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

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

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

MS. DIXON: Move to approve.

CHAIRMAN: Motion been made to approve.

Is there a second?

MR. MILLER: Second.

CHAIRMAN: All in favor raise your right hand.

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: Motion carries unanimously.

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

(PRESENTATION FOR BILL WILLIAMS.)

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

(MR. SEAN DYSINGER SWORN IN BY ATTORNEY.)

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

The next item on the agenda this evening,
this is the first meeting of the year and at this time
we elect new officers at this time. I declare the
chair of presidency open and turn it over to our
attorney to conduct elections.

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

MR. PEDLEY: I nominate Audie Pantle.

MR. ELLIOTT: Do I have a second?

MS. MASON: Second.

MR. ELLIOTT: Are there any other
nominations?

(NO RESPONSE)

MR. PEDLEY: Move the nomination cease.

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

MR. MILLER: Second.

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

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

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

MR. MILLER: Nominate Ward Pedley.
MR. ELLIOTT: Mr. Pedley has been nominated. Is there a second?

MS. DIXON: Second.

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

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

MR. MILLER: Second.

MR. ELLIOTT: All in favor.

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

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

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

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

MS. DIXON: Second.

MR. ELLIOTT: Are there any other nominations?

(NO RESPONSE)

MR. PANTLE: Move that nomination cease.

She be elected by acclamation.

MS. DIXON: Second.

MR. ELLIOTT: All in favor.
(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

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

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

Our first item on the agenda, Gary, please.

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CONDITIONAL USE PERMITS

ITEM 2

550 Steamboat Road, in an R-1A, A-R zone
Consider request for a Conditional Use Permit to place a 14-foot by 50-foot Class B manufactured home on the lot.
Reference: Zoning Ordinance, Article 8, Section 8.210B/7
Applicant: James A. Morris, Jr.

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

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

MR. NOFFSINGER: No, sir.

CHAIRMAN: Is there anyone in the audience wishing to speak in objection to this Conditional Use Permit?
CHAIRMAN: Is the applicant here? Is there anything you'd like to add?

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

CHAIRMAN: Thank you.

Any board members have any questions of the applicant?

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

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

MS. DIXON: Second.

CHAIRMAN: Motion been made and a second.

Is there any other discussion?

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

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: Motion carries unanimously.

Next item, please, sir.

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ITEM 3

6 Dublin Lane, in an I-2, R-4DT zone
Consider request for a Variance to reduce the front yard building setback from 25 feet to 0 feet in order to construct a 12.5-foot by 108-foot enclosed corridor.
Reference: Zoning Ordinance, Article 8, Section 8.5.4(c)
Applicant: Field Packing Company

MR. NOFFSINGER: Mr. Chairman, this variance has been advertised for public hearing at this time. All adjoining property owners have been notified. The application has been reviewed by the Planning Staff. It is found to be in order. This variance would allow the proposed structure to be built to the right-of-way line along Dublin Lane.

This request comes to us by mandate by I believe the federal regulations. The applicant as well as their engineer is here tonight to answer any questions you might have.

CHAIRMAN: Been any objections filed in the office?

MR. NOFFSINGER: No, sir.

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

(NO RESPONSE)

CHAIRMAN: Does the applicant have
anything they want to add to it?

MR. ELLIOTT: State your name, please.

MR. KAMUF: Charles Kamuf.

(MR. CHARLES KAMUF SWORN BY ATTORNEY.)

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

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

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

(NO RESPONSE)

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

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

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

MS. DIXON: Move to approve because it will not adversely affect the public health, safety or
welfare; will not alter the essential character of the
general vicinity; will not cause a hazard or a
nuisance to the public; and will not allow an
unreasonable circumvention of the requirements of the
zoning ordinance.

CHAIRMAN: Is there a second to the
motion?

MR. WARREN: Second.

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

(NO RESPONSE)

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

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: Motion carries unanimously.

Next item, please.

ITEM 4

720 Ford Avenue, in a P-1 zone
Consider request for a Variance to reduce the side
yard building setback from 10 feet to 2.9 feet in
order to construct a 13.5-foot by 29.0-foot canopy
over the existing pavement.
Reference: Zoning Ordinance, Article 8, Section
8.5.12(d)
Applicant: Trinity Episcopal Church of Owensboro

MR. NOFFSINGER: Mr. Chairman, this
application has been advertised for public hearing at
this time. All adjoining property owners have been
notified. The application has been reviewed by the Planning Staff. It's found to be in order. It is ready for consideration.

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

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

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

(NO RESPONSE)

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

MR. ELLIOTT: State your name, please.

MR. WIBLE: Charles Wible.

(MR. CHARLES WIBLE SWORN BY ATTORNEY.)

MR. WIBLE: Mr. Chairman and board members, just very briefly. I'm here on behalf of the church. As Mr. Noffsinger has said, the church owns the property on both sides of the property line. The purpose of this variance is in order to build a covered canopy over a portion of the existing driveway so that elderly members of the church can be let out of their cars and walk into the door of the church without being subject to inclement weather. It's
something that's being designed by an architect and
will be esthetically pleasing for the community and
the neighborhood. Be glad to answer any questions.

