

In The
Supreme Court of Virginia

RECORD NO. 041722

BRUCE FORBES,

Appellant,

v.

**RAYMOND E. RAPP, TRUSTEE,
HARRISONBURG PHYSICIANS FOR
ANESTHESIOLOGY, INC., et al.,**

Appellees.

APPENDIX

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and Gerald C. Bland

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VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

BRUCE FORBES,

Plaintiff,

v.

Chancery No. CH03-000285

RAYMOND E. RAPP, TRUSTEE,
HARRISONBURG PHYSICIANS FOR
ANESTHESIOLOGY, INC., PROFIT-
SHARING PLAN EARMARK TRUST
NO. (1),

Serve: Raymond E. Rapp, Trustee
963 Chapel Hill Lane
Weyers Cave, Virginia

and

BLAND LAND COMPANY,
a Virginia corporation,

Serve: Gerald C. Bland, Registered Agent
57 S. Main Street, Suite 308
Harrisonburg, Virginia 22801

and

GERALD C. BLAND
57 S. Main Street, Suite 308
Harrisonburg, Virginia 22801

Defendants.

TO THE HONORABLE JUDGES OF THIS COURT:

BILL OF COMPLAINT

The plaintiff, Bruce Forbes, by counsel, for his Bill of Complaint against the defendants Raymond E. Rapp, Trustee, Harrisonburg Physicians for Anesthesiology, Inc., Profit-Sharing Plan Earmark Trust No. (1), Bland Land Company and Gerald C. Bland, alleges and says as follows:

PARTIES

1. The plaintiff Bruce Forbes (hereinafter referred to as "Mr. Forbes") is a citizen of the United States and a resident of Harrisonburg, Virginia.

2. The defendant Raymond E. Rapp, Trustee, Harrisonburg Physicians for Anesthesiology, Inc., Profit-Sharing Plan Earmark Trust No. (1) (hereinafter referred to as "Rapp, Trustee") is the trustee of the Harrisonburg Physicians for Anesthesiology, Inc., Profit-Sharing Plan Earmark Investment Trust No. (1). At all times relevant to the matters alleged herein, the Trustee resided in Augusta County and was the record owner of the property which is the subject of this cause.

3. The defendant Bland Land Company (hereinafter referred to as the "Company") is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Virginia, is engaged in the business of the sale of real estate in the Commonwealth of Virginia on behalf of clients from the general public, including auction sales, and has its principal office located in Harrisonburg, Virginia.

4. The defendant Gerald C. Bland ("Mr. Bland") is a citizen of the United States and a resident of Rockingham County, Virginia. Mr. Bland is a real estate broker licensed with the Commonwealth of Virginia who is an owner of Bland Land Company. Mr. Bland is also a licensed auctioneer in the Commonwealth of Virginia. Mr. Bland routinely deals with the subdivision of large tracts of land in Rockingham County, and is known to be familiar with Rockingham County's subdivision requirements, including the requirements relating to access roads from public highways to the tracts in the subdivision.

FACTS

5. In the spring of 2003, the defendant Rapp, Trustee, through the defendants Company and Mr. Bland who were acting as his authorized agents, advertised for sale at auction to the general public certain real estate containing 143.040 acres known as the "Haines Quarter" located north of Keezletown, Virginia, in Rockingham County, which auction was to be held on May 17, 2003. A true copy of one of the brochure advertisement prepared and disseminated by the defendants is attached hereto marked Exhibit 1 and is incorporated herein by this reference. Prior to May 17, 2003, the defendants also placed similar advertisements in the Daily News-Record, a newspaper of general circulation in the Harrisonburg-Rockingham County area.

6. Prior to the date set for the auction, Mr. Forbes was provided with the brochure advertisement prepared by the defendants relating to the auction of the property. Among the material representations in the advertisement relating to the auction provided to Mr. Forbes were the representations that the property was "[t]o be sold with a deeded right of way" and that there were "[g]reat homesites along the southern edge of the 'Haines Quarter'" which "overlook the new Packsaddle Golf Course, adjoining from 12 Green, along 13, and on up the hill, with a distant view of downtown Harrisonburg. . . ."

7. After receiving the brochure advertisement prior to the date set for the auction, Mr. Forbes attempted to determine from the defendants Company and Mr. Bland whether there was a minimum bid amount required in order for the auction sale to be consummated, but the defendants Company and Mr. Bland indicated only that the sale was not an absolute auction. The defendants Company and Mr. Bland refused to provide further information with regard to a minimum amount which would be acceptable to the defendant Rapp, Trustee.

8. On May 17, 2003, the defendants Company and Mr. Bland conducted the auction at the site of the Haines Quarter property. Mr. Forbes attended the auction. Prior to beginning the auction, Mr. Bland handed out a sheet entitled "Rapp Auction Sale Announcements," which he read aloud to those assembled, including Mr. Forbes. A true copy of the Rapp Auction Sale Announcements is attached hereto marked Exhibit 2 and is incorporated herein by this reference.

9. The announcements at the auction included the following:

"1. Bland Land Company is selling as agents for the owner, Harrisonburg Physicians for Anaesthesiology (sic), Incorporated, Earmark Investment Trust # 1, Raymond E. Rapp, Trustee."

"2. Included with the property is an appurtenant right of way over and across the existing access road we all used this morning, recorded in the Rockingham County Courthouse in Deed Book 629, at page 329."

.....

"8. Seller reserves the right to reject any and all bids on the property."

10. The bidding was active and ended at the sum of \$3,600.00 per acre offered by Mr. Forbes. At the conclusion of the bidding, Mr. Forbes spoke with Mr. Bland and asked whether the bid amount was sufficient for the sale of the property given Announcement 8 which provided that the seller reserved the right to reject any and all bids. Mr. Bland responded that he would need to get back to Mr. Forbes and let him know after speaking with the owner who was not present at the auction. Mr. Bland responded in a like manner to a similar inquiry from another person in attendance at the auction, stating that "the Colonel is not here. I'll have to let you know."

11. Mr. Forbes tendered his check in the amount of \$51,490.00 to Mr. Bland, made payable to Bland Co. Escrow as a part of Mr. Forbes' offer.

12. Upon tendering the check to Mr. Bland, Mr. Forbes was handed a document which set forth, among other things, the bid price of \$3,600.00 per acre, which Mr. Forbes signed. A true copy of the document is attached hereto marked Exhibit 3. At no time did any of the defendants sign a document or memorandum confirming the auction sale or binding the defendant Rapp, Trustee to the sale.

13. The defendants have not notified Mr. Forbes that the offer made at the auction is acceptable, and have not provided Mr. Forbes with any document in writing signed by or on behalf of the defendant Rapp, Trustee or otherwise binding the defendant Rapp, Trustee to the sale.

14. After the auction, and while awaiting notice of whether the defendant Rapp, Trustee accepted or rejected his offer, Mr. Forbes caused his counsel to search the title to the subject property in anticipation of a closing in the event the sale was accepted. Despite the affirmative representations made by the defendants Company and Mr. Bland on behalf of the defendant Rapp, Trustee, there is no deeded right of way giving access from the Haines Quarter property to a public highway. Moreover, there is no appurtenant right of way in the chain of title over and across the existing access road as represented in the Rapp Auction Sale Announcements.

15. The title to the subject property is unmarketable.

16. Mr. Forbes, by and through counsel, has withdrawn his offer to purchase the property and has demanded the return of his deposit of \$51,490.00.

17. The defendants, without cause or justification, have failed to return Mr. Forbes' deposit money and further have failed to indicate that they will do so.

COUNT I

(Rescission Due to Fraud and Misrepresentation)

18. Mr. Forbes reasserts and realleges the allegations contained within Paragraphs 1 through 17 of the Bill of Complaint as if fully set forth herein.

19. The representations that the property was to be sold "with a deeded right of way" were accompanied by a reference to a deed of record in the Clerk's Office in Rockingham County. Those representations were false and misleading when made, and the defendants knew or should have known that they were false and misleading. The referenced deed does not contain a conveyance of a right of way from the owner of a servient estate, and there is no deeded or judicially established right of way in the chain of title to the Haines Quarter property. The representations at the auction that there was an appurtenant right of way over the access road used to access the property on the day of the sale were false and misleading as well. The defendants knew or should have known that those representations that there was a deeded right of way or an appurtenant right of way were false and misleading, and that such misrepresentations had the capacity to and did mislead Mr. Forbes to his detriment and caused him to forego further investigation of the property.

20. The defendants' representations that there were "[g]reat homesites along the southern edge of the 'Haines Quarter'" which "overlook the new Packsaddle Golf Course, adjoining from 12 Green, along 13, and on up the hill, with a distant view of downtown Harrisonburg. . . ." created in the general public, including Mr. Forbes, the impression that the advertised deeded right of way was sufficient to accommodate the subdivision of the property into two or more tracts, when in fact there was no deeded right of way whatsoever. Those

representations were false and misleading and the defendants knew or should have known that such representations were false and misleading to the general public, and to Mr. Forbes in particular.

21. The defendants made the misrepresentations with the intention that Mr. Forbes would rely upon them. In fact, Mr. Forbes reasonably relied on the misrepresentations of fact set forth herein to his detriment in making the bid on the property at the auction.

22. To the extent that any contract was formed with the defendant Rapp, Trustee, such contract was induced by the fraudulent misrepresentations by the defendant Rapp, Trustee through his authorized agents, the defendants Company and Mr. Bland.

23. Mr. Forbes is entitled to rescission of any contract formed with the defendant Rapp, Trustee relating to the purchase of the Haines Quarter property, and to the return of his deposit in the full amount of \$51,490.00, together with interest at the legal rate per annum from and after May 17, 2003 and his costs and attorneys' fees incurred in this action, and to the return of all attorneys' fees and expenses incurred in connection with the search of the title to the property.

COUNT II

(Implied Agreement for Return of Deposit - Alternative Claim)

24. Mr. Forbes realleges and reasserts the allegations contained within Paragraphs 1-21 of the Bill of Complaint as if fully set forth herein.

25. No agreement to purchase the Haines Quarter property was formed between Mr. Forbes and the defendants, or any of them.

26. The defendants never expressed in a writing signed by or on behalf of the defendant Rapp, Trustee mutual assent to the terms of Mr. Forbes' offer.

27. There is no memorandum in writing signed by or on behalf of the defendant Rapp, Trustee for the sale of the property, and therefore any contract of sale between the parties is unenforceable under the statute of frauds.

28. The deposit money was tendered by Mr. Forbes pursuant to an implied understanding that if no agreement was reached, such money would be returned to Mr. Forbes. No purchase agreement having been reached which is enforceable, Mr. Forbes is entitled to the return

of the deposit in the full amount of \$51,490.00, together with interest thereon at the legal rate per annum from and after May 17, 2003.

COUNT III

(Conversion)

29. Mr. Forbes realleges and reasserts the allegations contained within Paragraphs 1-21 of the Bill of Complaint as if fully set forth herein.

30. Mr. Forbes, through counsel, has demanded that the deposit in the amount of \$51,490.00 be returned to him. Notwithstanding these demands, the defendants have failed and refused to return the deposit without justification or authority.

31. As a result of their conduct, the defendants have converted Mr. Forbes' property to their own use and benefit.

32. As a direct and proximate result of the conversion of his property by the defendants, Mr. Forbes has suffered damage in the amount of \$51,490.00, together with interest thereon at the legal rate per annum from and after May 17, 2003.

CLAIM FOR PUNITIVE DAMAGES

33. Mr. Forbes realleges and reasserts the allegations contained within Paragraphs 1-21 and 29-32 of the Bill of Complaint as if fully set forth herein.

34. The defendants' conduct described herein was malicious, wanton and willful, and was in conscious or reckless disregard of Mr. Forbes' rights, entitling him to recover punitive or exemplary damages against the defendants.

WHEREFORE, the plaintiff Bruce Forbes, prays the Court that he have and recover judgment against the defendants as follows:

1. That to the extent that there is any agreement for the sale of the property between Mr. Forbes and the defendant Rapp, Trustee, the Court enter a Decree rescinding such agreement and returning the parties to the positions they occupied prior to May 17, 2003;


2. That he have and recover of the defendants, jointly and severally, judgment for the sum of FIFTY-ONE THOUSAND FOUR HUNDRED NINETY and NO/100 (\$51,490.00), together with interest thereon at the legal rate per annum from and after May 17, 2003, plus attorneys' fees and costs incurred in preparing for the purchase of the Haines Quarter property, including the title search;

3. That he have and recover judgment against the defendants for punitive damages in the sum of \$250,000.00 under Counts I and III;

4. That Mr. Forbes have and recover his costs expended in this matter, including his attorneys' fees in connection with his claims for rescission and conversion; and

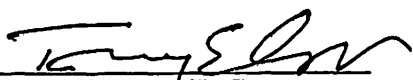
5. That he have and recover such other and further relief as the Court deems just and proper.

BRUCE FORBES
By: Counsel


Timothy E. Cupp, VSB. No. 23017
Cupp & Cupp, P.C.
1951 Evelyn Byrd Avenue, Suite D
P.O. Box 589
Harrisonburg, Virginia 22803
(540) 432-9988
Counsel for Plaintiff

CERTIFICATE

I hereby certify that on this 30th day of June, 2003, a true copy of the foregoing Bill of Complaint was mailed, postage prepaid, to the defendants at the addresses set forth for service herein as follows: Raymond E. Rapp, Trustee, 963 Chapel Hill Lane, Weyers Cave, Virginia 24486, Bland Land Company, 57 S. Main Street, Suite 308, Harrisonburg, Virginia 22801, and Gerald C. Bland, 57 S. Main Street, Suite 308, Harrisonburg, Virginia 22801, with a copy to David A. Penrod, Esquire, Hoover, Penrod, Davenport & Crist, 342 South Main Street, Harrisonburg, Virginia 22801.


Timothy E. Cupp

Mountain Land in the Heart of the Shenandoah Valley!

143 Acres – “The Haines Quarter”

Just North of
Keezletown, Virginia



Sells at

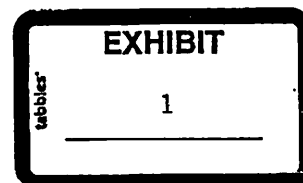
AUCTION

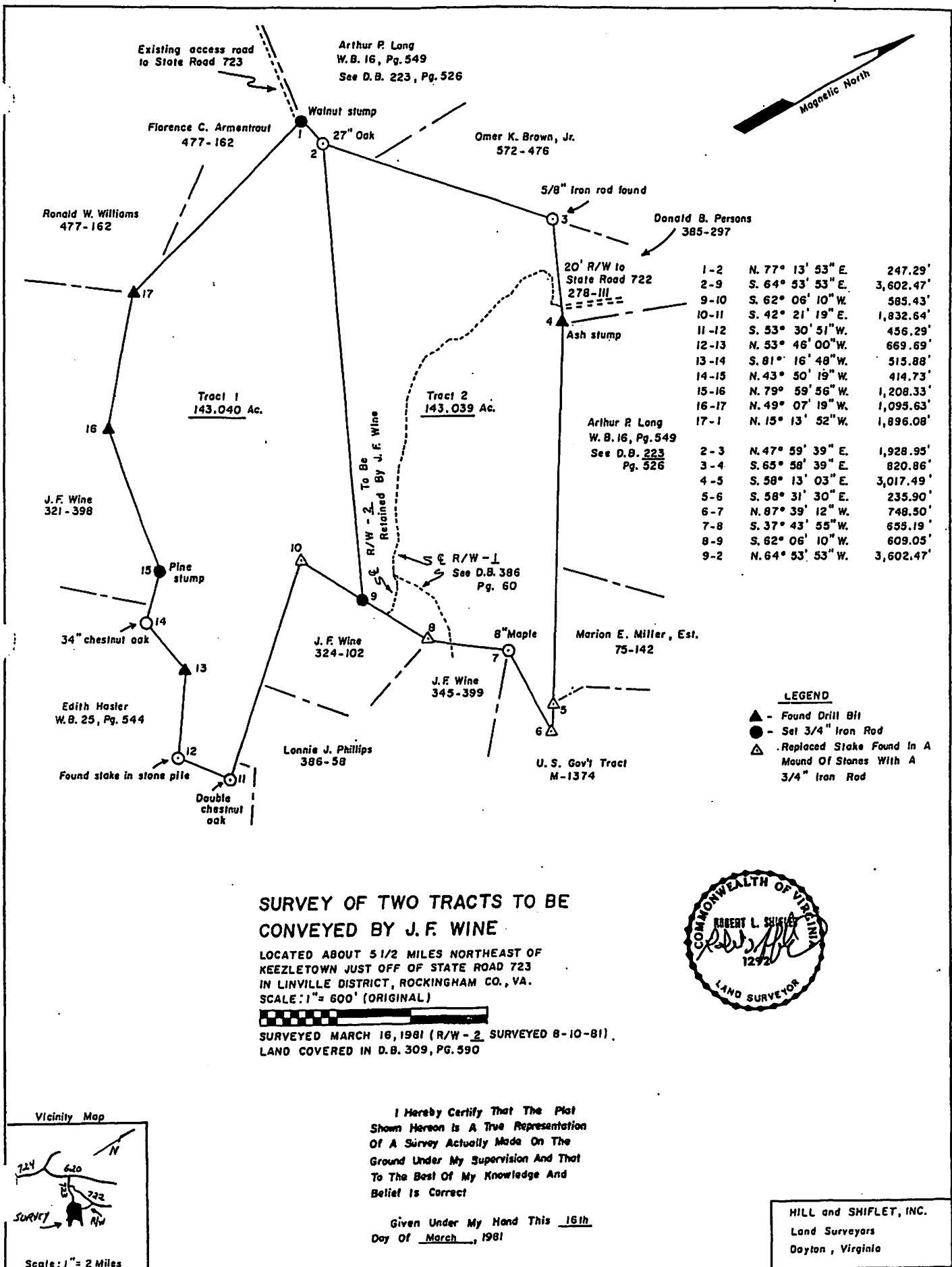
Saturday, May 17th – 10:30 AM

Sale to be Held Right on the Property!

BLAND

Land Company
57 S. Main St., #308 • Harrisonburg, VA 22801





Note: Tract One is the property offered at the auction.

Deer! Turkey!
Bear!

Crystal clear mountain streams
of sweet water!



143.04 Acres of Woodland Less than a Half Hour from Harrisonburg, Va.

Sells at

AUCTION

Saturday, May 17th – 10:30 AM

Great homesites along the southern edge of the "Haines Quarter" overlook the new Packsaddle Golf Course, adjoining from 12 Green, along 13, and on up the hill, with a distant view of downtown Harrisonburg, but otherwise it is as quiet as any wilderness area, and only twenty minutes from town! Owned and protected for many years as an ecological refuge. A truly special, wonderful place.

In the Keezletown North Ag & Forestal District, protected from development or division of any kind until June 23, 2005, by the act of the owners, who have retired.

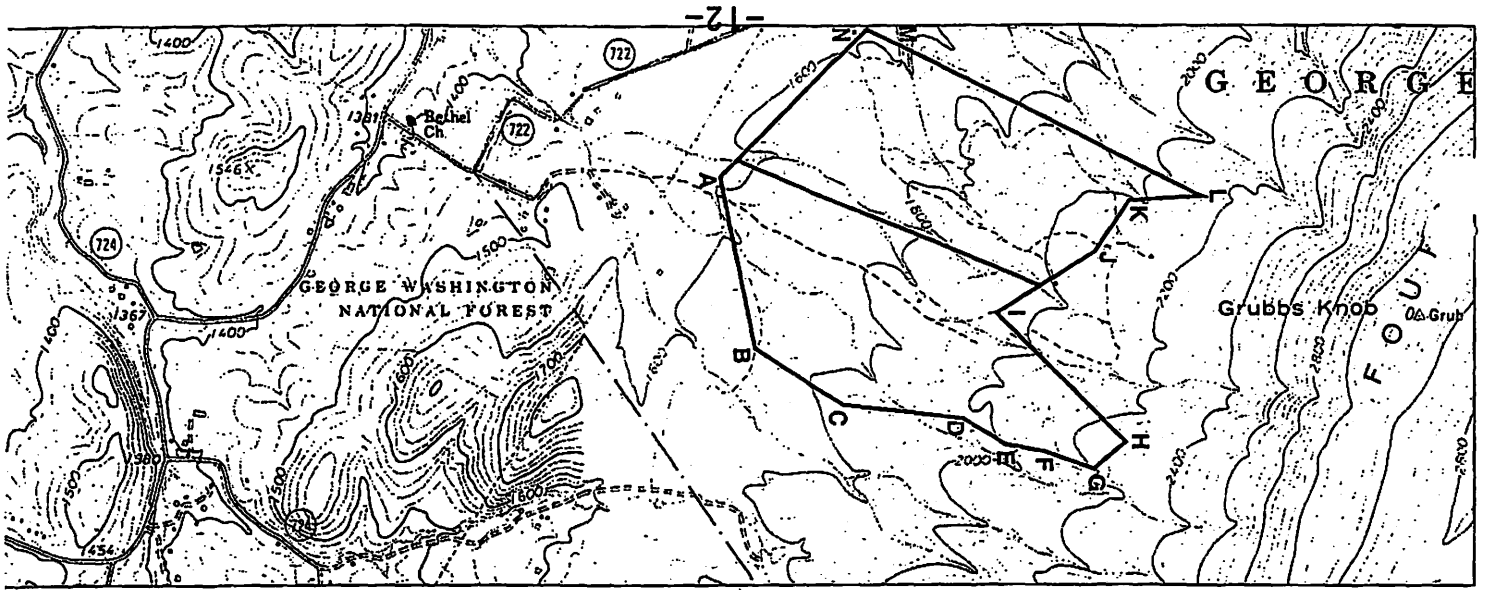
To be sold by a trustee under special warranty, with a deeded right of way recorded in the deed in, in the Clerk's Office in the Courthouse in Harrisonburg in Deed Book 629, at page 329. County Tax Parcel # 97-(A)-63. Possession at settlement. Sold according to the recorded plat reproduced on the facing page. Boundaries marked approximately by pink ribbon, and along the southern side line by the silver-gray blazes of the adjoiner.

Go look on your own [directions on back page], or call agents to arrange a tour or to get further information:

BLAND

Land Company

57 S. Main St.. #308 • Harrisonburg, VA 22801



Directions:

— From Harrisonburg: Go east on the Old Furnace Road, across I-81, becoming Rt. 718, to a left turn onto Rt. 717 to the next intersection, to a right turn onto Rt. 718, now Minnie Ball Lane. Go 1.1 mile to a left onto Rt. 620, the Mountain Valley Road; proceed north on Rt. 620 to a right turn onto Rt. 722, the Armentrout Path, at Bethel Church. Just past the church, proceed straight ahead onto Haines Quarter Lane, over the hill to the entrance to the access road across the timber bridge. Go up the road to the upper clearing, where the sale will be held. Watch for signs.

— From I-81: Take the U. S. 33 East exit, and continue on U. S. 33 out of the developed area to the stoplight for a left turn onto Rt. 620. Proceed north on Rt. 620, being sure to turn right at the fork in front of the Keezletown School, continuing on Rt. 620, the Mountain Valley Road, to Rt. 722, the Armentrout Path, and then as above.

Harrisonburg, VA 22801
57 S. Main St., #308
Land Company

BLAND

brought to you by

AUCTION

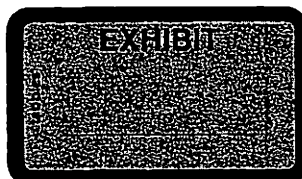
Sells at

143 Acres of Great Mountain Land
Rockingham County, Virginia

First Class Presort

1st Class Postage
Paid
Harrisonburg, Virginia
22801
Permit #66

1. Bland Land Company is selling as agents for the owner, Harrisonburg Physicians for Anaesthesiology, Incorporated, Earmark Investment Trust # 1, Raymond E. Rapp, Trustee.
2. Included with the property is an appurtenant right of way over and across the existing access road we all used this morning, recorded in the Rockingham County Courthouse in Deed Book 629, at page 329.
3. Selling with special warranty of title. The buyer will need to give the cashier today the name he or she intends to take title in, so we can write your deed promptly. The deed will be written by Mr. David Penrod, attorney.
4. Settlement will be at his offices on South Main Street in Harrisonburg, or other convenient place, on or before Thursday, June 17, 2003. If you delay closing until after June 17th, a penalty of one percent of today's purchase price will be added to the purchase price for each month or part month's delay.
5. Selling Tract One as shorn on a plat of Hill & Shiflet, Land Surveyors, dated March 16, 1981, a copy of which is printed in the brochure. Be clear that Tract One has 143.04 acres.
6. Real estate taxes will be pro-rated to the day of settlement.
7. Possession will be given at settlement. The property has been enrolled in the Keezletown North Ag and Forestal District until 6/23/05. We have the definition sheets from the County; see the cashier.
8. Seller reserves the right to reject any and all bids on the property.
9. Terms: 10% down payment in cash or good check today, to be held in Bland Land Company's interest-bearing escrow account in Rockingham Heritage Bank in Harrisonburg, Va., interest to accrue to the seller.
Balance due at settlement.
9. The bidding will be by the acre.



State of Virginia

County of Rockingham

THIS IS TO CERTIFY that I have this day purchased, at Auction from Lot 1. Harrison Bush physicians for
and estate of the late Dr. Samuel E. Harrison
Through the Bland Land Co., Selling agents, Tracts or Lots Not Raymond E. Bapp, Trustee
as per map shown me. Purchase Price \$3600 per (lot/acre) and I hereby bind myself to accept said
property as per the terms, conditions, reservations, etc., as announced at said Auction and pay for same accord-
ingly, subject to seller's confirmation.

This the 17th day of May 1903

Name Bruce Forbes

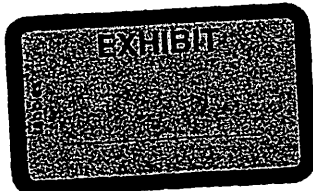
Address 256 Blue stone Hill Drive

Name of Buyer's Attorney Mac Nicholas Buyer's Telephone 4133-2831

Accepted by Bruce Forbes

Name(s) in Which Buyer Wants to Take Title

Cash Payment \$31496.00 Balance in _____ installments



VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

BRUCE FORBES

Plaintiff,

Chancery No. CH03-00285-00

v.

RAYMOND E. RAPP, TRUSTEE
HARRISONBURG PHYSICIANS FOR
ANESTHESIOLOGY, INC., PROFIT-
SHARING PLAN EARMARK TRUST
NO. (1)

Defendant.

DEMURRER, ANSWER, AND CROSS BILL OF COMPLAINT

I. DEMURRER

The Defendant, Raymond E. Rapp, Trustee, Harrisonburg Physicians for Anesthesiology, Inc., Profit-Sharing Plan Earmark Trust No. (1) (hereinafter "Defendant" or "Rapp"), by counsel, demurs to Count II of the Bill of Complaint on the grounds that the Bill of Complaint fails to allege facts upon which relief can be granted for the following reasons:

1. Paragraphs 25, 26, and 27 allege that an agreement was never formed between Plaintiff and Defendant because Defendant allegedly did not assent in a written format. Bill of Complaint. ¶¶ 25, 26, 27.
2. Exhibit 3, attached to the Bill of Complaint and signed by Plaintiff, indicates that a sale did occur ("This is to certify that I [Bruce Forbes] have this day purchased, at Auction from [Defendants], Tract 1 as per map shown me.") and that written mutual consent was waived ("subject to seller's confirmation" stricken through on document). See Exhibit 3.

WHEREFORE, the Defendant respectfully demurs and moves the Court to:
dismiss Count II of the Bill of Complaint with prejudice; award to him his costs
expended herein; and grant to him such further relief as the Court deems appropriate.

II. ANSWER

The Defendant, for his Answer, states the following:

1. The Defendant is without sufficient information to admit or deny the allegations set forth in paragraph 1 of the Bill of Complaint.
2. The Defendant admits the allegations set forth in paragraph 2 of the Bill of Complaint.
3. The Defendant is without sufficient information to admit or deny the allegations set forth in paragraph 3 of the Bill of Complaint.
4. The Defendant is without sufficient information to admit or deny the allegations set forth in paragraph 4 of the Bill of Complaint.
5. The Defendant admits the allegations set forth in paragraph 5 of the Bill of Complaint.
6. The Defendant is without sufficient information to admit or deny that Plaintiff was provided the brochure advertisement as alleged in paragraph 6 of the Bill of Complaint. Defendant states that the brochure advertisement speaks for itself.
7. The Defendant is without sufficient information to admit or deny the allegations set forth in paragraph 7 of the Bill of Complaint.
8. The Defendant admits that the auction was conducted on May 17, 2003 at the Haines Quarter, but is without sufficient information to admit or deny

the remainder of the allegations set forth in paragraph 8 of the Bill of Complaint.

9. The Defendant is without sufficient information to admit or deny the allegations set forth in paragraph 9 of the Bill of Complaint.
10. The Defendant is without sufficient information to admit or deny the allegations set forth in paragraph 10 of the Bill of Complaint.
11. The Defendant admits that Plaintiff tendered a check in the amount of \$51,490.00, but is without sufficient information to admit or deny the remainder of the allegations set forth in paragraph 11 of the Bill of Complaint.
12. The Defendant admits that Plaintiff was handed and signed the document labeled Exhibit 3, but denies the remainder of the allegations set forth in paragraph 12 of the Bill of Complaint.
13. The Defendant denies the allegations set forth in paragraph 13 of the Bill of Complaint.
14. The Defendant denies the allegations set forth in paragraph 14 of the Bill of Complaint.
15. The Defendant denies the allegation set forth in paragraph 15 of the Bill of Complaint.
16. The Defendant admits that Plaintiff attempted to withdraw the bid he submitted at public auction and which was accepted and that Plaintiff has demanded the return of his deposit. Defendant further states that Plaintiff's actions constitute a breach of contract.

17. The Defendant denies the allegations set forth in paragraph 17 of the Bill of Complaint.
18. The Defendant restates his answer to paragraphs 1-17 of the Bill of Complaint as if fully set forth herein.
19. The Defendant denies the allegations set forth in paragraph 19 of the Bill of Complaint.
20. The Defendant denies the allegations set forth in paragraph 20 of the Bill of Complaint.
21. The Defendant denies the allegations set forth in paragraph 21 of the Bill of Complaint.
22. The Defendant admits that a contract was formed, but denies the remainder of the allegations set forth in paragraph 22 of the Bill of Complaint.
23. The Defendant denies the allegations set forth in paragraph 23 of the Bill of Complaint.
24. The Defendant restates his answer to paragraphs 1-21 of the Bill of Complaint as if fully set forth herein.
25. The Defendant denies the allegation set forth in paragraph 25 of the Bill of Complaint. See Exhibit 3 of the Bill of Complaint.
26. The Defendant denies the allegation set forth in paragraph 26 of the Bill of Complaint.
27. The Defendant denies the allegations set forth in paragraph 27 of the Bill of Complaint.

28. The Defendant denies the allegations set forth in paragraph 28 of the Bill of Complaint.
29. The Defendant restates his answer to paragraphs 1-21 of the Bill of Complaint as if fully set forth herein.
30. The Defendant admits that Plaintiff has demanded the return of the deposit but denies the remainder of the allegations set forth in paragraph 30 of the Bill of Complaint.
31. The Defendant denies the allegations set forth in paragraph 31 of the Bill of Complaint.
32. The Defendant denies the allegations set forth in paragraph 32 of the Bill of Complaint.
33. The Defendant restates his answer to paragraphs 1-21 of the Bill of Complaint as if fully set forth herein.
34. The Defendant denies the allegations set forth in paragraph 34 of the Bill of Complaint.
35. All material allegations in the Bill of Complaint not specifically admitted are denied.

WHEREFORE, Defendant denies that Plaintiff is entitled to any relief requested and prays that the Bill of Complaint be dismissed and that Defendant be awarded the relief requested in his Cross Bill of Complaint.

III. CROSS BILL OF COMPLAINT

For his Cross Bill of Complaint, the Defendant (Cross-Plaintiff) states as follows:

1. The Plaintiff, Bruce Forbes ("Forbes") submitted the high bid at public auction of the real estate that is the subject of this dispute.
2. Pursuant to Forbes' bid and the document received and signed by Forbes on May 17, 2003 (Exhibit 3 of the Bill of Complaint) and confirmed by the May 21, 2003 letter sent from Defendant's attorney, David Penrod, to Forbes' attorney, Dean Nichols, incorporated herein as Exhibit A, a contract was created between Forbes and Defendant for the sale of Tract 1.
3. On or about June 30, 2003, via letter from Forbes' counsel, incorporated herein as Exhibit B, Forbes refused to follow through on the transaction, thereby breaching the contract formed on May 17, 2003.
4. On or about July 10, 2003, (after this litigation was filed) Defendant's counsel, David Penrod, contacted Forbes' counsel in good faith in an attempt to resolve this dispute, via letter incorporated herein as Exhibit C.
5. On or about July 15, 2003, Forbes indicated that he would not purchase Tract 1.
6. Defendant has received and accepted an offer to purchase Tract 1 for \$400,000.


WHEREFORE, Defendant (Cross-Plaintiff) respectfully requests that this Court enter judgment in his favor and against Forbes for: the amount of \$114,900 (the difference between the Plaintiff's purchase price at auction and the price at which the property was sold) plus interest at one percent (1%) per month from June 17, 2003 (\$5,148 accumulating per month); constituting the one percent purchase price penalty for not closing by June 17, 2003; that the Plaintiff be given credit equal to the amount of the

\$51,490 down payment by the Plaintiff; that Defendant be awarded costs; and any other relief this Court deems just.

RESERVATION

The Defendant reserves the right to amend or addend these Responsive Pleadings, including without limitation any plea, motion, demurrer, grounds of defense, or affirmative defense, as these become evident during the pendency of this action.

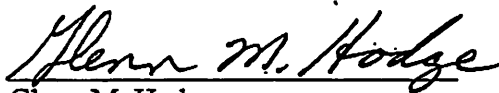
RAYMOND E. RAPP, TRUSTEE
HARRISONBURG PHYSICIANS FOR
ANESTHESIOLOGY, INC., PROFIT-
SHARING PLAN EARMARK TRUST
NO. (1)
By: Counsel



Glenn M. Hodge, Esq., VSB #12159
Marshall H. Ross, Esq., VSB #29674
Wharton Aldhizer & Weaver
100 South Mason Street
P.O. Box 20028
Harrisonburg, Virginia 22801
(540) 438-5352
(540) 434-5502 (facsimile)
Counsel for Defendant

CERTIFICATE

I hereby certify that on this 23rd day of July, 2003, a true copy of the foregoing
Demurrer, Answer and Cross Bill of Complaint was mailed, postage prepaid, to Timothy
E. Cupp, Esquire, Counsel for the Plaintiff.



Glenn M. Hodge
Counsel for Raymond E. Rapp, Trustee
Harrisonburg Physicians for
Anesthesiology, Inc., Profit-Sharing Plan
Earmark Trust No. (1)

KAZ0035

HOOVER, PENROD, DAVENPORT & CRIST

ATTORNEYS AT LAW
342 SOUTH MAIN STREET
HARRISONBURG, VIRGINIA 22801

LAWRENCE H. HOOVER, JR.
DAVID A. PENROD
JOHN N. CRIST
DALE A. DAVENPORT
ROBERT F. KEEFER
RICHARD A. BAUGH
DILLINA W. STICKLEY

FACSIMILE
540-433-3916

TELEPHONE
540-433-2444

May 21, 2003

Dean M. Nichols, Esquire
Layman & Nichols, P.C.
268 Newman Avenue
Harrisonburg, VA 22801

Re: Earmark Investment Trust #1 to Forbes

Dear Mac:

I represent Harrisonburg Physicians for Anesthesiology, Incorporated, Earmark Investment Trust #1, Raymond E. Rapp, Trustee, which sold a tract of land on May 17, 2003 to Bruce Forbes. I understand you will provide Mr. Forbes' legal representation.

I am writing to alert you that the auction sale announcement requires the closing to take place on or before June 17, 2003; there is a penalty if the closing is delayed.

Enclosed is a draft deed; please review and let me know if you want changes.

Sincerely,

HOOVER, PENROD, DAVENPORT & CRIST, P.L.C.



David A. Penrod

DAP/psw

cc: Jack Rapp

bcc: Chris Bland

THIS DEED is made this 21st day of May, 2003, by and between RAYMOND E. RAPP, TRUSTEE, HARRISONBURG PHYSICIANS FOR ANESTHESIOLOGY, INC., PROFIT-SHARING PLAN EARMARK INVESTMENT TRUST NO. (1), Grantor, and BRUCE FORBES, Grantee,

WITNESSETH:

That for and in consideration of the sum of Ten Dollars (\$10.00), cash in hand paid by the Grantee to the Grantor, the receipt of which is hereby acknowledged by the Grantor, the Grantor does hereby bargain, sell, grant and convey, with Special Warranty, unto BRUCE FORBES, Grantee, all that certain lot or parcel of land containing 143.040 acres, more or less, located just off State Road Nos. 722 and 723, together with any improvements thereon, and all rights, privileges, appurtenances, easements and rights of way thereunto belonging or appertaining, situate approximately five (5) miles northeast of Keezletown, in Linville District, Rockingham County, Virginia, and being more particularly described according to a survey by Robert L. Shiflet, C.L.S., dated March 16, 1981, as follows:

Beginning at a ¾" iron rod set in the remains of an old walnut stump on the north side of an access road, a corner of Arthur P. Long and Florence C. Armentrout; thence with a line of Arthur P. Long N 77° 13' 53" E 247.29 ft. to a 27" black oak tree, a corner of Arthur P. Long and a corner of Tract 2; thence with a line of Tract 2 S 64° 53' 53" E 3602.47 ft. to a corner of Tract 2 in a line of J. F. Wine's land that is recorded in Deed Book No. 324, page 102, set a ¾" iron rod in a mound of stones; thence with a line of J. F. Wine S 62° 06' 10" W 585.43 ft. to a corner of J. F. Wine, replaced a found stake with a ¾" iron rod in a mound of stones between a found marked chestnut oak and hickory near a road; thence with a line of J. F. Wine in part, Lonnie J. Phillips in part and Edith Hasler in part S 42° 21' 19" E 1832.64 ft. to a large marked double chestnut oak, a corner of Edith Hasler; thence with three lines of Edith Hasler S 53° 30' 51" W 456.29 ft. to a stake found in a mound of stones; thence N 53° 46' 00" W 669.69 ft. to a drill

Prepared by: HOOVER, PENROD, DAVENPORT & CRIST
342 S. Main St., Harrisonburg, VA 22801

Tax ID No. _____

bit found between 3 marked pine trees; thence S 81° 16' 48" W 515.88 ft. to an old marked 34" chestnut oak; thence with a line of Edith Hasler in part and J. F. Wine in part N 43° 50' 19" W 414.73 ft. to a ¾" iron rod set in an old marked pine stump; thence with two lines of J. F. Wine N 79° 59' 56" W 1208.33 ft. to a drill bit found in a mound of stones; thence N 49° 07' 19" W 1095.63 ft. to a drill bit found in a mound of stones, a corner of J. F. Wine and Ronald W. Williams; thence with a line of Ronald W. Williams in part and Florence C. Armentrout in part N 15° 13' 52" W 1896.08 ft. to the beginning, contains 143.040 acres.

Included in this conveyance is an appurtenant right of way over and across the existing access road from the aforesaid tract to State Road 723.

The property herein conveyed is all and the same real estate acquired by the Grantor herein from M. Bruce Wallinger, Trustee under a certain Trust Agreement dated July 29, 1981, FBO Jean F. Wine, by a deed dated August 13, 1981, which deed is recorded in the Clerk's Office of the Circuit Court of Rockingham County, Virginia, in Deed Book 629, at page 329.

This conveyance is subject to the conditions, restrictions and easements of record, if any, affecting the property hereby conveyed.

