

STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE STATE BOARD OF ELECTIONS

IN THE MATTER OF: CHALLENGE TO)
CANDIDACY OF MARK J. WILKINS,)
CANDIDATE FOR MAYOR OF DUNN)

ORDER

THIS MATTER CAME BEFORE THE STATE BOARD OF ELECTIONS upon the August 27, 2015 appeal of challenger Teresa Stephenson ("Challenger") from an order of the Harnett County Board of Elections ("Harnett Board") denying a petition challenging the qualifications of Mark J. Wilkins (Wilkins) as a candidate for the Mayor of Dunn, North Carolina. The State Board heard the appeal on September 18, 2015 in Raleigh, during which Challenger was represented by attorneys Michael L. Weisel and William Gilkeson, Jr. of the Wake County Bar, and Wilkins appeared *pro se*. Harnett County Attorney Monica Jackson also appeared before the Board.

This Board conducted a *de novo* review of all issues of law and based its decision on the record as a whole in determining whether Wilkins had shown by a preponderance of the evidence that he is qualified as a candidate under N.C. GEN. STAT. § 163-127.5. After reviewing the written submission of Challenger along with the record and applicable precedent, and after hearing argument from the parties, the State Board finds, concludes and orders as follows:

FINDINGS OF FACT

1. Challenger filed her petition before the Harnett Board on July 29, 2015 pursuant to Article IIB of Chapter 163 of the North Carolina General Statutes; and
2. The Harnett Board held a hearing on the challenge in a public meeting on August 18, 2015. The rights of both the Challenger and Wilkins were preserved throughout the Harnett Board proceeding; and
3. Challenger timely filed her appeal before the State Board; and
4. The whole record of the proceeding before the Harnett Board shows, by a preponderance of the evidence, that Wilkins established domicile at 107 NC 55 E in Dunn in Harnett County at the proper time to meet the requirements of N.C. GEN. STAT. § 163-127.5.

CONCLUSIONS OF LAW

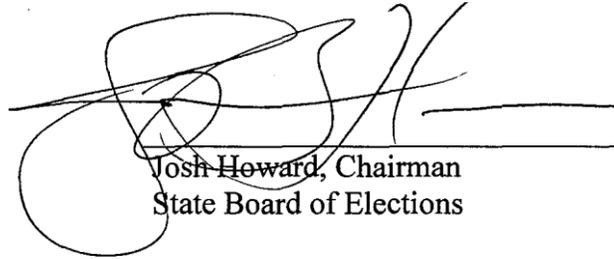
1. The decision of the Harnett Board, its findings of fact and conclusions of law, were supported by competent, material, and substantial evidence; and

2. The order of the Harnett Board, its findings of fact, and conclusions of law are without reversible error.

It is, therefore, **ORDERED**:

The August 27, 2015 order of the Harnett Board, denying the challenge to Wilkins' candidacy, is affirmed.

This the eighteenth day of September, 2015.



Josh Howard, Chairman
State Board of Elections

1 NORTH CAROLINA BEFORE THE
2 COUNTY OF WAKE STATE BOARD OF ELECTIONS

3

4 IN RE: Challenge to the |
5 Candidacy of Mark Wilkins |
6 for Mayor of Dunn

7

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North Carolina Board of Elections

9

441 N. Harrington Street

10

Raleigh, North Carolina

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FRIDAY, SEPTEMBER 18, 2015

14

10:06 a.m.

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16

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17

Pages 1 through 62

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Board members present:

Joshua B. Howard, Chairman

21

Rhonda K. Amoroso, Secretary

James L. Baker

22

Maja Kricker

Joshua D. Malcolm

23

24

Also Present:

Kim Westbrook Strach, Executive Director

Joshua Lawson, PIO

25

George McCue, Agency Counsel

T A B L E O F C O N T E N T S

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3 Call to Order 3
by Chairman Joshua B. Howard

4

5 Hearing in re: Challenge to the Candidacy 3
of Mark Wilkins for the Mayor of Dunn

6

7 Motion to affirm Harnett County 59
Board of Elections decision

8

9 Vote 59

10 Adjournment 61

11

12 Certificate 62

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1 PROCEEDINGS 10:06 a.m.

2 CHAIRMAN HOWARD: All right, everybody. It's
3 a little bit after 10:00. Thank you for being here
4 today, and in particular thank you to Justice Newby for
5 again coming to help our Board. We very much appreciate
6 your presence.

7 Apparently the law mandates that I do a couple
8 of things before we recognize you, sir.

9 (The Board proceeds with other
10 unrelated matters until 10:18 a.m.)

11 CHAIRMAN HOWARD: So now we are prepared for
12 a hearing with regard to the challenge to the candidacy
13 of Mark Wilkins for the mayor of Dunn.

14 Who is here for the challenger?

15 MR. WEISEL: Michael Weisel with the law
16 firm of Bailey & Dixon, and my colleague Bill Gilkeson.

17 CHAIRMAN HOWARD: Mr. Weisel, if you and Mr.
18 Gilkeson will come on over to the table, you'll be
19 recognized. And who's here for Mr. Wilkins?

20 MR. WILKINS: Me.

21 CHAIRMAN HOWARD: Sir, thank you for being
22 here, and you can come on over and sit on the other side.

23 Mr. Lawson, have you--

24 (Lectern being moved to table surface.)

25 CHAIRMAN HOWARD: I'm sorry, guys, I would've

1 thought that was already up there.

2 Have we laid out some ground rules for the time
3 today for each side to argue?

4 MR. LAWSON: We have, Mr. Chairman.
5 It's 20 minutes each and they can reserve up to five
6 minutes for rebuttal.

7 CHAIRMAN HOWARD: All right. Very well then.
8 I'll keep track of that time, and I'll let both sides
9 know as time gets close. So again, that's 20 minutes
10 total. And you can reserve five. You don't have to, but
11 that means you'd better stop and continue it, and I'll
12 let you now when you get to about ten.

13 It is my belief, Judge Baker--Mr. Weisel, you
14 brought the challenge, right?

15 MR. WEISEL: Our client has, and she
16 apologizes for not being here. She could not get off
17 work. But yes, that is correct.

18 CHAIRMAN HOWARD: Well, she's very capably
19 represented, and I believe then you have sort of the
20 burden of proof here, and you may go first.

21 MS. WEISEL: If the Chair will allow us,
22 we'd like to go ahead and distribute essentially hard
23 copies of what has already been distributed
24 electronically so you don't have to pull things.

25 CHAIRMAN HOWARD: Mr. Lawson, do we have this

1 already?

2 MR. LAWSON: A number of board members
3 requested it in hard copy, but not everybody.

4 CHAIRMAN HOWARD: We're glad to take whatever
5 he's handing out.

6 MR. WEISEL: We have color photos.

7 (Notebooks are distributed to the Board.)

8 CHAIRMAN HOWARD: Mr. Gilkeson, as we've
9 mentioned before that there's a subsequent matter on the
10 agenda today. If you can stick around after this.

11 MR. GILKESON: Oh, yes. Of course.
12 Intended to.

13 CHAIRMAN HOWARD: Mr. Weisel, you may
14 proceed.

15 MR. WEISEL: If my timer get out.

16 CHAIRMAN HOWARD: I wanted to share with the
17 Board members, I don't like abbreviating arguments, but
18 at the same time, as I'm sure Judge Baker knows, you
19 know, you've got to put some limit on it, and I'm
20 concerned that in future elections we may have as many
21 as 100 appeals, and we've got to start leading.

22 MR. BAKER: Now I may need to
23 reconsider.

24 (Laughter)

25 CHAIRMAN HOWARD: Mr. Weisel, thank you.

1 Tell us what we need to know.

2 MR. WEISEL: Yes, sir. Good morning,
3 Chairman Howard, members of the Board, and Executive
4 Director Strach. I'm Michael Weisel. Along with my
5 colleague, Bill Gilkeson at Bailey & Dixon, we represent
6 the challenger Teresa Ann Stephenson. She regrets not
7 being able to attend today, but she could not be excused
8 from work. We appreciate your taking the time for this
9 matter. I'd like to reserve five minutes of my time for
10 rebuttal and summary.

11 This case is about whether Mark "Cowboy"
12 Wilkins for a candidate for mayor of the city of Dunn
13 meets the constitutional and statutory requirements for
14 a candidate of that office.

15 We contend it presents two questions of
16 resolution by the Board. One, does the whole record
17 contains sufficient evidence to afford the conclusion
18 that Mr. Wilkins has met his statutory burden and
19 established his permanent domicile within the city limits
20 of Dunn, and two, more importantly, can an illegal
21 residence, as a matter of law, be a permanent residence
22 for a candidate.

23 The challenger contends that the answer to both
24 of these questions is emphatically no and believes that
25 the Harnett County Board of Elections' decision was

1 unsupported by the evidence, arbitrary, capricious, and
2 an abuse of profession.

