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OWENSBORO METROPOLITAN BOARD OF ADJUSTMENT

JANUARY 2, 2003

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The Owensboro Metropolitan Board of Adjustment met in regular session at 6:00 p.m. on Thursday, January 2, 2003, at City Hall, Commission Chambers, Owensboro, Kentucky, and the proceedings were as follows:

- MEMBERS PRESENT: C. A. Pantle, Chairman
- Gary Noffsinger,
- Planning Director
- Marty Warren
- Ruth Ann Mason
- Judy Dixon
- Tim Miller
- Sean Dysinger
- Ward Pedley
- Stewart Elliott
- Attorney

\* \* \* \* \*

CHAIRMAN: Call the Owensboro Metropolitan Board of Adjustment to order.

Welcome you all here this evening. Set a few guidelines up that we need to do. If you want to speak to any issue, please come to the microphone. Be sworn in by counsel so we can get all of the testimony on record in case there is a lawsuit or something involved and we'll have everything on the minutes.

With that the first thing on the agenda is the minutes of the December 5th meeting. They're on

1 record in the office. We find no corrections that  
2 need to be made.

3 What's the board's pleasure on the  
4 minutes.

5 MS. DIXON: Move to approve.

6 CHAIRMAN: Motion been made to approve.

7 Is there a second?

8 MR. MILLER: Second.

9 CHAIRMAN: All in favor raise your right  
10 hand.

11 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

12 CHAIRMAN: Motion carries unanimously.

13 The next item on the agenda this evening  
14 we've got an old member that's retiring, Bill  
15 Williams. Mr. Williams retired and we have a plaque  
16 we want to give him at this time.

17 (PRESENTATION FOR BILL WILLIAMS.)

18 CHAIRMAN: The next item on the agenda  
19 tonight we've got a new board member, Mr. Dysinger.  
20 At this time we'll ask our attorney to swear him in,  
21 please.

22 (MR. SEAN DYSINGER SWORN IN BY ATTORNEY.)

23 CHAIRMAN: Sean, congratulations. Good to  
24 have you with us.

25 The next item on the agenda this evening,

1 this is the first meeting of the year and at this time  
2 we elect new officers at this time. I declare the  
3 chair of presidency open and turn it over to our  
4 attorney to conduct elections.

5 MR. ELLIOTT: Mr. Chairman and Board, the  
6 floor is now open for the nomination for the office of  
7 chairman.

8 MR. PEDLEY: I nominate Audie Pantle.

9 MR. ELLIOTT: Do I have a second?

10 MS. MASON: Second.

11 MR. ELLIOTT: Are there any other  
12 nominations?

13 (NO RESPONSE)

14 MR. PEDLEY: Move the nomination cease.

15 MR. ELLIOTT: Motion nomination cease. Do  
16 I have a second?

17 MR. MILLER: Second.

18 CHAIRMAN: Mr. Pantle has been nominated  
19 as Chairman. All in favor please signify by raising  
20 your hand.

21 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

22 CHAIRMAN: We now have the office of vice  
23 chairman. The floor is now open for the nomination  
24 for the office of vice chairman.

25 MR. MILLER: Nominate Ward Pedley.

1 MR. ELLIOTT: Mr. Pedley has been  
2 nominated. Is there a second?

3 MS. DIXON: Second.

4 MR. PANTLE: Move that nomination cease  
5 and be elected by acclamation.

6 MR. ELLIOTT: Motion that nomination cease  
7 and be elected by acclamation. Is there a second?

8 MR. MILLER: Second.

9 MR. ELLIOTT: All in favor.

10 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

11 MR. ELLIOTT: Now we have the office of  
12 secretary. The floor is now open for the nomination  
13 of office of secretary.

14 MR. MILLER: I'd like to nominate Ruth Ann  
15 Mason.

16 MR. ELLIOTT: Ruth Ann Mason. Is there a  
17 second?

18 MS. DIXON: Second.

19 MR. ELLIOTT: Are there any other  
20 nominations?

21 (NO RESPONSE)

22 MR. PANTLE: Move that nomination cease.  
23 She be elected by acclamation.

24 MS. DIXON: Second.

25 MR. ELLIOTT: All in favor.

1 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

2 MR. ELLIOTT: We now have our offices, Mr.  
3 Chairman.

4 CHAIRMAN: Thank you. With that we'll  
5 proceed with our business.

6 Our first item on the agenda, Gary,  
7 please.

8 -----

9 CONDITIONAL USE PERMITS

10 ITEM 2

11 550 Steamboat Road, in an R-1A, A-R zone  
12 Consider request for a Conditional Use Permit to  
13 place a 14-foot by 50-foot Class B manufactured home  
14 on the lot.

13 Reference: Zoning Ordinance, Article 8,  
14 Section 8.210B/7

14 Applicant: James A. Morris, Jr.

15 MR. NOFFSINGER: Mr. Chairman, this  
16 application has been advertised for public hearing at  
17 this time. All adjoining property owners have been  
18 notified. The application is in order and ready for  
19 consideration.

20 CHAIRMAN: Has there been any objections  
21 filed in the office?

22 MR. NOFFSINGER: No, sir.

23 CHAIRMAN: Is there anyone in the audience  
24 wishing to speak in objection to this Conditional Use  
25 Permit?

1 (NO RESPONSE)

2 CHAIRMAN: Is the applicant here? Is  
3 there anything you'd like to add?

4 APPLICANT: No, sir. I was just here in  
5 case you had some questions.

6 CHAIRMAN: Thank you.

7 Any board members have any questions of  
8 the applicant?

9 (NO RESPONSE)

10 CHAIRMAN: Hearing none the chair will  
11 entertain a motion to dispose of the item.

12 MR. MILLER: Mr. Chairman, based on the  
13 information in the Conditional Use Permit and Staff's  
14 findings, recommend to approve.

15 MS. DIXON: Second.

16 CHAIRMAN: Motion been made and a second.  
17 Is there any other discussion?

18 (NO RESPONSE)

19 CHAIRMAN: Hearing none all in favor raise  
20 your right hand.

21 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

22 CHAIRMAN: Motion carries unanimously.

23 Next item, please, sir.

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25

1 VARIANCES

2 ITEM 3

3 6 Dublin Lane, in an I-2, R-4DT zone  
4 Consider request for a Variance to reduce the front  
5 yard building setback from 25 feet to 0 feet in order  
6 to construct a 12.5-foot by 108-foot enclosed  
7 corridor.

8 Reference: Zoning Ordinance, Article 8,  
9 Section 8.5.4(c)

10 Applicant: Field Packing Company

11

12 MR. NOFFSINGER: Mr. Chairman, this  
13 variance has been advertised for public hearing at  
14 this time. All adjoining property owners have been  
15 notified. The application has been reviewed by the  
16 Planning Staff. It is found to be in order. This  
17 variance would allow the proposed structure to be  
18 built to the right-of-way line along Dublin Lane.  
19 This request comes to us by mandate by I believe the  
20 federal regulations. The applicant as well as their  
21 engineer is here tonight to answer any questions you  
22 might have.

23 CHAIRMAN: Been any objections filed in  
24 the office?

25 MR. NOFFSINGER: No, sir.

CHAIRMAN: Is there anyone in the audience  
wishing to object to this?

(NO RESPONSE)

CHAIRMAN: Does the applicant have

1 anything they want to add to it?

2 MR. ELLIOTT: State your name, please.

3 MR. KAMUF: Charles Kamuf.

4 (MR. CHARLES KAMUF SWORN BY ATTORNEY.)

5 MR. KAMUF: This will show you - - that's  
6 the photograph of the property. Like Mr. Noffsinger  
7 said it will be approximately 100 foot by 12.5 in  
8 width. That's what it looks like before. That's what  
9 it looks as it exist now. This is a rendering showing  
10 the - - the new building has not been built, but this  
11 is exactly what it will look like.

12 We're here to answer any questions. We  
13 have the engineer and people from Fields Packing  
14 Company here if you have any questions.

15 CHAIRMAN: Any board member have any  
16 questions of the applicant?

17 (NO RESPONSE)

18 CHAIRMAN: Anything else you'd like to  
19 add, Mr. Kamuf?

20 MR. KAMUF: That's it unless you have some  
21 questions, Mr. Chairman.

22 CHAIRMAN: Hearing none the chair will  
23 entertain a motion to dispose of the item.

24 MS. DIXON: Move to approve because it  
25 will not adversely affect the public health, safety or



1 welfare; will not alter the essential character of the  
2 general vicinity; will not cause a hazard or a  
3 nuisance to the public; and will not allow an  
4 unreasonable circumvention of the requirements of the  
5 zoning ordinance.

6 CHAIRMAN: Is there a second to the  
7 motion?

8 MR. WARREN: Second.

9 CHAIRMAN: Motion been made and a  
10 second. Is there any other discussion?

11 (NO RESPONSE)

12 CHAIRMAN: Hearing none all in favor of  
13 the motion raise your right hand.

14 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

15 CHAIRMAN: Motion carries unanimously.

16 Next item, please.

17 ITEM 4

18 720 Ford Avenue, in a P-1 zone  
19 Consider request for a Variance to reduce the side  
20 yard building setback from 10 feet to 2.9 feet in  
21 order to construct a 13.5-foot by 29.0-foot canopy  
22 over the existing pavement.

Reference: Zoning Ordinance, Article 8, Section  
21 8.5.12(d)

Applicant: Trinity Episcopal Church of Owensboro

22

23 MR. NOFFSINGER: Mr. Chairman, this  
24 application has been advertised for public hearing at  
25 this time. All adjoining property owners have been

1 notified. The application has been reviewed by the  
2 Planning Staff. It's found to be in order. It is  
3 ready for consideration.

4 CHAIRMAN: Has there been any objections  
5 filed in the office?

6 MR. NOFFSINGER: No, sir. In fact, the  
7 church owns the adjoining property that will be most  
8 affected by the variance request.

9 CHAIRMAN: Is there anyone in the audience  
10 wishing to object to this variance?

11 (NO RESPONSE)

12 CHAIRMAN: Is the applicant, anyone for  
13 the applicant like to add anything?

14 MR. ELLIOTT: State your name, please.

15 MR. WIBLE: Charles Wible.

16 (MR. CHARLES WIBLE SWORN BY ATTORNEY.)

17 MR. WIBLE: Mr. Chairman and board  
18 members, just very briefly. I'm here on behalf of the  
19 church. As Mr. Noffsinger has said, the church owns  
20 the property on both sides of the property line. The  
21 purpose of this variance is in order to build a  
22 covered canopy over a portion of the existing driveway  
23 so that elderly members of the church can be let out  
24 of their cars and walk into the door of the church  
25 without being subject to inclement weather. It's

1 something that's being designed by an architect and  
2 will be esthetically pleasing for the community and  
3 the neighborhood. Be glad to answer any questions.

4 CHAIRMAN: Thank you.

5 Does any board member have any questions  
6 of the applicant?

7 MR. NOFFSINGER: I just have one comment.  
8 The requested variance to allow the canopy to be built  
9 to the property line would require that the structure  
10 be built according to the building code in terms of  
11 proper fire rating. The building or the canopy will  
12 be unenclosed. This will not be an enclosed building.  
13 We'll just have a roof structure supported by columns.  
14 The importance of side yard setbacks would be in terms  
15 of fire protection. Would be unable to fight a fire  
16 should there be a fire in one of the structures and  
17 you can get around the structures and fight that fire.  
18 Here's a situation where you have an unenclosed  
19 building and you can maneuver through it in case of a  
20 fire. You still have to meet that fire resistant  
21 application and code.

22 CHAIRMAN: Thank you. Any other comments?  
23 Any board member have any questions?

24 (NO RESPONSE)

25 CHAIRMAN: Hearing none the chair will

1 entertain a motion to dispose of the item.

2 MR. PEDLEY: Mr. Chairman, I make a motion  
3 for approval based on the findings it will not  
4 adversely affect the public health, safety or welfare;  
5 will not alter essential character of the general  
6 vicinity; will not cause a hazard or nuisance to the  
7 public; will not allow unreasonable circumvention of  
8 the requirements of the zoning regulations.

9 CHAIRMAN: Is there a second to the  
10 motion?

11 MS. DIXON: Second.

12 CHAIRMAN: Any other questions or comments  
13 from the board?

14 (NO RESPONSE)

15 CHAIRMAN: Hearing none all in favor of  
16 the motion raise your right hand.

17 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

18 CHAIRMAN: Motion carries unanimously.

19 Next item, please.

20 ITEM 5

21 2306, 2312, 2318, 2326, 2334 Frederica Street,  
22 in a B-4 zone  
23 Consider request for a Variance to reduce the  
24 required roadway buffer along Frederica Street from 60  
25 feet from the street centerline to 45 feet from the  
street centerline in order to construct a 14,500  
square foot retail building.  
Reference: Zoning Ordinance, Article 13, Section  
13.6221

1 Applicant: Hogan Real Estate, LLC, Mary & Jerry  
2 Marsh, Uni-Clean, Inc., S.G.P. Company, LLC

3 MR. NOFFSINGER: Mr. Chairman, this  
4 variance has been advertised for public hearing at  
5 this time and all adjoining property owners have been  
6 notified. The Planning Staff has reviewed the  
7 application and found the application to be in order.  
8 The request is to allow parking and landscaping to be  
9 located closer to Frederica Street than what the  
10 zoning ordinance allows. The project, as some of you  
11 might have read in the paper, is a proposed  
12 Walgreen's. It will entail removing the existing  
13 buildings on the property and opening that corner up  
14 to improve site distance as well as there will be some  
15 beautification in terms of landscaping. The Staff has  
16 given this a favorable recommendation in that the  
17 transportation plan shows the widening of Frederica  
18 Street south of 25th Street. This property is north  
19 of 25th Street. A favorable recommendation by this  
20 board would be consistent with what this board has  
21 recommended in the past with variances along this  
22 section of Frederica Street.

23 CHAIRMAN: Was there any objections filed  
24 in the office by anyone?

25 MR. NOFFSINGER: No, sir. We have had

1 some questions, but just folks questioning what the  
2 project was about.

3 CHAIRMAN: Is there anyone in the audience  
4 wishing to object to this application?

5 (NO RESPONSE)

6 CHAIRMAN: Is the applicant here and  
7 anything they'd like to say?

8 MR. KAMUF: Mr. Chairman, Charles Kamuf  
9 again. We have the engineers, we have the developers,  
10 we have the planners here that have planned  
11 everything. I have charts if you'd like to see them,  
12 but we're here to answer any questions if you have  
13 any.

14 CHAIRMAN: Any board members have any  
15 questions of the applicant?

16 MR. KAMUF: It will cut three access  
17 points off of Frederica. The visibility at the  
18 intersection of Booth Avenue will be clear now where  
19 in the past it hasn't. It's a 15-foot variance.