WITNESS the following signature and seal:

_____(SEAL)
RAYMOND E. RAPP, TRUSTEE,
HARRISONBURG PHYSICIANS FOR
ANESTHESIOLOGY, INC., PROFIT SHARING
PLAN EARMARK INVESTMENT TRUST
NO. (1)

STATE OF VIRGINIA
CITY OF HARRISONBURG, to-wit:

The foregoing instrument was acknowledged before me this ____ day of _____, 2003, by RAYMOND E. RAPP, TRUSTEE, HARRISONBURG PHYSICIANS FOR ANESTHESIOLOGY, INC., PROFIT-SHARING PLAN EARMARK INVESTMENT TRUST NO. (1).

My commission expires _____.

NOTARY PUBLIC

GRANTEE'S ADDRESS:

LAYMAN & NICHOLS, P.C.

A Professional Law Corporation

268 Newman Avenue
Harrisonburg, Virginia 22801

Telephone: (540) 433-2121

Facsimile: (540) 433-7296

www.layman-nichols.com

Michael L. Layman
Dean M. Nichols
Steven C. Rhodes
Glendon K. Gill

Daniel L. Bowman, CPA
(Not An Attorney)

Staunton Office
13 South New Street
Staunton, Virginia 24401
(540) 213-2121

June 30, 2003

VIA U.S. MAIL AND TELEFAX: 433-3916

David A. Penrod, Esq.
Hoover, Penrod, Davenport & Crist
342 South Main Street
Harrisonburg, VA 22801

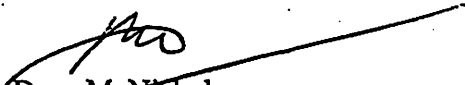
RE: Rapp Auction Sale

Dear David:

This letter is to withdraw Mr. Forbes's offer to purchase the 143 acre tract owned by Dr. Rapp, Trustee. This withdraw of the offer to purchase the property is based on misrepresentations regarding the existence of a deeded right of way to the property and misrepresentations regarding the ability to subdivide the property. Moreover, there has been no mutual assent to the offer evidenced in writing by Dr. Rapp, Trustee. Based on the withdraw of the offer and the invalidity of the sale to Mr. Forbes, this is a demand that Mr. Forbes's deposit of \$51,490 be returned immediately.

Sincerely,

LAYMAN & NICHOLS, P.C.


Dean M. Nichols

DMN/tpd

cc: Mr. Bruce Forbes
Timothy E. Cupp, Esquire

C:\CLIENT\LTR\FORBES PENROD\LTR

HOOVER, PENROD, DAVENPORT & CRIST, P.L.C.

ATTORNEYS AT LAW
342 SOUTH MAIN STREET
HARRISONBURG, VIRGINIA 22801

DAVID A. PENROD
JOHN N. CRIST
DALE A. DAVENPORT
RICHARD A. BAUGH
DILLINA W. STICKLEY

July 10, 2003

LAWRENCE H. HOOVER, JR.
OF COUNSEL

FACSIMILE
540-433-3916

TELEPHONE
540-433-2444

VIA FACSIMILE AND U.S. MAIL - 432-9557

Timothy E. Cupp, Esquire
Cupp & Cupp, P.C.
P. O. Box 589
Harrisonburg, VA 22803

Re: Forbes v. Rapp, et als

Dear Tim:

I am writing to confirm the substance of our telephone conversation earlier today.

I was surprised to receive a copy of this lawsuit. After I read the allegations, I assumed you had been given inaccurate or incomplete information, especially related to the claim that Mr. Forbes' bid of \$3,600.00 per acre had not been accepted.

As you know, an acceptance can be either express or implied. Not only was Mr. Forbes' high bid accepted and his deposit check cashed, on May 21 I mailed his attorney, Mac Nichols, a proposed deed conveying the property to Mr. Forbes. While Mac and I had subsequent discussions about the width of the easement, the lack of mutual assent was never raised by Mac until his letter of June 30. Further, Mr. Forbes' efforts during June to sell the property to another contradicts his position that he did not have a contract to purchase the land.

When Mac Nichols searched the title to the property, he found the advertised deed referring to the easement across this property, but he could not find the original grant of that easement. I represented to Mac that given the decades long use of the easement by Dr. Rapp and his predecessor in title, Dr. Jean Wine, that I could obtain without additional premium a title insurance policy guaranteeing the existence of an established easement. After making inquiries, I related to Mac that Mr. Clyde Hisey, over whom the easement passed, acknowledged the existence of the easement and was willing to grant a deeded easement. I offered to change the draft deed to add Mr. Hisey as a grantor of the existing easement.

So much about the history; here is where we are now.

Dr. Rapp has received an offer to purchase the property for \$400,000.00, or approximately \$2,800.00 an acre. The sale will include a deeded easement from Mr. Hisey. Given the circumstances of the auction, Dr. Rapp is inclined to sell the property for \$400,000.00, defend your client's lawsuit and counter sue for the difference between the auction price and the new \$400,000.00 purchase price.

HOOVER, PENROD, DAVENPORT & CRIST, P.L.C.

Timothy E. Cupp, Esquire

July 10, 2003

Page 2

The purpose of this letter is to put Mr. Forbes on notice of Dr. Rapp's intentions so that your client may, if he desires, reconsider his renunciation of his contract.

Kindly let me know by 5:00 p.m. Monday, July 14, whether Mr. Forbes will honor his contract and buy the property with a deeded easement, or whether he insists on continuing his litigation. Should I not receive an answer by 5:00 p.m. Monday, I shall assume Mr. Forbes wants to defend himself in court.

Sincerely,

HOOVER, PENROD, DAVENPORT & CRIST, P.L.C.



David A. Penrod

DAP/psw

cc: Dr. Jack Rapp

✓ bcc: Glenn Hodge, Esq.

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY.

BRUCE FORBES,

Plaintiff,

v.

RAYMOND E. RAPP, TRUSTEE,
HARRISONBURG PHYSICIANS FOR
ANESTHESIOLOGY, INC., PROFIT-
SHARING PLAN EARMARK TRUST
NO. (1), et al.,

Defendants.

Chancery No. CH03-000285

TO THE HONORABLE JUDGES OF THIS COURT:

AMENDED BILL OF COMPLAINT

The plaintiff, Bruce Forbes, by counsel, for his Amended Bill of Complaint against the defendants Raymond E. Rapp, Trustee, Harrisonburg Physicians for Anesthesiology, Inc., Profit-Sharing Plan Earmark Trust No. (1), Bland Land Company and Gerald C. Bland, alleges and says as follows:

PARTIES

1. The plaintiff Bruce Forbes (hereinafter referred to as "Mr. Forbes") is a citizen of the United States and a resident of Harrisonburg, Virginia.

2. The defendant Raymond E. Rapp, Trustee, Harrisonburg Physicians for Anesthesiology, Inc., Profit-Sharing Plan Earmark Trust No. (1) (hereinafter referred to as "Rapp, Trustee") is the trustee of the Harrisonburg Physicians for Anesthesiology, Inc., Profit-Sharing Plan Earmark Investment Trust No. (1). At all times relevant to the matters alleged herein, the Trustee resided in Augusta County and was the record owner of the property which is the subject of this cause.

3. The defendant Bland Land Company (hereinafter referred to as the "Company") is a corporation organized and existing under and by virtue of the laws of the Commonwealth of

Virginia, is engaged in the business of the sale of real estate in the Commonwealth of Virginia on behalf of clients from the general public, including auction sales, and has its principal office located in Harrisonburg, Virginia.

4. The defendant Gerald C. Bland ("Mr. Bland") is a citizen of the United States and a resident of Rockingham County, Virginia. Mr. Bland is a real estate broker licensed with the Commonwealth of Virginia who is an owner of Bland Land Company. Mr. Bland is also a licensed auctioneer in the Commonwealth of Virginia. Mr. Bland routinely deals with the subdivision of large tracts of land in Rockingham County, and is known to be familiar with Rockingham County's subdivision requirements, including the requirements relating to access roads from public highways to the tracts in the subdivision.

FACTS

5. In the spring of 2003, the defendant Rapp, Trustee, through the defendants Company and Mr. Bland who were acting as his authorized agents, advertised for sale at auction to the general public certain real estate containing 143.040 acres known as the "Haines Quarter" located north of Keezletown, Virginia, in Rockingham County, which auction was to be held on May 17, 2003. A true copy of one of the brochure advertisement prepared and disseminated by the defendants is attached hereto marked Exhibit 1 and is incorporated herein by this reference. Prior to May 17, 2003, the defendants also placed similar advertisements in the Daily News-Record, a newspaper of general circulation in the Harrisonburg-Rockingham County area.

6. Prior to the date set for the auction, Mr. Forbes was provided with the brochure advertisement prepared by the defendants relating to the auction of the property. Among the material representations in the advertisement relating to the auction provided to Mr. Forbes were the representations that the property was "[t]o be sold with a deeded right of way" and that there were "[g]reat homesites along the southern edge of the 'Haines Quarter'" which "overlook the new Packsaddle Golf Course, adjoining from 12 Green, along 13, and on up the hill, with a distant view of downtown Harrisonburg. . . ."

7. After receiving the brochure advertisement prior to the date set for the auction, Mr. Forbes attempted to determine from the defendants Company and Mr. Bland whether there was a minimum bid amount required in order for the auction sale to be consummated, but the defendants Company and Mr. Bland indicated only that the sale was not an absolute auction. The defendants Company and Mr. Bland refused to provide further information with regard to a minimum amount which would be acceptable to the defendant Rapp, Trustee.

8. On May 17, 2003, the defendants Company and Mr. Bland conducted the auction at the site of the Haines Quarter property. Mr. Forbes attended the auction. Prior to beginning the auction, Mr. Bland handed out a sheet entitled "Rapp Auction Sale Announcements," which he read aloud to those assembled, including Mr. Forbes. A true copy of the Rapp Auction Sale Announcements is attached hereto marked Exhibit 2 and is incorporated herein by this reference.

9. The announcements at the auction included the following:

"1. Bland Land Company is selling as agents for the owner, Harrisonburg Physicians for Anaesthesiology (sic), Incorporated, Earmark Investment Trust # 1, Raymond E. Rapp, Trustee."

"2. Included with the property is an appurtenant right of way over and across the existing access road we all used this morning, recorded in the Rockingham County Courthouse in Deed Book 629, at page 329."

.....

"8. Seller reserves the right to reject any and all bids on the property."

10. The bidding was active and ended at the sum of \$3,600.00 per acre offered by Mr. Forbes. At the conclusion of the bidding, Mr. Forbes spoke with Mr. Bland and asked whether the bid amount was sufficient for the sale of the property given Announcement 8 which provided that the seller reserved the right to reject any and all bids. Mr. Bland responded that he would need to get back to Mr. Forbes and let him know after speaking with the owner who was not present at the auction. Mr. Bland responded in a like manner to a similar inquiry from another person in attendance at the auction, stating that "the Colonel is not here. I'll have to let you know."

11. Mr. Forbes tendered his check in the amount of \$51,490.00 to Mr. Bland, made payable to Bland Co. Escrow as a part of Mr. Forbes' offer.

12. Upon tendering the check to Mr. Bland, Mr. Forbes was handed a document which set forth, among other things, the bid price of \$3,600.00 per acre, which Mr. Forbes signed. A true copy of the document is attached hereto marked Exhibit 3. At no time did any of the defendants sign a document or memorandum confirming the auction sale or binding the defendant Rapp, Trustee to the sale.

13. The defendants have not notified Mr. Forbes that the offer made at the auction is acceptable, and have not provided Mr. Forbes with any document in writing signed by or on behalf of the defendant Rapp, Trustee or otherwise binding the defendant Rapp, Trustee to the sale.

14. After the auction, and while awaiting notice of whether the defendant Rapp, Trustee accepted or rejected his offer, Mr. Forbes caused his counsel to search the title to the subject property in anticipation of a closing in the event the sale was accepted. Despite the affirmative representations made by the defendants Company and Mr. Bland on behalf of the defendant Rapp, Trustee, there is no deeded right of way giving access from the Haines Quarter property to a public highway. Moreover, there is no appurtenant right of way in the chain of title over and across the existing access road as represented in the Rapp Auction Sale Announcements.

15. The title to the subject property is unmarketable.

16. Mr. Forbes, by and through counsel, has withdrawn his offer to purchase the property and has demanded the return of his deposit of \$51,490.00.

17. The defendants, without cause or justification, have failed to return Mr. Forbes' deposit money and further have failed to indicate that they will do so.

COUNT I

(Rescission Due to Fraud and Misrepresentation)

18. Mr. Forbes reasserts and realleges the allegations contained within Paragraphs 1 through 17 of the Bill of Complaint as if fully set forth herein.

19. The representations that the property was to be sold "with a deeded right of way" were accompanied by a reference to a deed of record in the Clerk's Office in Rockingham County. Those representations were false and misleading when made, and the defendants knew or should have known that they were false and misleading. The referenced deed does not contain a conveyance of a right of way from the owner of a servient estate, and there is no deeded or judicially established right of way in the chain of title to the Haines Quarter property. The representations at the auction that there was an appurtenant right of way over the access road used to access the property on the day of the sale were false and misleading as well. The defendants knew or should have known that those representations that there was a deeded right of way or an appurtenant right of way were false and misleading, and that such misrepresentations had the capacity to and did mislead Mr. Forbes to his detriment and caused him to forego further investigation of the property.

20. The defendants' representations that there were "[g]reat homesites along the southern edge of the 'Haines Quarter'" which "overlook the new Packsaddle Golf Course, adjoining from 12 Green, along 13, and on up the hill, with a distant view of downtown Harrisonburg. . . ." created in the general public, including Mr. Forbes, the impression that the advertised deeded right of way was sufficient to accommodate the subdivision of the property into two or more tracts, when in fact there was no deeded right of way whatsoever. Those representations were false and misleading and the defendants knew or should have known that such representations were false and misleading to the general public, and to Mr. Forbes in particular.

21. The defendants made the misrepresentations with the intention that Mr. Forbes would rely upon them. In fact, Mr. Forbes reasonably relied on the misrepresentations of fact set forth herein to his detriment in making the bid on the property at the auction.

22. To the extent that any contract was formed with the defendant Rapp, Trustee, such contract was induced by the fraudulent misrepresentations by the defendant Rapp, Trustee through his authorized agents, the defendants Company and Mr. Bland.

23. Mr. Forbes is entitled to rescission of any contract formed with the defendant Rapp, Trustee relating to the purchase of the Haines Quarter property, and to the return of his deposit in the full amount of \$51,490.00, together with interest at the legal rate per annum from and after May 17, 2003 and his costs and attorneys' fees incurred in this action, and to the return of all attorneys' fees and expenses incurred in connection with the search of the title to the property.

COUNT II

(Breach of Contract - Alternative Claim)

24. Mr. Forbes realleges and reasserts the allegations contained within Paragraphs 1-21 of the Bill of Complaint as if fully set forth herein.

25. The defendant Rapp, Trustee was unable to convey, and remains unable to convey good and marketable title to the Haines Quarter property which was a condition of the sale.

26. The Haines Quarter property cannot be subdivided for sale to two or more purchasers in the general public.

27. To the extent an agreement between Mr. Forbes and Rapp, Trustee was reached, there was no deeded or appurtenant right of way to the property contained in a deed of record in the public records, and the defendant Rapp, Trustee did not and was unable to provide a deeded right of way to the property by the time performance was required under the agreement with Mr. Forbes.

28. To the extent there was an agreement between Mr. Forbes and Rapp, Trustee, the defendant Rapp, Trustee materially breached the agreement.

29. As a direct and proximate result of the defendant Rapp, Trustee's material breach of contract, Mr. Forbes is entitled to the return of his deposit in the full amount of \$51,490.00, together with interest at the legal rate per annum from and after May 17, 2003, and to the return of all attorneys' fees and expenses incurred in connection with the search of the title to the property.

COUNT III

(Implied Agreement for Return of Deposit - Alternative Claim)

30. Mr. Forbes realleges and reasserts the allegations contained within Paragraphs 1-21 of the Bill of Complaint as if fully set forth herein.

31. No agreement to purchase the Haines Quarter property was formed between Mr. Forbes and the defendants, or any of them.

32. The defendants never expressed in a writing signed by or on behalf of the defendant Rapp, Trustee mutual assent to the terms of Mr. Forbes' offer.

33. There is no memorandum in writing signed by or on behalf of the defendant Rapp, Trustee for the sale of the property, and therefore any contract of sale between the parties is unenforceable under the statute of frauds.

34. The deposit money was tendered by Mr. Forbes pursuant to an implied understanding that if no agreement was reached, such money would be returned to Mr. Forbes. No purchase agreement having been reached which is enforceable, Mr. Forbes is entitled to the return of the deposit in the full amount of \$51,490.00, together with interest thereon at the legal rate per annum from and after May 17, 2003.

COUNT IV

(Conversion)

35. Mr. Forbes realleges and reasserts the allegations contained within Paragraphs 1-21 of the Bill of Complaint as if fully set forth herein.

36. Mr. Forbes, through counsel, has demanded that the deposit in the amount of \$51,490.00 be returned to him. Notwithstanding these demands, the defendants have failed and refused to return the deposit without justification or authority.

37. As a result of their conduct, the defendants have converted Mr. Forbes' property to their own use and benefit.

38. As a direct and proximate result of the conversion of his property by the defendants, Mr. Forbes has suffered damage in the amount of \$51,490.00, together with interest thereon at the legal rate per annum from and after May 17, 2003.

CLAIM FOR PUNITIVE DAMAGES

39. Mr. Forbes realleges and reasserts the allegations contained within Paragraphs 1-21 and 35-38 of the Bill of Complaint as if fully set forth herein.

40. The defendants' conduct described herein was malicious, wanton and willful, and was in conscious or reckless disregard of Mr. Forbes' rights, entitling him to recover punitive or exemplary damages against the defendants.

WHEREFORE, the plaintiff Bruce Forbes, prays the Court that he have and recover judgment against the defendants as follows:

1. That to the extent that there is any agreement for the sale of the property between Mr. Forbes and the defendant Rapp, Trustee, the Court enter a Decree rescinding such agreement and returning the parties to the positions they occupied prior to May 17, 2003;

2. That he have and recover of the defendant, Rapp, Trustee, on Count II, the breach of contract claim, judgment for the sum of FIFTY-ONE THOUSAND FOUR HUNDRED NINETY and NO/100 (\$51,490.00), together with interest thereon at the legal rate per annum from and after May 17, 2003, plus attorneys' fees and costs incurred in preparing for the purchase of the Haines Quarter property, including the title search;


3. That he have and recover of the defendants, jointly and severally, on Counts III and IV judgment for the sum of FIFTY-ONE THOUSAND FOUR HUNDRED NINETY and NO/100 (\$51,490.00), together with interest thereon at the legal rate per annum from and after May 17, 2003, plus attorneys' fees and costs incurred in preparing for the purchase of the Haines Quarter property, including the title search;

4. That he have and recover judgment against the defendants for punitive damages in the sum of \$250,000.00 under Counts I and III;

5. That Mr. Forbes have and recover his costs expended in this matter, including his attorneys' fees in connection with his claims for rescission and conversion; and

6. That he have and recover such other and further relief as the Court deems just and proper.

BRUCE FORBES
By: Counsel


Timothy E. Cupp, VSB. No. 23017
Cupp & Cupp, P.C.
1951 Evelyn Byrd Avenue, Suite D
P.O. Box 589
Harrisonburg, Virginia 22803
(540) 432-9988
Counsel for Plaintiff

CERTIFICATE

I hereby certify that on this 1st day of December, 2003, a true copy of the foregoing Amended Bill of Complaint was served on the defendants by hand delivering true copies thereof to their counsel as follows: Glenn M. Hodge, Esquire, Wharton, Aldhizer & Weaver, PLC, 100 South Mason Street, Harrisonburg, Virginia 22801, and J. Jay Litten, Esquire, Litten & Sipe, LLP, 410 Neff Avenue, Harrisonburg, Virginia 22801.


Timothy E. Cupp

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

BRUCE FORBES,

Plaintiff,

v.

Chancery No. CHO3-00285

RAYMOND E. RAPP, TRUSTEE,
 HARRISONBURG PHYSICIANS FOR
 ANESTHESIOLOGY, INC., PROFIT-
 SHARING PLAN EARMARK TRUST
 NO. (1), *et al.*

Defendants.

**ORDER AMENDING
INTERPLEADER ACTION**

Defendant Bland Land Company has previously filed an interpleader action with respect to \$51,490 held by it in escrow (the "Escrowed Funds"). In its interpleader, Bland Land reserved the right to make its own claim against the Escrowed Funds.

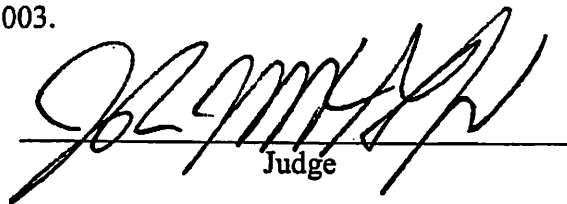
Subsequently, Bland Land filed a motion withdrawing any claim to the Escrowed Funds.

All parties concur in the motion, and it is therefore ordered that

- Bland Land is granted a nonsuit as to any claim against the Escrowed Funds, and accordingly,
- The Escrowed Funds will be awarded to Plaintiff or Defendant Rapp (or allocated between them).

The clerk shall certify copies of this order to counsel of record.

Entered this 10th day of December, 2003.


Judge

PLEASE ENTER THIS:

A TRUE COPY

ATTESTE:


DEPUTY CLERK

LITTEN & SIPE LLP


By: 

J. Jay Litten

410 Neff Avenue
Harrisonburg, Virginia 22801-3434
Telephone: (540) 434-5353
Facsimile: (540) 434-6069


Counsel for Bland Land Company and Defendant Bland

SEEN AND AGREED:


Glenn M. Hodge, Esquire

Wharton Aldhizer & Weaver, PLC
100 S. Mason Street
Harrisonburg, Virginia 22801

Counsel for Rapp, Trustee


Timothy E. Cupp, Esquire

Cupp & Cupp, P.C.
1951 Evelyn Byrd Avenue, Suite D
P.O. Box 589
Harrisonburg, Virginia 22803

Counsel for Plaintiff

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

BRUCE FORBES,

Plaintiff,

v.

RAYMOND E. RAPP, TRUSTEE,
HARRISONBURG PHYSICIANS FOR
ANESTHESIOLOGY, INC., PROFIT-
SHARING PLAN EARMARK TRUST
NO. (1), et al.,

Defendants.

Chancery No. CH03-00285

CONSENT ORDER

THIS CAUSE came before the Court on December 1, 2003 pursuant to the consent of the parties as evidenced by the endorsement of their counsel to allow the amendment to the plaintiff's Bill of Complaint as set forth in the attached Amended Bill of Complaint; and it appearing to the Court that the amendment should be granted, and that the defendants shall be deemed to have denied the new allegations of the Amended Bill of Complaint contained in Count II and the new claim for relief relating to the said Count II, that their prior defensive pleadings in response to the Bill of Complaint shall be deemed to respond to the Amended Bill of Complaint and that the defendants shall have an additional 10 days within which to file any additional grounds of defense they deem appropriate;

NOW THEREFORE, it is ORDERED, ADJUDGED and DECREED that leave is hereby granted to the plaintiff to file the Amended Bill of Complaint, and it is further Ordered the defendants shall be deemed to have denied the new allegations of the Amended Bill of Complaint contained in Count II and the new claim for relief relating to the said Count II, that their prior defensive pleadings in response to the Bill of Complaint shall be deemed to respond to the Amended Bill of Complaint and that the defendants shall have until December 11, 2003 within which to file any additional grounds of defense to the Amended Bill of Complaint they deem appropriate.

Entered this 18th day of December, 2003.

/S/ : John J. McGrath, Jr.
Honorable John J. McGrath, Jr., Judge Presiding

I ASK FOR THIS:

Timothy E. Cupp
Timothy E. Cupp, Counsel for Plaintiff

A TRUE COPY
ATTESTE: Deborah A. Rapp
DEPUTY CLERK

CONSENTED TO:

Glenn M. Hodge, Counsel for Defendant, Rapp

J. Jay Litten, Counsel for Defendants
Bland Land Co. and Gerald C. Bland

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

BRUCE FORBES,

Plaintiff,

v.

RAYMOND E. RAPP, TRUSTEE,
HARRISONBURG PHYSICIANS FOR
ANESTHESIOLOGY, INC., PROFIT-
SHARING PLAN EARMARK TRUST
NO. (1), et al.,

Defendants.

Chancery No. CH03-00285

**PLAINTIFF'S MOTION IN LIMINE
REGARDING EXPERT TESTIMONY**

The plaintiff, Bruce Forbes, by counsel, respectfully moves the Court as follows:

1. To instruct counsel for the defendants to refrain from making any mention, referring to, or mentioning, directly or indirectly, upon opening statement, interrogation of any witnesses, argument, objections, or in any other manner whatever, any of the matters set forth in Paragraph 3 below.
2. To instruct counsel for the defendants to inform the defendants and all witnesses called by the defendants to refrain from mentioning or referring to, in any way, any of the matters set forth in Paragraph 3 below.
3. The matters to which Paragraphs 1 and 2 apply are:
 - a. Any expert testimony or other expert evidence offered on behalf of the defendants from L.A. Hollen;
 - b. Any expert testimony or other expert evidence offered on behalf of the defendants from G. R. "Dick" Heatwole; and
 - c. Any expert testimony or other expert evidence offered on behalf of the defendants from David Penrod.

4. This motion is made on the basis of the defendant Raymond Rapp, Trustee's second and third supplemental responses to interrogatories in which he identifies G. R. "Dick" Heatwole, David Penrod and L.A. Hollen as expert witnesses the defendant proposes to use at trial. The supplemental responses provide the following as to the matters on which and the bases for Mr. Heatwole's, Mr. Penrod's and Mr. Hollen's opinions respectively:

HEATWOLE:

Heatwole will testify that based upon his experience as an auctioneer for a period of thirty-eight years, if the property had been offered for sale a second time at public auction, it would not have brought anything near the price that Forbes bid for the property or the \$400,000 amount that Rapp subsequently sold the property for after Forbes breached his contract.

PENROD:

Rapp may call David Penrod as an expert witness on the issue of whether the title to the property was marketable at the time Forbes breached his contract to purchase from Rapp. Penrod has a degree from Ohio State University and is an attorney licensed to practice in the Commonwealth of Virginia. He has practiced in the Harrisonburg area for approximately thirty (30) years. During his years of practice he gained extensive experience in real estate matters. Penrod will testify that in his opinion the title to the property was marketable when Forbes breached his contract to purchase from Rapp. His testimony is based on his legal knowledge and legal standards pertaining to Virginia real estate.

The designation of Penrod was received by the plaintiff's counsel on November 18, 2003, even though any opinion Mr. Penrod held was held well prior to the date of the designation. No other information was provided concerning the facts on which his opinion was based or the summary of the grounds for his opinions, in violation of the pretrial order. Moreover, the information provided above did not respond completely or adequately to the plaintiff's interrogatory relating to experts.

HOLLEN

"Rapp may call as an expert witness, L.A. Hollen, who will testify that the title to the property is marketable. Hollen has worked as a title abstractor for the Litten & Sipe firm for a period of approximately thirty (30) years. During that period of time he has conducted title searches on hundreds, if not on thousands of tracts of land, and is knowledgeable as to what constitutes marketable title in the Commonwealth of Virginia. In addition, Hollen is an agent for Southern Title Insurance Company and as an agent he issues on behalf of Southern Title Insurance Company title insurance property policies on property in the Commonwealth of Virginia."

The designation of Hollen as an expert for Rapp, Trustee was made on November 18, 2003, the last day of discovery. No other information was supplied concerning the basis of his anticipated testimony. Hollen is not an attorney licensed to practice in the Commonwealth of Virginia.

On August 7, 2003, Mr. Forbes served his discovery requests on the defendants in this case. Interrogatory No. 2 sought the information discoverable under Rule 4:1(b)(4)(A)(1) as follows:

Identify each person whom you expect to call as an expert witness at trial and state his/her qualifications, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which each expert is expected to testify and a summary of the grounds for each such opinion.

The response from Rapp, Trustee was that no decision had been made regarding experts and that the response would be supplemented.

On September 9, 2003 this Court entered its pretrial order requiring the designation of experts by the defendants 60 days prior to trial. The order also provided "If requested, all information discoverable under Rule 4:1(b)(4)(A)(1) of the Rules of the Supreme Court of Virginia shall be provided or the expert will not ordinarily be permitted to express any non-disclosed opinions at trial."

None of the information requested in the plaintiff's Interrogatory relating to the facts or the summary of the grounds for each opinion was provided in discovery as to the three designated experts. Moreover, there was no factual basis for the opinions provided, and accordingly the opinions constitute mere speculation.

ARGUMENT

1. All three proposed experts should be precluded from testifying as such because the basis for their testimony has not been designated as required by the Court's pretrial order. Moreover, the defendants have not provided the information requested in discovery with respect to these experts.

2. The expert opinions constitute speculation because none of the opinions are based upon facts specific to this property.

a. Mr. Heatwole confirmed in his deposition taken following the close of discovery that he did not know the property, did not know who the bidders were at the property, did not know how the sale was advertised, did not know the weather, and further that with respect to another sale of this property, he did not know what the terms would be or how the sale would be conducted. His proposed opinion is not based on an adequate factual situation as required by § 8.01-401.1, Code of Virginia of 1950, as amended, and constitutes inadmissible speculation. *See Countryside Corp. v. Taylor*, 263 Va. 549, 561 S.E.2d 680 (2002), in which the Supreme Court pointed out that expert testimony

is also inadmissible if the expert has failed to consider all the variables that bear upon the inferences to be deduced from the facts observed. *Tarmac-Mid-Atlantic, Inc.*, 250 Va. at 166, 458 S.E.2d at 466; see *Swiney v. Overby*, 237 Va. 231, 233-34, 377 S.E.2d, 374 (1989); *Grasty v. Tanner*, 206 Va. 723, 727, 146 S.E.2d 252, 255 (1966).

Mr. Heatwole's proposed opinion considers none of the variables which might influence another sale of the property, including the parties who are interested in it, the weather, or the manner in which the sale is advertised. His opinion as it relates to this case is nothing more than speculation.

b. Similarly, Mr. Penrod will testify that the title to the property is marketable. He intends to do so even though he has undertaken no title search of the property. Moreover, he did not look at any portion of the title to the property, and only looked at the deed in to Rapp, Trustee after the auction sale. His opinion is entirely speculative, and as set forth above, should be excluded.

c. No records have been produced indicating any examination of title by L.A. Hollen. As a result, his opinion should be excluded because of its speculative nature as well.

In addition, L.A. Hollen is precluded from offering testimony as an expert on the issue of the marketability of title to the Haines Quarter property because such testimony would constitute the unauthorized practice of law. Unauthorized Practice Rule 6-101 provides:

A non-lawyer shall not undertake for compensation, direct or indirect, to advise another in any matter involving the application of legal principles to the ownership, use, disposition or encumbrance of real estate, except that, incident to his investigation of factual matters, he may give advice to his regular employer, other than in aid of his employer's unauthorized practice of law, or to a lawyer upon request by the lawyer therefor.

Under the provisions of the Unauthorized Practice Considerations, UPC 6-1,

A non-lawyer may not express to any person, whether by way of a document purporting to summarize the legal status of title to real estate or otherwise, an opinion as to the validity of any such title, or as to the legal effect of anything found in the chain of title (such as, for example, a suit, will, judgment, release deed or extension agreement) or as to the effect on title of matters not necessarily appearing of record (such as, for example, adverse possession, the statute of limitations, the disabilities of parties, the failure to assign dower or the failure to acquire a bona fide domicile in another state). . . .

UPC 6-3 provides

A non-lawyer may compile and report factual information as disclosed by the public records, sometimes referred to as making an abstract of title; but he may not express an opinion or issue a certificate as to legal consequences of what his investigation of the public records may show. Incident to his investigation of the facts, an abstracter may give to his regular employer or, upon request, to a lawyer his opinion as to the status of legal title as disclosed by his investigation; but neither he nor his employer, unless a lawyer or registered law corporation, may give a certificate of title or opinion to a third party, or otherwise hold themselves out as possessing legal knowledge or skill.

While during the course of his employment by Litten & Sipe, Mr. Hollen may give the information to his employer, he cannot formulate and communicate an opinion on the legal effect of the title to the Haines Quarter property without violating the Unauthorized Practice Rules. Accordingly, the Court should refuse to allow testimony which violates the Rules of Court.


Third, the defendants have not provided the information in discovery relating to the facts and the summary of the grounds for Mr. Hollen's expert testimony. In addition to the plaintiff's request for expert information, on August 7, 2003 Mr. Forbes also requested (in Request 15) of Rapp, Trustee that he produce "Any title report or attorney's certificate relating to the title to the Haines Quarter property." The response was "Rapp has no documents responsive to this request." If Mr. Hollen is going to be an expert, he has to have such a title report but it has not been produced by his employer, Litten & Sipe or by Rapp, Trustee.

Mr. Hollen's proposed testimony should be excluded from evidence.

WHEREFORE, the plaintiff respectfully requests that the Court grant this Motion in its entirety and enter an appropriate Order binding on all counsel, parties, witnesses, and persons appearing in this action and including such further relief as the Court deems just and proper.

BRUCE FORBES

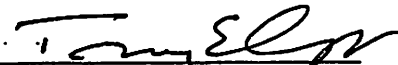
By: Counsel



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Harrisonburg, Virginia 22803
(540) 432-9988
Counsel for Plaintiff

CERTIFICATE

I hereby certify that on this 12th day of December, 2003, a true copy of the foregoing Motion in Limine was mailed, postage prepaid, to the defendants' attorneys of record at the following addresses: Glenn M. Hodge, Esquire, Wharton, Aldhizer & Weaver, PLC, 100 South Mason Street, Harrisonburg, Virginia 22801, and J. Jay Litten, Esquire, Litten & Sipe, LLP, 410 Neff Avenue, Harrisonburg, Virginia 22801.



Timothy E. Cupp



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ORIGINAL

VIRGINIA:

In the Circuit Court for Rockingham County

Bruce Forbes,

Plaintiff.

v.

At Law No.: CHO3-000285

Raymond E. Rapp, Trustee,
Harrisonburg Physicians for
Anesthesiology, Inc, et. al.

