

FEB 20 2001

RICHMOND, VIRGINIA

IN THE
Supreme Court of Virginia

RECORD NO. 001914

THE OHIO CASUALTY INSURANCE COMPANY,

Appellant/Cross-Appellee,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Appellee/Cross-Appellant.

APPENDIX

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111 South Calvert Street, Suite 1400
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Counsel for Appellant/Cross-Appellee

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Counsel for Appellee/Cross-Appellant

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JOHN T. FAIRFAX COUNTY
CLERK, CIRCUIT COURT
FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT OF

STATE FARM FIRE AND
CASUALTY COMPANY,

Complainant,

v.

THE OHIO CASUALTY INSURANCE
COMPANY

SERVE:
Registered Agent
James W. Morris, III
801 E. Main Street
Richmond, VA 23219

and

DAVID N. TALTON
SERVE AT:
9819 Courthouse Road
Vienna, VA 22181

Chancery No. 149960

and

AMY E. TALTON
SERVE AT:
9819 Courthouse Road
Vienna, VA 22181

and

TALTON BROTHERS CONSTRUCTION
COMPANY, INC.
SERVE:
Registered Agent
Jerry O. Talton, II
9819 Courthouse Road
Vienna, VA 22181

Defendants.

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW Complainant State Farm Fire and Casualty Company,
by counsel, and pursuant to Section 8.01-184 of the Code of
Virginia (1950), as amended, moves this honorable court for a

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declaratory judgment based upon the following grounds and reasons:

1. At all relevant times hereto State Farm Fire and Casualty Company (State Farm) was, and is now, an insurance company organized and existing under the laws of the state of Illinois and authorized and licensed in the Commonwealth of Virginia to write and deliver homeowner's insurance in the Commonwealth;

2. At all relevant times hereto defendant The Ohio Casualty Insurance Company (Ohio Casualty) was, and is now, an insurance company organized and existing under the laws of the State of Ohio and authorized and licensed in the Commonwealth of Virginia to write and deliver insurance contracts including commercial policies of insurance;

3. At all relevant times herein, defendants David and Amy Talton were residents of Fairfax County, Virginia, and also conducted business in the county;

4. At all relevant times herein, defendant Talton Brothers Construction Company, Inc. was authorized and licensed to do business in the Commonwealth of Virginia to include, but not limited to, the construction of single-family dwellings;

5. On or about November 25, 1991, Jerome and Gail Kozak contracted with defendants David and Amy Talton for the purchase/sale of a piece of property, including the construction of a dwelling thereon, located at or near 9844 Palace Green Way in Vienna (Fairfax County), Virginia;

6. On or about May 14, 1992, Stephen and Mary Kitchen contracted with defendants David and Amy Talton for the purchase/sale of a piece of property, including the construction of a dwelling thereon, located at or near 9846 Palace Green Way in Vienna (Fairfax County), Virginia;

7. Upon information and belief defendants David and Amy Talton entered into a contract or other arrangement with defendant Talton Brothers Construction to construct the dwellings for the Kozaks and Kitchens to be located at or near 9844 and 9846 Palace Green Way in Vienna (Fairfax County), Virginia;

8. On or about June 17, 1993, a fire broke out at the dwelling located at 9844 Palace Green Way causing significant property damage to the dwelling at that location and to the dwelling located at 9846 Palace Green Way, both of which were under construction at the time;

9. On or about June 17, 1993, a fire broke out at 9846 Palace Green Way causing significant property damage to the dwellings located at both 9846 and 9844 Palace Green Way, both of which were under construction at the time;

10. State Farm had issued homeowner's insurance policies to both the Kitchens and Kozaks that, technically, covered the dwellings located at 9844 and 9846 Palace Green Way on June 17, 1993;

11. At all relevant times herein (and specifically, although not limited to June 17, 1993) defendant Talton Brothers Construction was covered under a commercial policy of insurance issued by

defendant Ohio Casualty covering, among other things, the dwellings located at 9844 and 9846 Palace Green Way;

12. The Kozaks and Kitchens made a claim with State Farm for the property damage caused by the fire(s) of June 17, 1993;

13. As a result of the aforementioned claims by the Kozaks and Kitchens with State Farm, State Farm paid those claims and is now by contract and by common law subrogated to the rights of the Kozaks and Kitchens;

14. Ohio Casualty has been requested to pay under its insurance with Talton Brothers Construction the damage caused by the afore-mentioned fire(s) but has refused to make any payment.

WHEREFORE, Complainant respectfully requests this honorable Court to adjudicate and determine the rights and duties of the parties named in this action as to defendant Ohio Casualty's insurance policy with Talton Brothers Construction to include, but not limited to, the following:

a. To declare that Ohio Casualty has an obligation to provide insurance coverage for the losses that occurred as a result of the aforementioned fire(s) at 9844 and 9846 Palace Green Way;

b. To declare that defendant Ohio Casualty's insurance coverage for the aforementioned damages is primary and should be paid in full;

c. For such other and further relief as this Court may deem just and proper under the circumstances.

STATE FARM FIRE AND CASUALTY
COMPANY

By Counsel

BRAULT, PALMER, GROVE, ZIMMERMAN,
WHITE AND MIMS



AUGUST W. STEINHILBER, III, ESQUIRE
10533 Main Street, P.O. Box 1010
Fairfax, VA 22030
Counsel for Complainant

7.16.97

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97 JUL 16 PM 12:48

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

STATE FARM FIRE & CASUALTY CO.

Complainant

v.

THE OHIO CASUALTY INSURANCE COMPANY :

and

DAVID TALTON :

and

AMY E. TALTON :

and

TALTON BROTHERS CONSTRUCTION
COMPANY, INC. :

Defendants

JOHN T. FREY
CLERK-CIRCUIT COURT
FAIRFAX, VA.

Chancery No. 149960

ANSWER AND GROUNDS OF DEFENSE
OF OHIO CASUALTY INSURANCE COMPANY TO
BILL OF COMPLAINT FOR DECLARATORY JUDGMENT

The defendant, Ohio Casualty Insurance Company, through counsel, O'Connell & O'Connell, in Answer to the Bill of Complaint for Declaratory Judgment filed herein, states as follows:

FIRST DEFENSE

The Bill of Complaint for Declaratory Judgment fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

Defendant Ohio Casualty Insurance Company denies all allegations of contractual, legal or other obligation alleged against it in the Bill of Complaint for Declaratory Judgment and is without knowledge or information sufficient to form a belief as to the remaining allegations, and therefore denies the same and demands strict proof thereof.

Responding to the specific allegations contained in the Bill of Complaint for Declaratory Judgment, defendant states as follows:

1. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 1 of the Bill of Complaint for Declaratory Judgment, and therefore denies the same and demands strict proof thereof.

2. Defendant admits the allegations contained in paragraph 2 of the Bill of Complaint for Declaratory Judgment.

3-10. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 3 through 10 of the Bill of Complaint for Declaratory Judgment, and therefore denies the same and demands strict proof thereof.

11. Defendant admits the existence of a policy of insurance issued to Talton Brothers but asserts that the remaining allegations of paragraph 11 assert legal conclusions and other allegations, all of which are denied.

12-13. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 12 and 13 of the Bill of Complaint for Declaratory Judgment, and therefore denies the same and demands strict proof thereof.

14. Defendant admits the allegations contained in paragraph 14 of the Bill of Complaint for Declaratory Judgment.

All allegations not specifically admitted are hereby specifically denied.

THIRD DEFENSE

Complainant is not entitled to the relief sought.

FOURTH DEFENSE

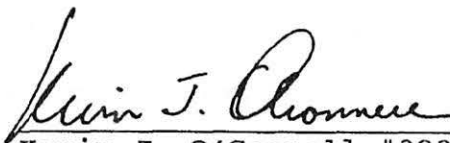
The Complainant's claim is barred by the statute of limitations.

GENERAL DENIAL

Defendant is not indebted as alleged, as there is no factual or legal basis on which liability or contractual responsibility of any defendant can be founded.

WHEREFORE, having fully answered, defendant Ohio Casualty Insurance Company requests that the Bill of Complaint for Declaratory Judgment against it be dismissed with costs.

Ohio Casualty Insurance Company
By counsel

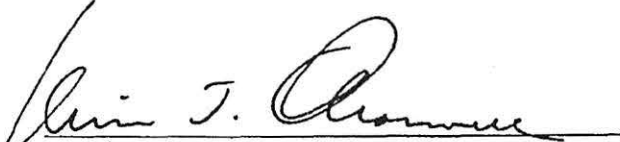


Kevin J. O'Connell #32366
O'Connell & O'Connell
Suite 204
401 East Jefferson Street
Rockville, Maryland 20850
301-424-2300

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer of Ohio Casualty Insurance Company to the Bill of Complaint for Declaratory Judgment was mailed, postage prepaid, on July 15, 1997 to

August W. Steinhilber, III, Esquire
Brault, Palmer, Grove, Zimmerman, White & Mims
10533 Main Street, P.O. Box 1010
Fairfax, VA 22030


Kevin J. O'Connell

7-21-97
fww

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

STATE FARM FIRE & CASUALTY CO. :
Complainant :
v. : Chancery No. 149960
THE OHIO CASUALTY INSURANCE COMPANY :
and :
DAVID TALTON :
and :
AMY E. TALTON :
and :
TALTON BROTHERS CONSTRUCTION :
COMPANY, INC. :
Defendants :

AGREED ORDER

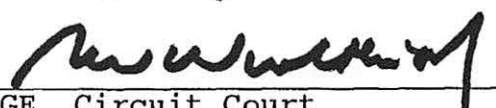
CAME THIS DAY the parties, upon the request of Kevin J. O'Connell of the law firm of O'Connell & O'Connell, counsel for defendant Ohio Casualty Insurance Company, to present for entry of an Order to extend the time to July 18, 1997 for this defendant to file and serve its Answer and Grounds of Defense to the Bill of Complaint for Declaratory Judgment.

IT APPEARING that complainant's counsel consents to this request, as evidenced by his signature hereon, it is hereby


ORDERED, that the time within which defendant Ohio Casualty Insurance may file and serve its Answer and Grounds of Defense to the Bill of Complaint for Declaratory Judgment is extended up to and including July 18, 1997.

7-21-97
KWW

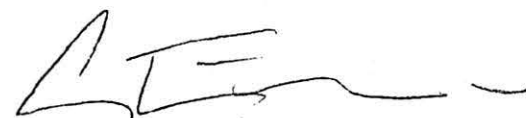
ENTERED this 21st day of July, 1997.


JUDGE, Circuit Court
for the County of Fairfax

I ASK FOR THIS:


Kevin J. O'Connell VSB# 32366
O'Connell & O'Connell
Suite 204
401 East Jefferson Street
Rockville, Maryland 20850
301-424-2300

SEEN AND AGREED TO:


August W. Steinhilber, III, Esquire
Brault, Palmer, Grove, Zimmerman, White & Mims
10533 Main Street, P.O. Box 1010
Fairfax, VA 22030

15-9

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

STATE FARM FIRE AND
CASUALTY COMPANY,

Complainant,

v.

THE OHIO CASUALTY INSURANCE
COMPANY, et al.,

Defendants.

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Chancery No. 149960

STIPULATIONS

COME NOW the parties and stipulate to the following facts:

1. At all relevant times herein, State Farm Fire & Casualty Company (State Farm) is an insurance company authorized and licensed in the Commonwealth of Virginia to write and deliver homeowners insurance in the Commonwealth.
2. At all relevant times herein, the Ohio Casualty Insurance Company (Ohio Casualty) is an insurance company authorized and licensed in the Commonwealth of Virginia to write and deliver insurance contracts including commercial policies of insurance such as builders risk and general liability policies.
3. At all relevant times herein, David and Amy Talton were residents of Fairfax County, Virginia and conducted business in the County including the sale of real estate, sale of single-family homes, and real estate development.
4. At all relevant times herein, Talton Brothers Construction Company, Inc. (Talton Brothers) was authorized and licensed to do business in the Commonwealth of Virginia including the construction and sale of single family dwellings.

5. On or about November 25, 1991, Jerome and Gail Kozak contracted with David and Amy Talton for the purchase/sale of a piece of property, including the construction of a dwelling thereon, located at or near 9844 Palace Green Way in Vienna (Fairfax County), Virginia. (See attached copies of contract and addendum.)

6. On or about May 14, 1992, Stephen and Mary Kitchen contracted with David and Amy Talton for the purchase/sale of a piece of property, including the construction of a dwelling thereon, located at or near 9846 Palace Green Way in Vienna (Fairfax County), Virginia. (See attached copies of contract and addendum.)

7. David and Amy Talton entered into a contract or other arrangement with Talton Brothers Construction to construct the dwellings for the Kitchens and Kozaks to be located at or near 9844 and 9846 Palace Green Way.

8. On or about June 17, 1993, a fire broke out at one of the aforementioned dwellings causing significant property damage to both dwellings.

9. State Farm had issued a homeowners insurance policy to the Kitchens (effective March 19, 1993) and Kozaks (effective April 27, 1993) that covered the damage to both dwellings that occurred on June 17, 1993.

10. Ohio Casualty issued one or more commercial policies of insurance (including builders risk) to Talton Brothers Construction on January 1, 1993, covering the dwellings and property located at or near 9844 and 9846 Palace Green Way. (Ohio Casualty denies the dwellings in question were still covered on June 17, 1993.)

11. The attached are copies of the State Farm homeowners^{and} Ohio Casualty builders risk insurance policies, respectively.

12. Intentionally left blank.

13. On or about October 30, 1992, ownership of 9846 Palace Green Way was transferred from David and Amy Talton to the Kitchens.

14. On or about November 4, 1992, ownership of 9844 Palace Green Way was transferred from David and Amy Talton to the Kozaks.

15. As of October 30, 1992 and March 19, 1993, the construction of the dwelling at 9846 Palace Green Way was not complete.

16. As of November 4, 1992 and April 27, 1993, the construction of the dwelling at 9844 Palace Green Way was not complete.

17. On June 17, 1993, construction of the dwelling at 9844 Palace Green Way was not complete, ^{in that} Talton Brothers Construction was still performing punch list items. A residential use permit had not yet been approved or issued. (See attached copy of Residential Use Permit).

18. On June 17, 1993, the construction of the dwelling at 9846 Palace Green Way was not complete, ^{in that} Some interior finishing work was being performed by Talton Brothers Construction. A residential use permit had not yet been approved or issued. (See copy of Residential Use Permit.)

19. Intentionally left blank.

20. Intentionally left blank.

21. The Kitchens had moved some furniture and/or other personal belongings into the dwelling at 9846 Palace Green Way before June 17, 1993.

22. Intentionally left blank.

23. Intentionally left blank.

24. The Kitchens and Kozaks made a claim with State Farm for the property damage caused by the aforementioned fires on June 17, 1993.

25. State Farm paid the claim of the Kitchens and Kozaks and is now subrogated to their rights pursuant to the terms of the homeowners policy and common law.

25a. State Farm paid the claim of the Kitchens with the following amounts: \$563,638.62 for damage to the dwelling/building located at 9846 Palace Green Way; \$5,421.14 for damage to personal property; and \$3,690.00 for rent and storage. (See attached breakdown, building estimate and sworn statement and proof of loss.)

25b. State Farm paid the claim of the Kozaks in an amount of \$86,081.00 for damage to the dwelling/building located at 9844 Palace Green Way. (See attached Schedule of Repairs.)

26. Ohio Casualty has been requested by State Farm to pay under Ohio Casualty's contract of insurance with Talton Brothers Construction for the damage caused by the aforementioned fire but has refused to make any payment.

27. In a letter dated January 14, 1997, Ohio Casualty denied State Farm's request that Ohio Casualty pay for the damage to both properties caused by the aforementioned fire.

28. Intentionally left blank.

29. Intentionally left blank.

30. The fire marshal of Fairfax County investigated and was unable to determine the cause of the fire which occurred on June 17, 1993.

31. One bedroom and bathroom were fully completed in the Kitchen dwelling, and Mr. and Mrs. Kitchen (but not their children) spent part or all of one night there before June 17, 1993. The Kitchens (including the children) had not moved into the dwelling on or before June 17, 1993, except as to the extent of Stipulation No. 21.

SEEN AND AGREED:
BRAULT, PALMER, GROVE, ZIMMERMAN,
WHITE AND STEINHILBER



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Fairfax, VA 22030
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Counsel for Plaintiff

SEEN AND AGREED:

O'CONNELL & O'CONNELL



KEVIN J. O'CONNELL, ESQUIRE
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Counsel for Defendant Ohio Casualty

SEEN AND AGREED:

MARTELL, DONNELLY, GRIMALDI & GALLAGHER



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Counsel for David and Amy Talton
and Talton Brothers Construction

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

STATE FARM FIRE AND
CASUALTY COMPANY,

Complainant,

v.

THE OHIO CASUALTY INSURANCE
COMPANY, et al.,

Defendants.

FILED
COURT SERVICES
JOHN T. FINE
CLERK, CIRCUIT COURT
FAIRFAX, VA

Chancery No. 149960

COMPLAINANT'S INITIAL BRIEF

COMES NOW State Farm, by counsel, and for its initial brief addressing the issues raised at the trial of this matter, states as follows:

A. REVIEW OF UNDERLYING FACTS

Defendant Talton Brothers was constructing a residential dwelling for the Kozaks located at 9844 Palace Green Way in Vienna; Talton Brothers was constructing a residential dwelling for the Kitchens at 9846 Palace Green Way. A fire of undetermined origin broke out on June 17, 1993 at one of the dwellings causing damage to both dwellings. The damage to the Kozak dwelling totaled \$86,081; the damage to the Kitchen dwelling totaled \$563,638.62.

At the time of the fire both the Kozaks and Kitchens had homeowner's insurance with State Farm, and Talton Brothers had builder's risk insurance with Ohio Casualty. Both the Kozaks and Kitchens placed a claim with State Farm for the damage caused by the fire. State Farm paid both claims in the above amounts relating to the respective dwellings.

Ohio Casualty has refused to pay for any damages caused by the fire. State Farm filed this suit for Ohio Casualty to reimburse it for the amounts it paid for the damage to

LAW OFFICES

Brault Palmer Grove
Zimmerman White
& Steinhilber LLP

FAIRFAX, VIRGINIA

MANASSAS, VIRGINIA

WASHINGTON, D. C.

the dwellings. A set of stipulations and exhibits was previously presented to the Court on the trial date of this matter – February 8, 2000.

B. ARGUMENT

1. **Ohio Casualty's insurance covers the damage to the buildings caused by the fire.**

Ohio Casualty is an insurance company authorized and licensed in the Commonwealth of Virginia to write and deliver insurance contracts including builder's risk policies (see Stipulation No. 2). Ohio Casualty issued a builder's risk insurance policy to Talton Brothers on January 1, 1993, covering the dwellings and property located at 9844 and 9846 Palace Green Way (see Stipulation No. 10). The Ohio Casualty insurance policy was in effect from January 1, 1993 until January 1, 1994. (See policy declarations and declarations of builder's risk coverage – first and fifth pages of Exhibit 3.) The Ohio Casualty builder's risk policy pays for a loss to covered property, which is defined as property that will become a permanent part of the buildings or structures that are shown in the declarations including the property of its insured or the property of others. (See builder's coverage form – 21st page of Exhibit 3.) The Kozak residence is Lot 6 of what is identified in the declarations of the builder's risk coverage as 9819 Courthouse Road; the Kitchen residence is Lot 7 as shown on the same declarations. Therefore, they are both covered properties.

Ohio Casualty made two arguments at trial against its builder's risk policy being in effect at the time of the fire. The first was that Talton Brothers no longer had an insurable interest because it stated that Talton Brothers no longer had a financial interest. The second was that once title transferred from the Taltons to the Kozaks and Kitchens, respectively, the insurance ceased. Neither argument is supported by the facts or the Ohio Casualty policy.

The initial argument that Talton Brothers no longer had an insurable interest in either the Kozak or Kitchen property is simply not accurate. Section 38.2-303(B) of the Virginia Code defines insurable interest as "a lawful and substantial economic interest in the safety or preservation of the subject of insurance free from loss, destruction or pecuniary damage." Talton Brothers' interest in the construction and completion of the project was the same on the date of the fire as it was when it began construction on each lot. The only "difference" is that title to the land had been transferred from the Taltons to the Kozaks and Kitchens before the fire. While Talton Brothers may not have owned the land any more, it still had an interest in the property and its obligations there. The dwellings were not complete, construction was ongoing, and residential use permits had not been approved or issued to either dwelling. Talton Brothers certainly still had an economic interest in completing both projects and, in fact, would not have been paid until it completed the construction of each dwelling.

If Ohio Casualty is attempting to argue that paragraph A.3.b. (21st page of Exhibit 3) applies to end the coverage to the dwellings in question (when Talton Brothers' interest ceases), then it is not giving the words of the insurance policy their usual and ordinary meaning as should be the case. It is a well settled doctrine in Virginia law that provisions of a contract should be given their usual and ordinary meaning. See Berry v. Klinger, 225 Va. 201, 208 (1983).

As set forth above, Talton Brothers still had a financial/economic interest in both properties. It also had a contractual interest in both properties, and it continued to work on both properties after title transferred. All of this shows Talton Brothers to still have an interest in both properties at the time of the fire. Therefore, paragraph A.3.b. of the Builder's Risk Coverage Form does not apply (to end the coverage to the locations in question).

Likewise, the Builder's Risk Coverage Form does not contain a provision that once title to land has been transferred there is no longer applicable insurance. The Ohio Casualty builder's risk policy (Exhibit 3) is replete with references to covered property not only as property of its insured (Talton Brothers in this instance) but also the property of others. For instance, paragraph A.1. (21st page of Exhibit 3) of the Builder's Risk Coverage Form (previously quoted) includes covered property to be the property of its insured or the property of others. Additional references to covered properties of others can be found in other places of the policy but, most significantly, in the Commercial Inland Marine Conditions (beginning on the 10th page of Exhibit 3) where it refers (in paragraph H. on the 11th page of Exhibit 3) to what it will do in the event of a loss involving the property of others. Therefore, the transfer of title is not an event that ends coverage of the Ohio Casualty builder's risk policy.

Overall, there are no facts in evidence constituting the basis for the Ohio Casualty builder's risk coverage to end on either of the properties in question in this litigation. Therefore, the policy was in effect on June 17, 1993 for both dwellings.

2. The Ohio Casualty insurance policy is primary.

Both construction contracts (Exhibits 1 and 2) make the Taltons (identified as the "sellers") responsible for the protection of persons and property on the premises. The amendment to the Kozak Sale and Construction Contract makes the seller responsible for promptly remedying damage and loss. The same contract requires the seller to maintain such insurance for damage because of property damage that may arise from and during operations under the construction. Likewise, the Kitchen Sale and Construction Contract requires the seller to take all reasonable precautions to protect the person and property of others on or adjacent to the site. Thus, the documents executed by the Taltons and Kozaks/Kitchens, without explicitly addressing this precise issue, place primary

responsibility for items of care, custody and control of the properties with the Taltons. Thus, their insurer (Ohio Casualty) should also be primary.

It also makes reasonable sense for the insurer of the entity performing the construction at a job site to have primary coverage for any loss that occurs. In this instance it was Talton Brothers who was performing the construction on two dwellings, neither of which was complete. No residential use permits had been issued to either dwelling and while the Kitchens had moved some personal belongings into the dwelling and had spent one night there, it was Talton Brothers who was performing the work there and had yet to complete and deliver possession of the dwellings. This point is further borne out by examining the sale and construction contracts of both the Kozaks and the Kitchens. Both contracts distinguish between a time of "closing and settlement on the lot" (which had taken place before the fire) and the time of "completion and delivery of possession" (which had not taken place before the fire).

Finally, the Court was inquiring from each side whether there was an event that would trigger which insurer had primary coverage. In response to that inquiry, there are two times (or "events") until which a builder's risk insurance policy should be primary under circumstances the same or similar to those present in this lawsuit. The first "event" would be completion of the project; the second "event" would be the issuance of a residential use permit.

Until a construction project is complete, and particularly under the circumstances in this case, the builder is the one that is primarily on the premises and continuing to work on the premises. It may have independent or subcontractors performing work for it, but until the construction is complete it is responsible for primary care, custody and control of the premises. Therefore, its insurer should have primary coverage until those circumstances change.

To the extent it is different from completion of the project, another "event" that makes sense to end the primary coverage of a builder's risk insurance policy is upon the issuance of a residential use permit.¹ Since a dwelling cannot be occupied or resided in until such a permit is issued, it makes logical sense that a builder's risk insurer would be primarily responsible for a loss occurring before such a permit was issued.

C. CONCLUSION

For the foregoing reasons State Farm respectfully requests this Court to enter an Order declaring that Ohio Casualty has an obligation to provide insurance coverage for the dwelling losses that occurred on June 17, 1993, at 9844 and 9846 Palace Green Way; to declare that Ohio Casualty's insurance coverage for the aforementioned damage is primary; and to declare that Ohio Casualty should pay in full State Farm the amounts of the damage to each property (\$86,081 for the Kozak dwelling and \$563,638.62 for the Kitchen dwelling) plus interest from the date of State Farm's payments.

STATE FARM FIRE AND CASUALTY
COMPANY

By Counsel

BRAULT, PALMER, GROVE, ZIMMERMAN,
WHITE AND STEINHILBER



AUGUST W. STEINHILBER, III, ESQUIRE

Bar No. 24368

P.O. Box 1010, 10533 Main Street

Fairfax, VA 22030

(703) 273-6400

Counsel for Complainant

¹ Fairfax County Zoning Ordinance 18-701 states that "No occupancy or use shall be made of any structure hereinafter erected or of any premises hereinafter improved, and no change in use shall be permitted, unless and until a Residential or Non-Residential Use Permit has been approved in accordance with the provisions of this Part. A Residential or Non-Residential Use Permit shall be deemed to authorize and is required for both the initial and continued occupancy and use of the building or land to which it applies."

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed, postage prepaid, to **Alexander Francuzenko, Esquire**, O'Connell & O'Connell, 401 East Jefferson Street, Suite 204, Rockville, MD 20850, Counsel for Plaintiff, this 23rd day of February, 2000.



August W. Steinhilber, III

NFO
2.25.00

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February 23, 2000

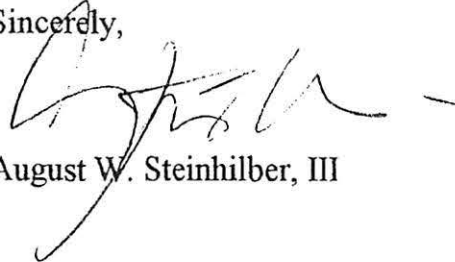
The Honorable Henry Hudson
Judges Chambers
Fairfax County Circuit Court
4110 Chain Bridge Road
Fairfax, VA 22030

Re: State Farm v. Ohio Casualty, et al.
Chancery No. 149960

Dear Judge Hudson:

Attached is a courtesy copy of Complainant's initial brief. The original was filed in the Clerk's office today.

Sincerely,



August W. Steinhilber, III

AWS/gp

Enclosure

cc: Alexander Francuzenko, Esquire

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FAIRFAX, VIRGINIA 22030-1010

The Honorable Henry Hudson
Judges Chambers
Fairfax County Circuit Court
4110 Chain Bridge Road
Fairfax, VA 22030

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

STATE FARM FIRE AND
CASUALTY COMPANY,

Complainant,

v.

THE OHIO CASUALTY INSURANCE
COMPANY, et al.,

Defendants.

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Chancery No. 149960

COMPLAINANT'S INITIAL BRIEF

COMES NOW State Farm, by counsel, and for its initial brief addressing the issues raised at the trial of this matter, states as follows:

A. REVIEW OF UNDERLYING FACTS

Defendant Talton Brothers was constructing a residential dwelling for the Kozaks located at 9844 Palace Green Way in Vienna; Talton Brothers was constructing a residential dwelling for the Kitchens at 9846 Palace Green Way. A fire of undetermined origin broke out on June 17, 1993 at one of the dwellings causing damage to both dwellings. The damage to the Kozak dwelling totaled \$86,081; the damage to the Kitchen dwelling totaled \$563,638.62.

At the time of the fire both the Kozaks and Kitchens had homeowner's insurance with State Farm, and Talton Brothers had builder's risk insurance with Ohio Casualty. Both the Kozaks and Kitchens placed a claim with State Farm for the damage caused by the fire. State Farm paid both claims in the above amounts relating to the respective dwellings.

Ohio Casualty has refused to pay for any damages caused by the fire. State Farm filed this suit for Ohio Casualty to reimburse it for the amounts it paid for the damage to

the dwellings. A set of stipulations and exhibits was previously presented to the Court on the trial date of this matter – February 8, 2000.

B. ARGUMENT

1. **Ohio Casualty's insurance covers the damage to the buildings caused by the fire.**

Ohio Casualty is an insurance company authorized and licensed in the Commonwealth of Virginia to write and deliver insurance contracts including builder's risk policies (see Stipulation No. 2). Ohio Casualty issued a builder's risk insurance policy to Talton Brothers on January 1, 1993, covering the dwellings and property located at 9844 and 9846 Palace Green Way (see Stipulation No. 10). The Ohio Casualty insurance policy was in effect from January 1, 1993 until January 1, 1994. (See policy declarations and declarations of builder's risk coverage – first and fifth pages of Exhibit 3.) The Ohio Casualty builder's risk policy pays for a loss to covered property, which is defined as property that will become a permanent part of the buildings or structures that are shown in the declarations including the property of its insured or the property of others. (See builder's coverage form – 21st page of Exhibit 3.) The Kozak residence is Lot 6 of what is identified in the declarations of the builder's risk coverage as 9819 Courthouse Road; the Kitchen residence is Lot 7 as shown on the same declarations. Therefore, they are both covered properties.

Ohio Casualty made two arguments at trial against its builder's risk policy being in effect at the time of the fire. The first was that Talton Brothers no longer had an insurable interest because it stated that Talton Brothers no longer had a financial interest. The second was that once title transferred from the Taltons to the Kozaks and Kitchens, respectively, the insurance ceased. Neither argument is supported by the facts or the Ohio Casualty policy.

The initial argument that Talton Brothers no longer had an insurable interest in either the Kozak or Kitchen property is simply not accurate. Section 38.2-303(B) of the Virginia Code defines insurable interest as "a lawful and substantial economic interest in the safety or preservation of the subject of insurance free from loss, destruction or pecuniary damage." Talton Brothers' interest in the construction and completion of the project was the same on the date of the fire as it was when it began construction on each lot. The only "difference" is that title to the land had been transferred from the Taltons to the Kozaks and Kitchens before the fire. While Talton Brothers may not have owned the land any more, it still had an interest in the property and its obligations there. The dwellings were not complete, construction was ongoing, and residential use permits had not been approved or issued to either dwelling. Talton Brothers certainly still had an economic interest in completing both projects and, in fact, would not have been paid until it completed the construction of each dwelling.

If Ohio Casualty is attempting to argue that paragraph A.3.b. (21st page of Exhibit 3) applies to end the coverage to the dwellings in question (when Talton Brothers' interest ceases), then it is not giving the words of the insurance policy their usual and ordinary meaning as should be the case. It is a well settled doctrine in Virginia law that provisions of a contract should be given their usual and ordinary meaning. See Berry v. Klinger, 225 Va. 201, 208 (1983).

As set forth above, Talton Brothers still had a financial/economic interest in both properties. It also had a contractual interest in both properties, and it continued to work on both properties after title transferred. All of this shows Talton Brothers to still have an interest in both properties at the time of the fire. Therefore, paragraph A.3.b. of the Builder's Risk Coverage Form does not apply (to end the coverage to the locations in question).

Likewise, the Builder's Risk Coverage Form does not contain a provision that once title to land has been transferred there is no longer applicable insurance. The Ohio Casualty builder's risk policy (Exhibit 3) is replete with references to covered property not only as property of its insured (Talton Brothers in this instance) but also the property of others. For instance, paragraph A.1. (21st page of Exhibit 3) of the Builder's Risk Coverage Form (previously quoted) includes covered property to be the property of its insured or the property of others. Additional references to covered properties of others can be found in other places of the policy but, most significantly, in the Commercial Inland Marine Conditions (beginning on the 10th page of Exhibit 3) where it refers (in paragraph H. on the 11th page of Exhibit 3) to what it will do in the event of a loss involving the property of others. Therefore, the transfer of title is not an event that ends coverage of the Ohio Casualty builder's risk policy.

Overall, there are no facts in evidence constituting the basis for the Ohio Casualty builder's risk coverage to end on either of the properties in question in this litigation. Therefore, the policy was in effect on June 17, 1993 for both dwellings.

2. The Ohio Casualty insurance policy is primary.

Both construction contracts (Exhibits 1 and 2) make the Taltons (identified as the "sellers") responsible for the protection of persons and property on the premises. The amendment to the Kozak Sale and Construction Contract makes the seller responsible for promptly remedying damage and loss. The same contract requires the seller to maintain such insurance for damage because of property damage that may arise from and during operations under the construction. Likewise, the Kitchen Sale and Construction Contract requires the seller to take all reasonable precautions to protect the person and property of others on or adjacent to the site. Thus, the documents executed by the Taltons and Kozaks/Kitchens, without explicitly addressing this precise issue, place primary

responsibility for items of care, custody and control of the properties with the Taltons. Thus, their insurer (Ohio Casualty) should also be primary.

It also makes reasonable sense for the insurer of the entity performing the construction at a job site to have primary coverage for any loss that occurs. In this instance it was Talton Brothers who was performing the construction on two dwellings, neither of which was complete. No residential use permits had been issued to either dwelling and while the Kitchens had moved some personal belongings into the dwelling and had spent one night there, it was Talton Brothers who was performing the work there and had yet to complete and deliver possession of the dwellings. This point is further borne out by examining the sale and construction contracts of both the Kozaks and the Kitchens. Both contracts distinguish between a time of "closing and settlement on the lot" (which had taken place before the fire) and the time of "completion and delivery of possession" (which had not taken place before the fire).

Finally, the Court was inquiring from each side whether there was an event that would trigger which insurer had primary coverage. In response to that inquiry, there are two times (or "events") until which a builder's risk insurance policy should be primary under circumstances the same or similar to those present in this lawsuit. The first "event" would be completion of the project; the second "event" would be the issuance of a residential use permit.

Until a construction project is complete, and particularly under the circumstances in this case, the builder is the one that is primarily on the premises and continuing to work on the premises. It may have independent or subcontractors performing work for it, but until the construction is complete it is responsible for primary care, custody and control of the premises. Therefore, its insurer should have primary coverage until those circumstances change.

To the extent it is different from completion of the project, another "event" that makes sense to end the primary coverage of a builder's risk insurance policy is upon the issuance of a residential use permit.¹ Since a dwelling cannot be occupied or resided in until such a permit is issued, it makes logical sense that a builder's risk insurer would be primarily responsible for a loss occurring before such a permit was issued.

C. CONCLUSION

For the foregoing reasons State Farm respectfully requests this Court to enter an Order declaring that Ohio Casualty has an obligation to provide insurance coverage for the dwelling losses that occurred on June 17, 1993, at 9844 and 9846 Palace Green Way; to declare that Ohio Casualty's insurance coverage for the aforementioned damage is primary; and to declare that Ohio Casualty should pay in full State Farm the amounts of the damage to each property (\$86,081 for the Kozak dwelling and \$563,638.62 for the Kitchen dwelling) plus interest from the date of State Farm's payments.

STATE FARM FIRE AND CASUALTY
COMPANY

By Counsel

BRAULT, PALMER, GROVE, ZIMMERMAN,
WHITE AND STEINHILBER



AUGUST W. STEINHILBER, III, ESQUIRE

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Counsel for Complainant

¹ Fairfax County Zoning Ordinance 18-701 states that "No occupancy or use shall be made of any structure hereinafter erected or of any premises hereinafter improved, and no change in use shall be permitted, unless and until a Residential or Non-Residential Use Permit has been approved in accordance with the provisions of this Part. A Residential or Non-Residential Use Permit shall be deemed to authorize and is required for both the initial and continued occupancy and use of the building or land to which it applies."

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed, postage prepaid, to **Alexander Francuzenko, Esquire**, O'Connell & O'Connell, 401 East Jefferson Street, Suite 204, Rockville, MD 20850, Counsel for Plaintiff, this 23rd day of February, 2000.



August W. Steinhilber, III

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

FILED
COURT SERVICES
10 MAR 19 PM 3:39
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

STATE FARM FIRE AND
CASUALTY COMPANY

Complainant,

v.

Chancery No. 149960

THE OHIO CASUALTY
INSURANCE COMPANY, *et al.*

Defendants.

**DEFENDANT OHIO CASUALTY INSURANCE COMPANY'S
OPPOSITION TO COMPLAINANT'S INITIAL BRIEF AND
BRIEF IN SUPPORT OF DEFENDANT'S POSITION**

COMES NOW, Ohio Casualty Insurance Company (hereinafter referred to as "Ohio Casualty"), by and through its counsel, O'Connell & O'Connell, and files this Opposition to State Farm's Initial Brief and Brief in Support of Defendant's Position, and states as follows:

I. Introduction

This action comes before the court following a fire which occurred on June 17, 1993, which damaged 9844 Palace Green Way and 9846 Palace Green Way in Vienna, Virginia. Before the time of the fire, the Kozak family had purchased and insured the home located at 9844 Palace Green Way. Before the time of the fire, the Kitchen family had purchased and insured the home located at 9846 Palace Green Way.

Both the Kozaks and the Kitchens maintained homeowners' insurance through State Farm Fire and Casualty Company (hereinafter referred to as "State Farm") on their respective properties. The Kozak State Farm policy went into effect April 27, 1993, which coincided with the closing and settlement date on the property. The Kitchen State Farm policy went into effect on March 19, 1993

which also coincided with the closing and settlement date on the property. The Kozaks and the Kitchens appropriately placed their claim for damages with State Farm, and State Farm paid both claims as it was legally obligated to do.

State Farm by this action attempts to shift to an unrelated entity, Ohio Casualty, a third party with which it has no privity, the payment that it was legally obligated to make to its insureds, the Kozaks and Kitchens. Among the several reasons which exist for denial of this request is that Ohio Casualty neither had nor has any direct or indirect obligation to State Farm and/or its insureds for any of the damages which occurred on the properties in question. Notwithstanding this point, State Farm asserts what it calls "a subrogation action" against Ohio Casualty.

This Honorable Court correctly pointed out that State Farm has the burden of establishing not only insurance coverage on the part of Ohio Casualty, but a factual event which legally triggers a shifting of the admitted coverage of State Farm and a substitution of Ohio Casualty which would somehow obligate Ohio Casualty as the primary insurer in this case. This is an impossible burden in the facts of this case and State Farm has failed to carry its legal burden in its initial brief. Even a cursory review of that brief reveals no legal basis or legal authority for its argument, and a continuing and necessary avoidance of the court's question with regard to identifying the triggering event which would shift coverage in this case from the party with admitted coverage to a party against whom no claim has been made by its insured.

This brief will address and refute the arguments set forth in State Farm's initial brief, and will then point out the legal and factual support for the following conclusions: 1) that State Farm has no standing to bring this case; 2) that there is no coverage owed under the Ohio Casualty's policy to its insured, Talton Brothers, or to any third party; 3) that there is no event or legal theory which shifts the admitted coverage from State Farm to Ohio Casualty, or which makes Ohio

Casualty's policy primary; and 4) any damages which could be asserted against the Ohio Casualty policy are limited by the terms of the Ohio Casualty policy itself. These four conclusions are supported by legal precedent as well as the facts contained in the stipulation between the parties, which distinguishes Ohio Casualty's position from that of State Farm. The arguments being asserted by Ohio Casualty in support of its position are not technically necessary, as State Farm has not met its initial burden in proving its case. Ohio Casualty provides the Court with these additional reasons to further demonstrate that the position asserted by State Farm in this case has no basis in the facts or the law, and that the relief sought should be denied.

II. Opposition to State Farm's Initial Brief.

A. Clarification of State Farm's statement of underlying facts.

Section A of State Farm's brief, titled "Review of Underlying Facts", sets forth a synopsis of the alleged facts in this case. State Farm asserts that at the time of the fire the Kozaks and the Kitchens had homeowners' insurance with State Farm and that Talton Brothers had builder's risk insurance with Ohio Casualty. The implication that the Ohio Casualty policy was in effect at the time of the fire and covered the properties in question is incorrect and is not supported by evidence. Stipulation Number 10 clearly reflects that Ohio Casualty denies that the dwellings in question were still covered on the date of the fire. In addition, State Farm states that Talton Brothers "was constructing a residential dwelling" for the Kozaks and Kitchens at the time of the fire. In contrast, Stipulation Numbers 17 and 18 reflect that although construction was not complete at the time of the fire, Talton Brothers was only completing punch list items for the Kozak home and had only some interior finishing work remaining on the Kitchen home. Ohio Casualty disputes the two inferences made by State Farm in its Review of Underlying Facts, and asserts that the stipulations and attached exhibits speak for themselves.

B. Items which refute State Farm's Argument.

The court correctly noted during the trial of this matter that the burden of establishing a shift and substitution of coverage is on State Farm. In the case of Aetna Casualty Insurity Company v. Goldman, et al., 217 Va. 419, 229 S.E. 2d. 863 (1976), the Virginia Supreme Court held that an insured has the burden of establishing coverage in an action against an insurance policy. The Virginia Supreme Court held that "it is fundamental that the insured, in an action on an insurance policy, has the burden of proving that the loss occurred while the policy was in force and effect. Couch on Insurance 2d. § 79:435; 45C.J.S. *Insurance* § 886." Aetna v. Goldman, et al., 217 Va. 419, 420, 229 S.E. 2d. 863, ____ (1976).¹ The law is clear with regard to State Farm's burden. State Farm has failed to meet its burden based on the stipulations filed with the trial court as well as the legal argument set forth in State Farm's initial brief. As a result, this Honorable Court does not need to proceed further in its review and analysis of this case, and it is respectfully submitted that judgment in favor of Ohio Casualty can be and should be entered on that basis alone.

State Farm argues that the Ohio Casualty policy covers both properties in question. This argument is based, as it must be, on selective portions of the Ohio Casualty policy which also contain omitted language contrary to State Farm's position. State Farm refers to the definition of a "covered property" as provided in the Ohio Casualty builder's risk policy. In its brief, State Farm does not provide the full definition which is as follows:

Property that will become the permanent part of buildings or structures that are shown in the declarations. This may be your property or the property of others for which you are legally liable. (emphasis added.)

¹Ohio Casualty additionally points out the obvious fact that State Farm is not an insured, and the issue of standing is addressed below.

As it must to support its position, State Farm has omitted the last portion of the definition in addressing the issue of coverage. There is absolutely no evidence of legal liability on the part of Talton Brothers in this case, and therefore the “property of others” inclusion does not apply. Covered property under the Ohio Casualty builder’s risk policy is property that “will become a permanent part of buildings or structures that are shown in the declarations.” The property which was destroyed as a result of the fire was property that was already a permanent part of the buildings and structures and not property as defined under the “covered property” clause of the Ohio Casualty policy. As a result, State Farm’s assertion that coverage existed under the Ohio Casualty builder’s risk policy is defeated based on either of two independent factors. First, that the terms of the provisions cited by State Farm itself reflect that there was no coverage, as the putative “covered property” was already a permanent part of a building or structure. Second, State Farm has failed to establish, or even mention, how Talton Brothers could possibly be “legally liable” for the property of others in this case. State Farm has the initial burden in this case pursuant to the Goldman case and it has failed to meet that burden.

State Farm does attempt to rebut some of the arguments made by Ohio Casualty at trial. State Farm resists Ohio Casualty’s assertions that Talton Brothers no longer had an insurable interest in the property and that the transfer of ownership from the Taltons to the Kozaks and Kitchens ceased coverage. The arguments presented by State Farm fail to carry its burden of proof to show that coverage exists under the Ohio Casualty policy. State Farm must establish, and it has not, that Talton Brothers was somehow “legally liable” for the property of others. The rebuttal arguments asserted in Section 1 of State Farm’s brief do not establish that Ohio Casualty was somehow legally liable for the property owned by the Kozaks and Kitchens.

State Farm brushes up against this issue in paragraph 2 of its initial brief (The Ohio Casualty

Insurance Policy is Primary.). State Farm argues that the sales contracts (Exhibits 1 and 2) make the Taltons responsible for the protection of persons and property on the premises. Significantly, State Farm fails to cite to the specific portion of the contracts, which were attached to the stipulations in this case. A close review of those contracts reflects that the Taltons agreed to indemnify and hold harmless the purchaser "from any and all claims, losses, suit, damages, judgments, expenses, costs and charges by reason of injuries or death suffered by any person or damage to property caused by seller or its contractors in the performance of the work." (emphasis added). In fact, Talton Brothers maintained a commercial general liability policy with Ohio Casualty for the sole purpose of indemnification for any injuries or damages caused by the negligence of Talton Brothers and/or its subcontractors.

There is no suggestion, much less evidence, that Talton Brothers were legally liable for the fire which caused the damage to the two homes in question. As a result, State Farm is not pursuing a true "subrogation action". State Farm fails to cite to any specific language in the contracts which would substantiate the incorrect inference it seeks that Talton Brothers agreed to protect property owned by the Kozaks and Kitchens from damage caused by an unknown source. If the damage was caused by Talton Brothers or its subcontractors, this matter would be in a completely different posture and would be a true subrogation action. Due to the fact that the cause of the fire is unknown, the Kozaks and the Kitchens appropriately filed their claim with their homeowners insurance, State Farm, which ultimately paid the claim that it was legally obligated to pay.

Because it cannot answer in a manner to support its position, State Farm sidesteps the question posed by the court, i.e., to identify which event would trigger a shifting of coverage from the State Farm policy to the Ohio Casualty policy. State Farm instead rephrases and restates the question when it states "whether there was an event that would trigger which insurer had primary

coverage.” The stipulated fact is that State Farm did have coverage for the Kozak and Kitchen claims. The stipulated fact is that Ohio Casualty disputes that it had any coverage for the Kozak and Kitchen claims. The court properly inquired, based on State Farm’s burden and the stipulated facts, what event or legal basis State Farm has for shifting coverage, to which it has admitted, to Ohio Casualty, who has denied that very same coverage. State Farm starts from the incorrect assumption that Ohio Casualty somehow had the underlying coverage and there were no events which triggered or shifted the coverage back to State Farm. As a result, State Farm has improperly reversed the nature and posture of this case attempting to force Ohio Casualty to disprove something that State Farm has the burden of proving. State Farm’s need to revise the court’s query reveals that the answer to the proper question goes contrary to the result desired by State Farm.

III. Ohio Casualty’s Arguments for Dismissal of this Action or Judgment in its Favor.

A. State Farm does not have the standing or legal basis to assert a claim for coverage against Ohio Casualty.

State Farm has taken the position that this declaratory judgment action is tantamount to a “subrogation action.” State Farm demanded that the parties stipulate to Stipulation Number 25 which states that State Farm paid the Kozaks’ and Kitchens’ claims and is now subrogated to their rights pursuant to the insurance contract and common law. Under the terms of its homeowners policy and pursuant to common law, State Farm admittedly has the standing and the legal right to assert a cause of action against a third party who caused the damage to its insureds. That is, however, not the subject of this suit. Neither the homeowners policy nor common law give State Farm the standing or legal right to pursue a cause of action against Ohio Casualty for damages that State Farm paid to its own insureds. Neither State Farm nor its insureds, the Kozaks and Kitchens, have any privity of contract with Ohio Casualty. Furthermore, State Farm has not alleged any

factual or legal basis upon which it may have to bring a claim for damages directly against Ohio Casualty. State Farm does not have the proper standing nor the legal right to bring this cause of action and therefore it must be dismissed.

Distilled to its essentials, State Farm is seeking payment from Ohio Casualty for damages that State Farm paid to its insureds, under the builder's risk coverage provided by Ohio Casualty to Talton Brothers. Not surprisingly, the tortured route this request takes does not withstand scrutiny and does not yield the result requested by State Farm. The builder's risk coverage form which is attached as an exhibit to the stipulations states that "throughout this policy, the words 'you' and 'your' refer to the name insured shown in the declarations. The words 'we', 'us', and 'our' refer to the company providing this insurance." Talton Brothers is the only named insured in the declarations. The loss payable provisions of the Ohio Casualty policy set forth descriptions of properties that were initially covered by the Ohio Casualty builder's risk policy. Under the loss payable provisions, the policy states the following:

For covered property in which both you and a loss payee shown below have an insurable interest, we will: 1. adjust losses with you; and 2. pay any claim for 'loss' for damage jointly to you and the loss payee, as interests may appear.

The loss payee in the policy provision above was identified as Virginia First Savings, the lender to Talton Brothers. Based on the loss payable provisions contained in the Ohio Casualty policy, the only possible payees for losses under the builder's risk insurance policy are Talton Brothers and/or Virginia First Savings. There are no provisions contained in the Ohio Casualty builder's risk policy which authorize payment or indemnity to any third parties. As a result, State Farm does not have any contractual right to assert this cause of action against Ohio Casualty.

State Farm may argue that since it has subrogation rights from its insureds, the Kozaks and

the Kitchens, it can assert some action by standing in the shoes of the Kozaks and Kitchens. Even if this were true, it does nothing to further State Farm's cause, because based on the contractual language quoted above, the Kozaks and the Kitchens do not have a legal right to assert this action against Ohio Casualty.² The language of the contract expressly states that the only possible payees under the terms of the policy can be Talton Brothers and/or Virginia First Savings. Neither Talton Brothers nor Virginia First Savings have asserted a claim against Ohio Casualty for this loss, and one must question why or how they could or would. Neither Talton Brothers nor Virginia First Savings have assigned their right to assert a claim for this loss to State Farm and/or the Kozaks and Kitchens. As a result, there is no contractual basis or legal right upon which any third party could assert a claim for loss as a result of the fire which occurred June 17, 1993 against the Ohio Casualty builder's risk policy.

State Farm has confused the present situation with one in which a third party has a right to assert a claim for damages against an insurance carrier when that insurer's insured is legally liable for damages. In this case, it is stipulated that the fire began as a result of an undetermined cause. State Farm and the Kozaks and Kitchens would have standing and the legal right to assert a claim for damages against Ohio Casualty under the commercial general liability policy if they were able to establish that Talton Brothers were legally liable for the fire. That same analysis cannot be applied when an insurer of a third party, not the builder, is asserting a claim against the builder's risk policy.

State Farm in its initial brief requested that the court examine the Ohio Casualty policy by

²This point should be moot, as the Kozaks and the Kitchens are not a party to this case, which is an additional basis for the dismissal of this suit. See Erie Insurance Group v. Hughes, 240 Va. 165, 393 S.E. 2d. 210 (1990).

giving the provisions of the policy their usual and ordinary meaning. Ohio Casualty urges the same, asking that the court give the usual and ordinary meaning to the provisions of its policy beginning with the title of the policy, "Builder's Risk". The intent of the policy is to protect Talton Brothers its lenders who have a legal interest in the property before it is sold and their risk is extinguished. A "builder's risk" policy is not intended to cover property in which Talton Brothers no longer has a legal interest, i.e., property owned by someone else. State Farm incorrectly asserts on Page 3 of its brief that Talton Brothers had a "financial/economic interest in both properties.". The correct statement is that Talton Brothers had an "interest" in completing the construction. Talton Brothers no longer had any legal interest in the property itself, as title had transferred from Talton Brothers to the Kozaks and Kitchens respectively and the Kozaks and Kitchens appropriately obtained homeowners insurance through State Farm in order to protect their legal and insurable interests. The court must carefully examine State Farm's use of the word interest in its brief.

State Farm asserts that Talton Brothers did have an interest in completing the property, but that is greatly distinguishable from the bald assertion that Talton Brothers had "a financial/economic interest". The bottom line is that the Kozaks and the Kitchens were the legal owners of their respective properties at the time that the fire occurred. The Kozaks and the Kitchens had every right to enforce any and all laws available to them with regard to their property including having Talton Brothers and/or its subcontractors removed from the property and enforcing trespass laws against them. Talton Brothers and its subcontractors were completing punch list items and interior finishing work for the respective properties with the permission of the Kozaks and Kitchens and for the benefit of the Kozaks and the Kitchens. The notion asserted by State Farm begs the question, if Kozaks and Kitchens had sold their property, how much would Talton Brothers have received for their "interest in the property."

The fact that Talton Brothers no longer had a legal interest further supports the point that there is no legal basis or standing on the part of State Farm to assert this action. Detailed legal research has revealed no case law which would provide State Farm with the authority to assert this action. It is obvious from the analysis provided above that the Ohio Casualty policy does not provide State Farm with the legal or contractual authority to bring this action. A review of the State Farm policy simply reflects that State Farm has subrogation rights against a liable party after paying out a claim to its insured. As a result, State Farm does not have the contractual right nor the common law right to assert this claim for damages against Ohio Casualty.

B. There is no coverage for the Kozaks' and Kitchens' loss under the Ohio Casualty Policy.

As stated above, Ohio Casualty maintains that State Farm does not have the legal standing to bring this cause of action against Ohio Casualty. Notwithstanding Ohio Casualty's position in that regard, Ohio Casualty asserts that there is no coverage available to any party under the builder's risk policy for the properties owned by the Kozaks and Kitchens as a result of the June 17, 1993 fire. The Ohio Casualty builder's risk policy, expressly states the terms of coverage under the policy.

