

Pages 1-91  
Exhibits - None

---

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF THE TRIAL COURT  
HAMPSHIRE, SS. SUPERIOR COURT  
NO. 1780CV00105

TIMOTHY FONDAKOWSKI,  
Plaintiff,

v.

PLANNING BOARD OF THE TOWN OF WESTHAMPTON  
THROUGH ITS MEMBERS MARK SCHWALLIE, THOMAS  
HATHAWAY, ROBERT TURNER, ROBERT DRAGON, JR.,  
COTTON TREE SERVICE, INC., DODGE MAPLE GROVE  
FARM, LLC, AND HAMPSHIRE SUPERIOR COURT,  
Defendants.

---

DEPOSITION OF MARK SCHWALLIE  
TAKEN MAY 21, 2018  
AT THE LAW OFFICES OF  
KOTFILA & JORDAN  
ONE MONARCH PLACE, SUITE 1340  
SPRINGFIELD, MASSACHUSETTS

Reporter: Raymond F. Catuogno, Jr.

<p style="text-align: center;">2</p> <p>APPEARANCES:</p> <p>For the Plaintiff:                  LAW OFFICES OF KOTFILA &amp; JORDAN                  One Monarch Place, Suite 1340                  Springfield, Massachusetts 01144                  BY: RICHARD T. JORDAN, ESQ.                  413-736-0077/413-781-5399                  attorneyjordan@gmail.com</p> <p>For the Defendant Town of Westhampton:                  KP LAW, P.C.                  101 Arch Street                  Boston, Massachusetts 02110                  BY: JACKIE COWIN, ESQ.                  617-556-0007                  jcowin@k-plaw.com</p> <p>In Attendance:                  Timothy Fondakowski                  David Cotton</p>	<p style="text-align: center;">4</p> <p style="text-align: center;">STIPULATIONS</p> <p>It is agreed by and between the parties that all objections, except objections as to the form of the questions, are reserved and may be raised at the time of trial for the first time.</p> <p>It is further agreed by and between the parties that all motions to strike unresponsive answers are reserved and may be raised at the time of trial for the first time.</p> <p>It is further agreed by and between the parties that the sealing of the original deposition transcript is hereby waived.</p> <p>It is further agreed by and between the parties that the notification to all parties of the receipt of the original deposition transcript is hereby waived.</p>						
<p style="text-align: center;">3</p> <p>INDEX:</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;"></th> <th style="text-align: right;">PAGE</th> </tr> </thead> <tbody> <tr> <td>WITNESS: MARK SCHWALLIE Examination by Mr. Jordan .....</td> <td style="text-align: right; vertical-align: bottom;">6</td> </tr> <tr> <td>EXHIBITS: (None marked)</td> <td></td> </tr> </tbody> </table>		PAGE	WITNESS: MARK SCHWALLIE Examination by Mr. Jordan .....	6	EXHIBITS: (None marked)		<p style="text-align: center;">5</p> <p>1                   * * * * *</p> <p>2                   MARK SCHWALLIE, Deponent, having produced</p> <p>3                   satisfactory identification by means of</p> <p>4                   Massachusetts Driver's License, was duly sworn,</p> <p>5                   deposes and states as follows:</p> <p>6                   MR. JORDAN: Same</p> <p>7                   stipulations?</p> <p>8                   MS. COWIN: Sure. Before you</p> <p>9                   start, I would like to put a brief</p> <p>10                  statement on the record, if I may.</p> <p>11                  MR. JORDAN: Sure.</p> <p>12                  MS. COWIN: The witness</p> <p>13                  informs me that he has been receiving some</p> <p>14                  therapy, some treatment, and his therapist</p> <p>15                  tells him he has a condition that</p> <p>16                  sometimes affects his memory. He thinks</p> <p>17                  that he is fine to testify today to the</p> <p>18                  events underlying this matter but wanted</p> <p>19                  you -- wanted that to be on the record.</p> <p>20                  MR. JORDAN: Okay. I'm</p> <p>21                  probably going to ask him a few questions</p> <p>22                  about that then.</p> <p>23                  MS. COWIN: Sure.</p> <p>24</p>
	PAGE						
WITNESS: MARK SCHWALLIE Examination by Mr. Jordan .....	6						
EXHIBITS: (None marked)							

6

1 EXAMINATION BY MR. JORDAN:  
 2 Q. Would you state your name, please?  
 3 A. Mark Schwallie.  
 4 Q. Mr. Schwallie, where do you live?  
 5 A. 116 Chesterfield Road, Westhampton.  
 6 Q. Sir, what is your occupation?  
 7 A. I'm an attorney.  
 8 Q. How long have you been an attorney?  
 9 A. Mid '80s.  
 10 Q. What area of practice?  
 11 A. I do collections.  
 12 MR. JORDAN: Off the record.  
 13 (Off-record conference)  
 14 MR. JORDAN: Back on the  
 15 record.  
 16 Q. (By Mr. Jordan) So you stated your  
 17 practice is collections?  
 18 A. Yes.  
 19 Q. Any other areas?  
 20 A. Occasionally refinances for Quicken  
 21 Loans.  
 22 Q. Okay. Sir, is that your current  
 23 practice?  
 24 A. Let me explain something. You're

7

1 saying practice. I cover cases, generally small  
 2 claims cases, for law firms from the eastern  
 3 part of the state that don't want to come out  
 4 here.  
 5 Q. Okay.  
 6 A. I no longer do my own cases.  
 7 Q. Okay.  
 8 A. So I just file substitute counsel  
 9 appearances, might argue a civil motion, but  
 10 most of it is small claims but here for the  
 11 small claims session.  
 12 Q. Like I said, that is what you  
 13 currently do?  
 14 A. That is what I currently do.  
 15 Q. In the past what other areas of the  
 16 law did you practice in?  
 17 A. I did some real estate  
 18 transactions, collections, maybe some wills.  
 19 Q. And sir, this morning I just  
 20 quickly looked up your name because I was  
 21 unfamiliar with your practice and it stated you  
 22 did primarily real estate, business, corporate.  
 23 Is that a fair assessment of what you used to  
 24 do?

8

1 A. I did some business advice with a  
 2 company that was from Westfield that -- right  
 3 after my divorce a friend of mine asked me to do  
 4 some help for his company with some legal advice  
 5 on occasion, but what I was there for was for  
 6 accounting to make sure the numbers got in  
 7 correctly to the computer. And I think I did  
 8 some tax work for him, sales tax, that type of  
 9 thing.  
 10 Q. So has your primary income since  
 11 the '80s been derived from legal work?  
 12 A. I guess for the most part, yes.  
 13 Some of it was, as I said, doing accounting  
 14 work.  
 15 Q. Now, you're on the Planning Board  
 16 for the Town of Westhampton; is that right?  
 17 A. Yes.  
 18 Q. How long have you been a member of  
 19 that Planning Board?  
 20 A. A long time. Maybe '90s or -- in  
 21 the '90s sometime. I don't know. Late '90s,  
 22 maybe.  
 23 Q. Late '90s, you think?  
 24 A. I don't know, too long.

9

1 Q. And you're currently chairman of  
 2 the Planning Board?  
 3 A. Yes.  
 4 Q. And how long have you been  
 5 chairman?  
 6 A. I don't know. A long time. Like  
 7 how long I have been on the board, it's been a  
 8 long time. I don't know, could be -- I know  
 9 when I got on the board I was not the chairman.  
 10 I think Pat Coffey was. At some point it was  
 11 decided for me to become chair, I think,  
 12 basically because nobody else really wanted to  
 13 do it.  
 14 Q. Okay.  
 15 A. This is where my memory is not very  
 16 good. Whether it was mid '90s, late '90s, I  
 17 don't know.  
 18 Q. Okay. So with regard to your  
 19 memory, how long have you had issues with your  
 20 memory?  
 21 A. Probably since -- I don't know. I  
 22 was going to say since my divorce. That was  
 23 probably around 2002, but it probably even goes  
 24 back further.

10

1 Q. If you know, how has your memory  
 2 issues affected your ability to fulfill your  
 3 capacities as a Planning Board member?  
 4 A. I think I have done fine. I mean,  
 5 it's for the -- with the type of work that I do,  
 6 it's -- I live in the moment. I guess that is  
 7 the only way I can say it. I don't think it's  
 8 adversely affected me.  
 9 Q. Now, are you familiar with Chapter  
 10 40A of the Mass General laws?  
 11 A. I have not read it recently.  
 12 Q. Do you know what it is?  
 13 A. I think it's the zoning bylaw for  
 14 Massachusetts.  
 15 Q. Now, you said you think. Have you  
 16 ever read the zoning bylaws of Massachusetts?  
 17 A. Off and on throughout the years.  
 18 Anybody would, you know, when something comes up  
 19 you look at it.  
 20 Q. All right. Now, were you a part of  
 21 a meeting where you talked about the possibility  
 22 of entering into a settlement with, I believe,  
 23 Mr. Cotton's companies -- the name escapes me.  
 24 Were you a part of the discussion which resulted

11

1 in an Agreement for Judgment that was entered  
 2 into against Mr. Cotton and his company?  
 3 A. Are you talking about an executive  
 4 session meeting?  
 5 Q. I'm talking about were you -- what  
 6 I'm asking you is -- let me pull back.  
 7 Do you know there was an Agreement  
 8 for Judgment that was entered into by the Town  
 9 of Westhampton and Mr. Cotton?  
 10 A. Yes.  
 11 Q. What part did you play in that?  
 12 A. I attended an executive session  
 13 meeting. There were two of them.  
 14 Q. What date was that, the first one?  
 15 A. March. I don't know what the year  
 16 was, '16, '17.  
 17 Q. All right.  
 18 A. I don't know off the top of my  
 19 head.  
 20 Q. Were all the members of the  
 21 Planning Board present at that session you had?  
 22 THE WITNESS: Am I allowed to  
 23 talk about the executive session?  
 24 MS. COWIN: Yes. You can

12

1 answer his questions.  
 2 THE WITNESS: I didn't know.  
 3 A. I don't think Pat Coffey was there.  
 4 He was never part of this whole thing.  
 5 Q. And that was due to the fact that  
 6 he had recused himself from it; is that right?  
 7 A. Could be. I can't remember.  
 8 Q. So how long have you been the  
 9 chairman of the Planning Board for Westhampton?  
 10 A. I think you asked that. I couldn't  
 11 remember the exact time or date.  
 12 Q. Okay. Have you been for the past  
 13 ten years?  
 14 A. Oh, yes.  
 15 Q. So as of today, you have no  
 16 knowledge or no memory of why Mr. Coffey recused  
 17 himself from acting on the special permit for  
 18 the property on Northwest Road?  
 19 A. The specific reason, I can't  
 20 remember. I don't know if he didn't show up for  
 21 the first meeting or he recused himself, what  
 22 went on. I just know that he was not part of  
 23 the whole process.  
 24 Q. Well, it was stated by one of the

