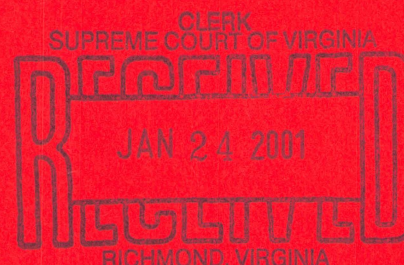


262 Va 230

In The
Supreme Court of Virginia

RECORD NO. 001711



RICKY WILLIAM NELSON
and
DANA ANN NELSON,

Appellants,

v.

LAUREL A. DAVIS,

Appellee.

APPENDIX

William G. Pickford
PICKFORD & PICKFORD
612 East Jefferson Street
Charlottesville, Virginia 22902
(804) 296-8191 Telephone
(804) 296-6920 Facsimile

Counsel for Appellants

Frederick T. Heblich, Jr.
ATTORNEY AT LAW
801 East Jefferson Street
Charlottesville, Virginia 22902
(804) 244-2784 Telephone
(804) 977-2874 Facsimile

Counsel for Appellee

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The Honorable Paul M. Peatross

Re: Granting Preliminary Injunction

entered February 3, 2000

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VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

RICKY WILLIAM NELSON
DANA ANN NELSON,

Complainants

CH00-11,575

v.

LAUREL A. DAVIS
Route 1, Box 191-A
Esmont, Virginia 22937,

Respondent

MOTION FOR PRELIMINARY INJUNCTION

Comes now Complainants, Ricky William Nelson and Dana Ann Nelson, and having been duly sworn, made oath as follows, in support of their motion for a preliminary injunction, later to be merged into a permanent injunction against Laurel A. Davis, as follows:

(1) That by the terms of a deed of Rachel Baughman, bearing date May 3, 1996, of record in the Clerk's Office of your Honor's Court in Deed Book 1536, page 494, Laurel A. Davis acquired title to a parcel of real property described therein as containing 3.286 acres being more particularly described on plat of Arthur F. Edwards, L.S., dated July 31, 1991, of record in said Clerk's Office in Deed Book 1191, page 142, a copy of which deed is attached hereto as Exhibit "A" and a copy of which plat is attached hereto as Exhibit "B"; and

(2) That by reference to said plat it will be noted that a graveled driveway runs across the 3.286 acres along the easterly boundary thereof from State Route 715 to the property lying to the rear of the property currently owned by Laurel A. Davis; and

(3) That by the terms of a deed of William E. Johns, single, et al, bearing date April 19, 1999, of record in said Clerk's Office in Deed Book 1812, page 28, Complainants acquired title to a parcel described as 3 acres in Albemarle County, Virginia, which property is more particularly described on plat of Robert L. Lum, C.L.S., bearing date May 11, 1988. A copy of the deed to Complainants is attached hereto as Exhibit "C" and a copy of the plat describing the property conveyed to Complainants is attached hereto as Exhibit "D"; and

(4) That the survey of the property belonging to Complainants indicates the driveway running from their property along the easterly boundary of the property owned by the Respondent; and

(5) That the Respondent has refused to allow Complainants access to their property across said graveled driveway stating that they would never be allowed to use the same; and

(6) That Respondent has physically interfered with the use of the easement shown on the aforesaid plats by placing tree limbs and brush in the same and by parking a vehicle in the driveway and failing and refusing to remove the same deliberately and with the intent to interfere with the use by

Complainants of the easement as ingress and egress to their property; and

(7) That a residence is located on the property of Complainants and Respondent's interference with the easement prevents the normal use of said residence and prohibits access to said residence by fire and other emergency vehicles in the event the same are required; and

(8) That said driveway has been used by Complainants and their predecessors in title for many years as ingress and egress to the property lying to the rear of Respondent's property and is clear and obvious on the ground; and

(9) That Complainants will suffer great and irreparable harm and injury if defendant is permitted to continue to obstruct and interfere with the use of said easement. Complainants have no adequate remedy at law if they are prevented from using the easement as access to their property; and

(10) Respondent will suffer no harm from the use of the easement as it has been used across her property previously.

WHEREFORE, for the reasons set forth herein, Complainants pray that Respondent be temporarily, and later permanently, enjoined from interfering with the use by Complainants of the driveway for ingress and egress to their property lying to the rear of Respondent's property and that, upon hearing upon the merits, that said preliminary injunction be made permanent.

WITNESS the following signatures and seals:

Ricky William Nelson
Ricky William Nelson

Dana Ann Nelson
Dana Ann Nelson

STATE OF VIRGINIA, AT LARGE
COUNTY OF ALBEMARLE, to-wit:

The foregoing was subscribed, sworn to and acknowledged before me by Ricky William Nelson and Dana Ann Nelson in the jurisdiction aforesaid, on the 27th day of December, 1999.

My commission expires: September 30, 2000.

Judith S. Herwig
Notary Public

W. G. Pickford
W. G. Pickford, Esquire
Pickford & Pickford
Counsel for Complainants
612 East Jefferson Street
Charlottesville, Virginia 22902
Telephone: (804) 296-8191
Facsimile: (804) 296-6920

1486 p. 297

BK 1536 PG 0494

004774

THIS DEED, made this 3rd day of May, 1996, by and between Rachel BAUGHMAN, party of the first part, hereinafter referred to as Grantor, and Laurel A. DAVIS, party of the second part, hereinafter referred to as Grantee, whose address is Rt. 1, Box 191-A, Keene, Virginia 22946.

W I T N E S S E T H:

That for and in consideration of the sum of \$62,125.00, cash in hand paid, the receipt of which is hereby acknowledged, the Grantor does hereby GRANT, BARGAIN AND SELL and CONVEY with GENERAL WARRANTY and ENGLISH COVENANTS OF TITLE unto the Grantee, all that certain lot or parcel of land, with the improvements thereon and the appurtenances thereto belonging, situated in the Scottsville Magisterial District of Albemarle County, Virginia, and being the same property conveyed to the Grantor herein by deed of Joe W. Ramos, Jr., and Annette L. C. Ramos, husband and wife, dated July 29, 1991, of record in the Clerk's Office of the Circuit Court for said County in D. B. 1170, page 135, and described therein as follows:

all that certain parcel of land situated in the Scottsville Magisterial District of Albemarle County, Virginia, as shown on Albemarle County Tax Map 121, Parcel 24-A, and situated on the south side of the road leading from Keene to Esmont, containing 2.65 acres, more or less.

That for and in consideration of the sum of \$10.00, cash in hand paid, the receipt of which is hereby acknowledged, the Grantor

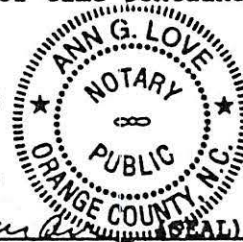
BK1536PG0495

does hereby RELEASE, REMISE and QUITCLAIM unto the Grantee, all of her right, title and interest in and to all that certain tract or parcel of land, with the improvements thereon and the appurtenances thereto belonging, situated on the south side of and adjoining State Route 715 in the Scottsville Magisterial District of the County of Albemarle, Virginia, containing 3.286 acres, more or less, more particularly described as T.M. 121, Parcel 24A on a plat prepared by Arthur F. Edwards, L.S., dated July 31, 1991, of record in said Clerk's Office in D. B. 1191, page 142, and which plat is believed to describe accurately the actual parcel of land conveyed to the Grantor herein by the aforesaid deed of record in D. B. 1170, page 135, and by a deed of correction of record in said Clerk's Office in D. B. 1191, page 140.

This conveyance is made expressly subject to the easements, conditions, restrictions, and reservations contained in duly recorded deeds, plats and other instruments constituting constructive notice in the chain of title to the property hereby conveyed, which have not expired by a limitation of time contained therein or have not otherwise become ineffective.

WITNESS the following signature and seal:

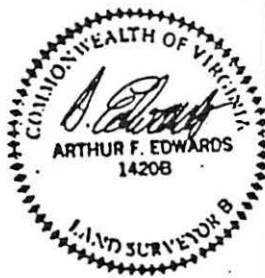

Rachel Baughman



THIS IS TO CERTIFY THAT ON JULY 31, 1991 I, J. EYED THE
PROPERTY SHOWN ON THIS PLAT AND THAT THE
TITLE LINES AND WALLS OF THE BUILDINGS
ARE SHOWN HEREON.

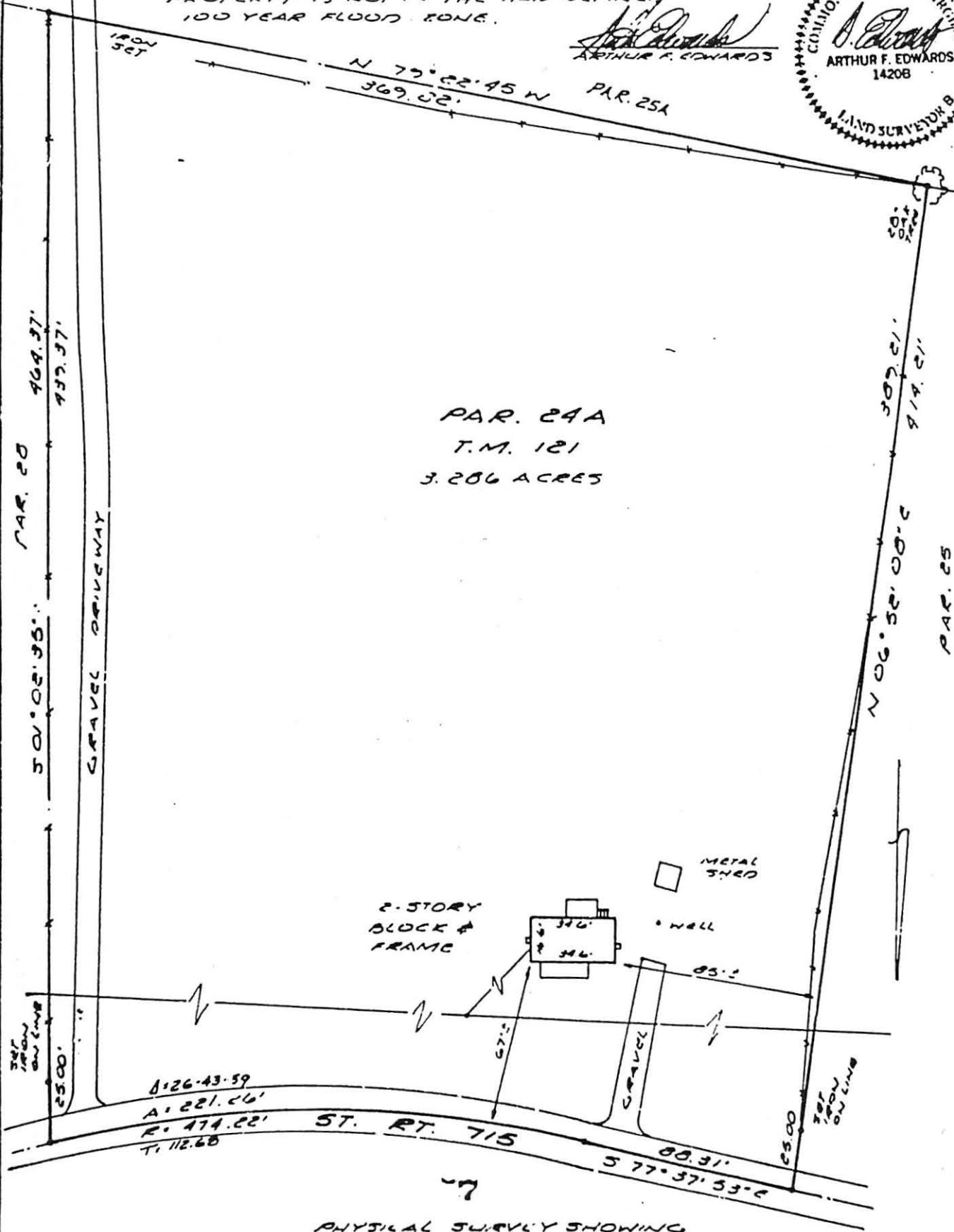
PROPERTY IS NOT IN THE HUD DEFINED
100 YEAR FLOOD ZONE.