NUMBER 3. WHEN COVERAGE BEGINS AND ENDS

We cover from the time that the property is at your risk starting on or after the time that this coverage begins, but we will not cover:

- a. After the owner or buyer accepts the property;
 - b. When your interest ceases;
 - c. Beyond 30 days after completion of the project;
 - d. When each building or structure is:
 - (1) Occupied in whole or in part; or
 - (2) Put to its intended use;
 - e. When the property is leased or rented to others;
 - f. When you abandon the construction site with no intention to complete it; or when this policy expires or is canceled;
- whichever occurs first. (Builder's Risk Coverage Form Page 1 of 3.)**

Ohio Casualty asserts that at least three of the seven conditions which end coverage occurred prior to June 17, 1993. As a result, coverage is not available to any party under the Ohio Casualty builder's risk policy.

Ohio Casualty will not provide coverage under the builder's risk policy "after the owner or buyer accepts the property." The owners or buyers in this case are the Kozaks and the Kitchens. The parties stipulated that on or about November 25, 1991 the Kozaks entered into a contract for the purchase of 9844 Palace Green Way. (See stipulation Number 5.) The parties also stipulated that on or about May 14, 1992 the Kitchens entered into a contract for the purchase of 9846 Palace Green Way. (See Stipulation Number 6.) Both contracts of sale have been incorporated by reference in the stipulations. The parties also stipulated that the Kitchens took title to 9846 Palace Green Way on October 30, 1992 which is reflected by the Deed and Bargain of Sale filed with the Land Records for Fairfax County. The parties also stipulated that the Kozaks took title to 9844 Palace Green Way on November 4, 1992 which is reflected in the Deed and Bargain of Sale filed with the Land Records in Fairfax County. It is undisputed that the Kozaks and Kitchens (owners) took title of their respective properties prior to June 17, 1993. Based on that fact alone, provision 3.A of Ohio Casualty's builder's risk policy applies, and therefore there is no coverage under that policy for the Kozak and Kitchen homes.

In addition, the original contract signed by the Kozaks and Kitchens for the purchase of their respective homes contains the following clause:

6.6 POSSESSION

Seller shall grant purchaser possession of the property immediately following settlement. (See original Agreement of Sale between the Taltons and Kitchens Page 6 of 14 and original Agreement of Sale between the Taltons and Kozaks Page 6 of 12.)

It is abundantly clear from the language quoted above that the owners (i.e., Kozaks and Kitchens) accepted their respective properties upon settlement. Settlement occurred prior to the June 17, 1993 fire and as a result, both the Kozaks and Kitchens legally and contractually accepted their respective properties thus ending any potential coverage under Ohio Casualty's builder's risk policy.

Ohio Casualty also asserts that Section "3.b. When your interest ceases" also applies to end any potential coverage on the part of Ohio Casualty. As stated above, "you or your" refers to the named insured in this case, who is Talton Brothers. It is clear from the sales contracts and the recorded deeds that the Taltons no longer had an interest in the property. State Farm attempts to transmogrify the word "interest" in its brief, arguing that Talton Brothers had an interest in completing the construction. The word "interest" in the context of an insurance policy contract must mean a legal or ownership interest. See Hall, Inc. v. Empire Fire and Marine Ins., 248 Va. 307, 448 S.E. 2d. 633 (1994). Based on the stipulated facts as well as the exhibits, there is no question that Talton Brothers' legal interest in the properties in question had ceased before June 17, 1993.

Additional support for this motion is contained in the statement proof of loss claim filed by the Kitchens, which is also attached as an exhibit pursuant to the stipulations. The Kitchens, in identifying their property on Palace Green Way, described "the interest of the insured in the described property" as "owner." The Kitchens, through their sworn statement in proof of loss, formalize and affirm the common sense conclusion that they had the ownership interest in the property which was damaged, and that the damages were sustained or incurred by them and their mortgagee. There is no mention of any damages sustained by Talton Brothers or any claim asserted on behalf of Talton Brothers in the sworn proof statement of loss. This last point simply solidifies Ohio Casualty's assertion that the Kozaks and the Kitchens unequivocally maintained an ownership

interest in their respective properties, and as a result, any damages that occurred to their respective homes, were directly sustained by them and thus were recoverable by them under their State Farm homeowners insurance policies.

The last exclusion provision which arises from the facts of this case is "3.c. When each building or structure is: (1) occupied in whole or in part." Stipulation Number 31 states "one bedroom and bathroom were fully completed in the Kitchen dwelling, and Mr. and Mrs. Kitchen (but not their children) spent part or all of one night there before June 17, 1993. The Kitchens (including the children) had not moved into the dwelling on or before June 17, 1993 except as to the extent of Stipulation Number 21." It is undisputed based on the stipulation quoted above as well as Stipulation Number 21 that the Kitchens had in part occupied their dwelling. Based on the application of the Ohio Casualty provision quoted above 3.c.(1), any potential coverage under the builder's risk policy ceased, beginning at the time of occupation. State Farm may attempt to argue that the Kitchens did not formally or completely occupy their dwelling, but that argument must fail when applying the ordinary and usual meaning of the clause "occupied in whole or in part". Stipulation Number 31 clearly reflects that the Kitchens occupied their dwelling in part. As a result, there is no coverage under the Ohio Casualty builder's risk policy for the dwelling owned by the Kitchens.

As repeatedly demonstrated it is not necessary for the court to reach the analysis set forth above with regard to potential coverage under the Ohio Casualty policy, but if the court reaches this point, it is clear that there was no coverage available to its insureds, Talton Brothers, or the named payee Virginia First Savings for the properties owned by the Kozaks and Kitchens.

C. There is no basis either factually or legally which would make Ohio Casualty's Builder's Risk policy primary to the Kozaks' and Kitchens' State Farm homeowners policies for the losses that the Kozaks' and Kitchens' sustained as a result of the June 17, 1993 fire.

Once again, State Farm has failed to provide any legal or factual basis which would shift coverage from State Farm to Ohio Casualty for a loss sustained by State Farm's insureds. State Farm wishes to turn the tables with regard to this issue and require Ohio Casualty prove that it was not the primary carrier. First, this turns the burden of proof on its head, and second, it is plain from the language of both policies that this is not the case.

Stipulation Number 9 states "State Farm had issued a homeowners insurance policy to the Kitchens (effective March 19, 1993) and Kozaks (effective April 27, 1993) that covered the damage to both dwellings that occurred on June 17, 1993." State Farm admits that it owes coverage for damages sustained by its insureds, the Kozaks and Kitchens. Ohio Casualty denies that it owes coverage to State Farm and the Kozaks and Kitchens, who are third parties with whom Ohio Casualty has no privity of contract. (See parenthetical to Stipulation Number 10.) As a result, State Farm has the burden to establish that there is some type of coverage under Ohio Casualty's builder's risk policy available to the properties in question on the date that the loss occurred and that that coverage is somehow primary to the coverage admitted by State Farm. State Farm has failed to meet its burden, and should not be permitted a second opportunity to address this issue in its reply brief.

A review of the Ohio Casualty policy reveals that the commercial inland marine conditions portion of the policy addresses the issue when there is other insurance covering a loss which is also covered under the Ohio Casualty policy.

F. OTHER INSURANCE

If you have other insurance covering the same 'loss' as a insurance under this coverage part, we will pay only the excess over what you should have received from the other insurance. We will pay the excess whether you can collect on the other insurance or not.

Section F of the commercial inland marine conditions portion of the Ohio Casualty policy

clearly addresses the issue of other potential insurers for losses that may also be covered under the Ohio Casualty policy. Applying the provision quoted above to the facts of this case reflects that the Kozaks' and Kitchens' losses were fully covered by the State Farm policies, and therefore any coverage that might have been available under the Ohio Casualty policy was not necessary and never arose.³

A review of the State Farm policy reflects that there is no similar excess insurance clause. Once again, Ohio Casualty requests that this court view the Ohio Casualty policy provision quoted above within its usual and ordinary meaning. In doing so, the court must find that if there were any coverage under the Ohio Casualty policy, that coverage would be excess to the coverage provided by State Farm in this case.

D. If the court finds that State Farm has standing, and if the court finds that there is coverage under the Ohio Casualty policy, and if the court finds that the coverage owed by Ohio Casualty is primary, then any coverage available is limited to \$300,000.00.

The Ohio Casualty builder's risk policy expressly states the amount of coverage which is available to its insured the Talton Brothers:

C. LIMITS OF INSURANCE

1. The most we will pay for 'loss' in any one occurrence is the applicable limits of insurance shown in the declarations.

The total amount of insurance coverage for any one loss or disaster pursuant to the declaration page is \$300,000.00. Neither State Farm, nor Ohio Casualty's own insureds can alter the amount of coverage available pursuant to the Ohio Casualty insurance contract. As a result, any coverage that may possibly be available in this case must be limited to \$300,000.00 pursuant to the

³Again, Ohio Casualty does not concede that State Farm has established coverage, and simply provides this additional argument in defending this case.

expressed terms of Ohio Casualty's builder's risk policy.

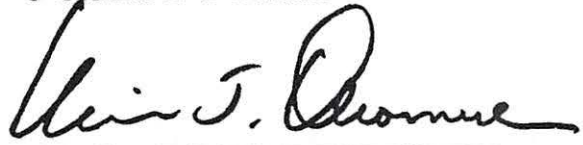
IV. CONCLUSION

Judgment in this case must be entered on behalf of Ohio Casualty and State Farm's claims should be dismissed with prejudice. State Farm has failed to meet its burden to establish that: 1) State Farm has standing to bring this action against Ohio Casualty; 2) that there is any coverage available under the Ohio Casualty builder's risk policy to its insureds Talton Brothers and/or any unrelated third party; and 3) that even if there is coverage available under the Ohio Casualty builder's risk policy, that the Ohio Casualty policy somehow is primary or coverage has shifted from State Farm to Ohio Casualty. Ohio Casualty requests that this Honorable Court dismiss this cause of action based on the first argument that State Farm does not have the standing or legal authority to bring this action. If the court deems that State Farm has the right to pursue this action, Ohio Casualty requests that this Honorable Court dismiss State Farm's claims based on its failure to meet its burden of proof as required by this Honorable Court and as set forth in the Goldman case. In addition, State Farm has not addressed, nor can it, the court's salient question as to what event or legal basis State Farm has for shifting its admitted coverage to Ohio Casualty in this case.

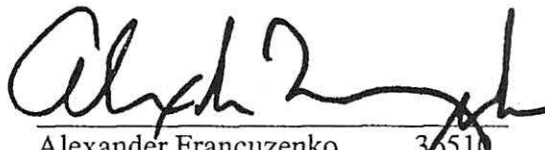
State Farm paid the claims of its insureds, the Kozaks and Kitchens, as it was legally obligated to do. Ohio Casualty has denied State Farm's demand for payment in this case, because Ohio Casualty does not have a legal obligation to either State Farm or State Farm's insureds, the Kozaks and Kitchens. State Farm has failed to provide this court with any legal or factual basis which would rebut the two statements made above. As a result, Ohio Casualty respectfully requests that this Honorable Court enter judgment in its favor, and dismiss State Farm's claims with prejudice.

Respectfully submitted,

O'Connell & O'Connell



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Defendant Ohio Casualty Insurance Company's Opposition to Complainant's Initial Brief and Brief in Support of Defendant's Position was mailed this 10th day of March, 2000 postage pre-paid to:

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March 10, 2000

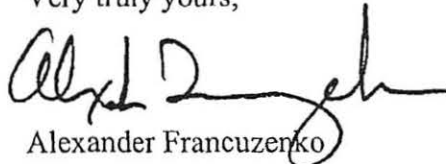
The Honorable Henry Hudson
Judges Chambers
Circuit Court of Fairfax County
4110 Chain Bridge Road
Fairfax, VA 22030-4009

Re: State Farm v. Ohio Casualty, *et al.*
Chancery No.: 149960

Dear Judge Hudson:

Attached is a courtesy copy of Defendant Ohio Casualty Insurance Company's Opposition to Complainant's Initial Brief and Brief in Support of Defendant's Position. The original was filed in the Clerk's office today.

Very truly yours,


Alexander Francuzenko

AF/ksd

Enclosure

cc: August W. Steinhilber, III, Esquire
Stephen P. Zachary, Esquire

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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

STATE FARM FIRE AND
CASUALTY COMPANY

Complainant,

v.

THE OHIO CASUALTY
INSURANCE COMPANY, *et al.*

Defendants.

Chancery No. 149960

**DEFENDANT OHIO CASUALTY INSURANCE COMPANY'S
OPPOSITION TO COMPLAINANT'S INITIAL BRIEF AND
BRIEF IN SUPPORT OF DEFENDANT'S POSITION**

COMES NOW, Ohio Casualty Insurance Company (hereinafter referred to as "Ohio Casualty"), by and through its counsel, O'Connell & O'Connell, and files this Opposition to State Farm's Initial Brief and Brief in Support of Defendant's Position, and states as follows:

I. Introduction

This action comes before the court following a fire which occurred on June 17, 1993, which damaged 9844 Palace Green Way and 9846 Palace Green Way in Vienna, Virginia. Before the time of the fire, the Kozak family had purchased and insured the home located at 9844 Palace Green Way. Before the time of the fire, the Kitchen family had purchased and insured the home located at 9846 Palace Green Way.

Both the Kozaks and the Kitchens maintained homeowners' insurance through State Farm Fire and Casualty Company (hereinafter referred to as "State Farm") on their respective properties. The Kozak State Farm policy went into effect April 27, 1993, which coincided with the closing and settlement date on the property. The Kitchen State Farm policy went into effect on March 19, 1993

which also coincided with the closing and settlement date on the property. The Kozaks and the Kitchens appropriately placed their claim for damages with State Farm, and State Farm paid both claims as it was legally obligated to do.

State Farm by this action attempts to shift to an unrelated entity, Ohio Casualty, a third party with which it has no privity, the payment that it was legally obligated to make to its insureds, the Kozaks and Kitchens. Among the several reasons which exist for denial of this request is that Ohio Casualty neither had nor has any direct or indirect obligation to State Farm and/or its insureds for any of the damages which occurred on the properties in question. Notwithstanding this point, State Farm asserts what it calls "a subrogation action" against Ohio Casualty.

This Honorable Court correctly pointed out that State Farm has the burden of establishing not only insurance coverage on the part of Ohio Casualty, but a factual event which legally triggers a shifting of the admitted coverage of State Farm and a substitution of Ohio Casualty which would somehow obligate Ohio Casualty as the primary insurer in this case. This is an impossible burden in the facts of this case and State Farm has failed to carry its legal burden in its initial brief. Even a cursory review of that brief reveals no legal basis or legal authority for its argument, and a continuing and necessary avoidance of the court's question with regard to identifying the triggering event which would shift coverage in this case from the party with admitted coverage to a party against whom no claim has been made by its insured.

This brief will address and refute the arguments set forth in State Farm's initial brief, and will then point out the legal and factual support for the following conclusions: 1) that State Farm has no standing to bring this case; 2) that there is no coverage owed under the Ohio Casualty's policy to its insured, Talton Brothers, or to any third party; 3) that there is no event or legal theory which shifts the admitted coverage from State Farm to Ohio Casualty, or which makes Ohio

Casualty's policy primary; and 4) any damages which could be asserted against the Ohio Casualty policy are limited by the terms of the Ohio Casualty policy itself. These four conclusions are supported by legal precedent as well as the facts contained in the stipulation between the parties, which distinguishes Ohio Casualty's position from that of State Farm. The arguments being asserted by Ohio Casualty in support of its position are not technically necessary, as State Farm has not met its initial burden in proving its case. Ohio Casualty provides the Court with these additional reasons to further demonstrate that the position asserted by State Farm in this case has no basis in the facts or the law, and that the relief sought should be denied.

II. Opposition to State Farm's Initial Brief.

A. Clarification of State Farm's statement of underlying facts.

Section A of State Farm's brief, titled "Review of Underlying Facts", sets forth a synopsis of the alleged facts in this case. State Farm asserts that at the time of the fire the Kozaks and the Kitchens had homeowners' insurance with State Farm and that Talton Brothers had builder's risk insurance with Ohio Casualty. The implication that the Ohio Casualty policy was in effect at the time of the fire and covered the properties in question is incorrect and is not supported by evidence. Stipulation Number 10 clearly reflects that Ohio Casualty denies that the dwellings in question were still covered on the date of the fire. In addition, State Farm states that Talton Brothers "was constructing a residential dwelling" for the Kozaks and Kitchens at the time of the fire. In contrast, Stipulation Numbers 17 and 18 reflect that although construction was not complete at the time of the fire, Talton Brothers was only completing punch list items for the Kozak home and had only some interior finishing work remaining on the Kitchen home. Ohio Casualty disputes the two inferences made by State Farm in its Review of Underlying Facts, and asserts that the stipulations and attached exhibits speak for themselves.

B. Items which refute State Farm's Argument.

The court correctly noted during the trial of this matter that the burden of establishing a shift and substitution of coverage is on State Farm. In the case of Aetna Casualty Insurance Company v. Goldman, et al., 217 Va. 419, 229 S.E. 2d. 863 (1976), the Virginia Supreme Court held that an insured has the burden of establishing coverage in an action against an insurance policy. The Virginia Supreme Court held that "it is fundamental that the insured, in an action on an insurance policy, has the burden of proving that the loss occurred while the policy was in force and effect. Couch on Insurance 2d. § 79:435; 45C.J.S. *Insurance* § 886." Aetna v. Goldman, et al., 217 Va. 419, 420, 229 S.E. 2d. 863, ____ (1976).¹ The law is clear with regard to State Farm's burden. State Farm has failed to meet its burden based on the stipulations filed with the trial court as well as the legal argument set forth in State Farm's initial brief. As a result, this Honorable Court does not need to proceed further in its review and analysis of this case, and it is respectfully submitted that judgment in favor of Ohio Casualty can be and should be entered on that basis alone.

State Farm argues that the Ohio Casualty policy covers both properties in question. This argument is based, as it must be, on selective portions of the Ohio Casualty policy which also contain omitted language contrary to State Farm's position. State Farm refers to the definition of a "covered property" as provided in the Ohio Casualty builder's risk policy. In its brief, State Farm does not provide the full definition which is as follows:

Property that will become the permanent part of buildings or structures that are shown in the declarations. This may be your property or the property of others for which you are legally liable. (emphasis added.)

¹Ohio Casualty additionally points out the obvious fact that State Farm is not an insured, and the issue of standing is addressed below.

As it must to support its position, State Farm has omitted the last portion of the definition in addressing the issue of coverage. There is absolutely no evidence of legal liability on the part of Talton Brothers in this case, and therefore the “property of others” inclusion does not apply. Covered property under the Ohio Casualty builder’s risk policy is property that “will become a permanent part of buildings or structures that are shown in the declarations.” The property which was destroyed as a result of the fire was property that was already a permanent part of the buildings and structures and not property as defined under the “covered property” clause of the Ohio Casualty policy. As a result, State Farm’s assertion that coverage existed under the Ohio Casualty builder’s risk policy is defeated based on either of two independent factors. First, that the terms of the provisions cited by State Farm itself reflect that there was no coverage, as the putative “covered property” was already a permanent part of a building or structure. Second, State Farm has failed to establish, or even mention, how Talton Brothers could possibly be “legally liable” for the property of others in this case. State Farm has the initial burden in this case pursuant to the Goldman case and it has failed to meet that burden.

State Farm does attempt to rebut some of the arguments made by Ohio Casualty at trial. State Farm resists Ohio Casualty’s assertions that Talton Brothers no longer had an insurable interest in the property and that the transfer of ownership from the Taltons to the Kozaks and Kitchens ceased coverage. The arguments presented by State Farm fail to carry its burden of proof to show that coverage exists under the Ohio Casualty policy. State Farm must establish, and it has not, that Talton Brothers was somehow “legally liable” for the property of others. The rebuttal arguments asserted in Section 1 of State Farm’s brief do not establish that Ohio Casualty was somehow legally liable for the property owned by the Kozaks and Kitchens.

State Farm brushes up against this issue in paragraph 2 of its initial brief (The Ohio Casualty

Insurance Policy is Primary.). State Farm argues that the sales contracts (Exhibits 1 and 2) make the Taltons responsible for the protection of persons and property on the premises. Significantly, State Farm fails to cite to the specific portion of the contracts, which were attached to the stipulations in this case. A close review of those contracts reflects that the Taltons agreed to indemnify and hold harmless the purchaser "from any and all claims, losses, suit, damages, judgments, expenses, costs and charges by reason of injuries or death suffered by any person or damage to property caused by seller or its contractors in the performance of the work." (emphasis added). In fact, Talton Brothers maintained a commercial general liability policy with Ohio Casualty for the sole purpose of indemnification for any injuries or damages caused by the negligence of Talton Brothers and/or its subcontractors.

There is no suggestion, much less evidence, that Talton Brothers were legally liable for the fire which caused the damage to the two homes in question. As a result, State Farm is not pursuing a true "subrogation action". State Farm fails to cite to any specific language in the contracts which would substantiate the incorrect inference it seeks that Talton Brothers agreed to protect property owned by the Kozaks and Kitchens from damage caused by an unknown source. If the damage was caused by Talton Brothers or its subcontractors, this matter would be in a completely different posture and would be a true subrogation action. Due to the fact that the cause of the fire is unknown, the Kozaks and the Kitchens appropriately filed their claim with their homeowners insurance, State Farm, which ultimately paid the claim that it was legally obligated to pay.

Because it cannot answer in a manner to support its position, State Farm sidesteps the question posed by the court, i.e., to identify which event would trigger a shifting of coverage from the State Farm policy to the Ohio Casualty policy. State Farm instead rephrases and restates the question when it states "whether there was an event that would trigger which insurer had primary

coverage.” The stipulated fact is that State Farm did have coverage for the Kozak and Kitchen claims. The stipulated fact is that Ohio Casualty disputes that it had any coverage for the Kozak and Kitchen claims. The court properly inquired, based on State Farm’s burden and the stipulated facts, what event or legal basis State Farm has for shifting coverage, to which it has admitted, to Ohio Casualty, who has denied that very same coverage. State Farm starts from the incorrect assumption that Ohio Casualty somehow had the underlying coverage and there were no events which triggered or shifted the coverage back to State Farm. As a result, State Farm has improperly reversed the nature and posture of this case attempting to force Ohio Casualty to disprove something that State Farm has the burden of proving. State Farm’s need to revise the court’s query reveals that the answer to the proper question goes contrary to the result desired by State Farm.

III. Ohio Casualty’s Arguments for Dismissal of this Action or Judgment in its Favor.

A. State Farm does not have the standing or legal basis to assert a claim for coverage against Ohio Casualty.

State Farm has taken the position that this declaratory judgment action is tantamount to a “subrogation action.” State Farm demanded that the parties stipulate to Stipulation Number 25 which states that State Farm paid the Kozaks’ and Kitchens’ claims and is now subrogated to their rights pursuant to the insurance contract and common law. Under the terms of its homeowners policy and pursuant to common law, State Farm admittedly has the standing and the legal right to assert a cause of action against a third party who caused the damage to its insureds. That is, however, not the subject of this suit. Neither the homeowners policy nor common law give State Farm the standing or legal right to pursue a cause of action against Ohio Casualty for damages that State Farm paid to its own insureds. Neither State Farm nor its insureds, the Kozaks and Kitchens, have any privity of contract with Ohio Casualty. Furthermore, State Farm has not alleged any

factual or legal basis upon which it may have to bring a claim for damages directly against Ohio Casualty. State Farm does not have the proper standing nor the legal right to bring this cause of action and therefore it must be dismissed.

Distilled to its essentials, State Farm is seeking payment from Ohio Casualty for damages that State Farm paid to its insureds, under the builder's risk coverage provided by Ohio Casualty to Talton Brothers. Not surprisingly, the tortured route this request takes does not withstand scrutiny and does not yield the result requested by State Farm. The builder's risk coverage form which is attached as an exhibit to the stipulations states that "throughout this policy, the words 'you' and 'your' refer to the name insured shown in the declarations. The words 'we', 'us', and 'our' refer to the company providing this insurance." Talton Brothers is the only named insured in the declarations. The loss payable provisions of the Ohio Casualty policy set forth descriptions of properties that were initially covered by the Ohio Casualty builder's risk policy. Under the loss payable provisions, the policy states the following:

For covered property in which both you and a loss payee shown below have an insurable interest, we will: 1. adjust losses with you; and 2. pay any claim for 'loss' for damage jointly to you and the loss payee, as interests may appear.

The loss payee in the policy provision above was identified as Virginia First Savings, the lender to Talton Brothers. Based on the loss payable provisions contained in the Ohio Casualty policy, the only possible payees for losses under the builder's risk insurance policy are Talton Brothers and/or Virginia First Savings. There are no provisions contained in the Ohio Casualty builder's risk policy which authorize payment or indemnity to any third parties. As a result, State Farm does not have any contractual right to assert this cause of action against Ohio Casualty.

State Farm may argue that since it has subrogation rights from its insureds, the Kozaks and

the Kitchens, it can assert some action by standing in the shoes of the Kozaks and Kitchens. Even if this were true, it does nothing to further State Farm's cause, because based on the contractual language quoted above, the Kozaks and the Kitchens do not have a legal right to assert this action against Ohio Casualty.² The language of the contract expressly states that the only possible payees under the terms of the policy can be Talton Brothers and/or Virginia First Savings. Neither Talton Brothers nor Virginia First Savings have asserted a claim against Ohio Casualty for this loss, and one must question why or how they could or would. Neither Talton Brothers nor Virginia First Savings have assigned their right to assert a claim for this loss to State Farm and/or the Kozaks and Kitchens. As a result, there is no contractual basis or legal right upon which any third party could assert a claim for loss as a result of the fire which occurred June 17, 1993 against the Ohio Casualty builder's risk policy.

State Farm has confused the present situation with one in which a third party has a right to assert a claim for damages against an insurance carrier when that insurer's insured is legally liable for damages. In this case, it is stipulated that the fire began as a result of an undetermined cause. State Farm and the Kozaks and Kitchens would have standing and the legal right to assert a claim for damages against Ohio Casualty under the commercial general liability policy if they were able to establish that Talton Brothers were legally liable for the fire. That same analysis cannot be applied when an insurer of a third party, not the builder, is asserting a claim against the builder's risk policy.

State Farm in its initial brief requested that the court examine the Ohio Casualty policy by

²This point should be moot, as the Kozaks and the Kitchens are not a party to this case, which is an additional basis for the dismissal of this suit. See Erie Insurance Group v. Hughes, 240 Va. 165, 393 S.E. 2d. 210 (1990).

giving the provisions of the policy their usual and ordinary meaning. Ohio Casualty urges the same, asking that the court give the usual and ordinary meaning to the provisions of its policy beginning with the title of the policy, "Builder's Risk". The intent of the policy is to protect Talton Brothers its lenders who have a legal interest in the property before it is sold and their risk is extinguished. A "builder's risk" policy is not intended to cover property in which Talton Brothers no longer has a legal interest, i.e., property owned by someone else. State Farm incorrectly asserts on Page 3 of its brief that Talton Brothers had a "financial/economic interest in both properties.". The correct statement is that Talton Brothers had an "interest" in completing the construction. Talton Brothers no longer had any legal interest in the property itself, as title had transferred from Talton Brothers to the Kozaks and Kitchens respectively and the Kozaks and Kitchens appropriately obtained homeowners insurance through State Farm in order to protect their legal and insurable interests. The court must carefully examine State Farm's use of the word interest in its brief.

State Farm asserts that Talton Brothers did have an interest in completing the property, but that is greatly distinguishable from the bald assertion that Talton Brothers had "a financial/economic interest". The bottom line is that the Kozaks and the Kitchens were the legal owners of their respective properties at the time that the fire occurred. The Kozaks and the Kitchens had every right to enforce any and all laws available to them with regard to their property including having Talton Brothers and/or its subcontractors removed from the property and enforcing trespass laws against them. Talton Brothers and its subcontractors were completing punch list items and interior finishing work for the respective properties with the permission of the Kozaks and Kitchens and for the benefit of the Kozaks and the Kitchens. The notion asserted by State Farm begs the question, if Kozaks and Kitchens had sold their property, how much would Talton Brothers have received for their "interest in the property."

The fact that Talton Brothers no longer had a legal interest further supports the point that there is no legal basis or standing on the part of State Farm to assert this action. Detailed legal research has revealed no case law which would provide State Farm with the authority to assert this action. It is obvious from the analysis provided above that the Ohio Casualty policy does not provide State Farm with the legal or contractual authority to bring this action. A review of the State Farm policy simply reflects that State Farm has subrogation rights against a liable party after paying out a claim to its insured. As a result, State Farm does not have the contractual right nor the common law right to assert this claim for damages against Ohio Casualty.

B. There is no coverage for the Kozaks' and Kitchens' loss under the Ohio Casualty Policy.

As stated above, Ohio Casualty maintains that State Farm does not have the legal standing to bring this cause of action against Ohio Casualty. Notwithstanding Ohio Casualty's position in that regard, Ohio Casualty asserts that there is no coverage available to any party under the builder's risk policy for the properties owned by the Kozaks and Kitchens as a result of the June 17, 1993 fire. The Ohio Casualty builder's risk policy, expressly states the terms of coverage under the policy.

NUMBER 3. WHEN COVERAGE BEGINS AND ENDS

We cover from the time that the property is at your risk starting on or after the time that this coverage begins, but we will not cover:

- a. After the owner or buyer accepts the property;**
 - b. When your interest ceases;**
 - c. Beyond 30 days after completion of the project;**
 - d. When each building or structure is:**
 - (1) Occupied in whole or in part; or**
 - (2) Put to its intended use;**
 - e. When the property is leased or rented to others;**
 - f. When you abandon the construction site with no intention to complete it; or when this policy expires or is canceled;**
- whichever occurs first. (Builder's Risk Coverage Form Page 1 of 3.)**

Ohio Casualty asserts that at least three of the seven conditions which end coverage occurred prior to June 17, 1993. As a result, coverage is not available to any party under the Ohio Casualty builder's risk policy.

Ohio Casualty will not provide coverage under the builder's risk policy "after the owner or buyer accepts the property." The owners or buyers in this case are the Kozaks and the Kitchens. The parties stipulated that on or about November 25, 1991 the Kozaks entered into a contract for the purchase of 9844 Palace Green Way. (See stipulation Number 5.) The parties also stipulated that on or about May 14, 1992 the Kitchens entered into a contract for the purchase of 9846 Palace Green Way. (See Stipulation Number 6.) Both contracts of sale have been incorporated by reference in the stipulations. The parties also stipulated that the Kitchens took title to 9846 Palace Green Way on October 30, 1992 which is reflected by the Deed and Bargain of Sale filed with the Land Records for Fairfax County. The parties also stipulated that the Kozaks took title to 9844 Palace Green Way on November 4, 1992 which is reflected in the Deed and Bargain of Sale filed with the Land Records in Fairfax County. It is undisputed that the Kozaks and Kitchens (owners) took title of their respective properties prior to June 17, 1993. Based on that fact alone, provision 3.A of Ohio Casualty's builder's risk policy applies, and therefore there is no coverage under that policy for the Kozak and Kitchen homes.

In addition, the original contract signed by the Kozaks and Kitchens for the purchase of their respective homes contains the following clause:

6.6 POSSESSION

Seller shall grant purchaser possession of the property immediately following settlement. (See original Agreement of Sale between the Taltons and Kitchens Page 6 of 14 and original Agreement of Sale between the Taltons and Kozaks Page 6 of 12.)

It is abundantly clear from the language quoted above that the owners (i.e., Kozaks and Kitchens) accepted their respective properties upon settlement. Settlement occurred prior to the June 17, 1993 fire and as a result, both the Kozaks and Kitchens legally and contractually accepted their respective properties thus ending any potential coverage under Ohio Casualty's builder's risk policy.

Ohio Casualty also asserts that Section "3.b. When your interest ceases" also applies to end any potential coverage on the part of Ohio Casualty. As stated above, "you or your" refers to the named insured in this case, who is Talton Brothers. It is clear from the sales contracts and the recorded deeds that the Taltons no longer had an interest in the property. State Farm attempts to transmogrify the word "interest" in its brief, arguing that Talton Brothers had an interest in completing the construction. The word "interest" in the context of an insurance policy contract must mean a legal or ownership interest. See Hall, Inc. v. Empire Fire and Marine Ins., 248 Va. 307, 448 S.E. 2d. 633 (1994). Based on the stipulated facts as well as the exhibits, there is no question that Talton Brothers' legal interest in the properties in question had ceased before June 17, 1993.

Additional support for this motion is contained in the statement proof of loss claim filed by the Kitchens, which is also attached as an exhibit pursuant to the stipulations. The Kitchens, in identifying their property on Palace Green Way, described "the interest of the insured in the described property" as "owner." The Kitchens, through their sworn statement in proof of loss, formalize and affirm the common sense conclusion that they had the ownership interest in the property which was damaged, and that the damages were sustained or incurred by them and their mortgagee. There is no mention of any damages sustained by Talton Brothers or any claim asserted on behalf of Talton Brothers in the sworn proof statement of loss. This last point simply solidifies Ohio Casualty's assertion that the Kozaks and the Kitchens unequivocally maintained an ownership

interest in their respective properties, and as a result, any damages that occurred to their respective homes, were directly sustained by them and thus were recoverable by them under their State Farm homeowners insurance policies.

The last exclusion provision which arises from the facts of this case is "3.c. When each building or structure is: (1) occupied in whole or in part." Stipulation Number 31 states "one bedroom and bathroom were fully completed in the Kitchen dwelling, and Mr. and Mrs. Kitchen (but not their children) spent part or all of one night there before June 17, 1993. The Kitchens (including the children) had not moved into the dwelling on or before June 17, 1993 except as to the extent of Stipulation Number 21." It is undisputed based on the stipulation quoted above as well as Stipulation Number 21 that the Kitchens had in part occupied their dwelling. Based on the application of the Ohio Casualty provision quoted above 3.c.(1), any potential coverage under the builder's risk policy ceased, beginning at the time of occupation. State Farm may attempt to argue that the Kitchens did not formally or completely occupy their dwelling, but that argument must fail when applying the ordinary and usual meaning of the clause "occupied in whole or in part". Stipulation Number 31 clearly reflects that the Kitchens occupied their dwelling in part. As a result, there is no coverage under the Ohio Casualty builder's risk policy for the dwelling owned by the Kitchens.

As repeatedly demonstrated it is not necessary for the court to reach the analysis set forth above with regard to potential coverage under the Ohio Casualty policy, but if the court reaches this point, it is clear that there was no coverage available to its insureds, Talton Brothers, or the named payee Virginia First Savings for the properties owned by the Kozaks and Kitchens.

C. There is no basis either factually or legally which would make Ohio Casualty's Builder's Risk policy primary to the Kozaks' and Kitchens' State Farm homeowners policies for the losses that the Kozaks' and Kitchens' sustained as a result of the June 17, 1993 fire.

Once again, State Farm has failed to provide any legal or factual basis which would shift coverage from State Farm to Ohio Casualty for a loss sustained by State Farm's insureds. State Farm wishes to turn the tables with regard to this issue and require Ohio Casualty prove that it was not the primary carrier. First, this turns the burden of proof on its head, and second, it is plain from the language of both policies that this is not the case.

Stipulation Number 9 states "State Farm had issued a homeowners insurance policy to the Kitchens (effective March 19, 1993) and Kozaks (effective April 27, 1993) that covered the damage to both dwellings that occurred on June 17, 1993." State Farm admits that it owes coverage for damages sustained by its insureds, the Kozaks and Kitchens. Ohio Casualty denies that it owes coverage to State Farm and the Kozaks and Kitchens, who are third parties with whom Ohio Casualty has no privity of contract. (See parenthetical to Stipulation Number 10.) As a result, State Farm has the burden to establish that there is some type of coverage under Ohio Casualty's builder's risk policy available to the properties in question on the date that the loss occurred and that that coverage is somehow primary to the coverage admitted by State Farm. State Farm has failed to meet its burden, and should not be permitted a second opportunity to address this issue in its reply brief.

A review of the Ohio Casualty policy reveals that the commercial inland marine conditions portion of the policy addresses the issue when there is other insurance covering a loss which is also covered under the Ohio Casualty policy.

F. OTHER INSURANCE

If you have other insurance covering the same 'loss' as a insurance under this coverage part, we will pay only the excess over what you should have received from the other insurance. We will pay the excess whether you can collect on the other insurance or not.

Section F of the commercial inland marine conditions portion of the Ohio Casualty policy

clearly addresses the issue of other potential insurers for losses that may also be covered under the Ohio Casualty policy. Applying the provision quoted above to the facts of this case reflects that the Kozaks' and Kitchens' losses were fully covered by the State Farm policies, and therefore any coverage that might have been available under the Ohio Casualty policy was not necessary and never arose.³

A review of the State Farm policy reflects that there is no similar excess insurance clause. Once again, Ohio Casualty requests that this court view the Ohio Casualty policy provision quoted above within its usual and ordinary meaning. In doing so, the court must find that if there were any coverage under the Ohio Casualty policy, that coverage would be excess to the coverage provided by State Farm in this case.

D. If the court finds that State Farm has standing, and if the court finds that there is coverage under the Ohio Casualty policy, and if the court finds that the coverage owed by Ohio Casualty is primary, then any coverage available is limited to \$300,000.00.

The Ohio Casualty builder's risk policy expressly states the amount of coverage which is available to its insured the Talton Brothers:

C. LIMITS OF INSURANCE

1. The most we will pay for 'loss' in any one occurrence is the applicable limits of insurance shown in the declarations.

The total amount of insurance coverage for any one loss or disaster pursuant to the declaration page is \$300,000.00. Neither State Farm, nor Ohio Casualty's own insureds can alter the amount of coverage available pursuant to the Ohio Casualty insurance contract. As a result, any coverage that may possibly be available in this case must be limited to \$300,000.00 pursuant to the

³Again, Ohio Casualty does not concede that State Farm has established coverage, and simply provides this additional argument in defending this case.

expressed terms of Ohio Casualty's builder's risk policy.


IV. CONCLUSION

Judgment in this case must be entered on behalf of Ohio Casualty and State Farm's claims should be dismissed with prejudice. State Farm has failed to meet its burden to establish that: 1) State Farm has standing to bring this action against Ohio Casualty; 2) that there is any coverage available under the Ohio Casualty builder's risk policy to its insureds Talton Brothers and/or any unrelated third party; and 3) that even if there is coverage available under the Ohio Casualty builder's risk policy, that the Ohio Casualty policy somehow is primary or coverage has shifted from State Farm to Ohio Casualty. Ohio Casualty requests that this Honorable Court dismiss this cause of action based on the first argument that State Farm does not have the standing or legal authority to bring this action. If the court deems that State Farm has the right to pursue this action, Ohio Casualty requests that this Honorable Court dismiss State Farm's claims based on its failure to meet its burden of proof as required by this Honorable Court and as set forth in the Goldman case. In addition, State Farm has not addressed, nor can it, the court's salient question as to what event or legal basis State Farm has for shifting its admitted coverage to Ohio Casualty in this case.

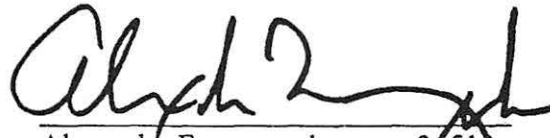
State Farm paid the claims of its insureds, the Kozaks and Kitchens, as it was legally obligated to do. Ohio Casualty has denied State Farm's demand for payment in this case, because Ohio Casualty does not have a legal obligation to either State Farm or State Farm's insureds, the Kozaks and Kitchens. State Farm has failed to provide this court with any legal or factual basis which would rebut the two statements made above. As a result, Ohio Casualty respectfully requests that this Honorable Court enter judgment in its favor, and dismiss State Farm's claims with prejudice.

Respectfully submitted,

O'Connell & O'Connell



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Defendant Ohio Casualty Insurance Company's Opposition to Complainant's Initial Brief and Brief in Support of Defendant's Position was mailed this 10th day of March, 2000 postage pre-paid to:

August W. Steinhilber, III, Esquire
10533 Main Street
PO Box 1010
Fairfax, VA 22030-1010

Stephen P. Zachary
1220 19th Street, NW
Suite 500
Washington, DC 20036



Alexander Francuzenko

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY
JOHN T. FREY
CIRCUIT COURT
FAIRFAX, VA.

STATE FARM FIRE AND
CASUALTY COMPANY,

Complainant,

v.

THE OHIO CASUALTY INSURANCE
COMPANY, et al.,

Defendants.

Chancery No. 149960

COMPLAINANT'S REPLY BRIEF

COMES NOW State Farm, by counsel, and for its Reply Brief addressing the issues raised both at the trial of this matter and in Defendant Ohio Casualty Insurance Company's Opposition To Complainant's Initial Brief and Brief In Support Of Defendant's Position, states as follows:

A. **BACKGROUND**

After reviewing Ohio Casualty's brief, it appears appropriate to review the background of this case to put the issues in this matter in their proper prospective. This is a declaratory judgment action filed pursuant to Section 8.01-184 of the Code of Virginia (1950), as amended. The purpose of a declaratory judgment action is to adjudicate and determine the rights and duties of parties relating to a specific matter which, in this case, is the Ohio Casualty builder's risk insurance policy. Any attempt by Ohio Casualty to characterize this action as something else shows either a lack of understanding of a declaratory judgment action or is an attempt to make arguments and/or analogies that are not on point.

Next, it appears necessary to review the burdens in this case. While there appeared to be an understanding between the Court and the parties as to the burdens when issues were initially argued at trial, defendant Ohio Casualty's brief shows significant diversions that are not accurate.

Ohio Casualty appears to confuse the burden of proof with the burden of going forward with the evidence and their respective underlying concepts. A party claiming application or coverage of an insurance contract has the burden of proving that the insurance contract applies to the specific facts at issue. State Farm has met its burden of proof in showing that the Ohio Casualty builder's risk insurance policy covers the losses to the Kozak and Kitchen properties at issue for the reasons set forth in this Brief and those set forth previously (at trial, in the stipulation, in the exhibits, and in its Initial Brief).

The burden of going forward with the evidence is different. Once a party has put forth enough evidence for a *prima facie* case against another, it is then incumbent upon the other party to go forward and present evidence to the contrary. In this matter, State Farm initially went forward with the evidence in its Initial Brief to show that the Ohio Casualty policy was in effect and covered both the Kozak and Kitchen dwellings. The stipulations and exhibits show the Ohio Casualty insurance policy to be in effect from January 1, 1993 until January 1, 1994. They also show coverage for Lots 6 and 7 (the Kozak and Kitchen properties, respectively). The loss to both properties took place on or about June 17, 1993, a date within the effective dates of Ohio Casualty's policy. Having made its *prima facie* showing that the Ohio Casualty policy was in effect and covers these losses, the burden of going forward with the evidence shifts to Ohio Casualty to show, if it can, why its policy was not in effect as to the Kitchen and Kozak properties on June 17, 1993. Ohio Casualty fails to meet this burden.

B. UNDERLYING FACTS

The underlying facts have not changed. State Farm incorporates from its initial brief the underlying facts in this matter as they need not be restated herein.

C. RESPONSE TO OHIO CASUALTY'S FOUR ARGUMENTS

1. **State Farm does have standing to assert a claim against Ohio Casualty in this declaratory judgment action.**

Contrary to Ohio Casualty's assertions, this action is a declaratory judgment action. Some fundamental principles of the concept of subrogation may apply, but it does not change the nature of this cause of action. It is still a cause of action to determine the rights and responsibilities of the parties in connection with the Ohio Casualty builder's risk insurance policy in question.

Ohio Casualty appears to argue that neither the State Farm homeowner's insurance policy nor common law gives State Farm the legal standing or right to pursue a cause of action against Ohio Casualty for damages that State Farm paid to the Kitchens and Kozaks because it argues that neither State Farm nor its insureds have privity of contract with Ohio Casualty. Privity, however, is not required by the underlying authority to bring a declaratory judgment action nor is it required by the doctrine of subrogation. See, Section 8.01-184 of the Virginia Code and Federal Land Bank of Baltimore v. Joynes, 179 Va. 394 (1942). The Federal Land Bank case specifically states that the doctrine of subrogation is not dependent upon contract nor upon privity between the parties, but rather is a creature of equity and is founded upon the principles of natural justice. See, Federal Land Bank at 401.

State Farm has the right to assert a claim for damages against Ohio Casualty in this matter. Ohio Casualty issued the builder's risk insurance policy to Talton Brothers covering the dwellings and property of the Kitchens and Kozaks. At the time of the fire, these dwellings were not complete, construction was ongoing, and residential use permits had not been approved or issued to either. Talton Brothers had an insurable interest in the property (as previously set forth in Section 38.2-303(B) of the Virginia Code because Talton Brothers had "a lawful and substantial economic interest in the safety or preservation of the subject of insurance free from loss, destruction or pecuniary damage") at least until construction was complete and residential use permits were issued.

The sale and construction contracts of both the Kozaks and Kitchens with the Taltons show the intent of the parties was for the Taltons to have continuing responsibility for the protection of the properties. As previously stated, both contracts distinguish between a time of "closing and settlement on the lot" (which had taken place before the fire) and the time of "completion and delivery of possession" (which had not taken place before the fire) [see paragraphs 1(g) and 1(h) of the Kozak amended sales contract – page 4 of Exhibit 1B; and paragraphs 1(e) and 1(f) of the Kitchen amended sales contract – pages 2 and 3 of Exhibit 2B].

Both amended sales contracts contain other references showing the Taltons to be responsible for the properties until they are complete (with completion by definition in the contracts requiring the issuance of a residential use permit). The Taltons are responsible for paying interest on the properties until residential use permits are issued; the Taltons had additional financial responsibilities on the properties until residential use permits were issued; the Taltons were responsible for the protection of the work (defined in the contract as "completing the improvements"); the Taltons were responsible to remedy any damage to property at the site; the Taltons had responsibility to maintain insurance (not just worker's compensation or liability insurance, but also insurance from "claims for damages because of property damage"); the Taltons were responsible for all of the construction going on at the properties; and, perhaps most significant, the Taltons' responsibilities/obligations "shall survive the initial closing and the permanent loan closing and final settlement" (see amended sales contracts generally (Exhibits 1B and 2B) and page 2 of the Second Amended Sales Contract with the Kitchens (part of Exhibit 2B)). Thus, Talton Brothers was legally liable for the protection of the property until construction was complete and was responsible for the primary care, custody and control of the premises. On the date of the fire construction was not complete at either dwelling as Talton Brothers was still performing at least some interior finishing work. Although the origin of this fire is unknown, it is believed to be related to a floor finish chemical (see Exhibit No. 9). Since Talton

Brothers' interests and responsibilities for the properties/premises in question easily constitutes an insurable interest in those properties and State Farm also had an insurable interest in the properties, then State Farm has the legal right to assert the application of the Ohio Casualty builder's risk insurance policy of Talton Brothers as both insurance policies covered the same premises.

State Farm's standing to bring this matter can also be illustrated by looking at this situation from a different perspective. Ohio Casualty does not dispute that its builder's risk policy covered the properties in question beginning January 1, 1993. It is also undisputed that State Farm did not issue its homeowner's policy to the Kitchens until March 19, 1993 and to the Kozaks until April 27, 1993 (see Stipulation 9). Therefore, there is not a dispute that between January 1, 1993 and March 19, 1993 (for the Kitchens) and the time between January 1, 1993 and April 27, 1993 (for the Kozaks) that Ohio Casualty would have been responsible for covering this type of loss during those periods.

The only difference between this type of loss occurring after January 1, 1993 and before State Farm issued its respective homeowner's policies to the Kitchens and Kozaks, is that the Kitchens and Kozaks purchased their homeowner's policies from State Farm on the aforementioned dates. No other event occurred between January 1, 1993 and June 17, 1993 that could even arguably affect the applicability of Ohio Casualty's policy. The issuance of another insurance policy to someone other than an insured of Ohio Casualty is not an event that ends Ohio Casualty's coverage of these properties.

Had State Farm decided not to pay the claims of the Kitchens and Kozaks that they initially paid but, instead, decided to file this declaratory judgment action at that time, there would have been no argument that State Farm lacked standing to make such a claim. The issues that would have been argued are whether the State Farm policies applied, whether the Ohio Casualty builder's risk policy applied, and the amount that each insurance company should pay. THESE

ARE THE PRECISE ISSUES RAISED IN THIS LITIGATION. IT DOES NOT MATTER THAT STATE FARM CHOSE TO PAY ITS CLAIMS BEFORE LITIGATING THE UNDERLYING INSURANCE ISSUES.

Any argument that Ohio Casualty makes relying on the transfer of ownership of the property to the Kitchens and Kozaks is misplaced. Ownership of the Kitchen property was transferred to the Kitchens on or about October 30, 1992 while ownership of the Kozak property was transferred to the Kozaks on or about November 4, 1992. (See Stipulations 13 and 14.) Therefore, ownership of the land has absolutely nothing to do not only with ending Ohio Casualty's builder's risk policy, but also in arguing that State Farm does not have standing to file this action.

Yet another way to look at this issue is to examine it in reverse. Ohio Casualty and State Farm are insuring the same things - the properties at 9844 and 9846 Palace Green Way. State Farm is affected by Ohio Casualty's actions as they pertain to the coverage on the properties relating to the June 17, 1993 loss because any amount paid by Ohio Casualty to Talton Brothers would reduce the amount of the loss suffered by the Kitchens and Kozaks. Obviously State Farm has an interest in the amount of any claim placed against it on a homeowner's policy. Equally as obvious is State Farm's standing to litigate that issue as it relates to any potentially interested party (which would include Ohio Casualty in this situation). This is exactly what State Farm is doing in this declaratory judgment action.

For the foregoing reasons, State Farm has standing to bring this declaratory judgment action.

2. The Ohio Casualty Builder's Risk policy covers the properties in question.

In its brief, Ohio Casualty argues that three of the seven conditions listed to end coverage occurred prior to June 17, 1993. They are:

LAW OFFICES

Brault Palmer Grove
Zimmerman White
& Steinhilber LLP

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WASHINGTON, D. C.

- (1) "After the owner or buyer accepts the property";
- (2) "when your interest ceases"; and
- (3) "when each building or structure is: (1) occupied in whole or in part." Contrary to

Ohio Casualty's arguments, however, none of the three conditions occurred.

Neither the Kitchens nor the Kozaks accepted the property. Ohio Casualty's first argument on this is based upon the fact that the Kozaks and Kitchens took title to their respective properties before June 17, 1993. This argument is not accurate for at least two reasons. First, it is stipulated that Ohio Casualty issued one or more commercial policies of insurance (including builder's risk) to Talton Brothers Construction on January 1, 1993, covering the dwellings and properties located at or near 9844 and 9846 Palace Green Way (the Kozak and Kitchen properties, respectively). While Ohio Casualty denies the dwellings in question were still covered on June 17, 1993, it is stipulated that they were covered on January 1, 1993. Thus the fact that the title to the land belonged to the Kitchens and Kozaks is an irrelevant fact furthermore, taking title to the land is not the same as accepting the property. There was still work to be done on both premises.

Second, Ohio Casualty argues paragraph 6.6 (possession) of the original contract between the Taltons and the Kitchens and Kozaks. In this instance, Ohio Casualty overlooks the fact that the original contracts signed by the Taltons, Kozaks and Kitchens were modified by the amendment. The amendment distinguished between: (1) a time of completion and (2) a time of closing and settlement on the lot. See paragraph 1(g) of the Kozak amended contract and paragraph 1(f) of the Kitchen amended sales contract. In fact, the amended contracts showed just the opposite of what Ohio Casualty argues. Both state that delivery of possession is to take place at the time of the completion (and not the time of closing and settlement on the lot). Completion is defined in both contracts (paragraph 3 of both amended sales contracts) to include the issuance of residential use of permits. Since it is stipulated that residential use permits were not issued to

either property, it was the intent of the parties that possession not be taken by the purchasers (Kozaks and Kitchens) until after the issuance of a residential use permit and completion of each respective property. Therefore, neither the Kitchens nor the Kozaks accepted their respective properties before June 17, 1993.

Talton Brothers' interest in the properties had not ceased by or before June 17, 1993. Taltons Brothers still had a financial/economic interest in both properties as explained in State Farm's initial brief.

The fact that title to the properties was in the name of the Kozaks and Kitchens bears no relation to Talton Brothers' interest in the properties. There is a fact that highlights Ohio Casualty's misplaced arguments on this issue. Ohio Casualty argues this point as though Talton Brothers owned the property and then transferred title of the property to the Kozaks and Kitchens. In fact, TALTON BROTHERS NEVER OWNED EITHER PROPERTY. Stipulations 5 and 6 in the sales contracts between the Taltons and Kitchens and Kozaks show that the sale of property was between the Kozaks and Kitchens (identified as purchasers) and David and Amy Talton (identified as sellers). Therefore, the fact that Talton Brothers did not own the property on June 17, 1993, is an irrelevant fact. Talton Brothers had the same interest in both properties while the land was owned by the Kozaks and Kitchens as it did while the land was owned by David and Amy Talton.

Then, Ohio Casualty mis-quotes Hall, Inc. v. Empire Fire and Marine Ins., 248 Va. 307 (1994). Ohio Casualty argues that the word "interest" in the context of an insurance contract must mean legal or ownership interest and cites Hall for that proposition. That is not what the Supreme Court ruled.