3 This Board may recall last year's sheriff's
4 candidate's residency challenge from Madison County. And
5 Judge Baker while you were not on the Board then, I
6 suspect that you know more about that case than any of
7 us.

8 In any event, they are similar; the burden of
9 proof is similar. I would say that there is a
10 difference; the Madison County decision was 3-0; the
11 Harnett County decision was 2 to 1.

12 In that case, the Madison County, as you--as
13 in this one, you may--or you're basing your decision on
14 the whole record of the hearing, of the hearing in
15 Harnett County. There's no new additional evidence.
16 It's all what's contained in the record. You have the
17 record before you in the notebooks, and that's according
18 to statute.

19 And what does that mean? Well, paraphrasing
20 the law as stated by our Supreme Court in 2003, and I'm
21 paraphrasing, the whole record requires the state board
22 in determining the substantiality of the evidence
23 supporting the local board's decision to take into
24 account whatever in the record fairly detracts from the
25 weight of the local board's evidence.

1 Under the whole evidence rule, the state board
2 may not consider the evidence which in and of itself
3 justifies the local board's result without taking into
4 account contradictory evidence or evidence in which
5 conflicting inferences could be drawn. That's from
6 Thompson vs. Board of Education as cited by NC State
7 Barber at the time.

8 By law, as set out in Farnsworth vs. Jones, and
9 you'll be hearing quite a bit about that case. That case
10 is located at Tab H-8, if you want to read it, and is
11 later codified in North Carolina General Statute 163-
12 127.5. "A candidate whose domicile is challenged has
13 the burden of proof and must establish three elements by
14 a preponderance of the evidence; (1) that he is
15 abandoning his former domicile, (2) that he is acquired
16 a new one, and (3) intends to make the new one his
17 permanent domicile.

18 We contend that Mr. Wilkins did not carry his
19 burden of proof at the hearing on any three prongs of the
20 statute.

21 After having heard the Harnett County Board
22 Counsel read twice what he needed to prove, Mr. Wilkins
23 gave what he knew to be the right answers when the
24 questions were read to him a third time by the board
25 chair for each of the three prongs.

1 Those answers alone, however, are not enough,
2 under the statute and under Farnsworth and other
3 subsequent cases. Our brief outlines, the hearing's
4 testimony, the evidence, and points made and
5 inconsistencies--I won't rehash them here, but I only
6 have a few minutes, but let's just focus briefly on the
7 three prong test.

8 CHAIRMAN HOWARD: Mr. Weisel, may I ask one
9 thing?

10 MR. WEISEL: Yes, sir.

11 CHAIRMAN HOWARD: Is the county attorney
12 here?

13 MR. WEISEL: I do not know.

14 MS. JACKSON: I am the attorney for
15 Harnett County.

16 CHAIRMAN HOWARD: Thank you for being here.
17 I don't know that we need to hear from you, but I just
18 wanted to make sure we know we have that resource. Thank
19 you. Go ahead, Mr. Weisel.

20 MR. WEISEL: Thank you. So the first
21 prong, an actual abandonment of the first domicile
22 coupled with an intent not to return to it. Mr. Wilkins'
23 proof consisted of oral statements that he separated from
24 his wife, that he moved out of 327 Stonehenge Drive on
25 January 23rd, 2015, and that he does not intend to return

1 to the marital home.

2 However, Mr. Wilkins offered no documentation
3 or explanation of the separation from his wife or of his
4 move from 320 Stonehenge Drive in January. Coming as it
5 did the time of the birth of their fourth child, January
6 seems an unlikely time for Mr. Wilkins to leave.

7 Mrs. Melissa Wilkins, his, I guess, estranged
8 wife, although accepting the Board's subpoena, did not
9 appear to testify or be questioned.

10 Mr. Wilkins's voter registration still said he
11 lived at 320 Stonehenge Drive until almost six months
12 after he said he moved out.

13 He changed his voter registration on July 17th,
14 the day filing closed for mayor of Dunn at noon. He
15 changed his voter registration to an address within the
16 city limits of Dunn so he could claim a residence there
17 and run for mayor.

18 His driver's license still said he lived at 320
19 Stonehenge until August 3rd, 2015, more than seven months
20 after he said he had moved out, but only five days after
21 his candidacy had been challenged by our client.

22 The second prong of the test, the acquisition
23 of a new domicile by actual residence there. Mr.
24 Wilkins's proof consisted of statements that he moved
25 into the carwash on January 23rd, 2015, the same day that

1 he left the Stonehenge house.

2 However, Dunn Police Officer Brannon's report
3 of late March quoted both of Mr. Wilkins's tenants and
4 Mr. Wilkins himself as making statements, established
5 that both sleeping rooms in the carwash were occupied by
6 people other than Mr. Wilkins.

7 And by the way, I apologize, in the interest
8 of time, I am not quoting where these are in the cites
9 and--you know, but all this material as background is
10 within both our brief which cites to the evidence as
11 well, and obviously, I'd be happy to answer anyone's
12 question.

13 Mr. Wilkins, in his testimony, disputed Officer
14 Brannon's report and told two confusing stories about the
15 residents at the carwash who talked to the officer, but
16 Mr. Wilkins' own two accounts contradict each other.
17 Moreover his testimony about the break-in by a homeless
18 man is inconsistent with the statement, "I ain't had no
19 break-ins since I've been living there," referring to the
20 carwash, if indeed, as he testified, he had been living
21 there since January 23rd.

22 Furthermore, Mr. Wilkins' claim of residing at
23 the carwash is called into question by the deputy
24 sheriff's notations on the subpoena he served Mr.
25 Wilkins.

1 According to the notes, a worker in the carwash
2 informed the deputy sheriff Mr. Wilkins frequently is not
3 at the carwash on rainy days. The morning the deputy
4 sheriff successfully served the subpoena, the deputy
5 sheriff observed Mr. Wilkins arriving in a car that came
6 from the direction of Sampson County, but the car was
7 registered at the address of yet another home, one of the
8 five real estate properties that Mr. Wilkins owns.

9 If Mr. Wilkins resided at the carwash,
10 obviously he'd be there on rainy days as well as sunny
11 days, and he would not have had to arrive at the carwash
12 in the morning because he would already--he would have
13 already been there after spending the night.

14 MS. AMOROSO: Mr. Weisel.

15 MR. WEISEL: Yes, ma'am.

16 MS. AMOROSO: I'm sorry, we have read
17 through the record--

18 MR. WEISEL: Okay.

19 MS. AMOROSO: --and we know the facts,
20 and my question to you regarding the three-prong test,
21 do you have any evidence or is there anything in the
22 record that shows that Mr. Wilkins was actually living
23 at the old home?

24 MR. WEISEL: No. There was no private
25 detective who staked him out and checked on that. I mean

1 our evidence is the lack of evidence that he was staying
2 there. And clearly as--and I'm happy to get to, if--you
3 know, the point is it is a carwash which, you know,
4 admittedly has some residential living facilities at it,
5 but under the law, under Dunn's zoning law, as is in the
6 evidence record, it is illegal to have a residence there.
7 You may not have a--

8 MS. AMOROSO: If some homeless person--

9 CHAIRMAN HOWARD: Was Dunn's zoning law or
10 his constitutional rights?

11 MR. WEISEL: Constitutional rights in
12 terms of what?

13 CHAIRMAN HOWARD: Doesn't he have a right to
14 run? Does he have a right to vote? He's got a right to
15 vote, right?

16 MR. WEISEL: Absolutely, but our
17 constitution--

18 CHAIRMAN HOWARD: Where should he vote?

19 MR. WEISEL: He should vote at where he
20 resides, his domicile, pursuant to the North Carolina
21 constitution.

22 CHAIRMAN HOWARD: So you disenfranchise Mr.
23 Wilkins by saying that he's got to go back to the old
24 house?

25 MR. WEISEL: No. He has--he owns five

1 pieces of real estate. He can be anywhere he wishes.
2 What I'm suggesting is the statute--our statutes and our
3 constitution require the domicile at a residence for 30
4 days prior to the election period.

5 And can you--I mean, you know, obviously it's
6 in the board's purview. Can you have a residence in a
7 place that is illegal to live?

8 CHAIRMAN HOWARD: Well, it's a violation
9 maybe of a city zoning rule which is an important bullet
10 point in your quiver and I get that.

11 MR. WEISEL: Okay.

12 CHAIRMAN HOWARD: But I'm worried about other
13 things too, like can a city zone people to not vote. I
14 mean, you know, of course not.

15 MR. WEISEL: Right.

16 CHAIRMAN HOWARD: So I'm interested in--where
17 would you say he should vote then? Is he illegally
18 registered in--

19 MR. WEISEL: Well, I don't know where
20 he's living. I mean if we contend--if you look at the
21 evidence in the pictures, under Farnsworth it's not just
22 his testimony.