13

1 town people. I guess that was at the May 23,  
 2 2017 remand hearing. Did you hear that  
 3 statement about Mr. Coffey, whether he had  
 4 recused himself?  
 5 A. I don't have a recollection of  
 6 that; I don't.  
 7 Q. Were you at the May 23, 2017 remand  
 8 hearing?  
 9 A. I was at the remand hearing. If  
 10 that is the date, I was there.  
 11 Q. And what was the purpose of that  
 12 meeting?  
 13 A. The purpose of the meeting was to  
 14 let the public know what had been decided and  
 15 let them know about the agreement for judgment.  
 16 Q. Okay. So getting back to the  
 17 Agreement for Judgment, what was your  
 18 participation in coming to that agreement?  
 19 A. I attended the meeting with the  
 20 other board members, except for Pat Coffey.  
 21 Phil Dowling was there, selectman. And I  
 22 believe town attorney was there via conference  
 23 call or whatever.  
 24 Q. All right. And again, what was

14

1 your participation in that meeting?  
 2 MS. COWIN: Objection to the  
 3 form. Do you understand what he is  
 4 asking?  
 5 THE WITNESS: No, I don't.  
 6 Q. (By Mr. Jordan) Did you review  
 7 some kind of draft of the proposed Agreement for  
 8 Judgment?  
 9 A. I don't know. I can't remember if  
 10 we did or not. I know we looked at conditions  
 11 and talked about conditions.  
 12 Q. You said the meeting was in March.  
 13 When you attended the meeting in March, had the  
 14 Agreement for Judgment already been written up,  
 15 if you know?  
 16 A. I don't remember if it was or not.  
 17 Q. Did you ever see the Agreement for  
 18 Judgment before it was filed with the Hampshire  
 19 Superior Court?  
 20 A. I honestly don't remember.  
 21 Q. Let's step back. What can you tell  
 22 me today about what you remember with regard to  
 23 your participation or involvement with entering  
 24 into this Agreement for Judgment?

15

1 A. As I said, we discussed with town  
 2 counsel various conditions that would be part of  
 3 the Agreement for Judgment that -- what I do  
 4 remember is town counsel saying that there was  
 5 not a likelihood that the town would be  
 6 successful with the case with Mr. Cotton,  
 7 that -- whether or not we were open to doing  
 8 agreement and, if we did agreement, what would  
 9 be the conditions.  
 10 Q. And who was at that meeting besides  
 11 the Planning Board members?  
 12 A. I think Phil Dowling was there, the  
 13 selectperson, and then I think the assistant  
 14 town clerk.  
 15 Q. So your memory is there was one  
 16 Select Board member and the assistant town  
 17 clerk?  
 18 A. I think so, yes.  
 19 Q. Did Mr. Dowling ever direct the  
 20 Planning Board to enter into an agreement with  
 21 Cotton Tree Service and Dodge Maple Farms, LLC?  
 22 A. I don't know what you mean by  
 23 direct. I got a call from one of the selectmen,  
 24 either Mr. Dowling or Mr. Prichette, saying they

16

1 would like to have a meeting with the Planning  
 2 Board on the Cotton litigation, would I be open  
 3 to that. I said yes, but I voted for the  
 4 allowance of the whole thing. He would have to  
 5 call the other Planning Board members and see if  
 6 they wanted to do so, then we had the meeting.  
 7 Q. Okay. How were you notified of  
 8 that meeting?  
 9 A. Probably with the same telephone  
 10 call. I don't know. I think, you know --  
 11 Q. Well, what was your expectation  
 12 that would occur at this meeting? And when you  
 13 talk about a meeting, you're talking about the  
 14 meeting you had in March?  
 15 A. Yes. I think there were a couple  
 16 of meetings in March.  
 17 Q. About the same subject?  
 18 A. Yes.  
 19 Q. Were they separated by weeks, days,  
 20 what?  
 21 A. I don't know. I don't have the  
 22 specific dates.  
 23 Q. Okay. So today can you -- with  
 24 your memory, can you distinguish what was done

17

1 at the first meeting and what was done at the  
 2 second meeting in March?  
 3 A. I think basically we were briefed  
 4 by town counsel at the first meeting of doing an  
 5 agreement; and that the Town's position was not  
 6 real strong; and that if Cotton was successful,  
 7 then there was the possibility that it could be  
 8 allowed with no conditions. And then I think we  
 9 talked about some possible conditions, and then  
 10 I think the second meeting gave time for town  
 11 counsel and Attorney Melnik to go back and forth  
 12 on some of the conditions.  
 13 Q. So you were present at a meeting  
 14 between Attorney Melnick?  
 15 A. No.  
 16 Q. So the second meeting, were you at  
 17 the second meeting?  
 18 A. Yes, I believe the second executive  
 19 session meeting was with the same people there.  
 20 Q. And which were the Planning Board?  
 21 A. Planning Board. I think it was  
 22 Phil Dowling again, Cheryl Provost. And I think  
 23 town counsel came in via conference call or  
 24 whatever.

18

1 Q. Do you know why Mr. Dowling was  
2 there?  
3 A. I think because the Select Board is  
4 the executive of the town, like a mayor.  
5 Q. That's why he was there?  
6 A. I assume so.  
7 Q. Was this meeting not for -- not a  
8 meeting with the Planning Board?  
9 A. I think it was both.  
10 Q. Was it your understanding then that  
11 the Select Board had input into the decision  
12 that would be made with regard to the Agreement  
13 for Judgment?  
14 A. Yes. I would say it would, yes.  
15 Q. Okay. You stated earlier that you  
16 had voted for Mr. Cotton's company to be able to  
17 have the saw mill; is that right?  
18 A. Going back to the original --  
19 nothing do with these two meetings.  
20 Q. Right.  
21 A. I'm going back to the original  
22 event.  
23 Q. In 2015, when the application was  
24 voted on?

19

1 A. I can't remember the date. But  
2 yes, for the original hearing I would have voted  
3 for -- to allow the use here, the saw mill use.  
4 Q. And why did you vote in that  
5 manner?  
6 A. Because Westhampton is a county  
7 town. I believe that individual land rights,  
8 people being able to do what they want with  
9 their property, basically, subject to rules and  
10 conditions, but, you know, I guess that is my  
11 basic thought process.  
12 Q. Okay. How many votes, if you know,  
13 were made on the application for the saw mill on  
14 Northwest Road in Westhampton?  
15 A. On the application?  
16 Q. Yes.  
17 A. I don't think an application has  
18 votes.  
19 MS. COWIN: Objection to the  
20 form. I know what you are getting at, but  
21 the question is confusing.  
22 Q. (By Mr. Jordan) The process is you  
23 need to apply for a special permit with the Town  
24 of Westhampton. Is that generally how it works?

20

1 A. Yes.  
2 Q. And then at some point the Select  
3 Board votes on that application, correct?  
4 A. You mean the Planning Board?  
5 Q. What did I say?  
6 A. Select Board, I think.  
7 Q. The Planning Board?  
8 A. Right. After the public hearings,  
9 they do a vote.  
10 Q. Okay.  
11 A. I'm sorry.  
12 Q. No. I used the wrong board.  
13 A. Yes. And I voted to allow it. And  
14 there were four people voting. I voted for it.  
15 Tom Hathaway voted for it and Bob Dragon and Bob  
16 Turner voted against it.  
17 Q. And under the bylaws of the Town of  
18 Westhampton, that's a denial of this special  
19 permit, right?  
20 A. Right.  
21 Q. And do you remember what happened  
22 after that? What happened after there was a  
23 denial of the special permit by the Planning  
24 Board?

21

1 A. I think Mr. Cotton appealed it.  
2 Q. And then there was a remand  
3 hearing, is that right, the next meeting to vote  
4 on the allowance of the special permit?  
5 A. Yes. I think it went through  
6 whatever the appeal process was and it was  
7 followed by the remand hearing.  
8 Q. Again, I want to get back just a  
9 little bit more and talk about the Agreement for  
10 Judgment.  
11 A. Okay.  
12 Q. When did you first see a copy of  
13 the Agreement for Judgment?  
14 A. I don't recall. I don't remember.  
15 Q. Was it prior to the May 23, 2017  
16 remand hearing?  
17 A. I would assume so, yes.  
18 Q. Why would you assume that?  
19 A. Because I think we had copies of it  
20 that night. That night they were also passed  
21 out to the general public.  
22 Q. Well, assuming that on May 23 was  
23 the filing of this Agreement for Judgment -- and  
24 I have a copy here. Would that help you if you

22

1 looked at the Agreement for Judgment document?  
 2 A. Sure.  
 3 Q. So you can see that is a stamp of  
 4 the Hampshire Superior Court?  
 5 A. Mm-hmm.  
 6 Q. Prior to April 3, 2017, had you  
 7 seen that document, sir?  
 8 A. I think so. I just don't know. I  
 9 don't have a specific memory of it and this  
 10 date.  
 11 Q. How about with regard -- do you  
 12 have a memory today of what is contained in the  
 13 Agreement for Judgment?  
 14 A. I think there are conditions in the  
 15 Agreement for Judgment. That's the biggest  
 16 thing, the conditions in there, that the project  
 17 would be allowed.  
 18 Q. Between the dates in March, which  
 19 you cannot remember that you had discussions  
 20 about talking about conditions and April 3,  
 21 2017, are you aware of any notice that was given  
 22 to interested parties in the Town that the  
 23 Planning Board was entering into Agreement for  
 24 Judgment with Mr. Cotton's company?

23

1 A. Notices to abutters or property  
 2 owners?  
 3 Q. Yes.  
 4 A. I think that was done by the town  
 5 clerk.  
 6 Q. Do you know when that was done, and  
 7 specifically with regard to --  
 8 A. No.  
 9 Q. -- dates?  
 10 A. No, I don't.  
 11 Q. So you have no memory of whether  
 12 there was any notice given between March -- the  
 13 two dates in March, that you stated you  
 14 discussed the conditions for the agreement and  
 15 judgment, and the April 3, 2017 date where that  
 16 was filed with the Hampshire Superior Court?  
 17 A. Say that again.  
 18 Q. You have no memory at this point of  
 19 whether between March, where you had the two  
 20 meetings --  
 21 A. Yes.  
 22 Q. And if I suggested to you those  
 23 meetings were in March of 2017, would that help  
 24 refresh your memory, sir?

