

**VILLAGE OF HINSDALE  
SPECIAL MEETING OF THE  
ZONING BOARD OF APPEALS  
AGENDA**

**Wednesday, October 28, 2015 @ 6:30 P.M.**  
**Memorial Hall – Memorial Building**  
*(Tentative & Subject to Change)*

- 1. CALL TO ORDER**
- 2. ROLL CALL**
- 3. APPROVAL OF MINUTES**
  - a) September 16, 2015
- 4. APPROVAL OF FINAL DECISION - None**
- 5. RECEIPT OF APPEARANCES**
- 6. RECEIPT OF REQUESTS, MOTIONS, PLEADINGS, OR REQUESTS TO  
MAKE PUBLIC COMMENT OF A GENERAL NATURE**
- 7. PRE-HEARING AND AGENDA SETTING**
- 8. PUBLIC HEARINGS**
  - a) MIH v Anglin –Remand from Circuit Court of DuPage County
- 9. NEW BUSINESS**
- 10. OTHER BUSINESS**
- 11. ADJOURNMENT**

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VILLAGE OF HINSDALE  
ZONING BOARD OF APPEALS  
MINUTES OF THE MEETING  
September 16, 2015

1. CALL TO ORDER

Chairman Bob Neiman called the regularly scheduled meeting of the Zoning Board of Appeals to order on Wednesday, September 16, 2015 at 6:32 p.m. in Memorial Hall of the Memorial Building, 19 E. Chicago Avenue, Hinsdale, Illinois.

2. ROLL CALL

**Present:** Members Gary Moberly, Keith Giltner, Kathryn Engel, Rody Biggert, John Podliska and Chairman Bob Neiman

**Absent:** Member Marc Connelly

**Also Present:** Village Manager Kathleen Gargano (left the meeting at 6:44 p.m.), Village Attorney Lance Malina, Director of Community Development/Building Commissioner Robb McGinnis and Village Clerk Christine Bruton

3. APPROVAL OF MINUTES

a) July 15, 2015

Member Moberly moved to approve the minutes of the meeting of July 15, 2015, as amended. Member Engel seconded the motion.

**AYES:** Members Moberly, Biggert, Engel, Podliska and Chairman Neiman

**NAYS:** None

**ABSTAIN:** Member Giltner

**ABSENT:** Member Connelly

Motion carried.

4. APPROVAL OF FINAL DECISION

a) V-04-15, 35 East Walnut Street

Member Podliska noted what appears to be a discrepancy between when the Legal Notice was published and when the meeting was held. Staff will confirm the dates.

Member Podliska moved to approve the Final Decision for V-04-15, 35 East Walnut Street, subject to confirmation of dates. Member Moberly seconded the motion.

**AYES:** Members Moberly, Giltner, Biggert, Engel, Podliska and Chairman Neiman

**NAYS:** None

**ABSTAIN:** None

1           **ABSENT:** Member Connelly

2  
3           Motion carried.

4  
5           **5. RECEIPT OF APPEARANCES**

6           All persons expecting to testify were sworn in by the Court Reporter. Mr.  
7           Mark Daniel noted MIH has an appearance on file.

8  
9           **6. RECEIPT OF REQUESTS, MOTIONS, PLEADINGS, OR REQUESTS TO**  
10          **MAKE PUBLIC COMMENT OF A GENERAL NATURE - None**

11  
12          **7. PRE-HEARING AND AGENDA SETTING**

13          a) **V-05-15, 718 West Fourth Street**

14           Mr. Pat Wagner, the architect on the project, and Mr. Brett Conway, the  
15           homeowner, addressed the Board. Mr. Wagner stated they are before the  
16           ZBA to request relief to build an addition to the existing home. The  
17           property is located on an unusual corner measuring 123' x 47'; he believes  
18           there are few lots that size in Hinsdale. When trying to design an addition, it  
19           became problematic to stay within the approved maximum building  
20           coverage.

21           Mr. Conway said this is a three-bedroom Tudor style home; there is not  
22           much closet space, there is a small kitchen and he has three children. His  
23           family loves Hinsdale and would love to expand the home.

24           Mr. Wagner explained the scope of the proposed addition which would  
25           include a kitchen and mudroom and add a fourth bedroom.

26           Mr. Wagner referenced the drawings in the packet. He said this is a non-  
27           conforming lot, but they will maintain the 20' foot setback on the Fourth  
28           Street side. Building elevations are included; the materials will be the  
29           same as the original structure because they want the addition to look like  
30           it's always been there. They are asking for a 4½% increase in building  
31           coverage which they believe is within the realm of complying with other lots  
32           in the area.

33           Chairman Neiman suggested the applicant provide evidence, if possible, of  
34           neighbor support. He reminded the applicant to be prepared to review the  
35           standards for approval during the public hearing and to give some thought  
36           to the consequences of the addition in terms of impermeable surface.

37           The public hearing is set for October 21<sup>st</sup>.

38  
39          **8. PUBLIC HEARINGS**

40          a) **MIH v Anglin –Remand from Circuit Court of DuPage County**

41           *Due to the complexity of the matter before the Board, a transcript of the*  
42           *following proceedings is included as part of this record.*

43           Present this evening are Mr. Lance Malina, Village Attorney, here as litigate  
44           representing Village Manager Kathleen Gargano and Mr. Mark Daniel,  
45           attorney representing Mr. Mitchell Saywitz, principal in MIH.

46           Chairman Neiman explained that in April 2015 the Circuit Court of DuPage

County remanded to ZBA ordered us to decide: 1) is there evidence in the record that MIH intended to discontinue or abandon its legal non-conforming use, before the Village issued letter saying they had; and 2) associated fees paid by MIH. He also stated it is important to note these are the only issues before the Board; the future use of the property is not. Chairman Neiman also noted the ZBA is a Board comprised of volunteers, some members are lawyers, but some are not and these are legal issues before us. MIH's interest in the legal non-conforming use is a property use, and cannot be taken away without due process as set out by the remand.

Member Podliska made note for the record, that he and Mr. Malina were colleagues in the State's attorney's office from approximately 1990 to 1995. He does not believe this will prevent him from being impartial and fair. He asked if any of his fellow Board members want him to recuse himself. They did not.

Discussion followed regarding procedural issues and whether the Village or MIH has the burden of proof with respect to intent to close the garden center. Chairman Neiman asked for a supplemental brief on this matter.

He also noted the ZBA has the option of reopening, but based on the briefs, neither attorney wants that. Mr. Daniel would be interested in supplementing the record. He would have additional witnesses and subpoenas would be required. All agreed to address this issue should it become necessary.

Chairman Neiman noted Mr. Daniel has asked for a summary determination, however, the ZBA has no procedure that allows for motions for summary determinations. Mr. Daniel disagrees.

Discussion followed regarding the judges reasoning for the remand. The issue was the intent to abandon. Mr. Malina and Mr. Daniel did not agree on the reasons, but it was noted that the original hearing by the ZBA focused on the time the property was vacant. Chairman Neiman stated that the ZBA would like to avoid making any reversible errors. One way to do this would be for a motion to be filed asking the court for clarification. The Board agrees.

**Member Biggert moved to direct the parties to file a motion for clarification with the Court with respect to the issue of whether the ZBA is empowered to decide the issue of intent on the merits or whether the Court has already determined that.** (There was no second; no action was taken on this motion.)

Mr. Daniel stated that he would not file a motion of clarification with the court. It is his opinion that the direction is clear. Mr. Malina stated he would file the motion. Discussion continued regarding what the judge is directing the ZBA to do.

**Member Podliska moved to direct the parties to file a motion with the Circuit Court to advise the ZBA whether the remand gives the ZBA the**

1 **authority to determine intent on the existing record without reopening**  
2 **that record.** Member Engel seconded the motion. (No action was taken on  
3 this motion.)  
4

5 Mr. Daniel suggested clarification from the judge be sought by another  
6 attorney besides Mr. Malina or himself because they are parties in the case  
7 and he believes there is a conflict. Specifically, the Village Attorney  
8 serving as counsel to the Village Manager asking for a motion to clarify on  
9 behalf of the ZBA. Mr. Malina does not believe there is an ethical question  
10 here, he is not going to argue the merits he is simply going at the direction  
11 of the ZBA to bring a request. Discussion followed.

12 **Member Podliska moved to direct the parties to file a motion with the**  
13 **Circuit Court to clarify whether the ZBA has the authority to determine**  
14 **the issue of intent based on the existing record.** Member Engel  
15 seconded the motion.  
16

17 **AYES:** Members Moberly, Giltner, Biggert, Engel, Podliska and Chairman  
18 Neiman

19 **NAYS:** None

20 **ABSTAIN:** None

21 **ABSENT:** Member Connelly  
22

23 Motion carried.  
24

25 Mr. Malina stated he will commit to getting this motion filed by the end of  
26 week but would like to have the transcript for the judge which would obviate  
27 the need for any briefing.

28 Mr. Daniel stated for the record that he perceives this return to court for  
29 clarification as problematic because the Village Attorney is in indirect or  
30 direct communication with the ZBA.

31 Chairman Neiman asked Mr. Daniel about Mr. Horne's testimony in the  
32 original public hearing wherein he testified to his efforts to lease the  
33 property, but there was no documentary evidence of this effort. Mr. Daniel  
34 explained this was uncontested sworn testimony, and that he did not know  
35 if he could produce such evidence without searching the record.  
36

37 Member Moberly asked Mr. Daniel to clarify a comment made by Mr. Daniel  
38 wherein he suggested there was secret communication between the Village  
39 Attorney and the ZBA. Mr. Daniel clarified his concern regarding how  
40 communications had made it to the ZBA and asking for a disclosure of  
41 those communications. His concern is staff and how communications take  
42 place and at whose direction. Discussion followed regarding the  
43 scheduling of a July hearing.  
44

45 Mr. Daniel asked if the Board could consider the matter of fees. Mr. Malina  
46 summarized stating when this was brought before the ZBA, the Village

1 required MIH reimbursement of court reporter and filing fees and also  
2 Village attorney fees. Former Village Manager Cook had an attorney and  
3 the Village Attorney represented the ZBA. Judge Sheen found that not  
4 reasonable particularly for a non-home rule community. The attorney's  
5 fees add up to approximately \$61,000. Mr. Malina said that Mr. Daniel  
6 feels some of the fees are unfair; there was an additional publication and  
7 other 'unnecessary things'.

8 Mr. Daniel said the Village Manager and MIH are in Agreement that MIH  
9 paid \$65,627.23 in three payments; an application fee of \$1,100, a payment  
10 in the fall of 2008 of \$8,000 and a final payment of \$56,527.23.

11 He provided Exhibit A, a listing of attorney's fees. Exhibit B is a listing of  
12 other miscellaneous fees. The parties agree that \$3,596.25 is non-  
13 refundable to MIH as it arose from the fees fairly charged to MIH. The final  
14 order when matter is disposed of in its entirety, should include an order that  
15 the Village should refund 62,031.08 not the 3,596.25. Mr. Malina and Mr.  
16 Daniel agree.

17 There was no further discussion on this matter.

18  
19 **9. NEW BUSINESS – None**

20  
21 **10. OTHER BUSINESS - None**

22  
23 **11. ADJOURNMENT**

24 With no further business before the Zoning Board of Appeals, Member Moberly  
25 made a motion to **adjourn the meeting of the Zoning Board of Appeals of**  
26 **September 16, 2015.** Member Engel seconded the motion.

27  
28 **AYES:** Members Moberly, Giltner, Biggert, Engel, Podliska and Chairman  
29 Neiman

30 **NAYS:** None

31 **ABSTAIN:** None

32 **ABSENT:** Member Connelly

33  
34 Motion carried.

35  
36 Chairman Neiman declared the meeting adjourned at 8:14 p.m.

37  
38  
39  
40 \_\_\_\_\_  
41 Christine M. Bruton  
42 Village Clerk  
43  
44

Approved: \_\_\_\_\_

STATE OF ILLINOIS    )  
                              )    ss:  
COUNTY OF DU PAGE    )

BEFORE THE HINSDALE ZONING BOARD OF APPEALS

In the Matter of:                                )  
  )  
MIH vs Anglin,                                    )  
Remand from Circuit Court                       )  
of DuPage County.                                )

REPORT OF PROCEEDINGS had and testimony  
taken at the hearing of the above-entitled  
matter before the Hinsdale Zoning Board of  
Appeals, at 19 East Chicago Avenue, Hinsdale,  
Illinois, on the 16th day of September, A.D.  
2015, at the hour of 6:30 p.m.

BOARD MEMBERS PRESENT:

MR. ROBERT NEIMAN, Chairman;

MR. RODY BIGGERT, Member;

MS. KATHRYN ENGEL, Member;

MR. KEITH GILTNER, Member;

MR. GARY MOBERLY, Member;

MR. JOHN PODLISKA, Member.