Arthur F. Edwards
ARTHUR F. EDWARDS



N 79° 22' 45" W PAR. 25A
369.52'

PAR. 24A
T.M. 121
3.206 ACRES



PHYSICAL SURVEY SHOWING
PARCEL 24A AS SHOWN ON SHEET 121
ALBEMARLE COUNTY TAX MAPS
ALBEMARLE COUNTY, VIRGINIA JULY 31, 1991

0 40 80 120 160

Ex B

BK1191 PG. 143

BK1812PG0028

006390

Prepared by McClure, Callaghan & Atkins

THIS DEED made and entered into this 19th day of April, 1999, by and between WILLIAM E. JOHNS, single, JUANITA A. LEE, single, and ROBIN A. LEE, single, the Grantors, and RICKY WILLIAM NELSON and DANA ANN NELSON, husband and wife, the Grantees, whose address is PO Box 11, Keene, Va. 22946

W I T N E S S E T H:

THAT FOR AND IN CONSIDERATION of the sum of THIRTEEN THOUSAND FIVE HUNDRED DOLLARS (\$13,500.00), cash in hand paid, the receipt of which is hereby acknowledged, the Grantors do hereby GRANT, BARGAIN, SELL and CONVEY with GENERAL WARRANTY and ENGLISH COVENANTS OF TITLE unto Ricky William Nelson and Dana Ann Nelson, husband and wife, as tenants by the entirety with full rights of survivorship as at common law and not as tenants in common, all that certain tract or parcel of land with improvements thereon and appurtenances thereunto pertaining, containing 3 acres, more or less, and lying in the Scottsville Magisterial District of Albemarle County, Virginia, on the road leading from Esmont to Keene a distance of about three miles from Esmont; being the same property which was conveyed to Magdaline Johns by deed of John Franklin B. Hill and Mary Banks Hill, his wife, dated January 3, 1941 and recorded in the Clerk's Office aforesaid in Deed Book 249, page 357. Magdaline Johns was also known as Madeline Johns and later became Madeline J. Mortis. Madeline J. Mortis died April 23, 1986 and by her will spread in the said County Clerk's Office in

BK1812P60029

Will Book 67, page 571, she devised the above described property to William Johns, Juanita Lee and Robin Lee. Williams Johns died January 20, 1995 and by his will spread in the said County Clerk's Office in Will Book 91, page 3, he devised his interest in the above described property to his son, William E. Johns.

This conveyance is subject to all applicable easements, reservations, restrictions, conditions and other encumbrances contained in duly recorded deeds, plats and other instruments constituting constructive notice in the chain of title to the above-described property which have not expired by a time limitation contained therein or have not otherwise become ineffective.

WITNESS the following signatures and seals:

William E. Johns (SEAL)
William E. Johns
Juanita A. Lee (SEAL)
Juanita A. Lee
Robin A. Lee (SEAL)
Robin A. Lee

STATE OF VIRGINIA
CITY/COUNTY OF CHARLOTTESVILLE, to-wit:

The foregoing Deed was acknowledged before me by WILLIAM E. JOHNS this 4th day of May, 1999.

My commission expires: June 30, 1999

Arlene Probst
Notary Public

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OF PAGINATION

PARCEL 28
EVELYN A. JONES
D. B. 408 - 056

PARCEL 27
DALLAS W. CRICKENBURGER
D. B. 571 - 246

PARCEL 24A
MARGARET A. ROSS
W. B. 63 - 148

PARCEL 25A
D. B. 249 - 357
3.364 ACRES

PARCEL 27A
D. B. 399 - 129
2.50 ACRES

PARCEL 25
LUNNIE W. AGEE
D. B. 944 - 605

DANIEL VANCLEF ESTATE

PARCEL 16

SURVEY SHOWING

TAX MAP 121 PARCELS 25A & 27A

THE MAGDALINE & WILLIAM JOHNS PROPERTY

SCOTTSVILLE DISTRICT ALBEMARLE COUNTY, VIRGINIA

DATE MAY 11, 1988

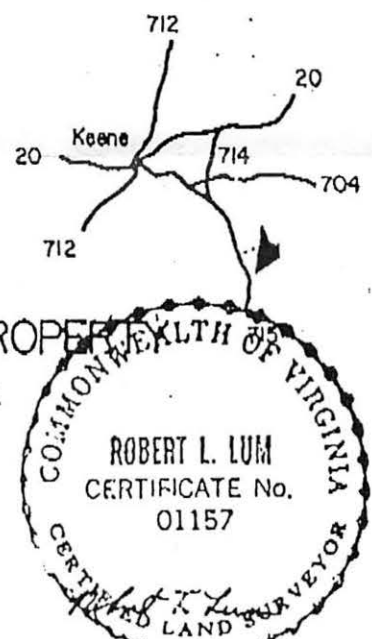
SCALE 1" = 100 FEET

ROBERT L. LUM

LAND PLANNING - SURVEYING

PALMYRA, VIRGINIA

10



Ex-D

BOOK 1191 PAGE 140

BOOK 1170 PAGE 135

007359

CORRECTED
THIS DEED,

made this 25th day of July, 1991, by and between
JOE W. RAMOS, JR. and ANNETTE L. C. RAMOS, husband and wife, the
Grantors, and RACHEL BAUGHMAN, unmarried, Grantee, whose address
is : Route S, Box 418, Charlottesville, Virginia 22901.

W I T N E S S E T H :

THAT FOR AND IN CONSIDERATION of the sum of TEN AND NO/100
DOLLARS (\$10.00), cash in hand paid, the receipt of which is hereby
acknowledged, the Grantors do hereby GRANT, BARGAIN, SELL and
CONVEY with GENERAL WARRANTY and ENGLISH COVENANTS OF TITLE unto
the Grantee, as her sole and separate equitable estate free from
the control and marital rights of any present or future husband and
free from any curtesy rights or inchoate curtesy rights of any
present or future husband of the said RACHEL BAUGHMAN, all of which
are hereby expressly excluded, and with the full and complete
authority in the said RACHEL BAUGHMAN to alien, convey, encumber
and otherwise deal with and dispose of the same without necessity
of joinder by or with any present or future husband of the said
RACHEL BAUGHMAN,

All that certain parcel of land situated in the
Scottsville Magisterial District of Albemarle County,
Virginia, as shown on Albemarle County Tax Map 121,
Parcel 24-A, and situated on the south side of the road
leading from Keene to Esmont, containing 2.65 acres, more
or less and being more particularly described on a survey
of B. Aubrey Huffman and Associates, Ltd., dated July 31,
1991 which is attached hereto and recorded herewith;
being the same property as was conveyed to the Grantors
by deed of Raymond L. Spradlin dated August 3, 1989 and
recorded in the aforesaid Clerk's Office in Deed Book
1061, page 698.

This conveyance is made expressly subject to the easements,
conditions, restrictions and reservations contained in duly

BOOK 119 | PAGE 141

BOOK 1170 | PAGE 136

recorded deeds, plats, and other instruments constituting constructive notice in the chain of title to the property hereby conveyed, which have not expired by a limitation of time contained therein or have not otherwise become ineffective.

WITNESS the following signatures and seals:

Joe W. Ramos, Jr. (SEAL)
Joe W. Ramos, Jr.

Annette L. C. Ramos (SEAL)
Annette L. C. Ramos

STATE OF VIRGINIA

CITY OF CHARLOTTESVILLE, to-wit:

The foregoing deed was acknowledged before me this 2 day of August, 1991 by JOE W. RAMOS, JR. and ANNETTE L. C. RAMOS.
My commission expires: 2/28/93

Sherrin M. Morris
Notary Public

* This Corrected Deed is recorded to attach the said survey of B. Aubrey Huffman & Associates, Ltd., dated July 31, 1991, which was inadvertently omitted when this Deed was originally recorded and to further clarify that the said parcel of land contains 3.286 acres, more or less, rather than the 2.65 acres, more or less, which was incorrectly described when this Deed was originally recorded.

VIRGINIA:

IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF ALBEMARLE:

THIS DEED WAS PRESENTED, AND WITH CERTIFICATE ANNEXED, IS ADMITTED
\$54,500.00
TO RECORD ON Aug 5, 1991, AT 1:38 O'CLOCK P M.