24

1 A. I don't know if it was '17 or '16.  
 2 Q. All right.  
 3 A. It was within the last year or two.  
 4 Q. So it's your understanding that  
 5 there was a year going between the date of  
 6 the -- possibly a year between the date for the  
 7 Agreement for Judgment and the May 23, 2017  
 8 remand date?  
 9 A. The executive session hearing,  
 10 looking at this date here, was probably March of  
 11 2017. That's the likelihood of it.  
 12 Q. For purposes of this deposition,  
 13 could we agree, with regard to your memory, the  
 14 dates we're talking about when you discussed the  
 15 conditions and the filing were March of 2017?  
 16 A. I don't have the executive session  
 17 minutes with me. I would assume it was March of  
 18 2017.  
 19 Q. Okay. So making that assumption,  
 20 sir, are you aware of any notice that was given  
 21 to interested parties such as abutters, other  
 22 people on Northwest Road, or anyone else that  
 23 would require notice under the open meeting law?  
 24 MS. COWIN: Objection to the

25

1 form. Could you say the question again?  
 2 Q. (By Mr. Jordan) All right. Are  
 3 you aware of any notice given to any interested  
 4 parties between March of 2017 and April 3, 2017  
 5 when the Agreement for Judgment was filed with  
 6 Hampshire Superior Court?  
 7 A. I believe the notices to -- I  
 8 believe any notices that were sent out for the  
 9 remand hearing, if that's what you're talking  
 10 about, was done by the town clerk.  
 11 Q. Okay. Now, my question though is  
 12 this, sir. I'm talking about two specific  
 13 dates. March, the two meetings you had in March  
 14 of 2017 --  
 15 A. Right.  
 16 Q. -- and the end date for this  
 17 particular question is April 3, 2017 when this  
 18 Agreement for Judgment was filed with the  
 19 Hampshire Superior Court. Those are the two  
 20 dates. Are you aware of any notice that was  
 21 given with respect to either your March 3  
 22 meetings --  
 23 A. The March meetings.  
 24 Q. -- in 2017 and the April 3, 2017,

26

1 in that time period?

2 A. Between the two meetings.

3 Q. Yes.

4 A. I'm not aware of that. I can't

5 recollect that.

6 Q. And in fact, you were present at

7 the May 23, 2017 remand hearing?

8 A. Yes.

9 Q. And you heard a lot of town folks

10 speaking out about this Agreement for Judgment,

11 the copies that had been handed out?

12 A. Yes, I was there.

13 Q. And you already testified that the

14 purpose of the meeting was to inform the town

15 folks about the Agreement for Judgment that the

16 town had entered into, correct?

17 A. I believe that is what -- whatever

18 I said before. You have that.

19 Q. As chairman of the Planning Board,

20 did you have any concerns at all about the

21 procedure by which this special permit was

22 granted?

23 A. No, I don't think so. We followed

24 what town counsel was saying, that we had to do

27

1 a remand hearing, that this is what was done in

2 this situation.

3 Q. So you had no concerns about the

4 procedure by which it was granted?

5 A. I was not thinking about the

6 procedure. I assumed this was all what you do.

7 Q. All right. I asked you about as a

8 Planning Board member. How about as an

9 attorney? Would you have any concerns about

10 procedure by which this special permit was

11 granted?

12 A. What do you mean by that?

13 Q. What I mean is, you're a legally

14 trained member of the bar, right?

15 A. And what do you mean by that? Let

16 me ask you a question.

17 MS. COWIN: You're not allowed

18 to ask him questions, unless you don't

19 understand.

20 Q. (By Mr. Jordan) Do you want to

21 take a break?

22 A. No.

23 Q. So my question to you again is,

24 sir: I asked you before as a Planning Board

28

1 member. Now I'm asking you as a member of the

2 bar. Did you have any concerns from a legal

3 standpoint about the procedure by which this

4 Agreement for Judgment was entered into?

5 A. I was there as a Planning Board

6 member, not as an attorney.

7 Q. So can I take it from that answer,

8 sir, that you make a division between when

9 you're acting as a Planning Board member you

10 don't use your legal skills and your legal hat

11 when you're making determinations about whether

12 special permits or other things that you vote on

13 should be allowed or not?

14 MS. COWIN: Objection. He is

15 here as a Planning Board chair, so I'm

16 objecting to the tone of the questioning

17 and the line of questioning. But to the

18 extent you understand the question, you

19 should answer it.

20 A. What was the question again?

21 MR. JORDAN: I'm not sure what

22 you mean by the tone. I think my tone is

23 appropriate.

24 MS. COWIN: I think the

29

1 question is inappropriate and the tone is

2 inappropriate.

3 MR. JORDAN: If you could

4 describe my tone, which is upsetting.

5 MS. COWIN: Your tone is

6 patronizing, somewhat sarcastic. The

7 substance of the question goes beyond what

8 this case is about.

9 MR. JORDAN: That's your

10 objection?

11 MS. COWIN: Most of it, yes.

12 Q. (By Mr. Jordan) You can answer,

13 now, sir.

14 A. I'm not town counsel.

15 Q. That was not my question.

16 A. You asked me if I was there as a

17 lawyer. I'm not town counsel.

18 Q. I did not ask you that, sir. What

19 I asked you was from your previous answer. I

20 asked you, so it would be a fair assumption --

21 when you're acting as a Planning Board member,

22 you make a distinction between whether you're

23 acting as a lawyer or as a Planning Board

24 member. That's the first part of the question.



30

1 MS. COWIN: Objection. Asked  
 2 and answered. You may answer again.  
 3 A. I was there as a Planning Board  
 4 member.  
 5 Q. And from your previous answer, it  
 6 would be a fair assumption that you don't use  
 7 your training as an attorney, your knowledge as  
 8 an attorney, when you're making decisions  
 9 concerning Planning Board matters?  
 10 MS. COWIN: Objection. Asked  
 11 and answered. Go ahead and answer.  
 12 A. I was there as a Planning Board  
 13 member.  
 14 Q. That's not answering my question,  
 15 sir, but we'll move on. We'll deal with that  
 16 later, I guess.  
 17 On May 23, 2017, which was the  
 18 remand hearing, the special permit was again  
 19 denied by the Planning Board; is that correct?  
 20 A. It was a split decision.  
 21 Q. Well, again, my question to you is:  
 22 As a result of the vote at the May 23, 2017  
 23 meeting, remand hearing, there was a public  
 24 vote. Do you remember that?

31

1 A. I do remember the vote.  
 2 Q. And as you stated, it was a split  
 3 decision. You and Mr. Hathaway voted for it?  
 4 A. Yes.  
 5 Q. And Mr. Dragon and Mr. Turner voted  
 6 against it?  
 7 A. Yes.  
 8 Q. Now, do you know what the result of  
 9 that is under the rules -- the bylaws of the  
 10 Town of Westhampton and actually 40A of the Mass  
 11 General laws?  
 12 A. I don't know if that legally works  
 13 as a denial with a remand hearing or not. All I  
 14 can tell you is it is in my mind a split  
 15 decision. This is somewhat related to the  
 16 question that you were asking me before about  
 17 being an attorney. I don't practice in this  
 18 area.  
 19 Q. Sir, there is no question before  
 20 you.  
 21 A. Okay.  
 22 Q. So as a Planning Board member,  
 23 chairman of the Planning Board, today you're  
 24 unaware of whether a split decision resulted in

32

1 a denial or not of the special permit for a saw  
 2 mill?  
 3 A. I know it resulted in a denial for  
 4 the original application and public hearings.  
 5 The legal result of it at a remand hearing, I  
 6 don't know what it is. If there's something in  
 7 the Chapter 40, whatever, there, maybe there is.  
 8 I have not read it recently.  
 9 Q. Okay. So after the May 23, 2017  
 10 remand hearing, what was your understanding of  
 11 how the Planning Board had voted? Was it  
 12 allowed? Was the special permit allowed or was  
 13 it denied?  
 14 A. I believe, based upon the Agreement  
 15 for Judgment, it was going to be allowed.  
 16 Q. So you are making a distinction  
 17 between a remand hearing and a regular hearing  
 18 of the Planning Board; is that correct?  
 19 A. I think they are two different  
 20 things. I don't know for sure.  
 21 Q. Let's talk about the first hearing  
 22 then. That too was a split decision, correct?  
 23 A. The first one?  
 24 Q. Yes.

33

1 A. Yes.  
 2 Q. And did that result in an allowance  
 3 or a denial of the special permit?  
 4 A. It was a denial.  
 5 Q. And that denial was by the Planning  
 6 Board, correct?  
 7 A. Yes.  
 8 Q. And who was the sole granting  
 9 authority of special permits in the Town of  
 10 Westhampton?  
 11 A. I believe it depends upon the use.  
 12 It could be Planning Board or ZBA.  
 13 Q. You're correct.  
 14 A. I'm happy I got something right.  
 15 Q. It's not a test, sir.  
 16 A. Okay.  
 17 Q. Let me refine that. That was a  
 18 poorly-worded question. Who is the sole  
 19 authority for the issuance of special permits  
 20 for saw mills in the Town of Westhampton?  
 21 A. I believe it's the Planning Board.  
 22 I would have to look it up.  
 23 Q. Between the time when the special  
 24 permit for the saw mill was initially denied,

34

1 which I believe was back in 2015 or so, and  
 2 2016, did you become aware of any factors or  
 3 findings that would require a second vote on the  
 4 special permit?  
 5 A. You're talking the original  
 6 hearing?  
 7 Q. Yes.  
 8 A. I don't recall anything, no.  
 9 Q. Did you have any discussions with  
 10 Mr. Dragon after the May 23, 2017 remand hearing  
 11 concerning the special permit for the saw mill?  
 12 A. I don't believe so. I don't  
 13 remember anything.  
 14 Q. How about Mr. Turner, same  
 15 question?  
 16 A. I don't think I did either.  
 17 Q. And you were present for the vote  
 18 on the May 23, 2017 hearing?  
 19 A. Yes.  
 20 Q. And you heard Mr. Turner and  
 21 Mr. Dragon both state that they had not heard  
 22 anything that would convince them to change  
 23 their mind with respect to the allowance of the  
 24 saw mill?