\* \* \* \* \*

1           ALSO PRESENT:

2                   MR. ROBERT MCGINNIS, Director of  
3                   Community Development/Building  
4                   Commissioner;

5                   MS. CHRISTINE BRUTON, Village Clerk  
6                   and Board's secretary;

7                   MR. LANCE MALINA, Attorney for Village  
8                   Manager;

9                   MR. MARK W. DANIEL, Attorney for MIH;

10                  MR. MITCHELL SAYWITZ, Representative of  
11                  MIH, LLC.

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12

13                  CHAIRMAN NEIMAN: Next public hearing  
14                  is MIH versus Anglin. So why don't the  
15                  attorneys and anyone else who wishes to speak  
16                  step up and introduce yourself and I have some  
17                  thoughts on how we might proceed.

18                  MR. MALINA: All right. Fair enough.  
19                  My name is Lance Malina and I am the village  
20                  attorney but I am here this evening as a  
21                  litigant representing the village manager  
22                  Kathleen Gargano, who is actually going over to  
23                  a pension board hearing that's occurring not  
24                  quite simultaneously but fairly close and that's

06:50:00PM



1 who I am and why I'm here tonight.

2 CHAIRMAN NEIMAN: Thank you.

3 MR. DANIEL: Good evening, everyone.

4 My name is Mark Daniel, D-a-n-i-e-l. I am an  
5 attorney with Daniel Law Office in Oakbrook  
6 Terrace, Illinois. I have been practicing for  
7 quite some time in the land development side and  
8 have represented a number of municipalities as  
9 their general counsel or special counsel on  
10 zoning matters. With me tonight from MIH, LLC,  
11 is Mitchell Saywitz who is a principal of MIH  
12 who is going to see what's going on during the  
13 proceedings and I certainly want to give you the  
14 time in exchange for what you are putting in  
15 here so we do appreciate your effort.

16 CHAIRMAN NEIMAN: Thank you, Mr.  
17 Daniel.

18 Before we begin any substantive  
19 debate, I think it's important for the ZBA to  
20 explain to both the parties and to anybody in  
21 the community who might be watching why this  
22 case is here, how it got here, and what the

1 issues are and are not this evening.

2 The Circuit Court of DuPage County  
3 in April 2015 entered an order remanding the  
4 case that had gone up on administrative review  
5 and ordered us to decide a couple of issues.

6 The first issue is: Was there  
7 evidence in the record the last time this case  
8 was up that MIH, the owner of the property,  
9 intended to discontinue or abandon its legal  
10 nonconforming use of the property as a garden  
11 center before the village issued its August 5,  
12 2008, letter to MIH declaring that it had  
13 discontinued or abandoned that legal  
14 nonconforming use.

15 And there's a second issue  
16 involving fees. Those are the two main issues  
17 at least as I see it, as I read the opinion.

18 And it's important for people I  
19 think in the community who might be watching to  
20 know that those are the only issues before us.  
21 We are not here on a referendum on how the  
22 property should be used in the future. The

1 Circuit Court gave us very specific directions  
2 which we must follow.

3 The second thing that I think it's  
4 important for everybody here to understand, keep  
5 in mind that we are all volunteers, some of us  
6 are lawyers, some of us aren't, and the issues  
7 before us in this public hearing I think are  
8 very much legal issues.

9 It's important for everyone to  
10 understand that MIH's interest in the legal  
11 nonconforming use as a garden center is a  
12 property interest under the law -- the Illinois  
13 case law makes that very clear -- that cannot be  
14 taken away from MIH without due process and  
15 unless we meet the standard set out by the Court  
16 in its remand order.

17 So this is an unusual procedural  
18 setting for us. Usually we are just dealing  
19 with variances and this is a whole different  
20 kettle of fish.

21 I want to raise a few preliminary  
22 procedural issues with the attorneys and

1 everybody else should feel free to jump in at  
2 any time.

3 The first issue is this. If the  
4 Circuit Court remanded the case to us in April,  
5 how does the Circuit Court still have  
6 jurisdiction over the case to set briefing  
7 schedules and so on?

8 My understanding is when a case  
9 goes up on administrative review and it's  
10 remanded, the Court usually divests itself of  
11 jurisdiction but that doesn't seem to have been  
12 the case here. Perhaps that's because the Court  
13 remanded it with instructions. Any thoughts  
14 from the attorneys on that?

15 MR. PODLISKA: May I interrupt you just  
16 one second?

17 CHAIRMAN NEIMAN: Sure.

18 MR. PODLISKA: Before we move to  
19 anything substantive, I'd like to put on the  
20 record that Mr. Malina and I were colleagues  
21 together in the United States attorney's office  
22 from I believe 1990 to 1995. That, in my view,

1 it does not present any conflict of interest for  
2 me or in any way prevent me from being  
3 completely fair and impartial in considering  
4 this matter. We want to put it on the record  
5 and give everyone an opportunity to address that  
6 issue if they wish and to determine whether they  
7 would wish me to recuse myself as a result of  
8 that.

06:54:56PM 9 MR. DANIEL: As much as you may enjoy  
10 the time alone, we are going to keep you here.  
11 I think you are fair in disclosing that but I  
12 can't let you go. I appreciate the disclosure.

13 MR. MALINA: We actually didn't work  
14 together. We haven't talked since I left the  
15 office and not that much while I was there. And  
16 also I suggest that the only reason that  
17 Mr. Podliska knows that we worked together for  
18 those five years as opposed to the many years he  
19 worked in the office is because I told him this  
06:55:22PM 20 evening when I saw him.

21 MR. PODLISKA: That actually is  
22 correct.

1 CHAIRMAN NEIMAN: You are not as  
2 memorable as you think.

3 MR. MALINA: I am not.

4 MR. PODLISKA: We actually worked in  
5 separate parts of the building although we were  
6 both at the U.S. attorney's office together.

7 CHAIRMAN NEIMAN: Okay. So any  
8 thoughts on the remand jurisdictions?

9 MR. MALINA: Your question, Chairman  
10 Neiman, from my perspective and why the order  
11 was granted over our objection was that the ZBA  
12 should have been free to decide for itself what  
13 the schedule was.

14 Having said that, I do think your  
15 point about the fact that the remand will return  
16 to the Court and the Court had given  
17 instructions, I certainly don't think it was a  
18 point worth fighting over and the Court did set  
19 some dates but ultimately the hearing date  
20 became your choice. So that was my view on it.

21 You know this has been a hard  
22 fought case. And we probably should have been

1     able to agree to more than we have, but we have  
2     tried. And Mr. Daniel and I have had cases  
3     against each other before and these things  
4     happen. So that's my answer. Mr. Daniel?

5                 MR. DANIEL: I think it's a fair  
6     statement to say that the Court has any  
7     jurisdiction to carry out or see the enforcement  
8     of any of its prior orders.

9                 As far as the reason for it, you  
10    might recall that Larry Thompson appeared before  
11    you, it might have been in July. That was the  
12    first time that I believe that this was going to  
13    be up. The last news I had was that they were  
14    going to address this in July. I was out of  
15    town on vacation, asked for a continuance but  
16    didn't get any confirmation of that. So we sent  
17    a lawyer in in July. And after that we had  
18    issues with trying to get set up for August with  
19    a briefing schedule and that's why we had  
20    applied to the Court to say hold on a second.  
21    We can't do it so soon. We have to get  
22    information to you. Many of you weren't here.

1     Actually, I don't think any of you were here  
2     back in '08. So that being said, it was  
3     important to give you the time to receive  
4     information.

5             CHAIRMAN NEIMAN: And correct me if I'm  
6     wrong, I suspect it's fair to say that  
7     regardless of what our outcome of the case may  
8     be, one or the other of you is going to take it  
9     back up on administrative review and you may as  
10    well have a judge who know the case already.

11            MR. MALINA: Right. There's an  
12    interesting procedural issue. If the ZBA were  
13    to decide that the evidence isn't there and  
14    found that the property rights still existed, we  
15    are actually not an appellant or a plaintiff on  
16    administrative review only MIH is. So it's an  
17    interesting procedural question about when it  
18    returns to the Court where we would be, I guess,  
19    whether that proceeding would end and we would  
20    have to file a different one or whatever. But  
21    certainly if the Board were to make findings  
22    that abandonment was there, it would return to



1 Judge Sheen to allow Mr. Daniel the argument  
2 that the ZBA having further pointed to the  
3 evidence it relied on, that evidence is  
4 insufficient still to support the finding of  
5 abandonment.

6 CHAIRMAN NEIMAN: Okay.

7 MR. DANIEL: Also because of the  
8 sequence of events there are three other cases  
9 pending beyond the administrative review so it's  
10 up there anyway. We are going to be in front of  
11 Judge Sheen again at some point.

12 CHAIRMAN NEIMAN: Okay. One of the  
13 issues that I'd also like you to address just as  
14 a preliminary matter is this. The Court, on  
15 page 17 of its order, gave us the option of  
16 reopening the record if we wanted to but based  
17 on the briefs that both of you have submitted,  
18 it doesn't seem like either of you want that.

19 Is that correct that neither of you  
20 are interested in reopening the record?

21 MR. MALINA: On behalf of the manager,  
22 that is correct.

1                   We originally thought there might  
2     be a disagreement over that and that was one of  
3     the things that led to our appearing in court  
4     and fighting over the briefing schedule is  
5     Mr. Daniel and I agreed on August 2nd, I  
6     believe, he agreed that he would not seek to  
7     reopen the evidence.

8                   I, on behalf of the manager, never  
9     sought to reopen the evidence. The manager  
10    always was going to maintain that the --  
11    maintained originally that the record was  
12    adequate and continues to maintain. Although  
13    the managers and even the attorneys for the  
14    manager have changed, we maintain that.

15                  Mr. Daniel also agreed to not  
16    introduce substantive evidence on the zoning  
17    matter and so that's correct.

18                  MR. DANIEL: The progression is  
19    important on that. What Mr. Malina says is  
20    accurate.

21                  The key issue is understanding  
22    whether or not the village is going to seek to

1       reopen the record because the judge reviewed the  
2       record and said there wasn't evidence of intent  
3       and we will address that in the substantive  
4       portion. We basically weren't going to reopen  
5       the record. We informed the village that we  
6       wouldn't seek to reopen the record because the  
7       record is what it is.

8                       That's on the zoning matter. We do  
9       have some rather efficient ways to handle the  
10      fee question.

11                   MR. MALINA: We have a preliminary  
12      matter to propose to the ZBA on our own.

13                   CHAIRMAN NEIMAN: On the fee issue?

14                   MR. MALINA: On the fee issue, right.

15                   CHAIRMAN NEIMAN: Let's stick with the  
16      zoning issue for a moment. And I promise we  
17      will get to your preliminary matter in the  
18      future.

19                   Another threshold procedural issue  
20      that I'd like your thoughts on because I'm a  
21      little unclear on this and if anybody else on  
22      the board knows the answer to this, feel free to

1 tell me.

2 Who has the burden of proving  
3 whether MIH intended or did not intend to  
4 abandon or discontinue the nonconforming legal  
5 use? Who has the burden of proof here?

6 The village acted in its August 5  
7 letter, and that would seem to me to say well,  
8 if the village is trying to take away the  
9 property interest, the village has the burden of  
10 proof. On the other hand, MIH is the appellant.  
11 Thoughts?

12 MR. MALINA: My thoughts are it's  
13 unclear under the case law in this regard and  
14 the reason is twofold.

15 Normally when a property right is  
16 going to be taken away, the burden is upon the  
17 government attempting to take that property  
18 right away.

19 On the other hand, the use here is  
20 a legal nonconforming use which is a use that's  
21 in derogation of the zoning code and suffered to  
22 maintain under certain circumstances which the

1 Court have said that the village does have the  
2 authority to impose.

3 So I think ultimately it's MIH's  
4 burden of persuasion to show that it still has  
5 that legal nonconforming right of the garden  
6 center that it maintained properly. I'm sure  
7 Mr. Daniel doesn't agree but I'll let him speak.

8 MR. DANIEL: I would agree with the  
9 preliminary indication that since this is a  
10 property right, it's the village's burden to  
11 establish, the village manager's burden to  
12 establish, that there was intent to abandon and  
13 that the ZBA was making affirmative finding to  
14 intent to abandon.

15 Now we did focus on that issue so  
16 it may appear from the record that we had the  
17 burden of proving having no intent to abandon,  
18 but the fact of the matter is the nonconforming  
19 use is a property right subject to what I'll  
20 refer to as a condition subsequent.

21 Once the right is there, there are  
22 conditions that may arise later that cause a

1     loss of that right and if they are condition  
2     subsequent, I say it's a village burden but once  
3     the right is there, we all agree it was a  
4     nonconforming use, there's no need to prove on  
5     MIH's part that the right exists. The question  
6     is whether the condition subsequent happened and  
7     that's why I think it's the village's burden.

8             CHAIRMAN NEIMAN: Do you both agree  
9     that there's nothing in the case law that could  
10    give us some direction on that issue?

11            MR. MALINA: There's nothing explicit  
12    in my view that says that in this context who  
13    has the burden on that issue.

