

Regular Public Meeting of the Englewood Cliffs Planning Board  
Minutes  
May 12, 2016

The Regular Meeting of the Englewood Cliffs Planning Board was called to order by Chairman Fehre at 7:30 PM.

Present at Roll Call:

Mr. Fehre  
Mr. Villari  
Mr. Kilmartin  
Mr. Chunman  
Mrs. O'Shea – Borough Rep  
Mr. Kim – 1<sup>st</sup> Alternate  
Mr. Porrino – 3<sup>rd</sup> Alternate  
Mr. Lee – 4<sup>th</sup> Alternate  
Councilman Park  
Ms. Eastwood – Mayor Designee

Absent:

Mrs. Rosenberg  
Mayor Kranjac

Also Present:

Andrew Hipolit, P.E., of Maser Consulting, the Borough's consulting engineer.  
Michael Kates, Esq., of Kates Nussman Rapone Ellis & Farhi, the Board's attorneys.

Public notice of this meeting has been given in compliance with the Open Public Meeting Law by advertisement in The Record, The Star Ledger, and posting of notice on the municipal building bulletin board at 482 Hudson Terrace.

Flag salute led by Mr. Kilmartin

The minutes of the April 14<sup>th</sup> & 25, 2016 meetings motioned by Mr. Villari, seconded by Mr. Kim were approved by voice vote.

Old Business:

**Application #265K -** Residential Variance, Chimney Side Yard Encroachment  
Melissa Ko – 675 Floyd Steet – Block 808 – Lot 6  
**Resolution - Approved**

Mr. Kates, Board Attorney, read the resolution which is incorporated herein as though fully stated and made a part hereof. The Chairman asked for a motion to approve. Motion was made by Mrs. O'Shea, seconded by Ms. Eastwood. Chairman asked for roll-call vote of the members that were eligible to vote: Mr. Fehre, Mr. Lee, Mrs. O'Shea, Councilman Park, and Ms. Eastwood each voted to adopt this Resolution; it was unanimous.

**Application #257K -** Site Plan Approval w/VariANCES  
FCA Realty, LLC – 100 Sylvan Avenue – Block 130 – Lot 23

**Application #258K -** Site Plan Approval w/VariANCES  
FCA Realty, LLC – 120 Sylvan Avenue – Block 130 – Lot 24

See attached transcripts.

**New Business:**

**Application #263K -** 'D3' use Variance & "C" Variance for Parking  
JooASoo, LLC—11 Sylvan Avenue—Block 134—Lot 3.01

Chairman Fehre stated that this application will be carried to the May 24, 2016 Special Meeting date with no additional advertising.

**Application #266K -** Amended Site Plan and Variance  
Bank of New Jersey—744 Palisade Avenue—Block 512—Lot 4,5,6

Chairman Fehre stated that this application will be carried to the May 24, 2016 Special Meeting date with no additional advertising.

**Application #267K -** Variance for Deck  
Mr. & Mrs. Tashjian—39 S. Virginia Avenue—Block 909—Lot 12

Mr. & Mrs. Tashjian represented themselves. Mr. Tashjian stated that there is a 26 year old deck on the home that was erected when the home was built in 1990. It's an old deck that is falling apart. They would like to replace it and extend it by 5 feet on one side. Mrs. Tashjian stated that they were unaware of the rear yard set of 25' and if it had changed since the deck was original built. The drawing marked as page A1 drawn by Mr. Peter Pulice of Williams Architect was pre-filed to the board. Mrs. Tashjian stated that they are requesting to redo the deck and add 5 feet to the one side of the deck into the rear property.

Mr. Fehre questioned if the property is an odd shape lot. Mrs. Tashjian stated yes and because of it the rear yard is not so deep. Mr. Fehre questioned that it is not the entire deck that is nonconforming just a portion of it. Mr. Tashjian stated that the nonconforming part is just the stairs and a small corner piece of the additional 5 feet.

Mr. Kilmartin questioned that the new deck will be in the same footprint of the existing deck except for the new 5 foot extension which is not in the side yard. Mrs. Tashjian stated yes.

Mrs. O'Shea questioned that the stairs are the same as the existing. Mrs. Tashjian stated yes.

Chairman Fehre asked for a motion to open to public. Motion was made by Mr. Trovato, seconded by Mr. Chinman and carried unanimously by voice vote.

No Comments.

Chairman Fehre asked for a motion to close to public. Motion was made by Mr. Villari, seconded by Mr. Kim and carried unanimously by voice vote.

Chairman Fehre requested a motion to approve the application. Motion was made by Mr. Chinman, seconded by Mr. Kilmartin. This motion was approved by roll-call vote, 9 Ayes, (Mr.

Fehre, Mr. Villari, Mr. Trovato, Mr. Kilmartin, Mr. Chinman, Mr. Kim, O'Shea, Councilman Park, and Ms. Eastwood), No Nays, No Abstentions.

Chairman Fehre asked for a motion to open to public. Motion was made by Mrs. O'Shea, seconded by Mr. Kilmartin and carried unanimously by voice vote.

No Comments.

Chairman Fehre asked for a motion to close to public portion and adjourn the meeting at 11:20 pm. Motion was made by Mrs. O'Shea, seconded by Mr. Kilmartin and carried unanimously by voice vote.

Respectfully submitted



Caterina Scancarella

Planning Board Administrative Secretary

**ENGLEWOOD CLIFFS PLANNING BOARD**  
**REGULAR MEETING – May 12, 2016 7:30 PM**

143 Charlotte Place, Englewood Cliffs, NJ

**CALL TO ORDER**

The meeting of the Englewood Cliffs Planning Board will come to order this (date). The time is (time).

**"OPEN PUBLIC MEETINGS ACT" STATEMENT**

Public notice of this meeting has been given in compliance with the Open Public Meeting Law by advertisement in The Record, and Star Ledger posting of notice on the Borough Hall bulletin board at 482 Hudson Terrace, Englewood Cliffs.

**ROLL CALL**

**FLAG SALUTE LED BY:**

**APPROVAL OF MINUTES:** April 14<sup>th</sup> and April 25, 2016

**OLD BUSINESS:**

- Application #265K - Residential Variance, Chimney Side Yard Encroachment  
Melissa Ko – 675 Floyd Street – Block 808 – Lot 6  
**Resolution – Approved**
- Application #257K - Site Plan Approval w/Variations  
FCA Realty, LLC – 100 Sylvan Avenue – Block 130 – Lot 23
- Application #258K - Site Plan Approval w/Variations  
FCA Realty, LLC – 120 Sylvan Avenue – Block 130 – Lot 24

**NEW BUSINESS:**

- Application # 263K – “D3” Use Variance & “C” Variance for Parking  
JooASoo, LLC – 11 Sylvan Avenue – Block 134 – Lot 3.01
- Application # 266K - Amended Site Plan and Variance  
Bank of New Jersey – 744 Palisade Avenue – Block 512 – Lot 4, 5, 6
- Application #267K - Variance for a Deck  
Mr. & Mrs. Tashjian – 39 S. Virginia Court – Block 909 – Lot 12

**COMMUNICATIONS**

**COMMITTEE REPORTS**

**PUBLIC COMMENTS OTHER THAN HEARING ON THIS AGENDA**

**ADJOURNMENT**

# ORIGINAL

## PLANNING BOARD

### BOROUGH OF ENGLEWOOD CLIFFS

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**IN THE MATTER OF THE APPLICATION OF :  
MELISSA KO FOR A DIMENSIONAL VARIANCE : MEMORIALIZATION RESOLUTION  
FOR LOT 6 IN BLOCK 808, 675 FLOYD STREET : APPLICATION NO. 265K**

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**WHEREAS, MELISSA KO** applied on or about March 18, 2016 to the Planning Board of the Borough of Englewood Cliffs for a dimensional variance relating to chimney encroachment in a required yard setback, in the "R-A Single-Family" zoning district; and

**WHEREAS,** a public hearing was conducted on April 14, 2016, upon proper notice certified by applicant's proof of service to property owners within a 200-foot radius of the subject property and proof of publication in an official newspaper of the Borough; and

**WHEREAS,** applicant was represented by Saverio V. Cersete, Esq., 1624 Center Avenue, P.O. Box 845, Fort Lee, NJ 07024; and

**WHEREAS,** admitted into evidence as Exhibit A-1 was "As-Built Site Plan" prepared by Seung W. Kim, R.A., 71 Grand Avenue, Suite #5, Palisade Park, NJ 07650, dated February 15, 2015 with latest revision January 10, 2016;

**WHEREAS,** admitted into evidence without exhibit reference were the following:

- Application dated March 8, 2016; and
- Impact and Evaluation Statement prepared by Saverio V. Cersete, Esq., undated; and

**WHEREAS,** testimony in support of the application was given by Seung W. Kim, R.A.; and no member of the public questioned the witness or commented on the application; and

KATES NUSSMAN RAPONE  
ELLIS & FARHI LLP  
ATTORNEYS-AT-LAW  
190 MOORE STREET  
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HACKENSACK, N.J.  
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WHEREAS, the Planning Board did consider the testimony and evidence presented, the following are the findings of fact and conclusions of the Board:

1. The applicant, **MELISSA KO**, is the owner of and resides in premises known as 675 Floyd Street, described as Lot 6 in Block 808 on the Tax Map of the Borough (the "subject property"). The subject property is in the R-A Single Family Residential Zone District. It is a newly constructed 2½-story "Colonial" style single-family dwelling.

2. Code Section 30-6.3, entitled "Extensions into Required Front, Side or Rear Yard", allows extensions or encroachments up to (2) two feet of a structure into a required front, side or rear yard if the extension is ten (10) feet or more above grade. The subject chimney is approximately eighteen (18) inches above grade and therefore does not comply with §30-6.3

a.1. The chimney projection is located on the northeast side of the property abutting Hollywood Avenue into what is technically a front yard but functions as a side yard on this corner lot.

3. The subject property is located at the intersection of Floyd Street and Hollywood Avenue. It consists of 10,686 sq. ft. and meets the minimum lot requirement for the R-A Zone. Other than the variance requested for the height of the chimney projection, no other variances are required. The Zoning Analysis and Data for the subject property and dwelling are as follows:

<u>Item</u>	<u>Required</u>	<u>As Built</u>
Min. Lot Area:	10,000 sq. ft.	10, 686 sq. ft.
Min. Lot Width:	100.0 ft.	114.56 ft.
Min. Front Yard:	30.0 ft.	32.3 ft.
Min. Rear Yard:	25.0 ft.	28.0 ft.
Min. Side Yard – One:	10.0 ft.	10.0 ft.
Min. Corner Side Yard:	15.0 ft.	13.2 ft. (V)
Max. Lot Coverage:	31.314%	25.1%
Max. Impervious Coverage:	51.0%	41.2%
Max. Rear Yard Coverage:	60%	18.7%
Max. Building Height:	30.0 ft./31.0 ft.	29.8 ft./31.1 ft.
Max. Building Height – Stories:	2.5	2.0

(V) Means variance required.

5. Applicant's architect, Mr. Kim, who did not design the home, acknowledged that the specification for the chimney was not on the original architectural plan and the chimney was therefore constructed without Borough approval. The encroachment and Code violation was discovered by the Borough in reviewing the completed home and applicant was required to apply for a variance to sanction the condition.

6. Mr. Kim minimized the offense, stating that the yard deficiency abutted Hollywood Avenue and not an adjoining home.

7. The Board majority concluded that the zoning offense was essentially *de minimus*, with no adverse effect on surrounding properties. Although the "hardship" was technically self-created, the error could not be undone without substantial expense. With no clear purpose in requiring the homeowner to incur that expense, the Board majority was satisfied to grant the variance.

**NOW, THEREFORE, BE IT RESOLVED** by the Planning Board of the Borough of Englewood Cliffs that the minor subdivision be approved, subject to the following conditions:

A. All representations made by applicant or its agents shall be deemed conditions of this approval and any misrepresentations by applicants contrary to the representations made before the Board shall be deemed a violation of this approval.

B. The action of the Planning Board in approving this application shall not relieve the applicants of responsibility for any damages caused by this project, nor does the Planning Board of the Borough of Englewood Cliffs, or its reviewing professionals and agencies, accept any responsibility for design of the proposed improvement or for any damages that may be caused by this development.

C. Applicant shall comply with all applicable federal, state, regional, county and local rules, regulations and requirements. In the event compliance with the requirements of any such governmental entity necessitates modifications to the Subdivision, applicant shall submit

revised plans to the Zoning Officer and Construction Official for their review and approval. If deemed by him to be so substantial or different as to warrant further review by the Planning Board, such modification(s) shall be referred to the Planning Board for its formal review, and applicant shall be required to present same in compliance with the notice provisions of the Municipal Land Use Law.

D. This approval is subject to applicant obtaining a building permit and any other State, County or Borough approvals (including Borough Board of Health), if required.

E. All fees, costs, bonds and escrows shall be paid when due or becoming due. Any monies are to be paid within twenty (20) days of said request by the Board's Secretary.

**MOTION BY:** MS. O'SHEA

**SECONDED BY:** MS. EASTWOOD

**IN FAVOR:** MS. O'SHEA, MS. EASTWOOD, MS. ROSENBERG, MR. LEE, COUNCILMAN PARK and MR. FEHRE

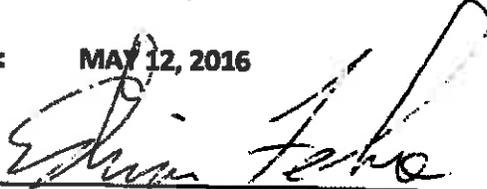
**OPPOSED:** MR. KILMARTIN

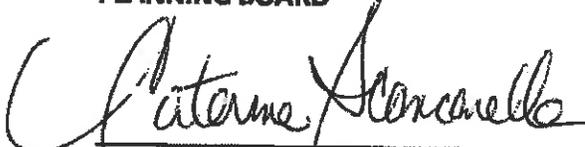
**RECUSED:** MR. PORRINO and MR. KIM

**ABSTAINED:** MR. VILLARI

**DATE APPLICATION APPROVED:** APRIL 14, 2016

**DATE RESOLUTION APPROVED:** MAY 12, 2016

  
EDWIN FEHRE, CHAIRMAN  
PLANNING BOARD

  
CATERINA SCANCARELLA  
PLANNING BOARD SECRETARY

**Attest:**

KATES NUSSMAN RAPONE  
ELLIS & FARHI, LLP  
ATTORNEYS-AT-LAW  
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May 6, 2016

VIA EMAIL

Ms. Cathy Scancarella, Planning Board  
Administrative Secretary  
Borough of Englewood Cliffs  
482 Hudson Terrace  
Englewood Cliffs, NJ 07632

Re: **Engineering Review**  
100 Sylvan Avenue  
Block 130, Lot 23  
Borough of Englewood Cliffs, Bergen County, NJ  
Planning Board Application #257K  
MC Project No. ECP-015

Dear Ms. Scancarella:

Our office is in receipt of copies of documents relative to the above-referenced application summarized in Exhibit 1.

Based on our review of these documents, we offer the following comments regarding completeness of this application:

**General**

1. The Applicant in this matter is:

FCA Realty LLC  
c/o John A. Schepisi, Esq.  
473 Sylvan Avenue  
Englewood Cliffs, NJ 07632

2. The Owner in this matter is:

I.T.L. Realty Inc.  
100 Sylvan Avenue  
Englewood Cliffs, NJ 07632

The Applicant shall notify the Board of any changes to the above information.



3. The project is located at 100 Sylvan Avenue, Block 130, Lot 23, Englewood Cliffs, New Jersey.
4. The project is located in the B-2 Limited Business Zone and is located between Van Nostrand Avenue and Middlesex Avenue.
5. The project has frontage along New Jersey State Highway Route 9W.
6. The Applicant is proposing to modify the existing site. The Applicant is proposing to construct an ADA compliant ramp at the front of the building. The Applicant is also proposing to reconstruct a concrete wall and concrete car ramp along the front of the building. In addition, the Applicant is proposing to modify the rear parking area by removing the existing loading dock area and expanding the existing parking lot closer to the rear property line.

#### **Variances/Non-conformities/Waivers**

7. The Board should request comments from the Board Attorney and Planner regarding the requirements of variances/non-conformities/waivers related to the construction of the new building. The Applicant has indicated in their application that they are seeking a conditional use variance.

#### **Miscellaneous**

8. The Applicant shall revise the General Note #1 on Sheet 2 to reflect the revision date of the Alta Survey provided.
9. The Alta Survey provided by the Applicant is showing three cross access easements, one located on Lot 23 and the other two located on Lot 24. The lease agreements shall be provided to the Board attorney for review.
10. The Applicant shall provide testimony regarding the 25' buffer zone shown on the Alta Survey. The Applicant shall clarify who owns and maintains the property and if the Applicant has the authority to improve the area with additional landscaping. See additional comments regarding Compliance Chart on sheet 7 in this letter.
11. The Applicant is showing an 18" storm pipe discharging into the inlet located near the southwest corner of the building. The Applicant shall determine the origin of this pipe and verify if it is currently in use. If the Applicant determines the pipe is inactive then the applicant shall plug the pipe accordingly.
12. The Stormwater Management Summary referenced on sheet 2 is considered invalid for this project. The Applicant shall remove the reference from the sheet.



13. The Applicant shall provide a stormwater management retention system for the site in compliance with section 30-7.14 of the Borough ordinance, which has a zero runoff requirement for proposed repaving and regrading activities.
14. The Applicant shall provide a circulation plan for the site. The Circulation plan shall show the following vehicular traffic:
  - a. Car Carrier
  - b. Englewood Cliff Largest Fire Fighting Apparatus
  - c. Garbage Truck
15. The Applicant shall revise the "Site Specific Note" # 5 to reflect the as-built conditions referenced in section 30-9.4(y) of the Borough ordinance. This note shall be updated on all the sheets where "Site Specific Notes" are located.
16. The Applicant shall revise the "Site Specific Note" # 2 to add the following sentence, "The Applicant shall repair any defective area found to be preventing the system from operating as it was designed to." This note shall be updated on all the sheets where "Site Specific Notes" are located.
17. The Applicant shall provide a copy of the Geotechnical report referenced in General Note # 6 on Sheet 2.
18. The Applicant shall extend the limit of disturbance line to include the concrete curb area being removed along the western portion of the property.
19. The Applicant shall verify that the existing curbing located along the western portion of the property being removed will not affect the structural integrity of the existing concrete wall located less than one (1) foot away.
20. The Applicant shall saw cut the existing sidewalk extending into the right of way located at the eastern corner of the property. The Applicant shall also include this area in the limit of disturbance.
21. The Applicant should consider and provide testimony regarding removing the asphalt pavement located on the western side of the building and the entire parking lot to repave it. The existing pavement is in poor condition, has been patched over numerous times and is heavily cracked throughout most of the portion. This condition is very important because of the 300' +/- of sheet flow over the asphalt to the catch basin located in the northwest corner of the site.



22. The Applicant shall specify if any existing trees will be removed as part of the project. It appears that four (4) trees located along the rear property line, shown on Sheet 3, will be removed.
23. The Applicant shall clarify if the existing inlet located in the northern corner of the property will remain. It appears from the site plan that curbing will be installed in front of the inlet.
24. The Applicant shall confirm the Siamese connection, shown on Sheet 3, located at the rear of the property, will be relocated or will not be disturbed. The Applicant shall confirm that the fire department will have clear access to the connection in the event of a fire. The Applicant shall obtain approval from the Fire Chief if it is relocated.
25. The Applicant shall verify the number of parking stalls (exterior) required, existing and proposed shown in the "Parking Requirements" table on Sheet 4. We have calculated based on the information provided values of 181, 10 (per the Survey provided) and 82 respectively. The Applicant shall update the information accordingly.
26. The Applicant shall confirm the number of interior parking spaces reference in the "Parking Requirements" table on Sheet 4. The Architectural plans show 63 vehicles being stored in the building. The Board Attorney and Planner should comment regarding this item.
27. The Applicant shall update the proposed parking minimum aisle width to include customer parking area width. The application still requires a variance for this item, as the required aisle width in the customer area is twenty-four (24) feet.
28. The Applicant shall confirm if the two (2) proposed parking lot loading spaces will be striped.
29. The Applicant shall revise the signage table on Sheet 4. It appears that some of the signs proposed are double sided. The area of each sign face shall be referenced.
30. The Applicant shall provide testimony regarding the existing and proposed lot coverage referenced in the bulk requirements table on Sheet 4. The Site Plan shows a building footprint of 33,438 SF, the existing calculations are based on 33,463 SF, and the proposed calculations are based on 33,880 SF. It does not appear that the Applicant is proposing any building expansion to increase the lot coverage.
31. It appears from the Site Plan that the Applicant is proposing different sidewalk width around the perimeter of the property. The Applicant shall dimension the width of the sidewalk to prevent any confusion during construction.



32. The Applicant shall provide testimony regarding the metal cover located along the northeast side of the building serves. The metal cover appears to be in the way of the proposed curb and sidewalk being installed.
33. The Applicant shall confirm if 4" or 6" concrete bollards shall be installed where they reference "PROP. CONC. BOLLARD (TYP.)" on Sheet 4 of the Site Plan.
34. The Applicant is showing a security fence located across the traveled way next to the proposed trash enclosure on Sheet 4. The Applicant shall confirm that a gate will be installed so access can be maintained.
35. The Applicant shall determine if the overhead wire that connected to an existing light fixture in the front is needed when the new light fixture is installed. The Applicant shall move the wire underground if it is still required.
36. The Applicant is proposing to install sidewalk extending from the right-of-way to the parking lot area in the front. The Applicant shall ensure the sidewalk is ADA compliant and shall show the required dimple pad.
37. The Applicant shall provide testimony regarding the use of the facility. It appears from the Architectural plans there will be 21 service bays. The Applicant shall provide testimony regarding any outdoor areas that may be dedicated to hazard material storage such as old and new antifreeze, transmission fluid, etc. The Applicant shall also address any needs for an outdoor generator and/or compressor(s), or bulk storage such as like car frames, beds, tires, etc.
38. The Applicant is proposing a Type 'A' Inlet be installed near the north corner of the site. The Applicant shall provide a detail showing the connection of the Type 'A' Inlet through the existing 15" RCP pipe. It appears that a doghouse connection should be made.
39. It appears from the grade provided on Sheet 5 that the Applicant is proposing walls over 4' in height. The Applicant shall comply with Section 30-7.15 of the Borough ordinance which states, "*Retaining walls greater than four (4) feet in height shall be of reinforced concrete and shall be designed by a professional engineer. Wall plans, elevations and design computations shall be submitted to the Planning Board's Engineer for approval.*" The Applicant shall provide plans for review.
40. The Applicant shall confirm that the existing inlet located in the north corner of Lot 24 is sized adequately for the increase in runoff it will be receiving due to the proposed construction.
41. It appears from the detail provided on Sheet 11 that light fixtures A-4 HSS and A-2 do not fit the required minimum setbacks from the curb. The foundations should either be



- mounted on a 30" high concrete foundation or bollards shall be installed, per Note #15, on the light pole foundation. The Applicant shall revise the note on sheet 6 to read, "all the proposed light fixtures, except for A-1, should be constructed with a 30" foundation".
42. The Applicant shall have the Shade Tree Commission review and approve the proposed landscaping plan.
  43. The Applicant shall revise the compliance chart table shown on sheet 7.
    - a. The Applicant is showing they comply with condition 30-7.10B. They do not comply.
    - b. The "calculations" for condition 30-7.10B should be 20', which it to be located on lots 23 and 24.
    - c. The "calculations" for condition 30-8 should be "Wider Buffer is required by Section 30-7.10B. The "Compliance" shall be N/A.
    - d. The "calculations" for section 30-9.6 should be deleted. The "Compliance" shall be N/A.
  44. The Applicant shall update the limit of disturbance areas to include items highlighted in this letter. The Applicant shall submit the new plan to the Bergen County Soil Conservation District for approval.
  45. It does not appear that the Applicant is proposing any belgian block curb. The Applicant shall remove the detail located on Sheet 9 if it is not part of the project.
  46. The Applicant shall provide a width of the proposed butt joint showing in the standard pavement butt joint detail shown on Sheet 9. The Applicant shall also specify that the contractor shall mill the existing pavement 2".
  47. It does not appear that the Applicant is proposing a truncated dome pattern on any ADA accessible routes. The Applicant shall remove the detail located on Sheet 9 if it is not part of the project.
  48. The Applicant shall revise the Type 'A' Inlet detail located on Sheet 10. The detail shall include the connection into 15" RCP pipe already in place.
  49. The Applicant is showing a "Retaining Wall Schematic Detail" on Sheet 11. The detail shown is not for construction. The detail shall be removed if not approved for construction.
  50. The Applicant shall clarify the 16'x18' trash enclosure detail shown on Sheet 11. It appears there is a discrepancy between the detail and the site plan. The detail shows a modular block wall as part of the screening, where the Site Plan shows a fence. The detail also shows a curb extending from the enclosure, but no curbing is proposed around the dumpster.



Ms. Cathy Scancarella, Planning Board Administrative Secretary

MC Project No. ECP-015

May 6, 2016

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51. The Applicant shall provide information on the permitting requirements including, but not limited to, the following:

- a. NJDOT;
- b. United Water;
- c. Bergen County;
- d. Bergen County Sewer Department;
- e. Local Soil County Conservation District;
- f. Shade Tree Approval;
- g. Fire Department;
- h. Building Department Permits; and
- i. Any other permits required for the project.

If you have questions or require any additional information, please do not hesitate to contact the undersigned.

Very truly yours,

MASER CONSULTING P.A.

A handwritten signature in black ink, appearing to read 'A. Hipolit', is written over a horizontal line.

Andrew R. Hipolit, P.E., P.P., C.M.E.  
Borough Engineer

ARH/tva

cc: Paul Renaud, Construction Code Official (via email)  
Michael Kates, Esq., Board Attorney (via email)  
John Schepisi, Esq., Applicants Attorney (via email)  
B.A. Bohler, P.E., Applicant Engineer (via email)

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Ms. Cathy Scancarella, Planning Board Administrative Secretary  
MC Project No. ECP-015  
May 6, 2016  
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***EXHIBIT 1***

**SUMMARY OF DOCUMENTS SUBMITTED  
FOR THE  
100 SYLVAN AVENUE APPLICATION**

**MAY 2016**



The following is a summary of the documents submitted for the review of the 100 Sylvan Avenue application:

- a. Plan entitled "Preliminary and Final Site Plan For FCA Realty LLC, Proposed Alteration/Renovation, 100 Sylvan Avenue, Block 130, Lot 23, Borough of Englewood Cliffs, Bergen County, New Jersey", prepared by Bohler Engineering, consisting of twelve (12) sheets, dated 04/21/2016;
- b. Plan entitled "Architectural Site Plan, Project CDJR Alteration/Renovation, 100 Sylvan Ave, Englewood Cliffs, NJ 07946", prepared by LAM Architecture, LLC, consisting of four (4) sheets, dated 11.13.15, revised through 12-21-15;
- c. Letter from Bergen County Soil Conservation District to FCA Realty, LLC regarding Alteration/Renovation, 100 & 120 Sylvan Avenue, Block 130, Lots 23 & 24, Englewood Cliffs, NJ, dated March 31, 2016; and
- d. Report entitled "Stormwater Management Summary for Proposed Alteration/Renovation, Prepared for: FCA Realty, LLC, Block 130, Lots 23 & 24, 100 & 120 Sylvan Avenue, Borough of Englewood Cliffs, Bergen County, New Jersey", prepared by Bohler Engineering, dated December 2015, revised through February 2016.



