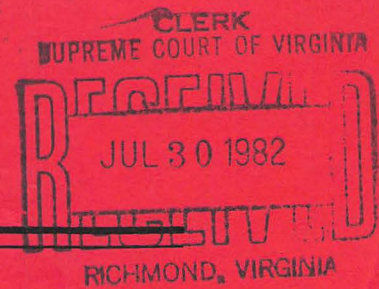


227VA580



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 811574

BLAIR W. CUPP, et al.,

Appellants,

v.

THE BOARD OF SUPERVISORS
OF FAIRFAX COUNTY,

Appellee.

JOINT APPENDIX

Thomas O. Lawson, Esquire
W. Brewster Cockrell, Esquire
4103 Chain Bridge Road
Fairfax, Virginia 22030

Counsel for Appellants

David T. Stitt
County Attorney
J. Richard Tremaine
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030

Counsel for Appellee

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BULK EXHIBITS INCORPORATED
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CANNOT BE REASONABLY REPRODUCED
BUT ARE ON FILE IN CLERK'S OFFICE

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- No. 1 - Development Plan Submitted to Board of Supervisors
- No. 2 - Plat Showing Entire Improvements to Wolf Trap Nursery
- No. 3 - Plat Showing Deceleration Lane
- Nos. 4A - 4M - Photographs of Wolf Trap Nursery
- Nos. 12-35, 40 - Items Sold at Wolf Trap Nursery
- No. 36 - Photograph
- No. 38 - Fairfax County Zoning Map
- Nos. 3A and 3B - Fairfax County Planning Maps

MOTION FOR DECLARATORY JUDGMENT

COME NOW the Complainants, Blair W. Cupp, Dorothy S. Cupp, and Wolf Trap Nursery, Inc., by counsel, pursuant to Code of Virginia of 1950, as amended, Section 8.01-184 et seq., and respectfully represent as follows:

1. That the Complainants are the owners of certain real estate located in Fairfax County, Virginia and more particularly described as 9439 Leesburg Pike, Vienna, Virginia 22180, Tax Map Reference 28-2 ((1)) 19, consisting of approximately 6.7208 acres.

2. That the Complainants have operated a nursery under the trade name of Wolf Trap Nursery, Inc. on the above described premises since May, 1972.

3. That at the time the Complainants commenced the operation of Wolf Trap Nursery, the subject property was zoned RE-1, and under the then existing Fairfax County Zoning Ordinance (1959) Section 30-2.1, such a nursery was interpreted to be a use permitted by right.

4. That since it commenced operations, the physical layout of the nursery has consisted of three greenhouses, a small office which connects two of the greenhouses, and several open air sheds which provide protection for potted and healed-in plants not grown in the greenhouse.

5. That approximately eighty-five percent (85%) of the retail sales of the nursery are attributable to sales of the plants and the remaining fifteen percent (15%) of receipts are derived from landscaping services and from the sale of certain accessory items which are incidental to the sale of plants ---

insecticides, pesticides, fungicides; sprayers; plant foods (liquid and granular); lawn foods (liquid and granular); weed killers; flower and grass seeds; peat moss; mulch; potting soil; pots; garden tools; and bird baths.

6. That on or about September 17, 1979, the Petitioners filed an application to the Board of Supervisors for a special exception (Special Exception No. 091-D-79) under Section 3-104 and 9-003 of the Zoning Ordinance, for the following proposed use:

..."modification and expansion of existing plant nursery, with variance to additional standards for the use to allow an existing lath house and parking area to remain close to the abutting R district then allowed by those additional standards."

A copy of the application is attached hereto, marked Exhibit A and made a part hereof.

7. That on December 5, 1979, the Planning Commission voted to recommend to the Board of Supervisors approval of SE 091-D-79, conditioned on conformance with certain development conditions, including the following:

- a. Construction of a deceleration/right turn lane for entrance to the plant nursery;
- b. Dedication of right-of-way to 100 feet from the centerline for a third eastbound lane and a standard service drive, the exact amount of dedication to be set by DEM at the time of site plan review.

8. That the Staff also recommended conditioning approval of SE 091-D-79 on compliance with the Zoning Ordinance provision concerning plant nurseries (Article 20, Part 3), approved on October 22, 1979, subsequent to the filing of Petitioners' application, which provision permits only the sale of "...items

designed solely to maintain and preserve the life and health of nursery stock such as fungicides, insecticides, chemicals, peat moss, humus, mulches, and fertilizers."

9. That at a regular meeting of the Board of Supervisors held on March 10, 1980, the Board denied SE 091-D-79.

10. That the above mentioned amendment to the Fairfax County Zoning Ordinance, dated October 22, 1979, pertaining to plant nurseries, is unreasonable and arbitrary on its face, and therefore unconstitutional in that it bears no reasonable relationship to the public health, safety and welfare.

11. That the October 22, 1979 Zoning Ordinance amendment is unconstitutional as applied to Complainants' property.

12. That the Board of Supervisors acted arbitrarily, capriciously and unreasonably in denying SE 091-D-79, in that its decision was based on compliance by the Complainant on the above mentioned unconstitutional zoning provision.

13. That the Complainants have a vested right in developing their nursery business, and the action of the Board of Supervisors constitutes a confiscation and unreasonable taking of Complainants' property.

14. That the Board did not have the authority under the enabling statute or local ordinances to require the Complainants to meet the development conditions specified in paragraph 7 of this Motion for Declaratory Judgment.

15. That the Board acted arbitrarily, capriciously and unreasonably, and therefore unconstitutionally, in applying the said development conditions to Complainants' property, in that Complainants' proposed development does not create the need for the dedication or deceleration lane.

WHEREFORE, your Complainants respectfully pray that the Court grant the following relief:

1. Declare unconstitutional, on its face and as applied to Complainants' property, Article 20, Part 3 of the Fairfax County Zoning Ordinance, which provision permits only the sale in plant nurseries of "...items designed solely to maintain and preserve the life and health of nursery stock such as fungicides, insecticides, chemicals, peat moss, humus, mulches, and fertilizers".

2. Declare unconstitutional the imposition by the Board of the development conditions applied to Complainants' property.

3. Declare that Complainants are entitled to modify and expand their nursery as a use existing on the effective date of the Zoning Ordinance, and that Complainants are in compliance with all zoning regulations.

4. Direct Fairfax County to issue the appropriate permits to allow Complainants to modify and expand their nursery and enjoin Fairfax County from interfering with Complainants' development.

5. Grant such other relief as may to the Court seem just.

BLAIR W. CUPP, DOROTHY S. CUPP,
and WOLF TRAP NURSERY, INC.

By Counsel

KELLY, LOUK, LAWSON & KELLY
4103 Chain Bridge Road
Fairfax, Virginia 22030

By: -

Thomas O. Lawson

Thomas O. Lawson
Counsel for Complainants

W. Brewster Cockrell

W. Brewster Cockrell
Counsel for Complainants

PLEA IN BAR

COMES NOW, Defendant Board of Supervisors, by counsel, and files this Plea in Bar and as grounds therefor alleges that Complainants, by counsel, requested denial of their Special Exception application, SE 091-D-79, and were granted their request, and thus no case or controversy exists.

BOARD OF SUPERVISORS
OF FAIRFAX COUNTY, VIRGINIA

By Kathryn M. Anderson
Counsel

DAVID T. STITT
COUNTY ATTORNEY

By Kathryn M. Anderson
Kathryn M. Anderson
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
691-2421
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plea in Bar was mailed, postage prepaid, to Thomas O. Lawson, Esquire, and W. Brewster Cockrell, Esquire, KELLY, LOUK, LAWSON & KELLY, counsel for Complainants, 4103 Chain Bridge Road, Fairfax, Virginia 22030, this 13th day of May, 1980.

Kathryn M. Anderson
Kathryn M. Anderson

ANSWER AND GROUNDS FOR DEFENSE

COMES NOW, Defendant Board of Supervisors, by counsel, and responds to Complainants' Motion for Declaratory Judgment as follows:

1. Defendant admits that Complainants Blair W. Cupp and Dorothy S. Cupp are owners of real property located in Fairfax County, Virginia, at 9439 Leesburg Pike, Vienna, Virginia 22180, consisting of approximately 6.7208 acres (hereinafter, the subject property). The rest of the allegations of Paragraph 1 are denied.

2. Defendant admits that Complainants Blair W. Cupp and Dorothy S. Cupp operate a nursery called Wolf Trap Nursery on the subject property. Defendant is without knowledge to determine when Wolf Trap Nursery began and therefore denies the rest of the allegations of Paragraph 2.

3. Assuming that Wolf Trap Nursery began in 1972, Defendant admits that the subject property was zoned RE-1 at that time. The rest of the allegations of Paragraph 3 are denied.

4. Defendant is without facts to verify the allegations in Paragraph 4 and therefore denies the same.

5. Defendant is without facts to verify the allegations in Paragraph 5 and therefore denies the same.

6. Admitted, except that no Exhibit A was attached to Defendant's copy of the Motion for Declaratory Judgment.

7. Admitted.

8. Defendant admits that the staff recommended approval of SE 091-D-79 so long as Wolf Trap Nursery complied with the Zoning Ordinance provision concerning plant nurseries (Article 20, Part 3) approved on October 22, 1979, subsequent to the filing of Complainants' application. Defendant denies the rest of the allegations in Paragraph 8.

9. Admitted.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

15. Denied.

16. Defendant denies all allegations not otherwise admitted.

WHEREFORE, having answered the allegations contained in the Motion for Declaratory Judgment, Defendant requests this Court to:

1. Dismiss Complainants' Motion for Declaratory Judgment; and

2. Award Defendant such additional relief as the Court may deem appropriate.

GROUND FOR DEFENSE

COMES NOW, Defendant Board of Supervisors, by counsel and states the following Grounds for Defense:

1. The Defendant Board of Supervisors' action to deny SE 091-D-79 was reasonable, justified, constitutional and bore a reasonable relationship to the public health, safety and welfare.

2. The October 22, 1979 Zoning Ordinance is constitutional as applied to the subject property.

3. The Complainants have no vested right in developing their nursery business.

4. The Defendant Board of Supervisors has authority under the enabling legislation and local ordinances to require the Complainants to meet the development conditions.

5. Complainants have not alleged an actual case or controversy and none exists.

6. Complainants are estopped from bringing this action because they requested the Defendant Board of Supervisors to deny SE 091-D-79 and were granted their request.

7. Complainants have failed to exhaust their administrative/legislative remedies.

8. Complainants, having requested the Defendant Board of Supervisors to deny SE 091-D-79, have taken inconsistent positions to the detriment and prejudice of the Defendant Board of Supervisors.

9. Complainants are barred from bringing this action by the doctrine of approbate and reprobate.

Respectfully submitted,

By Kathryn M. Anderson
Counsel

By Kathryn M. Anderson
Kathryn M. Anderson
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
691-2421
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer was mailed, postage prepaid, to Thomas O. Lawson, Esquire, and W. Brewster Cockrell, Esquire, KELLY, LOUK, LAWSON & KELLY, counsel for Complainants, 4103 Chain Bridge Road, Fairfax, Virginia 22030, this 13th day of May, 1980.

Kathryn M. Anderson
Kathryn M. Anderson

O R D E R

THIS CASE came on before this Court on agreement of counsel as follows, and

IT APPEARING TO THE COURT that Petitioners' Petition for Writ of Certiorari and Writ of Certiorari shall be quashed, and

IT FURTHER APPEARING TO THE COURT that Respondent shall pose no objection to Petitioners' case Blair W. Cupp, et al. v. Board of Supervisors, in Chancery No. 66424, based on the fact that it is styled a Declaratory Judgment, and shall pose no objection on procedural grounds to Petitioners raising the issues set forth in the Declaratory Judgment action,

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that Petitioners' Petition for Writ of Certiorari and Writ of Certiorari shall be quashed and this case dismissed.

THIS ORDER IS FINAL.

ENTERED this 14th day of May, 1980.

(Sgd) Lewis D. Morris, Judge
JUDGE

WE ASK FOR THIS:

DAVID T. STITT
COUNTY ATTORNEY

By

Kathryn M. Anderson

Kathryn M. Anderson
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
(703) 691-2421
Counsel for Respondent

SEEN AND AGREED:

W. Brewster Cockrell

W. Brewster Cockrell
KELLY, LOUK, LAWSON & KELLY
4103 Chain Bridge Road
Fairfax, Virginia 22030
Counsel for Petitioners

A COPY TESTE:

JAMES E. HOOFNAGLE, CLERK

By: Catharine Louk,
Deputy Clerk

MOTION TO AMEND GROUNDS
FOR DEFENSE

COMES NOW, Defendant Board of Supervisors, by counsel, and respectfully moves this Court to grant its Motion to Amend Grounds for Defense by adding three grounds as Paragraphs 10, 11 and 12 as follows:

10. The October 22, 1979 Zoning Ordinance amendment concerning nurseries is reasonable and justified on its face and bears a reasonable relationship to the public health, safety and welfare.

11. That Defendant Board of Supervisors' action to deny SE-091-D-79 in no way constitutes a confiscation and unreasonable taking of Complainants' property.

12. That Defendant Board of Supervisors' action, if it had applied the proposed development, would not have been arbitrary, capricious or unreasonable.

The reasons for this Motion are:

1. To insure that Defendant Board of Supervisors has all grounds of defense available to it at trial; and

2. To give Complainants ample notification of such additional ground (there are still seven weeks before trial at the time of sending a copy of this Motion to counsel for Complainants).

Motions to amend pleadings are generally liberally granted to further the ends of justice. See Rule 1:8 of the Rules of the Supreme Court of Virginia. See also 1B M.J., Amendments, §§ 4, 6 and 10, Haymore v. Brizendine, 210 Va. 578, 172 S.E.2d 774 (1970) and Griffin v. Rainer, 212 Va. 627, 186 S.E.2d 10 (1972).

WHEREFORE, Defendant respectfully requests this Court to grant its Motion to Amend Grounds for Defense.

BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA

Garen J. Harwood
By *for Kathryn M. Anderson*
Counsel

DAVID T. STITT
COUNTY ATTORNEY

By *Garen J. Harwood*
for Kathryn M. Anderson
Kathryn M. Anderson
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
691-2421
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Amend Grounds for Defense was mailed, postage prepaid, to counsel for Complainants, Thomas O. Lawson, Esquire, and W. Brewster Cockrell, Esquire, KELLY, LOUK, LAWSON & KELLY, 4103 Chain Bridge Road, Fairfax, Virginia 22030, this 2nd day of September, 1980.

Garen J. Harwood
for Kathryn M. Anderson
Kathryn M. Anderson

DECREE

THIS MATTER came on to be heard on August 15, 1980 upon the Defendant's Plea in Bar, upon due and timely notice, upon argument of counsel, and having been duly considered by the Court; it is hereby

ADJUDGED, ORDERED AND DECREED that the Plea in Bar is hereby dismissed.

ENTERED this 30th day of September, 1980.

(Sgd) Richard J. Jamborsky, Judge
JUDGE

I ASK FOR THIS:

KELLY, LOUK, LAWSON & KELLY
4103 Chain Bridge Road
Fairfax, Virginia 22030

By Thomas O. Lawson
Thomas O. Lawson
Counsel for Complainant

EXCEPTED TO:
SEEN AND ~~ACCEPTED~~

DAVID T. STITT
COUNTY ATTORNEY

By Kathryn M. Anderson
Kathryn M. Anderson
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
Counsel for Defendant

A COPY TESTE:

JAMES E. HOOFNAGLE, CLERK

By: Kathryn M. Anderson
Deputy Clerk



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

COUNTY OF FAIRFAX

CITY OF FAIRFAX

CITY OF FALLS CHURCH

April 17, 1981

BARNARD F. JENNINGS
WILLIAM G. PLUMMER
LEWIS D. MORRIS
BURCH MILLSAP
JAMES C. CACHERIS
THOMAS J. MIDDLETON
RICHARD J. JAMBORSKY
LEWIS HALL GRIFFITH
F. BRUCE BACH
JUDGES

JAMES KEITH
RETIRED JUDGE

FAIRFAX COUNTY COURTHOUSE
4000 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

Thomas O. Lawson, Esq.
Kelly, Louk, Lawson
and Kelly
4101 Chain Bridge Road
Fairfax, Virginia 22030

W. Brewster Cockrell, Esq.
Kelly, Louk, Lawson
and Kelly
4101 Chain Bridge Road
Fairfax, Virginia 22030

David T. Stitt, Esq.
County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030

Re: Blair W. Cupp, et al vs. Board
of Supervisors of Fairfax County
At Law No. 66424

Dear Counsel:

The Court has reviewed the pleadings, evidence, authorities and arguments of counsel.

Complainants, Blair and Dorothy Cupp (Cupp), instituted this suit to have a County zoning ordinance declared unconstitutional and to have declared as unconstitutional certain developmental conditions.

The Cupps own and operate Wolf Trap Nursery which contains 6.7208 acres. The property is zoned R-1, except for a small

Blair W. Cupp, et al vs. Board
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subdivision zoned R-2. The nursery is located at 9439 Leesburg Pike, Vienna, Virginia, along the busy Route 7 corridor.

On September 17, 1979 Cupp filed an application to the Board for a special exception in order to expand the nursery.

On December 5, 1979 the Planning Commission recommended approval with certain developmental conditions.

I Ordinance

The Ordinance was passed on October 22, 1979 and the pertinent amendments provide:

"GARDEN CENTER: An area or establishment engaged in the retail sales of items for the landscaping and maintenance of gardens, grounds and yards such as trees, shrubs, plants, seeds, bulbs, mulches, fertilizers, garden tools, pottery, statues, bird baths and other such items. Landscape contracting of items sold on the property shall be permitted as an accessory use. For the purpose of this Ordinance, garden centers shall be deemed RETAIL SALES ESTABLISHMENTS.

4. Delete the term and definition of NURSERY, PLANT in entirety and substitute in lieu thereof, in its proper alphabetical sequence, a new term and definition of PLANT NURSERY to read as follows:

PLANT NURSERY: An area or establishment for the propagation, cultivation and growing of nursery stock such as trees, plants, shrubs and vines. Retail sales from the site may be permitted as an accessory use and shall be limited to nursery stock grown on the property and items designed solely to maintain and preserve the life and health of nursery stock such as fungicides, insecticides, chemicals, peat moss, humus, mulches and fertilizers. Retail sales of items not designed solely to maintain and preserve the life and health of nursery

stock such as garden tools, hoses, pottery, statues and bird baths shall be deemed a GARDEN CENTER and shall be prohibited. Landscape contracting of nursery stock grown on the property shall be permitted as an accessory use.

For the purpose of this Ordinance, growing of nursery stock shall include stock which is grown on the premises and stock which is purchased elsewhere and transplanted for growth on the premises."

The sale of plants is the principal retail business of the nursery. In addition, the nursery sells plant food, pots, weed killers, fertilizer, sprayers, garden tools and other items accessory to sale of plants.

Philip Yates, Zoning Administrator, testified as to a list of items that would be allowed and not allowed to be sold under the amendment to the Ordinance:

Hand Sprayer	Allowed
Bug Sprayer	Allowed
Sprayer with water	Not Allowed
Sprayer with fertilizer	Allowed
Plastic Watering Can	Not Allowed
Tree in a ceramic pot	Allowed to sell tree but not the pot
Ceramic pot with plate	Not Allowed
Terra cotta duck	Not Allowed
Tree Wrap	Allowed
House plant spikes (fertilizer)	Allowed
Pruning shears	Not Allowed
Bulb planter	Not Allowed
Booklet on care of plants	Not Allowed

Mr. Yates testified to a number of other items that would be allowed to be sold under the Ordinance and items that would be prohibited. He testified no studies were undertaken before the Ordinance was promulgated.

Complainant, Blair Cupp, testified that a plastic container is necessary to control plant moisture.

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In Board of Supervisors of Fairfax County vs. Allman,
215 Va. 434, 444, 445 (1975), the Supreme Court of Virginia
stated in quoting from other cases:

"The general principles applicable to a judicial
review of the validity of zoning ordinances are well
settled. The legislative branch of a local govern-
ment in the exercise of its police power has wide
discretion in the enactment and amendment of zoning
ordinances. Its action is presumed to be valid so
long as it is not unreasonable and arbitrary. The
burden of proof is on him who assails it to prove
that it is clearly unreasonable, arbitrary or
capricious, and that it bears no reasonable or sub-
stantial relation to the public health, safety,
morals, or general welfare. The court will not sub-
stitute its judgment for that of a legislative body,
and if the reasonableness of a zoning ordinance is
fairly debatable it must be sustained. (citing cases)

....

In Fairfax County v. Snell Corp., 214 Va. 655, 659,
202 S. E. 2d 889, 893 (1974), we quoted from Carper
and then said:

'Inherent in the presumption of legislative validity
stated in Carper is a presumption of reasonableness.
But, as Carper makes plain, the presumption of
reasonableness is not absolute. Where presumptive
reasonableness is challenged by probative evidence of
unreasonableness, the challenge must be met by some
evidence of reasonableness. If evidence of reasonable-
ness is sufficient to make the question fairly debatable,
the ordinance 'must be sustained'. If not, the evidence
of unreasonableness defeats the presumption of reason-
ableness and the ordinance cannot be sustained.'"

On June 10, 1976 in the General District Court for the
County of Fairfax, in dismissing a criminal prosecution against
Cupp, the Court held the Ordinance unconstitutional.

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Under the Ordinance the nursery is allowed to sell a plant, but not its ceramic container, nor a plastic watering can, nor a booklet on its care, nor pruning shears.

The Court concludes that the Ordinance's ban on the sale of accessories is not reasonably related to the public health, safety and welfare.

II Special Exception

The Cupps have applied for a special exception for modification and expansion of the nursery.

The Board required road improvements as a condition to the expansion.

On December 5, 1979 the Planning Commission voted unanimously to recommend to the Board approval of Cupp's special exception, subject to two conditions; construction of a deceleration right turn lane for entrance to the plant nursery; and dedication of a right of way 100 feet from the centerline for a third eastbound lane and a standard service drive.

Robert Moore, a Transportation Planner for Fairfax County, testified as to the need for a deceleration lane on Route 7.

Section 15.1-491 (c), Va. Code, as amended, provides that a zoning ordinance may provide for the granting of special exceptions under suitable regulations and safeguards. Section 15.1-494 (f) provides the Board may hear application for special exceptions and may impose conditions relating to the use for which a permit is granted.

The Court find that the proposed road improvements are reasonably related to the public health, safety and welfare.

Blair W. Cupp, et al vs. Board
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Mr. Lawson should prepare the appropriate Order and
submit the same to counsel for approval as to form.

Very truly yours,



James C. Cacheris

JCC/al

cc: Kathryn M. Anderson, Esq.

D E C R E E

THIS MATTER CAME on to be heard on the 22nd and 27th days of October, 1980, after due and timely notice, upon appearance of the parties and the witnesses, upon the Court hearing evidence ore tenus, upon argument of counsel, upon submission of authorities by counsel, and

IT APPEARING TO THE COURT that the Complainant, Wolf Trap Nursery, is selling accessory products incidental to the sale of plants, and

IT FURTHER APPEARING TO THE COURT that the amendments to the Fairfax County Zoning Ordinance, Article 20, Part 13, passed on October 22, 1979, defining the terms "GARDEN CENTER" and "PLANT NURSERY", prohibit plant nurseries from selling accessory products incidental to the sale of plants, customarily sold by the plant nurseries, as developed by the evidence in this cause, and that such prohibition is not reasonably related to the public health, safety and welfare, and

IT FURTHER APPEARING TO THE COURT that the Complainants filed an application for a Special Exception to the Fairfax County Board of Supervisors to modify and expand Wolf Trap Nursery and that if the Special Exception were granted by the Board

of Supervisors, two conditions would be imposed: (1) construction of a deceleration right-turn lane for entrance to Wolf Trap Nursery, and (2) dedication of a right of way 100 feet from the center line for a third east bound lane and a standard service drive, the construction of which would be deferred until future redevelopment of the site, and

IT FURTHER APPEARING TO THE COURT that Section 15.1-491(c) of the 1950 Code of Virginia, as amended, provides that a zoning ordinance may provide for the granting of special exceptions under suitable regulations and safeguards, and that Section 15.1-495(f) provides that the Board may hear applications for special exceptions and may impose conditions relating to the use for which a permit is granted, and

IT FURTHER APPEARING to the Court that the two conditions, proposed by the Fairfax County staff, should the Defendant-Board of Supervisors act favorably on the Complainants' Special Exception, are reasonably related to the public health, safety and welfare, it is therefore

ADJUDGED AND DECREED that the amendments to the Fairfax County Zoning Ordinance, Article 20, Part 13, dated October 22, 1979, defining "GARDEN CENTER" and "PLANT NURSERY" are hereby declared unconstitutional on their face and as applied to Wolf Trap Nursery, and

IT IS FURTHER ADJUDGED AND DECREED that the dedication and road improvements proposed by the Fairfax County staff, should the Defendant-Board of Supervisors act favorably on the Special Exception, are valid.

per [unclear] ruled: that this order is stayed
AND THIS DECREE IS FINAL.

ENTERED this 24 day of June, 1981.

SEEN AND EXCEPTED:

KELLY, LOUK, LAWSON & KELLY
4103 Chain Bridge Road
Fairfax, Virginia 22030

By: Thomas O. Lawson
Thomas O. Lawson
W. Brewster Cockrell
Counsel for Complainant
Blair W. Cupp, et al

Office of the County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030

~~SEEN~~ + EXCEPTED TO:

By: David T. Stitt *for*
David T. Stitt
Counsel for Defendant
The Board of Supervisors
of Fairfax County

ASSIGNMENTS OF ERROR

- (1) The court erred in ruling that the dedication and road improvement requirements were valid because the Defendant did not rebut the Complainants' prima facie showing that the conditions were unreasonable by producing evidence at trial to make the question fairly debatable.
- (2) The Court erred in finding that the state enabling legislation authorized the Board of Supervisors to impose the dedication and road improvement requirements as conditions of the issuance of the special exception.
- (3) The court erred in finding that the local zoning ordinance authorized the Board of Supervisors to impose the dedication and road improvement requirements as conditions of the issuance of the special exception.
- (4) The court erred in failing to find that imposition of the dedication and improvement conditions would constitute an unconstitutional taking of the Complainants' property without just compensation.

ASSIGNMENTS OF CROSS-ERROR

I. The trial court erred when it found there to be a case or controversy between the parties when the Complainants applied for a special exception to the zoning ordinance, the county staff suggested approval with conditions, the Complainants requested denial of their application and the Board complied with their request.

II. The trial court erred when it found the definitions of plant nursery and garden center in the Fairfax County Zoning Ordinance to be unconstitutional on their face and as applied to the Complainants.

QUESTIONS PRESENTED

1. Whether the trial court erred when it determined that an individual who is not affected by a particular ordinance provision or by certain development conditions has standing to sue an Urban County Board of Supervisors and challenge the constitutionality of the ordinance provision and the conditions. (Assignment of Cross-Error I).

2. Whether the trial court was clearly correct in its decision on the issues of road improvement.

3. Whether the trial court erred when it usurped the legislative prerogative of the Board of Supervisors and substituted its judgment for that of the Board, on the definition of zoning ordinance terms. (Assignment of Cross Error II).

1 SOME DOCUMENTATION IN THE RECORD.

2 THE COURT: DO YOU HAVE ANY OBJECTION?

3 MR. LAWSON: THAT HADN'T BEEN INTRODUCED.

4 MS. ANDERSON: NO, YOUR HONOR.

5 MR. LAWSON: WE SHOULD HAVE OFFERED IT BEFORE.

6 (THE DOCUMENT HERETOFORE REFERRED
7 TO WAS MARKED PLAINTIFF'S EXHIBIT
8 NO. 11 FOR IDENTIFICATION AND WAS
9 RECEIVED IN EVIDENCE.)

10 MR. LAWSON: THANK YOU.

11 BY MR. LAWSON:

12 Q I SHOW YOU WHAT'S BEEN MARKED AS COMPLAINANT'S
13 EXHIBIT NO. 11 AND ASK YOU IF THAT'S A COPY OF THE ORDINANCE
14 AS ADOPTED ON THE DATE MENTIONED?

15 A YES, IT IS.

16 Q NOW, YOU WERE THE ONE, WOULD YOU SAY, THAT WAS
17 PRIMARILY RESPONSIBLE FOR THE DRAFTING OF THAT ORDINANCE?

18 A MISS JANE GWINN, MY ASSISTANT, HAD THE PRIMARY
19 CHARGE OF DRAFTING IT. I DID OVERSEE AND WAS DIRECTLY
20 INVOLVED IN THE FINAL PRODUCT.

21 Q IN THE ENTIRE PROCESS?

22 A THAT IS CORRECT.

23 Q NOW, WOULD IT BE ACCURATE TO CHARACTERIZE THE

1 THRUST OF THE AMENDMENT IN RELATION TO THE PRODUCTS WAS TO
2 PROHIBIT THE SALE OF MAN-MADE PRODUCTS?

3 A THAT WAS ONE OF THE UNDERLYING OBJECTIVES.

4 Q ALL RIGHT. NOW, LET ME GIVE YOU A FEW PRODUCTS
5 HERE, IF I MIGHT.

6 MR. LAWSON: I GUESS, YOUR HONOR, WE'LL HAVE TO
7 INTRODUCE THESE INDIVIDUALLY.

8 THE COURT: 12.

9 (THE ARTICLE HERETOFORE REFERRED
10 TO WAS MARKED PLAINTIFF'S EXHIBIT
11 NO. 12 FOR IDENTIFICATION.)

12 BY MR. LAWSON:

13 Q AND JUST SO PEOPLE WON'T BE MORE CONFUSED AND
14 PROBABLY ALREADY ARE; BUT I'D LIKE TO RUN THROUGH A FEW OF
15 THE PRODUCTS WITH YOU, IF I MIGHT.

16 IF YOU WOULD TELL HIS HONOR IN EACH PARTICULAR
17 INSTANCE WHETHER OR NOT THAT PARTICULAR PRODUCT WOULD BE
18 ALLOWED TO BE SOLD UNDER THIS AMENDMENT.

19 I HAND YOU COMPLAINANT'S EXHIBIT NO. 12, A HAND
20 SPRAYER, AND ASK IF YOU CAN TELL US WHETHER THAT WOULD BE
21 ALLOWED OR NOT.

22 A NO, IT WOULD NOT.

23 Q IT WOULD NOT BE, ALL RIGHT, SIR.

1 MR. LAWSON: MARK THIS AS COMPLAINANT'S NO. 13.

2 THE COURT: 13.

3 MS. ANDERSON: COULD YOU STATE WHAT THAT IS,
4 PLEASE?

5 MR. LAWSON: WHITEFLY AND MEALYBUG SPRAY.

6 (THE ARTICLE HERETOFORE REFERRED
7 TO WAS MARKED PLAINTIFF'S EXHIBIT
8 NO. 13 FOR IDENTIFICATION.)

9 BY MR. LAWSON:

10 Q LET ME SHOW YOU COMPLAINANT'S EXHIBIT NO. 13. AS
11 A MATTER OF FACT, YOU PROBABLY WANT TO LOOK AT THAT AND TRY
12 TO FIGURE OUT WHAT IT IS; AND THEN, WILL YOU TELL US WHETHER
13 THAT PARTICULAR PRODUCT WOULD BE ALLOWED TO BE SOLD.

14 A YES, IT WOULD.

15 Q IT WOULD BE?

16 A YES.

17 Q THAT IS SOME SORT OF A SPRAY; ISN'T THAT CORRECT,
18 FOR BUGS?

19 A THAT'S CORRECT, FOR USE IN ORNAMENTAL PLANTS.

20 Q IT HAS A HAND-PUMPING ACTION, SPRAY ACTION ON IT?

21 A THAT'S RIGHT.

22 THE COURT: YOU SAID THAT WOULD BE ABLE TO BE SOLD?

23 MR. LAWSON: HE SAID IT WOULD BE, YES.

1 THE WITNESS: YES.

2 (THE ARTICLE HEREINAFTER REFERRED
3 TO WAS MARKED PLAINTIFF'S EXHIBIT
4 NO. 14 FOR IDENTIFICATION.)

5 BY MR. LAWSON:

6 Q LET ME SHOW YOU COMPLAINANT'S EXHIBIT NO. 14,
7 ANOTHER SPRAYER. NOW, LET'S SUPPOSE I SHOW YOU COMPLAINANT'S
8 EXHIBIT NO. 14, AND SUPPOSE MR. CUPP WOULD HAVE FILLED THAT
9 WITH WATER; AND, INSTEAD OF SELLING IT FOR \$1.79, HE SOLD
10 IT FOR \$1.89 BECAUSE IT CONTAINS WATER. WOULD HE BE ALLOWED
11 TO SELL THAT?

12 A WITH WATER?

13 Q YES, SIR.

14 A NO, HE WOULD NOT.

15 Q HE WOULD NOT BE ALLOWED TO SELL IT?

16 A NO.

17 Q ALL RIGHT, SIR. SUPPOSE HE WERE TO FILL IT WITH
18 SOME SORT OF A SPRAY -- FERTILIZER SPRAY OR BUG SPRAY OF
19 SOME SORT -- AND SELL IT FOR TEN CENTS MORE. WOULD HE BE
20 ALLOWED TO SELL THAT PRODUCT?

21 A IN MY JUDGMENT, YES.

22 Q HE WOULD BE, ALL RIGHT.

23 MR. LAWSON: THIS IS COMPLAINANT'S NO. 15.

1 (THE ARTICLE HEREINAFTER REFERRED
2 TO WAS MARKED PLAINTIFF'S EXHIBIT
3 NO. 15 FOR IDENTIFICATION.)

4 BY MR. LAWSON:

5 Q I SHOW YOU COMPLAINANT'S EXHIBIT NO. 15. THIS IS
6 A LITTLE WATERING CAN, PLASTIC CAN, WHATEVER. WOULD HE BE
7 ALLOWED TO SELL THAT PARTICULAR PRODUCT?

8 A NO, HE WOULD NOT.

9 Q WOULD NOT, ALL RIGHT, SIR.

10 (THE ARTICLE HEREINAFTER REFERRED
11 TO WAS MARKED PLAINTIFF'S EXHIBIT
12 NO. 16 FOR IDENTIFICATION.)

13 BY MR. LAWSON:

14 Q NOW, I SHOW YOU COMPLAINANT'S EXHIBIT NO. 16,
15 WHICH CONSISTS OF A TREE OF SOME SORT IN A LITTLE CERAMIC
16 POT. WOULD HE BE ALLOWED TO SELL THAT PRODUCT?

17 TAKE ALL THE TIME YOU NEED. I DON'T MEAN TO RUSH
18 YOU.

19 A IT WOULD BE MY POSITION THAT HE COULD SELL THE
20 TREE ABSENT THE POT.

21 Q ABSENT THE POT, OKAY. A PERSON COULD COME IN AND
22 PUT THE DIRT IN HIS HAND AND WALK OUT WITH THE TREE BUT NOT
23 THE POT?

1 A A PAPER BAG OR AS THE CASE MAY BE.

2 Q SO, THE NEXT ONE WILL BE EASY THEN. I SHOW YOU
3 COMPLAINANT'S EXHIBIT NO. 17 --

4 THE CLERK: 17.

5 (THE ARTICLE HEREINAFTER REFERRED
6 TO WAS MARKED PLAINTIFF'S EXHIBIT
7 NO. 17 FOR IDENTIFICATION.)

8 BY MR. LAWSON:

9 Q -- 17, WHICH IS THE VERY SAME CERAMIC POT ONLY
10 IT'S GOT A LITTLE PLATE UNDERNEATH THERE TO CATCH THE WATER
11 AS IT SEEPS THROUGH. WOULD HE BE ALLOWED TO SELL THAT
12 PRODUCT?

13 A NO, HE WOULD NOT.

14 MR. LAWSON: 18.

15 (THE ARTICLE HEREINAFTER REFERRED
16 TO WAS MARKED PLAINTIFF'S EXHIBIT
17 NO. 18 FOR IDENTIFICATION.)

18 MR. LAWSON: THANK YOU.

19 Q NO. 18, WHICH IS A LITTLE TERRA COTTA DUCK -- DON'T
20 TAKE THAT IN THE BATHTUB BECAUSE I DON'T THINK IT WOULD
21 FLOAT; BUT WOULD HE BE ALLOWED TO SELL THAT? THAT'S SOME-
22 THING THAT YOU WOULD PUT PLANTS IN.

23 A DEFINITELY NOT.

1 Q DEFINITELY NOT, OKAY.

2 MR. LAWSON: NOW, COMPLAINANT'S NO. 19.

3 (THE ARTICLE HEREINAFTER REFERRED
4 TO WAS MARKED PLAINTIFF'S EXHIBIT
5 NO. 19 FOR IDENTIFICATION.)

6 MR. LAWSON: YOU DON'T MIND IF I DON'T SHOW YOU
7 EACH ONE OF THESE? I ASSUME YOU CAN SEE THEM FROM HERE.

8 MS. ANDERSON: NO, I THINK I CAN SEE THEM.

9 MR. LAWSON: OKAY.

10 BY MR. LAWSON:

11 Q NO. 19, WHICH IS TITLED "CLARK'S TREE WRAP". TAKE
12 A LOOK AT THAT AND TELL US WHETHER OR NOT THAT -- HE COULD
13 SELL THAT.

14 A YES, HE COULD.

15 Q HE COULD, ALL RIGHT, SIR.

16 MR. LAWSON: 20.

17 (THE ARTICLE HEREINAFTER REFERRED
18 TO WAS MARKED PLAINTIFF'S EXHIBIT
19 NO. 20 FOR IDENTIFICATION.)

20 BY MR. LAWSON:

21 Q THIS IS TITLED "JOBE'S HOUSE PLANT SPIKES", SOME
22 SORT OF A FERTILIZER. WOULD HE BE ALLOWED TO SELL THAT?

23 A THIS IS A FERTILIZER?

1 Q YOU LOOK AT IT, AND YOU TELL US.

2 GO AHEAD AND TAKE ALL THE TIME YOU NEED.

3 A YES, IN THE LIGHT THAT IT IS A FERTILIZER.

4 Q ALL RIGHT.

5 MR. LAWSON: NO. 21, I BELIEVE.

6 (THE ARTICLE HEREINAFTER REFERRED
7 TO WAS MARKED PLAINTIFF'S EXHIBIT
8 NO. 21 FOR IDENTIFICATION.)

9 BY MR. LAWSON:

10 Q NO. 21, WHICH ARE PRUNING SHEARS THAT YOU USE TO
11 PRUNE ROSEBUSHES AND OTHER THINGS LIKE THAT. WOULD HE BE
12 ALLOWED TO SELL THAT?

13 A NO, HE WOULD NOT.

14 Q WOULD NOT, OKAY.

15 MR. LAWSON: 22.

16 (THE ARTICLE HEREINAFTER REFERRED
17 TO WAS MARKED PLAINTIFF'S EXHIBIT
18 NO. 22 FOR IDENTIFICATION.)

19 BY MR. LAWSON:

20 Q I SHOW YOU EXHIBIT NO. 22, WHICH IS ENTITLED "BULB
21 PLANTER", SOMETHING TO DIG DOWN IN THE GROUND AND PUT THE
22 BULBS IN. IT'S MADE OF METAL. WOULD HE BE ALLOWED TO SELL
23 THAT?

1 A NO, HE WOULD NOT.

2 Q OKAY.

3 MR. LAWSON: 23?

4 THE CLERK: YES.

5 (THE ARTICLE HEREINAFTER REFERRED
6 TO WAS MARKED PLAINTIFF'S EXHIBIT
7 NO. 23 FOR IDENTIFICATION.)

8 BY MR. LAWSON:

9 Q NO. 23. WOULD HE BE ALLOWED TO SELL THAT?

10 MS. ANDERSON: COULD YOU IDENTIFY THAT, PLEASE?

11 THE COURT: DO YOU WANT TO SEE THAT, MS. ANDERSON?

12 BY MR. LAWSON:

13 Q I'M SORRY. JUST READ IT.

14 A "FISH EMULSION FERTILIZER 5-1-1 FOR HOUSE PLANTS";
15 AND IT'S NON-BURNING; AND IT'S FISH DEODORIZED.

16 YES, HE WOULD.

17 Q THAT'S A PLASTIC BOTTLE, RIGHT?

18 A THAT'S CORRECT.

19 Q OKAY, SIR.

20 MR. LAWSON: 24.

21 (THE ARTICLE HEREINAFTER REFERRED
22 TO WAS MARKED PLAINTIFF'S EXHIBIT
23 NO. 24 FOR IDENTIFICATION.)

1 BY MR. LAWSON:

2 Q NO. 24, WHICH IS "SPOT-GRO", HIGHLIGHTS PLANTS.
3 WOULD HE BE ALLOWED TO SELL THAT?

4 A NO, HE WOULD NOT.

5 (THE ARTICLE HEREINAFTER REFERRED
6 TO WAS MARKED PLAINTIFF'S EXHIBIT
7 NO. 25 FOR IDENTIFICATION.)

8 BY MR. LAWSON:

9 Q NO. 25, WHICH ARE VINE SUPPORTS, LITTLE DOODADS
10 THAT YOU TACK INTO A WALL BY WHICH A VINE WILL BE TRAINED
11 TO GROW UP ON A WALL. WOULD HE BE ALLOWED TO SELL THAT?

12 A NO, HE WOULD NOT.

13 Q WOULD NOT, ALL RIGHT, SIR.

14 MR. LAWSON: NO. 26.

15 (THE ARTICLE HEREINAFTER REFERRED
16 TO WAS MARKED PLAINTIFF'S EXHIBIT
17 NO. 26 FOR IDENTIFICATION.)

18 BY MR. LAWSON:

19 Q NO. 26 IS JUST SIMPLY A SAMPLE. IT'S A BOOKLET
20 ENTITLED "HOUSE PLANTS". MR. CUPP HAS A SERIES OF THESE ON
21 ROSES AND AZALEAS AND WHATEVER. IT TELLS YOU HOW TO CARE
22 FOR THEM AND PLANT THEM AND TAKE CARE OF THEM. WOULD HE BE
23 ALLOWED TO SELL THAT?

1 A NO, HE WOULD NOT.

2 Q HE WOULD NOT, OKAY, SIR.

3 (THE ARTICLE HEREINAFTER REFERRED
4 TO WAS MARKED PLAINTIFF'S EXHIBIT
5 NO. 27 FOR IDENTIFICATION.)

6 BY MR. LAWSON:

7 Q NO. 27, WHICH IS "SHULTZ-INSTANT LIQUID PLANT FOOD".
8 IT'S IN A CARDBOARD BOX. IT'S A BOTTLE WHICH HAS GOT A
9 LITTLE CAP ON IT. WOULD HE BE ALLOWED TO SELL THAT?

10 A YES, HE WOULD.

11 Q OKAY. NOW, LET'S OPEN THIS UP. IT'S GOT A LITTLE
12 EYEDROPPER ATTACHED TO THE TOP OF IT, HAS IT NOT?

13 A YES, IT DOES.

14 Q SUPPOSE HE SELLS THE BOTTLE WITH, SAY, JUST A
15 REGULAR CAP; AND HE WERE TO SELL THE EYEDROPPER AS A
16 SEPARATE ITEM. WOULD HE BE ALLOWED TO SELL THE EYEDROPPER?

17 A NO, HE WOULD NOT.

18 Q HE WOULD NOT; BUT, IN COMBINATION, HE COULD SELL
19 IT; IS THAT CORRECT?

20 A YES, HE COULD.

21 Q ALL RIGHT, SIR.

22 MR. LAWSON: 28, IS IT?

23 THE CLERK: YES.

1 (THE ARTICLE HEREINAFTER REFERRED
2 TO WAS MARKED PLAINTIFF'S EXHIBIT
3 NO. 28 FOR IDENTIFICATION.)

4 BY MR. LAWSON:

5 Q THIS IS TITLED "MIRACLE-GRO THERAPY FOR HOUSE
6 PLANTS". IT'S PLANT FOOD. IT'S GOT A LITTLE PLASTIC
7 MEASURER ON THE SIDE, WHICH IS CONTAINED IN THE BOX. WOULD
8 HE BE ALLOWED TO SELL THAT?

9 A YES, HE WOULD.

10 . Q AGAIN, THE SAME QUESTION: IF THIS LITTLE MEASURER
11 WERE NOT PART OF THE BOX, I ASSUME HE WOULD NOT BE ALLOWED
12 TO SELL THE MEASURER, WOULD HE --

13 A THAT'S RIGHT.

14 Q -- SEPARATELY?

15 A THAT'S RIGHT.

16 (THE ARTICLE HEREINAFTER REFERRED
17 TO WAS MARKED PLAINTIFF'S EXHIBIT
18 NO. 29 FOR IDENTIFICATION.)

19 BY MR. LAWSON:

20 Q NO. 29, "TRANSPLANTONE, MAKES ROOTS GROW". WOULD
21 HE BE ALLOWED TO SELL THAT? IT'S NOT A FERTILIZER. IT'S
22 NOT AN INSECTICIDE. WOULD HE BE ALLOWED TO SELL IT?

23 A IS IT NOT A FORM OF A CHEMICAL OR --

1 Q I WANT YOU -- YOU'RE THE ENFORCER. I WANT YOU TO
2 LOOK AT IT AND YOU TELL US WHETHER HE CAN SELL IT. YOU'VE
3 GOT TO APPLY THIS ORDINANCE.

4 A I WOULD SAY, "NO".

5 Q YOU WOULD SAY, "NO". YOU HAVE SOME DOUBTS IN YOUR
6 MIND THOUGH; IS THAT CORRECT?

7 A THAT'S CORRECT.

8 Q ALL RIGHT, SIR. YOU'RE NOT SURE, I GUESS, IS A
9 BETTER WAY TO PHRASE THAT; IS THAT CORRECT?

10 A (NODDING HEAD.)

11 MR. LAWSON: NO. 30.

12 (THE ARTICLE HEREINAFTER REFERRED
13 TO WAS MARKED PLAINTIFF'S EXHIBIT
14 NO. 30 FOR IDENTIFICATION.)

15 BY MR. LAWSON:

16 Q NO. 30, WHICH IS A UNIVERSAL SWIVEL HOOK FOR
17 PLANTERS. THIS IS THE THING WHERE YOU HAVE MACRAMES HANGING
18 FROM THE CEILING THAT YOU BUMP YOUR HEAD INTO. I ASSUME YOU
19 ALL HAVE THEM IN YOUR OFFICES OVER THERE. WOULD HE BE
20 ALLOWED TO SELL THAT?

21 A NO, HE WOULD NOT.

22 Q HE WOULD NOT.

23 MR. LAWSON: 31.

1 (THE ARTICLE HEREINAFTER REFERRED
2 TO WAS MARKED PLAINTIFF'S EXHIBIT
3 NO. 31 FOR IDENTIFICATION.)

4 BY MR. LAWSON:

5 Q NO. 31, A TROWEL FOR DIGGING IN THE GROUND. WOULD
6 HE BE ALLOWED TO SELL THAT?

7 A NO, HE WOULD NOT.

8 Q ALL RIGHT, SIR.

9 (THE ARTICLE HEREINAFTER REFERRED
10 TO WAS MARKED PLAINTIFF'S EXHIBIT
11 NO. 32 FOR IDENTIFICATION.)

12 BY MR. LAWSON:

13 Q NO. 32, THIS IS A LITTLE WICKER BASKET THAT YOU
14 WOULD PUT A POT WITH A PLANT IN IT. WOULD HE BE ALLOWED TO
15 SELL THAT?

16 A NO, HE WOULD NOT.

17 Q HE WOULD NOT.

18 (THE ARTICLE HEREINAFTER REFERRED
19 TO WAS MARKED PLAINTIFF'S EXHIBIT
20 NO. 33 FOR IDENTIFICATION.)

21 BY MR. LAWSON:

22 Q NO. 33, WHICH IS A -- EXCUSE ME, GO AHEAD AND OPEN
23 IT. IT'S SOME SORT OF A PAIR OF SHEARS OR WHATEVER. I'M

1 NOT SURE I KNOW WHAT IT IS MYSELF. WOULD HE BE ALLOWED TO
2 SELL THAT?

3 A IT LOOKS LIKE SOME TYPE OF SHEAR. IN ANY EVENT,
4 MY RESPONSE WOULD BE, "NO".

5 Q IT'S MADE OF METAL?

6 A RIGHT.

7 Q MADE IN CHINA, ISN'T IT, OR JAPAN, I BELIEVE.

8 A I THINK SO.

9 MR. LAWSON: 34. WE'RE GETTING CLOSE TO THE END,
10 JUDGE, TWO MORE.

11 (THE ARTICLE HEREINAFTER REFERRED
12 TO WAS MARKED PLAINTIFF'S EXHIBIT
13 NO. 34 FOR IDENTIFICATION.)

14 BY MR. LAWSON:

15 Q A PLASTIC TRAY, NO. 34, WHICH YOU PUT A PLANTER
16 ON TOP OF THAT TO KEEP THE WATER FROM RUNNING ONTO THE RUG.
17 WOULD HE BE ALLOWED TO SELL THAT?

18 A NO, HE WOULD NOT.

19 MR. LAWSON: 35.

20 (THE ARTICLE HEREINAFTER REFERRED
21 TO WAS MARKED PLAINTIFF'S EXHIBIT
22 NO. 35 FOR IDENTIFICATION.)

23 BY MR. LAWSON:

1 Q NO. 35, WHICH IS A PLASTIC CHRISTMAS DECORATION,
2 OBVIOUSLY MAN-MADE. WOULD HE BE ALLOWED TO SELL THAT?

3 A NO, HE WOULD NOT.

4 Q OKAY.

5 (THE ARTICLE HEREINAFTER REFERRED
6 TO WAS MARKED PLAINTIFF'S EXHIBIT
7 NO. 36 FOR IDENTIFICATION.)

8 BY MR. LAWSON:

9 Q I SHOW YOU NO. 36, WHICH IS A PHOTOGRAPH SHOWING
10 SOME BIRDBATHS AND FOUNTAINS --

11 MS. ANDERSON: WHERE IS THIS TAKEN?

12 MR. LAWSON: PARDON?

13 MS. ANDERSON: WHERE IS THIS TAKEN?

14 MR. LAWSON: TAKEN AT HIS PLACE. DO YOU OBJECT TO
15 IT?

16 MS. ANDERSON: NO.

17 BY MR. LAWSON:

18 Q I SHOW YOU NO. 36, WHICH IS A PHOTOGRAPH TAKEN AT
19 MR. CUPP'S PLACE OF BUSINESS; AND IT SHOWS SOME BIRDBATHS
20 AND A FOUNTAIN; AND ASK YOU IF HE'D BE ALLOWED TO SELL THOSE.

21 A NO, HE WOULD NOT.

22 Q ALL RIGHT, SIR. NOW, IN EACH INSTANCE, ALL OF
23 THESE PRODUCTS ARE MAN-MADE, ARE THEY NOT?

1 A THAT IS CORRECT.

2 Q AND --

3 A EXCEPT THE PLANT IN THE LITTLE CONTAINER THERE.

4 Q EXCEPT THE PLANT?

5 A RIGHT.

6 Q BUT EVERYTHING ELSE IS MAN-MADE, IS IT NOT?

7 A THAT'S MY RECOLLECTION.

8 Q SOME, HE'D BE ALLOWED TO SELL; SOME, HE WOULD NOT;

9 IS THAT CORRECT --

10 A THAT'S --

11 Q BY YOUR INTERPRETATION OF THE ORDINANCE?

12 A THAT'S CORRECT.

13 MR. LAWSON: THE COURT'S INDULGENCE FOR JUST ONE
14 MOMENT?

15 THE COURT: SURE.

16 MR. LAWSON: THAT'S ALL THE QUESTIONS I HAVE OF
17 THIS WITNESS.

18 THE COURT: CROSS EXAMINATION?

19 MS. ANDERSON: NO CROSS EXAMINATION, YOUR HONOR.

20 THE COURT: DO YOU WANT MR. YATES EXCUSED OR
21 SUBJECT TO RECALL?

22 MS. ANDERSON: HE'S SUBJECT TO RECALL BY MYSELF.

23 THE COURT: YOU CAN GIVE HIM A PHONE CALL LATER

1 SO HE CAN GO BACK TO THE OFFICE, IF THAT'S AGREEABLE WITH
2 YOU, MR. LAWSON?

3 MR. LAWSON: YES.

4 THE COURT: YOU CAN GO BACK TO YOUR OFFICE,
5 MR. YATES, FOR NOW.

6 (THEREUPON, THE WITNESS STOOD ASIDE, SUBJECT TO
7 RECALL.)

8 MR. LAWSON: YOUR HONOR, MR. CUPP IS THE NEXT
9 WITNESS. HE'S PROBABLY GOING TO BE QUITE A WHILE. I DON'T
10 KNOW WHETHER OR NOT YOU WANT TO START.

11 THE COURT: IT'S UP TO YOU.

12 (THEREUPON, THE WITNESS WAS SWORN.)

13 THEREUPON,

14 BLAIR W. CUPP,
15 COMPLAINANT, WAS CALLED FOR EXAMINATION BY COUNSEL IN HIS
16 OWN BEHALF, AND, HAVING BEEN PREVIOUSLY DULY SWORN, WAS
17 EXAMINED AND TESTIFIED AS FOLLOWS:

18 DIRECT EXAMINATION

19 BY MR. LAWSON:

20 Q BLAIR, WOULD YOU STATE YOUR FULL NAME, PLEASE?

21 A BLAIR W. CUPP. I RESIDE AT 9439 LEESBURG PIKE,
22 VIENNA, VIRGINIA.

23 Q YOU'RE GOING TO HAVE TO SPEAK UP NOW SO EVERYBODY

1 CAN HEAR YOU.

2 YOU LIVE -- I ASSUME YOU LIVE THERE, OF COURSE,
3 WITH YOUR WIFE; IS THAT CORRECT?

4 A YES.

5 Q HOW LONG HAVE YOU LIVED AT THAT ADDRESS?

6 A TWENTY-TWO YEARS.

7 Q HOW LONG HAVE YOU BEEN A RESIDENT OF FAIRFAX
8 COUNTY?

9 A SIXTY YEARS.

10 Q HOW OLD ARE YOU?

11 A SIXTY-THREE.

12 Q ALL RIGHT, SIR. NOW, YOU AND YOUR WIFE ARE THE
13 OWNERS AND PROPRIETORS OF THE WOLF TRAP NURSERY,
14 INCORPORATED; IS THAT CORRECT?

15 A THAT'S CORRECT.

16 Q HOW LONG HAVE YOU BEEN IN BUSINESS IN FAIRFAX
17 COUNTY AS A NURSERYMAN?

18 A EIGHT YEARS AND ABOUT FOUR MONTHS.

19 MS. ANDERSON: COULD YOU SPEAK UP? WHAT WAS THE
20 ANSWER TO THAT?

21 THE WITNESS: EIGHT YEARS AND ABOUT FOUR MONTHS.

22 BY MR. LAWSON:

23 Q NOW, SPEAK UP AS I TOLD YOU. DON'T LET YOUR VOICE

1 DROP OFF BECAUSE THERE'S AN AIR CONDITIONER RUNNING; AND
2 IT'S KIND OF HARD TO HEAR YOU.

3 AND, DURING THAT PERIOD OF TIME, HAS YOUR NURSERY
4 BUSINESS BEEN LOCATED AT THE LEESBURG PIKE ADDRESS?

5 A YES, IT HAS.

6 Q APPROXIMATELY HOW MUCH LAND DO YOU HAVE AT THAT
7 ADDRESS?

8 A 6.72 ACRES.

9 Q DO YOU ALSO LIVE ON THAT SITE?

10 A I LIVE THERE, YES.

11 Q AND THAT'S WHERE YOUR HOME HAS BEEN, YOU SAY, FOR
12 THE LAST TWENTY-TWO YEARS?

13 A YES.

14 Q AND YOUR PLACE OF BUSINESS FOR THE LAST --

15 A EIGHT YEARS.

16 Q -- EIGHT YEARS, PLUS, OKAY. NOW, LET ME SHOW YOU
17 A SERIES OF PHOTOGRAPHS; AND THEY HAVE BEEN MARKED AS 4A
18 THROUGH 4M, A TOTAL OF 13 PHOTOGRAPHS; AND IF YOU WOULD
19 DESCRIBE -- AND YOU PROBABLY BETTER STAND UP HERE, IF YOU
20 WOULD AND DESCRIBE THESE --

21 THE COURT: DO YOU WANT TO MOVE, MS. ANDERSON?
22 YOU MAY.

23 MS. ANDERSON: YES, SIR.

1 BY MR. LAWSON:

2 Q -- EACH PHOTOGRAPH TO HIS HONOR AND COUNSEL; AND
3 SO EVERYBODY WILL UNDERSTAND EXACTLY WHAT IS SHOWN IN THAT
4 PICTURE; AND DESCRIBE YOUR PLACE OF BUSINESS IN SO DOING.

5 A THIS IS A PHOTOGRAPH OF THE NURSERY TAKEN -- THIS
6 IS ACROSS THE -- OPPOSITE OF ROUTE 7, SHOWING THE PARKING LOT
7 AND THE LATH AREAS AND SOME OF THE PLANT MATERIAL.

8 Q IS THAT THE ENTRANCE? YOU'RE GOING TO HAVE TO
9 TALK SO THAT -- TURN AROUND SO THE JUDGE CAN SEE WHAT
10 YOU'RE DOING.

11 MS. ANDERSON: MAY I SEE THAT?

12 MR. LAWSON: YOUR HONOR, WE PROBABLY SHOULD HAVE
13 SAID THIS AT THE BEGINNING; BUT I DO WANT TO ASK THE COURT
14 TO TAKE A VIEW, OF COURSE, IN THIS PARTICULAR INSTANCE, OF
15 THE SITE.--

16 THE COURT: DO YOU AGREE?

17 MR. LAWSON: -- AT SOME POINT.

18 MS. ANDERSON: YOUR HONOR, SINCE THIS IS AN
19 OFFICIAL ATTACK ON AN ORDINANCE, I CAN'T AGREE TO A VIEW OF
20 THIS NURSERY ONLY. IF YOU WOULD TAKE A VIEW OF THE WHOLE
21 SITUATION.

22 THE COURT: I'LL TAKE IT UNDER ADVISEMENT.

23 MR. LAWSON: JUST SO IT'S QUITE CLEAR, WE'RE ALSO

1 ATTACKING THE ORDINANCE AS IT APPLIES IN THIS PARTICULAR
2 INSTANCE, YOUR HONOR, AS WELL AS ATTACKING, IN GENERAL,
3 THE CONSTITUTIONALITY OF THE ORDINANCE.

4 THE COURT: OKAY.

5 BY MR. LAWSON:

6 Q GO AHEAD. JUST WOULD YOU DO THIS: WOULD YOU
7 REFER TO THE EXHIBIT NUMBER AND THEN EXPLAIN IT TO HIS
8 HONOR?

9 A THIS IS EXHIBIT NO. 4B. THIS IS ANOTHER VIEW OF
10 THE FRONT OF THE NURSERY SHOWING MY HOUSE.

11 Q TURN IT SIDEWAYS SO HE CAN SEE.

12 THE COURT: YOUR HOUSE IS ON THE RIGHT, SIR?

13 THE WITNESS: YES, SIR.

14 THE COURT: SORT OF IN BACK?

15 THE WITNESS: IN BACK.

16 THE COURT: DID YOU SEE THIS, MS. ANDERSON?

17 MS. ANDERSON: YES, I DID.

18 THE WITNESS: THIS IS EXHIBIT 4C, WHICH IS A
19 CLOSER VIEW OF THE HOUSE.

20 BY MR. LAWSON:

21 Q YOU SAY "THE HOUSE", THAT'S YOUR HOME?

22 A MY HOME, YES.

23 THIS IS EXHIBIT 4D, WHICH SHOWS THE SIDE OF THE

1 GREENHOUSE, THE SALES OFFICE, THE LATH HOUSE, AND ANOTHER
2 LATH HOUSE HERE, AND PLANT MATERIAL.

3 THIS IS EXHIBIT 4E, WHICH SHOWS LOOKING BACK
4 TOWARD THE BACK END OF THE PROPERTY. IT SHOWS THE PLANT
5 MATERIAL AND THE WAREHOUSE WE HAVE THERE.

6 THIS IS 4F; AND THIS IS A PICTURE OF THE INTERIOR,
7 SHOWING THE DISPLAYS.

8 4G, WHICH IS ANOTHER PICTURE OF THE INTERIOR. IT
9 SHOWS THE EXTENT OF THE INSECTICIDES AND SO FORTH THAT WE
10 HAVE.

11 THIS IS 4H, WHICH SHOWS ANOTHER CORNER OF THAT
12 SAME ROOM.

13 THIS IS 4I, WHICH IS A LITTLE BIT CLOSER VIEW OF
14 BOTH OF THE LATH AREAS AND THE SALES OFFICE, TAKEN FROM THE
15 PARKING LOT.

16 THIS IS 4J, WHICH SHOWS THE GREENHOUSE ATTACHED TO
17 THE SALES OFFICE.

18 Q LET ME JUST INTERRUPT. DOES THAT SHOW ANY PLACE
19 TO THE REAR WHERE THE STOCK IS KEPT?

20 A NO, THAT ONE DOESN'T; BUT THE PREVIOUS ONE DID.

21 Q OKAY.

22 A THIS SHOWS -- THIS IS 4K, WHICH SHOWS THE NO. 2
23 LATH HOUSE AND PLANT MATERIAL IN FRONT OF IT.

1 MS. ANDERSON: COULD YOU INDICATE ON THE PLAT
2 WHICH IS NO. 2?

3 THE WITNESS: YES.

4 MR. LAWSON: WE'RE GOING TO GET TO THIS LATER, IF
5 YOU WANT TO WAIT.

6 MS. ANDERSON: OKAY, FINE.

7 MR. LAWSON: I'M GOING TO HAVE HIM EXPLAIN IT.

8 BY MR. LAWSON:

9 Q IN SHOWING EXHIBIT NO. 4L, BLAIR, IF YOU WOULD,
10 YOU MIGHT HELP HIS HONOR BY ELABORATING ON THE FUNCTION OF
11 A LATH HOUSE, WHAT IT DOES, AND WHAT THE PURPOSE OF IT IS.

12 A 4L IS A LATH HOUSE, SHOWING THE DETAILS OF THE
13 STRUCTURE; AND THE PURPOSE OF THAT IS TO RETARD WATERING.
14 THAT SUPPORTS SNOW FENCE WHICH IS LAID UP ON TOP OF THIS
15 STRUCTURE, AND THAT CUTS OUT ABOUT FIFTY PERCENT OF THE
16 LIGHT WHICH CUTS DOWN CONSIDERABLY ON THE WATERING
17 REQUIREMENTS.

18 Q DID YOU HAVE A PARTICULAR EXPERIENCE REGARDING
19 THAT THIS PAST YEAR OR DURING THE DROUGHT?

20 A I DID THIS SUMMER.

21 Q EXPLAIN TO YOUR HONOR WHAT THAT ENTAILED.

22 A OKAY. WE HAD FIVE FULL-TIME WATERING PERSONNEL
23 ON HAND; AND, THIS SUMMER, WE LOST APPROXIMATELY \$5,000.00

1 DUE TO NURSERY STOCK LOST DURING THE DROUGHT; AND ALL OF THE
2 LOSSES OCCURRED OUTSIDE OF THE LATH AREAS. ANY -- I DIDN'T
3 LOSE ONE PLANT THAT WAS INSIDE OF THE SHADED AREAS. THEY
4 WERE ALL OUT IN THE HOT SUN, AND THAT'S THE MAIN REASON FOR
5 THAT.

6 OKAY, AND THIS IS 4M. THIS IS ANOTHER PICTURE OF
7 THE LATH AREA, WHICH IS TAKEN FROM THE PARKING LOT. NOW,
8 I MIGHT POINT OUT SOMETHING, IF I MAY?

9 Q GO AHEAD.

10 A THIS THING AROUND THE TOP EDGE OF THE LATH AREA
11 IS NOT FUNCTIONAL EXCEPT JUST FOR LOOKS. I JUST TRIED TO
12 MAKE IT LOOK AS PLEASING AS I COULD.

13 Q IT LOOKS LIKE A MANSARD ROOF?

14 A YES, RIGHT.

15 Q ALL RIGHT, THANK YOU. YOU MAY HAVE A SEAT.

16 BLAIR, I SHOULD HAVE ASKED THIS EARLIER: IS THIS
17 BUSINESS OF YOU AND YOUR WIFE THE SOLE MEANS OF YOUR
18 LIVELIHOOD?

19 A YES, IT IS.

20 Q ALL RIGHT, SIR. NOW, WOULD YOU DESCRIBE IN
21 DETAIL, IF YOU WOULD, TO HIS HONOR, WHAT PRODUCTS YOU SELL,
22 WHAT SERVICES YOU RENDER, AND, IN GENERAL, WHAT IS INVOLVED
23 IN THE FUNCTION OF A RETAIL NURSERY.

1 A WE SELL ALL MANNER OF PLANT MATERIAL, INCLUDING
2 ANNUALS, PERENNIALS, TREES, SHRUBS, AND ANYTHING NORMALLY
3 FOUND, I WOULD SAY, IN A FULL-SERVICE NURSERY. WE ALSO
4 OFFER LANDSCAPING AS A SERVICE. WE HAVE --

5 Q WHEN YOU SAY "LANDSCAPING", EXACTLY WHAT DO YOU
6 MEAN BY THAT?

7 A WHERE WE GO OUT TO THE HOMEOWNER'S PROPERTY AND
8 PLANT TREES.

9 Q IT'S OFF-SITE SERVICE?

10 A RIGHT.

11 Q ALL RIGHT.

12 A WE HAVE A FULL-TIME LANDSCAPE DESIGNER ON THE
13 STAFF WHO DESIGNS UP THESE PROJECTS THAT THE HOMEOWNER
14 COMES IN TO US AND ASKS US TO DO.

