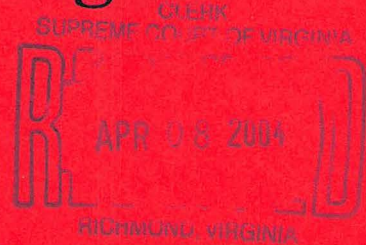

IN THE
Supreme Court of Virginia

RECORD NO. 032716



LOFTON RIDGE, LLC,

Appellant,

v.

**NORFOLK SOUTHERN RAILWAY CORPORATION,
PREVIOUSLY IDENTIFIED AS NORFOLK
SOUTHERN CORPORATION, A/K/A
NORFOLK AND WESTERN RAILROAD,**

Appellee.

JOINT APPENDIX

**James W. Barkley
Elisabeth M. Ayyildiz
MORIN & BARKLEY
123 East Main Street, 7th Floor
Post Office Box 240
Charlottesville, Virginia 22902
(434) 293-1200**

Counsel for Appellant

**Mark D. Loftis
WOODS, ROGERS
& HAZLEGROVE
Post Office Box 14125
Roanoke, Virginia 24038-4125
(540) 983-7618**

Counsel for Appellee

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VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOFTON RIDGE, LLC,

Complainant.

v.

NORFOLK SOUTHERN CORPORATION,
a/k/a Norfolk and Western Railroad

Serve: Willie F. Mitchell, Jr.
Registered Agent
3 Commercial Place
Norfolk, Virginia 23510

Respondent.

Case No.: CH00000284-00

BILL OF COMPLAINT

COMES NOW Lofton Ridge, LLC ("Lofton Ridge"), by counsel, for its Bill of Complaint filed herein against Norfolk Southern Corporation ("Norfolk Southern"), and states as follows:

1. Lofton Ridge is the owner of approximately 226 acres in Augusta County, Virginia, (hereinafter referred to as the "Property") all as more specifically identified in survey prepared by Thomas E. Shumate, dated September 9, 1998, a copy of which is attached hereto marked Exhibit A.

2. Access to the Property is provided by a dirt road to State Route 853 (State Route 853 crosses railroad tracks on property owned by Norfolk Southern). Attached hereto marked Exhibit B is plat prepared by Robert E. Funk, dated May 13, 1998 of 18.980 acres conveyed to John E. Todd, which plat locates State Route

853 crossing the railroad tracks and the dirt road crossing a very small portion of Norfolk Southern's property to reach State Route 853.

3. The only means of ingress and egress to the Property is over the dirt road to State Route 853.

4. On or about June 16, 2000, Norfolk Southern locked a gate which blocks the dirt road where it crosses Norfolk Southern's property and completely prevents Lofton Ridge any means of ingress and egress to or from the Property. Upon best information and belief, Norfolk Southern has provided John E. Todd (which also uses the dirt road) with keys to the lock so that he and his family may have access to their home which is located on the 18.980 acres identified on the Robert E. Funk Plat dated May 13, 1998.

5. Upon best information and belief, the dirt road, which crosses Norfolk Southern's property, has been used for ingress and egress to the Property for over sixty (60) years and is/has been the only means of ingress and egress to same. Lofton Ridge is entitled and has a claim of right to use the dirt road to reach State Route 853.

6. Norfolk Southern has wrongfully and without any right, denied Lofton Ridge access to its Property by blocking the dirt road.

7. Norfolk Southern's actions and claim, if any, to deny access to Lofton Ridge to its Property is adverse to Lofton Ridge's title and rights in the dirt road and such constitutes a cloud on Lofton Ridge's title to the Property.

8. Norfolk Southern has wrongfully interfered and continues to interfere with Lofton Ridge's rightful use of the dirt road, in part, by forcibly preventing and denying Lofton Ridge any access to the Property.

9. Norfolk Southern's wrongful and continued interference, unless enjoined by order of this Court, is and will cause grave and irreparable injury to Lofton Ridge in that Lofton Ridge is completely deprived of any use of the Property.

10. Norfolk Southern's actions have completely deprived Lofton Ridge of the use of its Property and it is impossible for Lofton Ridge to determine the precise amount of damage it will suffer if Norfolk Southern's conduct is not restrained. In addition, many of the damages resulting from the total deprivation of the use of the Property cannot be compensated in monetary damages.

11. Lofton Ridge has no adequate remedy at law for Norfolk Southern's continued conduct.

WHEREFORE, Lofton Ridge respectfully requests this Court:

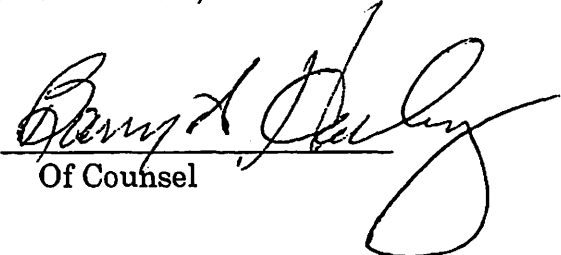
1. Enter a Preliminary Injunction prohibiting Norfolk Southern from interfering with Lofton Ridge's use of the dirt road and access to the Property until final disposition of this matter; and

2. Adjudge that the Property has legal access over the dirt road that crosses the property of Norfolk Southern in order to reach State Route 853; and

3. Enter a Decree permanently enjoining or prohibiting Norfolk Southern and any person claiming under it from further interfering with Lofton Ridge's use and enjoyment of the Property and the dirt road to State Route 853; and

4. Award Lofton Ridge damages against Norfolk Southern for its wrongful conduct identified herein; and
5. Award Lofton Ridge its costs and legal fees incurred in this action; and
6. Grant such other and further relief, both special and general, as the Court deems just and proper.

LOFTON RIDGE, LLC

By: 
Of Counsel

Barry A. Hackney (VSB# 05515)
HIRSCHLER, FLEISCHER, WEINBERG,
COX & ALLEN
The Federal Reserve Bank Building
701 East Byrd Street
P. O. Box 500
Richmond, Virginia 23218-0500
Telephone: (804) 771-9569
Facsimile: (804) 644-0957
Counsel for Lofton Ridge, LLC

#255651 v.1 04402.01278

FILED IN THE CLERK'S OFFICE OF THE
CIRCUIT COURT OF AUGUSTA COUNTY
THE 11th DAY OF July, 2000
AT 2:43 P.M. P. M.
WRIT TAX \$ 5.00
FEE 59.00
TOTAL PAID \$ 64.00

TESTE:
 CLERK/D.C.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

LOFTON RIDGE, LLC,

Plaintiff,

v.

NORFOLK SOUTHERN CORPORATION,
a/k/a Norfolk and Western Railroad

Defendant.

Case No. CH00000284-00

ANSWER

COMES NOW Norfolk Southern Railway Company ("NS"), incorrectly identified in the Bill of Complaint as "Norfolk Southern Corporation," by counsel, and for its Answer to the Bill of Complaint filed herein states as follows:

1. NS is without sufficient information either to admit or deny the allegations contained in Paragraph 1 of the Bill of Complaint, and therefore denies the same and calls for strict proof thereof. NS further denies that the document identified as "Exhibit A" was attached to the copy of the Bill of Complaint served upon NS, so NS is unable to respond to the allegations concerning said Exhibit.

2. NS denies the allegations contained in Paragraph 2 of the Bill of Complaint. NS further denies that the document identified as "Exhibit B" was attached to the copy of the Bill of Complaint served upon NS, so NS is unable to respond to the allegations concerning said Exhibit.

WOODS, ROGERS
& HAZLEGROVE
Attorneys at Law

RKE# 0654858.WPD
C/M: 069557-00059-01

3. NS denies the allegations contained in Paragraphs 3, 5, 6, 7, 8, 9, 10 and 11 of the Bill of Complaint.

4. In response to the allegations contained in Paragraph 4 of the Bill of Complaint, NS admits that it did in fact lock the gate at its crossing for a period of time, but states that the gate has since been unlocked at the request of the plaintiff. Although it has not yet been accomplished, it is the intention of NS to furnish keys to the lock at the gate to both the plaintiff and to John E. Todd for access to their respective properties pending resolution of this litigation.

5. With regard to the allegations of paragraph 5 of the Bill of Complaint, all of which are denied, NS states that even if said allegations were true they would not give plaintiff any rights in or over the railroad crossing at issue, and said allegations therefore fail to state any claim upon which relief can be granted under Virginia law.

6. Because plaintiff has declined to execute a private crossing agreement, plaintiff has no legally enforceable rights against NS.

7. NS denies that plaintiff has been injured and damaged as alleged in the Bill of Complaint, and calls for strict proof of each and every item of damage alleged.

8. NS denies that plaintiff is entitled to the relief sought in the Bill of Complaint, or to any other relief whatsoever.

9. All allegations contained in the Bill of Complaint not expressly admitted herein are denied.

WHEREFORE, having fully answered the Bill of Complaint, Norfolk Southern Railway Company ("NS"), incorrectly identified in the Bill of Complaint as "Norfolk

Southern Corporation," respectfully requests that the Bill of Complaint be dismissed, and that it be awarded its costs and expenses in defense of the Bill of Complaint and such other and further relief as the needs of equity require and which this honorable Court deems proper.

Respectfully submitted,

**NORFOLK SOUTHERN RAILWAY
COMPANY**
(Incorrectly identified as "Norfolk Southern
Corporation")

By: Michael K. Smeltzer
Of Counsel

Michael K. Smeltzer (VSB # 3504)
Mark D. Loftis (VSB # 30285)
Woods, Rogers & Hazlegrove, PLC
1400 First Union Tower
10 S. Jefferson Street
P.O. Box 14125
Roanoke, VA 24038-4125
Phone: 540-983-7600
Fax: 540-983-7711

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer was mailed to
Barry A. Hackney, Esq., Hirschler, Fleischer, Weinberg, Cox & Allen, P. O. Box 500,
Richmond, Virginia 23218-0500, counsel for plaintiff, this 31st day of July, 2000.

Michael K. Smeltzer

Filed in the Clerk's Office of the
Circuit Court of Augusta County
Time: 8:5am Date: Aug 4, 2000
TESTE: Lina R. Coffey Dep. Clk.
Date: Aug 4, 2000

RKE# 0654858.WPD
C/M: 069557-00059-01

3

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOFTON RIDGE, LLC,

Complainant,

v.

**NORFOLK SOUTHERN RAILWAY
COMPANY, previously identified as
NORFOLK SOUTHERN CORPORATION,
a/k/a Norfolk and Western Railway,**

Respondent.

Case No. CH 00000284-00

**MOTION TO COMPEL CORPORATE DEPOSITION
AND MEMORANDUM IN SUPPORT THEREOF**

Complainant, Lofton Ridge, L.L.C., (“Lofton Ridge”), by counsel, for its Motion to Compel Corporate Deposition and Memorandum in Support Thereof, respectfully states as follows:

PROCEDURAL POSTURE

On January 4, 2001, pursuant to Rule 4:5 of the Rules of the Supreme Court of Virginia, Lofton Ridge served its Notice of Deposition evidencing its intent to take the deposition of respondent Norfolk Southern Railway Company ("Norfolk Southern"), by and through its corporate representative on Tuesday, January 30, 2001. A true and correct copy of the Notice of Deposition is attached hereto as Exhibit A.

On January 29, 2001, Norfolk Southern served its Responses and Objections to Plaintiff's Notice of Deposition objecting to eleven of the nineteen topics identified

by the Complainant. Given the breadth of the objections, which will be discussed in detail, infra, counsel for the parties agreed to postpone the deposition pending ruling by this Court on Norfolk Southern's objections. A copy of Norfolk Southern's Responses and Objections to Plaintiff's Notice of Deposition is attached hereto as Exhibit B.

FACTS

Lofton Ridge is the owner of approximately 226 acres in Augusta County, Virginia (the "Property"). The Property, comprised of six deeded parcels, was purchased through a foreclosure sale from the prior owner, Capt. John E. Todd in 1998.¹

From 1966 through the present, the only ingress and egress from a public road to the Property has been provided by a dirt road that connects to State Route 853. This dirt road also provided the only means of ingress and egress for approximately 200 of the 226 acres since the mid-1940's. A small portion of this dirt road is located on property owned by Norfolk Southern.

On or about June 16, 2000, Norfolk Southern locked a gate blocking the dirt road where it crosses Norfolk Southern's property, completely preventing Lofton Ridge any means of ingress or egress to or from the Property. Norfolk Southern's actions and its continued interference in Lofton Ridge's right to use the dirt road has not only wrongfully denied Lofton Ridge access to its Property, but such actions

¹ Capt. Todd purchased the six parcels in separate transactions in 1966-1967, aggregating and utilizing the entire property for agricultural and commercial purposes from 1966-67 through 1998. Prior to the foreclosure sale, Todd retained ownership of 18.98 acres, and the remaining 226 acres were sold through foreclosure to Lofton Ridge, L.L.C.

are adverse to Lofton Ridge's title and rights in the dirt road and constitutes a cloud on Lofton Ridge's title to the Property.

Lofton Ridge's right to use the dirt road over Norfolk Southern's property for the reasonable use and development of the Property are based on the theories of implied easement of necessity, or in the alternative, prescriptive right, or in the further alternative, the principles of estoppel and waiver.

Upon best information and belief, as early as 1865, the Commonwealth of Virginia and the County of Augusta recognized State Route 853 and its predecessor as a publicly traveled road.

In September 1881, the Shenandoah Valley Railroad (predecessor to Norfolk Southern) condemned 8.09 acres of a 192-acre farm owned by Thomas Williams, a predecessor in title to Lofton Ridge. Following this condemnation, Thomas Williams owned property on both sides of the railroad, which halves were access by farm roads that crossed the condemned area. Upon information and belief, after installation of the railroad tracks, one of the farm roads crossed under the tracks through a culvert. Upon best information and belief, in 1940, this private road was recognized by the Commonwealth of Virginia as a part of State Route 853.

Upon best information and belief, the 1881 condemnation may have taken the only access from the Thomas Williams farm to the predecessor of State Route 853. Thus, an easement by necessity was created providing reasonable access from the Thomas Williams farm over a portion of the property condemned by the Shenandoah Valley Railroad Company to the predecessor of State Route 853 at the

time of the September 1881 conveyance. Upon information and belief, at a time contemporaneous with this conveyance, the Shenandoah Valley Railroad also constructed a crossing (the "Crossing"), which crossing is currently in existence, transverses State Route 853 (as it is currently located), and has been recognized as a public crossing.

In 1943, the Norfolk and Western Railway Company (Norfolk Southern's predecessor), condemned additional property originally a part of the Thomas Williams farm and closed the culvert, eliminating public road access to the then-current landowner. Upon information and belief, in exchange for the closing of the culvert and to provide the then-current landowner with public road access, Norfolk and Western Railway Company constructed, or assisted in the construction of, a farm road and the current Dirt Road, over which Norfolk Southern now seeks to deny access to Lofton Ridge. This Dirt Road provided the only means of ingress and egress for the then-current landowners of the Thomas Williams farm, and was openly and continuously used from 1943 through 1966.

If prior to the 1943 condemnation, the Thomas Williams farm still abutted the predecessor of State Route 853, then an easement by necessity over the property presently owned by Norfolk Southern was created by the second condemnation. In the alternative, based on the use of the dirt road by Lofton Ridge's predecessors in title, Lofton Ridge has a prescriptive easement of not less than 30 feet in width over the dirt road and other areas not utilized by Norfolk Southern as needed to access State Route 853, which easement was created prior to the purchase of the Property

by Capt. Todd. In the alternative, as a result of the actions taken by Norfolk & Western in eliminating the only public road access to the Property in 1943 and providing the then-current landowners with alternative access, Norfolk Southern is estopped from taking a contrary position and denying Lofton Ridge access to a public road over its property for the reasonable use and development of its Property.

ARGUMENT

In its deposition notice, Lofton Ridge requested that Norfolk Southern designate one or more corporate representatives to testify regarding, inter alia:

(2) the construction of the Gate which is constructed, in part, on Norfolk Southern's property and on Lofton Ridge's property, and which Gate was locked by Norfolk Southern prior to the institution of this litigation;

(4) all instances in which Norfolk Southern has denied any person access to the Property;

(8) the 1942-1943 expansion of the railroad trackage running parallel to the Property;

(9) the closing of the underpass/culvert;

(10) the elimination of the road passing underneath the railroad tracks;

(12) the construction and use of the dirt road located on the Property which connects to the dirt road on Norfolk Southern's property;

(13) the dirt road built across Norfolk Southern's property that connects the dirt road on Lofton Ridge's Property to State Route 853;

(16) communications with John E. Todd regarding Todd's use of the Dirt Road;

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

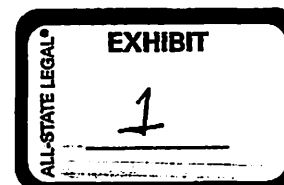
LOFTON RIDGE, LLC,)	
)	
Complainant.)	
v.)	Case No.: CH00000284-00
)	
NORFOLK SOUTHERN RAILWAY)	
COMPANY, previously identified as)	
NORFOLK SOUTHERN CORPORATION,)	
a/k/a Norfolk and Western Railroad)	
)	
Respondent.)	

AMENDED BILL OF COMPLAINT

COMES NOW Lofton Ridge, LLC ("Lofton Ridge"), by counsel, for its Amended Bill of Complaint filed herein against the Norfolk Southern Railway Company, previously identified as the Norfolk Southern Corporation, a/k/a the Norfolk & Western Railway ("Norfolk Southern"), and states as follows:

1. Lofton Ridge is the owner of approximately 226 acres in Augusta County, Virginia, (hereinafter referred to as the "Property") all as more specifically identified in survey prepared by Thomas E. Shumate, dated September 9, 1998, a copy of which is attached hereto marked Exhibit A.

2. Access to the Property is provided by a dirt road to State Route 853 (State Route 853 crosses railroad tracks on property owned by Norfolk Southern). Attached hereto marked Exhibit B is plat prepared by Robert E. Funk, dated May 13, 1998 of 18.980 acres conveyed to John E. Todd, which plat locates State Route 853 crossing the railroad tracks and the dirt road crossing a very small portion of Norfolk Southern's property to reach State Route 853.



3. The only means of ingress and egress to the Property is over the dirt road to State Route 853.

4. On or about June 16, 2000, Norfolk Southern locked a gate which blocks the dirt road where it crosses Norfolk Southern's property and completely prevents Lofton Ridge any means of ingress and egress to or from the Property. Upon best information and belief, Norfolk Southern has provided John E. Todd (which also uses the dirt road) with keys to the lock so that he and his family may have access to their home which is located on the 18.980 acres identified on the Robert E. Funk Plat dated May 13, 1998.

5. Upon best information and belief, the dirt road, which crosses Norfolk Southern's property, has been used for ingress and egress to the Property for over sixty (60) years and is/has been the only means of ingress and egress to same. Lofton Ridge is entitled and has a claim of right to use the dirt road to reach State Route 853.

6. Norfolk Southern has wrongfully and without any right, denied Lofton Ridge access to its Property by blocking the dirt road.

7. Norfolk Southern's actions and claim, if any, to deny access to Lofton Ridge to its Property is adverse to Lofton Ridge's title and rights in the dirt road and such constitutes a cloud on Lofton Ridge's title to the Property.

8. Norfolk Southern has wrongfully interfered and continues to interfere with Lofton Ridge's rightful use of the dirt road, in part, by forcibly preventing and denying Lofton Ridge access to the Property.

9. Norfolk Southern's wrongful and continued interference, unless enjoined by order of this Court, has and will cause grave and irreparable injury to Lofton Ridge in that Lofton Ridge is and will be completely deprived of any use of the Property.

10. Lofton Ridge has no adequate remedy at law for Norfolk Southern's continued conduct.

WHEREFORE, Lofton Ridge respectfully requests this Court:

1. Enter a Preliminary Injunction prohibiting Norfolk Southern from interfering with Lofton Ridge's use of the dirt road and access to the Property until final disposition of this matter;

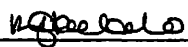
2. Adjudge that the Property has legal access over the dirt road that crosses the property of Norfolk Southern in order to reach State Route 853;

3. Enter a Decree permanently enjoining or prohibiting Norfolk Southern and any person claiming under it from further interfering with Lofton Ridge's use and enjoyment of the Property and the dirt road to State Route 853;

4. Award Lofton Ridge its costs and legal fees incurred in this action;

5. Grant such other and further relief, both special and general, as the Court deems just and proper.

LOFTON RIDGE, LLC

By: 
Of Counsel

Barry A. Hackney (VSB# 05515)
Raelenne J. Haeberle (VSB# 41583)
HIRSCHLER, FLEISCHER, PC
The Federal Reserve Bank Building
701 East Byrd Street
P. O. Box 500
Richmond, Virginia 23218-0500
Telephone: (804) 771-9569
Facsimile: (804) 644-0957
Counsel for Lofton Ridge, LLC

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Amended Bill of Complaint was delivered by electronic and first class mail, postage prepaid to Mark Loftis, Esquire, Woods, Rogers & Hazelgrove, PLC, 1400 First Union Tower, Post Office Box 4125, Roanoke, Virginia 24038-4125 this 7th day of June 2002.

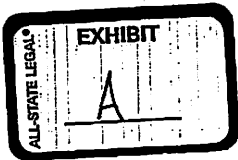
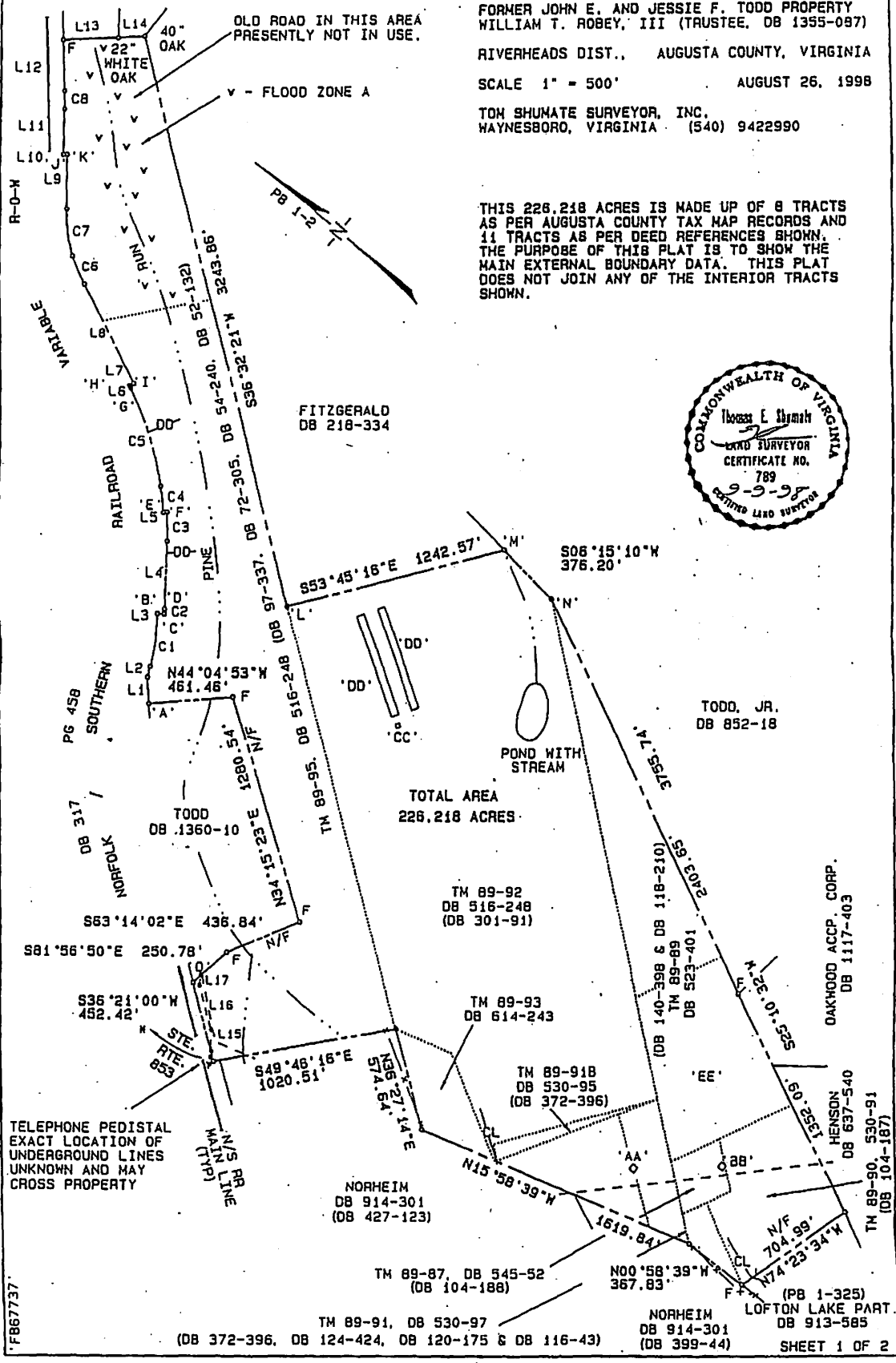
Raelenne J. Haeberle

#1931
CARROLL DB 1280-619
BAYES DB 979-14

PHYSICAL SURVEY

FORMER JOHN E. AND JESSIE F. TODD PROPERTY
WILLIAM T. ROBEY, III (TRUSTEE, DB 1355-087)
RIVERHEADS DIST., AUGUSTA COUNTY, VIRGINIA
SCALE 1" = 500' AUGUST 26, 1998
TOM SHUMATE SURVEYOR, INC.
WAYNESBORO, VIRGINIA (540) 9422990

THIS 226.218 ACRES IS MADE UP OF 8 TRACTS
AS PER AUGUSTA COUNTY TAX MAP RECORDS AND
11 TRACTS AS PER DEED REFERENCES SHOWN.
THE PURPOSE OF THIS PLAT IS TO SHOW THE
MAIN EXTERNAL BOUNDARY DATA. THIS PLAT
DOES NOT JOIN ANY OF THE INTERIOR TRACTS
SHOWN.



LINE	BEARING	DISTANCE				
CURVE	CHORD BEARING	CHORD	RADIUS	DELTA	ARC	TANGENT
L1	N46°40'00"E	143.85'				
L2	N65°28'00"E	60.00'				
C1	N59°39'59"E	296.18'	1465.39'	11°36'00"	296.68'	148.85'
L3	S36°08'01"E	37.00'				
C2	N53°20'59"E	27.09'	1502.39'	01°02'00"	27.09'	13.55'
L4	N52°50'00"E	370.17'				
C3	N49°45'12"E	161.45'	1502.39'	06°09'36"	161.53'	80.84'
L5	N43°19'36"W	20.00'				
C4	N43°56'42"E	141.12'	1482.39'	05°27'24"	141.18'	70.64'
C5	N32°59'00"E	561.32'	1959.86'	16°28'00"	563.26'	283.58'
L6	N24°44'58"E	14.69'				
L7	S65°15'00"E	30.00'				
L8	N24°45'00"E	621.00'				
C6	N29°30'00"E	176.53'	1065.91'	09°30'00"	176.73'	88.57'
C7	N42°55'30"E	263.93'	874.93'	17°21'00"	264.94'	133.49'
L9	N51°36'00"E	299.83'				
L10	N38°24'00"W	20.00'				
L11	N51°36'00"E	253.00'				
C8	N49°39'36"E	101.04'	1492.39'	03°52'48"	101.06'	50.55'
L12	N48°31'12"E	271.10'				
L13	S41°51'05"E	303.20'				
L14	S42°46'31"E	148.27'				
L15	N50°52'17"E	119.56'				
L16	N36°21'03"E	253.10'				
L17	N58°09'09"E	55.80'				

CORNER REFERENCES

- o - INDICATES IRON SET UNLESS OTHERWISE SAID
- of - INDICATES IRON FOUND

- 'A' - IRON FOUND BEARS S44°01'50"E 1.73'
- 'B' - CORNER FENCE POST BEARS S80°30'33"E 5.90'
- 'C' - CORNER FENCE POST BEARS N33°59'17"E 8.98'
- 'D' - CORNER FENCE POST BEARS S62°26'01"W 18.86'
- 'E' - CORNER FENCE POST BEARS N64°44'57"E 6.49'
- 'F' - CORNER FENCE POST BEARS N21°29'47"E 5.02'
- 'G' - CORNER FENCE POST BEARS N49°32'48"E 23.35'
- 'H' - CORNER FENCE POST BEARS S81°08'46"E 11.76'
- 'I' - CORNER FENCE POST BEARS S65°40'55"E 9.23'
- 'J' - CORNER FENCE POST BEARS N53°47'45"E 10.11'
- 'K' - CORNER FENCE POST BEARS N51°43'21"E 11.03'
- 'L' - IRON SET AT FOUND PINE KNOT IN STONE PILE
- 'M' - AXEL FOUND BEARS N84°14'02"W 2.64'
- 'N' - HOLLOW PINE STUMP; IRON FOUND BEARS N38°24'13"E 1.01'
- 'O' - IRON FOUND BEARS N81°56'50"W 1.28'

NOTES

- * - STATE ROUTE 853 AKA POOR CREEK LANE. 1± MILES TO US RTE. 11
- 4 - INDICATE END OF STATE MAINTENANCE SIGN SOUTHEAST OF RAILROAD CENTERLINE.
- 'AA' CONCRETE BLOCK STRUCTURE POSSIBLE WELL 'BB' CONCRETE STRUCTURE
- 'CC' POWER PEDISTAL WITH UG POWER LINES. EXACT LOCATION OF UG LINES UNKNOWN.
- 'DD' FRAME POULTRY HOUSE (42' X 584')
- 'EE' APPROXIMATE LOCATION OF OLD CHIMNEY FROM PAST HOUSE SITE
- INDICATES OVERHEAD POWERLINE WITH POLES *---* INDICATES FENCE
- INDICATES SOUTHEAST EDGE OF 30' R-O-W FOR TODD. SEE PB 1-3545
- SEE DB 530-97, DB 530-95 & DB 200-84 FOR WATER RIGHTS AFFECTING THIS PROPERTY
- SEE DB 530-91, DB 120-175, DB 116-43 & DB 111-545 FOR R-O-W AFFECTING THIS PROPERTY
- N/F - INDICATES PROPERTY LINE NOT FENCED, WITH FENCE ALONG/NEAR ALL OTHER EXTERNAL PROPERTY LINES
- CL— INDICATES CENTERLINE OLD ROADS. OTHER INTERNAL FARM ROADS NOT SHOWN.
- DD— INDICATES RAILROAD DRAINAGE DITCHES
- INDICATES INTERNAL DEED AND/OR TAX MAP PROPERTY LINES
- NO TITLE REPORT FURNISHED AT TIME OF SURVEY

TO ALL PARTIES INTERESTED IN TITLE TO PREMISES SURVEYED THIS IS TO CERTIFY THAT ON AUGUST 7, 11, 12, 22 & 24, 1998 I SURVEYED THIS PROPERTY. FOR REFERENCE TO THIS PROPERTY SEE DEED BOOKS 516-248, 614-243, 530-97, 530-95, 530-91, 545-52, AND 523-401 RECORDED IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF THE COUNTY OF AUGUSTA, VIRGINIA. SEE CHAIN OF TITLE FOR EASEMENTS, CONDITIONS, RESTRICTIONS, AND/OR RESERVATIONS OF RECORD. FOLLOWING FLOOD STATEMENT NOT BASED ON MY SURVEY. THIS PROPERTY IS WITHIN FLOOD ZONE X, OUTSIDE THE 500 YEAR FLOOD, AND ZONE A, NO BFE DETERMINED. FIRM COMMUNITY-PANEL NO. 510013 03008 & 03058 DATED MAY 17, 1990.