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## MEMORANDUM – 1

**To: Englewood Cliffs Planning Board**

**From: Eileen Banyra, PP, AICP**

**Date: May 9, 2016**

**Re: 100 Sylvan Avenue – Abandonment Issue  
MC Project No. ECP-015**

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I am in receipt of an application for the continuation of a preexisting nonconforming use (auto dealership) at 100 Sylvan Avenue (Block 130, Lot 23) in Englewood Cliffs. This property is located in the B-2 Limited Business zone which prohibits auto dealerships. In fact, auto dealerships are prohibited municipal-wide.

Prior to site plan review and consideration, two issues must first be addressed: the preexisting nature of the use, and abandonment. Late today, I had the opportunity to review and discuss my findings with the Board attorney Mr. Michael Kates, Esq. These findings are outlined below.

As it relates to the preexisting non-conforming condition, this appears to have been affirmed by the Board in 1986. At that time, the Zoning Board, on appeal, determined that the use was preexisting (preceded the use restriction) and was allowed to continue operations. This was reaffirmed in 2002 when the Board granted an approval for reconstruction of the dealership with the understanding that the dealership was a preexisting nonconforming use. While the Board should be guided by the Board Attorney, it is my opinion that prior decisions by the Board affirmed the non-conforming status.

What has not yet been fully established, however, is if the use has or has not been abandoned.

Prior to 2002, Toyota operated their dealership from Lots 22 and 23. Between 2003 and 2004 the dealership consolidated their operations onto Lot 22 where it remains today, and Lot 23 (aka 100 Sylvan Ave.) was to cease operations according to the resolution of approval. The resolution was subsequently amended in December 2002 to remove the requirement to cease operations, acknowledging the preexisting use, and with the applicant indicating that a future use may or may not be an auto dealer. This resolution did not grant permission for Toyota to continue using the site for parking or otherwise.

By February of 2004, the Toyota dealership was out of the building. Since that time, the building has been vacant and/or used for storage of furniture from other properties owned by the applicant. The resolution of approval for the dealership on Lot 22 also indicated that Lot 23 was unoccupied. In 2004, the current owner (Mr. Berardo) took ownership of the property at 100



Sylvan Avenue, and has allegedly been seeking a tenant ever since. Since that time, Mr. Berardo has allowed Toyota to continue using the property for vehicle storage, and additional parking spaces were rented to local car dealers until the Zoning Officer issued violations for same in February 2016 because a parking lot was not a permitted use. This rental arrangement also appears to have violated the 2002 Board of Adjustment resolutions (original and amended) approving the relocation of the Toyota dealer (Exhibits A-2 and A-3).

Abandonment requires (1) failure to act, implying no interest in property *and* (2) intent to abandon. If the owner used the property for other uses, intent to abandon may be evidenced.

In terms of failure to act, the applicant indicated in March 10th testimony that he, or his agents, have been actively seeking building tenants over the course of the past 12 years. Evidence to this effect should be presented.

In terms of intent to abandon, there is some question as to whether, during the past 12 years, the property was used by any other tenant which may result in abandonment of the car dealer use.

At the March 10 hearing, the public indicated that a tenant, "Marketing Information Systems" (an office, which would be a permitted use), may or may not have operated out of 100 Sylvan Avenue; however, the applicant did not recall. Online photos do show the building with façade signage for "Marketing Information Systems" (none with a date but appears to be circa 2008). See attached photo. The applicant should provide evidence to clarify this uncertainty.

The applicant also testified that the building served as storage space for furniture from other buildings that he owns. The Board should consider if this qualifies as a change in use.

Last but not least, the applicant testified that the building has been occupied "for at least seven years, plus or minus." The applicant has been in ownership of the building for twelve years. This statement does not account for the first five years of ownership. The use of the building for the full twelve years requires supportive documentation to that effect and not just claims of use.

Prior to the review of the proposed site plan, the Board must make a determination regarding the abandonment issue, hinging largely on the use of the space, tenancy of the space, and whether or not it has been occupied during the past twelve years. The applicant should present evidence to this effect in order to support their claim that the use has not been abandoned.

This application requires a thorough review of the testimony provided as well as documentation demonstrating how the property has been affirmatively marketed.

The first order of business is a legal one. The Board should seek direction from the Board Attorney regarding the case law and how to evaluate the information and testimony provided.





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## MEMORANDUM - 2

**To: Englewood Cliffs Planning Board**

**From: Eileen Banyra, PP, AICP**

**Date: May 9, 2016**

**Re: 100 Sylvan Avenue – Site Plan  
MC Project No. ECP-015**

---

### **Summary and Background**

We are in receipt of an application requesting the continuation of a preexisting nonconforming use (auto dealership) at 100 Sylvan Avenue (Block 130, Lot 23) in Englewood Cliffs.

This is the second of two reports on this application. The first report covered the issue of abandonment. This report, therefore, is premised on the possibility that the Board determines the property to have *not* been abandoned. If, on the other hand, the Board determines that the property *has* been abandoned, the application will need to be modified and a Use variance sought. If abandonment is not found, it appears that the application will still require a “d” variance for the expansion of a non-conforming use (NJSA 40:55D-70d.2 variance). This preliminary report represents a review of the application(s), transcript, exhibits, site and floor plans and various background materials.

This property is located in the B-2 Limited Business zone which prohibits auto dealerships, though the use has been determined to be a preexisting nonconforming use. The project requires numerous “c” and “d” variances which will be outlined below.

**Existing Conditions.** The property is currently a vacated auto dealership, with a 53,901 sf structure and 183 parking stalls. The property ceased operations in 2004.

**Surrounding Pattern of Development & Zoning.** To the southwest of the subject property is a Toyota auto dealer. This operation once occupied the subject property, but between 2002 and 2004 consolidated its operations to the existing parcel just south of the site in question. To the northeast of the subject property is an office building. To the rear of the property are residential properties.

**Project Description.** The project proposal envisions making upgrades to the subject property including parking reconfiguration, increase in the number of parking stalls, change in site circulation and driveway modifications and inclusion of an entry vestibule. (See Other (b))



**Zoning & Statutory Requirements.** The property is located in a B-2 zone, and the nonconforming use is preexisting. The applicant has requested the following variances: parking, parking stall size, parking aisle width, parking setback, loading dock size, and signage. However, we have identified several more, as follows:

A “d” variance pursuant to N.J.S.A. 40:55D-70(d.2), (a “d(2)” variance) is necessary for the **expansion of a non-conforming use**. The applicant proposes an increase in floor area of 189 sq. ft., an increase in the number of parking spaces from 110 to 146 parking spaces which will now be both inside (60) and outside (86), and a change to the circulation and paved areas; each of these alterations represents a change and intensification of the use on site.

The Board has the power to grant “d(2)” variances to permit expansions of lawfully created pre-existing nonconforming uses “in particular cases and for special reasons.”

These special reasons derived from the purposes of zoning are known as the positive criteria for a “d(2)” variance. The courts held (*Burbridge v. Mine Hill*) that the promotion of the general welfare is the purpose that most clearly amplifies the meaning of “special reasons.” The benefit to the general welfare derives not from the use itself but from the development of a site that is particularly suited for the use proposed. Special reasons warranting a “d(2)” variance may be found in the fact that the variance, if granted, would tend to minimize the nonconformity and make it more acceptable in its particular setting.

The “negative criteria” must also be satisfied by showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.” (*Medici*)

The project also requires ten (10) secondary variances pursuant to NJSA 40:55D-70(c) and four design waivers. It should be noted that the “c” variances, while considered secondary in the case of a “d” variance request, are also important to weigh, as the number of “c” variances may be indicative of a site challenge or amplify how unsuitable an application is. While the Board is asked to consider all variances, the focus is on the “d” variance.

Variances related to Parking:

- Parking stall size – (*see 30-10.2a*) stall size required 9x19, proposed 9x18
- Parking aisle width – (*see 30-10.2b*) required 25’, proposed 12.2’ one way/23.5’ two way
- Parking lot setback from lot line - (*see 30-10.2g*) required 5’, proposed 0’
- Parking setback from residential zone - (*see 30-10.2h*) required 10’, proposed 3-4’
- Front yard parking - (*see 30-10.2f*) – 11 front yard spaces exist, 17 are proposed
- Loading dock size – (*see 30-10.3a*) required 12x30, proposed 12x20
- Parking lot setback from residential zone - (*see 30-7.10b*) required 50’, proposed 4.6’



- Display of new or used vehicles in the front yard of motor vehicle sales (*see 30-11.6a*)
- No parking of motor vehicles shall be permitted in the front sixty (60) feet of motor vehicle sales (*see 30-11.6c*)
- Front sixty (60) feet of motor vehicle sales shall be landscaped... and shall be used for no purpose other than ingress and egress driveways, the sole exception being vehicles parked where the owners or drivers thereof are actually engaged in business at the premises at the time. (*see 30-11.6c*)

Waivers related to signage:

- Monument sign setback (*see 19-6c*) – required 30’ from street and 20’ from lot line; proposed +/-16’ from street (not sure of dimension but approx. 16’ and requires a variance), 12’ from front property line (variance) & 36’ from side property line
- Number of façade signs (*see 19-15.b(3)*) – permitted one (1), proposed six (6)
- Max sign area – (*see 19-16c*) required 32 sf and 4x16; two (2) don’t comply and are:  
69.6 sf and 5’4”x16’8”  
50.63 sf and 2’11”x20’11
- Sign may not extend above parapet, one sign does extend above parapet (*see 19-15.b(4)*)

**Master Plan.** It is important to refer to municipal Master Plan for guidance and to ensure that the proposal is in compliance with the overall, long-term vision that the City has established for itself.

2009 Master Plan Reexamination

The Report notes that the Borough has, “*evaluated conditions along the Sylvan Avenue corridor. Studies of this corridor were performed and identified land use concerns that included the appropriateness of the existing development, the adequacy of current land use regulations, and recommended changes in these regulations to improve the aesthetics and functionality of the corridor. Based on analysis of existing conditions and current zone standards for properties within the Sylvan Avenue corridor, certain actions are recommended to address land use concerns and to strengthen the existing zoning along this thoroughfare. Making these recommended changes will continue to promote the Borough’s Master Plan goals of upgrading and improving the municipality’s business areas.*”

Specifically with regard to this southern end of the B-2 zone, the Reexamination notes that, “[s]ite-intensive uses such as automobile dealerships...would continue to be prohibited in this district. ... An impervious coverage limitation and front yard landscaping requirement should also be considered.”



As it relates to the buffer requirements where B-2 adjoins residential uses, the Reexamination states, *“although the Borough’s current zone regulations require buffering when adjacent to residential zones, a number of properties provide insufficient buffering to adjoining residences...[but] many lots conform to the minimum buffer requirements but provided little or no visual screening between the two uses. ... Zoning regulations for landscaping in the front yard should be investigated... (See comments below)*

**Other.** The following represents planning comments, concerns and details. The comments are preliminary and additional details and/or comments may be provided. Where appropriate, the applicant and their professionals should be prepared to clarify or provide information regarding the following:

- a. This application is independent application and exclusive of 120 Sylvan Avenue property. 120 Sylvan will require additional discussion between the Board professionals and the applicant’s professionals as accessory parking is not permitted on a separate parcel;
- b. The floor plans and application indicate that a 189 sq. ft. front portico will be added. The site plan’s zoning chart - max lot coverage (FAR) represents a 417 sq. ft. increase. The applicant’s professionals to correct or explain the discrepancy between the two plan sets;
- c. The application and submission has changed, and the information relative to both sites is no longer applicable as the application is now only for one site. Should the application continue, detailed information shall be provided relative to the following: intended user and site operations; applicant becoming party to the application; number of employees and hours of operation; services to be provided; operations details such as car repairs, bodywork, car washing, spray painting and what special equipment and/or permits will be required; site management and security; and, solid waste, recycling, and oil disposal;
- d. The applicant should be prepared to discuss the circulation pattern and proposed on- and off-site traffic for the site plan changes as proposed. There are multiple variances requested relative to parking and circulation including number of spaces, size of spaces, aisle width, proximity of parking to adjacent residential uses, parking stall size, trailer (61 ft.) loading and unloading, one way circulation, streetscape considerations, distance between driveways and adjacent uses etc. Board Engineer to advise if a traffic expert should provide testimony;
- e. The rear yard landscaping buffer is proposed off-site on the residential properties. The applicant should discuss how this will be accomplished; conversations that have taken place with the neighbors regarding the off-site parking, etc.;



- f. Board Engineer should indicate the amount of bonding and/or maintenance fees that may be required to insure the landscaping materials longevity and/or site improvements as deemed appropriate;
- g. As the use is not a permitted use, the ordinance does not provide a specific parking standard. The Board Engineer should advise as to the appropriateness of the use selected (warehouse) as the “closest” use type standard and whether or not a different standard from the code should be considered;
- h. Tandem parking was identified in the paperwork supplied however it is not reflected on the plan for 100 Sylvan. Applicant should indicate if this is contemplated for 100 Sylvan, and if so where;
- i. The architectural plans should provide specific details including but not limited to the building structural integrity; damage to major systems, if any, due to water, age, wear/tear, and intended improvements; siding or treatment of all building walls and façade; lighting; etc.
- j. The applicant should indicate whether any green/sustainable features or LEED certifications will be sought;
- k. The impervious coverage is increasing 1%, bringing the coverage up to 97%. While coverage is not specifically regulated in the business zone, there are buffer requirements which are not being met; this represents conflict with what would be de facto impervious limits. Any additional landscaping that can be added should be wherever possible. (See rear parking area striped areas.)
- l. The garbage enclosure is represented as 8’ high walls and sheet nine (9) shows a 4’ or 8’ high enclosure. Sheet nine (9) should be corrected, as the maximum permitted fence height is 6’.
- m. Board Engineer to advise regarding on-site regulations for directional signs.

**Aerial Photos (source: Google)**



**Site Photo (source: Google: 10/2014)**



1 BOROUGH OF ENGLEWOOD CLIFFS  
2 PLANNING BOARD  
3 REGULAR MEETING  
4 10 Kahn Terrace  
5 Englewood Cliffs, New Jersey  
6 Thursday, May 12, 2016  
7 Commencing at 7:46 p.m.

STENOGRAPHIC.  
TRANSCRIPT OF  
PROCEEDINGS  
VOLUME III

8 - - - - -X  
9 IN RE: :  
10 APPLICATION NO. 259K :  
11 FCA REALTY, LLC, :  
12 Applicant. :  
13 :  
14 Site Plan Approval with Variances :  
15 Block 130, Lot 23, :  
16 100 Sylvan Avenue :  
17 - - - - -X

18 B E F O R E:

- 19 EDWIN FEHRE, CHAIRMAN
- 20 AUREL VILLARI, VICE CHAIRMAN
- 21 LAUREN EASTWOOD
- 22 JEFFERSON CHINMAN
- 23 RONALD KILMARTIN
- 24 MATTHEW TROVATO
- 25 KIKY KIM
- RUSSELL PORRINO
- J.P. LEE
- COUNCILMAN MARK PARK
- MARY O'SHEA

- Michael B. Kates, Esquire, Board Attorney
- Andrew Hipolit, PE, Board Engineer
- Cathy Scancarella, Board Secretary
- Eileen Banyra, Ad Hoc Board Planner

26 TRANSCRIBED BY AND BEFORE:

27 ToniAnn Acquaro, Professional Court Reporter, and Notary  
28 Public of the State of New Jersey.

29 Job No. 2306239

Page 2

1 APPEARANCES:  
 2  
 3 SCHEPISI & McLAUGHLIN, P.A.  
 4  
 5 Counsel for Applicant  
 6 Lighthouse E.C., LLC  
 7 473 Sylvan Avenue  
 8 Englewood Cliffs, New Jersey 07632  
 9  
 10 BY: JOHN SCHEPISI, ESQUIRE  
 11 (201) 569-9898  
 12 jschepisi@schepisi.com  
 13 and  
 14 DANIELLE CARDONE, ESQUIRE  
 15  
 16 PRICE, MEESE, SHULMAN & D'ARMINIO, P.C.  
 17  
 18 Counsel for the property owner ITL Realty  
 19  
 20 50 Tice Boulevard  
 21 Woodcliff Lake, New Jersey 07677  
 22 BY: GAIL PRICE, ESQ.  
 23 (201) 391-3737  
 24  
 25

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1 CHAIRMAN FEHER: The next item on the agenda  
 2 will be Application No. 257K, site plan approval with  
 3 variances, FCA Realty, LLC, 100 Sylvan Avenue, Block  
 4 130, Lot 23. And together with that will be application  
 5 258K, site plan approval with variances, FCA Realty,  
 6 LLC, Block 130, Lot 24.  
 7 MR. SCHEPISI: Good evening, everyone.  
 8 John Schepisi and Danielle Cardone for the applicant.  
 9 MR. CHINMAN: Mr. Kates, I am curious if I am  
 10 a voting member for this application. I wasn't the last  
 11 time. How would that work?  
 12 MR. KATES: You missed the very first one.  
 13 MR. CHINMAN: I read the transcript.  
 14 MS. SCANCARELLA: And listened to that tape.  
 15 MR. KATES: We have this bylaw which says  
 16 that -- well, now this is really in two parts. We have  
 17 a full nine member board. If, in fact, the board  
 18 determinations that a use variance is involved, it's a  
 19 different composition.  
 20 MR. CHINMAN: So the people that were here.  
 21 MR. KATES: Yeah, I think that would be  
 22 appropriate.  
 23 MR. SCHEPISI: While you are doing that, just  
 24 so the record is complete, you and I differ on your  
 25 interpretation, you and I differ on the board having the

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 (Exhibits retained.)

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1 right to change the statute by passing a bylaw and we  
 2 take exception to it. And we are reserving that.  
 3 MR. KATES: We will make new law.  
 4 MR. SCHEPISI: Hopefully we don't have to.  
 5 Hopefully this gets approved and I don't have to go to  
 6 court.  
 7 MR. KATES: Let's also, if we can measure the  
 8 timing for tonight because there are people here on an  
 9 application after yours.  
 10 MR. SCHEPISI: I don't think anybody is going  
 11 to go after us. I would use the night unless something  
 12 miraculous happens or I have a stroke, one or the other.  
 13 MR. KATES: It appears that Mr. Schepisi, and  
 14 we can estimate that the entire night will be dedicated  
 15 to this application. So rather than spending the night  
 16 here and not getting reached, we can carry this without  
 17 you having to re-notice to a date certain, which would  
 18 be when?  
 19 MS. SCANCARELLA: May 24.  
 20 MS. LEE: I was just to waiting to see if you  
 21 have a had a stroke and possibly we could be heard  
 22 today.  
 23 CHAIRMAN FEHER: So this application is going  
 24 to be carried to Tuesday, May 24.  
 25 I just want to identify for the record here that

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1 this application, Application No. 263K, a D-3 use  
2 variance and C variance for parking JooASoo, LLC, 11  
3 Sylvan Avenue, Block 134, Lot 3.01 is not going to be  
4 heard this evening and will be carried to Tuesday, May  
5 24, without the requirement of any additional notice.  
6 Okay. At this time you may proceed.  
7 MR. SCHEPISI: Mr. Chairman, Members of the  
8 Board, John Schepisi, of Schepisi & McLaughlin.  
9 Daniel Cardone is here with me.  
10 This is the continuation, I think it is our third  
11 presentation. In order to move this along a little bit  
12 quicker, can I make a request of the board? Can I  
13 finish with each of my witnesses, I will keep them here,  
14 and then they can be cross-examined -- one, two,  
15 three -- so we can at least get the case in. Is that  
16 acceptable?  
17 CHAIRMAN FEHER: That's acceptable to me. We  
18 were going to do a vote.  
19 MR. SCHEPISI: We were going to do the --  
20 CHAIRMAN FEHER: We have several issues here.  
21 One is the issue of the abandonment.  
22 MR. SCHEPISI: That's the first thing I was  
23 going to address.  
24 CHAIRMAN FEHER: And then there's the issue  
25 of an expansion, enlargement of the existing

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1 nonconforming use.  
2 MR. SCHEPISI: Correct.  
3 CHAIRMAN FEHER: We are going to vote on that  
4 also.  
5 MR. SCHEPISI: Or I may withdraw that. That  
6 we will play by ear as we go along.  
7 CHAIRMAN FEHER: And, of course, the site  
8 plan approval. We can do it that way.  
9 MR. SCHEPISI: Thank you. I just want to  
10 address a couple of questions the board had at the last  
11 hearing. There was the issue on this MISI, M-I-S-I,  
12 company. It has been going back and forth. We went and  
13 dug up the leases because MISI moved out of 100 Sylvan  
14 and moved into 120 Sylvan in 2004. So we have that  
15 lease.  
16 To answer everyone's question, MISI was never a  
17 tenant in the building after Parkway Toyota moved to  
18 their new building. We have that lease, we can mark  
19 that right into evidence right now.  
20 MS. CARDONE: Just the 2004.  
21 MR. KATES: We are up to Exhibit 9?  
22 (Applicant's Exhibit A-12 marked  
23 for identification.)  
24 MR. SCHEPISI: A-12. And we have already  
25 premarked it. And we are giving you each a copy of some

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1 copies and you can just mark them A-12.  
2 And while this is -- I'm sorry, I will wait  
3 until everybody is ready. This answers two questions  
4 that the board had: How much space did MISI have, and  
5 when did it move out?  
6 MISI was a tenant at 100 Sylvan until  
7 February 1, 2004 when they moved out and they leased  
8 3,771 square feet at the 120 Sylvan Ave. This is the  
9 lease document. And they are still a tenant in that  
10 building. So they vacated 100, they vacated the 3,771  
11 square feet, approximately, that was in 100 and they  
12 took almost the identical space in 120. So that was the  
13 first question the board had.  
14 Does the board have any questions on that?  
15 MR. VILLARI: I do. When did the lease for  
16 100 begin for MISI? You say it expired in February of  
17 2004. When did it begin? '89?  
18 MR. SCHEPISI: No, I think it was way before  
19 that.  
20 MR. VILLARI: Before '89.  
21 MR. SCHEPISI: They were part of Parkway  
22 Toyota. MISI was a marketing company for Parkway.  
23 MR. VILLARI: So you retained a copy of that  
24 original lease.  
25 MR. SCHEPISI: No, we never had it.

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1 MR. VILLARI: So the predecessor.  
2 MR. SCHEPISI: We bought the building from an  
3 estate and that was part of the problem.  
4 MR. VILLARI: You were unable to locate that  
5 lease.  
6 MR. SCHEPISI: And nobody who is currently in  
7 MISI has any knowledge of it.  
8 MR. VILLARI: But you believe that that lease  
9 had its inception well before 1989; is that what you are  
10 telling us?  
11 MR. SCHEPISI: I believe it, but I am not  
12 positive.  
13 MR. VILLARI: What is that based upon?  
14 MR. SCHEPISI: Based on the fact that they  
15 were there for a period of time and Parkway Toyota was  
16 in there from '86, so I know that they came in sometime  
17 after '86 and sometime before 2004.  
18 MR. KATES: Does Mr. Berardo's testimony  
19 connect MISI to Parkway Toyota as the marketing agency?  
20 I am trying to recall.  
21 MR. SCHEPISI: I believe that was done by --  
22 Mr. Cioffi testified to that. He did the electrical.  
23 There was a burglar alarm system there.  
24 MR. KATES: So we have that in the record.  
25 MR. SCHEPISI: I am pretty sure you have that

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1 in the record.  
2 MS. O'SHEA: Mr. Kates? Mr. Fehre?  
3 Somebody?  
4 I believe that Mr. Cioffi's testimony was that he  
5 did not do the burglar alarms for MSI. He only did it  
6 for Parkway Toyota. So if MSI was associated with  
7 Parkway, I would assume Mr. Cioffi would have done the  
8 whole building and not just the other parts and leave  
9 MSI unprotected.  
10 MR. SCHEPISI: I don't want to sound stupid.  
11 What relevance does that have to anything in this  
12 application?  
13 MR. KATES: Well, aren't you trying to  
14 connect the hull of the building as a preexisting  
15 nonconforming --  
16 MR. SCHEPISI: You already have that. That's  
17 res judicata. You have it in there.  
18 MR. KATES: The whole of the building, the  
19 MISI piece, as well.  
20 MR. SCHEPISI: Follow me for the moment,  
21 Mr. Kates. You have a building that is being used for  
22 office and it's being used for a car dealership. Part  
23 of a car dealership is the office space that goes with  
24 it. If part of the car dealership is being used for  
25 marketing internally or part of it is being used for

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1 marketing externally --  
2 MR. KATES: That's what we are trying to  
3 draw, the relationship between the marketing and the car  
4 dealership.  
5 MR. SCHEPISI: But it's an office space.  
6 MR. KATES: It's an independent lease.  
7 That's the point.  
8 MR. SCHEPISI: How does it affect anything?  
9 MR. KATES: We are trying to draw the proofs.  
10 Am I correct? Is that the issue here?  
11 MR. PORRINO: Maybe I can jump in for a  
12 moment, Mr. Chairman.  
13 CHAIRMAN FEHER: Go ahead.  
14 MR. PORRINO: We are looking still at this  
15 point the question of abandonment and has the use been  
16 expanded.  
17 MR. SCHEPISI: Correct.  
18 MR. PORINNO: So let's assume for a moment  
19 that the marketing company was working for Toyota and  
20 also had other businesses --  
21 MR. SCHEPISI: Let's assume that I --  
22 MR. PORRINO: So now the marketing company,  
23 which had a separate entrance, had separate electrical  
24 metering, et cetera, et cetera, is a conforming use. So  
25 if they occupy whether it's 3000 feet or 30,000 feet

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1 within that building, I think a reasonable argument can  
2 be made that part of that building was conforming, part  
3 of it was not. Because the Toyota part was  
4 nonconforming, the part occupied by the marketing  
5 company was. So if there was the question about -- if I  
6 can just finish my thought, Mr. Schepisi.  
7 MR. SCHEPISI: Go ahead.  
8 MR. PORRINO: If there was a question of  
9 whether the use was enlarged or not and the marketing  
10 company was a separate entity that was occupying office  
11 space as a conforming use, I think that in itself  
12 creates an expansion of the nonconforming use.  
13 Especially if they occupied the building at the same  
14 time and vacated the building at the same time.  
15 MR. SCHEPISI: They didn't vacate at the same  
16 time, they vacated before Parkway Toyota vacated.  
17 MR. PORINNO: Within months.  
18 MR. SCHEPISI: Six months. But going to the  
19 other part. MISI was in the building and occupying  
20 office space. There is no question about it. They were  
21 in there occupying office space. Parkway Toyota, prior  
22 to MISI coming in, was occupying office space, Renault  
23 was in there occupying office space. And we are going  
24 to be, if you get us approved, we are going to be  
25 occupying office space. So I don't understand the

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1 distinction. The name of the tenant is the only issue.  
2 It was used as a mixed use, an office building and a car  
3 dealership. Integral to a car dealership, you need  
4 offices. So there were office there and a car  
5 dealership. I think we are making a lot out of nothing  
6 and I don't understand where you are all coming from  
7 because it makes no sense under our land use law.  
8 MR. PORINNO: It does.  
9 MR. SCHEPISI: If somebody can explain it.  
10 MR. PORINNO: I think I can. If that office  
11 space that MISI occupied was instead occupied by first  
12 Renault during their entire tenancy, and then by Toyota  
13 Motor Company as back office space associated with their  
14 dealership, it would be a mute point.  
15 MR. SCHEPISI: Correct.  
16 MR. PORINNO: What I'm suggesting is and from  
17 what I'm hearing so far and the proofs that have been  
18 presented, it's not clear that they are one and the  
19 same. MISI is a separate company in business to provide  
20 marketing; to whomever we don't know, because there has  
21 been no proofs presented that I have seen that suggests  
22 that they have been linked outside of the fact that they  
23 did some work for Toyota.  
24 MR. SCHEPISI: You are right. You are 100  
25 percent correct. But let me take you to the next part.

