

**MINUTES**  
**November 18, 2020**  
**1:30 P.M.**  
**Wake County Board of Elections**

Chair Greg Flynn called the regularly scheduled meeting of the Wake County Board of Elections to order at 1:30 p.m. Present for the meeting from the Wake County Board of Elections were Greg Flynn, Keith Weatherly, Erica Porter, Gerry Cohen, Angela Hawkins, County Attorney Allison Cooper, County Attorney Claire Duff, Director Gary Sims, Deputy Director Olivia McCall, and staff members Shanya Scott and Evan Wingate.

Full hearing transcript of the Elections Protest of Joan Erwin is attached.

The Board led the Pledge of Allegiance.

On motion by Angela Hawkins, second by Erica Porter, the Board unanimously approved the Agenda.

On motion by Greg Flynn, second by Erica Porter, the Board moved to closed session pursuant to GS 143-318.11(3) at 1:31 p.m.

The Board returned from closed session at 2:18 p.m.

The Board heard opening statements from Karl E. Knudsen on behalf of Tim Gunther and David M. Lefkow on behalf of Joan Erwin.

On motion by Greg Flynn, second by Erica Porter, the Board moved to closed session pursuant to GS 143-318.11(3) at 2:40 p.m.

The Board returned from closed session at 3:08 p.m.

The Board heard direct examination of witness Don Carrington by David M. Lefkow.

The Board heard direct examination of witness Beth Tanner by David M. Lefkow.

On motion by Angela Hawkins, second by Keith Weatherly, the Board approved adding to evidence the Wake County Communications staff notes from Karl E. Knudsen's statement on behalf of Tim Gunther. Greg Flynn and Erica Porter opposed the motion.

On motion by Erica Porter, second by Angela Hawkins, the Board unanimously moved into recess at 4:26 p.m.

The Board reconvened at 4:36 p.m.

After deliberation, on motion by Angela Hawkins, second by Keith Weatherly, the Board unanimously finds that the candidate, Tim Gunther, is not eligible for District Court Judge District 10F and refers the findings to the North Carolina State Board of Elections in accordance with GS 163-182.10(d)(2)(e) for further action.

There being no further business, the Board adjourned at 4:43 p.m.

Respectfully submitted,



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Keith Weatherly, Secretary  
Wake County Board of Elections

STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE THE STATE BOARD OF ELECTIONS

IN RE: PROTEST OF TIM GUNTHER

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BOARD MEETING

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Held at the  
Wake County Commons Building  
Raleigh, North Carolina

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Wednesday, November 18, 2020  
1:30 P.M.

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Volume 1  
Pages 1 through 72

**A P P E A R A N C E S**

Wake County Board of Elections:

Greg Flynn, Chairman  
Keith Weatherly  
Angela Hawkins  
Gerry Cohen  
Erica Porter

Wake County Attorney's Office:

Allison Pope Cooper, Esquire  
Claire Hunter Duff, Esquire  
Wake County Attorney's Office  
301 South McDowell Street  
Post Office Box 550  
Raleigh, North Carolina 27601

On behalf of Joan Erwin:

David M. Lefkow, Esquire  
Lefkow Law  
1209 Prairie Pond Circle  
Raleigh, North Carolina 27614-8678

On behalf of Tim Gunther:

Karl E. Knudsen, Esquire  
Raleigh Building  
5 West Hargett Street, Suite 1100  
Raleigh, North Carolina 27601

Wake County Board of Elections Staff:

Gary Sims, Director  
Olivia McCall, Deputy Director  
Shanya Scott  
Evan Wingate

Also present:

Tim Gunther  
Joan Erwin

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

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Donald Carrington				
by Mr. Lefkow:	17			
Beth Tanner				
by Mr. Lefkow:	27			

**E X H I B I T S**

<u>Number</u>	<u>Description</u>	<u>Marked</u>
1	Affidavits	71
2	Time Line	71
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P R O C E E D I N G S

1:30 P.M.

1  
2 Chairman Flynn: As the Chair of the Wake  
3 County Election Board, I call this meeting to order.  
4 Would you all please stand for the pledge of  
5 allegiance?

6 (The Pledge of Allegiance was recited.)

7 Chairman Flynn: Thank you; the first  
8 item of business is the approval of the agenda. I know  
9 we're here for a hearing on a protest of Joan Erwin. I  
10 need a motion for approval of the agenda.

11 Mr. Scott: Mr. Chairman.

12 Chairman Flynn: Mr. Scott.

13 Mr. Scott: Sorry, with all the  
14 echos; it's hard to understand what you are saying.

15 Chairman Flynn: Okay, I'll -- I'll need  
16 -- I need a motion for the approval of the agenda.

17 Female Board Member: So move.

18 Chairman Flynn: All in favor, say aye.

19 Entire Board: Aye.

20 Chairman Flynn: The agenda's approved.  
21 At this point, before we get into the order of  
22 business, let's make a motion for this board to go into  
23 closed session. The motion is pursuant to the North  
24 Carolina General Statute Number 23-01.7 page 3 for the  
25 purpose is to consult with the county attorneys in

1 order to preserve the attorney-client privilege between  
2 the board and its attorneys. Do I have a second?

3 Female Board Member: Second.

4 Chairman Flynn: Second; in support all  
5 in favor, say aye.

6 Board: Aye.

7 Chairman Flynn: We're going into a  
8 closed session.

9 Male Speaker: We've got a room across  
10 the way.

11 (The Board Members went into closed session  
12 at 1:31 P.M.)

13 (The Board Members returned at 2:18 P.M. and  
14 open session was resumed.)

15 Chairman Flynn: So what I'll ask is for  
16 the protester, Ms. Erwin, to make an opening statement  
17 at the microphone, and following that, the candidate or  
18 attorney make an opening statement.

19 Male Speaker: Which microphone?

20 Chairman Flynn: The microphone at the  
21 table in the center.

22 Male Speaker: Okay.

23 Mr. Knudsen: It might be helpful, if  
24 I were to make Mr. Gunther's opening statement, and I  
25 do believe that under the procedure he was -- under the

1 law Mr. Gunther would have the burden of proof in  
2 establishing residency, since residency is in the --

3 Chairman Flynn: I'm sorry. I'm going to  
4 have to let the protester and the protester's attorney  
5 address us first and you may make remarks at the end.

6 Mr. Cohen: And also, Mr. Chairman,  
7 again --

8 Chairman Flynn: Mr. Cohen?

9 Mr. Cohen: -- I could not hear  
10 anything that the gentleman had said, so I would  
11 encourage anyone speaking to come to the microphone.

12 Chairman Flynn: Right, so if it's not on  
13 the microphone, it's not being put into evidence.

14 Mr. Lefkow: Good afternoon; thank  
15 you --

16 Chairman Flynn: Please state your name,  
17 again.

18 Mr. Lefkow: Oh, my name is David  
19 Lefkow. I am representing the protester, Joan Erwin.  
20 I am a member of Wake County Bar, and I thank you for  
21 your attention this afternoon.

22 Ms. Porter: Can you talk closer to  
23 the microphone, please?

24 Mr. Lefkow: Yes.

25 Ms. Porter: Thank you.

1                   Mr. Lefkow:                   The first matter of  
2                   business, I think from our perspective, would be to ask  
3                   the commission to issue our subpoenas that we've  
4                   presented. Some of the affiants are here, so we could  
5                   take direct testimony from them, but they have not been  
6                   subpoenaed yet, so could you consider our request for  
7                   the issuance of subpoenas.

8                   Chairman Flynn:                   Mr. Weatherly?

9                   Mr. Weatherly:                   Yeah, do we have a  
10                  complete list of -- are any of those potential  
11                  witnesses --

12                  Mr. Lefkow:                   Yes.

13                  Mr. Weatherly:                   -- here today?

14                  Mr. Lefkow:                   Yes.

15                  Mr. Weatherly:                   And which ones are not  
16                  that you want to require their presence?

17                  Mr. Lefkow:                   I think there are  
18                  approximately -- well, not approximately, I think there  
19                  are three that are not here today. You'll have to  
20                  excuse me. I was just asked to join in this process  
21                  late yesterday afternoon, so I'm not as conversant as I  
22                  would like to be.

23                  Mr. Weatherly:                   Well, I think at least  
24                  two -- two of us and maybe -- maybe all would be  
25                  prepared to issue subpoenas, but we don't want to



1 subpoena somebody -- you got to tell us who.

2 Ms. Erwin: Your Honor, we would like  
3 to subpoena Alicia Dawn Gunther.

4 Mr. Weatherly: Okay.

5 Ms. Erwin: We would like to subpoena  
6 Stephen Xavier.

7 Mr. Weatherly: Okay.

8 Ms. Erwin: Patricia Sauls.

9 Mr. Weatherly: I'm sorry. Could you --

10 Ms. Erwin: Patricia Sauls.

11 Mr. Weatherly: I'm sorry. Can you  
12 repeat the name for me again -- do these already appear  
13 on the list that you submitted?

14 Ms. Erwin: For subpoenas, yes; one  
15 last one, Judy Jackson.

16 Mr. Weatherly: So can you repeat again?  
17 You had Stephen Xavier?

18 Mr. Lefkow: It should be in your  
19 documentation I gave you yesterday.

20 Ms. Erwin: Stephen Xavier, yes.

21 Mr. Weatherly: Stephen Xavier, Patricia  
22 Sauls, Xavier, Judy Jackson.

23 Ms. Erwin: And Rex Wellness.

24 Mr. Lefkow: And Rex Wellness.

25 Mr. Weatherly: Judy Jackson, okay, and

1 Max?

2 Mr. Lefkow: Rex Jackson.

3 Ms. Erwin: Judy Jackson.

4 Mr. Lefkow: Judy Jackson, excuse me.

5 Mr. Weatherly: I'm sorry. You had Judy  
6 Jackson. Was there somebody else?

7 Mr. Lefkow: And Rex Wellness.

8 Mr. Weatherly: Rex --

9 Ms. Erwin: At Rex Wellness.

10 Mr. Lefkow: Oh, at Rex Wellness,  
11 excuse me.

12 Mr. Cohen: Are any of those persons  
13 you listed here today and willing to testify under oath  
14 without being compelled?

15 Ms. Erwin: No, Your Honor, we -- we  
16 got Stephen Xavier's affidavit. We've got affidavits,  
17 but, you know, they --

18 Mr. Cohen: These affidavits, do you  
19 have them in original form?

20 Ms. Erwin: I think all of them the  
21 original forms have been given to --

22 Mr. Lefkow: They were given to the --  
23 to the candidates, weren't they?

24 Mr. Knudsen: Mr. Chairman, if you  
25 would allow me to speak for less than three minutes, I

1                   might be able to save everybody a lot of trouble.

2                   Chairman Flynn:           All right, so I will --

3                   Ms. Porter:                    Could you put your mask  
4                   on, please?

5                   Chairman Flynn:            Please keep your mask on.  
6                   I will allow you to speak after these opening remarks,  
7                   but I wish that you could make this a general overview  
8                   of your case and then we can get into the nitty gritty  
9                   of the evidence.

10                  Ms. Erwin:                    Your Honor, maybe --  
11                  Counsel, I think that he is responding to the -- may I  
12                  request a meeting of counsel, and then we will know  
13                  better about the proceeding?