20 CHAIRMAN: Thank you, Mr. Kamuf.

21 Any other questions of the applicant?

22 (NO RESPONSE)

23 CHAIRMAN: Hearing none the Chair will  
24 entertain a motion to dispose of the item.

25 MR. WARREN: Motion to grant the variance

1 based on the findings that it will not adversely  
2 affect the public health, safety and welfare; will not  
3 alter the essential character of the general vicinity;  
4 will not cause a hazard or nuisance to the public;  
5 will not allow an unreasonable circumvention of the  
6 requirements of the zoning regulations.

7 CHAIRMAN: Is there a second?

8 MS. MASON: Second.

9 CHAIRMAN: Motion been made and a second.

10 Any other board member have any other comments or  
11 questions?

12 (NO RESPONSE)

13 CHAIRMAN: Hearing none all in favor of  
14 the motion raise your right hand.

15 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

16 CHAIRMAN: Motion carries unanimously.

17 Next item, please, sir.

18 ITEM 6

19 1123 Scherm Road, in a P-1 zone  
20 Consider request for a Variance to waive the  
21 required vehicular use area landscape easement  
22 including the 3-foot high continuous element and one  
23 tree for 40 linear feet on the north and east property  
24 lines of the lot.

25 Reference: Zoning Ordinance, Article 17,  
Section 17.3121, 17.3122, 17.3123, 17.3124

Applicant: City of Owensboro

24 MR. NOFFSINGER: Mr. Chairman, this

25 application has been advertised for public hearing at

1 this time. All adjoining property owners have been  
2 notified. The application has been reviewed by the  
3 Planning Staff and is found to be in order.

4 This is the former location of the Number  
5 fire station of the City of Owensboro. They are  
6 looking to sell this particular piece of property.  
7 The respective buyer will operate a professional type  
8 of medical dental office at this facility. It has  
9 been a real challenge for the City of Owensboro to  
10 accommodate this use and meet the parking requirements  
11 as contained in the zoning ordinance, plus install  
12 landscaping to bring the property up into compliance.  
13 Without granting this requested variance it would be  
14 very difficult to go in and find reuse of the  
15 property.

16 So the Planning Staff is recommending that  
17 based upon the information submitted in the  
18 application, that a favorable action with findings be  
19 granted.

20 CHAIRMAN: Is there any objections filed  
21 in the office on this application?

22 MR. NOFFSINGER: No, sir.

23 CHAIRMAN: Is there anyone in the audience  
24 wishing to object to this particular item?

25 (NO RESPONSE)



1                   CHAIRMAN: Is the applicant here and do  
2 they have anything they want to add?

3                   (NO RESPONSE)

4                   CHAIRMAN: Any board members have any  
5 questions of the applicant?

6                   (NO RESPONSE)

7                   CHAIRMAN: Hearing none the Chair will  
8 entertain a motion to dispose of the item.

9                   MS. DIXON: Move to approve based upon  
10 findings that it will not adversely affect the public  
11 health, safety or welfare; it will not alter the  
12 essential character of the general vicinity; it will  
13 not cause a hazard or a nuisance to the public; and  
14 will not allow an unreasonable circumvention of the  
15 requirements of the zoning regulations, and with the  
16 condition set forth by the staff.

17                   CHAIRMAN: Is there a second to the  
18 motion?

19                   MR. WARREN: Second.

20                   CHAIRMAN: Any other questions or comments  
21 from the board?

22                   MR. NOFFSINGER: I would just like to  
23 state that the condition pertain to closure of access  
24 as previously discussed and shown on the plat of  
25 record of the property. This just reinforces those

1 agreements in terms of access.

2 CHAIRMAN: You've got those in the motion  
3 of the record.

4 Any other comments or questions?

5 (NO RESPONSE)

6 CHAIRMAN: Hearing none all in favor of  
7 the application hold up your right hand.

8 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

9 CHAIRMAN: Motion carries unanimously.

10 Next item, please, sir.

11 ITEM 7

12 910 West Second Street, in an R-4DT zone  
13 Consider request for a Variance to waive the side  
14 yard building setback from 5 feet to 2 feet in order  
15 to construct a new single-family residence.

16 Reference: Zoning Ordinance, Article 8,  
17 Section 8.5.11(d)

18 Applicant: Richard & Rita Collinsworth

19 MR. NOFFSINGER: Mr. Chairman, this  
20 application has been advertised for public hearing at  
21 this time. All adjoining property owners have been  
22 notified. The Planning Staff has reviewed the  
23 application and we do have concerns regarding parking  
24 not only on the subject property but also on the  
25 adjoining property to the east.

26 We have talked with the applicant's  
27 surveyor about perhaps a way of shifting the proposed  
28 home to the west property line and constructing three

1 feet off of that west property line and then  
2 maintaining a five foot setback along the east  
3 property line. That would respect the existing  
4 parking and driveway area to the property to the east.  
5 That property to the east now it appears shares a  
6 driveway with the subject property and their parking  
7 is within this driveway. If the board is looking to  
8 ward a recommendation that the house should be shifted  
9 to the west, then I believe it's a situation that we  
10 would need to postpone taking action and re-advertise  
11 to shift because right now we advertised this variance  
12 as the home was going to be located too close to the  
13 east property line. This would shift the property  
14 closer to the west property line and would affect a  
15 different property owner. Given that we would  
16 recommend that we hear from the applicant and perhaps  
17 consider a postponement, shift the house to the west  
18 and all parking on this site be to the rear of the  
19 property, via that joint driveway.

20 CHAIRMAN: Is the applicant here?

21 MR. COLLINSWORTH: Yes.

22 CHAIRMAN: Would you come before the  
23 microphone and be sworn in.

24 MR. HUTCHINS: I'm going to be the builder  
25 of the property, the builder of the house.

1                   CHAIRMAN: State your name, please.

2                   MR. HUTCHINS: Brad Hutchins.

3                   (MR. BRAD HUTCHINS SWORN BY ATTORNEY.)

4                   MR. HUTCHINS: Rita is my sister. After  
5 talking with Ed Varble, he owns the house to the west  
6 of the property. Ed let me get his land rezoned so we  
7 can take this in front of the variance board tonight.

8                   As far as the driveway, the parking is in  
9 the back of the house. The driveway will go all the  
10 way to the back. Mr. Varble right now he - - right  
11 now it's a gravel driveway. It's going to be a  
12 concrete drive all the way to the back. We own the  
13 property on the west side of Mr. Varble's house also.  
14 Right now he's not in agreement with the five foot  
15 line. His air conditioner is actually sitting on my  
16 land which I don't care about.

17                   From what I understand, Jim, is this the  
18 type of things I need to announce to the board as far  
19 as what needs to be stated? I'm asking Mr. Mischel.

20                   CHAIRMAN: Jim, come to the microphone and  
21 be sworn in. State your name.

22                   Address your questions and then we'll get  
23 the answer for you.

24                   MR. ELLIOTT: State your name, please.

25                   MR. MISCHEL: Jim Mischel.

1 (MR. JIM MISCHEL SWORN BY ATTORNEY.)

2 CHAIRMAN: What's your question? State  
3 your question over, please.

4 MR. HUTCHINS: My main question: Would it  
5 be easier to bring the variance to the west side to  
6 get this past? That's my main question.

7 MR. NOFFSINGER: In terms of what Staff is  
8 recommending, you had asked for a two-foot variance or  
9 to go down to two feet within the property line.  
10 Staff is recommending that you build within no closer  
11 than three-feet of the property line. That is in  
12 keeping with the character of the neighborhood in  
13 terms of looking at the adjoining properties. It  
14 looks like we have a home that's within three feet of  
15 the property line. That would be Mr. Varble's  
16 residence to the east. Then also Mr. Tate who is the  
17 property owner to the west, they're showing four feet  
18 off that property line. So we're recommending not to  
19 go down two feet, but we're recommending the board  
20 approve a variance down to three feet and that it be  
21 shifted to the west property line along the common  
22 boundary with Mr. Tate. You would be three feet off  
23 of that line. Then you would maintain five feet off  
24 of the east property line which is a common boundary  
25 with Ed Varble. It appears that Ed Varble's driveway

1 right now is a joint driveway.

2 MR. HUTCHINS: It's some type of existing  
3 driveway. I don't know how to say it. The house that  
4 was there previously, it was a driveway both Ed's  
5 renters and the people living in the house at the time  
6 drove back to the back of the house. One went left  
7 and one went right.

8 MR. NOFFSINGER: I think that's what we  
9 would be looking to be maintained. The home that you  
10 build on this property should respect that type of  
11 traffic movement and you should have a joint driveway  
12 there with the parking for both properties to the rear  
13 and not to the front. Right now I have a site plan  
14 that shows you're going to put two parking spaces out  
15 front between the front of the home and your property  
16 line. That would create a situation where you would  
17 have to back out onto Second Street.

18 MR. HUTCHINS: I believe that was Bill  
19 Weikel.

20 MR. NOFFSINGER: Yes.

21 MR. HUTCHINS: I don't think it showed  
22 that with me.

23 MR. NOFFSINGER: He gave that to me on New  
24 Year's Eve. That's the site plan I have. What we're  
25 requesting is that you amend your application. That

1 would mean come back before this board at their  
2 February meeting and amend it to, build within three  
3 feet of that west property line and five feet off the  
4 east property line and that you show parking on both  
5 properties, the subject property and Mr. Varble's  
6 property, to the rear.

7 MR. HUTCHINS: Okay.

8 MR. NOFFSINGER: The board would postpone  
9 the action tonight.

10 MR. HUTCHINS: Okay.

11 CHAIRMAN: In other words, you'll amend  
12 your application to show these changes.

13 MR. HUTCHINS: That will work.

14 CHAIRMAN: Then we'll listen to it in  
15 February.

16 MR. HUTCHINS: All right. Is that it?

17 CHAIRMAN: We need a motion to postpone.

18 MR. WARREN: Motion to postpone.

19 MS. DIXON: Second.

20 CHAIRMAN: All in favor raise your right  
21 hand.

22 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

23 CHAIRMAN: Be postponed and it will be  
24 heard at the February meeting.

25 Thank you, sir.

1 Next item, please, sir.

2 -----

3 ADMINISTRATIVE APPEAL

4 ITEM 8

5 4951 Millers Mill Road, in an A-U zone  
6 Consider an Administrative Appeal to appeal the  
7 zoning administrator's decision that the commercial  
8 use of the subject property is a legally  
9 non-conforming use.  
10 Reference: Zoning Ordinance, Article 4, Section 4.3  
11 Appellant: Chris Dunn, J.A. Dunn Estate

12 MR. NOFFSINGER: Mr. Chairman, this appeal  
13 has been advertised and all parties of record have  
14 been notified as to this appeal.

15 Keep in mind that we are not considering a  
16 zoning change here tonight. The subject property is  
17 zoned A-U Urban Agricultural and it will remain A-U  
18 Urban Agricultural even after this board makes a  
19 decision.

20 This board here tonight is here to  
21 determine and consider the existing use of the  
22 property and to determine whether or not that this is  
23 a legally non-conforming use which existed prior to  
24 the adoption of the zoning ordinance in April of 1977  
25 or if it is an illegal use or a zoning violation that  
has started since 1977 and is not in the proper zoning  
classification.

Mr. Jim Mischel is here tonight. He is



1 the zoning administrator for the City of Owensboro and  
2 Daviess County. He has rendered a decision based upon  
3 evidence submitted to him that the use of the property  
4 is considered a grandfathered use or a non-conforming  
5 use and the use may continue. The appellants have  
6 disagreed with his decision and that's why we're here  
7 tonight.

8 I think what you will want to do, Mr.  
9 Chairman, is hear from Mr. Mischel as to what got us  
10 here. Then I would think you would hear from the  
11 appellant. Then I think you would hear from the  
12 property owner of the subject property that is in  
13 question.

14 CHAIRMAN: I had a couple of people  
15 contact me and say they understood this was a zoning  
16 change. This is not a zoning change. The Adjustment  
17 Board cannot change the zone. That has to go before  
18 the zoning board to do that. We can only listen to  
19 appeals, grant variances or conditional use permit.  
20 Some of you are here or came this evening planning on  
21 objecting or being in favor of a zoning change, this  
22 is not what we're doing this evening. We're just  
23 reviewing the administrative appeal made by Mr. Jim  
24 Mischel and whether we uphold it or disagree with it  
25 and that's what will be decided this evening.

1                   Mr. Mischel, you've been sworn in. Go  
2 ahead and state your case at this time.

3                   MR. MISCHEL: My name is Jim Mischel. I'm  
4 just going to give you a short history of what I know  
5 of this property.

6                   Back in July of this past year a request  
7 was made for our office for an electrical permit for  
8 some work to be done on this property. The lady that  
9 takes that application had some questions about it and  
10 brought it to me. After I looked at it, it looked  
11 like the property is zoned A-U. We had some questions  
12 and didn't process that permit.

13                   In talking with the owners, they had  
14 indicated to me that it was grandfathered in and had  
15 been used in a construction business and repair of  
16 their equipment for years dating back to the '70s.

17                   At that time they indicated they would get  
18 us some information. I don't think we received that  
19 information for awhile and then in that interim we  
20 sent out a valuation notice on this property.

21                   After that we got some affidavits from the  
22 owners stating that this property was in use dating  
23 back to '70s in the construction in repair of  
24 equipment. At that time I issued a letter stating  
25 that based on that information it looked to me that

1 the property was grandfathered in, if you want to say  
2 it. Legally non-conforming use. After that letter  
3 went out, I received some calls well even before that  
4 in that process, but after that it seemed like there  
5 was some affidavits and an attorney representing some  
6 of the neighbors and they have some affidavits that  
7 they turned in to the board here stating that the  
8 property was not used for that for those times.  
9 Essentially that's what brings us to this point. I  
10 don't know if you have any questions right now or not.

11 CHAIRMAN: Any board member have any  
12 questions of Mr. Mischel at this time?

13 (NO RESPONSE)

14 CHAIRMAN: The one that's objecting to the  
15 appeal, would the attorney come forward and state your  
16 name for the record.

17 MR. LAUMAS: Mr. Chairman, my name is  
18 Kevin Laumas. I represent the Dunn Estate.

19 (MR. KEVIN LAUMAS SWORN BY ATTORNEY.)

20 MR. LAUMAS: Mr. Chairman, I think it may  
21 be important for our purposes to look back at how this  
22 property has been used and kind of the history of the  
23 ownership of the property.