CHAIRMAN: Thank you.

Does any board member have any questions
of the applicant?

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

CHAIRMAN: Thank you. Any other comments?

Any board member have any questions?

(NO RESPONSE)

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

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

CHAIRMAN: Is there a second to the motion?

MS. DIXON: Second.

CHAIRMAN: Any other questions or comments from the board?

(NO RESPONSE)

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

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: Motion carries unanimously.

Next item, please.

ITEM 5

2306, 2312, 2318, 2326, 2334 Frederica Street, in a B-4 zone
Consider request for a Variance to reduce the required roadway buffer along Frederica Street from 60 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

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

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

MR. NOFFSINGER: No, sir. We have had
some questions, but just folks questioning what the
project was about.

CHAIRMAN: Is there anyone in the audience
wishing to object to this application?
(NO RESPONSE)

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

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

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

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

CHAIRMAN: Thank you, Mr. Kamuf.

Any other questions of the applicant?
(NO RESPONSE)

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

MR. WARREN: Motion to grant the variance
based on the findings that it will not adversely
affect the public health, safety and welfare; will not
alter the essential character of the general vicinity;
will not cause a hazard or nuisance to the public;
will not allow an unreasonable circumvention of the
requirements of the zoning regulations.

CHAIRMAN: Is there a second?

MS. MASON: Second.

CHAIRMAN: Motion been made and a second.

Any other board member have any other comments or
questions?

(NO RESPONSE)

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

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: Motion carries unanimously.

Next item, please, sir.

ITEM 6

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

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

Applicant: City of Owensboro

MR. NOFFSINGER: Mr. Chairman, this
application has been advertised for public hearing at

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

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

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

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

MR. NOFFSINGER: No, sir.

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

(NO RESPONSE)
CHAIRMAN: Is the applicant here and do they have anything they want to add?
(NO RESPONSE)

CHAIRMAN: Any board members have any questions of the applicant?
(NO RESPONSE)

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

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

CHAIRMAN: Is there a second to the motion?

MR. WARREN: Second.

CHAIRMAN: Any other questions or comments from the board?

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

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

Any other comments or questions?

(NO RESPONSE)

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

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: Motion carries unanimously.

Next item, please, sir.

ITEM 7

910 West Second Street, in an R-4DT zone
Consider request for a Variance to waive the side yard building setback from 5 feet to 2 feet in order to construct a new single-family residence.
Reference: Zoning Ordinance, Article 8, Section 8.5.11(d)
Applicant: Richard & Rita Collinsworth

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

We have talked with the applicant's surveyor about perhaps a way of shifting the proposed home to the west property line and constructing three
feet off of that west property line and then
maintaining a five foot setback along the east
property line. That would respect the existing
parking and driveway area to the property to the east.
That property to the east now it appears shares a
driveway with the subject property and their parking
is within this driveway. If the board is looking to
ward a recommendation that the house should be shifted
to the west, then I believe it's a situation that we
would need to postpone taking action and re-advertise
to shift because right now we advertised this variance
as the home was going to be located too close to the
east property line. This would shift the property
closer to the west property line and would affect a
different property owner. Given that we would
recommend that we hear from the applicant and perhaps
consider a postponement, shift the house to the west
and all parking on this site be to the rear of the
property, via that joint driveway.

CHAIRMAN: Is the applicant here?
MR. COLLINSWORTH: Yes.
CHAIRMAN: Would you come before the
microphone and be sworn in.
MR. HUTCHINS: I'm going to be the builder
of the property, the builder of the house.
CHAIRMAN: State your name, please.

MR. HUTCHINS: Brad Hutchins.

(MR. BRAD HUTCHINS SWORN BY ATTORNEY.)

MR. HUTCHINS: Rita is my sister. After talking with Ed Varble, he owns the house to the west of the property. Ed let me get his land rezoned so we can take this in front of the variance board tonight. As far as the driveway, the parking is in the back of the house. The driveway will go all the way to the back. Mr. Varble right now he -- right now it's a gravel driveway. It's going to be a concrete drive all the way to the back. We own the property on the west side of Mr. Varble's house also. Right now he's not in agreement with the five foot line. His air conditioner is actually sitting on my land which I don't care about.

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

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

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

MR. ELLIOTT: State your name, please.

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

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

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

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

MR. HUTCHINS: I believe that was Bill Weikel.

MR. NOFFSINGER: Yes.

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

MR. NOFFSINGER: He gave that to me on New Year's Eve. That's the site plan I have. What we're requesting is that you amend your application. That
would mean come back before this board at their February meeting and amend it to, build within three feet of that west property line and five feet off the east property line and that you show parking on both properties, the subject property and Mr. Varble's property, to the rear.

MR. HUTCHINS: Okay.

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

MR. HUTCHINS: Okay.

