11:8, 15:5, 26:18, 28:6, 29:22, 38:14, 51:20, 72:9, 87:17, 91:17, 92:12, 95:12, 97:14, 101:4, 109:8, 116:10, 145:14 township [52] - 9:6, 9:15, 10:2, 10:4, 10:5, 27:22, 27:23, 28:2, 28:3, 28:6, 28:17, 90:14, 90:17, 90:18, 91:2, 92:4, 94:10, 94:14, 94:18, 95:5, 95:11, 95:20, 97:15, 98:6, 99:14, 100:19, 109:1, 113:9, 113:18, 114:3, 115:17, 116:8, 122:8, 122:10, 122:17, 123:3, 123:9, 123:13, 124:14, 124:16, 126:21, 138:11, 139:2, 139:4, 143:10, 143:14, 143:20, 145:23, 145:24, 148:19 TOWNSHIP [1] - 1:1 Township [8] - 4:8, 83:16, 83:18, 93:16, 123:21, 127:7, 142:21, 144:16 townships [13] - 92:10, 92:24, 94:7, 94:9, 99:17, 100:16, 100:19, 101:24, 103:20, 108:5, 116:1, 133:15, 138:25 Townships [1] - 139:7 trace [1] - 121:6 tract [4] - 99:18, 100:4, 123:2, 123:4 traditional [3] - 22:11, 23:7, 137:9 traditionally [2] - 137:12, 137:17 traffic [34] - 72:12, 75:17, 78:22, 79:1, 79:4, 79:23, 80:16, 80:20, 90:10, 90:12, 90:18, 99:16, 103:22, 104:7, 106:21, 106:25, 123:5, 126:25, 127:4, 127:15, 127:16, 127:22, 128:1, 128:3, 128:8, 128:14, 128:16, 129:2, 129:13, 130:19, 131:2, 131:11, 133:9, 146:11
T				
Table [2] - 129:15, 131:8 table [1] - 88:14 tactics [3] - 22:11, 23:7, 137:9				

tragedy [2] - 26:4, 26:16 trail [1] - 4:24 transcript [12] - 72:17, 107:22, 114:17, 123:17, 132:13, 139:18, 140:11, 153:4, 154:6, 154:6, 154:22 transcripts [4] - 16:2, 17:22, 87:10, 134:4 transfer [1] - 15:7 transport [1] - 121:20 trash [1] - 15:7 travel [1] - 121:16 travels [1] - 111:12 traverses [1] - 111:9 treat [1] - 96:10 Treatment [1] - 122:3 treats [1] - 96:7 tree [23] - 11:11, 36:10, 36:15, 36:24, 37:6, 37:11, 37:12, 37:15, 37:16, 97:1, 97:13, 113:5, 114:2, 114:6, 114:14, 115:9, 115:11, 115:12, 115:18, 115:20, 116:7, 116:10, 143:10 Tree [1] - 113:24 treed [1] - 52:8 trees [31] - 5:24, 6:9, 6:11, 8:4, 25:16, 36:16, 36:17, 36:20, 36:21, 37:3, 37:8, 37:20, 37:22, 37:23, 37:24, 38:1, 38:4, 51:3, 51:5, 51:6, 56:1, 67:7, 73:2, 113:6, 113:19, 113:21, 114:10, 116:2 trials [1] - 4:24 triangular [1] - 8:24 tributaries [1] - 66:17 tried [1] - 8:2 tries [1] - 76:16 trip [1] - 19:5 trips [14] - 77:18, 78:7, 78:9, 80:21, 80:22, 81:13, 81:16, 81:23, 81:24, 82:1, 82:6, 82:9, 129:15, 129:18 trouble [2] - 27:11, 47:25 troubling [1] - 20:17 truck [2] - 22:2, 22:3	trucks [1] - 22:2 true [4] - 12:14, 74:20, 138:8, 153:3 truly [3] - 10:10, 10:13, 19:24 truth [1] - 120:20 trying [8] - 36:12, 64:13, 75:19, 78:1, 82:13, 86:21, 105:14, 113:6 turn [1] - 132:20 turnabouts [1] - 36:2 turns [2] - 111:13, 127:19 TWA [5] - 122:3, 122:6, 123:14, 145:18, 145:21 twice [1] - 127:1 two [52] - 5:11, 10:1, 10:8, 12:4, 13:11, 13:24, 15:25, 18:7, 19:4, 25:8, 28:15, 30:23, 33:7, 34:14, 37:10, 37:21, 45:8, 50:7, 53:16, 55:7, 57:19, 59:6, 60:11, 65:16, 70:5, 76:17, 77:15, 78:6, 79:10, 80:11, 80:13, 80:14, 80:23, 82:20, 88:25, 90:9, 95:5, 95:7, 104:15, 105:12, 107:9, 