15 WE ALSO -- IN THE COURSE OF LANDSCAPING, WE ARE
16 SOMETIMES REQUIRED TO BUILD A GARDEN OR THINGS LIKE THAT
17 WHERE YOU MIGHT HAVE ORNAMENTS, A FOUNTAIN, OR SOMETHING
18 THAT THE CUSTOMER WANTS.

19 Q SPEAK UP.

20 THE COURT: WHY DON'T YOU GET HIM SOME WATER, IT
21 MIGHT HELP HIM.

22 (THEREUPON, THE OFFICER OF THE COURT COMPLIED WITH
23 THE REQUEST.)

1 THE WITNESS: THAT'S ESSENTIALLY WHAT WE DO.

2 BY MR. LAWSON:

3 Q COULD YOU GIVE US AN ARRAY OF THE PLANTS THAT YOU
4 SELL?

5 A THE TYPE OF PLANTS?

6 Q YES, SIR.

7 A WE SELL SHADE TREES, AZALEAS, RHODODENDRONS,
8 NEEDLE EVERGREENS, DECIDUOUS SHRUBS. THAT WOULD COVER IT.

9 Q ALL RIGHT, SIR. TELL US, SIR, APPROXIMATELY HOW
10 MANY OF THOSE PLANTS YOU MIGHT HAVE AT A GIVEN TIME ON YOUR
11 SITE, APPROXIMATELY?

12 A NUMBERS OF PLANTS? GEE, IN THE SPRINGTIME, IN
13 THE HEIGHT OF THE SEASON, THERE MAY BE TEN THOUSAND
14 INDIVIDUAL PLANTS, IF YOU'RE COUNTING THE LITTLE GREENHOUSE
15 PLANTERS AS PLANTS.

16 Q WE'LL GET INTO THAT. NOW, A LOT OF THESE PLANTS,
17 ARE THEY ALL GROWN ON SITE OR DO YOU YIELD SOME IN OR
18 EXPLAIN THAT TO HIS HONOR?

19 A I PURCHASE SOME OF THEM ELSEWHERE AND WE BRING
20 THEM IN AND HOLD THEM UNTIL THEY'RE SOLD. WE BRING THEM IN
21 AND MULCH THEM. WE GROW SOME OF THEM THERE. I HAVE TREES
22 GROWING IN THE GROUND. I GROW PLANTS IN MY GREENHOUSE,
23 PROPAGATED FROM SEEDS.

1 Q NOW, WOULD YOU ELABORATE ON THE FUNCTION OF THE
2 GREENHOUSE? WHAT IS INVOLVED THERE?

3 A THAT IS AN ARTIFICIAL ENVIRONMENT FOR THE PLANTS
4 BECAUSE THEY WON'T GROW IN THE OUTSIDE ENVIRONMENT.

5 Q ARE THERE ANY PARTICULAR SPECIALTY PLANTS THAT
6 YOU HAVE GONE INTO?

7 A YES, I DO SPECIALIZE IN BONSAI, WHICH IS WHAT THAT
8 LITTLE TREE IS THERE.

9 Q WHAT'S A "BONSAI"?

10 A "BONSAI" IS --

11 Q LET ME SHOW YOU EXHIBIT NO. 16.

12 A "BONSAI" IS REALLY THE ART OF MINIATURIZING DWARF
13 TREES, AND IT'S DONE BY PRUNING -- TAKING A DWARF TO START
14 WITH AND PRUNING BACK THE ROOTS.

15 Q I SHOW YOU EXHIBIT NO. 33. DOES THAT HAVE ANY
16 PARTICULAR SIGNIFICANCE IN THIS PROCESS?

17 A YES, IT DOES. THIS ART STARTED IN JAPAN CENTURIES
18 AGO, AND THIS IS THE RECOMMENDED TOOL THAT THEY USE TO PRUNE
19 BACK -- IN A CERTAIN FASHION, PRUNE BACK THIS LITTLE TREE.
20 THE SHAPE OF THIS IS CURVED SO THAT, IF YOU WANTED TO TAKE
21 OFF A LITTLE BRANCH THERE, IT CUTS IT OFF CLEAN; AND LEAVES
22 NO SCAR.

23 Q NOW, COULD YOU -- WOULD YOU TELL US TYPICALLY

1 WHAT IS INVOLVED IN THE SALE OF PLANTS, AND, PARTICULARLY,
2 AS THAT MIGHT RELATE TO SOME OF THESE MAN-MADE PRODUCTS?
3 WOULD YOU EXPLAIN AND ELABORATE ON THAT TO HIS HONOR? IF
4 YOU WISH TO GIVE EXAMPLES, JUST SAY SO.

5 A WELL, TO START WITH, WE ARE PRIMARILY IN THE
6 PLANT BUSINESS. WE DON'T DO ANY ADVERTISING. I HAVE ONE
7 LITTLE -- THE SMALLEST LINE AS POSSIBLE -- IN THE YELLOW
8 PAGES. IT JUST SAYS, "WOLF TRAP NURSERY, INCORPORATED,"
9 WITH THE ADDRESS. IT'S WORD-OF-MOUTH ADVERTISING.

10 THE CUSTOMER WILL COME IN, AND THEY WILL COME IN
11 FOR A TREE OR A SHRUB OR A BUSH OR SOMETHING LIKE THAT; AND,
12 IN THE PROCESS OF MAKING THE SALE TO THE CUSTOMER, THEY MAY
13 ASK YOU, "WELL, IS THIS TREE SUSCEPTIBLE TO DISEASE?" LET'S
14 TAKE AN AZALEA FOR EXAMPLE. I'D SAY, "YES, IT IS"; AND
15 THEY SAY, "WELL, WHAT PRECAUTIONS SHOULD I TAKE?" "WELL,
16 YOU SHOULD SPRAY IT AT CERTAIN TIMES TO KEEP WHITEFLY OFF
17 AND OTHER TIMES TO KEEP OTHER FLYS OFF THE AZALEA. YOU
18 NEED TO FEED THE AZALEAS AT A CERTAIN TIME"; AND THEY'D SAY,
19 "DO YOU HAVE THESE PRODUCTS?" "YES, I DO!"; AND WE'D GO
20 AHEAD AND CONSUMMATE THE SALE.

21 Q HAVE YOU EVER HAD ANY INSTANCE WHERE A CUSTOMER
22 COMES IN FOR THE SPECIFIC PURPOSE AND THE SOLE PURPOSE OF
23 BUYING A MAN-MADE PRODUCT?

1 A SELDOM IF EVER. I CAN'T RECALL ONE INSTANCE WHERE
2 THEY CAME IN AND JUST -- WELL, I CAN'T REALLY SAY THAT IT
3 HAS NEVER HAPPENED BECAUSE I'M NOT THERE ALL THE TIME; BUT
4 I CAN'T RECALL ANY INSTANCE WHERE THE CUSTOMER CAME IN AND
5 BOUGHT A TROWEL. THEY ALWAYS BUY THAT IN CONNECTION WITH
6 BUYING THE BULBS FIRST, AND THEN BUY THE MAN-MADE ARTICLE
7 LATER.

8 Q ALL RIGHT. NOW, THE VARIOUS PRODUCTS THAT WE
9 HAVE SHOWN HERE, A LIST OF EXHIBITS RUNNING FROM EXHIBIT NO.
10 12 THROUGH EXHIBIT NO. 36, ARE THESE EXAMPLES OF -- IN
11 TOTAL -- OF THE MAN-MADE PRODUCTS THAT YOU SELL?

12 A NOT ALL OF THEM, NO.

13 Q ALL RIGHT. WHAT ELSE DO YOU SELL BESIDES THESE
14 THAT ARE MAN-MADE PRODUCTS?

15 A THEY ARE SIMILAR TO THIS, BUT I JUST COULDN'T
16 BRING EVERYTHING.

17 Q I UNDERSTAND, BUT I'M TALKING ABOUT -- OBVIOUSLY
18 YOU HAVE DIFFERENT SIZE BASKETS.

19 WHAT I'M ASKING YOU: THESE SAMPLES OF THE
20 DIFFERENT TYPES OF MAN-MADE PRODUCTS THAT YOU SELL, DOES
21 THIS CONSTITUTE THE TOTALITY OF THE TYPES OF PRODUCTS THAT
22 YOU SELL?

23 A YES.

1 Q ALL RIGHT. NOW, BEING IN THE BUSINESS FOR SOME
2 EIGHT YEARS NOW, COULD YOU TELL US, IN YOUR OPINION, WHETHER
3 OR NOT THESE PRODUCTS ARE ESSENTIAL TO THE HEALTH AND
4 MAINTENANCE OF THE PLANT?

5 A FOR THE HEALTH AND MAINTENANCE, YES.

6 Q ALL RIGHT, SIR. NOW, CAN YOU GIVE US SOME
7 EXAMPLES? LET ME JUST GIVE YOU COMPLAINANT'S EXHIBIT NO.
8 22. COULD YOU TELL US WHAT THE FUNCTION AND THE PURPOSE OF
9 THAT PARTICULAR ARTICLE IS?

10 A THIS IS A BULB PLANTER TO ENABLE YOU TO DIG INTO
11 THE SOIL DEEP ENOUGH, AND IT'S GRADUATED BY INCHES ON THE
12 SIDE BECAUSE CERTAIN BULBS ARE PLANTED ONE DEPTH AND ANOTHER
13 BULB IS PLANTED ANOTHER; BUT IT ENABLES YOU TO DIG DOWN A
14 HOLE SUFFICIENT TO ACCOMMODATE THE BULB OF THE PLANT. OF
15 COURSE, YOU COULD DIG IT WITH YOUR FINGERS, I GUESS; BUT
16 THIS JUST HAPPENS TO BE A MORE CONVENIENT WAY TO DO IT.

17 Q LET ME SHOW YOU A TROWEL, WHICH IS NO. 31. IS
18 THAT ANOTHER ARTICLE THAT WOULD BE USED FOR THE SAME PURPOSE?

19 A THE SAME THING. SOME PREFER TO DIG HOLES WITH A
20 TROWEL; SOME PREFER TO DIG IT WITH THIS.

21 Q I SHOW YOU NO. 18, WHICH IS A TERRA COTTA DUCK.
22 WHAT'S THE PURPOSE AND FUNCTION OF THAT?

23 A THAT'S POROUS; AND IT ALLOWS MOISTURE TO EVAPORATE

1 THROUGH THE SIDES, WHICH SOME PLANTS NEED.

2 Q DO ANY PARTICULAR PLANTS HAVE A UNIQUE NEED FOR
3 THAT?

4 A YES.

5 Q WHAT ARE THEY?

6 A CACTUS AND SUCH. THEY DON'T DO WELL IN PLASTIC
7 POTS.

8 Q NOW, THE SALES THAT YOU SAY THAT YOU MAKE OF
9 THESE MAN-MADE PRODUCTS; AND I BELIEVE THAT YOU CHARACTERIZED
10 THAT THEY WERE INCIDENTAL TO THE SALE OF THE PLANT ITSELF.
11 COULD YOU ELABORATE A LITTLE FURTHER ON THAT? IS THERE ANY
12 PARTICULAR REQUIREMENT OF YOU IN TERMS OF THE SERVICE IN
13 REGARDS TO THE SALE OF THESE PARTICULAR PRODUCTS, AND WHAT
14 HAPPENS?

15 A I DON'T KNOW WHAT YOU MEAN.

16 Q WELL, OTHER THAN JUST SIMPLY TO SELL A PLANT, DO
17 YOU DO ANYTHING ELSE WITH A CUSTOMER AS FAR AS THE SALE OF
18 A PARTICULAR PRODUCT?

19 A WE ANSWER A LOT OF QUESTIONS; BUT, AS FAR AS GOING
20 OUT AND PROVIDE OUR SERVICES OFF-SITE TO THEIR HOMES, OTHER
21 THAN DOING LANDSCAPING, WE DON'T.

22 Q DO YOU FIND, MR. CUPP, THAT A CUSTOMER VERY OFTEN
23 WILL ASK YOU QUESTIONS ABOUT THE CARE AND MAINTENANCE OF

1 PLANTS?

2 A ALL DAY LONG.

3 Q IS THAT ONE OF THE MAIN FUNCTIONS THAT YOU --

4 A YES.

5 Q -- PERFORM IN THE NURSERY?

6 A YES.

7 Q OKAY. EXHIBIT NO. 26, WHICH IS A BOOK ENTITLED
8 "HOUSE PLANTS", IF YOU WOULD TELL THE COURT WHO PUBLISHES
9 THAT PAMPHLET?

10 A THIS IS PUBLISHED BY BROOKLYN BOTANIC GARDEN.

11 Q WHAT IS THE FUNCTION AND PURPOSE OF THAT BOOK?

12 A TO EDUCATE THE CUSTOMER.

13 Q ARE THERE OCCASIONS AND WOULD YOU EXPLAIN TO US
14 WHEN THOSE OCCASIONS OCCUR THAT THOSE ARE SOLD?

15 A THESE ARE SOLD WHEN THE CUSTOMER BUYS A PLANT;
16 AND THEY WANT TO KNOW HOW TO CARE FOR IT; AND WE WILL TELL
17 THEM HOW TO CARE FOR IT; AND WE SOMETIMES WILL SAY, "WELL,
18 EVERYTHING WE'VE SAID IS ENCLOSED IN THIS BOOK. THE BOOK
19 HAS A LOT MORE FOR HOUSE PLANT CARE"; AND THEY WILL SOMETIMES
20 BUY IT.

21 Q DO YOU FEEL THAT BOOK IS ESSENTIAL TO THE HEALTH
22 AND MAINTENANCE OF A PLANT?

23 A THE INFORMATION IN IT IS, YES.

1 Q ALL RIGHT, SIR. NOW, IS THAT JUST A SAMPLE OF
2 THE BOOKLETS THAT YOU SELL?

3 A YES.

4 Q WHAT ARE THE OTHER BOOKLETS ABOUT?

5 A THERE'S A WHOLE SERIES OF THEM ON TREES AND SHRUBS,
6 ON PLANTING GARDENS, ALL HAVING TO DO WITH PLANTS.

7 Q AND THE OTHER SAMPLES THAT YOU MENTIONED, THE
8 OTHER BOOKLETS, ARE THEY PUBLISHED BY THE SAME ENTITY?

9 A YES, THE SAME SIZE BOOKLET.

10 Q ALL RIGHT, SIR. NOW, SINCE 1976, THE PRODUCTS
11 THAT YOU HAVE DESCRIBED TO HIS HONOR THAT YOU SELL -- NOT
12 JUST THE PLANTS AND SHRUBS AND FLOWERS, BUT ALSO THE VARIOUS
13 MAN-MADE PRODUCTS -- ARE YOU SELLING THE SAME PRODUCTS TODAY
14 THAT YOU SOLD IN 1976?

15 A ESSENTIALLY.

16 Q WHEN YOU SAY "ESSENTIALLY", WHAT DO YOU MEAN?

17 A WELL, A MANUFACTURER WILL CHANGE A PRODUCT HERE
18 AND THERE; BUT I'M STILL SELLING THE SAME THINGS THAT I SOLD
19 IN THE BEGINNING. I HAVEN'T EXPANDED IT.

20 Q YOUR PRODUCT LINE -- I'M TALKING ABOUT POTS AND --

21 A YES.

22 Q -- PRUNERS --

23 A RIGHT.

1 Q -- AND INSECTICIDES, ET CETERA?

2 A RIGHT.

3 Q NOW, YOU, UNFORTUNATELY, HAD TO APPEAR IN COURT
4 IN 1976?

5 A (NODDED HEAD.)

6 Q IS THAT CORRECT?

7 A THAT'S CORRECT.

8 Q FOR A ZONING VIOLATION?

9 A YES.

10 Q WERE THE SAME PRODUCTS WHICH YOU HAVE DESCRIBED
11 TO HIS HONOR PLUS ARE EXHIBITED HERE TODAY, ARE THEY
12 ESSENTIALLY THE SAME PRODUCTS THAT YOU SOLD THEN?

13 A YES, THEY ARE.

14 Q WHEN YOU APPEARED IN COURT, DID YOU BRING ANY
15 PRODUCTS INTO COURT?

16 A WE BROUGHT SOME, YES.

17 Q SOME OF THE SAME SAMPLES THAT YOU'VE SHOWN HERE
18 TODAY?

19 A (NODDED HEAD.)

20 Q THE ANSWER IS "YES"?

21 A YES.

22 Q SAY "YES" OR "NO".

23 A YES.

1 Q AND, ON THAT OCCASION, DID THAT PARTICULAR JUDGE
2 TAKE A VIEW OF YOUR PLACE OF BUSINESS?

3 A YES, HE CAME OUT.

4 Q ALL RIGHT, SIR; AND, OBVIOUSLY THERE WAS A
5 VARIATION OF THE PARTICULAR PRODUCTS; BUT THE PRODUCT LINE --
6 WAS THE PRODUCT LINE DISPLAYED THEN THE SAME AS IT IS TODAY?

7 A IN THE SAME PLACE, IN FACT.

8 Q NOW, LET'S TALK IN TERMS OF THE PERCENTAGE OF
9 SALES THAT YOU MAKE. LET ME SHOW YOU A DOCUMENT WHICH WILL
10 BE MARKED AS COMPLAINANT'S -- WHAT'S THE NEXT NUMBER?

11 THE CLERK: 37.

12 MR. LAWSON: 37 FOR IDENTIFICATION.

13 (THE DOCUMENT HERETOFORE REFERRED
14 TO WAS MARKED PLAINTIFF'S EXHIBIT
15 NO. 37 FOR IDENTIFICATION.)

16 BY MR. LAWSON:

17 Q -- COMPLAINANT'S EXHIBIT NO. 37, AND ASK YOU
18 WHETHER OR NOT YOU HAD PREPARED THAT DOCUMENT.

19 A YES, I DID.

20 Q OKAY.

21 MR. LAWSON: COUNSEL HAS A COPY OF THIS. I WOULD
22 LIKE TO OFFER THIS --

23 THE COURT: ANY OBJECTION?

1 MR. LAWSON: -- INTO EVIDENCE.

2 MS. ANDERSON: NO, YOUR HONOR.

3 THE COURT: 37 IS ADMITTED.

4 (THE DOCUMENT HERETOFORE MARKED
5 FOR IDENTIFICATION AS PLAINTIFF'S
6 EXHIBIT NO. 37 WAS RECEIVED IN
7 EVIDENCE.)

8 BY MR. LAWSON:

9 Q THE TOP PART OF THE DOCUMENT, WOULD YOU EXPLAIN
10 THAT TO HIS HONOR; AND YOU HAVE BROKEN DOWN INTO PERCENTAGES
11 SALES OF CERTAIN PRODUCTS, WOULD YOU EXPLAIN THAT TO HIS
12 HONOR?

13 A YES, SEVERAL YEARS AGO, I PURCHASED A CASH
14 REGISTER THAT WOULD GIVE ME A BREAKDOWN OF SALES MUCH WIDER
15 THAN WHAT I HAD BEEN USING PRIOR TO THAT. IT ENABLED ME TO
16 GIVE ME A TOTAL AT THE END OF A PERIOD OF DIFFERENT
17 CATEGORIES OF MERCHANDISE; AND, BY DIVIDING THE TOTAL SALES
18 OVERALL BY THE TOTAL IN ANY ONE CATEGORY, IT WOULD GIVE ME
19 THE PERCENTAGE OF SALES; AND I HAVE PREPARED THIS DOCUMENT
20 TO SHOW WHAT THE PERCENTAGE OF SALES WERE IN THE CHEMICALS,
21 CONTAINERS, AND HARDWARE, AND THE TOTAL VOLUME.

22 WOULD YOU LIKE ME TO READ THIS?

23 Q YES, IF YOU WOULD.

1 A OKAY. IN 1978, THE PERCENTAGE OF SALES THAT WERE
2 SOLD OF CHEMICALS WAS 2.6 PERCENT, OF CONTAINERS WAS 2.9
3 PERCENT, AND HARDWARE WAS 1.6.

4 IN '79, IT WAS CHEMICALS 1.5 PERCENT, CONTAINERS
5 WAS 2.6, AND HARDWARE WAS .08 PERCENT.

6 FOR THE FIRST SIX MONTHS OF 1980, CHEMICALS WERE
7 1.6 PERCENT, CONTAINERS 3.0 PERCENT, AND HARDWARE .06
8 PERCENT.

9 Q NOW, WHAT CONSTITUTES THE PERCENTAGE OF THE REST
10 OF THE SALES?

11 A I'M SORRY?

12 Q WHAT CONSTITUTES THE PERCENTAGE OF THE REST OF
13 YOUR SALES?

14 A ALL THE OTHER ITEMS THAT WE SELL.

15 Q WHICH ARE WHAT?

16 A PLANT MATERIAL, LABOR, MULCH, PEAT MOSS, AND ALL
17 THE MANY OTHER ITEMS THAT WE SELL.

18 Q WHAT? PLANTS?

19 A YEAH, PLANTS.

20 Q ALL RIGHT. YOU'VE GOT TO SPEAK UP AND TELL US.
21 PLANTS AND VARIOUS FORMS OF PLANTS ARE OBVIOUSLY THE
22 OVERWHELMING MAJORITY OF YOUR SALES?

23 A OVERWHELMING.

1 Q HAS THAT ALWAYS BEEN THE CASE?

2 A IT HAS, FROM THE BEGINNING.

3 Q ALL RIGHT, SIR. DO YOU CONTEMPLATE ANY CHANGE IN
4 THE STRUCTURE AND THE RANGE OF PRODUCTS SOLD?

5 A NO.

6 Q IN THE FUTURE? YOUR ANSWER IS "NO"?

7 ALL RIGHT, SIR. NOW, I WANT TO SHOW YOU A
8 DEVELOPMENT PLAN WHICH WAS THE FINAL SUBMISSION TO THE
9 BOARD OF SUPERVISORS IN YOUR CASE, WHICH HAS BEEN MARKED
10 COMPLAINANT'S EXHIBIT NO. 1. I GUESS IT'D BE BEST IF YOU STAND
11 AND HOLD IT LIKE THAT SO HIS HONOR CAN SEE IT. LET ME GET
12 SOME OF THESE THINGS OUT OF YOUR WAY, AND I WANT YOU TO
13 DESCRIBE TO THE COURT WHAT YOUR PLAN OF DEVELOPMENT WAS AND
14 THE PURPOSE OF EACH ASPECT OF IT -- WHAT YOU IMPLIED YOU
15 INTENDED TO DO AND WHAT YOU SHOWED THEM?

16 A THIS REPRESENTS THE ENTRANCE INTO THE PARKING LOT
17 RIGHT HERE. THIS IS THE SALES OFFICE. THIS IS AN EXISTING
18 LATH HOUSE. THIS IS LATH HOUSE NO. 2. THIS IS LATH HOUSE
19 -- RIGHT HERE -- NO. 1, WHICH IS ATTACHED TO THE FRONT END
20 OF THE SALES OFFICE.

21 Q AS YOU GO THROUGH -- LET ME INTERRUPT.

22 WOULD YOU TELL US WHAT'S THERE NOW AND WHAT YOU
23 INTEND TO DO?

1 A THAT'S WHAT I'M DOING.

2 Q I'M SORRY. GO AHEAD.

3 A THIS IS AN EXISTING GREENHOUSE, WHICH IS ATTACHED
4 ONTO THE SALES OFFICE IN THE BACK. THIS IS AN EXISTING
5 SERVICE BUILDING, WHICH IS A WAREHOUSE. THESE ARE ALL
6 THERE IN PLACE.

7 THERE WAS A TEMPORARY STRUCTURE HERE THAT HAS
8 BEEN REMOVED. IT WAS -- WE CALLED IT A GREENHOUSE. IT
9 NEVER QUALIFIED REALLY AS A GREENHOUSE, BUT THAT HAS BEEN
10 REMOVED.

11 WHAT WE PROPOSE TO DO IS TO MOVE THE PARKING FROM
12 THIS PARKING LOT HERE BACK TO THE PARKING LOT BEHIND WHICH
13 IS NOW IN PLANT MATERIAL. WE WANT TO EXTEND --

14 Q WHAT DID YOU INTEND TO DO WITH THE EXISTING
15 PARKING LOT?

16 A I WANT TO PUT IN PLANT MATERIAL HERE.

17 Q ANY PARTICULAR REASON?

18 A OH, AESTHETICS. I THINK IT WOULD LOOK NICER TO
19 HAVE THE PARKING AWAY FROM THE ROAD AND THE PLANT MATERIAL
20 OUT FRONT BECAUSE WE EMPHASIZE PLANT MATERIAL. WE DON'T
21 SELL AUTOMOBILES; WE SELL PLANTS; AND I WOULD LIKE TO HAVE
22 THE PLANTS OUT FRONT, OKAY?

23 Q ALL RIGHT.

1 A I WANT TO EXTEND THIS LATH AREA OVER TO THE WEST
2 SIDE, THE WAY IT'S SHOWN HERE, TO PROTECT THE PLANTS THAT
3 ARE OVER THERE RIGHT NOW FROM PERHAPS DRYING OUT IN THE SUN.

4 I WANT TO CONSTRUCT, IN PLACE OF THIS OLD GREEN-
5 HOUSE HERE, A NEW GREENHOUSE CONNECTED WITH THE NEW SALES
6 BUILDING AND RUNNING BACK AND CONNECTING TO THE SERVICE
7 BUILDING BACK HERE. THAT'S WHAT I WANT TO DO.

8 Q ACTUALLY, YOUR OFFICES -- YOUR OFFICE AND GREEN-
9 HOUSE RUN TOGETHER; ISN'T THAT CORRECT?

10 A RIGHT NOW, YES.

11 Q AND IT WOULD OVER HERE, TOO?

12 A IT WOULD OVER HERE, TOO.

13 Q WHAT'S THE FUNCTION OF THE REST OF THE SITE?

14 A THERE'S PLANT MATERIAL DISPLAYED EVERYWHERE ELSE,
15 RIGHT DOWN HERE TO ABOUT THIS POINT; AND THEN THERE ARE
16 TREES GROWING OVER ON THE WEST SIDE, ALL THE WAY BACK THIS
17 WAY -- ABOUT FIVE HUNDRED TREES GROWING THERE.

18 Q WHAT'S IN THE FRONT -- DIRECTLY IN FRONT OF YOUR
19 HOUSE?

20 A THIS IS MY LAWN. THIS IS WHERE WE LIVE.

21 Q YOU MAY HAVE A SEAT.

22 NOW, WHAT WAS THE PURPOSE IN DOING THESE
23 MODIFICATIONS AND CHANGES -- WHAT WAS THE MOTIVATION, THE

1 REASON FOR DOING THEM?

2 A THE MOTIVATION WAS I WANT MAINLY TO BE ABLE TO
3 OPERATE MORE EFFICIENTLY THAN I DO BECAUSE IT'S CUMBERSOME
4 TO OPERATE. I WANT TO PROTECT THE PLANTS FROM THE SUN,
5 FROM DRYING OUT. THAT'S THE REASON FOR THE ADDITIONAL
6 LATH AREA.

7 Q SPEAK UP.

8 A AND I JUST WANT TO ACCOMMODATE THE BUSINESS THAT
9 I HAVE.

10 Q DOES THIS ENTAIL OR DOES IT INVOLVE ANY EXPANSION
11 OF YOUR PRODUCT LINE OR YOUR SERVICES?

12 A NO, SIR. WE ALREADY OFFER ALL THE SERVICES THAT
13 I INTEND TO OFFER OR EVEN WANT TO OFFER.

14 Q I SHOW YOU EXHIBIT NO. -- COMPLAINANT'S EXHIBIT
15 NO. 11, WHICH IS THE AMENDMENT WHICH WAS ADOPTED BY THE
16 BOARD ON OCTOBER 22, '79. YOU -- OBVIOUSLY YOU HAVE READ
17 THAT BEFORE, HAVE YOU NOT?

18 A YES, I HAVE.

19 Q WHAT EFFECT DO YOU FEEL -- AS A NURSERYMAN
20 OPERATING IN FAIRFAX COUNTY, WHAT EFFECT DO YOU FEEL THAT
21 WOULD HAVE ON YOUR BUSINESS?

22 MS. ANDERSON: YOUR HONOR, I'M GOING TO HAVE TO
23 OBJECT IN LINE WITH MY OPENING ARGUMENT THAT THIS ISN'T

1 RELEVANT. THE ORDINANCE HASN'T BEEN APPLIED TO MR. CUPP.

2 MR. LAWSON: I DON'T THINK THE COUNTY, YOUR HONOR,
3 CAN SERIOUSLY CONTEND THAT THE ORDINANCE WOULD NOT APPLY IN
4 THE EVENT THAT THIS SE WERE TO BE GRANTED AND HE WERE TO
5 DEVELOP HIS SITE AS PLANNED.

6 I MEAN, THAT'S THE WHOLE ISSUE AND I THOUGHT WAS
7 THE WHOLE ISSUE IN THE FIRST ARGUMENT.

8 THE COURT: I'LL OVERRULE THE OBJECTION.

9 MS. ANDERSON: NOTE MY EXCEPTION.

10 THE COURT: GO AHEAD.

11 THE WITNESS: WHAT WAS YOUR QUESTION?

12 BY MR. LAWSON:

13 Q YOU HAVE READ THAT ORDINANCE?

14 A YES, I HAVE.

15 Q AS A NURSERYMAN IN FAIRFAX COUNTY, WOULD YOU TELL
16 US WHAT YOU FEEL THE EFFECT THAT ORDINANCE WOULD HAVE ON
17 YOUR BUSINESS IN THE EVENT IT WOULD BE APPLIED TO YOUR
18 BUSINESS?

19 A FOR EIGHT YEARS, I'VE BEEN SELLING ANCILLARY
20 PRODUCTS TO THE CUSTOMERS AS THEY COME IN. NOW, FOR ME TO
21 SUDDENLY SAY, "NO, I CAN'T DO THAT ANYMORE." IF A CUSTOMER
22 CAME IN TO BUY A ROSEBUSH, I'D BE ALLOWED TO SELL THAT; BUT,
23 IF I WANTED TO SELL THEM AN APPLICATOR TO SPRAY FOR

1 BLACKSPOTS, I COULDN'T DO THAT. I'D HAVE TO SEND THEM DOWN
2 TO MY NURSERYMAN RIGHT ACROSS -- DIAGONALLY ACROSS THE
3 ROAD -- FROM ME WHO CAN SELL THEM.

4 THERE ISN'T ANY REASON WHY THE CUSTOMER WOULD
5 COME BACK TO ME FOR THE ROSEBUSH IF THEY COULDN'T ALSO BUY
6 SOMETHING TO APPLY THE INSECTICIDE TO THE PLANTS FROM.
7 THERE'S NO REASON TO STOP AT MY PLACE. THEY MIGHT JUST AS
8 WELL GO TO THE OTHER PLACE IN THE FIRST PLACE AND FIND THE
9 WHOLE THING.

10 SO, THAT'S THE DETRIMENTAL EFFECT IT WOULD HAVE.

11 Q THAT'S JUST ONE EXAMPLE?

12 A THAT'S ONE EXAMPLE OF THE EFFECT, YES. I
13 COULDN'T BE COMPETITIVE.

14 Q DO YOU FEEL, SIR, THAT IT IS NECESSARY AND
15 IMPORTANT TO YOUR BUSINESS TO UPGRADE IT AS YOU HAD PLANNED
16 HERE IN YOUR DEVELOPMENT PLAN?

17 A YES, I DO.

18 Q AND, BUT FOR THE ORDINANCE, THAT YOU WOULD DO
19 THIS; IS THAT WHAT YOU'RE TELLING US?

20 A THAT'S EXACTLY CORRECT.

21 Q NOW, ARE YOU AWARE OF YOUR GENERAL KNOWLEDGE,
22 MR. CUPP, HAS THERE EVER BEEN ANY COMPLAINTS OF YOUR
23 BUSINESS ESTABLISHMENT THERE IN TERMS OF PRODUCTS SOLD OR

1 YOUR ACTIVITIES THERE?

2 MS. ANDERSON: YOUR HONOR, I THINK IT'S IRRELEVANT.
3 THE COURT: SUSTAINED.

4 BY MR. LAWSON:

5 Q NOW, LET'S TALK ABOUT THE TRAFFIC IN FRONT OF
6 YOUR PLACE OF BUSINESS THEN, MR. CUPP.

7 COULD YOU TELL US APPROXIMATELY -- WELL, LET ME
8 BACK UP FIRST AND ASK THIS: HAVE YOU BEEN ABLE TO ASCERTAIN
9 THE NUMBER OF CUSTOMERS THAT COME TO YOUR PLACE OF BUSINESS?

10 A YES, I HAVE. SINCE I HAVE THIS NEW CASH REGISTER,
11 IT DOES TELL ME THE NUMBER OF CUSTOMERS.

12 Q AND, ON AN AVERAGE, COULD YOU TELL US APPROXIMATELY
13 OR EXACTLY FROM ANY MATERIAL YOU HAVE, THE NUMBER OF
14 CUSTOMERS THAT COME TO YOUR PLACE OF BUSINESS?

15 A SOME DAYS, THERE ARE NONE, OF COURSE.

16 Q I'M TALKING ABOUT AN AVERAGE.

17 A AND SOME DAYS, THERE ARE MORE THAN TWENTY-FIVE;
18 BUT IT AVERAGES OUT--ON AN ACTUAL COUNT OF THE TAPES AT THE
19 CASH REGISTERS, IT AVERAGES OUT TO TWENTY-FIVE CUSTOMERS
20 PER DAY.

21 Q COULD YOU TELL US WHEN, BY AND LARGE, WHEN A
22 CUSTOMER COMES TO YOUR PLACE OF BUSINESS?

23 A IT'S GENERALLY IN THE MIDDLE OF THE DAY.

1 Q WHEN YOU SAY "THE MIDDLE OF THE DAY", WHAT DO YOU
2 MEAN BY THAT? WHAT HOURS ARE YOU TALKING ABOUT?

3 A WELL, WE OPEN FROM 8:30 TO 5:00; AND IT'S
4 PRIMARILY IN BETWEEN 11:00 AND 3:00, I'D SAY BECAUSE WE
5 DEAL PRIMARILY WITH THE HOUSEWIFE.

6 Q UH-HUH.

7 A AND THE HUSBAND IS GONE TO WORK; AND SHE'S IN
8 SHOPPING WHILE HE'S GONE OR THE KIDS ARE NOT HOME FROM
9 SCHOOL YET SO SHE GETS HER SHOPPING DONE IN BETWEEN THOSE
10 HOURS; BUT IT'S A WEEKEND BUSINESS. I'VE DESCRIBED WHAT
11 OCCURS DURING THE WEEK.

12 Q I WAS GOING TO ASK YOU ABOUT ON THE WEEKEND.

13 A ON THE WEEKEND, BOTH HUSBAND AND WIFE COME IN; AND
14 WE -- I WOULD VENTURE TO SAY. I DON'T KNOW EXACTLY, BUT I
15 WOULD VENTURE TO SAY SEVENTY PERCENT OF THE TOTAL VOLUME IS
16 DONE ON SATURDAY AND SUNDAY.

17 Q OKAY, AND WHAT TIME OF DAY ON WEEKENDS DO THEY
18 USUALLY COME IN?

19 A WE OPEN THE SAME HOURS -- 8:30 TO 5:00.

20 Q NO, BUT IN TERMS OF WHEN THEY COME?

21 A THEY START EARLY ON WEEKENDS. THEY GET IN THERE
22 AT 8:30 SOMETIMES, WAITING FOR ME TO OPEN.

23 Q OKAY. THE PRIMARY FLOW OF BUSINESS THEN IS ON

1 WEEKENDS?

2 A RIGHT.

3 Q AND, DURING THE TIME YOU'VE BEEN OPERATING THERE,
4 ARE YOU AWARE OF ANY ACCIDENT -- AUTOMOBILE ACCIDENT --
5 OCCURRING AT THE ENTRANCE TO YOUR PLACE OF BUSINESS?

6 MS. ANDERSON: YOUR HONOR, I DON'T THINK IT'S
7 RELEVANT.

8 MR. LAWSON: I THINK IT'S VERY RELEVANT, YOUR
9 HONOR. THE QUESTION OF ROAD AND TRAFFIC SAFETY IS VERY
10 IMPORTANT.

11 THE COURT: I'LL OVERRULE THE OBJECTION.

12 THE WITNESS: YES, I AM AWARE THAT THERE HAVE BEEN
13 NONE.

14 BY MR. LAWSON:

15 Q AND THAT'S IN EIGHT PLUS FOUR MONTHS YEARS; IS
16 THAT CORRECT?

17 A YES.

18 MR. LAWSON: THE COURT'S INDULGENCE FOR JUST A
19 MOMENT.

20 THE COURT: YES.

21 BY MR. LAWSON:

22 Q MR. CUPP, I HAVE A COUPLE FURTHER QUESTIONS. I
23 HAD ASKED YOU EARLIER, MR. CUPP, ABOUT YOUR APPEARANCE IN

1 COURT IN 1976 FOR A ZONING VIOLATION; IS THAT CORRECT?

2 A THAT'S CORRECT.

3 Q WHAT WAS THE RESULT OF THAT PROSECUTION?

4 MS. ANDERSON: YOUR HONOR, I BELIEVE IT'S HEARSAY
5 AND NOT RELEVANT.

6 THE COURT: WELL, HE WAS INVOLVED.

7 MR. LAWSON: THAT'S NOT HEARSAY.

8 THE COURT: ALL RIGHT, OVERRULED.

9 THE WITNESS: THE JUDGE -- THE COUNTY -- THE
10 JUDGE RULED THAT I WAS NOT IN VIOLATION OF THE ORDINANCE
11 TECHNICALLY.

12 BY MR. LAWSON:

13 Q THE PRODUCTS, YOU SAY, ARE ESSENTIALLY THE SAME
14 PRODUCTS THAT ARE SHOWN HERE TODAY; IS THAT CORRECT?

15 A THAT'S CORRECT.

16 MR. LAWSON: THAT'S ALL THE QUESTIONS, YOUR HONOR,
17 I HAVE AT THIS TIME.

18 THE COURT: MS. ANDERSON, DO YOU WANT TO WAIT
19 UNTIL AFTER THE LUNCH BREAK OR DO YOU WANT TO START YOUR
20 CROSS NOW?

21 MS. ANDERSON: I DON'T HAVE THAT MUCH, YOUR HONOR,
22 WHATEVER YOU SAY.

23 THE COURT: OKAY.

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CROSS EXAMINATION

BY MS. ANDERSON:

Q MR. CUPP, I JUST WANT TO MAKE SURE I UNDERSTOOD
YOU CORRECTLY. I WANT TO REFER TO PLAINTIFF'S EXHIBIT NO.
1, WHICH IS THE PLAT IN THIS CASE. YOU'RE SAYING THAT YOU
ARE GOING TO EXPAND THE EXISTING LATH HOUSE INTO THIS AREA;
IS THAT CORRECT?

A YES.

Q OKAY. ALSO, WITH REGARD TO THE PLAT, YOU POINTED
OUT A WAREHOUSE. COULD YOU POINT THAT OUT AGAIN?

A RIGHT HERE.

Q OKAY. WAS THAT IN EXISTENCE WHEN THE DISTRICT
COURT VIEWED YOUR PROPERTY?

A NO, IT WAS NOT.

Q AND, IF I UNDERSTAND YOU CORRECTLY, YOU ARE
INTENDING TO FILL THE ADDITIONAL GREENHOUSE AND LATH AREAS
WITH ADDITIONAL PLANTS; IS THAT CORRECT?

A NO, THAT IS NOT CORRECT. I INTEND TO FILL THE
GREENHOUSE WITH THE PLANT MATERIAL THAT IS ALREADY WHERE THE
LATH AREA WILL BE. I JUST WANT TO PROTECT THE EXISTING
PLANT MATERIAL.

Q I SEE, BUT YOU ARE GOING TO ADD PLANTS IN THE
GREENHOUSE?

1 A IN THE GREENHOUSE, YES.

2 Q WHEN DID YOU REMOVE THE GREENHOUSE THAT SHOWS UP
3 ON PLAINTIFF'S EXHIBIT NO. 1?

4 A EARLIER THIS SUMMER.

5 Q THIS SUMMER. AT THE TIME YOU WENT TO DISTRICT
6 COURT, COULD YOU STATE WHAT EVIDENCE WAS PUT ON BY THE
7 COMMONWEALTH'S ATTORNEY?

8 A I DON'T KNOW.

9 MS. ANDERSON: I HAVE NO FURTHER QUESTIONS.

10 THE COURT: ANY REDIRECT?

11 MR. LAWSON: JUST ONE, YOUR HONOR.

12 REDIRECT EXAMINATION

13 BY MR. LAWSON:

14 Q YOU WERE ASKED ABOUT THE SERVICE BUILDING, WHICH,
15 ON COMPLAINANT'S EXHIBIT NO. 1, WAS TO REAR OF THE EXISTING
16 GREENHOUSE. WOULD YOU TELL HIS HONOR WHAT THE FUNCTION OF
17 THAT BUILDING IS?

18 A THAT'S WHERE WE STORE ONE VEHICLE AND ALSO WE
19 HAVE RESTROOMS FOR THE CUSTOMERS IN THERE AND WE STORE STOCK
20 THAT NEEDS TO BE STORED INDOORS TO KEEP OUT OF THE WEATHER.

21 Q YOU SAY "A VEHICLE", WHAT DO YOU MEAN?

22 A I HAVE A PICKUP TRUCK.

23 Q AND WHAT IS THAT USED FOR?

1 A WE STORE THAT THERE. WE USE IT TO DELIVER
2 MULCH.

3 Q YOU USE THAT IN THE LANDSCAPING BUSINESS?

4 A YES.

5 Q WHICH IS AN OPERATION AS A MATTER OF RIGHT; IS
6 THAT CORRECT?

7 A YES.

8 THE COURT: ANY FURTHER QUESTIONS?

9 MR. LAWSON: NO, I'M SORRY.

10 MS. ANDERSON: YOUR HONOR, IF I MAY JUST GO A
11 LITTLE FURTHER?

12 RECROSS EXAMINATION

13 BY MS. ANDERSON:

14 Q YOU DON'T INTEND, MR. CUPP, THAT THESE SPRAYERS
15 COULD BE USED FOR WINDOW WASHING?

16 MR. LAWSON: YOUR HONOR, I WOULD OBJECT. I THINK
17 THAT'S BEING ARGUMENTATIVE WITH THE WITNESS. IT SEEMS TO
18 ME SHE COULD CROSS-EXAMINE AS TO THE DETAILS.

19 THE COURT: WHY DON'T YOU REPHRASE YOUR QUESTION,
20 MS. ANDERSON?

21 BY MS. ANDERSON:

22 Q MR. CUPP, COULDN'T THESE SPRAYERS BE USED FOR
23 WINDOW WASHING IF YOU FILLED THEM WITH WINDOW WASHING

1 MATERIAL?

2 A I SUPPOSE THEY COULD.

3 Q AND COULD THESE -- THESE LITTLE CERAMIC POTS BE
4 USED AS DESK ORNAMENTS IF YOU FILLED THEM WITH PAPER CLIPS
5 OR RUBBER BANDS?

6 A (NODDED HEAD.)

7 THE COURT: YOU'VE GOT TO STATE YOUR ANSWER.

8 THE WITNESS: YES. I'M SORRY.

9 BY MS. ANDERSON:

10 Q AND THE --

11 THE COURT: IT'S CALLED A WICKER BASKET.

12 BY MS. ANDERSON:

13 Q -- THE WICKER BASKETS THAT YOU SELL, THEY COULD
14 BE USED FOR WASTEPAPER BASKETS OR AN A TABLE SETTING OR
15 SOMETHING LIKE THAT; IS THAT CORRECT?

16 A YES.

17 Q AND THE LITTLE CHRISTMAS ORNAMENTS, THEY COULD BE
18 USED DIFFERENT PLACES AROUND THE HOUSE? THIS IS NOT
19 NECESSARY TO MAINTAIN THE HEALTH AND SAFETY OF THE PLANT?

20 A NO.

21 MS. ANDERSON: I HAVE NO FURTHER QUESTIONS.

22 THE COURT: ANY FURTHER QUESTIONS?

23 MR. LAWSON: JUST ONE.

1 FURTHER REDIRECT EXAMINATION

2 BY MR. LAWSON:

3 Q THE PRODUCTS THAT YOU WERE ASKED ABOUT, MR. CUPP,
4 HAVE YOU EVER SOLD THOSE PRODUCTS INDIVIDUALLY AS OPPOSED
5 TO INCIDENTAL TO A PLANT SALE?

6 A NO, I CAN'T THINK OF ANY INSTANCE WHERE THEY CAME
7 IN AND JUST BOUGHT ONE OF THOSE. A PLANT -- THE SALE OF A
8 PLANT GENERATED THE SALE OF THIS. THE PLANT CAME FIRST;
9 THIS CAME SECOND.

10 FURTHER RECROSS EXAMINATION

11 BY MS. ANDERSON:

12 Q THERE ARE TIMES, ARE THERE NOT, MR. CUPP, THAT
13 YOU SELL PLANTS WITHOUT SELLING THE ANCILLARY MATERIALS?

14 A YES.

15 Q AND WOULD YOU CHARACTERIZE THAT AS THE BULK OF
16 YOUR SALES -- SELLING PLANTS ALONE?

17 A OVERWHELMING.

18 MS. ANDERSON: THANK YOU.

19 THE COURT: ANY OTHER QUESTIONS? YOU MAY STEP
20 DOWN, SIR.

21 (THEREUPON, THE WITNESS WAS EXCUSED.)

22 THE COURT: WE'LL TAKE A LUNCH BREAK. I ASSUME
23 YOUR NEXT WITNESS WILL TAKE SOME TIME?

1 THE RECORD, HIS QUALIFICATIONS CAN BE STATED.

2 THEREUPON,

3 ROSSER H. PAYNE,

4 A WITNESS, WAS CALLED FOR EXAMINATION BY COUNSEL FOR THE
5 COMPLAINANTS, AND, HAVING BEEN PREVIOUSLY DULY SWORN, WAS
6 EXAMINED AND TESTIFIED AS FOLLOWS:

7 DIRECT EXAMINATION

8 BY MR. LAWSON:

9 Q ROSSER, WOULD YOU STATE YOUR FULL NAME FOR THE
10 RECORD, PLEASE?

11 A ROSSER H. PAYNE, JR., POST OFFICE BOX 818,
12 59 CULPEPER STREET, WARRENTON, VIRGINIA.

13 Q ROSSER, YOU HAVE HEARD COUNSEL STIPULATE AS TO
14 YOUR QUALIFICATIONS IN PLANNING AND ZONING AS AN EXPERT.

15 AT MY REQUEST, HAVE YOU HAD OCCASION TO READ
16 AND ANALYZE, IN PARTICULAR, AN AMENDMENT TO THE FAIRFAX
17 COUNTY ZONING ORDINANCE, WHICH HAS BEEN DESIGNATED AS
18 COMPLAINANT'S EXHIBIT NO. 11; AND I GIVE YOU A COPY OF
19 THAT; AND, IF SO, WOULD YOU TELL US BRIEFLY WHAT OTHER
20 MATTERS YOU HAVE TAKEN INTO CONSIDERATION IN YOUR ANALYSIS,
21 PARTICULARLY AS TO THE HISTORY OF THE EVOLUTION OF THE
22 NURSERY BUSINESS IN FAIRFAX COUNTY IN THE CONTEXT OF
23 PLANNING AND ZONING AND WHAT FACTORS YOU HAVE TAKEN INTO

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ACCOUNT?

A YES, IN LOOKING AT THE ZONING AMENDMENT, MY FIRST QUESTION IN READING IT WAS TO DETERMINE ITS PURPOSE; AND, IN LOOKING AT THE PURPOSE, I FOUND THAT THE ORDINANCE QUITE CLEARLY REDEFINED THE AREAS IN WHICH PLANT NURSERIES AND GARDEN CENTERS WOULD BE CONSIDERED.

PLANT NURSERIES, OF COURSE, HAVE BEEN HISTORICAL IN THIS COUNTY SINCE WE PASSED THE FIRST ORDINANCE IN 1941 AND THE SECOND ORDINANCE IN 1958, KNOWN AS THE FREEHILL AMENDMENT AND THE THIRD ORDINANCE OF 1959, KNOWN AS THE POMEROY ORDINANCE, AND THEN FINALLY THE LATEST ONE WHICH WAS THE RESULT OF THE ORDINANCE REVIEW COMMITTEE, WHICH CAME ALONG IN 1977 AND '78.

IN ALL OF THESE ORDINANCES, THE MATTER OF A PLANT NURSERY, A NURSERY WAS PERMITTED AS A MATTER OF RIGHT. IT WAS NOT CONSIDERED TO BE A SPECIAL PERMIT OR ZONING USE. THE USES PERMITTED, OF COURSE, WERE HORTICULTURAL AND AGRICULTURAL USES. THEY WERE DEFINED IN THE AGRICULTURAL ZONE AND THE HORTICULTURAL USES.

THEY PERMITTED ANCILLARY SALES OF THE EQUIPMENT NORMALLY USED IN THE SEEDING PREPARATION AND THE MAINTENANCE OF THE LIFE OF THE PRODUCT AND THE MARKETING OF THE PRODUCT.

1 NOW, THE NEW AMENDMENT DOES THREE THINGS FROM
2 READING IT QUITE CLEARLY. IT REDEFINES THE LOCATION OF THE
3 PLANT NURSERY AS SUCH AND DEFINES IT AS A SPECIAL EXCEPTION
4 IN VARIOUS RESIDENTIAL ZONES AND IN COMMERCIAL ZONES. IT
5 ALSO EXCLUDES ANY SALE OF ANCILLARY ITEMS OTHER THAN
6 FERTILIZERS, MULCHERS, AND PESTICIDES.

7 THE REDEFINITION OF A GARDEN CENTER THOUGH WAS
8 VERY DIFFICULT TO ANALYZE IN TERMS OF ITS PLANNING PURPOSES.
9 I FOUND NO STUDIES OR NO STATISTICS TO JUSTIFY ITS LOCATION.
10 ITS APPARENT JUSTIFICATION WAS TO PROVIDE A LOCATION FOR
11 THE LANDSCAPE CONTRACT USE OFFICE OR LAWN DOCTOR'S OFFICE
12 AS WELL AS A PLANT NURSERY WITH THE SALE OF ANCILLARY
13 EQUIPMENT IN A RETAIL SENSE.

14 IN FACT, THE DEFINITION CLOSES WITH THE STATEMENT:
15 "IT IS TO BE ASSUMED THAT IT IS OF COMMERCIAL -- RETAIL
16 COMMERCIAL USE."

17 SO, ITS ONLY PURPOSE, THEREFORE, WAS TO SEPARATE
18 THESE USES IN DEALING WITH THOSE TWO ITEMS.

19 Q "TO SEPARATE USES", NOW, YOU'RE TALKING ABOUT TO
20 SEPARATE WHAT HAD BEEN AS A MATTER OF RIGHT PRIOR TO THE
21 ADOPTION OF THIS ORDINANCE?

22 A THAT'S CORRECT.

23 Q THE ANCILLARY SALES?

1 A THAT'S RIGHT. THAT SEEMED TO BE ITS MAJOR THRUST.

2 Q ALL RIGHT, SIR. NOW, WOULD YOU -- IN GENERAL,
3 COULD YOU TELL US WHAT ARE THE PURPOSES OF ZONING REGULATIONS
4 AND WHAT GENERAL CRITERIA DOES ONE FOLLOW IN THE DRAFTING
5 OF ZONING REGULATIONS AND ORDINANCES, WHICH I ASSUME THAT
6 YOU HAVE HAD OCCASION TO DO IN THE PAST; AND, IF YOU WOULD,
7 YOU MIGHT ELABORATE ON THAT; AND ARE THERE ANY PARTICULAR
8 PITFALLS THAT A DRAFTER SHOULD BE AWARE OF IN THE DRAFTING
9 OF A ZONING ORDINANCE?

10 A WELL, NORMALLY SPEAKING, I SUPPOSE I HAVE
11 WRITTEN OR ASSISTED IN WRITING TWENTY TO THIRTY VARIOUS
12 ORDINANCES THROUGHOUT THE STATE WITH COUNTIES, CITIES, AND
13 TOWNS; AND, ONE OF THE MOST IMPORTANT THINGS THAT WE ARE GIVEN
14 AS PLANNERS IS THE DIRECTIVE OF THE STATE ENABLING ACT
15 WHICH IS READ TO US CLEARLY BY LOCAL ATTORNEYS WHO WORK
16 WITH US.

17 WHATEVER WE DO HAS TO TAKE INTO ACCOUNT THE
18 EXISTING USES AND ALSO HAS TO TAKE INTO ACCOUNT THE GROWTH
19 AND CHANGES OF THAT AREA. IT HAS TO TAKE INTO ACCOUNT -- THE
20 PRIMARY PURPOSE OF ALL, IS THE PROTECTION AND PROMOTION OF
21 THE PUBLIC HEALTH, SAFETY, AND WELFARE, WHILE, AT THE
22 SAME TIME, ENCOURAGING THE ECONOMIC BASE. THOSE -- THAT'S
23 THE BASIC RULE UNDER WHICH WE OPERATE.

1 IN TERMS OF DRAFTING ORDINANCES WHICH INTEND TO
2 DRAW LINES BETWEEN CLASSIFICATIONS OF ZONES AND PRODUCTS,
3 THE GENERAL RULE IS TO DRAW THE ORDINANCE THAT HAS TO DO
4 WITH THE CHANGES IN INTENSITY AND DENSITY OF USES -- LAND
5 USE -- RATHER THAN TO ELIMINATE OR DISCRIMINATE, AS IT WERE
6 FROM THE ZONING STANDPOINT, BETWEEN PRODUCTS THEMSELVES.

7 Q WHICH IS WHAT, OF COURSE, WAS DONE IN THIS
8 PARTICULAR INSTANCE; IS THAT WHAT YOU'RE TELLING US?

9 A YES. THE DIFFICULTY IS THAT MOST PLANNING
10 PRINCIPLES WILL INVOLVE COMMERCIAL USES. NOW, THIS
11 DEFINITION SETS UP A BARGAIN-CENTER DEFINITION AS A
12 COMMERCIAL USE PERIOD. IT THEREFORE HAS TO GO INTO A
13 COMMERCIAL ZONE.

14 UNDER THIS COUNTY'S APPROACH, COMMERCIAL ZONING
15 IS THE RESULT OF PLANNING WHICH CREATES USES IN A PLAN
16 WHICH ARE IN THE NEIGHBORHOOD COMMUNITY OR REGIONAL IN
17 NATURE AND SOMETIMES ROADSIDE; AND THOSE ARE COVERED UNDER
18 EIGHT CATEGORIES OF ZONING -- C1 THROUGH C8. C5 THROUGH
19 C8 ARE RETAIL USES BASED ON THOSE ORIGINAL PLANNING CONCEPTS,
20 AND C1 THROUGH C4 OFFICE USES.

21 IN TERMS OF DEALING WITH THE ZONE ITSELF WHERE
22 THESE NURSERIES -- PLANT NURSERIES -- ARE LOCATED THAT'S
23 ALWAYS BEEN, IN THIS AND OTHER COUNTIES, HISTORICALLY IN

1 RURAL, AGRICULTURAL, OR LOW-DENSITY, RURAL RESIDENTIAL
2 AREAS.

3 NOW, IN THIS COUNTY'S PLANNING PROCESS, IT WOULD
4 BE DIFFICULT TO HAVE A GARDEN CENTER DISTRICT CONFINED IN A
5 RURAL AREA BECAUSE IT WOULD CREATE A SPOT COMMERCIAL ZONE,
6 UNLESS IT HAPPENED TO BE IN THE NEIGHBORHOOD COMMUNITY OR
7 REGIONAL CENTER. IN WHICH CASE, THIS APPLICATION OF THIS
8 USE IS NOT ESSENTIAL. IT HAS NO REAL BASIS OR NO REAL
9 PURPOSE SINCE IT CREATES ONLY THE ABILITY TO SELL ANCILLARY
10 ITEMS WITH NURSERY PRODUCTS AND HAVE A LANDSCAPE CONTRACT
11 OFFICE. THE ZONES ARE ALREADY AVAILABLE.

12 THEREFORE, IN DRAFTING THIS PARTICULAR TYPE OF
13 AMENDMENT, THAT SERVES NO REAL PLANNING PURPOSE; AND, IN
14 DRAFTING AN ORDINANCE, I WOULD AVOID THAT PARTICULAR SUBJECT
15 FOR THE VERY SIMPLE REASON THAT THIS COUNTY'S ORDINANCE
16 DEFINES A NEIGHBORHOOD CENTER. IT ALSO RESTRICTS OR HAS
17 RESTRICTED IN THE PAST THE RETAIL SALES AREA OF ANY RETAIL
18 BUSINESS BY AREA COVERED, BY HEIGHT, BY DENSITY, AND BY FLOOR
19 AREA; BUT I KNOW OF NO ORDINANCE THAT HAS ATTEMPTED TO
20 DISCRIMINATE BETWEEN PRODUCT LINES BECAUSE THAT IS A CAN OF
21 WORMS IN THE PLANNING PROFESSION; AND WHAT IS SAUCE FOR THE
22 GOOSE MAY BE SAUCE FOR THE GANDER.

23 SO, IT IS IMPOSSIBLE FROM A PLANNING STANDPOINT,

1 IN MY OPINION, TO DRAW THE LINE ON THE BASIS OF PRODUCTS.
2 IF YOU HAVE A SAFEWAY IN A NEIGHBORHOOD SHOPPING CENTER THAT
3 HAS 27,000 SQUARE FEET BECAUSE IT'S A SMALL NEIGHBORHOOD
4 CENTER AND IF YOU HAVE A SAFEWAY, FOR EXAMPLE, IN A
5 REGIONAL CENTER WITH 200,000 SQUARE FEET, THAT IS A LAND-USE
6 CONTROL. THE IDEA TO SAY THAT ONE SAFEWAY CAN ONLY SELL
7 "DUZ" AND THE OTHER SAFEWAY CAN ONLY SELL "TIDE" IS
8 ABSOLUTELY LUDICROUS FROM A PLANNING STANDPOINT. IT IS
9 IMPOSSIBLE TO DEAL WITH.

10 Q DOES IT ALSO CREATE A PROBLEM WITH THE ENFORCEMENT?

11 A WELL, I WOULD HATE TO BE THE ENFORCEMENT OFFICER
12 WHO HAS TO DISTINGUISH BETWEEN PRODUCTS THAT WERE SOLD. I
13 THINK IT'S A MATTER OF TASTE AND A VALUE JUDGMENT.

14 Q DO YOU THINK IN THIS --

15 A WHAT --

16 Q I'M SORRY. GO AHEAD.

17 A WHAT MIGHT BE A VIOLATION TO ONE INSPECTOR WOULD
18 BE PERFECTLY APPROPRIATE TO ANOTHER.

19 Q DO YOU FEEL, IN THIS PARTICULAR INSTANCE, THAT
20 THIS ORDINANCE CREATES PROBLEMS FROM AN ENFORCEMENT STAND-
21 POINT?

22 A GIVEN THE HISTORY IN THIS COUNTY, WITH NEARLY
23 A FORTY-YEAR HISTORY OF ZONING OF NURSERIES TODAY; AND

1 ALMOST ALL OF THEM ARE IN RESIDENTIAL ZONES, WHICH HAVE
2 PERMITTED THE SALE OF ANCILLARY ITEMS TO INCLUDE THIS PLANT
3 EQUIPMENT WHICH ARE RELATED TO THE CARE, PROPAGATION, AND
4 MAINTENANCE OF SUCH PRODUCTS ALONE; AND, TO JUST SIMPLY
5 DROP THAT OUT WOULD BE A RATHER DIFFICULT ENFORCEMENT
6 PROBLEM.

7 IT ALSO CREATES A DIFFICULT PROBLEM IN TERMS OF
8 THE PERSON WHO COMES TO BUY THESE HORTICULTURAL, FLORI-
9 CULTURAL, AND AGRICULTURAL ITEMS BECAUSE, IF THEY CAN'T GET
10 THE THINGS THAT THEY NEED AS ADVISED BY THE PROFESSIONAL
11 PEOPLE WHO RAISE THESE PRODUCTS, THEY THEN MUST GET IN THE
12 CAR AND MAKE ANOTHER TRIP TO THE LOCAL COMMUNITY CENTER OR
13 REGIONAL CENTER OR NEIGHBORHOOD CENTER SOMEWHERE TO BUY THE
14 INDEPENDENT ITEM, WHICH CERTAINLY DOES NOT PROMOTE THE
15 PUBLIC HEALTH AND SAFETY.

16 IF THERE'S BEEN NO EMERGENCY, IF THERE'S BEEN NO
17 STUDY, IF THERE'S BEEN NO VIOLATION OF THE PUBLIC USES LAW,
18 THEN THERE'S NO BASIS FOR SUCH A REGULATION FROM THE
19 PLANNING STANDPOINT.

20 Q IT'S LIKE BUYING THE SPRAY BUT YOU COULDN'T BUY
21 THE SPRAYER. YOU'D HAVE TO GET IN YOUR CAR AND DRIVE
22 SOMEPLACE ELSE?

23 A THAT'S PRECISELY RIGHT.

1 Q NOW, YOU OBVIOUSLY HAVE INVESTIGATED THIS MATTER
2 WITH THE COUNTY AND HAVE STUDIED THIS MATTER. WERE YOU
3 ABLE TO ASCERTAIN WHETHER OR NOT THERE WERE ANY STUDIES
4 OR ANY REASON FOR THIS CHANGE AND THE AMENDMENT THAT
5 OCCURRED ON OCTOBER 22, 1979?

6 A I FOUND NONE. I LOOKED FIRST, OF COURSE, TO MY
7 NORMAL SOURCES, TO LOOK AT THE COMPREHENSIVE PLAN AND THE
8 PLAN REVIEWS DEALING WITH PROBLEMS BY NEIGHBORING
9 COMMUNITIES. I FOUND NONE THERE.

10 I FOUND NO EVIDENCE OF AN EMERGENCY ORDINANCE AS
11 PASSED BY THE BOARD. IT WAS SIMPLY AN ORDINANCE AMENDMENT.
12 SO, I DON'T KNOW. I WAS UNABLE TO DISCOVER ANY PARTICULAR
13 REASON FOR THE ADOPTION OF SUCH A PLAN.

14 Q IN THE CONTEXT OF THE DRAFTING OF ORDINANCES AND
15 PARTICULARLY DRAFTING OF AMENDMENTS, FROM A PLANNING
16 STANDPOINT, IS THERE ANY PARTICULAR CRITERIA OR GUIDELINES
17 THAT YOU WOULD FOLLOW IN DRAFTING AND ADOPTING AMENDMENTS
18 TO THE ORDINANCE -- ANY PARTICULAR CRITERIA THAT YOU WOULD
19 FOLLOW, ANY REASON, ANY BASIS FOR THIS COMING ABOUT?

20 A WELL, THIS IS ESSENTIALLY BOTH IN THE STATEMENTS
21 OF INTENT AND THE ENABLING ACT THAT WE WORK FROM, BOTH IN
22 THE COMPREHENSIVE PLAN AND IN THE ZONING. EACH ORDINANCE
23 AMENDMENT OR EACH ORDINANCE PROPOSED, HOWEVER YOU LOOK AT

1 IT, HAS TO BE SUPPORTED BY STUDIES OF ALL TYPES TO JUSTIFY
2 THE ACTION TAKEN UNLESS THERE HAS BEEN AN ERROR FOR USES
3 FOUND.

4 Q NOW, IN LOOKING AT THIS PARTICULAR ORDINANCE,
5 ARE YOU ABLE TO GIVE US YOUR OPINION WHETHER OR NOT THERE'S
6 BEEN ANY BASIS AS TO THE PUBLIC HEALTH, SAFETY, AND WELFARE
7 FOR THIS AMENDMENT.

8 A WELL, I WAS UNABLE TO FIND IT; AND, AS FAR AS I'M
9 CONCERNED, WITHOUT THE STUDIES AVAILABLE TO JUSTIFY THE
10 ACTION TAKEN, THE IDEA OF REMOVING THE SALE OF ANCILLARY
11 EQUIPMENT AND DEFINING THESE AREAS AS AGRICULTURAL USES PER
12 SE AND PROVIDING FOR THEM ONLY THE SINGLE-FAMILY, RESIDENTIAL
13 AREAS, PLACES THAT WERE IN A TOTALLY UNECONOMIC POSITION TO
14 COMPETE WITH THE FIVE COMMERCIAL ZONES WHICH ALLOW OFFICES
15 AND GARDEN CENTERS WITHIN THE PRIMARY USE OF A HECHINGER'S
16 OR WHATEVER.

17 IT SEEMS TO ME TO BE A TOTALLY UNREASONABLE ACTION
18 FROM A PLANNING STANDPOINT. I DON'T SEE HOW IT CAN BE
19 SUPPORTED OR RECOMMENDED WITHOUT EVEN ANY STUDIES TO JUSTIFY
20 IT.