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

MR. HUTCHINS: That will work.

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

MR. HUTCHINS: All right. Is that it?

CHAIRMAN: We need a motion to postpone.

MR. WARREN: Motion to postpone.

MS. DIXON: Second.

CHAIRMAN: All in favor raise your right hand.

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

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

Thank you, sir.

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Next item, please, sir.

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ADMINISTRATIVE APPEAL

ITEM 8

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

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

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

This board here tonight is here to
determine and consider the existing use of the
property and to determine whether or not that this is
a legally non-conforming use which existed prior to
the adoption of the zoning ordinance in April of 1977
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

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

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

CHAIRMAN: I had a couple of people contact me and say they understood this was a zoning change. This is not a zoning change. The Adjustment Board cannot change the zone. That has to go before the zoning board to do that. We can only listen to appeals, grant variances or conditional use permit. Some of you are here or came this evening planning on objecting or being in favor of a zoning change, this is not what we're doing this evening. We're just reviewing the administrative appeal made by Mr. Jim Mischel and whether we uphold it or disagree with it and that's what will be decided this evening.
Mr. Mischel, you've been sworn in. Go ahead and state your case at this time.

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

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

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

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

After that we got some affidavits from the owners stating that this property was in use dating back to '70s in the construction in repair of equipment. At that time I issued a letter stating that based on that information it looked to me that
the property was grandfathered in, if you want to say it. Legally non-conforming use. After that letter went out, I received some calls well even before that in that process, but after that it seemed like there was some affidavits and an attorney representing some of the neighbors and they have some affidavits that they turned in to the board here stating that the property was not used for that for those times. Essentially that's what brings us to this point. I don't know if you have any questions right now or not.

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

(NO RESPONSE)

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

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

(MR. KEVIN LAUMAS SWORN BY ATTORNEY.)

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

The property that is of concern today is currently owned by the Birkheads either their estate
or Mrs. Birkhead. The Birkheads purchased that property, the Birkheads purchased that property in 1982. It was owned by the Dunn family until 1982. So I guess right off, right from the beginning I guess we would dispute any affidavits that suggested that the subject property had been used for anything but agricultural prior to 1982 because the Birkheads didn't own it until then.

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

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

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

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

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

When the decisions were rendered by the Planning Commission and by Fiscal Court that denied it, essentially any industrial or commercial use ended at that time. That's what our evidence will be. I understand what Mr. Noffsinger indicated about a possible non-conforming use. It may be something that would have to be explained to the neighbors in a little more detail, but they strongly believe that.
when that decision was rendered that was the end of
the story and there would be no industrial or
commercial use. What they will tell you is that was
the case until about May or June of 2002. At that
time the property was utilized for industrial
purposes.

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

Now, we would ask that Mr. Mischel's
decision be reversed not only because it's never been
used for industrial purposes, but also it's really,
the land is not suitable for the use that the
Birkheads and anyone using it is using it for right
now. Specifically the road that allows entry and exit
of this property is very, it's a very narrow little
farm road that its purpose was to allow the Dunns to
get back to the back side of their farm. They
maintain that road. The Dunns maintain that road. They gravel it. They grade it. It's not built for heavy machinery. Now, there's some farm work that goes on that farm and there are farm vehicles that drive down that roads, but that's not a continual use. Some of these neighbors will tell you that they continue regular use of the land by heavy equipment and basically is ruining this road.

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

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

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

MR. LAUMAS: Mr. Chairman, we also make
part of the record the affidavits that were submitted
as part of our appeal.

CHAIRMAN: If you so desire.

MR. LAUMAS: Thank you.

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

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

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

MR. LAUMAS: I have a couple of witnesses.

CHAIRMAN: State your name for the record.

MR. DUNN: Chris Dunn.

(MR. CHRIS DUNN SWORN BY ATTORNEY.)

MR. DUNN: First off I'd just like to
I'm one of those confused persons. I find it, for lack of a better word, interesting that we're even here tonight because as Kevin said, mentioned that the Birkheads had tried to zone this to what they wanted to have it for now. They were rejected by the zoning board.

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

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

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

Then it was sold to the Birkheads. Actually it was traded I believe for a duplex. Dad
traded it for a duplex Mr. Birkhead built for him. Up until that time we never did anything in those houses except for agricultural.

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

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

In the late '80s I spent about 45 to 60 days down there, my brother and I, from daylight until dark, straight through 45 days. We cleared out a big area, a big fence line and everything down around there. I have never seen any such type industrial
work going on there at all. The most I've ever seen some of the Birkhead boys lived down there off and on I'd see them going up and down the road, a pickup truck every now and then. Basically I'd say maybe twice a day. Once going out and once going in. All of this industrial work going on out there and it's been going on out there for 15 or 20 years and I don't know where it's at or where it's been or when it was done. Basically that's all I've got to say unless you've got some questions.

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

(NO RESPONSE)

CHAIRMAN: Thank you, Mr. Dunn.

State your name for the record.

