

INDIAN RIVER COUNTY, FLORIDA  
M E M O R A N D U M

COMMUNITY  
DEVELOPMENT  
QUASI-JUDICIAL

TO: Joseph A Baird; County Administrator

DEPARTMENT HEAD CONCURRENCE:

  
~~Robert M. Keating, AICP; Community Development Director~~

FROM: Stan Boling, AICP  
Planning Director

DATE: April 12, 2010

SUBJECT: **Re-consideration of Request for a One-Year Extension of the Ocean Concrete Site Plan Application to Construct a Concrete Batch Plant [SP-MA-07-03-15 / 2004110124-57127]**

It is requested that the data herein presented be given formal consideration by the Board of County Commissioners at its regular meeting of April 20, 2010.

**BACKGROUND**

At its March 9, 2010 meeting, the Board of County Commissioners (BCC) considered an item from the County Attorney's Office regarding a recent 4<sup>th</sup> District Court of Appeals decision on a lawsuit brought by Ocean Concrete against the county (see attachment #1). That lawsuit relates to the BCC's denial of a site plan application extension request and staff's denial of a site plan for construction of a concrete batch plant.

At the March 9<sup>th</sup> meeting, the County Attorney's Office advised the BCC that the county's appeal to the Court of Appeals was denied and that the Circuit Court's August 24, 2009 decision stands (see attachment #2). In its August 2009 decision, the Circuit Court directed the county to hold a hearing on Ocean Concrete's site plan application extension request and, if necessary, to hold a second hearing on the merits of the site plan application denial itself. At its March 9, 2010 meeting, the BCC voted to hold a hearing on the site plan application extension denial at its regular meeting of April 20, 2010 and, if necessary, to hold a second hearing three weeks later at its regular meeting of May 11, 2010 (see attachment #3).

Since then, staff has coordinated with the County Attorney's Office and prepared this report for the Board's re-consideration of the site plan application extension request. The BCC is now to re-consider the request under the Circuit Court's instructions and approve or deny a one year extension of Ocean Concrete's site plan application.

**ANALYSIS:**

• **Site Plan Applications**

In its site plan application, Ocean Concrete, Inc. proposed construction of a concrete batch plant on a ±7.6 acre site zoned IL (Light Industrial) located on the west side of Old Dixie Highway approximately one mile south of CR512 (see attachment #4). The concrete batch plant was first proposed in a site plan application filed on

November 15, 2005. That application was reviewed on November 30, 2005 by the county's Technical Review Committee (TRC). On December 5, 2005, a formal discrepancy letter was issued by the county. The applicant never responded to that discrepancy letter, and on November 15, 2006, the site plan application expired pursuant to site plan ordinance regulations.

On December 6, 2006, a second site plan application to construct the concrete batch plant was filed. That application was reviewed by the TRC on December 20, 2006, and a formal discrepancy letter was issued on January 2, 2007. While Ocean Concrete's second site plan application was still valid, the BCC adopted an ordinance modifying the county's two industrial zoning districts: IL, Light Industrial, and IG, General Industrial. ~~Those modifications, adopted on July 24, 2007, restricted heavy process uses (such as concrete batch plants, paper mills, and brick/tile factories ) to the IG district only, thereby prohibiting such uses within the IL district. Although the IL district regulations were changed in July 2007, the county did not apply those changes to Ocean Concrete's second site plan application.~~

On November 16, 2007, Ocean Concrete, Inc. filed a lawsuit challenging the adopted LDR amendment. On November 21, 2007, the applicant submitted a response and also requested a one-year extension of the site plan application. Upon review, staff determined that the revised site plan did not address all discrepancies listed in the January 2, 2007 letter and issued a second discrepancy letter on December 4, 2007. In addition, the community development director issued a denial of the site plan application extension request on December 4, 2007 (see attachment #5).

In response to the December 4, 2007 discrepancy letter, the applicant submitted revised plans on December 6, 2007. Upon review of the applicant's December 6, 2007 submittal, staff determined that the revised plans did not address all previously identified discrepancies and on December 17, 2007, notified the applicant by formal letter that the second site plan application was not approvable and had expired because 12 months had passed since the application date (see attachment #7). Among the itemized application discrepancies cited by staff were the applicant's failure to establish legal positive outfall for the project's stormwater management system and failure to submit an adequate improvement design for Old Dixie Highway, which is a two-way, one-lane road in the area of the project site.

On December 14, 2007, the applicant filed an appeal of staff's decision to deny the site plan application extension request (see attachment #6). At its January 10, 2008 meeting, the Planning & Zoning Commission (PZC) considered Ocean Concrete's appeal of staff's decision to deny the site plan application extension request. By a vote of 7-0, the PZC found that staff did not fail in regard to any of the county's four appeal criteria from land development regulation section 902.07(5) and upheld staff's decision to deny the application extension request (see attachment #8). On January 30, 2008, the applicant filed an appeal of the PZC's decision (see attachment #9).

At its March 18, 2008 meeting, the BCC considered Ocean Concrete's appeal of the PZC's decision. By unanimous vote, the BCC found that the PZC did not fail in regard to any of the county's four appeal criteria and upheld the PZC's decision to deny the application extension request (see attachment #10). After the BCC decision, Ocean Concrete filed a lawsuit against the County in Circuit Court, seeking to overturn the county's decision to deny the application extension and the decision to deny the site plan.

- **Direction from the Circuit Court**

As a result of the lawsuit filed by Ocean Concrete, the Circuit Court rendered a decision on August 24, 2009 (see attachment #2). That decision directed the BCC to re-consider the application extension request using a different standard for review than was used in the BCC's 2008 consideration of the extension request. At that time, the BCC's 2008 decision was based on consistency with past county practice to grant site plan application extension

requests only if the subject application meets or is revised to meet the land development regulations in effect at the time the extension is granted. In 2008, the BCC determined that, because the application could not be revised to meet the IL district use allowances as amended July 24, 2007, the extension request should be denied. Upon review, the Circuit Court found that the county used the wrong standard in its 2008 decision, and directed the county to apply only the "finding of good cause..." criterion contained in site plan ordinance section 914.06(4)(d) on application extensions (see attachment #11).

In its decision, the Circuit Court indicates that the county should approve the application extension request if the county finds good cause justification or "...a legally sufficient reason...". That Circuit Court directive sets a low threshold for approving the extension request, and seems to flow from the court's reasoning that the county's denial of the extension request deprived Ocean Concrete of a hearing on the merits of the site plan itself.

~~Based on the criteria established in the Circuit Court's decision, staff's position is that the applicant has "good cause" to be granted an extension to allow time for the applicant to either adequately address application discrepancies identified by staff or allow the applicant an opportunity to present the existing site plan application for approval on the merits.~~

If the BCC approves the application extension, staff will (i) evaluate revised submittals under the pre-amendment Land Development Regulations ("LDRs"), without agreeing that the pre-amendment LDRs are applicable, and (ii) evaluate Ocean Concrete's argument that it has vested rights to application of the pre-amendment LDRs. With respect to the vested rights issue, Ocean Concrete will have the burden of submitting facts and argument in support of its position. Once that information is submitted, the vested rights decision will be made by the BCC, based on advice from the County Attorney's Office.

**RECOMMENDATION:**

Based on the Circuit Court's direction to apply only the "finding of good cause" criterion of section 914.06(4)(d), staff recommends that the BCC approve Ocean Concrete's request to extend the site plan application for one year.

**ATTACHMENTS:**

1. Item from County Attorney's Office
2. August 24, 2009 Circuit Court Decision
3. Draft Minutes from March 9, 2010 BCC Meeting
4. Location Map
5. Extension Request Denial Letter from Staff
6. Appeal of Staff Denial of Site Plan Application
7. Site Plan Denial Letter from Staff
8. Minutes from January 10, 2008 PZC Meeting
9. Appeal of PZC Denial of Site Plan Application Extension
10. Minutes from March 18, 2008 BCC Meeting
11. Site Plan Ordinance Section 914.06(4)(d)

<p><b>APPROVED AGENDA ITEM:</b></p> <p><b>FOR:</b> _____</p> <p><b>BY:</b> _____</p>
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Indian River Co,	Approved	Date
Admin.	AS	
Legal	[Signature]	4/14/10
Budget	CM	4/14/10
Dept.	[Signature]	4/14/10
Risk Mgr.	[Signature]	[Signature]

13A

## INDIAN RIVER COUNTY, FLORIDA

## MEMORANDUM

TO: The Board of County Commissioners

FROM:  George Glenn, Assistant County Attorney

DATE: March 3, 2010

SUBJECT: Update on Court's Decision Regarding Ocean Concrete and the Need to Set a Hearing Date for the Second Half of April.

It is requested that the following information be given formal consideration by the Board of County Commissioners ("BCC") at its regularly scheduled meeting of March 9, 2010.