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1 It's the use. It's not the name of the company. It's  
2 not who owns the company. It's the use. The use was  
3 used for office, whether it's back office for Toyota,  
4 whether it's front office for MISI, whether it's back  
5 office or regular office space for FCA. It's the use is  
6 what is the issue is.  
7 MR. PORINNO: I agree with that. But let's  
8 say we reversed it and 80 to 90 percent of the building  
9 was occupied by MISI and Toyota occupied 10 percent.  
10 MR. SCHEPISI: That would be a different fact  
11 pattern that doesn't exist here.  
12 MR. PORINNO: It doesn't matter, it's the  
13 same pattern.  
14 MR. KATES: No, it isn't.  
15 MR. PORINNO: Part of the building was  
16 occupied by a tenant that was using the space as general  
17 office use, not for a car dealership, that's the point  
18 that I am making.  
19 MR. KATES: And now you want to expand into  
20 that space with a dealership.  
21 MR. SCHEPISI: No. I am going to use that  
22 for office. I am going to count that space, that space  
23 that is --  
24 MR. KATES: But the office that you are  
25 putting in there is the dealership's office.

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1 MR. SCHEPISI: But what difference does it  
2 make whether it's --  
3 (Several people talking at once.)  
4 MR. SCHEPISI: Stop. Everybody please, I  
5 can't answer 15 questions at once. The issue that you  
6 have is the building is a car dealership building, it  
7 was built for that purpose. As an ancillary part of  
8 that building there is extra office space there that has  
9 been used by Toyota for itself, been used by Renault for  
10 itself and been used by Market Information Systems as  
11 office space. We are going to continue using 3771  
12 square feet of that building for office space. Whether  
13 it's FCA doing it, whether it's Jeep doing it, Chrysler,  
14 Dodge, or a third party. It's going to be office space.  
15 So the use is going to continue as it always has,  
16 a car dealership in which there is 3771 square feet of  
17 office, period. I don't understand the distinction you  
18 are making.  
19 MR. KATES: The distinction is take that barn  
20 in Saddle River where the horse disappeared for forty  
21 years. Let's assume in the corner of that barn they set  
22 up some kind of office unrelated to that use of it as a  
23 stable. And then that corner disappears and now they  
24 want to use the whole stable again.  
25 MR. SCHEPISI: But I am not going to use it

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1 for my car dealership, I am going to use it for office.  
2 MR. KATES: I thought you were using it for  
3 Toyota -- for your Jeep dealership coming in there?  
4 MR. SCHEPISI: The Jeep dealership is the  
5 name of the company that is going to be the tenant.  
6 MR. KATES: We are bringing in a dealership  
7 under the code.  
8 MR. SCHEPISI: No, it's an existing  
9 nonconforming use.  
10 MR. KATES: That space.  
11 MR. SCHEPISI: Yes, I'm using that space as  
12 office space. That's what the use is --  
13 MR. KATES: But the tenant --  
14 MR. SCHEPISI: Let me finish, Michael.  
15 Whether the tenant is Jeep, whether the tenant is  
16 Michael Kates Law Office, it's going to be office space.  
17 I'm not going to use it for any other purpose but office  
18 space.  
19 MR. KATES: I understand. But that office is  
20 accessory to a prohibited use. It's being accessory to  
21 a prohibited dealership, and therefore, that dealership  
22 is expanding into that space. That's the argument.  
23 MR. SCHEPISI: But if the dealership is going  
24 in and putting in a permitted use, it's not an expansion  
25 of the nonconforming use.

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1 MR. KATES: But it's not a permitted use.  
2 MR. SCHEPISI: What is not permitted? Is  
3 office use permitted? Yes.  
4 MR. KATES: Is it under separate ownership?  
5 MR. SCHEPISI: Does it have to be? Where  
6 does it provide that the ownership has to be separated?  
7 It doesn't. It's the use. Michael, it's the use.  
8 MR. KATES: You and I are arguing about this.  
9 I want you to get into your proofs. But the board's  
10 concern is that office use that you are describing, if  
11 you want it to be permitted, it has to be disconnected  
12 from the dealership that you are putting in there.  
13 MR. SCHEPISI: Why?  
14 MR. KATES: Otherwise you are expanding a  
15 nonconforming use.  
16 MR. SCHEPISI: No, I am not. I am not  
17 putting a dealership in there. I'm going to have 3771  
18 square feet of office space in that building.  
19 MR. KATES: Separate lease?  
20 MR. SCHEPISI: You want that? I will break  
21 it into two leases.  
22 MR. KATES: And what is the identity of the  
23 tenant?  
24 MR. SCHEPISI: I have to change the name of  
25 the tenant, too? Tell me where that is provided

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1 anywhere in our jurisdiction.

2 MR. KATES: If the prohibited use is the

3 tenant, then you are expanding the nonconforming use.

4 MR. SCHEPISI: If I leased the building, my

5 office building right across the street, to Chrysler,

6 but they are not using it for a prohibited use, Chrysler

7 can use it. So your argument doesn't make sense,

8 Michael. The name of the tenant, the business the

9 tenant is not -- it's the business that is being

10 conducted on the site. That's the issue.

11 MR. VILLARI: Excuse me. Mr. Schepisi, but

12 the business conducted on the site is an integral part

13 of the car dealership that is going to be occupying it.

14 MR. SCHEPISI: Which it always has been.

15 MR. VILLARI: MISI was not.

16 MR. KATES: MISI was not.

17 MR. SCHEPISI: We all accept the fact, but

18 for 3771 square feet of that building, we have an

19 existing nonconforming use that has not been expanded.

20 MR. KATES: Well, that's the issue of

21 abandonment.

22 MR. SCHEPISI: No, let's stay with that --

23 MR. PORINNO: Let's assume that the board

24 concludes the rest of the building had not been

25 abandoned, then what you still have is the expansion of

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1 the nonconforming use into that site.

2 MR. SCHEPISI: No, we don't. Not if I don't

3 use it for -- another tenant takes it.

4 MR. KATES: Yeah, but that's not the way the

5 application is submitted.

6 MR. SCHEPISI: You just raised this tonight.

7 I may have to make a modification on how we are going to

8 allocate the space.

9 MR. KATES: Our confusion is legitimate

10 because it's presented as one package.

11 MR. SCHEPISI: It is one package. All right.

12 This is one package. We are saying we are entitled to

13 this -- the fact that somebody else used the office

14 space that was not a car dealership and we, as a car

15 dealership, are going to continue using 3700 square feet

16 of office space in that building, you can't say that we

17 cannot do it. The ordinance does not give you that

18 right. That is not a change of use or an expansion of

19 the use. If I was taking the space that was pure office

20 space and I was going to service cars in that, that's a

21 different scenario.

22 MR. KATES: I understand your point.

23 MR. PORRINO: We would like to hear the

24 proofs, Mr. Schepisi. If it's possible to move on with

25 the next step. We can agree to disagree on this and

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1 still move on.

2 MR. SCHEPISI: We are fine. Let's go on to

3 your other questions. Gail Price would like to

4 introduce herself.

5 MS. PRICE: Good evening, Mr. Kate, members

6 of the board. Gail Price, from the firm of Price,

7 Meese, Shulman & D'Arminio. I haven't been here to date,

8 but I'm putting an appearance on the record with

9 Mr. Schepisi on behalf of the property owner, ITL

10 Realty.

11 I just will take one minute at this point in

12 time. But I think the important thing that the board

13 may be overlooking to follow up on what Mr. Schepisi was

14 saying is when the issue of nonconforming use and

15 entitlement to continue is looked at, you have to look

16 back at your documents.

17 And in 2002 when this board acted, not once, but

18 twice, on this property, there was no carve out of any

19 space that was not included in the nonconforming

20 entitlement. It covered the property in its entirety.

21 It didn't say there was office use that was not covered

22 or office use that was deemed a permitted use. It

23 covered the entire property and the entire building.

24 And the board did not making any exceptions, it did not

25 make any findings of fact or conclusions of law relative

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1 to that issue.

2 And I think as you deliberate on this issue that

3 is a very important fact because you can't go beyond

4 your own documents and your own codes as Mr. Schepisi

5 had pointed out. And, quite frankly, tenancy does not

6 control land use law, use controls it.

7 So I think this board would be not staying with

8 case law and would be non arbitrary and capricious if

9 you were all of a sudden to make a determination based

10 upon tenancy, names of tenants, rather than on uses. So

11 I would just ask that you look at your own documents and

12 the last approval which was for the entire property.

13 MR. KATES: Do we know whether that approval

14 had a board that was aware of the existence of MISI?

15 MS. PRICE: Michael, I think you would have

16 to look at your document. Your document is something

17 that would be taken as judicial notice by a reviewing

18 court or by another board. So that document is what is

19 relevant in terms of the four corners here. And the

20 fact that it didn't carve it out, in my humble opinion

21 of doing this for 33 years -- I know you have done it a

22 long time and so has John --

23 MR. SCHEPISI: He has done it longer.

24 MS. PRICE: My gray hair is covered -- I

25 don't think you can make that determination.

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1 MR. SCHEPISI: And you have to also  
2 remember 2002 is when Parkway Toyota got its approval  
3 for site next door. 2002 is when it passed Resolution  
4 No. 1 and Resolution No. 2. The building wasn't built  
5 and MISI did not move out until 2004. So you have this  
6 as a fact that that was there. The board had to  
7 consider it. It was there, it was an issue. And as  
8 Ms. Price has stated, you can't make exceptions today on  
9 that which is in based in your own documents.  
10 MR. KILMARTIN: Are you going to prove that  
11 MISI was in there in 2002?  
12 MR. SCHEPISI: Can I prove that MISI was in  
13 there in 2002?  
14 MR. KILMARTIN: Yes.  
15 MR. SCHEPISI: I will do that. I want to get  
16 all my other witnesses on. I will put Mr. Berardo on  
17 for that later. I will save him for that one little  
18 point.  
19 MR. KILMARTIN: Because that might nail your  
20 point down.  
21 MR. SCHEPISI: Okay. Very good point,  
22 Mr. Kilmartin.  
23 I'm sorry, you have it already in your proofs.  
24 You have it because your planner has testified that the  
25 photo is a 1986 photo. It shows that MISI was in the

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1 building at least in 1986. Your own planner has given  
2 that to you.  
3 MR. KATES: I still have a problem with  
4 accepting a global resolution that doesn't acknowledge  
5 knowledge of MISI being there disconnected to the  
6 dealership. If, in fact, it was part of not only the  
7 board's approval, but the court's approval, of which --  
8 MR. SCHEPISI: There was no court approval.  
9 That was all done by the board.  
10 MR. KATES: If the board had knowledge on its  
11 record that 3771 square feet of this building was  
12 occupied by an independent tenant doing some work for  
13 the dealership and still gave a blank assessment saying  
14 that it was an entirely preexisting nonconforming use,  
15 then it would be a mute point, but I don't know that  
16 they did that.  
17 MR. SCHEPISI: I don't think you can ever get  
18 that from any of the facts in this case today, twenty  
19 years later. But you know what is really funny, if you  
20 look at record that Ms. Scancarella put together at the  
21 board's request of the history, it's like every twenty  
22 years you bring this issue up. And every twenty years  
23 since that building has been built, the owner has had  
24 the identical issue. The only thing that has changed is  
25 the attorney on this side and the faces on that side.

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1 The same issue comes up, somebody comes up with a brain  
2 jammer.  
3 It's a nonconforming use and we have to go  
4 through the whole thing again. And you've already  
5 decided it multiple times, from the dates the building  
6 was built to the date Parkway Toyota went into there to  
7 the date that Parkway Toyota went out of there to 2002  
8 to today. Enough.  
9 Let me go on. The next question that you had is  
10 you wanted to know the dealerships that we had shown to  
11 property to over the years and we have an exhibit.  
12 MS. CARDONE: What was 12?  
13 (Applicant's Exhibit 13 marked for  
14 identification.)  
15 MR. SCHEPISI: Exhibit No. 13, which consists  
16 of two sheets of paper listing the names of the  
17 dealerships, the name of the broker that had been  
18 showing this property and bringing potential deals to  
19 it, because you had questions somebody wanted to see  
20 something in writing.  
21 MS. CARDONE: We only have two copies of all  
22 the pages. We only have one and one and then we will  
23 give it to the reporter.  
24 MR. SCHEPISI: And just so the record is  
25 clear, A-13 is two lists, one says "Prospective Tenant"

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1 on the top, the other one on the other side, the same  
2 one on the right says realtor and the prospective  
3 tenants: Toyota, Realtor Legacy Properties; prospective  
4 tenants East Coast Automotive, realtor Brandon Diordano.  
5 The next one; Classic Cars, Frank Triarsi. The next  
6 one; Alfa Romeo, Weiss Realty. The next one; Land  
7 Rover, New York, Colliers Houston. The next one is  
8 Tessler, Legacy Properties. The next one; Fiat Group,  
9 Joe Berardo. The next one; Cadillac, the office brought  
10 him in; Assalone/Prestige Motors, JB/CB Richard Ellis;  
11 experience Auto/Range Rover, Berardo bought him in  
12 directly; FCA Realty, CB Richard Ellis; Maserati, CB  
13 Richard Ellis; Autocentral Nissan, CB Richard Ellis.  
14 And then these are other brokers that brought deals in  
15 that we don't have the name of the tenant. And that's  
16 the second sheet that you have there. Cushman and  
17 Wakefield, Sitar Star, Washington Realty, Patrick  
18 Wilcox, and Jamie Weiss.  
19 MR. KATES: Do you have dates of all these  
20 entries?  
21 MR. SCHEPISI: Not on these sheets.  
22 MR. KATES: No.  
23 MR. SCHEPISI: But this is from two  
24 thousand -- this supplements Mr. Berardo's testimony  
25 since he bought the building every year he has had one

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1 to two dealerships in looking at the property.  
2 MS. O'SHEA: Do you have copies of any of the  
3 listing agreements?  
4 MR. SCHEPISI: Of the what?  
5 MS. O'SHEA: The listing agreements. When  
6 you give a realtor the ability to show your property,  
7 you usually have a listing agreement stating the terms  
8 of your permission.  
9 MR. SCHEPISI: Not when you are doing open  
10 listing. That's why you have so many different brokers  
11 here. Nobody has an exclusive.  
12 MS. O'SHEA: But even if the broker is  
13 showing a property to a client, they are going to have  
14 the owner sign an agreement that they are going to pay  
15 the commissions --  
16 MR. SCHEPISI: Once we bring --  
17 MS. SHEA: If the client proceeds, but you do  
18 that before you even bring the client.  
19 MR. SCHEPISI: No, you don't.  
20 MS. O'SHEA: Yes, you do.  
21 MR. SCHEPISI: Maybe you do, but most folks  
22 do not. What you do is you have them sign it the day  
23 you bring the client over there that you are going to  
24 rent to this client.  
25 MS. O'SHEA: Well, do you have any of those?

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1 MR. SCHEPISI: The broker would have it, we  
2 wouldn't.  
3 MS. O'SHEA: You don't keep a copy of the  
4 paperwork?  
5 MR. SCHEPISI: Mrs. O'Shea, please. You know  
6 the answer. Do you keep a copy?  
7 MS. O'SHEA: Yes.  
8 MR. SCHEPISI: Get me a copy of the listing  
9 agreement you did in 2002. Do you have it with you  
10 tonight?  
11 MS. O'SHEA: Not tonight. I can go home and  
12 get it for you.  
13 MR. PORINNO: Mr. Schepisi, when was this  
14 created?  
15 MR. SCHEPISI: I have no idea.  
16 MR. PORINNO: Is this recent or is this  
17 something that...  
18 MR. SCHEPISI: This was created at your  
19 request.  
20 MR. PORINNO: So it was done in the past  
21 month or two?  
22 MR. SCHEPISI: Yes.  
23 MR. PORINNO: What I would like to see  
24 personally is documents that were created over the past  
25 12 years, if you were trying to support the position

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1 that there was no abandonment, it would be helpful for  
2 us to see listing agreements, e-mails, some of  
3 documentation outside yours and your client's word that  
4 would demonstrate --  
5 MR. SCHEPISI: It's not my client's word.  
6 MR. PORINNO: The owner's word, I'm sorry.  
7 MR. SCHEPISI: I don't know what happened  
8 Mr. Berardo put this together, gave it to us, testified  
9 under oath, which is not being controverted by anybody,  
10 but apparently you are calling him a liar, that's what  
11 you are doing.  
12 MR. PORINNO: Mr. Schepisi.  
13 MR. SCHEPISI: That's what you are doing.  
14 The man testified under oath that this is what occurred.  
15 You asked him to bring in paper proof because his word  
16 doesn't mean anything in this town. That's what you are  
17 saying.  
18 MR. PORINNO: Case law is pretty clear,  
19 Mr. Schepisi that in cases of abandonment one should  
20 look at testimony by the applicant, by the owner, and  
21 also supporting evidence that supports, refutes, negates  
22 what the oral testimony is.  
23 MR. SCHEPISI: Correct. If there is a  
24 conflict; there is no conflict.  
25 MR. PORINNO: Mr. Schepisi, there is no way

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1 to know if there is a conflict or not without us doing  
2 our due diligence to know what happened.  
3 MR. SCHEPISI: What you are asking him to do  
4 is prove something, testify under oath, subject himself  
5 to perjury prosecution, and then go out and dig up the  
6 papers because you don't believe him. It's insane.  
7 MR. PORINNO: If he says or you say or if he  
8 says there was no listing agreements that were created  
9 that he has in his possession, that means something.  
10 That's worth something. But to just give us a list of  
11 prospective car dealers void of any background  
12 information.  
13 MR. SCHEPISI: What would you like that he  
14 has to go through and dig up?  
15 MR. PORINNO: There should be some  
16 documentation provided that he has attempted to lease  
17 this as a car dealership and not as an office building.  
18 Does that matter?  
19 MR. SCHEPISI: No.  
20 MR. PORINNO: That would be a clear picture.  
21 MR. SCHEPISI: There is no question here he  
22 has been trying to lease it as a car dealership and any  
23 other use that was permitted. But he wanted  
24 predominantly a car dealership because he knew he  
25 couldn't do anything else with the building but a car

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1 dealership.

2 MR. PORINNO: I don't personally fault you

3 bringing this document in. It doesn't really say much

4 beyond what we have already heard in terms of oral

5 testimony. That's the point I am trying to make.

6 MR. KILMARTIN: It doesn't say anything.

7 Take it for what it's worth. The man has testified that

8 he has been trying to find a tenant. The most logical

9 thing would have been a car dealership. He would have

10 taken something else. He has already said that. So to

11 me, nothing else came along, it was obvious he was

12 trying to rent it. I'm not sure on this particular

13 issue how much further we have to go.

14 MR. SCHEPISI: We will have another witness.

15 One of the brokers is here and he will substantiate that

16 also.

17 CHAIRMAN FEHER: Okay. You want to move on

18 then?

19 MR. SCHEPISI: I would love to.

20 Let's go on to the other issue that you had open.

21 The question was raised by your planner that she wanted

22 to see -- I'm sorry, that the planner wanted to see

23 supporting documentation. And I don't know whether the

24 board gave A-6, A-7 to the planner. And I'm just asking

25 that question because I don't know what you gave her.

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1 MS. SCANCARELLA: I give her everything,

2 including all my exhibits up on the FDP site. I think I

3 had all my exhibits on the FDP site.

4 MR. SCHEPISI: And were there renderings?

5 MS. SCANCARELLA: One through seven and then

6 we go to ten.

7 MR. SCHEPISI: You have 1 through 7 and 10

8 you have in there, too, and 11, the two renderings.

9 MS. SCANCARELLA: And 11.

10 MR. SCHEPISI: Did your planner --

11 MS. SCANCARELLA: I gave her access to the

12 FDP site.

13 MR. SCHEPISI: Okay.

14 Now there was one part that was raised and if I

15 can refer the board to the transcript of the March 15

16 hearing, Pages 30 through 36. This is, again, relating

17 to the dealerships, this is Mr. Berardo's sworn

18 testimony as to who was there, what people he showed it

19 to, and this is, again, fortifying the issue. Land

20 Rover, Alfa Romeo Maserati, Tessler, and others, Fiat,

21 Prestige was in there, that's correct. And we will have

22 another witness on it.

23 I just wanted to point to the board the sworn

24 testimony and there has been nothing presented by

25 anybody countering that. You asked us to prove

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1 something, we give you the uncontroverted proof and then

2 you want us to reprove it. Understand that's not the

3 way it's done. That's not the way it should be done.

4 If someone else was getting up saying something

5 contrary, I would agree with it.

6 MR. KATES: I think the board was only

7 commenting on the list that you were presented tonight,

8 that it was inadequate because it was done now, not to

9 disvalue the testimony.

10 MR. SCHEPISI: Mr. Kates, that's not what

11 they asked for. They asked us to give us a list of

12 everybody we brought in. We gave that list.

13 MR. KATES: It was the fair comment.

14 MR. SCHEPISI: Let's continue now with our

15 next witness. We are going to put on, it is going to be

16 Brad Bohler. Mr. Bohler is going to be on solely for

17 the purpose of addressing some of the issues your

18 planner has raised and to address the topographic

19 conditions.

20 B R A D B O H L E R, having been previously

21 sworn, testified as follows:

22 MR. SCHEPISI: Mr. Bowler was previously

23 sworn. He was qualified as a licensed professional

24 engineer and we are going to continue with his

25 testimony.

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1 MR. KATES: Mr. Bohler, you remain under

2 oath.

3 THE WITNESS: Thank you.

4 EXAMINATION BY MR. SCHEPISI:

5 Q. Mr. Bohler, you are the engineer at Bohler

6 Associates who is responsible for this project and

7 everybody is working under on this project; is that

8 correct?

9 A. Correct.

10 Q. From an engineering standpoint?

11 A. Yes.

12 Q. Are you familiar with the site?

13 A. Yes.

14 Q. The question has been raised as to the

15 topography of the site. Can you describe the site from

16 Sylvan Avenue and proceeding in a westerly direction

17 what the topography is on the site?

18 A. The plan I have up right now is the survey

19 that was filed with the application so I won't mark it.

20 For the purposes of the testimony, right would be the

21 north of the page. So from Sylvan Avenue going to the

22 back of the property, the site does slope up gently from

23 the first 50 feet or so of the property and then after

24 that, it drops off fairly steeply, at an approximate 10

25 to 15 percent grade down to the lower level of the

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1 building, at which point it is fairly flat along the  
2 north and south side of the building. And in the back  
3 it does drop off another foot or two in the back of the  
4 building to the rear.  
5 Q. And the building that was built on this site,  
6 the original building that was built in the 1960's for a  
7 car dealership, did it take into consideration that  
8 grade and had its entrance in the lower level for  
9 service and people would go up top for the showroom?  
10 A. Yes.  
11 Q. In your experience as a licensed professional  
12 engineer having testified since your first day on many,  
13 many site plans, does this site lend itself to office  
14 building purposes?  
15 A. No, it does not.  
16 Q. Is this what we call a specialty building  
17 that was built for the site for special purposes?  
18 A. Yeah, the way the entrances are positioned  
19 below the building as you get lower into the area.  
20 Q. Now, in relation to the rear of the property,  
21 there are residential properties to the rear; is that  
22 correct, sir?  
23 A. Yes.  
24 Q. And have you been in that rear area?  
25 A. A couple of times, yes.

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1 Q. And in relation to the drawing that is in  
2 front of you, I see something that says edge of payment  
3 to be removed right at 100?  
4 A. Yes.  
5 Q. Can you explain what is there and what is  
6 planned to be done there?  
7 A. It's an overgrown area but it is mainly  
8 gravel and a damaged fence for the most part. What is  
9 proposed to be there is a landscaped area and pavement  
10 area.  
11 Q. And do you recall that that area was used for  
12 parking for years and that one of the concerns that the  
13 neighbors had and was put on the record by the neighbors  
14 and we agreed to do it, was to put a curb in there to  
15 stop the cars from hitting the fence because they kept  
16 knocking the fence down? Do you recall that?  
17 A. Yeah, that was one of the requests that  
18 neighbors had. It's part of our meeting with them, as  
19 well.  
20 Q. So historically the cars which parked up to  
21 the fence and were hitting the fence, notwithstanding  
22 the fact that the macadam was short of that; is that  
23 correct, sir?  
24 A. That's what it appears.  
25 Q. And in relation to what you are proposing in

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1 order to address the concerns of the neighbors to the  
2 rear, the applicant has agreed to take that area that is  
3 now gravel and put macadam on it?  
4 A. Yes.  
5 Q. Not enlarge the parking area, it's still the  
6 same parking area, but we are going to stop the cars  
7 from hitting the fence and it's going to be the same  
8 number of square feet of parking; is that correct?  
9 A. Correct. But there is the area that is  
10 becoming landscaping so there will be shrubs in that  
11 area. So along the fence in that area, it will be  
12 enhanced with shrubs.  
13 Q. Would you say from an engineering standpoint  
14 that the nonconforming use, the structure, the parking,  
15 et cetera, is or is not being increased?  
16 A. Is not being increased.  
17 MR. SCHEPISI: Nothing further of this  
18 witness.  
19 At this time I would like to call Larry Lam.  
20 MR. HIPOLIT: I have a question. I would  
21 just like to clarify. You asked Mr. Bohler a question  
22 about the building not being suited for office. I'm not  
23 sure that is a question for an engineer.  
24 MR. SCHEPISI: Well, in his opinion as an  
25 engineer, he is saying from an engineering standpoint.