STATE TAX	\$ 81.75	(039)
LOCAL TAX	\$ 27.25	(213)
TRANSFER FEE	\$ 1.00	(212)
VSLF	\$ 1.00	(145)
CLERK'S FEE	\$ 12.00	(301)
PLAT	\$	

SEC. 58.1-802:

STATE TAX	\$ 27.25	(038)
LOCAL TAX	\$ 27.25	(220)
LOCAL TAX	\$	(223)

TOTAL	\$ 177.50
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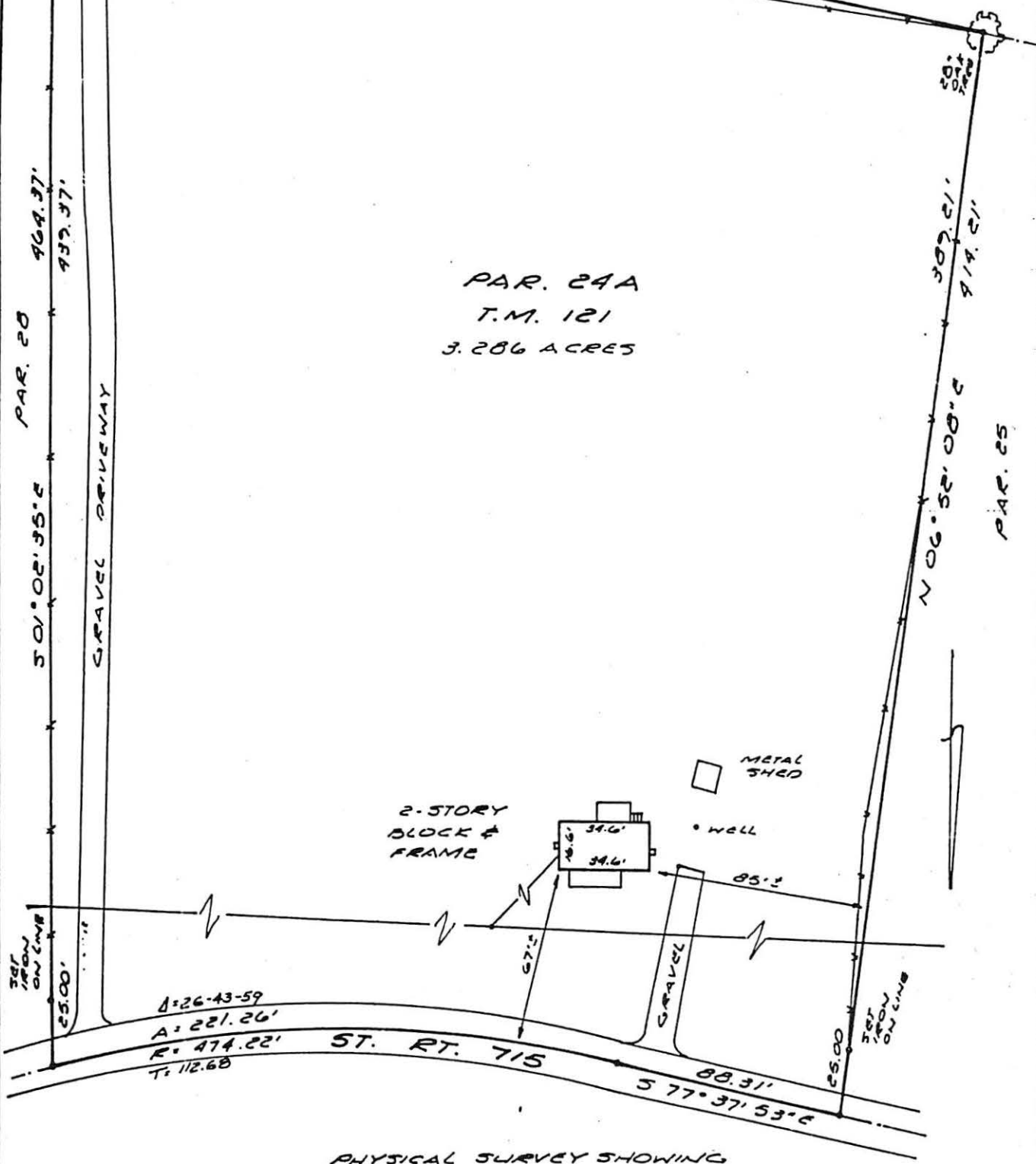
TESTE:

SHELBY J. MARSHALL, CLERK

BY: Sherrin M. Morris
DEPUTY CLERK

PROPERTY IS NOT IN THE HUD DEFINED
100 YEAR FLOOD ZONE.

Arthur F. Edwards
ARTHUR F. EDWARDS



PHYSICAL SURVEY SHOWING
PARCEL 24A AS SHOWN ON SHEET 121
ALBEMARLE COUNTY TAX MAPS
ALBEMARLE COUNTY, VIRGINIA JULY 31, 1991



B. AUBREY HUFFMAN AND ASSOCIATES, LTD.
CIVIL ENGINEERING-LAND SURVEYING-LAND PLANNING
CHARLOTTESVILLE, VIRGINIA

VIRGINIA: IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF ALBEMARLE

THIS DEED WAS PRESENTED, AND WITH CERTIFICATE ANNEXED, IS ADMITTED

TO RECORD ON Dec 2, 1991, AT 3:36 O'CLOCK P M.

STATE TAX	\$		(039)
LOCAL TAX	\$		(213)
TRANSFER FEE	\$		(212)
VSLF	\$	1.00	(145)
CLERK'S FEE	\$	12.00	(301)
PLAT	\$	2.00	

SEC. 58.1-802:

STATE TAX	\$		(038)
LOCAL TAX	\$		(220)
LOCAL TAX	\$		(223)

TOTAL \$ 15.00

TESTE:

SHELBY J. MARSHALL, CLERK

BY: Karen P. Shifflett
DEPUTY CLERK

a true copy TESTE:

SHELBY J. MARSHALL, CLERK

by: Jocelyn M. Davis
Deputy Clerk

BK1812PG0028

006390

Prepared by McClure, Callaghan & Atkins

THIS DEED made and entered into this 19th day of April, 1999, by and between WILLIAM E. JOHNS, single, JUANITA A. LEE, single, and ROBIN A. LEE, single, the Grantors, and RICKY WILLIAM NELSON and DANA ANN NELSON, husband and wife, the Grantees, whose address is PO Box 11, Keene, Va. 22946

W I T N E S S E T H:

THAT FOR AND IN CONSIDERATION of the sum of THIRTEEN THOUSAND FIVE HUNDRED DOLLARS (\$13,500.00), cash in hand paid, the receipt of which is hereby acknowledged, the Grantors do hereby GRANT, BARGAIN, SELL and CONVEY with GENERAL WARRANTY and ENGLISH COVENANTS OF TITLE unto Ricky William Nelson and Dana Ann Nelson, husband and wife, as tenants by the entirety with full rights of survivorship as at common law and not as tenants in common, all that certain tract or parcel of land with improvements thereon and appurtenances thereunto pertaining, containing 3 acres, more or less, and lying in the Scottsville Magisterial District of Albemarle County, Virginia, on the road leading from Esmont to Keene a distance of about three miles from Esmont; being the same property which was conveyed to Magdaline Johns by deed of John Franklin B. Hill and Mary Banks Hill, his wife, dated January 3, 1941 and recorded in the Clerk's Office aforesaid in Deed Book 249, page 357. Magdaline Johns was also known as Madeline Johns and later became Madeline J. Mortis. Madeline J. Mortis died April 23, 1986 and by her will spread in the said County Clerk's Office in

TLS 2
2-3-00
Orr

BK1812PG0029

Will Book 67, page 571, she devised the above described property to William Johns, Juanita Lee and Robin Lee. Williams Johns died January 20, 1995 and by his will spread in the said County Clerk's Office in Will Book 91, page 3, he devised his interest in the above described property to his son, William E. Johns.

This conveyance is subject to all applicable easements, reservations, restrictions, conditions and other encumbrances contained in duly recorded deeds, plats and other instruments constituting constructive notice in the chain of title to the above-described property which have not expired by a time limitation contained therein or have not otherwise become ineffective.

WITNESS the following signatures and seals:

William E. Johns (SEAL)
William E. Johns
Juanita A. Lee (SEAL)
Juanita A. Lee
Robin A. Lee (SEAL)
Robin A. Lee

STATE OF VIRGINIA
CITY/COUNTY OF CHARLOTTESVILLE, to-wit:

The foregoing Deed was acknowledged before me by WILLIAM E. JOHNS this 4th day of May, 1999.

My commission expires: June 30, 1999.

Arlene Probst
Notary Public

BK1812PG0030

STATE OF VIRGINIA
CITY/COUNTY OF CHARLOTTESVILLE, to-wit:

The foregoing Deed was acknowledged before me by JUANITA A. LEE this 4th day of May, 1999.

My commission expires: June 30, 1999

Arlene Probst
Notary Public

STATE OF VIRGINIA
CITY/COUNTY OF CHARLOTTESVILLE, to-wit:

The foregoing Deed was acknowledged before me by ROBIN A. LEE this 4th day of May, 1999.

My commission expires: June 30, 1999

Arlene Probst
Notary Public

a true copy TESTE:

SHELBY J. MARSHALL, CLERK

by: Patricia Minahan
Deputy Clerk

VIRGINIA:

IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF ALBEMARLE:

THIS DEED WAS PRESENTED, AND WITH CERTIFICATE ANNEXED, IS ADMITTED

TO RECORD ON May 4, 19 99, AT 2:32 O'CLOCK P. M.

STATE TAX	\$ <u>20.25</u>	(039)
LOCAL TAX	\$ <u>6.75</u>	(213)
TRANSFER FEE	\$ <u>1.00</u>	(212)
I.T.T.F	\$ <u>3.00</u>	(106)
VSLF	\$ <u>1.00</u>	(145)
CLERK'S FEE	\$ <u>12.00</u>	(301)
PLAT	\$	
SECT. 58.1-402:		
STATE TAX	\$ <u>6.75</u>	(038)
LOCAL TAX	\$ <u>6.75</u>	(220)
LOCAL TAX	\$	(223)
TOTAL	\$ <u>57.50</u>	

TESTE:

SHELBY J. MARSHALL, CLERK

BY:

Patricia Minahan
DEPUTY CLERK

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OF PAGINATION

PARCEL 28
EVELYN A. JONES
D. B. 408 - 056

PARCEL 27
DALLAS W. CRICKENBURGER
D. B. 571 - 246

PARCEL 24A
MARGARET A. ROSS
W. B. 63 - 148

PARCEL 25A
D.B. 249 - 357

3.364 ACRES

PARCEL 27A
D. B. 399 - 129

2.50 ACRES

PARCEL 25
LUNNIE W. AGEE
D. B. 944 - 605

DANIEL VANCLEEF ESTATE

PARCEL 16

SURVEY SHOWING

TAX MAP 121 PARCELS 25A & 27A

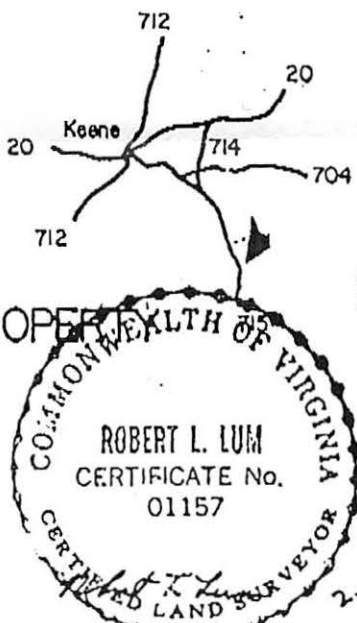
THE MAGDALINE & WILLIAM JOHNS PROPERTY

SCOTTSVILLE DISTRICT ALBEMARLE COUNTY, VIRGINIA

DATE MAY 11, 1988

SCALE 1" = 100 FEET

ROBERT L. LUM
LAND PLANNING - SURVEYING
PALMYRA, VIRGINIA



BK1536PG0494

004774

THIS DEED, made this 3rd day of May, 1996, by and between Rachel BAUGHMAN, party of the first part, hereinafter referred to as Grantor, and Laurel A. DAVIS, party of the second part, hereinafter referred to as Grantee, whose address is Rt. 1, Box 191-A, Keene, Virginia 22946.

