265VA26

In The
Supreme Court of Virginia

SUPREME COURT OF VIRGINIA
CLERK'S OFFICE
RECEIVED
JUN 03 2002
RICHMOND, VIRGINIA

RECORD NO. 020101

FRANK J. OTTOFARO, *et al.*,

Appellants,

v.

CITY OF HAMPTON,

Appellee.

APPENDIX

Joseph T. Waldo
Joseph L. Lyle, Jr.
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(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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City of Hampton

April 11, 2000

Part 4;
CL00-367

Jim Bohnaker, Clerk
Hampton Circuit Court
Post Office Box 40
Hampton, Va.

Re: Right of Way - Property of Frank J.Ottofaro And Dora J.Ottofaro

Dear Mr. Bohnaker:

The City of Hampton has deemed it necessary to enter upon and take possession of certain land, or interest therein owned in whole or in part by Frank J.Ottofaro and Dora J. Ottofaro, for construction, reconstruction, alteration or maintenance of a new arterial road network between Pine Chapel Road and West Mercury Boulevard, Hampton, Virginia.

Enclosed is a Certificate of Taking issued by the City of Hampton, Virginia, for the amount of $164,000.00 to be recorded and processed in accordance with the provisions of Title 33.1, Chapter 1, Article 7, of the 1950 Code of Virginia, as amended. Title to the land described therein should be recorded in the name of the City of Hampton, Virginia.

A check for $17.00 is enclosed to cover recordation fees. Also enclosed for deposit with the Court is a City check in the amount of $164,000.00 which covers the estimated value of the land or interest therein, required. Please return the recorded instrument for our files.

Sincerely,

City of Hampton, Virginia

By: _____
George E. Wallace, City Manager

By: _____
Paul Burton, City Attorney

SJA:pr/clms
Encls.
pc: Frank J. Ottofaro
Dora J. Ottofaro
John Bates
Kathy Grook

Certificate of Take filed 4-11-00 at 11:10 as Instrument # 5555 in the deed records.

OFFICE OF THE CITY ATTORNEY (757)727-6127
22 LINCOLN STREET, HAMPTON, VIRGINIA 23669

"Oldest Continuous English-Speaking Settlement in America -1610"

VIRGINIA

IN THE CIRCUIT COURT OF THE CITY OF HAMPTON, PART IV

CITY OF HAMPTON, Petitioner, v. FRANK J. OTTOFARO Serve: Frank J. Ottofaro 63 Wheatland Drive Hampton, VA 23666 and DORA J. OTTOFARO Serve: Dora J. Ottofaro 63 Wheatland Drive Hampton, VA 23666 and All that parcel of land, together with all improvements thereon, containing approximately .43 acres more or less and identified as Tax Parcel No. 3T023, lying and being in the City of Hampton, VA and All that parcel of land, together with all improvements thereon, containing approximately .31 acres more or less and identified as Tax Parcel 3T024, lying and being in the City of Hampton, VA Defendants.	At Law No. 00-367

PETITION IN CONDEMNATION

Petitioner, City of Hampton, respectfully states as follows:

1. Pursuant to its lawful powers under the Charter of the City of Hampton and Title 15.2, ch. 19, art. 3 of the Code of Virginia, the City Council adopted Resolution No. 99-2081 on September 22, 1999 authorizing the acquisition by negotiation or condemnation of certain property for construction of a new arterial road network between Pine Chapel Road and West Mercury Boulevard in the City of Hampton, and other improvements, consistent with the City's Comprehensive Plan. A copy of the Resolution is attached as Exhibit A.

2. Acquisition of such property is necessary for the public purposes of improving the City 's transportation network, providing improved access to underutilized property within the City of Hampton and reducing the traffic flow along the portion of West Queen Street that abuts a residential area.

3. Such property will be acquired for use in the creation and maintenance of streets and roads, and related transportation infrastructure improvements.

4. On or about April 4, 2000 petitioner acquired fee simple interest in the following property:

> PARCEL I:
> All that certain lot, part lot, piece or parcel of land, situate, lying and being in the City of Hampton, Virginia, containing 18,998 square feet or 0.4361 acre, more or less, and being shown and designated as "Plat Showing The Property of Frank J. Ottofaro," being dated March 28, 2000, and prepared by Sumner Consulting, a copy of which plat is attached hereto and by this reference incorporated herein and made a part of this description.

PARCEL II:
All that certain lot, part lot, piece or parcel of land, situate, lying and being in the City of Hampton, Virginia, containing 13,494 square feet or 0.3098 acre, more or less, and being shown and designated as "Plat Showing The Property of Frank J. Ottofaro," being dated March 28, 2000, and prepared by Sumner Consulting, a copy of which plat is attached hereto and by this reference incorporated herein and made a part of this description.

A copy of the plats and a copy of an overview of the area are attached as Exhibit B.

5. Petitioner acquired this interest when it filed a certificate of take and deposit of funds for the property pursuant to Title 33.1, art. 7, ch. 1 of the Code of Virginia on such date.

6. At the time of the filing of the certificate of take and deposit of funds, the defendants were owners thereof.

7. Petitioner made a bona fide but ineffectual effort to acquire from the owners by purchase the property sought to be condemned by means including a written statement to the owners which explained the factual basis for the condemnor's offer.

WHEREFORE, Petitioner prays for judgment that the property or the estate, interest or rights therein be condemned and the title thereto finally vested in the petitioner, and that just compensation for the property taken be ascertained and awarded (1) by commissioners appointed pursuant to applicable statutes, (2) if the defendants have appeared and responded, by agreement of the parties, or (3) if the defendants, upon proper notice, have failed to appear or respond, by the Court upon motion by the Petitioner, and for such other relief as may be lawful and proper.

CITY OF HAMPTON

By: _____
Of Counsel

Paul Burton, City Attorney
Sally James Andrews, Deputy City Attorney
Office of the City Attorney
22 Lincoln Street
Hampton, VA 23669
(757) 727-6127

William G. Broaddus
Robert L. Hodges
McGuire, Woods, Battle & Boothe LLP
One James Center
901 E. Cary Street
Richmond, VA 23219
(804) 775-1000

Counsel for Petitioner, City of Hampton

Filed in the Clerks Office this 31st day of May 2000

049	Writ Tax $	
304	Fee	25.00
219	Library	
229	CHMF	
123	Leg. Aid	
106	Tech. Fee	
206	Sheriff	
509	Others	
	Total	$ 25.00

James P. Bchnaker, Clerk

_____ DC

AFFIDAVIT

1. I, Sally James Andrews, am the Deputy City Attorney for the City of Hampton, Virginia. I make this Affidavit for the purpose of verifying this Petition for Condemnation. I am competent to testify to the facts asserted herein.

2. The facts, allegations and statements asserted in the Petition for Condemnation against Frank J. Ottofaro and Dora J. Ottofaro are true, accurate and complete to the best of my knowledge and belief.

Dated this 31st day of MAY, 2000.

Sally James Andrews

STATE OF VIRGINIA
CITY OF HAMPTON, to-wit:

This day SALLY JAMES ANDREWS personally appeared before me and being duly sworn, says she is the authorized agent for the City of Hampton, Virginia, and that the matters and things stated in the above Petition are true to the best of her knowledge and belief.

Given under my hand this 31st day of May, 2000.

Notary Public

My commission expires: January 31, 2001.

JAMES P. BOHNAKER
CLERK OF THE CIRCUIT COURT
00 MAY 31 PM 5:11
DK# ____ PG# ____
CITY OF HAMPTON, VA.

\\RIC6\4343\City of Hampton\Hampton Condemn 23-24.doc

RESOLUTION AUTHORIZING ACQUISITION BY CONDEMNATION OR NEGOTIATION OF PROPERTY FOR RIGHT-OF-WAY IMPROVEMENTS TO THE INTERSECTION OF WEST QUEEN STREET AND WEST MERCURY BOULEVARD AND OTHER STREET IMPROVEMENTS CONSISTENT WITH THE CITY'S COMPREHENSIVE PLAN.

WHEREAS, the Council of the City of Hampton deems it necessary to acquire property to be used for the construction of improvements to the intersection of West Mercury Boulevard and West Queen Street, for the construction of improvements to the intersection of Pine Chapel Road and West Queen Street; and property acquisition incidental to these named improvements which are consistent with the City's Comprehensive Plan; and

WHEREAS, the Council of the City of Hampton deems it necessary to acquire property to be used for the construction of a new arterial network between Pine Chapel Road and West Mercury Boulevard; and

WHEREAS, the Council of the City of Hampton deems it necessary to acquire property to be used for construction of a connecting road network for this new arterial; and

WHEREAS, construction of the new roadways and improvements to existing roadways will serve a public purpose by improving the City's transportation network; by providing improved access to underutilized property within the City of Hampton; and by reducing the traffic flow along the portion of West Queen Street that abuts a residential area; and

WHEREAS, pursuant to Section 33.1-91 of the Code of Virginia of 1950, as amended, and under the conditions set forth therein, the City is authorized to acquire an entire parcel of land even though only a part thereof is to be utilized for highway purposes.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Hampton, Virginia that it approves and directs the acquisition of the parcels located within the project area

and designated on the attached Exhibit "A" for the public purposes set out above by negotiation or condemnation.

BE IT FURTHER RESOLVED that the City Attorney be and is hereby authorized and directed to institute negotiations and condemnation proceedings as authorized by the Code of Virginia of 1950, as amended, for the acquisition of the necessary rights-of-way (and, within the limitations and conditions of Section 33.1-91 of the Code of Virginia of 1950, as amended, entire tracts upon which such rights-of-way shall be located) from the land owners which are designated on the attached Exhibit "A", but nothing in this resolution shall be construed as preventing negotiation by the City Attorney and/or City Manager for the purchase of any and all of said property at a private sale should the owners there agree to sell at the prices offered.

BE IT FURTHER RESOLVED by the Council of the City of Hampton, Virginia that the City Manager be authorized to file certificates of take in accordance with Article VII of Title 33.1 of the Code of Virginia of 1950, as amended, against the following parcels all located within the project area which are designated on the attached Exhibit "A".

I certify the foregoing to be a true and accurate copy of Resolution 99-2081, adopted at a regular meeting of the City Council of the City of Hampton, Virginia, held September 22, 1999, pertaining to acquisition by condemnation or negotiation of property for right-of-way improvements to the intersection of West Queen Street and West Mercury Boulevard and other street improvements consistent with the City's Comprehensive Plan.

Clerk

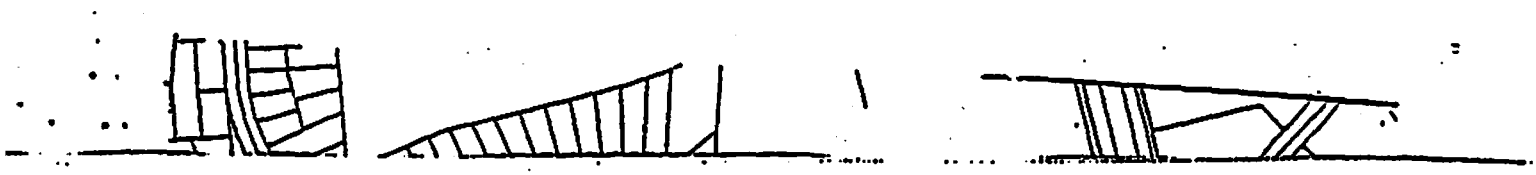


EXHIBIT A

Parcel Number	Property Owner	Total Assessment
2A	Joseph, Edwin A.	$ 228,700
2B	Miller, Augustus C.	$ 492,400
2C, 2, 3, & 4	Williams, Shawn Carlton ETAL	$ 325,700
2D	Bolin, Larry Dale	$ 847,700
5-1	Easter, David Leon	$ 185,800
5-2, 5-3, & 6	NDS Computers Inc.	$ 430,700
14	St. Johns Wood Apts. LP	$ 1,607,900
23 & 24	Ottofaro, Frank J. & Dora J.	$ 74,900
25	Victor, Irwin	$ 63,200
26 & 28	Yarrington, James E. & Lorena H.	$ 86,600
27A-1	Furno, Arietta C.	$ 29,000
27A-2	Mallory, James D.	$ 36,000
27A-3	Davis, F.L. Jr.	$ 37,000

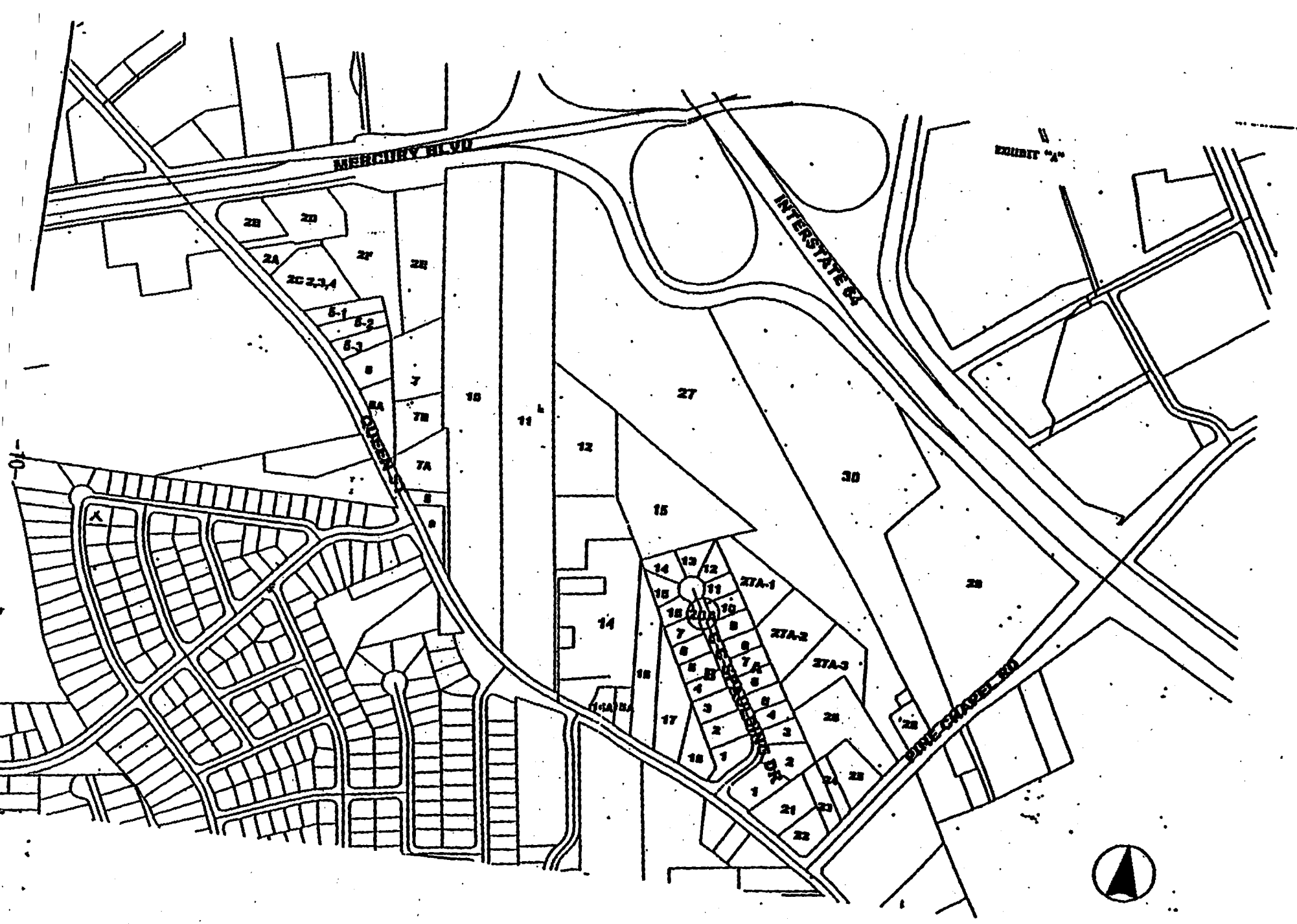
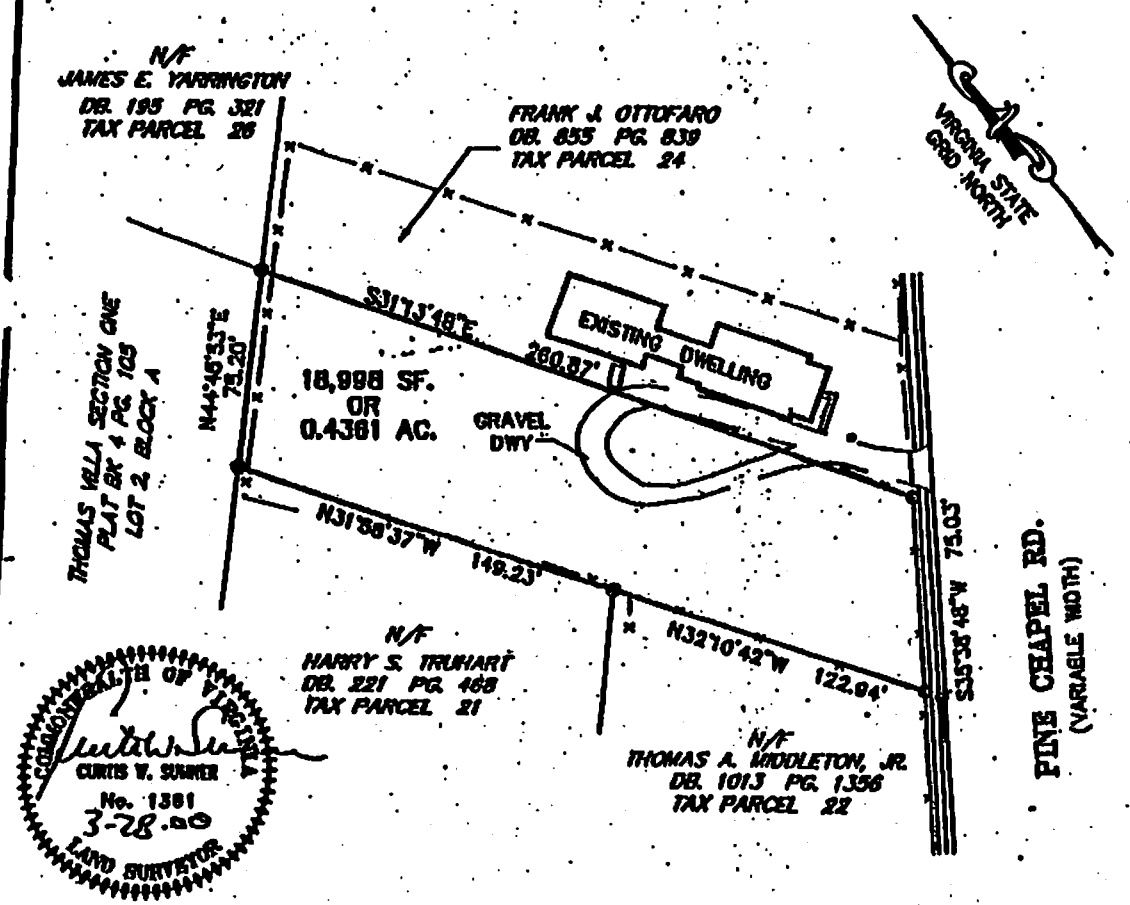


EXHIBIT "A"
MERCURY BLVD
INTERSTATE 64
QUEEN ST
PINE CHAPEL RD
I-70
27
30
15
14
11
12
10
28
17
18
21
22
23
24
25
27A-1
27A-2
27A-3



NOTES

1. NO TITLE REPORT FURNISHED.
2. THE PROPERTY SHOWN HEREON IS LOCATED ON HAMPTON CITY TAX MAP 31 PARCEL 23.
3. THIS PLAT REPRESENTS A CURRENT FIELD SURVEY BY THIS FIRM.
4. TOPOGRAPHIC FEATURE ARE TAKEN FROM PHOTOGRAMMETRIC SURVEY.

PLAT SHOWING
THE PROPERTY OF

FRANK J. OTTOFARO

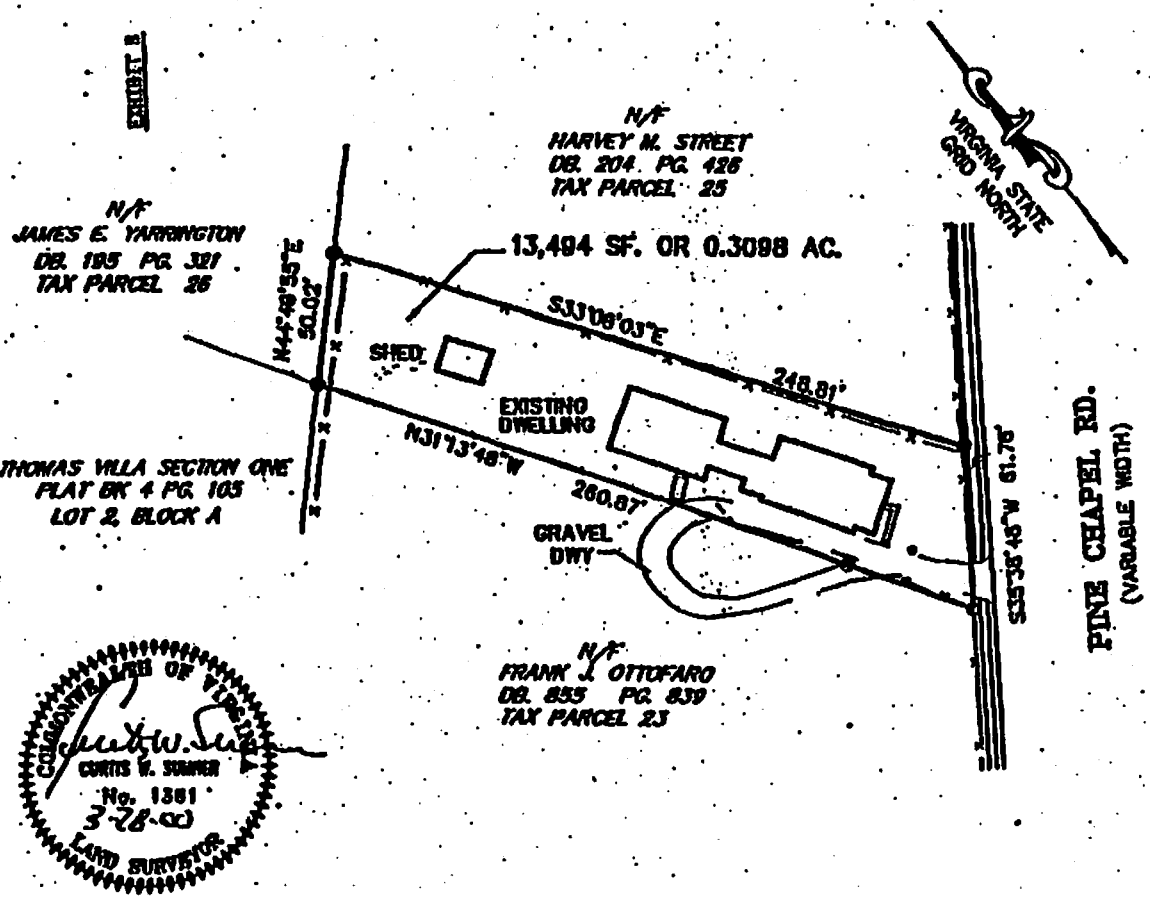
DEED BOOK 855 PAGE 839
CITY OF HAMPTON, VIRGINIA
SCALE: 1" = 50' MARCH 20, 2000

SUMNER CONSULTING
3165 KINROSS CIRCLE
HERNDON, VIRGINIA 22071
(703) 481-9281

SHEET 1 OF 1

23Clean.dwg

EXHIBIT B



COMMONWEALTH OF VIRGINIA
CURTIS W. SUMNER
No. 1381
3-28-00
LAND SURVEYOR

NOTES

1. NO TITLE REPORT FURNISHED.
2. THE PROPERTY SHOWN HEREON IS LOCATED ON HAMPTON CITY TAX MAP 31 PARCEL 24.
3. THIS PLAT REPRESENTS A CURRENT FIELD SURVEY BY THIS FIRM.
4. TOPOGRAPHIC FEATURE ARE TAKEN FROM PHOTOGRAMMETRIC SURVEY.

PLAT SHOWING
THE PROPERTY OF
FRANK J. OTTOFARO
DEED BOOK 866 PAGE 839
CITY OF HAMPTON, VIRGINIA
SCALE: 1" = 60' MARCH 28, 2000

SUMNER CONSULTING
3156 KINROSS CIRCLE
HERNDON, VIRGINIA 22071
(703) 481-9281

SHEET 1 OF 1

24Clean.dwg

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF HAMPTON, PART IV

CITY OF HAMPTON

Petitioner,

v. At Law No. 00-367

FRANK J. OTTOFARO

and

DORA J. OTTOFARO

ANSWER AND GROUNDS OF DEFENSE TO PETITION IN CONDEMNATION

NOW come the Respondents and property owners, Frank J. Ottofaro and Dora J. Ottofaro, by counsel, and as and for their Answer and Grounds of Defense to the Petition for Condemnation state as follows:

1. The Respondents deny the allegations of paragraph 1 of the Petition. The Petitioner may only use its exercise of the power of eminent domain according to the limitations and restrictions imposed by law and Article I, Section 11 of the Constitution of Virginia. Respondents further assert that the Petitioner's acquisition among other things is excessive and that its Resolution and actions have failed to establish the prerequisites for acquiring the Respondents' entire tract of land. Further in the construction of the statutes conferring the power of eminent domain

THE LAW FIRM OF
VALDO & LYLE
FESSIONAL CORPORATION
EST FREEMASON STREET
RFOLK, VIRGINIA 23510
EPHONE: (757) 622-5812

every reasonable doubt is to be resolved adversely to the right of the power and that the affirmative statutory right to take property by eminent domain must be shown as silence is negation and that unless both the spirit and the letter of the statute clearly confer the power of eminent domain it cannot be exercised.

2. The Petitioner has failed to comply with the provisions of Va. Code §33.1-91 and is not entitled to acquire the Respondents' entire parcel of land.

3. The Respondents deny the allegations contained in paragraph 2, and assert that the City Council of the City of Hampton acted arbitrarily and capriciously in adopting Resolution No. 99-2081 authorizing the acquisition of the Respondents' land. Based on information and belief, at the time of adopting Resolution No. 99-2081 the City had never determined the location of the alleged proposed road project.

4. The City seeks to acquire property which is clearly in excess of its lawful purposes, and plans to make such excess property available to private developers, contrary to law. Under these circumstances, acquisition of property by "quick take" pursuant to Va. Code § 33.1-89 et. seq. is not authorized.

5. Respondents deny the allegation of paragraph 3 for the above stated reasons.

THE LAW FIRM OF
WALDO & LYLE
PROFESSIONAL CORPORATION
WEST FREEMASON STREET
NORFOLK, VIRGINIA 23510
TELEPHONE: (757) 622-5812

6. Respondents deny the allegation of paragraph 4 that the Petitioner has lawfully acquired fee simple interest in their property.

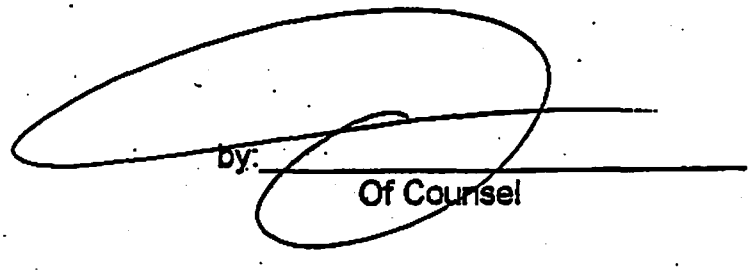
7. Respondents deny the allegation of paragraph 5 that Petitioner has properly acquired fee interest in their property for the above stated reasons.

8. Respondents admit the allegation contained in paragraph 6.

9. Respondents deny that a bona fide offer was made.

WHEREFORE, the Respondents and property owners, Frank J. Ottofaro and Dora J. Ottofaro, respectfully pray that the Petition in Condemnation be dismissed against it, with prejudice, that all relief prayed for by the City of Hampton be denied, and that the Respondents recover their costs and attorney's fees expended in this behalf.

FRANK J. OTTOFARO and
DORA J. OTTOFARO



by: _____
Of Counsel

THE LAW FIRM OF
ALDO & LYLE
FESSIONAL CORPORATION
EST FREEMASON STREET
RFOLK, VIRGINIA 23510
EPHONE: (757) 622-5812

Joseph T. Waldo, Esquire
VSB#: 17738
Joseph L. Lyle, Jr.
VSB# 04480
Guion H. Willis, Esquire
VSB# 24269
253 W. Freemason Street
Norfolk, Virginia 23510
(757) 622-5812
Fax: (757) 622-5815

Certificate of Service

I certify that a copy of the foregoing was mailed on the 19 day of June 2000 to:

Sally James Andrews, Esquire
Deputy City Attorney
Office of the City Attorney
22 Lincoln Street
Hampton, VA 23669

Joseph T. Waldo

JAMES P. BARKER
CLERK OF COURT
00 JUN 20 AM 11:30
BOOK # ____ PAGE # ____
CITY OF HAMPTON, VA.

THE LAW FIRM OF
WALDO & LYLE
PROFESSIONAL CORPORATION
1 WEST FREEMASON STREET
NORFOLK, VIRGINIA 23510
TELEPHONE: (757) 622-5812

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF HAMPTON, PART IV

CITY OF HAMPTON,

Petitioner,

v. At Law No.: 00-367

FRANK J. OTTOFARO

-and-

DORA J. OTTOFARO, et al.

Respondent.

CITY OF HAMPTON, VA.
00 DEC 12 PM 1:13

BRIEF IN SUPPORT OF MOTION TO STAY DEMOLITION PENDING HEARING ON DEFENSES

NOW COME the Respondents, Frank J. Ottofaro and Dora J. Ottofaro (the "Ottofaros"), by counsel, and in support of their Motion filed herein do hereby offer the following:

STATEMENT OF FACTS

The Hampton City Council on September 22, 1999 adopted Resolution No. 99-2081 (the "Resolution") authorizing the City of Hampton (the "City") to acquire by eminent domain property belonging to the Ottofaros and others for construction of a new arterial road between Pine Chapel Road and West Mercury Boulevard in the City of Hampton. On or about May 31, 2000, the City of Hampton filed a Petition for Condemnation against the Ottofaro property for the stated public purpose of improving the City's transportation network along West Queen Street. The City has proceeded against the Ottofaro property by means of quick-take pursuant to authority granted by its Charter and Title 33 of the Virginia Code. The City seeks to acquire in their entirety two

parcels belonging to the Ottofaros pursuant to Virginia Code § 33.1-91, despite the fact that only a portion of each parcel actually may be used for the road improvements. The City did not identify the location of the road to be constructed in its Resolution, nor did it attach to the Resolution a map, plat, drawing or plan showing the proposed road.

The City also did not state in its Petition for Condemnation that the Ottofaro property is being acquired as part of an overall retail development agreement between the Industrial Development Authority of the City of Hampton ("IDA") and Hampton Roads Associates, L.L.C., managed by Cordish Hampton Roads Investors, L.L.C., and its principal, David S. Cordish (herein, "Cordish"). See Development Agreement attached hereto as Exhibit 1. By Resolution dated May 13, 1998, the City authorized a development agreement with Robert Brown & Associates, Inc. ("Brown"), predecessor to Cordish, for the development of property bounded by Mercury Boulevard, West Queen Street, Pine Chapel Road, and Mercury Boulevard. See Resolution attached hereto as Exhibit 2 . This area included the Ottofaro properties, among others. The actual development agreement with Cordish was dated November 18, 1999 once Cordish replaced Brown as the developer. Pursuant to Article VII of the Development Agreement, the private developer agreed to attempt to acquire all of the properties for the development project, including road development parcels. If the developer was unable to acquire the properties, it would direct the City to institute condemnation proceedings and be subject to a corresponding reduction in its IDA allowance for the development. Significantly, the Development Agreement required that the City would only condemn those parcels which were necessary for the road improvements upon a direct showing of public purpose and need. See Development Agreement Article 7.1. If the developer was

unable to acquire title to the road improvement parcels, *and upon delivery to the IDA of engineering drawings approved by the City in detail sufficient for the purpose of eminent domain proceedings*, the IDA would cause the City to acquire the disputed parcels by condemnation, including the quick take provisions of Title 33. See Redevelopment Agreement Article 7.1 (emphasis added). This arrangement was first documented in the Proposed Terms of the development agreement with Brown. See Exhibit 3 attached hereto. Page 6 of the Proposed Terms stated that to the extent that the developer has not acquired title to portions of the Property that will be located within the right-of-way of the Road Improvements, the City shall acquire such portions pursuant to eminent domain. All acquisition costs incurred by the City shall reduce the $4,000,000.00 in Public Purpose Funds available to the developer for right-of-way acquisition and road improvements. The Proposed Terms further stated that the developer and City would work in conjunction with each other to select contractors for the road improvements, and that the developer would construct the road improvements. Exhibit 3, at p. 7.

The terms of the development project with Brown, and then Cordish, particularly concerning the road, were questionable from the outset. In a memorandum dated July 8, 1998, from a staff member of the Department of Retail Development to George Wallace, City Manager, the staff member answered the question of why the I-64 retail project recommended a road improvement. The unknown staff member, "June", cryptically wrote in response,

> "The reason given in the plan is to move traffic and relieve congestion. See attached explanation in the plan from June 8, 1994. Pat Thomas suggested that we not elaborate past what's stated in the attached section from the plan." See Exhibit 4 attached hereto.

Two weeks later, in a memorandum dated July 24, 1998, from George Wallace to Members of the City Council, Wallace stated that the developer will build the road improvements for the project, however, in response to the frequently asked question of why the City needed to pay for the roads of the private project, Wallace wrote,

> "This is a redevelopment project which requires the assemblage of many properties. The cost of the property makes it unfeasible for the developer to pay for the roads." See Exhibit 5 attached hereto, at p. 2.

In a Confidential memo outlining meetings between IDA officials and Members of Council on March 30 & 31, 1999, the memo stated that significant deal terms had changed from the original Brown agreement. According to the confidential memo, Cordish would now be the developer, and quite significantly, "*roads may be private rather than public*." See Exhibit 6, at page 2. (emphasis added). In fact, in an intervening petition filed in a companion case on the Hunsucker property taken for road improvements in the project area, Cordish has asserted that any interest in the property which is the subject of the condemnation belonged to him. See Petition for Leave to Intervene, ¶ 4, attached hereto as Exhibit 7. Cordish made this assertion after failed efforts to acquire the Hunsucker property and after directing the IDA to condemn the property for road improvement. See March 2, 2000 letter attached hereto as Exhibit 8. Cordish similarly directed the condemnation of the Ottofaro parcels by "quick take" in a letter dated March 3, 2000. See March 3, 2000 letter attached hereto as Exhibit 9. Cordish has not intervened in this proceeding, but consistent with his assertion in the Hunsucker case the Ottofaro interest being condemned would be his as well if his assertions prove to be true.

On a separate parcel in the project area, the owner Edwin Joseph on July 29, 1999,

wrote a letter to George Wallace complaining about the acquisition tactics of the former developer, Brown, and the City. According to Joseph, he initially was told that his property could not be condemned for private use. However, when he objected to the price offered by Brown, he was told that the City could move Queen Street so that they would have a reason to condemn his property. See Exhibit 10 attached hereto. Two months later, at the meeting of City Council to pass the Resolution condemning the Ottofaro property, among others, Councilman Kearney echoed the suspicion that the road project had in fact been moved to condemn property for the private project. See Excerpts of September 22, 1999 Council Meeting, attached hereto as Exhibit 11. According to the minutes,

> "Councilmember Kearney stated his belief that the power of condemnation is one of the strongest powers the government has and he is concerned that the resolution as written provides a very broad tool to be used without restraint. He commented as an elected official and a citizen he is bothered that the City is being used to force property owners to sell their property. He stated the road configuration is no longer as originally proposed and he believes the roadway may have been reconfigured to go through properties thus allowing the use of condemnation. Previously, only two properties on the left quadrant were to be affected and the new road configuration impacts 16 properties. He stated many years ago the City bought one section in the middle of the affected area to allow the City to control the property. Council is now being told the power of condemnation must be used to ensure the project will go through. Further, Council had been told that those residents of C.C. Spaulding who did not wish to move, could remain. He believes the new road configuration will go through that property. He stated if the venture is to be a private enterprise, then the developers should have the responsibility for acquisition of the properties."

The Resolution that passed that night included the Ottofaro parcels in a group of property to be acquired by eminent domain for road construction purposes. Property belonging to Edwin Joseph was also included in the Resolution. The Resolution did not

specify the road route or state why each property to be acquired was needed in its entirety. The Agenda Review Planning sheet presented to Council with the Resolution clearly indicated that the condemnation resolution was tied to the Cordish project. According to the Agenda sheet prepared by Assistant City Attorney Sally James Andrews,

> "The City of Hampton agreed to coordinate with the developer acquisition of property and if the developer was not able to acquire the property which would be located with the public rights-of-way of the road improvements, the City would acquire such property pursuant to eminent domain proceedings or negotiated agreement. Although the developer has under control a number of the properties both affected and not affected by the roadway it is now necessary to move forward with the acquisition of the remainder of the property necessary for the construction, alteration and improvements of the road network." See Agenda Review and Resolution attached hereto as Exhibit 12.

The road project has changed repeatedly both before and after the Resolution. In a diagram prepared prior to the date of the Resolution, a proposed road is shown entering the project area from Pine Chapel Road to the north of the Ottofaro parcels. See Exhibit 13 attached hereto. The proposed road does not touch the Ottofaro property. In a series of site plan options prepared for Brown, the original developer, the proposed road does not touch the Ottofaro property. See Exhibit 14 attached hereto. Not until a road plan dated June 14, 2000, after the Resolution authorizing the taking, does a plan show the road affecting the Ottofaro property. See Exhibit 15 attached hereto.

The Ottofaros believe that the overwhelming evidence indicates that their property is being taken for the private Cordish development, and not for the pretextual public use stated in the Petition for Condemnation. The Ottofaros assert that the Development Plan between the City and Cordish renders unlawful the resolution authorizing the condemnation of their property. The Ottofaros proffer that if they are granted a hearing

on their defenses to the condemnation, they will present as evidence the exhibits attached hereto together with oral testimony to demonstrate that the City's effort to acquire their property for a road is nothing more than a pretext to acquire their property for the private benefit of Cordish and his retail development. They further assert that the demolition of their house will constitute irreparable harm and that time is not of the essence for acquisition of their property or for a hearing on their defenses, as evidenced by a letter dated October 23, 2000 from Robert L. Hodges, counsel for the petitioner. In that letter, Mr. Hodges proposes a hearing date as late as February 6, 2001 for whatever proceedings are necessary on the Ottofaro defenses. See October 23, 2000 letter attached hereto as Exhibit 16. The Ottofaro believe that the City should refrain from demolishing their house until such time as this hearing can take place.

DISCUSSION OF LAW

I. Virginia law affords the Ottofaros the remedy of a stay or injunction to prohibit the demolotion of their house pending a hearing on their defenses to the take.

Under Virginia law, injunction is the proper remedy to prevent the taking or damaging of private property for public use without just compensation by one who is invested with the power of eminent domain. Meagher v. Appalchian Electric Power Co., 195 Va. 138, 146, 77 S.E.2d 461, 466 (1953); Nichols v. Central Virginia Power Co., 143 Va. 405, 413-415, 130 S.E. 764 (1925); Painter v. St. Clair, 98 Va: 85, 34 S.E. 989 (1900). Even the case of City of Richmond v. Dervishian, 190 Va. 398, 57 S.E.2d 120 (1950), cited by the City in its brief submitted to the court, stands for the proposition that injunction is a proper remedy where the condemnor has acted in violation of its enabling ordinance or resolution. The City only cites Dervishian for the proposition that a quick-

take statute is constitutional even though it allows property to be taken without notice, prior to a hearing on compensation. The Court in Dervishian held that such a statutory scheme was constitutional and an injunction should not issue to prevent a taking on this ground. However, in Dervishian, the Virginia court nonetheless upheld the temporary injunction issued by the lower court on other grounds, specifically because the authorizing resolution did not contain an estimated amount of the just compensation to be paid the property owner. Dervishian, 190 Va. at 419-20. As stated by the court,

> "Because of these defects in the basic resolution we are of the opinion that the lower court was correct in entering the decree enjoining the institution of condemnation proceedings." Id. at 420 (emphasis added).

In the present case, the Ottofaros do not claim and have not filed as a defense the assertion that the City does not have the constitutional authority to "quick-take" their property pursuant to Charter and Virginia Code. The Ottofaros do not attack this scheme as violative of due process. Rather, the Ottofaros claim other statutory irregularities, and that their property is being taken for a private benefit and not a public use.

In Nichols v. Central Virginia Power Co., 143 Va. 405, 413-415, 130 S.E. 764 (1925) the Supreme Court of Virginia held that injunction was the proper remedy where a condemning authority's declaration of public use was challenged by the owner. In Nichols, the property owner requested that the Central Virginia Power Company be enjoined from condemning its land because the condemnation was not for a public use. The Supreme Court held that the injunction to restrain the company from prosecuting work on the condemned land was proper. The Court in Nichols cited Lewis on Eminent Domain (2d ed.), section 633 for the following proposition:

> "It is now almost universally held that an entry upon private property

> under color of the eminent domain power will be enjoined until the right to make such entry has been perfected by a full compliance with the Constitution and the law." Nichols, 143 Va. at 413.

The Court cited the United States Supreme Court decision in Osborne & Company v. Missouri P. Ry. Co., 147 U.S. 248, 13 S.Ct. 299, 37 L. Ed. 155 for the proposition,

> "Equitable jurisdiction may be involved in view of the inadequacy of the legal remedy where the injury is destructive or of a continuous character, or irreparable in its nature; and the appropriation of private property to public use under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable if, indeed, relief may not be awarded *ex debito justitiae*." Id. at 413-14.

The Court cited earlier Virginia Supreme Court precedent in Manchester Cotton Mills v. Manchester, 25 Gratt. (66 Va.) 825, 828 for the further proposition that,

> "[A] private person who applies for an injunction to restrain a public incorporated company or body of functionaries from entering illegally on his land is not required to make out a case of destructive trespass or irreparable damage. The tendency of such bodies to act oftentimes in an arbitrary manner, and the inability of private persons to contend with them, it is said raises an equity for the proper interference of the court wherever there is the slightest excess of power." Nichols, 143 Va. at 414.

In very strongly worded language, the court in Manchester Cotton Mills proceeded,

> "It is no answer to him to say that for the appropriation of his lot he may recover in ejectment, and for the destruction of his valuable building he may recover in damages. Universal experience demonstrates how ineffectual such a remedy is to afford a just compensation, especially in controversies with a corporation backed by all the appliances of wealth and the influence of public sentiment." Nichols, 143 Va. at 414.

Further, there is nothing in the City of Hampton's Charter or in the procedural manner in which the City has attempted to take the Ottofaro property that would deny the Ottofaros the remedy of a preliminary injunctive relief pending a hearing on their challenge of public use and other defenses. The Hampton City Charter authorizes the City to acquire property by condemnation after adoption of an ordinance directing the

acquisition. Hampton Charter Sec. 2.01.d. As to property for streets, the Charter grants the City the same powers to condemn as are granted to the Commonwealth Transportation Commissioner in Title 33.1 of the Virginia Code. Section 33.1-122 permits the Commonwealth Transportation Commissioner to obtain defeasible title upon recordation of a certificate of take. "The title in the Commonwealth shall be defeasible until the reaching of an agreement between the Commissioner and such owner. . . or the compensation determined by condemnation proceedings as hereinafter provided." Section 33.1-125 allows this certificate to be invalidated upon further proceedings. Further proceedings are to commence in accordance with the procedural provisions of Title 25. See Va. Code § 33.1-132, Va. Code § 15.2-1904. Title 25 permits the landowner to assert defenses to the take. Virginia Code § 25-46.17 states that,

> "If any answer and grounds of defense has been filed objecting to the jurisdiction of the court, the court shall determine such issues or other matters, in controversy, excepting the issue of just compensation . . . and if the court determines all such issues or other matters involving the jurisdiction of the court in favor of the petitioner, the court shall enter an order fixing a date for the trial of the issue of just compensation . . . . "

The court cannot read these statutes in conflict to reach the conclusion that the property owner may not assert defenses in cases involving the "quick-take" afforded to the Transportation Commissioner. Rather, the court should read these statutes in harmony, to reach the result that a landowner can assert defenses in a hearing under Title 25, and that if successful, defeasible title which passes under the Title 33 certificate will revert to the property owner, and that where the authority of the condemnor is challenged, any waste or destruction of the property should be protected under the standards for issuance of a temporary injunction, as discussed in the authorities cited above.

Based upon these authorities, the court is fully authorized and required to issue an injunction where the condemnor is attempting to acquire and demolish property in an unconstitutional manner for a private use. The decision in Manchester Cotton Mills v. Manchester, 25 Gratt. (66 Va.) 825, 828 even states that in an eminent domain case the property owner does not have to make out a further case of irreparable harm to seek injunctive relief. In non-condemnation cases, the standard for obtaining a preliminary injunction does require that the moving party show that it at least has a reasonable likelihood of success on the merits of its argument. Vardell v. Vardell, 225 Va. 351, 302 S.E.2d 41 (1983); Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991); Goldbecker v. Board of Supervisors of Fairfax County, 37 Va. Cir. 584 (Va. Cir. Ct. 1994). Therefore, the Ottofaros offer the following documents and authorities to show that they have at least a reasonable likelihood of success on the merits of their defenses, and ask the court to protect them accordingly.

II. The Ottafaros have a reasonable likelihood of prevailing on the merits of their defenses because the City of Hampton failed to designate its road project with the specificity required by the Virginia Code.

"The statutes confirming the power of [eminent domain] are to be strictly construed, and the authority conferred thereby is required to be carefully exercised." Light v. City of Danville, 168 Va. 181, 196, 190 S.E.2d 276, 281 (1937). "The taking of private property, however, is a matter of serious import and is not to be permitted except where the right is plainly conferred and the manner of its exercise has been strictly followed. There must be no doubt or uncertainty about the existence of the power. If it is not plainly conferred it does not exist. . . . It is said that, in the construction of statutes conferring the power of eminent domain, every reasonable doubt is to be solved adversely

to the right; that the affirmative must be shown, as silence is negation; and that unless both the spirit and letter of the statute clearly confer the power, it cannot be exercised." School Board v. Alexander, 126 Va. 407, 412, 413, 101 S.E.349, 351 (1919); City of Richmond v. Carneal, 129 Va. 388, 106 S.E. 403, 406 (1921). "There is no better settled rule of law . .. than this, that statutes which encroach on the personal or property rights of the individual are to be strictly construed, and this is especially the case where it is claimed that the statute delegates to a corporation, whether municipal or private, the right of eminent domain, one of the highest powers of sovereignty pertaining to the State itself, and interfering seriously and oftentimes vexatiously with the ordinary rights of property." Blondell v. Gunter, 118 Va. 11, 13 (1915).

The City cites Virginia Code § 33.1-91 as its authority to acquire the entire two parcels from the Ottofaros. Section 33.1-91 authorizes the condemnor to acquire by eminent domain an entire tract of land whenever a portion is to be utilized, provided that,

> "the remainder of the tract can no longer be utilized for the purpose for which the entire tract is then being utilized, or a portion of a building is to be taken or the cost of removal or relocation of the buildings, or other improvements on the remaining portion, necessitated by the taking, would exceed the cost of destroying such buildings or other improvements, or the highway project will leave the remaining portions without a means of access to a public highway, or whenever in the judgment of the [condemnor] the resulting damages to the remainder of such tract or part thereof lying outside the proposed right-of-way, or the area being acquired for a purpose incidental to the construction, reconstruction or improvement of a public highway will approximate or equal the fair market value of such remaining lands."

These conditions are in accordance with the standards set forth by the Virginia Supreme Court in City of Richmond v. Carneal, 129 Va. 388, 106 S.E. 403 (1921), where the court held unconstitutional an ordinance prohibiting the condemnation of an entire parcel when

only a portion of the land was needed for the road improvement.

While the statute confers authority on the City to acquire an entire parcel when only a portion is needed, it does require the City to make certain determinations as a prerequisite, namely that use or value of the remainder would be frustrated, as required in Carneal. The City concedes in its brief at page three that the conditions of § 33.1-91 must be satisfied. However, there is no allegation in the Petition that the City made these determinations prior to its decision to condemn the entire parcel because there is no evidence in the record that would permit anyone at all to make these determinations. The location of the road improvement simply was not fixed at the time of the September 1999 Resolution authorizing the take, thereby frustrating the City's ability to meet these prerequisites.

Exhibit A attached to the Resolution and to the Petition for Condemnation does not show any proposed road improvement at all. See Exhibit 1 attached hereto. Unlike Carneal where the condemnation resolution and petition included maps and plats showing the layout of the road, there was absolutely no effort made to identify the road location in this case. Nor is there any evidence that Cordish provided the City with the engineering diagrams required by Article 7 of his agreement so that the City could make these legal determinations on public use of the entire tracts. The Resolution itself makes no finding on the need to acquire the entire parcel but merely cites § 33.1-91 as its authority to acquire the entire parcel. The Resolution states in a whereas clause that "pursuant to Section 33.1-91 of the Code of Virginia of 1950, as amended, and *under the conditions set forth therein*, the City is authorized to acquire an entire parcel of land even though only a part thereof is to be utilized for highway purposes." (emphasis added). While

recognizing the existence of conditions as set forth within the statute, the Council nonetheless made no review or determination of those conditions to necessitate its acquisition of the entire two tracts. Because the road location was not yet ascertained and Cordish did not provide engineering drawings, the City **could not** have made the necessary considerations prior to its decision to condemn the entire parcel. For this reason alone, the Petition for Condemnation has failed to state a public need for the entire two tracts, and therefore, must fail.

III. The Ottofaros have a reasonable likelihood of prevailing on the merits of their defenses because the City of Hampton has failed to state a public use that is fixed and definite as required by Virginia law.

In addition to the statutory prerequisites of Virginia Code § 33.1-91, Constitutional considerations require that the City specify a public need that is both fixed and definite. "A use to be public must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of enjoyment must be within control of the State, independent of the rights of the private owner of the property appropriated to the use." Nichols v. Central Va. Power Co., 143 Va. 405, 415-416, 130 S.E. 764 (1925). For a use to be public, it must be fixed and definite. Fallsbury v. Alexander, 101 Va. 98, 106, 43 S.E. 194 (1903). The use which the public is to have of the property or the manner in which the public is to be benefited by the use of it must be fixed and definite; it may not be vague, indefinite, nor uncertain. Id.

In the circuit court opinion of Carl v. City of Richmond, 11 Va. Cir. 100 (Richmond 1987), Judge Duling sitting for the Circuit Court of the City of Richmond invalidated an attempted take by the City of Richmond for a Visitor Orientation Center because the stated public use was not fixed and definite. There, the City of Richmond

passed an ordinance declaring a public necessity for the acquisition of seventy-five parcels of land for a visitor center complex, which was to include incidental facilities such as a gas station and gift shop. The City argued that its declaration of public necessity of the property foreclosed the issue of review to the court. The court disagreed, citing a law review article which noted the role of state courts to invalidate takings and "provide a brake, when necessary, on the natural tendency of government to overreach." Id. at 103. According to the court, the purpose of this system of checks and balances would be thwarted if the city were allowed to first declare a public need and then satisfy the constitutional requirement of public use and purpose by its own declaration. Id.

In invalidating the ordinance authorizing the condemnation for the visitor center, the court stated that a governing body cannot seize private property and turn it over to another on vague grounds of public interest. "The use which the public is to have of the property or the manner in which the public is to be benefited by the use of it must be fixed and definite; it may not be vague, indefinite, nor uncertain." Id. The court further stated that while it could not expect the City to set forth each element of construction and minute detail of its plan, the court could require the uses of the particular elements themselves to be defined. Citing City of Richmond v. Carneal, 129 Va. 388, 106 S.E. 403, 406 (1921). The court found the plans for the visitor center "far from definite." Id. at 105. A member of City Council even testified that certain elements in the project had "not yet been firmly decided upon." Id. Nevertheless, the City sought a blanket condemnation asserting that each parcel was necessary. Id. at 106. According to the court, "Since the elements of the project are so undefined and apparently limitless, the 'public use' . . .does not meet the requirement of 'fixed and definite.'" Id. at 109. The

court concluded that the ordinance authorizing the take unconstitutionally permitted the City to condemn land without a fixed and definite plan of public use for all of the parcels it sought to condemn, and enjoined the City from proceeding with further condemnation proceedings.

In this case, the City has failed to specify a fixed and definite public need because the road location was not fixed at the time of the September 1999 Resolution. It is of no little significance that Cordish never even delivered to the City approved engineering drawings in sufficient detail to show the public necessity for the acquisition of the Ottofaro parcels, as required by the Development Agreement. This failure provides yet another avenue to invalidate the take. There can be no dispute that the public use for the road improvement in relation to the Ottofaro property was never fixed as of the September 1999 Resolution. Whether the taking of the Ottofaro property is for the public use of a road improvement, or for the private benefit of the retail development project, is impossible to determine because the public use was so unfixed and indefinite as of the date of the Resolution authorizing the take.

IV. The Ottofaros have a reasonable likelihood of prevailing on the merits of their defenses because the City of Hampton has failed to state a public use with specificity inasmuch as the City seeks to condemn land for a private benefit in violation of Virginia law.

Even if the City could show that a public use was fixed and definite at the time of the City's Resolution, the public use is so intertwined with the private Cordish development that the taking cannot withstand constitutional scrutiny. Whether a taking under eminent domain is for public use, as well as a City's authority to condemn, falls within the realm of judicial determination and may properly be raised as a defense to a

condemnation action. See Board of Supervisors of Prince William County v. Board of Supervisors of Fairfax County, 206 Va. 730, 735, 146 S.E.2d 234, 238 (1966) (court determined issues regarding county's authority to condemn, whether public use was purpose of taking, and whether county followed statutory requirements). In Light v. City of Danville, 168 Va. 181, 196, 190 S.E. 276, 282 (1937), the court explicitly said, "A defendant may attack on the grounds of lack of constitutional capacity to exercise the power. He may show that the statute conferring the power has not been strictly followed in procedure. He may show any fact tending to prove that the exercise of the power is unauthorized, that the land is not being taken for public use, or that he has not been allowed a just compensation ascertained according to law." In Rudee Inlet Authority v. Bastian, 206 Va. 906, 147 S.E.2d 131 (1966), where the court invalidated a taking for a public marina, the court stated that a declaration that a use is a public one is not conclusive and must be subject to judicial review.

As stated in Nichols v. Central Va. Power Co., 143 Va. 405, 416, 130 S.E. 764, 767 (1925), "A use to be public must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of enjoyment must be within control of the State, independent of the rights of the private owner of the property appropriated to the use. The use of the property cannot be said to be public if it can be gainsaid, denied, or withdrawn by the owner. The public interest must dominate the private gain." (emphasis added).

With regard to streets, the courts have frequently invalidated a taking for a stated public purpose where a private benefit dominates. In City of Richmond v. Carneal, 129 Va. 388, 106 S.E. 403 (1921), the Court found unconstitutional a statute which permitted

a City to take more land than necessary for the street itself, thereby establishing that the taking was not for a public use. In Foster v. Board of Supervisors of Halifax County, 205 Va. 686, 139 S.E.2d 65 (1964), the court held that the county did not have the authority to condemn land of one property owner and establish a private road for the benefit of adjacent property owners. In Boyd v. C.L. Ritter Lumber Co., 119 Va. 348, 89 S.E. 273 (1916), the court held unconstitutional a statute and invalidated an attempt to establish a right of way for a timber mining road, stating that the legislature cannot authorize the taking of private property for private use under any conditions or stipulations. See also Dismal Swamp R.R. Co. v. John L. Roper Lumber Co., 114 Va. 537, 77 S.E. 598 (1913) (invalidating take for private road). In Mumpower v. Housing Authority, 176 Va. 426, 455, 11 S.E.2d 732, 742 (1940), the court held invalid language in a Cooperation Agreement between the City and Housing Authority that required the city to approve land the housing authority deemed necessary for streets and alleys. The court explained, "It is simply inconsistent with the fundamental concepts of a city as a municipal corporation to say that another political subdivision located within its bounds may dictate as to when and where it shall open, close, pave and otherwise deal with public ways within that city." If this power and control over public rights of way cannot be delegated to a housing authority, it certainly cannot be delegated to Cordish without violating the public use/private benefit dichotomy.

The law was further explained in a 1985 Attorney General opinion wherein the Attorney General opined that a county could not condemn property to complete a drive on behalf of a private development firm for access to a country club. 1984-1985 Report of the Attorney General 129. The facts of that case parallel the facts of the instant case in

that the county agreed to condemn the property necessary to complete the drive if the development firm was unable to purchase the right of way. The Attorney General wrote as follows:

> "In the context of mixed private and public uses, the rule has been stated: 'It is difficult at times to observe the line of demarcation between private benefit and public use. When the two are thus so blended, the judicial practice in such cases is to approve the undertaking if it is capable of furthering a public use, and disregard the private benefit as a mere incident.' . . . If, on the other hand, the benefit to the public is only incidental and collateral to a primarily private purpose of a taking, the taking is not for a public use."

The Attorney General declined to opine whether the contemplated use in that case met the public use test on the limited facts. However, on a second question of whether the county could allow private firms to use the county's power of eminent domain to acquire land or easements for the benefit of the development firm, the Attorney General unequivocally answered in the negative.

> "The General Assembly has delegated the power of eminent domain to certain political subdivisions, governmental agencies and public service corporations. In this instance, the power of eminent domain must be exercised in the name of the county through the appropriate action of the board of supervisors. I am not aware of any statute enabling a county to delegate its powers of eminent domain to a private firm to serve private purposes. Accordingly, I answer your question in the negative."

By allowing Cordish to negotiate the purchase and then direct the condemnation of the subject properties in the instant case, the City of Hampton has delegated at least a portion of its eminent domain powers to a private developer, and has run afoul of this prohibition.

In an analogous case, City of Virginia Beach v. Christopoulos Family, Law No. CL99-2811, Judge Padrick sitting for the Circuit Court of the City of Virginia Beach dismissed the City's Petition for Condemnation because it attempted to condemn private property for a private use. See Opinion attached hereto as

Exhibit 17. In that case, the City of Virginia Beach was attempting to condemn private property for a parking garage to be used for a city park as well as a convention hotel. Judge Padrick found that the development agreement between the City and the hotel developer provided the developer too much input and control over the development project. According to the court, its task was to determine whether the developer exercised control over the City's power of eminent domain in the contract. The court found that the developer's use of the property exceeded incidental benefit because the developer dictated how the City would exercise its power over the parking garage situated on land condemned for a public use, and accordingly dismissed the condemnation petition on summary judgment. See Exhibit 17 at page 13.

Cordish is exercising similar control over the present project, making the condemnation resolution unconstitutional. In the present case Cordish not only has control over the road construction, layout, and use, but he also is negotiating for right-of-way purchases, and when unsuccessful, directing the City to condemn on his behalf. See Exhibits 8 & 9. City Attorney Andrews even conceded in her memo to Council that "the developer has under control a number of the properties both affected and not affected by the roadway it is now necessary to move forward with the acquisition of the remainder of the property necessary for the construction, alteration and improvements of the road network." See Agenda Review and Resolution attached hereto as Exhibit 12. This conduct and degree of control far exceeds that exercised by the private developer in the Christopolous case and that of the housing authority in the Mumpower decision. Therefore,

judicial precedent and consistency requires that the court in this case likewise invalidate the take as being for Cordish's private benefit rather than public use.

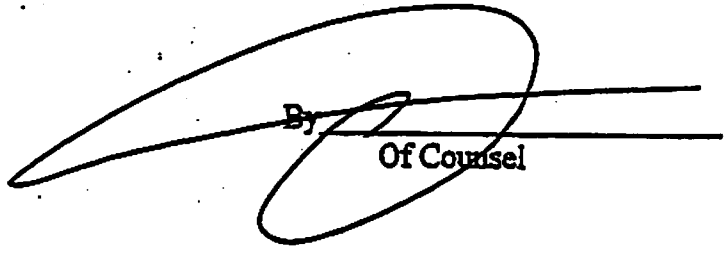
If the Court indeed does find that the City is attempting to acquire the property not for public road needs, but for economic development, redevelopment, or other similar purpose, it must invalidate the Certificate of Take recorded by the City. Title 15, 25, and 33, together with the Hampton City Charter, limit the City's right to acquire property by quick-take to streets and utilities. In a similar situation, Judge Delk sitting for the Circuit Court of the City of Suffolk invalidated a certificate of take recorded by the City of Suffolk. City of Suffolk v. Beamon, Law No. L95-514. According to the finding of the court, the City improperly used quick-take authority to condemn land for a parking lot and the proper remedy was to invalidate the certificate of take and revert title to the property back to the property owner. See Order attached hereto as Exhibit 18. The same remedy is available to the Ottofaros for the quick take filed against them.

CONCLUSION

Based upon the foregoing, the City cannot legally proceed with the condemnation of the Ottofaro property. The Ottofaros should be granted a hearing on the defenses raised in their answer and discussed herein, whereupon the court should dismiss the Petition for Condemnation and invalidate the certificate of take recorded against their property.

Respectfully submitted,

FRANK J. OTTOFARO and
DORA J. OTTOFARO



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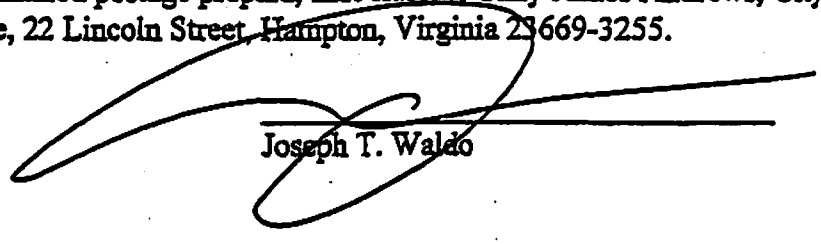
Certificate of Service

I hereby certify this 11th day of December, 2000, that a true copy of the foregoing Brief in Support of Answer and Grounds of Defense was mailed via UPS overnight air to William G. Broaddus, One James Center, 901 East Cary Street, Richmond, Virginia 23219-4030 and mailed postage prepaid, first class, to Sally James Andrews, City Attorney's Office, 22 Lincoln Street, Hampton, Virginia 23669-3255.



Joseph T. Waldo

VIRGINIA

IN THE CIRCUIT COURT OF

THE CITY OF HAMPTON, PART IV

Law No. 00-367

CITY OF HAMPTON,

Petitioner,

v.

FRANK J. OTTOFARO
-and-
DORA J. OTTOFARO, et al.

Respondents.

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APPENDIX

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APPENDIX TO RESPONDENTS' BRIEF IN SUPPORT OF MOTION TO STAY DEMOLITION PENDING HEARING ON DEFENSES

Exhibit	Tab
Cordish Development Agreement	1
City of Hampton Resolution	2
Proposed Terms of Redevelopment Agreement	3
7/8/98 Retail Development Memorandum	4
7/24/98 George Wallace Memorandum to Council	5
Confidential City Memo	6
Cordish Petition to Intervene in Hunsucker Case	7
3/2/00 Cordish Letter	8
3/3/00 Cordish Letter	9
7/29/99 Edwin Joseph Letter to George Wallace	10
9/22/99 Council Minutes	11
9/22/99 Agenda Review and Resolution	12
Road Development Diagram	13
Brown Site Plan for Development	14
6/14/00 Road Plan	15
10/23/00 Letter from Robert Hodges, Esq.	16
Judge Padrick Opinion, Va. Beach v. Christopolous	17
Judge Delk Opinion, Suffolk v. Beamon	18

VIRGINIA

IN THE CIRCUIT COURT
OF THE CITY OF HAMPTON, PART IV

CITY OF HAMPTON, Petitioner, v. FRANK J. OTTOFARO, et al. Defendants.	)	AT LAW NO. 00-367

PETITIONER CITY OF HAMPTON'S RESPONSE TO RESPONDENT'S BRIEF IN SUPPORT OF MOTION TO STAY

Petitioner, City of Hampton, responds to the brief filed on behalf of respondents Frank J. and Dora J. Ottofaro (the Ottofaros) as follows:

Introduction

The Ottofaros' argument is premised upon the following assumptions:

1. No road alignment existed at the time the City Council adopted its authorizing resolution;
2. The City Council's resolution authorizing condemnation was compelled by a private developer; and
3. The road will be primarily for a private purpose.

The Respondents' counsel weaves together a tapestry of allegation, innuendo and statements wrenched from their context to bolster their claims. But exposed to the full light of day, it is apparent that the City has properly exercised its power of eminent domain and should be allowed to proceed in accordance with the applicable statutes.

Statement of Facts

The following facts refute the Ottofaros' argument:

1. The road being built was planned since at least as early as December, 1989, when the Queen Street-Magruder Boulevard Connector was adopted as part of the City's 2010 Comprehensive Plan.
2. The Comprehensive Plan Amendment shows the general alignment of the road, but the specific road plans have been in place since at least August 4, 1999.
3. After the road plans were developed, on September 22, 1999, the City Council adopted a resolution declaring the public use and necessity for acquisition of a number of parcels, including the former Ottofaro property, for the road and related improvements.
4. The City is not a party to the Development Agreement referenced by the Ottofaros in their brief. The Agreement is between the City of Hampton Industrial Development Authority (IDA) and Hampton Roads LLC, a private developer. The Agreement was executed on November 18, 1999, *after* the City's adoption of its resolution authorizing condemnation.
5. The Development Agreement requires the rights of way of the road to be owned by or conveyed to the City.
6. The road, as a public arterial roadway, is open to use by the travelling public without limitation.

The Ottofaros recognize that the City is acting pursuant to a duly adopted Resolution No. 99 – 2081 adopted on September 22, 1999, authorizing the City to acquire by purchase or condemnation specific properties, including the former Ottofaro property, required for the

construction of the planned new arterial road between Pine Chapel Road and West Magruder Boulevard.

