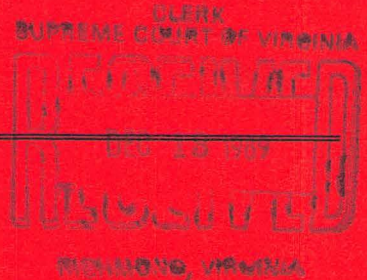


239 Va 622



IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA,

Appellant,

v.

SENTRY INSURANCE
A MUTUAL COMPANY,

AND

LEE LANDING DEVELOPMENT CORP.,

Appellees.

RECORD NO. 890777

JOINT APPENDIX

David T. Stitt
County Attorney
County of Fairfax
4100 Chain Bridge Road
Fairfax, Va. 22030
(703) 246-2421
Counsel for Appellant

Amy S. Owen
F. Joseph Nealon
Miles & Stockbridge
1701 Pennsylvania Ave., N.W.
Suite 500
Washington, D.C. 20006
(202) 333-2350
Counsel for Appellee
Sentry Insurance
A Mutual Company

TABLE OF CONTENTS

	<u>Page</u>
Motion for Judgment filed Decenber 24, 1987	1
Grounds of Defense of Sentry Insurance A Mutual Company filed January 28, 1988	25
Answer and Grounds of Defense of Lee Landing Development Corporation filed March 10, 1988	31
Sentry Insurance's Motion for Summary Judgment and Supporting Memorandum of Points and Authorities dated November 30, 1988	34
Transcript of Circuit Court proceedings on November 30, 1988	54
Final Order entered March 24, 1989	94
Assignments of Error 1 through 3	97

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA,

Plaintiff,

v.

SENTRY INSURANCE, A MUTUAL COMPANY,

Serve: John B. Browder
Registered Agent
1 James Center
Suite 1100
901 E. Carey Street
Richmond, Virginia 23219

AND

LEE LANDING DEVELOPMENT CORP.,

Serve: Alan H. Silverstein
Registered Agent
7297-L Lee Highway
Falls Church, Virginia 22012

Defendants.

AT LAW NO.

82 559

MOTION FOR JUDGMENT

COMES NOW, the Plaintiff, the Board of Supervisors of Fairfax County, Virginia, and requests this Honorable Court to grant its Motion for Judgment, and in support thereof respectfully represents as follows:

1. Plaintiff, the Board of Supervisors of Fairfax County, Virginia (hereinafter "the Board"), is a body politic and corporate in the Commonwealth of Virginia.

2. Defendant Lee Landing Development Corp. (hereinafter "Lee Landing") is a Virginia corporation that at all times relevant hereto conducted and transacted business in the Commonwealth of Virginia.

3. Defendant Sentry Insurance, A Mutual Company (hereinafter "Sentry"), a Wisconsin corporation, is an insurance company authorized to transact fidelity and surety business in the Commonwealth of Virginia, and at all times relevant hereto conducted and transacted business in the Commonwealth of Virginia.

COUNT ONE

4. The allegations of paragraphs 1-3 are hereby incorporated by reference in this count.

5. On or about September 30, 1983, Lee Landing entered into an Agreement with the Board, for the construction and installation of all physical improvements and facilities designated in plan numbered 3173-SP-01, known as Thomas E. Cozzo's Addition to Windsor Estates, in Fairfax County, Virginia within thirty (30) months of the Agreement, or by March 30, 1986. A copy of the Agreement, marked Exhibit A, is attached hereto and is incorporated herein by reference.

6. Lee Landing failed and neglected to perform the Agreement in accordance with the terms and conditions set forth therein in that it failed to properly construct and install all

of the required physical improvements and facilities within the time specified in the Agreement. Said physical improvements and facilities remain incomplete as of this date.

7. By Lee Landing's above-described breach of contract, the Board has sustained damages in the amount of \$571,000.00 and is sustaining further damages.

COUNT TWO

8. The allegations of paragraphs 1-3 are hereby incorporated by reference.

9. On or about September 30, 1983, Lee Landing as principal, and Sentry as surety, executed and delivered a Bond (hereinafter "the Bond") to insure to the Board performance of the Agreement referred to as Exhibit A. The Bond was in the amount of \$571,000.00. A copy of the Bond, marked Exhibit B, is attached hereto, and is incorporated herein by reference.

10. Lee Landing, as principal, is obligated under the terms of the Bond to the Board in the amount of \$571,000.00.

11. Sentry, as surety, is obligated under the terms of the Bond to the Board in the amount of \$571,000.00.

12. All required physical improvements and facilities of the project known as Thomas E. Cozzo's Addition to Windsor Estates, plan number 3173-SP-01, have not been completed in accordance with the Agreement.

13. By letter dated March 6, 1987, Sentry was notified that Lee Landing had not installed the public improvements required under the Agreement, and that the project was in default. The Board, as obligee under the Bond, demanded

that Sentry fulfill its obligations under the Bond. A copy of the letter, marked Exhibit C, is attached hereto and is incorporated herein by reference.

14. To date, Sentry has not paid over to the Board \$571,000.00, the amount of the Bond, nor any part thereof.

15. To date, Lee Landing has not paid over to the Board \$571,000.00, the amount of the Bond, nor any part thereof.

16. Lee Landing has failed to construct and install the physical improvements required under the Agreement.

17. Both Sentry and Lee Landing have failed and neglected to carry out their obligations under the Bond.

18. By Sentry's breach and failure to perform its obligations as principal under the Bond, the Board has sustained damages in the amount of \$571,000.00 and is sustaining further damages.

19. By Lee Landing's breach and failure to perform its obligations as surety under the Bond, the Board has sustained damages in the amount \$571,000.00 and is sustaining further damages.

COUNT THREE

20. The allegations of paragraphs 1-3 are alleged herein are incorporated by reference in this Count.

21. On or about September 30, 1983, Lee Landing entered into a Conservation Agreement with the Board for the installation and maintenance of conservation measures designated in plan 3173-SP-01, known as Thomas E. Cozzo's Addition to Windsor Estates in Fairfax, County, Virginia. A

copy of the Conservation Agreement, marked Exhibit D is attached hereto, and is incorporated herein by reference.

22. All required conservation measures for the project known as Thomas E. Cozzo's Addition to Windsor Estates, plan number 3173-SP-01, have not been installed and properly maintained according to the Conservation Agreement.

23. By Lee Landing's breach and failure to perform its obligations under the Conservation Agreement, the Board has sustained damages in the amount of \$20,000.00 and is sustaining further damages.

WHEREFORE, the Board requests this Court to:

A. Enter judgment against Lee Landing for its obligations under the Agreement for \$571,000.00 plus interest and continuing damages to date of trial;

B. Enter judgment against Lee Landing and Sentry for their obligations under the Bond, jointly and severally, for \$571,000.00 plus interest and continuing damages to date of trial;

C. Enter judgment against Lee Landing for its obligations under the Conservation Agreement for \$20,000.00 plus interest and continuing damages to date of trial;

D. Enter an award of costs against the Defendants for the Board's costs, attorney's fees and expenses herein; and

E. Award the Board such other and further relief as the Court deems just and proper.

Respectfully submitted,

BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA

By Elizabeth A. S.
Counsel

DAVID T. STITT
COUNTY ATTORNEY

By Elizabeth A. S.
Elizabeth A. Snyder
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
(703) 691-2421
Counsel for Plaintiff

EXHIBIT A

Lee

District



AGREEMENT

Director

County Attorney

Director of Finance

THIS AGREEMENT made this 30th day of September, 1983, by and between

LEE LANDING DEVELOPMENT CORP.

party of the first part, hereinafter Developer, and the BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, party of the second part, hereinafter called Board.

WITNESSETH

IN CONSIDERATION OF the approval by the Board through its designee, of a subdivision plat/site plan/construction plan for a project known as (Name) THOMAS E. COZZO'S ADDITION TO WINDSOR ESTATES Plan No. 3173-SP-01, Developer, for himself, and his heirs, personal representatives, assigns, or other successors in interest, agrees to construct and install all of the physical improvements and facilities shown on the approved plans and profiles, and approved revisions thereof, within 30 months of the date hereof.

DEVELOPER FURTHER AGREES:

1. To comply with all the requirements of the Fairfax County Code and the Fairfax County Public Facilities Manual.
2. To provide and maintain all-weather access, including snow removal and ice control, from all occupied dwellings to a public highway in the primary or secondary highway system.
3. To be responsible for having the streets and other improvements in any dedicated right-of-way accepted by the Virginia Department of Highways and Transportation into the State system of Highways; to comply with all requirements of the Virginia Department of Highways and Transportation for acceptance and to make prompt application upon completion of the required work for acceptance by that Department.
4. That any construction or improvement required hereunder shall be considered complete when it is accepted by the governmental unit which is to have ultimate responsibility for its maintenance. The Developer further agrees to be responsible for all maintenance and deterioration of the physical improvements and facilities until such acceptance.
5. To take out and maintain during the life of this Agreement and any extensions thereof, public liability insurance with Fairfax County as an additional named insured, in an amount not less than \$800,000 for injury to any one person, nor less than \$1,000,000 on account of any one accident; and property damage insurance in an amount not less than \$100,000 on account of any one accident nor less than \$500,000 for damages on account of all accidents. A Certificate of Insurance for the insurance required by this paragraph must be presented at the time that the agreement is submitted for review and approval.
6. That if any clause or portion of this Agreement is found not to be valid and binding, the remainder shall continue in full force and effect. The parties intend that each provision of this Agreement be valid and binding upon each and all of them, and expressly agree to abide thereby.
7. In the event that any suit, action or proceeding is brought by the County to enforce any provision of this Agreement, it is expressly agreed and understood that, regardless of when the breach of this Agreement occurs, the measure of damages recoverable shall be the costs of completion and/or correction of the work required by the Agreement as of the earlier of the following two dates:
 - (a) when the work is actually completed and/or corrected to final local and final state approval and acceptance; or
 - (b) date of trial.
 It is further expressly agreed and understood that the measure of damages shall include, and be limited to, the costs of completion and/or correction as set forth above (of which not more than ten percent of total shall consist of administrative and supervisory costs), maintenance and/or deterioration; and shall be adjusted for inflation.