In Hall an automobile dealership brought an action against an insurer to recover under its garage dealers insurance policy for the loss of an automobile due to fire. The insurer denied the loss was covered under the policy because the insured did not have legal title to the automobile at

the time of loss. The provision of the insurance policy in question stated that coverage applied to "owned private passenger autos only. Only the private passenger autos Hall owns."

The Supreme Court went onto rule that the controlling language in the policy that the coverage extended only to private passenger automobiles Hall "owns" was clear and unambiguous. Since Hall was not the owner of the automobile in question, the coverage did not apply.

Therefore, the Hall case does not stand for the proposition argued by Ohio Casualty. If the Ohio Casualty policy ended coverage "when your ownership ceases" then the Hall case might have some relevance in this matter. Since the Ohio Casualty policy uses the word "interest" instead, there is no question that Ohio Casualty still had an interest in the property. As previously pointed out, its interest was the same when the Kozaks and Kitchens owned the property as it was when David and Amy Talton owned the property. Additionally, it still had an insurable interest in the property as defined by 38.2-303 (B) of the Virginia Code.

Also, other courts have held that a builders risk policy is not terminated by a substantial completion. In Cherokee Ins. Co. v. United States Fire Ins. Co., 559 S.W.2nd 337 (1977) (Tenn. App.), a builders risk insurer sought to avoid the liability for damages resulting from a fire in an insured building by asserting that the building had been substantially completed and that such substantial completion terminated the builders risk coverage. The court disagreed, however, holding that the building was not completed and that the issue of completion or substantial completion was immaterial under the terms of the policy.

Then in Commercial Standard Ins. Co. v. Rhode Island Ins. Co., 193 F.2nd 375 (1952) the court held that a builder's risk insurer was liable for the loss and not the insurer under a permanent fire policy which had been written to supersede the builder's risk policy. The court ruled that the builder's risk policy was effective while the building was in the course of construction and until fully completed and occupied.

The situation at bar is analogous to the Cherokee Insurance and Commercial Standard cases. The Kozak and Kitchen dwellings were not complete, construction was ongoing, residential use permits had not been issued, the dwellings could not be put to use for which they were intended, and delivery of possession had not taken place. Therefore, Talton Brothers' interest in the properties had not yet ceased nor did the Kitchens or Kozaks accept the properties.

Ohio Casualty also argues that the building or structure was occupied in whole or in part. Its reliance on that argument is that one bedroom and bathroom were fully completed in the Kitchen dwelling and Mr. and Mrs. Kitchen (but not their children) spent all or part of one night there before June 17, 1993. Stopping by the premises periodically or even spending part or all of one night on a premises does not constitute occupying a property. Black's Law Dictionary defines occupation as "to take or enter upon possession of; to hold possession of; to take or hold possession". As has already been discussed, neither the Kitchens nor the Kozaks took possession of their respective property.

Additionally, some courts have addressed this issue. In American and Foreign Ins. Co. v. Allied Plumbing and Heating Co., 36 Mich. App. 561, 194 N.W. 2nd 158 (1971) a builders risk insurer appealed the trial court's determination that the builder's risk policy was still in effect even though several of the apartments in an apartment building were occupied at the time of a fire. The insurer contended that since there was occupation of some of the building that the building was "completed" within the meaning of the policy. The court held that a partial occupancy of the building was not substantial occupancy as to amount to "completion" as a matter of law.

Courts have also ruled that a mere transient or trivial use of a building is not sufficient to show it as being occupied. See Cuthrell v. Milwaukee Mechanics Ins. Co., 234 N.C. 137, 66 S.E.2nd 649 (1951). Similarly in Reliance Ins. Co. v. Jones, 296 F.2nd 71 (1961), the Court of Appeals agreed with the trial court's finding that the placing of a small amount of grain in a storage building as a temporary expedient did not constitute "occupancy" for the purposes of

terminating liability under the builder's risk policy. The court went on to state that since the building was never put to anything more than a mere transient or trivial use that it was not occupied. It added that a building is occupied when it is put to a "practical and substantial use for the purpose which it was designed" (emphasis added).

Here, although the Kitchens had moved some furniture and/or other personal belongings into the dwelling and spent part or all of one night there, such trivial and incidental or transient use does not constitute occupying the dwelling.

3. Ohio Casualty's Builder's Risk policy should be the primary insurance covering the losses in question.

Ohio Casualty's only argument against this matter is that because State Farm admitted that it owed coverage for the damages sustained by the Kozaks and Kitchens in this loss and because Ohio Casualty denied that it owed coverage that somehow this results in the State Farm policies being primary to the Ohio Casualty policy. This argument further illustrates Ohio Casualty's intentions throughout its handling of this matter. It has refused to extend coverage to these losses despite numerous requests. Then, as part of its argument, it says that because State Farm has paid the claims while it has refused, that those actions provide a legal basis for applying and categorizing the coverages.

There is a strong public policy reason for this court to not accept Ohio Casualty's reasoning. If Ohio Casualty is rewarded for refusing these claims, that will set a precedent for insurance companies across the state to be encouraged to deny claim and force matters into litigation. Not only is it a bad policy to promote additional litigation, but it also creates bad policy because it would penalize innocent insureds (such as the Kitchens, Kozaks and Talton Brothers in this case) who would otherwise be able to go about their business while the real parties in interest litigate the legal dispute between themselves (the insurers) as opposed to involving the innocent parties.

Ohio Casualty also argues that there is a "other insurance" clause in the Ohio Casualty policy. That clause states in relevant parts that "if you have other insurance covering the same loss as an insurance under this coverage part, we will pay only the excess over what you should have received from the other insurance." The "you" in the Ohio Casualty insurance refers to an insured which is Talton Brothers in this instance. There are no indications that Talton Brothers has any other insurance covering this loss. The fact are that the Kozaks and Kitchens had insurance covering a loss. Therefore there is no other insurance as defined by Ohio Casualty's own policy and the "other insurance" clause is not applicable.

4. **Ohio Casualty's builder's risk has at least \$575,000.00 of available insurance coverage to the Kitchen property and at least \$275,000.00 of available coverage to the Kozak property.**

Ohio Casualty quotes the "limits of insurance" section of its insurance policy to stand for the proposition that the maximum coverage available in this matter is limited to \$300,000.00. It refers to a paragraph that states the applicable limits of insurance are shown in the declarations. It then quotes the middle of the page without looking below to examine the "schedule of locations".

The schedule of locations shows Lot 6 "the Kozak property" to have at least \$275,000.00 of available insurance. Then, toward the bottom of the page the declaration shows Lot 7 (the Kitchen property) to have \$575,000.00 of insurance with that number being crossed and raised to \$650,000.00. There is then a stamp that says "see endorsement". The endorsement is contained in the back pages of Exhibit 3. The third to the last page contains an endorsement to add Lot 7 in an amount of \$575,000.00. The second to the last page contains an endorsement increasing the amount of insurance for Lot 7 to \$650,000.00 (and even goes so far as to formally identify the Kitchens as being additional insureds).

Therefore, by the terms of Ohio Casualty's builder's risk policy, the amount of coverage available for the Kitchen loss is at least \$575,000.00 and the amount of coverage available for the Kozak loss is at least \$275,000.00.

D. OHIO CASUALTY'S ARGUMENTS ARE CONTRARY TO THE ENDORSEMENTS IN ITS BUILDERS RISK INSURANCE POLICY

Ohio Casualty argues in this matter that the properties in question (those of the Kitchens and Kozaks) were not still covered by its builders risk insurance policy on June 17, 1993. In addition to all of the other reasons previously set forth why these arguments are inaccurate, Ohio Casualty has ignored its own insurance contract in making its arguments.

When an insurance contract is set up for a schedule of properties or schedule of locations (as was the case with the Ohio Casualty policy) different events can occur to affect one or more of the scheduled locations without affecting all of them. Changes to any of the scheduled locations are normally done by endorsements. The Ohio Casualty builder's risk insurance policy has several change endorsements that affect Lot 7 (the Kitchen lot) and Lot 6 (the Kozak lot).

The fourth to the last page of Exhibit 3 contains a change endorsement for Lot 7 (the Kitchen's lot). The endorsement shows that Lot 7 is to be deleted from the builder's risk coverage form and shows an effective date of that change to be June 18, 1993. It should be noted (and it is not coincidental) that the effective date of this change is the day after the losses in question. Notwithstanding the argument of its counsel to the contrary in this action, the only evidence of a policy change deleting the Kitchen property from coverage under the builder's risk form is the change order that went into effect after this loss.

There is a similar endorsement relating to the Kozak property. The last page of Exhibit 3 shows a change endorsement to delete from Ohio Casualty's builder's risk coverage form Lot 6 (the Kozak's lot). That policy change is effective August 20, 1993. Again, this is after the losses at issue in this litigation.

Therefore, the only evidence of any property being deleted from Ohio Casualty's builder's risk coverage form are two endorsements, both of which delete coverage effective after these losses that occurred on June 17, 1993. Thus it is clear that Ohio Casualty intended to cover the properties in question and was receiving premium payments for covering both properties until they were deleted on the aforementioned dates. There is no evidence that there were any deletions of either property before June 17, 1993 and Ohio Casualty should be estopped from arguing that its builder's risk insurance policy did not cover the Kozak and Kitchen properties on June 17, 1993.

The above argument can be taken one stop further by examining two other endorsements. The third to the last page of Exhibit 3 contains a change endorsement adding to the builder's risk coverage form Lot 7 on August 1, 1993. If all of the arguments made by Ohio Casualty in this matter were applicable, why would Ohio Casualty add the Kitchen's property back to its insurance after it knew all of the aforementioned facts? This further serves as a reason for Ohio Casualty to be estopped from arguing that its policy did not cover the Kitchen property on June 17, 1993.

Next there is a change endorsement on the second to the last page of Exhibit 3. It increases the insurance on the Kitchen lot (Lot 7) and even adds the Kitchens as a loss payee/additional insured. Once again, not only is it clear that the Ohio Casualty policy was in effect on June 17, 1993, but it is reaffirmed by the change endorsements which explicitly add the same conditions which Ohio Casualty argues should end coverage in this action.

E. CONCLUSION

Based upon the foregoing reasons and based upon the evidence presented in this matter (including the stipulations and exhibits and reasonable inferences that can be drawn from them) the following have been proven:

1. Ohio Casualty's builder's risk insurance covers the damage to the buildings caused by the fire in question. The policy was in effect from January 1, 1993, until January 1, 1994 and no event took place to end the policy before June 17, 1993. Neither the Kitchens nor the Kozaks accepted their property on or before June 17, 1993; Talton Brother's interest did not cease on or before June 17, 1993; and neither building or structure was occupied in whole or part before June 17, 1993. Furthermore, Talton Brothers had an insurable interest in both properties on June 17, 1993 and, perhaps most importantly, the Ohio Casualty policy itself, through its endorsements, shows that the policy as it relates to the Kitchen property was not deleted until June 18, 1993 (after which it was added again on August 1, 1993) and the Kozak property was not deleted from the coverage until August 20, 1993.

2. State Farm has standing to bring this to bring this declaratory judgment action. The interest it insured was the same as the interest insured by Ohio Casualty; more than one insurance company can insure the same property; and the underlying legal principles behind the authority for a declaratory judgment action and a subrogation matter are not dependent upon a contract or privity, but rather a creature of equity and founded upon principles of natural justice.

3. The Ohio Casualty policy is primary. The sale and construction contracts makes the Taltons (and not the Kozaks or Kitchens) responsible for the protection of the property on the premises; many other provisions of the contracts show the Taltons to have the responsibility for the primary care, custody and maintenance of the premises; Talton Brothers was still performing construction at both properties; neither of which was complete; no residential use permits had been issued to either dwelling; and Talton Brothers had yet to complete and deliver possession of the dwellings. It therefore follows that the insurer of Talton Brothers (Ohio Casualty), through its builder's risk policy, should be primary, much the same as the Ohio Casualty policy of Talton Brothers would have been primary before the transfer of ownership from Amy and David Talton to the Kozaks and Kitchens.

4. The Ohio Casualty builder's risk insurance policy contains at least Five Hundred Seventy-Five Thousand Dollars (\$575,000.00) of insurance to the Kitchen property and at least Two Hundred Seventy-Five Thousand Dollars (\$275,000.00) of insurance coverage to the Kozak property. The scheduled locations in the declaration page of the insurance policy shows these amounts.

WHEREFORE, for the foregoing reasons State Farm respectfully requests this Court to enter an Order declaring that Ohio Casualty has an obligation to provide insurance coverage for the dwelling losses that occurred on June 17, 1993, at 9844 and 9846 Palace Green Way; to declare that Ohio Casualty's insurance coverage for the aforementioned damage is primary; and to declare that Ohio Casualty should pay in full State Farm the amounts of the damage to each property (\$86,081.00 for the Kozak dwelling and \$563,638.62 for the Kitchen dwelling) plus interest from either June 17, 1993 (the date of the loss) or July 16, 1993 (the date of State Farm's payment) in addition to State Farm's costs expended herein.

STATE FARM FIRE AND CASUALTY CO.
By Counsel

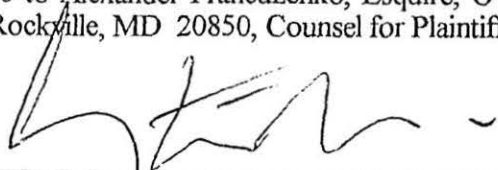
BRAULT, PALMER, GROVE, ZIMMERMAN,
WHITE & STEINHILBER



August W. Steinhilber, III, Esquire, VSB #24368
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Fairfax, Virginia 22030-1010
Counsel for Complainant

CERTIFICATE

I hereby certify that a true copy of the foregoing Complainant's Reply Brief was mailed, postage prepaid, on the 24th day of March, 2000 to Alexander Francuzenko, Esquire, O'Connell & O'Connell, 401 East Jefferson Street, Suite 204, Rockville, MD 20850, Counsel for Plaintiff.



August W. Steinhilber, III, Esquire

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3/24/00

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* ALSO ADMITTED IN DC

March 24, 2000

The Honorable Henry E. Hudson
Judges Chambers
Fairfax County Circuit Court
4110 Chain Bridge Road
Fairfax, VA 22030

Re: State Farm v. Ohio Casualty, et al
Chancery No.: 149960

Dear Judge Hudson:

Attached is a courtesy copy of State Farm's Reply Brief. This concludes the briefing scheduled by the Court to take place in this matter. As previously mentioned, Mr. Francuzenko and I are willing to appear before you again to conclude our oral arguments, if you find that to be necessary.

Please let me know if you need anything further from my office.

Sincerely,



August W. Steinhilber, III

AWS/rcy

Enc.

cc: Alexander Francuzenko, Esquire

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

STATE FARM FIRE AND
CASUALTY COMPANY,

Complainant,

v.

THE OHIO CASUALTY INSURANCE
COMPANY, et al.,

Defendants.

Chancery No. 149960

COMPLAINANT'S REPLY BRIEF

COMES NOW State Farm, by counsel, and for its Reply Brief addressing the issues raised both at the trial of this matter and in Defendant Ohio Casualty Insurance Company's Opposition To Complainant's Initial Brief and Brief In Support Of Defendant's Position, states as follows:

A. **BACKGROUND**

After reviewing Ohio Casualty's brief, it appears appropriate to review the background of this case to put the issues in this matter in their proper prospective. This is a declaratory judgment action filed pursuant to Section 8.01-184 of the Code of Virginia (1950), as amended. The purpose of a declaratory judgment action is to adjudicate and determine the rights and duties of parties relating to a specific matter which, in this case, is the Ohio Casualty builder's risk insurance policy. Any attempt by Ohio Casualty to characterize this action as something else shows either a lack of understanding of a declaratory judgment action or is an attempt to make arguments and/or analogies that are not on point.

Next, it appears necessary to review the burdens in this case. While there appeared to be an understanding between the Court and the parties as to the burdens when issues were initially argued at trial, defendant Ohio Casualty's brief shows significant diversions that are not accurate.

Ohio Casualty appears to confuse the burden of proof with the burden of going forward with the evidence and their respective underlying concepts. A party claiming application or coverage of an insurance contract has the burden of proving that the insurance contract applies to the specific facts at issue. State Farm has met its burden of proof in showing that the Ohio Casualty builder's risk insurance policy covers the losses to the Kozak and Kitchen properties at issue for the reasons set forth in this Brief and those set forth previously (at trial, in the stipulation, in the exhibits, and in its Initial Brief).

The burden of going forward with the evidence is different. Once a party has put forth enough evidence for a *prima facie* case against another, it is then incumbent upon the other party to go forward and present evidence to the contrary. In this matter, State Farm initially went forward with the evidence in its Initial Brief to show that the Ohio Casualty policy was in effect and covered both the Kozak and Kitchen dwellings. The stipulations and exhibits show the Ohio Casualty insurance policy to be in effect from January 1, 1993 until January 1, 1994. They also show coverage for Lots 6 and 7 (the Kozak and Kitchen properties, respectively). The loss to both properties took place on or about June 17, 1993, a date within the effective dates of Ohio Casualty's policy. Having made its *prima facie* showing that the Ohio Casualty policy was in effect and covers these losses, the burden of going forward with the evidence shifts to Ohio Casualty to show, if it can, why its policy was not in effect as to the Kitchen and Kozak properties on June 17, 1993. Ohio Casualty fails to meet this burden.

B. UNDERLYING FACTS

The underlying facts have not changed. State Farm incorporates from its initial brief the underlying facts in this matter as they need not be restated herein.

C. RESPONSE TO OHIO CASUALTY'S FOUR ARGUMENTS

1. **State Farm does have standing to assert a claim against Ohio Casualty in this declaratory judgment action.**

Contrary to Ohio Casualty's assertions, this action is a declaratory judgment action. Some fundamental principles of the concept of subrogation may apply, but it does not change the nature of this cause of action. It is still a cause of action to determine the rights and responsibilities of the parties in connection with the Ohio Casualty builder's risk insurance policy in question.

Ohio Casualty appears to argue that neither the State Farm homeowner's insurance policy nor common law gives State Farm the legal standing or right to pursue a cause of action against Ohio Casualty for damages that State Farm paid to the Kitchens and Kozaks because it argues that neither State Farm nor its insureds have privity of contract with Ohio Casualty. Privity, however, is not required by the underlying authority to bring a declaratory judgment action nor is it required by the doctrine of subrogation. See, Section 8.01-184 of the Virginia Code and Federal Land Bank of Baltimore v. Joynes, 179 Va. 394 (1942). The Federal Land Bank case specifically states that the doctrine of subrogation is not dependent upon contract nor upon privity between the parties, but rather is a creature of equity and is founded upon the principles of natural justice. See, Federal Land Bank at 401.

State Farm has the right to assert a claim for damages against Ohio Casualty in this matter. Ohio Casualty issued the builder's risk insurance policy to Talton Brothers covering the dwellings and property of the Kitchens and Kozaks. At the time of the fire, these dwellings were not complete, construction was ongoing, and residential use permits had not been approved or issued to either. Talton Brothers had an insurable interest in the property (as previously set forth in Section 38.2-303(B) of the Virginia Code because Talton Brothers had "a lawful and substantial economic interest in the safety or preservation of the subject of insurance free from loss, destruction or pecuniary damage") at least until construction was complete and residential use permits were issued.

The sale and construction contracts of both the Kozaks and Kitchens with the Taltons show the intent of the parties was for the Taltons to have continuing responsibility for the protection of the properties. As previously stated, both contracts distinguish between a time of "closing and settlement on the lot" (which had taken place before the fire) and the time of "completion and delivery of possession" (which had not taken place before the fire) [see paragraphs 1(g) and 1(h) of the Kozak amended sales contract – page 4 of Exhibit 1B; and paragraphs 1(e) and 1(f) of the Kitchen amended sales contract – pages 2 and 3 of Exhibit 2B].

Both amended sales contracts contain other references showing the Taltons to be responsible for the properties until they are complete (with completion by definition in the contracts requiring the issuance of a residential use permit). The Taltons are responsible for paying interest on the properties until residential use permits are issued; the Taltons had additional financial responsibilities on the properties until residential use permits were issued; the Taltons were responsible for the protection of the work (defined in the contract as "completing the improvements"); the Taltons were responsible to remedy any damage to property at the site; the Taltons had responsibility to maintain insurance (not just worker's compensation or liability insurance, but also insurance from "claims for damages because of property damage"); the Taltons were responsible for all of the construction going on at the properties; and, perhaps most significant, the Taltons' responsibilities/obligations "shall survive the initial closing and the permanent loan closing and final settlement" (see amended sales contracts generally (Exhibits 1B and 2B) and page 2 of the Second Amended Sales Contract with the Kitchens (part of Exhibit 2B)). Thus, Talton Brothers was legally liable for the protection of the property until construction was complete and was responsible for the primary care, custody and control of the premises. On the date of the fire construction was not complete at either dwelling as Talton Brothers was still performing at least some interior finishing work. Although the origin of this fire is unknown, it is believed to be related to a floor finish chemical (see Exhibit No. 9). Since Talton

Brothers' interests and responsibilities for the properties/premises in question easily constitutes an insurable interest in those properties and State Farm also had an insurable interest in the properties, then State Farm has the legal right to assert the application of the Ohio Casualty builder's risk insurance policy of Talton Brothers as both insurance policies covered the same premises.

State Farm's standing to bring this matter can also be illustrated by looking at this situation from a different perspective. Ohio Casualty does not dispute that its builder's risk policy covered the properties in question beginning January 1, 1993. It is also undisputed that State Farm did not issue its homeowner's policy to the Kitchens until March 19, 1993 and to the Kozaks until April 27, 1993 (see Stipulation 9). Therefore, there is not a dispute that between January 1, 1993 and March 19, 1993 (for the Kitchens) and the time between January 1, 1993 and April 27, 1993 (for the Kozaks) that Ohio Casualty would have been responsible for covering this type of loss during those periods.

The only difference between this type of loss occurring after January 1, 1993 and before State Farm issued its respective homeowner's policies to the Kitchens and Kozaks, is that the Kitchens and Kozaks purchased their homeowner's policies from State Farm on the aforementioned dates. No other event occurred between January 1, 1993 and June 17, 1993 that could even arguably affect the applicability of Ohio Casualty's policy. The issuance of another insurance policy to someone other than an insured of Ohio Casualty is not an event that ends Ohio Casualty's coverage of these properties.

Had State Farm decided not to pay the claims of the Kitchens and Kozaks that they initially paid but, instead, decided to file this declaratory judgment action at that time, there would have been no argument that State Farm lacked standing to make such a claim. The issues that would have been argued are whether the State Farm policies applied, whether the Ohio Casualty builder's risk policy applied, and the amount that each insurance company should pay. THESE

ARE THE PRECISE ISSUES RAISED IN THIS LITIGATION. IT DOES NOT MATTER THAT STATE FARM CHOSE TO PAY ITS CLAIMS BEFORE LITIGATING THE UNDERLYING INSURANCE ISSUES.

Any argument that Ohio Casualty makes relying on the transfer of ownership of the property to the Kitchens and Kozaks is misplaced. Ownership of the Kitchen property was transferred to the Kitchens on or about October 30, 1992 while ownership of the Kozak property was transferred to the Kozaks on or about November 4, 1992. (See Stipulations 13 and 14.) Therefore, ownership of the land has absolutely nothing to do not only with ending Ohio Casualty's builder's risk policy, but also in arguing that State Farm does not have standing to file this action.

Yet another way to look at this issue is to examine it in reverse. Ohio Casualty and State Farm are insuring the same things - the properties at 9844 and 9846 Palace Green Way. State Farm is affected by Ohio Casualty's actions as they pertain to the coverage on the properties relating to the June 17, 1993 loss because any amount paid by Ohio Casualty to Talton Brothers would reduce the amount of the loss suffered by the Kitchens and Kozaks. Obviously State Farm has an interest in the amount of any claim placed against it on a homeowner's policy. Equally as obvious is State Farm's standing to litigate that issue as it relates to any potentially interested party (which would include Ohio Casualty in this situation). This is exactly what State Farm is doing in this declaratory judgment action.

For the foregoing reasons, State Farm has standing to bring this declaratory judgment action.

2. The Ohio Casualty Builder's Risk policy covers the properties in question.

In its brief, Ohio Casualty argues that three of the seven conditions listed to end coverage occurred prior to June 17, 1993. They are:

- (1) "After the owner or buyer accepts the property";
- (2) "when your interest ceases"; and
- (3) "when each building or structure is: (1) occupied in whole or in part." Contrary to

Ohio Casualty's arguments, however, none of the three conditions occurred.

Neither the Kitchens nor the Kozaks accepted the property. Ohio Casualty's first argument on this is based upon the fact that the Kozaks and Kitchens took title to their respective properties before June 17, 1993. This argument is not accurate for at least two reasons. First, it is stipulated that Ohio Casualty issued one or more commercial policies of insurance (including builder's risk) to Talton Brothers Construction on January 1, 1993, covering the dwellings and properties located at or near 9844 and 9846 Palace Green Way (the Kozak and Kitchen properties, respectively). While Ohio Casualty denies the dwellings in question were still covered on June 17, 1993, it is stipulated that they were covered on January 1, 1993. Thus the fact that the title to the land belonged to the Kitchens and Kozaks is an irrelevant fact furthermore, taking title to the land is not the same as accepting the property. There was still work to be done on both premises.

Second, Ohio Casualty argues paragraph 6.6 (possession) of the original contract between the Taltons and the Kitchens and Kozaks. In this instance, Ohio Casualty overlooks the fact that the original contracts signed by the Taltons, Kozaks and Kitchens were modified by the amendment. The amendment distinguished between: (1) a time of completion and (2) a time of closing and settlement on the lot. See paragraph 1(g) of the Kozak amended contract and paragraph 1(f) of the Kitchen amended sales contract. In fact, the amended contracts showed just the opposite of what Ohio Casualty argues. Both state that delivery of possession is to take place at the time of the completion (and not the time of closing and settlement on the lot). Completion is defined in both contracts (paragraph 3 of both amended sales contracts) to include the issuance of residential use of permits. Since it is stipulated that residential use permits were not issued to

either property, it was the intent of the parties that possession not be taken by the purchasers (Kozaks and Kitchens) until after the issuance of a residential use permit and completion of each respective property. Therefore, neither the Kitchens nor the Kozaks accepted their respective properties before June 17, 1993.

Talton Brothers' interest in the properties had not ceased by or before June 17, 1993. Taltons Brothers still had a financial/economic interest in both properties as explained in State Farm's initial brief.

The fact that title to the properties was in the name of the Kozaks and Kitchens bears no relation to Talton Brothers' interest in the properties. There is a fact that highlights Ohio Casualty's misplaced arguments on this issue. Ohio Casualty argues this point as though Talton Brothers owned the property and then transferred title of the property to the Kozaks and Kitchens. In fact, TALTON BROTHERS NEVER OWNED EITHER PROPERTY. Stipulations 5 and 6 in the sales contracts between the Taltons and Kitchens and Kozaks show that the sale of property was between the Kozaks and Kitchens (identified as purchasers) and David and Amy Talton (identified as sellers). Therefore, the fact that Talton Brothers did not own the property on June 17, 1993, is an irrelevant fact. Talton Brothers had the same interest in both properties while the land was owned by the Kozaks and Kitchens as it did while the land was owned by David and Amy Talton.

Then, Ohio Casualty mis-quotes Hall, Inc. v. Empire Fire and Marine Ins., 248 Va. 307 (1994). Ohio Casualty argues that the word "interest" in the context of an insurance contract must mean legal or ownership interest and cites Hall for that proposition. That is not what the Supreme Court ruled.

In Hall an automobile dealership brought an action against an insurer to recover under its garage dealers insurance policy for the loss of an automobile due to fire. The insurer denied the loss was covered under the policy because the insured did not have legal title to the automobile at

the time of loss. The provision of the insurance policy in question stated that coverage applied to "owned private passenger autos only. Only the private passenger autos Hall owns."

The Supreme Court went on to rule that the controlling language in the policy that the coverage extended only to private passenger automobiles Hall "owns" was clear and unambiguous. Since Hall was not the owner of the automobile in question, the coverage did not apply.

Therefore, the Hall case does not stand for the proposition argued by Ohio Casualty. If the Ohio Casualty policy ended coverage "when your ownership ceases" then the Hall case might have some relevance in this matter. Since the Ohio Casualty policy uses the word "interest" instead, there is no question that Ohio Casualty still had an interest in the property. As previously pointed out, its interest was the same when the Kozaks and Kitchens owned the property as it was when David and Amy Talton owned the property. Additionally, it still had an insurable interest in the property as defined by 38.2-303 (B) of the Virginia Code.

Also, other courts have held that a builders risk policy is not terminated by a substantial completion. In Cherokee Ins. Co. v. United States Fire Ins. Co., 559 S.W.2nd 337 (1977) (Tenn. App.), a builders risk insurer sought to avoid the liability for damages resulting from a fire in an insured building by asserting that the building had been substantially completed and that such substantial completion terminated the builders risk coverage. The court disagreed, however, holding that the building was not completed and that the issue of completion or substantial completion was immaterial under the terms of the policy.

Then in Commercial Standard Ins. Co. v. Rhode Island Ins. Co., 193 F.2nd 375 (1952) the court held that a builder's risk insurer was liable for the loss and not the insurer under a permanent fire policy which had been written to supersede the builder's risk policy. The court ruled that the builder's risk policy was effective while the building was in the course of construction and until fully completed and occupied.

The situation at bar is analogous to the Cherokee Insurance and Commercial Standard cases. The Kozak and Kitchen dwellings were not complete, construction was ongoing, residential use permits had not been issued, the dwellings could not be put to use for which they were intended, and delivery of possession had not taken place. Therefore, Talton Brothers' interest in the properties had not yet ceased nor did the Kitchens or Kozaks accept the properties.

Ohio Casualty also argues that the building or structure~~d~~ was occupied in whole or in part. Its reliance on that argument is that one bedroom and bathroom were fully completed in the Kitchen dwelling and Mr. and Mrs. Kitchen (but not their children) spent all or part of one night there before June 17, 1993. Stopping by the premises periodically or even spending part or all of one night on a premises does not constitute occupying a property. Black's Law Dictionary defines occupation as "to take or enter upon possession of; to hold possession of; to take or hold possession". As has already been discussed, neither the Kitchens nor the Kozaks took possession of their respective property.

Additionally, some courts have addressed this issue. In American and Foreign Ins. Co. v. Allied Plumbing and Heating Co., 36 Mich. App. 561, 194 N.W. 2nd 158 (1971) a builders risk insurer appealed the trial court's determination that the builder's risk policy was still in effect even though several of the apartments in an apartment building were occupied at the time of a fire. The insurer contended that since there was occupation of some of the building that the building was "completed" within the meaning of the policy. The court held that a partial occupancy of the building was not substantial occupancy as to amount to "completion" as a matter of law.

Courts have also ruled that a mere transient or trivial use of a building is not sufficient to show it as being occupied. See Cuthrell v. Milwaukee Mechanics Ins. Co., 234 N.C. 137, 66 S.E.2nd 649 (1951). Similarly in Reliance Ins. Co. v. Jones, 296 F.2nd 71 (1961), the Court of Appeals agreed with the trial court's finding that the placing of a small amount of grain in a storage building as a temporary expedient did not constitute "occupancy" for the purposes of

terminating liability under the builder's risk policy. The court went on to state that since the building was never put to anything more than a mere transient or trivial use that it was not occupied. It added that a building is occupied when it is put to a "practical and substantial use for the purpose which it was designed" (emphasis added).

Here, although the Kitchens had moved some furniture and/or other personal belongings into the dwelling and spent part or all of one night there, such trivial and incidental or transient use does not constitute occupying the dwelling.

3. Ohio Casualty's Builder's Risk policy should be the primary insurance covering the losses in question.

Ohio Casualty's only argument against this matter is that because State Farm admitted that it owed coverage for the damages sustained by the Kozaks and Kitchens in this loss and because Ohio Casualty denied that it owed coverage that somehow this results in the State Farm policies being primary to the Ohio Casualty policy. This argument further illustrates Ohio Casualty's intentions throughout its handling of this matter. It has refused to extend coverage to these losses despite numerous requests. Then, as part of its argument, it says that because State Farm has paid the claims while it has refused, that those actions provide a legal basis for applying and categorizing the coverages.

There is a strong public policy reason for this court to not accept Ohio Casualty's reasoning. If Ohio Casualty is rewarded for refusing these claims, that will set a precedent for insurance companies across the state to be encouraged to deny claim and force matters into litigation. Not only is it a bad policy to promote additional litigation, but it also creates bad policy because it would penalize innocent insureds (such as the Kitchens, Kozaks and Talton Brothers in this case) who would otherwise be able to go about their business while the real parties in interest litigate the legal dispute between themselves (the insurers) as opposed to involving the innocent parties.

Ohio Casualty also argues that there is a "other insurance" clause in the Ohio Casualty policy. That clause states in relevant parts that "if you have other insurance covering the same loss as an insurance under this coverage part, we will pay only the excess over what you should have received from the other insurance." The "you" in the Ohio Casualty insurance refers to an insured which is Talton Brothers in this instance. There are no indications that Talton Brothers has any other insurance covering this loss. The fact are that the Kozaks and Kitchens had insurance covering a loss. Therefore there is no other insurance as defined by Ohio Casualty's own policy and the "other insurance" clause is not applicable.

4. **Ohio Casualty's builder's risk has at least \$575,000.00 of available insurance coverage to the Kitchen property and at least \$275,000.00 of available coverage to the Kozak property.**

Ohio Casualty quotes the "limits of insurance" section of its insurance policy to stand for the proposition that the maximum coverage available in this matter is limited to \$300,000.00. It refers to a paragraph that states the applicable limits of insurance are shown in the declarations. It then quotes the middle of the page without looking below to examine the "schedule of locations".

The schedule of locations shows Lot 6 "the Kozak property" to have at least \$275,000.00 of available insurance. Then, toward the bottom of the page the declaration shows Lot 7 (the Kitchen property) to have \$575,000.00 of insurance with that number being crossed and raised to \$650,000.00. There is then a stamp that says "see endorsement". The endorsement is contained in the back pages of Exhibit 3. The third to the last page contains an endorsement to add Lot 7 in an amount of \$575,000.00. The second to the last page contains an endorsement increasing the amount of insurance for Lot 7 to \$650,000.00 (and even goes so far as to formally identify the Kitchens as being additional insureds).

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Ohio Casualty argues in this matter that the properties in question (those of the Kitchens and Kozaks) were not still covered by its builders risk insurance policy on June 17, 1993. In addition to all of the other reasons previously set forth why these arguments are inaccurate, Ohio Casualty has ignored its own insurance contract in making its arguments.

When an insurance contract is set up for a schedule of properties or schedule of locations (as was the case with the Ohio Casualty policy) different events can occur to affect one or more of the scheduled locations without affecting all of them. Changes to any of the scheduled locations are normally done by endorsements. The Ohio Casualty builder's risk insurance policy has several change endorsements that affect Lot 7 (the Kitchen lot) and Lot 6 (the Kozak lot).

The fourth to the last page of Exhibit 3 contains a change endorsement for Lot 7 (the Kitchen's lot). The endorsement shows that Lot 7 is to be deleted from the builder's risk coverage form and shows an effective date of that change to be June 18, 1993. It should be noted (and it is not coincidental) that the effective date of this change is the day after the losses in question. Notwithstanding the argument of its counsel to the contrary in this action, the only evidence of a policy change deleting the Kitchen property from coverage under the builder's risk form is the change order that went into effect after this loss.

There is a similar endorsement relating to the Kozak property. The last page of Exhibit 3 shows a change endorsement to delete from Ohio Casualty's builder's risk coverage form Lot 6 (the Kozak's lot). That policy change is effective August 20, 1993. Again, this is after the losses at issue in this litigation.

Therefore, the only evidence of any property being deleted from Ohio Casualty's builder's risk coverage form are two endorsements, both of which delete coverage effective after these losses that occurred on June 17, 1993. Thus it is clear that Ohio Casualty intended to cover the properties in question and was receiving premium payments for covering both properties until they were deleted on the aforementioned dates. There is no evidence that there were any deletions of either property before June 17, 1993 and Ohio Casualty should be estopped from arguing that its builder's risk insurance policy did not cover the Kozak and Kitchen properties on June 17, 1993.

The above argument can be taken one stop further by examining two other endorsements. The third to the last page of Exhibit 3 contains a change endorsement adding to the builder's risk coverage form Lot 7 on August 1, 1993. If all of the arguments made by Ohio Casualty in this matter were applicable, why would Ohio Casualty add the Kitchen's property back to its insurance after it knew all of the aforementioned facts? This further serves as a reason for Ohio Casualty to be estopped from arguing that its policy did not cover the Kitchen property on June 17, 1993.

Next there is a change endorsement on the second to the last page of Exhibit 3. It increases the insurance on the Kitchen lot (Lot 7) and even adds the Kitchens as a loss payee/additional insured. Once again, not only is it clear that the Ohio Casualty policy was in effect on June 17, 1993, but it is reaffirmed by the change endorsements which explicitly add the same conditions which Ohio Casualty argues should end coverage in this action.

E. CONCLUSION

Based upon the foregoing reasons and based upon the evidence presented in this matter (including the stipulations and exhibits and reasonable inferences that can be drawn from them) the following have been proven:

1. Ohio Casualty's builder's risk insurance covers the damage to the buildings caused by the fire in question. The policy was in effect from January 1, 1993, until January 1, 1994 and no event took place to end the policy before June 17, 1993. Neither the Kitchens nor the Kozaks accepted their property on or before June 17, 1993; Talton Brother's interest did not cease on or before June 17, 1993; and neither building or structure was occupied in whole or part before June 17, 1993. Furthermore, Talton Brothers had an insurable interest in both properties on June 17, 1993 and, perhaps most importantly, the Ohio Casualty policy itself, through its endorsements, shows that the policy as it relates to the Kitchen property was not deleted until June 18, 1993 (after which it was added again on August 1, 1993) and the Kozak property was not deleted from the coverage until August 20, 1993.

2. State Farm has standing to bring this to bring this declaratory judgment action. The interest it insured was the same as the interest insured by Ohio Casualty; more than one insurance company can insure the same property; and the underlying legal principles behind the authority for a declaratory judgment action and a subrogation matter are not dependent upon a contract or privity, but rather a creature of equity and founded upon principles of natural justice.

3. The Ohio Casualty policy is primary. The sale and construction contracts makes the Taltons (and not the Kozaks or Kitchens) responsible for the protection of the property on the premises; many other provisions of the contracts show the Taltons to have the responsibility for the primary care, custody and maintenance of the premises; Talton Brothers was still performing construction at both properties; neither of which was complete; no residential use permits had been issued to either dwelling; and Talton Brothers had yet to complete and deliver possession of the dwellings. It therefore follows that the insurer of Talton Brothers (Ohio Casualty), through its builder's risk policy, should be primary, much the same as the Ohio Casualty policy of Talton Brothers would have been primary before the transfer of ownership from Amy and David Talton to the Kozaks and Kitchens.

4. The Ohio Casualty builder's risk insurance policy contains at least Five Hundred Seventy-Five Thousand Dollars (\$575,000.00) of insurance to the Kitchen property and at least Two Hundred Seventy-Five Thousand Dollars (\$275,000.00) of insurance coverage to the Kozak property. The scheduled locations in the declaration page of the insurance policy shows these amounts.

WHEREFORE, for the foregoing reasons State Farm respectfully requests this Court to enter an Order declaring that Ohio Casualty has an obligation to provide insurance coverage for the dwelling losses that occurred on June 17, 1993, at 9844 and 9846 Palace Green Way; to declare that Ohio Casualty's insurance coverage for the aforementioned damage is primary; and to declare that Ohio Casualty should pay in full State Farm the amounts of the damage to each property (\$86,081.00 for the Kozak dwelling and \$563,638.62 for the Kitchen dwelling) plus interest from either June 17, 1993 (the date of the loss) or July 16, 1993 (the date of State Farm's payment) in addition to State Farm's costs expended herein.

STATE FARM FIRE AND CASUALTY CO.
By Counsel

BRAULT, PALMER, GROVE, ZIMMERMAN,
WHITE & STEINHILBER

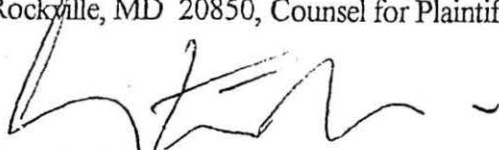


August W. Steinhilber, III, Esquire, VSB #24368
10533 Main Street
P. O. Box 1010
Fairfax, Virginia 22030-1010
Counsel for Complainant

LAW OFFICES
Braul Palmer Grove
Zimmerman White
& Steinhilber LLP
FAIRFAX, VIRGINIA
MANASSAS, VIRGINIA
WASHINGTON, D. C.

CERTIFICATE

I hereby certify that a true copy of the foregoing Complainant's Reply Brief was mailed, postage prepaid, on the 24th day of March, 2000 to Alexander Francuzenko, Esquire, O'Connell & O'Connell, 401 East Jefferson Street, Suite 204, Rockville, MD 20850, Counsel for Plaintiff.



August W. Steinhilber, III, Esquire

JP
417.00
HEH
VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

STATE FARM FIRE AND CASUALTY
COMPANY,

COMPLAINANT

V.

CHANCERY NO.149960

THE OHIO CASUALTY INSURANCE
COMPANY, et al.

DEFENDANT

MEMORANDUM OPINION

This is a coverage dispute between two insurance carriers, arising from the destruction of two adjacent structures by fire. The complainant seeks a declaratory judgment establishing that the defendant carrier has primary coverage and should reimburse the complainant for claims previously paid to the homeowners. The parties have stipulated to the operative facts. Both sides submitted supporting exhibits at trial. The Court previously heard oral argument and has reviewed memoranda of law filed by counsel.

The facts are not in dispute. Two couples, the Kozaks and the Kitchens, contracted separately with Talton Brothers, licensed builders, to construct residential dwellings at 9844 and 9846 Palace Green Way, Vienna, Virginia, respectively. The Kozaks signed their contract on November 25, 1991; the Kitchens signed theirs on May 14, 1992. Prior to completion of construction, both couples executed amended contracts. Under these amended agreements, both agreed to settle on their properties before the residential structures were fully completed. The builder was obligated to continue construction. Both agreements, which contained almost identical language, defined completion as the point at which the county issued a residential use permit.

Pursuant to the amended contracts, both purchasers proceeded to settlement. Ownership of 9844 Palace Green Way was transferred to the Kozaks on November 4, 1992. The Kitchens took title to 9846 Palace Green Way on October 30, 1992. Each obtained a homeowners' insurance policy from the Complainant, State Farm. The Kitchens' policy was effective on March 19, 1993. The Kozaks policy took effect on April 27, 1993. Both homes were damaged by fire on June 17, 1993. There is no dispute that the homeowners' policies covered the resulting fire damage.

The builder, Talton Brothers, acquired a builder's risk policy from the Defendant, Ohio Casualty, on January 1, 1993, covering both structures and properties. The language of the policy provided coverage for fire damage. However, Ohio Casualty denies that the policy was in effect on the day of the fire. Ohio Casualty contends that each purchaser had "accepted" the property and that under the terms of the builder's risk policy, coverage ceased at that point.

Although the origin of the June 17, 1993 fire remains undetermined, State Farm paid the claims filed by each purchaser under their homeowners' policy. The Kitchens received \$563,638.62 for structural damage, \$5,421.14 for damage to personal property and \$3,690.00 for rent and storage. The Kozaks were paid \$86,081.00 for structural damage. Arguing that it is now subrogated by contract and common law to the rights of its policyholders, State Farm seeks repayment from Ohio Casualty on the ground that primary coverage resides with the builders risk policy in this case. In the alternative, State Farm urges the Court to award proportionate contribution.

Initially, Ohio Casualty maintains that State Farm lacks standing to pursue reimbursement, due to absence of privity of contract. Ohio Casualty misconstrues the genesis of the concept of legal subrogation. The doctrine is a creature of equity, which arises by operation of law. It is not dependent upon contract or privity between the parties. *Federal Land Bank v. Joynes*, 179 Va. 394, 401 (1942). State Farm's payment of a debt allegedly owed by Ohio Casualty provides the necessary subrogation right to prosecute this declaratory judgment action.

Furthermore, contrary to Ohio Casualty's next ground of defense, Talton Brothers clearly had an insurable interest in the damaged structures on June 17, 1993. Both dwellings were still under construction and were not complete as that term is defined in the amended sales agreements. Until construction was completed, Talton Brothers had "a lawful and substantial economic interest in the safety or preservation of the subject of insurance free from loss, destruction or pecuniary damage." see §38.2-303 (B), Code of Virginia, 1950, as amended.

As the party seeking to prove primary coverage, the burden rests on State Farm to establish that the builder's risk policy issued by Ohio Casualty was in force and effect on June 17, 1993. *Aetna Casualty and Surety Company v. Goldman*, 217 Va. 419, 420 (1976). In arguing primary coverage by Ohio Casualty, State Farm relies on the language of the builders risk policy, particularly the endorsements. With respect to the Kitchens' property, the policy endorsement reflects deletion of coverage effective June 18, 1993. A similar endorsement on the builder's risk policy indicates that the Kozak property was deleted from coverage on August 20, 1993. Both deletions of coverage occurred after the June 17, 1993 fire.

Ohio Casualty directs the Court's attention to language in paragraph 3(a) of the Builder's Risk Coverage Form, which states that coverage shall cease, "(a)fter the owner or buyer accepts the property." Ohio Casualty argues that the Kozaks and the Kitchens "accepted" their property on the date of settlement. This event, according to Ohio Casualty, shifted primary coverage to the homeowners' policies issued by State Farm. The Court disagrees.

Pursuant to the amended sales agreements, both purchasers took title to the property prior to completion of the structure. However, the purchasers did not take possession or formally occupy their prospective dwellings prior to completion. As mentioned above, both the original and the amended sales contracts define "completion" as the point in time at which a residential use permit is issued by the county. The fact that one purchaser spent one night in the structure prior to the fire, and the other stored some property on their premises does not change the Court's analysis. In the Court's view, the full completion of the structures was the bright line event that would relieve Ohio Casualty of coverage responsibility under the builder's risk policy. This had not

occurred on the date of the fire. The builder's risk policy therefore covered the fire damage to the Kozak and Kitchen properties. The Court turns now to the issue of primary coverage.

A thorough review of the language of both the homeowners' and builder's risk policies in this case revealed no pertinent excess or secondary coverage clauses. Both policies appear to provide primary coverage. Therefore, both carriers in this case share a common obligation. At this stage of the analysis, Virginia appellate decisions provide minimal guidance with respect to policies of this type. The Court will therefore draw upon fundamental principles of equity and insurance law.

Given the existence of a common obligation, State Farm is not entitled to total indemnification. State Farm may recover contribution, however, for having paid Ohio Casualty's share.

The right of contribution is derived from basic tenets of equity. "... where two or more persons are subject to a common burden it shall be borne equally, since the law implies a contract between them to contribute ratably towards the discharge of the obligation." *Midwest Mutual Insurance Co. v. The Aetna Casualty and Surety Co.*, 216 Va. 926,928 (1976). In the insurance context, when two or more carriers are liable to pay a claim and "... one or more of them pays the whole of it, or more than his or her share, the one so paying may generally recover from the others the ratable proportion of the claim that each ought to pay." *Id.* Contribution is a remedy frequently utilized in cases involving concurrent common obligations between primary insurance carriers. See generally *Virginia Farm Bureau Insurance v. The Travelers Indemnity Co.*, 242 Va. 203 (1991).

Unless dictated by statute, a party seeking contribution need not reduce their claim to judgment. Payment of the amount due on the coexisting obligation is sufficient to trigger entitlement to contribution. *Nationwide Mutual Insurance Co. v. Jewel Tea Co.*, 202 Va. 527,531 (1961). In other insurance cases involving concurrent coverage, courts have ordered a pro rata distribution of the insurance burden. *Aetna Casualty & Surety Co. v. National Union Fire Insurance Co., et al.*, 233 Va. 49,54 (1987). This distribution formula is also utilized in contribution cases. *Wiley N. Jackson Co. v. City of Norfolk*, 197 Va. 62,66 (1955).

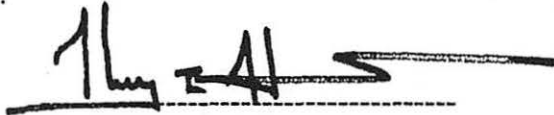
A survey of reported cases in Virginia provides minimal assistance in applying a pro rata distribution formula, particularly in identifying the determinative factors. Citing authority from other jurisdictions, the Supreme Court of Virginia noted in dicta in *GEICO v. Universal Underwriters Ins. Co.*, 232 Va. 326,330 (1986) that some courts have found "that liability should be prorated according to the policy limits in the respective policies." Although this appears to be the general rule, other courts have construed the term to mean "apportionment by equal shares or apportionment in proportion to the ratio between the premiums paid to a particular insurer and the total premiums paid to all insurers covering the occurrence." *Continental Insurance Co. v. McKain*, 821 F.Supp.1084 (E.D.Pa.,1993.)

In the immediate case, there is no significant difference in policy limits. The Court rejects Ohio Casualty's argument that the builder's risk policy limits its liability to \$300,000. Although the exact limits of coverage are difficult to discern from the handwritten notations on the policy endorsement, the ceiling clearly exceeds the amount

here in controversy. The Court therefore believes that payment should be apportioned equally between the carriers.

In the final analysis, the Court is of the opinion that State Farm's Motion for Summary Judgment should be granted, and a similar motion filed by Ohio Casualty denied. The Court finds that both carriers share a concurrent insurance obligation for the damage occasioned by the fire of June 17, 1993. State Farm paid its insured's claim for damages and is entitled to equitable pro rata contribution from Ohio Casualty in the amount of one-half the claim, or \$329,415.38. Judgment is therefore awarded to the Complainant in the amount of \$329,415.38.

Entered this 17th day of April 2000.

A handwritten signature in black ink, appearing to read "Henry E. Hudson", is written over a horizontal dashed line.

Henry E. Hudson, Judge

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

STATE FARM FIRE AND
CASUALTY COMPANY,

Complainant,

v.

THE OHIO CASUALTY INSURANCE
COMPANY, et al.,

Defendants.

Chancery No. 149960

FILED
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CLERK OF CIRCUIT COURT
FAIRFAX, VAMOTION TO AMEND FINAL ORDER

COMES NOW Complainant, by counsel, and for its Motion to Amend the Final Order entered in this matter on April 17, 2000, to include a ruling on Complainant's request for interest, states as follows:

1. Section 8.01-382 of the Code of Virginia (as amended) authorizes the Court to provide for interest on any amount awarded and to fix the period at which the interest shall commence;
2. The Final Order entered in this matter on April 17, 2000 does not address the issue of interest claimed by the Complainant;
3. The Court entered judgment in favor of the Complainant in the amount of \$329,415.38 based upon payments made by the Complainant on July 16, 1993;
4. The date of loss in this matter is June 17, 1993;
5. This is not the type of cause of action where the damages have been accruing over time – the amount paid was a liquidated amount;
6. Section 6.1-330.54 of the Virginia Code sets the legal rate of interest at 9% annually.

LAW OFFICES

Brault Palmer Grove
Zimmerman White
& Steinhilber LLPFAIRFAX, VIRGINIA
MANASSAS, VIRGINIA
WASHINGTON, D. C.

7. The dispute in this matter was between two insurance companies that regularly invest large amounts of money and receive rates of return on that money greatly exceeding 9% per year;

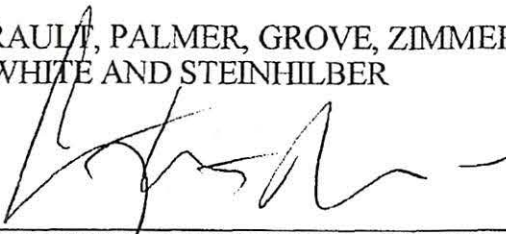
8. Complainant State Farm is entitled to an award of interest on the amount of the judgment at a rate of at least 9% (the legal rate) and beginning at least from July 16, 1993 (the date of payment).

WHEREFORE, Complainant State Farm respectfully requests this Court to amend its Final Order to include an award of interest at at least 9% per annum beginning at least on July 16, 1993.

STATE FARM FIRE AND CASUALTY
COMPANY

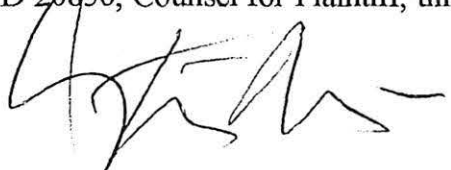
By Counsel

BRAULT, PALMER, GROVE, ZIMMERMAN,
WHITE AND STEINHILBER


AUGUST W. STEINHILBER, III, ESQUIRE
10533 Main Street, P.O. Box 1010
Fairfax, VA 22030
Counsel for Complainant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed, postage prepaid, to **Alexander Francuzenko, Esquire**, O'Connell & O'Connell, 401 East Jefferson Street, Suite 204, Rockville, MD 20850, Counsel for Plaintiff, this 24th day of April, 2000.


August W. Steinhilber, III

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED
COURT SERVICES

STATE FARM FIRE AND CASUALTY COMPANY

Plaintiff

Case Number: 2:09

THE OHIO CASUALTY INSURANCE COMPANY, et al.