Acting pursuant to its authority under its charter and Va. Code § 15.2-1904, the City filed a certificate of take for the Ottofaro property. Under the certificate of take, the City acquires a defeasible title to the property. Va. Code § 33.1-122. The City is authorized to enter the property, take possession and begin construction. Va. Code §§ 33.1- 119, 15.2-1904(A). The Ottofaros concede that the City has the power to take their property. They assert only that the property is being taken for a private benefit and not a public use. Ottofaro Brief, at 8.

The road for which the Ottofaro property has been acquired has been in the City's Comprehensive Plan since 1994. It is being constructed at this time as part of a comprehensive development of the adjacent area. Road construction is now at a point where the contractor needs to remove the improvements on the Ottofaro property to continue construction.

The Legal Standard

The undisputed authorizing resolution filed with the petition in condemnation is sufficient evidence of public use and necessity. Virginia Code § 15.2-1903(c). This removes these questions from judicial review. Hamer v. School Bd. of the City of Chesapeake, 240 Va. 66, 70 n.1, 393 S.E.2d 623, 626 n.1 (1990) (decided under same provision of Title 15.1).

The discretion of city officials in determining location of the road is reviewable by the courts only if it is arbitrarily or capriciously exercised or there is manifest fraud. Hamer, 240 Va. at 71, 393 S.E.2d at 626. If the Ottofaros allege that the City has arbitrarily and capriciously decided upon the location or quantity of property to be taken, the Ottofaros have both the burden of persuasion and the burden of going forward with the evidence. *Id.* at 71-72, 393 S.E.2d at

626. If the Ottofaros establish a *prima facie* case, the burden of going forward with the evidence shifts to the City. The City's burden is then only to produce sufficient evidence to show that the issue is fairly debatable. If the City makes that showing, the Court must conclude that the City's discretion was fairly and honestly exercised. *Id.*

In terms of the evidence to be considered, the Supreme Court has held as follows:

> Although legislative bodies sometimes choose to conduct hearings and investigations in aid of legislation, they do not always do so, and, absent a constitutional or statutory mandate, they are not obligated to do so. 'Courts are not concerned with the motives which actuate members of a legislative body in enacting a law . . . .', and, in the exercise of its legislative discretion, a legislative body is presumed to have been cognizant at the time it acted of all existing facts and circumstances bearing upon the public policies and private rights relating to their action. In determining 'reasonableness', therefore, a court must look not to what a legislative body was told or to what it knew when it acted, but to what it could have known at that time.
>
> Accordingly, we hold that a court reviewing a legislative action must consider all competent evidence adduced at trial concerning facts and circumstances existing at the time the legislative action was taken; if evidence of such facts and circumstances is sufficient to make the reasonableness of the legislative action 'fairly debatable', the court must uphold that action; and whether deliberate or innocent, misrepresentations of facts and circumstances made before a legislative body will not invalidate legislative action if the evidence shows that any facts and circumstances existing at the time it was taken were sufficient to sustain it.

Industrial Dev. Auth. v. La France Cleaners and Laundry Corp., 216 Va. 277, 282, 217 S.E.2d 879, 883 (1975) (internal citations omitted). The Ottofaros' evidence must meet both a quantitative and qualitative test. It must be substantial, relevant, and material. Board of Supervisors v. Williams, 216 Va. 49, 58, 216 S.E.2d 33, ___ (1975).

Whenever a party seeks injunctive relief, he must sue in equity. Wright v. Castles, 232 Va. 218, 222, 348 S.E. 2d 125, 128 (1986). *See also* Carbaugh v. Solem, 225 Va. 310, 314, 302 S.E. 2d 33, 35 (1983) (noting that a court of equity will not issue an injunction if the movant has an adequate remedy at law). The City's petition for condemnation, however, is an action at law. Va. Code Ann. § 25-45.4:1. A court cannot grant equitable relief in an action of law. Grenco Real Estate Inv. Trust v. Nathaniel Greene Dev. Corp., 218 Va. 228, 233, 237 S.E. 2d 107, 111 (1977).

Moreover, to obtain an injunction, the Ottofaros must prove that they would suffer irreparable harm if the injunction were not granted and that they did not have an adequate remedy at law. Wright v. Castles, 232 Va. at 224, 349 S.E.2d at 129. In addition, the court must be satisfied of the movant's equity. *See* Va. Code § 8.01-628. The landowner is also required to enter into bond with surety against damages. Va. Code § 8.01-631.

If the condemning authority is properly exercising its power, the Ottofaros have a constitutional right to just compensation, which is the "full and perfect equivalent" of the property or rights taken. *See* Appalachian Power Co. v. Gorman, 191 a. 344, 354, 61 S.E.2d 33, 38 (1950). This is a quintessential adequate remedy at law.

Argument

1. The Ottofaros are Entitled to Injunctive Relief Only Upon a Proper Showing.

The Ottofaros are not in equity. Even if the Ottofaros did bring the matter properly before the Court, the suggestion in their brief that the burden is somehow on the City turns the law on its head. The City has acquired a defeasible title to the property by operation of law. The law clearly contemplates that the City can enter on the property and begin construction before it ever files a petition in condemnation.

There is no provision in the applicable statutes to stay construction. In fact, under Va. Code § 33.1-119, the condemning authority is " ... authorized to acquire title and to enter upon and take possession of such property ... and proceed with the construction of such highway ..." *See also* Va. Code § 15.2-1904 (" ... a locality may enter upon and take possession of property before the conclusion of condemnation proceedings, using the procedures in §§ 33.1-119 through 33.1-132, for public purposes of streets and roads ..."). In City of Richmond v. Dervishian, 190 Va. 398, 413-14, 57 S.E.2d 120, 127-28 (1950), the Supreme Court held that the City could proceed with construction under quick take authority. The landowner had a remedy in trespass if the taking were later reversed. *Id.* at 414, 57 S.E.2d at 128.

The Ottofaros' reliance on Manchester Cotton Mills v. Manchester, 21 Gratt (66 Va.) 825, 828 (1875), is misplaced. Manchester Cotton Mills did not involve an exercise of the power of eminent domain. It involved action of the town to remove alleged obstructions on the public streets. The plaintiff claimed ownership of the property and the town claimed that the property had been dedicated to the town as a public street. The suit sought to preserve the status quo until the issue of title could be resolved. 25 Gratt. (66 Va.) at 827. The Court also observed that, when the town had complied with the legal requirements for condemnation, the courts are prohibited from interfering by injunction with the town authorities' work on the property acquired. *Id.* at 835.

Nichols v. Central Va. Pwr. Co., 143 Va. 405, 130 S.E. 764 (1925), quoted from the *dicta* in Manchester Cotton Mills, *id.* at 414, 130 S.E. at 766, but ultimately held that an injunction would not lie against condemnation where the purpose for which the property was acquired was a public use. *Id.* at 419, 130 S.E. at 768. Nichols was decided principally as a matter of law. The landowner contended that an electric line being constructed to supply a private power

company, which then supplied power to the public, was a private use. The Court concluded that supply of power was a public use. Here, there can be no question that acquisition for a public street is a public use. *See* City of Richmond v. Carneal, 129 Va. 338, ___, 106 S.E. 403, 405 (1921); Va. Code § 25-232.01.

2. The Ottofaros Have an Adequate Remedy at Law and are Unlikely to Prevail Along the Merits of their Defenses.

The Ottofaros correctly recognize that the City has authority under Virginia Code § 33.1-91 to acquire the entire Ottofaro property if certain conditions are satisfied. Ottofaro Brief, at 12-13. The City clearly satisfies the requirements of § 33.1-91 in at least three respects. First, the acquisition of the road right-of-way will require removal of the building. Second, the use of the property at the time of the take, for residential rental housing, is necessarily changed by removal of the improvements and by the City's acquisition and termination of the lease by filing its certificate of take. Third, the residue of the property will be without access to public road, because the road is a controlled access arterial roadway and Pine Chapel Road will no longer front the former Ottofaro property. In addition, the City believes that the loss of access adversely impacts the value of the residue sufficiently to bring it within still a fourth element of § 33.1-91.

The Ottofaros incorrectly assert that the City did not comply with § 33.1-91 because it lacked sufficient engineering information to make the determination. This is simply incorrect. The City has produced abundant documentation of the road plans and plats of the Ottofaro property showing the exact road configuration that was used. The plans pre-date the adoption of the Resolution. The City has supplied the Ottofaros' counsel with a copy of the August 4, 1999 road plan showing the present road configuration.

The Ottofaros have alleged as fact that their property is being acquired as part of a retail development agreement between the IDA and Hampton Roads Associates LLC. Ottofaro Brief at 2. As the relevant dates show, the Development Agreement cited by the Ottofaros was not executed until after the Resolution authorizing condemnation of the property. Moreover, the City is not a party to the Development Agreement, and so the Agreement imposes no binding obligations of any kind on the City.

In any event, the City's resolution is sufficient evidence on the issues of public use and necessity as a matter of law. Va. Code § 15.2-1903(c). Carl v. City of Richmond, 11 Va. Cir. 100 (1987), asserted a continuing power of judicial review, but its holding cannot be sustained in light of the Supreme Court's later decision in Hamer and recodification of the statute in 1997.[1]

In addition, the Ottofaros misconstrue the provisions of the Development Agreement, to which the City is not a party. *See* Ottofaro Brief at 2-3 and Ex. 1. Under Article 7 of the Development Agreement, the private developer agreed with the IDA to attempt to acquire all of the properties for the development, including "Road Development Parcels", which will be conveyed to the City. Ex. 1, § 7.1. If the developer were unable to acquire those properties it would notify the IDA. *Id.* The IDA agreed to use its best efforts to cause the City to acquire the additional parcels required for road improvements by use of its power of eminent domain. *Id.* The City was not a party to the Development Agreement as the Ottofaros claim. *See* Brief at 6. The Agreement explicitly recognized, and the Developer acknowledged, that the IDA's obligation to use its best effort was subject to the City's independent judgement as to public use and necessity. Ex. 1, § 7.1.

[1] The Supreme Court granted a writ of error to review the trial court's ruling in Carl and the parties then settled.

The Ottofaros also infer, as fact, that the City staff somehow concealed information about the terms of the development project. *See* Ottofaro Brief at 3 and Ottofaro Ex. 4. But the "plan" in Exhibit 4 does not refer to the development project. It refers to the Comprehensive Plan, a public document adopted by the City that showed the road in 1994.

Next, the Ottofaros allege that the road to be acquired may be private. Brief at 4. There is no evidence for this beyond various statements referring to alternative development options made in work papers before the development and passage of the Resolution. *See id.* The resolution is controlling. As shown on the City's Comprehensive Plan, the road will be a public, arterial roadway.

In W.S. Carnes & Co. v. Board of Supervisors, 252 Va. 377, 385, 478 S.E.2d 295, ___ (1996), the Supreme Court held that the circuit court properly excluded all minutes of board meetings except actual motions, resolutions, and ordinances and votes cast on those items. The Court held that evidence of the Board's intent or motive in enacting ordinances is irrelevant to the Court's consideration whether the laws adopted are valid. *Id.* The Court cited its decision in Blankenship v. City of Richmond, 198 Va. 97, 49 S.E.2d 321 (1948), where the Court held that courts are not concerned with the motives which actuate members of a legislative body in enacting a law, but with the results of their action. As the Court held in W.S. Carnes, such extrinsic materials cannot affect an otherwise valid City Council resolution.

As to the alleged private nature of the road, the test whether a road is public or private has been established by the Supreme Court. Stewart v. Highway Comm'r, 212 Va. 689, 692, 187 S.E.2d 156, 159 (1972). A road is a public road if the public has a free and unrestricted right in common to use it. *Id.* The test is not whether a private individual will receive a greater benefit than the public generally. *Id.* The opening of a public street is generally recognized as a public

use, and the taking of private property for that purpose is a public purpose. 1984-85 Ann.Rep.Att'y.Gen 129, 132 n.1.

The Ottofaros next allege that the private developer may claim that the Ottofaros' property would belong to him. Brief, at 4. This is a mischaracterization of Exhibit 7 and the collateral litigation. Hampton Roads LLC intervened in three condemnation cases, not including this one, because it claims that it is the true owner of certain options and potentially stands in the shoes of the landowner. There is no evidence that Hampton Road LLC is asserting a claim to the former Ottofaro property.

Next, the Ottofaros submit what can only be regarded as triple hearsay - a letter stating that another landowner was told by still another individual (not a representative of the City) that the City could move the road to affect his property. Brief at 4-5 and Ex. 10. Even if this evidence were admissible, it would have no relationship to the Ottofaro property, and could not render the City's action invalid.

Next the Ottofaros purport to rely on minutes incorporated in the statement by a single counsel member who actually voted against the September 22 condemnation resolution. *See* Ex. 11. Under W.S. Carnes, again, this evidence is not admissible to vary or contradict the terms of the Resolution. At most, the agenda review memorandum prepared for the Council, Ex. 12, explains only the staff's intent regarding the proposed resolution. It also cannot vary or invalidate the Resolution as adopted.

The Ottofaros submit no evidence that the alignment of the road was not in place prior to the Resolution or that it was changed before and after the Resolution. Brief, at 6 and Exs. 13 and 14. The road alignment in the area of the Ottofaro parcel is the same as it was on August 4, 1999, prior to adoption of the Resolution. The Ottofaros' statement that no road plan shows a

road affecting the former Ottofaro property until June 14, 2000 (Ottofaro Ex. 15) is simply wrong. The undated pages in Exs. 13 and 14 are not road plans.

The property is being acquired for a public road which has been in this City's comprehensive plan for years. The plans for the road are entirely subject to City approval and the road will be a public street in which public will have the same rights that it has in all of the public streets of the City. *See, e.g.*, Ottofaro Ex. 1, § 7.1. This public use is fixed and definite.

This case is entirely distinguishable from Carl v. The City of Richmond, 11 Va. Cir. 100 (1987), where a council member testified that the property to be acquired could be subject to any number of potential uses. Here, the City Council has directed that the property be acquired for construction of the road and the road is actually under construction at this time.

This case is also distinguishable from The City of Virginia Beach v. Christopoulos Family, No. 2811 (Va. Beach Cir. Ct., Aug. 10, 2000). In that case the Court held that the developer had substantial control over whether the City would exercise its power of eminent domain, over the details of construction of a parking garage, and over its eventual use once it was constructed. Here, the City acquired land for a public road. It has complete control and approval over the details of construction. Therefore, the facts in the Virginia Beach case do not recur here.

Conclusion

This case is controlled by City of Richmond v. Dervishian, where the Court held that a city could proceed with entry onto property acquired by quick take and begin construction. The same result was reached in City of Norton v. Goad, 28 Va. Cir. 520 (1992). To hold that the city cannot proceed with construction until after the post-petition statutory hearing is held would make the General Assembly's grant of the quick take power by charter and statute a nullity.

The City has undertaken condemnation for a classic public use, the opening of a road. Even the Ottofaros have not challenged that the City has properly adopted a Resolution and filed a certificate of take. The only challenge is that these actions are allegedly a subterfuge. Yet the Ottofaros cannot bring forward any probative, admissible evidence to carry their burden under the law. The City is simply building a road. The law permits this. The Ottofaros have an adequate remedy of law and their request to prevent the City from carrying out its public duty should be denied.

CITY OF HAMPTON

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CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of December 2000, a copy of the foregoing pleading was sent by facsimile and mailed, postage prepaid to Joseph T. Waldo, Esq., counsel for the defendants, Waldo & Lyle, 301 West Freemason Street, Norfolk, Virginia 23510.

William G. Broaddus

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IN THE CIRCUIT COURT OF THE CITY OF HAMPTON

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CITY OF HAMPTON,

Petitioner,

v.) AT LAW NO.

FRANK J. OTTOFARO, et al.,) CL00-0367

Defendants.

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TRANSCRIPT OF PROCEEDINGS

Hampton, Virginia

December 15, 2000

Before: THE HONORABLE WILFORD TAYLOR, JR., Judge

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Norfolk, Virginia

THE COURT: Would you three just go with the bailiff. We'll call you as we need you.

You may proceed.

MR. WALDO: Your Honor, another matter I'd like to bring to the Court's attention -- we didn't cite the statute in the brief, but the City of Hampton has certainly in their arguments last week implied injunction is not a remedy available to a property owner in a quick take.

I would like to refer the Court to Highway Code 33.1-124 where for quick take the code specifically addresses the use of an injunction by the property owner, so obviously the General Assembly did understand that property owners from time to time would challenge the right of the condemning authority to take it and lays out that if you use an injunction against the highway department then you don't get interest on any funds deposited if you're going to proceed to attempt to defeat the take.

So, I'd like -- as a matter of law, Your Honor, the General Assembly does recognize the right of a property owner to assert the defenses in highway cases, in condemnation cases for the Department of

Transportation.

THE COURT: I'll let you argue that at the appropriate time. We are going to follow the law, I can tell you that, whatever it is.

MR. WALDO: Your Honor, I felt like last week when we left here what was raised by the City is implying that the property owner could not raise that in a quick take, and of course that is not the law.

Your Honor, I think the number one issue here -- and I don't think the Court needs to go any further. Mr. Lyle is here to introduce on behalf of our team of attorneys certain documents if it's necessary. But, Your Honor, in our brief and in our pleadings we've made it clear that the resolution adopted by the City of Hampton is defective. Why is it defective? Because, Your Honor, that resolution must show the property that's being taken, the path of the public improvements to be taken from that property.

Your Honor, the property is mentioned, the property is disclosed. There is no public improvement. There is no road. As a matter of fact, Your Honor, the exhibits -- this is part of the record and of course I understand -- if I understand this correctly, the Court is receiving into evidence

the resolution with exhibits?

THE COURT: Yes.

MR. WALDO: Then, Your Honor, that's before the Court. I ask the Court -- there is no improvement that was presented to the city council for which to act upon under a resolution by law, Your Honor, under the cases cited, one of which, Your Honor, was Dervishian which the City stood on last week.

In Dervishian, Your Honor, it says, number one, that you do get judicial review of the issue of public use, but Dervishian granted an injunction because the resolution, Your Honor, was defective. That's what we're here on, Your Honor. We're saying amongst other things that the resolution is defective.

Your Honor, I think the case ends right there, because the City cannot go forward on a road that was never identified for which the council by law was required to vote upon a resolution.

Your Honor, I'm not just saying that. That's Dervishian, Nichols, which we cited, and Carneal. All of those cases, Your Honor, make it the black letter law of Virginia that a use to be public must be fixed. The use must be fixed and it must be

definite.

Your Honor, that is the sentence: A use to be public must be fixed and definite. Your Honor, it's cited in Nichols, it's cited in Carneal. There was no use fixed. There was no use definite.

Your Honor, they couldn't vote on it even if it was because it wasn't presented to them. That must be, Your Honor, part of the resolution. I believe, Your Honor, that in the City's brief they stated that you could rise no further and look not beyond the four corners of the resolution.

So, Your Honor, I don't believe that the Court should go any further than the resolution, which we submit to the Court was defective.

The second issue, Your Honor, is that the public use in Virginia must be fixed and must be definite. That's Dervishian and Nichols and a number, Your Honor, of other cases. That's not just the Virginia law, Your Honor. That's the law across the nation when you deal with taking a property owner's property against their will in condemnation. You cannot take a blanket take. You must show precisely what's needed in a condemnation and where that need is going.

Your Honor, taking it to a logical

conclusion, if the City of Hampton says -- which they did -- that they need the entire parcel and that the Ottofaros can't have the remainder, if there was going to be a road, you must identify that road so you can make that determination. That's also the statutory law of Virginia under the highway code, Title 33, upon which the City of Hampton relies in this proceeding today. So, Your Honor, that must be fixed and it must be definite.

Your Honor, in the Dervishian case, which was cited last week by the City of Hampton -- we left here because I had just gotten the brief the day before. It was my understanding that this type of action would not lie against the City, an injunction.

In Dervishian, an injunction was granted. That wasn't brought up either in the brief or last week in Court. We've been through this, Your Honor, before in Virginia for property owners where a legitimate use is challenged, and here it's the public use.

The Dervishian case, Your Honor, made it clear that every property owner has the right to assert that as a defense. The final ruling, Your Honor, of the Court in that -- I'd like to quote this for the record, Dervishian: Because of these defects

and the basic resolution, we are of the opinion that the lower court was correct in entering the decree enjoining the institution of the condemnation proceedings.

Your Honor, the other case that we relied upon very heavily was the Nichols case, in which in the end the Court found after a hearing on the merits -- which we are not here for. We are simply here on the injunction. But on a hearing on the merits, the Court found there wasn't any public use.

The Court made it clear that a property owner is entitled to injunctive relief to protect their property. Your Honor, I'd like to read from that opinion, which is 143 Va. 405. The Court cited Lewis --

THE COURT: I have a copy of it.

MR. WALDO: Your Honor, I'd like to refer the Court to Lewis on eminent domain, which was I think previously the most-cited treatise on eminent domain by the Supreme Court.

THE COURT: Page 9?

MR. WALDO: Your Honor, that is page -- I've got the -- I have the Southeastern Reporter cite, Your Honor. I don't have the Virginia Supreme Court's page number. I have 413 of the Southeastern

Reporter.

Your Honor, the first sentence is reading from Lewis, and it's in Lewis on eminent domain. That's the beginning of the paragraph. Do you see that?

THE COURT: Yes.

MR. WALDO: Your Honor, it says it is now almost universally held --

THE COURT: That is page 9 of the document I have.

MR. WALDO: It's now almost universally held that an entry upon private property under color of the eminent domain power will be enjoined until the right to take such entry has been perfected by a full compliance with the constitution and the laws.

Your Honor, if the highway code addresses the issue of a right to enjoin, the highway department, and if Dervishian and Nichols both recognize that right, then surely it cannot be denied to the Ottofaros.

Further along, Your Honor, probably at the bottom of your page there, the Court stated -- Judge Staples -- it is no answer to him to say that for the appropriation of his lot he may recover an ejectment and for the destruction of his valuable building he

may recover the damages. Universal experience demonstrates how ineffective such a remedy is to afford a just compensation, et cetera, et cetera, et cetera, dealing with a corporation that had the right to take property by eminent domain.

Your Honor, to say as the City has that they can get a full and perfect equivalent in money damages is not the issue. The Supreme Court of Virginia has said that, first, before you take when there is a challenge to the taking the defenses must be heard.

Again, Your Honor, in that case -- and it's probably about three more pages over -- a use to be public must be fixed and definite. I just want, Your Honor, to mention the Hamer case because I believe, Your Honor, respectfully, that that's miscited to the Court. Hamer dealt with the issue of necessity of the taking.

Mr. and Ms. Ottofaro have never raised an issue of necessity of the taking. They have raised an issue of a defective resolution that would not empower the City to take their property. They have raised the issue of the fact that the improvements that are supposed to be for the public use are not fixed and definite. And they have raised the issue,

Your Honor, of the public use, but not, Your Honor, the necessity.

That's not before the Court, Your Honor, on account of the Ottofaros. That's Hamer, Your Honor. That's what Hamer, amongst other things, deals with as cited by the City.

Your Honor, we are ready to proceed. You have the resolution before you. According to Nichols -- and I will have Mr. Ottofaro take the stand if the Court wishes to state that there would be irreparable harm -- maybe we can stipulate to that, but Nichols says, Your Honor, you do not have to go to that point, that simply because the property is being taken by eminent domain if a property owner challenges that that is the irreparable harm, the fact that the property would be taken. And it is presumed -- there is a presumption, Your Honor, according to the Court, under Nichols.

Your Honor, we are ready to proceed. We are ready, Your Honor, for Mr. Lyle to walk the Court through the evidentiary documents we have filed with the Court if the Court so chooses. But, Your Honor, I submit to the Court today that without getting into the documents the resolution is before the Court with the exhibits.

There is no road there. The Court could not allow that condemnation to go forward because when the resolution was adopted there was no road, and that's what -- the City of Hampton has said you cannot look beyond the four corners of the resolution, which you cannot.

We're going to proceed, Your Honor, as you tell us. If you want us to now put on evidence we are ready to do that.

THE COURT: Let me hear from Mr. Broaddus if he wants to respond by way of opening.

Help yourself.

MR. BROADDUS: Thank you, Judge.

Judge, I'm not going to argue the law. Let me just very succinctly if I may tell the Court what I believe the evidence will show. In 1989 the city council adopted a comprehensive plan. A portion of the comprehensive plan --

THE COURT: Hold your point.

Any objection to that being part of that?

MR. WALDO: Go right ahead.

THE COURT: Go ahead.

MR. BROADDUS: A portion of the comprehensive plan deals with transportation. That comprehensive plan adopted in 1989 shows a proposed

corridor for the -- what became known as the Queen Street and Magruder Boulevard connector.

Fast forward to 1999. In August of 1999 the alignment of this connector from Mercury to Queen Street was finalized and existed in August of 1999. September of '99 the city council adopted a resolution. The Court has that, made reference to it.

The first "whereas" makes reference to the intersection improvements including the intersection of Pine Chapel Road, and the second "whereas" makes reference to acquiring the property to be used in construction for a new arterial network between Pine Chapel Road and West Mercury Boulevard.

Section 15.2-1903, Subsection C, provides that when a petitioning condemnation is filed by or on behalf of a locality, the true copy of the resolution or ordinance duly adopted by the governing body declaring the intended public use of the property and the necessity therefore may be filed with the petition.

Then it goes on and says: And when so filed constitutes sufficient evidence of such public use and necessity.

I'm unaware of any obligation or any case

law or any requirement of the Code of Virginia that specifies that the resolution must contain a copy of the roadway alignment. That seems to be what Mr. Waldo is hanging his hat on. I'm not aware of the existence of any such obligation. The petition attaches the resolution. The resolution specifies the entire parcel will be taken, will be taken for use of an arterial roadway. That constitutes sufficient evidence of the public use and necessity.

THE COURT: All right. You may proceed.

MR. WALDO: Your Honor, may I respond to that? I would like to say the Nichols case is controlling on that, and I don't intend to mark this in evidence, but I simply brought a VDOT plan sheet the Virginia Department of Transportation uses to show the project that they are going to take so they can then condemn land. The plans are precise, Your Honor, because they must be.

The Supreme Court, Your Honor -- again, I don't need to restate it. It said it must be fixed and definite. In discovery, Your Honor -- and I think there are voluminous documents before you, but the only road plan we got was a plan that came to us, and when we get into the evidence we'll present it.

But, Your Honor, it wasn't voted upon.

The only plan we have been given was a plan that said "conceptual." Very clear, large letters, "conceptual." Then it says: This plan was drawn based on property lines taken from the tax maps and aerial photographs and should be assumed approximate. This plan is conceptual only, and all boundaries, roadways, acreages, et cetera, are not exact.

Your Honor, this wasn't even done from a survey.

THE COURT: I have that.

MR. WALDO: I don't know, Your Honor. In some discovery documents it did not have this memo on it. That's why later on this morning if we need to -- this afternoon -- we can introduce it if necessary.

THE COURT: Let me --

MR. WALDO: Your Honor, can I approach the bench? I can see if that is the same as what I have here.

THE COURT: No, this is not the same one. This is an overall roadway site plan. That's why you probably need to get on with your evidentiary --

MR. WALDO: Your Honor, again, it goes back to the issue, Your Honor, of whether or not in the resolution the road was fixed and definite.

THE COURT: I agree with you that's the issue. That's what I'm going to have to decide based on the evidence.

All right. You may proceed.

MR. LYLE: We call Mr. Wallace.

GEORGE E. WALLACE, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LYLE:

Q. Would you state your name, please, for the record.

A. George E. Wallace.

Q. Mr. Wallace, you are the city manager of the city of Hampton, are you not?

A. Yes.

Q. How long have you been so engaged?

A. August of 1997.

Q. Mr. Wallace, let me show you a resolution and ask you to take a look at it, please.

MR. LYLE: May I approach the witness?

THE COURT: Sure, help yourself.

BY MR. LYLE:

Q. I just handed you a resolution dated May 13, 1998, Mr. Wallace. Would you just take a quick look at that?

THE COURT: Let me mark it for you so we can help the court reporter out.

It's marked as Petitioners' Exhibit No. 1 -- actually, that should be -- well --

MR. BROADDUS: Why don't we use the term "Defendants'," Judge?

THE COURT: The petitioner in this case is -- what we're doing -- the way I understand we're doing this, the City has taken action to condemn the property. They filed a petition, and what we have before us today is the injunction.

So, Mr. Lyle and Mr. Wallace are the petitioners for this hearing. That's why I marked it as Plaintiffs -- Petitioners' Exhibit No. 1. Okay. They have the burden of proof.

MR. BROADDUS: Yes, sir.

MR. LYLE: Right.

(The document referred to was marked by the Court as Petitioners' Exhibit No. 1 for identification.)

BY MR. LYLE:

Q. Mr. Wallace, does that appear to be an accurate copy of the resolution dated May 13, 1998?

A. I've only had a short time to look at this. I can't unequivocally say that is what you're

representing it to be. I see it's dated May 13, 1998, signed by --

Q. Were you serving as city manager in May of 1998?

A. Yes, I was.

Q. Do you recall the substance of this resolution?

A. Let me read it a minute.

Q. Take your time. Do --

THE COURT: While he is doing that, Counsel, I may have misspoken when I said this becomes part of the file. I may have mentioned record. I think you're right. There are some letters that may be objectionable for the terms of the record.

What I was saying is evidence should come from the witnesses from the witness stand or by stipulation. What I meant to say was this -- I considered all these exhibits, including ones sent by the City as well as the petitioners for the injunction.

I just want to make sure this becomes part of the record, and I'm going to file it with the record.

MR. BROADDUS: Yes, sir, and my objection

was to the point you just made.

THE COURT: I understand. I may have used the wrong word. The hearing today -- the evidence that comes from the witnesses today is what will be considered today.

MR. BROADDUS: Thank you, sir.

THE COURT: While he is looking at that, the reason I say that is because there were some issues concerning the -- what documents would be part of the record versus -- again, this was in the file by Mr. Waldo in support of his motion for a stay to prevent the City from taking further action.

THE WITNESS: Are you just going to ask me questions on this resolution?

BY MR. LYLE:

Q. First of all, does that appear to be an accurate copy of the resolution?

A. As far as I know it looks like a resolution that was maybe adopted by the council in 1998.

Q. You'll notice at the bottom of page 2, paragraph 3, it refers to attached terms, proposed terms attached, and you'll notice that attached to this are some proposed terms. Would you take a look at that, please?

A. Okay. What's the reference to item 3? What's the question?

Q. Do the proposed terms appear to you to be accurate copies of the terms which were attached to that resolution? Do they appear to be in order as far as you can see?

A. Well, I don't know. I can't say unequivocally that -- these are your documents. They didn't come from mine, so I don't know if these are the documents that are in fact reflected in the city council clerk's records.

Q. Well, they come from the City on discovery. You'll notice at the bottom -- okay. You're saying you're not sure about the proposed terms?

A. The question you asked me was not if I was sure of the proposed terms. You asked me if I was sure that this was the document that was adopted as part of this particular resolution, and I'm saying no, I'm not sure of that.

Q. All right, sir. Mr. Wallace, I'm going to show you a memorandum. If you will, take a look at that, dated July 24, 1998. I ask you whether you wrote that to the members of the city council?

MR. LYLE: I'll give you a copy, Your

Honor, just to mark.

THE COURT: Mark it? Have you seen this, Mr. Broaddus?

MR. BROADDUS: Yes, sir, thank you.

(The document referred to was marked by the Court as Petitioners' Exhibit No. 2 for identification.)

THE WITNESS: This looks like a memo I probably developed, yes.

BY MR. LYLE:

Q. Okay, sir. Next I'm going to hand you a memorandum dated March 30 and 31, 1999 and ask you if you generated that memorandum to the members of city council?

A. I would imagine if it says "confidential" my first question is: What are you doing with it? But anyway --

Q. Well, the City gave it to me, Mr. Wallace. I don't know why.

THE COURT: That's pretty much what I was getting to about these documents coming in, but it's in now, marked as Exhibit 3.

(The document referred to was marked by the Court as Petitioners' Exhibit No. 3 for identification.)

THE WITNESS: Okay.

BY MR. LYLE:

Q. Now, in your memorandum marked Exhibit 3, if you'll take a look at the second page toward the bottom, paragraph 5 --

A. Is Exhibit 3 this last one you gave me?

Q. Yes, sir, the March 30, 31, 1999 memo from you. On the second page you see paragraph 5?

A. Uh-huh.

Q. It says, among other things, Mr. Cordish will be the lead developer and the majority owner. Do you see that?

A. Uh-huh.

Q. Of what was Mr. Cordish going to be majority owner, Mr. Wallace?

A. I believe the -- let me put it in context of this one. This project went through several iterations in terms of participants, the initial relationship with Rob Brown exclusively. Rob -- there was a portion of the property that was to be acquired and then a company out of Atlanta purchased that particular property which was in the middle of the whole complex, which forced the relationship between Mr. Brown and that company. Our relationship was to have that particular parcel developed into two

pieces. Mr. Brown was going to do one piece and the other developer was going to do a second piece.

When the land ownership relationship changed; that is, changed the configuration of the relationship between the developers, and then subsequently a third developer came in -- and this was supposedly the evolutionary development process of a tripod relationship. That's what that refers to.

Q. But the short answer would be he was anticipated to be the majority owner of what? Real estate, the project, the entity, or what?

A. The whole development process.

Q. Three lines down there is a line that says: Roads may be private rather than public. How did they end up as far as -- how do they stand right now, the roads? Are they private or public?

A. All the roads are public.

Q. Public. Have they been put out for bids, construction of those roads?

A. I believe there -- I'm not sure about that.

Q. You don't know whether they have been put out for bids?

A. I'm not sure.

MR. LYLE: Okay. Now, Your Honor, the next exhibit I think is already part of -- it's the September 22nd, 1999 resolution.

THE COURT: That was --

MR. LYLE: I just want to make sure the contents are the same. What it consists of is two pages with two Exhibit As attached to it.

BY MR. LYLE:

Q. Is that right, Mr. Wallace?

A. I'm not sure what I have here. What date is the last one you just gave me?

MR. LYLE: September 22nd, 1999.

THE COURT: Yes.

MR. LYLE: I just want to make sure that we're -- that there are four pages with two Exhibit As and two --

THE COURT: It's resolution, page 2 -- it's a copy of resolution 99-2081, adopted at the regular meeting of city council held on September 22nd, 1999.

It says, Pertains to acquisition by condemnation or negotiation property right-of-way for improvements to the intersection of West Queen Street and West Mercury Boulevard, et cetera.

MR. LYLE: It consists of two typed pages

with an Exhibit A with a list of property owners and an Exhibit A showing a map?

THE COURT: Yes, let me mark it.

MR. LYLE: All right.

THE COURT: Exhibit 4.

(The document referred to was marked by the Court as Petitioners' Exhibit No. 4 for identification.)

MR. BROADDUS: Judge, before we move much further, I'm uncertain whether Mr. Lyle intended to introduce these into evidence or merely wants them identified.

MR. LYLE: I've offered them into evidence. I'm assuming the Court is receiving them as you're marking them.

THE COURT: I'm marking them right now.

MR. BROADDUS: If you're moving them into evidence, I want to be heard on whether or not --

THE COURT: You'll get a chance. I'm just marking them. Let me say this up front: Anything that's marked is subject to cross.

MR. LYLE: All right.

MR. BROADDUS: My understanding is they are not being admitted right now, simply marked.

THE COURT: Right, you'll have your

chance.

BY MR. LYLE:

Q. Mr. Wallace, I'm going to hand you what has been designated as a development agreement and ask you to take a look at that please, sir.

THE COURT: I'm missing Exhibit 1. Where is that? I have 2, 3, 4. Where is 1? I think Mr. Wallace has it.

Do you have Exhibit 1?

MR. LYLE: The 1998 resolution.

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. LYLE:

Q. Mr. Wallace, you have before you a development agreement, a document titled "Development Agreement, Cordish Power Plant Project." Do you see that?

A. Yes, sir.

Q. Now, will you turn -- do you recognize it?

A. Yeah, I recognize it, yes.

Q. Would you turn to page 31, please?

THE COURT: Do you need that marked as well?

MR. LYLE: Yes, sir.

BY MR. LYLE:

Q. Are you at page 31?

A. Yes, sir, I am.

Q. Would you read section 20 -- 20.1 into the record please, sir?

A. 21-1. --

Q. 20.1.

A. I'm sorry, 20.1, my error. City authorization: By the execution of this agreement, the IDA represents that the City has to the extent it has jurisdiction authorized the undertakings set forth in the agreement and the expenditure and distribution of the IDA allowance in accordance with the provisions of this agreement.

Q. Now, the last one I'll ask you to read, Mr. Wallace -- would you read section 20.2 into the record?

A. 20.2? 20.2 says, Assignment.

Q. Excuse me, 20.2.1.

A. Okay. 20.2.1: This agreement is binding upon and shall inure to the benefit of the City, the developer, and their respective successors and assigned.

MR. LYLE: Have you marked the develop --

THE COURT: I don't have it yet.

MR. LYLE: If you'd mark that, please.

(The document referred to was marked by the Court as Petitioners' Exhibit No. 5 for identification.)

THE COURT: It's now marked, again, subject to cross.

MR. LYLE: What was the number of that last exhibit?

THE COURT: It was 5.

MR. LYLE: Your Honor, I have no further questions on direct, and I move the admission of Exhibits 1 through 5.

THE COURT: Mr. Broaddus, you may proceed.

CROSS-EXAMINATION

BY MR. BROADDUS:

Q. Mr. Wallace, you have before you -- perhaps you don't -- Exhibit No. 1.

A. No, sir, I don't.

THE COURT: You want to hand it to him, Mr. Broaddus?

MR. BROADDUS: Thank you, Judge.

BY MR. BROADDUS:

Q. At the very top, sir, it says, Resolution to approve terms of the proposed transaction. Do you see that at the very top of page 1?

A. Yes, sir.

Q. Did that transaction ever come to pass?

A. No, sir, this one did not materialize.

Q. Turn to Exhibit No. 5 if you will, sir.

THE COURT: Which one didn't materialize, Exhibit 1?

MR. BROADDUS: Yes, sir.

THE COURT: Okay.

MR. BROADDUS: It should be the last one.

BY MR. BROADDUS:

Q. Turn to the first page if you will, please. Who are the parties -- just the first page, sir. Who are the parties to this agreement?

A. An agreement between --

MR. LYLE: Just for the record, I object to the legal conclusion as to who the actual parties are. You have to read it in connection with the sections he read in the record. Subject to that --

THE COURT: You're moving to get it in, so it becomes -- if it comes in it becomes part of the record.

Go ahead. You can read it.

THE WITNESS: Development agreement between the Industrial Development Authority of the City of Hampton as lessor and Hampton Roads Associates, LLC, as lessee as of November 18th, 1999.

MR. BROADDUS: No other questions, Judge.

THE COURT: Okay.

MR. BROADDUS: With respect to admissibility, Judge, we object to the admissibility of --

THE COURT: Give them back to me now.

MR. LYLE: Can I redirect him very briefly?

THE COURT: Help yourself.

REDIRECT EXAMINATION

BY MR. LYLE:

Q. On Exhibit 5, the development agreement, the recital in paragraph 20.1 is correct, is it not?

A. You're asking me a question?

Q. Yes, I'm asking you --

A. What does recital mean?

Q. It says the City has to the extent it has jurisdiction authorized the undertakings set forth in this agreement. That's true, is it not?

A. You're reading from where?

Q. 20.1.

A. 20.1 says: The City to the extent it has jurisdiction -- is that what you just referenced?

Q. Authorized the undertakings contained in this agreement. Didn't the City authorize this?

A. To the extent of this agreement the IDA represents that the City has to the extent it has jurisdiction authorized the undertakings set forth in the agreement in the expenditure and distribution of the IDA allowance in accordance with the provisions of this agreement.

Q. That's a true statement, is it not?

A. I believe it is true, yes.

MR. LYLE: No further questions.

MR. BROADDUS: Judge, I object to the admissibility of Exhibit No. 1. The resolution and the attached terms of that agreement did not materialize.

THE COURT: What's your response to that? We'll take them one at a time.

MR. LYLE: Your Honor, the 1998 resolution we think is very relevant because when you compare it to the later 1999 resolution it reveals what's going on here.

What happened in the 1998 resolution is the City -- it authorized the City to enter into an agreement or contract with a private developer. Our position is that was an undertaking of dubious legality under the Dillon rule, and later the -- in the later resolution the City and the IDA are working

in tandem with each other so to speak, although it was the IDA that entered into the contract with the developer.

The City expressly authorized it and was bound by it. The contract used the words "and shall be bound by it."

THE COURT: Okay.

MR. LYLE: It's certainly admissible.

THE COURT: You get to open and close on that.

MR. BROADDUS: Judge, whether it's of dubious legality or not it's irrelevant. It never came to pass. The agreement is not a -- that is before the Court didn't bring about the road that is before the Court or the taking that's before the Court. Therefore, we submit that it is wholly irrelevant.

THE COURT: Let me see it. This is Exhibit --

MR. BROADDUS: It's No. 1, sir.

THE COURT: No. 1. Well, respectfully granted. It does come in. What weight I assign to it -- because it is an action of council. You can make the appropriate comments at closing as to what weight I should assign to it.

MR. BROADDUS: Yes, sir. With respect to Exhibits 2 and 3, Judge, it's unclear why they have been tendered. If they have been tendered simply to show the manager had a communication with members of council, so be it.

If it was tendered for the purpose of showing an agreement that council entered into or to somehow explain terms of a council action, we object to it. Council speaks through its resolutions and ordinances and not through memoranda written by its manager to --

THE COURT: I think you get to argue that. It's admissible because the author was the person who identified it, and you can argue what meaning I should assign to it.

Next?

MR. BROADDUS: No objection to 4.

THE COURT: No. 3 is the same thing. The author is the one that identified it, so it is admissible. No. 4 is no objection.

MR. BROADDUS: No objection to 4 or 5.

THE COURT: All right. They are in. I'll certainly note for the record any objections, exceptions to my ruling.

(Petitioners' Exhibits No. 1 through 5

were received into evidence.)

THE COURT: Any further need for Mr. Wallace?

MR. LYLE: No, sir.

THE COURT: You can stand down. Have a seat.

(The witness was excused.)

THE COURT: Next.

MR. LYLE: Ms. Grook.

KATHY GROOK, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LYLE:

Q. How are you, Ms. Grook?

A. Fine.

Q. Can you tell us your name for the record.

A. Kathy Grook.

Q. And your occupation?

A. Retail development manager with the City of Hampton.

Q. How long have you been so engaged?

A. Approximately six years.

Q. So, you have been engaged throughout the negotiations having to do with the power plant?

A. Yes.

Q. Is it true that Rob Brown & Associates was the predecessor of the present developer, Mr. Cordish; is that accurate?

A. Yes.

Q. Did you receive -- I'm going to hand you a set of maps containing four different scenarios of development and ask you whether you received those from Mr. Brown in connection with the power plant project?

A. Yes. You've only given me three, but yes.

Q: Oh, let me give you four.

A. You have a duplicate here.

Q. Give me a second.

A. I have B, C, and D.

Q. You have B, C, and D?

A. Yes, sir.

Q. Let me give you A. Is that an accurate depiction of A?

A. Yes.

Q. Would you put them together and clip them back together please, ma'am?

A. Sure.

MR. LYLE: We would offer that.

THE COURT: Any objection?

MR. BROADDUS: Judge, I object because

it's not the project that's before the Court, and this developer is not before the Court. That's the only reason.

MR. LYLE: Let me ask another couple questions.

THE COURT: Sure.

BY MR. LYLE:

Q. Ms. Grook, can you tell us the approximate time frame during which you received those maps?

A. Actually I can't.

Q. Would you agree it was before September, 1999?

A. Yes.

Q. Okay. For what purpose were you asked to review these maps?

A. Mr. Brown was presenting a financial analysis to the mayor and the City manager and myself and some other individuals, and these were just examples of site plans that he may consider doing.

Q. Is this the same Mr. Brown who is identified in a 1998 resolution that the council passed?

A. I'm not familiar with that resolution, so I have to --

Q. Okay.

A. I'd have to see the resolution.

Q. I understand. Now, the City has produced another rendering of this property. I ask you to take a look at that. It's a black and white copy, but it's obviously been marked up with a felt tip. Do you recognize that?

A. Yes.

Q. What does that show?

A. It shows a hand-done copy -- it's self-explanatory. The City and state-owned property, the Rob Brown option property, property the City owns less the Rob Brown option property, property that Mr. Brown was working on finalizing deals on, the church, proposed road, the lake, and the proposed entertainment project.

Q. Does this -- does this show in general terms the power plant project area?

A. Yes.

Q. Do you remember the time frame -- strike that. Did you make these notations on the right-hand side?

A. Yes.

Q. So, this is your document?

A. Yes.

MR. LYLE: Let me have that, please.

We offer this, Your Honor.

THE COURT: All right. Do I need to mark any objection from the City?

MR. BROADDUS: Judge, I object because, again, this is not the proposal that results in the road and is before the Court. It's irrelevant.

MR. LYLE: Let me ask one more question.

THE COURT: Help yourself.

BY MR. LYLE:

Q. This shows, does it not, Ms. Grook, the road leading from Pine Chapel Road parallel with West Queen Street? Do you see that?

A. Yes.

Q. That shows a different location than where the road exists today; isn't that true?

A. Some of it is, yes.

Q. It's different where it meets Pine Chapel Road, is it not?

A. Well, first of all, this was not -- this was a hand-drawn document, so actually it wasn't intended to be -- the answer would be no.

Q. I understand, but it shows the road in a different location than where it is today; is that not true?

A. Up toward Mercury Boulevard I agree.

Toward Pine Chapel I don't agree.

Q. Oh, okay. Well, isn't it true that the present anticipated location of the road passes right through lots 23 and 24 that are shown on this document?

A. Yes, but this document was not meant to be a -- even a schematic. It was a hand-done document for internal purposes.

Q. I understand. I'm just saying it's a different location of the road.

A. I guess you could say that.

Q. Can you tell us a time frame -- approximate time frame when you generated this document?

A. No, I can't.

Q. Can you tell me what you did with it once you finished generating it?

A. I really can't.

Q. I'm going to show you a letter dated March 2nd of 2000. It appears to be addressed to you, and I'll ask you whether you received that letter?

A. It's not addressed to me. This is addressed to the Industrial Development Authority of the city of Hampton.

Q. Keep reading.

A. Oh, I'm sorry. Attention Kathy Grook. Yes, I received it.

MR. LYLE: Okay. I offer this, Your Honor.

THE COURT: All right.

MR. BROADDUS: Judge, I do not object to the authenticity of the letter, the fact that it was received. I object to it inasmuch as it was sent to the Industrial Development Authority. It was months after the resolution of city council.

THE COURT: You can argue that. The only issue now is if it's admissible.

BY MR. LYLE:

Q. Let me show you another letter dated the next day, Mr. Grook, and ask you if you received that as well?

A. I would have to compare the two letters to be able to answer that question.

Q. Okay. Let me let you do that.

A. Okay.

Q. There are both of them. Just take a look at it.

A. Thank you. I would have to say yes, I received the letter.

Q. You received both of those letters?

A. Yes.

MR. LYLE: Okay.

MR. BROADDUS: Judge, for the record, same objection.

MR. LYLE: I want to offer the --

THE COURT: Again, I'll mark them and you can -- this is Exhibit No. 7.

(The documents referred to were marked by the Court as Petitioners' Exhibits No. 6 and 7 for identification.)

BY MR. LYLE:

Q. I'm wondering why there were two letters having to do with the Ottofaro property. Do you know why Mr. Cordish wrote two letters instead of one to you?

A. No.

Q. Let me back up and ask you to look at this memorandum dated July 8, 1998, which is addressed to Kathy and Mary, and I'll ask you if you received that?

A. I have to read it if you'll give me a minute. I don't recall this memo, but I also can't say I didn't receive it. I just don't recall it.

Q. At the bottom it says, Department of

Retail Development, does it not?

A. Yes.

Q. And you were with that department on July 8, 1998?

A. Yes.

Q. It's from somebody named June. Can you tell me who June is or was?

A. She is the director of retail development.

Q. What is her last name?

A. McPartland.

Q. Can you spell that?

A. M-c-P-a-r-t-l-a-n-d.

Q. In paragraph 5 -- would you read paragraph 5? It's brief. Read it into the record if you will.

A. Why did comprehensive plan recommend the road? The reason given in the plan is to move traffic and relieve congestion. See attached explanation in the plan for June 8th, 1994. Pat Thomas suggested that we not elaborate past what's stated in the attached section from the plan.

Q. Who is Pat Thomas?

A. She at the time was an employee of the planning department with the city of Hampton.

Q. Did you have discussions with Pat Thomas about this subject?

A. I can't remember the memo, so I can't -- I can't tell you if I did or I didn't.

Q. Can you tell us today why Ms. -- is it Mr. or Ms. Thomas?

A. Ms.

Q. Can you tell us why Ms. Thomas may have suggested you not elaborate past what is stated in the comprehensive plan?

A. I have no clue because I have no recall of seeing this memo.

Q. Okay. But it's fair to say it was addressed to you?

A. It was copied to me, yes.

MR. LYLE: We would offer that.

MR. BROADDUS: Object to it in part because it's incomplete, Judge. It makes reference to an attachment. There is no attachment in at least the copy that I have.

MR. LYLE: That's what we were provided on discovery, Your Honor. I think we're entitled to rely on it. If there's more, we didn't get it.

MR. BROADDUS: I also object to its relevancy.

THE COURT: I'll mark it, then you can argue what I should do with it. She's identified it.

(The document referred to was marked by the Court as Petitioners' Exhibit No. 8 for identification.)

MR. LYLE: May I see those exhibits just for a second, Your Honor?

THE COURT: Help yourself, right there. These I flipped over have not -- there is an objection, no further argument, so I haven't looked at those yet.

I haven't marked anything but this stack.

MR. LYLE: Your Honor, I offer into evidence, first of all, the set of maps which Ms. Grook testifies she received from Mr. Brown.

THE COURT: Okay.

MR. BROADDUS: On the basis of relevancy, Judge, this is not the road plan before the Court.

THE COURT: What's your purpose?

MR. LYLE: The whole basis -- not the whole basis, a part of the basis for the Ottofaros' position, Your Honor, is that the location of this road was a moving target throughout a considerable period of time.

It's shown in one location in the proposal from Mr. Brown, who by the way is mentioned in the resolution in 1998 passed by the council. It's shown

in another location in the rendering, albeit internal, made by the City's representative. It's shown in quite another location in what's called a conceptual drawing which the City I think is going to rely on as having existed prior to the resolution of September, 1999.

Nowhere in the -- the whole point is nowhere in the resolution is this road ever fixed in a definite location. I think this series of changed locations corroborates our argument.

THE COURT: I'm going to sustain the objection. She didn't make these drawings and the reliability would be hearsay. She testified she doesn't remember why the lines were changed, if they were changed, and I will sustain the objection.

MR. LYLE: I'll now move into evidence the rendering which she created herself, Your Honor.

THE COURT: All right.

MR. BROADDUS: Judge, I object to that on the basis that, again, that is not the project that's before this Court. The purpose of this exercise by Mr. Grook was not to in any way establish the alignment of the road. That's not her responsibility.

THE COURT: You can argue that. I'm just

marking it. It's her document. She has identified it and you can argue what weight I should assign to it. So that one comes in. You can have this one back.

MR. BROADDUS: Judge, that will be Exhibit No. 9?

THE COURT: Let me mark this as No. 10, denied. Let the record show I'm handing that to my clerk. What it consists of is one, two three, four, five sheets of paper, Exhibit 10.

(Petitioners' Exhibits No. 9 and 10 were marked by the Court for identification. Exhibit No. 9 was received into evidence. Exhibit No. 10 was refused.)

MR. LYLE: You may have already received these, but I move into evidence the two letters of March 22nd and March 3, which she indicated she received.

THE COURT: Those are in.

MR. LYLE: Finally, the July 8, 1998 --

THE COURT: That's in.

(Petitioners' Exhibits No. 6 through 8 were received into evidence.)

MR. LYLE: I have no further questions on direct.

MR. BROADDUS: No questions, Judge.

THE COURT: You're welcome to have a seat in the Court or you are free to go.

(The witness was excused.)

THE COURT: Next.

MR. WALDO: Your Honor, at this time I'm going to call Mr. Ottofaro unless the City will stipulate he is here today to say the taking down of his house would cause him damage that would be irreparable. That's the whole issue. The property owner is fighting here to save the property. I think under Nichols, Your Honor, that's not even an issue, but I'm going to put him on unless he wants to stipulate to that.

MR. BROADDUS: I'll stipulate that he would say that.

THE COURT: Put that in the record.

MR. WALDO: May I make the proffer?

THE COURT: Sure.

MR. WALDO: If Mr. Ottofaro were called today, his testimony would be that the taking down of his home would be against his will and cause irreparable harm.

MR. BROADDUS: Judge, one clarification. I think Mr. Wallace may have said "his home." I

don't stipulate it's his home. It's rental property.

THE COURT: I understand that.

MR. WALDO: I didn't mean to imply he lives there.

THE COURT: His property, not his home. It's a bifurcation. I don't think it becomes an issue if the Court rules that the City was not justified in taking the land. I think that's what you stated at the opening. The issue is this resolution and whether this is a proper take.

MR. WALDO: Your Honor, yes, sir. The issue is not only the resolution but whether or not the improvements were fixed, whether they were definite, whether they were for public purpose, which eventually will be heard at another date. I understand it's whether or not my client receives an injunction.

THE COURT: You're not asking me to rule whether this is a public or proper take today?

MR. WALDO: No, sir, we made it clear last week that this was going to be on the injunction only, Your Honor.

THE COURT: You said the main issue was whether the resolution is defective. The resolution, as I understood it from last time -- I asked, Am I

reviewing the action of council? And I think the answer was yes, and that's what I'm doing today.

I'm trying to give you as much latitude to get the information and documents in that you wish.

MR. WALDO: Your Honor, when we left here last week I agreed to try all the defenses today. The City last week wouldn't agree to that, so we were coming back only on the issue of the injunction today.

THE COURT: But I have to consider the resolution. You put it in.

MR. WALDO: Absolutely, Your Honor. No question about that. I'm sorry.

MR. LYLE: We have no further evidence at this time.

THE COURT: No further evidence.

MR. BROADDUS: Mr. Whitley. Judge, Mr. Whitley will have exhibits. Is it okay if Mr. Hodges just stands there?

THE COURT: Sure.

JAMES F. WHITLEY, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROADDUS:

Q. Mr. Whitley, you have been previously

sworn. Will you please state your name.

A. James F. Whitley.

Q. What position do you hold with the City of Hampton?

A. City engineer.

Q. Very briefly, would you tell the Judge your duties.

A. My duties include management of the City's capital projects as well as the review and approval of site plans and subdivisions.

Q. Do you become involved in your duties with transportation issues?

A. Yes, I do, approval of road plans as within my purview.

Q. How long have you held this position with the City, Mr. Whitley?

A. Approximately 12 years.

Q. Were you so employed in 1989?

A. Yes, I was.

Q. Were you involved with the development of the proposal submitted to council for the 1989 comprehensive plan that's I believe identified as the 2010 comprehensive plan?

A. Yes, I was.

Q. Did council ultimately adopt that?

A. Yes, they did.

MR. BROADDUS: Judge, may I tender this to him?

THE COURT: Have you-all seen that?

MR. LYLE: Yes.

MR. BROADDUS: Judge, if I may approach, this is a copy of certain pages out of the comprehensive plan I will be referring to, and I would like to have him identify it.

THE COURT: I'll mark this. Again, this is -- what it has on it is "Adopted by city council, 12/13/89." For the purpose of this hearing the defendant is presenting this.

BY MR. BROADDUS:

Q. I've just tendered you a document. Can you identify that?

A. Yes, this is a copy of the comprehensive plan adopted in December of 1989.

Q. Turn to page 78, please, sir.

A. Okay.

Q. As it relates to the particular project that's the subject of this matter, what does this document show?

A. This shows the schematic alignment of the connector road between Queen Street and Magruder

Boulevard, which goes through the property south of Mercury Boulevard.

Q. Is that shown in heavy dots or -- not dots but dashes?

A. Yes, it is.

Q. In the upper right portion of the chart?

A. Yes.

Q. When was this adopted?

THE COURT: Excuse me. You lost a client. Do we need to wait?

MR. WALDO: I think we'll proceed on. We're all right.

THE COURT: I don't mind waiting.

MR. WALDO: We're fine, Your Honor.

THE COURT: All right. Keep going.

BY MR. BROADDUS:

Q. When was this adopted, sir?

A. This plan was adopted December 13th, 1989.

MR. BROADDUS: Judge, I'd like to have these several pages I have tendered to the Court marked as Defendants' Exhibit -- our first exhibit.

THE COURT: Okay. Any objection? Well, I'll just mark it. You'll get a chance to cross-examine it.

(The document referred to was marked by

the Court as Defendants' Exhibit No. 1 for identification.)

BY MR. BROADDUS:

Q. To your knowledge, was Rob Brown or any other developer engaged in discussions with the City or the Industrial Development Authority in 1989?

A. No, sir.

Q. Who owned the particular road that's the subject of this proceeding?

A. This will be a public street owned by the City of Hampton.

Q. Who will use the street?

A. The general public.

Q. Will there be any limits on the ability of the general public to use the street?

A. No, sir.

Q. Do you have an approximation of the traffic count that will be using the street on a daily basis?

A. We estimate in the year 2018 approximately 26,000 vehicles per day.

Q. Mr. Whitley, I'm going to show you a document. I ask if you can identify that?

MR. WALDO: Your Honor, can we take a look at that?

THE COURT: Help yourself.

Let him look at it.

Mark that Exhibit 2. Let's put this sticky on it.

(The document referred to was marked by the Court as Defendants' Exhibit No. 2 for identification.)

BY MR. BROADDUS:

Q. Can you identify that, sir?

A. Yes, this is a conceptual plan prepared for the extension of the roadway and some private development.

Q. What's the date of this plan?

A. That plan is dated August 4th, 1999.

Q. What does it show with respect to that portion of the roadway at the southern end as it relates to the Ottofaro property? Point that out to the Judge, please.

A. Yes, the Ottofaro property is here, and this plan has the road alignment through the property.

THE COURT: What date? I didn't get it.

THE WITNESS: Date of the plan is August 4th, 1999.

BY MR. BROADDUS:

Q. Is that alignment across the Ottofaro property, the alignment that's being used for construction purposes?

A. Yes, it is.

Q. Mr. Hodges is now showing you a map, photograph. Can you identify that, sir?

A. Yes, sir, this is the photo of the -- an aerial photo of the area generally encompassing the --

THE COURT: Let's mark it. Again, help the court reporter out. That's Exhibit 4 he is referring to -- Exhibit 3.

(The item referred to was marked by the Court as Defendants' Exhibit No. 3 for identification.)

THE COURT: Now you can start again. Sorry.

MR. BROADDUS: Thank you.

BY MR. BROADDUS:

Q. Tell the Judge what that shows, Mr. Whitley.

A. That generally encompasses the area bounded by Queen Street, I-64, Pine Chapel Road, and West Mercury Boulevard, Queen Street.

Q. Explain to the Judge if you will using

that how the alignment of the new road ties into Queen Street.

A. Existing Queen Street at New Market Creek to the south. This project would extend the road northward generally along this alignment across Pine Chapel Road through the Ottofaro property, which the rental house is shown here, through that property generally along this alignment, along the corner of the C C Spaulding Drive subdivision and proceeding northward and eventually tying back into Queen Street up here at Mercury Plaza.

MR. BROADDUS: Judge, may I confer with Mr. Hodges for a moment?

THE COURT: Yes. All these are marked subject to cross.

(Defendants' Exhibit No. 4 was marked by the Court for identification.)

MR. WALDO: Thank you.

BY MR. BROADDUS:

Q. Mr. Whitley, I now show you a document and ask if you can identify that. It's been marked as Exhibit 4.

A. Yes, it's a blowup of a section of the street at the southern end of the Queen Street intersection going through the Ottofaro property,

which is shown in pink, the house and then the Pine Chapel Road intersection. You have in orange depicted the proposed curb and gutter for the roadway, which is part of a four-lane divided highway, and the green represents the landscaped areas.

Q. What is the size of the two parcels together that made up the Ottofaro property?

A. I believe it's approximately three quarters of an acre.

Q. The pink is the house in question?

A. Yes, the building is shown there.

Q. That's directly in the roadway?

A. Yes, the curb and gutter would run right through the front part of the house.

Q. Where are the contractors at the present time in terms of clearing? When I say where are they, show the Judge using the location of the clearing.

A. Yes. The contractor has cleared all of the right-of-way up to Pine Chapel Road. With the exception of the house here, up to Pine Chapel Road.

MR. WALDO: What's that number?

THE COURT: That's 4.

MR. BROADDUS: That's all the questions I

have of Mr. Whitley.

THE COURT: You may cross.

CROSS-EXAMINATION

BY MR. WALDO:

Q. Good afternoon, Mr. Whitley. I bet you would agree with me that lawyers by nature are not very precise but engineers are.

A. There's a general tendency to be a little more precise, yes.

Q. Engineers by nature, by trade, by profession must be precise; isn't that correct?

A. In civil engineering there's a little margin for error, but --

Q. Go past precise and say they have to be exact or if they don't we have real problems in this world when engineers are not precise and not exact.

A. If you're in NASA that's certainly the case.

Q. Wouldn't it be with a road, too?

A. There's some degree of leeway in a road construction.

Q. Roads have been built through the wrong property because engineers didn't check records or surveys or things like that?

A. Yes.

Q. Now, if I understood you correctly, this public road is approaching Mr. Ottofaro's house and the right-of-way has been cleared up to his house; is that correct?

A. (The witness nodded his head.)

Q. I take it that's a public road you are saying that serves the public?

A. Yes.

Q. By law, the City can't put out a public project without putting it out for public bid, correct?

A. There are many public facilities that were built by developers or by others that weren't put out for bids, as in a subdivision.

Q. I'm asking you in the City of Hampton if the City engineer can build a public road without putting it out for public bid?

A. Can the City put it out for bid? Can the City build a public road without putting it out for bid? I --

Q. I'll rephrase it. As the City engineer -- you're the City engineer in charge of the roads in the city of Hampton?

A. The construction of new projects, yes.

MR. BROADDUS: Judge, I object to the

extent he's trying to ask this witness for legal --

THE COURT: Where are you headed with this?

MR. WALDO: Your Honor, they brought up the fact it was a public road, and I'm going to find out if it really was a public road, because I have yet to find in my research that there was a public bid for a public road. I asked for that in discovery and didn't get it, so maybe he knows about it.

THE COURT: Help yourself. I'll allow it.

MR. BROADDUS: I don't have any problem with the question if he wants to ask how it was built.

BY MR. WALDO:

Q. Was it put out for public bid?

A. No, it was not.

Q. It was not?

A. That's correct.

Q. So, the City of Hampton is building a public facility without it ever going out for public bid? That's your answer today for the record?

A. The City of Hampton is not building a road, certainly a contractor is.

Q. Is this the City of Hampton's road or the contractor's road?

A. It will become the City of Hampton's road when it is complete.

Q. So, it's not the City of Hampton's road?

A. It's right-of-way. A road will be constructed within --

Q. I'm not sure, Mr. Whitley, I understand. It either is the City of Hampton's road or it is not, or is it something in between?

A. When the road is complete it will be inspected and accepted by the City of Hampton as a public street, much like a subdivision would be constructed. The developer would build the road and turn it over to the City.

Q. So, it's really right now, then, a private road to become public?

A. It's a right-of-way in which a contractor is building a street that will become public if that's what you're saying.

Q. That's what I'm asking. It's a private road today that will become public? That's your testimony?

MR. BROADDUS: Judge --

THE COURT: That's a legal conclusion. I'll make that at the appropriate time.

MR. WALDO: Let me then rephrase that.

BY MR. WALDO:

Q. As the city engineer -- it's a private road that's being built today, correct, Mr. Whitley?

THE COURT: Sustain the objection.

Next question.

MR. WALDO: All right. The comprehensive plan, Your Honor, for the record I believe at page 78 was Exhibit --

THE COURT: No. 1.

MR. WALDO: Could I see the original please, Your Honor? Thank you.

BY MR. WALDO:

Q. Mr. Whitley, I'm going to hand to you --

MR. WALDO: Your Honor, may I approach the witness?

THE COURT: Help yourself.

BY MR. WALDO:

Q. This is Exhibit 1. You just looked that over a few minutes ago, did you not?

A. Yes, I did.

Q. Now, that's a conceptual plan, is it not?

A. That's correct.

Q. That has no scale on it, correct?

A. Correct.

Q. Has no specifications, no measurements?

A. That's correct.

Q. And as a matter of fact, this particular plan, while it might be the comprehensive plan of the City of Hampton -- the road along Mercury and Pine Chapel has been realigned a number of times as a conceptual plan, hasn't it, by the City?

A. A road along Mercury and Pine Chapel?

Q. This road that was a conceptual plan identified in the City's Exhibit No. 1 is just that, it's a conceptual plan?

A. Yes.

Q. And there have been a number of these conceptual plans for this area?

A. The comprehensive plan is updated every ten years, so there are roads added and roads deleted in the comprehensive plan.

Q. Exactly. The comprehensive plan is not fixed and not definite, would you agree with that?

A. It's not a static plan, no, sir. It's updated every ten years, amendments are made.

Q. In laymen's terms, it's not fixed and not definite? Would you agree with that?

A. It's subject to change, yes.

Q. Now, do you have with you today the contract to build the road that the private developer

is building?

A. No, sir.

Q. You didn't bring that to court with you?

A. No, sir.

Q. Do you know what the time table is in that contract?

A. No, sir.

MR. WALDO: Your Honor, if I could, the resolution.

For the record, this is Exhibit No. 4. It's the petition.