8. To supply to the Board PERFORMANCE BOND from SENTRY INSURANCE A MUTUAL COMPANY
(Type of security or other guarantee) (Company, bank, lender, etc.)

In the amount of \$ 571,000.00 (Bond No.: 75-11975-04)

IN WITNESS of which the Developer signs and seals this Agreement.

Type of Organization:
Builder/Developer

Legal Name and Address:

LEE LANDING DEVELOPMENT CORP.7297-L Lee HighwayFalls Church, Virginia 22042

By _____

(Signature)

(Print or type name and title)

By Alan H. Silverstein

(Signature)

Alan H. Silverstein - President

(Print or type name and title)

STATE OF VIRGINIACOUNTY OF FAIRFAXThe foregoing instrument was acknowledged before me this 30th day of September, 1983by ALAN H. SILVERSTEIN, PRESIDENT OF LEE LANDING DEVELOPMENT CORP.

(Print or type Name of person and title, if applicable.)

My commission expires March 15, 1986
Barbara A. Messick
 Notary Public

In witness of which, the Board has caused this agreement to be executed on its behalf, and its seal affixed:

By Ethel W. Regester

Clerk of said Board

BOARD OF SUPERVISORS OF FAIRFAX
COUNTY VIRGINIABy J. Hamilton L. T.
County Executive

STATE OF VIRGINIA
COUNTY OF FAIRFAX

This 25th day of

October

19 83

, appeared before me in my State and County

persons, G. Hamilton Lambert and Ethel W. Register
(County) County Executive and Clerk of the said Board of Supervisors, respectively, and acknowledged their signatures and the seal of the said Board.

My Commission expires: June 16, 1984

William B. Smith
Notary Public

APPROVED AS TO FORM:

Wey

COUNTY ATTORNEY

EXHIBIT B

Director, DEM

County Attorney

Director of Finance

PS
AMC
JMM

PERFORMANCE BOND

(CORPORATE SURETY)

BOND NO.: 75-11975-04

DATE BOND EXECUTED:

9/30/83

PRINCIPAL(s):
(Legal Name(s))

Lee Landing Development Corporation

CO-PRINCIPAL(s):
(Legal Name(s))

SUM OF BOND:

Million(s) Thousand(s) Hundred(s)
Five Hundred Seventy One Thousand and
00/100ths Dollars (\$571,000.00).

DATE OF AGREEMENT: 9/30/83

PLAN NAME: Thomas E. Corso's Addition to
Windsor Estates.

PLAN NO.: 3173-EP-01

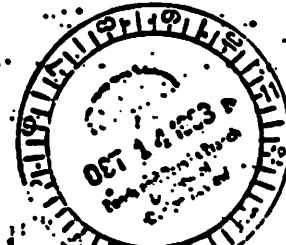
SURETY(ies):
(Name(s))

Sentry Insurance A Mutual Company

KNOW ALL MEN BY THESE PRESENTS, that we, the Principal,
Co-principal(s), and Surety hereto recite and declare that:

1. We are held and firmly bound to the obligee Board of
Supervisors of Fairfax County, Virginia (hereinafter called
"County"), in the sum written above in lawful money of the
United States of America, to be paid to the County, its succe-
sors or assigns, for the payment whereof Principal(s), Co-prin-
cipal(s), and Surety(ies) bind themselves, their heirs, executors,
administrators, successors, and assigns, jointly and severally,
firmly by this Bond.

2. The condition of this Bond is that if the Principal
shall in every respect perform all of its obligations under the
Agreement identified above, which Agreement is incorporated
herein by reference, then this Bond shall be void; otherwise,
the Bond shall continuously remain in full force and effect
until released by the County.



3. (A) It shall be the duty of the Principal to notify Surety of any revision to the plans, profiles, and specifications referred to in the Agreement. Except as otherwise provided herein, Surety expressly waives any right to receive notice from obligee or to review or approve any revisions to the plans, profiles and specifications referred to in the Agreement which are required to meet County or State standards. No such revisions of any kind in the work shall in any way affect the obligation of the Surety under this Bond; except that the Principal shall submit to the Surety for review and approval, and the Surety shall have the right to review and approve, any such revision which:

(1) adds additional subdivision lots to those shown in the original plat of subdivision, site plan or construction plan referred to in the Agreement;

(2) grants the Principal any extension of time beyond the period provided for in the Agreement for completion of its obligations under the Agreement;

(3) increases the cost of remaining construction and improvements required under the Agreement by more than ten percent of the original penal sum of the bond, as established by the estimate of Principal; provided, however, that the Surety shall be in all cases conclusively bound for purposes of this subparagraph by the estimate rendered by Principal to obligee as to the cost of any such revision. Where revisions are made without approval of Surety as required by this subparagraph 3(A)(3), Surety shall be released from any liability for such revision in excess of ten percent of the original penal sum of this bond; provided, however, that such revision without review and approval of Surety as required under this subparagraph 3(A)(3) shall not otherwise operate as a release or discharge of any obligation of Surety under this bond.

(B) The failure or refusal of obligee to take any action, proceeding, or step to enforce any remedy or exercise any right under the Agreement or the taking of any action, proceeding,



or is bound by obligation, acting in good faith on the belief that same is permitted by the provisions of the Agreement shall not in any way release Principal or Surety, or either of them, or their respective executors, administrators, successors, or assigns, from liability under this Bond. Except as set forth herein, Surety hereby waives notice of any amendment, indulgence, or forbearance, made, granted or permitted.

(C) The obligee, Principal, Co-principal, and Surety intend that each provision of this bond be valid and binding upon them, and expressly agree to abide thereby.

(D) In the event of a default (as defined in paragraph #4 of this Bond), the County may terminate whatever rights Principal, Co-principal and/or Surety may have to perform further work on the project.

4. (A) A default shall be deemed to have occurred on the part of the Principal if Principal shall fail to complete its obligations under the Agreement within the time set forth therein or any extensions thereof; or, prior to the expiration of such period, if in the judgment of the Director of the Department of Environmental Management, the Principal has:

(1) abandoned the performance of its obligations under the Agreement; or,

(2) renounced or repudiated its obligations under the Agreement; or,

(3) clearly demonstrated through insolvency, or otherwise, that its obligations under the Agreement cannot be completed within the time allotted under the Agreement.

(B) If Principal defaults in the performance of all or any part of the obligations specified in the Agreement, the Director, DEM, shall give written notice of the default to the Surety, with a copy to the Principal and Co-principal, if any. In the event of such default and notice, Surety shall within 45 days of receipt of the default notice, give written notice to the County stating whether it will assume the Agreement and



the obligations of the Principal; and should it elect to assume said obligations Surety shall be required to complete the Agreement according to its terms and provisions within 180 days of said notice, but not before expiration of the period provided for under the Agreement and approved extensions thereof. In the event that Surety elects to assume the obligations of Principal as provided herein and thereafter fails to faithfully perform all or any part of the work, or should it unnecessarily delay all or any part of the work, then the County may proceed as provided in paragraph #5 of this Bond.

5. Should Surety following notice of default notify the County that it elects not to assume the obligations of Principal under the Agreement; or fail within 45 days of receipt of the default notice as provided in paragraph #4 above to notify the County whether it elects to assume the obligations of Principal under the Agreement; or having elected to assume the obligations of Principal should it then fail to perform; then in either event the County may elect any of the following procedures or any combination thereof:

(A) terminate whatever rights Principal, Co-Principal and/or Surety may have to perform further work on the project;

(B) take over or retake all or any part of the work under the Agreement which is not completed and complete the same for the account and at the expense of the Principal and Surety, who shall be jointly and severally liable to the County for the costs incurred in completion and/or correction thereof. Such costs shall include maintenance and/or deterioration, but shall not include more than ten percent administrative and supervisory costs. The amount of obligee's actual costs for completion and/or correction of the work required under the Agreement shall be conclusive of the extent of the liability of Principal and Surety; provided, however, that Surety's liability shall in no case be greater than the penal sum of this Bond; or



(C) within six months of default (as defined in paragraph 4(A)), bring suit action or proceeding to enforce the provisions of this Bond; except that the County shall not be required to file suit, and the six months limitation shall be tolled, during the period in which Surety has elected to perform and is performing the obligations of Principal under Paragraph 4(B). In the event that any such suit, action, or proceeding is brought by the County, it is expressly agreed and understood that the damages recoverable in any such suit, action, or proceeding shall consist of and be limited to the cost of completion and/or correction of the work as required by the Agreement. Such costs shall include maintenance and/or deterioration but shall not include more than ten percent administrative and supervisory costs. Such costs shall be determined as of the earliest of the following three dates:

- 1) the date of completion and/or correction of the work as defined in the Agreement;
- 2) 18 months from the date suit is filed hereunder;
- 3) date of trial.

Provided, however, that should the County delay in filing suit beyond 6 months after the default, costs recoverable by the County hereunder shall nonetheless be determined as of a date not later than 24 months from the date of default; and that the liability of surety shall in no case be greater than the penal sum of this Bond.