14                  Mr. Lefkow:                    Could we take a five  
15                  minute recess to speak?

16                  Chairman Flynn:            That would be in order.  
17                  I'm sorry that you didn't have that opportunity while  
18                  we were in closed session.

19                  Ms. Erwin:                    Well, we -- we didn't --

20                  Chairman Flynn:            Is that what both parties  
21                  desire?

22                  Mr. Knudsen:                I think if you give me  
23                  thirty seconds to explain, Your Honor, then I think  
24                  that that's all that's going to be required by me.

25                  Ms. Erwin:                    If we could leave --

1 Chairman Flynn: You may leave the room.  
2 We'll be at ease.

3 Ms. Erwin: Thank you.

4 (A short break was taken at 2:29 P.M.)

5 (The proceedings resumed at 2:29 P.M.)

6 Mr. Lefkow: Mr. Gunther's attorney  
7 has indicated that he wanted -- we -- I think it would  
8 be appropriate for him to explain to the commission  
9 what he explained to us.

10 Chairman Flynn: Okay, please approach,  
11 and state your name.

12 Mr. Knudsen: Thank you very much; Mr.  
13 Chairman and members of the board, as I mentioned a  
14 minute ago, I'm Karl Knudsen. I'm a member of the Wake  
15 County Bar. I've known Tim Gunther since he first  
16 began to practice law in Wake County over twenty-eight  
17 years ago. I've witnessed his legal work firsthand  
18 many, many times over the years. Tim is a fine man, a  
19 fine lawyer, and he would make a great judge. Last  
20 year, Tim decided that he could best use his legal  
21 skills and life experience in service to the people of  
22 Wake County as a judge in the District Court, and he  
23 filed as a candidate in the district where he then  
24 resided. The particular seat was subsequently moved by  
25 action of the General Assembly to a district, which

1 included Fuquay-Varina, where his daughter rented a  
2 home. His daughter was gracious enough to allow him to  
3 reside in her home. With the intention of permanently  
4 moving to Fuquay-Varina, Tim began the process of  
5 establishing his residency there and amended his filing  
6 for District Court to reflect his intended residence in  
7 Fuquay-Varina. Much as happened since December of last  
8 year, in part because of the worldwide Coronavirus  
9 pandemic, some unanticipated non-COVID related medical  
10 issues, and some other logistical issues, Tim was  
11 unable to complete his move to Fuquay-Varina to a  
12 degree, which would fully satisfy the strict legal  
13 requirements for residency as a candidate for the  
14 judgeship of which he was ultimately elected by the  
15 people. We, therefore, will not contest the protest  
16 which has been filed. It is especially regrettable  
17 that this protest was presented so late in the process,  
18 despite the claimant or her advisors having invested a  
19 bulk of the information forming the basis for this  
20 protest for almost a year and having this information  
21 well within the time period established by law for  
22 contesting the residency of a candidate for office.  
23 Presenting this challenge within the proper time frame  
24 would have allowed for an appropriate remedial actions  
25 to be taken prior to this election. Tim would like to

1 express his deepest regrets and sincere apologies to  
2 his friends, family, supporters and the voters of Wake  
3 County who wanted him to serve them as a judge on the  
4 District Court. As a lawyer, Tim understands that the  
5 letter of the law must be followed no matter how  
6 personally heartbreaking the consequences may be and  
7 that sometimes having the best of intentions is simply  
8 not enough. Owning one's mistakes even when  
9 unintentional and accepting the consequences no matter  
10 how bitterly painful is the mark of a character. Thank  
11 you; we will not be presenting any additional evidence,  
12 testimony, and we will not further contest the  
13 proceedings; thank you very much.

14 Chairman Flynn: Thank you; does the  
15 protester wish to make a statement?

16 (Mr. Gunther and Mr. Knudsen leave the room.)

17 Ms. Erwin: I feel it necessary to  
18 press this forward to assure that I did not wait --

19 Ms. Porter: Can you speak into the  
20 microphone?

21 Ms. Erwin: I did not wait to make my  
22 protest. I first learned about the issue in July, June  
23 -- July of this year, couldn't believe it, felt like  
24 surely the man was moving, and counseled Beth Tanner,  
25 who had been my student in law school to hold off that

1 he's probably in the process of moving. After the  
2 regrettable article in the Carolina Journal came out  
3 where Mr. Gunther basically told the reporter that he  
4 had -- that he had not lived in the house, that he  
5 first said he and his daughter were renting the place  
6 together, then he said, well, yes, she -- when the  
7 reporter pressed him on it, said, well, yes, she does  
8 own the house and did admit that other people were  
9 living in the house. At that point, I felt that  
10 somebody needed to protest, because at that point it  
11 was October and at that point, it was far too long for  
12 people to say, well, surely he's going to move before  
13 the election. If the Nat Pendley case tells us  
14 anything, it's necessary that we establish residency  
15 and so as a -- I didn't particularly want to do this.  
16 In fact, I really didn't want to because I -- I was a  
17 criminal lawyer for years in the Attorney General's  
18 office, and I could see that Pendley hurt people, and I  
19 didn't want to hurt Tim Gunther, but when he still  
20 would not move and still did not acknowledge what he  
21 has acknowledged today, I felt obliged to file a  
22 protest. I just want you to know I was not sitting on  
23 any rights or trying to undermine him. I acted when I  
24 felt there was nothing else I could do, and I really  
25 didn't want to do it even then. Now the issue then

1 comes down, I believe to what remedy, and I think it is  
2 abundantly clear, from the very beginning, that Mr.  
3 Gunther had not had the residency requirements at any  
4 time from the time he filed to the time I filed my  
5 protest and up until and including the election, so  
6 then the issue is what's the remedy. If the --

7 Chairman Flynn: Let me interrupt you for  
8 a second.

9 Ms. Erwin: Yes.

10 Chairman Flynn: So thank you for your  
11 remarks.

12 Ms. Erwin: Yes.

13 Chairman Flynn: I'll take them as opening  
14 remarks and not evidence per se, but I think we need to  
15 have a discussion about what action should be taken by  
16 you all or by us since the candidate has capitulated  
17 and a discussion of remedy and closing remarks, which  
18 you seem to be entering into, but I think it might be  
19 appropriate for us to consult with our attorney.

20 Ms. Erwin: That will be fine, but I  
21 -- I would simply say that this is a situation where  
22 we've got Nat Pendley, and we've got a Julian Pierce  
23 situation where a person died and then got elected.

24 Chairman Flynn: I understand.

25 Ms. Erwin: Yes.



1 Chairman Flynn: Can we get a --

2 Ms. Erwin: But -- but there are lots  
3 of equities for all parties here, and we acknowledge  
4 that, but the only thing we would say is we do not  
5 think that appointment of someone by the Governor falls  
6 within this issue, so I then put it to your discretion  
7 as to what to do.

8 Chairman Flynn: Well, this is essentially  
9 an evidentiary hearing.

10 Ms. Erwin: Yeah.

11 Chairman Flynn: We're hearing truncated  
12 evidence, but we really need to discuss the next steps  
13 with our attorney.

14 Ms. Erwin: Okay.

15 Mr. Lefkow: Are you going to take a  
16 recess or --

17 Chairman Flynn: Yeah, we're going to --

18 Mr. Lefkow: -- or closed session?

19 Chairman Flynn: We're going to go into  
20 closed session for a short while, so I would make that  
21 motion to pursuant to General Statute 143-318.1183 to  
22 consult with the county attorneys in order to preserve  
23 the attorney-client privilege --

24 Mr. Lefkow: Before you do that, sir,  
25 I would just like to indicate that our position would

1 be that we request that the remedy be that can or be  
2 placed in the position that will be created as of  
3 January 1st.

4 Chairman Flynn: I'm aware of that.

5 Mr. Lefkow: Okay, I just wanted to  
6 make sure that we had that on the record; thank you.

7 Chairman Flynn: So we've got a motion and  
8 a second, all in favor say aye.

9 Board: Aye.

10 (The board went into closed session at 2:40  
11 P.M.)

12 (Open session resumed at 3:08 P.M.)

13 (Whereupon,

14 Donald Carrington

15 was called as a witness, duly sworn, and testified as  
16 follows:)

17 **D I R E C T E X A M I N A T I O N** 3:08 P.M.

18 By Mr. Lefkow:

19 Q Mr. Carrington, can you please state your  
20 full name for the record, please?

21 A Donald Carrington.

22 Q What is your occupation?

23 A I'm a writer/reporter for Carolina Journal a  
24 publication of the John Locke Foundation.

25 Q Okay, did you research and write an article,

1 which has been labeled as Exhibit 17?

2 A Yes.

3 Q Do you have a copy of that with you?

4 A I do.

5 Q Okay, could you explain what the article --  
6 what you detailed in the article, please?

7 A Well, I've written some other articles that  
8 dealt with the residency issues earlier this year, and  
9 this is was one -- the story where it came to my  
10 attention we had a candidate for office that did not  
11 appear to live in the district as required, and I  
12 studied property records, made some observations myself  
13 and looked at both houses and then interviewed Mr.  
14 Gunther.

15 Q Which houses are you referring to, Mr.  
16 Carrington?

17 A The one at Fuquay-Varina and the one in Cary.

18 Q Do you remember their addresses or is it  
19 detailed in your article?

20 A It's detailed in the article.

21 Q When did you conduct this research? Do you  
22 remember the dates?

23 A I talked to Mr. Gunther on October 14th  
24 and --

25 Q Can you tell us what you -- can you summarize

1 your discussions with him?

2 Chairman Flynn: I'm sorry. I did to  
3 interrupt for clarification, October 14th of this year?

4 The Witness: Yes, October 14th this  
5 year, I called him, and it took awhile for him to get  
6 back with me. I asked him where he lived, and first he  
7 said -- this is in my story, that he had his daughter  
8 rented the house in Fuquay-Varina, and I knew that not  
9 to be true that his daughter and ex-wife had bought a  
10 house in Fuquay-Varina, and that --

11 By Mr. Lefkow:

12 Q Mr. Carrington, excuse me. How did you come  
13 to understand that was his -- that his statement wasn't  
14 true about the house?

15 A Well, because his daughter wouldn't be  
16 renting the house from herself.

17 Q You checked the real estate records?

18 A Yes.

19 Q Okay.

20 A I mean, she -- she -- what it appeared to be  
21 is that Tim Gunther's former wife helped their daughter  
22 buy a house. They were both on the deed and both on  
23 the deed of trust, so when he said that he and his  
24 daughter were renting the house in -- in Fuquay, it  
25 didn't make in sense, and I immediately pointed out

1           that his daughter and former wife owned that house and  
2           then he said something like, oh, yeah.

3           Q       So you challenged him in his statement and  
4           then he gave an admission. Is that what you're saying?

5           A       Well, he -- yes, he real -- I think he --  
6           well, I don't know what he realized, but I had done  
7           enough research on that, and also I asked him if others  
8           had lived at that house because I had been down there  
9           and observed two -- two young men apparently in their  
10          twenties on the front porch.

