

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

OWENSBORO METROPOLITAN BOARD OF ADJUSTMENT

JANUARY 2, 2003

* * * * *

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.

15 Reference: Zoning Ordinance, Article 8,
16 Section 8.210B/7

17 Applicant: James A. Morris, Jr.

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

23 CHAIRMAN: Has there been any objections
24 filed in the office?

25 MR. NOFFSINGER: No, sir.

CHAIRMAN: Is there anyone in the audience
wishing to speak in objection to this Conditional Use
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.

24 -----

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.

12 -----

13

14

15

16

17

18

19

20

21

22

23

24

25

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

24 COUNTY OF RESIDENCE:
DAVIESS COUNTY, KENTUCKY

25