6. Surety shall have the right, at any time within 45 days of the default notice provided for in 4(C) hereof, to demand that the Director, DEM, state a sum constituting the estimated costs, as of that time, of completion and/or correction of the work required under the Agreement, as such costs are defined in 5(C). Should it so elect, Surety may then pay over to the County the sum so stated and be released from any further obligations under this bond. Provided, however, that the Surety shall in no event be required to pay over any such

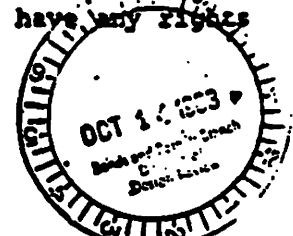
sum set by the Director, nor any other sum under this bond, prior to judgment in a suit hereunder. If funds are paid over under this section and the paid over funds are not sufficient to complete the work, the County's sole remedy shall be to proceed against the Principal and co-principal(s) for any deficiency. If there are any paid over funds not necessary for completion of the work, the County will return the excess, with legal interest, to Surety after completion of the work.

7. If any action or proceeding is initiated in connection with this Bond and any and all obligations arising hereunder, the venue thereof shall be the County of Fairfax, State of Virginia, and it is further understood and agreed that this contract shall be governed by the laws of the State of Virginia, both as to interpretation and performance.

8. All notices sent to the Principals, Co-principals and Surety shall be sent to the addresses set forth on the signature page unless said Principals, Co-principals and Surety notify the Director of DEM in writing of such change. If the addresses of any of the Principals, Co-principals or Surety change, the Principal, Co-principal or Surety shall immediately notify the Director of DEM in writing of such change. Failure to notify the Director of DEM of any change in address is deemed to be a waiver of any requirement for notice under this Bond to the Principals, Co-principals or Surety. All written notice to the County required under this Bond shall be sent certified mail and addressed to Director, DEM, with a copy to the Chief, Bonds & Permits Branch, DEM, provided, however, that any notice that may be required pursuant to Va. Code Ann. §49-25 shall be given to the above and the Chairman of the Board of Supervisors and the County Attorney.

9. If any one or more of the provisions of this Bond are determined to be illegal or unenforceable by a court of competent jurisdiction, all other provisions shall remain effective.

10. No party other than obligee shall have any rights under this Bond as against the Surety.



1. App~~o~~ 1 of this Bond by ~~the~~ surety shall be deemed acceptance without further notice to the Principal(s), Co-principal(s) and/or Surety(ies).

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be signed and sealed as of the day and year set forth above.

PRINCIPAL(S)

Type of Organization:

Corporation

State of Incorporation:

Virginia

Legal Name and Address:

Lee Landing Development Corporation
7297 Lee Highway

Falls Church, Virginia 22042

By: _____ (SEAL)
(Signature)

(Print or type name and title)

By: Alan H. Silverstein (SEAL)
(Signature)
Alan H. Silverstein
President

(Print or type name and title)

ACKNOWLEDGMENT OF PRINCIPAL(S)

STATE OF VIRGINIA

COUNTY OF FAIRFAX

I, BARBARA A. KESSLER a Notary Public in and for the State and County aforesaid, do hereby certify that
Alan H. Silverstein, President of Lee Landing Development Corp.

These names so signed to the foregoing bond, this day personally appeared before me in my State and County aforesaid and
acknowledged the same.

Given under my hand this 30th day of September, 1983

Notary Public

My commission expires: March 15, 1986

CO-PRINCIPAL(S)

Type of Organization:

Legal Name and Address:

State of Incorporation:

(Signature) (not)

(Print or type name and title)

(Signature) (not)

(Print or type name and title)

By _____ (Signature) (not)

(Print or type name and title)



ACKNOWLEDGEMENT OF CO-PRINCIPALIS

STATE OF _____

COUNTY OF _____

I, _____ a Notary Public in and for the State and County aforesaid, do hereby c

whose name is signed to the foregoing bond, this day personally appeared before me in my State and County afo

acknowledged the same.

Given under my hand this _____ day of _____ 19 _____

Notary Public

My commission expires: _____

CORPORATE STATE

State of Incorporation:

Wisconsin

Liability Limit:

\$12,151,000.00

Legal Name and Address:

Sentry Insurance a Mutual Company

1800 North Point Drive

Stevens Point, Wisconsin 54481

Signature

Robert L. Howard

Robert L. Howard
Print of type name

RETESTED:

Robert L. Howard

Robert L. Howard
Print of type name

ACKNOWLEDGEMENT OF CORPORATE SEAL

STATE OF VIRGINIA

COUNTY OF FAIRFAX

I, Linda Bond a Notary Public in and for the State and County aforesaid, do hereby certify
Robert L. Howard

Attorney-in-fact for the Sanitary Insurance & Mutual Company

whose name is signed to the foregoing bond, this day personally appeared before me in my State and County aforesaid
acknowledged the same.

Given under my hand this 30th day of September, 1983

Linda Bond
Notary Public

My commission expires: March 27, 1984

In witness of which, the Board has caused this agreement to be executed on its
behalf, and its seal affixed:

Attest: Ethel W. Register
Clerk of said Board

BOARD OF SUPERVISORS OF FAIRFAX
COUNTY VIRGINIA

By J. Hamilton
(Superior County Executive)

STATE OF VIRGINIA
COUNTY OF FAIRFAX

This 25th day of October, 1983, appeared before me in my State and County
aforesaid, Hamilton and Ethel W. Register
Superior County Executive and Clerk of the said Board of Supervisors, respectively, and acknowledged their signatures and the
act of the said Board.

My Commission expires: June 16, 1984

William P. Graham
Notary Public

APPROVED AS TO FORM:

COUNTY ATTORNEY

EXHIBIT C.

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX
4100 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030



OFFICE OF THE COUNTY ATTORNEY

March 6, 1987

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Sentry Insurance, A Mutual Company
1800 North Point Drive
Stevens Point, Wisconsin 54481

Re: Devonshire Townhouses/aka Thomas Cozzo's
Addition to Windsor Estates - 3173-SP-01
Bond No. 75-11975-04


To Whom It May Concern:

On September 30, 1983, the Board of Supervisors of Fairfax County, Virginia, entered into an agreement with Lee Landing Development Corporation to build the physical improvements and facilities for the above referenced site plan within 30 months or by March 30, 1986. Sentry Insurance is surety on the bond in the amount of \$571,000.

Notice is hereby given to you, on behalf of the Director of the Department of Environmental Management, that Lee Landing Development Corporation has defaulted in the performance of the obligations specified in the agreement. Under the terms of the bond, you must notify the County within 45 days of receipt of this notice of your intention to assume the obligations of that agreement.

If I do not hear from you within the time period specified above, the appropriate legal measures will be taken to protect my client.

Sincerely,


Elizabeth A. Snyder
Assistant County Attorney

EAS/pr

cc: Henry Schenke, Chief, Bonds & Agreements
Department of Environmental Management
Alan H. Silverstein, President
Lee Landing Development Corp.

Ref. No.: 20389

EXHIBIT D

RECEIVED

NOV 1 1983

5/51



CONSERVATION AGREEMENT

CLERK TO THE

30th

September

19 83

between LEE LANDING DEVELOPMENT CORP. A VIRGINIA corporation, hereinafter called "Developer", party of the first part, and the Board of Supervisors of Fairfax County, Virginia, hereinafter called "County", party of the second part:

WITNESSETH:

WHEREAS, Developer, desires approval of THOMAS E. COZZO'S ADDITION TO WINDSOR

ESTATES

3173-SP-01

measures as required by the Subdivision and San Plan Ordinances, or Chapter 104 of the County Code; and WHEREAS, County desires to ensure the maintenance, preservation and adequate performance of such conservation measures, NOW THEREFORE, for and in consideration of the foregoing promises and the following terms and conditions, and in further consideration of the approval of the aforesaid plans by the County and the issuance of permits for the work proposed to be done thereunder the parties hereto agree as follows:

1. Developer has deposited with the County, and the County by this execution hereby acknowledges that it holds, the sum of THREE THOUSAND SEVEN HUNDRED dollars (\$ 3,700.00) under and subject to the terms of this agreement.
2. In the event measures for conservation as provided for on the plans referred to herein, or on any approved revision thereof, are not commenced on or prior to the expiration of any release or other phenomena whereby any sedimentation or erosion, County shall have the right to enter upon Developer's property and construct such measures or do such other work as may be necessary to prevent further erosion or sedimentation, provided that County shall first give notice in writing to Developer or his superintendents of its intent so to do.
3. If in the sole judgment of County measures for the control of sediment and/or erosion have been constructed according to design but inadequately control sediment or erosion, Developer agrees to submit a revision to the erosion and sediment control plans and institute measures to effect such control. In the event Developer fails to do so County may revise the plans and may in like manner to No. 2 above enter to construct the necessary control measures, upon giving notice in writing to Developer or his superintendents of its intent so to do.
4. In the event measures for the control of sediment and/or erosion have been carried out, but fail, through oversight and/or inadequate maintenance, to perform the function for which they were intended, County may in like manner to 2 above, enter to perform such reconstruction or improvement as may be necessary to restore performance in accordance with the plans, or approved revisions thereof, upon giving notice in writing to Developer or his superintendents of its intent so to do.
5. In the event there occurs sedimentation and/or erosion from the property covered by the plans referred to herein in sufficient quantity adversely to affect downstream drainage, or travel on any street, road, highway or other public way, then County may take such steps as may be necessary to restore functions to the affected drainage or travel way.
6. In the event tree preservation measures are not installed, damaged trees are not repaired, dead, dying or hazardous trees or branches within and adjacent to the development area are not removed, or replacement trees, if required, are not planted as specified on the approved plans, County may in like manner to 2 above enter to perform such work upon giving notice in writing to Developer or his superintendents of its intent so to do.
7. In the event County performs or programs work of any nature, including labor, use of equipment, and materials under the provisions of 2, 3, 4, 5 and 6 above, either by force account or contract, it shall use the sum deposited to pay for such work up to the amount on deposit. The developer shall be reimbursed when such sums are used.
8. In the event the sums are used by the County pursuant to this Agreement, Developer agrees to deposit within ten (10) days of such disbursement, an amount sufficient to restore the amount to its original balance.
9. It is expressly agreed by all parties hereto that it is the purpose and intent of this agreement to ensure the installation, maintenance, and performance of conservation measures provided for on approved plans or revisions thereof, and for the restoration of function of facilities for drainage of vehicular travel if such facilities are adversely affected in their function by sedimentation or erosion from the property the subject of such plans. This agreement shall not be deemed to create or affirm any liability of any party hereto for any damage alleged to result from or be caused by erosion or sedimentation.
10. It is expressly agreed by the parties hereto that in the event the sum is not distributed in accordance with 7 above, or paid to County as part of the cost of the completion of improvements required by ordinance and/or laws enacted, or paid to the County as satisfaction for infractions caused by failure of developer to pay required fees, it shall be released in writing by the County, through its agent, the Director of Environmental Management.