MR. WILKERSON: My name is Ray Wilkerson.

(MR. RAY WILKERSON SWORN BY ATTORNEY.)

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

Now, when I first built my house there I
went to the county road department and I asked them if they would improve the road. It was nothing but a ditch. No, it's not on their drawings. It's not on their plans. It's not their road. It's just a neighborhood road where the farmers go in and out.

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

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

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

CHAIRMAN: When did this start?

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

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

CHAIRMAN: Yes.

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

MR. WILKERSON: Short period of time. You know, a few months ago. It started ten months. June, it started in June when they started in and out with their lumber and two by fours and whatever, you know. Take them in and bring them out. We don't want that going any further. Thank you.
CHAIRMAN: Anyone else at this time?

State your name for the record.

MR. DUNN: Douglas Dunn.

(MR. DOUGLAS DUNN SWORN BY ATTORNEY.)

MR. DUNN: Mr. Chairman and board members,

I'm completely against this proposed action and I can
prove to you there is no legal support for its
passing.

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

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

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

First I would like to say something about
the late Mr. George Birkhead. When I moved from
Nashville, Tennessee, back to the farm in 1987 Mr. Birkhead had done some things on our farm that I didn't think was right. We had some terrible disagreements which eventually lead to a courtroom battle. However soon thereafter we sat down over a cup of coffee and two donuts and we worked out our differences. I forgave him and he forgave me and we lived in harmony for the rest of his life.

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

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

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

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

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

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

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

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

Now, some of the confusion may have been
caused by the fact that one of his sons lived on the
property for a few years. When he came home at night
he might have unloaded a couple of shovels and even a
wheelbarrow and stored them in one of the barns. He
may have unloaded some other tools on his truck for
the next day's work, but he got in his truck in the
morning and he left and went to work and he came back
at night. There was nobody there during the day. He
lived there. He didn't work there.

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

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

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

CHAIRMAN: Any questions?

(NO RESPONSE)
CHAIRMAN: You have anything else, new
evidence? We don't want to listen to the same thing
over and over.

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

CHAIRMAN: You want those into evidence?

MR. HARTMAN: Yes.

MR. ELLIOTT: State your name, please.

MR. HARTMAN: My name is Jeff Hartman.

(MR. JEFF HARTMAN SWORN BY ATTORNEY.)

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

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

I work at Owensboro Fire Department. Been
there 24 years. I work approximately 105 days a year.
So that leaves me a few days to fiddle around the
house. Basically what I do on my property is I cut,
clean fence rows. We used to have some cattle out
there. We used to have some horses. As insurance and
things, I got rid of the animals. Didn't want to have
them any more. I have an aerial photograph here I'd
like for you to see too.

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

We own this property all the way to this
road here. These two properties join and that's what
my father and Mr. Wilkerson, we moved there in '59.
We live in what used to be a two-room log house.
You'll see on Millers Mill Road, if you've been out
there, that's the house that I originally grew up in.
That sits right here. The road that he is using
there, those are the pictures of what -- new gravel
was put down approximately two months ago maybe. The
activity that started -- like I said I take care of
all of this back to here, up through here. There's my
garden. The traffic, the dust and things, that was
another concern. Just stirring up so much dust with
the fast speed. This is residential out in here. You
can see all the homes here. Up until just the past
few months, again, this was taken in '87. If you all
come up and look and see how nice and clean this was,
that Mr. Birkhead here, he did take care of it, but
that was just his own personal use there. There
wasn't anything going on back there. I still live
there on this place as of today.

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

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

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

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

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

(NO RESPONSE)

CHAIRMAN: You have anything else you want
to add?

MR. HARTMAN: No.

CHAIRMAN: Thank you.

Do you have anything else you want to add?

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

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

MR. DUNN: Chris Dunn.

I don't know if you all really understand
this just right. This here, what Jeff is talking
about, this is Ray Wilkerson's and here is the
Hartman's old home place which is Tom Tabor now. If
you can see that little white line that's a fence and
it comes across there. That ingress and egress right
here is for the Dunns and Ray Wilkerson. It stops
right here. This lane going from here on back to the
farm is our farm and we only gave the Birkheads egress
and ingress, or my dad did, from here all the way
back. I didn't want you to confuse. Nobody has the
right going past here driving on this part of the
road. Just not everybody can do that. Just the
people with that piece of property there.

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

MR. DUNN: For that purpose there, right.
That's as far as this particular one here goes.
I'm not sure of the zoning, what this is.
Even if it's for all the public, it's not past that
point. That's where the pictures of the road that you
see.

MR. GREG DUNN: The plats on these two
properties, my dad's and Mr. Wilkerson, those
properties are actually together. It does not even
show a pass-way, or a right-of-way, or an easement, or
nothing on the plats. Ray put that in and dad and Ray
had took care of. They asphalted it twice. They
gaveled it early on for years and then they put
asphalt down. Now it's all pretty well shot.

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

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

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

(AUDIENCE COMPLIES WITH REQUEST.)