24 The property that is of concern today is  
25 currently owned by the Birkheads either their estate

1 or Mrs. Birkhead. The Birkheads purchased that  
2 property, the Birkheads purchased that property in  
3 1982. It was owned by the Dunn family until 1982. So  
4 I guess right off, right from the beginning I guess we  
5 would dispute any affidavits that suggested that the  
6 subject property had been used for anything but  
7 agricultural prior to 1982 because the Birkheads  
8 didn't own it until then.

9 From about the '50s until 1982 was owned  
10 by the Dunn family and it was used as a chicken house  
11 or for their farm. If you look at this area,  
12 basically you have some barns that the Birkheads  
13 presently own and it's all surrounded by about a 300  
14 acre farm. Some homes are on the front facing Millers  
15 Mill Road.

16 In 1982 the Birkheads purchased this  
17 property and immediately began and operating some form  
18 of a construction business. Some of the neighbors at  
19 that time, many of them are here today, they  
20 complained about that use to the city. The city I  
21 think made some attempts to prohibit its improper use.  
22 Then Mr. Birkhead filed in 1982 a request for a zoning  
23 change. The request was to zone it industrial. The  
24 Owensboro Metropolitan Planning Commission denied that  
25 request. It was appealed and Daviess County Fiscal

1 Court upheld that denial.

2 I think that you'll hear some evidence  
3 that at that time Mr. Birkhead may have even in a  
4 hearing indicated, okay, we'll make it agricultural  
5 and he began a hog operation on the farm in those  
6 barns.

7 I don't know how long that lasted, but it  
8 was around 1983 and it may have lasted up to a year.  
9 The state, from the information that the neighbors  
10 gave, the state then shutdown the hog operation.

11 The evidence that we would present tonight  
12 would be that it's never been used since the hog  
13 operation, since about 1983 to the current date it  
14 either remained unused or used for some form of  
15 storage. Then part of it, down the way there's a barn  
16 that's being used by an individual to raise some  
17 birds.

18 When the decisions were rendered by the  
19 Planning Commission and by Fiscal Court that denied  
20 it, essentially any industrial or commercial use ended  
21 at that time. That's what our evidence will be. I  
22 understand what Mr. Noffsinger indicated about a  
23 possible non-conforming use. It may be something that  
24 would have to be explained to the neighbors in a  
25 little more detail, but they strongly believe that

1 when that decision was rendered that was the end of  
2 the story and there would be no industrial or  
3 commercial use. What they will tell you is that was  
4 the case until about May or June of 2002. At that  
5 time the property was utilized for industrial  
6 purposes.

7 In June 2002 I think some of the neighbors  
8 began to complain because of the noise and the heavy  
9 traffic volume on this property. I think that maybe  
10 some of their contact was with Mr. Mischel. Then Mr.  
11 Mischel to enter that or send that letter to say stop  
12 using it for industrial purposes, the property. Then  
13 there's a reversal of that decision to allow that use.  
14 These neighbors will tell you that the property was  
15 not used at all for industrial until about June of  
16 2002.

17 Now, we would ask that Mr. Mischel's  
18 decision be reversed not only because it's never been  
19 used for industrial purposes, but also it's really,  
20 the land is not suitable for the use that the  
21 Birkheads and anyone using it is using it for right  
22 now. Specifically the road that allows entry and exit  
23 of this property is very, it's a very narrow little  
24 farm road that its purpose was to allow the Dunns to  
25 get back to the back side of their farm. They

1 maintain that road. The Dunns maintain that road.  
2 They gravel it. They grade it. It's not built for  
3 heavy machinery. Now, there's some farm work that  
4 goes on that farm and there are farm vehicles that  
5 drive down that roads, but that's not a continual use.  
6 Some of these neighbors will tell you that they  
7 continue regular use of the land by heavy equipment  
8 and basically is ruining this road.

9 In 1982 when the Planning Commission made  
10 their recommendation to deny the industrial use of  
11 this land, that was one of the things that was sited.  
12 That ingress and egress to this property does not meet  
13 the requirements of the law for this purpose. It  
14 still doesn't. This road hasn't changed since 1982  
15 except that my clients grade it on occasion and  
16 gravel.

17 What we would ask is that the board  
18 consider the affidavits and we would ask that that be  
19 entered into evidence. My clients also brought some  
20 petitions, about 135 petitions they wanted the board  
21 to consider to request that this use not continue. We  
22 wondered if we could put that into evidence as well.

23 CHAIRMAN: Bring it forward and we'll make  
24 it part of the record.

25 MR. LAUMAS: Mr. Chairman, we also make

1 part of the record the affidavits that were submitted  
2 as part of our appeal.

3 CHAIRMAN: If you so desire.

4 MR. LAUMAS: Thank you.

5 I think that's to summarize the reasons  
6 why we would ask that Mr. Mischel's decision be  
7 reversed.

8 First, this has been before the commission  
9 in 1982 and denied. Nothing has changed since '82 on  
10 this property. There is ingress and egress is not  
11 adequate for the use of this property it's being put  
12 to. It does adversely impact on the peace and  
13 tranquility of the neighborhood and these neighbors  
14 are here to tell you that. They're all here to tell  
15 you that the use of this property is ruining their  
16 enjoyment of their property. We would ask that you  
17 consider the affidavits, the petitions and some  
18 evidence that I wanted to present.

19 CHAIRMAN: Do you have anything else you  
20 want to present at this time?

21 MR. LAUMAS: I have a couple of witnesses.

22 CHAIRMAN: State your name for the record.

23 MR. DUNN: Chris Dunn.

24 (MR. CHRIS DUNN SWORN BY ATTORNEY.)

25 MR. DUNN: First off I'd just like to



1 start out with I'm one of those confused persons. I  
2 find it, for lack of a better word, interesting that  
3 we're even here tonight because as Kevin said,  
4 mentioned that the Birkheads had tried to zone this to  
5 what they wanted to have it for now. They were  
6 rejected by the zoning board.

7 I guess basically what they're going to  
8 try to show or say or what have you is that, well, we  
9 were told no, but now we did it all and nobody was  
10 looking so now we'd like for you to help us out and  
11 grandfather us in. I don't know how those kind of  
12 things work. That's what it looks to me personally.

13 To give you a little bit of my history. I  
14 go back to 1958 is when we moved out there and I was  
15 two years old. I'm 46. I've been part of the farm  
16 for 44 years. At that time I started working on the  
17 farm, I don't know, six, seven, something like that.  
18 I farmed every day until I was a teenager. We did  
19 agricultural farming.

20 In the middle '70s dad decided to retire.  
21 He sold all his machinery. Auctioned it off. It just  
22 kind of went back and forth as far as the chicken  
23 barns. Mostly the barns was used for poultry.

24 Then it was sold to the Birkheads.  
25 Actually it was traded I believe for a duplex. Dad

1       traded it for a duplex Mr. Birkhead built for him. Up  
2       until that time we never did anything in those houses  
3       except for agricultural.

4                   Then, as you well know from what Kevin  
5       stated, they started to build some trusses, walls and  
6       what have you. Traffic was getting heavy. Some of  
7       the neighbors, Ray Wilkerson and Mr. Hart at that  
8       time, who has passed away, complained about it and  
9       took it to the zoning board and then they brought it  
10      up for zone. Anyway, that part went on through. Then  
11      they had those kind of things. Then it all came to a  
12      stand still.

13                   I basically go out there almost every  
14      week. I have spent times out there a week at a time.  
15      We have areas like five or six acres. I've got a  
16      barn down there, stables. I do a lot of bushhogging  
17      and what have you. It takes about a week to do it  
18      all, weeding around the fences. It's right down there  
19      by these houses. I've spent a lot of time from  
20      daylight to dark.

21                   In the late '80s I spent about 45 to 60  
22      days down there, my brother and I, from daylight until  
23      dark, straight through 45 days. We cleared out a big  
24      area, a big fence line and everything down around  
25      there. I have never seen any such type industrial

1 work going on there at all. The most I've ever seen  
2 some of the Birkhead boys lived down there off and on  
3 I'd see them going up and down the road, a pickup  
4 truck every now and then. Basically I'd say maybe  
5 twice a day. Once going out and once going in. All  
6 of this industrial work going on out there and it's  
7 been going on out there for 15 or 20 years and I don't  
8 know where it's at or where it's been or when it was  
9 done. Basically that's all I've got to say unless  
10 you've got some questions.

11 CHAIRMAN: Any board member have any  
12 questions of Mr. Dunn?

13 (NO RESPONSE)

14 CHAIRMAN: Thank you, Mr. Dunn.  
15 State your name for the record.

16 MR. WILKERSON: My name is Ray Wilkerson.

17 (MR. RAY WILKERSON SWORN BY ATTORNEY.)

18 MR. WILKERSON: My concern that this  
19 operation out there of this - - I moved out there in  
20 in 1957. Built my house there on the small road that  
21 intersects through Millers Mill Road and goes back  
22 along the field to Dunns farm. That is the road that  
23 is being used or exit and entrance to the chicken  
24 barns down there.

25 Now, when I first built my house there I

1 went to the county road department and I asked them if  
2 they would improve the road. It was nothing but a  
3 ditch. No, it's not on their drawings. It's not on  
4 their plans. It's not their road. It's just a  
5 neighborhood road where the farmers go in and out.

6 Well, what I did is after I built my house  
7 I spent my money to clean the road up, widen it some,  
8 gravel it, blacktop it and I've maintained it. Myself  
9 and Hartmans and Dunns, we've reblacktopped it. That's  
10 the road that's used. At the best it's only 12 foot  
11 wide. I live right on the road.

12 Now, if there's an industrial operation  
13 back there, traffic is going to be going in and out,  
14 in and out. The workers are going to be going in and  
15 out. Trucks are going to be bypassing on a 12-foot  
16 wide road with their loads of whatever they're  
17 manufacturing back there, house parts, whatever. It's  
18 going to be dangerous. If I've got any little  
19 children running around there, they're going to be out  
20 there in the yard and it's going to be a danger point.  
21 For that reason, for that one reason, I'd like to keep  
22 it the way it is. Let it be agricultural. Let it  
23 stay agricultural. Let us keep the zone  
24 agricultural. We've had enough of the industrial  
25 operation down there. Making the house sections and

1 the roof truss and hauling them out and in. We've had  
2 enough of that.

3 CHAIRMAN: When did this start?

4 MR. WILKERSON: 1981 approximately and  
5 went to 1982 until we taken it to the board for  
6 rezoning. It was rejected. From that time on then  
7 it's been pretty quiet down there up until just as of  
8 lately. I understand that they're replanning on  
9 selling it to some log building operation. Somebody  
10 that builds log homes. They will start the same thing  
11 over again as we just went through. I don't want to  
12 see that.

13 MR. DYSINGER: Mr. Chairman, can I ask a  
14 question.

15 CHAIRMAN: Yes.

16 MR. DYSINGER: About how long, this time  
17 how long has it been going on? Not since 1982. The  
18 situation you have now when did that start to the best  
19 of your knowledge?

20 MR. WILKERSON: Short period of time. You  
21 know, a few months ago. It started ten months. June,  
22 it started in June when they started in and out with  
23 their lumber and two by fours and whatever, you know.  
24 Take them in and bring them out. We don't want that  
25 going any further. Thank you.

1 CHAIRMAN: Anyone else at this time?

2 State your name for the record.

3 MR. DUNN: Douglas Dunn.

4 (MR. DOUGLAS DUNN SWORN BY ATTORNEY.)

5 MR. DUNN: Mr. Chairman and board members,  
6 I'm completely against this proposed action and I can  
7 prove to you there is no legal support for its  
8 passing.

9 I live on the property that completely  
10 surrounds the subject property except about 100 feet  
11 that borders Mr. Jeff Hartman. This property has been  
12 in my family for 52 years.

13 Mr. Birkhead bought the subject five acres  
14 in 1980, early '80s, and there has never been anything  
15 in those buildings from 1959 to 1980 except chickens  
16 or turkeys.

17 The five acres contain four huge chicken  
18 houses built between 1959 and 1964. At one time we  
19 raised 50,000 laying hens in those houses. There's  
20 also a concrete block building that was originally  
21 built to wash eggs and to keep eggs on cold storage.  
22 This building was converted to living quarters in the  
23 1970s.

24 First I would like to say something about  
25 the late Mr. George Birkhead. When I moved from

1 Nashville, Tennessee, back to the farm in 1987 Mr.  
2 Birkhead had done some things on our farm that I  
3 didn't think was right. We had some terrible  
4 disagreements which eventually lead to a courtroom  
5 battle. However soon thereafter we sat down over a  
6 cup of coffee and two donuts and we worked out our  
7 differences. I forgave him and he forgave me and we  
8 lived in harmony for the rest of his life.

9 I grew to have great respect for Mr.  
10 Birkhead and I think he was a fine man. I want it  
11 understood that nothing I say about Mr. Birkhead is  
12 meant to cause any animosity toward him or any of his  
13 family, but you do need to know the facts.

14 Not once in 15 years that I've lived next  
15 door to Mr. Birkhead's property have I seen him do  
16 anything that violated his agricultural zoning. I've  
17 never seen him bring in trailer loads of new building  
18 materials like I've seen done in the last six months.  
19 I never saw him park a school bus, a post hole digger  
20 truck that can set telephone poles, a bucket truck,  
21 and several flatbed trailers like I've seen in the  
22 last six months.

23 I never saw Mr. Birkhead dig a pit and do  
24 any illegal dumping or burning of construction  
25 materials like I've seen in the last six months.

1 I never saw employees in pickup trucks  
2 speeding in and out of the property at all times of  
3 the day like I've seen in the last six months.

4 I never saw trucks pulling flatbed  
5 trailers loaded down with either railroad ties or logs  
6 from an old log house onto the property like I've seen  
7 in the last six months.

8 Mr. Birkhead never had the arrogance to  
9 paint a number five in front of our five mile per hour  
10 speed limit sign on our one-lane gravel road to make  
11 it now 55 mile an hour speed limit as I've seen done  
12 in the last six months.

13 However, over the years Mr. Birkhead has  
14 raised commercial rabbits. He's raised hogs and at  
15 this very time one of his buildings is leased to a man  
16 that grows approximately 5,000 quail. He's been  
17 raising quail for six to eight years.

18 Believe me if Mr. Birkhead had violated  
19 any zoning over the years, some neighbors whom he had  
20 alienated when he first bought the property would have  
21 reported him to the authorities before the sun went  
22 down that night. They were begging for a chance to  
23 report him.

24 Now, some of the confusion may have been  
25 caused by the fact that one of his sons lived on the



1 property for a few years. When he came home at night  
2 he might have unloaded a couple of shovels and even a  
3 wheelbarrow and stored them in one of the barns. He  
4 may have unloaded some other tools on his truck for  
5 the next day's work, but he got in his truck in the  
6 morning and he left and went to work and he came back  
7 at night. There was nobody there during the day. He  
8 lived there. He didn't work there.