In witness of all of which, the parties hereto have caused this agreement to be executed on their behalf.

LEE LANDING DEVELOPMENT CORP.

7297-L Lee Highway
Falls Church, Virginia 22042
Address - Please Print

Barbara A. Messick
Barbara A. Messick

(Type Name)

Alan H. Silverstein
Alan H. Silverstein, President

(Type Name and Title)

Director of Planning

[Signature]

19 24/83
15573
10-15-83
44-1200733

[Signature]
By Attorney

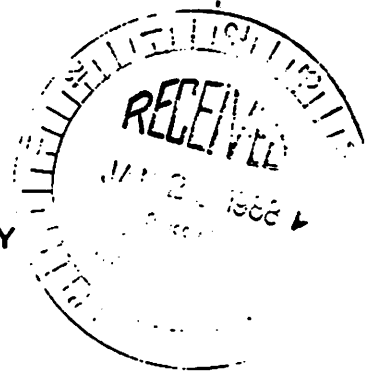
[Signature]
Chair

[Signature]
Deputy County Executive

11 P. C. 01

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY



BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA,

Plaintiff,

vs.

SENTRY INSURANCE, A
MUTUAL COMPANY, et al.,

Defendants.

At Law No. 82559

GROUND OF DEFENSE

Sentry Insurance A Mutual Company ("Sentry") responds to the motion for judgment as follows:

FIRST DEFENSE

The motion for judgment fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Plaintiff's claim is not covered by Sentry's bond.

THIRD DEFENSE

The damages sought by plaintiff are not covered by Sentry's bond.
bond.

FOURTH DEFENSE

Plaintiff has not complied with the terms and conditions of Sentry's bond.

FIFTH DEFENSE

Sentry's obligations under the bond have been discharged by the acts or omissions of the plaintiff.

SIXTH DEFENSE

Plaintiff's claim is barred by applicable statutes of limitations.

SEVENTH DEFENSE

Plaintiff's claim is barred by estoppel, waiver and/or laches.

EIGHTH DEFENSE

Plaintiff's claim is barred by the doctrines of accord and satisfaction.

NINTH DEFENSE

Plaintiff has not mitigated its damages.

TENTH DEFENSE

Sentry responds to the numbered paragraphs of the motion for judgment as follows:

1. Sentry admits the allegations of paragraph 1 of the motion for judgment.
2. Sentry lacks sufficient knowledge or information to admit or deny

the allegations of paragraph 2 of the motion for judgment and therefore denies those allegations.

3. Sentry admits the allegations of paragraph 3 of the motion for judgment.

4. Sentry repeats and incorporates by reference its responses to the allegations of paragraphs 1 through 3 of the motion for judgment.

5. Sentry admits that the agreement attached as exhibit A to the motion for judgment is authentic. The agreement speaks for itself. To the extent the allegations of paragraph 5 of the motion for judgment are inconsistent with the agreement, they are denied.

6. Sentry lacks sufficient knowledge or information to admit or deny the allegations of paragraph 6 of the motion for judgment and therefore denies those allegations.

7. Sentry denies the allegations of paragraph 7 of the motion for judgment.

8. Sentry repeats and incorporates by reference its responses to the allegations of paragraphs 1 through 3 of the motion for judgment.

9. Sentry admits that the bond attached as exhibit B to the motion for judgment is authentic. The bond speaks for itself. To the extent the allegations of paragraph 9 of the motion for judgment are inconsistent with the bond, they are denied.

10. Paragraph 10 of the motion for judgment states a legal conclusion which does not require a response. To the extent a response is required, the allegations of paragraph 10 of the motion for summary judgment are denied.

11. Paragraph 11 of the motion for judgment states a legal conclusion which does not require a response. To the extent a response is required,

the allegations of paragraph 11 of the motion for summary judgment are denied.

12. Sentry lacks sufficient knowledge or information to admit or deny the allegations of paragraph 12 of the motion for judgment and therefore denies those allegations.

13. Sentry admits that the letter attached a exhibit C to the motion for judgment is authentic. The letter speaks for itself. To the extent the allegations of paragraph 13 of the motion for judgment are inconsistent with the letter, they are denied.

14. Sentry admits the allegations of paragraph 14 of the motion for judgment.

15. Sentry lacks sufficient knowledge or information to admit or deny the allegations of paragraph 15 of the motion for judgment and therefore denies those allegations.

16. Sentry lacks sufficient knowledge or information to admit or deny the allegations of paragraph 16 of the motion for judgment and therefore denies those allegations.

17. Sentry denies the allegations of paragraph 17 of the motion for judgment.

18. Sentry denies the allegations of paragraph 18 of the motion for judgment.

19. Sentry denies the allegations of paragraph 19 of the motion for judgment.

20. Sentry repeats and incorporates by reference its responses to paragraphs 1 through 3 of the motion for judgment.

21. Exhibit D is not legible, and, as a result, Sentry cannot respond to the allegations of paragraph 21 of the motion for judgment. To the extent

a response is required, the allegations of paragraph 21 of the motion for judgment are denied.

22. Sentry lacks sufficient knowledge or information to admit or deny the allegations of paragraph 22 of the motion for judgment and therefore denies those allegations.

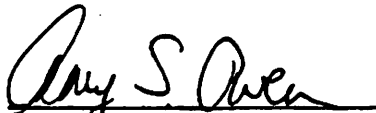
23. Sentry lacks sufficient knowledge or information to admit or deny the allegations of paragraph 23 of the motion for judgment and therefore denies those allegations.

24. Sentry denies the plaintiff is entitled to relief sought in any of the "wherefore" clauses which follow counts one, two and three of the motion for judgment.

25. Sentry denies each and every allegation which has not been specifically admitted.

WHEREFORE, Sentry requests that the motion for judgment be dismissed with prejudice and that it be awarded its fees, costs, expenses and such other relief as may be appropriate.

MILES & STOCKBRIDGE



F. Joseph Nealon
Amy S. Owen
Suite 500
1701 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 333-2350

Counsel for Insurance Company
of North America

CERTIFICATE OF SERVICE

I hereby certify that a copy of Sentry Insurance A Mutual Company's grounds of defense was mailed, postage prepaid, this 27th day of January, 1988 to Elizabeth A. Snyder, Assistant County Attorney, 4100 Chain Bridge Road, Fairfax, VA, 22030, counsel for plaintiff and to Robert J. Zelnick, Esq., 12610 Lake Ridge Drive, Woodbridge, VA, 22192, counsel for Lee Landing Development Corp.



Amy S. Owen

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA

Plaintiff

v.

LAW NO. 82559

SENTRY INSURANCE, A Mutual Company

and

LEE LANDING DEVELOPMENT CORP.

Defendants

ANSWER AND GROUNDS OF DEFENSE

COMES NOW defendant Lee Landing Development Corp., by counsel, and for its answer and grounds of defense to the Motion for Judgment filed against it states as follows:

1. The allegations contained in Paragraphs 1, 2 and 3 are admitted.

COUNT I

2. The allegations contained in Paragraph 4 are admitted.

3. With respect to the allegations contained in Paragraph 5, it is admitted that on or about September 30, 1983 Lee Landing entered into an Agreement with the Board, a copy of which was attached as Exhibit A to the Motion for Judgment. Said Agreement speaks for itself, and its terms need not be admitted or denied.

4. The allegations contained in Paragraphs 6 and 7 are denied.

COUNT II

5. The allegations contained in Paragraph 8 are admitted.

6. With respect to the allegations contained in Paragraph

9, it is admitted that on or about September 30, 1983 Lee Landing as principal and Sentry as surety executed and delivered a bond, a copy of which was attached as Exhibit B to the Motion for Judgment. The terms of said bond speak for themselves and need not be admitted or denied.

7. That Paragraphs 10 and 11 of the Motion for Judgment state a legal conclusion which does not require a response. To the extent that a response is required, said allegations are denied.

8. The allegations contained in Paragraph 12 are denied.

9. Lee Landing lacks sufficient knowledge to admit or deny the allegations contained in Paragraphs 13 and 14, and therefore denies same.

10. The allegations contained in Paragraph 15 are admitted.

11. The allegations contained in Paragraphs 16, 17, 18 and 19 are denied.

COUNT III

12. The allegations contained in Paragraph 20 are admitted.

13. With respect to the allegations contained in Paragraph 21, it is admitted that on or about September 30, 1983 Lee Landing entered into a Conservation Agreement with the Board, a copy of which was attached as Exhibit D to the Motion for Judgment. Said Agreement speaks for itself, and its terms need not be admitted or denied.