Defendant

JOHN T. FREY
CLERK, CIRCUIT COURT
Chancery Number: 19960
FAIRFAX, VA

RESPONSE TO MOTION

Moving party: State Farm Fire and Casualty Company

Responding party: The Ohio Casualty Insurance Company

Title of Motion to which the Response is filed: Motion to Amend Final Order

Date to be heard (Friday): May 5, 2000

RESPONSE filed by:

Alexander Francuzenko

Attorney Name

(301) 424-2300

Daytime Phone Number

401 E. Jefferson Street, Suite 204

36510

VSF Number

Rockville, MD 20850
Address

REPRESENTATION OF COUNSEL OF RECORD


I certify that: ☐ Prior to filing this Response I made a good faith effort to resolve this matter with Counsel of Record for the opposing party; or

☐ Prior to filing this Response I attempted without success to contact opposing counsel to attempt to resolve this matter.


Counsel of Record for Responding Party

CERTIFICATE OF SERVICE

I certify that I have filed this Response to Motion along with my Memorandum In Opposition in the Clerk's office no later than 4:00 pm on the Friday preceding the hearing date, and that I have served a copy of this Response To Motion and Memorandum upon all Counsel of Record in a manner intended to ensure receipt by opposing counsel of record no later than 4:00 pm on the Friday preceding the scheduled hearing date, pursuant to 1:12 of the Rules of the Supreme Court of Virginia this 28th day of April, 2000, 29.


Counsel of Record for Responding Party

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

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00 APR 28 PM 2:10
JULIA L. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

STATE FARM FIRE AND
CASUALTY COMPANY

Complainant,

v.

Chancery No. 149960

THE OHIO CASUALTY
INSURANCE COMPANY, *et al.*

Defendants.

**OHIO CASUALTY INSURANCE COMPANY'S OPPOSITION
TO COMPLAINANT'S MOTION TO AMEND FINAL ORDER**

COMES NOW, the Defendant, The Ohio Casualty Insurance Company(hereinafter referred to as "Ohio Casualty"), by and through its counsel, O'Connell & O'Connell, and files this Opposition to State Farm Fire and Casualty Company's (hereinafter referred to as "State Farm") Motion to Amend the Final Order, and in support thereof states the following:

1. State Farm in its Motion for Judgment failed to request pre-judgment interest as a form of relief. As a result, State Farm should be barred from requesting pre-judgment interest at this point in the litigation.

2. An award of pre-judgment interest is discretionary, which makes it distinguishable from post-judgment interest which is awarded as a matter of the law. Ragsdale v. Ragsdale, 30 Va. App. 283, 516 S.E.2d. 698 (1999).

3. Ohio Casualty had no duty or obligation to pay State Farm liquidated damages¹ or any other damages until the Judgment was entered April 17, 2000. This point is emphasized by the

¹Ohio Casualty contests that the damages awarded in this case are liquidated damages as a matter of law.

fact that there was no contract between State Farm and Ohio Casualty and the basis for State Farm's recovery in this case were the equity principles of subrogation and contribution.

4. There is no case law which allows a party to receive an award of pre-judgment interest, when the basis of a judgment is contribution. The case of Reid v. Ayscue, et al., 246 Va. 454, 435 S.E. 2d. 439 (1993) held that it was not an abuse of discretion to refuse to award pre-judgment interest in a case of contribution when a "legitimate controversy existed".

5. Damages in this case were not liquidated damages. The best evidence for this is the fact that claimant sought Judgment in the amount of \$86,081.00 for the Kozak dwelling and \$563,638.68 for the Kitchen dwelling, and the Court's award in this case was for only \$329,415.38.

6. An award of pre-judgment interest would be punitive based on the Plaintiff's delay in prosecuting this matter.

7. State Farm filed the Bill of Complaint for Declaratory Judgment in this case in June of 1997, nearly four years after the June 17, 1993 fire.

8. State Farm filed a Praecipe to place this case on term date in order to receive a trial date in August of 1999. Trial was then scheduled for February 8, 2000. Ohio Casualty has in no way delayed the adjudication of this matter.

9. Awarding pre-judgment interest in this case would penalize Ohio Casualty for State Farm's delay in prosecuting this case.

10. There is an abundant amount of case law in Virginia which stands for the proposition that pre-judgment interest should not be awarded when the delay in adjudication is not caused by the Defendant. Advance Marine Enterprises, et al. v. PRC, Inc., 256 Va. 106, 127, 501 S.E.2d. 148, _____ (1998); Reid v. Ayscue, et al., 246 Va. 454, 459, 436 S.E.2d. 439, _____ (1993).

11. If in fact this court awards pre-judgment interest, it must be limited to the amount of coverage. Dairyland Insurance Company v. Douthat, 248 Va. 627, 449 S.E. 2d. 799 (1994). Ohio Casualty asserts that its limits of insurance coverage for "any one loss or disaster" is \$300,000.00.

12. The Court dismissed Ohio Casualty's position with regard to its limits, but did not define the limits of Ohio Casualty's coverage in its Memorandum Opinion.

13. Pursuant to Dairyland, State Farm cannot be awarded pre-judgment interest above the coverage limits of the Ohio Casualty policy as the Court does not have the authority to rewrite Ohio Casualty's insurance contract. Dairyland Insurance Company v. Douthat, 248 Va. 627, 449 S.E. 2d. 799 (1994).

WHEREFORE, based on the foregoing arguments it is respectfully requested that State Farm's Motion to Amend the Final Order to include pre-judgment interest be denied or, in the alternative, be limited as required by law.

Respectfully submitted,



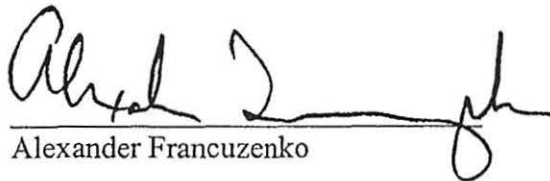
Alexander Francuzenko 36510
Suite 204
401 East Jefferson Street
Rockville, Maryland 20850
(301) 424-2300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Ohio Casualty Insurance Company's Opposition to Complainant's Motion to Amend Final Order was sent via Facsimile and U.S. Mail postage prepaid this 28th day of April 2000 to:

August W. Steinhilber, III, Esquire
10533 Main Street
P.O. Box 1010
Fairfax, VA 22030-1010

William J. Virgulak, Jr., Esquire
Martell, Donnelly, Grimaldi & Gallagher, P.C.
10201 Lee Highway, Suite 490
Fairfax, VA 22030-2222


Alexander Francuzenko

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

STATE FARM FIRE AND
CASUALTY COMPANY

Complainant,

v.

THE OHIO CASUALTY
INSURANCE COMPANY, *et al.*

Defendants.

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Chancery No.: 149960

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FILED
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JOHN J. KELLY
CLERK, CIRCUIT COURT
FAIRFAX, VA

**DEFENDANT OHIO CASUALTY INSURANCE COMPANY'S
MOTION FOR RECONSIDERATION AND TO AMEND THE FINAL ORDER**

COMES NOW, the Defendant, The Ohio Casualty Insurance Company (hereinafter referred to as "Ohio Casualty"), by and through its counsel, O'Connell & O'Connell, and files this Motion for Reconsideration and to Amend the Final Order and in support thereof states the following:

1. Ohio Casualty maintains that State Farm does not have the proper standing to assert this action and obtain a judgment against Ohio Casualty. The court has in essence placed State Farm in the shoes of Talton Brothers by permitting this action to go forward and entering a judgment against Ohio Casualty. The court asserts that the equity concept of legal subrogation allows State Farm to prosecute a Declaratory Judgment Action against Ohio Casualty for State Farm's payment of a "debt allegedly owed by Ohio Casualty". The only debt which Ohio Casualty could possibly owe under its builder's risk policy is to Talton Brothers, its insured. Talton Brothers has never made a claim under the Ohio Casualty builder's risk policy and State Farm does not have the authority nor the common law right to step in Talton Brothers' shoes in order to prosecute this claim. There is absolutely no legal authority upon which State Farm can prosecute this action against Ohio Casualty and obtain an award for damages. Therefore, it is respectfully requested that this Honorable Court

reconsider its decision on the issue of standing and enter a judgment in favor of Ohio Casualty dismissing State Farm's claims of prejudice.

2. The court rejects Ohio Casualty's argument that no coverage exists under the builder's risk policy pursuant to "Number 3, When Coverage Begins And Ends" clause in the Ohio Casualty policy based on the inference or finding of fact that construction was not complete. The stipulations filed with this court admit that construction of both dwellings was not complete with a few minor exceptions. This fact or inference as well as the court's interpretation of the sales contract and the implication of the residential use permit in this case, has no bearing on the contractual language contained in the Ohio Casualty policy which conclusively ends coverage based on the undisputed facts. There is no language contained in either the original sales contract or the amended sales agreement between the Taltons and the Kitchens and Kozaks respectively which defines acceptance of the property as being the point when construction is "completed". The only definition of "possession" in any of the agreements between the Taltons and the Kitchens and Kozaks is in paragraph 6.6 of the original agreement which grants possession to the purchaser immediately following settlement. In addition, the Kitchens and Kozaks legally accepted the properties in question when title was transferred to them. As a result, the facts in this case and the law require the court to apply the unambiguous contractual language in the Ohio Casualty builder's risk policy which ends coverage based on the two factors set forth above. It is important to note that Ohio Casualty is not denying coverage under paragraph 3.C which ends coverage "beyond thirty(30) days after completion of the project".

3. In addition, it is requested that the court reconsider the application of paragraph 3.D which ends coverage when each building or structure is: "(1) occupied in whole or in part." (Emphasis added) It is undeniable that the Kitchens occupied their dwelling in part pursuant to

Stipulation Number 31. As a result, any potential coverage under the Ohio Casualty policy ended at that time. The Ohio Casualty policy does not limit the level of occupation and simply says "in part". Based on the arguments set forth above, there is no coverage for the dwellings in question under the Ohio Casualty builder's risk policy and it is respectfully requested that this Honorable Court reconsider its Opinion and Order and enter judgment in favor of Ohio Casualty dismissing State Farm's claims with prejudice.

4. The court states on page 3 of its Opinion that "A thorough review of the language of both the homeowners' and builder's risk policies in this case revealed no pertinent excesses or secondary coverage clauses." Ohio Casualty respectfully disagrees with the court. The Ohio Casualty policy does contain a "other insurance provision" which clearly states that the Ohio Casualty policy is excess to any other insurance policy which covers the same loss. This provision is unambiguous and enforceable in this case. Therefore, it is respectfully requested that this Honorable Court reconsider its decision with regard to the issue of primary coverage and enter judgment in favor of Ohio Casualty dismissing State Farm's claims with prejudice.

5. Lastly, the court held that Ohio Casualty maintains that any loss caused by one disaster is limited to \$300,000.00 as set forth in its declaration page. Notwithstanding said position, the limits for coverage for the Kitchen home as of June 17, 1993 is at most \$275,000.00 pursuant to the declaration page. State Farm asserts that the insurance amount should be at least \$575,000.00 or \$650,000.00. A close look at the hand writing and the endorsements contained in the Ohio Casualty builder's risk policy reflect that any potential increase in insurance coverage took place subsequent to the fires thus not in effect at the time that State Farm alleges coverage existed. As a result, the insurance coverage limits for the Kitchen home at the time of the fire, June 17, 1993 is \$275,000.00 at most. Ohio Casualty, asserts that the court should then look at the total amount of

coverage on the declaration page for any one loss or disaster which clearly is \$300,000.00 for any one disaster thus limiting Ohio Casualty's exposure to that amount.

Wherefore, based on all the arguments set forth above, it is respectfully requested that this Honorable Court reconsider its Memorandum and Opinion and its Final Order and deny State Farm's claim for relief and enter judgment on behalf of Ohio Casualty dismissing State Farm's claims with prejudice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Alex Francuzenko', with a stylized flourish extending to the right.

Alexander Francuzenko
O'Connell & O'Connell
401 E. Jefferson Street
Suite 204
Rockville, MD 20850
301-424-2300

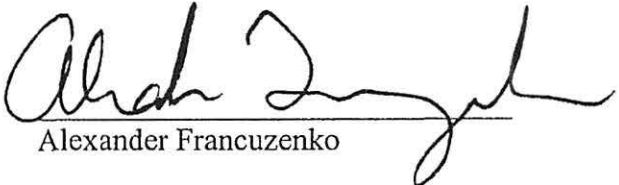
86510

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Defendant Ohio Casualty Insurance Company's Motion for Reconsideration and to Amend the Final Order was sent via Facsimile and U.S. Mail, postage prepaid this 28th day of April 2000 to:

August W. Steinhilber, III, Esquire
10533 Main Street
PO Box 1010
Fairfax, VA 22030-1010

William J. Virgulak, Jr., Esquire
Martell, Donnelly, Grimaldi & Gallagher, P.C.
10201 Lee Highway, Suite 490
Fairfax, VA 22030-2322


Alexander Francuzenko

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

STATE FARM FIRE AND CASUALTY CO.
PLAINTIFF

versus

THE OHIO CASUALTY INSURANCE CO.
DEFENDANT

5.3.00
FILED
COURT SERVICES
00 MAY - 3 PM 3:47
JOHN L. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA
CASE NUMBER: Chancery No. 149960

RESPONSE TO MOTION

Moving party: Defendant Ohio Casualty

Responding party: Complainant

Title of Motion to which Response is filed: Defendant's Motion for Reconsideration and to Amend the Final Order

Date to be heard (Friday): 5/5/00 HEH

Filed by: ,

August W. Steinhilber, III, Esquire

Name

10533 Main Street, Fairfax, VA 22030

Address

24368

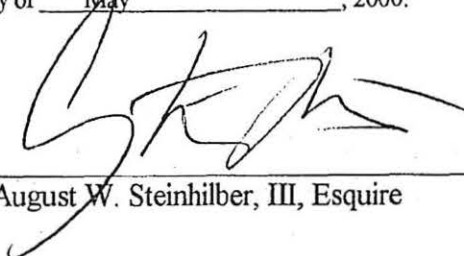
State Bar #

(703) 273-6400

Daytime Phone Number

(5) REPRESENTATION OF COUNSEL OF RECORD AND CERTIFICATE OF SERVICE

I represent that I have served a copy of this PRAECIPE/NOTICE on all Counsel of Record pursuant to 1:15 of the Rules of the Supreme Court of Virginia this 3rd day of May, 2000.


August W. Steinhilber, III, Esquire

53.00

VIRGINIA:

FILED
COURT SERVICES

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

STATE FARM FIRE AND
CASUALTY COMPANY,

CLERK, CIRCUIT COURT
FAIRFAX, VA

Complainant,

v.

Chancery No. 149960

THE OHIO CASUALTY INSURANCE
COMPANY, et al.,

Defendants.

**COMPLAINANT'S RESPONSE TO
DEFENDANT OHIO CASUALTY'S MOTION TO RECONSIDER**

COMES NOW complainant State Farm, by counsel, and for its Memorandum opposing defendant Ohio Casualty's Motion for Reconsideration, states as follows:

While defendant Ohio Casualty has titled its motion as one of reconsideration and to amend the final order, in essence, it is a simple motion for reconsideration. In that motion, Ohio Casualty restates the same arguments it made upon which this Court has already ruled. The Court has already taken the time to review the stipulations of the parties, the exhibits submitted by the parties, the initial arguments of counsel, and the subsequent briefs of counsel. Thereafter, the Court issued a four-page memorandum opinion and a corresponding final order. The Court's opinion addressed all of the issues either raised or argued by Ohio Casualty. Therefore, Ohio Casualty's motion for reconsideration should be summarily denied.


STATE FARM FIRE AND CASUALTY
COMPANY

By Counsel

LAW OFFICES
Brault Palmer Grove
Zimmerman White
& Steinhilber LLP

FAIRFAX, VIRGINIA
MANASSAS, VIRGINIA
WASHINGTON, D. C.


BRAULT, PALMER, GROVE, ZIMMERMAN,
WHITE AND STEINHILBER



AUGUST W. STEINHILBER, III, ESQUIRE
10533 Main Street, P.O. Box 1010
Fairfax, VA 22030
Counsel for Complainant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was sent by facsimile to **Alexander Francuzenko, Esquire**, O'Connell & O'Connell, 401 East Jefferson Street, Suite 204, Rockville, MD 20850, Counsel for Plaintiff, this 3rd day of May, 2000.



August W. Steinhilber, III

HEH
5500

Set

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

STATE FARM FIRE AND
CASUALTY COMPANY,

Complainant,

v.

Chancery No. 149960

THE OHIO CASUALTY INSURANCE
COMPANY, et al.,

Defendants.

FINAL ORDER

This Declaratory Judgment case is before the Court on cross motions for summary judgment. For the reasons stated in the Court's Memorandum Opinion of April 17, 2000, the Complainant's Motion for Summary Judgment is granted and the Defendant's Motion for Summary Judgment is denied.

The Court further finds that the Complainant is entitled to a pro rata contribution from ~~the~~ Defendant ^{OHIO CASUALTY INSURANCE CO.} for one-half of the claim paid by the Complainant to the Kozaks and Kitchens. This amounts to \$329,415.38.

The Court therefore awards judgment in this case to the Complainant, State Farm Fire & Casualty Company, ^{AGAINST DEFENDANT OHIO CASUALTY INSURANCE CO.} in the amount of \$329,415.38 ^{WITH NO PREJUDICE} ~~plus costs and interest~~ ^{on all}

~~amount of \$ at a rate of beginning~~

~~AND THE COURT DISMISSES THE REMAINING DEFENDANTS.~~
ENTERED this 5 day of MAY, 2000.

Henry E. Hudson
HENRY E. HUDSON, JUDGE

Defendant's motion for Reconsideration is denied and the Court's prior order of April 17, 2000 is vacated.

FILE TO GAIL
5-3-00

cc to atty 5500

Aw 5/5
a.2.

Aw 5/5
a.2.

Aw 5/5
a.2.

Aw 5/5
a.2.

I ASK FOR THIS:

BRAULT, PALMER, GROVE, ZIMMERMAN,
WHITE AND STEINHILBER



AUGUST W. STEINHILBER, III, ESQUIRE

Bar No. 24368

P.O. Box 1010, 10533 Main Street

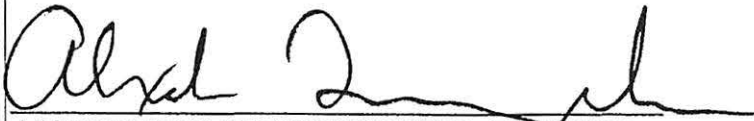
Fairfax, VA 22030

(703) 273-6400

Counsel for Complainant

SEEN: *and objected to:*

O'CONNELL & O'CONNELL



ALEXANDER FRANCUZENKO, ESQUIRE

401 East Jefferson Street, Suite 204

Rockville, MD 20850

Counsel for Defendant Ohio Casualty

LAW OFFICES

Brault Palmer Grove
Zimmerman White
& Steinhilber LLP

FAIRFAX, VIRGINIA
MANASSAS, VIRGINIA
WASHINGTON, D. C.

55.00

VIRGINIA:

FILED
COURT SERVICE

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

STATE FARM FIRE AND
CASUALTY COMPANY

Complainant,

v.

THE OHIO CASUALTY
INSURANCE COMPANY, *et al.*

Defendants.

Chancery No. 149960

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

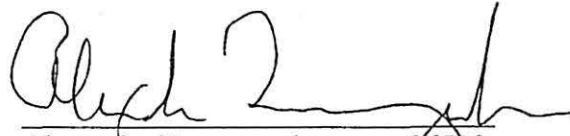
NOTICE OF APPEAL

Will the Clerk of the Circuit Court of Fairfax County and opposing counsel please take notice that the Defendant, The Ohio Casualty Insurance Company, hereby asserts an appeal in the above captioned action to the Supreme Court of Virginia from the Memorandum Opinion and Order entered April 17, 2000 by the Circuit Court of Fairfax County, Virginia.

It is requested that the Stipulations and Exhibits attached thereto be filed. A transcript of the hearing of this matter will be filed. A transcript has been ordered from the court reporter who reported the case.

Respectfully submitted,

O'CONNELL & O'CONNELL



Alexander Francuzenko
401 E. Jefferson Street
Suite 204
Rockville, MD 20850
301-424-2300

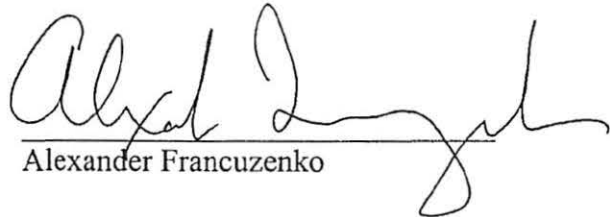
36510

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal was mailed this 5th
day of May 2000 postage pre-paid to:

August W. Steinhilber, III, Esquire
10533 Main Street
PO Box 1010
Fairfax, VA 22030-1010

William J. Virgulak, Jr., Esquire
Martell, Donnelly, Grimaldi & Gallagher, P.C.
10201 Lee Highway, Suite 490
Fairfax, VA 22030-2222


Alexander Francuzenko

CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

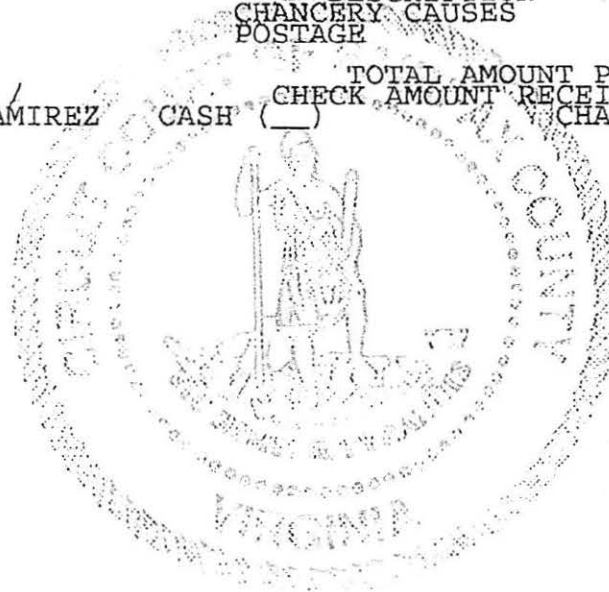
RECEIPT NBR: PS-2000404619 ***** COPY A ***** PAGE: 1
TIME: 10:29 DATE RECEIPTED: 05/05/2000 DATE FILED: 05/05/2000
RECEIPT FOR: CHY CASE APPEALED-SUPREME/COURT OF APPEALS
IDENTIFICATION NAME: STATE FARM FIRE & ETC VS OHIO CASUALTY

CFN: C149960

REVENUE DESCRIPTION	REVENUE CODE	REVENUE AMOUNT
CHANCERY CAUSES	0303	\$20.00
POSTAGE	0350	\$12.00
TOTAL AMOUNT PAID:		\$32.00
CHECK AMOUNT RECEIVED:		\$32.00
CHANGE:		\$0.00

CHECK NBR(S) 1166 /
CASHIER ID: MARINA RAMIREZ

CASH ()



John T. Frey
Clerk of Circuit Court

Official Receipt

~~COPY~~

5/16/00
NOTA already entered
on 5/5/00
sw.
FILED
00 MAY 16 AM 11:14
JOHN H. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

HEH
5/5/00
STATE FARM FIRE AND
CASUALTY COMPANY

Complainant,

v.

THE OHIO CASUALTY
INSURANCE COMPANY, *et al.*

Defendants.

Chancery No. 149960

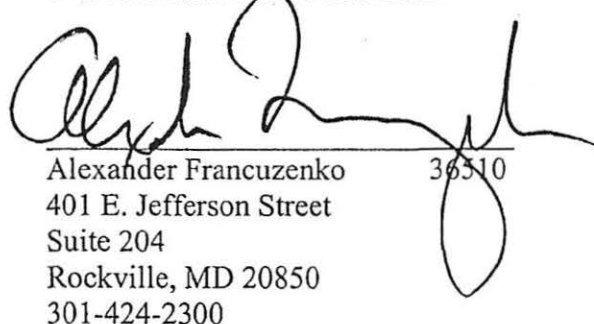
NOTICE OF APPEAL

Will the Clerk of the Circuit Court of Fairfax County, Virginia and opposing counsel please take notice that the Defendant, Ohio Casualty Insurance Company hereby asserts an Appeal in the above captioned action to the Supreme Court of Virginia from the Final Order entered May 5, 2000 by the Circuit Court of Fairfax County, Virginia.

It is requested that the Stipulations and Exhibits attached thereto be filed. A transcript of the hearing of this matter will be filed. A transcript has been ordered from the court reporter who reported the case.

Respectfully submitted,

O'CONNELL & O'CONNELL

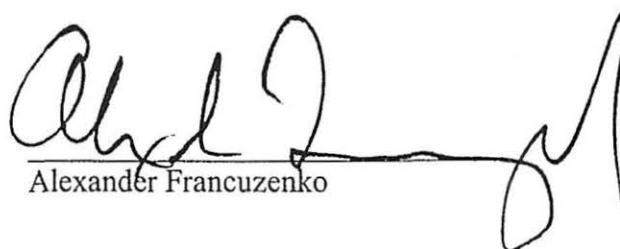

Alexander Francuzenko 36510
401 E. Jefferson Street
Suite 204
Rockville, MD 20850
301-424-2300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal was mailed this 15th day of May 2000 postage pre-paid to:

August W. Steinhilber, III, Esquire
10533 Main Street
PO Box 1010
Fairfax, VA 22030-1010

William J. Virgulak, Jr., Esquire
Martell, Donnelly, Grimaldi & Gallagher, P.C.
10201 Lee Highway, Suite 490
Fairfax, VA 22030-2222



Alexander Francuzenko

CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

RECEIPT NBR: PS-2000405112 ***** COPY A ***** PAGE: 1
 TIME: 11:01 DATE RECEIPTED: 05/17/2000 DATE FILED: 05/17/2000
 RECEIPT FOR: CHY CASE APPEALED-SUPREME/COURT OF APPEALS
 IDENTIFICATION NAME: STATE FARM VS OHIO CASUALTY

REVENUE	REVENUE	REVENUE
DESCRIPTION	CODE	AMOUNT
CHANCERY CAUSES	0303	\$20.00
POSTAGE	0350	\$12.00
TOTAL AMOUNT PAID:		\$32.00
CHECK AMOUNT RECEIVED:		\$32.00
CHANGE:		\$0.00

CFN: C149960

CHECK NBR(S) 1280 /
 CASHIER ID: MARINA RAMIREZ CASH



John T. Frey
 Clerk of Circuit Court

Official Receipt

ASSIGNMENT OF ERROR

Taking a position that is contrary to reported cases on the same issue, the trial court erred in holding that State Farm was entitled to contribution from Ohio Casualty in a situation where the two policies at issue insured different risks for different insureds and the Ohio Casualty policy contained a clause deeming its coverage to be excess in the presence of other insurance.

ASSIGNMENTS OF CROSS ERROR

First, the trial court erred in denying State Farm's request that Ohio Casualty fully reimburse it. Second, the trial court erred in denying State Farm's request for prejudgment interest.

whose principal residence is 2002 Oak Ledge Court, Virginia 22181 telephone numbers (h) (703) 938-5283, and (702) 296-4850.

A. Seller is the owner of approximately 9.50471 acre land located along Courthouse Road in the Providence District Fairfax County, Virginia which is currently being developed approximately 38 proposed dwelling units and related uses known as Williamsburg Commons ("Williamsburg Commons");

B. Purchaser desires to purchase and Seller desires to sell to Purchaser proposed Lot 6, Williamsburg Commons containing approximately 4,930 square feet of land as described on Exhibit A attached hereto, together with improvements there to be erected in substantial conformance with the building plans prepared by Nicholas Diffenbaugh dated July 5, 1990 as modified by the parties hereto containing approximately 3,650 square feet of first and second floor areas excluding garage and basement areas ("Building Plans") known as the George Reid (modified Nicholson, and with such additional items as shall be expressly described on (1) Exhibit B attached hereto as being included within the Base Price of the Property, and (2) Exhibit C attached hereto as being Extra items which are not included within the Base Price of the Property but instead are improvements whose cost is in addition to the Base Price of the Property (collectively all of the land and improvements described in Paragraph B are referred to in this Agreement of Sale as "Property"); *XX This house to include an excavated storage area comparable to the existing area in the Nicholson on Lot 4. Approx 70*

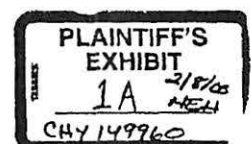
C. Seller intends to develop Williamsburg Commons as a residential community and in connection therewith to submit Williamsburg Commons to a homeowners association regime under the name Williamsburg Commons Homeowners Association which upon formation will become a nonstock, not-for-profit organization ("Homeowners Association"); and

D. Seller intends to provide Purchaser with certain information pertaining to the Property and the Homeowners Association, including but not limited to a Declaration of covenants, conditions and restrictions, pursuant to which the Property is to be submitted to the Homeowners Association which the Purchaser and other residents of Williamsburg Commons will be members ("Declaration"), the Bylaws ("Bylaws"), the Information Brochure ("Information Brochure"), any Rules and Regulations and other documents pertaining to the Homeowners Association, (collectively, as the same may be amended from time to time, the "Homeowners Association Documents").

NOW, THEREFORE, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties, intending to be legally bound hereby agree as follows:

1. AGREEMENT TO SELL AND PURCHASE.

Seller agrees to sell and Purchaser agrees to purchase the Property upon the terms and subject to the conditions contained herein.



12/ substantially completed within two (2) years after the date of this Agreement, then notwithstanding any provisions of this Agreement to the contrary, either Purchaser or Seller shall have the option to terminate this Agreement by written notice to the other party, in which event the Deposit shall be returned to Purchaser, whereupon this Agreement shall be of no further force and effect and neither party shall have any further obligation or liability unto the other on account of this Agreement. If Seller or Purchaser exercises such option, Seller shall not be liable to Purchaser for delays in the completion of the construction of the Property.

4.4 INSPECTION. Seller shall notify Purchaser in advance of Settlement that the Property is ready for inspection. Upon receipt of said notice, Purchaser shall promptly arrange for an appointment with a representative of Seller at the Property for the purpose of making a walk-through inspection of the Property. At the time of such inspection, Seller's form of Property Acceptance Form shall be completed and executed by Purchaser and the representative of Seller. Purchaser agrees to attend such inspection of the Property and participate in completing the Property Acceptance Form prior to Settlement. At Settlement the Property shall be in substantially the same physical condition as it is on the date of inspection. Failure of Purchaser to contact Seller for an appointment to inspect the Property, or failure of Purchaser to attend inspection of the Property on the date and time agreed upon with Seller, will constitute full acceptance of the Property by Purchaser in its "as is" condition, and Settlement will proceed on that basis.

4.5 MODEL AND DISPLAY ITEMS. Purchaser acknowledges and agrees that any decorations, furniture, furnishings, personal property, wallpaper, built-in features, appliances, lighting fixtures, additional plantings or landscaping and the like contained in any model unit of Williamsburg Commons are for demonstrative purposes only, and are not included in the Property which is the subject of this Agreement. Identification of said items may be obtained from Seller's sales representatives.

4.6 PLANS. Purchaser hereby acknowledges and agrees that any floor plans, renderings, drawings, site plans, and the like furnished by Seller to Purchaser or otherwise obtained by Purchaser which purport to depict the Property, or any portion thereof, are merely approximations, and do not necessarily reflect the actual as-built condition of the same.

4.7 WARRANTIES. PURCHASER HEREBY WAIVES ANY AND ALL WARRANTY RIGHTS PROVIDED BY SECTION 55-70.1 OF THE CODE OF VIRGINIA OR AT COMMON LAW. ALL WARRANTIES, OTHER THAN THOSE WHICH THE SELLER EXPRESSLY PROVIDES TO PURCHASER IN THE "BUILDERS LIMITED WARRANTED" TO BE PROVIDED BY SELLER TO PURCHASER AT TIME OF SETTLEMENT HEREUNDER ARE HEREBY FOREVER EXCLUDED. NOT IN DEROGATION OF THE FOREGOING, THE SELLER AGREES, WITHOUT RECOURSE, TO ASSIGN ALL GUARANTEES AND WARRANTIES FROM CONTRACTORS, SUBCONTRACTORS OR SUPPLIERS OF MATERIALS RUNNING IN FAVOR OF SELLER, AND TO ASSIGN TO THE PURCHASER ANY MANUFACTURERS'S WARRANTIES COVERING THE EQUIPMENT INSTALLED IN THE PROPERTY WHICH ARE ASSIGNABLE.

5. SETTLEMENT ON PURCHASE AND SALE.

5.1 SETTLEMENT DATE. Settlement shall be held on or

Assign
anticipates that the Property will not be substantially complete by the Settlement Date, Seller may, by giving Purchaser at least five (5) days prior written notice thereof, extend the date set for Settlement for up to ~~one~~ ^{one} hundred eighty (180) additional day to a date no later than ~~two~~ ^{two} (2) years following the date of full execution of this Agreement. Seller shall not be liable for any delay in the prosecution or completion of the work caused by (a) the act or neglect or default of the Purchaser, or (b) unavailability of public utilities or electricity to the Condominium Project or the Unit, or (c) damage by fire earthquake, weather or other casualty for which Seller is not responsible, or (d) the act, failure to act, or other delays by Fairfax County or any other governmental body with respect to the issuance of any required governmental permits including the Residential Use Permit or the Site Plan or the Subdivision Plat, or (e) strikes, walkouts or any other acts of employees or suppliers of labor or materials over which Seller has no control, (f) weather conditions, or (g) any factor beyond Seller's control. In any such event, Seller has the option to extend the time fixed for the substantial completion of work for a period equivalent to the time loss by reason of any of the above causes.

5.3 EXTENSION OF SETTLEMENT DATE FOR CASUALTY AND CONDEMNATION. Should the Property be substantially damaged or destroyed by fire or other casualty or cause to such an extent that Seller shall be unable to repair or restore the Property prior to the Outside Settlement Date discussed below in Section 5.4, or should any portion thereof be taken or affected by any condemnation (or conveyance in lieu thereof) prior to Settlement, then either party may terminate this Agreement upon written notice to the other, provided, however, that Purchaser shall have no right to terminate this Agreement in the event that such casualty or condemnation (or conveyance in lieu thereof) affects only the common area of the Homeowners Association and does not or will not materially affect Purchaser's use and enjoyment of the Property. In the event of such termination, Seller shall refund the Deposit to Purchaser and thereupon neither party shall have any rights or liabilities unto the other on account of this Agreement. If either party elects not to terminate this Agreement, then the last date set for Settlement shall be extended, subject to the provisions of Section 5.4 hereof, for such period as shall be reasonably required to complete the Property in accordance with the provisions of this Agreement.

Assign
5.4 OUTSIDE SETTLEMENT DATE. Notwithstanding any other provision of this Agreement to the contrary, in no event shall Seller have any right to extend the Settlement Date to a date which is more than ~~two~~ ^{one} (2) years after the date of execution of this Agreement. *one*

6. SETTLEMENT.

6.1 CONVEYANCE OF TITLE. The consummation of the purchase and sale of the Property contemplated under this Agreement is referred to throughout this Agreement as "Settlement". At Settlement, Seller shall convey the Property to Purchaser by a general warranty deed, free and clear of all encumbrances except (a) the provisions of the Homeowners Association Documents and all rights, easements, and assessments created thereby, (b) current ad valorem taxes not yet due and payable, (c) restrictions, conditions, reservations, limitations, covenants, easements, permitted encroachments onto public space,

material adverse affect on the development and contemplated use of the Property, (e) easements affecting the Property or Williamsburg Commons which are contained in right-of-way deeds or in condemnation suits, including rights-of-way which Seller shall have the right to convey and dedicate to public or private use both before and after the Settlement Date, provided such rights-of-way do not have a material adverse affect on the development and contemplated use of the Property, (f) zoning and subdivision laws and ordinances (g) any matters which are disclosed by the Site Plan, the Subdivision Plats, or which would be disclosed by a visual inspection or survey of Williamsburg Commons, (h) the deed of trust, if any, utilized by Purchaser to finance the purchase of the Property, (i) the standard printed form exceptions contained in an owner's policy of title insurance in the form customarily issued in the Commonwealth of Virginia, and (j) any other encumbrances affecting the Property or Williamsburg Commons which are waived or accepted by Purchaser as provided in Section 6.2 hereof. The reservation of Seller's rights to convey and dedicate easements and rights-of-way referred to in this Section 6.1 shall be included as a provisions in the Homeowners Association Documents and/or other recordable documents, including the aforesaid general warranty deed.

6.2 TITLE DEFECTS. If Seller is unable to convey title to the Property as provided in Section 6.1 above, then Seller, though not obligated to cure any objections or defects in title, shall be afforded a reasonable time (not less than thirty (30) nor more than one hundred eighty (180) days) within which to cure any objections or defects in title of which Purchaser advises Seller, with the Settlement Date to be extended, if necessary and subject to the limitation set forth in Section 6.4 hereto, to afford such time. If Seller does not cure such objections and defects, then Purchaser may either (a) accept title to the Property subject to such objections or defects and close the transaction, without any decrease in the purchase price or any claim against Seller, or (b) terminate this Agreement and thereupon receive a refund of the Deposit paid pursuant to Section 3 of this Agreement. Upon the return of the Deposit by the Seller to Purchaser, Seller shall be released and relieved of any liability to Purchaser and this Agreement shall thereupon be null and void.

6.3 SETTLEMENT; SETTLEMENT COSTS. Settlement is to be made at the law office of Fox & Proffitt, P.C. 9401 Lee Highway, Suite 402, Fairfax, Virginia 22031. Purchaser shall have the right to have counsel of its own choice attend Settlement at its expense on its behalf. Seller shall pay the Virginia grantor's tax, the cost for the preparation of the deed and the fees of its attorney. *As well as the cost of the purchase of the property.* Purchaser shall pay all other closing costs, including but not limited to examination of title, settlement attorney's fee, all loan fees, mortgage title insurance, notary's fee, survey, and all city, county and state transfer taxes, state stamp and recording charges for the deed and purchase money deed of trust, if any. In addition, all costs incurred in connection with obtaining Purchaser's purchase money financing for the acquisition of the Property, if any, shall be paid by Purchaser, including, but not limited to, any mortgage lender's loan origination fee (if applicable), plus any other fees, prepaid expenses or escrows required by any mortgage lender of Purchaser at time of loan application of Settlement shall be at the cost of Purchaser. All optional or elective services or charges, including but not limited to owner's title insurance, shall be at the cost of Purchaser.

not be deemed to be, and shall not be, an advance payment of an regular or special Assessments thereafter due and payable with respect to the Property. In addition, Purchaser shall, at Settlement, pay to the Association and the regular Assessment for the Unit which will be levied for the calendar month following the Settlement Date, plus payment to the Association (or reimbursement to Seller if previously paid by Seller to the Association) of a prorated portion of such regular monthly Assessment for the calendar month of Settlement, such proration to be based upon the number of days remaining in the month of Settlement, including the date of Settlement.

6.5 TAXES. Estimated real property taxes and any assessments on the Property shall be prorated as of the date of Settlement. Seller and Purchaser agree to make an appropriate adjustment between themselves when the actual charges are ascertained. Any supplemental tax bill that may be issued based upon completion of the Unit shall be paid by Purchaser. Purchaser shall assume, at the time of Settlement, whatever annual benefit charges for water and sewer services as may be assessed or levied against or applicable to the Property by the ultimate authority, public or private, which will bring water and sewerage facilities to the Property. Deferred connection benefit charges applicable to the Unit, if any, shall be prorated as of the date of Settlement and assumed thereafter by Purchaser.

6.6 POSSESSION. Seller shall grant Purchaser possession of the Property immediately following Settlement.

6.7 DOCUMENTS. At Settlement, Seller and Purchaser shall execute such documents and instruments as shall be necessary or appropriate to carry out the terms of this Agreement.

6.8 SELLER'S PERFORMANCE. Purchaser's acceptance of Seller's general warranty deed to the Property and the settlement of this transaction shall constitute an agreement by Purchaser that Seller has fully performed all of its agreements, obligations, and responsibilities under this Agreement, and no performance of any agreement, obligation, or representation of Seller shall survive Settlement, except the warranties of title contained in the Deed.

7. THE HOMEOWNERS ASSOCIATION AND RELATED HOMEOWNERS ASSOCIATION DOCUMENTS.

8.1 SELLER'S DELIVERIES. Prior to Settlement under this Agreement, Seller shall deliver to Purchaser copies of, and Purchaser will execute a receipt for, the following materials:

- (a) The proposed Declaration by which the Homeowners Association will be established;
- (b) The proposed By-Laws of the Homeowners Association;
- (c) The proposed Rules and Regulations of the Homeowners Association;
- (d) The Information Brochure summarizing in narrative form some of the characteristics of the Homeowners Association and its operation; and

pursuant to the terms of this Agreement.

8.2 THE HOMEOWNERS ASSOCIATION. Purchase acknowledges and understands that the Property will be part of a Homeowners Association bearing the name of Williamsburg Commons to be constructed upon the land shown in the Site Plan. Purchase further acknowledges and understands that the Property consists only of the real property that is legally and particularly described in this Agreement and that the remaining property within Williamsburg Commons shall be divided among other residential building lots and common areas, all as shown on the Site Plan and as provided in the Declaration which Seller has, or will have, recorded in the Land Records of Fairfax County, Virginia, prior to Settlement. Purchaser understands that, subject to the reservation by Seller herein of certain rights including the right to use the Swimming Pool and Pool House for the period of time set forth in the Homeowners Association Documents, as well as rights-of-way and utility easements, the rights of use and easements with respect to the common areas will be governed by the Declaration, the By-Laws of the Homeowners Association, and the Rules and Regulations as are promulgated by the Homeowners Association. Purchaser further understands that the Homeowners Association, which will be composed of Seller and all other owners of the residential building lots within Williamsburg Commons, will be responsible for the maintenance and operations of the common elements of the Homeowners Association and the grounds maintenance of all exterior common areas and all lots, including the Property, located in Williamsburg Commons. Purchaser acknowledges that the owner of each residential building lots in Williamsburg Commons will be required to be a member of the Association, to abide by its By-Laws and Rules and Regulations, and to pay periodic assessments for the maintenance and operation of the Homeowners Association, all as provided in the Declaration. The annual budget for the Homeowners Association, set forth in the materials to be furnished to Purchaser, which reflects estimated assessments to be paid by Purchaser is believed by Seller to be reasonably accurate, but it is only an estimate and may be adjusted by appropriate action of the Association from time-to-time pursuant to the By-Laws of Williamsburg Commons. Purchaser further understands and acknowledges that the Homeowners Association shall have sole and exclusive authority to regulate all landscaping and landscaping features upon the Property, and the Purchaser shall not have any authority or right to install, construct, alter, or remove any landscaping or landscaping features located on the Property. PURCHASER ACKNOWLEDGES AND AGREES THAT THE PROPERTY SHALL BE PURCHASED SUBJECT TO THE DECLARATION, THE BYLAWS, AND THE RULES AND REGULATIONS OF THE HOMEOWNERS ASSOCIATION, AND PURCHASER AGREES TO SUBSCRIBE TO AND ABIDE BY THE DECLARATION, THE BY-LAWS, AND THE RULES AND REGULATIONS OF THE HOMEOWNERS ASSOCIATION. THE DECLARATION, THE BY-LAWS, AND THE RULES AND REGULATIONS OF THE HOMEOWNERS ASSOCIATION ALONE WILL GOVERN THE HOMEOWNERS ASSOCIATION.

8.3 CHANGES OR AMENDMENTS IN THE HOMEOWNERS ASSOCIATION DOCUMENTS. Seller may at any time, without the approval of Purchaser, make such changes or amendments in the Declaration which do not materially and adversely affect the rights of Purchaser or the value of the Property, and such changes or amendments shall not affect the rights and liabilities of the parties under this Agreement or be a cause or a reason for termination or revision of this Agreement.

ASSIGNMENT, MORTGAGE, FLEDGE, TRANSFER, OR DELEGATION SHALL BE NULL AND VOID AND OF NO FORCE OR EFFECT AND SHALL BE DEEMED TO BE A DEFAULT ON THE PART OF PURCHASER HEREUNDER.

9.2 SUBORDINATION. This Agreement and all rights of Purchaser hereunder are subject and subordinate to any deed of trust or mortgage now or hereafter encumbering Williamsburg Commons or the Property. Unless this Agreement is expressly adopted and ratified by the holder of such deed of trust or mortgage (or by any purchaser therefrom) by written notice to Purchaser within thirty (30) days of such holder's or purchaser's acquiring fee title to the Property by foreclosure or deed or other conveyance in lieu of foreclosure, such holder or purchaser, as the case may be, shall have no liability or obligations under this Agreement whatsoever, and this Agreement shall be terminated and shall be of no further force and effect.

9.3 NOTICES. Any notice or other communication required or permitted under this Agreement must be in writing and delivered in person or sent by certified mail, postage prepaid, return receipt requested, to the address set forth on the Fact Sheet for the party to whom it is intended.

9.4 TIME OF ESSENCE. Time is of the essence of this Agreement.

9.5 NO WAIVER. No failure of Seller's to exercise any power given such party hereunder or to insist upon strict compliance by the other party with its obligations hereunder, and no custom or practice of the parties at variance with the terms hereof, shall constitute a waiver of a Seller's right to demand exact compliance with the terms hereof.

9.6 SOLE AGREEMENT; MODIFICATIONS. THIS AGREEMENT SUPERSEDES ALL OTHER UNDERSTANDINGS AND AGREEMENTS BETWEEN THE PARTIES AND CONSTITUTES THE SOLE AND ENTIRE AGREEMENT BETWEEN SELLER AND PURCHASER. ORAL REPRESENTATIONS NOT SET FORTH HEREIN CANNOT BE RELIED UPON AND ARE NOT BINDING ON EITHER SELLER OR PURCHASER. PURCHASER REPRESENTS THAT PURCHASER HAS NOT AND IS NOT RELYING UPON ANY WARRANTIES, PROMISES, GUARANTIES OR REPRESENTATIONS MADE BY ANYONE, INCLUDING SELLER OR ANYONE ACTING OR CLAIMING TO ACT ON BEHALF OF SELLER, EXCEPT FOR THOSE EXPRESSLY INCLUDED IN THIS AGREEMENT.

9.7 BINDING EFFECT. The word "Purchaser", as used herein, refers to the masculine, feminine, neuter, singular, or plural, as the indemnity of Purchaser or situation requires. This Agreement shall be binding upon Purchaser and the heirs, personal representatives, successors, and assigns of Purchaser, subject, however, to the restrictions on the right to assign set forth in § 9.1 hereinabove.

9.8 DEFAULT. In the event Purchaser fails to cure any default under this Agreement within fifteen (15) days after written notice from Seller, then, at the option of Seller, Seller may (i) terminate this Agreement and retain Purchaser's Deposit as full liquidated damages for such default, and if Seller so elects and so notifies Purchaser in writing, then Purchaser shall thereafter have no further rights or obligations under this Agreement, or (ii) seek such other remedies as are available in law or equity. Notwithstanding the foregoing, the failure of Purchaser to settle on the purchase of the Property when and as required herein shall be considered a default for which Purchaser

cancel this Agreement, in which event Seller shall promptly refund the Deposit to Purchaser and shall pay Purchaser the sum of One Hundred Dollars (\$100.00) as liquidated damages for the damages Purchaser shall have suffered, whereupon no further rights, obligations, or duties shall exist between the parties hereto pursuant to the terms of this Agreement, or (ii) see specific performance of the Agreement but not damages.

9.9 BROKERS. Each party hereby represents and warrants to the other that Shannon & Luchs is the Listing Company ("Listing Company") and no other broker has been involved in connection with this Agreement of Sale. The Seller and the Purchaser each confirm that disclosure of the agency relationships described below has been made in writing. Under the National Association of Realtors Code of Ethics, agents who are Realtors are obligated to treat fairly all parties to the transaction.

The Seller and the Purchaser confirm that in connection with the transaction described by this Agreement, the Listing Company, and their salespersons are acting on behalf of the Seller as the Seller's agent.

9.10 AGENT'S FEE. The Seller shall pay the Listing Company compensation ("Agent's Fee") in an amount equal to Three Percent of the Base Purchase Price set forth on the Fact Sheet attached hereto as previously agreed upon between the Seller and the Listing Company. The Seller instructs the Settlement agent to disburse the Agent's Fee to the Selling Company at time of settlement hereunder; provided, however, that the Listing Company hereby acknowledges and agrees that in the event that Settlement hereunder does not occur for any reason whatsoever, the Listing Company shall not be entitled to any compensation in connection with this Agreement.

9.11 SELLER STATUS. It is understood that Purchaser is purchasing a substantially completed Property and that Seller is not acting as a contractor for Purchaser in the construction of the Property. Purchaser acquires hereby no right, title or interest in or to the land, buildings or Property except the right and obligation to purchase the Property in accordance with the terms hereof upon the completion of the Property.

9.12 GOVERNING LAW. This Agreement and all the relationships between the parties hereto shall be construed and interpreted in accordance with the laws of the Commonwealth of Virginia.

9.13 SEVERABILITY. The provisions of this Agreement are intended to be independent, and in the event any provision hereof shall be declared by a court of competent jurisdiction to be invalid, illegal, or unenforceable for any reason whatsoever, such illegality, unenforceability, or invalidity shall not affect the remainder of the Agreement.

9.14 UNSOLD LOTS; RESERVATION OF RIGHTS BY SELLER. Until such time as all of the lots in Williamsburg Commons are sold, Seller reserves the right to make any use whatsoever of unsold lots, the common elements, the streets, and the main entrance of Williamsburg Commons, that may be legally permitted, including leasing of said lots and all activities necessary for or related to its sales and construction program. Purchaser recognizes and acknowledges his understanding that in order to accomplish Seller's construction program, trucks, construction

possession to the Purchaser hereunder. Any violation of this provision may, at the election of Seller, be considered a material breach of this Agreement. In addition, Purchaser shall indemnify and hold Seller harmless from and against any and all costs, expenses, claims and liabilities, including without limitation litigation costs and attorneys' fees, incurred by Seller as a result of the entry to the Property or the construction site prior to Settlement by Purchaser, its employees, agents, subcontractors, licensees or invitees.

9.16 AUTHORITY TO CONTRACT ; TERMINATION. Purchaser represents and warrants to Seller that it has the requisite authority to enter into this Agreement and perform its obligations hereunder without the consent or joinder of any other person or entity. The person executing this Agreement on Purchaser's behalf has the authority to bind Purchaser hereto with his signature. This Agreement shall terminate automatically if the Purchaser (or anyone of them if the Purchaser is more than one person) files for or is adjudicated a bankrupt, makes an assignment or other similar arrangement for the benefit of creditors, or dies (if a natural person), unless Seller shall at its sole discretion elect in writing that this Agreement shall not terminate on account of any of the foregoing.

IN WITNESS WHEREOF, and intending to be legally bound, the undersigned parties have caused this Agreement to be duly executed under seal as their free act and deed for the uses and purposes herein contained on the dates indicated below beneath their respective signatures.

9.17 This contract is subject to purchaser's "Approval" within 90 days of the "red" marked (modified George Reid Confirmation).
PURCHASER:

Jerome Kozak (SEAL)
JEROME KOZAK
Date: November 25, 1991

Gail Kozak (SEAL)
GAIL KOZAK
Date: November 25, 1991

SELLER:

AMY ELAINE TALTON SEAL

Date: 11/26/91

~~2nd~~ 2. 2nd FLOOR DUAL TUB/SHOWER AND SPLIT VANITIES

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FACT SHEET

Property Address:

Lot 6, Williamsburg Commons
Fairfax County, Virginia

Sales Price:

OK / GA
DNT
\$ 175,000.00 Lot price
\$ ~~450,000.00~~ Base Price for House with Standard Unit
\$ 475,000.00 Finishes (See Addenda attached to this
Fact Sheet).
\$ _____ Unit Extras and Finish Work for Above-
Standard Unit Finishes (See Addenda
attached to this Fact Sheet).
\$ 650,000 Total Price
\$ ~~635,000.00~~

Payment of Sales Price:

OK / GA
DNT
\$ 40,000.00 Deposit Paid at Contract Signing
\$ _____ Additional Deposit to be Paid (if any)
\$ 610,000.00
\$ 595,000.00 Cash from Purchaser at Settlement

Completion and Closing:

OK
DNT
Anticipated Completion Date of Unit:: July 1, 1992
Anticipated Settlement Date: July 12, 1992 - Aug.
Purchaser(s):

Purchaser Name: Jerome and Gail Kozak
Address: 2602 Oak Ledge Ct., Vienna, Va.

Phone: (Home) (703) 938-5283 (Office) () _____

Signature: Jerome J. Kozak
Jerome Kozak

Signature: Gail Kozak
Gail Kozak

Sellers:

David N. Talton
David N. Talton

Amy Elaine Talton
Amy Elaine Talton

AMENDMENT
TO
AGREEMENT OF SALE
AND
CONSTRUCTION CONTRACT
WILLIAMSBURG COMMONS
VIENNA, VIRGINIA

THIS AMENDMENT TO AGREEMENT OF SALE AND CONSTRUCTION CONTRACT is made and entered into this 4th day of November, 1992 by and between DAVID N. TALTON and AMY ELAINE TALTON, husband and wife (collectively the "Seller"); and JEROME KOZAK and GAIL KOZAK, husband and wife (collectively the "Purchaser").