Defendants.

~~~~~

The Trial taken in the above-styled matter in the  
Circuit Court for Rockingham County, in the Courthouse  
thereof, Harrisonburg, Virginia, before the Honorable  
John J. McGrath Jr., Judge of said Court, on the 18th day  
of December, 2003.



1 we...we're designing the golf course. We  
2 didn't, we designed it so that homes  
3 couldn't sit directly on the golf course  
4 basically for the fact that it, homes  
5 sitting on a golf course would take away  
6 from the, the aesthetics and the golf  
7 experience. We had... when we hired... when  
8 we took bids on designs for the original  
9 golf course, we had several plans with  
10 development on the tract, but overlooking the  
11 golf course never directly on the fairways.

12 Q. Okay. And quickly try to get to  
13 that.

14 MR. CUPP: Your Honor, may I  
15 approach?

16 THE COURT: You may.

17 (WHEREUPON, Plaintiff's Exhibit No. 3 was  
18 marked for Identification.)

19 Q. Let me show you what's been marked  
20 as Exhibit 3, and this is 25.

21 (WHEREUPON, the witness examined the  
22 document.)

23 Q. It's a two-page document or there are  
24 two pages to Exhibit 3. Can you tell the  
25 Court what that is?

1           A. Yes. It's... when we... we purchased  
2 Pack Saddle originally for the golf course,  
3 and then some time later the Freeze property  
4 which adjoined our golf course and adjoined  
5 Mountain Valley Road, the... when we  
6 purchased that parcel, we needed a... we  
7 talked to our, our architect about getting a  
8 road through that property which would be  
9 better access for us. So when we did that,  
10 we asked them for both a road, and when he  
11 did the road, a development plan for that  
12 property for the future.

13           Q. And... so are these two alternative  
14 plans then that you received?

15           A. Yes. These are two plans that we  
16 received and we actually built the entry  
17 road where he had shown it.

18           Q. For the, the Court's understanding,  
19 where is the, where does the golf course sit  
20 in relation to this, to this point?

21           A. You can see on the far right is the  
22 club house, and the golf course starts a  
23 little after where the "Y" shape is.

24           Q. All right. So the lots that you  
25 were considering were actually out on the



1 are directly on where the golf course would  
2 be located?

3 A. No.

4 MR. CUPP: All right. We  
5 move the admission of Exhibit 3.

6 THE COURT: Any objection?

7 MR. HODGE: No.

8 (WHEREUPON, Plaintiff's Exhibit No. 3 was  
9 received in Evidence.)

10 THE COURT: Let me, I, make  
11 sure I understand. This, this is the club  
12 house over here?

13 A. Yes.

14 THE COURT: Well, where's the  
15 entrance to the club house? I mean where's  
16 the road that you come in?

17 A. From Mountain Valley Road all the way  
18 on your left edge.

19 THE COURT: All right.

20 MR. CUPP: Your Honor, you  
21 might get a better picture looking down  
22 here, I, the, the aerial may show it better.

23 THE COURT: All right, well,  
24 one, the only question I really had was I  
25 thought you said the golf course was not

1 over until after the "Y".

2 A. Yeah, on that side of the "Y", to  
3 the right of your finger.

4 THE COURT: All right.

5 A. You can't, you can't really see it.

6 MR. HODGE: Down here's what  
7 he's talking about.

8 A. ...because, yeah, it's well to your  
9 left.

10 MR. HODGE: It would be way  
11 down here is what he's talking about.

12 A. Yeah, it would...

13 THE COURT: Oh, it's way  
14 down there?

15 A. ...if that was...if that was accurate  
16 on this view where Tim Cupp is.

17 MR. CUPP: The development  
18 area that I think that you're seeing there  
19 would actually be down in this area here.  
20 And maybe even off this map.

21 A. Actually, you probably have that  
22 other map that...

23 THE COURT: All right. That's  
24 fine. I, I have the direction.

25 MR. CUPP: This might clear



1 a...

2 A. It's, it's flat for flat. I mean,  
3 it's all relative. It's not flat. It's  
4 flat enough to build. From the 12 green  
5 'til just before the 13th green there's I  
6 would guess maybe 100 yards of area before  
7 it drops off pretty sharply.

8 Q. Okay. Now, get to the point of...

9 MR. CUPP: Your Honor, I  
10 move the admission of Exhibit 4.

11 THE COURT: Any objection?

12 MR. HODGE: No objection.

13 THE COURT: All right. It'll  
14 be admitted.

15 (WHEREUPON, Plaintiff's Exhibit No. 4 was  
16 received in Evidence.)

17 Q. I show you what we've marked...

18 (WHEREUPON, the document referred to was  
19 marked Plaintiff's Exhibit No. 5  
20 for Identification.)

21 Q. I show you a document which I've  
22 marked as Exhibit 5, and I'll ask you if you  
23 can take a minute and look at this, and tell  
24 me if you can identify it.

25 (WHEREUPON, the witness examined the



1 document.)

2 A. This is one of the brochures that we  
3 received on the sale of the Rapp property.

4 Q. Do you remember approximately...  
5 This, this references a sale on May 17th.  
6 Do you remember approximately how far in  
7 advance it was that you received this  
8 Exhibit 5?

9 A. I'm not exactly sure. I would guess  
10 maybe a month, maybe a little bit more.

11 Q. Okay. Did you have any conversations  
12 with Mr. Bland relating to anything in this  
13 document?

14 A. No, I never spoke to him.

15 Q. Did you have any discussions with  
16 your father, Bruce Forbes, concerning  
17 attending the purchase or the bidding at  
18 this auction referred to here?

19 A. Yes. We had, we had talked about  
20 going to this auction and bidding on this  
21 property several times.

22 Q. And why were you interested in  
23 bidding on this property?

24 A. I... I'd gone up and looked at the  
25 property and was quite impressed with the

1 flat area between number 13 and the... from  
2 number 13, our property line on number 13  
3 back where you could get several houses  
4 between 12 green and right before 13 green.  
5 And I had just... and when I had looked up  
6 on the property and walked the property, it  
7 seemed as if it was a good location and it  
8 would be well worth going to the auction.

9 Q. Did... did you make any decision  
10 about going to the auction at, at that time?

11 A. Going, going to the auction had kind  
12 of been an... on and off we had discussed it  
13 about going and then we had talked about not  
14 going, but I think after we had taken a good  
15 hard look at the property after we went up  
16 there and walked the edge between 13, and I  
17 had walked part of the property and found  
18 that there was a pretty good road between 12  
19 and 13 and the entrance. I think we had  
20 pretty much gone through and said that we're  
21 going to go to the auction.

22 Q. Was there anything in particular that  
23 was contained in this auction brochure that  
24 was important to you and your father?

25 A. We went over the brochure... it

1 actually states, it states that there is a  
2 deeded right-of-way into the property which  
3 we knew by looking at the plat that the  
4 property didn't meet any road. So we had...  
5 so we looked at that and we read through the  
6 brochure and it says "great home sites along  
7 the southern edge of Pack Saddle", which is  
8 true. I mean those, those sites along there  
9 would be great for housing. I mean you  
10 could...it's hard to imagine how much money  
11 you could sell those probably five-acre lots  
12 right on the golf course for.

13 And, and when we looked through the  
14 brochure, we saw that there was a deeded  
15 right-of-way into it. We also looked at  
16 the, the survey and saw that there was a,  
17 there was access into it where it says  
18 "existing access road to State 723" and our  
19 understanding of when... of subdivision is  
20 that you have... if you're going to  
21 subdivide a larger parcel, that you have to  
22 have access into each parcel.

23 So when we saw that there was  
24 existing access road to State 723 and then  
25 saw on the other property where it said "20-

1 foot right-of-way to State road 722" and  
2 then we just assumed along with the thing  
3 where it says there's a deeded right-of-way,  
4 we thought that that was a 20-foot access.

5 Q. Have you and your father ever  
6 obtained any properties at auction before?

7 A. He has. I have not personally.

8 Q. Okay. Do you know whether or not  
9 there was a - well, strike that - when did  
10 you finally make a decision, you and your  
11 father, that you were going to go to the, to  
12 the sale and bid?

13 A. I think we made our final decision  
14 that we were going to go in... I think we  
15 were always going to go. Bidding was the,  
16 was the issue. I think approx..., probably  
17 three, four days before the auction we had  
18 decided that we were going to go and we were  
19 going to bid on the property.

20 Q. Did the statement about the great  
21 home sites have anything to do with your  
22 interest in this property?

23 A. Well, that was just... it was all  
24 three items together which created the, our  
25 understanding that it could be subdivided,

1 A. I don't remember.

2 Q. Okay. Did anybody approach you after  
3 the sale in relation to this property?

4 A. Yeah. I had, I think I had two  
5 people come up to me. One was a lumber  
6 person. I think it was Shagg's Lumber and  
7 he handed me a card and he said that...

8 MR. LITTEN: Your Honor, I'm  
9 going to object at this point on the basis  
10 of hearsay.

11 Q. Well, just what... He handed you a  
12 card?

13 A. Yes.

14 Q. And what did the... what did the  
15 card say?

16 A. On the back...

17 MR. HODGE: We would object  
18 on that basis. I think it's a hearsay  
19 document. It's something that was created  
20 by whoever...

21 THE COURT: Do we have the  
22 card?

23 MR. CUPP: Yes, I'm... I'm  
24 going to offer it.

25 (WHEREUPON, Plaintiff's Exhibit No. 7 was

1 marked for Identification.)

2 Q. I'm showing you what's been marked as  
3 Exhibit 7 and I'll ask you to identify that.  
4 (WHEREUPON, the witness examined the  
5 document.)

6 A. Yes. This was the card that the  
7 guy... I don't... I think people call him  
8 Shagg... that he handed me at the auction  
9 after it was over.

10 Q. And on the back of that, the actual  
11 card, there is a number written. Is that  
12 your handwriting?

13 A. No. He, he handed me the card like  
14 this and said, "If you want to timber the  
15 property, this is how much we offer you."

16 MR. HODGE: Objection, Your  
17 Honor. Hearsay.

18 THE COURT: Sustained.

19 MR. CUPP: Your Honor, it  
20 constitutes an actual offer received relating  
21 to timber. It's not subject to hearsay.

22 THE COURT: Well...

23 MR. CUPP: It's, it's, it's  
24 what it is. It's the res gestae.

25 THE COURT: Well, what

1 exception to the hearsay rule would it come  
2 under?

3 MR. CUPP: The res gestae  
4 exception. I mean, it's an actual... It is  
5 an offer received relating to the timber.

6 THE COURT: Mr.... Who  
7 objected? Mr. Litten or Mr. Hodge?

8 MR. HODGE: I think we both  
9 did and we would still say it's hearsay  
10 because, you know, it's a document, at least  
11 a number is created by this man Shagg that  
12 we've had no opportunity in any way to  
13 verify where that came from or anything. I  
14 just don't see how...

15 THE COURT: The objection  
16 will be sustained. I'm going to reject the  
17 exhibit.

18 MR. CUPP: Note my exception.

19 THE COURT: It'll be noted.

20 CONTINUATION OF DIRECT

21 EXAMINATION BY MR. CUPP:

22 Q. Mr. Forbes, did you have any  
23 experience in the timber process...

24 A. I...

25 Q. ...prior to attending this particular

1 sale?

2 A. We had our golf course timbered where  
3 the golf holes were.

4 Q. Okay. So on Exhibit 1, the areas  
5 that are in the lighter shade of green, you  
6 had those timbered?

7 A. Yeah. Those were timbered obviously  
8 where there was timber. I mean... some of  
9 the area on the golf course was open fields.

10 Q. Are you aware of approximately how  
11 much area was subject to timbering when you  
12 were developing the golf course?

13 A. It's about... The outline of the  
14 course is 25 acres.

15 Q. And so that was the area that was,  
16 that you sold off timber?

17 A. Correct. We marked... we, we cut  
18 with a bulldozer the center lines of all the  
19 golf holes, and then we contracted with Neff  
20 Lumber to, for them to timber from the  
21 center line to some red ribbons that we  
22 had... that the architect and I put on the  
23 trees.

24 Q. Were you actually involved in the  
25 hands-on work that was done in developing



1 the golf course?

2 A. Yes.

3 Q. And that includes working with this  
4 timbering?

5 A. They had come out... when we had  
6 marked all the lines, they had came out and  
7 give, gave us a estimate of how much they  
8 would give us for the timber in those areas.

9 Q. Okay. Without going into their  
10 estimate, are you familiar with how much you  
11 received for the timbering of those 25  
12 acres?

13 MR. HODGE: Your Honor, I'm  
14 going to object to this line of questioning.  
15 I just don't see any relevancy...

16 THE COURT: Overruled.

17 Q. You can answer.

18 A. Can you repeat it? I'm sorry.

19 THE COURT: How much...

20 A. You threw me off...

21 THE COURT: How much did you  
22 get for the timber you sold off the golf  
23 course?

24 A. Oh, I'm sorry. We got \$45,000.

25 Q. And from your review of the, of the

1 timber and your knowledge of the -- well,  
2 strike that - from what you saw, were you  
3 able to, to tell whether the timber on Dr.  
4 Rapp's property was similar in nature to  
5 that of the 25 acres that you timbered?

6 MR. HODGE: Your Honor, I'd  
7 like my objection to be noted to this whole  
8 line of questioning.

9 THE COURT: All right. So  
10 noted.

11 A. Yeah. The, the land pretty much  
12 just kind of flowed together, and the trees  
13 are the same on both parcels.

14 Q. Based on that, do you have an  
15 opinion as to the value of the timber on the  
16 Rapp property?

17 MR. HODGE: Again, objection,  
18 Your Honor.

19 THE COURT: What's the basis  
20 of it?

21 MR. HODGE: Your Honor, this,  
22 this gentleman is maybe a golf course  
23 designer, but he's not a timber cruiser.  
24 And make, making that type of comparison is  
25 just... I think it's so speculative that it

1 really has no probative value in that  
2 regard.

3 THE COURT: Mr. Cupp?

4 MR. CUPP: Yes, Your Honor.

5 If you provide the foundation of someone who  
6 has knowledge of value and they offer that  
7 as a lay opinion, as to the knowledge of  
8 value of real property with timber.

9 THE COURT: Objection  
10 overruled.

11 A. I thought... well, when I got the  
12 offer from Mr. Shagg, I thought that that  
13 was low comparatively to what we had... I  
14 was thinking it would be more in the  
15 \$150,000 range.

16 Q. All right. And so is that your  
17 opinion as to the value of the timber on  
18 that property?

19 A. Yeah, with a, with how we'd want to  
20 cut it I think that it would be, considering  
21 we cut 25 acres and got 41,000, I think that  
22 if we did select cut and... we would at  
23 least make \$150,000.

24 Q. So your opinion is not based on a  
25 clear cutting?

1 A. No. We never clear cut property.

2 Q. Okay. Did you... do you recall any  
3 discussion with Mr. Bland relating to timber  
4 on the property?

5 A. No.

6 Q. You didn't have any?

7 A. No, we ... I mean we just knew from  
8 what we did at Pack Saddle that there was  
9 value in the timber.

10 MR. CUPP: All right. Your  
11 Honor, if you would bear with me for one  
12 minute?

13 Q. Just a few more questions, Mr.  
14 Forbes. Did you have any involvement after  
15 the auction sale with respect to issues  
16 relating to the easement or the... whether  
17 there was a deeded easement?

18 A. No. After the sale, I had sent... I  
19 had faxed Mac all the information I had, and  
20 that was, after that, I was pretty much out  
21 of the loop.

22 Q. What information was it that you  
23 faxed to Mr. Nichols? Let me ask this: When  
24 you said Mac, you're talking about Mac  
25 Nichols?



1       somebody was already driving ATVs on that  
2       property. They implied that it was our  
3       maintenance staff doing it, but we... since  
4       we don't have any of those vehicles, it  
5       wasn't us.

6           Q. You've also had some concern about  
7       the use of the adjoining property by hunters  
8       either coming on your golf course or  
9       poaching on your golf course or shooting,  
10      endangering golfers. That's a concern too?

11          A. I have... I've a concern of people  
12      hunting up there for the fact that they  
13      don't really... I, I don't, I don't believe  
14      they really have that much control over a  
15      bullet, and there would be people out on the  
16      golf course during times that they hunt.

17          Q. So that was another concern....

18          A. Yeah, I mean...

19          Q. ... about getting the Rapp property?

20          A. I mean that's, yeah, that's a concern  
21      all the time, somebody comes on your  
22      property, whether it's our property or  
23      adjoining property.

24          Q. Would ask you to clarify one thing  
25      in my mind. You had testified earlier, I

1 believe, that the golf course property had  
2 frontage on a public road.

3 A. Yes.

4 Q. Does that frontage result from the  
5 Freeze purchase or did you have frontage  
6 before?

7 A. We had frontage before.

8 Q. But the Freeze property is now the  
9 primary entrance to your golf course?

10 A. Correct.

11 Q. And that Freeze property was  
12 purchased at public auction?

13 A. Yes.

14 Q. By your father?

15 A. Kevin Williams actually purchased it  
16 for Bruce Forbes.

17 Q. And you said it was 80 acres and you  
18 paid \$400,000 for that property; is that  
19 correct?

20 A. I think it, I think it was \$5,000 an  
21 acre, yeah.

22 Q. Now, you have testified that you  
23 walked on the Rapp property, and that you  
24 were, I'll use the word "impressed" with the  
25 portion along the 13th fairway that it would



1 game plan would have been, is, I mean, that  
2 was the purpose of buying the property was  
3 to get 15 lots up there or was the purpose  
4 really to protect yourself?

5 A. I think it was both. Protects,  
6 protection in the nea..., near term from any  
7 development, and I think in the long term  
8 when we decided or whether we decided or the  
9 County would allow us to go in there and  
10 build and sell home sites and lots, that  
11 would be a parcel that would be quite  
12 attractive.

13 Q. I believe you've indicated your Dad  
14 indicated that you all look about 10 years  
15 out in advance when you acquire property.  
16 Is that an accurate way that you all look at  
17 your development?

18 A. Probably more him than me, I mean,  
19 but, yeah, our practice is to go and try to  
20 find something.

21 Q. And from your work in developing the  
22 golf course you understood of course that  
23 being able to develop the property up there  
24 with 15 lots would require County approval  
25 to do that?

1 A. Oh, yes. Yeah.

2 Q. On the day of the sale, did you make  
3 any inquiries to Mr. Bland about the access  
4 road?

5 A. No.

6 Q. Did your Dad in your hearing make  
7 any inquiries to Mr. Bland about the access  
8 road?

9 A. No.

10 Q. Now, on the day of the sale as I  
11 understand, and correct me if I'm wrong,  
12 that you all had decided that you were going  
13 to bid a few days before?

14 A. Yes.

15 Q. And you had put an initial value on  
16 the property of \$2,000 an acre. That's what  
17 you thought it was worth.

18 A. That's what I was to go up to.  
19 Now, over that, I don't know. I mean we  
20 paid more than that for both Pack Saddle and  
21 the Freeze property.

22 Q. But you, yourself...

23 A. I was authorized to go up to \$2,000.

24 Q. And anything above \$2,000 was going  
25 to be your Dad's decision?



1 A. That's correct.

2 Q. Now, Mr. Kellam, you, did you... You  
3 saw him at the, at the sale?

4 A. I didn't know Mr. Kellam. I just  
5 knew the person bidding against my father  
6 was to the left of me.

7 Q. Did you know and recognize that he  
8 had a Power Sports emblem on his shirt?

9 A. No, I didn't know. I didn't, that  
10 really didn't dawn on me.

11 Q. Did you tell your Dad on more than  
12 one occasion after he started bidding that  
13 y'all were above what you agreed to bid for?

14 A. I had... I reminded him of how high  
15 he was going, and at one point I told him  
16 that he was talking about how high he would  
17 go, and I told him that the person he's  
18 bidding against is right next to him and he  
19 needs to be quiet.

20 Q. Did your Dad say something to you  
21 during this time about concern for the man  
22 who was going to buy it was going to test  
23 three, three, or three-wheel ATVs over there?

24 A. I don't remember that.

25 Q. You're not saying that it didn't



1 that correct?

2 A. I... I don't know. I mean...he...  
3 in general, he'll buy something that he  
4 wants to buy. He won't go back. Generally,  
5 if he goes to a real estate agent and makes  
6 an offer, he's going to buy the property.

7 Q. If the offer's accepted?

8 A. Correct.

9 Q. Did you have some discussion with  
10 your Dad though about the decision to flip  
11 it to Kellam?

12 A. No. I didn't, I didn't think that  
13 was the best way to go about it. He  
14 thought differently so...

15 Q. You still thought it was a good buy,  
16 didn't you?

17 A. Yeah, I did.

18 Q. Did you talk about if you flipped it  
19 to Kellam, you still needed to have the  
20 protection of some sort of a buffer along  
21 13?

22 A. Uh...

23 Q. Fairway 13?

24 A. I... I heard pieces of conversations  
25 between him and Kevin. I wasn't really

1 involved.

2 Q. You didn't say or insist that that  
3 be a condition of the sale?

4 A. No, I didn't. After he had said he  
5 was going to try to flip it to Kellam, that  
6 was about it for me, my involvement.

7 Q. Now, you considered, of course, at  
8 the time that your Dad said he was going to  
9 flip it to Kellam that he had a right to do  
10 that. He had, he had, he had bought the  
11 property...

12 MR. CUPP: Objection. You're  
13 going to ask for him to make a legal  
14 conclusion.

15 THE COURT: Overruled.

16 A. I don't know. I mean I guess he  
17 had the right to.

18 Q. He wouldn't have done it if he  
19 didn't have the right. Your Dad wouldn't do  
20 that?

21 A. That, that would be... I guess.

22 MR. HODGE: I don't have any  
23 more questions.

24 THE COURT: All right. Mr.  
25 Litten.

1 And so after we learned that, it really just  
2 became a single home site, and I'm not  
3 really sure how much... I mean, how much  
4 would you, could you pay for, for a single  
5 home. And I... and I, at that point, I  
6 thought that \$500,000 for a single home site  
7 would be a lot of money.

8 THE COURT: Well, what do  
9 you think it would be worth? I mean, you're  
10 familiar with real estate?

11 A. I would probably say between \$1,000  
12 and \$1,500 an acre.

13 THE COURT: That's not  
14 counting the timber and all?

15 A. Correct. I mean... the timber would  
16 be 150. So, I mean, that would be involved  
17 in your calculation. So I guess it would  
18 end up being about \$1,000 to \$1,500 and then  
19 you could add the timber on to it would be  
20 about as high you'd go for a single family.

21 THE COURT: Okay.

22 A. So if it was 120 acres.

23 THE COURT: All right.  
24 Anything in light of my questions?

25 MR. HODGE: Your Honor, I

1 think in light of the, the extens..., your  
2 extension of it, I have a couple more  
3 questions. I don't really want...

4 THE COURT: Go ahead.

5 MR. HODGE: ...to belabor,  
6 belabor it.

7 **RECROSS EXAMINATION**

8 **BY MR. HODGE:**

9 Q. The right of way. Was your  
10 understanding that you had no access to the  
11 property? Is that, is that what your  
12 understanding was?

13 A. We didn't have a... my understanding  
14 of the situation was that we didn't have a  
15 deeded access that was 20-feet to allow us  
16 to put a road in.

17 Q. Now, as I understood and you correct  
18 me if I'm wrong, is that part of your view  
19 that that \$514,000 was a good price is that  
20 you'd be able to put those, not one lot but  
21 several lots, along the 13th fairway?

22 A. Correct.

23 Q. Have you subsequently learned that  
24 even with a 20-foot right-of-way, you  
25 wouldn't be able to put 15 lots up there?



1 stops.

2 Q. Okay. From 13, you have this view.  
3 Do you also have a view from... if you were  
4 on the Rapp property along 13?

5 A. Oh, yes.

6 Q. All right. What, if anything, did  
7 you decide to do when you got that, the  
8 brochure which is Exhibit 5?

9 A. This exhibit here I have underlined  
10 and made marks on it from before. These  
11 lots... I sort of laid it out and I looked  
12 down to see where the ingress/egresses and  
13 the other stuff... I knew from looking at  
14 this that this was just a sort of a  
15 hodgepodge put together bulletin. And I  
16 went in and tried to figure out how we could  
17 get into the property.

18 And there's two marks that they kept  
19 telling me where I crossed the gorge that I  
20 could come in above 13, and there's two  
21 slants down. And I, we made the decision  
22 that it, we could not come down that way.  
23 So we, we only had one other option coming  
24 off the golf course, and there is a home  
25 close to Number 12 green, and there's a

1 little road that comes up beside it and you  
2 can see where I put the, the small mark  
3 saying could we get in from there to  
4 subdivide this if it, if it was done along  
5 13. And we made the determination we  
6 couldn't do it.

7 Q. Was this all before the sale...

8 A. Yes.

9 Q. ...that you're talking about? Okay.  
10 Did you...

11 A. This was about a week before because  
12 I had decided not to go to the sale.

13 Q. Okay. Well, that's kind of what I  
14 was getting at.

15 A. Right. I... I was not going to go  
16 to the sale because every time I'd go to the  
17 sale, the auctioneers because we always  
18 buy... they know we're there and we, we got  
19 to the point that we have to have other  
20 people go for us to keep the bids down  
21 because of the properties that we, we buy.  
22 It seems like the bids go completely out-of-  
23 sight. So I had made the decision not to  
24 go to this auction.

25 Q. At some point, did you have

1 discussions with your son about...where you  
2 had changed your mind about going to the  
3 auction?

4 A. The day before.

5 Q. Okay.

6 A. He asked me to go up there and look  
7 at 13. Because of the flags coming in on  
8 13, it was approximately 10 or 15 feet from  
9 the fairway and I'd already made the  
10 decision to put up Leland Pines with a...  
11 which will grow about 30 feet up. And then  
12 I was going to put Hornby in between them to  
13 camouflage it so in years to come that they  
14 would not be able to foul up the site. And  
15 so that afternoon I went up to the golf  
16 course, I had looked and I said these are  
17 not the property lines.

18 So I went back and I said, "Jeff", I  
19 said, "You know... we're going up to \$2,000  
20 and...or \$2,000 an acre." And I said, "This  
21 thing could go higher, but we really don't  
22 need it, but th... it is coming too far in,  
23 and maybe we should have it surveyed again."  
24 And the next morning, I received a call and  
25 it was raining and misty, and I think Kevin



1 shirt with a patch that said Power Sports on  
2 it. You saw that?

3 A. Yes, I, I see...with I...Yes, I did.

4 Q. And at that time, you were, you were  
5 very concerned that there were going to be  
6 three-wheel ATVs...

7 A. Yes, I was.

8 Q. ...and that's, and that was the  
9 reason you started the bidding, isn't it?

10 A. No, no, that was not the reason. I  
11 had a piece of paper, and I don't know where  
12 it is, in my hands. And I was calculating  
13 on the paper with a pencil how much it would  
14 go, but I did start bidding because I felt  
15 that I could get the property at a  
16 reasonable price.

17 Q. So the concern about ATVs was not  
18 the motivating factor for you to start  
19 bidding is what you're saying now?

20 A. No, because I never thought it would  
21 go beyond \$2,000 an acre to be very honest  
22 with you. Even today I'm surprised it even  
23 went to... what it sold for.

24 Q. Mr. Forbes, do you remember....

25 THE COURT: Then why did you

1 bid it?

2 Q. Do you remember your deposition...

3 THE COURT: Wait a minute.

4 Why did you... I, I don't understand it.

5 You're saying you're surprised it went over

6 \$2,000? You're the guy who bid \$3,600.

7 A. I know...

8 THE COURT: Why?

9 A. I was surprised that anybody else  
10 could go up to that height for that piece of  
11 property.

12 THE COURT: All right.

13 A. I mean... I have never heard of  
14 anyone else bidding this high for mountain  
15 property.

16 THE COURT: So why were you  
17 bidding?

18 A. Because I... we needed it to protect  
19 a \$7 million investment over here on the  
20 left.

21 THE COURT: Now, it would  
22 protect that investment whether or not it  
23 had a right-of-way, wouldn't it?

24 A. Yes, but it would be worthless  
25 property.

1 CONTINUATION OF CROSS

2 EXAMINATION BY MR. HODGE:

3 Q. Mr. Forbes, you remember the  
4 deposition that we took at Mr. Cupp's office  
5 on October 29th?

6 A. Yes.

7 Q. I want to show you a copy of it,  
8 and I would call your attention to para...,  
9 or to page 33. And here's the question, and  
10 I'll read it: Well, what happened that you  
11 ended up being the high bidder?

12 Answer: I looked over to the right,  
13 and there was a guy, a gentleman standing  
14 over there to my left had Power Sports  
15 written on his shirt and three-wheelers or  
16 something. And that's when I stepped in. I  
17 did not want the land to be at that point  
18 used as a testing ground for three-wheelers.

19 That was your testimony on October  
20 29th?

21 A. Yes, it was.

22 Q. Now as I understand from your  
23 testimony is that you don't remember getting  
24 a copy of the sales announcement which - if  
25 I may approach the bench and look at one of

1 at auctions?

2 A. Because the minute that they see me  
3 coming, they run the auctions up, and I even  
4 asked someone later about this one. I asked  
5 my own attorney was this auction ran up.

6 Q. Now, in this conversation you say you  
7 had with Mr. Bland on the telephone, no  
8 discussion as to the number of lots that,  
9 that could be put on the property?

10 A. No.

11 Q. No discussion as to access, per se?

12 A. No.

13 Q. And that's the only conversation you  
14 say you had with him before the auction?

15 A. Yes, as far as I remember.

16 Q. And you saw no writings from him  
17 before the auction other than the brochure,  
18 correct?

19 A. No.

20 Q. I think you said one of your, one of  
21 your objections to the access to the  
22 property was that you objected to having to  
23 travel over Mr. Hisey's property, is that  
24 correct?

25 A. Probably. Oh, yeah. I mean...

1 Q. Well, you knew when you were driving  
2 in the auction, you were...

3 A. No, no, I did not. Never met Hisey  
4 before. Did not know who he was or never  
5 seen him until the end, and he hands me a  
6 key through the door and I don't even know  
7 the man today just like the man that's the  
8 ATV man out there. I didn't even know who  
9 he was until I was told. Today. Mr.  
10 Kellam that's sitting out there.

11 Q. So you didn't even know where Mr.  
12 Hisey's property was?

13 A. No. When I went up there, it was  
14 so rainy and so muddy that you couldn't, and  
15 you were afraid you were going to run over  
16 people that you wouldn't have known if his  
17 property. The only thing I knew by law that  
18 could protect me on this is that I always  
19 thought that land could not be land locked.  
20 Any land cannot be land locked. I would  
21 have never dreamed of an auctioneer or real  
22 estate company doing what was done in this  
23 site up there. Never. And the way it was  
24 handled.

25 THE COURT: Okay, let me just



1 left the auction and you were satisfied that  
2 you had a good deal...

3 A. Subject to them confirming it.

4 THE COURT: Yeah. I mean  
5 assuming...

6 A. Yeah. Yeah.

7 THE COURT: ...assuming it  
8 had the 20-foot right-of-way and they  
9 confirmed...

10 A. Right. And I had the, you know...  
11 yes.

12 THE COURT: Yes. And the  
13 property would, would have been worth \$3,600  
14 an acre?

15 A. To me? Yes.

16 THE COURT: All right.

17 A. Somebody else? No.

18 THE COURT: All right.  
19 Now, after you hear that there is no deeded  
20 right-of-way of any size, in your judgment  
21 based on your years of experience, what was  
22 that property worth?

23 A. Nothing.

24 THE COURT: All right. So  
25 the property had a value of zero? I mean

1 what about somebody that wanted to hunt on  
2 it or timber it?

3 A. Well, that was... I, I did look at  
4 that, but I... I went back and looked at the  
5 terrain and everything. I believe that  
6 there's 150, maybe \$175,000 worth of timber  
7 on it. It could probably be subdivided into  
8 ... there is a law that you could make it  
9 in if it's in the family, that I can have,  
10 give a lot to my son. And I would say two  
11 lots or three at the most, but that property  
12 up there is so bad to handle...

13 THE COURT: All right. So,  
14 that's what I mean... I understand what  
15 you're saying. I'm just trying to get a  
16 figure from you. After you discovered all  
17 of this, you, you made the determination  
18 that this stuff was, the lot, the whole  
19 property was maybe worth \$200,000; is that  
20 what you're saying? 250?

21 A. 250 or \$300,000.

22 THE COURT: All right.

23 A. If... well, I'm trying to be honest  
24 here with this whole thing, and, and I...  
25 you ask me a question and I'm going to tell

1 you and he's probably going to jump all over  
2 me about this, but my son came to me  
3 afterwards and he said, Bruce, to keep you  
4 out of court, I will buy the property. And  
5 I said, son, the money is there, but I'm  
6 telling you that this property is worthless.  
7 This was around June the 25th before that  
8 last si....

9 I says even if you try to do the  
10 timber, Mr. Hisey is going to stop you dead  
11 in your tracks because he will have DQ,  
12 everybody because you've got three streams  
13 coming in there. And I said, you've got  
14 other problems that you need... you have a  
15 daughter. Where are you going to send her  
16 to school? What are you going to do here  
17 and so forth?

18 And he says, Dad, I don't want to  
19 see you in a courtroom because it's going to  
20 cost big money. And I said, Jeff, I don't  
21 want to go there. I said, I'm sure that  
22 they will se..., sell it to Mr. Kellam and I  
23 prefer not to give you worthless property  
24 and buy it... He said, well, I'll pay you  
25 back.



1 Well, I thought about this for two  
2 days and I went down and I checked  
3 everything. And I decided that I would not  
4 put a burden on him that way. And I told  
5 him, I went back to him and I said, this  
6 property was absolutely not worth 2 or  
7 \$300,000 and in my grave, you're going to  
8 jump all over me. And he says, Dad, you  
9 don't understand how much that golf course  
10 is going to be worth in years to come. And  
11 I said, well, son, I've made the decision. I  
12 don't want you to go through what I've had  
13 to go through with Mr. Hisey, and I let it  
14 go at that.

15 THE COURT: All right. Any  
16 questions in light of mine?

17 MR. LITTEN: No, sir. I  
18 won't ask any more questions.

19 THE COURT: All right. You  
20 may step down, Mr. Forbes, and resume your  
21 seat at counsel table with your attorney.  
22 Who will be your next witness? Mr. Nichols?

23 MR. CUPP: Mr. Nichols, yes.

24 THE COURT: Okay. Why don't  
25 we take about five minutes before we start

1 with Mr. Nichols?

2 (WHEREUPON, a brief recess was taken.)

3 THE BAILIFF: All rise.

4 MR. CUPP: Thank you, your  
5 Honor.

6 DEAN McNAIR NICHOLS, ESQUIRE, having been  
7 duly sworn by the Court, was examined, and  
8 testified as follows:

9 DIRECT EXAMINATION

10 BY MR. CUPP:

11 Q. Good afternoon, Mr. Nichols. Please  
12 state your full name for the Court.

13 A. Dean McNair Nichols.

14 Q. And, Mr. Nichols, where do you live?

15 A. 217 Franklin Street, Harrisonburg.

16 Q. And what is your occupation?

17 A. Attorney.

18 Q. Briefly set out for the Court your  
19 background as an attorney.

20 A. I have been practicing for 18 years.  
21 My practice consists of various tax work,  
22 business work...

23 MR. HODGE: Your Honor, if  
24 there's a question about Mr. Nichols'  
25 qualifications, we'd stipulate that he's a



1 (WHEREUPON, the document referred to was  
2 marked Plaintiff's Exhibit No. 19  
3 for Identification and was examined by the  
4 witness.)

5 A. That was the letter that I wrote  
6 June 30th to David Penrod stating that  
7 Forbes was going to withdraw from the  
8 purchase. At that point, it was  
9 communicated to me that Mr. Hisey would not  
10 grant a 20-foot right-of-way.

11 Q. Prior to... prior to June 30 of this  
12 year, had you had any discussions with Mr.  
13 Kellam concerning the property?

14 A. Yes.

15 THE COURT: Prior to when?

16 MR. CUPP: Prior to June 30,  
17 the date of Exhibit 19.

18 THE COURT: All right.

19 Q. And why did you have discussions with  
20 Mr. Kellam?

21 A. It was at Mr. Forbes' request to  
22 talk about his possibly purchase of the  
23 property.

24 Q. And was that, at least as far as  
25 your involvement, successful or not

1 successful?

2 A. It was not successful.

3 Q. Approximately when did that, those  
4 discussions end?

5 A. I spoke with Kellam I believe on the  
6 9th, 10th, and 11th.

7 Q. Was there a figure that Mr. Kellam  
8 was willing to pay to buy the property?

9 A. Yes.

10 Q. What was that figure?

11 A. He was willing to pay \$450,000.

12 Q. And were there any restrictions on  
13 the property under that proposal?

14 A. What he was willing to do at that  
15 proposal was there would be an area of 5 to  
16 8 acres alongside the golf course that would  
17 have some restrictions on it as far as, oh,  
18 I believe that would cut trees within that  
19 area and would build a house on that, in  
20 that area except if there happened to be...  
21 there was a particular clearing that he was  
22 interested in. If that clearing happened to  
23 be within that 5 or 8 acre area, then he  
24 could build a house on that clearing, but  
25 that would be the only place.

1 Q. And why did those discussions  
2 terminate?

3 A. Mr. Kellam was only willing to pay  
4 450 and Mr. Forbes was not willing to sell  
5 to him for that.

6 Q. All right. During this time frame  
7 that you were discussing those issues with  
8 Mr. Kellam about the possibility of him  
9 taking the property, were you aware of the  
10 issues of marketability that you described  
11 earlier?

12 A. Yes. At that point, we were aware  
13 of the fact that there was no deeded right-  
14 of-way to the property as well as we... the  
15 issues with regard to subdivision that if he  
16 was going to be able to subdivide the  
17 property in any of, in any, in any manner.  
18 Well,... if he was going to be able to  
19 subdivide the property into two pieces where  
20 he would own it himself or to another  
21 person, then he would need 20 feet as far as  
22 the right-of-way was concerned based on  
23 Rockingham County's subdivision ordinance.

24 Q. Did Mr. Kellam express any concern  
25 about the right-of-way to you? Was that an

1 issue?

2 A. No, I didn't talk with him about  
3 that.

4 Q. All right. In relation to when you  
5 sent the letter to Mr. Penrod on June 30,  
6 when did the discussions end with Mr.  
7 Kellam?

8 A. My recollection was the last date  
9 that I talked with Mr. Kellam was the 11th  
10 of June.

11 MR. CUPP: Your Honor, would  
12 you give me one second?

13 THE COURT: Yes.

14 Q. Mr. Nichols, you have given your  
15 opinion concerning the fact that this  
16 property was not marketable and remains not  
17 marketable. My question for you is if you  
18 can tell the Court how you define  
19 marketability.

20 A. Yes. I define marketability as set  
21 forth in the Virginia Supreme Court case of  
22 Madbeth, M-A-D-B-E-T-H, comma, Inc. versus  
23 Weade, W-E-A-D-E. It's at 204 Virginia 199.  
24 And on page 202 it states and this, this  
25 ci..., this quote cites various preceding



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# ORIGINAL

VIRGINIA:

In the Circuit Court for Rockingham County

Bruce Forbes,

Plaintiff.

v.

At Law No.: CHO3-000285

Raymond E. Rapp, Trustee,  
Harrisonburg Physicians for  
Anesthesiology, Inc, et. al.

Defendants.

~~~~~

The Continuation of the Bench Trial taken
in the above-style matter in the Circuit
Court for Rockingham County, in the
Courthouse thereof, Harrisonburg,
Virginia, before the Honorable John J.
McGrath, Jr., Judge of said Court, on the
19th day of December, 2003.

* * *
1 mind.

2 Q. Did you and your partner, Mr. Simmers,
3 did you all make a decision about attending
4 the auction and bidding on the property?

5 A. Yes.

6 Q. Did you have any determination as to
7 how much you intended to bid for the property
8 when you went to the auction?

9 A. Yes.

10 Q. What was -- amount was that?

11 A. We were hoping we could purchase the
12 property at 300,000.

13 Q. Did you and Mr. Simmers have any type
14 of an agreement as to what you would bid for
15 the property?

16 MR. CUPP: Objection,
17 irrelevant.

18 THE COURT: Overruled.

19 A. Yes. We, we had discussed together
20 where we thought we would stop.

21 Q. And what number was that?

22 A. I can't recall exactly, but I would
23 say 350,000.

24 Q. Did both of you attend the auction?

25 A. No.

1 Q. Can you describe to the Court what
2 occurred at the auction when you got there?

3 A. It was kind of a damp Saturday
4 morning, as I recall, and I had driven to the
5 location on the property where the auction was
6 to take place and greeted -- I, I guess 30 or
7 40 other people were there. I was a bit
8 nervous, I'd never bid a, in a land auction
9 like that. So, I kind of stayed rather to
10 myself and watched what was happening and
11 waited for the auction to take place.

12 Q. What announcements, if any, were made
13 before the auction started concerning the
14 real estate?

15 A. They handed out a, a bid, an auction
16 sheet out and kind of went over the terms and
17 conditions of the auction. One of the things
18 that kind of surprised me, I was prepared to
19 bid a, a grand total number, not a per acre
20 number, and one of the items in the bid, bid
21 sheet was that it would be auctioned at a per
22 acre price.

23 Q. Did that cause you any problem in
24 bidding?

25 A. Well, I didn't want to go get my

1 calculator, but I kind of felt like I needed
2 it.

3 Q. Did you then, in fact, bid on the
4 property once the auction started?

5 A. I didn't bid immediately but, yes, I
6 did enter the bid at some point.

7 Q. Do you recall at what point you
8 entered the bid?

9 A. It seems that I started bidding at, at
10 2,000 or 2,200 an acre.

11 Q. Do you recall at that time how many
12 people were participating or bidding?

13 A. I don't know the exact number. I, I
14 just knew several people in, in that area were
15 bidding.

16 Q. As the bidding progressed did people
17 drop out and, if you can recall, at what
18 points did people drop out?

19 MR. CUPP: Objection, leading.

20 THE COURT: Overruled.

21 A. I watched the auctioneer and I could
22 tell by his actions that, yes, people were
23 starting to, to drop off somewhere between the
24 2,200 to 3,000 per acre price.

25 Q. After the bid hit 3,000 do you have

1 any recollection or idea of how many people
2 continued to bid after 3,000?

3 A. No. I didn't know at that time.

4 Q. You proceeded to bid up to what point?

5 A. A lot more than I should have. Well,
6 I, I proceeded to bid to 3,550 per acre.

7 Q. And the top bid was what?

8 A. 3,600.

9 Q. Did you hear the auctioneer knock the
10 property down as sold at \$3,600?

11 A. Yes.

12 MR. CUPP: Objection, leading.

13 THE COURT: Sustained. Go
14 back and ask him what he heard the auctioneer
15 state at the end of the auction, if anything.

16 CONTINUATION OF DIRECT.

17 EXAMINATION BY MR. HODGE:

18 Q. What did you hear the auctioneer say,
19 if anything, after the 3,000 -- \$3,600 bid?

20 A. Something to the effect of going once,
21 going, twice, sold.

22 Q. Did you know who was the successful
23 bidder at that time?

24 A. Yeah, I kind of figured it out. I
25 didn't know Mr. Forbes personally, but I

1 figured out that's who was bidding.

2 Q. On the day of the auction did you have
3 any clothing on that identified your business?

4 A. I think I had the same shirt on I
5 have today, yes, sir.

6 Q. And that says Blue Ridge Power Sports?

7 A. That is correct, yes.

8 Q. Does it have any other emblems on it?

9 A. It has Honda, I think, on the back of
10 it.

11 Q. After the, some time after the auction
12 did you have -- were you contacted by anyone
13 on behalf of Mr. Forbes?

14 A. Yes.

15 Q. And who was that?

16 A. I believe his name is Kevin Williams.

17 Q. And what was the reason for the
18 contact or the nature of the contact that Mr.
19 Williams had with you?

20 A. Initially he wanted to know what my
21 purpose was if I had purchased that piece of
22 land, what I wanted to do with it?

23 Q. What type of questions was he asking
24 you concerning your use of the land, if you
25 can recall?

1 A. He was very interested if I was
2 wanting to put some type of a riding area or
3 racing area for the products that we sell on
4 that property.

5 Q. What, if anything, did you tell him
6 as regards to your atten -- intentions in the
7 use of the property?

8 A. I explained to Mr. Williams that it
9 was mainly recreational property, that we
10 would be using some of the products that we
11 sell on the property.

12 not open to the public, not a racing
13 or a, a riding area for that type of, of
14 activity.

15 Q. Did it appear to you that he was
16 concerned that you might open this to the
17 public for public use or commercial use?

18 A. Yes.

19 MR. CUPP: Objection, leading.

20 THE COURT: Overruled.

21 A. Yes.

22 Q. What, if anything, occurred after you
23 told him what you were intending to use the
24 property for?

25 A. After he was comfortable with my

1 intended use he described interest in selling
2 the property to me.

3 Q. Will you describe to the Court what
4 the nature of your discussions about you
5 purchasing the property, what, what occurred?

6 A. Mr. Williams came to me with several
7 different proposals, proposals like they keep
8 a certain piece of the land and sell us the
9 balance. I was not interested in that. Their
10 next proposal was to sell me the entire tract
11 and they maintain what I would call control
12 over what I could or couldn't do with a
13 certain parcel of the land. I wasn't real
14 interested in that. Those types of
15 negotiations.

16 Q. What part of the land were they
17 interested in retaining some sort of control
18 over?

19 A. The parcel they were most interested
20 in was approximately 10 acres that was closest
21 to the fairway on the golf course.

22 Q. Do you know which fairway they were
23 talking about?

24 A. No, sir, I don't know the golf course.
25 I've heard people refer to it as Fairway 13

1 or 14.