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

MR. LAUMAS: Thank you.

CHAIRMAN: Next.

MR. KAMUF: Charles Kamuf again.

As indicated by Mr. Noffsinger, the reason
that we're here at this time has nothing to do with a
zoning case. The reason that we are here is to back
up the finding of fact that was made by Jim Mischel
where he specifically found that the property
qualifies under the grandfather clause as a legally
non-conforming use. Has nothing to do with zoning. Has nothing to do with 150 people coming down here objecting to anything. It has to do with what the property was being used for for the last 20 or 22 years. That is the issue for you all to decide.

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

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

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

May I point out to you, if I can, this is
the road that we're talking about in the deed itself in 1982. There is discussion concerning this easement. Certainly nobody is going to buy five acres at the rear of someone's property without an easement. It's in the deed itself if you want a copy of it.

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

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

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

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

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

MR. KAMUF: This is an aerial photograph.
I can't give you that. That's the latest aerial photograph that we have, but these pictures that I'm showing you are pictures that were taken in the last month.

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

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

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

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

MR. NOFFSINGER: It's a recent.

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

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

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

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

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

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

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

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

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

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

MR. KAMUF: Those two pictures refer right
here. It's this building. It would be to the east of
the property right here. That's what's taking place
at the present time. Those pictures were taken in the
last ten days.

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

MR. KAMUF: All I'm saying there is
activity going on. In one of the affidavits that you
will read in the record which was filed by Mr. Dunn or
by Kevin; in other words, there's some evidence there
that there's no activity going on in the neighborhood.
We're talking about 20 feet from this property.

That's what you see. Those pictures were taken the
other day. I'm not arguing in any way for the guy
that runs the pallet mill. I don't even know who owns
it. I just wanted to show you what I saw when I went
out there.

MR. NOFFSINGER: Mr. Kamuf, keep in mind
we're not here to address the pallet mill.
MR. KAMUF: That's right.

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

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

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

CHAIRMAN: That is the Birkhead property?

MS. MASON: This is on the Birkhead property?

MR. KAMUF: Yes. The buildings that you see, the buildings to the rear as you go down that hill, these buildings are sort of hidden in the back because you go down a hill. These two photographs, which are eight and nine, show the hill as it goes down, sloping down to the building.
Now, what's been happening out there since 1980? We showed you the photographs. We showed you the photograph of the mailbox. The mailbox still there at the present time. Some question as to what the activity has been going on out there in the last several years.

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

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


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

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

CHAIRMAN: These are --

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

CHAIRMAN: In the buildings on the red?

MR. KAMUF: On the red property.

CHAIRMAN: Thank you.


I would like to file those as the next exhibit.

There's some question about the delivery, as to whether deliveries were made out there. Here is a delivery ticket. All of these that I show you are tickets where material was delivered to Millers Mill Road. It specifically states on these Birkhead. For example, here is one from Thriftway dated 1/31/97.
Birkhead Custom Homes, that's where it was delivered at 4951 Millers Mill Road.

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

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

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

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

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

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

We have just gone through at random and picked out some of the billing that we had to show you that all during this period of time that we're talking about there's all kind of activity going on.
Kentucky Indiana Lumber Company, here is
one that's dated 9/30/91 where they said George
Birkhead, doing business as Birkhead Supply &
Manufacturing, shipped to 4951 Millers Mill Road.

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

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

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

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

The question here tonight is was this

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

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

I hope I've explained to everyone what the
grandfathered use is. If it started after 1977, it's
a zoning violation. It becomes an illegal use. Now,
the Kentucky Revised Statutes allow where you have
counties that contain cities of the third class,
fourth class or fifth class, smaller cities than the
City of Owensboro or city of the second class. It
allows for uses that have been in existence for a
period of ten years and not challenge to then become
lawful uses. Your zoning administration department
would not be allowed to even hear this case or even
consider it. It would become a grandfathered use or a
conforming use, I believe the statute says, and we
wouldn't even be considered here tonight. That's not
the case in Owensboro-Daviess County. You do not gain
the right to continue an activity just because it's
gone unchallenged for 10 years or 15. Our date is
April of 1977 that we go back to.

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

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

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

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

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

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

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

CHAIRMAN: That's what I wanted to be
sure.
Did you have a question?

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

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

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

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

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

MR. LAUMAS: Before 1980?

CHAIRMAN: Yes, sir.

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

CHAIRMAN: That's right.

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

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

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

During the subsequent years, Mr. Dunn and myself built several other larger homes in Normandy Heights and in Locust Hills and another very large home adjacent to the subdivision which we developed in the beginning. Some of these buildings required
trusses which were built in the turkey building. Mr. Dunn and myself discontinued our partnership and liquidated all properties in mid 1984."

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

MR. MISCHEL: Yes.

MR. KAMUF: That takes you back to 1975. I think by that letter we can ascertain that trusses were built on that property. The purpose of those trusses being built is that Mr. Dunn and Henry J. O'Bryan, and the top of that letter is Home Realty, they built the trusses and the walls for the houses they were building in Normandy Heights. So that's when it started.