14. The allegations contained in Paragraphs 22 and 23 are denied.

GROUND'S OF DEFENSE

15. All allegations contained in the Motion for Judgment not specifically admitted are hereby denied.

16. Plaintiff has failed to comply with the terms and conditions of the September 30, 1983 Agreement, the bond and the Conservation Agreement.

17. Defendant's obligations have been discharged by the acts and/or omissions of the plaintiff.

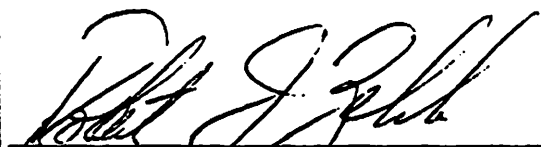
18. Plaintiff's claim is barred by the applicable statute of limitation.

19. Plaintiff's claim is barred by estoppel, waiver and/or laches.

20. Plaintiff's claim is barred by the doctrine of accord and satisfaction.

21. Plaintiff has failed to mitigate its damages, if any.

LEE LANDING DEVELOPMENT CORP.
By Counsel



ROBERT J. ZELNICK
Szabo, McCarthy, Quinto, Webb & Zelnick, P.C.
12610 Lake Ridge Drive
Woodbridge, VA 22192
Counsel for Defendant
Lee Landing Development Corp.

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of March, 1988 mailed, postage prepaid, a true copy of the foregoing Answer and Grounds of Defense to Elizabeth A. Snyder, Asst. County Attorney, 4100 Chain Bridge Road, Fairfax, VA 22030, Counsel for Plaintiff; and to F. Joseph Nealon, Counsel for Sentry Insurance, 1701 Pennsylvania Avenue, N.W., Ste 500, Washington, D.C. 20006.


ROBERT J. ZELNICK

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

**BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA,**

Plaintiff,

vs.

SENTRY INSURANCE, et al.

Defendants.

At Law No. 82559

**SENTRY INSURANCE'S MOTION FOR SUMMARY
JUDGMENT AND SUPPORTING MEMORANDUM
OF POINTS AND AUTHORITIES**

The Court should grant Sentry Insurance ("Sentry") summary judgment because the Board of Supervisors of Fairfax County failed to file suit within six months of Lee Landing Development Corporation's alleged default. The performance bond on which the County's suit is based specifically provides that suit must be filed within six months of the contractor's default (Exhibit A, paragraph 5 (C)). By letter dated March 6, 1987, Fairfax County advised Sentry that Lee Landing had defaulted on the Devonshire Townhouse project (Exhibit B). Fairfax County, however, did not file suit until December 24, 1987.^{1/} Fairfax County's Christmas Eve filing was too late.

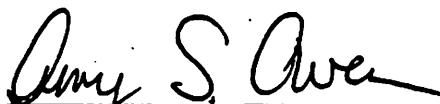
The performance bond is explicit. Suit must be filed within six months after the surety is notified of the contractor's alleged default. Virginia strictly enforces such conditions precedent; there is no need for the insurer

^{1/} Sentry was not served until some time after the filing.

to show any prejudice. See State Farm Mutual Automobile Insurance Company v. Porter, 272 S.E.2d 196, 199 (Va. 1980).

Fairfax County did not comply with the terms of the bond. Its suit against Sentry is time barred and should be summarily dismissed.

Respectfully submitted,

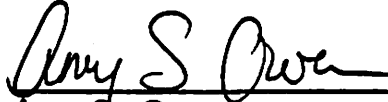
A handwritten signature in cursive script, reading "Amy S. Owen", written over a horizontal line.

F. Joseph Nealon
Amy S. Owen
Miles & Stockbridge
1701 Pennsylvania Avenue, N.W.
Suite 500
Washington, D.C. 20006
(202) 333-2350

Counsel for Sentry Insurance

CERTIFICATE OF SERVICE

I hereby certify that copies of Sentry Insurance's motion for summary judgment were hand-delivered this 30th day of November 1988 to Elizabeth A. Snyder, Esquire, Assistant County Attorney, 4100 Chain Bridge Road, Fairfax, Virginia, 22030, counsel for plaintiff, and to Robert J. Zelnick, Esq., 12610 Lake Ridge Drive, Woodbridge, Virginia 22192, counsel for Lee Landing Development Corporation.


Amy S. Owen

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

**BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA,**

Plaintiff,

vs.

SENTRY INSURANCE, et al.

Defendants.

At Law No. 82559

ORDER

Upon consideration of Sentry Insurance's motion for summary judgment, plaintiff's response thereto, and the record in this case, It is this 30th day of November, 1988 hereby

ORDERED that Sentry Insurance's motion is granted and that it is dismissed from this case.

U.S. District Judge

Alexandria, VA

Director, DEM

Exhibit

County Attorney

A

Director of Finance

PERFORMANCE BOND

(CORPORATE SURETY)

BOND NO.: 75-11975-04

DATE BOND EXECUTED:

9/30/83

PRINCIPAL(s):
(Legal name(s))

Lee Landing Development Corporation

CO-PRINCIPAL(s):
(Legal Name(s))

SUM OF BOND:

Million(s) Thousand(s) Hundred(s)

Five Hundred Seventy One Thousand and
00/100ths Dollars (\$571,000.00).

DATE OF AGREEMENT: 9/30/83

PLAN NAME: Thomas E. Cozzo's Addition to
Windsor Estates.

PLAN NO.:
3173-SP-01

SURETY(ies):
(Name(s))

KNOW ALL MEN BY THESE PRESENTS, that we, the Principal,
Co-principal(s), and Surety hereto recite and declare that:

1. We are held and firmly bound to the obligee Board of
Supervisors of Fairfax County, Virginia (hereinafter called
"County"), in the sum written above in lawful money of the
United States of America, to be paid to the County, its succes-
sors or assigns, for the payment whereof Principal(s), Co-prin-
cipal(s), and Surety(ies) bind themselves, their heirs, executors
administrators, successors, and assigns, jointly and severally,
firmly by this Bond.

2. The condition of this Bond is that if the Principal
shall in every respect perform all of its obligations under the
Agreement identified above, which Agreement is incorporated
herein by reference, then this Bond shall be void; otherwise,
the Bond shall continuously remain in full force and effect
until released by the County.

3. (A) It shall be the duty of the Principal to notify Surety of any revision to the plans, profiles, and specifications referred to in the Agreement. Except as otherwise provided herein, Surety expressly waives any right to receive notice from obligee or to review or approve any revisions to the plans, profiles and specifications referred to in the Agreement which are required to meet County or State standards. No such revisions of any kind in the work shall in any way affect the obligation of the Surety under this Bond; except that the Principal shall submit to the Surety for review and approval, and the Surety shall have the right to review and approve, any such revision which:

(1) adds additional subdivision lots to those shown in the original plat of subdivision, site plan or construction plan referred to in the Agreement;

(2) grants the Principal any extension of time beyond the period provided for in the Agreement for completion of its obligations under the Agreement;

(3) increases the cost of remaining construction and improvements required under the Agreement by more than ten percent of the original penal sum of the bond, as established by the estimate of Principal; provided, however, that the Surety shall be in all cases conclusively bound for purposes of this subparagraph by the estimate rendered by Principal to obligee as to the cost of any such revision. Where revisions are made without approval of Surety as required by this subparagraph 3(A)(3), Surety shall be released from any liability for such revision in excess of ten percent of the original penal sum of this bond; provided, however, that such revision without review and approval of Surety as required under this subparagraph 3(A)(3) shall not otherwise operate as a release or discharge of any obligation of Surety under this bond.

(B) The failure or refusal of obligee to take any action, proceeding, or step to enforce any remedy or exercise any right under the Agreement or the taking of any action, proceeding,

or step by obligee, acting in good faith upon the belief that same is permitted by the provisions of the Agreement shall not in any way release Principal or Surety, or either of them, or their respective executors, administrators, successors, or assigns, from liability under this Bond. Except as set forth herein, Surety hereby waives notice of any amendment, indulgence or forbearance, made, granted or permitted.

(C) The obligee, Principal, Co-principal, and Surety intend that each provision of this bond be valid and binding upon them, and expressly agree to abide thereby.

(D) In the event of a default (as defined in paragraph #4 of this Bond), the County may terminate whatever rights Principal, Co-principal and/or Surety may have to perform further work on the project.

4. (A) A default shall be deemed to have occurred on the part of the Principal if Principal shall fail to complete its obligations under the Agreement within the time set forth therein or any extensions thereof; or, prior to the expiration of such period, if in the judgment of the Director of the Department of Environmental Management, the Principal has:

(1) abandoned the performance of its obligations under the Agreement; or,

(2) renounced or repudiated its obligations under the Agreement; or,

(3) clearly demonstrated through insolvency, or otherwise, that its obligations under the Agreement cannot be completed within the time allotted under the Agreement.

(3) If Principal defaults in the performance of all or any part of the obligations specified in the Agreement, the Director, DEM, shall give written notice of the default to the Surety, with a copy to the Principal and Co-principal, if any. In the event of such default and notice, Surety shall within 45 days of receipt of the default notice, give written notice to the County stating whether it will assume the Agreement and

the obligations of the Principal; and should it elect to assume said obligations Surety shall be required to complete the Agreement according to its terms and provisions within 180 days of said notice, but not before expiration of the period provided for under the Agreement and approved extensions thereof. In the event that Surety elects to assume the obligations of Principal as provided herein and thereafter fails to faithfully perform all or any part of the work, or should it unnecessarily delay all or any part of the work, then the County may proceed as provided in paragraph #5 of this Bond.