BY MR. WALDO:

Q. Mr. Whitley, you're familiar with that, correct?

A. I believe I have seen it before. I don't know I know every nuance of it.

Q. I assume you looked at that before you came to court today?

A. I have seen this document before, yes, sir.

Q. Can you show me in that resolution where it shows the precise path of the improvements?

A. No, sir, it's not part of this resolution.

Q. What is it part of?

A. I'm sorry. I don't understand the

question.

Q. You say it's not part of that resolution. Is there some other document that was voted on by city council in September of '99?

A. I still don't understand the question.

Q. Was there some other document presented to city council with that resolution?

A. Do not know.

Q. Now, let me ask you if I can -- is this numbered? It's 4. Let me show you the City's No. 4. You're familiar with that?

A. Yes, I am.

Q. That shows the path of the highway going clearly through the Ottofaro property, doesn't it?

A. Yes, it does.

Q. That's June of 2000, correct?

A. That's correct.

Q. That was after Mr. Ottofaro turned the City's offer down, wasn't it?

A. I don't know what date he turned the City's offer down.

Q. I'm going to show you the City Defendants' No. 2, which says "conceptual site plan." I take it you're familiar with that document?

A. Yes, I am.

Q. That document is just that, is it not? It's a conceptual plan. It is not a precise road plan at all.

A. That is correct. It is a conceptual plan.

MR. BROADDUS: Object to the question, Judge. I'm not sure what he means by "plan." If he's talking alignment, that's one thing.

MR. WALDO: Your Honor, it says "plan" on it.

THE COURT: Well, what's the objection?

MR. BROADDUS: To the vagueness of the question. It gives a plan. It has certain aspects to it. If he's talking about construction --

THE COURT: Conceptual site plan, that's what it says.

BY MR. WALDO:

Q. Mr. Whitley, are you familiar with the legend at the bottom left of that which says the plan is conceptual only?

A. That's what the plan says, yes.

Q. You're familiar with as a City engineer, I'm sure, VDOT -- I showed your attorney earlier. You've seen the VDOT plan sheets for highways no doubt?

A. Yes, I have.

Q. Would you agree they are very precise and the reason is to locate tangible, physical appurtenances, buildings, fixtures when you're building a road?

A. When you get the construction design, yes, they need to show all that.

Q. When you get to design you need to show that, don't you?

A. Design of roadway, yes.

Q. That's not what you have here, this document before you that you just --

A. This is intended to show the alignment of the roadway rather than any design details.

MR. WALDO: Your Honor, there was no objection to those two documents being entered, and I don't know if the Court has ruled on those or not. I'd like those entered in the record.

THE COURT: What is it?

MR. WALDO: These two. I didn't know if the Court ruled on it.

THE COURT: I marked them subject to cross.

MR. WALDO: We move to admit those.

THE COURT: So, no objection, so they come in.

MR. WALDO: That's all the questions, Your Honor.

THE COURT: All right.

(The witness was excused.)

THE COURT: Anything else by way of evidence?

MR. BROADDUS: No, sir.

THE COURT: All right, the City rests. I'll listen to your comments, starting with Waldo and Lyle.

MR. BROADDUS: Judge, I apologize. As I understand it all the City's exhibits are in?

THE COURT: There's no objection, right? That's what he said, Exhibits 1 through 4.

MR. WALDO: Let me see the others, Your Honor.

THE COURT: You should have 2 through 4 here. No. 1 is on the bench.

MR. WALDO: That's right, Your Honor. I have no objections to those documents.

THE COURT: Okay.

(Defendants' Exhibits No. 1 through 4 were received into evidence.)

THE COURT: You may proceed.

MR. WALDO: Your Honor, with all due

respect, I've never seen such a thing as this where the City comes in, passes a resolution, says they are going to take property. There is a defense filed which challenges the specificity of the improvements taken.

Your Honor, the case law is clear in Virginia, Dervishian, which was cited last week by the City of Hampton, that it must be fixed and it must be definite.

Your Honor, the City engineer couldn't fix a definite path of a road, by his own evidence, before the date of the resolution. The resolution, Your Honor, controls.

Your Honor, he agreed that the comprehensive plan -- Your Honor, there is no scale on it. He agreed that that's not fixed and it's not definite. By nature, Your Honor, engineering is precise. There is a reason, Your Honor, that the Virginia code requires that road alignments be fixed. If not, we would be taking five-acre tracts when we need two-acre tracts and taking one-acre tracts when we could get by with a quarter of an acre or when we could get by with two acres.

Your Honor, that is the law. To say a property owner is not entitled to injunctive relief

when in good faith they raise objections to the taking flies in the face of Nichols and Dervishian.

Your Honor, I cite Hamer just for the position to make sure that the Court understands where the property owner is coming from, that Hamer is a necessity case only and does not deal with the issue of public use being fairly or not fairly debateable being subject to judicial review, because Hamer says that that is subject to judicial review.

So, Your Honor, Mr. and Ms. Ottofaro are entitled -- I don't think anybody would object to that -- to their right to argue the defenses to the take after discovery is taken.

Mr. Broaddus asked us to bring our notebooks today. We have all our dates available for the end of January now and February to get discovery taken and to argue this case very quickly.

When the City manager, Your Honor, comes into court and says as the representative of the City that he's not aware of whether or not there is a contract and the City engineer says that he's not aware of the time table and then to say we've got to rush and tear this house down -- which under Nichols the Supreme Court of Virginia says you don't do because in property rights, which is, Your Honor, a

civil right according to the United States Supreme Court, you cannot replace that property. It is irreparable harm.

Your Honor, I think that we have well laid out the case law in Virginia. This is a good faith challenge to the right of the sovereign to take property when it is not a public use. I reiterate it's brought in good faith.

Until that hearing, Your Honor, comes down, which we submit to the Court we will be ready today to schedule that hearing and can do it very quickly, no harm will come to the City. Their own evidence showed that today, Your Honor. There was no evidence.

Your Honor, case law is clear. Whether or not there was evidence would make no difference because Nichols says you're entitled to that stay in Virginia until -- until, Your Honor, the defenses are heard. Your Honor, I could argue all day all these cases, and you don't want to hear it. We cited them.

THE COURT: You have as much time as you wish.

MR. WALDO: Your Honor, we have a thick brief well laid out, but it goes back to, Your Honor, Dervishian and Nichols. Those cases have not been

overturned. They are the law in Virginia. Injunctive relief lies with the -- 33.1-91 and 125 I think of the highway code makes it clear that injunctive relief is a property owner's remedy to the type of challenge.

We ask, Your Honor, that simply the City be enjoined until this hearing -- which the property owner will be ready to appear at very quickly -- comes down and is heard, give us our opportunity, Your Honor to take discovery in this case.

For those reasons, Your Honor, we ask respectfully that this Court grant an injunction to keep this building and this piece of property, and I said home earlier, but the house that belongs to it. It's not the residence of Mr. and Ms. Ottofaro.

For those reasons, Your Honor, and respectfully, Your Honor, for the law cited in Virginia, Your Honor, I submit to the Court that under Nichols there is no other alternative but to grant this injunction.

Thank you very much.

THE COURT: Sure. You get to close.

MR. BROADDUS: Thank you, Judge. We appreciate the opportunity to be before you and the patience that you have exhibited and the

accessibility that you have provided to us.

Try as I may, Judge, I'm not able to determine the source of Mr. Waldo's repeated assertion that the public use must be fixed in such a way as to suggest or con -- take that requirement and say that the construction plans of a roadway have to be finalized and included in a resolution authorizing condemnation.

We concur that the public use has to be fixed and definite. That means you can't simply adopt a resolution saying, Condemn this property and at some time in the future we will decide whether we want to use it for a park, whether we want to use it for a school, maybe for a road. We don't know why we want it. We just want it.

That public use in that situation is not fixed and definite. That was a concern that the Judge in Richmond had in the case we cited where the city council member testified that they weren't sure what uses were going to be made of the property to be acquired.

Here the resolution could not be clearer. It says that it's being taken for purposes of a public road. That public road is one that has been shown in the City's comprehensive plan since 1989, a

road owned by the City to be used in common by members of the public. And the code section in question 15.2-1903, Subsection C, says that the resolution declaring the necessity and intended use, public use of the property, constitutes sufficient evidence of such public use and necessity.

Now, that should be the end of the question. But to try to address some of Mr. Waldo's concerns, we've demonstrated that the alignment was fixed prior to the council resolution. It was fixed on August 4, 1999. That alignment is the same that has been used for road construction purposes. That was testified to by Mr. Whitley.

So, Judge, the alignment was fixed. It was fixed across the Ottofaro property prior to condemnation resolution. Condemnation resolution constitutes sufficient evidence of the public use, and that should be the end of the case, Judge.

With respect to Dervishian, Dervishian is a significant and important case because it confirms through the Supreme Court that the right of quick take is constitutional, that quick take in fact conveys defeasible title to the condemnor, here the City of Hampton, and that the City has a right of possession to that property.

There has been no evidence to show that there was fraud here or that the city council's action in any way was arbitrary or capricious. So, there is no basis for the Court to set it aside. There is no basis to conclude that the Ottofaros have made a showing that they are likely to prevail on their affirmative defenses. There is no basis to deprive the City of the rights that it has, that the Supreme Court has confirmed belong to the City.

To be sure, at times in the past there have been a variety of suggestions, just as there have been a variety of suggestions with respect to how the ultimate developer should proceed in terms of particular use of the property or who the developer may be, but before the condemnation resolution was passed the uncertainty of the pass was put aside and the alignment was adopted.

The alignment shows coming right through the Ottofaro house, right through his parcels. There's no question about that. So, Judge, for these reasons we submit that there is no basis for holding that the Ottofaros have carried their burden of proof.

As the Court indicated earlier, the burden is upon them. The contractor is waiting. He has

done all of the clearing except for the Ottofaro house. That is the only obstacle to proceeding.

The use is public, the resolution declares it. The resolution is sufficient evidence according to the General Assembly. It's the City's property. This has been the situation since the certificate was filed in the spring of this year. They could have moved forward at an earlier time if they were concerned.

We ask the Court not to impose any barriers on the ability to proceed with construction. We ask the Court deny the motion for injunction.

THE COURT: Thank you. Anything else?

MR. WALDO: Yes, sir, Your Honor. I can't imagine when the City's engineer comes in and says he doesn't know the time table and doesn't bring a contract that there is any harm to the City. The city manager said he didn't know if there was a contract.

Now, the only evidence of any irreparable injury is what was stipulated to, the statement that would have been made by Mr. Ottofaro had he been required to get on the stand.

Your Honor, it's clear in Virginia that you can attack the public use. That's what we intend

to do at a hearing on the merits in this case. But if you would follow Mr. Broaddus' logic to its logical conclusion, then, Your Honor, 33.1-91 -- and I'll let Your Honor if you want --

THE COURT: I have it right here.

MR. WALDO: That would have no meaning. In other words, Your Honor, when you adopt your resolution for highways and roads in Virginia if you didn't have to identify what you were going to need then you might as well cross out the statute because that statute is there, Your Honor, so that if you don't need it all you can't take it all.

Now, Your Honor, the only evidence is the resolution before you, and that did mention the comprehensive plan. But the City's engineer, Mr. Whitley, very candidly admitted that that wasn't precise. It wasn't exact and it wasn't even a fixed plan. When you look at the actual document, Your Honor, that the City did introduce as evidence today that's not a plan of a road, Your Honor.

I mean, can you imagine in Virginia if we are now allowed to take, to use the awesome power of eminent domain of road projects by submitting a plan such as this and saying, We need all your property. Here is our plan.

Your Honor, with all due respect to the City, that is ridiculous. It is ridiculous to come into Court and subject someone's property to a definite and fixed plan such as this.

Your Honor, I ask the Court with all due respect to enjoin -- in accord with Nichols and Dervishian to enjoin the City from tearing down a building that to the property owners in the city of Hampton is special, is unique, and does mean something, and allow us to be heard on the merits in six or eight weeks where based on the City's own evidence there is no harm because, Your Honor, the City manager doesn't know if there is a contract.

The City engineer says it's a private developer building that road, and the City engineer says he doesn't know what the time table is. So, there wasn't any evidence today, Your Honor, that the time table is up or the time table is in two weeks and if we don't have that house torn down the City is going to be in real trouble. That was never the evidence today, Your Honor.

I submit, Your Honor, that under law, as well as the facts in this case, the Ottofaros are entitled to have their property spared until there can be a hearing on the merits.

Thank you, Your Honor.

THE COURT: Thank you. Again, I appreciate your arguments, and both sides' briefs were just outstanding and very helpful in trying to help me decide.

I agree the law provides -- that the General Assembly enacted this -- that the City can take a citizen's property for public purpose. Yes, I agree you have to have a definite and a fixed reason or public reason for it. I agree with that.

There's one other factor. I believe the cases require there has to be City control over -- municipality control over the development. The cases support that. I agree that a citizen does have a right to come into court, even under the quick take.

I struggled with that because, again, the code does provide for two different avenues. But even under the quick take I think this is a proper action to try to enjoin the City.

Now, let's look at the facts. I have to respectfully deny the injunction, Mr. Waldo. The facts don't support what you're contending, in my view.

The City's plan -- in my view, the facts support that it was fixed and definite since 1989.

My interpretation of the case is -- that's supported through the City's Exhibits 1 through 4.

Then when I look at council's action on 9/22 -- of course in that resolution they stated a public purpose. They described it as a connecting road network to reduce -- the purpose was to -- the primary purpose was to reduce traffic on Queen Street, and there was some testimony as to the amount of volume on that interconnecting or connecting road.

One thing -- they also identified the lots that were to be condemned. Of course they attached a site plan. Of course it doesn't show the road in the site plan, but it identifies the lots.

That's Plaintiff's Exhibit 4. Plaintiff's Exhibit 2 -- again another City document. I believe that was this memo from Mr. Wallace that confirms the City is controlling the condemnation.

Then when I also look at the agreement, this was -- I did reference this. The document is in. I'm looking at Article 7 that lays out how the City has to control this. In my view this supports the City's contention that this was proper council action.

Therefore, I respectfully deny an injunction. The evidence that I heard today up to

this point does not support it. I believe you would be entitled to proceed under the Dervishian ruling if there is any dispute over the compensation. That's the issue before the Court.

MR. WALDO: Your Honor, the public use we have not -- you agree that we -- we were asking for and entitled to a hearing on that. Today's motion is to be on the injunction only because we haven't taken our discovery on the public use.

THE COURT: I understand. You certainly would be entitled to another day in court under Dervishian. You can say public use, but my ruling today is this clearly states -- this resolution, this action of council on September 22nd, 1999 was a proper action in the Court's view based on the evidence I've heard today. That's my ruling.

Now, under Dervishian I guess you have another shot at this as I understand it, but I would be more than happy to schedule a subsequent hearing. I think the rules do permit that, not only Dervishian but by the quick take code division.

So, you do have another chance at this. My ruling today based on the facts that I have heard -- the facts I have determined from the evidence support the City's action in this case.

MR. WALDO: Your Honor, with all due respect to the Court's ruling, we believe that under 33.191 the Court's ruling ignores that statute, because you could not tell whether there was a remainder that was salvageable under the Court's ruling.

But regardless of that, Your Honor, I would ask -- we have 15 days under the statutes to effect an emergency appeal, get a ruling from the Supreme Court. We intend to do that immediately after this hearing.

I would ask for 15 days based on the evidence presented to this Court today that there was no time table, Your Honor. That was the City engineer and their testimony. He didn't even know of a time table.

I would ask simply for 15 days. The appeal is ready to go, Your Honor. We intend to effect an emergency appeal to the Supreme Court on this issue, and I think, Your Honor, not to grant the 15 days would be tragic, in spite of the fact there has been no evidence, Your Honor, that there was a pressing need to tear that down immediately.

I ask the Court in all good faith that the property owners be allowed 15 days.

THE COURT: I'll let Mr. Broaddus respond to that.

MR. BROADDUS: Judge, we strongly object to that. I called Mr. Waldo -- I may have the exact date wrong, Judge, but I believe it was on December 1.

MR. LYLE: November 30.

MR. BROADDUS: November 30. I said the City has a need to go on the property. We're giving this advance notice in the event you want to go in and photograph anything, do whatever you want to do so you will be able to protect your interests at the fair market value hearing. We didn't want him to find out the next day that the house was gone. So, 15 days have passed since that time. The contractor is there.

I went by this morning. The equipment is there. They are ready to go. They've cleared all around the house, all around -- not on the property. They didn't go on the property, but they have cleared all around that other portion of the road, and we would very much object to that.

THE COURT: I'll tell you how I see it, Mr. Waldo. I don't think it would be appropriate for the Court to stay any further action by the City,

because I believe that they are acting properly.

Again, you have every right to go get whatever order you need to get from the Supreme Court. My ruling today is this injunction -- the evidence does not support this injunction. I respectfully deny it.

I certainly respect your right to appeal my decision. I agree you have a right to do that. At this point my only ruling is going to be that the evidence does not support this injunction, that the City does have a right to proceed. That's where I am.

* * *

VIRGINIA: In the Circuit Court for the City of Hampton

CITY OF HAMPTON

vs. Petition in Condemnation LAW #00-367

FRANK J. OTTOFARO, et al

PLAINTIFF's: (Frank J. Ottofaro, et al)

Exhibit #1 – Resolution 98-1896 ✓
Exhibit #2 – Memorandum dated 7-24-98 ✓
Exhibit #3 – Agenda dated March 30 & 31, 1999 ✓
Exhibit #4 – Resolution 99-2081 ✓
Exhibit #5 – Development Agreement ✓
Exhibit #6 – Letter dated 3-2-00 ✓
Exhibit #7 – Letter dated 3-3-00 ✓
Exhibit #8 – Memo dated 7-8-98 ✓
Exhibit #9 – Map/Diagram ✓
Exhibit #10 – Site Plan Maps (5) – Denied ✓

-137-

DEFENDANT's: (City of Hampton)

Exhibit #1 – Comprehensive Plan dated 12-13-89 ✓
Exhibit #2 – Large Conceptual Site Plan dated 8-4-99 ✓
Exhibit #3 – Very large color map on board
Exhibit #4 – Large map on board

I, James P. Bohnaker, Clerk of the Circuit Court of the City of Hampton, hereby certify that the within are the original exhibits in the above captioned matter.

Given under my hand this 20th day of December, 2000.

Clerk

RECEIVED
CLERK
SUPREME COURT OF VIRGINIA
DEC 21 2000
RICHMOND, VIRGINIA

RECEIVED
SUPREME COURT CLERK
DEC 20 2000
RICHMOND, VIRGINIA

Exhibit 3 of 4
NOT Sent

Plaintiff Exhibit # 1 WT.
12/15/00

RESOLUTION

RESOLUTION TO APPROVE TERMS OF THE PROPOSED TRANSACTION FOR THE I-64/MERCURY BOULEVARD RETAIL PROJECT AND TO AUTHORIZE AND DIRECT THE CITY MANAGER TO NEGOTIATE AND ENTER INTO A DEVELOPMENT AGREEMENT CONSISTENT THEREWITH; AND, TO NAME ROBERT BROWN & ASSOCIATES, INC., AS THE DESIGNATED VENDOR FOR THE DESIGN AND CONSTRUCTION OF THE PUBLIC INFRASTRUCTURE IMPROVEMENTS.

WHEREAS, the Council of the City of Hampton has determined through its strategic economic development initiatives that providing opportunities for new retailers entering the Hampton Roads market in the Coliseum Central area will enhance the tax base, improve the image and economic vitality of the Coliseum Central area and stimulate redevelopment of other retail and commercial facilities located in the Coliseum Central market; and

WHEREAS, Robert Brown & Associates, Inc., a Virginia corporation (the "Developer"), desires to acquire, develop and construct a major retail and commercial development project including big box retail, specialty retail and restaurants (the "Project") on certain property located in the city of Hampton, Virginia, at the southwest quadrant of Interstate 64 and Mercury Boulevard, bounded by Mercury Boulevard, West Queen Street, Pine Chapel Road and a proposed interior road running from Mercury Boulevard to Pine Chapel Road (collectively, the "Property"). The aggregate cost of all aspects of the Project, including land acquisition, on-site and off-site improvements and construction of buildings and associated facilities and improvements, is tentatively estimated to be approximately $42,000,000; and

WHEREAS, the Developer has entered into option contracts ("Developer's Options") and letters of intent to acquire the property. The Developer intends to acquire additional property, making his total development approximately 51 developable acres, excluding interior roads and the right of way for widening of existing roads; and

WHEREAS, the City and the Developer recognize and agree that the Developer is assuming significant financial risk in undertaking the Project, and that all risks of cost overruns, labor difficulties, parcel acquisition and the like that are integral to making this complex development a success are the sole responsibility of the Developer; and

WHEREAS, the City and the Developer recognize and agree that the City's existing public road and utility infrastructure are not adequate to support the public's needs in using the Project and surrounding traffic arteries, and that pursuant to the City's Master Plan it is necessary to widen and/or improve West Queen Street, Mercury Boulevard and Pine Chapel Road and to develop and construct interior public streets within the Property and to install utilities within the rights-of-way of such public streets; and

WHEREAS, in order to accommodate such public roadway and infrastructure improvements, it may be necessary for the City to acquire, by eminent domain or purchase, certain properties;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Hampton:

1. The City Council finds that it is in the public interest of the citizens of the City of Hampton, and that it is consistent with the economic development goals of the City and with the City's master plan, for the Project to be developed to increase tax revenues, stabilize existing revenue sources derived from the Coliseum Central area and stimulate redevelopment of existing facilities that may generate higher revenues.

2. The City Council finds that the Developer is the only practical choice as general contractor for the construction of public infrastructure associated with the Project for the reasons that (i) the construction must be coordinated with marketing efforts for the Project and the schedules required by prospective tenants and occupants; (ii) it is far more efficient and cost effective to have the same contractors working in both the public sector and the private sector portions of the Project; (iii) the Developer is qualified and experienced to responsibly complete the Project; and (iv) since it is the owner and optionee of part of the land that makes up the Project, the Developer is in a unique position to accomplish the foregoing tasks to lead to the successful completion of the Project. The Developer shall be the "designated vendor" for the Project so as to permit appropriate progress payments from the City during the course of design and construction performed within the scope of this Agreement.

3. The City Council hereby approves the terms of the proposed transaction with the Developer as set forth on the "I-64/Mercury Boulevard Project – Proposed Terms" attached to this Resolution and hereby authorizes and directs the City Manager to negotiate and enter into a Development Agreement consistent therewith.

4. The City has made or intends to make certain expenditures in connection with the planning, development, acquisition, construction and equipping of the public roads and utility infrastructure to support the public's needs in using the Project, and intends and reasonably expects to reimburse itself for such expenditures with the proceeds of its bonds. As of the date of this Resolution, such bonds are expected to be issued for reimbursement of such expenditures and with respect to the planning, development, acquisition, construction and equipping of the public roads and utility infrastructure in the principal amount not to exceed $12 million. This paragraph of this Resolution constitutes a declaration of the City's "Official Intent" under Treas. Regs. §1.150-2(e) to reimburse itself with a portion of the proceeds of the bonds for certain of the proposed expenditures.

Adopted at the regular Council meeting held on May 13, 1998.

James L. Eason, Mayor

Attest:

Clerk

CITY13673

I-64/ MERCURY BOULEVARD RETAIL PROJECT
PROPOSED TERMS

Developer:

Robert Brown & Associates, Inc. or an entity in which Robert Brown owns at least 20% equity interest.

Property:

Approximately 51 developable acres bounded by Mercury Boulevard, West Queen Street, Pine Chapel road and a new interior road running approximately parallel to Interstate 64, in Hampton, Virginia.

The Project:

A large-tenant "big box" retail shopping center containing at least two Anchor Tenants and containing in the aggregate at least 350,000 square feet.

City Funding:

Up to $11,000,000 of Public Purpose Funds of which up to $7,000,000 will pay for road and utility improvements and up to $4,000,000 will pay for right-of-way acquisition. The Development Agreement will define the scope of the road and utility improvements and will describe the "Property" by whole parcel to be acquired by the Developer.

Developer Responsibilities:

Feasibility Phase:

Upon execution and delivery of a Development Agreement, the Developer agrees to undertake the following responsibilities:

Parcel Acquisition.

The Developer will acquire land within the Property and, to the extent parcels extend beyond the Property, all of such parcels, on such terms that the Developer, in its reasonable business discretion, determines to be feasible. To this end, the Developer must (i) acquire all property located on CC Spaulding Drive and such other additional property included in the City's approval of rezoning Case No. 1068 dated August 20, 1997, which the Developer has currently under option or contract, and to use commercially reasonable efforts to acquire lots from the owners of all lots not under option or contract; (ii) use commercially reasonable efforts to purchase and relocate the Little Zion Baptist Church; and (iii) acquire sufficient land, in the opinion of the City, on which to develop the Center to include gross leasable area of not less than 350,000 square

feet of retail space. Closing of land purchases will be contingent upon conditions to City funding being met.

Tenants and Purchasers.

The Developer will market the Project and seek to obtain commitments from prospective tenants and/or purchasers of portions of the Center. The Developer will keep the City apprised of the status of all negotiations and the identity of prospective tenants and purchasers. The City will use reasonable efforts to keep all such information confidential.

Employment of Architect; Submission of Plans and Specifications.

The Developer shall select and employ as the Project Architect a registered architect or architectural firm acceptable to the City to design the Private Components. All design of both the Public Components and the Private Components shall be subject to approval by the City.

Any material changes in design before completion of the Center must be approved by the City Manager.

Adjoining Development.

The Developer shall fully cooperate with and coordinate the foregoing plans with the retail entertainment developer selected by the City to develop the area between the interior road and Interstate 64, as shown on the Master Development Plan.

Budgets.

Attached hereto as Exhibit A is a preliminary budget (the "Preliminary Budget") prepared by the Developer, which shows the total costs of development of the Project. Also attached as Exhibit B is a preliminary pro forma of revenues and expenses (the "Pro Forma") for the Center after completion. During the pre-development period, the Developer will refine the Preliminary Budget as to the contemplated costs and expenses to design, develop and complete the Project and will coordinate all aspects of the budget process related to the Public Components and the Public Purpose Funds being provided by the City with the appropriate City departments and staff. The final budget (the "Development Budget") shall be subject to approval by the City Manager.

Survey.

The Developer will obtain a boundary survey of the Property and the Road Improvements at the Developer's own cost and expense.

Traffic Studies.

The Developer will arrange for the preparation of traffic studies of Mercury Boulevard as needed for the road design required below.

Road Design.

The Developer will begin preparation of the preliminary design for the Public Components, including the widening of and improvements to Mercury Boulevard, West Queen Street and Pine Chapel Road (as applicable) and for the layout of the interior public streets within the Property. Preliminary and final design of the Public Components shall be subject to the same City approval process as the Center schematics.

Design Phase:

Anchor Tenant Commitment.

The Developer shall obtain on or before November 30, 1998, an "Anchor Tenant Commitment", which means (a) a binding agreement (in the form of a lease or purchase agreement) between the Developer and one or more major retailers or similar users (collectively, the "Anchor Tenant") for (i) at least 130,000 square feet to be occupied by a single Anchor Tenant, or (ii) at least 150,000 square feet to be occupied by two or three Anchor Tenants, with no less than 15,000 square feet to be occupied by any single occupant of the two or three Anchor Tenants in question; and (b) each such Anchor Tenant must be approved by the City Manager. For example, if the Developer obtains a 110,000 square foot Montgomery Ward store, along with a 30,000 square foot Barnes & Noble Bookstore and a 15,000 square foot GAP store (all of whom are recognized retailers), the requirement for 150,000 square feet of Anchor Tenant under item (ii) would be satisfied, and the Anchor Tenant Commitment will have been obtained.

Road Utility Improvements.

The Developer will engage an engineering firm approved by the City to prepare plans for (a) the widening of and improvements to West Queen Street and Mercury Boulevard; (b) the new interior streets to be constructed through the Property providing access from Mercury Boulevard, Pine Chapel Road and West Queen Street; and (c) utilities infrastructure associated with the Project to be located within such rights-of-way, which shall include water, sewer, storm drainage, right-of-way landscaping, street lights and irrigation systems (the "Utility Improvements"). The road construction and improvements and the Utility Improvements are referred to collectively as the "Road Improvements".

City Responsibilities:

Pre-Development and Design Phase.

The City will appropriate $75,000 from the economic development fund to be used to reimburse the Developer for Road Improvement design and engineering costs, to be paid against invoices presented, and to be credited against the $7,000,000 road and utility improvement funds.

Conditions to City Funding:

- The Developer shall have acquired title to all of the Property, or so much of the Property that will allow, in the opinion of the City, the development of not less than 330,000 square feet of retail space in the Center.
- The Developer shall have obtained and maintain the Anchor Tenant Commitment.
- The Developer shall have obtained and maintain the private financing.
- The plans for the Road Improvements and the Center schematics and the Site Plan shall have been approved by the City.
- The Developer shall have completed the Developer's Responsibilities set forth above, and the City shall have approved a final budget (the "Development Budget") for the Project.
- The Developer shall have conveyed to the City the "Off-Site Property".

Adjustment to Public Purpose Funds:

Rents in Excess of Pro Forma.

Should the Developer achieve Actual Rents (hereafter defined) in excess of Pro Forma Rents (hereafter defined), and such higher rents are not attributable to higher costs of construction than budgeted, the available Public Purpose Funds shall be reduced by an amount determined by the following formula:

Pro Forma Rents shall be subtracted from Actual Rents.
The difference shall be divided by 1.1 and the quotient multiplied by ten.

This adjustment shall be made from time to time as Developer obtains letters of intent or similar commitments from tenants. For the purposes of this adjustment, "Actual Rents" means the average of the first three years' annual rents committed to by tenants, and "Pro Forma Rents" means the sum of the rents set forth in Pro Forma attached hereto

as Exhibit B, less a five percent vacancy but excluding all pass-throughs (CAM charges, insurance and taxes).

Cost Savings.

"Savings" means the difference between the actual cost of the Project and the greater of the Preliminary Budget or the Development Budget. For the purposes of calculating Savings, the cost of acquiring and relocating Little Zion Baptist Church in actual costs, in the Development Budget and in the Preliminary Budget, shall not exceed $2,000,000. All Savings aggregated against overruns shall be divided on the basis of two-thirds to the Developer and one-third to the City. Savings when achieved shall reduce the Public Purpose Funds available to the Project or, if Savings are achieved after the Public Purpose Funds are spent, the City's share shall be paid to the City in cash. The Preliminary Budget contains $2,294,826 for the acquisition of lots on CC Spaulding Drive and other parcels that are not currently under contract or option to the Developer. For the purposes of computing cost savings at completion of construction of the Project, the Preliminary Budget (or the Development Budget, as the case may be) (collectively, the "Budgets") shall be reduced by that amount. Three years after the date of the Development Agreement, one-third of the excess of $2,294,826 over the Developer's actual cost of all of such property acquired by the Developer during such period less the proceeds of sale of any property included in the Budgets sold by the Developer net of only closing costs and real estate commissions, shall be paid to the City. <All savings in the cost of Road Improvements shall inure to the benefit of the City.>

Shortfall in Public Purpose Funds.

Upon the City's expenditure of the full amount of the Public Purpose Funds, the Developer shall pay for all additional costs for the Public Components and shall complete construction of the Public Components even though the Public Purpose Funds provided by the City have been exhausted.

Financial Statements.

The Developer shall deliver to the City monthly financial statements showing costs of the Project expended to date and against the Development Budget, the funds required to complete, and the sources of funds in the Project and required to complete, in sufficient detail for the City to compare them with the Preliminary Budget and the Development Budget. Upon completion of the Project, the Developer shall deliver to the City statements of total costs of the Project setting forth the information required above, certified as correct by the Developer and, to the extent of construction costs, by the Project Architect. The City will have the right to audit Developer's books and records at any time.

Property Acquisition:

Acquisitions by the City.

The City shall own all right-of-way required for the Road Improvements. The City will coordinate acquisitions with the Developer so that the cost of the acquisitions is minimized to the extent reasonably possible. If and to the extent that the Developer has not acquired title to portions of the Property that will be located within the right-of-ways of the Road Improvements, the City shall acquire such portions of the Property pursuant to eminent domain proceedings or by consensual agreement with the property owners so that the construction of the Road Improvements may proceed. All acquisition costs incurred by the City shall reduce the $4,000,000 in Public Purpose Funds available for right-of-way acquisition, and to the extent such funds have been exhausted by the time such acquisition occurs, the Public Purpose Funds available for construction of Road Improvements shall be reduced. The Developer acknowledges and agrees that the City may only exercise its power of eminent domain when there is a direct showing of public purpose and need, and the power may only be exercised for those parcels which are necessary for the Road Improvements and related infrastructure improvements and additions. The Developer further acknowledges that the City does not intend to acquire by condemnation any portion of Little Zion Baptist Church (with the exception of acquisition in connection with possible widening of West Queen Street) or any lots on CC Spaulding Drive.

Developer Property.

Right of Way. The Developer shall convey to the City all property it now owns or subsequently acquires within the right-of-way of all Road Improvements. The City shall reimburse the Developer for its cost of any property within the right-of-way up to $4,000,000, reduced by (i) acquisition costs of right-of-way acquired by the City and (ii) all adjustments to the Public Purpose Funds on account of rents in excess of Pro Forma rents or cost savings.

Off-Site Property. The Developer shall convey all properties and rights, options and leases ("Property Rights") of properties owned by the Developer or any affiliated entity or person which are located between the interior road and Interstate 64 shown on the Master Development Plan (the "Off-Site Property") to the City at no cost to the City, except the City shall reimburse to the Developer the $150,000 option fee paid by the Developer if it exercises its option on Parcel 30.

Future Dedications. The Developer agrees to dedicate to the City, when requested by the City and without any reimbursement or compensation, such portion of the Property owned by the Developer that is immediately contiguous to West Queen Street for the purposes of the development and construction of the West Queen Street Phase II Improvements, which are contemplated to be made in the future.

City Exchange.

In exchange for the Off-Site Property, the City will convey to the Developer property currently owned by the City within the Property not needed for Road Improvements.

Construction of Public Components.

At such time after (a) the Anchor Tenant Commitment and (b) the City's approval of the Developer's Site Plan and the plans for the Road Improvements, the Developer and the City, in conjunction with each other, will undertake to complete the plans for the Road Improvements and coordinate obtaining all necessary City and other governmental approvals, and to solicit competitive bids for the construction of the Road Improvements from qualified contractors acceptable to the City and award the work for the Road Improvements in one or more contracts. The Developer shall then proceed to construct the Road Improvements in accordance with plans approved by the City using such contractor(s) selected through the foregoing bid procedures.

Events of Default by the Developer.

The following shall constitute Events of Default by the Developer:

- Failure to obtain the Anchor Tenant Commitment by November 30, 1998.
- Failure to complete its pre-development responsibilities by November 30, 1998.
- Failure to obtain commitments for debt and equity financing by February 28, 1999.
- Breach of any Developer covenant of the Development Agreement or failure to perform any of the Developer's obligations or responsibilities thereunder, after receipt of 30 days' written notice of such breach or failure.
- Bankruptcy of the Developer, or a general assignment for the benefit of the Developer's creditors, or an admission by the Developer of its inability to pay its debts as they become due, or attachment or levy on the Center, or default under any loan secured by the Center.
- Failure of the Developer to satisfy all conditions of funding by the City by May 31, 1999.

Option to Purchase:

In consideration of the undertakings by the City hereunder, the Developer will grant to the City the option to purchase all property and Property Rights owned by the Developer in the area bounded by Queen Street, Mercury Boulevard, Interstate 64 and Pine Chapel Road (collectively, the "Option Property"). This option may be exercised at any time up to one year after an Event of Default by the Developer occurs, and shall be exercised by the City giving written notice of its exercise. The purchase price for the Option Property shall be the costs incurred by Developer in acquiring the Option Property, including closing costs and attorneys' fees, but not including any interest or carrying costs of the Option Property nor the cost of any engineering, architectural or other studies or plans made with respect to the Option Property, the Center or the Road Improvements.

Other Terms:

Such other terms and such modification to these terms as the City Manager deems to be in the best interests of the City, on advice of the City Attorney and Special Counsel to the City, except without the consent of City Council in no event shall the Public Purpose Funds exceed $11,000,000, the "Parcel Acquisition" terms be reduced, or the Anchor Tenant Commitment requirements be changed.

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Plaintiff Exhibit #2
12/15/00 W.T.

City of Hampton

MEMORANDUM

TO: Members of City Council

FROM: George Wallace

DATE: July 24, 1998

SUBJECT: I-64/Mercury Boulevard Retail Project

You will find attached a summary of the major deal terms and some questions and answers regarding the above referenced project. I have attempted to give you the most significant information, as briefly as possible. The questions are those that seem to be the most frequently asked.

Please do not hesitate to let me know if I can provide you with additional information.

Thank you.

DEPARTMENT OF RETAIL DEVELOPMENT
2 EATON STREET, SUITE 600, HAMPTON, VIRGINIA 23669

I-64/Mercury Boulevard Retail Project 7/98

Summary of deal points:

Developer: Robert Brown & Associates, Inc., or an entity in which Robert Brown owns at least 20% equity interest. (Note: The development agreement will require that Robert Brown own 20%; however, under the current plan he will own 50%. His financial partner, R.G. Moore, will also own 50%.)

Project size: Approximately 51 acres. An anchor and specialty retail shopping center between 330,000 and 461,000 square feet.

City funding: Up to $11 M, of which $7 M will pay for road improvements and up to $4 M will pay for right-of-way acquisition. The developer will build the road; however, the City will approve all steps of the process including the solicitation of competitive bids and the selection of the contractor. The money will be disbursed as the work is completed and approved by the City. The City will keep any money not spent.

Condemnation: The City will not condemn the Little Zion Baptist Church or the homes on or adjacent to CC Spaulding Drive. Any costs of condemnation necessary for roads will be deducted from the $4 M set-aside for right-of-way acquisition, so that the City does not spend over $11 M.

Financial benefits:

The City's initial maximum investment will be $12 M (this includes yr. 1 debt service when no revenue is coming in). The 20-year payoff of principal and interest will be $21,047,520. The projected tax revenue for the 20-year period is $35,300,919 for the anchor and specialty retail project and $56,000,000 for the Urban Entertainment Center.

In addition, the developer will give the City property he owns on the I-64 side of the interior road, and the City will give the developer property it owns on the Queen Street side of the interior road. This will mean a net benefit to the City of approximately $2 M in property.

The projected tax revenue and the property which will be given to the City represent a net financial benefit of $76,253,399, over a twenty-year period.

The developer will also convey his land lease on parcel 30 to the City. This is the +/-13 acres which includes the lake and is needed for the Urban Entertainment Center project. The City will reimburse the developer $150,000 for the purchase of the land lease.

Purchase of CC Spaulding Drive: The developer has agreed to purchase all properties which are for sale and to appropriately buffer those properties which are not for sale.

Other safeguards:

Before any City funding is released, the developer will have:

- acquired enough property to build a shopping center of at least 330,000 SF.
- obtained a commitment from an anchor tenant of at least 130,000 SF, or up to three anchor tenants of 150,000 SF.
- obtained private financing.

The City will receive a savings from the $11 M if the developer's cost of construction is less or the rents are higher, based on a pre-determined budget and pro forma. In addition, the developer has agreed to a cap on his return on investment.

The developer will be responsible for any additional costs over the $11 M needed for building the roads.

Questions and answers:

Why is it important that we move forward with this project now?

Our consultants have said that we will continue to lose market share if we miss the window of opportunity to develop this site and to bring in retailers during this time when the retail industry is so active.

Also, the national developer is ready to move forward on the Urban Entertainment Center project; however, we need to be able to represent that we control the property. Once we give the developer notice of property control, he will begin serious conversations with retail/entertainment prospects and will submit a specific proposal to the City within seven months.

Why does the City need to pay for the roads?

This is a redevelopment project which requires the assemblage of many properties. The cost of the property makes it unfeasible for the developer to pay for the roads.

It is a common practice for the City to pay for roads to encourage private investment. Unlike most cases, these roads are being built at the same time the project is being built. This means immediate revenue to pay for the roads.

The roads will ultimately serve two projects and will make the development of the Urban Entertainment Center possible.

What steps are we taking to deal with our current retail vacancies?

There are specific plans for leasing many of our vacant shopping centers. For example:

- Leases for major tenants have been signed for Langley Square which is being sold and will be completely renovated.
- Newmarket Fair is being transformed to Netpark, an office complex.
- Mercury Plaza is being re-leased and a major renovation is planned by the owners.

In addition, the City's Retail Development Department is working with the business community to develop a program to continue to address vacancies.

What is the experience of the developer and his financial partner?

Robert Brown has twenty years of experience in developing shopping centers and successfully leases and manages eight shopping centers in Hampton Roads. He has previously submitted to us a list of retail projects he owns and financial information on each project.

R. G. Moore has been in the home building business since 1954 and has developed over 20,000 lots and 16,000 homes. He is currently developing homes in three Hampton Roads cities/counties and will begin projects in two additional cities in 1999.

Mr. Moore has been associated with Mr. Brown in seven retail projects, including Coliseum Crossing.

What is the impact of the intended land sale recently announced (JDN Inc.)?

- Not sure, may increase cost of land assembly
- Compels negotiations with a new entity in context yet to be determined
- Increases possibility that area will be developed in a fashion not envisioned previously and in a fashion that may preclude the entertainment complex and thereby reduces potential tax revenues.
- Based on our conversations with the developer, we are optimistic that they understand the goals of the City in the development of this site and will not stand in the way of moving forward as planned.

I-64/Mercury Blvd. Project - Agenda for Individual Meetings with Council Members

March 30 & 31, 1999

CONFIDENTIAL

Plaintiff Exhibit # 3
P 15 ou. W.T.-

George Wallace

Introduction

Reasons for this project:

- generation of tax revenue
- will help to establish the Coliseum area as a regional destination, insuring future private investment and the success of future projects
- **recapture business lost to other cities (big box will do this)**
- **provide unique shopping and entertainment opportunities for the citizens of Hampton, in a family environment (entertainment piece will do this)**
- **provide jobs for Hampton's citizens**

Positive statement regarding the increased return on investment, now that the two projects have been integrated

Agenda :

- John Bates - to explain deal
- Sheryl Bailey - to discuss return on investment
- Kathy Grook - to discuss information gathered on The Cordish Company from other cities

Schedule:

- individual meetings with Council - March 30 & 31
- public input and vote - April 28 Evening Session (John Bates will explain the specific items on which they will vote)

John Bates

Why this is a much better project for the City:

- puts Cordish as the lead developer giving us a much higher level of confidence in the ability of the developer to develop a quality project
- eliminates constant "tug of war" between the developers
- allows developers to maximize the potential of the project
- believe it will cost the City less in the long run
- allows City to see a quicker return because both projects are developed at once
- provides a better proportionate return to the City (Sheryl will explain later)

Specific deal terms:

1. In August, Council authorized George to proceed with a development agreement with Rob Brown and defined three specific deal terms which could not be changed:
   - minimum square footage - this has not changed, and additional square footage is being required for the entertainment piece of the project
   - parcel acquisition terms - have not changed, including the commitment to CC Spaulding Drive and the Church
   - $11 million funding - this has not changed for the 51 acres/big box portion; however, as we expected, we will need to approve additional incentives for the entertainment piece.

2. We have negotiated long and hard and come up with what we believe is a very fair deal for the City. (John, please reference the fact that other cities in the area are putting far more into similar projects. Sheryl will give some specific examples during her presentation.)

3. The return on investment is proportionately greater then what was originally approved for the big box piece. (Sheryl will explain during her presentation)

4. Specifics of what Cordish needs to make this a signature project:
   - up to $5 million for tenant inducements which must be pre-approved by the City Manager
   - the land - including parcel 27 and 29/VDOT (Sheryl will factor this into her numbers; however, if we are going to lease it, rather than give it to Cordish, it is important to make this point.)

5. Other significant deal terms which have changed:
   - Cordish will be the lead developer and the majority owner
   - Cordish has agreed to give us a % of the net revenue (this replaces the original complicated formula)
   - roads may be private rather than public (explain why this is positive)
   - the developer is given more flexibility with the use of the money (be careful how you position this)

6. Reasons why we are recommending the use of the IDA:
   - gives us the ability to receive a % of the profit
   - gives the city and the developer more flexibility
   - most City Councils prefer this because it takes the politics out of the day to day decision making on the deal

Page 3

1. Items that will require a vote on April 28:
    - resolution to authorize IDA to enter into development agreement
    - transfer of land to IDA (the VDOT property will never pass through the city, but go straight to the IDA)
    - $5 million to be appropriated to IDA during vote on budget
    - $12 million to be re-appropriated to IDA during vote on budget

Sheryl

- private and public investments
- examples of public investments made by other area cities
- tax revenue projections by Cordish and City
- independent analysis of this information by ERA
- annual debt service and net tax revenue to City (expected and minimum)
- additional adjustments to net tax revenue

Kathy

- letters from other cities who have worked with Cordish

George

- idea of tying some of the revenue to "community projects" in the strategic plan

Plaintiff Exhibit #4 WT.
12/15/00

RESOLUTION AUTHORIZING ACQUISITION BY CONDEMNATION OR NEGOTIATION OF PROPERTY FOR RIGHT-OF-WAY IMPROVEMENTS TO THE INTERSECTION OF WEST QUEEN STREET AND WEST MERCURY BOULEVARD AND OTHER STREET IMPROVEMENTS CONSISTENT WITH THE CITY'S COMPREHENSIVE PLAN.

WHEREAS, the Council of the City of Hampton deems it necessary to acquire property to be used for the construction of improvements to the intersection of West Mercury Boulevard and West Queen Street, for the construction of improvements to the intersection of Pine Chapel Road and West Queen Street; and property acquisition incidental to these named improvements which are consistent with the City's Comprehensive Plan; and

WHEREAS, the Council of the City of Hampton deems it necessary to acquire property to be used for the construction of a new arterial network between Pine Chapel Road and West Mercury Boulevard; and

WHEREAS, the Council of the City of Hampton deems it necessary to acquire property to be used for construction of a connecting road network for this new arterial; and

WHEREAS, construction of the new roadways and improvements to existing roadways will serve a public purpose by improving the City's transportation network; by providing improved access to underutilized property within the City of Hampton; and by reducing the traffic flow along the portion of West Queen Street that abuts a residential area; and

WHEREAS, pursuant to Section 33.1-91 of the Code of Virginia of 1950, as amended, and under the conditions set forth therein, the City is authorized to acquire an entire parcel of land even though only a part thereof is to be utilized for highway purposes.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Hampton, Virginia that it approves and directs the acquisition of the parcels located within the project area

and designated on the attached Exhibit "A" for the public purposes set out above by negotiation or condemnation.

BE IT FURTHER RESOLVED that the City Attorney be and is hereby authorized and directed to institute negotiations and condemnation proceedings as authorized by the Code of Virginia of 1950, as amended, for the acquisition of the necessary rights-of-way (and, within the limitations and conditions of Section 33.1-91 of the Code of Virginia of 1950, as amended, entire tracts upon which such rights-of-way shall be located) from the land owners which are designated on the attached Exhibit "A", but nothing in this resolution shall be construed as preventing negotiation by the City Attorney and/or City Manager for the purchase of any and all of said property at a private sale should the owners there agree to sell at the prices offered.

BE IT FURTHER RESOLVED by the Council of the City of Hampton, Virginia that the City Manager be authorized to file certificates of take in accordance with Article VII of Title 33.1 of the Code of Virginia of 1950, as amended, against the following parcels all located within the project area which are designated on the attached Exhibit "A".

I certify the foregoing to be a true and accurate copy of Resolution 99-2081, adopted at a regular meeting of the City Council of the City of Hampton, Virginia, held September 22, 1999, pertaining to acquisition by condemnation or negotiation of property for right-of-way improvements to the intersection of West Queen Street and West Mercury Boulevard and other street improvements consistent with the City's Comprehensive Plan.

Clerk

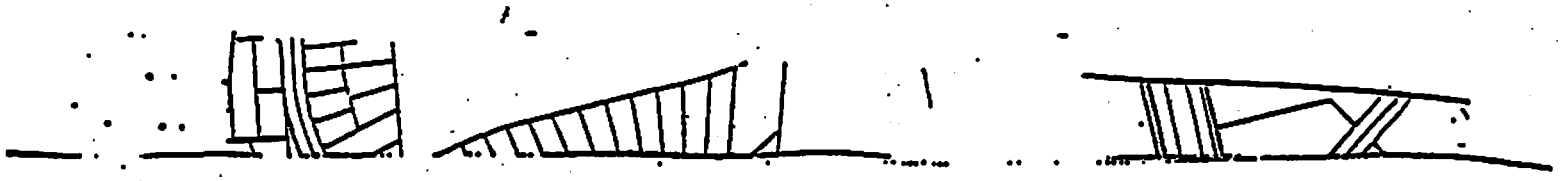
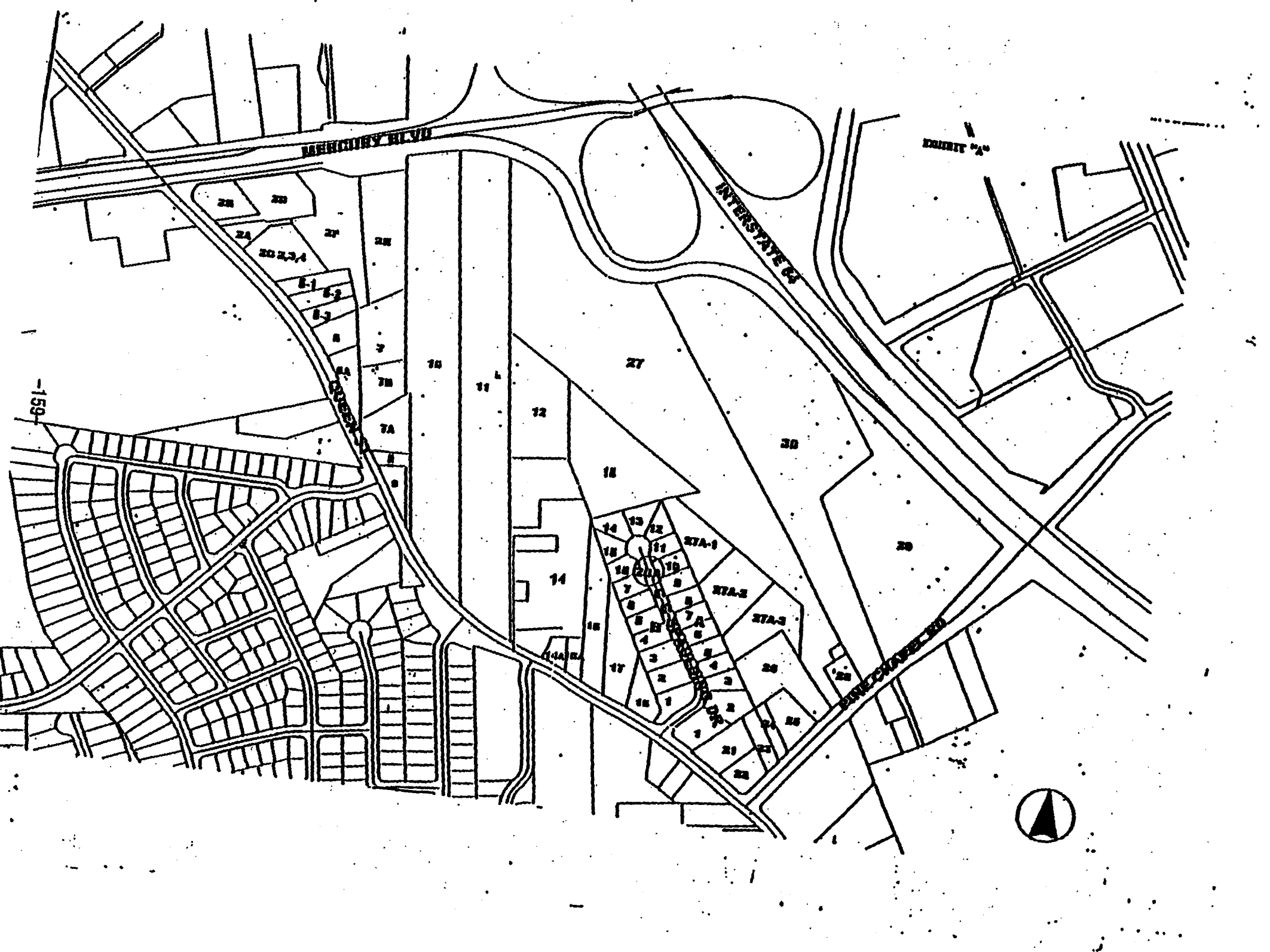


EXHIBIT A

Parcel Number	Property Owner	Total Assessment
2A	Joseph, Edwin A.	$ 228,700
2B	Miller, Augustus C.	$ 492,400
2C, 2, 3, & 4	Williams, Shawn Carlton ETAL	$ 325,700
2D	Bolin, Larry Dale	$ 847,700
5-1	Easter, David Leon	$ 185,800
5-2, 5-3, & 6	NDS Computers Inc.	$ 430,700
14	St. Johns Wood Apts. LP	$ 1,607,900
23 & 24	Ottofaro, Frank J. & Dora J.	$ 74,900
25	Victor, Irwin	$ 63,200
26 & 28	Yarrington, James E. & Lorena H.	$ 86,600
27A-1	Furno, Arietta C.	$ 29,000
27A-2	Mallory, James D.	$ 36,000
27A-3	Davis, F.L. Jr.	$ 37,000


MERCURY BLVD
INTERSTATE 64
EXHIBIT "A"
-159-
QUEEN
BUNKER HILL RD
BUNKER HILL DR
27A-1
27A-2
27A-3

Plaintiff Exhibit #5
12/15/00 W.T.

DEVELOPMENT AGREEMENT

CORDISH / POWER PLANT PROJECT

CONFIDENTIAL

DEVELOPMENT AGREEMENT

Between

THE INDUSTRIAL DEVELOPMENT AUTHORITY
OF THE CITY OF HAMPTON

As Lessor

and

HAMPTON ROADS ASSOCIATES, L.L.C.

As Lessee

As of November 18, 1999

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DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (this "Agreement") is made as of the 18th day of November, 1999, by and between **THE INDUSTRIAL DEVELOPMENT AUTHORITY OF THE CITY OF HAMPTON**, a political subdivision of the Commonwealth of Virginia (the "IDA"), and **HAMPTON ROADS ASSOCIATES, LLC**, a Maryland limited liability company (the "Developer").

RECITALS

A. Subject to the terms and provisions of this Agreement, the Developer desires to acquire, develop and construct a major retail and commercial development Project (hereafter defined), which will include big box retail, lifestyle entertainment retail and restaurants, on all or a portion of that certain property located in the City of Hampton, Virginia (the "City"), containing approximately one hundred seven (107) acres of land and bounded by Interstate Route 64, Mercury Boulevard, West Queen Street and Pine Chapel Road (collectively, the "Property"), as indicated on the plat attached hereto as Exhibit A.

B. Subject to the terms and provisions of this Agreement, the Developer intends to enhance the "Coliseum Central" area of the City by providing opportunities for new retailers entering the Hampton Roads market to locate in the City, improving the image and economic vitality of the Coliseum Central area and stimulating redevelopment of other retail and commercial facilities located in the Coliseum Central market.

C. The parties hereto recognize and agree that the Developer is assuming significant financial risk in undertaking the Project, and that all risks of cost overruns, labor difficulties, parcel acquisition and the like that are integral to making the Project a success after fulfillment of the IDA's obligations hereunder and under the Ground Leases (hereafter defined), are the sole responsibility of the Developer.

D. The parties recognize and agree that the City's existing public road and utility infrastructure are not adequate to support the public's needs in using the Project and surrounding traffic arteries, and that it is necessary to widen and/or improve West Queen Street, Mercury Boulevard and Pine Chapel Road, to develop and construct interior public streets within the Property, and to install utilities and other infrastructure to serve the Project and surrounding property. As a part of the Project and subject to the terms of this Agreement, the Developer intends to build, with the cooperation of the City of Hampton, a public road through the Property, effectively dividing the Property into two tracts, the easternmost of which is sometimes referred to in this Agreement as Phase One and the westernmost of which is sometimes referred to as Phase Two.

E. The IDA has found that it is in the public interest of the citizens of the City, and that it is consistent with the economic development goals of the City and with the City's master plan, for the Project to be developed, in order to increase tax revenues, stabilize existing revenue sources derived from the Coliseum Central area and stimulate redevelopment of existing facilities in order to generate higher revenues. The IDA is therefore willing, subject to the terms

and provisions of this Agreement, to enter into the Ground Leases and provide the Developer with an allowance in the amount of Eleven Million and 00/100 Dollars ($11,000,000.00) towards land acquisition costs, construction of road and utility infrastructure improvements costs and development costs, and to provide an additional allowance in the amount of Five Million and 00/100 Dollars ($5,000,000.00) for tenant inducement costs and tenant improvement costs, in order to achieve the substantial tangible revenue benefits and intangible benefits that will be derived from the development of the Project. The funds to be provided by the IDA are hereafter referred to as the IDA Allowance.

F. The IDA has found that the Developer is the only practical choice as general contractor for the construction of public infrastructure associated with the Project for the reasons that (i) the construction must be coordinated with marketing efforts for the Project and the schedules required by prospective tenants and occupants; (ii) it is far more efficient and cost-effective to have the same contractors working in both the public sector and the private sector portions of the Project; (iii) the Developer is qualified and experienced to responsibly complete the Project; and (iv) since it is the owner and optionee of part of the land that makes up the Project, the Developer is in a unique position to accomplish the foregoing tasks to lead to the successful completion of the Project. The Developer shall be the "designated vendor" for the Project so as to permit appropriate progress payments from the IDA during the course of design and construction performed within the scope of this Agreement.

G. But for the agreement of the IDA, subject to the terms and provisions of this Agreement, to enter into the Ground Leases and to provide the Developer with the IDA Allowance, the Developer would not have entered into this Agreement and would not have agreed to enter into the Ground Leases.

DEFINITIONS

For the purposes of this Agreement, and in addition to terms defined elsewhere in this Agreement, the following defined terms shall have the meanings described thereto in this Definitions Section.

Acquisition, Infrastructure and Development Allowance means that Eleven Million Dollar portion of the IDA Allowance for payment of those costs listed in Section 9.1.1.

Additional Allowance means that Five Million Dollar portion of the IDA Allowance for payment of those costs listed in Section 9.1.2.

Additional Parcels means those additional portions of the Property that the Developer shall acquire.

Anchor Tenant Commitment shall have the meaning set forth in Article VI.

Anchor Tenants shall have the meaning set forth in Article VI.

Arbitration Notice means written notice of either party's desire to arbitrate a dispute.

City shall have the meaning set forth in Recital A.

Contracts shall have the meaning set forth in Section 2.1.1.

Event of Termination shall mean those events listed in Sections 11.1 and 11.2.

Ground Lease means that Ground Lease Agreement between the IDA and Developer in the form attached hereto as Exhibit C-1.

Ground Leases means the Ground Lease and the Phase Two Ground Lease, together.

IDA Allowance means the funds to be provided by the IDA pursuant to Recital E.

IDA Representative means the City Manager of the City.

Leased Property means the Property owned by the IDA and leased to the Developer under the Ground Leases.

Mortgage shall have the meaning set forth in Section 19.1.

Mortgagee means the beneficiary of a Mortgage or any assignment of a Mortgage.

Option Property shall have the meaning set forth in Section 12.1.

Parcel Plat means that plat attached hereto as Exhibit D.

Parcel 29 means that parcel identified as parcel 29 on the Parcel Plat.

Phase One means that portion of the Property on the easternmost side of the public road built by the Developer on the Property.

Phase Two means that portion of the Property on the westernmost side of the public road built by the Developer on the Property.

Phase Two Ground Lease means that Ground Lease Agreement between the IDA and Hampton Roads Associates Two, LLC, in the form attached hereto as Exhibit C-2.

Preliminary Budget means the budget prepared by the Developer showing the total estimated costs of development of the Project.

Preliminary Design Funds shall have the meaning set forth in Section 5.1.3.

Project shall have the meaning set forth in Section 1.1.

Project Architect means the architect hired by the Developer to design the Project.

Property shall have the meaning set forth in Recital A.

Road Improvement Parcels means those portions of the Property that will be located within the right-of-way of the Road Improvements.

Road Improvements shall have the meaning set forth in Section 8.1.1.

Site Plan means the formal engineered site plan and subdivision plat for the Project.

Termination Payment shall have the meaning set forth in Section 7.3.

Zoning Case means the City's rezoning Case #1068 dated August 20, 1997.

Zoning Lots means all those lots and parcels included in the City's approval of rezoning Case #1068 dated August 20, 1997.

Zoning Requirements means the building and zoning requirements of the City including, without limitation, all Design Guidelines for the Coliseum Central District.

AGREEMENT

In consideration of the mutual promises and undertakings of the parties, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Developer and the IDA agree as follows:

ARTICLE I

THE PROJECT

1.1 The Project. Subject to the other provisions of this Agreement, the Project shall, at a minimum, initially consist of an integrated retail and commercial development containing a minimum of four hundred eighty thousand (480,000) square feet of space consisting of: (a) not less than three hundred thirty thousand (330,000) square feet of gross leasable area of retail stores containing at least one (1) Anchor Tenant; and (b) an entertainment, lifestyle retail and restaurant center containing not less than one hundred fifty thousand (150,000) square feet of gross leasable area of space. The two components may be integrated. Subject to the Developer's obligation hereunder to initially construct the Project and subject to applicable law and the provisions of the Ground Leases, the ultimate size, scope and configuration of the Project shall be determined by the Developer in its sole and absolute discretion and the Developer reserves the right, from time to time, to modify the Project.

ARTICLE II

PROPERTY ACQUISITION

2.1 Parcel Acquisition by Developer. The Developer has entered into options or contracts of sale, and intends to enter into options or contracts of sale, to acquire land within the Property on such terms that the Developer, in its reasonable business discretion, determines to be feasible. To this end, the Developer shall (i) offer to acquire all the Zoning Lots included in the Zoning Case, identified on Exhibit B, for not less than the same terms previously offered by Robert Brown Hampton Development Co.; (ii) use commercially reasonable efforts to purchase and relocate the Little Zion Baptist Church; and (iii) acquire sufficient land, in the opinion of the IDA, on which to develop the Project to include gross leasable area of not less than 480,000 square feet of retail space.

2.1.1 The offer made by the Developer pursuant to (i) above shall be made within five (5) business days after the execution of this Agreement, shall be open for acceptance for a period of not less than thirty (30) days, and shall be in the form of conditional contract of purchase (the "Contracts") with non-refundable deposits of $10,000 ($5,000 for lots not improved with dwelling units), which deposits shall apply against the purchase price with a closing date not more than two years after the date of the Contracts, and in form reasonably acceptable to the IDA. The Developer may choose to enter into the Contracts in another but affiliated entity.

2.1.2 If the Zoning Lots under Contracts on the thirty-fifth day after the last date the Developer makes a written offer to purchase a Zoning Lot represent less than seventy-five percent (75%) of the Zoning Lots (being 28 of the 37 Zoning Lots), the Developer shall have no further obligation with respect to the purchase of Zoning Lots, and may acquire as few or as many, and at such prices, as the Developer deems expedient. If the Zoning Lots under Contracts represent more than twenty-four but less than twenty-eight lots, the Developer shall waive any similar seventy-five percent requirement contained in such Contracts and retain such Contracts in full force and effect and, at the request of the IDA and upon reimbursement of all deposits made thereunder, assign the same to the IDA, but the Developer have no further obligation with respect to such Zoning Lots.

2.1.3 If the Zoning Lots under Contracts at the end of the thirty-five (35) day period described above represent twenty-eight or more Zoning Lots, the contract purchaser shall conditionally assign such Contracts to the IDA, such assignment to be conditioned upon default in the Contracts by the contract purchaser as provided in Section 2.1.4 below. The Developer and the IDA shall continue to negotiate with owners of Zoning Lots during a period of two years after the date of this Agreement to obtain Contracts with as many owners of Zoning Lots as practicable. The Developer shall have the power to determine, in its sole and absolute discretion, that the Contracted Zoning Lots are not suitable for inclusion in the Project, in which event the Developer may by notice to the IDA not more than ninety (90) nor less than sixty (60) days prior to the second anniversary of the date of this Agreement, require the IDA to accept an assignment of any Contracted Zoning Lots (other than Road Improvement Lots) it intends to not purchase. Upon delivery of a duly executed assignment to the IDA of all such Contracts, the

IDA shall pay to the Developer a sum equal to the deposits under Contracts to the extent such deposits apply to reduce the purchase price.

2.1.4 Should the Developer determine in its sole and absolute discretion that the Contracted Zoning Lots are usable, or should all Zoning Lots be subject to Contracts, the contract purchaser shall proceed to close the purchase subject to the terms and conditions of the Contracts. For the purposes of the foregoing sentence only, Parcels 1A, 21 and 22 shown on Exhibit A shall not be deemed "Zoning Lots". In either of such events, default by the contract purchaser under any contract shall cause the Phase Two Ground Lease to be terminable by the IDA as to all of the "Leased Premises" thereunder which has not been improved by buildings and related parking and landscaping improvements, as provided in the Phase Two Ground Lease. The Developer shall not be entitled to the return of or reimbursement for any deposits on any such Contracts. Developer shall cause all Contracts to be assigned to the IDA to the extent the conditional assignment set forth in Section 2.1.3 is not a complete and effective assignment.

2.1.5 The Developer's obligations under this Section 2.1 shall be subject to the condition that this Agreement be in full force and effect. Closing of land purchases may be contingent upon conditions to IDA funding being met.

2.2 Failure to Acquire Adequate Property. If the Developer does not acquire by purchase or ground lease so much of the Property that will allow, in the reasonable opinion of the IDA, the development of not less than 480,000 square feet of gross leasable area of retail space in the Project by June 30, 2000, this Agreement may be terminated by either party. For the purposes of this Section 2.2, the Road Improvement Parcels and Parcel 29 as shown on Exhibit A shall be deemed to have been acquired by the Developer.