SHEET 2 OF 2

Doc # 5611 BK 1360 PG 10

PLAT BOOK 1

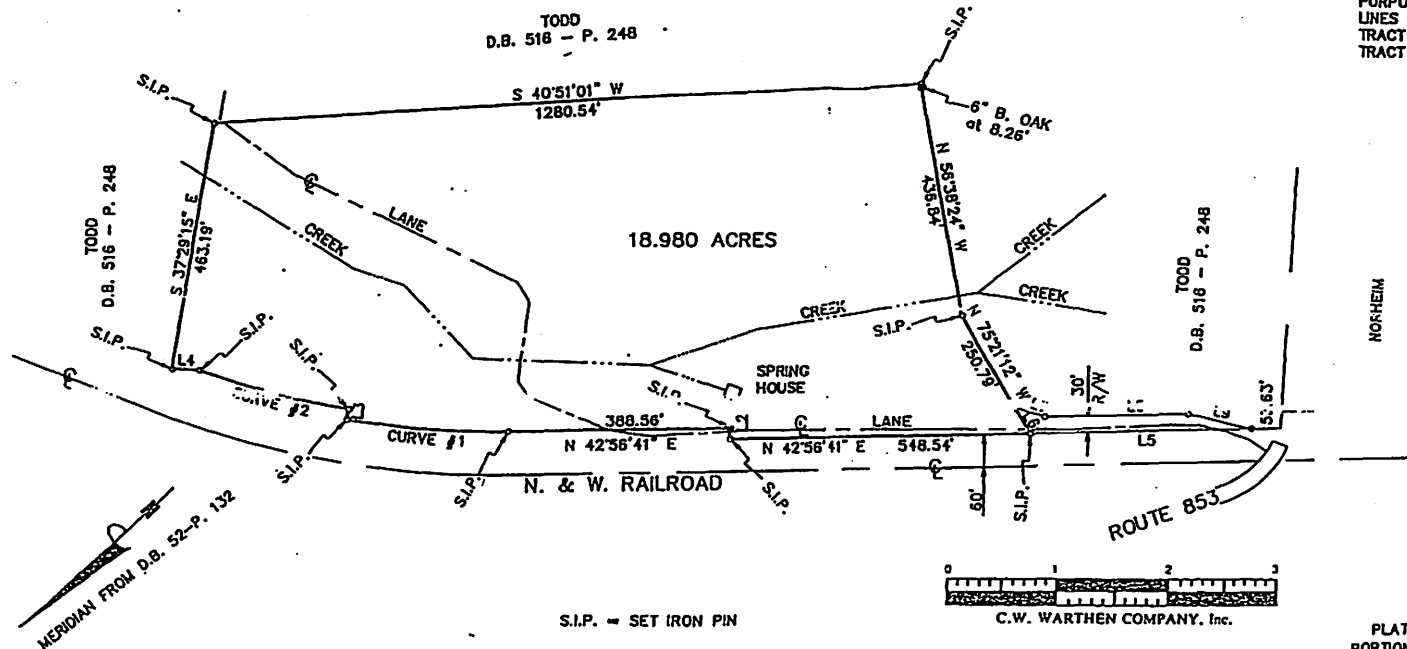
T.M. 89 - PORTION OF 95

Page 3545

NO REQUEST WILL BE MADE TO HAVE THE LOT OR LOTS, AS SHOWN HEREON, SERVED BY A PUBLIC STREET UNLESS AND UNTIL THE STREET HAS BEEN DESIGNED AND CONSTRUCTED, AT NO COST TO THE COUNTY OR THE VIRGINIA DEPARTMENT OF TRANSPORTATION TO THE THEN CURRENT STANDARDS FOR STREETS.

THIS LOT IS BEING CREATED AS THE RESULT OF A PURCHASE OR GIFT FROM A MEMBER OF THE IMMEDIATE FAMILY OF THE GRANTEE, THIS LOT IS BEING CONVEYED TO JOHN E. TODD, HUSBAND OF THE GRANTOR.

THE REMAINDER OF THIS TRACT (T.M. 89 - 95) IS HEREBY COMBINED WITH THE ADJOINING TRACT (T.M. 89 - 92), ALSO OWNED BY JOHN E. & JESSIE F. TODD IN D.B. 518 - P. 248, FOR THE PURPOSE OF ADJUSTING THE BOUNDARY LINES OR ADDING LAND TO THE EXISTING TRACT WITH THE RESULTING COMBINED TRACT TO BE TREATED AS ONE TRACT.



NUMBER	DIRECTION	DISTANCE
L2	S 47°03'19" E	20.00'
L3	S 36°18'32" E	20.00'
L4	N 46°32'31" E	49.60'
L5	S 75°21'12" E	57.60'
L6	S 64°44'47" W	55.80'
L8	S 42°56'41" W	253.10'
L9	S 57°27'55" W	119.65'

CURVE	DELTA	RADIUS	ARC	TANGENT	CHORD BEAR.	CHORD
CURVE #1	10°44'47"	1580.46	298.43	148.83	N 58°19'05" E	420.00
CURVE #2	10°21'06"	1560.46	281.93	141.35	N 58°32'01" E	281.55

SUBDIVISION AGENT

Robert E. Funk 5-9-96

SUBDIVISION AGENT

Robert E. Funk 5/13/98

EXHIBIT

ALL-STATE LEGAL

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOFTON RIDGE, LLC,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
(incorrectly identified as "Norfolk Southern
Railway Corporation"),

Defendant.

Case No. CH00000284-00

**DEMURRER AND ANSWER
TO AMENDED BILL OF COMPLAINT**

DEMURRER

COMES NOW the defendant, Norfolk Southern Railway Company (incorrectly identified as "Norfolk Southern Railway Corporation"), by counsel, and for its Demurrer to Plaintiff's Amended Bill of Complaint states as follows:

1. Plaintiff's Amended Bill of Complaint purports to state a claim for alleged interference with real property rights.
2. Plaintiff asks the Court to award relief which includes an award of its "costs and legal fees incurred in this action." (Amended Bill of Complaint, Prayer for Relief ¶ 4.)
3. Plaintiff has failed to any basis upon which it is, or could be, entitled to recover its attorneys' fees in this action.
4. Virginia adheres to the "American Rule," which hold that attorneys' fees should only be awarded to the prevailing party when the parties have contractually agreed to such an award or where the Virginia Code specifically grants such relief. None of the exceptions to the

RKE# 0758795.WPD
C/M: 069557-00059-01

"American Rule" applies to the facts or the cause of action pled in the Amended Bill of Complaint.

5. Accordingly, Plaintiff's claim for recovery of its attorneys' fees is insufficient as a matter of law, and must be dismissed.

WHEREFORE, Norfolk Southern Railway Company respectfully requests that Plaintiff's claim for recovery of its attorneys' fees be dismissed with prejudice.

ANSWER

COMES NOW the defendant, Norfolk Southern Railway Company (incorrectly identified as "Norfolk Southern Railway Corporation"), by counsel, and for its Answer to Plaintiff's Amended Bill of Complaint states as follows:

1. Upon information and belief, it denies the allegations contained in paragraph 1 of the Amended Bill of Complaint.

2. It denies the allegations contained in Paragraphs 2, 3, 5, 6, 7, 8, 9 and 10 of the Amended Bill of Complaint.

3. In response to the allegations contained in Paragraph 4 of the Amended Bill of Complaint, it admits that it did in fact lock the gate at its crossing but has furnished keys to the lock at the gate to both the plaintiff and to John E. Todd for access to their respective properties pending resolution of this litigation.

4. With regard to the allegations of paragraph 5 of the Bill of Complaint, all of which are denied, it states that even if said allegations were true they would not give plaintiff any rights in or over the railroad crossing at issue, and said allegations therefore fail to state any claim upon which relief can be granted under Virginia law.

5. Because plaintiff has declined to execute a private crossing agreement, plaintiff has no legally enforceable rights against the defendant.

6. It asserts that plaintiff knew, or had reason to know, prior to purchasing the property in question that it had no easement or other right of access across the railroad's right-of-way to reach the public road.

7. It asserts that plaintiff's position is the result of plaintiff's own negligence and/or the negligence of plaintiff's agents which is imputed to plaintiff.

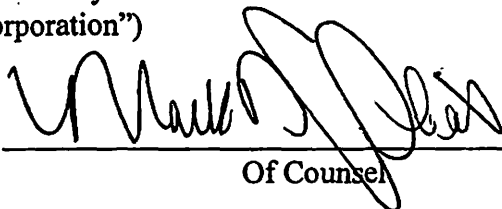
8. It denies that plaintiff is entitled to the relief sought in the Amended Bill of Complaint, or to any other relief whatsoever.

9. All allegations contained in the Amended Bill of Complaint not expressly admitted herein are denied.

WHEREFORE, having fully answered the Amended Bill of Complaint, Norfolk Southern Railway Company (incorrectly identified in the Amended Bill of Complaint as "Norfolk Southern Railway Corporation") respectfully requests that the Amended Bill of Complaint be dismissed, and that it be awarded its costs and expenses in defense of the Bill of Complaint and such other and further relief as the needs of equity require and which this honorable Court deems proper.

Respectfully submitted,

NORFOLK SOUTHERN RAILWAY COMPANY
(Incorrectly identified as "Norfolk Southern Railway Corporation")

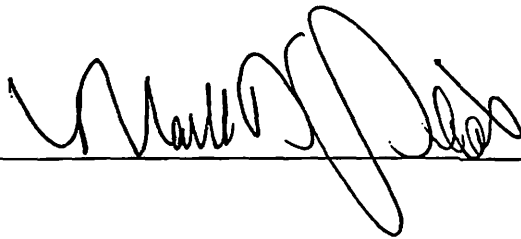
By  _____
Of Counsel

Michael K. Smeltzer (VSB #3504)
Mark D. Loftis (VSB #30285)
WOODS, ROGERS & HAZLEGROVE, PLC
First Union Tower, Suite 1400
10 South Jefferson Street
P.O. Box 14125
Roanoke, Virginia 24038-4125
Telephone: (540) 983-7600
Facsimile: (540) 983-7711

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Demurrer and Answer to Amended Bill of Complaint was mailed to Raelenne J. Haeberle, Esq., Hirschler, Fleischer, Weinberg, Cox & Allen, P. O. Box 500, Richmond, Virginia 23218-0500, counsel for plaintiff; this 25th day of July, 2002.



Filed in the Clerk's Office of the
Circuit Court of Augusta County

Time: 9:30am Date: July 26, 2002

TESTE: Mina R. Callahan Dep. Clk.

Date: July 26, 2002

WOODS, ROGERS
& HAZLEGROVE,
Attorneys at Law

RKE# 0758795.WPD
C/M: 069557-00059-01

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOFTON RIDGE, LLC,

Complainant.

v.

NORFOLK SOUTHERN RAILWAY
CORPORATION, previously identified as
NORFOLK SOUTHERN CORPORATION,
a/k/a Norfolk and Western Railroad

Respondent.

Case No.:CH00000284-00

COMPLAINANT'S OBJECTIONS AND ANSWERS
TO RESPONDENT NORFOLK SOUTHERN
RAILWAY CORPORATIONS' FIRST SET OF INTERROGATORIES

Complainant, Lofton Ridge, L.L.C. ("Lofton Ridge"), by counsel, for its
Objections and Answers to Respondent Norfolk Southern Railway Corporation's
("Norfolk Southern") First Set of Interrogatories respectfully states as follows:

GENERAL OBJECTIONS

1. Lofton Ridge objects to all Interrogatories to the extent such
Interrogatories seek the discovery of information or documents prepared in
anticipation of litigation or protected by the attorney-client privilege, the attorney
work-product doctrine or any other applicable privilege.

2. Lofton Ridge affirmatively states that it has not fully completed its
investigation of the facts relating to this case, has not fully completed discovery,
and has not completed its preparation for trial. All of the responses contained
herein are based upon the information and documents presently available and

3. Identify each and every person whom you expect to call to testify as an expert witness at any hearing or trial in this matter, and as to each such expert witness state the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; and a summary of the grounds for each opinion.

ANSWER: Subject to and without waiving the foregoing general objections, Lofton Ridge has not designated its expert witness(es) at this time and reserves its right to supplement this Answer at a later time in accordance with the Rules of the Supreme Court of Virginia.

4. Identify all exhibits you intend to offer as evidence at any trial or hearing in this case.

ANSWER: Subject to and without waiving the foregoing general objections, and subject to mutual agreement with counsel for Norfolk Southern, Lofton Ridge will exchange copies of its exhibits at a reasonable time prior to trial.

5. Paragraph 6 of the Bill of Complaint states, "Lofton Ridge is entitled and has a claim of right to use the dirt road to reach State Route 853." With regard to this claim, please describe the nature and character of the alleged "entitlement" or "claim of right" which is asserted (e.g., express or implied grant, express or implied easement, etc.), and state in detail the factual basis for the assertion.

OBJECTION: Lofton Ridge specifically objects to the foregoing interrogatory to the extent that it is overly broad, unduly burdensome and involves the discovery of information protected by the attorney-client privilege and the attorney work-product doctrine, in effect seeking the work product, thought processes, mental impressions, conclusions, opinions and/or legal theories and trial strategy of Lofton Ridge's counsel. Furthermore, Lofton Ridge is not required to fully develop and effectively try the merits of its case during the discovery process by stating in detail every factual basis supporting Lofton Ridge's claim of right to use the dirt road to reach State Route 853. In addition, as noted above, discovery is ongoing and therefore, Lofton Ridge reserves the right to supplement this answer.

ANSWER: Subject to and without waiving the foregoing general and specific objections, Lofton Ridge has the right to use the dirt road over Norfolk Southern's property for the reasonable use and development of its property, based on the theory of implied easement of necessity, or in the alternative, prescriptive right, or in the further alternative, the principles of estoppel and waiver.

Upon best information and belief, as early as 1865, the Commonwealth of Virginia and the County of Augusta recognized State Route 853 and its predecessor as a publicly traveled road.

In September 1881, the Shenandoah Valley Railroad (predecessor to Norfolk Southern) condemned 8.09 acres of a 192-acres farm owned by Thomas Williams. Following this condemnation, Thomas Williams owned property on both sides of the railroad tracks, which halves were accessed by farm roads which crossed the

condemned area and after installation of the railroad tracks, ran under the tracks through culverts. Upon best information and belief, the condemnation may have taken the only access from the Thomas Williams farm to the predecessor of State Route 853. Thus, an easement by necessity was created providing reasonable access from the Thomas Williams farm over a portion of the property condemned by the Shenandoah Valley Railroad Company to the predecessor of State Route 853 at the time of the September 1881 conveyance. Furthermore, upon information and belief, by constructing a crossing over its tracks on the lands previously owned by Thomas Williams, the Shenandoah Valley Railroad Company expressly recognized that such area would continue to be used as a public road by all properties abutting the condemned area.

If after this condemnation, the Thomas Williams farm still abutted the predecessor of State Route 853, then an easement by necessity over the property presently owned by Norfolk Southern was created when the Norfolk & Western Railway Company (Norfolk Southern's predecessor) condemned additional property in 1943.

In the alternative, Lofton Ridge has a prescriptive easement of not less than 30 ft. in width over the dirt road and other areas not utilized by Norfolk Southern as needed to access State Route 853, which easement was created prior to Cpt. Todd's acquisition of the property in 1966. Upon best information and belief, for a period of twenty years or more prior to Capt. Todd's purchase of the property presently owned by Lofton Ridge, prior owners of the Thomas Williams farm openly

and continuously, without permission or license, used that portion of the dirt road located on Norfolk Southern's property to access State Route 853 and its predecessors.

In the alternative, Lofton Ridge has an implied grant to use that portion of the dirt road on Norfolk Southern's property as ingress and egress to State Route 853 to enable Lofton Ridge to reasonably use and develop its property. Upon best information and belief, during the 1940s, Norfolk Southern's predecessor closed culverts through which the farm roads linking the northern and southern halves of the Thomas Williams farm passed (which roads may have also lead to a public roadway). Therefore, Norfolk Southern waived its right to object to and is estopped from denying Lofton Ridge access to State Route 853.

6. With regard to any alleged "entitlement" or "claim of right" identified in your answer to the preceding interrogatory, describe in detail the characteristics of the alleged "entitlement" or "claim of right" to cross the property of NS (e.g. scope and width of any claimed easement, nature of permitted uses, etc.)

ANSWER: Subject to and without waiving the foregoing general objections, please refer to the Answer to Interrogatory No. 5.

7. State each and every fact, and identify each and every document, upon which you rely, or upon which you may rely at trial, to support any alleged

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOFTON RIDGE, LLC,

Plaintiff,

v.

**NORFOLK SOUTHERN RAILWAY
COMPANY (incorrectly identified as
“Norfolk Southern Railway Corporation”),**

Defendant.

Case No. CH00000284-00

PLEA IN BAR

COMES NOW the defendant, Norfolk Southern Railway Company (incorrectly identified as “Norfolk Southern Corporation”), by counsel, and for its Plea in Bar to the Bill of Complaint filed against it states as follows:

JUDICIAL ESTOPPEL

1. Plaintiff's claims are barred by the doctrine of judicial estoppel.
2. Plaintiff in this case asks the Court to rule that it has an easement or other legal

right to cross a portion of the defendant's right of way as a means of ingress and egress to its property, alleging that it "is entitled to and has a claim of right to use the dirt road [across defendant's right-of-way] to reach State Route 853." (Amended Bill of Complaint, ¶ 5.)

Plaintiff seeks an order declaring that is “has legal access over the dirt road [across defendant’s right-of-way]” and enjoining defendant from interfering with plaintiff’s use of the dirt road to reach State Route 853. (Amended Bill of Complaint, Request for Relief.)

**WOODS, ROGERS
& HAZLEGROVE**
Attorneys at Law

RKE# 0786733.WPD
C/M: 069557-00059-01

3. At the same time it has been advancing the position in this action that it has an easement or claim of right to cross the railroad's right-of-way, plaintiff has been pursuing a law action for professional malpractice in this same Court against the attorneys and surveyor who did work for it in connection with the acquisition of the property, and who (according to the allegations in the law action) represented to the plaintiff that plaintiff's property had the benefit of an easement over the railroad's right-of-way to reach State Route 853. (The law action is styled *Lofton Ridge, LLC, et al. v. Phillip H. Miller, et al.*, Law No. CL 1000206-00. A copy of the Motion for Judgment filed by Lofton Ridge in the law action is attached as Exhibit A.)

4. The allegations made by plaintiff in the law action are vastly inconsistent with, and in fact mutually contradictory to, the allegations which plaintiff is asking the Court to accept in this case. In the law action, plaintiff alleges that the representations which were made regarding an easement over the railroad's right of way were "false" and were "negligently made" (Motion for Judgment, ¶¶ 24, 47), and that plaintiff's property has no easement or access rights over the railroad's right-of-way to reach State Route 853 and is in fact landlocked. (Motion for Judgment, ¶ 53.) In the law action, plaintiff sought damages of "in an amount in excess of \$400,000" (Motion for Judgment, Prayer for Relief), an amount representing nearly \$100,000 more than plaintiff paid for the property. (See Motion for Judgment, ¶ 6, alleging a total purchase price for the property of \$306,000.)

5. The law action has now been settled, and an Order has been entered dismissing the law action with prejudice. Although the Order does not recite the terms of the parties' agreement, the agreement in fact involvement the payment of money by (or on behalf of) the

defendants in the law action to the plaintiff, in settlement of the claims asserted by the plaintiff in the law action.

6. Through the filing, advancement and settlement of the law action, plaintiff has used this Court to obtain a monetary benefit for itself based on allegations which are directly contradictory to the allegations it seeks to advance in this chancery action.

7. Plaintiff is not permitted to obtain relief in both actions in the face of the vastly inconsistent positions which it has advanced in the two actions.

8. Under Virginia law, "A party is forbidden to assume successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory." *Burch v. Grace Street Building Corp.*, 168 Va. 329, 340, 191 S.E. 672, 677 (1937) (copy attached as Exhibit B). A party simply is not permitted to play "fast and loose" by taking "vastly inconsistent positions" in separate actions involving the same subject matter. *United Leasing Corp. v. Resource Bank*, 58 Va. Cir. 96, 108 (Cir. Ct. for the City of Richmond 2002)(copy attached as Exhibit C.)

9. Plaintiff should not be permitted to profit by obtaining an additional benefit by asserting a position in this action which is directly contrary to the position it asserted, litigated and ultimately benefitted from in the law action. In order to preserve the integrity of the courts and the judicial process, the Court should apply the principle of judicial estoppel as a bar to plaintiff's claim.

ELECTION OF REMEDIES

10. Plaintiff's claim is also barred by its binding election of remedies.

11. By choosing to proceed with the law action, and taking that action to conclusion through settlement, plaintiff has elected to accept money damages premised on the allegations contained in the law action.

12. Although the law action was concluded by settlement rather than final judgment, plaintiff has chosen to pursue the law action to a conclusion and to accept money damages as its remedy for the alleged wrong done to it. Plaintiff cannot now ask this Court to award a different, contradictory remedy. As the Supreme Court of Virginia has explained,

A party cannot, either in the course of litigation or in dealings *in pais*, occupy inconsistent positions. Upon that rule election is founded; a man shall not be allowed, in the language of the Scotch law, "to approbate and reprobate." And where a man has an election between several inconsistent courses of action, he will be confined to that course which he first adopts; the election, if made with knowledge of the facts, is itself binding, it cannot be withdrawn, though it has not been acted upon by another, by any change of position. Bigelow on Estoppel, page 733.

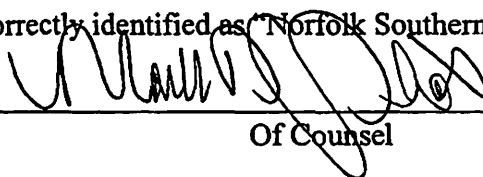
Nagle v. Syer, 150 Va. 508, 513, 143 S.E. 690, 692 (1928) (copy attached as Exhibit D) (quoting *Arwood v. Hill's Admr.*, 135 Va. 235, 243, 117 S.E. 603, 606 (1923)).

13. Having elected to conclude the law action and to accept money damages based on the allegations made and the claims asserted in the law action, plaintiff is now barred from seeking a different, contradictory remedy in this chancery action.

14. For all of the reasons set forth above, the Court should dismiss this action, and all of plaintiff's claims, with prejudice.

NORFOLK SOUTHERN RAILWAY COMPANY
(Incorrectly identified as "Norfolk Southern Corporation")

By



Of Counsel

WOODS, ROGERS
& HAZLEGROVE
Attorneys at Law

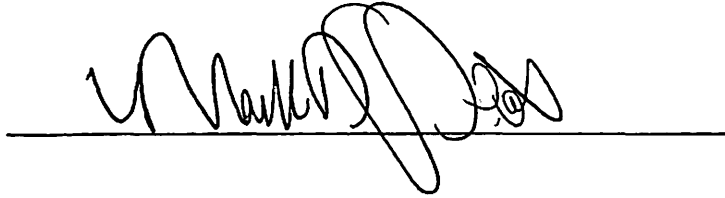
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Telephone: 540-983-7600
Facsimile: 540-983-7711

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plea in Bar was sent via
overnight mail to Raelenne J. Haeberle, Esq., Hirschler, Fleischer, Weinberg, Cox & Allen, P. O.
Box 500, Richmond, Virginia 23218-0500, counsel for plaintiff; this 6th day of February,
2003.



WOODS, ROGERS
& HAZLEGROVE, PLC
Attorneys at Law

RKE# 0786733.WPD
C/M: 069557-00059-01

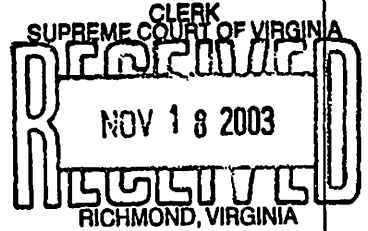
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Filed in the Clerk's Office of the
Circuit Court of Augusta County
Time: 11:10am Date: Feb 7, 2003
TESTE:
C. A. Turner, Jr. Dep. Clk.
Date: Feb 7, 2003

ORIGINAL

V I R G I N I A:

IN THE CIRCUIT COURT OF
AUGUSTA COUNTY



----- :
LOFTON RIDGE, LLC, :

Plaintiff :

-vs- :

CH00000284-00
VOLUME I

NORFOLK SOUTHERN RAILWAY :
COMPANY (incorrectly :
identified as "Norfolk :
Southern Railway Corporation"), :

Defendant :
----- :

FEBRUARY 11, 2003
9:00 A.M.

HEARD BEFORE THE HONORABLE:

CHARLES F. SMITH

P. O. Box 12628
Roanoke, Virginia 24027

E X H I B I T S

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APPEARANCES:

HIRSCHLER FLEISCHER
 Richmond, Virginia
 BY: RAELENNE J. HAEBERLE, ESQ.
 BARRY A. HACKNEY, ESQ.

Counsel on Behalf of Plaintiff

WOODS, ROGERS & HAZLEGROVE
 Roanoke, Virginia
 BY: MARK D. LOFTIS, ESQ.
 MICHAEL K. SMELTZER, ESQ.

Counsel on Behalf of Defendant

I N D E X

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Mary Ellen Showalter	50	--	--	--
Geneva R. Grove	59	--	--	--
John Davis	69	96	--	--
Theodore W. Lawhorn	89	93	--	--
John Davis	--	96	116, 123	121
John W. McNair, Jr.	126	141	161	163
Plaintiff Rests	166			
Lloyd R. Clingenpeel	193	209	--	--
Robert E. Funk	213	218	--	--
Jerry VanLear	219	--	--	--
Dana J. Cornett	225	--	--	--

Mr. Davis - Cross

1 number, if we could simply mark them as
2 Defendant's Exhibit 1 that would be fine or if the
3 court would rather use a letter.

4 THE COURT: I think the clerk has different
5 stickers for the respondent as opposed to the
6 complainant. We can mark them respondent exhibits
7 with the color coded sticker.

8 (Public auction documents were marked as
9 Defendant's Exhibit 1.)

10

11 BY MR. LOFTIS:

12 Q Mr. Davis, let me switch with you and I
13 will hand you the original that Judge Smith has marked.
14 Would you identify the document or the collection of
15 documents that have been marked as Defendant's Exhibit 1?

16 A Mr. Loftis, I believe it is the packet of
17 materials that we received, we Lofton Ridge, from the
18 auctioneer. I'm assuming that all these pages were on
19 there, it's been a long time, but it was certainly a
20 packet that looked like this.

21 Q And you see up in the corner the deposition
22 exhibit sticker?

23 A I do.

24 Q Deposition Exhibit 16. Do you recall

Mr. Davis - Cross

1 discussing this at your deposition?

2 A If this is the one that was at the
3 deposition, yes.

4 Q And I believe you told us at that time that
5 you had received this packet prior to the date of sale?

6 A That's correct.

7 MS. HAEBERLE: Excuse me, Your Honor, I
8 would just note for the record that I believe
9 Mr. Lawhorn has arrived. I don't know if you want
10 to get fully into your cross at this point in time
11 or if we want to take Mr. Lawhorn. It may seem
12 like a convenient time before you get into the
13 cross.

14 MR. LOFTIS: I will be glad to do whatever
15 the court's preference is, Your Honor, it makes no
16 difference to me. I will tell the court that
17 based on a representation Ms. Haeberle made to me
18 about a witness who Lofton Ridge is not going to
19 call, Mr. Davis's cross may take some time, so if
20 the court would prefer to take Mr. Lawhorn that's
21 fine.

22 THE COURT: For health reasons he needs to
23 go?

24 MS. HAEBERLE: I believe that's correct,



Mr. Davis - Cross

CROSS EXAMINATION CONTINUED

BY MR. LOFTIS:

Q Do remember where we were, Mr. Davis?
Defendant's Exhibit 1, I believe you told us was some
material that was received from the auctioneer prior to
the time that Lofton Ridge purchased the property?

A That's correct.

Q And would you look back at the last page of
Defendant's Exhibit 1?

A Yes.

Q And do you recognize that as a survey that
was done by Mr. Funk?

A I do.

THE COURT: Do I have a copy of that?

MR. LOFTIS: I'm sorry, Your Honor, I took
the one that has the court stamp on it. There is a
copy of it. I apologize. Your Honor, if I may
approach Mr. Davis.

THE COURT: Very well.

BY MR. LOFTIS:

Q Mr. Davis, you see here on this survey, the
last page of Defendant's Exhibit 1, the notation of Route

Mr. Davis - Cross

1 853?

2 A I do.

3 Q And you see it ending at least on this
4 survey in the railroad's right of way?

5 A That's what is indicated there, yes.

6 Q And so there is some distance there that
7 you have got a span from the end of what's shown as
8 Route 853 to get to the property that Lofton Ridge
9 purchased, is that correct?

10 A Looks like that's what it says.

11 MR. LOFTIS: Your Honor, I would move
12 admission of Defendant's Exhibit 1.

13 MS. HAEBERLE: No objection, Your Honor.

14 THE COURT: Admitted.

15 (The referred-to exhibit was admitted into
16 the Record.)

17
18 BY MR. LOFTIS:

19 Q Mr. Davis, at any point prior to the time
20 that Lofton Ridge closed on this piece of property did
21 anyone suggest to you that Norfolk Southern had made any
22 statements or any representation that this piece of
23 property had access to State Route 853 across the right of
24 way?