W I T N E S S E T H:

That for and in consideration of the sum of \$62,125.00, cash in hand paid, the receipt of which is hereby acknowledged, the Grantor does hereby GRANT, BARGAIN AND SELL and CONVEY with GENERAL WARRANTY and ENGLISH COVENANTS OF TITLE unto the Grantee, all that certain lot or parcel of land, with the improvements thereon and the appurtenances thereto belonging, situated in the Scottsville Magisterial District of Albemarle County, Virginia, and being the same property conveyed to the Grantor herein by deed of Joe W. Ramos, Jr., and Annette L. C. Ramos, husband and wife, dated July 29, 1991, of record in the Clerk's Office of the Circuit Court for said County in D. B. 1170, page 135, and described therein as follows:

all that certain parcel of land situated in the Scottsville Magisterial District of Albemarle County, Virginia, as shown on Albemarle County Tax Map 121, Parcel 24-A, and situated on the south side of the road leading from Keene to Esmont, containing 2.65 acres, more or less.

That for and in consideration of the sum of \$10.00, cash in hand paid, the receipt of which is hereby acknowledged, the Grantor

2-3-00
Tis 4
me

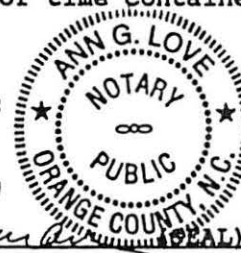
BK1536PG0495

does hereby RELEASE, REMISE and QUITCLAIM unto the Grantee, all of her right, title and interest in and to all that certain tract or parcel of land, with the improvements thereon and the appurtenances thereto belonging, situated on the south side of and adjoining State Route 715 in the Scottsville Magisterial District of the County of Albemarle, Virginia, containing 3.286 acres, more or less, more particularly described as T.M. 121, Parcel 24A on a plat prepared by Arthur F. Edwards, L.S., dated July 31, 1991, of record in said Clerk's Office in D. B. 1191, page 142, and which plat is believed to describe accurately the actual parcel of land conveyed to the Grantor herein by the aforesaid deed of record in D. B. 1170, page 135, and by a deed of correction of record in said Clerk's Office in D. B. 1191, page 140.

This conveyance is made expressly subject to the easements, conditions, restrictions, and reservations contained in duly recorded deeds, plats and other instruments constituting constructive notice in the chain of title to the property hereby conveyed, which have not expired by a limitation of time contained therein or have not otherwise become ineffective.

WITNESS the following signature and seal:


Rachel Baughman



BK1536PG0496

STATE OF NORTH CAROLINA

COUNTY OF Orange, to-wit:

The foregoing instrument was acknowledged before me this 6 day of May, 1996, by Rachel Baughman.

My Commission expires: 5-19-96.

Ann G Love
Notary Public

VIRGINIA: IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF ALBEMARLE:

THIS DEED WAS PRESENTED, AND WITH CERTIFICATE ANNEXED, IS ADMITTED

TO RECORD ON May 14, 1996, AT 3:51 O'CLOCK P. M.

STATE TAX	\$ <u>93.30</u>	(039)
LOCAL TAX	\$ <u>31.70</u>	(213)
TRANSFER FEE	\$ <u>1.00</u>	(212)
VSLF	\$ <u>1.00</u>	(145)
CLERK'S FEE	\$ <u>12.00</u>	(301)
PLAT	\$	

SEC.58.1-802:

STATE TAX	\$ <u>31.25</u>	(038)
LOCAL TAX	\$ <u>31.25</u>	(220)
LOCAL TAX	\$	(223)

TOTAL \$ 200.90

TESTE:

SHELBY J. MARSHALL, CLERK

BY: Deanne M. Morris
DEPUTY CLERK

a true copy TESTE:

SHELBY J. MARSHALL, CLERK

by: Deanne M. Morris
Deputy Clerk

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OF PAGINATION

conveyed and shall proceed to sell the same at public auction; advertisement required being three weeks by handbills posted in Charlottesville and Albemarle County. Such sale shall be upon the following terms: cash as to so much of the proceeds as may be necessary to defray expenses of executing this trust including a Trustees' commission of five per centum of the gross proceeds of sale and to discharge the amount of the debt hereby secured then unpaid, which is to be then paid whether due at that time or not, and if there be any residue, the same shall be made payable at such time and secured in such manner as the said Grantor, its successors or assigns, shall in writing prior to advertisement direct, or in case of failure to give such direction, as the Trustees shall think fit.

4. In case of advertisement by the Trustees followed by no sale of the property pursuant thereto, Trustees shall be entitled to commission of two and a half percent of the amount secured at the time of first advertisement.

IN WITNESS WHEREOF S-Square Construction Company, has caused its name to be signed hereto by Robert M. Swift, its President and agent hereunto duly authorized, and has caused its seal to be affixed and attested by Richard J. Funk, its Secretary.

(SEAL) S-SQUARE CONSTRUCTION COMPANY
ATTEST: By: Robert M. Swift, President
Richard J. Funk, Secretary

STATE OF VIRGINIA
COUNTY OF ALBEMARLE, to-wit:

I, Gertrude D. Mawyer, a Notary Public in and for the County and State aforesaid, do certify that Robert M. Swift, whose name is signed hereto as President of S-Square Construction Company, bearing date on the 12th day of May, 1965, have and each has acknowledged the same before me in my County aforesaid.

My commission expires the 6th day of February, 1968.
Given under my hand this 12th day of May, 1965.
Gertrude D. Mawyer, Notary Public

VIRGINIA:
IN THE CLERK'S OFFICE OF ALBEMARLE CIRCUIT COURT, June 8, 1965.
This deed was presented to me in said office and with certificate annexed admitted to record at 9:20 A. M.
Teste: *Em M. Mawyer*, Clerk

*Withdrewn by
Walker W. Jones
6-16-69*

470
Pencie J. Agee, &c
: Gift
Evelyn A. Jones, &c
t. Tax \$ 3.30
o. Tax 1.10
rans. 1.00
ee 5.00
aid \$10.40

THIS DEED, made this 7th day of June, 1965, by and between
PENCIE J. AGREE and JOE J. AGEE, her husband, parties of the first part, and
EVELYN A. JONES and WALKER W. JONES, husband and wife, parties of the second
part,

W I T N E S S E T H:

That for and in consideration of natural love and affection and of the sum of \$5.00 cash in hand paid, the said parties of the first part

*TT 5
2-3-69
SM*

hereby GIVE, GRANT and CONVEY, unto their daughter and son-in-law respectively, Evelyn A. Jones and Walker W. Jones, wife and husband, as tenants by the entirety and not as tenants in common, with full rights of survivorship as at common law, all that certain parcel of land, together with the improvements thereupon and appurtenances thereunto appertaining, situated on the road leading from Keene to Esmont, in the Scottsville Magisterial District of Albemarle County, Virginia, containing 4.59 acres, more or less; and being all of a parcel of 5.34 acres, more or less (see plat in D. B. 240 p. 510), which was conveyed to the said Pencie J. Agee by John L. Johnson and others by partition deed dated August 23, 1938, and recorded in the Clerk's Office of the Circuit Court of Albemarle County, Virginia, in D. B. 240 p. 507, with the exception of a parcel of 3/4ths of an acre, more or less, which was conveyed off therefrom to Virginia A. Gray by the said Pencie J. Agee and husband by deed dated June 10, 1944, and recorded in the Clerk's Office aforesaid in D. B. 260 p. 134. Reference to said plat and deeds is here made for a more particular description of the property hereby conveyed.

This conveyance is made subject to a right of way hereinbelow granted to the said Joe A. Agee for the benefit of adjoining property owned by him.

That for and in consideration of the sum of \$1.00 cash in hand paid by the said Joe J. Agee to the said Pencie J. Agee, the receipt whereof is hereby acknowledged, the said Pencie J. Agee hereby GRANTS unto the said Joe J. Agee a right of way for ingress and egress 12 feet in width along the west boundary of the property hereby conveyed to State Route 714, for the benefit of the land of the said Joe J. Agee adjoining the property hereby conveyed on the south.

WITNESS The following signatures and seals:

Pencie J. Agee (SEAL)

Joe J. Agee (SEAL)

STATE OF VIRGINIA

COUNTY OF ALBEMARLE, to-wit:

I, Nannie Martin, a Notary Public of and for the County aforesaid, in the State of Virginia, do hereby certify that Pencie J. Agee and Joe J. Agee, whose names are signed to the foregoing writing, bearing date of June 7, 1965, have and each has acknowledged the same before me in my County aforesaid.

Given under my hand this 7th day of June, 1965.

My commission expires: January 4, 1967.

Nannie Martin, Notary Public

VIRGINIA:

IN THE CLERK'S OFFICE OF ALBEMARLE CIRCUIT COURT, June 8, 1965.

This deed was presented to me in said office and with certificate annexed admitted to record at 12:30 P. M.

Teste:

a true copy TESTE:

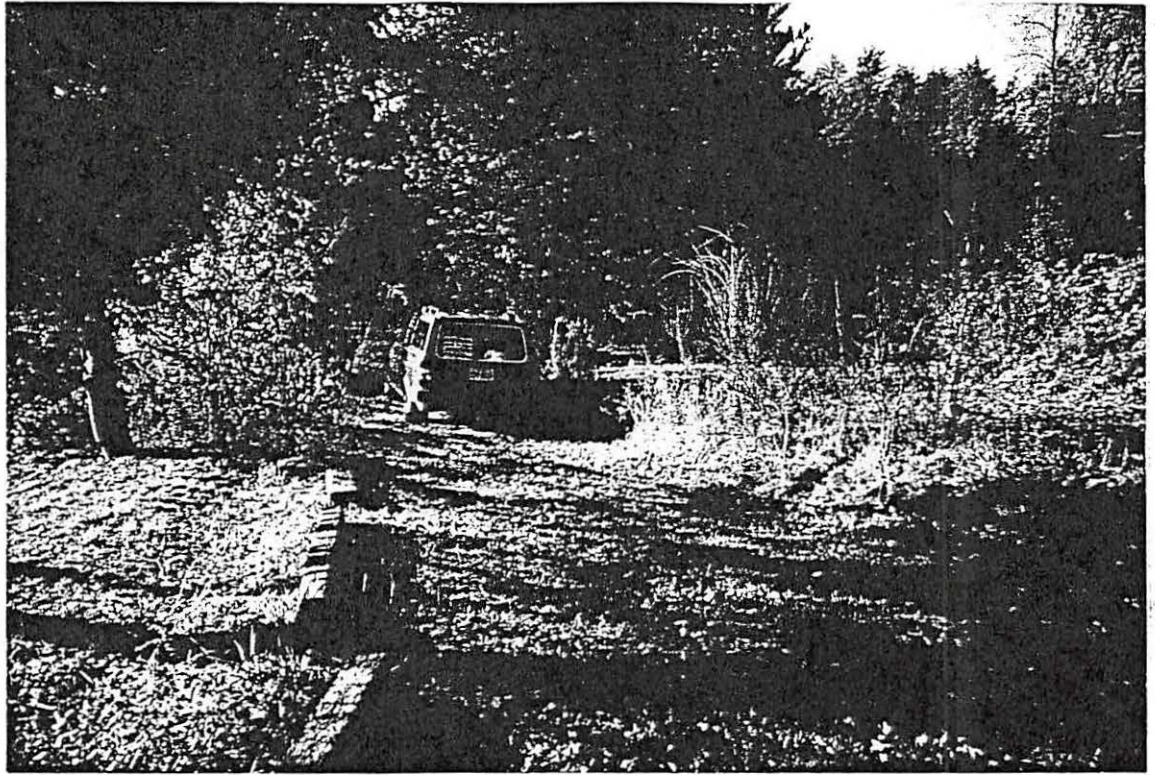
SHELLEY J. MARSHALL, CLERK

by Joetta J. Morris
Deputy Clerk

Goa H. H. H. H., Clerk



Π's Exh
6
2.300
Gmp

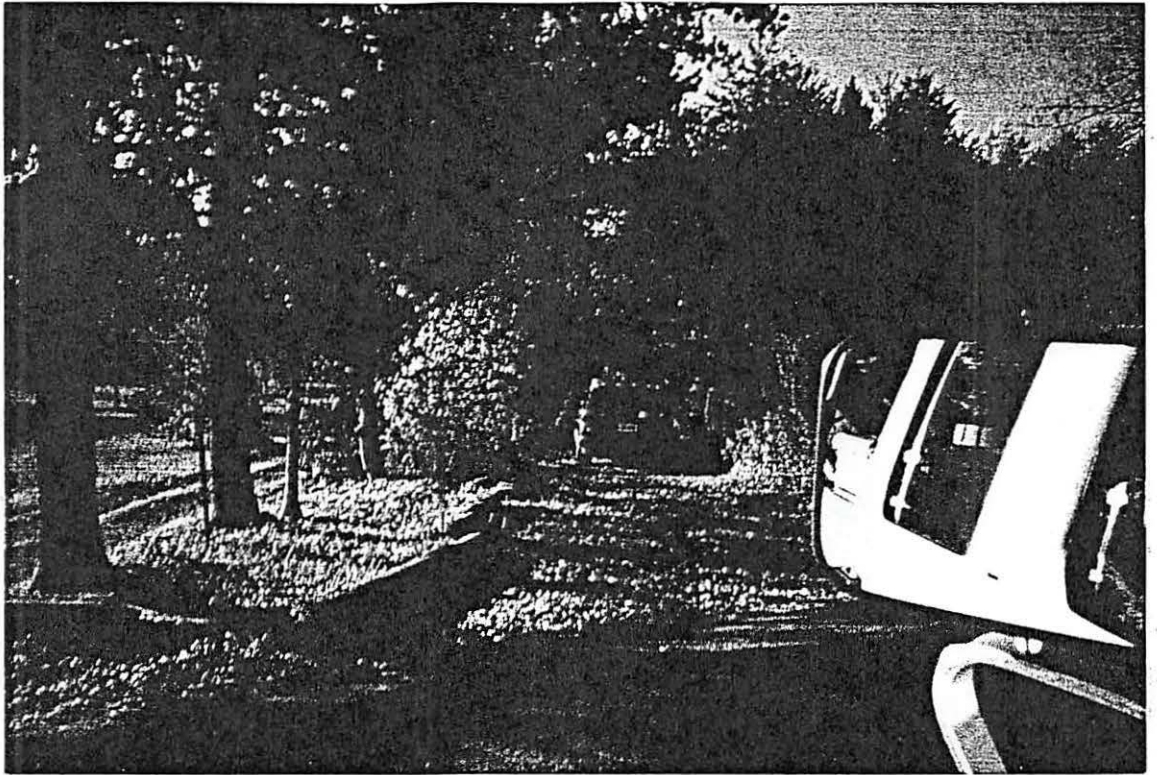


Tls 7
2.300
Dmp



2-3-00

Feb 8 PM



2-3-00
Edg 9 PMP



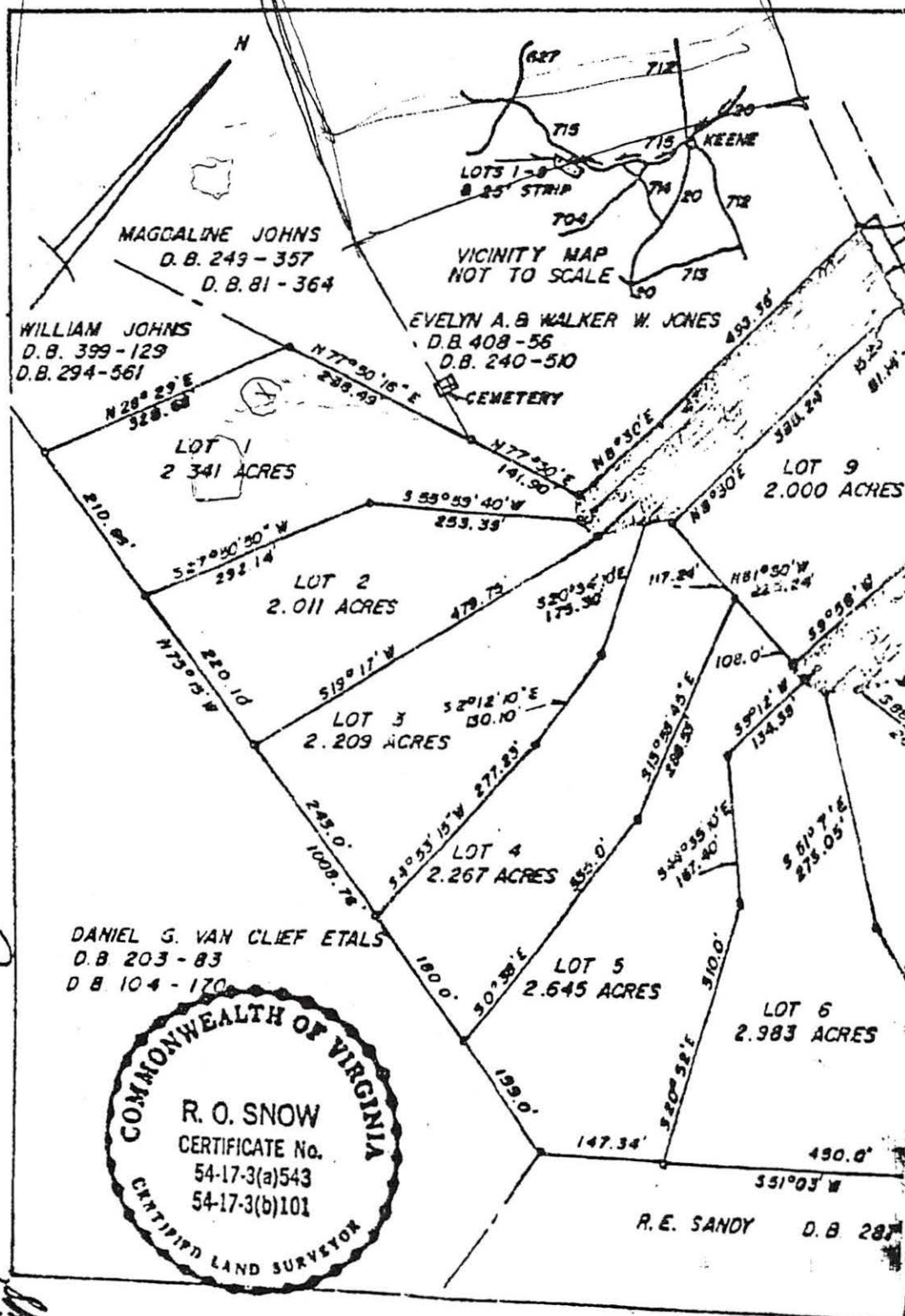
10. 2.31.06
Pmp



Δ's Exh #1

VIRGINIA:
 IN THE CLERK'S OFFICE OF ALBERMARLE CIRCUIT COURT,
 This deed was presented to me in said office and with certificate
 annexed admitted to record at 10:13 P.M.

Teste:



294/501 - S.S. + Pencil A
 2 1/2 AC
 22 AC - S.

5711

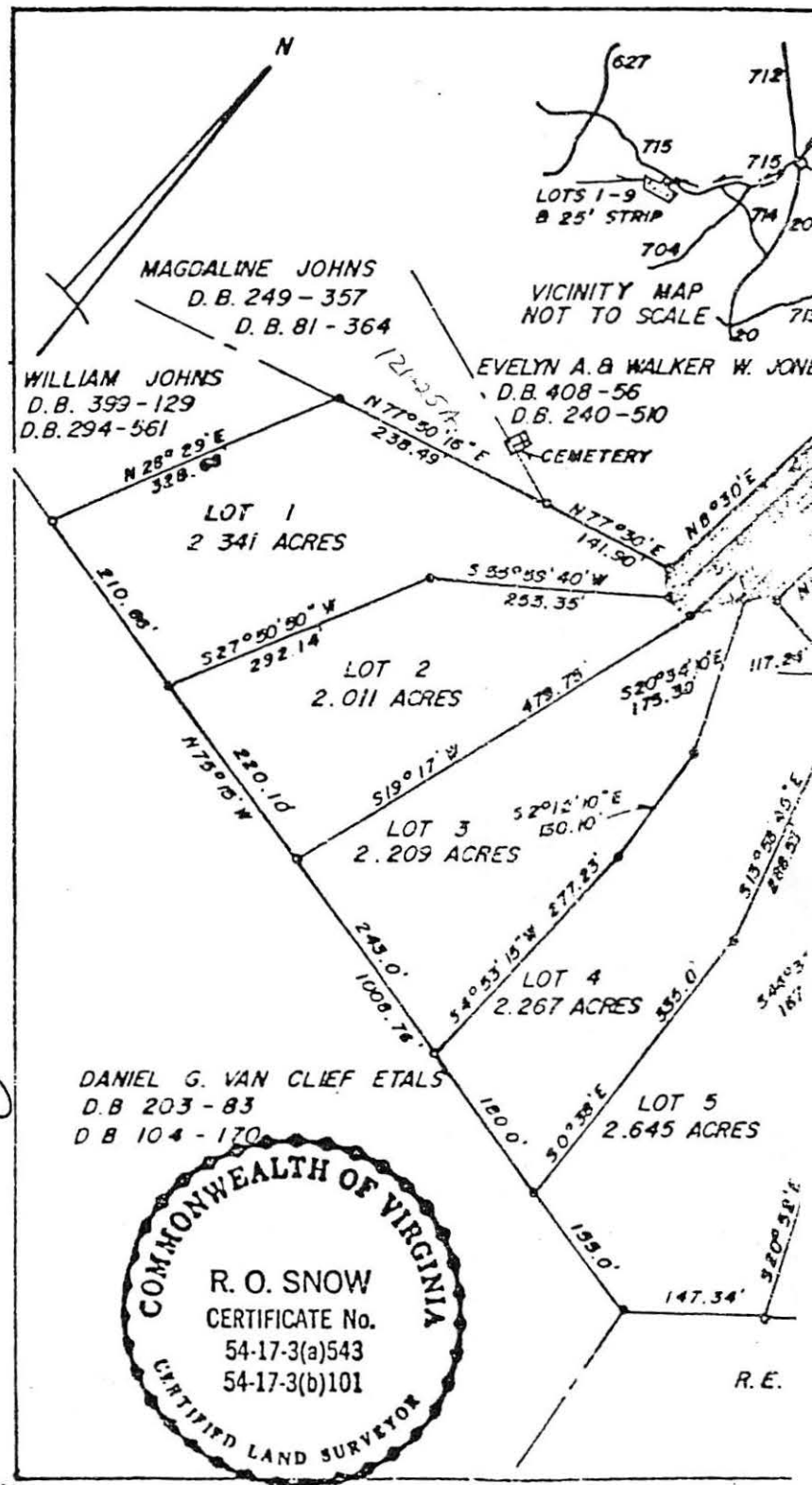
VIRGINIA:

IN THE CLERK'S OFFICE OF ALBEMARLE CIRCUIT COURT,
 This deed was presented to me in said office and with certificate
 annexed admitted to record at 10:13 A.M.