21 Q INDEPENDENT OF ANY STUDIES, AS TO YOUR OWN OPINION,
22 CAN YOU TELL US WHETHER OR NOT THERE'S ANY REASONABLE BASIS
23 FROM THE PUBLIC HEALTH, SAFETY, AND WELFARE FOR THIS

1 ORDINANCE?'

2 A I FOUND NONE.

3 Q WOULD YOU GIVE US IN THE HISTORICAL CONTEXT,
4 PARTICULARLY AS FAR AS YOUR SURVEY IS CONCERNED, MR. PAYNE,
5 WHAT MIGHT BE THE REASON -- WHAT MIGHT BE THE REASON
6 HISTORICALLY -- WHY A RETAIL NURSERY ESTABLISHMENT IS
7 LOCATED IN A RESIDENTIAL AREA, PARTICULARLY A LOW-DENSITY
8 RESIDENTIAL AREA, WHICH I BELIEVE IS WHAT YOU STATED EARLIER?

9 MS. ANDERSON: YOUR HONOR, IS HE ASKING FOR
10 SPECULATION ON THE PART OF THE WITNESS WHAT MIGHT BE A
11 REASON?

12 THE COURT: SUSTAINED.

13 MR. LAWSON: YOUR HONOR, I DIDN'T SAY "MIGHT".
14 I'M TALKING ABOUT IN THE HISTORICAL CONTEXT. MAYBE I DIDN'T
15 PHRASE IT PROPERLY.

16 THE COURT: WHY DON'T YOU REPHRASE IT.

17 BY MR. LAWSON:

18 Q WHAT I'M ASKING YOU IS THAT, BASED ON THE
19 HISTORICAL EXPERIENCE IN FAIRFAX COUNTY AS A PLANNER, CAN
20 YOU GIVE US THE REASON WHY THESE RETAIL NURSERY OPERATIONS
21 HAVE BEEN ALLOWED IN RESIDENTIAL AREAS -- WHY THEY HAVE
22 BEEN ALLOWED IN RESIDENTIAL AREAS?

23 A WELL, HISTORICALLY, I WAS RESPONSIBLE FOR '

1 ASSISTING IN ADMINISTERING THESE THINGS FOR THE SIXTEEN
2 YEARS THAT I WAS HERE. THE REASONS WERE QUITE SIMPLE.

3 FIRST OF ALL, THE RAISING AND PROPAGATION, IN
4 THIS COUNTY, OF HORTICULTURAL, FLORICULTURAL, AGRICULTURAL
5 ITEMS HAS TO BE CLOSE TO THE SOURCES OF SUPPLY OF:
6 FERTILIZER AND MANURE, ALSO LIGHT AND AIR REQUIRED, IN
7 FACT, THE USES, TOOK UP QUITE A BIT OF LAND, ANYWHERE FROM
8 ONE TO FIVE ACRES OF LAND AND PROVIDED A LOW INTENSITY USE
9 IN TERMS OF THE MARKET.

10 THEY WERE ALWAYS CONSIDERED TO BE ACCEPTABLE IN
11 RESIDENTIAL OR AGRICULTURAL ZONES FOR THAT REASON. THE
12 CONTINUATION OF THE ANCILLARY SALES THROUGH THOSE YEARS
13 WAS ALWAYS CONSIDERED TO BE, IN EVERY CASE, GENERALLY AN
14 ITEM WHICH WAS FOR THE CONVENIENCE OF THE BUYER OF THE
15 NECESSARY ITEM OF PURCHASING EQUIPMENT WHICH WAS SUITABLE
16 FOR CARE AND MAINTENANCE OF THE LIFE OF THE PLANT, GENERALLY
17 RESTRICTED TO HAND-HELD EQUIPMENT.

18 IT WAS NEVER CONSIDERED, IN MY EXPERIENCE HERE,
19 TO BE ANY KIND OF MACHINE EQUIPMENT, LARGE EQUIPMENT, ANY
20 OUTSIDE DISPLAYS OF ANY KIND OR ANY KIND OF EQUIPMENT LIKE
21 THIS THAT WAS SUITABLE OR ACCEPTABLE.

22 Q YOU'VE HAD AN OPPORTUNITY, I ASSUME, TO LOOK AT
23 THE ITEMS THAT ARE SHOWN ON THIS RAILING?

1 A YES, I HAVE.

2 Q ARE THESE ITEMS WHICH YOU WOULD CLASSIFY AS THE
3 ACCESSORY ITEMS THAT WE'VE BEEN TALKING ABOUT?

4 A YES.

5 MR. LAWSON: THAT'S ALL THE QUESTIONS I HAVE AT
6 THIS TIME, YOUR HONOR.

7 THE COURT: CROSS-EXAMINE?

8 CROSS EXAMINATION

9 BY MS. ANDERSON:

10 Q MR. PAYNE, AS FAR AS YOU KNOW, THERE IS NOTHING
11 IN THE 1959 ZONING ORDINANCE WHICH SPECIFICALLY ALLOWS THE
12 SALE OF ANCILLARY ITEMS; IS THAT NOT CORRECT?

13 A THAT'S RIGHT, IT SAYS "AGRICULTURAL". IT'S
14 DEFINED AS AGRICULTURAL USES; AND THE OTHER DEFINITION IS
15 ON WAYSIDE STANDS; AND I CAN GIVE YOU THE CITATION --
16 CHAPTER 30 OF THE ZONING ORDINANCE, SECTION 30-1.8.1, AND
17 ALSO IN THE SCHEDULE OF REGULATIONS IT'S COLUMN 1, ITEM
18 2, ITEM 5, AND ITEM 11. THESE DEAL WITH AGRICULTURAL USES
19 AND ESTABLISHMENT OF WAYSIDE STANDS.

20 Q NOW, WHILE YOU WERE WITH THE COUNTY, YOU NEVER
21 WERE ZONING ADMINISTRATOR; IS THAT CORRECT?

22 A NO, I WAS THE PRINCIPAL PLANNER AND DEPUTY
23 DIRECTOR OF PLANNING. I DID HAVE THE RESPONSIBILITY FOR

1 ESTABLISHING THE ZONING OFFICE AND ALSO ESTABLISHING THE
2 REZONING PROCESS.

3 Q WHEN YOU LOOKED FOR STUDIES AS FAR AS FAIRFAX
4 COUNTY IS CONCERNED WITH REGARD TO THE DEVELOPMENT OF THIS
5 ZONING ORDINANCE AMENDMENT, YOU NEVER SPOKE TO THE STAFF
6 MEMBERS OF FAIRFAX COUNTY; IS THAT CORRECT?

7 A THAT'S RIGHT, I DID NOT.

8 Q AND YOU WERE NOT PRIVY TO ANY OF THE INTERNAL
9 STAFF DISCUSSIONS ABOUT THE ZONING?

10 A OF COURSE NOT.

11 Q YOU SEEM TO MAKE A DISTINCTION BETWEEN HAND-HELD
12 EQUIPMENT AND MACHINERY. NOW, DOES THAT ALLOW THE SALE OF
13 A RAKE BUT NOT ALLOW THE SALE OF A SWEEPER?

14 A THAT'S RIGHT. IN OTHER WORDS, HISTORICALLY
15 SPEAKING, MY EXPERIENCE IN DISCUSSING WITH SEVERAL ZONING
16 ADMINISTRATORS THAT WE'VE HAD OVER THE YEARS, THESE
17 QUESTIONS DO COME UP. THE GENERAL QUESTION THAT WAS ASKED
18 IN THE DISCUSSION IN THOSE YEARS WAS WAS THE MACHINERY
19 OPERABLE IN TERMS OF WAS IT A GASOLINE ENGINE, WAS IT SOME
20 KIND OF A LAWN HOOKUP, AN ORCHARD SPRAYER, A TRACTOR, OR
21 WAS IT GENERALLY HAND-HELD EQUIPMENT SUCH AS A BASKET, A
22 RAKE.

23 Q BUT A SWEEPER IS NOT OPERATED BY A MOTOR, NOT THE

1 ONES I'M FAMILIAR WITH; IS THAT CORRECT?

2 A WELL, I DON'T --

3 MR. LAWSON: YOUR HONOR, I --

4 THE WITNESS: THIS IS MY PROBLEM. I DON'T KNOW
5 WHAT KIND OF A SWEEPER YOU'RE TALKING ABOUT.

6 MR. LAWSON: THAT'S RIGHT.

7 BY MS. ANDERSON:

8 Q IT'S ESSENTIALLY A MACHINE WITH BRUSHES DOWN THE
9 FRONT THAT YOU PUSH ALONG YOUR GRASS AND SWEEP UP INTO A
10 BIG BASKET BEHIND. IT'S FOR GRASS SHAVINGS OR LEAVES. THAT
11 IS NOT MOTORIZED TO MY GENERAL KNOWLEDGE.

12 A NO, NOR MINE. I DON'T KNOW THE TYPE OF EQUIPMENT
13 YOU'RE TALKING ABOUT.

14 Q WELL, LET ME ASK YOU THIS ONE: WOULD THERE BE A
15 DISTINCTION BETWEEN A PUSH-MOWER AND A MOWER WITH A MOTOR
16 FOR CUTTING GRASS?

17 A NO. NOW, THAT'S A LITTLE DIFFERENT. THAT'S A
18 PIECE OF MACHINERY THAT HAS TO BE DISPLAYED SOMEWHERE. IT
19 IS NOT NECESSARILY ESSENTIAL TO THE MAINTENANCE OF AN
20 AGRICULTURAL PLANT OR A BUSH OR SOMETHING OF THAT NATURE.
21 IT IS ESSENTIAL TO KEEP THE GRASS CUT, I SUPPOSE.

22 Q WELL, HOW ABOUT THE DISTINCTION BETWEEN, SAY, A
23 TOMATO STAKE. WOULD THAT BE AN ALLOWABLE ITEM UNDER HOW YOU

1 WOULD VISUALIZE THE HISTORICAL INTERPRETATION?

2 A TOMATO STAKES TO GO WITH MARKETING TOMATO PLANTS?

3 Q YES.

4 A YES.

5 Q HOW ABOUT ELABORATE TRELLISES THEN? WOULD THAT
6 BE ALLOWED OR NOT UNDER YOUR HISTORICAL INTERPRETATION?

7 A NO, ONE IS ORNAMENTAL AND THE OTHER IS FUNCTIONAL;
8 THEREFORE, THE DECISION THAT COMES UP FROM MY STANDPOINT IS
9 HOW EXTENSIVE IS THE TRELLIS.

10 Q WELL, --

11 A IS IT AN ITEM THAT WOULD HAVE TO BE DISPLAYED
12 OUTSIDE WITH A SIGN "FOR SALE" OR IS IT AN ITEM THAT CAN BE
13 STACKED INSIDE THAT CAN GO WITH THE ROSEBUSHES OR WHATEVER.

14 GENERALLY SPEAKING, IF IT IS KEPT INSIDE, IF IT'S
15 USED AS SOMETHING TO PROPAGATE A GRAPEVINE OR SOMETHING, IN
16 THAT INSTANCE, IT COULD BE SOLD. A MARKETING AND ASSEMBLED
17 LARGE TRELLIS OF SOME KIND, NO, IT WOULDN'T BE PERMITTED TO
18 BE SHOWN OUTSIDE.

19 Q HOW ABOUT GARDEN SHEDS?

20 A SHEDS?

21 Q YES.

22 A THOSE WERE GENERALLY NONEXISTENT IN MY TIME. I
23 WOULD HAVE TO GIVE YOU A VALUE JUDGMENT THAT A GARDEN SHED

1 IS AN ENTIRELY DIFFERENT THING. IT IS A STRUCTURE. IT IS
2 NOT NECESSARILY ESSENTIAL TO THE LIFE OF A PLANT. IT IS A
3 CONVENIENCE ITEM TO THE LIFE OF THE EQUIPMENT. I WOULD NOT
4 PRESUME, AS A VALUE JUDGMENT, THAT I WOULD PERMIT THAT.

5 Q HOW ABOUT THE SMALL KINDS OF GREENHOUSES THAT YOU
6 CAN BUY TO ADD ON TO YOUR HOUSE, THE SMALL TYPES OF GREEN-
7 HOUSES THAT YOU CAN PUT IN YOUR WINDOW?

8 A DO YOU MEAN INSIDE OF THE HOUSE?

9 Q YEAH, OR OUTSIDE OF THE HOUSE OR IN THE YARD.

10 A WELL, I DON'T KNOW HOW TO -- I WOULD SAY THAT IF
11 IT'S A SMALL ENOUGH THING TO BE KEPT INSIDE OF THE HOUSE OR
12 INSIDE OF THE SALES OPERATION THAT THEY HAVE HERE, IT WOULD
13 SEEM TO BE REASONABLE. IF IT HAS TO BE DISPLAYED OUTSIDE
14 AND HAS TO BE LOCATED OUTSIDE OF THE HOUSE, I'D SAY "NO".

15 Q AS YOU SEE IT, IS THERE ABSOLUTELY NO CASE IN YOUR
16 MIND THAT A DISPLAY OF ANCILLARY ITEMS COULD, IN ANY WAY, BE
17 INCOMPATIBLE WITH A RESIDENTIAL ZONE?

18 A THE OUTSIDE DISPLAY, IN EVERY CASE, OF ANCILLARY
19 EQUIPMENT WOULD BE PROBABLY NOT ACCEPTABLE. IF IT IS
20 ULTIMATELY STORED INSIDE AND SOLD IN REGARD TO THE PLANTS,
21 THE PRIMARY PURPOSE OF THE ZONING, I SEE NO REASON WHY THAT
22 SHOULDN'T BE CONTINUED.

23 MS. ANDERSON: I HAVE NO FURTHER QUESTIONS.

1 THE COURT: ANY OTHER QUESTIONS, MR. LAWSON?

2 MR. LAWSON: I MAY HAVE A COUPLE OF QUESTIONS.

3 REDIRECT EXAMINATION

4 BY MR. LAWSON:

5 Q ROSSER, SHOWING YOU COMPLAINANT'S EXHIBIT NO. 1,
6 THIS IS A SITE LAYOUT OF THIS PARTICULAR PROJECT. YOU HAD
7 AN OPPORTUNITY TO LOOK AT THAT BEFORE, I ASSUME, DID YOU
8 NOT?

9 A YES, THAT HAS THE STRUCTURES THAT EXIST AND THOSE
10 THAT ARE PROPOSED, THE LATH HOUSE OR THE OUTSIDE STRUCTURES
11 THAT COVER AND PROTECT THE PLANTS.

12 Q AND HAVE YOU HAD AN OPPORTUNITY TO REVIEW THAT IN
13 THE CONTEXT OF THE STAFF REPORT?

14 A YES.

15 Q AND, IN YOUR OPINION, AND ALSO TAKING INTO
16 CONSIDERATION THE STAFF REPORT, ARE THERE ANY ADVERSE
17 IMPACTS OR EFFECTS FROM THE MODIFICATIONS AND CHANGES THAT ARE
18 SHOWN ON THAT DEVELOPMENT PLAN?

19 A NONE WHATSOEVER. THE STAFF REPORT, I THINK, MADE
20 A RATHER GLOWING APPROVAL WITH THE ONE EXCEPTION THAT THEY
21 WOULD HAVE TO BUILD A GOOD DEAL OF ROAD NETWORK IN ORDER TO
22 ACHIEVE THIS PURPOSE; AND I ALSO NOTED THAT A NUMBER OF
23 WAIVERS WERE RECOMMENDED APPARENTLY BECAUSE THIS SECTION

1 I THINK, OF THE STAFF REPORT INDICATES QUITE CLEARLY THAT --
2 IT IS ARTICLE IX -- THAT THE SPECIAL EXCEPTION USES -- THAT
3 THE REQUIREMENTS OF THE ORDINANCE MAY BE VERY MUCH OR NEARLY
4 ALL WAIVED PROVIDED THAT THE OWNER LIVED ON THE SITE. OF
5 COURSE, THE OWNER DOES LIVE ON THE SITE.

6 Q AND YOU SAID OTHER THAN ROAD AND BUILDING
7 IMPROVEMENTS, OF COURSE, ALSO THE FOREGOING OF THESE
8 ANCILLARY SALES WOULD HAVE HAD TO HAVE BEEN GIVEN UP.

9 A OH, YES. BY THE ORDINANCE DEFINITION, IT APPEARS
10 THAT THE OPERATION IS PERFECTLY SATISFACTORY TO THE COUNTY
11 EXCEPT FOR THE ANCILLARY SALES.

12 Q IS THIS PARTICULAR LOCATION IN WHAT YOU WOULD
13 CHARACTERIZE AS A LOW-DENSITY AREA?

14 A MOST DEFINITELY.

15 Q IN YOUR OPINION, DOES THIS HAVE ANY ADVERSE
16 EFFECT ON THE NEIGHBORHOOD OR SURROUNDING AREA?

17 A WELL, IT'S BEEN THERE FOR SEVERAL YEARS; AND THE
18 ONLY THING NEW THAT WASN'T THERE SEVERAL YEARS AGO WAS THE
19 TOLSTON ROAD SUBDIVISION WHICH IS ON THE SOUTHEAST AND IN THE
20 REAR. EVERYTHING ON BOTH SIDES OF ROUTE 7 WITHIN A HALF
21 A MILE HAS BEEN THERE FOR MANY YEARS.

22 Q FROM THE ENVIRONMENTAL STANDPOINT, DO YOU SEE ANY
23 ADVANTAGE -- ANY PARTICULAR ADVANTAGE -- OF THESE ANCILLARY

1 SALES?

2 MS. ANDERSON: YOUR HONOR, I DON'T THINK THIS IS
3 FOLLOWING PROPER CROSS EXAMINATION.

4 MR. LAWSON: I'LL WITHDRAW THE QUESTION.

5 THAT'S ALL THE QUESTIONS I HAVE.

6 THE COURT: ANY CROSS?

7 MS. ANDERSON: NO, YOUR HONOR.

8 THE COURT: DO YOU WANT HIM EXCUSED OR SUBJECT TO
9 RECALL?

10 MR. LAWSON: HE CAN BE EXCUSED, YOUR HONOR.

11 THE COURT: ANY OBJECTION, MS. ANDERSON?

12 MS. ANDERSON: THAT'S FINE, YOUR HONOR.

13 THE COURT: YOU'RE FREE TO GO, SIR.

14 THE WITNESS: THANK YOU.

15 (THEREUPON, THE WITNESS WAS EXCUSED.)

16 THE COURT: CALL YOUR NEXT WITNESS.

17 MR. LAWSON: I'D LIKE TO CALL MR. DUNLOP.

18 (THEREUPON, THE WITNESS WAS SWORN.)

19 THEREUPON,

20 MICHAEL N. DUNLOP,

21 A WITNESS, WAS CALLED FOR EXAMINATION BY COUNSEL FOR THE
22 COMPLAINANTS, AND, HAVING BEEN PREVIOUSLY DULY SWORN, WAS
23 EXAMINED AND TESTIFIED AS FOLLOWS:

-460; LUN

30

1 A WELL, IT FLUCTUATED. I WOULD SAY, IN THE EARLY
2 '70'S, WHEN I FIRST CAME, WE WERE DOING AS MUCH AS TWENTY-
3 FIVE PERCENT APPROXIMATELY IN HARDGOODS; AND, WHEN WE CLOSED
4 IN '79, I BELIEVE WE WERE DOWN CLOSE TO FIFTEEN PERCENT.
5 IT WAS DROPPING EVERY YEAR.

6 Q WAS THIS PERCENTAGE -- THE CHANGE IN THAT
7 PERCENTAGE ATTRIBUTABLE TO HARDGOODS A FIGURE THAT
8 FLUCTUATED? HOW WOULD YOU DESCRIBE IT OR DID IT INCREASE
9 AND THEN DECREASE OR DID IT STEADILY DECREASE?

10 A IT JUST STEADILY DECREASED OVER A PERIOD OF TIME.

11 Q WHAT WAS --

12 A EACH YEAR.

13 Q WHAT WAS THE REASON FOR THAT?

14 A WELL, WHEN -- I THINK WHEN I FIRST GOT THERE, WE
15 WERE RIGHT ABOUT AT THE PEAK OF THE BOOM WHERE THE PUBLIC
16 BECAME AWARE OF PLANT MATERIAL AND ECOLOGY; AND IT GOT TO BE
17 SORT OF AN IN THING TO DO; AND A LOT OF -- A LOT OF
18 ACCESSORY ITEMS WERE PRODUCED; AND THE FIRST OUTLET THAT
19 SOLD THEM WAS GARDEN CENTERS.

20 FOR EXAMPLE, WE WOULD -- WE WOULD ORDER 150 CASES
21 A WEEK, DURING THE SPRING, OF PLASTIC POTS THAT YOU COULD
22 NOT GET ANYWHERE ELSE; AND IT WAS REALLY THE ONLY PLACE YOU
23 COULD GET THAT; AND, THEN, AFTER AWHILE, THE MASS

1 MERCHANDISING CHAINS WOULD GET INTO IT MORE AND MORE, LIKE
2 HECHINGER'S AND EVEN GROCERY STORES; AND THEY WHITTLED AWAY
3 AT IT BIT BY BIT; AND THEN THE ITEMS THAT WE WERE ABLE TO SELL
4 UNDER THE FAIR TRADE AGREEMENT, WHEN THEY REPEALED THE FAIR
5 TRADE LAW, AND OPENED THE WAY FOR THE MASS MERCHANTISERS TO
6 START MARKETING THESE THINGS. THEY WERE JUST BEATING US TO
7 DEATH WITH THE PRICE COMPETITION.

8 SO, THEY TOOK MORE AND MORE OF THAT AWAY.

9 Q WELL, MR. DUNLOP, AS A BUSINESSMAN, I'M SURE YOU
10 WERE SOMEWHAT CONCERNED AT THE DECREASE IN THE SALES.
11 WHAT WAS THE -- WHAT STEPS, IF ANY, DID CAPPER'S TAKE WITH
12 REGARD TO RELIEVING THIS SITUATION?

13 A WELL --

14 Q WAS THERE ANY ATTEMPT TO EXPAND THE BUSINESS IN
15 THOSE PRODUCTS?

16 A YEAH, IN FACT, WE TRIED TO COMPETE. AS A MATTER
17 OF FACT, WE GOT BURNED IN A FEW CASES. WE TRIED DIFFERENT
18 TECHNIQUES TO COMBAT WHAT THE EFFECTS WERE; BUT, IN THE
19 LAST COUPLE OF YEARS, I WAS DETERMINED TO CUT DOWN THOSE
20 LINES OF HARDGOODS AND CONCENTRATE MORE ON THE GREENGOODS.

21 Q I WOULD LIKE TO CALL YOUR ATTENTION -- AND YOU
22 MAY HAVE READ THIS PREVIOUSLY -- BUT I WOULD LIKE TO CALL
23 YOUR ATTENTION TO PLAINTIFF'S -- COMPLAINANT'S -- EXHIBIT

1 NO. 11, WHICH IS THE AMENDMENT TO THE FAIRFAX COUNTY
2 ORDINANCE, DATED OCTOBER 22, 1979, REDEFINING PLANT
3 NURSERIES; AND I ASK YOU TO LOOK AT THE ITEMS THAT ARE
4 SPECIFICALLY MENTIONED IN THE ORDINANCE THAT CAN BE SOLD
5 AND CAN'T BE SOLD AND ASK YOU IF, IN THE TERMINOLOGY THAT
6 YOU USED IN YOUR TESTIMONY THIS AFTERNOON, ALL OF THOSE
7 ITEMS, BOTH THE ONES THAT COULD BE SOLD AND COULDN'T BE
8 SOLD, WERE HARDGOODS?

9 A YEAH.

10 Q YOU HAVE PREVIOUSLY TESTIFIED THAT THE PERCENTAGE
11 OF HARDGOODS THAT CAPPER'S SOLD RANGED BETWEEN TWENTY-FIVE,
12 PERCENT WHEN YOU STARTED WORKING AND FIFTEEN PERCENT.

13 ISN'T IT CORRECT THEN THAT THAT FIGURE WOULD
14 COVER -- OR IS IT CORRECT THAT THAT FIGURE OF THOSE
15 PERCENTAGES WOULD COVER THE ITEMS IN THE AMENDMENT THAT
16 ARE ALLOWED TO BE SOLD AND NOT TO BE SOLD?

17 A I'M SORRY -- YEAH. BOTH OF THOSE CATEGORIES --

18 Q WAS INCLUDED IN THAT TWENTY-FIVE-PERCENT FIGURE?

19 A -- WERE INVOLVED.

20 Q WOULD IT BE CORRECT TO SAY THEN THAT THE FIGURE
21 OF THE PERCENTAGE OF ITEMS THAT WERE PROHIBITED BY THE
22 AMENDMENT WOULD BE LESS THAN FIFTEEN PERCENT?

23 A YEAH, BECAUSE A LOT OF THAT WOULD BE MULCH, WHICH

1 IS ALLOWED.

2 Q ALL RIGHT. YOU SAID, MR. DUNLOP, THAT YOU
3 ACTUALLY WERE ENGAGED IN THE SALE YOURSELF OF THE PLANTS
4 AND HARDGOODS.

5 WOULD YOU TELL ME THE CONTEXT IN WHICH THE SALE
6 OF A HARDGOOD ITEM WOULD BE SOLD?

7 A WELL, ALMOST -- IN MOST CASES, THE HARDGOODS WERE
8 SOLD AFTER THE PLANT WAS SOLD OR AT LEAST ALONG WITH IT.
9 I REALLY CONSIDERED THEM SORT OF A TIE-IN SALE.

10 WE TRIED TO TRAIN OUR SALESMEN TO TALK TO THE
11 CUSTOMER AND SUGGEST CERTAIN THINGS THAT COULD TIE IN TO
12 HELP THEM WITH THE PLANT MATERIAL THEY ARE BUYING. FOR
13 EXAMPLE, ROSES WAS ONE WE CONCENTRATED ON. BECAUSE, TO PUT
14 IN, SAY, A BED OF FIVE, SIX OR A DOZEN ROSES, YOU NEED OR
15 WE DEFINITELY RECOMMEND MULCH, SOME TYPE OF FERTILIZER FOR
16 ROOT PRODUCTION, CERTAIN TYPES OF PRUNERS FOR PRUNING CARE.
17 YOU CANNOT RAISE ROSES SUCCESSFULLY, I DON'T BELIEVE,
18 WITHOUT A SPRAY PROGRAM WHICH CAN BE TEN DAYS OR TWO WEEKS.
19 SO, WE HAVE INSECTICIDES AND SPRAYERS -- YOU KNOW, SEVERAL
20 TYPES OF THOSE; AND, BY TALKING TO THE CUSTOMER, WE COULD
21 USUALLY TIE IN SEVERAL SALES TO THEM.

22 Q WELL, WOULD YOU SAY THAT A PRUNER IS NECESSARY
23 TO PROMOTE THE HEALTH AND LIFE OF THE PLANT?

1 A ABSOLUTELY.

2 Q WOULD YOU SAY A TROWEL WAS NECESSARY FOR THAT
3 PURPOSE?

4 A YES.

5 Q WOULD YOU SAY THAT A TERRA COTTA POT IS NECESSARY
6 FOR THAT PURPOSE?

7 A YES.

8 Q THE ORDINANCE SPECIFICALLY STATES THAT BIRDBATHS
9 ARE NOT TO BE SOLD. DID CAPPER'S SELL BIRDBATHS?

10 A YEAH. YES, WE DID.

11 Q HOW MANY BIRDBATHS DID YOU STOCK?

12 A WELL, WE CARRIED THE VERY INEXPENSIVE KIND THAT WE
13 STOCK FROM TIME TO TIME; AND WE USUALLY CARRIED ABOUT TWICE
14 AS MANY BOWL TOPS FOR IT AS BASES BECAUSE THE TOPS WOULD
15 BREAK ON PEOPLE EVERY WINTER; AND THEY'D HAVE TO REPLACE
16 THAT.

17 BUT, THEN, WE HAD A LINE OF ORNAMENTAL, CONCRETE,
18 BIRDBATHS; AND I GUESS WE SOLD TWENTY-FIVE OR THIRTY OF
19 THOSE OVER A YEAR.

20 Q TOTAL?

21 A TOTAL.

22 Q WHAT DO THESE BIRDBATHS COST?

23 A WELL, RETAIL, THEY WOULD BE \$20.00 TO \$35.00 OR SO.

1 Q OKAY. SO, THAT WOULD BE AROUND \$400.00 OR
2 \$500.00 A YEAR FOR BIRDBATHS?

3 A YEAH.

4 Q DID YOU SELL -- DID CAPPER'S SELL STATUES?

5 A YEAH, WE -- THE SAME COMPANY THAT WE WOULD BUY
6 THE BIRDBATHS FROM, WOULD PRODUCE A LINE OF ORNAMENTAL,
7 CONCRETE FIGURINES AND FOUNTAINS AND THINGS LIKE THAT. WE
8 CARRIED A LITTLE BIT OF THOSE.

9 Q HOW MANY STATUES WERE SOLD?

10 A OH, I DON'T KNOW. WE WOULD NORMALLY ORDER THE
11 MINIMUM AMOUNT TO GET DELIVERED; AND WE'D ORDER SIX LITTLE
12 MUSHROOMS, SIX LITTLE BUNNY RABBITS -- YOU KNOW, JUST
13 SEVERAL GROUPS OF THINGS. WE STAYED AWAY FROM THE LITTLE
14 FLAMINGOS.

15 Q MR. DUNLOP, WHAT WOULD HAVE BEEN THE EFFECT ON
16 CAPPER'S OF AN ORDINANCE SUCH AS THIS BANNING THE SALE OF
17 THESE CERTAIN PRODUCTS -- CERTAIN HARDGOODS?

18 MS. ANDERSON: YOUR HONOR, I THINK HE'S ASKING HIM
19 TO SPECULATE.

20 THE COURT: WELL, ARE YOU ASKING WHAT CONTEXT,
21 MR. COCKRELL?

22 MR. COCKRELL: WELL, MAY IT PLEASE THE COURT,
23 MR. CUPP HAS BEEN ASKED THE SAME QUESTION AND ANSWERED IT

1 IN THE CONTEXT OF HIS BUSINESS. THERE HAS BEEN A FOUNDATION
2 LAID THAT MR. DUNLOP IS -- HAS BEEN -- IN THE NURSERY
3 BUSINESS WITH RETAIL ESTABLISHMENTS FOR YEARS.

4 I WOULD INDICATE TO THE COURT I WAS ASKING WHAT
5 WOULD BE THE IMPACT OR THE EFFECT ON CAPPER'S.

6 THE COURT: HE MAY ANSWER.

7 MS. ANDERSON: YOUR HONOR, PARDON ME?

8 THE COURT: GO AHEAD.

9 MS. ANDERSON: YOUR HONOR, WITH REGARD TO THE
10 CUPPS CASE -- I MEAN THAT'S WHAT WE'RE HERE ABOUT TODAY; BUT,
11 AS FAR AS ANOTHER CASE, I DON'T THINK THAT THAT'S RELEVANT.

12 THE COURT: SUSTAINED.

13 MR. COCKRELL: I HAVE NO FURTHER QUESTIONS.

14 MR. LAWSON: NO, WAIT A MINUTE.

15 BY MR. COCKRELL:

16 Q WHAT WAS THE ZONING OF CAPPER'S, MR. DUNLOP?

17 A FOR MOST OF ITS LIFE, IT WAS RESIDENTIAL; AND
18 THEN, IN THE LAST FEW YEARS, WE GOT COMMERCIAL ZONING.

19 Q WHEN WAS THAT?

20 A I BELIEVE THAT WAS '76 OR '75.

21 Q AND WHAT WAS THE REASON FOR THAT?

22 A WELL, SEVERAL PARCELS OF LAND -- THERE WERE
23 CONTRACTS TO SELL OFF SOME OF THE PARCELS OF LAND WE WEREN'T

1 COURT, PLEASE, MR. DONAHUE?

2 A MY NAME IS LEO DONAHUE, AND I LIVE AT 11707 AMKIN
3 DRIVE IN CLIFTON.

4 Q AND WHAT IS YOUR OCCUPATION?

5 A I'M THE DIRECTOR OF GOVERNMENT AFFAIRS WITH THE
6 AMERICAN ASSOCIATION OF NURSERYMEN IN WASHINGTON, D.C.:

7 Q WHAT IS THE FUNCTION OF THAT ORGANIZATION?

8 A THE AMERICAN ASSOCIATION OF NURSERYMEN IS A
9 NATIONAL TRADE ASSOCIATION, MEMBERSHIP OF WHICH IS COMPRISED
10 OF PEOPLE ENGAGED IN THE NURSERY BUSINESS -- PRODUCTION,
11 SALE, RETAIL, LANDSCAPING SERVICES, THAT TYPE OF THING.
12 IT'S A NORMAL TRADE ASSOCIATION WITH NORMAL TRADE
13 ASSOCIATION ACTIVITIES.

14 THEY PROVIDE GROUP LIFE AND HEALTH INSURANCE.
15 THEY REPRESENT THE TRADE BEFORE GOVERNMENT AGENCIES, PRESENT
16 THE TRADE'S VIEWS ON MATTERS PENDING IN THE CONGRESS, AND
17 SUCH THINGS AS THAT.

18 Q ALL RIGHT. HOW MANY MEMBERS ARE THERE OF THE
19 NURSERYMEN'S ASSOCIATION?

20 A THERE ARE A LITTLE OVER 3,000 MEMBER FIRMS. IT'S
21 A FIRM MEMBERSHIP ORGANIZATION.

22 Q AND ARE THESE NURSERIES LOCATED ALL THROUGHOUT
23 THE UNITED STATES?

1 A THROUGHOUT THE UNITED STATES, YES.

2 Q AND CAN YOU GENERALIZE WHAT TYPE OF OPERATION OR
3 BUSINESS ESTABLISHMENT IS REPRESENTED -- WHAT TYPE OF
4 NURSERY -- AND ITS SIZE AND TYPE OF OPERATION -- TYPE OF
5 ACTIVITY THAT IT CARRIES ON?

6 A ARE WE TALKING ABOUT PRODUCTION HISTORY --
7 WHOLESALE PRODUCTION HISTORY?

8 Q I'M ASKING YOU WHAT TYPES OF NURSERIES.

9 A WELL, YOU HAVE THE LARGE PRODUCTION NURSERIES
10 WHICH GROW THE PLANTS FIRST OF ALL. THEY MAY RANGE IN SIZE
11 UP TO SEVERAL THOUSAND ACRES. IN SOME CASES, THEY ARE
12 COMBINED HOLDINGS.

13 THEN YOU HAVE THE RETAIL OUTLETS WHICH RANGE IN
14 SIZE FROM A MODEST OR VERY SMALL NURSERY TO THE CHAIN-TYPE
15 NURSERY WITH SEVERAL -- MAYBE SIX OR MORE OUTLETS; AND THE
16 LANDSCAPE FIRMS USUALLY ARE CLASSED INTO A COUPLE OF GROUPS.
17 THOSE WHICH DO RESIDENTIAL AND THOSE WHICH DO COMMERCIAL;
18 AND THE ONES WHICH DO RESIDENTIAL LANDSCAPING ARE ACTUALLY
19 SMALLER AND REQUIRE LESS HEAVY EQUIPMENT THAN THOSE THAT DO
20 COMMERCIAL LANDSCAPING.

21 Q SPECIFICALLY, WHAT IS YOUR JOB AS DIRECTOR OF
22 GOVERNMENTAL AFFAIRS? WHAT DOES THAT MEAN? WHAT DO YOU DO?

23 A WELL, I'M RESPONSIBLE TO KEEP TRACK OF ANY PENDING

1 LEGISLATION WHICH WOULD HAVE AN IMPACT ON THE INDUSTRY, TO
2 MONITOR THE REGULATORY AGENCIES, ANY ACTIONS THEY TAKE
3 WHICH WOULD HAVE AN IMPACT ON THE INDUSTRY.

4 I'M ALSO REQUIRED TO TRAVEL QUITE A BIT. I
5 TRAVEL ABOUT A HUNDRED DAYS A YEAR AROUND THE COUNTRY TO
6 VARIOUS NURSERY MEETINGS EITHER TO SPEAK OR TALK TO PEOPLE
7 AND CLEAR UP ANY PROBLEMS.

8 Q IN YOUR TRAVELS, HOW MANY NURSERIES THROUGHOUT
9 THE YEAR WOULD YOU VISIT?

10 A WELL, MY TRIPS USUALLY RUN ABOUT AN AVERAGE OF
11 FOUR DAYS, I WOULD GUESS. ON EVERY TRIP, I VISIT TWO TO
12 FOUR NURSERIES.

13 Q AND OF THESE NURSERIES THAT YOU VISIT THROUGHOUT
14 THE YEAR, ARE SOME OF THE THEM RETAIL ESTABLISHMENTS?

15 A YES, A GOOD MANY OF THEM ARE RETAIL ESTABLISHMENTS.

16 Q WHAT -- WOULD YOU DESCRIBE FOR THE COURT, BASED
17 ON YOUR PERSONAL OBSERVATION, WHAT PRODUCTS THE RETAIL SALES
18 NURSERY SELLS?

19 A A RETAIL OUTLET NORMALLY SELLS PREDOMINANTLY WHAT
20 THE PUBLIC REFERS TO AS ENVIRONMENTAL PLANTS -- I MEAN
21 ORNAMENTAL PLANTS; WHAT I CALL ENVIRONMENTAL PLANTS. IN
22 ADDITION, THEY SELL THE ANCILLARY SUPPLIES AND EQUIPMENT
23 WHICH YOU NEED TO SUPPORT AND MAINTAIN THE LIFE OF THE

1 PLANT; FOR EXAMPLE, FERTILIZERS, MULCHERS, PRUNING SHEARS,
2 CONTAINERS IN WHICH YOU PUT INDOOR PLANTS, SPADES, RAKES,
3 HOES, GARDEN HOSE TO WATER THEM, SPRAYERS TO SPRAY THE
4 PESTICIDE, PLUS THEY PROVIDE PROFESSIONAL ADVICE ON
5 CULTURAL CARE OF THE PLANTS; AND SOME OF THEM HAVE GONE OR
6 ARE GOING INTO THE CHRISTMAS BUSINESS SURPRISINGLY. THEY
7 SELL CHRISTMAS TREES AND ALONG WITH THAT THE AUXILIARIES
8 SUCH AS LIGHTS AND ORNAMENTS; AND THE REASON THEY'VE DONE
9 THIS IS TO STABILIZE THEIR WORK FORCE SO THEY HAVE SOMETHING
10 TO DO THE YEAR ROUND SO THAT IT'S NOT A SEASONAL BUSINESS
11 WHERE YOU HAVE A NEW SET OF EMPLOYEES EVERY TIME YOU OPEN
12 UP IN MARCH OR APRIL AND ONLY KEEP THEM UNTIL YOU CLOSE DOWN
13 IN OCTOBER.

14 Q BASED ON YOUR OBSERVATION OF THE NURSERIES THAT
15 YOU VISITED, WHAT PORTION OF ITEMS FOR SALE WOULD YOU SAY
16 IS RELATED TO PLANTS AS OPPOSED TO ANCILLARY PRODUCTS,
17 HARDGOODS OF ALL TYPES?

18 A WELL, IT'S LIKE EVERY OTHER PART OF OUR CULTURE,
19 YOU KNOW. THERE'S A SAYING IN THE INDUSTRY IF YOU START
20 SELLING LESS THAN SEVENTY PERCENT OF PLANTS, YOU DON'T
21 BELONG IN THE NURSERY BUSINESS; AND A COUPLE OF YEARS AGO --
22 SEVERAL YEARS AGO -- WE HAD RESEARCH DONE BY THE BOARD OF
23 HORTICULTURAL RESEARCHERS TO SEE WHAT THE SPREAD WAS IN THE

1 MEDIAN RETAIL OUTLET -- THE MEDIAN PERCENTAGE OF RETAIL
2 OUTLETS SAMPLED WAS SEVENTY PERCENT IN PLANTS AND TWENTY-SIX
3 PERCENT IN WHAT THE INDUSTRY HAS CALLED "HARDGOODS", WHICH
4 INCLUDES FERTILIZERS AND MULCHERS AS WELL AS PRUNING SHEARS
5 AND CONTAINERS AND PESTICIDES AND ROOT TONERS AND ALL THE
6 OTHER EQUIPMENT AND THINGS YOU NEED TO TRANSPLANT.

7 Q WOULD THAT FIGURE INCLUDE BIRDBATHS AND
8 STATUARIES?

9 A IN SOME INSTANCES, YES, IT WOULD.

10 Q ARE BIRDBATHS -- LET ME DEFINE IT THIS WAY: ARE
11 ORNAMENTAL PRODUCTS CUSTOMARILY SOLD BY NURSERIES AS AN
12 ANCILLARY PRODUCT?

13 A IN A GOOD MANY NURSERIES, YES, BIRDBATHS ARE SOLD
14 AND STATUARIES ARE SOLD. IT'S NOT A HIGH PERCENTAGE OF
15 SALES. I WOULDN'T SAY THAT.

16 Q MR. DONAHUE, WHAT DOES THE TERM "GARDEN CENTER"
17 MEAN TO YOU?

18 A WE JUST SPENT A LOT OF MONEY TO FIND OUT WHAT
19 "GARDEN CENTER" MEANT, AND IT DEPENDS ON WHO YOU ARE. WE
20 THOUGHT A GARDEN CENTER WAS A RETAIL NURSERY OUTLET, BUT
21 THE PUBLIC PERCEIVES A GARDEN CENTER AS A DEPARTMENT IN
22 SEARS & ROEBUCK.

23 WE HAD A STUDY DONE BY AN ADVERTISING FIRM; AND,

1 IN GENERAL, THE PUBLIC PERCEIVES A GARDEN CENTER TO BE A
2 DEPARTMENT IN MONTGOMERY WARD'S, SEARS & ROEBUCK, AND
3 PENNEY'S; BUT I HAD NEVER THOUGHT OF RETAIL NURSERIES KNOWN
4 SUCH AS A GARDEN CENTER -- RETAIL NURSERY AS A GARDEN
5 CENTER. THAT'S WHAT THEY THOUGHT -- EVERYBODY IN OUR
6 INDUSTRY THOUGHT -- IT SHOULD BE CALLED; BUT MOST OF THEM
7 CALLED THEMSELVES NURSERIES.

8 Q OKAY. HAVE YOU VISITED OR HAD AN OCCASION TO
9 VISIT BLAIR CUPP'S BUSINESS?

10 A ON SEVERAL OCCASIONS, YES.

11 Q PRIOR TO ANY INVOLVEMENT WITH THIS CASE?

12 A YES.

13 Q WOULD YOU STATE THAT, IN COMPARISON TO THE
14 BUSINESSES -- NURSERIES -- THAT YOU VISITED ACROSS THE
15 COUNTRY, THAT THE SALE OF HIS HARDGOODS IS ANCILLARY?

16 A YEAH, HE SELLS VERY LITTLE OF WHAT THEY CALL
17 "HARDGOODS". IT APPEARS TO ME IN MY VISITS OUT THERE,
18 HE'S NOT -- THERE HAVE BEEN SOME WHICH HAVE GONE INTO
19 CRAFTS OR THAT SORT OF THING WHERE THEY WOULD HAVE A SMALL
20 DEPARTMENT WITHIN THE STORE IN ORDER TO STABILIZE THEIR
21 INCOME OVER THE NON-PLANT SEASONS; BUT I WOULD SAY THAT HIS
22 IS PROBABLY BELOW AVERAGE -- OBSERVATION ONLY.

23 Q WHAT WOULD YOUR OPINION BE AS TO THE EFFECT OF

1 DENYING NURSERYMEN ACROSS THE COUNTRY THE RIGHT TO SELL
2 ANCILLARY PRODUCTS?

3 A I THINK IT WOULD HAVE A DETRIMENTAL EFFECT FOR A
4 NUMBER OF REASONS. ONE, I'D LIKE TO LOOK UPON MYSELF AS
5 THE ULTIMATE CONSUMER; AND PEOPLE WITH WHOM I TALK PREFER
6 ONE-STOP SHOPPING -- GO TO ONE SHOP AND GET WHAT YOU NEED.

7 NOW, THE PARTICULAR WAY THE RETAIL NURSERY OUTLET
8 TRAIN PERSONNEL THERE, THEN THE INDIVIDUAL BUYING THE
9 PLANT KNEW NOTHING ABOUT IT, WOULD HAVE NOWHERE TO GO FOR
10 CULTURAL CARE INSTRUCTIONS; AND, BY THE TIME HE ACQUIRED
11 THEM BY GOING TO A LIBRARY OR SOMEPLACE, THE PLANT WOULD
12 PROBABLY BE DEAD, NUMBER ONE.

13 NUMBER TWO, IF I WERE GOING TO BUY A SMALL PLANT
14 AND WANTED TO -- I'D WANT TO HAVE A POT TO PUT IT IN WHEN
15 I GET HOME. IF I HAVE TO DRIVE TEN MILES TO A HECHINGER'S
16 OR SEARS OR A HARDWARE STORE TO GET THE POT, WHY, I'M NOT
17 GOING TO DO IT. I'D EITHER FOREGO BUYING THE PLANT OR I'D
18 SEE IF I CAN'T FIND SOMEPLACE WHERE I CAN BUY THEM BOTH.

19 Q HAVE YOU READ THE OCTOBER 22 AMENDMENT?

20 A YES, I HAVE.

21 Q ARE YOU -- IN YOUR POSITION WITH THE TRADE
22 ASSOCIATION OF THE AMERICAN NURSERYMEN'S ASSOCIATION, ARE
23 YOU AWARE OF ANY SIMILAR ORDINANCE THAT IS IN ITS SCOPE

1 BANNING THE SALE OF HARDGOODS?

2 A NO, I WAS SOMEWHAT SURPRISED OF THE VERBIAGE IN
3 THAT FOR A NUMBER OF REASONS. THE FIRST THING IS, I NEVER
4 HEARD OF A PLANT NURSERY UNTIL THEN. A NURSERY -- A PLANT
5 NURSERY IS NOT A TERM WHICH IS IN THE LEXICON OF MOST
6 PEOPLE. AT LEAST, IT WASN'T IN MINE, NOR IS IT IN ANYONE'S
7 IN THE PROFESSION THAT I KNOW OF -- THE TRADE.

8 SECONDLY, I DON'T KNOW OF ANY -- I ACT AS KIND OF
9 A CLEARINGHOUSE WHEN THE ZONING CASES COME UP; AND, WHEN WE
10 HEAR OF ONE, WE COLLECT THE INFORMATION AS TO WHO IS
11 INVOLVED, WHAT IS AT ISSUE; AND THEN, WHEN ANOTHER ARISES
12 WHICH SEEMS ANALOGOUS, WE CAN GET THAT INDIVIDUAL IN TOUCH
13 WITH THIS INDIVIDUAL IN ANOTHER STATE TO FIND OUT WHAT THE
14 ESSENCE OF IT WAS.

15 I'VE NEVER HEARD OF ONE SIMILAR TO THIS, WHICH
16 WOULD LIMIT THE SALE OF THOSE THINGS.

17 MR. COCKRELL: I ASK THE COURT'S INDULGENCE?

18 THE COURT: YES.

19 MR. COCKRELL: I HAVE NO OTHER QUESTIONS, YOUR
20 HONOR.

21 THE COURT: CROSS-EXAMINE?

22 CROSS EXAMINATION

23 BY MS. ANDERSON:

1 THEREUPON,

2 WALTER LEE PHILLIPS,

3 A WITNESS, WAS CALLED FOR EXAMINATION BY COUNSEL FOR THE
4 COMPLAINANTS, AND, HAVING BEEN PREVIOUSLY DULY SWORN, WAS
5 EXAMINED AND TESTIFIED AS FOLLOWS:

6 DIRECT EXAMINATION

7 BY MR. LAWSON:

8 Q LEE, WOULD YOU STATE YOUR FULL NAME AND ADDRESS,
9 PLEASE, FOR THE COURT?

10 A MY NAME IS WALTER L. PHILLIPS, JR., 207 PARK
11 AVENUE, FALLS CHURCH, VIRGINIA.

12 MR. LAWSON: YOUR HONOR, HIS QUALIFICATIONS HAVE
13 ALSO BEEN SUBMITTED AS COMPLAINANT'S EXHIBIT NO. 10.

14 THE COURT: ANY OBJECTION?

15 MS. ANDERSON: NO, SIR.

16 BY MR. LAWSON:

17 Q NOW, AT MY REQUEST, MR. PHILLIPS, HAVE YOU
18 PREPARED CERTAIN EXHIBITS THAT ARE SHOWN HERE? ONE IS
19 COMPLAINANT'S EXHIBIT NO. 1, COMPLAINANT'S EXHIBIT NOS. 2
20 AND 3 THERE?

21 A YES.

22 Q AND WOULD YOU TELL US WHAT WAS THE BASIS OF THE
23 PREPARATION -- WHAT DID YOU TAKE INTO ACCOUNT IN MAKING

1 THOSE PARTICULAR EXHIBITS; AND WOULD YOU EXPLAIN THOSE TO
2 THE COURT?

3 MS. ANDERSON: JUDGE, IF I MAY JUST MAKE A
4 GENERAL OBJECTION TO THIS TESTIMONY JUST IN LINE WITH MY
5 EARLIER CONTENTION THAT THESE WOULD NOT APPLY AND ARE NOT
6 AT ISSUE. I WOULD OBJECT TO THE TESTIMONY IN GENERAL
7 RATHER THAN JUMP UP AT EACH QUESTION.

8 THE COURT: ALL RIGHT.

9 THE WITNESS: THERE ARE THREE EXHIBITS. THE FIRST
10 IS AN EXHIBIT WHICH SHOWS THE EXTENT AND THE AREA OF THE
11 DEDICATION THAT WOULD BE REQUIRED ALONG ROUTE 7 IN
12 ACCORDANCE WITH THE STAFF REPORT THAT WAS DONE IN
13 CONNECTION WITH THIS SPECIAL EXCEPTION CASE.

14 THERE WAS A STRIP OF LAND 41 FEET WIDE BY
15 APPROXIMATELY 500 FEET LONG WHICH CONSTITUTES AN AREA OF
16 20,474 SQUARE FEET. THIS IS THE RED CROSS-HASHED AREA
17 SHOWN ON THIS DRAWING.

18 Q THAT'S COMPLAINANT'S EXHIBIT NO. 1; IS THAT
19 CORRECT?

20 A THAT'S CORRECT.

21 Q DOES THAT INFRINGE -- DOES THAT ACTUALLY INFRINGE
22 ON THE LATH HOUSE THAT'S SHOWN THERE.

23 A YES, THIS DRAWING INDICATES A PROPOSED LATH HOUSE

1 WHICH WOULD BE 40½ FEET FROM THE RIGHT-OF-WAY LINE OF
2 ROUTE 7. THERE'S ALSO AN EXISTING LATH HOUSE THERE, WHICH,
3 IT APPEARS, MIGHT BE AFFECTED BY THIS LINE. I CAN'T REALLY
4 TELL FROM THE DRAWING.

5 Q ALL RIGHT. NOW, EXHIBIT A AND B, WHICH ARE
6 COMPLAINANT'S EXHIBITS 2 AND 3, WOULD YOU EXPLAIN THOSE TO
7 THE COURT?

8 A EXHIBIT A INDICATES THE NATURE AND EXTENT OF THE
9 RIGHT-TURN LANE WHICH WOULD BE REQUIRED BY THE COUNTY --
10 FAIRFAX COUNTY -- AND THE VIRGINIA DEPARTMENT OF HIGHWAYS
11 AND TRANSPORTATION AS A CONDITION TO THE SITE PLAN APPROVAL
12 FOR THE CHANGE IN USE -- NOT CHANGE IN USE, BUT CHANGE IN
13 THIS PROPERTY -- SPECIAL EXCEPTION TO THIS PROPERTY.

14 EXHIBIT --

15 Q WAIT JUST A SECOND BEFORE YOU GO ANY FURTHER.
16 WOULD YOU JUST EXPLAIN THE LENGTH AND THE BREADTH OF THAT
17 PARTICULAR IMPROVEMENT, WHAT'S INVOLVED; AND, ALSO, DID YOU
18 DO A COST ANALYSIS OF WHAT IT WOULD COST TO PUT THAT
19 IMPROVEMENT IN?

20 A THIS RIGHT-TURN LANE HAS A LENGTH OF 300 FEET IN
21 A NORTHWESTERLY DIRECTION, WHICH WOULD BE A 14-FOOT WIDENING
22 OF ROUTE 7 WITH CURB AND GUTTER. IN ADDITION TO THAT, WOULD
23 BE A 100-FOOT TAPER OR TRANSITION AREA. AT THIS END, WOULD

1 BE A 60-FOOT TRANSITION AREA WITH A TAPER.

2 WE HAVE ESTIMATED THE COST OF THIS CONSTRUCTION
3 TO BE \$41,564.

4 Q NOW, WOULD YOU SHOW EXHIBIT B AND EXPLAIN THAT TO
5 THE COURT?

6 A EXHIBIT B DEPICTS THE ULTIMATE IMPROVEMENTS TO
7 ROUTE 7 WHICH ARE REFERRED TO IN THE STAFF RECOMMENDATIONS.
8 THIS CONSISTS OF THE WIDENING OF ROUTE 7 FOR THE ENTIRE
9 FRONTAGE OF THE PROPERTY, WHICH IS 500 FEET. IN ADDITION,
10 THERE WOULD BE A 125-FOOT TRANSITION TAPER ON THE NORTHWEST
11 END, AND A 60-FOOT TRANSITION TAPER ON THE SOUTHEAST END.

12 Q ARE THOSE OFF-SITE?

13 A THESE WOULD BE OFF-SITE. THE WIDENING, IN THIS
14 CASE, IS 14 FEET WITH CURB AND GUTTER ALONG THE ENTIRE
15 FRONTAGE AND THE CONSTRUCTION OF AN ENTRANCE, A 20-FOOT
16 MEDIAN -- GRASS MEDIAN, CONSTRUCTION OF A 26-FOOT WIDE
17 SERVICE ROAD WITH CONCRETE SIDEWALK ALONG THE SOUTHWESTERN
18 EDGE. THIS WOULD GO FROM ONE PROPERTY LINE TO THE OTHER.

19 Q IS THERE ANYTHING ON EITHER SIDE OF THE
20 PROPERTY AT THIS TIME?

21 A THERE'S NO SERVICE ROAD, NO, ON EITHER END AT
22 THIS POINT THAT THE CONNECTION COULD BE MADE TO.

23 Q AND CAN YOU ESTIMATE THE COST OF PUTTING THOSE

1 IMPROVEMENTS IN?

2 A THE ESTIMATED COST OF THESE IMPROVEMENTS IS
3 \$101,070.

4 Q NOW, THE STAFF REPORT RECOMMENDS THE ENTIRE
5 DEDICATION WHICH WOULD INCLUDE THESE IMPROVEMENTS; IS THAT
6 CORRECT?

7 A THE STAFF REPORT RECOMMENDS THE DEDICATION WHICH
8 IS SHOWN ON THE FIRST EXHIBIT OF 41 FEET, WHICH IS THIS
9 STRIP. THIS IS THE BACK LINE OF THAT. THIS IS CONSISTENT
10 WITH THE CROSS-HASHED AREA SHOWN ON THE FIRST EXHIBIT, AND
11 THE FUTURE IMPROVEMENT OF THESE.

12 Q THEY ARE RECOMMENDING A WAIVER AT THIS TIME?

13 A THAT'S CORRECT.

14 Q THE ACTUAL AMOUNT OF LAND INVOLVED IN BOTH
15 INSTANCES IS THE SAME; IS THAT CORRECT?

16 A YES.

17 Q ALL RIGHT, SIR. NOW, CAN YOU TELL US,--
18 MR. PHILLIPS, CAN YOU TELL US WHETHER YOU HAVE AN OPINION
19 WHETHER OR NOT IT IS NECESSARY FROM THE TRAFFIC SAFETY
20 STANDPOINT TO MAKE THE DEDICATION AT THIS PARTICULAR TIME
21 IN ACCORDANCE WITH THE STAFF REPORT?

22 MS. ANDERSON: YOUR HONOR, I BELIEVE HE'S
23 CERTIFIED AS AN ENGINEER. IF HE'S ASKING A TRANSPORTATION

1 TYPE OF QUESTION, I'M NOT SURE IT IS PART OF THE STIPULATED
2 AGREEMENT.

3 MR. LAWSON: I THINK HIS QUALIFICATIONS, YOUR
4 HONOR, WHEN I SPOKE TO THAT IS HE WORKS -- I CAN GO AHEAD
5 AND QUALIFY HIM IN THAT AREA.

6 THE COURT: WHY DON'T YOU QUALIFY HIM IN THAT
7 AREA.

8 MR. LAWSON: ALL RIGHT, SIR. I THINK IT'S
9 CONTAINED PROBABLY IN HIS QUALIFICATIONS. IT SHOULD BE
10 HERE SOMEWHERE.

11 BY MR. LAWSON:

12 Q COULD YOU OUTLINE FOR US, MR. PHILLIPS, WHAT
13 BEING A GRADUATE LICENSED ENGINEER WHAT YOU -- WHAT TYPE
14 OF WORK THAT YOU'RE ENGAGED IN, AND PARTICULARLY IN FAIRFAX
15 COUNTY?

16 A WELL, I'VE BEEN INVOLVED IN THE LAND DEVELOPMENT
17 ENGINEERING PRACTICE IN FAIRFAX COUNTY SINCE 1959. OUR
18 WORK CONSISTS ALMOST EXCLUSIVELY OF SITE PLANNING OF
19 COMMERCIAL, INDUSTRIAL AND RESIDENTIAL SITES IN THE COUNTY
20 IN ACCORDANCE WITH THE FAIRFAX COUNTY SITE PLAN ORDINANCE.

21 THIS INVOLVES, TO A LARGE EXTENT, THE WIDENING
22 OF EXISTING ROADS, THE PREPARATION OF DRAWINGS FOR SERVICE
23 ROADS, RIGHT-TURN LANES, ENTRANCES, DRAINAGE, AND EVERY

1 OTHER ASPECT OF THE DEVELOPMENT PROCESS.

2 Q DOES THIS INVOLVE HAVING TO WORK WITH THE STATE
3 DEPARTMENT OF HIGHWAYS AS WELL AS FAIRFAX COUNTY?

4 A YES, IT DOES. WE WORK WITH THE HIGHWAY
5 DEPARTMENT AS WELL AS FAIRFAX COUNTY.

6 Q ARE YOU REQUIRED TO MAKE RECOMMENDATIONS TO THE
7 PROPERTY OWNER AS TO WHAT THE CONFIGURATION AND THE
8 LOCATION OF THE ROAD AND ROAD IMPROVEMENTS SHOULD BE?

9 A YES, WE ARE. THE SITE PLAN ORDINANCE REQUIRES
10 THAT CERTAIN IMPROVEMENTS BE MADE; AND, IN ALMOST EVERY
11 INSTANCE, WE ARE IN A POSITION TO DISCUSS THESE WITH THE
12 COUNTY AND WITH THE HIGHWAY DEPARTMENT.

13 Q AND DOES THAT INVOLVE YOU THEN IN TURN ALSO MAKING
14 RECOMMENDATIONS AS TO TRAFFIC IMPROVEMENT, NOT ONLY TO
15 FAIRFAX COUNTY BUT TO THE HIGHWAY DEPARTMENT?

16 A WELL, NORMALLY, THE NATURE AND EXTENT OF THE
17 IMPROVEMENTS TO THE EXISTING HIGHWAY ARE A SUBJECT OF THE
18 PERMIT THAT IS ISSUED BY THE HIGHWAY DEPARTMENT.

19 WE MAY MAKE RECOMMENDATIONS; BUT, USUALLY, THEY
20 TELL US WHAT MUST BE DONE.

21 Q OFTEN TIMES, IS THAT A MATTER OF NEGOTIATION WITH
22 THE PARTIES AND THE HIGHWAY DEPARTMENT AND FAIRFAX COUNTY
23 IN WORKING OUT THE DETAILS?

1 A OFTEN TIMES, IT'S NECESSARY TO MAKE FIELD VISITS,
2 TO MAKE SPECIAL ENGINEERING STUDIES TO DETERMINE WHAT WOULD
3 BE THE PROPER THING TO DO IN THAT PARTICULAR CASE.

4 Q AS TO TRAFFIC SAFETY, I WOULD PRESUME?

5 A CORRECT.

6 Q HAVE YOU BEEN QUALIFIED BEFORE TO TESTIFY IN THIS
7 COURT AS TO MATTERS THAT RELATE TO TRAFFIC SAFETY?

8 A I HAVE TESTIFIED IN COURT A NUMBER OF TIMES
9 REGARDING THIS TYPE OF WORK. I'M NOT A TRAFFIC ENGINEER,
10 PER SE.

11 Q , BUT THE BULK OF YOUR WORK INVOLVES HIGHWAY PLANS
12 AND WORKING WITH THE HIGHWAY DEPARTMENT AND FAIRFAX COUNTY.

13 MR. LAWSON: YOUR HONOR, I THINK HE'S QUALIFIED.

14 THE COURT: DO YOU WANT TO VOIR DIRE.

15 MS. ANDERSON: YOUR HONOR, JUST FROM WHAT I'VE
16 HEARD, I DON'T BELIEVE HE'S QUALIFIED AS A TRANSPORTATION
17 PLANNER OR ENGINEER, WHICH SEEMS TO BE AT ISSUE HERE.

18 THE COURT: I'LL HAVE TO OVERRULE YOUR OBJECTION,
19 AND I'LL NOTE YOUR EXCEPTION. GO AHEAD.

20 BY MR. LAWSON:

21 Q SO, COULD YOU ANSWER THE QUESTION THEN? DO YOU
22 HAVE AN OPINION AS TO WHETHER OR NOT IT IS NECESSARY FROM
23 A TRAFFIC SAFETY STANDPOINT TO REQUIRE THE DEDICATION IN

1 THIS INSTANCE?

2 A THE RIGHT-TURN LANE WHICH HAS BEEN REQUIRED AND IS
3 THE SUBJECT OF EXHIBIT 2, I BELIEVE, IS ENTIRELY WITHIN THE
4 EXISTING RIGHT-OF-WAY OF ROUTE 7; AND, IN MY OPINION, THERE
5 IS NO NEED TO PROVIDE AN ADDITIONAL RIGHT-OF-WAY FOR THAT
6 IMPROVEMENT.

7 Q ARE YOU AWARE AFTER -- I ASSUME THAT YOU HAVE MADE
8 AN INVESTIGATION -- WHETHER OR NOT THERE ARE ANY HIGHWAY --
9 STATE HIGHWAY DEPARTMENT PLANS FOR SPECIFIC IMPROVEMENTS
10 AS TO ROUTE 7?

11 A THERE IS NO PROJECT AT THIS TIME FOR
12 IMPROVEMENTS TO ROUTE 7 IN THIS AREA.

13 Q AS ENVISIONED OR AS SHOWN ON THESE PARTICULAR
14 PLANS, IS THAT CORRECT?

15 A THAT'S CORRECT.

16 MR. LAWSON: THE COURT'S INDULGENCE FOR A MOMENT.
17 ONE FURTHER QUESTION.

18 BY MR. LAWSON:

19 Q DID YOU SUPPLY THE FINANCIAL DATA TO MACK DOWNS?

20 A YES.

21 MR. LAWSON: THAT'S ALL THE QUESTIONS I HAVE.

22 MS. ANDERSON: NO CROSS, YOUR HONOR.

23 THE COURT: OKAY. DO YOU WANT MR. PHILLIPS

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1 I WILL PROCEED AT THIS TIME. I MAY QUALIFY HIM FURTHER AT
2 A LATER TIME.

3 THEREUPON,

4 N. MC KENZIE DOWNS,
5 A WITNESS, WAS CALLED FOR EXAMINATION BY COUNSEL FOR THE
6 COMPLAINANTS, AND, HAVING BEEN PREVIOUSLY DULY SWORN, WAS
7 EXAMINED AND TESTIFIED AS FOLLOWS:

8 DIRECT EXAMINATION

9 BY MR. LAWSON:

10 Q SIR, WOULD YOU STATE YOUR FULL NAME, PLEASE, AND
11 ADDRESS?

12 A N. MC KENZIE DOWNS. I LIVE AT 3625 CORNEL ROAD
13 IN THE CITY OF FAIRFAX, AND MY OFFICE IS AT 4015 CHAIN
14 BRIDGE ROAD, CITY OF FAIRFAX.

15 Q MR. DOWNS, AT MY REQUEST, HAVE YOU PREPARED AN
16 EVALUATION OF LAND THAT IS BEING REQUIRED FOR DEDICATION
17 IN THE CUPP CASE, PARTICULARLY AS SHOWN IN THESE EXHIBITS,
18 COMPLAINANT'S EXHIBIT NO. 1 AND COMPLAINANT'S EXHIBIT NO. 2
19 AND NO. 3 AS PREPARED BY WALTER PHILLIPS' OFFICE?

20 MS. ANDERSON: PLEASE NOTE MY CONTINUING OBJECTION
21 YOUR HONOR?

22 THE COURT: OKAY.

23 THE WITNESS: YES, AT YOUR REQUEST, I DID EXAMINE

1 THE PROPERTY; AND, BY MEANS OF WHAT MIGHT BE TERMED "THE
2 MARKET DATA APPROACH", DID ASCERTAIN THE VALUE OF THE LAND
3 IN QUESTION AND ALSO THE VALUE OF THE IMPROVEMENTS AND THE
4 IMPACT IN VALUE ON THIS PROPERTY BY THIS PROPOSED
5 DEVELOPMENT.

6 BY MR. LAWSON:

7 Q ALL RIGHT, SIR. NOW, WOULD YOU TELL US VERY
8 BRIEFLY WHAT YOU TOOK INTO CONSIDERATION IN ORDER TO PREPARE
9 YOURSELF IN ORDER TO MAKE THESE EVALUATIONS?