14            CHAIRMAN NEIMAN: Mr. Daniel?

15            MR. DANIEL: I am fairly certain there  
16    had to be a case that evaluated that. Frankly,  
17    coming in on the burden question, I couldn't  
18    cite one to you but the supreme courts addressed  
19    it a couple of times.

20            CHAIRMAN NEIMAN: Perhaps what we could  
21    do given that I doubt we are going to reach any  
22    final decision or even take a vote this evening

1 is if either of you would like to submit a  
2 supplemental brief on that point after having  
3 done additional research that might help guide  
4 us and avoid any new error if the case goes back  
5 up.

6 My next related question is:  
7 Whoever has the burden of proof, what is the  
8 standard of proof? Is it preponderance of the  
9 evidence?

07:04:48PM

10 MR. MALINA: Preponderance of the  
11 evidence. It's a civil matter.

12 CHAIRMAN NEIMAN: Okay.

13 MR. BIGGERT: May I ask a question?

14 CHAIRMAN NEIMAN: Please.

15 MR. BIGGERT: Mr. Malina, as I  
16 understand you to suggest that because it is a  
17 nonconforming use, that MIH therefore has the  
18 burden?

07:05:14PM

19 MR. MALINA: Well that's stated very  
20 broadly. I think it's MIH has the burden of  
21 showing it has a legal nonconforming use that it  
22 maintained and by maintaining, I mean it didn't

1       abandon it or lose it in some other way.

2                       I think on the issue of the  
3       abandonment issue stated that way, as long as it  
4       maintained the use, then the specific  
5       abandonment intent it is the village's burden to  
6       show that MIH intended to abandon.

7                       MR. BIGGERT: Okay. Because even  
8       though it's nonconforming, it still is a  
9       property right.

07:05:52PM

10                      MR. MALINA: Correct. Conceded and  
11       agree.

12                      MR. DANIEL: I think if I could raise  
13       one issue. We did cite to a first district  
14       opinion in our brief, City of Des Plaines versus  
15       LaSalle National Bank of Chicago, 44 Ill.App.3d  
16       815, and in addressing the merits of the case,  
17       the Court does speak in a passive voice  
18       unfortunately, but it was a matter where Des  
19       Plaines was arguing that their cessation of use  
20       was enough to establish abandonment of a  
21       nonconforming use. And the court said, The mere  
22       cessation of use will not necessarily result in

07:06:26PM



07:07:02PM 1 loss of the right to resume a nonconforming use  
2 and an actual intent to abandon the use must be  
3 demonstrated. So that's affirmative language.  
4 An actual intent to abandon must be  
5 demonstrated. Which for me indicates that it's  
6 not that someone has to show there was no intent  
7 to abandonment. The municipal official, zoning  
8 enforcement officer has to show intent to  
9 abandonment. That's in the last page of the  
10 opinion. I can leave a copy here this evening  
11 or circulate it now if you like.

12 CHAIRMAN NEIMAN: I have a copy of the  
13 case if anybody else would like to look at it.

14 MR. BIGGERT: He just read from it so I  
15 think we all know what it said.

07:07:34PM 16 CHAIRMAN NEIMAN: That's helpful. But  
17 if either of you would like to address the issue  
18 in a supplemental brief between now and next  
19 month, perhaps -- no obligation to do so, but if  
20 you want to, let's get both briefs  
21 simultaneously a couple of weeks from today.

22 MR. MALINA: Just to be safe, it might

1 be prudent as a body to if you were going to  
2 decide it differently under one standard or one  
3 burden and not the other, it might be good to  
4 express that in your opinion and that would make  
5 sure you don't see this again.

6 CHAIRMAN NEIMAN: That is my goal.  
7 Trust me on this. Okay.

8 MR. DANIEL: On that issue, I have to  
9 go see a niece in Florida up until the 2nd of  
10 October. Can we go until say the Thursday the  
11 following week?

12 CHAIRMAN NEIMAN: Sure. Absolutely.  
13 Whatever your schedules permit. If we have the  
14 briefs a week before or six days before.

15 MR. DANIEL: October 8th?

16 MR. MALINA: That will work.

17 CHAIRMAN NEIMAN: I don't think the  
18 briefs should be very long.

19 MR. DANIEL: Thank you.

20 CHAIRMAN NEIMAN: One more issue on the  
21 record.

22 Everybody agrees that we have the

1 option if we want to to reopen the record for  
2 some or all of it; correct? Are you in  
3 agreement on that? Even if you don't want us  
4 to, if we think we need it, we can do that.

5 MR. MALINA: You want me to speak  
6 first?

7 CHAIRMAN NEIMAN: Whoever is ready.

8 MR. MALINA: I think that the court  
9 order is addressed to you. On the other hand,  
10 litigants can agree to be bound by certain  
11 things. But my belief is that you have the  
12 authority to have the matter reopened for  
13 further evidence if you independently so choose.

14 Having said that, I also should  
15 advise you that Mr. McGinnis and I because you  
16 were simply considering the previous record were  
17 considering the original publication as covering  
18 everything because no new evidence was going to  
19 be taken. I think if you were to decide you  
20 wanted additional evidence, it would be prudent  
21 to publish as an ancillary, almost like a  
22 partially new hearing under your zoning code for

1 a public hearing. Does that make sense?

2 CHAIRMAN NEIMAN: That makes sense. I  
3 think if we were going to take new evidence,  
4 yes.

5 MR. MALINA: I wanted to let you know I  
6 don't think we could do that tonight.

7 CHAIRMAN NEIMAN: I never expected you  
8 to. How could you.

9 MR. MALINA: Legally I believe that  
10 would be impeded.

11 CHAIRMAN NEIMAN: No. No. I would  
12 never ask people to present evidence without  
13 advance notice.

14 MR. DANIEL: On the issue of reopening  
15 the record, each of the sides would also then be  
16 interested in supplementing the record at that  
17 point because it changes the context and when we  
18 look at the possibility of reopening it and  
19 whether we are going to approach you and ask you  
20 to reopen it, there is the question of who  
21 recalls witnesses and if the record was  
22 reopened, we would have additional witnesses.

1 Mr. Horne, who was the main witness, who was an  
2 employee at the time, he's no longer an  
3 employee, so we would have to have a subpoena  
4 issued from the chair to Mr. Horne. And then we  
5 would have to have subpoenas issued to some  
6 officials who were witnesses, and then you have  
7 more on the limited issue of intent to abandon.

8 CHAIRMAN NEIMAN: Let's cross that  
9 bridge when we come to it.

07:10:48PM

10 MR. DANIEL: I just wanted to let you  
11 know just to make sure we are all on the same  
12 page when it comes to the reopening.

13 CHAIRMAN NEIMAN: Yet another good  
14 reason not to reopen the record but we will see  
15 what happens. Okay.

07:11:14PM

16 One other preliminary issue that I  
17 think we should address upfront is MIH's motion  
18 for summary determination. And let me just  
19 summarize what that motion said for everyone so  
20 that we can talk through and think through how  
21 we should proceed because it affects generally  
22 how we should proceed and at least according to

1 MIH if we should proceed.

2 So first of all, to my knowledge,  
3 the ZBA has no procedure that allows motions for  
4 summary determination. Is anyone aware of  
5 anything in the code that would allow such a  
6 motion?

7 But assuming that we could consider  
8 it anyway, what MIH has essentially argued in  
9 their motion is this. The judge wrote in his  
10 April 2015 opinion that the discontinuation or  
11 abandonment requires a showing of intent.

12 We have to figure out whether there  
13 was an intent to discontinue or abandon. And on  
14 page 26 of the Court's order remanding the case  
15 to us on the issue of intent, the Court wrote  
16 that the Court was remanding the case for  
17 findings of fact not inconsistent with this  
18 order and on page 17 of the order the Court  
19 said, well, I have looked at the record and I  
20 haven't found evidence of intent and MIH in its  
21 motion says, well, if we can't -- if the ZBA  
22 can't do anything inconsistent with this order

1 and the Court has held that there was no  
2 evidence of intent of abandon, then we are  
3 bound, according to MIH, to find that there was  
4 no evidence of intent to discontinue or abandon;  
5 but here's the issue, and I'd like Mr. Daniel to  
6 address this.

7 The Court also held on page 17 that  
8 because the ZBA's prior opinion did not cite to  
9 any evidence of intent, the Court was remanding  
10 for further consideration of that issue.

11 Also on page 17 the Court wrote  
12 that it expresses no opinion as to whether MIH  
13 demonstrated the required intent to discontinue  
14 or abandon, only that there is insufficient  
15 evidence serving as a foundation for the ZBA's  
16 prior finding which requires additional  
17 exploration.

18 Also on page 17 the Court, as we  
19 have discussed, said that we could hold a new  
20 hearing, reopen the hearing if we want, and on  
21 page 26 the Court wrote that it was remanding  
22 the case for further findings on the question of

1 intent and specifically required the ZBA, if it  
2 again found intent, to make further findings  
3 regarding the state of the property going  
4 forward.

5 So theoretically, Mr. Daniel, it  
6 seems to me if the Court still has jurisdiction  
7 despite the remand, the parties could ask the  
8 Court between now and next month if your motion  
9 has merit, if our hands are tied or not, but I  
10 just don't see why given the Court's language  
11 saying ZBA make further findings of fact.

12 Explore it. If you find evidence of intent in  
13 the record, specify what it is so I know what  
14 you are talking about.

15 Given those portions of the Court's  
16 ruling, why should we still grant your motion  
17 for summary disposition?

18 MR. DANIEL: First, on the procedural  
19 question, the capacity to file requests. The  
20 Hinsdale ZBA has a practice of allowing the Code  
21 of Civil Procedure to supplement where there are  
22 no rules in administrative proceedings so that's



1       why I filed this motion for summary  
2       determination. It's been handled in a handful  
3       of cases that I have been involved in but one  
4       way or the other that's the procedural concern.

5                       On the substance if you step back  
6       to April 2009, I think it was April 16th,  
7       there's a decision issued that says we don't  
8       believe intent to abandon is a necessary finding  
9       and we are proceeding on the issue of  
10       abandonment strictly on the basis of time.

11                      But, in that decision, it also said  
12       even if intent to abandon is required, we find  
13       there was intent to abandon. So you did have a  
14       finding on the record before you now that there  
15       was intent to abandon and Judge Sheen, who is a  
16       terrific judge, former municipal attorney, knows  
17       zoning, knows how these hearings work, reviewed  
18       the record himself, primarily the November  
19       hearing transcript, and determined from the  
20       record in his view that there was no intent to  
21       abandon shown in the record. That's stated in  
22       the opinion. He did remand it because he said

1 if you reopen the hearing, you may find it.

2 CHAIRMAN NEIMAN: Only if we reopen the  
3 hearing? Is that the way you read it?

4 MR. DANIEL: That's the way I read it  
5 because you have a finding before the decision  
6 and decision concerning the finding saying on  
7 this record, there's no intent to abandon. The  
8 finding has to be reversed and remanded.

9 So I don't see that as Judge Sheen  
10 saying maybe they will find something I missed.  
11 He's saying, I looked at the record and there's  
12 no intent to abandon affirmatively in his  
13 April 2015 decision.

14 MR. MOBERLY: Is it possible it's a  
15 documentation issue? As I read the record, it  
16 seems like he relied solely on time that passed  
17 and didn't go into the other evidence such as we  
18 were looking for different -- you guys were  
19 looking for different use of the property. Did  
20 you advertise it to be as a garden center, et  
21 cetera, et cetera. So maybe is this just an  
22 issue of lack of documentation in the record

1       rather than an actual intent to abandon?

2               MR. DANIEL: Well the record could be  
3       testimonial or documentary.

4               As far as the record that we have,  
5       the bulk of the testimony arises from Michael  
6       Horne, who I mentioned before was an employee of  
7       MIH. He was the one that was responsible for  
8       marketing the property as a garden center as  
9       mentioned at the hearing.

07:18:22PM 10              The village's approach was a  
11       problem at hearing. I do agree that they didn't  
12       pursue intent to abandon where they should have  
13       and maybe it was shortsighted at the time. We  
14       raised the issue of intent to abandon and they  
15       only cursorily touched on the issue of intent to  
16       abandon and in doing so raised facts and  
17       circumstances that we had to have Judge Sheen  
18       rule were not relevant to the issue of intent to  
19       abandon such as marketing it for other uses or  
07:18:54PM 20       filing a zoning application. He explicitly  
21       stated those circumstances were not evidence of  
22       intent.

1                   So they pursued it in part but they  
2     didn't dive in because they were really focused  
3     more on the duration, the time.

4                   MR. BIGGERT: Mr. Daniel, I have a  
5     question, I guess. If the Court intended to  
6     make a finding based on the record that there  
7     was no intent to abandon, why did the Court  
8     remand the case to us? He could have issued the  
9     final order and then you could appeal, I guess,  
10    to the appellate court and gone up through the  
11    chain of Illinois courts.

12                  MR. DANIEL: If he found no evidence in  
13    the record of intent to abandon, okay, no  
14    evidence of intent to abandon, the record is  
15    sustained, he could have entered judgment in our  
16    favor but we had two incomplete issues, okay?  
17    The first was the fee issue. Unfortunately that  
18    was still out there. So there was a remand no  
19    matter what.