11          Q       Again, which house are you referring to now?

12          A       The Fuquay house.

13          Q       Okay, and what was the address? Do you  
14          remember that?

15          A       It was the -- the Hepple -- 821 Hepplewhite  
16          Court.

17          Q       Thank you; please continue your answer.

18          A       Yeah, I asked him -- I knew the one man --  
19          the one man without the shirt on appeared to be his  
20          daughter's boyfriend, Rex, which I learned from social  
21          media. There was another man on the front porch; this  
22          was in the afternoon, and -- another man, and I said  
23          does someone else rent a room or stay in that house,  
24          and he acknowledged that his daughter's boyfriend and  
25          another man also lived there. So that puts three

1 people in that house, three adults, and he would be the  
2 fourth adult in that house.

3 Q Do you have any information that you want to  
4 provide regarding his other?

5 A On his other house, after that visit to  
6 Fuquay, I went to for the first time to see his house  
7 in Cary, and I waited out front down the street just  
8 doing some research on my phone and a -- a car pulled  
9 up. I recognized him. He was him. He was in his  
10 Chrysler 300, I believe it's called. He backed up the  
11 driveway in the Fuquay house and then went inside.  
12 That was just a total luck encounter as was the luck  
13 encounter the boys on the front porch in the house.  
14 They all happened the same day.

15 Q Let's go back a second and make sure, Mr.  
16 Carrington, that you are -- that we keep the houses  
17 straight.

18 A Sure.

19 Q I know it's a little confusing for -- for  
20 everyone, so if you could slow down --

21 A Okay.

22 Q -- just a little bit and when you're talking  
23 about a house, identify which house.

24 A Okay.

25 Chairman Flynn: So we need to backtrack.

1 Mr. Cohen's observing -- you're still talking about the  
2 Fuquay house when you said you saw him pull in the  
3 driveway.

4 The Witness: That -- that -- no, that  
5 was -- that was at the Cary house. When I finished at  
6 the Fuquay house, I headed back up -- back to Cary for  
7 the first time, and by chance, I -- he pulled up. It  
8 was about 5:15 in the afternoon, and he pulled up and  
9 backed into the driveway and then went into the house.

10 By Mr. Lefkow:

11 Q Did you have a conversation with him at that  
12 time?

13 A No -- no, I did not have a conversation with  
14 him.

15 Chairman Flynn: Excuse me for a minute.  
16 Mr. Cohen wishes to speak.

17 The Witness: Yeah.

18 Chairman Flynn: You'll need to turn your  
19 microphone on, Mr. Cohen.

20 Mr. Cohen: So you say --

21 The Witness: I can't hear you.

22 Mr. Cohen: When you said he backed  
23 into the Fuquay house, you meant to say the Cary house,  
24 and you erroneously said he backed into the Fuquay  
25 house?

1                   The Witness:                I don't know if I said  
2                   that, Mr. Cohen, but that's right. He backed into the  
3                   -- to the Cary house. I never saw him at the Fuquay  
4                   house.

5                   By Mr. Lefkow:

6                   Q       Mr. Carrington, what, if anything, did Mr.  
7                   Gunther say to you about the Cary house?

8                   A       He said -- in my story I wrote, he said he's  
9                   moved out of the Cary house, and they fixed it up to  
10                  sell it.

11                  Q       And --

12                  A       That's what I put in the story.

13                  Q       I see. Did he every call you after you  
14                  published this -- after this story was published?

15                  A       No, he didn't.

16                  Q       Did he ever dispute the details of the  
17                  article that you wrote?

18                  A       He -- not with me.

19                  Q       Did he send anything into your -- into the  
20                  publication?

21                  A       No, and -- and, in fact, one more point on  
22                  the Fuquay house -- I mean excuse me, the Cary house; I  
23                  decided to make one more visit there and I went on  
24                  Sunday morning very, very early while it was dark. I  
25                  noticed a paper in the driveway. I waited until I had



1 enough light to see with my night camera. It appeared  
2 to be a News & Observer Sunday paper in the drive, and  
3 I just thought that that was interesting. The car was  
4 backed up, as I had seen it before, so I had made that  
5 second trip to the house -- on a Sunday and his car was  
6 in the driveway and the paper was in the driveway as  
7 well.

8 Q Mr. Carrington, is there any other  
9 information you want to provide to the board at this  
10 time?

11 A No, everything -- I think you know from my  
12 investigation that this is in the story.

13 Mr. Lefkow: At this time, I completed  
14 my questioning; if the board has any questions of Mr.  
15 Carrington.

16 Chairman Flynn: Do the members have any  
17 questions? Just to clarify, we didn't tie -- October  
18 14th, is that the date of the article or the date which  
19 you began --

20 The Witness: The date on the article  
21 published online was October 16th.

22 Chairman Flynn: The time period of your  
23 in-person observation, was that the 14th, Mr.  
24 Carrington?

25 The Witness: It was the 14th when I

1 talked with him.

2 Chairman Flynn: It was prior to the  
3 discussion then --

4 The Witness: Yes.

5 Chairman Flynn: The 7th and the 11th,  
6 those the date?

7 The Witness: October 7th is when --  
8 right, is when I saw Rex Jacobson, his daughter's  
9 boyfriend, on the front porch of the house and that  
10 would be the same day that I first saw Tim Gunther back  
11 into his driveway at the house he owned in Cary,  
12 October 7th, and then the Sunday after that. I went  
13 back -- Sunday morning, I went back to that house in  
14 Cary and saw the car there again before the sun had  
15 come up.

16 Chairman Flynn: Did you see him?

17 The Witness: No, I didn't see him.

18 Chairman Flynn: Was there a name on the  
19 newspaper?

20 The Witness: I didn't open it up. It  
21 was wrapped -- had plastic on it, but the News &  
22 Observer is pretty expensive to get right now, and I  
23 figured that you wouldn't be having it sent to a place  
24 that you didn't live.

25 Chairman Flynn: Well, I don't want to get

1           you in a back and forth, but I do want to let the  
2           protester know that we're trying to find some  
3           substantial evidence, and I'd like to -- you're allowed  
4           to submit whatever evidence you want, but I wish we  
5           could focus on substantial tangible evidence and less  
6           of the evidence that tends towards hearsay or opinion.  
7           I'd like to focus on the facts and gather as much facts  
8           as we can. What -- so I'm addressing counsel.

9                   Mr. Lefkow:                   Yes, so I would like to  
10           move Mr. Carrington's testimony into evidence and  
11           understanding that there is no objection or challenge  
12           from the -- from the candidate to his -- to his  
13           statements to his testimony, so.

14                   Chairman Flynn:           There are no further  
15           questions from the board; thank you, Mr. Carrington.

16                   Mr. Lefkow:                   I'd like to call Beth  
17           Tanner as our next witness. Before we continue, I have  
18           much clearer copies of the photographs that appear in  
19           the article. I'd like to submit those to the board so  
20           that there's been much more clear and easier to  
21           preview.

22                   Chairman Flynn:           The previous items listed  
23           as being submitted into evidence, have you handed those  
24           over yet?

25                   Mr. Lefkow:                   I believe we did

1 previously, yes.

2 Ms. Erwin: The article along with my  
3 protest.

4 (Whereupon,  
5 Beth Tanner  
6 was called as a witness, duly sworn, and testified as  
7 follows:)

8 **D I R E C T E X A M I N A T I O N**

9 By Mr. Lefkow:

10 Q Ms. Tanner, could you state your full name  
11 for the record?

12 A Yes, Beth Tanner.

13 Q What is your occupation?

14 A I'm an attorney. I'm the Associate Director  
15 for the North Carolina Innocence Inquiry Commission.

16 Q And were you a candidate for judge this fall?

17 A Yes, I was.

18 Q And in what district?

19 A I was a candidate for judge in Wake County  
20 District F.

21 Q Okay, do you have in front of you a documents  
22 time line?

23 A I do.

24 Q Could you just explain for the board -- well,  
25 first of all, did you create the time line?

1 A I did create this document labeled time line.

2 Q And when did you create it?

3 A This morning.

4 Q Okay, and would you then go ahead, please,  
5 and explain generally what the time line displays in  
6 exhibits?

7 A Sure; I went through the information that was  
8 provided as attached to Ms. Erwin's protest, as well as  
9 the various affidavits that have already been submitted  
10 to the board and accepted uncontroverted as evidence an  
11 affidavit for myself and as a beneficial exhibit a time  
12 line of all of the times that Mr. Gunther was seen at  
13 Solway Court, and I included the times that Alyssa, I'm  
14 sorry if I'm saying her name wrong, Gunther advertised  
15 for a roommate at her home.

16 Q What does -- where is Solway Court located,  
17 in what community?

18 A Yes, that is -- I'm not sure that I know the  
19 name of the subdivision, but that is in Cary, North  
20 Carolina. It is not in District F.

21 Q Thank you; do you want to continue? Why  
22 don't you just go through each of the dates and explain  
23 exactly what -- what you presented?

24 A So on 4/26/19, that is when Mr. Gunther  
25 created his candidate committee running in District D.

1 On 5/12/19, as you can see there was a training  
2 certification for treasurer that indicated he was  
3 running in District D. On 10/8/19, Mr. Gunther voted  
4 in the municipal election under the address in District  
5 D, 103 Solway Court. On 12/18/2019, pursuant to the  
6 affidavit that you guys have, and which is in evidence  
7 now, Ms. Braswell saw Mr. Gunther at his home at 103  
8 Solway Court in Cary.

9 Q Excuse me. Could I stop you for a moment?  
10 Could you go back to the date of 10/8/19 and explain  
11 how you get gathered that information?

12 A Yes, I know that Mr. Gunther voted in the  
13 municipal elections on 10/8/19 because you can see that  
14 on the Board of Elections' website, and he did not  
15 change his driver's license to Hepplewhite Court until  
16 December.

17 Q Okay, let's continue.

18 A On January 1st, 2020, I gathered this PI  
19 report that has been accepted into evidence as part of  
20 Ms. Erwin's protest, the private investigator sees Mr.  
21 Gunther's vehicle at 103 Solway Court at 2:45 P.M. On  
22 January 3rd, 2020, the private investigator sees Mr.  
23 Gunther physically leaving his home at 103 Solway Court  
24 at 7:50 A.M. and then again at 5:43 P.M. At 8:45 P.M.,  
25 Mr. Gunther's car is backed into the driveway at 103

1 Solway Court; on January 4th, 2020, the private -- yes,  
2 sir?

3 Q Did the PI indicate who backed the car into  
4 the driveway at Solway Court?

5 A Her report -- I don't have it in front of  
6 me. I'm very sorry, but her report, I believe,  
7 indicated that at 8:45 P.M., she saw Mr. Gunther's car  
8 backed into his driveway. She saw him leaving his  
9 home, him, as in the person at 7:50 A.M. and again at  
10 5:43 P.M. And just to clarify, that is the home at 103  
11 Solway Court in Cary, North Carolina.

12 Chairman Flynn: Just to clarify, are you  
13 saying 7:30 A.M. that same day or the next day?

14 The Witness: I'm sorry. Tell me  
15 again. Are we at 1/3/2020, sir?

16 Chairman Flynn: Yes.

17 The Witness: Yes.

18 Chairman Flynn: All right.

19 The Witness: And I'm sorry. Again, I  
20 don't have the report in front of me, but I believe I  
21 quoted it directly. She -- she goes twice that day as  
22 I understand the report, so she goes once in the  
23 morning and actually sees Mr. Gunther leaving his home  
24 at 7:50 A.M. and the she's there again in the later  
25 afternoon and sees him again at 5:43 P.M. This does

1           come directly from the PI's report that's been entered  
2           into evidence as part of Ms. Erwin's protest, so that's  
3           obviously the original document, and this is my summary  
4           of that. Okay, can I keep moving?