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1 The planner is going to go into it next.  
2 THE WITNESS: I can elaborate on that. The  
3 parking that is assigned to this area generally in the  
4 back is a substantial grade lower than the first floor  
5 or the area that was used for office. The lower level  
6 wasn't really conducive to office, but regardless of the  
7 architecture, to get to the front of the building you  
8 would have to walk up the driveway and that would not be  
9 a safe walking maneuver if you use it for that use.  
10 MR. HIPOLIT: Have you been to the building?  
11 THE WITNESS: Yes.  
12 MR. HIPOLIT: What is it like inside?  
13 THE WITNESS: It's not well maintained.  
14 MR. HIPOLIT: It's in disrepair?  
15 THE WITNESS: Right.  
16 MR. HIPOLIT: If you gutted the building,  
17 which you will have to do, you can make it anything you  
18 want. So the entrance could be in the back.  
19 MR. SCHEPISI: Why don't we hear from an  
20 architect who knows this instead of two engineers who  
21 don't know it.  
22 MR. HIPOLIT: I want to be careful because he  
23 is testifying to issues that I am not sure is  
24 necessarily a condition.  
25 MR. SCHEPISI: Mr. Hipolit, are you saying

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1 that any building that is out there, we can take it down  
2 to the steel, take it down to the shell and it could be  
3 converted to another use; is that what you are saying?  
4 MR. HIPOLIT: Especially a building in  
5 disrepair.  
6 MR. SCHEPISI: I understand where you are  
7 coming from. Anything that you throw money at can be  
8 done. But sometimes it is economically unfeasible to do  
9 it.  
10 MR. PORRINO: I have a question in regard to  
11 a statement that was just made. Do you agree that there  
12 is no expansion of the nonconforming use of this  
13 property vis-a-vis the engineering, the site plan, let's  
14 call it, the site work, what he just testified to. He  
15 testified that there is no increase or expansion of the  
16 nonconforming use.  
17 MR. KATES: If you convert dirt to pavement.  
18 MR. HIPOLIT: I think there needs to be some  
19 more clarification and testimony. So the question I  
20 hear, and I will repeat it. So they have an area in the  
21 back that was either bare earth or gravel, they are  
22 testifying it was used for parking at some point and  
23 what they are doing now is paving it. So really the  
24 proof is on them if it was used for parking and that was  
25 what was intended in the site plan, then it wouldn't be

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1 an expansion. But if it really wasn't, somehow there  
2 needs to be some backup documentation on this to prove  
3 it was intended as parking.  
4 MR. CHINMAN: The map shows the parking all  
5 over it.  
6 MR. HIPOLIT: The issue is when this was  
7 approved, whoever approved it prior to me being here the  
8 first time, because I wasn't here, I don't know what it  
9 was approved for. So was it approved for parking. If  
10 it wasn't and they just took it over as parking and they  
11 never had the right to do that, so it would be an  
12 expansion of a nonconforming use as far as the parking  
13 goes. They have to tie that together. I don't know how  
14 they got that parking established. I know I don't have  
15 any records of it.  
16 MS. EASTWOOD: Do we have the old site plans?  
17 MR. SCHEPISI: Does who have them? The only  
18 place we've looked is the borough and apparently the  
19 borough doesn't.  
20 MS. SCANCARELLA: I took out everything I  
21 could find on that property.  
22 MS. O'SHEA: I have to go to Cathy. She may  
23 have it.  
24 MS. SCANCARELLA: I think that building was  
25 built before the UCC code. It was built in the '60s.

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1 That's before the UCC code, it came in the '70s.  
2 MR. HIPOLIT: Was there a site plan  
3 application when Toyota took it over?  
4 MS. SCANCARELLA: No.  
5 MR. SCHEPISI: And the plan that was done was  
6 for Equinox?  
7 MR. HIPOLIT: That was way after.  
8 MR. KATES: So do we have the proverbial  
9 80-year-old man.  
10 MR. HIPOLIT: I don't know if the question is  
11 answerable.  
12 MR. PORRINO: I appreciate it.  
13 MR. SCHEPISI: If there is no further  
14 questions of this witness, he is going to be here to  
15 answer other questions later, just so we can get  
16 everything in, I call Mr. Larry Lam. Mr. Lam has been  
17 sworn. He is a licensed architect in the State of New  
18 Jersey and other places.  
19 L A R R Y L A M, having been reminded he  
20 was previously sworn testifies as follows:  
21 EXAMINATION BY MR. SCHEPISI:  
22 Q. Mr. Lam, you have been hearing what has been  
23 going on here this evening?  
24 A. Uh-huh.  
25 Q. Are you familiar with this building?

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1 A. Yes.  
2 Q. Have you been in the building many times?  
3 A. Many times.  
4 Q. How many times?  
5 A. I used to be a customer. So I remember it  
6 from the '80s, '90s. I have been in it two or three  
7 times recently.  
8 Q. And in relation to the building, can you  
9 describe the condition of the building to the board?  
10 A. It remains in disrepair.  
11 Q. Is this building -- I'm sorry, has this  
12 building been built for a specialty use building?  
13 A. In my opinion, most definitely. I think the  
14 simplest way I can make it clear is I think everyone  
15 knows what it is like -- bless you -- I think everyone  
16 knows what it is like. It's a building surrounded by a  
17 lot of parking; parking is required by parking ratio by  
18 zoning.  
19 And this building is different because, as Brad  
20 had mentioned, you come in and then you drive down after  
21 coming in off the highway, and there is a long drive to  
22 the back. And there are more cars in the back. As  
23 Mr. Bohler also observed, there is a main entrance in  
24 the front. So there is a very long walk.  
25 And if you look at a typical office building

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1 usually, that an architect has done, office buildings,  
2 it's usually like a 12'8" floor to floor. The floor  
3 plates are typical. As a matter of fact, the taller the  
4 building goes, the architect will say on the plans, a  
5 typical floor plan between 8 and 12, even on the  
6 low-rise office building. You try to get floors typical  
7 on the building as testified to Mr. Bohler, it's not  
8 really typical because -- do you have this other  
9 exhibit, the floor plan? -- I hope we have it with us.  
10 The first floor has two main different elevations  
11 and the character -- thank you --  
12 MR. KATES: Can you refer to the plan, so we  
13 have it on the record? Sheet A, 101.  
14 THE WITNESS: A-101. So here's 9W. This is  
15 the under level, this part is about 1700 square feet,  
16 this is 1500. The character of these spaces is very  
17 different from what you would find in an office  
18 building. The floor heights are much taller. They are  
19 industrial in nature -- I'm sorry, I didn't catch the  
20 gentleman's name.  
21 MR. SCHEPISI: Mr. Hipolit.  
22 THE WITNESS: He is the borough engineer?  
23 MR. SCHEPISI: Yes.  
24 THE WITNESS: From an architectural  
25 prospective, these spaces are very tall. It's 21 feet

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1 to the floor level up to the underside of the structure,  
2 compared to 12'8", which is very typical for an office  
3 building, where in a section you will have an 8- or  
4 9-foot high space. Above that, you have some mechanical  
5 space and you have the floor above and that's your  
6 typical office building.  
7 So this is kind of like a factory, it's an  
8 industrial-type use. With years and years of vehicles  
9 dripping oil underneath and going into the ground. And  
10 to convert it into an office building, even in its  
11 disrepair state is a major operation. It's not like  
12 retrofitting, similar to the level above -- oh, maybe  
13 it's on the back of this.  
14 As far as being atypical from a standard office  
15 building and it is standard because that's how buildings  
16 in an office space have evolved over many decades; 12'8"  
17 floor to floor with a 3- to 4-foot mechanical space in  
18 the section. Here you have a very tall showroom  
19 building, as well.  
20 So to turn it into an office building is not  
21 impossible, as a matter of fact, because if you look  
22 there is a lot of rehab going on. But to change the  
23 showroom building to something else, it's very  
24 extensive. And to change the showroom building into the  
25 an office space would require in addition to a lot of

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1 imagination -- I would love to provide the imagination  
2 to turn it into an office space -- but it's just not  
3 practical. What are you going to do with it?  
4 Q. Is it economically feasible to do it?  
5 A. No. You can see from the artist's conception  
6 that it's not really an office building. The only part  
7 that is really an office building as Mr. Schepisi has  
8 been saying is up here, the top level, which is part of  
9 the use. You can't have a auto dealership running  
10 without a back office. In our design, the top level,  
11 you can see on the side elevation has a mixture of  
12 office and customer -- as we call it customer touch area  
13 that makes it an overall experience.  
14 So this really, the underlying, what is under the  
15 skin is very definitely an auto dealership. Even in the  
16 proportions of the different spaces, there is showroom,  
17 there is service, parts is part of it, and then office.  
18 So it's very clearly conceived as an auto dealership and  
19 I think proven by the fact that you have these high  
20 headroom spaces that are intended for a central car  
21 service use, not very compatible with a office workday  
22 environment.  
23 MR. KATES: Is that a garage for either  
24 office vehicles being parked or residential vehicles  
25 being parked, a 21-foot high would not be the normal

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1 there?  
2 THE WITNESS: Again, this is years and years  
3 ago and the documentation is very scarce.  
4 MR. KATES: I'm not talking about whether it  
5 ever was, I am asking if it were designed today for a  
6 multilevel office facility or multilevel residential  
7 facility and you have underground parking for a garage.  
8 THE WITNESS: Usually it's lower.  
9 MR. KATES: What was would it be?  
10 THE WITNESS: Typically it's 9 feet.  
11 MR. KATES: So it would never be 21 feet?  
12 That's what makes this different.  
13 THE WITNESS: Right. So this area being  
14 service -- well, it's going to be hard to indicate, but  
15 the showroom level is a split level above here. This is  
16 all relatively one level, some curves that are 6 inches  
17 high. This is more like a 1'4", 1'7" grade difference.  
18 Above this area, which is showroom, all of this is very  
19 tall ceiling. You can see it in the side view, side  
20 elevation faces north. So this is a double height  
21 showroom.  
22 Again, could it turn into an office building? I  
23 suppose. But it's wide. And then up here you have,  
24 this is very suitable for office. And down here you  
25 have in -- I think you see just proportionately, a very

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1 tall ceiling and it continues all the way through. So  
2 to use that volume --  
3 MR. CHINMAN: Excuse me, can I just ask a  
4 question? If this was to be changed into office space,  
5 you couldn't use half that building anyway because you  
6 don't have parking. So you would have to take off the  
7 back half to begin with?  
8 THE WITNESS: To delve into what you are  
9 saying, we all know that an office use requires 4 or 5  
10 parking spaces per square feet. As we all know from the  
11 site plan, look at the difference. You have all this  
12 parking and then you have a lesser space beyond 100. So  
13 it --  
14 MR. CHINMAN: Basically, you would have to  
15 take down the whole building and start from scratch.  
16 THE WITNESS: Right. That's what we are  
17 saying.  
18 MR. CHINMAN: I just want to cut to the  
19 chase.  
20 CHAIRMAN FEHER: Is that so bad? They had to  
21 take the whole building down right across the street.  
22 MR. SCHEPISI: But you gave them the sky.  
23 You let them put up -- you gave everybody 170 foot  
24 building, which you reduced down to 77 feet. Give them  
25 a 77 foot height, you will have a lot of this down

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1 there. And you don't want to do this --  
2 CHAIRMAN FEHER: We knock our houses down  
3 after 40 or 50 years in this town.  
4 MR. SCHEPISI: You don't. I don't. Some  
5 people do. But the property is what it is. You can't  
6 take a property owner and tell the property owner they  
7 should demolish their building. That's wrong. It's  
8 just wrong.  
9 CHAIRMAN FEHER: If I look at this building,  
10 even to fix it up and turn it back into a car dealership  
11 it probably is going to cost -- it probably would be  
12 cheaper to pack it in and start over.  
13 MR. SCHEPISI: Because the people who are  
14 putting the money in know what this is going to cost,  
15 say this is the way to do it, a car dealership.  
16 Chrysler is coming in. FCA is coming in. They know it,  
17 they crossed it out. This is the way it makes sense.  
18 Not to knock the building out.  
19 THE WITNESS: Cost-wise, just to address what  
20 you are saying, the bones of this building are very  
21 good. It's a steel structure --  
22 CHAIRMAN FEHER: That's the minor cost to  
23 the whole construction.  
24 THE WITNESS: I am just saying. When you are  
25 saying to turn it back into an auto dealership, the

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1 remaining value of the steel skeleton is of value.  
2 Rather than to tear it down and put something similar  
3 back up.  
4 MR. HIPOLIT: You're an architect -- and I  
5 hear a lot of testimony on this so be careful with this  
6 answer -- what is cheaper, knocking it down and building  
7 it new or rehabbing it?  
8 THE WITNESS: I think in this case because  
9 it's already configured, it's more economical to rehab  
10 it, it's all here. It's all here. All the space exists  
11 already. We are essentially thinning it out. All the  
12 spaces that are of industrial nature are already there.  
13 There is already a trench there, which you can see from  
14 the photos, which are very standard in the service  
15 department. If a car drives in with oil dripping, it's  
16 all there, it's a trench drain. It's all there. This  
17 is a dealership as evidenced from the photos.  
18 MR. HIPOLIT: What about your HVAC,  
19 sprinkler, and electrical?  
20 THE WITNESS: That, of course, has to be new  
21 because equipment ages and nothing lasts that long. But  
22 all the steel infrastructure is there already. Things  
23 are getting lighter.  
24 MR. HIPOLIT: How are you going to deal with  
25 all the new requirements for oil/water separators and

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1 the return without oil getting into the ground? All  
2 that has to be dealt with. You can't just discharge  
3 that to our sewers.  
4 THE WITNESS: Of course, there is going to a  
5 sand/oil separator between any trench drain or any drain  
6 in the service department. Before it goes into the city  
7 storm water system, there is a sand water separator,  
8 which has to be cleaned out on some calendar schedule,  
9 discharged water acceptable. That's standard.  
10 MR. HIPOLIT: Does the property currently  
11 have any contamination on it?  
12 THE WITNESS: I don't believe we have gotten  
13 to that point.  
14 MR. SCHEPISI: I believe there is the  
15 preliminary, we don't have any contamination.  
16 MR. KATES: Phase I is.  
17 MR. SCHEPISI: Does that answer your question  
18 on systems?  
19 BY MR. SCHEPISI:  
20 Q. In relation to the elevator, is this an  
21 office building where you have to put an elevator core?  
22 A. Absolutely. And there are requirements for  
23 the number of elevators for the population.  
24 Q. And presently there is an elevator in the  
25 building, but it's a service elevator for the use that

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1 is there?

2 A. It's more of an incidental use because in an  
3 office building, there are different populations. Some  
4 may come for a part, others may come to have their car  
5 serviced, others are shopping for a car. So there are  
6 different populations that come in like one of those  
7 puzzle cube. It's not like an office building where  
8 everyone is coming into an office.

9 MR. KATES: So you are saying the elevator  
10 core that is in there now is inadequate for an office  
11 building?

12 THE WITNESS: Correct.

13 MR. KATES: In terms of dimensions, size.

14 THE WITNESS: Well, the equipment itself is  
15 very old.

16 MR. KATES: Forget equipment.

17 Q. The building, the size, the number you need,  
18 is what is there adequate?

19 MR. HIPOLIT: It can't be.

20 THE WITNESS: It's positioned for the  
21 previous auto dealership use, where the use for the  
22 elevator is. We were proposing to put a new elevator  
23 here for convenience for the people dropping off their  
24 car.

25 MR. KATES: Can you mark that plan? You said

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1 here, the record doesn't record it, can you use a  
2 marker?

3 THE WITNESS: Or I can use a different plan.  
4 (Applicant's Exhibit 14 marked for  
5 identification.)

6 THE WITNESS: Here is the existing elevator  
7 on A-101 on the bottom. We are proposing a new  
8 elevator, convenience elevator here. But this is not  
9 like a work elevator for an office building.

10 MR. KATES: What would have for an office  
11 building?

12 THE WITNESS: I guess I haven't conceived it  
13 as an office building yet. But, I guess, we have to  
14 figure out how to get people to an office lobby and  
15 core. I guess it would be here. And as Mr. Bohler  
16 described it, it's a long walk from the back. It wasn't  
17 designed for that. This is going to be at significant  
18 cost converted.

19 MR. HIPOLIT: The ADA regulations for access  
20 don't necessarily change with use. You need ADA  
21 accessibility for the entire building, whether it's an  
22 office or a car dealership.

23 THE WITNESS: Absolutely.

24 MR. HIPOLIT: I'm not sure what argument you  
25 are trying to make.

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1 THE WITNESS: I am sorry if I confused anyone.

2 MR. TROVATO: Let's stick with the car  
3 dealership because that's what we are talking about.

4 Q. Are you saying in your professional opinion  
5 as an architect that this building cannot and should not  
6 be converted to office use and the particular purpose to  
7 which it was built, to it a car dealership, is the only  
8 practical use for this building?

9 A. Absolutely. In everything I have been trying  
10 to convey, the ceiling, floor-to-floor height, it is not  
11 an office building, the layout of parking, it's not  
12 sufficient. I suppose if the rent were low enough, it  
13 could be on the lower level. But there is no view.

14 This is a structure that suits a service department.  
15 It's got all the guts, the power, the trench drain is  
16 there. This was probably a more primitive separator.  
17 But this is definitely an industrial use for a car  
18 dealership, service department.

19 Q. Go to the side elevation the south or your  
20 north elevation.

21 A. This is north.

22 Q. Either one is good. The difference in the  
23 height of the rear section is what as compared to the  
24 front section, sir?

25 A. I have it here.

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1 Q. Approximately; I don't need it exactly.

2 A. You want...

3 Q. Just tell me the height of the rear portion  
4 of building, the westerly portion of the building from  
5 grade level, as compared to the height of the easterly  
6 portion.

7 A. This is about 22 feet and it's all empty,  
8 it's one tall space with a mezzanine. And the taller  
9 one is 25 feet from the street side, so it's a little  
10 taller from here.

11 Q. So your floors are not even straight from the  
12 back. So if you rented it to a tenant you would need  
13 steps walking from the front of their office to the rear  
14 of their office.

15 A. That's correct. No typical floor plan like  
16 you find in most office buildings.

17 Q. Once again, it's your opinion as a licensed  
18 architect in the State of New Jersey this building  
19 cannot and should not be converted to office use and  
20 it's a special purpose building as a car dealership and  
21 that's what it should be?

22 A. I think that makes more sense.

23 Q. Is that your testimony? Is that what you are  
24 saying, sir?

25 A. I would say this building is purpose built as

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1 an auto dealership. The site is configured as an auto  
2 dealership. The way it was used makes it a auto  
3 dealership. I think it's perfectly suitable. To change  
4 it to a different use would require a large amount of  
5 capital investment.  
6 MR. SCHEPISI: I have nothing further at this  
7 time.  
8 MS. O'SHEA: Would you put up the side  
9 profile of the building showing the drop off? Okay.  
10 When we've had the onsite inspection, in the middle  
11 drawing, right here under your middle figure, there is a  
12 space. That was where the elevator is, and there was a  
13 doorway there and there was a sign that said elevator  
14 and it say MSI Systems inside, right inside by that  
15 elevator. That elevator went upstairs, even though it's  
16 not working, to the second floor, which was the office  
17 space for MSI. And that part of the building above that  
18 and to the back where it drops off was the office space  
19 for MSI.  
20 Toyota kept the front part of the building for  
21 their showroom and sales desk and so on. And then the  
22 lower part of the building was their service department,  
23 their parts department and their repair department. So  
24 the elevator was for MSI upstairs that was the second  
25 entrance.

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1 MR. SCHEPISI: I don't think it was only for  
2 MSI.  
3 MS. O'SHEA: The elevator was from the ground  
4 to the second floor.  
5 MR. SCHEPISI: But Toyota had offices up  
6 there also.  
7 MS. O'SHEA: But it said MSI there on the  
8 elevator.  
9 THE WITNESS: You kind of have the other side  
10 of the building. I know what you are talking about.  
11 Let me show you. You kind have it reverse. You were  
12 having me point to this door. It's actually here you  
13 are talking about.  
14 MS. O'SHEA: It was on the north side of the  
15 building. The stairs going upstairs on the left side on  
16 the south side of the building. The elevator that I am  
17 speaking of when we went on the tour was on the north  
18 side of the building about approximately where I showed  
19 you. No not that far back. Just like I showed on the  
20 other drawing.  
21 THE WITNESS: On the other drawing, that is  
22 here. But there is no elevator.  
23 MS. O'SHEA: It was inside the foyer, inside  
24 the entrance there. We went in that. That's the door  
25 we went in. There are steps going down from that

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1 landing in the front of the building where the cars  
2 would be. And then there was an opening, a doorway, you  
3 went in there, and there was an elevator and a sign and  
4 it was from MSI second floor.  
5 MR. SCHEPISI: If I may proceed now?  
6 CHAIRMAN FEHER: Go ahead.  
7 MR. SCHEPISI: Our next witness who do we  
8 have here from CBRE?  
9 RONALD A. VOLK, after having been  
10 duly sworn, testified as follows:  
11 MR. KATES: What is your business address?  
12 THE WITNESS: It's 250 Pehle Avenue, Saddle  
13 Brook.  
14 MR. KATES: Your witness.  
15 EXAMINATION BY MR. SCHEPISI:  
16 Q. Spell your last name, sir.  
17 A. Volk, V-O-L-K.  
18 Q. And you are employed by CBRE?  
19 A. Yes.  
20 Q. In what capacity?  
21 A. Salesperson, leasing of properties.  
22 Q. And are you familiar with leasing of  
23 properties in Englewood Cliffs?  
24 A. Yes.  
25 Q. Are you familiar with the office market in

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1 Englewood Cliffs?  
2 A. Yes.  
3 Q. Would it be fair to say that there is a  
4 shortness of office space in Englewood Cliffs or there  
5 is a glut of office space?  
6 A. There is a glut. And with the impending LG  
7 development, there is going to be an even larger glut as  
8 they vacate their Sylvan corporate center and they are  
9 building at 111 Sylvan Avenue.  
10 Additionally, there is another factor in play,  
11 IBM is vacating space, as well, at their Sylvan  
12 corporate center. Bauer Publishing at 270 Sylvan is  
13 downsizing, they are giving up about 10 percent of their  
14 space. They are one of the larger tenants in town, as  
15 well.  
16 For the most part office space is not as viable  
17 as it used to be in the old days because people don't  
18 come up to this area. They go either out west or they  
19 go down to the Meadowlands. To give you an example of  
20 the flow of where this is going, for example, you might  
21 have heard recently that Unilever is closing down one of  
22 their call centers. They are vacating probably about 10  
23 to 20 square feet with that. There has been talk, I  
24 have heard about Maserati going down to Atlanta. I  
25 don't know if you've heard that, as well. The tenant

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1 that I happen to represent, Cannon USA, used to be at  
2 400 Sylvan. They have moved to the Meadowlands.  
3 So basically there is a seed change in the use of  
4 office space in Englewood Cliffs. And we look at it,  
5 CBRE, from a greater perspective, from what we call the  
6 Palisades market. The Palisades market includes Fort  
7 Lee as well going down to Teaneck, Ridgefield Park and  
8 so on and so forth.  
9 I have a couple of notes, if I may, to give you  
10 some stats. The Palisades in December of the 2006 --  
11 excuse me, I do not have my glasses, I wasn't expecting  
12 to be up here -- in December of 2006, there were 29  
13 buildings with 5.75 million square feet, there was 23  
14 percent availability rate. That was again about ten  
15 years ago.  
16 In today's market, the market has shrunk from 29  
17 to 25 buildings about 750,000 has left the market. 111  
18 Sylvan being one of them, as you know before it was  
19 demolished there was a potential gym that was going to  
20 go in there, Lifetime Fitness, I don't know if you are  
21 aware of that, but it wasn't going to be office space.  
22 One Executive Drive in Fort Lee has been converted to  
23 residential. 2100 North Central in Fort Lee, the  
24 Washington Building, that's vacant. It's probably going  
25 to be converted to residential. There is nobody that is

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1 filling an office building.  
2 And the availability rate in the market, if you  
3 look at the overall Palisades, is 19.6 percent. If you  
4 add back in the buildings that are taken out of the  
5 market, it's 30 percent. That's so far above  
6 equilibrium. We look at, in our office, equilibrium is  
7 anywhere from 10 to 12, maybe 13 percent. At 19 percent  
8 you are well above equilibrium. At 30 percent, that's  
9 why buildings are coming out of the market and being  
10 converted to residential because the demand is not  
11 there.  
12 CHAIRMAN FEHER: Right across the street,  
13 they are building LG, a beautiful building. Don't you  
14 see any spinoff from that construction there, from that  
15 beautiful new building spreading over to the other side  
16 of the street and possibility something happening there?  
17 THE WITNESS: I don't think there's a  
18 correlation. People are driven by patterns, where they  
19 need to be, how they get their people to work. The  
20 Palisades market is seen as a difficult market because  
21 of the traffic at the bridge. If you are coming down  
22 from the north, it can be difficult, coming up from the  
23 south, coming from the west, it can be awful. So that's  
24 why people shy away from it. That's why tenants are  
25 moving out west. All these tenants are -- if not for LG

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1 and Samsung, the office market in the Palisades area  
2 would be in much worse shape than it is. Probably 40 to  
3 50 percent decreased.  
4 CHAIRMAN FEHER: So are you saying we have to  
5 have car dealerships?  
6 MR. SCHEPISI: When they are existing  
7 nonconforming uses, don't chase them out.  
8 CHAIRMAN FEHER: I'm sure if we got rid of  
9 our ordinance and allowed car dealerships, you would  
10 have a whole strip of car dealership going all the way  
11 up to Tenafly, in a few years.  
12 MR. SCHEPISI: But when you have an existing  
13 nonconforming use, why penalize this individual, which  
14 is what you are doing. If you have another user ready  
15 to go in there, maybe you might be right. Legally you  
16 would wrong, but maybe you'd be right with that type of  
17 thinking. But here you have no market. You don't have  
18 an office market in Englewood Cliffs. There is none  
19 here. Go up and down the strip, how many buildings have  
20 the signs in front? Look at every building. Go to my  
21 building, go across the street. Every building has a  
22 sign office space for lease.  
23 So LG now is going to come and build this thing  
24 that they are building now and they are going to have  
25 their building. And what is going to happen? They are

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1 going to be leaving the building they have up north, we  
2 are going to be leaving the tenancy and it's going to be  
3 more glut.  
4 THE WITNESS: To give you some idea, IBM is  
5 vacating 27,000 square feet. LG is going to vacate  
6 34,000 at 910 and 911; 35,000 at 920; 57,000 at 100  
7 Sylvan; LG Chemical 14,000 at 910. Unilever is giving  
8 up, we talked about that, is about 15- to 20,000 square  
9 feet. And Dow Publishing is giving up about 10,000  
10 square feet.  
11 MR. SCHEPISI: 910, 920, 930, 940, I  
12 represented them. We got that zoning approved. What am  
13 I going to do now? They are losing all of their  
14 residential tenancies -- sorry -- all of their office  
15 tenancies. Now, are we going to convert that into  
16 living space? What other use can be there? You have a  
17 use, you have a major corporate tenant that wants to  
18 come in, dump substantial money into this community,  
19 rebuild this building and clean up the south side of  
20 town. Not just where LG is going to be.  
21 You asked us when we met with you, Mr. Feher,  
22 come up with a street scape; we came up with a street  
23 scape. Take care of the neighbors to the back. We did  
24 all these things.  
25 CHAIRMAN FEHER: Don't you need a 50 foot or

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1 60 foot parking lot with no parking in the front yard?  
2 That's our street scape.  
3 MR. SCHEPISI: If this was Englewood Cliffs a  
4 hundred years ago, yes. But, unfortunately, this is  
5 Englewood Cliffs in 2016 and you can't say, well,  
6 demolish your building because I would like to put in a  
7 nice street scape. But take what you have and make it  
8 pretty for me. That's what we did. You can't go into  
9 the midtown Manhattan and say, Well, I want to now have  
10 a 50-foot garden in front of every building. You can't  
11 do it.  
12 Englewood Cliffs was built, your predecessors  
13 came up with plans, your predecessors came up with  
14 designs, came up with ordinances. Everyone complied  
15 with it. People got variances, but they complied the  
16 basic scheme. You want to change it now, but don't put  
17 it on me and this property owner. You want to come and  
18 condemn it, condemn the property and do what you want to  
19 do with it. But do it with your money, not with his.  
20 I said you, I meant the borough's.  
21 MR. KILMARTIN: Mr. Volk, were you ever  
22 involved with bringing any potential tenants to this  
23 particular building?  
24 THE WITNESS: I represented the owner. And  
25 just to clear up one fact, the owner can or cannot have

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1 an open listing. And I was hired exclusively. We have  
2 an exclusivity document somewhere.  
3 MR. KILMARTIN: How long ago was that?  
4 THE WITNESS: I think it was three years.  
5 MR. KILMARTIN: And have you brought any  
6 prospective tenants to the building?  
7 THE WITNESS: Yes.  
8 MR. KILMARTIN: And who are they?  
9 THE WITNESS: We had Maserati came by. We  
10 had a Nissan dealer come by. We had a couple of no-name  
11 tenants, they weren't disclosed. We had a used car  
12 dealership, they came by. And then, you know, we had a  
13 couple of no-name tenants.  
14 MR. SCHEPISI: Who brought in FCA Reality?  
15 THE WITNESS: Another member of CBRE.  
16 MR. SCHEPISI: Your firm?  
17 THE WITNESS: Yes.  
18 MR. SCHEPISI: But not you personally.  
19 THE WITNESS: But when a tenant is brought in  
20 by an outside broker, they do not sign any type of  
21 agreement. It's not until you have a deal in front of  
22 you, basically, that you sign.  
23 MR. KILMARTIN: The prospective tenants, were  
24 they predominantly automotive?  
25 THE WITNESS: For the most part, yeah.