20                  On the zoning side of things,  
21    there's the possibility that the village manager  
22    might bring in more evidence on the basis that

1 they didn't view intent to abandon as a relevant  
2 consideration and that was actually argued on  
3 the record before Chairman Anglin and the ZBA  
4 back in 2008. So it may be that the Court  
5 remanded because the standard wasn't right at  
6 the time of hearing.

7 CHAIRMAN NEIMAN: Mr. Malina?

8 MR. MALINA: My view is that the judge  
9 did not comb the record to determine what the  
10 ZBA could have relied on and said what the ZBA  
11 did rely on in its alternative ruling was not  
12 sufficient because it was only time and there  
13 are cases that say that only time where intent  
14 is required is not sufficient and that it gave  
15 the ZBA the opportunity to specify if there were  
16 other things in the record that supported intent  
17 or to reopen the hearing.

18 Allowing the reopening of the  
19 hearing is somewhat unusual but normally an  
20 appellate judge looks at the record and then you  
21 have your shot when you have your hearing. You  
22 either put on the evidence or you didn't. If

1     you didn't have it or you missed something, then  
2     that's what you live with.

3                     I believe primarily the judge was  
4     remanding to say show me where it is if you  
5     relied on something else. And that's what we  
6     set forth with our -- our response is a combined  
7     response. Just so you know it responds to  
8     Mr. Daniel's motion and sets forth what, in  
9     essence, would be our reply brief.

07:21:38PM

10                    And that's basically our argument.  
11     We read the language of the judge differently  
12     from Mr. Daniel. We can read it the way I  
13     believe, you know, that's how I read it because  
14     it's an option, that this Board had the option,  
15     that the parties had the option to present  
16     additional evidence.

07:22:04PM

17                    MR. DANIEL: If I may? The opinion  
18     states the ZBA's findings that the activities  
19     are inconsistent with the intent to continue.  
20     And I'm paraphrasing. But he uses the language  
21     very clearly here exact quotation, Do not find  
22     any support in the record.

1                   Next sentence. The ZBA did not  
2     articulate what evidence in the record it based  
3     its conclusionary statements aside from the  
4     two-year vacancy. Further, this Court is unable  
5     to find such evidence in the administrative  
6     record of the ZBA proceeding.

7                   So it's not as though the Court is  
8     only looking at our arguments and saying well,  
9     those arguments don't raise an issue of intent.

07:22:34PM

10    The Court twice in two out of those three  
11    phrases said, I looked in the record. It's not  
12    in the record.

13                  CHAIRMAN NEIMAN: Yes, but in the next  
14    sentence the Court also says, But if the ZBA can  
15    find evidence, point me to it. And that's my  
16    struggle.

07:23:06PM

17                  Here's what I'm trying to get at,  
18    gentlemen. We would like to avoid making any  
19    reversible errors here. We would like a final  
20    decision on this case somewhere along the line.  
21    I suspect both of the parties would too.

22                  One of the ways we could clarify

1       this point and eliminate the possibility of any  
2       additional reversible error is for one or both  
3       of you to file a motion for clarification on  
4       this issue and ask the Court whether as MIH has  
5       argued we can only -- only if we reopen the  
6       record, can we find evidence of intent, or can  
7       we examine the record as it exists today and  
8       find evidence of intent. That might -- I'm open  
9       to suggestion from any of the Board members.

07:23:54PM

10               MR. MALINA: May I make one response to  
11       that before you consider?

12               CHAIRMAN NEIMAN: Sure.

13               MR. MALINA: And that is, that the  
14       Court did not have the benefit of Mr. Daniel's  
15       motion for summary judgment when we appeared on  
16       August 3rd or so when the order was entered,  
17       however, the Court was apprised that the parties  
18       intended to proceed on the record. And then  
19       Mr. Daniel, what we were fighting over was the  
20       briefing schedule because once we agreed to  
21       proceed on the record with no new evidence, the  
22       village wanted a much tighter briefing schedule

07:24:18PM



1       than Mr. Daniel was willing to agree to.

2                   The village manager didn't see the  
3       need to have an extended date. We already had  
4       the date of August 19th set aside. So once  
5       Mr. Daniel agreed that he would proceed on the  
6       record, as did I, I wanted to get it briefed  
7       within the next couple of weeks so we could be  
8       before you on August 19th and argue the record  
9       and the judge entered the order setting the  
10      briefing schedule so that's my point.

07:24:54PM

11                   CHAIRMAN NEIMAN: If the Court was  
12      apprised, Mr. Daniel, in August that the parties  
13      had agreed that the record would not be  
14      reopened, then couldn't the Court at that point  
15      said well, the whole zoning issue doesn't have  
16      to be remanded then because I already found  
17      there's nothing in the record? If your argument  
18      is right, wouldn't that be the Court's logical  
19      conclusion?

07:25:20PM

20                   MR. DANIEL: It wouldn't be. I think,  
21      first of all, the question is whether the  
22      commitment not to reopen the record remained

1 throughout the schedule. The Court authorized  
2 the schedule so that Hinsdale filed first, then  
3 we filed when Hinsdale replied and if something  
4 changed with the reopening of the record, yes,  
5 it may cause some consternation but if  
6 Mr. Karaca and Mr. Malina were in a position  
7 where they are drafting this, you know what, I  
8 know we told the judge and Mr. Daniel that we  
9 weren't going to do it but we do have to reopen  
10 the record, there was nothing binding or holding  
11 us to that. It was just setting the briefing  
12 schedule.

13 Now with that being said, the  
14 question about applying to the Court raises a  
15 question of exhausting administrative remedies  
16 because when it comes to the procedural matter  
17 of holding the hearing that the Court remanded  
18 to the ZBA, the Court can enforce that but you  
19 have primary jurisdiction over the substance as  
20 the administrative body, so we have to get your  
21 determination on that.

22 We are charged with an exhaustion

1 requirement and I think that's what we are  
2 looking at in that situation.

3 MR. BIGGERT: If we request you to go  
4 back to the Court for clarification, I don't see  
5 it as administrative exhaustion problem. And I  
6 don't think it's very burdensome on you either  
7 because it's a simple motion.

8 MR. MALINA: It is.

9 MR. BIGGERT: And as the Chairman said,  
10 we are trying to avoid a situation where we get  
11 into another series of appeals and this is not  
12 our every day type of case.

13 MR. MALINA: Nor mine.

14 MR. BIGGERT: Nor yours. Okay.

15 So I second the Chairman's idea in  
16 the sense that we are trying to avoid a  
17 situation that becomes worse. We are trying to  
18 figure this out and come up with a final  
19 decision and I think the Court's language in  
20 that opinion raises an issue of what is our  
21 mission, if you will, in this proceeding.

22 MR. DANIEL: And I just want to be

1 clear, I can't file a motion to reconsider or  
2 seek clarification on a judgment in favor of my  
3 client. It just can't be done in a timely  
4 fashion.

5 CHAIRMAN NEIMAN: No. Motion to  
6 clarify this particular issue I don't think  
7 would harm your client, I think it would help  
8 your client. And I think it might also help the  
9 ZBA.

07:27:48PM

10 We can either -- we have a few  
11 options here, okay? We could ask the parties to  
12 file a motion for clarification. We could rule  
13 on the motion, or we could defer ruling on the  
14 motion pending completion of the entire hearing.  
15 It seems to me that the third option is the  
16 least attractive.

07:28:26PM

17 Any thoughts from the other Board  
18 members on whether we should ask the parties to  
19 seek that motion for clarification or if we  
20 should rule on the motion now?

21 MR. BIGGERT: I agree with your  
22 thoughts that the third option is the least

1 attractive. And I agree with your thoughts on  
2 asking them to seek clarification.

3 MR. PODLISKA: I agree.

4 MS. ENGEL: I agree.

5 MR. MOBERLY: The lawyers all agree.  
6 I'll go along with the lawyers.

7 CHAIRMAN NEIMAN: Which means we really  
8 need your input.

9 MR. MOBERLY: It makes commonsense to  
10 me. It makes sense to me. As I read this, it's  
11 kind of unclear. They are remanding it back to  
12 us without real clear direction to the ZBA.

13 CHAIRMAN NEIMAN: All right. So  
14 perhaps, Chris, should we take a vote on that?

15 MS. BRUTON: You certainly can.

16 MR. BIGGERT: Yes.

17 CHAIRMAN NEIMAN: All right. Do I hear  
18 a motion?

19 MR. BIGGERT: A motion to direct the  
20 parties to file a motion for clarification with  
21 the Court with respect to the issue of whether  
22 we are empowered to decide the issue of intent

1 on the merits or whether the Court has already  
2 determined that. That's a little -- it could be  
3 tightened up a little bit but it's a shot.

4 MR. MOBERLY: This is on the motion,  
5 but is the question do we go back and open the  
6 hearing or go back and reopen the record?

7 CHAIRMAN NEIMAN: No.

8 MR. BIGGERT: We are not there yet.

9 CHAIRMAN NEIMAN: No.

07:30:16PM 10 I think the question is should the  
11 parties seek clarification from the Court on  
12 whether we must find that no evidence of intent  
13 exists in the record in order to be consistent  
14 in order to issue an order not inconsistent with  
15 the Court's April 2015 opinion, or are we free  
16 to examine the record and find evidence of  
17 intent and as long as we point out what that  
18 evidence of intent is, that would satisfy the  
19 Court.

07:30:56PM 20 MR. MALINA: Even if the Court  
21 disagreed it would satisfy.

22 CHAIRMAN NEIMAN: Let's talk it through

1 a little more.

2 The Court wrote that the Court's  
3 review of the record found no evidence of intent  
4 to discontinue or abandon the legal  
5 nonconforming use. But the Court also, in our  
6 view, wrote some things inconsistent with that,  
7 which is if the ZBA finds evidence of intent in  
8 the record as it exists, then they can still  
9 rule that there was evidence of intent but spell  
10 it out for us. Which is it?

11 MR. DANIEL: If I may, Chairman?

12 CHAIRMAN NEIMAN: Please.

13 MR. DANIEL: On the issue of the  
14 demonstration of intent is a fact. Okay? The  
15 demonstration of evidence of intent as a fact is  
16 something the Court is saying may or may not be  
17 in the record but I haven't found it in the  
18 record. So a fact for the purposes of this  
19 review has to be in the record. The Court is  
20 saying there's nothing in the record.

21 The judge is saying you can reopen  
22 or you can choose not to reopen. The parties

1     could ask you to reopen the hearing. And the  
2     judge isn't saying anything about what evidence  
3     may have been demonstrated, it's just saying  
4     that whatever was demonstrated is not in the  
5     record. And that's what we are here today on.

6                     And I don't know how long you want  
7     to debate the issue of whether you should ask us  
8     to go in, but I'll be frank with you, I'm not  
9     going to apply to the Court, MIH is not going to  
10    apply to the Court for clarification. We are  
11    asking you to rule on the motion. I want to  
12    save you time. I can't join in that motion. I  
13    think it's clear enough.

14                    The question is: What's in the  
15    record? And the Court is saying I have seen the  
16    record and it ain't there. Whether it was  
17    demonstrated or not by MIH, it didn't make it  
18    into the record. You have the choice to open or  
19    keep it closed.

20                    So the statements aren't  
21    necessarily inconsistent, okay? It's just a  
22    question of what evidence is in the record. And



1       there's a lot of evidence that could have been  
2       brought in the record on this. We had a time  
3       limit. We had objections. I mean, you have  
4       seen the November transcript from '08. There's  
5       really no inconsistency in that language so I  
6       have to decline on behalf of MIH to seek the  
7       clarification.

8               MR. BIGGERT: Are you telling us we  
9       don't have authority to ask you to do this?

07:33:42PM

10              MR. DANIEL: No.

11              CHAIRMAN NEIMAN: He's just saying he's  
12       not going to do it.

13              MR. BIGGERT: What if we direct him to  
14       do it?

15              MS. ENGEL: Are we supposed to go back  
16       then and read all of that information provided  
17       for us again to locate the evidence because  
18       somewhere in there it could be?

07:34:04PM

19              MR. MALINA: I view this issue  
20       different from Mr. Daniel. A lot different.

21                      I view the Court as giving the ZBA  
22       an option to take evidence or not and to point

1 more clearly to other evidence other than time  
2 because time it said is insufficient by itself  
3 in the record to determine if that's what it was  
4 relying on or is relying on now. And I have  
5 stipulated that I don't need to put on more  
6 evidence. I don't intend to unless if it's  
7 opened, I might explore it if the ZBA opened it.  
8 I think the case can be resolved as it is.

9 Having said that, if the ZBA wants  
10 a motion for clarification because it's your  
11 determination, it's your order to you, I will  
12 file the motion and express your desire.

13 CHAIRMAN NEIMAN: Well perhaps then we  
14 should debate what we think the Court directed  
15 us to do and see if we can come to a conclusion  
16 that way.