Mr. Davis - Cross

1 A Did Norfolk Southern?

2 Q Yes, sir.

3 A No.

4 Q Did anybody suggest to you that Norfolk
5 Southern had made a representation like that?

6 A No.

7 MR. LOFTIS: If we could mark that as
8 Defendant's Exhibit 2, please. Your Honor, I will
9 switch with you.

10 (A surveyor's report was marked as
11 Defendant's Exhibit 2.)

12

13 BY MR. LOFTIS:

14 Q Mr. Davis, do you recognize the document or
15 the collection of documents that have been marked as
16 Defendant's Exhibit 2?

17 A Yes, I believe this was-- I believe you
18 handed me this during the deposition.

19 Q All right, and the first three pages of the
20 exhibit are the copy of the survey report that Lofton
21 Ridge got from Mr. Shumate, is that correct?

22 A That would be correct.

23 Q And then the last two pages are a copy of
24 an attorney's preliminary report on title that was signed

Mr. Davis - Cross

1 by Mr. Denney on behalf of Lofton Ridge, correct?

2 A That's correct.

3 Q And nobody suggested to you at the time you
4 all closed on this property that that property had any
5 rights or any easements of any type across the railroad's
6 right of way except what's shown in Defendant's Exhibit 2,
7 is that right?

8 A From Norfolk Southern?

9 Q No, sir; anyone.

10 A Both our attorney and our surveyor were
11 present at closing and the question was asked, bottom
12 line, do we have access to our property for 11 lots over
13 this right of way, is that correct, and both agreed that
14 we did.

15 Q As far as the basis though, no one gave
16 you any basis other than what was shown in Defendant's
17 Exhibit 2?

18 A To make sure we were clear we asked the
19 question.

20 Q And in fact you did not have any
21 communication with anyone from Norfolk Southern prior to
22 closing about access rights, did you?

23 A I did not.

24 Q And to your knowledge did Mr. Koiner or

Mr. Davis - Cross

1 Mr. Hausrath communicate with Norfolk Southern about
2 access rights prior to closing?

3 A Not to my knowledge.

4 Q Mr. Davis, can I get you to, if you still
5 have got Defendant's Exhibit 2 in front of you, to look
6 down at item number 11. Do you see that on the first
7 page? First page, I got it item number 11, and down
8 underneath that there is a sub part 11A and there is a
9 question, is access to such streets or road limited,
10 question mark, and there is typed in there yes, end of
11 SR 853 near western crop corner as indicated by end of
12 state maint, M-A-I-N-T. sign, see plat. Do you see that?

13 A I do.

14 Q Did you question Mr. Shumate before closing
15 about what limitations there might be on access to the
16 property?

17 MS. HAEBERLE: Your Honor, I'm going to
18 object to the relevance of this whole line of
19 questioning. I'm not sure how Lofton Ridge's
20 knowledge as to what was there or was not there
21 has any bearing on the case that's been presented
22 as to Lofton Ridge's entitlement to access the
23 property.

24 THE COURT: Overruled.

Mr. Davis - Cross

1 MS. HAEBERLE: Thank you, Your Honor.

2 THE WITNESS: Repeat the question,

3 Mr. Loftis.

4 MR. LOFTIS: Yes, sir.

5

6 BY MR. LOFTIS:

7 Q You have a report in front of you that said
8 that the access to state road was limited; did you explore
9 with Mr. Shumate what the nature of those--

10 MR. HACKNEY: Excuse me, he hasn't
11 established when this gentleman saw this document.
12 I think his testimony is, Mr. Davis said I saw it
13 when you gave it to me in the deposition. There
14 has been no evidence at this point that when
15 Mr. Davis closed on this piece of property that he
16 had these documents in his possession, having seen
17 them, and in fact they are all to his lawyer, not
18 to him, so I don't think there is a proper
19 foundation been laid with respect to examining
20 this witness about what he knew or what was in
21 here.

22 It hasn't even been established when he
23 first saw it and until we establish that we would
24 object to this line of questioning.

Mr. Davis - Cross

1 THE COURT: It's cross examine, counsel.
2 If you need to, you may clear it up on redirect.
3 You may continue.

4 MR. LOFTIS: Thank you, Your Honor.

5

6 BY MR. LOFTIS:

7 Q You do recall, Mr. Davis, that you had
8 Mr. Denney's title report at the closing?

9 A There are a lot of documents at closing,
10 Mr. Loftis, that could have been there, it was probably
11 there, whether I looked at it, I cannot tell you.

12 Again, we were relying on Mr. Denney and
13 Mr. Shumate to handle the legal research for us and I
14 can't say that I saw this document there, but it probably
15 was there.

16 Q Mr. Davis, you authenticated some pictures
17 that were put into evidence when Mr. Haeberle was asking
18 you questions; do you recall that?

19 A I authenticated them?

20 Q Yes, sir; you identified them?

21 A Yes, I did.

22 Q And told the Judge what they showed.

23 A As a clerk I think of authenticate as
24 another term.

Mr. Davis - Cross

1 Q And a couple of those pictures at least, I
2 guess 36 and 37 I believe, show the roadway, the dirt or
3 gravel road from the end of the pavement going onto the
4 Lofton Ridge property, correct?

5 A Now there are four photographs on 36 and,
6 yes, one of them does show that.

7 Q Mr. Davis, do you know of any information
8 from any source which indicates that that dirt or gravel
9 road that runs from the end of the pavement through the
10 gates onto the Lofton Ridge property has ever been any
11 wider than it is now?

12 A Do I have information that it has been any
13 wider, no, I do not.

14 Q Do you have any information that said that
15 it was wider than is shown in those pictures?

16 A No, sir.

17 Q Lofton Ridge has not constructed anything
18 or made any improvements on the railroad's right of way,
19 has it?

20 A No, sir.

21 Q All the work that it's done has been on
22 Lofton Ridge's property, correct?

23 A That's correct.

24 MR. LOFTIS: Your Honor, if I might ask the

Mr. Davis - Cross

1 court to mark these as Defendant's Exhibit 3 and
2 Defendant's Exhibit 4.

3 THE COURT: Any particular order?

4 MR. LOFTIS: The February 2, 1999 letter
5 should be Exhibit 3 if the court would so mark it.

6 THE COURT: All right.

7 MR. LOFTIS: Your Honor, I must confess, I
8 do not recall if I moved admission of Defendant's
9 Exhibit 2, but if I neglected do so I would move
10 admission of that exhibit at this time.

11 MS. HAEBERLE: I would just restate our
12 objection as to relevance, Your Honor.

13 THE COURT: Noted; admitted.

14 (The referred-to exhibit was admitted into
15 the Record.)

16
17 (Two letters were marked as Defendant's
18 Exhibit 3 and Defendant's Exhibit 4.)

19
20 BY MR. LOFTIS:

21 Q Mr. Davis, can you identify the document
22 that has been placed in front of you that the Judge has
23 marked as Defendant's Exhibit 3?

24 A It appears to be a letter from Norfolk

Mr. Davis - Cross

1 Southern to Mr. Hausrath and Mr. Koiner and Mr. Blevins.

2 Q And you at some point recall seeing a copy
3 of that letter that was received by Lofton Ridge from the
4 railraod?

5 A It was not mailed to me, but I did
6 eventually see a copy of it, yes, sir.

7 Q And would you look at the document marked
8 as Defendant's Exhibit 4?

9 A Yes.

10 Q Can you identify that for us, please?

11 A That is a letter dated February 6, 1999
12 from Mr. Hausrath on behalf of all the folks listed below
13 there to Norfolk Southern.

14 Q And you are shown as a cc recipient on that
15 letter?

16 A That's correct.

17 Q And you did in fact receive a copy of it?

18 A I would have.

19 MR. LOFTIS: Your Honor, I would move
20 admission of Defendant's Exhibit 3 and Defendant's
21 Exhibit 4.

22 MS. HAEBERLE: Your Honor, I would object
23 based on relevance, but other than that.

24 THE COURT: Noted; admitted.

Mr. Davis - Cross

1 (The referred-to exhibits were admitted
2 into the Record.)

3
4 MR. LOFTIS: Mark that as Defendant's
5 Exhibit 5, Your Honor.

6 (A letter was marked as Defendant's
7 Exhibit 5.)

8
9 BY MR. LOFTIS:

10 Q Mr. Davis, do you recognize the document
11 that has been marked as Defendant's Exhibit 5?

12 A I do.

13 Q What is it?

14 A It appears to be a letter from Lofton Ridge
15 to Lofton Lake from Mr. Hausrath.

16 Q Mr. Hausrath in fact sent this letter to
17 Lofton Lake?

18 MS. HAEBERLE: I would object, Your Honor.

19 THE COURT: What's the objection, counsel?

20 MS. HAEBERLE: He's asked whether or not
21 Mr. Hausrath sent the letter. I believe it's not
22 Mr. Davis' letter.

23 MR. LOFTIS: Your Honor, either he knows or
24 he may not know.

Mr. Davis - Cross

1 THE WITNESS: I don't know.

2 THE COURT: If he doesn't know, he may so
3 state.

4

5 BY MR. LOFTIS:

6 Q Do you have any knowledge of what position
7 Lofton Lake may have taken about whether it had an
8 easement across Lofton Lake's property?

9 A Certainly the partners and I, as I have
10 said before, checked with every adjoining landowner, of
11 which Lofton Lake is one, to see if there was any chance
12 of us being able to purchase land to be able to get out a
13 different way, and either this proposal or another
14 proposal was presented to Lofton Lake by Mr. Hausrath, it
15 may have been very much like this proposal, but I am not
16 sure that was the actual letter that was sent.

17 Q Did you and Mr. Hausrath and perhaps others
18 discuss whether Lofton Ridge had an easement over Lofton
19 Lake property?

20 A As far as I know we do not have an easement
21 over Lofton Lake and we never have known that we did. Now
22 there have been other people that said we did, including
23 the railroad.

24 Q Including Mr. Hausrath in this letter?

Mr. Davis - Cross

1 A Because of what the railroad said, yes, I
2 believe that is where he got that from.

3 Q Regardless of why he said it, in this
4 letter at least he asserted that Lofton Ridge had an
5 easement over the Lofton Lake property, correct?

6 A I haven't read the letter, but if you say
7 it's in there.

8 Q Well, let's see, look down at the last
9 paragraph on the first page.

10 MR. HACKNEY: If Your Honor please, we are
11 going to object because he's cross examining this
12 witness on a letter that he doesn't even know was
13 sent and we would object to this entire line of
14 questioning.

15 THE COURT: What about that, Mr. Loftis?

16 MR. LOFTIS: Your Honor, I'm simply trying
17 to establish whether Mr. Davis recalls ever
18 discussing this with Mr. Hausrath and if Lofton
19 Lake had a position on it.

20 I acknowledge that I may or may not be able
21 to authenticate the exhibit. I'm simply trying to
22 see if he has any recollection of ever discussing
23 this with Mr. Hausrath.

24 THE COURT: And I think he's answered that

Mr. Davis - Cross

1 question.

2 MR. LOFTIS: Fair enough. That's fine,
3 Your Honor, I will move on.

4 THE COURT: I think the objection is good.

5 MR. HACKNEY: We would object to the entry
6 of this letter.

7 THE COURT: He hasn't moved for it.

8 MR. HACKNEY: Well, if Your Honor please, I
9 know that he hasn't moved for it to be entered,
10 but of course now it's up in front of the court
11 and he's citing the content of the letter.

12 THE COURT: And you have objected and the
13 court sustained the objection. The court is the
14 trier of the fact and the law here, counsel.

15 MR. HACKNEY: Yes, sir.

16 THE COURT: And we are going to get through
17 it and there will be occasions when the court is
18 going to necessarily have to perhaps see things
19 that are not ultimately admissible and the record
20 must be vouched on, the court is going to see it,
21 and I have to separate the wheat from the chaff.

22 MR. HACKNEY: Yes, sir.

23 MR. LOFTIS: Defendant's 6 I believe.

24 MR. HACKNEY: Five.

Mr. Davis - Cross

1 MR. LOFTIS: Five is still there, it may be
2 authenticated later.

3 THE COURT: Six.

4 MR. LOFTIS: We will leave 5 in case we are
5 able to authenticate it later.

6 (A Motion for Judgment was marked as
7 Defendant's Exhibit 6.)

8

9 BY MR. LOFTIS:

10 Q Mr. Davis, can you authenticate or identify
11 the document that's been marked as Defendant's Exhibit 6?

12 A This was a motion for judgment filed by one
13 of our attorneys.

14 Q Against whom?

15 A Well, it's listed on the front there,
16 Phil Miller, Ray Miller, Ronald Denney, Franklin, Denney,
17 Ward, Lawson, Shumate, Shumate.

18 Q And you are listed as an individual
19 plaintiff in this case, in addition to Lofton Ridge being
20 listed as a plaintiff?

21 A Yes, sir; that's the way the attorney drew
22 it up.

23 Q And this motion for judgment was in fact
24 filed in the Circuit Court of Augusta County?

Mr. Davis - Cross

1 A It certainly was, yes.

2 Q Let me ask you, Mr. Davis, if you would
3 look over at paragraph 13 of this motion for judgment.

4 THE COURT: Did you say--

5 MR. LOFTIS: Paragraph 13.

6 THE COURT: Paragraph 13

7

8 BY MR. LOFTIS:

9 Q Have you had a chance to look at paragraph
10 13, Mr. Davis?

11 A I have.

12 Q Are the allegations in paragraph 13 of this
13 motion for judgment accurate?

14 A Again, I think it speaks for itself. My
15 attorney filed this, but because I am a party to it I
16 would have to agree with it.

17 Q All right. And paragraph 13 deals with
18 some certifications which Mr. Miller was alleged to have
19 made about access across the railroad's right of way,
20 correct?

21 A That's what it appears.

22 Q Now, flip over if you would to
23 paragraph 24.

24 A Uh-huh.

Mr. Davis - Cross

1 Q The first sentence of paragraph 24 reads,
2 "The representations set forth in paragraph 13 above were
3 false and were negligently made by Mr. Miller and Ray and
4 Miller", do you see that?

5 A Yes.

6 Q Is that accurate?

7 A I guess that's why we are here today,
8 Mr. Loftis.

9 Q Well, no, sir, Norfolk Southern is not a
10 party to this suit, is it, to this motion for judgment?

11 A Technically not a party, no, sir.

12 Q Well, technically, I don't know what you
13 mean by technically. Is Lofton Ridge a party to this
14 motion for judgment?

15 A Yes, sir.

16 Q Where? I'm sorry, Norfolk Southern, is
17 Norfolk Southern a party?

18 A No, sir.

19 Q Let me ask you to look over if you would
20 down at paragraph 27, which reads, "As a direct and
21 proximate result of Mr. Miller and Ray & Miller's false
22 and negligent representations, Messrs. Koiner, Hausrath
23 and Davis and Lofton Ridge have been damaged in an amount
24 in excess of \$400,000", do you see that?

Mr. Davis - Cross

1 A Yes, sir.

2 Q And that's a claim that was made in that
3 case?

4 A Yes, sir.

5 Q Not amended or withdrawn?

6 A No, sir.

7 Q Not to belabor this, Mr. Davis, let me ask
8 you to flip over if you would to paragraph 53 in this
9 motion for judgment. You got that paragraph in front of
10 you?

11 A I do.

12 Q And that paragraph relates to some
13 allegations against Mr. Shumate and his company, correct?

14 A Yes, sir.

15 Q Mr. Shumate was the surveyor who Lofton
16 Ridge hired to do a survey before you closed on the
17 property, correct?

18 A One of the Mr. Shumate's.

19 Q Right. And paragraph 53 reads,
20 "Mr. Shumate and Tom Shumate, Surveyor, Inc., breached
21 their duty by failing to advise Messrs. Koiner, Hausrath,
22 Davis and Lofton Ridge that the property was landlocked
23 and did not abut a street or road maintained by a public
24 authority", do you see that?

Mr. Davis - Cross

1 A Yes, sir.

2 Q Is that accurate?

3 A Again, depending on how this trial comes
4 out it could be.

5 Q Well, Lofton Ridge made those allegations
6 in the motion for judgment, correct?

7 A Mr. Loftis, you know, I have already told
8 you my attorney drew this up and you know the answer, he
9 drew it, but I am bound by it because my name is on it.

10 Q And the case against Mr. Miller and
11 Mr. Denney and Mr. Shumate that was filed by Lofton Ridge
12 has been settled, correct?

13 A Partially.

14 Q And to the extent it's been settled, that
15 settlement involved the payment of money to Lofton Ridge
16 on its claims, correct?

17 MS. HAEBERLE: I would object, Your Honor,
18 the settlement was reached through a mediation and
19 therefore all terms of the settlement are
20 confidential by statute, Your Honor.

21 I would object to any line of questioning
22 as to the terms of the settlement or what they
23 included or did not include.

24 THE COURT: Was there a mediation

Mr. Davis - Cross

1 agreement?

2 MS. HAEBERLE: Yes, sir, it was, and for
3 the record Norfolk Southern was invited to attend
4 the mediation as well but declined.

5 MR. LOFTIS: Your Honor, Norfolk Southern
6 is not a party to this lawsuit, and I have not
7 asked him any of the terms beyond just the general
8 question of whether any money changed hands.

9 MS. HAEBERLE: It's not relevant, Your
10 Honor. It's also subject to confidentiality by
11 statute.

12 THE COURT: I will sustain the objection,
13 counsel.

14 MR. LOFTIS: All right.

15

16 BY MR. LOFTIS:

17 Q Just so we are clear, Mr. Davis, you
18 testified I believe Lofton Ridge only owns one piece of
19 property?

20 A That's correct. Can I clear that up?

21 Q Yes, sir.

22 A When you say one piece of property, there
23 are 11 parcels on this, so I guess technically there are
24 11, but it's all on this farm.

Mr. Davis - Redirect

1 Q And the property that is being described
2 that is the subject of this motion for judgment,
3 Defendant's Exhibit 6, is the same piece of property we
4 are litigating about today?

5 A I would agree.

6 MR. LOFTIS: Thank you, sir. Your Honor, I
7 would move admission of Defendant's Exhibit 6.

8 MS. HAEBERLE: I would object, Your Honor,
9 on the basis of relevance.

10 THE COURT: Overrule; admitted.

11 (The referred-to exhibit was admitted into
12 the Record.)

13
14 THE COURT: Will you get the exhibits back
15 the defendant admitted. Any redirect?

16 MS. HAEBERLE: I'm sorry, I didn't realize
17 that Mr. Loftis was finished.

18

19 REDIRECT EXAMINATION

20

21 BY MS. HAEBERLE:

22 Q Could you please refer to a document that
23 has been identified Number 2, Mr. Davis, by the
24 defendant?

Mr. Davis - Redirect

1 A Yes.

2 Q Could you please read the question number
3 11, the first statement, I believe the question reads,
4 "Are all abutting streets or roads maintained by public
5 authority?" Would you read the answer that's provided?

6 A Yes.

7 Q And the answer is?

8 A The answer is yes.

9 Q I then refer you to Exhibit Numbers 3 and 4
10 as admitted, Defendant's Exhibits 3 and 4. Could you
11 please identify for the court what Lofton Ridge's
12 understanding was as to where the trespass occurred?

13 A Yes, I think I alluded to this when I was
14 showing the picture a minute ago. It appears that Norfolk
15 Southern has a lane that is-- well, there is a cable
16 across it and I believe locks, there is a lane that has
17 access beside the tracks where they can go down and do
18 maintenance on the tracks.

19 We had Mr. Blevins, who is named in this
20 letter, Robert Blevins had parked his truck there to
21 unload-- actually his trailer to unload his excavating
22 equipment so he wouldn't tear up the crossing, so we
23 thought they were referring when we received this letter
24 that we were blocking that, and we were, and so that is

Mr. Davis - Redirect

1 why we wrote the next letter which said we apologize, we
2 sure won't do it again or I think it said we would be good
3 neighbors.

4 Q So it was not your understanding then that
5 the trespass was relating to the area in dispute today?

6 A Not at that time.

7 Q Okay. I also ask you to refer to document
8 number six, which has been admitted under Defendant's
9 Number 6, I would ask you to refer to paragraph number 9,
10 if you could please read that into the record as well?

11 A Is that on page three?

12 Q I'm sorry, correct, on page three,
13 paragraph number 9.

14 A "Messrs. Koiner, Davis and Hausrath
15 retained Mr. Denney and FDW&L to form Lofton Ridge.
16 Messrs. Koiner, Davis, Hausrath and Lofton Ridge retained
17 Mr. Denney and FDW&L to provide advise regarding the
18 acquisition and development of the property and to act as
19 settlement attorney in closing on the property".

20 Q So these were the only two activities that
21 those attorney were engaged in, correct?

22 A That's correct.

23 Q They were not engaged to represent you in
24 this litigation?

Mr. Davis - Redirect

1 A They were not.

2 Q I also ask you to refer to paragraphs 19
3 through 22, which are pages five and six of the motion for
4 judgment. Could you please read those paragraphs into the
5 record?

6 A Paragraph 19: "Following settlement Lofton
7 Ridge began to develop the property by building a road
8 intended to provide access to and from the property.

9 "The new road was supposed to link to a
10 dirt road that crosses property and a railroad crossing
11 owned by Norfolk Southern Corporation, a/k/a Norfolk &
12 Western Railroad, Norfolk Southern. The dirt road is the
13 only mean of egress and ingress to the property from State
14 Route 853".

15 Paragraph 20: "On or about June 16, 2000,
16 Norfolk Southern denied Lofton Ridge access to the dirt
17 road contending that Lofton Ridge was not entitled to use
18 the dirt road to reach State Route 853".

19 Q Paragraphs 21 and 22 as well.

20 A Paragraph 21: "On July 11, 2000 Lofton
21 Ridge filed a declaratory judgment action against Norfolk
22 Southern in the Circuit Court of Augusta County seeking a
23 declaration that Lofton Ridge was entitled to use the dirt
24 road to access State Route 853. As of the date of filing

Mr. Davis - Redirect

1 of this motion for judgment that matter is still pending".

2 Paragraph 22: "Without access to State
3 Route 853 the property is landlocked and may not be
4 developed as intended by Lofton Ridge. Had Lofton Ridge
5 known that the property was landlocked and could not be
6 developed as intended, it would not have closed or begun
7 developing the property".

8 Q Is it Lofton Ridge's understanding then
9 that the property is landlocked until the court
10 adjudicates this issue here in Lofton Ridge's favor?

11 MR. LOFTIS: I object to the leading. This
12 is her witness, it's her corporate representative,
13 and I object to the question as leading.

14 THE COURT: Well, again, we don't have a
15 jury, counsel, but refrain from leading, counsel

16 MS. HAEBERLE: Certainly.

17

18 BY MS. HAEBERLE:

19 Q Would you please tell me what Lofton
20 Ridge's understanding is with regard to the landlocked
21 nature of the property?

22 A Because of the historical and legal
23 research that we have had done and have done ourselves we
24 can find no other access to our property. Mr. Loftis

Mr. Davis - Recross

1 referred to some 20 foot right of way at some point, we
2 have no indication where that exists, where that is in
3 relation to our property, and as far as I know, as far as
4 Lofton Ridge knows, this is the only access we have.

5 Q So in essence until this court adjudicates
6 the issue and declares that there is access it is your
7 understanding that the property is landlocked?

8 A That's correct.

9 MS. HAEBERLE: I have no further
10 questions.

11 MR. LOFTIS: A follow-up, Your Honor. If
12 we could mark this as Defendant's Exhibit 7, please.

13 (An Order of Dismissal was marked as
14 Defendant's Exhibit 7.)

15
16 RECROSS EXAMINATION

17
18 BY MR. LOFTIS:

19 Q Mr. Davis, can you identify the document
20 that is marked as Defendant's Exhibit 7?

21 A Order of the Augusta County Circuit Court
22 signed by His Honorable Judge Thomas McNamara.

23 Q And it reads across the top order of
24 dismissal with prejudice, correct?

Mr. Davis - Recross

1 A It does.

2 Q And this is an order that was entered in
3 the case which Lofton Ridge and you and Mr. Koiner and
4 Mr. Hausrath filed against Mr. Miller and Mr. Denney and
5 Mr. Shumate and their firms, correct?

6 A That's correct.

7 Q And you are the clerk of court in Augusta
8 County, you know what with prejudice means, correct?

9 A I do.

10 Q It means that the case is over and all
11 claims are dismissed and can't be brought back, correct?

12 A As to the people named in the order I
13 think.

14 Q All right. Thank you, sir.

15 A Mr. Shumate is not named in the order.

16 MR. LOFTIS: Thank you, sir. I would move
17 the admission of Defendant's Exhibit 7, Your
18 Honor.

19 MS. HAEBERLE: I would just object on the
20 basis of relevance, Your Honor.

21 THE COURT: Admitted. Objection noted.

22 (The referred-to exhibit was admitted into
23 the Record.)
24

Mr. Davis - Redirect

1 MS. HAEBERLE: I just have one final
2 question in follow-up to Mr. Loftis' question.

3
4 REDIRECT EXAMINATION

5
6 BY MS. HAEBERLE:

7 Q With the dismissal of the case, Mr. Davis,
8 were there any findings of fact as to access or nonaccess
9 as to the property?

10 MR. LOFTIS: Your Honor, I'm going to
11 object to this because Ms. Haeberle has objected
12 to any inquiry into the terms of the settlement.
13 If she's going to ask this question then either
14 the court ought not let her go into this or if
15 it's going to let her go into it I should be able
16 to explore the terms of the settlement.

17 MS. HAEBERLE: Your Honor, I'm going into
18 what's before the court in the court record, and I
19 believe he's admitted the order of dismissal. I'm
20 asking him if in that order of dismissal are there
21 any findings of fact.

22 THE COURT: It speaks for itself, counsel.

23 MS. HAEBERLE: Thank you, Your Honor, I
24 have no further questions.



1 MR. LOFTIS: Your Honor, I have a motion at
2 this point. I don't know if the court wants to
3 take that up now or if the court would like to
4 take a break before we do it. I'm prepared to
5 proceed if the court is ready.

6 THE COURT: Anyone need a break?

7 MS. HAEBERLE: I'm fine, Your Honor.

8 THE COURT: We can just go ahead if you are
9 ready, Mr. Loftis.

10 MR. LOFTIS: Your Honor, at this time on
11 behalf of Norfolk Southern Railway Company I would
12 move to strike the plaintiff's case and ask the
13 court to enter summary judgment on behalf of
14 Norfolk Southern on a number of grounds.

15 First, Your Honor, under the doctrine of
16 judicial estoppel, the evidence shows from
17 Mr. Davis that Lofton Ridge filed, advanced and
18 has now settled a law action in which it made
19 vastly inconsistent claims to the one it's making
20 in this case.

21 The law action alleged that the attorneys
22 and surveyor who did work for Lofton Ridge
23 committed professional malpractice in certifying
24 that Lofton Ridge had a valid easement over the

1 railroad's right of way and that the property had
2 access to a public road.

3 The law action alleged in two separate
4 paragraphs that the property is in fact landlocked
5 and that Lofton Ridge would not have purchased the
6 property had it known this fact. Lofton Ridge
7 sought damages in that case in excess of \$400,000,
8 \$100,000 more than it paid to purchase the
9 property.

10 We would suggest, Your Honor, Lofton Ridge
11 used the power of this court to file and pursue
12 its law action and to settle that action and
13 through that settlement Lofton Ridge has received
14 compensation for its claims and has in fact
15 received a benefit. Yet in this case it takes
16 exactly the opposite position.

17 It comes into court now, reverses field and
18 asserts that it has an easement over the
19 railroad's right of way and that its property has
20 access to a public road, and it asks the court now
21 in this chancery case to grant it relief based on
22 these assertions. We would argue, Your Honor,
23 that that is exactly the kind of conduct that the
24 doctrine of judicial estoppel was designed to

1 prevent.

2 That doctrine is designed to prevent
3 parties from taking whatever position seems
4 convenient at the time and from playing fast and
5 loose with the court system by taking mutually
6 contradictory positions in litigation that
7 involves the same subject matter. That doctrine
8 has long been a part of the law of Virginia.

9 Indeed, the Virginia Supreme Court traced
10 it back to Scottish law, quoting the rule that a
11 party is not permitted, "to both approbate and
12 reprobate". Virginia law simply does not permit a
13 party to assert mutually inconsistent positions
14 such as the one Lofton Ridge wants to assert here.

15 They have already received a benefit
16 through the use of the courts via the settlement
17 of the law action, they now seek to obtain an
18 additional benefit by making a mutually
19 contradictory and inconsistent claim, and we would
20 suggest, Your Honor, that Lofton Ridge can't have
21 it both ways.

22 If the property is landlocked and the
23 attorneys and the surveyor committed professional
24 malpractice in telling them they had an easement,

1 they can't now assert that they have an easement
2 and have access to the public road.

3 Alternatively, if that property in fact has an
4 access then Lofton Ridge had no claim for
5 professional malpractice.

6 We would point the court to United Leasing
7 Corp. versus Resource Bank case, 58 Va. Cir. at 96
8 which we attach to the plea in bar that was filed
9 in this case. That is a case in which plaintiff
10 filed a suit asserting that a settlement and
11 assumption agreement that it had entered into had
12 been induced by fraud and was void and asked the
13 court to rescind the agreement.

14 At the same time the plaintiff had filed
15 four suits against four other parties seeking to
16 enforce the settlement and assumption agreement by
17 collecting an account it had assumed under the
18 agreement, and it took the position in those cases
19 that the agreement was valid and enforceable, and
20 in at least one of those other cases it had
21 obtained a payment from the party it sued.

22 Judge Johnson's opinion relies on the
23 doctrine of judicial estoppel primarily citing and
24 relying on the Birch versus Gray Street Building

1 Corp. case, which is 168 Va. 329, and held that
2 the plaintiff could not proceed with its case for
3 rescission because the allegations were directly
4 contradictory to the allegations made in the other
5 cases, and Judge Johnson in that case, Your Honor,
6 asked a rhetorical question.

7 He said if the court in this case rules for
8 the plaintiff and rescinds the contract what's the
9 plaintiff going to do, are they going to give back
10 the money that they got from these other parties
11 in the cases where they asserted that the
12 agreement was valid, and Judge Johnson said well
13 of course they are not, they simply can't have it
14 both ways, and I think the court could ask the
15 same question here.

16 If Lofton Ridge succeeds in obtaining an
17 easement and the relief it seeks from this court
18 in the equity case, is Lofton Ridge going to go
19 back and rescind and give back the settlement that
20 it has made in the law action. Certainly it's
21 not. And I would note, Your Honor, that Judge
22 Johnson's opinion disposes of any argument that
23 this is somehow covered under the rule that
24 parties can plead alternative theories of

1 recovery.