BACKGROUND

On October 6, 2009, the BCC authorized the County Attorney's Office to take an appeal of the Appellate Division of the Circuit Court's decision to grant Ocean Concrete's Petition for Writ of Certiorari. The County filed its own Petition for Writ of Certiorari with the 4th District Court of Appeal ("DCA") seeking to quash the order of the Circuit Court. That appeal was denied on the merits without analysis. Therefore, the order issued by the Appellate Division of the Circuit Court stands.

The order of the Circuit Court directed the County to hold a new hearing regarding the County's denial of the site plan *application extension request*. The BCC is to decide if good cause, i.e. "legally sufficient reason", exists to grant the *application extension request*. If the County finds that the applicant has not laid out a good cause justification for the request, and thus the County denies the appeal of the site plan application extension, then the County is required to hold a second hearing on the merits of the denial of the site plan itself.

A second hearing on the site plan merits is not required if the BCC approves the site plan application extension. The BCC never heard an appeal on the denial of the site plan because Ocean Concrete's appeal check bounced, and the appeal fee was not timely filed. While the Circuit Court expressly declined to address the site plan denial (and the effect of the bounced check), it concluded that if the BCC does deny the *application extension request*, it should hold a second hearing on the denial of the site plan itself.

APPROVED FOR 3-9-2010  
B.C.C. MEETING - REGULAR AGENDA  
W. J. Bellamy  
COUNTY ATTORNEY

Indian River Co.	Approved	Date
Admin.		3/4/10
Legal		3-3-10
Budget	—	—
Dept.	RMK	3/3/10
Flisk Mgr.	—	—

## ANALYSIS

After consulting with legal counsel for Ocean Concrete, the County Attorney's Office would like the BCC to consider a date in middle to late April to hold the hearing(s) as directed by the Court. The BCC may either hold the hearing(s) at a regularly scheduled meeting or at a special call meeting.

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### Attachments:

1. BCC staff report requesting authorization to take appeal to the 4th DCA.



Attorney's Matters 10/6/2009


Office of

13A

**INDIAN RIVER COUNTY  
ATTORNEY**

**MEMORANDUM**

TO: Board of County Commissioners

FROM:  George Glenn, Assistant County Attorney

DATE: September 30, 2009

SUBJECT: Ocean Concrete Lawsuit

On August 24, 2009; the Circuit Court sitting in their appellate capacity issued a non-final order regarding the Petition for Writ of Certiorari filed by Ocean Concrete regarding the denial of site plan application extension request and the denial of the site plan itself.

The Court did not reach a decision on the denial of the site plan itself, and instead held that the County erred as a matter of law when it denied petitioner's site plan application extension request. The rule addressing site plan application extension request is found at I.R.C. Code §914.06(4)(c). That section states the following:

Upon finding of good cause, the Community Development Director may grant one extension for a period of one year. No further site plan application extensions may be granted.

Because the Code does not define what constitutes good cause, the Community Development Director looked to the code provision relating to *approved* site plan extension request. That section has the "good cause" requirement as well, but also lists criteria for the Board to consider. One specific criterion found in that section is whether the use underlying the basis for the *approved* site plan is still allowed in that zoning district. The Board of County Commissioners ("BCC") had, after an application had been submitted, amended the Light Industrial zoning district ("IL") to prohibit concrete batch plants. As such, the Community Development Director denied the site plan application extension request.

The Court found that the Community Development Director's use of the criteria for *approved* site plan extension requests was the wrong standard. The Court did not make a finding of whether good cause exists to grant the site plan application extension requests, but merely ordered the BCC to hold a hearing to determine whether good cause exists to grant the extension.

The order does not become final if the County requests a rehearing. The County did ask for that rehearing, and it is awaiting a decision by the Court. If the Court denies the rehearing requests, the decision becomes final. At that time, the County will have two options. The first is to appeal that decision to the Fourth District Court of Appeals. The second is to hold the hearing to determine whether good cause exists to grant the application extension request.

~~The County Attorney's Office has raised several concerns with the Court's decision in its Motion for Rehearing. (see Attachment A) If the Circuit Court denies the County's Motion for Rehearing, the County should appeal that decision to the Fourth District Court of Appeals. There are costs associated with an appeal. The filing fee is \$300.00, and if the County loses, it could be responsible for Ocean Concrete's costs, but not attorney's fees.~~

If the County opts to hold the public hearing pursuant to the Court order, then it should coordinate with Ocean Concrete for a suitable meeting date.

Recommended Action:

Provide direction to the County Attorney's Office to take an appeal to the Fourth District Court of Appeals should the Circuit Court deny the County's Motion for Rehearing.

Attachments:

1. Motion for Rehearing

APPROVED FOR 10-6-09  
 B.C.C. MEETING - REGULAR AGENDA  
*with [Signature]*  
 COUNTY ATTORNEY

Indian River Co.	Approved	Date
Admin.	<i>[Signature]</i>	10/1/09
Ce. Atty.	<i>[Signature]</i>	9/30/09
Budget	<i>[Signature]</i>	9/30/09
Dept.		
Risk Mgr.		

IN THE CIRCUIT COURT FOR THE  
NINETEENTH JUDICIAL CIRCUIT IN AND  
FOR INDIAN RIVER COUNTY, FLORIDA.  
APPELLATE DIVISION

Circuit Case No. 2008-1098 CA20

AUG 26 2009

OCEAN CONCRETE, INC., a Florida  
corporation, and GEORGE MAIB,

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Petitioners,

v.

Not final until time expires for filing motion  
for rehearing, and if filed, disposed of.

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INDIAN RIVER COUNTY, a political  
subdivision of the State of Florida,

Respondent.

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Decision filed August 24, 2009.

Petition for writ of certiorari to the Indian River County Board of County Commissioners.

Geoffrey D. Smith, Susan C. Smith & Timothy B. Elliott, Smith & Associates, Tallahassee, for  
petitioners.

William G. Collins, II, County Attorney, and George Glenn, Assistant County Attorney, Vero  
Beach, for respondent.

PER CURIAM.

Ocean Concrete, Inc., and George Maib (hereafter "Petitioners") own a parcel of property in Indian River County, on which they wish to develop a concrete batch plant. The property is zoned IL (light industrial). On the date they filed their first site plan, concrete plants were a permitted use in IL districts. A site plan application was filed with the county on November 15, 2005. After reviewing the application, county staff issued a discrepancy letter, detailing areas in which the site plan did not meet the requirements of county code. Petitioners did not amend the application or respond to the discrepancy letter, so the application expired at the end of one year as dictated by county code.

Petitioners submitted a new site plan application on December 20, 2006. On January 2, 2007, county staff issued a discrepancy letter. On July 24, 2007, the County amended its land

development regulations to limit concrete plants to IG (industrial general) zoning districts. However, the county allowed Petitioners to continue the site plan application process to see if they could satisfy the regulations notwithstanding the new limitation. If they could, then the county would determine whether Petitioners had a vested right to proceed under the previous regulation or whether the new zoning regulations would apply. Petitioners filed their first response to the discrepancy letter on November 21, 2007. They also requested a one year extension for their site plan application pursuant to § 914.06(4)(d), Indian River County Code.

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The Community Development Director issued a second discrepancy letter on December 4, 2007 and denied the request for an extension of time on grounds that the land use development regulations had changed to prohibit Petitioner's requested use. Petitioners filed their response to the second discrepancy letter on December 6, 2007. On December 17, 2007, the County issued a third discrepancy letter which stated that the site plan application was denied because more than twelve months had elapsed since the application was filed.

Petitioners appealed both the denial of the site plan application extension and the denial of the site plan application itself. The denial of the site plan application extension was filed on December 14, 2007. This appeal went before the County's Planning and Zoning Commission, which unanimously upheld the community development director's decision. That decision was further appealed to the Board of County Commissioners, which also unanimously upheld the refusal to grant an extension.

Regarding the appeal of the denial of the site plan application, Petitioners filed that appeal on January 7, 2008. The appeal was accompanied by a check for \$800.00, as required by county code. On January 24, 2008, the check was returned to the county due to insufficient funds. One week later, Petitioners submitted a cashier's check for the appeal fee and the returned check fee. Notwithstanding this, the County Attorney rejected the appeal on grounds that the fee was not submitted within 21 days of the county's decision denying the site plan application, as required by §902.07(3)(b), I.R.C. Code. This decision was appealed directly to the Board of County Commissioners, which upheld the county attorney's decision by a vote of 4-1.

Petitioners seek review of both the denial of the site plan application extension and the rejection of the appeal of the denial of the site plan. On review by petition for writ of certiorari, the circuit court must determine whether procedural due process was afforded, whether the

essential requirements of the law were observed, and whether the findings and judgment were supported by competent substantial evidence. *Haines City Community Development v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995).