RECITALS:

R-1. Purchaser has previously entered into an Agreement of Sale dated November 25, 1991, as modified by Amendment to Agreement of Sale of even date herewith, (collectively the "Purchase Agreement"), for the purchase of Lot 6, Williamsburg Commons (the "Lot") and the construction of a dwelling and related improvements thereon known as the George Reid House (modified Nicolson) (the "Improvements"), for the Purchase Price and upon the terms and conditions set forth in the Purchase Agreement.

R-2. Seller desires and Purchaser has agreed to modify the Agreement of Sale to provide for the Purchaser to close and settle on the Lot upon the terms and conditions set forth in the Purchase Agreement as modified hereby, and to further provide for the completion of construction of the Improvements thereafter, also upon the terms and conditions of the Purchase Agreement as modified hereby.



NOW, THEREFORE, in consideration of the sum of ONE DOLLAR (\$1.00) cash in hand paid, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. PURCHASE AGREEMENT MODIFICATION. The Seller and Purchaser hereby modify and amend the Purchase Agreement as follows:

(a) Purchaser shall close and settle on Lot 6 within five (5) days of notification thereof by the Seller to the Purchaser at the offices of John F. McManus, Esq. of the law firm of Blankingship & Keith, 4020 University Drive, Suite 312, Fairfax, Virginia 22030.

(b) The Lot shall be conveyed in the then current stage of construction of the Improvements.

(c) The Lot shall be conveyed free and clear of liens. Title to the Lot shall be good, marketable and insurable by a licensed title company. Seller warrants that Purchaser shall be able to obtain an owners title insurance policy which, upon completion of construction of the Improvements, shall provide affirmative coverage against mechanics' and/or materialmen's liens. Seller further warrants that the title insurance company shall make available affirmative coverage insuring the Lender against mechanics' and materialmen's liens.

(d) The Purchase Price of the Lot shall be deemed for all purposes to be ONE HUNDRED SEVENTY-FIVE THOUSAND AND NO/100 DOLLARS (\$175,000.00).

(e) The total Base Purchase Price for the Improvements, exclusive of additions thereto for Unit Extras and Finish Work for Above-Standard Unit Finishes, is FOUR HUNDRED SEVENTY-FIVE THOUSAND AND NO/100 DOLLARS (\$475,000.00), computed as the difference between the \$650,000.00 total Base Purchase Price set forth in the Purchase Agreement less the \$175,000.00 purchase price for the Lot.

(f) Purchaser agrees to close on a loan ("Loan") from Southern Atlantic Mortgage, a division of Virginia First Savings Bank, F.S.B., 1308 Devil's Reach Road, Woodbridge, Virginia 22194 ("Lender") in the principal amount of FIVE HUNDRED TWENTY THOUSAND AND NO/100 DOLLARS (\$520,000.00) simultaneously with the closing and settlement on the Lot. The Loan shall be made pursuant to the terms and conditions set forth in that certain

Loan Commitment Letter dated October 9, 1992, incorporated herein by this reference ("Loan Commitment").

The Loan shall provide that \$45,000.00 of the \$520,000.00 Loan amount shall be made available at the initial closing to be applied toward the \$175,000.00 Purchase Price of the Lot, with the \$130,000.00 balance of the Purchase Price of the Lot, less the \$40,000.00 Deposit previously paid by the Purchaser to the Seller, to be paid by Purchaser at the initial closing in cash or current funds.

The \$475,000.00 balance of the \$520,000.00 total Loan Amount, shall be available to pay Seller for the \$475,000.00 total Base Purchase Price of the Improvements in accordance with the draw schedule attached to and made a part of the Loan Commitment. Amounts drawn down on the Loan and disbursed to or for the benefit of Seller, shall be applied toward and reduce the unpaid balance of the Purchase Price.

Notwithstanding anything else contained hereinto the contrary, it is understood and agreed that Purchaser may, at his sole option, take a permanent loan from some institutional lender other than the Lender, or Purchaser may, subject to the terms and conditions set forth in the Loan Commitment, at his sole option, convert the Loan into a permanent loan from Lender.

Seller and Purchaser agree that each shall bear the costs of closing and settlement on the Lot and the Loan in accordance with the pro-forma "HUD-1" Settlement Statement attached hereto and made a part hereof. Each party acknowledges and agrees that the numbers reflected on the Settlement Statement attached hereto are an estimate and may be subject to change of the actual amounts.

Purchaser and Seller agree to cooperate with the Lender and the title insurance company insuring the Loan, including providing information as requested, the execution of a promissory note and deed of trust securing the Lender, the execution of standard title insurance company indemnity and affidavit, requests for construction loan draws, the prompt payment to the Seller of any construction loan proceeds received by the Purchaser from the Lender, and all any other documents related thereto. Seller shall pay the cost of any title bringdowns, and inspection fees, required by Lender during construction, and Seller shall provide at Seller's sole cost and expense any legal opinions that may be required by Lender. Seller shall also be obligated to pay all interest accruing on the Loan until a Residential Use Permit has been issued by Fairfax County, at which time and thereafter, the Purchaser shall bear all interest accruing on the Loan or any other loan that the Purchaser may place on the Lot and Improvements. Upon the

date that a Residential Use Permit has been issued by Fairfax County for the Lot and Improvements, Seller shall immediately give Purchaser notice thereof.

(g) At time of completion and delivery of possession of the Improvements pursuant to the terms and conditions of the Original Agreement as modified, Seller shall reimburse Purchaser the following amounts in the manner hereinafter provided: (i) the sum of Four Thousand and No/100 Dollars (\$4,000.00) for rent and related expenses incurred by Purchaser, computed at the rate of \$1,000.00 per month for the period starting August 15, 1992 and ending December 14, 1992; plus (ii) the sum of Three Thousand Seven Hundred Ninety and No/100 Dollars (\$3,790.00) computed as one half of the \$7,580.00 credit referred to in Paragraph 6.3 of the Original Agreement; plus (iii) the sum of Seven Thousand Five Hundred and No/100 Dollars (\$7,500.00) computed as one-half of the \$15,000.00 credit which Seller has agreed to give to Purchaser for settlement and related costs. The foregoing credits shall be paid by a disbursement directly from the Lender to Purchaser at the time of the last draw set forth on the Draw Schedule, which disbursement to the Purchaser shall be reduced by the amount of Unit Extras and Finish Work for Above-Standard Unit Finishes (collectively "Extras") reflected on the attachment hereto plus such other Extras as Seller and Purchaser may also agree. The Seller shall join in with Purchaser at time of the initial closing on the Lot and Loan in signing a written directive to Lender to make the disbursement to Purchaser in accordance with this paragraph and that all other disbursements are to be made directly to David N. Talton. It is further agreed that the amount to be disbursed to Purchaser by the Lender shall be credited toward and reduce the remaining unpaid balance of the Purchase Price.

(h) At the time of closing and settlement on the Lot, Seller shall reimburse Purchaser the sum of Eleven Thousand Two Hundred Ninety and No/100 Dollars (\$11,290.00), which amount is made up of the following: (i) the sum of Three Thousand Seven Hundred Ninety and No/100 Dollars (\$3,790.00), computed as one half of the \$7,580.00 credit referred to in Paragraph 6.3 of the Original Agreement; plus (ii) the sum of Seven Thousand Five Hundred and No/100 Dollars (\$7,500.00) computed as one half of the \$15,000.00 credit which Seller has agreed to give to Purchaser for closing and related costs.

(i) Seller shall also reimburse Purchaser the sum of \$4,000.00 as the credit set forth in Paragraph 1(b) of the Amendment of even date herewith, which reimbursement shall be paid at the same time as provided in said Paragraph 1(b) of the Amendment.

(j) All adjustments for real estate taxes related to the Lot and Improvements shall be made as of the date of recordation of title to the Lot in the name of the Purchaser.

(k) All deposits paid and to be paid by the Purchaser under the terms of the Purchase Agreement shall be applied toward the cost of the Improvements in accordance with the Purchase Agreement as modified hereby.

(l) At time of completion and delivery of possession to Purchaser of the Improvements in accordance with the terms and conditions set forth in the Purchase Agreement, Purchaser agrees to immediately thereupon convert the Loan into a permanent loan, whereupon Seller shall be released from liability in connection with the Loan.

2. CONTRACT WORK. Seller agrees to construct the Improvements described in the Purchase Agreement, which Purchase Agreement is incorporated herein by this reference. The work to be performed by Seller in completing the Improvements is called the "Work" in this Construction Contract. Purchaser acknowledges and agrees that Seller shall have the right at their sole discretion to enter into a contract with Talton Brothers Construction Co., Inc. ("TBCC") a Virginia corporation, for the construction of the Improvements, provided, however, that Seller shall not be relieved in any way of their obligations pursuant to the Purchase Agreement as modified hereby, and further provided that Purchaser shall have no rights or obligations with respect to TBCC, contractual or otherwise, on account of any contract between Seller and TBCC.

3. PERFORMANCE STANDARD. The Work is to be performed and completed in accordance with the terms and conditions set forth in the Purchase Agreement and in accordance with all requirements of law. "Completion" includes obtaining all certificates of occupancy from appropriate authorities of Fairfax County, Virginia. Seller in performing this Construction Contract will provide all labor, tools, scaffolding, equipment, and supplies for the performance of the Work.

4. CONTRACT COST. For Seller's complete performance of the Work, exclusive of the \$175,000.00 Purchase Price for the Lot and exclusive of any Extra Items and Finish Work for Above-Standard Unit Finishes, Purchaser shall pay Seller the sum of FOUR HUNDRED SEVENTY-FIVE THOUSAND AND NO/100 DOLLARS (\$475,000.00).

5. TIME PERIOD. Seller agrees to complete the Work at the times specified in the Purchase Agreement. To enable the Work to be prosecuted in an orderly and expeditious manner, Purchaser agrees not to cause any other work to

be done to the Lot or to any of the Improvements, or which would in any way interfere with the progress or completion of the Work, without the express prior agreement of Seller.

6. TOOLS, MACHINERY EQUIPMENT. Purchaser assumes no liability or responsibility for the care, safety, or preservation of any tools, machinery, equipment, material, or supplies and all risks thereof are assumed by Seller.

7. PROTECTION OF PERSONS AND PROPERTY. Seller shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract.

The Seller shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

- a. Seller's employees and other persons who may be affected thereby;
- b. the Work and materials and equipment to be incorporated therein; and
- c. other property at the site or adjacent thereto.

The Seller shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury or loss.

The Seller shall promptly remedy damage and loss (other than damage or loss insured under property insurance paid for by the Seller during construction of the Improvements, whether such policies are in the name of the Seller, the Purchaser or in both names), to property at the site caused in whole or in part by the Seller, a contractor, a subcontractor, a sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Seller is responsible pursuant to this Paragraph 7, except for damage or loss attributable to acts or omissions of the Purchaser or anyone directly or indirectly employed by Purchaser, or by anyone for whose acts Purchaser may be liable, and not attributable to the fault or negligence of the Seller.

8. INDEMNITY. Seller agrees to indemnify and hold harmless Purchaser, its respective agents, servants, and employees of and from any and all

claims, losses, suits, damages, judgments, expenses, costs, and charges by reason of injuries or death suffered by any person or damage to property caused by Seller or its contractors in the performance of the Work.

9. INSURANCE. Seller shall maintain such insurance as will protect him from claims under workers' compensation acts and from claims for damages because of property damage or bodily injury, including death, that may arise from and during operations under this Contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. A copy of the insurance certificate evidencing such coverage is attached hereto.

10. CHANGE ORDERS. Upon the mutual consent of Seller and Purchaser, Seller and Purchaser may modify or change the Work so as to require the performance of extra Work for an additional Purchase Price upon such additional terms as the Seller and Purchaser may agree; provided that, if requested by the Seller, Purchaser shall sign a written Change Order for such performance of extra Work setting forth the additional Purchase Price for such extra Work together with the schedule for payment to Seller of the additional Purchase Price for the extra Work. In the event that Purchaser does not execute a Change Order, if requested by the Seller, then Seller shall not be obligated in any way to do the extra Work. In the event that Purchaser does not execute a Change Order, whether requested to do so by Seller or not, Seller may elect at his sole and absolute discretion to complete all or any part of the extra Work, and in the event that he elects to do all or any part of the extra Work, the Purchaser shall be obligated to immediately pay to Seller upon demand therefore, the additional Purchase Price for the extra Work as it is completed.

11. SELLER'S RESPONSIBILITIES. The Seller shall supervise and direct the Work, using the Seller's best skill and attention. The Seller shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under this Contract, unless the Purchase Agreement gives other specific instructions concerning these matters.

Unless otherwise provided in the Purchase Agreement, the Seller shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

The Seller shall enforce strict discipline and good order among the Seller's employees and other persons carrying out work under the Purchase Agreement. The Seller shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

Unless otherwise provided in the Purchase Agreement, the Seller shall pay sales, consumer, use, and other similar taxes which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect, and shall secure and pay for the building permit and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work

The Seller shall comply with and give notices required by laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on performance of the Work.

The Seller shall be responsible to the Purchaser for the acts and omissions of the Seller's employees, subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Seller.

The Seller shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under this Contract. At completion of the Work, the Seller shall remove from and about the Lot waste materials, rubbish, the Seller's tools, construction equipment, machinery and surplus materials.

The Seller shall pay all royalties and license fees; shall defend suits or claims for infringement of patent rights and shall hold the Purchaser harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Purchase Agreement unless the Seller has reason to believe that there is an infringement of patent.

The Seller shall maintain in a safe place at the site one record copy of the Purchase Agreement, Addenda thereto and any Change Orders. Upon completion of the Work, copies of these documents will be delivered to Purchaser.

12. NOTICES. All notices by either party to the other, to have any validity, must be in writing, addressed to them at the following addresses:

Mr. and Mrs. Talton
9809 COURTHOUSE RD.
VIENNA, VIRGINIA. 22181

Mr. and Mrs. Kozak
Jerome Kozak
Gail Kozak

All notices are to be sent either by hand-delivery, or by first class mail via the United States Postal Service. The notice shall be deemed given on the date the letter is delivered received if hand-delivered, or the date it is delivered by the US. Postal Service.

Except as modified herein, the terms and conditions of the Purchase Agreement remain unchanged and in full force and effect.

WITNESS the following signatures and seals:

PURCHASERS:

Jerome Kozak (SEAL)
JEROME KOZAK

Gail Kozak (SEAL)
GAIL KOZAK

SELLER:

David N. Talton (SEAL)
DAVID N. TALTON

Amy Elaine Talton (SEAL)
AMY ELAINE TALTON

ADDENDUM

THIS ADDENDUM, made this 4th day of November, 1992 to that certain Agreement of Sale and Construction Contract dated November 21, 1991 by and between David N. Talton and Amy Elaine Talton, husband and wife, ("Seller") and Jerome Kozak and Gail Kozak, husband and wife, ("Purchaser")

W I T N E S S E T H

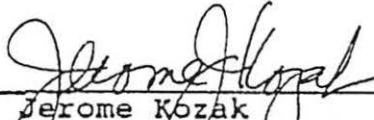
THAT, for and in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. That should Lender require an updated survey at the completion of the construction of Improvements, said survey shall be at the sole expense of Seller.
2. During the construction of the improvements, Seller shall render such performance to the Purchaser and/or Lender as may be required of the Purchaser by the terms of the loan documents between Purchaser and Lender.

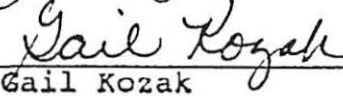
EXCEPT as modified herein, all terms and conditions remain unchanged and in full force and effect.

WITNESS the following signatures:

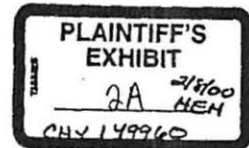

David N. Talton


Jerome Kozak


Amy Elaine Talton


Gail Kozak

Agreement of Sale



THIS AGREEMENT OF SALE ("Agreement") is made this 14, day of May, 1992, by and between DAVID N. TALTON AND AMY ELAINE TALTON (collectively the "Seller"); and STEPHEN E. KITCHEN AND MARY SUE KITCHEN (collectively the "Purchaser"), whose principal residence is 20 Portland Road, London, United Kingdom W11 4LA, telephone numbers (h) (011) 44-71-792-8211, and (w) (011) 44-71-412-4660

A. Seller is the owner of approximately 9.50471 acres of land located along Courthouse Road in the Providence District of Fairfax County, Virginia which is currently being developed into approximately 38 proposed dwelling units and related uses known as Williamsburg Commons ("Williamsburg Commons");

B. Purchaser desires to purchase and Seller desires to sell to Purchaser proposed Lot 7, Williamsburg Commons as described on Exhibit A attached hereto, together with improvements thereon to be erected in substantial conformance with the building plans prepared by Nicholas Diffenbaugh as may be modified in writing from time-to-time by the parties hereto ("Building Plans") known as the modified Nicolson House, and with such additional items as shall be expressly described on (1) Exhibit B attached hereto as being included within the Base Price of the Property, and (2) Exhibit C attached hereto as being Extra items which are not included within the Base Price of the Property but instead are improvements whose cost is in addition to the Base Price of the Property (collectively all of the land and improvements described in this Paragraph B are referred to in this Agreement of Sale as the "Property");

C. Seller intends to develop Williamsburg Commons as a residential community and in connection therewith to submit Williamsburg Commons to a homeowners association regime under the name Williamsburg Commons Homeowners Association which upon formation will become a nonstock, not-for-profit organization ("Homeowners Association"); and

D. Seller intends to provide Purchaser with certain information pertaining to the Property and the Homeowners Association, including but not limited to a Declaration of covenants, conditions and restrictions, pursuant to which the Property is to be submitted to the Homeowners Association in which the Purchaser and other residents of Williamsburg Commons will be members ("Declaration"), the Bylaws ("Bylaws"), the Information Brochure ("Information Brochure"), any Rules and Regulations and other documents pertaining to the Homeowners Association, (collectively, as the same may be amended from time to time, the "Homeowners Association Documents").

NOW, THEREFORE, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties, intending to be legally bound hereby agree as follows:

1. AGREEMENT TO SELL AND PURCHASE.

Seller agrees to sell and Purchaser agrees to purchase the Property upon the terms and subject to the conditions contained herein.

2. PURCHASE PRICE AND METHOD OF PAYMENT.

The total Purchase Price for the Property is SIX HUNDRED SIXTY FIVE THOUSAND DOLLARS, (\$665,000), as further specified on the Fact Sheet attached hereto as Exhibit D and made a part hereof (the "Fact Sheet") and shall be paid as specified on the Fact Sheet. The amounts specified on the Fact Sheet as Cash from Purchaser and Cash from Mortgage Proceeds shall be paid to Seller at Settlement in Cash, by wire transfer, or by bank certified or cashier's check drawn on a bank doing business in the metropolitan Washington, D.C. area, or as may be approved by the Seller. Purchaser agrees that in the event Seller elects by giving written notice thereof to Purchaser, Purchaser shall immediately apply for financing from a lender selected by Seller for the purchase of the Lot and construction thereafter by the Seller of the improvements described in this Agreement ("Construction/Perm. Loan"), all at the same Purchase Price described in this paragraph 2. and on the Fact Sheet attached hereto,

provided that Seller shall pay all costs and expenses incurred by Purchaser which exceed the costs and expenses which the purchaser would have incurred to finance the purchase of the Property without the Construction/Perm. Loan. If Seller elects to require Purchaser to obtain a Construction/Perm. Loan, Purchaser agrees to cooperate in promptly obtaining same and settling on the purchase of the Lot within five (5) days of issuance of a Construction/Perm Loan commitment. Thereafter, Seller will receive from Purchaser periodic payments not less often than once a month as the improvements are completed. All other terms and conditions of this Agreement shall remain unchanged.

3. DEPOSIT.

The Deposit to be paid to Seller by Purchaser upon the execution of this Agreement, together with any other deposits to be paid by Purchaser in connection with the transaction contemplated by this Agreement, shall be received and applied by Seller toward the costs and expenses incurred by Seller in constructing the improvements to be conveyed to Purchaser at time of Settlement hereunder. The Deposit shall be credited to Purchaser at Settlement. If Settlement is not made under this Agreement, the Seller shall be responsible for delivering the Deposit to the party entitled to receive the Deposit pursuant to the terms of this Agreement.

4. CONSTRUCTION: SELECTION: AND INSPECTION.

4.1 CONSTRUCTION AND SELECTION.

Prior to Settlement, Seller shall substantially complete the construction of the Property pursuant to Seller's building schedule substantially in accordance with the Fairfax County approved site plan for Williamsburg Commons (the "Site Plan") and the Building Plans. Purchaser agrees to make complete selection of standards offered by Seller and also to make complete selection of the Extra items set forth on Exhibit C attached hereto, by August 14, 1992 days of Purchaser signing this Agreement. If Purchaser fails to sign and deliver the selection sheet to Seller within the aforesaid time period, then Purchaser shall be deemed to have waived the right to make selections and the selections made by Seller shall be deemed conclusively binding upon and acceptable to Purchaser. Seller shall have the right to substitute materials of comparable value with respect to pattern, design, color, utility and quality. Seller may make such changes or modifications to or deviations from the Site Plan and the Building Plans as may be required by any governmental authority or by any construction or permanent lender or which, in the opinion of Seller, are required by site and job conditions and do not materially and adversely alter the size, quality, or value of the Property.

4.2 COMPLETION.

Seller shall endeavor to complete the construction of the Property on or before the Completion Date set forth on the Fact Sheet; provided, however, that if Seller shall be delayed at any time in the progress of construction by acts of God, labor disputes, Seller's inability to obtain materials and/or labor, inclement weather, and/or any other causes beyond the reasonable or practical control of Seller, then the Completion Date shall be extended for a number of days equal to the period of any such delay. For purposes of this Agreement, the Property will be considered completed upon the issuance of a Residential Use Permit by the appropriate governmental authorities for the Property. Minor incomplete items shall not entitle Purchaser to delay Settlement, but shall be listed in a walk-through report prepared by Seller and Purchaser prior to Settlement. No portion of the Purchase Price may be withheld from Seller or deposited in escrow on account of incomplete work upon the Property at the time of Settlement; Seller agrees to complete all such work within a reasonable period of time after Settlement, subject to weather conditions. For the purpose of complying with the Interstate Land Sales Full Disclosure Act, Seller, subject to the provisions of paragraph 4.3, undertakes and agrees to complete construction of the Property within a period of one (1) year after the date of this Agreement notwithstanding any longer period which may otherwise be provided for under this Agreement.

4.3 FAILURE OF COMPLETION.

If the Property is not substantially completed within one (1) year after the date of this Agreement, then notwithstanding any provisions of this Agreement to the contrary, either Purchaser or Seller shall have the option to terminate this Agreement by written notice to the other party, in which event the Deposit shall be returned promptly to Purchaser, whereupon this Agreement shall be of no further force and effect and neither party shall have any further obligation or liability unto the _____ of this Agreement. If Seller or Purchaser

exercises such option, Seller shall not be liable to Purchaser for delays in the completion of the construction of the Property.

4.4 INSPECTION.

Seller shall notify Purchaser in advance of Settlement that the Property is ready for inspection. Upon receipt of said notice, Purchaser shall promptly arrange for an appointment with a representative of Seller at the Property for the purpose of making a walk-through inspection of the Property. At the time of such inspection, Seller's form of Property Acceptance Form shall be completed and executed by Purchaser and the representative of Seller. Purchaser agrees to attend such inspection of the Property and participate in completing the Property Acceptance Form prior to Settlement. At Settlement the Property shall be in substantially the same physical condition as it is on the date of inspection. Failure of Purchaser to contact Seller for an appointment to inspect the Property, or failure of Purchaser to attend inspection of the Property on the date and time agreed upon with Seller, will constitute full acceptance of the Property by Purchaser in its "as is" condition, and Settlement will proceed on that basis.

4.5 MODEL AND DISPLAY ITEMS.

Purchaser acknowledges and agrees that any decorations, furniture, furnishings, personal property, wallpaper, built-in features, appliances, lighting fixtures, additional plantings or landscaping and the like contained in any model unit of Williamsburg Commons are for demonstrative purposes only, and are not included in the Property which is the subject of this Agreement. Identification of said items may be obtained from Seller's sales representatives.

4.6 PLANS.

Purchaser hereby acknowledges and agrees that any floor plans, renderings, drawings, site plans, and the like furnished by Seller to Purchaser or otherwise obtained by Purchaser which purport to depict the Property, or any portion thereof, are merely approximations, and do not necessarily reflect the actual as-built condition of the same.

4.7 WARRANTIES.

PURCHASER HEREBY WAIVES ANY AND ALL WARRANTY RIGHTS PROVIDED BY SECTION 55-70.1 OF THE CODE OF VIRGINIA OR AT COMMON LAW. ALL WARRANTIES, OTHER THAN THOSE WHICH THE SELLER EXPRESSLY PROVIDES TO PURCHASER IN THE "BUILDERS LIMITED WARRANTY" TO BE PROVIDED BY SELLER TO PURCHASER AT TIME OF SETTLEMENT HEREUNDER ARE HEREBY FOREVER EXCLUDED. NOT IN DEROGATION OF THE FOREGOING, THE SELLER AGREES, WITHOUT RECOURSE, TO ASSIGN ALL GUARANTEES AND WARRANTIES FROM CONTRACTORS, SUBCONTRACTORS OR SUPPLIERS OF MATERIALS RUNNING IN FAVOR OF SELLER, AND TO ASSIGN TO THE PURCHASER ANY MANUFACTURER'S WARRANTIES COVERING THE EQUIPMENT INSTALLED IN THE PROPERTY WHICH ARE ASSIGNABLE. The house is warranted against defects in material and workmanship for one year. The manufacturer's warranty shall apply to all appliances. The structure is warranted against defects in material and workmanship for ten years, including defects that cause wet basement conditions as defined herein. Wet basement conditions for purpose of this paragraph 4.7 exist when water trickles or flows in a basement outside of any drainage system, and does not exist when condensation appears on walls or floors.

5. SETTLEMENT ON PURCHASE AND SALE.

5.1 SETTLEMENT DATE.

Settlement shall be held on or before the Settlement Date specified on the Fact Sheet, provided the Property has been substantially completed by the Settlement Date. Seller shall notify Purchaser in advance of the time and date; settlement shall be held at the law offices of Fox & Proffitt, P.C. 9401 Lee Highway, Suite 402, Fairfax, Virginia 22031.

SELLER'S EXTENSION OF SETTLEMENT DATE.

If Seller anticipates that the Property will not be substantially completed by the Settlement Date, Seller may, by giving Purchaser at least five (5) days prior written notice thereof, extend the date set for Settlement for up to one hundred eighty (180) additional days to a date no later than twelve (12) months following the date of full execution of this Agreement. Seller shall not be liable for any delay in the prosecution or completion of the work caused by (a) the act or neglect or default of the Purchaser, or (b) unavailability of public utilities or electricity to the Project or the Unit, or (c) damage by fire, earthquake, weather or other casualty for which Seller is not responsible, or (d) the act, failure to act, or other delays by Fairfax County or any other governmental body with respect to the issuance of any required governmental permits including the Residential Use Permit or the Site Plan or the Subdivision Plat, or (e) strikes, walkouts or any other acts of employees or suppliers of labor or materials over which Seller has no control, (f) weather conditions, or (g) any factor beyond Seller's control. In any such event, Seller has the option to extend the time fixed for the substantial completion of work for a period equivalent to the time loss by reason of any of the above causes.

5.3 EXTENSION OF SETTLEMENT DATE FOR CASUALTY AND CONDEMNATION.

Should the Property be substantially damaged or destroyed by fire or other casualty or cause to such an extent that Seller shall be unable to repair or restore the Property prior to the Outside Settlement Date discussed below in Section 5.4, or should any portion thereof be taken or affected by any condemnation (or conveyance in lieu thereof) prior to Settlement, then either party may terminate this Agreement upon written notice to the other, provided, however, that Purchaser shall have no right to terminate this Agreement in the event that such casualty or condemnation (or conveyance in lieu thereof) affects only the common area of the Homeowners Association and does not or will not materially affect Purchaser's use and enjoyment of the Property. In the event of such termination, Seller shall refund the Deposit to Purchaser and thereupon neither party shall have any rights or liabilities unto the other on account of this Agreement. If either party elects not to terminate this Agreement, then the last date set for Settlement shall be extended, subject to the provisions of Section 5.4 hereof, for such period as shall be reasonably required to complete the Property in accordance with the provisions of this Agreement.

5.4 OUTSIDE SETTLEMENT DATE.

Notwithstanding any other provision of this Agreement to the contrary, in no event shall Seller have any right to extend the Settlement Date to a date which is more than twelve (12) months after the date of execution of this Agreement.

6. SETTLEMENT.6.1 CONVEYANCE OF TITLE.

The consummation of the purchase and sale of the Property contemplated under this Agreement is referred to throughout this Agreement as "Settlement". At Settlement, Seller shall convey the Property to Purchaser by a general warranty deed, free and clear of all encumbrances except (a) the provisions of the Homeowners Association Documents and all rights, easements, and assessments created thereby, (b) current ad valorem taxes not yet due and payable, (c) restrictions, conditions, reservations, limitations, covenants, easements, permitted encroachments onto public space, and other matters of record, provided the same do not prohibit or materially interfere with the use of the Property for the purposes intended, (d) utility easements serving or affecting the Property or Williamsburg Commons (and any obligations with respect thereto), including utility easements which Seller shall have the right to convey and dedicate both before and after the Settlement Date, provided such utility easements do not have a material adverse affect on the development and contemplated use of the Property, (e) easements affecting the Property or Williamsburg Commons which are contained in right-of-way deeds or in condemnation suits, including rights-of-way which Seller shall have the right to convey and dedicate to public or private use both before and after the Settlement Date, provided such rights-of-way do not have a material adverse affect on the development and contemplated use of the Property, (f) zoning and subdivision laws and ordinances (g) any matters which are disclosed by the Site Plan, the Subdivision Plats, or which would be disclosed by a visual inspection or survey of Williamsburg Commons, (h) the deed of trust, if any, utilized by Purchaser to finance the purchase of the Property, (i) the standard printed form exceptions contained in an owner's policy of title insurance in the form customarily issued in the Commonwealth of Virginia, and (j)

any other encumbrances affecting the Property or Williamsburg Commons which are waived or accepted by Purchaser as provided in Section 6.2 hereof. The reservation of Seller's rights to convey and dedicate easements and rights-of-way referred to in this Section 6.1 shall be included as a provisions in the Homeowners Association Documents and/or other recordable documents, including the aforesaid general warranty deed.

6.2 TITLE DEFECTS.

If Seller is unable to convey title to the Property as provided in Section 6.1 above, then Seller, though not obligated to cure any objections or defects in title, shall be afforded a reasonable time (not less than thirty (30) nor more than one hundred eighty (180) days) within which to cure any objections or defects in title of which Purchaser advises Seller, with the Settlement Date to be extended, if necessary and subject to the limitation set forth in Section 5.4 hereto, to afford such time. If Seller does not cure such objections and defects, then Purchaser may either (a) accept title to the Property subject to such objections or defects and close the transaction, without any decrease in the purchase price or any claim against Seller, or (b) terminate this Agreement and thereupon receive a refund of the Deposit paid pursuant to Section 3 of this Agreement. Upon the return of the Deposit by the Seller to Purchaser, Seller shall be released and relieved of any liability to Purchaser and this Agreement shall thereupon be null and void.

6.3 SETTLEMENT: SETTLEMENT COSTS.

Settlement is to be made at the law office of Fox & Proffitt, P.C. 9401 Lee Highway, Suite 402, Fairfax, Virginia 22031. Purchaser shall have the right to have counsel of its own choice attend Settlement at its expense on its behalf. Seller shall pay the Virginia grantor's tax, the cost for the preparation of the deed and the fees of its attorney. Purchaser shall pay all other closing costs, including but not limited to examination of title, Purchaser's settlement attorney's fee, all loan fees (subject to the obligations of Seller to pay for additional costs and expenses which may be incurred by Purchaser in connection with a Construction/Perm. Loan as further set forth in paragraph 2. hereinabove), mortgage title insurance, notary's fee, survey, and all city, county and state transfer taxes, state stamp and recording charges for the deed and purchase money deed of trust, if any. In addition, all costs incurred in connection with obtaining Purchaser's purchase money financing for the acquisition of the Property, if any, shall be paid by Purchaser, including, but not limited to, any mortgage lender's loan origination fee (if applicable), plus any other fees, prepaid expenses or escrows required by any mortgage lender of Purchaser at time of loan application of Settlement shall be at the cost of Purchaser. All optional or elective services or charges, including but not limited to owner's title insurance, shall be at the cost of Purchaser.

6.4 HOMEOWNERS ASSOCIATION ASSESSMENTS: INITIAL WORKING CAPITAL FOR HOMEOWNERS ASSOCIATION.

At Settlement, Purchaser shall pay to the Association a sum equal to two (2) months of the regular Assessments which, pursuant to the Declaration, are levied with respect to the Property. Such payment of two (2) months' assessments shall be used to fund a working capital reserve for the Homeowners Association and shall not be deemed to be, and shall not be, an advance payment of any regular or special Assessments thereafter due and payable with respect to the Property. In addition, Purchaser shall, at Settlement, pay to the Association the regular Assessment for the Unit which will be levied for the calendar month following the Settlement Date, plus payment to the Association (or reimbursement to Seller if previously paid by Seller to the Association) of a prorated portion of such regular monthly Assessment for the calendar month of Settlement, such proration to be based upon the number of days remaining in the month of Settlement, including the date of Settlement.

6.5 TAXES.

Estimated real property taxes and any assessments on the Property shall be prorated as of the date of Settlement. Seller and Purchaser agree to make an appropriate adjustment between themselves when the actual charges are ascertained. Any supplemental tax bill that may be issued based upon completion of the Unit shall be paid by Purchaser. Purchaser shall assume, at the time of Settlement, whatever annual benefit charges for water and sewer services as may be assessed or levied against or applicable to the Property by the ultimate authority, public or private, which will bring water and sewerage facilities to the Property. Deferred connection benefit charges applicable to the Unit, if any, shall be prorated as of the date of Settlement and assumed the

6.6 POSSESSION.

Seller shall grant Purchaser possession of the Property immediately following Settlement.

6.7 DOCUMENTS.

At Settlement, Seller and Purchaser shall execute such documents and instruments as shall be necessary or appropriate to carry out the terms of this Agreement.

6.8 SELLER'S PERFORMANCE.

Purchaser's acceptance of Seller's general warranty deed to the Property and the settlement of this transaction shall constitute an agreement by Purchaser that Seller has fully performed all of its agreements, obligations, and responsibilities under this Agreement, and no performance of any agreement, obligation, or representation of Seller shall survive Settlement, except the warranties of title contained in the Deed.

7. THE HOMEOWNERS ASSOCIATION AND RELATED HOMEOWNERS ASSOCIATION DOCUMENTS.

8.1 SELLER'S DELIVERIES.

Prior to Settlement under this Agreement, Seller shall deliver to Purchaser copies of, and Purchaser will execute a receipt for, the following materials:

- (a) The proposed Declaration by which the Homeowners Association will be established;
- (b) The proposed By-Laws of the Homeowners Association;
- (c) The proposed Rules and Regulations of the Homeowners Association;
- (d) The Information Brochure summarizing in narrative form some of the characteristics of the Homeowners Association and its operation; and
- (e) The proposed initial operating budget for the Homeowners Association.

In the event that this Agreement shall be terminated for any reason, Purchaser agrees to promptly return to Seller all Homeowners Association Documents delivered by Seller to Purchaser pursuant to the terms of this Agreement.

8.2 THE HOMEOWNERS ASSOCIATION.

Purchaser acknowledges and understands that the Property will be part of an Homeowners Association bearing the name of Williamsburg Commons to be constructed upon the land shown in the Site Plan. Purchaser further acknowledges and understands that the Property consists only of the real property that is legally and particularly described in this Agreement and that the remaining property within Williamsburg Commons shall be divided among other residential building lots and common areas, all as shown on the Site Plan and as provided in the Declaration which Seller has, or will have, recorded in the Land Records of Fairfax County, Virginia, prior to Settlement. Purchaser understands that the Swimming Pool and Pool House will not be available to the Purchasers until all improvements have been made to comply with Fairfax County and other governmental codes. The projected availability date of the Swimming Pool and Pool House shall be no sooner than Summer 1993, but no later than Summer 1994. Purchaser understands that, subject to the reservation by Seller herein of certain rights including the right to use the Swimming Pool and Pool House for the period of time set forth in the Homeowners Association Documents, as well as rights-of-way and utility easements, the rights of use and easements with respect to the common areas will be governed by the Declaration, the By-Laws of the Homeowners Association, and the Rules and Regulations as are promulgated by the Homeowners Association. Purchaser further understands that the Homeowners Association, which will be composed of Seller and all other owners of the residential building lots within Williamsburg Commons, will be responsible for the maintenance and operations of the common elements of the Homeowners Association and the grounds maintenance of all exterior common areas and all lots, including the Property, located in Williamsburg Commons. Purchaser acknowledges that the owner of each residential building lots in Williamsburg Commons will be required to be a member of the Association, to abide by its By-Laws and Rules and Regulations, and to pay periodic assessments for the maintenance and operation of the Homeowners Association, all as provided in the Declaration. The annual budget for the Homeowners Association, set forth in the materials to be furnished to Purchaser, which

reflects estimated assessments to be paid by Purchaser is believed by Seller to be reasonably accurate, but it is only an estimate and may be adjusted by appropriate action of the Association from time-to-time pursuant to the By-Laws of Williamsburg Commons. Purchaser further understands and acknowledges that the Homeowners Association shall have sole and exclusive authority to regulate all landscaping and landscaping features upon the Property, and the Purchaser shall not have any authority or right to install, construct, alter, or remove any landscaping or landscaping features located on the Property. PURCHASER ACKNOWLEDGES AND AGREES THAT THE PROPERTY SHALL BE PURCHASED SUBJECT TO THE DECLARATION, THE BYLAWS, AND THE RULES AND REGULATIONS OF THE HOMEOWNERS ASSOCIATION, AND PURCHASER AGREES TO SUBSCRIBE TO AND ABIDE BY THE DECLARATION, THE BY-LAWS, AND THE RULES AND REGULATIONS OF THE HOMEOWNERS ASSOCIATION. THE DECLARATION, THE BY-LAWS, AND THE RULES AND REGULATIONS OF THE HOMEOWNERS ASSOCIATION ALONE WILL GOVERN THE HOMEOWNERS ASSOCIATION.

8.3 CHANGES OR AMENDMENTS IN THE HOMEOWNERS ASSOCIATION DOCUMENTS.

Seller may at any time, without the approval of Purchaser, make such changes or amendments in the Declaration which do not materially and adversely affect the rights of Purchaser or the value of the Property, and such changes or amendments shall not affect the rights and liabilities of the parties under this Agreement or be a cause or a reason for termination or revision of this Agreement.

9. GENERAL PROVISIONS.

9.1 NO ASSIGNMENT BY PURCHASER.

PURCHASER SHALL NOT ASSIGN, MORTGAGE, PLEDGE, OR IN ANY WAY ENCUMBER OR TRANSFER THIS AGREEMENT, IN WHOLE OR IN PART, OR DELEGATE ANY OF THE DUTIES OR COVENANTS OF PURCHASER SET FORTH HEREIN, BY OPERATION OF LAW OR OTHERWISE, TO ANY PERSON OR ENTITY; AND ANY SUCH ATTEMPTED ASSIGNMENT, MORTGAGE, PLEDGE, TRANSFER, OR DELEGATION SHALL BE NULL AND VOID AND OF NO FORCE OR EFFECT AND SHALL BE DEEMED TO BE A DEFAULT ON THE PART OF PURCHASER HEREUNDER. ANY ASSIGNMENT OF THIS AGREEMENT MUST BE APPROVED BY THE SELLERS.

9.2 SUBORDINATION.

This Agreement and all rights of Purchaser hereunder are subject and subordinate to any deed of trust or mortgage now or hereafter (up to the date of settlement on the property hereunder) encumbering Williamsburg Commons or the Property. Unless this Agreement is expressly adopted and ratified by the holder of such deed of trust or mortgage (or by any purchaser therefrom) by written notice to Purchaser within thirty (30) days of such holder's or purchaser's acquiring fee title to the Property by foreclosure or deed or other conveyance in lieu of foreclosure, such holder or purchaser, as the case may be, shall have no liability or obligations under this Agreement whatsoever, and this Agreement shall be terminated and shall be of no further force and effect and the deposit shall be promptly returned..

9.3 NOTICES.

Any notice or other communication required or permitted under this Agreement must be in writing and delivered in person or sent by certified mail, postage prepaid, return receipt requested, to the address set forth on the Fact Sheet for the party to whom it is intended.

9.4 TIME OF ESSENCE.

Time is of the essence of this Agreement.

9.5 NO WAIVER.

No failure of Seller or Purchaser, respectively, to exercise any power given such party hereunder or to insist upon strict compliance by the other party with its obligations hereunder, and no custom or practice of the parties at variance with the terms hereof, shall constitute a waiver of a Seller's or Purchaser's right, respectively, to demand exact compliance with the terms hereof.

9.6 SOLE AGREEMENT; MODIFICATIONS.

THIS AGREEMENT SUPERSEDES ALL OTHER UNDERSTANDINGS AND AGREEMENTS BETWEEN THE PARTIES AND CONSTITUTES THE SOLE AND ENTIRE AGREEMENT BETWEEN SELLER AND PURCHASER. ORAL REPRESENTATIONS NOT SET FORTH HEREIN CANNOT BE RELIED UPON AND ARE NOT BINDING ON EITHER SELLER OR PURCHASER. PURCHASER REPRESENTS THAT PURCHASER HAS NOT AND IS NOT RELYING UPON ANY WARRANTIES, PROMISES, GUARANTIES OR REPRESENTATIONS MADE BY ANYONE, INCLUDING SELLER OR ANYONE ACTING OR CLAIMING TO ACT ON BEHALF OF SELLER, EXCEPT FOR THOSE EXPRESSLY INCLUDED IN THIS AGREEMENT.

9.7 BINDING EFFECT.

The word "Purchaser", as used herein, refers to the masculine, feminine, neuter, singular, or plural, as the indemnity of Purchaser or situation requires. This Agreement shall be binding upon Purchaser and the heirs, personal representatives, successors, and assigns of Purchaser, subject, however, to the restrictions on the right to assign set forth in 9.1 hereinabove.

9.8 DEFAULT.

In the event Purchaser fails to cure any default under this Agreement within forty five (45) days after written notice from Seller, then, at the option of Seller, Seller may terminate this Agreement and retain Purchaser's Deposit as full liquidated damages for such default, and if Seller so elects and so notifies Purchaser in writing, then Purchaser shall thereafter have no further rights or obligations under this Agreement. Notwithstanding the foregoing, the failure of Purchaser to settle on the purchase of the Property when and as required herein shall be considered a default for which Purchaser is entitled neither to notice nor the opportunity to cure. In the event Seller fails to cure any default under this Agreement within forty five (45) days after written notice from Purchaser, including, without limitation, the failure to complete the improvements to the Property by the last date permitted for the Settlement under Sections 5.1, 5.2, 5.3, and 5.4 hereof, then Purchaser may: (i) by written notice to Seller, rescind and cancel this Agreement, in which event Seller shall promptly refund the Deposit to Purchaser and shall pay Purchaser the sum of One Hundred Dollars (\$100.00) as liquidated damages for the damages Purchaser shall have suffered, whereupon no further rights, obligations, or duties shall exist between the parties hereto pursuant to the terms of this Agreement, or (ii) seek specific performance of the Agreement but not damages.

9.9 BROKERS.

Each party hereby represents and warrants to the other that Shannon and Luchs is the only Broker ("Broker") that has been involved in connection with this Agreement of Sale. The Seller and the Purchaser each confirm that disclosure of the agency relationships described below has been made in writing. Under the National Association of Realtors Code of Ethics, agents who are Realtors are obligated to treat fairly all parties to the transaction. The Seller and Purchaser confirm that in connection with the transaction described by this Agreement, the Broker, and their salespersons are acting on behalf of the Seller as the Seller's agent.

9.10 AGENT'S FEE.

The Seller shall pay the Broker compensation ("Agent's Fee") in an amount equal to Four Percent of the Base Purchase Price set forth on the Fact Sheet attached hereto as previously agreed upon between the Seller and the Broker. The Seller instructs the Settlement agent to disburse the Agent's Fee to the Selling Company at the time of settlement hereunder; provided, however, that the Broker hereby acknowledges and agrees that in the event that Settlement hereunder does not occur for any reason whatsoever, the Broker shall not be entitled to any compensation in connection

nent.

9.11 SELLER STATUS.

It is understood that Purchaser is purchasing a substantially completed Property and that Seller is not acting as a contractor for Purchaser in the construction of the Property. Purchaser acquires hereby no right, title or interest in or to the land, buildings or Property except the right and obligation to purchase the Property in accordance with the terms hereof upon the completion of the Property.

9.12 GOVERNING LAW.

This Agreement and all the relationships between the parties hereto shall be construed and interpreted in accordance with the laws of the Commonwealth of Virginia.

9.13 SEVERABILITY.

The provisions of this Agreement are intended to be independent, and in the event any provision hereof shall be declared by a court of competent jurisdiction to be invalid, illegal, or unenforceable for any reason whatsoever, such illegality, unenforceability, or invalidity shall not affect the remainder of the Agreement.

9.14 UNSOLD LOTS: RESERVATION OF RIGHTS BY SELLER.

Until such time as all of the lots in Williamsburg Commons are sold, Seller reserves the right to make any use whatsoever of unsold lots, the common elements, the streets, and the main entrance of Williamsburg Commons, that may be legally permitted, including leasing of said lots and all activities necessary for or related to its sales and construction program. Purchaser recognizes and acknowledges his understanding that in order to accomplish Seller's construction program, trucks, construction equipment and personnel, and noise and other inconveniences attendant thereto may be present. Purchaser agrees not to obstruct or impede any such construction or sales activities.

9.15 ACCESS.

Purchaser may not have access or entry (unless by prearranged appointment) to the Property or the construction site prior to Settlement, nor may he store any of his possessions in or about the Property or the construction site prior to Settlement and delivery of possession to the Purchaser hereunder. Any violation of this provision may, at the election of Seller, be considered a material breach of this Agreement. In addition, Purchaser shall indemnify and hold Seller harmless from and against any and all costs, expenses, claims and liabilities, including without limitation litigation costs and attorneys' fees, incurred by Seller as a result of the entry to the Property or the construction site prior to Settlement by Purchaser, its employees, agents, subcontractors, licensees or invitees.

9.16 AUTHORITY TO CONTRACT: TERMINATION.

Purchaser represents and warrants to Seller that they have the requisite authority to enter into this Agreement and perform its obligations hereunder without the consent or joinder of any other person or entity. This Agreement shall terminate automatically if the Purchaser (or any one of them if the Purchaser is more than one person) files for or is adjudicated a bankrupt, makes an assignment or other similar arrangement for the benefit of creditors, or dies (if a natural person), unless Seller shall at their sole discretion elect in writing that this Agreement shall not terminate on account of any of the foregoing. Seller agrees that in the event that both Purchasers die prior to the date that Seller commences to excavate the basement, this Agreement shall automatically terminate, whereupon the Seller shall deduct from the deposit the amount of costs and expenses incurred in connection with this Agreement of Sale and any balance of the deposit remaining shall be promptly returned to the Purchaser's estates jointly, and thereafter neither party shall have any further liability or obligation unto the other.

IN WITNESS WHEREOF, and intending to be legally bound, the undersigned parties have caused this Agreement to be duly executed under seal as their free act and deed for the uses and purposes herein contained on the dates indicated below beneath their respective signatures.

PURCHASERS:

Stephen E. Kitchen (SEAL)
Stephen E. Kitchen

Date: May 14, 1992

Mary Sue Kitchen (SEAL)
Mary Sue Kitchen

Date: May 14, 1992

SELLERS:

David N. Talton (SEAL)
DAVID N. TALTON

Date: 5/14/92

Amy Elaine Talton (SEAL)
AMY ELAINE TALTON

Date: 5/14/92

Exhibit "A"

Plat for lot 7, Williamsburg Commons.

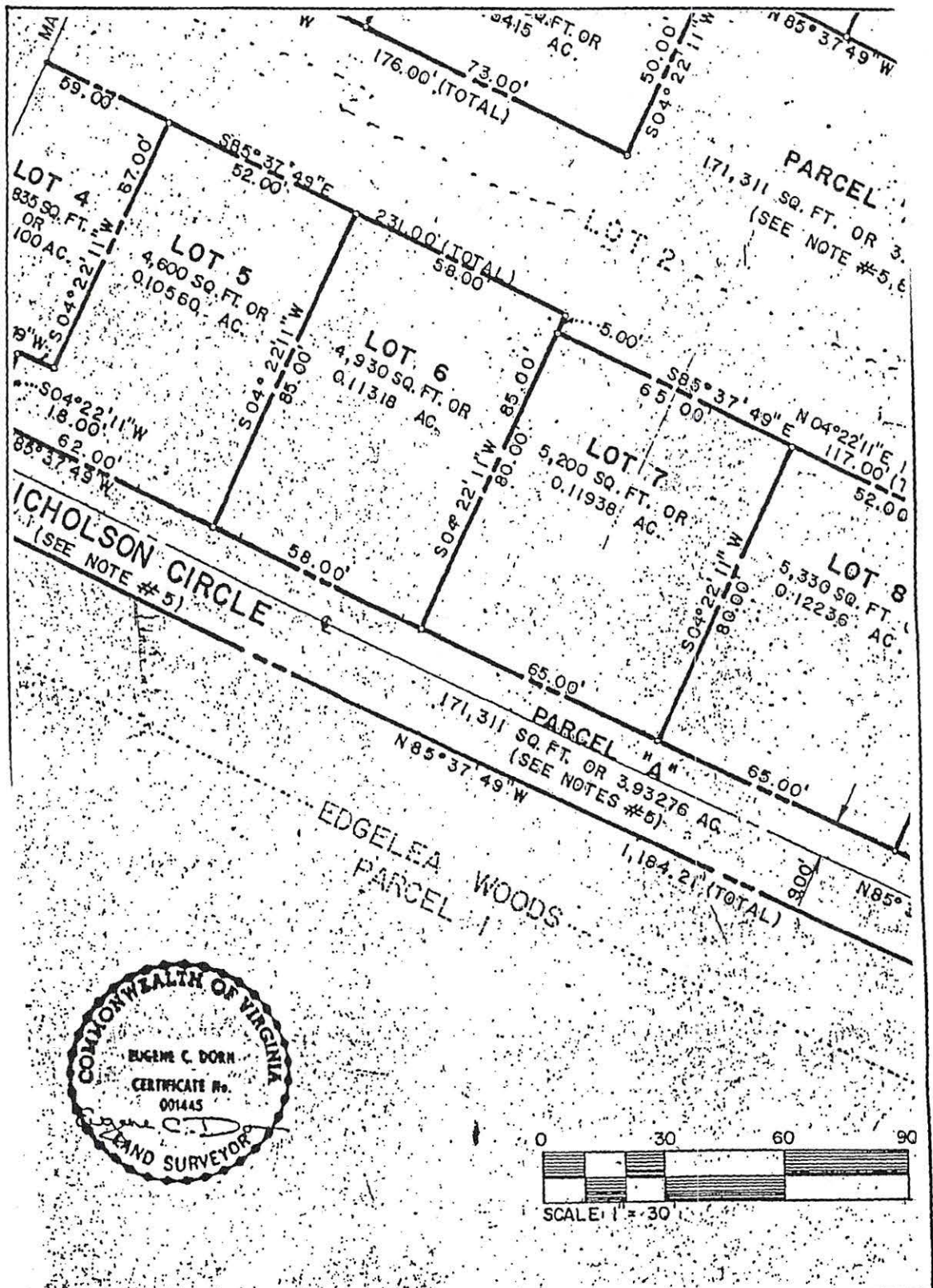


Exhibit "B"

Items included within the base price not reflected on the drawings are as follows:

- 1.) Additional large window in basement library and two windows in sitting room (studio) gable.
- 2.) The basement shall be divided into a bathroom, washer/dryer/utility room, library room, den, recreation room, and storage.
- 3.) Additional electric outlet and telephone line in library.
- 4.) Three bedrooms on the second floor.

Exhibit "C"

Optional items:

- 1.) Additional dormers.
- 2.) Library cabinetry.
- 3.) Plywood flooring, window, and access to area over master bedroom closet and bath.
- 4.) Additional windows in living room, (if architecturally acceptable).
- 5.) Walk in dormer on North side of sitting room (studio), (if architecturally acceptable).