2.3 Acquisition by IDA. On or before February 29, 2000, the IDA shall have obtained a contract to acquire Parcel 29 as shown on Exhibit A in form reasonably acceptable to the Developer. On or before February 28, 2000, the IDA shall acquire good and marketable title to Parcel 29, and by amendment include such parcel in the Ground Lease as provided in Section 3.2. Failure of the IDA to obtain such contract or to acquire title shall not be deemed an Event of Termination; however, the Developer's obligation to acquire property (contained in Section 2.2), to develop 480,000 square feet of gross leasable area (contained in Article X), and the similar condition to disbursement of the IDA Allowance (contained in Article IX), shall be reduced as provided in Section 11.4. There shall be no holdback from or reduction of the IDA Allowance.

ARTICLE III

THE GROUND LEASE

3.1. The Ground Lease. Upon satisfaction of the conditions to funding the Acquisition, Infrastructure and Development Allowance as set forth in Article IX (other than the requirement that the Ground Lease be in full force and effect), the parties hereto shall execute and deliver to each other two ground leases, including the Ground Lease substantially in the form attached hereto as Exhibit C-1, and the Phase Two Ground Lease substantially in the form attached hereto as Exhibit C-2. Initially, the only portion of the Property that shall be subject to

the Ground Lease shall be Parcel 27, which parcel is identified and described on the Parcel attached hereto as Exhibit D. From time to time, additional parcels of Property shall be mac subject to the Ground Lease or the Phase Two Ground Lease as provided in this Agreement. Developer shall have the right to record the Ground Lease and/or the Phase Two Ground Le or memoranda thereof (which the IDA shall sign upon presentation by the Developer) amon Land Records of the City of Hampton.

3.2 Parcel 29. Pursuant to Section 2.3 hereof, the IDA is obligated to acquire goc and marketable fee simple title to Parcel 29 depicted on Exhibit A. Within ten (10) days of acquiring Parcel 29, the IDA shall notify the Developer of such acquisition and provide the Developer with a title report demonstrating that it has good and marketable fee simple title tc Parcel 29 and an amendment to the Ground Lease, executed by the IDA, that changes the property description of the property that is the subject of the Ground Lease so that it includes Parcel 29. The amendment shall provide that all obligations of both parties made in the Grou Lease shall apply to Parcel 29 as of the date of such amendment. The form and substance of such amendment shall be reasonably acceptable to Developer.

3.3 Additional Parcels. As described in Section 2.1, the Developer has entered int options or contracts of sale, and after the date hereof intends to enter into additional options o contracts of sale, in order to acquire Additional Parcels. From time to time, the Developer sh: convey to the IDA the fee simple interest in and to each Additional Parcel (except no conveya of land in Phase Two need be conveyed to the IDA after termination of the Phase Two Groun Lease pursuant to Section 2.1.4 or Section 11.4 below), such conveyance being made by the Developer or by the present owner of such Additional Parcel. To that end, the IDA, at the request of the Developer, shall attend the closing on the acquisition of an Additional Parcel an at such closing, shall execute and deliver to the Developer an amendment to the Ground Lease (or, as to land in Phase Two, the Phase Two Ground Lease) that changes the property descripti of the property that is the subject of the Ground Lease (or, as to land in Phase Two, the Phase Two Ground Lease) so that it includes such Additional Parcel. The amendment shall provide that obligations of both parties made in the Ground Lease (or, as to land in Phase Two, the Pha Two Ground Lease) shall apply to such Additional Parcel as of the date of such amendment. The form and substance of such amendment shall be reasonably acceptable to Developer.

ARTICLE IV

PRELIMINARY DEVELOPER RESPONSIBILITIES

4.1. Preliminary Developer Responsibilities. Upon completion of acquisition by the Developer and IDA of all of the Property, or so much of the Property that will allow the development of the Project, the Developer shall undertake the following responsibilities:

4.1.1 Tenants and Purchasers. The Developer shall market the Project and seel to obtain commitments from prospective tenants and/or purchasers of portions of the Project. The Developer shall keep the IDA apprised of the status of all negotiations and the identity of prospective tenants and purchasers. The IDA acknowledges that such information constitutes a

confidential trade secret of the Developer. The IDA shall use reasonable efforts to keep all such information confidential.

4.1.2. Employment of Architects; Submission of Plans and Specifications.

(a) The Developer shall select and employ the Project Architect to design the Project and the road and infrastructure improvements. The Developer shall have the right, from time to time, to replace the Project Architect. The Project Architect shall be a registered architect or architectural firm that has experience in designing entertainment retail centers, and which has a good reputation in the industry. Tenants of the Project shall have the right to utilize their own architects.

(b) The design for the Project shall be at least comparable in quality to the Avenues at White Marsh, White Marsh, Maryland. Building finishes on side or rear-building elevations of the Project shall be finished to substantially the same degree as the front building elevation. Where the Project shares a border with a residential property, the Project shall be adequately screened and/or landscape buffered. All screening and landscaping buffers shall comply with the Zoning Requirements.

(c) The Developer shall cause schematic drawings showing the site plan and exterior facade of Developer constructed buildings to be prepared by the Project Architect and shall cause the same to be delivered to the IDA Representative for review promptly upon completion thereof.

(d) The Project shall comply with, and the Developer shall obtain such approvals of site plans and plans and specifications from the City as may be required by, all applicable Zoning Requirements. Nothing contained in this Agreement shall be deemed a waiver of any of the City's normal permit and approval process. As of the date of this Agreement and based upon the IDA's understanding of the Project, and without independent review of plans and Zoning Requirements, the IDA is not aware of the violation of any of the Zoning Requirements (other than proffer amendments required with respect to portions of Parcels 10 and 11 shown on Exhibit A).

4.1.3 Budgets. Concurrently with the execution of this Agreement, the Developer has provided to the IDA the Preliminary Budget and a preliminary pro forma of revenues and expenses for the Project, which has been approved by the IDA and the IDA Representative. From time to time during the development of the Project the Developer shall have the right, without the need to request or obtain the approval of the IDA, to modify and amend the Preliminary Budget and such pro forma to reflect changes in the cost of the Project, any such modifications or amendments shall be delivered to the IDA. The IDA acknowledges that such information constitutes a confidential trade secret of the Developer. The IDA shall use reasonable efforts to keep all such information confidential.

4.1.4. Road Design. The Developer shall begin preparation of the preliminary design for the road and infrastructure improvements of the Project, including the widening of and improvements to Mercury Boulevard, West Queen Street and Pine Chapel Road (as applicable) and the layout of any interior public streets within the Property. Preliminary and final design of such improvements shall be subject to the customary City approval process. To the extent the Developer gives notice to the IDA notice for acquisition of property by the City pursuant to Section 7.1, the Developer shall have caused plans for road widening and interior public streets to be prepared and delivered to the IDA that are sufficient for the City's use in eminent domain proceedings.

ARTICLE V

IDA RESPONSIBILITIES

5.1 IDA Responsibilities. From and after the date hereof, in addition to IDA's other obligations hereunder, the IDA shall undertake the following:

5.1.1 Project Coordination. The IDA shall assist the Developer with the land acquisition process for the Project. The IDA shall cooperate with the Developer in Developer's application for permits and approvals for the Project from the City and shall, within the bounds of propriety, use reasonable efforts to assist the Developer in obtaining all such permits and approvals. The Developer acknowledges that the IDA is a political subdivision of the Commonwealth of Virginia independent of the City, and has no power, de jure or de facto, to issue such permits or approvals or to influence their issuance or any other City process.

5.1.2 Survey. The IDA has obtained and delivered to the Developer a boundary survey of the Property at its cost and expense of the IDA. The Developer shall have the right to utilize such survey in connection with the development of the Project.

5.1.3 Preliminary Design Funds. The IDA shall reimburse the Developer for the first Seventy-Five Thousand and 00/100 Dollars ($75,000.00) of costs incurred by the Developer for the preliminary design and engineering costs of the Project within thirty (30) days of presentation of invoices therefor (the Preliminary Design Funds). Any payments made by the IDA pursuant to this Section 5.1.3 shall be credited against the amount of the IDA Allowance that the IDA is required to pay the Developer hereunder in connection with the Ground Lease.

5.1.4 IDA Representative. The IDA hereby appoints the IDA Representative to receive any and all submissions and to grant any and all approvals with respect to the Project. The IDA reserves the right to modify or terminate such appointment and to appoint another IDA Representative as its agent. Such modification or termination and appointment shall not become effective until the IDA provides the Developer with a notice of such action, which notice contains a reasonably detailed description of such action.

ARTICLE VI

ANCHOR TENANT COMMITMENT

6.1 Anchor Tenant Commitment.

6.1.1 Efforts to Lease. From and after the date hereof, the Developer shall use commercially reasonable efforts to procure the Anchor Tenant Commitment (as that term is hereinafter defined) on such terms that the Developer, in its reasonable discretion, determines to be feasible.

6.1.2 "Anchor Tenant Commitment" defined. The term Anchor Tenant Commitment means (a) a binding agreement (in the form of a lease or purchase agreement) between the Developer and one or more major retailers or similar users (collectively, the Anchor Tenant) for (i) at least 130,000 square feet of space in the Project to be occupied by a single Anchor Tenant, or (ii) at least 150,000 square feet of space in the Project to be occupied by two or three Anchor Tenants, with no less than 15,000 square feet to be occupied by any single occupant of the two or three Anchor Tenants in question; and (b) each such Anchor Tenant must be approved by the IDA Representative, which approval shall not be unreasonably withheld, conditioned or delayed, and which approval shall be deemed granted if not expressly given or rejected within thirty (30) days after the Developer's written request of the IDA Representative therefor. Notwithstanding the previous sentence, K-Mart, Lowe's, Sam's and Kohl's and any tenant that is comparable to any of the previous listed tenants are each hereby deemed to be an "Anchor Tenant". The parties recognize and agree that a "binding agreement" (in the form of a lease or purchase agreement) may consist of a lease agreement that contains commercially reasonable conditions and termination rights and that does not necessarily obligate the tenant thereunder to initially open and thereafter continuously operate a store at the Project.

6.2 Failure to Obtain the Anchor Tenant Commitment.

6.2.1 Right to Terminate. Subject to the provisions of Section 6.2.2 hereof, if, by the first anniversary of the date hereof, the Developer has failed to procure the Anchor Tenant Commitment, from and after such date, until the date that the Anchor Tenant Commitment has been procured, the IDA or the Developer shall have the right to terminate this Agreement and the Ground Lease by notifying the other party hereto of such terminations. Any such termination shall be effective thirty (30) days after the giving of such a termination notice.

6.2.2 Limitations on IDA's Right to Terminate.

Notwithstanding the provisions of Section 6.2.1, in the event that by the first anniversary of the date of this Agreement the Developer has made substantial progress towards procuring the Anchor Tenant Commitment, the IDA shall not have the right to terminate this Agreement, provided, however, that in the event that after the first anniversary of the date of this Agreement, the Developer ceases to make substantial progress towards procuring the Anchor Tenant Commitment, and the Developer does not recommence such efforts within thirty (30) days after notice of such cessation by the IDA and thereafter diligently pursue procuring the

Anchor Tenant Commitment, and in any event after eighteen (18) months after the date of this Agreement, the IDA shall have the right to terminate this Agreement and the Ground Lease by notifying the Developer of such terminations. Any such termination shall be effective thirty (30) days after the giving of such a termination notice.

ARTICLE VII

RIGHT-OF-WAY ACQUISITION

7.1 Acquisitions by the City. The Developer shall attempt to acquire and convey to the City all rights-of-way required for the Road Improvements. The IDA will coordinate such acquisitions with the Developer so that the cost of the acquisitions is minimized to the extent reasonably possible. If and to the extent that the Developer gives notice to the IDA that the Developer is unable to acquire title to the Road Improvement Parcels, and delivers to the IDA engineering drawings approved by the City in detail sufficient for the purpose, IDA shall exercise its best efforts to cause the City to acquire the Road Improvement Parcels (other than any Road Improvement Parcels which front on CC Spaulding Drive) pursuant to eminent domain proceedings or by consensual agreement with the property owners so that the construction of the Road Improvements may proceed. With respect to the Road Improvement Parcels the IDA will exercise its best efforts to cause the City to:

(i) determine the sums the City estimates to be the fair value of the property taken and the damage, if any, done to the residue;

(ii) make a bona fide offer to the owner or owners of each Road Improvement Parcel in the amount reported by the appraisal, and give each property owner ten (10) days to accept or reject such offer;

(iii) file a petition for condemnation, including the "quick take" provisions of §33.1-119 et seq. of the Code of Virginia (1950) as to all Road Improvement Parcels whose owners do not timely accept the bona fide offer, and diligently pursue the same to conclusion.

The Developer acknowledges and agrees that the City may only exercise its power of eminent domain when there is a direct showing of public purpose and need, and the power may only be exercised for property which is necessary for the Road Improvements and related infrastructure improvements and additions. The Developer further acknowledges that the City does not intend to acquire by condemnation any portion of Little Zion Baptist Church or any of the Zoning Lots, which are improved with owner-occupied dwellings. The cost of the acquisition of the parcels so acquired by the City shall be borne by the City; however, the IDA Allowance shall be reduced in accordance with the provisions of Section 9.1.1. The IDA or its designee shall periodically consult with the Developer with regard to all aspects of the City's efforts to acquire such parcels, and shall keep the Developer reasonably informed of the City's efforts to acquire the same. All costs and expenses incurred by the City in acquiring Road Improvement Parcels, including reasonable attorney's fees, shall be credited against and reduce the IDA Allowance; provided, however, that such reduction shall not exceed one hundred twenty percent (120%) of the prices for the Road Improvement Parcels as agreed by the parties.

Street, Mercury Boulevard and Pine Chapel Road; (b) interior streets to be constructed through the Property providing access from Mercury Boulevard, Pine Chapel Road and West Queen Street; and (c) utilities infrastructure associated with the Project to be located within such rights-of-way, which shall include water, sewer, storm drainage, right-of-way landscaping, street lights and irrigation systems (the "Road Improvements"). Schematic plans for the widening of and improvements to West Queen Street, Mercury Boulevard and Pine Chapel Road and the interior streets to be constructed through the Property providing access from Mercury Boulevard, Pine Chapel Road and West Queen Street shall be submitted to and approved by the IDA Representative, which approval shall not be unreasonably withheld, conditioned or delayed and which approval shall be deemed granted if not expressly given or rejected within thirty (30) days after the Developer's written request of the IDA Representative therefor. No construction work on such roads shall be undertaken prior to the approval or the deemed approval of such schematic plans. The IDA and the Developer shall cooperate with each other to effect the dedication of the Road Improvements.

8.1.2 Site Layout. The Developer's engineering firm shall prepare the Site Plan, which shall be consistent with Zoning Requirements, and submit the same to the City for approval in accordance with applicable law.

8.1.3 Road Improvement Coordination. The parties recognize that the City, acting by and through the IDA, is delegating to the Developer the City's responsibility to design (and ultimately construct) the Road Improvements. In such regard, the Developer agrees to coordinate all design work, bid review and construction of the Road Improvements, as and when authorized by this Agreement, with the City's Public Works Department and other departments as the City may request.

8.1.4 City Permits. The Project shall comply with all Zoning Requirements. The Developer recognizes and agrees that all licenses, permits, consents, inspections and approvals which must be obtained for the development of real estate in the Coliseum Central District of the City of Hampton will likewise be required in conjunction with the Project and are not waived by virtue of this Agreement, notwithstanding any provision of this Agreement to the contrary.

8.1.5 Developer Funds. The Developer shall arrange for equity investment and/or debt financing sufficient to cover the costs that Developer will incur in developing the Project which will not be paid out of the IDA Allowance, including costs of land acquisition, infrastructure and development costs in excess of the amount of the IDA Allowance.

ARTICLE IX

IDA ALLOWANCE

9.1 Amount of IDA Allowance. Upon satisfaction of the conditions contained in Section 9.2 hereof, the IDA shall provide the Developer, as a tenant allowance under the Ground Lease, the IDA Allowance. The IDA Allowance is broken down as follows:

9.1.1 Acquisition, Infrastructure and Development Allowance, defined. For the payment of land acquisition costs, the costs of construction of road and utility infrastructure improvements and development costs incurred by the Developer in connection with the Project, the sum of Eleven Million and 00/100 Dollars ($11,000,000.00), less (i) the costs and expenses, including reasonable attorney's fees, incurred by the City in acquiring Road Improvement Parcels pursuant to Section 7.1 (and subject to the limitations set forth therein), and (ii) so much of the Preliminary Design Funds as shall have been distributed to the Developer pursuant to Section 5.1.3.

9.1.2 Additional Allowance, defined. For payment of tenant inducement costs, tenant allowance costs and tenant improvement costs incurred by the Developer for the recruitment of tenants for the Project such as are found in The Power Plant in Baltimore, Maryland, Bayou Place, in Houston, Texas, and with the exception of the tenants listed on Exhibit E hereof, in the Avenue at White Marsh, in White Marsh, Maryland, or as otherwise approved by the IDA Representative, which approval shall not be unreasonably withheld, conditioned or delayed, and which approval shall be deemed granted if not expressly given or rejected within thirty (30) days after the Developer's written request of the IDA Representative therefor, the sum of Five Million and 00/100 Dollars ($5,000,000.00).

For all purposes of this Agreement and the Ground Lease, the IDA Allowance shall be deemed a "tenant allowance" made under the Ground Lease. However, in the event of a conflict between the provisions of the Ground Lease and the provisions of this Agreement, the provisions of this Agreement shall control and the conflicting provisions of the Ground Lease shall be interpreted and applied accordingly.

9.2 Conditions to the Acquisition, Infrastructure and Development Allowance. The Acquisition, Infrastructure and Development Allowance is subject to and conditioned upon the satisfaction of each of the following conditions:

9.2.1 This Agreement, Ground Lease and the Phase Two Ground Lease (unless terminated pursuant to Section 2.1.4 or Section 11.4) shall be in full force and effect and no Event of Termination of Developer shall have occurred and be continuing, and the Developer's representations and warranties contained in Article XVII shall continue to be true and correct.

9.2.2 The Developer shall have obtained financing sufficient, when combined with the IDA Allowance and the Developer's equity, to pay all costs of development of the Project as shown on the Preliminary Budget.

9.2.3 The schematic plans for Road Improvements that consist of the widening of and improvements to West Queen Street, Mercury Boulevard and Pine Chapel Road and the interior streets to be constructed through the Property providing access from Mercury Boulevard, Pine Chapel Road and West Queen Street have been approved or deemed approved by the IDA Representative in accordance with the provisions of Section 8.1.1 hereof.

9.2.4 The Anchor Tenant Commitment has been achieved.

9.2.5 The Developer, the City and/or the IDA has acquired title to or has entered into options or contracts in form satisfactory to the IDA Representative for the purchase of all of the Property, or so much of the Property that will allow the commercially reasonable development of the Project (as modified by Section 10.2) by the Developer.

9.2.6 All insurance required to be maintained by Section 14.1 of this Agreement shall, if applicable at that time, be in effect and certificates of such insurance shall have been delivered to the IDA.

9.2.7 All representations and warranties made by Developer in Article XVII shall remain true and correct.

9.2.8 The IDA shall have been furnished an updated opinion of counsel (which may be in the form of a then currently dated update of a previously delivered opinion) for the Developer including those matters set forth in Section 20.25.

The IDA Representative shall have the right and power, on behalf of the IDA, to waive the partial or full satisfaction of any and/or all of the above conditions.

9.3 Conditions to the Additional Allowance. The Additional Allowance is subject to and conditioned upon the satisfaction of each of the following conditions:

9.3.1 The conditions to the disbursement of the Acquisition, Infrastructure and Development Allowance contained in Section 9.2 hereof have been satisfied.

9.3.2 The Developer shall have delivered to the IDA Representative a copy of each contract in existence prior to the commencement of construction of the Project that is in excess of $500,000 between the Developer and a general contractor or construction manager for the improvements to the Project.

9.3.3 Building permits shall have been obtained from the appropriate department of the City and all other approvals of governmental authorities which are necessary or required for the commencement of construction of the Project.

9.3.4 A fully executed counterpart of the lease with each tenant with respect to which a Additional Allowance disbursement is sought, containing no conditions to commencement of the term of the lease or acceptance of the premises other than due completion of the tenant's premises and other commercially reasonable conditions and an estoppel certificate from such tenant acknowledging to the IDA that its lease is duly executed and in full force and effect, and all conditions to the commencement of the term of its lease other than completion of its premises and the satisfaction of other commercially reasonable conditions have been satisfied. The IDA acknowledges that each item delivered to the IDA pursuant to this Section 9.3.4 constitutes a confidential trade secret of the Developer. The IDA shall use reasonable efforts to keep such item and its content confidential.

The IDA Representative shall have the right and power, on behalf of the IDA, to waive

the partial or full satisfaction of any and/or all of the above conditions.

9.4 General Procedure for Disbursement of IDA Allowance. Subject to the satisfaction of the conditions set forth in Sections 9.2 and 9.3, disbursement of the IDA Allowance shall be made in accordance with the Preliminary Budget as the same may be amended from time to time. The IDA shall make distributions of the IDA Allowance not more frequently than once each calendar month. Upon all conditions for the making of a distribution having been satisfied, distributions of the IDA Allowance shall be made within fifteen (15) business days after receipt by IDA of the Developer's requisition (the "Requisition") therefor. Each Requisition shall set forth the amount requested to be disbursed from the IDA Allowance.

9.5 Conditions to Each Distribution. Each distribution of the IDA Allowance shall be subject to satisfaction of the following conditions, where applicable:

9.5.1 All of the conditions to the IDA Allowance set forth in Section 9.2 hereof and, if applicable, Section 9.3 hereof shall have been met and the status established or evidenced by the fulfillment of such conditions shall continue to be in effect without modification; and

9.5.2 The Developer shall have delivered to the IDA a certificate signed by an authorized officer or agent of the Developer, certifying and confirming that (a) no Events of Termination exist, and (b) all conditions to the IDA's obligation to make disbursement of the IDA Allowance have been fully satisfied.

9.5.3 The IDA shall have received the following:

(i) an estoppel certificate in form reasonably satisfactory to the IDA Representative, signed by an authorized representative of the Developer, acknowledging the amount of such distribution and the aggregate amount of all distributions made to date.

(ii) copies of bills, invoices or other documentation reasonably satisfactory to the IDA supporting the payments requested.

(iii) with regard to the Additional Allowance, waivers of mechanics' and materialmen's liens by the general contractors and/or construction manager of the Developer for all work performed or materials furnished through the date of the previous distribution. The Developer shall be solely responsible for all payments to contractors and shall ensure that the Project remains free of all mechanic's liens for work or services performed directly for the Developer.

ARTICLE X

PROJECT DEVELOPMENT

10.1 Road Improvements. The Developer, working with the City's Public Works Department, shall construct the Road Improvements as follows:

10.1.1 The Developer shall cause its engineer, engaged pursuant to Section 8.1.1, to complete the final plans and specifications for the Road Improvements and shall submit the same to the City for approval in accordance with its customary practices. Upon obtaining such approval, the Developer shall obtain or cause to be obtained all necessary permits from the City and other governmental agencies.

10.1.2 The Developer shall enter into a standard form City construction contract for the construction of the Road Improvements, and shall furnish the performance bond as required by §11-58 of the Code of Virginia (1950). Should the Developer not be a contractor licensed in Virginia, the Developer shall solicit competitive bids for the construction of the Road Improvements from qualified contractors acceptable to the City and award the work in one or more contracts. The Developer agrees that contractors and subcontractors located in the City of Hampton will be utilized to the extent reasonably possible if such contractors and subcontractors meet the City's qualification criteria, are otherwise competitive, and are available to meet the time constraints and construction schedules for the Project as established by the Developer, as determined by Developer in its sole judgment. This statement of intent is not intended by either party to create any third party enforcement rights with regard to the Developer's contracting process.

10.2 Construction of the Project. The Developer shall obtain, or cause others to obtain, all permits for and to commence, or cause others to commence, initial construction of the Project by the first day of the nineteenth full calendar month that follows the date Developer has, pursuant to the Ground Lease, ground leased from the IDA sufficient land within the Property to develop the Project. Subject to the adjustments as to minimum size described in Section 11.4, and subject to the force majeure provisions of Section 20.1T, the Developer shall thereafter diligently pursue construction of the Project to completion in accordance with the design criteria set forth in Section 4.2, to the full 480,000 square feet of gross leasable area.

10.3 Hotel Option. After two years after the date of this Agreement the Developer may submit a proposal, with sufficient detail to enable the IDA to make the decisions specified below, to the IDA to build a hotel on Phase Two. If such hotel will not, in the sole and absolute opinion of the Hampton Convention and Visitor's Bureau interfere or inhibit the development of a convention hotel in the immediate vicinity of the proposed convention center in Hampton, the IDA shall, within ninety (90) days after receipt of such proposal, either (i) accept the proposal, in which event the definition of "Project" contained herein shall be deemed to contain not more than 100,000 square feet of commercial retail space for the purposes of the minimum development requirements contained in this Agreement (but no portion of which shall be deemed "entertainment, lifestyle retail and restaurant space"); or (ii) reject the proposal, in which event the time period set forth in Section 11.4 shall be deemed extended from five years to seven years.

10.4 Cooperation. Throughout the course of the development of the Project, the IDA and the Developer shall work in conjunction with each other to do the following:

10.4.1 Complete all aspects of the Road Improvements and all infrastructure of the Project.

10.4.2 Procure all necessary permits and approvals from the City and all other governmental agencies having jurisdiction for the development and operation of the Project.

10.4.3 At the Developer's request, obtain for the IDA title to any property currently within the Interstate 64 ramp adjoining the Property which is made surplus by the redesign of such surplus property under the Ground Lease, at no cost to the IDA.

10.5 Financial Statements. During construction of the Project, the Developer shall deliver to the IDA quarterly financial statements showing construction costs of the Project expended to date and against the Preliminary Budget (as the same may be amended), the funds required to complete, and the sources of funds in the Project and required to complete, in sufficient detail for the IDA to compare them with the Preliminary Budget. Upon completion of the Project, the Developer shall deliver to the IDA statements of total costs of the Project, certified by the Developer, setting forth the information required above, certified as correct by the Developer and, to the extent of construction costs, by the Project Architect. For a period of three years after completion of the Project, the IDA shall have the right to audit the Developer's books and records at any time after not less than three business days' notice, and the Developer shall maintain complete books and records of the Project at its principal office at all times. After completion of the Project, the Developer shall deliver to the IDA financial statements as provided in the Ground Lease.

ARTICLE XI

EVENTS OF TERMINATION

11.1 Events of Termination by the Developer. Each of the following shall constitute an Event of Termination by the Developer:

11.1.1 The failure of the Developer to obtain commitments for "financing" (which are subject only to conditions customary in the industry) sufficient to fully develop the Project by the first anniversary of the date that the Developer has, pursuant to the Ground Lease, ground leased from the IDA sufficient land within the Property to develop the Project or, if the criteria set forth in Section 11.4 have been met, Phase One of the Project, which failure is not cured within thirty (30) days after the date the IDA notifies the Developer in writing of such failure. For purposes of this Section 11.1.1 the term "financing" means a combination of private debt, the IDA Allowance and equity sufficient to fully develop the Project.

11.1.2 With the exception of the matters addressed by Section 2.2 and Section 6.2 above, breach of any material covenant, obligation or requirement of Developer arising under this Agreement not specifically named as an Event of Termination in this Section 11.1, and the continuation of such breach for thirty (30) days after receipt of written notice from the IDA

specifying the nature and extent of such breach, or if such breach cannot reasonably be cured within such thirty (30) day period, the failure of Developer to commence to cure such breach within such thirty (30) day period and to diligently pursue same to completion.

11.1.3 The filing by the Developer of a voluntary proceeding or the consent by Developer to an involuntary proceeding under present or future bankruptcy, insolvency, or other laws respecting debtor's rights.

11.1.4 The entering of an order for relief against the Developer or the appointment of a receiver, trustee, or custodian for all or a substantial part of the property or assets of the Developer in any involuntary proceeding, and the continuation of such order, judgment or degree unstayed for any period of ninety (90) consecutive days.

11.1.5 A termination (other than for the causes set forth in Sections 7.2 and 11.4) of the Ground Lease or the Phase Two Ground Lease resulting from a material default by the Developer under the Ground Lease or the Phase Two Ground Lease.

11.1.6 The failure of the Developer to remove or cause to be removed, by bonding or otherwise, any and all liens for work done for the Developer or materials furnished to the Developer with respect to the Project within thirty (30) days after written notice by the IDA to the Developer of the filing thereof.

11.1.7 The failure of the Developer to obtain, or cause others to obtain, all permits for and to commence, or cause others to commence, initial construction of the Project by the first day of the nineteenth full calendar month that follows the date that the Developer has, pursuant to the Ground Lease, ground leased from the IDA sufficient land within the Property to develop the Project, which failure is not cured within thirty (30) days after the date the IDA notifies the Developer in writing of such failure, provided, however, if such failure cannot reasonably be cured within such thirty (30) day period, the failure of Developer to commence to cure such failure within such thirty (30) day period and to diligently pursue same to completion.

11.2 Events of Termination by the IDA. Each of the following shall constitute an Event of Termination by the IDA:

11.2.1 The filing by the IDA of a voluntary proceeding or the consent by the IDA to an involuntary proceeding under present or future bankruptcy, insolvency, or other laws respecting debtor's rights.

11.2.2 The entering of an order for relief against the IDA or the appointment of a receiver, trustee, or custodian for all or a substantial part of the property or assets of the IDA in any involuntary proceeding, and the continuation of such order, judgment or degree unstayed for any period of ninety (90) consecutive days.

11.2.3 With the exception of the matters addressed by Sections 2.2 and 6.2 hereof, the failure of the IDA to perform or to observe any non-monetary covenant, obligation or requirement of this Agreement not specifically named as an Event of Termination in this Section 11.2, and the continuation of such failure for 30 days after receipt of written notice from the Developer specifying the nature and extent of any such default, or if such default cannot reasonably be cured within such thirty (30) day period, the failure of either (i) to commence to cure such default within such thirty (30) day period and to diligently continue to pursue such efforts to cure to completion, or (ii) to cure such event of termination within a reasonable time after the expiration of the first thirty (30) day period, in no event to exceed ninety (90) days after the written notice of the event of termination.

11.2.4 The failure of the IDA to pay or cause to be paid when due any sum of money owed by the IDA to the Developer pursuant to this Agreement, unless such failure is due to offset or dispute for which the IDA has given notice to the Developer (and then only until such dispute is conclusively resolved), and the continuation of such failure for thirty (30) days after written notice from the Developer specifying the nature and extent of any such default with opportunity to cure.

11.2.5 A termination of the Ground Lease or the Phase Two Ground Lease resulting from a material default by the IDA under the Ground Lease or Phase Two Ground Lease.

11.2.6 The failure of the IDA to deliver any non-disturbance, attornment and subordination agreement, any estoppel certificate as to facts known by the IDA, and any agreement with any lender to the Developer so long as the substantive rights of the IDA under this Agreement and under the Ground Lease are not materially adversely affected, and the continuation of such failure for ten (10) days after written notice from the Developer specifying the nature and extent of such failure.

11.3 Remedies. Should an Event of Termination by the Developer occur hereunder, the IDA may, by written notice to the Developer, terminate this Agreement. Should an Event of Termination by the IDA occur hereunder, the Developer may, by written notice to the IDA, terminate this Agreement. The non-defaulting party may exercise any remedies available to it at law or in equity; except that neither party shall be liable to the other for damages that are consequential in nature, but shall be liable only for recovery of out-of-pocket costs actually incurred after execution of this Agreement provided, however, the IDA shall not have the right to recover the Preliminary Design Funds as set forth in Section 5.1.3. All remedies under this Agreement shall be cumulative and not restrictive of other remedies, including, without limitation, specific performance.

11.4 Termination of Phase Two Ground Lease. Notwithstanding the provisions of Sections 11.1 and 11.3, the Developer shall be deemed to not be in default, and no remedies under this Agreement shall be exercised against the Developer for failure to complete the Project

to the full 480,000 square feet of gross leasable area (380,000 square feet if the IDA fails to acquire Parcel 29 as provided in Section 2.3), so long as the Developer (i) completes on Phase One not less than 350,000 square feet of gross leasable area of commercial retail space (250,000 square feet if the IDA fails to acquire Parcel 29 as provided in Section 2.3), containing at least one Anchor Tenant and at least 110,000 square feet of entertainment, lifestyle retail and restaurant space (75,000 square feet if the IDA fails to acquire Parcel 29 as provided in Section 2.3) and (ii) acquires Parcels 10 and 11 shown on Exhibit A and conveys them to the IDA and leases them back under the Ground Lease (as to the portion of such parcels in Phase One) and the Phase Two Ground Lease (as to the portion of such parcels in Phase Two). However, should the Developer fail to complete the Project to the full 480,000 square feet of gross leasable area (380,000 square feet if the IDA fails to acquire Parcel 29) within five years after the date of this Agreement except to the extent extended pursuant to Section 10.3, the IDA may terminate the Phase Two Ground Lease, as provided therein. The obligation of the Developer to complete on Phase One not less than 350,000 square feet (250,000 square feet if the IDA fails to acquire Parcel 29) shall be subject to the following modifications:

11.4.1 For the purposes only of the introductory paragraph of this Section 11.4 (and not to Sections 11.4.2 et. seq.), each square foot of the Property upon which sales activities are conducted but which is not included as "gross leasable area" (for example, patio dining space for restaurants and yard and garden centers for home improvement tenants) shall be deemed to be one-half of one square foot of gross leasable area.

11.4.2 The Developer may, in the event of pressing need, propose to the IDA a modification to the Site Plan that may show some portion (not to exceed 50,000 square feet) of the 350,000 square foot minimum located on Phase Two. The IDA shall exercise reasonable commercial judgment in deciding whether to accept such modifications. If such modifications result in a portion of Phase One remaining undeveloped, the Developer may propose that such undeveloped portion be substituted under the Phase Two Ground Lease for the portion of Phase Two that Developer seeks to develop, and the IDA's decision shall be positively influenced by such substitution. Should the IDA agree to the revised Site Plan, the Ground Lease and the Phase Two Ground Lease shall be amended to effect such change and, if any, such substitution.

The parties may decide it is in their best interests to put property released from the Phase Two Ground Lease into a third lease; if so, they shall cooperate in creating a third ground lease on terms comparable to the First Ground Lease, and in effecting reciprocal easements, to the extent desirable between the property covered by such third ground lease and the property remaining under the Second Ground Lease.

11.4.3 The Developer may cause property to be released from the Second Ground Lease and included under the Ground Lease by posting with the IDA a completion bond, with surety acceptable to the IDA, in an amount equal to $300,000 per each acre of property to be so released and included under the Ground Lease. Such bond shall be released by the IDA when the Project is timely completed to the full 480,000 square feet of gross leasable area (380,000

square feet if the IDA fails to acquire Parcel 29 as provided in Section 2.3), containing at least one Anchor Tenant and at least 110,000 square feet of entertainment, lifestyle retail and restaurant space (75,000 square feet if the IDA fails to acquire Parcel 29 as provided in Section 2.3).

11.5 Waiver of Jury Trial. The IDA and the Developer do hereby waive trial by jury in any action, suit, proceeding, and/or counterclaim brought by either of the parties hereto against the other on any matters whatsoever arising out of or in any way connected with this Agreement, the Ground Lease any claim of injury or damage, and/or statutory remedy.

11.6 Attorney Fees. If either the IDA or the Developer brings suit or other legal proceedings or arbitration proceeding to enforce the provisions of this Agreement against the other, then the party prevailing in such suit or proceeding shall be reimbursed by the other for all reasonable attorneys' fees and litigation and/or arbitration costs and expenses incurred by the prevailing party in connection with such suit or proceeding.

ARTICLE XII

OPTION TO PURCHASE; FIRST REFUSAL

12.1 IDA Option to Purchase. In consideration of the undertakings by the IDA hereunder, the Developer hereby grants to the IDA the right and option, upon the occurrence of an Event of Termination by the Developer, to purchase any and all property, including without limitation all rights under the Ground Lease and options and contracts of purchase to acquire property owned or held by the Developer or any affiliate of the Developer (including contracts or options held by JDN on portions of the Property), and the leasehold interest held by Robert Brown Hampton Development Co., L.L.C. or any affiliate of that entity, in the Property (collectively, the "Option Property"). This option may be exercised at any time up to six months after an Event of Termination by the Developer occurs, may be exercised in addition to all remedies provided herein or at law or in equity, and shall be exercised by the IDA giving written notice of its exercise. The Developer shall have no obligation to maintain options in place. The purchase price for the Option Property shall be equal to all costs of acquiring the Property, including closing costs, reduced by all IDA Allowances actually disbursed, but not less than the principal balance of all debts secured by deeds of trust on the Option Property. Closing under this option shall occur within 30 days after exercise at the IDA's offices, at which time the Developer shall deliver a good and sufficient deed of conveyance and documents of transfer and/or assignment to the City, without any warranty of title, subject to all matters of record. The City may, at its election, apply the purchase price to clear encumbrances of record against the Option Property and pay the balance thereof, if any, to the Developer. Each party shall bear its own closing costs as established by local practice.

12.2 Developer Right of First Refusal. The IDA agrees that for a period of ten (10) years after the date of this Agreement it will not sell or transfer (i) any Zoning Lots purchased by

it under any Contract assigned to it pursuant to Sections 2.1.3 and 2.1.4, and (ii) any property with respect to which the Phase Two Ground Lease has been terminated pursuant to Section 11.4, to any party unless and until it has given notice to the Developer of the terms of such sale or transfer for a period of thirty (30) days to accept in writing the terms set forth in the notice. Failure by the Developer to (i) accept such offer within the thirty day period and (ii) timely close the purchase on such terms, shall be deemed to be rejection of the offer.

ARTICLE XIII

PUMP STATION

The Developer may connect its sanitary sewer system improvements to the City's existing pump station located on the Property, at no cost or expense to the Developer or other owners who purchase parcels through the Developer, other than normal Code-prescribed sewage connection fees to obtain sanitary sewer service within the City, subject to applicable credits, if any. The Developer acknowledges that neither the IDA nor the City is required to improve or upgrade the existing sanitary sewer system improvements under this Agreement.

ARTICLE XIV

INSURANCE; INDEMNIFICATION

14.1 General Liability Insurance. The Developer shall carry comprehensive general liability insurance insuring the IDA and the Developer against any and all liability for injury to or death of a person or persons and for damage to property in any way occasioned by or arising out of the activities of the Developer or the IDA and their respective agents, contractors or employees, in connection with the design and construction of the Project, in the amount of Five Million Dollars ($5,000,000) for property damage and Twenty Million Dollars ($20,000,000) for bodily injury or death of persons, or in such larger amounts as may be reasonably acceptable to the IDA. The Developer may procure and maintain a "blanket" All Risk policy to satisfy the requirements of this Section 14.1, which may cover other property or locations of the Developer and its affiliates and/or the affiliates of a member of Developer. To the extent insurance carried by the Lessee under the Ground Lease and the Phase Two Ground Lease meets the requirements of this Article XIV, these requirements shall be deemed satisfied so long as such insurance is in force.

14.2 Policy Requirements. The following general requirements shall apply to all insurance coverage carried by the Developer pursuant to Section 14.1:

14.2.1 Waiver of Subrogation. To the extent available, each policy shall contain a clause whereby the insurer waives all rights of subrogation against the IDA.

14.2.2 Additional Insured. The IDA shall be named as additional insured in all

policies hereunder.

14.2.3 Financially Sound Company. Such policies shall be procured from financially sound and reputable insurers licensed to do business in the Commonwealth of Virginia and have an A.M. Best rating of not less than A-8 or, if not rated with A.M. Best, the equivalent of A.M. Best's surplus size of A-8 (or otherwise approved by the IDA).

14.2.4 Certificates of Insurance. The Developer shall deliver to the IDA policies or certificates of insurance evidencing such coverage before the commencement of construction.

14.2.5 Replacement Certificates of Insurance. Within thirty (30) days before expiration of coverage, or as soon as practicable, renewal policies or certificates of insurance evidencing renewal and payment of premium shall be delivered by the Developer to the IDA.

14.2.6 Non-Cancelable Without Notice. The coverages shall be non-cancelable unless the carrier gives to the IDA thirty (30) days' prior written notice of cancellation.

14.3 Indemnification. Until the Ground Lease and the Phase Two Ground Lease are in full force and effect, the Developer and/or its affiliates are and shall be in exclusive control of the Project, and the IDA shall not in any event whatsoever be liable for any injury or damage to any person or property happening on, in, about or in connection with the Project or any part thereof. Until the Ground Lease and the Phase Two Ground Lease are fully executed and delivered and are in full force and effect, the following indemnity shall apply: The Developer shall indemnify and hold harmless the IDA and all entities claiming by, through or under the IDA from all claims, suits, actions and proceedings whatsoever which may be brought or instituted on account of, growing out of, occurring from, incident to or resulting from, directly or indirectly, any and all injuries or damages (including, without limitation, death) to persons or property arising out of the use and occupation of the Project, and all losses, costs, damages and expenses (including, without limitation, reasonable attorneys' fees and other costs of defending against such claims, suits, actions and proceedings), whether or not such injuries or damages (including, without limitation, death) result from, or are claimed to have resulted from, in whole or in part, the negligence of the IDA or any entity claiming by, through or under the IDA. The Developer shall assume on behalf of the IDA and all entities claiming by, through or under the IDA, and conduct with due diligence and in good faith, the defense of all such claims, suits, actions and proceedings against the IDA or any entity claiming by, through or under the IDA, whether or not the Developer is joined therein, even if such claims, suits, actions or proceedings be groundless, false or fraudulent, and the Developer shall bear the costs of all judgments and settlements in connection therewith; provided, however, without relieving the Developer of the Developer's obligations under this Agreement, the IDA or any entity claiming by, through or under the IDA may defend or participate in the defense of any or all of such claims, suits, actions or proceedings. Maintenance of the insurance referred to in this Agreement shall not affect the obligations of the Developer under this Agreement, and the limits of such insurance shall not constitute a limit on the liability of the Developer under this Section 14.3.

ARTICLE XV

EQUAL OPPORTUNITY EMPLOYER

15.1 Equal Opportunity Employer. The Developer is an Equal Opportunity Employer. In keeping with this policy, the Developer will recruit, hire, train and promote into all job levels of the Developer the most qualified persons without regard to race, color, religion, sex or national origin. Similarly, the Developer will continue to administer all other personnel matters (such as compensation, benefits, transfers, lay-offs and training) in accordance with the requirements of federal and state law. In addition, the Developer will use its best efforts to recruit well-qualified minorities for its work force, and the Developer's representatives will meet with representatives of the City from time to time to identify appropriate techniques for such recruitment. The Developer shall also ensure that each of its construction contractors or subcontractors are also Equal Opportunity Employers and that they extend the same policies as set forth in this Article XV to their respective personnel.

ARTICLE XVI

ARBITRATION

16.1 Arbitration. In the event that any dispute shall arise between the IDA and the Developer with respect to the application of any of the provisions of this Agreement, and such dispute is not resolved to the satisfaction of the IDA an the Developer within twenty (20) days after the IDA or the Developer shall provide the other with an Arbitration Notice, then the dispute shall be resolved in accordance with the Commercial Arbitration Rules of the American Arbitration Association then pertaining. The decision of the arbitrators shall be binding, final and conclusive on the parties. Unless the parties otherwise agree, such arbitration proceedings shall be conducted in Washington, D. C. Within twenty-five (25) days after the service of the Arbitration Notice, the IDA and the Developer shall appoint an impartial person as an arbitrator who shall have had at least ten (10) years' recent experience in a calling connected with the subject matter of the dispute. Such appointment shall be signed in writing by each party to the other, and the arbitrators so appointed, in the event of the failure of the IDA and the Developer to agree upon and appoint a third arbitrator within thirty (30) days after the appointment of the second arbitrator upon the matter so submitted, shall appoint a third arbitrator. If either party shall fail to appoint an arbitrator as aforesaid for a period of twenty-five (25) days after service of the Arbitration Notice, then the arbitrator appointed by the party having made such appointment shall appoint a second arbitrator and the two so appointed shall, in the event of the failure of the IDA and the Developer to agree upon and appoint a third arbitrator within thirty (30) days thereafter, appoint a third arbitrator. If such arbitrators fail to agree upon a third arbitrator within forty-five (45) days after appointment of the second arbitrator, then such third arbitrator shall be appointed by the American Arbitration Association from its qualified panel of

arbitrators, and shall be a person having at least ten (10) years' recent experience in the Commonwealth of Virginia, State of Maryland, or the District of Columbia in a calling connected with the subject matter of the dispute. The fees of all arbitrators and the expenses incident to the proceedings shall be borne by the losing party. The reasonable fees of respective counsel engaged by the parties, and the fees of expert witnesses and other witnesses called for the parties, shall also be paid by the losing party.

16.2 Enforcement. The decision of the arbitrators shall be rendered within thirty (30) days after appointment of the third arbitrator, and such decision shall be in writing and in duplicate, one counterpart thereof to be delivered to the IDA and the Developer. A judgment of a court of competent jurisdiction may be entered upon the award of the arbitrators in accordance with the rules and statutes applicable thereto then obtaining.

ARTICLE XVII

REPRESENTATIONS AND WARRANTIES OF THE DEVELOPER

In order to induce the IDA to enter into this Agreement and to distribute the IDA Allowance, the Developer represents and warrants to the IDA as follows:

17.1 The Developer is a duly organized and validly existing limited liability company under the laws of Maryland and has the power and authority to own its properties and other assets and to transact the business in which it is now engaged or proposed to engage. The Developer is duly qualified or licensed as a foreign entity in each jurisdiction in which the nature of the business it is engaged, or the character of the properties owned by it, makes such qualification or licensing necessary, including Virginia.

17.2 The Developer has the power and authority to execute, deliver and carry out the terms and provisions of this Agreement and all other instruments to be executed and delivered by the Developer in connection with its obligations hereunder. The execution, delivery and performance by the Developer of this Agreement have been duly authorized by all requisite action by the Developer, and this Agreement is a valid and binding obligation of the Developer enforceable in accordance with its respective terms, except as may be affected by applicable bankruptcy or insolvency laws affecting creditors' rights generally.

17.3 The Developer is not in default in the performance, observance or fulfillment of any of the obligations, covenants or conditions contained in any evidence of indebtedness of the Developer or contained in any instrument under or pursuant to which any such evidence of indebtedness has been issued or made and delivered. Neither the execution and delivery of this Agreement, nor the consummation of the transactions herein contemplated, will conflict with or result in a breach of any of the terms, conditions or provisions of the Articles of Organization of the Developer or of any agreement or instrument to which the Developer is now a party or

otherwise bound or to which any of its properties or other assets is subject, or of any order or decree of any court or governmental instrumentality, or of any arbitration award, franchise or permit, or constitute a default thereunder, or, except as contemplated hereby, result in the creation or imposition of any lien or other encumbrance upon any of the properties or other assets of the Developer.

17.4 There are no actions, suits, investigations or proceedings (whether or not purportedly on behalf of the Developer) pending or, to the knowledge of the Developer, threatened against or affecting the Developer or the Project, or any other of the assets or properties of the Developer at law or in equity or before or by a governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, or before an arbitrator of any kind, which involve the possibility of liability in excess of $100,000 or of any material adverse effect on the business operations, prospects, properties or other assets or in the condition, financial or otherwise, of the Developer, or of the Project, and the Developer is not in default with respect to any judgment, order, writ, injunction, decree, award, rule or regulation of any court, arbitrator or governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign.

17.5 To its best knowledge, the Developer is not a party to or otherwise bound by any agreement or instrument or subject to any other restriction or any judgment, order, writ, injunction, decree, award, rule or regulation which materially and adversely affect the business, operations, prospects, properties or other assets, or the condition, financial or otherwise, of the Developer or of the Project. The Developer has received no notice of, and to its best knowledge, is not in default (a) under any obligation for borrowed money, or (b) in the performance, observance or fulfillment or any of the obligations, covenants or conditions contained in any other agreement or instrument to which it is a party, by which it is otherwise bound or to which any of its property or the Project is subject.

17.6 To the Developer's best knowledge, neither this Agreement nor any document, certificate or financial statement furnished to the IDA by or on behalf of the Developer in connection herewith, contains any untrue statement of a material fact or omits to state any material fact necessary in order to make the statements contained herein and therein not misleading. There is no fact known to the Developer which materially adversely affects or in the future may (so far as it is now known to the Developer) have a material adverse effect upon the business, operations, prospects, property, other assets or financial condition of the Developer or of the Project which has not been set forth in this Agreement or in other documents, certificates and financial statements furnished to the IDA or on behalf of the Developer in connection with the transactions contemplated hereby.

ARTICLE XVIII

REPRESENTATIONS AND WARRANTIES OF THE IDA

In order to induce the Developer to enter into this Agreement, the IDA represents and warrants to the Developer as follows:

18.1 The IDA is a political subdivision of the Commonwealth of Virginia, duly organized and validly existing under the laws of the Commonwealth of Virginia, with full legal right, power, and authority to enter into and perform its obligations under this Agreement.

18.2 The IDA has the power and authority to execute, deliver and carry out the terms and provisions of this Agreement and all other instruments to be executed and delivered by the IDA in connection with its obligations hereunder. The execution, delivery and performance by the IDA of this Agreement have been duly authorized by all requisite action by the IDA, and this Agreement is a valid and binding obligation of the IDA enforceable in accordance with its respective terms, except as may be affected by applicable bankruptcy or insolvency laws affecting creditors' rights generally.

18.3 The IDA is not in default in the performance, observance or fulfillment of any of the obligations, covenants or conditions contained in any evidence of indebtedness of the IDA or contained in any instrument under or pursuant to which any such evidence of indebtedness has been issued or made and delivered. Neither the execution and delivery of this Agreement, nor the consummation of the transactions herein contemplated, will conflict with or result in a breach of any of the terms, conditions or provisions of the legislation creating the IDA or of any agreement or instrument to which the IDA is now a party or otherwise bound or to which any of its properties or other assets is subject, or of any order or decree of any court or governmental instrumentality, or of any arbitration award, franchise or permit, or constitute a default thereunder, or, except as contemplated hereby, result in the creation or imposition of any lien or other encumbrance upon any of the properties or other assets of the IDA.

18.4 There are no actions, suits, investigations or proceedings (whether or not purportedly on behalf of the IDA) pending or, to the knowledge of the IDA, threatened against or affecting the IDA or the Project, or any other of the assets or properties of the IDA at law or in equity or before or by a governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, or before an arbitrator of any kind, which involve the possibility of liability in excess of $100,000 or of any material adverse effect on the business operations, prospects, properties or other assets or in the condition, financial or otherwise, of the IDA, or of the Project, and the IDA is not in default with respect to any judgment, order, writ, injunction, decree, award, rule or regulation of any court, arbitrator or governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign.

18.5 To its best knowledge, the IDA is not a party to or otherwise bound by any agreement or instrument or subject to any other restriction or any judgment, order, writ, injunction, decree, award, rule or regulation which materially and adversely affect the business, operations, prospects, properties or other assets, or the condition, financial or otherwise, of the IDA or of the Project. The IDA has received no notice of, and to its best knowledge, is not in

default (a) under any obligation for borrowed money, or (b) in the performance, observance or fulfillment or any of the obligations, covenants or conditions contained in any other agreement or instrument to which it is a party, by which it is otherwise bound or to which any of its property or the Project is subject.

18.6 To the IDA's best knowledge, neither this Agreement nor any document, certificate or financial statement furnished to the Developer by or on behalf of the IDA in connection herewith, contains any untrue statement of a material fact or omits to state any material fact necessary in order to make the statements contained herein and therein not misleading. There is no fact known to the IDA which materially adversely affects or in the future may (so far as it is now known to the IDA) have a material adverse effect upon the business, operations, prospects, property, other assets or financial condition of the IDA or of the Project which has not been set forth in this Agreement or in other documents, certificates and financial statements furnished to the Developer or on behalf of the IDA in connection with the transactions contemplated hereby.

ARTICLE XIX

MORTGAGEE RIGHTS

19.1. Right to Mortgage. Notwithstanding any other provisions of this Agreement, the Developer shall at all times have the right to encumber, pledge, grant, or convey its rights, title and interest in and to the Property, or any portion or portions thereof, and/or to this Agreement and the Ground Lease by way of a mortgage (or assignment) (a "Mortgage") to secure the payment of any loan or loans obtained by the Developer to finance or refinance the Project and/or the Property.

19.2 Notice of Breaches to Mortgagees. In the event the IDA gives written notice to the Developer of a breach of its obligations under this Agreement, the IDA shall forthwith furnish a copy of the notice to the Mortgagees that have been identified to the IDA by the Developer. To facilitate the operation of this Section, the Developer shall at all times keep the IDA provided with an up-to-date list of Mortgages.

19.3 Mortgagee May Cure Breach of Developer.

19.3.1 In the event that the Developer receives notice from the IDA of a breach by the Developer of any of its obligations under this Agreement and such breach is not cured by the Developer pursuant to the provisions of this Agreement, the IDA shall, in addition to the notice provided in Section 19.2 hereof, give notice of the failure to cure on the part of the Developer to the Mortgagee at the expiration of the period within which the Developer may cure as set forth in this Agreement. Then the Mortgagee may proceed to cure any such failure and the Mortgagee, if it elects to cure such default, shall give the IDA written notice of its intention so to cure within ninety (90) days after the receipt of the additional notice herein set forth. In the

event that the Mortgagee elects to proceed to cure any such default, the Mortgagee shall do so within the applicable cure period contained in this Agreement; provided, however, that the commencement of the cure period for the Mortgagee shall commence on the date the Mortgagee notifies the IDA of the Mortgagee's election to cure such default and each applicable cure period shall be deemed doubled in length for the Mortgagee. For purposes of this Section 19.3, an Event of Termination of the Developer shall be deemed a breach by the Developer of its obligations under this Agreement.

19.3.2 In the event the Mortgagee elects to exercise its rights of foreclosure under a Mortgage (or appoint a receiver or accept a deed-in-lieu of foreclosure), after foreclosure of the Developer's interest in and to the Property and the Ground Lease (or after the appointment of a receiver or the obtaining of title to the Property and the Ground Lease via assignment-in-lieu of foreclosure), the Mortgagee may at its option:

(a) elect to assume the position of the Developer hereunder in which case, in the event the IDA has terminated this Agreement or suspended the distribution of the IDA Allowance, the IDA agrees that this Agreement shall be deemed reinstated and the IDA shall commence the distribution of IDA Allowance in accordance with the provisions of this Agreement and, in which case, such Mortgagee shall cure any default by the Developer hereunder that the Mortgagee had received notice of in accordance with the provisions of Section 19.2 hereof within the time frames contained in this Agreement and shall cause the Minimum Project to be substantially completed in accordance with the provisions of this Agreement; and/or

(b) elect not to reinstate the provisions of this Agreement.

The Mortgagee shall have the right so to elect (a) above of this Section 19.3.2 only if it shall exercise such right within six months after the receipt of the additional notice herein set forth.

19.3.3 For purposes of this Section 19.3, the term "Mortgagee" shall include not only the "Mortgagee", as that term is defined in Section 19.1 hereof, but shall also include any person or entity that obtains title to the Property as a result of the Mortgagee's exercise of its foreclosure rights or the transfer of title to the Property at the direction of the Mortgagee by the Developer to a person or entity by deed-in-lieu of foreclosure.

19.4 Rights and Duties of Mortgagee. In no event shall any Mortgagee be deemed to be the Developer hereunder or be obliged to perform or observe any of the covenants, terms or conditions of this Agreement on the part of the Developer to be performed or observed, or be in anyway obligated to complete the improvements to be constructed in accordance with this Agreement, nor shall it guarantee the completion of improvements as hereinbefore required of the Developer, whether as a result of (a) its having become a Mortgagee, (b) the exercise of any of its rights under the instrument of instruments whereby it became a Mortgagee (including without limitation, foreclosure or the exercise of any rights in lieu of foreclosure), (c) the

performance of any of the covenants, terms or conditions on the part of the Developer to be performed or observed under this Agreement or (d) otherwise, unless such Mortgagee shall either make the election set forth in Section 19.3.2 (a) of this Agreement or shall specifically elect under this Section 19.4 to become the Developer by written notice to the IDA whereupon such Mortgagee, upon making any such election as aforesaid, shall then and thereafter for all purposes of this Agreement be deemed to be the Developer hereunder.

19.5 Mortgagee's Rights Agreements. The IDA covenants and agrees with the Developer that the IDA, acting by and through the IDA Representative, shall, at the request of the Developer made from time to time and at any time, enter into a lender's rights agreement with any Mortgagee (or potential Mortgagee) identified by the Developer, which lender's rights agreement shall be consistent with the terms and provisions contained in this Article XIX of this Agreement that apply to Mortgagees and Mortgages. Within thirty (30) days of Developer's request for a lender's rights agreement pursuant to the provisions of this Section 19.5, time being of the essence, the IDA, acting through the IDA Representative, shall execute and deliver to the Developer such a lender's right agreement benefiting the identified Mortgagee (or potential Mortgagee) and such Mortgagee's Mortgage (or potential Mortgagee's potential Mortgage), which executed lender's rights agreement shall be in a form and substance that are reasonably acceptable to such Mortgagee (or potential Mortgagee) and that is consistent with, and at the option of such Mortgagee (or potential Mortgagee) incorporates, the terms and provisions of this Article XIX that apply to Mortgagees and Mortgages (such as the Mortgagee notice provisions and the Mortgagee cure rights provisions of this Article XIX).

19.6 Non-Subordination. Nothing contained in this Article XIX or in any other section of this Agreement shall be deemed to allow a subordination of the IDA's fee simple interest in the Leased Property. In no event will such subordination be made. The Developer may only mortgage its leasehold interest in the Leased Property.

ARTICLE XX

MISCELLANEOUS

20.1 City Authorization. By the execution of this Agreement, the IDA represents that the City has, to the extent it has jurisdiction, authorized the undertakings set forth in this Agreement and the expenditure and distribution of the IDA Allowance in accordance with the provisions of this Agreement.

20.2 Assignment.

20.2.1 This Agreement is binding upon and shall inure to the benefit of the City and Developer and their respective successors and assigns.

20.2.2 Except as provided in Section 20.2.3, the Developer may not assign its interest or any part thereof in this Agreement without the prior written approval of the IDA, which shall not be unreasonably withheld, conditioned or delayed, and upon such approval, the assignee shall assume all of the obligations of the Developer under this Agreement and shall not relieve the assignor of any liability hereunder. The Developer acknowledges that the IDA is placing specific reliance on the personal expertise of David Cordish in entertainment retail development and in attracting and retaining high-quality entertainment retail tenants. Consequently, David Cordish, or an entity in which David Cordish is a general partner, a member or the owner of at least fifty-one percent (51%) of the capital stock, partnership interest or membership interest, shall at all times before substantial completion of construction of the Project, exclusive of punch list items and work to be performed by tenants of the Project, own not less than fifty percent (50%) of partnership or membership interests or of the issued and outstanding capital stock or membership interest of the Developer.

20.2.3 Notwithstanding anything to the contrary contained in Section 20.2.2 to the contrary, the Developer shall have the right to transfer and assign all of its right, title and interest in and to this Agreement to a bona fide financial institution or lender that lends funds to the Developer in connection with the Project.

20.3 Public Disclosure. Subject to applicable legal requirements, until commencement of construction of the Project neither the Developer nor the IDA will make any press release or public statement about the transactions contemplated herein without the consent of the other, except the Developer may share information herein with prospective tenants, lenders and contractors, and such advisors and consultants as may be employed with respect to the Project and make necessary permit and license applications.

20.4 Consents and Approvals. The IDA and the Developer commit to work harmoniously with each other, and except in instances (if any) where a consent or approval is specified to be within the sole discretion of either party, any consent or approval contemplated under this Agreement shall not be unreasonably withheld, conditioned or delayed, except that Developer acknowledges that this covenant does not apply to permits required from the City of Hampton in connection with the Project. Unless a shorter or longer time period is specified in this Agreement, the IDA shall give or withhold (provided such withholding is reasonable under the circumstances, unless a sole discretion standard expressly applies) such approvals, certifications, or consents within thirty (30) days, time being of the essence.

20.5 Entire Agreement. This Agreement and the Ground Leases incorporate all prior negotiations and discussions between the parties regarding its subject matter and represent the entire agreement of the IDA and the Developer for the Project. This Agreement may only be modified by written instrument executed by the IDA and the Developer.

20.6 Headings. The captions and section headings contained in this Agreement are for convenience of reference only and shall not be considered in any interpretation of the provisions

of this Agreement.

20.7 Notices. A notice, communication, or request under this Agreement by the IDA to the Developer or by Developer to the IDA shall be sufficiently given or delivered if dispatched by either (a) certified mail, postage prepaid, return receipt requested, (b) nationally recognized overnight delivery service (next business day service), or (c) hand-delivery (if receipt is evidenced by a signature of the addressee or authorized agent), and addressed to the applicable parties as follows:

Developer:	Hampton Roads Associates, LLC c/o The Cordish Company 601 East Pratt Street, 6th Floor Baltimore, Maryland 21202 Attention: President
with a copy to:	Charles F. Jacobs, Esquire Cordish & Cordish 601 East Pratt Street, 6th Floor Baltimore, Maryland 21202
IDA:	The Industrial Development Authority of the City of Hampton 2 Eaton Street, Suite 600 Hampton, Virginia 23669
with a copy to:	City of Hampton Attention: City Attorney 22 Lincoln Street Hampton, Virginia 23669
and a copy to:	John W. Bates, III, Esquire McGuire, Woods, Battle & Boothe LLP One James Center Richmond, Virginia 23219

Any notice, communication, or request so sent shall be deemed to have been "given" (a) as of the next business day after being sent, if sent by nationally recognized express mail service, (b) as of the fifth business days after being sent, if sent by Registered or Certified U.S. Mail or (c) upon receipt, if sent by hand delivery. Either party may change its address for notice purposes by giving notice thereof to the other parties, except that such change of address notice shall not be deemed to have been given until actually received by the addressee thereof.

20.8 Partial Invalidity. If any term, covenant, condition, or provision of this

Agreement, or the application to any person or circumstance shall, at any time or to any extent be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall (except to the extent such result is clearly unreasonable) not be affected thereby, and under such circumstances each term, covenant, condition, and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law, insofar as such enforcement is not clearly unreasonable.

20.9 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed to an original, and such counterparts shall constitute one and the same instrument.

20.10 Choice of Laws and Venue. This Agreement shall be governed by and construed and enforced in accordance with the laws of the Commonwealth of Virginia, including conflicts of laws. Any lawsuit, action, or proceeding arising under this Agreement shall, to the extent there is federal jurisdiction over the parties and subject matter, be brought exclusively in the federal courts of the United States.

20.11 Force Majeure. For the purpose of any of the provisions of this Agreement, exclusive of Articles II and III, neither the IDA, nor the Developer, as the case may be, nor any successor in interest, shall be considered in breach of or default in any of its obligations, including, but not limited to, the beginning and completion of construction, or progress in respect thereto, in the event of enforced delay in the performance of such obligations due to causes beyond its control, including but not restricted to, strikes, lockouts, actions of labor unions, riots, storms, floods, litigation, explosions, acts of God or of the public enemy, acts of government, insurrection, mob violence, civil commotion, sabotage, malicious mischief, vandalism, inability (notwithstanding good faith and diligent efforts) to procure, or general shortage of, labor, equipment, facilities, materials, or supplies in the open market, defaults of independent contractors or subcontractors (provided that remedies are being diligently pursued against the same), failures of transportation, fires, other casualties, epidemics, quarantine restrictions, freight embargoes, severe weather, inability (notwithstanding good faith and diligent efforts) to obtain governmental permits or approvals, or delays of subcontractors due to such causes, it being the purpose and intent of this Section 20.11 that in the event of the occurrence of any such enforced delays, the time or times for the performance of the covenants, provisions, and agreements of this Agreement shall be extended for the period of the enforced delay (including any time reasonably required to recommence performance due to such enforced delay). The affected party shall use reasonable efforts to remedy with all reasonable dispatch the cause or causes preventing it from carrying out its agreements; and provided further, that the settlement of strikes, lockouts, and other industrial disturbances shall be entirely within the discretion of the affected party, and the affected party shall not be required to make settlement of strikes, lockouts, and other industrial disturbances by acceding to the demands of the opposing party or parties when such course is, in the judgment of the affected party, unfavorable to the affected party. Notwithstanding the above, (a) the Developer may not rely on its own acts or omissions as grounds for delay in its

performance, (b) the IDA may not rely on its own acts or omissions or the acts or omissions of the City as grounds for delay in its performance, and (c) the absence of immediately available funds shall not be grounds for delay.

20.12 No Partnership or Joint Venture. It is mutually understood and agreed that nothing contained in this Agreement is intended or shall be construed in any manner or under any circumstances whatsoever as creating or establishing the relationship of co-partners or creating or establishing the relationship of a joint venture between the IDA and the Developer or as constituting the Developer as the agent or representative of the IDA for any purpose or in any manner under this Agreement, it being understood that the Developer is an independent contractor hereunder.

20.13 Representatives Not Individually Liable. No member, official, representative, or employee of the IDA shall be personally liable to the Developer or any successor in interest in the event of any default or breach by the IDA for any amount which may become due to the Developer or successor or on any obligations under the terms of the Agreement. No partner, member, representative, or employee of the Developer or any of its members shall be personally liable to the IDA in the event any default or breach by the Developer for any amount which may become due to the IDA or on any obligations under the terms of this Agreement.

20.14 Ancillary Documents. The IDA Representative is hereby authorized, on behalf of the IDA, to execute any and all other documents necessary or appropriate to effectuate the transactions contemplated by this Agreement, provided such documents do not materially alter the relationship of the parties or the principal elements of the Minimum Project, and to grant such approvals and consents on behalf of the IDA.

