VILLAGE OF GOSHEN, NEW YORK:

ZONING BOARD OF APPEALS

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In The Matter Of:

JEFFREY SHERWIN, Applicant

To Consider an Appeal from the

Village Building Inspector's Determination

Affecting Premises Section 104, Block 1, Lot 2.

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October 17, 2013

276 Main Street

Goshen, New York

7:30 p.m.

BEFORE:

WAYNE STAHLMANN, Chairman

NEIL FRISHBERG

JOHN STROBL

GAR CLARK

STEPHEN J. GABA, ESQ.

ALSO PRESENT:

JAMES G. SWEENEY, ESQ.

JEFFREY D. SHERWIN, ESQ.

GREGORY G. HOOVER, ESQ.

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- PROCEEDINGS -

MR. STAHLMANN: Welcome everybody. We have one matter on the agenda tonight. As you can see, we have a stenographer here tonight, so, what I am going to ask for everybody's cooperation on is when you stand up to make a comment tell us who you are, tell us what your address is so we know where you live and if the stenographer waves to me I am going to say slow down so we can make sure we get everything properly on the record.

So, on the agenda is Applicant, Jeffrey Sherwin, who requested an annulment of the building inspector's issuance of a building permit to allow for the construction of a single-family dwelling at premises located at 14 McNally Street on the grounds that the said permit allegedly violates Village Law 7-736. Premise affected - 14 McNally Street, Goshen, New York. Applicant has the floor.

MR. SWEENEY: Thank you. For the record, my name is James Sweeney. I am an attorney here in Goshen. I am here on behalf of the Applicant, really the Appellant in this matter, Jeffrey Sherwin, but I want to let the Board know that I really represent all of the folks along Murray Avenue and Jeff happened to be the name that signed

- PROCEEDINGS -

the appeal and it precedes in his name but all of the folks on Murray Avenue and that area are my clients. And in the receipts of mailing - there were thirteen mailings made, thirteen green cards received back, so, we have 100 percent in that respect.

Let me next hand up some exhibits that I will refer to from time to time and I guess I will hand them to the Chairman. The first one is the decision of the Supreme Court back in 2000 that leads us to tonight's in decision of Judge Lang in the matter of Cohen against the Village of Goshen and I have labeled that as Appellant's Exhibit 1. The second document I am handing to the Chairman is the Deed from the Board of Education to the Village of Goshen for the strip of land that is the subject matter of tonight's proceedings and it is a Deed dated May 20th, 1970 and I have labeled that as Appellant's Exhibit No. 2. And the third document I am going to be handing up and referring to is a Deed from Tradewind Builders & Developers Inc. to C.H. Development Inc. for the parcel of land which is the subject of tonight's proceedings as well and I have labeled that as Appellant's Exhibit 3.

- PROCEEDINGS -

The third document I will be handing in is a reduced version of the site plan and survey that supports the building permit that is the subject of tonight's proceedings with certain color coding that will help you identify what this really says. The parcel that is outlined in yellow is the C.H. Development Inc. Parcel, the parcel that is outlined in black is the Village of Goshen's parcel and the strip labeled in red is the McNally or the so-called McNally Street, right-of-way or bed of the so-called McNally Street. I have also added one other item onto this which is the approximate location of the "Do Not Enter" sign at the intersection of the school parking lot and McNally Street - as they say so-called McNally Street. So, I will hand that in and I labeled that as Exhibit 4, we will be talking about that from time to time.

I think the best thing to do and start is to tell you how we got here. First, let's go back to 2000 and the document that I've handed up is the Exhibit No. 1 and that is a decision from the Supreme Court that annulled the Village Board's decision of a year or two before that which declared McNally Street or New McNally Street a

- PROCEEDINGS -

village street and a one-way village street by the way, a one-way inbound village street they had declared that, and Judge Lang of the Supreme Court after hearing arguments and considering a great deal of evidence decided that the Village had not gone through the proper procedures to affect a village street, it had not adopted a resolution and held a public hearing and received public input on the matter of whether the strip in question - which I call New McNally Street - was laid out as a village street in accordance with the dictates of the New York State Village Law and the matter was decided at that point and it came to rest at that point. There was an appeal taken but it was not, as we say, perfected and it died out, so, Judge Lang's decision stood and it stood for ten years.

Then it was brought to my attention through Mr. Sherwin that the Building Inspector, Ted, had issued a building permit for the lot in question and that's the lot that is outlined in yellow on that diagram that I handed you, the C.H. Development lot had issued a building permit for one home on that lot with access onto the New McNally Street. I contacted the Building

1 - PROCEEDINGS -

2 Inspector, both verbally and by letter, indicated
3 to him I didn't think that was a proper building
4 permit because of Judge Lang's earlier decision
5 declaring McNally Street not to be a village street
6 and as you may assume or I presume or know, no
7 building permit can be issued for any structure,
8 home or commercial structure, unless the lot has
9 frontage on either a municipally maintained street
10 - a village street in this case - or a street that
11 appears on a filed map that has been improved to
12 Village standards. I said to Ted Lewis that that's
13 not the case here, neither situation is the case
14 because of the strip of land we are talking about
15 has been declared not to be a village street. I
16 asked him to rescind the building permit, Ted did
17 not do that, so, I was forced to take this appeal
18 to you before I proceeded anywhere towards the
19 Court, required by certain rules and regulations to
20 proceed through your Board before there's any
21 litigation and that's a good rule, clears away an
22 awful lot of things and avoids litigation.
23 So, that's what happened. I took the appeal
24 to this Board and I based it basically on just what
25 I said - it is not a village street. You can't

1 - PROCEEDINGS -

2 issue a building permit and it does not support a
3 building permit. Then we got to the point where
4 the Building Inspector issued a letter explaining
5 himself in further detail and that's the letter of
6 October 2nd - that is somewhere in your materials -
7 and Ted Lewis took a different approach, or I
8 should say an alternative approach to why he
9 thought the New McNally Street supported the
10 building permit that he had issued and he referred
11 to and relied upon a section of the Village Law
12 known as Streets by Prescription, it is Village Law
13 6-626 and it is a very short statute and it is one
14 that has been around forever. I might as well read
15 it to you, it is only about fifty words and is easy
16 enough to read. It says, "All lands within the
17 Village which have been used by the public as a
18 street for ten years or more continuously shall be
19 a street with the same force and effect as if it
20 had been duly laid out and recorded as such." The
21 Building Inspector took the position that since
22 Judge Lang's decision in 2000 the Village forces
23 had maintained McNally Street, New McNally Street,
24 and had actually improved it and put a sidewalk
25 there, had paved it from time to time, snowplowed

it, so forth and so on, and he felt at that point it had - and had done so for ten years since Judge Lang's decision - he felt in view of that the street had automatically become a village street and there was no need to precede back to the process of having a resolution subject to public hearing and public input, that it was automatically a village street and supported the issuance of the building permit.

Well, that is how we got here tonight. I issued to you - and I don't know if you had the time to read it - a rather comprehensive position statement dated October 16th which outlines the positions that I am going to try to articulate to you tonight in a very simple fashion. I think the Building Inspector it wrong for several reasons.

First of all, and most important, streets by prescription refers to an old ancient rule, one that stems back to Roman Law and it has to do with the use of another's property in a way that is adverse or hostile to that owner's ownership rights. If you use somebody's property for a long period of time, whatever the law prescribes - and here it is ten years - and there is no objection

1 - PROCEEDINGS -
2 from the real owner, the law sets up an automatic
3 defense to any claim that you still own it. In
4 fact, the person who has been using it owns it and
5 has the rights to continue to use it as if he owned
6 it. As I said, that goes back to Roman law, it is
7 an ancient idea and has a lot to do with adverse
8 possession over Squatters Rights - as lots of
9 people call it - and the prescription is ten years.
10 It is prescribed, that is where the word comes
11 from, scribed, scribed in the law, ten years, you
12 do it for ten years continually the property is
13 effectively yours because that law sets up a
14 defense, nobody can say otherwise.
15 So, seems simple enough, but the law hasn't
16 imbued in it two very important characteristics
17 that are not in the naked language of the Statute I
18 just read to you. First, one of them is very
19 obvious - you cannot gain an adverse right over a
20 piece of property you own. There's no such thing
21 as a hostility against yourself. If you own the
22 property you can use it any way you want, you have
23 to use it according to all zoning laws and things
24 of that nature but it is your property and you
25 can't act hostile to your own interests. So, there

1 - PROCEEDINGS -
2 is no sense of adversity, no sense of hostility
3 when the claim is 'I've used it for ten years;
4 therefore, I have a prescriptive right', it just
5 does not make sense, it is an oxymoron, it does not
6 fit.
7 The second part of the rule is more important
8 I think. It requires when we are talking about
9 streets, not just somebody taking adverse
10 possession of another person's property, but
11 streets and ways and public means of
12 transportation. It requires a continuous use by
13 the public, by the public at large, and that means
14 more than the use by abutting owners, and as you
15 know this street, McNally Street, New McNally
16 Street, is used by the school district who is an
17 abutting owner, it is used by their staff, their
18 teachers, their students, so forth and so on. It
19 is also used by one owner who has a driveway - I
20 think the name is Farley - has a driveway in the
21 front-end of it. They are abutting owners.
22 MR. STAHLMANN: Can I interrupt you for a
23 second?
24 MR. SWEENEY: You may.
25 MR. STAHLMANN: When I coach Little League at

- PROCEEDINGS -

6:00 at night and I have practice behind GIS, how do I get there? I go up McNally Street. I am a member of the general public. At the time I didn't have any kids in GIS, I am not staff, I am not an employee of the system but I use that street regularly.

MR. SWEENEY: You are the general public?

MR. STAHLMANN: Yeah.

MR. SWEENEY: Well, here's the rule as it is explained, and I will read from a case that I think is a pretty good case and it is a case that really decided to stay in Maine but it is the same rule in New York and it is a good one - "Evidence of the use of the road by abutting land owners is insufficient to establish the existence of a public prescriptive easement because their travel does not constitute use by the people who are not separate from the public generally." What I am trying to say by that is the public does not have the right to move through that street and go through the parking lot of the school, they have no right to do that. They may do it but they have no right.

MR. STAHLMANN: So, am I trespassing when I do that?

- PROCEEDINGS -

MR. SWEENEY: I think you are but I am not going to go any further than that.

MR. STAHLMANN: On a Saturday afternoon when I pass through the school?

MR. SWEENEY: I think you are unless you have the right to cross over.

MR. STAHLMANN: Is the owner of the property who has the driveway on McNally - to my recollection has been there while I was on this Board thirteen years ago the first time we heard this and that driveway was there - is that person trespassing every morning when they go to work?

MR. SWEENEY: No.

MR. STAHLMANN: Why?

MR. SWEENEY: He is an abutting owner that has the right to use it but he's not the general public or the public at large.

MR. STAHLMANN: Well, if he is an abutting owner with the right to use it why is not this gentleman an abutting owner with the right to use the street?

MR. SWEENEY: He is, but that does not make it a public way, and I will get to the road he's not an abutting owner, that is a different issue. He's

1 - PROCEEDINGS -

2 not the general public, he's not the public at
3 large, he's not the whole public, he's not
4 indistinguishable from everyone else. That's the
5 test that anybody and everybody can role through
6 that street, but they can't.
7 MR. FRISHBERG: I am sorry - I have a case
8 that I was looking up it is by the Court of Appeals
9 maybe your research found it and it is called
10 Marchand vs. New York State Department of
11 Environmental Conservation, it was an action
12 entitled from 2012 which is relatively recent and
13 it quotes exactly what you said in 6-626, "All
14 lands within the Village which have been used by
15 the public as a street for ten years or more
16 continuously shall be a street with the same force
17 and effect as if it had been duly laid out and
18 recorded as such." This happened to be an exert by
19 title and it happened that the Court determined
20 this particular street was not a public place but
21 in doing that it sort of expels the rule from what
22 I can tell and they said that, from what I can
23 tell, is that there's two things that have to take
24 place - First, the Village has to maintain the
25 street; and two, it has to be used by the public.

1 - PROCEEDINGS -

2 So, it does not talk about adverse possession
3 per se. I mean, yes, it mentions prescriptive
4 easement but I am aware a prescriptive easement you
5 have to have an adverse possession. It seems to me
6 your argument that it cannot be a prescriptive
7 easement for the possession because the use isn't
8 adverse, it is not supported by the statute or by
9 the case, so, I am just baffled as to why, and then
10 you say it is true with Maine but this Court of
11 Appeals case seems to go against you.

12 MR. SWEENEY: I have cited some law in my rule
13 and in my position statement that says just what
14 I've said and it just does not make sense, you
15 can't have hostility against yourself.

16 MR. FRISHBERG: You are right, but it says
17 here, "As the Village acknowledges, the public use
18 in that sense is not enough to satisfy the statute.
19 We held more than a century ago, interpreting
20 similar language in an earlier statute: 'The road
21 must not only be traveled upon, but it must be kept
22 in repair or taken in charge and adopted by the
23 public authorities.'" Cited: Speir vs. Town of
24 Utrecht, which is a 1890 case.

25 MR. SWEENEY: I don't have any problem with

1 - PROCEEDINGS -

2 that, Neil. Of course, that is part of the process
3 of prescription, the municipality has to exercise
4 dominion over the strip of land and that's what
5 that case is talking about. But it also has to
6 have a sense of hostility when you are talking
7 about prescriptive use. The statute says streets
8 by prescription, it does not say streets by
9 continuous use, it says streets by prescription.
10 What does prescription mean? Prescription means
11 adverse and hostile use for ten years.
12 MR. FRISHBERG: But the narrative of statutory
13 prescription, shouldn't you have to read something
14 into the statute based upon the title?
15 MR. SWEENEY: No, I think you have to read the
16 case as interpreted.
17 MR. FRISHBERG: Well, I only have one, one
18 Court of Appeals case.
19 MR. SWEENEY: So, what I am telling you is
20 that there is two prongs to the Building
21 Inspector's theory of statutory prescription. The
22 first is - there's no hostility, the Village owns
23 it, can't be hostile to its own ownership; the
24 second is - there's not a use by the whole public,
25 not just a few members of the public and not just

- PROCEEDINGS -

abutting owners. Those two aspects have not been met, so, the Building Inspector's theory fails on that basis.

Now, there is another basis that is important and this I ask you to take a look at that diagram that I gave to you and maybe Ted has a full scale, I don't have a full scale of the piece that came with the building permit application. Do you have that with you?

MR. STAHLMANN: And if there's anyone out there that wants to see this I am going to put this out for you so you can follow along with us.

MR. SWEENEY: You will see -- and I have to come up here and point it out -- you will see on the diagram and the diagram that's being circulated is the C.H. Development property. It comes here, comes here, comes here, comes here and runs back along my client's property's backyard (indicating). You will see there is no actual frontage of the C.H. Development property upon McNally or New McNally Street. At this point in the northwest it is about a 40 foot separation gore - as we call it. At this point in the southeast it is about a 15 foot separation (indicating).

- PROCEEDINGS -

Now, the section of law that requires a street to support the issuance of a building permit requires that the parcel in question have actual frontage on the street, actual frontage, and the case law is pretty strong on that and easement from the property in question to the street will not do. I've cited case law in my position paper for you in that respect. It has to have actual frontage. Now, this parcel does not have actual frontage. It is seperated in one point by at least 40 feet and in another place by 15 feet and even if the Village granted permission to cross that, it does not work. The landowner has to have what we call fee title, actual ownership of the frontage parcel.

MR. FRISHBERG: He has to purchase that from the Village?

MR. SWEENEY: Yes, he has to acquire that somehow. So, this has nothing to do with the prescriptive easement, this has to do with the issuance of building permits.

MR. STAHLMANN: Can I ask you a question?

MR. SWEENEY: Yes, you may.

MR. STAHLMANN: When we own property, all of us here in the Village, we don't necessarily own to

1 - PROCEEDINGS -

2 the asphalt line, we own to a line that normally
3 towns reserve to themselves either if they want to
4 put in sidewalks or there's other things they want
5 to do. So, an asphalt may be 50 feet wide but the
6 right-of-way may be 70 or 80 feet wide and that's
7 how we get from our driveway to the street and when
8 we get from our driveway to the street we are
9 passing over Village property every morning.
10 MR. SWEENEY: That is generally true in your
11 property fronts on the right-of-way. In this case
12 this is Mr. Lewis' argue is a street by user. When
13 a street is acquired by a village or any
14 municipality by user it is acquired only up to the
15 extent that it is used. It is not acquired outside
16 of that user strip, that user strip is about 28
17 feet wide and that's the extent. If there is a
18 village street that's the extent of the village
19 street, 28 feet, it still leaves a gore there.
20 This is not the right-of-way on a subdivision map
21 or dedicated parcel and so forth where you have 50
22 feet then gutters or interior lines of 20 or so
23 feet and then you have the paved street itself, the
24 paved travel way. This is a street - if Ted is
25 correct - a street by use, and the use only extends

1 - PROCEEDINGS -
2 to what is the actual traveled way, and that's
3 about 28 feet here.
4 MR. GABA: I am sorry - I am looking at my
5 copy, where did the 15 feet from the pavement
6 figure come from?
7 MR. SWEENEY: The scale is about 15 feet.
8 MR. GABA: How did you come to scale that at
9 about 15 feet?
10 MR. SWEENEY: Can you get a scale?
11 MR. FRISHBERG: Can I ask you does it matter
12 how many feet, if it is 15 feet or 50 feet?
13 MR. GABA: It matters to this extent. The
14 road by user extends not only to the paved or
15 improved portion of the roadway but also to the
16 traveled way so to speak. The traveled way extends
17 any and includes anything that is necessary for
18 maintenance of the roadway, it can include
19 shoulders, it can include drainage ditches, it runs
20 on the nature of the roadway. So, to say that
21 McNally Street is just a paved way I don't think is
22 correct at all, but 15 feet then it might be -- you
23 know, you would have to look into what's actually
24 on that land and decide what is included within --
25 purported in any way by the user.

- PROCEEDINGS -

MR. SWEENEY: Ted, what is that scale at?

MR. LEWIS: Ten.