Teste:

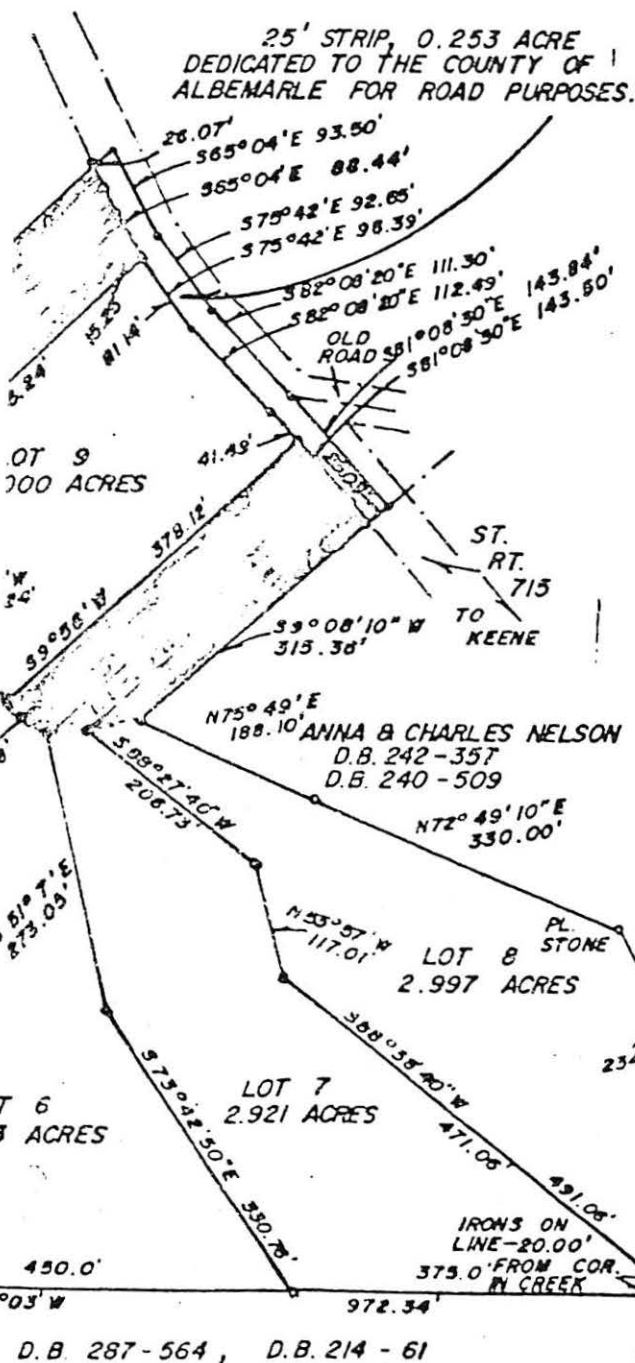
Henry J. MacArthur

Clerk



274/501

571/96



APPROVALS

SURVEY CERTIFICATION:

CERTIFIED TO BE CORRECT AND
ACCURATE.

R.D. Snow 11-4-74

COUNTY PLANNING COMMISSION:

David W. Carr 11-26-74
CHAIRMAN RPT

COUNTY BOARD OF SUPERVISORS:

John L. Humphrey 11-26-74
DESIGNATED AGENT

OWNERS APPROVAL:

THE SUBDIVISION OF THIS LAND
IS APPROVED AS SHOWN.

Anticollateral R/L
by R/L

STATE OF VIRGINIA,
COUNTY OF ALBEMARLE,
TO WIT:

THE FOREGOING INSTRUMENT
WAS ACKNOWLEDGED BEFORE
THIS 21 DAY OF NOV.
1978, 1978 at San Francisco, CA AS ONE
MY COMMISSION EXPIRES
Carol L. Lutz
NOTARY PUBLIC

NOTES:

— DENOTES IRON PM SET UNLESS INDICATED OTHERWISE.

ALL IRON PINS OR CORNER MARKERS AS INDICATED HEREON HAVE BEEN SET.

LOTS 1, 2, 3, 4 & 9 SHALL HAVE A NON-EXCLUSIVE R.O. WAY OVER & ACROSS THE SHADED STRIP BETWEEN LOT 9 & JONES PROPERTY FOR INGRESS OR EGRESS. THIS STRIP SHALL BE USED IN COMMON AS AN ENTRANCE CONNECTION TO ST. RT. 715.

LOTS 5, 6, 7 & 8 SHALL HAVE A NON-EXCLUSIVE R.O. WAY OVER 5
ACROSS THE SHADED STRIP BETWEEN LOT 9 & NELSON'S PROPERTY
FOR INGRESS OR EGRESS. THIS STRIP SHALL BE USED IN COMMON AS
AN ENTRANCE CONNECTION TO ST. RT. 715.

EXTERIOR BOUNDARY LINES TAKEN FROM PLAT OF R.O. SNOW &
ASSOCIATES DATED 7-22-74 & REVISED 10-28-74.

DEED BOOK REFERENCES FOR LOTS 1 THROUGH 9 AS FOLLOWS,
D.B. 357-543, D.B. 447-363, D.B. 331-513, D.B. 287-414, D.B. 240-509,
D.B. 74-501, D.B. 69-351.

31.74' PLAT OF
LOTS 1-THROUGH-9 & 25' STRIP, LOCATED
ON ST. RT. 715 ABOUT 1.0 MI. S. W. OF KE
ALBEMARLE COUNTY, VA.

FOR
MONTECELLO HOME BUILDERS, INC.

SCALE: 1" = 200'

NOVEMBER 4, 1964

R. O. SNOW & ASSOCIATES
CHARLOTTESVILLE, VA.

1826

647/363 is 19/2 Sol. f

22 sold. by J.J. Agnew & Elijah Agnew 1863

VIRGINIA: IN THE CIRCUIT COURT FOR ALBEMARLE COUNTY

RICKY WILLIAM NELSON
DANA ANN NELSON,

Complainants

v.

Case #:

LAUREL A. DAVIS,

Respondent

DECREE GRANTING PRELIMINARY INJUNCTION

This matter came on this day on Complainants' affidavit for a preliminary injunction seeking to restrain Laurel A. Davis from interfering with the use by Complainants of a road crossing Respondent's property for ingress and egress to Complainants' property in Albemarle County, Virginia; and it appearing to the Court from the evidence of Complainants that this motion is proper and should be granted; it is hereby DECREED as follows:

The Complainants motion for preliminary injunction is granted upon the following conditions:

(1) That Complainants post an injunction bond in accordance with Virginia Code Section 8.01-631 in the amount of \$ 500.⁰⁰/_{xx} in cash or with a surety approved by the Court;

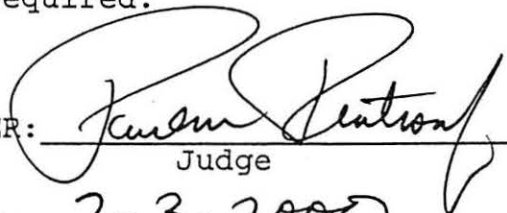
(2) That Complainant's right to enter upon the property of Respondent shall be limited to the use of the gravel driveway

indicated on the survey of Respondent's property recorded in the Clerk's Office in Deed Book 1191, page 142 for the purpose of ingress and egress to Complainant's property lying to the rear of Respondent's property and described on plat of Robert L. Lum, C.L.S., bearing date May 11, 1988, a copy of both of which plats are filed herein.

(3) That Respondent Laurel A. Davis be, and she hereby is enjoined from interfering with the entry by Complainants or their agents, tenants, guests or invitees for the purpose of ingress and egress to Complainants' property.

(4) That the time during which this injunction shall be effective shall be until 2-22-2000 at 8:30 A.M. and upon expiration of said time such injunction shall stand dissolved, unless, before the expiration thereof, it be enlarged.

This matter is continued to February 22, 2000 for such further proceeding as may be required. at 8:30 A.M.

