231 Va 190



IN THE

# Supreme Court of Virginia

AT RICHMOND

RECORD NO. 822060

JOHN P. D. CRIST,

Appellant,

v.

METROPOLITAN MORTGAGE FUND, INC.,

Appellee.

## APPENDIX

Wyatt B. Durrette, Jr.
Michael C. Montavon
Joyce A. Naumann
ROEDER, DURRETTE AND
DAVENPORT, P.C.
3900 University Drive
Fairfax, Virginia 22030

Counsel for Appellant

H. Bradley Evans, Jr.
THOMAS AND FISKE, P.C.
510 King Street, Suite 200
Post Office Box 820
Alexandria, Virginia 22313

Counsel for Appellee

APPELLATE PRINTING SERVICES • HERITAGE BUILDING • RICHMOND, VIRGINIA • (804) 643-7789

TABLE OF CONTENTS

AMENDED MOTION FOR JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES now the Plaintiffs, by Counsel, and file this Amended Motion for Judgment pursuant to leave of Court to add Hugh Fletcher, Jr. as a party, to restate a cause of action against Pohick Associates Limited Partnership and the individual defendants and to amend the allegations against Metropolitan Mortgage Fund, Inc.

COUNT I

1. Your Plaintiffs were the contract owners of approximately thirty-three (33) acres of land located in Fairfax County, Virginia more particularly described on Exhibit A attached hereto, by virtue of a contract between themselves and one Veronica Higgins

2. On May 26, 1972, for good and valuable consideration, Plaintiff and Defendant Metropolitan Mortgage Fund, Inc. hereafter Metropolitan, entered into an Assumption Agreement which is attached hereto and incorporated herein as Exhibit B which provides that your Plaintiffs transer all their rights under their contract with Veronica Higgins to Metropolitan.

3. The Assumptoin Agreement states in Paragraph four "Metropolitan will attempt to rezone all or a portion of the property to a use permitting a higher residential density than currently allowed under present zoning."

4. The Assumption Agreement further provides that the sum of Two Hundred Fifty Dollars ($250.00) per dwelling unit would be paid to your Plaintiffs as more particularly set forth in said Agreement.

5. The Defendant Metropolitan took title to the aforesaid property by Deed dated June 13, 1972, and recorded in Deed Book 3632 at Page 493 among the land records of Fairfax County, Virginia.

6. The Defendant Metropolitan purchased the said property for the sum of Two Hundred Thirty-Six Thousand One Hundred Sixteen and 80/100 Dollars ($236,116.80).

7. By Deed dated June 15, 1973, and recorded November 21, 1973, Defendant Metropolitan conveyed the property to Pohick Associates, a partnership formed solely for purposes of developing the property.

8. On information, Plaintiffs allege that Metropolitan conveyed the property to Pohick Associates for the sum of One Hundred Thirty-Four Thousand Seven Hundred Dollars ($134,700.00), an unfair and inadequate consideration.

9. Defendant Metropolitan did not attempt to rezone the property prior to conveying it to Pohick Associates, thereby breaching the existing, express and explicit duty imposed on it by the Assumption Agreement.

10. Pohick Associates caused the property to be rezoned on August 2, 1976 for a minimum of Two Hundred Thirty-Five (235) units.

11. As a result of Defendant Metropolitan's breach, your Plaintiffs suffered damages in the amount of Fifty-Eight Thousand Seven Hundred and Fifty Dollars ($58,750.00).

12. That the Defendants breach of contract was willful, malicious and wanton, thereby entitling your Plaintiffs to punitive damages.

WHEREFORE, your Plaintiffs pray:

That they be awarded judgment and execution forthwith against Metropolitan Mortgage Fund, Inc, for the sum of Fifty Eight Thousand Seven Hundred Fifty Dollars ($58,750.00) with interest from August 12, 1976 as compensatory damages, Two Hundred Thousand Dollars ($200,000.00) as punitive damages, reasonable attorney's fees and the costs of this proceeding.

COUNT II

COMES NOW the Plaintiffs, by Counsel, and pursuant to Code of Virginia Section 55-80 and 55-82 and state as follows:

1-12. Paragraphs one through twelve of Count I are incorporated herein as paragraphs one through twelve.

13. The conveyance of the property from Metropolitan t Pohick Associates was not an arms length transaction, was a conve ance for less than adequate consideration, was done with intent t delay and hinder your Plaintiffs who were and are creditors of Metropolitan and is therefore void.

14. The conveyance of the property from Metropolitan to Pohick Associates was done with the intent to defraud your Plaintiffs, who were and are creditors of Metropolitan, of their just compensation under the Assumption Agreement in that your Defendants have stated that transfer of the property to the same parties in interest using a different legal entity extinguished your Plaintiffs rights to additional compensation, and in that the transfer was for fifty percent of the original purchase price, and is, therefore, void.

15. Defendants R. Marshall Fitton, Robert C. Fitton and George E. Travers were officers, shareholders or directors of

Defendant Metropolitan and were general partners in Pohick Associates at the time of the aforesaid conveyance.

16. Pohick Associates had actual knowledge of the intent of its immediate grantor to wit: to hinder, delay, and defraud your Plaintiffs, therefore, the aforesaid conveyance to Pohick Associates is void.

WHEREFORE, your Plaintiffs pray:

1. That the Deed from Metropolitan Mortgage Fund, Inc. to Pohick Associates recorded in Deed book 3952 at Page 182 among the land records of Fairfax County be declared void by Order of this Court, that a copy of said Order be spread among the land records of Fairfax County and indexed in the name of Pohick Associates and that your Plaintiffs be awarded attorneys fees, all pursuant to Code of Virginia, Section 55-80 and 55-82.

2. That they be awarded judgment and execution forthwith against Metropolitan Mortgage Fund, Inc. for the sum of Fifty Eight Thousand Seven Hundred Fifty Dollars ($58,750.00) with interest from August 12, 1976 as compensatory damages, Two Hundred Thousand Dollars ($200,000.00) as punitive damages, reasonable attorneys fees and the costs of this proceeding.

COUNT III

1-12. The allegations of Paragraphs one through twelve of Count I are incorporated herein as Paragraphs one through twelve

13. Defendant Metropolitan has stated that no liability under the Assumption Agreement would attach until site plan approv has been obtained.

14. Defendant Metropolitan, in letters dated Sept. 11, 197 and January 4, 1977, attached hereto and incorporated herein as

Exhibit C and D have unequivocally and absolutely refused to perform under the Assumption Agreement even after site plan approval has been obtained thereby committing an anticipatory breach of a duty to perform in the future.

WHEREFORE your Plaintiffs pray:

That they be awarded judgment and execution forthwith against Metropolitan Mortgage Fund, Inc. for the sum of Fifty Eight Thousand Seven Hundred Fity Dollars ($58,750.00) with interest from August 12, 1976, as compensatory damages, Two Hundre Thousand Dollars ($200,000.00) as punitive damages, reasonable attorney's fees and the costs of this proceeding.

COUNT IV

As an alternative to Count I, your Plaintiffs pray that:

1-12. The allegations of Paragraphs one through twelve of Count I are incorporated herein as paragraphs one through twelve.

13. That the Defendant, Pohick Associates, acted as the agent of Metropolitan Mortgage Fund, Inc. in obtaining rezoning of the property.

14. That the sum of Fifty Eight Thousand Seven Hundred Fifty Dollars ($58,750.00) is now due and owing to your Plaintiffs and has not been paid, despite repeated demands for the same.

WHEREFORE, your Plaintiffs pray that they be awarded judgment and execution forthwith against Metropolitan Mortgage Fund, Inc. for the sum of Fifty Eight Thousand Seven Hundred Fifty Dollars ($58,750.00) with interest from August 12, 1976, reasonabl attorneys fees and the costs of this proceeding.

COUNT V

1. Your Plaintiffs, Creditors of Metropolitan, entered into a contract with Metropolitan Morgage Fund dated May 26, 1972, a copy of which is attached hereto and incorporated herein as Exhibit B.

2. Pursuant to the contract your Plaintiffs conveyed all of their rights as contract purchasers of a certain parcel of ground described in Exhibit A hereto to Metropolitan.

3. Said contract provides that Metropolitan would attempt to rezone the aforesaid property and upon said rezoning, additional compensation would be paid to your Plaintiffs.

4. Metropolitan, as assignee of your Plaintiffs, purchased the property for the sum of Two Hundred Thirty-Six Thousand One Hundred Sixteen and 80/100 Dollars ($236,116.80).

5. By Deed dated June 15, 1973, and recorded November 21, 1973, Metropolitan conveyed the aforesaid property to Pohick Associates, a limited partnership.

6. At the time of the conveyance from Metropolitan to Pohick, R. Marshall Fitton, Robert L. Fitton and George Travers were officers, directors or shareholders of Metropolitan and were also general partners of Pohick Associates.

7. Although Metropolitan purchased the property for Two Hundred Thirty-Six Thousand One Hundred Sixteen and 80/100 Dollars ($236,116.80) on information Plaintiffs allege it conveyed the property to Pohick for the sole consideration that Pohick assume a Deed of Trust on the property with an outstanding balance of approximately One Hundred Thirty-Four Thousand Seven Hundred Dollars ($134,700.00). As a result, R. Marshall Fitton,

Robert L. Fitton and George Travers conveyed to themselves property worth approximately One Hundred One Thousand Four Hundred Sixteen and 80/100 Dollars ($101,416.80) to which they had no rightful claim.

WHEREFORE, your Plaintiffs pray:

1. That an Order be entered providing that the conveyance from Metropolitan Mortgage Fund, Inc. to Pohick Associates recorded in Deed Book 3952 at Page 182 among the land records be set aside and that a copy of said Order be spread among the land records of Fairfax County, Virginia and indexed in the grantor index under the name of Pohick Associates.

2. That this Court charge R. Marshall Fitton, Robert L. Fitton and George Travers as Trustees of Metropolitan Mortgage Fund, Inc. as to any proceeds resulting from the sale of the property by Pohick to the extent of approximately One Hundred Thousand One, Four Hundred Sixteen and 80/100 Dollars ($101,416.80

R. F. CRIST III and JOHN P. D. CRIST
d/b/a VIKING CONSTRUCTION COMPANY

By Counsel

CHESS, DURRETTE & ROEDER
4085 Chain Bridge Road
Fairfax, Virginia

By _____
Richard B. Chess, Jr., Esquire
Co-Counsel for Plaintiffs

_____
Michael R. Vanderpool, Esquire
Co-Counsel for Plaintiffs

CERTIFICATION

I hereby certify that on this 21 day of April, 1977, I mailed, postage prepaid, a true copy of the foregoing Amended Motion for Judgment to all counsel of record in this matter.

EXHIBIT A

That parcel of land located on Pohick Road, Fairfax County, Virginia, designated in the 1972 County Tax Assessment Maps as Parcel 13 Double Circle on, Section 107

property to a use permitting a higher residential density than currently allowed under present zoning. Metropolitan will make this attempt at a time it deems proper. If Metropolitan is successful in obtaining a higher residential density for all or a portion of the property, Viking's interest in additional consideration will vest in the amount of $250.00 for each and every dwelling unit for which site plan approval is subsequently obtained from the appropriate governing agencies of Fairfax County. In the event Metropolitan sells the subject property after obtaining the said rezoning, Metropolitan warrants that it will pay Viking $250.00 for each and every unit for which site plan approval is

EXHIBIT B

ASSUMPTION AGREEMENT

THIS AGREEMENT made this 26th day of May, 1972, by and between R. F. Crist III and John P. D. Crist, dba Viking Construction Co., hereinafter called "Viking" and Metropolitan Mortgage Fund, Inc., a Maryland Corporation, hereinafter called "Metropolitan",

WITNESSETH:

WHEREAS, Viking entered into that certain contract dated November 15, 1971 with Veronica Higgins to purchase a parcel of land on Pohick Road, Fairfax County, Virginia, designated in the County Tax Assessment Maps as Parcel 13, Double Circle One, Section 107, said contract attached hereto as Exhibit A, and

WHEREAS, the settlement date under said contract has been extended by Viking, upon the payment to the Seller of $3,000.00 in extension fees, to June 15, 1972, and Viking warrants said contract is in full force and effect, and

WHEREAS, Viking is given the right in said contract to assign its interest in said contract,

NOW THEREFORE, for and in consideration of the sum of Ten Dollars ($10.00) in hand paid by each of the parties to the other, and for other good and valuable considerations receipt of which is acknowledged, the parties hereto hereby agree as follows:

1. Viking assigns to Metropolitan all its right, title and interest in its November 15, 1971 contract with Veronica Higgins (Exhibit A).