2 Q. What agreement, if any, did you reach
3 with Mr. Williams about purchasing the...

4 A. I reached no agreement.

5 Q. Did you give him any numbers that you
6 were willing to pay for the property?

7 A. I don't know if I gave him numbers or
8 he gave me numbers that they were interested
9 in. I can't recall how that was proposed.

10 Q. Did you have meetings in person with
11 Mr. Williams or was this all by telephone?

12 A. In person.

13 Q. Were you subsequently contacted by
14 anyone other than Mr. Williams concerning your
15 purchase of the Rapp property, what I'll call
16 the Rapp property?

17 A. Yes.

18 Q. Would you describe to the Court what
19 that contact was?

20 A. Telephone contacts by Mr. Mac Nichols
21 several weeks after Kevin Williams and, and
22 our discussions ended.

23 Q. What was the nature of those
24 conversations, telephone conversations with Mr.
25 Nichols?

1 A. He was very interested in trying to
2 pick up the negotiations where they had left
3 off and to see if he could come up with a way
4 to sell the property to us.

5 Q. Did you reach any type of an agreement
6 or understanding with Mr. Nichols about the
7 purchase of this property?

8 A. No, sir.

9 Q. Did you all have any discussions as to
10 price for the property?

11 A. It seems that Mr. Nichols indicated to
12 me that Mr. Forbes didn't want to spend any
13 more money than he had already spent on the
14 property and, therefore, the price were to be
15 somewhere in the \$450,000 range. There were
16 still issues of control over what I could and
17 couldn't do on the questionable 10 acres and I
18 was uncomfortable with that. So, that's about
19 as far as we got.

20 Q. Did you ever make an offer of a
21 specific dollar amount for the purchase of
22 this property to Mr. Nichols?

23 A. I indicated interest, but didn't write
24 an offer.

25 Q. What value did you put that you were

1 interested at?

2 A. Somewhere around the 450,000 mark.

3 Q. Did you ever get a firm number from
4 Mr. Nichols as to what Mr. Forbes would sell
5 the property for?

6 A. Yes.

7 Q. And what amount is that?

8 A. It would be a number of what Mr.
9 Forbes bid on the property less his down
10 payment, whatever that number is.

11 Q. Under that offer was Mr. Forbes then
12 to have any type of control over any portion
13 of the property?

14 A. Yes. He wanted 20 years control over
15 the 10 acre -- the said 10 acres that most
16 closely bordered the golf course.

17 Q. I take it the negotiations at some
18 time were terminated?

19 A. That is correct.

20 Q. And why did they terminate?

21 A. I didn't, I wasn't interested. It
22 wasn't, it wasn't a deal that I was interested
23 in.

24 Q. Now, were you at some time after your
25 negotiations with Mr. Nichols contacted by

1 anyone else about purchasing the property?

2 A. After my conversation with Mister...

3 Q. After your negotiations with Mr.

4 Nichols terminated or broke off, were

5 completed.

6 A. Yes.

7 Q. And who was that?

8 A. Mr. Bland.

9 Q. And what, if anything, did Mr. Bland
10 tell you about why he was contacting you?

11 MR. CUPP: Objection,
12 leading...

13 THE COURT: Overruled.

14 MR. CUPP: ...culpable hearsay.

15 THE COURT: Overruled. Go
16 ahead.

17 A. I was, I was rather confused. It was
18 the third attempt back to us to purchase the
19 property and Mr. Bland then had informed me
20 that the closing, the original closing on the
21 property had not taken place and that they
22 were, they would be interested in selling it.

23 Q. Who did he tell you that he was
24 representing, if anyone, to sell the property?

25 A. The owner.

1 Q. And that's Dr. Rapp?

2 A. I assume, yes.

3 Q. What negotiations did you have with
4 Mr. Bland in regards to the purchase of the
5 property?

6 A. Oh, I think I said that Mr. Simmers
7 and I would put our heads together and then
8 we would make an offer.

9 Q. And what offer, if any, did you make?

10 A. We made an offer of 400,000.

11 Q. If you were interested in buying it at
12 450, why the offer then for 400?

13 A. Well, it, it...

14 MR. CUPP: Objection, relevance.

15 THE COURT: Overruled.

16 A. It seemed to me like there were
17 problems and people, people weren't closing.
18 It just seemed like maybe we could get a
19 little better deal.

20 Q. What, if anything, did Mr. Bland tell
21 you is the reason for the Forbes not closing?

22 A. I don't recall any reason for not
23 closing.

24 Q. Okay. Did -- what, if anything, did
25 Mr. Bland tell you about the Hizie right of



1 A. Yes.

2 Q. Okay. In other words, you didn't go
3 out there operating on a clean slate as to
4 what the value might be?

5 A. No.

6 Q. All right. I believe Mr. Hodge asked
7 you what you were going to go up to when you
8 attended the bid, attended the sale on the
9 17th, right?

10 A. Yes.

11 Q. And I think you said something around
12 350, 350,000?

13 A. 300 to 350.

14 Q. Would, would a number of \$2,800 an
15 acre be more accurate as to what you were
16 thinking about bidding, up, up to 2,800 an
17 acre?

18 A. No.

19 Q. Okay. Let's see, now I'm going to
20 look at Page 36, Line 10. In asking you some
21 questions related to what your, what authority
22 you had when you went to the sale I asked
23 you, beginning at Line 9, had he given you
24 authority to go beyond -- he being Mr. Simmers
25 -- to go beyond 380,000? Answer: Well, it's

1 a joint venture, I didn't need his authority
2 although I might have had to pay more than my
3 half. Okay, before I...

4 Question: Okay, before I get any
5 further -- excuse me, I think I'm on the
6 wrong page here. Oh, okay, back on Page 35
7 beginning at 4. When you got there, Greg --
8 referring to the sale -- what did, did you
9 have in your mind an amount that you were
10 going to stop at?

11 Answer: Yes.

12 Question: What was that amount?

13 Answer: A whole lot less than where I
14 did and I was going to stop at about 380.

15 Question: Okay, and how did you
16 determine that you were going to stop at 380?

17 Answer: Again, it was based on Bud
18 and I, or our knowledge of what we had looked
19 at before the auction and kind of what we
20 felt it would take to buy the property.

21 Question: Do you know what that would
22 come out to as a per acre price?

23 Answer: 28.

24 Question: 2,800 an acre?

25 Answer: Somewhere in that

1 neighborhood.

2 Do you remember those questions and
3 your answers?

4 A. Yes, I do.

5 Q. And were they correct at the time?

6 A. Oh, I feel I'm still answering it the
7 same way.

8 Q. So, approximately the \$2,800 per acre
9 is what you were...

10 A. If, if...

11 Q. ...going into it?

12 A. ...if that's the calculation.

13 Remember, I had more of a total price in my
14 mind, Tim; than I did have a per acre price.

15 THE COURT: And, and what
16 you're saying is, the total price that you
17 had in mind was 380,000?

18 A. Yeah, somewhere in that neighborhood.
19 We, we weren't going to let 20,000 stop us
20 from buying it. So, three to 380 is kind of
21 what we felt we could buy it for.

22 THE COURT: Okay.

23 CONTINUATION OF CROSS

24 EXAMINATION BY MR. CUPP:

25 Q. That's what you went into it?

1 A. Yes.

2 Q. Obviously it was going to take a lot
3 more than that once you, once the bidding
4 started, isn't that what it appeared?

5 A. Not when it started.

6 Q. Well, by the time the bidding was
7 over...

8 A. Yes, sir.

9 Q. ...it was obvious to you that it was
10 going to take a hundred and some more thousand
11 to win that bid, right?

12 A. Yes.

13 Q. And, in fact, you continued bidding up
14 to the amount of 3,550 an acre, correct?

15 A. Yes.

16 Q. And would you agree with me that
17 that comes to something around \$505,000?

18 A. Yes.

19 Q. And although you didn't have your
20 calculator, you knew that that's approximately
21 where you were when you tendered your last
22 bid?

23 A. Yes.

24 Q. And that last bid, in your mind at
25 that time on that day was a fair price for

1 that property, wasn't it?

2 A. I felt it was very high. Now, I
3 don't mean that that's unfair, but I felt it
4 was very high.

5 Q. Well, in, in fact you felt that it was
6 a fair price for the property?

7 A. I was willing to pay that.

8 Q. Do, do you disagree that that was,
9 that something over 505,000 was a fair price
10 for the property?

11 A. I don't understand the question. Do I
12 feel that 505,000 was not a fair price?

13 Q. Well, I'm asking it in the
14 affirmative. Did you -- do you not feel that
15 505,000 was a fair price for the property?

16 A. I was willing to pay that.

17 Q. And is that yes?

18 A. Yes, yes, yes.

19 Q. Okay. I take it that, from your
20 responses to Mr. Hodge's questions, that you
21 did not know that there was any problem with
22 the right of way when you were bidding that
23 fair price, did you?

24 A. The advice that we had received said
25 the right of way would need some work and I

1 knew that that day. The day of the
2 auction...

3 Q. You, you're talking about prior to the
4 auction?

5 A. Yes. We had investigated it prior to
6 the auction and our advice back to us was we
7 -- the right of way would need work.

8 Q. Now, you hadn't investigated the right
9 of way?

10 A. Yes.

11 Q. You had?

12 A. Well, we had people investigate it for
13 us.

14 Q. So, is what you're talking -- what
15 you're testifying to based on what somebody
16 else told you?

17 A. An attorney.

18 MR. CUPP: Your Honor, I would
19 move to strike any reference to what that
20 attorney told him based on hearsay.

21 THE COURT: I mean, first of
22 all, you asked the question but, but more
23 importantly he's indicating that he was aware
24 of a right of way problem prior to the
25 auction. Now, the fact that he became aware



1 A. Yes.

2 Q. Went to high school with me, didn't
3 you?

4 A. Yes.

5 Q. Yeah. And so, you wanted to have a
6 recreational property that was within a short
7 distance so you could shoot over there during
8 the day if you, if you wanted to?

9 A. It would be easier for us to use, yes.

10 Q. Right. So, did that -- oh, strike
11 that.

12 Would you say that this -- you looked
13 at this property before the sale, didn't you?

14 A. Yes.

15 Q. In fact, you spent part of a, a
16 morning or afternoon on the property?

17 A. Yes, we did.

18 Q. About three and a half hours?

19 A. Yes, we did.

20 Q. And you pretty much toured the whole
21 property, didn't you?

22 A. Oh, I would say most of, 70 percent of
23 it, yes.

24 Q. And during that -- well, your --
25 during your review of that property when you

1 were actually on it, it's fair to say that
2 there's a substantial amount of timber on it?

3 A. Yes, I believe there is.

4 Q. The access road that you, from State
5 Route 723, the Anscort Road...

6 A. Okay.

7 Q. ...up to the property that you
8 purchased, that access road, is it fair to say
9 to this Court that it doesn't go in a
10 straight line?

11 A. That is correct, yes.

12 Q. It kind of winds around?

13 A. Yes.

14 Q. Even goes across a creek?

15 A. Yes.

16 Q. Takes a, a left turn, doesn't it?

17 A. Yes.

18 Q. And you have not had or undertaken to
19 have that access road surveyed, have you?

20 A. No.

21 Q. You also, going back to the timber
22 issue, you were aware that the property had
23 not been timbered in some time, correct?

24 A. That's what was indicated to us, yes.

25 Q. And you could tell that just by

1 looking at it?

2 A. Yes.

3 Q. In fact you knew didn't you, Mr.
4 Kellam, it hadn't been timbered in 30, 35
5 years?

6 A. Yes.

7 Q. When Mr. Bland came back to you and
8 asked you to give an offer, did he tell you
9 that he was talking to other purchasers?

10 A. I don't recall him saying specifically
11 he was talking to other purchasers. He could
12 have.

13 Q. He told you he was just dealing with
14 you, didn't he?

15 A. It, it, he said you're the, you were
16 the second high bidder, our best opportunity
17 is with you, something to that effect maybe
18 or...

19 Q. And he asked you, didn't he, or, or
20 told you so when he, when he expressed to you
21 that he wanted to sell the property to you
22 and Mr. Simmers he said you offered Forbes
23 450,000, you won't do any less for me, will
24 you?

25 A. He said something to that effect,

1 correct.

2 MR. CUPP: Bear with me one
3 second. Those are all the questions I have.
4 Thank you, Mr. Kellam.

5 A. Thank you.

6 THE COURT: Redirect, Mr. Hodge?

7 MR. HODGE: Just a couple.

8 REDIRECT EXAMINATION

9 BY MR. HODGE:

10 Q. In regards to your negotiation of a
11 purchase of this property with Mr. Bland, did
12 you or Mr. Hites negotiate the ultimate
13 purchase price of \$400,000?

14 A. I did.

15 Q. To clarify in my mind, you have
16 testified, I believe, that you or Mr. Simmers
17 had someone to at least investigate about the
18 right of way before the auction?

19 A. That is correct.

20 Q. Was that Attorney Earl Finman?

21 A. Yes.

22 Q. And that's an attorney that Mr.
23 Simmers normally uses, I believe?

24 A. That is correct, yes.

25 Q. And you indicated also that there was

1 maybe a question of, of either the, the size
2 or the, or the location of the right of way
3 was what was brought to your attention?

4 A. Yes.

5 Q. Did you and Mr. Simmers discuss
6 whether that was a, of sufficient concern not
7 to look at the property and bid it?

8 A. No, it...

9 MR. CUPP: Objection, calls
10 for hearsay.

11 THE COURT: Overruled.

12 A. No.

13 MR. HODGE: I have no further
14 questions, Your Honor.

15 THE COURT: All right.

16 MR. LITTEN: No, sir.

17 THE COURT: All right, thank
18 you. Is this witness excused?

19 MR. HODGE: Yes, sir. As far
20 as I'm concerned.

21 THE COURT: All right, thank
22 you very much, sir, you're free to leave.

23 A. Thank you.

24 THE COURT: All right, thank
25 you. Is this witness excused?

1 MR. HODGE: Yes, sir.

2 MR. CUPP: As far as I'm
3 concerned.

4 MR. HODGE: Yes, sir.

5 THE COURT: All right, thank
6 you very much, sir.

7 MR. KELLAM: Thank you.

8 THE COURT: You're free to
9 leave. Is there one other witness?

10 MR. HODGE: Mr. G. R. Dick
11 Heatwole.

12 THE COURT: Mr. Heatwole?

13 MR. HODGE: Yes, sir.

14 MR. CUPP: Your Honor, while
15 we're waiting for Mr. Heatwole, I renew my
16 objection, for the reasons outlined in the
17 motion.

18 THE COURT: All right, I'll
19 reserve ruling on that. Please come forward,
20 sir. Raise your right hand.

21 Do you swear the evidence you shall
22 give in this proceeding shall be the truth,
23 the whole truth and nothing but the truth, so
24 help you God?

25 MR. HEATWOLE: Yes, sir.

1 THE COURT: Please have a seat
2 here in the witness box.

3 THE COURT: Please come
4 forward, sir. Raise your right hand. Do you
5 swear the evidence that you shall give in
6 today's proceedings shall be the truth, the
7 whole truth and nothing but the truth, so help
8 you God?

9 MR. HEATWOLE: Yes, sir.

10 THE COURT: Please have a seat
11 here in the witness box.

12 GEORGE R. DICK HEATWOLE, having been duly
13 sworn by the Court was examined and testified
14 as follows:

15 DIRECT EXAMINATION

16 BY MR. HODGE:

17 Q. Good morning, Mr. Heatwole?

18 A. Good morning, sir.

19 Q. Would you state your name, address and
20 occupation for the record here, please?

21 A. George R. Dick Heatwole, 8141 Crisman
22 Road, Harrisonburg, Virginia.

23 Q. And what is your occupation?

24 A. I'm sorry. I'm a full time auctioneer.

25 Q. And how long have you been an

1 auctioneer?

2 A. Approximately, almost 40 years.

3 Q. Do you have any type of a license or
4 is there a license required to be an
5 auctioneer in the Commonwealth of Virginia?

6 A. Yes, sir.

7 I'm a licensed auctioneer in Virginia,
8 West Virginia, Maryland, Pennsylvania, North
9 Carolina and I have also done work in
10 Delaware.

11 Q. Do you have any other, hold any other
12 licenses from the Commonwealth of Virginia?

13 A. Yes, sir. I'm a Virginia real estate
14 broker.

15 Q. How many auctions do you normally or
16 would you say you average per year?

17 A. A hundred plus.

18 Q. And you've been averaging that for how
19 many years would you say?

20 A. Probably 25 to 30.

21 Q. What all types of auctions do you
22 conduct?

23 A. We conduct personal property, antique,
24 real estate and we're the standing auctioneer
25 for the bank -- U.S. Bankruptcy Court, Western

1 District of Virginia.

2 Q. And your auctioneering includes
3 auctioning real estate at times?

4 A. Yes, sir.

5 Q. Do you have any idea, estimate of how
6 many real estate auctions you would conduct,
7 average a year?

8 A. We would probably average 25 a year.

9 Q. Do people seek your advice as to
10 whether they should auction a property or how
11 to sell property?

12 A. Yes, sir, frequently.

13 Q. What is the benefit, if any, would you
14 say of selling real estate at auction rather
15 than through a listing broker?

16 MR. CUPP: Your Honor, I'm
17 going to object to that. First of all, that
18 was -- I'm assuming you're asking him based on
19 his expertise in the auction business.

20 He'd have an opinion to that, but that
21 certainly was not one of the opinions that was
22 listed.

23 THE COURT: Did you disclose
24 this opinion?

25 MR. HODGE: It's not an

1 opinion. This is a, more of a foundation in
2 terms of his, his advice and...

3 THE COURT: What is the
4 question? I'm sorry, what...

5 MR. HODGE: I think I asked
6 him words to the effect as to advice he would
7 give people as to the benefits of holding...

8 THE COURT: I'm going to
9 sustain the objection.

10 MR. HODGE: ...of holding an
11 auction.

12 CONTINUATION OF DIRECT

13 EXAMINATION BY MR. HODGE:

14 Q. Do you have experience in terms of
15 property going up for auction a second time
16 after it has not -- or it's, it's been sold
17 at an auction and for whatever reason it
18 hasn't closed?

19 A. Yes, sir.

20 MR. CUPP: Your Honor, again
21 I'm going to object. This is, this is
22 getting to the foundation of our argument
23 that, that it's asking for a wholly
24 speculative opinion. It's...

25 THE COURT: Well, it's

1 overruled this time. I want to hear the
2 evidence and then I can determine what, what
3 weight, if any, to give to it. Go ahead.

4 MR. HODGE: I'll try to ask it
5 the same. Could I ask the Court Reporter to
6 read that back?

7 THE COURT: Sure.

8 MR. HODGE: I'm completely --
9 read that back, sir.

10 COURT REPORTER: I don't know
11 if my volume will reach you.

12 THE COURT: I think it was, do
13 you have experience in auctions of real estate
14 after the, after it has been auctioned and it
15 did not close for whatever reason. Does
16 that sound close enough?

17 MR. HODGE: Yes.

18 THE COURT: All right, go
19 ahead.

A. May I answer?

20 THE COURT: Yeah.

21 A. Yes, sir, I have.

22 Q. And what is your experience in that
23 regard?

24 MR. CUPP: Same objection,
25 Your Honor.

1 THE COURT: Overruled.

2 A. My experience has been that it brings
3 less the second time.

4 Q. Can you quantify whether it's
5 significantly less or close to the same price,
6 but less?

7 A. Well, it happens so infrequently and,
8 you know, my experience has been, gosh, a, a
9 figure off the top of my head would be 10 to
10 20 percent less at least, but it happens so
11 infrequently that I, I don't have a basis.

12 Q. Why does it happen infrequently?

13 A. Well, usually your buyer goes to
14 the...

15 MR. CUPP: Objection, calls
16 for speculation.

17 THE COURT: Overruled.

18 A. Your buyer comes to the closing table
19 and we just never really have a problem with
20 auctions not closing.

21 Q. Is there a, a view among auctioneers
22 that you don't want to put the same property
23 up twice when it doesn't close?

24 MR. CUPP: Objection. That,
25 that again is asking for what a view is not,

1 not for an expert opinion. He's not a fact
2 witness and it really is asking for lay
3 opinions. These other people aren't in here
4 and haven't been qualified.

5 THE COURT: Overruled.

6 A. Based on, I'm a member of the
7 Virginia Auctioneer's Association consisting of
8 most of the auctioneers in Virginia, based on
9 my peers and our, the opinions at, at
10 conventions and seminars that we've discussed,
11 I feel probably almost unanimously we feel
12 that it's not a good practice.

13 Q. It would be better, a better practice,
14 then, to try to sell the property then
15 privately?

16 MR. CUPP: Objection, leading.

17 THE COURT: Sustained.

18 MR. HODGE: Your Honor,
19 normally I think you can ask leading questions
20 of expert witnesses if we're going to get him
21 qualified. I don't know -- to get him
22 qualified you're -- at, at this point I think
23 that a leading question...

24 THE COURT: Well, I've already
25 accepted him as qualified so as to be asking

1 him his opinions.

2 MR. HODGE: Okay. Okay. I'm,
3 I'm sorry, I thought he had not been
4 qualified.

5 THE COURT: No.

6 MR. HODGE: Okay. I, I
7 apologize, Your Honor.

8 CONTINUATION OF DIRECT

9 EXAMINATION BY MR. HODGE:

10 Q. In your opinion, then, it is not a
11 good -- is it a good idea or a bad idea to
12 offer property again for auction if it has not
13 closed after a previous auction in a close
14 proximity?

15 A. I...

16 MR. CUPP: Objection.
17 There's no foundation for him to give that
18 opinion on the facts of this case.

19 THE COURT: Overruled.

20 A. Would you repeat the question, please?

21 Q. Okay, I'm sorry. I'm asking whether
22 or not in your opinion it would be advisable
23 for a property owner to put property back up
24 for auction when it's been auctioned once and
25 the property did not close after the first

1 sale?

2 MR. CUPP: Same objection.

3 THE COURT: Overruled.

4 A. I would recommend against it, yes,
5 sir.

6 Q. Calling your attention to the situation
7 where Dr. Rapp had offered a property for
8 sale, you're familiar with that, where Dr.
9 Rapp had offered the mountain property for
10 sale at a public auction?

11 A. Yes, sir.

12 Q. And after the sale did not close, it
13 would be your opinion that he should not put
14 it back up for auction again to try to sell
15 the property?

16 MR. CUPP: Objection, leading.

17 THE COURT: Well...

18 MR. CUPP: And, and there's no
19 foundation.

20 THE COURT: Wait a minute.

21 What I want to know is, let me ask this of
22 you. First of all, you could have, say a
23 distressed property and you could be selling
24 foreclosed property at a bankruptcy sale or a
25 trustee sale under a deed of trust or

1 something like that, right?

2 A. Yes, sir.

3 THE COURT: And if you didn't
4 have something like that close at an auction
5 it could be for any number of reasons and it
6 could be for a defect in the property, defect
7 in title, it could be that the winning bidder
8 was a sham or he couldn't -- he or she
9 couldn't get the financing and, and your
10 testimony is that in those situations I take
11 it you're saying your expert opinion is that
12 you shouldn't put it up a second time?

13 A. Based on, on properties that -- as I
14 say this happens so infrequently that my
15 advice is, whatever the circumstances are, you
16 just don't get a second bite at the apple, at
17 being successful.

18 THE COURT: All right. Now,
19 now let's take it from a distressed sale or a
20 forced sale situation.

21 A. A forced sale, okay.

22 THE COURT: Right. To a non-
23 forced sale as evidence in this case has
24 indicated, and you can just assume this would
25 be correct for the purposes of giving your

1 answer, apparently there were somewhere between
2 50 -- 30 to 50 bidders on the property, the
3 consensus seems to have been that the property
4 had a value of somewhere in the, the, quote,
5 \$2,000 an acre range as mountain property and
6 the bidding took it to \$3,600 and the, it
7 didn't close. Now, under those circumstances
8 would there be any sense to go back and see
9 if you could get the same fervent activity you
10 had before?

11 A. I don't think so. Without knowing all
12 the details of this auction the last two
13 bidders, how many bidders were in past what
14 point. I try to look at the situations as
15 though I were the bidder. If I was the
16 backup bidder and I knew that the purchaser
17 and I were the last two in the bidding
18 process say from 2,500 to 3,000 an acre, if
19 I was that backup bidder I'm going to say,
20 well, whoa, wait a minute. You take that guy
21 out of the pool I would have probably bought
22 it for \$2,500. And if you put it back up at
23 auction he's got that thought in his mind.

24 The rest of the bidder pool is going
25 to be saying, well, why didn't this guy come

1 to the closing table, what's wrong with that
2 property, what did he find out that we don't
3 know that's not being disclosed and it puts a
4 cloud over the whole thing.

5 THE COURT: All right.

6 MR. CUPP: Your Honor, I --
7 begging the Court's pardon, but I need to move
8 to strike that. He's putting himself in the
9 place of what a bidder might or might not say
10 under circumstances that haven't been set out
11 in our -- and haven't been set before...

12 THE COURT: Well, Mr. Cupp,
13 this is what makes horse races. I would have
14 thought you would have loved that answer, but
15 that's fine. I'll deny your motion to strike.

16 MR. HODGE: I don't have any
17 further questions.

18 THE COURT: All right.

19 MR. LITTEN: No questions,
20 Your Honor.

21 THE COURT: All right, this
22 witness is excused or...

23 MR. CUPP: Well, I have some
24 questions.

25 THE COURT: All right, sir.

1 MR. CUPP: If you're, if
2 you're not going to strike his testimony in
3 total.

4 THE COURT: No, I'm not.
5 All right.

6 CROSS EXAMINATION

7 BY MR. CUPP:

8 Q. Mr. Heatwole, your opinion that you
9 have given here today is not based on the
10 Rapp property or the auction sale that took
11 place on May 17, 2003, is it?

12 A. I did not attend the auction. I do
13 not know -- only know what I have been told
14 by you and Mr. Hodge.

15 Q. And you have not been on that
16 property, have you?

17 A. Not physically on that property, no,
18 sir.

19 Q. Okay. And you didn't look into any of
20 the specifics about who the bidders were in
21 connection with this property?

22 A. No, sir.

23 Q. And you don't know any of the
24 circumstances relating tot he auction sale?

25 A. No, sir.

1 Q. In order to have a successful auction
2 sale, you do know that it's important that
3 good title be offered, isn't it?

4 A. I leave that up to the attorneys
5 involved, yes, sir.

6 Q. Well, you always include -- you always
7 sell property free and clear of any liens of
8 encumbrances, right?

9 A. That's part of our contract, yes, sir.

10 Q. And that's a standard practice by
11 auctioneers, isn't it?

12 A. I would think, yes. I can't speak for
13 other auctioneers, but our standard -- when it
14 comes to what they have in their contract, I
15 don't know what they put in their contract,
16 but...

17 Q. Well, a minute ago you spoke for other
18 auctioneers when you said what their
19 opinions...

20 A. I said our opinions at seminars and
21 conventions and meetings our opinion was
22 almost unanimous, but I haven't read anybody
23 else's contract.

24 Q. Just so I make sure...

25 A. But I'm saying yes, free of -- free,

1 our contract says free of liens and
2 encumbrances, yes, sir.

3 Q. And that's important for there to be -
4 - it is important for there to be good title
5 to the property?

6 A. Absolutely.

7 Q. And you would also agree that, that
8 it's important that there is a deeded access
9 and not access by prescription in order for
10 there to be a successful auction sale?

11 A. That would help. I don't know that
12 it's, you know, a prescription right of way,
13 it depends on the, the buyer.

14 Q. But in cases where there is some
15 kind of question about whether the use is only
16 -- the, the right or way is only by
17 prescription you notify people of that, don't
18 you?

19 A. If I'm aware of it, yes, sir.

20 Q. Would you agree with me that it is not
21 a common practice for bidders to check out the
22 status of title before offering bids at
23 auctions?

24 A. I don't think they do. I think they
25 rely on the legal community when they do their

1 title work to check that.

2 Q. After the sale?

3 A. After the sale, yes, sir.

4 MR. CUPP: Those are all the
5 questions I have.

6 THE COURT: Any redirect?

7 MR. HODGE: Just one.

8 REDIRECT EXAMINATION

9 BY MR. HODGE:

10 Q. Mr. Heatwole, if -- you, you indicated
11 that you think that offering property for sale
12 a second time after a closing does not occur
13 after a first auction, if, if there is some
14 question that the first purchaser at the first
15 auction is making a claim that title is not
16 good, would that affect your, your decision in
17 any way or confirm...

18 MR. CUPP: Objection, exceeds
19 the scope of my cross.

20 THE COURT: Overruled.

21 A. Would you repeat the question again?

22 Q. The question is, is if you are at an
23 auction, the first purchaser then does not
24 close claiming there is some sort of a title
25 defect, would that impact on a second auction

1 if one were held?

2 A. I think it would, yes.

3 Q. Do you have any idea in terms of
4 quantifying the, the effect?

5 A. I don't think there's any, any rule of
6 thumb to say percentage-wise how much it
7 effects because I think each case is, is
8 different, but in my experience it's, you're
9 always, whether you're selling real estate,
10 personal property, whatever, the second time
11 it's never as good.

12 MR. HODGE: Thank you.

13 THE COURT: All right,
14 nothing further of this witness? All right,
15 sir, you're excused, thank you.

16 A. Thank you, sir.

17 THE COURT: All right, nothing
18 further of this witness? All right, sir,
19 you're excused, thank you.

20 MR. HEATWOLE: Thank you, sir.

21 THE COURT: All right, Mr.
22 Cupp?

23 MR. CUPP: Can we have a short
24 break?

25 THE COURT: Yeah, we will.

1 Who is your next witness?

2 MR. CUPP: My next witness
3 will be Kevin Williams.

4 THE COURT: Pardon me?

5 MR. CUPP: Kevin Williams.

6 THE COURT: All right. We
7 will take a short break of five minutes.

8 BAILIFF: All rise.

9 (WHEREUPON, a brief recess was taken.)

10 THE COURT: All right, call
11 your next witness, please.

12 MR. CUPP: Your Honor, we
13 call Kevin Williams.

14 THE COURT: Kevin Williams,
15 please come forward. If you'd raise your
16 right hand? Do you swear the evidence you
17 shall give in today's proceedings shall be the
18 truth, the whole truth and nothing but the
19 truth, so help you God?

20 MR. WILLIAMS: I do.

21 THE COURT: Please have a seat
22 in the witness box.

23 THE COURT: I'm sorry. Right
24 there, yeah.

25 MR. WILLIAMS: Okay.

1 Q. And did he do that?

2 A. No.

3 Q. And the third, the other, the other
4 times that you called did you actually reach
5 him or do you recall?

6 A. I don't.

7 Q. Nonetheless, do you recall leaving some
8 type of message?

9 A. Yes.

10 Q. Did Mr. Bland at any point ever tell
11 you why he was not responding with the
12 information related to the property?

13 A. I think he may have mentioned that it
14 just slipped his mind.

15 Q. Do you remember approximately the time
16 frame when that was after the first call?

17 A. The first call was that week. I
18 believe it may have been the following week
19 when I, when I talked to him again. If it
20 wasn't the second week, then it was the third
21 week.

22 Q. Now, we've heard testimony from other
23 witnesses, Mr. Williams, concerning
24 conversations that you had with Greg Kellam
25 following the sale. Were those conversations

1 after you attempted to contact Mr. Bland?

2 A. Yes.

3 Q. And what, if anything, did you discuss
4 with Mr. Kellam?

5 A. I had talked with him about
6 transferring our rights to the property to him
7 if we could have a buffer between Number
8 13 and a clearing that he was looking at
9 building a cabin.

10 THE COURT: I'm sorry, you,
11 you started to speak to Mr. Kellam and when
12 was that?

13 A. I believe it was in the second week
14 after the sale that I started to speak to him
15 or that week I actually went up on the
16 property and it was after I went up on the
17 property that I started speaking with Mr.
18 Kellam.

19 THE COURT: All right. And at
20 that time you didn't know anything about the
21 right of way?

22 A. No.

23 THE COURT: All right. So,
24 you were, you were going and talking to him
25 about selling it to him before any issue of

1 the right of way came up?

2 A. Yes.

3 THE COURT: All right.

4 CONTINUATION OF DIRECT

5 EXAMINATION BY MR. CUPP:

6 Q. Well, did you, did you ever before
7 this litigation, did you have any knowledge
8 of the right of way issue?

9 A. No.

10 Q. That wasn't something you discussed
11 with Mr. Forbes?

12 A. No.

13 Q. What, what was the first proposal that
14 you made?

15 A. The first proposal I made to Mr.
16 Kellam was that in exchange for approximately
17 a 10 acre buffer between Number 13 and that
18 property we would let him buy the property at
19 his top bid and we would maintain our bid.
20 So, I think his bid was at, I think it was
21 like -- I don't even remember what it was,
22 but it was, it was lower than, than ours, but
23 it was -- we were going to let him pay his
24 amount and -- for the property and we would
25 take the rest.

1 Q. And have the buffer?

2 A. And have the buffer.

3 Q. During the course of the negotiations,
4 if any, did you receive any -- or, or what
5 was the final response that you received from
6 Mr. Kellam as to what he was willing to do?

7 A. I think that the final offer that he
8 made was 450,000 and he would take the whole
9 thing.

10 Q. Okay. And at that point, what was
11 your involvement after he made that proposal?

12 A. I was out.

13 Q. Did you have anything to do, in any
14 way, with the issues relating to the right of
15 way?

16 A. No.

17 Q. Do you, do you recall approximately
18 when that was?

19 A. When what...

20 Q. How long your discussions with Kellam
21 went on?

22 A. About three weeks.

23 Q. And up to that point had you still
24 received nothing from Mr. Bland?

25 A. No.

1 MR. CUPP: Those are all the
2 questions I have.

3 THE COURT: All right. Cross
4 examination?

5 MR. HODGE: Just very briefly,
6 Your Honor.

7 CROSS EXAMINATION

8 BY MR. HODGE:

9 Q. You're the number three man in the
10 Forbes enterprise business, business
11 enterprise?

12 A. I guess you could say that, yes.

13 Q. That's Mr. Bruce Forbes would be
14 number one, Jeff number two and you're number
15 three?

16 A. Yes.

17 Q. Before the sale did you express any
18 opinions that the property would be valuable
19 as a buffer to the golf course?

20 A. I never really talked about the
21 property at all. I went up to the property,
22 I -- on Number 13 and saw the ribbons that
23 had been tied and that was about it.

24 Q. You never expressed any opinion to
25 either Jeff or his dad that the property ought

1 Q. Looking at the, in the...

2 THE COURT: Can you give me
3 the exhibit number on that again?

4 MR. HODGE: It's Tab 13, Your
5 Honor.

6 THE COURT: All right.

7 Q. Mr. Nichols says, moreover there has
8 been no mutual assent to the offer evidenced
9 in writing by Dr. Rapp, Trustee. Had this
10 issue as to whether or not there, there was
11 in fact a contract to buy this property been
12 raised before?

13 A. No. This, this letter was the first
14 time I had any indication that there was a
15 claim there had not been mutual assent. It
16 was never raised or discussed in any of our
17 conversations.

18 Q. Did you continue to represent Dr. Rapp
19 then in terms of trying to sell this real
20 estate?

21 A. Yes.

22 Q. Did you prepare a contract of sale for
23 Mr. Rapp?

24 A. I did.

25 Q. Okay. Look at Tab 18, behind Tab 18.

1 A. I see it.

2 Q. Would you identify this document?

3 A. It's a contract that I prepared
4 between Dr. Rapp, and when, when I refer to
5 him, I refer to him in his capacity as
6 trustee for his trust, to Mr. Kellam and Mr.
7 Simmers.

8 Q. Did you have any participation in
9 negotiating the price that was paid on this
10 property?

11 A. I offered advice to Mr. Bland about
12 price, but I had no direct hand in the
13 negotiation of the price.

14 Q. What was your advice or communication
15 to Mr. Bland on that?

16 A. Get the best price you could, highest
17 price you could. And we had discussions about
18 trying to get \$500,000 or an amount that
19 represented Mr. Kellam's and Mr. Simmers' last
20 bid at the auction. And the original idea
21 was, let's go back and tell them that their
22 second to last bid, it turns out it's a
23 winning bid and we'll sell it to you at that
24 price. And, and then sequentially what
25 happened, then, Mr. Bland was not successful.

1 We had more discussions about what should we
2 do next, what should we do next, trying to
3 get the best price we could for the property.

4 Q. Did you have any discussions about
5 putting it back up for auction?

6 A. We did.

7 Q. What was the, your advice in that
8 regard?

9 A. That it was a bad idea.

10 Q. And why did you give that advice?

11 MR. CUPP: Your Honor, to the
12 extent that that's some type of an opinion
13 being offered as an expert I would object.
14 There is, there is nothing that's been
15 designated...

16 THE COURT: No, I think it's
17 just...

18 MR. CUPP: ...that his
19 advice...

20 THE COURT: ...it's not his
21 opinion as an expert. Go ahead.

22 A. I, I gave that advice because my
23 understanding that fairly early in the bidding
24 all but two bidders had backed out and that
25 one of those bidders was Mr. Forbes and the

1 other was Mr. Kellam and Mr. Simmers. And
2 the only thing that drove the price was those
3 two bidders competing against each other and
4 it drove the price significantly above what
5 everyone had anticipated the property was
6 going to sell for. In my opinion you would
7 not again be able to create that excitement at
8 a second auction.

9 Q. And from this contract it was executed
10 by all parties?

11 A. Yes.

12 Q. And looking behind Tab 19 is that the
13 deed that you prepared to consummate that
14 contract?

15 A. It is.

16 Q. And looking behind Tab 20 is the HUD 1
17 Settlement Statement consummated, does it
18 memorialize the, the financial transactions?

19 A. Yes.

20 Q. Mr. Penrod --

21 MR. HODGE: I would like to
22 ask opinions on, his legal opinions on his
23 expert qualifications. Would you stipulate to
24 that or do you want me to walk him through
25 his qualifications?



1 remember that?

2 A. Yes.

3 Q. And was that based on something you
4 got from the transcript of the sale?

5 A. No, that would have been based on
6 information provided to me by, by Mr. Bland.

7 Q. Okay.

8 A. And perhaps also subsequently by Mr.
9 Kellam, but I'm not sure about that.

10 Q. When you told Mr. Bland to get as much
11 as you can for the property, that was the
12 advice you gave him, right?

13 A. That was -- yes, that was part of the
14 advice I gave him.

15 Q. At the time that you gave him that
16 advice did you know that he was being sued by
17 Mr. Forbes?

18 A. Yes.

19 Q. I want to make certain that I know
20 about your conversations with Dr. Rapp during
21 this June time frame, June to, to July.

22 A. All right.

23 Q. My recollection was you had only --
24 you spoke to Dr. Rapp the one time on the
25 telephone prior to the auction sale, correct?

1 Q. And there were other bidders over
2 \$3,000 an acre, weren't there?

3 A. No, I'm not aware of that at all. My
4 understanding, because I am not the auctioneer
5 and I'm not standing on the podium, what the
6 crowd does as a whole I'm not necessarily
7 aware of. And so, my understanding of how
8 many people bid at what level at that auction
9 I have because my auctioneer later told me
10 about it because we always...

11 Q. So, you couldn't say one way or that
12 other who was bidding?

13 A. Not early on. I know who was bidding
14 after 23, \$2,400 an acre. It was Mr. Kellam
15 and Mr. Forbes. So, I only saw those two
16 bidding much over two grand an acre.

17 Q. That's all you saw?

18 A. That's all I saw.

19 Q. You were out in the crowd, it was
20 raining, correct?

21 A. No, it, no, it wasn't. It had been,
22 it was wet underfoot, but it stopped raining
23 long enough to have the sale, thank the Lord.
24 And during the auction I'm just another point
25 of sale guy and at some point when just about

1 everybody in that crowd is through bidding I
2 don't have any more work to do.