ENTER: 

Judge

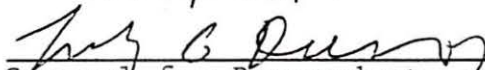
DATE: 2-3-2000

Cdb/74p.16

I ask for this:

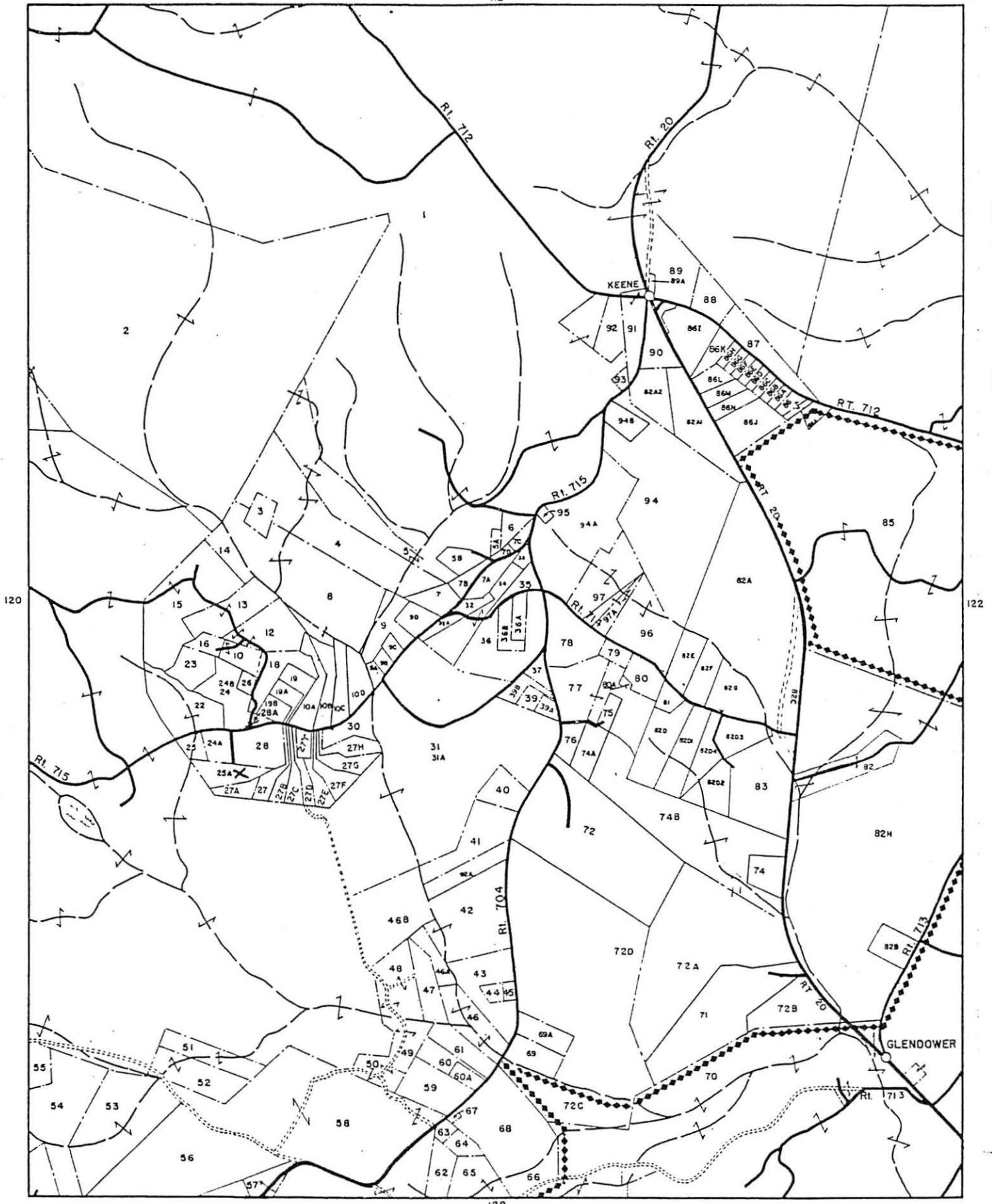

Counsel for Complainants

Seen and agreed to:


Counsel for Respondent

ALBEMARLE COUNTY

112



SCALE IN FEET

0 500 1000 1500 2000 2500

AGRICULTURAL & FORESTAL DISTRICTS

SCOTTSVILLE DISTRICT

35

π's Exh.

SECTION 121

VIRGINIA: IN THE CIRCUIT COURT FOR ALBEMARLE COUNTY

RICKY WILLIAM NELSON
and
DANA ANN NELSON,

Complainants,

v.

CH 00-11,575

LAUREL A. DAVIS,

Respondent.

ORDER

This cause came to be heard on February 21, 2000, on the Complainants' Motion for Permanent Injunction, and evidence was heard *ore tenus* and was argued; and

UPON CONSIDERATION WHEREOF, for the reasons stated in the court's opinion letter dated February 28, 2000, a copy of which is attached hereto and which is incorporated by reference, it appearing proper to do so, it is accordingly

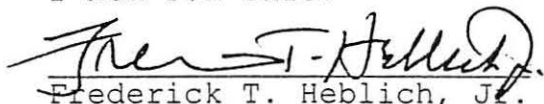
ORDERED, that the motion for a permanent injunction is denied; and it is FURTHER ORDERED that the temporary injunction issued by this court on February 3, 2000, be, and it hereby is, dissolved; the injunction bond of the Complainants is released and the Clerk shall pay the \$500.00 posted as surety to counsel for the complainants. This cause is ended.

ENTERED this 17th day of April, 2000


Judge


cdnsp.55

I ASK FOR THIS:



Frederick T. Heblich, Jr.
801 East Jefferson Street
Charlottesville, VA 22902
Tel. (804) 244-2784
Fax (804) 977-2874
VSB 21898
Counsel for Respondent

SEEN AND OBJECTED TO IN IN TOTO ON THE GROUNDS SET FORTH BELOW:



William G. Pickford
Pickford and Pickford
612 East Jefferson Street
Charlottesville, VA 22902

Counsel The Court found that the road in question has been in use for more than 80 years. This finding was not rebutted by any evidence. However the Court erred in failing to allow Complainants the presumption that said use is under a claim of right and erred in failing to place upon the Respondent the burden of rebutting this presumption. Causey v. Lanigan, 208 Va. 587; Pettus v. Keeling, 232 Va. 483; Umbarger v. Phillips, 240 Va. 120; and followed in Chaney v. Haynes, 250 Va. 155.

2. The Court made no factual finding of any permissive use and no evidence was presented that any person ever requested permission to use this road. However, the Court speculates that the use was permissive in its "Analysis".
3. The Court determined there was a "mistaken belief" of a recorded right by relying on a deed executed more than 40 years after the evidence indicates the road was already in existence.
4. The Court found that plats of record and by which the conveyances to the Complainants and Respondent were made show the existing driveway but failed to allow Complainants the presumption permitted by such deeds and plats that the right of way exists. Robertson v. Robertson, 214 Va. 76.
5. The Court ignored the failure of the Respondent owner of the servient tract to testify or offer any evidence to rebut the presumption of an easement to which Complainants were entitled.

COMMONWEALTH OF VIRGINIA



Sixteenth Judicial Circuit

F. Ward Harkrader, Jr.
P.O. Box 799
Louisa, Virginia 23093
(540) 967-5300

Lloyd C. Sullenberger
P.O. Box 230
Orange, Virginia 22960
(540) 672-2433

Paul M. Peatross, Jr.
P.O. Box 1651
Charlottesville, Virginia 22902
(804) 972-4015

Albemarle Culpeper Fluvanna Goochland
Greene Louisa Madison Orange Charlottesville

John R. Cullen
P.O. Box 876
Louisa, Virginia 23093
(540) 727-3440

Edward L. Hogshire
315 East High Street
Charlottesville, Virginia 22902
(804) 293-5859

February 28, 2000

William G. Pickford, Esquire
Pickford & Pickford
612 East Jefferson Street
Charlottesville, Virginia 22902

Frederick T. Heblich, Jr., Esquire
801 East Jefferson Street
Charlottesville, Virginia 22902

RE: Ricky William Nelson and Dana Ann Nelson v. Laurel
A. Davis

Dear Counsel:

This cause comes before the Court on Complainants' Motion for Preliminary and Permanent Injunction enjoining Respondent from interfering with the use of a driveway on her property in Albemarle County, Virginia from State Route 715 for ingress and egress to their property. A preliminary injunction was granted on February 3, 2000 until February 22, 2000 at which time a hearing was scheduled for additional evidence. A hearing was held and the Court took the matter under advisement to consult the legal authorities.

FACTUAL FINDINGS

Complainants' Exhibit B attached to the Petition for Preliminary Injunction is a plat of record in Deed Book 1191, page 142, which is the attached page to a deed conveying 3.286 acres, more or less, identified as Tax Map 121, Parcel 24A to the Respondent, Laurel A. Davis, under date of

William G. Pickford, Esquire
Frederick T. Heblich, Jr., Esquire
February 28, 2000
Page 2

May 3, 1996. Exhibit B shows an existing driveway over the Davis property. To the rear of the Davis property is a lot containing 3.364 acres of land, more or less, identified as parcel 25A on Plaintiff's Exhibit 3 introduced at the hearing on February 3, 2000, which is owned by Complainants, Ricky William Nelson and Dana Ann Nelson. Plaintiff's Exhibit 3 shows a driveway to State Route 715 on Parcel 24A and Parcel 25A, which is the driveway in question.

Also shown on Plaintiff's Exhibit 3 is Parcel 28 owned by Evelyn A. Jones and of record in Deed Book 408, page 56 of the Clerk's Office of the Circuit Court of Albemarle County. According to the testimony of David Dykes, there is an express easement from Parcel 25A across Parcel 28 to State Route 715 as noted at Deed Book 408, page 57.

Anna Nelson, age 81, testified that she use to own the Davis property for approximately one year in the 1960's. Ms. Nelson testified the road has been there as long as she can remember and she has lived in the area all of her life. She further testified that there were other houses behind the Davis property that used the road and that her father also used the road to get to property he owned behind the Davis property. It was the only road that gave access to this back property from State Route 715. Ms. Nelson further testified that she never knew the road to ever be closed and it was opened and used during her entire life time.

Gary Turner, age 44, indicated he grew up in the area and lived near this property all of his life. From 1995 through 1997 he lived on the Nelson property and used the road over the Davis property to get to and from State Route 715. He also did some maintenance on the road by providing gravel. He lived there at a time when Ms. Davis owned her property and she never told him not to use the road. Some years back before he lived on the property he used the road to park his car and play ball on a ball field on the Davis property.

Ricky Nelson, the Complainant, testified he bought the property (Parcel 25A) in May of 1999 and that there was a house on the property. The driveway over the Davis property is the only access to State Route 715, the main public road. He has a tenant on his property named Nannie Thomas who is 75 years of age. Ms. Davis blocked the use of the road by putting up a gate and parking a vehicle in the road.

William G. Pickford, Esquire
Frederick T. Heblich, Jr., Esquire
February 28, 2000
Page 3

QUESTIONS PRESENTED

1. Does the recordation of the plat with the deed to Ms. Davis and the language in the deed indicating that the conveyance is made subject to the easements contained in duly recorded plats give Mr. and Mrs. Nelson a right-of-way over the Davis property to State Route 715?
2. Have Mr. and Mrs. Nelson and their predecessors in title acquired an easement by prescription over the Davis property under Virginia law?

DISCUSSION OF AUTHORITY

Under Virginia law it is well established that the primary consideration in construing deeds is to determine the intention of the parties executing the instrument. Where a plat is referred to in a deed for the purpose of fixing its boundaries, the effect is the same as if it were copied into the deed. See Poindexter v. Molton, 237 Va. 448 (1989). Although a deed and a plat are considered together as a single instrument, in order to ascertain the parties intent where there is some ambiguity, the Court may properly admit extrinsic and parole evidence.

The phrase "subject to" in a deed provision generally is a phrase of qualification and notice and does not create affirmative rights, but such general observation is not dispositive of the case. Davis, v. Henning, 250 Va. 271 (1995).

To establish a private right-of-way by prescription over lands of another, the claimant must prove, by clear and convincing evidence, use under a claim of right, exclusive, uninterrupted, and with the knowledge and acquiescence of the owners of the land over which it passes, and that the use is continued for at least twenty years. The essence of an adverse use is the intentional assertion of a claim hostile to the ownership right of another, but the use of property under the mistaken belief of a recorded right cannot be adverse as long as such mistake continues. Chaney v. Haynes, 250 Va. 155 (1995).