5                     Mr. Lefkow:            Please.

6                     The Witness:            On January 4th, 2020, the  
7           private investigator reports that she sees Mr.  
8           Gunther's vehicle parked at his home at 103 Solway  
9           Court at 10:11 A.M. and then again at 8:50 P.M. These  
10          are the items about Alyssa Dawn Gunther. On 2/2/2020,  
11          Alyssa Dawn Gunther, the owner of 821 Hepplewhite Court  
12          had an ad for a roommate on a website. This is my  
13          summary. The ad indicates that she and her boyfriend  
14          live at the address. That ad and the subsequent post  
15          on 3/9 and 3/10, which are also by Ms. Gunther about a  
16          roommate are attached to the affidavit of Gene Brentley  
17          Tanner, which has already been accepted into evidence.

18                    Ms. Hawkins:            Excuse me, Ms. Tanner.  
19          Hepplewhite Court is in what city?

20                    The Witness:            Fuquay-Varina.

21                    Ms. Hawkins:            Thank you.

22                    The Witness:            On 6/19/2020, Brentley  
23          Tanner sees Mr. Gunther at 8:40 A.M. driving his  
24          vehicle, which I know also the vehicle regularly seen  
25          at 103 Solway Court in Cary, North Carolina, at the



1 intersection of Walnut Road and High House Road in  
2 Cary, North Carolina. On 8/30/2020, Brentley Tanner  
3 takes a photo of 103 Solway Court with lights on in the  
4 home; Mr. Gunther's car parked in the driveway, and  
5 trash set out in the street in front of the home. On  
6 September 26, 2020, Mr. Xavier observes Mr. Gunther's  
7 car in the driveway at 103 Solway Court. That notation  
8 A.M./P.M. means that he saw it in the morning and in  
9 the evening. That can be found in his affidavit, which  
10 has been submitted into evidence and accepted. On  
11 9/27/2020, Mr. Xavier observes Mr. Gunther's car in the  
12 driveway at 103 Solway Court in the morning and in the  
13 afternoon. On 9/28/2020, Mr. Xavier observes Gunther's  
14 car in the driveway at 103 Solway Court in Cary, North  
15 Carolina, in the morning and in the afternoon. On  
16 9/29/2020, Mr. Xavier observes Gunther's car in the  
17 driveway at 103 Solway Court in the morning and in the  
18 afternoon. On 9/30/20, Mr. Xavier observes Gunther's  
19 car again in the driveway at 103 Solway Court in the  
20 morning. I believe I have actually missed a date that  
21 is included in Mr. Xavier's affidavit that he -- oh,  
22 maybe I didn't. It's down here 10/31. I apologize.  
23 On October 5th, 2020, Mr. Gunther mails documents to  
24 the Board of Elections from the downtown Cary Post  
25 Office. Those documents and the further explanation of

1 that can be found in the affidavit of Brentley Tanner,  
2 which has already been entered and accepted into  
3 evidence in this case.

4 Chairman Flynn: So let me stop you for a  
5 second.

6 The Witness: Yes, sir.

7 Chairman Flynn: Do you know that Mr.  
8 Gunther personally mailed those documents?

9 The Witness: Mr. Gunther submitted the  
10 reports to the Board of Elections and the mail was  
11 postmarked 27519 based on what was found on the Board  
12 of Elections' website.

13 Chairman Flynn: Do you have -- do you  
14 have evidence that he placed it in the mail?

15 The Witness: Sir, I did not see him  
16 place it in the mail if that if that is your question.

17 Chairman Flynn: Is there any record that  
18 shows that he paid for the postage that he put it in  
19 the mail? Did somebody do it on his behalf? Can you  
20 exclude that?

21 The Witness: I do not have anything  
22 other than what is obtained or what is provided in the  
23 affidavit of Brentley Tanner as to him mailing that --  
24 that item.

25 Chairman Flynn: So --

1                   The Witness:            -- or as to that item  
2                   being mailed.

3                   Chairman Flynn:        We're kind of wandering  
4                   here. I have seen the affidavits about observing Mr.  
5                   Gunther's car in the driveway, and I've seen pictures  
6                   of the lights on and that could be my household while  
7                   -- when I'm away. There would be a car in the driveway  
8                   and there would be lights on. And so for this period  
9                   of time, did Xavier observe Mr. Gunther or just his  
10                  car?

11                  The Witness:     We observed -- I'm sorry. The  
12                  affidavits say that they observed his car parked in the  
13                  driveway.

14                  By Mr. Lefkow:

15                  Q     Anything else that is in the affidavit that  
16                  would shine more light on --

17                  A     Certainly.

18                  Chairman Flynn:       Well, he said  
19                  enlightened. I want you to provide some substantial  
20                  evidence and -- and we are -- you are repeating  
21                  statements that are in affidavits on behalf of the  
22                  protester, but I would really like to know what -- what  
23                  is your personal knowledge of these -- of these events.

24                  Mr. Lefkow:            We had requested that the  
25                  Board issue a subpoena for Mr. Gunther so that we could

1 have him testify, and of course, that opportunity is  
2 now lost because he is, as far as I can tell, left the  
3 -- the hearing room and --

4 Chairman Flynn: We could --

5 Mr. Lefkow: -- he would be the best  
6 evidence, maybe not.

7 Chairman Flynn: Mr. Gunther has already  
8 made his statement. I'm asking you. I don't doubt  
9 what you're telling me, but you're repeating statements  
10 of Xavier. Is Xavier here?

11 The Witness: No, sir, he is not  
12 here, --

13 Mr. Lefkow: No.

14 The Witness: -- and he provided an  
15 affidavit that has been entered into evidence without  
16 objection, so that evidence has been received.

17 Chairman Flynn: So I'm -- Xavier's not  
18 here to answer questions and you're unable to answer  
19 his questions. I'd like to skip over these items that  
20 I think -- you can enter them into the evidence, but I  
21 don't see specific evidence of Mr. Gunther's presence,

22 Mr. Lefkow: It's unfortunate that  
23 the --

24 Chairman Flynn: Please let Mr. Cohen  
25 speak.

1                   Mr. Lefkow:            Oh, excuse me. I'm  
2                   sorry.

3                   Mr. Cohen:            Mr. --

4                   Chairman Flynn:      You'll need to turn your  
5                   microphone on.

6                   Mr. Cohen:            Has Mr. Xavier's  
7                   affidavit been distributed to board members, so we can  
8                   see it --

9                   The Witness:          Yes, sir, Mr. Xavier's --  
10                  and I do apologize. I'm going off of memory here. Mr.  
11                  Xavier's affidavit along with four videos, Mr. Alan's  
12                  affidavit, Ms. Braswell's affidavit, Mr. Tanner's  
13                  affidavit, and Ms. Lesnik's affidavit were submitted  
14                  prior to the board hearing to the board.

15                  Mr. Cohen:            I saw them. I saw the  
16                  email and looked at the videos last night, but it would  
17                  be useful, I think, if there's an actual copy at least  
18                  for me and the other board members of the affidavit  
19                  you're referring to. I did read it, but I don't really  
20                  recall exactly what was in it.

21                  Mr. Lefkow:          Let me raise another  
22                  issue and that is that as far as Mr. Gunther. Unless  
23                  I'm mistaken, he didn't actually testify either under  
24                  oath or not under. It was a statement made by his  
25                  attorney. Is that correct, but you're taking notice of

1 his attorney's statement on his behalf as evidence?

2 Chairman Flynn: I haven't said that. I  
3 said --

4 Mr. Lefkow: I'm asking. I'm sorry --  
5 that's why we have tried to move onto this subpoena  
6 issue so that we could put him under oath and have him  
7 testify about his residence.

8 Chairman Flynn: You can enter his  
9 statement as your evidence.

10 Mr. Lefkow: Pardon me?

11 Chairman Flynn: You can enter his  
12 statement as your evidence.

13 Mr. Lefkow: But he hasn't made a  
14 statement here today. His attorney made a statement  
15 and that's very different than evidence. I'm not a  
16 scholar in evidentiary issues, but if there's no  
17 admission or declaration by Mr. Gunther about his  
18 residence, that's not --

19 Chairman Flynn: Mr. Cohen?

20 Mr. Cohen: Can I ask our attorneys  
21 or the county attorney staff whether --

22 Mr. Lefkow: Would they accept --

23 Mr. Cohen: -- the admission of Mr.  
24 Gunther's attorney with the permission of Mr. Gunther,  
25 even not under oath is admissible for our consideration

1           that his attorney has stated that he was not domiciled  
2           in Fuquay-Varina?

3                   Ms. Cooper:                   Mr. Cohen, to answer  
4           your question -- can you hear us?

5                   Mr. Cohen:                   Yes.

6                   Ms. Cooper:                   It is part of the record  
7           and it's going to be noted, of course, in the  
8           transcript, so you can -- it is in the record. He did  
9           not make an official statement under oath, but on  
10          behalf of his attorney, there is evidence in the record  
11          that he's not contesting any of the evidence that's  
12          being put forth at this time either, which you still  
13          have to determine whether or not there's substantial  
14          evidence to the residency question that we're here for.

15                   Mr. Lefkow:                   He specifically stated,  
16          to my recollection, that Mr. Gunther never established  
17          domicile in District 10F.

18                   Mr. Cohen:                   So let's recapitulate the  
19          attorney's statement. Do you have that handy?

20                   Chairman Flynn:                I'm going to ask that we  
21          not go in -- on this diversion, because I'm trying to  
22          address the fact that Ms. Tanner is repeating  
23          statements from another witness's affidavit that don't  
24          actually address, directly address --

25                   Mr. Lefkow:                   Well, we consider them --

1 Chairman Flynn: -- Mr. Gunther's  
2 residency. These are --

3 Mr. Lefkow: Circumstantial evidence  
4 -- you're looking for probative evidence that you can  
5 make a ruling on, correct?

6 Chairman Flynn: Correct.

7 Mr. Lefkow: Okay, that's why I'm  
8 asking the court reporter to go back and see exactly  
9 what Mr. Gunther's attorney said even though Mr.  
10 Gunther never made any statement and whether or not  
11 your attorneys suggest that you can consider his  
12 attorney's statements as his, is another question.

13 Chairman Flynn: That's not the issue  
14 before us right now. I'm just asking -- I'm trying to  
15 speed this along and for you to provide the most  
16 concentrated direct evidence.

17 Mr. Lefkow: Yes, I appreciate --

18 Chairman Flynn: I don't want us to be  
19 just belaboring the fact and restating the  
20 circumstantial evidence. We already have the  
21 affidavit. I'm not trying to badger the witness.

22 Mr. Lefkow: No, no.

23 Chairman Flynn: I'm trying to help you  
24 make the strongest case possible.

25 Mr. Lefkow: Thank you; thank you;



1 well, okay, so let us, I think we're -- with regard to  
2 the time line that Ms. Tanner created right here, we're  
3 done with that testimony. You can obviously, as you  
4 said, read it and know the affidavits that support it  
5 are in the record, so --

6 Ms. Hawkins: I have a question about  
7 one, if --

8 Chairman Flynn: Sure.

9 Ms. Hawkins: -- I may for the witness  
10 without completing the testimony about the time line.  
11 I'd like to ask Ms. Tanner if we're going to skip over  
12 Xavier and we talked about the post office, Mr.  
13 Carrington has testified and if we could move down to  
14 Brently Tanner. Ms. Tanner, did you observe any of the  
15 items in Brently Tanner's affidavit from the trash and  
16 recycling, you personally?