10 A WELL, BASICALLY, YOUR HONOR, FROM THE STANDPOINT
11 OF ESTABLISHING THE LAND VALUE, I EXAMINED SALES IN THE
12 GENERAL AREA TO DETERMINE JUST WHAT THE VALUES WERE. BASED
13 ON THAT RESEARCH, I ARRIVED AT A VALUE OF ABOUT \$1.25 PER
14 SQUARE FOOT ON THE LAND.

15 THERE IS ABOUT 20,474 SQUARE FEET WITHIN THIS
16 AREA UNDER CONSIDERATION; THEREFORE, IT WOULD HAVE A VALUE
17 OF ABOUT \$25,592. NOW, INCLUDED WITHIN THIS TAKE, SINCE
18 THIS IS AN ACTIVE AREA THAT IS ACTIVELY BEING UTILIZED IN THE
19 PRESENCE OF A NURSERY BUSINESS, THERE ARE TWO LARGE, BRICK
20 GATEPOSTS WHICH DO LEND VALUE TO THE PROPERTY FROM AN
21 AESTHETIC STANDPOINT. THEY ARE KEPT --

22 Q I SHOW YOU COMPLAINANT'S EXHIBIT 4A. DOES THAT
23 SHOW THOSE PARTICULAR IMPROVEMENTS?

1 A PLAINTIFF'S EXHIBIT 4A, YOUR HONOR, DOES SHOW THE
2 ENTRANCE; AND THERE ARE TWO GATEPOSTS THAT YOU CAN SEE KEPT
3 AT THIS LOCATION. THERE IS ALSO A -- AND YOU CAN SEE IN
4 THE PICTURE, YOUR HONOR -- AN IRON GATE -- A DOUBLE IRON
5 GATE -- HINGED FROM EACH OF THE POSTS.

6 IN ADDITION TO THAT, THERE IS A SUBSTANTIAL AMOUNT
7 OF PERMANENT SHRUBBERY. THIS IS NOT SOMETHING THAT'S ON
8 THE EXHIBIT THERE TO BE SOLD, YOUR HONOR. THIS IS A
9 LANDSCAPING THAT IS AESTHETICALLY DESIRABLE FOR THE
10 OPERATION.

11 IN ADDITION TO THAT, THERE IS ONE LARGE, FREE-
12 STANDING SIGN AT THIS LOCATION. THERE'S ALSO ANOTHER FREE-
13 STANDING SIGN OVER AT THIS LOCATION ON THE RIGHT SIDE OF
14 THE PHOTOGRAPH.

15 INCLUDED WITHIN THIS AREA ALSO IS THE DRIVEWAY
16 ENTRANCE, THE PARKING AREA, WHICH WOULD BE DISPLACED, AND
17 A PORTION OF ONE LATH HOUSE WOULD ALSO BE WITHIN THIS AREA.
18 THIS ALL HAS VALUE. CERTAIN DISPLAY BEDS WHICH ARE LOCATED
19 THERE WOULD HAVE TO BE RELOCATED.

20 SO, THE ACTUAL REQUIREMENT HAS A VERY SUBSTANTIAL
21 IMPACT ON THE VALUE OF THIS PROPERTY; AND, OF COURSE, THE
22 ACTUAL COST OF PUTTING IN THESE ROAD IMPROVEMENTS AS SUCH,
23 HAS ALSO A VERY SIGNIFICANT IMPACT IN THE VALUE.

1 SO, IN MY ESTIMATION, THE VALUE OF THE LAND
2 COUPLED WITH THE IMPROVEMENTS HAVE A TOTAL VALUE OF ABOUT
3 \$30,392. THIS IS LAND AND IMPROVEMENTS WITHIN THAT AREA;
4 AND, WITH RESPECT TO THE VALUE OF THE IMPROVEMENTS, I FELT
5 THAT CERTAIN OF THEM COULD BE RELOCATED. SO, IT'S ACTUALLY
6 A COST OF RELOCATION AS OPPOSED TO AN ACTUAL COMPENSATION
7 FOR THE PARTICULAR SIGN OR THE BED THEMSELVES WHICH WOULD
8 HAVE TO BE RELOCATED.

9 IN ADDITION TO THAT, RELYING ON THE ESTIMATE OF
10 MR. PHILLIPS AS TO COST IF THE ULTIMATE SECTION WERE
11 CONSTRUCTED, OF \$101,070, THAT, COUPLED WITH THE \$30,392
12 WOULD MEAN COST OR AN IMPACT ON VALUE OF \$131,500.

13 IF THE RIGHT-TURN LANE ONLY WAS PUT IN, THEN WE
14 WOULD HAVE A TOTAL OF \$41,564 FOR THAT; AND THAT, COUPLED
15 WITH THE VALUE OF LAND AND IMPROVEMENTS AND/OR MOVE OF
16 THESE IMPROVEMENTS WOULD AMOUNT TO \$71,956 OR ABOUT \$72,000.

17 NOW, BASICALLY, WHAT THIS AMOUNTS TO, EVEN IF THE
18 APPRAISER DISREGARDS THE VALUE OF THE LAND, THE COST OF
19 PUTTING IN THESE IMPROVEMENTS AND RELOCATING THE IMPROVE-
20 MENTS THAT ARE ACTUALLY IN PLACE -- THE LATH HOUSE,
21 ET CETERA -- WOULD MEAN THAT THERE IS AN OBLIGATION THERE
22 WHICH WOULD TAKE A TREMENDOUS INCREASE AND IMPROVEMENT IN
23 THE NET OPERATION IN ORDER TO CURTAIL THAT.

1 ASSUMING -- AND THIS WOULD BE EXTREMELY
2 REASONABLE -- ASSUMING, SAY, A FIFTEEN-PERCENT INTEREST
3 RATE AND A FIFTEEN-YEAR LOAN TO CURTAIL THAT, THAT WOULD
4 MEAN THAT YOU'D HAVE ANNUAL PAYMENTS OF \$17,781 PER YEAR
5 JUST TO CURTAIL THESE IMPROVEMENTS CHANGE WHICH ARE REQUIRED
6 BECAUSE OF THIS INCONTESTABLE EXPANSION, SO TO SPEAK, OF
7 THE OPERATION OF THE BUSINESS.

8 NOW, THAT WOULD MEAN, IN ORDER TO DO THAT TO
9 CURTAIL THAT, THE OPERATION WOULD HAVE TO INCREASE ITS
10 NET -- ITS NET -- ABOUT FIFTY-SEVEN PERCENT, WHICH IS
11 COMPLETELY UNREALISTIC. IT WOULD BE VIRTUALLY IMPOSSIBLE
12 FROM AN APPRAISER'S STANDPOINT TO INCREASE THAT BUSINESS
13 BY THAT AMOUNT EVEN IF SUBSTANTIAL IMPROVEMENTS ARE MADE
14 TO THE EXISTING IMPROVEMENTS ONLY.

15 THIS ROAD IMPROVEMENT ACTUALLY CONTRIBUTES
16 NOTHING THAT WOULD INCREASE HIS REVENUE FROM AN APPRAISAL
17 STANDPOINT.

18 LOOKING AT FROM THE STANDPOINT OF THE RIGHT-TURN
19 LANE ONLY, THAT WOULD AMOUNT TO \$46,364. THE ANNUAL
20 CURTAILMENT OF THAT OVER A FIFTEEN-YEAR PERIOD AMOUNTS TO
21 \$7,787; AND THAT AMOUNTS TO ABOUT A TWENTY-FIVE PERCENT
22 INCREASE IN HIS NET JUST TO CURTAIL THAT EXPENSE.

23 SO, THERE IS A VERY SUBSTANTIAL IMPACT ON THE

1 VALUE OF THIS BY THIS REQUIREMENT -- BY THE COUNTY
2 REQUIREMENT.

3 ACTUALLY, WHAT IT AMOUNTS TO IS THAT THE OPERATOR
4 WOULD HAVE TO GIVE UP A PRODUCT LINE, SO TO SPEAK, HE WOULD
5 LOSE LAND, HE WOULD LOSE IMPROVEMENTS, HE WOULD HAVE A COST
6 OF PUTTING IN THESE IMPROVEMENTS, WHICH WOULD BE REQUIRED
7 BY THE COUNTY; AND, IN OTHER WORDS, THE ORDINANCE WOULD
8 WORK TO THE OWNER'S DISADVANTAGE; BUT, OVER AND ABOVE THAT,
9 THE TEARING DOWN OF A GREENHOUSE AND REPLACING IT WITH A
10 SLIGHTLY LARGER GREENHOUSE, THE INCREASE IN THE SIZE OF THE
11 LATH HOUSE AND DISPLACEMENT OF ONE WOULD HAVE ABSOLUTELY
12 NO ADVERSE EFFECT ON ANY OF THE EXISTING AND POTENTIAL
13 HOUSING IN THE IMMEDIATE AREA. IT IS A LOGICAL AND
14 REASONABLE EXTENSION OF THIS EXISTING OPERATION.

15 SO, FROM AN APPRAISAL STANDPOINT, I WOULD SAY
16 THAT THE NURSERY IS COMPATIBLE TO THIS AREA --

17 MS. ANDERSON: YOUR HONOR, IT'S HARDLY AN
18 APPRAISAL STANDPOINT. THIS IS--

19 THE COURT: SUSTAINED.

20 BY MR. LAWSON:

21 Q WELL, LET ME ASK YOU THIS, MR. DOWNS: WOULD YOU
22 ELABORATE A LITTLE FURTHER -- YOU STARTED INTO THIS -- AS
23 TO WHETHER OR NOT -- I THINK IT DOES, YOUR HONOR. I THINK

1 AN APPRAISER CAN GIVE AN OPINION AS TO WHETHER OR NOT IT
2 WOULD HAVE ANY ADVERSE EFFECT ON THE NEIGHBORING PROPERTY.

3 THE COURT: ALL RIGHT. WHY DON'T YOU ASK HIM IT
4 THAT WAY.

5 MR. LAWSON: ALL RIGHT.

6 BY MR. LAWSON:

7 Q CAN YOU ANSWER THAT QUESTION -- THE NEIGHBORHOOD
8 AND THE AREA -- WOULD IT HAVE ANY ADVERSE IMPACT ON THE
9 NEIGHBORING PROPERTIES?

10 IT MIGHT BE HELPFUL IF YOU WERE TO SHOW HIS HONOR
11 WHAT IS INVOLVED IN THE AREA, WHAT THE AREA IS LIKE, AS
12 A BACKGROUND FOR THAT.

13 A WELL, TO ANSWER THE QUESTION, IT WOULD NOT HAVE
14 AN ADVERSE IMPACT. I WOULD SHOW TO YOUR HONOR A COMPILATION,
15 SO TO SPEAK, OF TWO SECTION SHEETS OF FAIRFAX COUNTY
16 SHOWING THE ZONING IN THE AREA.

17 PARCEL 19 AT THIS POINT, WHICH IS OUTLINED IN
18 YELLOW, IS THE SUBJECT PROPERTY. JUST TO THE WEST OF THIS
19 IS TOWN & COUNTRY DAYSCHOOL. THE OLD ANDREW'S CHAPEL
20 SCHOOL -- ELEMENTARY SCHOOL -- IS LOCATED ON PARCEL 60; BUT
21 THIS IS USED BY LYONS CONSTRUCTION COMPANY. HE HAS AN
22 OFFICE, VERY HEAVY EQUIPMENT IN THERE, THINGS OF THIS
23 NATURE. HAZELTON LABORATORIES IS LOCATED AT THIS POINT.

1 ANDREW'S CHAPEL CEMETARY IS HERE. OLD ANDREW'S CHAPEL
2 METHODIST CHURCH IS THE LOCATION WHICH IS USED BY ANOTHER
3 DENOMINATION. THE NEW ANDREW METHODIST CHURCH IS AT THIS
4 LOCATION. THE BETHEL BAPTIST CHURCH AT THIS LOCATION.

5 SO, ALONG THIS SECTION OF ROUTE 7 THERE
6 UNQUESTIONABLY IS A SUBSTANTIAL AMOUNT OF SINGLE-FAMILY,
7 RESIDENTIAL HOUSING; BUT ALSO OTHER TYPES OF USES WHICH ARE
8 ALMOST TANTAMOUNT TO BEING COMMERCIAL IN NATURE. SO, THIS --

9 MS. ANDERSON: YOUR HONOR, I BELIEVE THIS GOES
10 BEYOND AN APPRAISAL STANDPOINT.

11 MR. LAWSON: I THINK IT'S A BASIS --

12 THE COURT: I'LL OVERRULE IT. GO AHEAD.

13 BY MR. LAWSON:

14 Q GO AHEAD.

15 A THIS DEVELOPMENT THAT I HAVE MENTIONED HAS NOT,
16 IN ANY WAY, STOPPED OR SLOWED THE SUBDIVISION AND DEVELOP-
17 MENT FOR SINGLE-FAMILY RESIDENTIAL HOUSING. IN OTHER
18 WORDS, IMMEDIATELY ADJACENT TO THE SUBJECT PROPERTY TO THE
19 SOUTHEAST IS A SUBDIVISION. HERE'S ONE DIRECTLY ACROSS FROM
20 LYONS CONSTRUCTION WHICH HAS BEEN THERE FOR YEARS, AND THIS
21 SUBDIVISION HERE HAS RECENTLY COME INTO BEING. ALL OF THIS
22 DEVELOPMENT HAS TAKEN PLACE, AND I CAN FIND NO ADVERSE
23 EFFECT IN THE MARKET BY A NURSERY ON SINGLE FAMILY,

1 RESIDENTIAL DEVELOPMENT. AN EXAMINATION OF SALES WOULD
2 INDICATE THAT THEY FOLLOW THE SAME UPWARD TREND IN VALUE
3 AS PROPERTIES WHICH ARE ISOLATED FROM SUCH USES.

4 AS A MATTER OF FACT, THIS REALLY SATISFIES THE
5 DEMAND IN AN AREA WHERE THERE IS GROWTH TO WHERE THE
6 PROPERTY OWNER GOES OUT AND DOES A SUBSTANTIAL AMOUNT OF
7 HIS OWN LANDSCAPING.

8 SO, IT DOES PROVIDE A GOOD OUTLET; AND THE
9 CONTEMPLATED IMPROVEMENTS TO THIS USE; THAT IS, THE NEW
10 LATH HOUSE, THE NEW GREENHOUSE, AND SO FORTH, WOULD ACTUALLY
11 UPGRADE THE IMPROVEMENTS THAT NOW EXIST AND ACTUALLY
12 BROADEN THE TAX BASE.

13 SO, ACTUALLY, I THINK THAT THE CONTEMPLATED
14 IMPROVEMENTS IMPROVE IT RATHER THAN ACTUALLY DO ANYTHING
15 TO DOWNGRADE IT; AND THE REQUIREMENT OF A DECELERATION LANE
16 AND SERVICE ROAD AT THIS LOCATION HAS NO HELPFUL ASPECT TO
17 THE SUBJECT PROPERTY ALSO.

18 MR. LAWSON: YOUR HONOR, I'D LIKE TO OFFER THIS
19 INTO EVIDENCE.

20 THE COURT: WHAT EXHIBIT?

21 THE CLERK: 38.

22 THE COURT: 38. ANY OBJECTION?

23 MS. ANDERSON: I HAVEN'T SEEN IT, YOUR HONOR.

1 MR. LAWSON: IT'S THE COUNTY TAX MAP -- ZONING
2 MAP.

3 MS. ANDERSON: YOUR HONOR, THERE ARE A LOT OF
4 ADDITIONS TO THIS TAX MAP HERE. I DON'T KNOW WHAT HE MEANS
5 BY "LYONS CONSTRUCTION" AND --

6 MR. LAWSON: THESE ARE THINGS THAT HE ALREADY
7 EXPLAINED TO THE COURT.

8 MS. ANDERSON: I STILL DON'T KNOW WHAT "LYONS
9 CONSTRUCTION" MEANS, WHETHER IT'S A --

10 MR. LAWSON: LET ME ASK HIM.

11 BY MR. LAWSON:

12 Q MR. DOWNS, SHE'S ASKING WHAT SOME OF THESE TERMS
13 ARE. MAYBE YOU'D BETTER EXPLAIN THAT.

14 A WELL, I --

15 THE COURT: MAYBE YOU COULD STAND SO THAT
16 MS. ANDERSON CAN SEE. YOU MAY BE ABLE TO SEE BETTER IF
17 YOU GOT CLOSER. GO AHEAD.

18 THE WITNESS: I'VE WRITTEN IN AT THE TOP OF THE
19 SHEET IN RED "TOWN & COUNTRY DAYSCHOOL". NOW, THIS IS THE
20 TOWN & COUNTRY DAYSCHOOL THAT IS JUST OFF THIS SHEET. IT'S
21 ACTUALLY ON THE SECOND SHEET, 19.1. I DIDN'T PUT THAT
22 SHEET TOGETHER BECAUSE IT WOULD BE TOO CUMBERSOME TO HANDLE;
23 BUT IT IS LOCATED THERE -- ONLY TO GIVE THE COURT SOME

1 INDICATION OF THE TYPE DEVELOPMENT WHICH EXISTS ALONG THIS
2 PART; AND PARCEL 60, WHICH IS ON SECTION SHEET 19-4, I'VE
3 WRITTEN "LYONS CONSTRUCTION". THIS IS THE SITE OF THE OLD
4 ST. ANDREW'S -- I DIDN'T MEAN THAT -- ANDREW'S CHAPEL
5 ELEMENTARY SCHOOL WHICH HAS BEEN USED FOR YEARS BY THE
6 LYONS CONSTRUCTION COMPANY AS AN OFFICE. HEAVY EQUIPMENT,
7 LARGE TRUCKS, AND ALL, NOT ONLY PARK THERE, THEY OPERATE
8 THE BUSINESS OUT OF THIS FACILITY; AND I MERELY PUT THAT IN
9 FOR MY OWN INFORMATION AND FOR THE COURT'S INFORMATION TO
10 INDICATE WHAT EXISTED ON THAT PARCEL.

11 HAZELTON LABORATORIES, FOR INSTANCE, THAT'S
12 PRINTED IN ON THE COUNTY SHEET. IT IS THERE. THIS IS TRUE
13 OF ANDREW'S CHAPEL CEMETARY, ANDREW'S CHAPEL -- THE OLD
14 METHODIST CHURCH AS WELL AS THE NEW ONE, AND ALSO THE BAPTIST
15 CHURCH. THOSE ARE UNDERLINED JUST TO INDICATE TO THE
16 COURT AND FOR MY INFORMATION WHAT EXISTS ON THIS ROUTE.

17 MS. ANDERSON: I HAVE NO FURTHER QUESTIONS, YOUR
18 HONOR.

19 THE COURT: ANY OBJECTION TO THE EXHIBIT?

20 MS. ANDERSON: NO, YOUR HONOR.

21 THE COURT: IT'S ADMITTED. 38.

22 (THE DOCUMENT HERETOFORE REFERRED
23 TO WAS MARKED COMPLAINANT'S EXHIBIT

1 NO. 38 FOR IDENTIFICATION AND WAS
2 RECEIVED IN EVIDENCE.)

3 MR. LAWSON: THAT'S ALL THE QUESTIONS I HAVE,
4 YOUR HONOR.

5 THE COURT: CROSS?

6 CROSS EXAMINATION

7 BY MS. ANDERSON:

8 Q MR. DOWNS, DID YOU TAKE INTO CONSIDERATION THE
9 APPRAISED VALUE OF THE PROPERTY FOR PURPOSES OF THE REAL
10 ESTATE APPRAISAL?

11 A WELL, I EXAMINED IT; AND I HAVE IT. I'LL BE GLAD
12 TO GIVE IT TO THE COURT FOR WHATEVER VALUE THIS ADDS TO
13 THIS, IF YOU WANT ME TO; BUT --

14 Q YES, IF YOU WOULD, PLEASE?

15 A YES, THE PRESENT ASSESSMENTS FOR TAX PURPOSES ON
16 THE LAND, YOUR HONOR; AND THERE ARE 6.72 ACRES IN THE
17 TRACT. THE LAND IS PRESENTLY VALUED AT \$70,570, WHEREAS
18 THE IMPROVEMENTS ARE VALUED AT \$101,710. NOW, THESE
19 IMPROVEMENTS, YOUR HONOR, IN ADDITION TO THE GREENHOUSE,
20 THE LATH HOUSE, THINGS OF THAT NATURE, ALSO INCLUDE A ONE-
21 STORY, BRICK DWELLING WITH A FULL BASEMENT, WHICH IS AN
22 EXTREMELY NICE DWELLING; AND IT MEASURES 60 X 32 PLUS; THE
23 SCREEN PORCH, 12 X 16; AND THE ATTACHED GARAGE, 24 X 38.

1 SO, THOSE -- THAT IMPROVEMENT VALUE DOES IMPROVE
2 THAT DWELLING WHICH IS SUBSTANTIAL IN NATURE AND IN VERY
3 GOOD CONDITION.

4 Q YOU STATED THAT YOU HAD EXAMINED OTHER NURSERIES
5 AND SAW NO ADVERSE IMPACT ON THE SURROUNDING NEIGHBORHOOD.

6 DID YOU SPECIFICALLY EXAMINE THE NURSERY KNOWN
7 AS MEADOW'S FARM AT 4808 BACKLICK ROAD?

8 A NO, I DID NOT EXAMINE MEADOW'S FARM ON BACKLICK
9 ROAD.

10 Q AND DID YOU HAVE AN OPPORTUNITY TO EXAMINE
11 BETTY'S AZALEA RANCH ON ROUTE 29/211?

12 A YES, I'M VERY FAMILIAR WITH IT BECAUSE I BOUGHT
13 AZALEAS THERE.

14 Q DID YOU EXAMINE THAT IN THE CONTEXT OF ADVERSE
15 IMPACTS ON OTHER PROPERTIES AROUND IT?

16 A WELL, I DON'T THINK IT WOULD CERTAINLY HAVE AN
17 ADVERSE EFFECT ON IT. AS FAR AS EXAMINING SALES OF
18 PROPERTIES IMMEDIATELY ADJACENT TO IT, NO, I DID NOT.

19 Q WHAT IS THE -- AS A GENERAL RULE, WHAT IS THE
20 IMPACT OF NON-CONFORMING COMMERCIAL USE ON SURROUNDING
21 RESIDENTIAL GROWTH OR USES?

22 A I WOULD SAY NORMALLY IT WOULD HAVE LITTLE OR NO
23 MEASURABLE IMPACT WHATSOEVER. THE ORDINANCE IN FAIRFAX

1 COUNTY IS SO STRONG THAT IT PROTECTS THE DEVELOPMENT OF
2 ADJACENT PROPERTIES; AND, PARTICULARLY, IN USES LIKE A
3 NURSERY WHERE YOU HAVE FLOWERY THINGS, TREES, AND THINGS OF THIS
4 NATURE, THEY DO NOT HAVE TO BE LOCATED IN A COMMERCIAL AREA
5 IN MY ESTIMATION.

6 OVER THE YEARS, IT HAS BEEN FOUND THAT PROJECTS
7 LIKE THIS DO NOT, IN ANY WAY, STOP GROWTH. AS A MATTER OF
8 FACT, IT'S AN ASSET TO THE COMMUNITY.

9 Q WELL, LET ME TAKE YOUR ATTENTION OFF OF NURSERIES
10 AND, SAY, LIKE THE GASOLINE STATION THAT HAS BEEN ON THE
11 STREET FOR MANY, MANY YEARS, DOES THAT HAVE AN ADVERSE
12 EFFECT --

13 MR. LAWSON: I WOULD OBJECT. IT OBVIOUSLY HAS
14 NOTHING TO DO WITH THE CASE WE'RE TRYING TODAY.

15 THE COURT: I UNDERSTAND; BUT THIS IS CROSS
16 EXAMINATION; AND I'LL OVERRULE THE OBJECTION.

17 THE WITNESS: WELL, I CAN THINK OF ONLY TWO
18 SERVICE STATIONS THAT PROBABLY MIGHT FIT IN THAT CATEGORY;
19 ONE BEING OVER IN THE LANGLEY AREA WHERE THERE WAS NO
20 COMMERCIAL ZONING; AND I HAVE KNOWN THAT PARTICULAR SERVICE
21 STATION SINCE I WAS A SMALL BOY, WHICH, OF COURSE, IS BACK
22 ALMOST SIXTY YEARS THAT HAS BEEN THERE; AND DEVELOPMENT IN
23 THAT AREA AND CERTAINLY THE QUALITY OF DEVELOPMENT IN THE

1 LANGLEY AREA HAS CERTAINLY NOT BEEN ADVERSELY AFFECTED BY
2 THAT STATION. I THINK THAT THERE ARE SITUATIONS WHERE
3 COMMERCIAL DEVELOPMENT COULD IMPACT A RESIDENTIAL
4 NEIGHBORHOOD IF IT IS NOT PROPERLY ORIENTED; BUT I WOULD
5 POINT TO, OUT ON 123 NEAR THE FAIRFAX COUNTRY CLUB, A
6 STATION AT THE CORNER OF 123 AND -- I'VE FORGOTTEN THE NAME
7 OF THE ROAD --

8 MS. ANDERSON: ZION DRIVE?

9 THE WITNESS: -- ZION DRIVE.

10 THE COURT: IS THAT THE EXXON STATION?

11 THE WITNESS: YES, SIR; AND THE BOARD, IN ITS
12 WISDOM, SAW FIT TO ACTUALLY ALLOW THAT STATION TO BE
13 EXPANDED; AND IT HAS BEEN LANDSCAPED, A WALL PUT IN,
14 THINGS OF THIS NATURE. IT HAS CERTAINLY NOT INTERFERED WITH
15 DEVELOPMENT IN THAT AREA; AND, AS A MATTER OF FACT, I JUST
16 EXAMINED A PIECE OF PROPERTY ACROSS THE ROAD FROM IT THAT
17 IS PROPOSED FOR DEVELOPMENT; AND THE SALES PRICE OF THAT
18 LAND IS ON THE BASIS OF \$12,500 PER RAW UNIT WHICH COMPARES
19 FAVORABLY WITH OTHER LAND IN THAT IMMEDIATE AREA WHICH IS
20 NOT UNDER THE IMPACT OF SUCH A SERVICE STATION.

21 SO, I'D HAVE TO SAY THAT SERVICE STATIONS, IF
22 ANYTHING, YES, COULD IMPACT A RESIDENTIAL NEIGHBORHOOD, BUT,
23 IN FAIRFAX COUNTY, IF THE DEVELOPMENT IS PROPERLY ORIENTED

1 AND THE THING IS PROPERLY SCREENED AND SO FORTH, SINGLE-
2 FAMILY RESIDENTIAL DEVELOPMENT CANNOT ONLY EXIST; BUT IT
3 WILL FOLLOW THE SAME UPWARD TREND IN VALUE AS PROPERTIES
4 WHICH ARE ISOLATED FROM SUCH A BUSINESS.

5 MS. ANDERSON: I HAVE NO FURTHER QUESTIONS.

6 THE COURT: ANY FURTHER QUESTIONS?

7 MR. LAWSON: NO, YOUR HONOR. MR. DOWNS MAY BE
8 EXCUSED.

9 THE COURT: ANY OBJECTION, MS. ANDERSON?

10 MS. ANDERSON: NO, SIR.

11 THE COURT: YOU'RE FREE TO GO, SIR.

12 THE WITNESS: THANK YOU.

13 MR. LAWSON: THAT'S OUR CASE, YOUR HONOR.

14 THE COURT: OKAY, THE COMPLAINANT RESTS.

15 MS. ANDERSON: YOUR HONOR, I'D LIKE TO JUST ENTER
16 SOME THINGS IN THE RECORD WHICH I BELIEVE HAVE ALREADY BEEN
17 STIPLATED TO. FIRST OF ALL, THE ZONING ORDINANCE THAT HAS
18 BEEN PASSED AND --

19 THE COURT: THAT'S NO. 1 -- DEFENDANT'S NO. 1.
20 THAT'S IN.

21 MS. ANDERSON: SECOND OF ALL, THIS IS A
22 COMPILATION OF FOUR FAIRFAX COUNTY ZONING MAPS OF THE
23 SUBJECT PROPERTY. MAY I OUTLINE THE SUBJECT PROPERTY FOR

1 THE COURT: IT'S ADMITTED.

2 (THE DOCUMENT HERETOFORE REFERRED
3 TO WAS MARKED DEFENDANT'S EXHIBIT
4 NO. 17 FOR IDENTIFICATION AND WAS
5 RECEIVED IN EVIDENCE.)

6 BY MS. ANDERSON:

7 Q I'D ASK YOU TO IDENTIFY DEFENDANT'S NO. 18.

8 A YES, THIS IS A COPY OF THE AMENDMENT AS ADOPTED
9 BY THE BOARD.--

10 MR. LAWSON: THIS IS ALREADY IN EVIDENCE, YOU
11 KNOW.

12 THE WITNESS: AND AS PRESENTED BY THE CLERK TO
13 THE BOARD. THE AMENDMENT BEING ADOPTED ON -- HAVING BEEN
14 ADOPTED ON OCTOBER 22, 1979.

15 THE COURT: THE SAME AS COMPLAINANT'S EXHIBIT NO.
16 11?

17 MS. ANDERSON: IT'S THE SAME AS 11, YOUR HONOR.
18 I'M SORRY. I WON'T CLUTTER THE RECORD THEN.

19 BY MS. ANDERSON:

20 Q MR. YATES, WHY ARE PLANT NURSERIES ALLOWED IN
21 RESIDENTIAL ZONES AT ALL?

22 A PLANT NURSERIES, LIKE OTHER USES, COULD WELL BE
23 AND CAN WELL BE COMPATIBLE IN RESIDENTIAL DISTRICTS. MANY

1 HAVE CHARACTERISTICS WHICH, AGAIN, COULD BE VERY COMPATIBLE
2 WITH ADJACENT RESIDENTIAL USES. THEY DO REQUIRE, GENERALLY
3 SPEAKING -- PLANT NURSERIES, AS WE GENERALLY KNOW THEM, DO
4 REQUIRE CONSIDERABLE LAND AREA FOR STORING OF STOCK;
5 DISPLAY OF STOCK OUTDOORS; AND, BECAUSE OF THIS REQUIREMENT
6 -- LAND AREA REQUIREMENT -- AND THE ECONOMICS OF THE
7 INDUSTRY, IF YOU WILL, IT WOULD BE SOMEWHAT UNREALISTIC IN MY
8 EYES TO FORCE THEM ENTIRELY WITHIN THE COMMERCIAL AND
9 INDUSTRIAL-ZONED DISTRICTS.

10 I THINK IT'S IN RECOGNITION OF THE NEED OF THE
11 INDUSTRY AND THE PARTICULAR CHARACTERISTICS OF THE USE
12 ITSELF, IF IT SUGGESTS THAT IT CAN WELL BE AN APPROPRIATE
13 USE IN CERTAIN LOCATIONS AND PROPERLY REGULATED IN
14 RESIDENTIAL DISTRICTS.

15 Q WHAT'S THE PURPOSE OF THE SPECIAL EXCEPTION?

16 A THE SPECIAL EXCEPTION REALLY IS DESIGNED TO
17 ADDRESS USES SUCH AS THIS, SUCH AS PLANT NURSERIES, USES
18 WHICH HAVE CHARACTERISTICS WHICH MIGHT BE A LITTLE MORE
19 INTENSIVE IN NATURE THAN OTHER SIMILAR TYPE USES.

20 RATHER THAN CREATE SEPARATE ZONING DISTRICTS OR
21 RESTRICT SUCH USES TO LESS RESTRICTIVE DISTRICTS SUCH AS
22 THE COMMERCIAL AND INDUSTRIAL, WE HAVE EMPLOYED THE SPECIAL
23 EXCEPTION AS WELL AS THE SPECIAL PERMIT APPLICATION TO

1 ALLOW SUCH USES TO LOCATE IN LESS INTENSE DISTRICTS,
2 RESIDENTIAL DISTRICTS, IF YOU WILL, WITH PROPER SAFEGUARDS;
3 AND, IN A CASE-BY-CASE BASIS, TO INSURE COMPATIBILITY WITH
4 RESIDENTIAL COMPLIANCE.

5 ABSENT THE SPECIAL EXCEPTION, WE WOULD HAVE NO
6 RECOURSE OTHER THAN -- SUCH AS THE SUBJECT PLANT NURSERIES
7 -- TO FORCE THEM INTO COMMERCIAL AND INDUSTRIAL DISTRICTS,
8 WHICH, AGAIN, IN MY MIND, IT'S UNREALISTIC, IMPRACTICAL,
9 AND UNREASONABLE.

10 Q WHY DOES MR. CUPP NEED A SPECIAL EXCEPTION?

11 A UNDER THE PROVISIONS OF SECTION 15-101 OF THE
12 ZONING ORDINANCE, PARAGRAPH 2 STATES THAT, IN ESSENCE, ANY
13 USE THAT'S OUT THERE AND GOT THERE AS A PERMITTED USE OR A
14 USE BY RIGHT IN YEARS GONE BY CAN CONTINUE; AND IT'S NOW
15 NOT ALLOWED BY RIGHT IN A GIVEN ZONING DISTRICT. IT'S ONLY
16 ALLOWED BY SPECIAL PERMIT OR SPECIAL EXCEPTION. THAT USE
17 CAN CONTINUE TO EXIST. IT SHALL NOT BE DEEMED NON-CONFORMING;
18 HOWEVER, IF IT WAS TO EXPAND OR INCREASE IN SCOPE OR
19 ACTIVITY OR BUILDING BULK -- AND I THINK THE WORDS ARE
20 "REPLACEMENT" OR "ENLARGEMENT" -- THAT IT SHALL BE SUBJECT
21 TO THE STANDARDS IN THE APPLICATION OF A SPECIAL EXCEPTION.
22 * SO, AGAIN, IT'S THE PROVISIONS OF 15-101,
23 PARAGRAPH 2, WHICH SUGGESTED THAT MR. CUPP, IN HIS DESIRE TO

to Cross of 142

1 MR. LAWSON: YES, SIR.

2 THIS IS A COPY, YOUR HONOR, OF WALTER PHILLIPS OR
3 LEE PHILLIPS, I SHOULD SAY, RESUME.

4 THE COURT: JUST SIT ANYWHERE YOU CAN, MR. YATES,
5 THE BEST YOU CAN. I'M SORRY WE'RE IN THIS COURTROOM.

6 GO AHEAD.

7 MS. ANDERSON: YOUR HONOR, JUST TO CLEAN UP THE
8 RECORD, I NOTICE ON DEFENDANT'S EXHIBIT NO. 6 WE'RE MISSING
9 TWO PAGES; AND I JUST WANT TO INSERT THE ADDITIONAL PAGES.

10 THE COURT: WHY DON'T YOU GIVE THAT TO THE CLERK.
11 THAT GOES WITH DEFENDANT'S EXHIBIT 6; IS THAT CORRECT?

12 MS. ANDERSON: YES, UH-HUH. I BELIEVE THAT'S THE
13 1959 ZONING ORDINANCE.

14 THE COURT: ARE WE READY?

15 MS. ANDERSON: YES, SIR.

16 THE COURT: OKAY. GO AHEAD, SIR.

17 MR. LAWSON: ALL RIGHT.

18 CROSS EXAMINATION

19 BY MR. LAWSON:

20 Q SIR, LET ME BEGIN BY SHOWING YOU A COPY OF THE
21 STAFF REPORT IN THIS PARTICULAR CASE THAT'S BEEN MARKED AND
22 HAS BEEN RECEIVED AS COMPLAINANT'S EXHIBIT NO. 6; AND I'M
23 SURE, OF COURSE, THAT YOU LOOKED AT THAT ON MANY OCCASIONS;

1 IS THAT CORRECT?

2 A THAT'S CORRECT.

3 Q AND THERE ARE A SERIES OF LETTERS THAT WERE
4 ATTACHED TO THE STAFF REPORT AND I ASSUME THEY ARE ALL
5 ATTACHED THERETO AND MADE A PART OF THE RECORD; IS THAT
6 CORRECT?

7 A THAT'S CORRECT.

8 Q NOW, YOU WERE OBVIOUSLY INVOLVED IN THE
9 PREPARATION OF THIS PARTICULAR APPLICATION, I WOULD ASSUME;
10 IS THAT CORRECT?

11 A THAT'S CORRECT.

12 Q AND BOB DAVIS WAS THE PARTICULAR STAFF MAN THAT
13 WAS ASSIGNED TO THIS CASE; IS THAT RIGHT?

14 A HE WAS THE COORDINATOR OF THIS PARTICULAR CASE,
15 THAT'S CORRECT.

16 Q OKAY, AND IT'S HIS RESPONSIBILITY, WHEN YOU SAY
17 "THE COORDINATOR", TO PUT TOGETHER, I TAKE IT, THE STAFF
18 REPORT AND TO HANDLE CORRESPONDENCE WITH THE APPLICANT
19 AND/OR HIS ATTORNEY OR WHOEVER; ISN'T THAT CORRECT?

20 A THAT'S CORRECT.

21 Q AND, AGAIN, THIS IS ALL DONE UNDER YOUR SUPERVISION
22 AND CONTROL; IS THAT -- WOULD THAT BE CORRECT?

23 A THAT IS CORRECT.

1 Q ALL RIGHT, SIR. WOULD HE PERIODICALLY CHECK WITH
2 YOU AS TO A PARTICULAR APPLICATION? WOULD THAT BE A STAN-
3 DARD PRACTICE OR PROCEDURE --

4 A YES, IT IS.

5 Q FOR ALL THE STAFF PEOPLE? AND WAS THAT DONE IN
6 THIS PARTICULAR INSTANCE?

7 A YES, IT'S MY RECOLLECTION THAT BOB AND I HAD
8 SEVERAL CONVERSATIONS WITH REFERENCE TO THE PARTICULARS OF
9 THIS APPLICATION.

10 Q I WOULD ASSUME, WOULDN'T IT BE FAIR TO SAY, THAT
11 THAT WAS PARTICULARLY DONE IN THIS CASE BECAUSE THIS CASE
12 IS SOMEWHAT CONTROVERSIAL AND BEING THE FIRST SE UNDER THE
13 NEW AMENDMENT; ISN'T THAT CORRECT?

14 A THAT'S CORRECT.

15 Q I BELIEVE THAT THIS OTHER CASE DIDN'T ACTUALLY
16 COME IN UNTIL LATER, DID IT?

17 A IT WAS SUBSEQUENTLY FILED.

18 Q NOW, LOOK AT THE DOCUMENTS THERE THAT ARE
19 ATTACHED, PARTICULARLY BEGINNING WITH THE DECEMBER 6 LETTER
20 WHICH I WROTE TO MR. DAVIS. DO YOU HAVE THAT LETTER?

21 A IT DOES NOT SEEM TO BE IN HERE. CORRESPONDENCE
22 IN HERE IS DATED JANUARY AND FEBRUARY.

23 Q I HAD ASKED THAT ALL OF THOSE DOCUMENTS BE MADE --

1 OR LETTER, RATHER -- BE MADE PART OF THE -- WELL, LET ME
2 ASK YOU THIS: I ASSUME THAT IT HAS THE ORIGINAL LETTER OF
3 JUSTIFICATION WHICH IS DATED SEPTEMBER THE 4TH, 1979?
4 THAT WOULD BE A PART OF THE BOARD -- SHOULD BE A PART OF
5 THE ACTUAL APPLICATION ITSELF?

6 A I DO HAVE THAT.

7 Q OKAY; AND SUSSEQUENT, YOU DON'T, YOU SAY, HAVE
8 A LETTER OF MARCH THE 6TH, 1979?

9 A MARCH THE 6TH?

10 Q I'M SORRY. I SAID MARCH THE 6TH -- DECEMBER THE
11 6TH? YOU DON'T HAVE THAT?

12 A NO, I COULD NOT FIND THAT.

13 Q OKAY. LET ME SHOW YOU A COPY OF A LETTER -- I
14 SUPPOSE I BETTER HAVE THIS MARKED FOR IDENTIFICATION,
15 COMPLAINANT'S EXHIBIT --

16 THE CLERK: 39.

17 MR. LAWSON: 39.

18 YOUR HONOR, WE HAD AGREED EARLIER THAT ALL
19 CORRESPONDENCE WOULD BE A PART OF THE RECORD. I DON'T KNOW
20 WHY IT'S NOT IN THERE. IT SHOULD BE.

21 THIS IS A LETTER -- DO YOU HAVE A COPY OF THIS?

22 MS. ANDERSON: NO, I DON'T BELIEVE I DO. YEAH,
23 I'VE SEEN THAT ONE.

1 MR. LAWSON: I WOULD LIKE TO MAKE THIS A PART OF
2 THE RECORD, IF WE MIGHT INTRODUCE THAT, YOUR HONOR?

3 THE COURT: ANY OBJECTION, MS. ANDERSON?

4 MS. ANDERSON: NO, YOUR HONOR.

5 THE COURT: OKAY.

6 (THE DOCUMENT HERETOFORE REFERRED
7 TO WAS MARKED PLAINTIFF'S EXHIBIT
8 NO. 39 FOR IDENTIFICATION AND WAS
9 RECEIVED IN EVIDENCE.)

10 BY MR. LAWSON:

11 Q INDICATED IN THERE IN THAT PARTICULAR LETTER IS
12 THAT WE OBJECTED TO THE DEDICATION AND THE ROAD IMPROVEMENTS;
13 ISN'T THAT CORRECT?

14 A THAT'S CORRECT.

15 Q NOW, I SHOW YOU -- WELL, LET ME WITHDRAW THAT.

16 LOOK AT THE LETTER OF JANUARY 4, 1980, FROM
17 ROBERT DAVIS ADDRESSED TO ME.

18 A I HAVE IT.

19 Q YOU DO HAVE THAT LETTER?

20 A UH-HUH.

21 Q OKAY. SOB DAVIS INDICATES IN THERE THAT THIS
22 NEW AMENDMENT WOULD PROHIBIT THE SALE OF RETAIL ITEMS NOT
23 SPECIFICALLY DESIGNATED SOLELY TO MAINTAIN AND PRESERVE THE

1 LIFE AND HEALTH OF NURSERY STOCK, SUCH AS GARDEN TOOLS,
2 HOSES, POTTERY, STATUES, AND BIRDBATHS; ISN'T THAT CORRECT?

3 A THAT'S CORRECT.

4 Q AND HE ALSO STATES IN THERE; AND I QUOTE,
5 "SUBSEQUENT TO THE PLANNING COMMISSION HEARING WHERE THE
6 STAFF RECOMMENDED APPROVAL, MR. CUPP INFORMED ME THAT THESE
7 ITEMS WERE CURRENTLY BEING SOLD ON SITE. UNLESS THESE
8 ITEMS ARE REMOVED FROM THE SITE AS SALES ITEMS, THE STAFF
9 WILL HAVE TO RECOMMEND A DENIAL PENDING SPECIAL EXCEPTION
10 APPLICATION TO THE BOARD OF SUPERVISORS"; ISN'T THAT
11 CORRECT?

12 A THAT'S A CORRECT STATEMENT, YES.

13 Q SO, IN OTHER WORDS, IT WAS THE POSITION OF THE
14 STAFF AT THAT TIME THAT, EVEN BEFORE THIS MATTER WAS TO BE
15 HEARD BY THE BOARD OF SUPERVISORS, THAT MR. CUPP WOULD HAVE
16 TO, YOU MIGHT SAY, SORT OF IN PREPARATION OF HAVING THIS
17 SE APPROVED, BRING HIMSELF INTO CONFORMANCE WITH THE NEW
18 ORDINANCE?

19 A THAT WAS THE STATEMENT AS PRESENTED, BUT IT'S MY
20 RECOLLECTION THAT THAT WAS LATER CLARIFIED.

21 Q RIGHT. WE'LL GET TO THAT, BUT THAT'S THE POSITION
22 OF THE STAFF AT THAT TIME, IS IT NOT?

23 A YES. I THINK WHAT HE IS PROBABLY TRYING TO SAY

1 WAS FINAL APPROVAL OF THE SPECIAL EXCEPTION WOULD
2 NECESSITATE THE REMOVAL OR THE NONSALE OF THESE ITEMS.

3 Q WELL, WE'LL GET TO THAT. SO, ON JANUARY THE 10TH,
4 DO YOU HAVE MY LETTER TO BOB DAVIS?

5 A THAT'S CORRECT.

6 Q AND, IN THAT LETTER, DID I OBJECT TO THAT
7 POSITION; AND AGAIN REITERATE OUR OBJECTION TO THE ROAD
8 IMPROVEMENTS; ISN'T THAT CORRECT?

9 A THAT'S CORRECT.

10 Q AND WE ALSO TAKE THE POSITION THAT MY CLIENT HAS
11 THE RIGHT TO CONTINUE THE SALE OF PRODUCTS THAT WERE IN
12 SALE OR BEING SOLD AT THAT TIME; ISN'T THAT CORRECT?

13 A THAT'S THE POSITION YOU PRESENTED IN THAT LETTER,
14 SIR.

15 Q OKAY, SIR. NOW, IN RESPONSE TO THAT, BOB DAVIS
16 WROTE TO ME ON JANUARY THE 23RD, 1980; ISN'T THAT CORRECT?

17 A THAT'S CORRECT.

18 Q AND THAT'S IN THE RECORD?

19 A THAT'S CORRECT.

20 Q ALL RIGHT, SIR; AND HE STATES THERE AS YOU JUST
21 EARLIER STATED, HE BACKS OFF OF THE POSITION THAT WE HAD
22 TO BRING OURSELVES INTO CONFORMANCE PRIOR TO THE HEARING;
23 BUT, THAT SUSSEQUENT, ONCE THE APPLICATION WOULD BE APPROVED,

1 THEN HE WOULD HAVE TO CEASE THE SALE OF MAN-MADE PRODUCTS;
2 ISN'T THAT CORRECT?

3 A THAT'S CORRECT.

4 Q SO, IN OTHER WORDS, THEN THAT WAS THE POSITION OF
5 THE COUNTY STAFF THEN THAT, IF AND WHEN THIS APPLICATION
6 WERE TO BE APPROVED, THEN WOLF TRAP NURSERY WOULD HAVE TO
7 CEASE THE SALE OF MAN-MADE PRODUCTS; ISN'T THAT CORRECT?

8 A THAT IS CORRECT. THERE IS NO WAY THAT WE COULD
9 RECOMMEND TO THE BOARD OR THE BOARD COULD ADOPT, IN MY
10 JUDGMENT, A SPECIAL EXCEPTION FOR THIS USE THAT WAS NOT IN
11 CONFORMANCE WITH THE PROVISIONS IN THE THEN CURRENT ZONING
12 ORDINANCE.

13 Q ALL RIGHT, SIR. I WOULD ASSUME THEN ARE YOU
14 TELLING US THAT IT IS CURRENTLY THE POSITION THEN OF THE
15 COUNTY THAT ONCE THIS APPLICATION WERE APPROVED, THEN THE
16 APPLICANT WOULD THEN HAVE TO BRING HIMSELF INTO COMPLIANCE
17 WITH THE OCTOBER 10 AMENDMENT; ISN'T THAT CORRECT?

18 A THAT'S CORRECT. OCTOBER 22 I BELIEVE IT WAS.

19 Q WHAT DID I SAY? THE 10?

20 A 10.

21 Q I BEG YOUR PARDON. AGAIN, I WROTE TO MR. DAVIS
22 ON JANUARY THE 29TH, DID I NOT?

23 A YES.

1 Q AND THAT'S ALSO A PART OF THE RECORD?

2 A YES, IT IS.

3 Q AND, IN THE SECOND PARAGRAPH, PARTICULARLY, I
4 STATED THAT IT WAS MY CLIENT'S POSITION WE OBJECTED TO THE
5 STAFF'S INTERPRETATION OF THE ORDINANCE AND AS TO THE
6 CONDITIONS OF THE SPECIAL EXCEPTION?

7 A YES, YOU DID.

8 Q AND CITES LEGAL ARGUMENTS IN THERE; IS THAT
9 CORRECT?

10 A THAT'S CORRECT.

11 Q OKAY, AND I ALSO OBJECTED TO THE ROAD IMPROVEMENTS?

12 A THAT'S CORRECT.

13 Q AND PARTICULARLY THE SECOND PARAGRAPH OR REALLY
14 THE FIRST FULL PARAGRAPH OF PAGE 2. WOULD YOU READ THAT
15 PARAGRAPH TO THE COURT?

16 A "IT HAS BEEN THE POSITION OF MY CLIENT AND
17 CONTINUES TO BE HIS POSITION THAT HE SEEKS THE SPECIAL
18 EXCEPTION (WITHOUT THE CONDITIONS AND LEGAL INTERPRETATION
19 GIVEN TO IT BY THE STAFF) ONLY AS A METHOD OF EXHAUSTING
20 HIS ADMINISTRATIVE REMEDIES FOR IT IS MR. CUPP'S POSITION
21 THAT HE HAS THE RIGHT TO APPLY FOR AND SEEK APPROVAL OF A
22 BUILDING PERMIT TO CONSTRUCT THE IMPROVEMENTS AS SHOWN ON
23 THE DEVELOPMENT PLAN ASSUMING, OF COURSE, THAT APPLICABLE

1 REQUIREMENTS OF THE BUILDING CODE ARE MET WITH PRIOR BOARD
2 APPROVAL; AND THAT HE HAS A VESTED RIGHT TO CONTINUE HIS
3 BUSINESS AND TO ACCOMMODATE ITS NORMAL, NATURAL GROWTH."

4 Q SO, YOU UNDERSTOOD, DID YOU NOT, AT THAT TIME
5 THAT IT WAS THE APPLICANT'S POSITION THAT HE REALLY DIDN'T
6 EVEN HAVE TO BRING HIMSELF UNDER THIS ORDINANCE; AND IT WAS
7 QUITE CLEAR ALL ALONG THAT WE CONTESTED THE LEGAL POSITION
8 THAT THE COUNTY WAS ASSUMING UNDER THIS ORDINANCE; IS THAT
9 NOT CORRECT?

10 A THAT IS CORRECT.

11 Q YOU DIDN'T HAVE ANY DOUBTS IN YOUR MIND WHAT THE
12 POSITION OF MR. CUPP WAS ASSUMING THAT IN THIS CASE, DID
13 YOU?

14 A NO, WE DEFINITELY RECOGNIZED THAT HIS POSITION
15 WAS CONTRARY TO THAT OF OURS.

16 Q AND WOULDN'T IT BE FAIR TO CHARACTERIZE THAT IT
17 WAS CERTAINLY THE POSITION OF THE COUNTY THAT THIS ORDINANCE
18 WAS CONSTITUTIONAL AND VALID AND ALSO THAT IT WAS APPLICABLE
19 TO MR. CUPP'S BUSINESS? THERE WASN'T ANY QUESTION IN THE
20 COUNTY'S MIND; ISN'T THAT CORRECT?

21 MS. ANDERSON: MR. YATES CAN ONLY SPEAK ON HIS
22 BEHALF, NOT ON BEHALF OF THE COUNTY.

23 THE COURT: SUSTAINED.

1 MR. LAWSON: WELL, YOUR HONOR, I THINK THE COUNTY
2 CAN ONLY OBVIOUSLY SPEAK THROUGH ITS AGENTS.

3 THE COURT: IN HIS POSITION AS ZONING ADMINISTRATOR.

4 MR. LAWSON: OKAY.

5 BY MR. LAWSON:

6 Q AND, IT IS YOUR POSITION AS ZONING ADMINISTRATOR
7 AND THE ONE WHO IS IN CHARGE OF THE DRAFTING OF ORDINANCES
8 AS WELL AS ENFORCING THE ORDINANCES, AND PARTICULARLY IN
9 CHARGE OF THE PREPARATION OF THIS PARTICULAR APPLICATION
10 AND MAKING THE PRESENTATION TO -- NOT YOU PERSONALLY, BUT
11 BEING IN CHARGE OF THE PRESENTATION -- TO THE BOARD OF
12 SUPERVISORS, IT WAS ALWAYS, AND I ASSUME STILL IS, YOUR
13 POSITION THAT THE ORDINANCE WAS VALID AND CONSTITUTIONAL;
14 IS THAT CORRECT?

15 A MOST CERTAINLY.

16 Q AND YOU HAD HAD NO INDICATION FROM THE BOARD OR
17 ANYONE ELSE IN THE COUNTY THAT A CONTRARY POSITION WAS
18 GOING TO BE TAKEN, DID YOU?

19 A THAT A CONTRARY -- THAT SOMEBODY ELSE --

20 Q THAT A CONTRARY POSITION WAS TO BE TAKEN?

21 A NO, I DID NOT, SIR.

22 Q ALL RIGHT, SIR; AND THAT WOULD EQUALLY BE TRUE OF
23 THE ROAD IMPROVEMENTS THAT WERE SOUGHT BY THE COUNTY IN THIS

1 PARTICULAR INSTANCE -- THAT THEY WERE VALID AND THAT,
2 LEGALLY, THAT THE COUNTY COULD MAKE A DEVELOPER MAKE THESE
3 IMPROVEMENTS; ISN'T THAT CORRECT?

4 A THAT'S CORRECT.

5 Q ALL RIGHT, SIR. NOW, THIS PARTICULAR CASE WAS
6 FIRST SCHEDULED IN FEBRUARY OF 1980; ISN'T THAT CORRECT;
7 AND THEN SUBSEQUENTLY DEFERRED FOR ONE MONTH UNTIL MARCH
8 THE 10TH?

9 A THAT'S MY RECOLLECTION.

10 Q AND THAT DEFERRAL WAS MADE AT THE REQUEST OF
11 SUPERVISOR FALCK; ISN'T THAT RIGHT?

12 A I DON'T REALLY RECALL.

13 Q ALL RIGHT, SIR. DO YOU RECALL A LETTER THAT I
14 WROTE TO YOU ON FEBRUARY 14, '80? IT'S IN THE PACKAGE. IT
15 SHOULD BE. IF IT'S NOT, I'LL GIVE YOU A COPY.

16 A NO, I SEEM TO RUN OUT IN JANUARY.

17 MR. LAWSON: MARK THIS FOR IDENTIFICATION.

18 THE WITNESS: I'M SORRY. I DO HAVE IT.

19 BY MR. LAWSON:

20 Q YOU DO?

21 A UH-HUH.

22 Q FEBRUARY THE 14TH, MY LETTER ADDRESSED TO YOU?

23 A THAT'S CORRECT.

1 Q SO THAT OBVIOUSLY WOULD HAVE BEEN DURING THE
2 PERIOD OF TIME THAT THE CASE WAS DEFERRED BY THE BOARD;
3 ISN'T THAT CORRECT?

4 A THAT'S CORRECT.

5 Q AND YOU AND I HAD TALKED ABOUT THIS, HAD WE NOT,
6 ABOUT THE POSSIBILITY OF AN AMENDMENT TO THE ORDINANCE?

7 A YES, WE HAD.

8 Q IN THIS PARTICULAR LETTER OF FEBRUARY THE 14TH,
9 I PROPOSED AN AMENDMENT TO THE ORDINANCE WHICH IS THE
10 POSITION OF MR. CUPP THAT THIS WOULD TAKE CARE OF HIS
11 PARTICULAR SITUATION; ISN'T THAT CORRECT?

12 A THAT'S CORRECT.

13 Q AND I TAKE IT, IT WAS YOUR POSITION THAT THIS
14 WAS NOT AN AMENDMENT THAT YOU WERE WILLING TO RECOMMEND TO
15 THE BOARD OF SUPERVISORS?

16 A THAT'S CORRECT, BASED UPON CONSULTATION WITH THE
17 COUNTY ATTORNEY'S OFFICE.

18 Q ALL RIGHT, SIR; AND, SO, THIS ATTEMPT TO AMEND
19 THIS PARTICULAR APPLICATION -- OR, EXCUSE ME, TO AMEND THE
20 ORDINANCE -- TO TAKE CARE OF THIS PARTICULAR SITUATION, THAT
21 APPLICATION WAS REVOKED THEN; ISN'T THAT CORRECT?

22 A THAT'S CORRECT.

23 Q ALL RIGHT. NOW, TURNING PARTICULARLY TO -- OH,

1 LET ME MAKE SURE THAT MR. CUPP'S LETTER OF FEBRUARY THE
2 4TH, 1980, IS ALSO IN THAT PACKAGE.

3 A IT IS.

4 Q I'M SURE THAT'S PART OF IT.

5 A IT IS.

6 Q OKAY, FINE. NOW, IT WAS THE RECOMMENDATION OF
7 THE STAFF, IS IT, IN THIS PARTICULAR CASE, THAT THE
8 APPLICATION BE APPROVED; ISN'T THAT CORRECT?

9 A THAT'S CORRECT, AS LONG AS IT FULLY CONFORMED
10 WITH THE CURRENT PROVISIONS OF THE ZONING ORDINANCE.

11 Q AND JUST TO MAKE THAT -- THAT NOBODY HAS ANY
12 AMBIGUITY IN THEIR MIND ABOUT THAT, THAT ONCE THIS THING
13 WAS APPLIED -- I MEAN ONCE THE SE WAS GRANTED -- THEN, OF
14 COURSE, THE ORDINANCE WOULD HAVE BEEN APPLIED; ISN'T THAT
15 CORRECT, AFTER?

16 A THAT'S CORRECT.

17 Q OKAY. NOW, APPARENTLY, YOUR STAFF, UNDER YOUR
18 DIRECTION AND SUPERVISION HAD NO PROBLEM WITH THE LOCATION
19 OF THE RETAIL/COMMERCIAL NURSERY AT THIS PARTICULAR SPOT, I
20 TAKE IT; ISN'T THAT CORRECT, BECAUSE YOU HAD RECOMMENDED
21 FAVORABLE ACTION ON THIS?

22 A YOU SAY A RETAIL/COMMERCIAL NURSERY. WE DID HAVE
23 PROBLEMS WITH THE FULL RANGE OF COMMERCIAL ACTIVITIES AS

1 HAD TAKEN PLACE HERETOFORE; BUT AN EXPANSION OF A TRUE
2 PLANT NURSERY, NO, WE DID NOT HAVE ANY PROBLEMS WITH THAT.

3 Q WELL, YOU KNEW THAT, AT THE TIME OF THE
4 APPLICATION, WHAT TYPE OF AN OPERATION MR. CUPP -- WOLF
5 TRAP NURSERY, INC., -- WAS ENGAGED IN; ISN'T THAT CORRECT?

6 A THAT'S CORRECT.

7 Q AND YOU KNEW THIS WAS A RETAIL OPERATION, A NURSERY;
8 ISN'T THAT CORRECT?

9 A THAT'S CORRECT.

10 Q I MEAN, OBVIOUSLY, HE WAS IN THE BUSINESS TO MAKE
11 MONEY AS I WOULD ASSUME ALL NURSERIES ARE ENGAGED IN; ISN'T
12 THAT CORRECT?

13 A THAT'S CORRECT.

14 Q OKAY, SIR; AND THE STAFF APPARENTLY DID NOT HAVE
15 ANY PROBLEMS WITH THE LOCATION OF THIS PARTICULAR FACILITY
16 AT THAT SPOT, DID IT?

17 A NO, IT DID NOT.

18 Q YOU HADN'T HAD ANY TROUBLE WITH THIS PARTICULAR
19 USE AT THAT SPOT FOR EIGHT PLUS YEARS?

20 MS. ANDERSON: YOUR HONOR, THAT'S IRRELEVANT.

21 THE COURT: SUSTAINED.

22 MR. LAWSON: OKAY, NO RECORD OF COMPLAINTS, THAT'S
23 FINE.

1 BY MR. LAWSON:

2 Q NOW, YOU HAVE PREVIOUSLY TESTIFIED, PHIL, I
3 BELIEVE, THAT YOU RECOGNIZE THE ECONOMIC REALITIES, I THINK
4 WERE YOUR WORDS, OF LOCATING A NURSERY IN A RESIDENTIAL
5 AREA; ISN'T THAT CORRECT? YOU RECOGNIZED THAT THAT'S WHERE
6 THEY HAD TO BE FROM AN ECONOMIC STANDPOINT?

7 A A TRUE PLANT NURSERY THAT DOES REQUIRE ADEQUATE
8 GROUNDS FOR THE GROWING AND CULTIVATING OF ITS CROPS, YES,
9 THOSE NEED A LARGE AMOUNT OF LAND AREA; AND THUS,
10 CONSEQUENTLY, IS AND COULD BE APPROPRIATE IN THE
11 RESIDENTIAL DISTRICT.

12 Q AND YOU WOULD CERTAINLY RECOGNIZE THAT THAT TYPE
13 OF FACILITY FROM THE ECONOMIC REALITIES WOULD NOT FIT IN A
14 C AREA; ISN'T THAT CORRECT, LAND THAT WAS ZONED FOR
15 COMMERCIAL USES?

16 A I WOULDN'T SAY IT NECESSARILY WOULDN'T FIT. WE
17 DO HAVE SEVERAL NURSERIES IN THE COUNTY IN COMMERCIAL
18 DISTRICTS.

19 Q WELL, MOST OF THOSE WERE THERE PRIOR TO THE ZONING;
20 ISN'T THAT CORRECT?

21 A I DON'T KNOW WHICH CAME FIRST QUITE FRANKLY.

22 Q OKAY.

23 A THERE ARE SEVERAL IN MY MIND THAT IT IS VERY

1 CONCEIVABLE THAT THE ZONING CAME SUBSEQUENT TO, BUT THEN
2 THE REVERSE WOULD ALSO BE TRUE.

3 Q ALL RIGHT, SIR; BUT YOU CERTAINLY -- YOU
4 CERTAINLY DO RECOGNIZE BECAUSE OF THE COST AND THE PRICE
5 OF LAND AND THAT A NURSERY'S GOT TO HAVE A FAIR AMOUNT OF
6 LAND -- I BELIEVE THE ORDINANCE CALLS FOR AT LEAST ONE ACRE
7 UNDER THE CURRENT ORDINANCE; ISN'T THAT CORRECT?

8 A THAT'S CORRECT.

9 Q AS A MATTER OF FACT, THE STAFF EVEN TOYED WITH THE
10 IDEA OF MAKING THAT A MINIMUM OF FIVE ACRES, ISN'T THAT
11 CORRECT?

12 A THAT'S CORRECT.

13 Q AND, OBVIOUSLY, WITH THE COST OF COMMERCIAL LAND,
14 THAT WOULD CERTAINLY BE A VERY IMPORTANT FACTOR IN THE
15 LOCATION OF A NURSERY; ISN'T THAT CORRECT?

16 A THAT'S CORRECT.

17 Q ALL RIGHT, SIR. NOW, YOU -- THROUGHOUT YOUR
18 TESTIMONY, AS WELL AS THE DEPOSITION WHICH I TOOK BACK IN
19 JUNE OF THIS YEAR, YOU TALK ABOUT THE COMMERCIALIZATION AND
20 YOU TALK ABOUT THE COMMERCIAL FLAVOR AND THE EXPANSION
21 THEREOF AS BEING A "PROBLEM", QUOTE, UNQUOTE, ASSOCIATED
22 WITH THE SALE OF MAN-MADE PRODUCTS WITH THE RETAIL NURSERY;
23 ISN'T THAT CORRECT? ISN'T THAT THE WAY THAT YOU CHARACTERIZE

1 THE PROBLEM?

2 A THE SALE OF MAN-MADE PRODUCTS, YES, IS DEFINITELY
3 A STRONG COMPONENT OF THAT PROBLEM.

4 Q BUT WHEN YOU SAY "THAT PROBLEM", I'M TALKING ABOUT
5 THE EXPANSION OF THE COMMERCIALIZATION IS THE WAY YOU
6 WOULD CHARACTERIZE THE PROBLEM; ISN'T THAT RIGHT?

7 A I'M SORRY. I DON'T UNDERSTAND THE QUESTION.

8 Q WELL, HAVEN'T YOU TESTIFIED ON BOTH OCCASIONS
9 THAT IT'S THE COMMERCIALIZATION AND THE COMMERCIAL
10 EXPANSION THAT IS ONE OF THE PROBLEMS IN THE ORDINANCE?

11 A THAT'S CORRECT.

12 Q OKAY. THAT WAS ONE OF THE OBJECTIVES THAT YOU
13 WERE TRYING TO GET A HANDLE ON OR WHATEVER?

14 A MOST DEFINITELY, YES.

15 Q OKAY, FINE. NOW, YOU CERTAINLY RECOGNIZE IN THE
16 SALE OF PLANTS THAT EACH TRANSACTION INVOLVES A COMMERCIAL
17 TRANSACTION; ISN'T THAT CORRECT?

18 A THAT'S CORRECT.

19 Q ALL RIGHT, SIR; AND, IN THE CASE OF MR. CUPP, HE
20 HAS PREVIOUSLY TESTIFIED THAT HE WOULD HAVE AS MANY AS
21 10,000 ITEMS OF STOCK ON HAND AT A PARTICULAR TIME. YOU
22 WOULD RECOGNIZE THAT EACH ONE OF THOSE TRANSACTIONS IS A
23 COMMERCIAL TRANSACTION; IS THAT NOT CORRECT?

1 A THAT'S CORRECT.

2 Q SO, YOU'RE TALKING ABOUT A TOTAL OF 10,000
3 COMMERCIAL TRANSACTIONS OVER A PARTICULAR PERIOD OF TIME;
4 ISN'T THAT CORRECT?