As to the trial that you all were talking about a few minutes ago. The property, they tried to get the property zoned sometime in about 1982. The reason for that is because these same neighbors were objecting. When it was denied Mr. Birkhead continued to operate as a small business construction company. He never quit. They took criminal action against him, and that's part of the record that I have filed and I'll file a copy of that. It's already in the record, but a copy of that violation. They took criminal
action against him in 1985.

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

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

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

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

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

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

Number 6, The jury found Mr. Birkhead 'not guilty' of operation of a Light Industrial Business in
an Agricultural Zone."

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

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

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

The next person that we will present is a - listen to this - a truck driver and a salesman who has worked for Jagoe's and Lowe's. He will tell you that his job duty, he now works for Kight, and they include as a salesperson as well as making deliveries of supplies at the Birkhead property. He will say this: I know of my own personal knowledge from 1992
to the present time deliveries were made to the
Millers Mill Road address on a regular basis
throughout the year. To the best of my knowledge
during the period of time from '92 to the present time
the Birkheads continually and on a regular basis
prefab their custom homes at the Millers Mill address.

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

If you look, I think some of you are
looking at that affidavit of Joe McKinley. The
federal judge was the prosecuting attorney at that
time and he's saying, wait a minute. The basic
fundamental of that trial was that a jury came back
and found this man not guilty of operating an
industrial activity. The reason he did is because of
what? The evidence was presented at the trial that it
was grandfathered in. That they've been doing it for
that period of time. I won't take any more of your
time, but we have several witnesses that I would like
to bring up.

The first of those is Mr. Joe Birkhead.

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

MR. JOE BIRKHEAD: Joe Birkhead.

(MR. JOE BIRKHEAD SWORN BY ATTORNEY.)

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

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

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

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

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

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

(NO RESPONSE)

CHAIRMAN: Thank you.

MR. ELLIOTT: State your name, please.

MR. JAMES BIRKHEAD: James Birkhead.

(MR. JAMES BIRKHEAD SWORN BY ATTORNEY.)

MR. JAMES BIRKHEAD: This may help me here. Since Dad bought the property, the whole idea
was to set up a prefabrication shop.

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

We also manufacture kitchen cabinets.

Stored material through here. We have a sheet metal shop in this section of the building.

There's a block barn, a block building right over here where we store our crane truck, we store our flatbed dump trucks, our tractors, and implement equipment. We stored, we have a lot of storage for trailers and things in these other two barns back here. We've got appliances. We've stored building materials there. We've built roof trusses there. We've built wall panels there. We've built custom cabinets there. We bought material in semi-tractor trailer loads for the past 20 years. We have continually run a business. Joe, my brother, presently is the owner of Birkhead Custom Homes. The Birkheads have always, we have always and never stopped using this property as our shop to run our business out of it.
We have at times continued to run our construction business and raise rabbits and raise hogs at the same time. The construction has never, never ceased.

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

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

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

CHAIRMAN: Which was 1980, correct?

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

CHAIRMAN: Any board member have any
MR. MILLER: I've got one, Mr. Chairman.

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

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

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

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

MR. MILLER: Did you witness it yourself though?

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

CHAIRMAN: Any other questions?

(NO RESPONSE)

MR. ELLIOTT: State your name, please.

MR. McCARTHY: David M. McCarthy.
MR. McCARTHY: I'm presently in sales with Kight Lumber company. I've known the Birkheads for years. I started selling to them when I was with Jagoe's Lumber in about 1992 is when I started in sales. So I've been on the property either making sales calls, making small deliveries in my pickup, and I've also had deliveries sent out there on tandem two-ton trucks, two and a half ton trucks to the Birkheads over the years and when I was with Jagoe's and also since I've been with Kight.

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

I also saw the truss equipment that Jim referred to, the equipment that's used in manufacturing roof trusses. I also saw that equipment there and do know that they at times they had built their own roof trusses. I know that this has gone on at least since '92 when I first started selling to them up until the present. My affidavit states that.

That's all I have unless there's a question.

MR. DYSINGER: Yes, I have a question.
In your experience of the land is only since the Birkheads took ownership in '80?

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

CHAIRMAN: Any other questions?

(NO RESPONSE)

MR. ELLIOTT: State your name, please.

MR. BOSWELL: Gary Boswell.

(MR. GARY BOSWELL SWORN BY ATTORNEY.)

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

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

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

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

When this came up -- I just found out
about this today. They called me. I just went back
and pulled my old files out just for the record. I
went back through. It looks as though about
approximately 1992 was when we started providing
temporary workers for the Birkheads. Here's a copy of
the invoice. This was '94, but I found some old ones.
It's dated 12/22 of '94 and it's addressed to Birkhead
Custom Homes, 4951 Millers Mill Road, Attention: Jim
Birkhead. The best I remember we were sending
employees to that location. I didn't actually go out. We sent them there and what they did from there they worked under the supervision of the Birkheads. I believe that's all I have to offer.