2. Upon settlement of said contract Metropolitan agrees to reimburse Viking the following amounts:

a) $5,000.00 deposited by Viking with the contract
b) $3,000.00 paid by Viking for extension fees
c) $800.00 paid by Viking for a rezoning filing fee

3. Upon settlement of said contract Metropolitan agrees to pay the following amounts for bills incurred by Viking in connection with its evaluation of the property described herein:

a) $3,100.00 to Runyon and Huntley, per bill attached hereto as Exhibit B
b) $750.00 to Edward B. Chitlik, per bill attached hereto as Exhibit C

4. Metropolitan will attempt to rezone all or a portion of the property to a use permitting a higher residential density than currently allowed under present zoning. Metropolitan will make this attempt at a

time it deems proper. If Metropolitan is successful in obtaining a higher residential density for all or a portion of the property, Viking's interest in additional consideration will vest in the amount of $250.00 for each and every dwelling unit for which site plan approval is subsequently obtained from the appropriate governing agencies of Fairfax County. In the event Metropolitan sells the subject property after obtaining the said rezoning, Metropolitan warrants that it will pay Viking $250.00 for each and every unit for which site plan approval is obtained within ten (10) days of the purchaser's obtaining said approval. If Metropolitan develops the property itself, or contributes the property to a joint venture or partnerhsip to which it is a party, Metropolitan agrees to pay Viking $250.00 for each and every dwelling unit for which site plan approval is obtained within ten (10) days of said approval.

5. If Metropolitan determines that a higher residential density is not an appropriate use for the property, or if a rezoning application filed for such a use is denied and Metropolitan decides not to hold the property until a second application for a similar use can be filed and action thereon obtained, Metropolitan may file a rezoning application for an industrial use. If such an application is approved, Metropolitan agrees to pay Viking $50,000.00 within one (1) year of the approval of said zoning.

6. Nothing herein contained should be construed to imply that Metropolitan must file any rezoning application within any period of time.

IN WITNESS WHEREOF the parties have caused this instrument to be fully executed on the day and year first above written.

WITNESS:

Lucille C. Legge

Lucille C. Legge

VIKING CONSTRUCTION CO.

By R. F. Crist III

John P. D. Crist

ATTEST

METROPOLITAN MORTGAGE FUND, INC.

By William D. Caldwell
Senior Vice President

ACKNOWLEDGEMENT

SHAW REAL ESTATE

By

EXHIBIT C


# METROPOLITAN MORTGAGE FUND, INC.

*Mortgage Bankers*

500 MONTGOMERY STREET · ALEXANDRIA, VIRGINIA 22314 · TEL. 703/836-6400


September 17, 1976

Mr. John P. D. Crist
International Equities Corporation
3118 Gulf-to-Bay Boulevard
Clearwater, Florida 33519

Dear John:

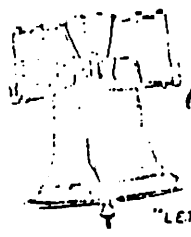
Please be advised that Metropolitan Mortgage Fund sold and conveyed title to the Pohick Road parcel in 1973 as part of a divestiture required by the Federal Reserve Board. All right, title and interest of Metropolitan was at that time transferred to Pohick Associates, a joint venture of which Metropolitan is not now, nor ever has been a party.

Since Metropolitan never sought nor obtained any rezoning of the property prior to conveying the title, or since that time for that matter, there is no further liability on behalf of Metropolitan under the agreement of May 26, 1972.

Very truly yours,

R. Marshall Fitton
President

rmf/ap



*America's Bicentennial*

"LET FREEDOM RING"

12

FHA APPROVED MORTGAGEE

EXHIBIT D

METROPOLITAN MORTGAGE FUND, INC.
Mortgage Bankers
500 MONTGOMERY STREET · ALEXANDRIA, VIRGINIA 22314 TEL 703/836-6400

January 4, 1977

Richard B. Chess, Jr., Esquire
Chess, Durrette & Roeder
4085 Chain Bridge Road, #300
Fairfax, Virginia 22030

Re: Pohick Road Parcel

Dear Mr. Chess:

Your letter of December 23, 1976 concerning the Crist's claim to additional consideration under their Assumption Agreement dated May 26, 1972, has been referred to this department for response.

This is to advise you that Metropolitan Mortgage Fund, Inc. sold and conveyed title to the Pohick Road parcel in 1973 as part of a divestiture required by the Federal Reserve Board. All right, title and interest of Metropolitan was at that time conveyed to Pohick Associates, a Joint Venture, to which Metropolitan is not now, nor ever has been a party. Since Metropolitan never sought nor obtained any rezoning of the property prior to conveying the title, or since that time for that matter, there is no further liability on behalf of Metropolitan under the agreement of May 26, 1972.

The contract allows this course of conduct as it provides for the payment of the additional fee only in the event of several contingencies "after obtaining site plan approval" and silent as to any fees for sale prior thereto. In addition, the contract does not require Metropolitan to file or pursue any particular zoning.

I am of the opinion that a valid defense exists on the part of Metropolitan to this demand in that they conveyed the property prior to any rezoning and, thus, did not obtain any benefits or profits from any rezoning and, therefore, should not be obligated to pay any additional consideration. This can be further supported by the fact that the sale was a forced sale (at cost) based upon a divestiture imposed by the Federal Reserve Board.

If I can be of any further assistance in resolving this matter, please let me know.

Very truly yours,

Robert W. Haas
Corporate Counsel

rwh/ap
cy: Mr. R. Marshall Fitton

FHA APPROVED MORTGAGEE

INTERROGATORIES

TO: Metropolitan Mortgage Fund, Inc.
c/o Robert W. Haas, Esq.
500 Montgomery Street
Alexandria, Va 22314

COMES NOW the Plaintiffs, by Counsel, and submits the following Interrogatories to be answered by an agent of the Defendant, under oath.

a. These Interrogatories are continuing in nature so as to require you to file supplemental answers if you obtain further or different information before trial.

b. When the name of a person is requested, indicate the full name, home address and business address of such person.

c. Unless otherwise indicated, these Interrogatories refer to the time, place, land and circumstances of the occurrence mentioned in the Motion for Judgment.

d. When knowledge or information in possession of the parties is requested, such request includes the knowledge of the parties' agent, employees, next friend, guardian, officers, directors, representative, business associates, authorized dealer, and unless privileged, such parties' attorneys.

e. The pronoun "you" refers to the party answering for the Defendant corporation to whom these Interrogatories are addressed and the persons mentioned in subparagraph d.

****

34. If all or substantially all of your stock was owned by another corporation in 1973, identify that corporation, list all of its officers, directors and shareholders for the years 1972 and 1973.

35. Why did you purchase this property?

****

40. Was The Fitton Company aware of the assumption agreement?

(a) If so, when did it first learn of the agreement?

****

49. Did you ever seek or obtain any re-zoning of the property prior to conveying it to Pohick Associates.

(a) If so, state each and every step taken.

****

ANSWER

COMES NOW, the Defendant, Metropolitan Mortgage Fund, Inc., ("Metropolitan") by Counsel and for its Answer to the Amended Motion for Judgment states as follows:

COUNT I

1. The Defendant, Metropolitan admits the allegations in paragraphs 1 and 2 of the Amended Motion for Judgment.

2. The Defendant, Metropolitan, states that the Assumption Agreement referred to in paragraphs 3 and 4 of the Motion for Judgment is a legal document which speaks for itself; to the extent that the allegations set forth in paragraphs 3 and 4 of the Motion for Judgment are inconsistent with the terms of said Assumption Agreement, Defendant, Metropolitan, denies said allegations.

3. The Defendant, Metropolitan, affirmatively states that the Deed referred to in paragraph 5 of the Motion for Judgment is dated June 12, 1972; Defendant otherwise admits the allegations set forth in paragraph 5 of the Amended Motion for Judgment.

4. The Defendant, Metropolitan, specifically denies the allegations contained in paragraph 6 of the Amended Motion for Judgment.

5. The Defendant, Metropolitan, admits the allegations in paragraph 7 of the Amended Motion for Judgment.

6. The Defendant, Metropolitan, specifically denies the allegations of paragraphs 8, 9, 10, 11 and 12, and demands strict proof thereof.

COUNT II

1-6. The Answers to paragraphs 1 through 12 of Count I of the Amended Motion for Judgment are incorporated herein as paragraphs 1 through 6.

7. The Defendant, Metropolitan, specifically denies the allegations of paragraphs 13 and 14, and demands strict proof thereof.

8. The Defendant, Metropolitan, admits the allegations in paragraph 15 of the Amended Motion for Judgment.

9. The Defendant, Metropolitan, specifically denies the allegations of paragraph 16, and demands strict proof thereof.

COUNT III

1-6. The Answers to paragraphs 1 through 12 of Count I of the Amended Motion for Judgment are incorporated herein as paragraphs 1 through 6.

7. The Defendant, Metropolitan, specifically denies the allegations of paragraphs 13 and 14, and demands strict proof thereof.

COUNT IV

1-6. The Answers to paragraphs 1 through 12 of Count I of the Amended Motion for Judgment are incorporated herein as paragraphs 1 through 6.

7. The Defendant, Metropolitan, specifically denies the allegations of paragraphs 13 and 14, and demands strict proof thereof.

COUNT V

1. The Defendant, Metropolitan, denies the allegations in paragraph 1, and demands strict proof thereof.

2. The Defendant, Metropolitan, admits the allegations in paragraph 2 of the Amended Motion for Judgment.

3. The Defendant, Metropolitan, specifically denies the allegations of paragraphs 3 and 4, and demands strict proof thereof.

4. The Defendant, Metropolitan, admits the allegations in paragraphs 5 and 6 of the Amended Motion for Judgment.

5. The Defendant, Metropolitan, specifically denies the allegations of paragraph 7, and demands strict proof thereof.

GROUNDS OF DEFENSE

1. By way of further defense, the Defendant, Metropolitan, states that it sold and conveyed title to the Pohick Road parcel in June, 1973 as part of a divestiture order of the Federal Reserve Board, dated April 23, 1973. All right,

title and interest of Metropolitan was at that time conveyed to Pohick Associates, a Limited Partnership, to which Metropolitan is not now, nor ever has been, a party. Since Metropolitan did not obtain rezoning of the property prior to the forced sale based upon the divestiture imposed by the Federal Reserve Board, there is no further liability on behalf of Metropolitan under the agreement of May 26, 1972.

2. By way of further defense, the imposition of the Government's action recited in paragraph 1 above made the contract impossible to perform and thereby excused further performance on the part of Metropolitan.

3. By way of further defense, the Defendant, Metropolitan, states that the contract requires the payment of additional fee only in the event of sale or development by Metropolitan after rezoning, and not for a sale prior thereto. In addition, the contract does not require Metropolitan to file or pursue any particular rezoning within any particular time limit. Since Metropolitan conveyed the property prior to any rezoning and, thus, did not obtain any benefits or profits from any subsequent rezoning, they should not be obligated to pay any additional consideration..

4. By way of further defense, the failure of the conditions precedent referred to in paragraph 3 above to be satisfied negates any obligation of Metropolitan to pay the additional consideration called for in the Assumption Agreement.

5. By way of further defense, the Assumption Agreement, dated May 26, 1972, constitutes an impermissible restraint on alienation which should be declared void by this Court.

6. By way of further defense, Counts II, III, IV, V fail to state a cause of action upon which relief can be granted.

WHEREFORE, Metropolitan, having fully answered the Amended Motion for Judgment filed herein, prays that the action be dismissed as to them, with their costs.