20.15 Broker. The IDA and the Developer each represent and warrant for itself that it has not dealt with any broker in connection with this Agreement or the Ground Lease and each covenants and agrees to indemnify and hold the other harmless from and against any claim, cost, liability, or expense (including reasonable attorney's fees) arising or resulting from a breach of this warranty.

20.16 Third Party Beneficiary. Nothing contained in this Agreement shall be construed to confer upon any other party the rights of a third party beneficiary.

20.17 Payment or Performance on Saturday, Sunday, or Holiday. Whenever the provisions of this Agreement call for any payment or the performance of any act on or by a date that is not a Business Day upon which the , including the expiration date of any cure periods provided herein, then such payment or such performance shall be required on or by the immediately succeeding Business Day.

20.18 "Business Day", defined. The term "Business Day" shall mean a day other than a Saturday, Sunday, or legal holiday in the Commonwealth of Virginia.

20.19 Incorporation into Agreement. All exhibits, schedules, and recitals form a part of this Agreement.

20.20 Conflict of Terms. It is the intention of the IDA and the Developer that if any provision of this Agreement is capable of two constructions, one of which would render this provision valid and enforceable, then the provision shall have the meaning which renders it valid and enforceable.

20.21 No Waiver. No failure on the part of the IDA or The Developer to enforce any covenant or provision contained in the Agreement nor any waiver of any right under this Agreement shall discharge or invalidate such covenant or provision or affect the right of the other party to enforce the same in the event of any subsequent default.

20.22 Compliance with Laws. The Developer shall, at all times, be subject to all applicable law pertinent to the Project, this Agreement, and the Developer's actions in connection with the Project and this Agreement. Nothing in this Section 20.22 or any other part of this Agreement, however, shall be construed to (a) limit or prevent the Developer from challenging at law or in equity the applicability of any Applicable Law and/or pursuing its rights in furtherance thereof through appropriate judicial proceedings or (b) constitute a waiver of due process. Notwithstanding anything to the contrary contained in this Agreement, no provision of this Agreement shall be construed to require the Developer to comply with any applicable law during the period that the Developer may be pursing a bona fide challenge of the applicability, lawfulness, and/or enforceability of such applicable law (unless such law requires compliance during any such challenge). If the Developer's challenge is successful, the Developer shall not be required by the provisions of this Agreement to comply with such applicable law.

20.23 Date of Agreement. The date of this Agreement shall be the date upon which this Agreement has been delivered to the Developer after same have been fully executed by the IDA.

20.24 Time of the Essence. Time is of the essence in the performance of the obligations of the Developer and the IDA under this Agreement.

20.25 Opinion of Counsel. Upon the execution of this Agreement, each party shall have furnished to the other party an opinion of counsel, in form and substance mutually acceptable and customary in like transactions, as to the taking of all necessary action in connection with the authorization, execution, and delivery of this Agreement and the Ground Lease by such party, the enforceability of this Agreement and the Ground Lease in accordance with the terms of each such agreement, and as to other matters mutually deemed necessary or appropriate by the parties.

20.26 Confidentiality of the Developer's Information. The IDA acknowledge that any information provided by the Developer to the IDA concerning the cost of developing the Project,

IN WITNESS WHEREOF, the IDA has caused this Development Agreement to be duly executed in its name and on its behalf by the _____ of the Industrial Development Authority of the City of Hampton, Virginia, and the Developer has caused this Development Agreement to be duly executed in its name and behalf by _____.

THE INDUSTRIAL DEVELOPMENT AUTHORITY OF THE CITY OF HAMPTON, VIRGINIA

By: _____ (SEAL)
Chairman

HAMPTON ROADS ASSOCIATES, LLC, a Maryland limited liability company,

By: Cordish Hampton Roads Investors, LLC, a Maryland limited liability company, the Operating Manager,

By: _____ (SEAL)
David S. Cordish
Authorized Member

STATE OF VIRGINIA:
CITY OF HAMPTON:

The foregoing instrument was acknowledged before me this 18th day of November, 1999, by Benjamin A. Williams, III, as Chairman of THE INDUSTRIAL DEVELOPMENT AUTHORITY OF THE CITY OF HAMPTON, VIRGINIA, a of the Commonwealth of Virginia.

My commission expires: January 31, 2002.

Kathleen S. Clinton
Notary Public

STATE OF MARYLAND:
~~CITY~~/COUNTY OF Anne Arundel:

The foregoing instrument was acknowledged before me this 15th day of November, 1999, by DAVID S. CORDISH as the Authorized Member of Cordish Hampton Roads Investors, LLC, a limited liability company, organized under the laws of Maryland, as the Operating Manager of HAMPTON ROADS ASSOCIATES, LLC, a limited liability company, organized under the laws of Maryland.

My commission expires: 9-23-2003

MELANIE ANNE HENNETT-HODGE NOTARY PUBLIC ANNE ARUNDEL CO. MD.

Melanie Anne Bennett-Hodge
Notary Public

W:\Hampton\MDA\jacobsmda16.doc

39

Hampton Roads Associates, LLC

RECEIVED
MAR 2 2000
CITY OF HAMPTON
DEPT OF DEVELOPMENT

The Cordish Company
The Power Plant
601 East Pratt Street
6th Floor
Baltimore, MD 21202
410-752-4444
Fax 410-659-0491
e-mail: Reed@Cordish.com

Plaintiff Exhibit #6
12'15'00 WT

March 2, 2000

Industrial Development Authority of the City of Hampton
2 Eaton Street
Suite 600A
Hampton, VA 23669
Attention: Kathy Grook

Re: Road Improvement Parcels
Hampton, Virginia

Dear Gentlemen:

Please refer to that certain Development Agreement (the "Agreement") dated as November 18, 1999, by and between us concerning the Power Plant of Hampton Roads. Unless defined herein or the context otherwise requires, each capitalized term herein shall have the meaning ascribed to it in the Agreement. This letter is to serve notice, pursuant to Section 7.1 of the Agreement, that the Developer is unable to acquire title to the following Road Improvement Parcels at this time.

1. Parcel 12 Hunsucker
2. Parcel 15 Hunsucker
3. Parcels 23 and 24 Ottofaro
4. Parcel 27 A-3 Davis
5. Parcel 2A Joseph
6. Parcel 2C Williams
7. Parcel 5-1 Easter

The Developer expects the City to immediately commence quick take proceedings to begin immediately on the above properties. We reserve the right to add additional properties to the above list at a later date.

Thank you for your prompt attention.

By: Hampton Roads Associates, LLC

By: Cordish Hampton Roads Investors, LLC.
the Operating Manager

By: _____
Reed S. Cordish
Vice President

CITY13222

cc: City Attorney
City of Hampton
22 Lincoln Street
Hampton, VA 23669

John W. Bates, III, Esq.
McGuire, Woods, Battle & Boothe LLP
One James Center
901 East Cary Street
Richmond, VA 23219

David S. Cordish
Charles Jacobs
Van Westmoreland, JDN Development
Via Facsimile 404-262-9543
J. Gillis Salada, JDN Development
Via Facsimile 404-262-9543

CITY13223

Hampton Roads Associates, LLC

The Cordish Company
The Power Plant
601 East Pratt Street
6th Floor
Baltimore, MD 21202
410-752-5444
Fax:410-659-9491
e-mail: Reed@Cordish.com

Plaintiff Exhibit # 7
12/15/00 dT.

March 3, 2000

Industrial Development Authority of the City of Hampton
2 Eaton Street
Suite 600A
Hampton, VA 23669
Attention: Kathy Grook

Re: Road Improvement Parcels
Hampton, Virginia

Dear Gentlmen:

Please refer to that certain Development Agreement (the "Agreement") dated as November 18, 1999, by and between us concerning the Power Plant of Hampton Roads. Unless defined herein or the context otherwise requires, each capitalized term herein shall have the meaning ascribed to it in the Agreement. This letter is to serve notice, pursuant to Section 7.1 of the Agreement, that the Developer is unable to acquire title to the following Road Improvement Parcels at this time, despite making bonafide offers.

1. Parcels 23 and 24 Ottofaro
2. Parcel 27 A-3 Davis
3. Parcel 2A Joseph
4. Parcel 2C Williams
5. Parcel 5-1 Easter

The Developer expects the City to immediately commence quick take proceedings on the above properties. We reserve the right to add additional properties to the above list at a later date.

Thank you for your prompt attention.

By: Hampton Roads Associates, LLC

By: Cordish Hampton Roads Investors, LLC,
the Operating Manager

By: _____
Reed S. Cordish
Vice President

CITY13215

cc: City Attorney
City of Hampton
22 Lincoln Street
Hampton, VA 23669

John W. Bates, III, Esq.
McGuire, Woods, Battle & Boothe LLP
One James Center
901 East Cary Street
Richmond, VA 23219

David S. Cordish
Charles Jacobs
Van Westmoreland, JDN Development
Via Facsimile 404-262-9543
J. Gillis Salade, JDN Development
Via Facsimile 404-262-9543

CITY13216

Plaintiff Exhibit #8
12/15/00

I-64 Retail Project

City of Hampton

July 8, 1998

To: George

From: June

Copy: Kathy and Mary

Re: additional info for I-64 retail project August presentaion

Attached is the updated version of your presentation that is now in power point and ready for you to present at this Friday's EMT meeting. If you have any more changes just let me know and we'll get them made in time for the Council meeting. Next week we have to add the slide showing commercial zoning.

Here are the answers to your questions:

1. **Impact on real estate tax rate** - 1990-95 compounded annual growth rate was 1.25% and 1995-97 was 4.77%. This has been added to the section in the presentation. These percentages are based on calendar year sales compounded growth rates used in a previous presentation which matched growth rates with fiscal year tax rates. (Does it matter that this chart shows we reduced the tax rate 4 times when we had both large increases in sales (11%) and low increases in sales (2.5%)?) I've attached the annual increases for your background information.

2. **commercial zoning** - Kathy is having a slide made for the power point presentation to Council that shows what the area looks like with everything that is commercially zoned except Spaulding Drive.

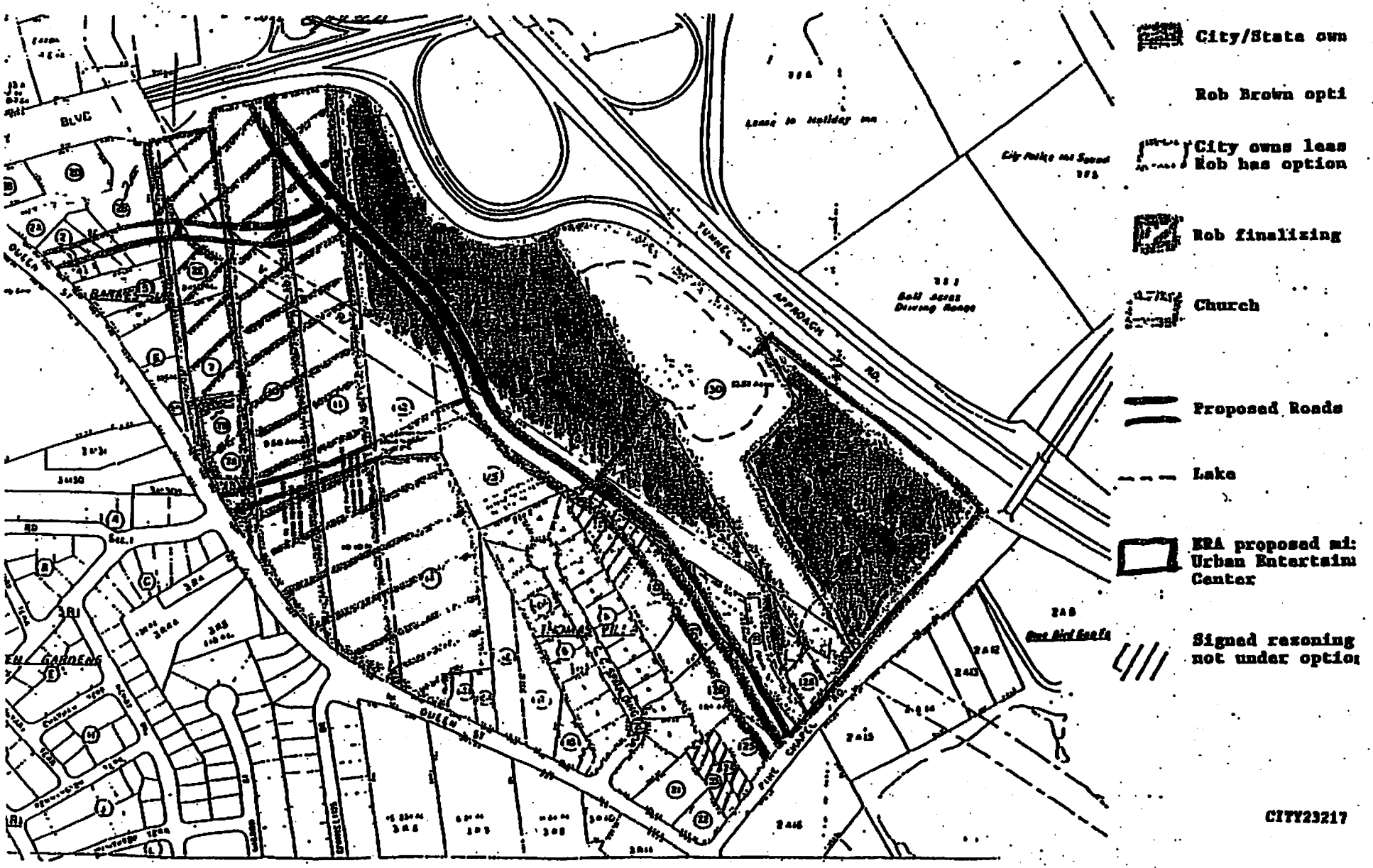
3. **what $500,000 helps you borrow** - According to Pete, if you had $500,000 a year, you could issue a 20-year bond worth about $6 million at 5.5%. The rule of thumb is annual debt service is not greater than 10% of the issue.

4. **how were the jobs figures calculated** - Kathy explained over the phone.

5. **Why did comprehensive plan recommend the road** - The reason given in the plan is to move traffic and relieve congestion. See attached explanation in the plan from June 8, 1994. Pat Thomas suggested that we not elaborate past what's stated in the attached section from the plan.

DEPARTMENT OF RETAIL DEVELOPMENT
2 EATON STREET, SUITE 600, HAMPTON, VIRGINIA 23669
(757) 727-6161

Plaintiff Exhibit #9
Nixon WT



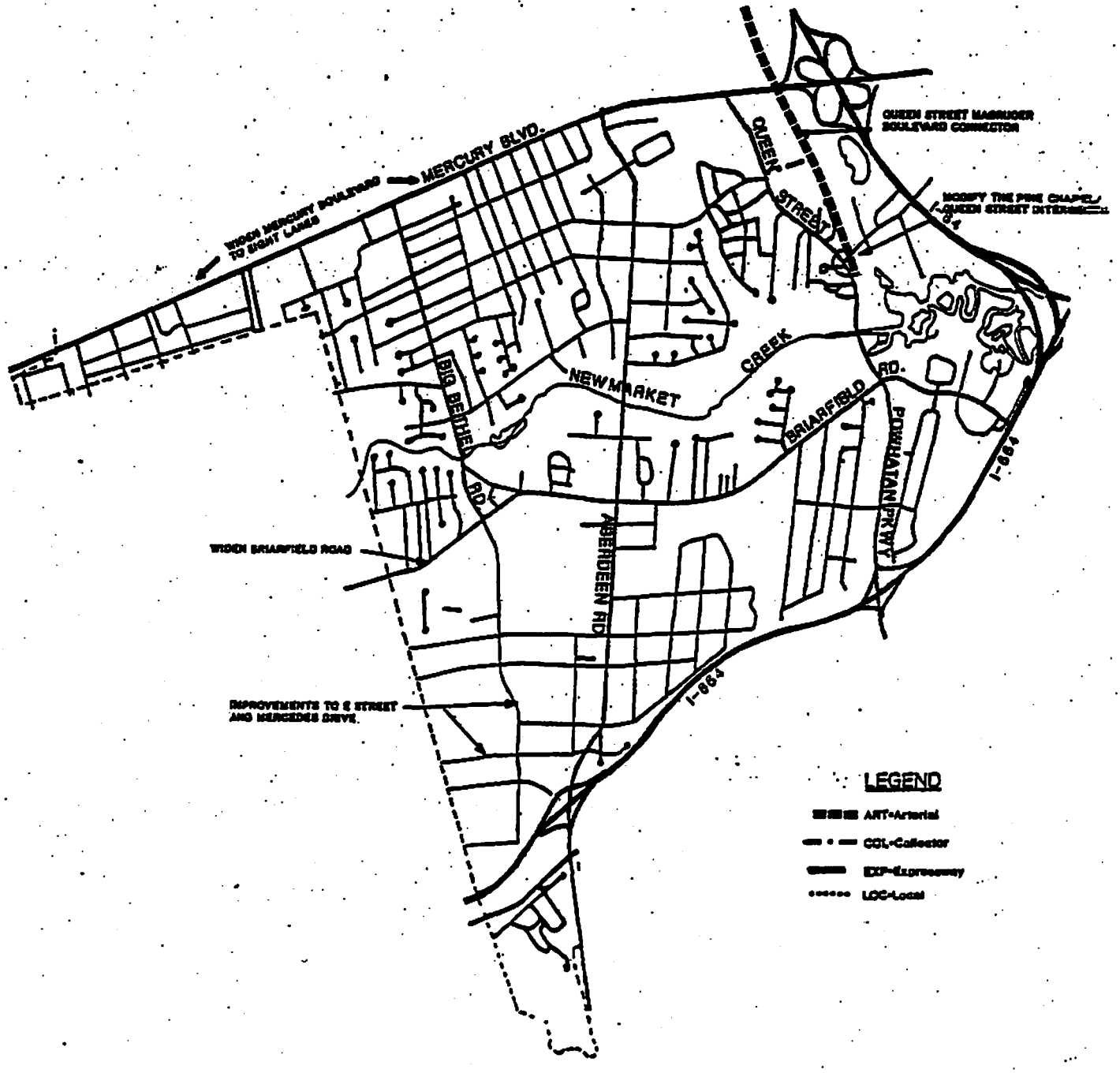
DEF EXHIBIT # 1
12 15 00 WT.

COMPREHENSIVE PLA

ADOPTED BY HAMPTON
CITY COUNCIL
12-13-89

PLANNING AREA 2

THOROUGHFARES PLAN



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PLANNING AREA TWO

Area Two is relatively well served by the existing road network. The most significant new road project recommended for Area Two is likely to facilitate more efficient north-south traffic through the Area rather than being a solution to an existing deficiency. The proposed Queen Street-Magruder Boulevard connector provides direct north-south access from the southwestern quadrant of Hampton to Mercury Central and the rapidly developing Magruder Corridor. Access to this road from Todds Lane/Cunningham Drive will also assist access from Area Three to the Magruder Corridor.

BRIARFIELD ROAD - Briarfield Road should be widened to four lanes between Aberdeen Road and the Newport News city line. Cooperation with Newport News should be pursued in order to widen the remaining segment of Briarfield Road from the city line to Jefferson Avenue. This project will provide improved capacity and travel options for workers in Copeland Industrial Park and provide a convenient east-west link between mid-town Newport News and Downtown Hampton.

MERCEDES DRIVE - Improvements to 50th Street should also be coordinated with Newport News to better serve the employment node of Copeland Industrial Park. This road should be widened to four lanes between Aberdeen Road and the City line.

E STREET - The final road improvement aimed at improving access to Copeland Industrial Park is the widening of E Street to major collector status to provide more efficient internal circulation between Briarfield Road and 50th Street and complete the link between Big Bethel Road and Mercedes Drive.

WEAVER ROAD EXTENSION - In order to facilitate future development in the area bounded by Interstate 64, Mercury Boulevard, Queen Street and Pine Chapel Road, Weaver Road should be extended east of Queen Street and connect to the proposed Queen Street-Magruder connector.

SUMMARY OF PLANNING AREA TWO TRANSPORTATION RECOMMENDATIONS

FC - Functional Classification:
- Art - arterial
- Col - collector
- Exp - expressway
- Loc - local

CT - Current Road Type

PT - Proposed Road Type:
- 2U - 2 lanes, undivided
- 4U - 4 lanes, undivided
- 5U - 5 lanes, undivided
- 2D - 2 lanes, divided
- 4D - 4 lanes, divided
- 5D - 5 lanes, divided
- 6D - 6 lanes, divided
- 8D - 8 lanes, divided

TF - Time Frame for Improvement
- S - short
- I - intermediate
- L - long

STREET	FROM	TO	FC	CT	PT	TF
Big Bethel Rd. ("E" St.)	Briarfield Rd.	Mercedes Dr.	Art	2U	4U	L
Briarfield Rd.	Aberdeen Rd.	West City Line	Art	2U	4U	I
Interstate 64	Bridge Tunnel	NN City Line	Exp	4D/6D	8D	L
Mercury Bl.	King St.	NN City Line	Art	4D/6D	8D	S
Queen St. - Magruder Conn.	Pine Chapel Rd.	Magruder Bl.	Art		4D	L
Weaver Rd.	Aberdeen Rd. Intersection Improvements					
82nd St.	Newmarket Dr. Intersection Improvements					

RESPONDENT'S EXHIBIT # 2: LARGE CONCEPTUAL SITE PLAN

CAN BE OBTAINED AT THE CLERKS OFFICE
OF THE SUPREME COURT OF VIRGINIA

RESPONDENT'S EXHIBIT # 3: VERY LARGE COLOR MAP ON BOARD

CAN BE OBTAINED AT THE CLERKS OFFICE
OF THE CIRCUIT COURT OF VIRGINIA
AT HAMPTON

RESPONDENT'S EXHIBIT # 4: VERY LARGE MAP ON BOARD

CAN BE OBTAINED AT THE CLERKS OFFICE
OF THE CIRCUIT COURT OF VIRGINIA
AT HAMPTON

CERTIFIED COPY

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF HAMPTON, PART I

CITY OF HAMPTON,
Petitioner,
v.
GEORGE A. ORPHANIDYS FAMILY TRUST, et al.,
Defendants.

AT LAW
00-362

CITY OF HAMPTON,
Petitioner,
v.
JAMES F. HUNSUCKER, SYLVIA HUNSUCKER, KENNETH M. SLATER, ROSALIND SLATER, et al.,
Defendants.

AT LAW
00-416

CITY OF HAMPTON,
Petitioner,
v.
JAMES F. HUNSUCKER, SYLVIA HUNSUCKER, KENNETH M. SLATER, ROSALIND SLATER, et al.,
Defendants.

AT LAW
00-417

IN THE CIRCUIT COURT OF THE CITY OF HAMPTON, PART IV

CITY OF HAMPTON,
Petitioner,
v.
FRANK J. OTTOFARO, and DORA J. OTTOFARO, et al.,
Defendants.

AT LAW
00-367

SUPREME COURT OF VIRGINIA
CLERK'S OFFICE
RECEIVED
DEC 26 2001
RICHMOND, VIRGINIA

DEPOSITION UPON ORAL EXAMINATION
OF BENJAMIN A. WILLIAMS, III
TAKEN ON BEHALF OF THE DEFENDANTS GEORGE A. ORPHANIDYS FAMILY TRUST, JAMES F. HUNSUCKER, SYLVIA HUNSUCKER, KENNETH M. SLATER, ROSALIND SLATER, et al.
Newport News, Virginia
January 30, 2001

TAYLOE ASSOCIATES, INC.
Registered Professional Reporters
Telephone: (757) 461-1984
Norfolk, Virginia

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	Mr. Infantino	29

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Deposition upon oral examination of BENJAMIN A. WILLIAMS, III, taken on behalf of the Defendants George A. Orphanidys Family Trust, James F. Hunsucker, Sylvia Hunsucker, Kenneth M. Slater, Rosalind Slater, et al., before Scott D. Gregg, RPR, and Notary Public for the Commonwealth of Virginia at Large, commencing at 8:30 a.m., January 30, 2001, at the law offices of Patten, Wornom, Hatten & Diamonstein, LC, 12350 Jefferson Avenue, Suite 360, Newport News, Virginia.

BENJAMIN A. WILLIAMS, III, called as a witness, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WILSON:

Q. Mr. Williams, good morning. My name is John Wilson. I'm here on behalf of the Hunsuckers and Orphanidys in the condemnation suits that have been filed by the City of Hampton.

Would you, please, state your full name?

A. Benjamin A. Williams, III.

Q. Do you have any role with regard to the Hampton Industrial Development Authority?

A. I do. I'm the chairman.

Q. How long have you been the chairman of

the IDA?

A. Approximately two and a half years.

Q. Were you a member of the IDA prior to becoming chairman?

A. I was.

Q. How long have you been serving under the IDA?

A. Sixteen years.

Q. Does the IDA independently have condemnation powers, to your knowledge?

A. I don't think so. We may, but we have never, to my knowledge, used it.

Q. And the IDA is not invoking any condemnation powers with regard to the power plant project?

A. Not at all.

Q. Do you understand what I mean when I say the "power plant project"?

A. I do.

* * *

* * *

[redacted]

A. -- Right.

Q. Do you know when the road plans were finally finalized with regard to the power plant project?

A. I can't give you an exact date. I know that they were finally -- probably the final location was sometime in the year 2000 possibly, and I think the last adjustments that I know of were dealing with the Spaulding -- the lots at the end of Spaulding Drive. And the only other adjustment that I was aware of was after the -- also, this would have been in either late '99 or 2000. I can't tell you exactly when.

A guy received a call from Richard Steinberg, who is the president of Coliseum Mall -- I mean, Mall Properties. Mall Properties owns not only Coliseum Mall, but Mercury Plaza, which is directly across Queen Street, and he advised me that he -- they were almost finished negotiating a deal with Kmart to put a Super K over there, and did the IDA have any objection if the engineers looked at the plans for the intersection of Powhatan Parkway and Queen Street, because Kmart had raised some concerns about how that was going to work.

And I talked to the city engineer and the city manager, and, in fact, the engineers for -- to my understanding is the engineers from Mall Properties did speak with not only the city engineer but the Cordish engineers, and at that time the JDM engineers, and there was a certain, small adjustment of that intersection. It had nothing to do with other than to make sure that intersection worked, so to speak.

Obviously, we would be foolish to put an intersection that didn't work with both sides with that major development on the other side.

Q. Do you know if the original road width was proposed to be 100 feet for Powhatan Parkway?

A. I don't know that.

Q. Do you know if that width ever changed to 120 feet?

A. I think -- it is what it is. I know that they -- there were some discussions probably from Fred Whitley, as he would give us updates from time to time, that they had, you know, studied what they thought the road -- the traffic count for that road would be in light of the use that was intended for that area, and in considering the fact that they would anticipate possibly more use from people getting off of 664 to Powhatan Parkway that they thought that the

traffic counts were higher.

And they were designing the road not only to meet the current traffic needs, but what they thought might be projected in the future.

Q. Did you have any knowledge one way or the other if the road width changed between December of '99 and the present?

A. No, I don't know that. I can't remember when the dates -- you know, there's been so many different things in this project.

Q. Did you have any role with regard to analyzing the location or configuration of the storm water drainage system that will accommodate the project?

A. No. I was advised early on by Fred Whitley, you know, that the drainage for the -- for that roadway was being designed to be -- well, there was really no other alternative way he told me, that he used the, quote, Orphanidys' lake as the ultimate recipient of the drainage waters.

Q. Did Mr. Whitley ever tell you where the conduits from the road to the lake were to be located?

A. No.

Q. Did you ever get involved at that level of detail?

A. No.

* * *

Q. I guess what I'm trying to get though, you did not have an official role with regard to the condemnation?

A. No, other than, you know, asking the City -- I guess we technically asked the City to condemn those properties for the roads that could not be acquired. But as far as specific pieces, no specific pieces.

* * *

* * *

Q. With regard to the residual portions of parcel 30 which aren't being used for the lake or

which aren't being used for the road improvements, is it your understanding that that land would ultimately be transferred to the IDA?

A. Yes, that's my understanding.

Q. And who would transfer that land to the IDA?

A. I guess the City would, like they transferred the other property they owned in the same manner.

Q. And once the land is transferred from the City to the IDA, what uses does the IDA propose for the residual portions of parcel 30?

A. It would be part of the ground -- part of the property that was to be ground leased to Hampton Roads -- Cordish Development Company, Hampton Roads -- whatever the name of it is -- Associates, LLC.

Q. If you'd look, please, at the development agreement, which I think we've marked as Exhibit 1, and I'm looking specifically at page seven, right at the top, there's a statement, "From time to time additional parcels of property shall be made subject to the ground lease or the phase two ground lease as provided in this agreement"; do you understand that?

A. Uh-huh.

Q. Was it your understanding that the

residual portions of parcels 12, 15, and 30 would be made subject to the ground lease or the phase two ground lease after the conveyance from the City of Hampton to the IDA?

A. That was my understanding. The ground -- the part on the, I guess, northerly side would be to the ground lease, and to the southern side would be to the phase two ground lease, or east and west, whichever which way you look at it.

Q. Do you know if the City of Hampton has transferred any of parcels 12, 15, and 30 to the IDA?

A. They have not.

Q. Do you know why the City of Hampton has not done that at this time?

A. I think probably because of the condemnation litigation. They were just waiting -- I think they have filed certificates of take, but until everything was resolved, they have not made any transfer. There's been no deeds.

Q. Other than the ground leases and the various addenda which we have previously marked which were provided us to as a part of a FOIA request, are you aware of any other contracts which would govern residual portions of parcels 12, 15, and 30?

A. No.

Q. Is it your understanding that the ground lease, whether it be phase one or phase two, would govern the residual portions of parcels 12, 15, and 30 once the City of Hampton conveyed those properties to the IDA?

A. That's my understanding.

Q. What's the status of the project at this time?

A. The status of the project is the parcel on which Lowe's Home Improvement is going to go has been subleased, I guess, or broken out, subdivided and leased to -- or the improvements are being done so it can be leased to fulfill the lease agreement that I understand the Cordishes have with Lowe's, and the actual clearing and preconstruction for the roadway -- for the entire roadway is being done.

Q. What do you contend will be the public use of the residual portions of parcels 12, 15, and 30 after the property is transferred to the IDA from the City of Hampton?

A. I don't think there will be any public use. I think it will just be -- you know, whatever the incidental remainder part is would be -- would certainly not be left useless. It would be added to this project.

Q. Okay. But I guess the point I'm making is, the residual portions will ultimately be put under the leases that we've already discussed to the development?

A. Right.

Q. And the developer will use that property, including the residual portions of parcels 12, 15, and 30, for its private development of the power plant project?

A. Well, we'll lease it to him and he'll use it for that purpose. The IDA will lease it.

(A document was marked by the reporter as Williams, III Deposition Exhibit No. 14.)

BY MR. WILSON:

Q. Mr. Williams, I've handed to you a letter dated March 3rd, 2000, from Reed S. Cordish on behalf of Hampton Roads Associates to the IDA.

Do you recognize that letter?

A. I'm not sure that I ever saw the letter. I knew that it came, but I'm not sure I ever saw it.

Q. What did the IDA do once it was notified by the developer that the developer was unable to acquire road parcels?

A. I'm not sure we did anything because I think the City was provided with a copy of this letter

at the same time.

So if you look at the agreement, our understanding of the agreement is that the developer was to use his best efforts to try and negotiate the acquisition of the parcels as part of the total package of acquiring the properties. And if they could not by a certain date, then they had to give notice of the parcels they could not. And this was the notice that they gave.

And I think that the City probably received a copy of this in some fashion and so -- I can't remember any formal communication or letter where we said, you know, we've received this notice. I think we were working so closely with the City and Fred Whitley and Kathy Grook and everybody that everybody knew.

* * *

BY MR. INFANTINO:

Q. Most of his questions were all directed to the Orphanidys parcels, 12, 15, and 30. My client owned parcels 23 and 24, Frank Ottofaro.

Are you familiar with those parcels?

A. I am.

Q. Are you aware of any type of the same analysis being done with regard to the necessity to take the residual portion of those parcels?

A. No.

Q. And is the residual portions of those parcels going to be handled the same way under these ground leases as parcels 12, 15, and 30?

A. They will be if they both fall on either -- I'm note exactly sure -- I know his is near Pine Chapel Road. I think it's on Pine Chapel Road, but I'm not familiar with how his is split.

Q. Your Exhibit 13 has a sketch attached, which is not to scale. It shows the parcels.

A. Okay. He has which ones?

Q. Twenty-three and twenty-four.

A. Certainly the portion of -- he's 23 and 24?

Q. Yes.

A. And this is the take right here, so if that's a portion, I can't -- if that's a portion, then I assume it is of the phase two ground lease, then it would be treated the same way.

The only reason I hesitate about that is I think these three lots here are not -- the three lots in there are not critical that anybody acquired them, and I think it was these three. And so I'm not exactly sure where the phase --

Q. The road is definitely coming through both his parcels, so I --

A. Yeah, I understand, but this would be the residual piece right here.

Q. And that may be developed with the three parcels?

A. So what I'm saying, I think this piece right here -- these pieces -- there wasn't any requirement that -- or in the whole plans that they were absolutely critical to anybody. They would like to have all of the property at some time put into the commercial development -- the IDA would -- because our goal is just to get the taxes out of it, but --

Q. So if the Ottofaro property doesn't fall within phase one, it would be --

A. Phase two.

Q. It be will be held by the IDA --

A. But it might fall in phase two. I'm not familiar enough with the boundaries. I think it is in phase two. Phase one is basically everything on the north side of Powhatan Parkway, and phase two is everything -- just about everything on the south. And I think that the phase two boundary line -- this does include those properties. But I'm saying I haven't looked at it long enough to know exactly.

But assuming that it does, then -- there was no analysis or -- that would be turned over to the

phase two ground lease.

Q. Okay.

A. Okay.

Q. And ultimately phase two would be developed by the private developer?

A. Right. I think phase two is -- there's a phase two ground lease that Cordish would have.

MR. INFANTINO: Okay. That's it.

MR. HODGES: I don't have any questions.

THE WITNESS: I think the questions were clear enough. I'll waive any signatures.

(Deposition adjourned at 9:22 p.m.)

DEVELOPMENT AGREEMENT

Between

THE INDUSTRIAL DEVELOPMENT AUTHORITY
OF THE CITY OF HAMPTON

As Lessor

and

HAMPTON ROADS ASSOCIATES, L.L.C.

As Lessee

As of November 18, 1999

JDN1471

Williams Ex 1

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DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (this "Agreement") is made as of the 18th day of November, 1999, by and between THE INDUSTRIAL DEVELOPMENT AUTHORITY OF THE CITY OF HAMPTON, a political subdivision of the Commonwealth of Virginia (the "IDA"), and HAMPTON ROADS ASSOCIATES, LLC, a Maryland limited liability company (the "Developer").

RECITALS

A. Subject to the terms and provisions of this Agreement, the Developer desires to acquire, develop and construct a major retail and commercial development Project (hereafter defined), which will include big box retail, lifestyle entertainment retail and restaurants, on all or a portion of that certain property located in the City of Hampton, Virginia (the "City"), containing approximately one hundred seven (107) acres of land and bounded by Interstate Route 64, Mercury Boulevard, West Queen Street and Pine Chapel Road (collectively, the "Property"), as indicated on the plat attached hereto as Exhibit A.

B. Subject to the terms and provisions of this Agreement, the Developer intends to enhance the "Coliseum Central" area of the City by providing opportunities for new retailers entering the Hampton Roads market to locate in the City, improving the image and economic vitality of the Coliseum Central area and stimulating redevelopment of other retail and commercial facilities located in the Coliseum Central market.

C. The parties hereto recognize and agree that the Developer is assuming significant financial risk in undertaking the Project, and that all risks of cost overruns, labor difficulties, parcel acquisition and the like that are integral to making the Project a success after fulfillment of the IDA's obligations hereunder and under the Ground Leases (hereafter defined), are the sole responsibility of the Developer.

D. The parties recognize and agree that the City's existing public road and utility infrastructure are not adequate to support the public's needs in using the Project and surrounding traffic arteries, and that it is necessary to widen and/or improve West Queen Street, Mercury Boulevard and Pine Chapel Road, to develop and construct interior public streets within the Property, and to install utilities and other infrastructure to serve the Project and surrounding property. As a part of the Project and subject to the terms of this Agreement, the Developer intends to build, with the cooperation of the City of Hampton, a public road through the Property, effectively dividing the Property into two tracts, the easternmost of which is sometimes referred to in this Agreement as Phase One and the westernmost of which is sometimes referred to as Phase Two.

E. The IDA has found that it is in the public interest of the citizens of the City, and that it is consistent with the economic development goals of the City and with the City's master plan, for the Project to be developed, in order to increase tax revenues, stabilize existing revenue sources derived from the Coliseum Central area and stimulate redevelopment of existing facilities in order to generate higher revenues. The IDA is therefore willing, subject to the terms

and provisions of this Agreement, to enter into the Ground Leases and provide the Developer with an allowance in the amount of Eleven Million and 00/100 Dollars ($11,000,000.00) towards land acquisition costs, construction of road and utility infrastructure improvements costs and development costs, and to provide an additional allowance in the amount of Five Million and 00/100 Dollars ($5,000,000.00) for tenant inducement costs and tenant improvement costs, in order to achieve the substantial tangible revenue benefits and intangible benefits that will be derived from the development of the Project. The funds to be provided by the IDA are hereafter referred to as the IDA Allowance.

F. The IDA has found that the Developer is the only practical choice as general contractor for the construction of public infrastructure associated with the Project for the reasons that (i) the construction must be coordinated with marketing efforts for the Project and the schedules required by prospective tenants and occupants; (ii) it is far more efficient and cost-effective to have the same contractors working in both the public sector and the private sector portions of the Project; (iii) the Developer is qualified and experienced to responsibly complete the Project; and (iv) since it is the owner and optionee of part of the land that makes up the Project, the Developer is in a unique position to accomplish the foregoing tasks to lead to the successful completion of the Project. The Developer shall be the "designated vendor" for the Project so as to permit appropriate progress payments from the IDA during the course of design and construction performed within the scope of this Agreement.

G. But for the agreement of the IDA, subject to the terms and provisions of this Agreement, to enter into the Ground Leases and to provide the Developer with the IDA Allowance, the Developer would not have entered into this Agreement and would not have agreed to enter into the Ground Leases.

DEFINITIONS

For the purposes of this Agreement, and in addition to terms defined elsewhere in this Agreement, the following defined terms shall have the meanings described thereto in this Definitions Section.

Acquisition, Infrastructure and Development Allowance means that Eleven Million Dollar portion of the IDA Allowance for payment of those costs listed in Section 9.1.1.

Additional Allowance means that Five Million Dollar portion of the IDA Allowance for payment of those costs listed in Section 9.1.2.

Additional Parcels means those additional portions of the Property that the Developer shall acquire.

Anchor Tenant Commitment shall have the meaning set forth in Article VI.

Anchor Tenants shall have the meaning set forth in Article VI.

Arbitration Notice means written notice of either party's desire to arbitrate a dispute.

City shall have the meaning set forth in Recital A.

Contracts shall have the meaning set forth in Section 2.1.1.

Event of Termination shall mean those events listed in Sections 11.1 and 11.2.

Ground Lease means that Ground Lease Agreement between the IDA and Developer in the form attached hereto as Exhibit C-1.

Ground Leases means the Ground Lease and the Phase Two Ground Lease, together.

IDA Allowance means the funds to be provided by the IDA pursuant to Recital E.

IDA Representative means the City Manager of the City.

Leased Property means the Property owned by the IDA and leased to the Developer under the Ground Leases.

Mortgage shall have the meaning set forth in Section 19.1.

Mortgagee means the beneficiary of a Mortgage or any assignment of a Mortgage.

Option Property shall have the meaning set forth in Section 12.1.

Parcel Plat means that plat attached hereto as Exhibit D.

Parcel 29 means that parcel identified as parcel 29 on the Parcel Plat.

Phase One means that portion of the Property on the easternmost side of the public road built by the Developer on the Property.

Phase Two means that portion of the Property on the westernmost side of the public road built by the Developer on the Property.

Phase Two Ground Lease means that Ground Lease Agreement between the IDA and Hampton Roads Associates Two, LLC, in the form attached hereto as Exhibit C-2.

Preliminary Budget means the budget prepared by the Developer showing the total estimated costs of development of the Project.

Preliminary Design Funds shall have the meaning set forth in Section 5.1.3.

Project shall have the meaning set forth in Section 1.1.

Project Architect means the architect hired by the Developer to design the Project.

Property shall have the meaning set forth in Recital A.

Road Improvement Parcels means those portions of the Property that will be located within the right-of-way of the Road Improvements.

Road Improvements shall have the meaning set forth in Section 8.1.1.

Site Plan means the formal engineered site plan and subdivision plat for the Project.

Termination Payment shall have the meaning set forth in Section 7.3.

Zoning Case means the City's rezoning Case #1068 dated August 20, 1997.

Zoning Lots means all those lots and parcels included in the City's approval of rezoning Case #1068 dated August 20, 1997.

Zoning Requirements means the building and zoning requirements of the City including, without limitation, all Design Guidelines for the Coliseum Central District.

AGREEMENT

In consideration of the mutual promises and undertakings of the parties, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Developer and the IDA agree as follows:

ARTICLE I

THE PROJECT

1.1 The Project. Subject to the other provisions of this Agreement, the Project shall, at a minimum, initially consist of an integrated retail and commercial development containing a minimum of four hundred eighty thousand (480,000) square feet of space consisting of: (a) not less than three hundred thirty thousand (330,000) square feet of gross leasable area of retail stores containing at least one (1) Anchor Tenant; and (b) an entertainment, lifestyle retail and restaurant center containing not less than one hundred fifty thousand (150,000) square feet of gross leasable area of space. The two components may be integrated. Subject to the Developer's obligation hereunder to initially construct the Project and subject to applicable law and the provisions of the Ground Leases, the ultimate size, scope and configuration of the Project shall be determined by the Developer in its sole and absolute discretion and the Developer reserves the right, from time to time, to modify the Project.

ARTICLE II

PROPERTY ACQUISITION

2.1 Parcel Acquisition by Developer. The Developer has entered into options or contracts of sale, and intends to enter into options or contracts of sale, to acquire land within the Property on such terms that the Developer, in its reasonable business discretion, determines to be feasible. To this end, the Developer shall (i) offer to acquire all the Zoning Lots included in the Zoning Case, identified on Exhibit B, for not less than the same terms previously offered by Robert Brown Hampton Development Co.; (ii) use commercially reasonable efforts to purchase and relocate the Little Zion Baptist Church; and (iii) acquire sufficient land, in the opinion of the IDA, on which to develop the Project to include gross leasable area of not less than 480,000 square feet of retail space.

2.1.1 The offer made by the Developer pursuant to (i) above shall be made within five (5) business days after the execution of this Agreement, shall be open for acceptance for a period of not less than thirty (30) days, and shall be in the form of conditional contract of purchase (the "Contracts") with non-refundable deposits of $10,000 ($5,000 for lots not improved with dwelling units), which deposits shall apply against the purchase price with a closing date not more than two years after the date of the Contracts, and in form reasonably acceptable to the IDA. The Developer may choose to enter into the Contracts in another but affiliated entity.

2.1.2 If the Zoning Lots under Contracts on the thirty-fifth day after the last date the Developer makes a written offer to purchase a Zoning Lot represent less than seventy-five percent (75%) of the Zoning Lots (being 28 of the 37 Zoning Lots), the Developer shall have no further obligation with respect to the purchase of Zoning Lots, and may acquire as few or as many, and at such prices, as the Developer deems expedient. If the Zoning Lots under Contracts represent more than twenty-four but less than twenty-eight lots, the Developer shall waive any similar seventy-five percent requirement contained in such Contracts and retain such Contracts in full force and effect and, at the request of the IDA and upon reimbursement of all deposits made thereunder, assign the same to the IDA, but the Developer have no further obligation with respect to such Zoning Lots.

2.1.3 If the Zoning Lots under Contracts at the end of the thirty-five (35) day period described above represent twenty-eight or more Zoning Lots, the contract purchaser shall conditionally assign such Contracts to the IDA, such assignment to be conditioned upon default in the Contracts by the contract purchaser as provided in Section 2.1.4 below. The Developer and the IDA shall continue to negotiate with owners of Zoning Lots during a period of two years after the date of this Agreement to obtain Contracts with as many owners of Zoning Lots as practicable. The Developer shall have the power to determine, in its sole and absolute discretion, that the Contracted Zoning Lots are not suitable for inclusion in the Project, in which event the Developer may by notice to the IDA not more than ninety (90) nor less than sixty (60) days prior to the second anniversary of the date of this Agreement, require the IDA to accept an assignment of any Contracted Zoning Lots (other than Road Improvement Lots) it intends to not purchase. Upon delivery of a duly executed assignment to the IDA of all such Contracts, the

IDA shall pay to the Developer a sum equal to the deposits under Contracts to the extent such deposits apply to reduce the purchase price.

2.1.4 Should the Developer determine in its sole and absolute discretion that the Contracted Zoning Lots are usable, or should all Zoning Lots be subject to Contracts, the contract purchaser shall proceed to close the purchase subject to the terms and conditions of the Contracts. For the purposes of the foregoing sentence only, Parcels 1A, 21 and 22 shown on Exhibit A shall not be deemed "Zoning Lots". In either of such events, default by the contract purchaser under any contract shall cause the Phase Two Ground Lease to be terminable by the IDA as to all of the "Leased Premises" thereunder which has not been improved by buildings and related parking and landscaping improvements, as provided in the Phase Two Ground Lease. The Developer shall not be entitled to the return of or reimbursement for any deposits on any such Contracts. Developer shall cause all Contracts to be assigned to the IDA to the extent the conditional assignment set forth in Section 2.1.3 is not a complete and effective assignment.

2.1.5 The Developer's obligations under this Section 2.1 shall be subject to the condition that this Agreement be in full force and effect. Closing of land purchases may be contingent upon conditions to IDA funding being met.

2.2 Failure to Acquire Adequate Property. If the Developer does not acquire by purchase or ground lease so much of the Property that will allow, in the reasonable opinion of the IDA, the development of not less than 480,000 square feet of gross leasable area of retail space in the Project by June 30, 2000, this Agreement may be terminated by either party. For the purposes of this Section 2.2, the Road Improvement Parcels and Parcel 29 as shown on Exhibit A shall be deemed to have been acquired by the Developer.

2.3 Acquisition by IDA. On or before February 29, 2000, the IDA shall have obtained a contract to acquire Parcel 29 as shown on Exhibit A in form reasonably acceptable to the Developer. On or before February 28, 2000, the IDA shall acquire good and marketable title to Parcel 29, and by amendment include such parcel in the Ground Lease as provided in Section 3.2. Failure of the IDA to obtain such contract or to acquire title shall not be deemed an Event of Termination; however, the Developer's obligation to acquire property (contained in Section 2.2), to develop 480,000 square feet of gross leasable area (contained in Article X), and the similar condition to disbursement of the IDA Allowance (contained in Article IX), shall be reduced as provided in Section 11.4. There shall be no holdback from or reduction of the IDA Allowance.

ARTICLE III

THE GROUND LEASE

3.1. The Ground Lease. Upon satisfaction of the conditions to funding the Acquisition, Infrastructure and Development Allowance as set forth in Article IX (other than the requirement that the Ground Lease be in full force and effect), the parties hereto shall execute and deliver to each other two ground leases, including the Ground Lease substantially in the form attached hereto as Exhibit C-1, and the Phase Two Ground Lease substantially in the form attached hereto as Exhibit C-2. Initially, the only portion of the Property that shall be subject to

the Ground Lease shall be Parcel 27, which parcel is identified and described on the Parcel Plat attached hereto as Exhibit D. From time to time, additional parcels of Property shall be made subject to the Ground Lease or the Phase Two Ground Lease as provided in this Agreement. The Developer shall have the right to record the Ground Lease and/or the Phase Two Ground Lease or memoranda thereof (which the IDA shall sign upon presentation by the Developer) among the Land Records of the City of Hampton.

3.2 Parcel 29. Pursuant to Section 2.3 hereof, the IDA is obligated to acquire good and marketable fee simple title to Parcel 29 depicted on Exhibit A. Within ten (10) days of acquiring Parcel 29, the IDA shall notify the Developer of such acquisition and provide the Developer with a title report demonstrating that it has good and marketable fee simple title to Parcel 29 and an amendment to the Ground Lease, executed by the IDA, that changes the property description of the property that is the subject of the Ground Lease so that it includes Parcel 29. The amendment shall provide that all obligations of both parties made in the Ground Lease shall apply to Parcel 29 as of the date of such amendment. The form and substance of such amendment shall be reasonably acceptable to Developer.

3.3 Additional Parcels. As described in Section 2.1, the Developer has entered into options or contracts of sale, and after the date hereof intends to enter into additional options or contracts of sale, in order to acquire Additional Parcels. From time to time, the Developer shall convey to the IDA the fee simple interest in and to each Additional Parcel (except no conveyance of land in Phase Two need be conveyed to the IDA after termination of the Phase Two Ground Lease pursuant to Section 2.1.4 or Section 11.4 below), such conveyance being made by the Developer or by the present owner of such Additional Parcel. To that end, the IDA, at the request of the Developer, shall attend the closing on the acquisition of an Additional Parcel and at such closing, shall execute and deliver to the Developer an amendment to the Ground Lease (or, as to land in Phase Two, the Phase Two Ground Lease) that changes the property description of the property that is the subject of the Ground Lease (or, as to land in Phase Two, the Phase Two Ground Lease) so that it includes such Additional Parcel. The amendment shall provide that obligations of both parties made in the Ground Lease (or, as to land in Phase Two, the Phase Two Ground Lease) shall apply to such Additional Parcel as of the date of such amendment. The form and substance of such amendment shall be reasonably acceptable to Developer.

ARTICLE IV

PRELIMINARY DEVELOPER RESPONSIBILITIES

4.1. Preliminary Developer Responsibilities. Upon completion of acquisition by the Developer and IDA of all of the Property, or so much of the Property that will allow the development of the Project, the Developer shall undertake the following responsibilities:

4.1.1 Tenants and Purchasers. The Developer shall market the Project and seek to obtain commitments from prospective tenants and/or purchasers of portions of the Project. The Developer shall keep the IDA apprised of the status of all negotiations and the identity of prospective tenants and purchasers. The IDA acknowledges that such information constitutes a

confidential trade secret of the Developer. The IDA shall use reasonable efforts to keep all such information confidential.

4.1.2. Employment of Architects; Submission of Plans and Specifications.

(a) The Developer shall select and employ the Project Architect to design the Project and the road and infrastructure improvements. The Developer shall have the right, from time to time, to replace the Project Architect. The Project Architect shall be a registered architect or architectural firm that has experience in designing entertainment retail centers, and which has a good reputation in the industry. Tenants of the Project shall have the right to utilize their own architects.

(b) The design for the Project shall be at least comparable in quality to the Avenues at White Marsh, White Marsh, Maryland. Building finishes on side or rear-building elevations of the Project shall be finished to substantially the same degree as the front building elevation. Where the Project shares a border with a residential property, the Project shall be adequately screened and/or landscape buffered. All screening and landscaping buffers shall comply with the Zoning Requirements.

(c) The Developer shall cause schematic drawings showing the site plan and exterior facade of Developer constructed buildings to be prepared by the Project Architect and shall cause the same to be delivered to the IDA Representative for review promptly upon completion thereof.

(d) The Project shall comply with, and the Developer shall obtain such approvals of site plans and plans and specifications from the City as may be required by, all applicable Zoning Requirements. Nothing contained in this Agreement shall be deemed a waiver of any of the City's normal permit and approval process. As of the date of this Agreement and based upon the IDA's understanding of the Project, and without independent review of plans and Zoning Requirements, the IDA is not aware of the violation of any of the Zoning Requirements (other than proffer amendments required with respect to portions of Parcels 10 and 11 shown on Exhibit A).

4.1.3 Budgets. Concurrently with the execution of this Agreement, the Developer has provided to the IDA the Preliminary Budget and a preliminary pro forma of revenues and expenses for the Project, which has been approved by the IDA and the IDA Representative. From time to time during the development of the Project the Developer shall have the right, without the need to request or obtain the approval of the IDA, to modify and amend the Preliminary Budget and such pro forma to reflect changes in the cost of the Project, any such modifications or amendments shall be delivered to the IDA. The IDA acknowledges that such information constitutes a confidential trade secret of the Developer. The IDA shall use reasonable efforts to keep all such information confidential.

4.1.4. Road Design. The Developer shall begin preparation of the preliminary design for the road and infrastructure improvements of the Project, including the widening of and improvements to Mercury Boulevard, West Queen Street and Pine Chapel Road (as applicable) and the layout of any interior public streets within the Property. Preliminary and final design of such improvements shall be subject to the customary City approval process. To the extent the Developer gives notice to the IDA notice for acquisition of property by the City pursuant to Section 7.1, the Developer shall have caused plans for road widening and interior public streets to be prepared and delivered to the IDA that are sufficient for the City's use in eminent domain proceedings.

ARTICLE V

IDA RESPONSIBILITIES

5.1 IDA Responsibilities. From and after the date hereof, in addition to IDA's other obligations hereunder, the IDA shall undertake the following:

5.1.1 Project Coordination. The IDA shall assist the Developer with the land acquisition process for the Project. The IDA shall cooperate with the Developer in Developer's application for permits and approvals for the Project from the City and shall, within the bounds of propriety, use reasonable efforts to assist the Developer in obtaining all such permits and approvals. The Developer acknowledges that the IDA is a political subdivision of the Commonwealth of Virginia independent of the City, and has no power, de jure or de facto, to issue such permits or approvals or to influence their issuance or any other City process.

5.1.2 Survey. The IDA has obtained and delivered to the Developer a boundary survey of the Property at its cost and expense of the IDA. The Developer shall have the right to utilize such survey in connection with the development of the Project.

5.1.3 Preliminary Design Funds. The IDA shall reimburse the Developer for the first Seventy-Five Thousand and 00/100 Dollars ($75,000.00) of costs incurred by the Developer for the preliminary design and engineering costs of the Project within thirty (30) days of presentation of invoices therefor (the Preliminary Design Funds). Any payments made by the IDA pursuant to this Section 5.1.3 shall be credited against the amount of the IDA Allowance that the IDA is required to pay the Developer hereunder in connection with the Ground Lease.

5.1.4 IDA Representative. The IDA hereby appoints the IDA Representative to receive any and all submissions and to grant any and all approvals with respect to the Project. The IDA reserves the right to modify or terminate such appointment and to appoint another IDA Representative as its agent. Such modification or termination and appointment shall not become effective until the IDA provides the Developer with a notice of such action, which notice contains a reasonably detailed description of such action.

ARTICLE VI

ANCHOR TENANT COMMITMENT

6.1 Anchor Tenant Commitment.

6.1.1 Efforts to Lease. From and after the date hereof, the Developer shall use commercially reasonable efforts to procure the Anchor Tenant Commitment (as that term is hereinafter defined) on such terms that the Developer, in its reasonable discretion, determines to be feasible.

6.1.2 "Anchor Tenant Commitment" defined. The term Anchor Tenant Commitment means (a) a binding agreement (in the form of a lease or purchase agreement) between the Developer and one or more major retailers or similar users (collectively, the Anchor Tenant) for (i) at least 130,000 square feet of space in the Project to be occupied by a single Anchor Tenant, or (ii) at least 150,000 square feet of space in the Project to be occupied by two or three Anchor Tenants, with no less than 15,000 square feet to be occupied by any single occupant of the two or three Anchor Tenants in question; and (b) each such Anchor Tenant must be approved by the IDA Representative, which approval shall not be unreasonably withheld, conditioned or delayed, and which approval shall be deemed granted if not expressly given or rejected within thirty (30) days after the Developer's written request of the IDA Representative therefor. Notwithstanding the previous sentence, K-Mart, Lowe's, Sam's and Kohl's and any tenant that is comparable to any of the previous listed tenants are each hereby deemed to be an "Anchor Tenant". The parties recognize and agree that a "binding agreement" (in the form of a lease or purchase agreement) may consist of a lease agreement that contains commercially reasonable conditions and termination rights and that does not necessarily obligate the tenant thereunder to initially open and thereafter continuously operate a store at the Project.

6.2 Failure to Obtain the Anchor Tenant Commitment.

6.2.1 Right to Terminate Subject to the provisions of Section 6.2.2 hereof, if, by the first anniversary of the date hereof, the Developer has failed to procure the Anchor Tenant Commitment, from and after such date, until the date that the Anchor Tenant Commitment has been procured, the IDA or the Developer shall have the right to terminate this Agreement and the Ground Lease by notifying the other party hereto of such terminations. Any such termination shall be effective thirty (30) days after the giving of such a termination notice.

6.2.2 Limitations on IDA's Right to Terminate

Notwithstanding the provisions of Section 6.2.1, in the event that by the first anniversary of the date of this Agreement the Developer has made substantial progress towards procuring the Anchor Tenant Commitment, the IDA shall not have the right to terminate this Agreement, provided, however, that in the event that after the first anniversary of the date of this Agreement, the Developer ceases to make substantial progress towards procuring the Anchor Tenant Commitment, and the Developer does not recommence such efforts within thirty (30) days after notice of such cessation by the IDA and thereafter diligently pursue procuring the

Anchor Tenant Commitment, and in any event after eighteen (18) months after the date of this Agreement, the IDA shall have the right to terminate this Agreement and the Ground Lease by notifying the Developer of such terminations. Any such termination shall be effective thirty (30) days after the giving of such a termination notice.

ARTICLE VII

RIGHT-OF-WAY ACQUISITION

7.1 Acquisitions by the City. The Developer shall attempt to acquire and convey to the City all rights-of-way required for the Road Improvements. The IDA will coordinate such acquisitions with the Developer so that the cost of the acquisitions is minimized to the extent reasonably possible. If and to the extent that the Developer gives notice to the IDA that the Developer is unable to acquire title to the Road Improvement Parcels, and delivers to the IDA engineering drawings approved by the City in detail sufficient for the purpose, IDA shall exercise its best efforts to cause the City to acquire the Road Improvement Parcels (other than any Road Improvement Parcels which front on CC Spaulding Drive) pursuant to eminent domain proceedings or by consensual agreement with the property owners so that the construction of the Road Improvements may proceed. With respect to the Road Improvement Parcels the IDA will exercise its best efforts to cause the City to:

(i) determine the sums the City estimates to be the fair value of the property taken and the damage, if any, done to the residue;

(ii) make a bona fide offer to the owner or owners of each Road Improvement Parcel in the amount reported by the appraisal, and give each property owner ten (10) days to accept or reject such offer;

(iii) file a petition for condemnation, including the "quick take" provisions of §33.1-119 et seq. of the Code of Virginia (1950) as to all Road Improvement Parcels whose owners do not timely accept the bona fide offer, and diligently pursue the same to conclusion.

The Developer acknowledges and agrees that the City may only exercise its power of eminent domain when there is a direct showing of public purpose and need, and the power may only be exercised for property which is necessary for the Road Improvements and related infrastructure improvements and additions. The Developer further acknowledges that the City does not intend to acquire by condemnation any portion of Little Zion Baptist Church or any of the Zoning Lots, which are improved with owner-occupied dwellings. The cost of the acquisition of the parcels so acquired by the City shall be borne by the City; however, the IDA Allowance shall be reduced in accordance with the provisions of Section 9.1.1. The IDA or its designee shall periodically consult with the Developer with regard to all aspects of the City's efforts to acquire such parcels, and shall keep the Developer reasonably informed of the City's efforts to acquire the same. All costs and expenses incurred by the City in acquiring Road Improvement Parcels, including reasonable attorney's fees, shall be credited against and reduce the IDA Allowance; provided, however, that such reduction shall not exceed one hundred twenty percent (120%) of the prices for the Road Improvement Parcels as agreed by the parties.

7.2 Developer's Right to Terminate. If within ninety (90) days after the Developer has delivered the notice and plans described above, the City Council of the City has not filed a petition for condemnation or within one hundred eighty (180) days after such delivery of notice and plans the City has not acquired title and the right of entry to each of the Road Improvement Parcels for which acquisition by eminent domain proceedings or consensual agreement is required pursuant to Section 7.1, then at any time thereafter until the earlier to occur of (i) the date the City has acquired good and marketable fee simple title to each of such Road Improvement Parcels, or (ii) fifteen (15) months after the date of this Agreement, the Developer shall have the right and option to terminate this Agreement and the Ground Lease and the Phase Two Ground Lease by notice to the IDA. Any such termination shall be effective thirty (30) days after such notice is given. In the event of such termination, the IDA shall, within thirty (30) days of the effective date of such termination pay to the Developer the Termination Payment. Simultaneously with such payment the Developer shall transfer and assign to the IDA, and the IDA shall assume, all of the Developer's right, title, interest in and to the Property and all Contracts.

7.3 Termination Payment. defined. The Termination Payment shall be paid from the IDA Allowance and shall be used to reimburse the Developer for all documented out-of-pocket costs to third parties incurred by the Developer pursuant to the terms of this Agreement, including land acquisition costs, including closing costs; engineering and architectural fees; and reasonable attorney's fees; all to the extent not previously funded with the proceeds of the IDA Allowance.

7.4 Developer Property. If any portion of the right-of-way for the Road Improvements is owned by the Developer during the term of the Ground Lease, the Developer shall at the request of the IDA convey such right-of-way to the City, at no cost to the City. If any portion of the Property is owned by the Developer during the term of this Agreement, the Developer shall at the request of the IDA convey such property to the IDA and incorporate it under the Ground Lease, except that no conveyance of property in Phase Two need be conveyed to the IDA and leased back if the Phase Two Ground Lease has been terminated as provided in Section 2.1.4 or Section 11.4.

ARTICLE VIII

DEVELOPER RESPONSIBILITIES AFTER ANCHOR TENANT COMMITMENT

8.1 Developer Responsibilities. Upon completion of acquisition by the Developer and IDA of all of the Property, or so much of the Property that will allow the development of the Project (or, should the IDA not acquire Parcel 29, the minimum gross leasable area specified in Section 2.3), and upon the procurement of the Anchor Tenant Commitment, the Developer shall undertake the following responsibilities:

8.1.1 Road and Utility Improvements. The Developer shall engage an engineering firm to prepare plans for (a) the widening of and improvements to West Queen

Street, Mercury Boulevard and Pine Chapel Road; (b) interior streets to be constructed through the Property providing access from Mercury Boulevard, Pine Chapel Road and West Queen Street; and (c) utilities infrastructure associated with the Project to be located within such rights-of-way, which shall include water, sewer, storm drainage, right-of-way landscaping, street lights and irrigation systems (the "Road Improvements"). Schematic plans for the widening of and improvements to West Queen Street, Mercury Boulevard and Pine Chapel Road and the interior streets to be constructed through the Property providing access from Mercury Boulevard, Pine Chapel Road and West Queen Street shall be submitted to and approved by the IDA Representative, which approval shall not be unreasonably withheld, conditioned or delayed and which approval shall be deemed granted if not expressly given or rejected within thirty (30) days after the Developer's written request of the IDA Representative therefor. No construction work on such roads shall be undertaken prior to the approval or the deemed approval of such schematic plans. The IDA and the Developer shall cooperate with each other to effect the dedication of the Road Improvements.

8.1.2 Site Layout. The Developer's engineering firm shall prepare the Site Plan, which shall be consistent with Zoning Requirements, and submit the same to the City for approval in accordance with applicable law.

8.1.3 Road Improvement Coordination. The parties recognize that the City, acting by and through the IDA, is delegating to the Developer the City's responsibility to design (and ultimately construct) the Road Improvements. In such regard, the Developer agrees to coordinate all design work, bid review and construction of the Road Improvements, as and when authorized by this Agreement, with the City's Public Works Department and other departments as the City may request.

8.1.4 City Permits. The Project shall comply with all Zoning Requirements. The Developer recognizes and agrees that all licenses, permits, consents, inspections and approvals which must be obtained for the development of real estate in the Coliseum Central District of the City of Hampton will likewise be required in conjunction with the Project and are not waived by virtue of this Agreement, notwithstanding any provision of this Agreement to the contrary.

8.1.5 Developer Funds. The Developer shall arrange for equity investment and/or debt financing sufficient to cover the costs that Developer will incur in developing the Project which will not be paid out of the IDA Allowance, including costs of land acquisition, infrastructure and development costs in excess of the amount of the IDA Allowance.

ARTICLE IX

IDA ALLOWANCE

9.1 Amount of IDA Allowance. Upon satisfaction of the conditions contained in Section 9.2 hereof, the IDA shall provide the Developer, as a tenant allowance under the Ground Lease, the IDA Allowance. The IDA Allowance is broken down as follows:

9.1.1 Acquisition, Infrastructure and Development Allowance, defined. For the payment of land acquisition costs, the costs of construction of road and utility infrastructure improvements and development costs incurred by the Developer in connection with the Project, the sum of Eleven Million and 00/100 Dollars ($11,000,000.00), less (i) the costs and expenses, including reasonable attorney's fees, incurred by the City in acquiring Road Improvement Parcels pursuant to Section 7.1 (and subject to the limitations set forth therein), and (ii) so much of the Preliminary Design Funds as shall have been distributed to the Developer pursuant to Section 5.1.3.

9.1.2 Additional Allowance, defined. For payment of tenant inducement costs, tenant allowance costs and tenant improvement costs incurred by the Developer for the recruitment of tenants for the Project such as are found in The Power Plant in Baltimore, Maryland, Bayou Place, in Houston, Texas, and with the exception of the tenants listed on Exhibit E hereof, in the Avenue at White Marsh, in White Marsh, Maryland, or as otherwise approved by the IDA Representative, which approval shall not be unreasonably withheld, conditioned or delayed, and which approval shall be deemed granted if not expressly given or rejected within thirty (30) days after the Developer's written request of the IDA Representative therefor, the sum of Five Million and 00/100 Dollars ($5,000,000.00).