17 I focus on a passage in page 17  
18 after the Court noted that it was unable to find  
19 any specific supporting evidence in the record.  
20 In the next sentence the Court wrote, This Court  
21 expresses no opinion as to whether MIH  
22 demonstrated the required intent to discontinue

1 or abandon its use, only that there is  
2 insufficient evidence serving as the foundation  
3 for the ZBA's finding which requires additional  
4 exploration.

5 To my mind, and I am open to  
6 suggestion from other Board members, that  
7 language makes it clear that the Court was  
8 leaving it to us to examine either the record as  
9 it exists or if we chose to take additional  
10 evidence by reopening the record to determine  
11 whether as the Court wrote MIH demonstrated the  
12 required intent to discontinue or abandon its  
13 use.

14 I don't know how -- even though on  
15 the last page of the opinion the Court said  
16 don't do anything inconsistent with my opinion,  
17 and even though the Court wrote, I don't see  
18 anything in the record, the Court to my mind  
19 wouldn't have told us that it expressed no  
20 opinion on whether MIH demonstrated the required  
21 intent to discontinue or abandon its use unless  
22 the Court was giving us authority to find that

1 intent in the existing record or in a reopened  
2 record. Thoughts?

3 MS. ENGEL: I think it would take at  
4 least personally a lot more time to go through  
5 all of the information that we were provided  
6 specifically looking for evidence of MIH's  
7 intent to discontinue or not. I mean, it will  
8 take me a long time to go through all of that.

9 This is a case of first impression  
10 for me. I was -- I didn't even live in the  
11 village in 2008. So actually we had less than a  
12 week to go through all of the information that  
13 was provided but if that's where we are and  
14 where we need to be.

15 CHAIRMAN NEIMAN: I'm not suggesting we  
16 take a vote on whether or not there was evidence  
17 of intent, just whether we have authority to  
18 continue at all.

19 MR. GILTNER: So are you saying then if  
20 we go through this process and without reopening  
21 the case and let's say we decide that there is  
22 intent, so we are trying to avoid a situation

1       where there's going to be further challenge at  
2       the court level, right?

3               CHAIRMAN NEIMAN:   Yes.

4               MR. GILTNER:   So that to me seems  
5       unreasonable for us to try to find that out now.

6               MR. PODLISKA:   So the question is that  
7       we seek clarification is:  Has the Court given  
8       us the authority to determine intent solely by  
9       examining the existing record it?

07:38:28PM

10              MR. GILTNER:   Without reopening it.

11              CHAIRMAN NEIMAN:  I guess that's right.

12              MR. BIGGERT:  I think our authority to  
13       open the record he says you can do it if you  
14       want; however, he has these inconsistent  
15       statements.  He says, I don't find it in the  
16       record and yet he goes on to suggest you, ZBA,  
17       can do whatever you want with respect to fact  
18       finding and make your decision and you have  
19       raised the issue of whether in order to make  
20       this case proceed clearly without any procedural  
21       defects, the idea of asking the parties to go  
22       back with a simple motion to the Court to

07:39:00PM

1 clarify this inconsistency Mr. Daniel has raised  
2 it in his motion for summary determination.

3 He's saying to us that you don't have any  
4 authority to go further because that's what the  
5 Court said. Mr. Malina disagrees with that, and  
6 we have caught the issue and that's where it is.

7 I don't think it has anything to do  
8 with whether we have the authority to reopen the  
9 record or not it has to do with what our  
10 authority is with respect to determining the  
11 case on its merits.

12 MR. PODLISKA: I agree, but the point  
13 being do we have the authority if we choose not  
14 to reopen the record, do we have the authority  
15 on this record to determine intent because the  
16 motion for summary disposition essentially says  
17 that we don't. That if we don't without a  
18 reopened record, without additional -- on this  
19 record alone, it's the position of MIH that the  
20 Circuit Court has already determined that this  
21 record is insufficient to establish that.

22 Now the question is: Has the Court

1 given us the authority to make a determination  
2 on this record, on the existing record, of  
3 whether or not there was intent. That's what we  
4 need clarification. Put that way then it's  
5 simply yes or no from the Circuit Court. Can  
6 you tell us yes; can you tell us no on that  
7 question?

8 CHAIRMAN NEIMAN: Okay. So given it  
9 seems to be the consensus of the Board that we  
10 would like one or both of the parties, depending  
11 on whether or not Mr. Daniel is willing to  
12 participate, and I don't think we can force you  
13 to file any motion you don't want to file, but I  
14 think it seems to be the consensus that we would  
15 like one or both parties to seek clarification  
16 on that point from the Court.

17 So, John, would you care to make a  
18 motion in that regard? Phrase it just the way  
19 you said it a few minutes ago if you can.

20 MR. PODLISKA: I can so move.

21 MR. BIGGERT: She could read it back if  
22 you want. The court reporter could read it back

1 for you.

2 MR. PODLISKA: We are asking the  
3 Circuit Court to advise us whether in the  
4 Court's remand order this Board has been given  
5 the authority to determine intent on the  
6 existing record without reopening that record.

7 CHAIRMAN NEIMAN: Do I hear a second on  
8 that motion?

9 MS. ENGEL: Second.

07:42:26PM

10 CHAIRMAN NEIMAN: Roll call, please.

11 MR. MOBERLY: I think Mr. Daniel wants  
12 to say something.

13 MR. DANIEL: Yes. A lot of concerns on  
14 this. We weren't part of any of the  
15 communications leading up to the meeting  
16 scheduling or the rumored July meeting. I have  
17 a real concern about either of us stepping up in  
18 front of the judge with a message from the ZBA  
19 that they would like clarification.

07:42:54PM

20 CHAIRMAN NEIMAN: Why not?

21 MR. DANIEL: The chairman and members  
22 are individually by reason of coming into office



1 parties in the case. So you could independently  
2 seek clarification through another attorney  
3 outside of one working in either of our law  
4 offices for example. Because we are parties in  
5 the case. On that side of things it's just a  
6 conflict question. When it comes to the way of  
7 motions --

8 CHAIRMAN NEIMAN: What's the conflict?

9 MR. DANIEL: How the village attorney  
10 serving as counsel to the village manager goes  
11 in on behalf of the ZBA to advance the request  
12 for clarification.

13 MR. BIGGERT: Okay. What's the problem  
14 with that?

15 MR. DANIEL: We are asking you for an  
16 independent determination. It's almost as if  
17 the judge asked me to go find out something for  
18 him and I do as a party in the case. You don't  
19 do it.

20 MR. BIGGERT: You are counsel of  
21 record.

22 MR. MALINA: I think it can easily be

1       done. I think there's no ethical question at  
2       all. I'm not going to argue the merits of your  
3       clarification frankly because I don't agree it's  
4       necessary, but it's your right to seek it, and  
5       I'm simply going at the direction of the ZBA  
6       carry your request as the remanded  
7       administrative body back to the judge. I don't  
8       intend to argue it because I don't think it was  
9       necessary but the judge can just answer it.

07:44:18PM

10               MR. DANIEL: There has to be a prayer  
11       in the motion and the minute that someone says,  
12       Judge, I would like for you to do this --

13               CHAIRMAN NEIMAN: No, the prayer in the  
14       motion could simply be wherefore, we ask the  
15       Court for clarification on this certain  
16       question. Completely nonpartisan.

07:44:44PM

17               MR. DANIEL: Neither party has the need  
18       for clarification. It's the ZBA. And you have  
19       the ability to go into the courthouse and ask  
20       for that clarification.

21                       That said, the motion itself is  
22       phrased in a way where we are arguing that you

1 don't have any authority to make a finding on  
2 intent, okay? I'm just trying to be particular  
3 because everyone else is being very careful.

4 The fact of the matter is I'm not  
5 saying that you don't have the authority to make  
6 a finding on intent. I'm saying because the  
7 judge reviewed the record, there's only one  
8 finding that you can make. You have the  
9 authority to make the finding. The question is:  
10 Do you have the authority to make a finding  
11 inconsistent with the statement on page 17?

12 CHAIRMAN NEIMAN: But that is precisely  
13 the question which we are asking, Mr. Daniel.

14 MR. DANIEL: It's not how it was  
15 phrased that's all. You have authority. It's  
16 just a question of whether you have to make this  
17 inconsistent with the page 17 language.

18 CHAIRMAN NEIMAN: Well, there's a lot  
19 of language on page 17, it goes both ways and  
20 that's the issue. And in order for us to know  
21 what we must be consistent with, the question is  
22 must we be consistent with the portion on

1 page 17 where the Court said I don't think  
2 there's evidence of intent, or with the portion  
3 of the order on page 17 where the Court said  
4 ZBA, go examine the record again and if you find  
5 evidence of intent, let me know where it is. So  
6 nice try but that doesn't work.

7 MR. PODLISKA: Well, I think we can fix  
8 that by simply saying we are asking whether we  
9 have the authority to find intent or the lack of  
10 intent.

11 MR. BIGGERT: Stick with the motion the  
12 way you first phrased it.

13 MR. PODLISKA: But -- because that is  
14 your argument. Your argument is we have the  
15 authority to find intent but we are just bound  
16 by what the Court has already determined to find  
17 it only one way. So the question is: Do we  
18 have the authority to find it one way or the  
19 other?

20 MR. MALINA: Actually, the more I think  
21 about procedurally where this is I think the  
22 motion that I would bring would be on behalf of

1 the village manager, which is I'm trying to get  
2 this case done. The ZBA felt they didn't have  
3 the resources to do that in response to the  
4 remand and we need the Court to clarify what the  
5 ZBA is to do so that I can get a decision from  
6 you on behalf of the manager.

7 MR. GILTNER: Why do you think it's not  
8 necessary to do?

9 MR. MALINA: Why? Because to me -- and  
10 people read things differently. I read Judge  
11 Sheen as saying, you know, I haven't seen it in  
12 the record but if it's there, show it to me and  
13 I'll look at it. That's how I read it.

14 I don't think it's -- very  
15 respectfully, you know, I don't see the  
16 ambiguity but that's why you are there. You are  
17 there to provide your own perspective and so I  
18 respect that. I don't agree with it but I  
19 respect it.

20 MR. DANIEL: I just hope you are clear  
21 on what the position is with page 17 language.  
22 The judge said, I reviewed the record and in two

1 sentences says it's just not there. There's no  
2 evidence of intent to abandon in the record.

3 CHAIRMAN NEIMAN: And in the next  
4 sentence --

5 MR. DANIEL: Please let me finish,  
6 Mr. Chairman. That's where I'm going next.

7 In the next paragraph, in the next  
8 paragraph the -- it's a distinct paragraph, the  
9 judge says because the ZBA may not base its  
10 finding of discontinuation or abandonment solely  
11 on the two-year vacancy and does not site other  
12 specific evidence supporting its decision, this  
13 matter is remanded back to the ZBA for further  
14 consideration.

15 The next sentence says, This Court  
16 expresses no opinion as to whether MIH  
17 demonstrated the required intent to discontinue  
18 or abandon its use, only that there is  
19 insufficient evidence serving as the foundation  
20 for the ZBA's finding which requires additional  
21 exploration.

22 So let's break that up. No opinion

1 as to whether MIH demonstrated the required  
2 intent. MIH didn't come into the hearing to  
3 prove intent. That is a statement of the  
4 collection of facts outside of the record. He's  
5 saying maybe it's there outside of the record.  
6 It's up to you to reopen it and let it in but  
7 it's not there now. Okay?

8 There's no way MIH would come into  
9 the hearing and show intent to abandon. That is  
10 a statement of the condition of the evidence  
11 that may be outside of the record that the Court  
12 couldn't find because it wasn't brought into the  
13 hearing.

14 Now that the record stays the same  
15 it's not coming into the hearing and that's why  
16 this is binding on the ZBA. That's why we filed  
17 the motion. I just want to make sure you are  
18 clear on that.

19 It's a question of what from the  
20 pool of facts outside of the record did we all  
21 decide to bring before the ZBA under oath and  
22 what is still out there that was never brought

1 in. The stuff that's out there may be where MIH  
2 demonstrated intent. That's again a statement  
3 of the condition of the facts outside of the  
4 record. A demonstration of intent. But we at  
5 hearing had no demonstration of intent on our  
6 part or by the village because the Court  
7 reviewed the record and said there was no  
8 demonstration of intent. Okay? I just want to  
9 be clear so you have that explanation. That's  
10 why we seek further that there was no  
11 inconsistency in that language.

07:50:28PM

12 CHAIRMAN NEIMAN: Okay. The consensus  
13 of the Board is that we do see at least a chance  
14 of -- I wouldn't say an inconsistency. We are  
15 just not clear on what authority we have.

16 So, John, you want to give it a try  
17 for a third and final time?

18 MR. PODLISKA: We are asking the  
19 Circuit Court to clarify whether the ZBA has the  
20 authority to determine the issue of intent one  
21 way or the other based upon the existing record.