5. Should Surety following notice of default notify the County that it elects not to assume the obligations of Principal under the Agreement; or fail within 45 days of receipt of the default notice as provided in paragraph #4 above to notify the County whether it elects to assume the obligations of Principal under the Agreement; or having elected to assume the obligations of Principal should it then fail to perform; then in either event the County may elect any of the following procedures or any combination thereof:

(A) terminate whatever rights Principal, Co-Principal and/or Surety may have to perform further work on the project;

(B) take over or relet all or any part of the work under the Agreement which is not completed and complete the same for the account and at the expense of the Principal and Surety, who shall be jointly and severally liable to the County for the costs incurred in completion and/or correction thereof. Such costs shall include maintenance and/or deterioration, but shall not include more than ten percent administrative and supervisory costs. The amount of obligee's actual costs for completion and/or correction of the work required under the Agreement shall be conclusive of the extent of the liability of Principal and Surety; provided, however, that Surety's liability shall in no case be greater than the penal sum of this Bond; or

(C) Within six months of default as defined in paragraph #4(A)), bring suit action or proceeding to enforce the provisions of this Bond; except that the County shall not be required to file suit, and the six months limitation shall be tolled, during the period in which Surety has elected to perform and is performing the obligations of Principal under Paragraph 4(B). In the event that any such suit, action, or proceeding is brought by the County, it is expressly agreed and understood that the damages recoverable in any such suit, action, or proceeding shall consist of and be limited to the cost of completion and/or correction of the work as required by the Agreement. Such costs shall include maintenance and/or deterioration but shall not include more than ten percent administrative and supervisory costs. Such costs shall be determined as of the earliest of the following three dates:

- .. 1) the date of completion and/or correction of the work as defined in the Agreement;
- 2) 13 months from the date suit is filed hereunder;
- 3) date of trial.

Provided, however, that should the County delay in filing suit beyond 6 months after the default, costs recoverable by the County hereunder shall nonetheless be determined as of a date not later than 24 months from the date of default; and that the liability of surety shall in no case be greater than the penal sum of this Bond.

6. Surety shall have the right, at any time within 45 days of the default notice provided for in 4(C) hereof, to demand that the Director, DEM, state a sum constituting the estimated costs, as of that time, of completion and/or correction of the work required under the Agreement, as such costs are defined in 5(C). Should it so elect, Surety may then pay over to the County the sum so stated and be released from any further obligations under this bond. Provided, however, that the Surety shall in no event be required to pay over any such

sum set by the Director, nor any other sum under this bond, prior to judgment in a suit hereunder. If funds are paid over under this section and the paid over funds are not sufficient to complete the work, the County's sole remedy shall be to proceed against the Principal and co-principal(s) for any deficiency. If there are any paid over funds not necessary for completion of the work, the County will return the excess, with legal interest, to Surety after completion of the work.

7. If any action or proceeding is initiated in connection with this Bond and any and all obligations arising hereunder, the venue thereof shall be the County of Fairfax, State of Virginia, and it is further understood and agreed that this contract shall be governed by the laws of the State of Virginia, both as to interpretation and performance.

8. All notices sent to the Principals, Co-principals and Surety shall be sent to the addresses set forth on the signature page unless said Principals, Co-principals and Surety notify the Director of DEM in writing of such change. If the addresses of any of the Principals, Co-principals or Surety change, the Principal, Co-principal or Surety shall immediately notify the Director of DEM in writing of such change. Failure to notify the Director of DEM of any change in address is deemed to be a waiver of any requirement for notice under this Bond to the Principals, Co-principals or Surety. All written notice to the County required under this Bond shall be sent certified mail and addressed to Director, DEM, with a copy to the Chief, Bonds & Permits Branch, DEM, provided, however, that any notice that may be required pursuant to Va. Code Ann. §49-25 shall be given to the above and the Chairman of the Board of Supervisors and the County Attorney.

9. If any one or more of the provisions of this Bond are determined to be illegal or unenforceable by a court of competent jurisdiction, all other provisions shall remain effective.

10. No party other than obligee shall have any rights under this Bond as against the Surety.

11. Approval of this Bond by the County shall be deemed acceptance without further notice to the Principal(s), Co-principal(s) and/or Surety(ies).

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be signed and sealed as of the day and year set forth above.

PRINCIPAL(S)

Type of Organization:

Corporation

Legal Name and Address:

Lee Landing Development Corporation
7297 Lee Highway

State of Incorporation:

Falls Church, Virginia 22042

Virginia

By: _____ (SEAL)
(Signature)

(Print or type name and title)

By: Alan H. Silverstein (SEAL)
(Signature)
Alan H. Silverstein
President

(Print or type name and title)

ACKNOWLEDGEMENT OF PRINCIPAL(S)

STATE OF VIRGINIA

COUNTY OF FAIRFAX

I, Barbara A. Messick a Notary Public in and for the State and County aforesaid, do hereby certify that
Alan H. Silverstein, President of Lee Landing Development Corp.

whose name is signed to the foregoing bond, this day personally appeared before me in my State and County aforesaid and acknowledged the same.

Given under my hand this 30th day of September, 1983

Barbara A. Messick

Notary Public

My commission expires March 15, 1986

CO-PRINCIPAL(S)

Type of Organization

Legal Name and Address

State of Incorporation

By _____ (seal)
(Signature)

(Print or type name and title)

By _____ (seal)
(Signature)

(Print or type name and title)

By _____ (seal)
(Signature)

(Print or type name and title)

ACKNOWLEDGEMENT OF CO-PRINCIPAL(S)

STATE OF _____

COUNTY OF _____

I, _____, a Notary Public in and for the State and County aforesaid, do hereby :

whose name is signed to the foregoing bond, this day personally appeared before me in my State and County and acknowledged the same.

Given under my hand this _____ day of _____, 19 _____

Notary Public

My commission expires: _____

CORPORATE SURETY

State of Incorporation:

Wisconsin

Legal Name and Address

Sentry Insurance a Mutual Company

Liability Limits

1800 North Point Drive

\$12,151,000.00

Stevens Point, Wisconsin 54481

Signatures

By Robert L. Howard
Attorney-in-Fact
Robert L. Howard
(Print or type name)

COUNTERSIGNED:

By Robert L. Howard
Virginia Resident Agent
Robert L. Howard
(Print or type name)

ACKNOWLEDGEMENT OF CORPORATE SEAL

STATE OF Virginia :

COUNTY OF Fairfax :

I, Linda Bond a Notary Public in and for the State and County aforesaid, do hereby certify
Robert L. Howard

Attorney-in-fact for the Sentry Insurance A Mutual Company

whose name IS signed to the foregoing bond, this day personally appeared before me in my State and County aforesaid
acknowledged the same.

Given under my hand this 30th day of September, 19 83

Linda Bond

Notary Public

My commission expires: March 27, 1984

In witness of which, the Board has caused this agreement to be executed on its
behalf, and its seal affixed:

BOARD OF SUPERVISORS OF FAIRFAX
COUNTY VIRGINIA

Seal: _____
Clerk of said Board

By _____
(Deputy) County Executive

STATE OF VIRGINIA
COUNTY OF FAIRFAX

This _____ day of _____, 19 _____, appeared before me in my State and County
aforesaid, _____ and _____
Deputy County Executive and Clerk of the said Board of Supervisors, respectively, and acknowledged their signatures and the
act of the said Board.

My Commission expires: _____
Notary Public

APPROVED AS TO FORM:

COUNTY ATTORNEY

SENTRY INSURANCE A MUTUAL COMPANY

STEVENS POINT, WISCONSIN

POWER OF ATTORNEY

Nº 84683

KNOW ALL MEN BY THESE PRESENTS:

That the SENTRY INSURANCE A MUTUAL COMPANY, a corporation of the State of Wisconsin, having its principal offices in the city of Stevens Point, Wisconsin, pursuant to authority granted by a resolution of its Board of Directors adopted May 7, 1970, which reads as follows:

The President, the Vice President, or the Treasurer of this Corporation shall have authority to appoint in writing such attorneys-in-fact as the business of the Corporation may require, and to authorize such attorneys-in-fact, and each of them to execute on behalf of the Corporation, any bonds, recognizances, stipulations, contracts of indemnity and other undertakings of like character, or to exercise any lesser number of said powers as hereinbefore set forth.

"Said appointments shall be attested by the Secretary or an Assistant Secretary of this Corporation under its seal. The signature of the Secretary or any Assistant Secretary to certified copies of such powers of attorney may be original or facsimile, and when the corporate seal is affixed thereto, any third party may rely on said certified copies of powers of attorney as the act and deed of this Corporation. The President, the Vice President, or Treasurer may revoke any appointment made pursuant hereto, and revoke any and all authority conferred by any such appointment;"

does hereby nominate, constitute and appoint

ROBERT L. HOWARD OF FAIRFAX, VIRGINIA

its true and lawful Attorney-in-Fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed.

ANY AND ALL BONDS OR UNDERTAKINGS WITHOUT LIMITATION

IN WITNESS WHEREOF, SENTRY INSURANCE A MUTUAL COMPANY of Stevens Point, Wisconsin, has caused these presents to be signed by its proper officer, and its corporate seal to be hereunto affixed this

.....2nd..... day ofFEBRUARY..... 19..83.....

SENTRY INSURANCE A MUTUAL COMPANY



H. F. Holtz
President
J. Maney
Secretary

STATE OF WISCONSIN, COUNTY OF PORTAGE - ss

On this2nd..... day ofFEBRUARY..... A.D., 19..83....., personally came before me H. F. Holtz and T. J. Maney, to me known to be the individuals and officers of the SENTRY INSURANCE A MUTUAL COMPANY of Stevens Point, Wisconsin, who executed the above instrument, and they each acknowledged the execution of the same, and being by me duly sworn, did severally depose and say: that they are the said officers of the corporation aforesaid and the seal affixed to the above instrument is the seal of the corporation, and that said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority of the Board of Directors of said corporation.