35

1 A. State that again.  
 2 Q. You were at the May 23, 2017 --  
 3 A. Right.  
 4 Q. -- where there was a vote taken?  
 5 A. Yes.  
 6 Q. And in fact, you opened it up for a  
 7 vote after the public comment, right?  
 8 A. Correct.  
 9 Q. And during that vote Mr. Dragon and  
 10 Mr. Turner both voted to not allow the saw mill,  
 11 correct?  
 12 A. Right.  
 13 Q. And did you hear the statement made  
 14 by both or one of them that they had not heard  
 15 anything different that would convince them to  
 16 change their vote?  
 17 A. I don't recall that comment. If  
 18 it's recorded somewhere, I don't disagree with  
 19 it.  
 20 Q. So you don't remember?  
 21 A. No, I don't. If you would like  
 22 me -- well, there's no question.  
 23 Q. Now, how about yourself? Between  
 24 the first vote on the special permit and the

36

1 remand vote on the special permit, were you  
 2 aware of any material or favorable changes in  
 3 conditions that would warrant the granting of  
 4 the special permit?  
 5 MS. COWIN: I object because  
 6 he voted for it the first time, so he did  
 7 not change his vote.  
 8 A. I didn't change my vote. I was  
 9 shocked that the other two voted that way at the  
 10 remand hearing. And the other thing I would  
 11 like to add, because I don't know if it relates  
 12 to two questions back, is it was not until  
 13 recently Bob Turner -- because he has had so  
 14 many health problems. I think he's had a heart  
 15 attack and a stroke. He said something to me  
 16 when I was driving him home one night, that, you  
 17 know, people -- you know, at the remand hearing  
 18 he said something like he was sorry, you know,  
 19 he changed things because of what went on that  
 20 night for the remand hearing. But I have not  
 21 had any discussions with these guys. I was  
 22 shocked. I thought they were going to vote  
 23 heads up for it. I know my condition during  
 24 that hearing. I got to a point where I just

37

1 shut down. I was like a deer in the headlights.  
 2 That's all I can say on the thing.  
 3 Q. Now, sir, are you -- I'm going to  
 4 ask you to read -- this is Chapter 40A, Section  
 5 16. And if you could read that first paragraph,  
 6 and you can read it to yourself. If you want to  
 7 show it to your attorney --  
 8 A. Okay.  
 9 Q. I guess I direct your attention to  
 10 the following language in 16. It says, "No  
 11 appeal application or petition which has been  
 12 unfavorably and finally acted on by the special  
 13 permit granting authority shall be acted  
 14 favorably upon within two years after the date  
 15 of final unfavorable action unless said  
 16 sufficient permit granting authority or permit  
 17 granting authority finds by unanimous vote of  
 18 three members or a vote of four members of a  
 19 board of five members or two-thirds members of a  
 20 board of more than five members, specific and  
 21 material changes in the conditions upon which  
 22 the previous unfavorable action was based and  
 23 describe such changes in the record of its  
 24 proceedings."

38

1 Now, with respect to that language,  
 2 sir, first of all, were you aware of Section 17  
 3 of Chapter 40A when you had --  
 4 A. This is 16, right?  
 5 Q. Chapter 40A, Section 16.  
 6 A. Okay. At that moment in time,  
 7 probably not.  
 8 Q. Was a vote ever conducted where  
 9 as -- on the issue of specific and material  
 10 changes in the conditions upon which the  
 11 previous unfavorable action was based? Was a  
 12 vote ever taken by the Planning Board with  
 13 respect to that language?  
 14 A. I don't recall that.  
 15 Q. To follow up on that, were those  
 16 specific and material changes described in the  
 17 record of any of those proceedings that you had  
 18 when you discussed whether there would be a  
 19 further vote on the special permit?  
 20 A. I don't remember any type of  
 21 discussion about Section 16 of 40 or what's the  
 22 verbiage that's contained in here. All I know  
 23 is that town counsel was stating to us during  
 24 the process of the litigation that she felt we

39

1 did not have a strong case. So whether that was  
 2 all incorporated in it, I don't know. But I  
 3 don't remember any discussions on Section 16.  
 4 Q. Or a vote?  
 5 A. We took a vote at the executive  
 6 session meeting to settle the case.  
 7 Q. Okay. You took a vote. And again,  
 8 did you take a vote of whether there was  
 9 specific and material changes made?  
 10 A. I don't have a recollection of  
 11 that.  
 12 Q. Okay. Are you aware of any records  
 13 in the possession of the Town of Westhampton or  
 14 you, yourself, or any board members of the  
 15 Planning Board that describes such changes of  
 16 that proceeding?  
 17 A. I think this is like a legal  
 18 analysis question. And what I'm saying to you  
 19 is I don't know if what was discussed during  
 20 executive session and what was being reported to  
 21 us by town counsel fulfills this or not. I  
 22 don't know.  
 23 Q. Okay. As a Planning Board member,  
 24 do you have any input at all with respect to

40

1 violations of conditions of special permits?  
 2 A. We have a zoning enforcement  
 3 officer and building inspector.  
 4 Q. My question to you though is: As a  
 5 Planning Board member, do you have any  
 6 involvement in the enforcement of the conditions  
 7 of the special permit?  
 8 A. Again, I don't think there is  
 9 anything under the bylaws that says we do.  
 10 Q. So you have never been involved in  
 11 any enforcement of any conditions of the special  
 12 permit?  
 13 A. I don't have any recollection of  
 14 that.  
 15 Q. Now, at the -- as a Planning Board  
 16 member, did you, yourself, ever review any  
 17 letters from town residents reporting violations  
 18 by Mr. Cotton's companies of the allowed special  
 19 permit for the saw mill?  
 20 A. You mean since the remand hearing?  
 21 Q. Since the remand hearing.  
 22 A. I don't believe I have seen any.  
 23 Q. Would you normally see documents  
 24 like that?

41

1 A. No. I think they would be going to  
 2 the building inspector or maybe the selectmen.  
 3 Q. But you have never seen them,  
 4 correct?  
 5 A. Never is an absolute. I don't have  
 6 any recollection. I assumed there was not  
 7 anything going on up there because everything  
 8 was in like a holding pattern.  
 9 Q. What do you mean by a holding  
 10 pattern?  
 11 A. Until all of this figured itself  
 12 out.  
 13 Q. So --  
 14 A. Your appeal or whatever.  
 15 Q. You talking about Mr. Fondakowski's  
 16 appeal?  
 17 A. Yes.  
 18 Q. So as a holding pattern, do I take  
 19 that to mean you don't believe anything is going  
 20 on --  
 21 A. I have not been -- yes.  
 22 Q. Let me finish.  
 23 A. Okay.  
 24 Q. -- there is nothing going on, any

42

1 activity at the location of the special permit  
 2 on Northwest Road?  
 3 A. I don't know if there has been or  
 4 not. I have not been up there to look or  
 5 anything like that.  
 6 Q. You said you assumed a holding  
 7 pattern. What did you mean by that?  
 8 A. That until all of this litigation  
 9 was done, because you appealed, there would not  
 10 be anything going on up there.  
 11 Q. Okay.  
 12 A. Maybe I'm mistaken. I don't know.  
 13 Q. You mentioned quite a few times  
 14 that the reason that there was a remand hearing  
 15 and conditions were set was on advice of town  
 16 counsel, correct?  
 17 A. I don't know what you're looking  
 18 for in an answer. You premised it that I  
 19 answered several times, so I will go with my  
 20 previous answers.  
 21 Q. Okay. While the litigation was  
 22 going on between the Town of Westhampton and  
 23 Mr. Cotton's companies, are you aware of  
 24 generally what had been done with respect to the

43

1 litigation that was -- that occurred between the  
 2 town and Mr. Cotton's company? Were you  
 3 following it?  
 4 A. I think some discovery was being  
 5 done, maybe some Interrogatories or something.  
 6 Q. Were you kept apprised, I guess, of  
 7 the progression of the litigation between  
 8 Mr. Cotton's companies and Westhampton?  
 9 A. I think when town counsel needed  
 10 something or asked about something, she would  
 11 call me.  
 12 Q. All right. Now, what about -- were  
 13 you aware of a summary judgment motion that had  
 14 been made on behalf of Mr. Cotton's companies  
 15 during that period of litigation with  
 16 Westhampton?  
 17 A. I think I remember that a summary  
 18 judgment motion had been filed. I can't  
 19 remember whether it was by town counsel for  
 20 Westhampton or Mr. Cotton's motion. I think I  
 21 vaguely remember something about a motion for  
 22 summary judgment.  
 23 Q. Do you remember how the Court ruled  
 24 on that motion for summary judgment?

44

1 A. I can't remember whose motion it  
 2 was.  
 3 Q. Would it help refresh your memory  
 4 if it was done by Attorney Melnick on behalf of  
 5 Mr. Cotton's company?  
 6 A. If you say it is. If that is the  
 7 situation it is, I don't know.  
 8 Q. But it does not refresh your  
 9 memory?  
 10 A. No.  
 11 Q. Are you aware of any instance where  
 12 the Town of Westhampton was unsuccessful in  
 13 either prosecuting or defending any motions  
 14 during the period of litigation between  
 15 Westhampton and --  
 16 A. I may have been. At the time town  
 17 counsel may have let me know what the result  
 18 was, but I don't have any firm recollection on  
 19 that.  
 20 Q. It was stated, during the May 23,  
 21 2017 remand hearing by yourself and actually  
 22 Mr. Dowling, to the town residents that attended  
 23 that, that due to the fact that town counsel had  
 24 recommended it, because it looked like the Town

45

1 of Westhampton would likely lose the appeal,  
 2 that was the reason for setting the conditions.  
 3 Do you remember making statements to that  
 4 effect, sir?  
 5 A. I don't remember -- I think the  
 6 gist of that is correct. I don't remember  
 7 specifically "likely." I just have an  
 8 impression that the Town did not have a strong  
 9 case. In my mind "likely" is a little  
 10 different.  
 11 Q. And factually, do you know why the  
 12 Town did not have a strong case?  
 13 A. I can't remember right now, no.  
 14 Q. Sir, what I have here is a  
 15 transcript of the May 23, 2017 remand hearing.  
 16 And I'm just referring to Page 5. This is  
 17 Mr. Dowling speaking. Do you remember making  
 18 this statement, "The Select Board voted  
 19 unanimously to direct the Planning Board to come  
 20 up with a set of conditions to attempt to settle  
 21 this case"? Do you remember Mr. Dowling  
 22 directing the Planning Board to do that, sir?  
 23 A. I don't doubt what he said there.  
 24 I don't have a firm recollection. That was a

46

1 very contentious meeting.  
 2 Q. That's all right. You answered the  
 3 question. And when you say contentious, why was  
 4 it contentious?  
 5 A. The place was packed. There were  
 6 some people that were upset with the situation  
 7 and they were very vocal about it. Some people  
 8 said disparaging things. I think there may have  
 9 even been a police officer there.  
 10 Q. Do you know why people were upset  
 11 at that meeting?  
 12 A. I believe this whole situation has  
 13 been very difficult for everybody in town. I  
 14 think there has been a lot of people in town  
 15 that feel Mr. Cotton should do what he is  
 16 proposing out there. I think a lot of the  
 17 neighbors that are close to it were upset with  
 18 it. I think there's other people in Westhampton  
 19 that don't want to see anything change. So it  
 20 was a situation that a lot of people felt  
 21 strongly on one way or the other.  
 22 Q. And they were very vocal about it?  
 23 A. Yes.  
 24 Q. And that was the reason actually

47

1 for having an open meeting on it, correct, was  
 2 that comment on what the Town planned to do,  
 3 correct?  
 4 A. It was so the people could hear  
 5 what was going on. And if people wanted to  
 6 state something, they could.  
 7 Q. And do you know why it was included  
 8 in that Agreement for Judgment that there be an  
 9 open meeting conducted, which happened on May  
 10 23, 2017?  
 11 A. Say that again.  
 12 Q. Do you know why it was contained in  
 13 the Agreement for Judgment that there be a  
 14 requirement that there be an open meeting, which  
 15 ended up occurring on May 23, 2017?  
 16 A. Not really. I assume it's part of  
 17 the procedure.  
 18 Q. And when you say that, you mean the  
 19 open meeting law procedure?  
 20 A. Whatever Chapter 40A requires.  
 21 Q. Okay.  
 22 A. All I remember is town counsel  
 23 saying, you know, there needed to be a remand  
 24 hearing.