MR. SWEENEY: Ten feet, okay. So, there is that separation. I disagree with Steve Gaba. When a street is taken by use it is taken only as to its traveled way and there's a Court of Appeals case on that and I believe I cited that in my materials as well. If it is taken by dedication that is a whole different story, then you have sidewalks and strips and things of that nature that are usually accessory of the streets, but that is not the case here if Ted Lewis' theory is correct.

MR. FRISHBERG: So, the only portion of the street that can be taken by use is the concrete portion?

MR. SWEENEY: That's correct.

MR. FRISHBERG: Because that is the only thing, under your theory, that anybody can possibly go up and down, they are not going to go on the dirt part and the Village is not maintaining the dirt part?

MR. SWEENEY: That's correct. There are curbs on the street which help define that user way, that's very well defined with the curbs.

- PROCEEDINGS -

So, that is another reason that I feel the issuance of the building permit fails, those are the three legal reasons that I think the building permit fails. Then there are policy issues that are at stake which I tried to outline in my position paper.

The first is that the street has historically been a one-way street in. If this house is built how in God's name are the people going to get out to Murray Avenue if it is a one-way street in?

MR. STAHLMANN: How does the neighbor in the other street do it because the neighbor across the street has been doing it for sixteen years.

MR. STROBL: There's an arrow right down in the middle of the street, I went up there today. When I went up to McNally Street there's an arrow right in the middle of the street when I made a left-hand turn onto right where the new house is supposed to go, yellow line right in the middle of the road.

MR. SWEENEY: If you get into the parking lot you see "Do Not Enter" which validates what I tried to point out in my position paper that historically that whole street has been an inbound street.

- PROCEEDINGS -

MR. STAHLMANN: The "Do Not Enter" sign is in the parking lot of the school.

MR. SWEENEY: Yeah, for the street.

MR. STAHLMANN: I understand that. Do the people who live across the street and their only access is what you call New McNally Street, do they make a left turn and go out of their house in the morning or do they "trespass" through the school every day?

MR. SWEENEY: The only answer that could be for this proposed house if that's a one-way street - and a one-way street by use - is that they would have to make a left turn into the parking lot and they have no right to go across the parking lot.

MR. FRISHBERG: So then they are landlocked?

MR. STAHLMANN: So, they are landlocked too, should we shut them down?

MR. SWEENEY: I am talking about this proposed house, how do they get out if it is a one-way street?

MR. FRISHBERG: The Village is entitled to make it a two-way street, right?

MR. SWEENEY: They are. If they go through the process of declaring this a street after a

- PROCEEDINGS -

public hearing, yes, they can make it a two-way street.

MR. STROBL: What is the line in the middle of the road?

MR. SWEENEY: I have no idea where that came from.

MR. STROBL: It is on the map in 2012.

MR. SWEENEY: There's no record of that in Village records anywhere.

MR. STROBL: This is from November 20, 2012 and I went up there today and there's a line right in the middle of the road when you make the left-hand turn, yellow line going up that road.

MR. SWEENEY: Up to the driveway.

MR. STROBL: Right up that road when you make the left-hand turn.

MR. SWEENEY: Which seems to say that it is a two-way street up to the driveway instead of a one-way street after.

MR STROBL: I agree with you.

MR. SWEENEY: And there's not an inkling of anything in Village records that indicates that is a two-way street or half of the street or a quarter of the street or any of the street. All of the

- PROCEEDINGS -

Village records that I have been able to touch base on says it is a one-way street inbound.

MR. FRISHBERG: If a street is not labeled is it by default a two-way street?

MR. SWEENEY: I have no idea. It has been labeled, there was a one-way sign up on that street and that is gone now.

MR. FRISHBERG: I think that was a sign, I think, put up by the intermediate school, right?

MR. SWEENEY: No, I am not talking about that. There was a one-way street sign years ago at the intersection of Murray, one-way inbound street, it is gone, I don't know what happened to it.

MS. HOLLANDER: It disappeared in the middle of the night.

MR. SWEENEY: So, historically that has been a one-way street. That presents a problem for the new house because if it is a one-way street the only way he can get out is go across the parking lot and if he does not have rights - which he does not - how is he going to get to where he has to go? And the other bigger issue is if that street is declared to be open to the public in a public way that means anybody can use it, all of Harness

1 - PROCEEDINGS -

2 Estates can use it and come through and try to go
3 through north to Scotchtown. That can happen in
4 the middle of the day, it can happen at school bus
5 time, it can happen any time. That's confusion,
6 confusion at its worst.

7 MR. FRISHBERG: They would have to be going
8 through the middle school, wouldn't they?

9 MR. SWEENEY: Yeah, they would have to go
10 right through the middle of it through the parking
11 lot.

12 MR. STAHLMANN: First of all, there does not
13 seem to be anything to stop them now because you
14 have a person living on New McNally Street that
15 somehow is going to work every day and they are not
16 being ticketed for whatever it is they do.

17 MR. SWEENEY: That is not my responsibility
18 and it is not your responsibility either.

19 MR. STAHLMANN: I understand that, but all I
20 am trying to say is we already have a situation
21 where this street is being used and access is being
22 gained --

23 MR. SWEENEY: By one person, maybe illegally,
24 maybe.

25 MR. STAHLMANN: So, is it a burden on the

- PROCEEDINGS -

neighborhood if one other person uses the streets?

MR. SWEENEY: What about all of Harness Estates?

MR. STAHLMANN: I am not talking about anybody else.

MR. SWEENEY: But if it is a public street it would be.

MR. FRISHBERG: I don't understand.

MR. SWEENEY: If this is a public street anybody can use it.

MR. STAHLMANN: I would argue anybody uses it now.

MR. SWEENEY: You would be surprised to find anybody except the individual person, the Farley person and the school people and maybe you.

MR. STAHLMANN: And maybe me, okay.

MR. SWEENEY: If it becomes a public street it is truly open to the general public and anyone and everyone from everywhere, be at Harness Estates, be at Goshen, be at Monroe or be at Pennsylvania can use it. I don't think that's a good idea, that's a policy issue and I think that is something you should take into consideration. Let me sum up, I've been up here a long time.

- PROCEEDINGS -

If Mr. Noscowski wants to use this street as a support for this building permit he should do what the law says, go to the Village Board, come to this room before the Village Board and say 'make this a village street', and that is a deliberative political process. That involves the people who live along the street, the people in the village, and the Village Board will listen as to whether it should be a village street or whether it shouldn't be a village street and take into consideration all of those policy issues I just talked about and if the Village Board after that public hearing says it is a village street then there is -- if he can get title to the intervening area he can build his house, but short of that he can't and should not and I am telling you that that is the process and this building permit really should be vacated. Thank you.

MR. STAHLMANN: Thank you very much. Thank you, sir. Do I have anyone for C.H. here?

MR. HOOVER: My name is Gregory Hoover, I am an attorney and I represent C.H. and John Noscowski. I live in Warwick and I have used McNally Street a hundred times. I go to the

- PROCEEDINGS -

courthouse here all the time, I know people up there. Sometimes I go out McNally because there's too much traffic coming up Murray. I haven't heard anything tonight about anybody doing any kind of study as to who uses McNally Street, there's just a bold assertion that the only people who use it are those going to the school. So, whether there is public use or not, I don't know. I know I use it, you use it, I know a lot of people who use it. So, I don't know, until there's a study done if we can actually say whether it is just the abutting landowners that use it.

There is a double yellow line up McNally Street. There are no one-way signs anywhere. If there was a sign there I don't know anything about it and I have no idea how long ago it disappeared but it has never been replaced and if there was one sign there how does that tell anybody up the road that it is a one-way. There should've been at least four signs, two at each end, there shouldn't be a double yellow line there, this road is used going both ways by a lot of people.

I would like to back up to the decision of the Court back in 2000. Mr. Sweeney would have you

1 - PROCEEDINGS -

2 believe for some reason that the Court said McNally
3 Street is not a road, is not a public street, is
4 not a village street. The Court was never asked to
5 address that question. The only thing the Court
6 was asked to address back in 2000 was did the
7 Village Board do the proper thing when they brought
8 this before the Board and declared it a village
9 street, they said that procedure was wrong.
10 McNally Street had been used for fifteen years
11 before that at least and has been used not for ten
12 years since, but for thirteen.
13 The Court was never asked to decide is McNally
14 Street a street, it was only asked to describe did
15 the Village do the right thing at that time, and
16 they said, no, they didn't. That left open the
17 question whether or not McNally Street was a
18 street. It could've acquired the use by
19 prescription for the fifteen years prior to that
20 lawsuit ever being brought and for the thirteen
21 since but it was never asked that question. So, I
22 don't know why anybody was saying that the Court
23 decided McNally Street is not a street.
24 MR. FRISHBERG: You don't think that decision
25 is binding on us though?

1 - PROCEEDINGS -

2 MR. HOOVER: No, I don't at all. It is
3 binding on you for the fact that the decision that
4 the Village Board made is now a void, but that's
5 not binding on the question as to whether or not
6 McNally Street is a street because they were never
7 asked to address that question. Whoever brought
8 the lawsuit never thought that that was a question
9 the Court should answer.

10 MR. FRISHBERG: The implication is if they
11 determined that the village didn't follow the
12 correct process to make it a street, by implication
13 it is not a street?

14 MR. HOOVER: No, by implication it is not a
15 street because of that reason. It could still be a
16 street because of the public use but they were
17 never asked the question is it a street or not for
18 any reason.

19 MR. FRISHBERG: But couldn't they have?

20 MR. HOOVER: The attorney that brought the
21 lawsuit certainly could've.

22 MR. FRISHBERG: The reason I ask that because
23 is the Village now collaterally estopped for making
24 that argument since they could've made it then, if
25 what you say is true?

1 - PROCEEDINGS -

2 MR. HOOVER: Are they collaterally estopped

3 for making what argument?

4 MR. FRISHBERG: They missed their opportunity

5 to make that argument before Judge Lang and they

6 didn't make that argument.

7 MR. HOOVER: They were responding to a

8 lawsuit. The only question being brought up in

9 that lawsuit was were the procedures correctly

10 followed, they responded to that. The question was

11 never presented to them or to the court - is

12 McNally Street a street.

13 MR. FRISHBERG: All right.

14 MR. HOOVER: The only question presented was

15 was the procedure properly followed, and they

16 decided, no, it wasn't. That does not make McNally

17 Street not a street, it just means it was not a

18 street for that treason, it could've been a street

19 for any other reason.

20 MR. FRISHBERG: Since we are talking about

21 prescriptive easement can you address Mr. Sweeney's

22 argument that you can't have a prescriptive

23 easement unless the use of adversity, owner of the

24 adversive argument that he has made.

25 MR. HOOVER: I don't believe the statute talks

1 - PROCEEDINGS -

2 in those terms. The statute says if it has been
3 used as a street by the public for more than ten
4 years it is a street. He's bringing in that it
5 must comply with prescriptive easement to do that.
6 The statute does not say that, the statute does not
7 talk about adverse possession which can't be
8 adverse to yourself, it only says if there's a
9 street that has been used as a street for ten years
10 it is a street.

11 MR. FRISHBERG: So then we should ignore the
12 title streets by prescription?

13 MR. HOOVER: Certainly. The title is not in
14 the statute.

15 MR. STROBL: I have a question on this.
16 Everyone is talking McNally Street all night, I
17 mean, what is everybody considering McNally Street,
18 where does it stop and start? Are we counting the
19 school parking lot? I want to see what the length
20 is of McNally Street we are talking, New McNally
21 Street. The parking lot, is that considered part
22 of McNally Street? Because I think it is confusing
23 to everybody, you know, what parts. I think
24 there's three parts there and --

25 MR. LEWIS: There are. For the record this is

- PROCEEDINGS -

Ted Lewis speaking. This is how this permit was issued and not a great scrutiny but as you can clearly see this line right here clearly shows the Village of Goshen, this line right here shows where the school starts, Goshen Central School District, so, McNally Street would end right here and the school property would take off. This clearly shows it (indicating).

MR. STAHLMANN: For the record, he's pointing at a map and he's showing us where the Village line is on the map.

MR. STROBL: So, we are considering, the Board, going through there, going through this parking lot and school to this corner is what we are considering McNally Street as we all agreed on (indicating)? And then apart from that turn is what we are considering some people call New McNally Street, basically the curb part that we are saying coming off of, you know, making the left-hand turn up on in? We are not arguing that the school parking lot is a road? Because I look at that --

MR. STAHLMANN: No, we are just looking at Murray Street to the edge of the border of that

- PROCEEDINGS -

property line I think is what it is. Is that a fair statement?

MR. HOOVER: It is a fair statement but then if you name McNally Street a street and people drive up there where do they go when they get to that property line? They continue right on through. It is delineated as a through area of the lot right there, parking to the left, parking to the right and people drive through. I would think that what you would do is put up a 10 mile an hour sign to go through that part of the property. It is not private property anymore. Under the Vehicle and Traffic Law any parking lot that holds more than five cars is a public road. You can be arrested for DWI, be arrested for speeding, failure to stop at a stop sign. Those are all public roads once they have more than five cars there. Sure, the school owned it, but it is deemed public because it has more space for more than five cars.

So, certainly people are going to drive through there, people have been driving through there for 25 years, 28 years, and they are going to continue. That's neither here nor there as far as whether McNally Street is a street or not, not

- PROCEEDINGS -

whether it should be, whether it is.

MR. STROBL: Yeah, that's what I am asking.

MR. HOOVER: That's right. I think it is. If they have been used for 28 years as a street, it is a street. Mr. Sweeney talks about a gore. Again, I bought my property a long time ago, I own out to the middle of the road, it does not happen anymore. Today you own up to the edge of the road. The edge of the road according to this map isn't delineated. What is shown on here is the edge of the pavement, it does not mean that is the edge of the roadway. This is just a survey done showing what's there, nobody who did this survey researched where the property line is for that road.

MR. FRISHBERG: I understand with his argument that when you acquire a property by use you can only acquire that portion that you had maintained and the Village did not maintain that property.

MR. HOOVER: That's nonsensical. If it is a used road, it is a used road and a road that encompasses a meaning and that meaning includes some place for people to walk, it includes some place for drainage ditches to be. I mean, it is nonsensical to think that any road no matter how it

1 - PROCEEDINGS -

2 becomes a road is merely limited from the edge of
3 pavement to the edge of pavement. It does not make
4 sense. If this is a road it is a road same as all
5 other roads and I think you have to use the plain
6 language and the plain meaning of the word road to
7 describe this. I think Mr. Sweeny is really trying
8 to narrow it down to something that cannot really
9 be narrowed.

10 MR. FRISHBERG: Do you know if this statute -
11 and I was flipping through the notes I haven't seen
12 anything - is viewed broadly, narrowly, some other
13 way?

14 MR. HOOVER: No, I don't know and I am not
15 going to say --

16 MR. FRISHBERG: I don't know the answer either
17 I am trying to figure it out.

18 MR. HOOVER: I don't know much more than you
19 do.

20 MR. STAHLMANN: Can I ask you this question?
21 One of the things you are asking us to consider is
22 that through the use over the years this has become
23 a road. So, what do we have in the testimony
24 regarding maintenance, snow plowing, paving, are
25 there those things that have happened on the street

- PROCEEDINGS -

through the years?

MR. HOOVER: Absolutely. If you just take a look at the road it has been there how long? It has been there for 25 years. It sure looks a hell of a lot better than Sleepy Valley Road that I live on. Somebody has been maintaining it, the Village says they have. They've been plowing it, the double yellow line in the middle that's fairly new, that's not warn and those buses quite a few of them go up and down there every day and I am fairly certain they don't maintain a distance from that line.

MR. FRISHBERG: So, for us to decide - I guess in your client's favor - do we need to hear sworn testimony as to who is maintaining it and what they are doing and who has been using it?

MR. HOOVER: I would think so. But who has been using it, how are we going to determine that? I don't think the burden is on us to prove that, I think the burden is on the objectives to prove that nobody is using it but the abutting landowners which they assert, and I don't think that is anywheres near true.

MR. FRISHBERG: So, your claim is the burden

- PROCEEDINGS -

isn't on your client to say that the Village has been maintaining it and other people have been using it, it is theirs to show the negative?

MR. HOOVER: They are claiming that nobody but the school uses it, let them prove it.

MR. FRISHBERG: Right. They are showing negative?

MR. HOOVER: I don't see that, I don't see that at all. I started using that street -- my grandson is 17, I guess he was in the intermediate school eight years ago, I think that was the first time I discovered McNally Street. Well, once discovered I used it a number of times since and he's now in Washingtonville. So, certainly I am not a permissive user of that street, I use it because I am part of the public and it is a street. There's no sign anywhere where it says it is not. Why would anybody wind up at that intersection feel obligated to not go up that road?

MR. FRISHBERG: Who paved that road, who put the tar down?

MR. HOOVER: I have been told the Village did.

MR. FRISHBERG: Can you confirm that?

MR. GABA: I believe Steve did in his research

- PROCEEDINGS -

in the Department of Transportation in the highlighted part in the DPW, it is right in the Building Inspector's decision.

MR. FRISHBERG: So, the Village created that street by putting tar down. Who snowplows it, the Village?

MR. HOOVER: The Village does.

Now, as far as the argument about Harness Estates, if you are going to come out of Harness Estates and come straight down Murray to Scotchtown it makes a lot more sense than to even think of making a right and going up that hill and through the parking lot and then where do you wind up, you wind up on another street with a number of stop signs to get to Scotchtown.

MR. FRISHBERG: Do we need a traffic study before we can make a decision?

MR. HOOVER: No. Why? I mean, we are not proposing that we are doing something against the flow of traffic, they are. They are proposing that we are doing something that nobody else does, only the school and its parents and teachers and invitees use that road. I think that's nonsense. Anything else?

1 - PROCEEDINGS -

2 MR. STAHLMANN: No, sir.

3 MR. HOOVER: Thank you.

4 MR. SWEENEY: Can I have one minute quickly?
5 The law is clear that the burden of proving who
6 uses the street and proving that it has been used
7 for ten years or more by general public is on the
8 one who wants it to be and that would be Mr.
9 Noscowski, not us.

10 MR. FRISHBERG: What would they need to do?

11 MR. SWEENEY: I belive there has to be some
12 testimony from some first-hand person that it has
13 been used by the general public.