23 He--I think it's important to recognize, I
24 understand we are the appellant here, but we're calling
25 into question the original decision. In the original

1 decision Mr. Wilkins had the burden of proof, and the
2 burden of proof is not merely his testimony. It is
3 indicia of mail, of personal pictures.

4 If you look at the case law, Farnsworth among
5 others, there are several, and you know, for the Madison
6 County case here, you had a day of testimony at the
7 hearing level with mail, photographs, furniture.

8 I mean if you look through these pictures,
9 there's nothing personal in the space at all, and it
10 says, "Do you have"--you know, asked him did his kids
11 come and stay and visit, and you know, he said they came
12 to visit, and, you know, (unintelligible) question, he
13 said they came to stay.

14 I mean there's no sort of evidence of anything
15 around. I'm not saying things can't get moved in and
16 moved out, but there was--other than his testimony and
17 the five photographs and his driver's license, which, as
18 I said, was changed only after the challenge was filed,
19 that's the only evidence that is in the record. And
20 we're suggesting that's insufficient.

21 MR. BAKER: Let us say that we--if we
22 had been on the county board. We would have found that's
23 absolutely insufficient. He moved there, so he could be
24 a--in the back of his carwash so he could file for mayor
25 and run for mayor.

1 MR. WEISEL: Yes, sir.

2 MR. BAKER: But we weren't there, and
3 we can't substitute our judgment for the county's
4 decision. What we think--I certainly wouldn't have
5 decided that he lived there, but they did, and they did
6 have his testimony and they did have those photographs,
7 and so--

8 MR. WEISEL: And that is why I
9 specifically opened up with Thompson vs. Board of
10 Education, because I agree with your statement. This
11 board may not substitute its judgment for the judgment
12 of the county board, but what I am saying is the county
13 board failed to take into account the evidence, and that
14 that lack of evidence, as I recounted both in the
15 brief--and the brief is summarized here, you know, in my
16 remarks, mandate, you know, require that you take that
17 into account and set aside that decision by virtue of an
18 error in law and, you know, and--

19 MR. MALCOLM: So frame that for me.
20 Frame it for the board. Frame for me, if you would, the
21 distinction between testimonial evidence--is that
22 conclusive?

23 MR. WEISEL: No, and Farnsworth makes
24 that very clear.

25 MR. MALCOLM: What does Farnsworth--

1 MR. WEISEL: Well, let me--I'll go ahead
2 and read a quote for you. I'll get it here. So I'm
3 quoting directly from the case, all right? "Although a
4 person's testimony regarding his or her intent regarding
5 the acquisition of a new domicile is competent evidence,
6 it is not conclusive.

7 "We must consider the evidence of all
8 surrounding circumstances and the conduct of the person
9 in determining whether he or she has effectuated a change
10 of domicile." That's at Farnsworth, 186 and 187.

11 MR. MALCOLM: So does the reference in
12 Farnsworth push this board to consider the whole record?

13 MR. WEISEL: Well, the whole record is
14 your standard of review. That's what you must do.
15 That's statutory. That's what you must do.

16 MR. MALCOLM: Which means we look at not
17 only the testimonial evidence, but we look to see
18 whether--

19 MR. WEISEL: At the documentary
20 evidence.

21 MR. MALCOLM: Hold on. Hold on a second.

22 MR. WEISEL: Sure.

23 MR. MALCOLM: So this board would be
24 responsible to look at on page, excuse me, Page 6--on
25 Page 6, Paragraph 34, the board found: "When asked about

1 other personal effects that were not visible in images
2 of the living space offered," he stated, "the candidate
3 stated that he only took his shoes when he moved from the
4 Stonehenge address."

5 And so he did not make a statement as to where
6 his will is, his DD214 is when he served in the military,
7 where his social security card is, or any other personal
8 item that a reasonable person would consider valuable
9 personal items, correct?

10 Do you know anywhere else in the record for the
11 candidate stated anything about his personal items that
12 all of us treasure and protect and which we normally take
13 to our domicile?

14 MR. WEISEL: No, Mr. Malcolm. As a
15 matter of fact, in the brief I went into some detail
16 about the series of questions that Farnsworth and other
17 cases specifically sort of hone in on, which is "where
18 is your mail coming to? You know, where are you listed
19 a church directory? You know, where are your important
20 papers, your car insurance documents, your personal
21 checking account; what address was on them?

22 And to all those questions, you know, Mr.
23 Wilkins did not answer, did not have the documents, and
24 the board had no, you know, answer. More importantly,
25 I would also point out that the subpoena issued by the

1 county board, if you go to--I'm sorry.

2 CHAIRMAN HOWARD: Mr. Weisel, we're pretty
3 much at the end of the 15 minutes, but I want you to
4 continue to respond to any board member questions.

5 MR. WEISEL: Okay.

6 CHAIRMAN HOWARD: Go ahead and proceed, but
7 I just want the board to know it's time, and then we'll
8 recognize Mr. Wilkins.

9 MR. WEISEL: I believe it is Tab L. I'm
10 not real sure. Sorry. It's Tab K. I'm sorry. If you
11 look at Tab K exhibit, you will see that the county board
12 in fact subpoenaed Mr. Wilkins as to the entire list of
13 items that some of the case law requires, you know, to
14 examine for the board to be able to make a determination.

15 And in response to the subpoena, Mr. Wilkins
16 only provided us, as I mentioned, the driver's license
17 and these photographs.

18 CHAIRMAN HOWARD: Any other questions from
19 board members?

20 (No response from the Board.)

21 CHAIRMAN HOWARD: You want to reserve five
22 minutes, right?

23 MR. WEISEL: I do, yes. Thank you.

24 CHAIRMAN HOWARD: Mr. Weisel, you and Mr.
25 Gilkeson are preeminent in your field. Your briefs are

1 typical of that; they're fantastic. Thank you. It's
2 very helpful.

3 MR. WEISEL: I cannot take credit for
4 that. It's solely Mr. Gilkeson and Ms. Fair's (phonetic)
5 excellent work.

6 CHAIRMAN HOWARD: Well, we will recognize
7 y'all for rebuttal at the appropriate time.

8 Mr. Wilkins, you've got 20 minutes to tell us
9 why, I assume, you would want us to affirm the county
10 board order.

11 MR. WILKINS: Well, I appreciate
12 everybody coming and thank y'all for being here and
13 listening to this, and what I want to tell folks is that
14 I have talked to the zoning and planning board, and they
15 have told me, "Provide the original plans of the carwash
16 where it shows that it had the apartment," and they will
17 make the proper arrangements to zone it properly.

18 They said it's a situation where this type of
19 zoning is not in Dunn, but there are several folks that
20 live at their place of business, especially when you have
21 a full bathroom like I do. We have a full kitchen.

22 CHAIRMAN HOWARD: Mr. Wilkins, so is that in
23 the record? Is there anything we can point to in the
24 transcript about that zoning information you have?

25 MR. WILKINS: I'm getting--the plans are

1 about 15, 16 year old, and the contractor that built
2 them, they don't have the files like they do now.
3 Whenever they have files, they have file sticks.

4 Well, they are coming up with the plans, and
5 the head of the--Mr. Steve--I can't pronounce his last
6 name. He's got--he is the head of the zoning and
7 planning for Dunn, and he said that, "We'll overcome this
8 hurdle. We will definitely overcome the hurdle if you
9 provide the plans."

10 MR. MALCOLM: Mr. Wilkins, do you think
11 if last week or a week before this hearing was held, the
12 planning board in that county, had they zoned it
13 residential or commercial C, whatever, do you think that
14 should make a difference? Is that germane to this whole
15 issue, as you understand the law? Is there anything--do
16 you know of anything in the law--I don't know of anything
17 in your comments here where it even--I don't think even
18 matters, to be quite candid to counsel.

19 It doesn't matter. I think you guys are
20 wasting--in my humble opinion, everybody's wasting their
21 time arguing about whether it is zoned commercial. If
22 a person--a homeless veteran was sleeping under an oak
23 tree in front of this business and he registered to vote,
24 if that's where he put his head down every night, a
25 county board could find that that was his residence for

1 voting purposes.

2 So I think maybe I shouldn't have said that so
3 directly. But do you understand that this is really not
4 about how it's zoned? It's really about where your
5 domiciled.

6 MR. WILKINS: Yes, sir. Yes, sir.

7 MR. MALCOLM: And based on the record,
8 where are you domiciled?

9 MR. WILKINS: At 107 North Carolina
10 Highway 55 East, Suite B.

11 MR. MALCOLM: And when did you give up
12 your domicile at the--it is Stonehenge address? When did
13 you give that up?