Lorraine R. Pzybylski
Notary Public
Commission Expires
Oct. 16, 1983

CERTIFICATE

I, the undersigned, secretary of the SENTRY INSURANCE A MUTUAL COMPANY of Stevens Point, Wisconsin, a Wisconsin corporation, DO HEREBY CERTIFY that the foregoing Power of Attorney remains in full force and has not been revoked, and furthermore that the provisions of the By-Laws of the company and the Resolutions of the Board of Directors set forth in the Power of Attorney, are still in force.

Signed and sealed at the City of STEVENS POINT this ...30th... day of ...September....., 19...83

(SEAL)

J. Maney
Secretary

88-2132A 2288-21

(Supplement to all bond forms. Submit in duplicate)

To EXPEDITE the processing of this bond, please TYPE or PRINT the following information, including the reverse side of this sheet, when applicable.

INDIVIDUAL	PRINCIPAL	CORPORATE	IF SET ASIDE LETTER	IF OF CREDIT	SURETY	INSURANCE COMPANY
NAME _____ TEL. _____						
ADDRESS _____ CITY _____ ZIP _____						
BUSINESS OR FIRM NAME <u>Lee Landing Development Corp.</u> TEL. <u>536-3702</u>						
INCORPORATED UNDER THE LAWS OF THE STATE OF <u>Virginia</u>						
ADDRESS <u>7297-L Lee Highway</u> CITY <u>Falls Church, VA</u> ZIP <u>22042</u>						
INDIVIDUAL SIGNING FOR PRINCIPAL <u>Alan H. Silverstein, President</u>						
IF NOT VIRGINIA CORPORATION, PLEASE COMPLETE THE FOLLOWING:						
VIRGINIA REGISTERED AGENT _____						
ADDRESS _____ CITY _____ ZIP _____						
LENDER _____ TEL. _____						
ADDRESS _____ CITY _____ ZIP _____						
BANK _____ TEL. _____						
ADDRESS _____ CITY _____ ZIP _____						
NAME OF INSURANCE COMPANY <u>Sentry Insurance A Mutual Company</u> TEL. <u>715 346-7204</u>						
ADDRESS <u>1800 North Point Drive, Stevens Point</u> CITY <u>Wisconsin,</u> ZIP <u>54481</u>						
ATTORNEY-IN-FACT <u>Robert L. Howard</u> TEL. <u>703 691-1505</u>						
ADDRESS <u>P.O. Box 1180 Fairfax,</u> CITY <u>Virginia</u> ZIP <u>22030</u>						
DEED BOOK <u>5768</u> PAGE <u>0334</u> (Recording of the Power of Attorney in the Fairfax County Land Records is mandatory if an insurance company is used as surety. Countersigning for the State of Virginia by a resident agent is required. The number assigned to this Bond is <u>75-11975-04</u> .)						

Person to be contacted is additional information is required.

NAME Richard Tomblin TEL. 536-3702
(Representative of the principal - NOT the surety)

COUNTY OF FAIRFAX
DIVISION OF DESIGN REVIEW
PERFORMANCE BOND ESTIMATE

West side Beulah Street
 South of Lewin Drive
 LOCATION

Lee
 DISTRICT

MAP REFERENCE

9	1	1	0	1	18, 20A
1	2	3	4	5	6
7	8	9			

Thomas E. Cozzo's Addition to Windsor Estates
 PLAN TITLE

3173-SP-01-2
 NUMBER

Accotink Creek

WATERSHED

Lower Potomac

SEWERAGE TREATMENT PLANT

CL. LIN FT.
 STREET

6.5 ACRES

64 LOTS-OUTS

17

MONTHS

TIME LIMIT

Springfield Associates, Inc.

ENGINEER OR SURVEYOR

Townhouses

TYPE OF PROJECT

237-9222

V.U.

2/7/83

PHONE

PREPARED BY

DATE

1 STORM DRAINAGE

						FOR COUNTY USE ONLY		
	ITEM	QUANTITY	UNIT	UNIT COST	TOTAL	QTY COMP		
DRAINAGE STRUCTURES	DI-3	6	Each	2060.00	12360.00			
	DI-4	2	Each	2290.00	4580.00			
	YI-1	1	Each	1600.00	1600.00			
	MI-2	2		2290.00	4580.00			
	12" Conc. Pipe	328	Lin.Ft.	46.00	15088.00			
	15" Conc. Pipe	315	Lin.Ft.	51.00	16065.00			
	24" Conc. Pipe	184	Lin.Ft.	69.00	12696.00			
	27" Conc. Pipe	149	Lin.Ft.	74.00	11026.00			
	18" Conc. Pipe	35	Lin.Ft.	57.00	1995.00			
	36" Conc. Pipe	25	Lin.Ft.	97.00	2425.00			
	42" Conc. Pipe	412	Lin.Ft.	109.00	44908.00			
	17" x 13" CMP	58	Lin.Ft.	20.80				
	15" CMP	24	Lin.Ft.	20.80	1289.60			
	Paved Ditch W=7.2'	115	Lin.Ft.	32.40	3726.00			
		15						
	Erosion Control Stone	180	Sq.Yds.	4.50	877.50			
	Sodded Swale	320	Sq.Yds.	4.00	1280.00			
	TKIN 18" Conc. Endwall	1	Each	1560.00	1560.00			
	42" Conc. Endwall	1	Each	2160.00	2160.00			
	12" Endwall	1	Each	560.00	560.00			
				50				
	36" Conc. Endsection	1	Each	1060.00	1060.00			

REET CONSTRUCTION

SCR COUNTY USE ONLY

ITEM	QUANTITY	UNIT	UNIT COST	TOTAL	CR COMP		
Clear & Grub	4.6	Acres	2060.00	9476.00			
Excavation	2100	Cu. Yds.	3.50	7350.00			
Embankment	19400	Cu. Yds.	5.00	97000.00			
Subbase	293	Cu. Yds.	20.50	6006.50			
6" A.B.	6150		4.20	25830.00			
Base Course 3" B-3	809	Sq. Yds.	6.00	4854.00			
1 1/2" S-5	6150		3.45	21217.50			
Bit. Conc. Surface 3" S-5	809	Sq. Yds.	4.60	3721.40			
Gravel Shoulders	53	Sq. Yds.	3.50	185.50			
Surface Treatment		Sq. Yds.					
Driveway Ent. Type DE-1	2	Each	570.00	1140.00			
Sidewalk	2122	Lin.Ft.	9.00	19098.00			
Header Curb CG--6R	1228	Lin.Ft.	11.00	13508.00			
Curb & Gutter CG-6	1889	Lin.Ft.	11.00	20779.00			
Street Signs	5	Each	61.00	305.00			
Roadside Delineators	13	Each	31.00	403.00			
Traffic Barricade		Each					
CG-10A	2	Each	2500.00	5000.00			

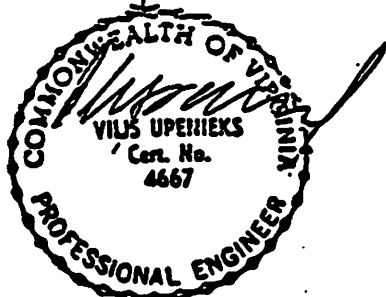
3. MISCELLANEOUS

Water Main	1664	Lin.Ft.	29.00	48256.00			
Fire Hydrants	3	Each	1490.00	4470.00			
Sanitary Sewer	1151	Lin.Ft.	34.00	39134.00			
Overlot Grading	66	Per Lot	150.00	9900.00			
Survey Pipes	132	Each	63.00	8316.00			
Screening	122	Per Tree	50.00	6100.00			
Recreational Facilities		Lump Sum					
As-Built	6.5	Lump Sum		4877.00			

SUBTOTAL 496763.00

PLUS 15% ENGRG. & MISC. 74514.45

(SEAL & SIGNATURE OF
SUBMITTING ENGINEER
OR SURVEYOR)



TOTAL 571,277.45

QUOTE 571,000

CONSERVATION ESCROW

ABSORBIST

SEDIMENTATION

TOTAL

QUOTE

PRO-RATA-SHARE

AMOUNT

51



COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX
4100 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

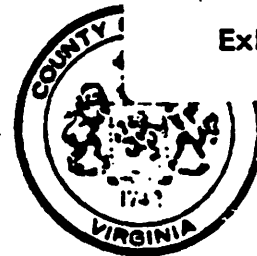


Exhibit
B

OFFICE OF THE COUNTY ATTORNEY

March 6, 1987

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Sentry Insurance, A Mutual Company
1800 North Point Drive
Stevens Point, Wisconsin 54481

Re: Devonshire Townhouses/aka Thomas Cozzo's
Addition to Windsor Estates - 3173-SP-01
Bond No. 75-11975-04


To Whom It May Concern:

On September 30, 1983, the Board of Supervisors of Fairfax County, Virginia, entered into an agreement with Lee Landing Development Corporation to build the physical improvements and facilities for the above referenced site plan within 30 months or by March 30, 1986. Sentry Insurance is surety on the bond in the amount of \$571,000.

Notice is hereby given to you, on behalf of the Director of the Department of Environmental Management, that Lee Landing Development Corporation has defaulted in the performance of the obligations specified in the agreement. Under the terms of the bond, you must notify the County within 45 days of receipt of this notice of your intention to assume the obligations of that agreement.

If I do not hear from you within the time period specified above, the appropriate legal measures will be taken to protect my client.