14 MR. FRISHBERG: So, Mike Nuzzolese should get
15 here and testify? I mean, the affidavits -- I am
16 looking at a case -- actually this Marchand vs. New
17 York State it says affidavits --

18 MR. SWEENEY: There's no affidavits here.

19 MR. STROBL: Isn't it a school for the general
20 public? I mean, the general public pays school
21 taxes. I mean, we are sending kids to school,
22 isn't that a general public school?

23 MR. SWEENEY: School buses use that road, you
24 never seen a school bus use a private drive for a
25 private road?

- PROCEEDINGS -

MR. STAHLMANN: The point is that the record should have something in it that gives us a basis, a basis for saying that, in deed, there's been maintenance here, there's been paving here, someone has been painting lines in the road, who did these things. I understand what you are saying.

MR. FRISHBERG: And I think we were entitled to accept hearsay on that issue but we should have something.

MR. SWEENEY: The law is clear and I don't want to repeat myself but the law is very clear. When a street is taken by use it is taken from curb to curb or inch to pavement and inch to pavement, there's nothing else outside.

MR. GABA: I disagree very strongly with Mr. Sweeney on that. It is the first time we ever did disagree, Jim. But what I was going to say is that Mr. Sweeney is correct if the road was being taken by user and this was a court proceeding where municipality was asserting that for this instance then certainly the burden of proof would be on the municipality, that's not the case here. What you have here is an appeal of the determination by the Building Inspector. The Building Inspector has

- PROCEEDINGS -

investigated the fact and made the determination, now the person challenging that determination has to carry the burden of proof to determine that his decision was irrational, arbitrary and capricious and otherwise should be set aside.

MR. FRISHBERG: We went through this process in an earlier decision with the building permit that was issued regarding Delanceys and I thought the law was we get to stand in the shoes of the Building Inspector and make that decision as though we were standing in his shoes.

MR. GABA: I have not seen any cases --

MR. FRISHBERG: That's what I understood the law to be, it is almost like a de novo decision that it is not whether we act arbitrary and capricious, it is whether if we were the Building Inspector would we have made that same decision.

MR. SWEENEY: That is right in the text of the statute.

MR. STAHLMANN: Let me do this. We would like to hear from you, folks. Does anyone want to make a comment and want to have anything to say, anybody from the neighborhood?

MS. HOLLANDER: Lisa Hollander, 187 Murray

1 - PROCEEDINGS -

2 Avenue. I don't understand when our file was
3 tagged 'do not issue a building permit' why we were
4 not alerted beforehand and the building permit was
5 issued, the land behind our house was clear-cut,
6 there are no trees there, he cleared the property
7 right up to our property line. Mr. Noscowski took
8 wood chips and it was almost out of vindictiveness
9 maybe because he wasn't able to build ten years ago
10 and a pile of wood chips were put in our backyard
11 that were 12 feet high. I mean, a huge pile of
12 wood chips.

13 MR. STAHLMANN: When you say in your backyard
14 --

15 MS. HOLLANDER: In our property in our
16 backyard. So, what I don't understand is why the
17 building permit was even issued when our file was
18 tagged but our lawyer told us that don't worry,
19 they will not be building, that however the road
20 was determined or whatever the results were this
21 file was tagged 'do not issue a building permit.'
22 So, why Mr. Lewis went ahead and issued it is a
23 confusion to me that we were not alerted and the
24 adverse possession or whatever that was, it was
25 just kind of like we were plowed and he was allowed

1 - PROCEEDINGS -

2 to clear-cut the property without us being notified
3 to even object.
4 MR. FRISHBERG: So, the issue you are raising
5 is whether Mr. Lewis had an obligation to notify a
6 continuous property owner to issue a building
7 permit?
8 MS. HOLLANDER: He has an obligation when the
9 file -- I feel he has an obligation when the file
10 was tagged, that is what we were told. In 2001 the
11 file was tagged 'do not ever issue a building
12 permit on this property.' So, my feeling is as a
13 homeowner abutting this property - and we went
14 through this whole thing ten years ago - I felt
15 that if the file is tagged that way then why
16 weren't the homeowners of the abutting property
17 notified before the building permit was issued and
18 as a result of the building permit being issued we
19 now have a clear-cut piece of property behind our
20 house.
21 MR. FRISHBERG: I am going to ask Mr. Gaba -
22 did Ted have an obligation to notify the continuous
23 property owner?
24 MR. GABA: I don't think there was anything in
25 the code about issuing building permits and

- PROCEEDINGS -

notifying an abutting property owner.

MR. STAHLMANN: Lisa, do you mind if I ask you a question and believe me, I do it with the upmost respect. I think I am the only board member that was here thirteen years ago when we did this and I asked the question then and it is more philosophical - you have a two acre lot, it is bigger than anybody else's lot in the neighborhood and he's putting one house on it and that neighborhood has fought him vigorously now for fifteen years, so, as a fellow neighbor tell me, what's going on, what is the objection to him putting a house on the property because it has to be more than the legal technicalities that I am hearing. What does the neighborhood not want about a house on that property? Do you understand what I am saying? And if you don't feel comfortable answering I don't want to put you on the spot.

MS. HOLLANDER: I feel part of it is that he does not respect the other property owners. I believe it was you that asked him did you consider putting a road on the other side of the property and I believe Mr. Noscowski said no, and I believe you asked him would you consider having a meeting

- PROCEEDINGS -

with your neighbors and he said no and he clear-cut the property. As soon as he got his building permit he came in with backhoes, and also Mr. Noscowski parked a backhoe for the last month - this has been on a stay or whatever you call it - he parked a backhoe right abutting up our property. It is not nice, you don't make nice with your neighbors when you do things like this.

MR. STAHLMANN: I understand that. I guess what I am trying to ask is when we live in a village do we have the expectation that our neighbor will never develop the property next door to us? I live on Winston Drive and I am right across the street from all that vacant land that runs along North Church Street, do I have an expectation that no one will ever put a house there?

MR. SWEENEY: Can I answer that? The answer is, no, you don't have expectation at all but you do have an expectation that the person who owns the property is going to follow the law.

MR. STAHLMANN: Okay. Thank you.

MR. SHERWIN: I am Jeffery Sherwin, I am the appellant. As you may know, Mike Donnelly

1 - PROCEEDINGS -

2 represented us thirteen years ago and I think you
3 looked at his petition following the Article 78
4 proceeding you will see that every one of these
5 arguments was made and decided and I think if the
6 Board reads it and your attorney reads it you will
7 see that basically after considering all of the
8 arguments the Supreme Court found that this is not
9 a public street and all of these arguments were
10 made. The questions were all asked, I think
11 there's five or six points in here and you can look
12 at the petition, you can look at the decision of
13 the Court.
14 I think there's two issues here. One is, you
15 know, you ask kind of a, I think, a personal issue
16 like what are we opposed to it and, yes --
17 MR. STAHLMANN: Again, I do it with respect,
18 I am not being a wise guy.
19 MR. SHERWIN: No, I understand that and I
20 don't think that has really anything to do with it
21 but I will answer it. I think we have been
22 involved in this since, I guess, 2001.
23 MR. STAHLMANN: I think it was earlier than
24 that.
25 MR. SHERWIN: Yeah, maybe, granted otherwise.

- PROCEEDINGS -

What I found is the following: Apparently Mr. Noscowski bought this property for $60,000 in 2001, the property was landlocked, he didn't use any due diligence to determine whether it was landlocked or not but that was the way it went and following that we had a number of board meetings which I attended and in my opinion every time an offer of conciliation was met through Mr. Noscowski, we would meet with the neighbors and talk with him if he would work out a buffer zone or anything like that and he declined. I think you asked that question yourself, I think the Planning Board Chairman asked him about it. Originally it was a five lot subdivision, then it was four and two and he's already told one of our neighbors that he intends to build a second house there if he can get this one through, so, I think that's what his intent is. So, there's a little more to the story each time but really he has not acted - and I hate to say it out loud - as a good neighbor. He went once the building permit was issued he came right through and took out every tree right into our backyard. You are welcome to come into our backyard, 187 Murray Avenue, you will see his

- PROCEEDINGS -

excavator sitting there, there was a second one sitting there a few days ago. You will see he's took down every possible tree, every live living thing down. You don't do that with neighbors, you don't treat neighbors like that. You would not be happy, you would not be happy, you would not be happy or you. So, there's been a total lack of respect for the neighbors in the community in my opinion and that's talking to you and has nothing to do with legal issues. A little more to it - he then took a huge pile of wood chips at least six feet high and deposited it on our property over the fence because Ted asked him to put up the silt fence and I called Ted and Ted said you mean it is on the downhill side of that fence, I said, yeah, it is on our property. He had to go out there and ask him to move it.

This is not the way you get cooperation from neighbors. So, there's two things here I would like to say. Number one, there are legal issues that I feel are determinative that demonstrate that the building permit was not properly issued, we are prepared to go forward with this and let the courts decide, if necessary. I think Jim Sweeney who is

- PROCEEDINGS -

very knowledgeable about this, I think Mike Donnelly who was very knowledgeable about this before us, each of them feel strongly that the building permit should not be issued, there's no legal basis that this is a public street. I think if you folks believe that the school property is a public street up there I think you are making a mistake. That's owned by the school street. The school does not want people driving through that property and you can talk to the superintendent, you can talk to the principal, I've done that. They do not want to give a license or an easement to drive through that property. The street has always been a one-way street, there was a one-way street sign when I moved there in 1983. It was there up, I would say, up until three or four years ago when during the night it disappeared, how it disappeared - I don't know.

These double yellow lines we are talking about they don't go too far, they kind of go up to where that driveway is for the far house.

MR. STAHLMANN: So, how does the neighbor go to work every day?

MR. SHERWIN: I have no idea, I have never

- PROCEEDINGS -

seen that neighbor leave. I honestly have no idea, you would have to ask Mr. Farley or Mrs. Farley, I don't know. But they don't go up to the area where Mr. Noscowski's intent of getting access, they don't go there.

MR. STAHLMANN: They go up and make a left and they go down to Murray Street.

MR. SHERWIN: Do they?

MR. STAHLMANN: Yes.

MR. SHERWIN: You know better than I do. I've never seen them leave that house and I've lived there since 1983. And if you look at the minutes - I think Mr. Sweeney submitted those of the Village Board from 2001 and I have a copy of them if you need a copy of them - Mal Stewart as trustee when he made the motion or the resolution to pass or declare the village street which was overturned by the Supreme Court. He said, I also want to reaffirm this is a one-way street going -- one-way street or one-way driveway going up to the school, so, it has always been that way. I think without the permission of the school to go through their property - which they don't want to do, they don't want to open up the flood gates to the public, the

- PROCEEDINGS -

Harness Estates and to other people. There really is no access to that property and I believe these arguments who have been made by Mr. Sweeney are valid and will stand up in the courts. Thank you.

MR. STAHLMANN: Gentleman in the back, tell us who you are?

MR. NOSCOWSKI: John Noscowski, I am the owner of the property in question.

First of all, the question on the gore area where they say I would need permission from the school, my deed gives me the right-of-way from Murray Avenue to the property, so, that permission is in the deeded land. Secondly, I didn't go on anybody's property. I kept my silt fence 25 feet off of the property, they are using lawn which is encroaching probably 15 to 20 feet on my property. I didn't clear-cut the trees to their property, I am off of their property. I've been keeping the site neat, I went there out of courtesy to the Building Inspector to move a pile of chips which was 30 feet off of the property line on my land.

Nobody ever approached me in the history of this property - and it is for sale, they could've bought it - about design, house location, I never

- PROCEEDINGS -

applied for a building permit, I never applied for five homes there. Previously in the '80s which Mr. Sherwin's office was representing somebody and in his paperwork which I have states that that's a street while he was trying to get a five lot subdivision for that previous person out of Mr. Sherwin's office. The two lot subdivision that I proposed, the driveways were on the school side of that property which I was in for a variance, not a building permit application.

MR. STAHLMANN: That is right, I remember that.

MR. NOSCOWSKI: So, there is a lot of mistruths stated against me here this evening and nobody has approached me ever and talked about this in a gentleman-like manner.

MR. STAHLMANN: I remember from our minutes way back when, John, something about there was an indication that the school was going to consider making you an offer? Just my recollection from thirteen years ago.

MR. NOSCOWSKI: Correct. And they went to vote and lost by three votes.

MR. STAHLMANN: So, you did have discussions

- PROCEEDINGS -

with the school?

MR. NOSCOWSKI: With the school and they were the only ones that ever had discussions with me on that property.

MR. LOBREGLIO: My name is Len LoBreglio and I live at 183 Murray. Since this whole hearing is about when the building permit was properly issued and a question was asked before whether the Building Inspector has to notify anybody about the building permit, I just want to take that one step back. If something is tagged 'do not issue a building permit', I know what that means to me but what does that mean legally in terms of issuing a building permit?

MR. STAHLMANN: I don't know. First of all, Ted, was there some indicator on the file?

MR. LEWIS: No. I issued it clearly on the survey that I showed you tonight. It was done by a professional land surveyor and it clearly shows the Village of Goshen owns the property which I issued that permit on. It is as simple as that.

MR. STAHLMANN: I've never seen something tagged.

MR. GABA: I've seen tags as reminders or

- PROCEEDINGS -

flags just to alert a Building Inspector but I am not aware of anything saying you can't issue a building permit for this property. It might be, you know, it has some easement over it or it got some issue as far as size or something like that that just wants to alert the Building Inspector to indicate when someone comes in or something like that but to not issue a building permit I have not heard of.

MR. STAHLMANN: I don't know if that answers your question or not but I am trying to get to the bottom of it.

MS. LOBREGLIO: I am Carole LoBreglio, 183 Murray Avenue. I am also an employee of Goshen Central School. Part of my responsibilities is to do bus duty and bus duty occurs from quarter to 3 to 3:15, basically that's when the buses are arriving. When school buses come up to this New McNally - what we call a driveway - they take up the entire width of this road. Sometimes those buses are sitting there waiting for other buses behind them, ten minutes, twelve minutes, fifteen minutes. I see this as a safety issue for the homeowner who might have a family, a brand new

- PROCEEDINGS -

baby, and need to get out of their driveway to get to the hospital. How is that person going to get out when the buses are lined twice a day for upwards of fifteen, twenty minutes in the beginning of school, at the end of school, sometimes dismissal takes forty minutes because children don't know how to get on buses and schedules are off. So, there was mention of a traffic study, as a taxpayer, as a mother, as a teacher, I highly recommend looking into that because it is not just about what the property owner wants to do, it is about our new neighbor and what their situation might be. Thank you very much.

MR. STAHLMANN: Have there been any incidents with the neighbor on the other side of the street that we know of?

MS. LOBREGLIO: I don't know.

MR. HOOVER: Just curious how an 8 foot bus can take up all of 28 feet of pavement. By law they are no more than 8 feet wide, that leaves 20 feet. If they are taking up the whole pavement then somebody is all over the road and does not know how to drive a bus.

MR. FRISHBERG: That road is 28 feet wide?

1 - PROCEEDINGS -

2 MR. HOOVER: That's what Mr. Sweeney says.

3 MR SWEENEY: One last comment. Mr. Noscowski
4 mentioned that his deed has some indication of some
5 type of right from his property to the road, it
6 does not. The deed is in front of you, it is
7 Exhibit No. 3. You will look at it rather
8 carefully and simply, it does not even mention a
9 road as a boundary, it is completely the void of
10 any mention of a right-of-way or a road.

11 MR. FRISHBERG: Is there a survey that went
12 along?

13 MR. SWEENEY: The survey is on the application
14 that Mr. Lewis referred to, it is a diagram.

15 MR. FRISHBERG: Did you compare the survey
16 with the description?

17 MR. LEWIS: I strictly looked at the survey.

18 MR. FRISHBERG: So, you didn't compare whether
19 the survey purports to the description in the deed?

20 MR. LEWIS: The survey clearly indicates the
21 meets and balance of the entire property.

22 MR. FRISHBERG: I understand. But, I guess,
23 what I am trying to figure out, Mr. Noscowski
24 claims that he owns that the portion that Mr.
25 Sweeney called the gore and --

- PROCEEDINGS -

MR. LEWIS: He's calling it a gore parcel, I am just calling it it is the way the radius is on the street or the geometric configuration the way the lot is laid out.

MR. FRISHBERG: I guess there's a dispute that Mr. Noscowski owns that portion or not, he says he owns it, Mr. Sweeney says he doesn't, can you make a determination whether he owns that?

MR. NOSCOWSKI: I didn't state that I owned it.

MR. FRISHBERG: I am sorry, then I misunderstood you, I apologize.

MR. NOSCOWSKI: The question came about where they said if the street became a street by use it is only that blacktop portion, so, the portion from the blacktop area to my property line I would need permission from the school to go across it. My deed gives me a right-of-way from Murray Avenue to my property. It is in my Title Insurance policy.

MR. SWEENEY: It is not in the deed.

MR. FRISHBERG: I am looking at your deed and I am just looking for the word easement or something and I am not seeing it, it is not there, so, I am just baffled as to why I don't see it in

1 - PROCEEDINGS -

2 this. But maybe I am short for it, what do I know,
3 I don't have your Title Insurance Policy in front
4 of me.

5 MR. HOOVER: Mr. Sherwin vividly objected
6 before when somebody said there was a motion by his
7 firm from a prior owner and I have a copy here of a
8 letter from 1986 from MacVane, Lewis, Sherwin,
9 McDermott and Rosengreen in which it says, "There's
10 one matter that I would like to call to your
11 attention involving the roadway leading to the
12 Goshen Intermediate School." This letter is from
13 MacVane, Lewis on behalf of their client and it is
14 signed by Peter Strefis, may he rest in peace.
15 "The wider portion of what some people regard as a
16 driveway is actually part of Murray Avenue
17 extension and is a village street. At the point
18 where the roadway narrows it ceases to be a village
19 street and is part of the property of the school
20 district." This was asserted by Mr. Sherwin's firm
21 back in 1986. I would like to give it to you to
22 have as a copy.

23 MR. FRISHBERG: Is he bound by what is --

24 MR. HOOVER: No, but he was just objecting
25 very strongly that that was never done, nobody ever

1 - PROCEEDINGS -

2 said that. I would like you to just have it in

3 your file.