07:51:08PM

22 CHAIRMAN NEIMAN: Second?



1 MS. ENGEL: I'll second the motion.

2 CHAIRMAN NEIMAN: Roll call, please?

3 MS. BRUTON: Member Moberly?

4 MR. MOBERLY: Yes.

5 MS. BRUTON: Member Giltner?

6 MR. GILTNER: Yes.

7 MS. BRUTON: Member Biggert?

8 MR. BIGGERT: Yes.

9 MS. BRUTON: Member Engel?

07:51:30PM 10 MS. ENGEL: Yes.

11 MS. BRUTON: Member Podliska?

12 MR. PODLISKA: Yes.

13 MS. BRUTON: Chairman Neiman?

14 CHAIRMAN NEIMAN: Yes.

15 Mr. Daniel, you are free to join  
16 that motion, oppose that motion, whatever you  
17 want to do.

18 We would, however, appreciate it if  
19 the motion could be filed promptly and in my  
07:51:52PM 20 view it doesn't require briefing but that's for  
21 the Court to decide and we certainly would like  
22 direction from the Court before next month's

1 hearing if that's possible, but again, that is  
2 up to the judge, he wears the robe.

3 MR. MALINA: I'll commit to getting the  
4 motion filed by the end of the week. I think it  
5 would be helpful for the judge, depending on  
6 when the transcript can be prepared, to have the  
7 transcript, and then I don't think any briefing  
8 is necessary because everything is on the  
9 record, including our position, your position,  
10 and the Court can just rule.

07:52:22PM

11 MR. DANIEL: If I may? I just have an  
12 issue now that the motion is passed, I need to  
13 make a record on behalf of my client. But we  
14 perceive this issue of returning to the Court on  
15 this motion that was approved to seek  
16 clarification as problematic because the village  
17 attorney who is charged with the enforcement of  
18 the code was in direct or indirect communication  
19 with the zoning board either with your staff or  
20 directly in scheduling this. We are concerned  
21 about that because somehow there had to be  
22 communication and we haven't seen disclosures,

07:53:00PM

1 and we have raised that with counsel. And now  
2 we have a judgment in April, the time for motion  
3 to reconsider having been passed. We are here  
4 for a hearing and a decision on a property  
5 that's valued at millions of dollars and we have  
6 the village who could have shortly after the  
7 decision gone in on a motion to reconsider but  
8 didn't.

07:53:32PM 9 CHAIRMAN NEIMAN: We are not asking the  
10 Court to reconsider anything; we are asking for  
11 clarification of the existing order. It's not  
12 reconsideration of anything, Mr. Daniel.

13 MR. DANIEL: We are going to have to  
14 see where that goes. I just mention that for  
15 the record.

16 Is there anything else on the  
17 zoning front tonight?

07:53:58PM 18 CHAIRMAN NEIMAN: I have a question  
19 that I'd like to ask about that. As I read the  
20 transcript, when you put Mr. Horne on the stand,  
21 he testified as to all of the marketing and  
22 other efforts to lease the property and so on

1 but there was no documentary evidence introduced  
2 that I recall regarding what the billboards  
3 seeking to lease the property actually said or  
4 what the advertisements in the newspapers or on  
5 the web said or what the marketing materials  
6 taken to the shopping centers, meetings around  
7 the country said about whether or not MIH was  
8 marketing it as a garden center or for some  
9 other non-garden center development.

07:54:56PM

10 Why was there no documentary  
11 evidence submitted and only testimony?

12 MR. DANIEL: Because it was uncontested  
13 sworn testimony. There was no one that  
14 presented evidence that we did not market it to  
15 the six or seven other garden centers that were  
16 mentioned under oath and there was no one  
17 presenting counterevidence of the effort to  
18 reuse it, the effort to preserve the building.

07:55:24PM

19 CHAIRMAN NEIMAN: Well, it seems to me  
20 that if the marketing materials were consistent  
21 with the use as a garden center, it would have  
22 been in your interest to introduce that

1 evidence.

2 MR. DANIEL: You had no one that was  
3 contesting it. No one at all that was  
4 contesting it. It was sworn testimony  
5 uncontradicted by any fact in the record.

6 Mr. Horne testified that --

7 CHAIRMAN NEIMAN: Mr. Horne didn't  
8 testify that he marketed it only as a garden  
9 center. He just talked about how he marketed  
10 it.

11 MR. DANIEL: No. That's not accurate.  
12 He stated he marketed it to particular garden  
13 centers and talked about the competitive  
14 advantage Home Depot has in the area, Lowe's and  
15 the others and why the smaller garden centers  
16 that would use the space find it difficult in  
17 the economy and the market that we faced at the  
18 time and he listed garden centers under oath and  
19 that was uncontested. That's all you need and  
20 that's all that's there.

21 CHAIRMAN NEIMAN: And if we were to ask  
22 to reopen the record for MIH to supply us with

1       those marketing materials, could you do that?

2               MR. DANIEL: I can't tell you that  
3       without searching it. But I can tell you right  
4       now that you have plenty of people that would be  
5       able to testify to that.

6               If you want to go fishing on the  
7       issue of intent, there's plenty of intent.  
8       There's a lot of it. You have architects sworn  
9       testimony. You have the configuration of the  
10       building with utilities in the south end of the  
11       building serving the north end of the building.  
12       You have pipes for it. There's a lot that we  
13       didn't get into at the hearing because of  
14       Mr. Anglin's rather surprise time limitation.  
15       There's a lot we didn't get into at hearing.

16              CHAIRMAN NEIMAN: Okay.

17              MR. MOBERLY: I just want to ask --  
18       push back a little bit. At the July 15th  
19       meeting MIH -- one of your colleague was here  
20       and MIH was not on the agenda.

21              As I understand the August meeting,  
22       I was all set to come to the August meeting,

1       there was not a quorum. So you made some  
2       comment that there was secret communication  
3       between the village attorney and the ZBA, I'm  
4       pushing back on that. I'm on the ZBA. I heard  
5       nothing to that affect, just that we did not  
6       have a quorum for the August meeting.

07:57:36PM 7               MR. DANIEL: What I am saying is there  
8       was a concern expressed to the village attorney  
9       about how communications had made it to the ZBA  
10       and asking for a disclosure of those  
11       communications. Because somehow the ZBA,  
12       whether it's the chairman or the body, had to  
13       receive information about this. Somehow  
14       somebody had to tell Mr. Karaca that there was  
15       going to be a hearing in July when I had no  
16       communication whatsoever other than through  
17       Mr. Karaca that there was going to be a hearing  
18       in July and then I got no information telling me  
19       there wouldn't be so we sent a lawyer in, okay.

07:58:04PM 20               Now setting the expense aside, the  
21       question is why do I find myself on the outside  
22       of the communication loop with the body holding

1 the decision-making authority when the attorney  
2 who is on the other side of the case from me  
3 seems to know everything. I'm just curious  
4 about that. It may not have been Mr. Karaca or  
5 Mr. Malina. I appreciate both of their legal  
6 skills. Mr. Malina is a very ethical attorney.

7 My concern is staff, and how did  
8 the communication take place and at whose  
9 direction. And I'm wondering how it is that we  
10 get to the level of having this approach to the  
11 Court where both of us say it's not necessary  
12 and now the village manager is saying you know,  
13 I don't mind doing that, I'll go in and seek  
14 that clarification.

15 MR. MOBERLY: I was here on July 15 and  
16 it was not on the agenda. And I was as shocked  
17 as anybody to see the gentleman here.

18 MR. MALINA: I don't want to get into a  
19 subset of arguments which I think are  
20 unproductive. My liaison -- our liaison with  
21 the ZBA is Miss Bruton, who is the clerk.

22 When we got the order, along with



1 me sending it to Miss Bruton, Miss Gargano and  
2 Mr. McGinnis, who are the contacts, it appeared  
3 from our reading we have some things in common  
4 in the sense that I think we all agree it wanted  
5 the ZBA do something. I thought I knew what it  
6 meant. Mr. Daniel thought he knew what it  
7 meant. Maybe we didn't. But I think we can all  
8 agree it wanted you all to get together and talk  
9 about it and so a date had to be set.

07:59:44PM

10 As far as any miscommunications, I  
11 mean, I don't want to get into it. As far as  
12 I'm concerned, Mr. Daniel knew that the July  
13 date wasn't going to go forward in any  
14 substantive way but it was already on the agenda  
15 and so we wanted it to simply not pull it off.

08:00:10PM

16 All there is is what there is. I  
17 think the review could be done on the record.  
18 I'm ready to go. I want this done. I am not  
19 trying to delay it. I would never have tried to  
20 put any kind of thing into the mix that would  
21 cause any puppeteering to delay this because  
22 that's the last thing I want. That's why I

1       couldn't agree with a briefing schedule with  
2       Mr. Daniel. I thought this should have been  
3       done in August.

4                       As a matter of fact, I wish the  
5       judge would have ruled on the record, which he  
6       had the power to do, as any appellate court  
7       does, but he didn't and he's the judge and so I  
8       go with that.

9                       MR. DANIEL: Just so that we are clear.

08:00:36PM

10       I had asked for the line of communication a long  
11       time ago and I got responses to the affect of  
12       there's been no communication between me,  
13       Mr. Karaca and any attorney or Lance --

14                       CHAIRMAN NEIMAN: Who is Mr. Karaca?

15                       MR. DANIEL: He works --

16                       MR. MALINA: He's my partner.

17                       MR. DANIEL: -- with Mr. Malina.

08:01:00PM

18       Denying there's communication between the  
19       attorney and ZBA is one thing. I want the staff  
20       link so I knew and I had that confidence.

21                       I heard Mr. Malina say it was done  
22       through the ZBA's secretary. As we filed our

1       briefs, we sent notes into Chris and said,  
2       please take this in your capacity as secretary,  
3       we copied it to each other. I didn't see that  
4       when it came to the decision making or the July  
5       meeting and that was a concern. That's why I  
6       had to raise it. I did not hear that mode of  
7       communication and I wasn't part of that  
8       communication.

08:01:30PM 9               CHAIRMAN NEIMAN: Mr. Daniel, maybe I  
10       can try to clear up your concerns. At least as  
11       I recall, I first heard about the fact that this  
12       case had been remanded from Miss Bruton and I'm  
13       not positive about that, but I'm pretty sure. I  
14       don't know how Miss Bruton found out but when  
15       she knew that the case had been remanded, I  
16       believe she informed me and I said, okay, put it  
17       on the agenda.

08:02:02PM 18               Until tonight, to my knowledge, I  
19       have never seen Mr. Malina. I have never talked  
20       to Mr. Malina. I don't know if anybody else  
21       has. But the only way, as I recall, the case  
22       got on the July agenda was Chris informed me

1     that the case had been remanded and I said, oh,  
2     I guess we ought to put it on the agenda.  There  
3     was nothing nefarious.

4             MR. DANIEL:  You have to understand  
5     that in protecting your client, you have to make  
6     sure there's proper notification.

7             CHAIRMAN NEIMAN:  I don't have a  
8     client, sir.  I'm sorry, I don't have a client.

9             MR. MALINA:  He means him.

08:02:30PM 10            MR. DANIEL:  You need to make sure  
11     that's the line of communication.  Because you  
12     are not part of the communication that initiated  
13     the process, okay?  And I needed to make sure  
14     that it did not go directly from Klein Thorpe to  
15     the ZBA with communications that I was unaware  
16     of or that it didn't go from Klein Thorpe to the  
17     mayor and down to the ZBA.  If it went to the  
18     secretary for the ZBA in the ordinary course  
19     that we file our materials, there's not an  
20     issue.  It's just that it could have been  
21     disclosed two months ago when I asked.

22            CHAIRMAN NEIMAN:  We didn't know you

1 had asked.

2 MR. DANIEL: I understand that. But no  
3 one wants to be in the position of having to  
4 raise the issue of communication in front of a  
5 panel of volunteers like you guys. It's not as  
6 if I intended for that to be disrespectful, I  
7 just wanted to understand the line of  
8 communication.

9 CHAIRMAN NEIMAN: I hope I have cleared  
10 that up for you.

11 MR. DANIEL: Okay. So that is cleared  
12 up.

13 CHAIRMAN NEIMAN: So does any of the  
14 other Board members have any other questions for  
15 this evening?

16 MR. MOBERLY: Can I ask a really dumb,  
17 obvious question to Mr. Daniel? So if we say  
18 yes, God bless you, next month, are you guys  
19 putting up a garden center? Can I buy my  
20 Christmas tree on that property? What are the  
21 plans for the property?

22 MR. DANIEL: As for the plans for the

08:04:06PM 1 property, there would be the continuing  
2 marketing of the garden center. There would  
3 have to be some work done on the site to put it  
4 in the position of being occupied as a garden  
5 center depends on which portion is being  
6 occupied and where. Then we have the balance of  
7 the consideration of the parking lot as to  
8 capacity for uses to the west. It had been  
9 ongoing since Bo Proczko was the administrator  
10 and Hinsdale Orthopaedics and ManorCare might be  
11 using the parking lot pursuant to a license that  
12 was encouraged by the village manager some time  
13 ago.

14 MR. MOBERLY: So Cassim Gallery has  
15 moved out, like, this month. I don't know if  
16 that changes your plans or not but they have  
17 officially moved.