2 He says that simply does not apply in a
3 case where a party is asserting mutually
4 contradictory positions in two separate actions.
5 So we would suggest that Lofton Ridge simply
6 cannot proceed in this matter, that it should not
7 be permitted to use the judicial system, take
8 whatever position it deems appropriate and
9 convenient to try to obtain a double benefit.

10 We filed a plea in bar in this issue, but
11 we would suggest at this point it doesn't matter
12 how the court fashions its ruling, whether it's a
13 granting of the plea in bar or granting the motion
14 to strike and entering summary judgment, that in
15 either event the court ought to invoke the
16 doctrine of judicial estoppel as a bar to this
17 action.

18 Secondly, Your Honor, and for much the same
19 reasons, we would argue that this action is barred
20 by the doctrine of election of remedies. Again,
21 plaintiff has settled at least a portion or a
22 large portion of the law action. As the Supreme
23 Court of Virginia has explained, when a party has
24 a choice between two inconsistent courses of

1 action and chooses to pursue one of them, the
2 party is bound by that election, and here Lofton
3 Ridge had two potential causes of action, it had a
4 chancery action against the railroad to try to
5 obtain an easement, it had a law action against
6 the attorneys and the surveyor for malpractice.

7 It chose to plead both of those cases, but
8 the one it chose to pursue to conclusion first and
9 to settle was the law action, and we would argue
10 that that is a binding election of remedies.
11 Lofton Ridge has been compensated based on its
12 allegations that the property is landlocked and
13 that it has no easement, that it has elected to
14 accept that remedy and that it's now barred from
15 seeking a fundamentally inconsistent remedy in
16 this chancery action.

17 Now, Your Honor, substantively I will
18 confess at this point, Your Honor, that I am a
19 little bit confused about what basis the plaintiff
20 is in fact asserting, or bases I should say. A
21 number have been asserted throughout the case and
22 if I start to argue a basis that the plaintiff is
23 no longer pursuing I will be happy to cease the
24 argument on that if there is a stipulation that

1 that's not being pursued, but certainly one of the
2 assertions that has been made in the course of the
3 case is that there is a prescriptive easement
4 across the railroad's right of way.

5 MS. HAEBERLE: I believe, Mr. Loftis, as
6 indicated, we are proceeding forward on the basis
7 that were identified in our answer to
8 interrogatory, and prescriptive right,
9 prescriptive easement, is not one of those.

10 MR. LOFTIS: Based on that stipulation,
11 Your Honor, we don't need to argue that. There
12 has also been an argument that there was an
13 implied easement of necessity.

14 MS. HAEBERLE: Again, Your Honor, we are
15 also not alleging easement by necessity.

16 MR. LOFTIS: Fine. Equitable easement, an
17 equitable easement, Your Honor, is granted only in
18 cases where the plaintiff has been permitted to
19 use and to make improvements on the property of
20 another party with the consent of that party.
21 That's what the Moore v. Lewis case says, 208 Va.
22 560, the Buckles Irvine Coal Company versus
23 Kennedy Coal Corp. case, 134 Va. 1.

24 The decisions make clear, Your Honor, that

1 behalf of Norfolk Southern Railway Company.

2 THE COURT: You may respond, Ms. Haeberle.

3 MS. HAEBERLE: Thank you, Your Honor.

4 Taking his points in order, first with regard to
5 the judicial estoppel issue, we believe that the
6 pleadings are not inconsistent, there is
7 absolutely no admission of any sort of judicial
8 facts affirming the pleading, but basically what
9 Mr. Davis testified was that until this court
10 adjudicates access over the property, the property
11 is landlocked.

12 Further, Your Honor, there is absolutely no
13 evidence that there has been any benefit that has
14 been received by Lofton Ridge. Now it is
15 certainly clear that there was a settlement and
16 that the case was dismissed, but there is
17 absolutely no evidence that there is any sort of
18 benefit.

19 Further, even if this court were to find
20 that the pleadings were inconsistent, the law as
21 stated by Mr. Loftis also clearly provides in the
22 case of Birch versus Gray Street, which I believe
23 he cited, that where a man has an election between
24 several inconsistent courses of action he will be

1 confined to that which he first adopts.

2 This lawsuit was filed first, these were
3 the first claims that were made in terms of
4 whether or not the issue would be properly
5 adjudicated by the court, and thus to the extent
6 that judicial estoppel may be a defense, I would
7 cite that it may be a defense to the malpractice
8 defendants, that Lofton Ridge has taken maybe an
9 inconsistent position in the second filing which
10 was the filing of the lawsuit, and so thus it is
11 not a defense that Norfolk Southern is able to
12 raise and rely upon here.

13 Further, Your Honor, there are different
14 forms of damages that are at issue here. The
15 first is the issue of equitable relief, whether or
16 not there is access over the property. In the
17 second suit, which was the damages addendum, as is
18 clear from the evidence, is in excess of the
19 property's value.

20 Regardless of what the court rules here,
21 even if the court grants complete access to Lofton
22 Ridge at this point in time, there are still
23 numbers of damages that Lofton Ridge sustained
24 from the time it closed on the property in 1998

1 until today. Those damages are not duplicative of
2 the type of relief that is sought here, but rather
3 a completely different form and relate to
4 different compensatory issues and items faced by
5 Lofton Ridge.

6 With regard to the election of remedies and
7 the choice of remedies, I believe all of the
8 actions that he has cited relate to contract
9 actions. We don't have a contract here, Your
10 Honor, where we are deciding between reformation
11 or rescission. What we have is we have an equity
12 action to determine whether or not there is access
13 to property, we also have a compensatory action
14 against different defendants for different types
15 of damages, and I guess that would cover then both
16 of the two principles with regard to election of
17 remedies and judicial estoppel.

18 With regard to the substance of the case,
19 we believe that we have fully supported our case
20 in terms of we have plead an implied easement
21 based on preexisting use, we also believe that the
22 road came up to the underpass, provided access to
23 that property, and by the closing of the underpass
24 and the taking of that road, which we believe is

1 all submitted in the documents, the court has not
2 had an ample opportunity to review all of those
3 documents, and we believe it's clear that we have
4 at least met our case as to that burden.

5 Now, I would prefer not to go ahead and
6 give you my whole closing statement now at this
7 time, I think it would be inappropriate and I
8 think also given that the court has not had an
9 opportunity to review all those documents it would
10 also be premature at this point in time to grant
11 the defendant's motion.

12 THE COURT: Question, counsel.

13 MS. HAEBERLE: Yes, sir.

14 THE COURT: Is the plaintiff confined to
15 the theory that it espouses first or that it
16 pursues first?

17 MS. HAEBERLE: I believe as I read the law,
18 Your Honor, it's the position that has been taken
19 first, and in this case the position that was
20 taken first was the filing of this action.

21 THE COURT: Suppose then they filed this
22 action, subsequently file the action at law for
23 the negligence, nonsuited this action, six months
24 later refiled it?

1 MS. HAEBERLE: Well, I believe that was
2 actually very akin to the facts that the court
3 handled, and what the court held in the first
4 case, I believe it was the Birch case, is that the
5 plaintiff actually nonsuited the first case, then
6 came back in the second case, asserted a
7 completely different state of facts, and the court
8 said you can't do that, you are confirmed to the
9 state of the facts that you initially plead.

10 That's the case here, Your Honor, this case
11 was plead first. As a result of the time that it
12 was taking to resolve the issue with the railroad,
13 in order to avoid a statute of limitations filing
14 there was basically a forced filing on behalf of
15 Lofton Ridge.

16 I mean if they were going to preserve any
17 rights as to the other defendants because this
18 case was taking so long they had to file a case.
19 I mean the court is clear that what you look at is
20 what was first filed, the statements that were
21 first made.

22 MR. HACKNEY: If Your Honor please, I know
23 you don't like two counsel from the same party
24 speaking to the same issue.

1 THE COURT: Double teaming.

2 MR. HACKNEY: But the pleading, with the
3 court's permission, the plea in abatement got
4 filed Friday. We have not had an opportunity to
5 do anything other than look at the allegations in
6 his plea.

7 Since June of 2002 Norfolk Southern has
8 known about the other lawsuits because Mr. Loftis
9 examined Mr. Davis and some other folks and
10 specifically talked about the other lawsuits, so
11 quite frankly, the timing of the filing has now
12 left us without the ability to rebut it.

13 Second, if you look in the pleadings
14 themselves, paragraph 9, there were two
15 undertakings that the lawyers did, one was to
16 assist Lofton Ridge in the development of the
17 property, and one was to act as the closing
18 attorney. It wasn't just close this, they were
19 supposed to do more. It's not just you messed up
20 the title. But the pleadings speak for
21 themselves.

22 And then the allegations that Mr. Davis
23 read specifically said that the only access is
24 Route 853, that we closed on it on a certain day,

1 the railroad came in and stopped us from using
2 it. And then when we talk about landlocking,
3 Mr. Loftis always leaves out the phrase, and it's
4 in paragraph 22, it starts off, without access to
5 State Route 853 we are landlocked. So there is no
6 unequivocal statement in this pleading that says
7 we are landlocked.

8 Now, if you look at the case, just the
9 case, and we haven't had an opportunity to do any
10 other research but look at the cases, if you at
11 the case that is the leading case on it, Birch
12 versus Gray Street Building, on page 329 where
13 they talk about this judicial estoppel, it says a
14 litigant is estopped from taking a position which
15 is inconsistent with one previously assumed,
16 either in the course of the litigation for the
17 same cause of action or in dealing in proxy.

18 Then it goes down and it says a little
19 farther, where we talk about approbate and
20 reprobate, and it says and where a man has elected
21 between several inconsistent courses of action, he
22 will be confined to that which he first adopts.
23 The election if made with knowledge of the parties
24 is and of itself binding.

1 All the cases that have been cited here
2 deal with a litigant taking a position in a case
3 and either nonsuiting it or losing it, and then at
4 a later date coming back with a new theory based
5 on the same facts. That is not what this court
6 has today. This case was filed several years
7 before the litigation with the attorneys.

8 THE COURT: A litigant doesn't adopt a
9 position until he starts pursuing that position,
10 doesn't he?

11 MR. HACKNEY: Pardon?

12 THE COURT: A litigant doesn't adopt a
13 position with regard to his causes of action until
14 he actually commences proceeding and pursuing that
15 cause of action, does he?

16 MR. HACKNEY: No, sir.

17 THE COURT: You can plead numerous
18 alternatives.

19 MR. HACKNEY: Sure.

20 THE COURT: But when you start going
21 through litigation and you adopt, then you adopt
22 your theory of recovery. Isn't that what the case
23 says, when you adopt your theory of recovery?

24 MR. HACKNEY: No, this case says once you

1 have taken a position you can't later in
2 subsequent litigation reverse your position, and
3 we don't have that case here.

4 In fact, if the litigation had not been
5 initiated against the surveyor or the attorney,
6 and this court rules that we do not have access,
7 then the statute of limitations would have run on
8 those claims.

9 THE COURT: I understand.

10 MR. HACKNEY: So just on the law itself
11 that's been cited, we don't believe it's
12 applicable to this case, and a reading of the
13 lawsuit will show you that it's not the surveyor--
14 in fact, the surveyor, the cause of action against
15 the surveyor has not even been resolved, and I
16 think the document would speak for itself. The
17 surveyor did not-- his counsel did not sign it.

18 But there are more obligations that the law
19 firm undertook than just closing this real estate
20 transaction.

21 THE COURT: Your motion, your last word,
22 Mr. Loftis.

23 MR. LOFTIS: Your Honor, I will try to be
24 real brief. First of all, let me address the

1 timing issue, Your Honor. We certainly knew in
2 the summer of last year that the malpractice
3 action had been filed, we did not find out
4 literally until Thursday when I sent a paralegal
5 up here to get a copy of the motion for judgment
6 with the file stamp on it that the case had in
7 fact been settled, that the dismissal order had
8 been entered.

9 I believe this dismissal order says it was
10 entered in June, the Circuit Court case
11 information index shows that is still an active
12 case with no dismissal order having been entered,
13 so we didn't find out until Thursday, but the
14 simple fact of the matter is that our position is
15 the one articulated by the court.

16 Parties can plead alternatively, but when
17 they elect to pursue one of those alternative
18 courses of action to a conclusion the position is
19 they are bound by that, and the plea of judicial
20 estoppel we included the argument on election of
21 remedies in there because the two the way the
22 Virginia Supreme Court phrases the rule are
23 inexorably bound together.

24 What drives the doctrine of judicial

1 estoppel is mutually inconsistent relief. The
2 plaintiff just can't have it both ways, and I
3 would assert again, Your Honor, this is a case
4 where the plaintiff can't have it both ways. They
5 have pursued this malpractice case to a
6 conclusion, they have reached some settlement, the
7 terms of which we don't know because they won't
8 disclose it, but it was presumably satisfactory to
9 them because they signed an agreed dismissal
10 order.

11 The relief in that case that was sought,
12 and the court can look at the motion for judgment,
13 but what it says is if we had known this property
14 was landlocked we wouldn't have bought it, we want
15 our \$400,000 back because we want to be put back
16 in the position we would have been in if we hadn't
17 bought it, but for your negligence we wouldn't
18 have bought this property and we are entitled to
19 be put back in that position.

20 That's the theory of compensation in a tort
21 case, entitled to be put back as if this had never
22 happened in a malpractice case, I'm entitled to be
23 compensated for the consequences of this. Your
24 Honor, they have accepted whatever benefit was

1 agreeable to them, but their position was we
2 wouldn't have bought the property and that's what
3 we are entitled to be compensated for.

4 Judge, they have still got the property,
5 they have been compensated, but now they want to
6 get an additional benefit by taking a directly
7 opposite position and saying forget what we said
8 in the malpractice case, we may have pursued that
9 to a conclusion and taken a position and bound
10 ourselves to that, but forget what we said, now we
11 want the court to give us an easement so we get
12 that benefit on top of it too. If they have an
13 easement there was no malpractice case against
14 these attorneys.

15 Briefly, Your Honor, the argument was made
16 that the doctrine of election of remedies is
17 somehow limited to contract actions. That's
18 simply not the law. I think the court knows that
19 that doctrine applies in cases where there may be
20 a choice between a tort cause of action and a
21 contract cause of action.

22 Finally, Ms. Haeberle in addressing this
23 issue about equitable easement and implied
24 easement suggested that there had been evidence

1 that the public road touched the Lofton Ridge
2 property, and we would assert, Your Honor, there
3 has been no such evidence.

4 In fact, their own expert, Mr. McNair, sat
5 here just a few minutes ago and said he found no
6 such evidence that that road was ever built to the
7 underpass, that the road never in fact touched the
8 property, so we would argue that there is no
9 evidence that this property ever had any direct
10 access to a public road, and if that's the basis
11 on which we are pursuing the claim of equitable
12 easement we would assert that there is just no
13 evidence to support that and that the court ought
14 not let the case go forward.

15 THE COURT: Counsel, if this plea were
16 filed Friday, obviously I haven't had the
17 opportunity to see it myself and to read the
18 authorities cited. I have had the occasion to
19 write my own opinion on the issue of equitable
20 estoppel, and that is the troubling part for the
21 court here, I will tell you that.

22 That should have been reported as well, I
23 don't know, maybe it was. In any event, I need to
24 take the motion under advisement, but at the same

1 time I believe I think we need to go forward,
2 counsel, and let the court continue to hear the
3 evidence so we don't waste time.

4 MR. LOFTIS: Very well, Your Honor, just my
5 objection would be reserved in the record.

6 THE COURT: Noted.

7 MR. LOFTIS: I am prepared to proceed, Your
8 Honor.

9 THE COURT: Let's take a break here, about
10 10 or so minutes, counsel. Court is in recess.

11 (A recess was taken.)

12
13 THE COURT: All right, Mr. Loftis.

14 MR. LOFTIS: Your Honor, as our first
15 witness we would call Lloyd Clingenpeel.

16
17
18 LLOYD R. CLINGENPEEL

19 was called as a witness and after having first been duly
20 sworn to tell the truth, the whole truth, and nothing but
21 the truth, was examined and testified as follows:

TRUSTEE'S SALE

OF FARM
252 ACRES, MORE OR LESS
RIVERHEADS MAGISTERIAL DISTRICT
ROUTE 1, BOX 50 151
GREENVILLE, VA 24440

EXHIBIT

KPF
4-30-02 #16

In execution of a Deed of Trust dated May 9, 1979 from John E. Todd and Jessie F. Todd to secure the United States of America, acting through the Farmers Home Administration, United States Department of Agriculture, of record in the Clerk's Office for the Circuit Court of Augusta County, Virginia, in Deed Book 710, at page 575, the undersigned Substitute Trustee will offer for sale to the highest bidder at

PUBLIC AUCTION

ON

JUNE 24, 1990

AT 4:00 PM

AT THE FRONT DOOR OF THE COURTHOUSE OF
THE COUNTY OF AUGUSTA, VIRGINIA
IN STAUNTON, VIRGINIA

A farm situate in the Riverheads Magisterial District of Augusta County, Virginia, located approximately two (2) miles southeast of the Village of Greenville, having as its address Route 1, Box 50, Greenville, Virginia, containing approximately 252 acres, more or less, composed of a number of contiguous parcels described in the above mentioned Deed of Trust of record in said Clerk's Office in Deed Book 710, at page 575, which farm originally contained approximately 261 acres, more or less, from which there has been separated and not made a part of this trustee's sale a parcel of land containing 18.980 acres upon which there is located a residence house of the farm together with associated farm buildings, which parcel adjoins the N & W Railroad and is bounded as follows:

BEGINNING at a set iron pin in the northwest line of said railroad, a corner to Norheim bears S 42° 56' 41" W 447.06 ft. and S 43° 00' E 30.00 ft., thence from said beginning iron pin by seven lines with the southeast side of the railroad right of way N 42° 56' 41" E 548.54 ft. to an iron pin, S 47° 03' 19" E 20.00 ft. to a set iron pin, S 42° 56' 41" E 388.56 ft. to a set iron pin, thence by a curve to the right having a central angle of 10° 44' 47", a radius of 1580.46 ft. for an arc length of 296.43 ft. to a set iron pin, S 36° 18' 32" E 20.00 ft. to a set iron pin, thence by a curve to the right having a

261

- 19

242

**DEFENDANT'S
EXHIBIT**

EXHIBIT 1 2-1003

central angle of $10^{\circ} 21' 06''$, a radius of 1560.46 ft. for an arc length of 281.93 ft. to a set iron pin, N $46^{\circ} 52' 31''$ E 49.60 ft. to a set iron pin in said railroad line, thence by four new lines S $37^{\circ} 29' 15''$ E 463.19 ft. to a set iron pin, S $40^{\circ} 51' 01''$ W 1200.54 ft. to a set iron pin, thence N $56^{\circ} 38' 24''$ W passing a 6" black oak at 0.26 ft. for a total distance of 426.04 ft. to a set iron pin, N $75^{\circ} 21' 12''$ W 250.79 ft. to the beginning containing 10.980 acres.

A bidder's deposit of ten percent (10%) of the sale price by cashier's check, certified check, postal money order or cash will be required.

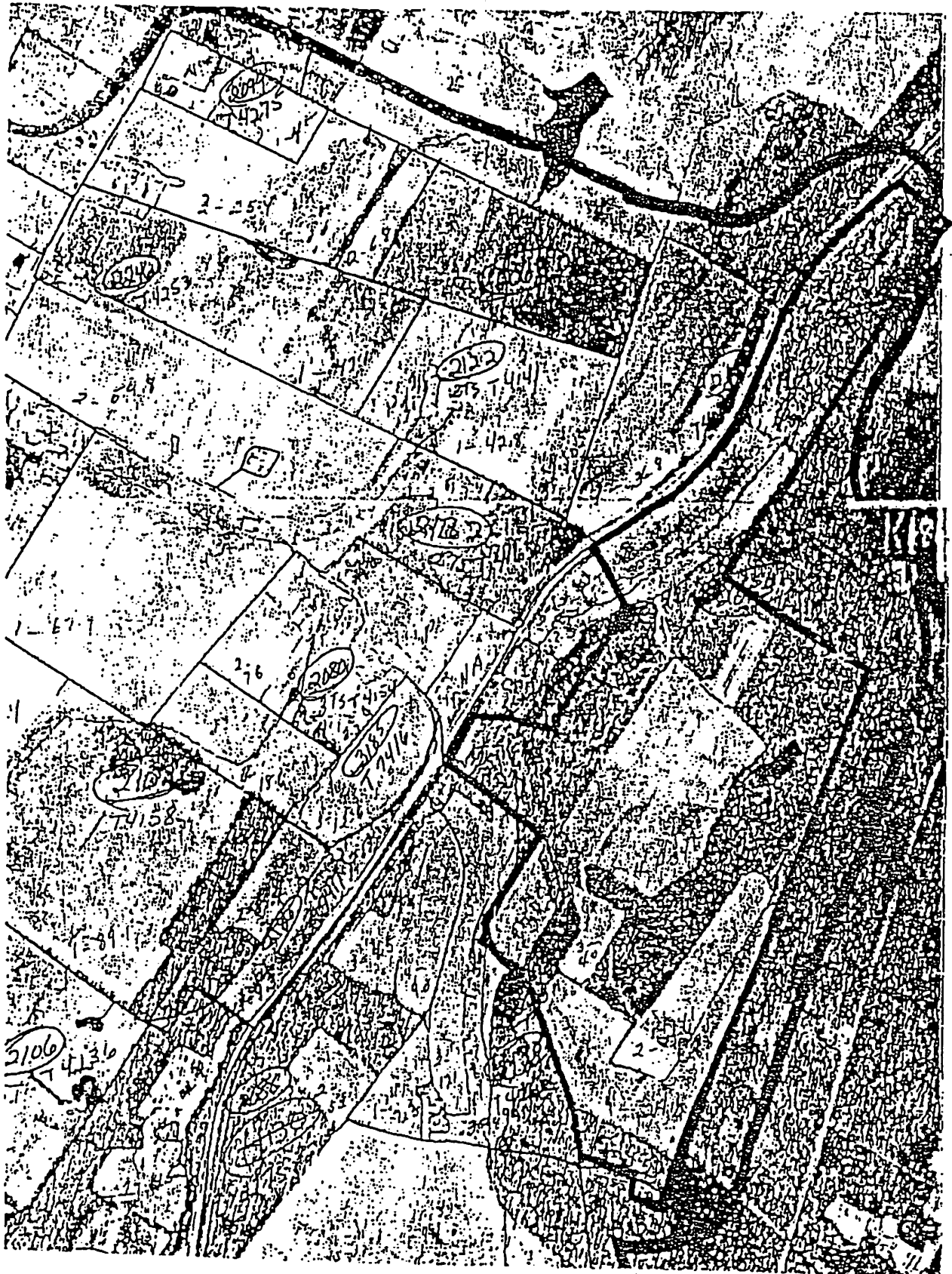
Terms of sale: Cash, final settlement within 30 days.

W.T. RODEY, III
SUBSTITUTE TRUSTEE
131 West 21st Street
P.O. Box 669
Duona Vista, Virginia 24416
(540) 261-2575

FOR INFORMATION CONTACT:
Farm Service Agency
P. O. Box 70
Varona, VA 24482
(540) 248-6218

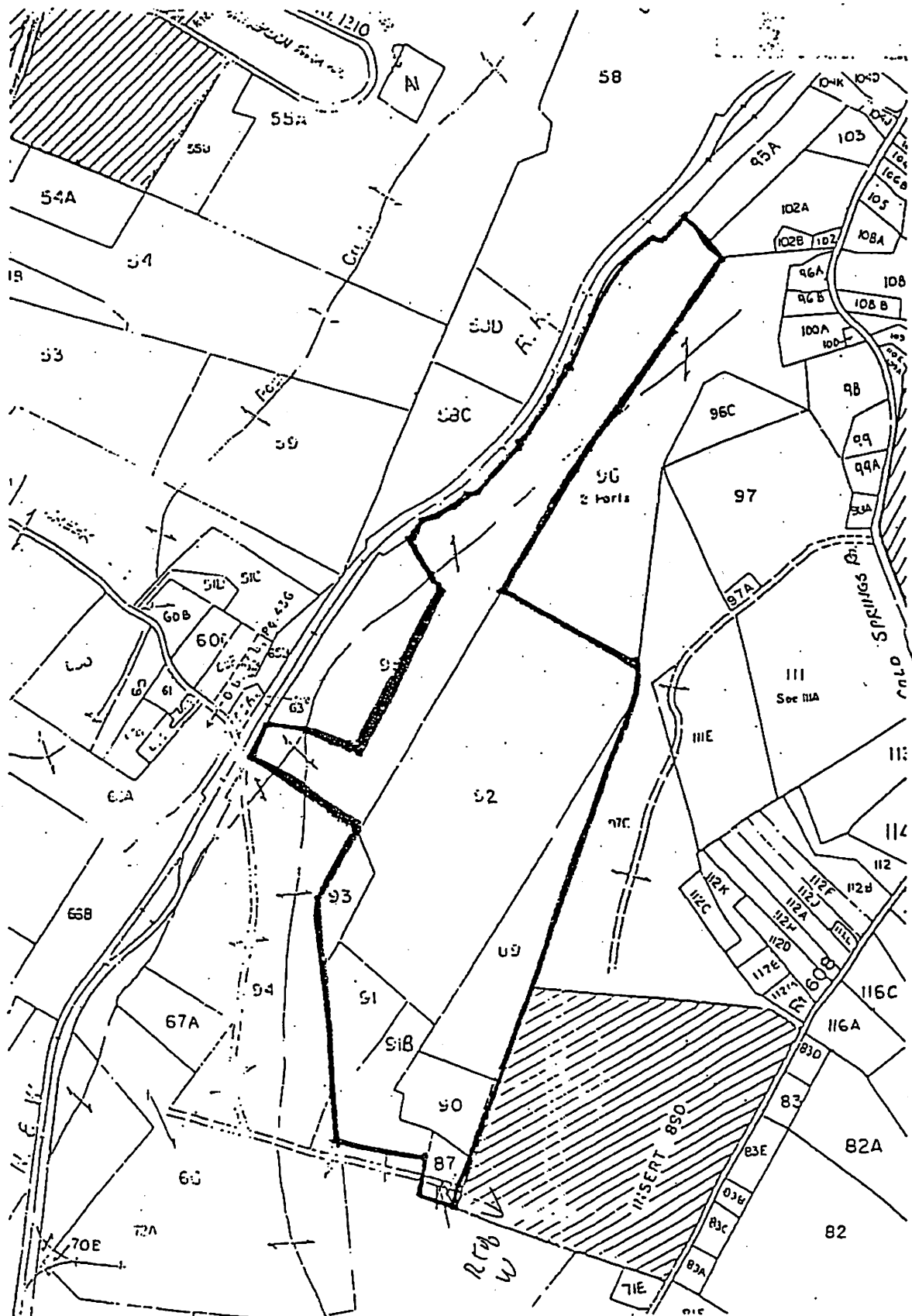
COL. TOM WOLFE, AUCTIONEER, #311
540-334-7651
P.O. Box 450
Reques Hill, Va 24065