Exhibit "D"

WILLIAMSBURG COMMONS

AGREEMENT OF SALE

FACT SHEET

Property Address: Lot 7, Williamsburg Commons
Fairfax County, Virginia

Sales Price:

\$ 175,000	Lot price (paid at closing on the lot if a Construction/Perm. Loan is obtained)
\$ 490,000	Base Price for House with Standard Unit Finishes (to be paid monthly as construction is completed if a Construction/Perm. Loan is obtained) (See Addenda attached to this Fact Sheet).
\$ _____	Unit Extras and Finish Work for Above-Standard Unit Finishes (See Addenda attached to this Fact Sheet).
\$ 665,000	Total Price

Payment of Sales Price:

\$ 133,000 Deposit Paid at Contract Signing

\$ _____ Additional Deposit to be Paid (if any)

\$ 532,000 Cash from Purchaser at Settlement

Completion and Closing:

Anticipated Completion Date of Unit:: December 31, 1992

Anticipated Settlement Date: January 10, 1993

Purchaser(s):

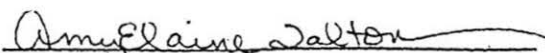
Purchaser Name: Stephen E. & Mary Sue Kitchen
Address: 20 Portland Road, London, United Kingdom W11 4LA
Phone: (Home) (011)44-71-792-8211 (Office) (011-44) 71-442-4660

Signature: 
Stephen E. Kitchen


Signature: 
Mary Sue Kitchen

Sellers:

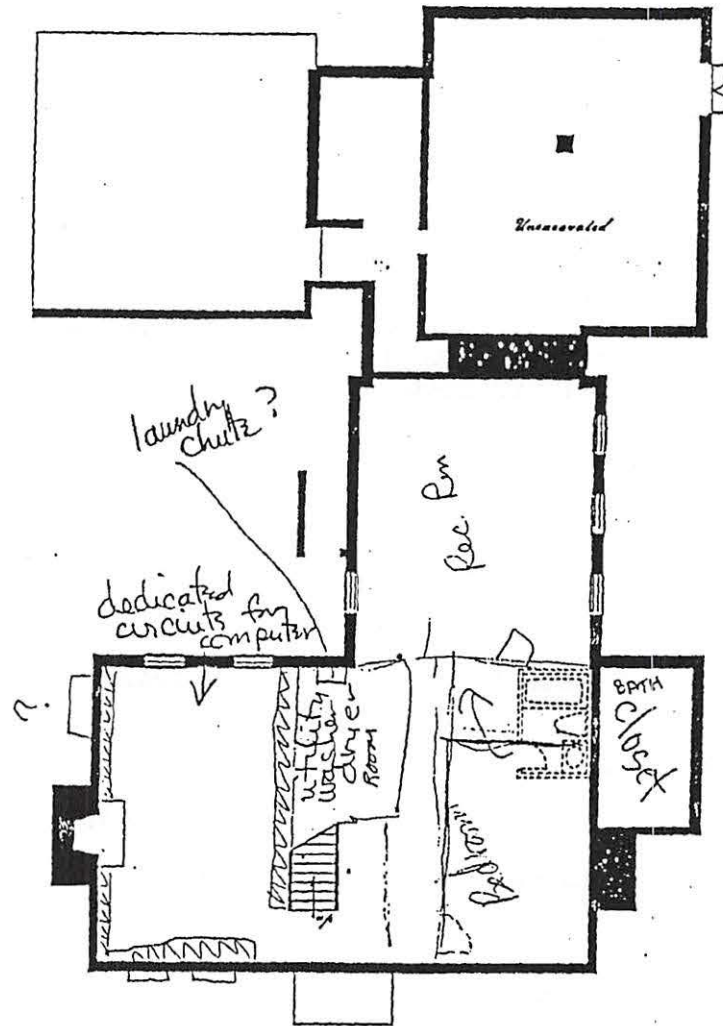

David N. Talton


Amy Elaine Talton

Agent:


Mary Pawson

All floor plans are subject to change and subject to change without notice. The floor plan is subject to change and subject to change without notice. The floor plan is subject to change and subject to change without notice.



Basement Floor Plan

Nielsen House

AMENDMENT
TO
AGREEMENT OF SALE
AND
CONSTRUCTION CONTRACT
WILLIAMSBURG COMMONS
VIENNA, VIRGINIA

THIS AMENDMENT TO AGREEMENT OF SALE AND CONSTRUCTION CONTRACT is made and entered into this 30th day of October, 1992 by and between DAVID N. TALTON and AMY ELAINE TALTON, husband and wife (collectively the "Seller"); and STEPHEN E. KITCHEN and MARY S. KITCHEN, husband and wife (collectively the "Purchaser").

RECITALS:

R-1. Purchaser has previously entered into an Agreement of Sale dated May 14, 1992 (the "Purchase Agreement"), for the purchase of Lot 7, Williamsburg Commons (the "Lot") and the construction of a dwelling and related improvements thereon known as the Modified Nicolson House (the "Improvements"), for the Purchase Price and upon the terms and conditions set forth in the Purchase Agreement.

R-2. Seller desires and Purchaser has agreed to modify the Agreement of Sale to provide for the Purchaser to close and settle on the Lot upon the terms and conditions set forth in the Purchase Agreement as modified hereby, and to further provide for the completion of construction of the Improvements thereafter, also upon the terms and conditions of the Purchase Agreement as modified hereby.

SELLER and PURCHASER, in consideration of the mutual agreements entered into in the Purchase Agreement, which Purchase Agreement is not terminated hereby or merged into this Construction Contract, agree as follows:

1. PURCHASE AGREEMENT MODIFICATION. The Seller and Purchaser hereby modify and amend the Purchase Agreement as follows:

(a) Purchaser shall close and settle on Lot 7, within three (3) days of notification thereof by the Seller to the Purchaser, at the offices of John F. McManus, Esq. of the law firm of Blankingship & Keith, 4020 University Drive, Suite 312, Fairfax, Virginia 22030.



(b) The Lot shall be conveyed in the then current stage of construction of the Improvements.

(c) The Purchase Price of the Lot shall be deemed for all purposes to be One Hundred Seventy-Five Thousand and No/100 Dollars (\$175,000.00).

(d) Subject to any adjustments for extra items to be paid in excess of the Base Purchase Price, the total Purchase Price for the Improvements shall be FOUR HUNDRED NINETY THOUSAND AND NO/100 DOLLARS (\$490,000.00), computed as the difference between the \$665,000.00 total Base Purchase Price set forth in the Purchase Agreement less the \$175,000.00 purchase price for the Lot as set forth herein. Seller and Purchaser agree that nothing in this Amendment shall modify or change in any way the items set forth in the Purchase Agreement as being included in the Base Purchase Price, which items shall include, but not be limited to, those items referred to in Exhibit "B" to the Purchase Agreement.

(e) Purchaser agrees to close on a construction/permanent loan in the principal amount of \$491,250.00 ("Loan") from Southern Atlantic Mortgage, a division of Virginia First Savings Bank, F.S.B., 1308 Devil's Reach Road, Woodbridge, Virginia 22194 ("Lender"), simultaneously with the closing and settlement on the Lot. The Loan shall contain such terms and conditions as are set forth in that certain commitment letter from Lender to Purchaser dated October 9, 1992 as amended by Lender by letter dated October 30, 1992 (collectively the "Loan Commitment"). Purchaser agrees that the construction loan portion of the Loan shall be funded in accordance with a draw schedule to be determined by Seller and Lender, and which draw schedule shall provide for the payment by the Purchaser to the Seller at time of closing on the Loan of \$173,750.00 in cash or other current funds of the \$175,000.00 Purchase Price of the Lot, and shall further provide for the Purchaser to direct and authorize the Lender to disburse the construction loan proceeds up to the \$491,250.00 maximum principal amount of the Loan directly to Seller as construction of the Improvements progresses. Seller acknowledges receipt from Purchaser of \$133,000.00 as the Deposit which shall be applied toward the \$173,150.00 due from Purchaser upon closing on the Lot, thereby reducing to \$40,750.00 the amount of the Purchase Price of the Lot due from Purchaser at closing on the Lot.

Seller and Purchaser acknowledge and agree that Purchaser and Lender may modify those terms and conditions of the Loan which apply only to the permanent loan portion of the Loan, it being expressly understood and agreed that except as

otherwise expressly provided herein, Purchaser shall pay for all costs and expenses of Settlement and the permanent loan, and as required by the provisions set forth in Paragraph 2 of the Purchase Agreement, Seller shall pay for those costs and expenses which are in excess of the costs and expenses which Purchaser would have borne to close and settle on the Property and on a permanent loan; including, by way of illustration, the Seller shall pay the one percent (1%) loan fee set forth in the Loan Commitment as a cost and expense associated with the construction loan portion of the Loan and Purchaser shall pay all additional loan fees, the house location survey, appraisal, credit report, owner's and mortgagee's title insurance premium (exclusive of the extra hazardous risk premium for the construction loan/mechanic's lien coverage), purchaser's settlement attorney fees, and other fees, costs and expenses associated with the permanent loan portion of the Loan. Purchaser agrees to cooperate with the Lender and the title insurance company insuring the Loan, including but not limited to providing information as requested, the execution of a promissory note, deed of trust, and loan agreement securing the Lender, the execution of standard title insurance company indemnity and affidavit, requests for construction loan draws, the immediate payment to the Seller of any construction loan proceeds received by the Purchaser from the Lender, and standard documents related thereto.

(f) At time of completion and delivery of possession to Purchaser of the Improvements in accordance with the terms and conditions set forth in the Purchase Agreement, Purchaser agrees to immediately thereupon either (i) convert the Loan to a permanent loan, or (ii) close on a permanent loan from another lender causing the principal amount of the construction loan portion of the Loan to be paid in full, and Seller to be released thereby from any and all liability on account of the Loan. Seller acknowledges and agrees that any and all interest accruing on the Loan during the construction phase of the Loan shall be paid by the Seller and not by the Purchaser.

2. CONTRACT WORK. Seller agrees to construct the Improvements described in the Purchase Agreement, which Purchase Agreement is incorporated herein by this reference. The work to be performed by Seller in completing the Improvements is called the "Work" in this Construction Contract. Purchaser acknowledges and agrees that Seller shall have the right at their sole discretion to enter into a contract with Talton Brothers Construction Co., Inc. ("TBCC") a Virginia corporation, for the construction of the Improvements, provided, however, that Seller shall not be relieved in any way of their obligations pursuant to the Purchase Agreement as modified hereby, and further provided that Purchaser shall have no rights or obligations with respect to TBCC, contractual or otherwise, on account of any contract between Seller and TBCC.

3. PERFORMANCE STANDARD. The Work is to be performed and completed in accordance with the terms and conditions set forth in the Purchase Agreement and in accordance with all requirements of law. "Completion" includes obtaining all certificates of occupancy from appropriate authorities of Fairfax County, Virginia. Seller in performing this Construction Contract will provide all labor, tools, scaffolding, equipment, and supplies for the performance of the Work.

4. CONTRACT COST. Purchaser agrees to pay Seller for Seller's complete performance of the Work, the amounts at the times stated in Schedule "B" attached hereto, which amounts are the amounts also stated on the Fact Sheet attached to the Purchase Agreement subject to any modifications.

5. TIME PERIOD. Seller agrees to complete the Work at the times specified in the Purchase Agreement. To enable the Work to be prosecuted in an orderly and expeditious manner, Purchaser agrees not to cause any other work by anyone other than Seller or Seller's designee, to be done to the Lot or to any of the Improvements, or which would in any way interfere with the progress or completion of the Work, without the express prior agreement of Seller.

6. TOOLS, MACHINERY EQUIPMENT. Purchaser assumes no liability or responsibility for the care, safety, or preservation of any tools, machinery, equipment, material, or supplies and all risks thereof are assumed by Seller.

7. PROTECTION OF PERSONS AND PROPERTY. Seller must take all reasonable precautions to protect the persons and property of others on or adjacent to the site from damage, loss, or injury resulting from operations under this Construction Contract by Seller or any other party with whom Seller has contracted.

8. INDEMNITY. Seller agrees to indemnify and hold harmless Purchaser, its respective agents, servants, and employees of and from any and all claims, losses, suits, damages, judgments, expenses, costs, and charges by reason of injuries or death suffered by any person or damage to property caused by Seller or its contractors in the performance of the Work.

9. CHANGE ORDERS. Upon the mutual consent of Seller and Purchaser, Seller and Purchaser may modify or change the Work so as to require the performance of extra Work for an additional Purchase Price and upon such additional terms as the Seller and Purchaser may agree; provided that, if requested by the Seller, Purchaser shall sign a written Change Order for such performance of

extra Work setting forth the additional Purchase Price for such extra Work together with the schedule for payment to Seller of the additional Purchase Price for the extra Work. In the event that Purchaser does not execute a Change Order, if requested by the Seller, then (a) Seller shall not be obligated in any way to do the extra Work, and (b) if Seller elects at their sole and absolute discretion to complete all or any part of the extra Work, notwithstanding Purchaser's failure to execute a Change Order for such extra Work, the Purchaser shall be obligated to immediately pay to Seller upon demand therefore, the additional Purchase Price for the extra Work as it is being completed.

10. NOTICES. All notices by either party to the other, to have any validity, must be in writing, addressed to them at their respective addresses above, or such other address as set forth herein and sent either by first class mail via the United States Postal Service. The notice shall be deemed given two (2) after the date the letter is delivered with the US. Postal Service.

WITNESS the following signatures and seals:

PURCHASERS:

 (SEAL)
STEPHEN E. KITCHEN

 (SEAL)
MARY S. KITCHEN

SELLER:

 (SEAL)
DAVID N. TALTON

 (SEAL)
AMY ELAINE TALTON

SECOND AMENDMENT
TO
AGREEMENT OF SALE
AND
CONSTRUCTION CONTRACT

THIS AMENDMENT TO AGREEMENT OF SALE AND CONSTRUCTION CONTRACT IS made and entered into this 17th day of March, 1993, by and between DAVID N. ELLIOT and ANN ELAINE ELLIOT, husband and wife (collectively the "seller"), and STEVEN E. KITCHEN and MARY S. KITCHEN, husband and wife (collectively the "purchaser").

RECITALS:

E-1. Purchaser and Seller have previously entered into an Agreement of Sale dated May 14, 1992 as amended by that certain Amendment dated October 30, 1992 (collectively the "Purchase Agreement"), for the purchase of Lot 7, Williamsburg Commons (the "lot") and the construction of a dwelling and related improvements thereon known as the Modified Nicolson House (the "improvements"), for the Purchase Price and upon the terms and conditions set forth in the Purchase Agreement.

E-2. Pursuant to the terms set forth in the Purchase Agreement, on or about October 30, 1992 (the "Initial Closing Date"), Purchaser acquired ownership and title to the lot and the improvements completed as of the Initial Closing Date.

E-3. Subsequent to the Initial Closing Date, seller by their General Contractor, Talton Brothers Construction Company, Inc. (the "General Contractor") has continued construction of the improvements.

E-4. Purchaser and Seller have agreed to the construction of certain extra items (the "extras"), the cost of which are in addition to the \$663,000.00 total price of the lot and improvements.

E-5. Purchaser and Seller have agreed to close and settle on the unpaid balance of the \$663,000.00 total price of the lot and the improvements which have been completed subsequent to the Initial Closing Date, and simultaneously thereafter Purchaser will settle on the remaining loan (the "remaining loan closing and final settlement").

E-6. In the case of the permanent loan closing and final settlement, Seller shall complete the extras and any unfinished improvements in a timely manner and without delay, and Purchaser shall pay to seller the cost of the extras upon their completion, in the amounts to be agreed upon by the seller and purchaser.

BOTH SELLER and PURCHASER in consideration of the mutual agreements entered into in the Purchase Agreement, which Purchaser

Agreement is not constituted hereby" or merged into this Amendment, and in consideration of the foregoing Recitals, which are incorporated herein and made an integral part hereof, do hereby agree as follows:

1. Provided that the Improvements have been completed, Purchaser agrees to pay for the Extras upon their completion in accordance with a schedule mutually agreed upon by the Seller and the Purchaser. The amount for the cost of each item (and any credits due Purchaser) shall be mutually agreed upon by the Seller and the Purchaser. The cost of the Extras is in addition to the \$665,000.00 total price of the lot and the Improvements.

2. Notwithstanding anything else contained in the Purchase Agreement, and notwithstanding Purchaser's acceptance of Seller's general warranty deed to the Property (the "Deed"), Paragraph 6.8 of the Purchase Agreement is hereby modified to provide that (a) Seller's agreements, obligations, and responsibilities under the Purchase Agreement, as modified hereby (the "Seller's Obligations"), shall survive the Initial Closing and the Permanent Loan Closing and Final Settlement, and (b) Seller's Obligations shall continue until the date that all of the Improvements and the Extras have been completed, whereupon the Seller's Obligations shall be deemed to have been completed, except for the warranties of title contained in the Deed (including but not limited to warranties against any mechanic's or materialman's liens), and except for all other warranties expressly provided in the Purchase Agreement, all of which warranties shall survive execution and delivery of the Deed.

3. Purchaser acknowledges and agrees that (a) Purchaser shall not delay payments due to Seller for completed Extras if any review, assessment, and related custom Improvements or Extras are incomplete due to inclement weather, unavailability of materials, or other factors beyond the control of Seller, and (b) Improvements and Extras shall not be deemed "incomplete" when such items are otherwise complete except for routine "punch-list" minor repairs.

4. The Purchase Agreement shall remain in full force and effect except as expressly modified hereby.

WITNESS the following signatures:

SUBSCRIBERS:

DEBBIE E. BROWN

DEBBIE E. BROWN

SELLERS:



DAVID N. TALTON



AMY EDADINE TALTON

INSURANCE IS PROVIDED BY THE COMPANY DESIGNATED BELOW
(A stock insurance company, herein called the company)

DAILY REPORT COPY ONLY - NOT VALID WHEN ATTACHED TO POLICY

POLICY NUMBER

BH0(94) 50 62 04 81



The Ohio Casualty Insurance Company

136 North Third Street, Hamilton, Ohio 45025



UND. NO.
3

ZIP CODE AT LOCATION OF RISK
22181

AUDIT

COMM.

UND.
JPH

INSPECTION

COMMERCIAL INLAND MARINE

POLICY DECLARATIONS

NAMED INSURED & MAILING ADDRESS		AGENT'S NAME & ADDRESS 19 04 2292	
Talton Brothers Construction Co. 9819 Courthouse Road Vienna, Virginia 22181		R & A Insurance Agency, Inc. 10010 Colesville Road, Suite A Silver Spring, Maryland 20901	
INSURED IS Individual		PREVIOUS POLICY NO. BH0(93) 00 33 43 09	
POLICY PERIOD: This policy is in force from 01/01/93 to 01/01/94 at 12:01 A.M. standard time at your mailing address shown above		INSURED'S BUSINESS Carpentry	
In return for the payment of the premium, and subject to all the terms of this policy, we agree with you to provide the insurance as stated in this policy.			
These Declarations, together with the Common Policy Conditions, and the Commercial Inland Marine Coverage Part (which consists of Coverage Forms and other applicable forms and endorsements, if any, issued to form a part of it) complete this policy.			

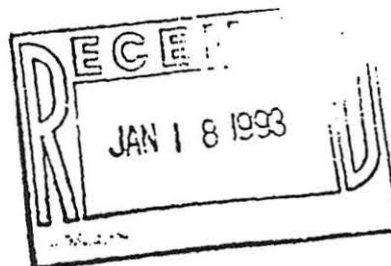
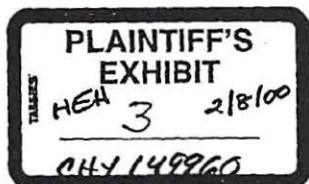
Forms and endorsements attached to this policy at time of issue:

TL 0017 11 85, CM 0001 10 91, CM 7405 01 86, TL 0022 05 87, CM 7551 06 86,
CM 7540 06 86, CM 7580 06 86, CM 7650 01 86, CM 7410 01 86, CM 7411 09 90,
CM 7543 01 86, CM 7418 04 87, CM 7419 06 86, CM 7520 01 86

Buildings Risk

Total Prepaid Premium \$ 5.774
Premium Payable Now \$ (5.774)
Premium Payable at Each Anniversary \$

1-12-93



Issue Date 01/14/93 At Baltimore Branch Office

By _____
Authorized Representative



BM0(94) 50 62 04 81

COMMERCIAL INLAND MARINE

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LOSS PAYABLE PROVISIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL INLAND MARINE COVERAGE PART

LOSS PAYABLE

For covered property in which both you and a Loss Payee shown below have an insurable interest, we will:

1. Adjust losses with you; and
2. Pay any claim for "loss" or damage jointly to you and the Loss Payee, as interests may appear.

SCHEDULE

Item No.	Description	Loss Payee (Name and Address)
	9819 Courthouse Road Vienna, VA 22181 Lot. #6 Loc. #1	Virginia First Savings ✓ Bank, FSB P O Box 2009 Petersburg, VA 23804
	9819 Courthouse Road Vienna, VA 22181 Lot #37 Loc. #1	
	9819 Courthouse Road Vienna, VA 22181 Lot #7 Loc. #1	
	9819 Courthouse Road Vienna, VA 22181 Lot #4 Loc #1	



BM0(94) 50 62 04 81

COMMERCIAL INLAND MARINE

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LOSS PAYABLE PROVISIONS

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COMMERCIAL INLAND MARINE COVERAGE PART

LOSS PAYABLE

For covered property in which both you and a Loss Payee shown below have an insurable interest, we will:

1. Adjust losses with you; and
2. Pay any claim for "loss" or damage jointly to you and the Loss Payee, as interests may appear.

SCHEDULE

Item No.

Description

Loss Payee
(Name and Address)

Builders Risk
9819 Courthouse Road
Vienna, VA 22181
Lot. #3 Loc. #1

First Virginia Savings ✓
Bank, FSB
c/o Southern Atlantic Mortg
1380 Devils Reach Road
Woodbridge, VA 22194



BM0(94) 50 62 04 81

COMMERCIAL INLAND MARINE

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LOSS PAYABLE PROVISIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL INLAND MARINE COVERAGE PART

LOSS PAYABLE

For covered property in which both you and a Loss Payee shown below have an insurable interest, we will:

1. Adjust losses with you; and
2. Pay any claim for "loss" or damage jointly to you and the Loss Payee, as interests may appear.

SCHEDULE

Item No.	Description	Loss Payee (Name and Address)
4	1986 John Deere 450 Track Loader S# 376260T	Crestar Bank ✓ P O Box 980 Newport News, VA 23606

The Ohio Casualty Group of Insurance Companies

NAME OF COMPANY	Ohio Casualty Insurance Company	POLICY NO. BMO(94) 50 62 04 81
NAMED INSURED	Talton Brothers Construction Co.	EFFECTIVE DATE 01/01/93

COMMERCIAL INLAND MARINE DECLARATIONS BUILDER'S RISK COVERAGE

Premium for this Coverage.....	\$ 4,340.
Minimum Earned Premium.....	\$ 100.
Amount of Deductible.....	\$ 500.

Total Amount of Insurance for this Coverage

1. Any One Loss or Disaster.....	\$ 300,000.
2. Any One Storage Location.....	\$
3. In Transit.....	\$

Schedule of Locations

Address

Provisional Amount of Insurance

OFF 5/17/93	1.	9819 Courthouse Road, Vienna, VA 22181 (Lot #3, Loc. #1)	\$ 300,000. ✓
OFF 8/10/93	2.	9819 Courthouse Road, Vienna, VA 22181 (Lot #5, Loc. #1)	\$ 275,000. ✓
OFF 5/14/93	3.	9819 Courthouse Road, Vienna, VA 22181 (Lot #37, Loc. #1) See Endorsement	\$ 220,000. ✓
OFF 4/18/93	4.	9819 Courthouse Road, Vienna, VA 22181 (Lot #7, Loc. #1) See Endorsement	\$ 275,000. ✓
5/14/93	5.	9819 Courthouse Road, Vienna, VA 22181 (Lot #4, Loc. #1)	275,000. ✓
		Completed Value	\$ 6,000
	6.	" " " " (Lot #9, Loc. #1) See Endorsement	525,000

This section applies only if rates and premiums are shown below and if the Builder's Risk Completed Value Reporting Endorsement, CM 75 21, is attached to this policy.

Monthly Rate per \$100 of Amounts Reported.....	\$
Deposit Premium.....	\$

Reporting Period: Monthly 50,000
 ADD: LOT 7 - 575,000 See Endorsement
 LOT 34 - 575,000.

ADD 10-27 Lot 33 610,000 See Endorsement



The Ohio Casualty Group of Insurance Companies

NAME OF COMPANY Ohio Casualty Insurance Company

POLICY NO. BPO(94) 50 62 04 81

NAMED INSURED Talton Brothers Construction Co.

EFFECTIVE DATE 01/01/93

COMMERCIAL INLAND MARINE DECLARATIONS COMPUTER EQUIPMENT COVERAGE

Premium for this Coverage..... \$ 38.
Amount of Deductible..... \$ 250.

The deductible for Breakdown Coverage, Endorsement CM 75 41,
if made a part of this policy, is..... \$ 2,500.

Locations	Amount of Insurance
1. <u>9819 Courthouse Road, Vienna, Virginia 22181</u>	\$ <u>7,500.</u> ✓
2. _____	\$ _____
3. _____	\$ _____

Schedule of Equipment

<u>Loc. No.</u>	<u>Description</u>	<u>Serial No.</u>	<u>Amount of Insurance</u>
1	AT & T Panasonic Phone System	PC6300	\$ 7,500.

Catastrophe Limit..... \$ 10,500.

Extension of Coverage

If an amount of insurance is shown below, the amount of insurance which applies to data and media and/or extra expense in Section B, Extension of Coverage, Form CM 75 40, is changed to the amount scheduled:

<u>Loc. No</u>	<u>Data and Media</u>	<u>Extra Expense</u>
1.		
2.		
3.		



The Ohio Casualty Group of Insurance Companies

NAME OF COMPANY Ohio Casualty Insurance Company

POLICY NO. BH0(94) 50 62 04 81

NAMED INSURED Talton Brothers Construction Co.

COMMERCIAL
INLAND MARINE
SCHEDULE ENDORSEMENT
CONTRACTORS EQUIPMENT COVERAGE FORM CONTINUED

Schedule of Items Covered

Amount of Insurance

- | | |
|---|----------------------------------|
| 1. 1984 John Deere Tractor MDL 1050 W/Attachments S# 006840 | \$ 16,000. ✓ |
| 2. 1984 Laser Transit Model 942 S# 2234/20249 | 5,000. — |
| 3. 1986 Case Loader Backhoe 580E S# 17030493 | See Endorsement 15,000 41,500. ✓ |
| 4. 1986 John Deere 450 Track Loader S# 376260T | 10,600 20,000. ✓ |

455 John Deere Tractor S# T0455GA787683 57,800
Add'l Insd Gardiner Equip Co, Inc.
PO Box 37
Waldorf, MD 20601
See Endorsement



The Ohio Casualty Group of Insurance Companies

NAME OF COMPANY Ohio Casualty Insurance Company POLICY NO. BMO(94) 50 62 04 81
NAMED INSURED Talton Brothers Construction Co. EFFECTIVE DATE 01/01/93

CONTRACTOR'S INLAND MARINE DECLARATIONS

CONTRACTOR'S EQUIPMENT COVERAGE FORM

- ☐ Named Peril Coverage
☒ Broad Coverage

Premium for this Coverage \$ 743.
Amount of Deductible \$ 250.
Total Amount of Insurance for this Coverage \$ 82,500.
Schedule of Items Covered Amount of Insurance

See Attached CM 7410 01 86

Equipment Leased or Rented From Others (Short Term; Auditable)

1. Amount of Insurance \$
2. Minimum Earned Premium \$
3. Rate per \$100 of Lease/Rent Expense \$

INSTALLATION COVERAGE FORM

This Coverage Is Auditable

Rate Per \$100 of Gross Receipts \$.12
Estimated Receipts \$ 600,000.
Deposit Premium for this Coverage \$ 540.
Minimum Earned Premium \$ 540.
Amount of Deductible \$ 500.
Amount of Insurance for this Coverage
1. Any One Installation Site \$ 10,000.
2. In Transit \$ 10,000.
3. Any Loss or Disaster \$ 10,000.

Type of Property Covered

This policy covers materials, supplies, machinery, equipment and fixtures property of the insured or similar property of others for which the insured has assumed liability and which the insured has contracted to install or erect, excluding labor costs, usual to insured's operations as a carpenter.

TOOL COVERAGE FORM

Premium for this Coverage \$ 113.
Amount of Deductible \$ 250.
Total Amount of Insurance for this Coverage \$ 5,000.
Limit per Tool \$ 500.
Limit per Vehicle \$ 1,250.
Schedule of Items Covered Amount of Insurance

COMMON POLICY CONDITIONS

All Coverage Parts included in this policy are subject to the following conditions.

A. CANCELLATION

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
 - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed, proof of mailing will be sufficient proof of notice.

B. CHANGES

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

C. EXAMINATION OF YOUR BOOKS AND RECORDS

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

D. INSPECTIONS AND SURVEYS

We have the right but are not obligated to:

1. Make inspections and surveys at any time;
2. Give you reports on the conditions we find; and
3. Recommend changes.

Any inspections, surveys, reports or recommendations relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

1. Are safe or healthful; or
2. Comply with laws, regulations, codes or standards.

This condition applies not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

E. PREMIUMS

The first Named Insured shown in the Declarations:

1. Is responsible for the payment of all premiums; and
2. Will be the payee for any return premiums we pay.

F. TRANSFER OF YOUR RIGHTS AND DUTIES UNDER THIS POLICY

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

COMMERCIAL INLAND MARINE CONDITIONS

The following conditions apply in addition to the Common Policy Conditions and applicable Additional Conditions in Commercial Inland Marine Coverage Forms:

LOSS CONDITIONS

A. ABANDONMENT

There can be no abandonment of any property to us.

B. APPRAISAL

If we and you disagree on the value of the property or the amount of "loss," either may make written demand for an appraisal of the "loss." In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of "loss." If they fail to agree, they will submit their difference to the umpire. A decision agreed to by any two will be binding. Each party will:

1. Pay its chosen appraiser; and
2. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

C. DUTIES IN THE EVENT OF LOSS

You must see that the following are done in the event of "loss" to Covered Property:

1. Notify the police if a law may have been broken.
2. Give us prompt notice of the "loss." Include a description of the property involved.
3. As soon as possible, give us a description of how, when and where the "loss" occurred.
4. Take all reasonable steps to protect the Covered Property from further damage. If feasible, set the damaged property aside and in the best possible order for examination. Also keep a record of your expenses, for consideration in the settlement of the claim.

5. Make no statement that will assume any obligation or admit any liability, for any "loss" for which we may be liable, without our consent.

6. Permit us to inspect the property and records proving "loss."

7. If requested, permit us to question you under oath, at such times as may be reasonably required, about any matter relating to this insurance or your claim, including your books and records. In such event, your answers must be signed.

8. Send us a signed, sworn statement of "loss" containing the information we request to settle the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.

9. Promptly send us any legal papers or notices received concerning the "loss."

10. Cooperate with us in the investigation or settlement of the claim.

D. INSURANCE UNDER TWO OR MORE COVERAGES

If two or more of this policy's coverages apply to the same "loss," we will not pay more than the actual amount of the "loss."

E. LOSS PAYMENT

We will pay or make good any "loss" covered under this Coverage Part within 30 days after:

1. We reach agreement with you;
2. The entry of final judgment; or
3. The filing of an appraisal award.

We will not be liable for any part of a "loss" that has been paid or made good by others.

F. OTHER INSURANCE

If you have other insurance covering the same "loss" as the insurance under this Coverage Part we will pay only the excess over what you should have received from the other insurance. We will pay the excess whether you can collect on the other insurance or not.

G. PAIR, SETS OR PARTS

1. Pair or Set. In case of "loss" to any part of a pair or set we may:
 - a. Repair or replace any part to restore the pair or set to its value before the "loss"; or
 - b. Pay the difference between the value of the pair or set before and after the "loss."
2. Parts. In case of "loss" to any part of Covered Property consisting of several parts when complete, we will only pay for the value of the lost or damaged part.

H. PRIVILEGE TO ADJUST WITH OWNER

In the event of "loss" involving property of others in your care, custody or control, we have the right to:

1. Settle the "loss" with the owners of the property. A receipt for payment from the owners of that property will satisfy any claim of yours.
2. Provide a defense for legal proceedings brought against you. If provided, the expense of this defense will be at our cost and will not reduce the applicable Limit of Insurance under this insurance.

I. RECOVERIES

Any recovery or salvage on a "loss" will accrue entirely to our benefit until the sum paid by us has been made up.

J. REINSTATEMENT OF LIMIT AFTER LOSS

The Limit of Insurance will not be reduced by the payment of any claim, except for total "loss" of a scheduled item, in which event we will refund the unearned premium on that item.

K. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If any person or organization to or for whom we make payment under this insurance has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "loss" to impair them.

GENERAL CONDITIONS

A. CONCEALMENT, MISREPRESENTATION OR FRAUD

This Coverage Part is void in any case of fraud, intentional concealment or misrepresentation of a material fact, by you or any other insured, at any time, concerning:

1. This Coverage Part;
2. The Covered Property;
3. Your interest in the Covered Property; or
4. A claim under this Coverage Part.

B. LEGAL ACTION AGAINST US

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all the terms of this Coverage Part; and
2. The action is brought within 2 years after you first have knowledge of the "loss."

C. NO BENEFIT TO BAILEE

No person or organization, other than you, having custody of Covered Property, will benefit from this insurance.

D. POLICY PERIOD

We cover "loss" commencing during the policy period shown in the Declarations.

E. VALUATION

The value of property will be the least of the following amounts:

1. The actual cash value of that property;
2. The cost of reasonably restoring that property to its condition immediately before "loss"; or
3. The cost of replacing that property with substantially identical property.

In the event of "loss," the value of property will be determined as of the time of "loss."

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EFFECTIVE TIME CHANGES - REPLACEMENT OF 12 NOON

This endorsement modifies the COMMON POLICY DECLARATIONS.

To the extent that coverage in this policy replaces coverage in other policies terminating noon standard time on the inception date of this policy, coverage under this policy shall not become effective until such other coverage has terminated.

QUICK REFERENCE

COMMERCIAL INLAND MARINE COVERAGE PART

READ YOUR POLICY CAREFULLY

DECLARATIONS PAGE

Named Insured and Mailing Address
Policy Period
Description of Business and Location.
Coverages and Limits of Insurance

COVERAGE FORM(S)**A. COVERAGE**

1. Covered Property
2. Property Not Covered
3. Covered Causes of Loss
4. Additional Coverage — Collapse
5. Coverage Extensions (If Applicable)

B. EXCLUSIONS

- Earthquake (If Applicable)
- Governmental Action
- Nuclear Hazard
- War and Military Action
- Water (If Applicable)
- Other Exclusions

C. LIMITS OF INSURANCE**D. DEDUCTIBLE (IF APPLICABLE)****E. ADDITIONAL CONDITIONS****F. DEFINITIONS****ENDORSEMENTS (IF APPLICABLE)****COMMERCIAL INLAND MARINE CONDITIONS****LOSS CONDITIONS**

- A. Abandonment
- B. Appraisal
- C. Duties in the Event of Loss
- D. Insurance Under Two or More Coverages
- E. Loss Payment
- F. Other Insurance
- G. Pair, Sets or Parts
- H. Privilege to Adjust With Owner
- I. Recoveries
- J. Reinstatement of Limit After Loss
- K. Transfer of Rights of Recovery Against Others to Us

GENERAL CONDITIONS

- A. Concealment, Misrepresentation or Fraud
- B. Legal Action Against Us
- C. No Benefit to Bailee
- D. Policy Period
- E. Valuation

COMMON POLICY CONDITIONS

- A. Cancellation
- B. Changes
- C. Examination of Your Books and Records
- D. Inspections and Surveys
- E. Premiums
- F. Transfer of Your Rights and Duties Under This Policy

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This Inland Marine coverage is subject to the terms shown below.
The Commercial Inland Marine Conditions also apply.

CONTRACTOR'S EQUIPMENT BROAD COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy, the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we," "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meanings. Refer to Section F—DEFINITIONS.

A. COVERAGE

We will pay for "loss" to Covered Property from any of the Covered Causes of Loss.

1. **COVERED PROPERTY**, as used in this Coverage Form, means:

- Your contractor's equipment as scheduled.
- Similar property of others that is in your care, custody or control as scheduled.
- Optional coverage. This coverage, when indicated in the Declarations, only applies to unscheduled equipment in your care that has been leased or rented from others. The limit shown in the Declarations for such equipment is the most we will pay for "loss" in any one event.

Within 30 days after the end of each policy year, you must report to us the actual rental fees you have paid or owe on this equipment for the past 12 months. We will figure your actual premium on the basis of the report by multiplying the rate times each \$100 of rental fees. If it is more than you have already paid, you will owe us the difference. If it is less, you will get a return premium. But you will not pay less than any minimum annual premium shown in the Declarations.

- Newly acquired equipment. We will cover direct "loss" or damage for up to 30 days caused by any insured peril to newly acquired equipment you own. We will pay the actual cash value of the equipment up to 20% of the total limit of your coverage under this policy to a maximum of \$25,000.

This coverage ends 30 days after you acquire the new equipment. It will end sooner if you report the newly acquired equipment's value to us to obtain permanent coverage. You then agree to pay an additional premium on it for the rest of the policy period.

2. PROPERTY NOT COVERED

- Automobiles or similar vehicles.
- Tires or tubes. But we will cover "loss" or damage to such property if it is caused by fire, windstorm or theft or if it happens at the same time as another "loss" or damage covered under this agreement.
- Tents or tarpaulins.

- Plans, blueprints, designs or specifications.
- Marine equipment designed to be used on rivers, lakes or harbors.
- Underground property or any property while located underground.
- Accounts, money, securities, evidences of debt, deeds or other valuable papers. Nor will we cover jewelry, precious stones or similar valuables.
- Contraband, or property in the course of illegal transportation or trade.

3. COVERED CAUSES OF LOSS

Covered Causes of Loss means RISKS OF DIRECT PHYSICAL "LOSS" to Covered Property except those causes of "loss" listed in the Exclusions.

B. EXCLUSIONS

- We will not pay for a "loss" caused directly or indirectly by any of the following. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss."

a. GOVERNMENTAL ACTION

Seizure or destruction of property by order of governmental authority.

But we will pay for acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread if the fire would be covered under this Coverage Form.

b. NUCLEAR HAZARD

- (1) Any weapon employing atomic fission or fusion, whether in time of peace or war; or
- (2) Nuclear reaction or radiation, or radioactive contamination, however caused.

But we will pay for direct "loss" caused by resulting fire if the fire would be covered under this Coverage Form.

c. WAR AND MILITARY ACTION

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

2. We will not pay for a "loss" caused by or resulting from any of the following:

- a. Unexplained disappearance.
- b. Shortage found upon taking inventory.
- c. Dishonest acts by:
 - (1) You;
 - (2) Anyone else with an interest in the property;
 - (3) Your or their employees or authorized representatives; or
 - (4) Anyone entrusted with the property, whether in collusion with others or occurring during the hours of employment.

This exclusion doesn't apply to a carrier for hire.

- d. Processing or work upon the property.
But we will pay for direct "loss" caused by resulting fire or explosion, if these causes of "loss" would be covered under this Coverage Form.
- e. Voluntary parting with any property by you or anyone entrusted with the property if induced to do so by any fraudulent scheme, trick, device or false pretense.
- f. Unauthorized instructions to transfer property to any person or to any place.
- g. Wear and tear, any quality in the property that causes it to damage or destroy itself, hidden or latent defect, gradual deterioration, depreciation; insects, vermin, rodents; corrosion, rust, dampness, cold or heat.
- h. Mechanical breakdown or electrical damage to electrical appliances or devices including wiring unless the loss is caused by lightning. But if fire results, we will pay for losses caused directly by the fire.
- i. Overload or weight of a load exceeding the registered lifting or supporting capacity of any machine.
- j. Equipment on water. We won't cover "loss," except by fire, to insured property while it's on water.

C. LIMITS OF INSURANCE

The most we will pay for "loss" in any one occurrence is the applicable Limits of Insurance shown in the Declarations.

D. DEDUCTIBLE

We will not pay for "loss" in any one occurrence until the amount of the adjusted "loss" before applying the applicable Limits of Insurance exceeds the Deductible shown in the Declarations. We will then pay the amount of the adjusted "loss" in excess of the Deductible, up to the applicable Limits of Insurance.

E. ADDITIONAL CONDITIONS

The following conditions apply in addition to the Commercial Inland Marine Conditions and the Common Policy Conditions:

1. COVERAGE TERRITORY

We cover property wherever located within:

- a. The continental United States of America; and
- b. Canada.

2. VALUATION

General Condition E. Valuation in the Commercial Inland Marine Conditions is replaced by the following:

a. Property

The value of property will be the least of the following amounts:

- (1) The actual cash value of that property;
- (2) The cost of reasonably restoring that property to its condition immediately before "loss"; or
- (3) The cost of replacing that property with substantially identical property.

b. Property of Others

The value of property in your care, custody or control will be the lesser of:

- (1) The amount for which you are liable; or
- (2) Actual cash value.

In the event of "loss," the value of property will be determined as of the time of "loss."

3. COINSURANCE

All Covered Property, except property in transit, must be insured for at least 100% of its total value as of the time of "loss" or you will incur a penalty.

The penalty is that we will pay only the proportion of any "loss" that the Limits of Insurance shown in the Declarations for all Covered Property at all locations bears to 100% of the total value of all property at all locations as of the time of "loss."

F. DEFINITIONS

"Loss" means accidental loss or damage.



This Inland Marine coverage is subject to the terms shown below.
The Commercial Inland Marine Conditions also apply.

COMPUTER EQUIPMENT COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy, the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we," "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meanings. Refer to Section F DEFINITIONS.

A. COVERAGE

We will pay for "loss" to Covered Property from a Covered Cause of Loss.

1. COVERED PROPERTY, as used in this Coverage Form, means:

Data processing equipment which is scheduled in the Declarations. The equipment must be your property or property of others in your care.

2. PROPERTY NOT COVERED

- a. Contraband, or property in the course of illegal transportation or trade.
- b. Accounts, bills, money, securities, evidences of debt, valuable papers, records, abstracts, deeds, manuscripts or other documents. However, this exclusion doesn't apply to media.

3. COVERED CAUSES OF LOSS

Covered Causes of "Loss" means RISKS OF DIRECT PHYSICAL LOSS to Covered Property except those causes of "loss" listed in the Exclusions.

B. EXTENSION OF COVERAGE

If a covered "loss" occurs, we'll also pay up to 20% of the amount of your scheduled equipment or \$25,000, whichever is less for each of the following:

1. DATA AND MEDIA

Data means information stored on media and includes facts, instructions, and programs converted to a form usable in a data processing operation. Media means material on which data is recorded, such as magnetic discs, diskettes or tapes, disc packs, paper tapes or cards used in computer processing units. The total for data and media combined can't exceed 20% of the amount of scheduled equipment or \$25,000, whichever is less.

2. EXTRA EXPENSE

Extra Expense means any necessary operating expenses over and above your normal cost of operating your data processing operation had no "loss" occurred. We'll pay these necessary expenses from the date of "loss" until:

- a. The equipment is repaired or replaced and normal operation resumes;
- b. The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
- c. The limit of this extension of coverage is used.

You agree to resume normal operation, either partial or complete, as soon as you can following any "loss."

C. EXCLUSIONS

- 1. We won't pay for a "loss" caused directly or indirectly by any of the following. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss."**

a. GOVERNMENTAL ACTION

Seizure or destruction of property by order of governmental authority.

But we will pay for acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread if the fire would be covered under this Coverage Form.

b. NUCLEAR HAZARD

- (1) Any weapon employing atomic fission or fusion, whether in time of peace or war; or
- (2) Nuclear reaction or radiation, or radioactive contamination, however caused. We will pay for direct "loss" caused by resulting fire if the fire would be covered under this Coverage Form.

c. WAR AND MILITARY ACTION

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

2. We won't pay for a "loss" caused by or resulting from any of the following:

- a. Delay, or loss of market.
- b. Dishonest acts by:
 - (1) You;
 - (2) Anyone else with an interest in the property;
 - (3) Your or their employees or authorized representatives; or
 - (4) Anyone entrusted with the property, whether in collusion with others or occurring during the hours of employment.

This exclusion doesn't apply to a carrier for hire.

- c. (1) Any earth movement such as an earthquake, landslide, or earth sinking, rising or shifting; but we will pay for direct loss caused by resulting fire or explosion, if these would be covered under this form.
- (2) Volcanic eruption, explosion or effusion; but we will pay for direct loss caused by resulting fire, if the fire would be covered under this form.

This exclusion doesn't apply to property in transit.

- d. Flood, surface water, waves, tides, tidal waves, overflow of any body of water or its spray, all whether driven by wind or not.
- e. Wear and tear; hidden or latent defect or any quality in property that causes it to damage or destroy itself; gradual deterioration; insects, vermin, rodents; corrosion, rust, mold, rot, dampness or dryness, cold or heat.
- f. Mechanical breakdown, machinery malfunction or media failure while the media is being run through the data processing equipment unless fire results. We'll pay for "loss" caused by the fire.
- g. Interruption of power supply, power surge, blackout or brownout unless caused by lightning.
But if fire or explosion results we'll pay for "loss" caused directly by the fire or explosion.
- h. Electrical or magnetic injury, disturbance or erasure of media, unless caused by lightning.
- i. Error or omission in programming.
- j. Process or work upon the property.

But we'll pay for direct "loss" caused by resulting fire or explosion, if these causes of "loss" would be covered under this Coverage Form.

D. LIMITS OF INSURANCE

1. LIMITS OF INSURANCE

The most we will pay for "loss" to computer equipment in any one occurrence is the applicable Limit of Insurance scheduled in the Declarations. The most we will pay for "loss" to computer equipment, data and media, and for extra expense, all combined, in any one occurrence is the Catastrophe Limit shown in the Declarations.

2. VALUE OF PROPERTY

a. Equipment

The value of the equipment is the actual cash value at the time and place of the "loss." However, we won't pay more than the actual cash value, or the cost of repairing or replacing the property with a similar kind and quality, whichever is less. But we'll subtract the deductible first.

b. Data and Media

We won't pay more than the actual reproduction of the data. If you don't replace or reproduce the data, the most we'll pay is the cost of the blank tapes or disks.

3. DEDUCTIBLE

We won't pay for "loss" in any one occurrence until the amount of the adjusted "loss" before applying the applicable Limits of Insurance exceeds the Deductible shown in the Declarations. We will then pay the amount of the adjusted "loss" in excess of the Deductible, up to the applicable Limit of Insurance.

4. COINSURANCE

All covered property, except property in transit, must be insured for 100% of its total value as of the time of "loss" or you will incur a penalty.

The penalty is that we will pay only the proportion of any "loss" that the Limit of Insurance shown in the Declarations for all Covered Property at all locations bears to 100% of the total value of all property at all locations as of the time of "loss."

E. ADDITIONAL CONDITIONS

The following conditions apply in addition to the Commercial Inland Marine Conditions and the Common Policy Conditions:

COVERAGE TERRITORY

We'll cover your scheduled equipment while located on your premises scheduled in the Declarations. We'll also cover in transit from one location to another, or located elsewhere temporarily for up to 45 days.

F. DEFINITIONS

"Loss" means accidental loss or damage.



This Inland Marine coverage is subject to the terms shown below.
The Commercial Inland Marine Conditions also apply.

INSTALLATION COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy, the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we," "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meanings. Refer to Section G DEFINITIONS.

A. COVERAGE

We will pay for "loss" to Covered Property from any of the Covered Causes of Loss.

1. COVERED PROPERTY, as used in this Coverage Form, means:

Property intended for installation in connection with your occupation as shown in the Declarations. This may be your property or the property of others for which you are legally liable.

2. PROPERTY NOT COVERED

- a. Contraband, or property in the course of illegal transportation or trade.
- b. Existing buildings or structures to which improvements, alterations, repairs or additions are being made.
- c. Machinery, tools or equipment that won't be a permanent part of the installation.
- d. Building materials, such as lumber, structural steel, bricks and mortar, after the materials become a physical part of the structure.
- e. Accounts, bills, deeds, currency, money, notes or securities.
- f. Property on premises you own, lease or operate unless it is specifically assigned and invoiced for a particular job.
- g. Watercraft or floating equipment, blueprints, specifications, automobiles, trucks, trailers, automotive parts or permanent buildings.

3. WHEN COVERAGE BEGINS AND ENDS

We cover from the time the property is at your risk, starting on or after the time this coverage begins; but we will not cover:

- a. After the owner or buyer accepts the property;
- b. When your interest ceases;
- c. When this policy expires or is cancelled; whichever occurs first.

4. COVERED CAUSES OF LOSS

Covered Causes of Loss means RISKS OF DIRECT PHYSICAL "LOSS" to Covered Property except those causes of "loss" listed in the Exclusions.

B. EXCLUSIONS

1. We won't pay for a "loss" caused directly or indirectly by any of the following. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss."

a. GOVERNMENTAL ACTION

Seizure or destruction of property by order of governmental authority.

But we will pay for acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread if the fire would be covered under this Coverage Form.

b. NUCLEAR HAZARD

- (1) Any weapon employing atomic fission or fusion, whether in time of peace or war; or
- (2) Nuclear reaction or radiation, or radioactive contamination, however caused. We will pay for direct "loss" caused by resulting fire if the fire would be covered under this Coverage Form.

c. WAR AND MILITARY ACTION

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

2. We won't pay for a "loss" caused by or resulting from any of the following:

- a. Delay or loss of market.
- b. Unexplained disappearance.
- c. Shortage found upon taking inventory.
- d. Dishonest acts by:
 - (1) You;
 - (2) Anyone else with an interest in the property;
 - (3) Your or their employees or authorized representatives; or
 - (4) Anyone entrusted with the property, whether in collusion with others or occurring during the hours of employment.

This exclusion doesn't apply to a carrier for hire.

e. Water damage by:

- (1) Water that backs up from any sewer or drain;
- (2) Water that seeps, leaks or flows from below the surface of the ground.

- f. Rain, snow, sleet, sand or dust to property in the open.

This exclusion doesn't apply to property in the custody of a carrier for hire.

- g. Testing, but we will pay for direct "loss" or damage caused by resulting fire or explosion.
- h. Defective materials, poor workmanship; error, omission or deficiency in designs, plans or specifications.

But we will pay for direct "loss" or damage caused by fire, lightning, wind, smoke, discharge from fire protection or building service equipment or explosion, if these causes of "loss" would be covered under this form.

- i. Wear and tear; hidden or latent defect or any quality in property that causes it to damage or destroy itself; gradual deterioration; insects, vermin, rodents; corrosion, rust, mold, rot; dampness or dryness, cold or heat.

- j. Mechanical breakdown, rupture or bursting caused by centrifugal force.

But if another "loss" that we insure results, we will pay for only the resulting "loss" or damage.

- k. Explosion, rupture or bursting of steam boilers, steam pipes, steam turbines or steam engines; but this exclusion applies only to "loss" or damage to the boiler, pipe, turbine or engine in which the "loss" occurred.

- l. Artificially generated current creating a short or other electrical disturbance.

But we will pay for direct "loss" caused by the resulting fire or explosion if these causes of "loss" would be covered under this form.

- m. The enforcement of any ordinance or law:

- (1) Regulating the construction, use or repair of any property; or
- (2) Requiring the tearing down of any property, including the cost of removing its debris.

- n. Settling, cracking, shrinkage or expansion of the covered property.

- o. Penalties for noncompletion or noncompliance with contract conditions.

- p. "Loss" or damage covered under any guarantee, warranty, or other expressed or implied obligation of any contractor, manufacturer or supplier. This exclusion applies whether or not such contractor, manufacturer or supplier is insured by this form.

C. LIMITS OF INSURANCE

The most we will pay for "loss" in any one occurrence is the applicable Limits of Insurance shown in the Declarations.

D. DEDUCTIBLE

We won't pay for "loss" in any one occurrence until the amount of the adjusted "loss" before applying the applicable Limits of Insurance exceeds the Deductible shown in the Declarations. We will then pay the amount of the adjusted "loss" in excess of the Deductible, up to the applicable Limit of Insurance.

E. COINSURANCE

All covered property, except property in transit, must be insured for 100% of its total value as of the time of "loss" or you will incur a penalty.

The penalty is that we will pay only the proportion of any "loss" that the limit of insurance at any construction premises bears to the projected full value of all property at that construction premises at date of completion.

F. ADDITIONAL CONDITIONS

The following conditions apply in addition to the Commercial Inland Marine Conditions and the Common Policy Conditions:

1. REPORTS AND RECORDS

You agree to keep accurate records of your business. These records should be maintained in a manner which will allow us to settle a "loss" accurately. Your gross receipts must be reported to us at the end of each policy period shown in the Declarations. You must report all receipts to us whether or not you've collected them. We will figure your actual premium by multiplying the rate shown in the Declarations times each \$100 of receipts. If it is more than you've already paid, you'll owe us the difference. If it is less, you will get a return premium. But, you will not pay less than the minimum annual premium shown in the Declarations, even if you cancel the policy.

We may examine and audit your books and records as they relate to this insurance at any time during the policy period and up to three years afterward.

2. VALUE OF PROPERTY

The value of the property is the actual cash value at the time and place of "loss" plus labor and other charges or expenses accrued. However, we won't pay more than actual cash value, or the cost of repairing or replacing the property with a similar kind and quality, whichever is less. We'll subtract the deductible first.

3. COVERAGE TERRITORY

We cover property wherever located within:

- a. The continental United States of America; and
- b. Canada.

G. DEFINITIONS

"Loss" means accidental loss or damage.



This Inland Marine coverage is subject to the terms shown below.
The Commercial Inland Marine Conditions also apply.

TOOL COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy, the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we," "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meanings. Refer to Section F—DEFINITIONS.