ANALYSIS

The recording of the deed and plat conveying the property to Ms. Davis showing a gravel driveway on the eastern boundary of the property does constitute constructive notice but it does not create an easement where none is expressly granted in any of the records. At the hearing on February 22,

Page 4
2000, no evidence was introduced to explain the intent or meaning of the document that a right-of-way was granted to the owner of Parcel 25A over the land of Ms. Davis, Parcel 24A. Therefore, there is no express grant of an easement of record.

However, Complainants take the position that they had acquired an easement by prescription under the definition above noted. The evidence in the case was that there was permissive use by many people in the area which did not amount to a claim hostile to the ownership right of another. In fact, the evidence discloses that there was a mistaken belief that there was a recorded right-of-way at the location noted over 24A, when in fact the express granted easement was over Parcel 28. Under the case of Chaney v. Haynes, supra, the use is not adverse as required for a prescriptive easement when the use of the property was under the mistaken belief of a recorded right. The evidence shows the mistake continues today that the use of the road was thought to be over the express right-of-way, which is not on the Davis property, but on Parcel 28. Chaney v. Haynes is factually similar to the case at bar.

CONCLUSION

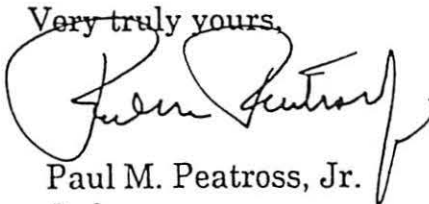
The Complainants have failed to meet their burden of showing that the gravel driveway of record on the plat was an easement granted over the Davis property per the intent of the parties.

The Complainants have also failed to show that in a claim of easement by prescription that the use was an adverse use for the required twenty year period. Therefore, the request for an injunction of a permanent nature is denied and the preliminary injunction is dissolved.

William G. Pickford, Esquire
Frederick T. Heblich, Jr., Esquire
February 28, 2000
Page 5

Mr. Heblich is instructed to prepare a decree consistent with this opinion, circulate it to Mr. Pickford for endorsement, and present it to the Court for entry.

Very truly yours,

A handwritten signature in black ink, appearing to read "Paul M. Peatross, Jr.", written over the typed name.

Paul M. Peatross, Jr.
Judge

PMPjr:sf

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

RICKY WILLIAM NELSON
DANA ANN NELSON,

Complainants

v.

CH : 00-11,575

LAUREL A. DAVIS,


Respondent

NOTICE OF APPEAL

The Complainants, Ricky William Nelson and Dana Ann Nelson hereby give notice of appeal from the order of this Court entered April 17, 2000, and further give notice that a statement of facts, testimony and other incidents of the case will be filed, all in accord with Rule 5:9 of the Rules of Supreme Court of Virginia.

RICKY WILLIAM NELSON
DANA ANN NELSON

By Counsel



W. G. Pickford, Esq.
Pickford & Pickford
612 East Jefferson Street
Charlottesville, Virginia 22902
Telephone No.: (804) 296-8191
Facsimile No.: (804) 296-6920
Counsel for Complainants

13

FILED
2000 MAY -8 PM 12:16
CIRCUIT COURT CLERK'S OFFICE
ALBEMARLE COUNTY, VA
SHELBY J. MARSHALL, CLERK
BY _____

C E R T I F I C A T E

I certify that I mailed a true copy of the foregoing
Notice of Appeal attached hereto to Frederick T. Heblich, Jr.,
801 East Jefferson Street, Charlottesville, Virginia 22902,
counsel for respondent this 8th day of May, 2000.



W. G. Pickford

VIRGINIA: IN THE CIRCUIT COURT FOR ALBEMARLE COUNTY

RICKY WILLIAM NELSON
DANA ANN NELSON,

Complainants

v.

Case #: CH00-11-575

LAUREL A. DAVIS,

Respondent

STATEMENT OF FACTS, TESTIMONY AND
OTHER INCIDENTS OF THE CASE

Comes now Ricky William Nelson and Dana Ann Nelson,
Complainants, by counsel, pursuant to Rule 5:11 and for their
statement of facts, testimony and other incidents of the case
represent as follows:

(1) Laurel A. Davis, hereinafter referred to as "Davis",
acquired title to a parcel described as containing 3.286 acres
on State Route 715 in Albemarle County, Virginia, by deed of
Rachel Baugham, dated May 3, 1996. Said deed is of record in
the Clerk's Office of the Circuit Court of Albemarle County,
Virginia, in Deed Book 1536, page 494. The deed by its terms
incorporates as a description of the property conveyed therein,
a plat of record in Deed Book 1191, page 142. This plat was
prepared by Arthur F. Edwards, Land Surveyor, and is dated July
31, 1991. Said plat includes in the description of the
property a graveled drive running from State Route 715 across

the Davis property along the eastern boundary onto property lying to the rear and adjoining the Davis property.

(2) Ricky William Nelson and Dana Ann Nelson, hereinafter referred to as Nelson, acquired title to property in the rear and adjoining the Davis property by deed of William E. Johns, et al, dated April 19, 1999, of record in said Clerk's Office in Deed Book 1812, page 28. Said property is described therein as containing 3 acres and is more particularly described by plat of Robert L. Lum, C.L.S., dated May 11, 1998, which plat together with the aforesaid deeds are a part of the record in this cause. The Lum plat of the Nelson property shows the same road as that described on the Davis plat, as crossing the Nelson property onto the Davis property.

(3) The road shown on both of the aforesaid plats is also indicated on Albemarle County Tax Map 121 as lying between Parcels 24A and 28 thereon. No other roads are indicated on said Tax Map as serving the Nelson property.

(4) Following the purchase of the Nelson property, Davis told the Nelsons they could not use the aforesaid road as access across her property to their property. When Nelson continued to use the road, Davis parked a vehicle in the road, dumped brush in the road and placed a chain barrier across the same thus impairing the use of the road by Nelson.

(5) Nelson filed their motion for a preliminary and permanent injunction in the Circuit Court of Albemarle County, Virginia, on December 27, 1999. An ore tenus hearing on said

preliminary injunction was conducted on February 3, 2000. At said hearing the Court received into evidence the deeds and plats of the respective properties and heard evidence from Complainants, D. W. Crickenberger, a relative of Nelsons and an owner of an adjoining parcel of real property; and, Anna Nelson, age eighty one, as to the continued use and existence of the road during the lifetime of Anna Nelson. Davis did not appear at said hearing but was represented by counsel. Upon said evidence and exhibits the Circuit Court entered a preliminary injunction with a hearing set on the merits for February ^{22 Jmf 6-27-00} ~~24~~, 2000.

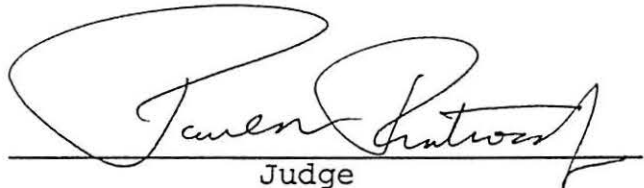
(6) At the hearing on the merits on February ^{22 Jmf 6-27-00} ~~24~~, 2000, the Court heard evidence for Complainants regarding the existence, use and interference of the use of the road by defendant. The Court heard the testimony of Gary Turner, age forty four, who testified that he had lived in the neighborhood all his life and was familiar with the road which he described as having been in existence for as long as he could remember. Gary Turner testified that he, along with many others, had used the road over the years as access to property in the rear of the Davis property and he had used the road while he was a tenant on the Nelson property before it was sold to the Nelsons. The Court heard the evidence of Anna Nelson, age eighty one, who testified that she had lived in the neighborhood all her life and that the road had been in existence as long as she could recall. Mrs. Nelson testified

that she had owned the Davis property for a brief time in the 1960's and the road was in existence and use at that time. She further testified that the road was used by numerous people as access to property in the rear of the Nelson and Davis properties and that her mother, Pencie J. Agee had acknowledged a road for the benefit of the property in the rear of the Davis property to State Route 715 by deed dated June 7, 1965, of record in Deed Book 408, page 57 of said Clerk's Office. The Court also heard the evidence of D. W. Crickenberger that he had been a resident of the neighborhood for many years, owning a parcel adjoining the Nelsons, his daughter and son-in-law. Mr. Crickenberger testified that the road had been in existence as long as he could recall and that there was no other access to the Nelson property. None of the witnesses testifying at the ore tenus hearing offered any testimony as to any person who ever asked permission of anyone to use said road. At said hearing defendant did not testify and her only witness was David Dykes who described himself as a title examiner without any legal training. He testified as to the existence of the deed of Pencie Agee dated June 7, 1965, of record in Deed Book 408, page 57 and the road described therein which he concluded ran over the adjoining property owned by Mr. and Mrs. Jones (TAX PARCEL 28) and not the Davis property. He testified that he found no record of any other road which served the Nelson property and that the existing road was the only one in the

area which matched the description of the road provided in the Pencie Agee deed and indicated on the aforesaid Tax Map.

At said hearing, Complainants argued that as a result of the unrefuted evidence of long and continuous use of said road they were entitled to a presumption that said use was under a claim of right in accord with Causey v. Lanigan, 208 Va. 587. The Court, as evidenced by its letter opinion incorporated into its order of April 17, 2000, failed to allow Complainants said presumption and ruled that the Complainants had the burden to prove all of the elements of a prescriptive easement. Said letter opinion and order are attached hereto and this appeal is taken from said order.

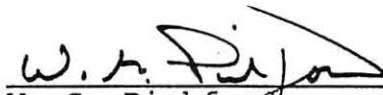
Signed and made a part of the record herein this 27th
day of June, 2000.


Judge

Submitted by:

RICKY WILLIAM NELSON
DANA ANN NELSON
Complainants

By Counsel


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C E R T I F I C A T E

I certify that I mailed a true copy of the Statement of Fact, Testimony and other Incidents of the Case to Frederick T. Heblich, Jr., counsel for Respondent, 801 East Jefferson Street, Charlottesville, Virginia 22902, this 7th day of June, 2000.

W. G. Pickford
W. G. Pickford

ASSIGNMENTS OF ERROR

1. The Chancellor erred in ruling that despite the unrefuted evidence of open, visible, continuous and unmolested use of the road across the land of Appellee for at least twenty years, Appellants were not entitled to the presumption that said use had been under a claim of right.
2. The Chancellor erred in ruling that Appellants had the burden of proving each and every element of a prescriptive easement.
3. The Chancellor erred in ruling that the Appellee had no burden of rebutting the presumption that the use of said road had been under a claim of right by showing that the use was permissive.
4. The Chancellor erred in ruling that the conveyance to Appellee by a reference to a plat incorporated therein showing the property to be encumbered by a graveled road along the eastern boundary thereof to the property in the rear of the same did not constitute an implied covenant that there is such a way.