110:18, 124:19, 130:21, 131:9, 131:23, 142:16, 145:4, 147:2, 148:14, 148:22, 151:19 two-and-a-half [1] - 37:10 two-bedrooms [1] - 107:9 tying [1] - 125:7 type [3] - 26:2, 54:20, 101:20 types [2] - 42:18, 135:25 typical [2] - 90:21, 126:2 typically [1] - 92:2	101:14 unanimously [2] - 92:25, 101:12 unavailable [2] - 23:19, 24:2 unchallenged [1] - 95:22 unchanged [1] - 36:23 under [28] - 27:24, 39:18, 42:1, 65:9, 78:25, 80:9, 81:11, 81:12, 82:1, 91:21, 94:24, 98:2, 99:14, 115:22, 118:4, 118:17, 120:13, 120:16, 123:2, 125:8, 128:17, 128:22, 129:8, 129:18, 142:3, 142:25, 146:5, 149:6 undercount [1] - 38:3 understood [3] - 7:10, 19:25, 114:4 understory [5] - 6:13, 7:18, 7:22, 8:11, 12:9 undeveloped [4] - 63:15, 64:10, 70:24, 71:3 undisturbed [6] - 95:15, 102:18, 109:22, 113:20, 116:12, 116:15 undoubtedly [1] - 74:20 undulates [1] - 108:1 unduly [1] - 130:17 unequivocally [1] - 89:20 unhealthy [1] - 8:13 unheard [1] - 13:20 unit [5] - 13:17, 25:25, 58:19, 77:19, 80:22 unites [1] - 9:13 units [9] - 25:25, 78:7, 90:4, 93:6, 93:12, 103:3, 107:5, 107:8 University [1] - 14:6 unless [3] - 13:14, 56:17, 100:6 unlikely [1] - 133:25 unnecessary [2] - 96:13, 97:7 unnoticed [3] - 87:18, 89:6, 102:14 unrefuted [1] - 85:9 unresolved [1] - 84:1	unrestricted [1] - 103:9 unseen [1] - 92:1 unspecified [1] - 84:2 unsupported [1] - 104:23 untouched [1] - 53:3 unusual [4] - 5:10, 11:5, 110:13, 136:7 up [48] - 5:3, 6:24, 7:17, 9:12, 13:21, 16:9, 19:13, 21:7, 21:24, 22:4, 26:4, 31:11, 31:21, 33:2, 36:18, 60:5, 60:11, 63:9, 68:16, 68:22, 68:24, 71:23, 73:23, 74:4, 77:6, 77:10, 81:11, 83:7, 84:22, 84:25, 85:14, 90:1, 111:17, 115:7, 117:4, 118:25, 120:10, 121:4, 121:10, 121:11, 123:20, 125:19, 131:11, 137:1, 141:18, 146:22, 150:19 upheld [1] - 83:15 upper [3] - 43:6, 49:8, 49:9 urban [4] - 9:1, 13:21, 31:2, 31:4 US [1] - 71:1 uses [6] - 33:15, 94:1, 101:17, 101:19, 101:21, 128:8 utilities [4] - 84:20, 116:24, 122:15, 125:25 Utility [1] - 121:12 utility [7] - 82:25, 99:18, 109:23, 117:1, 121:8, 125:9, 125:16 utterly [1] - 74:14	35:14, 35:17, 89:21, 91:11, 94:23, 96:3, 104:20, 107:20, 108:18, 108:23, 109:5, 109:9, 109:18, 141:20, 141:23, 146:2 variances [4] - 17:9, 108:24, 109:11, 142:2 various [6] - 11:10, 20:24, 32:4, 63:5, 100:13, 124:1 vast [2] - 51:15, 68:11 vastly [3] - 15:1, 15:4, 37:9 Vecchio [1] - 20:20 vector [3] - 60:20, 60:22, 61:6 vehicle [2] - 21:19, 105:25 vehicles [10] - 21:16, 22:7, 22:18, 23:18, 32:24, 34:9, 34:17, 78:7, 130:8 vehicular [2] - 128:4, 129:4 ventilation [1] - 108:13 Vermule [2] - 71:1, 71:2 Verona [4] - 38:9, 38:15, 38:16 Verona's [1] - 104:21 version [2] - 37:5, 65:1 versus [3] - 20:5, 51:23, 83:17 vested [1] - 128:10 vetted [2] - 138:13, 143:20 vetting [2] - 97:16, 101:1 via [6] - 90:6, 103:14, 104:14, 106:18, 129:4, 151:23 Vice [2] - 1:8, 87:1 victims [1] - 18:21 videos [1] - 25:3 view [6] - 16:19, 35:24, 51:10, 51:19, 62:17, 69:18 views [1] - 18:8 vintage [1] - 38:4 violate [1] - 101:24 violated [4] - 76:2, 82:19, 82:22, 110:25 violates [1] - 104:21 Vireo [1] - 59:17 virgin [2] - 68:20, 147:14