9 The barn was his garage so he wasn't  
10 breaking any zoning regulations. I'm sure all of you  
11 have some construction materials in your garage, but  
12 your house certainly isn't zoned light industrial.

13 Lastly I would like to say for the sake of  
14 discussion, merely for the sake of discussion that if  
15 Mr. Birkhead was violating a zoning this still doesn't  
16 give the next owner the right to do the same illegal  
17 acts and say I'm grandfathered in because Mr. Birkhead  
18 did illegal acts.

19 I suggest you can't grandfather something  
20 that was illegal in the beginning. You can't  
21 grandfather something that was illegal in the  
22 beginning. I ask you to deny this illegal invasion  
23 into our quiet rural community. Thank you

24 CHAIRMAN: Any questions?

25 (NO RESPONSE)

1                   CHAIRMAN: You have anything else, new  
2 evidence? We don't want to listen to the same thing  
3 over and over.

4                   MR. HARTMAN: Okay. Some pictures here,  
5 Mr. Chairman.

6                   CHAIRMAN: You want those into evidence?

7                   MR. HARTMAN: Yes.

8                   MR. ELLIOTT: State your name, please.

9                   MR. HARTMAN: My name is Jeff Hartman.

10                  (MR. JEFF HARTMAN SWORN BY ATTORNEY.)

11                  MR. HARTMAN: I myself have been a long  
12 time residence my whole life on this piece of property  
13 that attaches to the Birkhead property. I've been  
14 there about 45 years, since I was two years old.

15                  I have some pictures that I just took some  
16 this week and then I also have an aerial photograph of  
17 that place in '87 to show how it was kept clean.  
18 Wasn't any activity or that much activity, whether  
19 personal activity back there or not, but I'd like to  
20 submit some of these pictures.

21                  I work at Owensboro Fire Department. Been  
22 there 24 years. I work approximately 105 days a year.  
23 So that leaves me a few days to fiddle around the  
24 house. Basically what I do on my property is I cut,  
25 clean fence rows. We used to have some cattle out

1 there. We used to have some horses. As insurance and  
2 things, I got rid of the animals. Didn't want to have  
3 them any more. I have an aerial photograph here I'd  
4 like for you to see too.

5           If you're not familiar with this  
6 neighborhood here, this is Millers Mill Road here,  
7 right here. The pictures that you're passing around  
8 there I took those Tuesday afternoon in the pouring  
9 down rain. That's my truck on approximately eight  
10 foot of road there that goes back, back through here.  
11 This is Mr. Wilkerson's home that he built and moved  
12 there back in 1957. He's one of the first gentleman  
13 there. When he talked about this ditch, that's  
14 basically what he converted himself over to a driveway  
15 to get to his home. That was the start.

16           We own this property all the way to this  
17 road here. These two properties join and that's what  
18 my father and Mr. Wilkerson, we moved there in '59.  
19 We live in what used to be a two-room log house.  
20 You'll see on Millers Mill Road, if you've been out  
21 there, that's the house that I originally grew up in.  
22 That sits right here. The road that he is using  
23 there, those are the pictures of what - - new gravel  
24 was put down approximately two months ago maybe. The  
25 activity that started - - like I said I take care of

1 all of this back to here, up through here. There's my  
2 garden. The traffic, the dust and things, that was  
3 another concern. Just stirring up so much dust with  
4 the fast speed. This is residential out in here. You  
5 can see all the homes here. Up until just the past  
6 few months, again, this was taken in '87. If you all  
7 come up and look and see how nice and clean this was,  
8 that Mr. Birkhead here, he did take care of it, but  
9 that was just his own personal use there. There  
10 wasn't anything going on back there. I still live  
11 there on this place as of today.

12 CHAIRMAN: The people in the back have a  
13 right to ingress and egress on that right-of-way back  
14 through; is that correct?

15 MR. HARTMAN: That's right. That's all it  
16 is. They have permission. It varies from about eight  
17 foot, I think out in here is about 11 to 12 foot here.  
18 Whenever traffic, Mr. Tabor whenever his family goes  
19 in and out, Ray's family goes in and out, there is no  
20 room to pass. You can tell by the pictures. Usually  
21 one will have to pull off the road or move.

22 CHAIRMAN: But there is a permanent  
23 easement through there for the people in the back to  
24 use that property; is that correct?

25 MR. HARTMAN: The only easement that I

1 know of what I could trace back on this here was - -  
2 this was just a pass-way. It had a dimension of like  
3 an eight foot pass-way. That's back in 1800. I don't  
4 know if the horse and wagons went down that road or  
5 what. When I was a child that was a ditch and had a  
6 little gravel on one side of that ditch. I think  
7 that's what Mr. Wilkerson eventually try to grade and  
8 put his driveway in to get into his house. I grew up  
9 in this log house that sits right here. I've been on  
10 this property here for 44 years.

11 CHAIRMAN: Any board member have any  
12 questions of the speaker?

13 (NO RESPONSE)

14 CHAIRMAN: You have anything else you want  
15 to add?

16 MR. HARTMAN: No.

17 CHAIRMAN: Thank you.

18 Do you have anything else you want to add?

19 MR. LAUMAS: Mr. Chairman, just a brief  
20 witness to explain that ingress and egress.

21 MR. ELLIOTT: Restate your name for the  
22 record. You've been previously sworn in.

23 MR. DUNN: Chris Dunn.

24 I don't know if you all really understand  
25 this just right. This here, what Jeff is talking

1 about, this is Ray Wilkerson's and here is the  
2 Hartman's old home place which is Tom Tabor now. If  
3 you can see that little white line that's a fence and  
4 it comes across there. That ingress and egress right  
5 here is for the Dunns and Ray Wilkerson. It stops  
6 right here. This lane going from here on back to the  
7 farm is our farm and we only gave the Birkheads egress  
8 and ingress, or my dad did, from here all the way  
9 back. I didn't want you to confuse. Nobody has the  
10 right going past here driving on this part of the  
11 road. Just not everybody can do that. Just the  
12 people with that piece of property there.

13 CHAIRMAN: In other words, they have the  
14 right to use that road for whatever type of operation,  
15 to support their operation back there?

16 MR. DUNN: For that purpose there, right.  
17 That's as far as this particular one here goes.

18 I'm not sure of the zoning, what this is.  
19 Even if it's for all the public, it's not past that  
20 point. That's where the pictures of the road that you  
21 see.

22 MR. GREG DUNN: The plats on these two  
23 properties, my dad's and Mr. Wilkerson, those  
24 properties are actually together. It does not even  
25 show a pass-way, or a right-of-way, or an easement, or

1 nothing on the plats. Ray put that in and dad and Ray  
2 had took care of. They asphalted it twice. They  
3 graveled it early on for years and then they put  
4 asphalt down. Now it's all pretty well shot.

5 CHAIRMAN: Any questions? Do you have  
6 anything else you want to add at this time?

7 MR. LAUMAS: Some of the neighbors wanted  
8 me to let the board know that basically everyone in  
9 this area is opposed to this use. I didn't know if  
10 you wanted to stand up. It's obvious it's everyone  
11 over here.

12 CHAIRMAN: They can raise their hands of  
13 ones that are opposed.

14 (AUDIENCE COMPLIES WITH REQUEST.)

15 CHAIRMAN: Thank you. You'll have a  
16 chance to add anything else at the end.

17 MR. LAUMAS: Thank you.

18 CHAIRMAN: Next.

19 MR. KAMUF: Charles Kamuf again.

20 As indicated by Mr. Noffsinger, the reason  
21 that we're here at this time has nothing to do with a  
22 zoning case. The reason that we are here is to back  
23 up the finding of fact that was made by Jim Mischel  
24 where he specifically found that the property  
25 qualifies under the grandfather clause as a legally

1 non-conforming use. Has nothing to do with zoning.  
2 Has nothing to do with 150 people coming down here  
3 objecting to anything. It has to do with what the  
4 property was being used for for the last 20 or 22  
5 years. That is the issue for you all to decide.

6 We do not wish to expand anything that we  
7 have been doing in the last 20 years. We want to be  
8 doing just what we've been doing in the last 20 years.  
9 I think it will be very unequivocal as to what we were  
10 doing.

11 What does grandfather mean? Grandfather  
12 means that we want to operate as a small construction  
13 company where we've made trusses just as Mr. Doug Dunn  
14 told you. There's been trusses made there since 1975  
15 on this property. We want to continue to make trusses  
16 and we want to continue to use and to use the property  
17 for building components to store materials and  
18 equipment. Nothing more. Nothing more. That's  
19 exactly what we intend to do.

20 I have gone on the internet and have a  
21 large photograph, and I have copies for each of you,  
22 because I know it's so important for you to look at  
23 this property and ascertain what is out there. Here  
24 are copies for each board member.

25 May I point out to you, if I can, this is



1 the road that we're talking about in the deed itself  
2 in 1982. There is discussion concerning this  
3 easement. Certainly nobody is going to buy five acres  
4 at the rear of someone's property without an easement.  
5 It's in the deed itself if you want a copy of it.

6 Okay. Here is where we are. You come  
7 down this particular road as you see and you get to  
8 this property. I painted it in red. You can see  
9 in-between where the buildings are, but this is in  
10 red. There's been some testimony that there is not  
11 any other activity out there. If you look at the area  
12 that you see in black, I've outlined that in black,  
13 that is a pallet mill that we will show you pictures  
14 about in just a second.

15 First of all here are some photographs as  
16 to what's taking place out there. I would like to  
17 mark those as exhibits.

18 First of all here is a picture of a  
19 mailbox. What does it say? it says "Birkhead Custom  
20 Homes".

21 The question then comes up, what are they  
22 doing with the property?

23 MR. WARREN: Mr. Kamuf, when were these  
24 pictures taken?

25 MR. KAMUF: This is an aerial photograph.

1 I can't give you that. That's the latest aerial  
2 photograph that we have, but these pictures that I'm  
3 showing you are pictures that were taken in the last  
4 month.

5 MR. NOFFSINGER: Mr. Kamuf, this aerial  
6 photo, when was that taken?

7 MR. KAMUF: I can't give you that date. I  
8 got it off, we got most of them off the internet, but  
9 it's the latest.

10 MS. MASON: They didn't give you a date on  
11 the internet as to when?

12 MR. KAMUF: No. I can go back through  
13 there and find out.

14 MR. NOFFSINGER: It's a recent.

15 MR. KAMUF: Let me say it's a very recent.  
16 I'm talking about the last couple of years.

17 The next question is: What's operating on  
18 this area that you see in black? Twenty foot from  
19 this property right here in this corner is a pallet  
20 mill. That's what that looks like. That is a truck,  
21 a Heister lifting pallets. Here is also what it looks  
22 like as you see in that particular photo. I'd like to  
23 pass these around if I could.

24 CHAIRMAN: Mr. Kamuf, when did this  
25 operation start?

1                   MR. KAMUF: There will be witnesses that  
2 will testify. It's been over ten years ago. In other  
3 words, it is a non-conforming use also that nobody did  
4 anything about. Here is what these photographs show,  
5 Exhibits 2 and 3.

6                   We have taken some photographs as to  
7 what's being done on the property at the present time.  
8 In other words, we've told you that the property has  
9 been used for years for the making of trusses, for the  
10 making of walls. We've got numerous witnesses that  
11 will be here to testify from the '80s, further back  
12 than the '80s. Here are photographs of which I'll  
13 introduce as exactly what's been taken place on the  
14 property. This is what's been done for years.

15                   MR. DYSINGER: Counselor, this photograph  
16 here, is this the pallet mill?

17                   MR. KAMUF: That's the pallet mill. The  
18 building that you see to the rear is the pallet mill.

19                   MR. DYSINGER: So this is not the Birkhead  
20 residence?

21                   MR. KAMUF: It's not the Birkhead. Has  
22 nothing to do with the Birkhead property.

23                   CHAIRMAN: This is what you've got  
24 outlined in black?

25                   MR. KAMUF: Those two pictures refer right

1 here. It's this building. It would be to the east of  
2 the property right here. That's what's taking place  
3 at the present time. Those pictures were taken in the  
4 last ten days.

5 MR. NOFFSINGER: Mr. Kamuf, this pallet  
6 mill, I think you probably want to answer this  
7 question, as to when this use started because if it  
8 happened prior to '77, then it may be a grandfathered  
9 use for that particular piece of property, but if it  
10 happened since 1977 and started without proper zoning,  
11 it will be a violation. I'm not sure how that helps  
12 your case.

13 MR. KAMUF: All I'm saying there is  
14 activity going on. In one of the affidavits that you  
15 will read in the record which was filed by Mr. Dunn or  
16 by Kevin; in other words, there's some evidence there  
17 that there's no activity going on in the neighborhood.  
18 We're talking about 20 feet from this property.  
19 That's what you see. Those pictures were taken the  
20 other day. I'm not arguing in any way for the guy  
21 that runs the pallet mill. I don't even know who owns  
22 it. I just wanted to show you what I saw when I went  
23 out there.

24 MR. NOFFSINGER: Mr. Kamuf, keep in mind  
25 we're not here to address the pallet mill.

1 MR. KAMUF: That's right.

2 MR. NOFFSINGER: We're here to address the  
3 Birkhead property.

4 MR. KAMUF: I understand, but I wanted to  
5 show you what was going on.

6 These exhibits I'm showing you is exactly  
7 what has taken place inside the buildings on the  
8 property. Exhibits 8 and 9, as I show you, this shows  
9 the road that was in question. If there was any  
10 question about the size of the road, that's what it  
11 looks like. These pictures were taken in the last ten  
12 days. Here's a pictures which shows some of the  
13 buildings on the property as you see now in the  
14 area. These buildings have been built in the range of  
15 1975. This is the chicken ranch or the turkey ranch  
16 that you're talking about.

17 CHAIRMAN: That is the Birkhead property?

18 MS. MASON: This is on the Birkhead  
19 property?

20 MR. KAMUF: Yes. The buildings that you  
21 see, the buildings to the rear as you go down that  
22 hill, these buildings are sort of hidden in the back  
23 because you go down a hill. These two photographs,  
24 which are eight and nine, show the hill as it goes  
25 down, sloping down to the building.

1                   Now, what's been happening out there since  
2                   1980? We showed you the photographs. We showed you  
3                   the photograph of the mailbox. The mailbox still  
4                   there at the present time. Some question as to what  
5                   the activity has been going on out there in the last  
6                   several years.

7                   This next exhibit that I show you, this is  
8                   just one billing that I found. The check was written  
9                   on Birkhead Custom Homes on Millers Mill Roads and it  
10                  was written to Green River Electric. The date of the  
11                  check is '98. Here is another check that was written  
12                  on Birkhead Custom Homes. The B & B or B and  
13                  something Sanitation for \$95, and that was in '98.  
14                  What I'm trying to show you is the activity was going  
15                  on at that time.