17 The Witness: I observed the items from  
18 the trash, me personally, so I -- of all of the times  
19 listed in the affidavit, I observed in the trash  
20 including a letter addressed to Timothy Gunther from  
21 his mother, the address was 103 Solway Court, Cary,  
22 North Carolina in her handwriting. Inside the card was  
23 a date written in the same handwriting as was in the  
24 card 11/5/2020. It wished Mr. Gunther a happy birthday  
25 and a congratulations on his achievement. I also

1 personally observed all of the other items including  
2 the credit card statement, the statement from the News  
3 & Observer canceling -- recently canceling Mr.  
4 Gunther's subscription to them, and I also saw, for  
5 myself, the bag with a order for a pickup of a meatball  
6 sub. I believe the date on that was 11/13/13 -- 2020,  
7 and it had Timothy Gunther's name on it, Tim Gunther,  
8 and it was from the trash can from Solway Court.

9 Mr. Lefkow: I don't have any other  
10 questions for Ms. Tanner at this time, if the board  
11 does.

12 Chairman Flynn: Are there any other  
13 members that have any other questions?

14 Mr. Weatherly: Just one.

15 Chairman Flynn: You'll have to turn on  
16 your microphone.

17 Mr. Weatherly: Yeah, are any of the  
18 exhibits that showed proof of ownership of both of  
19 these residences, deeds -- copies of the deeds that are  
20 in the exhibit --

21 The Witness: Yes, sir, they are, I  
22 believe, in the exhibits attached to the affidavit of  
23 Tiffany Lesnik. I believe there is also some ownership  
24 information in the original protest.

25 Mr. Weatherly: Okay, and he does by this

1 evidence, own the house in Cary and his daughter is the  
2 legal owner of the house in Fuquay?

3 The Witness: Yes, his daughter owns  
4 that house with his -- I believe that is his ex-wife.

5 Mr. Weatherly: Oh, okay, so joint  
6 ownership between the mother and the daughter.

7 The Witness: Yes, and it was purchased  
8 in the summer of last year --

9 Mr. Weatherly: Okay.

10 The Witness: -- by them.

11 Mr. Lefkow: I have nothing further of  
12 Ms. Tanner at this time.

13 Chairman Flynn: Thank you.

14 Mr. Lefkow: Thank you.

15 The Witness: Can I be excused?

16 Chairman Flynn: Yes.

17 The Witness: Thank you.

18 Mr. Lefkow: While we appreciate the  
19 opportunity to present the evidence that we have with  
20 affidavits and exhibits, we believe that the statement  
21 by Mr. Tanner's attorney, which he -- excuse me, Mr.  
22 Gunther's attorney made to the board is conclusive in  
23 terms of the fact that Mr. Gunther did not have an  
24 established residency in Fuquay-Varina and that there  
25 was no objection by Mr. Gunther or by the protester

1 regarding that statement, so we assume that that's  
2 conclusive evidence of -- of his failure to be a  
3 resident within the district where he was running as a  
4 judge.

5 Mr. Weatherly: Mr. Chairman, I guess the  
6 record will show that Mr. Gunther was here and heard  
7 firsthand the testimony offered by his attorney and had  
8 every opportunity to object or add to. I guess that's  
9 even though he didn't utter a word. The record will  
10 show he was present, and -- and listening to the  
11 testimony offered on his behalf.

12 Mr. Lefkow: We believe that that's  
13 the most probative evidence that we can -- could  
14 provide at this point now that Mr. Gunther's no longer  
15 personally available to testify himself, that his  
16 attorney who represented him made those declarations on  
17 his behalf.

18 Mr. Weatherly: In his presence.

19 Mr. Lefkow: Yes, in his presence, and  
20 as far as I remember, there were no objections by Mr.  
21 Gunther.

22 Chairman Flynn: So we will have to make  
23 some findings, and -- and as useful as this time line  
24 is -- I would like to make sure that the time line of  
25 evidence lines up with the time line of events and the

1 main events that we're considering are the date of  
2 filing and the date of the election. There's plenty of  
3 evidence around the election. Can you speak to the  
4 evidence around the time of filing of Mr. Gunther?

5 Ms. Erwin: Yes, we've got an  
6 affidavit.

7 Chairman Flynn: An affidavit from?

8 Ms. Erwin: He filed on the 16th of  
9 December, and on the 18th of December --

10 Chairman Flynn: I'm sorry --

11 Ms. Erwin: And I apologize. I can't  
12 -- I am having trouble talking. He filed on December  
13 16th. On December 18th, Stacy Surratt, that is an  
14 affidavit that has been accepted, drove by the 103  
15 Solway Court house and saw his car, and the -- and the  
16 house was lit, and I think there's actually a picture  
17 attached to her affidavit, which was proffered and  
18 accepted into evidence.

19 Chairman Flynn: Okay, so I have a  
20 question for our attorney. Does the protester need to  
21 be sworn in to offer evidence?

22 Ms. Erwin: Do you want me to? I'll  
23 be very happy to.

24 Ms. Cooper: Yes, she does if she's  
25 going to testify any further. I think the affidavits

1 are already admitted --

2 Mr. Lefkow: Right.

3 Ms. Cooper: -- in, but if she's  
4 going to give personal testimony, she does.

5 Ms. Erwin: Ms. Cooper, I was just  
6 trying to help. My attorney just showed up late  
7 yesterday, and I knew it was --

8 Chairman Flynn: That's fine. We're all  
9 working our way through this.

10 Court Reporter: I didn't hear what she  
11 just said.

12 Chairman Flynn: I'm sorry. You'll have  
13 to repeat it for the court reporter.

14 Mr. Lefkow: What she was saying was,  
15 Ms. Erwin and I spoke yesterday afternoon at about  
16 4:30, which was the first time I knew anything about  
17 this, so my knowledge is inferior to hers with regard  
18 to the facts, so I apologize to that. But I did look  
19 at everything last night, but it is still -- I didn't  
20 live it, so it's a little easier for Ms. Erwin to  
21 explain.

22 Chairman Flynn: So I do want to make sure  
23 you have the opportunity to submit as much evidence as  
24 -- as will be useful in our findings. The affidavit  
25 with the photograph of the car and the lit house, it's

1 sort of been evidence, and though it fits with the  
2 other evidence, do you have any other evidence around  
3 the time of filing that addresses Mr. Gunther's  
4 residency?

5 Mr. Lefkow: I think it has to -- all  
6 of these documents, exhibits, photographs have to be  
7 taken in totality to create a mosaic of what actually  
8 happened here. You can take out a piece, but if you  
9 put it all together, the puzzle seems to be -- paints  
10 the same picture or displays the same picture that Mr.  
11 Gunther's attorney did today in terms of acknowledging  
12 his lack of residency, so I think it's -- one has to  
13 look at it its totality rather than just into the --  
14 put it all together is what I'm suggesting.

15 Ms. Hawkins: Mr. Chairman?

16 Chairman Flynn: Ms. Hawkins.

17 Ms. Hawkins: Do we have a copy of the  
18 statement Mr. Knudsen read? I mean did he leave a  
19 paper copy of that? I would like to have that if  
20 there's any way we could get that.

21 Chairman Flynn: We could probably  
22 expedite a portion of a transcript.

23 Ms. Cooper: It will definitely be on  
24 the transcript, yes.

25 Ms. Hawkins: But we would we -- we

1           wouldn't have that today. It's part of the evidence,  
2           is it not?

3                   Ms. Cooper:                No, we would not.

4                   Chairman Flynn:        It is not part of the  
5           evidence?

6                   Ms. Cooper:                It is part of the  
7           evidence, but it's going to be part of the transcript.  
8           We just don't have a paper copy.

9                   Ms. Hawkins:             But before we deliberate,  
10          would we need that paper copy or a review of that? I  
11          would like to go back and hear exactly what Mr. Knudsen  
12          had to say about the residency. He said a couple of  
13          things about going to move there, but didn't move there  
14          -- had a plan to move there, but didn't move there. I  
15          would be interested in seeing as we move forward with  
16          collecting evidence into deliberations exactly what Mr.  
17          Knudsen said.

18                  Mr. Lefkow:             Can the court reporter  
19          read back his statement? It couldn't have been more  
20          than a minute to a minute and a half?

21                  Ms. Hawkins:             Do you think, Mr.  
22          Chairman or the county attorneys, if there's any way  
23          for someone to contact Mr. Knudsen and ask him to maybe  
24          electronically send us that statement such that we can  
25          run a copy of that? His office is in town, so --



1 Ms. Cooper: Yes -- I don't think  
2 there is any way; however, we could use notes that have  
3 been taken, if you would like to refer back to notes.

4 Ms. Hawkins: Well, I kind of thought  
5 you would have a copy so.

6 Ms. Cooper: Right, but it would not,  
7 you know, entered into evidence as an exhibit. We do  
8 have, of course, the transcript, which is why this is  
9 being recorded by statute to refer back to.

10 Ms. Hawkins: Okay, could we contact  
11 Mr. Knudsen's office or is that out of line to ask him  
12 for a copy of that?

13 Mr. Lefkow: We don't have any  
14 objection to that.

15 Chairman Flynn: So that's really our  
16 responsibility, not the attorney's. So I would ask  
17 staff to attempt to contact Mr. Gunther's attorney to  
18 ask if he's willing to share a copy. I don't know if  
19 it was written or if it was notes from which he spoke.

20 Ms. Hawkins: I think it looked to me  
21 like he was reading off of a sheet of paper, but --

22 Chairman Flynn: Yes.

23 Mr. Sims: He was reading off a  
24 sheet of paper. He did not turn it back in --

25 Ms. Hawkins: He didn't leave it for

1 us.

2 Mr. Sims: We do have somebody that  
3 was taking notes, so these are only notes. These are  
4 not an official transcript.

5 Chairman Flynn: Mr. Sims needs a  
6 microphone.

7 Mr. Sims: Okay, so we do have  
8 somebody that was taking notes and this is not a  
9 transcript. These are only going to be notes, so if  
10 you give me one moment, I can print those off.

11 Ms. Hawkins: And in the meanwhile, can  
12 staff try to get up with the attorney, because he's  
13 right here in town? I'm sure he could send one over.

14 Chairman Flynn: So while we're working on  
15 this, I just want to restate where I'm heading. I want  
16 to be provided all evidence and for the time period  
17 beginning with the date of filing for the election.

18 Speaker: One moment please.

19 Ms. Hawkins: Actually, I'll read the  
20 notes that I have, if that's okay, from what Mr.  
21 Knudsen said --

22 Chairman Flynn: Please go ahead.

23 Ms. Hawkins: It may be the same thing.

24 Chairman Flynn: Thank you.

25 (The notes taken during Mr. Knudsen's

1 statement were printed and distributed.)

2 Chairman Flynn: So all the members have a  
3 copy of the notes of the attorney's statement. Ms.  
4 Hawkins, do you have comments?