CHAIRMAN: Anyone have any questions?

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

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

CHAIRMAN: Thank you.

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

MR. ELLIOTT: State your name, please.

MS. COLLINS: Judy Collins.

(MS. JUDY COLLINS SWORN BY ATTORNEY.)

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

State your name for the record, please.

MR. CASTLEN: I'm Steve Castlen.

(MR. STEVE CASTLEN SWORN BY ATTORNEY.)

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

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

Since that time we've discontinued the

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

CHAIRMAN: From when to when do you have
knowledge?

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

CHAIRMAN: Anyone else have any questions?

(NO RESPONSE)

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

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

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

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

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

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

It talks about the 4.9 acres. Then there's other testimony in here that states that the property was used most recently, would have been from 1980 to 1982, as a rabbit business. If that is the case, then regardless of what happened prior to '77,
if the use then became a conforming use, raising rabbits would be an agricultural use, then you would lose your grandfather clause, but there's evidence stated under oath at that hearing by the applicant that the property during the time it was being rezoned and two years prior to that, there's no evidence submitted that it was used for non-agricultural activities.

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

MR. JAMES BIRKHEAD: James B. Birkhead. It's hard to see on the red here. We have always used this from day one for construction. At one time there were two barns here that we also raised rabbits in, but never ceased construction operation in this building. At one time where Mr. Stefanopoulos is now raising quail in the long building in through here, right through here, we raised hogs, but while we were raising hogs, Dad was doing all of this. Joe and I always maintained the construction business in this biggest barn. We also stored our crane trucks, flatbed trucks, tractor implements in a block building right here.

CHAIRMAN: We're going to take about a ten minute recess and both attorneys, Mr. Kamuf and Mr.
Laumas, you all come up here. Want you to look at this, what's in the book.

--- (OFF THE RECORD) ---

CHAIRMAN: Call the meeting back to order, please.

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

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

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

MR. KAMUF: Joe Mills is here.

Stewart, you understand where I'm at?

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

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

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

MR. KAMUF: That's right.

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

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

MR. ELLIOTT: Criminal action.

CHAIRMAN: Mr. Kamuf, let's hear your
other witness.

MR. ELLIOTT: State your name, please.

MR. MILLS: Joe Mills.

(MR. JOE MILLS SWORN BY ATTORNEY.)

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

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

So I called him and I talked to him about what happened at that trial and why did it end up like it did. Basically it was the testimony of J. Henry O'Bryan and about his relationship with Mr. Dunn and what they had done in that building. You know, the building of the houses and the assembly of components and storage of materials and so forth there. That's
what he told me was the turning point in that trial. Was the fact that it had prior use of the property.

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

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

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

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

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

One other quick thing. We do run a small

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

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

CHAIRMAN: Any questions of Mr. Mills?
(NO RESPONSE)

MR. JAMES BIRKHEAD: James B. Birkhead.

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

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

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

MR. LAUMAS: Mr. Chairman, I agree with
Mr. Elliott regarding that trial. I think Mr. Kamuf
and his witnesses want to talk about that trial as
being some form of a finding of how the property was
used, but that's a criminal case. The jury said not
guilty. We don't have a clue why the jury said not
guilty. The commonwealth attorney, the commonwealth
through Mr. McKinley has to prove beyond a reasonable
doubt that the property was used improperly. He
didn't reach a burden. We can't draw any conclusion.
from that beyond the fact that he didn't reach that verdict. I don't think we can say today that, you know, we can now look back and have findings of fact. I think most people would agree with that.

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

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

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

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

MR. ELLIOTT: Restate your name.
MR. DUNN: Chris Dunn.

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

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

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

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

CHAIRMAN: Thank you.

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

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

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

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

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

   CHAIRMAN: Do you have anything else to add?

   MR. MISCHEL: No, not at this time.

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

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

   The question seems to be from the period of 1975 to 1980. Was that used to build trusses or for home construction or whatever? Was there 18 month period during that period? If there was, that's not a non-conforming use. The whole question is that period. What I'm hearing from this side and from what
I'm hearing from that side. If there was an 18 month period, anywhere from 1975 to today, it is no longer a non-conforming use according to the zoning ordinance. I haven't -- we had one gentleman say it did not occur. We have this side that says it did. Two letters from deceased people. This is very difficult for this board to sit here and make a decision on.

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

MR. PEDLEY: That's right.

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

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

MR. MISCHEL: I see your dilemma.

CHAIRMAN: You have a question?

MR. DYSINGER: The letter from Mr. Rummage to Mr. Dame, the letter from Mr. O'Bryan, what was the
other thing, Jim, you mentioned that you based your
decision on?

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

MR. DYSINGER: And those affidavits --

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

MS. MASON: Prior to 1980?

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

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

MR. MISCHEL: Right.

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

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

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

MR. NOFFSINGER: Appears to be a letter.