First, Petitioners claim the county departed from the essential requirements of law and/or deprived them of due process by denying their application to extend the deadline for completing their site plan application. They argue the community development director cannot refuse to grant an extension on the basis that the site plan could no longer conform to the IL zoning requirements because the standard under county ordinances is "good cause."

All site plan applications expire 12 months from the date they are received by the county unless an extension of time is granted. § 914.06(4)(c), I.R.C. Code. The authority to grant extensions is addressed in subsection (d):

Upon finding of good cause, the community development director may grant one extension for a period of one year. No further site plan application extensions may be granted.

The code does not delineate a standard for good cause. In his letter denying the requested extension, the community development director stated that "the county's practice and policy" was to evaluate extension requests under the criteria set forth in § 914.08. That code section grants the county commission authority to extend by one year the time limit for commencing construction on an approved site plan. Section 914.08 permits extensions "only for good cause," and subsection (2)(a) sets forth criteria the county commission should consider when determining whether good cause exists. One of the criteria is "the impacts of having any new and existing regulations applied to the project." Applying this criterion, the community development director denied the extension because of the new regulation prohibiting concrete plants in IL districts.

We find the county used the wrong standard when it denied the extension request. The plain language of § 914.06(4)(c) makes the standard "good cause." Good cause is "a legally sufficient reason." Black's Law Dictionary (8th ed. 2004). Instead of determining whether Petitioners had a legally sufficient reason for requesting an extension, the development director looked at the current zoning regulations and determined the site plan couldn't meet those regulations. Essentially, the county denied the extension request by determining that the site plan application had to be denied on the merits. Denying an extension in this manner not only

sidesteps the good cause standard, it also results in the Petitioners' application being denied on procedural grounds instead of on the merits of the site plan itself. This deprives Petitioners of the opportunity to argue in the county's appeal processes and the courts that they had the right to proceed under the preexisting regulations. We reject the argument advanced by the County that the standard in § 914.08(2)(a) should be applied to § 914.06(4)(c) under the *in pari materia* doctrine. The application of this doctrine would take a reason for granting a good cause extension to a construction deadline and turn it into a bar to granting a site plan application extension. The plain language of § 914.06(4)(c) does not permit the denial of an application extension on the basis that land development regulations have changed.

Petitioners also seek review of the decision to reject the appeal of the site plan application itself. We find that this appeal by Petitioners was premature. This issue of whether the site plan application was properly denied was not ripe for review until a final decision on the site plan application extension was made, because the application was denied on the basis that the application period had expired. This decision was made on December 17, 2009, three days after Petitioners appealed the site plan application extension. If the site plan extension had been granted, then the denial of the site plan application would necessarily be reversed as well.

We grant the petition for writ of certiorari and hold that the County departed from the essential requirements of law and deprived Petitioners of due process by applying the wrong standard to the denial of the site plan application extension. On review by petition for certiorari, the circuit court is limited to denying the petition or granting the petition and quashing the decision below, placing the parties in the same position as if the decision had not been made. See *Tamiami Trail Tours, Inc. v. Railroad Commission*, 174 So. 451, 454 (Fla. 1937) (on reh'g)(discussing the legal effect of quashing a decision). Therefore, we may not determine whether Petitioners' had good cause for receiving a site plan application extension. Instead, the Board of County Commissioners must hold a new hearing to determine whether good cause exists to grant the extension. If the site plan application extension is denied, Petitioners should then have an opportunity to appeal the denial of the site plan application on the merits.

*Petition Granted; Quashed and Remanded with Directions.*

LEVIN, C.J., McMANUS, J., and YACUCCI, Acting Circuit Judge, concur.

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Copies of above decision  
were furnished to the attorneys/parties  
of record on the same date  
the decision was filed.

**ATTACHMENT 2**

BY Lena Allen  
Deputy Clerk

**JEFFREY K. BARTON**

DATE: 4/12/10

Clerk to the Board



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**13. COUNTY ATTORNEY MATTERS**

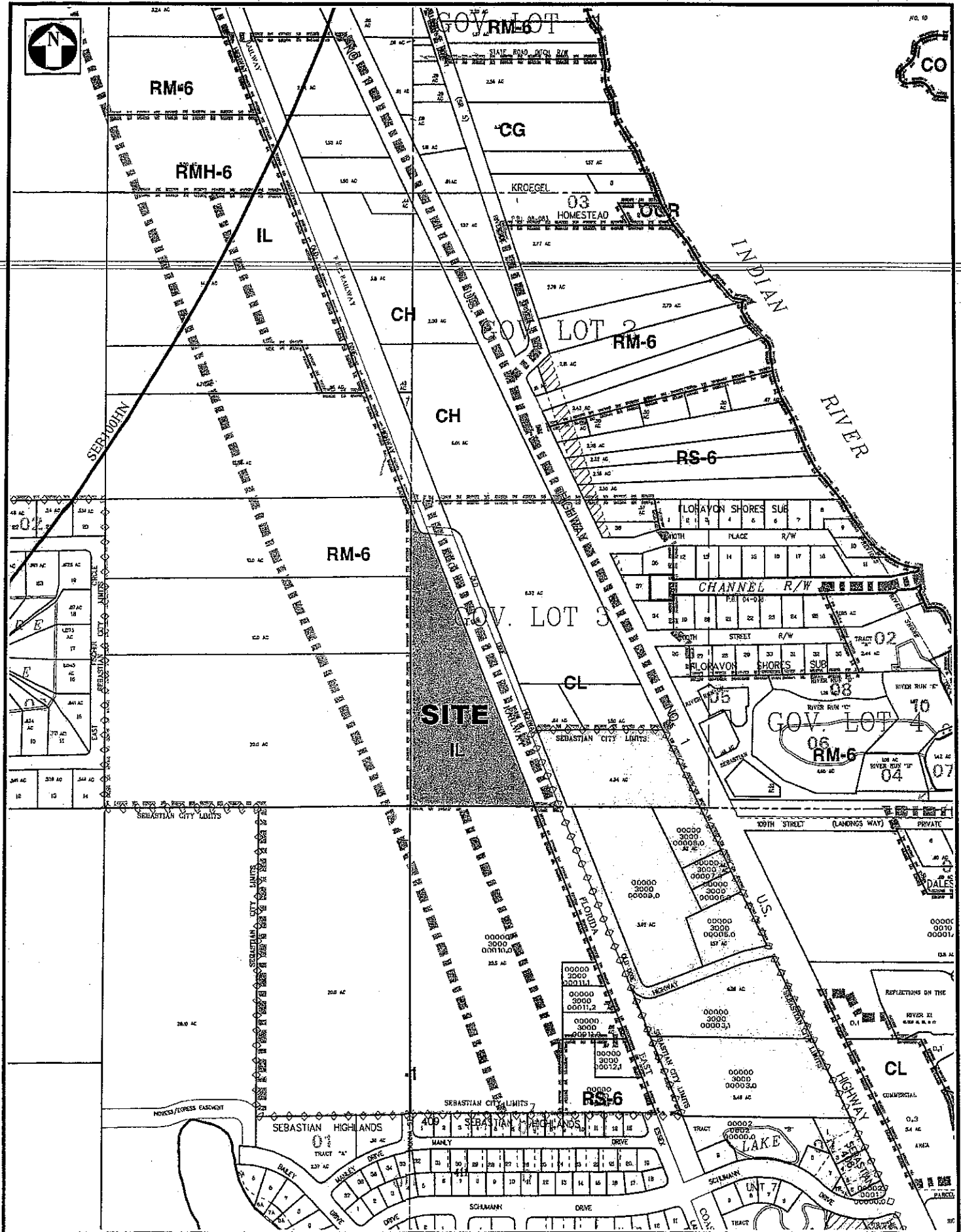
**13.A. UPDATE ON COURT'S DECISION REGARDING OCEAN CONCRETE AND THE  
NEED TO SET A HEARING DATE FOR THE SECOND HALF OF APRIL**

MOTION was made by Commissioner Wheeler,  
SECONDED by Commissioner Flescher, for discussion,  
to set the hearing date for April 20, 2010, the same day as  
the Regular Board of County Commission Meeting.

After a brief discussion, Commissioner Davis voiced his preference for setting both  
hearing dates now.

MOTION was AMENDED by Commissioner Wheeler,  
SECONDED by Commissioner Flescher, to schedule the  
first hearing date for April 20<sup>th</sup>, 2010 to hear the  
application extension request; and the second hearing date  
for May 11<sup>th</sup>, 2010 to hear the denial of the site plan, if  
necessary.

The Chairman CALLED THE QUESTION and the  
Motion carried unanimously.