METROPOLITAN MORTGAGE FUND, INC.

by Counsel

ROBERT W. HAAS, Esquire
500 Montgomery Street
Alexandria, Virginia 22314
703/836-6400
Attorney for the Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 1977, a copy of the foregoing was mailed, first class mail, postage prepaid, to Plaintiff's Counsel of record.

Robert W. Haas

ANSWERS TO INTERROGATORIES

COMES NOW, the Defendant, Metropolitan Mortgage Fund, Inc., (MMF), under oath, and for its Answers to the Interrogatories filed herein states as follows:

a. The information supplied in these Answers is not based solely on the information of the executing party, but includes knowledge of the party, his agents, representatives and attorneys, unless privileged.

b. The word usage and sentence structure may be that of the attorney assisting in the execution of these Answers and does not purport to be the exact language of the executing party.

****

34. The Fitton Company, a District of Columbia Corporation
Robert L. Fitton, President, Director, 50% stockholder
R. Marshall Fitton, Secretary, Director, 50% stockholder

35. MMF purchased this undeveloped tract of land with the intention of holding it for future sale to a developer, which was in keeping with the competitive market conditions at the time.

****

40. Fitton Company was aware of the Assumption Agreement at the time it was executed by MMF.

****

49. Yes.

a. Rezoning of the property was not obtained while MMF was the owner. Although no formal rezoning requests were submitted to the County, numerous discussions and correspondence transpired with John T. Hazel,

Jr., Esq. of Hazel, Beckhorn and Hanes, who was engaged by MMF to pursue the rezoning. Based upon his recommendations, amending the pending rezoning application submitted by the Plaintiffs was not undertaken in 1972, nor early 1973.

On information and belief, the Plaintiffs were familiar with the status of the rezoning and MMF's efforts to obtain a rezoning, and, to protect their interest in adjoining property, ultimately testified in opposition to Pohick Associates at the eventual rezoning hearings.

****

## STIPULATIONS

1. On November 15, 1971, R. F. Crist, III and John Crist, partners in the Viking Construction Co. (hereinafter referred to as "Viking"), entered into a contract with Veronica Higgins to purchase a parcel of land in Fairfax County, Virginia consisting of some thirty-three acres (hereinafter referred to as "the property").

2. On May 26, 1972, Viking and Metropolitan Mortgage Fund, Inc. (hereinafter referred to as "Metropolitan") entered into an Assumption Agreement (attached hereto as "Exhibit A") wherein Viking assigned all its rights and interests in the property to Metropolitan, and Exhibit A is hereby stipulated into evidence.

At this time the Assumption Agreement was signed, there was pending a rezoning application for I-P for the property.

3. The Assumption Agreement attached hereto as Exhibit A is a true and accurate reproduction of the original agreement entered into by Viking and Metropolitan.

4. The letters attached hereto as Exhibits B, C and D are documents of correspondence between the parties, and are hereby stipulated into evidence.

5. Metropolitan took title to the property by Deed dated June 12, 1972, recorded in Deed Book 3632 at Page 493 among the land records of Fairfax County, Virginia.

6. Metropolitan paid Crist Two-Hundred Sixty-Three Thousand, One Hundred Sixteen and 80/100 Dollars ($263,116.80) at that time.

7. During the period that Metropolitan held the property, Metropolitan did not file any rezoning applications for the property, on advice of zoning counsel, John T. Hazel, Esquire.

8. The Fitton Company, sole owner of Metropolitan, began negotiations for voluntary merger with the Dominion Bankshares Corporation in October, 1971, and agreed to such merger by contract dated August 30, 1972, a copy of which is attached hereto as "Exhibit E."

9. As a condition of approving the voluntary merger, the Federal Reserve Board required Metropolitan to divest itself of the property.

10. Pursuant to a Sales Contract dated June 15, 1973 and by Deed dated June 15, 1973, Metropolitan conveyed the property to Pohick Associates, a limited partnership.

11. On June 22, 1973, the Fitton Company and the Dominion Bankshares Corporation merged.

12. Pohick Associates is or was at that time a limited partnership consisting of R. Marshall Fitton, Robert A. Fitton, and George Travers, among others. Fitton, Fitton, and Travers own 50% collectively. Pohick Associates was formed for the express purpose of purchasing and developing the property.

13. At the time of the acquisition of the property by Pohick Associates, R. Marshall Fitton and Robert A. Fitton were serving as executive vice-president and president, respectively, of Metropolitan, and each owned fifty percent (50%) of the outstanding shares of the Fitton Company.

14. When Pohick Associates bought the property, it paid Two Hundred Seventy-Seven Thousand Seven Hundred Sixty-Eight and

12/100 Dollars ($277,768.12). An MAI appraisal was done by John H. Beess on June 1, 1973, indicating that the fair market value of the property was Two Hundred Seventy-Three Thousand Dollars ($273,000.00).

15. On August 2, 1976, the land was rezoned upon application of Pohick Associates from RE-1 District to RTC-10 District, a higher residential density than that previously permitted.

16. Such rezoning was subject to the Revised Proffer of March 26, 1976 which, inter alia, provided for a maximum of 225 units on the property, or 6.3 units per acre.

17. In 1978, when Fairfax County revised its zoning map, the property was remapped from RTC-10 to P-8.

18. On July 20, 1982, a site plan was approved for a part of the property, providing for 86 units on 12.7 acres of the property.

19. Metropolitan has paid no sums pursuant to the Assumption Agreement of May 26, 1972, in regard to the above rezoning or site plan approval.

JOHN P. CRIST
By Counsel

MALONEY and CHESS
3900 University Drive
Fairfax, Virginia 22030

By: Joyce Ann Naumann
Joyce Ann Naumann

METROPOLITAN MORTGAGE FUND, INC.
By Counsel

Robert W. Haas, Esquire

ASSUMPTION AGREEMENT

THIS AGREEMENT made this 26th day of May, 1972, by and between R. F. Crist III and John P. D. Crist, dba Viking Construction Co., hereinafter called "Viking" and Metropolitan Mortgage Fund, Inc., a Maryland Corporation, hereinafter called "Metropolitan",

WITNESSETH:

WHEREAS, Viking entered into that certain contract dated November 15, 1971 with Veronica Higgins to purchase a parcel of land on Pohick Road, Fairfax County, Virginia, designated in the County Tax Assessment Maps as Parcel 13, Double Circle One, Section 107, said contract attached hereto as Exhibit A, and

WHEREAS, the settlement date under said contract has been extended by Viking, upon the payment to the Seller of $3,000.00 in extension fees, to June 15, 1972, and Viking warrants said contract is in full force and effect, and

WHEREAS, Viking is given the right in said contract to assign its interest in said contract,

NOW THEREFORE, for and in consideration of the sum of Ten Dollars ($10.00) in hand paid by each of the parties to the other, and for other good and valuable considerations receipt of which is acknowledged, the parties hereto hereby agree as follows:

1. Viking assigns to Metropolitan all its right, title and interest in its November 15, 1971 contract with Veronica Higgins (Exhibit A).

2. Upon settlement of said contract Metropolitan agrees to reimburse Viking the following amounts:

a) $5,000.00 deposited by Viking with the contract
b) $3,000.00 paid by Viking for extension fees
c) $800.00 paid by Viking for a rezoning filing fee

3. Upon settlement of said contract Metropolitan agrees to pay the following amounts for bills incurred by Viking in connection with its evaluation of the property described herein:

a) $3,100.00 to Runyon and Huntley, per bill attached hereto as Exhibit B
b) $750.00 to Edward B. Chitlik, per bill attached hereto as Exhibit C

4. Metropolitan will attempt to rezone all or a portion of the property to a use permitting a higher residential density than currently allowed under present zoning. Metropolitan will make this attempt at a time it deems proper. If Metropolitan is successful in obtaining a higher residential density for all or a portion of the property, Viking's interest in additional consideration will vest in the amount of $250.00



Exhibit A

for each and every dwelling unit for which site plan approval is subsequently obtained from the appropriate governing agencies of Fairfax County. In the event Metropolitan sells the subject property after obtaining the said rezoning, Metropolitan warrants that it will pay Viking $250.00 for each and every unit for which site plan approval is obtained within ten (10) days of the purchaser's obtaining said approval. If Metropolitan develops the property itself, or contributes the property to a joint venture or partnerhsip to which it is a party, Metropolitan agrees to pay Viking $250.00 for each and every dwelling unit for which site plan approval is obtained within ten (10) days of said approval.

5. If Metropolitan determines that a higher residential density is not an appropriate use for the property, or if a rezoning applicantion filed for such a use is denied and Metropolitan decides not to hold the property until a second application for a similar use can be filed and action thereon obtained, Metropolitan may file a rezoning application for an industrial use. If such an application is approved, Metropolitan agrees to pay Viking $50,000.00 within one (1) year of the approval of said zoning.

6. Nothing herein contained should be construed to imply that Metropolitan must file any rezoning application within any period of time.

IN WITNESS WHEREOF the parties have caused this instrument to be fully executed on the day and year first above written.

WITNESS:

Lucille C. Legge

Lucille C Legge

VIKING CONSTRUCTION CO.

By R. F. Crist III

John P. D. Crist

ATTEST

Secretary

METROPOLITAN MORTGAGE FUND, INC.

By William D. Walden
Senior Vice President

ACKNOWLEDGEMENT

SHAW REAL ESTATE

By

METROPOLITAN MORTGAGE FUND, INC.
Mortgage Bankers
500 MONTGOMERY STREET ALEXANDRIA, VIRGINIA 22314 TEL 703/836-6400

September 17, 1976

Mr. John P. D. Crist
International Equities Corporation
3118 Gulf-to-Bay Boulevard
Clearwater, Florida 33519

Dear John:

Please be advised that Metropolitan Mortgage Fund sold and conveyed title to the Pohick Road parcel in 1973 as part of a divestiture required by the Federal Reserve Board. All right, title and interest of Metropolitan was at that time transferred to Pohick Associates, a joint venture of which Metropolitan is not now, nor ever has been a party.

Since Metropolitan never sought nor obtained any rezoning of the property prior to conveying the title, or since that time for that matter, there is no further liability on behalf of Metropolitan under the agreement of May 26, 1972.

Very truly yours,

R. Marshall Fitton
President

rmf/ap

METROPOLITAN MORTGAGE FUND, INC.
Mortgage Bankers
500 MONTGOMERY STREET ALEXANDRIA, VIRGINIA 22314 TEL 703/836-6400

January 4, 1977

Richard B. Chess, Jr., Esquire
Chess, Durrette & Roeder
4085 Chain Bridge Road, #300
Fairfax, Virginia 22030

Re: Pohick Road Parcel

Dear Mr. Chess:

Your letter of December 23, 1976 concerning the Crist's claim to additional consideration under their Assumption Agreement dated May 26, 1972, has been referred to this department for response.

This is to advise you that Metropolitan Mortgage Fund, Inc. sold and conveyed title to the Pohick Road parcel in 1973 as part of a divestiture required by the Federal Reserve Board. All right, title and interest of Metropolitan was at that time conveyed to Pohick Associates, a Joint Venture, to which Metropolitan is not now, nor ever has been a party. Since Metropolitan never sought nor obtained any rezoning of the property prior to conveying the title, or since that time for that matter, there is no further liability on behalf of Metropolitan under the agreement of May 26, 1972.

The contract allows this course of conduct as it provides for the payment of the additional fee only in the event of several contingencies "after obtaining site plan approval" and silent as to any fees for sale prior thereto. In addition, the contract does not require Metropolitan to file or pursue any particular zoning.

I am of the opinion that a valid defense exists on the part of Metropolitan to this demand in that they conveyed the property prior to any rezoning and, thus, did not obtain any benefits or profits from any rezoning and, therefore, should not be obligated to pay any additional consideration. This can be further supported by the fact that the sale was a forced sale (at cost) based upon a divestiture imposed by the Federal Reserve Board.

If I can be of any further assistance in resolving this matter, please let me know.