48

1 Q. All right. And when you say remand  
 2 hearing, you mean an open meeting for the Town?  
 3 A. Well, I don't know if there is a  
 4 difference between an open meeting and a remand  
 5 hearing. It was called a remand hearing.  
 6 Q. How did you come up with the  
 7 restrictions on the Planning Board? How did the  
 8 Planning Board come up with the restrictions  
 9 that would be added to the special permit?  
 10 A. Are you talking conditions?  
 11 Q. Yes.  
 12 A. I think those came from town  
 13 counsel, I think, in negotiations with  
 14 Mr. Cotton, Dodge Maple Hill or whatever. And I  
 15 think some of the conditions were talked about  
 16 during the course of the public hearing process.  
 17 Q. Did the Planning Board have any  
 18 involvement in negotiating that?  
 19 A. We were part of the executive  
 20 session process and, as I said, we discussed the  
 21 various conditions that were put into place  
 22 there.  
 23 Q. Were all the conditions that you  
 24 discussed placed in the Agreement for Judgment?

49

1 A. I think so. You know, you say  
 2 "all." That's an absolute. I don't deal in  
 3 worlds of absolute. I believe so.  
 4 Q. Are records kept of your executive  
 5 session?  
 6 A. Yes.  
 7 Q. Would those records reflect all of  
 8 the conditions that the Planning Board had  
 9 discussed and would like as part of the Planning  
 10 Board -- as part of the special permit?  
 11 A. Yes.  
 12 Q. And you stated it was negotiated  
 13 between essentially the attorneys in this case,  
 14 right?  
 15 A. Yes. I think --  
 16 Q. This Agreement for Judgment?  
 17 A. I think that is where the ball  
 18 starts rolling with the attorneys, and then they  
 19 have to go consult with clients.  
 20 Q. So you were the chairman of the  
 21 Planning Board, which is the sole granting  
 22 authority, correct, for special permits for saw  
 23 mills in the Town of Westhampton?  
 24 A. I think so, but I have not looked

50

1 it up.

2 Q. So you were the client?

3 A. Yes.

4 Q. So after it was negotiated, did you

5 review this document?

6 A. I can't remember. All I remember

7 are the conditions. Did I review Agreement for

8 Judgment -- I remember reviewing conditions.

9 Q. But you don't remember reviewing

10 this document?

11 A. I don't have a firm recollection of

12 when and where.

13 Q. If you had reviewed it, would it

14 have been done at a meeting by the Planning

15 Board or would it have been done individually by

16 separate Planning Board members?

17 A. I just don't remember the mechanics

18 of it, I'm sorry.

19 Q. Now, do you remember, at the May

20 23, 2017 meeting, discussing previous violations

21 that had occurred on the northwest property by

22 Mr. Cotton's companies?

23 A. I don't have a recollection of that

24 coming up at the May 23 meeting. I have no

51

1 reason to doubt that it didn't, if you have it

2 there. I do remember --

3 Q. You answered.

4 A. Okay.

5 Q. So I'm reading from -- again, this

6 is a transcript and this is a statement

7 attributed to you. Do you remember making this

8 statement about -- when you were talking about

9 the conditions having more strength because they

10 would become an order of the Court and you would

11 be able to enforce it with the Town. Do you

12 remember making that statement or words to that

13 effect?

14 A. I don't specifically remember

15 saying that, but I could see myself saying that.

16 Q. Do you remember making the

17 statement along these lines? I believe that has

18 more weight, talking about the contempt action,

19 than we were in the previous situation where the

20 building inspector was trying to write out

21 tickets and nothing was really happening. Do

22 you remember making that statement?

23 A. I don't have any reason to doubt it

24 if it's there.

52

1 Q. Well, you were aware there had been

2 previous violations and tickets had been

3 written, correct?

4 A. Yes. That's where I was going to

5 finish up that last question where you told me I

6 had answered. I was going to say yes. Through

7 the public hearing process, yes, we did hear

8 that there were zoning enforcement issues that

9 the neighbors were upset by certain things

10 Mr. Cotton was doing or not doing. I can't

11 remember.

12 Q. Well, tickets were issued. We're

13 talking about several things, not just

14 violations. We're talking about the --

15 A. Then I misspoke. They are

16 violations, tickets. To me they are the same.

17 Q. And as a result of violations,

18 fines were assessed. Do you recall that?

19 A. I think I heard that along the way.

20 Q. Was the first time you heard it at

21 the May 23, 2017 meeting or were you aware of

22 that when you voted back in March of 2017?

23 A. I think -- I'm not positive, but I

24 think I heard that during the public hearing

53

1 process.

2 Q. That was the first time you had

3 heard there were previous violations?

4 A. Not at the May hearing. I'm

5 talking about through the public hearing

6 process. I think people brought that up. I

7 cannot say for certain, but -- all I remember is

8 that people were saying the zoning enforcement

9 officer, the building inspector, had gone up and

10 spoken to Mr. Cotton a few times, that they were

11 not happy with what was going on up there. I

12 think I may have heard something about fines.

13 Q. So today you're unaware at least

14 that there was potentially a large amount of

15 fines for continuing violations?

16 A. I have no idea what the amounts

17 were.

18 Q. As of today, you're unaware that

19 there were continuing violations where

20 tickets for violations had been assessed, added

21 up to a fairly large sum of money against

22 Mr. Cotton's company?

23 A. I have no recollection of amounts

24 or -- I think I may have heard something about

54

1 tickets. I can't say for certain.  
 2 Q. Do you know Ms. Melanovich?  
 3 A. Maybe by sight. I don't know.  
 4 Q. Do you remember having a discussion  
 5 at the May 23 meeting where there were comments  
 6 about the amounts that were paid in legal fees?  
 7 Do you remember that part of a discussion?  
 8 A. Not really. But as I said, if it's  
 9 there, it's there.  
 10 Q. Do you remember Ms. Melanovich  
 11 questioning why the money owed in fines was not  
 12 collected to offset those legal fees so the Town  
 13 would not have to have that financial burden?  
 14 A. Say that again.  
 15 Q. Do you remember Ms. Melanovich  
 16 mentioning the legal fees and saying that --  
 17 asking why the fines were not collected against  
 18 Mr. Cotton's company to alleviate the legal fees  
 19 for the defense of the Planning Board?  
 20 A. I think I have a vague recollection  
 21 of that, somebody saying something about legal  
 22 fees. But again, if it's in the transcript,  
 23 it's in the transcript.  
 24 Q. Right. But I'm asking you, sir, if

55

1 you remember that discussion.  
 2 A. I remember somebody saying  
 3 something about fees. The Planning Board does  
 4 not see what somebody has paid in fines or fees.  
 5 Q. What was the purpose of adding  
 6 conditions to the special permit for the saw  
 7 mill?  
 8 A. To regulate hours of operation,  
 9 exactly what was going to go on up there, that  
 10 it was not a retail establishment.  
 11 Q. And the purpose, as described by  
 12 you and Mr. Dowling at different times, was that  
 13 the conditions would give teeth to enforcement  
 14 of violations up there. Do you remember making  
 15 statement or words to that effect, sir?  
 16 A. I think you read from the  
 17 transcript before of what I said about this  
 18 making it stronger with some type of contempt  
 19 and being able to enforce things in court.  
 20 Q. So again --  
 21 A. Do I have a recollection, a firm  
 22 recollection, no. I have no reason to doubt  
 23 what is in there is not what I said at the time.  
 24 Q. So the reason for having the

56

1 conditions was so you could enforce some  
 2 restrictions or limitations on the use of the  
 3 property, right?  
 4 A. Yes. I think that is -- yes.  
 5 Q. And the result of violations -- or  
 6 at least repeated violations would end up in the  
 7 issuing of some enforcement action by the town  
 8 enforcer?  
 9 A. I hope that would not happen.  
 10 Q. But again, the purpose of having  
 11 the conditions is the ability to enforce the  
 12 conditions on the holder of the special permit,  
 13 correct?  
 14 A. Yes. There are some rules.  
 15 Q. So acknowledging that, would it be  
 16 important in making decisions about whether  
 17 conditions should be placed on the special  
 18 permit, on how the applicant for the special  
 19 permit had violated previous conditions that had  
 20 been placed on the special permit?  
 21 A. Say that again.  
 22 Q. In making the decision about  
 23 putting conditions on the special permit, do you  
 24 think it would be helpful to know what the

57

1 person -- what the entity you're giving the  
 2 special permit, whether they had complied with  
 3 earlier conditions on other special permits that  
 4 had been issued by the Town?  
 5 A. Yes, but this situation was very  
 6 convoluted. During the public hearing process,  
 7 I recall Mr. Cotton and the people that  
 8 supported him saying no, none of those things  
 9 happened, and then the neighbors who were  
 10 immediately affected saying the contrary. So  
 11 yes, but this was a very convoluted and murky  
 12 situation and it was a difficult situation.  
 13 Q. Okay. So again, that is -- you're  
 14 talking about -- are you aware that there has  
 15 been a continuing violation of at least 856 days  
 16 where it has been disregarded that a  
 17 cease-and-desist order had been issued by the  
 18 Town and it had been disregarded for over 856  
 19 days on a previous special permit that had been  
 20 granted to Mr. Cotton's --  
 21 A. I have no recollection of that,  
 22 honestly.  
 23 Q. So you didn't know that?  
 24 A. I don't want to say. I don't know.