**INDIAN RIVER COUNTY  
COMMUNITY DEVELOPMENT DEPARTMENT**

1801 27th Street, Vero Beach FL 32960

772-226-1237 / 772-978-1806 fax

[www.ircgov.com](http://www.ircgov.com)

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December 4, 2007

Todd Smith, P.E.  
121 Hinchman Ave  
Sebastian FL 32958

**RE: Request to Extend Ocean Concrete Site Plan Application 2004110124/SP-MA-07-03-15**

Dear Mr. Smith:

Be advised that staff has received and reviewed your request for a one year extension of the above referenced site plan application. Since your extension request was not received until November 21, 2007, we could not accommodate your request for a response by November 21st.

Although your extension request letter indicates that "established county practice and policy" is to "automatically and summarily grant" such extension requests, that is incorrect. In fact, the county's practice and policy is to review site plan application extension requests in a manner comparable to reviewing site plan approval extension requests [reference 914.08(2)]. As such, staff considers the impacts of new and existing regulations as applied to the project. In this case, the project proposed by the subject site plan application does not conform to the existing IL (Light Industrial) zoning district regulations. Therefore, staff denies your request to extend the subject site plan application. Accordingly, the subject site plan application was filed on December 6, 2006 and will become null and void if approval is not obtained within 12 months from that date.

Pursuant to 914.06(4)(d), you may appeal this decision to the Planning & Zoning Commission if an appeal is filed within 10 days of notification. If you decide to file an appeal, you will need to use the enclosed form.

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Robert M. Keating, AICP  
Community Development Director

Attachments: 1. Extension Request from Todd Smith  
2. Appeal Form

cc: Joe Baird, County Administrator  
Stan Boling, AICP  
Will Collins, Esq.  
George Glenn, Esq.  
Brian Freeman, AICP

~~Jim Davis, P.E.~~

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Chris Mora, P.E.  
Chris Kafer, P.E.  
David Hays  
Glenn Schuessler  
George Maib  
Rebecca Grohall, City of Sebastian  
Ralph Brown  
Richard Brown  
Susan Cressionnie  
Deb Robinson  
Helene Caseltine  
Ruth Stanbridge  
George Simons  
Rex Nelson  
Don Liesen  
Robert Markham  
Don Wright  
Bart Burns  
Hazel Bond  
Kathy Charest TM2007-0495



APPLICATION FORM FOR APPEALS

APPEALS FROM:

- Decisions of the Community Development Director or His Designee; AND
- Actions/Decisions of the Planning and Zoning Commission (P&ZC)

FEES:

- I. Site Plan Projects:  
Appeal by project applicant: \$400.00  
Appeal by affected party: \$800.00
- II. Appeal of Staff Determination: \$800.00

Is this an appeal by a project applicant? YES

If so, please list the project name OCEAN CONCRETE, INC.

Property Owner(s): GEORGE MAIB

Address: 4234 SKYLINE DR JENSEN BEACH, FL 34957

Phone Number: 772-200-5727

Signature: [Signature] (or letter of authorization attached)

Applicant Name: OWNER

Address: \_\_\_\_\_

Phone Number: \_\_\_\_\_

Signature: [Signature]

Site Address (If Applicable): \_\_\_\_\_

1. What is being appealed? SITE PLAN EXTENSION REQUEST DENIAL BY BOB KEATING, DATED DEC. 4, 2007
2. Reason(s) for the appeal SEE ATTACHED EXHIBIT "A"
3. What staff (or P&ZC) error(s) is alleged? STAFF SHOULD HAVE GRANTED THE SITE PLAN EXTENSION, COMPLETED THEIR REVIEW AND ONLY OR APPROVE THE PROJECT ON ITS MERITS.

4. What land development regulation (LDR) provision(s) have allegedly been improperly interpreted or applied 914.06 (5)(F)

5. What LDRs and/or Comprehensive Plan goals, objectives, policies support your position? 914.06 (1)(a)(4)(b) & 914.06 (5)(F)

SEE ATTACHED EXHIBIT "A" FOR COMPREHENSIVE DESCRIPTION

NOTE: Supplemental or additional information may be attached. If such information is being attached, please list here what is being attached:

1. LETTER TO IRC DATED 11-15-07 RE: SITE PLAN RE-SUBMITTAL
2. LETTER FROM IRC DATED 12-4-07 RE: RESPONSE TO SITE PLAN RESUBMITTAL
3. LETTER FROM IRC DATED 12-4-07 RE: SITE PLAN EXTENSION DENIAL
4. LETTER TO IRC DATED 12-6-07 RE: RESPONSE TO IRC LETTER DATED 12-4-07

OFFICE USE ONLY:

FEE PAID: \_\_\_\_\_

DATE RECEIVED: \_\_\_\_\_

DATE ACCEPTED: \_\_\_\_\_

cc: Bill Collins - County attorney

**Exhibit "A"**

**Additional Information for Appeal of Denial to Extend Site Plan Application**

**#2. Reasons For The Appeal:**

**Reason No. 1- The Community Development Director should have granted the extension because the County Growth Management Staff failed to conduct a complete review of the site plan application final comments within the time specifically required by Code.**

On Nov. 21, 2007, Ocean Concrete, Inc. submitted a formal response to the Indian River County Growth Management Department in response to TRC comments. Based on County documentation, the site plan expiration date for the project was Dec. 6, 2007. The Indian River County Growth Management Department failed to complete its review as mandated by County Code, and issued an incomplete response to the materials submitted on Nov. 21, 2007. See attached letter from I.R.C. with highlighted sections of individual reviewers acknowledging that they did not finish a "complete" review of the enclosed materials submitted on Nov. 21, 2007. Pursuant to I.R.C. LDR Section 914.06(1)(a)(4)(b) I.R.C. was to process the site plan with the same approval process required of a minor site plan since the project proposed less than 150,000 sf of impervious area. Pursuant to I.R.C. LDR 914.06 (5) (f), the County was to finish a "complete" review within seven (7) working days. The County responded to Ocean Concrete on Dec. 4, 2007 with specific comments from three individual reviewers that they did not perform a "complete" review. Therefore, the Community Development Director should have granted the site plan extension request so I.R.C. staff could fulfill their obligations of a complete review and then either approve or deny the project based on the merits of the application.

**Reason No. 2- The Community Development Director's denial of the site plan extension is arbitrary and inconsistent with County staff's actions of the site plan review, and is based on inapplicable Code provisions.**

This is an appeal of the decision of the Community Development Director to deny a request for extension of a pending site plan application under the provisions of Section 914.06(4)(d) of the County Code. The Community Development Director's denial of the extension request is arbitrary, capricious, and taken in clear violation of the Applicant's property rights, and is based upon a misapplication of inapplicable County Code provisions. Further, the action, if upheld, amounts to a de facto denial of the site plan application, and appeal is hereby made of such decision to deny the site plan application.

The request for extension was made under Section 914.06(4)(d) of the County Code, which allows for a one year extension of time of a pending site plan application. The request for extension was filed on November 21, 2007 prior to the scheduled expiration date of the application, and was made simultaneously with detailed and complete responses to the Technical Review Committee's comments on the site plan application. The only reason offered for the denial of the extension request is that *"the subject site plan application does not conform to the existing IL (Light Industrial) zoning district regulations."* Thus the denial of the extension of the site plan application erroneously makes a determination on the merits of whether the site plan

application should be approved under existing County Code and the recent changes in LDR requirements, rather than simply addressing the issue of whether more time is needed to complete the site plan review process.

In his denial letter, the Community Development Director relies upon Section 914.08(2) as justification for reviewing and applying the affect of recently changed LDRs. However, by its own terms, Section 914.08(2) applies only to requests for extensions of final approved site plans in order to allow more time to commence construction of an approved project. The cited Section does not, by its express terms, apply to requests for approval of pending applications for site plan approval. Thus the Community Development Director relies upon a clearly inapplicable Code provision as the basis for his decision.

The proper question to be addressed under the applicable Section 914.06(4)(d) is whether there is "good cause" for the requested extension of a pending site plan application. Such good cause for an extension is clearly demonstrated in this matter by the County staff's own actions in reviewing the Applicant's Response to the TRC comments submitted on November 21, 2007. Contrary and completely inconsistent with the Community Development Director's denial of the extension request, the TRC and County staff did not deny the site plan application based upon the changed LDR for Light Industrial zoning. Instead, the TRC failed to complete its review, and offered additional comments, and requested additional information from the applicant. (See attached letter from County) Thus the TRC by its own actions, failed to complete the review, and specifically recognized that further review of the project and proposed site plan was needed. If the TRC and Community Development Director honestly believed that the pending site plan cannot be approved under any circumstances due to the changed LDRs, then the appropriate action would have been to deny the site plan application on the merits, and allow the Applicant to file a proper administrative appeal of such denial.

The issues raised by the TRC in its comment letter of December 4, 2007 were also promptly and completely addressed by the Applicant prior to the permit expiration date. Thus good cause is demonstrated for an extension, as additional time is clearly needed to allow the TRC to complete its review on the merits of the application. The TRC and Community Development Director cannot be permitted to fail to complete their review and request additional information on the one hand, and then deny a request for extension to allow staff to complete its review on the other. Such actions would clearly constitute bad faith in the site plan review process.