16                  The next exhibit that I'll show you there  
17                  was some question as to what was going on out there.  
18                  We have four telephone books. This is dated, this one  
19                  here is 1993 to 1994. On the inside under Birkhead it  
20                  shows Birkhead Custom Homes, Millers Mill Road.  
21                  Birkhead Supply & Manufacturing, Millers Mill Road.  
22                  This is a telephone book '93 to '94.

23                  Here is another telephone book 1998.  
24                  Birkhead Supply & Manufacturing, Millers Mill Road.  
25                  Phone book 1988 to 1989.

1                   CHAIRMAN:    Mr. Kamuf, let me ask you one  
2                   question.  These pictures 4 through 12 that show  
3                   inside the building, is this the building on the red  
4                   property or building outlined in black?

5                   MR. KAMUF:  All the pictures that I've  
6                   shown you are related and relative only to the  
7                   Birkhead property with the exception of the two that I  
8                   designated as the pallet mill.

9                   CHAIRMAN:  These are - -

10                  MR. KAMUF:  What's taking place and you  
11                  will hear - -

12                  CHAIRMAN:  In the buildings on the red?

13                  MR. KAMUF:  On the red property.

14                  CHAIRMAN:  Thank you.

15                  MR. KAMUF:  Here is another telephone book  
16                  that's date 1998.  Birkhead Custom Homes, Millers Mill  
17                  Road.  Birkhead Supply & Manufacturing.

18                  I would like to file those as the next  
19                  exhibit.

20                  There's some question about the delivery,  
21                  as to whether deliveries were made out there.  Here is  
22                  a delivery ticket.  All of these that I show you are  
23                  tickets where material was delivered to Millers Mill  
24                  Road.  It specifically states on these Birkhead.  For  
25                  example, here is one from Thriftway dated 1/31/97.

1 Birkhead Custom Homes, that's where it was delivered  
2 at 4951 Millers Mill Road.

3 Here is another one from Kight. It is  
4 dated 7/01/98. It was shipped and sold to Birkhead  
5 Custom Homes. It was to be delivered on Millers Mill  
6 Road.

7 Here is another one from Kight. "Deliver  
8 to shop at 4951 Millers Mill Road." These are all two  
9 by four material that is to be supplied for the  
10 building of trusses and the building of walls for  
11 building.

12 Here is another one Thriftway Supply.  
13 "Deliver to Birkhead Custom Homes, 4951 Millers Mill  
14 Road."

15 Here is one from Lee Brick. That's a  
16 brick company. It was a brick company. Delivered,  
17 shipped to Birkhead Custom Homes, 4951 Millers Mill  
18 Road.

19 MR. DYSINGER: Counselor, what was the  
20 year on that?

21 MR. KAMUF: That last one is 11/01/94.

22 We have just gone through at random and  
23 picked out some of the billing that we had to show you  
24 that all during this period of time that we're talking  
25 about there's all kind of activity going on.



1                   Kentucky Indiana Lumber Company, here is  
2                   one that's dated 9/30/91 where they said George  
3                   Birkhead, doing business as Birkhead Supply &  
4                   Manufacturing, shipped to 4951 Millers Mill Road.

5                   When people tell you that there was not  
6                   activity going on in the last so many years, those  
7                   invoices go back to '91.

8                   Here is another one. This one here is  
9                   from Lowe's. 4951 Millers Mill Road. These are some  
10                  billings that I would like to introduce as part of the  
11                  record.

12                  CHAIRMAN: While you're doing that I'm  
13                  going to ask the planning director to state what  
14                  grandfathering in, when the law was passed and after  
15                  what time things were no longer grandfathered in.

16                  MR. NOFFSINGER: In terms of grandfathered  
17                  use, what we mean by that is that that is a use that  
18                  has existed prior to the adoption of the zoning  
19                  ordinance April 20th or 21st of 1977. That means that  
20                  use existed prior to that date. That use is allowed  
21                  to continue so long as they do not expand. Meaning  
22                  they take in more property, they use more property  
23                  than what they did at the adoption of the ordinance in  
24                  April of '77.

25                  The question here tonight is was this

1 property used for non-agricultural activities of an  
2 industrial nature, building of trusses and whatnot  
3 that's been described, prior to that date in '77.

4 Now, the evidence presented to Mr. Mischel  
5 when he made that decision was enough to convince him  
6 that, yes, it was. At the conclusion of this Mr.  
7 Kamuf's statements, I would like for Mr. Mischel to  
8 state exactly what that evidence was that led him to  
9 render a decision that, yes, this was a grandfathered  
10 use.

11 I hope I've explained to everyone what the  
12 grandfathered use is. If it started after 1977, it's  
13 a zoning violation. It becomes an illegal use. Now,  
14 the Kentucky Revised Statutes allow where you have  
15 counties that contain cities of the third class,  
16 fourth class or fifth class, smaller cities than the  
17 City of Owensboro or city of the second class. It  
18 allows for uses that have been in existence for a  
19 period of ten years and not challenge to then become  
20 lawful uses. Your zoning administration department  
21 would not be allowed to even hear this case or even  
22 consider it. It would become a grandfathered use or a  
23 conforming use, I believe the statute says, and we  
24 wouldn't even be considered here tonight. That's not  
25 the case in Owensboro-Daviess County. You do not gain

1 the right to continue an activity just because it's  
2 gone unchallenged for 10 years or 15. Our date is  
3 April of 1977 that we go back to.

4 CHAIRMAN: Let me ask one more question of  
5 our attorney over there.

6 If the case was brought up that was  
7 brought to court, I mean also to the zoning board and  
8 it was denied and then it went to court and was upheld  
9 that this was grandfathered in; is that correct?

10 MR. ELLIOTT: First of all, I don't think  
11 there's any evidence that this went to court. It was  
12 found to be grandfathered in.

13 CHAIRMAN: In other words, the court  
14 approved the denial of the zoning board. When the  
15 zoning board denied it and then the court upheld it?

16 MR. ELLIOTT: No. The recommendation by  
17 the zoning board to deny it. It went to fiscal court  
18 and they upheld the Planning Commission's denial.

19 CHAIRMAN: When they upheld the denial  
20 that then took it back and it could continue if it had  
21 been grandfathered in.

22 MR. ELLIOTT: It could continue on a  
23 grandfather use, non-conforming use.

24 CHAIRMAN: That's what I wanted to be  
25 sure.

1 Did you have a question?

2 MR. LAUMAS: Mr. Chairman, I guess that  
3 may have explained the point and what we've appealed.  
4 The property was purchased by Birkhead in 1980 and it  
5 was owned by the Dunns before that date. So from '77  
6 to '80 it was used agricultural.

7 CHAIRMAN: This is our determination here.  
8 If it was non-conforming and sold as non-conforming  
9 and continued as non-conforming, then it would be  
10 grandfathered in.

11 MR. KAMUF: You can tact that on. That's  
12 correct. I think Stewart will tell you that. You can  
13 tact the non-conforming time on.

14 MR. LAUMAS: Mr. Chairman, is there going  
15 to be a finding that the Dunns had non-conform and  
16 then sell it? It wasn't sold until '80.

17 CHAIRMAN: But if it was non-conforming  
18 before then.

19 MR. LAUMAS: Before 1980?

20 CHAIRMAN: Yes, sir.

21 MR. LAUMAS: So they have to present  
22 evidence to show it's non-conforming before 1980?

23 CHAIRMAN: That's right.

24 MR. KAMUF: Here is a letter dated October  
25 23, 1985, by J. Henry O'Bryan who was a partner of Mr.

1       Dunn's father.

2                        "To whom it may concern: This is to  
3       certify that during the years 1975 through 1984 J.A.  
4       Dunn and I operated as a partnership in developing  
5       lots and building houses. The first development was  
6       done on Millers Mill Road at Windridge Country Club in  
7       October of 1975. We subsequently built three homes on  
8       this small development. Two of these were presold.  
9       One was a spec house.

10                      During the period of time building  
11       materials and miscellaneous equipment and tools were  
12       stored in the buildings on Mr. Dunn's five acre" - and  
13       he called it a turkey ranch - "since none of them were  
14       being used any more for raising chickens or turkeys.  
15       There were seven large buildings on this five acres,  
16       none of which were being used except for storage by  
17       Mr. Dunn and myself. In this manner we could avoid  
18       vandalism and theft of the material, which normally  
19       can be prevented when these materials are stored  
20       around the building site.

21                      During the subsequent years, Mr. Dunn and  
22       myself built several other larger homes in Normandy  
23       Heights and in Locust Hills and another very large  
24       home adjacent to the subdivision which we developed in  
25       the beginning. Some of these buildings required

1 trusses which were built in the turkey building. Mr.  
2 Dunn and myself discontinued our partnership and  
3 liquidated all properties in mid 1984."

4 This letter goes back to 1975. I have  
5 already filed that, Jim, in the record, but you want  
6 me to file another copy? This was filed as part.

7 MR. MISCHEL: Yes.

8 MR. KAMUF: That takes you back to 1975.

9 I think by that letter we can ascertain  
10 that trusses were built on that property. The purpose  
11 of those trusses being built is that Mr. Dunn and  
12 Henry J. O'Bryan, and the top of that letter is Home  
13 Realty, they built the trusses and the walls for the  
14 houses they were building in Normandy Heights. So  
15 that's when it started.

16 As to the trial that you all were talking  
17 about a few minutes ago. The property, they tried to  
18 get the property zoned sometime in about 1982. The  
19 reason for that is because these same neighbors were  
20 objecting. When it was denied Mr. Birkhead continued  
21 to operate as a small business construction company.  
22 He never quit. They took criminal action against him,  
23 and that's part of the record that I have filed and  
24 I'll file a copy of that. It's already in the record,  
25 but a copy of that violation. They took criminal

1 action against him in 1985.

2 The attorney that tried that case is now a  
3 federal judge. His name is Joe McKinley. He files  
4 this affidavit.

5 "Number 1, That I was the prosecuting  
6 attorney in the case of Commonwealth versus George  
7 Birkhead, Case No. 4, a copy of the Criminal Complaint  
8 is attached hereto.

9 Number 2, That the charge in the  
10 above-mentioned case was for the operation of a Light  
11 Industrial in an Agricultural Zone.

12 Number 3, That the charge was brought by  
13 Jeff Dame, then County Enforcement Officer for the  
14 Owensboro Metropolitan Planning Commission.

15 Number 4, The case was tried by a jury in  
16 Daviess District Court.

17 Number 5, That the Defendant, George  
18 Birkhead, presented evidence at the trial that  
19 demonstrated that he and prior successors in title" -  
20 and that affidavit of Henry O'Bryan was presented -  
21 "used the subject property and the buildings on the  
22 subject property in the same manner as the existing  
23 use at the trial.

24 Number 6, The jury found Mr. Birkhead 'not  
25 guilty' of operation of a Light Industrial Business in

1 an Agricultural Zone."

2 I might say that one of the witnesses that  
3 appeared at that trial was Mr. Ray Wilkerson. Mr.  
4 Wilkerson went down there at that time telling the  
5 court of all the activities were taking place and all  
6 the illegal activities. The jury found, according to  
7 the federal judge that filed this affidavit, that  
8 there was no violation. Now he's coming in here and  
9 he's saying, wait a minute. At that time he was  
10 saying all of the activity was taking place and now he  
11 said there was no activity. You heard him testify a  
12 few minutes ago.

13 MR. NOFFSINGER: Mr. Chairman, for the  
14 record, in that affidavit that I would like to clear  
15 for the record that Mr. Jeff Dame has never been  
16 employed with the Owensboro Metropolitan Planning  
17 Commission. He was a zoning enforcement officer for  
18 Daviess County Fiscal Court. We took over zoning  
19 administration in 2000, January of 2000. This is a  
20 situation that we have inherited the enforcement  
21 aspect outside the City of Owensboro. The Owensboro  
22 Metropolitan Planning Commission, their zoning  
23 enforcement officers did not visit this site at that  
24 time.

25 MR. KAMUF: I understand.



1                   The next person that will testify in just  
2 a few minutes is Mr. Stefanopoulos. Mr. Stefanopoulos  
3 raises quail out there. He's been out there over ten  
4 years. He'll tell you about it. His testimony will  
5 be that during this entire ten year - - you know, the  
6 questions come up really not what happened past 1990.  
7 The real issue that they're claiming is, hey, nothing  
8 has taken place in the last ten years. He's been out  
9 there ten years and he will testify that on a regular  
10 and continual basis that this property has been used  
11 for a construction business. He's out there every day  
12 taking care of these quail. He'll tell you what has  
13 taken place out there. He will also tell you about  
14 the pallet mill. One reason I'm saying the pallet  
15 mill, and I understand, I'm not trying to get the  
16 pallet mill man in trouble. I'm saying evidently he's  
17 doing the same thing out there that the Birkheads have  
18 been doing for the last 25 years.

19                   The next person that we will present is a  
20 - listen to this - a truck driver and a salesman who  
21 has worked for Jagoe's and Lowe's. He will tell you  
22 that his job duty, he now works for Kight, and they  
23 include as a salesperson as well as making deliveries  
24 of supplies at the Birkhead property. He will say  
25 this: I know of my own personal knowledge from 1992

1 to the present time deliveries were made to the  
2 Millers Mill Road address on a regular basis  
3 throughout the year. To the best of my knowledge  
4 during the period of time from '92 to the present time  
5 the Birkheads continually and on a regular basis  
6 prefab their custom homes at the Millers Mill address.

7 Jim Birkhead is the youngest son. He  
8 lived on the property. He's 37 years old. He lived  
9 on this property. Joe lived on the property until the  
10 past several years at which time Jim moved on the  
11 property. They will tell you that on a regular and  
12 continual basis they used this property. It's been  
13 done since 1975. I find it unusual what's taking  
14 place on the property is that Mr. Dunn has sold this  
15 property as you see it here. He sold that five acres  
16 and now he wish he hadn't sold it. Now the man,  
17 according to the affidavit of Mr. Henry O'Bryan that  
18 was partners with him building trusses out there, the  
19 siblings, the children are now saying we don't want to  
20 go on what has been going on for the last 25 years.

21 If you look, I think some of you are  
22 looking at that affidavit of Joe McKinley. The  
23 federal judge was the prosecuting attorney at that  
24 time and he's saying, wait a minute. The basic  
25 fundamental of that trial was that a jury came back

1 and found this man not guilty of operating an  
2 industrial activity. The reason he did is because of  
3 what? The evidence was presented at the trial that it  
4 was grandfathered in. That they've been doing it for  
5 that period of time. I won't take any more of your  
6 time, but we have several witnesses that I would like  
7 to bring up.