4 MR. SWEENEY: That was considered by the Court

5 in Judge Lang's 2000 decision.

6 MR. FRISHBERG: I do have a question, Mr.

7 Sweeney and Mr. Hoover, because Mr. Sherwin brought

8 up this petition that was submitted, can you tell

9 me -- what I heard you say is that a lot of the

10 arguments that we are reviewing today was viewed

11 then.

12 MR. SWEENEY: Every one of them.

13 MR. FRISHBERG: To what extent are we bound to

14 that petition be part of our decision making

15 process, if at all?

16 MR. SWEENEY: Should the decision be part of

17 your decision making process?

18 MR. FRISHBERG: No, to the extent that these

19 arguments were made in the petition, to what extent

20 should that be part of our decision making process?

21 MR. SWEENEY: The Article 78 petition?

22 MR. FRISHBERG: Yeah.

23 MR. SWEENEY: All of them should be, I think

24 it is a collateral-stoppled issue all across the

25 board.

- PROCEEDINGS -

MR. SHERWIN: Can I just clarify something? This letter that has been talked about which was an exhibit in the prior proceeding was a letter written by Peter Strefis who I believe at that point - I didn't have personal knowledge of it - but I believe he was the Planning Board attorney at that point. Am I correct, Jim?

MR. SWEENEY: That is correct.

MR. SHERWIN: He was the Planning Board attorney for the Village of Goshen, he wasn't representing anybody for the firm for the subdivision or anything like that, he wrote the letter and he was commenting about a submission made by Mr. Carr on behalf of Tradewind Developers. Our firm did not represent anybody on a subdivision property, it was totally a misstatement.

The other thing is Mr. Noscowski said he never proposed a five lot subdivision for this parcel, I have minutes of those meetings where he had come in and asked for the five lot subdivision lot and you may remember that.

MR. STAHLMANN: I remember the application of the --

MR. SHERWIN: Yeah, then it went from five to

- PROCEEDINGS -

four to three to two and then one and then maybe another one after this.

MR. STAHLMANN: So, could that also then be an argument that he's been a little conciliatory and that he is entitled to build a house on a two acre lot?

MR. SHERWIN: I think if he's legally entitled to build there, he should build there; if he is not legally entitled to build there, he should not be permitted to build there. That's my position. Thank you, sir.

MR. STAHLMANN: Anybody else? Steve, is there anything you want to say, want to tell us about?

MR. GABA: I am here to serve the Board, if you have any questions for me I will be happy to answer them.

MR. STAHLMANN: Here's what I want to do. I want to go around and get a feel for where everybody is. Gar?

MR. CLARK: Mr. Sweeney is doing a good job of presenting this case on the issuance of this but how can this Board supersede the Village Law which is 6-626 stating that is a Village street. How would we supersede it?

- PROCEEDINGS -

MR. STROBL: I am still a little bit troubled with what goes through the school. I mean, I kind of want to know what we really honestly consider McNally Street. Does it go up to like where the DecHale's house, does it become the school parking lot and then are we talking New McNally Street? If the school is a road how wide should that be in the parking lot, shouldn't that be marked? And then I will be honest, I have been going back and forth on this thing, I have printed stuff, I've been online, I have been on the County site, my wife thinks I am totally nuts and she's probably right. But I think my thing on it is it has been sitting here for ten or thirteen years. If I am going to say honestly, I just don't know why it just didn't go in front of the Village Court and they just made it a street and that is what they should have done. I have a hard time going ten or twelve years later on a case that we were sued on and just saying, okay, it is ours now, when we've had a case before and I would think if I am on the Village Board I think I would be a member and instead of being sued I think I would have an open meeting, let everybody speak and then be done, why be sued? To me it does not make

- PROCEEDINGS -

any sense. So, I mean, I would like to almost recommend it goes that way, I know we can't do that but I just don't see why we are going to the direction we are going in. I don't see why we got involved. I think it should really go to the Board and they should have an open hearing and do this and why do we want to spend thousands of dollars on lawyers, I mean, I am a tax payer, so, I am pissed off. I mean, that does not help you in which direction I am going in.

Honestly, if I look at that map and I look at it from an aerial view it reminds me of an access street going into the high school and that road is the same way, if you want me to be perfectly honest. How is that road any different than going to the road that goes into the high school off of Scotchtown, it is the same thing, it is the same thing and we don't call that a road. So, I am having difficulties with that, I am having difficulties with the parking lot going between McNally Street here and in some of the records I have seen it called New McNally Street. I have not seen it on the Village map, I have not seen the lanes of McNally Street on a so-called street list.

- PROCEEDINGS -

Does it go, is it divided, how long is it, don't just give me McNally Street, giving me the New York State Thruway, are we talking New York City or Buffalo? So, I haven't seen any of that stuff.

MR. HOOVER: I think the difference between this road and the access road to the high school the school district owns the whole property along that road, you have private property owners on both sides of that road. So, it is not the same as the access road to the high school.

MR. STROBL: No, but I am saying it is an access to the school and I look at this thing --

MR. HOOVER: But you have private property owners.

MR. STROBL: As I look at this as of right now it is almost like an access road to the school, that originally is what it looks like. And, yes, the gentleman has got property there but let's be truthful, buyer beware, I mean, hey, come on, buyer beware. I mean, I look at that, yeah, I want him to use this property, sure I do, I mean, he bought it why wouldn't you want him to use that property but when you are ready to buy that thing he should have gone and done a little more work. So, now to

- PROCEEDINGS -

me I would still like to see him do something but I think the Board should get involved. I don't really think it should be us and we are going to be right back to a lawsuit and when we are all done we are going to end up at the Village Court and Village decides if it is a road or not. It does not make any sense. If that's an answer that's my feeling.

MR. FRISHBERG: I think there's good arguments on both sides. I think, you know, section 6-626 is true, it has the word prescription in it but there's nothing in that statute that says the word prescription. In my reading, at least of this Court of Appeals case, it does not indicate that it is supposed to be a prescription. In case - I will put it in the record I guess - is called Marchand vs. New York State Department of Environmental Conservation. That wound up to be an action to acquire title and in that case the Court found that the dirt road was not a Village street because it was maintained by the owner. Now, my reading of the case is that if the property is maintained by the Village and is used by a public body and used by the public then it becomes a road if it is

1 - PROCEEDINGS -

2 continuously used for a period of ten years. But,
3 you know, what I am hearing is that the Town became
4 responsible, the Village is responsible for the
5 condition of this road, that's what I understand.
6 I don't think there's any dispute that the Village
7 plows the road, the Village tars the road, the
8 Village maybe even helped create the road. I
9 wasn't quite sure listening to people but I don't
10 think there's any dispute that DPW takes their
11 snowplow down there and maintains it, I don't think
12 there's any dispute that if there's a big hole in
13 that road someone from DPW would patch it. Now,
14 they may not do anything with the dirt portion of
15 it but I am not that convinced.
16 So, just in terms of Mr. Sweeney's argument
17 that it has to be adverse, I just don't see that in
18 the statute and I ask the question how should the
19 statute be interpreted, narrowly or broadly, and I
20 am not sure the answer to that, maybe Mr. Gaba
21 could chime in on how this statute should be
22 interpreted because to add the word prescription to
23 the statute to me it means adding something to the
24 statute, at least in the cases I found. And Mr.
25 Sweeney may very well agree and with great respect

1 - PROCEEDINGS -

2 to him, he as well as Mr. Hoover, but I just don't
3 see it.
4 Going to the argument that, all right,
5 assuming for the moment there's no easement by
6 prescription, there is an easement -- not an
7 easement - I am sorry. Assuming for the moment it
8 is owned by use, the next argument is find the
9 property does not go to the road itself, so, the
10 road itself does not include the dirt portion of
11 the property, I am having trouble with that too. I
12 think if there was a problem with that dirt portion
13 of the property the Village would maintain it if
14 there was an issue regarding that. The problem I
15 am having is this burden of proof, I am not sure
16 who has the burden of proof. There is this case -
17 I will go back to the Marchand case and there is an
18 Appellant Division portion of that case - they said
19 that affidavits of people who maintained the
20 Village street is enough and that Marchand case
21 they had affidavits of, I guess, people equivalent
22 to the DPW and things like that, but there's just
23 been nothing here as to whether or not that dirt
24 portion is maintained. Forget the street portion,
25 I think everybody sees the street portion is

1 - PROCEEDINGS -

2 maintained but what about the dirt portion, but Mr.
3 Sweeney says, well, that's not included. I can't
4 find any cases one way or the other, Mr. Sweeney
5 says there are cases --
6 MR. SWEENEY: It is in your materials, I will
7 recite them to you.
8 MR. FRISHBERG: Just refer me to the footnote
9 if you know it offhand.
10 MR. SWEENEY: I don't. I think it is on page
11 6 or 7. I will refresh your memory with it.
12 MR. FRISHBERG: So, I am having trouble with
13 it. The last argument, as I understand, was the
14 policy reasons and I am hearing -- I forgot your
15 name, I am sorry.
16 MS. LOBREGLIO: Carole LoBreglio.
17 MR. FRISHBERG: I am hearing you loud and
18 clear that when buses line up you are not sure how
19 people are getting out but Mr. Hoover says, well,
20 wait a minute, the buses are only 8 feet wide.
21 MR. LOBREGLIO: May I say something? I know
22 that Mal Stewart has said years ago that it was a
23 one-way street, I don't know if they have ever been
24 there in the morning but they do line up and they
25 also angle themselves in such a way that they can

- PROCEEDINGS -

get as far in as possible to that line and it does not block it. You are right, one bus by itself is not going to take up the whole thing but if there is kind of one over here and one over here and one in the middle too.

MS. LOBREGLIO: And at that point it is one-way, vehicles are only coming into the school property one way. We are not allowed to even allow cars to come through during that time period and parents are making a legal U-turn because it is a one-way affair at that point of the day and it says it is one-way, there's a sign there.

MR. FRISHBERG: No, I was there this evening, I just drove up the street I was going to pull down and turn around and it says "Do Not Enter" clear as day.

MR. HOOVER: But, again, nowhere does it say "One-way"?

MR. FRISHBERG: No, there's not an arrow where it says "One-way", you are right, but clearly when you are coming in from the intermediate school it says, "Do Not Enter."

MR. STAHLMANN: Mr. Hoover, can I ask you a question? The Village gets State funding based on

- PROCEEDINGS -

their streets?

MR. HOOVER: They also get federal funding, the street is included in the land of --

MR. STAHLMANN: That was my question. They have to submit a list to the State of what their streets are because that's what their funding is based on?

MR. HOOVER: That's correct.

MR. STAHLMANN: So, that lists then includes --

MR. HOOVER: McNally Street and they've been getting funding for it for years.

MR. STAHLMANN: Since there's also McNally Street over there is there any way to understand as to what that is all about?

MR. SWEENEY: Yes, there is. They get both funding. They are on what is known as State Inventory for CHIPS purposes - that's State aid from our State aid; however, the inventory is prepared by the street superintendent, the highway superintendent, Department of Public Works Chief or whatever he is - not prepared, reviewed or signed off by the Village Board. The fact that a street appears on a CHIPS Inventory does not make it a

1 - PROCEEDINGS -
2 municipal street.
3 MR. STAHLMANN: I was just trying to
4 understand what the State did with it.
5 MR. FRISHBERG: It does say, by the way, going
6 back to this Lang's decision, it says, "The record
7 before the court is also the void of evidence that
8 the alternative, the paved driveway never became
9 Village streets through public use for village
10 maintenance", pursuant to Village Law 6-226.
11 "Naked use by the public is not enough, whether
12 under the theory of dedication of prescription and
13 must be further demonstration that the Village has
14 continuously maintained or repaired the alleged
15 street and let's assume control thereof during the
16 period of time in question." This predates this
17 Court of Appeals decision I found.
18 So, here's my issue as I raise it --
19 MR. STAHLMANN: I think I know where you are
20 going with this.
21 MR. FRISHBERG: -- that back in 2003 it sounds
22 like the Village tried to make the same argument
23 but lacked evidence of it, now they have the same
24 argument they are making to us that they are making
25 before the Supreme Court. Are they barred for

1 - PROCEEDINGS -

2 making that argument before us?

3 MR. GABA: They are not barred from making the

4 argument based on the ten intervening years based

5 on the Court's decision, even if it wasn't found to

6 be a road by user back in 2003, the intervening ten

7 years could result in prescriptive --

8 MR. FRISHBERG: In other words, the relevant

9 time period which was the date of this decision

10 until now?

11 MR. GABA: As far as this proceeding is

12 concerned, for the Court it is dates prior to the

13 court's decision. So, if the Building Inspector

14 had found that it was a road by user based upon

15 facts predating that decision then perhaps there

16 would be some collateral estoppel issue would be

17 considered but it has been ten years since that

18 decision, those facts which, of course, went before

19 that Court could result in the road to becoming a

20 village street.

21 MR. STAHLMANN: Is the fact that he made that

22 determination sufficient for this Board or does

23 this Board need to hear independent testimony as to

24 the use or maintenance?

25 MR. GABA: I would have to tell you on that I

- PROCEEDINGS -

have not been around the horn on burden of proof where you have a neighboring property owner challenging the building permit. The general rule in regard to any application, ZBA or variance or filing a building permit for yourself is that you bear the burden of proof, you will have to show for use variance or et cetera that you meet the criteria. I am not familiar with any cases which say that the burden is any different when you have a neighbor challenging it. I could just be ignorant in that, it is very possible that is the case.

MR. SWEENEY: Maybe I can explain, Steve, and see if I can find some law for you. The difference is between an applicant asking for an affirmative belief coming to you and asking for a variance, and the appellant who is coming to you saying the Building Inspector error, is negative. When an affirmative belief is involved there is no question, the person seeking that variance or whatever type of affirmative belief has the burden. Someone who is coming before you and saying the man did wrong does not have the burden, he only has the burden of proving legality and that's what we tried

1 - PROCEEDINGS -

2 to do tonight.

3 MR. HOOVER: I've been trying cases for a

4 long, long time. He who brings a case must prove

5 it. In this case the appellant brought this case;

6 therefore, the appellant has the burden. I don't

7 care if he's trying to prove the negative or

8 positive or whatever, if he is bringing the case

9 before you he has to prove prima facie, he is

10 entitled to relief, then the burden might shift to

11 the other side to disprove it. But if you are

12 bringing a case you better bring it all.

13 MR. FRISHBERG: Doesn't that require him to

14 prove a negative? Generally when you bring a case

15 you have to prove to something affirmative, not

16 prove a negative.

17 MR. HOOVER: Generally you do, but you are

18 still the bringer of the case; therefore, you have

19 to bring the case before the trier of fact, that

20 means you have the burden of proof to prove what

21 case you are bringing.

22 MR. FRISHBERG: I understand. In a personal

23 injury case you have to prove someone ran the stop

24 sign, but I am trying to wrap my arms around --

25 MR. HOOVER: You can't come in and make a bald

- PROCEEDINGS -

assertion the public doesn't use the road. If you are going to make that as one of your arguments then you have to prove it - the public does not use the road. I don't know how you are going to prove it other than have somebody out there every day questioning everybody who goes through there 'what are you doing?' But if you are going to make that assertion to the Board that that is the problem then you have to prove it.

MR. SWEENEY: That's not the proof. What we are saying is that the Building Inspector made that determination that the public used the road and we are saying we don't, he has the burden of proving that they do. You stand in the shoes of the Building Inspector on these applications.

MR. FRISHBERG: That's what I thought Dave told us the last time.

MR. SWEENEY: It is right in the statute.

MR. FRISHBERG: Because we had a Building Inspector for the case, I don't know, it was a month ago or two months ago regarding Delanceys where we were asked to annul the decision of the Building Inspector to issue the building permit and I remember being a little confused about that

- PROCEEDINGS -

myself as to where we are on this and at least that's my recollection, I don't know if it is the recollection of the Board but at least that is my recollection.

MR. SWEENEY: There is absolutely no proof here that the general public, the public at large uses this road - none.

MR. FRISHBERG: Well, actually, the lady had talked about the buses.

MR. SWEENEY: The buses are a segment of the public, they are not the whole public.

MR. FRISHBERG: Yeah, but the whole public doesn't need to use it, everyone does not need to go down that street but the fact is every day buses use that street.

MR. SWEENEY: Every day somebody, an abutter, sits in his driveway, every day, what's the difference?

MR. FRISHBERG: That is what I am trying to figure out. What is the difference between a bus using that street or every day someone picking up their kid using that street?

MR. SWEENEY: Any activity that relates to an abutter - if you read the case I cited that is in

1 - PROCEEDINGS -

2 footnote 7 or 8 - does not qualify as general
3 public use. It has to be divorced from that, it
4 has to be everybody.
5 MR. STAHLMANN: And it is your position that
6 the only people that ever go up that street are
7 going to the school?
8 MR. SWEENEY: The school or the Farley's or
9 whatever their name is, and maybe you.
10 MR. FRISHBERG: So, the parent who picks up
11 their kid from that school does not count as part
12 of the general public?
13 MR. SWEENEY: No, invitee of the school. It
14 wouldn't be that except by the invitation of the
15 school to pick up his child.
16 MR. STAHLMANN: Steve, let me ask you this
17 question - if we asked for testimony with regard to
18 maintenance, who maintains it, who put the lines
19 down, who laid the asphalt, who snowplows, do we
20 have the right to ask for that?
21 MR. GABA: Yeah, you can subpoena information
22 if you need to.
23 MR. STAHLMANN: Okay. Do we have the right to
24 ask for a continuation of the meeting for next
25 month with the idea that someone produce something

- PROCEEDINGS -

for us?

MR. GABA: You can hold a public hearing next month, absolutely.

MR. DONAVON: Would it be worth while to also ask the school what their role is in the maintenance of that road because I don't know how either the school or the Village sort of knows where to stop their plows, do you know what I am saying? I think that the school might actually --

MS. LOBREGLIO: Yes, they do actually. The janitors and this dirt area is often shoveled or plowed with a snowblower with the maintenance crew at the intermediate school, and I was just curious does the snowplow go up that little piece and stop and then the school plow then come in? I am not there that early in the morning, so, I can't, but I have seen maintenance crew work on this area of what we are calling dirt. It would be worthwhile to ask.