5 A THAT'S CORRECT.

6 Q ALL RIGHT; AND, AS LONG AS IT'S A SALE OF A LIVING
7 PLANT, YOU DON'T HAVE ANY PROBLEM WITH THAT, DO YOU?

8 A NO, I DO NOT.

9 Q EVEN THOUGH IT HAPPENS TO BE A COMMERCIAL
10 TRANSACTION?

11 A THAT'S CORRECT.

12 Q NOW, IF HE WERE TO SELL ONE SINGLE BIRDBATH DURING
13 THAT SAME PERIOD OF TIME, YOU WOULD HAVE A PROBLEM WITH THAT
14 PARTICULAR COMMERCIAL TRANSACTION; IS THAT WHAT YOU'RE
15 TELLING US?

16 A YES.

17 Q ALL RIGHT, SIR. SO, REALLY, WHAT YOU'RE TELLING
18 US IS THAT IT ISN'T THE FACT OF THE COMMERCIAL FLAVOR, IF
19 YOU WILL, OF THE TRANSACTION? IT'S THE PARTICULAR ITEM
20 BEING SOLD THAT YOU HAVE A PROBLEM WITH; ISN'T THAT A FAIR
21 STATEMENT?

22 A PARTIALLY, YEAH; BUT A PART OF THE COMMERCIAL
23 FLAVOR AS WELL IS JUST THE SHEER VIEW OR THE SHEER PRESENCE

1 OF BIRDBATHS, FOUNTAINS, RAILROAD TIES, AND WHAT HAVE YOU,
2 GIVE A VERY HEAVY AND STRONG COMMERCIAL APPEARANCE TO A
3 PIECE OF PROPERTY THAT TREES, BUSHES, SHRUBS, DO NOT; AND
4 IT'S PART OF THAT IMAGE, IF YOU WILL, THAT IS OF CONCERN
5 AND REFLECTS ON THE COMMERCIAL NATURE OF THE USE.

6 Q I UNDERSTAND THAT'S YOUR JUDGMENT, AND I UNDER-
7 STAND THAT'S THE OBJECTIVE; BUT, WHAT YOU'RE TELLING US IS
8 THAT 10,000 COMMERCIAL SALES INVOLVING -- OR COMMERCIAL
9 TRANSACTIONS -- INVOLVING THE SALE OF PLANTS, EVEN 100,000
10 TRANSACTIONS INVOLVING THE SALE OF PLANTS, PHILOSOPHICALLY
11 OR FROM A ZONING STANDPOINT, YOU DON'T HAVE ANY PROBLEM
12 WITH THAT?

13 MS. ANDERSON: YOUR HONOR, I THINK WE'VE ALREADY
14 COVERED THIS MATERIAL.

15 MR. LAWSON: THIS IS CROSS EXAMINATION.

16 THE COURT: OKAY. I'LL OVERRULE THE OBJECTION.

17 BY MR. LAWSON:

18 Q JUST ANSWER THE QUESTION. YOU DON'T HAVE ANY
19 PROBLEM WITH WHATEVER THE VOLUME OF SALES MAY BE?

20 A YEAH, BUT YOU'RE ATTEMPTING TO LIMIT THE WHOLE
21 PROBLEM TO JUST THE SALE OF THESE ITEMS. IT'S THE STORAGE,
22 THE DISPLAY, THAT IS ALSO -- HAS ALSO -- GOT TO BE TAKEN
23 INTO CONSIDERATION.

1 Q NO, I WANT YOU TO RESPOND TO A PARTICULAR QUESTION
2 THAT I ASKED YOU. YOUR COUNSEL CAN COME BACK AND ASK YOU
3 OTHER QUESTIONS.

4 MR. LAWSON: I DON'T THINK, YOUR HONOR, THAT THE
5 WITNESS IS ANSWERING THE QUESTION THAT HAS BEEN PUT TO HIM.
6 I THINK I'M ENTITLED TO AN ANSWER.

7 THE WITNESS: AS FAR AS ANY COMMERCIAL SALE OF
8 LIVE STOCK, NO, SIR.

9 BY MR. LAWSON:

10 Q OKAY, AND WHAT YOU HAVE ATTEMPTED TO DO IN THIS
11 PARTICULAR ORDINANCE IS TO SINGLE OUT CERTAIN ITEMS AND TO
12 SAY THAT, FOR SOME REASON, THOSE PARTICULAR SALES ARE BAD
13 AND THAT YOU'RE GOING TO BAN THEM UNDER THIS ORDINANCE;
14 ISN'T THAT CORRECT?

15 A WE'RE NOT SAYING THAT THEY'RE BAD. WE'RE JUST
16 SAYING THEY ARE NOT APPROPRIATELY LOCATED IN THE RESIDENTIAL
17 DISTRICT.

18 Q WELL, THERE MUST BE SOME REASON WHY YOU'RE GOING
19 TO BAN THESE PARTICULAR SALES? YOU WOULD AGREE WITH THAT?

20 A THAT IS CORRECT, AND I'VE TRIED TO ENUNCIATE
21 THOSE REASONS.

22 Q I'M SORRY?

23 A AND I'VE TRIED TO ENUNCIATE THOSE REASONS.

1 Q RIGHT; AND YOU WOULD CERTAINLY NOT TAKE THE
2 POSITION, WOULD YOU, THAT YOU HAVE THE ABSOLUTE POWER JUST
3 SIMPLY TO BAN THE SALE OF ANY ITEM?

4 MS. ANDERSON: YOUR HONOR, THAT'S AN ARGUMENTATIVE
5 QUESTION.

6 THE COURT: SUSTAINED.

7 MR. LAWSON: ALL RIGHT.

8 BY MR. LAWSON:

9 Q NOW, LET'S TALK ABOUT SOME OF THESE PARTICULAR
10 PRODUCTS THAT WE'VE SEEN THROUGH WITH YOU BEFORE.

11 A SHOW-AND-TELL AGAIN?

12 Q YES, SIR. I SHOW YOU COMPLAINANT'S EXHIBIT NO.
13 22, WHICH IS A BULB PLANTER.

14 A UH-HUH.

15 Q NOW, COULD YOU TELL US WHAT OTHER USES THAT
16 PARTICULAR ITEM COULD POSSIBLY HAVE OTHER THAN BEING USED
17 TO PLANT BULBS?

18 A WHAT OTHER USES?

19 Q YES.

20 A I'M NOT ONE HEAVY ON IMAGINATION. NOW, I THINK
21 THAT WOULD BE ONE OF THE MORE LOGICAL AND ONLY USES FOR
22 THAT TOOL.

23 Q AS A MATTER OF FACT, THERE ISN'T ANY OTHER USE

1 YOU COULD PUT THAT TO, IS THERE?

2 MS. ANDERSON: YOUR HONOR, HE JUST STATED THAT HE
3 COULDN'T THINK OF ANY OTHERS.

4 BY MR. LAWSON:

5 Q IF YOU NEED TIME TO THINK ABOUT IT, GO AHEAD, IF
6 YOU CAN THINK OF ANY OTHER USE YOU COULD PUT THAT TO.

7 A I GUESS ONE COULD TAKE IT TO THE BEACH AND BUILD,
8 YOU KNOW, SAND CASTLES WITH IT. IT COULD BE USED AS A FORM
9 OF A TOY I WOULD IMAGINE.

10 Q ALL RIGHT, SIR. ANY OTHER USE YOU CAN THINK OF?

11 A NONE AT THE MOMENT.

12 Q NOW, ARE YOU ABLE TO TELL US THAT THAT IN ANY WAY
13 IS DETRIMENTAL TO THE PUBLIC HEALTH?

14 A NOT AT ALL.

15 Q IT ISN'T?

16 A NO.

17 Q CAN YOU TELL US ANY WAY THAT IT IS DETRIMENTAL
18 TO THE PUBLIC MORALS?

19 A THAT OBJECT ITSELF?

20 Q YES, SIR.

21 A NO.

22 Q AND CAN YOU TELL US ANY WAY IT IS DETRIMENTAL TO
23 THE PUBLIC SAFETY?

1 A NO.

2 Q AND HOW ABOUT THE PUBLIC WELFARE?

3 A THE OBJECT ITSELF, NO, IS NO DETRIMENT TO THE
4 PUBLIC WELFARE.

5 Q ALL RIGHT, SIR. AS A MATTER OF FACT, MR. YATES,
6 THE QUESTION I JUST ASKED YOU, THE SAME ANSWER WOULD BE
7 APPLICABLE TO ALL OF THE ITEMS WHICH WE HAVE INTRODUCED; IS
8 THAT NOT CORRECT?

9 A THE OBJECTS THEMSELVES, THAT'S CORRECT; BUT WHERE
10 THEY ARE SOLD, THERE IS A DEFINITE TIE-IN TO THE PUBLIC
11 HEALTH, SAFETY, AND WELFARE IN MY MIND'S EYE.

12 Q NOW, PHIL --

13 A I WOULD TAKE THAT AS USING THE SAME ANALOGY.

14 Q JUST ANSWER THE QUESTIONS, IF YOU WILL. I HAD
15 SHOWED YOU EARLIER -- THIS IS COMPLAINANT'S EXHIBIT NO. 16
16 -- AND YOU HAD TESTIFIED THAT THEY WOULD BE ALLOWED TO SELL
17 THE PLANT BUT THEY WOULD NOT BE ALLOWED TO SELL THE POT THAT
18 THE PLANT IS IN; IS THAT NOT CORRECT?

19 A THAT'S CORRECT.

20 Q OKAY, SIR. NOW, I SHOW YOU ANOTHER PLANT --

21 (THE ARTICLE HERETOFORE REFERRED
22 TO WAS MARKED PLAINTIFF'S EXHIBIT
23 NO. 40 FOR IDENTIFICATION.)

1 BY MR. LAWSON:

2 Q -- WHICH IS AN AFRICAN VIOLET IN A PLASTIC
3 CONTAINER. I THINK THAT'S BEEN MARKED AS NO. 40; ISN'T
4 THAT CORRECT?

5 A THAT'S CORRECT.

6 Q NOW, YOU'RE TELLING US IN THE SAME ANSWER ONE
7 WOULD BE ALLOWED TO SELL THAT PLANT, WHICH IS THE AFRICAN
8 VIOLET; BUT HE WOULD NOT BE ALLOWED TO SELL THE POT; ISN'T
9 THAT CORRECT?

10 A THAT'S RIGHT, SIR.

11 Q SO, WHAT YOU'RE TELLING US THEN IS THAT, IF HE
12 WERE TO SELL THAT, HE WOULD HAVE TO TAKE THE PLANT OUT OF
13 THE POT IN ORDER TO SELL IT; ISN'T THAT CORRECT?

14 A HE WOULD NOT HAVE TO TAKE IT OUT OF THE POT, NO.
15 MOST PLANT NURSERIES OR MANY OF THEM SELL SUCH PRODUCTS IN
16 THESE LITTLE PRESSED PAPER OR DISPOSAL-TYPE CONTAINERS
17 WHICH WOULD BE MOST AGREEABLE, NO PROBLEM WITH THAT
18 WHATSOEVER.

19 Q WELL, THAT'S A MAN-MADE PRODUCT, IS IT NOT?

20 A PRESSED PAPER?

21 Q YES, SIR.

22 A YES.

23 Q WHAT'S THE DIFFERENCE BETWEEN ONE OF PLASTIC AND

1 ONE OF PAPER OTHER THAN WHAT IT'S MADE OUT OF?

2 A I GUESS THE ONE WOULD BE DISPOSAL WHEREAS, WHEN
3 YOU START ALLOWING THE SALE OF PLASTICS, CERAMICS, AND
4 WHAT HAVE YOU, THEN YOU DEFINITELY GET INTO A LARGER DISPLAY
5 AND CAPABILITY OF THIS TYPE OF PRODUCT WHICH IS NOT, IN OUR
6 JUDGMENT, APPROPRIATE IN A RESIDENTIAL DISTRICT.

7 Q ALL RIGHT, SIR. SO, NOW, WHAT YOU'RE TELLING US
8 IS THAT HE'S GOT A TOTAL OF 10,000 ITEMS -- LET'S ASSUME HE
9 HAS THAT IN STOCK; AND LET'S SAY THAT ALL OF THEM ARE
10 LOCATED IN A PLASTIC CONTAINER LIKE THAT. WHAT YOU'RE
11 TELLING US THEN IS HE WOULD HAVE TO TAKE IT OUT AND PUT IT
12 INTO A PIECE OF PAPER OR SOME SORT OF PRESSED PAPER I THINK
13 IS WHAT YOU CHARACTERIZED IT AS?

14 A UH-HUH.

15 Q IN ORDER TO SELL IT; IS THAT CORRECT?

16 A THAT'S CORRECT.

17 Q AND IF HE DIDN'T, HOW WOULD HE SELL IT? HE WOULD
18 HAVE TO TAKE IT OUT AND PUT IT IN A PIECE OF PAPER; IS THAT
19 WHAT HE WOULD HAVE TO DO?

20 A A CARDBOARD BOX, YES. MANY A TIME I'VE GONE TO A
21 PLANT NURSERY AND BROUGHT MY PRODUCE HOME IN DISPOSAL BOXES.
22 I DON'T BUY THE CONTAINERS AT THE NURSERY.

23 Q BUT IN THIS PARTICULAR INSTANCE, IF ALL OF THE

1 PLANTS ARE GROWN IN A PLASTIC CONTAINER, WHAT YOU'RE SAYING
2 IS HE'D HAVE TO TAKE IT OUT OF THE PLASTIC CONTAINER AND
3 THEN PUT IT INTO A PAPER CONTAINER OR A PIECE OF PAPER OR
4 JUST HAND IT TO THE INDIVIDUAL; ISN'T THAT CORRECT? THAT'S
5 WHAT YOU'RE TELLING US?

6 A ARE YOU TELLING ME THAT HIS EXISTING STOCK IS IN
7 THESE CONTAINERS?

8 Q YES, SIR.

9 A YES, AS FAR AS EXISTING STOCK, I GUESS WE WOULD
10 HAVE, AS FAR AS THE ADMINISTRATION OF THE ORDINANCE, TO ALLOW
11 HIM TO SELL THIS TYPE OF ITEM IN THIS TYPE OF CONTAINER;
12 BUT ANY FUTURE STOCK SHOULD BE MORE APPROPRIATE CONTAINERS
13 THAT ARE DISPOSAL.

14 Q OKAY, AND WHAT YOU'RE TELLING US IS YOU TRANSFER
15 FROM ONE MAN-MADE ITEM INTO ANOTHER MAN-MADE ITEM THEN; IS
16 THAT CORRECT?

17 A THAT'S CORRECT.

18 Q ALL RIGHT, SIR. NOW, LET'S TAKE A LOOK AT THE
19 ORDINANCE. NO. 11 I BELIEVE IS THE NUMBER OF IT.

20 SIR, I'D ASK YOU TO PAY PARTICULAR ATTENTION TO
21 THE DEFINITION UNDER THERE OF A PLANT NURSERY; AND THE
22 WORDING IS THAT RETAIL SALES MAY BE ALLOWED AS AN ACCESSORY
23 USE; IS THAT NOT CORRECT?

1 A THAT'S CORRECT.

2 Q OKAY. NOW, WHAT DOES THAT MEAN IN TERMS OF THE
3 ZONING ORDINANCE, "IT MAY BE ALLOWED AS AN ACCESSORY USE"?
4 THAT MEANS IT CANNOT BE ALLOWED AS A PRIMARY ACTIVITY; IS
5 THAT NOT CORRECT?

6 A THAT'S CORRECT.

7 Q SO THAT THE MAIN THRUST OF THE ORDINANCE IS THAT
8 YOU HAVE THE RIGHT TO GROW AND TO PROPAGATE PLANTS; BUT THE
9 BOARD, UNDER CERTAIN CIRCUMSTANCES, COULD DEPRIVE YOU OF THE
10 RIGHT TO SELL THOSE PRODUCTS AT A RETAIL LEVEL; IS THAT NOT
11 CORRECT?

12 A THAT'S CORRECT.

13 Q NOW, THE STAFF HAD ORIGINALLY RECOMMENDED THAT THE
14 WORD "MAY" WOULD BE "SHALL"; IS THAT NOT CORRECT?

15 A I THINK THAT'S THE WORD WE HAD THAT WAS
16 SUBSEQUENTLY MODIFIED BY THE PLANNING COMMISSION AT A PUBLIC
17 HEARING.

18 Q BY I BELIEVE IT WAS MRS. WRIGHT WHO MADE THE
19 MOTION; IS THAT NOT CORRECT?

20 A THAT'S MY RECOLLECTION.

21 Q OKAY; BUT THE STAFF -- AND I BELIEVE THAT EARLIER YOU
22 HAD TESTIFIED TO IN YOUR DEPOSITION -- IT IS THE STAFF'S
23 POSITION THAT YOU FELT THAT THEY SHOULD HAVE THE SALE -- THE

1 RIGHT OF RETAIL SALE -- AS A MATTER OF RIGHT?

2 A THE STAFF HAD RECOMMENDED THAT RETAIL SALES BY
3 RIGHT --

4 Q WOULD BE ALLOWED AS A MATTER OF RIGHT; IS THAT
5 NOT CORRECT?

6 A OUR VERY FIRST DRAFT DID NOT ALLOW RETAIL SALES.

7 Q BUT I'M TALKING ABOUT THE ONE THAT WENT TO THE
8 PLANNING COMMISSION AND THE ONE THAT THE STAFF HAD FIRST. --
9 IT HAD INCLUDED THE WORD "SHALL"; IS THAT NOT CORRECT?

10 A THAT'S CORRECT. AN EARLIER VERSION, HOWEVER, THAT
11 HAD GONE TO THE PLANNING COMMISSION BACK IN THE SUMMER
12 MONTHS OF 1980 HAD RECOMMENDED THAT NO RETAIL SALES --

13 Q OKAY, BUT THE STAFF OBVIOUSLY HAD CHANGED ITS
14 MIND AND FELT THAT THEY SHOULD BE ALLOWED AS A MATTER OF
15 RIGHT?

16 A THAT'S CORRECT.

17 Q OKAY. DID YOU FEEL, WHEN THAT CHANGE WAS MADE
18 FROM "SHALL" TO "MAY" THAT IT WAS REALISTIC TO THINK THAT
19 YOU WOULD HAVE A WHOLESALE NURSERY OPERATION IN FAIRFAX
20 COUNTY?

21 A YES.

22 Q CAN YOU THINK OF ANY THAT EXIST IN FAIRFAX COUNTY?

23 A I DON'T KNOW OF ANY OFF THE TOP OF MY HEAD, NO.

1 Q ALL RIGHT, SIR.

2 A BUT I THINK IT'S A COMPLETELY REASONABLE USE TO
3 BE EXPECTED IN THE WESTERN AREAS OF THE COUNTY.

4 Q NOW, LET'S GET INTO THE QUESTION OF A GARDEN
5 CENTER; AND I BELIEVE IT'S THE NEXT PARAGRAPH WHERE YOU
6 DEFINE -- OR THE PARAGRAPH ABOVE -- AND IT DEFINES A GARDEN
7 CENTER, WHICH IS THE FIRST TIME THAT THAT TERM HAS APPEARED
8 IN THE FAIRFAX COUNTY ZONING ORDINANCE; IS THAT NOT CORRECT?

9 A THAT'S CORRECT.

10 Q AND ALL THAT YOU HAVE DONE IN THAT ORDINANCE THERE
11 IS TO DEFINE AN ACTIVITY; IS THAT NOT CORRECT?

12 A THAT'S CORRECT.

13 Q OKAY. IN OTHER WORDS, YOU HAVE NOT CREATED A
14 NEW CATEGORY OR A NEW ALLOWABLE USE UNDER THE COUNTY
15 ORDINANCE, HAVE YOU?

16 A NO, WE HAVE MERELY INSERTED A DEFINITION FOR
17 PURPOSES OF CLARIFICATION.

18 Q OKAY. SO, WHEN YOU TALK IN TERMS OF A GARDEN
19 CENTER THEN, YOU'RE NOT TALKING ABOUT A PARTICULAR CATEGORY
20 -- A ZONING CATEGORY -- OR A PARTICULAR CATEGORY FOR
21 SPECIAL EXCEPTIONS OR ANYTHING OF THAT NATURE THEN; IS THAT
22 CORRECT?

23 A NO, I THINK THE SOLE PURPOSE OF THAT DEFINITION IS

1 TO HELP DRAW A DISTINCTION AND CLARIFICATION BETWEEN A
2 GARDEN CENTER AS A RETAIL SALES ESTABLISHMENT AND A PLANT
3 NURSERY.

4 Q SO, A --

5 A PAST CONFUSION HAD CENTERED AROUND THE TWO USES.

6 Q SO THAT THE REAL PURPOSE OF PUTTING THE DEFINITION
7 IN THERE, IN EFFECT, WAS TO TAKE AWAY FROM A NURSERY THE
8 RIGHT TO SELL CERTAIN ITEMS; IS THAT NOT CORRECT?

9 A NOT TO TAKE AWAY IN MY MIND'S EYE AT ALL, BUT
10 MERELY TO CLARIFY.

11 Q WELL, CERTAINLY, THE EFFECT IS TO TAKE IT AWAY;
12 IS IT NOT?

13 A AS FAR AS FUTURE USE IS CONCERNED, YES.

14 Q THAT'S WHAT I'M TALKING ABOUT.

15 A YES.

16 Q ALL RIGHT, SIR; AND A GARDEN CENTER THEN IS
17 SIMPLY ANOTHER FORM OF A RETAIL ESTABLISHMENT; IS THAT NOT
18 CORRECT?

19 A THAT IS CORRECT. IT BELONGS IN A RETAIL OR A
20 COMMERCIAL DISTRICT -- ZONING DISTRICT.

21 Q I'M SORRY?

22 A THAT BELONGS IN A RETAIL ZONING DISTRICT.

23 Q WHICH WOULD BE ANYWHERE FROM A C5 TO A C6 CATEGORY;

1 IS THAT NOT CORRECT?

2 A THAT'S CORRECT.

3 Q ANYTHING FROM C1 TO C4 WOULDN'T ALLOW A GARDEN
4 CENTER?

5 A GENERALLY NOT. THEY ARE PRIMARILY THE OFFICE
6 DISTRICTS.

7 Q RIGHT. SO, IN OTHER WORDS, WHEN YOU TALK ABOUT
8 C5 THROUGH C8, YOU'RE TALKING ABOUT THE WHOLE GAMUT OF
9 RETAIL SALES, ARE YOU NOT?

10 A THAT'S CORRECT.

11 Q SO, IT REALLY WOULDN'T MAKE ANY DIFFERENCE WHAT
12 KIND OF AN OPERATION -- FOR EXAMPLE, IF IT WAS SEARS &
13 ROEBUCK, IT COULD BE A GARDEN CENTER OR IT COULD BE A
14 RETAILER OF DRY GOODS OR MOSTLY ANY PRODUCT; IS THAT NOT
15 CORRECT?

16 A THAT IS CORRECT.

17 Q AND THE SAME WOULD BE TRUE WITH A HECHINGER'S?
18 THEY COULD SELL THE FULL RANGE OF PRODUCTS -- LUMBER, BRICKS
19 -- AS WELL AS THE PRODUCTS ALLOWED UNDER THE GARDEN CENTER?

20 A THAT IS CORRECT.

21 Q AND, AS A MATTER OF FACT, IF LORD & TAYLOR'S
22 WANTED TO ESTABLISH A GARDEN CENTER, IT WOULD BE ALLOWED;
23 IS THAT NOT CORRECT?

1 A THAT IS CORRECT.

2 Q SO, IN OTHER WORDS, IN THE RETAIL CATEGORIES FROM
3 C5 TO C8, YOU DO NOT ATTEMPT -- WHEN I SAY "YOU" -- THE
4 COUNTY ORDINANCE DOES NOT ATTEMPT TO REGULATE IN ANY FASHION
5 THE PRODUCTS THAT ARE SOLD; IS THAT NOT CORRECT?

6 A THAT IS CORRECT.

7 Q SO, YOU CAN JUST RUN THE GAMUT OF WHATEVER -- AS
8 LONG AS YOU'RE SELLING IT RETAIL OR WHATEVER, YOU CAN SELL
9 ANYTHING WHATSOEVER?

10 A NO, THERE ARE -- WITH SOME LIMITATIONS. THINGS
11 LIKE VEHICLES SALES HAVE LIMITATIONS. THEY ARE ALLOWED ONLY
12 BY SPECIAL EXCEPTIONS IN SEVERAL OF THE DISTRICTS -- THE
13 LARGER TYPE OF ITEMS, IF YOU WILL, SUCH AS AUTOMOBILES; BUT
14 ITEMS OF A SIZE, IF YOU WILL, AS POTS AND CLOTHING AND WHAT
15 HAVE YOU ARE DEEMED RETAIL SALES ESTABLISHMENTS AND
16 GENERALLY ARE ALLOWED IN THE C5 THROUGH C8 COMMERCIAL
17 DISTRICTS.

18 Q WELL, AS A MATTER OF FACT, THERE ARE VERY FEW
19 ITEMS THAT WOULD NOT BE ALLOWED TO BE SOLD AT RETAIL; ISN'T
20 THAT CORRECT? JUST AS YOU HAVE POINTED OUT, THERE ARE
21 CERTAIN EXCEPTIONS?

22 A THAT'S CORRECT.

23 Q SO, IF A PERSON WERE TO OPERATE A GARDEN CENTER,

1 HE WOULD NOT HAVE TO GET ANY SPECIAL EXCEPTION OR ANY SORT
2 OF SPECIAL APPROVEMENT -- EXCUSE ME -- APPROVAL BY THE
3 COUNTY AS LONG AS HE HAD A C5 THROUGH C8 CATEGORY; IS THAT
4 NOT CORRECT?

5 A THAT'S CORRECT.

6 Q ONE OTHER ITEM I WANTED TO SHOW YOU WAS THIS BOOK
7 THAT WAS INTRODUCED AS COMPLAINANT'S EXHIBIT NO. 26, WHICH
8 IS A HANDBOOK ON PLANT -- ON HOUSE PLANTS. COULD YOU
9 POSSIBLY GIVE US ANY OTHER EXAMPLES HOW THAT BOOK COULD BE
10 USED IN ANY OTHER FASHION OTHER THAN IN SOME FASHION
11 RELATED TO THE PROPAGATION AND GROWING OF PLANTS?

12 A ENTERTAINING READING, I WOULD IMAGINE, FOR SOME-
13 BODY WHO WOULD HAVE SUCH AN INTEREST.

14 Q HAVE AN INTEREST IN HOUSE PLANTS; IS THAT CORRECT?

15 A RIGHT.

16 Q AND WHAT YOU'RE TELLING US IS THAT YOU HAVE
17 BANNED THE SALE OF THAT BOOK IN A RETAIL NURSERY; ISN'T THAT
18 CORRECT?

19 A A BOOK COULD BE PURCHASED LIKE ANY OTHER BOOK ON
20 ANY OTHER SUBJECT APPROPRIATELY IN A BOOKSTORE OR IN A
21 RETAIL SALES ESTABLISHMENT IN A COMMERCIAL DISTRICT.

22 Q YOU DIDN'T ANSWER MY QUESTION THOUGH. IN A RETAIL
23 NURSERY, YOU HAVE BANNED THE SALE OF THAT BOOK; ISN'T THAT

1 CORRECT?

2 A THAT'S CORRECT.

3 Q OKAY, SIR; AND YOU CAN'T TELL US HOW THE SALE OF
4 THAT BOOK IN ANY WAY INFRINGES ON THE PUBLIC HEALTH, SAFETY,
5 AND WELFARE, CAN YOU?

6 A THE SALE OF THAT ITEM IN A RESIDENTIAL DISTRICT,
7 I THINK DOES IMPINGE UPON THE HEALTH, SAFETY, AND WELFARE.

8 Q YOU FEEL THAT IT DOES? THAT'S YOUR JUDGMENT?

9 A YES, I DO. THE WHOLE UNDERLYING PURPOSE OF
10 ZONING IN MY MIND'S EYE IS TO SEPARATE COMMERCIAL -- TRUE
11 COMMERCIAL -- USES FROM RESIDENTIAL USES; AND, IF YOU
12 DIDN'T BAN THE SALE --

13 Q AND BAN THE SALE OF BOOKS?

14 A IN RESIDENTIAL DISTRICTS, YES.

15 Q ALL RIGHT, SIR. YOU DON'T FEEL THAT THAT BOOK IS
16 NECESSARY OR ESSENTIAL TO THE PROPAGATION AND THE GROWING
17 OF PLANTS?

18 A JUST AS MUCH AS AND NO MORE SO THAN THE TRUCK YOU
19 NEED TO GET THE PLANTS THERE AND TO GET HOME. SHOULD I
20 HAVE A RIGHT TO BUY THE TRUCK IN A RESIDENTIAL DISTRICT, TOO?

21 MR. LAWSON: YOUR HONOR, I THINK HE'S BEING
22 ARGUMENTATIVE AND NOT BEING RESPONSIVE TO THE QUESTION.

23 THE COURT: ALL RIGHT. GO AHEAD.

1 BY MR. LAWSON:

2 Q PHIL, DO YOU REALLY FEEL THAT IT'S IN THE PUBLIC
3 INTEREST -- IF AN INDIVIDUAL WERE TO GO IN TO BUY BULBS,
4 LET'S SAY, OR TO BUY ROSEBUSHES, FOR EXAMPLE; AND THAT
5 PERSON WOULD ASK MR. CUPP OR ANY OTHER RETAIL NURSERYMAN
6 THAT HE WOULD LIKE TO BUY SOME PRUNING SHEARS OR HE WOULD
7 LIKE TO BUY A SPRAY GUN OR APPLICATOR -- AND JUST ANSWER
8 THE QUESTION, IF YOU WILL, AND NOT GIVE ME YOUR ARGUMENTS,
9 WHICH YOU ARE VERY GOOD AT -- DO YOU FEEL IT'S IN THE PUBLIC
10 INTEREST FOR MR. CUPP TO TELL THE INDIVIDUAL, "NO, I CAN'T
11 SELL YOU THAT PRODUCT"?

12 A DO I THINK IT'S IN THE PUBLIC INTEREST?

13 Q YES.

14 A YES, I DO, SIR.

15 Q DO YOU THINK IT'S IN THE PUBLIC INTEREST FOR THAT
16 INDIVIDUAL TO GET INTO HIS CAR AND POSSIBLY DRIVE FOUR OR
17 FIVE MILES OR WHATEVER IT IS TO ANOTHER OUTLET IN ORDER TO
18 BUY THOSE PRODUCTS?

19 A IN A COMMERCIAL DISTRICT, YES, I DO.

20 Q YOU FEEL THAT IT IS?

21 A YES, SIR.

22 Q NOW, YOU HAVE TESTIFIED THAT APPARENTLY THAT THE
23 STAFF HAD HAD SOME PROBLEMS WITH A PARTICULAR OPERATOR IN

1 THE BURKE AREA, I BELIEVE; ISN'T THAT CORRECT?

2 A SEVERAL, YES.

3 Q AS A MATTER OF FACT, THAT CASE RESULTED IN A
4 COURT ACTION; IS THAT NOT CORRECT?

5 A THAT'S CORRECT.

6 Q OKAY, SIR; AND I BELIEVE THAT YOU HAVE TESTIFIED
7 THAT THE PROBLEMS ASSOCIATED WITH THAT PARTICULAR OPERATION
8 HAD TO DO IN ABOUT THREE OR FOUR DIFFERENT CATEGORIES. ONE
9 HAD TO DO WITH THE VIOLATION OF THE SIGN ORDINANCE; IS THAT
10 NOT CORRECT -- THE APPROPRIATENESS AND THE SIZE OF A
11 PARTICULAR SIGN THAT WAS USED AT THAT OPERATION?

12 A THAT'S ONE OF THE ISSUES.

13 Q ONE OF THE ISSUES, RIGHT; AND ANOTHER ISSUE WAS
14 FILLING THE FLOODPLAIN IN, I BELIEVE; IS THAT NOT CORRECT,
15 WAS ONE OF THE OTHER PROBLEMS ASSOCIATED WITH THAT PARTICULAR
16 FACILITY?

17 MS. ANDERSON: YOUR HONOR, HE HASN'T TESTIFIED TO
18 THAT IN COURT.

19 MR. LAWSON: WELL, HE HAS TESTIFIED TO THE PROBLEMS
20 ASSOCIATED WITH THAT OPERATION. I THINK I HAVE A RIGHT TO
21 CROSS-EXAMINE HIM ON THAT POINT.

22 MS. ANDERSON: YOUR HONOR, I --

23 THE COURT: I DON'T THINK HE DID TESTIFY TO THAT.

1 MR. LAWSON: I DON'T THINK HE DID EITHER. THAT'S
2 THE REASON I'M ASKING IT NOW.

3 BY MR. LAWSON:

4 Q WAS THAT NOT ONE OF THE OTHER PROBLEMS ASSOCIATED
5 WITH THAT PARTICULAR OPERATION WAS THE FLOODPLAIN?-- WAS
6 FILLING IN THE FLOODPLAIN?

7 MS. ANDERSON: I THINK THE JUDGE HAS DIRECTED YOU
8 TO ANSWER.

9 THE WITNESS: YES, IT WAS.

10 BY MR. LAWSON:

11 Q AND ANOTHER HAD TO DO WITH THE BULK SIZE OF THE
12 PARTICULAR SALES OFFICE, I BELIEVE; IS THAT NOT CORRECT?

13 A THAT'S CORRECT.

14 Q OKAY, SIR; AND WERE THERE ANY OTHER PROBLEMS
15 ASSOCIATED WITH THAT PARTICULAR FACILITY WHICH RESULTED IN
16 LITIGATION IN THAT CASE? AREN'T THOSE THE AREAS THAT THEY
17 HAD PROBLEMS -- THAT THE COUNTY HAD PROBLEMS -- WITH THIS
18 PARTICULAR PERSON OR OPERATION, WHATEVER IT WAS?

19 A I THINK THAT FAIRLY WELL SUMMARIZES THE --

20 Q ALL RIGHT.

21 A -- THE SEVERAL ISSUES.

22 Q ALL RIGHT, SIR. NOW, YOU HAVE EARLIER TESTIFIED
23 THAT, PRIOR TO THE REQUIRING OF AN SE IN THE BOSC ORDINANCE

1 OF 1978 --

2 A '7 -- I'M SORRY.

3 Q -- '78; ISN'T THAT CORRECT?

4 A THAT'S RIGHT.

5 Q AUGUST THE 4TH, 1978, IT WAS EFFECTIVE?

6 A (NODDING HEAD.)

7 Q THAT A NURSERY OF THE TYPE THAT MR. CUPP HAS WAS
8 ALLOWED AS A MATTER OF RIGHT; IS THAT NOT CORRECT?

9 A PRIOR TO, YES, AUGUST OF '78.

10 Q OKAY, SIR; AND SUBSEQUENT -- I'M SORRY?

11 A THAT'S CORRECT.

12 Q AND SUBSEQUENT -- WELL, LET ME WITHDRAW THE
13 QUESTION.

14 THE SOLE EFFECT OF THE '78 ORDINANCE WAS SIMPLY
15 TO REQUIRE AN APPLICANT TO SEEK APPROVAL AND THE SPECIAL
16 EXCEPTION FROM THE BOARD OF SUPERVISORS; ISN'T THAT CORRECT?

17 A THAT'S CORRECT.

18 Q AND WOULD IT BE FAIR TO CHARACTERIZE THAT AS A
19 PROCEDURAL CHANGE AND NOT A SUBSTANTIVE CHANGE IN THE LAW?

20 A NOT ONLY WAS IT A PROCEDURAL CHANGE, BUT IT'S MY
21 RECOLLECTION THAT THE '78 ORDINANCE DID HAVE SOME DEFINITE
22 STANDARDS THAT HAD TO BE SATISFIED --

23 Q WELL, STANDARDS IN TERMS OF SETBACKS AND THINGS

1 OF THAT NATURE; BUT WHAT I'M TALKING ABOUT IN TERMS OF THE
2 PRODUCT LINE THAT YOU ALLOWED TO BE SOLD, THERE WAS NO
3 CHANGE IN THE SUBSTANTIVE LAW IN THE '78 ORDINANCE, WAS
4 THERE? I BELIEVE THAT YOU HAD -- YOU HAD EARLIER TESTIFIED
5 TO THAT EFFECT?

6 A THAT'S CORRECT.

7 Q ALL RIGHT, SIR. SO THEN, REALLY, THE TIME THAT
8 THERE WAS A SUBSTANTIVE CHANGE IN THE LAW OCCURRED WITH THIS
9 PARTICULAR AMENDMENT THAT WE'RE CONCERNED ABOUT HERE TODAY
10 IN OCTOBER OF 1979; IS THAT NOT CORRECT? I BELIEVE THAT
11 YOU HAD EARLIER TESTIFIED TO THAT EFFECT?

12 A THAT'S CORRECT.

13 Q ALL RIGHT, SIR. SO THEN, MR. CUPP WAS OPERATING
14 THEN AS A MATTER OF RIGHT WHEN HE FILED THIS APPLICATION IN
15 SEPTEMBER OF 1979; IS THAT NOT CORRECT?

16 A MR. CUPP WAS A GRANDFATHERED USE.

17 Q NO, NO, I DIDN'T SAY THAT. ON OCTOBER THE 17TH,
18 1979, WHEN HE FILED THIS APPLICATION, HIS OPERATION WAS A
19 MATTER OF RIGHT AT THAT TIME; IS THAT NOT CORRECT?

20 A QUITE FRANKLY, THAT'S DEBATABLE IN MY MIND AS WELL
21 AS ALL THE OTHER PLANT NURSERIES IN THE COUNTY.

22 Q WELL, THERE WASN'T A VIOLATION, WAS THERE, AT THAT
23 TIME?

1 A NO, THERE WAS NOT.

2 Q AND HE WAS IN COMPLIANCE WITH THE LAW; IS THAT NOT
3 CORRECT?

4 MS. ANDERSON: I DON'T KNOW IF THAT'S IN THE
5 WITNESS'S KNOWLEDGE, YOUR HONOR.

6 MR. LAWSON: WELL, HE'S --

7 THE COURT: IF HE KNOWS.

8 MR. LAWSON: IF HE KNOWS, OKAY.

9 THE WITNESS: AGAIN, IN MY JUDGMENT, IT WAS AND
10 IT WAS NOT.

11 MR. LAWSON: IT WAS OR WAS NOT. OKAY, I'LL ACCEPT
12 THAT ANSWER.

13 BY MR. LAWSON:

14 Q WELL, AS A MATTER OF FACT, 19 -- AS FAR BACK AS
15 1976, IN JUNE, THE COUNTY ATTEMPTED TO PROSECUTE MR. CUPP,
16 DID THEY NOT?

17 A THAT'S CORRECT.

18 Q FOR THE SALE OF CERTAIN ITEMS?

19 A THAT'S CORRECT.

20 Q AND JUDGE GRIFFITH, WHO'S NOW IN THE CIRCUIT COURT,
21 RULED THAT THE ORDINANCE, AS APPLIED TO HIM, WAS
22 UNCONSTITUTIONAL; IS THAT NOT CORRECT?

23 A I DON'T KNOW WHETHER THERE WAS A SPECIFIC FINDING

1 OR RULING OR NOT; BUT, AGAIN, I THINK THAT THAT CASE
2 POINTED OUT THE --

3 Q JUST ANSWER THE QUESTION, MR. YATES. YOU DON'T
4 NEED TO VOLUNTEER ANYTHING. I'M NOT TRYING TO BE RUDE; BUT,
5 SERIOUSLY, YOU JUST ANSWER THE QUESTIONS, IF YOU WILL,
6 PLEASE.

7 MR. LAWSON: CAN I HAVE THIS MARKED?

8 (THE DOCUMENT HEREINAFTER REFERRED
9 TO WAS MARKED PLAINTIFF'S EXHIBIT
10 NO. 41 FOR IDENTIFICATION.)

11 BY MR. LAWSON:

12 Q YOU WERE AWARE THAT THERE WAS A PROSECUTION BACK
13 IN JUNE THE 10TH OF 1976; IS THAT NOT CORRECT, OF MR. CUPP?

14 A THAT'S CORRECT.

15 Q AND YOU OBVIOUSLY WERE NOT INVOLVED IN THAT
16 PARTICULAR CASE, I ASSUME?

17 A NO, I WAS NOT.

18 Q EITHER AS A WITNESS OR ADVISING THE COUNTY IN THE
19 PROSECUTION?

20 A I WAS NOT.

21 MR. LAWSON: YOUR HONOR, I WOULD LIKE TO OFFER THE
22 TRANSCRIPT OF THAT -- OF THE JUDGE'S RULING.

23 THE COURT: ANY OBJECTION?

1 MS. ANDERSON: YES, SIR. THERE'S BEEN NO EVIDENCE
2 AS TO WHAT THE TESTIMONY WAS OR EVEN WHAT THE VIOLATION WAS
3 YOUR HONOR.

4 MR. LAWSON: IF IT PLEASE THE COURT, I THINK IT
5 HAS -- THERE HAS BEEN IN AN EARLIER --

6 THE COURT: MR. CUPP TESTIFIED TO THAT.

7 MR. LAWSON: THAT'S WHAT I WAS GOING TO SAY.

8 MS. ANDERSON: HE TESTIFIED AS TO HIS CASE. THERE'S
9 BEEN NO EVIDENCE AS TO WHAT THE PROSECUTION PUT ON, YOUR
10 HONOR. I DON'T THINK THAT'S RELEVANT TO SHOW ANYTHING; AND
11 WE STILL DON'T HAVE ANY TESTIMONY AS TO WHAT THE VIOLATION
12 WAS, ONLY THAT A ZONING VIOLATION WAS PROSECUTED. I DON'T
13 THINK THAT'S RELEVANT, YOUR HONOR.

14 MR. LAWSON: I THINK THAT MR. CUPP HAS ALREADY
15 TESTIFIED, IF THE COURT PLEASE, THAT HE WAS PROSECUTED FOR
16 THE SALE OF PRODUCTS; AND I SPECIFICALLY ASKED HIM -- AND
17 ASKED HIM ABOUT ALL THE ITEMS I HAD LINED UP ON THE JURY BOX
18 THERE; AND ASKED HIM IF THESE WERE THE SAME ITEMS WHICH WERE
19 BROUGHT TO COURT AT THAT TIME; AND HE TESTIFIED, "YES,"
20 THAT THEY WERE, PLUS, AS WELL, THAT HIS PRODUCT LINE HAD NOT
21 CHANGED SINCE THAT OCCASION ON JUNE THE 10TH, 1976; AND I
22 THINK --

23 MS. ANDERSON: YOUR HONOR --

1 MR. LAWSON: -- FOR THAT PURPOSE, IT IS RELEVANT.

2 MS. ANDERSON: YOUR HONOR, WE HAVE THE TRANSCRIPTS
3 DELIVERED TO US OVER THE WEEKEND; AND MR. CUPP DID NOT
4 TESTIFY AS TO WHAT THE VIOLATION WAS. HE ONLY TESTIFIED AS
5 TO THE FACT THAT HE BROUGHT CERTAIN ITEMS INTO COURT AND
6 THEY WERE THE SAME ITEMS IN 1976.

7 THERE IS NO EVIDENCE OF WHAT THE VIOLATION WAS,
8 YOUR HONOR; AND THERE IS, AGAIN, NO EVIDENCE OF WHAT THE
9 PROSECUTION'S CASE WAS AND WHETHER IT WAS A ZONING CASE SUCH AS
10 WE ARE ARGUING TODAY OR CRIMINAL PROSECUTION AS TESTIFIED TO.

11 I DO NOT THINK THAT THAT RULING SHOULD BE ALLOWED
12 IN UNDER THOSE CIRCUMSTANCES.

13 MR. LAWSON: YOUR HONOR, I THINK THE COURT CAN
14 TAKE THE TIME -- IT'S ONLY FIVE PAGES. I THINK YOU WILL
15 SEE THAT, WHAT THE JUDGE IS RULING, STATES WHAT THE
16 VIOLATION WAS; AND HE STATES IN THERE SPECIFICALLY AS TO
17 CONSTITUTIONALITY OF THE SALE -- OF THE ATTEMPTED REGULATION
18 BY THE COUNTY AS TO PROHIBIT THESE PARTICULAR MAN-MADE
19 ITEMS; AND I THINK THAT IT CERTAINLY IS RELEVANT.

20 MS. ANDERSON: THERE IS SIMPLY NO EVIDENCE ON
21 WHICH TO BASE THAT OPINION, YOUR HONOR, NOT BEFORE THIS
22 COURT.

23 THE COURT: I'LL LOOK IN MR. CUPP'S TESTIMONY

1 SINCE WE HAVE IT. LET ME REVIEW IT FOR A MINUTE.

2 PAGE 42 --

3 MR. LAWSON: WHICH VOLUME IS THAT, YOUR HONOR?

4 THE COURT: THAT'S VOLUME --

5 MR. LAWSON: VOLUME I.

6 THE COURT: VOLUME I, SIR. OKAY, ANYTHING
7 FURTHER?

8 MS. ANDERSON: NO, SIR.

9 THE COURT: OKAY. I'LL OVERRULE THE OBJECTION,
10 BUT HIS FINDING IS OBVIOUSLY NOT BINDING ON THIS COURT.

11 MR. LAWSON: NO, YOUR HONOR, I CERTAINLY DON'T
12 MEAN TO SUBMIT IT FOR THAT PURPOSE.

13 THE COURT: OKAY. EXCEPTION NOTED.

14 MS. ANDERSON: THANK YOU, YOUR HONOR.

15 (THE DOCUMENT HERETOFORE MARKED
16 FOR IDENTIFICATION AS PLAINTIFF'S
17 EXHIBIT NO. 41 WAS RECEIVED IN
18 EVIDENCE.)

19 MR. LAWSON: THE COURT'S INDULGENCE FOR JUST ONE
20 MOMENT?

21 THE COURT: YES, SIR.

22 BY MR. LAWSON:

23 Q PHIL, WASN'T THERE A TIME THAT THE STAFF, AND,

1 PARTICULARLY, I WOULD ASSUME YOU AND JANE GWINN IN YOUR
2 DRAFTING OF THIS ORDINANCE, THAT YOU -- I BELIEVE THE WORD
3 YOU USED WAS TO "TOY" WITH THE POSSIBILITY OF REGULATING
4 THE SALE OF MAN-MADE PRODUCTS ON A PERCENTAGE BASIS? HAD
5 THAT NOT BEEN A CONSIDERATION AT ONE TIME IN THE DRAFTING
6 OF THIS AMENDMENT?

7 A THAT'S CORRECT.

8 Q AS A MATTER OF FACT, YOU HAD -- YOU HAD ALSO
9 TOYED WITH THE POSSIBILITY OF BANNING ENTIRELY THE SALE OF
10 MAN-MADE PRODUCTS; IS THAT NOT CORRECT?

11 A THAT'S CORRECT.

12 Q AND THE PURPOSE THAT YOU WERE GOING TO DO THAT WAS
13 BECAUSE OF THE EASE OF ADMINISTRATION AND ENFORCEMENT I
14 BELIEVE IS WHAT YOU HAD PREVIOUSLY TESTIFIED TO; IS THAT
15 CORRECT?

16 A AS FAR AS THE PERCENTAGE IS CONCERNED, YES. IT
17 WOULD BE VERY BULKY AND CUMBERSOME.

18 Q NO, WHAT I HAD ASKED YOU WAS AS TO THE BANNING
19 TOTALLY OF MAN-MADE PRODUCTS -- THAT THE REASON THAT YOU HAD
20 GIVEN SOME CONSIDERATION TO THAT WAS THE EASE OF ENFORCEMENT;
21 IS THAT NOT CORRECT?

22 A NO, THAT'S NOT CORRECT.

23 Q IT HAD NOT BEEN?

1 A NO.

2 Q BUT YOU HAD -- ALL RIGHT. WELL, WHY DID YOU DROP
3 THAT AS A POSSIBILITY THEN?

4 A AGAIN, AS I WAS ABOUT READY TO EXPLAIN, AS FAR AS
5 THE PERCENTAGE BASIS --

6 Q NO, I DIDN'T ASK YOU ABOUT THE PERCENTAGE BASIS,
7 MR. YATES. I'M ASKING YOU ABOUT THE TOTAL BANNING OF
8 MAN-MADE PRODUCTS.

9 A I THOUGHT YOU ASKED ME TWO QUESTIONS THERE.
10 THERE WERE TWO CONSIDERATIONS.

11 Q NO, I ASKED YOU -- I'M PARTICULARLY ASKING YOU
12 THE LATTER QUESTION NOW -- THE BANNING TOTALLY OF MAN-MADE
13 PRODUCTS. WHY WAS THAT PARTICULARLY DROPPED?

14 A WHY WAS THE BANNING?

15 Q YES, SIR.

16 A BECAUSE WE FELT IT WAS REASONABLE. IN AN
17 ENDEAVOR TO BE REASONABLE AND RECOGNIZE THE NEEDS OF THE
18 PLANT NURSERY INDUSTRY, WE FELT THAT CERTAIN, SPECIFIED
19 RELATED PRODUCTS SHOULD AND COULD APPROPRIATELY BE RETAINED
20 AS PART OF A PLANT NURSERY.

21 Q RIGHT. THAT'S WHAT I WAS TRYING TO GET AT TO GET
22 YOU TO SAY. IN OTHER WORDS, YOU FELT THAT THE TOTAL
23 BANNING OF MAN-MADE PRODUCTS WOULD NOT BE A REASONABLE

1 EXERCISE OF THE POLICE POWER IS WHAT YOU'RE TELLING US;
2 ISN'T THAT CORRECT?

3 MS. ANDERSON: YOUR HONOR, HE'S ASKING FOR A
4 LEGAL CONCLUSION.

5 THE COURT: SUSTAINED IF YOU'RE ASKING FOR A
6 LEGAL CONCLUSION.

7 MR. LAWSON: ALL RIGHT, SIR.

8 BY MR. LAWSON:

9 Q YOU DID NOT FEEL THEN--NOT AS A QUESTION OF LAW,
10 BUT AS A QUESTION OF THE STAFF'S OPINION, YOU FELT IT WOULD
11 NOT BE REASONABLE TO TOTALLY BAN THE SALE OF MAN-MADE
12 PRODUCTS; ISN'T THAT CORRECT?

13 A THAT'S CORRECT.

14 Q ALL RIGHT, SIR. SO, REALLY, THEN, WHAT YOU HAVE
15 ATTEMPTED TO DO IS TO MEANDER THROUGH THE MAZE OF MAN-MADE
16 PRODUCTS BY THIS ORDINANCE AND TO ATTEMPT TO BAN CERTAIN
17 MAN-MADE PRODUCTS AND TO ALLOW CERTAIN MAN-MADE PRODUCTS
18 FOR SALE; ISN'T THAT WHAT YOU HAVE ATTEMPTED TO DO IN THIS
19 ORDINANCE?

20 A THAT'S CORRECT.

21 Q NOW, YOU HAVE SEEN PHOTOGRAPHS -- I DON'T RECALL
22 THE EXACT NUMBER OF THE EXHIBIT -- WHERE WE SHOW ABOUT THREE
23 OR FOUR BIRDEATHS THAT ARE ALIGNED ON THE SIDE OF THE SALES

1 OFFICE OF MR. CUPP'S ESTABLISHMENT AS WELL AS A FOUNTAIN
2 A LADY STANDING WITH AN URN ON HER HEAD, I BELIEVE; ISN'T
3 THAT CORRECT?

4 MS. ANDERSON: YOUR HONOR, I DON'T THINK THAT W
5 EVER INTRODUCED INTO EVIDENCE.

6 MR. LAWSON: IT'S IN THE PHOTOGRAPH. IT'S IN THE
7 SAME PHOTOGRAPH -- WELL, LET'S FIND IT SO THERE WON'T BE
8 ANY QUESTION.

9 THE CLERK: IT'S OVER THERE.

10 MR. LAWSON: OH, THIS IS WHERE.

11 THE CLERK: IT'S IN THE BASKET.

12 MR. LAWSON. YES.

13 BY MR. LAWSON:

14 Q I SHOW YOU COMPLAINANT'S EXHIBIT NO. 36 -- DO
15 YOU SEE IT THERE?

16 MS. ANDERSON: YEAH, OH, OKAY.

17 BY MR. LAWSON:

18 Q SO THERE WON'T BE ANY CONFUSION, DO YOU SEE HER
19 STANDING THERE?

20 A I SURE DO.

21 Q NOW, IF HE WERE TO SELL ONE OF THOSE ITEMS, YOU'RE
22 TELLING US THAT THAT, OF COURSE, WOULD VIOLATE THE ORDINANCE,
23 ASSUMING, OF COURSE, THAT THE PERMIT WERE APPROVED, ET CETERA?

1 A AS PART OF A PLANT NURSERY IN A RESIDENTIAL
2 DISTRICT, THAT'S CORRECT.

3 Q ALL RIGHT, SIR. IF HE JUST HAS THEM THERE, NOT
4 FOR SALE, BUT JUST TO LOOK AT AS PART OF ORNAMENTATION OR
5 DECORATION, IF YOU WILL, OF THE SITE, DOES THAT, IN ANY WAY,
6 VIOLATE THE ORDINANCE?

7 A IF THEY WERE PART OF THE DISPLAY, NO.

8 Q OKAY, SIR. NOW, IF HE WERE TO HAVE ONE OF THOSE
9 IN HIS FRONT YARD -- AND, OF COURSE, YOU RECOGNIZE, AND
10 WHICH HE HAS TO UNDER THIS ORDINANCE, HE HAS TO LIVE AT THIS
11 PARTICULAR SITE; ISN'T THAT CORRECT?

12 A THAT'S CORRECT.

13 Q RIGHT. IF HE WERE TO HAVE THE FOUNTAIN AS WELL AS
14 A COUPLE OF BIRDBATHS DISPLAYED IN HIS FRONT YARD, THAT WOULD
15 NOT BE A VIOLATION OF THE ORDINANCE, WOULD IT?

16 A NO, IT WOULD NOT.

17 Q OKAY, SIR. NOW, SUPPOSE JUST BECAUSE HE FELT
18 SORRY FOR HIS LAWYER HE WERE TO GIVE ME ONE OF THOSE BIRD-
19 BATHS, WOULD THAT VIOLATE THE ORDINANCE?

20 A IF HE WERE TO GIVE YOU ONE?

21 Q YES, SIR.

22 A NO.

23 Q YOU HAVEN'T ATTEMPTED TO REGULATE THAT THEN?

1 A NO.

2 Q ALL RIGHT, SIR. SO THAT WHAT YOU'RE TELLING US IS
3 THAT, ONE, THE FACT THAT THE ITEM IS THERE, DOESN'T
4 CONSTITUTE A VIOLATION OF THE ORDINANCE; IF HE WERE TO GIVE
5 ONE OF THEM AWAY, IT DOESN'T CONSTITUTE A VIOLATION OF THE
6 ORDINANCE; BUT, IF HE WERE TO SELL ONE OF THOSE PRODUCTS,
7 IT'S THE COMMERCIAL TRANSACTION IS WHAT VIOLATES THE
8 ORDINANCE AND IS WHAT YOU HAVE ATTEMPTED TO BAN; IS THAT NOT
9 CORRECT?

10 A THE COMMERCIAL TRANSACTION AS WELL AS THE DISPLAY
11 OF NUMEROUS OF THESE. I'M ASSUMING THAT IF IT WERE A PART
12 OF HIS RESIDENCE HE WOULDN'T HAVE TEN OR TWELVE OF THESE
13 LINED UP.

14 Q WELL, I THOUGHT YOU HAD TESTIFIED THAT, IF HE HAD
15 THEM OUT THERE AND WERE PART OF A DISPLAY, AS LONG AS THEY
16 WERE NOT FOR SALE, THAT WOULD NOT VIOLATE THE ORDINANCE?

17 A AS PART OF THE LANDSCAPING ARRANGEMENT THAT HE
18 MIGHT HAVE, YES, IT WOULD BE TOLERABLE; BUT, IF THERE WERE
19 TEN OR TWELVE OF THESE LINED, JUST FOR THE SAKE OF BEING
20 LINED UP AND SITTING THERE ON THE SITE, THEN ONE WOULD HAVE
21 TO QUESTION THE REASON OR THE MOTIVE FOR THEM BEING THERE.

22 Q WELL, YOU HAVE TO ASSUME THE FACTS, IF YOU WILL,
23 PHIL. LET'S JUST ASSUME THAT HE HAPPENED TO BE A REAL

1 AFICIONADO OF BIRDBATHS, IF YOU WILL, OKAY; AND LET'S
2 SUPPOSE HE HAS TEN OR TWELVE ARRANGED IN A GARDEN FASHION
3 AND WHAT HE THINKS IS ATTRACTIVE AS PART OF A DISPLAY OF
4 HIS BUSINESS, OKAY; AND THESE ARE NOT FOR SALE, OKAY, THE
5 ANSWER IS "YES" TO BOTH OF THOSE QUESTIONS?

6 A THAT'S CORRECT, I --

7 Q DOES THAT VIOLATE THE ORDINANCE?

8 A NO, IT DOES NOT.

9 Q IT DOES NOT, OKAY; AND, IF HE WERE TO GIVE ONE OF
10 THEM AWAY TO SOMEBODY OR TO A FRIEND, THAT DOESN'T VIOLATE
11 THE ORDINANCE?

12 A NO, IT DOES NOT.

13 Q IT'S JUST SIMPLY THE MERE SALE OF THAT ITEM,
14 YOU'RE TELLING US, CONSTITUTES A VIOLATION?

15 A THAT'S CORRECT.

16 Q ALL RIGHT, SIR; AND, AS FAR AS YOU'RE CONCERNED,
17 IF THERE WOULD SIMPLY BE ONE SALE, THAT, IN SOME WAY -- I'LL
18 WITHDRAW THE QUESTION.

19 IF THERE IS JUST ONE SALE, THAT CONSTITUTES A
20 VIOLATION; AND, IF THERE WERE A HUNDRED SALES OF PLANTS IN
21 CARDBOARD BOXES FOR PROFIT; IN OTHER WORDS, CONSTITUTING A
22 COMMERCIAL TRANSACTION, THAT WOULD NOT VIOLATE THE
23 ORDINANCE?

1 A THAT'S CORRECT.

2 MR. LAWSON: THE COURT'S INDULGENCE FOR JUST A
3 SECOND?

4 THE COURT: YES.

5 BY MR. LAWSON:

6 Q PHIL, I BELIEVE THAT YOU HAVE TESTIFIED THAT THE
7 INDIVIDUAL SALES -- THE INDIVIDUAL SALES OF THESE VARIOUS
8 ITEMS THAT WE HAVE INTRODUCED -- I'M TALKING ABOUT THE POTS
9 AND THE BOOKS AND THE TROWEL, ET CETERA -- YOU'RE SAYING,
10 INDIVIDUALLY, THAT THESE DO NOT CONSTITUTE A DETRIMENT TO
11 THE PUBLIC HEALTH, SAFETY, AND WELFARE?

12 MS. ANDERSON: I THINK HE SAID THE ITEMS
13 THEMSELVES, NOT THE SALE, YOUR HONOR.

14 THE COURT: SUSTAINED.

15 MR. LAWSON: ALL RIGHT. I THINK THAT IS CORRECT.
16 I BEG YOUR PARDON.

17 BY MR. LAWSON:

18 Q THAT THESE PARTICULAR ITEMS, INDIVIDUALLY, DO NOT
19 OR ARE NOT IN ANY WAY DETRIMENTAL TO THE PUBLIC HEALTH,
20 SAFETY, AND WELFARE IS WHAT YOU TOLD US?

21 A THE ITEMS THEMSELVES --

22 Q YES, SIR.

23 A -- ARE NOT.

1 Q OKAY; AND WHAT YOU'RE TELLING US THAT ANY SALE,
2 NO MATTER HOW SMALL IN TERMS OF THE PERCENTAGE--FOR EXAMPLE,
3 IN THE CASE OF MR. CUPP, IS CONTAINERS AND HARDWARE, WHICH
4 IS WHAT WE WERE TALKING ABOUT, WOULD BE .036 PERCENT OF
5 HIS TOTAL SALES THE FIRST SIX MONTHS OF 1980, WHAT YOU'RE
6 TELLING US IS THAT THAT, IN YOUR JUDGMENT --

7 MS. ANDERSON: YOUR HONOR, THAT'S NOT WHAT'S
8 STATED.

9 MR. LAWSON: I'LL -- I'LL WITHDRAW THE -- WELL,
10 IT IS. YOU HAVE TO ADD THE TWO UP TOGETHER. IT IS 3.06
11 PERCENT.

12 MS. ANDERSON: THAT'S NOT WHAT YOU SAID.

13 MR. LAWSON: WHAT DID I SAY?

14 MS. ANDERSON: .036.

15 MR. LAWSON: I BEG YOUR PARDON. I CAN'T READ
16 MUCH LESS TALK. I'LL WITHDRAW THE QUESTION.

17 BY MR. LAWSON:

18 Q LET ME ASK YOU THIS QUESTION, PHIL: IN THE CASE
19 OF MR. CUPP -- I HOPE I'LL GET IT RIGHT THIS TIME -- 3.06
20 PERCENT CONSTITUTES THE SALE OF CONTAINERS AND OF HARDWARE,
21 WHICH ARE THESE PRODUCTS THAT WE'RE TALKING ABOUT -- SOME,
22 OF COURSE, ADMITTEDLY, HE MIGHT BE ABLE TO SELL, LIKE THE
23 TREE WRAP I THINK YOU HAVE PREVIOUSLY TESTIFIED HE COULD

1 SELL AND THE FERTILIZER -- NO, IT DOES NOT INCLUDE THE
2 FERTILIZER.

3 CAN YOU DEMONSTRATE TO THE COURT -- I'LL WITHDRAW
4 THE QUESTION.

5 MR. LAWSON: THAT'S ALL THE QUESTIONS I HAVE.

6 THE COURT: REDIRECT, MS. ANDERSON?

7 MS. ANDERSON: YES, SIR.

8 REDIRECT EXAMINATION

9 BY MS. ANDERSON:

10 Q REFERRING BACK TO THE JANUARY 23, 1980, LETTER,
11 IF YOU WILL, PLEASE?

12 MR. LAWSON: JANUARY WHAT?

13 MS. ANDERSON: 23, 1980.

14 THE COURT: THAT'S IN THE STAFF REPORT?

15 MS. ANDERSON: YES, I THINK IT'S IN THE EXHIBIT
16 WITH THE STAFF REPORT, YOUR HONOR.

17 THE COURT: JANUARY 23, '80.

18 BY MS. ANDERSON:

19 Q YOU STATED WEDNESDAY WHEN WE WERE IN COURT THAT
20 MR. CUPP WOULD NOT HAVE TO CONFORM TO THE SPECIAL
21 EXCEPTION UNTIL HE STARTED TO EXPAND AND MODIFY --

22 MR. LAWSON: YOUR HONOR, I WOULD OBJECT.

23 BY MS. ANDERSON:

1 Q -- AND, TODAY --

2 MR. LAWSON: GO AHEAD.

3 BY MS. ANDERSON:

4 Q -- YOU SAID THAT HE HAD TO PERFORM IMMEDIATELY

5 UPON THE APPROVAL OF THE APPLICATION. ARE YOU CHANGING

6 YOUR TESTIMONY?

7 MR. LAWSON: IT SOUNDS LIKE SHE'S TRYING TO

8 IMPEACH HER OWN WITNESS, YOUR HONOR; AND, CERTAINLY, SHE

9 CAN'T DO THAT.

10 THE COURT: SIR, YOU CAN.

11 MR. LAWSON: YOU CAN?

12 THE COURT: BY PRIOR INCONSISTENT STATEMENTS.

13 MR. LAWSON: HER OWN WITNESS?

14 THE COURT: YES, SIR, 801.404 IS WHERE IT'S FOUND.

15 MR. LAWSON: WELL, IF THAT'S WHAT SHE IS

16 ATTEMPTING TO DO, I CERTAINLY WOULD WITHDRAW THE OBJECTION.

17 THE COURT: THAT'S THE ONLY GROUNDS.

18 MS. ANDERSON: I'M ASKING THAT HE EXPLAIN HIS --

19 THE INCONSISTENCY BETWEEN WEDNESDAY AND TODAY.

20 THE WITNESS: YES, I WAS INCONSISTENT. ONE WOULD

21 NOT HAVE TO LIVE BY THE NEW STANDARDS CONCERNING PLANT

22 NURSERIES UNTIL HE TOOK STEPS TO IMPLEMENT THE SPECIAL

23 EXCEPTION USE. THE NEW PROVISIONS OF THE ORDINANCE WOULD

1 NOT BECOME OPERATIVE JUST UPON THE BOARD'S GRANTING OF THE
2 SE; BUT, SUBSEQUENTLY THERETO, WHEN THE APPLICANT TOOK THE
3 INITIATIVE TO IMPLEMENT THE CONDITIONS IN THE APPROVAL OF
4 THE SE.

5 BY MS. ANDERSON:

6 Q OKAY. REFERRING YOUR ATTENTION TO THE LETTER OF
7 JANUARY 29, 1980, TO YOUR KNOWLEDGE, WAS THAT LETTER BEFORE
8 THE BOARD OF SUPERVISORS AT THE TIME THAT THEY RULED UPON
9 THIS SPECIAL EXCEPTION APPLICATION?

10 A I CAN'T SAY WITH CERTAINTY, ALTHOUGH IT IS MY
11 UNDERSTANDING AND MY RECOLLECTION THAT ALL THE
12 CORRESPONDENCE THAT TOOK PLACE BETWEEN MR. DAVIS AND
13 MR. LAWSON WAS PRESENTED TO THE BOARD AT THE REQUEST OF
14 MR. LAWSON.