For all purposes of this Agreement and the Ground Lease, the IDA Allowance shall be deemed a "tenant allowance" made under the Ground Lease. However, in the event of a conflict between the provisions of the Ground Lease and the provisions of this Agreement, the provisions of this Agreement shall control and the conflicting provisions of the Ground Lease shall be interpreted and applied accordingly.

9.2 Conditions to the Acquisition, Infrastructure and Development Allowance. The Acquisition, Infrastructure and Development Allowance is subject to and conditioned upon the satisfaction of each of the following conditions:

9.2.1 This Agreement, Ground Lease and the Phase Two Ground Lease (unless terminated pursuant to Section 2.1.4 or Section 11.4) shall be in full force and effect and no Event of Termination of Developer shall have occurred and be continuing, and the Developer's representations and warranties contained in Article XVII shall continue to be true and correct.

9.2.2 The Developer shall have obtained financing sufficient, when combined with the IDA Allowance and the Developer's equity, to pay all costs of development of the Project as shown on the Preliminary Budget.

9.2.3 The schematic plans for Road Improvements that consist of the widening of and improvements to West Queen Street, Mercury Boulevard and Pine Chapel Road and the interior streets to be constructed through the Property providing access from Mercury Boulevard, Pine Chapel Road and West Queen Street have been approved or deemed approved by the IDA Representative in accordance with the provisions of Section 8.1.1 hereof.

9.2.4 The Anchor Tenant Commitment has been achieved.

9.2.5 The Developer, the City and/or the IDA has acquired title to or has entered into options or contracts in form satisfactory to the IDA Representative for the purchase of all of the Property, or so much of the Property that will allow the commercially reasonable development of the Project (as modified by Section 10.2) by the Developer.

9.2.6 All insurance required to be maintained by Section 14.1 of this Agreement shall, if applicable at that time, be in effect and certificates of such insurance shall have been delivered to the IDA.

9.2.7 All representations and warranties made by Developer in Article XVII shall remain true and correct.

9.2.8 The IDA shall have been furnished an updated opinion of counsel (which may be in the form of a then currently dated update of a previously delivered opinion) for the Developer including those matters set forth in Section 20.25.

The IDA Representative shall have the right and power, on behalf of the IDA, to waive the partial or full satisfaction of any and/or all of the above conditions.

9.3 Conditions to the Additional Allowance. The Additional Allowance is subject to and conditioned upon the satisfaction of each of the following conditions:

9.3.1 The conditions to the disbursement of the Acquisition, Infrastructure and Development Allowance contained in Section 9.2 hereof have been satisfied.

9.3.2 The Developer shall have delivered to the IDA Representative a copy of each contract in existence prior to the commencement of construction of the Project that is in excess of $500,000 between the Developer and a general contractor or construction manager for the improvements to the Project.

9.3.3 Building permits shall have been obtained from the appropriate department of the City and all other approvals of governmental authorities which are necessary or required for the commencement of construction of the Project.

9.3.4 A fully executed counterpart of the lease with each tenant with respect to which a Additional Allowance disbursement is sought, containing no conditions to commencement of the term of the lease or acceptance of the premises other than due completion of the tenant's premises and other commercially reasonable conditions and an estoppel certificate from such tenant acknowledging to the IDA that its lease is duly executed and in full force and effect, and all conditions to the commencement of the term of its lease other than completion of its premises and the satisfaction of other commercially reasonable conditions have been satisfied. The IDA acknowledges that each item delivered to the IDA pursuant to this Section 9.3.4 constitutes a confidential trade secret of the Developer. The IDA shall use reasonable efforts to keep such item and its content confidential.

The IDA Representative shall have the right and power, on behalf of the IDA, to waive

the partial or full satisfaction of any and/or all of the above conditions.

9.4 General Procedure for Disbursement of IDA Allowance. Subject to the satisfaction of the conditions set forth in Sections 9.2 and 9.3, disbursement of the IDA Allowance shall be made in accordance with the Preliminary Budget as the same may be amended from time to time. The IDA shall make distributions of the IDA Allowance not more frequently than once each calendar month. Upon all conditions for the making of a distribution having been satisfied, distributions of the IDA Allowance shall be made within fifteen (15) business days after receipt by IDA of the Developer's requisition (the "Requisition") therefor. Each Requisition shall set forth the amount requested to be disbursed from the IDA Allowance.

9.5 Conditions to Each Distribution. Each distribution of the IDA Allowance shall be subject to satisfaction of the following conditions, where applicable:

9.5.1 All of the conditions to the IDA Allowance set forth in Section 9.2 hereof and, if applicable, Section 9.3 hereof shall have been met and the status established or evidenced by the fulfillment of such conditions shall continue to be in effect without modification; and

9.5.2 The Developer shall have delivered to the IDA a certificate signed by an authorized officer or agent of the Developer, certifying and confirming that (a) no Events of Termination exist, and (b) all conditions to the IDA's obligation to make disbursement of the IDA Allowance have been fully satisfied.

9.5.3 The IDA shall have received the following:

(i) an estoppel certificate in form reasonably satisfactory to the IDA Representative, signed by an authorized representative of the Developer, acknowledging the amount of such distribution and the aggregate amount of all distributions made to date.

(ii) copies of bills, invoices or other documentation reasonably satisfactory to the IDA supporting the payments requested.

(iii) with regard to the Additional Allowance, waivers of mechanics' and materialmen's liens by the general contractors and/or construction manager of the Developer for all work performed or materials furnished through the date of the previous distribution. The Developer shall be solely responsible for all payments to contractors and shall ensure that the Project remains free of all mechanic's liens for work or services performed directly for the Developer.

ARTICLE X

PROJECT DEVELOPMENT

10.1 Road Improvements. The Developer, working with the City's Public Works Department, shall construct the Road Improvements as follows:

10.1.1 The Developer shall cause its engineer, engaged pursuant to Section 8.1.1, to complete the final plans and specifications for the Road Improvements and shall submit the same to the City for approval in accordance with its customary practices. Upon obtaining such approval, the Developer shall obtain or cause to be obtained all necessary permits from the City and other governmental agencies.

10.1.2 The Developer shall enter into a standard form City construction contract for the construction of the Road Improvements, and shall furnish the performance bond as required by §11-58 of the Code of Virginia (1950). Should the Developer not be a contractor licensed in Virginia, the Developer shall solicit competitive bids for the construction of the Road Improvements from qualified contractors acceptable to the City and award the work in one or more contracts. The Developer agrees that contractors and subcontractors located in the City of Hampton will be utilized to the extent reasonably possible if such contractors and subcontractors meet the City's qualification criteria, are otherwise competitive, and are available to meet the time constraints and construction schedules for the Project as established by the Developer, as determined by Developer in its sole judgment. This statement of intent is not intended by either party to create any third party enforcement rights with regard to the Developer's contracting process.

10.2 Construction of the Project. The Developer shall obtain, or cause others to obtain, all permits for and to commence, or cause others to commence, initial construction of the Project by the first day of the nineteenth full calendar month that follows the date Developer has, pursuant to the Ground Lease, ground leased from the IDA sufficient land within the Property to develop the Project. Subject to the adjustments as to minimum size described in Section 11.4, and subject to the force majeure provisions of Section 20.11, the Developer shall thereafter diligently pursue construction of the Project to completion in accordance with the design criteria set forth in Section 4.2, to the full 480,000 square feet of gross leasable area.

10.3 Hotel Option. After two years after the date of this Agreement the Developer may submit a proposal, with sufficient detail to enable the IDA to make the decisions specified below, to the IDA to build a hotel on Phase Two. If such hotel will not, in the sole and absolute opinion of the Hampton Convention and Visitor's Bureau interfere or inhibit the development of a convention hotel in the immediate vicinity of the proposed convention center in Hampton, the IDA shall, within ninety (90) days after receipt of such proposal, either (i) accept the proposal, in which event the definition of "Project" contained herein shall be deemed to contain not more than 100,000 square feet of commercial retail space for the purposes of the minimum development requirements contained in this Agreement (but no portion of which shall be deemed "entertainment, lifestyle retail and restaurant space"); or (ii) reject the proposal, in which event the time period set forth in Section 11.4 shall be deemed extended from five years to seven years.

10.4 Cooperation. Throughout the course of the development of the Project, the IDA and the Developer shall work in conjunction with each other to do the following:

10.4.1 Complete all aspects of the Road Improvements and all infrastructure of the Project.

10.4.2 Procure all necessary permits and approvals from the City and all other governmental agencies having jurisdiction for the development and operation of the Project.

10.4.3 At the Developer's request, obtain for the IDA title to any property currently within the Interstate 64 ramp adjoining the Property which is made surplus by the redesign of such surplus property under the Ground Lease, at no cost to the IDA.

10.5 Financial Statements. During construction of the Project, the Developer shall deliver to the IDA quarterly financial statements showing construction costs of the Project expended to date and against the Preliminary Budget (as the same may be amended), the funds required to complete, and the sources of funds in the Project and required to complete, in sufficient detail for the IDA to compare them with the Preliminary Budget. Upon completion of the Project, the Developer shall deliver to the IDA statements of total costs of the Project, certified by the Developer, setting forth the information required above, certified as correct by the Developer and, to the extent of construction costs, by the Project Architect. For a period of three years after completion of the Project, the IDA shall have the right to audit the Developer's books and records at any time after not less than three business days' notice, and the Developer shall maintain complete books and records of the Project at its principal office at all times. After completion of the Project, the Developer shall deliver to the IDA financial statements as provided in the Ground Lease.

ARTICLE XI

EVENTS OF TERMINATION

11.1 Events of Termination by the Developer. Each of the following shall constitute an Event of Termination by the Developer:

11.1.1 The failure of the Developer to obtain commitments for "financing" (which are subject only to conditions customary in the industry) sufficient to fully develop the Project by the first anniversary of the date that the Developer has, pursuant to the Ground Lease, ground leased from the IDA sufficient land within the Property to develop the Project or, if the criteria set forth in Section 11.4 have been met, Phase One of the Project, which failure is not cured within thirty (30) days after the date the IDA notifies the Developer in writing of such failure. For purposes of this Section 11.1.1 the term "financing" means a combination of private debt, the IDA Allowance and equity sufficient to fully develop the Project.

11.1.2 With the exception of the matters addressed by Section 2.2 and Section 6.2 above, breach of any material covenant, obligation or requirement of Developer arising under this Agreement not specifically named as an Event of Termination in this Section 11.1, and the continuation of such breach for thirty (30) days after receipt of written notice from the IDA

specifying the nature and extent of such breach, or if such breach cannot reasonably be cured within such thirty (30) day period, the failure of Developer to commence to cure such breach within such thirty (30) day period and to diligently pursue same to completion.

11.1.3 The filing by the Developer of a voluntary proceeding or the consent by Developer to an involuntary proceeding under present or future bankruptcy, insolvency, or other laws respecting debtor's rights.

11.1.4 The entering of an order for relief against the Developer or the appointment of a receiver, trustee, or custodian for all or a substantial part of the property or assets of the Developer in any involuntary proceeding, and the continuation of such order, judgment or degree unstayed for any period of ninety (90) consecutive days.

11.1.5 A termination (other than for the causes set forth in Sections 7.2 and 11.4) of the Ground Lease or the Phase Two Ground Lease resulting from a material default by the Developer under the Ground Lease or the Phase Two Ground Lease.

11.1.6 The failure of the Developer to remove or cause to be removed, by bonding or otherwise, any and all liens for work done for the Developer or materials furnished to the Developer with respect to the Project within thirty (30) days after written notice by the IDA to the Developer of the filing thereof.

11.1.7 The failure of the Developer to obtain, or cause others to obtain, all permits for and to commence, or cause others to commence, initial construction of the Project by the first day of the nineteenth full calendar month that follows the date that the Developer has, pursuant to the Ground Lease, ground leased from the IDA sufficient land within the Property to develop the Project, which failure is not cured within thirty (30) days after the date the IDA notifies the Developer in writing of such failure, provided, however, if such failure cannot reasonably be cured within such thirty (30) day period, the failure of Developer to commence to cure such failure within such thirty (30) day period and to diligently pursue same to completion.

11.2 Events of Termination by the IDA. Each of the following shall constitute an Event of Termination by the IDA:

11.2.1 The filing by the IDA of a voluntary proceeding or the consent by the IDA to an involuntary proceeding under present or future bankruptcy, insolvency, or other laws respecting debtor's rights.

11.2.2 The entering of an order for relief against the IDA or the appointment of a receiver, trustee, or custodian for all or a substantial part of the property or assets of the IDA in any involuntary proceeding, and the continuation of such order, judgment or degree unstayed for any period of ninety (90) consecutive days.

11.2.3 With the exception of the matters addressed by Sections 2.2 and 6.2 hereof, the failure of the IDA to perform or to observe any non-monetary covenant, obligation or requirement of this Agreement not specifically named as an Event of Termination in this Section 11.2, and the continuation of such failure for 30 days after receipt of written notice from the Developer specifying the nature and extent of any such default, or if such default cannot reasonably be cured within such thirty (30) day period, the failure of either (i) to commence to cure such default within such thirty (30) day period and to diligently continue to pursue such efforts to cure to completion, or (ii) to cure such event of termination within a reasonable time after the expiration of the first thirty (30) day period, in no event to exceed ninety (90) days after the written notice of the event of termination.

11.2.4 The failure of the IDA to pay or cause to be paid when due any sum of money owed by the IDA to the Developer pursuant to this Agreement, unless such failure is due to offset or dispute for which the IDA has given notice to the Developer (and then only until such dispute is conclusively resolved), and the continuation of such failure for thirty (30) days after written notice from the Developer specifying the nature and extent of any such default with opportunity to cure.

11.2.5 A termination of the Ground Lease or the Phase Two Ground Lease resulting from a material default by the IDA under the Ground Lease or Phase Two Ground Lease.

11.2.6 The failure of the IDA to deliver any non-disturbance, attornment and subordination agreement, any estoppel certificate as to facts known by the IDA, and any agreement with any lender to the Developer so long as the substantive rights of the IDA under this Agreement and under the Ground Lease are not materially adversely affected, and the continuation of such failure for ten (10) days after written notice from the Developer specifying the nature and extent of such failure.

11.3 Remedies. Should an Event of Termination by the Developer occur hereunder, the IDA may, by written notice to the Developer, terminate this Agreement. Should an Event of Termination by the IDA occur hereunder, the Developer may, by written notice to the IDA, terminate this Agreement. The non-defaulting party may exercise any remedies available to it at law or in equity; except that neither party shall be liable to the other for damages that are consequential in nature, but shall be liable only for recovery of out-of-pocket costs actually incurred after execution of this Agreement provided, however, the IDA shall not have the right to recover the Preliminary Design Funds as set forth in Section 5.1.3. All remedies under this Agreement shall be cumulative and not restrictive of other remedies, including, without limitation, specific performance.

11.4 Termination of Phase Two Ground Lease. Notwithstanding the provisions of Sections 11.1 and 11.3, the Developer shall be deemed to not be in default, and no remedies under this Agreement shall be exercised against the Developer for failure to complete the Project

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to the full 480,000 square feet of gross leasable area (380,000 square feet if the IDA fails to acquire Parcel 29 as provided in Section 2.3), so long as the Developer (i) completes on Phase One not less than 350,000 square feet of gross leasable area of commercial retail space (250,000 square feet if the IDA fails to acquire Parcel 29 as provided in Section 2.3), containing at least one Anchor Tenant and at least 110,000 square feet of entertainment, lifestyle retail and restaurant space (75,000 square feet if the IDA fails to acquire Parcel 29 as provided in Section 2.3) and (ii) acquires Parcels 10 and 11 shown on Exhibit A and conveys them to the IDA and leases them back under the Ground Lease (as to the portion of such parcels in Phase One) and the Phase Two Ground Lease (as to the portion of such parcels in Phase Two). However, should the Developer fail to complete the Project to the full 480,000 square feet of gross leasable area (380,000 square feet if the IDA fails to acquire Parcel 29) within five years after the date of this Agreement except to the extent extended pursuant to Section 10.3, the IDA may terminate the Phase Two Ground Lease, as provided therein. The obligation of the Developer to complete on Phase One not less than 350,000 square feet (250,000 square feet if the IDA fails to acquire Parcel 29) shall be subject to the following modifications:

11.4.1 For the purposes only of the introductory paragraph of this Section 11.4 (and not to Sections 11.4.2 et. seq.), each square foot of the Property upon which sales activities are conducted but which is not included as "gross leasable area" (for example, patio dining space for restaurants and yard and garden centers for home improvement tenants) shall be deemed to be one-half of one square foot of gross leasable area.

11.4.2 The Developer may, in the event of pressing need, propose to the IDA a modification to the Site Plan that may show some portion (not to exceed 50,000 square feet) of the 350,000 square foot minimum located on Phase Two. The IDA shall exercise reasonable commercial judgment in deciding whether to accept such modifications. If such modifications result in a portion of Phase One remaining undeveloped, the Developer may propose that such undeveloped portion be substituted under the Phase Two Ground Lease for the portion of Phase Two that Developer seeks to develop, and the IDA's decision shall be positively influenced by such substitution. Should the IDA agree to the revised Site Plan, the Ground Lease and the Phase Two Ground Lease shall be amended to effect such change and, if any, such substitution.

The parties may decide it is in their best interests to put property released from the Phase Two Ground Lease into a third lease; if so, they shall cooperate in creating a third ground lease on terms comparable to the First Ground Lease, and in effecting reciprocal easements, to the extent desirable between the property covered by such third ground lease and the property remaining under the Second Ground Lease.

11.4.3 The Developer may cause property to be released from the Second Ground Lease and included under the Ground Lease by posting with the IDA a completion bond, with surety acceptable to the IDA, in an amount equal to $300,000 per each acre of property to be so released and included under the Ground Lease. Such bond shall be released by the IDA when the Project is timely completed to the full 480,000 square feet of gross leasable area (380,000

square feet if the IDA fails to acquire Parcel 29 as provided in Section 2.3), containing at least one Anchor Tenant and at least 110,000 square feet of entertainment, lifestyle retail and restaurant space (75,000 square feet if the IDA fails to acquire Parcel 29 as provided in Section 2.3).

11.5 Waiver of Jury Trial. The IDA and the Developer do hereby waive trial by jury in any action, suit, proceeding, and/or counterclaim brought by either of the parties hereto against the other on any matters whatsoever arising out of or in any way connected with this Agreement, the Ground Lease any claim of injury or damage, and/or statutory remedy.

11.6 Attorney Fees. If either the IDA or the Developer brings suit or other legal proceedings or arbitration proceeding to enforce the provisions of this Agreement against the other, then the party prevailing in such suit or proceeding shall be reimbursed by the other for all reasonable attorneys' fees and litigation and/or arbitration costs and expenses incurred by the prevailing party in connection with such suit or proceeding.

ARTICLE XII

OPTION TO PURCHASE; FIRST REFUSAL

12.1 IDA Option to Purchase. In consideration of the undertakings by the IDA hereunder, the Developer hereby grants to the IDA the right and option, upon the occurrence of an Event of Termination by the Developer, to purchase any and all property, including without limitation all rights under the Ground Lease and options and contracts of purchase to acquire property owned or held by the Developer or any affiliate of the Developer (including contracts or options held by JDN on portions of the Property), and the leasehold interest held by Robert Brown Hampton Development Co., L.L.C. or any affiliate of that entity, in the Property (collectively, the "Option Property"). This option may be exercised at any time up to six months after an Event of Termination by the Developer occurs, may be exercised in addition to all remedies provided herein or at law or in equity, and shall be exercised by the IDA giving written notice of its exercise. The Developer shall have no obligation to maintain options in place. The purchase price for the Option Property shall be equal to all costs of acquiring the Property, including closing costs, reduced by all IDA Allowances actually disbursed, but not less than the principal balance of all debts secured by deeds of trust on the Option Property. Closing under this option shall occur within 30 days after exercise at the IDA's offices, at which time the Developer shall deliver a good and sufficient deed of conveyance and documents of transfer and/or assignment to the City, without any warranty of title, subject to all matters of record. The City may, at its election, apply the purchase price to clear encumbrances of record against the Option Property and pay the balance thereof, if any, to the Developer. Each party shall bear its own closing costs as established by local practice.

12.2 Developer Right of First Refusal. The IDA agrees that for a period of ten (10) years after the date of this Agreement it will not sell or transfer (i) any Zoning Lots purchased by

it under any Contract assigned to it pursuant to Sections 2.1.3 and 2.1.4, and (ii) any property with respect to which the Phase Two Ground Lease has been terminated pursuant to Section 11.4, to any party unless and until it has given notice to the Developer of the terms of such sale or transfer for a period of thirty (30) days to accept in writing the terms set forth in the notice. Failure by the Developer to (i) accept such offer within the thirty day period and (ii) timely close the purchase on such terms, shall be deemed to be rejection of the offer.

ARTICLE XIII

PUMP STATION

The Developer may connect its sanitary sewer system improvements to the City's existing pump station located on the Property, at no cost or expense to the Developer or other owners who purchase parcels through the Developer, other than normal Code-prescribed sewage connection fees to obtain sanitary sewer service within the City, subject to applicable credits, if any. The Developer acknowledges that neither the IDA nor the City is required to improve or upgrade the existing sanitary sewer system improvements under this Agreement.

ARTICLE XIV

INSURANCE; INDEMNIFICATION

14.1 General Liability Insurance. The Developer shall carry comprehensive general liability insurance insuring the IDA and the Developer against any and all liability for injury to or death of a person or persons and for damage to property in any way occasioned by or arising out of the activities of the Developer or the IDA and their respective agents, contractors or employees, in connection with the design and construction of the Project, in the amount of Five Million Dollars ($5,000,000) for property damage and Twenty Million Dollars ($20,000,000) for bodily injury or death of persons, or in such larger amounts as may be reasonably acceptable to the IDA. The Developer may procure and maintain a "blanket" All Risk policy to satisfy the requirements of this Section 14.1, which may cover other property or locations of the Developer and its affiliates and/or the affiliates of a member of Developer. To the extent insurance carried by the Lessee under the Ground Lease and the Phase Two Ground Lease meets the requirements of this Article XIV, these requirements shall be deemed satisfied so long as such insurance is in force.

14.2 Policy Requirements. The following general requirements shall apply to all insurance coverage carried by the Developer pursuant to Section 14.1:

14.2.1 Waiver of Subrogation. To the extent available, each policy shall contain a clause whereby the insurer waives all rights of subrogation against the IDA.

14.2.2 Additional Insured. The IDA shall be named as additional insured in all

policies hereunder.

14.2.3 Financially Sound Company. Such policies shall be procured from financially sound and reputable insurers licensed to do business in the Commonwealth of Virginia and have an A.M. Best rating of not less than A-8 or, if not rated with A.M. Best, the equivalent of A.M. Best's surplus size of A-8 (or otherwise approved by the IDA).

14.2.4 Certificates of Insurance. The Developer shall deliver to the IDA policies or certificates of insurance evidencing such coverage before the commencement of construction.

14.2.5 Replacement Certificates of Insurance. Within thirty (30) days before expiration of coverage, or as soon as practicable, renewal policies or certificates of insurance evidencing renewal and payment of premium shall be delivered by the Developer to the IDA.

14.2.6 Non-Cancelable Without Notice. The coverages shall be non-cancelable unless the carrier gives to the IDA thirty (30) days' prior written notice of cancellation.

14.3 Indemnification. Until the Ground Lease and the Phase Two Ground Lease are in full force and effect, the Developer and/or its affiliates are and shall be in exclusive control of the Project, and the IDA shall not in any event whatsoever be liable for any injury or damage to any person or property happening on, in, about or in connection with the Project or any part thereof. Until the Ground Lease and the Phase Two Ground Lease are fully executed and delivered and are in full force and effect, the following indemnity shall apply: The Developer shall indemnify and hold harmless the IDA and all entities claiming by, through or under the IDA from all claims, suits, actions and proceedings whatsoever which may be brought or instituted on account of, growing out of, occurring from, incident to or resulting from, directly or indirectly, any and all injuries or damages (including, without limitation, death) to persons or property arising out of the use and occupation of the Project, and all losses, costs, damages and expenses (including, without limitation, reasonable attorneys' fees and other costs of defending against such claims, suits, actions and proceedings), whether or not such injuries or damages (including, without limitation, death) result from, or are claimed to have resulted from, in whole or in part, the negligence of the IDA or any entity claiming by, through or under the IDA. The Developer shall assume on behalf of the IDA and all entities claiming by, through or under the IDA, and conduct with due diligence and in good faith, the defense of all such claims, suits, actions and proceedings against the IDA or any entity claiming by, through or under the IDA, whether or not the Developer is joined therein, even if such claims, suits, actions or proceedings be groundless, false or fraudulent, and the Developer shall bear the costs of all judgments and settlements in connection therewith; provided, however, without relieving the Developer of the Developer's obligations under this Agreement, the IDA or any entity claiming by, through or under the IDA may defend or participate in the defense of any or all of such claims, suits, actions or proceedings. Maintenance of the insurance referred to in this Agreement shall not affect the obligations of the Developer under this Agreement, and the limits of such insurance shall not constitute a limit on the liability of the Developer under this Section 14.3.

ARTICLE XV

EQUAL OPPORTUNITY EMPLOYER

15.1 Equal Opportunity Employer. The Developer is an Equal Opportunity Employer. In keeping with this policy, the Developer will recruit, hire, train and promote into all job levels of the Developer the most qualified persons without regard to race, color, religion, sex or national origin. Similarly, the Developer will continue to administer all other personnel matters (such as compensation, benefits, transfers, lay-offs and training) in accordance with the requirements of federal and state law. In addition, the Developer will use its best efforts to recruit well-qualified minorities for its work force, and the Developer's representatives will meet with representatives of the City from time to time to identify appropriate techniques for such recruitment. The Developer shall also ensure that each of its construction contractors or subcontractors are also Equal Opportunity Employers and that they extend the same policies as set forth in this Article XV to their respective personnel.

ARTICLE XVI

ARBITRATION

16.1 Arbitration. In the event that any dispute shall arise between the IDA and the Developer with respect to the application of any of the provisions of this Agreement, and such dispute is not resolved to the satisfaction of the IDA and the Developer within twenty (20) days after the IDA or the Developer shall provide the other with an Arbitration Notice, then the dispute shall be resolved in accordance with the Commercial Arbitration Rules of the American Arbitration Association then pertaining. The decision of the arbitrators shall be binding, final and conclusive on the parties. Unless the parties otherwise agree, such arbitration proceedings shall be conducted in Washington, D. C. Within twenty-five (25) days after the service of the Arbitration Notice, the IDA and the Developer shall appoint an impartial person as an arbitrator who shall have had at least ten (10) years' recent experience in a calling connected with the subject matter of the dispute. Such appointment shall be signed in writing by each party to the other, and the arbitrators so appointed, in the event of the failure of the IDA and the Developer to agree upon and appoint a third arbitrator within thirty (30) days after the appointment of the second arbitrator upon the matter so submitted, shall appoint a third arbitrator. If either party shall fail to appoint an arbitrator as aforesaid for a period of twenty-five (25) days after service of the Arbitration Notice, then the arbitrator appointed by the party having made such appointment shall appoint a second arbitrator and the two so appointed shall, in the event of the failure of the IDA and the Developer to agree upon and appoint a third arbitrator within thirty (30) days thereafter, appoint a third arbitrator. If such arbitrators fail to agree upon a third arbitrator within forty-five (45) days after appointment of the second arbitrator, then such third arbitrator shall be appointed by the American Arbitration Association from its qualified panel of

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arbitrators, and shall be a person having at least ten (10) years' recent experience in the Commonwealth of Virginia, State of Maryland, or the District of Columbia in a calling connected with the subject matter of the dispute. The fees of all arbitrators and the expenses incident to the proceedings shall be borne by the losing party. The reasonable fees of respective counsel engaged by the parties, and the fees of expert witnesses and other witnesses called for the parties, shall also be paid by the losing party.

16.2 Enforcement. The decision of the arbitrators shall be rendered within thirty (30) days after appointment of the third arbitrator, and such decision shall be in writing and in duplicate, one counterpart thereof to be delivered to the IDA and the Developer. A judgment of a court of competent jurisdiction may be entered upon the award of the arbitrators in accordance with the rules and statutes applicable thereto then obtaining.

ARTICLE XVII

REPRESENTATIONS AND WARRANTIES OF THE DEVELOPER

In order to induce the IDA to enter into this Agreement and to distribute the IDA Allowance, the Developer represents and warrants to the IDA as follows:

17.1 The Developer is a duly organized and validly existing limited liability company under the laws of Maryland and has the power and authority to own its properties and other assets and to transact the business in which it is now engaged or proposed to engage. The Developer is duly qualified or licensed as a foreign entity in each jurisdiction in which the nature of the business it is engaged, or the character of the properties owned by it, makes such qualification or licensing necessary, including Virginia.

17.2 The Developer has the power and authority to execute, deliver and carry out the terms and provisions of this Agreement and all other instruments to be executed and delivered by the Developer in connection with its obligations hereunder. The execution, delivery and performance by the Developer of this Agreement have been duly authorized by all requisite action by the Developer, and this Agreement is a valid and binding obligation of the Developer enforceable in accordance with its respective terms, except as may be affected by applicable bankruptcy or insolvency laws affecting creditors' rights generally.

17.3 The Developer is not in default in the performance, observance or fulfillment of any of the obligations, covenants or conditions contained in any evidence of indebtedness of the Developer or contained in any instrument under or pursuant to which any such evidence of indebtedness has been issued or made and delivered. Neither the execution and delivery of this Agreement, nor the consummation of the transactions herein contemplated, will conflict with or result in a breach of any of the terms, conditions or provisions of the Articles of Organization of the Developer or of any agreement or instrument to which the Developer is now a party or

otherwise bound or to which any of its properties or other assets is subject, or of any order or decree of any court or governmental instrumentality, or of any arbitration award, franchise or permit, or constitute a default thereunder, or, except as contemplated hereby, result in the creation or imposition of any lien or other encumbrance upon any of the properties or other assets of the Developer.

17.4 There are no actions, suits, investigations or proceedings (whether or not purportedly on behalf of the Developer) pending or, to the knowledge of the Developer, threatened against or affecting the Developer or the Project, or any other of the assets or properties of the Developer at law or in equity or before or by a governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, or before an arbitrator of any kind, which involve the possibility of liability in excess of $100,000 or of any material adverse effect on the business operations, prospects, properties or other assets or in the condition, financial or otherwise, of the Developer, or of the Project, and the Developer is not in default with respect to any judgment, order, writ, injunction, decree, award, rule or regulation of any court, arbitrator or governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign.

17.5 To its best knowledge, the Developer is not a party to or otherwise bound by any agreement or instrument or subject to any other restriction or any judgment, order, writ, injunction, decree, award, rule or regulation which materially and adversely affect the business, operations, prospects, properties or other assets, or the condition, financial or otherwise, of the Developer or of the Project. The Developer has received no notice of, and to its best knowledge, is not in default (a) under any obligation for borrowed money, or (b) in the performance, observance or fulfillment or any of the obligations, covenants or conditions contained in any other agreement or instrument to which it is a party, by which it is otherwise bound or to which any of its property or the Project is subject.

17.6 To the Developer's best knowledge, neither this Agreement nor any document, certificate or financial statement furnished to the IDA by or on behalf of the Developer in connection herewith, contains any untrue statement of a material fact or omits to state any material fact necessary in order to make the statements contained herein and therein not misleading. There is no fact known to the Developer which materially adversely affects or in the future may (so far as it is now known to the Developer) have a material adverse effect upon the business, operations, prospects, property, other assets or financial condition of the Developer or of the Project which has not been set forth in this Agreement or in other documents, certificates and financial statements furnished to the IDA or on behalf of the Developer in connection with the transactions contemplated hereby.

ARTICLE XVIII

REPRESENTATIONS AND WARRANTIES OF THE IDA

In order to induce the Developer to enter into this Agreement, the IDA represents and warrants to the Developer as follows:

18.1 The IDA is a political subdivision of the Commonwealth of Virginia, duly organized and validly existing under the laws of the Commonwealth of Virginia, with full legal right, power, and authority to enter into and perform its obligations under this Agreement.

18.2 The IDA has the power and authority to execute, deliver and carry out the terms and provisions of this Agreement and all other instruments to be executed and delivered by the IDA in connection with its obligations hereunder. The execution, delivery and performance by the IDA of this Agreement have been duly authorized by all requisite action by the IDA, and this Agreement is a valid and binding obligation of the IDA enforceable in accordance with its respective terms, except as may be affected by applicable bankruptcy or insolvency laws affecting creditors' rights generally.

18.3 The IDA is not in default in the performance, observance or fulfillment of any of the obligations, covenants or conditions contained in any evidence of indebtedness of the IDA or contained in any instrument under or pursuant to which any such evidence of indebtedness has been issued or made and delivered. Neither the execution and delivery of this Agreement, nor the consummation of the transactions herein contemplated, will conflict with or result in a breach of any of the terms, conditions or provisions of the legislation creating the IDA or of any agreement or instrument to which the IDA is now a party or otherwise bound or to which any of its properties or other assets is subject, or of any order or decree of any court or governmental instrumentality, or of any arbitration award, franchise or permit, or constitute a default thereunder, or, except as contemplated hereby, result in the creation or imposition of any lien or other encumbrance upon any of the properties or other assets of the IDA.

18.4 There are no actions, suits, investigations or proceedings (whether or not purportedly on behalf of the IDA) pending or, to the knowledge of the IDA, threatened against or affecting the IDA or the Project, or any other of the assets or properties of the IDA at law or in equity or before or by a governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, or before an arbitrator of any kind, which involve the possibility of liability in excess of $100,000 or of any material adverse effect on the business operations, prospects, properties or other assets or in the condition, financial or otherwise, of the IDA, or of the Project, and the IDA is not in default with respect to any judgment, order, writ, injunction, decree, award, rule or regulation of any court, arbitrator or governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign.

18.5 To its best knowledge, the IDA is not a party to or otherwise bound by any agreement or instrument or subject to any other restriction or any judgment, order, writ, injunction, decree, award, rule or regulation which materially and adversely affect the business, operations, prospects, properties or other assets, or the condition, financial or otherwise, of the IDA or of the Project. The IDA has received no notice of, and to its best knowledge, is not in

default (a) under any obligation for borrowed money, or (b) in the performance, observance or fulfillment or any of the obligations, covenants or conditions contained in any other agreement or instrument to which it is a party, by which it is otherwise bound or to which any of its property or the Project is subject.

18.6 To the IDA's best knowledge, neither this Agreement nor any document, certificate or financial statement furnished to the Developer by or on behalf of the IDA in connection herewith, contains any untrue statement of a material fact or omits to state any material fact necessary in order to make the statements contained herein and therein not misleading. There is no fact known to the IDA which materially adversely affects or in the future may (so far as it is now known to the IDA) have a material adverse effect upon the business, operations, prospects, property, other assets or financial condition of the IDA or of the Project which has not been set forth in this Agreement or in other documents, certificates and financial statements furnished to the Developer or on behalf of the IDA in connection with the transactions contemplated hereby.

ARTICLE XIX

MORTGAGEE RIGHTS

19.1. Right to Mortgage. Notwithstanding any other provisions of this Agreement, the Developer shall at all times have the right to encumber, pledge, grant, or convey its rights, title and interest in and to the Property, or any portion or portions thereof, and/or to this Agreement and the Ground Lease by way of a mortgage (or assignment) (a "Mortgage") to secure the payment of any loan or loans obtained by the Developer to finance or refinance the Project and/or the Property.

19.2 Notice of Breaches to Mortgagees. In the event the IDA gives written notice to the Developer of a breach of its obligations under this Agreement, the IDA shall forthwith furnish a copy of the notice to the Mortgagees that have been identified to the IDA by the Developer. To facilitate the operation of this Section, the Developer shall at all times keep the IDA provided with an up-to-date list of Mortgages.

19.3 Mortgagee May Cure Breach of Developer.

19.3.1 In the event that the Developer receives notice from the IDA of a breach by the Developer of any of its obligations under this Agreement and such breach is not cured by the Developer pursuant to the provisions of this Agreement, the IDA shall, in addition to the notice provided in Section 19.2 hereof, give notice of the failure to cure on the part of the Developer to the Mortgagee at the expiration of the period within which the Developer may cure as set forth in this Agreement. Then the Mortgagee may proceed to cure any such failure and the Mortgagee, if it elects to cure such default, shall give the IDA written notice of its intention so to cure within ninety (90) days after the receipt of the additional notice herein set forth. In the

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event that the Mortgagee elects to proceed to cure any such default, the Mortgagee shall do so within the applicable cure period contained in this Agreement; provided, however, that the commencement of the cure period for the Mortgagee shall commence on the date the Mortgagee notifies the IDA of the Mortgagee's election to cure such default and each applicable cure period shall be deemed doubled in length for the Mortgagee. For purposes of this Section 19.3, an Event of Termination of the Developer shall be deemed a breach by the Developer of its obligations under this Agreement.

19.3.2 In the event the Mortgagee elects to exercise its rights of foreclosure under a Mortgage (or appoint a receiver or accept a deed-in-lieu of foreclosure), after foreclosure of the Developer's interest in and to the Property and the Ground Lease (or after the appointment of a receiver or the obtaining of title to the Property and the Ground Lease via assignment-in-lieu of foreclosure), the Mortgagee may at its option:

(a) elect to assume the position of the Developer hereunder in which case, in the event the IDA has terminated this Agreement or suspended the distribution of the IDA Allowance, the IDA agrees that this Agreement shall be deemed reinstated and the IDA shall commence the distribution of IDA Allowance in accordance with the provisions of this Agreement and, in which case, such Mortgagee shall cure any default by the Developer hereunder that the Mortgagee had received notice of in accordance with the provisions of Section 19.2 hereof within the time frames contained in this Agreement and shall cause the Minimum Project to be substantially completed in accordance with the provisions of this Agreement; and/or

(b) elect not to reinstate the provisions of this Agreement.

The Mortgagee shall have the right so to elect (a) above of this Section 19.3.2 only if it shall exercise such right within six months after the receipt of the additional notice herein set forth.

19.3.3 For purposes of this Section 19.3, the term "Mortgagee" shall include not only the "Mortgagee", as that term is defined in Section 19.1 hereof, but shall also include any person or entity that obtains title to the Property as a result of the Mortgagee's exercise of its foreclosure rights or the transfer of title to the Property at the direction of the Mortgagee by the Developer to a person or entity by deed-in-lieu of foreclosure.

19.4 Rights and Duties of Mortgagee. In no event shall any Mortgagee be deemed to be the Developer hereunder or be obliged to perform or observe any of the covenants, terms or conditions of this Agreement on the part of the Developer to be performed or observed, or be in anyway obligated to complete the improvements to be constructed in accordance with this Agreement, nor shall it guarantee the completion of improvements as hereinbefore required of the Developer, whether as a result of (a) its having become a Mortgagee, (b) the exercise of any of its rights under the instrument of instruments whereby it became a Mortgagee (including without limitation, foreclosure or the exercise of any rights in lieu of foreclosure), (c) the

performance of any of the covenants, terms or conditions on the part of the Developer to be performed or observed under this Agreement or (d) otherwise, unless such Mortgagee shall either make the election set forth in Section 19.3.2 (a) of this Agreement or shall specifically elect under this Section 19.4 to become the Developer by written notice to the IDA whereupon such Mortgagee, upon making any such election as aforesaid, shall then and thereafter for all purposes of this Agreement be deemed to be the Developer hereunder.

19.5 Mortgagee's Rights Agreements. The IDA covenants and agrees with the Developer that the IDA, acting by and through the IDA Representative, shall, at the request of the Developer made from time to time and at any time, enter into a lender's rights agreement with any Mortgagee (or potential Mortgagee) identified by the Developer, which lender's rights agreement shall be consistent with the terms and provisions contained in this Article XIX of this Agreement that apply to Mortgagees and Mortgages. Within thirty (30) days of Developer's request for a lender's rights agreement pursuant to the provisions of this Section 19.5, time being of the essence, the IDA, acting through the IDA Representative, shall execute and deliver to the Developer such a lender's right agreement benefiting the identified Mortgagee (or potential Mortgagee) and such Mortgagee's Mortgage (or potential Mortgagee's potential Mortgage), which executed lender's rights agreement shall be in a form and substance that are reasonably acceptable to such Mortgagee (or potential Mortgagee) and that is consistent with, and at the option of such Mortgagee (or potential Mortgagee) incorporates, the terms and provisions of this Article XIX that apply to Mortgagees and Mortgages (such as the Mortgagee notice provisions and the Mortgagee cure rights provisions of this Article XIX).

19.6 Non-Subordination. Nothing contained in this Article XIX or in any other section of this Agreement shall be deemed to allow a subordination of the IDA's fee simple interest in the Leased Property. In no event will such subordination be made. The Developer may only mortgage its leasehold interest in the Leased Property.

ARTICLE XX

MISCELLANEOUS

20.1 City Authorization. By the execution of this Agreement, the IDA represents that the City has, to the extent it has jurisdiction, authorized the undertakings set forth in this Agreement and the expenditure and distribution of the IDA Allowance in accordance with the provisions of this Agreement.

20.2 Assignment.

20.2.1 This Agreement is binding upon and shall inure to the benefit of the City and Developer and their respective successors and assigns.

20.2.2 Except as provided in Section 20.2.3, the Developer may not assign its interest or any part thereof in this Agreement without the prior written approval of the IDA, which shall not be unreasonably withheld, conditioned or delayed, and upon such approval, the assignee shall assume all of the obligations of the Developer under this Agreement and shall not relieve the assignor of any liability hereunder. The Developer acknowledges that the IDA is placing specific reliance on the personal expertise of David Cordish in entertainment retail development and in attracting and retaining high-quality entertainment retail tenants. Consequently, David Cordish, or an entity in which David Cordish is a general partner, a member or the owner of at least fifty-one percent (51%) of the capital stock, partnership interest or membership interest, shall at all times before substantial completion of construction of the Project, exclusive of punch list items and work to be performed by tenants of the Project, own not less than fifty percent (50%) of partnership or membership interests or of the issued and outstanding capital stock or membership interest of the Developer.

20.2.3 Notwithstanding anything to the contrary contained in Section 20.2.2 to the contrary, the Developer shall have the right to transfer and assign all of its right, title and interest in and to this Agreement to a bona fide financial institution or lender that lends funds to the Developer in connection with the Project.

20.3 Public Disclosure. Subject to applicable legal requirements, until commencement of construction of the Project neither the Developer nor the IDA will make any press release or public statement about the transactions contemplated herein without the consent of the other, except the Developer may share information herein with prospective tenants, lenders and contractors, and such advisors and consultants as may be employed with respect to the Project and make necessary permit and license applications.

20.4 Consents and Approvals. The IDA and the Developer commit to work harmoniously with each other, and except in instances (if any) where a consent or approval is specified to be within the sole discretion of either party, any consent or approval contemplated under this Agreement shall not be unreasonably withheld, conditioned or delayed, except that Developer acknowledges that this covenant does not apply to permits required from the City of Hampton in connection with the Project. Unless a shorter or longer time period is specified in this Agreement, the IDA shall give or withhold (provided such withholding is reasonable under the circumstances, unless a sole discretion standard expressly applies) such approvals, certifications, or consents within thirty (30) days, time being of the essence.

20.5 Entire Agreement. This Agreement and the Ground Leases incorporate all prior negotiations and discussions between the parties regarding its subject matter and represent the entire agreement of the IDA and the Developer for the Project. This Agreement may only be modified by written instrument executed by the IDA and the Developer.

20.6 Headings. The captions and section headings contained in this Agreement are for convenience of reference only and shall not be considered in any interpretation of the provisions

of this Agreement.

20.7 Notices. A notice, communication, or request under this Agreement by the IDA to the Developer or by Developer to the IDA shall be sufficiently given or delivered if dispatched by either (a) certified mail, postage prepaid, return receipt requested, (b) nationally recognized overnight delivery service (next business day service), or (c) hand-delivery (if receipt is evidenced by a signature of the addressee or authorized agent), and addressed to the applicable parties as follows:

Developer:	Hampton Roads Associates, LLC c/o The Cordish Company 601 East Pratt Street, 6th Floor Baltimore, Maryland 21202 Attention: President
with a copy to:	Charles F. Jacobs, Esquire Cordish & Cordish 601 East Pratt Street, 6th Floor Baltimore, Maryland 21202
IDA:	The Industrial Development Authority of the City of Hampton 2 Eaton Street, Suite 600 Hampton, Virginia 23669
with a copy to:	City of Hampton Attention: City Attorney 22 Lincoln Street Hampton, Virginia 23669
and a copy to:	John W. Bates, III, Esquire McGuire, Woods, Battle & Boothe LLP One James Center Richmond, Virginia 23219

Any notice, communication, or request so sent shall be deemed to have been "given" (a) as of the next business day after being sent, if sent by nationally recognized express mail service, (b) as of the fifth business days after being sent, if sent by Registered or Certified U.S. Mail or (c) upon receipt, if sent by hand delivery. Either party may change its address for notice purposes by giving notice thereof to the other parties, except that such change of address notice shall not be deemed to have been given until actually received by the addressee thereof.

20.8 Partial Invalidity. If any term, covenant, condition, or provision of this

JDN1507

Agreement, or the application to any person or circumstance shall, at any time or to any extent be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall (except to the extent such result is clearly unreasonable) not be affected thereby, and under such circumstances each term, covenant, condition, and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law, insofar as such enforcement is not clearly unreasonable.

20.9 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed to an original, and such counterparts shall constitute one and the same instrument.

20.10 Choice of Laws and Venue. This Agreement shall be governed by and construed and enforced in accordance with the laws of the Commonwealth of Virginia, including conflicts of laws. Any lawsuit, action, or proceeding arising under this Agreement shall, to the extent there is federal jurisdiction over the parties and subject matter, be brought exclusively in the federal courts of the United States.

20.11 Force Majeure. For the purpose of any of the provisions of this Agreement, exclusive of Articles II and III, neither the IDA, nor the Developer, as the case may be, nor any successor in interest, shall be considered in breach of or default in any of its obligations, including, but not limited to, the beginning and completion of construction, or progress in respect thereto, in the event of enforced delay in the performance of such obligations due to causes beyond its control, including but not restricted to, strikes, lockouts, actions of labor unions, riots, storms, floods, litigation, explosions, acts of God or of the public enemy, acts of government, insurrection, mob violence, civil commotion, sabotage, malicious mischief, vandalism, inability (notwithstanding good faith and diligent efforts) to procure, or general shortage of, labor, equipment, facilities, materials, or supplies in the open market, defaults of independent contractors or subcontractors (provided that remedies are being diligently pursued against the same), failures of transportation, fires, other casualties, epidemics, quarantine restrictions, freight embargoes, severe weather, inability (notwithstanding good faith and diligent efforts) to obtain governmental permits or approvals, or delays of subcontractors due to such causes, it being the purpose and intent of this Section 20.11 that in the event of the occurrence of any such enforced delays, the time or times for the performance of the covenants, provisions, and agreements of this Agreement shall be extended for the period of the enforced delay (including any time reasonably required to recommence performance due to such enforced delay). The affected party shall use reasonable efforts to remedy with all reasonable dispatch the cause or causes preventing it from carrying out its agreements; and provided further, that the settlement of strikes, lockouts, and other industrial disturbances shall be entirely within the discretion of the affected party, and the affected party shall not be required to make settlement of strikes, lockouts, and other industrial disturbances by acceding to the demands of the opposing party or parties when such course is, in the judgment of the affected party, unfavorable to the affected party. Notwithstanding the above, (a) the Developer may not rely on its own acts or omissions as grounds for delay in its

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performance, (b) the IDA may not rely on its own acts or omissions or the acts or omissions of the City as grounds for delay in its performance, and (c) the absence of immediately available funds shall not be grounds for delay.

20.12 No Partnership or Joint Venture. It is mutually understood and agreed that nothing contained in this Agreement is intended or shall be construed in any manner or under any circumstances whatsoever as creating or establishing the relationship of co-partners or creating or establishing the relationship of a joint venture between the IDA and the Developer or as constituting the Developer as the agent or representative of the IDA for any purpose or in any manner under this Agreement, it being understood that the Developer is an independent contractor hereunder.

20.13 Representatives Not Individually Liable. No member, official, representative, or employee of the IDA shall be personally liable to the Developer or any successor in interest in the event of any default or breach by the IDA for any amount which may become due to the Developer or successor or on any obligations under the terms of the Agreement. No partner, member, representative, or employee of the Developer or any of its members shall be personally liable to the IDA in the event any default or breach by the Developer for any amount which may become due to the IDA or on any obligations under the terms of this Agreement.

20.14 Ancillary Documents. The IDA Representative is hereby authorized, on behalf of the IDA, to execute any and all other documents necessary or appropriate to effectuate the transactions contemplated by this Agreement, provided such documents do not materially alter the relationship of the parties or the principal elements of the Minimum Project, and to grant such approvals and consents on behalf of the IDA.

20.15 Broker. The IDA and the Developer each represent and warrant for itself that it has not dealt with any broker in connection with this Agreement or the Ground Lease and each covenants and agrees to indemnify and hold the other harmless from and against any claim, cost, liability, or expense (including reasonable attorney's fees) arising or resulting from a breach of this warranty.

20.16 Third Party Beneficiary. Nothing contained in this Agreement shall be construed to confer upon any other party the rights of a third party beneficiary.

20.17 Payment or Performance on Saturday, Sunday, or Holiday. Whenever the provisions of this Agreement call for any payment or the performance of any act on or by a date that is not a Business Day upon which the , including the expiration date of any cure periods provided herein, then such payment or such performance shall be required on or by the immediately succeeding Business Day.

20.18 "Business Day", defined. The term "Business Day" shall mean a day other than a Saturday, Sunday, or legal holiday in the Commonwealth of Virginia.

20.19 Incorporation into Agreement. All exhibits, schedules, and recitals form a part of this Agreement.

20.20 Conflict of Terms. It is the intention of the IDA and the Developer that if any provision of this Agreement is capable of two constructions, one of which would render this provision valid and enforceable, then the provision shall have the meaning which renders it valid and enforceable.

20.21 No Waiver. No failure on the part of the IDA or The Developer to enforce any covenant or provision contained in the Agreement nor any waiver of any right under this Agreement shall discharge or invalidate such covenant or provision or affect the right of the other party to enforce the same in the event of any subsequent default.

20.22 Compliance with Laws. The Developer shall, at all times, be subject to all applicable law pertinent to the Project, this Agreement, and the Developer's actions in connection with the Project and this Agreement. Nothing in this Section 20.22 or any other part of this Agreement, however, shall be construed to (a) limit or prevent the Developer from challenging at law or in equity the applicability of any Applicable Law and/or pursuing its rights in furtherance thereof through appropriate judicial proceedings or (b) constitute a waiver of due process. Notwithstanding anything to the contrary contained in this Agreement, no provision of this Agreement shall be construed to require the Developer to comply with any applicable law during the period that the Developer may be pursing a bona fide challenge of the applicability, lawfulness, and/or enforceability of such applicable law (unless such law requires compliance during any such challenge). If the Developer's challenge is successful, the Developer shall not be required by the provisions of this Agreement to comply with such applicable law.

20.23 Date of Agreement. The date of this Agreement shall be the date upon which this Agreement has been delivered to the Developer after same have been fully executed by the IDA.

20.24 Time of the Essence. Time is of the essence in the performance of the obligations of the Developer and the IDA under this Agreement.

20.25 Opinion of Counsel. Upon the execution of this Agreement, each party shall have furnished to the other party an opinion of counsel, in form and substance mutually acceptable and customary in like transactions, as to the taking of all necessary action in connection with the authorization, execution, and delivery of this Agreement and the Ground Lease by such party, the enforceability of this Agreement and the Ground Lease in accordance with the terms of each such agreement, and as to other matters mutually deemed necessary or appropriate by the parties.

20.26 Confidentiality of the Developer's Information. The IDA acknowledge that any information provided by the Developer to the IDA concerning the cost of developing the Project,

the cost of land acquisition, the terms of any financing of the Project, the identity of any potential tenant of the Project, the terms of any lease of a tenant at the Project or the actual sales of any tenant of the Project shall constitute "confidential financial information" and may contain "trade secrets" and "confidential information". Accordingly, the IDA, to the fullest extent permitted by applicable law, shall deny public inspection of such information. This Section 20.26 shall not limit, however, the exercise of the IDA's rights in any legal proceeding, provided that the IDA then requests the court to maintain such information as confidential.

20.27 Estoppel Certificates. The IDA and the Developer, at any time and from time to time, upon not less than thirty (30) days prior written notice from a party hereto, or to a person designated by such party, such as a tenant or a mortgagee or lender of the Developer, shall execute, acknowledge, and deliver to the party requesting such statement, a statement in reasonably acceptable form to the requesting party certifying, among other matters, (a) that this Agreement is unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as modified and stating the modifications), (b) stating whether or not, to the best knowledge of the signer of such certificate, the IDA or the Developer is in breach and/or default in performance of any covenant, agreement, or condition contained in this Agreement and, if so, specifying each such breach and/or default of which the signer may have knowledge, and (c) any other factual matters reasonably requested in such estoppel certificate, it being intended that any such statement delivered hereunder may be relied upon by the party requesting such statement and/or any person not a party to this Agreement (if such other person is identified at the time such certificate was requested). At any time after completion of the Project as provided herein the IDA shall, at the request of the Developer, promptly execute, acknowledge and deliver to the Developer a statement to that effect and to the effect, to the extent true, that all of the Developer's obligations under this Agreement have been fulfilled. The IDA Representative is hereby authorized to execute, acknowledge, and deliver such certificates on behalf of the IDA.

20.28 Good Faith and Fair Dealing. The parties covenant and agree each to the other that its conduct under this Agreement, and the interpretation and enforcement of the provisions hereof, shall be characterized by good faith and fair dealings so that the objectives of each party as set forth in this Agreement may be achieved.

END OF PAGE 37

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IN WITNESS WHEREOF, the IDA has caused this Development Agreement to be duly executed in its name and on its behalf by the _____ of the Industrial Development Authority of the City of Hampton, Virginia, and the Developer has caused this Development Agreement to be duly executed in its name and behalf by _____.

THE INDUSTRIAL DEVELOPMENT AUTHORITY OF THE CITY OF HAMPTON, VIRGINIA

By: Benjamin A. Wilson (SEAL)
Chairman

HAMPTON ROADS ASSOCIATES, LLC, a Maryland limited liability company,

By: Cordish Hampton Roads Investors, LLC, a Maryland limited liability company, the Operating Manager,

By: David S. Cordish (SEAL)
David S. Cordish
Authorized Member

STATE OF VIRGINIA:
CITY OF HAMPTON:

The foregoing instrument was acknowledged before me this 18th day of November, 1999, by Benjamin A. Williams, III, as Chairman of THE INDUSTRIAL DEVELOPMENT AUTHORITY OF THE CITY OF HAMPTON, VIRGINIA, a of the Commonwealth of Virginia.

My commission expires: January 31, 2002.

Notary Public

STATE OF MARYLAND:
~~CITY~~/COUNTY OF Anne Arundel:

The foregoing instrument was acknowledged before me this 15th day of November, 1999, by DAVID S. CORDISH as the Authorized Member of Cordish Hampton Roads Investors, LLC, a limited liability company, organized under the laws of Maryland, as the Operating Manager of HAMPTON ROADS ASSOCIATES, LLC, a limited liability company, organized under the laws of Maryland.

My commission expires: 9-23-2003.

NOTARY PUBLIC

Notary Public

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EXHIBIT "D"
MERCURY BLVD
INTERSTATE 64
QUEEN ST
PINE CHAPEL RD
JDN1514

EXHIBIT B

Zoning Lots as per Tap Map 3T

PARCEL #	NAME
16	Taylor, Lois V.
17	Palmer, Edward B.
18	Turner, Warner W.
1	Jackson, MHT
2	Davis, Galveston, Jr.
3	Hayes, Preston T.
4	Taylor, Melvin Louis
5	Webster, William S.
6	Hargraves, Bobby H.
7	Holcomb, Frederick & C.R.
8/9	Lucas, Andrew B., Jr.
1	Southerland, Ralph E.
2	Eley, Joseph K.
3	Boone, Eugene/Janet (Scott)
4	Borum, Wilbert T.
5	Scott John E.
6	Threat, Carlton & Ida
11	Belgrave, Claude & Flora
12	Evans, James & Jacquelyn
13	Hargraves, Billy & Vilma
14	Peoples, Jsper & Bobbie
15	Meadows, Moses & Loretta
16	Hines, Thomas B.
20A	Morris, Louise H.
21	Truhart, Harry S.
22	Middleton, Thomas
24	Ottofaro, Frank J. & Dora J.
25	Irwin, Victor
26	Yarrington, James E. Sr.
14A	Jordan, Nathan
15A	Taylor, Lois V.

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10	Whitney, Gloria R.
23	Ottofaro, Frank J. & Dora J.
27A-1	Furno, Arietta C.
27A-2	Mallory, James D.
27A-3	Davis, F.L. Jr.
28	Yarrington, James E. Sr.

JDN1516

DUPLICATE

CERTIFIED ORIGINAL

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF HAMPTON, PART IV

CITY OF HAMPTON,)
Petitioner, (
v.) AT LAW 00-367
FRANK OTTOFARO (
and DORA J. OTTOFARO, et al.,)
Defendants. (

CLERK SUPREME COURT OF VIRGINIA
RECEIVED
DEC 26 2001
RICHMOND, VIRGINIA

TRANSCRIPT OF PROCEEDINGS

Hampton, Virginia

February 16, 2001

JAMES P. HOWLAKER
CLERK OF THE CIRCUIT COURT
01 NOV 13 PM 12:55
CITY OF HAMPTON, VA.
DK # PG #

Before:

THE HONORABLE WILFORD TAYLOR, JR., JUDGE

TAYLOE ASSOCIATES, INC.
Registered Professional Reporters
Telephone: (757) 461-1984
Norfolk, Virginia

Proceed, Mr. Waldo.

MR. WALDO: Thank you. Joe Waldo on behalf of the property owners, Your Honor, on this issue the defense is to the take. Your Honor, counsel for both sides have agreed on a number of stipulations of fact. I think Mr. Broaddus and Mr. Infantino have reviewed this. Your Honor, I would like to present the stipulations of fact to the Court signed by both parties.

THE COURT: Thank you.

MR. WALDO: Your Honor, if I could, for the record, since we last met and you ruled that we were not entitled to an injunction, we have taken a great deal of discovery and a number of facts have come to the attention of the property owners which we'll be

presenting those into evidence today.

THE COURT: Help yourself.

MR. WALDO: I would like Your Honor to focus the Court's attention on the three issues that we feel the property owner is entitled to prevail on its defenses to the take. The first issue that we believe the evidence is stipulated will clearly show when it's introduced into this proceeding is that the city council of Hampton delegated its authority to determine which property would be condemned and that was delegated to the city attorney. That violated the standard set forth in the City of Richmond versus Carneal and A. B. Ruttick versus City of Richmond. We'll site those for you later today.

MR. BROADDUS: Excuse me, Judge. I apologize for interrupting, but we have not stipulated there has been an unlawful delegation.

THE COURT: He didn't say that. This is what he's going to try to show today.

MR. BROADDUS: I apologize to the Court.

MR. WALDO: Mr. Broaddus, I wish we could have stipulated to that, but that's why I'm here.

THE COURT: He is trying to convince me of that.

MR. WALDO: Your Honor, the other issue is

the Statute 33.1-91 and we're going to show that as to one of the parcels taken by the City that the take involved approximately 818 square feet leaving a residual of 18,333 square feet, that this violated the standard set forth in 33.1-91 because the criteria to determine whether or not the City could take that residual was never met and never considered. That is the second issue, Your Honor.

33.1-91 requires if there is a residual parcel and, in this case, on Parcel No. 23 -- there were two parcels taken from the Ottofaros. Parcel 24 had a house on it. That was tore down when the injunction failed. Parcel 23 was contiguous to that. That was a raw undeveloped piece of property. It was zoned commercial property so it was zoned for commercial development and it sat undeveloped. On that piece of property, 23, it had 19,151 square feet. The City, Your Honor, only took 818 square feet. That meant they didn't take 18,333 square feet.

Mr. Ottofaro will be saying he could have developed 18,333 square feet in a number of different ways for commercial uses because it was zoned commercial at the time it was taken.

The statute requires that unless there is a house on the property that must be torn down, which

there was not -- there was a house on the other parcel, not on this parcel. Unless that remnant would cost more than the damage to the remnant, which it didn't, then the City could not take that piece of property. It's set forth, Your Honor, and I won't go into all provisions of the code, but under 33.1-91, their criteria is set forth in the code and the City must meet the criteria or it cannot take the residual. Otherwise, the taking, Your Honor, is not for public use. So the taking of the residual portion of that property, we think the fact disclosed was not for residually lawful purpose.

The final issue, Your Honor, is that the taking was not for public use and we're going to show and I think the stipulations and the record will show that this property is being taken for the Cordish development and it's being taken for a road network for the Cordish development and the road network, Your Honor, is being developed by a private developer. It was never put out to bid by the City, but it's being developed on land taken by eminent domain for which there must be a public purpose.

We're going to show, Your Honor, and submit to the Court that that would violate the standards of allowing property to be taken for a public

use when, in fact, a private road is not a public use. Those are the three points.

THE COURT: Anything you want to say by way of opening?

MR. BROADDUS: Certainly, Judge. Thank you. We appreciate the opportunity to be before you. Judge, when the Court met in December, there was extensive testimony produced at that time and the facts have not changed. We believe that the Court's ruling was correct at that time and we would urge the Court to adhere to its ruling because there is no basis for a different conclusion.

With respect to the points that Mr. Waldo has suggested he would try to focus on, the petition in condemnation has attached to it an exhibit that is a resolution of the city council and that resolution states that will, therefore, be resolved by the council of City of Hampton, Virginia, that it approves and directs their acquisitions of the parcels located within the project area and designated on the attached Exhibit A.

Going to Exhibit A, there is a list of various parcels. Among them are Parcels No. 23 and 24, property owner Ottofaro, Frank J. and Dora J. And then attached to that was a plat. So certainly there is no

basis to suggest that the city council has delegated to someone else the authority to pick and choose what properties to take. City council clearly said in the resolution take Parcels 23 and 24 of Mr. and Mrs. Ottofaro.

With respect to whether the taking meets the requirements of Virginia Code Section 33.1-91, we submit that clearly the evidence is that the taking of the entire parcel is for an area in the aggregate, which is less than two acres. Obviously, the remnant would be less than two acres. The property does not have access, the Court will recall the testimony of Mr. Whitley and we'll call him back again, if necessary, which is one of the four criteria for taking a remnant. In addition, the property would no longer be able to be used for the purpose in which it was previously being used which was a residence. So clearly we submit we do meet the requirements of that particular section of the code.

And, Judge, with respect to not being taken for a public use, first, we submit that that determination is a determination that the general assembly has vested in the city council under Section 15.2-1903, Subsection C of the code, and that in any event, even if the Court were to examine that, the

Court will recall that in 1989 the city council adopted a comprehensive plan and that comprehensive plan designated a roadway through this general area to be developed for purposes of connecting Queen Street to Magruder Boulevard far to the west.

This is the first stage of that construction of a public roadway that was projected well before this particular project was even conceived of or thought of. The public will have the unfettered right of access to use this roadway. The purpose is to facilitate public movement of traffic and there is no basis to conclude that the taking is for a private purpose. To be sure, there will be some enhancement of a development opportunity.

The Durbashin case and the City of Richmond Supreme court case makes it very clear that because a private entity incidentally benefits from a public purpose does not deprive that public purpose of what it is, the public purpose. So we submit that the evidence will not in any way suggest to the Court that it should reverse its ruling.

THE COURT: Thank you. Call your first witness.

MR. WALDO: We would called Kathy Grook.

KATHY GROOK, having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WALDO:

Q. Ms. Grook, Joe Waldo. How are you?

A. Fine. How are you?

Q. Can we start by getting you to tell us your name and what your position is with the City of Hampton?

A. Kathy Grook. I'm retail development manager with the City of Hampton.

Q. You're serving as the project manager for the retail development known as the power plant; correct?

A. Yes.

Q. Are you familiar with the road network being constructed for the quadrant of property bounded by West Mercury Boulevard, Queen Street, Pine Chapel Road, and I-64?

A. Relatively familiar, yes.

Q. Is this the same quadrant where the power plant project will be developed?

A. Yes.

Q. Let me ask you, you're familiar with the August 4, 1999, I think you've referred to it as schematic drawing for the power plant project road

improvements principally located on Powhatan Parkway?

A. Yes.

Q. Ms. Grook, I'm going to show you this.

THE COURT: Do I need to mark it? I'm going to mark it as Defense Exhibit 1.

(The document referred to was marked for identification as Defendants' Exhibit No. 1 and admitted into evidence.)

BY MR. WALDO:

Q. Ms. Grook, that is the document we were just talking about. You're familiar with that?

A. Yes.

Q. Now, to your knowledge, this schematic has not changed, has it, between August 4, 1999 and September 8, 1999?

A. I don't believe so.

Q. And do you report from time to time to city council on the power plant project?

A. Yes. Through the city manager.

Q. Was it your understanding that the alignment that was contained in the August 4, 1999 road drawing was the alignment that the city council relied upon when it authorized the taking of the Ottofaro property?

A. I'm not sure.

Q. Let me ask you: Do you remember having your deposition taken?

A. Yes.

Q. At that time, weren't you asked that question? Do you remember being asked that question?

A. Probably. I don't know.

Q. Is your position today that you're not sure or that, yes, you do recall it has not changed, the alignment has not changed?

A. What is your question again? I'm sorry.

Q. My question is: Was it your understanding that the alignment that was contained in the August 4, 1999, I think you called it a schematic or drawing, was the alignment that the city council relied upon when it authorized a taking of the Ottofaro property in its resolution of September 1999?

A. I think what you're trying to say is that I said yes in my deposition. Today I'm saying I'm not sure. That answer stands.

Q. So earlier you said yes and today you're saying you changed that to you're not sure?

A. Yes.

Q. Let me ask you: In your role as a retail development manager and project manager for the power plant project, did you provide schematics to city

council for consideration in determining which property would be taken?