A. COVERAGE

We will pay for "loss" to Covered Property from any of the Covered Causes of Loss.

1. **COVERED PROPERTY**, as used in this Coverage Form, means:

Tools and carrying cases belonging to you that you use in your occupation.

2. **PROPERTY NOT COVERED**

Contraband, or property in the course of illegal transportation or trade.

3. **COVERED CAUSES OF LOSS**

Covered Causes of Loss means RISKS OF DIRECT PHYSICAL "LOSS" to Covered Property except those causes of "loss" listed in the Exclusions.

B. EXCLUSIONS

1. We will not pay for a "loss" caused directly or indirectly by any of the following. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss."

a. GOVERNMENTAL ACTION

Seizure or destruction of property by order of governmental authority.

But we will pay for acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread if the fire would be covered under this Coverage Form.

b. NUCLEAR HAZARD

- (1) Any weapon employing atomic fission or fusion, whether in time of peace or war; or
- (2) Nuclear reaction or radiation, or radioactive contamination, however caused.

But we will pay for direct "loss" caused by resulting fire if the fire would be covered under this Coverage Form.

c. WAR AND MILITARY ACTION

- (1) War, including undeclared or civil war;

- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

- (3) Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

2. We will not pay for a "loss" caused by or resulting from any of the following:

- a. Theft from any unattended vehicle unless at the time of the theft its windows, doors and compartments were closed and locked and there are visible signs that the theft was the result of forced entry.

But this exclusion does not apply to property in the custody of a carrier for hire.

- b. Unexplained disappearance.
- c. Shortage found upon taking inventory.
- d. Dishonest acts by:

- (1) You;
- (2) Anyone else with an interest in the property;
- (3) Your or their employees or authorized representatives; or
- (4) Anyone entrusted with the property, whether in collusion with others or occurring during the hours of employment.

This exclusion doesn't apply to a carrier for hire.

- e. Voluntary parting with any property by you or anyone entrusted with the property if induced to do so by any fraudulent scheme, trick, device or false pretense.
- f. Unauthorized instructions to transfer property to any person or to any place.
- g. Wear and tear, any quality in the property that causes it to damage or destroy itself, hidden or latent defect, gradual deterioration, depreciation; insects, vermin, rodents; corrosion, rust, dampness, cold or heat.
- k. Mechanical breakdown or electrical damage to electrical appliances or devices including wiring unless the "loss" is caused by lightning. But if fire results, we will pay for losses caused directly by the fire.



This Inland Marine coverage is subject to the terms shown below.
The Commercial Inland Marine Conditions also apply.

BUILDER'S RISK COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy, the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we," "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meanings. Refer to Section G DEFINITIONS.

A. COVERAGE

We will pay for "loss" to Covered Property from any of the Covered Causes of Loss.

1. COVERED PROPERTY, as used in this Coverage Form, means:

Property that will become a permanent part of buildings or structures that are shown in the Declarations. This may be your property or the property of others for which you are legally liable.

2. PROPERTY NOT COVERED

- a. Contraband, or property in the course of illegal transportation or trade.
- b. Existing buildings or structures to which improvements, alterations, repairs or additions are being made.
- c. Machinery, tools or equipment that won't be a permanent part of the structure.
- d. Property at locations not scheduled unless the property is specifically intended for installation at the location scheduled in the Declarations.
- e. Trees, shrubbery, lawns or plants.
- f. Plans, designs, blueprints, specifications, mechanical drawings or similar property.
- g. Glass, unless "loss" is caused by fire, lightning, wind, hail, aircraft, vehicles, riot or discharge from fire protection equipment.
- h. Property while on aircraft or watercraft. However, we will cover property on ferries and railroad carfloats.

3. WHEN COVERAGE BEGINS AND ENDS

We cover from the time the property is at your risk starting on or after the time this coverage begins, but we will not cover:

- a. After the owner or buyer accepts the property;
- b. When your interest ceases;
- c. Beyond 30 days after completion of the project;
- d. When each building or structure is:
 - (1) Occupied in whole or in part; or
 - (2) Put to its intended use;

- e. When the property is leased or rented to others;
 - f. When you abandon the construction site with no intention to complete it; or
 - g. when this policy expires or is cancelled;
- whichever occurs first.

4. COVERED CAUSES OF LOSS

Covered Causes of Loss means RISKS OF DIRECT PHYSICAL "LOSS" to Covered Property except those causes of "loss" listed in the Exclusions.

B. EXCLUSIONS

1. We won't pay for a "loss" caused directly or indirectly by any of the following. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss."

a. GOVERNMENTAL ACTION

Seizure or destruction of property by order of governmental authority. We will pay for acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread if the fire would be covered under this Coverage Form.

b. NUCLEAR HAZARD

- (1) Any weapon employing atomic fission or fusion, whether in time of peace or war; or
- (2) Nuclear reaction or radiation, or radioactive contamination, however caused. We will pay for direct "loss" caused by resulting fire if the fire would be covered under this Coverage Form.

c. WAR AND MILITARY ACTION

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

d. EARTHQUAKE

- (1) Any earth movement such as an earthquake, landslide, or earth sinking, rising or shifting; but we will pay for direct loss caused by resulting fire or explosion, if these would be covered under this form.
- (2) Volcanic eruption, explosion or effusion; but we will pay for direct loss caused by resulting fire, if the fire would be covered under this form.

Volcanic action means direct loss or damage resulting from the eruption of a volcano when the loss or damage is caused by:

- (a) Airborne volcanic blast or airborne shock waves;
- (b) Ash, dust or particulate matter; or
- (c) Lava flow.

All volcanic eruptions that occur within any 72-hour period will constitute a single occurrence.

Volcanic action does not include the cost to remove ash, dust or particulate matter that does not cause direct physical loss or damage to the described property.

This exclusion doesn't apply to property in transit.

e. WATER

- (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water or its spray, all whether driven by wind or not;
- (2) Mudslide or mudflow;
- (3) Water that backs up from any sewer or drain;
- (4) Water that seeps, leaks or flows from below the surface of the ground; or
- (5) Any release of water impounded by a dam.

But we will pay for direct "loss" or damage caused by resulting fire, explosion or theft, if these would be covered under this form.

This exclusion doesn't apply to property in transit.

2. We won't pay for a "loss" caused by or resulting from any of the following:

- a. Delay, loss of use or loss of market.
- b. Unexplained disappearance.
- c. Shortage found upon taking inventory.
- d. Dishonest acts by:
 - (1) You;
 - (2) Anyone else with an interest in the property;
 - (3) Your or their employees or authorized representatives; or
 - (4) Anyone entrusted with the property, whether in collusion with others or occurring during the hours of employment.

This exclusion doesn't apply to a carrier for hire.

e. Voluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense;

- f. Rain, snow, sleet, sand or dust damage to property in the open.

This exclusion doesn't apply to property in the custody of a carrier for hire.

- g. Testing, but we will pay for direct "loss" or damage caused by resulting fire or explosion.
- h. Defective materials, poor workmanship; error, omission or deficiency in designs, plans or specifications.

But we will pay for direct "loss" or damage caused by fire, lightning, wind, smoke, discharge from fire

protection or building service equipment or explosion, if these causes of loss would be covered under this form.

- i. Wear and tear; hidden or latent defect or any quality in property that causes it to damage or destroy itself; gradual deterioration; insects, vermin, rodents; corrosion, rust, mold, rot, dampness or dryness, cold or heat.

- j. Release, discharge or dispersal of contaminants or pollutants.

- k. Mechanical breakdown, rupture or bursting caused by centrifugal force.

But if another "loss" that we insure results, we will pay for only the resulting "loss" or damage.

- l. Explosion, rupture or bursting of steam boilers, steam pipes, steam turbines or steam engines.

But this exclusion applies only to "loss" or damage to the boiler, pipe, turbine or engine in which the "loss" occurred.

- m. Artificially generated current creating a short or other electrical disturbance.

But we will pay for direct "loss" caused by resulting fire or explosion if these causes of "loss" would be covered under this form.

- n. The enforcement of any ordinance or law:

- (1) Regulating the construction, use or repair of any property; or
- (2) Requiring the tearing down of any property, including the cost of removing its debris.

- o. Settling, cracking, shrinkage or expansion of the covered property.

- p. Penalties for noncompletion or noncompliance with contract conditions.

- q. "Loss" or damage covered under any guarantee, warranty, or other expressed or implied obligation of any contractor, manufacturer or supplier. This exclusion applies whether or not such contractor, manufacturer or supplier is insured by this form.

C. LIMITS OF INSURANCE

- 1. The most we will pay for "loss" in any one occurrence is the applicable Limits of Insurance shown in the Declarations.
- 2. Provisional Amount. Your limit of coverage shown in the Declarations is provisional. At any time your coverage is in force the actual amount of coverage is that part of the provisional amount that the actual value of your property bears to the value at the date of completion, but your coverage will not exceed the provisional amount.

D. DEDUCTIBLE

We won't pay for "loss" in any one occurrence until the amount of the adjusted "loss" before applying the applicable Limits of Insurance exceeds the Deductible shown in the Declarations. We will then pay the amount of the adjusted "loss" in excess of the Deductible, up to the applicable Limits of Insurance.

E. COINSURANCE

All covered property, except property in transit, must be insured for 100% of its total completed value as of the time of "loss" or you will incur a penalty.

The penalty is that we will pay only the proportion of any "loss" that the limit of insurance at any construction premises bears to the projected full value of all property at that construction premises at date of completion.

F. ADDITIONAL CONDITIONS

The following conditions apply in addition to the Commercial Inland Marine Conditions and the Common Policy Conditions:

1. DEBRIS REMOVAL

If the insured property is damaged by a covered peril, we'll pay the cost of removing debris of the damaged property. The amount we'll pay for both "loss" to property and debris removal expenses combined won't be more than the applicable limit of coverage.

2. IMPAIRMENT OF RECOVERY RIGHTS

If any act or agreement of yours before or after loss impairs your right to recover from others, we won't cover the "loss"; nor will we cover any "loss" which you settle or compromise without our written consent.

3. CLAIMS AGAINST OTHERS

You will make claim promptly in writing against any other party who had custody of the covered property when the "loss" occurred.

4. RECORDS

We may examine and audit your books and records as they relate to this insurance at any time during the policy period and up to three years afterward.

5. COVERAGE TERRITORY

We cover property wherever located within:

- a. The continental United States of America; and
- b. Canada.

6. ASSIGNMENT

Your interest in this policy cannot be assigned without our written consent.

G. DEFINITIONS

"Loss" means accidental loss or damage.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.



COMMERCIAL INLAND MARINE CHANGE ENDORSEMENT

09-15-93 tr/JPH

COMPANY Ohio Casualty Ins. Co.	END. NO. 7	POLICY CHANGES EFFECTIVE 06-18-93	POLICY NUMBER B#0(94)50 62 04 81
NAMED INSURED Talton Brothers Construction Co.			AGENT'S NAME R & A Insurance Agcy. Inc
			AGENCY CODE 19 04 2292

CHANGES

This policy is changed as shown below:

- ☐ The name or address of the insured is changed as shown below.
☐ The description of property is changed to read as shown below.

The item(s) listed below are:

- ☐ Added to schedule.
☒ Deleted from schedule.

The amount of insurance is:

- ☐ increased by \$ _____
☐ decreased by \$ _____
 to a new policy total of \$ _____.

Delete from Builders Risk coverage form

Lot 7 Loc. #1 9819 Courthouse Road
 Vienna, VA 22181

CODER ikw INTL

SEP 21 1993

Due at Endorsement Effective Date		PREMIUM RECAPITULATION		
Premium adjustment if the Premium is payable in annual installments.		Additional Premium	Return Premium	
Date Due	Original Installments	Increase	Decrease	Revised Installments
05-18-93			634	
\$	\$	\$	\$	\$
\$	\$	\$	\$	\$
\$	\$	\$	\$	\$
\$	\$	\$	\$	\$
Total Premium to Policy Expiration		\$	\$	

All other terms and conditions of this policy remain unchanged.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.



COMMERCIAL INLAND MARINE CHANGE ENDORSEMENT

09-15-93 tr/JPH

COMPANY Ohio Casualty Ins. Co.	END. NO. 8	POLICY CHANGES EFFECTIVE 08-01-93	POLICY NUMBER BMO(94) 50 62 04 81
NAMED INSURED Talton Brothers Construction Co.			AGENT'S NAME R & A Insurance Agcy.!
			AGENCY CODE 19 04 2292

CHANGES

This policy is changed as shown below:

- ☐ The name or address of the insured is changed as shown below.
☐ The description of property is changed to read as shown below.

The item(s) listed below are:

- ☒ Added to schedule.
☐ Deleted from schedule.

The amount of insurance is:

- ☐ increased by \$ _____
☐ decreased by \$ _____
to a new policy total of \$ _____

9/29/93
 CODER

SEP 20 1993

K NICHOLS

Add to Builders Risk coverage form

9819 Courthouse Rd. Vienna, VA 22181
 Lot #7 Lot #1

Amount of Insurance \$ 575,000.

9819 Courthouse Rd. Vienna, VA 22181
 Lot #34 Lot #1

Amount of Insurance \$ 575,000.

Add Mortgagee for above
 Virginia First Savings Bank FSB
 PO Box 2009
 Petersburg, VA 23804

CODER K.W. INC

SEP 21 1993

Due at Endorsement Effective Date		PREMIUM RECAPITULATION		
Premium adjustment if the Premium is payable in annual installments.		Additional Premium	Return Premium	
08-01-93		1672		
Dates Due	Original Installments	Increase	Decrease	Revised Installments
\$	\$	\$	\$	\$
\$	\$	\$	\$	\$
\$	\$	\$	\$	\$
\$	\$	\$	\$	\$
Total Premium to Policy Expiration		\$	\$	

All other terms and conditions of this policy remain unchanged.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.



COMMERCIAL INLAND MARINE CHANGE ENDORSEMENT

H.O. - BALT.

11/12/93 dw/JPH

COMPANY Ohio Casualty Insurance Company	END. NO. 13	POLICY CHANGES EFFECTIVE 11/05/93	POLICY NUMBER BNO(94) 50 62 04 81
NAMED INSURED Talton Brothers Construction Co.			AGENT'S NAME R & A Insurance Agency Inc.
			AGENCY CODE 19 04 2292

CHANGES

This policy is changed as shown below:

- ☐ The name or address of the insured is changed as shown below.
☐ The description of property is changed to read as shown below.

DEC 3

CODER

NOV 19 1993

The item(s) listed below are:

- ☐ Added to schedule.
☐ Deleted from schedule.

V EMBRY

The amount of insurance is:

- ☐ increased by \$ _____
☐ decreased by \$ _____
to a new policy total of \$ _____

Increasing Lot #7 Loc. #1 9819 Courthouse Road, Vienna, VA 22181
Amount of Insurance \$ 650,000.

Add as Loss Payee/Additional Insured:

Steven & Mary Kitchens
9845 Palace Green Way
Vienna, VA 22181

CODER

INT.

NOV 23 1993

Due at Endorsement Effective Date		PREMIUM RECAPITULATION		
Premium adjustment if the Premium is payable in annual installments.		Additional Premium	Return Premium	
Date Due	Original Installments	Increase	Decrease	Revised Installments
11/05/93		35		
\$	\$	\$	\$	\$
\$	\$	\$	\$	\$
\$	\$	\$	\$	\$
\$	\$	\$	\$	\$
Total Premium to Policy Expiration		\$	\$	

All other terms and conditions of this policy remain unchanged.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.



COMMERCIAL INLAND MARINE CHANGE ENDORSEMENT

H.O. - BALT.

09/20/93 dw/JPH

COMPANY Ohio Casualty Insurance Company	END. NO. 10	POLICY CHANGES EFFECTIVE 03/20/93	POLICY NUMBER BMO(94) 50 62 04 81
NAMED INSURED Taiton Brothers Construction Co.			AGENT'S NAME R & A Insurance Agency, Inc.
			AGENCY CODE 19 04 2292

CHANGES

This policy is changed as shown below:

- ☐ The name or address of the insured is changed as shown below.
☐ The description of property is changed to read as shown below.

The item(s) listed below are:

- ☐ Added to schedule.
☐ Deleted from schedule.

The amount of insurance is:

- ☐ increased by \$ _____
☐ decreased by \$ _____
 to a new policy total of \$ _____

Delete from Builders Risk Coverage form:

9819 Courthouse Road
 Vienna, VA 22181
 Lot 6, Loc. #1

CODER

KW INIT.

OCT 05 1993

10/11/93
 J. MERRILL
 SEP 23 1993

CODER
 SEP 22 1993
 K NICHOLS

Due at Endorsement Effective Date

PREMIUM RECAPITULATION

Premium adjustment if the Premium is payable in annual installments.

09/20/93		Additional Premium		Return Premium	
Dates Due		Increase		Decrease	
Original Installments				Revised Installments	
\$		\$		\$	
\$		\$		\$	
\$		\$		\$	
\$		\$		\$	
Total Premium to Policy Expiration		\$		\$	

All other terms and conditions of this policy remain unchanged.

YOUR STATE FARM HOMEOWNERS EXTRA POLICY

FP-7155-4
(2/92)



INSURANCE
- YOUR LIABILITY
Personal Liability
Medical Payments
Liability Coverages
Includes:
Includes:
Includes cop

AND SECTION II - C
PROVISIONS

NOT INSURED
INS

PLAINTIFF'S
EXHIBIT

MS# 4 2/5/00

098841 AND

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Policy Period
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And also,

Includes copyrighted material of Insurance Services Office with its permission.

Copyright, Insurance Services Office, 1975, 1977.

Policy Number
46-BA-6044-2

DECLARATIONS PAGE



STATE FARM FIRE AND CASUALTY COMPANY
1500 STATE FARM BLVD, CHARLOTTESVILLE VA 22909-0001
A STOCK COMPANY WITH HOME OFFICES IN BLOOMINGTON, ILLINOIS

NAMED INSURED

KOZAK, JEROME J & GAIL E
9844 PALACE GREEN WAY
VIENNA VA 22181-6097

2476-F206 E

LOAN NO: 146-06-5304
MORTGAGEE:

VIRGINIA FIRST SAVINGS BK FSB
ITS SUCCESSORS OR ASSIGNS
ATIMA
1308 DEVILS REACH RD
WOODBIDGE VA 22192-2806

HOMEOWNERS POLICY - EXTRA FORM 5

Automatic Renewal - If the policy period is shown as 12 months, this policy will be renewed automatically subject to the premiums, rules and forms in effect for each succeeding policy period. If this policy is terminated we will give you and the Mortgagee/Lienholder written notice in compliance with the policy provisions or as required by law.

Policy Period: 12 MONTHS
Effective Date: 04/27/1993
Expiration Date: 04/27/1994

The policy period begins and ends at 12:01 AM standard time at the residence premises.

Location of Residence Premises
SAME AS MAILING ADDRESS

Coverages & Property		Limits of Liability	Inflation Coverage Index: 127.7
SECTION I			Deductibles - SECTION I
A	DWELLING	\$ 555,000	ALL LOSSES \$ 1,000
	DWELLING EXTENSION	\$ 55,500	
B	PERSONAL PROPERTY	\$ 416,250	
C	LOSS OF USE	ACTUAL LOSS SUSTAINED	
SECTION II			In case of loss under this policy, the deductibles will be applied per occurrence and will be deducted from the amount of the loss. Other deductibles may apply - refer to your policy.
L	Personal Liability (Each Occurrence)	\$ 500,000	
	Damage to Property of Others	\$ 500	
M	Medical Payments to Others (Each Person)	\$ 1,000	
Loss Settlement Provision (See Policy)			Policy Premium \$ 452.00
Forms, Options, & Endorsements			
EXTRA FORM 5 (EXTRA REPLACEMENT COST ON DWELLING AND REPLACEMENT COST ON CONTENTS)		FP-7155.4	
JEWELRY AND FURS \$2,500 EACH ARTICLE/\$5,000 AGGREGATE		OPTION JF	
VA AMENDATORY ENDORSEMENT		FE-7276.1	
BACK UP OF SEWER AND DRAINS		FE-7370.3	

Other limits and exclusions may apply - refer to your policy

PREPARED
FEB 07, 2000
AFP
FP-7001.5C

COUNTERSIGNED

2000

BY

AGENT

JAMES T MARRION
703-281-4188

Your policy consists of this page, any endorsements

Policy Number
46-BA-3419-5

DECLARATIONS PAGE

STATE FARM FIRE AND CASUALTY COMPANY
1500 STATE FARM BLVD, CHARLOTTESVILLE VA 22909-0001
A STOCK COMPANY WITH HOME OFFICES IN BLOOMINGTON, ILLINOIS



NAMED INSURED

2476-F206 E
KITCHEN, STEPHEN E & MARY S
9846 PALACE GREEN WAY
VIENNA VA 22181-6097

LOAN NO: 4080005827
MORTGAGEE:

CITICORP MORTGAGE INC
ITS SUCCESSORS AND/OR ASSIGNS
PO BOX 81300
ATLANTA GA 30366-1300

HOMEOWNERS POLICY - EXTRA FORM 5

Automatic Renewal - If the policy period is shown as 12 months, this policy will be renewed automatically subject to the premiums, rules and forms in effect for each succeeding policy period. If this policy is terminated we will give you and the Mortgagee/Lienholder written notice in compliance with the policy provisions or as required by law.

Policy Period: 12 MONTHS
Effective Date: 03/19/1993
Expiration Date: 03/19/1994

The policy period begins and ends at 12:01 AM standard time at the residence premises.

Location of Residence Premises
SAME AS MAILING ADDRESS

Coverages & Property		Limits of Liability	Inflation Coverage Index: 126.2
SECTION I			Deductibles - SECTION I
A	DWELLING	\$ 560,000	ALL LOSSES \$ 1,000
	DWELLING EXTENSION	\$ 56,000	
B	PERSONAL PROPERTY	\$ 420,000	
C	LOSS OF USE	ACTUAL LOSS SUSTAINED	
SECTION II			In case of loss under this policy, the deductibles will be applied per occurrence and will be deducted from the amount of the loss. Other deductibles may apply - refer to your policy.
L	Personal Liability (Each Occurrence)	\$ 500,000	
	Damage to Property of Others	\$ 500	
M	Medical Payments to Others (Each Person)	\$ 1,000	
Loss Settlement Provision (See Policy)			Policy Premium \$ 529.00
Forms, Options, & Endorsements			
EXTRA FORM 5 (EXTRA REPLACEMENT COST ON DWELLING AND REPLACEMENT COST ON CONTENTS)		FP-7155.4	
JEWELRY AND FURS \$2,500 EACH ARTICLE/\$5,000 AGGREGATE		OPTION JF	
BACK UP OF SEWER AND DRAINS		FE-7370.3	
VA AMENDATORY ENDORSEMENT		FE-7276.1	

Other limits and exclusions may apply - refer to your policy

PREPARED
FEB 07, 2000
AFP
FP-7001.5C

COUNTERSIGNED 2000
BY AGENT

JAMES T. MARRION
703-281-4188

Your policy consists of this page, any endorsements and the policy form. Please keep these together.

internal combustion engine as the primary source of propulsion;

owned or operated, or hired by or for the insured or employer of the insured or used by the insured for the purpose of instruction in the use thereof; or

- (2) under Coverage M for bodily injury to a pupil arising out of corporal punishment administered by or at the direction of the insured.

SECTION I AND SECTION II - CONDITIONS are modified as follows:

1. Cancellation

- a. Reference to 10 days notice in b.(1) is changed to 15 days notice;
- b. Reference to 10 days notice in b.(2) is changed to 45 days notice; and
- c. Reference to 30 days notice in b.(3) is changed to 45 days notice.

2. Nonrenewal

- Reference to 30 days notice is changed to 45 days notice.

Option FA - Firearms. Firearms are insured for accidental direct physical loss or damage.

The limits for this option are shown in the Declarations. The first amount is the limit for any one article; the second amount is the aggregate limit for each loss.

The following additional provisions apply:

1. we do not insure for any loss to the property described in this option either consisting of, or directly and immediately caused by, one or more of the following:
 - a. mechanical breakdown, wear and tear, gradual deterioration;
 - b. insects or vermin;

- c. any process of refinishing, renovating, or repairing;
- d. dampness of atmosphere or extremes of temperatures;
- e. inherent defect or faulty manufacture;
- f. rust, fouling or explosion of firearms;
- g. breakage, marring, scratching, tearing or denting unless caused by fire, thieves or accidents to conveyances; or
- h. infidelity of an insured's employees or persons to whom the insured property may be entrusted or rented.

2. our limit for loss by any Coverage B peril except theft is the limit shown in the Declarations for Coverage B, plus the aggregate limit;

3. our limits for loss by theft are those shown in the Declarations for this option. These limits apply in lieu of the Coverage B theft limit; and

4. our limits for loss by any covered peril except those in items 2. and 3. are those shown in the Declarations.

Option IO - Incidental Business. The coverage provided by this option applies only to the incidental business occupancy on file with us.

1. Section I: COVERAGE B - PERSONAL PROPERTY is extended to include equipment, supplies and furnishings usual and incidental to this business occupancy. This Optional Policy Provision does not include merchandise held as samples or for sale or for delivery after sale.

The Option IO limit is shown in the Declarations. The limit applies in addition to the Section I, **COVERAGE B - PERSONAL PROPERTY, Special Limits of Liability** on property used or intended for use in a business while away from the described premises.

2. Section II: The residence premises is not considered business property because an insured occupies a part of it as an incidental business.

3. Section II: Exclusion 1.b. of Coverage L and Coverage M is replaced with the following:

- b. **bodily injury or property damage** arising out of business pursuits of an insured or the rental or holding for rental of any part of any premises by an insured. This exclusion does not apply:

(1) to activities which are ordinarily incidental to non-business pursuits or to business pursuits of an insured which are necessary or incidental to the use of the residence premises as an incidental business;

(2) with respect to Coverage L to the occasional or part-time business pursuits of an insured who is under 19 years of age;

(3) to incidental business activities of any insured for babysitting, caddying, lawn care, newspaper delivery and other similar activities; or

(4) to the rental or holding for rental of a residence of yours:

(a) on an occasional basis for exclusive use as a residence;

(b) in part, unless intended for use as a residence by more than two roomers or boarders; or

(c) in part, as an incidental business or private garage;

(5) when the dwelling on the residence premises is a two family dwelling and you occupy one part and rent or hold for rental the other part; or

(6) to farm land (without buildings) not in excess of 500 acres, rented or held for rental to others.

4. SECTION I AND SECTION II - CONDITIONS are modified as follows:

a. Cancellation

(1) Reference to 10 days notice in b.(1) is changed to 15 days notice;

(2) Reference to 10 days notice in b.(2) is changed to 45 days notice; and

(3) Reference to 30 days notice in b.(3) is changed to 45 days notice.

b. Nonrenewal

Reference to 30 days notice is changed to 45 days notice.

5. This insurance does not apply to:

a. **bodily injury** to an employee of an insured arising out of the residence premises as an incidental business other than to a residence employee while engaged in the employee's employment by an insured;

b. **bodily injury** to a pupil arising out of corporal punishment administered by or at the direction of the insured;

c. liability arising out of any acts, errors or omissions of an insured, or any other person for whose acts an insured is liable, resulting from the preparation or approval of data, plans, designs, opinions, reports, programs, specifications, supervisory inspections or engineering services in the conduct of an insured's incidental business involving data processing, computer consulting or computer programming; or

d. any claim made or suit brought against any insured by:

(1) any person who is in the care of any insured because of child care services provided by or at the direction of:

(a) any insured;

(b) any employee of any insured; or

(c) any other person actually or apparently acting on behalf of any insured; or

(2) any person who makes a claim because of bodily injury to any person who is in the care of an

HOMEOWNERS POLICY - EXTRA FORM 5

DECLARATIONS CONTINUED

We agree to provide the insurance described in this policy:

1. based on your payment of premium for the coverages you chose;
2. based on your compliance with all applicable provisions of this policy; and
3. in reliance on your statements in these Declarations.

You agree, by acceptance of this policy, that:

1. you will pay premiums when due and comply with the provisions of the policy;
2. the statements in these Declarations are your statements and are true;

3. we insure you on the basis your statements are true; and

4. this policy contains all of the agreements between you and us and any of our agents.

Unless otherwise indicated in the application, you state that during the three years preceding the time of your application for this insurance your Loss History and Insurance History are as follows:

1. Loss History: you and the members of your household have not had any insured losses, whether paid or not, that would have been covered under the terms of this or a similar policy; and
2. Insurance History: no insurance company has cancelled or refused to renew your homeowners or fire insurance.

DEFINITIONS

"You" and "your" mean the "named insured" shown in the Declarations. Your spouse is included if a resident of your household. "We", "us" and "our" mean the Company shown in the Declarations.

Certain words and phrases are defined as follows:

1. "aircraft" means any machine or device capable of atmospheric flight except model airplanes.
2. "bodily injury" means physical injury, sickness, or disease to a person. This includes required care, loss of services and death resulting therefrom.

Bodily injury does not include:

- a. any of the following which are communicable: disease, bacteria, parasite, virus, or other organism, any of which are transmitted by any insured to any other person;
- b. the exposure to any such disease, bacteria, parasite, virus, or other organism by any insured to any other person; or
- c. emotional distress, mental anguish, humiliation, mental distress, mental injury, or any similar injury

unless it arises out of actual physical injury to some person.

3. "business" means a trade, profession or occupation. This includes farming.
4. "Declarations" means the policy Declarations, any amended Declarations, the most recent renewal notice or certificate, an Evidence of Insurance form or any endorsement changing any of these.
5. "insured" means you and, if residents of your household:
 - a. your relatives; and
 - b. any other person under the age of 21 who is in the care of a person described above.

Under Section II, "insured" also means:

- c. with respect to animals or watercraft to which this policy applies, the person or organization legally responsible for them. However, the animal or watercraft must be owned by you or a person included in 5.a. or 5.b. A person or organization using or having custody of these animals or watercraft in the course of a business, or without permission of the owner, is not an insured; and

- d. with respect to any vehicle to which this policy applies, any person while engaged in your employment or the employment of a person included in 5.a. or 5.b.

6. "insured location" means:

- a. the residence premises;
- b. the part of any other premises, other structures and grounds used by you as a residence. This includes premises, structures and grounds you acquire while this policy is in effect for your use as a residence;
- c. any premises used by you in connection with the premises included in 6.a. or 6.b.;
- d. any part of a premises not owned by an insured but where an insured is temporarily residing;
- e. vacant land owned by or rented to an insured. This does not include farm land;
- f. land owned by or rented to an insured on which a one or two family dwelling is being constructed as a residence for an insured;
- g. individual or family cemetery plots or burial vaults of an insured;
- h. any part of a premises occasionally rented to an insured for other than business purposes; and
- i. 500 acres or less of farm land (without buildings) rented to others.

7. "motor vehicle", when used in Section II of this policy, means:

- a. a motorized land vehicle designed for travel on public roads or subject to motor vehicle registration. A motorized land vehicle in dead storage on an insured location is not a motor vehicle;
- b. a trailer or semi-trailer designed for travel on public roads and subject to motor vehicle registration. A boat, camp, home or utility trailer not being towed by or carried on a vehicle included in 7.a. is not a motor vehicle;

- c. a motorized golf cart, snowmobile, or other motorized land vehicle owned by an insured and designed for recreational use off public roads, while off an insured location. A motorized golf cart while used for golfing purposes is not a motor vehicle;

- d. a motorized bicycle, tricycle or similar type of equipment owned by an insured while off an insured location; and

- e. any vehicle while being towed by or carried on a vehicle included in 7.a., 7.b., 7.c. or 7.d.

8. "occurrence", when used in Section II of this policy, means an accident, including exposure to conditions, which results in:

- a. bodily injury; or
- b. property damage;

during the policy period. Repeated or continuous exposure to the same general conditions is considered to be one occurrence.

9. "property damage" means physical damage to or destruction of tangible property, including loss of use of this property. Theft or conversion of property by an insured is not property damage.

10. "residence employee" means an employee of an insured who performs duties, including household or domestic services, in connection with the maintenance or use of the residence premises. This includes employees who perform similar duties elsewhere for you. This does not include employees while performing duties in connection with the business of an insured.

11. "residence premises" means:

- a. the one, two, three or four-family dwelling, other structures, and grounds; or
- b. that part of any other building;

where you reside and which is shown in the Declarations.

SECTION I - COVERAGES

COVERAGE A - DWELLING

1. We cover:

- a. the dwelling used principally as a private residence on the residence premises shown in the Declarations. This includes structures attached to the dwelling;
- b. materials and supplies located on or adjacent to the residence premises for use in the construction, alteration or repair of the dwelling or other structures on the residence premises;
- c. wall-to-wall carpeting attached to the dwelling on the residence premises; and
- d. outdoor antennas.

2. Dwelling Extension. We cover other structures on the residence premises, separated from the dwelling by clear space. Structures connected to the dwelling by only a fence, utility line, or similar connection are considered to be other structures.

We do not cover other structures:

- a. used in whole or in part for business purposes; or
- b. rented or held for rental to a person not a tenant of the dwelling, unless used solely as a private garage.

3. Except as specifically provided in SECTION I - ADDITIONAL COVERAGES, Land, we do not cover land, including the land necessary to support any Coverage A property. We do not cover any costs required to replace, rebuild, stabilize, or otherwise restore the land, nor do we cover the costs of repair techniques designed to compensate for or prevent land instability.

COVERAGE B - PERSONAL PROPERTY

1. We cover personal property owned or used by an insured while it is anywhere in the world. At your request, we will cover personal property owned by others while the property is on the part of the residence premises occupied exclusively by an insured. At your request, we will also cover personal property owned by a guest or a

residence employee, while the property is in any other residence occupied by an insured or in the physical custody of the residence employee.

We cover personal property usually situated at an insured's residence, other than the residence premises, for up to \$1,000 or 10% of the Coverage B limit, whichever is greater. This limitation does not apply to personal property in a newly acquired principal residence for the first 30 days after you start moving the property there. If the residence premises is a newly acquired principal residence, personal property in your immediate past principal residence is not subject to this limitation for the first 30 days after the inception of this policy.

Special Limits of Liability. These limits do not increase the Coverage B limit. The special limit for each of the following categories is the total limit for each loss for all property in that category:

- a. \$200 on money, bank notes and coins;
- b. \$250 on property used or intended for use in a business while away from the described premises;
- c. \$250 on business property in storage or held as samples or for sale or for delivery after sale, all while on the residence premises;
- d. \$1,000 on securities, accounts, deeds, evidences of debt, letters of credit, notes other than bank notes, manuscripts, passports, tickets and stamps;
- e. \$1,000 on watercraft of all types and outboard motors, including their trailers, furnishings and equipment;
- f. \$1,000 on trailers not used with watercraft; and
- g. \$2,500 for loss by theft of firearms.

See SECTION I - ADDITIONAL COVERAGES for special limits on jewelry, watches, fur garments and garments trimmed with fur, precious and semi-precious stones, gold other than goldware or gold plated ware, silver other than silverware or silver plated ware, and platinum.

2. Property Not Covered. We do not cover:

- a. articles separately described and specifically insured in this or any other insurance;
- b. animals, birds or fish;
- c. any engine or motor propelled vehicle or machine designed for movement on land. We do cover those not licensed for use on public highways which are:
 - (1) used solely to service the insured location; or
 - (2) designed for assisting the handicapped;
- d. devices or instruments for the recording or reproduction of sound which obtain power for operation from an engine or motor propelled vehicle's electrical system, but only while permanently installed in an engine or motor propelled vehicle. We do not cover tapes, wires, records or other mediums that may be used with these devices or instruments while in the vehicle;
- e. aircraft and parts;
- f. property of roomers, boarders, tenants and other residents not related to an insured. We do cover property of roomers, boarders and other residents related to an insured;
- g. property regularly rented or held for rental to others by an insured. This exclusion does not apply to property of an insured in a sleeping room rented to others by an insured;
- h. property rented or held for rental to others away from the residence premises; or
- i. any citizens band radios, radio telephones, radio transceivers, radio transmitters, antennas and other similar equipment which obtain power for operation from an engine or motor propelled vehicle's electrical system. This exclusion applies only while the property is located in or upon an engine or motor propelled vehicle.

COVERAGE C - LOSS OF USE

1. Additional Living Expense. If a Loss Insured causes the residence premises to become uninhabitable, we cover the necessary increase in cost to maintain your standard of living. Payment is for the shortest time required (a) to repair or replace the premises or (b) for your household to settle elsewhere. This period of time is not limited by the expiration of this policy.

2. Fair Rental Value. If a Loss Insured causes that part of the residence premises rented to others or held for rental by you to become uninhabitable, we cover its fair rental value. Payment shall be for the shortest time required to repair or replace the part of the premises rented or held for rental. This period of time is not limited by expiration of this policy. Fair rental value shall not include any expense that does not continue while that part of the residence premises rented or held for rental is uninhabitable.

3. Prohibited Use. If a civil authority prohibits your use of the residence premises because of direct damage to a neighboring premises by a Loss Insured, we cover any resulting Additional Living Expense and Fair Rental Value. Coverage is for a period not exceeding two weeks while use is prohibited.

We do not cover loss or expense due to cancellation of a lease or agreement.

No deductible applies to Coverage C.

SECTION I - ADDITIONAL COVERAGES

1. Debris Removal. We will pay the reasonable expenses you incur in the removal of debris of covered property when coverage is afforded for the peril causing the loss. This expense is included in the limit applying to the damaged property.

We will also pay reasonable expenses for removal of fallen trees which cause damage to covered property.

When the amount payable for the property damage plus the debris removal expense exceeds the limit for the damaged property, an additional 5% of that limit is available for debris removal expense.

2. **Temporary Repairs.** If damage is caused by a Loss Insured, we will pay the reasonable and necessary cost you incur for temporary repairs to covered property to protect the property from further immediate damage or loss. This coverage does not increase the limit applying to the property being repaired.

3. **Trees, Shrubs and Other Plants.** We cover outdoor trees, shrubs, plants or lawns, on the residence premises, for loss caused by the following: Fire or lightning, Explosion, Riot or civil commotion, Aircraft, Vehicles not owned or operated by a resident of the residence premises, Vandalism or Malicious Mischief or Theft. The limit for this coverage shall not exceed 5% of the limit applying to the dwelling. We will not pay more than \$500 for any one outdoor tree, shrub or plant. This coverage may increase the limit otherwise applicable. We do not cover property grown for business purposes.

4. **Fire Department Service Charge.** We will pay up to \$500 for your liability assumed by contract or agreement for fire department charges. This means charges incurred when the fire department is called to save or protect covered property from a Loss Insured. No deductible applies to this coverage. This coverage may increase the limit otherwise applicable.

5. **Property Removed.** Covered property, while being removed from a premises endangered by a Loss Insured, is covered for any accidental direct physical loss. This coverage also applies to the property for up to 30 days while removed. We will also pay for reasonable expenses incurred by you for the removal and return of the covered property. This coverage does not increase the limit applying to the property being removed.

6. **Credit Card, Bank Fund Transfer Card, Forgery and Counterfeit Money.**

a. We will pay up to \$1,000 for:

- (1) the legal obligation of an insured to pay because of the theft or unauthorized use of credit cards and bank fund transfer cards issued to or registered in an insured's name. If an insured has not complied with all terms and conditions under which the cards are issued, we do not cover use by an insured or anyone else;

(2) loss to an Insured caused by forgery or alteration of any check or negotiable instrument; and

(3) loss to an Insured through acceptance in good faith of counterfeit United States or Canadian paper currency.

No deductible applies to this coverage.

We will not pay more than the limit stated above for forgery or alteration committed by any one person. This limit applies when the forgery or alteration involves one or more instrument in the same loss.

b. We do not cover loss arising out of business pursuits or dishonesty of an insured.

c. **Defense:**

(1) We may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend claims or suits ends when the amount we pay for the loss equals our limit of liability.

(2) If claim is made or a suit is brought against an insured for liability under the Credit Card or Bank Fund Transfer Card coverage, we will provide a defense. This defense is at our expense by counsel of our choice.

(3) We have the option to defend at our expense an insured or an insured's bank against any suit for the enforcement of payment under the Forgery coverage.

7. **Power Interruption.** We cover accidental direct physical loss caused directly or indirectly by a change of temperature which results from power interruption that takes place on the residence premises. The power interruption must be caused by a Loss Insured occurring on the residence premises. The power lines off the residence premises must remain energized. This coverage does not increase the limit applying to the damaged property.

8. **Refrigerated Products.** Coverage B is extended to cover the contents of deep freeze or refrigerated units on the residence premises for loss due to power failure or mechanical failure. If mechanical failure or power failure is known to you, all reasonable means must be used to

protect the property insured from further damage or this coverage is void. Power failure or mechanical failure shall not include:

- a. removal of a plug from an electrical outlet; or
- b. turning off an electrical switch unless caused by a Loss Insured.

This coverage does not increase the limit applying to the damaged property.

9. **Arson Reward.** We will pay \$1,000 for information which leads to an arson conviction in connection with a fire loss to property covered by this policy. This coverage may increase the limit otherwise applicable. However, the \$1,000 limit shall not be increased regardless of the number of persons providing information.

10. **Jewelry and Furs.** Jewelry, watches, fur garments and garments trimmed with fur, precious and semi-precious stones, gold other than goldware or gold plated ware, silver other than silverware or silver plated ware, and platinum are insured for accidental direct physical loss or damage.

We do not cover loss or damage caused by mechanical breakdown, wear and tear, gradual deterioration, insects, vermin, inherent vice, or seizure or destruction under quarantine or customs regulations.

In addition to limitations and exclusions otherwise applicable, the following also apply:

- a. our limit for loss by any Coverage B peril except theft shall be the limit stated in the Declarations for Coverage B, plus \$2,500; and
- b. our limit for loss by theft and any covered peril, except those in item a., shall be \$1,500 on any one article and \$2,500 in the aggregate.

11. **Land.** If a single event results in both a Loss Insured to the insured dwelling, other than the breakage of glass or safety glazing material, and a loss of land stability, we will pay up to \$10,000 as an additional amount of insurance for repair costs associated with the land. This includes the costs required to replace, rebuild, stabilize or other-

wise restore the land. This Additional Coverage applies only to the land necessary to support that part of the insured dwelling sustaining the Loss Insured.

The SECTION I - LOSSES NOT INSURED reference to earth movement does not apply to the loss of land stability provided under this Additional Coverage.

12. **Volcanic Action.** We cover direct physical loss to a covered building or covered property contained in a building resulting from the eruption of a volcano when the loss is directly and immediately caused by:

- a. volcanic blast or airborne shock waves;
- b. ash, dust or particulate matter; or
- c. lava flow.

We will also pay for the removal of that ash, dust or particulate matter which has caused direct physical loss to a covered building or covered property contained in a building.

One or more volcanic eruptions that occur within a 72-hour period shall be considered one volcanic eruption.

This coverage does not increase the limit applying to the damaged property.

13. **Locks.** We will pay the reasonable expenses you incur to re-key locks on exterior doors of the dwelling located on the residence premises, when the keys to those locks are a part of a covered theft loss.

No deductible applies to this coverage.

14. **Temporary Living Expense Allowance.** If the residence premises becomes uninhabitable because of a loss caused by earthquake, landslide or volcanic explosion, or if a civil authority prohibits your use of the residence premises because an earthquake, landslide or volcanic explosion has occurred, we will pay up to \$2,000 to cover the necessary increase in cost which you incur to maintain your standard of living.

The SECTION I - LOSSES NOT INSURED references to earthquake, landslide and volcanic explosion do not apply to this Additional Coverage.

This coverage is excess over any other valid and collectible insurance which is in force at the time of the loss.

No deductible applies to this coverage.

INFLATION COVERAGE

The limits of liability shown in the Declarations for Coverages A and B will be increased at the same rate as the increase in the Inflation Coverage Index shown in the Declarations.

To find the limits on a given date:

1. divide the Index on that date by the Index as of the effective date of this Inflation Coverage provision; then
2. multiply the resulting factor by the limits of liability for Coverages A and B separately.

The limits of liability will not be reduced to less than the amounts shown in the Declarations.

If during the term of this policy, the Coverage A limit of liability is changed at your request, the effective date of this Inflation Coverage provision is changed to coincide with the effective date of such change.

SECTION I - LOSSES INSURED

COVERAGE A - DWELLING

We insure for accidental direct physical loss to the property described in Coverage A, except as provided in SECTION I - LOSSES NOT INSURED.

COVERAGE B - PERSONAL PROPERTY

We insure for accidental direct physical loss to property described in Coverage B caused by the following perils, except as provided in SECTION I - LOSSES NOT INSURED:

1. Fire or lightning.
2. Windstorm or hail. This peril does not include loss to property contained in a building caused by rain, snow, sleet, sand or dust. This limitation does not apply when the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening.

GUARANTEED EXTRA COVERAGE

We will settle covered losses to the dwelling under Coverage A and other building structures under Dwelling Extension at replacement cost without regard to the limit of liability, subject to the Loss Settlement provisions in SECTION I - CONDITIONS.

Except as specifically provided in SECTION I - ADDITIONAL COVERAGES, Land, we will not pay for land, including the land necessary to support any Coverage A property, or any costs required to replace, rebuild, stabilize, or otherwise restore the land, nor will we pay the costs of repair techniques designed to compensate for or prevent land instability.

Report Increased Values.

You must notify us within 90 days of the start of any new building valued at \$5,000 or more or any additions to or remodeling of buildings which increase their values by \$5,000 or more and pay any additional premium due for the increase in value. If you fail to notify us within 90 days, our payment will not exceed the limit of liability applying to the building. See SECTION I - CONDITIONS, Loss Settlement for additional provisions.

This peril includes loss to watercraft of all types and their trailers, furnishings, equipment, and outboard motors, only while inside a fully enclosed building. This limitation does not apply to rowboats and canoes on the residence premises.

3. Explosion.
4. Riot or civil commotion.
5. Aircraft, including self-propelled missiles and spacecraft.
6. Vehicles.
7. Smoke, meaning sudden and accidental damage from smoke.

This peril does not include loss caused by smoke from agricultural smudging or industrial operations.

8. Vandalism or malicious mischief, meaning only willful and malicious damage to or destruction of property.

9. Theft, including attempted theft and loss of property from a known location when it is probable that the property has been stolen.

This peril does not include:

- a. loss of a precious or semi-precious stone from its setting;
- b. loss caused by theft:
 - (1) committed by an insured;
 - (2) in or to a dwelling under construction or of materials and supplies for use in the construction until the dwelling is completed and occupied; or
 - (3) from the part of a residence premises rented to others:
 - (a) caused by a tenant, members of the tenant's household, or the tenant's employees;
 - (b) of money, bank notes, bullion, gold, goldware, silver, silverware, pewterware, platinum and coins;
 - (c) of securities, checks, cashier's checks, traveler's checks, money orders and other negotiable instruments, accounts, deeds, evidences of debt, letters of credit, notes other than bank notes, manuscripts, passports, tickets and stamps; or
 - (d) of jewelry, watches, fur garments and garments trimmed with fur, precious and semi-precious stones;
- c. loss caused by theft that occurs away from the residence premises of:
 - (1) property while at any other residence owned, rented to, or occupied by an insured, except while an insured is temporarily residing there. Property of a student who is an insured is covered while at a residence away from home;
 - (2) watercraft of all types, including their furnishings, equipment and outboard motors; or

(3) trailers and campers designed to be pulled by or carried on a vehicle.

If the residence premises is a newly acquired principal residence, property in the immediate past principal residence shall not be considered property away from the residence premises for the first 30 days after the inception of this policy.

10. Falling objects. This peril does not include loss to property contained in a building unless the roof or an exterior wall of the building is first damaged by a falling object. Damage to the falling object itself is not included.
11. Weight of ice, snow or sleet which causes damage to property contained in a building.
12. Sudden and accidental discharge or overflow of water or steam from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system, or from within a household appliance.

This peril does not include loss:

- a. to the system or appliance from which the water or steam escaped;
 - b. caused by or resulting from freezing;
 - c. caused by or resulting from water from outside the plumbing system that enters through sewers or drains, or water which enters into and overflows from within a sump pump, sump pump well or other type system designed to remove subsurface water which is drained from the foundation area; or
 - d. caused by or resulting from continuous or repeated seepage or leakage of water or steam which occurs over a period of time and results in deterioration, corrosion, rust, mold, or wet or dry rot.
13. Sudden and accidental tearing asunder, cracking, burning or bulging of a steam or hot water heating system, an air conditioning or automatic fire protective sprinkler system, or an appliance for heating water.

This peril does not include loss:

- a. caused by or resulting from freezing; or

- b. caused by or resulting from continuous or repeated seepage or leakage of water or steam which occurs over a period of time and results in deterioration, corrosion, rust, mold, or wet or dry rot.

14. Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system, or of a household appliance.

This peril does not include loss on the residence premises while the dwelling is vacant, unoccupied or being constructed, unless you have used reasonable care to:

- maintain heat in the building; or
- shut off the water supply and drain the system and appliances of water.

SECTION I - LOSSES NOT INSURED

1. We do not insure for any loss to the property described in Coverage A which consists of, or is directly and immediately caused by, one or more of the perils listed in items a. through l. below, regardless of whether the loss occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

- freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system, or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing. This exclusion only applies while the dwelling is vacant, unoccupied or being constructed. This exclusion does not apply if you have used reasonable care to:

- maintain heat in the building; or
- shut off the water supply and drain the system and appliances of water;

- freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a fence, pavement, patio, swimming pool, foundation, retaining wall, bulkhead, pier, wharf or dock;
- theft in or to a dwelling under construction, or of materials and supplies for use in the construction, until the dwelling is completed and occupied;

15. Sudden and accidental damage to electrical appliances, devices, fixtures and wiring from an increase or decrease of electrical currents artificially generated. There is no coverage for loss to a tube, transistor, wafer, card, chip, integrated circuit or similar electronic circuitry and components.

16. Breakage of glass, meaning damage to personal property caused by breakage of glass which is a part of a building on the residence premises. There is no coverage for loss or damage to the glass.

17. Collapse of a building or any part of a building. This peril does not include settling, cracking, shrinking, bulging or expansion.

- vandalism or malicious mischief or breakage of glass and safety glazing materials if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant;

- continuous or repeated seepage or leakage of water or steam from a:

- heating, air conditioning or automatic fire protective sprinkler system;
- household appliance; or
- plumbing system, including from, within or around any shower stall, shower bath, tub installation, or other plumbing fixture, including their walls, ceilings or floors;

which occurs over a period of time and results in deterioration, corrosion, rust, mold, or wet or dry rot. If loss to covered property is caused by water or steam not otherwise excluded, we will cover the cost of tearing out and replacing any part of the building necessary to repair the system or appliance. We do not cover loss to the system or appliance from which the water or steam escaped;

- wear, tear, marring, scratching, deterioration, inherent vice, latent defect or mechanical breakdown;

- corrosion, electrolysis, or rust;

- mold, or wet or dry rot;

- contamination;

- smog, smoke from agricultural smudging or industrial operations;

- settling, cracking, shrinking, bulging, or expansion of pavements, patios, foundation, walls, floors, roofs or ceilings; or

- birds, vermin, rodents, insects, or domestic animals. We do cover the breakage of glass or safety glazing material which is a part of a building, when caused by birds, vermin, rodents, insects or domestic animals.

However, we do insure for any resulting loss from items a. through l. unless the resulting loss is itself a Loss Not Insured by this Section.

2. We do not insure under any coverage for any loss (including collapse of an insured building or part of a building) which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

- Ordinance or Law, meaning enforcement of any ordinance or law regulating the construction, repair or demolition of a building or other structure, unless specifically provided under this policy.

- Earth Movement, meaning the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not. Earth movement includes but is not limited to earthquake, landslide, mudflow, sinkhole, subsidence and erosion. Earth movement also includes volcanic explosion or lava flow, except as specifically provided in SECTION I, ADDITIONAL COVERAGES, Volcanic Action.

We do insure for any direct loss by fire, explosion, other than explosion of a volcano, theft, or breakage of glass or safety glazing materials which are part of the dwelling resulting from earth movement, provided the resulting loss is itself a Loss Insured.

c. Water Damage, meaning:

- flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, all whether driven by wind or not;

- water from outside the plumbing system that enters through sewers or drains, or water which enters into and overflows from within a sump pump, sump pump well or any other system designed to remove subsurface water which is drained from the foundation area; or

- natural water below the surface of the ground including water which exerts pressure on, or seeps or leaks through a building, sidewalk driveway, foundation, swimming pool or other structure.

However, we do insure for any direct loss by fire, explosion, or theft resulting from water damage, provided the resulting loss is itself a Loss Insured.

- Neglect, meaning neglect of the insured to use a reasonable means to save and preserve property and after the time of a loss, or when property is endangered.

- War, including any undeclared war, civil war, insurrection, rebellion, revolution, warlike act by a military force or military personnel, destruction or seizure of use for a military purpose, and including any consequence of any of these. Discharge of a nuclear weapon shall be deemed a warlike act even if accidental.

- Nuclear Hazard, meaning any nuclear reaction, radiation, or radioactive contamination, all whether controlled or uncontrolled or however caused, or an consequence of any of these. Loss caused by the nuclear hazard shall not be considered loss caused by fire, explosion, or smoke. However, we do insure

for direct loss by fire resulting from the nuclear hazard.