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1 Again, there were some that were unknown to me. They  
2 don't always say who they are or their business.  
3 MR. KILMARTIN: And as a realtor looking at  
4 that building, who does that building say to you as far  
5 as prospective leases?  
6 THE WITNESS: I will say that it doesn't say  
7 anything about office to me. Even if you did convert  
8 it, the rents you could get for it -- and I'm not an  
9 expert in construction, I may be an expert in rents --  
10 but from what I understand, you need at least a 30 to 40  
11 square feet budget to develop a building. And rents  
12 here are probably about 20 to 25. And Sylvan Avenue is  
13 probably one of the top, I think approaching \$30 or so.  
14 So it doesn't make sense.  
15 MR. KILMARTIN: So for an office use, are you  
16 saying, in your opinion, that the prospective buyer  
17 would just go somewhere else before they would develop  
18 this as an office?  
19 THE WITNESS: Again, there are too many  
20 factors working against it, in my humble opinion.  
21 MR. KILMARTIN: Thank you.  
22 MR. SCHEPISI: I have no further questions.  
23 CHAIRMAN FEHER: Any questions?  
24 MR. SCHEPISI: The next person I am going to  
25 bring up is one of your prior board members.

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1 Mr. Surace.  
2 Can you introduce yourself to the board?  
3 CHAIRMAN FEHER: We know you have been on  
4 the board.  
5 MR. SURACE: Vince Surace, 55 Center Street.  
6 CHAIRMAN FEHER: How long had you been on the  
7 board?  
8 MR. SURACE: Oh, about 20 years.  
9 CHAIRMAN FEHER: Board of adjustment.  
10 THE WITNESS: I was a member of the board of  
11 adjustment.  
12 MR. KATES: You were a member of the public  
13 the last time you spoke. So you are now the applicant's  
14 witness so let's put you under oath.  
15 VINCENT SURACE, after having been  
16 duly sworn, was examined and testified as follows:  
17 EXAMINATION BY MR. SCHEPISI:  
18 Q. Mr. Surace, can you please --  
19 MR. SCHEPISI: Danny, can you please put up  
20 that drawing that shows the site plan? No. No. No.  
21 Get me the plan that shows the rear of the building, the  
22 rear of the property. That's all. Thank you.  
23 Q. Mr. Surace, I show you a document that has  
24 been marked --  
25 MR. SCHEPISI: What is that drawing number?

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1 MS. CARDONE: I don't know what is the  
2 number.  
3 Q. It's part of package this was the drawing.  
4 It's the site plan prepared by Bohler Engineers showing  
5 the existing conditions on the property.  
6 MR. SCHEPISI: Am I correct?  
7 MR. BOHLER: Yes.  
8 Q. Mr. Surace, can you go up to that drawing and  
9 point out to the board where your home is?  
10 THE WITNESS: (Indicating.)  
11 Q. The rear of the property?  
12 A. I'm sorry. It's right here.  
13 Q. When you say "right here," so the second  
14 property in --  
15 A. Lot 130, Block 19.  
16 Q. And that's your property?  
17 A. Yes.  
18 Q. And immediately adjacent to you to the south  
19 are the Donopolises (phonetic); is that correct?  
20 A. No, to the north. Donopolis is 18 and 17.  
21 Q. To the north. I'm sorry. And the  
22 Donopolises and you had certain concerns for this  
23 project and you met with the engineer for the project  
24 and you met with me?  
25 A. Yes.

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1 Q. And what were your concerns; do you remember?  
2 A. My concerns were a few things. One was the  
3 parking because my fence went down about three times.  
4 Q. And the fence would go down because the cars  
5 would come up and --  
6 A. I might even have pictures of it. They bump  
7 right in.  
8 Q. And that was one of your concerns?  
9 A. That's one.  
10 Q. Let me stay with that one first. Now, in  
11 relation to that concern, the car -- I went back there  
12 again this evening just to make sure my memory wasn't  
13 failing -- the macadam didn't go all the way up to the  
14 fence; is that correct?  
15 A. No, it has 4, 4 and a half feet.  
16 Q. But there was stone, there was crushed stone  
17 and gravel?  
18 A. Crushed stone and weeds, a lot of weeds.  
19 Q. And how many years have you been living  
20 there, sir?  
21 A. Ten years.  
22 Q. When you bought your house, was it a new  
23 build?  
24 A. I bought property and I built on it, yes.  
25 Q. And when you built on it, this condition was

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1 there then and it has continued ever since; is that  
2 correct?  
3 MR. KATES: What condition?  
4 Q. The condition of the cars hitting it.  
5 A. At that time, the condition was a little  
6 better because Toyota was there. At least they were  
7 there, and they were taking care of it.  
8 Q. But they were driving and parking up to the  
9 fence?  
10 A. Yes. They were doing that, yes.  
11 Q. And in relation to the issues that you and  
12 your neighbors were having, you were complaining about  
13 drainage issues; is that correct?  
14 A. Yes.  
15 Q. And did you request that the plans be changed  
16 in order to put a curb running the entire length of 100  
17 Sylvan to the end of 120 Sylvan so that the water would  
18 be stopped before it sheet flowed into your property?  
19 A. Yes.  
20 Q. Did the FCA agree to take care of that?  
21 A. Yes.  
22 Q. And did FCA agree to take the dumpsters that  
23 were on your property line and move them in towards the  
24 building so that they wouldn't be on your property line?  
25 A. They also promise me they would put another

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1 drain.  
2 Q. And we changed the plan to show that second  
3 drain?  
4 A. Right. And the curb would serve as two  
5 things; one for the cars parking and also for the water  
6 in case the drain gets clogged up and water run on our  
7 properties, all three properties.  
8 Q. And did FCA also agree to address your  
9 concerns and your neighbors' concerns and reimburse for  
10 the cost of planting 8 to 10 foot Leyland Cyprus trees  
11 in your buffer area on your property?  
12 A. Yes.  
13 Q. And your deed to your property provides --  
14 this all came out of one big subdivision -- the dead  
15 provides that the buffer to the residential zone is in  
16 the residential area because the lots are so deep there;  
17 is that correct?  
18 A. Yes.  
19 Q. So you have it, you use it, you occupy it?  
20 A. Yes.  
21 Q. And FCA would give you the money to put in  
22 the plantings that you specified on the plans; is that  
23 correct?  
24 A. Yes.  
25 Q. And you would maintain it?

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1 A. Yes.

2 Q. And you and your neighbors are both happy  
3 with that?

4 A. Yes. As a matter of fact, I'm sorry they are  
5 not here. Because it was the man's birthday and they  
6 all went out to eat.

7 Q. Have we addressed every concern you had?

8 A. Yes. You addressed the lights. They  
9 promised me they were going to put lights facing towards  
10 the building not to our homes. Because usually a lot of  
11 things, they have the lights just glaring over there.  
12 They have them on all night sometimes.

13 Q. And wasn't there also a concern that Parkway  
14 Toyota was washing cars with power equipment and we  
15 agreed we would not have any power washing of cars, they  
16 would all be done by hand inside?

17 A. Yes.

18 Q. Were there any other concerns that you had?

19 A. Not really. The new fence, you were going to  
20 put a new fence, the curb, the drainage, the trees.

21 MR. CHINMAN: The lights.

22 A. The lights, of course. And the garbage  
23 dumpster, that's our main concern.

24 Q. Now, are you as the taxpayer and a resident  
25 of Englewood Cliffs requesting that this board approve

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1 this application and that this existing nonconforming  
2 use continue provided that these protections are given  
3 to you and your neighbors?

4 A. Absolutely.

5 MS. SHEA: The dotted line that is on the  
6 plan beyond the property line, that is the buffer line?  
7 The buffer zone line?

8 MR. SCHEPISI: Can I explain it to you? Ms.  
9 O'Shea?

10 MS. O'SHEA: The dotted line there is the  
11 curb where you are going to put the trees.

12 THE WITNESS: This. You are talking, that's  
13 the buffer zone?

14 MR. SCHEPISI: The slashed line. That's the  
15 buffering line.

16 MS. O'SHEA: I remember when the planning  
17 board, at times, put the buffer zone on residential  
18 property which to me made no sense because you are  
19 buffering the property and you are not making a buffer  
20 at all. But do you own that part of the property?

21 THE WITNESS: Yes.

22 MS. O'SHEA: You pay taxes on that part of  
23 property?

24 THE WITNESS: Yes.

25 MS. O'SHEA: So it's your property to do

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1 whatever you wish with?

2 THE WITNESS: Yes.

3 MR. SCHEPISI: And if you recall, the  
4 property owner to the south didn't have as deep a lot.  
5 And Parkway Toyota agreed to give them, when we went  
6 into their project, gave them some additional land to  
7 try to square them off. These properties are very deep.

8 CHAIRMAN FEHER: How deep are they?

9 THE WITNESS: They are 200 feet.

10 MR. SCHEPISI: And the last 25 is a mandatory  
11 buffer. They can't build that. But we as commercial  
12 took care of the landscape and gave them the money for  
13 it.

14 THE WITNESS: Twenty feet.

15 MS. O'SHEA: Is there any buffer on the  
16 commercial side of the fence?

17 MR. SCHEPISI: No.

18 CHAIRMAN FEHER: What is called for there,  
19 it's a 50-foot buffer?

20 MR. SCHEPISI: No.

21 THE WITNESS: No, 20 feet.

22 CHAIRMAN FEHER: Twenty foot buffer on the  
23 B-2 zone?

24 MR. SCHEPISI: Up by where your dad's was.

25 MR. PORRINO: North of Hollywood Avenue, I

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1 think it is 120 and then it goes down.

2 CHAIRMAN FEHER: Why not put the 20 foot  
3 buffer on that property?

4 MR. SCHEPISI: I'm sorry?

5 CHAIRMAN FEHER: Why not put the 20 foot  
6 buffer on that property?

7 MR. SCHEPISI: But who does it benefit?

8 CHAIRMAN FEHER: The benefits, but it is, if  
9 it's full landscaping they have the right to use it.  
10 That's the logic when they laid these lots out, to give  
11 the property owner the additional 20 feet that is now  
12 their land, their land to do what they want to do with  
13 it. And have the commercial give them the money to do  
14 the landscaping. Everybody is happy with it. And if it  
15 ain't broken.

16 I would be happy if there was the extra 20 foot  
17 of buffer.

18 THE WITNESS: We waited all these years. We  
19 knew something was going to happen. All the junks come  
20 in, they hit the fence. Sometimes they come over.

21 CHAIRMAN FEHER: So you are basically saying,  
22 yes, it's going to be better than it was before?

23 THE WITNESS: Oh, 100 percent better.

24 CHAIRMAN FEHER: You are not saying you want  
25 a car dealership there.

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1 THE WITNESS: Why not?  
2 CHAIRMAN FEHER: What would you rather have,  
3 a car dealership or a nice office building?  
4 THE WITNESS: I would rather have the car  
5 dealership to tell you the truth because I have seen  
6 what they did with Cadillac. It's beautiful what they  
7 did to that. And the way I saw the rendering of this, I  
8 think it's exceptional. Well, and you know what, they  
9 go home. A lot of times, the office they stay until  
10 10:00, 11:00 at night. At least these people, they go  
11 home. To me it's better and my neighbors.  
12 BY MR. SCHEPISI:  
13 Q. And you are authorized to speak on behalf of  
14 your neighbors?  
15 A. Yes.  
16 Q. And you were the only three that are directly  
17 affect by this?  
18 A. Yes.  
19 MR. CHINMAN: Would it be nice if the lights  
20 in the parking lot went off at an earlier time?  
21 THE WITNESS: It would be nice.  
22 MR. CHINMAN: And would it be nice if they  
23 did that?  
24 THE WITNESS: Yes.  
25 MR. CHINMAN: And would it be nice if they

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1 blocked the mechanical?  
2 THE WITNESS: Well, we going to have trees  
3 over there. I got some and they going to put some more.  
4 And I get them almost 15, 16 feet high already. And  
5 they going to block whatever is not blocked already.  
6 And we are happy with it.  
7 MS. O'SHEA: I appreciate Mr. Surace speaking  
8 for his neighbors, but without his neighboring being  
9 here.  
10 MR. SCHEPISI: Unfortunately, they had  
11 scheduled a birthday party for tonight.  
12 MS. O'SHEA: But to speak on their behalf, he  
13 really can't.  
14 THE WITNESS: I am under oath that they told  
15 me that whatever I think is right that they will go  
16 along with it. I will swear to God.  
17 MS. O'SHEA: Which house are you going to put  
18 the garbage dumpster in back of?  
19 THE WITNESS: I don't know, not me. They are  
20 not going to put it next to the line, they are going to  
21 put it away.  
22 MR. SCHEPISI: We will take that has a  
23 stipulation if we ever get to the site plan.  
24 MR. KATES: You said your fence was down  
25 three times?

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1 THE WITNESS: It's still down.  
2 MR. KATES: When did it go down, you don't  
3 remember?  
4 THE WITNESS: The last time was about three,  
5 two years ago, two or three years ago. And I called the  
6 guy. They come in, they put it down again. It went  
7 down again.  
8 MR. KATES: It's an empty building. Who is  
9 doing this?  
10 THE WITNESS: No, they used to park cars,  
11 too. It was cars from Nissan, cars from Cadillac before  
12 that.  
13 MR. KATES: You heard the testimony that  
14 there were cars parked right up to your line?  
15 THE WITNESS: Yeah.  
16 MR. KATES: And that was consistent with your  
17 experience?  
18 THE WITNESS: As a matter of fact, I put a  
19 little gate on to go in and take a look at it. And  
20 there is a little gate on it.  
21 BY MR. SCHEPISI:  
22 Q. So consistently, as long you have been there,  
23 the cars have been parked up to your fence?  
24 A. Even when the dealership was on.  
25 Q. And that has not stopped until the town

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1 issued a cease and desist order?  
2 A. Even I noticed something. Even if they don't  
3 hit the fence, when the wind comes, it hits the hood of  
4 the cars and just, you know, the fence has slots in it  
5 so.  
6 MR. SCHEPISI: Nothing further for Mr.  
7 Surace. Thank you, sir.  
8 THE WITNESS: Thank you.  
9 MR. SCHEPISI: Before I put my planner on,  
10 does anyone have any questions for the witnesses that  
11 have already testified, from the board's standpoint?  
12 If there are no question then I'm going to call  
13 John McDonough.  
14 CHAIRMAN FEHER: Do you need a break?  
15 (Brief recess.)  
16 CHAIRMAN FEHER: We have another witness.  
17 What is your plan, to have all the witnesses and then  
18 we will go with a vote on whether --  
19 MR. SCHEPISI: The continuation of the  
20 nonconforming use. And hopefully you vote the right  
21 way.  
22 MR. KIM: What is the right way, to deny is  
23 what you want?  
24 MR. SCHEPISI: I won't answer that, what we  
25 want. The right way is what the law provides. Okay?

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1 CHAIRMAN FEHER: So you are going to address  
2 this evening, the abandonment issue and the enlargement  
3 issue.  
4 MR. SCHEPISI: Just the abandonment. I will  
5 call for a vote on the abandonment.  
6 CHAIRMAN FEHER: And then the enlargement  
7 issue.  
8 MR. SCHEPISI: Well, the enlargement issue,  
9 we are going to take out the interior.  
10 MR. PORRINO: If I can jump in, I think it's  
11 the board's discretion, Mr. Schepisi, if we want to vote  
12 to decide both the question of enlargement of  
13 nonconforming use and the abandonment separately,  
14 because either one triggers the D variance, and two of  
15 our members will have to step down.  
16 CHAIRMAN FEHER: I think we vote it  
17 separately tonight.  
18 MR. SCHEPISI: Tonight I want to do a vote on  
19 the abandonment issue.  
20 CHAIRMAN FEHER: And that's all.  
21 MR. SCHEPISI: As of this moment. Maybe in  
22 twenty minutes I may change my position.  
23 CHAIRMAN FEHER: If we want to have a vote on  
24 the enlargement issue.  
25 MR. SCHEPISI: You have not had any testimony

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1 on it. How can you have a vote? Until I put my site  
2 plan in through my architect and my engineer on the site  
3 plan, that is building specific, you don't have any  
4 testimony.  
5 MR. KATES: Wait a second, aren't you  
6 planning to use that 3100 square feet of space that MISA  
7 was using?  
8 MR. SCHEPISI: For office. You haven't heard  
9 any testimony on that, Michael. It's not before you  
10 yet.  
11 CHAIRMAN FEHER: That's not the only  
12 enlargement issue.  
13 MR. SCHEPISI: That's the only one I know of.  
14 If you are really just opposed to this, let's not  
15 waste everybody's time. You have prejudged this  
16 application.  
17 MR. KATES: You have your planner, we have  
18 our planner. We can bring this issue to the floor  
19 whether it can be resolved tonight or not, I'm not sure,  
20 but we have questions about the expansion piece of it.  
21 MR. SCHEPISI: Michael, I mentioned it  
22 earlier. You are mixing up tenancies with uses.  
23 MR. KATES: Let's ask the planners.  
24 CHAIRMAN FEHER: That's one thing. How  
25 about the fact that you are selling trucks now, Ram

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1 trucks?  
2 MR. SCHEPISI: But how is that an enlargement  
3 of an automobile dealership?  
4 CHAIRMAN FEHER: It's not an automobile. You  
5 are selling trucks now.  
6 MR. KATES: Mr. Chairman, with all due  
7 respect.  
8 JOHN McDONOUGH, after having  
9 been duly sworn, was examined and testified as follows:  
10 MR. KATES: Please identify yourself for the  
11 record.  
12 THE WITNESS: Yes, hello everyone. My name is  
13 John McDonough, that's spelled M-c- capital  
14 D-o-n-o-u-g-h. I am the project planner.  
15 MR. KATES: Your office address?  
16 THE WITNESS: My office address is 101  
17 Gibraltar Drive, in Parsippany, New Jersey.  
18 EXAMINATION BY MR. SCHEPISI:  
19 Q. Are you licensed professional planner in the  
20 state of New Jersey, sir?  
21 A. Yes. Still current, still valid.  
22 Q. How many years have been a licensed  
23 professional planner?  
24 A. Twenty plus.  
25 Q. Have you testified before boards of

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1 adjustment and planning boards in the state?  
2 A. For better or worse everything single night,  
3 yes.  
4 Q. And you also represent -- are you a planner  
5 for certain municipalities?  
6 A. I am. In fact, I was here a month ago in  
7 front of this same board.  
8 Q. As a professional planner, are you familiar  
9 with this application? Have you reviewed this  
10 application? Have you reviewed the zoning ordinance?  
11 Have you reviewed the master plan? Have you reviewed  
12 the revisions and the updates to the master plan?  
13 A. Thoroughly.  
14 Q. Are you prepared to testify this evening from  
15 a professional planner standpoint as to this  
16 application?  
17 A. I am.  
18 MR. SCHEPISI: I offer this professional  
19 planner who has testified before you in the past and who  
20 is a licensed professional in the state.  
21 CHAIRMAN FEHER: Acceptable.  
22 Q. Please walk the board through your knowledge  
23 of this site from your outline.  
24 A. My testimony is going to be somewhat  
25 different than what you would ordinarily hear from a

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1 planner. We are not going to talk about whether this  
2 use at this site is the good thing, is a bad thing, if  
3 it ties with the statutory positive criteria, the  
4 statutory negative criteria, the impact on the public  
5 good, the impact on your zoning plan ordinance. We are  
6 not going to talk about all the purposes of zoning.  
7 We are in a different section of the MLUL here.  
8 I know this board is used to dealing with Subsection 70  
9 of the statute. We are in Section 68, which is to  
10 validate the preexisting nonconforming status of this  
11 particular use.  
12 Use you heard a lot of fact testimony leading up  
13 to my testimony. I don't think I have to be redundant,  
14 I think I can actually be relatively succinct, and to  
15 the point, with the elements approved that would  
16 constitute abandonment, which really is the critical  
17 issue before the board this evening.  
18 Q. Please proceed.  
19 A. Just by way of background to establish my  
20 familiarity with the site. We have a piece of property  
21 here that is in the south end of town, near the border  
22 with Fort Lee. We have that frontage on Sylvan Avenue.  
23 We have a mix of surrounding land uses, both commercial,  
24 residential. We also do have a sort of concentration of  
25 like uses, as well.

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1 The conditions of the property, we talking about  
2 a single tax lot here at 100 Sylvan, at the address,  
3 Block 130, Lot 23. We have a nice regular geometry. We  
4 are looking at a property that is probably two acres in  
5 size. And, importantly, the condition of the property,  
6 as you heard through the testimony before me, as you  
7 heard from the factual testimony of the condition of the  
8 property as it exists now, was developed as a dealership  
9 going back now five, six decades, back to the early  
10 1960's.  
11 That piece of paper of property has essentially  
12 remained intact from the a formed standpoint in terms of  
13 the original development back in the 1960's. We are  
14 looking at a renovation and occupancy of that building  
15 to put in a new auto dealership under the brand of  
16 Chrysler, Jeep, and Dodge Ram.  
17 So the question before the board, the first test  
18 that the board faces this evening was actually outlined  
19 in your planner's report, I thought the planner gave the  
20 board a good overview of the criteria to consider with  
21 respect to the test that is before you now. And I agree  
22 with the factual context of that report.  
23 So, again, we are in Section 68, which gives the  
24 zoning board to grant a certificate of preexisting use  
25 to the use that is before you now. There are two

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1 elements in the statute to validate a nonconforming use  
2 status under that Subsection 68.  
3 First is the commencement of use, and I think  
4 that has been clearly vetted by the board, if we go back  
5 all the way to the very first hearing when those  
6 resolutions were entered. We see that clearly has been  
7 established. I think that your planner would agree with  
8 that in her report that she issued to the board. As we  
9 go back to the 2002 resolution, the issuance of the 2002  
10 resolution.  
11 The second elements of proof with respect to  
12 nonconforming use is that continuation of use and  
13 whether there has been a break in that use, whether  
14 there has been an abandonment under the technical  
15 definition or the element of proof as needed in our  
16 statutory.  
17 The case law, as I understand it -- again, I have  
18 been doing this for a long time. I have seen a lot of  
19 abandonment cases tried by boards of adjustment -- is  
20 clear. For an nonconforming use to expire there must be  
21 a clear intent to abandon it. There are cases, which  
22 have been entered as part of our legal analysis here  
23 whereby a use has been dormant for upwards of 27 years  
24 and has been found to be a legally sustained  
25 nonconforming use. And that's that Saddle Brook case.

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1 Q. Saddle River.  
2 A. Saddle River, I'm sorry.  
3 Leasing attempts, none of these are elements,  
4 which could constitute abandonment. Indicators of  
5 abandonment would be things such as destruction of use  
6 or replacement of use, is clearly an aspect of  
7 abandonment and that has not happened here. We have  
8 unrefuted and relentless testimony from our applicant  
9 that he has not intended to abandon the use at this  
10 particular location. And that was, of course, after  
11 being subjected to significant cross-examination by the  
12 board and by the public.  
13 So we have a factual basis for the continuation  
14 of the use here. And just going back to the testimony  
15 of the owner and my notes in terms of fact pattern that  
16 was established. Lot 23 was developed as a Renault  
17 dealership back in the 1960s. The board resolution  
18 certifies this status and that this owner took over this  
19 piece of property in 2004. The physical condition of  
20 the property, the form of the property did not change  
21 when the applicant took over this site.  
22 The applicant, through its testimony kept renting  
23 the site to Toyota, then to Nissan, then to Volkswagen  
24 and then they continued to rent it out to an auto  
25 dealership use, as well. Car buyers have always been

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1 permitted to view cars on this particular piece of  
2 property. That break has never occurred here. So now  
3 you see a continuity of use.  
4 Additional basis for the continuation of use goes  
5 back to my review of the physical condition of the  
6 property. Looking back at aerial photographs, I looked  
7 at 16 aerial photographs dating back to 1931, it  
8 revealed the history of this property. Of course, back  
9 in 1931 and through the '40s and '50s, the site and the  
10 area was largely undeveloped. It was essentially a  
11 wooded area.  
12 In the 1960s there is still no development in the  
13 early 1960's, but we see the clearing of trees and  
14 something changing in the area. The development is  
15 starting to come in.  
16 By the 1970s the development is in its current  
17 form. As you see in the survey before you a site that  
18 is dominated by buildings. It is consistent with the  
19 context that we saw in the 1970's. We see in those  
20 photographs stacked vehicles, which is also consistent  
21 with what we would see with this type of land use, the  
22 parking of vehicles for display and inventory storage.  
23 The photos as recent as 2013 reveal no physical  
24 change. And as I have gone on the property several  
25 times now during the course of this hearing. There are

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1 still signs that say service, that say parts, that say  
2 early bird drop off. And actually you can see the  
3 letters Parkway Toyota still remnant on the property  
4 there on the building on the side.  
5 So in terms of my understanding of the law and my  
6 experience of the law, the indicators of abandonment are  
7 essentially threefold. And they are not here. Number  
8 one, some indicator of letting go of the responsibility  
9 for a piece of property, foreclosure or something to  
10 that extent. Clearly, Mr. Berardo has paid every single  
11 loan payment on this property, has made every single tax  
12 bill, as well. So that element is not here, as well.  
13 Secondly, some form of destruction, either  
14 manmade or natural, taking down a building certainly an  
15 aspect of abandonment. I personally have been involved  
16 with gas stations where the tanks have been pulled, the  
17 pumps have been pulled, canopies have been pulled. And  
18 we argued that that was not abandonment because the  
19 intent was not there. And elements of the building and  
20 elements of the structure still stayed intact. The  
21 board found in favor of that interpretation of non  
22 abandonment. We had objectors after that. We went to  
23 court. And the court found in favor of our  
24 interpretation. So I have experienced legal validation  
25 of that type of an argument.