14 MR. WILKINS: The 23rd of January.

15 CHAIRMAN HOWARD: Mr. Weisel, did you want
16 to be recognized?

17 MR. WEISEL: I did just briefly. Mr.
18 Chairman, for the record, I'm not going to say it again
19 is that we object to any evidence being entered in, you
20 know--

21 CHAIRMAN HOWARD: That's not--

22 MR. WEISEL: Correct, the record is the
23 record. That's what it is. It's a standing objection.
24 I won't say it again.

25 MR. MALCOLM: So based on the record,

1 where did you establish when you left that prior address,
2 based on your testimony?

3 MR. WILKINS: What do you mean?

4 MR. MALCOLM: When you came before the
5 county board--

6 MR. WILKINS: Yes, sir.

7 MR. MALCOLM: And I'm asking you to
8 confirm what's in the record.

9 MR. WILKINS: Yes.

10 MR. MALCOLM: So on the 23rd of
11 January--

12 MR. WILKINS: Yes, sir.

13 MR. MALCOLM: --was when you changed
14 domiciles?

15 MR. WILKINS: Yes, sir.

16 MR. MALCOLM: And that's because of the
17 difficulties in your personal life?

18 MR. WILKINS: Yes, sir. Yes, sir. And
19 matter of fact, my wife doesn't live at the 320
20 Stonehenge. Matter of fact, there's no furniture, no
21 anything. It's actually being sold at this point in
22 time.

23 MR. MALCOLM: But at the time of his
24 hearing, were your personal items at that address?

25 MR. WILKINS: No, sir. I had--

1 MR. MALCOLM: You said you only took your
2 clothes and your shoes. So where was everything else?

3 MR. WILKINS: Clothes, shoes, my personal
4 items. I don't have as many personal items as my family
5 does, my kids and so forth, that sort of thing.

6 I also want to bring to the attention that this
7 is my--this is an issue that was with the previous mayor
8 whenever he actually--he was not a resident of Dunn, and
9 you know, before he was elected, he actually was not a
10 resident of Dunn, and he actually bought his house after
11 he become mayor.

12 MR. MALCOLM: Is that in the record?

13 MR. WILKINS: No, sir. No, sir. I just
14 wanted to bring that to the folks' attention because I
15 was bombarded with this--

16 MR. MALCOLM: Yes, sir, those lawyers.

17 MR. WILKINS: Yeah. I told them they
18 earned every dime that they made last time. They earned
19 every dime.

20 MR. MALCOLM: Well, speaking to that--
21 speaking to that every dime, I see where the county
22 board--and I want to hear from the county board, in
23 particular the county attorney. How is it germane as to
24 who was retaining counsel for the person that was
25 challenging? Under the law, how is that germane to your

1 argument? Who's paying these guys--

2 MR. WILKINS: Well--

3 MR. MALCOLM: --how is that germane to
4 the statutory framework on the Farns--when we keep
5 hearing these guys with the fancy degrees refer to
6 Farnsworth, how is that germane? Your understanding.
7 I know you're not an attorney.

8 MR. WILKINS: There's politics behind it.
9 In Dunn, North Carolina, there's big politics. And
10 that's the reason I was bringing up that Oscar Harris,
11 when he become mayor, he was not even a resident.

12 I've even got something here showing that his
13 house was robbed, January 15th. It was reported by him
14 in Benson, North Carolina. So the reason why I say that
15 is, and that makes it--makes--they're crucifying me about
16 my address and saying that I can't run because of my
17 address because I'm not a resident.

18 I pay taxes in Dunn, North Carolina. I pay a
19 hefty amount of taxes in a year's time, and I am a
20 registered voter at that address where I can vote, so.

21 MR. MALCOLM: You're a registered voter
22 at which address?

23 MR. WILKINS: The 107 North Carolina
24 Highway 55 East.

25 MR. MALCOLM: When did you become a

1 registered voter there?

2 MR. WILKINS: I had to become registered
3 in order to run.

4 MR. MALCOLM: The same day?

5 MR. WILKINS: The same day that I did,
6 yes, sir. You know, one thing about it is I am at fault
7 for not having everything changed over, but it's a slow
8 process for everybody. It does not happen in one day.

9 MS. AMOROSO: Is there anything else you
10 wish to add that is not already in the record?

11 MR. WILKINS: You know, they say that my
12 walls are bare. We've had--I've had a flood That siding
13 has been flooded, and it's being repainted and that sort
14 of thing.

15 So I don't have my walls littered with pictures
16 and stuff like that because I'm still--I just--I have
17 been renovating it as living, too, to make sure that I
18 can repair where the flood was.

19 MR. MALCOLM: Well, speaking of that,
20 sir, I'm going to refer to Page 19 of the transcript.
21 Do you know a Mr. Powell? Mr. Powell, I guess my
22 understanding is he's one of the board members asking a
23 question, and it says on Page 19, one of the board
24 members, and I'm referring to Line 7: "Okay, now, so you
25 live in a carwash. That's an apartment attached to a

1 carwash. About how large is this apartment? Would you
2 estimate the square footage?"

3 And you respond, "About 900 square feet." Mr.
4 Powell says, "That's a pretty good size," and you
5 responded, "Yes, sir," being the gentleman that you are.
6 And Powell asked, "Is that an apartment?" And you say,
7 "Yes, sir."

8 And then Powell notes, "Okay, now, do you
9 intend to stay there? Do you have other plans?" And you
10 respond by saying, "Well, I got a"--and on the next two
11 pages with that inquiry, you never answer that question.
12 You never answer that question until much later in the
13 hearing when the attorney and the county chairman
14 repeatedly ask the question, very prescriptive, numerous
15 times about what your intent is.

16 So at the beginning of the hearing, would say
17 it would be reasonable for this board to consider as your
18 testimonial evidence that you were giving inconsistent
19 answers to the county board?

20 MR. WILKINS: Inconsistent answers?

21 MR. MALCOLM: Yeah, because they ask you
22 at the beginning of the hearing what your intent was, and
23 you never answered them. "Well, you know, my thing is
24 I'm having a lot of break-ins up there at the carwash,
25 so folks"--you never answered. You never answer them

1 about what your intentions are.

2 And the reason that's critical for me is
3 because of this case they keep referring to as Farnsworth
4 because it's what the board--and I know it's very
5 difficult, because I've been doing it for six years and
6 obviously it's very difficult to try to understand what's
7 in your head, what's in a candidate's head.

8 MR. WILKINS: I understand.

9 MR. MALCOLM: And that's why you're
10 hearing them, and I'm asking you now, what's in the
11 record to show anything beyond your testimonial evidence
12 to support that, and of course, factual basis, insurance
13 paperwork or things like that.

14 MR. WILKINS: Mr. Kern and Mr. Spears had
15 asked me is this going to be my permanent domicile, and
16 I told them on several occasions in the record that it
17 will be.

18 CHAIRMAN HOWARD: Do any other board members
19 have questions for Mr. Wilkins?

20 (No response from the Board.)

21 CHAIRMAN HOWARD: Seeing none, then thank
22 you, sir, for being here. We'll return to Mr. Weisel.
23 If I can start, and we'll keep track of that five
24 minutes, but if I can ask you, sir, where would an appeal
25 from this board go?

1 MR. WEISEL: It goes--well, actually
2 that was one of the points that I was going to make which
3 is the Farnsworth case has now been codified into the new
4 statute, thanks to Representative Julia Howard who was
5 a part of that process.

6 So that changed; it used to go to the Wake
7 County Superior Court. It now goes directly to the Court
8 of Appeals from here. And I will be very brief.

9 CHAIRMAN HOWARD: And let me make the record
10 clear. Your objection earlier about this board
11 considering non-record evidence is sustained. And our
12 board is reminded that the standard of review here is
13 that the statute requires de novo review of issues of
14 law, and we review the whole record but only the record
15 and of course your arguments to determine whether the
16 candidate has shown by the preponderance of evidence that
17 he or she resides within the district.

18 MR. WEISEL: Thank you, Mr. Chair. I'll
19 be brief. It's obvious--and I really do appreciate you
20 all taking the time to read this--there's a lot of
21 material. It was a difficult hearing just because, you
22 know, they were great folks, but everyone was new, the
23 surroundings were difficult for folks to work, so it was
24 a little difficult to hold the hearing, but everyone did
25 a great job, and Mr. Wilkins is quite helpful in his

1 presentations.

2 So to briefly touch upon the point that several
3 of you made about which I agree; we don't want to go down
4 the slippery slopes of, you know, where do you reside;
5 where do you live; where do you--into disenfranchisement
6 of the vote which I don't--you know, I don't think we
7 want to get into a discussion about that today. I agree
8 with your points.

9 What I would say is that there is--you know,
10 there are consequences for breaking the law. Certainly
11 as a practical matter, one can live wherever, under a
12 bridge or, you know, homeless person, whatever.
13 Although, it's interesting; other places require homeless
14 folks to register at the shelter nearest where they live
15 on the streets, and then utilize that as the address.