5 Ms. Hawkins: Well, I just actually  
6 wanted to go back and read the summation of what he  
7 said and this is consistent with what I had in my  
8 notes. This was from staff's notes. He was unable to  
9 complete his move to Fuquay to a degree that would  
10 satisfy the strict legal requirements for residency as  
11 a candidate for the judgeship for which was ultimately  
12 -- for which he was ultimately elected. Yeah, I just  
13 wanted to go back and make sure that there was a --  
14 that the -- it clearly stated that he did not live in  
15 Fuquay-Varina.

16 Chairman Flynn: So I think, instead of us  
17 wandering down a hole where we're testifying, we have  
18 this -- we can note that we have this summation, and we  
19 can consider this in our deliberations. At this point,  
20 I want to make sure that the protester has every  
21 opportunity to submit evidence.

22 Mr. Lefkow: We would request that any  
23 of the notes that were taken by -- I don't know if it  
24 was Mr. Sims or not, but whoever took the notes you  
25 just reviewed, we would ask that they be admitted into

1 evidence.

2 Chairman Flynn: Okay.

3 Mr. Lefkow: I don't think there's any  
4 objection.

5 Chairman Flynn: I'll let the attorney  
6 determine --

7 Ms. Cooper: I don't know that that's  
8 necessary given that the transcript that we'll have --  
9 and the attorney can, in opening statement, speak on  
10 behalf of his client, and it's effectively -- we have  
11 on the record that statement and an admission.

12 Ms. Hawkins: Would that be considered  
13 evidence?

14 Ms. Cooper: It can be, and it can  
15 certainly be put in -- in the order that we're directed  
16 to draft after you deliberate today.

17 Ms. Hawkins: I don't have any  
18 objection to also entering the staff notes, as soon as  
19 I read from it, and it was paraphrasing.

20 Chairman Flynn: Can we just make this  
21 part of the record? The protester, I'm not sure if  
22 they even have possession of this, but it's --

23 Mr. Lefkow: We do not.

24 Chairman Flynn: -- it's a product, so  
25 it's kind of hard to enter into the evidence, but this

1 exists. I don't think we need to make an exhibit of  
2 it.

3 Mr. Lefkow: It would seem to me to be  
4 a -- an official document created by -- by the board  
5 itself, so I couldn't imagine my -- you couldn't accept  
6 it into evidence, but I understand your attorney's  
7 thoughts on it, so --

8 Ms. Hawkins: Mr. Chairman, if we have  
9 it, then -- and we're going to admit it into the  
10 record, is there -- why can't we just admit it as  
11 evidence.

12 Ms. Cooper: It's basically  
13 duplicative of what you already have. It's been given,  
14 you know, in oral statements, so it's an unnecessary  
15 exhibit. For the purposes of the record, there will be  
16 the transcript that will verify what was said based on  
17 what is put forth in the order that you have.

18 Ms. Hawkins: But are there -- is there  
19 any harm or damage in accepting that into evidence? I  
20 understand it's duplicate information, but is there any  
21 damage to doing that?

22 Ms. Cooper: The only damage, it's an  
23 uncertified transcript basically of what was said  
24 earlier in the hearing. The parties, the protester,  
25 could definitely make an argument and restate what was

1 said, but it's -- it's just unnecessary as far as we're  
2 concerned. But if you want to move it in, I think you  
3 have that option.

4 Chairman Flynn: It does -- I'm not an  
5 attorney, but when you have two different versions of  
6 the same thing, it does lead to the possibility of  
7 unraveling some of the facts as there may be slightly  
8 different --

9 Ms. Hawkins: Well, I'd like --

10 Chairman Flynn: -- slightly different  
11 expressions, slightly different interpretations of  
12 events.

13 Ms. Hawkins: Well, I'd like to make a  
14 motion that we move it into evidence.

15 Chairman Flynn: Do I hear a second?

16 Mr. Weatherly: Yeah, second.

17 Chairman Flynn: Discussion?

18 Mr. Cohen: Would you repeat the  
19 motion?

20 Ms. Hawkins: I make the motion that we  
21 put into evidence the notes from the staff from Mr.  
22 Karl Knudsen's statement on behalf of his attorney, Tim  
23 Gunther. It is a staff's notes, which we will have the  
24 fact statement once we are -- once the court reporter  
25 has completed her work, but until then, since we have

1 this, and we've read from this, and we've referenced  
2 this, and the protester's attorney has asked, I see no  
3 harm in not admitting this into evidence for what it  
4 is, a staff's notes.

5 Mr. Weatherly: Yeah, as long as this --  
6 it's stipulated what this is and who produced it and  
7 that there is a transcript of -- of -- an actual  
8 transcript available when -- as soon as possible, I  
9 don't see any problem with stating what this is and why  
10 we've entered it into the record.

11 Chairman Flynn: So I don't have any huge  
12 objections to it, but this is placing on an obligation  
13 on the staff member who made these notes, this goes to  
14 the state board, and they be called as a witness.

15 Ms. Hawkins: But we're already going  
16 to enter it into the record whether it's evidence or  
17 not.

18 Chairman Flynn: We're entering it as  
19 evidence, if -- one of the attorneys can correct me,  
20 but I believe that to be the understanding.

21 Ms. Cooper: I'm sorry. Is there a  
22 question?

23 Chairman Flynn: If we're -- let me get  
24 this straight, Ms. Hawkins. You have asked for this to  
25 be entered as evidence?

1 Ms. Hawkins: Yes.

2 Chairman Flynn: Is that your motion?

3 Ms. Hawkins: Per request of the  
4 protester.

5 Chairman Flynn: So are there legal  
6 consequences for the note taker or for this body in  
7 having these notes entered as evidence as opposed to  
8 just being part of the record?

9 Ms. Cooper: Yeah, there definitely  
10 could be if -- if there was a question of authenticity,  
11 who took the notes, all of that. I mean we have -- we  
12 will still have the transcript that states -- will  
13 state verbatim the statement that's already come into  
14 evidence from the attorney in question.

15 Ms. Hawkins: May I ask one more  
16 question of the director, please?

17 Mr. Sims: Sure.

18 Ms. Hawkins: Is the staff member that  
19 took the note in this room?

20 Mr. Sims: It's not actually a board  
21 of elections staff member. It's part of our  
22 communications team with Wake County, so she was taking  
23 notes along the way. She is here.

24 Ms. Hawkins: She's in this room?

25 Mr. Sims: Yes.



1 Ms. Hawkins: It's the Communication  
2 Director of Wake County who took these notes?

3 Mr. Sims: Right, should say she's  
4 the --

5 Ms. Hawkins: A staff --

6 Mr. Sims: -- communications staff  
7 member.

8 Ms. Hawkins: Assigned to the -- yeah,  
9 okay, so it's a Wake County --

10 Mr. Sims: Yeah.

11 Ms. Hawkins: -- employee assigned to  
12 elections.

13 Mr. Sims: That's correct. That's  
14 correct, works in a different department, but part of  
15 our overall team.

16 Ms. Hawkins: I still stand on my  
17 motion.

18 Chairman Flynn: There has been a motion.  
19 Is there a motion second?

20 Mr. Weatherly: I second.

21 Chairman Flynn: All in favor say aye?

22 Board Members: Aye.

23 Chairman Flynn: Any opposed?

24 Board Members: No.

25 Chairman Flynn: The motion carries. So

1 if there is no further evidence to be submitted or  
2 testimony, and please correct me --

3 Mr. Lefkow: We have nothing further  
4 to submit today; thank you.

5 Chairman Flynn: So I'll entertain some  
6 closing remarks.

7 Mr. Lefkow: Just one second, Mr.  
8 Chair, I just want to make sure this is a separate  
9 document that we have. Would it be best to give it its  
10 own exhibit number since this is, my understanding that  
11 first series of exhibits were going to be entered in as  
12 one exhibit? Would this be considered Exhibit 2, since  
13 it's independently submitted? I just want to make sure  
14 for any chain? Okay, so this will be Exhibit 2.

15 Chairman Flynn: This may be Exhibit 3  
16 because there was the time line.

17 Mr. Lefkow: I just want to make sure  
18 we're keeping up with the exhibits that will need to be  
19 with the official documentation.

20 Chairman Flynn: So this is exhibit, which  
21 number?

22 Court Reporter: This might be 3, because  
23 we had the two before. I mean, I haven't been handed  
24 anything to mark. But the two things that they --

25 Chairman Flynn: So this -- there is a

1 time line that was handed to the board members. I  
2 don't recall that it was specifically referred to as an  
3 exhibit. Once we get the official transcript and  
4 documents, we just need to make sure that everything is  
5 properly labeled, with -

6 Mr. Lefkow: I apologize; if I could  
7 move the time line into evidence.

8 Chairman Flynn: So could we have a copy  
9 for the Court Reporter of the time line?

10 Ms. McCall: I do not --

11 Chairman Flynn: Please hand it to Ms.  
12 McCall.

13 Ms. Erwin: Exhibit 1 is pretty much  
14 everything else, all of the documents that we received.  
15 It would be those videos, the picture of the trash, the  
16 pictures of the house and the car, and the protester's  
17 original protest statement and all of the accompanying  
18 of the accoutrement of documents is Exhibit 1.

19 Court Reporter: Is that the way that you  
20 want to do it, all under 1, and then that statement 2  
21 that they just printed?

22 Ms. Erwin: The statement would be  
23 Number 3.

24 Ms. Cooper: Yes, I think the statement  
25 would be 3. The time line would be 2, that Ms. Tanner

1 presented, and then all of the affidavits that were  
2 referenced by the protester's attorney earlier are  
3 admitted under 1. And there is a need for redaction,  
4 in the Gene Tanner affidavit. And do we have physical  
5 copies of those?

6 Female Speaker: Yes, we have copies.

7 Ms. Cooper: Okay, I know that they  
8 have been submitted to the board and we have a print-  
9 out, but I didn't know if had wet signatures on any of  
10 them.

11 Female Speaker: Yes, I have them in front  
12 me right now.

13 Ms. Erwin: And that would also be  
14 the originals of the photographs of the trash?

15 Mr. Lefkow: We do actually have the  
16 trash from the receptacle. Would the Board like to  
17 receive that as evidence?

18 Ms. Hawkins: Does evidence have to be  
19 -- if it has to be the original -- wouldn't evidence  
20 have to be the original pieces of trash?

21 Chairman Flynn: We don't have the  
22 original as far as any of the photographs.

23 Ms. Cooper: Okay, that's fine. The  
24 pictures will suffice. It's just that the actual  
25 signatures -- for any affidavits of anyone who is not

1 actually here today, we should have original signatures  
2 on.