58

1 Q. Does 865 days -- are there many  
 2 continuing violations in the Town of  
 3 Westhampton, that you're aware of, conditions  
 4 placed on special permits or zoning violations?  
 5 A. I don't keep track of zoning  
 6 violations or what the building inspector is  
 7 doing or not doing, so I don't know how to  
 8 answer that question.  
 9 Q. As the chairman of the Planning  
 10 Board, was the person applying -- the entity  
 11 that was applying for an application for a  
 12 special permit, the saw mill, had been in  
 13 violation for, it looks like, years of zoning  
 14 violations which had been issued by the town  
 15 enforcement officer?  
 16 A. I don't know how to really answer  
 17 the question. Of course a long violation would  
 18 be of a concern. I don't know for sure one way  
 19 or the other what was going on up there because  
 20 both sides were saying this and the other side  
 21 was saying that. And it seemed to be like the  
 22 Hatfields and McCoys. I don't know how to say  
 23 that.  
 24 Q. We're not talking about he said,

59

1 she said. We're talking about the town  
 2 enforcement officer issuing violations. An  
 3 actual violation was -- it states here 865 days.  
 4 So that is my question.  
 5 A. I don't recall. I don't remember  
 6 anything about a long ongoing violation that the  
 7 building inspector wrote a ticket for or  
 8 anything like that. I have no memory of that.  
 9 Q. Do you have a memory of -- who is  
 10 Chuck Miller?  
 11 A. I think he was the building  
 12 inspector.  
 13 Q. And he was previous to Mr. Quinlan,  
 14 is that correct, Tom Quinlan?  
 15 A. I think so, yes.  
 16 Q. Do you remember ever hearing from  
 17 Mr. Miller or other people that Mr. Miller had  
 18 stated that the enforcement of especially the  
 19 amount of trucks going on the property where the  
 20 saw mill was located would be impossible to  
 21 enforce?  
 22 A. I believe he came to one of the  
 23 public hearings, one of the original public  
 24 hearings. And I have a vague recollection that

60

1 yes, it was hard to enforce or know what  
 2 actually was going on up there.  
 3 Q. Well, actually, he used the word  
 4 "impossible." Do you remember that?  
 5 A. I have no reason to doubt that. If  
 6 it's written down in a transcript or whatever, I  
 7 would not doubt it.  
 8 Q. But you have no memory of that?  
 9 A. No.  
 10 Q. Now, today, with regard to the  
 11 special permit, is there a site plan attached to  
 12 the special permit, the use of the property? Is  
 13 there a site plan involved?  
 14 A. Not in this one.  
 15 Q. Do you know what a forestry plan  
 16 is?  
 17 A. Like a forest-cutting plan?  
 18 Q. Just a forestry plan. It was  
 19 referenced in the application.  
 20 A. In the application or in this?  
 21 Q. I believe it was in the  
 22 application. But generally, I'm asking you, do  
 23 you know what a forestry plan is?  
 24 A. I have heard of forest-cutting

61

1 plans. There is a certain amount of board feet.  
 2 I don't know. Sometimes, I guess, people refer  
 3 to forestry plans as a Chapter 61 or something  
 4 for certain tax benefits.  
 5 Q. Do you know if a Chapter 61  
 6 forestry plan has been filed on this particular  
 7 land that has the --  
 8 A. It may have been sent during one of  
 9 the public hearings.  
 10 Q. My question is: Do you know today  
 11 whether --  
 12 A. No, I don't know.  
 13 Q. -- a Chapter 61 forestry plan --  
 14 A. No.  
 15 Q. Again, at the May 23, 2017 remand  
 16 hearing, you were asked by Mr. Silvernail -- on  
 17 April 2 you basically decided to vote yes. And  
 18 I'm reading from the transcript. Now I know  
 19 you're going to say you didn't actually vote,  
 20 but you did sign a paper that says no matter how  
 21 you vote tonight that special permit will be  
 22 issued, is that correct, Planning Board. Do you  
 23 remember answering that "The agreement reads the  
 24 way it reads." Do you remember that interchange



62

1 between you and Mr. Silvernail?  
 2 A. Not specifically, but that would be  
 3 something I would normally say. A document  
 4 speaks for itself.  
 5 Q. So at that point in time you were  
 6 aware that it was irrelevant as to how the  
 7 Planning Board voted at the May 23, 2017  
 8 meeting, that no matter what, based on the  
 9 Agreement for Judgment, that the special permit  
 10 would issue?  
 11 A. I believe so because this was  
 12 already filed with the Court.  
 13 Q. So on that day you were aware of  
 14 it?  
 15 A. I think so. Again, I can't speak  
 16 for certain, but I think so.  
 17 Q. When asked -- do you remember,  
 18 during that May 23, 2017 public comments piece,  
 19 telling the people at the meeting that if they  
 20 saw violations they could report it either to  
 21 the Select Board or to the town enforcement  
 22 officer?  
 23 A. It sounds like something I would  
 24 have said. If it's in the transcript, I have no

63

1 reason to disagree with it.  
 2 Q. Is it your understanding that the  
 3 Select Board has managerial -- acts in a  
 4 managerial capacity to the town enforcement  
 5 officer for the Town of Westhampton?  
 6 A. I think they are the executive of  
 7 the Town and they would be the one in charge of  
 8 him. I have not looked at the town bylaw or  
 9 whatever. And I think they hire him and can let  
 10 him go, that type of thing, so I'm assuming so.  
 11 Q. Do you remember some members of the  
 12 Town asking, I guess, the Planning Board as a  
 13 whole and, I guess, Mr. Dowling or whoever else  
 14 was there, if the agreement has already been  
 15 entered into, then why is there a open meeting  
 16 so we can comment on it? Do you remember that  
 17 exchange?  
 18 A. I guess vaguely. If it's there, I  
 19 don't have any reason to doubt it. May I add --  
 20 okay.  
 21 Q. Do you remember making this  
 22 statement that the condition -- again, at the  
 23 May 23, 2017 remand hearing, that the conditions  
 24 on the special permit were negotiated between

64

1 the attorneys? Do you remember making that  
 2 statement?  
 3 A. If it's in there, I don't have any  
 4 reason to doubt it.  
 5 Q. Do you remember a Ms. Anderson  
 6 asking you what is the purpose of this public  
 7 hearing if the case has already been settled?  
 8 Do you remember stating to let everybody know  
 9 what the agreement is and you can make public  
 10 comments if you want? Do you remember making  
 11 that statement?  
 12 A. I don't have any definite  
 13 recollections of this whole thing. I don't have  
 14 any reason, if that is the transcript, to doubt  
 15 what is in there.  
 16 Q. So since the granting of the  
 17 special permit by the Hampshire Superior Court,  
 18 other than coming to the deposition today, have  
 19 you been involved in any further discussions  
 20 about this ongoing litigation other than with  
 21 your attorney?  
 22 A. What was that again?  
 23 Q. My question to you is: Since the  
 24 granting of the permit, other than conversations

65

1 you have had with your attorney, have you had  
 2 discussions about this ongoing litigation with  
 3 Mr. Fondakowski versus the Town of Westhampton  
 4 with any other persons?  
 5 A. The only recollection I have at  
 6 this moment is Bob Turner and his ill health and  
 7 him not able to, you know, be part of the  
 8 process. I have not been having discussions  
 9 with individual Planning Board members or  
 10 anything like that, if that's what you're asking  
 11 me.  
 12 Q. So you have had discussions with  
 13 Mr. Turner, you said?  
 14 A. Yes.  
 15 Q. What were those discussions?  
 16 A. It was about his health and not  
 17 being able to perform. I would text him about  
 18 Planning Board, him not being able to drive -- I  
 19 think he has had a heart attack or a stroke --  
 20 not being able to participate. I had various  
 21 serious concerns with him when I have texted him  
 22 or called him and it's kind of gibberish. I  
 23 think he is on some medication that he is a bit  
 24 out there on.

66

1 Q. Have you asked him what medications  
 2 he is on?  
 3 MS. COWIN: Objection. I  
 4 think we're getting into a HIPPA area  
 5 here.  
 6 MR. JORDAN: HIPPA relates to  
 7 medical.  
 8 MS. COWIN: He mentioned  
 9 medication and a stroke. Don't mention  
 10 anything about Mr. Turner's medical  
 11 condition.  
 12 MR. JORDAN: I would note that  
 13 we spoke for about a minute about it. So  
 14 are you directing him to not speak about  
 15 the conversation he had with --  
 16 MS. COWIN: Why don't you ask  
 17 him a question? And the instruction is  
 18 don't mention anything about medical  
 19 conditions.  
 20 MR. JORDAN: Are you  
 21 instructing the witness not to answer my  
 22 question about the conversations,  
 23 including his medical?  
 24 MS. COWIN: Mr. Jordan, ask a

67

1 question and I will instruct him or I  
 2 won't.  
 3 Q. (By Mr. Jordan) The question to  
 4 you: Did you ask Mr. Turner about what  
 5 medication he was on?  
 6 MS. COWIN: You can answer  
 7 that yes or no.  
 8 A. No.  
 9 Q. Do you know if Mr. Turner is on any  
 10 medication?  
 11 MS. COWIN: Yes or no.  
 12 A. Yes.  
 13 Q. What medication is he on?  
 14 MS. COWIN: Do not answer  
 15 that.  
 16 A. I don't know.  
 17 Q. Are you aware that Mr. Turner was  
 18 just at a meeting, a town meeting of some sort?  
 19 A. Town meeting?  
 20 Q. That's yes or no.  
 21 A. No, I'm not aware. When you say  
 22 recent, you have to clarify the question.  
 23 Q. Within the past couple weeks?  
 24 A. No, I don't.

68

1 Q. Are you aware of that, yes or no?  
 2 A. I have not been around for a period  
 3 of time.  
 4 Q. Sir, I'm asking, are you aware of  
 5 that, yes or no?  
 6 A. I think he told me he was going to  
 7 go speak to the selectmen about his condition.  
 8 MS. COWIN: I think the  
 9 confusion is -- when you say town meeting,  
 10 do you mean the annual town meeting?  
 11 MR. JORDAN: Whatever town  
 12 meeting occurred on or around May 13 of  
 13 this year.  
 14 A. I don't think so, no.  
 15 Q. How about May 11? I may have been  
 16 off on the date.  
 17 A. The last discussion I had with Bob,  
 18 Mr. Turner, was that he was not doing well. He  
 19 was going to go speak to the selectmen and he  
 20 might be resigning.  
 21 Q. When you say conversation, is this  
 22 by text?  
 23 A. No.  
 24 Q. In a personal phone call?