Very truly yours,

Robert W. Haas
Corporate Counsel

rwh/ap
cy: Mr. R. Marshall Fitton

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28 HA APPROVED MORTGAGEE

Exhibit C

International Equities Corporation

INVESTMENT COUNSELING • TAX SHELTERS • REGISTERED REAL ESTATE BROKER

3110 GULF-TO-BAY BOULEVARD
CLEARWATER, FLORIDA 33519
TELEPHONE 813-726-1002

August 27, 1976

Marshal Fitton, President
Metropolitan Mortgage Fund, Inc.
500 Montgomery Ave.
Alexandria, Va. 22314

Dear Marshal:

Congradulations on a long hard fought victory. I see where the property that my brother and I sold to your company has been recently rezoned for townhouses. (Parcel 13, Double Circle one, Section 107 designated in the Fairfax County tax Assessment Maps)

We are looking foreward to the conclusion of this transaction in accordance with the agreement, a copy of which is enclosed, dated the 26th of May, 1972.

Please let us know what we might do to be of help in expediting this matter.

Very truly yours,

John P. D. Crist

Exhibit D

# AGREEMENT FOR EXCHANGE OF STOCK

THIS AGREEMENT, made and entered into as of this 30th day of August, 1972, among Dominion Bankshares Corporation, a Virginia corporation, hereinafter referred to as "Dominion," party of the first part; Robert L. Fitton and R. Marshall Fitton, residents of Virginia, hereinafter sometimes referred to in the aggregate as "Fittons," parties of the second part; The Fitton Company, a District of Columbia corporation, hereinafter referred to as "Company," party of the third part; Metropolitan Mortgage Fund, Inc., a Maryland corporation, hereinafter referred to as "Mortgage Company," party of the fourth part; Fitton Insurance Agency, Inc., a Virginia corporation, hereinafter referred to as "Insurance Agency," party of the fifth part; and Metropolitan Data Services, Inc., a Virginia corporation, hereinafter referred to as "Computer Services Company," party of the sixth part;

- W I T N E S S E T H -

WHEREAS, the Fittons own all of the issued and outstanding voting common stock of the Company which in turn owns all of the issued and outstanding voting common stock of the Mortgage Company; and

WHEREAS, the Fittons own 100% of the entire issued and outstanding voting common stock of the Insurance Agency; and

WHEREAS, the Company owns in excess of 51% of the issued and outstanding voting common stock of Computer Services Company; and

WHEREAS, Computer Services Company has rights enforceable only upon termination of employment of the holders to repurchase at book value all its voting common stock now outstanding owned by others than the Fittons and will reserve such repurchase rights on any shares hereafter issued. and

WHEREAS, Dominion desires to acquire from the Fittons all of the outstanding voting common stock of the Company and the Insurance Agency, (all such common stock interests in the aggregate being hereinafter referred to as "Fitton Shares"), in exchange for the hereinafter designated number of shares of the Ten Dollar ($10.00) par common stock of Dominion (hereinafter referred to as "Dominion Stock"), and the Fittons are willing to effect such stock exchange;

NOW, THEREFORE, IN CONSIDERATION of the mutual promises and undertakings of the parties hereto, their several agreements, warranties and representations, all as hereinafter set forth, it is agreed as follows:

1. Basic Exchange Ratio. Dominion agrees to issue 71,428 shares of Dominion Stock (35,714 shares each to Robert L. Fitton and R. Marshall Fitton) in exchange for all of the Fitton shares, and the Fittons, individually and jointly, agree to exchange the Fitton shares and have the same issued to Dominion in exchange for such shares of Dominion Stock, the said number of shares of Dominion Stock being subject to an appropriate increase in the event Dominion declares a stock dividend subsequent to the date of

this agreement and prior to the Closing Date, and such number of Dominion shares being subject to a reduction in accordance with Sections 7 and 8 of this Agreement.

2. Agreements and Representations of Dominion. Dominion agrees with and represents to the Fittons as follows:

(a) Following the execution of this agreement, Dominion shall expeditiously cause to be prepared at its expense separate and concurrent or combined applications for approval by the Board of Governors of the Federal Reserve System ("Board") of the acquisition by Dominion pursuant to Section 4(c)(8) of the Bank Holding Company Act of 1956, as amended, of the Fitton shares giving it voting control of the Company, the Mortgage Company, the Insurance Agency and the Computer Services Company (hereinafter being referred to in the aggregate as the "Fitton Companies"). Dominion shall formally request the Board to consider and act upon the separate or combined applications at the same time and dispose of the applications by one order or several orders of even or near even date.

(b) Dominion shall deliver to the Fittons at the Closing Date the appropriate number of shares of Dominion Stock required by the terms hereof and represents that such shares will be duly and validly issued, fully paid and non-assessable; provided, however, that it is understood that such shares will not be registered shares covered by an effective registration statement on file with the Securities and Exchange Commission but will be unregistered, restricted

shares issued by Dominion on the basis of a private sale exemption afforded by Section 4(2) of the Securities Act of 1933, as amended, and the certificates therefor will contain an appropriate legend evidencing this fact and restricting the sale or other disposition of such shares in accordance with applicable rules and regulations of the Securities and Exchange Commission.

(c) Dominion, after the consummation of this proposed transaction, will make available to the Fitton Companies its Profit-Sharing and Pension Plans and other fringe benefits generally afforded by it to its affiliates, and any similar benefits in effect at such time in the Fitton Companies will be terminated.

3. Agreements and Representations of the Fittons. The Fittons hereby agree and represent as follows:

(a) To cooperate fully with representatives and attorneys of Dominion and its subsidiary banks in making available to them all the records, ledgers, minute books and other documents of the Fitton Companies and in providing and verifying all data and other information required to be made a part of the applications to the Board with reference to detailed statements relating to the Fitton Companies, their financial history and condition, their competitive posture in the market area served and their competitive posture as relating to Dominion and its subsidiary banks and companies.

(b) That they are acquiring hereunder the Dominio Stock for investment and acknowledge that Dominion has

delivered to each of them its 1971 Annual Report, its March 31, 1972, Financial Statements furnished its stockholders, its Proxy Statement in respect of its April, 1972, annual stockholders' meeting, its December 7, 1971, Prospectus with reference to its issue of debentures, its 10-K report for the year 1971 and its 10-Q reports for the quarters ended March 31, 1972, and June 30, 1972.

(c) The income statements, balance sheets and reconciliations of capital accounts of the Fitton Companies prepared by the Fitton Companies at and for the period ended May 31, 1972, copies whereof being attached hereto marked Exhibit 1 and made a part hereof, accurately represent and depict the financial condition and the results of operations of the Fitton Companies at the dates and for the periods indicated, said financial statements having been prepared in accordance with generally accepted accounting principles applied on a basis consistent with those followed in the last full fiscal year of each of the Fitton Companies.

(d) The Report of Loans Serviced by the Mortgage Company dated 5/31/72, a copy whereof being attached hereto and made a part hereof marked Exhibit 2, accurately and completely sets forth the names of the investors, the number of loans, the escrow balances, the principal balances and the service fees incident thereto of the Mortgage Company as of that date.

(e) The Fitton Shares have been duly and validly issued by the respective Fitton Companies and constitute

authorized, fully paid and nonassessable shares of stock thereof, and appropriate certificates evidencing the same, properly endorsed, will be made available and delivered to Dominion at the Closing Date.

(f) There is no litigation pending or threatened which will substantially affect any material assets of the Fitton Companies, their right to carry on their business or the value of the Fitton Shares.

(g) None of the Fitton Companies, without the written consent of Dominion first had and obtained, will at any time from the date hereof until after the Closing Date (or the termination or expiration of this Agreement) increas the salaries or other compensations of any of its officers, enlarge any officer or employee fringe benefits, effect or enter into any agreement to effect any amendments to their respective Articles of Incorporation, merge, consolidate, liquidate, encumber all or substantially all of their assets. issue any additional stock of any class, or take any other corporate action except the performance of its normal business affairs and operations, nor will they amend, terminate or in any manner agree to effect any modification of any employment contracts with their employees.

(h) Each of the Fitton Companies is a corporation duly organized, validly existing and in good standing under the laws of the state of its incorporation and has the corporate powers to own its properties and carry on businesses now being conducted by them in the State of Virginia and elsewhere.

(i) They will cooperate with the Company or Dominion in the event either applies for and attempts to take out insurance on the lives of the Fittons or either of them.

(j) They will not, from the date hereof until after the Closing Date (or the termination or expiration of this Agreement), permit the Mortgage Company to effect or agree to effect any waiver of cancellation fee contained in any service agreement between any investor and the Mortgage Company.

4. Agreements and Representations of the Fitton Companies. The Fitton Companies severally agree and represent as follows:

(a) Their respective earnings statements, balance sheets and reconciliations of capital accounts, attached to this Agreement as Exhibit 1, accurately portray their financial and operating condition as of the date thereof and were prepared in accordance with generally accepted accounting principles applied on a basis consistent with those followed in the last full fiscal year of each thereof.

(b) They will each make available to representatives and attorneys of Dominion and its subsidiary banks all such data and information reasonably required by Dominion for the purpose of preparing its applications to the Board; will give access to their books of account, ledgers, minute books and financial and operating records and make available the same for the purpose of any audits to be made by

accountants for Dominion and/or representatives of Peat, Marwick, Mitchell & Co. (such accounting firm being hereinafter referred to as "Accountants").

(c) They will not without the written consent of Dominion first had and obtained at any time from the date hereof until after the Closing Date (or the termination or expiration of this Agreement) increase the salaries or other compensations of any of their officers, enlarge any officer or employee fringe benefits, amend, terminate or in any manner agree to effect any modification of any employment contracts with their employees, effect or enter into any agreement to effect any amendments to their respective Articles of Incorporation, merge, consolidate, liquidate, encumber all or substantially all of their assets, issue any additional stock of any class, or take any other corporate action except the performance of their normal business affairs and operations.

5. The Closing. The date and place of closing and certain actions with respect thereto shall be as follows:

(a) The place of closing shall be the main office of Dominion at 201 South Jefferson Street in the City of Roanoke, Virginia, or such other place in Virginia as Dominion may designate in writing as the place of closing.

(b) The closing shall be held on the "Closing Date," which shall be a date specified by Dominion in writi to the Fittons and shall be no later than one hundred twent

(120) days following the date the order of the Board approving acquisition by Dominion of indirect control of all of the voting common stock of the Mortgage Company through acquisition by Dominion of all of the voting common stock of the Company becomes effective, is not the subject of litigation and is no longer contestable or subject to litigation or review by any governmental or regulatory agency. The Closing Date shall not be postponed by reason of the failure of the Board to approve, or by reason of Board disapproval of, Dominion's application to acquire the direct and indirect voting share control of either or both the Insurance Agency or the Computer Services Company.

(c) On the Closing Date the Fittons shall deliver to Dominion stock certificates evidencing all of the outstanding voting common stock of the Company, and of the Insurance Agency if at such time the Board has approved acquisition thereof by Dominion, such certificates to be properly endorsed and in due form for transfer, together with any certificates, opinions and other documents required by this Agreement. Dominion shall at that time deliver to the Fittons certificates registered in their respective names evidencing the number of shares of Dominion Stock due to the Fittons in exchange for the above mentioned stock as determined by the terms and conditions of this Agreement.

6. Conditions to Consummation of Agreement. The obligations of the Fittons and Dominion to consummate the exchange offer provided in this Agreement shall be subject to the conditions precedent of receipt prior to the termination

of this Agreement of (i) Board approval of the acquisition of indirect control of all the voting stock of the Mortgage Company through the acquisition of all of the voting stock of the Company by Dominion, and (ii) a ruling from the Internal Revenue Service that the proposed exchange of Dominion Stock for the Fitton shares will not result in any realizable gain to the Fittons under the Internal Revenue Code.

7. Basis for Basic Exchange Ratio and Adjustment Thereof. The basic exchange ratio specified in Section 1 ("Basic Exchange Ratio") is based upon the financial statements of the Fitton Companies comprising Exhibit 1 to this Agreement. The exchange ratio to be effective at the Closing Date shall be the Basic Exchange Ratio adjusted (other than as in Section 1 provided) by the reduction of the number of shares of Dominion Stock therein specified in an amount equal to the aggregate of monetary reductions calculated in accordance with the provisions of Section 8 of this Agreement divided by 35 (rounded off to the nearest whole).