MR. NOSCOWSKI: There was also a sidewalk installed there in the last couple of years by the Town or the Village and that is on that supposed door area in between the pavement and my property line which is probably an excess of six or seven

- PROCEEDINGS -

feet, so, there's probably almost two or three feet, that gore area.

MS. HOLLANDER: I just have a question. I always thought that it was the Village's responsibility to pave and take care of roads or driveways or whatever we want to call them that lead up to our public schools. So, whether it is part of the Village or whether it is part of the school, you know, if the Village takes care of it, so what? I mean, why is that important?

MR. STAHLMANN: I think it is important.

MS. HOLLANDER: It is an accommodation, I mean, don't we have to get our school buses up to the school?

MR. STAHLMANN: I understand what you are saying.

MS. HOLLANDER: So, I would think -- I don't know why that makes a difference.

MR. STAHLMANN: Okay. Anybody else have any comments this evening? Do I have a motion here from anybody?

MR. FRISHBERG: Let me raise the issue - if the direction we think we are going is that we want to hear testimony it seems to me we have to keep

the public hearing open. I would like to hear a little bit more if it is okay. I would make a motion to keep the public hearing open to next month. I would like to do a little bit more in terms of this.

MR. STROBL: I will second that.

MR. STAHLMANN: All in favor?

MR. FRISHBERG: Aye.

MR. STROBL: Aye.

MR. CLARK: Aye.

MR. SWEENEY: I have no objection to that. I would ask for two things - you have the subpoena power to bring in the highway superintendent and I think I would exercise that to bring him in.

MR. FRISHBERG: Well, is there anybody you think we should hear from? I would ask you that and I will ask Mr. Hoover that, are there people you think we should hear from?

MR. HOOVER: Certainly the highway superintendent.

MR. SWEENEY: And I suspect the school superintendent here as well.

MR. STAHLMANN: How about Mike from the DPW?

MR. SWEENEY: And I would also ask you and I

think you have the power to direct that no activity take place until you make the determination essence in administrative stay. I think that is in the statute, I am not 100 percent sure.

MR. FRISHBERG: We have a right to issue a stay?

MR. GABA: There's an automatic stay on enforcement proceedings, I don't believe this board has the power to issue stays.

MR. SWEENEY: I think it is in the statute, let me see if I can dig it up.

MR. STAHLMANN: Anything else?

MR. SWEENEY: No.

MR. STAHLMANN: Mr. Hoover, anything else?

MR. HOOVER: No, sir.

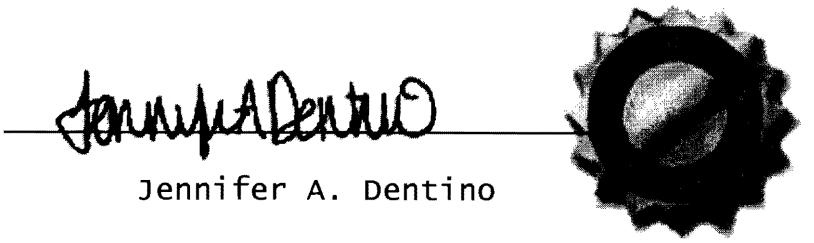
MR. STAHLMANN: For everyone who came tonight thank you very much, thank you for your time. Our meetings are now the third Thursday of the month.

(Proceedings concluded at 9:07 p.m.)

C-E-R-T-I-F-I-C-A-T-I-O-N

I, Jennifer A. Dentino, a stenographic Court Reporter and Notary Public within and for the State of New York, hereby certify:

That I am not related to any of the parties to this action by blood or marriage and I am in no way interested in the outcome of this matter.



Jennifer A. Dentino

Court Reporter

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10:14
10:17
10:21
11:15
12:16
12:19
12:21
12:25
16:2
28:12
37:22
44:13
44:16
45:2
46:7
accept
41:9
access
5:24
22:7
25:21
51:5
52:3
64:13
65:7,11
65:13
65:17
accessory
20:12
accomm...
80:13
acknow...
14:17
acquire
17:18
35:17
35:18
66:20
acquired
18:13
18:14
18:15
29:18
acre 45:8
62:6
act 9:25
42:16
acted
48:20
action
13:11
66:19
83:9
activity
77:24
82:2
actual
16:20
17:4,5
17:9,10
17:15
19:2
add 67:22
added
4:12
adding
67:23
address
2:7
29:5,6
30:7
31:21
admini...
82:4
adopted
5:8
14:22
adverse
8:22
9:7,19
10:9
14:2,5
14:8
15:11
32:7,8
43:24
67:17
adversity
10:2
31:23
adversive
31:24
aerial
64:13
affair
70:12
affect
5:7
affida...
40:15
40:17
40:18
68:19
68:21
affirm...
74:16
74:20
74:22
75:15
afternoon
12:4
agenda
2:3,11
ago 12:11
14:19
24:12
28:17
35:7
38:12
43:9
44:14
45:6
47:2
49:3
50:18
53:22
69:22
76:22
76:22
agree
23:21
67:25
agreed
33:16
ahead
43:22
aid 71:19
71:20
alert
55:2,7
alerted
43:4,23
alleged
72:14
allegedly
2:16
allow
2:13
70:9
allowed
43:25
70:9
altern...
7:8
72:8
ancient
8:19
9:7
angle
69:25
annul
76:23
annulled
4:23
annulment
2:12
another's
8:21
answer
22:11
30:9
36:16
46:19
46:19
47:21
62:17
66:8
67:20
answering
45:19
answers
55:11
anybody
13:5
20:19
24:25
26:5,11
26:12
26:15
28:5,19
29:22
38:19
42:23
45:9
54:10
61:12
61:16
62:13
80:20
80:22
81:16
anybody's
52:15
anymore
34:13
35:8
anywheres
37:24
apart
33:17
apologize
58:13
Appare...
48:2
appeal
1:7 3:2
5:15
6:17,23
41:24
Appeals
1:3
13:8
14:11
15:18
20:7
66:15
72:17
appears
6:11
71:25
appellant
2:22
46:25
68:18
74:18
75:5,6
Appell...
3:14,20
3:25
applicant
1:6
2:11,18
2:21
74:16
applic...
16:9
53:11
57:13
61:23
74:5
applic...
76:16
applied
53:2,2
approach
7:7,8
approa...
52:23
53:16
approx...
4:13
arbitrary
42:5,16
area 3:3
27:15
34:8
51:4
52:10
58:17
79:12
79:18
79:24
80:3
argue
18:12
26:12
arguing
33:21
argument
14:6
30:24
31:3,5
31:6,22
31:24
35:16
39:9
62:5
67:16
68:4,8
69:13
72:22
72:24
73:2,4
arguments
5:5
47:5,8
47:9
52:4
60:10
60:19
66:10
76:3
arms 75:24
arrested
34:16
34:16
arriving
55:19
arrow
21:15
21:17
70:20
Article
47:3
60:21
articu...
8:15
aside
42:6
asked
6:16
29:4,6
29:13
29:14
29:21
30:7,17
45:7,22
45:25
47:10
48:12
48:14
49:14
54:9
61:21
76:23
78:17
asking
35:3
36:21
74:16
74:17
aspects
16:2
asphalt
18:2,5
78:19
assert
37:23
asserted
59:20
asserting
41:21
assertion
28:7
76:2,9
assume
6:6
72:15
assuming
68:5,7
attended
48:7
attention
5:18
59:11
attorney
2:20
27:23
30:20
47:6
61:7,11
author...
14:23
automatic
9:2
82:8
automa...
8:5,8
Avenue
2:25
3:3
21:11
43:2
48:25
52:13
55:15
58:19
59:16
avoids
6:22
aware
14:4
55:3
awful
6:22
Aye 81:9
81:10
81:11

B

baby 56:2
back 3:6
3:11
4:20
8:6,20
9:6
16:18
28:24
28:25
29:6
52:6
53:19
54:12
59:21
63:10
66:5
68:17
72:6,21
73:6
backhoe
46:5,7
backhoes
46:4
backyard
16:19
43:10
43:13
43:16
48:24
48:25
baffled
14:9
58:25
balance
57:21
bald 75:25
barred
72:25
73:3
base 24:2
based
6:24
15:14
70:25
71:8
73:4,4
73:14
basically
6:24
33:19
47:7
55:18
basis
16:4,5
41:3,4
50:6
bear 74:7
becoming
73:19
bed 4:11
beginning
56:5
behalf
2:21
59:13
61:15
belief
74:17
74:20
74:22
believe
20:8
29:2
31:25
38:25
45:4,22
45:24
45:24
50:7
52:3
61:5,7
82:9
belive
40:11
best 4:19
better
37:6
51:11
75:12
beware
65:20
65:21
big 67:12
bigger
24:23
45:9
binding
29:25
30:3,5
bit 63:2
81:3,5
black 4:9
blacktop
58:16
58:17
block 1:9
70:3
blood
83:9
board 1:3
2:23
3:16
6:20,24
12:11
27:4,5
27:9,13
29:7,8

30:4
33:14
45:5
47:6
48:7,13
51:15
60:25
61:7,10
62:15
62:23
63:22
64:6
66:3
71:24
73:22
73:23
76:9
77:4
82:9
Board's
4:23
body 66:24
bold 28:7
border
33:25
bottom
55:13
bought
35:7
48:3
52:25
65:22
bound
59:23
60:13
boundary
57:9
brand
55:25
bring
75:12
75:14
75:19
81:14
81:15
bringer
75:18
bringing
32:4
75:8,12
75:21
brings
75:4
broadly
36:12
67:19
brought
5:18
29:7,20
30:7,20
31:8
60:7
75:5
Buffalo
65:5
buffer
48:11
build
27:15
43:9
48:17
62:6,9
62:9,10
62:11
Builders
3:22
building
1:8
2:12,13
4:4
5:19,20
5:23,25
6:3,7
6:16
7:2,3,4
7:10,21
8:10,17
15:20
16:3,9
17:3,21
21:3,4
27:3,18
39:4
41:25
41:25
42:8,11
42:17
43:3,4
43:17
43:19
43:21
44:6,11
44:17
44:18
44:25
46:3
48:22
49:23
50:5
52:21
53:2,11
54:8,10
54:11
54:13
54:15
55:2,4
55:7,9
73:13
74:4,6
74:19
76:12
76:16
76:20
76:24
76:24
built
21:9
burden
25:25
37:20
37:21
37:25
40:5
41:22
42:4
68:15
68:16
74:2,7
74:10
74:22
74:24
74:25
75:6,10
75:20
76:14
bus 25:4
40:24
55:17
55:17
56:19
56:24
70:3
77:21
buses
37:10
40:23
55:18
55:19
55:22
55:22
56:4,8
69:18
69:20
77:10
77:11
77:15
80:14
buy 65:24
buyer
65:20
65:20

C

call 5:11
9:9
16:23
17:14
22:7
33:18
46:6
55:20
59:10
64:19
80:7
called
13:9
49:15
57:25
64:23
66:17
calling
58:2,3
79:19
capric...
42:5,17
cards 3:5
care 75:7
80:6,10
carefully
57:8
Carole
55:14
69:16
Carr 61:15
carry
42:4
cars 34:15
34:18
34:20
70:10
case 6:10
6:13,13
11:11
11:12
11:12
13:7
14:9,11
14:24
15:5,16
15:18
17:6,8
18:11
20:7,12
40:16
41:23
62:22
63:19
63:21
66:15
66:16
66:20
66:23
68:16
68:17
68:18
68:20
74:13
75:4,5
75:5,8
75:12
75:14
75:18
75:19
75:21
75:23
76:21
77:25
cases
42:13
67:24
69:4,5
74:9
75:3
ceases
59:18
Central
33:6
55:16
century
14:19
certain
4:5
6:19
37:12
certainly
30:21
32:13
34:21
38:15
41:22
81:20
certify
83:7
cetera
74:8
Chairman
1:15
3:10,15
48:14
challe...
42:3
74:4,11
charac...
9:16
charge
14:22
Chief
71:22
child
78:15
children
56:7
chime
67:21
chips
43:8,10
43:12
49:12
52:21
71:19
71:25
Church
46:16
circul...
16:16
cited
14:12
14:23
17:8
20:8
77:25
City 65:4
claim 9:3
10:3
37:25
claiming
38:5
claims
57:24
clarify
61:2
CLARK
1:18
62:21
81:11
clear
40:5
41:11
41:12
69:18
70:16
cleared
43:6
clearly
33:4,4
33:8
54:18
54:20
57:20
70:21
clears
6:21
clear-cut
43:5
44:2,19
46:2
52:18
client
38:2
59:13
clients
3:4
client's
16:19
37:15
coach
10:25
code 44:25
coding
4:5
Cohen
3:13
collat...
73:16
collat...
30:23
31:2
collat...
60:24
color 4:5
come 16:15
19:6,8
25:2
27:4
39:10
39:11
48:24
55:19
61:20
65:20
70:10
75:25
79:16
comes
9:10
16:17
16:18
16:18
16:18
55:8
comfor...
45:18
coming
28:4
33:20
70:8,22
74:17
74:18
74:23
comment
2:6
42:23
57:3
commen...
61:14
comments
80:21
commer...
6:8
community
49:9
compare
57:15
57:18
comple...
57:9
comply
32:5
compre...
8:13
concerned
73:12
concil...
48:9
concil...
62:5
concluded
82:20
concrete
20:15
condition
67:5
config...
58:4
confirm
38:24
confused
76:25
confusing
32:22
confusion
25:5,6
43:23
Conser...
13:11
66:19
consider
1:7
36:21
45:22
45:25
53:20
63:4
consid...
26:24
27:11
consid...
32:21
60:4
73:17
consid...
5:5
32:17
33:13
33:16
33:18
47:7
consti...
11:18
constr...
2:14
contacted
5:25
contin...
9:12
contin...
78:24
continue
9:5
34:7,24
contin...
10:12
15:9
44:6,22
contin...
7:18
13:16
67:2
72:14
control
72:15
convinced
67:15
cooper...
2:5
49:19
copy 19:5
51:15
51:16
59:7,22
corner
33:15
correct
18:25
19:22
20:13
20:17
20:23
30:12
41:19
53:23
61:8,9
71:9
correctly
31:9
could've
29:18
30:21
30:24
31:18
52:24
count
78:11
counting
32:18
County
63:12
couple

79:22
course
15:2
73:18
court
3:11
4:23
5:4
6:19
13:8,19
14:10
15:18
20:7
28:25
29:2,4
29:5,13
29:22
30:9
31:11
41:20
47:8,13
51:19
60:4
63:17
66:6,15
66:20
72:7,17
72:25
73:12
73:19
83:5,17
courtesy
52:20
courth...
28:2
courts
49:24
52:5
court's
73:5,13
create
67:8
created
39:5
crew 79:13
79:18
criteria
74:9
cross
12:7
17:13
curb 33:19
41:13
41:14
curbs
20:23
20:25
curious
56:19
79:14
C-E-R-...
83:3
C.H 3:23
4:7
5:22
16:17
16:21
27:21
27:23

D

D 1:23
date 73:9
dated
3:19
8:14
dates
73:12
Dave 76:17
day 22:10
25:4,15
37:11
50:24
56:4
70:12
70:17
76:6
77:15
77:17
77:18
77:22
days 49:3
de 42:15
deal 5:6
DecHale's
63:6
decide
19:24
29:13
37:14
49:25
decided
5:6,14
11:13
29:23
31:16
47:5
decides
66:7
decision
3:11,12
4:22,24
5:17
6:4
7:22
8:4
28:24
29:24
30:3
39:4,18
42:5,8
42:11
42:15
42:18
47:12
60:5,14
60:16
60:17
60:20
72:6,17
73:5,9
73:13
73:15
73:18
76:23
declare
51:18
declared
4:25
5:4
6:15
24:24
29:8
declaring
6:5
22:25
declined
48:12
dedicated
18:21
dedica...
20:9
72:12
deed 3:16
3:18,22
41:4
52:12
57:4,6
57:19
58:19
58:21
58:22
deeded
52:14
deemed
34:19
default
24:5
defense
9:3,14
define
20:24
defined
20:25
Delanceys
42:9
76:22
delibe...
27:6
deline...
34:8
35:10
demons...
49:22
demons...
72:13
Dentino
83:5,16
Depart...
13:10
39:2
66:18
71:22
deposited
49:13
describe
29:14
36:7
descri...
57:16
57:19
design
52:25
detail
7:5
determ...
1:8
41:24
42:2,3
58:9
73:22
76:13
82:3
determ...
49:22
determine
37:19
42:4
48:5
determ...
13:19
30:11
43:20
develop
46:13
Develo...
3:22
61:15
Develo...
3:23
4:8
5:23
16:17
16:21
diagram
5:22
16:6,16
16:16
57:14
dictates
5:12
died 5:16
differ...
65:6
74:15
77:19
77:21
80:19
different
7:7
12:25
20:10
64:16
74:10
diffic...
64:20
64:21
dig 82:12
diligence
48:5
direct
82:2
direction
64:5,11
80:24
dirt 20:21
20:22
66:21
67:14
68:10
68:12
68:23
69:2
79:12
79:19
disagree
20:5
41:16
41:18
disapp...
24:15
28:17
50:18
50:19
discov...
38:13
38:14
discus...
53:25
54:4
dismissal
56:7
disprove
75:11
dispute
58:6
67:6,10
67:12
distance
37:12
district
10:16
33:6
59:20
65:8
ditches
19:19
35:24
divided
65:2
Division
68:18
divorced
78:3
document
3:15,20
4:2,21
doing
13:21
21:14
28:5
37:17
39:20
39:22
62:21
76:8
dollars
64:8
dominion
15:4
DONAVON
79:5
Donnelly
46:25
50:3
door 46:13
79:24
double
28:14
28:22
37:9
50:20
downhill
49:16
DPW 39:3
67:10
67:13
68:22
81:24
drainage
19:19
35:24
drive
34:6,10
34:21
40:24
46:14
50:14
56:24
driveway
10:19
10:20
12:9,12
18:7,8
23:15
23:19
50:22
51:21
55:20
56:2
59:16
72:8
77:18
driveways
53:9
80:7
driving
34:22
50:10
drove
70:15
due 48:4
duly 7:20
13:17
duty 55:17
55:17
dwelling
2:14
DWI 34:16