3 Chairman Flynn: If we could just make  
4 sure that we keep everything properly; it's to make  
5 sure that that we are allowing the Court Reporter -- I  
6 just want to make sure we are allowing for the Court  
7 Reporter and our Attorney to make sure that they have  
8 all the proper documentation before we --

9 Court Reporter: Yes, if I could get all  
10 of those.

11 Mr. Lefkow: Mr. Flynn, we actually  
12 have the original trash, and it's far less obnoxious  
13 that I thought it would be, if you would like to have  
14 us submit it. I -- we don't have copies, obviously. I  
15 mean, this is original --

16 Mr. Flynn: I don't believe we need  
17 -- we have copies.

18 Female Speaker: We have copies that  
19 came --

20 Mr. Lefkow: You have the pictures?

21 Female Speaker: Yes, we have pictures.

22 Mr. Lefkow: Okay.

23 Chairman Flynn: So I think we got all  
24 of our evidence squared away. I will allow you to make  
25 a closing statement, but I have to state on behalf of

1 the board that we are not -- we don't have authority to  
2 issue the remedy that you have requested. The state  
3 board certifies this District Court seat, not the  
4 county board. Our authority is limited to the  
5 qualifications of the candidate. We will be  
6 considering the timing, the main resident area, and I'm  
7 not -- I'm not prejudging or finding. I just want you  
8 to understand the elements that we are addressing, so  
9 that there's substantial evidence to believe that a  
10 violation of the election law or other irregularity or  
11 misconduct did occur and that it was sufficiently  
12 serious to cast doubt on the inherent results of the  
13 election. If the county board makes this conclusion,  
14 it may order the following and the two categories that  
15 we are considering these findings in order that one,  
16 that the protest and the county board's decision be  
17 sent to the state board for action by it and/or that  
18 any other action -- any other action is within the  
19 authority of the county board. And our authority does  
20 not extend to certifying the results of this election.

21 Ms. Hawkins: And can we state that  
22 this was 163-82.1?

23 Chairman Flynn: Yeah, General Statute  
24 163-182.1.

25 Mr. Cohen: Mr. Chairman?

1 Chairman Flynn: Mr. Cohen.

2 Mr. Cohen: The page 3 of the  
3 election protest procedure guide deals with this  
4 specific type of challenge on the challenge of the  
5 candidate him or herself, not the election results --  
6 it states that if an election protest is filed on the  
7 basis of a candidate's eligibility, that's -- that's  
8 the question we're answering whether the candidate is  
9 eligible or not, so I think that that's -- my initial  
10 thought is that our substantiative part of our motion  
11 needs to be finding, based on whatever evidence that  
12 the candidate Gunther is not eligible to serve.  
13 Whether that's a synonym for disqualified, attorneys  
14 might or other board members might have an actual word  
15 to use, but the manual refers to the candidate's  
16 eligibility.

17 Chairman Flynn: So we'll take that as  
18 information. It's not deliberation yet, but eventually  
19 you'll get to make your closing remarks.

20 Mr. Lefkow: It's okay. Well, the sun  
21 is setting. My remarks will be very brief. I would  
22 note for the record that there has been no evidence  
23 provided that Mr. Gunther ever assumed any residency at  
24 the Hepplewhite address, which would put him as a  
25 resident within the judicial district. Also, I would

1 note just, even though this is presented in the Board's  
2 documents, the definition of substantial evidence,  
3 which I believe the protester has presented today is  
4 more than a mere scintilla -- a mere scintilla. It  
5 means such relevant evidence as a reasonable mind might  
6 accept as adequate to support a conclusion and the  
7 conclusion that we are presenting for the Board to  
8 consider is that Mr. Gunther was not an eligible  
9 candidate and, therefore, his election would be void,  
10 not valid, and that -- and then of course as a remedy,  
11 the protester would request that the next highest vote  
12 getter be certified and be appointed as -- directed to  
13 be the judge -- the winning candidate in the district.  
14 The totality of our circumstantial evidence both by  
15 testimony and affidavits demonstrates that Mr. Gunther  
16 was a resident at the Solway address in Cary, not the  
17 Happlewhite address in Fuquay-Varina; therefore, as I  
18 said -- this was stated just a moment ago, he was not a  
19 eligible candidate for the judgeship position; thank  
20 you.

21 Chairman Flynn: Thank you, and just to  
22 reiterate, if there is an avenue to pursue a remedy  
23 that you seek, that would be through the State Board of  
24 Elections. This concludes the evidentiary portion of  
25 our hearing. We'll move into deliberation. I'll give



1 our attorney an opportunity to make sure we're on the  
2 right path.

3 Ms. Cooper: Yes, that's right.  
4 Chair, if you would like for me to read back for the  
5 record the affidavits I have just to verify that there  
6 is nothing missing before the protester may leave and  
7 then you can lead into the deliberations. We have  
8 affidavit of Gene Brently Tanner, Joseph Bradshaw,  
9 which is all under Exhibit 1, Michael Allen, Tiffany  
10 Lesnik, Stacy Surratt, and Michael Allen. There is one  
11 for Stephen Xavier, but I am missing a signature --  
12 actually, never mind. It's not stapled. It's here,  
13 and Stephen Xavier.

14 Mr. Lefkow: There's a flash drive  
15 with the Xavier affidavit and also do you have  
16 possession of the affidavit of Brett Joseph Bradshaw?

17 Ms. Cooper: Yes.

18 Mr. Lefkow: Thank you.

19 Ms. Cooper: Sorry, I might have  
20 Joseph Bradshaw -- Brett, yes.

21 Mr. Lefkow: Okay.

22 Ms. Cooper: Yes, we can go into  
23 deliberations, and that needs to be done in the open  
24 unless there is a need to go into closed session for  
25 attorney-client privilege.

1                   Mr. Lefkow:                You also have the  
2                   protester's actual protest document.

3                   Ms. Cooper:                Oh, yes.

4                   Mr. Lefkow:                Okay, thank you.

5                   Chairman Flynn:          All right, so we can move  
6                   into deliberation. Do any members need to take  
7                   advantage of a recess?

8                   Board Member:             Here.

9                   Chairman Flynn:          So the Board moves to  
10                  recess for five minutes? Do I hear a second?

11                  Ms. Hawkins:             Second.

12                  Chairman Flynn:          Second by Ms. Hawkins;  
13                  all in favor, say Aye.

14                  Board Members:          Aye.

15                  Chairman Flynn:          We will recess for five  
16                  minutes.

17                  (A short break was taken at 4:20 P.M.)

18                  (The proceedings resumed at 4:30 P.M.)

19                  Chairman Flynn:          All right, so we have  
20                  been presented with an abundance of evidence. We have  
21                  the statements of the candidate's attorney, statements  
22                  -- it's up to us to decide whether there is substantial  
23                  evidence to believe a violation of election law or  
24                  irregularity or misconduct did occur and that it is  
25                  sufficiently serious to cast doubt on the apparent

1 results of the election, and if we decide that, we have  
2 to make certain findings and take certain actions,  
3 which could include submitting the decision to the  
4 state board and any other action that is within our  
5 authority. So I will open it up to the members and I  
6 think I'll solicit opinions and then we can begin our  
7 discussion, so, Mr. Cohen.

8 Mr. Cohen: Yes, I think that the --  
9 I believe that the evidence demonstrates that Mr.  
10 Gunther was not qualified to be elected to Judicial  
11 District 10F Seat 2, because he was not a resident or  
12 domiciled in that district, but instead in District  
13 10B. And, therefore, we should find as part of the  
14 protest, I think I've already said this, that he is not  
15 qualified to hold the office.

16 Chairman Flynn: Thank you; Mr. Weatherly?

17 Mr. Weatherly: Yes, the -- to me the key  
18 piece of evidence that was entered into the record  
19 today was the admission of guilt by the -- by the  
20 candidate through his attorney and that is paramount to  
21 me that that was indeed admission that he is not a  
22 qualified candidate, so we would grant the petition.

23 Chairman Flynn: Ms. Hawkins?

24 Ms. Hawkins: The evidence I've seen,  
25 the most compelling would be the admission of the

1 candidate that he did not live in the district as given  
2 by statement from his attorney, Mr. Knudsen, and the  
3 evidence presented by Ms. Erwin, primarily the  
4 photographs of that trash, I mean -- I felt like was  
5 quite compelling, so I do not believe that Mr. Gunther  
6 did live in 10F when he went in for office.

7 Chairman Flynn: Ms. Porter?

8 Ms. Porter: I'm in agreement with --  
9 with the opinions of the board so far, especially  
10 because of the -- the candidate's admissions.

11 Chairman Flynn: I did note the comments,  
12 but I did want to address the time line. The -- there  
13 is evidence of trash in October. There is other  
14 evidence after the date of the election that includes a  
15 birthday card, I think, after the election. This is  
16 circumstantial that it -- it seems to be beyond our  
17 authority to -- to really consider it as those items  
18 after the elect -- date of the election. I just want  
19 to make sure that we're -- we're focused on the  
20 evidence that directly relates to our deliberation and  
21 that we're not so unduly influenced by tangential  
22 evidence, so it seems pretty clear. I want to thank  
23 them for finally addressing the issues. I want to  
24 thank the protester for bringing this before us. There  
25 are a great number of issues in our democracy that

1 don't get addressed until somebody stands up and speaks  
2 to them. I would like to thank the people who provided  
3 evidence and engaged in our democracy in holding the  
4 candidate accountable. And I think we need to correct  
5 some language that will be part of our findings when  
6 noted. We will -- when we complete our deliberations,  
7 we will notify all parties of the decision by 5:00 P.M.  
8 tomorrow, assuming we finish the deliberations today,  
9 and a written decision will be provided within five  
10 days. So in these circumstances, I sometimes turn to  
11 Mr. Cohen.

12 Mr. Cohen: Are we -- is the next step to  
13 make some sort of motion? What are you suggesting we  
14 do next?

15 Chairman Flynn: I think a motion should  
16 be that we -- so the document requires us to make  
17 findings of fact and completeness of law and the  
18 findings of fact, I think, will be -- we'll need to  
19 wordsmith -- the completeness of law is pretty  
20 straightforward on substantial evidence. I think we're  
21 going to need help with the findings of fact, and I'll  
22 just ask our attorney to address how to go about that.

23 Ms. Cooper: Unless there's a --  
24 unless there's a legal question regarding the  
25 application of law, I don't think it's necessary for us

1 to go into closed session again.

2 Chairman Flynn: Right.

3 Ms. Cooper: -- attorney-client  
4 privilege that could be done in the open on the record  
5 if you want to do it now or instruct us to draft in  
6 accordance to the statements that has been made today  
7 and having the transcript, we can draft a proposed  
8 order for your review.

9 Chairman Flynn: That would seem  
10 appropriate. I'll just poll the members; Mr. Cohen?

11 Mr. Cohen: Yes, I would agree with  
12 that. I just think, as mentioned before, the procedure  
13 may at little bit -- since the election protest is  
14 filed on the basis of the candidate's eligibility, the  
15 finding, it think should be in the order that the  
16 candidate is not eligible to hold the seat. It seems  
17 to be that direction should be based on the manual.

18 Chairman Flynn: Mr. Weatherly?

19 Mr. Weatherly: Yes, the understanding  
20 we're talking about is the county attorney staff will  
21 draw up a draft for us for our review, yes.

22 Chairman Flynn: Certainly; okay, Ms.  
23 Hawkins?

24 Ms. Hawkins: I agree.

25 Chairman Flynn: Ms. Porter?

1 Ms. Porter: Yes.

2 Chairman Flynn: Okay, so I guess I'll  
3 entertain a motion to that effect and that this board  
4 finds that the candidate is not eligible.

5 Ms. Hawkins: So moved.

6 Chairman Flynn: Do I hear a second?

7 Mr. Weatherly: Second.

8 Chairman Flynn: Second by Mr. Weatherly;  
9 any further discussion; all in favor, say aye.

10 Board Members: Aye.

11 Chairman Flynn: Any opposed; the motion  
12 carries. So I believe we're at the end of our meeting  
13 and while I'm always anxious to go ahead and close it  
14 up, I want to make sure that we've covered everything  
15 before we do.