16 MR. MALCOLM: That's not the law in North
17 Carolina.

18 MR. WEISEL: No, I understand. I'm just
19 saying that that's--you know, people have tried to
20 address the problem.

21 And so what I'm saying is that this is for a
22 specific office. There is further case law which I cite
23 in the brief that says that places have an interest in
24 the officers serving in public service be residents, be
25 part of the community in which they--you know, and

1 understand the needs of the residents, and that in
2 breaking the law even if it's a, quote, minor law, in
3 breaking the law, because it could have been fixed; you
4 can get a special exception for this use if he had wanted
5 to do that.

6 He has to take an oath of office and part of
7 that oath as mayor of office, if he wins, you know, he
8 has intent to violate the law now because he in doing so
9 acknowledges that. Should he win the election, there's
10 an intent to violate the oath of office. His oath of
11 office, the mayor takes an oath to both support and
12 defend the constitution of the United States and the
13 constitution and laws of North Carolina, you know, not
14 inconsistent therewith.

15 I mean I think we made the point here; I agree
16 with the Board's concerns about that. I do believe that
17 for a public office, there needs to be some concern about
18 statutory violation because in essence, what I would
19 argue if the Board determines that you don't have to have
20 any, you know, residence where the statutes and
21 constitution, the North Carolina constitution clearly
22 outline some requirements, that you are basically saying
23 there are no residency requirements in North Carolina.

24 You know, I don't really have much to speak
25 about with Mr. Wilkins' testimony. There are some

1 specific things in the Harnett County board's order that
2 we would point out were errors in (unintelligible), and
3 I don't think that that's necessary.

4 CHAIRMAN HOWARD: Where is that order in--

5 MR. WILKINS: It's at Tab 1 actually, and
6 there are a number that were stated, and understandably,
7 the transcript took quite a while, and you know, what I'm
8 saying is our contention strictly as a matter of law is
9 that there are errors.

10 MR. MALCOLM: I think that's absolutely
11 critical, and I think that if I were you, I'd be arguing
12 that the entire time instead of arguing about his
13 commercial stuff because if this board seeks to overturn
14 or make an adjustment, we've got--is it not correct that
15 we would have to find that there were errors in the
16 findings in the conclusions of law and such?

17 MR. WEISEL: You know, I believe that
18 just the board's failing to take the record, the full
19 record into account would be sufficient under the--you
20 know, under the statutory case law, but certainly.

21 MR. MALCOLM: But now that I've told you
22 that it doesn't matter to me, can you tell me where--

23 MR. WEISEL: Yeah, no, no, I will. So
24 for instance, on Page 7, which is Page 4 of the order
25 after Tab 1, Number 19, it said that the finding of fact

1 was the candidate did state that he only had a business
2 checking account. Well, actually in the testimony that's
3 not what he said. What he said was he did not have a
4 personal checking account with the new residence address
5 on it of 17 North Carolina Highway 55. So that's not,
6 you know, an accurate finding of fact.

7 On Page 9--Page 6 of the order, 38, "Moreover
8 the candidate testified"--I'm sorry, at the bottom of the
9 line, "Moreover the candidate testified that he lived in
10 the other apartment during and after the departure of
11 Kevin Tracey." This was in regards to what the police
12 officer came and found, the allegations of rental of the
13 spaces and everything else.

14 You know, I'm not--I did not do a minute--given
15 the time constraints, I did not do a minute
16 (unintelligible), but there was no--I do not recall that,
17 and there is nowhere in the testimony. In fact, the
18 testimony tended to show, and whether it's hearsay or
19 not, tended to show that both bedrooms were occupied by
20 different people that were not Mr. Wilkins during--in
21 March during the time when he said that he had moved,
22 since he had said he moved January 23rd.

23 On 7--I mean this is--you know, this is
24 obviously at the Board's discretion, but 41, "The Board
25 in its discretion to review the entire record gives more

1 weight to the testimony of the candidate concerning his
2 intent to make the 55 his domicile residence, that the
3 Dunn zoning ordinances"--we would argue otherwise, but
4 I understand, you know, this Board's here, but then if
5 you also go to 42, "The Board at its discretion to review
6 the entire record gives greater weight to the overall
7 testimony of the candidate."

8 And that's fine, but our argument would be that
9 there was and at least one board member certainly agreed
10 with us that there was a lack of any weight given to the
11 lack of evidence which the--Mr. Wilkins had the burden
12 of proof at that juncture.

13 And you know, in response to direct questions
14 regarding the indicia of things that Farnsworth and other
15 cases, (unintelligible) as well the statute, he did not
16 meet those.

17 CHAIRMAN HOWARD: Mr. Malcolm, am I gathering
18 you'd like to hear from the county attorney?

19 MR. MALCOLM: Absolutely.

20 MR. WEISEL: Okay.

21 CHAIRMAN HOWARD: Mr. Weisel, if you'd wrap
22 up so we can take--

23 MR. WEISEL: I can, and I will say by
24 summation, I think you know how the challenger feels and
25 what our issues are. I, however, have sort of a

1 housekeeping matter, I guess. I must renew my oral
2 motion for reconsider of the previous Board ruling.

3 The Board ruled without public notice, and
4 contrary to prior--previous historic practice including
5 last year's hearing and we would argue about, again,
6 statutory requirements, that the preparation of cost of
7 the whole hearing record is now to be borne by the
8 appealing party instead of the county board of elections.

9 And then in conjunction too my understanding
10 is if they were appealed from here, normally that has
11 been a state board preparation of the record and cost of
12 the transcripts, et cetera, and that goes up.

13 That's not been--you know, we were informed
14 that was not Board practice. Under protest, the
15 challenger paid--prepared the record and paid for the
16 cost of approximately \$1,000 solely for the transcript.

17 So we just renew our request that the Board
18 continue to follow past practices and order the Harnett
19 County Board to reimburse these costs, and we're happy
20 to file a motion to that effect. We did, but for the
21 record we'll need to have--

22 CHAIRMAN HOWARD: Will you file that in
23 writing?

24 MR. WEISEL: We'll be happy to.

25 CHAIRMAN HOWARD: If you would do that--that

1 should not interfere with the decision today.

2 MR. WEISEL: I don't think it does, and
3 I think it's a totally separate matter.

4 CHAIRMAN HOWARD: That's an important policy
5 issue this whole board needs to consider. I don't know
6 that my colleagues are familiar with what you're talking
7 about yet. So--

8 MR. WEISEL: Oh, I'm sorry. I didn't
9 know that--

10 CHAIRMAN HOWARD: I want everybody to vote
11 on that. What concerns me, Mr. Weisel, is that if
12 someone brings a frivolous appeal, why are we now
13 burdening the county with that cost?

14 MR. WEISEL: I understand completely,
15 and my flip side argument to your point, because I do
16 believe there will be other residency--you know, anti-
17 residency challenges and the like, because it's not
18 just this decision; it's other decisions at the county
19 board level, that you may very well be precluding some
20 challengers or candidates, as the case may be, who are
21 unable to afford the cost of--I mean this was a very
22 brief hearing, and everything else; it would be \$5,000.

23 CHAIRMAN HOWARD: Right. That's a
24 traditional issue in all forms of litigation; how do we
25 vindicate rights?

1 MR. WEISEL: Well, true, but except
2 that, you know, it's within the framework of the quasi-
3 judicial nature which, as I said, we would argue--we can
4 have an argument; statutorily we believe that that's
5 required, and also I think it's a fundamental--
6 potentially a fundamental denial of due process, but we
7 don't really need--I just--

8 CHAIRMAN HOWARD: If you will file something
9 in writing on that, it would be great.

10 MR. WEISEL: Happy to do so.

11 CHAIRMAN HOWARD: Mr. Lawson, we're going to
12 want staff to respond and I want the whole board to
13 consider that. That's a significant issue, and I
14 appreciate your argument.

15 MR. WEISEL: Well, and we do--you know,
16 on behalf of our clients we need to do so. So we're
17 clear on the record in here, that is a--well, concurrent
18 with this, it is a separate issue. We're not looking for
19 resolution of that matter, and we agree that we're going
20 to take it up separately and we'll file a separate motion
21 for that.

22 CHAIRMAN HOWARD: Thank you, sir. If the
23 county attorney might come forward. And are there any
24 county board members?

25 MR. MALCOLM: Is the chairman here? I

1 may want to hear from the chairman.

2 MS. JACKSON: May it please the Board,
3 all of our county commiss--I mean all our board members
4 are here.

5 MR. MALCOLM: Oh, that's great.

6 CHAIRMAN HOWARD: Thank all of y'all for (a)
7 for your service. I was on a county board. I know my
8 colleague on my left and my right were on a county board
9 for even longer than I was, and it is an incredible
10 investment of time, and we appreciate what you do.