E

earlier
6:4
14:20
42:8
47:23
early
79:17
easement
11:17
14:4,4
14:7
17:6,20
31:21
31:23
32:5
50:13
55:5
58:23
68:5,6
68:7
easy 7:15
edge 33:25
35:9,9
35:11
35:12
36:2,3
Education
3:16
effect
7:19
13:17
effect...
9:13
eight
38:12
either
6:9
18:3
25:18
36:16
79:8
else's
45:9
employee
11:6
55:15
encomp...
35:22
encroa...
52:17
enforc...
82:9
Enter
4:14
21:23
22:2
70:16
70:23
entire
55:21
57:21
entitled
13:12
22:22
41:8
62:6,8
62:10
75:10
Enviro...
13:11
66:18
equiva...
68:21
error
74:19
ESQ 1:19
1:22,23
1:24
essence
82:3
establish
11:16
Estates
25:2
26:4,20
39:10
39:11
52:2
estopped
30:23
31:2
estoppel
73:16
et 74:8
evening
53:15
70:14
80:21
everybody
2:2
13:5
32:17
32:23
62:20
63:24
68:25
76:7
78:4
everyb...
2:5
evidence
5:6
11:14
72:7,23
exactly
13:13
excavator
49:2
excess
79:25
exercise
15:3
81:15
exert
13:18
exhibit
3:14,20
3:25
4:17,22
57:7
61:4
exhibits
3:8
existence
11:16
expect...
46:12

46:20
46:21
expels
13:21
explain
74:14
explained
11:11
explai...
7:4
extends
18:25
19:14
19:16
extension
59:17
extent
18:15
18:17
18:18
19:13
60:13
60:18
60:19

F

facie
75:9
fact 9:4
30:3
42:2
71:24
73:21
75:19
77:15
facts
73:15
73:18
fails
16:3
21:3,5
failure
34:16
fair 34:3
34:4
fairly
37:9,11
familiar
74:9
family
55:25
far 34:24
39:9
50:21
50:22
55:6
70:2
73:11
Farley
10:20
26:15
51:3,3
Farley's
78:8
fashion
8:16
favor
37:15
81:8
federal
71:3
fee 17:14
feel 21:2
38:19
44:9
45:18
45:20
49:22
50:4
62:19
feeling
44:12
66:9
feet 17:11
17:12
18:5,6
18:17
18:19
18:22
18:23
19:3,5
19:7,9
19:12
19:12
19:12
19:22
20:4
43:11
49:13
52:15
52:17
52:22
56:20
56:21
56:22
56:25
69:20
80:2,3
fellow
45:12
felt 8:2,4
44:14
fence
49:14
49:15
49:16
52:15
fifteen
29:10
29:19
45:12
55:23
56:5
fifty
7:15
figure
19:6
36:17
57:23
77:21
file 43:2
43:17
43:21
44:9,9
44:11
44:15
54:17
60:3
filed
6:11
filing
74:6
find 26:14
68:8
69:4
74:15
firm 59:7
59:20
61:12
61:16
first
3:10
4:20
8:18
9:18
12:11
13:24
15:22
21:8
25:12
38:12
41:17
52:10
54:16
first-...
40:12
fit 10:6
five 34:15
34:18
34:20
47:11
48:15
53:3,6
61:19
61:21
61:25
flags
55:2
flipping
36:11
flood
51:25
floor
2:18
flow 39:21
folks
2:24
3:3
42:22
50:7
follow
16:13
30:11
46:22
followed
31:10
31:15
following
47:3
48:2,6
foot 16:23
16:25
56:19
footnote
69:8
78:2
force
7:19
13:16
forced
6:17
forces
7:22
forever
7:14
Forget
68:24
forgot
69:14
forth 8:2
10:18
18:21
63:10
forty
56:7
forward
49:24
fought
45:11
found
13:9
47:8
48:2
66:20
67:24
72:17
73:5,14
four 28:21
48:15
50:17
62:2
FRISHBERG
1:16
13:7
14:16
15:12
15:17
17:16
19:11
20:14
20:18
22:16
22:22
24:4,9
25:7
26:9
29:24
30:10
30:19
30:22
31:4,13
31:20
32:11
35:16
36:10
36:16
37:14
37:25
38:7,21
38:24
39:5,17
40:10
40:14
41:8
42:7,14
44:4,21
56:25
57:11
57:15
57:18
57:22
58:6,12
58:22
59:23
60:6,13
60:18
60:22
66:10
69:8,12
69:17
70:14
70:20
72:5,21
73:8
75:13
75:22
76:17
76:20
77:9,13
77:20
78:10
80:23
81:9,16
82:6
front
57:6
59:3
63:16
frontage
6:9
16:20
17:5,5
17:9,10
17:15
fronts
18:11
front-end
10:21
full 16:7
16:8
funding
70:25
71:3,7
71:13
71:18
further
7:5
12:3
72:13

G

G 1:22,24
Gaba 1:19
19:4,8
19:13
20:5
38:25
41:16
42:13
44:21
44:24
54:25
62:15
67:20
73:3,11
73:25
78:21
79:3
82:8
gain 9:19
gained
25:22
Gar 1:18
62:20
gates
51:25
general
11:4,8
12:17
13:2
26:19
40:7,13
40:19
40:20
40:22
74:4
77:7
78:2,12
generally
11:19
18:10
75:14
75:17
gentleman
12:21
52:6
65:19
gentle...
53:17
geometric
58:4
getting
51:5
69:19
71:13
GIS 11:2,5
give 50:13
59:21
65:3
gives
41:3
52:12
58:19
giving
65:3
go 4:20
11:3,21
12:3,13
14:11
20:20
20:20
21:20
22:8,15
22:24
24:20
24:22
25:2,9
27:4,25
28:3
34:6,12
37:11
38:20
49:17
49:24
50:21
50:21
50:23
51:4,6
51:7,8
51:23
52:14
58:18
62:19
63:5,16
64:6
65:2
68:9,17
77:15
78:6
79:15
God's
21:10
goes 9:6
63:3
64:3,17
76:7
going 2:5
2:8
3:21
8:15
12:3
16:12
20:20
21:10
23:14
24:22
25:7,15
28:8,23
33:14
33:14
34:21
34:23
36:15
37:19
39:10
39:13
41:18
44:21
45:13
46:22
51:20
51:21
53:20
56:3
63:10
63:15
63:19
64:4,5
64:11
64:14
64:16
64:21
66:4,6
68:4
70:4,15
72:5,20
76:3,5
76:8
78:7
80:24
good 6:21
11:12
11:14
26:22
48:21
62:21
66:10
gore 16:23
18:19
35:6
52:10
57:25
58:2
80:3
Goshen
1:2,12
2:18,21
3:13,17
26:21
33:5,6
54:21
55:15
59:12
61:11
Goshen's
4:9
grandson
38:11
granted
17:13
47:25
great 5:5
33:3
67:25
green 3:5
Gregory
1:24
27:22
grounds
2:16
guess 3:9
37:14
38:11
46:10
47:22
57:22
58:6
66:17

68:21
gutters 18:22
guy 47:18

H

half 23:24
hand 3:8,9 4:17
handed 4:21 5:22
handing 3:15,21 4:2
happen 25:3,4 25:5 35:8
happened 2:25 6:23 13:18 13:19 24:14 36:25
happy 49:7,7 49:8 62:16
hard 63:19
Harness 24:25 26:3,20 39:9,10 52:2
hate 48:20
hear 37:15 42:22 73:23 80:25 81:2,17 81:19
heard 12:11 28:4 55:10 60:9
hearing 5:5,9 8:8 23:2 27:13 45:16 54:7 64:7 67:3 69:14 69:17 79:3 81:2,4
hearsay 41:9
held 5:9 14:19
hell 37:5
help 4:6 20:24 64:10
helped 67:8
hey 65:20
high 43:11 49:13 64:14 64:17 65:7,11
highli... 39:3
highly 56:10
highway 71:21 81:14 81:20
hill 39:13
histor... 21:8,24 24:17
history 52:23
hold 79:3
holds 34:14
hole 67:12
Hollander 24:15 42:25 42:25 43:15 44:8 45:20 80:4,13 80:18
home 5:24 6:8
homeowner 44:13 55:25
homeow... 44:16
homes 53:3
honest 63:10 64:16
honestly 51:2 63:4,15 64:12
Hoover 1:24 27:22 27:22 30:2,14 30:20 31:2,7 31:14 31:25 32:13 34:4 35:4,20 36:14 36:18 37:3,18 38:5,9 38:23 39:8,19 40:3 56:19 57:2 59:5,24 60:7 65:6,14 68:2 69:19 70:18 70:24 71:3,9 71:12 75:3,17 75:25 81:18 81:20 82:15 82:16
horn 74:2
hospital 56:3
hostile 8:22 9:25 15:11 15:23
hostility 9:21 10:2 14:15 15:6,22
hour 34:11
house 21:9,19 22:8,12 22:20 24:19 27:16 43:5 44:20 45:10 45:14 45:17 46:17 48:17 50:22 51:12 52:25 62:6 63:6
huge 43:11 49:12
hundred 27:25

I

idea 9:7 23:6 24:6 26:22 28:17 50:25 51:2 78:25
identify 4:6
ignorant 74:12
ignore 32:11
illegally 25:23
imbued 9:16
implic... 30:10 30:12 30:14
important 8:18 9:16 10:7 16:5 80:11 80:12
improved 6:11 7:24 19:15
inbound 5:3 21:25 24:3,13
inch 41:14 41:14
incidents 56:15
include 19:18 19:19 68:10
included 19:24 69:3 71:4
includes 19:17 35:22 35:23 71:10
indepe... 73:23
indicate 55:8 66:15
indicated 6:2
indicates 23:23 57:20
indica... 16:19 16:25 33:9,17
indica... 53:20 57:4
indicator 54:17
indist... 13:4
indivi... 26:15
inform... 78:21
injury 75:23
inkling 23:22
input 5:9 8:8
Inspector 5:19 6:2 7:4 7:21 8:17 41:25 41:25 42:11 42:18 52:21 54:10 55:2,7 73:13 74:19 76:12 76:16 76:21 76:24
inspec... 1:8 2:13 15:21 16:3 39:4
installed 79:22
instance 41:21
insuff... 11:16
Insurance 58:20 59:3
intends 48:17
intent 48:19 51:5
intere... 83:10
interests 9:25
interior 18:22
interm... 24:10 38:11 59:12 70:22 79:14
interp... 15:16 67:19 67:22
interp... 14:19
interrupt 10:22
inters... 4:15 24:13 38:19
interv... 27:15 73:4,6
inventory 71:19 71:20 71:25
invest... 42:2
invita... 78:14
invitee 78:13
invitees 39:24
involved 47:22 64:6 66:3 74:20
involves 27:7
involving 59:11
irrati... 42:5
issuance 2:13 8:9 17:3,21 21:3 62:22
issue 7:2 12:25 24:23 26:23 41:9 43:3,21 44:4,6 44:11 47:15 54:12 55:3,6 55:9,24 60:24 68:14 72:18 73:16 76:24 80:23 82:6,10
issued 5:20,23 6:7 7:4 7:10 8:12 33:3 42:9 43:5,17 43:22 44:17 44:18 48:22 49:23 50:5 54:8,18 54:21
issues 21:5 27:12 47:14 49:11 49:21
issuing 44:25 54:14
item 4:13

J

J 1:19
James 1:22 2:20
janitors 79:12
Jeff 2:25
Jeffery 46:24
Jeffrey 1:6,23 2:11,22
Jennifer 83:5,16
Jim 41:18 49:25 61:8
job 62:21
John 1:17 27:23 52:8 53:19
Judge 3:12 5:4,16 6:4 7:22 8:3 31:5 60:5

K

keep 80:25 81:4
keeping 52:19
kept 14:21 52:15
kid 77:23 78:11
kids 11:5 40:21
kind 28:5 43:25 47:15 50:21 63:3 70:5
know 2:7 2:23 6:6 8:12 10:15 19:23 24:14 28:2,9 28:9,10 28:11 28:16 29:22 32:23 33:20 36:10 36:14 36:16 36:18 46:25 47:15 50:19 51:4,11 54:13 54:16 55:5,11 56:8,17 56:18 56:24 59:2 63:4,16 64:3 66:11 67:3 69:9,21 69:23 72:19 76:5,21 77:3 79:7,9 80:10 80:19
knowledge 61:6
knowle... 50:2,3
known 7:12 71:18
knows 79:8

L

labeled 3:14,19 3:25 4:10,17 24:4,7
lack 49:8
lacked 72:23

lady 77:9
laid 5:11
7:20
13:17
58:5
78:19
land 3:17
3:23
6:14
11:15
15:4
19:24
43:5
46:15
52:14
52:22
54:20
71:4
landlo...
22:16
22:17
48:4,5
landowner
17:14
landow...
28:13
37:22
lands
7:16
13:14
lanes
64:25
Lang 3:12
5:4
31:5
language
9:17
14:20
36:6
Lang's
5:17
6:4
7:22
8:4
60:5
72:6
large
10:13
12:18
13:3
77:7
law 2:17
5:13
7:11,12
8:20,24
9:2,6
9:11,13
9:15
14:12
17:2,6
17:8
27:4
34:14
40:5
41:11
41:12
42:10
42:15
46:22
56:20
62:23
72:10
74:15
lawn 52:16
laws 9:23
lawsuit
29:20
30:8,21
31:8,9
66:5
lawyer
43:18
lawyers
64:9
lead 80:8
leading
59:11
leads
3:12
League
10:25
leave
51:2,12
leaves
18:19
56:21
left 22:8
22:14
29:16
34:9
51:7
left-hand
21:19
23:14
23:17
33:21
legal
21:4
45:15
49:11
49:21
50:6
70:11
legality
74:25
legally
54:14
62:8,10
Len 54:6
length
32:19
letter
6:2 7:4
7:5
59:8,12
61:3,4
61:14
let's
4:20
65:19
72:15
Lewis
6:12
7:7
18:12
20:3,13
32:25
33:2
43:22
44:5
54:18
57:14
57:17
57:20
58:2
59:8,13
license
50:13
limited
36:2
line 18:2
18:2
21:20
23:4,12
23:14
28:14
28:22
33:4,5
33:11
34:2,7
35:15
37:9,13
43:7
52:22
58:17
69:18
69:24
70:2
79:25
lined
56:4
lines
18:22
41:6
50:20
78:18
Lisa 42:25
45:3
list 64:25
71:6
listen
27:9
listening
67:9
lists
71:10
litiga...
6:21,22
little
10:25
48:19
49:11
62:5
63:2
65:25
76:25
79:15
81:3,5
live 2:8
22:6
27:8,24
37:6
46:11
46:14
49:4
54:7
lived
51:12
living
25:14
49:4
LoBreglio
54:6,6
55:14
55:14
56:18
69:16
69:16
69:21
70:7
79:11
located
2:15
location
4:14
52:25
long 8:23
26:25
28:17
35:7
37:4
65:2
75:4,4
look 16:6
19:23
33:22
37:4
47:11
47:12
51:13
57:7
64:12
64:12
65:13
65:16
65:21
looked
47:3
57:17
looking
13:8
19:4
33:24
40:16
56:11
58:22
58:23
looks
37:5
65:18
lost 53:24
lot 1:9
4:15
5:20,21
5:23,24
6:8,22
9:7
11:22
21:22
22:3,14
22:15
24:21
25:11
28:10
28:23
32:19
32:21
33:15
33:22
34:9,14
37:6
39:12
39:14
45:8,9
48:15
53:6,8
53:14
58:5
60:9
61:19
61:21
61:21
62:7
63:7,9
64:21
lots 9:8
loud 48:21
69:17

M

MacVane
59:8,13
mailing
3:4
mailings
3:5
Main 1:11
Maine
11:13
14:10
maintain
13:24
35:19
37:12
68:13
mainta...
6:9
7:23
35:18
66:22
66:23
68:19
68:24
69:2
72:14
mainta...
20:21
37:7,16
38:3
maintains
67:11
78:18
mainte...
19:18
36:24
41:5
72:10
73:24
78:18
79:7,13
79:18
making
30:23
31:3
33:20
39:13
50:8
53:21
60:14
60:17
60:20
70:11
72:24
72:24
73:2,3
Mal 51:16
69:22
man 74:23
manner
53:17
map 6:11
18:20
23:8
33:11
33:12
35:10
64:12
64:24
Marchand
13:10
40:16
66:17
68:17
68:20
marked
63:9
marriage
83:9
materials
7:6
20:8
69:6
matter
1:5 2:3
2:22
3:13,18
5:10,13
19:11
35:25
59:10
83:10
matters
19:13
McDermott
59:9
McNally
2:15,17
4:10,11
4:12,15
4:16,25
4:25
5:11,25
6:5 7:9
7:23,23
10:15
10:15
11:3
12:9
16:21
16:22
19:21
21:17
22:7
25:14
27:25
28:3,6
28:14
29:2,10
29:13
29:17
29:23
30:6
31:12
31:16
32:16
32:17
32:20
32:20
32:22
33:7,16
33:19
34:5,25
38:13
55:20
63:5,7
64:22
64:23
64:25
65:3
71:12
71:14
mean 14:3
15:10
32:17
35:12
35:24
39:19
40:15
40:20
40:21
43:11
49:15
54:14
63:3
64:2,9
64:10
65:20
65:21
65:22
80:11
80:14
meaning
35:22
35:22
36:6
means
10:11
10:13
15:10
24:25
31:17
54:13
67:23
75:20
meet 48:10
74:8
meeting
45:25
63:24
78:24
meetings
48:7
61:20
82:19
meets
57:21
member
11:4
45:5
63:23
members
15:25
memory
69:11
mention
56:9
57:8,10
mentioned
57:4
mentions
14:3
merely
36:2
met 16:3
48:9
middle
21:16
21:18
21:20
23:4,13
24:15
25:4,8
25:10
35:8
37:9
70:6
Mike 40:14
46:25
50:2
81:24
mile 34:11
mind 45:3
minute
40:4
69:20
minutes
51:13
53:18