15 Q REFERRING YOUR ATTENTION TO THE LETTER OF
16 FEBRUARY 14, 1980, WHEREIN THERE'S A PROPOSAL TO AMEND THE
17 ZONING ORDINANCE, COULD YOU STATE WHY THAT AMENDMENT WAS NOT
18 CONSIDERED?

19 A I THINK THE MAIN REASON THAT WE DID NOT PURSUE IT
20 ANY FURTHER WAS THE FACT THAT IT DID OPEN UP KIND OF DUAL
21 STANDARDS FOR THE REGULATION OF PLANT NURSERIES AND KIND OF
22 RUNS CONTRARY TO THE SHEER INTENT OF THE PROVISIONS OF
23 SECTION 15-101, THAT THEY WERE WILLING TO ACCEPT THOSE

1 GRANDFATHERED USES, IF YOU WILL, AT THEIR EXISTING LEVEL OF
2 ACTIVITY; BUT ANY EXPANSION OF ACTIVITY, IN OUR JUDGMENT,
3 SHOULD BE THE SUBJECT OF A SPECIAL CONDITION OR A SPECIAL
4 EXCEPTION AND THE CONDITIONS THAT MIGHT WELL BE ASSOCIATED
5 WITH IT.

6 Q MR. LAWSON ASKED YOU SOME QUESTIONS ABOUT
7 COMMERCIALIZATION AND THE DISTINCTION BETWEEN MAN-MADE AND
8 GROWN PRODUCTS. YOU SAID THAT THE COMMERCIALIZATION --
9 THAT DISTINCTION WAS ONLY ONE ELEMENT OF THE
10 COMMERCIALIZATION THAT YOU WERE INTERESTED IN. COULD YOU
11 STATE WHAT OTHER ELEMENTS OF COMMERCIALIZATION YOU WERE
12 INTERESTED IN WITH REGARD TO THE OCTOBER 22, 1979,
13 AMENDMENT?

14 A WELL, THE OTHER CONCERNS THAT HAD BEEN IDENTIFIED
15 WITH THE PLANT NURSERIES THROUGHOUT THE COUNTY WERE NOT
16 ONLY THE SALE OF MAN-MADE PRODUCTS; BUT THE ANCILLARY USES,
17 IF YOU WILL, THAT HAD BEEN ALLOWED TO GROW OUT OF THE OLD
18 DEFINITION AND OLD ADMINISTRATION OF SUCH SERVICES AS LAWN
19 MAINTENANCE, AND LANDSCAPE CONTRACTING, WHICH INVOLVES,
20 NEEDLESS TO SAY, RATHER HEAVY TRUCK AND HEAVY EQUIPMENT
21 STORAGE AND OPERATION ON RESIDENTIALLY ZONED PROPERTIES.

22 SO, I THINK IT WAS THE MAN-MADE PRODUCTS AND THESE
23 ANCILLARY SERVICES, IF YOU WILL, THAT WERE GROWING OUT OF

1 THE PLANT NURSERIES, AS WE REALIZED THEM IN FAIRFAX COUNTY,
2 THAT CAUSED CONCERN TO THE BOARD AND PLANNING COMMISSION AND
3 THE STAFF.

4 Q AND THOSE ANCILLARY SERVICES -- LAWN MAINTENANCE
5 AND LANDSCAPE SERVICES -- WERE THEY SPECIFICALLY ADDRESSED
6 IN THE OCTOBER 22, 1979, AMENDMENT?

7 A THAT IS CORRECT, THEY WERE.

8 Q REFERRING YOUR ATTENTION TO MR. CUPP'S LETTER OF
9 FEBRUARY 4, I'D LIKE TO POINT YOUR ATTENTION TO THE THIRD
10 LINE IN FROM THE BOTTOM WITH REGARD TO THE SENTENCE THAT
11 BEGINS, "THE ONE WHO PAYS ALL OF OUR BILLS AND MAKES OUR
12 BUSINESS POSSIBLE --"

13 MR. LAWSON: WHAT PAGE ARE YOU READING FROM?

14 MS. ANDERSON: FROM THE FIRST PAGE IN THE FIRST
15 FULL PARAGRAPH.

16 BY MS. ANDERSON:

17 Q "-- AND INDEED MAKES THIS GOVERNING BODY POSSIBLE,
18 THE CONSUMERS DEMANDING MORE AND MORE TO BE ABLE TO DO
19 ONE-STOP SHOPPING." DO YOU HAVE A COMMENT ON THAT?

20 A YES, IF, INDEED, WE WANT TO FACILITATE ONE-STOP
21 SHOPPING IN FAIRFAX COUNTY, WHICH I WHOLEHEARTEDLY ENDORSE,
22 I THINK THEY SHOULD BE APPROPRIATELY LOCATED IN THE
23 COMMERCIAL DISTRICTS.

1 Q NOT IN RESIDENTIAL DISTRICTS?

2 A NOT IN RESIDENTIAL DISTRICTS, DEFINITELY, NO.

3 I MEAN, THAT UNDERLINES THE WHOLE PURPOSE AND INTENT OF THE
4 ZONING ORDINANCE.

5 Q IN YOUR CROSS EXAMINATION BY MR. LAWSON, YOU
6 STARTED TO SAY THAT IT WAS NOT THE OBJECTS THEMSELVES THAT
7 ARE DETRIMENTAL TO THE PUBLIC HEALTH, SAFETY, AND WELFARE;
8 BUT THE SALES AND TRANSACTION THAT IS DETRIMENTAL. COULD
9 YOU EXPLAIN THAT FURTHER?

10 A WELL, AGAIN, IT'S NOT ONLY THE TRANSACTION ITSELF
11 AND THE NUMBER OF TRANSACTIONS THAT IS OF CONCERN; BUT IT'S
12 THE STORAGE AND THE DISPLAY OF THESE FEATURES THAT, ALL
13 COMBINED, HAVE A TENDENCY TO COMMERCIALIZE THE FLAVOR OF
14 A GIVEN INSTITUTION OR A GIVEN ESTABLISHMENT.

15 I MEAN, JUST -- IT WAS OUR JUDGMENT THAT ONE-STOP
16 SHOPPING IS NOT NECESSARILY THE ONLY WAY THAT A PLANT
17 NURSERY HAS TO GO; AND, INDEED, MANY OF THEM DO NOT OFFER
18 ONE-STOP SHOPPING CAPABILITIES; AND WE JUST FELT THAT IT WAS
19 APPROPRIATE IN A RESIDENTIAL DISTRICT TO TRY AND DISTINGUISH
20 BETWEEN THE TWO TO ALLOW THOSE USES THAT ARE REASONABLE IN
21 A RESIDENTIAL DISTRICT, AS PLANTS, TREES, AND WHAT HAVE YOU,
22 THAT CAN BE MADE COMPATIBLE IN A RESIDENTIAL SETTING; BUT
23 ALL OF THE ITEMS, WHICH, AGAIN, MUST BE DISPLAYED AND STORED,

1 THAT ARE MORE OF A GARDEN CENTER OR HARDWARE STORE TYPE OF
2 ITEM ARE NOT APPROPRIATELY LOCATED IN A RESIDENTIAL
3 DISTRICT.

4 Q JUST AS A POINT OF CLARIFICATION, THE HECHINGER'S,
5 SEARS, MONTGOMERY WARDS, AND PENNEY'S THAT HAVE BEEN
6 REFERRED TO IN THIS TRIAL, THEY ARE ALL LOCATED IN THE C5
7 THROUGH C8 DISTRICTS?

8 A MOST DEFINITELY.

9 Q AND IS THAT THE HIGHER LEVEL END OF THE INTENSITY
10 OF THE COMMERCIAL DISTRICTS?

11 A THAT'S THE HIGHER END OF THE INTENSITY OF THE
12 COMMERCIAL DISTRICTS.

13 Q SPEAKING OF THE PROBLEMS WITH REGARD TO THE
14 DE ANGELIS NURSERY, WAS THERE A PROBLEM REGARDING --

15 THE COURT: I ASSUME THAT'S THE BURKE ONE?

16 MS. ANDERSON: YES, YOUR HONOR.

17 THE COURT: NOBODY MENTIONED THE NAME. OKAY.

18 MS. ANDERSON: THERE ARE TWO BURKE NURSERIES THAT
19 HAVE BEEN REFERRED TO. THIS IS THE ONE WITH REGARD TO THE
20 SIGNS.

21 BY MS. ANDERSON:

22 Q WAS THERE A PROBLEM WITH REGARD TO THE GROWING OF
23 PLANTS ON THAT PROPERTY?

1 A I GUESS THE PROBLEM WAS THERE WAS NO PLANTS
2 GROWING ON THE PROPERTY.

3 Q I BELIEVE THAT YOU ANSWERED THAT A NURSERY SUCH
4 AS CUPP'S, AND I BELIEVE THAT INCLUDES THE SALE OF MAN-MADE
5 PRODUCTS, WAS A NURSERY BY RIGHT UNDER THE 1959 ZONING
6 ORDINANCE. IS THAT -- WAS THAT YOUR TESTIMONY?

7 MR. LAWSON: YOUR HONOR, I THINK IT IS ARGUMENTA-
8 TIVE.

9 THE COURT: SHE'S ASKING A QUESTION. I'LL
10 OVERRULE IT. GO AHEAD.

11 MS. ANDERSON: I'M CLARIFYING WHAT HE HAS STATED,
12 I GUESS.

13 THE WITNESS: I THINK I RESPONDED IT WAS A
14 GRANDFATHERED USE.

15 BY MS. ANDERSON:

16 Q ARE YOU DISTINGUISHING BETWEEN THAT AND A NURSERY
17 BY RIGHT?

18 A NO, I DON'T THINK I AM.

19 Q LET ME ASK YOU, WAS THERE ANY PROVISION IN THE
20 1959 ZONING ORDINANCE THAT SPECIFICALLY ALLOWED THE SALE OF
21 MAN-MADE PRODUCTS?

22 A NO, THERE WAS NOT.

23 Q YOU HAD BEGUN TO EXPLAIN SOMETHING WITH REGARD TO

1 THE PROSECUTION OF MR. CUPP, I THINK, THAT YOU WOULD WANT TO
2 GO FURTHER ON. WOULD YOU, PLEASE, STATE THE REASONS FOR
3 DOING SO?

4 A I THINK THE WHOLE PURPOSE OF THAT COURT CASE, IF
5 YOU WILL --

6 MR. LAWSON: WAIT A MINUTE. I WOULD OBJECT. I'M
7 SORRY. WHAT DID YOU ASK? WHAT WAS THE PURPOSE OF THE
8 PROSECUTION OF THE CUPP CASE IN '76?

9 YOUR HONOR, THIS WITNESS SAID EARLIER, AS I
10 UNDERSTAND IT, HE WAS NOT INVOLVED WITH THE PROSECUTION OF
11 THAT CASE. I DON'T SEE HOW HE COULD -- HE COULD TESTIFY AS
12 TO WHAT THE COUNTY'S PURPOSE MIGHT HAVE BEEN.

13 MS. ANDERSON: YOUR HONOR, HE DID STATE THAT HE
14 HAD FAMILIARITY WITH THE CASE; AND I THINK HE CAN TESTIFY
15 FROM THAT.

16 MR. LAWSON: WELL, IF HE DOES, IT'S CERTAINLY GOT
17 TO BE ON THE BASIS OF HEARSAY. IT SEEMS TO ME THAT THE
18 RULING STANDS ON ITS OWN AS TO WHAT THE SCOPE OR PURPOSE OF
19 THE PROSECUTION WAS. IT COULD BE A NUMBER OF REASONS. IT
20 COULD HAVE BEEN A PERSONAL THING AGAINST MR. CUPP FOR ALL
21 WE KNOW.

22 IT SEEMS TO ME THE CASE HAS TO STAND ON THE FACTS
23 AND THE LAW AND NOT ON WHAT THE MOTIVATION OF THE

1 PROSECUTION WAS.

2 THE COURT: I'M GOING TO OVERRULE YOU. I THINK
3 YOUR OBJECTION GOES TO THE POINT.

4 MR. LAWSON: EXCEPTION, PLEASE.

5 THE COURT: YES, SIR.

6 BY MS. ANDERSON:

7 Q IF YOU WOULD STATE WHY MR. CUPP WAS BROUGHT TO
8 PROSECUTION?

9 A IT WAS AN ENDEAVOR ON BEHALF OF THE COUNTY TO
10 REALLY TRY AND CLARIFY THE INTENT OF THE PROVISIONS OF THE
11 1959 ORDINANCE, BEING THE JUDGMENT THAT, AT THAT POINT IN
12 TIME, THAT THE SALE OF MAN-MADE PRODUCTS WAS HIGHLY
13 DEBATABLE AS A USE BY RIGHT AS A PLANT NURSERY WITHIN
14 RESIDENTIAL DISTRICTS.

15 Q I BELIEVE -- LET ME ASK YOU THIS: IS THERE ANY
16 REQUIREMENT FOR A NURSERYMAN TO LIVE ON THE PROPERTY ON
17 WHICH HIS NURSERY IS LOCATED UNDER THE CURRENT ZONING
18 ORDINANCE?

19 A NO, THERE IS NOT.

20 MS. ANDERSON: I HAVE NO FURTHER QUESTIONS.

21 THE COURT: ANY RECROSS, MR. LAWSON?

22 MR. LAWSON: JUST A COUPLE QUESTIONS, YOUR
23 HONOR.

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RECROSS EXAMINATION

BY MR. LAWSON:

Q THE LANDSCAPING BUSINESS, OF COURSE, IS ALLOWED UNDER THE NEW ORDINANCE; IS THAT NOT CORRECT?

A LANDSCAPING BUSINESS?

Q YES, SIR.

A WELL, THE OCTOBER 22 AMENDMENT, IT IS ALLOWED AS A CONTRACTOR'S OFFICE AND SHOP --

Q RIGHT.

A -- IN THE MORE INTENSE COMMERCIAL AND THE MORE INTENSE INDUSTRIAL DISTRICTS.

Q BUT WHAT I'M TALKING ABOUT IS THE TYPE OPERATION MR. CUPP HAS AND ALWAYS HAS HAD WHICH IS AN OFF-SITE LANDSCAPING TYPE OF SERVICE. THAT IS CERTAINLY STILL ALLOWED UNDER THE CURRENT ORDINANCE; IS IT NOT?

A THAT'S CORRECT, YES.

Q ALL RIGHT, SIR.

A I THINK THE -- I REFER TO THE DEFINITION OF LANDSCAPE. THE LAST SENTENCE OF THE DEFINITION DOES, INDEED, READ: "LANDSCAPE CONTRACTING OF NURSERY STOCK GROWN ON THE PROPERTY SHALL BE PERMITTED AS AN ACCESSORY USE."

Q RIGHT. WHICH MEANS, JUST AS MR. CUPP DOES AND ALWAYS HAS, IS TO GO OUT, FOR EXAMPLE, AND LANDSCAPE YOUR

1 A ROBERT L. MOORE.

2 Q AND WHAT IS YOUR CURRENT POSITION IN FAIRFAX
3 COUNTY.

4 A I'M A PRINCIPAL PLANNER IN THE FAIRFAX COUNTY
5 OFFICE OF TRANSPORTATION.

6 Q AND HOW LONG HAVE YOU BEEN WITH THE COUNTY?

7 A I'VE BEEN WITH THE COUNTY SINCE MAY OF 1974.

8 Q WAS THAT ALWAYS IN THE OFFICE OF TRANSPORTATION?

9 A PRIOR TO BECOMING A SEPARATE OFFICE, WE WERE
10 THE TRANSPORTATION PLANNING BRANCH OF THE COMPREHENSIVE
11 PLANNING OFFICE. WE HAVE BEEN THE TRANSPORTATION OFFICE
12 FOR A FEW YEARS NOW -- TWO OR THREE YEARS.

13 Q ARE YOU FAMILIAR WITH THE SUBJECT APPLICATION?

14 A YES, I AM.

15 Q WHAT CONDITIONS WERE RECOMMENDED BY STAFF WITH
16 REGARD TO ROAD IMPROVEMENTS FOR THE SUBJECT APPLICATION?

17 A OKAY. THE STAFF RECOMMENDED THAT RIGHT-OF-WAY
18 BE DEDICATED TO ACCOMMODATE THE FUTURE WIDENING OF ROUTE 7,
19 THAT AN ADDITIONAL LANE BE CONSTRUCTED, A SERVICE DRIVE BE
20 CONSTRUCTED, AND THE DECELERATION -- A DECELERATION -- LANE
21 BE CONSTRUCTED.

22 I BELIEVE THE STAFF ALSO INDICATED THAT THE
23 CONSTRUCTION AND DEDICATION OF ALL OF THOSE IMPROVEMENTS

1 COULD BE DEFERRED EXCEPT FOR THE DECELERATION, RIGHT-TURN
2 LANE.

3 Q COULD YOU STATE WHY THOSE CONDITIONS WERE
4 RECOMMENDED?

5 MR. LAWSON: YOUR HONOR, I THINK THE STAFF REPORT
6 COULD SPEAK FOR ITSELF. THERE IS A REPORT FROM THE
7 DEPARTMENT OF TRANSPORTATION, AND I WOULD OBJECT. I DON'T
8 SEE THE POINT BECAUSE, AS I SAY, THE STAFF REPORT DOES
9 SPEAK TO THE QUESTION.

10 MS. ANDERSON: YOUR HONOR, I THINK HE CAN STATE
11 FROM HIS EXPERIENCE IN THE COUNTY.

12 THE COURT: OKAY. I'LL OVERRULE THE OBJECTION.
13 GO AHEAD.

14 THE WITNESS: WELL, OUR RESPONSIBILITY IS TO
15 RECOMMEND TO THE BOARD OF SUPERVISORS THOSE ROAD
16 IMPROVEMENTS, WHICH, NUMBER ONE, ARE NECESSARY TO
17 ACCOMMODATE THE LONG-RANGE PLAN OF THE COUNTY; AND, NUMBER
18 TWO, ARE NECESSARY TO ACCOMMODATE A SITE'S SPECIFIC ACCESS
19 NEEDS.

20 THE DEDICATION AND FUTURE CONSTRUCTION ARE
21 CONSISTENT WITH THE LONG-RANGE PLAN OF THE COUNTY. THE
22 DECELERATION, RIGHT-TURN LANE IS SOMETHING THAT WE FELT WAS
23 NECESSARY TO IMPROVE THE ACCESS IN AND OUT OF THE SITE.

1 BY MS. ANDERSON:

2 Q WITH REGARD TO THE LONG-RANGE PLAN OF THE COUNTY,
3 WHAT IS THE PLAN FOR ROUTE 7?

4 A SIX LANES.

5 Q IS THAT THREE LANES ON EASTBOUND AND WESTBOUND?

6 A THAT'S RIGHT, IT WOULD BE THREE LANES IN EACH
7 DIRECTION.

8 Q THERE ARE ONLY TWO LANES IN EACH DIRECTION AT
9 THIS TIME?

10 A THAT IS CORRECT.

11 Q WITH REGARD TO THE RECOMMENDATION THAT THE SERVICE
12 DRIVE AND EASTBOUND LANE WOULD NOT BE CONSTRUCTED UNTIL A
13 LATER TIME, IS THERE ANY PROVISION FOR WAIVER OF THOSE
14 RECOMMENDATIONS?

15 A YES, THERE IS. THE SITE PLAN ORDINANCE OF THE
16 COUNTY DOES REQUIRE THAT SERVICE DRIVES BE CONSTRUCTED ON
17 PRIMARY HIGHWAYS. THAT PROVISION CAN BE WAIVED IF THERE IS
18 A FINDING THAT AN ALTERNATIVE MEANS OF PROVIDING INTERNAL
19 ACCESS -- MAINLY, INTERPARCEL ACCESS SO THAT YOU DON'T HAVE
20 TO GET OUT ON THE MAIN HIGHWAY TO GO FROM ONE PARCEL OR ONE
21 SITE TO ANOTHER -- IF THAT CAN BE ACCOMPLISHED IN SOME OTHER
22 FASHION, THEN THERE BECOMES NO NEED FOR A SERVICE DRIVE.

23 Q COULD THAT BE ACCOMPLISHED IN THIS CASE?

1 A YES, INDEED. I BELIEVE THE PROPERTY IMMEDIATELY
2 ADJACENT ON THE WEST HAS MADE A PROVISION FOR AN INTERNAL
3 ROAD WITH THAT SUBDIVISION WHICH WAS APPROVED FOR THAT
4 PROPERTY.

5 Q WHAT ARE THE CONCERNS IN REQUESTING THE DECELERATION
6 LANE? YOU SAY TO ACCOMMODATE SITE ACCESS. COULD YOU
7 EXPLAIN THAT TO US?

8 A YES, WE TRY AND LOOK AT ANY DEVELOPMENT WITH
9 REGARD TO ITS IMPACT ON THE ADJACENT HIGHWAY SYSTEM.
10 ROUTE 7 IS A MAJOR ARTERIAL HIGHWAY. IT'S CLASSIFIED THAT
11 WAY IN RECOGNITION OF ITS FUNCTION IN CARRYING THROUGH
12 TRAFFIC REALLY. ROUTE 7 EXTENDS ALL THE WAY FROM, I GUESS,
13 ALEXANDRIA TO WINCHESTER. IT PROVIDES FOR LONG-DISTANCE
14 TRAVEL INSOFAR AS FAIRFAX COUNTY IS CONCERNED.

15 OF COURSE, PEOPLE GOING FROM RESTON TO TYSONS
16 CORNER, THIS KIND OF THING, ALL HAVE TO USE ROUTE 7. IT'S
17 A MAJOR ARTERIAL HIGHWAY. IT'S A WELL-RECOGNIZED PRINCIPAL
18 OF TRANSPORTATION PLANNING THAT ROADS SHOULD PERFORM
19 DISCRETE FUNCTIONS; AND, TO THE EXTENT THAT THEY CAN BE
20 DESIGNED THAT WAY, THEIR EFFICIENCY WILL BE MAXIMIZED. FOR
21 EXAMPLE, ON ROADS SUCH AS MAJOR ARTERIALS, THEY ARE INTENDED
22 TO PROVIDE FOR THROUGH TRAFFIC. WHEN YOU HAVE A LOT OF
23 TURNING MOVEMENTS IN AND OUT, THEY DISRUPT THE FLOW OF

1 TRAFFIC. PEOPLE SLOWING DOWN, SPEEDING UP, WHATEVER, TO
2 MAKE THESE TURNS, INTERFERES WITH ITS FUNCTION IN CARRYING
3 THROUGH TRAFFIC ON ROUTE 7; AND YOU SEE EVIDENCE OF THIS IN
4 MANY OLDER COMMERCIAL DISTRICTS WHERE THE ROADS ARE
5 COMPLETELY CONGESTED BY VIRTUE OF A LOT OF ADJACENT
6 DEVELOPMENT, TRAFFIC TURNING IN AND OUT, CONFLICTING WITH
7 THE THROUGH-TRAFFIC MOVEMENT.

8 SO, THE DECELERATION LANE WAS A RECOMMENDATION
9 THAT WAS STRUCTURED REALLY JUST TO PROVIDE A MEANS WHEREBY
10 THAT TRAFFIC THAT NEEDS TO SLOW DOWN TO MAKE THAT TURN INTO
11 THE SITE CAN BE ACCOMPLISHED WITHOUT -- WITH -- MINIMAL
12 DISRUPTION TO THE FLOW ON ROUTE 7.

13 MS. ANDERSON: I HAVE NO FURTHER QUESTIONS.

14 THE COURT: CROSS-EXAMINE?

15 MR. LAWSON: YES, SIR.

16 CROSS EXAMINATION

17 BY MR. LAWSON:

18 Q YOU HAVE TALKED ABOUT THE NEEDS ALONG ROUTE 7.
19 IN THIS STAFF REPORT, IT INDICATES THAT THERE ARE
20 APPROXIMATELY 34,000 PLUS VEHICLES A DAY THAT TRAVEL ROUTE
21 7; ISN'T THAT CORRECT?

22 A UH-HUH, YES, THAT'S TRUE.

23 Q SOMEWHERE AROUND THERE?

1 A UH-HUH.

2 Q IT'S IN EXCESS OF 34,000. SO THAT, IN OTHER
3 WORDS, IF THERE IS -- AS THINGS EXIST RIGHT AT THE PRESENT
4 TIME, THERE IS CERTAINLY A PRESSING NEED, WOULD YOU NOT
5 SAY, FOR IMPROVEMENT OF ROUTE 7.

6 A I WOULD SAY THAT ROUTE 7 SHOULD BE IMPROVED, YES.
7 WHEN YOU SAY IT IS A PRESSING NEED, I THINK THAT IS A
8 RELATIVE STATEMENT --

9 Q YOU'RE RIGHT. IT IS.

10 A -- THAT NEEDS TO BE TAKEN INTO CONTEXT.

11 Q I THINK THAT THE WAY THAT THEY HAVE CHARACTERIZED
12 IT IS THAT THE SERVICE ALONG ROUTE 7 IS POOR AT THE
13 PRESENT TIME; IS THAT NOT CORRECT?

14 A YES.

15 Q SO, IT WOULD BE FAIR TO SAY THEN THAT THERE'S NO
16 QUESTION THAT IF ONE SPADE OF DIRT WAS NOT TURNED THAT
17 THERE IS A NEED -- WHEN SERVICE IS POOR, THERE CERTAINLY IS
18 A NEED FOR HIGHWAY IMPROVEMENTS; IS THAT NOT CORRECT?

19 A YES.

20 Q AND IT WOULD ALSO BE CORRECT TO SAY THAT THIS IS
21 A GENERALIZED CONDITION THAT EXISTS ALL UP AND DOWN ROUTE 7;
22 IS THAT NOT CORRECT?

23 A IN FAIRFAX COUNTY, YES.

1 Q THAT'S WHAT I'M TALKING ABOUT, IN FAIRFAX COUNTY?

2 A UH-HUH.

3 Q AND PARTICULARLY -- ALL RIGHT, IN FAIRFAX COUNTY.

4 SO, THIS ISN'T SOMETHING THAT IS GENERATED OR CREATED BY
5 THIS PARTICULAR APPLICATION; IS THAT NOT CORRECT?

6 A WELL, THE 34,000 BY ITSELF IS NOT GENERATED BY
7 THIS APPLICATION, NO; AND THIS IS PRECISELY THE POINT I WAS
8 TRYING TO MAKE EARLIER THAT THE 34,000 IS THERE REGARDLESS
9 OF THIS SITE, TO A CERTAIN EXTENT. OUR RECOMMENDATION TO
10 THE BOARD WAS TO TRY TO MINIMIZE THE IMPACT OF THE
11 DEVELOPMENT OF THIS SITE ON THAT 34,000.

12 Q I GUESS I'M REALLY NOT MAKING MYSELF CLEAR. WHAT
13 I'M TRYING TO -- A PERSON TRYING TO ADDRESS HIMSELF TO THE
14 QUESTION OF THE ROAD EXPANSION WHERE YOU WANT THE DEDICATION
15 UP TO A MAXIMUM OF 100 FEET FROM THE CENTER LINE OF ROUTE 7.
16 WHAT I'M TALKING ABOUT THERE IS THAT THAT -- THE REASON FOR
17 THAT IS A GENERALIZED CONDITION THAT EXISTS ALONG ROUTE 7
18 IS WHAT I'M ADDRESSING; ISN'T THAT CORRECT?

19 A YES.

20 Q AND NOT SOMETHING THAT IS SPECIFICALLY GENERATED
21 OR CAUSED BY THIS PARTICULAR DEVELOPMENT?

22 A THAT'S CORRECT.

23 Q OKAY; AND THAT'S WHAT IS RECOMMENDED BY THE STAFF;

1 ISN'T THAT CORRECT, IN HIS LETTER OF NOVEMBER THE 8TH, 197

2 A RIGHT.

3 Q THE REASON FOR IT; ISN'T THAT CORRECT?

4 A I BELIEVE WE ALSO --

5 Q JUST ANSWER THE QUESTION, IF YOU WILL.

6 A WOULD YOU REPEAT THE QUESTION?

7 Q WELL, THE REASON -- THE REASON THAT YOU'RE ASKING
8 FOR THE DEDICATION, AND YOU'RE GOING TO WAIVE THE IMPROVE-
9 MENTS AT THIS TIME, IS BECAUSE OF THE LEVEL OF SERVICE ALONG
10 ROUTE 7 AS IT EXISTS TODAY IS POOR; AND THERE IS A NEED FOR
11 THIS ROAD IMPROVEMENT; AND THAT'S THE REASON THAT YOU'RE
12 ASKING FOR THE DEDICATION?

13 A YES.

14 Q OKAY, SIR. NOW, AS FAR AS ANY -- AS TO ANY --
15 STUDIES AS TO THIS PARTICULAR SITE OR AS TO NURSERIES IN
16 GENERAL, YOUR OFFICE OBVIOUSLY HASN'T DONE ANY BECAUSE THAT'S
17 WHAT YOU STATE IN YOUR STAFF REPORT; ISN'T THAT CORRECT?

18 A THAT'S CORRECT.

19 Q SO, IN TERMS OF THE VEHICLES THAT ARE GENERATED OR
20 WILL BE GENERATED BY THIS PARTICULAR FACILITY, YOU DON'T
21 HAVE ANY STUDY AS TO NURSERIES OR PARTICULARLY AS TO MR. AND
22 MRS. CUPP'S OPERATION, DO YOU?

23 A WE DON'T KNOW THE AMOUNT OF TRAFFIC OUT OF

1 NURSERIES, PER SE, OTHER THAN THAT WE DO KNOW THAT TURNING
2 MOVEMENTS ON AND OFF OF ARTERIAL HIGHWAYS GENERALLY TENDS
3 TO DISRUPT THE TRAFFIC FLOW.

4 Q WELL, YOU KNOW THAT, AS IT EXISTS RIGHT NOW, THERE
5 ARE OBVIOUSLY TURNING MOVEMENTS IN AND OUT OF THE PROPERTY;
6 ISN'T THAT CORRECT?

7 A YES.

8 Q WHETHER THERE'S NOTHING DONE; ISN'T THAT RIGHT?

9 A YES...

10 Q AND, IF SOMEBODY WERE TO BUILD A SINGLE-FAMILY
11 HOME THERE, JUST ON A SINGLE HOLE OR A SINGLE PIECE OF
12 GROUND, THAT THAT, IN AND OF ITSELF, WOULD GENERATE TURNING
13 MOVEMENTS IN AND OUT OF THE PROPERTY, WOULD IT NOT?

14 A THAT'S RIGHT.

15 Q AND YOU STATE HERE IN YOUR STAFF REPORT, QUOTE,
16 "A TRIP GENERATION RATE FOR PLANT NURSERIES IS UNAVAILABLE";
17 AND THAT IS CORRECT; ISN'T THAT RIGHT?

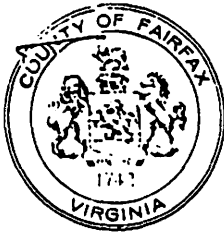
18 ~~A~~ YES.

19 Q YOU HAVEN'T DONE ANY STUDIES?

20 MR. LAWSON: THE COURT'S INDULGENCE, YOUR HONOR.
21 THAT'S ALL THE QUESTIONS I HAVE, YOUR HONOR.

22 MS. ANDERSON: NO REDIRECT, YOUR HONOR.

23 THE COURT: DO YOU WANT MR. MOORE EXCUSED OR



COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

APPLICATION FOR SPECIAL EXCEPTION, SPECIAL PERMIT, VARIANCE OR APPEAL
AS PROVIDED IN THE FAIRFAX COUNTY ZONING ORDINANCE

Application No. S.E. 091-D-79
Assigned by Staff

August 2, 19 79

The undersigned hereby applies for the special exception, special permit, variance, or appeal as indicated below, for property owned and described as follows:

Name of Applicant: Blair W. and Dorothy S. Cupp

Name of Property Owner: Blair W. and Dorothy S. Cupp

Postal Address of Property: 9439 Leesburg Pike, Vienna, VA 22180

Name of Subdivision: None

County Property Identification Map Reference: 19-3 22-2 (11) 19

Lot Area: 6.7203 acres District: Dranesville Zoning: R-1

The undersigned has the power to authorize and does hereby authorize Fairfax County staff representatives on official business to enter on the subject property as necessary to process the application.

NATURE OF THIS APPLICATION

(Applicant is to complete only one of the following boxes. If a Variance is needed in conjunction with a Special Exception or a Special Permit, separate application for Variance must be filed.)

SPECIAL EXCEPTION* <u>and 9-1103</u>		— Application to Board of Supervisors under provisions of
Section <u>3-104</u> Catman		of the Zoning Ordinance.
Proposed Use: <u>Modification and expansion of existing plant nursery, with Vienna</u>		
<u>to additional standards to the use to allow existing lot lines and</u>		
SPECIAL PERMIT*		— Application to Board of Zoning Appeals under provisions of
Section _____		of the Zoning Ordinance.
Proposed Use: <u>making area to remain closer to existing Robert House allowed</u>		
<u>the 1/2 acre additional standards.</u>		
VARIANCE		— Application to Board of Zoning Appeals under provisions of
Section _____		of the Zoning Ordinance.
Request: _____		
APPEAL		— Application to Board of Zoning Appeals under provisions of
Section _____		of the Zoning Ordinance.
Appeal: _____		

* See requirement for affidavit on back.

Thomas O. Lawson

Signature of Applicant or Agent

Thomas O. Lawson, Esquire

Address

Zip

4103 Chain Bridge Road

Fairfax, VA 22030

Telephone Number 273-1950

BELOW THIS LINE FOR STAFF USE

Application, complete with all required submissions, received: 9/17/79

Filing Fee paid: \$ 50.00

Receiving Staff Member: Hm

AFFIDAVIT

I, Blair W. Cupp, do hereby make oath or affirmation that to the best of my knowledge and belief the foregoing information contained in this application is true; and:

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

Name	Address	Relationship
Blair W. & Dorothy S. Cupp	9439 Leesburg Pike	Vienna, VA Owners
Thomas S. Lawson	4103 Chain Bridge Road	Fairfax, VA Attorney

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

Name	Address	Relationship

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

Name	Address	Relationship

2. That no member of the Fairfax County Board of Supervisors, Planning Commission or Board of Zoning Appeals owns or has any interest in the subject land or has any interest in the outcome of the decision.

NONE EXCEPT AS FOLLOWS: (If none, so state)

3. That within the five (5) years prior to the filing of this application, no member of the Fairfax County Board of Supervisors, Planning Commission, or Board of Zoning Appeals or any member of his immediate household and family, either directly or by way of partnership in which any of them is a partner, employee, agent or attorney, or through a partner of any of them, or through a corporation in which any of them is an officer, director, employee, agent or attorney or holds outstanding bonds or shares of stock with a value in excess of fifty dollars (\$50), has or has had any business or financial relationship, other than any ordinary depositor or customer relationship with or by a retail establishment, public utility or bank, including any gift or donation having a value of fifty dollars (\$50) or more with any of those listed in Par. 1 above.

NONE EXCEPT AS FOLLOWS: (If none, so state)

WITNESS the following signature this 4th day of Sept, 19 79.

Blair W. Cupp
Applicant

The above affidavit was subscribed and confirmed by oath or affirmation before me this 14th day of September 19 79, in the State of Virginia.

Donna J. Richards
Notary Public

My commission expires: March 19, 1982.



STAFF REPORT

APPLICATION NUMBER SE-091-D-79

DRANESVILLE DISTRICT

Applicant: Blair & Dorothy Cupp

Subject Parcel: 19-3 ((1)) 19

Present Zoning: R-1

Acreage: 6.7208 acres

Proposed Use: Plant Nursery Expansion

Applicable Zoning Ordinance Provision: 3-104 and 9-003

Application Filed: September 17, 1979

Planning Commission Hearing Date: December 5, 1979

Board of Supervisors Hearing Date: February 4, 1980 at 3:00 P.M.

Staff Recommendation: The staff recommends approval of SE-091-D-79, subject to the conditions noted in Appendix 1 of this report. The staff also recommends modification of the transition yard along the east and south sides of the site, subject to the approval of the Director of the Department of Environmental Management. The transition yard and barrier should be waived along the west side of the parcel.

It is further recommended that the Board of Supervisors modify the additional standards of Paras. 2 and 3 of Sect. 9-514, as amended, to allow the lath house and proposed parking lot to remain closer to the lot line which abuts the R District.

RD



SPECIAL EXCEPTION APPLICATION

Number: SE-091-D-79

District: DRANESVILLE

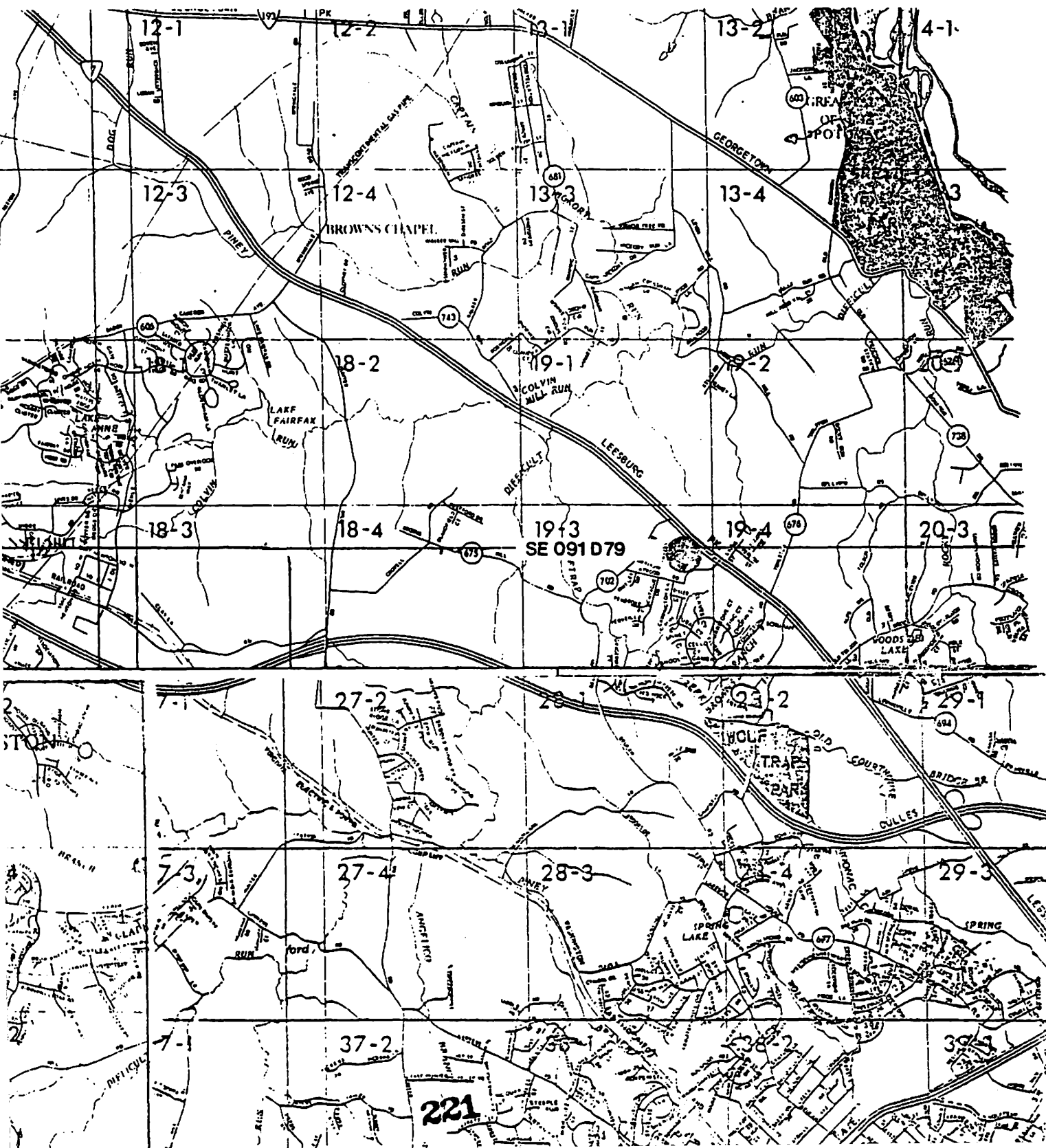
Acreage: 6.7208

Subject Parcel: 19-3 ((1)) 19

Existing Zoning: R-1

Applicant: Blair & Dorothy Cupp

Proposed Use: Plant Nursery Expansion





SPECIAL EXCEPTION APPLICATION

Number: SE-091-D-79

District: DRANESVILLE

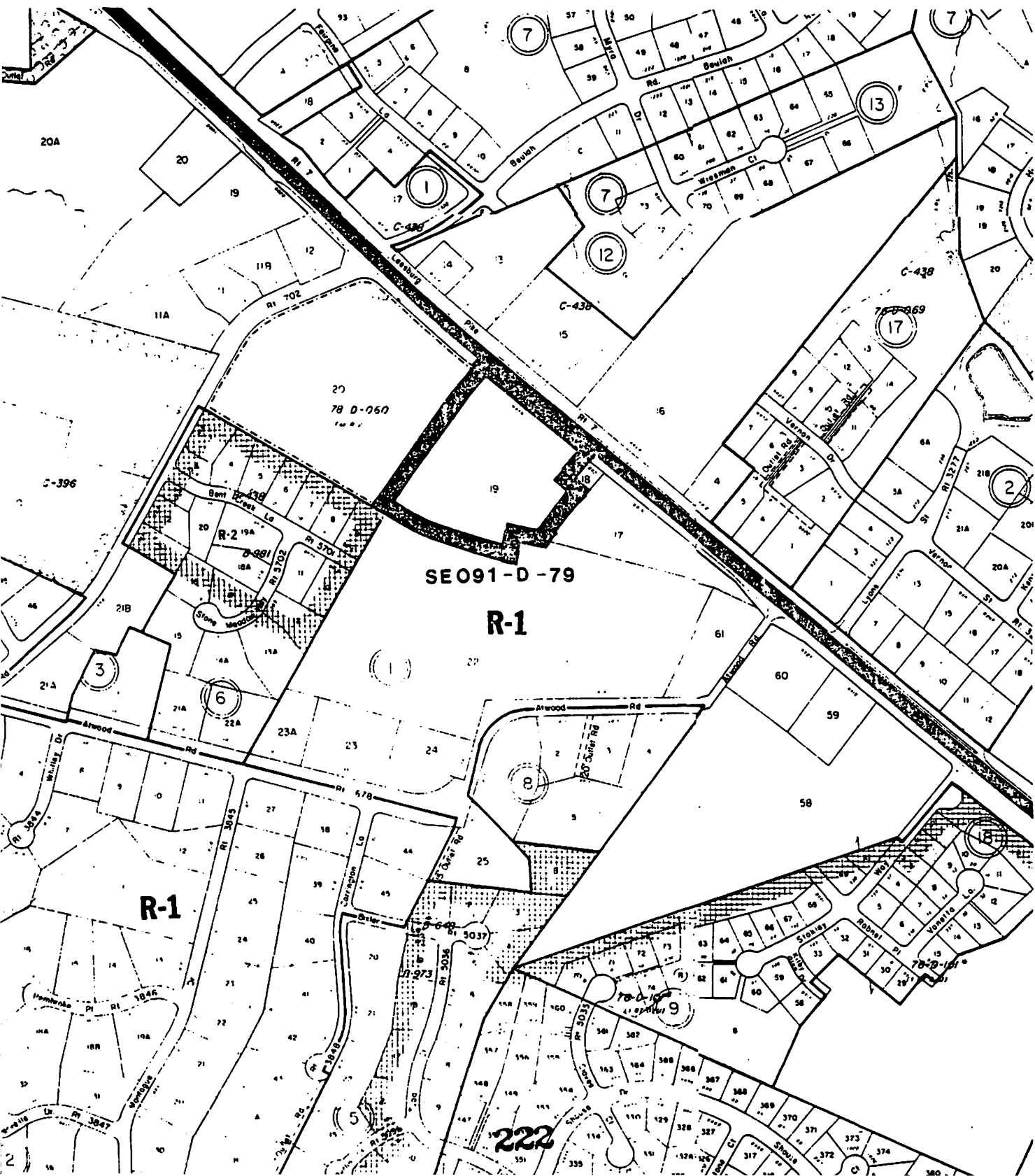
Acreage: 6.7208 acres

Subject Parcel: 19-3 ((1)) 19

Existing Zoning: R-1

Applicant: Blair & Dorothy Cupp

Proposed Use: Plant Nursery Expansion



LEESBING PARK ROUTE 7

S 45° 09' 40" E

DATE POST

RELOCATE
LATIN
HOUSE

PARKING
AREA

CLP
TELEPHONE C.

S 45° 09' 40" E

64.31'

EXISTING LATIN HOUSE

245.32'

S 46° 3' 00" W

129.41'

S 46° 3' 00" W

129.41'

136.90'

6.7208 Acres

N 54° 38' 10" W

162.70'

DESCRIPTION OF THE APPLICATION

Mr. and Mrs. Cupp request approval of a special exception application for modification and expansion of a plant nursery which has been operating at its present location for seven years. The applicants also request a variance (Sect. 9-003) to the additional standards for plant nurseries, as amended (Sect. 9-514), to allow the existing lath house and parking area to remain closer to the abutting R-District than allowed by those additional standards.

The facility is in operation seven days a week from 8:30 a.m. to 5:00 p.m. with a maximum of seven employees at a time.

A plant nursery is a Category 5 Special Exception Use within the R-1, Residential District, one dwelling unit/acre. Approval of this application must satisfy pertinent standards contained in the Zoning Ordinance, an extract of which is Appendix 4.

LOCATION AND CHARACTER OF THE AREA

The 6.7 acre site is located at 9439 Leesburg Pike (Route 7) approximately 550 feet east of Beulah Road (Route 702).

The site and the surrounding area are zoned R-1. The property to the west was recently rezoned to the R-2 Zoning Category (78-D-60).

CONFORMANCE WITH THE COMPREHENSIVE PLAN

The subject property is in the M7, Wolf Trap Community Planning Sector of the McLean Planning District of Area II.

The Plan states:

"C. Land along the south side of Route 7 should maintain the pattern of an average density of 1-2 units per acre but permit cluster development so that land immediately adjacent to the highway would remain as open space and provide a buffer for the residential area.

D. To maintain the present scenic attractiveness of Route 7 in this area, site plans for all developments should be encouraged to continue to feature greater than normal setbacks from the highway and natural buffering as many recent developments have done. To implement this policy proposal a zoning ordinance amendment policy should be considered.

E. Route 7 through this sector should be kept free of additional commercial-industrial development west of the Dulles Airport Access Road."

The adopted Plan Map shows residential use at 1-2 dwelling units/acre.

STAFF ANALYSIS

Transportation Analysis

The Office of Transportation would not object to approval of this application provided the applicant makes improvements noted in the development conditions of Appendix 1. See Appendix 5.

Environmental Analysis

There are no significant environmental constraints to the proposed development. See Appendix 6.

Preliminary Site Plan Analysis

The proposed on-site buildings must satisfy the 100-foot setback requirement of Paragraph 2, Sect. 9-514, as amended. The parking area must be located to meet the 50 foot setback required in Paragraph 3 of Sect. 9-514, as amended, and must be of a dustless surface. See Appendix 4. The applicant requests a modification of these requirements by the Board of Supervisors. Ref. Sect. 9-003. Modification of those requirements appears to be appropriate.

Retail and wholesale sales are proposed on the site. A retail sales establishment in an R-1 District requires Transitional Screening 3 between the commercial and adjacent residential uses. This screening is required on the eastern, western and southern side of this site. Transitional Screening 3 consists of an unbroken 50 foot wide strip of landscaped open space and a barrier fence in accordance with the provisions of Par. 3C of Sect. 13-109 of the Zoning Ordinance. Construction of a Transition Screening 3 on the eastern portion of the site would require removal of part of the existing lath house.

Peripheral landscaping could satisfy modification requirements of Par. 2 of Sect. 13-111 by minimizing adverse impact with architectural and landscaping techniques.

The single-family dwelling of the applicant is situated between the plant nursery and the rezoned parcel to the west, which is approximately 280 feet from the nursery. In this instance the staff feels that a Transition Screening 3 Yard is not necessary. The staff, therefore, recommends waiver of this screening requirement pursuant to Par. 2 of Sect. 13-111. Likewise, the existing vegetation and growing nursery stock (i.e., trees, shrubs and plants) on the southern portion of the site provides adequate screening along that border. Staff feels that the Transition Screening 3 requirement should be modified on the south to retain and use the existing vegetation. Any landscaping or screening deemed necessary should be provided to the satisfaction of the Director of Environmental Management.

Service drives are usually required along primary roads. However, in approving a preliminary plat for R-2 development on the

property west of the nursery the service drive required was waived because public street access was provided through the rezoned property from Beulah Road to the Cupp property. Therefore, unless the Cupp property is redeveloped, no functional service drive is required for the development proposed under this special exception. At the time of redevelopment of the Cupp property, extension of the public street from the west may be required in lieu of a service road.

A standard deceleration lane should be provided in order to insure uninhibited traffic movement on the existing two eastbound lanes of Route 7.

STAFF CONCLUSIONS AND RECOMMENDATIONS

The special exception proposed conforms to the Plant Nursery definition, as amended, in Article 20 of the Zoning Ordinance.

The setback requirements noted in Paras. 2 and 3 of Sect. 9-514, as amended, and the screening requirement of Article 13 can be modified by the Board of Supervisors. Any waiver or modification of the screening requirements must be approved by the Director of Environmental Management.

Parking must be of a dustless surface.

The staff recommends approval of SE-091-D-79, subject to the conditions noted in Appendix 1 of this report. The staff also recommends that the transition yard along the east and south sides of the site be modified pursuant to Par. 2 of Sect. 13-111 of the Zoning Ordinance. The transition yard and barrier should be waived along the west side of the parcel.

It is further recommended that the Board modify the additional standards of Pars. 2 and 3 of Sect. 9-514 to allow the lath house and proposed parking lot to be located closer to the lot line which abuts the R District.

APPENDICES

1. Proposed Development Conditions
2. Affidavit
3. Statement of Justification
4. General Standards
5. Transportation Analysis
6. Environmental Analysis

PROPOSED DEVELOPMENT CONDITIONS

If it is the intent of the Board of Supervisors to approve SE-091-D-79 located as Tax Map 19-3 ((1)) 19 for use as a plant nursery pursuant to Sects. 3-104 and 9-003 of the Fairfax County Zoning Ordinance, the staff recommends that the Board condition the approval by requiring conformance with the following development conditions:

1. This Special Exception is granted for the location indicated in the application and is not transferable to other land.
2. This Special Exception is granted for the buildings and uses indicated on the plats submitted with the application only.
3. A copy of this Special Exception SHALL BE POSTED in a conspicuous place along with the Residential/Non-Residential Use Permit on the property of the use and be made available to all Departments of the County of Fairfax during hours of operation of the permitted use.
4. Submission and approval of a site plan prepared in accordance with the provisions of Article 17. The revised site plan will satisfy ordinance requirements for parking, landscaping and screening, subject to approval of the Director, Department of Environmental Management.
5. Construction of a deceleration/right turn lane for entrance to the plant nursery.
6. Dedication of right-of-way to 100 feet from the centerline for a third eastbound lane and a standard service drive, the exact amount of dedication to be set by DEM at the time of site plan review. Construction of the third lane and the service drive can be deferred until such time as the site redevelops.
7. Provision of peripheral landscaping along the eastern side of the site to minimize adverse impact to the adjoining residential property.
8. Retention of existing vegetation along the eastern, western, and southern property boundaries where waivers or modifications to the screening requirements are granted.
9. This approval, contingent on the above noted conditions, shall not relieve the applicant from compliance with the provisions of any applicable ordinances regulations or adopted standards. The applicant shall be himself responsible for obtaining the required Residential/Non-Residential Use Permit through established procedures, and this Special Exception shall not be valid until this has been complied with.

AFFIDAVIT

I, Blair W. Cupp, do hereby make oath or affirmation that to the best of my knowledge and belief the foregoing information contained in this application is true; and:

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

Name	Address	Relationship
Blair W. & Dorothy S. Cupp	9439 Leesburg Pike	Vienna, VA Owners
Thomas O. Lawson	4103 Chain Bridge Road	Fairfax, VA Attorney

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

Name	Address	Relationship
NONE		

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

Name	Address	Relationship
NONE		

2. That no member of the Fairfax County Board of Supervisors, Planning Commission or Board of Zoning Appeals owns or has any interest in the subject land or has any interest in the outcome of the decision.

NONE EXCEPT AS FOLLOWS: (If none, so state)

3. That within the five (5) years prior to the filing of this application, no member of the Fairfax County Board of Supervisors, Planning Commission, or Board of Zoning Appeals or any member of his immediate household and family, either directly or by way of partnership in which any of them is a partner, employee, agent or attorney, or through a partner of any of them, or through a corporation in which any of them is an officer, director, employee, agent or attorney or holds outstanding bonds or shares of stock with a value in excess of fifty dollars (\$50), has or has had any business or financial relationship, other than any ordinary depositor or customer relationship with or by a retail establishment, public utility or bank, including any gift or donation having a value of fifty dollars (\$50) or more with any of those listed in Par. 1 above.

NONE EXCEPT AS FOLLOWS: (If none, so state)

WITNESS the following signature this 4th day of Sept, 19 79.

Blair W. Cupp
Applicant

The above affidavit was subscribed and confirmed by oath or affirmation before me this 4th day of September, 19 79, in the State of Virginia.

W. J. P. [Signature]

KELLY, LOUK, LAWSON & KELLY

ATTORNEYS AT LAW

4103 CHAIN BRIDGE ROAD

FAIRFAX, VIRGINIA 22030

H. WISE KELLY, JR.
RALPH G. LOUK
THOMAS O. LAWSON
H. WISE KELLY, III

703. 273-1950

OF COUNSEL
ROBERT B. HOOD, JR.

W. BREWSTER COCKRELL

September 4, 1979

Members, Fairfax County
Board of Supervisors

Re: SE Plant Nursery
Blair W. and Dorothy S. Cupp
T/A Wolf Trap Nursery

Ladies and Gentlemen:


The above applicants have been operating a plant nursery at 9439 Leesburg Pike, Vienna, VA for seven years and now that Capers Nursery has gone out of business, they are virtually the only full service plant nursery in this area. Thus, it serves a real need for this area.

The Cupps also live on the premises and thus assure the continued maintenance of an attractive and esthetically pleasing environment. The business is in operation seven days a week from 8:30 a.m. to 5:00 p.m. with a maximum number of employess at any given time of 7. The maximum number of customers at any one time would be 15; thus, the operation has a minimal effect on the traffic on Route 7.

The proposed modifications are really more in the nature of rearranging the location of activities on the site rather than their expansion. For example one greenhouse is being moved closer to an existing greenhouse and the sales and display building. The same is true of the lath house and the existing sales and display area is being expanded. In each instance the changes will move the various activities away from the property lines and in closer proximity to the applicants' house.

Since the site consists of 6.7+ acres of land there is obviously more than enough area to accommodate these modifications.

Very truly yours,



Thomas O. Lawson

TOL/dfr

Enclosures

9-006 General Standards

In addition to the specific standards set forth hereinafter with regard to particular special exception uses, all such uses shall satisfy the following general standards:

1. The proposed use at the specified location shall be in harmony with the policies embodied in the adopted Comprehensive Plan.
2. The proposed use shall be in harmony with the general purpose and intent of the applicable zoning district regulations.
3. The proposed use shall be such that it will not adversely affect the use or development of the neighboring properties in accordance with the applicable zoning district regulations and the applicable provisions of the adopted Comprehensive Plan. The location, size and height of buildings, structures, walls and fences, and the nature and extent of screening, buffering and landscaping shall be such that the use will not hinder or discourage the appropriate development and use of adjacent or nearby land and/or buildings or impair the value thereof.
4. The proposed use shall be such that pedestrian and vehicular traffic generated will not be hazardous or conflict with existing and anticipated traffic in the neighborhood.
5. In addition to the standards which may be set forth in this Article for a particular category or use, the Board shall require landscaping and screening in accordance with the provisions of Article 13.
6. Open space shall be provided in an amount equivalent to that specified for the zoning district in which the proposed use is located.
7. Adequate utility, drainage, parking, loading and other necessary facilities to serve the proposed use shall be provided. Parking and loading requirements shall be in accordance with the provisions of Article 11.
8. Signs shall be regulated by the provisions of Article 12, except as may be qualified in the parts that follow for a particular category or use. However, the Board may impose more strict standards for a given use than those set forth in this Ordinance.

9-514 Additional Standards for Plant Nurseries

1. In the R-A through R-4 Districts, no plant nursery shall be established except on a lot which has a minimum lot area of five (5) acres and has frontage on an arterial street as defined in the adopted comprehensive plan.
2. In the R-A through R-4 Districts, no building or structure used for or in connection with such use shall be located closer than 100 feet to any lot line which abuts an R district.
3. In the R-A through R-4 Districts, no off-street parking or loading space shall be located closer than fifty (50) feet to any lot line which abuts an R district.
4. Plant nurseries shall be subject to the regulations of the zoning district in which located. In addition, in the R-A through R-4 Districts the Board shall impose such conditions and restrictions as it may deem necessary to assure that the use will be compatible with the adjacent residential area. In particular the Board may condition the following:
 - A. Location, size, height and use of structures
 - B. Location and number of commercial vehicles
 - C. Lighting and hours of operation
 - D. Location of materials stored outside

Article 20

PLANT NURSERY: An area or establishment for the propagation, cultivation and growing of nursery stock such as trees, plants, shrubs and vines. Retail sales from the site may be permitted as an accessory use and shall be limited to nursery stock grown on the property and items designed solely to maintain and preserve the life and health of nursery stock such as fungicides, insecticides, chemicals, peat moss, humus, mulches and fertilizers. Landscape contracting of nursery stock grown on the property shall be permitted as an accessory use.

For the purpose of this Ordinance, growing of nursery stock shall include stock which is grown on the premises and stock which is purchased elsewhere and transplanted for growth on the premises.

FAIRFAX COUNTY, VIRGINIA

MEMORANDUM

TO: Sidney R. Steele, Chief
Zoning Evaluation Branch, OCP DATE November 8, 1979

FROM: Shiva K. Pant, Director
Office of Transportation *SK Pant*

FILE NO: 3-5, SE-091-D-79

SUBJECT: Transportation Impact

REFERENCE: SE-091-D-79, 19-3

IMPACT ANALYSIS AND DESIGN CONSIDERATIONSCompatibility with the Adopted Plan

The site is located on the south side of Leesburg Pike (Rt. 7) southeast of Beulah Road. Route 7 is classified as a principal arterial, the main function of which is to provide for through traffic. The road is four lanes in this area with a median divider. There are separate turn lanes on Route 7 at some intersections including that with Beulah Road. The 1978 traffic count on Route 7 in the vicinity site was 34,965 vpd. This is the latest traffic count available and is reported by VDH&T. The level of service in this area is very poor due to the high volumes of traffic.

The transportation element of the Countywide Plan recommends the widening of Route 7 to a six lane divided facility. Public hearings for this project have not been scheduled at this time. In addition, service drives are required along primary roads such as Route 7. Therefore, sufficient right-of-way should be dedicated for a third eastbound lane, and a standard service drive. Dedication should include right-of-way to about 100 feet from the centerline, the exact amount to be set by the Department of Environmental Management at the time of site plan review. Construction of the third lane and the service drive can be deferred until such time as the site redevelops.

A trip generation rate for plant nurseries is unavailable, therefore, an estimate of the number of trips to and from the facility is undetermined.

Access to the Surrounding Street System

The existing site has direct access to Route 7 and no change in this situation is proposed by the applicant. There is a break in the median divider on Route 7 at the entrance to the site. In addition, there are separate left turn lanes at this location.

November 8, 1979

The applicant should construct a deceleration/right turn lane on eastbound Route 7, such that vehicles reducing speed to enter the site will not disrupt traffic flow on Route 7.

RECOMMENDATION

The Office of Transportation would not object to the approval of this application provided the applicant:

- o dedicates right-of-way to about 100 feet from centerline along the frontage of the site, the exact amount to be set by the Department of Environmental Management at the time of site plan review,
- o constructs a deceleration/right turn lane for entrance to the plant nursery.

SKP/tlh

ENVIRONMENTAL SITE ANALYSIS

Appendix 6

Project Number: SE-091-D-79 Location: 19-3 ((1)) 19
 Existing Zoning: Proposed Zoning and/or Use: Nursery Acreage: 6.7

Site Features	Presence		Comments
	yes	no	
A. Geology: Coastal Plain, <u>Piedmont</u> , Triassic			
1. shallow bedrock		x	
2. groundwater resource		x	
3. mineral resources		x	
B. Topography:			
1. steep slopes (≥15%)		x	
2. irregular landform		x	
C. Hydrology:			C. Difficult Run watershed
1. water features	x		1. Stream located in southeast corner of the site. No disturbance to the stream is proposed.
2. critical location in watershed		x	
3. water supply watershed	x		3. The property is located upstream of the Potomac water intake. Proposed modifications will not significantly impact the water quality of the Potomac.
D. Soils:			D.
1. marine clays		x	4., 5., 6. - Meadowville silt loam found adjacent to the stream in the southeast corner of the site. No construction is planned on this soil.
2. shrink-swell clays		x	
3. highly erodible soils		x	
4. high water table soils	x		
5. soils with low bearing strength	x		
6. poor infiltration soils	x		
E. Vegetation, Wildlife & Open Space:			
1. quality vegetation		x	
2. wildlife habitat		x	
3. adopted EQC		x	

Environmental Quality	Problems		Comments
	yes	no	
F. Noise:			
1. airport noise		x	F.
2. highway noise		x	2. Some of the nursery buildings fall within the unacceptable noise zone of Route 7. However, this noise will not significantly affect this commercial use.
3. railroad noise		x	
4. other types of noise		x	
G. Water:			
1. point source pollution		x	
2. non-point source pollution		x	
H. Air:			
1. mobile source pollution		x	
2. stationary source pollution		x	
I. Aesthetics: For example: internal views, views from site, views of site from adjacent development		x	
J. Other:			

December 6, 1979

Robert L. Davis
Office of Comprehensive Planning
Zoning Evaluation Branch
The Massey Building
4100 Chain Bridge Road
Fairfax, VA 22030

Re: SE-091-D-79
Blair and Dorothy Cupp

Dear Bob:

I would like the application to reflect the fact that the operating entity for the nursery will be the Wolf Trap Nursery, Inc. My original letter of justification dated September 4, 1979, does reference this fact in the re; however, I would assume that the board, upon issuing the SE, would want to include the operating entity in the permit as well as the owners of the property. In this instance the Cupps are the sole owners of the corporation as well.

On another matter I would like the record to reflect that the applicants object to the requirement of the dedication of a right-of-way up to 100 feet from the centerline of Route 7 and the construction of a deceleration right turn lane at the entrance. Am I correct in assuming that the staff's recommendation is that both the construction and the dedication of the 100 foot right-of-way be deferred until a later redevelopment of the site?

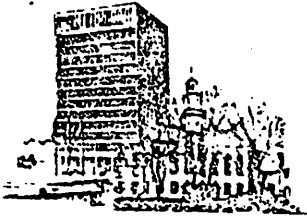
Also, I would appreciate it if the staff would clarify exactly what transitional yard is going to be required on the eastern boundary adjacent to the present lathe house. The vegetation that exists on the entire perimeter of the site is more than adequate to screen the facility from the adjacent properties; and, I would therefore request a waiver of the transitional yard requirement on all of the side yards.

Very truly yours,

Thomas O. Lawson

TOL/dfr

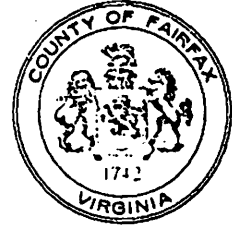
cc: Blair Cupp



COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

4100 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

January 4, 1980



Mr. Thomas O. Lawson
Attorney-at-Law
4103 Chain Bridge Road
Fairfax, Virginia 22030

Re: SE-091-D-79 - Blair and Dorothy Cupp

Dear Tom:

The pending application will reflect the fact that the operating entity for the plant nursery is Wolf Trap Nursery, Inc.

Your assumptions that construction of the deceleration lane and the dedication will be deferred until a later redevelopment of the site is incorrect. Construction of a deceleration/right turn lane for entrance to the plant nursery is to take place at the time that the proposed improvements are made onsite. Likewise, dedication of right-of-way up to 100 feet from the centerline of Route 7 for a third eastbound lane and a standard service drive should occur upon approval of the site plan for the special exception. Construction of the third eastbound lane and the service drive can be deferred until such time as the site redevelops.

I agree that the vegetation that exists along the eastern boundary of the site is adequate to screen the facility from the adjacent property. A waiver of that transitional yard requirement would be in order and will be recommended to the Board of Supervisors.

The pending special exception application for expansion of Wolftrap Nursery, Inc. brings it under the current regulations of the Zoning Ordinance. Conformance with the Ordinance definition for plant nurseries would prohibit the retail sales of items not designed solely to maintain and preserve the life and health of nursery stock such as garden tools, hoses, pottery, statues and bird baths. Subsequent to the Planning Commission hearing, where the staff recommended approval, Mr. Cupp informed me that these items were currently being

Mr. Thomas O. Lawson

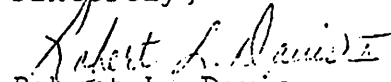
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January 4, 1980

sold onsite. Unless these items are removed from the site as sales items the staff will have to recommend denial of the pending special exception application to the Board of Supervisors.

If you have further questions regarding this application, please contact me.