11 Mr. Malcolm, what questions did you have for
12 the county attorney?

13 MR. MALCOLM: Reading the transcript, to
14 be quite blunt like I always am, it sounded like it was
15 painful. It sounded like it was a painful hearing.

16 MS. JACKSON: I won't disagree.

17 MR. MALCOLM: I noticed and I assume
18 you're familiar with the Knight (phonetic) case that was
19 cited by the North Carolina Court of Appeals in 2008
20 where the Court of Appeals found some problems which
21 occurred in Edgecombe County which related to the board
22 of elections there violating two basic fundamentals.

23 One of those is that the county attorney just
24 took over, and in the first matter the county attorney,
25 and you'll hear my--you'll see the nexus here in a

1 minute. The county attorney took over and made a recusal
2 determination for the board of elections because, to be
3 honest with you, it seems like the board was in--I was
4 going to say incompetent, but that's probably not the
5 right word. Maybe they were impotent or didn't know what
6 to do, but they made--he made that decision; the county
7 attorney did, and later they violated (unintelligible).
8 The Court of Appeals overturned that.

9 When I read that case which I read years ago
10 when I was on Robeson and I read the transcript of this
11 hearing, I was dumfounded, and I was dumfounded by how
12 much you were involved in the hearing, and I was
13 dumfounded how you were asking questions, and I was
14 dumfounded how you were somewhat controlling the flow,
15 unlike today; Chairman Josh Howard is controlling the
16 flow of this Board, and every once in a while, we turn
17 around and look at our competent and capable counsel on
18 my left, Josh Lawson.

19 Did you find that you--and I don't mean to put
20 you on the spot, but I am because that's what I'm--I
21 think that's what I'm put up here to do. Do you think
22 you were overreaching and controlling what was being
23 presented to the board in this matter?

24 MS. JACKSON: I don't recall asking any
25 factual questions to either--or to any of the witnesses.

1 What I recall my involvement was, to the extent that the
2 board members had questions of me, I answered those
3 questions in the hopes and effort of providing them
4 guidance of how to move forward with this hearing
5 inasmuch as none of them are attorneys.

6 I mean if you could point me to something in
7 the transcript, I'll stand corrected, but I do not recall
8 at any point that I asked or I did any sort of direct or
9 cross-examination of any of the witnesses.

10 MR. MALCOLM: Page 18, line 12. "Now,
11 Mr. Wilkins, was there anything else that you would like
12 to tell us about the photos or anything else that you
13 would like us to do with these photos?"

14 MS. JACKSON: I did--

15 MR. MALCOLM: I can keep going.

16 MS. JACKSON: I did direct that question
17 to Mr. Wilkins because he is pro se; he was there by
18 himself unrepresented by counsel, and I wanted to make
19 sure that he had--that his due process rights were
20 afforded to him and that he had a right to be heard
21 throughout the entire hearing.

22 I was not trying to extract anything in
23 particular from him. I just wanted him to understand as
24 a lay person--and furthermore, as I understand it, I
25 don't even think this man has a college degree. I wanted

1 him to understand, "Look, this is it; this is your
2 opportunity to be heard. Whatever you've got to say, you
3 need to say it now. I don't really care what you say.
4 Just get it all out now."

5 That was my only ulterior motive, to the extent
6 that there was one. Again, my ulterior motive was due
7 process and the right for everyone to have a fair
8 hearing, those that were represented by counsel and those
9 that were not.

10 MR. MALCOLM: When the board went into
11 closed session, I noticed in the transcript that the
12 board--I think the board relied on subparagraph 3, and
13 that was to receive--was that to receive legal advice
14 from you?

15 MS. JACKSON: Under 143 of the General
16 Statutes, yes, they consulted with me for legal advice.
17 I made it clear on the record before we went into closed
18 session and I reiterated it when we were in closed
19 session, that they were not to deliberate the facts of
20 the case.

21 And I can tell you as an attorney and officer
22 of the court, they did not deliberate the facts of the
23 case. It was for the limited purpose of asking legal
24 questions regarding what the statute says and means.

25 MR. MALCOLM: And I think that's good.

1 I think that's helpful that you state that today because
2 I was under the understanding it was a very short period
3 of time. It was only 10 or 12 minutes. So it was not
4 like the case that I referred to earlier.

5 MS. JACKSON: And I'll tell you, half of
6 that was spent--I can tell you I misplaced some documents
7 and I had to sort of get those together. So really the
8 time spent with any dialogue between myself and the board
9 was minimal.

10 MR. MALCOLM: Yes, ma'am. You've heard
11 the challengers or the appellants talk about the findings
12 of fact. I assume you prepared the findings of fact for
13 the board for their perusal, and of course the chairman
14 executed it, I assume.

15 MS. JACKSON: I did, and all the board
16 members signed off on it including the gentleman that
17 dissented.

18 MR. MALCOLM: The references they make
19 to what they allege are misstatements in the findings of
20 fact, does the board or you take--do you agree with that
21 or disagree?

22 MS. JACKSON: I disagree. I will
23 tell--I will be candid with the board and tell you that
24 I was given the opportunity to hear an audio recording
25 of the entire proceedings, and I drafted my order

1 accordingly. I listened to it several times.

2 MR. MALCOLM: Yes, ma'am. So how did
3 you--who had the audio recording? Because I asked about
4 that earlier this week. This is the first time any--I've
5 asked four of our staff members if there was an audio
6 recording. So is there an audio recording?

7 MS. JACKSON: Well, the court reporter
8 has an audio recording. She has several backups in terms
9 of how she captures the hearing, and in addition, there
10 were media present.

11 MR. MALCOLM: So did you rely on the
12 audio recording?

13 MS. JACKSON: No. I relied on--I
14 listened to it after I had basically wrote what I was
15 going to write. I used that as a tool to make sure that
16 my notes were accurate.

17 MR. MALCOLM: Yes, ma'am.

18 MS. JACKSON: I took notes, the board
19 members took notes, and I based my findings on that and
20 not of someone else. Again, it was just to make sure
21 that I heard--that what I thought I heard was in fact
22 what was there.

23 MR. MALCOLM: Did the board reconvene to
24 review those findings, or did they--

25 MS. JACKSON: They did.

1 MR. MALCOLM: Okay, and at that time--so
2 that was an official meeting of the board?

3 MS. JACKSON: It was not an official
4 meeting of the board. They met in my office to review
5 my draft.

6 MR. MALCOLM: How did they do that? How
7 did the board--how did a board, a public body meet in
8 your office to discuss a matter?

9 MS. JACKSON: They came to look at
10 the--they came to look at the order, and it wasn't
11 intended to be an official meeting. It was intended to
12 be, "Look, our deadline is 4:30 today. Come sometime to
13 my office between 2:00 and 4:30."

14 I understand two of these gentlemen are
15 schoolteachers, and so those two ended up showing up at
16 the same time because they got out of school at the same
17 time.

18 MR. MALCOLM: So they came to your office
19 together, so there were two members--

20 MS. JACKSON: It wasn't as a deliberative
21 process. It was intended to be each of them to look at
22 it, tell me if they had a problem with it; "Are you okay?
23 Sign this."

24 MR. MALCOLM: And were there changes that
25 were made?

1 MS. JACKSON: Not to my knowledge.

2 MR. MALCOLM: Did you make--

3 MS. JACKSON: Oh, other than some minor
4 typographical--one typographical error.

5 MR. MALCOLM: Those are all the questions
6 I have for you.

7 CHAIRMAN HOWARD: Do any other board members
8 have questions for the county attorney, Ms. Jackson?

9 MS. AMOROSO: I'd like to thank you, Ms.
10 Jackson. I know it's very important to have a county
11 attorney at these meetings particularly when you do not
12 have legal folks, lawyers, as board members, which I
13 believe a good majority of our counties do not. So thank
14 you for your service there.

15 MS. JACKSON: Thank you. And if I could
16 just say--I know, again, that this is a separate matter
17 regarding the cost of the transcript, but the county most
18 certainly would like to be heard on that issue as well
19 when the time is appropriate.

20 CHAIRMAN HOWARD: If Mr. Weisel goes forward
21 with that written motion, would you serve Harnett County
22 with that?

23 MR. WEISEL: Absolutely.

24 MS. JACKSON: And we haven't reviewed
25 that motion, but I certainly have some thoughts and

1 comments on that.

2 CHAIRMAN HOWARD: Well, I want y'all to
3 respond to it. I want you to do it formally. Serve it
4 on her, and we will look for your responses.

5 MR. WEISEL: We'll serve it on all the
6 parties.

7 MS. JACKSON: Thank you.

8 CHAIRMAN HOWARD: Mr. Lawson, make sure that
9 happens. All right, thank you, Ms. Jackson, and I also
10 want to thank Chairman Currin and Mr. Spears and Mr.
11 Powell. Thank you again for your service.