AERIAL PHOTOGRAPH



This is a detailed topographic map of the Pine Bluff, Arkansas area. The map features contour lines indicating elevation, with labels such as 11A, 11B, 11C, 15B, 15C, 15D, 15E, 15F, 15G, 15H, 15I, 15J, 15K, 15L, 15M, 15N, 15O, 15P, 15Q, 15R, 15S, 15T, 15U, 15V, 15W, 15X, 15Y, 15Z, 16A, 16B, 16C, 16D, 16E, 16F, 16G, 16H, 16I, 16J, 16K, 16L, 16M, 16N, 16O, 16P, 16Q, 16R, 16S, 16T, 16U, 16V, 16W, 16X, 16Y, 16Z, 17A, 17B, 17C, 17D, 17E, 17F, 17G, 17H, 17I, 17J, 17K, 17L, 17M, 17N, 17O, 17P, 17Q, 17R, 17S, 17T, 17U, 17V, 17W, 17X, 17Y, 17Z, 18A, 18B, 18C, 18D, 18E, 18F, 18G, 18H, 18I, 18J, 18K, 18L, 18M, 18N, 18O, 18P, 18Q, 18R, 18S, 18T, 18U, 18V, 18W, 18X, 18Y, 18Z, 19A, 19B, 19C, 19D, 19E, 19F, 19G, 19H, 19I, 19J, 19K, 19L, 19M, 19N, 19O, 19P, 19Q, 19R, 19S, 19T, 19U, 19V, 19W, 19X, 19Y, 19Z, 20A, 20B, 20C, 20D, 20E, 20F, 20G, 20H, 20I, 20J, 20K, 20L, 20M, 20N, 20O, 20P, 20Q, 20R, 20S, 20T, 20U, 20V, 20W, 20X, 20Y, 20Z, 21A, 21B, 21C, 21D, 21E, 21F, 21G, 21H, 21I, 21J, 21K, 21L, 21M, 21N, 21O, 21P, 21Q, 21R, 21S, 21T, 21U, 21V, 21W, 21X, 21Y, 21Z, 22A, 22B, 22C, 22D, 22E, 22F, 22G, 22H, 22I, 22J, 22K, 22L, 22M, 22N, 22O, 22P, 22Q, 22R, 22S, 22T, 22U, 22V, 22W, 22X, 22Y, 22Z, 23A, 23B, 23C, 23D, 23E, 23F, 23G, 23H, 23I, 23J, 23K, 23L, 23M, 23N, 23O, 23P, 23Q, 23R, 23S, 23T, 23U, 23V, 23W, 23X, 23Y, 23Z, 24A, 24B, 24C, 24D, 24E, 24F, 24G, 24H, 24I, 24J, 24K, 24L, 24M, 24N, 24O, 24P, 24Q, 24R, 24S, 24T, 24U, 24V, 24W, 24X, 24Y, 24Z, 25A, 25B, 25C, 25D, 25E, 25F, 25G, 25H, 25I, 25J, 25K, 25L, 25M, 25N, 25O, 25P, 25Q, 25R, 25S, 25T, 25U, 25V, 25W, 25X, 25Y, 25Z, 26A, 26B, 26C, 26D, 26E, 26F, 26G, 26H, 26I, 26J, 26K, 26L, 26M, 26N, 26O, 26P, 26Q, 26R, 26S, 26T, 26U, 26V, 26W, 26X, 26Y, 26Z, 27A, 27B, 27C, 27D, 27E, 27F, 27G, 27H, 27I, 27J, 27K, 27L, 27M, 27N, 27O, 27P, 27Q, 27R, 27S, 27T, 27U, 27V, 27W, 27X, 27Y, 27Z, 28A, 28B, 28C, 28D, 28E, 28F, 28G, 28H, 28I, 28J, 28K, 28L, 28M, 28N, 28O, 28P, 28Q, 28R, 28S, 28T, 28U, 28V, 28W, 28X, 28Y, 28Z, 29A, 29B, 29C, 29D, 29E, 29F, 29G, 29H, 29I, 29J, 29K, 29L, 29M, 29N, 29O, 29P, 29Q, 29R, 29S, 29T, 29U, 29V, 29W, 29X, 29Y, 29Z, 30A, 30B, 30C, 30D, 30E, 30F, 30G, 30H, 30I, 30J, 30K, 30L, 30M, 30N, 30O, 30P, 30Q, 30R, 30S, 30T, 30U, 30V, 30W, 30X, 30Y, 30Z, 31A, 31B, 31C, 31D, 31E, 31F, 31G, 31H, 31I, 31J, 31K, 31L, 31M, 31N, 31O, 31P, 31Q, 31R, 31S, 31T, 31U, 31V, 31W, 31X, 31Y, 31Z, 32A, 32B, 32C, 32D, 32E, 32F, 32G, 32H, 32I, 32J, 32K, 32L, 32M, 32N, 32O, 32P, 32Q, 32R, 32S, 32T, 32U, 32V, 32W, 32X, 32Y, 32Z, 33A, 33B, 33C, 33D, 33E, 33F, 33G, 33H, 33I, 33J, 33K, 33L, 33M, 33N, 33O, 33P, 33Q, 33R, 33S, 33T, 33U, 33V, 33W, 33X, 33Y, 33Z, 34A, 34B, 34C, 34D, 34E, 34F, 34G, 34H, 34I, 34J, 34K, 34L, 34M, 34N, 34O, 34P, 34Q, 34R, 34S, 34T, 34U, 34V, 34W, 34X, 34Y, 34Z, 35A, 35B, 35C, 35D, 35E, 35F, 35G, 35H, 35I, 35J, 35K, 35L, 35M, 35N, 35O, 35P, 35Q, 35R, 35S, 35T, 35U, 35V, 35W, 35X, 35Y, 35Z, 36A, 36B, 36C, 36D, 36E, 36F, 36G, 36H, 36I, 36J, 36K, 36L, 36M, 36N, 36O, 36P, 36Q, 36R, 36S, 36T, 36U, 36V, 36W, 36X, 36Y, 36Z, 37A, 37B, 37C, 37D, 37E, 37F, 37G, 37H, 37I, 37J, 37K, 37L, 37M, 37N, 37O, 37P, 37Q, 37R, 37S, 37T, 37U, 37V, 37W, 37X, 37Y, 37Z, 38A, 38B, 38C, 38D, 38E, 38F, 38G, 38H, 38I, 38J, 38K, 38L, 38M, 38N, 38O, 38P, 38Q, 38R, 38S, 38T, 38U, 38V, 38W, 38X, 38Y, 38Z, 39A, 39B, 39C, 39D, 39E, 39F, 39G, 39H, 39I, 39J, 39K, 39L, 39M, 39N, 39O, 39P, 39Q, 39R, 39S, 39T, 39U, 39V, 39W, 39X, 39Y, 39Z, 40A, 40B, 40C, 40D, 40E, 40F, 40G, 40H, 40I, 40J, 40K, 40L, 40M, 40N, 40O, 40P, 40Q, 40R, 40S, 40T, 40U, 40V, 40W, 40X, 40Y, 40Z, 41A, 41B, 41C, 41D, 41E, 41F, 41G, 41H, 41I, 41J, 41K, 41L, 41M, 41N, 41O, 41P, 41Q, 41R, 41S, 41T, 41U, 41V, 41W, 41X, 41Y, 41Z, 42A, 42B, 42C, 42D, 42E, 42F, 42G, 42H, 42I, 42J, 42K, 42L, 42M, 42N, 42O, 42P, 42Q, 42R, 42S, 42T, 42U, 42V, 42W, 42X, 42Y, 42Z, 43A, 43B, 43C, 43D, 43E, 43F, 43G, 43H, 43I, 43J, 43K, 43L, 43M, 43N, 43O, 43P, 43Q, 43R, 43S, 43T, 43U, 43V, 43W, 43X, 43Y, 43Z, 44A, 44B, 44C, 44D, 44E, 44F, 44G, 44H, 44I, 44J, 44K, 44L, 44M, 44N, 44O, 44P, 44Q, 44R, 44S, 44T, 44U, 44V, 44W, 44X, 44Y, 44Z, 45A, 45B, 45C, 45D, 45E, 45F, 45G, 45H, 45I, 45J, 45K, 45L, 45M, 45N, 45O, 45P, 45Q

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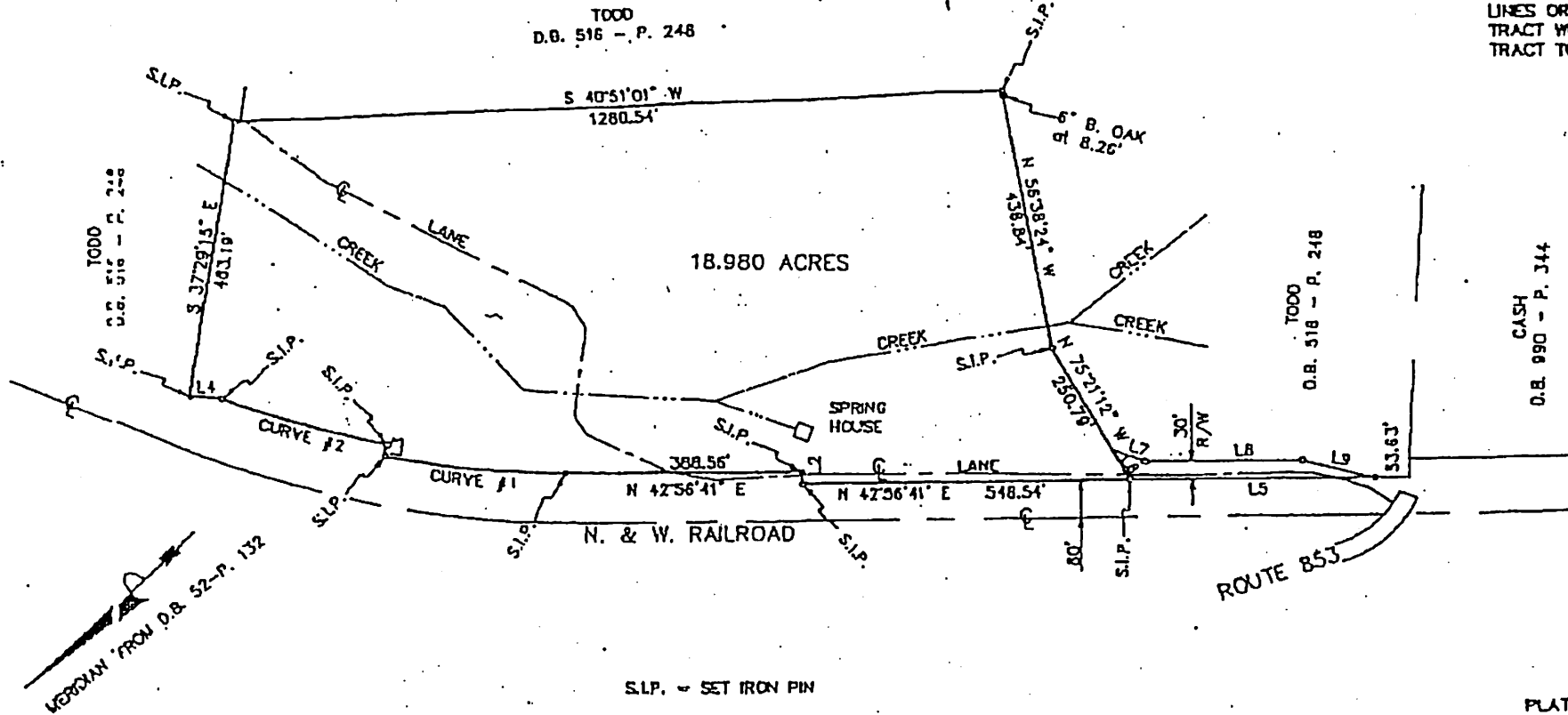
Pres Ch. 40a / Ch. 111-1

Serge
MT
land

NO REQUEST WILL BE MADE TO HAVE THE LOT OR LOTS, AS SHOWN HEREON, SERVED BY A PUBLIC STREET UNLESS AND UNTIL THE STREET HAS BEEN DESIGNED AND CONSTRUCTED, AT NO COST TO THE COUNTY OR THE VIRGINIA DEPARTMENT OF TRANSPORTATION TO THE THEN CURRENT STANDARDS FOR STREETS.

THIS LOT IS BEING CREATED AS THE RESULT OF A PURCHASE OR GIFT FROM A MEMBER OF THE IMMEDIATE FAMILY OF THE GRANTEE, THIS LOT IS BEING CONVEYED TO JOHN E. TODD, HUSBAND OF THE GRANTOR.

THE REMAINDER OF THIS (T.M. 89 - 95) IS HER WITH THE ADJOINING TRAC 92), ALSO OWNED BY JO F. TODD W.D.B. 516 - P. PURPOSE OF ADJUSTING 7 LINES OR ADDING LAND TO TRACT WITH THE RESULT TRACT TO BE TREATED AS:



S.I.P. = SET IRON PIN

COMMON WE
ROBI
LAND

PLAT OF A
PORTION OF THE

JOHN E. TODD ETAL. PROPE

RIVERHEADS DISTRICT. AUGUSTA C

SCALE: 1" = 200' APRIL 22,

R.E. FUNK - LAND SURVEYOR
15 TERRY ST., STAUNTON, VA

NUMBER	DIRECTION	DISTANCE
L2	S 47°03'19" E	20.00'
L3	S 36°18'32" E	20.00'
L4	N 46°32'31" E	42.80'
L5	N 42°56'41" E	383.43'
L6	S 75°21'12" E	57.80'
L7	S 04°44'47" W	55.60'
L8	S 42°56'41" W	253.10'
L9	S 57°27'55" W	119.65'

R/W

NUMBER	DELTA	RADIUS	ARC	TANGENT	CHORD BEAR.	CHORD
CURVE #1	10°44'47"	1580.46	296.43	148.65	N 48°19'05" E	296.00
CURVE #2	10°21'06"	1560.46	281.93	141.35	N 58°32'01" E	281.55

SUBMISSION AGENT

John E. Todd 5-9-96

6/2/98 - Plat Recorded

SURVEYOR'S REPORT

Fill out and sign with all Surveys in accordance with the Instructions on the reverse side.

EXHIBIT

To: **LAWYERS TITLE INSURANCE CORPORATION**

Richmond, Virginia.

THIS IS TO CERTIFY that on August 7, 1998, I made an accurate survey of the premises standing in the name of William T. Robey, III, Trustee (DB 1355-087)

situated at Riverheads Augusta Virginia
District XXX County State

briefly described as: Augusta County Tax Map 89 Parcels 87, 89, 90, 91, 91B, 92, 93
and shown on the accompanying survey entitled: Physical survey former John E. & / & 95
Jessie F. Todd Property

I made a careful inspection of said premises and of the buildings located thereon at the time of making such survey, and again on Aug. 11, 12, 22, 1998, and at the time of such latter inspection I found Robey to be in possession of said premises as Trustee

I further certify as to the existence or non-existence of the following at the time of my last inspection:

1. Rights of way, old highways, or abandoned roads, lanes or driveways, drains, sewer, water, gas or oil pipe lines across said premises (Include any such matters shown on the recorded plat of subdivision):
See DB 530-91, DB 120-175, DB 116-43 & DB 111-545 for R-O-W's affecting property, also see roads shown & stated on plat.

2. Springs, streams, rivers, ponds, or lakes located, bordering on or running through said premises:
Pine Run flows across western portion of property, pond with outlet stream located at eastern corner of property; see plat.

3. Cemeteries or family burying grounds located on said premises. (Show location on plat):

None seen

4. Telephone, telegraph or electric power poles, wires or lines located on, under, overhanging or crossing said premises and serving other property or properties: Overhead power lines across southern & western portion of property. Power pedestal near central portion of prop. & tele. ped. at western corner, exact location of u.g. lines from pedestals is unknown and may cross property, see plat.

5. Joint driveways or walkways; party walls or rights of support; porches, steps or roofs used in common or joint garages:

None seen

6. Disputed boundaries, encroachments or overhanging projections. (If the buildings, projections or cornices thereof, or signs affixed thereto, fences or other indications of occupancy encroach upon or overhang adjoining properties or easement areas, or the like encroach upon or overhang surveyed premises, specify all such):

None seen

7. Physical evidence of boundary lines on all sides. (Be specific): Irons found and set; stumps, trees, pine knot and fence post found on or referenced to property corners, see plat.

8. Is the property improved? Yes, two poultry houses & chimney from old house
(a) Building is: Brick (); Clapboard (x); other (x) Rock chimney site.
Specify

(b) Building is: One story (x); Two story (); split-level (); other ()
Specify

9. Indications of building construction, alterations or repairs within recent months:

None seen

(a) If new improvements under construction, how far have they progressed?

NA

10. Changes in street lines either completed or officially proposed: None seen or known

(a) Are there indications of recent street or sidewalk construction or repairs?

None seen

11. Are all abutting streets or roads maintained by public authorities? Yes

(a) Is access to such streets or roads limited? Yes, end of S.R. 853 near western prop. corner as indicated by end of state maint. sign; see plat.

12. If the surveyed premises are subject to restrictive covenants, do the improvements, use and occupancy comply with such? (If the premises are subject to restrictive covenants, have the examining attorney furnish you verbatim copy of them)

None, found or known

Thomas E. Shumate, CLS 789

Thomas E. Shumate Surveyor

NOTE: In all cases where there are encroachments, easements, party walls, etc., they should also be denoted upon the map of your survey. Also, be certain map complies with Instructions on reverse side. Particular attention is directed to Paragraph 3 of these Instructions.

No title report furnished at time of survey.

DEFENDANT'S EXHIBIT

Handwritten notes and signatures

(Be sure to answer each item. If the property is not subject to any such of items 1 to 6 inclusive, insert the word "none" following the item.)

000167

LINE	BEARING	DISTANCE				
CURVE	CHORD BEARING	CHORD	RADIUS	DELTA	ARC	TANGENT
L1	N46°40'00"E	143.85'				
L2	N85°28'00"E	60.00'				
C1	N59°39'59"E	296.18'	1465.39'	11°36'00"	296.68'	148.85'
L3	S36°08'01"E	37.00'				
C2	N53°20'59"E	27.09'	1502.39'	01°02'00"	27.09'	13.55'
L4	N52°50'00"E	370.17'				
C3	N49°45'12"E	161.45'	1502.39'	06°09'36"	161.53'	80.84'
L5	N43°19'36"W	20.00'				
C4	N43°56'42"E	141.12'	1482.39'	05°27'24"	141.18'	70.64'
C5	N32°59'00"E	561.32'	1959.86'	16°28'00"	563.26'	283.58'
L6	N24°44'58"E	14.69'				
L7	S65°15'00"E	30.00'				
L8	N24°45'00"E	621.00'				
C6	N29°30'00"E	176.53'	1065.91'	09°30'00"	176.73'	88.57'
C7	N42°55'30"E	263.93'	874.93'	17°21'00"	264.94'	133.49'
L9	N51°36'00"E	299.83'				
L10	N38°24'00"W	20.00'				
L11	N51°36'00"E	253.00'				
C8	N49°39'36"E	101.04'	1492.39'	03°52'48"	101.06'	50.55'
L12	N48°31'12"E	271.10'				
L13	S41°51'05"E	303.20'				
L14	S42°46'31"E	148.27'				
L15	N50°52'17"E	119.56'				
L16	N36°21'03"E	253.10'				
L17	N58°09'09"E	55.80'				

CORNER REFERENCES

- o - INDICATES IRON SET UNLESS OTHERWISE SAID
- o_F - INDICATES IRON FOUND

- 'A' - IRON FOUND BEARS S44°01'50"E 1.73'
- 'B' - CORNER FENCE POST BEARS S80°30'33"E 5.90'
- 'C' - CORNER FENCE POST BEARS N33°59'17"E 8.98'
- 'D' - CORNER FENCE POST BEARS S62°26'01"W 18.86'
- 'E' - CORNER FENCE POST BEARS N64°44'57"E 6.49'
- 'F' - CORNER FENCE POST BEARS N21°29'47"E 5.02'
- 'G' - CORNER FENCE POST BEARS N49°32'46"E 23.35'
- 'H' - CORNER FENCE POST BEARS S81°08'46"E 11.76'
- 'I' - CORNER FENCE POST BEARS S65°40'55"E 9.23'
- 'J' - CORNER FENCE POST BEARS N53°47'45"E 10.11'
- 'K' - CORNER FENCE POST BEARS N51°43'21"E 11.03'
- 'L' - IRON SET AT FOUND PINE KNOT IN STONE PILE
- 'M' - AXEL FOUND BEARS N84°14'02"W 2.64'
- 'N' - HOLLOW PINE STUMP; IRON FOUND BEARS N38°24'13"E 1.01'
- 'O' - IRON FOUND BEARS N81°56'50"W 1.28'

NOTES

- * - STATE ROUTE 853 AKA POOR CREEK LANE. 1 1/2 MILES TO US RTE. 11
- 4 - INDICATE END OF STATE MAINTENANCE SIGN SOUTHEAST OF RAILROAD CENTERLINE.
- 'AA' CONCRETE BLOCK STRUCTURE POSSIBLE WELL 'BB' CONCRETE STRUCTURE
- 'CC' POWER PEDISTAL WITH UG POWER LINES, EXACT LOCATION OF UG LINES UNKNOWN.
- 'DD' FRAME POULTRY HOUSE (42' X 584')
- 'EE' APPROXIMATE LOCATION OF OLD CHIMNEY FROM PAST HOUSE SITE
- INDICATES OVERHEAD POWERLINE WITH POLES *---* INDICATES FENCE
- INDICATES SOUTHEAST EDGE OF 30' R-O-W FOR TODD, SEE PG 1-3545
- SEE DB 530-97, DB 530-95 & DB 200-84 FOR WATER RIGHTS AFFECTING THIS PROPERTY
- SEE DB 530-91, DB 120-175, DB 116-43 & DB 111-545 FOR R-D-W AFFECTING THIS PROPERTY
- N/F - INDICATES PROPERTY LINE NOT FENCED, WITH FENCE ALONG/NEAR ALL OTHER EXTERNAL PROPERTY LINES
- CL— INDICATES CENTERLINE OLD ROADS. OTHER INTERNAL FARM ROADS NOT SHOWN.
- DD— INDICATES RAILROAD DRAINAGE DITCHES
- INDICATES INTERNAL DEED AND/OR TAX MAP PROPERTY LINES
- NO TITLE REPORT FURNISHED AT TIME OF SURVEY

TO ALL PARTIES INTERESTED IN TITLE TO PREMISES SURVEYED THIS IS TO CERTIFY THAT ON AUGUST 7, 11, 12, 22 & 24, 1998 I SURVEYED THIS PROPERTY. FOR REFERENCE TO THIS PROPERTY SEE DEED BOOKS 516-248, 614-243, 530-97, 530-95, 530-91, 545-52, AND 523-401 RECORDED IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF THE COUNTY OF AUGUSTA, VIRGINIA. SEE CHAIN OF TITLE FOR EASEMENTS, CONDITIONS, RESTRICTIONS, AND/OR RESERVATIONS OF RECORD. FOLLOWING FLOOD STATEMENT NOT BASED ON MY SURVEY. THIS PROPERTY IS WITHIN FLOOD ZONE X, OUTSIDE THE 500 YEAR FLOOD, AND ZONE A, NO BFE DETERMINED. FIRM COMMUNITY-PANEL NO. 510013 03008 & 03058 DATED MAY 17, 1990.

SHEET 2 OF 2

000168

ATTORNEY'S PRELIMINARY REPORT ON TITLE TO **Lawyers Title Insurance Corporation**

MARKETABLE FEE SIMPLE TITLE IS VESTED IN: **JOHN E. & JESSIE F. TODD**
 BY **WILLIAM T. ROBEY, III, SUBSTITUTE TRUSTEE** PURCHASE PRICE
\$ 306,000.00

NAME AND ADDRESS OF PURCHASER: **Lofton Ridge, LLC**

TO BE MORTGAGED TO: **First Virginia Bank - Blue Ridge, Its Successors and/or Assigns, ATIMA**

TYPE OF LOAN	RES. LOAN	BORROWER'S	LOAN AMOUNT	PERMANENT	TEMP. CONVEY	CONST. FORM	DOES MTO SECURE FUTURE ADVANCES	FIXED RATE	ADJ. RATE	OWNER'S POLICY DESIRED	POLICY NUMBER, IF PREVIOUSLY INSURED
YES NO	YES NO	YES NO		YES NO			YES NO	YES NO		YES NO	
XX	XX	XX	\$350,000.00	XX			XX	XX		XX	

LOCATION OF PROPERTY, CITY, COUNTY, STATE — PLEASE ATTACH RIDER GIVING DESCRIPTION AS IT WILL APPEAR IN DEED OR MORTGAGE AND SHOW SOURCE OF TITLE OF PRESENT OWNER.

1. TAXES AND SPECIAL ASSESSMENTS: (If none, so state)

A. STATE, COUNTY, CITY AND SCHOOL TAXES PAID THIS AND INCLUDING	B. TAXES NOW DUE AND PAYABLE	C. A LIEN BUT NOT DUE AND PAYABLE	D. SPECIAL LEVIES OR ASSESSMENTS NOW DUE	E. SPECIAL LEVIES OR ASSESSMENTS PAYABLE IN FUTURE INSTALLMENTS	F. INCOME, ESTATE OR INHERITANCE TAX LIENS, STATE OR FEDERAL
1st 1/2 1998	None	2nd 1/2 1998	None	None	None

2. MORTGAGES, DEEDS OF TRUST, AND VENDOR'S LIENS (Show all and give complete data—If none, so state)

See Attached

3. ARE THERE ANY RESTRICTIVE COVENANTS AND CONDITIONS? NO (If so, attach verbatim copy—unless previously furnished)

A. FILED FOR RECORD ON	BOOK	PAGE	VIOLATED YES NO	B. DO RESTRICTIONS CONTAIN REVERSIONARY OR FUTURE CLAUSE?	2. IF SO, HAS SUCH CLAUSE BEEN RELEASED OR SUBORDINATED IN FAVOR OF MORTGAGEE? (If yes, attach copy)

4. DOES RECORDED PLAT OF SUBDIVISION SHOW SETBACK LINE? (If so, give details) NO

5. ARE THERE OTHER LIENS, OBJECTIONS OR DEFECTS? (If any, indicate items here and describe below)

A. JUDGMENTS OR DECREES, STATE OR FEDERAL	C. DECEDENT'S DEBTS OR UNADMINISTERED ESTATE	E. FINANCING STATEMENTS ON RETURN FILED IN NAME OF AN OWNER OF THE PREMISES OR OTHERWISE KNOWN	G. OIL AND MINERAL RIGHTS
B. MECHANICS' AND MATERIALMEN'S NOTICES ON LIENS	D. BANKRUPTCY PROCEEDINGS: ASSETS AND LIABILITIES	F. EASEMENTS, PARTY WALL AGREEMENTS, ETC.	H. ENVIRONMENTAL LIENS, STATE OR FEDERAL
			I. OTHER MATTERS

782/594: Easement to Continental Telephone Company of Virginia.
 900035419: Financing Statement to USA Farmers Home Administration to secure fixtures.
~~XXXXXXXXXXXXXXXXXXXX~~ 30' right-of-way from Route 853 for the benefit of the 18.980 parcel as shown in Deed Book 1360/10 & Plat Book 1/3545.

The easement over the N & W Railroad is a prescriptive easement that has been in use prior to the construction of the railroad and is a valid easement under the wagon wheel statute and is shown on the plans of the railroad as an existing right of way. Title to Parcel IV is by tax title deed. I certify that the proceedings were properly conducted and more than 20 years have passed since title was conveyed by the Clerk of Court (1973).

6. APPURTENANT EASEMENTS AND PARTY WALL RIGHTS. IF SUCH EASEMENTS OR RIGHTS OVER ADJOINING PREMISES ARE BEING CONVEYED OR MORTGAGED, HAVE YOU EXAMINED THE TITLE TO THE ADJOINING PREMISES AND DO YOU CERTIFY THAT UNENCUMBERED TITLE TO SUCH EASEMENTS OR RIGHTS IS VESTED IN THE VENDOR OR MORTGAGOR?

(INDICATE YES XXX NO _____ OR NOT APPLICABLE _____)

7. IF PROPERTY DESCRIBED ABOVE IS A CONDOMINIUM UNIT, DO YOU CERTIFY THAT ALL DOCUMENTS REFERRED TO IN YOUR STATE'S CONDOMINIUM STATUTE COMPLY WITH REQUIREMENTS OF THAT STATUTE?

(INDICATE YES _____ NO _____ OR NOT APPLICABLE XXX)

B. A. PROPERTY OCCUPIED BY OWNER OR OTHERS	IF BY OTHER THAN OWNER, PROVIDE DETAILS UNDER SCH B 3 ABOVE	C. DATE LAST REPAIRS OR CONSTRUCTION COMPLETED	LIEN PERIOD EXPIRED YES NO	D. IS PER AS TO MATTERS OF SURVEY RECORDED? (IF SO ATTACH CURRENT PLAT OF SURVEY)	E. WILL ANY PORTION OF LOAN PROCEEDS FINANCE CONSTRUCTION?	F. DOES RECORD DISCLOSE RIGHT OF ACCESS TO PUBLIC ROAD?
XX		Unknown	XXX	Yes	No	Yes

F. INDICATE ANY ALTA ENDORSEMENT(S) REQUESTED BY LENDER

August 25, 1998 at 9:00 A.M.

THE UNDERSIGNED CERTIFIES AS SET FORTH ON THE REVERSE: THE FOREGOING INFORMATION IS CORRECT.

000169

DATE AND TIME OF TITLE CERTIFICATION
 FRANKLIN, DENNEY, WARD & LAWSON, P/C

APPROVED ATTORNEY

R. Denney

Waynesboro, Virginia

ATTORNEY'S FINAL CERTIFICATE
TO
Lawyers Title Insurance Corporation
National Headquarters - Richmond, Virginia

BINDER OR COMMITMENT NUMBER

THE UNDERSIGNED CERTIFIES TO LAWYERS TITLE INSURANCE CORPORATION THAT ALL THE REQUIREMENTS OF SCHEDULE B OF THE INTERIM TITLE INSURANCE BINDER OR COMMITMENT NUMBERED ABOVE OR ATTACHED HERETO, INCLUDING THE SATISFACTION AND RELEASE OF ALL LIENS AND ENCUMBRANCES REQUIRED TO BE SATISFIED AND RELEASED, HAVE BEEN COMPLIED WITH AND THAT MARKETABLE, FEE SIMPLE TITLE TO THE REAL ESTATE DESCRIBED UNDER SCHEDULE A OF SAID BINDER OR COMMITMENT IS AT THE DATE OF THIS CERTIFICATE, VESTED OF RECORD IN:

SECTION 1 - OWNER	UNDER DUTY EXECUTED AND ACKNOWLEDGED DEED OF BARGAIN AND SALE FROM		
	AND <u>William T. Robey III</u>		
	DATED <u>9/11/98</u>		
	STATE OF <u>VA</u>		
BOOK <u>1380</u>		PAGE <u>679</u>	
DUTY FILED FOR RECORD IN THE OFFICE OF (AUTH. RECORDING OFFICIAL)		COUNTY OF <u>Augusta</u>	
DATE AND TIME FILED FOR RECORD <u>9/29/98 @ 11:01 PM</u>		RECORDER'S DOCUMENT OR FILING NUMBER	
CONSIDERATION		<u>\$ 306,000.00</u>	

SUBJECT ONLY TO THE DEFECTS, OBJECTIONS, LIENS, AND ENCUMBRANCES SET FORTH UNDER SCHEDULE B OF SAID BINDER OR COMMITMENT.

AND (NATURE OF SECURITY INSTRUMENT)		FROM	
AND <u>Deed of Trust</u>		<u>Softan Ridge, LLC</u>	
TO (NAME OF TRUSTEE IF A DEED OF TRUST)			
<u>David W. Driver + Donald E. McFall</u>			
DATED <u>9/28/98</u>		DUTY FILED FOR RECORD IN THE OFFICE OF (AUTH. RECORDING OFFICIAL)	
STATE OF <u>VA</u>		COUNTY OF <u>Augusta</u>	
BOOK <u>1380</u>		PAGE <u>684</u>	
DATE AND TIME FILED FOR RECORD <u>9/29/98 @ 11:03 AM</u>		RECORDER'S DOCUMENT OR FILING NUMBER	
TO SECURE THE PRINCIPAL SUM OF		<u>\$ 350,000.00</u>	
AND INTEREST THEREON			

TRANSFERRED -		TO SECURE THE PRINCIPAL SUM OF	
(A) BY SEPARATE ASSIGNMENT FROM THE ABOVE MORTGAGEE OR BENEFICIARY		<u>\$ 350,000.00</u>	
DATED		TO	
DATE AND TIME FILED FOR RECORD		AS DOCUMENT NUMBER	
BOOK		PAGE	
RECORDED IN			
(B) BY ENDORSEMENT OF NOTES ONLY AND DELIVERY			
TO			

THIS IS TO FURTHER CERTIFY THAT SAID SECURITY INSTRUMENT IS LEGAL AND VALID ACCORDING TO ITS TENOR AND PURPORT, THAT NOTHING HAS BEEN FILED OF RECORD OR COME TO THE ATTENTION OF THE UNDERSIGNED WHICH WOULD AFFECT ADVERSELY THE TITLE TO THE REAL ESTATE DESCRIBED UNDER SCHEDULE A OF SAID BINDER OR COMMITMENT OR THE LIEN AND PRIORITY OF SAID INSTRUMENT, WHETHER PRIOR OR SUBORDINATE TO THE LIEN OF SAID SECURITY INSTRUMENT.

THE FINAL MATURITY OF THE DEBT IS 2000
YEAR ONLY (REQUIRED IN GA. AND MD. ONLY)

NOTE: IN THE EVENT THE INSTRUMENT(S) HEREIN REFERRED TO EMPLOY(S) ANY OTHER OR DIFFERENT DESCRIPTION FROM THAT SET FORTH UNDER SCHEDULE A OF THE SAID BINDER OR COMMITMENT, OR CONTAINS ANY EXCEPTIONS OR RESERVATIONS NOT COVERED BY THE EXCEPTIONS UNDER SCHEDULE B OF SAID BINDER OR COMMITMENT, THE TITLE COMPANY SHOULD BE ADVISED FULLY.