8. Closing Date Adjustments. The following shall constitute monetary reductions for calculation in accordance with the provisions of Section 7 to adjust the Basic Exchange Ratio:

(a) If on the Closing Date Dominion shall not have received at least thirty (30) days prior Board approval for the acquisition of the Insurance Agency, then the shares of the Insurance Agency included within the definition of

the Fitton Shares shall be eliminated from the shares to be acquired by Dominion hereunder and there shall be a monetary reduction in the amount of $57,908.00.

(b) If on the Closing Date Dominion shall not have received at least thirty (30) days prior Board approval for its acquiring indirect voting control of the Computer Services Company, then the Company agrees to divest itself of all shares of Computer Services Company it may then own, and there shall be a monetary reduction in the amount of $32,212.00.

(c) An audit of the financial statements as shown in Exhibit 1 shall be made by the Accountants. A monetary reduction will be made if and in the amount that the Accountants reasonably determine that the combined stockholders' equity of the Fitton Companies as shown in the financial statements comprising Exhibit 1 to this Agreement is overstated because of a failure to comply with generally accepted accounting principles applied on a basis consistent with those followed in the last full fiscal year of each of the Fitton Companies. (The Mortgage Company will record on its books prior to the Closing Date and in any event prior to December 31, 1972, the deferred income due from Bowery Savings Bank, all advance interest paid out of the Government National Mortgage Association pool and accruing to the benefit of the Mortgage Company and any other unrecorded assets except two notes in the amount of $110,000 and $50,00 made by Indian Acres of Thornburgh, Inc., and Chalet Woods,

Incorporated, respectively, which notes shall be and remain the property of the Mortgage Company.)

(d) There shall be a monetary reduction in an amount equal to any dividends or any other like payments or distributions paid by any of the Fitton Companies since the date shown on the financial statements in Exhibit 1.

(e) There shall be monetary reductions in the amounts herewith shown or referred to on account of any of the following occurrences:

(i) In the event of a decrease in loan servicing rates heretofore in effect between the Investor(s) and the Mortgage Company, monetary reduction shall be in an amount determined by multiplying such decrease in rate(s) (per annum) by the unpaid principal balances of loans then being serviced for such Investor(s) multiplied by 4.83;

(ii) In the event any Investor(s) impose any transfer fees or any other charges of any kind as a condition to its Consent, the monetary reduction shall be in an amount equal to any such required transfer fees or charges.

(iii) In the event Bowery Savings Bank requires or effects a forfeiture of the earned deferred mortgage servicing fees (created or caused by said Investor paying the Mortgage Company on the basis of a

level payment plan rather than on the actual amount of principal loan balances outstanding), the monetary reduction shall be in an amount equal to any such forfeited earned deferred mortgage servicing fees.

9. Indemnification By The Fittons of Certain Liabilities of The Mortgage Company. In connection with any real estate mortgage notes for the payment of which the Mortgage Company, as of the Closing Date, is contingently liable pursuant to the terms of any repurchase or loan service agreement or in any capacity other than endorser for the payment of all or any part of the indebtedness so evidenced (all such notes being hereinafter called "Contingent Liability Notes"), the Fittons hereby warrant and agree to indemnify and save harmless the Mortgage Company from all combined net loss it may incur within three (3) years of the Closing Date by reason of the Contingent Liability Notes.

10. Options of Dominion to Terminate Agreement. Dominion shall have the options to terminate this Agreement without liability to it upon written notice given on or prior to the Closing Date in the following events:

(a) Upon the death or judicially declared incompetence of both the Fittons prior to the Closing Date.

(b) In the event Dominion determines in good faith after filing with the Board the application or applications for approval of acquisition of the Fitton Shares that Board approval of acquisition of the Fitton Shares and, indirectly, the Mortgage Company, is unlikely because of

objections to or adverse comments concerning the acquisitio: by the Board or other regulatory agencies or because of oth: circumstances, including appeals or related litigation unduly delaying confirmation of the acquisition of the Fitton Shares.

(c) In the event at the Closing Date the Fittons are unable or have failed to perform their undertakings or make good their agreements, warranties or representations upon which Dominion is herein relying for the consummation of this exchange offer.

(d) In the event at the Closing Date the Mortgag Company is servicing mortgage loans with principal balances aggregating less than $144,000,000.00.

11. Warranties, Etc., of Fittons to be Joint and Several. All warrantics, representations, liabilities and undertakings of the Fittons herein contained shall be jointly and severally binding upon them, their successors, heirs and personal representatives, and shall survive the consummation of this Exchange Offer Agreement for a period of three (3) years from the Closing Date.

12. Default of Parties. Unless waived or excepted, default or material breach by any party in the full and punctual performance of any covenant, undertaking or representation herein contained shall give rise to liability upon the party at fault.

13. Notices. All communications hereunder will be in writing, and, if sent to the Fittons, will be mailed,

delivered or telegraphed and confirmed to them jointly at 500 Montgomery Street, Alexandria, Virginia, 22314, or if sent to Dominion, will be mailed, delivered or telegraphed and confirmed to it at 201 South Jefferson Street, Roanoke, Virginia, 24011, Attention: Byron A. Hicks.

14. Successors. This Agreement will inure to the benefit of and be binding upon the parties hereto, their respective successors and the heirs and personal representatives of the Fittons.

IN WITNESS WHEREOF, the parties hereto have executed or caused to be executed by an authorized officer this Agreemen and have affixed or caused to be affixed by an authorized officer their respective seals as at the date hereinabove set forth.

DOMINION BANKSHARES CORPORATION

By _____
President

ATTEST:
(SEAL)

_____
Secretary

(SEAL)
Robert L. Fitton

(SEAL)
R. Marshall Fitton

THE FITTON COMPANY

ATTEST:
(SEAL)

By _____
President

Secretary

METROPOLITAN MORTGAGE FUND, INC.

By _____
President

ATTEST:
(SEAL)

Assistant Secretary

FITTON INSURANCE AGENCY, INC.

By _____
President

ATTEST:
(SEAL)

Assistant Secretary

METROPOLITAN DATA SERVICES, INC.

By _____
Vice President

ATTEST:
(SEAL)

Secretary

BOARD OF SUPERVISORS ACTION
ON ZONING MAP AMENDMENT
APPLICATION NUMBER C-403

Applicant: POHICK ASSOCIATES
Present Zoning: RE-1 Requested Zoning: RTC-10 OR I-P
Proposed Use: TOWN HOUSES
Subject Parcels: 107-2 & 108-1((1)) 42 & 46 Acreage: 34.5 ACRES

At a regular meeting of the Board of Supervisors of Fairfax County, Virginia, held in the Board Room in the Massey Building at Fairfax, Virginia on AUGUST 2, 1976, the following action was adopted on the subject application.

☐ Amended the zoning map as requested.

☐ Amended the zoning map as requested, and further restricted the use of the subject property by the conditions proffered and accepted pursuant to Virginia Code Ann., Section 15.1-491(a), which conditions are incorporated into the Zoning Ordinance as it affects said parcel. (See Attachment 1)

☐ Denied the requested _____ District.

☐ Amended the zoning map for the subject property to the _____ District.

☒ Amended the zoning map for the subject property to the RTC-10 District, and further restricted the use of the subject property by the conditions proffered and accepted pursuant to Virginia Code Ann., Section 15.1-491(a), which conditions are incorporated into the Zoning Ordinance as it affects said parcel. (See Attachment 1)

☐ In addition to the action taken above, the applicant presented certain restrictive covenants for recordation governing the subject property (a copy of which is attached).

☐ In addition to the action taken above, the Board of Supervisors instructed that the site plan/subdivision plat be forwarded to the Planning Commission/Board of Supervisors for its review before approval.

Stipulated 3
~~PLF DEF~~ EX #_____
DATE 8-3-82
JUDGE BMK
CASE # L 38702

Distribution:

Applicant
Clerk to the Board
Executive Director, Planning Commission
Supervisor of Assessments
Director, Mapping Division, Overlay Branch
Director, Zoning Enforcement Division
Director, Office of Research and Statistics
Public Affairs
VDH & T

Coordinator SS

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Application Number C-403

Approved to the RTC-10 District

Total Number of Dwelling Units 225 Density 6.5 DU/AC

Building Floor Area _____ Floor Area Ratio (FAR) _____

The following conditions were proffered and accepted pursuant to Virginia Code, Ann., Section 15.1-491(a) and shall further restrict the use of the property subject to the above referenced application:

See Attachment 2 for proffers.

Re: Rezoning Application C-493
Pohick Associates

REVISED PROFFER
March 25, 1976

The undersigned proffers that, providing rezoning is granted by the Fairfax County Board of Supervisors at the scheduled hearing on March 29, 1976, for a density allowing a minimum of 225 dwelling units (6.5 dwelling units per acre), development of the property which is the subject of this application shall be in accordance with the development plan prepared by Long and Rinker dated February 17, 1976, as revised herein, and shall further be subject to the following additional terms and conditions:

1. Density shall not exceed 6.5 units per acre or a total of 225 dwelling units, except as provided in paragraph 5 hereof.

2. The general road alignment shall be as shown on the revised development plan filed previously and made a part of this proffer.

3. The access road serving the subject property shall consist of 44 feet of pavement in a 60 foot right of way from its intersection with Pohick Road to the intersection of the access point to the aforesaid property to the south. Sufficient right of way to provide a Pohick Road width of 45 feet from the centerline shall be dedicated and Pohick Road widened to 32 feet from centerline with curb, gutter and sidewalks.

4. The general open space system shall be substantially as shown on the aforesaid development plan and at time of development the developer shall construct either two tennis courts or a swimming pool, as the developer may elect.

5. In the event the rezoning action now pending results in a grant of density of 235 units (6.8 units per acre) on the site which is the subject of this application, the applicant shall convey a total of 10 lots for moderate income housing to the Fairfax County Housing Authority, or its successor, at such location as applicant or successor may select providing pro rata costs of infrastructure including road, storm drainage and utility extensions shall be paid by the Fairfax County Housing Authority, or its successor, at the time said facilities are constructed. Applicant shall advise the Housing Authority at the time of site plan filing of the locations and availability of the lots and the Housing Authority shall commit reimbursement for infrastructure within 60 days after site plan filing, providing payment for such infrastructure may at the option of the

Housing Authority, or its successor, be deferred until date of release of performance bond for site plan construction.

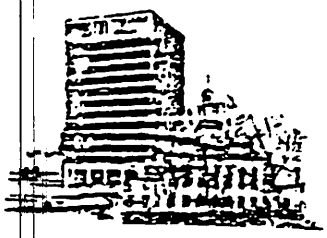
In the event the Housing Authority fails to commit infrastructure reimbursement as aforesaid within 60 days of notice of site plan filing, this provision shall terminate as to those lots tendered.

The provisions of this paragraph shall apply to land only and nothing herein shall be deemed a commitment by applicant to construct dwelling units, nor shall applicant be entitled to develop any of the 10 lots tendered by this paragraph in the event the Housing Authority declines to accept said lots.

POHICK ASSOCIATES

By: _____

Date: _____



COMMONWEALTH OF VIRGINIA

# COUNTY OF FAIRFAX

4100 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

August 11, 1976

John T. Hazel, Esquire
P.O. Box 547
Fairfax, Virginia 22030

Dear Mr. Hazel:

Enclosed you will find a copy of an Ordinance adopted by the Board of Supervisors at its meeting on August 2, 1976, granting the application of POHICK ASSOCIATES (No. C-403) to rezone certain land in Lee District from RE-1 District to RTC-10 District.