12 MR. MALCOLM: I apologize, Ms. Jackson.
13 I do have one more question. In the transcript, do you
14 know whether the board and whether you ever instructed
15 them as to their weight or any discussion about evidence,
16 testimonial evidence, and whether issue can be
17 considered, the difference between testimonial evidence
18 as opposed to copies of driver's license and things like
19 that, how they should weigh that?

20 I noticed in the order it repeatedly refers,
21 "We gave the greater weight to." But I didn't see--

22 MS. JACKSON: I will tell you. If you'll
23 look at the record, I looked at pattern jury instructions
24 that are given to juries in North Carolina courts, both
25 district and superior, and I read out the pattern jury

1 instruction of what the standard of law is for
2 preponderance of evidence. And you'll find that there.

3 MR. MALCOLM: Yes, ma'am. I'm not
4 referring--I'm not referring to that.

5 MS. JACKSON: I think that sort of speaks
6 to--if I'm not mistaken--correct me if I'm wrong. I
7 think to some extent it does speak to that.

8 MR. MALCOLM: So is your answer no?

9 MS. JACKSON: I'm sorry?

10 MR. MALCOLM: Is the answer no to the
11 question I'm asking? Are you telling me you just relied
12 on the instructions you gave them at the end? Did you
13 talk to the board--

14 CHAIRMAN HOWARD: Mr. Malcolm, our review is
15 de novo anyway, right?

16 MR. MALCOLM: Yes.

17 CHAIRMAN HOWARD: Whether they got that wrong
18 below, we've got to make a new decision.

19 MR. MALCOLM: Yeah, but the reason I'm
20 thinking that's pertinent to this board is because, and
21 as I've mentioned to Josh Lawson and all, just no
22 comparison. This big black book I have under my--in my
23 lap here is actually the documents and everything this
24 board reviewed in 2013 when we considered the Pasquatank
25 issue, and the board there and the county attorney there

1 went through a very deliberative process.

2 And in my mind and in instructions or the
3 training that the state board does and did years ago,
4 that's one of the things they taught, and for the board
5 members, especially for Ms. Amoroso's point, a lot of our
6 board members are brand new. A lot of them haven't--
7 they're not lawyers, and to me that's pretty important,
8 for them to understand how--you know, to have that
9 discussion instead of just reading a pattern jury
10 instruction to them.

11 I'm not getting in a back and forth to you.
12 I'm just letting you know to me that's pertinent.

13 MS. JACKSON: Well, I took the position
14 that if it's good enough for the Superior Courts of North
15 Carolina, it's good enough for this board because that's
16 all a jury's ever going to get, and they're fact finders
17 as well.

18 MR. MALCOLM: Okay.

19 CHAIRMAN HOWARD: Thank you, Ms. Jackson.
20 It's very helpful that you were here today.

21 It's time to turn to discussion, and then once
22 we resolve this matter, my intention would be to take a
23 brief recess and then come back in about five minutes.

24 Judge Baker, you're new, so you get to go
25 first.

1 MR. BAKER: It would seem more
2 appropriate that I would go last, but--

3 (Laughter)

4 MS. BAKER: Well, as I say, in the
5 questions that I asked, I don't know what I would have
6 reached the result that the board did if I had been at
7 the board, but my concern really is the role that we have
8 before us today.

9 And if there is in fact evidence to justify
10 what the county board found, I wonder how far we can
11 possibly go without substituting our judgment for the
12 county board, and I find that to be a difficult thing.

13 The board below had--when the--when Mr. Wilkins
14 had his burden, they had his testimony to go on, that he
15 had in fact moved, that he was taking residence in the
16 place. They had before it that there were in fact
17 residence quarters; that there was a place for him to
18 live there, and he said he was living there.

19 There was evidence presented that he wasn't
20 there at various times, which actually doesn't mean a
21 whole lot to me. When the officer went there, they
22 didn't find him there. I'm not at my residence right
23 now, of course, so I don't know, on an occasion or two,
24 what that means.

25 There was a mention that we didn't have a

1 private detective or anything. Maybe that would have
2 been a good thing to have had in the evidence; that he's
3 never at the carwash and that he's living back at his
4 home, but that wasn't there. So I suppose it is possible
5 to see how the board below reached its decision.

6 As the new guy and speaking first, that's what
7 I'm struggling with about substituting what I might have
8 done if I had been at the county level rather than just
9 looking to see if there was any evidence that the board
10 could justify their decision or justifiable evidence for
11 them to reach the decision below. So that's what I'm
12 struggling with.

13 CHAIRMAN HOWARD: Dr. Kricker, what are your
14 thoughts?

15 MS. KRICKER: Well, first of all, my
16 thoughts are that the county boards--generally they're
17 not lawyers, and neither am I, as a matter of fact.
18 However, they--in terms of substituting our judgment, we
19 are in the position on making appeals and that we need
20 to consider how knowledgeable they are in terms of making
21 these decisions, and also it is our job to consider the
22 entire record.

23 At any rate we've heard about this basic case
24 of Farnsworth, and in Hall vs. Wake County Board of
25 Elections, 1972, and I quote from that decision, "A

1 person's testimony regarding his intention with respect
2 to acquiring or retaining domicile is not conclusive, and
3 such testimony is to be accepted with considerable
4 reserve though no suspicion may be entertained as to the
5 truthfulness of such a person."

6 So basically what this is saying is that given
7 that the burden of proof for domicile is on the
8 candidate, the candidate needs to actually produce
9 physical evidence as well as show by his actions that he
10 actually has a domicile at the stated place.

11 Now, I have some questions. First of all,
12 there was the issue raised about whether a commercial
13 property would be considered a domicile. And while it
14 is true that essentially a homeless person can claim as
15 their domicile a street corner even though it may be
16 illegal to live there, the law also states that if the
17 person is found not to be domiciled at a specific place,
18 then they would be considered domiciled at their previous
19 residence.

20 So what I'm wondering about is whether for a
21 person who has a previous domicile or may not have
22 abandoned the residence, can they claim a place that is
23 illegal to live in as their residence.

24 And of course the second issue is, is the
25 candidate actually living and sleeping at the claimed

1 residence. And I'm taking a look at the entire record
2 and what the evidence for and against the second question
3 was.

4 And I look--one, there are the statements, but
5 I'm also looking for physical evidence that he was there.
6 One, the evidence for is that he states that he has
7 separated from his wife. He offered photographs of
8 living quarters of a bedroom, bath, and kitchen, living
9 area. He had changed his voter registration, his
10 driver's license changed, he had photographs of clothes
11 in the bedroom, and stated that he had moved there in
12 January 23rd--on January 23rd.

13 He claimed that he was not aware that the
14 location was zoned solely commercial, and that he
15 proposed to negotiate the problem with the planning board
16 and the county commissioners.

17 But then we have a certain amount of evidence
18 against. The property zoned as commercial was C3 and it
19 is illegal to use as a residence, and I think we need to
20 decide whether this fact alone indicates it cannot be a
21 domicile particularly in consideration of the fact that
22 the candidate owns other residential properties.

23 There was no documentation for separation. The
24 candidate's wife who had been subpoenaed could have
25 offered information as to whether the candidate lived at

1 the Stonehenge address or at the Highway 55 address or
2 at least whether or not the candidate was occupying the
3 previous home.

4 The candidate did not produce any personal
5 documents even though he was subpoenaed for them. He did
6 not offer any utility bills or tax bills or personal
7 checkbook, mail. The auto insurance card he had
8 contained a Fayetteville address.

9 The candidate's name remains on or at least
10 according to the record, the candidate's name remains on
11 the warranty deed of the Stonehenge drive home. The
12 candidate's driver's license changed after the challenge.

13 By the candidate's own statement, there were
14 no personal effects in living quarters other than
15 clothing and shoes. Evidence from a Dunn Police Officer
16 Brannon in March that there--that both bedrooms in the
17 living quarters were occupied and not by the candidate;
18 the candidate's statement to Officer Brannon that he
19 would be allowing a friend to live in a second bedroom
20 to help them out.

21 And at this point I would state that while the
22 county board may have considered this hearsay, they had
23 the option of continuing the hearing and getting either
24 an affidavit or having present Officer Brannon to clarify
25 if there was any question about this situation.

1 CHAIRMAN HOWARD: Dr. Kricker, you have very
2 clearly gone thoroughly through the record, and I think
3 we all have.

4 MS. KRICKER: Yeah.

5 CHAIRMAN HOWARD: In the interest of time,
6 I see the value of all the points you're making, but
7 where are you headed with this? What's your conclusion?

8 MS. KRICKER: My conclusion is, is that
9 there is--given the whole record, that there is not
10 sufficient evidence that the previous home had been
11 abandoned and that domicile--a permanent home had been
12 established at the Highway 55 address.