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1 And, of course, replacement of use. I know that  
2 is taken into consideration. I know that MSI tenant  
3 that was talked about at length by the board. That was  
4 generally a small portion of the building. I think we  
5 are talking about 3000 square feet or so in an over  
6 50,000 square feet building.  
7 And, importantly, we turn to the case law for  
8 guidance in that regard. And I refer the board and the  
9 record to a very similar case to establish what we have  
10 here, which is the S&S Auto Sales Case versus the Zoning  
11 Board of Adjustment for the Borough of Stratford. That  
12 was a reverse of an abandonment determination that was  
13 made on a particular piece of property that had vehicles  
14 for display for auto sales. And when the owner ran into  
15 problems finding good employees to manage that site, to  
16 operate that site, the owner moved the cars to another  
17 piece of property and the use went inactive for a  
18 certain period of time.  
19 The courts -- the board denied that  
20 interpretation and established that that did constitute  
21 abandonment. It went up a level in court on appeal.  
22 And the court on the law division affirmed the board's  
23 decision. And then it went up to the next level, to the  
24 appeals level, the appellate level, and there was a  
25 reversal of that abandonment and determination.

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1 And one of the things that the court found in  
2 that decision was what they called a transitory land  
3 use. And the exact words here are: Notwithstanding the  
4 owners declaration to the contrary, the use of premises  
5 for purposes other than nonconforming use, unless it be  
6 shown that such uses were only intended to be transitory  
7 or point towards abandonment of the use by owner.  
8 All I know is that that MSI is not there now. It  
9 was there for an small period of time. And in my  
10 opinion that would constitute a transitory type of land  
11 use. Whether it had a accessory component or link to  
12 the property, the primary use, if the board made a  
13 determination that it was a separate and distinct use,  
14 still its nature was transitory. Certainly not  
15 occupying a large portion of the building and a very  
16 small component of the overall physical space.  
17 Elements or indicators that would not constitute  
18 abandonment for the board's consideration in my opinion  
19 would be the following: Turning off the power is not  
20 relevant in terms of abandonment, and that same case,  
21 that auto sales case that I talking about made a similar  
22 comment in that regard.  
23 Pursuit of other uses does not constitute  
24 abandonment. If the owner found another tenant, knocked  
25 down the building, and turned this into a retail

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1 development or an office, I think we would be here under  
2 totally different circumstances. But pursuit of an  
3 alternate use does not constitute abandonment. Nonuse  
4 does not constitute abandonment. Suspension of use does  
5 not constitute abandonment. Again, we go back to that  
6 case where upwards of 27 years, the Saddle River case,  
7 it was not in use and the court found that they did not  
8 have an abandonment.

9 So I am not the lawyer in the room. There are a  
10 lot of lawyers in this room, but as a planner we operate  
11 within the legal framework. We look towards the law for  
12 guidance and how we should regulate land use. And I  
13 would conclude from a planning standpoint, based on the  
14 facts that are before us, there is a Latin phrase I hear  
15 lawyers use a lot, I don't know the exact Latin phrase  
16 but the translation is: It is what it is, the thing is  
17 what it is.

18 This thing was built the 1960 to be a auto  
19 dealership. Its form has not changed. It has not  
20 substantially been used for anything but a dealership.  
21 It's sitting there ready to accommodate a dealership.  
22 Not particularly conducive as you heard through the  
23 architect to accommodate or to adaptively be used as an  
24 office type, which is permitted in the zone.  
25 So from that regard, I would conclude from that

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1 planning standpoint that the test of abandonment has not  
2 been met here or hasn't been actually passed by the  
3 applicant. That this is a continual use and the finding  
4 of the board back in 2002 will carry forth to today in  
5 2016.

6 MR. SCHEPISI: Questions of this witness?  
7 MR. VILLARI: I have a question.  
8 Mr. McDonough, that was very persuasive testimony  
9 that you just gave and I thank you very much for giving  
10 us the benefit of your experience. One question: With  
11 the fact that the prior owner of this property leased  
12 the property or part of the property to MSI, Information  
13 Systems, for about fifteen years from sometime in the  
14 late 1980's to at least 2004, which was a conforming  
15 use, because it was office space, wouldn't that be  
16 evidence of an attempt to abandon the nonconforming use?  
17 That wouldn't be transitory, it was 15 years.  
18 MR. SCHEPISI: Just to keep the facts  
19 correct, and they continued with the car dealership on  
20 the property also. It's not a situation where they just  
21 leased it to office and didn't have a car dealership.  
22 THE WITNESS: And my testimony is consistent  
23 with that statement, that the dominant use here was the  
24 auto dealership and that was a companion use. It was  
25 something that was never intended to totally overtake

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1 the use.  
2 MR. VILLARI: I grant your point. It was not  
3 the predominant use, it was an auto dealership. But  
4 part of this property was leased to an independent  
5 company, not for a transitory period, but for a period  
6 of at least 15 years from the late 1980s until 2004, if  
7 I understand your statement. So that is not transitory,  
8 that is a long period of time.  
9 THE WITNESS: There was a nexus with that  
10 land use, we had testimony in that regard, whether it  
11 was accessory or part of that use, I would certainly say  
12 it was complimentary. In that regard, it's a certainly  
13 not a distinct use.  
14 MR. VILLARI: We really don't have any  
15 testimony as to what the nature of that business was.  
16 We confirmed it was an adjunct to the auto dealership.  
17 We know it's an information system company. We don't  
18 have anything in the record that I am aware of. Unless  
19 I am missing something.  
20 MR. SCHEPISI: The only thing that you have  
21 as Ms. Price mentioned earlier, the 2002 approval of the  
22 building to the south that was overturned by the board  
23 itself never mentioned that and never put a restriction  
24 that that property can only be used for that office use,  
25 that it was a partial abandonment.

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1 MR. VILLARI: I understand your point.  
2 MR. SCHEPISI: And also the fact that going  
3 back historically every twenty years the same type of  
4 argument has come up. And during that entire period,  
5 this building has been used for multiple purposes,  
6 automotive related and permitted. So the fact that you  
7 have office use in an auto dealership, that's a  
8 permitted use, but it's still an existing nonconforming  
9 use. We cannot be told that we cannot continue a small  
10 portion as office.  
11 MR. VILLARI: I understand your point.  
12 MR. SCHEPISI: Because it's an existing  
13 nonconforming dealership with office. And that's what  
14 we are going to have there in the future.  
15 MR. PORRINO: Mr. Chairman, if I may?  
16 CHAIRMAN FEHER: Go ahead.  
17 MR. PORRINO: Mr. McDoogle --  
18 Mr. Kates: McDonough.  
19 MR. PORINNO: I'm sorry, McDonough. Would  
20 you agree that if MSI occupied that space for in excess  
21 of ten years, it's no longer transitory; is that fair?  
22 THE WITNESS: I don't know if there was a  
23 durational aspect associated with that. Especially  
24 given the small scale.  
25 MR. PORINNO: Do you know how large of a

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1 space outside of testimony here tonight that MSI  
2 occupied in that building at any time?  
3 THE WITNESS: I don't.  
4 MR. PORINNO: Maybe I should enlighten the  
5 board and the members of the public here and the  
6 applicant. I got -- thank you, Cathy -- our secretary  
7 went back at our request and dug into the records of the  
8 building department and the fire department of the  
9 Borough of Englewood Cliffs, dating back to the year  
10 predating 2004. And part of that documentation Mr.  
11 Schepisi, I think, was also copied.  
12 MS. SCANCARELLA: Yes, he has it.  
13 MR. PORINNO: There were plans in that file  
14 that indicate quite clearly that MSI occupied for a  
15 quite a number of years the entire second floor of that  
16 building.  
17 MR. SCHEPISI: Mr. Porinno, where are you  
18 getting this from? That was not in the plan.  
19 MR. PORINNO: If I may, and I have a point of  
20 clarification. This is for our chairman and our  
21 attorney: All of the information that was supplied to  
22 us on the website that was in response to our request,  
23 is that automatically part of the record?  
24 MR. KATES: Well, Mr. Schepisi may have not  
25 seen what you are about to use.

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1 MR. SCHEPISI: I have to see it.  
2 MR. PORINNO: And my question is this, and  
3 it's a broader question: If what have we automatically,  
4 whatever we have on our computers, on the website, are  
5 not part of the official record, I'm going to ask here  
6 and now that they be made part of the record, so if  
7 there ever is an appeal down the road.  
8 MR. KATES: We normally mark it as a board  
9 exhibit.  
10 MR. SCHEPISI: The problem I have, and I  
11 don't know what Cathy posted on your website because I  
12 am not privy to that website.  
13 MS. SCANCARELLA: I posted and I sent  
14 everything to you.  
15 MR. SCHEPISI: I do not know what was posted.  
16 MR. KATES: It's not general public  
17 information, we have to mark it now. But we always  
18 share it with the attorneys for the applicant.  
19 MR. SCHEPISI: How do I know a clerical error  
20 didn't take place?  
21 MR. KATES: We know. Okay. I am showing you  
22 now.  
23 MS. PRICE: Can I just ask a procedural  
24 question? If there was a posting that members of the  
25 public are not privy to or not entitled to see, will

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1 there be a profer in terms of every single document  
2 before any action is taken because we have no way of  
3 understanding what --  
4 MR. KATES: We are submitting it tonight.  
5 MS. PRICE: No. I mean a profer as to the  
6 documents.  
7 MR. KATES: That's what we are going to be  
8 doing.  
9 MS. PRICE: Everything. And then we will get  
10 a list of those documents.  
11 MR. KATES: It will be a part of our record.  
12 MS. PRICE: No. No. No. I mean, a list  
13 that everybody in the room or any interested party is  
14 going to understand what documents the board had that  
15 everybody else didn't have before tonight coming to this  
16 public hearing.  
17 CHAIRMAN FEHER: Is there any reason we can't  
18 give access to the FTP system?  
19 MS. SCANCARELLA: No, we can't.  
20 CHAIRMAN FEHER: There may be something in  
21 there.  
22 MS. PRICE: I mean, it really puts people at  
23 a huge disadvantage.  
24 CHAIRMAN FEHER: If there is something in  
25 there, it should be public.

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1 MR. KATES: Well, the point is well taken  
2 that there shouldn't be any surprises either. So that  
3 if we have the resource to something.  
4 MR. SCHEPISI: It should be available to the  
5 public, not just the applicant, the public.  
6 MR. KATES: The public responding will hear  
7 it tonight, and have an opportunity to understand it and  
8 if they need more time to digest it, we will deal with  
9 that issue separately. But right now...  
10 MR. SCHEPISI: I have seen this before.  
11 MR. KATES: Thank you.  
12 MRS. PRICE: Is there a list of documents?  
13 MS. SCANCARELLA: No, there is not a list.  
14 There is just one document.  
15 MS. PRICE: So we are going to go through all  
16 that and identify it?  
17 MR. KATES: Yes. Let's start with this  
18 document and mark it, please. BD-1 for Board Exhibit-1.  
19 MR. SCHEPISI: You had another board exhibit.  
20 MS. SCANCARELLA: It was a certificate of  
21 occupancy for the Toyota dealership.  
22 MS. CARDONE: BD-2 was the Renault  
23 Resolution.  
24 MR. KATES: Don't think that was in the  
25 transcript.

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1 MS. SCANCARELLA: Yeah, I have it.  
2 MR. KATES: BD-2 was the Renault USA  
3 resolution dated October 13, 2001 which would make this  
4 D-3.  
5 (Board's Exhibit 3 marked for  
6 identification.)  
7 (Board's Exhibit 4 marked for  
8 identification.)  
9 MR. SCHEPISI: Let's decide.  
10 MS. SCANCARELLA: We are going to make the  
11 Tristate Fire Sprinkler drawing dated 9/13/1989. It's  
12 only one page. That one.  
13 MR. KATES: And that is what it is called?  
14 MS. SCANCARELLA: Tristate Fire Sprinkler,  
15 Inc., Marketing Information Systems. 100 Sylvan Avenue,  
16 First floor corridor. So this is BD-3.  
17 MR. SCHEPISI: What is the date on it?  
18 MS. SCANCARELLA: 9/13/1989. And BD-4 will  
19 be two sheets dated April 5, 2000; proposed second floor  
20 alterations, Parkway Toyota 100 Sylvan Avenue. There is  
21 no company name on it. That's what it says. I'm sorry,  
22 Richard and Sons, Inc., General Contracting.  
23 MR. SCHEPISI: And the purpose of those  
24 drawings are?  
25 MR. PORINNO: Your planner has testified that

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1 the marketing systems' tenancy was transient in nature.  
2 And we have information in front of us that I believe  
3 suggests otherwise. I would just like to walk the board  
4 and members of the public through it, as to what I think  
5 it speaks to, or what it depicts. Starting with the  
6 Tristate Fire Sprinkler, which is marked BD-3, dated  
7 May 2. This depicts a renovation to the entrance  
8 corridor that served Marketing Information Systems. And I  
9 say that because the job is marked "Marketing  
10 Information Systems, 100 Sylvan Avenue, First Floor  
11 Corridors." And it shows that they were moving some  
12 walls around and some sprinkler heads.  
13 MR. SCHEPISI: Excuse me. The only thing  
14 that I am seeing is that they are moving some  
15 sprinklers.  
16 MR. PORINNO: New partitions.  
17 MR. SCHEPISI: Where is that?  
18 MR. PORINNO: Two-thirds of the way down, it  
19 says it twice, left and right.  
20 MR. SCHEPISI: But they are not moving any.  
21 It says new partitions. You stated that they are moving  
22 partitions, which is different than a new partition.  
23 MR. KATES: They were installing partitions.  
24 Are you finished, Mr. Schepisi?  
25 MR. SCHEPISI: Yeah, I am.

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1 MR. PORINNO: Do you have any other comments  
2 that are important here?  
3 MR. SCHEPISI: I don't know where you are  
4 going with this.  
5 MR. PORINNO: If you'd let me finish.  
6 MR. SCHEPISI: Unfortunately, you are not a  
7 witness testifying. You are a board member asking  
8 questions.  
9 MR. PORINNO: I can be, if the chair wishes  
10 for me to be sworn in as a witness.  
11 CHAIRMAN FEHER: It's not necessary, but just  
12 get to the end here.  
13 MR. PORINNO: This is information that was  
14 provided to us as a board. I will speak to exactly what  
15 it says, and everyone can interpret it the way they  
16 wish. Is that fair?  
17 MR. SCHEPISI: That's fine.  
18 MR. PORINNO: So there is a plan drawn by  
19 Tristate Sprinklers dated 9/13 of 1989, with the name  
20 Marketing Information Systems on it.  
21 MR. SCHEPISI: Okay.  
22 MR. PORINNO: I will leave it to maybe our  
23 planner to interpret if what I am showing indicates a  
24 tenancy by Marketing Information Systems for an extended  
25 period of time versus a transitory tenancy. That's the

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1 point I am going to make. Okay? And I will let the  
2 planner look at this, our planner, and she can testify  
3 if you wish as to if these different plans indicates  
4 something that refutes your expert's testimony. Okay?  
5 MR. SCHEPISI: Just so the record is clear --  
6 MR. PORINNO: There is one plan in 1989 from  
7 Tristate, but for the job is called Marketing  
8 Information Systems going to BD-4.  
9 MR. SCHEPISI: Excuse me. Excuse me. If you  
10 are going to state that for the record will you show  
11 first floor corridors, nothing about the second floor,  
12 which is the area that you have been saying Marketing  
13 Systems had their offices.  
14 MR. PORINNO: Mr. Schepisi, read the whole  
15 thing then. Mr. Chairman, I think I have to right --  
16 MR. SCHEPISI: It --  
17 MR. KATES: Let him present it the way he  
18 wants to present it.  
19 MR. SCHEPISI: Why should it be put in wrong  
20 to start with? It's a mischaracterization.  
21 MR. KATES: Let him put it in. Let him put  
22 it on the record.  
23 MR. SCHEPISI: That's what I am trying to do.  
24 MR. KATES: Don't interrupt him.  
25 MR. PORINNO: You are interrupting me, I'm

1 sorry.

2 Moving forward to BD-4, which is a plan drafted  
3 by it appears to be a contractor RP Richards & Sons,  
4 Inc., General Contractor. The date of the plan is  
5 April the 5th of the year 2000, which is eleven years  
6 later than the plan marked BD-3.

7 And on BD-4, it shows a floor plan, a floor plan  
8 of what appears to be the second floor. And on the  
9 right side of that plan is an area composed of about 20  
10 or 22 different offices. And the name across them is  
11 Marketing Information Systems, Inc., area.

12 Then there is a section of the space that appears  
13 to be separated. And then there is construction phases  
14 detailing that -- I can go into when I am finished --  
15 but the point is that Toyota, based on these plans,  
16 Toyota appears to be taking over part of the space that  
17 Marketing Systems once held.

18 So I will leave it to the planner to analyze this  
19 and see if she agrees or thinks that the space was  
20 carved up, all of it was Marketing Systems and then at  
21 some point Toyota took over part of it.

22 There is some note that I will mention now, such  
23 as under construction phase. Permanent wall to separate  
24 the MSI space to be constructed after 5 p.m. Second,  
25 the demolition and construction of MSI computer room to

1 be coordinated. Third, demolition and construction of  
2 Parkway Toyota to be started once separation of the  
3 areas are completed.

4 I'm going on now to the second page.

5 MR. SCHEPISI: Can we stay with the first  
6 page while it's fresh in everyone's mind? It says, the  
7 second floor, first page of the second floor. In order  
8 to understand what Mr. Porinno is saying, I believe  
9 these are the second floor. The plan that is shown, the  
10 dotted hashed line shows the area of the work. The area  
11 that says Marketing Systems Inc., is just reflecting  
12 where this contractor put that notation. This other  
13 work is Parkway Toyota space. This is the area that is  
14 being worked on by Marketing Systems coming up from  
15 their stairwell to Marketing Systems to the hatched  
16 space, not the other area. The other area remains  
17 Parkway Toyota space. And his interpretation is totally  
18 wrong. Totally wrong.

19 MR. PORINNO: If I go to Page 2, I think you  
20 will retract your last statement. Please go to Page 2  
21 of BD-4. This is drawing 2 of 2, dated April 5,  
22 of 2000.

23 MR. SCHEPISI: All right.

24 MR. PORINNO: There are two separate plans  
25 within this one page.

1 MR. SCHEPISI: Correct.

2 MS. BANYRA: One shows an electrical detail.  
3 And the other one shows, let's call them the finishes of  
4 the various same space. It's same space, two different  
5 plans, one for electrical purposes, one for finishes of  
6 the office space. If you look at the electrical note  
7 that is on the left-hand side of the page, it reads:  
8 Re-switch lighting controls, as needed, to segregate the  
9 Toyota space areas and separate MSI area. Verify in  
10 field.

11 MR. SCHEPISI: Correct. And that's exactly  
12 what I am saying. The MSI area is a small area, they  
13 subdivided that out from the Toyota space. That's the  
14 MSI area. And they took the Toyota conference room and  
15 they were converting that into MSI space. You are  
16 wrong, Mr. Porinno. And you are misleading this board.

17 MR. PORINNO: I am entitled to make my point.  
18 Everyone can disagree including you, that's fine. But  
19 if you look at the plan, and read the designations in  
20 every room, you can go through every one of these, if  
21 you wish, it's very clear as to who was doing what. And  
22 I am putting it into the record.

23 CHAIRMAN FEHER: It's in the record.

24 MR. PORINNO: It depicts in my mind the fact  
25 that Marketing Information Systems was in this space for

1 at least a period of eleven years. That's the point I  
2 am trying to make.

3 MR. SCHEPISI: So that's -- excuse me.  
4 Mr. Porinno, that's your only point?

5 CHAIRMAN FEHER: Do we have this in PDF?

6 MR. SCHEPISI: So the only point that  
7 Mr. Porinno is attempting to make is that Marketing  
8 Systems was in part of this building for eleven years;  
9 is that the only point?

10 MR. PORINNO: And they rented or I'm assuming  
11 they leased. I can't tell you how many square feet it  
12 is, it's at least 22 offices, maybe it's more.

13 MR. SCHEPISI: There are not 22 rooms that  
14 are relating to this. The only area is in the dotted  
15 area and it's approximately six rooms. And it coincides  
16 with the 37 square feet they had and they took at one  
17 point. That's the space. What you are doing is you are  
18 creating something that is not there.

19 MR. CHINMAN: So it's really not clear if MSI  
20 is just that dotted area. You think it is and he thinks  
21 it's not. I am trying to clarify it.

22 MR. PORINNO: What I believe is that  
23 Marketing Systems had the whole space at one point. And  
24 then in the year 2000 an arrangement was made where they  
25 needed more space. And they expanded into that second

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1 floor MSI gave up some space and Toyota took it over.  
2 That is my interpretation of what happened.  
3 MR. HIPOLIT: If you want, I can weigh in on  
4 it. I looked at it. I just looked at it.  
5 So the plan, I guess, what you marked Drawing 1  
6 of 2. In 2000 Marketing Systems at some point, it  
7 appears they had to whole floor and then Toyota spieled  
8 off this dotted area, at least part of it. Because it  
9 says Marketing system has a computer room inside there.  
10 I don't know if they were going to keep it or not.  
11 MR. SCHEPISI: Can I ask, Mr. Hipolit, upon  
12 what are you basing that conclusion? It's pure  
13 speculation. How do you know what space Marketing  
14 Systems had?  
15 MR. HIPOLIT: It says it right on it.  
16 MR. SCHEPISI: Show me. Does it have the  
17 right space or the left space?  
18 MR. HIPOLIT: They had all of it.  
19 MR. SCHEPISI: Oh, they did.  
20 MR. HIPOLIT: That's what is says.  
21 MR. SCHEPISI: The contractor's drawing just  
22 has the notation, Marketing Systems. Show where it says  
23 on that drawing --  
24 MR. HIPOLIT: On the top left side it says  
25 lobby, entrance.

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1 MR. SCHEPISI: That's the first floor.  
2 MR. HIPOLIT: That takes you into it.  
3 MR. SCHEPISI: No, it doesn't.  
4 MR. HIPOLIT: I am telling you what I see.  
5 CHAIRMAN FEHER: Is this a working drawing?  
6 MR. PORINNO: There was a permit issued.  
7 MR. HIPOLIT: It's a demolition construction  
8 scanned to scale.  
9 MR. CHINMAN: Usually it says how many square  
10 feet on the permit, though.  
11 MR. KIM: This work was carried out.  
12 MS. SCANCARELLA: Where is the permit?  
13 MR. HIPOLIT: The plan even says the title  
14 is: Proposed Second Floor Alterations.  
15 MR. CHINMAN: But you don't know whether it's  
16 just the dotted area.  
17 MR. HIPOLIT: If you had a plan like this and  
18 you had someone who owned the space, you would mark the  
19 overall space with the owner and then separate it out.  
20 This is pretty consistent.  
21 MR. SCHEPISI: With what you are saying now  
22 Marketing Systems had that entire area.  
23 MR. HIPOLIT: And they peeled off a piece for  
24 Parkway Toyota at some point in 2000.  
25 MR. SCHEPISI: When Parkway Toyota was in the

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1 process of buying the piece next door and moving over  
2 and finishing their application in 2002. Andy, you are  
3 wrong.  
4 CHAIRMAN FEHER: We have differences of  
5 opinion. Can we move on?  
6 MS. PRICE: I have a couple of question, if I  
7 may. I would like to know whether there were  
8 architectural drawings that went with these contractor  
9 drawings, that are part of that record?  
10 MS. SCANCARELLA: I'm sorry, what?  
11 MS. PRICE: Are there architectural drawings  
12 with the contractor drawings that Mr. Porinno reviewed  
13 as part of the record that confirm that they were  
14 prepared by a licensed professional?  
15 MS. SCANCARELLA: That's all I have.  
16 MS. PRICE: So there are no architectural  
17 drawings on file.  
18 MS. SCANCARELLA: No, not by a licensed  
19 architect. That was by a contractor. Are there any  
20 other architectural drawings? I don't remember, it was  
21 so many months ago when I did the research.  
22 MS. PRICE: Mr. Porinno, did you review any  
23 architectural drawings by a licensed architect?  
24 MR. PORINNO: I reviewed whatever files were  
25 provided by our secretary.

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1 MR. SCHEPISI: The answer is no.  
2 MR. PORINNO: Mr. Schepisi, please.  
3 MS. PRICE: I'm specifically asking: Did you  
4 review any architectural drawings that went hand and  
5 hand with either the '89 drawing or the 2000 drawing?  
6 MR. PORINNO: The answer is no.  
7 MS. PRICE: Did you personally speak with  
8 anyone from Tristate or Frank and Sons or...  
9 MR. SCHEPISI: RP Richards & Sons.  
10 MR. PORINNO: I have no knowledge outside the  
11 documents provided by the secretary.  
12 MS. PRICE: So your conclusions that you are  
13 making tonight and your proffer is based purely upon  
14 your interruption of these two drawings that were not  
15 done by architects?  
16 MR. PORINNO: I will then ask to be entered  
17 another exhibit, if we need to keep --  
18 MS. PRICE: I am asking --  
19 MR. PORINNO: I am sorry, but you asked me a  
20 question. There is a building permanent that was  
21 issued.  
22 MS. PRICE: And do you know if that work was  
23 completed on the building permit?  
24 MR. KATES: Why don't we pass it around  
25 first?

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1 MS. PRICE: Do you have knowledge as to  
2 whether that work was completed? I'm just asking about  
3 your personal knowledge because you are making a profer.  
4 MR. PORINNO: My personal knowledge is that  
5 it appears the permit was issued, the inspector signed  
6 off on inspections for the work. And that's the only  
7 personal knowledge that I have is that inspections were  
8 made. I don't know if a CO was issued or not. And  
9 that's as far as I can tell from the documents.  
10 MS. PRICE: So you are relying just on that  
11 document. You have no personal knowledge as to whether  
12 it was, in fact, done or not?  
13 MR. PORINNO: That is correct.  
14 MS. PRICE: And the second plan that you  
15 offered was dated 2000. What year did the zoning board  
16 approve the continuation of the nonconforming use and  
17 making that specific finding?  
18 MR. PORINNO: I don't agree with your  
19 wording.  
20 MS. PRICE: The document is in the record.  
21 MR. PORINNO: You are talking about now when  
22 the ownership was approved at 50 Sylvan Avenue?  
23 MR. KATES: It goes from 2000.  
24 MS. PRICE: So 2002 postdated the year 2000,  
25 which was the drawing that you are asking a profer to be

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1 made on this basis, correct?  
2 MR. PORINNO: So what is the question,  
3 please?  
4 MS. PRICE: So 2002, when the board made a  
5 finding, postdates the 2000 plan that you are referring  
6 to?  
7 MR. PORINNO: I personally disagree with the  
8 profer that the 2002 resolutions, those resolutions were  
9 dealing with 50 Sylvan Avenue. They did address the 100  
10 Sylvan Avenue in that the use was not to be continued on  
11 100 Sylvan. And then they changed the wording,  
12 obviously, so that only the applicant, which is Parkway  
13 Toyota, would not continue the use on 50 Sylvan. But I  
14 don't feel, sitting here, having read those resolutions  
15 and having been on that zoning board at that time,  
16 sitting on the zoning board, I do not feel that the  
17 board was concerned about Marketing Systems. They may  
18 not have had any awareness that they even existed.  
19 MS. PRICE: And you are making that judgement  
20 on the basis that you served on the board at a different  
21 time?  
22 MR. PORINNO: I'm making the judgment on not  
23 only having served on this board, but on another board  
24 and having heard applications before and seen  
25 resolutions drafted.