69

1 A. No. He asked me to come up to his  
 2 house.  
 3 Q. When was that?  
 4 A. Very end of April, I think.  
 5 Q. What kind of discussion did you  
 6 have with Mr. Turner?  
 7 A. He just wanted to tell me that he  
 8 was not doing very well, that he was thinking  
 9 about resigning. And I think he was coming to  
 10 grips with his physical and mental problems.  
 11 Q. And if you know, was he calling you  
 12 because you're the chairman of the Planning  
 13 Board?  
 14 A. I think so, yes. I think he wanted  
 15 to just say this in person. It was a difficult  
 16 thing because --  
 17 MS. COWIN: You have answered  
 18 the question.  
 19 Q. (By Mr. Jordan) So from your  
 20 answer, sir, would it be a fair statement to say  
 21 that you don't have a social relationship with  
 22 Mr. Turner?  
 23 A. I don't know what you mean by  
 24 social relationship.

70

1 Q. You're not friends where you have  
 2 been friends over the years in terms of you do  
 3 things socially together?  
 4 A. We're not drinking buddies. We  
 5 have mutual neighbor friends, probably showed up  
 6 at the same party once or twice over the years.  
 7 Our kids all went to the small Westhampton  
 8 elementary school. His daughter may have been  
 9 in my son's class. The class sizes are eight to  
 10 ten people.  
 11 Q. I think you answered the question.  
 12 Sir, I'm looking at some information that was  
 13 provided to me and one of the things is -- my  
 14 question, I guess, is: How long have you been  
 15 on the town Planning Board? Would it refresh  
 16 your memory to say since 2006? Does that  
 17 refresh your memory?  
 18 A. No, because I think before that.  
 19 Q. Would it refresh your memory to say  
 20 you have been chairman of the Planning Board  
 21 since 2007?  
 22 A. No, not really.  
 23 Q. In terms of the Select Board, you  
 24 stated that Mr. Dowling had come to at least one

71

1 of the Planning Board meetings you had to  
 2 discuss the resolution of the case back in March  
 3 of 2017?  
 4 A. I think there were two meetings and  
 5 I think he came to them both.  
 6 Q. Now, in your prior experience when  
 7 you're having Planning Board meetings, has a  
 8 member of the Select Board ever showed up to  
 9 those meetings other than this time that  
 10 Mr. Dowling came to the meeting?  
 11 A. They may have come to other  
 12 meetings and even public hearings.  
 13 Q. I'm talking about Planning Board  
 14 meetings where you're discussing the issue --  
 15 A. I don't know. I can't remember  
 16 anything.  
 17 Q. Would the same answer be true for  
 18 any meetings of the Planning Board with regard  
 19 to discussing the allowance or disallowance of  
 20 any special permits?  
 21 A. Say that again.  
 22 Q. Would the same answer apply to  
 23 where there were meetings of the Planning Board  
 24 to discuss the issuance or nonissuance of the

72

1 special permit?  
 2 A. They don't usually come to our  
 3 meetings. I don't know what else to say to  
 4 that.  
 5 MR. JORDAN: Off the record.  
 6 (A recess was taken)  
 7 MR. JORDAN: Back on the  
 8 record.  
 9 Q. (By Mr. Jordan) Sir, I'm going to  
 10 show you what is labeled Westhampton  
 11 Massachusetts Assessor's Plan, which includes  
 12 the property that is comprised of the -- the saw  
 13 mill special permit is attached to. As a real  
 14 estate guy, you can probably read this better  
 15 than I can. Do you know which -- on this  
 16 assessor's map, I believe Lot 15 is the one that  
 17 is -- has the special permit for the saw mill.  
 18 Have you ever reviewed the assessor's map and  
 19 the map for the issuance of the permit?  
 20 A. I don't have a recollection of  
 21 reviewing this. I know there were site plans  
 22 that were presented at the public hearing.  
 23 Q. Okay. Did you ever look at any  
 24 kind of map that described the location of the

73

1 special permit property?  
 2 A. In the site plans that were  
 3 presented during the public hearings had orders  
 4 on it. I don't know if I saw assessor's map or  
 5 what was presented at the time.  
 6 Q. Do you know what property -- the  
 7 number of the property that was identified as  
 8 the location of the saw mill on Northwest Road?  
 9 A. I thought you said it was fifteen  
 10 here. I know it's a large track of property.  
 11 Q. Okay. Other than me telling you  
 12 that, do you know that it was -- Lot 15 was the  
 13 property that was designated on the application  
 14 for the location of the saw mill?  
 15 A. I think so because I remember the  
 16 property abutting this river or stream or  
 17 whatever here.  
 18 Q. Okay. Do you remember if what is  
 19 identified there as Lot 26 was identified as the  
 20 location of part of the land that the permit  
 21 was -- strike that.  
 22 Do you remember Lot 26 being a part  
 23 of that special permit application?  
 24 A. Off the top of my head, no, I don't

74

1 have a recollection of that.  
 2 Q. Do you know what access is used --  
 3 what lot number access is used to access Lot 15  
 4 on that map?  
 5 A. I can't tell from this map. I  
 6 think there is a dirt road or something. There  
 7 is a big sign at the entrance of it off of  
 8 Northwest Road.  
 9 Q. Okay. Have you seen that sign?  
 10 A. Yes. I have driven by it.  
 11 Q. And if you remember, what does that  
 12 sign say?  
 13 A. I think it says something Dodge  
 14 Hill Maple Farm or something. I believe it's a  
 15 wooden sign.  
 16 Q. And if you know, is that sign on  
 17 property that is identified as the location of  
 18 the saw mill?  
 19 A. I don't know.  
 20 Q. Now, at some point there was a site  
 21 visit where members of the Planning Board and  
 22 Board of Selectmen went up to the proposed site  
 23 of the saw mill. Were you part of that group?  
 24 A. Yes.

75

1 Q. When was that, approximately?  
 2 A. I don't know for sure. It was part  
 3 of the initial public hearing process.  
 4 Q. Why did you go up there as a member  
 5 of the Planning Board?  
 6 A. To take a look at the property and  
 7 what was being discussed.  
 8 Q. All right. And when you say look  
 9 at the property, were you just there to look at  
 10 it?  
 11 A. I think we heard some of the  
 12 machinery that Mr. Cotton was going to use to  
 13 put trees into a chipper.  
 14 Q. And as part of getting approved for  
 15 the saw mill special permit, I guess, is there a  
 16 requirement that noise testing be done, if you  
 17 know?  
 18 A. I can't remember off the top of my  
 19 head, no.  
 20 Q. Are you aware of the requirement  
 21 that -- and this is my word -- a neutral party  
 22 should be taking those test readings for sound?  
 23 A. I can't remember if there is  
 24 something specific in the bylaw on that. All I

76

1 know or can remember is it was brought up at one  
 2 of the public hearings, that the neighbors were  
 3 concerned about noise. So I believe we went up  
 4 to the property to get a lay of the land where  
 5 stumps were, where chips were, and to have a  
 6 demonstration of some of the machinery that  
 7 Mr. Cotton was using.  
 8 Q. If you know, did either of Maple  
 9 Grove Farm or Cotton Tree Service, that you're  
 10 aware of, pay for an independent consultant to  
 11 come up and do sound testing on the property?  
 12 A. I can't remember on that. Maybe.  
 13 I don't know. Nothing is popping out in my mind  
 14 right now.  
 15 Q. How about traffic test for traffic?  
 16 A. I remember David Blakesley, head of  
 17 the highway department, came up during one of  
 18 the public hearings and talked about traffic  
 19 issues. He may have had some recent study from  
 20 Pioneer Valley Commission on traffic counts or  
 21 vehicles or something like that. I have a vague  
 22 recollection of that, may have been done.  
 23 Q. Who is David Blakesley?  
 24 A. I think he is the head of our

77

1 highway department.  
 2 Q. Are you aware that the Westhampton  
 3 bylaws require that a consultant needs to be  
 4 hired by the applicant for traffic testing?  
 5 A. Could be, if it's in the bylaws. I  
 6 don't doubt it. It's not popping into my head  
 7 right now.  
 8 Q. You're not aware of that happening?  
 9 A. I believe David Blakesley was the  
 10 one who came and talked.  
 11 Q. But are you aware of Mr. Cotton  
 12 hiring a consultant to --  
 13 A. I don't have any recollection of  
 14 that. I don't think he did. I don't know.  
 15 Q. Did you ever see any of the letters  
 16 that were written in opposition, or at least  
 17 sighting concerns about the placement of the saw  
 18 mill on Northwest Road?  
 19 A. If they were submitted during the  
 20 public hearing process, I probably saw them. Do  
 21 I specifically remember them, no.  
 22 Q. Now, with regard to the noise  
 23 testing, were you present when any noise testing  
 24 measurements were made?

78

1 A. I don't have a recollection. I  
 2 just remember hearing the machine having some  
 3 logs running through. I can't remember somebody  
 4 testing or not testing.  
 5 Q. Were you next to the machine when  
 6 they were throwing logs through?  
 7 A. I have been at times, yes. And I  
 8 have been at times far away, different  
 9 locations.  
 10 Q. You said you think. You're not  
 11 sure?  
 12 A. I remember standing near the  
 13 machine and I remember standing far away near  
 14 one of the boundaries, far boundaries, just to  
 15 get a sense. I probably stopped between to  
 16 listen.  
 17 Q. Did you have any kind of -- or were  
 18 you with someone that had any kind of machine  
 19 that would measure the decibels?  
 20 A. I didn't have any of that type of  
 21 equipment and I don't remember anybody being  
 22 there that had that type of equipment, but I  
 23 can't say for certain.  
 24 Q. All the Planning Board members were

79

1 there, right?  
 2 A. There were neighbors there. There  
 3 was the four Planning Board members who were  
 4 there.  
 5 Q. All right. How about the Select  
 6 Board, anyone from the Select Board?  
 7 A. I don't recall anybody from there  
 8 being there.  
 9 Q. Was Mr. Cotton there?  
 10 A. Yes, I think he was. I think -- I  
 11 can't remember if he ran the machine or one of  
 12 his co-workers did, but I think he was there.  
 13 Q. But on any visit to the site that  
 14 you're aware of, you're not aware that any  
 15 readings were made by some time of decibel  
 16 machine, right?  
 17 A. I don't have any recollection of  
 18 that.  
 19 Q. And you stated you were near the  
 20 machines at points and at other points far away?  
 21 A. Yes.  
 22 Q. Did you stand on Mr. Fondakowski's  
 23 land and listen to it?  
 24 A. I may have. Where do you live?

80

1 MS. COWIN: You can't ask him.  
 2 A. I'm sorry. I may have stood at one  
 3 of the neighbor's houses or whatever.  
 4 Q. So you don't know?  
 5 A. I don't know.  
 6 Q. What was the purpose of you going  
 7 up there and, I guess, standing at different  
 8 locations? What were you trying to accomplish?  
 9 A. Just to hear if it was loud or  
 10 unruly noise.  
 11 Q. Did you think it would be helpful  
 12 to have sound measurements made so you would be,  
 13 I guess, in compliance with your bylaws?  
 14 A. I think we just wanted to get a  
 15 generic feel of the property and a generic  
 16 listening to the machinery. For my own personal  
 17 experience, there is a large tract of land  
 18 behind me and there is a large tract of land  
 19 across the street from me. There is a current  
 20 logging project going on across the street. I  
 21 hear heavy machinery and cutting and noise all  
 22 the time, so my opinion is you hear it out in  
 23 Westhampton.  
 24 Q. Because you hear it at your house?