55:23
55:23
55:24
56:5,7
61:20
missed
31:4
missta...
61:17
mistake
50:9
mistruths
53:15
misund...
58:13
moment
68:5,7
Monroe
26:21
month
46:5
76:22
78:25
79:4
81:5
82:19
months
76:22
morning
12:13
18:9
22:9
69:24
79:17
mother
56:10
motion
51:17
59:6
80:21
81:4
move 11:21
49:18
52:21
moved
50:16
municipal
72:2
munici...
15:3
18:14
41:21
41:23
munici...
6:9
Murray
2:24
3:3
21:11
24:13
28:4
33:25
39:11
42:25
48:25
51:8
52:13
54:7
55:15
58:19
59:16

N

naked
9:17
72:11
name 2:20
2:25
3:2
10:20
21:10
27:22
34:5
54:6
69:15
78:9
narrative
15:12
narrow
36:8
narrowed
36:9
narrowly
36:12
67:19
narrows
59:18
nature
9:24
19:20
20:11
near 37:24
neat 52:20
necess...
17:25
necessary
19:17
49:25
need 8:6
37:15
39:17
40:10
51:16
52:11
56:2
58:17
73:23
77:14
77:14
78:22
negative
38:4,8
74:19
75:7,14
75:16
neighbor
21:12
21:13
45:12
46:13
48:21
50:23
51:2
56:13
56:16
74:11
neighb...
26:2
42:24
45:9,11
45:16
neighb...
74:3
neighbors
46:2,9
48:10
48:16
49:5,6
49:9,20
Neil 1:16
15:2
neither
6:13
34:24
never
28:18
29:4,13
29:21
30:6,8
30:17
31:11
40:24
46:13
50:25
51:12
52:25
53:2
54:23
59:25
61:18
72:8
new 1:2,12
2:18
4:25
5:11,13
5:24
7:9,23
10:15
11:14
13:10
16:21
21:19
22:7
24:19
25:14
32:20
33:18
37:9
40:16
55:19
55:25
56:13
63:7
64:23
65:3,4
66:18
83:7
nice 46:8
46:8
night
11:2
24:16
32:16
50:18
nonsense
39:24
nonsen...
35:20
35:25
normally
18:2
north
25:3
46:16
northwest
16:22
Noscowski
27:2,24
40:9
43:7
45:24
46:5
48:3,9
52:8,8
53:14
53:23
54:3
57:3,23
58:7,10
58:14
61:18
79:21
Noscow...
51:5
Notary
83:6
notes
36:11
notified
44:2,17
notify
44:5,22
54:10
notifying
45:2
November
23:11
novo 42:15
number
38:14
39:15
48:7
49:21
nuts 63:13
Nuzzolese
40:14

O

object
44:3
objected
59:5
objecting
59:24
objection
8:25
45:13
81:12
object...
37:21
obligated
38:20
obliga...
44:5,8
44:9,22
obvious
9:19
occurs
55:17
October
1:11
7:6
8:14
offer
48:8
53:21
offhand
69:9
office
53:4,8
okay 20:4
26:17
46:23
63:20
78:23
80:20
81:3
old 8:19
once 34:18
38:13
48:22
ones 54:4
one-way
5:2,3
21:9,11
22:12
22:13
22:20
23:20
24:3,7
24:12
24:13
24:18
24:19
28:15
28:20
50:15
50:15
51:20
51:20
51:21
69:23
70:8,12
70:13
70:19
70:21
online
63:11
open 24:24
26:19
29:16
51:25
63:24
64:7
81:2,4
opinion
48:8
49:10
opport...
31:4
opposed
47:16
origin...
48:14
65:18
outcome
83:10
outline
21:6
outlined
4:7,9
5:21
outlines
8:14
outside
18:15
41:15
overtu...
51:18
owned 9:5
34:19
50:9
58:10
68:8
owner 9:2
10:17
10:19
12:8,16
12:20
12:21
12:25
31:23
44:6,23
45:2
52:8
56:12
59:7
66:22
74:3
owners
10:14
10:21
11:15
16:2
45:21
65:9,15
ownership
8:22
15:23
17:15
owner's
8:22
owns 9:4
15:22
46:21
54:21
57:24
58:7,8
58:9
65:8
oxymoron
10:5

P

page 69:10
painting
41:6
paper
17:8
21:7,24
paperwork
53:5
parcel
3:23
4:7,8,8
4:9
17:4,10
17:15
18:21
58:2
61:19
parent
78:10
parents
39:23
70:11
parked
46:5,7
parking
4:15
11:22
21:22
22:3,14
22:15
24:20
25:10
32:19
32:21
33:15
33:22
34:9,9
34:14
39:14
63:6,9
64:21
part 10:7
15:2
20:21
20:22
32:21
33:19
34:12
38:17
39:3
45:20
55:16
59:16
59:19
60:14
60:16
60:20
78:11
80:9,9
partic...
13:20
parties
83:8
parts
32:23
32:24
pass 12:5
51:17
passing
18:9
patch
67:13
pave 80:6
paved
7:25
18:23
18:24
19:14
19:21
38:21
72:8
pavement
19:5
35:11
36:3,3
41:14
41:14
56:20
56:22
79:24
paving
36:24
41:5
payer
64:9
pays 40:20
peace
59:14
Pennsy...
26:21
people
9:9
11:18
21:10
22:6
26:16
27:7,8
28:2,7
28:10
28:23
33:18
34:5,10
34:21
34:22
35:23
38:3
50:10
52:2
59:15
67:9
68:19
68:21
69:19
78:6

81:18
percent
3:6
82:5
perfected
5:16
perfectly
64:15
period
8:24
67:2
70:10
72:16
73:9
permis...
17:13
51:23
52:11
52:13
58:18
permis...
38:16
permit
2:13,16
4:4
5:20,23
6:4,7
6:16
7:2,3
7:10
8:10
16:9
17:3
21:3,5
27:3,18
33:2
42:8
43:3,4
43:17
43:21
44:7,12
44:17
44:18
46:4
48:22
49:23
50:5
53:2,11
54:8,11
54:13
54:15
54:22
55:4,9
74:4,6
76:24
permits
17:21
44:25
permitted
62:11
person
9:4
12:12
25:14
25:23
26:2,15
26:16
40:12
42:3
46:21
53:7
56:3
74:21
personal
47:15
61:6
75:22
person's
10:10
Peter
59:14
61:5
petition
47:3,12
60:8,14
60:19
60:21
philos...
45:8
pick 78:15
picking
77:22
picks
78:10
piece
9:20
16:8
44:19
79:15
pile 43:10
43:11
49:12
52:21
pissed
64:9
place
13:20
13:24
17:12
35:23
35:24
82:3
plain
36:5,6
plan 4:3
Planning
48:13
61:7,10
plow 79:16
plowed
43:25
79:13
plowing
36:24
37:8
plows
67:7
79:9
point
5:14,15
7:3 8:2
16:15
16:22
16:24
17:11
21:24
41:2
59:17
61:6,8
70:7,12
pointing
33:10
points
47:11
policy
21:5
26:23
27:12
58:20
59:3
69:14
political
27:7
portion
19:15
20:14
20:16
35:18
57:24
58:7,16
58:16
59:15
67:14
68:10
68:12
68:18
68:24
68:24
68:25
69:2
position
7:21
8:13
14:13
17:8
21:7,24
62:11
78:5
positions
8:15
positive
75:8
posses...
9:8
10:10
14:2,5
14:7
32:7
43:24
possible
49:4
70:2
74:12
possibly
20:19
power
81:14
82:2,10
practice
11:2
precede
8:6
precedes
3:2
predates
72:16
predating
73:15
Premise
2:17
premises
1:9
2:15
prepared
49:24
71:21
71:23
prescr...
9:10
prescr...
8:24
prescr...
7:12
8:19
9:9
15:3,8
15:9,10
15:10
15:13
15:21
29:19
32:12
66:12
66:14
66:16
67:22
68:6
72:12
prescr...
10:4
11:17
14:3,4
14:6
15:7
17:20
31:21
31:22
32:5
73:7
PRESENT
1:21
presented
31:11
31:14
presen...
62:22
presents
24:18
presume
6:6
pretty
11:12
17:6
previous
53:7
Previo...
53:3
prima
75:9
principal
50:12
printed
63:11
prior
29:19
59:7
61:4
73:12
private
34:13
40:24
40:25
65:9,14
probably
52:17
63:13
79:25
80:2
problem
14:25
24:18
68:12
68:14
76:9
procedure
29:9
31:15
proced...
5:7
31:9
proceed
6:20
proceeded
6:18
procee...
41:20
47:4
61:4
73:11
procee...
2:1 3:1
3:18,24
4:1,5
5:1 6:1
7:1 8:1
9:1
10:1
11:1
12:1
13:1
14:1
15:1
16:1
17:1
18:1
19:1
20:1
21:1
22:1
23:1
24:1
25:1
26:1
27:1
28:1
29:1
30:1
31:1
32:1
33:1
34:1
35:1
36:1
37:1
38:1
39:1
40:1
41:1
42:1
43:1
44:1
45:1
46:1
47:1
48:1
49:1
50:1
51:1
52:1
53:1
54:1
55:1
56:1
57:1
58:1
59:1
60:1
61:1
62:1
63:1
64:1
65:1
66:1
67:1
68:1
69:1
70:1
71:1
72:1
73:1
74:1
75:1
76:1
77:1
78:1
79:1
80:1
81:1
82:1,9
82:20
process
8:7
15:2
22:25
27:7,17
30:12
42:7
60:15
60:17
60:20
produce
78:25
profes...
54:20
prongs
15:20
proof
41:22
42:4
68:15
68:16
74:2,7
75:20
76:11
77:6
proper
5:7 6:3
29:7
properly
2:10
31:15
49:23
54:8
property
8:21,23
9:12,20
9:22,24
10:10
12:8
16:17
16:21
17:7,24
18:9,11
33:8
34:2,7
34:12
34:13
35:7,15
35:17
35:19
43:6,7
43:15
44:2,6
44:12
44:13
44:16
44:19
44:23
45:2,14
45:17
45:21
45:23
46:3,7
46:13
46:22
48:3,4
49:13
49:17
50:7,11
50:14
51:24
52:3,9
52:13
52:15
52:16
52:17
52:18
52:19
52:22
52:24
53:10
54:5,21
55:4
56:12
57:5,21
58:17
58:20
59:19
61:17
65:8,9
65:14
65:19
65:22
65:23
66:23
68:9,11
68:13
70:9
74:3
79:24
proper...
16:19
proposed
22:12
22:19
53:9
61:19
proposing
39:20
39:21
prove
37:20
37:21
38:6
75:4,7
75:9,14
75:15
75:16
75:20
75:23
76:4,5
76:10
proving
40:5,6
74:25
76:14
public
5:9,9
7:17
8:7,8
10:11
10:13
10:13
11:4,8
11:16
11:19
11:20
12:17

12:18
12:24
13:2,2
13:3,15
13:20
13:25
14:17
14:23
15:24
15:25
23:2
24:24
24:24
26:7,10
26:18
26:19
27:13
28:9
29:3
30:16
32:3
34:15
34:17
34:19
38:17
40:7,13
40:20
40:20
40:22
47:9
50:6,8
51:25
66:24
66:25
71:22
72:9,11
76:2,4
76:13
77:7,7
77:12
77:12
77:13
78:3,12
79:3
80:8
81:2,4
83:6
pull 70:15
purchase
17:16
purported
19:25
purports
57:19
purposes
71:19
pursuant
72:10
put 7:24
16:12
18:4
24:10
34:11
38:21
43:10
45:19
46:17
49:14
66:17
78:18
putting
39:6
45:10
45:14
45:23
p.m 1:12
82:20

Q

qualify
78:2
quarter
23:24
55:17
question
5:10,20
17:4,7
17:22
29:5,17
29:21
30:5,7
30:8,17
31:8,10
31:14
32:15
36:20
45:4,7
48:13
52:9,10
54:9
55:12
58:14
60:6
67:18
70:25
71:5
72:16
74:21
78:17
80:4
questi...
76:7
questions
47:10
62:16
quickly
40:4
quite
37:10
67:9
quotes
13:13

R

radius
58:3
raise
72:18
80:23
raising
44:4
ran 75:23
read 7:14
7:16
8:13
9:18
11:11
15:13
15:15
77:25
reading
66:14
66:22
reads
47:6,6
ready
65:24
reaffirm
51:20
real 9:2
really
2:22,24
4:6
11:12
27:18
36:7,8
47:20
48:20
52:2
63:4
64:6
66:4
reason
21:2
29:2
30:15
30:18
30:22
31:19
reasons
8:17
21:4
69:14
receipts
3:4
received
3:6 5:9
recite
69:7
recoll...
12:10
53:21
77:3,4
77:5
recommend
56:11
64:3
record
2:10,19
23:9
32:25
33:10
41:2
66:17
72:6
recorded
7:20
13:18
records
23:10
23:23
24:2
64:22
red 4:10
reduced
4:3
refer 3:9
69:8
referred
7:10
57:14
referring
3:21
refers
8:19
refresh
69:11
regard
59:15
74:5
78:17
regarding
36:24
42:9
68:14
76:22
regularly
11:7
regula...
6:19
related
83:8
relates
77:24
relati...
13:12
relevant
73:8
relied
7:11
relief
75:10
remember
53:12
53:18
61:22
61:23
76:25
reminders
54:25
reminds
64:13
repair
14:22
repaired
72:14
repeat
41:12
replaced
28:18
Reporter
83:6,17
represent
2:24
27:23
61:16
repres...
47:2
repres...
53:4
61:12
requested
2:12
require
75:13
required
6:19
requires
10:8,12
17:2,4
rescind
6:16
research
13:9
38:25
resear...
35:14
reserve
18:3
resolu...
5:8 8:7
51:17
respect
3:7
17:9
45:5,21
47:17
49:9
67:25
responded
31:10
respon...
31:7
respon...
55:16
respon...
25:17
25:18
80:6
respon...
67:4,4
rest 5:14
59:14
result
44:18
73:7,19
results
43:20
reviewed
71:23
reviewing
60:10
right
9:19
10:4
11:20
11:22
11:23
12:7,17
12:20
12:21
14:16
21:15
21:18
21:19
21:20
22:15
22:23
23:12
23:16
24:10
25:10
29:15
31:13
33:4,5
33:7
34:7,9
34:10
35:4
38:7
39:3,13
42:19
43:7
46:7,14
48:22
48:23
53:12
57:5
63:13
65:16
66:5
68:4
70:3,21
76:19
78:20
78:23
82:6
rights
8:23
9:5,8
24:21
right-...
4:11
18:6,11
18:20
52:12
57:10
58:19
road 11:15
12:24
14:20
19:14
21:21
23:5,13
23:14
23:16
28:19
28:22
29:3
33:22
34:15
35:8,9
35:10
35:15
35:21
35:21
35:21
35:25
36:2,4
36:4,6
36:23
37:4,6
38:20
38:21
39:24
40:23
40:25
41:6,19
43:19
45:23
55:21
56:23
56:25
57:5,9
57:10
63:8
64:14
64:16
64:17
64:19
65:7,7
65:9,10
65:11
65:17
66:7,21
66:25
67:5,7
67:7,8
67:13
68:9,10
73:6,14
73:19
76:2,5
76:13
77:8
79:7
roads
34:17
36:5
80:6
roadway
19:15
19:18
19:20
35:12
59:11
59:18
role 13:5
79:6
Roman
8:20
9:6
room 27:5
Roseng...
59:9
rule 6:21
8:19
10:7
11:10
11:13
13:21
14:12
74:4
rules
6:19
runs 16:18
19:19
46:16

S

safety
55:24
sale 52:24
satisfy
14:18
Saturday
12:4
saying
29:22
33:20
41:4,7
45:18
55:3
63:20
65:12
74:18
74:23
76:12
76:14
79:10
80:17
says 4:6
7:16
14:13
14:16
15:7,9
24:3
27:4,13
32:2,8
37:8
38:18
40:17
57:2
58:7,8
59:9
66:13
69:3,5
69:19
70:12
70:16
70:21
70:23
72:6
scale
16:7,8
19:7,8
19:10
20:2
schedules
56:8
school
4:15
10:16
11:22
12:5
22:3,9
24:10
25:4,8