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1 MS. PRICE: But are you making that judgment  
2 based upon any written documents that this board or any  
3 member of the public would have before them to make that  
4 conclusion?  
5 MR. PORINNO: I'm making that --  
6 MS. PRICE: That's just a yes-or-no.  
7 MR. PORINNO: I think I am entitled to answer  
8 that. I am not being cross-examined here.  
9 MS. PRICE: No. No. No. I'm just asking if  
10 you relied on anything.  
11 MR. PORINNO: I am trying to find the right  
12 words. I relied on the resolutions that I read and I  
13 think these resolutions spoke very clearly as to what  
14 that board's intent was. That's what we have to go  
15 with.  
16 MS. PRICE: That's fair and we can make that  
17 legal argument. And my questions was: Did that  
18 resolution postdate the 2000 drawing? So it does  
19 because that's the action of the zoning board in 2002.  
20 MR. PORINNO: That's fair. So can we mark.  
21 MS. SCANCARELLA: We need to mark this.  
22 MR. KATES: BD-5, building permanent.  
23 (Board's Exhibit 5 marked for  
24 identification.)  
25 MR. KATES: What's the date of that permit,

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1 please?  
2 MR. PORINNO: Let's mark it. So this would  
3 be the building permit.  
4 MS. SCANCARELLA: Hold on a second.  
5 Mr. Schepisi doesn't have a copy of that one. I have to  
6 take my copies out.  
7 CHAIRMAN FEHER: Any questions?  
8 MR. SCHEPISI: I don't know what you are  
9 doing.  
10 MR. PORINNO: She is about to mark two more  
11 exhibits.  
12 MR. SCHEPISI: Why don't we mark the exhibits  
13 that we have, give them an exhibit number before we take  
14 out two more.  
15 MR. KATES: BD-5 is the building permit in  
16 your hand. And what is the date on it?  
17 MR. SCHEPISI: 5/4/2000.  
18 MS. SCANCARELLA: And it's Permit No. 00 --  
19 MR. SCHEPISI: 119.  
20 MS. SCANCARELLA: -- dash 119. BD-5.  
21 Now he wants to put into the record, and I will  
22 get a copy as soon as I find it, there are several  
23 different things. I can find it for you. 7549. 7544?  
24 And 589. So we are going to mark in. But you have  
25 different pages than I have. Okay, this is good. I'm

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1 sorry, so this is going to be -- BD-6 is going to be  
2 Permit No. 7549 dated 10/5/89.  
3 (Board's Exhibit BD-6 marked for  
4 identification.)  
5 MR. SCHEPISI: Slow down for a second.  
6 Permit number what?  
7 MS. SCANCARELLA: 7549.  
8 MR. SCHEPISI: No, 7544.  
9 MS. SCANCARELLA: And it's dated 10/5/89.  
10 MR. SCHEPISI: It has nothing to do with the  
11 2000.  
12 MR. KATES: If you remember you had the 1989  
13 drawing and the 2000 drawing. Each of those exhibits  
14 correlates to the plans. So you have a building permit  
15 associated with each plan. One is from 1989 and one  
16 from 2000.  
17 MR. SCHEPISI: So the one is for the first  
18 floor sprinkler renovation.  
19 MR. PORINNO: Right. The permit.  
20 MR. SCHEPISI: For a \$2,400 renovation. And  
21 the other one is for the second floor renovation for a  
22 value of \$9,800. Those are the two, right?  
23 MR. PORINNO: That's correct.  
24 MR. SCHEPISI: And the purpose of this is?  
25 MR. PORINNO: I will repeat it, hopefully for

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1 the last time.  
2 MR. SCHEPISI: The sarcasm is not necessary.  
3 Just tell us what your purpose is.  
4 MR. PORINNO: Try to take the anger out of  
5 your voice.  
6 MR. SCHEPISI: I have no anger. Annoyance,  
7 yes; anger, no. Please tell us.  
8 MR. PORINNO: Your expert testified that the  
9 Marketing Systems's use of that building was transitory  
10 in nature. And I think the documents that I've asked to  
11 be put into the record here, as exhibits indicate  
12 otherwise. They occupied the building. I believe they  
13 occupied the building somewhere between eleven and  
14 fifteen years. That's it.  
15 MR. SCHEPISI: That's the only purpose.  
16 MR. PORINNO: Yes.  
17 MR. SCHEPISI: Before you mentioned the area  
18 that they occupied, that they occupied the entire second  
19 floor. And it seems kind of strange that they can  
20 renovate an entire second floor for \$8,000. Before you  
21 were saying one thing and now you are saying something  
22 else. If the only purpose you are introducing it is to  
23 show that they were there for eleven years or twelve  
24 years.  
25 MR. PORINNO: Mr. Schepisi, I think the

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1 exhibit speaks for itself.  
2 MR. SCHEPISI: I don't think it does. You  
3 have been interpreting it and making statements to this  
4 board that are not correct.  
5 MR. PORINNO: Okay. As has our engineer.  
6 You are entitled to your opinion. Can we move on? I  
7 suggest we move on to the next one, or if there is  
8 someone else.  
9 MR. SCHEPISI: Mr. Chairman, I don't know who  
10 is running the meeting, Mr. Porinno or yourself. I will  
11 defer.  
12 MR. KILMARTIN: I kind have an observation.  
13 I think the exhibits that were just introduced establish  
14 that the town was aware of MSI for many years, 1989 up  
15 to 2000, when the building permits were filed. And this  
16 is prior to the 2002 ordinance when arguably with the  
17 knowledge that MSI is there in a little bit or a lot of  
18 this building, we said that the entire building can  
19 continue on with the nonconforming use of a car  
20 dealership. That's what I think we've established.  
21 MR. CHINMAN: The only other thing I am  
22 confused about is we established that was 3700 feet for  
23 a long period of time, but we don't know if there was  
24 much greater square footage or if it was the same 3700  
25 square feet that we are talking about. We are not clear

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1 about that.  
2 MR. PORINNO: And I did not measure the  
3 square footage.  
4 MR. CHINMAN: 3700 versus 40,000 that is a  
5 big different.  
6 MR. HIPOLIT: I think the question for the  
7 architect is --  
8 MR. SCHEPISI: Has Mr. Hipolit become a board  
9 member? The board is having a discussion.  
10 MR. HIPOLIT: I'm a professional.  
11 MR. SCHEPISI: But he hasn't been asked.  
12 Nobody asks Mr. Hipolit his opinion, he opts in as  
13 another board member.  
14 CHAIRMAN FEHER: I would like to hear his  
15 professional opinion.  
16 MR. SCHEPISI: On what?  
17 CHAIRMAN FEHER: Whatever he wants to say.  
18 MR. HIPOLIT: I haven't heard the architect  
19 testify as to the square footage of the second floor.  
20 It's a valid question.  
21 CHAIRMAN FEHER: Is there an answer to that  
22 question?  
23 MR. SCHEPISI: I am assuming there is.  
24 CHAIRMAN FEHER: He is asking?  
25 MR. SCHEPISI: Do you want me to ask our

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1 architect if he can tell us what the square footage of  
2 is second floor, the entire second floor is?  
3 Larry, are you here?  
4 MR. LAM: It's 13,500.  
5 MR. SCHEPISI: That's the entire second  
6 floor. Please look at it and don't give me an answer  
7 that we have to come back and correct. Do you need a  
8 scale? Here is an architectural scale, if you need it.  
9 MR. LAM: 13,239.  
10 MR. SCHEPISI: That's the whole second floor?  
11 MS. O'SHEA: What was the answer again?  
12 MR. LAM: 13,239.  
13 MR. SCHEPISI: That's the whole second floor  
14 and when they moved out of the building they squeezed  
15 that into the 3700 square feet where they are now.  
16 MS. O'SHEA: In the new location.  
17 MR. SCHEPISI: They moved their entire  
18 operation from 100 Sylvan to 120 Sylvan and they moved  
19 it into 3700 square feet. So can they have had the  
20 whole floor? Kind of difficult.  
21 MR. PORRINO: Could they have downsized?  
22 MR. SCHEPISI: No, they did that later.  
23 MR. PORINNO: Mr. Schepisi, there is nothing  
24 on the record.  
25 MR. SCHEPISI: Mr. Porinno, everything that

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1 you are raising is pure conjecture. It has no bearing  
2 in fact.  
3 MR. PORINNO: Mr. Schepisi, I'm sorry, bring  
4 paper, show me the paper.  
5 MR. CHINMAN: Whatever. Let's move on.  
6 CHAIRMAN FEHER: I have a question. You  
7 have seen our Ordinance 93-06 and our zoning  
8 code 30-11.4, which states, "If any nonconforming use  
9 ceases for a continuous period of one year or more, or  
10 is changed to or replaced by a conforming use, or is  
11 moved for any distance for any reason, the land and  
12 building theretofore devoted to such nonconforming use  
13 shall thereupon be subject to all regulations as to use  
14 for the district in which such land and building are  
15 located, as if such nonconforming use had never  
16 existed."  
17 So this ordinance, what you are telling me, the  
18 courts would probably invalid this, is that what you are  
19 saying?  
20 THE WITNESS: That's a legal argument, that I  
21 am not putting before the board. That is certainly a  
22 legal representation.  
23 CHAIRMAN FEHER: That is our ordinance.  
24 MR. SCHEPISI: Your ordinance does not  
25 provide for the continuation of an existing

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1 nonconforming use the way that the court does. The  
2 intent of the property owner -- excuse me -- the intent  
3 of property owner is what governs.  
4 CHAIRMAN FEHER: I understand the legal  
5 argument that you made. But the ordinance is in  
6 conflict with that, right?  
7 MR. SCHEPISI: Yes.  
8 CHAIRMAN FEHER: It's clearly in conflict.  
9 MR. SCHEPISI: Not clearly, it's in conflict  
10 with the case law of this state.  
11 CHAIRMAN FEHER: This case law, was there an  
12 ordinance similar to this that was involved in that  
13 Stop & Shop?  
14 MR. SCHEPISI: Yes, there was. It was not  
15 Stop & Shop, one of other ones.  
16 MR. KATES: The answer is, yes, we don't have  
17 the citation.  
18 CHAIRMAN FEHER: We as the local board, are  
19 we not bound by our local ordinances?  
20 MR. SCHEPISI: No. You are bound by the  
21 court decisions in the state.  
22 CHAIRMAN FEHER: When we have something like  
23 this in front of us, should we say that's our ordinance  
24 we are going to go with our ordinance, take it to court  
25 if you want to.

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1 MR. SCHEPISI: That's the good way; that  
2 would not be a responsible way to do it. If your  
3 attorney and the applicant's attorney are both advising  
4 you that the ordinance that you have doesn't not comport  
5 with the law in the state. So by saying somebody, let's  
6 say Graziano decided to scribe this ordinance and then  
7 that was what was passed and that does not comply with  
8 what the court has held in similar cases with similar  
9 ordinances, you can't just say, well we have ours our  
10 way. You have to follow the precedence set by the law.  
11 CHAIRMAN FEHER: So we can and should ignore  
12 this ordinance?  
13 MR. SCHEPISI: You should based upon the case  
14 law in the state.  
15 MR. PORINNO: Mr. Chairman, if I can weigh  
16 in? I thinks there is a case that was mentioned in the  
17 Municipal Land Use, Wilcox 2011 Edition, they address a  
18 an similar ordinance. It looks likes it's Berkeley  
19 Square versus Trenton Zoning Board of Adjustment. It's  
20 addressing a Trenton ordinance that required that the  
21 vacation of a nonconforming use was regarded a permanent  
22 abandonment.  
23 After that zoning board, the Stratford, the  
24 appellate division examined the case and in which the  
25 law division found an abandonment to that regard to the

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1 owner's intent. The test applied by the law division  
2 was not authorized by the New Jersey law. The appellate  
3 division sustained by judicial review in New Jersey  
4 illustrated by the cases cited, in the Berkley Square  
5 versus Trenton Zoning Board, that the Trenton ordinance  
6 provided by the nature of nonuse was considered  
7 permanent abandonment had to be considered together with  
8 the owner's objective intent to resume the nonconforming  
9 use, as well as his actions before it could deprived of  
10 that use. My point is we don't have to completely  
11 ignore our ordinance. It has to be looked at in  
12 conjunction with the bigger package here. That's my  
13 point.

14 CHAIRMAN FEHER: I am probably going to ask  
15 our planner to comment about this.

16 MS. BANYRA: The statements just now or the  
17 entire thing?

18 CHAIRMAN FEHER: How much do we pay attention  
19 to our own ordinance, which is in conflict with what  
20 people are telling us the courts have decided?

21 Plan plan: My name is Eileen Banyra. I am a  
22 licensed professional planner.

23 MR. KATES: Can I put you under oath?

24 EILEEN BANYRA, after having been duly  
25 sworn testified as follows.

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1 MR. KATES: And just so the record is clear,  
2 Mr. Hipolit's testimony all evening was not under oath.  
3 ANDREW R. HIPOLIT, having taken an  
4 oath duly swore the testimony given by him previously  
5 was the truthful.

6 MR. HIPOLIT: I only asked questions. I  
7 didn't give testimony today.

8 MS. BANYRA: So relevant to that question  
9 about the zoning ordinance and I think prior to me  
10 submitting my report, I did call the board attorney just  
11 to discuss what my preliminary findings were before I  
12 finally sent it out. And Michael and I did talk about  
13 that ordinance, which my understanding would be that  
14 it's an ordinance of one year is possibly not a valid  
15 ordinance.

16 CHAIRMAN FEHER: Possibly?

17 MS. BANYRA: I am saying possibly. I am not  
18 a lawyer. My read of the case law is that I wouldn't  
19 consider it, you would consider it with other things but  
20 that is not typically a valid ordinance. That's my  
21 understanding.

22 CHAIRMAN FEHER: So we are fully within our  
23 right if we decide to ignore that ordinance.

24 MR. KATES: You are on safer ground by  
25 ignoring it than not ignoring it.

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1 MR. KILMARTIN: Considering the other  
2 factors.

3 MR. CHINMAN: Can we ask our planner?

4 CHAIRMAN FEHER: Was this ordinance known at  
5 the time when the property was purchased by Mr. Berardo?  
6 This was 1993, I believe, so it was always in, there  
7 nobody questioned it.

8 MR. SCHEPISI: Nobody knew what your  
9 ordinance provided, nobody looked at what your ordinance  
10 provided, nobody cared what your ordinance provided.  
11 Who goes in and checks every ordinance in a  
12 municipality? Any attorney would have told them that  
13 this ordinance would never been sustained from the day  
14 it was passed it would never been sustained.

15 CHAIRMAN FEHER: What was the date of this  
16 Stop & Shop decision?

17 MR. KATES: S&S.

18 MR. McDONOUGH: 2004 was the case that I  
19 referred to.

20 MR. CHINMAN: Excuse me, Mr. Chairman, since  
21 we are paying this planner so much money. There is  
22 something that she may want to help us understand.

23 MS. BANYRA: I have a couple of questions for  
24 Mr. McDonough, if I may.

25 MS. O'SHEA: Come up.

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1 MS. BANYRA: I want to ask John a couple of  
2 questions. I will speak up.

3 John, your testimony going back to -- I am not  
4 going to talk about the second floor, the first floor, I  
5 don't know what documents. I'm not looking at the same  
6 documents. I think the point that was being made is:  
7 Is it transitory or not? And I don't know if you gave  
8 your opinion on eleven years, twelve years, fifteen  
9 years.

10 MR. McDONOUGH: The answer to the question is  
11 similar to what a board member had said. The start date  
12 is 2002, that's when this resolution came into the  
13 effect. That use was eleven years before the  
14 determination was already made.

15 MS. BANYRA: I am sorry, I am speaking to the  
16 extra tenant, MSI.

17 MR. McDONOUGH: That's the tenant we are  
18 talking about.

19 MS. BANYRA: So they have been in the  
20 building for ten or eleven years and you feel --

21 MR. McDONOUGH: In 2000, the resolution  
22 clearly states the applicant has a valid preexisting  
23 nonconforming use. So these documents that we saw this  
24 evening, a couple of documents in 2002 were available to  
25 the same board -- not the same board, per se, but the

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1 board at the time, made that determination that it was a  
2 preexisting nonconforming use. So those documents not  
3 new, per se.  
4 MS. BANYRA: I am following up on just some  
5 of their questions. I think it's just a yes or no. So  
6 personally I don't consider that a transitory use, in  
7 terms of that. If we go to whether or not it's a  
8 preexisting nonconforming and we are subtracting out  
9 that area and I think that is maybe where you are going  
10 with this one.  
11 MR. McDONOUGH: I will go to the first  
12 question. I don't know that I accept based on specific  
13 facts whether that use was in place for eleven years or  
14 not.  
15 MS. BANYRA: Assuming that is the testimony.  
16 My experience would say that is not a transitory use.  
17 You are correct, I haven't reviewed all these documents  
18 that are being passed back and forth.  
19 Regarding the 2002 --  
20 MR. SCHEPISI: You are asking him a question  
21 and you are not letting him answer it.  
22 MS. BANYRA: I thought he did.  
23 John, in the building when you were talking about  
24 the different mechanisms for abandonment, was there the  
25 removal of equipment, how would you factor that in or

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1 how would you characterize that? I understand there is  
2 no equipment left in the building including lifts, which  
3 are typical to a car dealership.  
4 THE WITNESS: I think that goes back to the  
5 S&S case. There were fifteen reasons why that board  
6 denied that auto dealer use. One of those fifteen was  
7 removal of equipment. The courts overturned that and  
8 said that was not abandonment. So there is a fact  
9 pattern consistency.  
10 MS. BANYRA: The condition of the property,  
11 did you testify to that in terms of the court case and  
12 the fact that the property hasn't been maintained? I  
13 don't know if you made a statement relevant to that.  
14 MR. McDONOUGH: What I said with respect to  
15 the property was that evidence of the auto dealership  
16 use is still there. The signage is still in place. The  
17 physical form of the building is exactly the same now in  
18 terms of its bulk, its mass, its condition as it was  
19 back 2002.  
20 MS. BANYRA: So the condition of the property  
21 is not relevant?  
22 MR. SCHEPISI: I don't believe the witness  
23 said that.  
24 MS. BANYRA: I am asking that.  
25 MR. KATES: The first question: Was is the

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1 condition of the property relevant to the issue of  
2 abandonment?  
3 MR. SCHEPISI: And he answered that. And  
4 then she said --  
5 MS. BANYRA: I don't think he answered that.  
6 MR. McDONOUGH: Is the question if the  
7 maintenance condition of the property --  
8 MS. BANYRA: Yeah.  
9 MR. McDONOUGH: -- a relevant consideration?  
10 MS. BANYRA: Yes.  
11 MR. McDONOUGH: It's a portion of it, but  
12 there are many other considerations.  
13 MS. BANYRA: And the use of the property, I  
14 think there was testimony about the use of the property  
15 for storage. I don't know if you weighed in on that.  
16 The applicant indicated he used the property for office  
17 storage for his own term.  
18 MR. McDONOUGH: And I believe that  
19 interrelates to Mr. Berardo's use which is right next  
20 door. It was a logical extension and a sharing of space  
21 that was available on his premises.  
22 MS. BANYRA: So your testimony is that it  
23 doesn't change or imply any change of use.  
24 MR. McDONOUGH: That's correct.  
25 MS. BANYRA: I think those are the only

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1 questions I have right now.  
2 MR. McDONOUGH: And, Mr. Chairman, one point  
3 I would like to make for the record because the question  
4 was asked, notwithstanding the ordinance whether it's  
5 valid or not, I don't accept the fact that there is a  
6 separation of use here. In my opinion, that has never  
7 happened. There may have been periods with no activity.  
8 But that has been no cease and desist, there has been no  
9 stoppage of that use. The phrase cessation and  
10 abandonment, I see them as interchangeable.  
11 CHAIRMAN FEHER: When Toyota moved, the car  
12 dealership moved out of that building, they ceased to  
13 deal in cars on 100 Sylvan Avenue.  
14 MR. SCHEPISI: Mr. Chairman, I beg to differ.  
15 The testimony was they always showed cars on that  
16 property after Toyota left.  
17 CHAIRMAN FEHER: You mean they sold cars,  
18 they brought them upstairs in that dilapidated building  
19 and they signed the contract?  
20 MR. SCHEPISI: No. No. No. That they were  
21 still selling cars off that site. They would take them  
22 and show the cars. It's uncontroverted testimony.  
23 CHAIRMAN FEHER: But isn't that a warehouse  
24 or something?  
25 MR. SCHEPISI: But it's still part of a car

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1 dealership.

2 MS. O'SHEA: Lower your voice, I can hear.

3 CHAIRMAN FEHER: It's not a dealership

4 operation, it's a storage operation.

5 MR. SCHEPISI: Excuse me. Following that

6 same logic, if I had a supermarket and one day I stop

7 selling eggs, are you telling me I lost the right to

8 sell eggs in the future? No.

9 CHAIRMAN FEHER: That's not what I am talking

10 about. The use as an automotive dealership ceased --

11 MR. SCHEPISI: No. No. Simple. The

12 uncontroverted testimony --

13 CHAIRMAN FEHER: But they never sold a car

14 since Toyota.

15 MR. SCHEPISI: They did.

16 CHAIRMAN FEHER: Now did they.

17 MR. SCHEPISI: They took people there and

18 showed them cars and people bought them and they went

19 back to the office and signed it.

20 CHAIRMAN FEHER: Where did they go to sign

21 the contract?

22 MR. SCHEPISI: That's not relevant.

23 MS. O'SHEA: I've got my hand up. I am ahead

24 of you.

25 CHAIRMAN FEHER: They turned it into a

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1 warehouse.

2 MR. SCHEPISI: But it's part of the car

3 dealership function.

4 MS. O'SHEA: Mr. Chairman, I still have --

5 (Several people speaking at once.)

6 CHAIRMAN FEHER: I didn't say abandonment,

7 did you cease the use of --

8 MR. SCHEPISI: No, it's always continued in

9 part as a car dealership, not completely the same way.

10 It was modified, changed, but it always continued in the

11 manner of a car dealership, showing cars, prepping cars.

12 Always continued, never changed.

13 MS. SCANCARELLA: Mary?

14 MS. O'SHEA: In the resolutions, one of them

15 from 2000 that was then modified about the use for the

16 property owner, Toyota, Parkway Toyota agreed to cease

17 using that property. Now, if they continued and

18 apparently they didn't continuously do it because the

19 photo that the planner gave of the building to the

20 board, our planner, our planner gave a report with a

21 picture and that picture shows MSI in the building,

22 shows Toyota is gone. And it doesn't show any Toyota

23 cars parked there -- wait a minute, Mr. Schepisi,

24 please -- our ordinances says that no property owner or

25 lessee shall permit by agreement in any form the

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1 premises to be used for off-street parking which is not

2 directly related to the building parking requirements of

3 that site without planning board approval. If there is

4 no building on the site or lot, parking is prohibited

5 unless there is approval of the planning board. All

6 right? That's general parking.

7 And then motor vehicle establishment: There

8 shall be no storage either by day or night in the front

9 yard of new vehicles, used vehicles or vehicles in the

10 custody or possession of the occupants on the premises

11 for the purpose of servicing same. And it also goes on

12 to say that any -- any vehicles they have to be parked

13 on their own property. All right?

14 So if Toyota was parking vehicles on their

15 property, they were in violation of their own approval

16 from 2002 because they said they were ceasing to use the

17 property. If they began to use it again afterwards for

18 some time through some arrangement with the owner, that

19 was never approved. We were never given a copy of the

20 lease agreement with Toyota. We were never given a

21 certificate of occupancy by Toyota to use the property.

22 So any use for storage, vehicle storage on that property

23 was not a permitted use.

24 Also, all the fire inspection reports from before

25 when Toyota was there until this year always state the

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1 building is empty, it's vacant, it's abandon, it has no

2 electric, no fire alarms, no water, no services. If

3 they were servicing cars in that building, again, they

4 were in violation.

5 MR. SCHEPISI: Ask your attorney, a violation

6 of the municipal ordinance, even if they were in

7 violation is not a reason to cause a nonconforming use

8 to expire. The cases are replete on that.

9 MS. O'SHEA: They had no approval to park

10 cars there.

11 MR. SCHEPISI: You don't need approval. They

12 could be in there doing it illegally as long as they --

13 MS. O'SHEA: But that doesn't make it a --

14 MR. SCHEPISI: Will you ask your attorney?

15 Will you ask your attorney?

16 (Several people speaking at once.)