A. I did not, I don't believe. I think that's what I testified to before.

Q. I'm going to show you a memorandum that says it's to the members of city council from Kathy Grook dated September 22, 1999.

MR. WALDO: Your Honor, can I approach the witness?

THE COURT: Defense Exhibit 2, we'll mark it.

(The document referred to was marked for identification as Defendants' Exhibit No. 2 and admitted into evidence.)

BY MR. WALDO:

Q. Ms. Grook, let me ask you, this is marked for the record as property owner's No. 2. Will you look that over and tell me if that is your memo?

A. Yes, it is.

Q. That was dated September 22 of 1999; correct?

A. Yes.

Q. In that memorandum, you were providing council with a copy of the site plan showing the original alignment of Powhatan Parkway, weren't you?

A. Yes.

Q. Did you attach an old site plan marked as Scenario D, and that was prepared by Rob Brown, the former developer?

A. Yes.

Q. Did you tell council in that memorandum you did not have a diagram of the original alignment as it crossed specific parcels of property, meaning the Ottofaro's?

A. I don't know. I'll have to read it.

Q. Okay.

A. What is your question again?

Q. My question is: Did you tell council in that memorandum that you did not have a diagram of the original alignment as it crossed the specific parcels of property?

A. Yes. But let me clarify that. What I'm saying here, someone had asked that we show them the original alignment of the road as Rob Brown proposed it. And what I'm saying is that in relation to the road that Rob Brown proposed at that time, I did not seem to have anything that showed the specific parcels that it crossed.

Q. Ms. Grook, the Scenario D does not cross the Ottofaro property. Do you agree with that?

A. I'm not sure because it doesn't show the parcel alignments here. I suspect it doesn't. It may touch them. I'm not certain.

Q. Would you agree that the August 4, 2000 site plan did cross the Ottofaro property?

A. Yes.

Q. Do you know of any more recent site plans in existence?

A. There is a site plan that has been officially approved by the city, yes. I'm not sure when that was.

Q. Let me ask you this question so it will be a complete question. Do you know of any more recent site plans in existence or did you present any other site plans to city council prior to September 22 of 1999 when council met, other than the August 4, 1999 road plan?

A. I don't think so, but I'm not sure.

Q. At your deposition you said there were none. You said no. Do you agree with that?

A. I don't remember what I said in my deposition.

Q. Do you remember being asked if there was a schematic between September of '99 and December, Page 53, Line 18.

Ms. Grook, my question was, if there was a question presented to you at the deposition, question, "If there was a schematic between September of '99 and December of '99, you would have shown the version in between, the most recent version in between?" Answer, "Sure." Did you make that statement?

A. If it's in my deposition, I did.

Q. Do you remember being at a power plant team meeting on January 13 of 2000, along with Mr. Cordish and other people from the City?

A. I don't specifically remember the date.

Q. Let me show you, if I can, an agenda of that meeting.

THE COURT: Do you want that marked?

MR. WALDO: Yes, sir.

THE COURT: 3.

(The document referred to was marked for identification as Defendants' Exhibit No. 3 and admitted into evidence.)

BY MR. WALDO:

Q. I want you to look that over. When you've looked it over, I'll have a question for you.

A. Okay.

Q. Now, from that agenda, do you remember being at that meeting?

A. Yes.

Q. Do you remember a discussion with the developer concerning the ability of the City to condemn residual portions of property that would not be used specifically for the right of way?

A. I'm sorry. Could you ask that one more time?

Q. Do you remember discussions with the developer concerning the ability of the City to condemn residual portions of property that would not be used specifically for the right-of-way?

A. I believe that was an item that was discussed at this meeting. However, I don't remember specifics. I think that is what I testified to in my deposition.

Q. Do you remember the developers being told at that meeting that it depended strictly upon the statute?

A. I don't necessarily remember the developers being told at that meeting, but I know the developers were told at some time that it depended upon the statute.

Q. Let me ask you if you remember this question in the deposition. What do you recall being said about the ability to condemn the residual between

the developer and those other -- I'm sorry. Page 21, Line 21 is the answer. The question is at 17 and the answer is at 21.

The question was, "What do you recall being said about the ability to condemn the residual between the developer and those other people that were at the meeting?" The answer, "That it strictly depended upon the statute and whether or not it met the intent of the statute."

A. Okay. Well, like I've said, I know the developer was told that. I don't necessarily remember when they were told that.

Q. Are you familiar with the development agreement between the developer and the Hampton IDA concerning the power plant project?

A. Yes.

Q. Let me ask you this: Do the terms between the provisions of that agreement require the developer, Mr. Cordish, to build Powhatan Parkway?

A. Yes.

Q. And he is also to attempt to purchase the right-of-ways for the highway, isn't he?

A. Yes.

Q. He is also authorized to ask the City to initiate condemnation proceedings when he can acquire

the right-of-way?

A. That is not correct. He will ask the IDA to ask the City, but there is no obligation.

Q. So, in other words, he is to give the IDA notice if he cannot acquire the right-of-way so that the IDA can get the City to acquire the right-of-way from condemnation?

A. That's correct, with the exception that the City is under no obligation with the IDA to proceed with condemnation for that document or any other document.

Q. That's your opinion; correct?

A. Yes. That is what I know as fact.

THE COURT: Exhibit 4.

(The document referred to was marked for identification as Defendants' Exhibit No. 4 and admitted into evidence.)

MR. BROADDUS: Before we move away from Defendants' Exhibit 3, at least the copy that I have has attached to the January 13 agenda a separate sheet. It's our understanding that the separate sheet was not a part of the agenda. It was an exhibit, a separate exhibit.

THE COURT: Had you planned to move it for introduction?

MR. WALDO: Yes, sir. Absolutely.

THE COURT: Well, it hadn't been moved. I guess we can deal with it now.

MR. WALDO: I'll tell you what I'll do. I'll withdraw that part and bring it in through another witness.

THE COURT: All right. You may proceed.

MR. WALDO: Your Honor, if I could give the witness a copy of that.

BY MR. WALDO:

Q. Ms. Grook, let me ask you first to look that over. Doesn't that have a stamp on it dated March 2, City of Hampton Department of Development?

A. Yes.

Q. That would be your office?

A. Yes.

Q. That is a copy, is it not, of the letter to your attention from Cordish giving notice to proceed with condemnation?

A. Yes.

MR. WALDO: That's all.

THE COURT: Anything else?

MR. BROADDUS: Very briefly, Judge.

CROSS-EXAMINATION

BY MR. BROADDUS:

Q. Ms. Grook, if you turn to Defendants' 2, this is the memo of September 22, 1999.

A. Yes.

Q. Do you have that before you?

A. Yes.

Q. In the first sentence it makes reference to the original road alignment. Do you see that?

A. Yes.

Q. And what did you understand by the original road alignment?

A. The road alignment that was proposed by Rob Brown when he was the developer developing this project.

Q. Was the purpose of this to refer to the road alignment as it existed on the August 4, 1999 plan?

A. No.

MR. BROADDUS: Thank you. No further questions, Judge.

THE COURT: Any redirect?

MR. WALDO: No.

THE COURT: Next witness.

MR. WALDO: I'm going to call Mr. Whitley.

JAMES F. WHITLEY, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WALDO:

Q. Mr. Whitley, good morning.

A. Good morning.

Q. Mr. Whitley, to begin, could you tell us your full name and your position with the City of Hampton?

A. My full name is James Frederick Whitley. I'm the city engineer for Hampton.

Q. Do you have primary responsibility for the construction of the arterial road network serving the power plant project for the City?

A. I was assigned project manager responsibility for that project, yes.

Q. And does the August 4, 1999 road plan represent the road plan in effect as of September 22, 1999?

A. I would need to see that plan to respond to your question.

MR. WALDO: Your Honor, for the record, I'm showing the witness property owner's No. 1.

BY MR. WALDO:

Q. There you go, Mr. Whitley. Take your time and look that over.

A. There has been a slight shift in the road

from the date of this plan in a westward direction in the vicinity of the residential subdivision, but generally it reflects the approximate alignment of the current road.

Q. Did that alignment happen before the September 22, 1999 council meeting or after?

A. I'm sorry?

Q. You say there has been a slight shift in the alignment. Is that what you said?

A. Yes.

Q. In other words, the document that you're looking at, the property owner's, I think that is No. 1, there has been a shift in the alignment of that. My question is, that alignment shift came after the September 22, 1999 city council meeting?

A. I can't tell you exactly when that shift occurred. No, sir.

Q. Does the June 14 road plan represent the final alignment and plan for construction of the power plant? I'll show you that.

THE COURT: We'll mark this as No. 5.

(The document referred to was marked for identification as Defendants' Exhibit No. 5 and admitted into evidence.)

BY MR. WALDO:

Q. Mr. Whitley, here is --

THE COURT: When you say alignment, what do you mean by that, Mr. Waldo?

MR. WALDO: The layout of the road.

THE WITNESS: This path.

THE COURT: All right.

THE WITNESS: The alignment on this plan dated 6/14 2000 appears to reflect the current construction plan. Yes.

BY MR. WALDO:

Q. That is different from the plan that was, we'll say, of record in September of '99 when the resolution for the condemnation was adopted by the city council. Do you agree with that, that is a different plan?

A. It's certainly different from this plan you showed me earlier. Yes, sir.

Q. The plan I showed you earlier, property owner's No. 1, was the plan in existence as of September 22, 1999?

A. I don't know for sure if there was another plan in between these two.

Q. But, to the best of your knowledge, that was the plan that was available to the council as of September 1999 when they voted on the resolution of

public purpose?

A. I can only say this was certainly in existence in August and prior to council action.

Q. Can you tell me of any other plan then?

A. No.

Q. There is no other plan that you know of?

A. No. There's been a number of plans from the time this project started.

Q. But no other plan that you know of that city council saw?

A. None that I know of.

Q. Let me ask you if the road right-of-way was increased for the entire length of the road after the original plan that you have identified of August 4, 1999?

A. I'm sorry. Could you ask that one more time?

Q. If the right-of-way for the road was increased from the original road shown in your plan of August 4, 1999?

A. There was a change at some point in the right-of-way width at my request to increase it to 120 feet wide after consultation with the city traffic engineer.

Q. That was done after September 22, 1999?

A. I'm not sure exactly when that occurred.

Q. That was not on the first plan that you identified of August -- let me show you another plan in November.

THE COURT: Is that No. 6?

MR. WALDO: Yes.

(The document referred to was marked for identification as Defendants' Exhibit No. 6 and admitted into evidence.)

BY MR. WALDO:

Q. For the record, this is No. 6. Now, doesn't Exhibit No. 6 show a 100-foot right-of-way?

A. Yes, it does.

Q. So that's November of '99, is it not, No. 6?

A. November 3, '99.

Q. So the change had to have come after November?

A. Yes.

Q. Who was the consulting engineer responsible for the design of the roadway?

A. That would be Haynes Gibson & Associates.

THE COURT: What two parcels again? You said them in your opening.

MR. WALDO: 23 and 24.

BY MR. WALDO:

Q. Was Haynes Gibson hired by the private developer to design the road?

A. Yes.

Q. Is the private developer controlling the construction of the road?

A. Yes. He's responsible for the construction of the road yes.

Q. This road was never put out to public bid, was it?

A. No. Not by the City of Hampton.

Q. Can you tell the Court why the road was not put out for public bid if it was a public road?

A. This was treated like a private developer like in a subdivision where the developer is responsible for construction, building it to city standards and the City would accept the road on completion.

Q. Once a road is completed, it must be accepted by the City; correct?

A. Yes.

Q. Let me ask you if you can identify this letter to JDN.

THE COURT: Let me mark it.

(The document referred to was marked for

identification as Defendants' Exhibit No. 7 and admitted into evidence.)

THE COURT: Before we leave 6, tell me exactly what you're telling me to look at. I notice on both plats it crosses 23 and 24 and there was testimony there was a slight shift. Tell me what you want me to look at.

MR. WALDO: Your Honor, what we're showing is that the road alignment has changed, the right-of-way has changed as the resolution is adopted.

THE COURT: All right. I understand. I want to make sure I'm seeing exactly what you want me to see because I'm the trier of fact today.

BY MR. WALDO:

Q. Is this your letter as city engineer? And look that over, if you can.

A. Yes, it is.

Q. JDN was one of the private developers, was it not?

A. Yes.

Q. Did you indicate in the letter that you just identified that pursuant to the latest development agreement with the developer, you needed to approve the alignment of public roads and subsequently would require additional detailed designs for construction?

A. Let's see. Talk about the detailed design which is normally done after the alignment is developed. Access points, the alignment of Cordish Drive, which is not the main road, but a side street, traffic signals, left turn lane and a right turn lane. Basically details of the design.

Q. You did indicate that you needed to approve the alignment of the public roads and subsequently would require additional detailed designs?

A. Following the approval of the schematic alignment roadway, we still need to discuss specific access points, et cetera.

Q. From that, Mr. Whitley, isn't it safe to say that we could conclude and the Court could conclude that the road alignment had not been approved as of that date, 11/18/99?

A. I'm not -- I disagree with your conclusion. The alignment of the road was -- schematic alignment was approved.

Q. Schematic?

A. Yes. We were into the design details.

Q. You had signed off on that at that time?

A. I had knowledge this alignment was acceptable.

Q. You had signed off, was my question?

A. I did not sign a right-of-way plan. That is not normally what I would do in a subdivision or private development like this.

Q. Wasn't the design of the road still being worked out on November 18, 1999?

A. Absolutely. The construction details were yet to be developed.

Q. And the construction details involved such things as right-of-way, did they not?

A. The right-of-way line was usually developed first. Once that's agreed upon, then the detailed design is done.

Q. My question is: That is one of the issues of construction, is the right-of-way?

A. One of the issues needed to get to construction drawings is the approval of right-of-way. Yes.

Q. Will the road remain a privately constructed road until acceptance on behalf of the City?

A. New portions of the road, yes, will remain private until accepted by the City.

Q. You say the new portions. The portions, all of the road Mr. Cordish is developing?

A. The distinction I'm making is a portion

of Queen Street is being widened --

Q. That's not before the Court today. I'm specifically speaking about the property that would impact the Ottofaros or the construction that would impact the Ottofaro's property and the road Mr. Cordish is building.

My question is: The road must be accepted by the City; correct?

A. That's correct. The new road crosses existing Pine Chapel Road. I'm making a distinction that a portion of this project in the vicinity is also public street, existing public street.

Q. But what Mr. Cordish is building and developing as far as a road is his road until the City accepts that road?

A. Except where it crosses existing public streets, yes, you're correct.

Q. Would you say that it is fair to characterize this road as a private road for purposes of bidding the project under the public procurement act?

A. I'm not the procurement official, so I don't know that I'm really qualified to answer that.

Q. Were you present at a power plant meeting held on January 13, 2000?

A. I would have no way to know unless you have some notes to indicate that it was.

Q. Let me show you a memorandum of January 13, 2000. Actually it's already in evidence. Mr. Whitley, the January 13 memo, that's your handwriting on the first part of that agenda, is it not?

A. Yes.

Q. The second page of that is procedures for city acquisition of property for roads. Do you agree?

A. Yes.

Q. That is your procedures in the City of Hampton as the city engineer?

A. No, sir. I'm not sure who put this together.

Q. It's not the procedures that the City relies upon?

A. I'm not responsible for the right-of-way property acquisition for the City. So I'm not really sure who put this together. It's not a procedure that my office relied upon.

Q. Let me ask you if Mr. Cordish was the private developer present at that meeting?

A. I've got a list of names at the top --

Q. We're talking about the January 13 memo;

correct?

A. Yes. I see Reid Cordish's name.

Q. He was present?

A. Apparently so, yes.

Q. He was involved in all of the negotiations for the road, was he not?

A. I would not know.

Q. He was involved in many of the negotiations for the road and right-of-way. Would you agree with that?

A. I'm really not qualified to answer that. I can say he was at this meeting, but beyond that --

Q. Is that all that you know about Mr. Cordish's involvement in the acquisition of the right of way at this one meeting?

A. You've got other meeting notes to say he was there --

Q. That's not my question. I'm asking you if you have knowledge that Mr. Cordish was involved in acquisition of the right-of-way for the arterial road network for the power plant project?

A. I don't have any direct knowledge, no.

Q. Do you have any indirect knowledge?

A. I'm just familiar that he's involved in the project.

Q. The project included the roads. Wasn't Mr. Cordish to develop roads?

A. Mr. Cordish was responsible for having the roads constructed. Yes.

Q. Was there an agenda item on the need to be creative with the use of condemnation?

A. There is an Item 6 that says discussion and be creative in condemnation.

Q. There was, was there not?

A. That was an item on the agenda.

Q. You were there at that meeting, were you not?

A. Yes.

Q. Do you remember that?

A. I don't remember specifically what was discussed, but I certainly see the agenda items.

Q. Let me ask you if you'll go back to that agenda of that meeting of January. Was an agenda item on that dealing with finalizing the alignment and engineering drawings with details sufficient for condemnation purposes?

A. I see in addenda Item 9 finalization of road alignment.

Q. Those were covered, to your knowledge, with respect to that meeting?

A. It's been too long to remember all the details of all the meeting, but certainly an agenda item.

Q. With respect to the Ottofaro property, there was going to be -- you're familiar with the two parcels, 24 and 23?

A. Yes.

Q. 23, let me show you, I'll call your attention to the second page of this summary of right-of-way acquisition.

THE COURT: No. 8.

(The document referred to was marked for identification as Defendants' Exhibit No. 8 and admitted into evidence.)

BY MR. WALDO:

Q. Let me start with, for the record, this is No. 8. It's a summary of right-of-way acquisition and the second page, Mr. Whitley, is a map showing parcels that would be in the power plant area. Do you agree with that?

A. It's a summary of right-of-way acquisition with some square footages on it and I see a tax map with the parcels in the vicinity of the I-64 Queen Street areas.

Q. Those parcels 23 and 24, you recognize, do

you not, as the Ottofaro property?

A. Yes.

Q. With respect to 23 and 24, that is the general area that one of these arterial roads to the power plant is going to traverse, is it not?

A. Yes, sir.

Q. Let me call your attention to the first page of this, where it lists the parcels on the left. Do you see that?

A. Yes, I do.

Q. On the left it lists Frank Ottofaro Parcel 23. Do you see that?

A. Yes.

Q. The proposed right-of-way required for that parcel is 818 feet. Do you agree with that?

A. That's what it says, yes.

Q. The residual is 18,333 feet?

A. That's what it says. Yes, sir.

Q. That parcel would have had access to the road, would it not?

A. I'm not sure I understand your question.

Q. That residual parcel would have had access to a public road. In other words, it would not have been cut off to all access in a public road?

A. I need to see the map. But I can say it

would have had frontage on the road.

Q. That's what I mean. By having frontage, it would have access to a public road?

A. No, sir. It's not necessarily --

MR. BROADDUS: Objection. Those are two entirely distinct and separate terms.

THE COURT: He answered no. That was his answer.

MR. WALDO: I'm going to let him look this over, Your Honor. I have a couple more questions.

THE COURT: I understand your objection.

THE WITNESS: Okay. I have the map.

BY MR. WALDO:

Q. At the time the plan was done, the road was not finalized, would you agree?

A. Which plan?

Q. Let me put it this way: At the time of the resolution of city council, the alignment of the roads had not been finalized?

A. As it pertains to the Ottofaro property, the alignment remained consistent through the August date up through the November date.

Q. Well, the right-of-way was increased, was it not?

A. Yes.

Q. That meant the road changed? It had to. If the right-of-way changed, the road changed?

A. We go by the centerline alignment. That stayed the same. The width of the road and the right-of-way increased.

Q. The road got bigger, meaning the path the road would take was not the same path because the path got wider?

A. I would disagree with you. The path, the alignment stayed the same, but the path did get wider.

Q. The right of way got wider. No question about that?

A. Well, you need to understand that there is a transition in the width of the road through the undeveloped area and has to transition down to the width of existing Queen Street. So there is a transition through the property that at its widest point the road is 120 feet, existing Queen Street is probably a 60-foot right-of-way.

Q. Now, you stated that the road coming through Mr. Ottofaro's parcel No. 23 had frontage on a public road; correct?

A. It did have frontage, yes.

Q. And the road was not a nonaccess road? Let me rephrase that. Nowhere in any plans or

documents was that road listed as a nonaccess road or limited access road with respect to the Ottofaro property?

A. I don't know all the documents that exist. All I can tell you is from my perspective, we were approaching the design of this as a controlled access road.

Q. Can you show me anything that restricts access to the Ottofaro property, any city document, or can you refer me to the specific document today?

A. I'm not familiar with anything that says specifically that Ottofaro property can't have access. I just know from our access management criteria, we would want this parcel to have access where it's located.

Q. Let me ask you, the residual parcel, Parcel 23 is 18,333 square feet?

A. Yes. That's what is on this exhibit.

Q. That size residual parcel would allow construction of commercial buildings in the City of Hampton?

A. That size parcel would have limited use, but I could not sit here and tell you there is no use.

Q. Well, every parcel has limited use. You can't build a factory on a small piece of property?

MR. BROADDUS: Judge, I object. He's arguing with the witness.

THE COURT: I'll sustain that.

BY MR. WALDO:

Q. Mr. Whitley, my question is: That residual parcel of the Ottofaro lot 23 could have a commercial structure built upon it?

A. I really can't answer you sitting here because there are so many criteria, setbacks, parking requirements, green space. You probably could fit a Fotomat on there with that size space; but beyond that, I'm not sure.

Q. Let me ask you this: 18,000 square feet is close, give or take, of half an acre. Would you agree?

A. Four-tenths.

Q. Four-tenths of an acre?

A. Yes.

Q. And would you agree, as an engineer, you must be involved in plans that developers submit to the City?

A. Yes.

Q. And there are a lot of commercial developers, commercial structures, whether it's a hot dog stand, a Subway franchise, that are on four-tenths

of an acre?

A. Yes.

Q. So that type of development, say a Subway restaurant, could be built on four-tenths of an acre?

A. Yes. There are limitations on the configuration, but that square footage would be enough.

Q. Let me ask you this, Mr. Whitley: In your deposition, didn't you say the property was designed to have access, the Ottofaro property?

A. I'm sorry.

Q. Haven't you previously stated that the Ottofaro property was designed to have access, the Ottofaro property?

A. Access to what?

Q. To the intersection. The Ottofaro property was designed to have access to the intersection?

A. I believe I said that in sort of planning for the future. Access at that general area would need to occur at the Pine Chapel Road intersection in order to take advantage of the signal.

Q. That is where the Ottofaro property is, is it not?

A. Unfortunately, it's offset from the intersection. It doesn't have road frontage at that

location.

Q. That's your position?

A. That is what the plan shows.

MR. WALDO: That's all the questions I have.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. BROADDUS:

Q. Mr. Whitley, I'm going to show you Exhibit 1, which is the August 4, '99 road plan. Also, I'm going to show you Exhibit 5, which is the June 14, 2000 road plan. Now, point out to the Court, if you will, please, where the changes occurred in terms of general area of the road between the two dates.

A. The alignment shifted in this vicinity at the end of CC Spaulding Drive where the road shifted to the west.

MR. WALDO: If he could, for the record, explain that, because it's not going to be very clear.

THE WITNESS: The alignment shifted.

MR. WALDO: Could you identify the document, Mr. Whitley?

THE WITNESS: Exhibit 5. To the west at the northern end of CC Spalding Drive in the residential lots. The previous design, the

right-of-way was east of CC Spaulding subdivision more in the early direction and it shifted to the west and encompassed the portion of the lot so it would be the northern end of CC Spaulding Drive. That was the change that was made.

BY MR. BROADDUS:

Q. Was there any change on the Ottofaro parcel No. 23 and 24 between the date of August 4, 1999 and June 14, 2000?

A. No, sir. The alignment was consistent.

Q. Now, was the increase in width of the road at Pine Chapel accommodated by alignment on the side of the road opposite the Ottofaro parcel?

A. Mr. Broaddus, I'm not sure exactly which side the change was made on. This was in a transition from 120-foot width at this portion of the middle of the project to the southern end to tie in to Queen Street.

MR. WALDO: For the record, could the witness refer to them --

THE COURT: Right.

THE WITNESS: This is Exhibit 1. The right-of-way alignment on Exhibit 1 had a 100-foot right-of-way through the majority of the project, was transitioned down to approximately 60-foot right-of-way

on existing Queen Street. On Exhibit 5, the alignment in the middle of the project, the right-of-way increased to 120 feet. It was still a transition down to Queen Street, the southern end, to 60 feet. I'm just not sure exactly where that narrowing of the right-of-way occurred.

BY MR. BROADDUS:

Q. Did it occur before the Ottofaro parcel]?

A. It looks to have narrowed down by the time it gets to Pine Chapel Road.

Q. Now, the August 4, 1999 roadway plan.

A. Yes.

Q. That shows taking on both parcels?

A. It shows both parcels, 23 and 24 affected by the right-of-way, yes, sir.

Q. The road actually crosses over both parcels?

A. Yes, it does. Physical pavement.

Q. Now, did your office approve the August 4, 1999 roadway alignment?

A. Yes, we did.

Q. Now, describe to the Court a little bit more about the process that is used by a developer in constructing a subdivision and the roads in the subdivision?

A. The developer's consultant will prepare an alignment plan for a future right-of-way and submit it to my office for review. In the case of a subdivision that would go to the planning commission to be approved, but the alignment was approved before construction plans are prepared.

Q. Then the developer pays for that?

A. The developer pays for the improvement, yes.

Q. Assuming it's constructed to city standards, it's accepted by the City as a public road?

A. Yes.

Q. And does the public, in this general situation, have unfettered access to that subdivision road?

A. They have the right to use the road to go from Queen Street to Mercury Boulevard.

Q. In the general context of building a subdivision, once the road is accepted, does the public have the right to use that subdivision road?

A. Yes, sir.

Q. Now, in this particular situation, did the City adopt a comprehensive plan in 1989?

A. Yes, sir.

Q. And did that plan show, as a portion of

the plan, the proposed construction of the road from Pine Chapel north to Magruder Boulevard?

A. To Mercury.

Q. Supposed to be northwest of Magruder Boulevard?

A. Yes, sir.

Q. Is this particular roadway consistent with that document?

A. Yes, it is.

Q. When this road is constructed, assuming that it's constructed to city standards, will it be accepted by the City?

A. Yes, it will.

Q. And will the public have the ability to use the road?

A. Yes, sir.

Q. Will there be any limitation on the ability of the public to use it?

A. No, sir.

Q. Now, the City has acquired certain right-of-way to be available for the road; right?

A. Yes, sir.

Q. That's what this case is about?

A. Yes, sir.

Q. Now, distinguish, if you will, for the

Court between your understanding of the terms "access" and "frontage."

A. Well, on the road every parcel that abuts that roadway has frontage on the road, but not necessarily every parcel has access. Access is controlled by the City in order to promote smooth traffic flow, improved safety, and that sort of thing.

Q. What is access?

A. Access is the right to be able to drive on that property and off that property onto the public street.

Q. Calling your attention to Exhibit 1, does this show access points off of the Parkway?

A. It shows some proposed access points, yes, sir.

Q. Does it show an access point at the Ottofaro parcels?

A. No, it does not.

Q. Does it show an access point to the east of the Ottofaro parcel, just a little bit west of it or north of it?

A. It shows access on the Pine Chapel Road intersection to the north of the Ottofaro property and it shows existing Queen Street being connected south.

Q. Where does Pine Chapel come into Queen

Street as it presently exists?

A. Today it's roughly a 90-degree angle on Queen Street right here.

Q. And that will be relocated to the west or to the north?

A. Yes, sir.

Q. Would your office with this particular configuration approve access for the Ottofaro parcel?

A. We would not approve access to the Ottofaro property. Access would be approved in the vicinity of the Pine Chapel Road intersection at this location.

Q. Thank you. Mr. Whitley, I'm going to show you a document and ask if you can identify this.

THE COURT: Let me mark it for you.

(The document referred to was marked for identification as City Plaintiff's Exhibit No. 1 and admitted into evidence.)

MR. BROADDUS: I'm going to place the exhibit number you gave me right under the prior exhibit number because this was introduced at the December 15 hearing, also.

THE COURT: Sure.

THE WITNESS: Yes. I recognize this drawing.

BY MR. BROADDUS:

Q. What does that depict?

A. This is an enlarged view of the proposed road extension from the tie-in at the southern end of Queen Street through the Ottofaro property on beyond the Pine Chapel Road intersection.

Q. What does the color show? It's got some colors in there.

A. The color green shows the landscape within the right-of-way. The orange depicts proposed curb. Pink is the dwelling, the rental unit on Ottofaro property and then the white is in between the pavement.

Q. Was the pink, which shows the house, is that in the actual right-of-way of the road?

A. Yes, it is.

Q. And that had to be removed?

A. Yes.

Q. Now, the house was on Parcel 24?

A. Yes. Parcel 24.

Q. Was Parcel 23 used as a yard for the house?

A. I believe it was, yes.

Q. In fact, did the driveway for the house come in on Parcel 23?

A. I'm not sure. It's not depicted on there.

I believe it did.

MR. WALDO: Your Honor, I would like to strike that if he's not sure.

BY MR. BROADDUS:

Q. I'll show you a document and ask if you're familiar with this?

A. This is a plat of primarily Parcel 23, I believe. 24. Excuse me.

Q. Does that show a portion of a circular driveway on the adjoining Parcel 23?

A. Yes, it does.

MR. BROADDUS: I would like to have this marked as City Exhibit 2.

(The document referred to was marked for identification as City Plaintiff's Exhibit No. 2 and admitted into evidence.)

MR. BROADDUS: That's all the questions we have.

THE COURT: Anything else?

MR. WALDO: Yes, sir. This is No. 1, Plaintiff's No. 1.

REDIRECT EXAMINATION

BY MR. WALDO:

Q. Mr. Whitley, with respect to No. 1, you just reviewed that with Mr. Broaddus and it shows the

two Ottofaro lots, does it not?

A. Yes.

Q. The two Ottofaro lots, I'm going to refer you to the property owner's No. 8. If you take the residual on the two Ottofaro lots, that is well over a half acre, would you agree?

A. It appears to be about 26,742 square feet.

Q. And both of those front on the new --

A. Can I see?

Q. Both of those front on the new road, do they not?

A. Both of those residuals have frontage. Yes.

Q. Now, none of those, Mr. Whitley, have driveways on them, do they? None of the residual parcels?

A. No, sir, they do not.

Q. As a matter of fact, on this exhibit we're looking at, the City's No. 1, there are no driveways anywhere, are there?

A. On this particular blowup, no, there are no driveways. Excuse me. There are two driveways shown on Pine Chapel Road.

Q. We're talking about the new road. Pine Chapel was there before.

A. The relocated portion of Pine Chapel Road which is in the construction plan.

MR. WALDO: With respect to your deposition, Your Honor, I'm going to mark this.

THE COURT: It's the same as No. 1.

MR. WALDO: It was from his deposition. So if he agrees this was at his deposition.

BY MR. WALDO:

Q. For the record, this is No. 5 and it's dated June 14. Is that the same as the Exhibit 7 in your deposition?

A. It appears to be. Yes, sir.

MR. WALDO: I'll just work on No. 5. We'll refer to No. 5, for the record.

BY MR. WALDO:

Q. At your deposition, Mr. Whitley, you testified there were no driveways down near the intersection where the Ottofaro's property was located. Do you agree with that?

A. That is what my deposition said. Yes, sir.

Q. And the reason there were none there was because you were uncertain as to how that might be developed when your deposition was taken?

A. Correct.

Q. Is your position today that the City would not grant a driveway for that residual parcel to the Ottofaros, Mr. Ottofaro were allowed to build on that?

A. My position is that in the interest of traffic safety and efficient traffic flow, the best location for driveway access is at Pine Chapel Road intersection where there is a traffic signal where traffic can get in and out.

Q. There is no plan before you to make a decision on, is there?

A. There is no development plan on that side of the road.

Q. Until you get a development plan, that is when the City normally makes those decisions; correct?

A. We generally would make that final call at that point, but we have a pretty good idea on a new road like this where we would like access points to be.

Q. And even if you, in your wisdom, were to deny Mr. Ottofaro a driveway permit, he would have recourse to appeal that decision, would he not?

A. I'm not a lawyer, but I presume he could challenge it, yes, sir.

Q. Haven't your decisions been challenged before over the years?

A. In terms of access, I don't recall where

it's ever gone to court. I think disagreements with developers, we've managed to work it out.

Q. You've managed to work it out?

A. Yes.

Q. So it's been challenged and there's been a compromise?

A. I don't know if there has been a compromise, but something has been worked out.

Q. Because what you do is you basically mirror the procedures set forth by the Virginia Department of Transportation when it comes to roads, construction of roads and access to roads. Would you agree with that?

A. Generally our procedure is, yes, in terms of access management and follow-up, Virginia Department of Transportation. Not necessarily to the letter.

MR. WALDO: That's all.

THE COURT: All right. Thank you. Do we have a further need for Mr. Whitley?

MR. BROADDUS: Judge, I doubt it, but I hate to let him go.

THE COURT: Next witness.

MR. WALDO: Mr. Wallace.

GEORGE WALLACE, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WALDO:

Q. Mr. Wallace, good morning. For the record, could you state your name and your position with the City.

A. George E. Wallace, Jr., city manager of Hampton.

Q. Mr. Wallace, you're familiar with the power house project, are you not?

A. Power plant.

Q. Power plant.

A. Yes, generally.

Q. You say generally. That has been a rather important project for the City here in the last year or two. Would you agree or disagree?

A. One of the main projects, yes.

Q. And fairly high profile. Would you agree with that?

A. Depends on how you describe high profile, but it's had some publicity.

Q. Now, with respect to the development of this, the power plant is being developed by a private developer named Cordish; correct?

A. Yes.

Q. Mr. Cordish is developing the roads for

that project, would you agree?

A. Yes.

Q. None of those roads have been put out for public procurement or public bid that Mr. Cordish is developing?

A. Public bid, meaning public bid by the City?

Q. Yes, sir. By the government.

A. I believe he followed the bid process, but none by the City.

Q. Do you have a copy of the bid process that he followed?

A. No.

Q. You don't. You say you believe that?

A. Yes, I do.

Q. What do you base that on?

A. Conversations with the developer.

Q. Did you ever provide that during discovery, the bid process, to your attorneys?

A. Did I ever provide --

Q. Did you ever provide procedures that he adhered to --

A. No, I did not.

Q. You did not?

MR. BROADDUS: Judge, he said they were

based on conversations. He didn't say there were any documents.

BY MR. WALDO:

Q. Mr. Wallace, are there any streets in the City of Hampton that have been developed by a private developer for which the City condemned the land for the private developer, other than the project that is before the Court today, to your knowledge?

A. I don't know. I can't make a judgment of that because I don't have that vast array of knowledge required to make that particular judgment.

Q. Can you name any, from your knowledge?

A. Yes. My response is, not to my knowledge.

MR. WALDO: That's all, Your Honor.

MR. BROADDUS: No questions.

MR. WALDO: At this time we stipulated that we would admit the deposition of Ben Williams.

THE COURT: What is it about this that you want me to know for this hearing?

MR. INFANTINO: I deposed Mr. Williams and we subpoenaed him today.

THE COURT: I saw him on the list, so he's here.

MR. INFANTINO: Basically, that whole packet of materials is what we're calling him for and

what we would impart to the Court, as chairman of the IDA he signed all of the documents involving the ground leases for the power plant project and his understanding is that the residual portions of the property that are being condemned will be transferred from the City to the IDA and the IDA will lease those portions.

THE COURT: Is that the essence of what this represents?

MR. BROADDUS: To the best of my knowledge, yes, sir.

MR. INFANTINO: If you read all of that, that is what you would get.

THE COURT: That is Mr. Williams has testified.

MR. WALDO: And, Your Honor, we agreed to introduce the resolution.

THE COURT: This is the original resolution that we referred to previously. This is the one dated 22, September, and I'll make this Exhibit 9.

(The documents referred to were marked for identification as Defendants' Exhibits No. 9 and 10 and admitted into evidence.)

THE COURT: Is that an exhibit or do we just recognize him as a witness? Do you want it as an

exhibit?

MR. WALDO: We want the deposition entered into evidence.

THE COURT: It's in.

MR. WALDO: Okay. Finally, Your Honor, I've handed to Mr. Broaddus a copy of an analysis that the City did under 33.1-91 with respect to the residual parcels, parcels of the Ottofaro. So I'll introduce that and stipulate.

THE COURT: Any objection?

MR. BROADDUS: No, sir.

THE COURT: All right.

MR. WALDO: Your Honor, that's all the evidence on behalf of the property owners.

THE COURT: All right. Do you want to proceed or just rule on these? The three questions Mr. Waldo proposed and, again, he had the burden of proving these three contentions. I guess at this point does the City have anything else?

MR. BROADDUS: Judge, we would move to strike the evidence with respect to the affirmative defenses. I'll be glad to argue it.

THE COURT: Well, you have no evidence so let's hear from Mr. Waldo. Let's take it an issue at a time.

MR. BROADDUS: Judge, if you'll bear with me just one moment.

THE COURT: All right.

(There was a discussion off the record.)

MR. BROADDUS: We have no evidence, judge.

THE COURT: Okay.

MR. WALDO: Your Honor, what I would ask at this time on behalf of Mr. Ottofaro, the moving party, is the Court to take the evidence presented today. I prepared a brief. There are two cases that I mentioned this morning and I would like to set those out again because I believe --

THE COURT: Let me read this. Let me take a few minutes. We've got a little time.

(A recess was taken.)

THE COURT: This pretty much tracks your opening argument. I can follow it pretty quickly. All right, you may proceed.

MR. WALDO: Your Honor, I feel like we have covered it in the brief and the two cases that I've cited to the Court which are cited in the brief and that is the Carneal case and the Ruttick case, Your Honor. Both of those cases are cited in the brief.

THE COURT: I had a chance to review them.

MR. WALDO: I think, Your Honor, for the

three points that we mentioned in the opening that we have covered it and we've clearly shown that the tape was more than was necessary, was never even considered the alignment of the road has changed since the resolution was adopted and that the public purpose cannot exist for a road that is being developed by a private developer that the City acknowledges never went out for public procurement for which a private developer is assembling parcels and acquiring those parcels through the City's condemnation.

And, Your Honor, probably most important is the resolution itself shows clearly that the city attorney has been delegated the authority to determine which properties would be acquired by the City for condemnation and that clearly, Your Honor, is contrary to the law in Virginia and would make the taking not only not for a public purpose, but unconstitutional. I don't think I could argue extensively on these cases, but you've got them before you and you said you read the brief.

So I submit that to the Court and say we have met the test and we have met the burden to prove that the defense to the taking should be sustained. Your Honor, just for the record, the Ruttick cite is 125 Va. 552. That was a 1935 case.

THE COURT: All right. Go on, Mr. Broaddus. Let's start with that last point first. I guess he is referring to Page 2 of the resolution, "be it further resolved that the city attorney is hereby authorized," et cetera. Go ahead.

MR. BROADDUS: Judge, I'd be delighted to.

THE COURT: How do you distinguish Ruttick?

MR. BROADDUS: By the resolution and by what happened.

THE COURT: Go ahead.

MR. BROADDUS: The very last "whereas" clause of the resolution on Page 1 makes reference to the fact that the City is authorized to acquire an entire parcel of land. Then the very first part of the "whereas" -- I'm sorry -- of the resolve clause. Therefore, be resolved by the council of the City of Hampton, Virginia, that it approves and directs the acquisition of the parcels. It doesn't say portions of the parcels. It says the parcels. That is the definite Article B and parcel is parcel. Not a portion, not part, not that part that is needed for right-of-way, not the part the city attorney determines is needed. It says acquisition of the parcels.

And then the last "resolve" says, shall it

be further resolved by the council of the City of Hampton, Virginia, is that the city manager be authorized to file certificates of take in accordance with the code against the following parcels. So, Judge, it's clear that this resolution authorizes and directs the staff of the City to acquire all of the parcels.

In Ruttick, by contrast, the city council resolution referred to a plan which had an outline in blue of the area to be taken and in different colors of easements and things of that nature. After that was adopted, the city attorney changed one end to enlarge the end of the take and another end of the parcel to shorten or constrict the amount of land to be taken. Council had said we're going to take -- I don't recall the exact figures, Judge, but it's in the vicinity of 50 acres of one particular tract and 130, as I recall, of another tract. And the city attorney substantially changed those. So there was in that case a manipulation, a change in the area for something entirely different from what the council had addressed. Here the city council of the City of Hampton has made it very clear. Take the entire parcel and that is what has been done.

Now, there is a suggestion that analysis

was performed by the city attorney's staff in conjunction with others. Certainly, I hope, one does not expect city council to pull out a calculator and make measurements off of a plat as to the size of a parcel and what particular portion of that might be in the right-of-way and what portion is left. Calculations were made by the city attorney's office in conjunction with others. That doesn't mean that there was a delegation of authority. That confirms what the city council did and the legitimacy of it under the Code of Virginia.

The resolution is what speaks to the issue and it says, directs the acquisition of the parcels and the Ottofaro parcels are listed on Exhibit A, which is referenced by the resolution. Of course, the tax map shows the parcels.

So, Judge, with respect to the Ruttick case and the suggestion somehow that there has been a delegation, the facts are completely inconsistent with that. The resolution addresses that issue and there is no evidence that it should be construed in any way other than what it says. Now, I'll be happy to address the other aspects --

MR. WALDO: Your Honor, can I just respond?

THE COURT: Let him finish.

MR. WALDO: I thought you wanted to take each item separately.

THE COURT: I wanted him to go through 1, 2, and 3. The second issue was whether this taking was proper under 33.1-91 and he says it's not. What is your response? If you want to address both in his final issue, that this was for a public purpose, you can do both of those. Feel free. Then I'll let you respond.

MR. BROADDUS: With respect to the aspects of 33.1-91, as the Court knows, that is a section that has several different components to it. It has four separate situations in which if they occur would authorize and permit a locality to acquire an entire parcel. First, we meet the initial criteria that the remnant is less than two acres. The entire tract here is only three-quarters of an acre so there is no question about the two-acre limit.

Now, Mr. Hodges' letter of January 30, which has been put in as an exhibit, shows the first prong. The stake and the construction of the road required the removal of the home. So follows that the parcels no longer be used for the purpose which they were used prior to the take, for residence.

The second point is similar in that there is a separate factor in the code that says when you remove a building, and because the parcel was in the path of the roadway, the building has to come down, so that is met. These are all in this juncture. You only have to meet one. You meet those.

Then No. 3, because of the construction of the road and the alignment of the road, there will not be access to the Ottofaro parcel after the construction of the road. As Mr. Whitley testified, due to the street that runs off to the east on the other side of the Parkway from the Ottofaro parcel, access to the west will come a little bit farther to the north than where the Ottofaro parcels meet and will not cross the Ottofaro parcel. So they do not have access to the Powhatan Parkway after that is constructed.

Four relates to the damage to the residue and there is no evidence to refute the statement in Mr. Hodges' letter that the damage will approximately equal the fair market value of the residue and the damage will be because there won't be any access.

So, Judge, we clearly meet those requirements of Section 33.1-91 and there has been no difference in the facts before the Court today that's what existed in December. Now, Mr. Waldo, to be sure,

lists seven bullets that he contends are different. But I think that careful analysis of the evidence will show that this is either not new or is not relevant to the Ottofaros. For example, we certainly acknowledge that the August 4 plan was the plan before the council at the time they adopted the resolution in September '99 authorizing condemnation. That was the testimony in December. The final roadway plan was completed in June of 2001 or 2000 -- it should be 2000. And there was a widening of the roadway from 100 feet to 120 feet.

If the Court will recall Mr. Whitley's testimony, he said that widening occurred in the middle area of the roadway and that it tapered down at the Pine Chapel Road, Queen Street area and that the 120 feet he didn't think went onto the Ottofaro parcel. And he showed where in the original plan and in the new plan the alignment is as it crosses the Ottofaros', the same. The change in the alignment other than the width occurred in the vicinity of the Spaulding Road subdivision, the end of that. Not in any way with respect to the Ottofaros'.

Now, the point No. 5 we have already discussed because the resolution directs the taking of the entire parcel, not something less. And point No. 6

simply sets forth the amount of square footage within the road right-of-way. That is certainly not new information. That was always readily known. Point No. 7 is certainly not new. The development agreement was before the Court in the earlier case. I would have to add, Judge, that there is no obligation on city council to convey any remnant to the industrial development authority. Whether it does so is a decision to be made by city council and city council hadn't acted on it. The title to the property at this time is in the City.

Now as to the public purpose, Judge, let me address several different aspects of it. In the Stewart case, the Supreme Court said whether a road is sought to be constructed is a public road or one merely for the benefit of a private individual is not rested in the fact that such an individual will obtain a greater benefit than the public generally. The test is not the length of the road or how many actually use it, but how many have the free and unrestricted right and common to use it. It's a public road if it is free and common to all citizens. Of course, that is what Mr. Whitley testified would be the case here and this road is the fulfillment of the city council's comprehensive plan which was adopted in 1989, long before the power plant was even conceived.

And, Judge, the development agreement which is part of the exhibits attached to Mr. Williams' deposition provides a number of interesting aspects. It, as the Court may recall, does not obligate the City in any way to initiate condemnation. It provides that if the developer is unable to acquire particular parcels, he'll notify the IDA and the IDA will request the City to exercise the power of eminent domain, but under the Subsection 7.1, there is a clear acknowledgment that developer acknowledges and agrees that the City may exercise eminent domain in only certain areas and there is no obligation on the City to so act.

And then, Judge, if you consider the paragraphs in Article 9, it's clear that the industrial development authority is going to provide to the developer certain funds. Those funds would be used for the acquisition of land and the cost of construction of the road and the utility infrastructure. So funds are being provided through the industrial development authority for the construction of this road which will be a public road consistent with the City's comprehensive plan. It's public money, building a public road and the City has utilized the opportunity to have a private contractor ultimately do the

construction. There is nothing wrong with that. That doesn't make it any less a public road.

Mr. Whitley made it clear that the process is consistent with the mechanisms used by developer to construct subdivision. The developer comes in and says, "This is my road alignment." Either the city engineer or the planning commission says, "Make these changes," and they approved the road alignment. The developer goes on construction and comes back again and says, "I've constructed city standard, accept it into the public system."

So, Judge, for these reasons, we submit that the road clearly is a public use. We clearly meet the provisions of Title 33.1-91 and there has been no unauthorized delegation. I would conclude, Judge, by making reference to the Hammer case, which we referred to in our earlier memoranda filed in December and that portion of Section 15.2-1903 which provides that the resolution is sufficient evidence of the public use and necessity. That is Subsection C of 15.2-1903. And the resolution clearly makes reference to acquisition of the entire parcels of the Ottofaros' property as set forth. For these reasons, Judge, we submit that the landowner, former landowner has failed completely to carry their burden of proof, which is a stringent

burden and that the affirmative defenses should be struck.

THE COURT: All right. Back to you, Mr. Waldo.

MR. WALDO: Your Honor, I'm going to be brief because I think we well stated the facts and the law, but I would like to begin by saying, having heard what Mr. Broaddus has now presented to the Court, that what the Ottofaros have done is very carefully present to the Court certain facts, that with those facts in evidence before the Court is now the evidence I'll submit, Your Honor, that would allow the Court and should allow the Court to invalidate the taking.

What Mr. Broaddus hasn't mentioned is that the condemnation statutes every case where the Supreme Court has struck down the condemnation. The Supreme Court of Virginia has made it very clear that each of the condemnation statutes are strictly construed, Your Honor, against the government, against in this case the City of Hampton, strictly construed against it.

Your Honor, we raised three issues. When you go to the issue of public purpose, it's clear, Your Honor, that you've got a developer, Mr. Cordish, that is working hand in hand with the City that is designating which property will be taken and what

property will be taken when he can't negotiate. He is developing the road, Your Honor, not the City. We're going to assume that the road will be turned over by Mr. Cordish at some future date, but it's not the City's road today, Your Honor.

The difference between the analogy that Mr. Broaddus gave to the Court, Your Honor, with respect to a private developer and the fact before the Court with the Ottofaros, no private developer in Virginia has ever developed a road in a subdivision with the benefit of the condemnor condemning the property from private owners so that the subdivision will then have roads built by the developer. That is not the way it works, Your Honor. The developer buys the piece of property, develops the road according to standard and if he meets those, he turns them over to the City. The City has no obligation and is not involved.

In this case, Your Honor, you've got a great deal, No. 1 --

THE COURT: How is that different from what's happening here?

MR. WALDO: Because a developer does not use and cannot use the power of condemnation to take the land. You see, here, Your Honor, there are two

different, entirely different situations. Because a developer develops a piece of property and chooses to buy it, builds roads, and if the roads are built properly and if he does everything, then he can turn it over to the City and say to the City, "These are your roads." He doesn't sell them to the City. He dedicates them to the City. He is never allowed, Your Honor, the right to condemn. He has already acquired. The developer has already acquired. So it's not the same, Your Honor. It's mixing apples and oranges to say that a developer turns property over, a private developer does. He turns over property to cities all the time.

But nowhere has there ever been a case cited before the Supreme Court where a developer took the property by eminent domain. Can't do it, Your Honor. That is the big difference between these cases when you mention a developer. We would stipulate developers turn over property to the City if the order --

THE COURT: I understand that is what it was referring to.

MR. WALDO: That is entirely different, Your Honor. Now, it is highly unusual to call a road a public road that was built for the public when, in

fact, it's not a public road today. It was not built for the public today and it was not built according to public procurement.

Your Honor, the City in this case on one side says it's private. It's owned by a developer today, therefore, there is no public procurement. He'll give it to us later. They argued that it's a private developer that owns the road today and later on they're going to argue that it's a public road so that you can't condemn it. But it's a private road so that there is no public procurement.

Your Honor, I would submit to the Court that the City of Hampton is judicially estopped from taking two positions that are inconsistent with each other. Now, Your Honor, why do I say that the city council delegated contrary to the law its authority to condemn to the city attorney? Mr. Broaddus mentioned that the city attorney, in his argument, calculated the land that was going to be taken and determined it. Why is that, Your Honor? Because there was no certain plan that was in place that the city council could adopt a resolution and know specifically what they had to have and they didn't have to have. Your Honor, by the facts before the Court, the city attorney, Mr. Burton, had to make the decision of what needed to be taken and

what didn't need. Just because, Your Honor, he might have been acting in good faith doesn't make it a legal delegation of the authority of the council.

THE COURT: Before you leave that point, you introduced Exhibit 9 which has an attachment exhibit with the resolution, the specific properties for all of these.

MR. WALDO: Yes, sir. If you look at that resolution, how can the Court determine the residual parcels --

THE COURT: You're talking about residual?

MR. WALDO: Yes, sir. And this is a good point the Court has brought up. How can the City know what residual parcels should be taken or should not be taken? There is no way. Your Honor, if you were to say the City says refer to the comprehensive plan.

THE COURT: That is what they did in the first paragraph.

MR. WALDO: And, Your Honor, the comprehensive plan is before the Court and in evidence. There is no way that anyone can look at the comprehensive plan and tell what the residual parcels are and what can be kept and what can't.

Your Honor, the reason that has to be in evidence or before the condemning body, the council, is

because if it weren't, then condemnations would be arbitrary because they would take everything in their sight whether they needed it or not. That is not what the Supreme Court allows in Virginia.

I submit, Your Honor, to the Court that in the case before the Court that the resolution was adopted contrary to the way these resolutions are ever adopted in Virginia for road projects. For instance, Your Honor, when a Commonwealth transportation board meets to condemn a project, a road plan is presented when they adopt the resolution because when they present a road plan showing exactly the layout of the road and the parcels, then when the petitioning condemnation is filed, they already knew when they adopted the resolution what had to be taken and what was the residual parcel.

In this case, Your Honor, it's the city attorney, not the council that decides what the residual parcel will be and that is where the City went wrong. I'm not saying that what the City did was in bad faith. I'm saying what they did was wrong contrary to the law and when the Supreme Court says that every single statute will be construed strictly against the condemnor, then that is what the Supreme Court requires.

THE COURT: Wasn't the residual determined by what was left after the road went through the property?

MR. WALDO: Your Honor, that is why we put into evidence --

THE COURT: I guess my question is, is that something that council has to decide?

MR. WALDO: It has to be before the council because, if not, you can't decide. The plan would have had to have been before the council and I submit, Your Honor, in every traditional condemnation, that plan would have been before the council. It wouldn't have been a plan that was changing as freely been admitted. The plan did change in the sense that, Your Honor, the right-of-ways went from 100 feet at the time the council felt the road was going to be developed to 120 feet. But before the council, when they voted, there was a resolution with no map and it only referred to the comprehensive plan. That is all that is noted, the comprehensive plan. And there is nowhere in the comprehensive plan that a residual parcel can be determined. Now, that, Your Honor, is what 33.1-91 is all about.

That, forgetting about the two-acre parcel, we agree with the City on that. This is not

bigger than two acres. But that is only one test. The test is, Your Honor, are you taking a residual parcel that could be used and you have to determine that. Your Honor, the evidence and the reason Mr. Ottofaro didn't have to take the stand today was because the City's own attorney finally admitted that you could put a Fotomat type of facility there or he agreed with me that on the residual parcel of Mr. Ottofaro you could place a Subway --

THE COURT: That was Mr. Whitley.

MR. WALDO: Mr. Whitley. I'm sorry, Your Honor. The city engineer. Mr. Whitley agreed with that. So he agreed that the residual parcel could be developed and tried to say, well, it didn't have a driveway. Well, Your Honor, none of those lots had a driveway at that plan. He agreed with his deposition earlier that that hadn't been formulated at that time. And furthermore, Your Honor, the issue is it was a public street there. You have to grant access to a public street if you have a parcel of land for which you can develop. They could not deny the access, couldn't deny the access.

Mr. Whitley finally admitted that even if he ruled no, that is still subject to negotiation. That is not a final decision, Your Honor. So he is

asking the Court to take his decision as the final decision when it's not. Your Honor, the reason that Mr. Ottofaro wasn't required to come on the stand is because we introduced a document that said the taking of Parcel 23 was 19,151 feet. But all the City took was 818 feet. That is about four and a half percent, 95 percent of the residual of a commercial piece of property was left intact. And I'm asking the Court to take notice of Plaintiff's Exhibit No. 1 today. Because they were very careful to point out that the house had to be taken on one of nine parcels, but the other parcel, Your Honor, shows no building, no house there, no habitat, and that parcel was raw land and it was zoned commercial and that could have been developed and could have been used.

You see, Your Honor, the reason the statutes I submit to the Court are strictly construed against the condemnor is it's not the government's right to take the property from the Ottofaros when it's not needed for a public purpose, to give it to a private developer. And that is where I think, Your Honor, because the City never made that determination and could not have made that determination from the comprehensive plan, because, Your Honor, that is all that is before the government body, the city council,

in the resolution is a comprehensive plan and a list of lots instructing the city attorney to determine what will have to be taken.

Your Honor, I'll submit to you that the City must fail on that point. 33.1-91, I've covered Your Honor. The public use, I think we have laid everything out we possibly could, especially in our briefs and the evidence before the Court and the only thing I would like to point out to the Court since Hammer was mentioned here today, Your Honor, that was Judge Bagnell, who was reversed, in the Chesapeake Circuit Court, a school board case. The question whether a taking is for public purpose is a judicial question reviewable by the courts, but the necessity of the condemnor's project when its purpose has been established is a legislative question. So the question of whether the taking is for a public purpose is clearly before this Court. And I will conclude because, again, I think with the depositions, the evidence we have presented, the facts of the case and the law that we have cited to this Court, that the City clearly exceeded its authority in condemning the Ottofaro property and we ask that our defenses be sustained and the condemnation be dismissed against the property.

THE COURT: All right. Thank you. Good presentation, you answered my question, but it doesn't change what I see here. I have no problem with this resolution. The city's resolution is a valid one. It didn't improperly delegate to the city manager. It laid out the comprehensive plan, which I'll make reference to it, which showed a road going through this property and made reference to this property, as well as many others.

The city attorney had very specific guidance. It's not a delegation in the sense they had latitude. Of course, in the resolution it does invite a public purpose. I don't have any problem with the government action in this case. Up to this point, I have not heard anything that will change my mind. So I deny the affirmative defense.

MR. WALDO: Respectfully note our exception.

THE COURT: Go ahead.

MR. WALDO: That's all I was going to say, Your Honor. I understand and respect the Court's decision today and I do respectfully note our exception.

THE COURT: Let me mention about the residual. In looking at this, the question was --

Mr. Whitley did testify that there can be negotiations, but the best evidence today is that this property is not near, not at that intersection. And that is the best evidence. It would not have access based on the location of the intersection. That is what I have today and that is what I'm ruling.

That just leaves the petition. Is there anything else? Right now what I've heard, I'm denying the affirmative defense. I've ruled that the resolution was a valid one. The City has acted properly in this case, in my view.

MR. WALDO: I assume Mr. Broaddus will prepare the order.

MR. BROADDUS: Yes.

THE COURT: Do we need any more on the petition? I'll then sustain the petition.

MR. WALDO: Your Honor, it might be helpful to the Court to exchange some of the exhibits we have on board folded up.

THE COURT: Before we do that, let me ask you-all a question. We haven't -- I dusted off our list of commissioners and we inherited that this term. Some of those people on that, I don't think can hear this case. Under the code, there are a couple ways we can go. We can give you all a list of the current

commissioners or you-all can come up with your own or we can use the jury list and just pick property owners from that.

MR. WALDO: The jury list would be fine with us, Your Honor.

MR. BROADDUS: Judge, if I may, I would like to consult with the city attorney --

THE COURT: I just wanted to tell you that because that list, I'm not happy with it. I'd rather have a more -- well, the first alternative is that the parties may agree on the selection of commissioners and you may look at the list and you may say, okay, pick from that, but I just wanted to bring it to your attention before we get too far. I guess I need to send you all a list.

MR. BROADDUS: That would be helpful, yes, sir.

THE COURT: Then I'm open to however you want to proceed because I want to make sure you have a fair panel. That's my goal. What is your other point?

MR. WALDO: These are the documents that were submitted on the boards today and I think Mr. Broaddus would agree it might be easier to substitute these exhibits.

THE COURT: These exhibits. All right.

MR. BROADDUS: We do not have with us a fold up copy of City Exhibit 1. We would, if the Court would permit, be happy to have a copy made and send it to the Court.

THE COURT: We can do that.

MR. WALDO: Your Honor, if they can just send us -- it will be a color copy.

MR. BROADDUS: Yes.

MR. WALDO: If you can send us a copy of that.

MR. BROADDUS: Sure.

MR. WALDO: Mr. Broaddus, let me show you these documents.

THE COURT: I have 2 in front of me. Where is 1?

MR. WALDO: Here is 1, and I have a folded up copy that I would like --

THE COURT: We have the stipulation of fact which I didn't label, and I have the deposition which I didn't label. They are self-explanatory. And Mr. Waldo's brief. I didn't label that: I have 1 as the plat dated August of '99. 8/4/99. Defendants' Exhibit 2 is Ms. Grook's memo. Exhibit 3 is the agenda. 4 is the letter of Reid Cordish dated March 2, 2000. 5 is the plat, it looks like 6/14/00. All

right. 5 is 6/14/2000 plat. 6 is the conceptual site plan dated 11/3/99. 7 is Mr. Whitley's letter to Mr. Gill. 8 is the right-of-way acquisition summary. 9 is the defendant introduced the resolution which I have. And I have 10, which is the letter to Mr. Lyle from Mr. Hodges. That covers that.

Now, for the City, I have No. 2, which is the plat showing the property of Frank Ottofaro. What was No. 1? The picture, and you're going to get that done.

MR. BROADDUS: Yes, sir.

THE COURT: Anything else I need to have, for the record?

MR. WALDO: I think that's all.

THE COURT: Thank you, and I look forward to seeing you again. I'll get you a list of the commissioners and you-all can tell me how you want to proceed.

(The proceedings were adjourned.)

EXHIBITS

VIRGINIA: In the Circuit Court for the City of Hampton

CITY OF HAMPTON

Vs. Petition in Comdemnation - Law #00-367

FRANK J. OTTOFARRO, et al

PLAINTIFF'S : (City of Hampton)

Exhibit #1 - Smaller version of Defendant's Exhibit #4 on 2000 Exhibits envelope.

Exhibit #2 - Plan Showing the Property of Frank J. Ottofaro.

Exh

DEFENDANT'S

Exhibit #1 - Conceptual Site Plan of Power Plant of Hampton Roads dated 8/4/99.

Exhibit #2 - Memo & Example of Original Road Alignment for the I-64 Retail Project dated 9/22/99.

Exhibit #3 - Power Plant of Hampton Roads Team Meeting dated 1/13/00.

Exhibit #4 - Letters dated 3/2/00 and 3/9/00.

Exhibit #5 - Overall Roadway Site Plan dated 6/14/00.

Exhibit #6 - Copy of Conceptual Site Plan dated 11/3/99.

Exhibit #7 - Letter dated 11/18/99.

Exhibit #8 - Summary of Right-of-Way Acquisition.

Exhibit #9 - Resolution and Exhibit A.

Exhibit #10 - Letters dated 1/30/01 and 7/2/01 and Picture of Big Bethel Rd. and W. Mercury Blvd. intersection.

Exhibit #11 - Picture of Aberdeen & Brianfield Roads intersection.

I, James P. Bohnaker, Clerk of the Circuit Court of the City of Hampton, hereby certify that within are the original exhibits in the above captioned matter.

Given under my hand this 21st day of December, 2001.

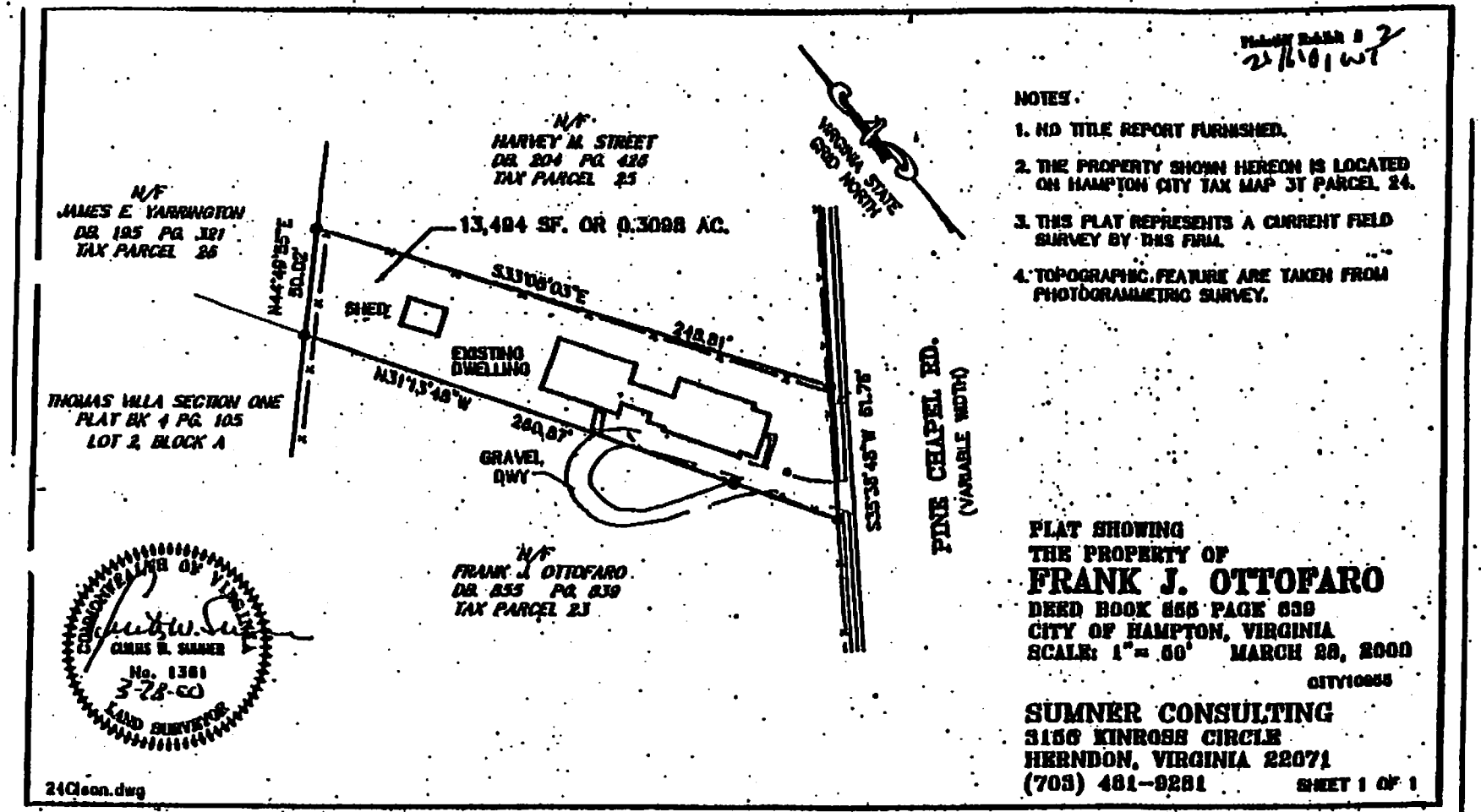
James P. Bohnaker, Clerk

RECEIVED
DEC 26 2001
RICHMOND, VIRGINIA

CLERK'S OFFICE
SUPREME COURT OF VIRGINIA

PETITIONER'S EXHIBIT # 1: BLUEPRINT

CAN BE OBTAINED AT THE CLERKS OFFICE
OF THE SUPREME COURT OF VIRGINIA



NOTES:

1. NO TITLE REPORT FURNISHED.
2. THE PROPERTY SHOWN HEREON IS LOCATED ON HAMPTON CITY TAX MAP 37 PARCEL 24.
3. THIS PLAT REPRESENTS A CURRENT FIELD SURVEY BY THIS FIRM.
4. TOPOGRAPHIC FEATURE ARE TAKEN FROM PHOTOGRAMMETRIC SURVEY.