8 The first of those is Mr. Joe Birkhead.

9 MR. ELLIOTT: State your name for the  
10 record, please.

11 MR. JOE BIRKHEAD: Joe Birkhead.

12 (MR. JOE BIRKHEAD SWORN BY ATTORNEY.)

13 MR. JOE BIRKHEAD: My name is Joe  
14 Birkhead. I presently live at Spring Meadow Drive. I  
15 am the present owner of Birkhead Custom Home.

16 Since the property was purchased by my dad  
17 in 1980, I'm very familiar with the property. Always  
18 have been. It consist of five acres and the buildings  
19 that you all have seen.

20 Even within the past year, constructing my  
21 own cabin at Rough River I used the property for  
22 sawing down miscellaneous walls, roof components, many  
23 different things. Any employees, myself, my father or  
24 my family, we all use the property since it was bought  
25 on a continual basis without any interruption. We

1 stored equipment on there. Forklifts, cranes,  
2 tractors, and a lot of other equipment that you've  
3 also seen in those pictures, which is the same  
4 equipment that has been there for many years. Stored  
5 all kinds of lumber; plywood, cabinets, heating and  
6 air stuff, a variety of stuff. I don't know what else  
7 to add.

8 We've never stopped using the property  
9 since the day it was bought. It's unbelievable to me  
10 that these neighbors can tell you they never saw  
11 anything. I've lived there for 11 years, 11, 12  
12 years. I came and went every day. Most of the  
13 neighbors can't even see the property from their  
14 place. You can't even see the property from the  
15 road. They don't have a clue what's going on I  
16 guess. I don't know. Any questions?

17 CHAIRMAN: Any board member have any  
18 questions of Mr. Birkhead?

19 (NO RESPONSE)

20 CHAIRMAN: Thank you.

21 MR. ELLIOTT: State your name, please.

22 MR. JAMES BIRKHEAD: James Birkhead.

23 (MR. JAMES BIRKHEAD SWORN BY ATTORNEY.)

24 MR. JAMES BIRKHEAD: This may help me  
25 here. Since Dad bought the property, the whole idea

1 was to set up a prefabrication shop.

2 This long barn right here we've used since  
3 the purchase of the property. We've built roof  
4 trusses in there, in this section of the building,  
5 wall panels right here, prefab. This is the way we  
6 have constructed homes for the past 20 some odds  
7 years, prefabrication.

8 We also manufacture kitchen cabinets.  
9 Stored material through here. We have a sheet metal  
10 shop in this section of the building.

11 There's a block barn, a block building  
12 right over here where we store our crane truck, we  
13 store our flatbed dump trucks, our tractors, and  
14 implement equipment. We stored, we have a lot of  
15 storage for trailers and things in these other two  
16 barns back here. We've got appliances. We've stored  
17 building materials there. We've built roof trusses  
18 there. We've built wall panels there. We've built  
19 custom cabinets there. We bought material in  
20 semi-tractor trailer loads for the past 20 years. We  
21 have continually run a business. Joe, my brother,  
22 presently is the owner of Birkhead Custom Homes. The  
23 Birkheads have always, we have always and never  
24 stopped using this property as our shop to run our  
25 business out of it.

1                   We have at times continued to run our  
2                   construction business and raise rabbits and raise hogs  
3                   at the same time. The construction has never, never  
4                   ceased.

5                   We've got other people to testify, but  
6                   they've all seen it. They know what's going on.  
7                   That's all I have to say.

8                   CHAIRMAN: You're saying from what year to  
9                   now?

10                  MR. JAMES BIRKHEAD: From the very day  
11                  that my father purchased the property.

12                  CHAIRMAN: Which was 1980, correct?

13                  MR. JAMES BIRKHEAD: If that's when he  
14                  purchased it. When we purchased the property I can  
15                  remember the first thing that I saw when I walked in  
16                  that property. It was jiggging equipment to build roof  
17                  trusses. At that time they didn't use metal plates  
18                  like they do now. They had big tables that they  
19                  jiggged things down on and use plywood and glue and  
20                  staples, you know, to staple down on these big jig  
21                  tables. We built roof trusses, but we did it in a  
22                  more modern way than that. That is the first thing I  
23                  can remember walking in the very first barn when my  
24                  dad bought that property.

25                  CHAIRMAN: Any board member have any

1 questions?

2 MR. MILLER: I've got one, Mr. Chairman.

3 To your knowledge prior to April of 1977  
4 were any houses or portion of houses constructed in  
5 the barns that you're talking about?

6 MR. JAMES BIRKHEAD: That's what J. Audrey  
7 done told us. When we made the deal - -

8 MR. MILLER: I know that's what he told  
9 you. To your knowledge did you see it going on? Do  
10 you know that it happened prior to April of 1977?

11 MR. JAMES BIRKHEAD: I know that J. Henry  
12 O'Bryan and J. Audrey Dunn told me. J. Audrey Dunn  
13 came around all the time. J. Audrey himself, he's a  
14 pretty good guy. He was cool. He was all the time  
15 there when we were setting everything up. He would  
16 tell me himself what they had done.

17 MR. MILLER: Did you witness it yourself  
18 though?

19 MR. JAMES BIRKHEAD: No. I'd never been  
20 on the property until we purchased it, but I did see  
21 evidence that this went on.

22 CHAIRMAN: Any other questions?

23 (NO RESPONSE)

24 MR. ELLIOTT: State your name, please.

25 MR. McCARTHY: David M. McCarthy.

1 (MR. DAVID MCCARTHY SWORN BY ATTORNEY.)

2 MR. MCCARTHY: I'm presently in sales with  
3 Kight Lumber company. I've known the Birkheads for  
4 years. I started selling to them when I was with  
5 Jagoe's Lumber in about 1992 is when I started in  
6 sales. So I've been on the property either making  
7 sales calls, making small deliveries in my pickup, and  
8 I've also had deliveries sent out there on tandem  
9 two-ton trucks, two and a half ton trucks to the  
10 Birkheads over the years and when I was with Jagoe's  
11 and also since I've been with Kight.

12 I know that they constructed, you know,  
13 they prefab their wall panels for their houses. They  
14 prefab their wall panels in their buildings at Millers  
15 Mill Road and then ship them to a job to construct a  
16 house.

17 I also saw the truss equipment that Jim  
18 referred to, the equipment that's used in  
19 manufacturing roof trusses. I also saw that equipment  
20 there and do know that they at times they had built  
21 their own roof trusses. I know that this has gone on  
22 at least since '92 when I first started selling to  
23 them up until the present. My affidavit states that.  
24 That's all I have unless there's a question.

25 MR. DYSINGER: Yes, I have a question.



1                   In your experience of the land is only  
2 since the Birkheads took ownership in '80?

3                   MR. McCARTHY: My experience is only since  
4 they took ownership.

5                   CHAIRMAN: Any other questions?

6                   (NO RESPONSE)

7                   MR. ELLIOTT: State your name, please.

8                   MR. BOSWELL: Gary Boswell.

9                   (MR. GARY BOSWELL SWORN BY ATTORNEY.)

10                  MR. BOSWELL: As a former politician, I'm  
11 just here to present facts and information. I've got  
12 friends on both sides of this thing. I'm just here to  
13 present facts because I was asked to do so.

14                  I was a county commissioner from 1989 to  
15 approximately 1991. The first time I remember being  
16 on this property was approximately 1989 to '90. I  
17 don't remember specifically, but some of the neighbors  
18 or someone had called me regarding this property. I  
19 don't remember exactly what the situation was. It may  
20 have had something to do with the driveway. It seems  
21 like maybe someone had called me regarding possibly  
22 some maintenance, Daviess County doing some  
23 maintenance on a driveway. I had never been on this  
24 property prior to that time.

25                  I went and visited and went by the

1 driveway. At that time I think was probably the first  
2 time I met the Birkheads. They were in the process or  
3 actually were in the process of manufacturing, the  
4 best I remember, these pallets. They showed me. They  
5 were setting up things and they were making these - -  
6 not pallets. I think walls for houses. I thought it  
7 was kind of interesting because I think they were  
8 actually manufacturing walls there. I think they were  
9 taking those walls out and I thought that was kind of  
10 something different. I do remember that specifically.

11 I guess I got to know the Birkheads  
12 through that visit. Of course, I am a business man  
13 also. I have a company called Temporary  
14 Professionals, Incorporated. I provide construction  
15 help and temporary labor to various companies.

16 When this came up - - I just found out  
17 about this today. They called me. I just went back  
18 and pulled my old files out just for the record. I  
19 went back through. It looks as though about  
20 approximately 1992 was when we started providing  
21 temporary workers for the Birkheads. Here's a copy of  
22 the invoice. This was '94, but I found some old ones.  
23 It's dated 12/22 of '94 and it's addressed to Birkhead  
24 Custom Homes, 4951 Millers Mill Road, Attention: Jim  
25 Birkhead. The best I remember we were sending

1 employees to that location. I didn't actually go out.  
2 We sent them there and what they did from there they  
3 worked under the supervision of the Birkheads. I  
4 believe that's all I have to offer.

5 CHAIRMAN: Anyone have any questions?

6 MS. MASON: So you don't have any  
7 knowledge of the property, anything that was going on  
8 on the property prior to April of 1977?

9 MR. BOSWELL: No, I do not. Only for the  
10 time I was out there.

11 CHAIRMAN: Thank you.

12 MR. BOSWELL: Here is copy of the invoice.  
13 This was '94. I do have some things of '92, but it's  
14 all about the same.

15 MR. ELLIOTT: State your name, please.

16 MS. COLLINS: Judy Collins.

17 (MS. JUDY COLLINS SWORN BY ATTORNEY.)

18 MS. COLLINS: I live at Steeplechase which  
19 is real close, about a mile from this property that we  
20 are discussing. I've known the Birkheads probably  
21 about six and a half years. I've lived in  
22 Steeplechase for seven. I have witnessed on several  
23 occasions when I was out there that they were in fact  
24 making trusses that they were building in the area.

25 CHAIRMAN: Any questions?

1 (NO RESPONSE)

2 CHAIRMAN: Thank you.

3 State your name for the record, please.

4 MR. CASTLEN: I'm Steve Castlen.

5 (MR. STEVE CASTLEN SWORN BY ATTORNEY.)

6 MR. CASTLEN: With all due respect to the  
7 neighbors who many of them are customers and clients  
8 and friends of mine, the Hartmans and the Dunns,  
9 through the years, I just wanted to merely state my  
10 involvement or my knowledge of this property.

11 I've sold several properties along there  
12 and I knew that there was some type of an operation  
13 going on, manufacturing and all, but in 1997,  
14 somewhere between '97 and '98 Earl Fisher, who was at  
15 that time president of Western Kentucky Gas, and  
16 Charlie Bullock, who was the president of Owensboro  
17 National Bank, we went together in order to supply  
18 listings for the company because there was a shortage  
19 of houses. We contracted the Birkheads to build  
20 properties for us in the Brookhill area. At that time  
21 they built the trusses, the cabinets and some of the  
22 walls or all of the walls, I'm not real for sure, in  
23 that property because I witnessed that type of  
24 activity.

25 Since that time we've discontinued the

1 building business, as far as on our end, as far as  
2 hiring the Birkheads. I've bought and stored things  
3 in their buildings. Just recently in the last six  
4 months looked at stones and things that they kept on  
5 their property to purchase for decorative purposes.

6 CHAIRMAN: From when to when do you have  
7 knowledge?

8 MR. CASTLEN: It was '97 and '98 that  
9 actually we were involved in the building business or  
10 having the Birkheads build, but I do know that they  
11 manufactured the trusses and their walls and things at  
12 that time.

13 CHAIRMAN: Anyone else have any questions?

14 (NO RESPONSE)

15 CHAIRMAN: At this time, Mr. Kamuf,  
16 there's one thing we want to read in the record. Mr.  
17 Mischel went downstairs. We kept referring to the '82  
18 zoning time when denial and there's some things,  
19 testimony at that time we want to read into the record  
20 that may clear some things up.

21 MR. NOFFSINGER: Mr. Chairman, Staff would  
22 like to submit a copy of the transcript from the  
23 October 9, 1982, Planning Commission meeting. This  
24 case was referred to tonight I believe by both parties  
25 in terms of what took place in terms of the action

1 which was a denial recommendation by the Planning  
2 Commission and fiscal court upheld that denial  
3 recommendation.

4 This is a transcript that was transcribed  
5 of the meeting. It has word for word as to what was  
6 said and what took place at that meeting. When I look  
7 through here many of the names are familiar.

8 Under the applicant's findings it states,  
9 this is by the applicant, again this is 1982, October  
10 of '82, "The poultry business has been terminated for  
11 several years and most recently the subject property  
12 has been used for the raising of rabbits and storage.  
13 Since the applicant has gone out of the rabbit  
14 business, there is no practical use of the building on  
15 said property unless a new use is approved by the  
16 board."

17 Then the applicant's attorney states in  
18 the record that, "Mr. Birkhead bought this property  
19 about two years ago and prior to that time it was used  
20 for the poultry business."

21 It talks about the 4.9 acres. Then  
22 there's other testimony in here that states that the  
23 property was used most recently, would have been from  
24 1980 to 1982, as a rabbit business. If that is the  
25 case, then regardless of what happened prior to '77,

1 if the use then became a conforming use, raising  
2 rabbits would be an agricultural use, then you would  
3 lose your grandfather clause, but there's evidence  
4 stated under oath at that hearing by the applicant  
5 that the property during the time it was being rezoned  
6 and two years prior to that, there's no evidence  
7 submitted that it was used for non-agricultural  
8 activities.

9 MR. KAMUF: Mr. Birkhead is here to answer  
10 that, Gary.

11 MR. JAMES BIRKHEAD: James B. Birkhead.

12 It's hard to see on the red here. We have  
13 always used this from day one for construction. At  
14 one time there were two barns here that we also raised  
15 rabbits in, but never ceased construction operation in  
16 this building. At one time where Mr. Stefanopoulos is  
17 now raising quail in the long building in through  
18 here, right through here, we raised hogs, but while we  
19 were raising hogs, Dad was doing all of this. Joe and  
20 I always maintained the construction business in this  
21 biggest barn. We also stored our crane trucks,  
22 flatbed trucks, tractor implements in a block building  
23 right here.