In sum, the actions of the Community Development Director are clearly arbitrary and capricious and are nothing more than a transparent and bad faith bureaucratic maneuver with the specific intent to deny the Applicant's property development rights.

**Reason No. 3- To the extent the Community Development Director's denial of extension is upheld, it constitutes a de facto denial on the merits of the site plan application, and the Applicant hereby appeals that decision on the grounds listed below in detail.**

The Community Development Director's denial of the site plan extension request is tantamount to a de facto denial of the site plan application, and constitutes a deliberate and bad

faith maneuver to arbitrarily allow the expiration of the site plan application. Accordingly, the Applicant hereby, through this appeal, also appeals, pursuant to Section 914.13 and 902.07 of the County Code, the decision to deny the site plan application. Pursuant to Section 902.07(3)(c) of the County Code, the reasons for this appeal, the errors alleged, and related matters include the following:

- 1) The Community Development Director has inappropriately applied LDRs that were ~~changed after the site plan was submitted, and after the Applicant had expended~~ substantial sums in reasonable reliance of the existing LDRs. The County's actions in changing the LDRs were taken in bad faith, in a concerted effort to deliberately deprive the Applicant of his legitimate property rights. The County's various actions including changing the LDRs are also the subject of a pending lawsuit filed in Circuit Court for the Nineteenth Judicial Circuit in and for Indian River County, Florida, styled Ocean Concrete, Inc. and George Maib v. Indian River County, Board of County Commissioners, Case No. 20071589-CA-17.
- 2) The Ordinances allegedly improperly applied include Section 911.11 which establishes the zoning requirements for Light Industrial districts. The Community Development Director improperly applied the Ordinance amendments that were adopted via Ordinance # 2007-027 on July 24, 2007, well after the date of the application, and after substantial investments of time, funds, and effort by the Applicant made in good faith reliance on published rules and regulations.
- 3) The LDRs supporting the Applicant's position include Section 911.11 as it existed prior to the adoption of the changed LDR for Light Industrial districts.
- 4) The goals, objectives, and policies of the Comprehensive Plan supporting the Applicant's position are contained in the elements of the Comprehensive Plan pertaining to provision of sufficient available land to meet the industrial development needs of Indian River County, including the need for location of certain types of such facilities along the FEC Rail Line, as a major materials delivery artery in the County.

For the foregoing reasons, the Applicant appeals the decision of the Community Development Director dated December 4, 2007 and respectfully requests:

1. That the decision to deny the Site Plan Application Extension Request be reversed.
2. That the matter be returned to the Community Development Director and TRC to complete their evaluation on the merits of the site plan, and to enter their final decision, allowing the Applicant and affected parties their due process rights to appeal such decision under the County Code.
3. Alternatively, consider the denial of the application extension as a de facto denial of the site plan application, and reverse such decision for the reasons specified herein.

S:\506.0 Ocean Concrete\Correspondence\Extension Appeal.Rev.12-14-2007.doc



**INDIAN RIVER COUNTY**  
**COMMUNITY DEVELOPMENT DEPARTMENT**  
1801 27th Street, Vero Beach FL 32960  
772-226-1237 / 772-978-1806 fax  
[www.ircgov.com](http://www.ircgov.com)

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December 17, 2007

Todd Smith, P.E.  
121 Hinchman Avenue  
Sebastian, FL 32958

**RE: Ocean Concrete Major Site Plan Application**  
SP-MA-07-03-15 / 2004110124-57127

Dear Mr. Smith:

County staff has reviewed the application resubmittal for major site plan approval referenced above. The itemized discrepancies listed below demonstrate failure to comply with the regulations as they existed prior to the Board of County Commissioners amending the land development regulations to prohibit concrete batch plants in the IL, Light Industrial, district. Of particular note is the applicant's failure to establish legal positive outfall for the project's stormwater management system (#9 below) and failure to submit an adequate design for the improvement of Old Dixie Highway (#13 & 14 below).

This site plan application was submitted on December 6, 2006. Pursuant to LDR Section 914.06(4)(c), the application has now expired and is thus null and void because approval was not obtained within 12 months of the submittal date.

*Current Development Planning*

1. A conditional concurrency certificate has not been issued for the project due to the applicant's failure to submit an approvable traffic study.

*Drainage and Right-of-Way (David Hays, 226-1596)*

2. The site data provided on the site plan states a total impervious area of 143,479 while the stormwater management report states 149,300. (914.14)

3. Please identify the total area used to determine the area percentages in the stormwater report. The percentages are considerable different than the site data table on the plan. It appears neither adds to 100%. (914.14)
4. Areas stated as impervious type and basin boundaries should be clarified. The plan indicates two stormwater tracts with a boundary line labeled for "Type 1 WW". The site data on the plans and stormwater report does not separate the drainage areas and provide individual treatment volumes, but instead uses a total. The two SW tracts have different bleeder elevations.
5. Identify the limits of the off-site drainage that will be treated in the on-site SW tract.
6. It appears a large portion of the off-site improvements will not receive stormwater treatment in accordance with water management district requirements.
7. Please explain the variable discharge rates shown for both ponds. According to the output, discharge rates rise and drop drastically from adjacent time periods.
8. The use of the Santa Barbara program does not properly allow for the multiple drainage area basins and flow patterns designed and demonstrated in the report.
9. Outfall appears to discharge across private property instead of discharging into a receiving water body. A positive discharge is required. (930.07) The plans have indicated to "regrade right-of-way to provide positive drainage from CB#16 southwards to match existing flow path". The plans must demonstrate all grading and elevations. No grading plan to demonstrate positive outfall can be achieved has been provided.
10. The plans are not clear on the limits of paving. It is interpreted that the entrance road and service road are intended to be unpaved. This type of use without paved roads will likely result in continuous siltation runoff into the SW tracts.
11. The response states the site will take in the off-site drainage. Please provide clarification on the off-site boundaries.
12. All details shall include maximum slopes allowed. Please provide.
13. Old Dixie Highway: Roadway design plans have not been appropriately submitted to demonstrate the road can be built in accordance with regulations. This response is considered insufficient. This response is the first review or discussion based on using access southward from the plant. All previous plans and discussions have only been based on access and roadway improvements north of the site.
  - a. The Maintenance map has not been recorded yet and will not be official until it is. Design using this area may not be appropriate.
  - b. How will drainage from station 9+00 to US 1 be handled? A SJRWMD permit

will be required.

- c. The integrity of the existing road will have to be established with core borings demonstrating the existing base and asphalt for it to be used as an overlay design. Borings shall be provided at a maximum spacing of 400 feet, alternating each side of centerline. The plans are not permissible until this has been established.
- d. There does not appear to be enough right-of-way to construct the road as designed. ~~Will additional right-of-way be obtained?~~
- e. Open/Rural 50' R/W Section: 12 foot lane widths are required unless otherwise agreed to by the County Engineer. The rural design section shall include 12' lanes and a minimum 4 foot paved and 4 foot stabilized or 8 foot stabilized shoulders. The typical section does not include any drainage runoff design. The subgrade shall be compacted to LBR40. Provide a pavement cross slope of 2%, shoulder cross slope of 6%.
- f. Curbed/Urban roadway section: The detail indicates a cross section of 34 feet. The existing right-of-way is 30 feet in width from approximately station 14+60 to the railroad crossing. The roadway shall be designed to include inline drainage slopes at a minimum of 0.3% and cross slopes of 2%. Weep holes shall not be drilled into the curb. P-Type inlets shall be used instead of rear curb swale and Type C inlets. The base shall be compacted to LBR40. The maximum allowable length of 18" pipe without a structure is 300 feet.
- g. The roadway design shall include full cross sections at 100 foot stations with sufficient information to include all necessary improvements and existing and proposed grades to demonstrate constructability. If the existing road is sufficient to construct on, a pavement overlay will be required. Provide a roadway provide that include center line, right and left profile grades. A pavement marking and sign plan is required.
- h. The edge of the existing pavement shall be saw cut. Provide a pavement saw cut - butt joint detail.
- i. Pipes in the county right-of-way shall be RCP.
- j. Trees shall be relocated outside of the right-of-way. Any trees not removed shall meet all appropriate clear zone criteria.

Traffic Engineering (Jeanne Bresett, 226-1326)

- 14. The project's traffic impact study has not been approved. As previously indicated, the project's trip distribution must account for trips occurring on Old Dixie Highway both north and south of the project site. Old Dixie Highway is a single-lane, two-way road in this area. In order to handle additional traffic generated by Ocean Concrete, and

particularly truck traffic, Old Dixie Highway must be widened to a two-lane roadway from US1 to CR512 to accommodate two-way traffic flow.