FLAT SHOWING
THE PROPERTY OF
FRANK J. OTTOFARO
DEED BOOK 855 PAGE 839
CITY OF HAMPTON, VIRGINIA
SCALE: 1"= 50' MARCH 28, 2000

CITY10955

SUMNER CONSULTING
3156 KINROSS CIRCLE
HERNDON, VIRGINIA 22071
(703) 481-9281

SHEET 1 OF 1

21Olson.dwg

RESPONDENT'S EXHIBIT # 1: CONCEPTUAL SITE PLAN OF POWER PLANT OF HAMPTON ROADS

CAN BE OBTAINED AT THE CLERKS OFFICE OF THE SUPREME COURT OF VIRGINIA

MEMORANDUM

TO: **Members of City Council**

FROM: **Kathy Grook**

DATE: **September 22, 1999**

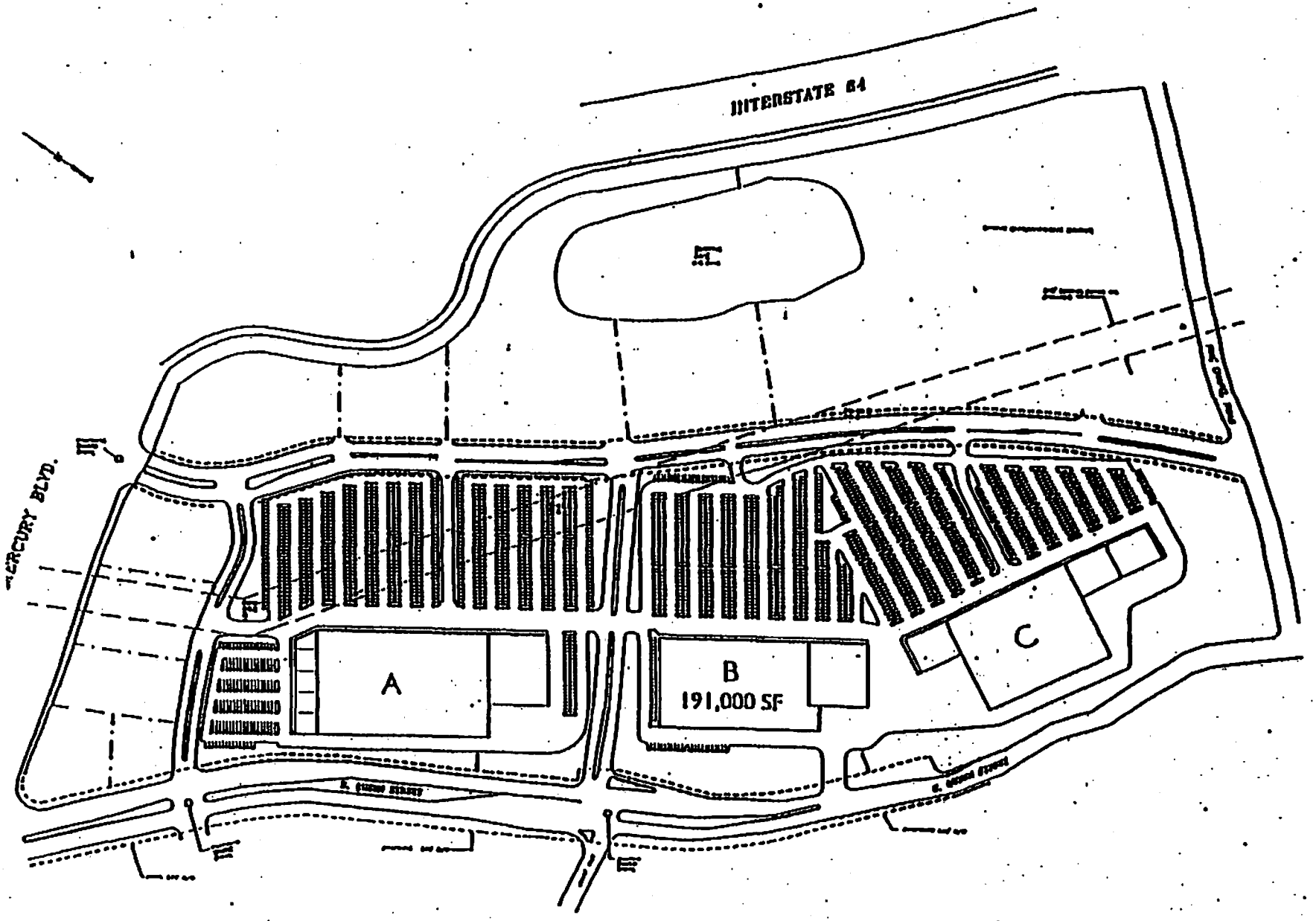
COPY TO: **George Wallace**

This is the most recent example I have of the original road alignment for the I-64 retail project. This shows the site being developed as two projects. Please note that this plan would have required a significant widening of West Queen Street, from Mercury Boulevard to just past Weaver Road. I do not have a site plan showing this road alignment over the specific parcels.

Thank you and please let me know if I can provide you with additional information.

DEF. EXHIBIT # 2
2/16/01 WT.

Grook 2



-369-

FOIA 2669

±53064089/1 Condit /Gil Schaber/Non Watermain

Jeff, Fred, Sally, Kathy, Shelly
John Bates

(10)

The Power Plant of Hampton Roads
~~Team Meeting~~
January 13, 2000

DEF. EXHIBIT # 3 WT.
2/16/01

AGENDA

1. Review of condemnation procedures
2. Information needed for appraisals
3. Procedure for communicating to City final offer to property owners by developers
4. Review of proposed road alignment
5. Discussion of CC Spaulding Drive relative to road alignment
6. Discussion of ability to be creative in condemnation (park & ride, park, etc.)
7. Discussion of ability to take residual
8. Parcel by parcel discussion of residual
9. Finalization of road alignment

① overall plat of road alignment showing all pro...
② plat of each property, showing road alignment, area of take, area of residual

- 120' R/W req'd along Powhatan Pkwy (for future widening)
- need to approve set of road alignment plans – Gil will submit for approval (but no approval on access points/site street intersections tonight)
- Mercury Plaza access
  - give them copy of Windsor memo.
- CC Spaulding strategy
  - ① acquire lots needed for road alignment
  - ② acquire enough lots to avoid downzoning back to residential
  - ③ acquire all lots

Residues - look at access to them

CITY16214

53064090/1

Procedure for City Acquisition of Property for Roads
I-64/Mercury Blvd. Site 12/20/99

1. Jeff Cundiff makes final assessment of fair market value and value of damage done to the residue, if any.
2. Developer makes final written offers to property owners.
3. Developer finalizes road alignment and engineering drawings with detail sufficient for condemnation purposes.
4. Developer notifies IDA/City of need for formal appraisals.
5. IDA/City orders formal appraisals as needed.
6. Developer notifies IDA/City of need for condemnation and delivers to the IDA the detailed engineering drawings and the last written offer to the property owner.
7. IDA/City makes bona fide offer to property owners (in the amount reported by the appraisals), and gives each property owner 10 days to accept or reject such offer.
8. City gives notice of filing of certificate of take by registered mail.
9. City records certificate of take and pays estimated compensation into court. (must be done within 90 days of notice by developer)
10. City acquires title and right of entry. (must be done within 180 days of notice by developer)
11. Proceedings to determine just compensation:
    - Commissioners selected
    - Commissioners' hearing
    - Report from commissioners
    - Filing of exceptions (10 days)
    - Court rules on exceptions, report confirmed and final order entered

CITY16215

Hampton Roads Associates, LLC

RECEIVED
MAR 2 2000
CITY OF HAMPTON
DEPT OF DEVELOPMENT

The Cordish Company
The Power Plant
401 East Pratt Street
6th Floor
Baltimore, MD 21202
410-752-4444
Fax 410-659-6451
e-mail: Reed@Cordish.com

March 2, 2000

Industrial Development Authority of the City of Hampton
2 Eaton Street
Suite 600A
Hampton, VA 23669
Attention: Kathy Crook

DEF. EXHIBIT # 4
2/16/01

Re: Road Improvement Parcels
Hampton, Virginia

Dear Gentlemen:

Please refer to that certain Development Agreement (the "Agreement") dated as November 18, 1999, by and between us concerning the Power Plant of Hampton Roads. Unless defined herein or the context otherwise requires, each capitalized term herein shall have the meaning ascribed to it in the Agreement. This letter is to serve notice, pursuant to Section 7.1 of the Agreement, that the Developer is unable to acquire title to the following Road Improvement Parcels at this time.

1. Parcel 12 Hunsucker
2. Parcel 15 Hunsucker
3. Parcels 23 and 24 Ottofaro
4. Parcel 27 A-3 Davis
5. Parcel 2A Joseph
6. Parcel 2C Williams
7. Parcel 5-1 Easter

The Developer expects the City to immediately commence quick take proceedings to begin immediately on the above properties. We reserve the right to add additional properties to the above list at a later date.

Thank you for your prompt attention.

By: Hampton Roads Associates, LLC

By: Cordish Hampton Roads Investors, LLC.
the Operating Manager

By: _____
Reed S. Cordish
Vice President

CITY13222

cc: City Attorney
City of Hampton
22 Lincoln Street
Hampton, VA 23669

John W. Bates, III, Esq.
McGuire, Woods, Battle & Boothe LLP
One James Center
901 East Cary Street
Richmond, VA 23219

David S. Cordish
Charles Jacobs
Van Westmoreland, JDN Development
Via Facsimile 404-262-9543
J. Gillis Salade, JDN Development
Via Facsimile 404-262-9543

CITY13223

Hampton Roads Associates, LLC

The Cordish Company
The Power Plant
601 East Pratt Street
6th Floor
Baltimore, MD 21202
410-727-5444
Fax:410-659-9491
e-mail: Reed@Cordish.com

March 3, 2000

Industrial Development Authority of the City of Hampton
2 Eaton Street
Suite 600A
Hampton, VA 23669
Attention: Kathy Grook

Re: Road Improvement Parcels
Hampton, Virginia

Dear Gentlemen:

Please refer to that certain Development Agreement (the "Agreement") dated as November 18, 1999, by and between us concerning the Power Plant of Hampton Roads. Unless defined herein or the context otherwise requires, each capitalized term herein shall have the meaning ascribed to it in the Agreement. This letter is to serve notice, pursuant to Section 7.1 of the Agreement, that the Developer is unable to acquire title to the following Road Improvement Parcels at this time, despite making bonafide offers.

1. Parcels 23 and 24 Ottofaro
2. Parcel 27 A-3 Davis
3. Parcel 2A Joseph
4. Parcel 2C Williams
5. Parcel 5-1 Easter

The Developer expects the City to immediately commence quick take proceedings on the above properties. We reserve the right to add additional properties to the above list at a later date.

Thank you for your prompt attention.

By: Hampton Roads Associates, LLC

By: Cordish Hampton Roads Investors, LLC,
the Operating Manager

By: _____
Reed S. Cordish
Vice President

CITY13215

cc: City Attorney
City of Hampton
22 Lincoln Street
Hampton, VA 23669

John W. Bates, III, Esq.
McGuire, Woods, Battle & Boothe LLP
One James Center
901 East Cary Street
Richmond, VA 23219

David S. Cordish
Charles Jacobs
Van Westmoreland, JDN Development
Via Facsimile 404-262-9543
J. Gillis Salade, JDN Development
Via Facsimile 404-262-9543

CITY13216

RESPONDENT'S EXHIBIT # 5: OVERALL ROADWAY CITE PLAN

CAN BE OBTAINED AT THE CLERKS OFFICE OF THE SUPREME COURT OF VIRGINIA

RESPONDENT'S EXHIBIT # 6: COPY OF CONCEPTUAL CITE PLAN

CAN BE OBTAINED AT THE CLERKS OFFICE OF THE SUPREME COURT OF VIRGINIA

53064092/1 JLL set 95-008 -17

(17)

City of Hampton

November 18, 1999

Mr. I. Gill Sallade, Vice President
JDN Development Company Inc
359 E. Paces Ferry Road, N.E., Suite 450
Atlanta, GA 30305

DEF. EXHIBIT # 7
2/16/01 WT

Re: Mercury/I-64 Retail Development

Dear Gill:

I spoke with Kathy Grook yesterday regarding the latest supplemental agreement, for the above-referenced development, which includes a paragraph about approval of the schematic drawings for the alignment of the public roads. Given this approval, I wanted to ensure that we had an understanding with regard to the subsequent detailed design that would be needed with the development plan, including the public roads improvement plans. Also, we have just received a draft traffic impact report on the project, a copy of which is attached for your information.

Following approval of the agreement, and the schematic alignment of the roadway, we will still need to discuss specific access points such as the driveway locations for the proposed redevelopment of the Mercury Plaza Center (reference my letter of October 29th). Other items we will need to discuss include the alignment of Cordish Drive, the location of traffic signals, the need for a left turn lane into the project from Mercury Boulevard (see Kimley-Horn's study) at W. Queen Street, and the need for a free right turn lane from Powhatan Parkway onto Pine Chapel Road (eastbound).

These details can be worked out in the design phase without affecting the overall schematic layout. I am available at your convenience to discuss these items and I look forward to working with you on the detailed design of the public streets in the project.

Sincerely,

Fred Whitley, P.E.
City Engineer

cc: Kathy Grook
George Wallace
Lynn Allsbrook

ENGINEERING
22 LINCOLN STREET
HAMPTON, VIRGINIA 23669
TEL: (757) 727-6388 FAX: (757) 727-6123

CITY16217

DEF. EXHIBIT # 2/16/01 WJT. 8

SUMMARY OF RIGHT-OF-WAY ACQUISITION

ALL AREAS AND ACREAGES ARE PRELIMINARY AND MUST BE VERIFIED PER THE FINAL DESIGN DOCUMENTS

PARCEL	PROPERTY OWNER	EXISTING PROPERTY SIZE (s.f./acres)	PROPOSED R/W REQUIRED (s.f./acres)	REMAINING PROPERTY (s.f./acres)	ADDITIONAL TEMPORARY CONSTRUCTION EASEMENT (s.f./acres)
2A	EDWIN A. JOSEPH	14,825 / 0.34	7,850 / 0.18	6,975 / 0.16	3,558 / 0.82
2B	AUGUSTUS C. MILLER	33,962 / 0.78	8,067 / 0.19	25,895 / 0.59	4,593 / 0.11
2C	LELIA J. WILLIAMS	20,878 / 0.48	5,317 / 0.12	15,561 / 0.36	2,085 / 0.05
2D	LARRY DALE BOLIN	56,000 / 1.29	1,166 / 0.03	54,834 / 1.26	9,882 / 0.23
2E	C. KENNETH WRIGHT	108,672 / 2.45	19,916 / 0.46	88,756 / 1.99	11,270 / 0.26
2F	LUSKIN'S INC.	144,993 / 3.33	32,980 / 0.76	112,013 / 2.57	18,662 / 0.43
2,3,4	LELIA J. WILLIAMS	38,483 / 0.88	19,554 / 0.45	18,929 / 0.43	6,091 / 0.14
5-1	DAVID LEON EASTER	20,776 / 0.48	11,863 / 0.27	8,913 / 0.20	3,859 / 0.09
5-2	NDS COMPUTERS, INC.	18,414 / 0.42	17,229 / 0.40	1,115 / 0.03	892 / 0.02
5-3	NDS COMPUTERS, INC.	17,202 / 0.39	16,163 / 0.37	1,039 / 0.02	1,042 / 0.02
6	WALTER L. BARNES	29,137 / 0.67	16,421 / 0.34	12,716 / 0.29	4,775 / 0.11
6A	UNITED STATES OF AMERICA	24,502 / 0.56	27 / 0.00	24,475 / 0.56	398 / 0.01
7C	C. KENNETH WRIGHT	53,695 / 1.23	22,736 / 0.52	30,959 / 0.71	7,676 / 0.18
10	O.F.A. LAND TRUST	393,456 / 9.03	37,192 / 0.85	356,264 / 8.18	12,592 / 0.29
11	FERGUSON CORP.	428,124 / 9.83	26,337 / 0.60	401,787 / 9.22	9,894 / 0.23
12	JAMES F. HUNSUCKER	112,580 / 2.58	19,709 / 0.45	92,871 / 2.13	8,703 / 0.15
14	ST. JOHN'S WOODS APARTMENTS	62,307 / 1.43	10,184 / 0.23	52,123 / 1.20	5,770 / 0.13
15	JAMES F. HUNSUCKER	165,085 / 3.79	33,984 / 0.78	131,101 / 3.01	12,956 / 0.30
20	THOMAS VILLA S/D (CC SPAULDING DRIVE)	357,173 / 8.20	13,635 / 0.31	343,538 / 7.89	5,738 / 0.13
22	THOMAS A. MIDDLETON, JR.	21,814 / 0.50	0 / 0	21,814 / 0.50	198 / 0.00
23	FRANK J. OTTOFARO	19,151 / 0.44	818 / 0.02	18,333 / 0.42	2,112 / 0.05
24	FRANK J. OTTOFARO	13,599 / 0.31	5,190 / 0.12	8,409 / 0.19	2,585 / 0.06
25	HARVEY M. STREET	32,254 / 0.74	21,166 / 0.49	11,088 / 0.25	5,340 / 0.12
26	JAMES E. YARRINGTON	80,603 / 1.85	37,690 / 0.87	42,913 / 0.99	10,460 / 0.24
27A1	ARIETTA C. FURNO	49,385 / 1.13	27,613 / 0.63	21,772 / 0.50	10,873 / 0.25
27A2	PATRICIA D. MALLORY	61,378 / 1.41	22,410 / 0.51	38,968 / 0.89	8,926 / 0.20
27A3	F.L. DAVIS, JR.	62,770 / 1.44	16,086 / 0.37	46,684 / 1.07	5,889 / 0.14
27B	CITY OF HAMPTON	878,044 / 20.16	1,920 / 0.04	876,124 / 20.11	648 / 0.01
27C	CITY OF HAMPTON	23,157 / 0.53	5,222 / 0.12	17,935 / 0.41	1,144 / 0.03
28	JAMES E. YARRINGTON	15,580 / 0.36	6,551 / 0.15	9,029 / 0.21	2,335 / 0.05
30	GEORGE A. ORPHANIDY'S FAMILY TRUST	456,268 / 10.47	3,261 / 0.07	453,007 / 10.40	2,336 / 0.05
2A16		147,009 / 3.37	26,035 / 0.60	120,974 / 2.78	7,945 / 0.18

EXHIBIT "A"
MERCURY BLVD
INTERSTATE 64
QUEEN ST
PINE CHAPEL RD
CHAPEL RIDGE DR
2B
2D
2A
2F
2E
2C 2,3,4
5-1
5-2
5-3
6
7
8A
7B
7A
8
9
10
11
12
14
14A
14B
15
16
17
18
27
30
28
27A-1
27A-2
27A-3
20A
A
B
CITY13690

EXHIBIT # 1 DEF. EXHIBIT # 9 2/14/01 WT. 99-2081

RESOLUTION AUTHORIZING ACQUISITION BY CONDEMNATION OR NEGOTIATION OF PROPERTY FOR RIGHT-OF-WAY IMPROVEMENTS TO THE INTERSECTION OF WEST QUEEN STREET AND WEST MERCURY BOULEVARD AND OTHER STREET IMPROVEMENTS CONSISTENT WITH THE CITY'S COMPREHENSIVE PLAN.

WHEREAS, the Council of the City of Hampton deems it necessary to acquire property to be used for the construction of improvements to the intersection of West Mercury Boulevard and West Queen Street, for the construction of improvements to the intersection of Pine Chapel Road and West Queen Street; and property acquisition incidental to these named improvements which are consistent with the City's Comprehensive Plan; and

WHEREAS, the Council of the City of Hampton deems it necessary to acquire property to be used for the construction of a new arterial network between Pine Chapel Road and West Mercury Boulevard; and

WHEREAS, the Council of the City of Hampton deems it necessary to acquire property to be used for construction of a connecting road network for this new arterial; and

WHEREAS, construction of the new roadways and improvements to existing roadways will serve a public purpose by improving the City's transportation network; by providing improved access to underutilized property within the City of Hampton; and by reducing the traffic flow along the portion of West Queen Street that abuts a residential area; and

WHEREAS, pursuant to Section 33.1-91 of the Code of Virginia of 1950, as amended, and under the conditions set forth therein, the City is authorized to acquire an entire parcel of land even though only a part thereof is to be utilized for highway purposes.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Hampton, Virginia that it approves and directs the acquisition of the parcels located within the project area

and designated on the attached Exhibit "A" for the public purposes set out above by negotiation or condemnation.

BE IT FURTHER RESOLVED that the City Attorney be and is hereby authorized and directed to institute negotiations and condemnation proceedings as authorized by the Code of Virginia of 1950, as amended, for the acquisition of the necessary rights-of-way (and, within the limitations and conditions of Section 33.1-91 of the Code of Virginia of 1950, as amended, entire tracts upon which such rights-of-way shall be located) from the land owners which are designated on the attached Exhibit "A", but nothing in this resolution shall be construed as preventing negotiation by the City Attorney and/or City Manager for the purchase of any and all of said property at a private sale should the owners there agree to sell at the prices offered.

BE IT FURTHER RESOLVED by the Council of the City of Hampton, Virginia that the City Manager be authorized to file certificates of take in accordance with Article VII of Title 33.1 of the Code of Virginia of 1950, as amended, against the following parcels all located within the project area which are designated on the attached Exhibit "A".

I certify the foregoing to be a true and accurate copy of Resolution 99-2081, adopted at a regular meeting of the City Council of the City of Hampton, Virginia, held September 22, 1999, pertaining to acquisition by condemnation or negotiation of property for right-of-way improvements to the intersection of West Queen Street and West Mercury Boulevard and other street improvements consistent with the City's Comprehensive Plan.

Clerk

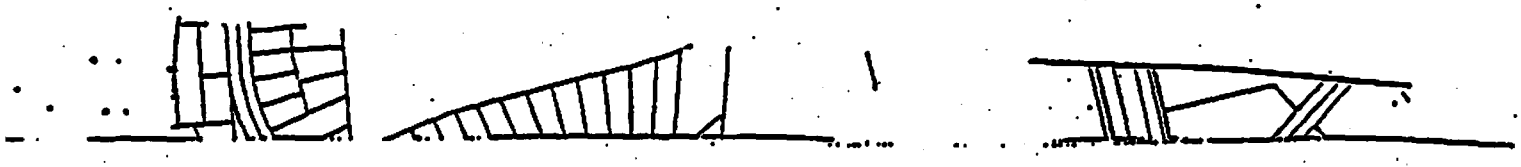
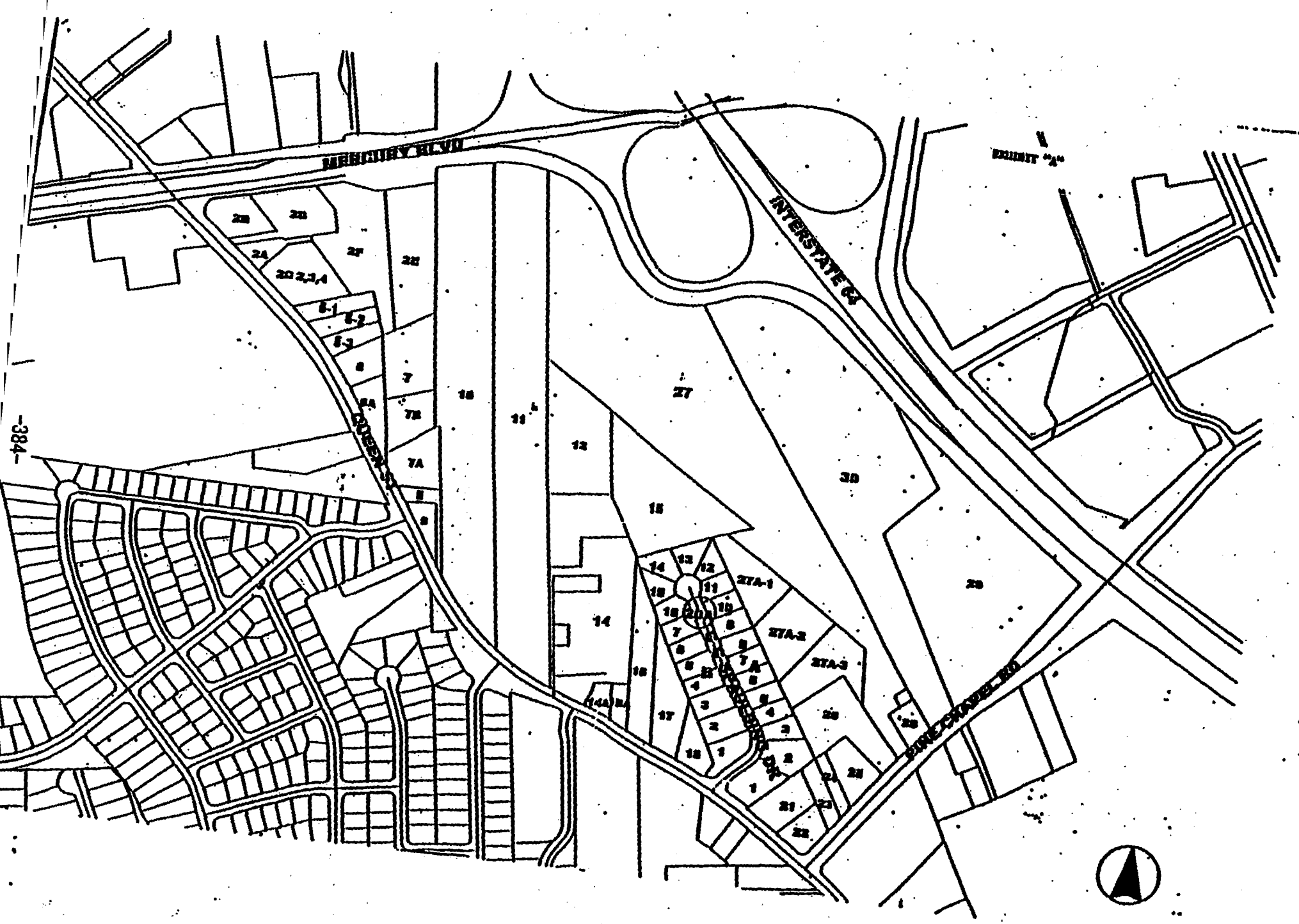


EXHIBIT A

Parcel Number	Property Owner	Total Assessment
2A	Joseph, Edwin A.	$ 228,700
2B	Miller, Augustus C.	$ 492,400
2C, 2, 3, & 4	Williams, Shawn Carlton ETAL	$ 325,700
2D	Bolin, Larry Dale	$ 847,700
5-1	Easter, David Leon	$ 185,800
5-2, 5-3, & 6	NDS Computers Inc.	$ 430,700
14	St. Johns Wood Apts. LP	$ 1,607,900
23 & 24	Ottofaro, Frank J. & Dora J.	$ 74,900
25	Victor, Irwin	$ 63,200
26 & 28	Yarrington, James E. & Lorena H.	$ 86,600
27A-1	Furno, Arietta C.	$ 29,000
27A-2	Mallory, James D.	$ 36,000
27A-3	Davis, F.L. Jr.	$ 37,000


MERCURY BLVD
INTERSTATE 64
EXHIBIT "A"
QUEEN ST
-384-
PINE CHAPEL RD
27A-1
27A-2
27A-3

McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030
Phone: 804.775.1000
Fax: 804.775.1061
www.mcguirewoods.com

Robert L. Hodges
Direct: 804.775.7513

McGUIREWOODS

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JAN 31 2001
WALDO & LYLE, P.C.

COPY

rhodges@mcguirewoods.com
Direct Fax: 804.698.2082

January 30, 2001

Via Facsimile and U.S. Mail

Joseph L. Lyle, Jr., Esq.
Waldo & Lyle
301 West Freemason Street
Norfolk, Virginia 23510

DEF. EXHIBIT # 10
2/16/01 WT

City of Hampton v. Ottofaro
At Law No. 00-367

Dear Joe:

At the deposition on Thursday I advised Phil Infantino that we would provide you with a statement of the analysis made pursuant to Virginia Code § 33.1-91 that the entire Ottafaro property was subject to acquisition under the City's power of eminent domain.

The Ottafaro property is a total of 0.75 acres. Of this, 0.14 acres will be occupied by the right-of-way of Powhatan Parkway. Additional areas of the property will be used temporarily for construction purposes. The residue of the property is 0.61 acres. The property qualifies for acquisition under Virginia Code § 33.1-91, for the following reasons:

(1) The acquisition of the property and the building of the road will require removal of the existing residence, meaning that the property can no longer be used for the same use that was in effect at the time of the take;

(2) The construction of the road requires removal of the residence on the property;

(3) After the construction of the controlled-access Powhatan Parkway, the property will no longer have access to a public road;

(4) The damage to the residue will approximate or equal the fair market value of the residue.

In addition, the residue of the property is not in excess of two acres.

These conditions satisfy the conditions of Virginia Code § 33.1-91.

Please feel free to call me if you have any questions. With best regards, I am

Very truly yours,

Robert L. Hodges

RLH/afh

cc: Sally J. Andrews, Esq.
William G. Broaddus, Esq.

THE LAW FIRM OF
WALDO & LYLE
A PROFESSIONAL CORPORATION

CONDEMNATION, EMINENT DOMAIN & PROPERTY RIGHTS

301 WEST FREEMASON STREET
NORFOLK, VIRGINIA 23510
TELEPHONE: (757) 622-5812
FACSIMILE: (757) 622-5815
www.vaemdomain.com
www.emdomain.com

July 2, 2001

COMM PLTF PETI DEF RESP

EXHIBIT # 1

City VS Waldo

DATE 8/16/01

VIA FACSIMILE: (757) 640-3701
William Broaddus, Esquire
McGuire, Woods, Battle & Boothe, L.L.P.
World Trade Center
Suite 9000
101 West Main Street
Norfolk, VA 23510-1655

RE: City of Hampton
v. Frank J. & Dora F. Ottofaro
AT LAW NO.: 00-367

Dear Bill:

This will confirm our request for a copy of the City's appraisal which was in hand at the time the offer of purchase was extended to the Ottofaros, on the alternative, details of the appraisal including the amount thereof.

We believe we are entitled to this information even under the law as it existed prior to July 1, 2000. The provisions of Code § 25-248 which governed as of the date of take providing pertinent part that the property "shall be appraised before the institution of negotiations," and that your client "establish an amount which it believes to be just compensation therefore and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property." Pursuant to Code § 25-238, your client is a "state agency" governed by Title 25.

Even absent these statutes, the fair market value known to the condemnor at the time it makes a bona fide offer and subsequently takes the property is relevant by any reasonable standard. I trust that we can expect prompt disclosure of this information.

Looking forward to hearing from you, I remain

Very truly yours,

Joseph L. Lyle, Jr.

JLL:rjp

MODE = MEMORY TRANSMISSION START=JUL-02 17:38 END=JUL-02 17:39

FILE NO.= 025

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-JOSEPH T WALDO PC -

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A PROFESSIONAL CORPORATION

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RE: City of Hampton
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This will confirm our request for a copy of the City's appraisal which was in hand at the time the offer of purchase was extended to the Ottofaros, on the alternative, details of the appraisal including the amount thereof.

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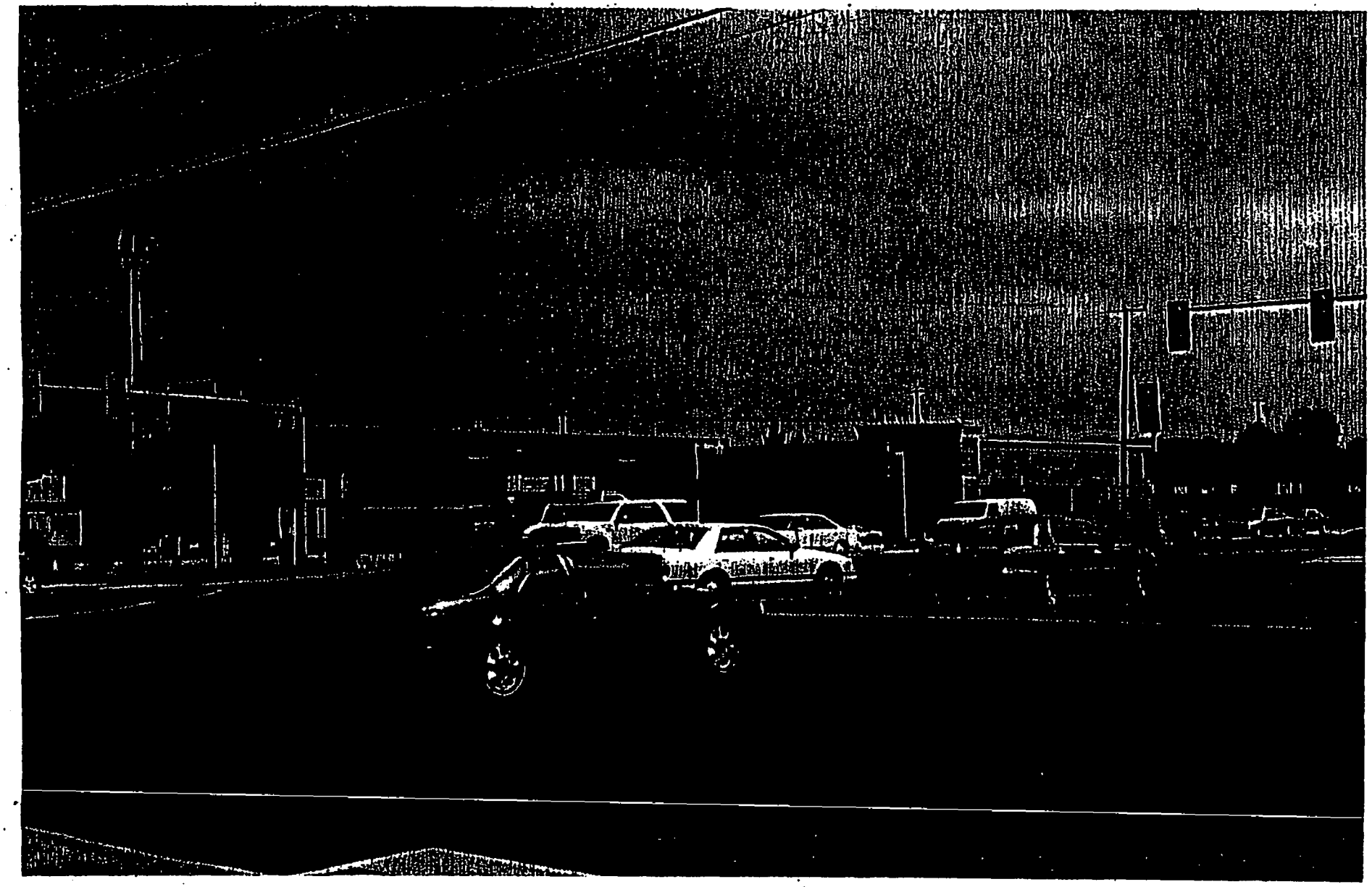
Big Bethel Road & W. Mercury Boulevard



VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF HAMPTON, PART IV

CITY OF HAMPTON,

Petitioner,

v. At Law No.: 00-367

FRANK J. OTTOFARO

-and-

DORA J. OTTOFARO, et al.

Respondent.

STIPULATIONS OF FACT

NOW COME the parties, by counsel, and hereby stipulate to the following facts for purposes of the February 16, 2001 hearing on the Respondent's defenses to the take:

1. Hampton City Council Resolution dated 9/22/99 and attached to its Petition for Condemnation is admissible in evidence as a resolution of Council authorizing the acquisition by condemnation of parcels 23 and 24 as depicted in Exhibit A to the Resolution.

2. The Conceptual Site Plan dated 8/4/99 is admissible in evidence as a depiction of the Powhatan Parkway road alignment in effect on 8/4/99.

3. The Overall Roadway Site Plan dated 6/14/00 is admissible in evidence as a depiction of the Powhatan Parkway Road alignment in effect on 6/14/00.

4. The deposition transcript of Ben A. Williams dated January 30, 2001, together with all exhibits, is admissible in evidence in lieu of the actual testimony of Mr. Williams on 2/16/01.

5. The 1/30/01 letter of Robert L. Hodges to Joseph L. Lyle, Jr. is admissible in

evidence as a statement of the analysis performed by the Hampton City Attorney's office in conjunction with others on the necessity of acquiring in their entirety Ottofaro parcels 23 and 24.

FRANK J. OTTOFARO and
DORA J. OTTOFARO

By _____
Of Counsel

Joseph T. Waldo, Esq.
Joseph L. Lyle, Jr. Esq.
Philip J. Infantino, Esq.
WALDO & LYLE, P.C.
253 W. Freemason Street
Norfolk, Virginia 23510
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Fax (757) 622-5815

CITY OF HAMPTON

By _____
Of Counsel

William G. Broaddus
Robert L. Hodges
McGuire Woods
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030
(804) 775-1000
(804) 775-1061 (fax)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF HAMPTON, PART IV

CITY OF HAMPTON,

Petitioner,

v. At Law No.: 00-367

FRANK J. OTTOFARO

-and-

DORA J. OTTOFARO, et al.

Respondent.

BRIEF IN SUPPORT OF DEFENSES TO THE TAKE

NOW COME the Respondents, Frank J. Ottofaro and Dora J. Ottofaro (the "Ottofaros"), by counsel, and in support of their defenses to the Petition in Condemnation filed against them do hereby state as follows:

STATEMENT OF THE CASE

The Hampton City Council on September 22, 1999 adopted Resolution No. 99-2081 (the "Resolution") authorizing the City of Hampton to acquire the Ottofaros' property by eminent domain for construction of a road network between Pine Chapel Road and West Mercury Boulevard in the City of Hampton. On or about May 31, 2000, the City of Hampton filed a Petition for Condemnation against the Ottofaro property for the stated public purpose of improving the City's transportation network along West Queen Street. Pursuant to Virginia Code § 33.1-91, the City seeks to acquire two parcels in their entirety belonging to the Ottofaros.

On December 8, 2000, the parties appeared before the Court on the Ottofaros' application for an injunction to prevent the demolition of a house located on one of their

parcels pending subsequent hearing on the defenses. The injunction hearing was continued for one week. (T. 32/18). The Court declined to expand the scope of the hearing beyond the application for the injunction. (T. 32/10). On December 15, 2000, the Court ruled as follows, "At this point my only ruling is going to be that the evidence does not support this injunction, that the City does have a right to proceed." (T. 89/9). The Court scheduled this hearing on the Ottofaros' defenses to the take. (T. 86/10).

Since December 15, 2000, the Respondents have taken the discovery depositions of George Wallace, Fred Whitley, Kathy Grook, Benjamin Williams, June McPartland, and Patricia Thomas. Respondents have discovered the following new facts concerning the acquisition of the Ottofaro property for the Powhatan Parkway road improvement:

1. The road plan in place for Powhatan Parkway prior to the City Council Resolution of September 22, 1999 was a plan dated August 4, 1999.
2. The final road plan for Powhatan Parkway was not completed until June 14, 2001.
3. Sometime after January 13, 2001, the City Engineer required the developer to increase the proposed right-of-way of Powhatan Parkway from 100 feet to 120 feet.
4. The June 14, 2001 road alignment changed the proposed August 4, 1999 alignment by increasing the right-of-way along the entire length from 100 feet to 120 feet, and shifted the alignment southward after additional property was acquired in the Spaulding Drive subdivision.
5. After the September 22, 1999 Resolution, the City Attorney in conjunction with others made the decision to acquire the Ottofaro parcels in their entirety

pursuant to Virginia Code § 33.1-91.

6. The initial right-of-way requirements for the Ottofaro property required that only 818 square feet of 19,151 square feet total was necessary for acquisition on parcel 23 (approximately 4.5%); and that 5,190 square feet of 13,599 square feet total was necessary for acquisition on parcel 24 (approximately 38%).

7. Any portion of the Ottofaro property not used for the Powhatan Parkway right-of-way will be transferred to the IDA and leased to the Cordish Company for development of the Power Plant project.

Each of these facts was discovered after the December 15, 2000 injunction. Each fact remains essentially undisputed.

-- DISCUSSION OF LAW

I. City Council Resolution No. 99-2081 constituted an unlawful delegation of authority to the Hampton City Attorney to determine the amount of land to be acquired for the purpose of a public right-of-way.

The Hampton City Council authorized the City Attorney to institute condemnation proceedings against property belonging to the Ottofaros (identified in the Resolution as parcels 23 & 24) pursuant to Section 33.1-91 of the Code of Virginia and "under the conditions set forth therein." See Resolution dated 9/22/99. The stated public purpose was for the construction of a new arterial road network between Pine Chapel Road and West Mercury Boulevard. The decision whether to acquire only the property necessary for the right-of-ways or to acquire entire parcels under the conditions of Virginia Code § 33.1-91 was left to the discretion of the Hampton City Attorney. See 9/22/00 Resolution and Hodges Letter to Lyle 1/31/01.

The actual road design and layout was done by Haines, Gibson & Associates ("Haines, Gibson"), subject to approval of the City Engineer, Fred Whitley. Haines, Gibson was an engineering firm hired by Cordish Development Company, the private developer of the adjacent Power Plant project. Whitley, working in conjunction with Haines, Gibson, changed the right-of-ways after the Council's Resolution of September 22, 1999. The road alignment that was in existence at the time of the September 22, 1999 Council meeting was contained in a Conceptual Road Plan dated 8/4/99. See 8/4/99 Road Plan. That plan showed a road alignment with a 100 foot right-of-way that crossed the Ottofaro property and curved around the northernmost properties on Spaulding Drive. Whitley recommended changes in the road alignment that would improve traffic flow. The road alignment was shifted southward after acquisition of three properties on Spaulding Drive. Also, the right-of-way was increased from 100 feet to 120 feet along the entire length of the road. These changes were incorporated into final road plans dated 6/14/00. See Overall Roadway Site Plan dated 6/14/00.

Because of the changes recommended by Whitley and incorporated into the final road plans by Haines, Gibson, more property was needed for the 120 foot right-of-way than originally was shown on the 8/4/99 Road Plan and less property was needed for the right-of-way around the Spaulding Drive subdivision where additional property was acquired by purchase. The Hampton City Council never considered whether less property was needed because of the shift in the alignment southward, nor whether more property was needed because of the increased 120 foot right-of-way, nor whether the entire Ottofaro property had to be acquired under Virginia Code § 33.1-91 to satisfy these needs, either before or after the alignment changes. These decisions were left to the

discretion of the City Attorney, City Engineer, and others.

The City of Hampton may not condemn more property than it needs to serve it public purposes. The only exception is when the conditions of Virginia Code § 33.1-1 are met. In City of Richmond v. Carneal, 129 Va. 388, 106 S.E. 403 (1921), the Court held unconstitutional a statute that authorized the City of Richmond to acquire land in excess of that required, and to replat and dispose of the excess in such manner as the city saw fit. The issue in Carneal was whether the taking of residue portions not needed for the street, and to be replatted and disposed of by the City, satisfied a public use. The Court held that it did not and declared the statute unconstitutional. However, the court noted a small exception where there may be a remnant of property left after the greater part is taken for a public purpose. According to the Court, when a remnant is so small or of such a shape and of so little value that the taking of it may be incidental, the taking is necessary in connection with the greater taking.

Subsequent to Carneal, the Virginia General Assembly enacted Virginia Code § 33.1-91 codifying the situations in which a condemnor may acquire residual portions of property incidental to a taking for a public use. Virginia Code § 33.1-91 authorizes the condemnor to acquire by eminent domain an entire tract of land whenever a portion is to be utilized, provided that,

> "the remainder of the tract can no longer be utilized for the purpose for which the entire tract is then being utilized, or a portion of a building is to be taken or the cost of removal or relocation of the buildings, or other improvements on the remaining portion, necessitated by the taking, would exceed the cost of destroying such buildings or other improvements, or the highway project will leave the remaining portions without a means of access to a public highway, or whenever in the judgment of the [condemnor] the resulting damages to the remainder of such tract or part thereof lying outside the proposed right-of-way, or the area being acquired for a purpose incidental to the construction, reconstruction or

improvement of a public highway will approximate or equal the fair market value of such remaining lands."

Only City Council can make the decision whether the Virginia Code § 33.1-91 exception applies in the first place. Delegation of the authority to make this decision to the City Attorney or others is unconstitutional. In Ruddock v. City of Richmond, 165 Va. 552, 178 S.E.44 (1935), the Court held that the City could not delegate to the City Attorney the decision on the amount of land to be taken. The City of Richmond wanted to condemn property for the improvement of the James River. The Resolution referenced an existing engineering map showing the improvements generally, and attached a copy as an exhibit. The map did not show the acreage to be taken, nor the metes and bounds of the lands desired, nor elevations. It also included a legend that described the drawing as "subject to inaccuracies in minor details as can be shown on such a small scale." When the City Attorney filed the Petition for Condemnation, however, he described the property to be acquired by attaching a revised, more detailed map that added some land and deleted other lands from the land necessary for the project. The Supreme Court held that neither the City Attorney nor any other party was legally able to amend the description of the property to be taken as contained in the Resolution. Pursuant to Ruddock, only the City Council could determine what property needed to be taken. This also includes any determination as to whether entire parcels must be acquired under Virginia Code § 33.1-91.

The City Council never made these determinations, but rather instructed the City Attorney to make the necessary acquisitions, subject to the limitations of Virginia Code § 33.1-91. Exhibit A attached to the Resolution does not show any proposed road improvement at all. Unlike Carneal where the condemnation resolution and petition

included maps and plats showing the layout of the road, there was absolutely no effort made to identify the road location in the resolution. Therefore, the City Council could not have made the necessary determinations under § 33.1-91 since the location of the road was not fixed in the resolution authorizing the take. The alignment changed after September 22, 1999, adding and deleting property from the 8/4/99 alignment. Any effort by a party other than City Council to fix the road location before or after the resolution, or to make the statutory determinations before or after the resolution violates Ruddock.

II. **Even if the City of Hampton properly delegated authority to the City Attorney or others to determine the amount of land to be acquired from the Ottofaros, the City violated Virginia Code § 33.1-91 with respect to parcel 23.**

Assuming *arguendo* that the City Attorney was authorized to make the necessary determinations under Virginia Code § 33.1-91, his decision is in clear violation of the statute. The statute permits entire parcels to be acquired when (1) the remainder of the tract can no longer be utilized for the purpose for which the entire tract is then being utilized; or (2) a portion of a building is to be taken; or (3) the highway project will leave the remainder without a means of access to a public highway; or (4) the resulting damages to the remainder will approximate or equal the fair market value of such remaining lands. The Court has held that condemnation statutes must be strictly construed in favor of the owner. Richmond v. Carneal , 129 Va. 388, 106 S.E. 403 (1921).

The City in its analysis dated January 30, 2001 claims that all four conditions are satisfied by combining parcels 23 and 24 into one property comprising .75 acres. This is an improper application of the statute. Petitioner cannot unify the two parcels for purposes of Virginia Code § 33.1-91 just because of their common ownership. Parcels 23 and 24 are two separate parcels with separate legal descriptions. Parcel 24 was improved

with the house which has been destroyed. Parcel 23 was and remains a vacant lot, only a fraction of which is touched by the road improvement. Parcel 23 consists of 19,151 square feet or .44 acres. The right-of-way acquisition is only 818 square feet or 0.02 acres—a take of approximately 4.5% of the total.

Moreover, Fred Whitley has testified in deposition that the parcel will continue to have access at the intersection of Pine Chapel Road and Powhatan Parkway. Whitley said that the driveways and accesses have not been finalized yet. According to Whitley, there are no driveways depicted on the Ottofaro property because of the uncertain nature in how that parcel might be developed. According to Whitley, the Ottofaro property was not intended to be no access. According to Whitley, the idea is that as this property might need access, the access would logically go at one of the intersections.

III. The City of Hampton is acquiring private property for a private use.

The law is well-settled that private property must be acquired for a fixed and definite public use. Rudee Inlet Authority v. Bastian, 206 Va. 906, 147 S.E.2d 131 (1966); Nichols v. Central Va. Power Co., 143 Va. 405, 130 S.E. 764 (1925). According to the Court in Carneal, "This has been stated so often, and the principles on which it is founded have been considered so fully, that it is unnecessary to discuss it or to cite authorities." Carneal, 106 S.E. at 408. The residue of the property in this case is undisputedly going to a private use and not a public use.

Benjamin A. Williams, IV, was deposed in this case and his deposition introduced into evidence by agreement of the parties. His testimony, coupled with the attached deposition exhibits, demonstrate that the residual portions of this property undeniably will be replatted and diverted to private use as the City sees fit, just as the Court

prohibited in Carneal. According to Williams, the residual portions of all property acquired under condemnation will be transferred by the City to the Industrial Development Authority, and leased to the Cordish Development Group under ground leases for either Phase 1 or Phase 2 of the Power Plant Project. (Williams Deposition at 23/4, 23/13, 30/4). According to Williams, there will be no public use of the residual portions of the property acquired. (Dep. 25/21). This acquisition of private property for a private use runs directly counter to Carneal.

Additionally, the developer, and not the City of Hampton, is exercising total control over this road at present. According to Williams, the IDA does not own all the right-of-ways at present. (Dep. 28/6). The road is being constructed as a private road, without going out to public bid, and at some later date will be dedicated to the public. The City claims that the road is private at this point to avoid compliance with the Public Procurement Act, but claims that the road is public in order to satisfy the public use requirements of the eminent domain statutes. The City cannot have it both ways under the law. The City has argued that the road is being constructed like any subdivision road in that it must be constructed subject to City approval for later dedication. However, in a subdivision situation, the developer owns the property and the right-of-ways on which the property is being constructed. The dedication comes from land owned by the private developer. The City does not condemn the right-of-ways for the sub-developer. In this case, the developer is building a road on right-of-ways owned in some instances by Hampton Roads Associates, in some instances by the Hampton Industrial Development Authority, and in some instances by the City. This arrangement, and lack of City control over the construction, does not meet the test for public use.

CONCLUSION

Based upon the foregoing, the Court must dismiss the Petition for Condemnation filed against the Ottofaros. The Hampton City Council unlawfully delegated its authority to the City Attorney. Parcel 23 does not meet the conditions of Virginia Code § 33.1-91. Moreover, the City of Hampton is acquiring private property for a private use. The private use is established both by the intended use of the residual portions and the fact that Powhatan Parkway is being developed as a private road at present, under total control of the developer, to be dedicated at some future date.

Respectfully submitted,

FRANK J. OTTOFARO and
DORA J. OTTOFARO

By _____
Of Counsel

Joseph T. Waldo, Esq.
Joseph L. Lyle, Jr. Esq.
Philip J. Infantino, Esq.
WALDO & LYLE, P.C.
253 W. Freemason Street
Norfolk, Virginia 23510
(757) 622-5812
Fax (757) 622-5815

Certificate of Service

I hereby certify this 15th day of February, 2001, that a true copy of the foregoing Brief in Support of Defenses to the Take was hand-delivered to William G. Broaddus, One James Center, 901 East Cary Street, Richmond, Virginia 23219-4030 and to Sally James Andrews, City Attorney's Office, 22 Lincoln Street, Hampton, Virginia 23669-3255.

Joseph T. Waldo

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF HAMPTON, PART III

CITY OF HAMPTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	AT LAW NO. 00-367
	)	
FRANK J. OTTOFARO, et als.,	)	
	)	
Defendants.	)	

ORDER

On Friday, February 16, 2001, the parties came to be heard upon Mr. and Mrs. Ottofaro's Affirmative Defenses and the Court held an evidentiary hearing. Whereupon, having considered the evidence, exhibits and argument of counsel, the Court found, for the reasons which were stated from the Bench and which are incorporated herein by reference, that the Affirmative Defenses should be denied, and therefore, ORDERS that the Ottofaro's Affirmative Defenses are denied and that the case should proceed to the just compensation hearing upon the petition as filed by the City of Hampton.

The Clerk shall send a certified copy of this Order to all counsel of record.

ENTERED: 3/6/01

Judge

We ask for this:

A. Paul Burton, City Attorney
Sally James Andrews, Deputy City Attorney
Office of the City Attorney
City of Hampton
22 Lincoln Street
Hampton, Virginia 23669

William G. Broaddus
Robert L. Hodges
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219

Counsel for City of Hampton

Seen and Objected to:

Joseph T. Waldo
Philip J. Infantino
Waldo & Lyle, P.C.
301 West Freemason Street
Norfolk, Virginia 23510

Counsel for Mr. and Mrs. Frank J. Ottofaro

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON, PART I

CITY OF HAMPTON

vs. LAW NO.: 00-367

FRANK J. OTTOFARO, et al.

This day came the parties, with their attorneys, and thereupon came the jury commissioners, who were sworn well and truly to try the issue joined and the truth of and upon the premises to speak, and having heard the evidence and arguments of counsel and received instructions of the Court, the jurors retired to their room to consult of a verdict, and after some time returned into Court having found the following, to-wit: "Your Jury, after being duly sworn, respectfully report unto Your Honor that, pursuant to orders heretofore entered in this cause they went upon and viewed the land described in the petition filed in this cause; and that they find upon the evidence before them, and upon their view of the premises, the following award of just compensation. $170,000.00. (Signed) by each juror."

Whereupon, the defendant, by counsel, expressed that they would file exceptions to the report.

Entered this 16th day of August, 2001.

CHRISTOPHER W. HUTTON, JUDGE

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF HAMPTON, PART IV

CITY OF HAMPTON,

Petitioner,

Case No.: 00-367

v.

FRANK J. OTTOFARO
and
DORA J. OTTOFARO,

Respondents.

EXCEPTIONS TO JURY COMMISSIONERS REPORT

THIS DAY CAME the Respondents, Dora J. and Frank J. Ottofaro, as and for their exceptions to the report of the Jury Commissioners and stated as follows:

1. The Respondents except to the prior ruling of this Court on the issue of jurisdiction all as set forth in the record and hereby restate and incorporate their defenses to the jurisdiction all as previously set forth in the record.

2. The Respondents except to the ruling of this Court allowing the impeachment of the Respondents' appraiser, Alexander Salzberg, on the issue of his resignation and expulsion from the Society of Real Estate Appraisers during the time period of 1989 to 1990 all as set forth in the record.

3. The Respondents except to the Court's ruling refusing a continuance in this case which continuance was the first and only continuance requested by the Respondents. The

THE LAW FIRM OF
ALDO & LYLE
PROFESSIONAL CORPORATION
WEST FREEMASON STREET
NORFOLK, VIRGINIA 23510
TELEPHONE: (757) 622-5812

continuance was requested following the Court's adverse ruling on the issue of impeachment of the property owners' appraiser.

4. The Respondents except to the Court's ruling refusing to order the City of Hampton to produce in discovery as requested its fair market appraisal of the subject property in the amount of $164,000.00 which appraisal was the basis of the City's offer, and of the Certificate of Take divesting the Respondents of the defeasible title to the subject property.

WHEREFORE, for the reasons stated herein and the record, the Respondents by counsel respectfully request that the Court affirm the exceptions of the Respondents and order a new trial in this matter with respect to the valuation of the subject property and that the Court sustain the defenses to the jurisdiction of the Court previously raised by the Respondents, and that this suit be dismissed.

FRANK J. OTTOFARO
DORA J. OTTOFARO

By _____
Of Counsel

Joseph T. Waldo
WALDO & LYLE, P.C.
301 W. Freemason Street
Norfolk, VA 23510
(757) 622-5812
Fax: (757) 622-5815
Counsel for Respondents

THE LAW FIRM OF
WALDO & LYLE
PROFESSIONAL CORPORATION
301 WEST FREEMASON STREET
NORFOLK, VIRGINIA 23510
TELEPHONE: (757) 622-5812

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing pleading was mailed to William Broaddus, Esquire McGuire, Woods, Battle & Boothe, L.L.P., World Trade Center, Suite 9000, 101 West Main Street, Norfolk, VA 23510-1655, this 21st day of August 2001.

Joseph T. Waldo

JAMES P. BOHNAKER, CLERK
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BOOK # ____ PAGE # ____
CITY OF HAMPTON, VA

THE LAW FIRM OF
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PROFESSIONAL CORPORATION
WEST FREEMASON STREET
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VIRGINIA

IN THE CIRCUIT COURT
OF THE CITY OF HAMPTON, PART I

CITY OF HAMPTON, Petitioner, v. FRANK J. OTTOFARO and DORA J. OTTOFARO, Respondents.	)	AT LAW NO. 00-367

PETITIONER, CITY OF HAMPTON'S RESPONSE TO THE EXCEPTIONS TO THE JURY COMMISSIONERS' REPORT

Petitioner, City of Hampton, responds to the Exceptions to the Jury Commissioners' Report filed by Respondents, Frank J. and Dora J. Ottofaro, as follows:

1. **Court's Ruling on the Issue of Jurisdiction is the Law of the Case.**

Respondents' first exception is to restate and incorporate their objections to the jurisdiction of the Court. The Court held extensive evidentiary hearings on the issues of jurisdiction. Based on the evidence presented, the Court found that the City of Hampton had properly exercised its power of eminent domain in the condemnation of the property acquired. This ruling is law of the case. Petitioner urges that the Court overrule this exception for all of the same reasons that respondents' jurisdictional challenge was rejected when raised.

2. **Impeachment Evidence of Respondents' Appraiser Was Clearly Admissible.**

A commissioner's report is entitled to great weight, is *prima facie* correct, and must be confirmed unless good cause is shown against it. State Highway & Transp. Comm'r v. Carter,

216 Va. 631, 641, 222 S.E.2d 776, 777 (1976). Absent evidence of fraud or corruption not alleged here, *see* Va. Code § 25-46.21, neither the trial court nor the Supreme Court can set aside the award unless it is shown that the commissioners proceeded on erroneous principles or the amount awarded is so inadequate or excessive as to show prejudice or corruption on their part. Carter, *supra*. There was no objection to the instruction of the commissioners.

The Court properly allowed evidence of respondents' appraiser, Alexander Salzberg's resignation and expulsion from the Society of Real Estate Appraisers during the time period 1989 to 1990. The determination of the scope of cross-examination in general and the extent of testimonial impeachment in particular should be left largely to the discretion of the trial court. Russell v. Commonwealth Transp. Comm'r of Va., 261 Va. 617, 621, 544 S.E.2d 311, ___ (2001). Mr. Salzberg qualified as an expert in the appraisal of real estate. The evidence clearly went directly to his qualifications as an expert and was not unduly prejudicial. When a witness has qualified as an expert and given his opinion, the opposing party has a right to test his qualifications a an expert and to measure his capacity to give reliable opinions, and questions propounded to that end are proper and within the discretion of the trial court. Adams v. Ristine, 138 Va. 273, 291, 122 S.E. 126, __ (1924). Petitioner notes further that the Court actually excluded part of the evidence that Petitioner wished to use to impeach Mr. Salzberg.

3. Respondents' Exception Concerning a Continuance Is Incorrect as a Matter of Fact and was Not Justified.

Respondents argue that their request for a continuance during the trial was the first and only continuance requested by Respondents. This is not correct. Respondents requested a continuance at the hearing of June 5, 2001 on Petitioner's Motion to Compel. The Court granted a continuance until July 10. The purpose of the continuance requested June 5 was to permit the Respondents to retain a different appraiser from that originally designated. This new appraiser

was Mr. Salzberg. He was retained between June 5 and the time interrogatories were answered on June 15. Defendants' counsel was obviously aware at that time that Mr. Salzberg was potentially subject to impeachment on the facts indicated. Defendants' counsel actually filed a motion *in limine* on this point on July 6, 2001, referencing earlier cases involving the same issue. The parties were before the Court on pretrial motions on July 9, 2001, but defendants' counsel did not bring this issue on. Defendants should not be heard to complain now when the matter could have been heard and resolved significantly in advance of trial. If there was any prejudice to respondents, it was entirely self-inflicted, and resulted from tactical decisions made by respondents from which the Court should provide no relief.

4. The Court Properly Denied Respondents' Request for the Appraisal of a Non-Testifying Appraiser.

Respondents except to the Court's ruling denying them discovery of the appraisal report of David E. Richards, which formed the basis of the City's offer and certificate of take. Defendant sought the appraisal in discovery, and filed a motion to compel, but the Court then sustained the City's objections based on Va. Sup. Ct. R. 4:1(b)(4) and Hornback v. State Highway Comm'r, 205 Va. 40, 135 S.E.2d 136 (1964). Under these authorities, a litigant is not entitled to discovery of the opinions of a non-testifying expert absent a specific showing of necessity that respondents never attempted. Because the appraisal was used only for the City's *bona fide* offer and certificate, neither of which is admissible as evidence of value in the just compensation hearing, the Court properly excluded it.

WHEREFORE petitioner, the City of Hampton, moves that the Court will overrule respondents' exceptions, enter final judgment on the Commissioners' report and grant such other and further relief as the ends of justice may require.

CITY OF HAMPTON

Of Counsel

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Sally James Andrews, Deputy City Attorney
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JAMES P. BOHNAKER
CLERK, CIRCUIT COURT
01 OCT 10 PM 3:51
FILED
CITY OF HAMPTON, VA.
BK

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October, 2001, a copy of the foregoing pleading was faxed and mailed, postage prepaid to Joseph L. Lyle, Jr., Esq., Waldo & Lyle, 301 West Freemason Street, Norfolk, Virginia 23510

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF HAMPTON, PART III

CITY OF HAMPTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	AT LAW NO. 00-367
	)	
FRANK J. OTTOFARO, and	)	
DORA J. OTTOFARO, et als.	)	
Defendants.	)	

FINAL ORDER

On August 16, 2001, the parties and their counsel came to be heard at trial upon the issue of just compensation for the property taken by the Petitioner, the City of Hampton, and the Jurors returned an award of $170,000 as just compensation for the property and the Landowners, having filed exceptions to the report, on October 12, 2001, the parties and their counsel appeared to be heard upon the Landowners' exceptions to the report and the Court received the argument of counsel; and

It appearing to the Court that the Jurors previously appointed, after having been administered the oath of office in accordance with the law, duly returned their report on August 16, 2001 in the amount of $170,000 as just compensation for the property and that the exceptions filed by the Landowners should be overruled for the reasons stated by the Court from the Bench which are hereby incorporated in this Order by reference.

THEREFORE, the Court approves, ratifies and confirms the Jurors' report in all particulars and, upon payment into Court of the balance of the just compensation found by the Jurors, the Court confirms unto the City of Hampton indefeasible fee simple title to the property

previously owned by Frank J. Ottofaro and Dora J. Ottofaro and more particularly described in the Petition of Condemnation, being Tax Map parcels number 3T023 and 3T024 and, further, the Court overrules the exceptions. Interest shall be paid upon that portion of the award over the amount paid into Court with the Certificate of Take from April 11, 2000. The Clerk shall deliver such funds to counsel for the former Landowners.

The Clerk shall record a copy of this Order in the Deed Book under the names of Frank J. Ottofaro and Dora J. Ottofaro, as Grantors, and the City of Hampton, as Grantee. The Clerk shall send a certified copy of this Order to counsel of record.

Nothing further remaining to be done in this case, the same is hereby stricken from the docket of this Court.

ENTERED: 10/12/01

Judge

We ask for this:

A. Paul Burton, City Attorney
Sally James Andrews, Deputy City Attorney
Office of the City Attorney
City of Hampton
22 Lincoln Street
Hampton, Virginia 23669

William G. Broaddus
Robert L. Hodges
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One James Center, 901 East Cary Street
Richmond, Virginia 23219

Counsel for City of Hampton

Seen and Objected to for the reasons stated in Memoranda and Briefs and the record

Joseph T. Waldo
~~Philip J. Infantino~~
Waldo & Lyle, P.C.
301 West Freemason Street
Norfolk, Virginia 23510

Counsel for Frank J. Ottofaro and Dora J. Ottofaro

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF HAMPTON, PART I

CITY OF HAMPTON

Petitioner,

v. At Law No. 00-367

FRANK J. OTTOFARO

and

DORA J. OTTOFARO

Respondents.

NOTICE OF APPEAL

COME NOW the Respondents, Frank J. Ottofaro and Dora J. Ottofaro, by counsel, pursuant to Rule 5:9 of the Supreme Court of Virginia, and note their appeal to the Final Order entered herein on October 12, 2001.

The transcripts of the hearings of December 8, 2000 and December 15, 2000 regarding the Respondent's Motion to Stay were filed with the trial court on December 20, 2000. The remaining transcripts will be filed and have been ordered from the court reporter who reported the case.

FRANK J. OTTOFARO and
DORA J. OTTOFARO

By _____
Of Counsel

01 OCT 25 PM 4:43
CLERK #
CITY OF HAMPTON, VA

Joseph T. Waldo
Joseph L. Lyle, Jr.
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301 W. Freemason Street
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(757) 622-5812
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing pleading was mailed to Sally James Andrews, Esquire, Deputy City Attorney, Office of the City Attorney, 22 Lincoln Street, Hampton, VA 23669 and William G. Broaddus, Esquire, McGuire Woods, LLP, One James Center, 901 East Cary Street, Richmond, VA 23219-4030, this 24th day of October 2001.

Joseph T. Waldo

120 feet after the Council's resolution. (Exhibit D5, Tr. 2/16/01, pp. 26-28).

The evidence further revealed that only 818 square feet of the Ottofaros' property would have been needed, leaving an excess of 26,742 square feet of their property unaffected. (Tr. 8/16/01, pp. 32, 53). Nevertheless, the City condemned the entire parcel, relying on Code §33.1-91, and stating in the resolution that "the City is authorized to acquire an entire parcel of land even though only a part thereof is to be utilized for highway purposes."

ASSIGNMENTS OF ERROR

1. The trial court erred in finding a public purpose in this case.

2. The trial court erred in upholding the City's condemnation resolution.

3. The trial court erred in denying the owner access to the City's appraisal upon which its Certificate was based.

4. The trial court erred in permitting improper impeachment of the owners' appraisal witness.

5. The trial court erred in denying the owners' Motion for Continuance.