24 CHAIRMAN: We're going to take about a ten  
25 minute recess and both attorneys, Mr. Kamuf and Mr.

1 Laumas, you all come up here. Want you to look at  
2 this, what's in the book.

3 - - - - (OFF THE RECORD) - - - -

4 CHAIRMAN: Call the meeting back to order,  
5 please.

6 Mr. Kamuf, you have anything you want to  
7 add right now.

8 MR. KAMUF: Yes. I have one other  
9 witness.

10 It's our contention that from that  
11 affidavit of Joe McKinley that the property has been  
12 grandfathered in. They specifically found at that  
13 time that there was not a violation. The evidence was  
14 presented according to the affidavit of McKinley. At  
15 that time they went in and proof was heard by Henry  
16 O'Bryan, which was the affidavit that we read. At  
17 that time it was, it's been non-conforming since that  
18 day. In other words, you didn't have to go back any  
19 further. I think that's the question you were asking  
20 earlier, Audie. What date do you go back? Certainly  
21 you've got to go back, I'm talking about as far as the  
22 1977 date, but once this issue came up and it was  
23 tried, it was judicially decided at that time that  
24 there was not a violation. So you come forward from  
25 that date forward.



1 CHAIRMAN: Anything else you want to add?

2 MR. KAMUF: Joe Mills is here.

3 Stewart, you understand where I'm at?

4 MR. ELLIOTT: I don't agree with that,  
5 Charlie.

6 MR. KAMUF: I understand, but that's our  
7 position. In other words, the date that you go, if  
8 you try a criminal case against a man - -

9 MR. ELLIOTT: You use a criminal case,  
10 proof is beyond a reasonable doubt. This particular  
11 situation is preponderance of the evidence. I think  
12 there's a different standard. Of course, Judge  
13 McKinley, now federal judge, he was the prosecutor on  
14 that case and he was the one that said they were in  
15 violation. He apparently failed to prove his case to  
16 the jury.

17 MR. KAMUF: That's right.

18 MR. ELLIOTT: That doesn't mean that that  
19 I guess raise judicata. I means that it determines  
20 the issue. They found it was not criminal.

21 MR. KAMUF: That's right. They  
22 specifically found that was not guilty of any  
23 violation.

24 MR. ELLIOTT: Criminal action.

25 CHAIRMAN: Mr. Kamuf, let's hear your

1 other witness.

2 MR. ELLIOTT: State your name, please.

3 MR. MILLS: Joe Mills.

4 (MR. JOE MILLS SWORN BY ATTORNEY.)

5 MR. MILLS: I got involved in this  
6 property in about June of this past year. I own an  
7 interest in a construction company. My partner is Ms.  
8 Birkhead's nephew. That's how we got involved with  
9 it.

10 When we met with her to look at the  
11 property and so forth, went to look it over, it was  
12 obvious that there had been business run there from  
13 the property. We talked about the history of the  
14 property and so forth. She told me about the trial in  
15 1985 and about the zoning and so forth. She gave me  
16 some records. I looked through those and I came  
17 across some information about that trial and found out  
18 Joe McKinley was involved in it.

19 So I called him and I talked to him about  
20 what happened at that trial and why did it end up like  
21 it did. Basically it was the testimony of J. Henry  
22 O'Bryan and about his relationship with Mr. Dunn and  
23 what they had done in that building. You know, the  
24 building of the houses and the assembly of components  
25 and storage of materials and so forth there. That's

1       what he told me was the turning point in that trial.  
2       Was the fact that it had prior use of the property.

3                 Secondly, they had talked about the  
4       traffic in and out of the road. We had started, we  
5       hired an extra crew and started in there cleaning up  
6       because there was a lot of pieces of wood left over  
7       from the building and the pallet or the truss making,  
8       a lot of sawdust and shavings and things and scrap  
9       wood that had been over there for 10 or 15 years, I  
10      guess. That's what the clean up process was that they  
11      were referring to of record.

12                We weren't aware that there was a problem  
13      with the property at all until Tom Vittitow, who works  
14      for me, went down to apply for an electrical permit  
15      and found out that there had been a complaint made  
16      about the property. That's about the only knowledge  
17      that I have of that.

18                In the records that Mrs. Birkhead had  
19      given me, I did find a letter from Mr. Rummage to Jeff  
20      Dame. It says Daviess County Planning & Zoning  
21      Enforcer. It says here, "RE: 4.9 acres, Millers Mill  
22      Road owned by George I. Birkhead, non-conforming use,  
23      grandfather clause." It says, "Dear Mr. Dame," - it  
24      was dated October 24, 1985. I'll just read it and  
25      then I'll be done. I won't take any more of your

1 time.

2 It says, "Please accept this letter as  
3 certification as a matter of law that the subject  
4 property has been used for the period of 1975 to date  
5 for the purpose of constructing in the building  
6 situated on said property, trusses and walls for  
7 residential buildings and for the storage of building  
8 materials, etcetera, and that the said uses are  
9 therefore grandfathered in under the Owensboro Metro  
10 Zoning Ordinance and Amendments thereto, and that said  
11 uses are not in violation of any law or regulation.

12 The testimony of Mr. J. Henry O'Bryan,  
13 realtor and developer, given before the trial of the  
14 action of Commonwealth versus George Birkhead and  
15 Daviess District Court on October 24, 1985, sets out  
16 in detail the fact that for a period of five years  
17 prior to Mr. Birkhead's acquisition of the subject  
18 property on April 16, 1980, the said property was used  
19 for the purpose of construction of trusses and walls  
20 to be moved from the subject property and placed on  
21 residential buildings constructed by partnership  
22 composed of J. Henry O'Bryan and Audrey Dunn." It's  
23 signed William E. Rummage, Attorney for George I.  
24 Birkhead.

25 One other quick thing. We do run a small

1 construction company. It's not like Peters or Mr.  
2 Lanham's business. We build four or five houses a  
3 year. We take down old original houses and restore  
4 them, build them back. The only thing that we'll use  
5 the property for is basically what the Birkheads did,  
6 storage of equipment and materials and build and  
7 assembly components for the houses, the storage  
8 buildings and the small construction remodeling  
9 business. That's what they did. That's what we  
10 intend to do with the property.

11 I don't know if any of you all want to see  
12 that letter or not. I think it's fairly important.  
13 It goes back to a trial that has already happened.

14 CHAIRMAN: Any questions of Mr. Mills?

15 (NO RESPONSE)

16 MR. JAMES BIRKHEAD: James B. Birkhead.

17 I'd just like to state that when we  
18 purchased this property, my father purchased this  
19 property, the intent of the purchase was for a  
20 prefabricating facility. Mr. Dunn had assured us that  
21 the property was grandfathered in. That's why we  
22 bought this property, under his assurance that he did  
23 prefabrication work. Built roof trusses and wall  
24 components on this property.

25 I witnessed, you know, I witnessed the

1 first time I went onto this property a truss jig.  
2 Okay. I recall Mr. Dunn stating, you know, him and J.  
3 Henry O'Bryan considered themselves pioneers in the  
4 prefabrication in the area because no one at this time  
5 had ever tried to prefabricate housing in Daviess  
6 County. He was really pleased that we wanted to  
7 continue and do the same thing and progressed  
8 automated in housing. That's what I would like to  
9 state.

10 CHAIRMAN: Thank you.

11 Let me give you a minute right here and  
12 then we'll rebuttal. After you finish up just  
13 briefly, we want to listen to Mr. Mischel and what he  
14 based his findings on, the evidence that he used. Go  
15 ahead.

16 MR. LAUMAS: Mr. Chairman, I agree with  
17 Mr. Elliott regarding that trial. I think Mr. Kamuf  
18 and his witnesses want to talk about that trial as  
19 being some form of a finding of how the property was  
20 used, but that's a criminal case. The jury said not  
21 guilty. We don't have a clue why the jury said not  
22 guilty. The commonwealth attorney, the commonwealth  
23 through Mr. McKinley has to prove beyond a reasonable  
24 doubt that the property was used improperly. He  
25 didn't reach a burden. We can't draw any conclusion

1 from that beyond the fact that he didn't reach that  
2 verdict. I don't think we can say today that, you  
3 know, we can now look back and have findings of fact.  
4 I think most people would agree with that.

5           Secondly, why are these people here? I  
6 mean they've produced some sketchy information about  
7 how they've used this property. They're here because  
8 the property is now used industrial since June and  
9 they know about it. I mean if it's used industrial,  
10 they know about it. They complained in '82 and  
11 they're complaining now. Those are the only two  
12 points in time that we have of that property has been  
13 used industrial.

14           There is no proof as to how that property  
15 was used before 1980 except an affidavit from Mr.  
16 O'Bryan, who I believe deceased, statements from these  
17 witnesses about Mr. Dunn, who is deceased. We don't  
18 have any evidence here.

19           I did want to state I have one quick  
20 witness regarding this building of houses on Millers  
21 Mill Road, if I can, just to address that.

22           CHAIRMAN: We'll listen to that and then  
23 we'll listen to Mr. Mischel and then you all can  
24 summarize up after that.

25           MR. ELLIOTT: Restate your name.

1 MR. DUNN: Chris Dunn.

2 In regards before 1980 where there was  
3 truss building and what have you going on there at the  
4 farm, I don't know where that information is coming  
5 from. I was part of that. Those houses that was  
6 built was not down there at those farms. They were  
7 down on the stretch of Millers Mill Road across from  
8 Windridge Country Club, which you can see on that  
9 picture they had up there. I don't know where it's  
10 at. I was part of that. As a matter of fact, in the  
11 late '70s I was power of attorney for my dad two or  
12 three occasions. All this stuff that's coming out in  
13 the late '70s and stuff about all of this, I don't  
14 know a good word for it, but it didn't happen.

15 Those barns was old hen houses. They  
16 still had the roosting mature pits all in them. You  
17 couldn't store a thing in them. Most of them still  
18 had manure in them.

19 There was a time, a situation on one of  
20 the houses that - - by the way Henry O'Bryan never  
21 came out there. I never even saw him anywhere in the  
22 vicinity of that farm. Not to say that he never came  
23 out there, but I never saw him out there and I was out  
24 there quite often.

25 Also on that when they built those houses,



1 my dad one night called me and said there was some  
2 lumber. I went out and put it on a trailer one night  
3 and took it down to the tobacco barn. That was the  
4 nearest we ever got to storage of lumber for those  
5 houses. There was nothing ever stored in those  
6 things. There was never ever anything built as far as  
7 trusses before the '80s. My dad spent of his time in  
8 Florida. Him and Henry O'Bryan wasn't down here doing  
9 this big truss company. I can assure you that I  
10 firsthand saw that there was none of this construction  
11 going on prior to 1980.

12 CHAIRMAN: Thank you.

13 Now we're going to listen to Mr. Mischel  
14 and the evidence that he used to base his finding.  
15 Then you all can sum it up, each one of you.

16 MR. MISCHEL: Basically as of in June of  
17 this past year, July, I really didn't know the history  
18 of this property. I feel like I've gotten a pretty  
19 good history lesson tonight.

20 Essentially what I based that decision on  
21 is after receiving some information from Mr. Kamuf.  
22 It was detailed in two affidavits. One from James  
23 Birkhead and one from Joseph Birkhead, which I think  
24 we already have in the record, and then a letter from  
25 Mr. O'Bryan, the one that he's already read into the

1 record dated 1985 stating that the property was used  
2 from '75 to '84 for the operation of building homes.  
3 Also a letter, which I think they just finished  
4 reading, dated October 1985 by Mr. Rummage for George  
5 Birkhead stating the same thing.

6 Basically with that information, I based  
7 that letter of legal non-conforming use.

8 CHAIRMAN: Do you have anything else to  
9 add?

10 MR. MISCHEL: No, not at this time.

11 CHAIRMAN: Any board member have a  
12 question of Mr. Mischel at this time?

13 MR. PEDLEY: I have a question and a  
14 comment on non-conforming use of structures on Article  
15 4.33, Jim. Says, "When a non-conforming use of land  
16 is discontinued or abandon so as to show a gross lack  
17 of diligence and usage for 18 months or more, the land  
18 shall not thereafter be used except in conformity with  
19 the regulations of the zoning district."

20 The question seems to be from the period  
21 of 1975 to 1980. Was that used to build trusses or  
22 for home construction or whatever? Was there 18 month  
23 period during that period? If there was, that's not a  
24 non-conforming use. The whole question is that  
25 period. What I'm hearing from this side and from what

1 I'm hearing from that side. If there was an 18 month  
2 period, anywhere from 1975 to today, it is no longer a  
3 non-conforming use according to the zoning ordinance.  
4 I haven't - - we had one gentleman say it did not  
5 occur. We have this side that says it did. Two  
6 letters from deceased people. This is very difficult  
7 for this board to sit here and make a decision on.

8 MR. MISCHEL: I think that's a correct  
9 statement. The ordinance was adopted in April of '77.  
10 So from that point on, for that to continue as a  
11 legally non-conforming use you cannot have an 18 month  
12 period.

13 MR. PEDLEY: That's right.

14 MR. MISCHEL: If it occurs 18 months of  
15 non-use for that non-conforming use, then it will lose  
16 that status. That's correct.

17 MR. PEDLEY: We have this side that says  
18 there was no activity during that period. We have  
19 this side who has presented documents or affidavits  
20 that there was, but those people are not here. I have  
21 a problem with this decision.

22 MR. MISCHEL: I see your dilemma.

23 CHAIRMAN: You have a question?

24 MR. DYSINGER: The letter from Mr. Rummage  
25 to Mr. Dame, the letter from Mr. O'Bryan, what was the

1 other thing, Jim, you mentioned that you based your  
2 decision on?

3 MR. MISCHEL: There were two affidavits.  
4 One from Joseph Birkhead and one from James Birkhead.

5 MR. DYSINGER: And those affidavits - -

6 MR. MISCHEL: Stating the use of that  
7 property was for construction.

8 MS. MASON: Prior to 1980?

9 MR. MISCHEL: I think they stated from  
10 1980. That their dad bought that property and used  
11 it, but then they go forward to say from what they've  
12 heard. Mr. O'Bryan's letter is contained in here as  
13 part of that affidavit.

14 MS. MASON: Which we have here, this  
15 letter here.

16 MR. MISCHEL: Right.

17 CHAIRMAN: They're saying in their  
18 affidavits that they used the building continuously  
19 for storage or some form.

20 MR. MISCHEL: Yes. In their affidavit,  
21 Mr. O'Bryan's letter is in there with Mr. Rummage's  
22 letter stating that continual use from '75 on.

23 MR. DYSINGER: I had a question about the  
24 letter from Mr. O'Bryan. This may be a legal  
25 question. Is it an affidavit? I mean it looks to be

1 just a letter.

2 MR. NOFFSINGER: Appears to be a letter.

3 MR. DYSINGER: We keep calling it an  
4 affidavit and I don't know if that's the case. Is it?

5 MS. MASON: It's a letter. It says, "To  
6 whom it may concern."

7 MR. KAMUF: It's a letter, the one from  
8 Henry O'Bryan, but it was part of what was introduced  
9 at the trial. I think McKinley referred to that later  
10 on. It is a letter.