81

1 A. You hear it everywhere, I feel.  
 2 But yes, I hear stuff going on around me, so  
 3 it's --  
 4 Q. Are you aware -- strike that.  
 5 What machine was being run when you  
 6 were there? Could you identify which machine it  
 7 was?  
 8 A. Not specifically, but it was a big  
 9 machine that could take big logs.  
 10 Q. When you were standing next to it  
 11 was it loud?  
 12 A. It was loud, but I don't think it  
 13 was that bad.  
 14 Q. But today you could not state if it  
 15 was within the required decibels?  
 16 A. I was there to hear with a generic  
 17 ear.  
 18 Q. Now, with the two meetings you had  
 19 in March of 2017, the first meeting, how long  
 20 did that last?  
 21 A. I have no idea. I can't remember.  
 22 Q. Was it more than a half hour?  
 23 A. I don't honestly know.  
 24 Q. So it could have been a minute or

82

1 could have been an hour. You can't approximate?  
 2 A. I think I answered the question. I  
 3 don't know.  
 4 Q. If you're satisfied, that's fine.  
 5 Now, with regard to the decibel level, one of  
 6 the findings in the Agreement for Judgment and  
 7 in the special permit decision states that --  
 8 specifically it states that the noise can be  
 9 mitigated by the conditions of approval. That  
 10 was one of the findings in there to support the  
 11 allowance. What exactly -- what conditions  
 12 mitigated the sound, that you're aware?  
 13 A. I believe there was something in  
 14 there about a wall or barrier.  
 15 Q. And where was that wall or barrier  
 16 going to go?  
 17 A. I can't remember off the top of my  
 18 head. It's in here, I believe.  
 19 Q. If you know, was that wall or  
 20 barrier going to be at ground level?  
 21 A. I can't remember off the top of my  
 22 head.  
 23 Q. If you know, has that wall been  
 24 constructed?

83

1 A. I don't know if it has or has not.  
 2 Q. Is it your understanding for the  
 3 saw mill to operate that those conditions have  
 4 to be met first?  
 5 A. I believe he is supposed to have  
 6 followed the conditions. So I don't know the  
 7 specific verbiage before or after, but he is  
 8 supposed to be following the conditions.  
 9 Q. So if the saw mill is being  
 10 operated and there is no wall work, that would  
 11 be a violation of the conditions for the special  
 12 permit?  
 13 A. If he is not following the  
 14 conditions, then it would be a violation.  
 15 Q. So my question is: Is that a  
 16 violation if there is no wall and the saw mill  
 17 is operating?  
 18 A. I believe there is a wall thing in  
 19 there. And if he's not following the  
 20 conditions, it would be a violation. I'm not  
 21 trying to be difficult. My brain is trying to  
 22 sort through all of this.  
 23 Q. With regard to the findings that  
 24 supported the allowance of the special permit by

84

1 Hampshire Superior Court -- have you ever been  
 2 read those findings?  
 3 A. I believe I have, yes.  
 4 Q. If you could, this is the Judgment  
 5 on Agreement of the parties entered by the  
 6 Court, which was recorded at the Registry of  
 7 Deeds on 6/5/17. Here on Page 2, do you  
 8 remember reading those?  
 9 A. Yes.  
 10 Q. At Number 7 it says, "Although the  
 11 commercial nature of the business to process  
 12 wood, including the use of large trucks at the  
 13 property to deliver and pick up wood products  
 14 processed at the property, and the actual  
 15 processing of wood at the property is  
 16 significant in scope, the Planning Board finds  
 17 that the use can be sufficiently mitigated by  
 18 conditions of approval." Now, if you  
 19 remember -- do you remember what the finding was  
 20 with regard to the -- I guess the first vote,  
 21 the denial of the permit that said those  
 22 conditions could not be sufficiently mitigated  
 23 by conditions of the board? Do you remember  
 24 that?

85

1 A. I don't remember that, but, again,  
 2 I don't disagree if that was one of the  
 3 findings. I don't remember that off the top of  
 4 my head.  
 5 Q. So did you discuss -- did you have  
 6 any discussions with regard to the mitigating  
 7 factors that would cause a change of the denial  
 8 over the allowance here in terms of the  
 9 findings?  
 10 A. I think we had discussions on  
 11 trying to eliminate any issue regarding noise,  
 12 large truck traffic, like types or numbers of  
 13 trips, that sort of thing.  
 14 Q. In terms of the number of trips and  
 15 trucks and noise, is it your understanding there  
 16 had been a change to how many trips or how many  
 17 trucks would visit the site on a monthly basis  
 18 between the denial and the allowance? Was there  
 19 a change in that particular fact that you're  
 20 aware of?  
 21 A. I think I said I didn't know that  
 22 the thing was operating. So my recollection is,  
 23 regarding limitation of trucks going in and out,  
 24 it was something that was discussed at public

86

1 hearings during the initial public hearings.  
 2 And it was difficult to kind of put your hands  
 3 around it, but I remember neighbors concerned  
 4 with truck traffic or the potential for truck  
 5 traffic.  
 6 Q. Well, to go back, do you remember  
 7 Mr. Dragon making the statement that he had not  
 8 heard anything to change his mind with respect  
 9 to his vote regarding conditions of approval  
 10 that would make him change his vote?  
 11 A. I don't have a recollection of what  
 12 he said.  
 13 Q. Okay. If you are aware of -- if  
 14 you were aware of, say, a violation in that a  
 15 wall has not been constructed, what do you think  
 16 should happen? What do you think the Town  
 17 should do as a result of that alleged violation?  
 18 A. I think that is something for the  
 19 Select Board to decide along with building  
 20 inspector.  
 21 Q. It's not for the Planning Board?  
 22 A. As far as I know, the Planning  
 23 Board does not have any enforcement powers.  
 24 That is my understanding.

88

1 A. I don't know if they have  
 2 discretion or not.  
 3 MR. JORDAN: I have no further  
 4 questions.  
 5 MS. COWIN: I have no  
 6 questions.  
 7 (Deposition concluded)  
 8  
 9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24

87

1 Q. But I'm asking you, I guess, as the  
 2 chairman of the Planning Board that set  
 3 conditions that would have teeth, what would  
 4 your position be with respect to a violation if  
 5 it has occurred? What should happen?  
 6 A. I'm only one vote on the Planning  
 7 Board. So I think it's something that the  
 8 Select Board and the building inspector,  
 9 especially the building inspector, investigate,  
 10 make a decision, and do what they feel is  
 11 necessary.  
 12 MS. COWIN: You have finished  
 13 answering the question.  
 14 THE WITNESS: Okay.  
 15 Q. (By Mr. Jordan) Is it your  
 16 understanding that the enforcement officer has  
 17 discretion as to whether he will enforce  
 18 violations of a special permit or not?  
 19 A. I don't know if he has discretion  
 20 or not.  
 21 Q. Is it your understanding that the  
 22 Select Board has discretion as to whether a  
 23 violation of the special permit conditions  
 24 should be enforced or not?

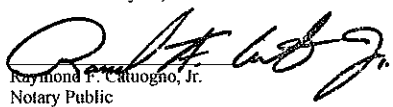
89

COMMONWEALTH OF MASSACHUSETTS  
 Hampshire, ss.

I, RAYMOND F. CATUOGNO, JR., a Notary  
 Public in and for the Commonwealth of  
 Massachusetts, do hereby certify that there came  
 before me on May 21, 2018, at the offices of  
 Kotfila & Jordan, One Monarch Place, Suite 1340,  
 Springfield, Massachusetts, the following named  
 person, to wit: MARK SCHWALLIE, who was by me  
 duly sworn to testify to the truth and nothing  
 but the truth as to his knowledge touching and  
 concerning the matters in controversy in this  
 cause; that he was thereupon examined upon his  
 oath and said examination reduced to writing by  
 me; and that the statement is a true record of  
 the testimony given by the witness, to the best  
 of my knowledge and ability.

I further certify that I am not a relative  
 or employee of counsel/attorney for any of the  
 parties, nor a relative or employee of such  
 parties, nor am I financially interested in the  
 outcome of the action.

WITNESS MY HAND May 29, 2018.

  
 Raymond F. Catuogno, Jr.  
 Notary Public

My Commission expires:  
 February 12, 2021

90

June 2, 2018

Jackie Cowin, Esq.  
KP LAW, P.C.  
101 Arch Street  
Boston, MA 02110

Re: FONDAKOWSKI v. TOWN OF WESTHAMPTON, et al.

Dear Counselor:

Enclosed is a copy of the deposition of  
MARK SCHWALLIE taken on May 21, 2018, in the  
above-entitled action.

According to Rule 30(e) of the  
Massachusetts Rules of Civil Procedure, the  
deponent has thirty days to sign the deposition  
from the date of its submission to the deponent,  
which is the above date.

Please have the deponent sign the enclosed  
Signature Page/Errata Sheet and return it to the  
offices of:

Richard T. Jordan, Esq.  
LAW OFFICES OF KOTFILE & JORDAN  
One Monarch Place, Suite 1340  
Springfield, MA 01144

Whereupon it will be attached to the  
original deposition transcript, and a copy  
thereof to all counsel of record.

Thank you for your cooperation in this  
matter.

Raymond F. Catuogno, Jr.

cc: Richard T. Jordan, Esq.

91

COMMONWEALTH OF MASSACHUSETTS  
Hampshire, ss. 1780CV00105

TIMOTHY FONDAKOWSKI,  
Plaintiff,

v.

PLANNING BOARD OF THE TOWN OF WESTHAMPTON  
THROUGH ITS MEMBERS MARK SCHWALLIE, THOMAS  
HATHAWAY, ROBERT TURNER, ROBERT DRAGON, JR.,  
COTTON TREE SERVICE, INC., DODGE MAPLE GROVE  
FARM, LLC, AND HAMPSHIRE SUPERIOR COURT,  
Defendants.

I, MARK SCHWALLIE, do hereby certify,  
under the pains and penalties of perjury, that  
the foregoing testimony is true and accurate, to  
the best of my knowledge and belief, with the  
addition of the following changes/corrections:  
Page| Line| Change/Correction


WITNESS MY HAND, this day of , 2018.

MARK SCHWALLIE

cc: Richard T. Jordan, Esq.  
Jackie Cowin, Esq.