3 So, but my auctioneer may need me at
4 some point so I attend and instead of
5 circulating all around the crowd towards the
6 end of the bidding to be pretty close to the
7 sound truck and you could see these two guys
8 bidding, but nobody else.

9 Q. Mr. Penrod testified that you told him
10 about bidders.

11 A. Yes.

12 Q. What did you tell him?

13 A. I told him there were five bidders and
14 that -- oh, let's see. Three guys bid from
15 the beginning until just over two grand an
16 acre, like maybe two grand, 21, \$2,200 and
17 then those three stopped and the other two
18 started. And those two carried it to the
19 end. That's what I told David. And I know
20 that because Colonel Mets told me that.

21 MR. CUPP: Your Honor, I'd move to
22 strike what Colonel Mets told him, it's
23 nonresponsive.

24 THE COURT: Overruled.

25 Q. You had a list of folks, whether they



1 Q. Meaning?

2 A. This, this auction. That's what my
3 normal practice is.

4 Q. Why is it your practice these
5 auctions?

6 A. Well, I like projects that are short
7 instead of long. I like, in a boom time I
8 like projects that will take maximum advantage
9 of the boom psychology and that's going to be
10 an auction instead of a listing. I like
11 vacant land, not houses in town, and vacant
12 land is, is, works very well sold in this
13 market at good times and bad. So, there's a
14 service to be offered and there's a market for
15 it and it works great.

16 Q. What did you mean by the boom time
17 psychology?

18 A. When there's a real estate boom price
19 will so outstrip value that property will sell
20 for a lot more than you'd have nerve or
21 imagination to ask. And that's hardly ever
22 true, but once in a while it's real true and
23 in my judgment we've been in a time like that
24 for year, year and a half now. It's a great
25 time to sell property. It's a terrible time

1 to try to buy property because you can't buy
2 bargains. Now, that's the basic reason I
3 urged Dr. Rapp strongly to market this
4 property this way because I thought it was,
5 would work fine and sell high.

6 Q. And before this property came up did
7 you know Dr. Rapp?

8 A. Yes, I've known him in social
9 situations and at church for 20 some years,
10 yeah.

11 Q. What did you do when you found out
12 that he had property he wanted to sell?

13 A. He called me and asked me if I'd come
14 and see him about the piece of land he had
15 for sale. And I called him and made the
16 appointment and went to Weyers Cave just
17 shortly to meet with him at his farm.

18 Q. And what did you all discuss?

19 A. I asked him about what he had for sale
20 because I didn't imagine he was going to sell
21 the farm. And we talked some about the
22 property and then I asked him why he wanted
23 to sell it and we talked some about his
24 motivations for that. I described the pair of
25 services I could offer. I could take a

1 Q. Did you tell any callers the property
2 could be subdivided?

3 A. No.

4 Q. Are you sure of that?

5 A. Yes.

6 Q. Obviously, then, you don't remember
7 anyone calling and saying he was a developer
8 from Charlottesville?

9 A. No, I don't remember that.

10 Q. I believe Mr. Forbes testified
11 yesterday that you had also told him that
12 mountain land would go for 2,000 to \$2,500 per
13 acre?

14 A. Mm-hmm. (Indicating affirmatively.)

15 Q. Did you tell anyone that?

16 A. No, I never give buyers price
17 guidance.

18 Q. Why not?

19 A. Mostly what I do in this profession is
20 what I was taught by the old guys that I was
21 raised around and one of the main things they
22 tell you, they told me, is that if you give
23 them price guidance, in a cold moment if they
24 think that price, if they find out some, some
25 version of the price they got to pay if it

1 sold, if in a cold moment they think that
2 that is high they won't come to the auction.
3 And if they don't come I don't have the
4 opportunity to do that auction thing. If in
5 a cold moment they think it's reasonable
6 they'll come to the auction, but they'll never
7 bid any higher because if they've outbid the
8 price I got over on them in some way.

9 So, we never disclose, you don't give
10 price guidance to buyers at all because any --
11 it doesn't matter how many caveats I would
12 give them, if I give them a hard number
13 they're going to zero in on that and they
14 won't be able to think about anything else.
15 And, of course, I don't want them thinking
16 about how much money they're going to pay, I
17 want them to think about anything else. So,
18 we don't give them price guidance.

19 Q. You remember making announcements at
20 the sale?

21 A. Sure.

22 Q. I'd like to call your attention to Tab
23 4 of the Defendant's notebook.

24 A. Mm-hmm. (Indicating affirmatively.)

25 Q. The third, third sheet inside of Tab 4



1 you know, there wasn't anything else for sale
2 up there. That's what I asked if anybody had
3 anything to sell, please -- to sell, please
4 call me.

5 Q. And after -- it, it certainly was the
6 only mountain property that was adjacent to
7 Pack Saddle Golf Course that was for sale?

8 A. Yeah, to my knowledge.

9 Q. Pack Saddle is very close to the
10 National Forest, right?

11 A. Adjoins, I think. Yeah, it's the
12 piece between ours and...

13 Q. So, you would agree with me wouldn't
14 you, Mr. Bland, that after the sale with Mr.
15 Forbes did not go through that left this one
16 piece of land on, of any size...

17 A. Mm-hmm. (Indicating affirmatively.)

18 Q. ...on Massanutten Mountain that was
19 still for sale?

20 A. Right.

21 Q. And you described this as being a boom
22 time?

23 A. Right.

24 Q. And the, within the next two months
25 that boom time still existed here in this

1 area, right?

2 A. I think it still exists, yes.

3 Q. It still exists now?

4 A. Yes.

5 Q. And it's true that the only efforts
6 that you made on behalf of Mister -- Dr. Rapp
7 to sell this property after the Forbes, after
8 Mr. Forbes did not go through...

9 A. Mm-hmm. (Indicating affirmatively.)

10 Q. ...the sale, the only efforts that you
11 made was to go to Mr. Kellam?

12 A. Yes.

13 Q. And you did not contact any of the
14 other folks that were at the sale?

15 A. No.

16 Q. You did not put an advertisement in
17 the paper?

18 A. No.

19 Q. You did not make any other phone calls
20 to people other than who was at the sale with
21 regard...

22 A. No, I didn't, I didn't do any other
23 marketing or selling efforts at all.

24 Q. All right. And you did that both at
25 -- it was both you and Mr. Penrod that made

1 that determination?

2 A. Well, ultimately Dr. Rapp made all
3 those decisions, but that was, yeah, that
4 was our conversation.

5 Q. And, in fact, Mr. Penrod directed you
6 to tell them to go to those folks, Mr. Kellam
7 and Mr. Simmers?

8 A. I don't know if he said only go to
9 them, but go to them.

10 Q. Nonetheless you didn't...

11 A. I mean, he...

12 Q. ...go to anybody else?

13 A. Right. And I'm sure that David and
14 Dr. Rapp were both comfortable with me only
15 seeking to sell it to the runner-up bidder.

16 Q. Did you make the statement that I
17 asked Mr. Kellam about, to Mr. Kellam that, to
18 the, to the effect that you're going, you
19 offered 450, 450,000 to Mr. Forbes so treat me
20 as well as you did him?

21 A. That's a paraphrase. It, he had, I
22 think earlier in that conversation he had said
23 that, that he was willing to give the 450 and
24 as I was getting ready to walk out the door I
25 needed to close him a little. And so I said,

1 I asked him how he'd -- oh, I asked him a
2 couple times how he'd beat his high bid and
3 no, they couldn't do that, you know, and we
4 wouldn't be comfortable at all and I think I
5 asked him once how comfortable he'd be at 475
6 and he said, I don't think we'd be very
7 comfortable with that. And I said, well, how
8 comfortable would you be at whatever, the 463
9 which would be the high bid less the down
10 payment and he said, I wouldn't be comfortable
11 like that. And I said, well, you'd be as
12 good to us as you would be to Mr. Forbes,
13 wouldn't you? He said, oh, yeah, and I left
14 because, I mean, he was covered customers with
15 his motorcycle business. He didn't have any
16 more time to talk about it.

17 Q. And then the next time you talked to
18 him it was a take it or leave it \$400,000?

19 A. Yeah, yes.

20 Q. And...

21 A. Yeah.

22 Q. ...Dr. Rapp took it rather than leave
23 it?

24 A. Yeah. And I'm certain...

25 Q. And rather than doing anything else to

1 look into remarketing?

2 A. Yeah.

3 Q. Now, you are not a member of the
4 Multiple Listing Service, are you?

5 A. No.

6 Q. And you're not a member of the local
7 Board of Realtors?

8 A. No.

9 Q. So, the Multiple Listing Service is a
10 mechanism that other realtors can tap into in
11 order to advertise properties they have for
12 sale, correct?

13 A. Yes.

14 Q. Did you make any efforts to ask
15 someone to put this property on the Multiple
16 List, Listing Service?

17 A. No, for the same reason that I've
18 never belonged to the Board of Realtors. I'm,
19 I'm not sure that that way of marketing real
20 estate is particularly effective in country
21 property. I'm very comfortable that year in,
22 year out I can sell stuff higher than the
23 realtors can of the kind of property that I
24 sell. And I've, you know, we've stayed in
25 business since 1949 doing it.

1 Q. Virtually all of your business is
2 auction sales?

3 A. Yes.

4 Q. And you told Dr. Rapp that?

5 A. Yes.

6 Q. And of your auction business virtually
7 all of it is an absolute auction, isn't it?

8 A. Oh, yes. This is the first one that
9 wasn't -- hasn't been absolute in 15 years,
10 anyway.

11 Q. In fact, isn't it true that, that
12 property sold under reservation often don't
13 bring what it would bring under an absolute
14 auction?

15 A. You know, I've spent my career saying
16 that and thinking that and lately I'm not so
17 sure because I go to foreclosures here and
18 they're never absolute and still these people
19 bid avidly, but the way I understand the
20 psychology of bidders that has to make some
21 difference. Didn't in this case.

22 Q. Well, you never offered this property
23 at absolute auction?

24 A. Well, no, but nothing would have made
25 it sell any higher. It was plenty high.

1 RECROSS EXAMINATION

2 BY MR. HODGE:

3 Q. Very quickly, Mr. Bland, do you
4 consider the \$400,000 price this property was
5 ultimately sold for...

6 A. Mm-hmm. (Indicating affirmatively.)

7 Q. ...a good price for the property?

8 A. Right.

9 MR. CUPP: Your Honor, that's
10 asking for an opinion as to value. He wasn't
11 designated as an, an expert witness.

12 THE COURT: Well, I'll sustain
13 that objection and go about it the other way.
14 You indicated that you had formed, back when
15 you and Dr. Rapp were talking an idea, a
16 rough idea as to the value of the property
17 but you would not disclose it to any of the
18 callers?

19 A. No, I Dr. Rapp and I had established
20 the reserve price which I would not disclose.
21 I never formed any indication, any rough idea
22 of the, of the price. See, I don't care
23 about value, I care about price and those are
24 radically unpredictable at auction sales.
25 Just depends on who shows up and what they

1 do. And I, I really don't form expectations
2 and that drives people like Dr. Rapp crazy
3 because they want me to tell them how much
4 money they're going to make and I can't do
5 that.

6 I was astounded that it was so high
7 and the reason I recommended to Mr. Penrod and
8 Dr. Rapp that we take that \$400,000 offer,
9 even though maybe two weeks before maybe
10 they'd been willing to give Mr. Forbes a lot
11 more than that was that it was still just
12 high as a kite.

13 Q. How would you characterize the \$3,600
14 an acre bid at the sale?

15 MR. CUPP: The same objection,
16 Your Honor.

17 THE COURT: Overruled.

18 A. It was amazing. I mean, I've, I've
19 looked at the, I've looked at every sale since
20 then in another appraisal. I've looked at,
21 oh, every sale between the Massanutten
22 Mountain and Singer's Glen that's over 10
23 acres and the crop land ones get in 43 to
24 \$4,900 an acre, but that's not so much over
25 \$3,600 an acre for the side of the mountain

1 on a right of way you can't specify and it
2 was phenomenal .

3 MR. HODGE: I don't have any
4 other questions.

5 THE COURT: All right.
6 Anything in light of those questions?

7 MR. LITTEN: No, sir.

8 THE COURT: Mr. Cupp?

9 CONTINUATION OF REDIRECT

10 EXAMINATION BY MR. CUPP:

11 Q. What, what were those appraisals you
12 looked at?

13 A. I did an appraisal in a -- let me
14 think which one.

15 Q. While you're thinking, you're not a
16 certified appraiser, correct?

17 A. No, this was in court. I'm admitted
18 occasionally as an expert in this circuit on
19 value for real estate and this was in a
20 partition, in a family partition suit.

21 MR. CUPP: Your Honor, in
22 light of that I renew my objection that he's
23 not been designated as an expert on any of
24 these issues of valuation.

25 THE COURT: Overruled. Do you

1 have any further questions?

2 MR. CUPP: No, sir.

3 THE COURT: All right. There
4 was referenced in the testimony of Mr. Forbes
5 that there was a parcel of land that he
6 bought at auction called the Freeze parcel?

7 A. Yes, the Fanny Freeze place.

8 THE COURT: Pardon?

9 A. The Fanny Freeze farm.

10 THE COURT: All right. And I
11 believe the testimony was it was an 80 acre
12 parcel and it sold for \$5,000 an acre.

13 A. Right, 400 grand.

14 THE COURT: All right. What
15 distinguishes that property from this property?

16 A. My knowledge of that auction sale is
17 from two gentlemen that attended that auction
18 sale.

19 THE COURT: Well, no, I'm just
20 asking is that, is that property qualitatively
21 different than this property?

22 A. It's significantly different. It has
23 frontage. It's a corner lot on two, two
24 state roads one of which is 620, the main
25 thoroughfare in that area, and it is the, it

1 is a way for Pack Saddle to get an, an
2 entrance down on 620 which would surely have
3 commercial value to them. And I happen to
4 know that the runner-up bidder, an optometrist
5 here named Bob Eggleston, both of those guys
6 told me Bob was just bidding for the sheer
7 orneriness of it.

8 MR. CUPP: Your Honor, I move
9 to strike...

10 THE COURT: That will be
11 stricken.

12 MR. CUPP: ...all those
13 references.

14 A. That's what happened that time, but
15 its, its proximity to those roads and that
16 intersection that's -- and that golf course is
17 the thing that made that.

18 THE COURT: All right.
19 Anything further? All right, you may step
20 down.

21 A. Thank you.

22 MR. CUPP: Just for the
23 record, Your Honor, I move to strike all that
24 testimony relating to his information about
25 the Freeze property.

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1 **THE COURT:** The motion is
2 denied. Go ahead, do you have a witness?

3 **MR. HODGE:** Mr. Mike Pugh, I
4 think.

5 **THE COURT:** Mr. Pugh, okay.
6 All right, Mr. Pugh, if you'd come forward,
7 please, and be sworn?

8 Raise your right hand. Do you swear
9 the evidence you shall give in today's
10 proceedings shall be the truth, the whole
11 truth and nothing but the truth, so help you
12 God?

13 **MR. PUGH:** I do.

14 **THE COURT:** All right. Please
15 have a seat in the witness box.

16 **MICHAEL PUGH**, having been duly sworn by the
17 Court was examined and testified as follows:

18 **DIRECT EXAMINATION**

19 **BY MR. HODGE:**

20 Q. State your name for the record,
21 please.

22 A. Michael Pugh.

23 Q. And what is your occupation, Mr. Pugh?

24 A. I'm an appraiser.

25 Q. What certifications or qualifications

1 do you have as an appraiser?

2 A. I hold a Certified General Real Estate
3 Appraisal License in the State of Virginia.

4 Q. How long have you performed as an
5 appraiser?

6 A. Approximately 24 years. I was
7 licensed by the state in 1995 as a Certified
8 General Appraiser when they instituted
9 licensing.

10 Q. Have you had occasion to testify as an
11 expert on appraisals in this court or any
12 court in the Commonwealth of Virginia?

13 A. Yes, sir, I have.

14 Q. What courts are those?

15 A. I was in Judge Lane's court this
16 month and also in Highland County Circuit
17 Court this month.

18 MR. HODGE: Your Honor, I'd
19 move that Mr. Pugh be qualified as an expert
20 witness in appraisal?

21 THE COURT: Any objection?

22 MR. CUPP: Your Honor, I don't
23 have any objection to his qualifications What
24 I do have objection to, and it would be a
25 continuing one, is the one that I raised the

1 other day relating in my Motion in Limine that
2 is related to not being provided with this
3 information as required by the pre-trial order
4 and, and those other the other information.

5 MR. HODGE: Your Honor, I
6 think we qual -- we, we, we replied and we
7 gave -- we responded on the request for
8 interrogatories, we supplemented our answers,
9 we gave his qualifications and be -- prior to
10 the cutoff time on discovery we gave them a
11 copy of the appraiser -- appraisal. So, I
12 think we, I think we've...

13 MR. CUPP: Well, I, I raised
14 it in my written document that's been filed
15 with the Court and I understood that you were
16 taking that under advisement.

17 THE COURT: All right, that'll
18 be denied. The Motion in Limine is denied in
19 that regard and we'll hear the testimony of
20 Mr. Pugh.

21 CONTINUATION OF DIRECT

22 EXAMINATION BY MR. HODGE:

23 Q. Mr. Pugh, did you, are you -- strike
24 that. Did you -- were you asked to appraise
25 the property of 143 acres that, that had been

1 owned by Dr. Raymond Rapp, Trustee, on
2 Massanutten Mountain?

3 A. Yes, sir.

4 Q. And what was the date of your
5 appraisal that you were asked to appraise the
6 property at?

7 A. The date of the report was November
8 the 10th of 2003. The date of value was July
9 the 18th, 2003.

10 Q. Did you form an opinion as to the
11 value of this property, the fair market value
12 of this property as a result of your appraisal
13 work?

14 A. I did.

15 Q. And what value did you determine this
16 property was worth?

17 A. I appraised it at \$415,000.

18 Q. Is there a, any type of an accepted
19 variance in terms of when you look at the
20 value, fair market value of a property in
21 appraising?

22 A. Typically there's a range of value
23 that one could expect, yes, sir.

24 Q. And what would that range be?

25 A. Usually within 10 percent would be

1 acceptable in, in our field.

2 Q. What method did you use in terms of
3 making your appraisal of the Rapp property?

4 A. We utilized the market approach
5 exclusively.

6 Q. And why was that?

7 A. The property was unimproved, therefore
8 the cost approach was eliminated and there's
9 no substantial income stream from the property
10 so we've eliminated -- we eliminated the
11 income approach.

12 Q. And what -- how many comparables did
13 you make, then, if you used the comparable
14 approach?

15 A. We utilized, or I utilized three in
16 the report. Specifically I examined quite a
17 few more than three, but chose the three best
18 sales that I could possibly find for that
19 area.

20 Q. Did you find any sales that you used
21 as comparables that you thought were outside
22 of what you had expected to find?

23 A. I did.

24 Q. And what was that comparable?

25 A. The Comparable Number 3 in the report.



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1 I think our initial conversations and
2 discussions about general real estate values
3 in that particular area, at that point I
4 hadn't been aware of the fact that Sale Number
5 3 had actually closed until we, we actually
6 did the report and at that time that's when I
7 included that along with the Sale 1 and 2.

8 Q. Would you look at the notebook in
9 front of you there behind Tab 23.

10 MR. CUPP: Your Honor, I
11 object to the introduction of this if it's
12 going to be introduced. Obviously, he's here
13 to testify as to what his opinion is.
14 This would, among other things, be
15 duplicative. This is one of the matters that
16 I raised in objections in the pre-trial
17 motions.

18 THE COURT: Are you offering
19 this?

20 MR. HODGE: Yes, sir, I would
21 offer it as, as an exhibit in evidence, also,
22 Your Honor.

23 THE COURT: All right. Your
24 objection's overruled. It will be admitted
25 as, as Defendant's Exhibit 23.

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1 MR. CUPP: Please note my
2 objection -- objection.

3 THE COURT: It is.
4 (WHEREUPON, Defendant's Exhibit No. 23
5 previously marked for Identification was
6 received in Evidence.)

7 CONTINUATION OF DIRECT
8 EXAMINATION BY MR. HODGE:

9 Q. Can you direct us to the, the
10 comparable that you were talking about and
11 what page we could find that, that...

12 A. That would be on Page 46, I believe.

13 Q. And that is the property on State
14 Route 644?

15 A. Yes, sir.

16 Q. Okay. And what caused you...

17 THE COURT: I'm sorry. The
18 page number was...

19 MR. HODGE: 46, Your Honor.

20 THE COURT: 46. State Route
21 644, all right. Go ahead.

22 Q. And what was it about this tract of
23 land that, that made you use it as a
24 comparable?

25 A. I chose this particular sale mainly

1 because of its lo -- location, similar
2 location to the subject, similar influences,
3 similar topography. And, of course, it closed
4 on June, in June of 2003 so it was fairly
5 close to the date of value that I was
6 directed to prepare my report on.

7 Q. And what made this one as considerable
8 or as a comparable in terms of proxim --
9 proximity?

10 A. This particular sale was very close to
11 Massanutten, the development at Massanutten as
12 well as the stables and had similar influences
13 that I felt the subject had been exposed to
14 due to the fact that it was, adjoined the
15 golf course, Mr. Forbes' golf course.

16 Q. If you hadn't run into that comparable
17 would your price, you think, would have varied
18 from where you were at?

19 A. It would have. The adjustment chart
20 found on Page 47 would reflect that, the next
21 page. It's on Sale Number 3 there.

22 Q. Do you feel that if that comparable
23 hadn't been used that your price, and you had
24 other comparables just like the other two,
25 your appraisal value would have been under

1 \$400,000?

2 A. Yes, I do.

3 MR. CUPP: Objection, leading.

4 THE COURT: Sustained.

5 Q. What would have been the effect on
6 your appraisal if you had not used that as a
7 comparable?

8 A. It may have been approximately 100,
9 \$100 per acre less than, than the, the
10 appraisal, appraised value.

11 MR. HODGE: I have no
12 further questions, Judge.

13 THE COURT: All right. Mr.
14 Litten?

15 MR. LITTEN: No, no, sir.

16 THE COURT: Mr. Cupp?

17 MR. CUPP: I have just a few.

18 CROSS EXAMINATION

19 BY MR. CUPP:

20 Q. Good afternoon, Mr. Pugh. If you
21 would look at -- you actually went on this
22 property on October 2nd of this year, correct?

23 A. Yes, sir.

24 Q. And you didn't do the -- and, and your
25 report was November 10th?

* * *

1 Mr. Hodge?

2 A. Yes, sir.

3 Q. So, it would have been some time in
4 that...

5 A. In that week.

6 Q. ...in that week before November 10th?

7 A. Yes, sir.

8 Q. Let's see, if you would turn to Page 7
9 where it says assumptions and limiting
10 conditions, do you see that?

11 A. Yes, sir.

12 Q. Paragraph 4 provides certain
13 exclusions, right?

14 A. That's correct.

15 Q. And specifically listed there, unless
16 it's set forth in your appraisal the value
17 doesn't, it doesn't reflect mineral, gas, oil
18 or similar rights...

19 A. Yes, sir.

20 Q. ...on the property, right?

21 A. That's correct.

22 Q. Timber rights would be included in
23 this particular exclusion, correct?

24 A. That's correct.

25 Q. In other words, if you assigned any

1 value in your valuation to timber you would
2 reflect it within the body of the report?

3 A. Typically if, if I see large timber I
4 notify the owner or the, our client that, that
5 we're not qualified to do that kind of
6 estimation and at that point they need to hire
7 a forester.

8 Q. You're not a forester, correct?

9 A. No, sir.

10 Q. And you assigned no value to timber?

11 A. No, sir.

12 Q. And, now, when you went and looked at
13 this property you were there only for an hour,
14 correct?

15 A. Yes, sir.

16 Q. And you didn't go over the whole
17 property?

18 A. We drove over part of the property and
19 walk, walked over part of it. We did not
20 walk the entire boundary.

21 Q. There was much of it that you could
22 not drive around, correct?

23 A. Yes, sir.

24 Q. Logging roads...

25 A. Parts that you can walk through.

1 Q. Logging roads had been blocked off by
2 trees?

3 A. That's correct.

4 Q. Now -- excuse me. I take it from
5 your report that you did not use the bids --
6 well, strike that.

7 Are you aware that this matter
8 involves an auction sale?

9 A. Yes, sir.

10 Q. And you're aware of that from Mr.
11 Hodge, right?

12 A. Yes, sir.

13 Q. Are you aware that there were bids at
14 the auction sale?

15 A. I am now.

16 Q. You did not take into account what
17 those bids were, the, the final -- the second
18 and final bid at the auction sale?

19 A. No, sir. The only thing we use to
20 establish value in our appraisal work would be
21 the actual closed, historical sales that have
22 been verified.

23 Q. The three that you reflect in here?

24 A. That's correct.

25 Q. And there were, I think you told Mr.

1 Q. But just so I make sure I understand,
2 you didn't know that Mr. Kellam at one point
3 had offered over 500,000 for the property?

4 MR. HODGE: Your Honor, I'm
5 going to object to the form of that question.
6 Whether an offer, an offer would indicate that
7 it was, it was not at an auction when, in
8 fact, it was a bid. I object to the form of
9 the question.

10 THE COURT: All right.
11 Sustained, rephrase it to he, he made the bid
12 at an auction.

13 MR. CUPP: Yes.

14 Q. You did not know that he had made a
15 bid at an auction for over \$500,000?

16 A. I did at some point, but I don't
17 remember when.

18 Q. But not before...

19 A. I don't know.

20 Q. ...you sold it to him for 400?

21 A. I don't know.

22 Q. You don't know that?

23 A. No, I do not.

24 Q. Before you sold the property to Kellam
25 for 400,000 did you know that there had been

1 an offer by Mr. Kellam to Mr. Forbes to pay
2 \$450,000 for the property?

3 A. I heard something about that, but I'm
4 not sure exactly when. I think it must have
5 been then, yes.

6 Q. Are you certain of that?

7 A. I'm not certain exactly when, no. No,
8 I'm not certain when it was that I first
9 heard that he had offered \$450,000 for it.

10 MR. CUPP: One second, Your
11 Honor. I'm, I'm looking for the interrogatory
12 responses.

13 Q. Dr. Rapp, again, do you remember
14 signing, responding to some questions in this
15 case that Bruce Forbes had of you...

16 A. The deposition?

17 Q. ...some, some interrogatories?

18 A. I'm not sure what an interrogatory
19 means. I, there's a deposition, yes, I
20 remember that.

21 Q. Okay. There was an interrogatory
22 which was a question to you, or a series of
23 questions to you and which you signed
24 responses.

25 MR. CUPP: If I can approach,

1 Your Honor...

2 THE COURT: You may.

3 MR. CUPP: ...and show him
4 what I'm talking about.

5 Q. It's this document, sir.

6 A. All right.

7 Q. And specifically Number 9.

8 (WHEREUPON, the Witness examined the document.)

9 A. Well, I know who I contacted. I
10 contacted Penrod and Bland. As far as whom
11 they contacted I have no idea.

12 Q. Well, I'm referring you -- the, the
13 question was, identify all individuals or
14 entities you or anyone on your behalf
15 contacted on or after July 15, 2003 in an
16 effort to sell Haines Quarter property and
17 with such person or entity, describe the
18 substance of the discussion...

19 A. And what's your question?

20 Q. ...and negotiations. Well, my question
21 is, what is your answer?

22 A. My answer is just what I gave, that I
23 know that, that Mr. Penrod and Mr. Bland and
24 I guess Mr. Hodges then at that point, I
25 believe. That's all I can tell you.

1 Q. Okay. What I'm getting at is, this
2 portion of your answer, sir, where you said...

3 A. Right.

4 Q. ...that they offered to, to purchase
5 the property at price of \$400,000 which was, I
6 understand, the final price they had offered
7 to buy it from Bruce Forbes?

8 A. Well, I, I don't think that's, I don't
9 know whether I signed it, I don't think that's
10 true right there because that -- I, I
11 understand the final price that they had
12 offered to buy it from Bruce Forbes. I don't
13 think that's, I deny having said that, even if
14 I signed it.

15 Q. Okay. And you, you knew that you were
16 signing this under oath?

17 A. Well, yeah. Yeah, I knew I was
18 signing it under oath. Maybe I didn't read
19 it before I signed it. That's the kind of
20 practice probably.

21 Q. What was the amount that you were told
22 was the final offer between Mr. Forbes and
23 Kellam?

24 A. I think 450, I believe.

25 Q. Do you recall signing a contract with

***COMPLETE SUMMARY
APPRAISAL REPORT***

***OF
143.04 Acres***

***LOCATED OFF
State Routes 722 & 723
Keezletown, Virginia***

***PREPARED FOR
Glenn Hodge ESQ.***

***DATE OF REPORT
November 10, 2003***

***DATE OF VALUE
July 18, 2003***

***BY
MICHAEL W. PUGH
CERTIFIED GENERAL APPRAISER***

COLONIAL APPRAISAL SERVICE

Michael W. Pugh
Certified General Appraiser
2340 South Main Street
Harrisonburg, Virginia 22801

540-433-2377
Fax 433-5946

November 10, 2003

Mr. Glenn Hodge ESQ.
Wharton Aldhizer & Weaver
100 South Mason Street
Harrisonburg, Virginia 22801.

RE: Appraisal of 143.04 acres located on the west side of the Massanutten Mountains in Keezletown, Virginia.

Dear Mr. Hodge:

Pursuant to your request, I have appraised the above referenced property, more fully described in the body of this report.

I submit herein a report containing the most pertinent of the data assembled, my analysis and conclusions. This report has been prepared in accordance with and subject to the *Uniform Standards of Professional Appraisal Practice*, as promulgated by the Appraisal Standards Board of the Appraisal Foundation and all other applicable laws, rules, and FIRREA Regulations. I, Michael W. Pugh, hold a certified general real estate appraisal license issued by the Virginia Real Estate Appraisal Board.

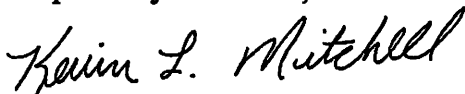
This is a Complete Summary Appraisal Report made according to the binding requirements and guidelines of the *Uniform Standards of Professional Appraisal Practice* (USPAP). I have performed all of the procedures of the Valuation Process required by the USPAP for a Complete Summary Appraisal.

I conclude from this analysis, subject to the contingent and limiting conditions set forth herein, that the subject property has a market value as defined as of July 18, 2003 of:

FOUR HUNDRED FIFTEEN THOUSAND DOLLARS
(\$415,000)

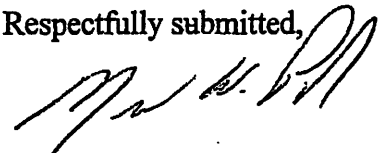
Thank you for this opportunity to be of service. If I can be of any further assistance please call.

Respectfully submitted,



Kevin L. Mitchell
(Unlicensed staff, signature appears
for credit purposes only)

Respectfully submitted,



Michael W. Pugh
Certified General Appraiser
State Certification #: 882
Expiration Date: 12/03

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DEEDS OF BARGAIN AND SALE
SUBJECT PLAT
SUBJECT PHOTOS
AREA MAP
FLOOD MAP

CLIENT AND INTENDED USER OF THE APPRAISAL

The client and intended user of this appraisal is Glenn Hodge ESQ., and Dr. Raymond E. Rapp, Trustee, Harrisonburg Physicians For Anesthesiology.

INTENDED USE AND PURPOSE OF THE APPRAISAL

The purpose of this appraisal is to develop an opinion of market value in terms of cash or on financing terms equivalent to cash of the subject property in fee simple title unencumbered as of July 18, 2003, for litigation purposes.

PROPERTY RIGHTS

The property rights being appraised are fee simple. Fee simple is defined as:

The maximum possible estate one can possess in real property. A fee simple estate is the least limited interest and the most complete and absolute ownership in land; it is of indefinite duration; freely transferable, and inheritable.

DEFINITION OF MARKET VALUE

The definition of market value as used in this report, was obtained from the Uniform Standards of Professional Appraisal Practice, 2002 Edition and is defined as;

The most probable price, in terms of money, which a property should bring in a competitive and open market under all conditions requisite to a fair sale with the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

1. Buyer and seller are typically motivated.
2. Both parties are well informed or well advised, and acting in what they consider their best interests;
3. A reasonable time is allowed for exposure in the open market;
4. Payment is made in terms of cash in United States dollars or in terms of financial arrangements comparable thereto; and
5. The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

SCOPE OF THE APPRAISAL

In the preparation of this appraisal, we personally visited the subject property, and did visually inspect the properties boundaries. We have contacted the assessor's office and the Clerk of the Circuit Court's office of the subject's jurisdiction to verify the legal description, current tax assessment, date of assessment, and checked for any transfers of the property during the previous three-year period.

We have researched public records, the Multiple Listing Service and the office files to obtain data and that data is assumed to be reliable and correct. We have interviewed property owners, developers and brokers to obtain related data. Our office subscribes to the *Marshall and Swift Cost Valuation Service* and uses this data along with local builder information to establish estimates used in the cost approach to value.

Flood hazard maps for local areas are maintained in our office and updated as new information becomes available. Accumulated area data and files on previous appraisals from this office are used when possible.

This scope is not limited to the above contributors but does cover the large majority of information used in the normal course of business by this office. This report is prepared by the appraiser using computer-assisted computations and has been reviewed for accuracy by the appraisers to the best of their ability. We reserve the right to correct any mathematical or typographical errors that may have been overlooked in the review process.

We have analyzed the data from these sources to gain an understanding of the economic climate, environment and market forces, which affect real estate values including that of the subject. We have applied the collected information to the appropriate valuation approach to develop the opinion of market value for the subject property.

ASSUMPTIONS AND LIMITING CONDITIONS

The term "Appraiser", as referenced herein, refers to the appraiser preparing the report, the appraiser's employer for purposes of this appraisal, and other employees of the employer and/or appraiser.

1. **LIMIT OF LIABILITY:** The liability of the Appraiser is limited to the client and to the fee collected (if any) with no liability or obligation to any other third party. If this report is placed in the hands of anyone other than the client, the client shall make such party aware of all limiting conditions and assumptions of the assignment and related discussions. The Appraiser assumes no responsibility for any costs incurred to discover or correct deficiencies of any nature present in the property.
2. **CONFIDENTIALITY:** This appraisal is to be used only in its entirety; no part is to be used without the entire report. All conclusions and opinions concerning the analysis set forth in the report were prepared by the specific Appraiser(s) whose signature(s) appear(s) on the appraisal report, unless indicated otherwise in the report. No change in the report shall be made by anyone other than this Appraiser. The Appraiser shall have no responsibility if any such unauthorized change is made.
3. **INCLUSIONS:** Unless otherwise stated in the report, the valuation in this report is based on surface rights free and clear of all liens and encumbrances (Fee Simple).
4. **EXCLUSIONS:** Unless specifically cited, value does not reflect mineral, gas, oil or similar rights that may exist in whole or in part unless specifically noted in the report. Furnishings, equipment, personal property, and business operations, except as indicated in the report, have been disregarded with only the real estate and fixtures being considered in the value estimate.
5. **LEGAL MATTERS:** The Appraiser assumes no responsibility for matters of a legal nature affecting the property appraised or the title thereto, nor does the Appraiser render any opinion as to the title, which is assumed to be good and marketable.
6. **LEGAL DESCRIPTION AND EXHIBITS:** The legal description of the property as provided by the client, is assumed to be accurate. Any plats, maps or sketches in the report show approximate dimensions and are included to assist the reader in visualizing the property. Such items may not be to scale and are not surveys unless provided by a registered surveyor.
7. **MANAGEMENT OF THE PROPERTY:** The property is appraised as though under prudent and competent ownership and management. Further, the appraisal is based on the premise that there is full compliance with all applicable federal, state, and local statutes and/or environmental regulations, unless otherwise stated in the report.
8. **HAZARDOUS OR TOXIC MATERIALS:** The Appraiser is not qualified to verify or detect the presence of hazardous substances by visual inspection or otherwise, nor qualified to determine the effect, if any, of known or unknown substances present. Unless otherwise stated on this form or an attachment hereto, the final value conclusion is based on the subject property being free of hazardous waste contaminations, and it is specifically assumed that present subsequent ownerships will exercise due diligence to ensure that the property does not become otherwise contaminated.

9. **HIDDEN COMPONENTS:** The Appraiser assumes that there are no hidden or unapparent conditions of the property, subsoil, or structures, which would render it more or less valuable. The Appraiser assumes no responsibility for such conditions or for engineering, which might be required to discover such factors.
10. **INFORMATION USED:** Information, estimates, and options furnished to the Appraiser, and contained in this report, were obtained from sources considered reliable and believed to be true and correct. However, no responsibility for the accuracy of such items is assumed by the Appraiser. It is suggested that the client independently verify the information provided prior to entering into transaction that would significantly impact the property or would require a substantial commitment of funds. Unless otherwise noted, no one provided significant professional assistance to the undersigned.
11. **COURT TESTIMONY:** The Appraiser is not required to give testimony or appear in court because of having made this appraisal with reference to the property in question, unless arrangements have been made previously therefore.
12. **COMPONENT VALUES:** The distribution of the total valuation in this report between land and improvements applies only under the existing program or utilization. The separate valuations for land and building must not be used in conjunction with any other appraisal and are invalid if used.
13. **TIME EFFECT ON VALUES:** The market value estimated, the cost estimates, and other estimates used in arriving at the final estimate of value are as of the effective date of the appraisal. Because the markets upon which these estimates and conclusions are based are dynamic in nature, they are subject to change over time. Further, the appraisal report and value estimates are subject to change if physical, legal, financial and other conditions differ from conditions on the appraisal date.
14. **CHANGES AND MODIFICATIONS:** The Appraiser reserves the right to alter statements, analysis conclusions or value estimates in the appraisal if facts become known that are pertinent to the appraisal process that were unknown to the Appraiser at the time of report preparation.
15. **DISTRIBUTION AND USE OF REPORT:** Neither all nor any part of the contents of this report, or copy thereof shall be distributed without the prior written consent of the Appraiser. Possession of this report or any copy thereof does not carry with it the right of publication, nor may it be used for other than its intended use. Neither all nor any part of the appraisal report shall be conveyed to the general public through advertising, public relations, news, sales or other media, without the written consent and approval of the Appraiser. The physical report(s) remain the property of the Appraiser for the use of the client.
16. **FEE:** The fee (if any) for this appraisal or study is for the service rendered and not for the physical report or the time spent preparing the physical report itself. The fee for provision of this report is for analytical services provided by the Appraiser and has no relation to the final values report.
17. **ACCEPTANCE OF, AND/OR USE OF, THE APPRAISAL REPORT BY THE CLIENT OR ANY THIRD PARTY CONSTITUTES ACCEPTANCE OF THE ABOVE CONDITIONS.**

OTHER CONDITIONS: None

CENTRAL SHENANDOAH PLANNING DISTRICT

The Central Shenandoah Planning District lies in the northwestern part of the Commonwealth of Virginia, between the Blue Ridge Mountains and the West Virginia border. It includes five counties (Augusta, Bath, Highland, Rockbridge, and Rockingham) and five independent cities (Buena Vista, Harrisonburg, Lexington, Staunton, and Waynesboro). The region also has eleven incorporated towns within its borders: Glasgow and Goshen in Rockbridge, Craigsville and portions of Grottoes in Augusta, and Bridgewater, Broadway Dayton, Elkton, Mt. Crawford, Timberville and portions of Grottoes in Rockingham. With a land area of 3,439 square miles, it is the largest district in the state.

The Region is bounded on the east by the crest of the Blue Ridge Mountains and on the west by the elevations of the Allegheny Mountains and the West Virginia border. Of the Region's 2.2 million acres of land, approximately 1.2 million acres are publicly held and protected. The headwaters of the James, Shenandoah and Maury rivers are located in the Region.