08:04:28PM 18 MR. DANIEL: They may have materially  
19 be closed, they may have had their 40th going  
20 out of business sale.

21 MR. MOBERLY: I know. All I know I  
22 bought from them in June and we were shocked to

1 find out in August they were gone. They said we  
2 have moved and they have the address in the  
3 window.

4 MR. DANIEL: But there's intent to go  
5 ahead and market --

6 MR. MOBERLY: The whole entire parcel  
7 as a garden center. Okay.

8 MR. DANIEL: Demising could change  
9 depending on the tenant but generally, you are  
10 going to have re-occupancy of the building and  
11 intent to find someone that can re-occupy it and  
12 then make the effort.

13 MR. GILTNER: Just can I ask another  
14 question just related to that?

15 How is the garden center defined if  
16 we can just talk about this generally?

17 MR. DANIEL: Paraphrase the special use  
18 ordinance allowed a litany of maybe 26 different  
19 uses and those uses in one way, shape or form  
20 were in progress over time at the property. So  
21 Walter E. Smithe became another furnishings,  
22 Cassim, Amlings and their use ran the gamut from

1 outdoor furnishings to plants to garden  
2 equipment, lawnmower service and that kind of  
3 routine.

4 So all those items were within the  
5 uses that the Morris family had had since  
6 decades ago. It's risky to paraphrase what they  
7 are because the minute I say something, I'm  
8 mistaken.

9 MR. GILTNER: I understand.

08:05:58PM

10 MR. MALINA: And that raises an issue  
11 that is not before the Board, but a special use  
12 is different from a legal nonconforming use.

13 A legal nonconforming use is  
14 determined objectively by looking at the history  
15 of the use at the time that the zoning code made  
16 it nonconforming and different people can  
17 disagree over what that shows.

08:06:24PM

18 A special use is listed out. And  
19 the way the village dealt with the annexation of  
20 this parcel is rather than not defining it and  
21 treating it as a legal nonconforming use and  
22 being silent on that and just letting the legal



1 nonconforming provisions govern, it created a  
2 special use.

3 One interesting thing about the  
4 judge's ruling is is that Judge Sheen found that  
5 the special use was lost because it was  
6 abandoned which ends up leaving a legal  
7 nonconforming use having more protection than a  
8 special use in this particular case. So there  
9 are interesting things out there.

08:06:54PM

10 What's before you is the record,  
11 the legal nonconforming use. You may have other  
12 questions that may play into your decision. All  
13 I can tell you is I'm willing to go on the  
14 record as it stands any time you are ready and  
15 if you want more, I'll respond the best way I  
16 can.

08:07:16PM

17 MR. DANIEL: On the special use side,  
18 there was no issue of the intent to abandon  
19 coming up in his decision. It was a very short  
20 portion in the opinion.

21 On the procedural part of tonight,  
22 we do have a matter of fees that we should be

1     able to dispose of, get the material in the  
2     record and have that clarified. We are both  
3     ready to do that at this point in time. We have  
4     a court reporter here, we may as well.

5             MR. MALINA: That's what I was going to  
6     try to take care of first but we can do that. I  
7     agree.

8             CHAIRMAN NEIMAN: Given the Court's  
9     opinion, are you maybe even in agreement on  
10    this?

11            MR. MALINA: I think so.

12            CHAIRMAN NEIMAN: Oh, good.

13            MR. MALINA: I believe I am. But we  
14    will see.

15            CHAIRMAN NEIMAN: Famous last words.  
16    Go ahead.

17            MR. MALINA: Can I summarize?

18            MR. DANIEL: Okay.

19            MR. MALINA: So back when this was  
20    brought before the ZBA and the hearing was held,  
21    the village's code required Mr. Daniel's client  
22    to reimburse the village for the costs of the

1 fair.

2 He felt there was an additional  
3 publication that was done for some hundreds of  
4 dollars and certain things that were done that  
5 were unnecessary that his client was made to  
6 bear the cost of. He wanted to have a sub  
7 hearing about that. I thought we agreed not to  
8 have a hearing.

9 What I agreed to do is to stipulate  
10 that those costs over and above what the two  
11 attorneys are are to be taken as part of the  
12 argument about the two attorney's fees and if we  
13 lose, we are going to reimburse Mr. Daniel's  
14 client for the two sets of attorney's fees plus  
15 those out-of-pocket costs which are a couple  
16 thousand.

17 So Mr. Daniel wants to get some  
18 exhibits in the record and I'm prepared to  
19 stipulate to those. Is that fair, Mr. Daniel?

20 MR. DANIEL: I think to the extent  
21 there are any clarifications, we are going to  
22 cover it with this.

08:08:48PM

1 hearing, which included the court reporter and  
2 filing fees set by code, but in addition,  
3 required the applicant to pay for the village's  
4 attorneys' fees both Mr. Cook at the time had  
5 counsel that sort of prosecuted the case on  
6 behalf of the manager the way I'm doing tonight  
7 and the ZBA had the village attorney Mr. Ken  
8 Florey at that time advising the ZBA as an  
9 attorney and MIH had to pay for both those sets  
10 of attorneys because under the code it was  
11 viewed as reimbursing for costs when you have  
12 somebody that wants to pursue something.

13 Judge Sheen found that not  
14 reasonable. Particularly for a non-home rule  
15 community. I'm not saying whether we are going  
16 to challenge that or not, but what we did try to  
17 do is to clarify what that number would be  
18 because Judge Sheen wanted it clarified.

08:09:14PM

19 So coming into tonight the two  
20 attorney's fees if you add them all up added up  
21 to about 61,000. Very broadly, 61,000. There  
22 are some costs which Mr. Daniel feels were not

1                   We have two exhibits that I'll work  
2     with the court reporter on. Group Exhibit A and  
3     Group Exhibit B. And what I'll do is describe  
4     these exhibits for the ZBA and we would just  
5     like to have them a part of the record.

6                   In general, I'd like to first  
7     recite the stipulation as far as the evidence on  
8     the fees is concerned and I'll do it as  
9     concisely as we can here.

08:10:54PM

10                  The village manager and MIH are in  
11     agreement that MIH paid an aggregate amount of  
12     \$65,627.23. They did that over the course of  
13     three payments. There was an application fee of  
14     \$1,100, a payment in the fall of 2008 of \$8,000  
15     and a payment later in the amount of \$56,527.23.  
16     All of that is already in the record, okay?  
17     This is trying to outline what was paid.

18                  CHAIRMAN NEIMAN: And that's exclusive  
19     of attorneys' fees.

08:11:44PM

20                  MR. DANIEL: No. This is what we paid  
21     regardless. I'm just listing the payments now,  
22     okay?

1                   So that the total payments that the  
2 parties agree to are \$65,627.23. All right. At  
3 this point in time, the parties agree that none  
4 of the fees or costs from Fuchs & Roselli, the  
5 law firm that represented Mr. Cook, are  
6 recoverable.

7                   MR. MALINA: We agree that's what the  
8 judge ordered, yes.

9                   MR. DANIEL: We also agree that none of  
10 the fees or costs from Robbins Schwartz Nicholas  
11 Lifton & Taylor can be recovered according to  
12 the judge's ruling.

13                  MR. MOBERLY: What exactly did they do?

14                  MR. DANIEL: They were the attorneys  
15 for the ZBA.

16                  MR. MALINA: They advised you.

17                  MR. MOBERLY: Okay.

18                  MR. DANIEL: Now, mashing because of  
19 the difference in the position, I chose not to  
20 bring in Fuchs & Roselli's fees because  
21 obviously Fuchs & Roselli is an attorney for our  
22 opponent at the time and that's easy enough for

1 me to work on if there's an appeal.

2 When it comes to the attorney's  
3 fees for Robbins Schwartz Nicholas Lifton &  
4 Taylor, we have Group Exhibit A, which comprises  
5 a summary sheet and billings from Robbins  
6 Schwartz for the work done in this case. Okay.  
7 And the amount of the billings, in my view, is  
8 not relevant, okay, because we only paid  
9 \$65,627.23, but I believe the amount is  
10 substantially in excess of what Mr. Malina  
11 stated but again, it's a matter of recollection.  
12 I think it may have been 83 by one firm and more  
13 by another. It may have been 83 combined but  
14 the fees are more than we paid. All right.

15 Now, when it comes to Judge Sheen's  
16 -- I just want to make sure we are agreed on  
17 these --

18 MR. MALINA: What's at issue is the 65  
19 is the total you paid, right?

20 MR. DANIEL: \$65,627.23 we agree on  
21 that. And we agree that the judge ordered that  
22 none of the Fuchs & Roselli fees and costs and

1 none of the Robbins Schwartz fees and costs are  
2 recoverable, correct?

3 MR. MALINA: Correct. And that leaves  
4 us with an amount that's a couple thousand  
5 dollars below what you want.

6 MR. DANIEL: Right.

7 Right now the village manager's  
8 position was that costs according to what we  
9 will call Group Exhibit B, amount to \$4,264.25.  
10 426425. From that we had two unnecessary legal  
11 notices they issued at a cost of \$650 for one  
12 and \$378 for another. The amount of agreed  
13 costs that the village under Judge Sheen's order  
14 was entitled to obtain from MIH is \$3,596.25 and  
15 we agree on that.

16 MR. MALINA: Right. We are agreeing we  
17 are not going to fight over those amounts that  
18 you felt were unreasonable. So they would be  
19 included in the amount when you add it to the  
20 attorneys' fees it adds up to \$62,031.08; is  
21 that right?

22 MR. DANIEL: That's correct.



1 MR. MALINA: And we agree that if the  
2 fee denial was upheld, that's what the village  
3 is going to write a check for.

4 MR. DANIEL: So we would ask,  
5 Mr. Chairman, that the ZBA admit Group Exhibit A  
6 and Group Exhibit B and eventually enter an  
7 appropriate order on the matter of fees now that  
8 the evidence is before it.

9 MR. PODLISKA: So what we were given on  
10 remand was a direction to hold a fee hearing  
11 where reasonable costs will be appropriately  
12 determined without factoring in attorneys' fees.

13 MR. MALINA: Right.

14 MR. PODLISKA: So the bottom line of  
15 what you told us here is you have reached an  
16 agreement as to what these reasonable costs are  
17 and you a number for that.

18 MR. DANIEL: We do.

19 CHAIRMAN NEIMAN: What's the number?

20 MR. MALINA: \$3,596.25. Correct?

21 MR. DANIEL: That is correct.

22 MR. PODLISKA: And so the parties are

1 asking us to enter an order for that; correct,  
2 for that amount?

3 MR. MALINA: Well, essentially or to  
4 deduct -- that that's the amount that we don't  
5 have to reimburse them for but we have to  
6 reimburse them for everything else that they  
7 paid us.

8 MR. DANIEL: So the order would  
9 effectively state of the amount paid \$3,596.25  
10 arose from matters the parties agree were costs  
11 fairly chargeable to MIH under the ordinance and  
12 the remainder was not.

13 CHAIRMAN NEIMAN: So essentially what  
14 you would like this evening is an order from us  
15 -- well, I don't know if we should enter the  
16 order now or if it should be part of our opinion  
17 regarding the zoning issue.

18 MR. MALINA: I think it should all be  
19 done at one time but I don't really have any  
20 objection.

21 We are not partially settling this  
22 case. We are agreeing to those numbers and we

1 agree that if we are found to owe the money, we  
2 are going to owe that.

3 CHAIRMAN NEIMAN: The parties are  
4 therefore in agreement that our final order when  
5 we dispose of this matter in its entirety should  
6 include an order that the village should refund  
7 everything that MIH has already paid except for  
8 \$3,596.25?

9 MR. MALINA: Exactly.

08:17:44PM

10 MR. DANIEL: And the refund amount  
11 would be \$62,031.08.

12 CHAIRMAN NEIMAN: 62,031.08?

13 MR. DANIEL: Yes.

14 CHAIRMAN NEIMAN: Thank you for  
15 reaching the agreement. Always helpful. Okay.

16 Any other Board members have any  
17 other questions for this evening?

18 MR. DANIEL: Mr. Chairman, will these  
19 be admitted then by agreement?

08:18:24PM

20 CHAIRMAN NEIMAN: Yes.

21 MR. DANIEL: Okay.

22 MR. MALINA: No objection.

1                   CHAIRMAN NEIMAN: Those documents will  
2     be admitted.

3                   No other questions for this evening  
4     on this case?

5                   MR. PODLISKA: No.

6                   CHAIRMAN NEIMAN: Thank you, gentlemen.

7                   (WHICH, were all of the  
8                   proceedings had, evidence  
9                   offered or received in the  
10                  above entitled cause.)

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16 IN TESTIMONY WHEREOF I have  
17 hereunto set my hand and affixed my notarial  
18 seal this 21st day of September, A.D. 2015.