Very truly yours,

Ethel Wilcox Register

Ethel Wilcox Register
Clerk to the Board

EWR/pkw

cc: Mr. Patteson
Mr. Yates
Mr. Knowlton
Mr. Beales

At a regular meeting of the Board of Supervisors of Fairfax County, Virginia, held in the Board Room in the Massey Building at Fairfax, Virginia on the 2nd day of August, 1976, the following ordinance was adopted:

AN ORDINANCE AMENDING THE ZONING ORDINANCE
(PROPOSAL NO. C-403 )

WHEREAS, POHICK ASSOCIATES filed in proper form, an application requesting the zoning of a certain parcel of land hereinafter described, from RE-1 District to I-P or RTC-10 / Districts, and

WHEREAS, at a duly called public hearing the Planning Commission considered the application and the propriety of amending the Zoning Ordinance in accordance therewith, and thereafter did submit to this Board its recommendation, and

WHEREAS, this Board has today held a duly called public hearing and after due consideration of the reports, recommendation, testimony and facts pertinent to the proposed amendment, the Board is of the opinion that the Ordinance should be amended,

NOW, THEREFORE, BE IT ORDAINED, that that certain parcel of land situated in the Lee District, and more particularly described as follows: (see attached legal description)
Be, and hereby is, zoned to the RTC-10 District, and said property is subject to the use regulations of said RTC-10 District, and further restricted by the conditions proffered and accepted pursuant to Va. Code Ann., § 15.1-491(a), which conditions are incorporated into the Zoning Ordinance as it affects said parcel, and

BE IT FURTHER ENACTED, that the boundaries of the Zoning Map heretofore adopted as a part of the Zoning Ordinance be, and they hereby are, amended in accordance with this enactment and that said zoning map shall annotate and incorporate by reference the additional conditions governing said parcel.

GIVEN under my hand this 2nd day of August, 1976.

Ethel Wilcox Register

Ethel Wilcox Register
Clerk to the Board

DESCRIPTION OF THE REMAINDER OF THE THOMAS O. BAKER ESTATE PROPERTY, LEE DISTRICT, FAIRFAX CO. VIRGINIA

BEGINNING at a point in the westerly side of POHICK ROAD, the northeast corner to HUNTER;

THENCE leaving the road and running with the north line of HUNTER S 69° 05' W 2309 feet to a point, the southeast corner to C. H. BAKER;

THENCE leaving the line of HUNTER and running with the easterly line of C. H. BAKER N 19° 55' W 592 feet to a point the northeast corner to C. H. BAKER and the southeast corner to H. U. BAKER;

THENCE leaving the line of C. H. BAKER and running with the easterly line of H. U. BAKER N 19° 10' W 252 feet to a point, the southwest corner to BEACH;

THENCE running with the southerly line of BEACH, ROSE, GRAHAM and BAKER N 76° 45' E 2059 feet to a point in the westerly line of POHICK ROAD;

THENCE leaving the line of BAKER and running with the westerly side of POHICK ROAD S 34° 50' E 312 feet and S 53° 05' E 333 feet to the beginning contains 34.5 ACRES°

RUNYON & HUNTLEY
DECEMBER 6, 1971

7:30 P.M. Item - C-403 - POHICK ASSOCIATES
LEE DISTRICT

The Planning Commission on July 8, 1976 unanimously recommended to the Board of Supervisors that application C-403 be denied for the I-P category and granted for the RTC-10 District contingent on the Board's amendment of the Comprehensive Plan as proposed and proffered on March 25, 1976 pursuant to Virginia Code Section 15.1-491(a).

# REZONING AFFIDAVIT

1. George E. Travers, do hereby make oath or affirmation that I am an applicant in Rezoning Case Number C-403 which was filed on 26th day of January, 1972, and that to the best of my knowledge and belief the following information is true:

1. (a) That the following constitutes a listing of names and last known addresses of all applicants, title owners, contract purchasers, or lessees of the land described in the application, and if any of the foregoing is a trustee, each beneficiary having an interest in such land, and all attorneys, real estate brokers, and all agents who have acted on behalf of any of the foregoing with respect to the application:

| Name | Address | Relationship |
|---|---|---|
| Pohick Associates/ Limited Partnership | 500 Montgomery St.,Alexandria, Va. | Applicant & Owner |
| John T. Hazel, Jr., P. O. Box 547, Fairfax, Va. 22030 | | Attorney |

(b) That the following constitutes a listing of the shareholders of all corporations of the foregoing who own ten (10) per cent or more of any class of stock issued by said corporation, and where such corporation has ten (10) or less shareholders, a listing of all the shareholders:

| Name | Address | Relationship |
|---|---|---|
| None | | |

(c) That the following constitutes a listing of all partners, both general and limited, in any limited partnership of the foregoing:

| Name | Address | Relationship |
|---|---|---|
| See list attached | | |

2. That no member of the Fairfax County Board of Supervisors or Planning Commission owns or has any interest in the land to be rezoned or has any interest in the outcome of the decision.

EXCEPT AS FOLLOWS: (If none, so state)

None

3. That ~~within the two (2) years prior to~~ since the filing of this application, no member of the Fairfax County Board of Supervisors or Planning Commission or any member of his immediate household and family, either directly or by way of partnership in which any of them is a partner, employee, agent or attorney, or through a partner of any of them, or through a corporation in which any of them is an officer, director, employee, agent or attorney or holds outstanding bonds or shares of stock with a value in excess of one hundred ($100) ~~five dollars ($5)~~, has or has had any business or financial relationship, other than any ordinary depositor or customer relationship with or by a retail establishment, public utility or bank, including any gift or donation having a value of ~~five dollars ($5)~~ one hundred ($100) or more with any of those listed in Par. 1 above.

EXCEPT AS FOLLOWS: (If none, so state)

WITNESS the following signature this 12th day of February, 1976

POHICK ASSOCIATES

By: George E. Travers

General Partner, Pohick Associate

Applicant

The above affidavit was subscribed and confirmed by oath or affirmation before me this 12 day of February 1976, in the State of Virginia

Notary Public

My commission expires: August 9, 1976.

54

Environmental Quality Advisory Council

Northern Virginia Soil and Water Conservation District

Fairfax County Park Authority

Virginia Cooperative Extension Service

Division of State Forestry

Citizens-at-Large (9)

One from each district and one at-large appointed by the Board of Supervisors for 3 years and may be reappointed.

Chosen for their knowledge and experience in the field of arboriculture or related fields.

Grandfather Provisions

Amendments to the Subdivision Ordinance (Chapter 101 of the Code of the County of Fairfax, Virginia), the Zoning Ordinance (Chapter 112), and the Public Facilities Manual shall become effective upon adoption unless otherwise specified; provided however, that unless otherwise specified, the following will be grandfathered for the features shown thereon under prior ordinance and provisions so long as the due diligence standards set forth below are met:

a) an approved preliminary subdivision plat or a bona fide preliminary subdivision plat submitted and accepted for review for at least sixty (60) days;

b) an approved final subdivision plat;

c) a bona fide public facility construction plan submitted and accepted for review;

d) a bona fide site plan submitted and accepted for review;

e) an approved grading plan;

Stipulated
PLF DEF-EX # 5
DATE 8-3-82
JUDGE [illegible]
CASE # 138702

f) provisions of an approved special exception or special permit, provided however, that amended provisions shall govern to the extent that they do not preclude the use and the approved features;

g) approved site plan waivers and exceptions and subdivision waivers.

Due Diligence Standards

Grandfather status shall be retained only as long as the following deadlines are met:

1. Subdivision construction plans, submitted pursuant to an approved preliminary plat, shall be filed within twelve (12) months of preliminary plat approval. If corrections are deemed necessary by the reviewing authority, revised plans shall be filed within six (6) months of return to the developer or his authorized agent; provided however, that the Director may extend the time period when due diligence has been evidenced but a problem beyond the developer's control prevented correction and resubmission. A resubmission necessitated solely by a previously noted correction shall not extend the time limitations. The first section of a preliminary plat to be developed as a multi-section project showing more than one section shall meet these requirements. Additional sections shall be filed for review within at least twenty-four (24) month intervals; provided however, that all sections must be of record within five (5) years of the original date of preliminary plat approval unless an extension is granted by the Board of Supervisors.***

Executed agreements and bonds, escrows, easements and fees shall be submitted within twelve (12) months of the date of transmission of the

* * *

FINAL ORDER

THIS CAUSE came before the Court on August 3, 1982, for trial upon the merits, and the parties being present with their respective Attorneys, and evidence having been taken and arguments of counsel heard by the Court, and it being the opinion of the Court that the Plaintiff did fail to prove that it had sustained damages by a preponderance of the evidence required by law, it is therefore

ORDERED that judgment be, and the same hereby is, entered for the Defendant, and it is further

ORDERED that the Plaintiff be and hereby is granted leave to file his Motion for Reconsideration regarding the issue of nominal and punitive damages as claimed by the Plaintiff.

ENTERED this 19 day of August, 1982.

(S/d) Barbara F. Keenan, Judge

Honorable Barbara F. Keenan, Judge

WE ASK FOR THIS:

Robert W. Haas, Esq.
Attorney for Defendant
9900 Main Street
Fairfax, Va. 22031

SEEN AND OBJECTED TO:

J. A. Naumann
Attorney for Plaintiff
Maloney and Chess
3900 University Dr.
Fairfax, Va. 22030

A COPY TESTE:
JAMES E. [illegible], CLERK
By [illegible]
Deputy Clerk

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA
COUNTY OF FAIRFAX CITY OF FAIRFAX
CITY OF FALLS CHURCH

BARNARD F. JENNINGS
WILLIAM G. PLUMMER
LEWIS D. MORRIS
BURCH MILLSAP
THOMAS J. MIDDLETON
RICHARD J. JAMBORSKY
LEWIS HALL GRIFFITH
F. BRUCE BACH
BARBARA M. KEENAN
QUINLAN H. HANCOCK
JOHANNA L. FITZPATRICK
JUDGES

JAMES KEITH
RETIRED JUDGE

FAIRFAX COUNTY JUDICIAL CENTER
4110 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

September 9, 1982

Wyatt Durrette, Jr., Esq.
Jan A. Naumann, Esq.
Maloney & Chess
3900 University Drive
Fairfax, Virginia 22030

Lawrence Carlson, Esq.
Kincheloe & Carlson
Post Office Box 94
3923 University Drive
Fairfax, Virginia 22030

Robert W. Haas, Esq.
9900 Main Street
Fairfax, Virginia 22031

Re: R. F. Crist, III v. Metropolitan Mortgage Fund, Inc.
At Law No. 38702

Dear Counsel:

Upon review of the argument and authorities presented by counsel, as well as my own research in this matter, I have determined on reconsideration that judgment should be entered on behalf of the plaintiff and nominal damages in the amount of $100.00 be awarded. I further find that the facts of this case do not support an award of punitive damages, and, accordingly, the plaintiff's request for punitive damages is denied.

Mr. Durrette will please prepare an order, submit it to opposing counsel for their approval as to form, and forward the order to the Court for entry.

Very truly yours,

Barbara M. Keenan

****

(TR 5) MS. NAUMANN: I have a copy.

THE COURT: I have Amended Answer and Supplemental Grounds of Defense and that's the last thing.

MS. NAUMANN: Your Honor, attached to our stipulation were all the documents that would be necessary. I believe I have copies of most of it. If you want to give me a minute, I can pull it together.

THE COURT: Okay, that might be a good idea, because I don't have it in the file.

MS. NAUMANN: Your Honor, additionally, I have the orders from last Friday's rulings.

THE COURT: Can any of these documents be stipulated to by the parties.

MS. NAUMANN: Yes, ma'am.

MR. HAAS: Yes.

MS. NAUMANN: Would you prefer for me to wait until you read it?

THE COURT: I think it would be a good idea if you don't mind.

Is there agreement between the parties that the assumption agreement and the agreement for exchange of stock be admitted to the exhibits at this time?

MS. NAUMANN: Yes, Your Honor.

(TR 6) MR. HAAS: Yes, Your Honor.

THE COURT: It's stipulated 1 and 2 then.

****

MS. NAUMANN: There are other documents that the parties have stipulated into evidence if you would like to have that at this time.

THE COURT: Why don't we go ahead and do that.

MS. NAUMANN: Exhibit G, which is the rezoning of the property; Exhibit H, which is site plan approval of 86 units of the property.

THE COURT: It will be stipulated as 3 and 4.

(TR 7) MS NAUMANN: The grandfather provision found in Fairfax County's public facilities manual.

THE COURT: That's stipulated No. 5.