Bisected by Interstate 81 on the north-south axis and by Interstate 64 on the east-west axis, the Region is approximately 45 miles north of Roanoke, 100 miles west of Richmond, 125 miles southwest of Washington, D. C., 68 miles south of the Virginia Inland Port, and 200 miles northwest of the Port of Hampton Roads.

The Central Shenandoah Valley Region is rich in history and culture. It has been settled in many areas over 250 years. A hospitable climate, prime soils and diverse forest and wildlife combined to make the Region attractive to early settlers. Villages and farms dotted the landscape. Cities are graced with historic landmarks and prominent academic institutions. Communities and civic life have been and continued to be well established.

Rockingham, Augusta, and Rockbridge counties occupy the heart of the great Valley of Virginia, which is drained in the north by two forks of the Shenandoah River. At its widest portions (the area between Staunton and Harrisonburg), the Valley floor averages about twenty miles across; the planning district's major cities and most of its population are concentrated in this area. The floor itself is not flat but rolling, with elevations between 1,000 and 1,500 feet. Elevations in the mountains on either side

range from 3,000 to 4,000 feet. Much of this mountain area is public land, including the Shenandoah National Park along the Blue Ridge Mountains and the George Washington National Forest in the Allegheny Mountains to the west. Highland and Bath counties lie in the sparsely populated Alleghenies; most of their area is in national forest.

First settled by farmers from Pennsylvania, the Valley has long had close economic ties to the north. The opening of the Baltimore and Ohio Railroad in the nineteenth century reinforced this pattern, establishing Baltimore as the main market for the region's goods. Transportation in the Central Shenandoah Valley today remains strongly patterned by the Valley's north-south axis. In addition to the two major rail lines that run on either side, Interstate 81 follows the entire length of the Valley; it leads southwest to Roanoke, Virginia and Tennessee, and north into Canada. Along most of the district's eastern edge, the Blue Ridge Mountains still present a formidable barrier to connections with Piedmont Virginia. But Interstate 64, crossing the ridge at Rockfish Gap, links Staunton and Waynesboro to Charlottesville and Richmond. I-64 also extends west from Lexington into West Virginia. Two small regional airports-one between Staunton and Harrisonburg at Weyers Cave, another at Hot Springs in Bath County-provide some commuter service.

The fertile limestone soil of the Valley makes this region one of the foremost agricultural areas of the state. Rockingham County, in particular, leads Virginia in many aspects of farming, including agricultural employment, livestock and poultry, and is among the leading turkey-producing counties in the nation. As of 1996, Augusta County was second among all Virginia counties in sheep and lambs and first in raising cattle for beef. Historically, Rockbridge County holds a place in American farming as the home of Cyrus McCormick, inventor of the McCormick Reaper (1834) that helped revolutionize agriculture.

Population trends within the Region have varied over the past 40 years. Since 1960, the Augusta and Rockingham Areas have registered the highest increases in population. The Rockingham Area has grown rapidly in recent decades outpacing the state's rate of growth from 1970 to 1980 (22.7% versus 14.0%), matching it from 1980 to 1990 (15.0% versus 15.7%), and outpacing it once again from 1990 to 2000 (22.7% versus 14.4%).

AREA DATA

Rockingham County lies in the geographic center of the Shenandoah Valley of Virginia. The Blue Ridge Mountains on the east and the Allegheny Mountains on the west provide protection so the area is markedly free from climate extremes and disturbances. The Valley floor itself is at an elevation of 1,000 feet.

Harrisonburg is in the center of commerce and travel for the area and is known for its "booming" poultry industry. The City was established in 1780 and was named for Thomas Harrison, who donated the land for the County court house. It became an incorporated city in 1849. It now encompasses 17.3 square miles. Harrisonburg has a population of 34,000 and operates under the city manager form of government. The City is equidistant from Washington, D.C. (124 miles), Richmond (116 miles), and Roanoke (111 miles).

Named in honor of Thomas Harrison, who deeded two and one-half acres of his plantation to the County for a courthouse in 1779, Harrisonburg was founded in 1780. It was recognized by the Virginia General Assembly as a town in 1849 and incorporated as a city in 1916. In 1794, Bishop Francis Asbury, the first Methodist Bishop in America, organized conferences in the Harrison house and eventually started a school in the area. "Stonewall" Jackson's Civil War Valley Campaign ended in Port Republic in 1862. Seven years later the railroad was completed between Washington, D.C., and Harrisonburg. Harrisonburg became the focal point for the poultry industry with the completion of the railroad and the development of one of the nation's first incubators in the nearby community of Dayton in 1884. Bridgewater College was established in 1880. James Madison University was established by the General Assembly in 1908 as the State Normal and Industrial School for Women at Harrisonburg. Eastern Mennonite College (now Eastern Mennonite University), a privately endowed liberal arts college, was established nine years later in 1917.

Formed from Augusta County in 1778 and named for the Marquis of Rockingham, a British statesman sympathetic with the American Revolution, Rockingham County is the third largest county in Virginia, encompassing 853 square miles of diverse terrain. There are five election districts and seven

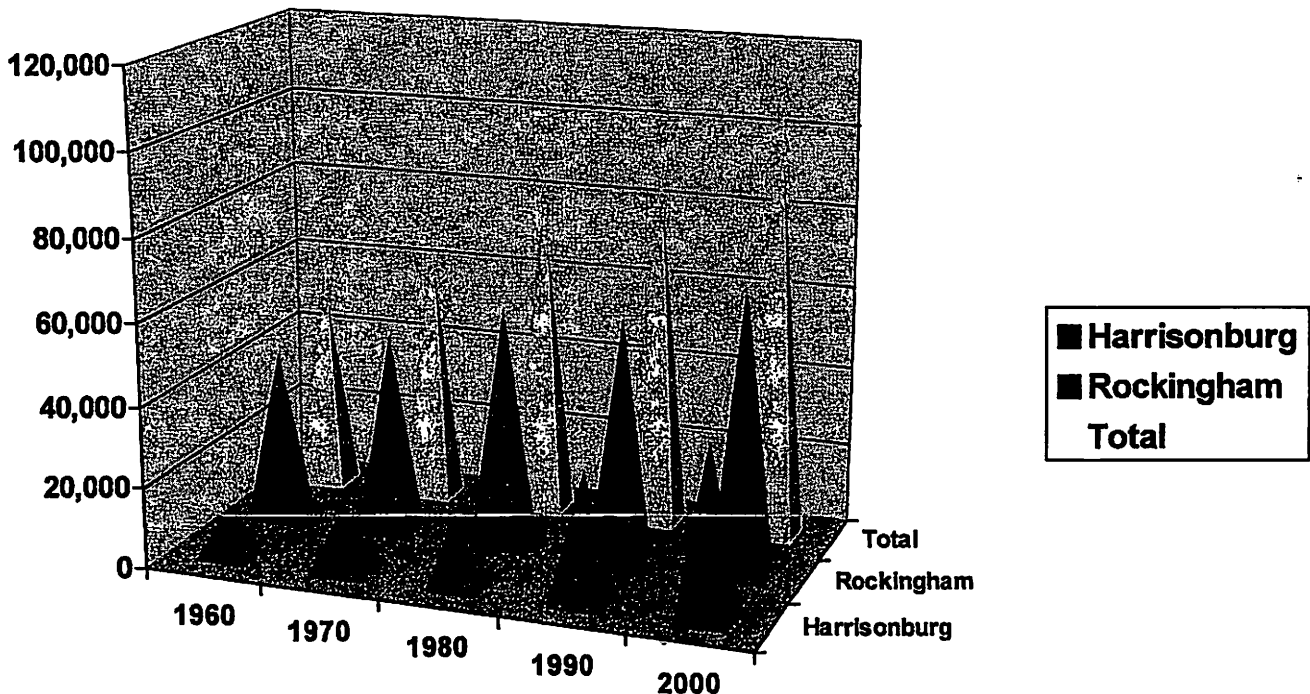
incorporated towns within the County. The Ashby District includes the towns of Bridgewater, Dayton, and Mt. Crawford. The towns of Elkton and Grottoes are located in the Stonewall District, while Timberville and Broadway are both situated in the Plains District. Harrisonburg is the only independent city.

The high quality of natural resources in the Rockingham County area is indicated by the large proportion of the County that is held as national forest and national park. Approximately 32.6 percent of Rockingham County is owned by the Federal government. The George Washington-Jefferson National Forest covers approximately 139,870 acres and Shenandoah National Park has 37,979 acres in the County.

POPULATION

Rockingham County and the City of Harrisonburg have grown rapidly in recent decades, with population increasing by 68.3 percent between 1960 and 2000 (see below). The population of the area was 52,401 in 1960 and reached 108,193 in 2000. The fastest growth, out-pacing the State rate, occurred between 1970 and 1980 (22.7 percent) and between 1990 and 2000 (22.7 percent). The 2000 Census showed a 22.7 percent increase (20,004 persons) in the last decade. Harrisonburg's population, however, expanded by more than 31 percent between 1990 and 2000 and by more than 56 percent between 1980 and 1990. The area's 2000 population accounted for 1.5 percent of the State's total population.

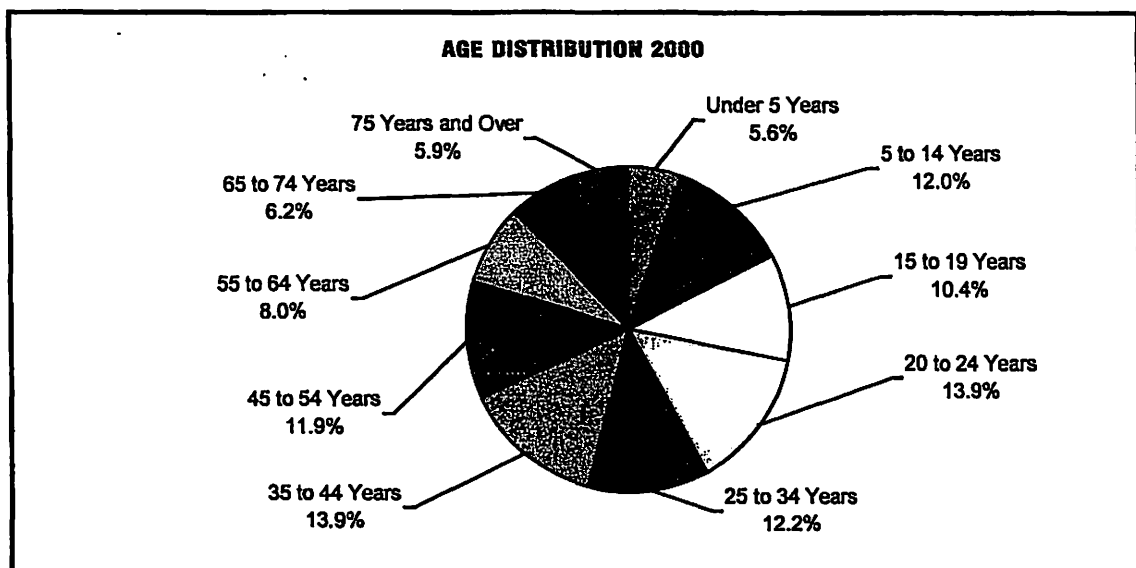
POPULATION TRENDS 1960-2000



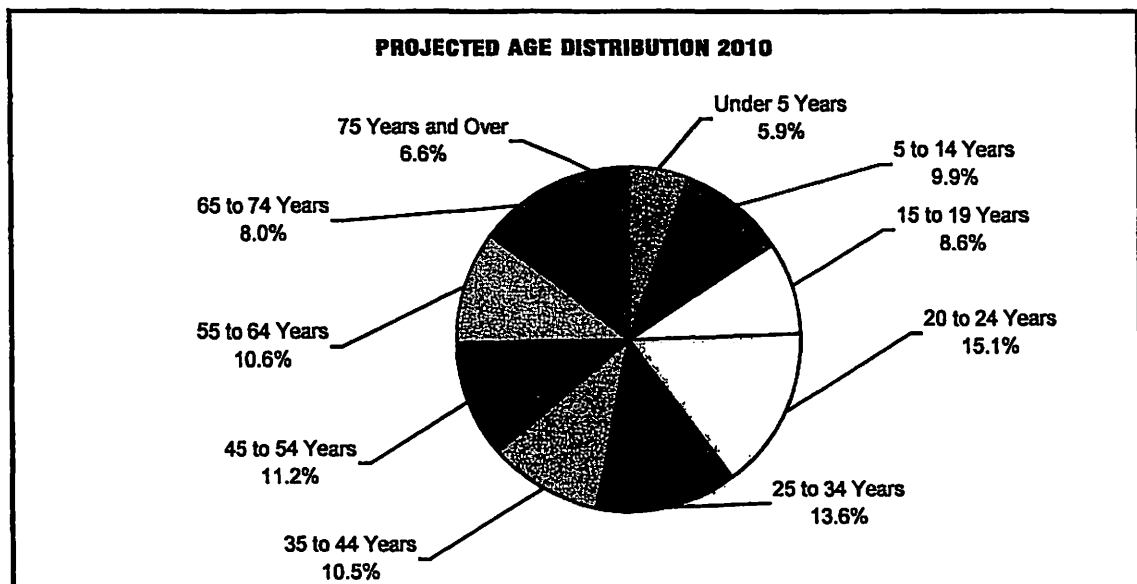
On January 1, 1983, Harrisonburg annexed 11.4 square miles and 4,984 people from Rockingham County. The City has continued to grow at a fast clip, with population increasing 20.9 percent between 1983 and 1990. The County population increased by 0.8 percent for the decade. Without the annexation, this figure would have been 9.5 percent.

The residents of the seven incorporated towns are included in the County figures. These towns and their 2000 populations are Bridgewater (5,203), Broadway (2,192), Dayton (1,344), Elkton (2,042), Grottoes (2,114), Mt. Crawford (254) and Timberville (1,739).

In 2000, the County of Rockingham had a total of 67,725 persons and the City of Harrisonburg had 40,468 persons. The charts below represent the percentages of various age groups for the Rockingham County-Harrisonburg area for the Year 2000. Also, shown below is the Virginia Employment Commission's 1999 estimates for the Year 2010.



SOURCE: U.S. Census 2000.



SOURCE: Virginia Employment Commission, 1999.

ADJUSTED GROSS INCOME

The 1998 median adjusted gross income (AGI) figures for the Rockingham County-Harrisonburg area were lower than the State median for both individuals and married couples. Rockingham County's median AGI for individuals (\$15,039) was the highest in the area and second highest in the Planning District, while Harrisonburg's median for married couples (\$42,913) was one of the highest in the Planning District. All income categories were higher than the previous year.

MEDIAN ADJUSTED GROSS INCOME – 1996 AND 1998

AREA	INDIVIDUAL		MARRIED COUPLE	
	AGI-1996	AGI-1998	AGI-1996	AGI-1998
Rockingham County	\$13,519	\$15,039	\$36,546	\$41,215
Harrisonburg	\$13,125	\$14,252	\$38,941	\$42,913
Virginia	\$15,021	\$17,002	\$45,482	\$50,849

SOURCE: 1996 Virginia AGI, Weldon Cooper Center for Public Service, 1999, 1998 Virginia AGI, Weldon Cooper Center for Public Service, 2001.

EFFECTIVE BUYING INCOME

Individual and family income is important, and so is the buying power associated with that income. The effective buying income of the Rockingham County-Harrisonburg area is summarized below. Effective buying income is comparable to disposable personal income and indicates the money available to buy goods and services.

EFFECTIVE BUYING INCOME

	(E.B.I.)		
	ROCKINGHAM COUNTY	HARRISONBURG	VIRGINIA
Total E.B.I. (\$000)	1,121,463	585,350	138,780,100
Median Household E.B.I.	37,911	30,000	41,810
Percents of Households by E.B.I. Groups (%)			
\$20,000-\$34,999	24.4	24.2	20.3
\$35,000-\$49,999	20.8	17.2	17.2
\$50,000 & over	33.7	25.3	41.0
Buying Power Index	0.0207	0.0169	2.5655

SOURCE: "Survey of Buying Power", Sales and Marketing Management, 2001.

EMPLOYMENT SECTORS

The work force in the Rockingham County-Harrisonburg area is composed of persons working in many different sectors. While agriculture has long been the backbone of the Rockingham County economy, more and more people are engaged in nonagricultural employment. The manufacturing, government, tourism, retail trade, and agriculture all play an important part in the local economy.

Manufacturing plays a vital role in the local economy. While the manufacturing base is diverse, many of the largest manufacturers process food. Textiles, fabricated metal, machinery and plastics also occupy important segments of the region. In recent years, heating, ventilation, and air conditioning manufacturing have increased their rolls in the area. There are also many smaller firms specializing in lumber, wood products, printing and publishing.

Tourism has always been a very important component of the local economy. In 1999, travelers spent more than \$143 million in the area. Travel-generated payroll topped \$31 million and accounted for 2,193 jobs. State and local tax receipts based on tourism accounted for \$7.8 and \$5.3 million respectively. While many travelers come to Virginia from long distances, the area's tourist attractions and recreational sites also draw in-state visitors.

The Rockingham County-Harrisonburg area has a number of attractive features for tourists. These include activities at James Madison University, Eastern Mennonite University, and Bridgewater College, historical sites, natural scenery, and the recreational opportunities in the Shenandoah National Park and George Washington National Forest. The area also boasts a good highway system and ample lodging and meeting and convention facilities. The following table summarizes tourism expenditures in the area in 1999.

TOURISM – 1999

	ROCKINGHAM COUNTY	HARRISONBURG	TOTAL AREA
Total Travel Expenditures (\$000)	\$87,421	\$56,421	\$143,842
Travel Generated Payroll (\$000)	\$17,704	\$13,908	\$31,612
Travel Generated Employment	1,211	982	2,193
State Receipts (\$000)	\$4,585	\$3,176	\$7,761
Local Tax Receipts (\$000)	\$3,563	\$1,781	\$5,344

SOURCE: Virginia Tourism Corporation, 2001.

Retail trade in the Rockingham County-Harrisonburg area has increased steadily in recent years. As shown in the following table, retail sales in the City have been especially robust, totaling over \$772 million. Retail sales in the County increased by almost 25 percent over 1999 to total nearly \$358 million in 2000.

TAXABLE SALES – 2000

	ROCKINGHAM COUNTY		HARRISONBURG	
<u>CATEGORY</u>	<u>NUMBER OF DEALERS</u>	<u>TAXABLE SALES</u>	<u>NUMBER OF DEALERS</u>	<u>TAXABLE SALES</u>
Apparel	21	\$985,102	45	\$21,243,197
Automotive	160	\$20,382,121	112	\$44,881,960
Food	200	\$113,754,231	224	\$183,854,512
Furniture, Home Furnishings	49	\$5,965,970	72	\$47,944,802
General Merchandise	79	\$53,380,476	73	\$162,482,367
Lumber, Building Materials	76	\$32,752,961	53	\$124,892,960
Fuel	4	\$388,008	4	\$2,395,732
Machinery	37	\$6,804,121	68	\$35,930,672
Hotels and Motels	15	\$8,863,665	19	\$18,969,796
Miscellaneous, ABC, & Other	757	\$114,997,421	643	\$130,167,924
Total	1,398	\$358,274,076	1,313	\$772,763,922

SOURCE: Virginia Department of Taxation, Taxable Sales in Virginia Counties and Cities, Annual Report, 2000.

Agriculture has long been one of Rockingham County's major industries. Rockingham County is the number one agricultural county in the State in terms of market value of products sold. In 1997, approximately 75 percent of the land in the County was classified as agricultural. Between 1992 and 1997, however, the number of farms as well as the amount of land farmed decreased slightly. In 1997, the average farm in Rockingham County was 126 acres and had an average value of land and buildings of \$382,956.

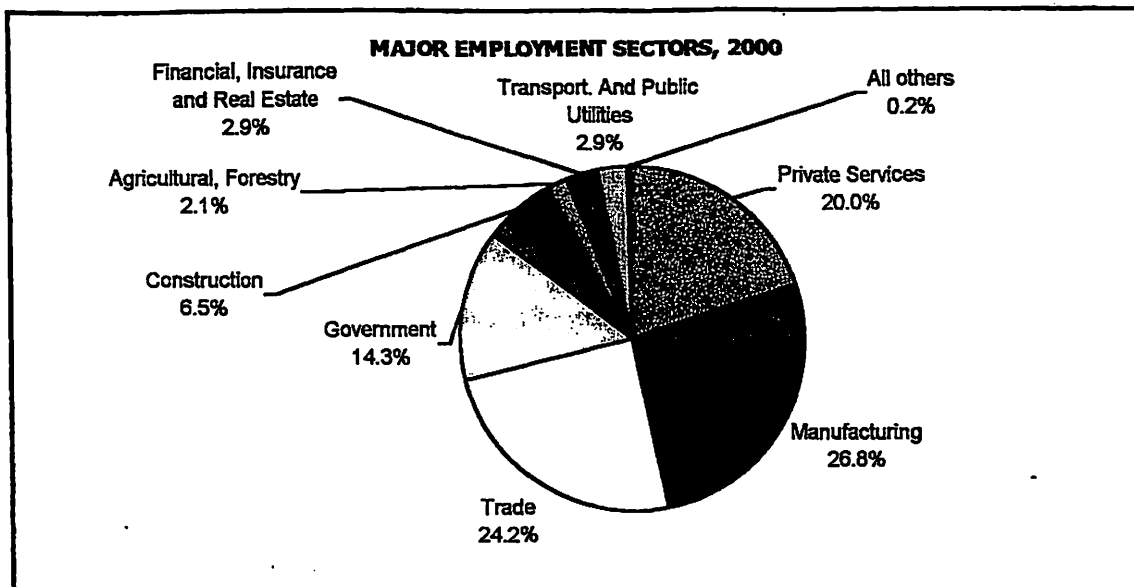
In 1997, the approximate market value of agricultural products sold by Rockingham County farmers was \$438 million. Poultry and poultry products were sold for more than \$335 million, which accounted for 76.6 percent of the total market value of agricultural products sold. The other major product group was livestock and livestock products. This accounted for \$90.6 million of the annual total.

LABOR AND EMPLOYMENT

The Rockingham County-Harrisonburg area has an increasing number of persons of working age living within its boundaries. According to the 2000 Census, the area was home to 60,725 persons between the ages of 20 and 54. The largest single age category was the 20 to 24 years classification with 15,023 persons. This number reflects students at the colleges and universities located in the area. According to the Virginia Employment Commission's population projections, this age group is estimated to grow to 63,801 persons by 2010.

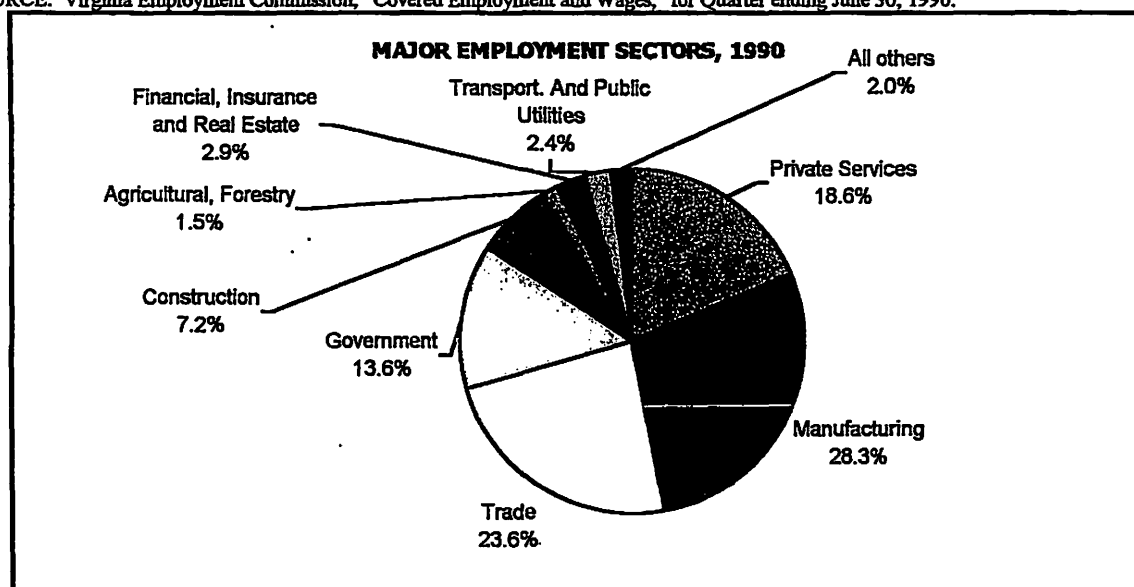
The 1990 Census showed 44,761 workers living in Rockingham County and Harrisonburg. Commuting data from the Census demonstrated the area's strong employment base. Of the 44,146 area workers for whom commuting data were available, 34,844 (79 percent) worked in the locality in which they resided. Many of the remaining workers (4,572) commuted between the City and the County. Overall, the area had more in-commuters than out-commuters (3,189 for the County and 474 for the City). The largest commuting partner was Augusta County, which hosted 1,887 area workers and sent 3,095 of its workers into the area. Other major destinations were Shenandoah, Page, and Albemarle counties, the cities of Staunton and Waynesboro, bordering counties in West Virginia, and Northern Virginia.

Rockingham County and Harrisonburg residents can be considered part of the potential work force for an incoming industry, facility, or establishment. The following chart gives a detailed breakdown of the work force. According to the 1990 Census, approximately 9,430 workers were classified as working in managerial and professional specialty occupations; 5,941 as working in precision production, craft, and repair occupations; and 1,206 as technicians or in related support occupations. Since 1980, the Harrisonburg-Rockingham County area has shown increases in all major occupation groups. This across-the-board growth demonstrates that the area labor force has been able to meet the demands of new and existing industry.



SOURCE: Virginia Employment Commission, "Covered Employment and Wages," for Quarter ending June 30, 2000.

SOURCE: Virginia Employment Commission, "Covered Employment and Wages," for Quarter ending June 30, 1990.



During the year 1997-98, the eight universities and colleges located in the Central Shenandoah Valley Region conferred over 4,500 degrees, including 540 advanced degrees. Combined enrollment for the Region's colleges and universities in the fall of 1998 exceeded 25,000 students. Nearby, the University of Virginia graduates some 5,000 students annually and maintains an active enrollment of over 20,000 students per year. These institutions help provide a perpetual pool of educated workers for businesses and industries in the area.

MARKETS AND TRANSPORTATION

Interstate 81 (north-south) runs from Canada to Tennessee, bisecting Rockingham County and connecting the area with key markets to the north, south, east, and west. U.S. Routes 11 (north-south) and 33 (east-west) intersect in Harrisonburg. U.S. Route 340 originates in Augusta County and proceeds north through Grottoes and Elkton to its terminus in Maryland. Virginia Primary Highways 42, 211, 256, 257, 259, and 276 serve to interconnect the towns of Bridgewater, Broadway, Dayton, Elkton, Grottoes, Mt. Crawford, and Timberville with the major highways.

Interstate and intrastate public transportation is provided by Greyhound Bus Lines with a station located in Harrisonburg. The City of Harrisonburg operates a fixed route bus system serving the City. One publicly operated and one privately owned taxicab company serves the area. Package delivery is also provided by the publicly operated taxi company. The City of Harrisonburg offers van service to the handicapped residents of the area. National, as well as local, car rental agencies operate in the Rockingham County-Harrisonburg area.

The Rockingham County-Harrisonburg area is served by many motor freight carriers with distribution facilities in Harrisonburg, Rockingham County, Augusta County, Staunton, and Waynesboro. Most of these firms are authorized for intrastate shipping to and from locations within the area, while others only provide interstate services. Several contract carriers are also available to provide local service to industries and businesses in the area.

The Rockingham area is served by three railroad companies. The Norfolk and Western Railway (N&W), which is part of the Norfolk Southern Corporation, travels north to south and provides local freight service to Grottoes and Elkton on a daily or as-requested basis. The Chesapeake Western Railway supplies local freight service to Harrisonburg and Elkton daily and to Dayton on an as-requested basis. The Southern Railway, also part of the Norfolk Southern Corporation, provides daily service to Harrisonburg, Broadway, and Timberville.

In addition, the Shenandoah Valley Railroad Company operates a short line between Pleasant Valley and Staunton, with connections to CSX and Chesapeake Western. N&W operates trailer-on-flatcar (TOFC) loading facilities located in Roanoke. Passenger rail service is available via AMTRAK from Staunton and Charlottesville.

The Rockingham County-Harrisonburg area is served by the Shenandoah Valley Regional Airport, a commercial facility in Weyers Cave, located in the northern section of Augusta County. The Shenandoah Valley Regional Airport is a fully certified Part 139 commercial Airport with a 6,000 x 150 runway, including full precision instrument approaches providing all weather capability. The Airport is served by US Airways Express, which provides direct and one-stop connecting service through their hub in Pittsburgh. In April 2000, United Express inaugurated daily round-trip flights to and from Washington Dulles International Airport. Reagan National, Dulles International, and Baltimore-Washington International Airport are within a two-and-a-half hour drive of Rockingham County and are served by all the major airlines for national, as well as international, markets.

LOCAL GOVERNMENT SERVICES

Rockingham County and the City of Harrisonburg provide educational, health, welfare, and recreational services, as well as law enforcement and fire protection to their citizens. Water and sewer services are supplied to the residents of Harrisonburg, Bridgewater, Broadway, Dayton, Elkton, Grottoes, and Timberville.

Rockingham County provides water and sewer services to various areas in the County. Rockingham County and Harrisonburg have adopted comprehensive plans, zoning ordinances, and subdivision ordinances. Both the County and the City have planning departments, zoning and subdivision administrators, building officials, planning commissions, and boards of zoning appeals to monitor and guide new development in their respective jurisdictions. Each of the towns (except Mt. Crawford) has a planning commission and has adopted a comprehensive plan and zoning and subdivision ordinances. The Rockingham County Planning Commission serves Mt. Crawford.

TAXES

In Virginia, cities and counties are separate taxing entities. In addition, residents of towns are subject to both town and counties levies. Utility taxes, however, are paid only to the town, if both the town and the county levy utility taxes. The majority of taxes paid by residents in the two jurisdictions are real estate, utilities taxes and taxes on tangible personal property. A summary of the 2000 taxes is presented in the following table.

OURC E: Local Commis sioner s of Revenu e Per \$100 Assess ed Value * 100% Value, per \$100 Value ** Per \$100 of invento ry held for resale	S YEAR	ROCKINGHAM	HARRISONBURG
		2001	2001
Real Estate *		\$0.71	\$0.62
*Personal Property **		\$2.80	\$2.00
Machinery/Tools **		\$2.55	\$2.00
Business Merchants Capital Tax ***		\$0.87	None
Utilities			
Residential		\$2.00 (Electricity, Gas)	10% (\$1.00 Max./Electricity, Gas, Telephone, Water)
Commercial		\$20.00 (Electricity, Gas)	10% (\$15.00 Max./Electricity, Gas, Telephone, Water)
Sales and Use		1%	1%
Meals Tax		None	5%
Lodging Tax		2%	5%
Admissions		None	5%

EDUCATION AND TRAINING PROGRAMS

The Rockingham County-Harrisonburg area has many educational opportunities for its residents. Two separate public school systems, a vocational-technical school, a community college, and three 4-year colleges and universities are located in the area.

The Rockingham County public school system consists of 13 elementary schools, 4 middle schools, and 3 high schools. The 1999-2000 year-end enrollment served by these facilities was 10,491 students. The Harrisonburg public school system consists of one high school, one middle high school, and four elementary schools. The 1999-2000 year-end student enrollment was 3,590. Several private elementary and secondary schools are open to residents of the area.

The Massanutten Technical School, located in Harrisonburg, serves residents of the Rockingham County-Harrisonburg area. Both day and evening instruction are offered in many areas of study including data processing, automotive technology, electronics, carpentry, and health services. The school works with local industries to develop training programs tailored to meet their specific needs.

The Dominion Business School in Harrisonburg provides comprehensive training for business careers. Courses offered by the school include data and word processing, accounting, small business management, and secretarial science.

Rockingham County and Harrisonburg are fortunate to have many colleges and universities located in the area. James Madison University (JMU), a four-year State-supported university with close to 14,000 students and over 700 faculty, is located in Harrisonburg. JMU, which has consistently been cited as one of the top under-graduate universities in the Country, offers under-graduate degree programs in many disciplines, including mathematics, computer science, chemistry, accounting, finance, business administration, public administration, and communications. At the graduate level, master's degree programs are offered in business administration, public administration, and science. The University also offers educational specialist and doctoral degrees.

The university operates a continuing education program including the JMU on-line/virtual university with programs leading to off-campus graduate degrees. Continuing education courses are available for area residents and employees to supplement and update knowledge and skills. JMU also

offers many programs that could be beneficial to businesses and industries in the area. The Office of Sponsored Research and Outreach facilitates Economic Development and Outreach Programs for the University through public/private partnerships and involvement in the Shenandoah Valley Partnership, the Valley of Virginia Partnership for Education, and the Shenandoah Valley Technology Council. JMU's Center for Innovative Science and Technology (CISAT) was recently named a Virginia 21st Century Manufacturing Innovation Center.

Eastern Mennonite University, located in Harrisonburg, and Bridgewater College, located in the Town of Bridgewater, are both privately endowed four-year institutions. Eastern Mennonite and Bridgewater College offer curricula, which emphasize the liberal arts.

Blue Ridge Community College, located in Weyers Cave in the northern portion of Augusta County, serves residents of the area. Curricular offerings are designed to meet regional employment needs and include programs in electronics, data processing, engineering, accounting, and management. Blue Ridge Community College offers associate in applied science and associate in science and arts degrees. Blue Ridge Community College operates satellite campuses in Waynesboro and Harrisonburg that provides instructional training and services for local businesses, organizations, and industries.

The surrounding counties offer Rockingham County and Harrisonburg residents increased opportunities for educational enrichment. The University of Virginia is located in Charlottesville, 55 miles southeast of Harrisonburg, and Virginia Military Institute (VMI) is located in Lexington, 60 miles south of Harrisonburg. Both are State-supported institutions, which confer engineering degrees. VMI cooperates with industries to provide the opportunity for employees to pursue undergraduate engineering courses on a part-time basis.

HOUSING

Between 1990 and 2000, the number of housing units in the Rockingham County-Harrisonburg area increased by 7,429 (23.9 percent). A total of 8,149 residential building permits were issued in the two localities between 1990 and 2000.

According to the 2000 Census, 64.7 per-cent of all the occupied housing units in the area were owner occupied. However, due to the influence of the student population from James Madison University, 61.0 percent of all the occupied units in Harrisonburg were renter occupied. These units are composed of apartment complexes, duplexes, houses, rooms, single units, and manufactured homes.

GENERAL HOUSING CHARACTERISTICS – 2000

	ROCKINGHAM COUNTY	HARRISONBURG	AREA
TOTAL HOUSING UNITS*	27,328	13,689	41,017
Occupied Housing Units			
Total	25,355	13,133	38,488
Owner	19,787	5,125	24,912
Renter	5,568	8,008	13,576
Median Value Specified Owner Occupied Units	\$71,800	\$89,300	\$75,500
Median Contract Rent	\$281	\$341	\$315
Rental Vacancy Rate	4.9	3.3	4.0

*Includes vacant units and seasonal vacation homes

SOURCE: U.S. Census, 2000.

Paralleling a national trend, the average household size in the Rockingham County-Harrisonburg area has declined over the last decade. This trend is reflected more in Rockingham County than in Harrisonburg, where the student population inflates the average population per unit. The average household size for Rockingham County is 2.67 persons per household and for the City of Harrisonburg the average household size is 3.8 persons per household.

MEDICAL CARE

The Rockingham County-Harrisonburg area is served by over 184 physicians. In addition to general practitioners, there are many specialists available to serve the medical needs of the area residents. There are more than 50 dentists located in the area to serve the dental needs of residents.

The Rockingham County-Harrisonburg area is served by Rockingham Memorial Hospital, a non-profit, acute-care community facility, located in Harrisonburg. The health care staff consists of more than 220 physicians, 1,810 health care workers, and 600+ volunteers. Specialized programs offered by Rockingham Memorial Hospital include a state-of-the-art regional Cancer Center, Cardiopulmonary Services, Family Birth Place, Hospice, Mental Health, Home Health Care, Women's Health Focus, and a new Wellness Pavilion featuring a Wellness Center and Outpatient Rehabilitation Services. This new 50,000 square foot facility offers an indoor track, 2 pools, and an oversize whirlpool. Childcare Connection is another service offered by Rockingham Memorial Hospital in cooperation with area businesses and agencies. This resource and referral program helps parents identify childcare providers. The Hospital also offers the Center for Corporate Health, which aids business and industry with health and health care related issues.

Rockingham Memorial Hospital is a member of VaLiance Health, a regional alliance of independent, community-focused healthcare providers that was founded in 1997. As equal partners in this alliance, Augusta Medical Center, Rockingham Memorial Hospital, Stonewall Jackson Hospital, and University of Virginia Health System have made a commitment to collaborating efforts where appropriate to maximize the use of resources and deliver cost-effective, high quality services which are convenient to the patient of their service areas.

In addition to hospital services, Rockingham County and Harrisonburg jointly maintain health departments and clinics to serve the area residents' health needs. Outpatient medical care and services are available.

The area is served by volunteer rescue squads located in Harrisonburg, Bergton, Bridgewater, Broadway (also serving Timberville), Clover Hill, Elkton, and Grottoes. Mental health services are provided by the Harrisonburg-Rockingham Community Services Board through the Massanutten Mental Health Center, Valley Community Counseling Center, Pear Street Center, and Rockingham Memorial Hospital. In addition to these services, independent psychiatrists and psychiatric social workers also practice in the area.

LAW ENFORCEMENT AND FIRE PROTECTION

The Rockingham County-Harrisonburg area is served by a number of law enforcement agencies: The Rockingham County Sheriff's Department with 42 officers; the Harrisonburg Police Department with 69 officers; the Virginia State Police with 12 officers; the police departments of Bridgewater with 6 officers, Broadway with 2 officers, Dayton with 5 officers, Elkton with 6 officers, Grottoes with 3 officers, and Timberville with 2 officers; and the James Madison University Police Department with 18 officers. A private security force provides protection for the Massanutten Resort Development.

The Harrisonburg Fire Department is staffed by approximately 67 full-time firefighters supplemented by a large number of volunteers in four stations. The Department uses five pumper trucks and two aerial ladder vehicles. The maximum height, which can be reached by the aerial apparatus, is 9 stories.

The Harrisonburg Fire Department has a trained hazardous materials response team, which has responsibility for dealing with incidents involving hazardous substances. Rockingham County has a joint agreement with the City to use the team in assisting the County to respond to hazardous material incidents. The County has had a hazardous materials response team for 12 years. Rockingham County, along with the City of Harrisonburg and Augusta County, make up one of the Regional Response Teams for the state.

Rockingham County is served by volunteer fire companies, which are supplemented by full-time personnel. The volunteer companies, which serve the County, are Bridgewater, Broadway/Bergton, Clover Hill, Elkton, Grottoes, McGaheysville, Singers Glen, Timberville, and Hose Company 4/Port Road, which covers Massanetta Springs and areas just east of the City.

In addition to these companies, the Volunteer Fire Department of Weyers Cave in Augusta County also assists in providing protection to the residents of a portion of southern Rockingham County. New Market Fire Company in Shenandoah County assists in providing protection to the residents of a portion of northern Rockingham County.

CULTURAL AND RECREATIONAL OPPORTUNITIES

Residents of the Rockingham County-Harrisonburg area enjoy an abundance of cultural and recreational opportunities. The Shenandoah National Park, George Washington National Forest, Skyline Drive, Grand Caverns Regional Park, and Natural Chimneys Regional Park offer scenic views, hiking, picnicking, camping, swimming, fishing, and other outdoor recreational activities. Rockingham County and Harrisonburg have independent departments, which administer parks and recreation facilities and programs. Organized sporting activities such as baseball, basketball, football, tennis, swimming, and volleyball are provided for participants of all ages and physical abilities. In addition, numerous public tennis and basketball courts, jogging trails, playgrounds, and playfields are available in the City and throughout the County. Recreation centers, athletic centers, public schools, churches, and various civic and social organizations also provide recreational opportunities for area residents.