3. We do not insure under any coverage for any loss consisting of one or more of the items below. Further, we do not insure for loss described in paragraphs 1. and 2. immediately above regardless of whether one or more of the following: (a) directly or indirectly cause, contribute to or aggravate the loss; or (b) occur before, at the same time, or after the loss or any other cause of the loss:

- conduct, act, failure to act, or decision of any person, group, organization or governmental body whether intentional, wrongful, negligent, or without fault; or
- defect, weakness, inadequacy, fault or unsoundness in:

SECTION I - CONDITIONS

1. **Insurable Interest and Limit of Liability.** Even if more than one person has an insurable interest in the property covered, we shall not be liable:

- to the insured for an amount greater than the insured's interest; or
- for more than the applicable limit of liability.

2. **Your Duties After Loss.** After a loss to which this insurance may apply, you shall see that the following duties are performed:

- give immediate notice to us or our agent. Also notify the police if the loss is caused by theft. Also notify the credit card company or bank if the loss involves a credit card or bank fund transfer card;
- protect the property from further damage or loss, make reasonable and necessary temporary repairs required to protect the property, keep an accurate record of repair expenditures;
- prepare an inventory of damaged or stolen personal property. Show in detail the quantity, description, actual cash value and amount of loss. Attach to the inventory all bills, receipts and related documents that substantiate the figures in the inventory;
- as often as we reasonably require:

- planning, zoning, development, surveying, siting;
- design, specifications, workmanship, construction, grading, compaction;
- materials used in construction or repair; or
- maintenance;

of any property (including land, structures, or improvements of any kind) whether on or off the residence premises.

However, we do insure for any resulting loss from items a. and b. unless the resulting loss is itself a Loss Not Insured by this Section.

- exhibit the damaged property;
- provide us with records and documents we request and permit us to make copies; and
- submit to examinations under oath and subscribe the same; and
- submit to us, within 60 days after the loss, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:
 - the time and cause of loss;
 - interest of the insured and all others in the property involved and all encumbrances on the property;
 - other insurance which may cover the loss;
 - changes in title or occupancy of the property during the term of this policy;
 - specifications of any damaged building and detailed estimates for repair of the damage;
 - an inventory of damaged or stolen personal property described in 2.c.;
 - receipts for additional living expenses incurred and records supporting the fair rental value loss;

- evidence or affidavit supporting a claim under the Credit Card, Bank Fund Transfer Card, Forgery and Counterfeit Money coverage, stating the amount and cause of loss.

3. **Loss Settlement.** Covered property losses are settled as follows:

- a. We will pay actual cash value at the time of loss for:

- antiques, fine arts, painting, statuary and similar articles which by their inherent nature cannot be replaced with new articles;
- articles whose age or history contribute substantially to their value including, but not limited to, memorabilia, souvenirs and collectors items;
- property not useful for its intended purpose.

However, we will not pay an amount exceeding the applicable limit of liability or an amount exceeding that necessary to repair or replace the property.

- b. We will pay the cost to repair or replace other personal property, carpeting, domestic appliances, awnings and outdoor antennas whether or not attached to buildings, subject to the following:

- loss to property not repaired or replaced within one year after the loss will be settled on an actual cash value basis;
- we will not pay an amount exceeding the smallest of the following:
 - replacement cost at the time of loss;
 - the full cost of repair;
 - any special limit of liability described in the policy; or
 - any applicable Coverage A or Coverage B limit of liability.

- c. We will pay the cost to repair or replace buildings under Coverage A and other structures under Dwelling Extension, subject to the following:

- until actual repair or replacement is completed, we will pay the actual cash value of the damage

to the buildings or other structures, up to policy limits, not to exceed the replacement cost of the damaged part of the building or of structures, for equivalent construction and use the same premises. This does not apply when full cost of repair or replacement is less than \$1,000 or less than 5% of the whole amount insurance applicable to the building or of structure for the peril causing the loss;

- you must make claim within 180 days after loss for any additional payment on a replacement cost basis.

Any additional payment is limited to that amount you actually and necessarily spend to repair or replace the damaged buildings or other structures with equivalent construction and for equivalent use on the same premises;

- we will not pay more than the \$10,000 limit on land as provided in SECTION I - ADDITIONAL COVERAGES; and

- we will not pay for increased costs resulting from enforcement of any ordinance or law regulating the construction, repair, or demolition of a building or other structure, unless specifically provided under this policy or as may be provided by endorsement to this policy.

4. **Loss to a Pair or Set.** In case of loss to a pair or set, may elect to:

- repair or replace any part to restore the pair or set to its value before the loss; or
- pay the difference between actual cash value of property before and after the loss.

5. **Glass Replacement.** Loss for damage to glass caused by a Loss Insured shall be settled on the basis of replacement with safety glazing materials when required by ordinance or law.

6. **Appraisal.** If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, independent

appraiser. Each shall notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the residence premises is located to select an umpire. The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by you and us.

If the written demand is made by us, then we will reimburse you for the reasonable cost of your appraiser and your portion of the cost of the umpire.

7. **Other Insurance.** If a loss covered by this policy is also covered by other insurance, we will pay only our share of the loss. Our share is the proportion of the loss that the applicable limit under this policy bears to the total amount of insurance covering the loss.

8. **Suit Against Us.** No action shall be brought unless there has been compliance with the policy provisions. The action must be started within two years after the date of loss or damage.

9. **Our Option.** If we give you written notice within 30 days after we receive your proof of loss, we may repair or replace any part of the property damaged or stolen with equivalent property. Any property we pay for or replace becomes our property.

10. **Loss Payment.** We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable 30 days after we receive your proof of loss and:

- reach agreement with you;
- there is an entry of a final judgment; or
- there is a filing of an appraisal award with us.

11. **Abandonment of Property.** We need not accept any property abandoned by an insured.

12. **Mortgage Clause.** The word "mortgagee" includes trustee:

- If a mortgagee is named in this policy, any loss payable under Coverage A shall be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment shall be the same as the order of precedence of the mortgages.

- If we deny your claim, that denial shall not apply to a valid claim of the mortgagee, if the mortgagee:

- notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;
- pays any premium due under this policy on demand if you have neglected to pay the premium; or
- submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and Loss Payment apply to the mortgagee.

- If this policy is cancelled or not renewed by us, the mortgagee shall be notified at least 10 days before the date cancellation takes effect.

- If we pay the mortgagee for any loss and deny payment to you:

- we are subrogated to all the rights of the mortgagee granted under the mortgage on the property; or
- at our option, we may pay to the mortgagee the whole principal on the mortgage plus any accrued interest. In this event, we shall receive a full assignment and transfer of the mortgage and all securities held as collateral to the mortgage debt.

- Subrogation shall not impair the right of the mortgagee to recover the full amount of the mortgagee's claim.

13. **No Benefit to Bailee.** We will not recognize an assignment or grant coverage for the benefit of a person or organization holding, storing or transporting property for a fee. This applies regardless of any other provision of this policy.

SECTION II - LIABILITY COVERAGES

COVERAGE L - PERSONAL LIABILITY

If a claim is made or a suit is brought against an insured for damages because of **bodily injury** or **property damage** to which this coverage applies, caused by an **occurrence**, we will:

- pay up to our limit of liability for the damages for which the insured is legally liable; and
- provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages, to effect settlement or satisfy a judgment resulting from the **occurrence**, equals our limit of liability.

COVERAGE M - MEDICAL PAYMENTS TO OTHERS

We will pay the necessary medical expenses incurred or medically ascertained within three years from the date of an accident causing **bodily injury**. Medical expenses means reasonable charges for medical, surgical, x-ray, dental, ambulance, hospital, professional nursing, prosthetic devices and funeral services. This coverage applies only:

- to a person on the insured location with the permission of an insured;
- to a person off the insured location, if the **bodily injury**:
 - arises out of a condition on the insured location or the ways immediately adjoining;
 - is caused by the activities of an insured;
 - is caused by a residence employee in the course of the residence employee's employment by an insured; or
 - is caused by an animal owned by or in the care of an insured; or

14. **Loss Clause.** Any loss paid hereunder shall not reduce the applicable limit of liability under this policy.

3. to a residence employee if the **occurrence** causing **bodily injury** occurs off the insured location and arises out of or in the course of the residence employee employment by an insured.

SECTION II - ADDITIONAL COVERAGES

We cover the following in addition to the limits of liability:

1. Claim Expenses. We pay:

- expenses we incur and costs taxed against an insured in suits we defend;
- all premiums on appeal bonds required in any suit, and premiums on bonds to release attachments in any such suit for an amount not in excess of the Coverage L limit. We also pay the cost, not to exceed \$250 per bail bond, of bail bonds required of a vehicle to which this policy applies. We are not obligated to apply for or furnish any bond;
- reasonable expenses an insured incurs at our request. This includes actual loss of earnings (but not loss of other income) up to \$100 per day for aiding in the investigation or defense of claims or suits;
- prejudgment interest awarded against the insured on that part of the judgment we pay; and
- interest on the entire judgment which accrues after entry of the judgment and before we pay or tender or deposit in court that part of the judgment which does not exceed the limit of liability that applies.

2. **First Aid Expenses.** We will pay expenses for first aid to others incurred by an insured for **bodily injury** covered under this policy. We will not pay for first aid to you or any other insured.

3. Damage to Property of Others:

- a. We will pay for property damage to property of others caused by an insured.
- b. We will not pay more than the smallest of the following amounts:
 - (1) replacement cost at the time of loss;
 - (2) full cost of repair; or
 - (3) \$500 in any one occurrence.
- c. We will not pay for property damage:
 - (1) if insurance is otherwise provided in this policy;
 - (2) caused intentionally by an insured who is 13 years of age or older;

- (3) to property, other than a rented golf cart, owned by or rented to an insured, a tenant of an insured, or a resident in your household; or
- (4) arising out of:
 - (a) business pursuits;
 - (b) any act or omission in connection with a premises an insured owns, rents or controls, other than the insured location; or
 - (c) the ownership, maintenance, or use of a motor vehicle, aircraft, or watercraft, including airboat, air cushion, personal watercraft, sail board or similar type watercraft.

SECTION II - EXCLUSIONS

1. Coverage L and Coverage M do not apply to:

- ☒ a. bodily injury or property damage which is either expected or intended by an insured;
- ☒ b. bodily injury or property damage arising out of business pursuits of any insured or the rental or holding for rental of any part of any premises by any insured. This exclusion does not apply:
 - (1) to activities which are ordinarily incident to non-business pursuits;
 - (2) with respect to Coverage L to the occasional or part-time business pursuits of an insured who is under 19 years of age;
 - (3) to incidental business activities of any insured for babysitting, caddying, lawn care, newspaper delivery and other similar activities;
 - (4) to the rental or holding for rental of a residence of yours:
 - (a) on an occasional basis for the exclusive use as a residence;
 - (b) in part, unless intended for use as a residence by more than two roomers or boarders; or

- (c) in part, as an office, school, studio or private garage;
- (5) when the dwelling on the residence premises is a two, three or four-family dwelling and you occupy one part and rent or hold for rental the other part; or
- (6) to farm land (without buildings) not in excess of 500 acres, rented or held for rental to others;
- ☒ c. bodily injury or property damage arising out of the rendering or failing to render professional services;
- ☒ d. bodily injury or property damage arising out of any premises owned or rented to any insured which is not an insured location. This exclusion does not apply to bodily injury to a residence employee arising out of and in the course of the residence employee's employment by an insured;
- e. bodily injury or property damage arising out of the ownership, maintenance, use, loading or unloading of:
 - ☒ (1) an aircraft;
 - ☒ (2) a motor vehicle owned or operated by or rented or loaned to any insured; or

☒ (3) a watercraft:

- (a) owned by or rented to any insured if it has inboard or inboard-outdrive motor power of more than 50 horsepower;
- (b) owned by or rented to any insured if it is a sailing vessel, with or without auxiliary power, 26 feet or more in overall length;
- (c) designated as an airboat, air cushion, or similar type of craft;
- (d) powered by one or more outboard motors with more than 25 total horsepower owned by any insured. If you request in writing to us within 45 days after acquisition, an intention to insure any outboard motors acquired prior to the policy period, coverage will apply; or
- (e) owned by any insured which is a personal watercraft using a water jet pump powered by an internal combustion engine as the primary source of propulsion.

This exclusion does not apply to bodily injury to a residence employee arising out of and in the course of the residence employee's employment by an insured. Exclusion e.(3) does not apply while the watercraft is on the residence premises;

☒ f. bodily injury or property damage arising out of:

- (1) the entrustment by any insured to any person;
 - (2) the supervision by any insured of any person;
 - (3) any liability statutorily imposed on any insured; or
 - (4) any liability assumed through an unwritten or written agreement by any insured;
- with regard to the ownership, maintenance or use of any aircraft, watercraft, or motor vehicle (or any other motorized land conveyance) which is not covered under Section II of this policy;

☒ g. bodily injury or property damage caused directly or indirectly by war, including undeclared war, or any warlike act including destruction or seizure or use for

a military purpose, or any consequence of these. Discharge of a nuclear weapon shall be deemed warlike act even if accidental;

☒ h. bodily injury to you or any insured within the meaning of part a. or b. of the definition of insured.

This exclusion also applies to any claim made or suit brought against any insured to share damages with or repay someone else who may be obligated to pay damages because of the bodily injury;

☒ i. any claim made or suit brought against any insured by:

- (1) any person who is in the care of any insured because of child care services provided by or at the direction of:
 - (a) any insured;
 - (b) any employee of any insured; or
 - (c) any other person actually or apparently acting on behalf of any insured.
- (2) any person who makes a claim because of bodily injury to any person who is in the care of any insured because of child care services provided by or at the direction of:
 - (a) any insured;
 - (b) any employee of any insured; or
 - (c) any other person actually or apparently acting on behalf of any insured.

This exclusion does not apply to the occasional child care services provided by any insured, or to the part-time child care services provided by any insured who is under 19 years of age.

☒ 2. Coverage L does not apply to:

- a. liability assumed under any unwritten contract or agreement, or by contract or agreement in connection with a business of the insured;
- b. property damage to property owned by any insured;

- 4c. property damage to property rented to, occupied or used by or in the care of any insured. This exclusion does not apply to property damage caused by fire, smoke or explosion;
- 7d. bodily injury to a person eligible to receive any benefits required to be provided or voluntarily provided by an insured under a workers' compensation, non-occupational disability, or occupational disease law;
- X e. bodily injury or property damage for which an insured under this policy is also an insured under a nuclear energy liability policy or would be an insured but for its termination upon exhaustion of its limit of liability. A nuclear energy liability policy is a policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada, or any of their successors.

SECTION II - CONDITIONS

1. **Limit of Liability.** The Coverage L limit is shown in the Declarations. This is our limit for all damages from each occurrence regardless of the number of insureds, claims made or persons injured.

The Coverage M limit is shown in the Declarations. This is our limit for all medical expense for bodily injury to one person as the result of one accident.

2. **Severability of Insurance.** This insurance applies separately to each insured. This condition shall not increase our limit of liability for any one occurrence.

3. **Duties After Loss.** In case of an accident or occurrence, the insured shall perform the following duties that apply. You shall cooperate with us in seeing that these duties are performed:

- give written notice to us or our agent as soon as practicable, which sets forth:
 - the identity of this policy and insured;
 - reasonably available information on the time, place and circumstances of the accident or occurrence; and

- X 3. Coverage M does not apply to bodily injury:
- to a residence employee if it occurs off the insured location and does not arise out of or in the course of the residence employee's employment by an insured;
 - to a person eligible to receive any benefits required to be provided or voluntarily provided under any workers' compensation, non-occupational disability or occupational disease law;
 - from nuclear reaction, radiation or radioactive contamination, all whether controlled or uncontrolled or however caused, or any consequence of any of these;
 - to a person other than a residence employee of an insured, regularly residing on any part of the insured location.

- names and addresses of any claimants and available witnesses;

- immediately forward to us every notice, demand, summons or other process relating to the accident or occurrence;

- at our request, assist in:

- making settlement;
- the enforcement of any right of contribution or indemnity against a person or organization who may be liable to an insured;
- the conduct of suits and attend hearings and trials; and
- securing and giving evidence and obtaining the attendance of witnesses;

- under the coverage - Damage to Property of Others:

- submit a sworn statement of loss to us within 60 days after the loss; and

- exhibit the damaged property if within the insured's control;

- the insured shall not, except at the insured's own cost, voluntarily make payments, assume obligations or incur expenses. This does not apply to expense for first aid to others at the time of the bodily injury.

4. **Duties of an Injured Person - Coverage M.** The injured person, or, when appropriate, someone acting on behalf of that person, shall:

- give us written proof of claim, under oath if required, as soon as practicable;
- execute authorization to allow us to obtain copies of medical reports and records; and
- submit to physical examination by a physician selected by us when and as often as we reasonably require.

5. **Payment of Claim - Coverage M.** Payment under this coverage is not an admission of liability by an insured or us.

SECTION I AND SECTION II - CONDITIONS

1. **Policy Period.** This policy applies only to loss under Section I or bodily injury or property damage under Section II which occurs during the period this policy is in effect.

2. **Concealment or Fraud.** This policy is void as to you and any other insured, if you or any other insured under this policy has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance, whether before or after a loss.

3. **Liberalization Clause.** If we adopt any revision which would broaden coverage under this policy without additional premium the broadened coverage will automatically, immediately apply to this policy from the date of such revision.

4. **Waiver or Change of Policy Provisions.** A waiver or change of any provision of this policy must be in writing

6. **Suit Against Us.** No action shall be brought against us unless there has been compliance with the policy provisions.

No one shall have the right to join us as a party to action against an insured. Further, no action with respect to Coverage L shall be brought against us until the obligation of the insured has been determined by final judgment or agreement signed by us.

7. **Bankruptcy of an Insured.** Bankruptcy or insolvency of an insured shall not relieve us of our obligation under this policy.

8. **Other Insurance - Coverage L - Personal Liability:** If loss covered by this policy is also covered by other insurance, we will pay only the proportion of the loss that the limit of liability that applies under this policy bears to the total amount of insurance covering the loss. However, with respect to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any motor vehicle or watercraft in which this policy applies, this insurance under Coverage L shall be excess insurance over any other valid and collectible insurance available to the insured.

by us to be valid. Our request for an appraisal or examination shall not waive any of our rights.

5. **Cancellation.**

- You may cancel this policy at any time by notifying us in writing of the date cancellation is to take effect. We may waive the requirement that the notice be in writing by confirming the date and time of cancellation to you in writing.

- We may cancel this policy only for the reasons stated in this condition. We will notify you in writing of the date cancellation takes effect. This cancellation notice may be delivered to you, or mailed to you at your mailing address shown in the Declarations. Proof of mailing shall be sufficient proof of notice:

- When you have not paid the premium, we may cancel at any time by notifying you at least 10 days before the date cancellation takes effect

This condition applies whether the premium is payable to us or our agent or under any finance or credit plan.

(2) When this policy has been in effect for less than 60 days and is not a renewal with us, we may cancel for any reason. We may cancel by notifying you at least 10 days before the date cancellation takes effect.

(3) When this policy has been in effect for 60 days or more, or at any time if it is a renewal with us, we may cancel if there has been:

- (a) Conviction of a crime arising out of acts increasing the probability that a peril insured against will occur;
- (b) Discovery of fraud or material misrepresentation;
- (c) Willful or reckless acts or omissions increasing the probability that a peril insured against will occur as determined from a physical inspection of the insured premises;
- (d) Physical changes in the property which result in the property becoming uninsurable as determined from the physical inspection of the insured premises.

We may cancel this policy by notifying you at least 30 days before the date cancellation takes effect.

(c) When this policy is cancelled, the premium for the period from the date of cancellation to the expiration date will be refunded. When you request cancellation, the return premium will be based on our rules for such cancellation. The return premium may be less than a full pro rata refund. When we cancel, the return premium will be pro rata.

(d) The return premium may not be refunded with the notice of cancellation or when the policy is returned to us. In such cases, we will refund it within a reasonable time after the date cancellation takes effect.

6. **Nonrenewal.** We may elect not to renew this policy. If we elect not to renew, a written notice will be delivered to you, or mailed to you at your mailing address shown in the Declarations. The notice will be mailed or delivered at least 30 days before the expiration date of this policy. Proof of mailing shall be sufficient proof of notice.

If this policy is written for a policy period of less than one year, we agree that we will not refuse to renew except as of the expiration of a policy period which coincides with the end of an annual period commencing with its original effective date.

7. **Assignment.** Assignment of this policy shall not be valid unless we give our written consent.

(8) **Subrogation.** An insured may waive in writing before a loss all rights of recovery against any person. If not waived, we may require an assignment of rights of recovery for a loss to the extent that payment is made by us.

If an assignment is sought, an insured shall:

- a. sign and deliver all related papers;
- b. cooperate with us in a reasonable manner; and
- c. do nothing after a loss to prejudice such rights.

Subrogation does not apply under Section II to Medical Payments to Others or Damage to Property of Others.

(9) **Death.** If any person named in the Declarations or the spouse, if a resident of the same household, dies:

- a. we insure the legal representative of the deceased. This condition applies only with respect to the premises and property of the deceased covered under this policy at the time of death;

b. insured includes:

- (1) any member of your household who is an insured at the time of your death, but only while a resident of the residence premises; and

(2) with respect to your property, the person having proper temporary custody of the property until appointment and qualification of a legal representative.

10. **Modification of Terms.** The terms of this policy which are less favorable than those which are provided for the statutes, rules and regulations of the state where this policy is issued are amended to conform to such statutes, rules and regulations.

OPTIONAL POLICY PROVISIONS

The following Optional Policy Provisions are subject to all the terms and provisions of this policy, unless otherwise indicated in the terms of the option.

Each Optional Policy Provision applies only as indicated in the Declarations.

Option AI - Additional Insured. The definition of Insured is extended to include the person or organization named in the Declarations as an Additional Insured or whose name is on file with us. Unless otherwise limited in the Declarations, coverage is with respect to the following policy Sections:

1. Section I - Coverage A; or

2. Section II - Coverages L and M but only with respect to the residence premises or any other insured location, subject to the following:

- a. the Additional Insured is not an insured for the purpose of defining or adding any insured location under this policy; and
- b. this coverage does not apply to bodily injury to any employee, or to property damage incurred by any employee, arising out of or in the course of the employee's employment by the Additional Insured.

This option applies only with respect to the location shown in the Declarations.

Option BU - Business Pursuits.

Section II - Exclusion 1.b. is modified as follows:

1. Section II coverage applies to the business pursuits of an insured who is a:

- a. clerical office employee, salesperson, collector, messenger; or
- b. teacher, school principal or school administrator;

while acting within the scope of the above listed occupations.

2. However, no coverage is provided:

a. for bodily injury or property damage arising out of a business owned or financially controlled by the insured or by a partnership of which the insured is a partner or member;

b. for bodily injury or property damage arising out of the rendering of or failure to render professional services of any nature (other than teaching or school administration). This exclusion includes but is not limited to:

(1) architectural, engineering or industrial design services;

(2) medical, surgical, dental or other services or treatment conducive to the health of person or animals; and

(3) beauty or barber services or treatment;

c. for bodily injury to a fellow employee of the insured injured in the course of employment; or

d. when the insured is a member of the faculty or teaching staff of a school or college:

(1) for bodily injury or property damage arising out of the maintenance, use, loading or unloading of:

(a) draft or saddle animals, including vehicles for use with them; or

(b) aircraft, motor vehicles, recreational motor vehicles or watercraft, airboats, air cushions or personal watercraft which use a water jet pump powered by an

internal combustion engine as the primary source of propulsion;

owned or operated, or hired by or for the Insured or employer of the Insured or used by the Insured for the purpose of instruction in the use thereof; or

(2) under Coverage M for bodily injury to a pupil arising out of corporal punishment administered by or at the direction of the Insured.

SECTION I AND SECTION II - CONDITIONS are modified as follows:

1. Cancellation

- Reference to 10 days notice in b.(1) is changed to 15 days notice;
- Reference to 10 days notice in b.(2) is changed to 45 days notice; and
- Reference to 30 days notice in b.(3) is changed to 45 days notice.

2. Nonrenewal

Reference to 30 days notice is changed to 45 days notice.

Option FA - Firearms. Firearms are insured for accidental direct physical loss or damage.

The limits for this option are shown in the Declarations. The first amount is the limit for any one article; the second amount is the aggregate limit for each loss.

The following additional provisions apply:

- we do not insure for any loss to the property described in this option either consisting of, or directly and immediately caused by, one or more of the following:
 - mechanical breakdown, wear and tear, gradual deterioration;
 - insects or vermin;

- any process of refinishing, renovating, or repairing;
 - dampness of atmosphere or extremes of temperatures;
 - inherent defect or faulty manufacture;
 - rust, fouling or explosion of firearms;
 - breakage, marring, scratching, tearing or denting unless caused by fire, thieves or accidents to conveyances; or
 - infidelity of an Insured's employees or persons to whom the insured property may be entrusted or rented.
- our limit for loss by any Coverage B peril except theft is the limit shown in the Declarations for Coverage B, plus the aggregate limit;
 - our limits for loss by theft are those shown in the Declarations for this option. These limits apply in lieu of the Coverage B theft limit; and
 - our limits for loss by any covered peril except those in items 2. and 3. are those shown in the Declarations.

Option IO - Incidental Business. The coverage provided by this option applies only to the incidental business occupancy on file with us.

1. Section I: COVERAGE B - PERSONAL PROPERTY is extended to include equipment, supplies and furnishings usual and incidental to this business occupancy. This Optional Policy Provision does not include merchandise held as samples or for sale or for delivery after sale.

The Option IO limit is shown in the Declarations. The limit applies in addition to the Section I, COVERAGE B - PERSONAL PROPERTY, Special Limits of Liability on property used or intended for use in a business while away from the described premises.

2. Section II: The residence premises is not considered business property because an Insured occupies a part of it as an incidental business.

3. Section II: Exclusion 1.b. of Coverage L and Coverage M is replaced with the following:

b. bodily injury or property damage arising out of business pursuits of an Insured or the rental or holding for rental of any part of any premises by an Insured. This exclusion does not apply:

(1) to activities which are ordinarily incidental to non-business pursuits or to business pursuits of an Insured which are necessary or incidental to the use of the residence premises as an incidental business;

(2) with respect to Coverage L to the occasional or part-time business pursuits of an Insured who is under 19 years of age;

(3) to incidental business activities of any Insured for babysitting, caddying, lawn care, newspaper delivery and other similar activities; or

(4) to the rental or holding for rental of a residence of yours:

(a) on an occasional basis for exclusive use as a residence;

(b) in part, unless intended for use as a residence by more than two roomers or boarders; or

(c) in part, as an incidental business or private garage;

(5) when the dwelling on the residence premises is a two family dwelling and you occupy one part and rent or hold for rental the other part; or

(6) to farm land (without buildings) not in excess of 500 acres, rented or held for rental to others.

4. SECTION I AND SECTION II - CONDITIONS are modified as follows:

a. Cancellation

(1) Reference to 10 days notice in b.(1) is changed to 15 days notice;

(2) Reference to 10 days notice in b.(2) is changed to 45 days notice; and

(3) Reference to 30 days notice in b.(3) is changed to 45 days notice.

b. Nonrenewal

Reference to 30 days notice is changed to 45 days notice.

5. This insurance does not apply to:

a. bodily injury to an employee of an Insured arising out of the residence premises as an incidental business other than to a residence employee while engaged in the employee's employment by an Insured;

b. bodily injury to a pupil arising out of corporal punishment administered by or at the direction of the Insured;

c. liability arising out of any acts, errors or omissions of an Insured, or any other person for whose acts an Insured is liable, resulting from the preparation or approval of data, plans, designs, opinions, reports, programs, specifications, supervisory inspections or engineering services in the conduct of an Insured's incidental business involving data processing, computer consulting or computer programming; or

d. any claim made or suit brought against any Insured by:

(1) any person who is in the care of any Insured because of child care services provided by or at the direction of:

(a) any Insured;

(b) any employee of any Insured; or

(c) any other person actually or apparently acting on behalf of any Insured; or

(2) any person who makes a claim because of bodily injury to any person who is in the care of an

Insured because of child care services provided by or at the direction of:

- (a) any Insured;
- (b) any employee of any Insured; or
- (c) any other person actually or apparently acting on behalf of any Insured.

Coverage M does not apply to any person indicated in (1) and (2) above.

This exclusion does not apply to the occasional child care services provided by any Insured, or to the part-time child care services provided by any Insured who is under 19 years of age.

Option JF - Jewelry and Furs. Under SECTION I - ADDITIONAL COVERAGES, item 10. Is changed as follows:

1. the "\$1,500" limit is replaced with the first amount shown in the Declarations for this option; and
2. the "\$2,500" limit is replaced with the second amount shown in the Declarations for this option.

Option SA - Merchandise Samples. The Option SA limit shown in the Declarations applies in addition to the Special Limits of Liability on business property in storage or held as samples or for sale or for delivery after sale while located on the residence premises.

IN WITNESS WHEREOF, this Company has executed and attested these presents.

Laura P. Sullivan

Secretary

Edward B. Runtz Jr.

President

The Board of Directors, in accordance with Article VI(c) of this Company's Articles of Incorporation, may from time to time distribute equitably to the holders of participating policies issued by said Company such sums out of its earnings as in its judgment are proper.

UP NO. 091987

COUNTY OF FAIRFAX, VIRGINIA
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
DIVISION OF DESIGN REVIEW
RESIDENTIAL USE PERMIT
08/04/93

STREET NUMBER	STREET NAME	ST TY	ACT NO.	LEVEL	UNIT	ACT NO.
09844	PALACE GREEN	WY	001			01

LOT NUMBER	SUBDIVISION NAME	MAP REFERENCE NUMBER	INSP AREA
00006	WILLIAMSBURG COMMONS	048-1- /37/ /0006-	3

INSPECTED BY

DATE

ELECTRICAL	<i>[Signature]</i>	8/2/93
PLUMBING	<i>[Signature]</i>	8/2/93
MECHANICAL	<i>[Signature]</i>	8/2/93
BUILDING	<i>[Signature]</i>	8/2/93
PUBLIC UTILITIES	<i>[Signature]</i>	8/5/93
APPROVED	<i>[Signature]</i>	8/5/93
REMARKS		

THE FOLLOWING REQUIREMENTS, IF CHECKED, ARE BEING WAIVED IN
ACCORDANCE WITH CHAPTER 112 ARTICLE 18 PART 704 OF THE FAIRFAX
COUNTY CODE TO OBTAIN A RESIDENTIAL USE PERMIT:

- ___ FINAL GRADING, SODDING, SEEDING OF LOT
- ___ COMPLETION OF LANDSCAPING AND SCREENING REQUIREMENTS
- ___ COMPLETION OF SIDEWALKS
- ___ BITUMINOUS CONCRETE STREET/DRIVEWAY SURFACE
- ___ ADEQUATE STAND OF GRASS

ATTENTION

NO TREES OR SHRUBS MAY BE PLANTED IN THE DEDICATED
RIGHT-OF-WAY WITHOUT FIRST OBTAINING A PERMIT FROM
VIRGINIA DEPARTMENT OF TRANSPORTATION AT 934-0584.
WHEN EXCEPTIONS FOR FINAL GRADING, SODDING AND/OR
SEEDING ARE GRANTED DURING THE WINTER, THE BUILDER IS
OBLIGATED TO COMPLETE THIS WORK BY THE FIRST DAY OF MAY.

HOMEOWNER
BUILDER
704116

PLAINTIFF'S
EXHIBIT

HEA 5 - 2/8/00

CHY149960

COUNTY OF FAIRFAX, VIRGINIA
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
DIVISION OF DESIGN REVIEW
RESIDENTIAL USE PERMIT
02/24/94

STREET NUMBER	STREET NAME	ST TY	ACT NO.	LEVEL	UNIT	ACT NO.
09846	PALACE GREEN	WY	001			01

LOT NUMBER	SUBDIVISION NAME	MAP REFERENCE NUMBER	INSP AREA
00007	WILLIAMSBURG COMMONS	048-1- /37/ /0007-	3

	INSPECTED BY	DATE
ELECTRICAL	<i>[Signature]</i>	2-24-94
PLUMBING	<i>[Signature]</i>	2-24-94
MECHANICAL	<i>[Signature]</i>	2-24-94
BUILDING	<i>[Signature]</i>	2-24-94
PUBLIC UTILITIES	<i>[Signature]</i>	2-25-94
APPROVED	<i>[Signature]</i>	2-25-94
REMARKS		

THE FOLLOWING REQUIREMENTS, IF CHECKED, ARE BEING WAIVED IN ACCORDANCE WITH CHAPTER 112 ARTICLE 18 PART 704 OF THE FAIRFAX COUNTY CODE TO OBTAIN A RESIDENTIAL USE PERMIT:

- ☒ FINAL GRADING, SODDING, SEEDING OF LOT
- ☐ COMPLETION OF LANDSCAPING AND SCREENING REQUIREMENTS
- ☐ COMPLETION OF SIDEWALKS
- ☐ BITUMINOUS CONCRETE STREET/DRIVEWAY SURFACE
- ☒ ADEQUATE STAND OF GRASS

HOMEOWNER
BUILDER
ZONING

PLAINTIFF'S
EXHIBIT

6 2/8
HE

CHY149960

HOUSE COST BREAKDOWN

PLAINTIFF'S
EXHIBIT
HEH 7 - 2/8/00
CH-148960

HOUSE NAME: Kitchen House

Revised 7/20/93

LOT NUMBER: 7

Sub to TBCC	Markup factor	Work by subcontractor	Work by WWC or TBCC	TOTAL
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1. Excavation					
2. Spoil removal					
3. Footings					
4. Basement masonry					
5. Basement slab					
6. Garage slab				2,630	2,630
7. Waterproofing					
8. Basement drains					
9. Soil treatment					
Framing:					
10. Materials				56,800	56,800
11. Labor				42,517	42,517
12. Exterior masonry					
13. Fireplaces and interior masonry					
Exterior millwork:					
14. Windows	21,422	0.25	26,778	8,743	35,521
15. Entrance				4,251	4,251
16. Other doors & features				4,386	4,386
17. Cornice				11,702	11,702
18. Siding				20,866	20,866
19. Shutters					
20. Railings				952	952
21. Outbuilding or special treatment				2,726	2,726
22. Misc. millwork				9,425	9,425
23. Roofing, cedar shingles, copper flashing				20,997	20,997
24. Plumbing	9,700	0.25	12,125		12,125
25. Heating and air conditioning	12,083	0.25	15,104	1,208	16,312
26. Electrical	9,818	0.25	12,273	784	13,057
27. Insulation				4,661	4,661
28. Drywall and Durock	12,455	0.25	15,569	1,346	16,915
29. Ceramic in bathrooms	9,200	0.35	12,420	788	13,208
30. Bathroom fixtures				6,627	6,627
Interior millwork:					
31. Stairs				4,691	4,691
32. Floors	9,420	0.25	11,775	12,382	24,157
33. Doors				8,614	8,614
34. Wainscot				17,205	17,205 *2
35. Library, cabinetry (master bedroom)				12,059	12,059 *2
36. Window seats & built-ins				12,123	12,123 *2
37. Trim				26,243	26,243 *2
38. Railings				6,351	6,351
39. Coach house doors				3,364	3,364
40. Kitchen cabinetry	6,720	0.25	8,400	600	9,000
41. Misc. millwork				8,656	8,656
42. Interior painting				7,380	7,380
43. Exterior painting				2,910	2,910
44. Kitchen appliances	4,003	0.00	4,003		4,003
45. Hardware				575	575
46. Light fixtures				2,000	2,000
47. Basement sump (if required)	NA			NA	
48. Underground sprinklers	NA			NA	
49. Brick walkways and/or patio					
50. Landscaping				800	800
51. Exterior lighting	469	0.25	586		
52. Parking area					
53. Adjacent road and driveway					
54. Cleaning	520	0.25	650		
55. Contingency				9,000	
56. Demolition (subcontractor amount paid in full)	25,000		25,000		
57. Sand blasting	2,500	0.25	3,125		
58. Acid cleaning	1,500	0.25	1,875		
59. Repair masonry	17,500		17,500		

TOTAL COST TO REPLACE BASE HOUSE

*1 - These items shall be performed time and materials

227

002

503,545.00

60,093.62

563,638.62

EXTRAS FOR LOT 7

ITEM NO.		DESCRIPTION	BILLING PRICE	TO REPLACE	
1		Charlie's playroom	2,500.00	4,000.00	at least \$1500 was a gift
2		Library	26,000.00		not installed
3		cabinets in studio	3,320.00	400.00	not installed (rough in)
4		studio dormer	9,244.00	9,244.00	
5	1	additional nook window	1,466.00	1,466.00	
6		sink in studio, plumbing to, sink, faucet	892.00	675.00	does not include sink
7		phone / intercom system	4,900.00	4,710.00	one phone not in house
8	2	High-efficiency furnaces	3,600.00	3,600.00	
9	1	Steam humidifier			
10		additional dormer lights	1,625.00	1,625.00	
11	1	towel heater installation	125.00	125.00	
12		special medicine closet	480.00	480.00	
13		2 additional dormers	5,000.00	5,000.00	
14		beams in garage studio	2,000.00	2,000.00	
15	1	floor drain in basement	190.00	190.00	
16	5	gas logs, piping only	2,250.00	2,250.00	
17	1	gas dryer piping	450.00	450.00	
18	1	gas to range	nc	450.00	compensation to Kitchens
19	2	additional receptacles in garage	250.00	250.00	
20	2	receptacles in attic	250.00	250.00	
21	2	attic & garage heat	1,530.00	1,530.00	
22	1	future fan housings w/ switch	156.00	156.00	
23	1	heat lamp	275.00	275.00	
24		rout out for kitchen sink	nc	142.19	compensation to Kitchens
25	1	light over garage stairs	nc	125.00	compensation to Kitchens
26		additional stereo wiring	nc	280.00	compensation to Kitchens
27		additional cable television wiring	nc	227.00	compensation to Kitchens
28		paneled window seats	nc	1,179.00	compensation to Kitchens
29		additional wainscot in 2nd. floor hall	nc	816.00	compensation to Kitchens
30		plate rail in dining room	nc	405.35	compensation to Kitchens
31		additional on plumbing fixtures	5,000.00	5,000.00	approximate
32		additional on plumbing installation	1,625.00	1,625.00	
33		additional on lighting	2,000.00	2,000.00	approximate
34		additional on electrical	3,885.00	3,885.00	
35		additional on cabinetry	3,392.08	3,692.08	
36		additional on appliances	1,591.00	1,591.00	
		TOTAL OF PRICED ITEMS	83,996.08	60,093.62	



BUILDING ESTIMATE - PROPERTY CLAIMS

STATE FARM INSURANCE COMPANIES — Home Offices Bloomington, Illinois

CLAIM

PLAINTIFF'S
EXHIBIT

REH 8 7/8/00

CHY 149960

INSURED Stephen E and Mary S Kitchen DATE ESTIMATED June 22, 1993 PAGE 1 OF 1LOCATION 9846 Palace Green Way CLAIMANT _____ PRICE TABLE _____

DESCRIPTION	QUANTITY	UNIT OF MEASURE	UNIT COST (incl. any applicable sales tax)	EXTENSION	%	DEPR./ BETTER.	NET SETTLEMENT
<u>Coverage A - Building</u>							
<u>Basic Construction of House</u>	<u>Per estimate from Talton Brothers Construction</u>						<u>416,910 90</u>
<u>5% Profit and Overhead</u>							<u>104,227 72</u>
<u>Demolition of House</u>							<u>25,000 00</u>
<u>Masonry Repairs</u>							<u>17,500 00</u>
<u>Subtotal of Coverage A</u>							<u>563,638 62</u>
<u>Less 25% Profit and Overhead</u>	<u>To Be Paid Upon 50% Completion of House</u>						<u>104,227 72 ></u>
<u>Less Demolition</u>	<u>Pre-paid by State Farm on 6/25/93</u>						<u>25,000 00 ></u>
<u>Total Coverage A</u>							<u>434,410 90</u>
<u>Coverage B - Personal Property</u>							
<u>Personal Property</u>	<u>Per inventory provided by Insured</u>						<u>5,421 14</u>
<u>Less your policy deductible</u>							<u>1,000 00 ></u>
<u>Total Coverage B</u>							<u>4,421 14</u>
<u>Coverage C - Additional Living Expenses</u>							
<u>Rent (August 1, 1993 thru October 31, 1993)</u>	<u>3</u>	<u>Months</u>	<u>995.00</u>	<u>2,985 00</u>			<u>2,985 00</u>
<u>Storage of London Items (July 1, 1993 thru September 30, 1993)</u>	<u>3</u>	<u>Months</u>	<u>100.00</u>	<u>300 00</u>			<u>300 00</u>
<u>Storage of New York Items (July 1, 1993 thru September 30, 1993)</u>	<u>3</u>	<u>Months</u>	<u>135.00</u>	<u>405 00</u>			<u>405 00</u>
<u>Total Coverage C</u>							<u>3,690 00</u>

COMPANY REPRESENTATIVE J. E. Hill PHONE NUMBER 703-218-0458

NOTE: This form is printed on Non Carbon Required paper - Write only on the number of sheets needed!



SWORN STATEMENT IN PROOF OF LOSS

CLAIM NO. 46-C421-393

POLICY NUMBER 46-BA-3419-5 EFFECTIVE DATE 3/19/93 EXPIRATION DATE 3/19/94
 TYPE OF POLICY Homeowners - X5 PROPERTY INSURED 6846 Palace Green Way Vienna VA AMOUNT \$ 560,000 +

TO ☒ STATE FARM FIRE AND CASUALTY COMPANY ☐ STATE FARM GENERAL INSURANCE COMPANY ☐ STATE FARM COUNTY MUTUAL INSURANCE COMPANY OF TEXAS ☐ STATE FARM LLOYDS

By the above policy of insurance, you insure: Stephen E Kitchen / Mary S. (hereinafter called Insured)

A Fire Name of Insured Stephen E Kitchen / Mary S. Loss occurred 6.17.93 about the hour of 2 ☒ A.M. ☐ P.M.

Peril Fire which loss upon best knowledge and belief of Insured was caused by unknown ... floor finish chemical Origin

The interest of the Insured in the described property was OWNERS

Others having interest in the described property at the time of loss either as mortgagee, lienholder, or otherwise were Virginia First Savings Bank as mortgagee. Since the above policy was issued there has been no change in title, use, or possession of said property except none

THE ACTUAL CASH VALUE of the described property at time of loss was (\$ Building \$ Contents) \$ see below

THE REPLACEMENT COST of the described property at time of loss was (\$ 563,638.62 \$ 4,421.14) \$ 568,159.76
 Building Contents

THE TOTAL INSURANCE covering the described property including this policy and all other policies (whether valid or not), binders, or agreement to insure was at time of said loss THIS POLICY & POSSIBLY BINDER & BAR \$?

THE ACTUAL LOSS AND DAMAGE to the described property as a result of said loss was (Building \$ Contents \$ Other \$ same as above) \$ above

LESS AMOUNT OF DEDUCTIBLE \$ 1000

INSURED HEREBY CLAIMS OF THIS COMPANY (*) under this policy the sum of \$ 567,159.76

*Subject to Supplemental Claim, if applicable, to be filed in accordance with the terms and conditions of the Replacement Cost Coverage under the above described policy. see above

THE FULL COST OF REPAIR OR REPLACEMENT is \$?

MAXIMUM AMOUNT OF SUPPLEMENTAL CLAIM under the Replacement Cost Coverage of the above described policy is (\$ Building \$ Contents) \$?

In consideration of the payment to be made hereunder for any property other than real property on an actual cash value or replacement cost basis, the insured does hereby assign to said insurer all right, title and interest in and to said property for which claim is being made hereunder, and agrees to immediately notify said insurer in case of any recovery of the property for which claim is being made hereunder, and will render all assistance possible in any endeavor to recover said property. Insured also agrees to turn over to said insurer, any such recovery which may be made, or reimburse said insurer in full to the extent of the payment which may be recovered.

The said loss was not caused by design or procurement on the part of the insured or this affiant; nothing has been done by or with the privity or consent of insured or this affiant, to violate the conditions of the policy, or render it void, no articles are mentioned herein or in annexed schedules but such as were interested in the loss and insured under this policy, and belonged to the insured at the time of said loss, no property saved has been in any manner concealed, and no attempt to deceive the said insurer as to the extent of said loss, has in any manner been made. Any other information that may be required will be furnished on call, and considered a part of this proof. All loss verification, as required by the insurance policy, is annexed hereto.

Applicable in California Only: For your protection California Law requires the following to appear on this form — (a) It is unlawful to: (1) Knowingly present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance. (2) Knowingly file multiple claims for the same loss or injury with more than one insurer with an intent to defraud the insurer. (3) Knowingly prepare, make, or subscribe any writing, with intent to present or use the same, or to allow it be present or used in support of any such claim. (b) Every person who violates any provision of this section is punishable by imprisonment in the state prison, for two, three, or four years, or by fine not exceeding ten thousand dollars (\$10,000), or by both.

Applicable in Florida Only: Any person who knowingly and with intent to injure, defraud or deceive any insurance company files a statement of claim containing any false, incomplete or misleading information is guilty of a felony of the third degree.

Applicable in Alaska, Delaware and Idaho Only: Any person who knowingly, and with intent to defraud or deceive any insurance company, files a statement of claim containing any false, incomplete or misleading information is guilty of a felony.

Applicable in New York Only: Any person who knowingly and with intent to defraud any insurance company or other person files a statement of claim containing any materially false information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime.

It is expressly understood and agreed that the furnishings of this blank to the insured or the assistance of an adjuster, or any agent of the insurer in the making of this proof, is not a waiver of any rights of said Insurer or of any of the conditions of this policy.

WITNESS their hand at Fairfax Stephen E Kitchen 9-3-93
 this 3rd day of September, 1993 } Mary Sue Kitchen 9-3-93
 State of Virginia County of Fairfax Signature Date

Personally appeared before me, the day and date above written Stephen E and Mary Sue Kitchen signer of the foregoing statements, who being by me duly sworn, made solemn oath that the matters contained in the foregoing statements are true in substance and in fact.



Allison Albert NOTARY PUBLIC (SEAL)
 commission expires July 31, 1997

SCHEDULE OF REPAIRS TO LOT 6

HOUSE NAME: George Reid House
LOT NUMBER: 6

Excavation		
Spoil removal		
Footings		
Basement masonry	418	clean exterior brick ✓
Basement slab		
Waterproofing		
Basement drains		
Soil treatment		
Framing:		
Materials	1,011	plywood, Tyvek, etc.
Labor	6,237	remove and replace plywood and tyvek, rebuild 3 dormers
Exterior masonry		
Fireplaces and interior masonry		
Exterior millwork:		
Windows	15,069	includes authentic exterior and interior trim & installation ✓
Entrance		
Other doors	721	porch double doors ✓
Cornice	2,983	
Siding	9,914	remove and replace ✓
Shutters		
Railings		
Outbuilding or special treatment		
Misc. millwork	1,950	replace and or <u>repair interior trim (includes materials)</u>
Roofing, cedar shingles, copper flashing	13,308	remove & replace entire side exposed to lot 7 ✓
Plumbing	600	remove and install new whirlpool ✓
Heating and air conditioning	3,759	
Electrical		
Insulation		
Drywall	1,649	removal, replacement and repair ✓
Ceramic in bathrooms	502	remove grout & regrout tile (will try this solution first) ✓
Bathroom fixtures	1,554	whirlpool, sink, toilet tank and seat ✓
Interior millwork:		
Stairs		
Floors	10,874	replace owner designated areas, sand, stain, and poly ✓
Doors		
Wainscot		
Library cabinetry (master bedroom)		
Window seats & built-ins	410	dormer bookcase
Trim		
Railings		
Coach house doors		
Kitchen cabinetry		
Misc. millwork		
Interior painting	4,750	price based on areas designated by Mr. Kozak ✓
Exterior painting	3,105	50% of exterior plus all window sills and horizontal areas ✓
Kitchen appliances		
Hardware		
Light fixtures		
Basement sump (if required)		
Underground sprinklers		
Brick walkways and/or patio	784	replace and compact base in patio area ✓
Landscaping	1,150	regrade (minor), prep. and sod around house ✓
Exterior lighting	78	replace light hit by fire truck ✓
Parking area	190	regrade washed out area between lot 6 & 7 ✓
Adjacent road and driveway		
Cleaning	649	paint on windows and hearths
Contingency	2,300	2.5% of total
	390	remove sod
	885	dump fees
	842	demo (areas not covered under other unit costs)

TOTAL COST

\$86,081

\$83,781

All non-TBCC pre-RUP work at Williamsburg Commons shall be charged a 25% coordination fee. (This does not apply this schedule.)

PLAINTIFF'S
EXHIBIT

10

2/8/10
NEH

CH4149960

92-210910

SS:21 9-AOWZ661

DEED OF BARGAIN AND SALE

THIS DEED OF BARGAIN AND SALE made this 4th day of November, 1992, by and between David N. TALTON and Amy Elaine TALTON, husband and wife (hereinafter referred to as "Grantor"); and Jerome J. KOZAK and Gail E. KOZAK, husband and wife, as tenants by the entirety with common law right of survivorship (hereinafter collectively referred to as "Grantee").

W I T N E S S E T H :

That for and in consideration of the sum of Ten Dollars (\$10.00), cash in hand paid, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Grantor, subject to the matters hereinafter set forth, hereby grants and conveys in fee simple with general warranty and full english covenants of title to Grantee all that certain lot or parcel of land situate in Fairfax County, Virginia, and more particularly described as follows: Lot number six (6), WILLIAMSBURG COMMONS, as the same appears duly dedicated, platted and recorded in Deed Book 8276 at Page 1312, among the land records of Fairfax County, Virginia.

AND BEING a part of the same property recorded in Deed Book 5678 at Page 558, among the land records of Fairfax County, Virginia.

This conveyance is made subject to all recorded easements, conditions, restrictions and agreements as they may

Property Address: 9844 Palace Green Way
Vienna, Va 22181
Consideration: \$412,500.00

Return to: Stewart Title
#49
927458

BK8330 0197

FOR RECORD BY Stewart Title
DATE 2/8/00
BY HEH
CASE CH4149860

lawfully apply to the real estate hereby conveyed or any part thereof.

WITNESS the following signatures.

GRANTOR:

David N. Talton
DAVID N. TALTON

Amy Elaine Talton
AMY ELAINE TALTON

BK8330 0198

COMMONWEALTH OF VIRGINIA,

COUNTY/CITY OF FAIRFAX to wit:

I, the undersigned Notary Public in and for the jurisdiction aforesaid, do hereby certify that David N. Talton and Amy Elaine Talton have signed the foregoing Deed of Bargain and Sale, bearing date on the 4th day of November, 1992, and acknowledged the same before me.

GIVEN under my hand this 4th day of November, 1992.

[Signature]
Notary Public

My Commission Expires: Nov 31, 1995.

NOV -6 1992
RECORDED FAIRFAX CO VA
TESTE: [Signature] CLERK

A COPY TESTE:
JOHN T. FREY, CLERK
BY: Dorsey J. McCray
Deputy Clerk

92-206154

SE:1 2-AON 2661

DEED OF BARGAIN AND SALE

THIS DEED OF BARGAIN AND SALE made this 30th day of October, 1992, by and between David N. TALTON and Amy Elaine TALTON, husband and wife (hereinafter referred to as "Grantor"); and Stephen E. KITCHEN and Mary S. KITCHEN, husband and wife, as tenants by the entirety with common law right of survivorship (hereinafter collectively referred to as "Grantee").

WITNESSETH:

LIGHT PRINT

That for and in consideration of the sum of Ten Dollars (\$10.00), cash in hand paid, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Grantor, subject to the matters hereinafter set forth, hereby grants and conveys in fee simple with general warranty and full english covenants of title to Grantee all that certain lot or parcel of land situate in Fairfax County, Virginia, and more particularly described as follows:

Lot number Seven (7), WILLIAMSBURG COMMONS, as the same appears duly dedicated, platted and recorded in Deed Book 8276 at Page 1312, among the land records of Fairfax County, Virginia. AND BEING a part of the same property recorded in Deed Book 5678 at Page 558, among the land records of Fairfax County, Virginia.

This conveyance is made subject to all recorded easements, conditions, restrictions and agreements as they may lawfully apply to the real estate hereby conveyed or any part thereof.

Consideration: \$420,000.00
9846 Palace Green Way
Vienna, Virginia 22181

BK8322 0417

FILED 2/8/00
DATE HEA
CASE CHY 149960

BK8322 0418

WITNESS the following signatures:

GRANTOR:

David N. Talton
DAVID N. TALTON

Amy Elaine Talton
AMY ELAINE TALTON

COMMONWEALTH OF VIRGINIA,

COUNTY/CITY OF FAIRFAX to wit:

LIGHT PRINT

I, the undersigned Notary Public in and for the jurisdiction aforesaid, do hereby certify that David N. Talton and Amy Elaine Talton have signed the foregoing Deed of Bargain and Sale, bearing date on the 30th day of October, 1992, and acknowledged the same before me.

GIVEN under my hand this 30th day of October, 1992.

[Signature]
Notary Public

My Commission Expires: May 31, 1995

b:\leeds\1906-4.ded

NOV -2- 1992

RECORDED FAIRFAX CO VA

TESTED

[Signature]

2

A COPY TESTE:

JOHN T. FREY, CLERK

BY: Pamela D. McCray
Deputy Clerk