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

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

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

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

(NO RESPONSE)

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

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

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

MR. ELLIOTT: State your name, please.

MR. STEFANOPOULOS: Eli Stefanopoulos.

(MR. ELI STEFANOPOULOS SWORN BY ATTORNEY.)

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

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

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

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

MR. STEFANOPOULOS: He came over two weeks ago. He was all upset. He told me they were going to sue me because I was lying on my affidavit. He said you better go over there to your attorney and take that paper down. Then he start saying about, something about the buildings out there, you know, the electrical lines and everything. He's going to bring
inspectors and make it impossible for me to raise
quails any more over there which is fine with me. I'm
67 years old. I don't care if I quit tomorrow. Then
he said something, I don't know what you meant by
that, but he said, something about that place might
catch on fire. Then about ten days ago on Sunday also
he came down there and he said, well, I heard you talk
to your attorney about the conversation we had last
week. I said, yes, I did. He said, well, you mean
that by going to your attorney that means you are not
going to tear up your affidavit? I said, no, I don't.
He said, okay. He left.

MR. KAMUF: That's it.
CHAIRMAN: Sir, you've been involved with
raising birds there how long?

MR. STEFANOPoulos: About '99.

CHAIRMAN: Thank you.
Anybody have any questions of him?

(NO RESPONSE)

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

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

MR. LAUMAS: Mr. Chairman, I guess we
boiled the issue down to what occurred from the time
before 1977 to 1980. Mr. Mischel and Mr. Noffsinger have the minutes from that zoning meeting in 1982. I think it was 50 pages. I didn't read every page, but what I read it appeared that there was an attempt to zone this property industrial by Mr. Birkhead. Mr. Birkhead made statements and his lawyer made statements about what the property was used for. It's clear what they were arguing. The property was used for rabbits, and it was no longer used for rabbits, which is clearly agricultural and that there's no good use for it so let us now use it for industrial purposes. That's what those minutes say in 1982. They can bring letters from people we can't talk to and letters from lawyers that aren't here, but at the meeting in 1982 they were arguing for an industrial use of this property. They could have brought everything they wanted. They could have brought Mr. O'Bryan in here at that time. They could have brought 100 witnesses to say that that was used by Mr. Dunn and Mr. O'Bryan for industrial purposes. They didn't do that.

Mr. Birkhead came in and said it was used for rabbits. That's what he said. He had every motivation at that time to claim that it was industrial and he didn't say it. That's the best
evidence you have. You had a full hearing where everyone could come in and testify. It appears that the only thing mentioned was that it was an agricultural use. Forgetting what everyone says here, the only issue is what happened before 1982. He says, Mr. Birkhead says it was for agricultural purposes.

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

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

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

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

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

Just because it's 18 months, here's a case that I looked at. It's Holloway versus Ready Mix
Concrete. They held that a tenure -- it showed an intent to abandon. You've got to have the intent to abandon.

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

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

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

(NO RESPONSE)

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

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

CHAIRMAN: Call the meeting back to order.

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

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

MR. NOFFSINGER: Stewart.

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

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

MR. KAMUF: I think Stewart is on the right line. In other words, why are we up here tonight? We're up here tonight because Mr. Mills is the nephew or he's related, he and Mr. Hazel or one of them is related to Mrs. Birkhead. If they buy the
property, they want to be sure as to exactly that they can continue the use as a small business. So that's the same answer that Stewart gave you as far as what happened in 1982. In '82 there was financing or some issue that had to be a certification that this was a use that they could use out there. I hope I explained it.

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

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

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

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

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

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

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

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

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

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

MR. ELLIOTT: Yes.

CHAIRMAN: Any other questions anyone have?

(NO RESPONSE)

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

(NO RESPONSE)

CHAIRMAN: The chair will entertain a motion.

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

CHAIRMAN: Based on the evidence?

MS. DIXON: Based upon the evidence.

CHAIRMAN: Is there a second to this motion?

MR. DYSINGER: I'll second it.

MR. PEDLEY: Excuse me. Just a second.

His determination being correct or incorrect?

MS. DIXON: Incorrect. Supporting the appeal.

CHAIRMAN: Which means that grandfathered
in is incorrect.

Any other discussion?

(NO RESPONSE)

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

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

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

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

CHAIRMAN: All in favor raise your right hand.

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

CHAIRMAN: All opposed.

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

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

Any other business?
MR. KAMUF: What was the vote.

CHAIRMAN: The vote was six to one.

Any other business coming before the meeting?

MS. DIXON: Move to adjourn.

CHAIRMAN: Motion been made to adjourn.

MR. MILLER: Second.

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

(ALL BOARD MEMBERS PRESENT RESPONDED AYE.)

CHAIRMAN: We are adjourned.

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STATE OF KENTUCKY

COUNTY OF DAVIESS

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

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

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

COMMISSION EXPIRES:
DECEMBER 19, 2006

COUNTY OF RESIDENCE:
DAVIESS COUNTY, KENTUCKY