19  
20  
21  
22

  
KATHLEEN W. BONO,  
C.S.R. No. 84-1423,  
Notary Public, DuPage County  
237 South Wisconsin Avenue,  
Addison, IL 60101-3837

\$	4	according [4] - 23:22, 25:3, 80:11, 82:8 accurate [2] - 12:20, 63:11 acted [1] - 14:6 activities [1] - 32:18 actual [3] - 19:2, 19:4, 29:1 add [2] - 77:20, 82:19 added [1] - 77:20 Addison [1] - 87:22 addition [1] - 77:2 additional [1] - 17:3, 21:20, 22:22, 25:16, 32:16, 34:2, 45:3, 45:9, 48:18, 56:20, 78:2 address [8] - 7:5, 9:14, 11:13, 13:3, 19:17, 23:17, 25:6, 73:2 addressed [2] - 16:18, 21:9 addressing [1] - 18:16 adds [1] - 82:20 adequate [1] - 12:12 administrative [1] - 4:4, 6:9, 10:9, 10:16, 11:9, 26:22, 33:5, 36:15, 36:20, 37:5, 52:7 administrator [1] - 72:9 admit [1] - 83:5 admitted [2] - 85:19, 86:2 advance [2] - 22:13, 51:11 advantage [1] - 63:14 advertise [1] - 28:20 advertisements [1] - 62:4 advise [2] - 21:15, 50:3 advised [1] - 80:16 advising [1] - 77:8 affect [2] - 65:5, 68:11 affects [1] - 23:21 affirmatively [1] - 28:12 affixed [1] - 87:17 aforesaid [1] - 87:15 agenda [6] - 64:20, 66:16, 67:14, 69:17, 69:22, 70:2	aggregate [1] - 79:11 ago [5] - 49:19, 68:11, 70:21, 72:13, 74:6 agree [31] - 9:1, 15:7, 15:8, 16:3, 16:8, 18:11, 21:10, 29:11, 35:1, 38:21, 39:1, 39:3, 39:4, 39:5, 48:12, 52:3, 55:18, 67:4, 67:8, 68:1, 76:7, 80:2, 80:3, 80:7, 80:9, 81:20, 81:21, 82:15, 83:1, 84:10, 85:1 agreed [10] - 12:5, 12:6, 12:15, 34:20, 35:5, 35:13, 78:7, 78:9, 81:16, 82:12 agreeing [2] - 82:16, 84:22 agreement [7] - 21:3, 76:9, 79:11, 83:16, 85:4, 85:15, 85:19 agrees [1] - 20:22 ahead [2] - 73:5, 76:16 ain't [1] - 42:16 allow [2] - 11:1, 24:5 allowed [1] - 73:18 allowing [2] - 26:20, 31:18 allows [1] - 24:3 almost [2] - 21:21, 51:16 alone [2] - 7:10, 48:19 ALSO [1] - 2:1 alternative [1] - 31:11 ambiguity [1] - 55:16 Amlings [1] - 73:22 amount [12] - 79:11, 79:15, 81:7, 81:9, 82:4, 82:9, 82:12, 82:19, 84:2, 84:4, 84:9, 85:10 amounts [1] - 82:17 ancillary [1] - 21:21 Anglin [3] - 1:5, 2:12, 31:3 Anglin's [1] - 64:14 annexation [1] - 74:19 answer [3] - 9:4, 13:22, 52:9 anyway [2] - 11:10, 24:8 appeal [2] - 30:9, 81:1 APPEALS [1] - 1:3	appeals [1] - 37:11 Appeals [1] - 1:11 appear [1] - 15:16 appeared [3] - 9:10, 34:15, 67:2 appearing [1] - 12:3 appellant [2] - 10:15, 14:10 appellate [3] - 30:10, 31:20, 68:6 applicant [1] - 77:3 application [2] - 29:20, 79:13 applied [1] - 9:20 apply [2] - 42:9, 42:10 applying [1] - 36:14 appreciate [4] - 3:15, 7:12, 59:18, 66:5 apprised [2] - 34:17, 35:12 approach [3] - 22:19, 29:10, 66:10 appropriate [1] - 83:7 appropriately [1] - 83:11 approved [1] - 60:15 April [8] - 4:3, 6:4, 24:10, 27:6, 28:13, 40:15, 61:2 architects [1] - 64:8 area [1] - 63:14 argue [3] - 35:8, 52:2, 52:8 argued [3] - 24:8, 31:2, 34:5 arguing [2] - 18:19, 52:22 argument [6] - 11:1, 32:10, 35:17, 54:14, 78:12 arguments [3] - 33:8, 33:9, 66:19 arise [1] - 15:22 arises [1] - 29:5 arose [1] - 84:10 articulate [1] - 33:2 aside [3] - 33:3, 35:4, 65:20 assuming [1] - 24:7 attempting [1] - 14:17 Attorney [2] - 2:5, 2:7 attorney [15] - 2:18, 3:5, 27:16, 51:2, 51:9, 60:17, 65:3, 65:8, 66:1, 66:6, 68:13, 68:19, 77:7, 77:9,
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8a

**Christine Bruton**

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**From:** Jacob H. Karaca [REDACTED]  
**Sent:** Friday, October 23, 2015 10:47 AM  
**To:** Christine Bruton  
**Cc:** Mark Daniel [REDACTED] Lance C. Malina  
**Subject:** MIH 10.05.15 Hearing Transcripts.PDF  
**Attachments:** MIH 10.05.15 Hearing Transcripts.PDF

Ms. Bruton-

On behalf of both parties in the ZBA remand, please find the attached hearing transcripts from Judge Sheen's courtroom on October 5, 2015, for the ZBA's consideration on the MIH remand matter up next Wednesday.

JHK

Jacob Karaca, Partner  
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20 North Wacker Drive, 1660  
Chicago, Illinois 60606  
(312) 984-6437

IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT  
DU PAGE COUNTY, ILLINOIS

MIH, LLC, )  
 )  
Plaintiff, )  
 )  
-vs- ) No. 2009 CH 310  
 )  
PAUL ANGLIN, et al., )  
 )  
Defendant. )

REPORT OF PROCEEDINGS had at the  
Hearing of the above-entitled cause, before the  
Honorable TERENCE SHEEN, Judge of Said Court, recorded  
on the DuPage County Computer Based Digital Recording  
System, DuPage County, Illinois, and transcribed by  
ROSEMARIE LAMANTIA, Certified Shorthand Official Court  
Reporter, commencing on the 5th day of October, 2015.

PRESENT:

DANIEL LAW FIRM, PC.  
MR. MARK DANIEL,

appeared on behalf of MIH, LLC,  
Plaintiff;

KLEIN, THORPE AND JENKINS, LTD, by  
MR. JACOB H. KARACA,

appeared on behalf of Anglin, et al.,  
Defendants.

1 THE CLERK: Our first case, MIH versus Anglin.

2 MR. DANIEL: Good morning, your Honor.

3 THE COURT: Good morning.

4 MR. DANIEL: Mark Daniel, D-A-N-I-E-L, for MIH.

5 MR. KARACA: Good morning, your Honor. Jacob  
6 Karaca, K-A-R-A-C-A, here for the defendants. We're  
7 here on our motion this morning, your Honor, on behalf  
8 of the village manager only for the remand proceedings  
9 as ZBA has decided not to retain its own counsel. And  
10 I'm -- for the remand I was just representing the  
11 village manager to put forward our position, which was  
12 we didn't think we needed to reopen the record but if  
13 the ZBA wanted to, it could. And when we went to  
14 hearing after the briefing schedule set by your Honor  
15 after this court was informed that the parties were  
16 going to be proceeding on the closed record, the ZBA on  
17 motion of Mr. Daniel got confused and said, well, can  
18 we disagree with the judge's basically dicta statement  
19 that it didn't see anything in the record regarding  
20 intent or do we have to follow the intent?

21 MR. DANIEL: Judge, if I could --

22 MR. KARACA: So -- so we filed our motion. We  
23 filed our motion and this morning I got emailed and  
24 then just got handed right now copies of several other

1 motions basically asking this court to reconsider its  
2 prior ruling and take away the remand to the ZBA. The  
3 ZBA hasn't decided, by the way, whether or not to  
4 reopen the record. It just didn't want to do the wrong  
5 thing because it got confused.

6 THE COURT: Go ahead.

7 MR. DANIEL: Your Honor, we filed a -- first of  
8 all, we filed a motion for judgment on the  
9 administrative review matters. We also have filed a  
10 response to the rather odd motion for clarification  
11 brought at the request of the ZBA by the village  
12 manager, who is a party to the case, but, as far as I  
13 am concerned, I'd like to have you take sometime if you  
14 can on this. I know it's on the 9:00 o'clock call.  
15 The ZBA, I understand, has expressed an interest in a  
16 swift ruling. I'm able to stick around this morning if  
17 needed but, obviously, this is an important issue that  
18 both sides, with important matters and --

19 THE COURT: And I'm denying both of them. I sent  
20 it back to the ZBA for them to determine whether they  
21 were going to go on the record as is or take new  
22 evidence. Once they reached that decision, then  
23 consider the matters.

24 My opinion also said that I wasn't expressing

1     what their opinion should be. That is what a remand  
2     does. So they have to reach their decisions and I deal  
3     with it. That's --

4             MR. DANIEL: But if we could set this for  
5     argument. It's important that you understand and, you  
6     just got this this morning on our behalf but when two  
7     parties appear before you and say there is no new  
8     evidence we are bringing in, it's time for the court to  
9     enter judgment on the record as it stands. That's what  
10    happens in these administrative review cases. I think  
11    you're aware of it. No one is bringing in new evidence  
12    and the ZBA cannot investigate on its own. It has no  
13    authority under state law or the zoning ordinance to do  
14    so.

15            THE COURT: They can review, if they decide not to  
16    reopen the record, they can review the evidence on  
17    there and reach a decision based on the record before  
18    them. They used a wrong standard, which I certainly  
19    clearly articulated. So it does not need me to decide.  
20    It was remanded back. That's my order. Thank you very  
21    much.

22            MR. KARACA: Thank you, your Honor.

23                    (Whereupon the Court attended to other  
24                    matters on its call, after which the

1 following proceedings were had herein:)

2 THE CLERK: Your Honor, recall MIH versus Anglin.

3 MR. DANIEL: Good morning again, Judge. Mark  
4 Daniel, D-A-N-I-E-L.

5 MR. KARACA: Good morning, again, your Honor.  
6 Jacob Karaca.

7 Plaintiffs won't agree to put language in the  
8 order that says for the reasons stated in open court  
9 for the remand. So we're at an impasse.

10 MR. DANIEL: Judge, you denied both motions. I  
11 asked for a hearing on it. And the last time that we  
12 tried to collect information from the record we were  
13 unable to get a transcript. The court reporter  
14 couldn't identify the hearing so there were no reasons  
15 stated in the record and it was actually on the matter  
16 of whether the village was going to waive the -- I  
17 think it was the issue of the waiver of presenting new  
18 evidence. So I don't like to include that when you had  
19 not read the briefing on it.

20 THE COURT: I read it. I read your motion this  
21 morning. You should know better. You know I read  
22 everything. And I find that what you presented that it  
23 was a matter of law is not accurate. I said I was  
24 expressing no final opinion because I left it up to the

1 board whether they were going to go on the record,  
2 which if they do, I may have one opinion, and if they  
3 reopen it up, I may have another opinion but it's  
4 premature when it's remanded back for them because they  
5 haven't decided the issue. I need them to decide for  
6 me to review it.

7 So I was very explicit on the record. So  
8 that will be my order based on what I said on the  
9 record.

10 MR. DANIEL: Judge, that doesn't answer their  
11 entire motion.

12 THE COURT: They wanted clarification.

13 MR. DANIEL: -- issue. One of the questions is if  
14 they don't reopen the record are they stuck with your  
15 ruling and that was referred to as dicta when it is  
16 clearly not dicta. You found --

17 THE COURT: I review the records as done down  
18 below and that's what I'm going to do. It's remanded  
19 back. I made that very clear.

20 So thank you very much.

21 MR. DANIEL: As to the order, Judge, you're  
22 saying --

23 MR. KARACA: Thank you, your Honor.

24 THE COURT: For the reasons stated on the record.

1 The record is clear what I said so.

2 MR. DANIEL: And both motions are denied?

3 THE COURT: Yes. I don't need to clarify it.

4 (Which were all the proceedings had at the  
5 hearing of the above-entitled cause, this  
6 date.)

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1           IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT  
2                           DU PAGE COUNTY, ILLINOIS  
3  
4

5                       I, ROSEMARIE LAMANTIA, hereby certify that I  
6       am a Certified Shorthand Official Court Reporter  
7       assigned to transcribe the computer based digital  
8       recording of proceedings had of the above-entitled  
9       cause, Administrative Order No. 99-12, and Local Rule  
10      1.01(d). I further certify that the foregoing,  
11      consisting of Pages 1 to 8, inclusive, is a true and  
12      accurate transcript completed to the best of my  
13      ability, based upon the quality of the audio recording.  
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18  
19  
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21                                         
22                                       Official Court Reporter  
23                                       Eighteenth Judicial Circuit of Illinois  
24                                       DuPage County