16 Ms. Cooper: Yeah, I think we're good.  
17 We'll get that draft to you hopefully tomorrow. I  
18 understand we have a meeting tomorrow.

19 Chairman Flynn: Okay.

20 Mr. Cohen: Will we need to take some  
21 sort of further vote based on the order?

22 Chairman Flynn: I don't believe so,  
23 but --

24 Mr. Cohen: Okay.

25 Chairman Flynn: -- we can certainly that.

1 Ms. Cooper: I don't think that's -- I  
2 don't think that's necessary.

3 Chairman Flynn: Okay.

4 Ms. Cooper: It will be distributed to  
5 all five of you. If there's some point of contention,  
6 then we could go back in, but that's not necessary.

7 Chairman Flynn: Okay.

8 Mr. Cohen: If you need more  
9 operative words in the finding than the actual legal  
10 results, certainly phone.

11 Chairman Flynn: All right, so I'll  
12 entertain a motion for adjournment.

13 Mr. Weatherly: So moved.

14 Chairman Flynn: Moved by Mr. Weatherly;  
15 do I hear a second?

16 Ms. Hawkins: Second.

17 Chairman Flynn: Second by Ms. Hawkins;  
18 all in favor, say aye.

19 Board: Aye.

20 Chairman Flynn: We're adjourned; thank  
21 you, everybody.

22 (The proceedings were concluded at 4:50 P.M.)

23 (Exhibit Numbers 1, 2, and 3 marked for  
24 identification after the proceedings were concluded.)

25



NORTH CAROLINA

WAKE COUNTY

**C E R T I F I C A T E**

I, Diane C. Byrd, Notary/Reporter, do hereby certify that this Wake County Board of Elections Meeting was taken by me and transcribed under my direction and that the seventy-two pages which constitute this meeting are a true and accurate transcript.

I certify that I am not counsel for, or employed by either party in this action, nor am I interested in the outcome of this action.

IN WITNESS THEREOF, I have hereunto set my hand this 6th day of December, 2020.

*Diane C. Byrd*

\_\_\_\_\_  
Diane C. Byrd  
Notary Public  
Certificate No.: 19933130099

WAKE COUNTY OF NORTH CAROLINA  
WAKE COUNTY

BEFORE THE WAKE COUNTY BOARD OF ELECTIONS

IN RE: PROTEST OF JOAN ERWIN            )  
  )  
  )  
  )

**ORDER**

THIS MATTER CAME BEFORE THE WAKE COUNTY BOARD OF ELECTIONS (“Board”) on November 18, 2020 in an election protest (“Protest”) filed pursuant to G.S. 163-182.9 and G.S. 163-127.2, by Joan Erwin (“Protestor”), regarding the qualifications of candidate Tim Gunther (“Gunther” or “Candidate”), based on residency, to run for office in the Wake County District Court Judge 10-F contest (the “Contest”), .

The State Board heard opening statements from the Protestor and her attorney, David M. Ledford and attorney Karl Knudsen on behalf of the Candidate and oral testimony from Don Carrington and Beth Tanner. Having considered the Protest Petition inclusive of its attachments, sworn Affidavits, arguments from interested parties, relevant statutes, and basing its decision upon the evidence presented, the Board hereby finds, concludes, and orders as follows:

FINDINGS OF UNDISPUTED FACTS

1. Gunther was one of two candidates for the Contest in the November 3, 2020 general election and is a registered voter in Wake County, North Carolina. The other candidate was Beth Tanner.
2. Protestor filed an election protest petition (“Protest Petition”) with the Board on or about October 29, 2020, pursuant to G.S. 163-127.2(c) and GS 163-182.9 contending the Gunther did not reside in Judicial District 10-F and did not meet the constitutional qualifications for office, specifically residency, which constitutes a violation of election law, irregularity, or misconduct sufficient to cast doubt on the apparent results of the election.
3. Protestor further contended in the Protest Petition that Gunther did not reside at the 821 Hepplewhite Court, Fuquay-Varina address provided for on his updated voter registration form dated December 12, 2019 and an amended Notice of Candidacy Form dated December 16, 2019 filed with the State Board of Elections. Instead, Protestor contends Gunther resides at 103 Solway Court, Cary, which is not in District 10-F and instead is in District 10D, where Gunther originally filed to run for District Court on April 26, 2019.
4. At the time of the filing of the Protest Petition, the vote totals for the subject Contest had not been finalized as to the Board had not yet conducted the canvass, but the unofficial results indicated Tim Gunther was ahead of opponent Beth Tanner.

5. The Board held a preliminary consideration hearing on the Protest Petition on November 13, 2020, prior to finalizing its canvass for the November 3, 2020 general election, finding probable cause based solely on the written allegations in the Protest Petition and advanced this matter to a full evidentiary hearing.
6. In opening statements, the Protestor requested that the Board subpoena additional witnesses for purposes of conducting a full evidentiary hearing. The Board made no ruling on this request.
7. At the outset of the hearing, Gunther's attorney made an opening statement as to the general legal qualifications of Gunther but stated that he and his client would not participate in the Protest or contest the proceedings. He further stated that Gunther was unable to complete his planned move to Fuquay-Varina as a result of Covid-19 for purposes of establishing residency for the judgeship in which he was elected, District 10-F. Gunther made no statements.
8. The Board took judicial notice of the Protest Petition submitted by the Protestor and all accompanying exhibits attached thereto, being those exact same exhibits considered at the Board's probable cause consideration, which include, among other documents: tax records indicating Gunther as the record owner of the residence located at 103 Solway Ct., Cary; tax records for 821 Hepplewhite Court, Fuquay-Varina; and a report of from Pat Williams, a NC licensed private investigator, with detailed dates and times of Gunther located at the Cary residence in January 2020 and August 2020.
9. As additional evidence, the Protestor submitted numerous sworn Affidavits from third parties alleging that Gunther did not reside in Judicial District 10-F on or around the filing of his amended Notice of Candidacy in December 2020 and the months and days leading up to and following the November 3, 2020 election, but instead he resided at the 103 Solway Court, Cary. All Affidavits submitted were entered into evidence.
10. Don Carrington provided oral testimony as to investigative work he conducted in October of 2020 concerning whether Gunther resided in District 10-F. Don Carrington had a telephone conversation with Mr. Gunther on October 14, 2020 wherein Mr. Gunther informed Mr. Carrington he was planning to sell his Cary residence and stated he was renting a home with his daughter in Fuquay-Varina. Mr. Carrington testified that Mr. Gunther's daughter owned the Fuquay-Varina residence in question and that it would be improbable for her to rent a home she owned. Mr. Carrington further testified that he wrote a news article soon after the telephonic account with Gunther which was published in the Carolina Journal and submitted as part of the Protest Petition.

11. Beth Tanner provided oral testimony and a timeline of dates she prepared based on the Affidavits submitted into evidence. On November 15, 2020, Ms. Tanner personally observed trash collected from a trash receptacle located outside 103 Solway Court, Cary, which included mail addressed to Gunther at the Cary residence, billing statements with Gunther's name and Cary address and other mail and receipts with Gunther's personal information located thereon. The timeline was entered into evidence.
12. Following a request by the Protestor's attorney to have admitted into evidence the statements of admission made by Gunther's attorney in opening statements as to residency, the Board requested staff to print handwritten notes and entered said notes into evidence for purposes of verifying the actual statements made in the proceeding.
13. Protestors and her attorney argued that Mr. Gunther's attorneys' statements were conclusive that Mr. Gunther did not reside within the District for which he was residing.
14. The board finds as a fact that Candidate did not reside in Judicial District 10-F as the term "reside" is defined by law.
15. The board finds as a fact that at the time of his election, Candidate was not a resident of the judicial district to which he was elected as by law required.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to G.S. 163-182.10.
2. Protestor is properly before the Board pursuant to G.S. 163-182.9(a) as a registered voter eligible to vote in District 10-F and timely filed the Protest in accordance with G.S. 163-182.9(b)(4)(c) prior to the Board's completion of canvass.
3. Candidates for district court races in North Carolina are required to file a notice of candidacy with the State Board of Elections in accordance with G.S. 163-106.2 which are subject to cancelation by the Board during the verification process if the candidate does not meet the constitutional or statutory qualifications for office, including residency. The Board relied on the address provided by the Gunther, also being his voter registration address, in verifying his Notice of Candidacy form in accordance with G.S. 163-106.5 for Judicial District 10-F.
4. The North Carolina Constitution instructs "Every District Judge shall reside in the district for which he is elected." N.C. Const. Art. IV, § 10.

5. For purposes of determining the residency of a candidate, G.S. 163-57 provides “[i]n the event that a person’s residence is not a traditional residence associated with real property, then the location of the usual sleeping area for that person shall be controlling;” and “that residence shall be broadly construed; and that, in all cases, a residence is that habitation “to which whenever that person is absent, that person has the intention of returning.”
6. In an election protest, the burden of proof is on the protestor to prove an outcome-determinative violation by “substantial evidence.” See generally G.S. § 163-182.10(d)(2). See *Appeal of Ramseur*, 120 N.C. App. 521 (1995) (“In sum, we conclude that in an action to invalidate an election or referendum, the burden of proof is upon the unsuccessful party to show that the outcome of the election or referendum would have been different absent irregularities in the voting process.”). The burden was on Protestor before the Board for factual determinations regarding residency.
7. The Board in sustaining a Protest must find “substantial evidence”, which is such relevant evidence as a reasonable mind might accept adequate to support a conclusion and is more than a scintilla or a permissible inference. The court should take into account contradictory evidence from which conflicting inferences could be drawn. See *Rotruck v. Guilford County Board of Elections*, 267 N.C. App. 260 (2019). The evidence presented at the hearing by Protestor and the admission by Gunther through counsel that he was “unable to complete his move” constitutes substantial evidence that Gunther never abandoned his Cary residence located in District 10-D to establish residency in District 10-F.
8. Protestor has met the burden of showing by substantial evidence in accordance with G.S. 163-182.10(d) that Gunther did not reside in Judicial District 10-F at the time of filing his Notice of Candidacy or at the time of the general election on November 3, 2020 and was therefore ineligible as a candidate in the District 10-F Contest.
9. Candidate is not eligible to be certified as the duly elected District Court Judge from Judicial District 10F.
10. To the extent that any conclusion of law herein constitutes a finding of fact or vice versa, each is incorporated herein into the other.

IT IS THEREFORE ORDERED, by unanimous vote of all five WAKE COUNTY BOARD OF ELECTIONS members that this matter be referred to the North Carolina State Board of Elections in accordance with G.S. 163-182.10(d)(2)(e) for further action.

This the 19<sup>th</sup> day of November, 2020.

WAKE COUNTY BOARD OF ELECTIONS

A handwritten signature in black ink, appearing to read "Greg Flynn", with a long horizontal flourish extending to the right.

---

Greg Flynn, Chair

**Certificate of Service**

I, Greg Flynn, Chair for the Wake County Board of Elections, do hereby certify that that the foregoing materials were deposited to the care and custody of the U.S. Postal Service using certified mail, with an electronic copy where indicated:

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This the 20th day of November, 2020.

  
Greg Flynn