Sincerely,



Robert L. Davis
Staff Coordinator
Zoning Evaluation Branch
Office of Comprehensive Planning

RLD:cd

January 10, 1980

Robert L. Davis
Office of Comprehensive Planning
Zoning Evaluation Branch
The Massey Building
4100 Chain Bridge Road
Fairfax, VA 22030

Re: SE-091-D-79
Blair and Dorothy Cupp

Dear Bob:

I have reviewed your letter of January 4, 1980, with Mr. Cupp and I am disturbed by your interpretation of the existing zoning ordinance regarding Wolf Trap Nursery's present operations. You say that Mr. Cupp must cease to sell a number of items even prior to the approval of this application. The clear implication of your letter ignores the fact that Mr. Cupp's business is grandfathered as a pre-existing use. In fact approximately 4 years ago Mr. Cupp was prosecuted by the County for the sale of these same items and Judge Griffith found him not guilty. I am surprised that you would state in effect that before the staff would consider recommending favorably on this request Mr. Cupp must comply with an ordinance which is not applicable to him.

Additionally it is my client's position that even if the SE is approved, his business will continue as a grandfathered, non-conforming use and the new ordinance would not be applicable to him. All Mr. Cupp seeks to do is rearrange his facilities in a more efficient manner with a diminuous amount of expansion and to continue doing what he has been doing for the last seven years. He is not seeking to expand his operation in terms of the activities that are conducted thereon.

Finally, Mr. Cupp also objects to the requiring of the dedication of the right-of-way up to 100 feet from the center line of Route

Robert L. Davis
January 10, 1980
Page 2

7 for the third east bound lane and service drive and the request that he construct a deceleration/right turn lane. I have already stated the reasons why he objects to this, and would simply add that the expense is out-of-line with the requirement. Additionally, I think that Hylton Enterprises v. The Board of Supervisors of Prince William County, 258 S.E. 2d 577, decided October 5, 1979, by the Virginia Supreme Court prohibits the County from making this requirement.

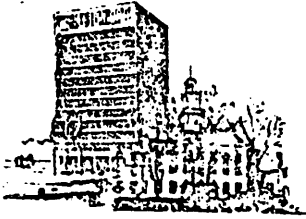
I would request that this letter as well as your letter of January 4, 1980, be made a part of the board package and a part of the record in this case.

Very truly yours,

Thomas O. Lawson

TOL/dfr

cc: Blair Cupp



COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

4100 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

January 23, 1980



Mr. Thomas O. Lawson
Kelly, Louk, Lawson & Kelly
4103 Chain Bridge Road
Fairfax, Virginia 22030

Dear Tom:

It was not my intention in my letter of January 4, 1980 to imply that items not designed solely to maintain and preserve the life and health of nursery stock should cease to be sold prior to the approval of the special exception application for the expansion of Wolftrap Nursery, Inc. I made the statement so that you and Mr. Cupp will understand that if the special exception is approved it must come into compliance with the current Zoning Ordinance definition and regulations for plant nurseries.

Your client's position that even if the special exception is approved, his business will continue as a grandfathered, nonconforming use and the new ordinance would not be applicable is in error. Par. 2 of Sect. 15-101 states:

"Any use existing prior to the effective date of this Ordinance, which is allowed within a particular zoning district as a special permit or a special exception use by the provisions of this Ordinance, shall not be deemed to be a nonconforming use in such district. However, any subsequent replacement or enlargement of such use or of any building in which the same is conducted or the construction of any additional building for such use beyond the extent which existed prior to the effective date of this Ordinance, shall be subject to a special permit or special exception obtained in accordance with the provisions of this Ordinance. Such special permit or special exception shall be approved only if the resulting use complies with the standards set forth in Articles 8 or 9 for the particular use in question."

The last sentence clearly states that the resulting use, if approved, must come into compliance with the ordinance provisions concerning plant nurseries.

Staff recommendations regarding improvements to Route 7 will remain as stated.

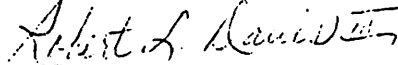
Thomas O. Lawson

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January 23, 1980

As requested, your letter of January 10, 1980, as well as my letters of January 4 and January 17, 1980 will be made a part of the Board package on the subject Special Exception application.

Sincerely yours,



Robert L. Davis, III
Staff Coordinator
Zoning Evaluation Branch
Office of Comprehensive Planning

RLD:cd

January 29, 1980

Robert L. Davis
Office of Comprehensive Planning
Zoning Evaluation Branch
The Massey Building
4100 Chain Bridge Road
Fairfax, VA 22030

Re: SE-091-D-79
Blair and Dorothy Cupp
T/A Wolf Trap Nursery, Inc.

Dear Bob:

Attached to this letter are ten copies of a site layout of Blair Cupp's property at the Wolf Trap Nursery, Inc. located on Leesburg Pike, Route 7. You will see that the sales office expansion has been reduced and that the proposed new lathe house and greenhouse have been extended to where they now join. I would appreciate it if you would substitute these for the plats now in the file. This will be Mr. Cupp's final submission.

For the record I would like to make it clear that my client objects to the staff's interpretation of the ordinance for the conditions that would attach to the special exception result in an unwarranted confiscation of a portion of Mr. Cupp's business and, therefore, would be illegal and void. Obviously these conditions would seriously damage his business and he would be foolish to accept the special exception under these circumstances.

The required dedication and road improvements are also unreasonable, illegal and not related to the public health, safety and welfare. This is particularly true in this instance since the modifications in Mr. Cupp's business are so diminuous that they will not measurably impact the public welfare or safety, particularly traffic on Route 7. This is a development of such a nature that it would be impossible for him to pass on the cost of such road improvements to the consuming public which is normally the case with a developer of houses or a commercial enterprise. In the later two instances road improvement costs can simply be added on

Robert L. Davis
January 29, 1980
Page 2

as a cost of the project and passed on to the ultimate purchaser. That obviously would be impossible in the case of a business of this type for when you sell rose bushes, azaleas, etc. your price has to be competitive with the market.

It has been the position of my client and continues to be his position that he seeks the special exception (without the conditions and legal interpretation given to it by the staff) only as a method of exhausting his administrative remedies, for it is Mr. Cupp's position that he has the right to apply for and seek approval of a building permit to construct the improvements as shown on the development plan assuming, of course, that applicable requirements of the building code are met without prior board approval and that he has a vested right to continue his business and to accommodate its normal, natural growth.

I would appreciate it if you would make this letter a part of the board package and part of the record in this case.

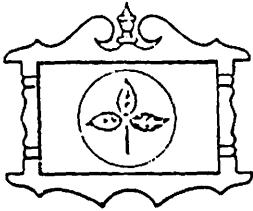
Very truly, yours,

Thomas O. Lawson

TOL/dfr

Enclosures

cc: Blair Cupp
Nancy K. Falck



WOLF TRAP *Nursery, Inc.*

9439 LEESBURG PIKE / VIENNA, VIRGINIA 22180 / PHONE (703) 759-2424

Blair W. Cupp

February 4, 1980 Dorothy S. Cupp

Mr. John F. Herrity, Chairman,
Fairfax County Board of Supervisors,
Dear Mr. Herrity:

My wife and I opened our business on May 6, 1972, and fortunately for us, and the community which we serve, our business has prospered. Some time after we opened we began receiving calls items that we were forbidden to sell under the ordinance existing at that time. I obtained a copy of the County ordinance and I noticed that on the first page there appeared a declaration which read something like this: "The purpose and intent of this Fairfax County ordinance is to promote the health, safety and welfare of the general public". My first reaction to this was very positive, because this is the very nature of our business. Every time we plant a tree or shrub we are providing 'clean air machines', as each item of green foliage provides all with oxygen, literally our breath of life. Then as I read further into the ordinance I discovered item after item that is designed to restrict, rather than promote the health, safety and welfare of the citizens. The ordinance failed to recognize that in a competitive world, the more narrow the scope of a business, the less is its chance of survival. For example, if we were to attempt to sell only Star roses, and nothing else, we would not survive. The one who pays all of our bills and makes our business possible, and indeed makes this governing body possible, the consumer, is demanding more and more to be able to do one stop shopping. Gasoline is now \$1.18 per gallon and is projected to reach \$2. by the end of the year. It is too precious to waste unnecessarily.

I recognized early that in order to be competitive I must be able to sell these ancillary products that the consumer was demanding, and failing to recognize anything detrimental to the health safety and welfare of the public that might occur from the sale of such items, we decided to test the validity of the ordinance in court. The rest of the story is now history. After an inspection of our premises by the court, where many man made objects such as pruning shears, concrete products, water hoses etc., were on display and being offered for sale, the court ruled against the restrictive ordinance in favor of the people. Is it not in the best interest of the people that items



GROWERS OF BEAUTIFUL PLANTS



which they need and want be made available to them without governmental interference, as long as there is no threat to their helth, safety or welfare?

Please allow me to illustrate this point. A fair amount of our greenhouse business is done in the sale of Bonsai trees, miniature trees grown only in containers. Some of these trees are a number of years old and are relatively expensive for their size. We also sell the miniature trees separately as starters to those who wish to grow and train their own from a seedling. Bonsai trees need a special container with certain size drainage holes, and we also offer these for sale. I have brought one of these starter pots along with me today for your inspection, and with your permission would like to pass it around. Now, the new ordinance enacted a couple of months ago, with which the county staff is recommending that in order to be granted this application we must comply, specifically forbids the sale of this item. This new ordinance says to my customer, yes, you may purchase a Bonsai starter from Wolf Trap Nursery, but it is not in your best interest to allow Wolf Trap Nursery to sell you the special container to grow it in. Therefore, if you wish to complete your purchase you must spend your time and expensive fuel and try to locate this item elsewhere. The most logical conclusion for this customer to reach is to go elsewhere for the entire purchase, having a depressing effect on the customer's living expense, and our business. This same principle applies to the sale of other items.

We do happen to sell Star roses, and anyone familiar with roses that they need care. Among other things, they are subject to a fungus called 'black spot', creating a need for frequent spraying with a fungicide. Fungicide comes only in wetable powder form, and must be mixed and diluted with water in order to be properly applied. This requires some sort of spraying device. The ordinance states that I can sell the powder, but the customer must go elsewhere to purchase the sprayer with which to apply the solution. Is this needless waste of time and gasoline in the best interest of the public? I believe that you will agree with me, and my clientel as well, that it is not.

When plant material is stored above ground it takes almost constant watering to maintain life. In our case, this water is supplied by a deep well. In summer, the three horse power pump at the bottom of this well runs almost constantly during the day, consuming large amounts of electrical energy. For convenience and accessibility we are attempting to consolidate the areas where the plant material is stored. It helps considerably to retard water evaporation if we can shade these plants from the sun. This is best accomplished by means of a shade or lath house. This term is a mis-nomer, for it is not a house. In fact it is not eaven a building. It is only a support so that we may lay snow fence over top of the plants, and still have room beneath it to work and service the plants. This reduces by 50% the amount of sunlight reaching the plants, retarding evaporation and greatly reduces watering requirements, resulting not only in a reduction in labor, but a substantial savings of electrical energy as well. The county staff is saying that for me to implement these energy saving measures by erecting the snow

fence, I must forgo my present status and bring my entire operation under the provisions of the newly enacted ordinance, giving up the sale of the very item which the county court has already ruled on.

Now let us examine some of the other conditions attached to the approval of this application. I happen to live on this property, and have for the past twenty one years. When I built our home it suitable for the size of our family, but now the kids have left the nest and the house is much too large for our present needs. My wife may one day decide that smaller living quarters would be more suitable and wish to move into an apartment. But the ordinance says - not so, you cannot do this, it is against the rules, in this case for you not to live where you work. By what authority does any county apply restrictions as to where individual tax paying citizens shall live? Does the house that I reside in have any effect, adversely or otherwise, on the health, safety or welfare of any other citizen?

Another condition attached to the granting of this application is that I donate a strip of land approximately 60' x 500' across the front of my property, for future highway widening, and that I also construct at my own expense a deceleration lane on the east bound lane of route seven. I stongly object to the approval of this application conditional upon my making road improvements to an existing public highway. I believe that we have constitutional guarantees as to private ownership of property, and I happen to hold title to this strip of land, and if there have been any offers by the State to purchase this property it has not come to my attention. In the past when the Hlghway Department needed additional right of way, even in condemnation, the property owner was paid for his land. Why should a citizen whose misfortune is to own property abutting a busy highway, be the one to bear the brunt of this expense? When my children needed to go to school we didn't buy the bus or build the school, individually. If it was for the common good the burden was, and still is, shared by all. The question also arises as to the need for a deceleration lane. Have there been any studies conducted at this site that show a need? According to the latest traffic count made, I believe within the last twelve months, by the Department of Highways, the number of vehicles passing my door in a twenty four hour period was 34, 956. The cash register that we use provides us, at the end of a given period, with an accurate count of the number of customers. Last year, according to this record, our average number of customers was only twenty five per day. Can anyone claim that this small operation is having an adverse impact on the traffic on route seven? Isn't it reasonable to assume that if because of our small operation there is a clear and present danger on route seven, in a period of $7\frac{1}{2}$ years, with 34, 956 cars per day passing our door, at least one would have collided with one of the twenty five entering or leaving our premices? A check with both the County and State police, and also the Hlghway Department in Culpeper where shch records are kept, shows that there has not been one single accident involving any vehicle leaving or entering our place of business since we began. If there were abnormal danger here, there would, in this length of time be evidence of it.

In closing let me say that what we propose to do is not the result of any expansion program . . . it is a result of a natural, orderly growth of business. It is just a natural outgrowth of pride of accomplishment. Not striving to be the biggest, only the best. When you really want to excell you do the things necessary to bring about excellency. You keep your place neat and clean, will not allow trash to accumulate. You will keep bulky material, which of necessity must be stored out of doors, covered at all times. You will offer high grade plant material, that is well cared for, at a reasonable cost. You will conform to good taste in the architectural style of your buildings, being in keeping with your neighborhood. When you do all of these things, people just naturally want to trade with you. Good business practices inevitably result in natural business growth. As I stated in the beginning, our business has prospered, and we have every reason to believe that it will continue. But the time has come for us to consolidate and become more energy efficient, and at the same time make the daily work load a little easier.

Sincerely,

Blair W. Cupp

Blair W. Cupp,
President

Addendum To

SE 091-D-79

BACKGROUND

On December 5, 1979, the Planning Commission voted to recommend to the Board of Supervisors approval of SE 091-D-79, which is an application to expand an existing plant nursery in an R-1, Residential District in Dranesville District.

The special exception application was recommended for approval based on the staff's conclusion (page 3, Staff Report) that the use will conform to the Plant Nursery definition, as amended October 22, 1979, in Article 20 of the Zoning Ordinance. The staff recommendation is based solely on the plant nursery being in conformance with the amendment provisions adopted on October 22, 1979. Enclosure #2 of this addendum presents the adopted plant nursery definition and additional standards.

STAFF COMMENTS

Presently, retail sales of such items as garden tools, hoses, pottery, statues and bird baths are taking place at Wolftrap Nursery. The application for special exception to expand the nursery brings the use within the present Zoning Ordinance provisions. Consequently, retail sales of the items noted and similar such items are expressly prohibited as part of a plant nursery. The staff cannot recommend approval of this special exception application unless the sale of such items is terminated. Strict compliance with the revised definition and additional standards would make the use a compatible use in the R-1 District for which staff would recommend approval.

The single family detached dwelling shown on the preliminary site plan is the domicile of the nursery operator with the plant nursery as an accessory use. Par. 5 of Sect. 9-514, as amended, provides the Board of Supervisors with the authority to vary, modify or waive the provisions of Paragraphs 1, 2 and 3 of the additional standards for plant nurseries and the provisions of Article 13 for a plant nursery which is accessory to a single family detached dwelling. Thus, those modifications and waivers requested by the applicant to allow the existing lath house and parking lot to remain closer to the abutting R district than allowed by the additional standards for plant nurseries are permitted. Modifications and waivers of screening requirements are also permitted by the section noted above. In this instance, where modification or waiver is granted, retention of existing vegetation would be appropriate.

STAFF CONCLUSIONS AND RECOMMENDATIONS

Sales at the present facility are not in accordance with the recently adopted provisions of the Zoning Ordinance with regard to a plant nursery. Thus, the staff cannot recommend approval of expansion of the enterprise without the operation being brought into conformance with the ordinance.

Therefore, should the applicants intend to continue sales of merchandise now prohibited at a plant nursery, the staff recommends denial of the application. With the understanding that sales would conform to the current provisions of the Zoning Ordinance, the staff recommends approval of the application subject to the development conditions listed in Revised Appendix 1, Proposed Development Conditions. Enclosure #1. In that instance, the staff would also recommend that the Board modify the transition yard along the south side of the site and waive the transition yard and barrier along the east and west sides of the parcel provided existing vegetation is retained along the eastern, western, and southern property boundaries where the modifications and waivers are granted.

It is further recommended that the Board modify the additional standards of Pars. 2 and 3 of Sect. 9-514 to allow the existing lath house and the proposed parking lot to be located not closer than 13 feet from the lot line which abuts the R District.

PROPOSED DEVELOPMENT CONDITIONS

If it is the intent of the Board of Supervisors to approve SE 091-D-79 located as Tax Map 19-3 ((1)) 19 for use as a plant nursery pursuant to Sects. 3-104 and 9-003 of the Fairfax County Zoning Ordinance, the staff recommends that the Board condition the approval by requiring conformance with the following development conditions:

1. This Special Exception is granted for the location indicated in the application and is not transferable to other land.
2. This Special Exception is granted for the buildings and uses indicated on the plats submitted with the application only.
3. A copy of this Special Exception SHALL BE POSTED in a conspicuous place along with the Residential/Non-Residential Use Permit on the property of the use and be made available to all Departments of the County of Fairfax during hours of operation of the permitted use.
4. Submission and approval of a site plan prepared in accordance with the provisions of Article 17. The revised site plan will satisfy ordinance requirements for parking, landscaping and screening, subject to approval of the Director, Department of Environmental Management.
5. Construction of a deceleration/right turn lane for entrance to the plant nursery.
6. Dedication of right-of-way to 100 feet from the centerline for a third eastbound lane and a standard service drive, the exact amount of dedication to be set by DEM at the time of site plan review. Construction of the third lane and the service drive can be deferred until such time as the site redevelops.
7. Retention of existing vegetation along the eastern, western and southern property boundaries where waivers or modifications to the screening requirements are granted.
8. This approval, contingent on the above noted conditions, shall not relieve the applicant from compliance with the provisions of any applicable ordinances, regulations or adopted standards. The applicant shall be himself responsible for obtaining the required Residential/Non-Residential Use Permit through established procedures, and this Special Exception shall not be valid until this has been complied with.

PLANT NURSERY: An area or establishment for the propagation, cultivation and growing of nursery stock such as trees, plants, shrubs and vines. Retail sales from the site may be permitted as an accessory use and shall be limited to nursery stock grown on the property and items designed solely to maintain and preserve the life and health of nursery stock such as fungicides, insecticides, chemicals, peat moss, humus, mulches and fertilizers. Retail sales of items not designed solely to maintain and preserve the life and health of nursery stock such as garden tools, hoses, pottery, statues and bird baths shall be deemed a GARDEN CENTER and shall be prohibited. Landscape contracting of nursery stock grown on the property shall be permitted as an accessory use.

For the purpose of this Ordinance, growing of nursery stock shall include stock which is grown on the premises and stock which is purchased elsewhere and transplanted for growth on the premises.

9-514 Additional Standards for Plant Nurseries

1. In the R-A through R-4 Districts, no plant nursery shall be established except on a lot which has a minimum lot area of one (1) acre and has frontage on an arterial street as defined in the adopted comprehensive plan.

2. In the R-A through R-4 Districts, no building or structure used for or in connection with such use shall be located closer than 100 feet to any lot line which abuts an R district.

3. In the R-A through R-4 Districts, no off-street parking or loading space shall be located closer than fifty (50) feet to any lot line which abuts an R district.

4. Plant nurseries shall be subject to the regulations of the zoning district in which located. In addition, in the R-A through R-4 Districts, the Board shall impose such conditions and restrictions as it may deem necessary to assure that the use will be compatible with the adjacent residential area. In particular, the Board may condition the following:

- A. Location, size, height and use of structures
- B. Location and number of commercial vehicles
- C. Lighting and hours of operation
- D. Location of materials stored outside

5. In the R-A through R-4 Districts, notwithstanding the provisions of Sect. 9-003, the Board may vary, modify or waive the provisions of Paragraphs 1, 2 and 3 above and the provisions of Article 13 for a plant nursery which is accessory to a single family detached dwelling, provided such dwelling is the domicile of the nursery operator.

PROPOSED DEVELOPMENT CONDITIONS

If it is the intent of the Board of Supervisors to approve SE-091-D-79 located as Tax Map 19-3 ((1)) 19 for use as a plant nursery pursuant to Sects. 3-104 and 9-003 of the Fairfax County Zoning Ordinance, the staff recommends that the Board condition the approval by requiring conformance with the following development conditions:

1. This Special Exception is granted for the location indicated in the application and is not transferable to other land.
2. This Special Exception is granted for the buildings and uses indicated on the plats submitted with the application only.
3. A copy of this Special Exception SHALL BE POSTED in a conspicuous place along with the Residential/Non-Residential Use Permit on the property of the use and be made available to all Departments of the County of Fairfax during hours of operation of the permitted use.
4. Submission and approval of a site plan prepared in accordance with the provisions of Article 17. The revised site plan will satisfy ordinance requirements for parking, landscaping and screening, subject to approval of the Director, Department of Environmental Management.
6. Dedication of right-of-way to 100 feet from the centerline for a third eastbound lane and a standard service drive, the exact amount of dedication to be set by DEM at the time of site plan review; or, in the event the service drive is waived by Director, DEM, dedication of 60 feet from centerline. Construction of the third lane and the service drive, if required, can be deferred until such time as the site redevelops.
7. Provision of peripheral landscaping along the eastern side of the site to minimize adverse impact to the adjoining residential property.
8. Retention of existing vegetation along the eastern, western, and southern property boundaries where waivers or modifications to the screening requirements are granted.
9. This approval, contingent on the above noted conditions, shall not relieve the applicant from compliance with the provisions of any applicable ordinances regulations or adopted standards. The applicant shall be himself responsible for obtaining the required Residential/Non-Residential Use Permit through established procedures, and this Special Exception shall not be valid until this has been complied with.

CUPP SITE

RIGHT TURN LANE

Route 7 Widening:

Surface - 1½" S-5 - 591 SY @ \$2/SY/IN	\$ 1,773
Base - 5½" B-3 - 591 SY @ \$1.80/SY/IN	5,851
Subbase - 12" Stone - 282 CY @ \$18/CY	5,076
Gravel Shoulders - 72 SY @ \$3/SY	216
Delineators - 19 @ \$27/EA	513
Curb & Gutter - 300 LF @ \$10/LF	3,000
CG-10A Entrance - 1 @ \$2,500	2,500
Clearing & Grubbing - 0.15 AC @ \$1,800/AC	270
Grading - 1632 CY Fill @ \$4.50/CY	7,344

Drainage:

10' 24" Pipe @ \$60/LF	600
1' - 24" EW	960

Guardrail:

250 LF @ \$30/LF	7,500
20 Posts @ \$27/EA	<u>540</u>

Sub-Total	\$36,143
Contingencies - 15%	<u>5,421</u>
Total	\$41,564

CUPP SITE

ULTIMATE SECTION

Route 7 Widening:

Surface - 1½" S-5 - 811 SY @ \$2/SY/IN	\$ 2,433	
Base - 5½" B-3 - 811 SY @ \$1.80/SY/IN	8,029	
Subbase - 12" Stone - 326 CY @ \$18/CY	<u>5,868</u>	
		\$ 16,330

Service Drive:

Surface - 2" S-5 - 1331 SY @ \$2/SY/IN	\$ 5,324	
Base - 6" Spec. 210 - 1331 SY @ \$.60/SY/IN	4,792	
Subbase - 8" - 345 CY @ \$18/CY	<u>6,210</u>	
		16,326

Gravel Shoulder - 90 SY @ \$3/SY	270
Delineators - 21 @ \$27/EA	567
Header Curb - 470 LF @ \$9/LF	4,230
Curb & Gutter - 938 LF @ \$10/LF	9,380
Barricades - 2 @ \$800/EA	1,600
Sidewalk - 470 LF @ \$8/LF	3,760
Seeding Median - 1035 SY @ \$1/SY	1,035
CG-10A Entrance - 1 @ \$2,500	2,500
Clearing & Grubbing - 0.78 AC @ \$1,800/AC	1,404
Grading - 5,375 CY Fill @ \$4.50/CY	24,188

Drainage:

60' - 24" Conc. Pipe @ \$60/LF	\$ 3,600	
1' - DI-3	1,800	
1 - EW	<u>960</u>	
		<u>6,360</u>
Sub-Total		\$ 87,887
Contingencies - 15%		<u>13,183</u>
Total		\$101,070

QUALIFICATIONS

Telephone: 273-4227

N. McK. Downs
P. O. Box 363
Fairfax, Va. 22030

Office: 4015 Chain Bridge
Road

1. Licensed real estate broker from 1948 to date.
2. Engaged in the listing, sale, management, and appraisal of residential, commercial, and industrial real estate from 1948 to date.
3. Member of Northern Virginia Board of Realtors and National Association of Real Estate Boards. Also member of American Right of Way Association and Society of Real Estate Appraisers, with SRA designation.
4. Formal education includes A.S.T.P. Certificate in Civil Engineering - University of Virginia, 1937-38; Rutgers University, 1942-43. Graduate of Army Language School, Monterey, California. Satisfactory completion of Appraisal courses at George Washington University, University of Virginia, and University of Tampa as conducted by the National Institute of Real Estate Appraisers.
5. 1954-55 engaged in selection, acquisition, and supervision of construction of all microwave sites in France for U.S. Army Signal Corps.
6. Fee appraisal assignments:
 - (a) Virginia Department of Highways on projects in Fairfax, Loudoun, Fauquier, Prince William, Frederick, and Arlington Counties and City of Alexandria, City of Fairfax, City of Falls Church.
 - (b) Fairfax County School Board - site acquisition and easement valuations.
 - (c) Fairfax County Division of Land Acquisition - land acquisition projects and easement valuations.
 - (d) City of Fairfax - land acquisition valuations, easement valuations, and as review appraiser on various projects.
 - (e) Town of Warrenton - appraiser and consultant on land acquisition and R/W for water reservoir project.
 - (f) American Telephone and Telegraph Company as appraiser and consultant on R/W and site acquisition.

QUALIFICATIONS - N. McK. Downs

- (g) Virginia Electric and Power Company on transmission line R/W and site acquisition.
- (h) Atlantic Seaboard Corporation on gas line R/W.
- (i) Washington Gas Light Company on R/W and site acquisition valuation.
- (j) Colonial Pipe Line Company on gas line R/W and site location studies.
- (k) (1) Mobil Oil Company - site valuation for service stations.
(2) Texaco Oil Company - site valuation for service stations.
(3) American Oil Company - site valuation for service stations.
- (l) Town of Vienna - site acquisition and R/W appraisals.
- (m) Town of Hamilton - sewerage treatment plant site acquisition and R/W appraisals.
- (n) Fairfax County Water Authority as appraiser and consultant on R/W and site acquisition.
- (o) Town of Leesburg, R/W appraiser and consultant for various projects, including sewerage treatment plant, sewer easements, drainage easements, etc.
- (p) Town of Lovettsville - easement valuations.
- (q) Town of Purcellville - easement valuations.
- (r) City of Falls Church - appraisal of site acquisition and R/W for water tower sites, water pumping station sites, and road expansion projects, etc.
- (s) Chesapeake and Potomac Telephone Company - R/W and site acquisition valuations.
- (t) R/W and site valuations for R.F.&P. Railroad and Southern Railroad.
- (u) Appraiser and consultant for Potomac Bank and Trust Company. Also serve as appraiser for trust departments of Arlington Trust Company, National Bank of Fairfax, Riggs National Bank, Mount Vernon National Bank, Woodlawn National Bank, First Virginia Bank, First & Merchants National Bank.

QUALIFICATIONS - N. McK. Downs

- (v) County of Loudoun - appraiser and consultant on real estate assessments and various other projects.
- (w) Various law firms, lending institutions, and individuals in the Northern Virginia area on all types of appraisal work.
- 7. Served as member of Town of Fairfax Planning Commission; also served as Chairman of Board of Zoning Appeals, City of Fairfax.
- 8. Qualified as expert in circuit courts in Arlington, Fairfax, Loudoun, Fauquier, and Frederick Counties, in Corporation Court of City of Alexandria, and in United States District Court for Eastern District of Virginia.

APPRAISAL QUALIFICATIONS

N. McK. Downs
P. O. Box 363
Fairfax, Va. 22030

Professional Affiliations:

Society of Real Estate Appraisers, S.R.A.
Northern Virginia Board of Realtors, Broker
National Association of Real Estate Boards
Virginia Real Estate Association
American Right of Way Association
National Association of Review Appraisers, C.R.A.

Education:

A.S.T.P. Certificate - Civil Engineering
University of Virginia - 1937-1938
Rutgers University - 1942-1943
Army Language School, Monterey, California - 1950
National Institute of Real Estate Appraisal Courses
George Washington University - 1948
University of Virginia - 1958
University of Tampa - 1971

Appraisal Clients: (Partial List)

Virginia Department of Highways and Transportation
City of Alexandria, Va.
City of Fairfax, Va.
City of Falls Church, Va.
Arlington County, Va.
Fairfax County, Va.
Loudoun County, Va.
Prince William County, Va.
Town of Warrenton, Va.
Town of Leesburg, Va.
Town of Lovettsville, Va.
Town of Vienna, Va.
Toan of Hamilton, Va.
Town of Purcellville, Va.
United States Department of Justice
Northern Virginia Regional Park Authority
Northern Virginia Community College

Virginia Electric and Power Co.
Chesapeake and Potomac Telephone Co.
American Telephone and Telegraph Co.
Washington Gas Light Co.
American Water Works

Appraisal Qualifications - N. Nek. Downs

Southern Railway System
R.F. and P. Railroad Co.
Lehigh Portland Cement Co.
Colonial Pipeline Co.
Mobil Oil Co.
Texaco Oil Co.
American Oil Co.
Reston Land Corp.
Northern Virginia Steel Corp.
Costain-Washington, Inc.

National Bank of Fairfax
Bank of Virginia
George Mason Bank
First Virginia Bank
1st American Bank of Virginia
First and Merchants National Bank
Riggs National Bank
Arlington Fairfax Savings and Loan Association
Suburban Savings and Loan Association

Various Law Firms and individuals of Northern Virginia, District of Columbia, Richmond, Va., Fredericksburg, Va., etc.

Appraisal Experience:

Engaged in the appraisal of residential, commercial and industrial properties from 1948 to date. Assignments consisted of valuation of easements and fee acquisitions for condemnation purposes, annexation valuations, zoning valuations, assessment valuations, loan valuations, etc.

Served as review appraiser for City of Fairfax on Route 50 road expansion project and also as review appraiser for Newgate Savings and Loan Association while serving on Board of Directors.

Qualified as Expert Witness in United States District Court for Eastern District of Virginia and also District of Columbia, Circuit Courts of Arlington County, Fairfax County, Fauquier County, Frederick County, Stafford County, Rappahannock County, Spotsylvania County, Warren County, City of Alexandria and District Court of Fairfax County.

WALTER L. PHILLIPS
INCORPORATED
CIVIL ENGINEERS
LAND SURVEYORS
PLANNERS

DIRECTORS
WALTER L. PHILLIPS, P.E.
CHAIRMAN OF THE BOARD
W. LEE. PHILLIPS, JR., P.E.
PRESIDENT
ROBERT A. KINSEY, P.E.
VICE PRESIDENT

ASSOCIATE
JERRY A. MCKNIGHT, C.L.S.

RESUME'

Name: Walter L. Phillips, Jr.
Address: 221 Midvale Street,
Falls Church, Virginia 22046
Birthplace: Falls Church, Virginia
Date of Birth: March 19, 1935
Education: Graduated from the University of Virginia
with a degree in Civil Engineering in 1956,
Tau Beta Pi and Raven Society
Registration: Holds both Engineering and Land Surveying
Registration in Virginia

Entered the engineering firm of Walter L. Phillips in 1959 and
became President of the corporation in 1971.

Professional Activities:

Member of National Society of Professional Engineers, Virginia
Society of Professional Engineers and the Northern Virginia
Chapter of Virginia Society of Professional Engineers.

Mr. Phillips has served on the Board of Directors of the Northern
Virginia Chapter of Virginia Society of Professional Engineers,
as Chairman of Professional Engineers in Private Practice
Functional Section of the Northern Virginia Chapter, and as
State Secretary-Treasurer of Professional Engineers in Private
Practice. Mr. Phillips has also served as the member repre-
senting the Northern Virginia Chapter of Virginia Society of
Professional Engineers on the National Capital Area Water
Study Committee of the National Society of Professional Engineers.
This committee addressed itself to the critical water supply
problems of this area and was composed of engineering repre-
sentatives of all Metropolitan Washington engineering societies.

Member of Building Code Appeals Board of the City of Falls
Church, Virginia.

Resume' of Walter L. Phillips, Jr.
Page 2

Mr. Phillips is an Affiliate Member of the American Institute of Planners.

Member of Northern Virginia Builders Association since 1960 having served three years on the Board of Directors and one year as Secretary.

Mr. Phillips was elected "Engineer of the Year" by the Northern Virginia Chapter of the Virginia Society of Professional Engineers in 1970.

Business Activities:

The firm of Walter L. Phillips, Incorporated, since 1945, has been involved in the land development phase of Civil Engineering. The firm has specialized in storm drainage, sewer and water system design, and deal almost entirely with private developers, local municipalities, and the State Government of Virginia.

Non-Professional Activities:

Member Board of Directors First Virginia Bank, former member of the Board of Directors of Falls Church Bank (before merger with Old Dominion and Mount Vernon Banks).

Member of Falls Church Lions Club.

Member of Falls Church Presbyterian Church.

Member of Washington Golf and Country Club and Chesapeake Country Club.

FIRM RESUMÉ

ROSSER H. PAYNE, JR., A.I.C.P., and ASSOCIATES

59 Culpeper Street
P. O. Box 818
Warrenton, Virginia
22186

703 - 347-3600

January 1980

ROSSER H. PAYNE, JR., A.I.C.P.
Firm Owner and Principal Consultant

A. PERSONAL

1. Birth Date: October 6, 1925
2. Resident and Native: Fauquier County, Virginia
3. Business Address: 59 Culpeper Street
P. O. Box 818
Warrenton, Virginia 22186
4. Professional Memberships: American Institute of Certified Planners
American Planning Association
Urban Land Institute

B. EDUCATION

1. St. John's College, Washington, D. C. - 1942
2. George Washington University
3. Virginia Polytechnic Institute - 1946-1950
B.E. - Mechanical and Civil Engineering
4. University of Chicago - I.C.M.A. - Planning and Management
Institute for training in municipal planning and administration -
Graduate Studies 1960-1964

C. MILITARY RECORD

- U. S. Army Air Forces: Armorer, Gunner and Pilot
December 1942 - December 1945 (honorably discharged December 1945)
- Service in E.T.O. - C.B.I. and Western Pacific Theatres of War
- Pensioned for war injuries - 1945-1958

D. PROFESSIONAL BACKGROUND

1. Civil and Cartographic Engineering, U. S. Geological Survey, Atlantic Region, 1109 North Highland Street, Arlington, Virginia - 1949-1952
2. Planner under F. Dodd McHugh, Former Planning Director of New York City: Fairfax County Comprehensive Plan Project - 1952-1954
3. Deputy Director of Planning & Principal Planner, County of Fairfax, Virginia (staff of 60) - 1954-1967 (resigned March 1, 1967)
4. Private Consultant (Urban Planning and Management) - March 1, 1967 to date

Total Professional Experience: 30 years

Total Planning Experience: 27 years

E. HIGHLIGHTS OF RECENT EXPERIENCE (detailed on following pages)

1. Public Sector Planning and Administration:
 - a. Statewide Planning
 - b. Consultant to Virginia Counties and Municipalities
 - c. Director to Fairfax County, Virginia
 - d. Academic and University
2. Private Sector Land Management and Planning Design:
 - a. Residential Development Projects
 - b. Commercial Development Projects
 - c. Industrial Development Projects
 - d. Special Land Use Projects
 - e. Comprehensive Land Use Projects
 - f. Legal - Expert Witness

PUBLIC SECTOR PLANNING AND ADMINISTRATION

A. Statewide Planning

1. Special Consultant (representing A.I.P.) to the Governor, assisting in drafting the legislation and Table of Organization for the Division of State Planning in the Governor's Office - 1965
2. Special Consultant to the Virginia Outdoor Recreation Study Commission - 1965-1966
3. Member of four "VALC" (Virginia Advisory Legislative Council) Study Committees:
 - a. Planning Legislation - 1964-1965
 - b. Air Pollution Legislation - 1965
 - c. Soil and Water Conservation (Special Consultant to Task Force) - 1971
 - d. Land Use Planning Policies - 1972-1976 (two successive committees)
4. Chairman and Director of the Virginia Chapter of the American Institute of Planners - 1965-1966 (two terms)
5. First Virginian to be certified in City and County Management by the International City Managers Association - 1964
6. Recipient of the Annual Award of the Virginia Citizens' Planning Association as the Professional Planner making the greatest contribution to Virginia planning efforts - 1965
7. Author of the first "Tax Policy Study" in the State of Virginia with regard to open space, agricultural, and conservation lands in urban areas (V.O.R.C. Study Report Supplement) - 1965
8. Author of the first "Open Space Land Act" in Virginia (HB-745); introduced in the Legislature February 1964 and passed into law under the Virginia Outdoor Recreation Commission study in the 1966 Session of the General Assembly

B. Consultant to Virginia Counties and Municipalities

1. Principal Consultant to the following local jurisdictions in the State of Virginia, preparing their first Comprehensive Plans:
 - a. The County of Fairfax: adopted October-December 1958
 - b. The County of Fauquier: adopted October 1967
 - c. The City of Fredericksburg: adopted December 1970
 - d. The Town of Warrenton: adopted March 1971
 - e. The County of Albemarle: adopted September 1971
 - f. The Town of Leesburg: adopted June 1974
 - g. The County of Madison: adopted April 1977

2. Planning Consultant retained by the following jurisdictions for the development of local zoning ordinances, site plan and subdivision controls, special planning and land-use projects, and municipal and county management services:
 - a. The County of Fauquier, Virginia
 - b. The City of Fredericksburg, Virginia
 - c. The County of Albemarle, Virginia
 - d. The Town of Warrenton, Virginia
 - e. The Upper Shenandoah Valley Regional Park Authorities (Associated)
 - f. The County of Northumberland, Virginia
 - g. The Town of Warsaw, Virginia
 - h. The Maryland National Capital Parks and Planning Commission
 - i. The County of Rappahannock, Virginia
 - j. The County of Culpeper, Virginia
 - k. The County of Loudoun, Virginia
 - l. The Town of Leesburg, Virginia
 - m. The County of Madison, Virginia
 - n. The County of Patrick, Virginia
3. Planning Consultant for the following jurisdictions, introducing the requirement for temporary and permanent erosion and sediment control measures into their subdivision control ordinances:
 - a. The County of Fairfax, Virginia - 1965
 - b. The County of Albemarle, Virginia - 1967
 - c. The County of Fauquier, Virginia - 1968
 - d. The County of Northumberland, Virginia - 1969
 - e. The Town of Warrenton, Virginia - 1971
 - f. The Town of Leesburg, Virginia - 1974
 - g. The County of Madison, Virginia - 1975
4. Private Consultant to the U. S. Department of Agriculture for the development of the Environmental Impact Statement, PL-566 Program, Fauquier County, Virginia - 1974
5. Special Consultant to the County of Fauquier, Virginia, for the Public Water Supply Planning Report for Fauquier County, PL-566 Program (Cedar Run) - 1974-1975
6. Special Consultant to the County of Fauquier, Virginia, for the Public Water Supply Planning Report for Fauquier County, PL-566 Program (Carters Run) - 1976-1977
7. Environmental Consultant for E.P.A., Section 208, Step 1, Wastewater Facilities Plan for Fairview Beach and Dahlgren, King George County, Virginia - 1977-1978

C. Director to Fairfax County, Virginia

1. Author of 25 special planning reports published in Fairfax County, Virginia, and the State, relative to the planning process
2. Author of the first "open space" study in Virginia - "The Vanishing Land," Fairfax County, Virginia - 1962
3. Author of the first major "cluster" zoning ordinance in Virginia, resulting in "Reston," Virginia (Fairfax County)
4. Author of the first ordinance in Virginia requiring the use of soils analysis data in subdivisions, County of Fairfax, Virginia - 1953-1954
5. Originator of the first adopted small watersheds flood protection program in urban Virginia (Pohick Creek, Fairfax County, Virginia), to be used as a model in the rest of the State - 1966

D. Academic and University

1. University Professor, elected by the Board of Visitors as a Visiting Professor of City Planning, The University of Virginia, Charlottesville, Virginia - June 7, 1967 (twelve years of faculty service to date)
2. University Lecturer, The University of Virginia, Charlottesville, Virginia - 1963-1966
3. Contributing author to national planning publications:
 - a. Interstate Commission on the Potomac River Basin - 1965
 - b. Land Use Planning, A.S.P.O. - 1965
 - c. Soils, Water and Suburbia, H.U.D. and U.S.D.A. - 1966
 - d. National Society of Sanitary Engineers, Department of H.E.W. - 1971
 - e. Soils Conservation Service in Virginia, U. S. Department of Agriculture - 1975
4. Seminar Lecturer conducting continuing seminars in the State under the auspices of the Federal Title VIII Planning Training Program and the State Division of Criminal Justice, for the purpose of training commissions, boards, and administrators in the planning aspects of their programs

PRIVATE SECTOR LAND MANAGEMENT AND PLANNING DESIGN

A. Residential Development Projects

1. The Meadows of Newgate, Centreville, Virginia (townhouse and apartment planned unit development); The Minchew Corporation - 1967
2. Lewis Acres, Manassas, Virginia (townhouse development study and site plan) - 1968
3. Musket Hills Subdivision, Manassas, Virginia (single-family detached development); F. E. Davis Company - 1971
4. Thunderbird Ranch Recreational Planned Community, Front Royal, Virginia - 1971
5. Leeds Square Planned Cluster Development, Warrenton, Virginia (residential townhouse feasibility and site planning study) - 1972
6. Budd's Ferry Estates Planned Residential Community, Charles County, Maryland - 1973
7. East Leesburg Hills, Loudoun County, Virginia (residential cluster subdivision) - 1973
8. High Point Farm Residential Subdivision, Culpeper, Virginia (site plan and conceptual development study) - 1972
9. Meadow Run Residential Subdivision, Warrenton, Virginia (conceptual development plan) - 1973
10. Mirror Ridge Planned Residential Development, Loudoun County, Virginia; Sugarland 67, Ltd. - 1973
11. Ashburn Associates Planned Residential Community, Loudoun County, Virginia (development feasibility study) - 1974
12. Woodstone Residential Community, Sterling, Virginia (conceptual development site plan); Carl M. Freeman Associates - 1974
13. Fairfax West Planned Residential Development (Carney-Smith property), Fairfax County, Virginia (site plan, 5300 units); 50-66 Association - 1974-1975
14. Moore-Day Townhouse Community, Fairfax County, Virginia (site plan); 50-66 Association - 1975
15. Stonehenge Townhouse Development, Charlottesville, Virginia (site planning and final engineering design); Ferguson-Suburban Associates - 1975
16. Cabin Branch Forest, Loudoun County, Virginia (conceptual development plan) - 1977

17. Cardinal Glen, Loudoun County, Virginia (single-family detached cluster development plan) - 1977
18. Arcola Glen, Loudoun County, Virginia (concept plan) - 1976
19. The Ridges in Hume, Fauquier County, Virginia (concept plan) - 1979
20. Markwood Glade, Loudoun County, Virginia (concept plan) - 1978
21. Seneca Hills, Loudoun County, Virginia (concept plan) - 1978
22. South Wales Planned Cluster Development, Culpeper County, Virginia - 1979
23. Alwington Farms Estates, Warrenton, Virginia (concept plan) - 1979
24. Broad Run Meadows, Loudoun County, Virginia (concept plan) - 1978

B. Commercial Development Projects

1. Springfield Mall Regional Shopping Center, Springfield, Virginia (land-use analysis and development study); Arlen Inc. and Lynch Properties Inc. - 1969-1970
2. United Virginia Bank of Fairfax, Vienna Branch Study (market area and land-use analysis) - 1970
3. Fairfax National Bank, Fairfax County, Virginia (locational and development analysis) - 1971
4. Fauquier National Bank, Warrenton, Virginia (branch location site plan) - 1971
5. Fauquier County Regional Airport, Fauquier County, Virginia (site plan and location study) - 1972
6. Dulles Town Center/International Hotel Complex, Dulles Airport, Fairfax County, Virginia (conceptual development plan) - 1973-1974
7. Sugarland Plaza Shopping Center, Loudoun County, Virginia (conceptual development plan and land-use feasibility) - 1974
8. Ford Motor Company/Properties Financial, Loudoun County, Virginia (conceptual site plan) - 1976
9. W. T. Galliher & Bro., Inc., Lumber Company, Vienna, Virginia (preliminary market analysis) - 1977
10. Westwood Shopping Center, Winchester, Virginia (conceptual development plan); Shenandoah Valley National Bank/Alvin Lapidus - 1979

11. Fair Oaks Regional Shopping Mall (part of Fairfax West Plan), Fairfax County, Virginia (development plan); The Taubman Company - 1973-1975
12. Holiday Inn Site Development Plan, Warrenton, Virginia; Highlands Motel Joint Venture - 1978-1979

C. Industrial Development Projects

1. Dranesville Industrial Park, Dranesville, Virginia (site plan and concept study) - 1968
2. Arcola-Dulles Industrial Park, Loudoun County, Virginia (site plan and concept study) - 1973
3. Gregory/Bryant Industrial Park, Chantilly, Virginia (site plan and concept study) - 1974
4. Chantilly Industrial Park, Chantilly, Virginia (site plan and concept study) - 1974
5. Moore Brothers Company/Sanders Quarry, Inc., Fauquier County, Virginia (Belle Meade Quarry site development plan) - 1977
6. Luck Quarries, Inc., Fairfax County, Virginia (concept plan) - 1975
7. Plumly Lumber Corporation, Winchester, Virginia (transportation alternative study, Butler Drive) - 1975-1976
8. Dulles 777 Industrial Park, Fairfax County, Virginia (conceptual development plan) - 1976
9. Horton Industrial Park, Fairfax County, Virginia (concept plan) - 1977
10. Dulles Industrial Park South, Fairfax County, Virginia (concept plan) - 1978

D. Special Projects

1. Village Design Study, Great Falls; Virginia Civic Association, Great Falls, Virginia - 1969
2. Northern Virginia Community College, North Campus, Loudoun County, Virginia - 1970
3. Fairfax Lodge Nursing Home, Fairfax County, Virginia; Suburban Savings and Loan - 1970-1971
4. Tysons Corner Financial Associates, Inc.; Office/Motel/Apartment Complex, Fairfax County, Virginia (land use feasibility study) - 1971

5. Tysons Corner Townhouse/Library Plan, Fairfax County, Virginia; Franklin Construction Corporation - 1971
6. Residential Market Area and Economic Feasibility Study, Townhouse Residential Developments, Fauquier County and the Town of Warrenton, Virginia - 1972
7. Bank of Virginia Housing and Branch Location Analysis, Front Royal, Virginia - 1973
8. Residential Market Area and Economic Feasibility Study, Townhouse Residential Development, Albemarle County and the City of Charlottesville, Virginia - 1974-1975
9. Linton Hall, Prince William County, Virginia (market and feasibility study) - 1976-1977
10. Financial Mortgage and Realty Corporation; Marketing and Feasibility Study, Olmsted Property near Linden, Warren and Fauquier Counties, Virginia - 1979
11. Cloverland Farm, Prince William County, Virginia; Market Feasibility Study - 1979

E. Comprehensive Land Use Projects

1. Tysons Corner, Virginia; Monumental Properties, Inc. (regional center study) - 1971
2. New Town of Fairfax West, Fairfax County, Virginia; 50-66 Assn. (land use feasibility and site planning study, 1300-acre mixed development) - 1973
3. Clarke County Comprehensive Planned Community, Winchester, Virginia; Harry F. Byrd, Inc. (feasibility and site planning study, 1200-acre mixed development) - 1973
4. Froehlich-Lalande/Fairfax West Development Site Plan, Fairfax County, Virginia (commercial/industrial, residential mini-community) - 1975

F. Legal - Expert Witness

1. Rezoning cases: twelve years
2. Condemnation cases: twenty-five years
3. Annexation cases - ten annexations in Virginia
4. Legal issues in zoning cases at court (approximately 170 cases over thirty-year period); most recent at Supreme Court level:
 - a. The Allman Decision, Fairfax County, Virginia Supreme Court
 - b. Matthews vs. Greene County, Virginia Supreme Court 9/1/77

FIRM REFERENCES

1. John T. Hazel, Attorney
Hazel Beckhorn and Hanes
4084 University Drive
Fairfax, Virginia 22030
2. John Humphrey
Director of Planning
Northampton County
Box 328
Eastville, Virginia 23347
3. J. Willard Lineweaver, Mayor
Town of Warrenton
434 Winchester Street
Warrenton, Virginia 22186
4. David L. Ferguson
Developer
19 Winchester Street
Warrenton, Virginia 22186
5. E. A. Prichard, Attorney
Boothe, Prichard and Dudley
4085 University Drive
Fairfax, Virginia 22030
6. James E. Jones, Owner
Fairfax Furniture, Inc.
10670 Lee Highway
Fairfax, Virginia 22030
7. The Honorable Harry F. Byrd
U. S. Senator - Virginia
Senate Office Building
Washington, D. C. 20510
8. Richard Collins, Chairman
Department of Planning
School of Architecture
University of Virginia
Charlottesville, Virginia 22903

ADOPTION OF AN AMENDMENT TO CHAPTER
112 (ZONING) OF THE 1976 CODE OF
THE COUNTY OF FAIRFAX, VIRGINIA

At a regular meeting of the Board of Supervisors of Fairfax County, Virginia, held in the Board Room in the Massey Building, at Fairfax, Virginia, on Monday, October 22, 1979, the Board, after having first given notice of its intention so to do, in the manner prescribed by law, adopted an amendment to Chapter 112 (Zoning), of the 1976 Code of the County of Fairfax, Virginia, said amendment so adopted being in the words and figures following, to-wit:

BE IT ORDAINED BY THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA:

Amend Chapter 112 (Zoning) as follows:

Amend Article 20, Part 3, Definitions, as follows:

1. Revise the definition of AGRICULTURE to read as follows:

AGRICULTURE: The use of a tract of land not less than five (5) acres for (a) the tilling of the soil; (b) the growing of crops or plant growth of any kind, including forestry; (c) pasturage; (d) horticulture; (3) dairying; (f) floriculture; or (g) raising of poultry and livestock.

The term 'agriculture' shall not include the following uses: (a) the maintenance and operation of plant nurseries; (b) the feeding of garbage to animals; (c) the raising of fur-bearing animals as a principal use; (d) the operation of maintenance of a commercial stockyard or feed yard, or (e) the retail sales of agricultural products except in accordance with the provisions of Par. 27 of Sect. 10-102. However, the definition of agriculture shall not be deemed to preclude: (a) the keeping of livestock on parcels of two (2) acres in size as permitted by Sect. 2-512; or (b) gardening, as permitted as an accessory use in Sect. 10-102.

2. Revise the definition of CONTRACTOR'S OFFICES AND SHOPS to read as follows:

CONTRACTOR'S OFFICES AND SHOPS: Establishments for the installation and servicing of such items as air conditioners, electrical equipment, flooring, heating, painting, plumbing, roofing, tiling and ventilating and establishments for the

planting and maintenance of gardens, grounds and yards such as landscape contractors and lawn maintenance services.

3. Add a new term and definition of GARDEN CENTER in its proper alphabetical sequence:

GARDEN CENTER: An area or establishment engaged in the retail sales of items for the landscaping and maintenance of gardens, grounds and yards such as trees, shrubs, plants, seeds, bulbs, mulches, fertilizers, garden tools, pottery, statues, bird baths and other such items. Landscape contracting of items sold on the property shall be permitted as an accessory use. For the purpose of this Ordinance, garden centers shall be deemed RETAIL SALES ESTABLISHMENTS.

4. Delete the term and definition of NURSERY, PLANT in entirety and substitute in lieu thereof, in its proper alphabetical sequence, a new term and definition of PLANT NURSERY to read as follows:

PLANT NURSERY: An area or establishment for the propagation, cultivation and growing of nursery stock such as trees, plants, shrubs and vines. Retail sales from the site may be permitted as an accessory use and shall be limited to nursery stock grown on the property and items designed solely to maintain and preserve the life and health of nursery stock such as fungicides, insecticides, chemicals, peat moss, humus, mulches and fertilizers. Retail sales of items not designed solely to maintain and preserve the life and health of nursery stock such as garden tools, hoses, pottery, statues and bird baths shall be deemed a GARDEN CENTER and shall be prohibited. Landscape contracting of nursery stock grown on the property shall be permitted as an accessory use.

For the purpose of this Ordinance, growing of nursery stock shall include stock which is grown on the premises and stock which is purchased elsewhere and transplanted for growth on the premises.

Amend Article 3, Residential District Regulations, R-P and R-C Districts, Section 3-P04 and 3-C04, Special Exception Uses, by revising Par. 3 to read as follows:

3. Category 5 - Commercial and Industrial Uses of Special Impact, limited to:

- A. Marinas, docks and boating facilities, commercial
- B. Offices
- C. Plant nurseries

Amend Article 5, Industrial District Regulations, as follows:

1. Amend the I-4 District, Sect. 5-404, Special Exception Uses, by adding a new Par. 4I to read as follows:

I. Plant nurseries

2. Amend the I-5 and I-6 Districts, Sections 5-502 and 5-602, Permitted Uses, by adding a new Par. 19 to read as follows:

19. Plant nurseries

Amend Article 9, Special Exceptions, Sect. 9-502, Districts In Which Category 5 Uses May Be Located, as follows:

1. Amend Par. 1 by revising the following two entries to read as follows:

I-5 District: Limited to uses 8, 14, 16, 20, 21 and 23

I-6 District: Limited to uses 14, 16, 20, 21 and 23

2. Amend Par. 2 by revising the following three entries to read as follows:

R-P, R-C Districts: Limited to uses 13, 14 and 16

I-3 District: Limited to uses 3, 5, 7, 12, 13, 15, 18 and 19

I-4 District: Limited to uses 3, 5, 7, 12, 13, 15, 16, 18 and 19

Amend Article 9, Special Exceptions, by revising Sect. 9-514 to read as follows:

9-514 Additional Standards for Plant Nurseries

1. In the R-A through R-4 Districts, no plant nursery shall be established except on a lot which has a minimum lot area of one (1) acre and has frontage on an arterial street as defined in the adopted comprehensive plan.

2. In the R-A through R-4 Districts, no building or structure used for or in connection with such use shall be located closer than 100 feet to any lot line which abuts an R district.

3. In the R-A through R-4 Districts, no off-street parking or loading space shall be located closer than fifty (50) feet to any lot line which abuts an R district.

4. Plant nurseries shall be subject to the regulations of the zoning district in which located. In addition, in the R-A through R-4 Districts, the Board shall impose such conditions and restrictions as it may deem necessary to assure that the use will be compatible with the adjacent residential area. In particular, the Board may condition the following:

- A. Location, size, height and use of structures
- B. Location and number of commercial vehicles
- C. Lighting and hours of operation
- D. Location of materials stored outside

5. In the R-A through R-4 Districts, notwithstanding the provisions of Sect. 9-003, the Board may vary, modify or waive the provisions of Paragraphs 1, 2 and 3 above and the provisions of Article 13 for a plant nursery which is accessory to a single family detached dwelling, provided such dwelling is the domicile of the nursery operator.

Amend Article 13, Landscaping and Screening, the Transitional Screening and Barrier Matrix, by adding plant nurseries to Par. 9.

GIVEN under my hand this 22nd day of October, 1979.

Ethel Wilcox Register
Ethel Wilcox Register
Clerk to the Board

	<u>1978</u>	<u>1979</u>	<u>First 6 mos. 1980</u>
Chemicals	2. 6%	1. 5%	1. 6%
Containers	2. 9%	2. 6%	3%
Hardware	1. 6%	. 08%	. 06%

BUILDING PERMITS FOR STRUCTURES ON PROPERTY

<u>Date</u>	<u>Building</u>	<u>Permit number</u>
12/4/70	Sales Office	P 70784
10/22/71	Greenhouse	P 79666
6/19/74	Lath Areas	111909
9/17/76	Warehouse	76090677

VIRGINIA:

IN THE GENERAL DISTRICT COURT FOR THE COUNTY OF FAIRFAX

COUNTY OF FAIRFAX,

-vs-

BLAIR CUPP,

Defendant.

OPINION OF COURT

Fairfax, Virginia

Thursday, June 10, 1976

The above-entitled matter came on for trial in open
Court at 11:00 a.m.

BEFORE: The Honorable Lewis H. Griffith, Judge.

APPEARANCES:

RAYMOND BROWNELLE, ESQ., Assistant Commonwealth's
Attorney for Fairfax County, appearing on
behalf of the County of Fairfax.

THOMAS O. LAWSON, ESQ., appearing on behalf of
the Defendant, Blair Cupp.

-000-

PHYLLIS E. JACOBS
Official Court Reporter
Circuit Court for Prince George's County
P.O. Box 401
Upper Marlboro, Maryland
20370

(whereupon, following testimony and arguments by counsel, the Court rendered the following opinion:)

THE COURT: As everyone in the court is aware, this is a criminal proceeding, and being a criminal proceeding, the Commonwealth has the burden of proving their case beyond a reasonable doubt.

As such, the Court, in determining the case, has the right to rely on the cumulative testimony of all of the witnesses or the individual testimony of any particular witness.

The charge in this particular case is did the defendant, Blair Cupp, violate Section 30-2.2.1 of the Fairfax County Code by offering for sale manufactured and processed items, or property known to RE-1 that gives the location of the property as such.

As Mr. Lawson has observed, the owner and operator of the property in this case apparently is Wolftrap Nursery, Incorporated, but I am not going to determine the case on that basis. I am not going to dismiss the case on the basis that the wrong Defendant has been named as such, although I think that is a matter of some consideration.

I want to direct my attention to what I consider to be the merits of the case, particularly the County Ordinance and its application. Application has been argued by the Commonwealth's Attorney and counsel for the Defendant.

Certainly no one is more appreciative of the Zoning Laws, I think, than those of us who live in an area such as Fairfax County. If it were not for such laws, virtually bedlam would exist, I am sure, because of the urban type existence or the living, if you want to call it that, which we are experiencing in many areas in Fairfax County.

It always gives the Court concern when a person, such as the Defendant, or counsel for the Defendant, asks the Court to disregard a particular Zoning Ordinance, as such, because the question is where do you draw the line.

From the strict testimony in evidence, which has been given here today, I have no doubt but that the Commonwealth has proved their case beyond a reasonable doubt. The question in my mind, however, is the applicability of this Ordinance to this particular Defendant.

In this particular case -- and I want it to be well recognized that any holding that I make in this case at this time is related to the specific facts in this particular case to this particular Defendant and to no other person -- I think the argument of counsel for the Defendant is well taken, in that a local governing body can indeed legislate the use of property.

However, I think that legislation must be tied in in some way with the promotion of the health, safety and general welfare of the public.

The limitations on the use of that property must be reasonably related to the health, safety and general welfare of the public at large.

Reference has been made to several other violations of this Ordinance, one being the Craven's Nursery, Inc., and another one which the name escapes me at this particular time.

It is difficult for me to see at this time that the operation of the Wolftrap Nursery, Incorporated, with 15 percent of its business being attributable to incidental items, how that is a danger to the health, safety and general welfare of the public as such.

There is no testimony before the Court to show that anyone has been jeopardized by the actions of this Defendant. There has been no testimony to show that the traffic is a problem, the public has been endangered, that any property owners have complained, or much less been burdened or harmed in any way by this operation.

I am also impressed with the fact that at least the testimony of the evidence before the Court at this time shows that the items referred to in the testimony as ancillary or incidental items are items which are specifically restricted to sustaining plant life, which is the primary purpose of this business, as I understand it.

As I understand the testimony of the evidence, the raising of plants, the sale of plants, which are raised on

this piece of property, is quite lawful and within the interpretation of this particular Zoning Ordinance.

For that reason, it's the determination of the Court, at this particular time and for this particular location, that the application of this Ordinance to this particular Defendant, taking into consideration the limited ancillary or incidental items which are being sold by him, is an unreasonable and arbitrary application of the law, and as being such, I think it is unconstitutional.

I do not make any decision with respect to any other case or application of the Statute to any other business. I think each case has to be determined on its own facts and its own merits.

The charge against this particular Defendant is dismissed.

(Whereupon, at 3:00 p.m. the above-entitled matter was concluded.)

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ARTICLE 9

SPECIAL EXCEPTIONS

PART 0

9-000 GENERAL PROVISIONS

9-001

Purpose and Intent

There are certain uses, like those regulated by special permit, which by their nature or design can have an undue impact upon or be incompatible with other uses of land within a given zoning district. In addition, there are times when standards and regulations specified for certain uses allowed within a given district should be allowed to be varied, within limitations, in the interest of sound development. These uses as described may be allowed to locate within given designated districts under the controls, limitations, and regulations of a special exception.

The Board of Supervisors may issue special exceptions under the provisions of this Article when it is concluded that such action will not be incompatible with existing or planned development in the general area. In addition, in the granting of a special exception, the Board may stipulate such conditions and restrictions, including those specifically contained herein, as will assure the use being homogeneous with the neighborhood in which it is to be located. Where such cannot be accomplished, the Board shall deny the use as not being in accordance with the adopted comprehensive plan or as being incompatible with existing uses or development permitted by right in the area.

9-002

Authorization

In consideration of an application filed with the Zoning Administrator, the Board may authorize the establishment of those special exception uses that are expressly listed in a particular zoning district; provided, however, that no special exception shall be required for a use specifically permitted in a given district, notwithstanding that such use may also be included in a use category available by special exception.

No special exception use shall be authorized unless said use complies with all of the applicable standards of this Article 9 and all other applicable requirements of this Ordinance.

9-003

Limits on Authority

The Board shall have no authority to vary, modify or waive any of the regulations or standards prescribed for any use or purpose for which a special exception is required, and any purported such modification, variance, or waiver shall ipso facto nullify the action of the Board in issuing any special exception hereunder. The Board's discretion shall be limited to determinations with respect to the standards applying to the use or purpose covered by the application.

This provision shall not preclude any concurrent, but jurisdictionally separate, proceedings applying to the same property, in which an application is made for a variance on an allegation of hardship.

The jurisdiction of the Board with respect to any use or purpose for which the Board is authorized to issue special exceptions shall be confined to the consideration of the question of conformity to the provisions of this Ordinance. On an affirmative finding with respect to conformity, the Board shall issue the special exception applied for subject to whatever conditions and restrictions deemed necessary under the provisions of Sect. 007 below

9-004

Status of Special Exception Uses

Any use for which a special exception is granted by the Board and which complies with the specific requirements of this Ordinance and those conditions and restrictions which may be imposed by the Board under Sect. 007 below, shall be deemed to be a permitted use on the lot on which it is thus permitted.

Once a special exception has been granted, however, the use shall not be enlarged, extended, increased in intensity, or relocated unless an application is made for a new or revised special exception.

9-005**Establishment of Categories**

For purposes of applying specific conditions upon certain types of special exception uses, and for allowing special exception uses to be established only in those zoning districts which are appropriate areas for such uses, all special exception uses are divided into categories of associated or related uses, as hereinafter set forth in this Article 9.

9-006**General Standards**

In addition to the specific standards set forth hereinafter with regard to particular special exception uses, all such uses shall satisfy the following general standards:

1. The proposed use at the specified location shall be in harmony with the policies embodied in the adopted comprehensive plan.
2. The proposed use shall be in harmony with the general purpose and intent of the applicable zoning district regulations.
3. The proposed use shall be such that it will not adversely affect the use or development of neighboring properties in accordance with the applicable zoning district regulations and the applicable provisions of the adopted comprehensive plan. The location, size and height of buildings, structures, walls and fences, and the nature and extent of screening, buffering and landscaping shall be such that the use will not hinder or discourage the appropriate development and use of adjacent or nearby land and/or buildings or impair the value thereof.
4. The proposed use shall be such that pedestrian and vehicular traffic generated will not be hazardous or conflict with existing and anticipated traffic in the neighborhood.
5. In addition to the standards which may be set forth in this Article for a particular category or use, the Board shall require landscaping and screening in accordance with the provisions of Article 13.
6. Open space shall be provided in an amount equivalent to that specified for the zoning district in which the proposed use is located.
7. Adequate utility, drainage, parking, loading and other necessary facilities to serve the proposed use shall be provided. Parking and loading requirements shall be in accordance with the provisions of Article 11.
8. Signs shall be regulated by the provisions of Article 12, except as may be qualified in the Parts that follow for a particular category or use. However, the Board may impose more strict standards for a given use than those set forth in this Ordinance.