****

(TR 9) JOHN DEBELL,

a witness, was called for examination by counsel for the Plaintiff, and, after having been duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. NAUMANN:

Q. Sir, would you please state your name and occupation for the Court?

A. Yes, my name is John T. DeBell. I am a civil engineer and principal in the engineering firm of DeBell, Elton and Titus.

Q. Would you please state your educational background and experience for the Court?

A. Yes, I have --

THE COURT: Excuse me, is there any question here as to qualification of the witness?

MR. HAAS: No, is he being certified as an expert

(TR 10) witness?

MS. NAUMANN: Yes.

THE COURT: I assume that's the intent.

MR. HAAS: I have no objection.

BY MS. NAUMANN:

Q. Sir, are you familiar with the property which is the subject of this suit known as Washington Square on Pohick Road in Fairfax, Virginia?

A. Yes, I am.

Q. Have you visited the property?

A. Yes, I have.

Q. Did you observe any activity on the property at that time?

A. Yes, as of yesterday the site is being cleared for construction.

Q. Are you familiar with the preliminary subdivision plans drawn up on this property?

A. Yes, I am. I have them with me and have reviewed them.

Q. When were they approved by Fairfax County, if at all?

A. They have been approved by Fairfax County. The preliminary was approved in November of 1981.

(TR 11) Q. Are there any conditions or limitations on these plans?

A. There were some conditions set in particular density in the rezoning case that preceeded it. The plan conforms with the rezoning, so there are no other conditions other than normal requirements.

Q. These plans conform to the recommended development conditions of the zone and proffers for the property?

A. Yes, they do.

Q. Did you uncover any extraordinary physical or engineering limitations to developing the property in the manner found on the preliminary plan?

A. No, not at all. It's a very nice piece of property. Utilities are available at the site. No soil problems, gently rolling terrain, and it's ideally suited for the use it is being developed under.

Q. What is your opinion of the engineering feasibility of developing the property in the current zone?

A. I believe it is very feasible.

Q. In your opinion what is the number of units that could be developed?

A. The number of units that could be developed, the

(TR 12) maximum number without rezoning the property is 225 units. That is the number that is shown on the

approved preliminary plan. We reviewed that and there is absolutely no reason that it cannot be developed to that number. In fact, the property is such that if it were rezoned to a higher density, you would be able to get more units than that on it; but under the current property rezoning conditions, 225 is the limit and that's the number to be developed on it.

Q. Would your opinion change if the 1973 ordinances were governing?

A. No, it would not.

Q. Are you familiar with the site plan that has been approved for part of this land?

A. Yes, I am.

Q. Does it conform with the preliminary plan?

A. Yes, it does.

MS. NAUMANN: I have no further questions, Your Honor.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. HAAS:

Q. You said you were familiar with the preliminary
(TR 13) site plan that has been filed on this property?

A. Yes, sir.

Q. Did you prepare that plan?

A. No, I did not.

Q. Did your firm prepare that plan?

A. No, it did not.

Q. Your familiarity comes only from a review of that plan?

A. That's correct.

Q. Matching that against the current subdivision ordinances?

A. Well, against the current and the one in effect in 1973.

Q. When was that subdivision plan approved?

A. The preliminary plan?

Q. Preliminary.

A. The preliminary was approved in November of 1981.

Q. You've done no feasibility study or engineering work on the ground at this particular site?

A. No, not other than review the work that had been done.

Q. Then you've done no soil review or subsoil review feasibility study for lot density in relation to subdivision setbacks and other requirements?

(TR 14)

A. I've reviewed the soils as they show on the County's soil mapping. I've done no field soils.

Q. You've done no field work on this project at all?

A. Well, I've seen the site and have walked it. We've done no detailed or anything like that.

Q. Can you tell without doing that work how many lots could be put on this piece of property approved by the County as site plan without doing a full engineering feasibility work-up on this property?

A. Well, that work has been essentially done by another firm. We reviewed that work. Not only by the firm, but it's been reviewed by all Fairfax County agencies that approved.

Q. Is that for the entire site?

A. As it concerns the preliminary plans, for the entire site, yes. The final site is just for the first section.

Q. How many units are in that final site?

A. 86 units are in the first section.

Q. After a preliminary site plan has been filed,

(TR 15) the County can come back and change and amend various things in that site plan, is that correct, when the final is approved?

A. No, it is my understanding once the preliminary is approved that any ordinance changes the preliminary grandfathers them under the ordinance at the time of its approval. So if you change any type of zoning requirement in the future, this plan would still be able to be developed under the preliminary plan as long as that plan stays active. It expires in a year's time unless final site plans are filed. So,

there are certain procedures you have to do to keep it active. It is active right now.

Q. In order to grandfather under a preliminary site plan, the developer of the property has to do certain things, is that correct?

A. He has to keep the plan active.

Q. That's stipulated in the code on how that's done?

A. Yes, it is.

Q. From an engineering standpoint --

THE COURT: Excuse me, please.

(Discussion off the record.)

(TR 16) BY MR. HAAS:

Q. What steps have to be done to a preliminary site plan in order to make it a final site plan?

A. The final site plan is much more detailed. It's another set of drawings completely. The preliminary shows just a preliminary layout; it shows the roads, parking, water, sewer. It shows everything but it shows it in a preliminary way. The final plan shows the detailed engineering calculations.

Q. Isn't the difference then that the final site plan has full engineering data that confirms what preliminary was proposed can actually be built on that site?

A. Well, I think that the preliminary -- concerning number of units and those types of things, the

preliminary shows the full number of units that can be built on a piece of property.

When you get to final, you show more information. You show road grades and inverts for sewer and water and so forth. At the approval of a preliminary plan, I've never known a piece of property that couldn't get the number of units that were approved on it.

MR. HAAS: I have no further questions.

(TR 17) REDIRECT EXAMINATION

BY MS. NAUMANN:

Q. Mr. DeBell, would you explain, please, the engineering difficulties that could occur if a unit of land which is divided into sections, preliminary site plan approval is obtained, final site plan approval is obtained for one part, but then the preliminary plan for whatever reason, inactivity I believe you specified, was allowed to not be grandfathered and subsequent ordinance changes occurred? What would be the effect from an engineering point of view on that piece of property, developing that property?

A. Well, the ordinances are constantly being changed and the approved preliminary is kind of where you draw the line and you plan that property based on

everything that is in effect at that particular time.

If you had to meet every ordinance when it was changed, then by the time you got to the end of the property, you wouldn't really have a plan. You would have an area that wouldn't conform with your overall plan.

So, when you get an approved preliminary, it reallygrants you the right to develop that property fully as it's shown on that preliminary as long as you diligently

(TR 18) pursue it and keep something moving on the property and don't sit on it and allow your plans to expire. Does that answer your question?

Q. Well, let me make sure I understand. What you are saying is that if the entire unit is not allowed to conform to one set of ordinances, it would be possible to have one section developed under one set of governing rules, another section subsequently, so that the entire engineering system would not necessarily flow?

A. That's correct.

MS. NAUMANN: Thank you, no further questions.

THE COURT: Anything in response?

RECROSS EXAMINATION

BY MR. HAAS:

Q. When you hear the term "site plan approval", what does that mean to you?

A. Site plan approval in Fairfax County, site plan is defined to include a set of plans, final engineering on a piece of property and all the details. Site plan approval is the approval made for that set of plans.

Q. That's the final site plan approval where you can go from there to get a building permit, is that correct?

A. Well, there are other steps like posting bonds
(TR 19) and other types of permits and fees, but as far as engineering that's the final step in the engineering process.

MR. HAAS: Nothing further.

****

(TR 37) THE COURT: The motion to strike on Count No. 1 of the motion for judgment is denied. I believe that the pleadings and the facts in proof of the pleadins [sic] are sufficient.

With regard to Count No. 3 on the question of anticipatory breach, I want to take the opportunity to read the authorities cited by the Plaintiff and the Defendant.

TRANSCRIPT, August 3, 1983

I will direct the Defendant to proceed in Counts No. 1 and 3 at this time.

****

(TR 38) MR. HAAS: I think it's a question of timing. I think that's what we are arguing here, Your Honor. There is no time stated for performance in this contract either under the clear reading of the contract taken as a whole or, if you will, imply a condition that the zoning had to take place when the Defendant owned the property.

THE COURT: I think that while they still owned the property, they would have to attempt to rezone. I think that's a reasonable reading.

****

(TR 40) MR. HAAS: They hired Bill Hazel to advise them on the course to follow to successfully rezone the property.
(TR 41) On his advice, they said to leave the application that was pending to stand and to go for industrial and hopefully be able to have a better leverage from that to go to residential in the future. They paid Mr. Hazel for that advice.

THE COURT: So, you are saying that they did attempt to rezone by getting legal advice and by then following the advice of the lawyer.

MR. HAAS: Yes, Your Honor. ....

****

(TR 43) THE COURT: I really think the only issue here unless you are telling me you are going to be presenting any further testimony or showing me by reference to the stipulated documents to the contrary that the issue here is what is the proper measure of damages with regard to the 86 units or with regard to the breach of Metropolitan not attempting to rezone the property.

I don't believe that the evidence shows that Metropolitan did attempt to rezone the property during the time that they owned it and that any reasonable construction of Paragraps [sic] 4 and 6 would require that during the time

(TR 44) that Metropolitan owned the property, that they would attempt to rezone, although they didn't have to do it at any particular time during that period of time that they owned the property.

It is clear that during the entire time they owned the property they did not attempt to rezone. Simply having a lawyer I do not believe constitutes evidence of attempting to rezone the property which was their affirmative obligation under the contract.

So, I believe unless you can show me by reference to the documents or further testimony, the only issue here is what is the damages for their failure to do it under Count No. 1, leaving the issue of anticipatory breach and the other units aside for the moment.

****

(TR 45) THE COURT: At this time it is the finding of the Court that Metropolitan was obligated to attempt to rezone and they did not. So, given the fact what is the proper measure of damages? In other words, sure, the contract lists the measure of damages on successful performance, but it's all predicated on their even attempting to do it in the first place which they didn't do. So, they definitely breached Paragraph 4.

It is my finding at this time that Metropolitan had the obligation to attempt to rezone and they didn't do it, but I want to hear from you on what is the appropriate measure of damages. Is it the $250 dollars or something else? What are they obligated to prove?

****

(TR 48) THE COURT: I have some difficulty, and I'm interested in the Plaintiff's response, with the Plaintiff saying that damages are recited in the contract for successful performance. In other words, if Metropolitan is successful, this is what Metropolitan owes and then clearly, it was the future owner that was successful,
(TR 49) saying, therefore, that the proper damages for Metropolitan failing to attempt to rezone are equal to what they would owe had they successfully performed. I think there is possibly skipping one logical connection and that is what is the obligation vis-a-vis successful versus unsuccessful performance when all they are

obligated to do here apparently is to attempt to rezone. At least that's all I find that they failed to do. I need to know that.

****

(TR 51) THE COURT: Can I assume that the zoning -- I see you are asking me to say that for measure of damages you must assume that zoning would have been successful. I'm not sure that's a logical leap that is supported by either in the case or the law. Just because it was successful in 1976 does not mean that during the time period Metropolitan owned the property that rezoning would have been successful. Arguably, if they had held onto it until 1976, it would have been successful, because if someone else could have gotten it, they probably could have gotten it.

****

(TR 53) THE COURT: Yes, but they aren't obligated under the contract to do it at any certain time, only during the time that they owned it. So, I can't say because they could have done it in 1976 that they were obligated to hold onto the property until then. They weren't obli-

gated to successfully rezone, but only to attempt to

(TR 54) rezone. I don't think I can imply that the damages for failing to attempt to rezone are necessarily those related to successful performance because successful performance was had three years down the line. I just can't do that.

I think it's pretty obvious that between the lines here due to the ownership of Pohick Associates that they were transferring the property off. It would appear that they were transferring the property off and then trying to develop it at a later date without being encumbered by the contract that they had with your client. At least that's the inference that can be drawn.

The way this contract is worded it doesn't set a measure of damges for failing to attempt, and it doesn't set a measure of damages for unsuccessful performance. I'm not satisfied -- I cannot find at this time that damages for successful performance are the measure of damages for failing to attempt to rezone prior to divesting themselves of the property; notwithstanding that between the lines that suggests itself of activity on the part of parties which is less than exemplary. It appears to me to be a poorly worded contract.