The Harrisonburg-Rockingham Historical Society, located in Dayton, promotes an appreciation of the region's heritage. There are many historically significant sites in the area, including the Fort Harrison House in Dayton, the Lincoln Homestead, Turleytown, Bridgewater College, and Civil War Battlefield sites. James Madison University, Bridgewater College, and Eastern Mennonite University provide lectures, concerts, art exhibits, and numerous athletic events, most of which are open to the general public and many of which are free. Bridgewater College offers a historical and cultural museum and Eastern Mennonite University operates a museum of natural history, a planetarium, and an observatory. James Madison University has a Convocation/Recreation Center, which seats over 7,000 for athletic events and concerts. The University also operates the Wells Planetarium, the Latimer-Shaffer Theatre, and the Sawhill Gallery, which offer programs open to the public throughout the year. Valley Playhouse was founded in 1989 to bring community theatre back to Harrisonburg on a permanent basis. Also in Harrisonburg, Court Square Theatre was recently completed.

The Virginia Poultry Festival, held each May in Harrisonburg, is a celebration in honor of the important role the poultry industry plays in the area, as well as the state's economy. The weeklong festival includes a parade and a "Friends of Feathers" banquet.

The Rockingham Public Library, a regional library with headquarters in Harrisonburg, serves Harrisonburg, Rockingham and Page Counties. The seven branch libraries are located in Bergton, Broadway, Bridgewater, Elkton, Grottoes, Luray, and Shenandoah. The library houses approximately 150,000 items and subscribes to more than 400 magazines and newspapers. It offers public access to the Internet at all locations as well as videos, audio books, and CDs. The library operates a bookmobile that makes more than 50 stops during each monthly cycle. In addition to the Public Libraries, each of the four colleges in the area has their own library facilities. The universities and colleges encourage the use of their library facilities to area residents and local business and industry representatives.

There are more than 100 churches in the Rockingham County-Harrisonburg area. Most major denominations are represented.

There are many agencies dedicated to public service in the area. The Boy Scouts of America, the Girl Scouts of America, the Boys Club, and the Big Brother/Big Sister programs provide youth-oriented activities. Counseling services are available for emotional, educational, legal, and social problems. Residential and day programs are provided by both public and private concerns to meet the needs of the area's older population, as well as those with various types of handicapping conditions. The United Way is active in the area raising funds for many service organizations.

A wide variety of civic organizations operate in the Rockingham County-Harrisonburg area. These organizations, open to both men and women, work to meet the needs of the communities in which they are located.

The shopping establishments in the Harrisonburg-Rockingham County area offer a wide variety of goods to shoppers in a seven county area. Shopping opportunities range from small, locally owned specialty stores to large, nationally known discount and department stores. Valley Mall, located in Harrisonburg, is a major regional mall with the largest selection of merchandise.

The economic information for this report was obtained from the "Economic Overview 2002 Rockingham County and the City of Harrisonburg" compiled and printed by the Central Shenandoah Planning District Commission.

MARKET AREA TRENDS

The subject property is located just east of State Route #722 & #723, approximately five miles northeast of Keezletown, Virginia. The subject is wooded with recreational and agricultural (timber) use. Adjacent properties consist of wooded mountain land, grazing and a public golf course, (Pack Saddle). The subject is relatively close to shopping, employment and schools in the nearby City Of Harrisonburg, which is located approximately 15 minutes southwest of the subject. Currently property values are increasing with a limited supply and strong demand and low interest rates offered by local lending institutions.

SITE DATA

Subject property contains approximately 143.04 acres more or less known as the "Haines Quarter" located on the western side of Massanutten Mountain. Topography consists of steep wooded mountainside. Access is by a stone base 15' Deeded Right of Way providing ingress and egress to subject. The tract is divided by two logging roads of limited use. The logging roads are in fair to poor condition and are typical for properties of this type. The subject includes two small grass clearings, a spring and a natural creek. The tract is irregular in shape with several areas with panoramic views of the Shenandoah Valley. The subject property is adjacent to the New "Packsaddle Golf Course" on the southern boundary. The subject property is protected from development or division of any kind until June 23, 2005 by the Keezletown North Ag and Forestall agricultural District.

ZONING AND OTHER RESTRICTIONS

The subject is zoned A-2, general agricultural, by the County of Rockingham, Virginia.

Representative uses permitted under this classification are as follows:

- Agricultural;
- Animal husbandry;
- Orchard;
- Plant nursery;
- Single family dwelling;
- Aquaculture;
- Greenhouse;
- Church;
- Cemetery;
- Golf course;
- Police, fire or rescue station;
- Fish hatchery;
- Church camp;
- Campground;
- School;

This zoning is typical for properties in the subject's area suitable for recreation.

FLOOD HAZARD AREA

To assist the citizens in a potential or actual emergency, The United States Federal Government has created the Federal Emergency Management Agency (FEMA). Among the many responsibilities of FEMA, one is to determine the high hazard areas where the probability of periodic flooding is high. Through the National Flood Insurance Program, FEMA has compiled Flood Insurance rate maps, which rate areas according to the probability of periodic flooding. Areas where potential flooding occurs within a 100-year time frame are considered to be in a flood hazard area. Flood Hazard Map #510133, Panel 43B, dated September 29, 1986 indicates that the subject property is not located in a flood hazard area. Refer to the flood hazard map located in the addendum section of this report.

ENVIRONMENTAL HAZARDS

The value estimated is based on the assumption that the property is not negatively affected by the existence of hazardous substances or detrimental environmental conditions unless otherwise stated in this report. The appraiser is not an expert in the identification of hazardous substances or detrimental environmental conditions. The appraiser's routine inspection of and inquiries about the subject property did not develop any information that indicated any apparent significant hazardous substances or detrimental environmental conditions, which would affect the property negatively unless otherwise stated in this report. It is possible that Phase I or II tests and inspections made by a qualified hazardous substance and environmental expert would reveal the existence of hazardous substances or detrimental environmental conditions on or around the property that would negatively affect its value.

HIGHEST AND BEST USE

Highest and best use is typically defined as the reasonable and probable use, which, at the time of the appraisal, is the most profitable and likely use for the property. There are four tests to the highest and best use; physically possible, legally permissible, financially feasible, and maximally productive.

Physically Possible. The site must possess adequate size, shape, soil, and other physical conditions to support potential use.

Legally Permissible. The potential use of the property must conform to all private, local, and state zoning and use restrictions for the site.

Financially Feasible. The potential use must be capable of providing a net return to the property owner.

Maximally Productive. Of those physically possible, legally permissible, and financially feasible uses, the highest and best use for a property is that use which provides the greatest net return to the property owner over a given period.

These criteria should usually be considered sequentially; it makes no difference that a use is financially feasible if it cannot be physically constructed on the site or if it is not legally permitted.

Each alternative land use has been analyzed according to these four criteria. The land use plan recommended as a result of this analysis represents the highest best use for the land.

The subject property is currently utilized for recreation.

Analysis of the Subject Property As If Vacant: In an evaluation of the highest and best use of land as if vacant, structural improvements are eliminated from consideration. All factors regarding neighborhood trends and site characteristics are given full weight in the analysis. With this framework in mind, a property owner's most reasonable approach to the use of the land must be evaluated.

After analyzing local zoning codes and market area trends, it is my opinion that the highest and best use for the subject, as if vacant, as of the date of value is for recreational and/or residential purposes.

DELINEATION OF TITLE FOR THE SUBJECT PROPERTY

The subject property is identified as parcel 97-A-63 on the County of Rockingham Tax Maps. It was acquired by Raymond E. Rapp, Trustee, Harrisonburg Physicians For Anesthesiology Inc. from M. Bruce Wallinger, Trustee under a certain Trust agreement by deed dated August 13, 1981, as recorded in the Clerk's Office of Rockingham County in Deed Book 629 at Page 329.

LEGAL DESCRIPTION

All that certain lot or parcel of land with improvements thereon containing and together with all rights, privileges, appurtenances, easements and right of ways, situate about five miles northeast of Keezletown, in the Linville District, Rockingham County, Virginia as record in Deed Book 629 at Page 329.

SALE, OPTION OR LISTING AGREEMENT

None known as of the date of this report.

REAL ESTATE TAX ASSESSMENT DATA

The real estate assessor's office for the County of Rockingham was consulted to confirm the present and historical tax structure for the County. The County assesses property on a yearly basis at a ratio of 100% of assessed value. The current 2003 tax rate is \$0.71 per \$100 of assessed value. The rates for the past ten years are reflected in the following table.

Year	Rate
2002	\$0.71
2001	\$0.71
2000	\$0.71
1999	\$0.68
1998	\$0.68
1997	\$0.68
1996	\$0.68
1995	\$0.66
1994	\$0.66
1993	\$0.71

The current assessment for the subject is \$143,000 for the site and \$0 for the improvements for a total assessment of \$143,000. This equates to a tax liability of \$1,015 for 2003.

VALUATION PROCESS

The valuation process develops a supportable estimate of market value of the property appraised. It involves collecting market evidence to support an analysis of value trends, the reactions of buyers and sellers in the marketplace, and a proper interpretation of the facts. Traditionally, three approaches to value are used; the Cost Approach, the Sales Comparison Approach, and the Income Capitalization Approach.

All three approaches are based on the principal of substitution which states that no reasonable person would be willing to pay more for a property than the current cost of buying the site and constructing a similar building having similar utility. In theory, all three approaches are designed to provide an estimate of market value as of a specific date, and all three are, in essence, market data comparative approaches. When the data is correctly analyzed and processed, the three approaches will provide value indications within a narrow range, with diversions resulting only for the lack of mathematical precision inherent in the appraisal process. One or more of these approaches is used in all estimations of value, depending on the type of property, the function of the appraisal and the quality and quantity of data available for analysis.

SALES COMPARISON APPROACH

In the sales comparison approach, the appraiser's objective is to find the probable market value of the subject property by interpreting data on sales of similar properties. Each comparable sale is compared with the subject property. Typically physical characteristics, terms of financing, and conditions of sale are included in the elements of comparison. Adjustments are made to the comparable sales price to arrive at an indication of what the subject property would sell for if offered in the market. Herein we have conducted a thorough investigation of the subject's immediate and general neighborhood to identify recent sales of property with reasonably similar characteristics and utility.

Herein, additionally, we have prepared a discrete valuation of the site, as if vacant. By comparison of the site to several historical transactions involving land intended for similar use to that of the subject, we have made an estimation of the value of the subject land. We would invite your attention to the following comparable sales, land value comparison charts and schedule of values.

LAND COMPARABLE SALE #1

Location: State Route 625
Elkton, Virginia

Zoning: A-2 General Ag

Tax Map: #117-A-12-15, 17

Grantor: Suzanne Lamontagne

Grantee: Exchangers LLC

Sale Price: \$475,000

Deed Date: 03/02

Sale Date: 03/02

Deed Book: 2054

Page: 744

Site Area: 170 acres

Financing Concessions: None indicated

Verified By: Public records/Colonial Appraisal Service

Comments: Lump sum value of site improvements is \$135,500 per 2002 appraisal.

LAND COMPARABLE SALE #2

Location: State Route 622
Elkton, Virginia

Zoning: A-2 General Ag

Tax Map: #133-A-9

Grantor: Donald W. Clark

Grantee: Larry R. Shifflett

Sale Price: \$313,000

Deed Date: 01/03

Sale Date: 01/03

Deed Book: 2195

Page: 571

Site Area: 162.649 acres

Financing Concessions: None indicated

Verified By: Public records/Colonial Appraisal Service

LAND COMPARABLE SALE #3

Location: State Route 644
McGaheysville, Virginia

Zoning: A-2 General Ag

Tax Map: #113-A-37

Grantor: Mark A. Michael

Grantee: Terry W. Bowman

Sale Price: \$170,000

Deed Date: 05/03

Sale Date: 06/03

Deed Book: 2285

Page: 177

Site Area: 50 acres

Financing Concessions: None indicated

Verified By: Public records/Colonial Appraisal Service

Comments: Appraised by Colonial Appraisal Service

LAND VALUE COMPARISON

Property Location: State Route 722 & 723
Keezletown, Virginia

Date of Valuation: July 18, 2003

Annual Time Adjustment: 2%

SALE NUMBER:	1	2	3
SALE LOCATION:	Rt.625 Elkton, Va.	Rt. 622 Elkton, Va.	Rt. 644 McGaheysville, Va
SALE DATE:	03/02	01/03	06/03
UNITS (Land Area):	170 acres	162.649 acres	50 acres
HIGHEST & BEST USE:	Recreation	Recreation	Recreation
SALE PRICE:	\$475,000	\$313,000	\$170,000
UNIT PRICE:	\$2,794	\$1,924	\$3,400
INTEREST:	0	0	0
CASH EQUIVALENCY:	0	0	0
MARKET ADJUSTMENT:	\$56	0	0
ADJUSTED PRICE:	\$2,850	\$1,924	\$3,400
DEGREE OF COMPARABILITY:			
Location:	+\$1,000	+\$1,000	0
Access:	0	0	-\$170
Topography:	0	0	0
Public Utilities:	0	0	0
Utility:	-\$140	-\$100	0
Land Size:	0	0	-\$340
Improvements:	-\$800	0	0
NET ADJUSTMENTS	+\$60	+\$900	-\$510
INDICATED VALUE	\$2,910	\$2,824	\$2,890

ADOPTED UNIT VALUE \$2,900 per acre

ESTIMATED MARKET VALUE: \$2,900 per acre x 143.04 acres = \$414,816

ROUNDED \$415,000

SALES COMPARISON APPROACH ANALYSIS

Every effort has been made to use comparables sold within three (3) years of appraisal date. Our data base includes local MLS data, appraisal files and available public record, and is considered to be as good or better than any competing appraisal service in our area. Paramount to time is matching the most similar sales to the subject. This at times necessitates using comparables over three (3) years old. The comparables used in this appraisal are felt to be the best and most representative current sales found for comparison in this report.

The comparables utilized in the land value comparison were the best obtainable and are felt to reflect the market value of the subject. Comparable #1 was given a 2% annual time adjustment. Comparables #1 & 2 borders the Shenandoah National Park therefore a negative utility adjustment was applied. Comparable #1 consists of a log home and barn on property resulting in a negative adjustment. Comparable #3 consists of 50 acres resulting in a negative adjustment for tract size. Comparable #3 was superior to subject in having a 20' new gravel access road on the tract, therefore a negative adjustment was applied. Comparables #1 & 2 were adjusted upward for inferior locations. After applying the adjustments outlined above, all sales yield similar value conclusions. Therefore in the final analysis, equal weight was placed on each sale.

MARKETABILITY ANALYSIS

Exposure time, in the case of real property, is the estimated length of time the property would have been offered on the market prior to the hypothetical consummation of a sale at market value on the effective date of the appraisal. Exposure time is a retrospective opinion based on analysis of past events assuming a competitive and open market.

The basis for determining the market exposure is simply by investigating actual sales of properties similar to the subject that have occurred and verifying the amount of time which was required between the date of listing and the actual consummation of the disposition. Interviews were conducted of active professionals knowledgeable of a given property type in a particular marketplace in order to estimate a reasonable period of time which would be necessary after the date of value. Also, to determine a reasonable exposure time a property would require in order to trade at what would be defined as a "reasonable exposure time" the fundamental underlying principle is that the property is correctly priced to sell.

Properties of this type are typically marketed through real estate brokerage and management firms. The marketing is achieved through multiple listing services and newspaper advertisements.

Correlating the data presented, the indicated exposure time ranges from 90 to 120 days. This is predicated on the physical condition of the subject property as detailed in the body of this report, financing being readily available and the listing price being consistent with the market value estimate found herein.

VALUE RECONCILIATION

Reconciliation is the culminating of ideas or indications to arrive at a final value. The different indications of value derived in this appraisal report follow:

Subject value indicated by Sales Comparison Approach	\$415,000
Subject value indicated by Cost Approach	N/A
Subject value indicated by Income Approach	N/A

Each approach is a comparative analysis of the data in the marketplace, which is significant and applicable to the use of the respective approach. The accuracy and reliability of each approach is dependant the quality and quantity of the market data available, the type of property being appraised and the definition of market value.

The land sales comparison is utilized when valuing vacant land. Land sales were researched throughout the market area, which were representative of the highest and best use of the subject parcel. These sales were reasonably current and parallel the economic environment of the subject. The comparable sales, with the recited adjustments applied, are resultant in a defensible estimate of market value for the site.

Typically when valuing vacant land the cost and income approaches are not utilized in establishing land value therefore these approaches were not applied in this evaluation..

The approach indicated above was utilized to make the final value estimate. We have carefully re-examined each step in each method, and we believe the conclusions accurately reflect the attitude of a typical purchaser. It is our belief that this re-examination has confirmed original conclusions.

CERTIFICATION OF VALUE

I certify that, to the best of my knowledge and belief:

- The statements of fact contained in this report are true and correct.
- The reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal, impartial, and unbiased professional analyses, opinions, and conclusions.
- I have no present or prospective interest in the property that is the subject of this report, and no personal interest with respect to the parties involved.
- I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment.
- My engagement in this assignment was not contingent upon developing or reporting predetermined results.
- My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
- My analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the *Uniform Standards of Professional Appraisal Practice*.
- Michael W. Pugh & Kevin Mitchell both made a personal inspection of the property that is the subject of this report.
- Kevin Mitchell provided significant professional assistance to the persons signing this report, including data collection and interpretation.
- Based on my analysis of the data, subject to the limiting conditions and definitions set forth herein and allowing a reasonable exposure time, it is my opinion that the market value of the fee simple estate of the subject property as of July 18, 2003, on an "as is" basis, is:

FOUR HUNDRED FIFTEEN THOUSAND DOLLARS
(\$415,000)

PRINCIPAL APPRAISER

Date of appraisal: July 18, 2003

Date of report: November 10, 2003

Name: Michael W. Pugh

Signature: 

State Certification #:882

Expiration Date: December 31, 2003

CO-APPRAISER

Date of appraisal: July 18, 2003

Date of report: November 10, 2003

Name: Kevin L. Mitchell

(Unlicensed staff, signature appears for credit purposes only)

Signature: *Kevin L. Mitchell*

QUALIFICATIONS

MICHAEL W. PUGH

CERTIFIED GENERAL APPRAISER

State Certification #: 882

Expiration Date: December 31, 2003

Professional education background:

- Appraisal Practice-Rules & Regulations
- Residential Real Estate Appraisal
- Advanced Real Estate Appraisal
- Graduate Realtors Institute (University of Virginia)
- Real Estate Appraisal 1, 2 & 3 (University of Virginia)
- Certified Residential Specialists – National Association of Realtors
- Certified Residential Broker – National Association of Realtors
- Commercial Income Property Valuation I, II & III

Professional memberships:

- Appraisal Section of the Virginia Association of Realtors
- National Association Of Realtors
 - Virginia Association Of Realtors
- Harrisonburg-Rockingham Association Of Realtors
- Realtors National Marketing Institute
- Real Estate Brokerage Council

Experience:

- Certified General Real Estate Appraiser by the Virginia Appraisal Board
- Licensed Real Estate Broker, Virginia and West Virginia – 25 years
- Fee Appraiser – 23years
- Retail Shopping Center assignments:
 - Daly Commercial Complex
 - Wal-mart Shopping Center
 - Cloverleaf Shopping Center
 - University Plaza

Partial list of clientele:

- BB&T Bank
- First Virginia Bank
- Farm Credit of the Virginias
- Farmers & Merchants Bank
- First Citizens Bank
- Second Bank & Trust
- County of Rockingham
- James Madison University
- City of Harrisonburg
- Harrisonburg Electric Commission
- Commonwealth of Virginia

Partial list of clientele continued:

- Coor's Brewing Company
- Wachovia Bank
- Wal-Mart
- Travelers Insurance Company

FB0629 1:0329
Jean F. Wine,

W I T N E S S E T H :

That for and in consideration of the sum of Ten Dollars (\$10.00) cash in hand paid by the party of the second part to the party of the first part, and other good and valuable considerations, the receipt whereof is hereby acknowledged at and before the sealing and delivery of this deed, said party of the first part does hereby grant and convey with Special Warranty of Title, subject to easements, restrictions and reservations of record, unto said RAYMOND E. RAPP, TRUSTEE, HARRISONBURG PHYSICIANS FOR ANESTHESIOLOGY, INC., PROFIT-SHARING PLAN EARNMARK INVESTMENT TRUST NO. (1) party of the second part, all that certain real estate, together with the improvements thereon, and all rights, privileges, appurtenances, easements and rights of way thereunto belonging or in anywise appertaining, situate approximately five (5) miles northeast of Keezletown, in Linville District, Rockingham County, Virginia, and being more particularly described as all that certain tract of land located just off State Road Nos. 722 and 723 containing 143.040 acres, more or less, and more particularly described according to a survey by Robert L. Shiflet, C.L.S., dated March 16, 1981, as follows:

Beginning at a 3/4" iron rod set in the remains of an old walnut stump on the north side of an access road, a corner of Arthur P. Long and Florence C. Armentrout; thence with a line of Arthur P. Long N 77° 13' 53" E 247.29 ft. to a

129 ECD 330

27" black oak tree, a corner of Arthur P. Long and a corner of Tract 2; thence with a line of Tract 2 S 64° 53' 53" E 3602.47 ft. to a corner of Tract 2 in a line of J. F. Wine's land that is recorded in Deed Book No. 324, page 102, set a 3/4" iron rod in a mound of stones; thence with a line of J. F. Wine S 62° 06' 10" W 585.43 ft. to a corner of J. F. Wine, replaced a found stake with a 3/4" iron rod in a mound of stones between a found marked chestnut oak and hickory near a road; thence with a line of J. F. Wine in part, Lonnie J. Phillips in part and Edith Hasler in part S 42° 21' 19" E 1832.64 ft. to a large marked double chestnut oak, a corner of Edith Hasler; thence with three lines of Edith Hasler S 53° 30' 51" W 456.29 ft. to a stake found in a mound of stones; thence N 53° 46' 00" W 669.69 ft. to a drill bit found between 3 marked pine trees; thence S 81° 16' 48" W 515.88 ft. to an old marked 34" chestnut oak; thence with a line of Edith Hasler in part and J. F. Wine in part N 43° 50' 19" W 414.73 ft. to a 3/4" iron rod set in an old marked pine stump; thence with two lines of J. F. Wine N 79° 59' 56" W 1208.33 ft. to a drill bit found in a mound of stones; thence N 49° 07' 19" W 1095.63 ft. to a drill bit found in a mound of stones, a corner of J. F. Wine and Ronald W. Williams; thence with a line of Ronald W. Williams in part and Florence C. Armentrout in part N 15° 13' 52" W 1896.08 ft. to the beginning, contains 143.040 acres.

Included in this conveyance is an appurtenant of way over and across the existing access road from foresaid tract to State Road 723.

The real estate conveyed herein is a portion of real estate conveyed to M. Bruce Wallinger, Trustee under Main Trust Agreement dated July 29, 1981, FBO Jean F. party of the first part herein, by deed dated July 29, from Jean F. Wine, single, which deed is to be recorded Clerk's Office of the Circuit Court of Rockingham, Virginia, prior to the recordation of this deed, therein described as "TRACT ONE". Reference to the said deed and the plat attached thereto is hereby made rather description and derivation of title to the state herein conveyed.

- 2 -

WITNESS the following signature and seal.

M. Bruce Wallinger, Trustee (SEAL)
M. Bruce Wallinger, Trustee under a
certain Trust Agreement dated July 29,
1981, FBO Jean F. Wine

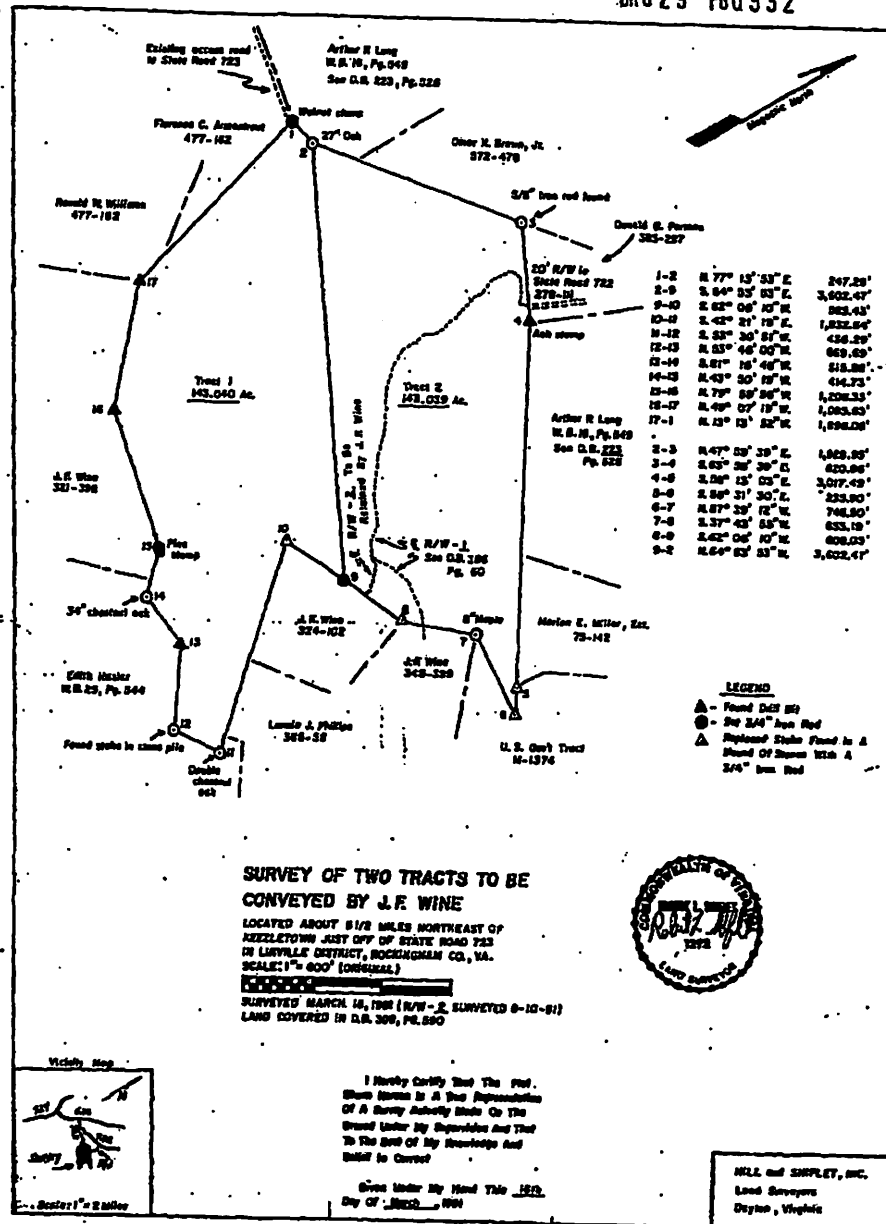
STATE OF VIRGINIA

CITY/COUNTY OF Rockingham, to-wit:

The foregoing instrument was acknowledged before
me in the jurisdiction aforesaid this 13th day of August,
1981, by M. BRUCE WALLINGER, Trustee under a certain Trust
Agreement dated July 29, 1981, FBO Jean F. Wine.

My commission expires 4/12/85.

Michael W. Pugh
Notary Public



BEFORE ME (in the Clerk's Office of the Circuit Court of Rockingham County, Virginia) this day of March, 1981, at 11:13 A.M. I certify that the foregoing instrument was this day presented to the office aforesaid, and is together with the certificate of acknowledgment annexed, admitted to record this day of March, 1981, at 11:13 A.M. I certify that the fees were paid when application was made.

Sec. 53-54 - State 11 - 32 County 7 - 50 City 1 - 00
 Sec. 53-54.1 - State 11 - 32 County 7 - 50 City 1 - 00
 Recording 12.00

TESTE
 L. VENTRE HARPER
 CLERK

Deed Book No. 629 Page 329

FLOOD MAP

A black and white flood map titled "FLOOD MAP". The map shows a network of roads and a river. A road labeled "620" runs vertically on the left. A road labeled "722" runs diagonally from the top right towards the center. A road labeled "723" runs diagonally from the bottom right towards the center. A river flows from the top left towards the center. A large area is labeled "ZONE C". A smaller area is labeled "George Washin National For". An arrow points to a specific location on road "723" with the word "Subject" written inside it. The map is marked with a coordinate "-237" at the bottom.

George Washin
National For

Subject

ZONE C

-237-

[illegible]

FLOOD MAP

A black and white flood map titled "FLOOD MAP". The map shows a network of roads and a specific area labeled "ZONE C". A road labeled "722" runs diagonally from the top right towards the center. Another road labeled "723" branches off from road 722 and runs towards the bottom right. A third road labeled "620" runs vertically from the bottom center towards the middle. A fourth road runs horizontally across the middle. A specific area is outlined with a thick black line and labeled "Subject" with an arrow pointing to it. The text "George Washin National For" is partially visible on the right side. The map is marked with a coordinate "-237" at the bottom center.

George Washin
National For

Subject

722

723

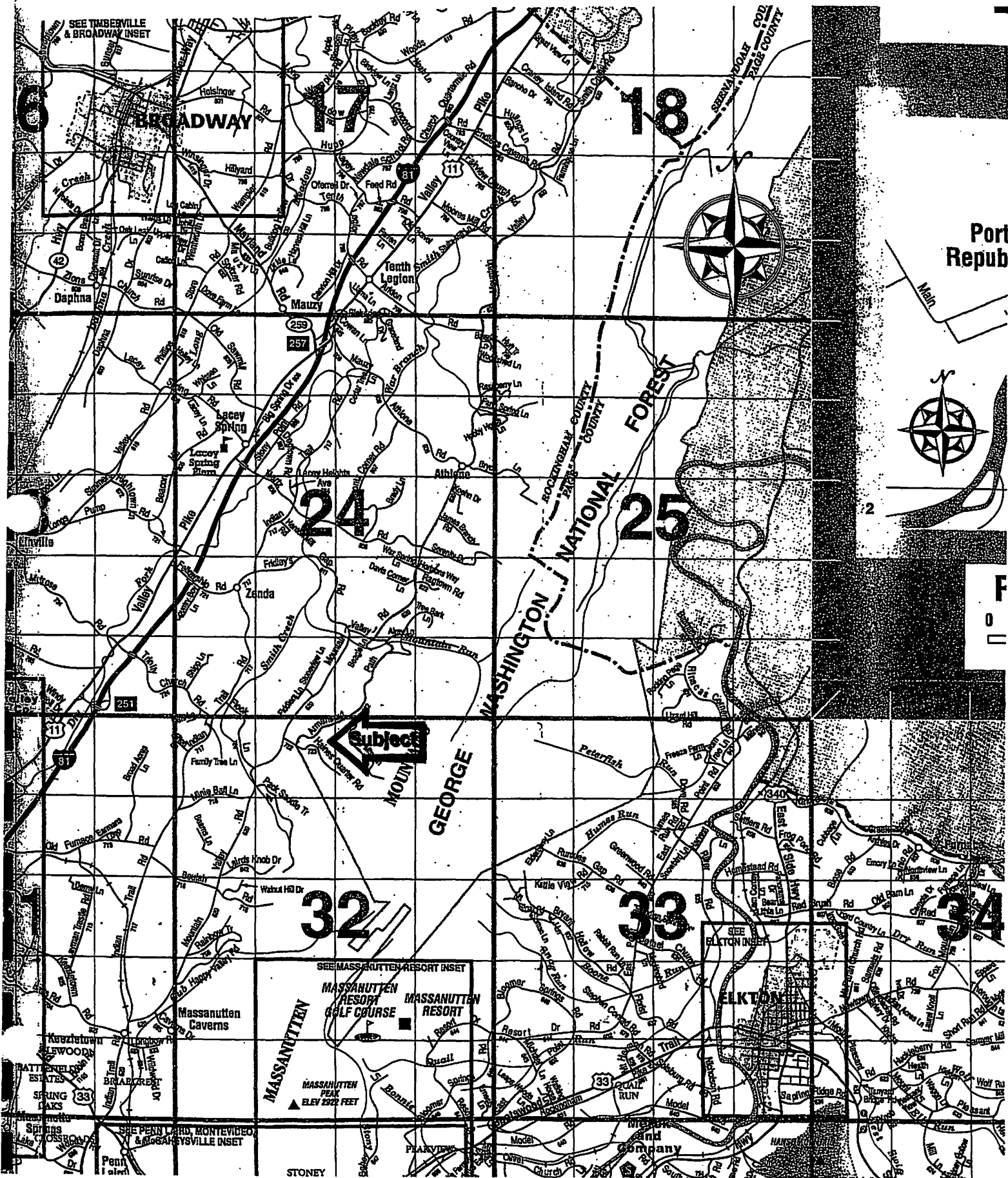
620

ZONE C

-237-

[illegible]

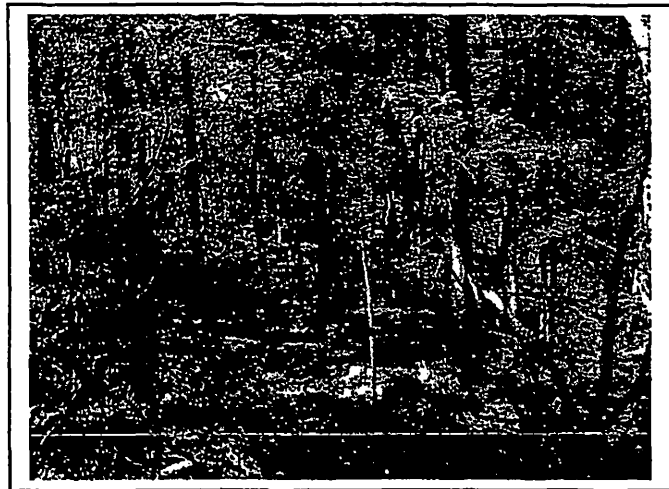
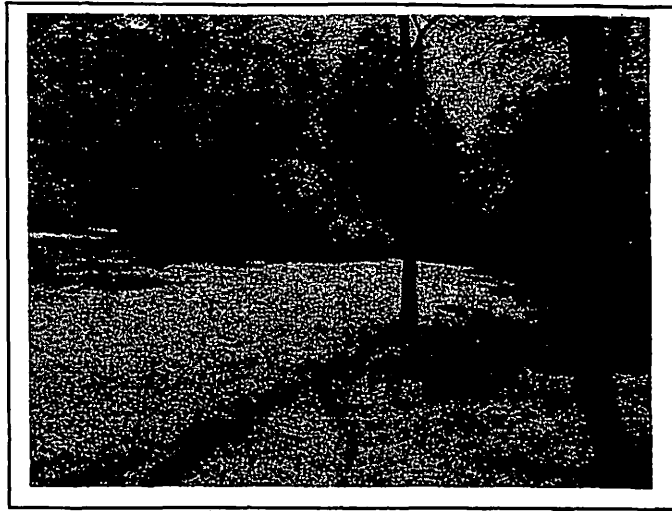
AREA MAP



SUBJECT PHOTOGRAPHS



SUBJECT PHOTOGRAPHS



VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

BRUCE FORBES,

Plaintiff,

v.

Chancery No. CH03-00285

RAYMOND E. RAPP, TRUSTEE
HARRISONBURG PHYSICIANS FOR
ANESTHESIOLOGY, INC., PROFIT-
SHARING PLAN EARMARK TRUST
NO. (1), et al.

Defendants.

MOTION

The Defendant, Raymond Rapp, Trustee, Harrisonburg Physicians for Anesthesiology, Inc., Profit-sharing Plan Earmark Trust No. (1), (Rapp) by counsel moves the Court for an Order requiring the Plaintiff to provide to Rapp all reports from the Plaintiff's appraiser expert witness together with all communications from that witness, and in support of this Motion states as follows:

1. In pretrial discovery, mailed to counsel for Plaintiff on October 20, 2003, Defendant included the following interrogatory: *Identify each person whom you expect to call as an expert witness at trial and state his/her qualifications, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which each expert is expected to testify and a summary of the grounds for each such opinion.*

2. The Plaintiff had not obtained an expert witness prior to trial but was given leave to obtain an expert witness on the value of the land that is subject to this litigation. Plaintiff's counsel has advised Defendant's counsel that he has obtained an expert witness, David Miller of Blue Ridge Appraisals, but Plaintiff has not made available any report from Mr. Miller.

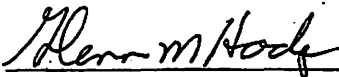
3. Rapp's counsel has requested such a report at least three (3) days prior to the hearing on February 26, 2004, at which Plaintiff will be permitted to put on his expert witness to provide testimony concerning the value of the real estate in question. While

Plaintiff's counsel has indicated he will make such report available, he has given no assurances that it will be made available in adequate time for the Defendants to review it and prepare for the hearing on February 26.

WHEREFORE, Defendant Rapp moves the Court to order Plaintiff to provide to Rapp's counsel any reports from his expert witness and any communications from his expert witness at least three (3) days prior to the hearing scheduled for February 26, 2004.

RAYMOND E. RAPP, TRUSTEE
HARRISONBURG PHYSICIANS FOR
ANESTHESIOLOGY, INC., PROFIT-
SHARING PLAN EARMARK TRUST
NO. (1)

By Counsel



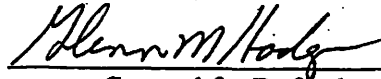
Glenn M. Hodge, Esq., VSB #12159
Wharton Aldhizer & Weaver
100 South Mason Street
P.O. Box 20028
Harrisonburg, Virginia 22801
(540) 438-5352
(540) 434-5502 (facsimile)
Counsel for Defendant Rapp

CERTIFICATE

I hereby certify that a true copy of the foregoing Motion was mailed this 11th day
of February, 2004, to:

Timothy E. Cupp, Esquire
Cupp & Cupp, P.C.
P.O Box 589
Harrisonburg, VA 22803

J. Jay Litten, Esquire
Litten & Sipe, LLP
410 Neff Avenue
Harrisonburg, VA 22801

A handwritten signature in cursive script, appearing to read "Glenn M. Hodge", is written over a horizontal line.

Counsel for Defendant, Rapp

GMH/EA3128.DOC

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

BRUCE FORBES,

Plaintiff,

v.

RAYMOND E. RAPP, TRUSTEE, et al.,
HARRISONBURG PHYSICIANS FOR
ANESTHESIOLOGY, INC., PROFIT-
SHARING PLAN EARMARK TRUST
NO. (1)

Defendants.

Chancery No. CH03-00285

ORDER

This matter came on the 2nd day of February 2004, to schedule a date for further testimony on behalf of the plaintiff involving the appraisal or valuation of the property which is the subject of this cause, Glenn M. Hodge appearing on behalf of the defendant Rapp, Trustee, J. Jay Litten appearing on behalf of the remaining defendants, and Timothy E. Cupp appearing on behalf of the plaintiff Forbes;

IN CONSIDERATION THEREOF, it is ORDERED that the matter is set for a further evidentiary hearing on February 26, 2004, at 9:00 a.m. for two (2) hours.

It is further ORDERED that the proposed Findings of Fact and Conclusion of Law are to be filed on February 27, 2004.

The Clerk is directed to send attested copies to all counsel of record.