13 CHAIRMAN HOWARD: Very good, and thank you
14 for raising those points.

15 Madam Secretary, our review has to be on the
16 whole record, and do you find, going through all the
17 points Dr. Kricker's raised and also the rest of the
18 record, that the Harnett County board's decision was
19 supported by competent material and substantial evidence?

20 MS. AMOROSO: I actually do, and I--what
21 I'm hearing seems to be inconsistent with past decisions,
22 and I recall the Pasquatank decision where we had--you
23 know, we're looking at 49-51, and we have construed, as
24 the statues have, fairly liberally; we want people to be
25 able to register and vote and to run for office.

1 And it's not for me to put what I think your
2 intent was. If you tell me, Mr. Wilkins--if he says he
3 has moved, he's clearly left the old residence with the
4 wife. People going through separation and divorce, it's
5 a very, very tricky and tragic situation.

6 So sometimes you walk out with just your
7 clothes on your back, and you know, we've known people
8 that have been through that. So I cannot put my judgment
9 on you. I will take your word at face value.

10 The zoning issue here I find completely
11 irrelevant as a separate issue because, again, I bring
12 up the homeless--the homeless situation. People that are
13 homeless are living in places that are not zoned for
14 residential, but there was no evidence put forth by the
15 challenger to show that Mr. Wilkins is actually still at
16 the old place. We don't have any pictures of him coming,
17 going, no investigation. Mr. Baker had reiterated
18 earlier my concern.

19 And we have--again, I will reiterate, we have
20 liberally construed these residency challenges in the
21 past to give the benefit to the person who was running
22 or a person who is trying to vote, and we look at the
23 whole, everything in totality.

24 So that's where I'm coming down here, and my
25 feeling again is if we allow Mr. Wilkins--if we say that

1 he's living there and his domicile is where it is, which
2 is a residence, so let the voters decide. Throw it out
3 to the folks, the citizens. That's where I am right now,
4 based on our past decision making on this board.

5 CHAIRMAN HOWARD: Those previous decisions,
6 Mr. Malcolm, weigh on me as well, and Judge Baker, I
7 don't know if you would have noticed what we did before
8 in I think it was Pasquatank; we let a college kid run
9 for office from a dorm room, and then it was the Ledford
10 sheriff race in Madison Count--was that--

11 MR. BAKER: Sure was.

12 CHAIRMAN HOWARD: --your neck of the woods?
13 And he had been through a similar fact pattern where I
14 think maybe he had just been--he just changed residences
15 due to a marital situation. And we let him run too
16 despite--in both instances, you know, they were briefly
17 in those locations.

18 But we have a history of including people in
19 this process. I want people to vote; I want people to
20 run. I want to let everybody vote and fun where they're
21 legally qualified.

22 Mr. Malcolm, what are your thoughts then?
23 Should we also let Mr. Wilkins run?

24 MR. MALCOLM: Well, with all due respect
25 to you, Mr. Chairman, and my fellow board members, I

1 think it would be a mistake, in my opinion, for us to
2 draw analogies between what happened in Pasquatank.
3 Pasquatank, as every one of you folks that are informed
4 knows, students and their status by case law is to be
5 interpreted different, when those young men and women
6 live in dorm rooms which a lot of people consider them
7 as in transit. So I don't think it's--I don't think
8 that's a comparison.

9 If we were to draw a comparison between Mr.
10 Ledford, and I remember that day very clearly because the
11 former chair of this board so eloquently represented him,
12 the former chair would, I think the distinguishing factor
13 between those and it seemed the problem that I've got
14 with what happened in this county and I still have not
15 heard anyone yet mention is it's clear in the eight, nine
16 years I've been involved in the State Board of Elections,
17 it's clear in all the training, it's clear in numerous
18 case laws, it's clear to everything that's ever said that
19 what this board and what the county board should have
20 done is consider all the surrounding circumstances.

21 But no one's talking about the conflict, and
22 I don't believe, with all due respect--I don't know you,
23 sir, and I don't have any reason to question you, but a
24 person is going to have an obvious bias based on their
25 testimonial evidence, and I think what the county board

1 should have done and what this board is required to do
2 is to consider the fact of his obvious bias in his
3 testimonial evidence.

4 And I think in addition the county board should
5 have and it should be in the record, for which it is not,
6 is required or should use have used in its deliberative
7 process, it should have stated that the conduct of the
8 challenged voter is of greater evidentiary value than the
9 declarations by a voter because, in my opinion, in
10 looking at the whole record, that's all we have from you,
11 sir, and that's all the county board relied on. In its
12 order, kept using the same phrase over and over and over,
13 "We give greater weight to, we give greater weight to."

14 At no point did the county board in preparing
15 its findings of fact and conclusions of law actually
16 address the fact that the county board was required to
17 give greater evidentiary value to the total things other
18 than declarations of the voters.

19 So I guess in conclusion I think that this
20 board, and Judge, I think it would actually be an error
21 in law for this board to consider whether there's one
22 scintilla of evidence to support their decision.

23 I actually think the case law makes it very
24 clear that we were not required nor should we make a
25 determination solely whether they had evidence. I think

1 because of the standard of review that we're going
2 through, that we're required to consider all of it, not
3 just whether they have some testimony.

4 So I guess in summation I think this board, the
5 state board should reverse the decision of the county
6 board of election and move forward.

7 CHAIRMAN HOWARD: Mr. Malcolm, as always it's
8 very reasonable and thoughtful, but I respectfully
9 disagree. I am inclined by the evidence in the record,
10 having issued--I mean endeavored into a review of the
11 whole record, to believe that the Harnett County Board's
12 decision was supported by competent material and
13 substantial evidence and to move to affirm that.

14 Madam Secretary, do I hear a motion to affirm
15 the Harnett County decision in this matter?

16 MS. AMOROSO: So moved.

17 CHAIRMAN HOWARD: Is there a second?

18 MR. BAKER: Second.

19 CHAIRMAN HOWARD: All those in favor say aye.

20 (Vote in the affirmative.)

21 CHAIRMAN HOWARD: I'm in favor as well, Mr.

22 McCue. All those opposed.

23 (Vote in the negative by Ms. Kricker

24 and Mr. Malcolm.)

25 CHAIRMAN HOWARD: Mr. McCue, if you would

1 report those as well, then the Harnett County decision
2 is affirmed by a vote of three and two.

3 Thank all of you gentlemen for your service.
4 Mr. Wilkins, good luck with your race.

5 MR. WILKINS: Thank you.

6 MR. WEISEL: Mr. Chairman, may I ask a
7 question here in terms of process? As you know, the
8 appeal process from here is in fact the Court of Appeals
9 directly, as you mentioned. As to the transcript and the
10 record, what is this board's position as to who prepares
11 the record and the transcript?

12 CHAIRMAN HOWARD: My first thought would be
13 you're going to need a written order right away. I want
14 to get through the rest of the calendar today so that Mr.
15 Lawson can get to that. Can you get that out today,
16 Josh?

17 MR. LAWSON: Yes.

18 CHAIRMAN HOWARD: There will be a written
19 order out today. It'll be very brief. As to the
20 transcript, Mr. Peters, Mr. Lawson, what do y'all think?

21 MR. LAWSON: In the past we have ordered
22 the transcript on an expedited basis. I inquired as to
23 how quickly this one can be prepared. We have borne the
24 cost in the past, but this goes to the other motions
25 previously mentioned.

1 CHAIRMAN HOWARD: I think for the purposes
2 of today--the election's already started, hasn't it?

3 MR. WEISEL: Yeah, my understanding is
4 absentee ballots have--

5 CHAIRMAN HOWARD: I don't necessarily think
6 we need to make a policy decision. Let's get the
7 transcript done, and we'll pay for it, and let's get it
8 out there so you can pursue what you need to pursue.

9 MR. WEISEL: Thank you. Appreciate it.

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(Whereupon, the proceedings

14

concluded at 11:32 p.m.)

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STATE OF NORTH CAROLINA
COUNTY OF ALAMANCE

C E R T I F I C A T E

I, G. Lynn Bodenheimer, Certified Verbatim Reporter and Notary Public, do hereby certify that I was present and served as court reporter for the foregoing proceeding held at the North Carolina State Board of Elections in Raleigh, North Carolina, on September 18, 2015; that said proceeding was reported by me and transcribed by me personally; and that the foregoing pages 1 through 61 constitute a true and accurate transcription of the proceeding.

I do further certify that I am not of counsel for or in the employment of either of the parties to this action, nor am I interested in the results of this action.

In witness whereof, I have hereunto subscribed my name this 21st day of September, 2015.



G. LYNN BODENHEIMER
Certified Verbatim Reporter/
Notary Public No. 19942140002

My Commission Expires:

August 3, 2019

Date: 9/18/15

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