Fire Prevention Bureau (Sandra Seeley, 226-1961)

15. The project's Fire plan review fee (\$250) needs to be paid.

If I may provide any further assistance, please contact me at 772-226-1239.

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Sincerely,



Brian Freeman, AICP  
Senior Planner, Current Development

cc: Robert M. Keating, AICP  
Stan Boling, AICP  
David Hays, P.E.  
Ken Oristaglio  
Jeanne Bresett  
Sandra Seeley  
Jim Davis, P.E.  
Chris Mora, P.E.  
Chris Kafer, P.E.  
Glenn Schuessler  
Joe Baird  
Will Collins, Esq.  
George Glenn, Esq.  
Geoffrey Smith, Smith & Associates  
George Maib  
Rebecca Grohall, City of Sebastian  
Ralph Brown  
Richard Brown  
Susan Cressionnie  
Deb Robinson  
Helene Caseltine  
Ruth Stanbridge  
George Simons  
Rex Nelson  
Don Liesen  
Robert Markham  
Don Wright  
Bart Burns

Hazel Bond

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**Item on Consent** (7:32:00)

Chairman Hamner read the following into the record:

- A. RCMA Day Care Facility:** Request for administrative permit approval for a pre-school/day care facility to be known as RCMA day care. Redlands Christian Migrant Association, Owner. Knight, McGuire & Associates, Inc.; Agent. Located at 7625 85th Street (CR510), between 66th Avenue and 82nd Avenue. Zoning Classification: A-1, Agricultural 1 (up to 1 unit per 5 acres). Land Use Designation: AG-1, Agricultural 1 (up to 1 unit per 5 acres). (SP-MA-07-12-45/2001110154-60157) [**Quasi-Judicial**]

Mr. Fletcher wondered if a slow-down lane would be required when the road was paved or widened. Mr. Bob Keating, IRC Community Development Director, advised during the design phase it would be decided where it would be appropriate to have median cuts.

(7:33:47)

**ON MOTION BY Mr. Lawrence, SECONDED BY Dr. Baker, the members voted unanimously (7-0) to approve the Consent Agenda.**

**Public Discussion** (7:34:20)

The secretary administered the testimonial oath to those present who wished to speak at tonight's meeting on any quasi-judicial items.

Chairman Hamner read the following into the record:

- A. Ocean Concrete:** Appeal of a decision by community development staff to deny a request for a one year extension of a site plan application to construct a concrete batch plant. Located on the west side of Old Dixie Highway, south of County Road 512. Ocean Concrete, Inc., Owner. Todd Smith, Agent. Zoning Classification: IL, Light Industrial. Land Use Designation: C/I, Commercial/Industrial. [SP-MA-07-03-15 / 2004110124-57127] [**Quasi-Judicial**]

Attorney George Glenn, IRC Assistant County Attorney, clarified the appeal was to determine whether IRC staff improperly denied the

applicant's request for a site plan extension, and questions of merit and whether it was a good project or not were irrelevant.

Mr. Brian Freeman, IRC Senior Planner, reviewed the information contained in his memorandum dated December 31, 2007, a copy of which is on file in the Commission Office (7:36:27).

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The applicant's representative, Attorney Geoffrey Smith, Smith & Associates, Tallahassee, Florida (7:43:23), maintained IRC staff was maneuvering to try and create the pretext that the project had expired. He stated a group known as Stop Ocean Concrete had posted the date of tonight's public hearing on its web site on December 22, 2007 before it was ever publicly announced, and submitted a copy of the Sebastian Concerned Citizens' web page which is on file in the Commission Office.

Attorney Smith discussed a letter dated December 4, 2007 to Mr. Todd Smith, P.E. from Mr. Brian Freeman, a copy of which is on file in the Commission Office. He cited LDR Section 914.06(4)(d) regarding extensions of site plan applications and gave his reason why the four criteria were not followed by IRC staff.

Attorney Smith related if staff was applying the changed LDRs they should straight forwardly say it was on the merits and not try to make it into a procedural matter that the permit had expired. He explained the legal principal of equitable estoppel.

Mr. Keating took issue with Attorney Smith's claim that staff changed the rules in the middle of the game because when looking at an extension request they were looking at a new game and adding another period to the game. He stated there were new rules and if staff extended the site plan it should be subject to those new rules. Mr. Keating pointed out the criteria regarding extension of site plan applications was discretionary on the part of the Community Development Director, and IRC staff had applied the criteria of looking at the impacts of changed LDRs in deciding whether or not to grant the extension request. He added IRC staff had gone to great lengths to make sure the application was reviewed under only the rules that were in effect without any changes when it was submitted, and had only applied the impacts of the zoning district changes in looking at an extension.

Attorney Smith asked Mr. Keating if, setting aside the change in the LDRs, the applicant's request for an extension would be granted. Mr. Keating replied it would if there was no change in the LDRs.

Discussion followed.

Mr. Todd Smith P.E., the applicant's Engineer (8:21:09), wanted to go on record that the applicant had been moving forward as diligently as possible, and talked about all the different agencies they had to deal with. He maintained, regardless of any extension or comment letters, there was no way the applicant could have secured an approval on the site plan within the twelve month period of 2007. He took issue with criteria #3 and #4 of LDR Section 914.06(4)(d).

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Stormwater data was discussed.

The applicant, Mr. George Maib (8:37:44), stated the decision would inevitably be decided by a judge in a court of law and he asked the P&Z to allow him the opportunity to see his work come to fruition. He noted if the courts decided against him he would find another use to implement on the property and much of data concerning future road improvements, etc. would be utilized in another acceptable design which would be presented to staff.

Attorney Glenn discussed the factors and the reasoning associated with staff's denial of the extension.

Chairman Hamner opened the public discussion at 8:18 p.m. He asked if anyone present today was in favor of the appeal, with the assumption being anyone not in favor would support IRC staff's case.

Mr. Charles Wilson, 1935 19<sup>th</sup> Avenue, Vero Beach (8:49:34) disclosed he had worked with the applicant regarding the designation of Old Dixie Highway as a historic roadway, but did not represent him in this action. He was concerned it would be the policy of the County where a project could be delayed long enough that it then became a single person's decision whether the project could go forward or not. Mr. Wilson outlined why he did not believe staff had followed item #4 of the criteria.

Mr. Kelly Matherne (8:53:45) stated Sebastian Concerned Citizens did not have advanced information of tonight's meeting ahead of anyone else.

Mr. William Cox, River Run Drive, Sebastian (8:54:34), did not believe the extension should be granted.

Attorney Smith reiterated his arguments against denial of the extension (8:56:16).

Chairman Hamner closed the public discussion at 8:27 p.m.

A member of the audience who had arrived after the swearing in of those who wished to speak asked to be heard. Chairman Hamner reopened the public discussion at 8:31 p.m., and the secretary administered the testimonial oath.

Mr. Al Manzi, 742 Holden Avenue, Sebastian (9:00:06), spoke against the extension being granted.

Chairman Hamner closed the public discussion at 8:35 p.m.

(9:02:48)

**ON MOTION BY Ms. Keys, SECONDED BY Mr. Lawrence, the members voted unanimously (7-0) to find staff did not fail in regard to any of the four appeal criteria and to uphold denial of the extension.**

Chairman Hamner called a recess at 8:35 p.m. and reconvened the meeting at 8:37 p.m.

**Public Hearing** (9:03:38)

Chairman Hamner read the following into the record:

- A. Indian River Estates Phase III:** Request for major site plan and special exception approval to construct a total care facility addition to be known as Indian River Estates Phase III. Adult Community Total Services, Inc., Owner. Carter Associates, Inc., Agent. Located at 7500 26th Street. Zoning Classification: RM-8, Residential Multi-Family (up to 8 units/acre). Land Use Designation: M-1, Medium Density (up to 8 units/acre). Density: 7.45 units per acre. (SP-MA-08-02-06/2007040082-60628) [**Quasi-Judicial**]

Mr. Steven Deardeuff, IRC Senior Planner, reviewed the information contained in his memorandum dated December 10, 2007, a copy of which is on file in the Commission Office (9:03:01).



APPLICATION FORM FOR APPEALS

APPEALS FROM:

- Decisions of the Community Development Director or His Designee, AND
- Actions/Decisions of the Planning and Zoning Commission (P&ZC)

FEES:

- I. Site Plan Projects:  
Appeal by project applicant: \$400.00  
Appeal by affected party: \$800.00
- II. Appeal of Staff Determination: \$800.00

Is this an appeal by a project applicant? YES

If so, please list the project name OCEAN CONCRETE, INC.