ENTERED: 

JUDGE

Date:

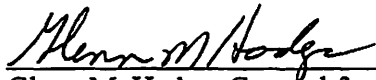
FEB 19 2004

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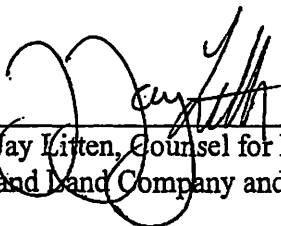
ATTESTE: 

CLERK OF COURT

WE ASK FOR THIS:



Glenn M. Hodge, Counsel for Defendant,
Raymond E. Rapp, Trustee



J. Jay Litten, Counsel for Defendants,
Bland Land Company and Gerald C. Bland



Timothy E. Cupp, Counsel for Plaintiff,
Bruce Forbes

GMH/EA3140.DOC

1 VIRGINIA:

2 IN THE CIRCUIT COURT FOR THE COUNTY OF ROCKINGHAM

3 *****

4 BRUCE FORBES,

5 Plaintiff,

6 -vs-

CHANCERY NO. CH03-000285

7 RAYMOND E. RAPP, Trustee,

8 HARRISONBURG PHYSICIANS FOR

9 ANESTHESIOLOGY, INC.,

10 PROFIT-SHARING PLAN EARMARK

11 TRUST NO.(1),, ET AL.,

12 Defendant.

13 *****

14 EXCERPT TRANSCRIPT OF PROCEEDINGS

15 BEFORE THE HONORABLE JOHN J. MCGRATH, JR.

16 Harrisonburg, Virginia

17 Thursday, February 26, 2004

18 2:26 p.m.

19 Pages 1 - 15

20 Reported by: Tracy W. Koschara, Court Reporter

21
22
23 ORIGINAL

A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFF:

TIMOTHY E. CUPP, ESQUIRE

CUPP & CUPP

Post Office Box 589

1951 Evelyn Byrd Avenue, Suite D

Harrisonburg, Virginia 22803

(540) 432-9988

ON BEHALF OF THE DEFENDANT RAYMOND E. RAPP:

GLENN M. HODGE, ESQUIRE

WHARTON, ALDHIZER & WEAVER

100 South Mason Street

Harrisonburg, Virginia 22801

(540) 434-0316

ON BEHALF OF THE DEFENDANT GERALD C. BLAND AND
BLAND LAND COMPANY:

J. JAY LITTEN, ESQUIRE

LITTEN & SIPE

410 Neff Avenue

Harrisonburg, Virginia 22801

(540) 434-5353

P R O C E E D I N G S

1
2 THE COURT: All right. I believe we're
3 ready to resume in the matter of Forbes versus
4 Rapp, et al. And I believe you were going to
5 produce a witness, Mr. Cupp.

6 MR. CUPP: Your Honor, we did engage
7 someone to look at this matter. In preparing the
8 proposed findings of fact and conclusions, I
9 determined this week that I believe we have the
10 evidence, or in the event -- the only issue related
11 to the valued property is if the Court determines
12 that there was a breach by Mr. Forbes. That's the
13 only time that that issue would come, because it
14 would be contract price, market value difference
15 would be the only thing they could recover. In
16 looking at the evidence and having gone back
17 through all the evidence that we had, it appeared
18 to me clear that even under their best evidence
19 that the differential, that there is a no
20 differential between the value of the property and
21 the contract price. And therefore, as opposed to
22 putting on additional evidence, I think is
23 appropriate and would tender to the Court a motion

1 to strike their evidence on breach of contract,
2 that is Dr. Rapp's evidence on breach of contract
3 for failure to show any damage. And the reason for
4 that is their own testimony from their expert, who
5 you allowed to testify over our objection, was that
6 the value of property excluding the value of the
7 timber on the land was \$415,000. The unrefuted
8 evidence was that the value of the timber on the
9 property was at least \$150,000. As a result of
10 that and taking into account Mr. Kellam who is one
11 of the owners currently in his testimony about fair
12 price was the price that he bid at the sale, and
13 also that he would have even given the amount of
14 450 following the sale not going through, taking
15 all of that evidence into account, I don't believe
16 they are able to show that they have suffered any
17 damage of as a result of that. We would move to
18 strike their breach of contact claim.

19 The additional reason for moving to
20 strike breach of contract claim is that their own
21 testimony establishes that they failed to mitigate
22 as a matter of law. Again, we have a gentleman who
23 says that, that being Mr. Bland, who says that

1 after Mr. Forbes notified them that he was not
2 going to go through with the transaction, he goes
3 to Mr. Kellam and said, and this is a quote that
4 Mrs. Cupp had put down, you're our best chance, you
5 were the second high bidder and you're our best
6 chance. And he does nothing else, absolutely
7 nothing else to mitigate those losses, to the
8 extent that they suffered any. And this is a guy
9 who just weeks before had offered to pay what he
10 said was a fair price 507,792. I think their own
11 evidence shows that they totally failed to mitigate
12 those law losses. Even Mr. Heatwole, their own
13 evidence or expert evidence, again over our
14 objection, but even Mr. Heatwole said that on a
15 second sale of the property he would think that it
16 would be from 10 to 20 percent less. Well, they
17 made no effort to do that second sale. The first
18 sale again, Your Honor, was with reserve, so they
19 could reject it at any point. They didn't have to
20 accept that, and they could have done that the
21 second time to see if -- and indeed if it was in
22 Mr. Heatwole's range on the second sale, assuming
23 you accept that evidence, 10 percent would have

1 been in the neighborhood of \$51,000; again, way
2 more than they ultimately sold it to Mr. Kellam.
3 And the other evidence, of course, relates to
4 Mr. Kellam just saying take it or leave it. And it
5 was as if it was a fire sale, but Dr. Rapp said he
6 was under no obligation to sell, he was under no
7 pressure to sell. So those are the two bases on
8 the breach of contract claim.

9 And as a result of that, that's our
10 motion to strike, we will not have any further
11 evidence relating to valuation, because after
12 review it's clearly within the record.

13 Thank you.

14 THE COURT: Thank you.

15 Mr. Hodge.

16 MR. HODGE: May it please the Court,
17 first of all, we would submit very clearly that
18 there was a contract. It was a contract,
19 purchaser's price for \$3,600 an acre, \$514,000.
20 There's evidence abundantly clear in the record,
21 the document signed by Mr. Forbes, the action by
22 the auctioneer, the action by Mr. Penrod even
23 confirming by sending the deed that it was an

1 accepted contract. So if we have a breach of
2 contract, what were we supposed to get? We were
3 supposed to get \$514,000 for this property. We
4 ended up having to sell it for \$400,000. The law
5 is very clear, first of all, that mitigation is an
6 affirmative defense that is required to be proven
7 by the defendant or the plaintiff in this case, the
8 defendant in the cross bill. We put on evidence,
9 though, out of an abundance of caution that, in
10 fact, what we sold the property for was a fair
11 market value price for the property. We sold it
12 for \$400,000. We had an appraisal for \$415,000.
13 The appraiser said very clearly that appraisals are
14 not an exact science. A ten percent variance is
15 accepted within the industry. The \$400,000 is well
16 within that variance. So we submit, Your Honor,
17 that there is a contract, there's a breach of a
18 contract, and we've established what damages we
19 have incurred.

20 I would disagree with Mr. Cupp whether
21 there was any probative evidence as to what the
22 value of the timber was on this property. But
23 nonetheless, the appraisal that Mr. Pugh made was

1 withstanding timber there because he was looking at
2 it as a tract of land as it is. So I would submit
3 very succinctly that there is a breach of contract,
4 and the breach of contact is what we ended up with
5 the property when we sold it and what we would have
6 gotten if Mr. Forbes had not breached the contract.
7 So for those reasons I would ask the Court to deny
8 the motion.

9 We are ready certainly to argue the
10 entire case. The order that was entered specified
11 that we would provide our proposed findings of fact
12 and conclusions of law tomorrow. We certainly will
13 do that, and whichever way the Court wants to
14 handle it.

15 THE COURT: Mr. Litten.

16 MR. LITTEN: Nothing further on the
17 motion, Your Honor. I'm prepared to argue the
18 whole case if that's the Court's decision.

19 THE COURT: On the motion, did you want
20 respond to Mr. Hodge?

21 MR. CUPP: The only thing I would say,
22 Judge, is I think there are facts in dispute about
23 the contract and that's why my motion was directed

1 to the damage issue. So I just wanted to be clear
2 on that.

3 With respect to arguing the case, we
4 had -- when I was anticipating putting on evidence,
5 we decided we would submit proposed findings. I
6 have mine ready to submit. And I think it would
7 be -- I personally think it would be more
8 appropriate for you to look at those and then we
9 would argue the matter, because, I mean, I feel
10 certain all parties have them ready. But we'll do
11 whatever you want to do.

12 THE COURT: Just out of curiosity, what
13 is the length of these proposed findings?

14 MR. CUPP: Mine's about 15 pages.

15 MR. HODGE: Mine would be approximately
16 eight pages, Your Honor.

17 MR. LITTEN: Two or three pages, Judge.

18 MR. CUPP: His is single spaced,
19 though.

20 THE COURT: Well, I'll be very candid
21 with you. I'm willing to do it in any fashion that
22 counsel feel is best suited for the matter. I can
23 hear argument now. I have plenty of time. I have

1 a jury out and they're going to be there for a
2 while. On the other hand, I can certainly
3 reschedule it after you've submitted the proposed
4 findings of fact and conclusions of law.

5 MR. CUPP: I just think that -- my
6 feeling is that if we submitted the proposed
7 findings tomorrow and then we could even be
8 penciled in possibly to set a date for final
9 argument within a very short period of time, then
10 that would allow us to respond to the assertions by
11 other counsel.

12 THE COURT: Let me just see what my --
13 I know I have a lot of time tomorrow, but, of
14 course, that won't really do the trick.

15 MR. CUPP: Judge, while I'm doing that,
16 and just as -- again, my review of my notes
17 indicated that at the end of our December 19 trial
18 date, which was very late in the evening, I believe
19 5:30 or 6, Mr. Litten provided me with some
20 provisions of Mr. Forbes' deposition, and there
21 were a few follow ups, and I just made a few pages
22 that I would submit to the Court that I think
23 explain some of that testimony. I think the rules

1 allow when one party submits a deposition --

2 THE COURT: No question about it. I'm
3 just wondering --

4 MR. CUPP: And these are very limited.

5 THE COURT: Let me just look for a
6 minute. Mr. Litten supplied excerpts from
7 Mr. Forbes' deposition?

8 MR. LITTEN: Yes, sir.

9 THE COURT: And was there any other
10 depositions that excerpts were supplied from?

11 MR. CUPP: I think that's the only one.

12 MR. LITTEN: I think Mr. Cupp had
13 submitted some or indicated that you would submit
14 some.

15 MR. CUPP: In any event, there are just
16 a few pages, I think four or five pages.

17 THE COURT: Yeah. That's fine. I have
18 no problem with that. You have a right to do that,
19 but what has me puzzled for a moment here, I'm just
20 curious of whether the whole deposition isn't
21 better. Instead of -- by the time we get so much
22 of it in, you might as well have it all in, but
23 I'll leave it up to you folks.

1 MR. CUPP: I'll be glad to submit all
2 the deposition originals.

3 MR. LITTEN: No objection.

4 MR. CUPP: I think it being in
5 equity --

6 THE COURT: Fine. Why don't we do that
7 then. If we just have all the depositions filed,
8 and I will look at those to the extent I'm directed
9 to by the parties in their briefs or the extent it
10 seems appropriate.

11 MR. CUPP: I was going to ask about
12 that, because there were a number of situations
13 where I examined a witness with reference to a
14 deposition, and, of course, I didn't make that
15 available to the Court at that point, because I
16 didn't know what was going to be -- but I can
17 submit those originals tomorrow with the ones that
18 I have.

19 THE COURT: How many depositions are
20 there? I'm just thinking of really the people who
21 testified, I was thinking of.

22 MR. CUPP: Six or eight, probably.

23 MR. HODGE: Mr. Kellam, Mr. Bowes, Jeff

1 Forbes was deposed, Mr. Bland was deposed, Bruce
2 Forbes was deposed. You deposed Mike Pugh and you
3 deposed Dick Heatwole.

4 THE COURT: Who was Mike Pugh?

5 MR. HODGE: He was the appraiser.

6 THE COURT: All right. Fine. All of
7 those people testified then. So just submit those.

8 (Discussion off the record)

9 THE COURT: All right. The 18th. Is 9
10 o'clock best suited for you?

11 All right. We'll set it at 9 o'clock
12 on the 18th.

13 If you can prepare that order, please.

14 MR. CUPP: I will.

15 Judge, the last thing I have is, I had
16 asked Dr. Rapp, and this is not in deposition, but
17 I had asked him about his response to one
18 interrogatory, interrogatory nine, and I would just
19 submit that.

20 THE COURT: All right.

21 MR. CUPP: That's the 18th at 9. Thank
22 you.

23 THE COURT: All right. Thank you very

1 much. Appreciate you coming over.

2 (Proceedings concluded at 2:40 p.m.)
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VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

BRUCE FORBES,

Plaintiff,

v.

RAYMOND E. RAPP, TRUSTEE, et al.,

Defendant.

CHANCERY NO. CH03-00285

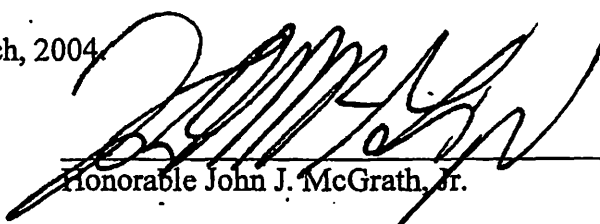
ORDER

This matter came before the court on the 26th day of February 2004, Glenn M. Hodge appearing on behalf of the defendant Rapp, Trustee, J. Jay Litten appearing on behalf of the remaining defendants, and Timothy E. Cupp appearing on behalf of the plaintiff Forbes, and no further evidence being offered on that date and it appearing to the Court that a date and time for final arguments should be set;

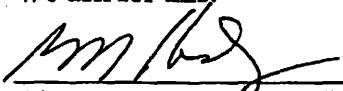
IN CONSIDERATION THEREOF, it is ORDERED that the matter is set for final arguments on March 18, 2004 at 9:00 a.m.

The Clerk is directed to send an attested copy of this Order to all counsel of record.

Entered this 18th day of March, 2004.


Honorable John J. McGrath, Jr.

We ask for this:


Glenn M. Hodge (VSB #12159)
Counsel for Defendant Rapp, Trustee


J. Jay Litten
Counsel for Defendants Bland and Bland Land


Timothy E. Cupp (VSB # 23017)
Counsel for Plaintiff

A TRUE COPY

ATTEST:


CLERK

Excerpt of Proceedings
March 18, 2004

Page 1

1 VIRGINIA:

2 IN THE CIRCUIT COURT FOR THE COUNTY OF ROCKINGHAM

3 *****

4 BRUCE FORBES,

5 Plaintiff,

6 -vs-

CHANCERY NO. CH03-000285

7 RAYMOND E. RAPP, Trustee,

8 HARRISONBURG PHYSICIANS FOR

9 ANESTHESIOLOGY, INC.,

10 PROFIT-SHARING PLAN EARMARK

11 TRUST NO.(1),, ET AL.,

12 Defendant.

13 *****

14 EXCERPT TRANSCRIPT OF PROCEEDINGS

15 BEFORE THE HONORABLE JOHN J. MCGRATH, JR..

16 Harrisonburg, Virginia

17 Thursday, March 18, 2004

18 Pages 1 - 7

19 Reported by: Tracy W. Koschara, Court Reporter

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21

22

23

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(540) 801-0288

Excerpt of Proceedings

March 18, 2004

Page 2

A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFF:

TIMOTHY E. CUPP, ESQUIRE

CUPP & CUPP

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Harrisonburg, Virginia 22803

(540) 432-9988

ON BEHALF OF THE DEFENDANT RAYMOND E. RAPP:

GLENN M. HODGE, ESQUIRE

WHARTON, ALDHIZER & WEAVER

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(540) 434-0316

ON BEHALF OF THE DEFENDANT GERALD C. BLAND AND
BLAND LAND COMPANY:

J. JAY LITTEN, ESQUIRE

LITTEN & SIPE

410 Neff Avenue

Harrisonburg, Virginia 22801

(540) 434-5353

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(540) 801-0288

Excerpt of Proceedings
March 18, 2004

Page 3

E X C E R P T O F
P R O C E E D I N G S

THE COURT: All right. The Court has had extensive notes of the rather lengthy proceeding that took place in this case over what it seems like now three or four days in various bits and snatches. There has been a court reporter at every session, but no transcript has been ordered in the trial matters; so, therefore, I have to rely on my notes and the exhibits that have been introduced. And I appreciate the pleadings that have been filed, the proposed findings of fact and conclusions of law and the oral argument.

I have to say that this is a case that relies heavily, if not exclusively, on the credibility of the witnesses. And I think I can best state it, by having reviewed my notes and having reviewed my recollections of the testimony of the witnesses, Mr. Forbes' case really rises and falls on his testimony. I found him to be totally lacking in credibility. I found it difficult to believe many of the statements that were made. His testimony often was bombastic, inconsistent,

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Excerpt of Proceedings
March 18, 2004

Page 4

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Excerpt of Proceedings
March 18, 2004

Page 5

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2 simply clear that these matters were discussed and
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4 bidding. The matter was knocked down.

5 Under all the circumstances of this
6 case, the Court finds that there was a contract.
7 The contract was breached. It was patently no
8 fraud. This is a gentleman who represented himself
9 to be the owner and operator of, I think it was,
10 something like 17 LLC's, an experienced land
11 developer. And the thought that he somehow
12 rationally relied upon a brochure and rationally
13 relied upon the other items that he stated is
14 simply incredible.

15 I find that there should be judgment
16 entered on the cross bill, the cross claim of the
17 defendant Rapp, I guess it is. He's actually in a
18 capacity as a trustee.

19 The Court finds that the fair market
20 value of the property was \$415,000. Again, we have
21 the actual sale at \$400,000, but the plaintiff or
22 the defendant in this case did not rise above his
23 own evidence. In his own evidence the expert

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Excerpt of Proceedings
March 18, 2004

Page 6

1 indicated it was \$415,000. Therefore, a judgment
2 will enter against the plaintiff in the amount of
3 \$99,900 with interest to run at one percent per
4 month from June 17th, 2003 until paid in full.

5 You'll prepare that order, Mr. Hodge,
6 and circulate it for endorsement. Thank you.

7 MR. CUPP: You did not make any
8 findings relating to marketability or any of the --

9 THE COURT: Well, I found against your
10 client on each and every specific.

11 MR. CUPP: And you found that the
12 defendants mitigated their damages?

13 THE COURT: Mr. Cupp, you heard my
14 ruling and you know what my ruling is.

15 * * * * *

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1 saying, like an idiot I assumed I would be able to
2 subdivide. You cannot take that statement out of
3 context. The context is, first, that Bland told
4 him he could for the sale, and then all of those
5 other things combined together to show that this is
6 property and their own expert says that people
7 don't do title searches on it, this is property
8 that could be subdivided.

9 So based on those things, Your Honor,
10 we would ask that judgment be entered in favor of
11 Mr. Forbes as we requested in the findings.

12 THE COURT: All right. The Court has
13 had extensive notes of the rather lengthy
14 proceeding that took place in this case over what
15 it seems like now three or four days in various
16 bits and snatches. There has been a court reporter
17 at every session but no transcript has been ordered
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10 indicated it was \$415,000. Therefore, a judgment
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18 THE COURT: Well, I found against your
19 client on each and every specific.

20 MR. CUPP: And you found that the
21 defendants mitigated their damages?

22 THE COURT: Mr. Cupp, you heard my
23 ruling and you know what my ruling is.

1 MR. FORBES: Appeal the case.

2 THE COURT: If you say one more thing,
3 then you're going to be held into contempt.

4 Do you have anything to say?

5 MR. FORBES: Not right now.

6 THE COURT: Good.

7 MR. FORBES: I will.

8 I should have had a jury trial.

9 THE COURT: Sir, you're in contempt of
10 court. Arrest that man and take him into custody.

11 (Proceedings concluded at 11:26 a.m.)

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VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

BRUCE FORBES,)	
)	
Plaintiff,)	
)	
v.)	Chancery No. CH03-00285
)	
RAYMOND E. RAPP, TRUSTEE, <u>et al.</u> ,)	
HARRISONBURG PHYSICIANS FOR)	
ANESTHESIOLOGY, INC., PROFIT-)	
SHARING PLAN EARMARK TRUST)	
NO. (1), et als)	
)	
Defendants.)	
)	

ORDER

This matter came on for an *ore tenus* hearing on December 18 and 19, 2003 on the pleadings previously filed and hearings previously held, the Plaintiff, Bruce Forbes, appearing in person and with his attorneys, Timothy C. Cupp and Jenifer D. Cupp, the Defendant, Raymond E. Rapp, Trustee, appearing in person and with his attorney, Glenn M. Hodge, and the Defendants, Bland Land Company and Gerald C. Bland, appearing in person through Gerald C. Bland with their attorney, J. Jay Litten. The parties presented evidence through witnesses and exhibits as documented in the record in this cause. The plaintiff moved for additional time to obtain the services of an appraiser to appraise the property in question for the reasons set forth in the record. The Court granted the motion. The matter was thereafter continued until February 26, 2004. On February 26, 2004, the plaintiff did not present any additional evidence for the reasons set forth in the record. The plaintiff then moved to strike the defendant Rapp, Trustee's evidence on his counterclaims for the reasons set forth in the record, which motion was denied. Thereafter, the parties submitted their Proposed Findings of Fact and Conclusions of Law and the matter was scheduled for final argument on March 18, 2004, at which time the matter was argued by counsel.

After consideration of the evidence, the Court is of the opinion, for the reasons stated orally in Court, a transcript of which is attached hereto as Exhibit A, that the Plaintiff entered into a contract to purchase land from the Defendant, Raymond E. Rapp, Trustee, that there were no misrepresentations on the part of any of the Defendants in the advertisement or in connection with the sale of the property and that all of the Plaintiff's claims against the Defendants should be dismissed.

Further, the Court is of the opinion that Plaintiff and Cross Defendant, Bruce Forbes, breached his contract to buy the property from the Defendant and Cross Plaintiff, Raymond E. Rapp, Trustee, and that the Defendant and Cross Plaintiff, Raymond E. Rapp, Trustee, is entitled to a judgment on his counterclaim in the amount of Ninety-Nine Thousand Nine Hundred Forty Four Dollars (\$99,944.00), together with interest at the rate of one percent (1%) per month from June 17, 2003.

Therefore, it is ADJUDGED, ORDERED and DECREED that all of the Plaintiff's claims against all of the Defendants are dismissed.

It is further ADJUDGED, ORDERED and DECREED that the Defendant, and Cross-Plaintiff, Raymond E. Rapp, Trustee, shall recover of the Plaintiff and Cross-Defendant, Bruce Forbes, the sum of \$99,944.00 together with interest at the rate of one percent (1%) per month from June 17, 2003 until paid, together with costs expanded.

If no appeal to this Order is noted and appeal suspension bond posted within the time provided by law, the Clerk is directed to pay to Raymond E. Rapp, Trustee, the funds interpleaded, to wit, \$51,490.00, together with any interest accrued thereon, to be credited against the judgment awarded herein.

The Clerk is directed to send attested copies to all counsel of record.

ENTERED: /s/ John J. McGrath, Jr.
JUDGE

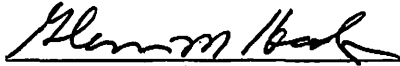
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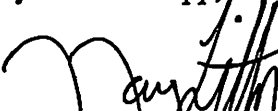
ATTESTE:

Heather A. Riordan
DEPUTY CLERK

WE ASK FOR THIS:



Glenn M. Hodge, Counsel for Defendant and Cross-Plaintiff,
Raymond E. Rapp, Trustee



J. Jay Litten, Counsel for Defendants,
Bland Land Company and Gerald C. Bland

SEEN AND OBJECTED TO
for the reasons stated on Exhibit B attached hereto:



Timothy E. Cupp, Counsel for Plaintiff and Cross Defendant
Bruce Forbes

GMHEA3238.DOC

1 VIRGINIA:

2 IN THE CIRCUIT COURT FOR THE COUNTY OF ROCKINGHAM

3 *****

4 BRUCE FORBES,

5 Plaintiff,

6 -vs-

CHANCERY NO. CH03-000285

7 RAYMOND E. RAPP, Trustee,

8 HARRISONBURG PHYSICIANS FOR

9 ANESTHESIOLOGY, INC.,

10 PROFIT-SHARING PLAN EARMARK

11 TRUST NO. (1) ,, ET AL.,

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14 EXCERPT TRANSCRIPT OF PROCEEDINGS

15 BEFORE THE HONORABLE JOHN J. MCGRATH, JR.

16 Harrisonburg, Virginia

17 Thursday, March 18, 2004

18 Pages 1 - 7

19 Reported by: Tracy W. Koschara, Court Reporter

20
21
22
23 ORIGINAL

A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFF:

TIMOTHY E. CUPP, ESQUIRE

CUPP & CUPP

Post Office Box 589

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ON BEHALF OF THE DEFENDANT RAYMOND E. RAPP:

GLENN M. HODGE, ESQUIRE

WHARTON, ALDHIZER & WEAVER

100 South Mason Street

Harrisonburg, Virginia 22801

(540) 434-0316

ON BEHALF OF THE DEFENDANT GERALD C. BLAND AND
BLAND LAND COMPANY:

J. JAY LITTEN, ESQUIRE

LITTEN & SIPE

410 Neff Avenue

Harrisonburg, Virginia 22801

(540) 434-5353

E X C E R P T O F
P R O C E E D I N G S

1
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12 defendants mitigated their damages?

13 THE COURT: Mr. Cupp, you heard my
14 ruling and you know what my ruling is.

15 * * * * *

CERTIFICATE OF COURT REPORTER

I, Tracy W. Koschara, Court Reporter, Notary Public in and for the Commonwealth of Virginia at Large, certify that I reported verbatim the proceedings in the Circuit Court for the County of Rockingham in Harrisonburg, Virginia, in the captioned cause, heard by the Honorable John J. McGrath, Jr., Judge of said court, on March 18, 2004.

I further certify that the foregoing transcript, numbering pages 1 through 7, inclusive, constitutes a true, accurate, and complete excerpt transcript of said proceedings.

Given under my hand this 30th day of March, 2004.

Tracy W. Koschara

Tracy W. Koschara, Notary Public
Commonwealth of Virginia at Large

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

BRUCE FORBES,

Plaintiff,

v.

RAYMOND E. RAPP, TRUSTEE, et al.

Defendant.

Chancery No. CH03-00285

EXHIBIT B TO JUDGMENT ORDER -

PLAINTIFF'S EXCEPTIONS AND OBJECTIONS TO JUDGMENT ORDER

The plaintiff excepts and objects to the Order granting judgment in favor of the defendants on the grounds stated in open court, including in the final argument, incorporated herein, and on the grounds set forth in the various pleadings and motions filed herein by the plaintiff and based upon the objections tendered prior to, at and subsequent to the trial, all reflected in the record, and which are incorporated herein, including without limitation, pre-trial rulings rescinding the order directing issues to be decided by a jury and thereafter trying the case to the Court even though the Court indicated that credibility was central to its decision; not directing issues out of chancery when there were issues of fact and credibility in sharp conflict and where the defendants had agreed to trying issues to a jury which was reflected in the Court's pre-trial order; allowing the defendant Rapp, Trustee's experts to testify despite Rapp, Trustee's violation of the pre-trial order; allowing G.R. Heatwole to testify as an expert without foundation for his testimony on the issue addressed at trial, and based upon pure speculation since he stated that he did not have a basis to answer the opinion question; allowing Mike Pugh, the appraiser, to testify despite the fact that the work he performed to arrive at his opinion offered at trial was not even performed until well after the period required for submission of his opinion to the plaintiff under the pre-trial order, and on the grounds that the defendant withheld the opinion from counsel for the plaintiff until the last day of the discovery period, again well after the date required by the pre-trial order. The plaintiff further objects to the repeated inappropriate admission of hearsay testimony and other hearsay evidence; and the admission of evidence relating to prescriptive use of the subject access road when the defendants

failed to join the parties required to establish such use, and further where the defendants produced nothing more than objectionable hearsay relating to such prior use.

The plaintiff objects to the Order on the further grounds that the defendant Rapp, Trustee failed to prove damages, and that the uncontradicted evidence in the record established that the value of the property exceeded the price under the alleged contract; and on the grounds that the Order is contrary to the law and the evidence; the plaintiff further objects to the Court's ruling allowing the defendant to introduce a document prepared after the discovery cut-off date and after the time allowed for identification of exhibits, in the form of the subordination agreement admitted by the Court for the defendant during the plaintiff's case-in-chief; the plaintiff objects to the Court's ruling that the defendant Rapp, Trustee mitigated damages, since the evidence established that the defendant did not reasonably mitigate the damages he claims to have suffered and took no steps, reasonable or otherwise, to obtain anything close to the market value for the property; and the plaintiff further objects to the Court ignoring the uncontradicted evidence that the value of the timber on the subject property was in addition to the appraised value testified to by defendant's expert and increased the value of the subject property to an amount in excess of the alleged contract price; and the plaintiff further objects to the Court's failure to grant the plaintiff's motion to strike the defendant Rapp, Trustee's evidence on his Counterclaim based upon Rapp, Trustee's failure to prove damage and failure to mitigate any damages allegedly suffered.


The plaintiff objects to the ruling of the Court to the extent that it assumes or finds that Rapp, Trustee was able to convey good and marketable title, since the evidence established that he was unable to convey marketable title, and to the extent a contract was formed between the plaintiff and Rapp, Trustee, Rapp, Trustee breached his obligation to convey and could not convey good and marketable title. Moreover, the defendant Rapp, Trustee was unable to convey the property with a deeded right of way. The only access was pursuant to an alleged access road which the uncontradicted evidence established was not deeded from the holder of the servient estate, although the defendants represented that to be the case. The defendant asserted in argument, without admissible evidence, that there was a prescriptive right, but the evidence established that any prescriptive right was encumbered by a substantial deed of trust, and that in any event, under the law, the prescriptive use defines the nature and extent of the use of the right of way. By being so

defined, even if there was a prescriptive right, the existence of such right breached the defendant's obligations to convey a deeded right of way, and the use to future owners was limited to use as a game preserve. The proposed deed from Mr. Penrod did not meet the obligations of the alleged contract by failing to include a deeded access road or deeded right of way to which the defendant Rapp, Trustee obligated himself through Mr. Bland's representations.

The plaintiff further objects to the admission of expert testimony from David Penrod for the reasons set forth in the motion to strike and for the further reasons outlined in the motion filed prior to trial relating to the supplemental opinions disclosed only several days prior to the trial in Mr. Penrod's errata sheets to his signature page to the transcript; the plaintiff further objects to the Court granting the defendant Rapp, Trustee, judgment for interest from June 17, 2003, a period greater than that requested by the defendant; moreover, such finding as to the date interest begins to run necessarily indicates that, to the extent a contract was formed, Rapp, Trustee was required to provide a deeded access road by June 17, 2003, and the uncontradicted evidence establishes that Rapp, Trustee was unable to do so; the plaintiff objects to the Court's Order to the extent that it varies from the plaintiff's proposed Findings of Fact and Conclusions of Law submitted on February 27, 2004; the plaintiff objects to the Order because it fails to find that the defendants made material misrepresentations of fact concerning the ability to subdivide the property and concerning the conveyance of the property with a deeded right of way, which the defendants had no intention of conveying and which the owner of the servient estate was not willing or able to convey to the plaintiff, and on which misrepresentations the plaintiff reasonably relied.

BRUCE FORBES

By: Counsel


Timothy E. Cupp, VSB. No. 23017
Cupp & Cupp, P.C.
1951 Evelyn Byrd Avenue, Suite D
P.O. Box 589
Harrisonburg, Virginia 22803
(540) 432-9988
Counsel for Plaintiff

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

BRUCE FORBES,

Plaintiff.

v.

Chancery No. CH03-00285

**RAYMOND E. RAPP, TRUSTEE,
HARRISONBURG PHYSICIANS FOR
ANESTHESIOLOGY, INC., PROFIT-
SHARING PLAN EARMARK TRUST
NO. (1), et al.**

Defendants.

ORDER

The Defendants, Raymond E. Rapp, Trustee, and Bland Land Company, Inc, have each filed for an award of attorney fees as sanctions pursuant to Section 8.01-271.1 of the Code of Virginia. The Defendants' request for sanctions is based upon Plaintiff having acted in bad faith and filing a law suit which was not warranted by the facts or law.

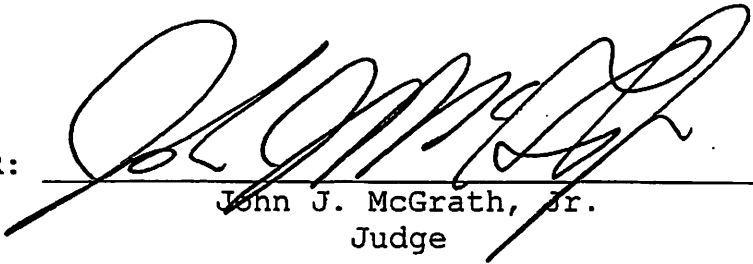
Although it is an extremely close question, the Court concludes that sanctions are not appropriate in this case.

The Clerk of the Court is directed to send certified copies of this Order to: Timothy E. Cupp, Esquire, Cupp & Cupp, P.C., 1951 Evelyn Byrd Avenue, Suite D, P.O. Box 589 Harrisonburg, VA 22803, Counsel for Plaintiff Bruce Forbes; Glen M. Hodge, Esquire, Wharton Aldhizer & Weaver, PLC, 100 South

Mason Street, Harrisonburg, VA 22801, Counsel for Defendant
Raymond E. Rapp, Trustee; and to J. Jay Litten Esquire, Litten &
Sipe L.L.P., 410 Neff Avenue, Harrisonburg, VA 22801-3434,
Counsel for Defendant Bland Land Company.

DATED: May 10, 2004

ENTER:



John J. McGrath, Jr.
Judge

A TRUE COPY

ATTESTE:



DEPUTY CLERK

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

BRUCE FORBES,

Plaintiff,

v.

CHANCERY NO. CH03-285

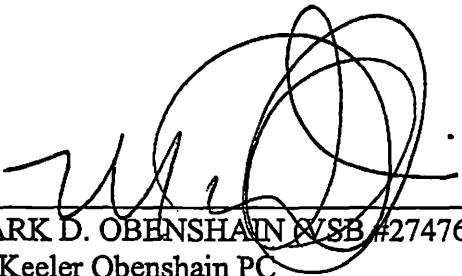
RAYMOND E. RAPP, TRUSTEE,
HARRISONBURG PHYSICIANS FOR
ANESTHESIOLOGY, INC., PROFIT-
SHARING PLAN EARMARK TRUST
NO. (1), et al.,

Defendants.

NOTICE OF APPEAL

The plaintiff, Bruce Forbes, hereby gives notice of appeal to the Supreme Court of Virginia from the Final Judgment Order of this Court entered on the 22nd day of April, 2004, and further gives notice that a transcript of the case will be filed. The plaintiff certifies that a copy of the transcript has been ordered from the reporter who reported the case.

BRUCE FORBES
By Counsel



MARK D. OBENSHAIN (VSB #27476)
Of Keeler Obenshain PC
111 East Market Street
P. O. Box 1287
Harrisonburg, Virginia 22803
(540) 437-3133
(540) 437-3134 (fax)
Co-Counsel for Plaintiff

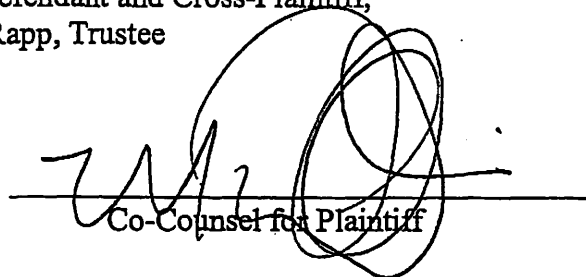
TIMOTHY E. CUPP (VSB #23017)
Of Cupp & Cupp, P.C.
1951 Evelyn Byrd Avenue, Suite D
P. O. Box 589
Harrisonburg, Virginia 22803
(540) 432-9988
Co-Counsel for Plaintiff

CERTIFICATE

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed this
13th day of May, 2004, to:

J. Jay Litten, Esquire
Litten & Sipe, LLP
410 Neff Avenue
Harrisonburg, Virginia 22801
Counsel for Defendants Bland Land
Company and Gerald C. Bland

Glenn M. Hodge, Esquire
Wharton, Aldhizer & Weaver, PLC
P. O. Box 20028
Harrisonburg, Virginia 22801
Counsel for Defendant and Cross-Plaintiff,
Raymond E. Rapp, Trustee


Co-Counsel for Plaintiff

32252

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

BRUCE FORBES,

Plaintiff,

v.

CHANCERY NO. CH03-285

RAYMOND E. RAPP, TRUSTEE,
HARRISONBURG PHYSICIANS FOR
ANESTHESIOLOGY, INC., PROFIT-
SHARING PLAN EARMARK TRUST
NO. (1), et al.,

Defendants.

NOTICE OF FILING OF TRANSCRIPTS

TO: J. Jay Litten, Esquire
Litten & Sipe, LLP
410 Neff Avenue
Harrisonburg, Virginia 22801

Glenn M. Hodge, Esquire
Wharton, Aldhizer & Weaver, PLC
P. O. Box 20028
Harrisonburg, Virginia 22801

PLEASE TAKE NOTICE of the filing of the following transcripts for the appeal in
the above-styled case:

<u>Transcript</u>	<u>Date Filed</u>
Michael W. Pugh deposition, 11/19/03	3/1/04
David A. Penrod deposition, 11/20/03	3/1/04
Jeffrey Forbes deposition, 11/19/03	3/1/04
Gerald Bland deposition, 10/29/03	3/1/04
Greg Kellam deposition, 11/14/03	3/1/04
Raymond Rapp deposition, 11/14/03	3/1/04
George Heatwole, II deposition, 11/20/03	3/1/04
Kevin Williams deposition, 11/19/03	3/1/04

Filed in the Clerk's Office
Rockingham County, Va.

2:34
MAY 25 2004


Dianne L. Lusk
Clerk

<u>Transcript</u>	<u>Date Filed</u>
Bruce Forbes deposition, 10/29/03	3/1/04
Dean M. Nichols deposition, 11/20/03	3/1/04
Transcript of Proceedings, 12/11/03	5/25/04
Transcript of Proceedings, 12/17/03	5/25/04
Transcript of Proceedings, 12/18/03	5/25/04
Transcript of Proceedings, 12/19/03	5/25/04
Excerpt Transcript of Proceedings, 2/26/04	5/25/04
Transcript of Proceedings, 3/18/04	5/25/04

This notice has this day been filed by counsel for the appellant in the office of the Clerk of the Circuit Court of Rockingham County on the 25th day of May, 2004.

Given under my hand this 25th day of May, 2004.

BRUCE FORBES
By Counsel


 MARK D. OBENSHAIN (VSB #27476)
 Of Keeler Obenshain PC
 111 East Market Street
 P. O. Box 1287
 Harrisonburg, Virginia 22803
 (540) 437-3133
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 Co-Counsel for Plaintiff


TIMOTHY E. CUPP (VSB #23017)
 Of Cupp & Cupp, P.C.
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 P. O. Box 589
 Harrisonburg, Virginia 22803
 (540) 432-9988
 Co-Counsel for Plaintiff

CERTIFICATE

I hereby certify that a true copy of the foregoing Notice of Filing of Transcript was
mailed this 25th day of May, 2004, to:

J. Jay Litten, Esquire
Litten & Sipe, LLP
410 Neff Avenue
Harrisonburg, Virginia 22801
Counsel for Defendants Bland Land
Company and Gerald C. Bland

Glenn M. Hodge, Esquire
Wharton, Aldhizer & Weaver, PLC
P. O. Box 20028
Harrisonburg, Virginia 22801
Counsel for Defendant and Cross-Plaintiff,
Raymond E. Rapp, Trustee



Co-Counsel for Plaintiff

32689

ASSIGNMENTS OF ERROR

3. The trial court, having determined in error that the Auction Contract should not be rescinded and that Forbes breached the Auction Contract, failed to properly take into consideration clear evidence that the Property Owner failed to make any attempt to mitigate its damages, and thus erred in awarding the Property Owner damages in the amount of \$99,944.00.
4. The trial court erred in permitting the Defendants to present expert testimony to refute the Plaintiff's claim that damages were not mitigated when the testimony amounted to nothing more than inadmissible speculation.