V				
vacant [1] - 4:7 valid [2] - 140:2, 142:20 validly [1] - 132:10 valuable [2] - 31:1, 37:23 value [3] - 12:3, 12:4, 141:12 variance [26] - 33:20, 33:21, 33:23, 34:4, 34:5, 34:13, 34:20, 34:23, 34:24, 35:12,				

virtually [3] - 66:21, 68:20, 73:12 visible [2] - 7:1 vital [3] - 60:8, 70:6, 73:16 VITE [1] - 1:12 vociferous [1] - 39:2 void [1] - 141:15 volume [1] - 129:13 voluntarily [1] - 91:2 voluntary [1] - 92:6 vote [10] - 20:14, 28:18, 86:1, 93:1, 98:13, 99:10, 104:2, 126:14, 146:7, 151:20 voted [2] - 98:8, 101:12	53:11 Watchung [1] - 109:21 water [66] - 39:24, 41:8, 41:12, 41:14, 42:10, 42:16, 42:17, 42:20, 42:22, 43:4, 43:7, 43:9, 43:14, 43:23, 44:1, 44:5, 44:13, 44:17, 44:25, 45:2, 45:19, 46:4, 46:7, 47:19, 65:10, 65:19, 65:22, 65:24, 66:2, 66:4, 66:8, 66:13, 66:19, 67:8, 67:23, 68:1, 68:2, 84:5, 84:23, 84:24, 84:25, 85:3, 88:20, 88:21, 93:23, 117:8, 119:12, 122:16, 123:19, 125:5, 125:7, 125:12, 125:16, 125:17, 125:19, 125:20, 125:25, 126:1, 126:7, 126:15, 126:22, 134:22, 137:16, 146:11, 148:15 Water [6] - 93:24, 125:6, 125:18, 145:10, 148:20, 148:21 waterline [1] - 126:10 waterlines [3] - 125:8, 125:11, 145:9 waters [3] - 66:5, 67:6, 84:21 Wayne [1] - 11:23 ways [6] - 33:16, 79:10, 80:7, 80:11, 80:14, 80:23 weak [1] - 23:14 wear [2] - 10:8, 86:22 Wednesday [2] - 147:24, 151:22 WEDNESDAY [1] - 1:2 Wednesday's [1] - 86:7 week [4] - 28:7, 110:2, 146:6, 148:22 weeks [1] - 147:24 WEHI [2] - 93:16, 147:18 weigh [3] - 88:3, 89:8, 89:9 weisleder [1] - 102:2 Weisleder [3] - 102:4, 102:15, 102:25	welcome [2] - 4:1, 86:16 welfare [17] - 10:24, 17:6, 17:12, 73:20, 84:7, 85:22, 90:25, 96:19, 97:16, 97:20, 98:2, 100:23, 106:14, 116:12, 143:19, 143:25 west [12] - 55:15, 95:8, 95:9, 110:25, 111:5, 111:11, 111:23, 112:22, 118:24, 119:5, 120:24, 134:10 West [18] - 4:4, 4:8, 9:20, 36:11, 38:14, 38:17, 69:2, 92:5, 92:16, 92:20, 93:4, 93:14, 93:24, 100:5, 104:22, 104:24, 105:9, 121:19 WEST [3] - 1:1, 1:6, 2:7 western [16] - 32:9, 32:17, 41:24, 42:6, 42:23, 42:25, 43:18, 43:22, 43:23, 44:1, 45:8, 45:14, 46:2, 55:3, 55:4, 65:13 wet [2] - 66:11, 66:12 wetland [11] - 32:7, 32:10, 32:11, 41:23, 42:19, 43:25, 44:6, 46:6, 46:11, 46:13 wetlands [51] - 32:8, 32:18, 32:21, 35:23, 36:7, 40:18, 42:3, 42:4, 42:5, 42:6, 42:7, 42:9, 42:14, 42:15, 42:19, 42:25, 43:3, 43:5, 43:6, 43:10, 43:18, 43:22, 43:24, 44:1, 44:9, 44:16, 45:1, 45:19, 45:20, 45:21, 45:24, 46:3, 46:6, 46:8, 46:9, 47:5, 47:17, 50:17, 66:9, 67:6, 72:3, 85:6, 117:20, 132:2, 139:23, 139:25, 140:11, 140:17 wetter [1] - 66:3 whammy [1] - 61:15 where'd [1] - 36:17 whoa [3] - 148:7 whole [8] - 11:2, 14:7, 18:6, 36:19, 67:14, 70:10, 70:22, 70:23	wholly [1] - 104:23 wide [1] - 128:25 widening [1] - 132:21 width [2] - 97:2, 133:8 wild [2] - 62:6, 62:8 wildlife [2] - 60:1, 73:24 William [1] - 124:23 willing [1] - 96:8 willy [1] - 91:25 willy-nilly [1] - 91:25 wind [1] - 51:1 winter [1] - 70:15 wiped [1] - 70:8 Wisconsin [1] - 14:7 wise [1] - 49:14 wished [1] - 17:3 withhold [1] - 126:3 withstanding [1] - 139:15 WITNESS [2] - 154:2, 154:5 witness [7] - 47:8, 47:11, 47:14, 72:1, 83:6, 83:8, 124:23 Witness [1] - 154:25 witnesses [7] - 5:12, 11:20, 88:1, 88:2, 89:8, 102:5, 137:21 woman [2] - 25:4, 25:7 won [1] - 14:23 wonder [1] - 33:25 wondering [1] - 27:9 Wood [7] - 58:24, 58:25, 59:1, 59:3, 59:9, 59:16, 61:12 WOODBIDGE [1] - 2:4 woodlands [1] - 8:10 woods [5] - 8:9, 15:15, 63:19, 71:6, 71:7 word [5] - 51:25, 87:21, 139:9, 144:12 words [1] - 104:7 works [1] - 47:3 Works [1] - 122:3 world [2] - 8:17, 54:10 worried [1] - 39:25 worry [3] - 28:5, 28:9, 44:21 worse [2] - 117:14, 136:9 worsen [1] - 117:11 would've [1] - 126:12	wrangled [1] - 16:24 wrap [1] - 141:18 wrapping [1] - 81:11 write [1] - 18:3 writing [1] - 148:11 wrote [2] - 28:15, 120:5
W				
wait [2] - 77:20, 148:7 waivers [1] - 109:12 wake [2] - 26:4, 68:22 wake-up [1] - 26:4 walk [1] - 36:21 walked [1] - 91:24 walking [3] - 19:7, 131:19, 132:7 wall [1] - 108:16 walls [4] - 107:15, 107:17, 107:18, 108:12 walsh [4] - 41:20, 47:6, 119:17, 120:4 Walsh [5] - 14:4, 15:10, 40:17, 45:4, 74:14 wants [3] - 9:21, 74:23, 114:8 Warner [28] - 4:5, 24:19, 56:12, 76:21, 77:5, 77:6, 77:9, 77:10, 78:3, 79:13, 79:14, 79:18, 80:3, 81:3, 90:6, 94:1, 103:11, 106:18, 125:8, 125:13, 126:10, 128:24, 129:4, 131:10, 131:15, 131:17, 133:10 warner [1] - 21:9 warranted [1] - 135:12 waste [2] - 14:14, 83:9 watch [1] - 151:23 watching [2] - 5:10,				
Y				
year [11] - 25:2, 25:17, 26:17, 39:3, 86:5, 87:15, 90:15, 100:22, 108:20, 114:9, 141:8 years [26] - 6:10, 12:9, 12:24, 18:13, 37:25, 38:1, 38:5, 42:15, 46:9, 67:17, 67:21, 68:5, 68:6, 68:21, 68:22, 73:6, 75:10, 77:20, 89:24, 94:9, 97:17, 110:18, 143:21, 145:4, 149:20 yeast [2] - 76:13, 76:14 yell [1] - 88:14 yelling [4] - 88:17, 89:1, 89:19, 101:25 yellow [4] - 48:23, 49:21, 53:21, 56:3 yield [1] - 46:25 yourself [3] - 16:3, 17:14, 151:8 yourselves [3] - 18:15, 20:10, 24:5				
Z				
zeal [1] - 89:14 zone [12] - 21:25, 22:1, 22:6, 35:13, 50:13, 98:25, 136:12, 139:4, 143:6, 146:3, 147:20 Zone [1] - 4:4 zoned [4] - 90:13, 98:21, 105:18, 106:1 zones [1] - 85:7 Zoning [5] - 1:13, 34:4, 34:12, 34:15, 35:2 zoning [40] - 21:6, 34:14, 35:13, 35:18, 89:23, 90:21, 91:6, 91:8, 91:15, 93:13, 93:22, 94:20, 94:21, 95:2, 95:19, 98:4, 98:7, 98:23, 104:16, 104:21, 105:18,				

106:15, 115:19,
116:20, 127:5,
127:11, 127:24,
128:10, 128:12,
138:10, 141:22,
142:5, 142:7, 142:10,
142:12, 142:17,
144:23, 146:19,
147:17, 147:20
zoologist ^[1] -
138:20
zoom ^[5] - 4:2,
86:17, 117:6, 151:4,
151:23
zooming ^[1] - 121:7