Property Owner(s): GEORGE MAIB

Address: 4234 SKYLINE DRIVE, JENSEN BEACH, FL. 34957

Phone Number: 772-266-5727

Signature: [Signature] (or letter of authorization attached)

Applicant Name: SAME AS OWNER

Address: \_\_\_\_\_

Phone Number: \_\_\_\_\_

Signature: [Signature]

Site Address (If Applicable): \_\_\_\_\_

1. What is being appealed? PLANNING AND ZONING COMMISSION DENIAL OF APPEAL OF DECISION BY THE COMMUNITY DEVELOPMENT DIRECTOR DENYING 1 YEAR SITE PLAN APPLICATION EXTENSION

2. Reason(s) for the appeal FAILURE TO GRANT A ROUTINE REQUEST FOR EXTENSION. P&Z SHOULD HAVE OVERTURNED COMMUNITY DEVELOPMENT DIRECTOR AS MORE FULLY DISCUSSED ON ATTACHMENT A.

3. What staff (or P&ZC) error(s) is alleged? FAILURE TO OVERTURN THE DECISION TO DENY A SITE PLAN APPLICATION EXTENSION WHERE GOOD CAUSE FOR EXTENSION EXISTS AND FAILURE TO EXTEND CONSTITUTES A DENIAL ON THE MERITS.

4. What land development regulation (LDR) provision(s) have allegedly been improperly interpreted or applied 914.06(5)(f)

5. What LDRs and/or Comprehensive Plan goals, objectives, policies support your position? 914.06(1)(a)(4)(b), 914.06(5)(5) See attached Exhibit A.

NOTE: Supplemental or additional information may be attached. If such information is being attached, please list here what is being attached:

1. Denial letter from Indian River Community Development Department dated January 17, 2008
2. Transcript of January 10, 2008 P&Z Hearing – to be provided
3. All submittals to P&Z for January 10, 2008 Hearing – to be provided

OFFICE USE ONLY:

FEE PAID: \_\_\_\_\_

DATE ACCEPTED: \_\_\_\_\_

DATE RECEIVED: \_\_\_\_\_

## Attachment A

Ocean Concrete hereby incorporates by reference the evidence, arguments, testimony and legal analysis presented to the Planning and Zoning Commission at its January 10, 2008 meeting, including but not limited to Ocean Concrete's appeal to the P&Z and all attachments thereto, and all information presented at the January 10, 2008 as reflected in the transcript of proceedings.

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Ocean Concrete asserts that the P&Z Commission erred by denying the appeal. Ocean Concrete had sought a simple 1 year extension of its pending site plan application. This request was denied solely on the basis that there had been a change in LDRs for the Light Industrial zoning category. In essence, the extension request was a determination on the merits that the project could not conform to current zoning requirements.

The Community Development director candidly admitted at the P&Z meeting that: 1) very few requests for site plan extension are ever denied, and; 2) the request by Ocean Concrete would not have been denied but for the change in the IL zoning classification.

During the P&Z meeting, the Community Development Director claimed that it was processing the application pursuant to the IL zoning that was in effect prior to the amendment to prohibit concrete batch plants. If this is the case, then clearly the county staff felt that more time was necessary to reach a decision on the merits, and thus good cause existed for an extension of the site plan application. As the Community Development Director acknowledged, such extensions are routinely granted, and an extension would have been granted in this case, if the County was truly evaluating the application under the IL zoning in effect prior to the amendment. Thus the County staff is on the horns of a dilemma--if it was evaluating the application in good faith under the pre-existing LDRs prior to the amendment, then an application extension should have been granted. If, on the other hand, the County staff was evaluating the application under the LDRs after the amendment to prohibit concrete batch plants, then its action in denying an extension was tantamount to a decision on the merits of the application. The County Staff cannot have it both ways.

The request for extension was made under Section 914.06(4)(d) of the County Code, which allows for a one year extension of time of a pending site plan application. The request for extension was filed on November 21, 2007 prior to the scheduled expiration date of the application, and was made simultaneously with detailed and complete responses to the Technical Review Committee's comments on the site plan application. The only reason offered for the denial of the extension request is that *"the subject site plan application does not conform to the existing IL (Light Industrial) zoning district regulations."* Thus the denial of the extension of the site plan application erroneously makes a determination on the merits of whether the site plan application should be approved under existing County Code and the recent changes in LDR requirements, rather than simply addressing the issue of whether more time is needed to complete the site plan review process.

In his denial letter, the Community Development Director relies upon Section 914.08(2) as justification for reviewing and applying the affect of recently changed LDRs. However, by its own terms, Section 914.08(2) applies only to requests for extensions of final approved site plans in order to allow more time to commence construction of an approved project. The cited Section does not, by its express terms, apply to requests for approval of pending applications for site plan approval. Thus the Community Development Director relies upon a clearly inapplicable Code provision as the basis for his decision.

The proper question to be addressed under the applicable Section 914.06(4)(d) is whether there is "good cause" for the requested extension of a pending site plan application. Such good cause for an extension is clearly demonstrated in this matter by the County staff's own actions in reviewing the Applicant's Response to the TRC comments submitted on November 21, 2007. Contrary and completely inconsistent with the Community Development Director's denial of the extension request, the TRC and County staff did not deny the site plan application based upon the changed LDR for Light Industrial zoning. Instead, the TRC failed to complete its review, and offered additional comments, and requested additional information from the applicant. (See attached letter from County) Thus the TRC by its own actions, failed to complete the review, and specifically recognized that further review of the project and proposed site plan was needed. If the TRC and Community Development Director honestly believed that the pending site plan cannot be approved under any circumstances due to the changed LDRs, then the appropriate action would have been to deny the site plan application on the merits, and allow the Applicant to file a proper administrative appeal of such denial. It should be noted that Ocean Concrete has filed a separate appeal, challenging the decision of the Community Development Director on the merits of the site plan application.

The issues raised by the TRC in its comment letter of December 4, 2007 were also promptly and completely addressed by the Applicant prior to the permit expiration date. Thus good cause is demonstrated for an extension, as additional time is clearly needed to allow the TRC to complete its review on the merits of the application. The TRC and Community Development Director cannot be permitted to fail to complete their review and request additional information on the one hand, and then deny a request for extension to allow staff to complete its review on the other. Such actions would clearly constitute bad faith in the site plan review process.

In sum, the actions of the Community Development Director are clearly arbitrary and capricious and are nothing more than a transparent and bad faith bureaucratic maneuver with the specific intent to deny the Applicant's property development rights.

**To the extent the P&Z denial of the appeal on the extension request is upheld, it constitutes a de facto denial on the merits of the site plan application, and the Applicant hereby appeals that decision on the grounds listed below in detail.**

The Community Development Director's denial of the site plan extension request is tantamount to a de facto denial of the site plan application, and constitutes a deliberate and bad faith maneuver to arbitrarily allow the expiration of the site plan application. Accordingly, the Applicant hereby, through this appeal, also appeals, pursuant to Section 914.13 and 902.07 of the County Code, the decision to deny the site plan application. Pursuant to Section 902.07(3)(c) of the County Code, the reasons for this appeal, the errors alleged, and related matters include the following:

- 1) The site plan application fully and completely met all requirements for issuance of site plan approval prior to the expiration date.
- 2) The Community Development Director has inappropriately applied LDRs that were changed after the site plan was submitted, and after the Applicant had expended substantial sums in reasonable reliance of the existing LDRs. The County's actions in changing the LDRs were taken in bad faith, in a concerted effort to deliberately deprive the Applicant of his legitimate property rights.
- 3) The Community Development Director and the P&Z failed to properly consider the vested rights and equitable estoppel issues raised by Ocean Concrete. The County's various actions including changing the LDRs are also the subject of a pending lawsuit filed in Circuit Court for the Nineteenth Judicial Circuit in and for Indian River County, Florida, styled Ocean Concrete, Inc. and George Maib v. Indian River County, Board of County Commissioners, Case No. 20071589-CA-17.
- 4) The Ordinances allegedly improperly applied include Section 911.11 which establishes the zoning requirements for Light Industrial districts. The Community Development Director improperly applied the Ordinance amendments that were adopted via Ordinance # 2007-027 on July 24, 2007, well after the date of the application, and after substantial investments of time, funds, and effort by the Applicant made in good faith reliance on published rules and regulations.
- 5) The LDRs supporting the Applicant's position include Section 911.11 as it existed prior to the adoption of the changed LDR for Light Industrial districts.
- 6) The goals, objectives, and policies of the Comprehensive Plan supporting the Applicant's position are contained in the elements of the Comprehensive Plan pertaining to provision of sufficient available land to meet the industrial development needs of Indian River County, including the need for location of certain types of such facilities along the FEC Rail Line, as a major materials delivery artery in the County.