****

(TR 58) THE COURT: Well, it's not an unusual situation for a person not being able to prevail because they are relying on their rights in the contract that doesn't protect their rights. I'm afraid this is what the situation is on the part of the Plaintiffs.

Obviously there is a contract and obviously there is a breach, but I can't find that the measure of damages for failing to attempt to rezone are those that would have attached had rezoning been attempted and been

successful. To say that the parties simply because there was successful rezoning in 1976, that that is the proper measure of damages, I can't make that leap. I simply can't do it. It is too speculative, it is too attenuated and it is making certain assumptions that I do not believe that I'm either obliged

(TR 59) or able to make.

I think the obvious result is that the Defendant is able then to slide out of something that he shouldn't be able to slide out of because obviously he had the obligation to attempt to rezone and I've already found that; that he failed to do that and he breached the contract.

The contract is not worded to protect the Plaintiff as to the recitation of damages, what are the damages should there be a failure to attempt to rezone or should there be an attempt to rezone and it is unsuccessful. I can't make the leap and say it's got to be the same as if performance had been successful as it was three years later. I can't do it.

Now, if you can give me some other measure of damages --

MS. NAUMANN: Well, Your Honor, there has been a breach of the contract. They are entitled to recover for what damages they have sustained. The damage they have sustained is not getting the consideration that they bargained for in that contract.

TRANSCRIPT, August 3, 1983

THE COURT: Well, you are going to have to show me another measure of damages. The result is obviously offensive to fairness, but I can't speculate and assume

(TR 60) which I think the measure of damages is forcing me to do.

MS. NAUMANN: ....

It would be unreasonable to assume that property is not going to be developed, that 225 units are not going to be developed out of that property.

(TR 61) THE COURT: Absolutely, but in what fashion, with what density?

MS. NAUMANN: 225 is the maximum density that is allowed under that plan.

THE COURT: But it was as subsequent development showed, but in a contemplation of the parties here, who knows?

MS. NAUMANN: Whatever density was allowed that's for sure. They were obviously going for the maximum number possible.

THE COURT: A higher density than currently allowed? What was currently allowed at the time? Was it an R-1 equivalent?

MS. NAUMANN: It's in the stipulations, Your Honor. I think it is an RC-1.

THE COURT: So, what if it had been an R-2? He would owe a lot less money.

MS. NAUMANN: But the parties agreed to leave that exact amount open. They agreed that they were not going

to nail down what the amount of future consideration was going to be. It depended on what the county said could be the maximum use available in that rezoning.

****

(TR 62) THE COURT: But the problem that I have is that, first of all, there is no measure -- As I've said before, there is no measure for failing to attempt. There is no measure of damages for failing to attempt to rezone, and there is no measure for unsuccessfully attempting to rezone. So, you are saying that I have to assume that had they attempted to rezone that it would have been successful because it was successful three years later and that's just too much.

At this point in time I cannot find that the measure of damages is set out with any specificity. I think it's unfortunate from the Plaintiff's point of view that they are not protected contractually by a definite measure of damages that the Court can apply in this case. It's an obvious situation where the Plaintiff is no, I don't believe, protected by the document which purports to protect them.

MS. NAUMANN: Your Honor, as to the anticipatory repudiation, I believe the measure of damages moves up in effect the time of performance. I would argue basically the same facts I presented to the Court that the full amount sued for is presently due. I understand that you have --

THE COURT: It's the same problem, though, with both. The problem I'm finding lies with Count No. 1 also would lie with Count No. 3 necessarily.

****

(TR 64) THE COURT: Well, at this time it is my finding that damages are not capable of proof to any degree to be able to be set by the Court for the reasons stated several times.

If the Plaintiff wants to file authorities supporting the fact that nominal damages lie or would lie in this case and that, therefore, the Court should consider the awarding of nominal damages and further consider the awarding of punitive damages, I will be happy to entertain that as a motion to reconsider. But at this time based on the failing to show the damages for the attempt to rezone,

(TR 65) the fact that they are speculative in nature, and as my finding further required the Court to go forward three years in time to find that because rezoning was successful at that time it would have been successful had they attempted to rezone during the time that they owned the property.

The judgment is entered for the Defendants leaving the Plaintiff to file for reconsideration on the issue of nominal damages and any punitive damages that may flow if and when the Court were to award nominal damages. I need authority with regard to the issue of nominal damages if

you want to file for reconsideration on that and, also, what you have to show the standard of law with regard to punitive damages.

The judgment for the Defendant having been entered, I'll ask counsel for the Defendant to draw up an order. If you do present a motion to reconsider on the issue of the nominal damages, then, of course, counsel for the Defendant would have to reply prior to them appearing at the Friday motion or an extended time motion should that be necessary.

****

ORDER

THIS MATTER came before this Court on September 1, 1982, upon Plaintiff's Motion for reconsideration of the Court's Order of August 19, 1982, and

WHEREAS, after hearing argument of counsel for both parties on the Motion to Reconsider, and reviewing this matter, it appearing to the Court that the Motion is proper as to the award of nominal damages, it is accordingly hereby

ORDERED that judgment is entered for the Plaintiff in the sum of $100.00 as nominal damages; and it is further

ORDERED that the transcripts of the hearings in this matter are a part of the record.

ENTERED this 12 day of October, 1982, nunc pro tunc September 9, 1982.

(Sgd) Barbara M. Keenan, Judge

Barbara M. Keenan, Judge

SEEN AND OBJECTED TO AS TO THE COURT'S DENIAL OF AN AWARD OF ACTUAL, COMPENSATORY AND PUNITIVE DAMGES:

MALONEY AND CHESS
3900 University Dr.
Fairfax, Va. 22030

By: JNaumann
Jan Naumann
Counsel for Plaintiff

SEEN AND OBJECTED TO AS TO THE COURT'S AWARD OF JUDGMENT AND NOMINAL DAMAGES TO PLAINTIFF:

Robert Haas
Counsel for Defendant

LAW OFFICES
MALONEY AND CHESS
3900 UNIVERSITY DRIVE
FAIRFAX, VIRGINIA 22030

A COPY TESTE:

TRANSCRIPT, September 1, 1982

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(TR 3) P R O C E E D I N G S

THE COURT: Crist v. Metropolitan Mortgage Fund. Swear the reporter, please.

(The Court Reporter is sworn.)

THE COURT: Mr. Durette [sic], since you weren't here at the original trial, let me tell you what my basic concern was, sir. That was the failure to attempt to rezone, I felt that any damages that the Court could assign to the breach of contract would have to be speculative because I found at the time that I could not find that the zoning would have been successful or the application would have been successful at the time. She said that nominal damages could lie anyway.

I felt that if the Court's determination was that the damages were speculative, that is, I wouldn't know whether or not the rezoning was successful. I couldn't find that from the evidence. How could I award any damages. Where in the law, I wanted her to find for me, provided that nominal damages could be found when any damages were speculative as far as I could find. I think she was saying -- Well, she had authority that nominal damages could be awarded even though the specific damages sought were speculative or were found to be speculative by

(TR 4) the Court. I realize that your memorandum does not proceed with this question, but that is the direction I was thinking of.

TRANSCRIPT, September 1, 1982

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(TR 6) MR. DURETTE [sic]: ...

We cited a number of cases in the memorandum to show that the plaintiff does not have to prove damages with mathematical certainty, with reasonable certainty.

I believe that your ruling of the speculative nature of the damages would be correct if you had under this particular contract --

THE COURT: If you have an arms-length transfer between two parties?

MR. DURETTE [sic]: Yes, Your Honor. I think your ruling would then be correct, because this contract as you pointed out in the prior hearing may not have been drawn carefully enough to protect the Plaintiff against that type of transaction. If you had different parties and surely if you had a different attorney rendering the advice once the sale had taken place, then it would be speculative as to when the rezoning would have been applied for and whether or not it would have been granted.

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(TR 9) THE COURT: Your basic argument is that because of the same principals and the same attorney, these were the same parties, they in fact later applied for the rezoning and they got it and they, therefore, owe some money?

MR. DURETTE [sic]: Yes, that's it. The only reasonable inference from that is had the transfer of

title not occurred, the same events would have occurred; precisely the same time, precisely the same parties with precisely the same results. The inference from those facts is just as much evidence as the facts themselves. Therefore, we have met our burden of proving what our actual damages are.

THE COURT: Are there any cases that deal with that that you are familiar with? In other words, the transfer of ownership to a different entity having some of the same principals or all of the same principals? That would be something I would be interested in knowing.

MR. DURETTE [sic]: So would we. We were not able to find any cases that I guess even remotely related to that particular aspect. All we could do was find the general cases that -- the United Virginia Bank case which I mentioned ....

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(TR 10) THE COURT: I don't think there is really any position for me to reconsider on the question of nominal damages and punitive damages. I think the real issue here is does the nature of the transaction -- did I give enough consideration to the fact that these were the same principals, it was the same entity, and rezoning was had
(TR 11) through the entity with a different name but the same people controlling it and the same people advising it. I think that is really it.

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THE COURT: The only basis for reconsideration. I don't think that if I find the damages -- as I found the damages were speculative, then I should go ahead and take a nominal damage and assign punitive. I think that is really patchwork. I think you are pretty much agreeing with that even though you cannot do that on the record.

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(TR 21) MR. HAAS: Your Honor, if you will address yourself to the stipulations filed in Court, you will note that they contracted with Metropolitan Mortgage Fund, Inc. It is true that the principals of -- R. Marshall and Robert A. Fitton were 50 percent owners of the entity. Mr. George Travers was the secretary of that corporation, but did not have a partnership interest therein or an ownership interest.

The conveyance on June 15, 1973, was to a

(TR 22) limited partnership and Robert Fitton and Marshall Fitton were joint owners of that partnership. They, in addition to George Travers, owned 50 percent of the partnership. They did not even own a controlling interest in that partnership that was formed.

The reason they formed it was to liquidate the property in response to a Federal Reserve divestiture order.

Again, obviously this was a voluntary merger that was entered into based on a contract between the parties dated August 30, 1972.

However, when they entered that contract, they had no intention of divesting the property at that time. They didn't know that that would be any of the terms of a Federal Reserve Board approval which was required of the merger. In fact, that contract, which is Exhibit E to the stipulations, gave no right to the Fittons to terminate or withdraw from the contract if such conditions were imposed on it as a result of Federal Reserve approval. The acquiring bank did have that option. The sellers did not.

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(TR 47) ... They say they didn't have a choice. They had a choice. They could have breached the contract for the merger if they didn't have an exempt clause or a contingency in that contract. I haven't read it. I would just simply take the representation that they didn't have a contingency is accurate. They could have breached that one. Those chose not to breach that one. They chose to breach this one. They did so intentionally and willfully and that was a conscious disregard for the Plaintiff's rights.

THE COURT: How would that be different from any other breach of contract?

MR. DURETTE [sic]: Well, lots of breaches of contracts are unintentional.

THE COURT: But every intentional breach doesn't give rise to punitive damages, does it?

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MR. DURETTE [sic]: I think that an intentional breach of contract, a deliberate and intentional breach of contract, rises to the standard of a conscious disregard of the Plaintiff's rights.

I think that it can give rise to an award of punitive damages. I think that is within the sound discretion of the Court, but I think it can. Yes, I do.

(TR 48) I think an intentional breach of a contract as distinguished from an unintentional one, an intentional breach of contract depending upon the facts and circumstances of that particular --

THE COURT: You are not saying that every one --

MR. DURETTE [sic]: No, ma'am, I am not saying that everyone does. I think that is a judgment call on the part of the trier of facts.

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## ASSIGNMENTS OF ERROR

1. The trial court erred in not considering the reasonable and legitimate inferences to be drawn from the evidence presented.
2. The trial court erred in not awarding Mr. Crist actual damages.
3. The trial court erred in not awarding Mr. Crist punitive damages.
4. The trial court erred in not granting Mr. Crist's Motion to Reconsider its denial of an award of actual and punitive damages to Mr. Crist.