ALSO, THIS IS TO CERTIFY THAT ALL TAXES AND ASSESSMENTS AGAINST SAID REAL ESTATE HAVE BEEN PAID UP TO AND INCLUDING THOSE FOR:
YEAR 1st 1/2 1998 SHOW YEAR OR PORTION OF YEAR THROUGH WHICH TAXES AND ASSESSMENTS HAVE BEEN PAID. LOAN IS ☐ FHA ☐ VA ☒ OTHER Conventional
MY EXAMINATION OF THE TITLE TO SAID REAL ESTATE WAS CONTINUED FROM THE DATE FIRST WRITTEN ON SAID BINDER, OR COMMITMENT DOWN TO:
DATE AND TIME 9/29/98 @ 11:03 AM

66 1st 1/2 1998

VIRGINIA: IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOFTON RIDGE, LLC,

and

WARREN KOINER,

and

JOHN B. DAVIS,

and

WILLIAM HAUSRATH

Plaintiffs,

v.

PHILLIP H. MILLER, ESQUIRE,

At Law No. _____

and

RHEA & MILLER, P.C.,

and

RONALD W. DENNEY, ESQUIRE,

and

FRANKLIN, DENNEY, WARD &
LAWSON, PLC,

and

TOM SHUMATE, SURVEYOR, INC.,

and

THOMAS E. SHUMATE,

Defendants.

DEFENDANT'S
EXHIBIT

1/10/03 2-11-03

MOTION FOR JUDGMENT

Lofton Ridge, LLC, Warren Koiner, John B. Davis, and William Hausrath for their Motion for Judgment against Phillip E. Miller, Esquire, Rhea & Miller, P.C., Ronald W. Denney, Esquire, Franklin, Denney, Ward & Lawson, PLC, Tom Shumate, Surveyor, Inc. and Thomas E. Shumate state as follows:

BACKGROUND

1. Lofton Ridge, LLC ("Lofton Ridge") is the owner of property located in the Riverheads Magisterial District of Augusta County, Virginia (the "Property"). The Property was originally comprised of approximately 226 acres. The members of Lofton Ridge are Warren Koiner, John B. Davis, and William Hausrath.

2. Franklin, Denney, Ward & Lawson, PLC ("FDW&L") is a law firm with its principal place of business in Waynesboro, Virginia. Upon information and belief, Ronald W. Denney, Esquire practices law for and is a member of FDW&L.

3. Rhea & Miller, P.C. ("Rhea & Miller") is a law firm with its principal place of business in Staunton, Virginia. Upon information and belief, Phillip H. Miller, Esquire practices law for and is a shareholder of Rhea & Miller.

4. Tom Shumate, Surveyor, Inc. is a corporation organized and existing under the laws of the Commonwealth of Virginia and with its principal place of business in Waynesboro, Virginia. Thomas E. Shumate is, upon information and belief, a certified land surveyor and owner of Tom Shumate, Surveyor, Inc.

5. On or about June 24, 1998, the Property, which was then owned by John E. Todd and Jessie F. Todd, was subject to foreclosure and offered for sale at a public auction.

6. On or about June 24, 1998, Mr. Koiner entered into a Memorandum of Sale for the purchase of the Property. The Purchase price of the property was \$306,000. Upon executing the Memorandum of Sale, Mr. Koiner paid a deposit of \$30,600. (A true and accurate copy of the Memorandum of Sale is attached hereto as Exhibit 1.)

7. On or about July 20, 1998, Lofton Ridge was admitted to record and authorized to do business by the Commonwealth of Virginia State Corporation Commission. The purpose of Lofton Ridge was to acquire and develop for profit the Property. The Property was to be resold in not less than twelve (12) parcels to create a residential subdivision.

8. Shortly after its formation, Lofton Ridge reimbursed Mr. Koiner for the deposit of \$30,600 and was assigned all rights and obligations under the Memorandum of Sale.

9. Messrs. Koiner, Davis, and Hausrath retained Mr. Denney and FDW&L to form Lofton Ridge. Messrs. Koiner, Davis, Hausrath and Lofton Ridge retained Mr. Denney and FDW&L to provide advice regarding the acquisition and development of the Property and to act as settlement attorney in closing on the Property.

10. Messrs. Koiner, Davis, and Hausrath advised Mr. Denney that the sole purpose of Lofton Ridge was the acquisition and development for profit of the Property. Messrs. Koiner, Davis, and Hausrath also told Mr. Denney that the Property was to be resold in not less than 12 parcels to create a residential subdivision and that they intended to improve the Property to facilitate its sale.

11. As part of their duties as counsel for Messrs. Koiner, Davis, and Hausrath and Lofton Ridge, Mr. Denney and FDW&L were to perform a title examination. Mr.

Denney and FDW&L recommended that Phillip H. Miller, Esquire of Rhea & Miller, P.C. perform the title examination. As a result of the recommendation of Mr. Denney and FDW&L, Lofton Ridge retained Phillip Miller, Esquire and Rhea & Miller to perform a title examination of the Property in association with Mr. Denney and FDW&L.

12. The purpose of the title examination was, inter alia, to identify any liens, objections, defects, and easements affecting the property, or problems with access to or Lofton Ridge's intended use of the Property so that Lofton Ridge could determine whether to close on or develop the Property.

13. Mr. Miller and Rhea & Miller performed the title examination and prepared an Attorney's Preliminary Report on Title (the "Report"). (The Report is attached hereto as Exhibit 2.) In the Report, Mr. Miller and Rhea & Miller certified, inter alia, the following:

5. ARE THERE ANY OTHER LIENS, OBJECTIONS OR DEFECTS? yes

* * *

The easement over the N&W Railroad is a prescriptive easement that has been in use prior to the construction of the railroad and is a valid easement under the wagon wheel [sic.] statute and is shown on the plans of the railroad as an existing right of way.

6. IF EASEMENTS IN OR OVER ADJOINING PREMISES OR PARTY WALL RIGHTS ARE BEING CONVEYED OR MORTGAGED, HAVE YOU EXAMINED THE TITLE TO SUCH ADJOINING PREMISES AND DO YOU CERTIFY THAT UNENCUMBERED TITLE TO SUCH RIGHTS OR EASEMENTS IS VESTED IN THE VENDOR OR MORTGAGOR? yes

* * *

DOES RECORD DISCLOSE ACCESS TO PUBLIC ROAD? yes

14. Mr. Denney and FDW&L adopted, ratified, and presented the Report as their own.

15. Messrs. Koiner, Davis, and Hausrath and Lofton Ridge retained Mr. Shumate and Thomas Shumate Surveyor, Inc. to perform a physical survey of the Property and to provide a Surveyor's Report. On or about September 9, 1998, Shumate prepared a physical survey of the Property (the "Survey") and the Surveyor's Report. (A true and accurate copy of the Survey and the Surveyor's Report are attached hereto as Exhibit 3.)

16. In the Surveyor's Report, Mr. Shumate and Thomas Shumate Surveyor, Inc. certified, inter alia, the following:

11. Are all abutting streets or roads maintained by public authorities?
Yes

17. On or about September 11, 1998, the Property was conveyed to Lofton Ridge by William T. Robey, III, Grantor/Substitute Trustee of the Property by Deed of Trust. The Deed of Trust was recorded on September 29, 1998 in Augusta County Circuit Court.

18. Final settlement occurred September 28, 1998. (A true and accurate copy of the Settlement Statement is attached hereto as Exhibit 4.) At closing, FDW&L charged Lofton Ridge \$1,161.50 for professional services rendered and Rhea & Miller charged Lofton Ridge \$300 for professional services rendered.

19. Following settlement, Lofton Ridge began to develop the Property by building a road intended to provide access to and from the Property. The new road was supposed to link to a dirt road that crosses property and a railroad crossing owned by Norfolk Southern Corporation a/k/a Norfolk and Western Railroad ("Norfolk Southern").

The dirt road is the only means of egress and ingress to the Property from State Route 853.

20. On or about June 16, 2000, Norfolk Southern denied Lofton Ridge access to the dirt road, contending that Lofton Ridge was not entitled to use the dirt road to reach State Route 853.

21. On July 11, 2000, Lofton Ridge filed a declaratory judgment action against Norfolk Southern in the Circuit Court of Augusta County, seeking a declaration that Lofton Ridge was entitled to use the dirt road to access State Route 853. As of the date of filing of this Motion for Judgment, that matter is still pending.

22. Without access to State Route 853, the Property is landlocked and may not be developed as intended by Lofton Ridge. Had Lofton Ridge known that the Property was landlocked and could not be developed as intended, it would not have closed on or begun developing the Property.

COUNT I
CONSTRUCTIVE FRAUD
(PHILLIP E. MILLER AND RHEA & MILLER)

23. Messrs. Koiner, Hausrath, and Davis and Lofton Ridge reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 22, above.

24. The representations set forth in paragraph 13 above were false and were negligently made by Mr. Miller and Rhea & Miller. The representations were made in such a way as to induce Messrs. Koiner, Hausrath, and Davis and Lofton Ridge to rely upon them, with the intent that Messrs. Koiner, Hausrath, and Davis and Lofton Ridge rely upon them.

25. Mr. Miller and Rhea & Miller knew or had reason to know that Messrs. Koiner, Hausrath, and Davis and Lofton Ridge would rely on the representations in the Report. Mr. Miller Rhea & Miller knew or had reason to know that Messrs. Koiner, Hausrath, and Davis and Lofton Ridge would use the Report in determining whether to close on and develop the Property.

26. Messrs. Koiner, Hausrath, and Davis and Lofton Ridge reasonably and detrimentally relied upon the misrepresentations by closing on the Property and by starting construction on the access road.

27. As a direct and proximate result of Mr. Miller and Rhea & Miller's false and negligent representations, Messrs. Koiner, Hausrath, and Davis and Lofton Ridge have been damaged in an amount in excess of \$400,000.

COUNT II
CONSTRUCTIVE FRAUD
(RONALD W. DENNEY AND FDW&L)

28. Messrs. Koiner, Hausrath, and Davis and Lofton Ridge reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 27, above.

29. Mr. Miller and Rhea & Miller were the agents and/or associates of Mr. Denney and FDW&L for the purposes of performing the title examination.

30. The false and negligent representations made by Mr. Miller and Rhea & Miller in the Report were made in connection with performing the title examination.

31. Mr. Denney and FDW&L ratified and adopted the Report as their own.

32. Mr. Denney and FDW&L knew or had reason to know that Messrs. Koiner, Hausrath, and Davis and Lofton Ridge would rely on the representations in the

Report. Mr. Denney and FDW&L knew or had reason to know that Messrs. Koiner, Hausrath, and Davis and Lofton Ridge would use the Report in determining whether to close on and develop the Property.

33. Messrs. Koiner, Hausrath, and Davis and Lofton Ridge reasonably and detrimentally relied upon the false and negligent representations in the Report by closing on the Property and by starting construction on the access road.

34. As a direct and proximate result of Mr. Denney and FDW&L's false and negligent representations, Messrs. Koiner, Hausrath, and Davis and Lofton Ridge have been damaged in an amount in excess of \$400,000.

COUNT III
PROFESSIONAL NEGLIGENCE
(PHILLIP H. MILLER AND RHEA & MILLER)

35. Messrs. Koiner, Hausrath, and Davis and Lofton Ridge reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 34, above.

36. Mr. Miller and Rhea & Miller were counsel for Lofton Ridge. As counsel for Lofton Ridge, Mr. Miller and Rhea & Miller had a duty to exercise reasonable care in the performance of the title examination.

37. Mr. Miller and Rhea & Miller failed to exercise reasonable care in the performance of the title examination. By way of example and not limitation, Mr. Miller and Rhea & Miller failed to conduct properly the title examination.

38. As a direct and proximate result of Mr. Miller and Rhea & Miller's failure to exercise reasonable care in the performance of the title examination, Messrs. Koiner,

Hausrath, and Davis and Lofton Ridge have been damaged in an amount in excess of \$400,000.

COUNT IV
PROFESSIONAL NEGLIGENCE
(RONALD W. DENNEY AND FDW&L)

39. Messrs. Koiner, Hausrath, and Davis and Lofton Ridge reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 38, above.

40. Mr. Denney and FDW&L were counsel for Messrs. Koiner, Hausrath, and Davis and Lofton Ridge. As counsel for Messrs. Koiner, Hausrath, and Davis and Lofton Ridge, Mr. Denney and FDW&L had a duty to exercise reasonable care in providing advice to them. By way of example and not limitation, Mr. Denney and FDW&L had a duty to advise fully and properly Messrs. Koiner, Hausrath, and Davis and Lofton Ridge regarding the extent to which they would be able to develop the Property for its intended use.

41. By way of example and not limitation, Mr. Denney and FDW&L failed to exercise reasonable care in advising Messrs. Koiner, Hausrath, and Davis and Lofton Ridge regarding any limitations on access to or development of the Property. Had Messrs. Koiner, Hausrath, and Davis and Lofton Ridge been properly advised, they would not have closed on or begun developing the Property.

42. As a direct and proximate result of Mr. Denney and FDW&L's failure to exercise reasonable care in the performance of the duties for which it was retained, Lofton Ridge has been damaged in an amount in excess of \$400,000.

COUNT V
PROFESSIONAL NEGLIGENCE/VICARIOUS LIABILITY
(MR. DENNEY AND FDW&L)

43. Messrs. Koiner, Hausrath, and Davis and Lofton Ridge reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 42, above.

44. Mr. Miller and Rhea & Miller were the agents and/or associates of Mr. Denney and FDW&L.

45. Mr. Denney and FDW&L are vicariously liable for the negligence and constructive fraud of their agents, Mr. Miller and Rhea & Miller, set forth in Counts I and III, above.

COUNT VI
CONSTRUCTIVE FRAUD
(THOMAS E. SHUMATE AND THOMAS E. SHUMATE SURVEYOR, INC.)

46. Messrs. Koiner, Hausrath, and Davis and Lofton Ridge reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 45, above.

47. The representation set forth in paragraph 16 above was false and was negligently made by Mr. Shumate and Tom Shumate, Surveyor, Inc. The representation was made in such a way as to induce Messrs. Koiner, Hausrath, and Davis and Lofton Ridge to rely upon it with the intent that Messrs. Koiner, Hausrath, and Davis and Lofton Ridge rely upon it.

48. Mr. Shumate and Tom Shumate, Surveyor, Inc. knew or had reason to know that Messrs. Koiner, Hausrath, and Davis and Lofton Ridge would rely on the representations in the Surveyor's Report. Mr. Shumate and Tom Shumate, Surveyor, Inc.

knew or had reason to know that Messrs. Koiner, Hausrath, and Davis and Lofton Ridge would use the Surveyor's Report in determining whether to close on and develop the Property.

49. Messrs. Koiner, Hausrath, and Davis and Lofton Ridge reasonably and detrimentally relied upon the misrepresentation by closing on the Property and by starting construction on the access road.

50. As a direct and proximate result of Mr. Shumate and Tom Shumate Surveyor, Inc.'s false and negligent representation, Messrs. Koiner, Hausrath, and Davis and Lofton Ridge have been damaged in an amount in excess of \$400,000.

COUNT VII
PROFESSIONAL NEGLIGENCE
(THOMAS E. SHUMATE AND TOM SHUMATE, SURVEYOR, INC.)

51. Messrs. Koiner, Hausrath, and Davis and Lofton Ridge reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 50, above.

52. As land surveyors for Messrs. Koiner, Hausrath, and Davis and Lofton Ridge, Mr. Shumate and Tom Shumate, Surveyor, Inc. had a duty to exercise reasonable care in performing the services for which they were retained.

53. Mr. Shumate and Tom Shumate, Surveyor, Inc. breached their duty of care by failing to advise Messrs. Koiner, Hausrath, and Davis and Lofton Ridge that the property was landlocked and did not abut a street or road maintained by a public authority.

54. As a direct and proximate result of Mr. Shumate and Thomas Shumate Surveyor, Inc.'s breach of their duty of care, Messrs. Koiner, Hausrath, and Davis and Lofton Ridge have been damaged in an amount in excess of \$400,000.

WHEREFORE, Warren Koiner, William Hausrath, John B. Davis and Lofton Ridge, LLC, by counsel, pray that the Court enter judgment in their favor and against Phillip E. Miller, Esquire, Rhea & Miller, P.C., Ronald W. Denney, Esquire, and Franklin, Denney, Ward & Lawson, PLC in an amount in excess of \$400,000, award them their costs as by law allowed, and grant such other and further relief as the Court may deem appropriate.

Respectfully Submitted,

LOFTON RIDGE, LLC, WARREN
KOINER, JOHN B. DAVIS AND
WILLIAM HAUSRATH

By Counsel

COUNSEL:



James W. Barkley, Esquire (VSB #35778)
Elisabeth M. Ayyildiz (VSB #41261)
Morin & Barkley
123 East Main Street, Seventh Floor
Charlottesville, Virginia 22902
(804) 293-1200
(804) 293-2135 (facsimile)


Counsel for Warren Koiner, William Hausrath,
John B. Davis and Lofton Ridge, LLC

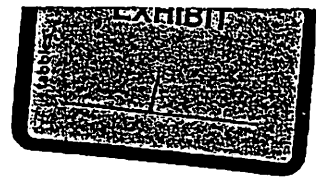
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FILED IN THE CLERK'S OFFICE OF THE
CIRCUIT COURT OF AUGUSTA COUNTY
THE 6th DAY OF July, 2001
AT 2:30 P. M.

WRIT TAX \$ 25.00
FEF 159.00
TOTAL PAID \$ 184.00

TESTE:

 CLERK/D.C.



MEMORANDUM OF SALE

Warren Komer has this 24th day of June, 1998, purchased the premises described in the annexed Foreclosure Sale for the sum of Three hundred six thousand & no/100 Dollars (\$306,000.00), and hereby promises and agrees to comply with the terms and conditions of the sale of said premises contained in said notice and the attached Terms of Sale. Title in the property is requested in the following name and style:

Dated: 6/24/98

Warren Komer
Purchasers

Received from Warren Komer of P.O. Box 174, Spotswood, Pa. 22952, the sum of Thirty Thousand Six Hundred Dollars (\$30,600.00), being ten percent (10%) of the amount bid for property sold by me under and pursuant to the terms of a Power of Sale.

Dated: 6/24/98

H. J. Pater 111
Individual Conducting Sale
(Substitute Trustee)

TERMS OF SALE

The premises described in the Notice of Foreclosure Sale will be sold under my direction upon the following terms:

A minimum of ten percent (10%) of the purchase money of said premises will be required to be paid in cash or by cashier's check, certified check, or postal money order payable to W. T. Robay, III, Substitute Trustee for Farmers Home Administration, United States Department of Agriculture, at the time and the place of sale, for which a receipt will be given.

The balance of said purchase money will be required to be paid in cash, or in one of the forms specified above payable to the Trustee as shown above, and delivered to my office at 131 West 21st Street, Buena Vista, Virginia, within thirty (30) days after the sale, or upon delivery of the Trustee's Deed.

The purchaser of said premises will at the time and place of sale, sign a memorandum of purchase and an agreement to comply with the terms and conditions of the sale herein contained.

The Bidding will be kept open after the property is struck down; and in case any purchaser shall fail to comply with any of the above conditions of sale, the premises so struck down will be again put up for sale under these same terms of sale, and such purchaser will be held liable for any deficiency there may be between the sum for which they may be purchased on the resale, and also for any costs or expenses occurring on such resale.

Dated: 6/24/91

W. T. Robay, III
Substitute Trustee

Post-It® Fax Note	7671	Date	6/27/01	# of pages	3
To	Betsy	From	Heane		
Co./Dept.		Co.			
Phone #		Phone #			
Fax #		Fax #			

TRUSTEE'S SALE**OF FARM****252 ACRES, MORE OR LESS****RIVERHEADS MAGISTERIAL DISTRICT****ROUTE 1, BOX 58****GREENVILLE, VA 24440**

In execution of a Deed of Trust dated May 9, 1979 from John E. Todd and Jessie F. Todd to secure the United States of America, acting through the Farmers Home Administration, United States Department of Agriculture, of record in the Clerk's Office for the Circuit Court of Augusta County, Virginia, in Deed Book 718, at page 575, the undersigned Substitute Trustee will offer for sale to the highest bidder at

PUBLIC AUCTION**ON****JUNE 24, 1998****AT 4:00 PM**

**AT THE FRONT DOOR OF THE COURTHOUSE OF
THE COUNTY OF AUGUSTA, VIRGINIA
IN STAUNTON, VIRGINIA**

A farm situate in the Riverheads Magisterial District of Augusta County, Virginia, located approximately two (2) miles southeast of the Village of Greenville, having as its address Route 1, Box 58, Greenville, Virginia, containing approximately 252 acres, more or less, composed of a number of contiguous parcels described in the above mentioned Deed of Trust of record in said Clerk's Office in Deed Book 718, at page 575, which farm originally contained approximately 261 acres, more or less, from which there has been separated and not made a part of this trustee's sale a parcel of land containing 18.980 acres upon which there is located a residence house of the farm together with associated farm buildings, which parcel adjoins the N & W Railroad and is bounded as follows:

BEGINNING at a set iron pin in the northwest line of said railroad, a corner to Norheim bears S 42° 56' 41" W 447.06 ft. and S 43° 00' E 30.00 ft., thence from said beginning iron pin by seven lines with the southeast side of the railroad right of way N 42° 56' 41" E 548.54 ft. to an iron pin, S 47° 03' 19" E 20.00 ft. to a set iron pin, S 42° 56' 41" E 388.56 ft. to a set iron pin, thence by a curve to the right having a central angle of 10° 44' 47", a radius of 1580.46 ft. for an arc length of 296.43 ft. to a set iron pin, S 36° 18' 32" E 20.00 ft. to a set iron pin, thence by a curve to the right having a

central angle of $10^{\circ} 21' 06''$, a radius of 1560.46 ft. for an arc length of 281.93 ft. to a set iron pin, N $46^{\circ} 52' 31''$ E 49.60 ft. to a set iron pin in said railroad line, thence by four new lines S $37^{\circ} 29' 15''$ E 463.19 ft. to a set iron pin, S $40^{\circ} 51' 01''$ W 1280.54 ft. to a set iron pin, thence N $56^{\circ} 38' 24''$ W passing a 6" black oak at 8.26 ft. for a total distance of 436.84 ft. to a set iron pin, N $75^{\circ} 21' 12''$ W 250.79 ft. to the beginning containing 18.980 acres.

A bidder's deposit of ten percent (10%) of the sale price by cashier's check, certified check, postal money order or cash will be required.

Terms of sale: Cash, final settlement within 30 days.

W.T. ROBEY, III
SUBSTITUTE TRUSTEE
131 West 21st Street
P.O. Box 669
Buena Vista, Virginia 24416
(540) 261-2575

FOR INFORMATION CONTACT:
Farm Service Agency
P. O. Box 70
Verona, VA 24482
(540) 248-6218

**ATTORNEY'S PRELIMINARY
REPORT ON TITLE**

TO

Ronald W. Denney
P. O. Drawer 1140, Waynesboro, VA



Marketable Fee Simple Title is Vested in: **JOHN E. TODD & JESSIE F. TODD**

Name of Purchaser:

To be mortgaged to:

Purchase Price:

Loan Amount:

Permanent	Temp.	Const.	Does Mtg. Secure	Owner's Policy	Prev.	Name of Previous Co. and Policy No.
	Const.	Perm.	Future Advances	Desired	Insured	if insured within last 10 years

SCHEDULE A:	SEE ATTACHED FOR DESCRIPTION
	ALTA 8.1 REQUIRED NO
	INSURED CLOSING LETTER: no

SCHEDULE B:						
1. TAXES AND SPECIAL ASSESSMENTS:						
TAXES PAID THRU	TAXES NOW DUE	A LIEN BUT NOT DUE	SPEC. ASSESS.	LAND USE	INCOME/ESTATE	
1997	1/2 '98	2nd 1/2 1998	none	yes	none	

2. MORTGAGES, DEEDS OF TRUST, AND VENDORS LIENS:
 Deed of trust to Marion V. Baker, Trustee, dated 05/09/79 securing loans of \$30,100, \$365,500 & \$10,500 to USA Farmers Home Administration., of record in Deed Book 718, Page 575.
 Deed of trust to Marion V. Baker, Trustee, dated 11/21/75 securing a loan of \$30,100 to USA Farmers Home Administration of record in Deed Book 647, P age 315.
 Deed of trust to Philip H. Miller & Richard F. McPherson, Trustees, dated 2/27/79 securing a \$11,419.20 debt to Staunton School of Cosmetology, Inc. of record in Deed Book 714, Page 207. This debt has been paid but not released.

3. ARE THERE ANY RESTRICTIVE COVENANTS AND CONDITIONS?	none
RECORDED ON	BOOK PAGE VIOLATED FORFEITURE RELEASE OF FORFEITURE

4. DOES RECORDED PLAT SHOW A SETBACK LINE? no

5. ARE THERE ANY OTHER LIENS, OBJECTIONS OR DEFECTS? yes
 Easement to Continental Telephone Company of VA dated 09/17/81 of record in DB 782, P 594.
 Financing statement recorded as Doc. #900035419 to USA Farmers Home Administration securing fixtures.
 Thirty foot right of way from Route 853 for the benefit of the 18.980 acre parcel as shown on plat of record in Deed Book 1360, Page 10 (Plat Book 1, Page 3545)
 The easement over the N & W Railroad is a prescriptive easement that has been in use prior to the construction of the railroad and is a valid easement under the wagon wheel statute and is shown on the plans of the railroad as an existing right of way.
 Title to Parcel IV is by tax title deed. I certify that the proceedings were properly conducted and more than 20 years has passed since title was conveyed by the Clerk of the Court (1973).

6. IF EASEMENTS IN OR OVER ADJOINING PREMISES OR PARTY WALL RIGHT
ARE BEING CONVEYED OR MORTGAGED, HAVE YOU EXAMINED THE TITLE TO SUCH ADJOINING PREMISES AND DO YOU CERTIFY THAT UNENCUMBERED TITLE TO SUCH RIGHTS OR EASEMENTS IS VESTED IN THE VENDOR OR MORTGAGOR? yes

7. IF PROPERTY DESCRIBED ABOVE IS A CONDOMINIUM UNIT, DO YOU CERTIFY THAT ALL DOCUMENTS REFERRED TO IN YOUR STATE'S CONDOMINIUM STATUTE COMPLY WITH REQUIREMENTS OF THAT STATUTE? n/a

PROPERTY OCCUPIED BY	DATE OF LAST REPAIRS OR CONST. COMPLETED	LIEN PERIOD EXPIRED?	SURVEY INS. REQUIRED?	TYPE OF LOAN	RES. LOAN?	BORROWER'S PRIN. RES.?
OWNER OTHERS		YES NO		FHA VA OTH.		
x	none recent	x	no	x	yes	yes

WILL ANY PART OF LOAN PROCEEDS FINANCE CONSTRUCTION? no **DOES RECORD DISCLOSE ACCESS TO PUBLIC ROAD?** yes

BASED ON A PERSONAL EXAMINATION OF ALL PUBLIC RECORDS AFFECTING THE TITLE TO THE REAL ESTATE DESCRIBED IN SCHEDULE A HEREOF FOR A PERIOD OF NOT LESS THAN 60 YEARS LAST PAST, THE APPROVED ATTORNEY CERTIFIES THAT IN HIS OPINION THE REPORT ON TITLE CORRECTLY REFLECTS THE STATUS OF THE TITLE TO SAID REAL ESTATE. CERTIFICATION IS HEREBY MADE THAT SO FAR AS IS KNOWN THERE IS NO DISPUTE AMONG ATTORNEYS OF THE LOCAL BAR AS TO THE VALIDITY OF THE TITLE TO THE REAL ESTATE COVERED BY THIS REPORT, AND THAT THE TITLE IS IN NO WAY DEPENDENT UPON THE SALE OF THE PROPERTY FOR DELINQUENT TAXES OR ASSESSMENTS UNLESS OTHERWISE SO STATED ABOVE.

DATE AND TIME OF CERTIFICATION: July 6, 1998 at 9:00 AM

RHEA & MILLER, P.C.
P. O. BOX 2366
STAUNTON, VA 24402-2366

BY:

SURVEYOR'S REPORT

Fill out and sign with all Surveys in accordance with the Instructions on the reverse



To: LAWYERS TITLE INSURANCE CORPORATION

Richmond, Virginia.

THIS IS TO CERTIFY, that on August 7, 19 98, I made an accurate survey of the premises standing in the name of William T. Robey, III, Trustee (DB 1355-087)

situated at Riverheads Augusta Virginia
District XXX County State

briefly described as: Augusta County Tax Map 89 Parcels 87, 89, 90, 91, 91B, 92, 9
and shown on the accompanying survey entitled: Physical survey former John E. & / & 95
Jessie F. Todd Property

I made a careful inspection of said premises and of the buildings located thereon at the time of making such survey, and again on Aug. 11, 12, 22, 1998, and at the time of such latter inspection I found

Robey to be in possession of said premises as
Trustee

~~XXXXXXXXXXXX~~

I further certify as to the existence or non-existence of the following at the time of my last inspection:

1. Rights of way, old highways, or abandoned roads, lanes or driveways, drains, sewer, water, gas or oil pipe lines across said premises (Include any such matters shown on the recorded plat of subdivision):
See DB 530-91, DB 120-175, DB 116-43 & DB 111-545 for R-O-W's affect-
ing property, also see roads shown & stated on plat.

2. Springs, streams, rivers, ponds, or lakes located, bordering on or running through said premises:
Pine Run flows across western portion of property, pond with outlet
stream located at eastern corner of property; see plat.

3. Cemeteries or family burying grounds located on said premises. (Show location on plat):

None seen

4. Telephone, telegraph or electric power poles, wires or lines located on, under, overhanging or crossing said premises and serving other property or properties: Overhead power lines across southern &
western portion of property. Power pedestal near central portion of
prop. & tele. ped. at western corner, exact location of u.g. lines from
pedistals is unknown and may cross property, see plat.

5. Joint driveways or walkways; party walls or rights of support; porches, steps or roofs used in common or joint garages:

None seen

6. Disputed boundaries, encroachments or overhanging projections. (If the buildings, projections or cornices thereof, or signs affixed thereto, fences or other indications of occupancy encroach upon or overhang adjoining properties or easement areas, or the like encroach upon or overhang surveyed premises, specify all such):

None seen

7. Physical evidence of boundary lines on all sides. (Be specific): Irons found and set; stumps,
trees, pine knot and fence post found on or referenced to property
corners, see plat.