11 CHAIRMAN: Any other questions of Mr.  
12 Mischel at this time?

13 (NO RESPONSE)

14 CHAIRMAN: Each one of you has got five  
15 minutes each to summarize, unless you've got something  
16 new that you want to add that we haven't heard.

17 MR. KAMUF: The only one that I have that  
18 you haven't heard, if you'd let him testify, Mr.  
19 Stefaopoulos. He's the only witness that I haven't  
20 got on that I'd like to get on.

21 CHAIRMAN: Bring him forward. Then you  
22 all have five minutes to summarize.

23 MR. ELLIOTT: State your name, please.

24 MR. STEFANOPOULOS: Eli Stefanopoulos.

25 (MR. ELI STEFANOPOULOS SWORN BY ATTORNEY.)

1                   MR. STEFANOPOULOS: I have been on that  
2 place about ten years. I raise quails up there. Been  
3 there all the time. During that period of time I've  
4 have been there, there was a lot of activity going on,  
5 building of trusses and everything, you know, until  
6 the last few years. The activity for some reason it  
7 was kind of slowed down, but always somebody there  
8 once in awhile. There was some. I think about last  
9 summer they were cleaning up a building over there and  
10 I picked up of wood shaving. Seems likes they were, I  
11 guess they come from cabinets they were building or  
12 something. I don't know. That's stuff was there.

13                   MR. KAMUF: Did Mr. Dunn come out to see  
14 you?

15                   MR. STEFANOPOULOS: Yes, he came out to  
16 see me.

17                   MR. KAMUF: When did he come to see you  
18 and what did he do?

19                   MR. STEFANOPOULOS: He came over two weeks  
20 ago. He was all upset. He told me they were going to  
21 sue me because I was lying on my affidavit. He said  
22 you better go over there to your attorney and take  
23 that paper down. Then he start saying about,  
24 something about the buildings out there, you know, the  
25 electrical lines and everything. He's going to bring

1 inspectors and make it impossible for me to raise  
2 quails any more over there which is fine with me. I'm  
3 67 years old. I don't care if I quit tomorrow. Then  
4 he said something, I don't know what you meant by  
5 that, but he said, something about that place might  
6 catch on fire. Then about ten days ago on Sunday also  
7 he came down there and he said, well, I heard you talk  
8 to your attorney about the conversation we had last  
9 week. I said, yes, I did. He said, well, you mean  
10 that by going to your attorney that means you are not  
11 going to tear up your affidavit? I said, no, I don't.  
12 He said, okay. He left.

13 MR. KAMUF: That's it.

14 CHAIRMAN: Sir, you've been involved with  
15 raising birds there how long?

16 MR. STEFANOPOULOS: About '99.

17 CHAIRMAN: Thank you.

18 Anybody have any questions of him?

19 (NO RESPONSE)

20 MR. LAUMAS: Who would you like to go  
21 first, Mr. Chairman?

22 CHAIRMAN: That's up to you all. Go  
23 ahead.

24 MR. LAUMAS: Mr. Chairman, I guess we  
25 boiled the issue down to what occurred from the time

1 before 1977 to 1980. Mr. Mischel and Mr. Noffsinger  
2 have the minutes from that zoning meeting in 1982. I  
3 think it was 50 pages. I didn't read every page, but  
4 what I read it appeared that there was an attempt to  
5 zone this property industrial by Mr. Birkhead. Mr.  
6 Birkhead made statements and his lawyer made  
7 statements about what the property was used for. It's  
8 clear what they were arguing. The property was used  
9 for rabbits, and it was no longer used for rabbits,  
10 which is clearly agricultural and that there's no good  
11 use for it so let us now use it for industrial  
12 purposes. That's what those minutes say in 1982.

13 They can bring letters from people we  
14 can't talk to and letters from lawyers that aren't  
15 here, but at the meeting in 1982 they were arguing for  
16 an industrial use of this property. They could have  
17 brought everything they wanted. They could have  
18 brought Mr. O'Bryan in here at that time. They could  
19 have brought 100 witnesses to say that that was used  
20 by Mr. Dunn and Mr. O'Bryan for industrial purposes.  
21 They didn't do that.

22 Mr. Birkhead came in and said it was used  
23 for rabbits. That's what he said. He had every  
24 motivation at that time to claim that it was  
25 industrial and he didn't say it. That's the best



1 evidence you have. You had a full hearing where  
2 everyone could come in and testify. It appears that  
3 the only thing mentioned was that it was an  
4 agricultural use. Forgetting what everyone says here,  
5 the only issue is what happened before 1982. He says,  
6 Mr. Birkhead says it was for agricultural purposes.

7 The only other evidence Chris Dunn  
8 testified that his dad never used the subject property  
9 for building purposes. Said there was a manure pits  
10 on both sides of the buildings. You couldn't use them  
11 for any kind of industrial purpose.

12 I did want to point out that whenever that  
13 property was used for industrial purposes, the whole  
14 neighborhood turns out to oppose it. They were here  
15 in 1982. I think there's some evidence that some  
16 people testified. They're here again today. The  
17 reaction of these neighbors when it is used for  
18 industrial purposes is that they oppose it and they're  
19 here again today to oppose it. Beyond anything that  
20 is presented here, the best evidence of what happens  
21 in those minutes, whether that's good or bad for these  
22 neighbors, it's right there. Mr. O'Bryan's letter is  
23 not relevant because it wasn't even presented at that  
24 meeting. Thank you.

25 CHAIRMAN: Mr. Kamuf.

1                   MR. KAMUF: In looking at this book of  
2 land use, it talks about abandonment. The question  
3 has come up what happened? We're not talking about  
4 what happened prior to 1977. We're talking about what  
5 happened from '77, I guess now, until 1982. One  
6 asserting abandonment bares the burden of proof. In  
7 other words, we have come into court and we have said,  
8 hey, there has not been an abandonment.

9                   Nobody, I don't believe, has said there  
10 has been an abandonment of any right that we've had as  
11 far as the grandfather clause.

12                   You've heard what Jim Birkhead says. He  
13 said when he got out there and looked at the property  
14 on the day that they purchased it sometime in April of  
15 1980, the first thing he saw was this jig and that Mr.  
16 Dunn came on the property frequently. He told him  
17 about building those trusses there on that property.  
18 That was something that was significant at that time  
19 because people were not using these type of jigs to  
20 make prefab homes. What did he do? He looked at it  
21 and he talked to Mr. Dunn about it at that time. Mr.  
22 Dunn confirmed that he had been building these trusses  
23 out there.

24                   Just because it's 18 months, here's a case  
25 that I looked at. It's Holloway versus Ready Mix

1 Concrete. They held that a tenure - - it showed an  
2 intent to abandon. You've got to have the intent to  
3 abandon.

4 If there was a short period of time, let's  
5 say six months or seven months that they did it or if  
6 they operated like Jim Birkhead said and they operated  
7 a poultry business as well as on the adjoining  
8 property as they operated building of trusses and  
9 those building components and storage of vehicles and  
10 storage of equipment, then we're okay.

11 That's pretty well where we are. I'm  
12 still relying on the affidavits and letters that I  
13 submitted to Jim Mischel. I think we've presented a  
14 prima facie case as to what happened during that  
15 period of time. Thank you.

16 CHAIRMAN: Does any board member have any  
17 questions of the attorneys?

18 (NO RESPONSE)

19 CHAIRMAN: We're going to take five to six  
20 minutes or whatever to recess again and let the board  
21 members look at the minutes here of the zoning. Then  
22 we'll see whether we can come up with a decision after  
23 that. Thank you.

24 - - - - (OFF THE RECORD) - - - -

25 CHAIRMAN: Call the meeting back to order.

1                   At this time does any board member have  
2                   any other questions of anybody, the attorneys or  
3                   anyone that made testimony?

4                   MS. MASON: I have a question and I don't  
5                   know who to address it to?

6                   MR. NOFFSINGER: Stewart.

7                   MS. MASON: Why in 1982 did they go before  
8                   the Metropolitan Board, the big board, and request a  
9                   rezoning if they were already grandfathered in?

10                  MR. ELLIOTT: That happens all the time,  
11                  someone is grandfathered in, but they just wanted to  
12                  maybe to obtain money, financing, that they get the  
13                  correct zoning. You can't expand a non-conforming  
14                  use. So they may want to expand a non-conforming use  
15                  and get the proper zoning. There are various reasons  
16                  they do that, but it has happened before where someone  
17                  is grandfathered in for that particular use and they  
18                  just want to make sure. So they come in and legally  
19                  go before the zoning board to get it rezoned. There's  
20                  no question about it after that.

21                  MR. KAMUF: I think Stewart is on the  
22                  right line. In other words, why are we up here  
23                  tonight? We're up here tonight because Mr. Mills is  
24                  the nephew or he's related, he and Mr. Hazel or one of  
25                  them is related to Mrs. Birkhead. If they buy the

1 property, they want to be sure as to exactly that they  
2 can continue the use as a small business. So that's  
3 the same answer that Stewart gave you as far as what  
4 happened in 1982. In '82 there was financing or some  
5 issue that had to be a certification that this was a  
6 use that they could use out there. I hope I explained  
7 it.

8 CHAIRMAN: Since you made a comment, now  
9 you got something you want to add.

10 MR. LAUMAS: We had some evidence to  
11 suggest that the neighbors complained and there was  
12 some orders or some people from the city went out and  
13 told them to stop and then they requested the zoning.  
14 They could have come in and requested, we want to zone  
15 it for industrial purposes. I mean it could have been  
16 just an application out of the blue too.

17 CHAIRMAN: One correction on your  
18 statement. It had to be to the county and not the  
19 city.

20 Any other board member have any questions  
21 before we entertain a motion to dispose of the item?

22 MR. NOFFSINGER: Mr. Chairman, I think it  
23 would be important for Mr. Elliott to go over the  
24 potential motions in terms of what the board is  
25 considering on appeal and clarify the options they

1 have in terms of taking final action.

2 MR. ELLIOTT: Of course, this is a form of  
3 appeal. Mr. Mischel has made a determination that  
4 this property was a non-conforming use before the  
5 enactment of our ordinance and that as a  
6 non-conforming use it's not in violation of the zoning  
7 ordinance.

8 Your motion should be that that  
9 interpretation, his interpretation of the evidence and  
10 facts are correct. That he was right in that  
11 determination. That would be one way to dispose of  
12 the motion.

13 If you feel like that his decision was  
14 incorrect, then you would make a finding his decision  
15 was incorrect and that the evidence that you heard  
16 tonight, all the evidence does not support his  
17 determination. He told you what evidence he used to  
18 make that determination, but you heard other evidence  
19 from both sides.

20 The motion should be that his  
21 interpretation is either in error or is correct.

22 CHAIRMAN: In other words, the motion, two  
23 motions, the board supports Mr. Mischel's saying that  
24 it is grandfathered in based on the evidence presented  
25 that we've heard; or that he is wrong in his decision

1 based on the evidence, correct, those two things?

2 MR. ELLIOTT: Yes.

3 CHAIRMAN: Any other questions anyone  
4 have?

5 (NO RESPONSE)

6 CHAIRMAN: Give each one of you attorneys  
7 one more minute if you need it.

8 (NO RESPONSE)

9 CHAIRMAN: The chair will entertain a  
10 motion.

11 MS. DIXON: Mr. Chairman, based upon the  
12 evidence presented here tonight and in particular the  
13 minutes from the zoning meeting in 1982, I move that  
14 we do not support, that we find Mr. Mischel's judgment  
15 to be incorrect. That's my motion.

16 CHAIRMAN: Based on the evidence?

17 MS. DIXON: Based upon the evidence.

18 CHAIRMAN: Is there a second to this  
19 motion?

20 MR. DYSINGER: I'll second it.

21 MR. PEDLEY: Excuse me. Just a second.  
22 His determination being correct or incorrect?

23 MS. DIXON: Incorrect. Supporting the  
24 appeal.

25 CHAIRMAN: Which means that grandfathered

1 in is incorrect.

2 Any other discussion?

3 (NO RESPONSE)

4 CHAIRMAN: All in favor of the motion hold  
5 up your right hand that Mr. Mischel made an incorrect  
6 determination that this particular piece of property  
7 was not grandfathered in, correct?

8 MR. ELLIOTT: He made a determination that  
9 it was grandfathered in.

10 CHAIRMAN: But we're overruling it, which  
11 is incorrect. His determination was incorrect; is  
12 that right?

13 MR. ELLIOTT: Right. It has not been in  
14 continuous use since 1977.

15 CHAIRMAN: All in favor raise your right  
16 hand.

17 (SIX (6) COMMISSION MEMBERS PRESENT - RUTH  
18 ANN MASON, C.A. PANTLE, JUDY DIXON, TIM MILLER, SEAN  
19 DYSINGER AND WARD PEDLEY - RAISED THEIR HAND.)

20 CHAIRMAN: All opposed.

21 (ONE (1) COMMISSION MEMBER - MARTY WARREN  
22 - RAISED THEIR HAND.)

23 CHAIRMAN: Motion carries. Mr. Mischel's  
24 interpretation was incorrect.

25 Any other business?



1 MR. KAMUF: What was the vote.

2 CHAIRMAN: The vote was six to one.

3 Any other business coming before the  
4 meeting?

5 MS. DIXON: Move to adjourn.

6 CHAIRMAN: Motion been made to adjourn.

7 MR. MILLER: Second.

8 CHAIRMAN: All in favor of the motion  
9 raise your right hand.

10 (ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

11 CHAIRMAN: We are adjourned.

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1 STATE OF KENTUCKY)  
 ) SS: REPORTER'S CERTIFICATE  
2 COUNTY OF DAVIESS)

3 I, LYNNETTE KOLLER, Notary Public in and for  
4 the State of Kentucky at Large, do hereby certify that  
5 the foregoing Owensboro Metropolitan Board of  
6 Adjustment meeting was held at the time and place as  
7 stated in the caption to the foregoing proceedings;  
8 that each person commenting on issues under discussion  
9 were duly sworn before testifying; that the Board  
10 members present were as stated in the caption; that  
11 said proceedings were taken by me in stenotype and  
12 electronically recorded and was thereafter, by me,  
13 accurately and correctly transcribed into the  
14 foregoing 105 typewritten pages; and that no signature  
15 was requested to the foregoing transcript.

16 WITNESS my hand and notarial seal on this  
17 the 20th day of January, 2003.

18

19

\_\_\_\_\_  
LYNNETTE KOLLER, NOTARY PUBLIC  
OHIO VALLEY REPORTING SERVICE  
202 WEST THIRD STREET, SUITE 2  
21 OWENSBORO, KENTUCKY 42303

22 COMMISSION EXPIRES:  
DECEMBER 19, 2006

23

COUNTY OF RESIDENCE:  
24 DAVIESS COUNTY, KENTUCKY

25