For the foregoing reasons, the Applicant appeals the decision of the Planning and Zoning Commission dated January 10, 2008 and respectfully requests:

1. That the decision to deny the Site Plan Application Extension Request be reversed.
2. That the matter be returned to the Community Development Director and TRC to complete their evaluation on the merits of the site plan, and to enter their final decision. To the extent such decision is to deny the site plan based upon the change in LDRs, then the Community Development Director should make a determination of whether or not vested rights exist based upon principles of equitable estoppel, and the amount of time, energy, and financial resources invested by the applicant prior to the change in LDRs. The Applicant and affected parties should be provided their due process rights to appeal any decision by the Community Development Director on the merits of the site plan application under the County Code.
3. Alternatively, consider the denial of the application extension as a de facto denial of the site plan application, and reverse such decision for the reasons specified herein.

*The Chairman called a Break at 10:42 a.m., and reconvened the meeting at 10:54 a.m., with Commissioners Davis and Flescher absent.*

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**11.A.2. OCEAN CONCRETE, INC.'S APPEAL OF A DECISION BY THE PLANNING AND ZONING COMMISSION AFFIRMING THE COMMUNITY DEVELOPMENT DIRECTOR'S DENIAL OF A REQUEST FOR A ONE-YEAR EXTENSION OF A SITE PLAN APPLICATION TO CONSTRUCT A CONCRETE BATCH PLANT**

*(Clerk's Note: (1) Commissioners Davis and Flescher were absent at the resumption of the meeting, and returned at 10:55 a.m. (2) Court Reporter Kathy Duncombe of Atlantic Reporting was present on behalf of Ocean Concrete)*

County Attorney William Collins informed the Board that this was a quasi-judicial matter, and requested that the Clerk swear-in all potential speakers. The Deputy Clerk administered the Oath.

Planning Director Stan Boling recapped the backup memorandum dated March 6, 2008, and through a PowerPoint presentation provided background description and conditions on Ocean Concrete, Inc.'s appeal of a decision of the Planning and Zoning Commission (PZC). He reported that PZC at its January 10, 2008 meeting considered and denied (7-0) an appeal by Ocean Concrete, which sought to reverse a decision of the Community Development Director to deny a request for a one-year extension of a major site plan application to construct a concrete batch plant. He reminded the Board of prior actions on this matter, and outlined the section of the Code [S. 914.06(4)(d)] that applies to application extensions.

Director Boling summarized and related staff's responses to the Appellant's contentions:

- (1) that staff should have granted the extension request because County staff failed

to conduct a complete review of the site plan application, and issue final comments within the time specified by the Land Development Regulations (LDRs).

Staff contends that it did issue a discrepancy letter within seven (7) working days as required by the LDRs, and that the review followed standard procedures.

~~(2) that staff's denial of the site plan extension was arbitrary and inconsistent with~~  
staff's actions during the site plan review and is not based on applicable LDR provisions.

Staff contends that its actions were neither arbitrary nor capricious.

(3) that staff's denial of the site plan application constitutes a deliberate and bad faith maneuvering to arbitrarily allow the expiration of the site plan application.

Staff contends that it has followed all the review timeframe.

Director Boling then presented staff's recommendation that the Board find that PZC did not fail to follow the appropriate review standards, and to deny the appeal and uphold P&Z's decision. Staff found that Planning and Zoning did not fail in its review and findings. Director Boling thereafter responded to questions from the Board regarding prior extensions granted, requiring compliance with new LDRs.

*The Chairman opened the floor to public input.*

Charles Wilson, 1936 19<sup>th</sup> Avenue, representing Ocean Concrete, explained the difference between a concrete and a cement plant, and remarked that this site has agreed that it would not create cement. He disclosed that they have a million dollar pollution/dust control provision on the Plant that creates no dust, pollution, manufacturing operations, and no noise. He presented a four-option scenario of how the Board may look at the issue. He thought that if given the opportunity, they could reach a compromise for the best of all the people.

Jeffrey Smith, Esquire, Smith & Associates, Tallahassee, representing Ocean Concrete, asked the Board for only one thing, "A fair, honest, straightforward hearing and decision that's free of any kind of posturing, legal gamesmanship, and maneuvering." He

submitted to the Board that the process that brought them here is nothing more than “gamesmanship.” He debated staff’s response and agreed that it would be fair if they were being denied on the merits, but felt the decision to deny the site plan extension was riddled with inconsistency, which reasons he gave. He implored the Board to grant the extension request.

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**Todd Smith**, 121 Hinchman Avenue, Sebastian, Engineer for the Ocean Concrete Project, wanted to address comments from Director Boling’s presentation, which he thought was prejudicially brought to the Board to indicate that they let two years go by and had done nothing with the project. He stated the reason for the extension request, and stood by the reasoning that what they submitted met all the County Code requirements.

Director Keating informed the Board that staff’s position is the same as the Planning and Zoning Commission, and believed they made the right decision in denying the application for extension. He felt the decision was not arbitrary, our decision was logical and rational, and was the only correct decision to be made.

MOTION WAS MADE by Commissioner Flescher,  
SECONDED by Commissioner O’Bryan, to support  
P&Z’s decision, that it did not fail in the review process,  
and therefore deny the appeal and uphold the P&Z’s  
decision to wholly affirm the Community Development  
Director’s actions and decision.

Commissioner O’Bryan discussed the decision by the Board for uses in certain industrial light zoned districts. He believed staff made the correct decision.

Chairman Bowden thought it was clear that the extension of the site plan application was the only decision that we could make legally and logically. She supported staff’s decision.

Commissioner Flescher remarked, based on earlier comments, that this was not about the merits of Ocean Concrete, but is solely on the appeal process, and whether there were any inherent actions within staff, or there was a defect in P&Z's process.

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~~The Chairman CALLED THE QUESTION and by~~

unanimous vote, the Board found that the Planning and Zoning Commission's decision did not fail in regard to any of the four appeal review areas. The Board denied the appeal and upheld the Planning and Zoning Commission's decision to wholly affirm the Community Development Director's determination to deny the request for a one-year extension of the subject site plan application, as recommended in the memorandum dated March 6, 2008.

**11.B. EMERGENCY SERVICES - NONE**

**11.C. GENERAL SERVICES - NONE**

**11.D. HUMAN RESOURCES**

**1. MEDICARE HEALTH INSURANCE PLAN FOR RETIREES AND HEALTH INSURANCE SUBSIDY POLICY**

Human Resources Director Jim Sexton brought two issues to the Board: (1) offering a Medicare health insurance plan to retirees, and (2) a potential revision to the health insurance subsidy policy that is currently in place. He asked that the two items be discussed separately, and he began with whether the County should offer Medicare health insurance plans

termination by staff that the project does not require a concurrency certificate, or an acknowledgement that the applicant will apply for a concurrency certificate. The acknowledgement shall be in writing on a form provided by Indian River County.

- (b) *Form.* All application packages shall be submitted in a form and in a complete manner as specified by the planning division on the site plan application form.
- (c) *Application expiration.* All applications shall expire and become null and void if approval is not obtained within twelve (12) months from the date a complete application is received by the planning division.
- (d) *Application extensions.* Upon finding of good cause, the community development director may grant one extension for a period of one year. No further site plan application extensions may be granted. If denied, all appeals of such decisions shall be heard by the planning and zoning commission. All appeals must be filed within ten (10) days of notification of denial. Appeal procedures shall be as specified in Chapter 902.
- (5) *Departmental review of site plan applications.*
  - (a) *Coordinating division.* The planning division shall be responsible for the coordination of all site plan reviews. Applicants shall submit all applications and materials to the planning division.
  - (b) *Completeness review:*
    1. The planning division shall review all applications to ensure completeness before distribution to reviewing departments and agencies. Only complete applications will be distributed to the reviewing departments and agencies. Failure to submit required application material will result in the application material not being distributed; the application will be deemed incomplete. Planning staff

shall notify the applicant within five (5) days of submittal if the application is incomplete.

- 2. Applicants shall have thirty (30) days from the notice of an incomplete application to complete the application; failure of the applicant to complete the application within the thirty (30) day period shall void the application request.
- 3. Once the application is deemed to be complete, it will be distributed by the planning division for departmental review, and consideration at the appropriate TRC meeting.
- (c) *Application distribution for review.* For complete applications, the planning division shall distribute all appropriate application material(s) to the appropriate TRC members, all appropriate county departments, and other state, regional and local review agencies.
- (d) *TRC review and comments.* Each TRC member shall review the application and submit written comments to the planning division within eleven (11) days after the routing of the site plan application materials and prior to the date the application is scheduled, by the planning division to be considered at a TRC meeting. The technical review committee shall consider each application, shall complete a technical evaluation of the site plan application, and shall identify any deficiencies or discrepancies. Complete comments on all applications considered at the TRC meeting shall be assembled and forwarded to the applicant within four (4) working days. Applications with substantial deficiencies may be rescheduled for review by the technical review committee at the discretion of the technical review committee.
- (e) *Resubmission and scheduling major site plans for planning and zoning commission consideration.* The applicant's response to the TRC comments shall consist of five (5) revised plan sets and an itemized letter detailing how all of the discrep-