8. Is the property improved? Yes, two poultry houses & chimney from old house

(a) Building is: Brick () ; Clapboard (x) ; other (x) Rock chimney site.

Specify

(b) Building is: One story (x) ; Two story () ; split-level () ; other ()

Specify

9. Indications of building construction, alterations or repairs within recent months:

None seen

(a) If new improvements under construction, how far have they progressed?

NA

10. Changes in street lines either completed or officially proposed: None seen or known

(a) Are there indications of recent street or sidewalk construction or repairs?

None seen

11. Are all abutting streets or roads maintained by public authorities? Yes

(a) Is access to such streets or roads limited? Yes, end of S.R. 853 near western prop.
corner as indicated by end of state maint. sign; see plat.

12. If the surveyed premises are subject to restrictive covenants, do the improvements, use and occupancy comply with such? (If the premises are subject to restrictive covenants, have the examining attorney furnish you verbatim copy of them)

None found or known

Thomas E. Shumate, CLS 789

[Signature]
~~XXXXXXXXXXXX~~ Surveyor

NOTE: In all cases where there are encroachments, easements, party walls, etc., they should also be denoted upon the map of your survey. Also, be certain map complies with Instructions on reverse side. Particular attention is directed to Paragraph 3 of these instructions.

port furnished at time of survey

(Be sure to answer each item. If the property is not subject to any such of items 1 to 6 inclusive, insert the word "none" following the item.)

Lawyers Title Insurance Corporation

National Headquarters

Survey Instructions and Certificate

A survey to be acceptable to the LAWYERS TITLE INSURANCE CORPORATION of Richmond, Va., must be prepared in U. S. Standard of measurements and if within corporate limits of any town, village or city, must be a "transit" survey and not a "compass" survey. Preference will always be given to surveys showing bearings referred to true north but all surveys which show bearings must designate the meridian referred to whether true, magnetic or arbitrary and if true meridian is not used approximate deflection must be noted on the plat.

Boundaries

1. Every survey, whether of farm or city property, must indicate the physical character of the boundary lines, that is, whether fence, wall, water-course, highway, etc., and if no physical evidence of boundaries exists, such fact must be noted. Any material variations from the record lines by fences, walls or structures, whether on the property surveyed or adjoining, must be shown, with the extent of such variations. If any of the boundaries or lines of record coincide with lot or property lines on any filed map, or are adopted from previous surveys, whether by the same surveyors or otherwise, such facts should be shown on the plat. The surveyor is required to check the descriptions of adjoining owners, when furnished to him, and show the extent of any variations between the boundaries as stated therein and those of the property surveyed.

Rights of Way, Easements, etc.

2. The surveyor must indicate any water courses, drains, sewers, utility easements, joint driveways or roads. He must also show any paths or trails crossing the property if they appear to serve adjoining owners. He must also show any existing cemetery or burying grounds on surveyed property.

Streets and Alleys

3. Names of streets and alleys must be shown with the distance from the nearest corner to beginning point of property surveyed. Width of street and sidewalk in front or at side of premises should be shown with width of alley in rear or side of premises.

Party Walls

4. The nature, character, location and width of all walls on or near boundary lines should be shown. Show all projections beyond face of wall and indicate the portion of wall on the property and the portion on adjoining property, and whether subject to beam rights. The thickness of walls throughout entire length should be shown. If building on premises has no independent wall but uses any wall of adjoining premises, this condition should be shown and explained. The same requirements apply where conditions are reversed.

Adjoining Owners and Lot Numbers Encroachments

5. Indicate on survey the names of adjoining owners on all sides of the premises which information may be obtained from occupants. Lot numbers and name of subdivision of the property in question and of adjoining lots must be shown.

Buildings and Lot Lines

6. Encroachments of buildings and of structural appurtenances, such as fire escapes, bay windows, etc., by or on adjoining property, on abutting streets, or upon easement areas must be indicated with the extent of such encroachments.

7. All buildings on property must be shown with dimensions and relation to lot and building lines. If conditions in chain of title or zoning ordinances require building to be set back specified distances from street or property line survey must show measured distances from said building to said line. In acreage surveys buildings may be plotted to scaled positions.

Area Contiguity

8. Show acreage of the property except in cases of small lots.

9. If survey comprises several parcels, show interior lines and facts sufficient to insure contiguity. The Company may require that it be furnished with a consolidated description. Caution should be used to see that there are no strips or gores.

Courses and Distances

10. Courses and distances should be properly denoted, showing stakes or other monumentations appearing on the premises. Map should show arrow pointing north and give scale of distances.

Certificates

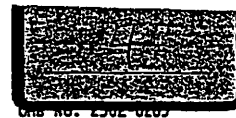
11. All maps must show City or Town and State where premises located with such other notations as will accurately identify property surveyed. The certificate thereon must be dated as of date survey was made, signed by surveyor, and be to the effect that the survey was actually made on the ground as per record description and is correct; that there are no encroachments either way across property lines except as shown.

The certificate should be addressed, to-wit: "To all parties interested in title to premises surveyed."

In addition to the certified map of the survey, a report must be filled out by the surveyor on the following attached form entitled "SURVEYOR'S REPORT."

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A. Settlement Statement

U.S. Department of Housing
and Urban Development

B. Type of Loan

 1. ☐ FHA 2. ☐ FmHA 3. ☐ Conv. Unins.
 4. ☐ VA 5. ☐ Conv. Ins.
6. File Number
LOFTON RIDGE

7. Loan Number

8. Mortgage Ins. Case Number

C. This form is furnished as a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked (p.o.c) were paid outside the closing; they are shown for informational purposes and are not included in totals.

D. Name and Address of Borrower
Lofton Ridge, LLCE. Name and Address of Seller
William T. Robey, III
Substitute TrusteeF. Name and Address of Lender
First Virginia Bank
125 North Central Avenue
Staunton, VA 24401

G. Property Location

 226.218 acres as shown on "Physical
Survey Former John E. and Jessie F.
Todd Property, Riverheads District
Augusta County, Virginia"
H. Settlement Agent Ronald W. Denney for:
FRANKLIN, DENNEY, WARD & LAWSON, PLCI. Settlement Date
Place of Settlement
129 North Wayne Avenue
Waynesboro, VA 22980

09/28/98

J. SUMMARY OF BORROWER'S TRANSACTION		K. SUMMARY OF SELLER'S TRANSACTION	
100. GROSS AMOUNT DUE FROM BORROWER		400. GROSS AMOUNT DUE TO SELLER	
101. Contract sales price	306,000.00	401. Contract sales price	306,000.00
102. Personal property		402. Personal property	
103. Settlement charges to borrower (line 1400)	14,055.73	403.	
104.		404.	
105.		405.	
Adjustments for items paid by seller in advance		Adjustments for items paid by seller in advance	
106. City/town taxes to		406. City/town taxes to	
107. County taxes to		407. County taxes 09/28/98 to 12/31/98	1.3
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. GROSS AMOUNT DUE FROM BORROWER	320,055.73	420. GROSS AMOUNT DUE TO SELLER	306,001.3
200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER		500. REDUCTIONS IN AMOUNT DUE TO SELLER	
201. Deposit or earnest money	30,600.00	501. Excess deposit (see Instructions)	30,600.0
202. Principal amount of new loan(s)	350,000.00	502. Settlement charges to seller (line 1400)	306.0
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff of first mortgage loan	
205.		505. Payoff of second mortgage loan	
206.		506.	
207.		507.	
208.		508.	
209.		509.	
Adjustments for items unpaid by seller		Adjustments for items unpaid by seller	
210. City/town taxes to		510. City/town taxes to	
211. County taxes 07/01/98 to 09/28/98	653.27	511. County taxes 07/01/98 to 09/28/98	653.2
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. TOTAL PAID BY/FOR BORROWER	381,253.27	520. TOTAL REDUCTION AMOUNT DUE SELLER	31,559.2
300. CASH AT SETTLEMENT FROM/TO BORROWER		600. CASH AT SETTLEMENT TO/FROM SELLER	
301. Gross amount due from borrower (line 120)	320,055.73	601. Gross amount due to seller (line 420)	306,001.3
302. Less amount paid by/for borrower (line 220) (381,253.27)		602. Less reduction amount due seller (line 520) (31,559.2)	
303. CASH (<input type="checkbox"/> FROM) (<input checked="" type="checkbox"/> TO) BORROWER	61,197.54	603. CASH (<input checked="" type="checkbox"/> TO) (<input type="checkbox"/> FROM) SELLER	274,442.1

SUBSTITUTE FORM 1099 SELLER STATEMENT: The information contained in Blocks E, G, H and I and on line 401 (or, if line 401 is asterisked, lines 403 and 404) is important tax information and is being furnished to the Internal Revenue Service. If you are required to file a return, a negligence penalty or other sanction will be imposed on you if this item is required to be reported and the IRS determines that it has not been reported. You are required by law to provide [see box H] with your correct taxpayer identification number. If you do not provide [see box H] with your correct taxpayer identification number, you may be subject to civil or criminal penalties imposed by law, and under penalties of perjury, I certify that the number shown on this statement is my correct taxpayer identification number.

Seller's Signature

WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 & 1010.

SETTLEMENT STATEMENT
PAGE 2

1. SETTLEMENT CHARGES		PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
700. TOTAL SALES/BROKER'S COMMISSION based on price \$ 306,000.00 X = \$			
Division of commission (line 700) as follows:			
701. \$	to		
702. \$	to		
703.	Commission paid at Settlement		
704.			
800. ITEMS PAYABLE IN CONNECTION WITH LOAN			
801.	Loan Origination Fee 0.5000% First Virginia Bank	1,750.00	
802.	Loan Discount X		
803.	Appraisal Fee 750.00 to Fry Appraisal Service	750.00	
804.	Credit Report to		
805.	Lender's Inspection Fee		
806.	Mortgage Insurance Application Fee to		
807.	Assumption Fee		
808.	Flood Certification Fee to First Virginia Bank	25.00	
809.			
810.			
811.			
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE			
901.	Interest from to \$ /day		
902.	Mortgage Insurance Premium for months to		
903.	Hazard Insurance Premium for 1 years to Barger Insurance		
904.			
905.			
1000. RESERVES DEPOSITED WITH LENDER			
1001.	Hazard Insurance months @ \$ per month		
1002.	Mortgage Insurance months @ \$ per month		
1003.	City property taxes months @ \$ per month		
1004.	County property taxes months @ \$ 220.79 per month		
1005.	Annual assessments months @ \$ per month		
1006.	months @ \$ per month		
1007.	months @ \$ per month		
1008.	months @ \$ per month		
1100. TITLE CHARGES			
1101.	Settlement or closing fee to		
1102.	Abstract or title search to		
1103.	Title examination to Rhea & Miller	300.00	
1104.	Title insurance binder to		
1105.	Document preparation to		
1106.	Notary fees to		
1107.	Attorney's fees to Franklin, Denney, Ward & Lawson	1,161.50	
		(Includes above items Numbers: 1101, 1103, 1105)	
1108.	Title insurance to Liberty Title Services, L.C.	1,278.00	
		(Includes above items Numbers:)	
1109.	Lender's coverage \$ 350,000.00		
1110.	Owner's coverage \$ 306,000.00		
1111.	Expenses to Franklin Law Firm	113.23	
1112.			
1113.			
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES			
1201.	Recording fees: Deed \$ 18.00 ; Mortgage \$ 48.00 ; Releases \$	66.00	
1202.	City/county tax/stamps: Deed \$ 153.00 ; Mortgage \$ 175.00	328.00	
1203.	State tax/stamps: Deed \$ 459.00 ; Mortgage \$ 525.00	984.00	
1204.	Grantor's Tax		306.00
1205.			
1300. ADDITIONAL SETTLEMENT CHARGES			
1301.	Survey to Thomas E. Shumate, Surveyor	7,300.00	
1302.	Pest inspection to		
1303.			
1304.			
1305.			
1400.	TOTAL SETTLEMENT CHARGES (enter on line 103, Section A and line 502, Section K)	14,055.73	306.00

CERTIFICATION
I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

[Signature]
Borrowers

[Signature]
Sellers

The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement.

September 28, 1998

Settlement Agent FRANKLIN, DENNEY, WARD & LAWSON, PLC

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOFTON RIDGE, LLC, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Law No. CL 1000206-00
)	
PHILIP H. MILLER, ESQ., et al.,)	
)	
Defendants.)	
_____)	

ORDER OF DISMISSAL WITH PREJUDICE

The Parties of record having agreed that any and all claims by Plaintiffs Lofton Ridge, LLC, Warren Koiner, John B. Davis and William Hausrath against Defendants Philip H. Miller, Esq., Ronald W. Denney, Esq., Rhea & Miller, P.C. and Franklin, Denney Ward & Lawson, PLC in the above-referenced matter should be dismissed, and having agreed that any and all claims by Third-Party Plaintiffs Ronald W. Denney, Esq. and Franklin Denney Ward & Lawson PLC against Third-Party Defendants Philip H. Miller, Esq. and Rhea & Miller, P.C. in the above-referenced matter should be dismissed and sufficient cause appearing therefor, now, upon request of the Parties,

IT IS HEREBY:

ORDERED that any and all claims of Plaintiffs Lofton Ridge, LLC, Warren Koiner, John B. Davis and William Hausrath against Defendants and Third-Party Plaintiffs Ronald W. Denney, Esq. and Franklin, Denney Ward & Lawson, PLC in the above-referenced matter be and the same hereby are dismissed in their entirety, with prejudice;

ORDERED that any and all claims of Plaintiffs Lofton Ridge, LLC, Warren Koiner, John B. Davis and William Hausrath against Defendants and Third-Party Defendants Philip H. Miller, Esq.

DEFENDANT'S
EXHIBIT

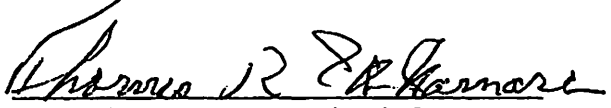
2-11-03

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and Rhea & Miller, P.C. in the above-referenced matter be and the same hereby are dismissed in their entirety, with prejudice; and

ORDERED that any and all claims of Defendants and Third-Party Plaintiffs Ronald W. Denney, Esq. and Franklin, Denney Ward & Lawson, PLC against Defendants and Third-Party Defendants Philip H. Miller, Esq. and Rhea & Miller, P.C. in the above-referenced matter be and the same hereby are dismissed in their entirety, with prejudice.

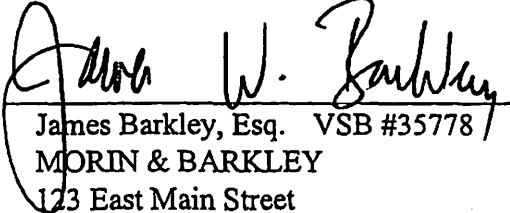
Dated: 12/19/02


Judge, Augusta County Circuit Court

WE ASK FOR THIS:

LOFTON RIDGE, LLC, WARREN KOINER,
JOHN B. DAVIS and WILLIAM HAUSRATH
By counsel

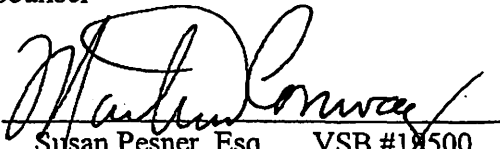
By:


James Barkley, Esq. VSB #35778 /
MORIN & BARKLEY
123 East Main Street
Seventh Floor
Charlottesville, VA 22902

Counsel for Plaintiffs

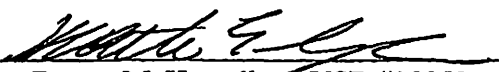
9

RONALD W. DENNEY, ESQ. and FRANKLIN
DENNEY WARD & LAWSON, PLC
By Counsel

By: 
Susan Pesner, Esq. VSB #18500
Martin Conway, Esq. VSB #34334
PESNER KAWAMOTO LAW GROUP
7926 Jones Branch Drive
Suite 740
McLean, VA 22102

Counsel for Defendants/Third-Party Plaintiffs

PHILIP H. MILLER, ESQ. and RHEA &
MILLER, P.C.
By Counsel

By: 
Danny M. Howell VSB #30352
Heather E. Gange VSB #47625
SCHRAUB & COMPANY, CHTD.
1481 Chain Bridge Road
Suite 200
McLean, VA 22101

Counsel for Defendants/Third-Party Defendants

10657

BK 1380 PG 679

306,000.00
SEP 14 1998

Prepared By: W. T. Robey, III
P. O. Box 669
Buena Vista, VA 24416

TRUSTEE'S DEED

THIS DEED, made the 11th day of Sept, in the year 1998, between WILLIAM T. ROBEY, III, Grantor/Substitute Trustee (hereinafter referred to as "substitute trustee"), a resident of the City of Buena Vista, Virginia, and LOFTON RIDGE LLC, whose address is 114 Quo Drive, Waynesboro, VA 22980, Grantees.

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

WHEREAS, JOHN E. TODD and JESSIE F. TODD, (hereinafter called Borrower), by a certain Deed of Trust dated May 9, 1979 and recorded in the Office of the Clerk of the Circuit Court for Augusta, Virginia, in Deed Book 718, at page 575, did grant and convey to MARION V. BAKER, Trustee, certain property located in Augusta County, Virginia, hereinafter more particularly described, in trust to secure the debt referred to in said Deed of Trust; and

WHEREAS, in the Deed of Trust the Trustee was empowered, pursuant to the request of the Beneficiary for the benefit of the United States of America, acting through the Farmers Home Administration of the United States Department of Agriculture in the Deed of Trust and upon the breach of any of the covenants contained therein, to sell the property with all improvements



thereon, rights, privileges, and appurtenances thereunto belonging;
and

WHEREAS, William T. ROBEY, III has been appointed Substitute Trustee in the said Deed of Trust by virtue of an instrument dated February 17, 1998 and recorded in the Office of the Clerk of the Circuit Court for Augusta County, Virginia, in Deed Book 1355, at page 087; and

WHEREAS, the Borrower, having failed to pay the debt and perform certain covenants as provided in the Deed of Trust, the Substitute Trustee, in the execution of the powers and duties conferred upon him by the said Deed of Trust, did on the 24th day of June, 1998 after giving notice of the time, terms and place of sale according to law, expose for sale said property with all improvements thereon, rights, privileges, and appurtenances thereunto belonging at public auction at the courthouse door for Augusta County located in Staunton, Virginia, to the highest bidder for cash, at which sale the Grantees were the highest bidder thereof, and complied with the terms of said sale.

NOW, THEREFORE, in consideration of the sum of Ten Dollars (\$10.00) and other valuable consideration, the receipt whereof is hereby acknowledged, the said William T. ROBEY, III, Substitute Trustee, hereby conveys with Special Warranty unto the said Grantees, a farm situate in the Riverheads Magisterial District of Augusta County, Virginia, located approximately two (2) miles southeast of the Village of Greenville, having as its address Route 1, Box 58, Greenville, Virginia, containing approximately 242

DK 1380PG681

acres, more or less, composed of a number of contiguous parcels described in the above mentioned Deed of Trust of record in said Clerk's Office in Deed Book 718, at page 575, which farm originally contained approximately 261 acres, more or less.

FROM WHICH there has been separated and not made a part of this trustee's sale a parcel of land containing 18.980 acres upon which there is located a residence house of the farm together with associated farm buildings, which parcel adjoins the N & W Railroad and more particularly described by plat of record in the aforesaid Clerk's Office in Deed Book 1360, at page 10 and is bounded as follows:

BEGINNING at a set iron pin in the northwest line of said railroad, a corner to Norheim bears S 42x 56' 41" W 447.06 ft. and S 43x 00' E 30.00 ft., thence from said beginning iron pin by seven lines with the southeast side of the railroad right of way N 42x 56' 41" E 548.54 ft. to an iron pin, S 47x 03' 19" E 20.00 ft. to a set iron pin, S 42x 56' 41" E 388.56 ft. to a set iron pin, thence by a curve to the right having a central angle of 10x 44' 47", a radius of 1580.46 ft. for an arc length of 296.43 ft. to a set iron pin, S 36x 18' 32" E 20.00 ft. to a set iron pin, thence by a curve to the right having a central angle of 10x 21' 06", a radius of 1560.46 ft. for an arc length of 281.93 ft. to a set iron pin, N 46x 52' 31" E 49.60 ft. to a set iron pin in said railroad line, thence by four new lines S 37x 29' 15" E 463.19 ft. to a set iron pin, S 40x 51' 01" W 1280.54 ft. to a set iron pin, thence N 56x 38' 24" W passing a 6" black oak at 8.26 ft. for a total distance of 436.84 ft. to a set iron pin, N 75x 21' 12" W 250.79 ft. to the beginning containing 18.980 acres.

THERE IS HEREBY RESERVED TO THE OWNER(S) OF THE AFORESAID 18.980 ACRE TRACT OF LAND A NON EXCLUSIVE THIRTY FOOT RIGHT OF WAY

EASEMENT FOR INGRESS AND EGRESS ALONG THE N&W RAILROAD FROM STATE ROUTE 853 TO THE LAND OWNED BY JOHN E. TODD, ET UX, WHICH CONTAINS 18.980 ACRES, ALL OF WHICH IS SHOWN UPON A PLAT OF RECORD IN THE AFORESAID CLERK'S OFFICE IN PLAT BOOK 1, AT PAGE 3545.

It being a portion of the same property conveyed to JOHN E. TODD and JESSIE F. TODD, by the following deeds, less the aforementioned described parcel containing 18.980 acres, all of which reference is made for a more particular description of the property herein conveyed:

1. Deed dated July 12, 1966 from Tommy C. Hays and wife of record in the aforesaid Clerk's Office in Deed Book 516, at page 248.

2. Deed dated March 1, 1967 from James W. Harvey, Jr. and wife, of record in the aforesaid Clerk's Office in Deed Book 523, at page 401.

3. Deed dated August 11, 1967 from William W. Lawhorn and wife of record in the aforesaid Clerk's Office in Deed Book 530, at page 95.

4. Deed dated August 11, 1967 from Theodore W. Lawhorn, et al of record in the aforesaid Clerk's Office in Deed Book 530, at page 97.

5. Deed dated August 11, 1967 from Roy J. Truxell, et al, of record in the aforesaid Clerk's Office in Deed Book 530, at page 91.

6. Deed dated November 22, 1968 from Theodore W. Lawhorn, et al, of record in the aforesaid Clerk's Office in Deed Book 545, at page 52.

7. Deed dated November 1, 1973 from Rudolph Shaver,

BK 1380PG683

Clerk of the Circuit Court of Augusta County, of record in the
aforesaid Clerk's Office in Deed Book 545 at page 52.

WITNESS the following signature and seal of William T.
ROBEY, III, Substitute Trustee, this 11th day of Sept.,
1998.

W. T. Robey, III (SEAL)
WILLIAM T. ROBEY, III
Substitute Trustee

STATE OF VIRGINIA, AT LARGE
CITY OF BUENA VISTA

The foregoing instrument was acknowledged before me in
the City of Buena Vista, Virginia, this 11th day of
Sept., 1998, by WILLIAM T. ROBEY, III, Substitute
Trustee.

John B. Davis
Notary Public

My Commission Expires: 11/30/99.

State Tax	039	\$ <u>459.00</u>	VIRGINIA: In the Clerk's Office of the
County Tax	213	\$ <u>53.00</u>	Circuit Court of Augusta County, Va.
Transfer Fee	212	\$ <u>7.00</u>	<u>Sept. 29</u> 19 <u>98</u> this
Clerk's Fee	301	\$ <u>13.00</u>	writing was admitted to record at
St. Library	145	\$ <u>1.00</u>	<u>11:01</u> o'clock <u>A</u> .M. and the
Tech. Fund	106	\$ <u>3.00</u>	Tax imposed by Section 58.1-802 of the
State Tax	038	\$ <u>153.00</u>	Code of Virginia in the amt. of
Local Tax	220	\$ <u>153.00</u>	\$ <u>306.00</u> has been paid.
TOTAL		\$ <u>936.00</u>	TESTE: JOHN B. DAVIS, CLERK By: <u>Carol M. Blythe</u> Dep. Clerk

5

A True and Correct Copy

Teste: Mina R. Coffey Deputy Clerk
Circuit Court

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOFTON RIDGE, LLC,

Plaintiff,

v.

**NORFOLK SOUTHERN RAILWAY
COMPANY (incorrectly identified as
"Norfolk Southern Railway Corporation"),**

Defendant.

Case No. CH00000284-00

DEFENDANT'S POST-TRIAL BRIEF

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Counsel for Defendant

It is undisputed that NSRC did not say or do anything to suggest that NSRC had any rights whatsoever to cross the railroad's right-of-way, and that Lofton Ridge did not rely on anything the railroad said or did in making its decision to purchase the property. (Vol I, pp. 97-100.)

J. Lofton Ridge's Malpractice Claims Against the Attorneys and Surveyor Who Represented it in the Purchase of the Property.

In recognition of the above facts, on July 6, 2001, Lofton Ridge instituted a law action in this Court styled *Lofton Ridge, LLC, et al. v. Phillip H. Miller, et al.*, Law No. CL 1000206-00. (Vol. I, p. 110; Def. Ex. 6.) In that law action, Lofton Ridge alleged that Denney, Miller & Shumate each committed professional malpractice by representing to Lofton Ridge that the property it was purchasing had the benefit of an easement over the railroad's right-of-way to reach State Route 853. (Vol. I, pp. 111-114; Def. Ex. 6.)

Lofton Ridge's allegations in the law action are vastly inconsistent with, and in fact mutually contradictory to, the allegations which Lofton Ridge asks the Court to accept in this case. In the law action, Lofton Ridge alleges that the representations which were made regarding an easement over the railroad's right of way were "false" and were "negligently made" (Vol. I, pp. 111-112; Def. Ex. 6, ¶¶ 24, 47), and that its property has no easement or access rights over the railroad's right-of-way to reach State Route 853 and is in fact landlocked. (Vol. I, pp. 113-114; Def. Ex. 6, ¶ 53.) Lofton Ridge seeks damages of "in an amount in excess of \$400,000", an amount representing nearly \$100,000 more than Lofton Ridge paid for the property. (Vol. I, pp. 112-113; Def. Ex. 6.)

As shown by the evidence at trial, the law action has now been settled in part and an "Order of Dismissal With Prejudice" has been entered dismissing the claims against two of the

defendants in the law action with prejudice. (Vol. I, pp. 114, 121-122; Def. Ex. 7.)¹⁶ The Order does not recite the terms of the parties' settlement agreement. (Def. Ex. 7.) When Lofton Ridge's representative was asked about the terms of the settlement, the Court sustained an objection by Lofton Ridge's counsel based on the fact that the case was settled in mediation and was subject to a confidentiality agreement. (Vol. I, pp. 114-115.) It is a fair inference, however, that the settlement agreement in fact involved the payment of money by (or on behalf of) the two defendants in the law action to Lofton Ridge, in settlement of the claims asserted in the law action. Certainly, for a settlement agreement to be legally enforceable Lofton Ridge must have received some consideration, which it deemed sufficient, in exchange for releasing its claims against Denney & Miller.

DESCRIPTION OF LOFTON RIDGE'S CLAIMS IN THIS ACTION

Having already received a benefit from the claims it advanced in the law action, Lofton Ridge now asks the Court in this action to rule that it in fact has an easement of some type to cross a NSRC's right of way as a means of ingress and egress to its property. The Amended Bill of Complaint makes vague allegations that Lofton Ridge "is entitled to and has a claim of right to use the dirt road [across NSRC's right-of-way] to reach State Route 853" (Amended Bill of Complaint, ¶ 5), without identifying the basis of the claimed right. Throughout the case, Lofton Ridge has at various times advanced virtually every conceivable theory of easement to support its claim. (See, e.g., Lofton Ridge's Motion to Compel Discovery, p. 3.) By the time of trial, Lofton Ridge had abandoned almost all of these theories, and instead asserted that it was entitled to use the roadway over the railroad's right-of-way on the theories of (i) easement by implication; and

¹⁶ The Order dismisses the plaintiff's claims against Mr. Denney and Mr. Miller, along with their law firms, with prejudice. The claims against Mr. Shumate and his surveying firm apparently have not been settled or otherwise resolved.

the above elements there must also be "an express intention to deceive, or such careless and culpable negligence as amounts to constructive fraud." *Chesapeake & Ohio Ry. Co. v. Walker*, 100 Va. 69, 94, 40 S.E. 633, 914-15 (1902). The undisputed evidence demonstrates that NSRC made no representations at all, and that Lofton Ridge did not rely on anything NSRC said or did in making its decision to purchase the property. Since Lofton Ridge cannot establish the elements for an estoppel, its claim fails as a matter of law.

Finally, there is no evidence to support Lofton Ridge's assertion that NSRC waived any of its rights. The evidence establishes nothing more than that NSRC has, passively, allowed members of the public to use its right-of-way in the near the Lofton Ridge property. By no agreement with any property owners or the public did NSRC expressly waive any legal right. Nor by any stretch of the evidence (which, to show implied waiver, would have to reach the level of "clear and unmistakable evidence"), has NSRC intentionally and knowingly waived any of its property rights in its right-of-way. *Fox v. Deese*, 234 Va. 412, 425, 362 S.E.2d 699, 707 (1987); *Coleman v. Nationwide Life Ins. Co.*, 211 Va. 579, 583, 179 S.E.2d 466, 469 (1971); *Roenke v. Va. Farm Bureau Ins. Co.*, 209 Va. 128, 135, 161 S.E.2d 704, 709 (1968); *May v. Martin*, 205 Va. 397, 404, 137 S.E.2d 860, 865 (1964); *Creteau v. Phoenix Assurance Co.*, 202 Va. 641, 644, 119 S.E.2d 336, 339 (1961).

VII. LOFTON RIDGE'S CLAIMS IN THIS CASE ARE BARRED UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL, BASED ON THE SETTLEMENT OF THE LAW ACTION FOR PROFESSIONAL MALPRACTICE.

Lofton Ridge's claims in this case that it has an easement across NSRC's right-of-way should be barred by the claims it pursued – and which it has now settled – in the law action for professional malpractice filed in this same Court.

Under Virginia law, “A party is forbidden to assume successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory.” *Burch v. Grace Street Building Corp.*, 168 Va. 329, 340, 191 S.E. 672, 677 (1937). A party simply is not permitted to play “fast and loose” by taking “vastly inconsistent positions” in separate actions involving the same subject matter. *United Leasing Corp. v. Resource Bank*, 58 Va. Cir. 96, 108 (Cir. Ct. for the City of Richmond 2001).