9-007**Conditions and Restrictions**

In addition to those standards set forth in this Article, the Board, in granting a special exception, may impose such conditions, safeguards and restrictions upon the proposed use as it may deem necessary in the public interest to secure compliance with the provisions of this Ordinance and to protect the viability of the implementation of the adopted comprehensive plan. To accomplish this end, the Board may establish a time limitation on the length of the exception in accordance with the provisions of Sect. 008 below and may require the posting of a guarantee or bond in a reasonable amount by the applicant.

9-008**Time Limitations, Extensions, Renewals**

In addition to the time limits set forth in this Article, the Board may require, as a condition to the issuance of any special exception, that it shall be issued for a specified period of time; that it may be subsequently extended for a designated period by the Zoning Administrator; or that it may be periodically renewed by the Board. The procedure of granting an extension or renewal shall be as presented in Sections 012 and 013 below.

amendment number 1, regarding plant nurseries. It is a subject on which I have spoken from time to time. And this Commission has indulged me by listening. I've been waiting for some of the language before us tonight for a very long time. We have seen a proliferation of plant nurseries in residential districts that have impacted, sometimes quite seriously, on existing subdivisions and neighborhoods. So, I'm all for trying to strengthen the language. I am concerned, however, that in trying to restrain the several nurseries in the County that seem to go too far in what they attempt to do in residentially zoned land, that we may be going perhaps too far. I therefore am going to recommend that this Commission close the public hearing...excuse me, allow written comment on this amendment to be forwarded to the Commission and to defer decision on this particular item for a period of two weeks, if that is agreeable to the Secretary.

Mr. Gurski: I know he'd love to hear that. Mr. Brinitzer, you're recognized.

Mr. Brinitzer: If you'll extend that to September, I'll second your motion because I think that there's considerable merit to it. I think that recognizing that those who are there now are not affected, I still believe that we ought to benefit from considerably more input from the community as to the impact that this particular change to the Ordinance would have. So, I suggest that we move this to September. The calendar is clogged anyhow and that we try to get this thing publicized as much as possible to get some greater reaction.

Mrs. Wright: Mr. Chairman?

Mr. Gurski: Mrs. Wright.

Mrs. Wright: That would mean readvertising, is that correct, Miss Gwinn, Mr. Yates?

Mr. Gurski: I don't think so. Mr. Yates?

Mr. Yates: What are we doing? Deferring decision?

Mr. Gurski: As of now. The public hearing is closed on this item and Mrs. Wright does not take into consideration re-opening it. It mentions encouraging written input during the time between now and the deferred decision. The question is, must it be readvertised?

Mr. Yates: No, sir. Not if the decision is just deferred. However I'm under the impression that what's going to come out of these next couple of months of deliberation would be some proposed amended language, it's very conceivable that that proposed amended language would have to be readvertised. JUL 9 1979

Mrs. Wright: Mr. Chairman?

Mr. Gurski: Mrs. Wright.

Mrs. Wright: I'm of the opinion that if we go for a September date that we ought to have a new public hearing on it and get more information.

Mr. Gurski: Well, the Chair would -

Mr. Lightfoot: The 6th.

Mr. Gurski: Mr. Lightfoot?

Mr. Lightfoot: Mr. Chairman, I'd say let's have the public hearing then and distinctly arrange for that.

Mrs. Wright: I'm sorry, I can't hear you.

Mr. Lightfoot: I said let's arrange for a public hearing unquestionably, and I suggest a date of the 6th day of September.

Mrs. Wright: 6 September?

Mr. Lightfoot: 6.

Mrs. Wright: Okay. Alright. Alright, Mr. Chairman, then I would MOVE THAT THE PLANNING COMMISSION RECOMMEND TO THE BOARD OF SUPERVISORS DEFERRAL OF THE PROPOSED AMENDMENT TO THE ZONING ORDINANCE WITH REGARD TO PLANT NURSERIES TO A ...excuse me, I WOULD RECOMMEND THAT WE DEFER DECISION ON PLANT NURSERIES TO A DATE OF SEPTEMBER 6, AND ASK THE BOARD OF SUPERVISORS TO DEFER THEIR DATE OF HEARING ON THIS PROPOSED AMENDMENT.

Mr. Gurski: Mr. Brinitzer?

Mr. Brinitzer: Second.

Mr. Gurski: Seconded by Mr. Brinitzer.

Mr. Lightfoot: Mr. Chairman?

Mr. Gurski: And included in that motion is a continuation now, the reopening and the continuation of the public hearing on that single item. Mr. Lightfoot.

Mr. Lightfoot: Just a matter of procedure. Would the Board go ahead and hear the other 5 items on the scheduled date?

Mr. Yates: Yes sir.

JUL 9 1979

2:00 PM (22)
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Mr. Gurski: Any other comment? If not, you've heard the motion by Mrs. Wright that this Commission defer decision on the one item, plant nurseries, and reopen the public hearing on it and continue that hearing to 6 September. All those in favor of the motion, please respond by saying aye.

Commissioners: Aye.

Mr. Gurski: Opposed?

Mr. Lockwood: No.

Mr. Gurski: The motion passes. There was one no vote by Commissioner Lockwood.

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Mr. Merrell absent for the vote on all amendment motions; Mr. Maxwell absent from the meeting).

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*Zoning Ordinance
Amendments
10.1.1*

VERBATIM TRANSCRIPT OF THE PUBLIC HEARING CONDUCTED BY THE BOARD OF SUPERVISORS ON JULY 9, 1979 REGARDING AMENDMENTS TO THE ZONING ORDINANCE.

CHAIRMAN HERRITY: The next issue is the public hearing on proposed amendments to the Zoning Ordinance. Staff?

MISS GWINN: Very briefly, Mr. Chairman, these are proposed amendments, there are six. They concern plant nurseries. They address bowling alleys as a Group V Commercial Recreation Special Permit Use in the I-5 and I-6 Districts, and revisions to the additional standards for commercial recreation uses. There is a proposed editorial change to the General Provisions of Article 20, Definitions; minor revisions to the BZA (Board of Zoning Appeals) appeal procedures; an amendment addressing nursing facilities in residential districts; and editorial changes to the cluster subdivision appeal procedure. I'd be happy to answer any questions.

CHAIRMAN HERRITY: Any questions by Board members? Okay. This is a public hearing. We have two listed speakers, Mr. Daniel Shaner. Mr. Shaner, welcome. We appreciate you taking your time and coming this afternoon.

MR. SHANER: Thank you, Mr. Chairman. Ladies and gentlemen, my name is Daniel Shaner and I'm here on behalf of my client, Marcus Zettle. Mr. Zettle is a nurseryman, and on March - or April 27, '79 filed a special exception application for a plant nursery at the intersection of Route 123 and Wolf Run Shoals Road, sometimes known as Butte Corner. In the in-

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terim of course, the Board requested or authorized the advertisement of an amendment to the Zoning Ordinance with respect to plant nurseries, and the restriction or the prohibition of retail sales, landscaping, and lawn maintenance services from plant nurseries in the R residential district. We think that this proposed amendment to the Zoning Ordinance does not really address the real issues that are of concern to the Board. The small nurseryman, and Mr. Zettle is a small nurseryman and we have had occasion in the last couple of weeks to talk to many small businessmen in the nursery business - what it will effectively do is to exclude nurseries, or exclude the small businessman from establishing a nursery. We cannot afford, because of the area required for a plant nursery, to locate in an I or a C district. That's why we find many of the nurseries in Fairfax County today in the R district. A sampling or a review of the Yellow Pages, the County doesn't have as far as I've been able to ascertain a list of the names or the number of nurseries in the County, but in the Yellow Pages for Northern Virginia, we find approximately thirty-two (32) nurseries. And a random sampling of these nurseries, or ten, we find that nine are in an R-1 district, and the tenth is in an R-3 district. The reason for this, again, is of course is that it's just not economically feasible to operate in any other type of district for this type of a nursery. And it is not feasible

to just grow plants. You must have that ability to have retail sales and the related landscaping services. The effect, we think, and this is the consensus of opinion of the many nurserymen that I've talked with, is that if we prohibit retail sales in the R district that ultimately the small nurseryman will be out of business and our nursery business will be centralized or located primarily in the large department stores. We will no longer have the small businessman. The Planning Commission, on June 28, recommended that the Board defer action on this proposed amendment until such time as interested and concerned nurserymen can come to the Staff, provide input, and perhaps come back to the Board in September with a meaningful amendment that will reflect the concerns of the Board, and also provide a continuing group in the County of small nursery businessmen.

CHAIRMAN HERRITY: Thank you, Mr. Shaner. Roger Smith?

MR. SMITH: My name is Roger Craig Smith. I represent the Early and Smith Nurseries at 9638 Burke Lake Road in Burke Virginia. I would like to say that I support the recommendations of the Planning Commission to defer the action on this until the sixth of September. And we are presently working and trying to get the nurserymen together, to get together with Staff. And I believe that if we can achieve the objectives of

the County, because we also see a need to stop the clearly commercial establishments from being in the residential areas, but also it's a matter of survival for us. I believe if we are driven to commercial ground, these small businesses are going to disappear over a period of time.

SUPERVISOR TRAVESKY: Mr. Chairman?

MR. SMITH: Thank you.

SUPERVISOR TRAVESKY: Mr. Chairman, I'd like to ask Mr. Smith a question. For the members of the Board who aren't aware, I haven't met Mr. Smith before, but they do have in Burke a nursery that is only identified on the main street by a very attractive sign and then by some very beautiful landscaping. There is no sign of anything else, because the nursery itself sits quite a distance back from the road. And the buildings are not visible. And I was wondering, Mr. Smith, if you feel that that has created any type of a problem. It seems in this day and age everyone thinks they have to have a big sign out front and a whole lot of buildings to show how extensive their stock is. Have you found that to be a problem in conducting a business such as yours?

MR. SMITH: I don't believe that at all. The nursery you're speaking of belongs to me. And we seem to do very well hidden from public view. My father opened the business, well, after they condemned the property for Dulles Airport.

He moved in right after that, and we've been down there for quite a few years and have had no problems with anybody in the County.

SUPERVISOR TRAVESKY: Okay, thank you.

SUPERVISOR MOORE: Mr. Chairman?

CHAIRMAN HERRITY: Mrs. Moore.

SUPERVISOR MOORE: Can I ask you another question?

MR. SMITH: Oh, I'm sorry.

SUPERVISOR MOORE: Is it, your problem is with not being able to sell for retail rather than the size of the restrictions?

MR. SMITH: Well, I don't believe it's going to effect me because of the amount of time we've been there. But ultimately what it's going to do, it's going to stop any kind of expansion. And I think if you'll - well, I'm trying to get the information together from the University on the amount of land use, agricultural and residential, you know that the nurseries operate on in the State, opposed to your commercial. And there's a good reason for that.

SUPERVISOR MOORE: The reason, I guess, I'm asking is that - because we have a problem, Mrs. Travesky and I seem to have all the nursery problems as well in the County, and the restriction is one acre. Do you think that a nursery can operate on less than an acre reasonably?

MR. SMITH: It depends on the type of operation.

My operation I could not run on less than five acres.

SUPERVISOR MOORE: Well, this is what I'm thinking.

MR. SMITH: Now I think possibly your small back yard operations, they could survive under heavier restrictions where we can't. It's also a seasonal business. We have to do contracting in the interim where we do not do retail sales. There's just no way we could survive, you know, without it.

SUPERVISOR MOORE: When you mean contracting, you mean having a lot of trucks and -

MR. SMITH: No, I don't mean that at all. I operate with a pickup trucks and two (unintelligible) trucks.

SUPERVISOR MOORE: I wish I were in Burke.

MR. SMITH: And we have a tractor. And we do quite a bit of the landscaping for the builders in Fairfax County.

SUPERVISOR MOORE: Yes, we'd welcome you. Thank you.

CHAIRMAN HERRITY: Thank you very much, Mr. Smith. I appreciate you taking time in being here. That concludes the list of speakers. Are there other citizens that wish to speak at this public hearing? Mr. Odin.

MR. ODIN: Mr. Chairman,

CHAIRMAN HERRITY: Do you have one in your back

yard?

MR. ODIN: No indeed, Mr. Chairman. I do have one in my back yard.

CHAIRMAN HERRITY: Okay.

MR. ODIN: He does an excellent job and is a good neighbor. Mr. Chairman, I appear before the Board today on the proposed amendment to the nursing home Ordinance. And may I say that though there seems to be pretty much accord with everyone who has reviewed that particular Ordinance, I do believe that it points up a rather startling fact in Fairfax County and something that was rather shocking to me and I think it's of equal concern to you. In reviewing this Ordinance, I was really surprised to find that in many ways the elderly are almost being excluded from our zoning categories. And as a matter of fact, unless this amendment occurs it's almost total. Well, it is total. I was surprised, for instance, that in a rural agricultural zone that you may, in a special exception, establish a penal institution and house as many prisoners and criminals as you like, but no where in that Code or that zoning category may one establish housing for the elderly or a nursing home. And in the rural preservation area you may establish kennels and animal shelters, and you may board horses there, but you can't board people if they're elderly there. In the residential conservation district, do

you know you can have veterinary hospitals without limitation, but you can't have a nursing home.

CHAIRMAN HERRITY: Are you saying the County has gone to the dogs?

MR. ODIN: I'm saying, we may be, if we continue to age in population, the only people that will be able to live here will be the dogs. More shocking than anything, I suppose, is in the R-30 district. And just sometime as your convenience take a look at that. For thirty units to the acre, thirty units to the acre - now that's two and a half per unit or a population density of seventy-five, but you know there is a provision in there that no matter how many acres you have, you may have medical care facilities limited to nursing facilities which have a capacity of less than fifty beds. Less than fifty beds. One might assume that we adopted this zoning policy from Eskimo folklore. We certainly have to concede that something is wrong when the Board of Zoning Appeals, not the Board of Supervisors but the Board of Zoning Appeals, may grant special use permits for dormitories, fraternities and sorority houses in residential homes, for everything from flashing to eating goldfish, as occurred in my time. And yet, if you can believe it, you know, you've got to come to the Board of Supervisors when you're going to house a few elderly who make very little noise, and are visited by very few people

unfortunately and regrettably. One would have to say we've given more consideration to the spatial concepts than to humanity. And I submit that this particular Ordinance that's being proposed isn't going to correct what's happening here, inadvertently perhaps I hope, I sincerely hope that and I know that because of the help and assistance I received in obtaining the support for this amendment, but I will say that unless that amendment goes through, there's no way and there are three different organizations that's looked at it, and I know of no one who has taken exception to it. You just can't afford to build these facilities. And we're not talking about (unintelligible) human beings, or people with pathology, we're talking about people who should be living in our community throughout their lives including the latter years. Thank you very much. I just hope that it'll be addressed one day even on a broader scope.

CHAIRMAN HERRITY: Thank you, Mr. Odin.

MR. ODIN: Thank you.

SUPERVISOR : Mr. Odin, you have no objection then to the amendment that's being proposed here, as they are?

MR. ODIN: I have no objections to them as they were proposed by the Staff. But you know before the Planning Commission there were two. One is, you know you can have fraternity houses and sorority houses anywhere. But there was

a proposal by the Planning Commission that the elderly be limited to arterial highways and that they have at least, at least five acres surrounding them. And yet, no such restrictions exist. And when it came out of the Planning Commission, if you can believe it, even if it was in an R-30 zone you had to have five acre minimum. There's a book of rather interesting - I got carried away with this, by the way. As a matter of fact, the Planning Commission told me to represent my client and forget - they didn't ^{put} it quite that way but they asked me what my client can live with. My client can live with the five acres. My client can live with an arterial. But I wonder as a citizen can we live with such restrictions as that? I checked out of the library a rather interesting book. And let me read you one paragraph and then I'm going to get out of here, I hope alive. But, one paragraph about the five acres. And it says, "One of the biggest problems of exterior space in elderly housing is that it is often symbolic rather than useful. The manicured front lawn with the circular drive, the two lawn chairs and token hedges and a neon, neo-colonial sign all serve as symbols to the passing motorist of the respectable housing project. But to have five acres on an arterial where the decibel reading, even for the young is almost intolerable, where we require set backs and say that that's the only place that people who have spent most

of their life forces trying to get out of that type of atmosphere and into a single family, when they get older uprooted and that's where we confine them. That's not providing housing. That's warehousing." Thank you.

CHAIRMAN HERRITY: Thank you very much, Mr. Odin. Again, this is a public hearing. Are there citizens who wish to speak either for or against this ordinance at this public hearing?

MR. MCDERMOTT: Mr. Chairman, I'd like to switch back to the nurseries.

CHAIRMAN HERRITY: Well, I was going to say to Mr. Odin that back about 1973 when we able to get this particular Ordinance in, there was a great deal of doubt as to whether the Board even wanted to go that far at that time, if you recall the history of it.

MR. ODIN: Yes sir.

MR. MCDERMOTT: Mr. Chairman, my name is Frank McDermott. I represent a George P. Grahmn, Jr., and I wanted to address the standards proposed for the plant nurseries and endorse Mr. Shaner's comments, not repeat them, but state though that in addition to them that many of these nurseries in the R-1 district or in the residential districts are on highway corridors where you don't have the situation that appears to be problematic in a couple of the areas in the southern

part of the County. If you pass the Ordinance that's proposed here, or the changes, the amendments that are proposed, there will be none, there will be no possibility of any kind of nursery operation even on your highway corridors where they don't present these kinds of problems for the particularly residential areas. And to reiterate Mr. Shaner's comments, we cannot afford, the small nurseryman cannot afford to go into the commercial or industrial areas with the type operations these people run. And I think you can put the kind of teeth in your existing Ordinance without removing the ability of your owner of the residential district, or residential property to have a plant nursery in operation without removing the right in the residential district. Thank you, sir.

CHAIRMAN HERRITY: Thank you very much. Other citizens that wish to speak? Okay, the public hearing is closed. Items for the record? The public hearing is closed. Staff and Planning Commission recommendation, please.

MISS GWINN: Alright, the Planning Commission recommended deferral, as noted, of the plant nursery amendment until September 6. I think they recommended approval as noted in the Staff Report. I can go through them if you'd like, there are a couple changes that they recommended. And I could go through -

CHAIRMAN HERRITY: Why don't you just tell us what the changes are, Jane.

MISS GWINN: Okay. Okay, on amendment number two which deals with the bowling alleys and the additional standards for commercial recreation uses, the Planning Commission recommended that rather than using the term "free-standing building" that it be replaced with the phrase, this is on paragraph three of Section 8-502 which is the General Standards for Commercial Recreation Uses, that that paragraph be revised to say, "No building designed primarily and specifically for such use shall be located within a hundred feet of any adjoining property which is in an R district." The Staff recommends - in all of these the Staff is recommending the Planning Commission recommendation. Proposed amendment number three, which deals with a minor editorial change to the lead in to the definitions, the Planning Commission recommended approval as advertised, as well as the amendment number four dealing with the appeals on BZA. On the nursing facilities they are recommending two changes to the additional standards, one of which would be a modification to paragraph 4 of Section 9-308, which addresses the provision that requires free standing nursing facilities to be located on a parcel fronting on, and with direct access, to an existing or planned - and they're saying just "arterial" and delete "collector", which would

limit these then to just arterial streets. And they're also recommending that in single family detached districts, there be a minimum lot size of five acres. And then there was no change to the last amendment regarding cluster subdivisions.

SUPERVISOR MOORE: Mr. Chairman?

CHAIRMAN HERRITY: Mrs. Moore.

SUPERVISOR MOORE: There is not the five acre requirement, except in the single family detached districts?

MISS GWINN: They're limiting it, the standard reads in the R-E through R-5 districts, so -

SUPERVISOR MOORE: So it would not apply, the five acre minimum would not apply beyond the single family detached, right?

MISS GWINN: That's correct.

CHAIRMAN HERRITY: Okay, further questions?

SUPERVISOR CIKINS: Mr. Chairman?

CHAIRMAN HERRITY: Yes.

SUPERVISOR CIKINS: Is there any urgency about the final approval of these amendments? The reason I ask is I have a letter here from the Mount Vernon Council which raised - are you familiar with all the issues that were raised, have they all been resolved?

MISS GWINN: Yes.

SUPERVISOR CIKINS: They have? Okay.

MISS GWINN: I'm almost positive they have at the Planning Commission.

SUPERVISOR CIKINS: At the Planning Commission level, right.

MISS GWINN: That was kind of the basis for those -

SUPERVISOR CIKINS: Well, what you were just explaining, it seems to me that some of it stemmed from this -

MISS GWINN: Yes.

SUPERVISOR CIKINS: - at least, are consistent with this letter.

MISS GWINN: It is.

SUPERVISOR CIKINS: So - okay. Well, in that case I have no more question (unintelligible).

CHAIRMAN HERRITY: Okay. Further questions? Okay, what's the pleasure of the Board. This is the nurseries, Mr. Scott?

SUPERVISOR SCOTT: Well, as recommended by the Planning Commission, I don't have any particular difficulty with postponing decision on the taxi cab ordinance until -

CHAIRMAN HERRITY: Taxi cab? We already did that.

SUPERVISOR SCOTT: On the nursery, I'm sorry. I

am sorry, Mr. Chairman, on the nursery ordinance until September, and I WOULD SO MOVE.

SUPERVISOR TRAVESKY: Second.

CHAIRMAN HERRITY: Discussion? All in favor indicate by saying aye.

SUPERVISORS PENNINO, ALEXANDER, CIKINS, TRAVESKY, MOORE, SCOTT, SHACCHIS: Aye.

CHAIRMAN HERRITY: Opposed, nay. The Chair votes aye and the motion carries.

SUPERVISOR MOORE: Before we go on beyond nurseries, I wonder if I could ask the Staff one question about the nursery in Burke. Has the notice of violation been sent out as the Board directed on the building which is closer to the hundred foot line?

MISS GWINN: Yes, it has.

SUPERVISOR MOORE: Okay. And is that then going to Court, do you know?

MISS GWINN: They have filed for a special exception.

SUPERVISOR MOORE: Fine on that.

MISS GWINN: So, no we're not going to Court.

SUPERVISOR TRAVESKY: Mr. Chairman?

SUPERVISOR SCOTT: Mr. Chairman?

SUPERVISOR TRAVESKY: Could I also ask that when,

I assume that the reason we are going to defer is so that the sub-committee or this committee on nurseries can work with the Staff -

CHAIRMAN HERRITY: That's correct.

SUPERVISOR TRAVESKY: - and I would hope that they would address also the size of the necessary auxiliary buildings that they would be using or feel they need to use because I feel that has a bearing also on whether they are going to be accepted in a residential zone and the types of building that would be, and the kind of traffic that they hope to generate. In other words, try to hit on all of the things that impact on the residential communities that create the problem in the first place. And also, dealing with the question of expansion because I think we have to know, going in, what the size of that nursery is going to be after a few years. And I know that we can't look at our crystal ball but I think you know what I'm getting at, that if we agree to a nursery in a residential zone, we should be able to at the outset set some kind of limits for what that will, what type of a business that will be.

SUPERVISOR MOORE: Mr. Chairman, I think that Mrs. Travesky has made some really excellent points and I wonder if it would be helpful to have a couple of the people who have worked to try to work out some of the situations

in Burke serving with the nurserymen too, so that everyone would understand what the total problem is. And I would ask unanimous consent that either Mrs. Remington or Mr. Adams or possibly somebody from the other nursery, maybe if Mr. Sevino that those three people be asked to serve - meet with these nursery people so that they can have a more balanced discussion of the problem, that we can not only take care of the small nurserymen, but that we can make sure that it doesn't impact on the -

CHAIRMAN HERRITY: Well, I don't have -

SUPERVISOR MOORE: - neighborhood.

CHAIRMAN HERRITY: I think that including a couple citizens in this group makes some sense.

SUPERVISOR MOORE: Yes, I think those three people would be -

CHAIRMAN HERRITY: What, who are they?

SUPERVISOR MOORE: Mrs. Remington, Eileen Remington -

CHAIRMAN HERRITY: She's leaving town, I believe.

SUPERVISOR TRAVESKY: Yes.

SUPERVISOR MOORE: Well then, possibly Mr. Adams and Mr. Sevino. I don't know -

CHAIRMAN HERRITY: Okay, that would be fine. Unless there's objection, we'll have them meet with the nursery-

men and the Staff. Mr. Adams and Mr. Sevino.

SUPERVISOR PENNINO: Mr. Chairman, it looks like Mr. Smith has some questions or statements. I wonder if there is something he can take up at the Board individually or something should be -

CHAIRMAN HERRITY: Well, I don't know. We normally -

MR. SMITH: I just wanted to say that Mr. Sevino is currently working on trying to organize this at the moment.

CHAIRMAN HERRITY: Well he will be working with you, then so -

MR. SMITH: Right.

CHAIRMAN HERRITY: - it's all consistent. Thank you. Okay, we'll go on with the rest of these Ordinance changes. Mr. Scott.

SUPERVISOR SCOTT: Mr. Chairman, I MOVE THAT THE BOARD APPROVE THE PROPOSED AMENDMENT NUMBER TWO AS RECOMMENDED BY THE PLANNING COMMISSION.

CHAIRMAN HERRITY: Okay, is there a second to the motion?

SUPERVISOR PENNINO: Second.

CHAIRMAN HERRITY: Discussion? All in favor in-

dicate by saying aye.

SUPERVISORS PENNINO, ALEXANDER, CIKINS, TRAVESKY,
MOORE, SCOTT, SHACOCHIS: Aye.

CHAIRMAN HERRITY: Opposed, nay. The Chair votes
aye and the motion carries.

SUPERVISOR SCOTT: Mr. Chairman, I MOVE THAT THE
BOARD APPROVE THE PROPOSED AMENDMENT TO THE ZONING ORDINANCE,
NUMBER THREE AS RECOMMENDED BY THE PLANNING COMMISSION.

CHAIRMAN HERRITY: Is there a second?

SUPERVISOR PENNINO: Second.

CHAIRMAN HERRITY: Discussion? All in favor in-
dicade by saying aye.

SUPERVISORS PENNINO, ALEXANDER, CIKINS, TRAVESKY,
MOORE, SCOTT, SHACOCHIS: Aye.

CHAIRMAN HERRITY: Opposed, nay. The Chair votes
aye.

SUPERVISOR SCOTT: Mr. Chairman, I MOVE THAT THE
BOARD APPROVE PROPOSED AMENDMENT NUMBER FOUR AS RECOMMENDED
BY THE PLANNING COMMISSION.

SUPERVISOR PENNINO: Second.

CHAIRMAN HERRITY: Discussion? All in favor in-
dicade by saying aye.

SUPERVISORS PENNINO, ALEXANDER, CIKINS, TRAVESKY,
MOORE, SCOTT, SHACOCHIS: Aye.

CHAIRMAN HERRITY: Opposed, nay. The Chair votes aye and the motion carries.

SUPERVISOR SCOTT: Mr. Chairman, I'm going to have a question about number five. I thought Miss Gwinn said, in response to Mrs. Moore's question, that the five acre limitation applies only above R-5, I mean, below R-5?

MISS GWINN: R-E through R-5 districts.

SUPERVISOR SCOTT: Okay. Now, what was the rationale for striking out collector, on the part of the Planning Commission?

MISS GWINN: A concern that there could - well, a few of them weren't exactly sure what a collector of and didn't like the arterials where we can make lists and identify all the arterial streets in the County. I think a feel-that these could be, a collector would allow them to be tucked away in neighborhoods or would not require them to be on the front, right in the front on your major streets. I would note, although Staff is recommending approval as recommended by the Planning Commission, I think it takes away from flexibility by requiring them to be on arterials, and there may well be instances when it's not on arterials where we would be in favor of it. Since they're all special exception I kind of hate to see us tie them down always to arterial streets.

SUPERVISOR SCOTT: Do you have any other differences with the Planning Commission recommendation?

MISS GWINN: No.

SUPERVISOR SCOTT: Mr. Chairman, I'm going to MOVE THAT THE BOARD APPROVE THE STAFF RECOMMENDATION WHICH IS THE ONE MODIFICATION THAT IS PROPOSED BY THE STAFF.

CHAIRMAN HERRITY: Is there a second?

SUPERVISOR PENNINO: Second.

SUPERVISOR MOORE: Mr. Chairman, I'm going to MOVE TO AMEND IT SO THAT THE FIVE ACRE MINIMUM REQUIREMENT IN THE SINGLE FAMILY DISTRICTS APPLY, not so that it has to apply on the arterial streets but that in a single family detached area that there be a minimum of five acres.

SUPERVISOR SCOTT: That's in the Staff recommendation. That's a part of the Staff recommendation.

SUPERVISOR MOORE: It is? Okay.

CHAIRMAN HERRITY: Okay, all in favor of the motion -

SUPERVISOR CIKINS: Mr. Chairman, five acres is not in the Staff recommendation.

SUPERVISOR SCOTT: Yes, they don't have any problem with that. They're recommending R-E through R-5, and if there's any question about that, enter it as part of my motion Mrs. Moore.

SUPERVISOR MOORE: Okay.

CHAIRMAN HERRITY: All in favor of -

SUPERVISOR SCOTT: Wait a minute -

SUPERVISOR SHACOCHIS: Wait. Let's hold. I want a clarification. The Planning Commission recommendation in the Staff comment brings in the five acres. That was not -

CHAIRMAN HERRITY: Mrs. Moore put it as part of his motion, so it doesn't make any difference, Mr. Shacochis. The five acres is part of Mr. Scott's motion.

SUPERVISOR SCOTT: No, Mr. Shacochis I think is asking a different question.

CHAIRMAN HERRITY: Oh, I'm sorry. Go ahead.

SUPERVISOR SHACOCHIS: Mr. Scott moved the Staff recommendation. The Staff recommendation does not speak to the five acres. That was brought in by the Planning Commission, correct?

MISS GWINN: That's correct.

SUPERVISOR SHACOCHIS: Now, I'm in favor of the Staff recommendation. I'm not in favor of either of the amendments proposed by the Planning Commission. And I think Mr. Odin gave some very cogent arguments with respect to that, and I would, will support the Staff recommendation but not the amendments by the Planning Commission.

SUPERVISOR SCOTT: Mr. Chairman, in response to

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Mr. Shacochis' concern, Mr. Odin mentioned the five acre limitation on the R-30 district. But that's not what the Planning Commission did. The Planning Commission -

SUPERVISOR SHACOCHIS: No, he talked to the five acre limitation anywhere in his comments from the book that he read dealt specifically with that five acres in that it's let's say, cosmetic rather than realistic.

SUPERVISOR SCOTT: Okay.

CHAIRMAN HERRITY: Okay, we have a motion on the floor which has been seconded -

SUPERVISOR SCOTT: Just to clarify the motion, Mr. Chairman, what I am suggesting is that the only difference from the Planning Commission recommendation is to put the word 'collector' back in, as the Staff has recommended, to give a little bit more locational flexibility. That's all.

CHAIRMAN HERRITY: Okay. All in favor of the motion indicate by saying aye.

SUPERVISORS PENNINO, CIKINS, TRAVESKY, MOORE,
SCOTT: Aye.

CHAIRMAN HERRITY: Opposed, nay.

SUPERVISORS ALEXANDER, SHACOCHIS: Nay.

CHAIRMAN HERRITY: Division. Mr. Shacochis?

SUPERVISOR SHACOCHIS: Nay.

SUPERVISOR CIKINS: Aye.

SUPERVISOR ALEXANDER: Nay.

SUPERVISOR PENNINO: Aye.

SUPERVISOR SCOTT: Aye.

SUPERVISOR MOORE: Aye.

SUPERVISOR TRAVESKY: Aye.

CHAIRMAN HERRITY: The Chair votes aye and the motion carries. Okay, that -

SUPERVISOR SCOTT: Mr. Chairman?

CHAIRMAN HERRITY: Yes, there's one more.

SUPERVISOR SCOTT: On the proposed amendment number six, I MOVE THAT THE BOARD APPROVE THE PLANNING COMMISSION RECOMMENDATION.

CHAIRMAN HERRITY: Is there a second?

SUPERVISOR PENNINO: Second.

CHAIRMAN HERRITY: Discussion? All in favor of the motion indicate by saying aye.

SUPERVISORS ALEXANDER, CIKINS, MOORE, SCOTT, SHACOCHIS, PENNINO, TRAVESKY: Aye.

CHAIRMAN HERRITY: Opposed, nay. The Chair votes aye and the motion carries. That's it.

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Prepared by:

Sara Robin Sutton
Sara Robin Sutton

ZONING ORDINANCE AMENDMENT - PLANT NURSERIES

MRS. PELLETTIERI: We'll move on to our next Zoning Ordinance amendment which is an amendment to Chapter 112 of the Zoning Ordinance regarding plant nurseries. May we have a staff report please?

MS. GWINN: Very briefly, this amendment is somewhat the result of a study by staff, a comprehensive study by staff on this whole issue of nurseries/garden centers. The amendment revises the current definitions of agriculture, contractors offices and shops and plant nurseries. It establishes a new term and definition of garden center. It revises the standards regulating plant nurseries as a special exception use in R Districts and it revises and establishes the districts for plant nurseries and gardens may be allowed. I'd be happy to answer any questions.

MRS. PELLETTIERI: Are there any questions?

MRS. WRIGHT: Madam Chairman.

MRS. PELLETTIERI: Mrs. Wright.

MRS. WRIGHT: I don't have any questions at this point but I do have a comment to make. The Commission hopefully will recall that we had a public hearing in June of this year on proposed amendments with regard to plant nurseries. And we deferred decision until this fall so that staff could get together with citizens and other groups. And I must say that this

is the product we have before us tonight, whether we recommend adoption or not, is a much improved product than the one we saw in June, at least in my opinion.

MRS. PELLETTIERI: Alright, thank you for that little background there. Before we call on the public hearing, I think there are quite a few people who want to speak to this. We have no one listed on our speakers list so we'll just take the hands as they come up. I'd like to ask that you be sure to give your name and your address before making your presentation. Alright I will call for any public comments on this matter of the Zoning Ordinance/Plant Nurseries. Is there anyone here who would like to speak? The gentleman in the red shirt.

MR. TIPPETT: Madam Chairman, members of the Commission, my name is Guy Tippet. I am the President of the Northern Virginia Nurserymen Association. I would like to take this time to thank members of Fairfax County for allowing us to give some input. We have been very impressed with the thoughtfulness that has gone into coming up with this definition. There are a couple points which I believe we should be aware of and I would like to take just a few minutes to point out some of these points. In the proposed amendment, the term "agriculture", I believe we're getting away from what a nursery truly is. Its essence was an agriculture. We are still very much involved in agriculture. We grow as a farmer grows a crop of corn. We do everything that

is necessary to keep this product as a farmer would to cultivate his corn. And then we take it to market. The difference is in our market. We are not set up in such a way that we can grow it and throw it in a hopper and take it to a mill or a large buyer. Our buyer happens to be the public in Fairfax County. So we are a little unique in this situation that once we have this product, we have to distribute locally. We are generally recognized throughout the country as an agricultural entity, we are not excluded from agriculture in any way. Our problem has been in the growth of Fairfax County, that we are in residential districts. And in some cases, this has been primarily because we were there first in the County and the County has grown around us. I'm pointing this out because of the fact of our type of industry. We're growing plant material which takes a great deal of area. It's not a commodity that we can put on a shelf. We need land space. And as everyone is well aware, land space in Fairfax County has become a premium item. No one can grow nursery stock in Fairfax County on straight commercial ground, unless you are a very large operation. No one can start a nursery growing on commercial ground. There is no way you can turn a product every four to seven years and stay in business on commercial ground. This is why we have generally been in residential areas, because naturally the ground is cheaper and two, we have tried to improve our appearances and be

compatible with the people that have moved in around us. These are two major points which I would like to make everyone aware. We generally feel that the association itself, that there has been quite a few regulations over the years in regards to nurseries. We are aware that there has been one or two problems here lately with nurseries in Fairfax County. We do feel that there is enough laws on the books that these problems can be eliminated without all nurseries being effected. Our main concern is the future of the nursery industry. We are the essence of the environment at this time. And we do not want five years from now or ten years from now, to not have a nursery as it is known in Fairfax County. Thank you.

MRS. PELLETTIERI: Thank you Mr. Tippet.

MRS. WRIGHT: Madam Chairman.

MRS. PELLETTIERI: Mrs. Wright.

MRS. WRIGHT: Do you have anything specific that you would talk to in the proposed amendment?

MR. TIPPETT: You'll have to forgive me, I'm a little awkward. This is my first appearance before the Commission and I have just scanned through this. My main concern is, it says here, the term "agriculture" shall not include plant nurseries. I do not want us excluded from agriculture. We are definately agriculture and I realize that as Fairfax County is today, there's no agriculture. But we are an exception because

that is our essence. And we have tried to work with staff in separating large garden centers from growers of plant material which I mean someone that has two, three, four, five or even ten acres of stock. They are still growing it just as a farmer. They need basically the same type of implements which may be trucks, tractors, and the things that you would find on any farm. And I would like to go on record that we are still agriculture and we'd like to maintain ourself as an agriculture.

MRS. WRIGHT: Madam Chairman, I'm going to respond to this and perhaps staff would like to comment afterwards. I believe that the intent was not to exclude plant nurseries from residential districts but in taking them out of the agricultural use, what we do is remove their use by right and I don't think we're precluding the growing of crops and the tilling of the soil. But what we're trying to get at is the expansion of these uses into more commercial type operations from being-- not totally precluded from the residential zone, but from being a use by right in requiring a special exception. Have you gone through the staff report and seen the definition of plant nurseries as opposed to garden centers?

MR. TIPPETT: I have gone through it very briefly.
Yes.

MRS. WRIGHT: Does that answer some of the questions?

MR. TIPPETT: Yes, that does answer some of the

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Yes.

MRS. WRIGHT: Does that answer some of the questions?

MR. TIPPETT: Yes, that does answer some of the

questions, yes.

MRS. WRIGHT: And as I said, Madam Chairman, staff may want to comment on my remarks.

MRS. PELLETTIERI: Does staff want to comment?

MS. GWINN: Just very briefly. Mrs. Wright capsulized it pretty well. If the operation is mainly growing, then it can be deemed agriculture. If there's going to be retail sales from the site, then it becomes a plant nursery by definition. That's basically where the line is drawn. And it's the retail sales in the residential district that has given us so many problems. I think if you're just going to be, there's no question that just the growing is agriculture and really doesn't have that much impact.

MR. TIPPETT: If I may make a comment, this is the problem that we have been trying to work out. Just growing it, if we have no market for what we grow it is totally senseless. And we're not the type of industry where we can grow it say on three acres as an example and take it somewhere else to get rid of it. It's as it has been in the past, it's wherever it's grown it's usually retail from that item. There's no market except truly as a wholesaler only, which is usually a very large establishment as far as acreage is concerned. If we're limited to grow only on the land, then we have eliminated our market. And we do fear this. What do we do with it?

MRS. PELLETTIERI: Thank you very much.

MR. TIPPETT: Thank you.

MRS. PELLETTIERI: Is there anyone else here who would like to speak to this issue?

MR. RUSSELL: Madam Chairman, members of the Commission, I'm Donald Russell. My operation is at my home at 3800 Hummer Road in Annandale. The definition of plant nurseries does not really bother me. But the other items covered by this amendment does. It doesn't bother me as a nurseryman because I, well I've been growing plants all my life. I have not been a nurseryman all my life. I retired in 1971 and talked with the Zoning Commission about it and they said my operation classified me as a farmer in a residential area. So I'm covered by the grandfather clause. And I don't want to expand but I think the public is served by small nurseries. There is rarely a day when members of the public do not come by and ask me what is bothering this plant. Is this lace bug or is it chlorosis (sp) or what not? My operation is on less than an acre, well the definition of plant nurseries does not restrict it to operations of five acres. There are other sections of the amendment that would say that you can't have a plant nursery unless you have five acres. And you have to have certain setback requirements and so on. A small nursery such as mine if it were to start anew, could not fit in to the total definition that this Ordinance

would provide. It is a, in effect a neighborhood service that a small nursery provides. One like myself who does it sort of half-way as a hobby would be precluded from doing this and I think the public would be a loser as a result of it. My own nursery will close one day, probably not too far in the future, but I would hope that there would be others who would fill what I believe is a real need. And I think this definition, the, not the plant nursery per se definition but the other restrictions would prohibit this from happening.

MRS. PELLETTIERI: Thank you Mr. Russell. I'll have to say I've long enjoyed your yard on Hummer Road. Mr. Newton Edwards.

MR. EDWARDS: Madam Chairman, members of the Commission, my name is Newton Edwards. I live at 6524 Elmdale Road. Perhaps some of you know me from my kind of long time interest in parks and conservation. I've got a second passion that's flowers and shrubs. I operate a small nursery. In Fairfax County, a good deal of the character of our County and the quality of it is going to be determined by the way people plant their yards, maintain them, and things of this sort. The small nursery is the predominate one in Fairfax County, as licensed by the State. There are relatively few larger nurseries. My fear is that the staff and others have concentrated on the

larger operations. They're the visible ones and I suspect they're the ones that have caused the problems. The person who has an acre or so of land and enjoys this speciality, be it growing day lilies or azaleas or camelias or whatever, and selling them, or perhaps tomatoes or strawberries for that matter, he is going to be driven out by this ordinances. We're not going to have in Fairfax County any longer individuals who have great experience and can sell and advise their neighbors and customers. The material is going to be shipped in from great distances, California and the south, grown in sawdust and bark, quickly in fertilizer, they're not going to be able to get the homegrown material. This Ordinance will prohibit the small grower in his backyard kind of operation. I know there's possibilities of abuse but it seems to me that going to the expense that the County has of outlawing nurseries of less than five acres is most unfortunate for the County. What we're going to be doing is driving out a source of information and good supplies for the citizens of the County that need it. So I would speak to the need for amending the proposal to allow the small nurseries to continue to operate. I think they can be restricted in terms of the nuisance aspect, in terms of such things as large amount of parking of trucks or any of the other type of things, and I'm well aware of, that intrude into a residential

environment and can be objectionable. But I think it's gone too far to outlaw them all together. This an improvement over the earlier staff report, but it still has the effect of driving out of the County all of the small nurseries in the future. I'd urge you to not adopt this without some further work and an amendment to allow the small nurseries to continue to operate in the future. It doesn't effect me and the others; we're all grandfathered. But I think it would be a shame to have this happen to the County in the long run. There are a lot of gardeners, a lot of garden clubs and a lot of interest in beauty and conservation. Thank you.

MRS. WRIGHT: Madam Chairman.

MRS. PELLETTIERI: Mr. Edwards, do you have a suggested size limitation?

MR. EDWARDS: Pardon?

MRS. PELLETTIERI: Do you have a suggested size limitation?

MR. EDWARDS: I think that the size is really not, that's my objection. I think that putting a size limitation misses the point. A nursery can be done on a quarter acre....

(Verbatim continued on next page)

A nursery can be done on a quarter acre as far as I'm concerned, if it's done right. It can be done on ten acres and be done wrong. It's the kind of impact it has that's incompatible with the neighbors and the neighborhood. And so it seems to me that what I'm saying is that it's not the size but how it operates that makes it compatible or not. If they're bringing in trucks all night and raising hob (?) and parking and causing problems in the neighborhood of that type, then regardless of the size, it's out of order. If on the other hand it's a small area where one or two cars come up behind the house and it has no adverse impact where they don't sell anything but the material they grow and give advice and so on, I don't think, in other words, I think the size limitation is wrong. And particularly up as large as five. Now the great majority of the nurseries in the County are small, under an acre. And I think they ought to be allowed to continue. So if you must have a size limitation, perhaps somewhere in the, I live in a quarter acre zone. I have to have a lot that's over an acre. But, excuse me, a half an acre zone and I have a lot over an acre. But certainly from my own point of view I've wanted to not be, knocking me out at a half acre site. I think you ought to go down at least to a half acre. But again I don't think it's the size, it's how it's used that's the important thing.

MRS. PELLETTIERI: Thank you very much.

MRS. FASTEAU: Madam Chairman.

MRS. PELLETTIERI: Mrs. Fasteau.

MRS. FASTEAU: I welcome Mr. Newton. I have been associated with him in the Mason District. One question of information and I would hope that it doesn't sound too personal. How do you get your trade? I have seen your garden and I know what you do. But how do you manage to do any commercial arrangements at all? You don't have a sign out in front that I recall when I was there. Do you advertise? How do you manage it so that it is reasonable in a residential area? And you don't really in any sense impact the neighbors?

MR. EDWARDS: Well, I've lived in my community for some twenty, thirty years and it's been largely by word of mouth, neighbors and people that have known me. I do send out a bulletin every year. And the people that are interested in azaleas and rhododendron, particularly, and to my former customers and it's largely in that manner that it gets to be known. It is, as a former speaker said, a form of pretty much local community, kind of, service. I happen also to be a very highly specialized guy. I grow two or three hundred varieties of rhododendron so people come from all over the United States to get rare things that I'm known for. But again, that's a different kind of association with the National Rhododendron Society and somebody else might

do it with a...

MRS. FASTEAU: So it would be through journals and that kind of thing? I ask the question because in view of what you are hoping to achieve, a modification of this, would you have any suggestion as to the wording which would allow these smaller enterprises such as yours without, at the same time, in such neighborhoods creating an aura of commercial intrusion, whether it be traffic or trucks or a sign or excessive goings and comings, whatever. And I wondered if you had any wording to suggest, not immediately at this moment but if this were to be deferred for further study or modification, would you be able to help?

MR. EDWARDS: I think I can. I'm sorry I haven't, this is a very technical matter. the staff has wrestled with. I'm sure you all appreciate better than I, it's a matter of definitions and specific amendments. And I think that, I think I could suggest some language particularly with the help of the staff that would accomplish the objectives of allowing a nursery on a small acre with adequate restrictions as to impact on residential. I think this goes too far.

MRS. FASTEAU: Thank you.

MR. EDWARDS: I'm sorry because I know it's very difficult to get up and criticize something without having specific suggestions to substitute.

MRS. PELLETTIERI: Thank you Mr. Edwards. Nice to see you. Is there anyone else here who would like to speak to this issue? Mr. Savino?

MR. SAVINO: Madam Chairman, members of the Board, my name is Ron Savino. I happen to be president of the Burke Communities Civic Association but tonight I'm here speaking as the citizen advisory member of the meeting in June or July when it took place between Mr. Yates and Ms. Gwinn and about a half a dozen nurserymen association. We had a very informal meeting; it lasted three or four hours and we were in agreement on many, many items. And then there were some that we weren't in agreement on. And the one particular item which held everything up was the profit definition. How can we show what is a garden center and restrict a garden center and a plant nursery and separate the two? I think staff has come up with the best that they could possibly put together at this time. I believe we all know how this came apart; plant nurseries in Fairfax County were under the agricultural use for many, many years. We had no problems with them. They've all followed under the Ordinance, they grew their plants, they had restrictive covenants on them and they really did their job the proper way. We had two nurseries which I won't mention that tested the Ordinance. And unfortunately we found out at that time that if two tested it and we would lost in court, something had to be done. I'm sorry

to say that probably one of the only solutions we've come up with so far is limiting these very fine nurseries to five acres or more. I really think that's a restriction in the future. I'd like to ask staff several questions. If a new, if a nursery such as the gentleman that you just, was up here speaking prior to me getting up here, was to retire his business tomorrow, a very fine business, would they have to comply with this new Ordinance somebody who would take it over, such as a son or maybe somebody with the same interests as this gentleman has? If so, we've lost another good nursery. And all the other nurseries that are deemed very good nurseries. Would it be grandfathered? Must there be a relation, blood relation? These things we have to iron out before we lose all our present nurseries, very good nurseries. I believe there is a problem with the five acres but I don't know how to solve it. Maybe allowing a nursery by right on residential zoned property without a restriction to the acreage only be allowed by right if they comply with certain expansions of the Ordinance. In other words, if they keep it down to the home grown materials such as the gentleman that was just up here, can we word it that way so that we could still have the small ones, but the ones that want to open to a grander scale, they would have to then come in for a special exception. Now, I don't write the, write the Ordinances and I don't intend to write the Ordinances, but I think we can maybe look at this in

two ways, restrict them by right and allow them by right but yet the ones that want to go into a larger phase and have problems doing so, we could then have the Ordinance written perhaps, to address that issue. If you have any questions, I'll be happy to answer but I want to reiterate that everyone at that meeting that night spent many long hours and the only problem we had was this definition. But from what I heard here tonight I'd hate to lose these small nurseries in Fairfax County. I mean, I've gone to them on many occasions and asked questions and gotten free advice. I'd hate to have to go to Hechinger's to ask a clerk what is wrong with my plant and not get an answer. Thank you.

MRS. PELLETTIERI: Thank you. Is there anyone else?

MR. RUSSELL: I'd like to say one other thing if I could...

MRS. PELLETTIERI: Uh, Mr. Russell.

MR. RUSSELL: I...

MRS. PELLETTIERI: I believe you've spoken before and we don't usually have people come back.

MRS. WRIGHT: Madam Chairman. Madam Chairman, I'd like to hear what Mr. Russell has to say.

MR. RUSSELL: Well, it was only two minor things. Tom Bennett of Bennett's Nursery has worked with your staff and he couldn't be here tonight and I neglected to tell you that he

was sorry he couldn't be here and he wanted me to thank the staff for the help that they've, the work that they've done with the association. Tom is without electricity and heat and has got some blown trees, some blown down trees in his yard and a few other things so he couldn't be here tonight. He wanted you folks to know that. A question was asked about advertising; I have never advertised at all except as a charity thing in a high school program of some kind if they came and wanted ten dollars for publishing their paper or something of this nature but I've never advertised and I don't think the kind of nursery that I have or the other small nurseries need to do it. It gets known around by friends and customers that, how we operate. And we don't have to advertise.

MRS. WRIGHT: Madam Chairman.

MRS. PELIETTIERI: Mrs. Wright.

MRS. WRIGHT: Mr. Russell. Mr. Russell, let me ask you a question. What we have before us tonight is plant nurseries and garden centers. But there's another part of the Ordinance that is not before us tonight and that has to do with wayside stands. Does your operation, I'm totally unfamiliar with it, does it have a building from which you sell? When you sell your plants or shrubs or flowers, whatever it is, do you sell them directly from the ground, do you have any kind of a temporary

stand or what?

MR. RUSSELL: All the plants that I have are planted and a customer comes and walks around the yard and says I want this one and we dig it up he takes it home.

MRS. WRIGHT: So, okay.

MR. RUSSELL: Everything, it's a different kind of a nursery but, and I don't, I wouldn't say that we ought to define it. Just in the manner which I operate, because most of them couldn't afford to do this, but it's a completely hand operation and people can see how it fits into a landscape and this is one reason why we have lots of satisfied customers, I think.

MRS. WRIGHT: Do you have any greenhouses?

MR. RUSSELL: No.

MRS. WRIGHT: Okay. Thank you, Madam Chairman.

MRS. PELLETTIERI: Thank you Mr.

MR. RUSSELL: When I say no, I've got a bay window in my garage that I sometimes have some plants in, but it's not a greenhouse.

MRS. PELLETTIERI: Is there anyone else here who would like to speak to the plant nursery amendment? Alright, I think we'll turn back to staff now and first of all we have some questions raised by Mr. Savino that we would like answered and then any other comments by the staff.

MS. GWINN: In response to Mr. Savino's questions, existing nurseries today, the uses are grandfathered and it's irregardless of who is running it, the use is run with the land. They don't run with the family. So that if someone wanted to retire, his business could pass on to someone else by right. There's no problem with that. The problem would be if there was any expansion contemplated, then a special exception would be required. But the use may continue. On the second which kind of interrelates with these nurserymen in their backyards, I think staff is very sympathetic. I don't think we particularly want to preclude this type of use in the County. I don't think there's any way we can condition or allow this type of use by right. This, you cannot condition a use by right. Under the old Ordinance, this thing was allowed by right and it kind of got us into the problem that we're in now. One possible alternative would be to delete paragraph 1 of Section 9-514 which contains the requirement for a minimum lot size of five acres and also the requirement for a plant nursery to have frontage on an arterial street, which I also think would preclude this small backyard nurseryman. If we deleted that standard then it could be addressed, the size, the scope of each one could be addressed on a case by case basis as a special exception use. That's a possibility that you may want to consider. I don't have any further comments.

MRS. PELLETTIERI: Alright, are there any questions of staff?

MRS. WRIGHT: Madam Chairman.

MRS. PELLETTIERI: Mrs. Wright.

MRS. WRIGHT: Ms. Gwinn, say that again, amend, I just want to know...

MS. GWINN: Okay. Paragraph 1 of Section 9-514...

MRS. WRIGHT: Right.

MS. GWINN: ...which is additional standards for plant nurseries, you could simply delete that whole paragraph. If you deleted it, then you'd be deleting the requirement for a five acre lot size and a requirement for the nursery to have frontage on an arterial. Certainly the size and the traffic could be addressed on a case by case basis when a special application was considered.

MRS. WRIGHT: What was the other suggestion that you threw at us as a possibility?

MS. GWINN: That was it.

MRS. WRIGHT: No...

MS. GWINN: I don't think there was another.

MRS. WRIGHT: I thought you made a second one? All right. Is there, okay. If I understand your comments correctly, then a wayside stand such as it is would not cover the concerns that have been voiced here tonight?

MS. GWINN: No they would not, because by definition the backyard operation would be a nursery rather than agriculture.

MRS. WRIGHT: Alright. On page two of the staff report, under the definition of plant nursery, the last paragraph where we talk about stock grown elsewhere and transplanted, this would include bagged in burlap materials? Or is it specifically stuff to be transplanted onto the land?

MS. GWINN: No, it doesn't, it would include balled and burlaped. It does not have to be transplanted into the soil.

MRS. WRIGHT: Okay. Those are all the questions that I have. At this time, Madam Chairman, I think perhaps when you get to the point of closing the public hearing that I would like to request that we have a brief recess before going into a motion on this case.

MRS. PELLETTIERI: There being no further questions, we will close the public hearing and honor Mrs. Wright's request for a brief recess. We've been here about an hour and we can take about a ten minute recess and we'll come back and wrap up tonight's business.

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CHAIRMAN HERRITY: Disclosures by Board Members in this case: C.k., who appears for the applicant in this case? Mr. Lawson, you state your name for the record, please, Sir.

MR. LAWSON: For the record, my name is Tom Lawson. I appear here on behalf of the applicant, uh what I'm going to ask the Board to do in this case and just to save you time, my client and I'm sure that few of you on the Board are aware of this, we have had a number of conversations with the Staff on this particular case in attempting to work out some sort of an amendment that my client could live with. My client was in operation prior to the adoption of the new ordinance on August the 14th of 1978, and the new ordinance and the interpretation that's being given to us by the Staff is such that we are not able to live with the Staff's interpretation as to the effect of that a the new ordinance on this SE and so in view of that we would ask the Board to turn down this application ah which may sound a bit unusual to you but we are not able to economically, it's not feasible for us to live with it and a also the various letters and correspondence that you have from me on behalf of my client, of course, I would appreciate that being part of the record. I also have a letter from the CUPPS ah which is dated February the 4th 1980, and for the record I would also like to make that a part of the record, if I might. Really, in view of the position we are taking that's really all that I would have to say at this time. If any of you do have any questions, I'd be glad to try to...

INDEX # 19
DATE 10/27/80
JUDGE Ju
CASE "Chu 12242d

CHAIRMAN HERRITY: Are there any questions? O.K., this is a public hearing Ladies and Gentlemen. Those citizens who wish to speak either for or against this application at the public hearing, any takers, O.K., ah, are there items for the record? The public hearing is closed. The Staff and Planning Commission report, please?

MR. DAVIS: Thank you, Mr. Chairman. The Staff recommends approval of Special Exception No. 091-D-79 subject to the conditions noted in Appendix I of this report. The Staff also recommends modification of the transitional yard along the east and south sides of the site, subject to the approval of the Director of the Department of Environmental Management. The Transitional yard and barrier should be waived along the west side of the parcel. It is further recommended that the Board of Supervisors modify the additional standards of paragraphs 2 and 3 of Section 9-514 as amended to allow the lath house and proposed parking lot to remain closer to the lot line which abutts the R District. On Wednesday, December 5, 1979, the Planning Commission voted unanimously to recommend to the Board of Supervisors approval of Special Exception No. 091-D-79 subject to the conditions noted in Appendix I of the Staff Report. Commission further voted unanimously to recommend to the Board of Supervisors the modification of the additional standards of Paragraph 2 and 3 of Section 9-514 as amended to allow the lath house and proposed parking lot to remain closer to the lot line which abutts the R District. Thank you.

CHAIRMAN HERRITY: O.K. What's the pleasure of the Board?

Mrs. Falck.

SUPERVISOR FALCK: May I begin by asking Mr. Lawson a question? Did I understand you correctly, Mr. Lawson? That you are requesting this Board to deny this Special Exception?

MR. LAWSON: Yes, that's correct. In view of the interpretation of the Staff - that the Staff is giving to the ordinance and the development plan conditions which are attached to this, it's just not economically feasible for the CUPPS to go ahead with the project.

SUPERVISOR FALCK: Under those circumstances, why don't you just withdraw this request for a special exception?

MR. LAWSON: Well, that's not what we would like to do, we would like the Board to act on it one way or another and...

CHAIRMAN HERRITY: Mrs. Falck, I believe he is asking the Board to withdraw indicating withdrawal by implication.

MR. LAWSON: Well, we're not withdrawing the case and ...

CHAIRMAN HERRITY: A half a dozen of eggs are six eggs, Mr. Lawson, you're either petitioning this Board for something or you're not.

MR. LAWSON: Well, we did, and and what the Staff has come up with is something that we're not able to live with and it would seem to me that the Board would have to vote that up or down one way or another.

CHAIRMAN HERRITY: It might be appropriate to the Board to act to allow you to withdraw your original application if you no longer desire the use.

MR. LAWSON: Well, I've, I've huh, I really don't think that's what we want to do. We'd like to ask the Board to vote up or down on it.

CHAIRMAN HERRITY: O.K. Further discussion?

SUPERVISOR FALCK: Mr. Chairman.

CHAIRMAN HERRITY: Mrs. Falck.

SUPERVISOR FALCK: In view of the fact that the applicant has asked for denial in this case I will simply move that the Board deny it.

SUPERVISOR PENNINO: Second.

CHAIRMAN HERRITY: O.K. All in favor of the motion indicate by saying "AYE". Opposed vote "NAY", Chair votes "AYE", motion carried.



Verbatim Specialist
for Clerk to the Board

ARTICLE 15

NONCONFORMITIES

PART 1

15-100 NONCONFORMING USES

15-101

Qualification of Nonconforming Uses

1. Notwithstanding the definition of nonconforming building or use presented in Article 20, a building or use shall not be deemed a nonconforming use if such was a conforming building or use prior to the effective date of this Ordinance, and such building or use would otherwise be a conforming use under the provisions of this Ordinance except that it does not meet the minimum district or lot size or minimum yard requirements of the zoning district in which located.
Such a use may be continued and may be enlarged, provided that such use after enlargement shall comply with all of the regulations of the zoning district in which located except the lot size requirements.
2. Any use existing prior to the effective date of this Ordinance, which is allowed within a particular zoning district as a special permit or a special exception use by the provisions of this Ordinance, shall not be deemed to be a nonconforming use in such district. However, any subsequent replacement or enlargement of such use or of any building in which the same is conducted or the construction of any additional building for such use beyond the extent which existed prior to the effective date of this Ordinance, shall be subject to a special permit or special exception obtained in accordance with the provisions of this Ordinance. Such special permit or special exception shall be approved only if the resulting use complies with the standards set forth in Articles 8 or 9 for the particular use in question.

15-102

Nonconforming Uses Which May be Continued and Enlarged

1. The following nonconforming uses may be continued, and upon obtaining a special exception from the Board in accordance with the provisions of Article 9, such use may be enlarged subject to the conditions set forth in Paragraphs 2 through 4 below.
 - A. Single family detached dwelling in a C or I district or an R district where such a dwelling is not permitted by the provisions of this Ordinance.
 - B. A commercial use, allowed as a permitted, special permit or special exception use in a C district of one class under the provisions of this Ordinance, but located in a C district of another class where such use is not allowed.
2. Such uses as set forth in Par. 1 may be enlarged to a total aggregate extent not to exceed twenty-five (25) per cent of the area of land occupied by such nonconforming use, and to a total aggregate extent not to exceed twenty-five (25) per cent of the gross floor area of the building in which such nonconforming use is conducted; provided that such enlargement shall never exceed the maximum floor area ratio prescribed for the zoning district in which located.
3. Structural alterations may be made in a building housing a nonconforming use set forth in Par. 1 above, but only to a total aggregate extent not to exceed fifty (50) per cent of its current appraised value according to the records of the Supervisor of Assessments.
4. Whereas a single family detached dwelling may be remodeled, extended, expanded or enlarged in accordance with the provisions of this Section, in no instance shall such structure be used to accommodate a greater number of dwelling or lodging units than such structure accommodated prior to any such work.

PART 1

3-100 R-1 RESIDENTIAL DISTRICT, ONE DWELLING UNIT/ACRE

3-101

Purpose and Intent

The R-1 District is established to provide for single family detached dwellings at a density not to exceed one (1) dwelling unit per one (1) acre; to allow other selected uses which are compatible with the low density residential character of the district; and otherwise to implement the stated purpose and intent of this Ordinance.

3-102

Permitted Uses

1. Accessory uses and home occupations as permitted by Article 10.
2. Agriculture, as defined in Article 20.
3. Dwellings, single family detached.
4. Public schools, parks, playgrounds, athletic fields and related facilities.

3-103

Special Permit Uses

For specific Group uses, regulations and standards, refer to Article 8.

1. Group 2 - Interment Uses.
2. Group 3 - Institutional Uses.
3. Group 4 - Community Uses.
4. Group 5 - Commercial Recreation Uses, limited to:
Commercial swimming pools, tennis courts and similar courts
5. Group 6 - Outdoor Recreation Uses.
6. Group 7 - Older Structures.
7. Group 8 - Temporary Uses.
8. Group 9 - Uses Requiring Special Regulation, limited to:
 - A. Barbershops or beauty parlors as a home occupation
 - B. Home professional offices
 - C. Sawmilling of timber

3-104

Special Exception Uses

For specific Category uses, regulations and standards, refer to Article 9.

1. Category 1 - Light Public Utility Uses.
2. Category 2 - Heavy Public Utility Uses, limited to:
Landfills
3. Category 3 - Public and Quasi-Public Uses, limited to:
 - A. Colleges, universities
 - B. Cultural centers, museums and similar facilities
 - C. Fire stations

- D. Housing for the elderly
 - E. Institutions providing housing and general care for the indigent, orphans and the like
 - F. Libraries
 - G. Medical care facilities, except nursing facilities which have a capacity of less than fifty (50) beds
 - H. Penal and correctional institutions
 - I. Police substations, branch governmental substations
 - J. Post offices
 - K. Private clubs and public benefit associations
 - L. Quasi-public parks, playgrounds, athletic fields and related facilities
 - M. Any other office, facility, building or property owned, leased or used by the federal government, the State or any local governmental jurisdiction, but specifically excluding housing projects sponsored by the Redevelopment and Housing Authority
- 4. Category 4 - Transportation Facilities.
 - 5. Category 5 - Commercial and Industrial Uses of Special Impact, limited to:
 - A. Establishments for scientific research and development
 - B. Funeral chapels
 - C. Marinas, docks and boating facilities, commercial
 - D. Offices
 - E. Plant nurseries

3-105**Use Limitations**

- 1. No sale of goods or products shall be permitted, except as accessory and incidental to a permitted, special permit or special exception use.
- 2. All uses shall comply with the performance standards set forth in Article 14.

3-106**Lot Size Requirements**

- 1. Minimum district size for cluster subdivisions: 5 acres
- 2. Average lot area: No Requirement
- 3. Minimum lot area
 - A. Conventional subdivision lot: 36,000 sq. ft.
 - B. Cluster subdivision lot: 25,000 sq. ft.
- 4. Minimum lot width
 - A. Conventional subdivision lot:
 - (1) Interior lot - 150 feet

- (2) Corner lot - 175 feet

B. Cluster subdivision lot:

- (1) Interior lot - No Requirement
- (2) Corner lot - 125 feet

5. The minimum district size requirement presented in Par. 1 above may be waived by the Board in accordance with the provisions of Sect. 9-610.

3-107

Bulk Regulations

1. Maximum building height

- A. Single family dwellings: 35 feet
- B. All other structures: 60 feet -

2. Minimum yard requirements

A. Single family dwellings

(1) Conventional subdivision lot

- (a) Front yard: Controlled by a 50° angle of bulk plane, but not less than 40 feet—
- (b) Side yard: 15 feet, but a total minimum of 40 feet
- (c) Rear yard: 25 feet

(2) Cluster subdivision lot

- (a) Front yard: Controlled by a 40° angle of bulk plane, but not less than 30 feet
- (b) Side yard: 12 feet, but a total minimum of 40 feet
- (c) Rear yard: 25 feet

B. All other structures

- (1) Front yard: Controlled by a 50° angle of bulk plane, but not less than 40 feet —
- (2) Side yard: Controlled by a 45° angle of bulk plane, but not less than 20 feet
- (3) Rear yard: Controlled by a 45° angle of bulk plane, but not less than 25 feet

3. Maximum floor area ratio: 0.15 for uses other than residential

3-108

Maximum Density

One (1) dwelling unit per acre

3-109

Open Space

In subdivisions approved for cluster development, 20% of the gross area shall be open space

3-110**Additional Regulations**

1. Refer to Article 2, General Regulations, for provisions which may qualify or supplement the regulations presented above.
2. Refer to Article 11 for off-street parking, loading and private street requirements.
3. Refer to Article 12 for regulations on signs.
4. Refer to Article 13 for landscaping and screening requirements.
5. Refer to Article 17 for uses and developments which require the submission of a site plan.