26:16
28:8
32:19
33:6,6
33:8,15
33:22
34:19
38:6,12
39:23
40:19
40:20
40:21
40:22
40:23
40:24
50:7,9
50:10
51:21
51:23
52:12
53:9,20
54:2,3
55:16
55:19
56:6,6
58:18
59:12
59:19
63:3,6
63:8
64:14
64:17
65:7,8
65:11
65:13
65:17
70:8,22
78:7,8
78:11
78:13
78:15
79:6,8
79:10
79:14
79:16
80:10
80:14
80:15
81:22
schools
80:8
Scotch...
25:3
39:11
39:16
64:18
scribed
9:11,11
scrutiny
33:3
se 14:3
second
3:15
10:7,23
15:24
48:17
49:2
81:7
Secondly
52:14
section
1:9
7:11
17:2
66:11
see 2:3
16:12
16:14
16:15
16:20
21:23
32:19
33:4
38:9,9
47:4,7
48:25
49:3
55:24
58:25
64:4,5
66:2
67:17
68:3
74:15
82:12
seeing
58:24
seeking
74:21
seen 36:11
40:24
42:13
51:2,12
54:23
54:25
64:23
64:24
64:24
65:5
79:18
sees 68:25
segment
77:11
sending
40:21
sense
10:2,2
10:5
14:14
14:18
15:6
36:4
39:12
64:2
66:8
separate
11:18
separa...
16:23
16:25
20:5
seperated
17:11
serve
62:15
set 42:6
sets 9:2
9:13
seven
79:25
Sherwin
1:6,23
2:12,23
5:19
46:24
46:24
47:19
47:25
50:25
51:9,11
59:5,8
60:7
61:2,10
61:25
62:8
Sherwin's
53:4,8
59:20
shift
75:10
shoes
42:10
42:12
76:15
short
7:13
27:16
59:2
shoulders
19:19
should've
28:20
shoveled
79:12
show 38:4
74:7
showed
54:19
showing
33:11
35:13
38:7
shown
35:11
shows
33:4,5
33:8
54:20
shut 22:18
side 45:23
49:16
53:9
56:16
75:11
sides
65:10
66:11
sidewalk
7:24
79:21
sidewalks
18:4
20:10
sign 4:14
22:2
24:7,9
24:12
28:16
28:19
34:12
34:17
38:18
50:16
70:13
75:24
signed
2:25
59:14
71:23
signs
28:15
28:21
39:16
silt 49:14
52:15
similar
14:20
simple
8:16
9:15
54:22
simply
57:8
single...
2:14
sir 27:21
40:2
62:12
82:16
site 4:3
52:20
63:12
sits 77:18
sitting
49:2,3
55:22
63:14
situation
6:13
25:20
56:13
six 47:11
49:12
79:25
sixteen
21:14
size 55:6
Sleepy
37:6
slow 2:9
snow 36:24
snowbl...
79:13
snowplow
67:11
79:15
snowpl...
7:25
snowplows
39:6
78:19
somebody
10:9
37:7
53:4
56:23
59:6
76:6
77:17
somebo...
8:23
soon 46:3
sorry
13:7
19:4
58:12
68:7
69:15
sort 13:21
79:8
sounds
72:21
southeast
16:24
so-called
4:11,12
4:16
64:25
space
34:20
speak
19:16
63:24
speaking
33:2
speeding
34:16
Speir
14:23
spend
64:8
spot 45:19
Squatters
9:8
staff
10:17
11:5
STAHLMANN
1:15
2:2
10:22
10:25
11:9,24
12:4,8
12:15
12:19
16:11
17:22
17:24
21:12
22:2,5
22:17
25:12
25:19
25:25
26:5,12
26:17
27:20
33:10
33:24
36:20
40:2
41:2
42:21
43:13
45:3
46:10
46:23
47:17
47:23
50:23
51:7,10
52:6
53:12
53:18
53:25
54:16
54:23
55:11
56:15
61:23
62:4,13
62:18
70:24
71:5,10
71:14
72:3,19
73:21
78:5,16
78:23
80:12
80:16
80:20
81:8,24
82:13
82:15
82:17
stake
21:6
stand 2:6
42:10
52:5
76:15
standards
6:12
standing
42:12
start
4:19
32:18
started
38:10
starts
33:6
state
5:13
13:10
40:17
58:10
65:4
66:18
70:25
71:6,18
71:19
71:20
72:4
83:7
stated
53:15
statement
8:14
14:13
34:3,4
states
53:5
stating
62:24
statute
7:13
9:17
14:8,18
14:20
15:7,14
31:25
32:2,6
32:6,14
36:10
42:20
66:13
67:18
67:19
67:21
67:23
67:24
76:19
82:5,11
statutory
15:12
15:21
stay 11:13
46:6
82:4,7
82:8
stays
82:10
stems
8:20
stenog...
2:4,8
stenog...
83:5
step 54:11
STEPHEN
1:19
Steve
20:5
38:25
62:13
74:14
78:16
Stewart
51:16
69:22
stood
5:17,17
stop 25:13
32:18
34:17
34:17
39:15
75:23
79:9,15
story
20:10
48:19
straight
39:11
street
1:11
2:15,18
4:11,12
4:16,16
4:25,25
5:2,2,3
5:8,11
5:12,25
6:5,5,9
6:10,10
6:15,25
7:9,18
7:19,23
7:23
8:5,5,9
10:15
10:15
10:16
11:3,6
11:21
12:22
13:6,15
13:16
13:20
13:25
16:22
17:2,5
17:7
18:7,8
18:12
18:13
18:18
18:19
18:23
18:24
18:25
19:21
20:6,15
20:24
21:8,9
21:11
21:13
21:14
21:16
21:17
21:18
21:25
21:25
22:4,6
22:7,12

22:13
22:21
22:23
22:25
23:3,19
23:20
23:24
23:24
23:25
23:25
24:3,4
24:5,7
24:12
24:13
24:18
24:19
24:23
25:14
25:21
26:7,10
26:18
27:2,6
27:8,10
27:11
27:14
27:25
28:6,15
29:3,3
29:4,9
29:10
29:14
29:14
29:17
29:18
29:23
29:23
30:6,6
30:12
30:13
30:15
30:16
30:17
31:12
31:12
31:17
31:17
31:18
31:18
32:3,4
32:9,9
32:10
32:16
32:17
32:20
32:21
32:22
33:7,16
33:19
33:25
34:5,5
34:25
34:25
35:5,6
36:25
38:10
38:13
38:16
38:17
39:6,15
40:6
41:13
46:15
46:16
47:9
50:6,8
50:9,14
50:15
50:16
51:8,18
51:20
51:21
53:6
56:16
58:4,15
58:15
59:17
59:19
62:24
63:5,7
63:17
64:14
64:22
64:23
64:25
64:25
65:3
66:21
68:20
68:24
68:25
69:23
70:15
71:4,12
71:15
71:21
71:24
72:2,15
73:20
77:15
77:16
77:22
77:23
78:6
streets
7:12
8:18
10:9,11
15:7,8
15:9
20:12
26:2
32:12
71:2,7
72:9
Strefis
59:14
61:5
strictly
57:17
strip
3:17
4:10
5:10
6:14
15:4
18:16
18:16
strips
20:10
STROBL
1:17
21:15
23:4,8
23:11
23:16
23:21
32:15
33:13
35:3
40:19
63:2
65:12
65:16
81:7,10
strong
17:6
strongly
41:16
50:4
59:25
structure
6:7,8
students
10:18
study
28:6,11
39:17
56:9
stuff
63:11
65:5
subdiv...
18:20
48:15
53:7,8
61:13
61:16
61:19
61:21
subject
3:17,24
4:4 8:7
submis...
61:14
submit
71:6
submitted
51:14
60:8
subpoena
78:21
81:13
sued 63:20
63:23
63:25
suffic...
73:22
sum 26:24
superi...
50:11
71:21
71:22
81:14
81:21
81:23
supersede
62:23
62:25
support
7:2
17:3
27:3
supported
7:9 8:9
14:8
supports
4:4
supposed
21:20
66:16
79:23
Supreme
3:11
4:23
5:4
47:8
51:19
72:25
sure 2:9
34:18
37:5
65:22
67:9,20
68:15
69:18
82:5
surprised
26:14
survey
4:3
35:13
35:14
54:19
57:11
57:13
57:15
57:17
57:19
57:20
surveyor
54:20
suspect
81:22
Sweeney
1:22
2:19,20
10:24
11:8,10
12:2,6
12:14
12:16
12:23
14:12
14:25
15:15
15:19
16:14
17:18
17:23
18:10
19:7,10
20:2,4
20:17
20:23
21:22
22:4,11
22:19
22:24
23:6,9
23:15
23:18
23:22
24:6,11
24:17
25:9,17
25:23
26:3,7
26:10
26:14
26:18
28:25
35:6
40:4,11
40:18
40:23
41:11
41:17
41:19
42:19
46:19
49:25
51:14
52:4
57:2,3
57:13
57:25
58:8,21
60:4,7
60:12
60:16
60:21
60:23
61:9
62:21
67:25
69:3,4
69:6,10
71:17
74:14
76:11
76:19
77:6,11
77:17
77:24
78:8,13
81:12
81:22
81:25
82:11
82:14
Sweeney's
31:21
67:16
Sweeny
36:7
sworn
37:15
system
11:6

T

tagged
43:3,18
43:21
44:10
44:11
44:15
54:12
54:24
tags 54:25
take 6:17
13:23
16:6
26:24
27:11
33:8
37:3
54:11
55:20
56:20
70:4
80:6
82:3
taken
5:15
14:22
20:6,6
20:9,15
41:13
41:13
41:19
takes
56:7
67:10
80:10
talk 14:2
32:7
48:10
50:11
50:12
talked
27:12
53:16
61:3
77:10
talking
4:18
6:14
10:8
15:5,6
22:19
24:11
26:5
31:20
32:16
32:20
49:10
50:20
63:7
65:4
talks
31:25
35:6
tar 38:22
39:6
tars 67:7
tax 64:9
taxes
40:21
taxpayer
56:10
teacher
56:10
teachers
10:18
39:23
techni...
45:15
Ted 5:19
6:12,16
7:7
16:7
18:24
20:2,13
33:2
44:22
49:14
49:15
49:15
54:17
tell 2:6,7
4:20
13:22
13:23
28:19
45:12
52:6
60:8
62:14
73:25
telling
15:19
27:17
ten 5:17
7:18
8:3,25
9:9,11
9:12
10:3
13:15
15:11
20:3,4
29:11
32:3,9
40:7
43:9
44:14
55:23
63:14
63:19
67:2
73:4,6
73:17
terms
32:2
54:14
67:16
81:6
test 13:5
testify
40:15
testimony
36:23
37:16
40:12
73:23
78:17
80:25
text 42:19
thank
2:19
27:19
27:20
27:20
40:3
46:23
52:5
56:14
62:12
82:18
82:18
theirs
38:4
theory
15:21
16:3
20:13
20:19
72:12
thereof
72:15
thing
4:19
9:20
20:19
29:5,7
29:15
44:14
49:5
61:18
63:11
63:14
64:18
64:19
65:13
65:24
70:4
things
6:22
9:23
13:23
18:4
20:11
36:21
36:25
41:7
46:9
49:20

68:22
81:13
think
4:19
6:3
8:16
10:8,20
11:11
12:2,6
15:15
19:21
21:4
24:9,10
26:22
26:23
29:24
32:22
32:23
34:2,10
35:4,25
36:5,7
37:18
37:20
37:21
37:23
38:12
39:12
39:24
41:8
44:24
45:5
47:2,5
47:10
47:14
47:15
47:20
47:21
47:23
48:12
48:13
48:18
49:25
50:2,6
50:8
51:14
51:22
60:23
62:8
63:13
63:22
63:22
63:23
64:6
65:6
66:3,4
66:10
66:11
67:6,10
67:11
68:12
68:25
69:10
72:19
79:10
80:12
80:18
80:24
81:15
81:17
81:19
82:2,4
82:11
thinks
63:12
third
3:20
4:2
82:19
thirteen
3:5,5
12:11
29:12
29:20
45:6
47:2
53:22
63:15
thought
7:9
30:8
42:9
76:17
80:5
thousands
64:8
three
21:4
32:24
50:17
53:24
62:2
80:2
Thruway
65:4
Thursday
82:19
ticketed
25:16
time 3:9,9
4:18,18
7:25,25
8:13,24
11:4
12:11
25:5,5
26:25
28:2
29:15
35:7
38:13
41:17
48:8,20
63:19
70:10
72:16
73:9
75:4
76:18
82:18
times
27:25
38:14
title
13:19
15:14
17:14
27:15
32:12
32:13
58:20
59:3
66:20
today
21:16
23:12
35:9
60:10
told 38:23
43:18
44:10
48:16
76:18
tonight
2:3,4
8:11,16
28:5
54:19
75:2
82:17
tonight's
3:12,18
3:24
4:5
total
49:8
totally
61:17
63:13
touch
24:2
Town 14:23
67:3
79:23
towns
18:3
Tradewind
3:22
61:15
traffic
28:4
34:14
39:17
39:21
56:9
transp...
10:12
39:2
travel
11:17
18:24
traveled
14:21
19:2,16
19:16
20:7
treason
31:18
treat
49:6
tree 48:23
49:4
trees
43:6
52:18
trespass
22:9
trespa...
11:24
12:13
tried
21:6,23
72:22
74:25
trier
75:19
trouble
68:11
69:12
troubled
63:2
true 14:10
18:10
30:25
37:24
66:12
truly
26:19
trustee
51:16
truthful
65:20
try 8:15
25:2
trying
11:19
25:20
36:7,17
46:11
53:6
55:12
57:23
72:3
75:3,7
75:24
77:20
turn 21:19
22:8,14
23:14
23:17
33:17
33:21
70:16
twelve
55:23
63:19
twenty
56:5
twice
56:4
two 4:24
9:16
13:23
13:25
15:20
16:2
28:21
45:8
47:14
48:15
49:20
53:8
62:2,6
76:22
80:2
81:13
two-way
22:23
23:2,19
23:24
24:5
type 57:5
74:22

U

unders...
22:5
25:19
26:9
35:16
41:7
43:2,16
45:17
46:10
47:19
57:22
67:5
69:13
71:15
72:4
75:22
80:16
unders...
42:14
upmost
45:4
upwards
56:5
use 8:21
8:23
9:5,22
9:23
10:12
10:14
11:6,15
11:18
12:17
12:20
12:21
14:7,17
15:7,9
15:11
15:24
18:25
18:25
20:6,15
22:13
24:25
25:2
26:11
26:22
27:2
28:7,9
28:9,10
28:10
28:13
29:18
30:16
31:23
35:17
36:5,22
38:16
39:24
40:23
40:24
41:13
48:4
58:15
65:22
65:23
68:8
72:9,11
73:24
74:8
76:2,4
77:14
77:16
78:3
user 18:12
18:14
18:16
18:16
19:14
19:25
20:24
38:16
41:20
73:6,14
uses 26:2
26:12
28:6
38:6
40:6
77:8
usually
20:11
Utrecht
14:24
U-turn
70:11

V

vacant
46:15
vacated
27:18
valid
52:5
validates
21:23
Valley
37:6
variance
53:10
74:5,8
74:17
74:21
Vehicle
34:13
vehicles
70:8
verbally
6:2
version
4:3
view 8:4
64:13
viewed
36:12
60:10
vigoro...
45:11
village
1:2,8
2:17
3:13,16
4:9,23
5:2,2,3
5:6,8
5:12,13
6:5,10
6:12,15
6:25
7:11,12
7:17,22
8:5,9
13:14
13:24
14:17
15:22
17:12
17:17
17:25
18:9,13
18:18
18:18
20:21
22:22
23:10
23:23
24:2
27:4,5
27:6,8
27:9,10
27:11
27:13
27:14
29:4,7
29:8,15
30:4,11
30:23
33:5,11
35:19
37:7
38:2,23
39:5,7
39:8
46:12
51:14
51:18
54:21
59:17
59:18
61:11
62:23
62:24
63:17
63:22
64:24
66:6,7
66:21
66:24
67:4,6
67:7,8
68:13
68:20
70:25
71:24
72:9,9
72:10
72:13
72:22
73:20
79:8,23
80:9,10
Village's
80:5
vindic...
43:8
violates
2:16
vividly
59:5
void 30:4
57:9
72:7
vote 53:24
votes
53:24
vs 13:10
14:23
40:16
66:18

W

wait 69:20
waiting
55:22
walk 35:23
want 2:23
9:22
18:3,4
32:19
41:12
42:22
42:23
45:16
45:19
50:10
50:13
51:19
51:24
51:25
54:11
62:14
62:14
62:18
62:19
63:4

64:8,15
65:21
65:23
80:7,24
wants
16:12
27:2
40:8
55:7
56:12
warn 37:10
Warwick
27:24
Washin...
38:15
wasn't
31:16
43:9
61:11
67:9
73:5
waves 2:8
way 5:3
8:21
9:22
12:24
18:24
19:2,16
19:16
19:21
19:25
20:7,24
24:20
24:24
36:13
44:15
48:6
49:19
51:22
53:19
58:3,4
64:3,15
69:4,25
70:9
71:15
72:5
83:9
WAYNE
1:15
ways 10:11
28:23
welcome
2:2
48:24
went 21:16
21:17
23:12
42:7
43:22
44:13
48:6,21
52:20
53:23
57:11
61:25
73:18
weren't
44:16
we've
63:21
wide 18:5
18:6,17
56:21
56:25
63:8
69:20
wider
59:15
width
55:21
wife 63:12
wind 38:19
39:14
39:15
Winston
46:14
wise 47:18
wood 43:8
43:10
43:12
49:12
word 9:10
36:6
58:23
66:12
66:13
67:22
words
7:15
73:8
work 12:13
17:13
25:15
48:11
50:24
65:25
79:18
works
71:22
worry
43:18
worst
25:6
worth
79:5
worthw...
79:19
wouldn't
25:8
65:23
78:14
wound
66:19
wrap 75:24
written
61:5
wrong
8:17
29:9
74:24
wrote
61:13

X

x 1:4,10

Y

yeah 11:9
22:4
25:9
35:3
47:25
49:16
60:22
61:25
65:21
77:13
78:21
year 4:24
years
5:17
7:18
8:3,25
9:9,11
9:12
10:3
12:11
13:15
15:11
21:14
24:12
29:10
29:12
29:19
32:4,9
34:23
34:23
35:5
36:22
37:2,5
38:12
40:7
43:9
44:14
45:6,12
47:2
50:17
53:22
63:15
63:19
67:2
69:22
71:13
73:4,7
73:17
79:22
yellow
4:7
5:21
21:20
23:14
28:14
28:22
37:9
50:20
York 1:2
1:12
2:18
5:13
11:14
13:10
40:17
65:3,4
66:18
83:7

Z

ZBA 74:5
zone 48:11
zoning
1:3
9:23

$

$60,000
48:3

1

1 1:9 3:14
4:22
10 34:11
100 3:6
82:5
104 1:9
12 43:11
14 2:15,17
15 16:24
17:12
19:5,7
19:9,12
19:22
52:17
16th 8:14
17 1:11
38:11
183 54:7
55:14
187 42:25
48:25
1890 14:24
1970 3:19
1983 50:16
51:13
1986 59:8
59:21

2

2 1:9 3:20
2nd 7:6
20 18:22
23:11
52:17
56:21
20th 3:19
2000 3:11
4:21
7:22
28:25
29:6
60:5
2001 44:10
47:22
48:3
51:15
2003 72:21
73:6
2012 13:12
23:8,11
2013 1:11
25 34:23
37:5
52:15
276 1:11
28 18:16
18:19
19:3
34:23
35:5
56:20
56:25

3

3 3:25
55:17
57:7
3:15 55:18
30 52:22

4

4 4:18
40 16:23
17:11

5

50 18:5,21
19:12

6

6 69:11
6-226
72:10
6-626
7:13
13:13
62:24
66:11
6:00 11:2

7

7 69:11
78:2
7-736
2:17
7:30 1:12
70 18:6
78 47:3
60:21

8

8 56:19,21
69:20
78:2
80 18:6
80s 53:3

9

9:07 82:20