The principle of judicial estoppel has been applied by the Virginia Courts to prevent parties from taking advantage of the Court system by espousing contradictory positions in an effort to gain an unfair benefit. *See, e.g., Canada v. C. H. Beasley & Bros.*, 132 Va. 166, 111 S.E. 251 (1922) (creditor who took position in bankruptcy proceedings that debt was that of husband could not later attempt to collect from wife by asserting that debt was due from her); *Johnson v. Powhatan Mining Co.*, 127 Va. 352, 103 S.E. 703 (1920) (“A man cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage”); *Simpson v. Dugger*, 88 Va. 963, 14 S.E. 760 (1892) (party who asserted contract was valid and sought to enforce it could not, after court ordered contract cancelled for fraud, pursue separate suit seeking to reform the contract and equitably enforce it against other parties for his benefit).

The doctrine was invoked by the Supreme Court of Virginia in *Leech v. Beasley*, 203 Va. 955, 128 S.E.2d 293 (1962). That case involved a single-car accident in which there was a conflict in the evidence as to who was driving the vehicle. Leech sued Beasley, alleging the accident occurred as a result of Beasley’s gross negligence. Beasley denied the claims, and filed a counterclaim against Leech alleging that Leech was driving and that the accident resulted from

the gross negligence of Leech. The cases were tried together, and the jury returned a verdict adverse to Leech. On appeal, Leech argued that he had been prejudiced by having the cases tried together, because “he was put in the position of having to introduce and rely on the testimony showing the existence of gross negligence to prove his claim for damages, then being unable to discredit such testimony in defending the counter-claims.” 203 Va. at 960, 128 S.E.2d at 296.

The Court found no merit in Leech’s contention. As the Court explained Leech’s position:

What Leech seeks, in this respect, is the right to say, in successive trials of his claim and the counter-claims, “If Beasley was driving the automobile, then the accident resulted from the gross negligence of the driver, but if I was driving, it did not result from the gross negligence of the driver.”

Leech v. Beasley, 203 Va. 955, 961, 128 S.E.2d 293, 297 (1962). Relying on the principle of judicial estoppel, the Court held that, “No party, under the law, has this right.” *Id.*

This is akin to what Lofton Ridge seeks to do in this case. It seeks the right to say to the attorneys and surveyor in the law action, “The property we purchased is landlocked. You were negligent in telling us we had an easement over the railroad’s right-of-way to reach the public road, and we would not have purchased the property had we known the property was landlocked. For this negligence, you owe us damages because we cannot use the property for the purposes we acquired it.” At the same time, Lofton Ridge seeks the right to say to NSRC in this chancery action, “The property is not landlocked. We have an easement and a legal right to cross your right-of-way to reach the public road. We are entitled to an injunction preventing you from interfering with our use of your right-of-way so that we can use the property for the purposes we acquired it.”

Lofton Ridge cannot maintain both positions. The property is either landlocked or it is not. If it is not, Lofton Ridge has no viable claim for damages against its attorneys and surveyor. If it is, Lofton Ridge cannot be entitled to any relief in this action.

Yet, as shown by the evidence, Lofton Ridge has already settled its law claims against the attorneys who represented it, receiving some consideration from them (which it deemed sufficient) and dismissing its claims with prejudice. Having taken this benefit based on its claims that the property is landlocked, Lofton Ridge now reverses field and seeks an additional benefit by asking this Court to rule the property is not landlocked, and that Lofton Ridge in fact has an easement across NSRC's right-of-way.

In a more recent decision from the Circuit Court for the City of Richmond, Judge Randall G. Johnson invoked the doctrine of judicial estoppel to preclude a party from obtain such a double benefit. In *United Leasing Corp. v. Resource Bank*, 58 Va. Cir. 96, 108 (Cir. Ct. for the City of Richmond 2001), plaintiff filed suit asserting that a Liquidation Agreement it had entered into had been induced by fraud and was void, and asked the Court to rescind the agreement. At the same time, the plaintiff had filed suits against four other parties, seeking to enforce the Liquidation Agreement by collecting accounts that it had assumed under the agreement. In those four cases, it took the position that the Liquidation Agreement was valid. In at least one of those other cases, the plaintiff had obtained an arbitration award in its favor. Judge Johnson relied on the doctrine of judicial estoppel (primarily citing and relying on *Burch v. Grace Street Bldg. Corp.*, 168 Va. 329, 191 S.E. 672 (1937)) in holding that the plaintiff could not proceed with its suit for rescission because the allegations were directly contradictory to the allegations made in the other cases. In explaining the basis for his ruling, Judge Johnson rhetorically asked, "[I]f United Leasing is successful in having the Liquidation Agreement rescinded in this case, will it

return the money received in the Mississippi arbitration? The court thinks not.” 58 Va. Cir. at 107-08.

Similarly, Lofton Ridge cannot give back the benefit it obtained from the settlement of the law action. This is not a situation in which Lofton Ridge seeks the same relief, on the same underlying facts, under two different legal theories. Nor is it a case in which Lofton Ridge seeks relief based on alternative versions of the same facts. Rather, Lofton Ridge seeks two mutually contradictory outcomes, in each case taking whatever position it believes will result in a benefit to it. No court – especially not a court of equity – should permit such conduct. As the Supreme Court of Virginia has explained:

"If the parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed; the coercive process of the law available only between those who consented to its exercise could be set at naught by all. But the rights of all men, honest and dishonest, are in the keeping of the courts, and consistency of proceeding is, therefore, required of all those who come or are brought before them."

Burch v. Grace Street Bldg. Corp., 168 Va. 329, 340-341, 191 S.E. 672, 677 (1937) (quoting Bigelow on Estoppel (6th Ed.) 732, 783).

Through the filing, advancement and settlement of the law action, Lofton Ridge has used this Court to obtain a monetary benefit for itself based on allegations which are directly contradictory to the allegations it seeks to advance in this chancery action. Lofton Ridge should not be permitted to obtain relief in both actions in the face of the vastly inconsistent positions which it has advanced in the two actions.

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOFTON RIDGE, LLC.)	
)	
Complainant,)	
)	
v.)	
)	Case No. CH00000284-00
NORFOLK SOUTHERN RAILWAY)	
COMPANY, previously identified as)	
NORFOLK SOUTHERN CORPORATION)	
a/k/a Norfolk and Western Railroad)	
)	
Respondent.)	

**LOFTON RIDGE, LLC'S BRIEF IN OPPOSITION
TO RESPONDENT'S PLEA IN BAR**

Lofton Ridge, LLC. ("Lofton Ridge") by counsel, for its Brief in Opposition to respondent, Norfolk Southern Railway Company's ("Norfolk Southern") Plea in Bar, respectfully states as follows:

INTRODUCTION

On or about July 5, 2000, Lofton Ridge filed this action against Norfolk Southern on the equity side of the Circuit Court for Augusta County, Virginia. As set forth in its Bill of Complaint and amended Bill of Complaint, Lofton Ridge alleged inter alia, that Norfolk Southern had wrongfully, and without any right, denied Lofton Ridge access to its real property by locking a gate, thereby blocking access over the dirt road which connected the Lofton Ridge property (the "Property") to a public road, namely State Route 853, which road had been used as the only means for ingress and egress for over sixty years. As these improper actions

completely prevented Lofton Ridge any means of ingress and egress to its Property, Lofton Ridge requested, inter alia, that this Court adjudge that the Property has legal access over the dirt road to reach State Route 853 and enter a decree permanently enjoining or prohibiting Norfolk Southern and any person claiming under it from further interference with Lofton Ridge's use and enjoyment of its Property and the dirt road which connected its Property to State Route 853.

One year later, on July 6, 2001, Lofton Ridge and Warren Koiner, John B. Davis, and William Hausrath, the individual members of Lofton Ridge (collectively, the "Plaintiffs"), filed an action at law against Phillip E. Miller, Esquire, Rhea & Miller, P.C., Ronald Denney, Esquire ("Mr. Denney"), Franklin, Denney, Ward & Lawson, PLC, ("FDW&L") Tom Shumate, Surveyor, Inc. and Thomas E. Shumate (collectively, the "At-law Defendants"), in the Circuit Court for Augusta County, case no. CL1000206-00 (the "At-law Action"), seeking monetary damages in excess of \$400,000¹.

Contrary to Norfolk Southern's claim, this action involved more than just professional malpractice claims against the attorneys and surveyor who performed work for Lofton Ridge in connection with its acquisition of the Property. Rather, as noted in the seven count Motion for Judgment ("MFJ"), a copy of which was attached to Defendant's Plea in Bar, the action also included claims based upon constructive fraud and vicarious liability, stemming from various statements made by the At-Law Defendants regarding both access to and development of the Property. As alleged in the Motion for Judgment, Mr. Denney and FDW&L were

¹ An amount in excess of the purchase price of the Property.

retained for the purpose of providing “advice regarding the acquisition *and development* of the Property”; from such retention stemmed Lofton Ridge’s engagement of the remaining At-law Defendants.

ARGUMENT

I. Lofton Ridge’s Claims in the Instant Action are Not Barred by the Doctrine of Judicial Estoppel.

The doctrine of judicial estoppel, based upon the legal premise that “a party is forbidden to assume successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory,” Burch v. Grace Street Bldg. Corp., 168 Va. 329, 340, 191 S.E. 672 (1937), does not apply to bar the continued prosecution of this equity action against Norfolk Southern.

As an initial predicate, the allegations made in both lawsuits are not mutually contradictory, but rather, when read in their entirety, something Norfolk Southern is want to do, the allegations are wholly consistent. Akin to the allegations made in this lawsuit, in the Plaintiff’s Motion for Judgment against the At-law Defendants, alleges that:

- “the dirt road is the only means of egress and ingress to the Property from State Route 853,” MFJ ¶19;
- “On or about June 16, 2000, Norfolk Southern denied Lofton Ridge access to the dirt road, contending that Lofton Ridge was not entitled to use the dirt road to reach State Route 853,” MFJ ¶ 20;

- “On July 11, 2000, Lofton Ridge filed a declaratory judgment action [the instant action] against Norfolk Southern in the Circuit Court of Augusta County, seeking a declaration that Lofton Ridge was entitled to use the dirt road to access State Route 853,” MFJ ¶21;
- “As of the date of filing of this Motion for Judgment, that matter is still pending,” MFJ ¶ 21; and
- “Without access to State Route 853, the Property is landlocked and may not be developed as intended by Lofton Ridge.” MFJ 22.

It is against this backdrop -- that Norfolk Southern has denied Lofton Ridge its access to a public road, that without access to State Route 853, the property will be landlocked and that final determination of the access issue is still pending before this Court -- that Lofton Ridge’s claims against the individual defendants arise: namely, compensation for the injuries sustained as a result of representations made and advice given by the At-Law Defendants regarding both access and development of the Property. Thus, when the Motion for Judgment is read in its entirety, it is clear that the at law action is merely akin to that permitted by Va. Code §8.01-281 - a pleading in the alternative -- the filing of which was necessitated by the running of the statute of limitations against the At-law Defendants.

Further, the allegations complained of by Norfolk Southern, that Lofton Ridge’s property “has no easement or access rights . . . and is in fact, landlocked,” are conclusions of law, not inconsistent statements of fact, arrived at by virtue of Norfolk Southern’s denial of access and its assertion that no legal access could be

had over its property to reach State Route 853. Further, unlike the situation involving an express easement or deeded right, until this Court finally determines this matter, there is no adjudication of access rights.²

Finally, even if the allegations made in both pleadings were determined to be mutually inconsistent, the doctrine of judicial estoppel does not apply to bar the action against Norfolk Southern. As noted by the Supreme Court in Burch, “where a man has an election between several inconsistent courses of action, he will be confined to that which he *first adopts*” Id. (*emphasis added*). In this case, the position first adopted was that taken upon the filing of the Norfolk Southern litigation, one year prior to the filing of the At-Law litigation. Further, while the case against some of the At-Law Defendants was resolved through a confidential mediated settlement, contrary to that argued by Norfolk Southern, (i) the at-law action has not been dismissed with prejudice -- the Order referenced in Norfolk Southern’s motion, dismissing only some of the At-Law Defendants, (ii) there were no findings of fact or conclusions of law made by the Court during the At-Law Litigation or pursuant to the dismissal, and (iii) there is no evidence that Lofton Ridge has received any monetary benefit as a result of its settlement and dismissal of some of the At-law Defendants. Thus, to the extent that any party *may* be (or have been) entitled to a defense pursuant to the doctrine of judicial estoppel, a defense Lofton Ridge wholly refutes, such defense would arise only in favor of the At-Law Defendants and not Norfolk Southern.

² On a side note, Lofton Ridge has not pursued an adjudication of legal access rights based upon the theories identified in and espoused by the At-law Defendants prior to the closing on the Property.

II. Lofton Ridge's continued prosecution of this action is not barred by the election of remedies.

The doctrine of election of remedies is premised upon the legal theory that a plaintiff is not entitled to a double recovery: "if a suit in equity and an action at law between the same parties and touching the same subject matter are pending at the same time, the court of equity, upon application of the defendant, should compel the complainant to elect which he will prosecute. . . there can be but one satisfaction for one cause of action." Pollard & Bagby, Inc. v. Morton G. Thalhimer, Inc., 169 Va. 529, 534, 194 S.E. 701, 702 (1938).

As discussed above, and contrary to that required for application of the rule, the pending suits involve different parties (including different named plaintiffs, the At-Law action being brought and relief being sought by both Lofton Ridge and its individual members), different underlying facts, causes of action, wrongs complained of and relief sought.

Contrary to Norfolk Southern's assertions, Lofton Ridge has sustained more than one wrong at the hands of both Norfolk Southern and the At-Law Defendants, the different wrongs justifying different forms of separate relief. Lofton Ridge is not asking this Court to award contradictory remedies. Rather, in this action, Lofton Ridge seeks an adjudication of its rights and injunctive relief permitting it to utilize the dirt road for ingress and egress to its property. In the At-Law action, Lofton Ridge sought, and continues to seek, monetary relief for damages sustained as a result of misrepresentations made regarding both access *and the development potential* of the Property. Even if Lofton Ridge prevails on the merits as against

Norfolk Southern and its right to access is legally adjudicated, Lofton Ridge will still have sustained damage as a result of the representations made by the At-Law Defendants, which damages are not recoverable against Norfolk Southern: such remedies being separate and cumulative, not inconsistent, simultaneous or wanting of election.

Finally, there is no evidence before this Court supporting Norfolk Southern's conclusory statement, nor can it be implied from a dismissal of the action, that Lofton Ridge has accepted money damages premised on the allegations contained in the At-law Action, a necessary predicate to bar prosecution of this action based upon the doctrine of election of remedies.

CONCLUSION

Neither the doctrine of judicial estoppel nor the concept of election of remedies applies to bar the prosecution of Lofton Ridge's action against Norfolk Southern. Lofton Ridge has not advanced mutually contradictory or inconsistent positions nor has it sought or accepted monies or other benefits from the At-Law Defendants in remedy of the wrongs occasioned it by Norfolk Southern. Rather, the filing of both actions was necessitated to provide Lofton Ridge complete relief for the different wrongs it has suffered, namely (i) an adjudication of its right to access its Property via the dirt road that connects with Route 853, (ii) an injunction against Norfolk Southern preventing any further interference of its right to continue to use the dirt road for ingress and egress, and (iii) compensation for the monetary

damages it sustained as a result of the misrepresentations made by the At-law Defendants regarding both access and the development potential of the Property.

Thus, Lofton Ridge, LLC, by counsel, respectfully requests that this Court overrule the Respondent's Plea in Bar and grant such other and further relief as it deems appropriate.

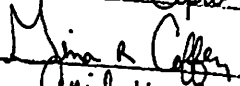
LOFTON RIDGE, LLC

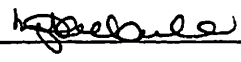
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CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, a true copy of the foregoing Brief in Opposition to Respondent's Plea in Bar to Mark D. Loftis, Esquire, Woods, Rogers & Hazelgrove, PLC, 1400 First Union Tower, P.O. Box 4125, Roanoke, VA 24038-4125, counsel for respondent, on this 15th day of April 2003.

Filed in the Clerk's Office of the
Circuit Court of Augusta County
Time: 12:00 noon Date: April 16, 2003
TESTE:  Dep. Clk.
Date: April 16, 2003



VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOFTON RIDGE, LLC,

Plaintiff,

v.

**NORFOLK SOUTHERN RAILWAY
COMPANY (incorrectly identified as
“Norfolk Southern Railway Corporation”),**

Defendant.

Case No. CH00000284-00

DEFENDANT'S REPLY BRIEF

Plaintiff's post-trial brief is a transparent effort to make an end-run around the Supreme Court of Virginia's decision in *Norfolk & Western Railway v. Waselchalk*, 244 Va. 329, 421 S.E.2d 424 (1992). At bottom, plaintiff's claim is premised on nothing more than evidence of historical use of the railroad's right-of-way by plaintiff's predecessors in title and the public in general. But rights cannot be acquired in property which is dedicated to a public use – such as NSRC's right-of-way here – based merely on historical use of the property.

Lofton Ridge attempts to fit the evidence of historical use into the theory of “easement by implication” or “equitable easement,” but even if Lofton Ridge could acquire rights across NSRC’s right-of-way on these theories (which it cannot, as a matter of law), in each instance Lofton Ridge wholly failed to prove the required elements for such an easement. The labels which Lofton Ridge employs cannot convert the kind of historical, permissive use of railroad property shown here into a covenant running with the land.

the Supreme Court of Virginia did not permit the assertion of prescriptive rights in railroad property, so it would not permit the assertion of an equitable easement.

III. ANY IMPLIED OR EQUITABLE EASEMENT CREATED WAS EXTINGUISHED WHEN THE PROPERTY ACQUIRED A DEEDED ACCESS TO THE PUBLIC ROAD

No matter how many times Lofton Ridge refers to the dirt road across NSRC's right-of-way as the only means of ingress and egress to its property, it cannot escape the plain fact that in 1967 the property acquired a deeded easement providing access to State Route 608. Lofton Ridge offered no evidence to suggest that this easement had been extinguished, or that it could not be developed. The acquisition of this easement eliminated any need for an implied or equitable easement to reach a public road. Even if any such implied or equitable easement had been created (and it had not), such an easement would have been extinguished by the deeded access to State Route 608. *American Oil Co. v. Leaman*, 199 Va. 637, 639, 101 S.E.2d 540, 542 (1958).

IV. THE SETTLEMENT IN LOFTON RIDGE'S LAW ACTION BARS ITS CLAIM UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL

Lofton Ridge's arguments on the doctrine of judicial estoppel are both factually and legally flawed, based on a hyper-technical parsing of the Motion for Judgment. To suggest, as Lofton Ridge does, that the law action seeks recovery for loss of the "development potential" of its property (Pl. Brief, p. 6) ignores the nature of the claims advanced in the law action. The claimed negligence and malpractice in the law action is premised entirely on the alleged inaccuracy of the representations made by the attorneys and surveyor regarding *access to the property across the railroad's right-of-way*. (Vol. I, pp. 111-114; Def. Ex. 6, ¶¶ 13, 14, 16, 24-26, 32-33, 47-48, 53.) These representations, which are before the Court (Def. Exs. 2 & 6), do not relate at all to the scope or width of the purported access easement, or to whether Lofton

Ridge could develop the property. Rather, the law action plainly asserts that Lofton Ridge has been damaged because it purchased landlocked property. Here, however, Lofton Ridge asserts that it has precisely the same easement which its attorneys described in their representations – merely labeling it an “implied easement” or “equitable easement” instead of a “prescriptive easement.” It cannot seriously be contended that these assertions are consistent with what it alleged in the law action.

Lofton Ridge’s argument that the doctrine of judicial estoppel cannot apply because this case was filed before the law action misunderstands the nature of judicial estoppel. Equity looks at substance, not mere form. *E. g., Texas Co. v. Northrup*, 154 Va. 428, 444, 153 S.E. 659, 664 (1930). The substantive rule of estoppel comes into play only when a party has either received a benefit, or caused another party to change its position, in reliance on the position relied upon. *See, e.g., Pollard & Bagby, Inc. v. Morton G. Thalheimer, Inc.*, 169 Va. 529, 536-37, 194 S.E. 701, 703 (1938). Here it is the benefit which Lofton Ridge received through the settlement of the law action that converts the law action from mere inconsistent pleading into the basis for invocation of judicial estoppel.

Finally, Lofton Ridge cannot seriously be heard to argue that it received no benefit from its settlement of the law action. Having successfully blocked inquiry into the terms of the settlement, Lofton Ridge cannot now hide behind this veil of confidentiality to suggest that its settlement was not supported by adequate consideration.⁶

CONCLUSION

The Supreme Court of Virginia has recently reiterated that easements must be proven by clear and convincing evidence. *Shaheen v. County of Mathews*, ___ Va. ___, ___ S.E.2d ___,

⁶ Lofton Ridge did not advance any arguments on the issues of estoppel, waiver or the width of the purported easement. Accordingly, NSRC has not addressed those issues in its Reply Brief, but rather stands on the arguments advanced at pp. 37-45 of its opening Post-Trial Brief.

TWENTY-EIGHTH JUDICIAL CIRCUIT
OF VIRGINIA

CHARLES B. FLANNAGAN, II, JUDGE

C. RANDALL LOWE, JUDGE

J. AUBREY MATTHEWS, RETIRED

CHARLES H. SMITH, JR., RETIRED



COMMONWEALTH OF VIRGINIA

7-25-03

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RE: Lofton Ridge v. Norfolk Southern Railway Co., etc.

Dear Council:

I have completed my review of this case which has been submitted to me for deliberation and final decision. I have reviewed the pleadings, extensive exhibits, counsel's memoranda, authorities cited and considered all of same in light of the evidence heard and arguments made at the trial on February 11th & 12th, 2003.

This is the most interesting and complex right-of-way case I have ever tried. The case was obviously well-prepared and, thus, well-tried from both sides. I am confident counsel uncovered and presented every relevant and material bit of factual evidence as well as every available and pertinent piece of documentary evidence. Likewise, counsel have identified, explored and developed every conceivable legal theory that might apply. Your

briefs are well stated and compelling. It has all provided considerable "food for thought" for me and consumed a considerable amount of time over the past couple of months. It is, therefore, with some regret that I am compelled to decide the case, not on the merits, but upon the basis of the plea in bar of judicial estoppel filed by the defendant.

The plaintiff is a limited liability corporation which owns a tract of land in Augusta County, Virginia consisting of some 242 acres and known as the Whip-O-Will-Farm. The property was acquired at foreclosure in 1998 for approximately \$300,000. The plan was to develop the property into 12 residential tracts for resale. Prior to the sale, the prospective purchasers engaged attorney Ronald W. Denny, Esq. and the law firm of Franklin, Denny, Ward & Lawson, P.L.C. to perform legal work incidental to their prospective purchase- title work, document preparation, incorporation, closing, etc. Mr. Denny, in turn, engaged Phillip H. Miller, Esq. and the law firm of Rhea & Miller, P.C. to perform the title examination. At the same time, plaintiff hired Tom Shumate, a certified land surveyor to perform a physical survey of the property. Subsequently, in his title report, Mr. Miller certified the property had access by virtue of a prescriptive easement over the property of the defendant. He further certified that this easement provided the property with access to State Route 853. Mr. Denny and his firm adopted and ratified and presented this report as their own. Mr. Shumate, in his "Surveyor Report," certified that all abutting streets or roads were maintained by public authorities. On the strength of their certifications, the plaintiff took title to the property and closed on 9-28-98. They immediately began development by building a road intended to provide access to and from the property. This road was supposed to link to a dirt road that crosses the property

and a railroad crossing owned by the defendant. This was their only means of access to State Route 853.

On June 16, 2000, the defendant blocked the plaintiff's access to the property by locking a gate located on their right-of-way. On July 11, 2000, the plaintiff filed a declaratory judgment action against the defendant in the Circuit Court of Augusta County seeking a declaration that they were entitled to use the dirt road to access State Route 853 and for injunctive relief. The parties subsequently reached an agreement which provided plaintiff access to their property *pendente lite*.

On July 6, 2001, the plaintiff's filed a law action against their attorneys and surveyor alleging professional negligence in their title and survey reports regarding the property. Specifically, the plaintiffs alleged that the title and survey certifications made were false and negligently made. They contended they were falsely and negligently advised by their attorneys that they had access to State Route 853 across the railroad right-of-way and, that without said access, their property was landlocked and not suitable for development. They contended they were falsely and negligently advised by their surveyor that their property abutted a publicly maintained road or street when, indeed, the property was landlocked and not suitable for development. For such false and negligent certifications the plaintiffs sought damages from their attorneys "...in an amount in excess of \$400,000..." (Interestingly, their motion for judgment contains no prayer for judgment against their surveyor.)

The law action was pursued through mediation prior to this trial and apparently resolved in a manner satisfactory to the plaintiff. (The mediation agreement is confidential and this court did not require disclosure, but their satisfaction is evidenced by their

dismissal of the law action against their attorneys, with prejudice, by order entered 12-19-02.) The suit apparently remains pending as to the surveyor, but, as indicated, there is no prayer for judgment damages against him, so it must be presumed the plaintiff has received the full benefit it expects from the law action.

The defendant has filed a plea in bar contending their action is now barred by the doctrine of judicial estoppel. That doctrine, as historically applied in Virginia, prohibits litigants from assuming inconsistent positions or mutually contradictory positions in a suit or series of suits with reference to the same set of facts. The defendant relies upon the holding in the case of Nagle v. Syer, 150 Va. 508 (1928) in which the court stated (quoting Arwood v. Hill's Admr., 135 Va. 235 (1923):

“A party cannot, either in the course of litigation or in dealings in pais, occupy inconsistent positions. Upon that rule election is founded; a man shall not be allowed, in the language of the Scotch law, ‘to approbate and reprobate.’ And where a man has an election between several inconsistent courses of action, he will be confined to that course which he first adopts; the election, if made with knowledge of the facts, is itself binding, it cannot be withdrawn...”

The defendant contends the positions taken by the plaintiff in the two suits are mutually inconsistent and contradictory. As the defendant correctly notes:

“The property is either landlocked or it is not. If it is not, Lofton Ridge has no viable claim for damages against its

attorneys and surveyors. If it is, Lofton Ridge cannot be entitled to any relief in this action.”

The plaintiff contends it has not taken mutually inconsistent positions in the separate suits. They maintain they are merely pleading in the alternative as permitted by Sec. 8-01-281 of the Code. That in the law action they sought and continue to seek monetary relief for damages sustained as a result of misrepresentations made regarding both access and development potential of the property, while in this case, they seek only a declaration of their right to access and no monetary relief. They contend the defendant has no standing to raise this defense in any event, since this action was filed first.

This suit is about one thing and one thing only – access. A close reading of the allegations of the motion for judgment filed in the law action reveals no substantive allegations regarding negligent advice about the development potential of the property. That suit was about one thing and one thing only – access. The property couldn’t be developed because it had no access. To read it any other way, as defendant suggests, would result in “ a hyper-technical parsing of the Motion for Judgment....” The claimed negligence and malpractice in the law action is premised entirely on the alleged inaccuracy of the representations made by the attorneys and surveyor regarding access to the property across the railroads right-of-way.

The court agrees. The positions taken by the plaintiff are mutually contradictory and inconsistent. It cannot be both ways. The plaintiff has now settled its law action, reaped the benefit of an award and dismissed it with prejudice against their attorneys. Having taken this benefit based upon the claim that the property is landlocked, the plaintiff is now precluded from reaping an additional benefit – a ruling by this court that it is not.

Nor does it matter that this action was first filed and, thus, this position first "adopted." The court is of the opinion that the position first "adopted" is that which was first pursued to a satisfactory conclusion by way of litigation, mediation, arbitration, etc. as the defendant correctly notes:

"...the substantive rule of estoppel comes into play only when a party has either received a benefit, or caused another party to change its position ... Here it is the benefit which Lofton Ridge received through the settlement of the law action that converts the law action from mere inconsistent pleading into the basis for invocation of judicial estoppel."

The law action having been successfully concluded on the basis of no access and pursuit of this action now barred thereby, the former becomes the law of the case.

Mr. Loftis should prepare an appropriate order incorporating this ruling and submit for entry.

Yours truly,


Charles H. Smith, Judge

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

LOFTON RIDGE, LLC,)	
)	
Complainant,)	
)	Case No.: CH00000284-00
v.)	
)	
NORFOLK SOUTHERN RAILWAY)	
COMPANY, previously identified as)	
NORFOLK SOUTHERN CORPORATION,)	
a/k/a Norfolk and Western Railroad)	
)	
Respondent.)	

FINAL DECREE

This cause came on to be heard upon the Amended Bill of Complaint; upon the Respondent's Answer and Plea in Bar; upon the evidence presented in open Court by the parties on February 11-12, 2003, before the Court sitting without a jury; upon the arguments of counsel; and upon the briefs and memoranda filed by the parties.

The Court, having duly considered the foregoing, rendered its memorandum opinion sustaining the Respondent's Plea in Bar based on the doctrine of judicial estoppel. The memorandum opinion is incorporated into this Final Decree by reference.

It is accordingly ADJUDGED, ORDERED and DECREED that:

1. The Respondent's Plea in Bar of judicial estoppel is SUSTAINED for the reasons set forth in the Court's memorandum opinion.
2. The Amended Bill of Complaint is accordingly dismissed with prejudice.

3. The cause is stricken from the docket and the papers placed among the ended chancery causes.

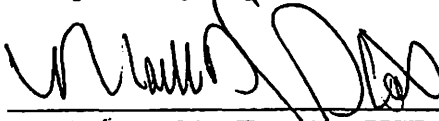
4. The Clerk of this Court shall certify a true copy of this Final Decree to counsel of record.

ENTER: 912103

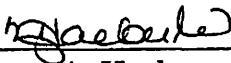
Charles H. South Jr.
JUDGE *Delegated*

DATE: Sept 2, 2003

I respectfully request the entry of this Final Decree:


Mark D. Loftis, Esquire (VSB #30285)
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Counsel for Norfolk Southern Railway Company

Seen and objected to for the reasons set forth in the record, including any and all reasons mentioned in any written or oral arguments, brief(s) and memoranda presented:


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ASSIGNMENT OF ERROR

The trial court erred in sustaining Norfolk Southern Railway Corporation's ("Norfolk Southern's") plea in bar and dismissing this action with prejudice based upon the doctrine of estoppel by inconsistent position, or "judicial" estoppel.