17 THE COURT REPORTER: One at a time, please.

18 MR. PORINNO: Michael?

19 MR. KATES: The use made of that property is

20 not relevant to the state of mind of the owner in terms

21 of abandonment. If the use is being put to by Toyota in

22 this case in violation of the resolution --

23 MS. O'SHEA: Yes.

24 MR. KATES: -- that does not go to the issue

25 of abandonment here tonight. It's state of mind of the

1 property owner, Mr. Berardo, not Toyota.  
 2 MS. O'SHEA: But Mr. Berardo has other  
 3 occupants in other buildings. He knows when he has a  
 4 tenant for the building he needs to get a certificate of  
 5 occupancy. There was no certificate of occupancy  
 6 granted on that building.  
 7 MR. KATES: That's not the issue. That is  
 8 not the issue. The discontinuance of utilities is not  
 9 the issue.  
 10 MR. SCHEPISI: It's the intent of the  
 11 property owner. Did he intend to abandon the existing  
 12 nonconforming use, that's the test. Mary, everything  
 13 you are saying makes sense logically, but it's against  
 14 the law. So what you're saying makes sense logically,  
 15 but it's not the law.  
 16 The law is the intent of the property owner. And  
 17 this goes back to protecting the constitutional rights  
 18 of the property. And the property owner had to do  
 19 something, had to take some overt action had to intend  
 20 to abandon the use. This is a property here. This is  
 21 the United States. We have a right to our property, the  
 22 right to enjoy it. Mr. Berardo has the right. You  
 23 can't take it away because you have it on a whim. And  
 24 that's what our courts have held.  
 25 You don't like car dealerships, you said it from

1 day one. Not just this application, it's every car  
 2 dealership.  
 3 MS. O'SHEA: How do you know that?  
 4 MR. SCHEPISI: Because you said it before on  
 5 other applications.  
 6 MS. O'SHEA: I didn't opposed it then, I was  
 7 the secretary for the board of adjustment.  
 8 MR. SCHEPISI: You were making statements on  
 9 it.  
 10 CHAIRMAN FEHER: Are we going to get to vote  
 11 this evening?  
 12 MR. SCHEPISI: I don't know.  
 13 CHAIRMAN FEHER: Do you have any more  
 14 witnesses on this issue of abandonment?  
 15 MR. SCHEPISI: I have a couple of questions.  
 16 If the board is going to consider this photo, which is  
 17 attached to the planner's report, the photo is a photo  
 18 after everybody is out of building. So the statement  
 19 that was made by Mrs. O'Shea saying that MSI was still  
 20 in the building when Parkway Toyota was out, is  
 21 incorrect. Your planner states right on the photo, it's  
 22 a vintage of 2008, a 2008 photo. And there's no  
 23 questions that neither MISI nor Parkway Toyota were in  
 24 the building. That's incorrect.  
 25 MS. O'SHEA: I have a question for the

1 planner. You mentioned about the signs. Now,  
 2 internally there was a big Toyota sign in the building.  
 3 It's not there anymore. All there is, is a black mark  
 4 on the wall like when you take a picture down. And you  
 5 didn't paint. It has not been painted over. It's like  
 6 a dirt mark. The signs you are talking about, service  
 7 and repair, are just on the side of the building. And  
 8 the one that was presented into evidence, that little  
 9 flippy sign that is all worn off, hardly readable. Do  
 10 you think, in your expert opinion, do you think a person  
 11 who was looking to buy a Toyota would pull in that  
 12 dilapidated building to buy a Toyota, looking for a car  
 13 dealership?  
 14 MR. SCHEPISI: I object --  
 15 MS. O'SHEA: He is saying there are signs  
 16 there and I am asking if the signs are representative of  
 17 a car dealership.  
 18 MR. SCHEPISI: But Mary, I know what you are  
 19 doing. I am just objecting for the record.  
 20 MS. O'SHEA: He still has to answer though.  
 21 MR. SCHEPISI: No, I object before he answers  
 22 not after he answers. That's the way it works in this  
 23 world. You object before the question is answered. I  
 24 object to the question. It has no relevance to these  
 25 proceedings whether somebody driving down sees a

1 dilapidated sign would go into that property to buy a  
 2 Toyota. The test is: What was the intent of the  
 3 property owner? Did he abandon the nonconforming use?  
 4 And the answer is no. Now, whatever the board rules --  
 5 MS. O'SHEA: He brought up the sign, so he  
 6 still didn't answer the question.  
 7 MR. SCHEPISI: I just objected.  
 8 CHAIRMAN FEHER: First of all, we want  
 9 testimony from our planner. If you are done with your  
 10 witnesses?  
 11 MR. McDONOUGH: Anybody want to ask from the  
 12 public?  
 13 MR. SCHEPISI: You brought up a good point.  
 14 Would anybody from the public like to ask questions?  
 15 MR. KATES: After our planner.  
 16 MS. BANYRA: Again, my name is Eileen Banyra  
 17 and I represent the Englewood Cliffs board.  
 18 I did prepare a report. It's dated May 9 and  
 19 it's relative to -- I broke my report into two sections,  
 20 one was I entitled it the abandonment issue. And the  
 21 second was more relative to site plan.  
 22 And really my review of the information, which  
 23 included, I believe, all of the files that were on  
 24 the -- although I am not clear based on some of the  
 25 files that were floating around tonight, they didn't

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1 sound familiar to me -- but I believe I reviewed all of  
2 those files. I reviewed all the fire department  
3 records. I looked at aerial photos, I looked at the  
4 site plans that were submitted for both 100 and 120  
5 Sylvan Avenue.  
6 MR. KATES: Eileen, let me interrupt you. We  
7 are going to mark your Memorandum No. 1 as besides BD-7.  
8 And Memorandum 2 as BD-8.  
9 (Applicant's Exhibit BD-7 marked  
10 for identification.)  
11 (Applicant's Exhibit BD-8 marked  
12 for identification.)  
13 MR. KATES: And, Mr. Schepisi, have you seen  
14 these before tonight?  
15 MR. SCHEPISI: Yes, I received them  
16 yesterday. And we will hear Ms. Price.  
17 MS. SCANCARELLA: What was BD-7?  
18 MR. KATES: BD-7 and 8, Memorandum 1 and 2.  
19 MS. BANYRA: So, basically, what I did was  
20 framed what I felt, tried to frame the issue because I  
21 didn't think -- it came into me as basically three  
22 different parts, two different applications, two site  
23 plan applications with the basic threshold issue being  
24 whether or not abandonment and/or the preexisting  
25 nonconforming use was determined.

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1 So on my review of this I went through -- and I  
2 am not going to read my report into the record. I don't  
3 think it's necessary. And the question really is about  
4 whether or not the abandonment has been established.  
5 And I think you heard some testimony from their planner  
6 this evening. And we talked about what happened with  
7 the Toyota dealer in 2002. We talked about an amended  
8 resolution. At both times as one of the board members  
9 stated the applicant indicated in the resolution that  
10 the Toyota dealership was moving from Lot 23 to  
11 Lot 22 -- yes -- and 23 was now going to cease  
12 operations for that particular Toyota dealership.  
13 The amended was which -- I believe, was  
14 November 2002 appeared to be clarified, and in  
15 clarification what was outlined was that the owner came  
16 back it appears and indicated that he was not seeking to  
17 have that use removed from the property. And I think  
18 that that was clear to me, that the board made a finding  
19 that the use was being maintained on that property not  
20 for the Toyota that just left, but if in the future the  
21 applicant wanted to bring a car dealership in there, he  
22 would have the right to do that.  
23 And the second thing in that resolution was that  
24 he may use it for something else. It's pretty straight  
25 forward. I don't think there is any magic there. He

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1 didn't appear to abandon the use. And it was reaffirmed  
2 there 2002.  
3 MR. KATES: Do you think that the resolution,  
4 the 2002 resolution, goes to the cleansing -- for lack  
5 of a better term -- of the status of MSI?  
6 MS. BANYRA: No, I don't. And I looked at  
7 the testimony. I think it was Mr. Kilmartin that said,  
8 well, the board should consider that because the  
9 building department should have known. My experience as  
10 a municipal planner and I have been a planning director  
11 sitting with building department files and building  
12 department people. Often the boards don't know what the  
13 town people know, so to speak. The board may or may not  
14 have known that.  
15 One of the things that I think is interesting is  
16 that in both resolutions and I didn't really pick up on  
17 this before, both resolutions do cite transcripts. And  
18 I don't know whether those transcripts were ever looked  
19 at, as to what was the flavor -- what was actually  
20 looked at back in 2002. The resolutions say the use is  
21 maintained. That he had a preexisting nonconforming use  
22 on Lot 23. I don't think -- it didn't appear and it  
23 certainly doesn't appear in the resolution that that  
24 other use was even contemplated, at least in the  
25 resolution, it's not stated. It maybe in the

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1 transcript. I didn't unfortunately look at that. And I  
2 just looked at that tonight.  
3 It says it's attached, the resolution is attached  
4 to a copy of the transcript and it gives the date.  
5 MR. KATES: What page are you on?  
6 MS. BANYRA: I am looking at Page 4 of 5.  
7 MS. SCANCARELLA: Eileen, which resolution?  
8 MS. BANYRA: The amended one, the July.  
9 MR. SCHEPISI: No, the November.  
10 MR. KATES: There are two, July 8, 2002 and  
11 November 8.  
12 MS. BANYRA: So page -- both of these say  
13 they were attached. Page 5 of 6 on the amended one, it  
14 references transcript of the proceedings of this matter  
15 and that the resolutions are going to be attached to the  
16 transcript. So there may be more information out there  
17 relevant to what the board looked at and what the board  
18 didn't. To me on the face, the applicant, when it was  
19 determined on 2002 that he had a preexisting or the  
20 ability to use it again for a preexisting nonconforming  
21 use.  
22 Relevant to the discussion tonight and whether or  
23 not abandonment has occurred, I think from what I tried  
24 to outline in my report was that I felt that the  
25 applicant had to provide information that is

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1 satisfactory to the board's query as to whether or not  
2 that could be determined. So I think really -- I don't  
3 know if there was a determination for me, per se.  
4 It's really the determination for the board based  
5 on I think advice -- and as the other planner  
6 indicated -- this is legal, a lot of this stuff is legal  
7 testimony. And it's not really planning issues. We are  
8 reviewing documents that are legal documents. We are  
9 certainly familiar with the law by the nature of our  
10 business, but whether or not it was abandoned, I think  
11 the board has to evaluate the information that has been  
12 provided and decide whether or not a case has been made  
13 for that either there was enough activity going on, that  
14 there wasn't an intent to abandon the property, that  
15 certain steps didn't occur. And I think Mr. McDonough  
16 did do a fair job of outlining that.  
17 So I think that really is the board's call. That  
18 is not really for anyone else to make a decision on  
19 that. So whether you feel there is enough information,  
20 if you don't feel there is enough information, I think  
21 that speaks to itself.  
22 The burden is on the applicant to present that  
23 case. And I think that in terms of abandonment, that's  
24 all I really have to say about that.  
25 Relevant to other issues maybe I will wait until

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1 after you decide what my feeling is on expansion of the  
2 nonconforming use. I can wait until you make a decision  
3 on that.  
4 MR. KATES: One last question and that is the  
5 issue of the size of the space devoted under a separate  
6 lease, the lease produced tonight to Marketing  
7 Information Systems.  
8 MS. BANYRA: You know, I have to -- I  
9 disagreed with Mr. Schepisi, I think, on that. It is an  
10 office use, but to me it's an independent entity. So  
11 while there are other uses in there, my review of that  
12 would be it's a separate person. Yes, it's an office  
13 use. If it was Toyota office, fair game, that is  
14 permitted.  
15 As a separate office, I would categorize it as a  
16 separate use, one is permitted, one is permitted  
17 ancillary to the principal use, which is the car  
18 dealership, which is there by way of historical right.  
19 And the other use was apparently came in at some point  
20 in time. So to me that square footage is, whatever that  
21 number is, which, again, I heard 3700 square feet, I  
22 heard a couple thousand, 13,000, I don't know what that  
23 number is, that number is in question.  
24 MR. KATES: If you are talking about 3000  
25 square feet compared to the entire building, which I

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1 think is...  
2 MR. SCHEPISI: 53,000.  
3 MR. KATES: 53,000 square feet. Does that  
4 minor square footage, as it relates to the building,  
5 contextually really mean that it's too insignificant to  
6 dwell on as on the issue of abandonment?  
7 MS. BANYRA: It's an interesting question. I  
8 think that, you know, that number it is small if it's  
9 3700. I don't know if that matters, for example, I am  
10 going to use an example of if Starbucks located in  
11 another store, they are co-locating in another store.  
12 Does that mean it's a separate principal use or not? It  
13 goes to how big that building is, and how big the  
14 intended use is.  
15 MR. KATES: The dynamics.  
16 MS. BANYRA: But what is interesting is they  
17 did have a separate entrance, it appears they had a  
18 separate entrance. They did a separate area space. It  
19 didn't appear to be interrelated. So, you know, I think  
20 it's a separate use, personally.  
21 MR. KILMARTIN: Can I have some follow up on  
22 that? I think this may have been the point that  
23 Mr. Schepisi was trying to make. So continue all that.  
24 This portion of the second floor was used by MISI for a  
25 conforming office space use. And now if the -- even if

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1 that is the case, if the car dealership comes in now and  
2 uses that second floor office as an office space and for  
3 a car dealership, where is the problem or is there a  
4 problem?  
5 MS. BANYRA: Frankly, no matter what that  
6 space was doing and I think, again, I spoke with  
7 Mr. Kates about this in my opinion, almost no matter --  
8 no matter what happens on this property, it's in for an  
9 expansion of a nonconforming use. It's a nonconforming  
10 structure that is having significant changes to a site  
11 plan. Some of it was a little bit -- and I spoke to  
12 Mr. Schepisi about this -- there is an increase in  
13 impervious coverage. There is an increase in  
14 circulation, there is a big change in circulation.  
15 There are all kinds of variances relative to the side  
16 parking. So to me, there is an intensification of the  
17 site.  
18 If you're in on a nonconforming use, you have a  
19 nonconforming use and you are making changes to it that  
20 are substantive changes, in my experience, you are back  
21 before the zoning board of adjustment.  
22 MR. SCHEPISI: The problem is your question  
23 has never been answered. The witness did an excellent  
24 job, but she didn't answer your question. The fact is  
25 very simple, the office use is an office use whether

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1 it's used by a car dealership or whether it's used by an  
2 office; do you agree?  
3 MS. BANYRA: No, I don't. I think from my  
4 perspective if everything else stayed the same, I think  
5 that square footage would be in play. And I think let's  
6 say it's 3700 square feet. You don't have 3700 square  
7 feet. You are going to build around it and you don't  
8 have that space. And if you are expanding that, then  
9 you are expanding a nonconforming use --  
10 MR. SCHEPISI: But --  
11 MS. BANYRA: However, my opinion is also that  
12 that whole site is changing now with the circulation and  
13 that it's an intensification of that site. I think you  
14 are in no matter what. That's why I said it the way I  
15 did because to me that space is not irrelevant, but it  
16 is.  
17 MR. SCHEPISI: Let's break it down to the  
18 simplest of forms. We have the space, it's 3700 square  
19 feet of space. It's used by an office, by a company  
20 called MISI.  
21 MS. BANYRA: Yes.  
22 MR. SCHEPISI: Parkway Toyota moves out,  
23 along comes my client, buys the building, wants to  
24 continue with the nonconforming use. Along comes FCA,  
25 they go into the building and they maintain 3700 square

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1 feet of office space --  
2 MS. BANYRA: I was going to ask, who is FCA?  
3 MR. SCHEPISI: That's Fiat Chrysler.  
4 They come in and they take and they use 3700  
5 square feet of office space in the building, nothing  
6 else changes. Everything else stays the same.  
7 MS. BANYRA: Is that their only office space  
8 in the building, in that location?  
9 MR. SCHEPISI: Yes. Let's work with that for  
10 a second. Do we have an expansion of a nonconforming  
11 use?  
12 MS. BANYRA: Yes.  
13 MR. SCHEPISI: How?  
14 MS. BANYRA: Because you went from an  
15 independent use of a whole building and now you have two  
16 principal uses of the building.  
17 MR. SCHEPISI: Now you are into something  
18 else. Notwithstanding the nonconforming use, now you  
19 are into the issue do I have two uses on the property;  
20 that is not the issue.  
21 MS. BANYRA: One is permitted as a principal  
22 use, one is accessory that the car dealer is allowed to  
23 have office -- I mean the car dealership itself,  
24 everyone I think recognizes along with a car dealership  
25 there are offices associated with that. That I would

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1 say is ancillary.  
2 MR. SCHEPISI: Let's say I have a 52,000  
3 square foot building. In that 52,000 square foot  
4 building, I have 3700 square feet being used as office  
5 space.  
6 MS. BANYRA: Uh-huh.  
7 MR. SCHEPISI: It's used by the same company  
8 that is operating the dealership. Now another company  
9 comes in and continues that same space. Have I extended  
10 a nonconforming use with that scenario?  
11 MS. BANYRA: Your scenario is a car  
12 dealership that is using it as office space for a car  
13 dealer.  
14 MR. SCHEPISI: Correct.  
15 MS. BANYRA: The next car dealer comes in and  
16 uses it as office space, no problem.  
17 MR. SCHEPISI: So now I am going to change it  
18 a little bit. Now I come along, same space, I have a  
19 car dealership, the 3700 square feet of office space is  
20 being leased to someone else. That car dealership goes  
21 out, that tenant goes out, new car dealership comes in.  
22 They say I want to use that office space myself. They  
23 keep everything the same, the building the same, but I  
24 want to use that 3700 square feet for office for my  
25 dealership.

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1 MR. KATES: But the cases say you shouldn't  
2 be enhancing the nonconforming use.  
3 MR. SCHEPISI: But I am not enhancing it.  
4 MR. KATES: Yes, you are.  
5 MR. PORINNO: You are giving the dealership  
6 space that it didn't have for office,use.  
7 MR. SCHEPISI: No, I am giving -- that  
8 dealership is taking office space that was previously  
9 office space and using it for office space.  
10 MR. KATES: It's a nonconforming use that you  
11 are allowing it to have office space, you are enhancing  
12 it.  
13 MR. SCHEPISI: Michael, I disagree.  
14 CHAIRMAN FEHER: All right. We getting away  
15 from the abandonment question.  
16 MR. KATES: We are getting into abandonment.  
17 CHAIRMAN FEHER: It's after 11:00, we have to  
18 hear the public.  
19 MR. KATES: Assuming you need a D-2 variance  
20 because there is an expansion, which I think is an  
21 easier question than the abandonment question.  
22 MR. SCHEPISI: We are not going to get to  
23 that. I am not prepared to answer this.  
24 MR. CHINMAN: I make a motion to open the  
25 public. It's 11:05.

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1 MS. O'SHEA: Can I just ask something? Very  
 2 small. There has been certain statements of the 3700  
 3 square feet of space the MSI used and we are getting  
 4 that number because that was the amount of space they  
 5 moved into at one point. There are differences of  
 6 opinion on what those plans that were shown from the  
 7 sprinkler company, that possibly MSI had the whole  
 8 second floor and was giving off certain space back to  
 9 Toyota.

10 So I think when we are using the number 3700  
 11 square feet, we are making a leap of faith or an  
 12 assumption. It could be 3700 square feet or 13,000  
 13 space, which would be approximately a third -- not a  
 14 third, 20 percent or so of the building was MSI. So  
 15 it's not a fact in play here, 3700. It's either 3700 up  
 16 to 13,000. I just want to clarify

17 MS. BANYRA: I think it's the same answer.

18 MR. CHINMAN: Can we still open to the  
 19 public?

20 CHAIRMAN FEHER: If the board is done asking  
 21 questions. There is a motion to open to the public.

22 MR. KILMARTIN: Second.

23 CHAIRMAN FEHER: All in favor?

24 ALL BOARD MEMBERS: Aye.

25 CHAIRMAN FEHER: Is there anybody out there

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1 that would like to be heard on the issue of abandonment?  
 2 We are going to have further opportunity to ask  
 3 questions about the enlargement and also the issues  
 4 dealing with the site plan. But the issue of  
 5 abandonment is what we want to decide tonight. So I  
 6 would ask anybody from the public if they would like to  
 7 be heard.

8 MS. PRICE: Just on the abandonment. I think  
 9 I know the hour is late, but I don't believe that the  
 10 board, as I said earlier, can ignore the 2002  
 11 resolution. That's the law of the case. And it does  
 12 not except out any area that was somehow attributed to  
 13 an office, whether it's MSI or otherwise. It speaks of  
 14 the use of the car dealership and the ability for that  
 15 use to continue.

16 I am sure, having sat here for this entire night,  
 17 that the board would have put a condition in or carved  
 18 it out because I am sure you are, you and your companion  
 19 element of the board are very detailed with your  
 20 findings. I don't think you can just jump to that. And  
 21 I don't think you can jump to that on contractor  
 22 drawings and speculating on what may or may not have  
 23 occurred in the absence of unrefuted testimony in that  
 24 case.

25 So when you take the S&S Auto case and you take

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1 the facts and you take the testimony and you take your  
 2 own resolution, with all due respect, if you ignore  
 3 those documents, I think that board would be acting  
 4 wholly arbitrarily and capriciously by not allowing this  
 5 application to go forward at this juncture with your  
 6 jurisdiction. That's not to say that there may not be  
 7 other issues along the way. But this issue, to me, is  
 8 clear cut on all fronts.

9 MR. SCHEPISI: And there was a statement --  
 10 I'm sorry, Gail, were you done?

11 MR. PRICE: Yes.

12 MR. CIOFFI: Joe Cioffi, 30 Sylvan Avenue,  
 13 Englewood Cliffs.

14 To be honest with you, I have been here at all  
 15 these meetings and I find it hard to believe that you  
 16 have an old building on 9W that somebody wants to bring  
 17 in what looks like a nice building and you people are  
 18 jerking around with this thing. I mean it's incredible,  
 19 the questions that you are asking. They are not  
 20 changing the building. They are keeping the same  
 21 office. You had the separate office in the building at  
 22 one time. And as I stated to you folks last time, I  
 23 maintained the fire alarm system for it, I maintained  
 24 the burglar alarm for it and they are both gone now.

25 But I will tell you, I find it incredible. If

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1 you people wind up in a lawsuit because of this building  
 2 and the taxpayers -- you are using my money. I mean  
 3 that's incredible. My money will be used to fight your  
 4 lawsuit. And I will tell you, at that point in time, I  
 5 will sue you because it's wrong if you don't say yes on  
 6 this building. I don't know what you want to see on  
 7 this building. The diagram and the picture looks  
 8 beautiful of the building.

9 I think you should really look at this and make a  
 10 decision, a normal decision, because otherwise you are  
 11 going to have this building sitting here ruining the  
 12 whole area. And I own a building and another property  
 13 on the avenue. And it's wrong for you people to do  
 14 this.

15 CHAIRMAN FEHER: Thank you. Would anyone  
 16 else like to be heard on the issue of abandonment?  
 17 If not, can I have a motion to close the public  
 18 portion?

19 MR. KILMARTIN: Motion to close.

20 MR. CHINMAN: Second.

21 CHAIRMAN FEHER: All in favor?

22 ALL BOARD MEMBERS: Aye.

23 CHAIRMAN FEHER: If they are no further  
 24 questions.

25 MR. SCHEPISI: May I just do a short synopsis

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1 of the evening?

2 CHAIRMAN FEHER: Sure.

3 MR. SCHEPISI: The uncontroverted testimony

4 that you heard proves one thing: There was an existing

5 nonconforming use, there was never an intention to

6 abandon and it was never abandoned. All the innuendo,

7 all the what-ifs that have been raised by other people,

8 that is not a factual proof testimony. The burden is

9 not on us to prove that we don't want to abandon, the

10 group has to show we did abandon. And basically what we

11 have is no one has come forward to give us one scintilla

12 of evidence following the statute and case law criteria

13 that this property owner intended to and did abandon the

14 existing nonconforming use.

15 And I respectfully submit that you should pass a

16 motion this evening approving the fact that the existing

17 nonconforming use has not been abandoned, it continues.

18 And then we go to the other issues that Mr. Kates has

19 raised and the other issue that other members have

20 raised. But a vote should be taken tonight and the vote

21 should be an affirmative vote and avoid unnecessary

22 litigation. Thank you.

23 CHAIRMAN FEHER: Would anybody care to make

24 a motion?

25 MS. EASTWOOD: I have a question first for

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1 Mr. Kates. Who has the burden of proof?

2 MR. KATES: They have, the applicant.

3 CHAIRMAN FEHER: On the issue of abandonment,

4 can I have a motion?

5 MR. KILMARTIN: I make a motion that the

6 board determine that there was no abandonment.

7 CHAIRMAN FEHER: Do I have a second?

8 MR. TROVATO: Second.

9 MS. SCANCARELLA: Before I take a roll call,

10 who is voting?

11 CHAIRMAN FEHER: It's the full board.

12 MS. SCANCARELLA: Not including Mr. Lee or

13 Mr. Chinman.

14 Mr. Villari?

15 MR. VILLARI: What is the motion? The motion

16 is that there was not an abandonment?

17 MS. SCANCARELLA: There was not an

18 abandonment.

19 MR. VILLARI: I vote against the motion. I

20 vote that there was an abandonment and I would be happy

21 to put my reasons on the record.

22 MS. SCANCARELLA: So you are voting no?

23 MR. VILLARI: I am voting no.

24 MR. KATES: It would be help if you did put

25 your reason on.

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1 MR. VILLARI: I want everybody to listen to

2 me carefully because I think the issue of abandonment is

3 a relatively clearcut issue that is narrowly defined by

4 the applicable law. On the issue of abandonment of a

5 nonconforming use, it requires two things; a subjective

6 intent to abandon that use, and an overt act or the

7 failure to act which carries a sufficient implication

8 that the owner of the property did, in fact, intend to

9 abandon the use.

10 It carries a lot of weight with me that the prior

11 owner, I'm not talking about Mr. Berardo, but the prior

12 owner of the property leased a portion of the building

13 to MISI, an independent entity from everything we did

14 hear tonight, for a conforming use. That was not a

15 transient use, but lasted from the late 1980s until

16 2004, perhaps fifteen years, plus or minus a year or

17 two. That, ladies and gentlemen, to me is an overt act

18 that is indicative of an intent to abandon the

19 nonconforming because they leased it to a conforming

20 use, to MISI.

21 So on the narrow issue of abandonment, I vote

22 that there was a abandonment for those reasons.

23 MS. SCANCARELLA: Finished?

24 MR. VILLARI: Yes.

25 MS. SCANCARELLA: Mr. Trovato?

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1 MR. TROVATO: I don't believe there was an

2 intent to abandon so I'm voting yes.

3 MS. SCANCARELLA: Mr. Kilmartin?

4 MR. KILMARTIN: Yes.

5 MS. SCANCARELLA: Mr. Kiky Kim?

6 MR. KIM: No.

7 MS. SCANCARELLA: Mr. Porinno?

8 MR. PORINNO: I am going to vote no with a

9 couple of explanations and I will be brief. One is I

10 feel that representations that the rental of parking

11 spaces to Toyota or any other dealers were all illegal

12 and I don't think they can be used as supporting the

13 applicant's position that this use was not abandoned.

14 And, secondly, most, if not all, of the

15 equipment, furniture and lifts were removed and there

16 was no intent by the applicant to replace them.

17 Number three is the period of time. It's twelve

18 years, it's not one year, two years it's not three

19 years, it's twelve years. And there was case law that

20 suggests that mere inactivity could result in a

21 abandonment of the property and as I cited that case

22 inially Villari versus Zoning Board of Adjustment.

23 MR. VILLARI: Not this Villari, it's another

24 Villari.

25 MR. PORINNO: Again, I vote no.

1 MS. SCANCARELLA: Mrs. O'Shea?  
 2 MS. O'SHEA: No.  
 3 MS. SCANCARELLA: Councilman Park?  
 4 COUNCILMAN PARK: No.  
 5 MS. SCANCARELLA: Ms. Eastwood?  
 6 MS. EASTWOOD: No.  
 7 MS. SCANCARELLA: Chairman Feher?  
 8 CHAIRMAN FEHER: No.  
 9 MS. SCANCARELLA: I have two yeses; one, two  
 10 three, four, five, six, seven, noes.  
 11 MR. KATES: It has been deemed that the use  
 12 has been abandoned, and a D-1 use variance will be  
 13 needed.  
 14 MR. SCHEPISI: We will convene with the  
 15 client and we decide whether they want to proceed with  
 16 the D-1 variance or go with another avenue approach. We  
 17 will report back to the board.  
 18 CHAIRMAN FEHER: Thank you.  
 19 (Witness excused.)  
 20 (Deposition concluded 11:20 p.m.)  
 21  
 22  
 23  
 24  
 25

1 CERTIFICATION  
 2  
 3 STATE OF NEW JERSEY )  
 : ss:  
 4 COUNTY OF BERGEN )  
 5  
 6 I, TONIANN ACQUARO, a Notary Public for  
 7 and within the State of New Jersey, do hereby certify:  
 8 That the witness whose examination is  
 9 hereinbefore set forth was duly sworn and that such  
 10 examination is a true record of the testimony given by  
 11 that witness.  
 12 I further certify that I am not related  
 13 to any of the parties to this action by blood or by  
 14 marriage and that I am in no way interested in the  
 15 outcome of this matter.  
 16 IN WITNESS WHEREOF, I have hereunto set  
 17 my hand this 12th day of May, 2016.  
 18  
 19  
 20 *Toniann Acquaro*  
 TONIANN ACQUARO,  
 Professional Court Reporter  
 21 and New Jersey State Notary, 01AC6200255  
 My Commission Expires January 26, 2017  
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 23  
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