Sincerely,


Elizabeth A. Snyder
Assistant County Attorney

EAS/pr

cc: Henry Schenke, Chief, Bonds & Agreements
Department of Environmental Management
Alan H. Silverstein, President
Lee Landing Development Corp.

Ref. No.: 20389



Ref 20389

SENDER: Complete items 1, 2, 3 and 4. Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box (es) for service(s) requested.	
1. <input checked="" type="checkbox"/> Show to whom, date and address of delivery. 2. <input type="checkbox"/> Restricted Delivery.	
3. Article Addressed to: SENTRY INSURANCE 1800 NORTH POINT DRIVE STEVENS POINT WISCONSIN 54481	
4. Type of Service: <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Certified <input type="checkbox"/> Insured <input type="checkbox"/> COD <input type="checkbox"/> Express Mail	Article Number P317617252
Always obtain signature of addressee at agent and DATE DELIVERED	
5. Signature - Addressee X <i>Ken Waters</i>	
6. Signature - Agent X	
7. Date of Delivery	
8. Addressee's Address (ONLY if requested and fee paid)	

PS Form 3811, July 1983 447-045 NOVED SVE/ATTY XJ DOMESTIC RETURN RECEIPT

Ref 20389-985 CTY ATTY/EAS P.O. DEVONSHIRE

SENTRY INSURANCE	
1800 NORTH POINT DR	
STEVENS POINT WIS 54481	
Special Delivery Fee	
Restricted Delivery Fee	
Insurance Fee (Amount)	
In return and Value Delivered	
Within the United States in return	
for and Address of Delivery	
TOTAL (Postage and Insurance)	
Postmark of Post	

RECEIPT FOR CERTIFIED MAIL
P. 317 4.17 252
NOV 14 1983
U.S. MAIL
(See Reverse)

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

-----X

BOARD OF SUPERVISORS, : C O P Y

Plaintiff, :

versus, : AT LAW NO. 82559

SENTRY INSURANCE, et al, :

Defendants. :

-----X

Fairfax, Virginia

Wednesday, November 30, 1988

The above-entitled action came on to be heard
before the Honorable Michael P. McWeeny, a Judge for the
Circuit Court of Fairfax County, in Courtroom 4E, The
Jennings Judicial Center, Fairfax, Virginia 22030, beginning
at 11:25 o'clock a.m..

- - - - -

FINNEY & ASSOCIATES
Court Reporting Service
11417 Meath Drive
Fairfax, Virginia 22030
(703) 278-8923

APPEARANCES:**For the Plaintiff Board of Supervisors:**

ELIZABETH A. SNYDER, ESQUIRE
 ASSISTANT COUNTY ATTORNEY
 4100 Chain Bridge Road
 10th Floor
 Fairfax, Virginia 22030

For the Defendant Sentry Insurance:

F. JOSEPH NEALON, ESQUIRE
 AMY S. OWEN, ESQUIRE
 Miles & Stockbridge
 1701 Pennsylvania Avenue, N.W.
 Suite 500
 Washington, D.C. 20006

For the Defendant Lee Landing Development Corporation:

ROBERT J. ZELNICK, ESQUIRE
 Szabo, McCarthy, Quinto,
 Webb & Zelnick
 12610 Lake Ridge Drive
 Woodbridge, Virginia 22192

C O N T E N T S :**ARGUMENT OF COUNSEL****Page 3****E X H I B I T S :****NONE.**

FINNEY & ASSOCIATES
Court Reporting Service
 11417 Meath Drive
 Fairfax, Virginia 22030
 (703) 278-8923

P R O C E E D I N G S :

(The Court Reporter was sworn.)

THE COURT: Would this be the Board of Supervisors of Fairfax County versus Sentry Insurance and Lee Landing?

MS. SNYDER: Yes, Your Honor.

THE COURT: Now, I have been handed in Chambers one set of motions, which I frankly have not had a chance to look at; I have been reviewing the file. I understand that there are also pre-trial motions for the County.

MS. SNYDER: Well, there were some motions in the file; I have only one motion that I am going to be presenting this morning. It is a motion for default judgment.

THE COURT: Let me start then with the motion for default judgment, and then we will proceed in order. Preliminarily, is there going to be a request for a rule on witnesses?

MR. NEALON: Yes, Your Honor.

THE COURT: Anyone who is in the courtroom who may testify, you are asked to please wait outside; you will be called in by name at the appropriate time. Please do not discuss your testimony with anyone involved in the case.

MS. SNYDER: Your Honor, I would advise the Court that Mr. Henry Schenke of the Bonds and Agreements Branch of

1 the Department of Environmental Management is sitting at
2 counsel table as the Board's representative.

3 THE COURT: All right.

4 MS. SNYDER: Your Honor, this comes on my motion
5 for default judgment for failure of the defendant Lee
6 Landing Corporation to respond to discovery as ordered by the
7 Court.

8 I submitted to Lee Landing Corporation
9 interrogatories and request for production of documents.
10 They were not -- there was no timely response whatsoever. I
11 then had to proceed in Court to get the defendant to respond
12 within the time period that the motion was set.

13 I did receive what purported to be a response to
14 the interrogatories and request for production of documents.
15 I have handed the Court copies of the interrogatories and
16 request for production of documents that I submitted, and the
17 defendant Lee Landing's response.

18 When I went into Court, having deemed that these
19 responses were inadequate, I obtained the order of --
20 although it is not signed, I do have an endorsed order,
21 endorsed by all counsel that -- this was Judge Hancock, who
22 ruled that the defendant was required to produce answers to
23 the interrogatories and request for production by Wednesday,

1 November 23rd, at noon, given the fact that trial was within
2 a week.

3 What I received on Wednesday, the 23rd, at about
4 12:30, hand delivered to me, was a two-page document,
5 defendant Lee Landing's supplemental responses to
6 interrogatories and request for production of documents, and
7 a file box, which I have brought with me, full of all sorts
8 of unresponsive documents and a few documents that had
9 something to do with the case.

10 The kind of information that I requested in my
11 request for production of documents included as-built
12 drawings, copies of labor reports and records, copies of
13 equipment reports and records -- this, Your Honor, is a
14 construction contract case, basically -- progress reports,
15 progress photographs, design calculations, copies of
16 subcontracts, copies of all agreements for furnishing
17 equipment and material, copies of labor contracts, copies of
18 scheduling documentation, bid tabulations, payroll records --
19 I mean, I had a list of 26 items in my request for production
20 of documents, and what I got was this one-paragraph response,
21 basically saying, I've given you what records I have got, in
22 this box, very few of which were responsive to the request,
23 and says, additionally, that the other records are in dead

1 storage and can be provided in the future. The Court's order
2 was that the documents should be provided by noon of
3 Wednesday the 23rd; they were not.

4 Additionally, what purports to be a response to
5 interrogatories -- there are so many of these interrogatories
6 that this one-paragraph answer can't even possibly claim to
7 answer the interrogatories that were proposed. For instance,
8 interrogatory No. 11: Identify the personnel of the
9 developer who performed work on the project -- field
10 supervision, home supervisory office responsibility, persons
11 who performed site design, and as-built drawings on this
12 project. No information was provided about the -- the
13 interrogatories were not supplemented.

14 Interrogatory No. 12: Identify all contractors;
15 whether the contract was oral or written; the date of the
16 contract; the payment terms of the contract; the scope of
17 work. The initial response was an objection. This was in no
18 way supplemented by this one-paragraph response.

19 Interrogatories Nos. 13 and 14 regarding their
20 policy with respect to documents. They say, well, we have no
21 formal policy with regard to these documents; we cannot --
22 and then, in interrogatory No. 15, they say they cannot
23 specifically identify the missing documents at this time.

1 They made no attempt to supplement that response.

2 Interrogatory No. 15: Did you employ engineers,
3 consultants, testing, laboratory experts, or other experts to
4 examine the job during the course of construction? The
5 objection was that it was -- and, incidently, as I mentioned,
6 these responses were filed late in the first place, but the
7 answer they said was an objection that it was overly broad
8 and burdensome. The Judge ordered them to answer that; it
9 has not been answered.

10 The interrogatory No. 16 regarding legal actions
11 that Lee Landing Corporation has been involved in. The
12 statement of Lee Landing was that it was overly broad. There
13 was no supplemental response to that interrogatory.

14 Interrogatory No. 17 was a request for information
15 regarding dates and locations of meetings held regarding this
16 work. That interrogatory was answered as being overly broad
17 and burdensome. There was no supplemental answer to that
18 interrogatory.

19 Interrogatory No. 18 asks for the identity of
20 persons who visited the site. Again, an objection that it
21 was overly broad, and no supplement to that in accordance
22 with the Court's order.

23 Interrogatory No. 19: Whether you indicated any

1 uncertainty or reservations to any person regarding the site,
2 site conditions, specifications, drawings, or other matters.
3 Again, the response, overly broad. No response in the
4 supplemental response in accordance with the Court's order.

5 I think the behavior of Lee Landing is flying right
6 in the face of the Court's order, and that Lee Landing should
7 not be permitted to defend this case, and the default
8 judgment should be entered against it for its failure to
9 comply with the Court's order.

10 THE COURT: Mr. Zelnick.

11 MR. ZELNICK: Thank you, Your Honor. If I can loop
12 back, Your Honor, it is important. The suit was filed by
13 the County in December, I believe, of last year. No
14 discovery at all was filed by the County until -- September
15 28th is the date of mailing of the interrogatories. Now,
16 it's true we were late in responding, but we are only
17 talking about a period of about two weeks, and we are not
18 talking about any significant type of delay in response to
19 this.

20 The County basically sat back for ten months before
21 they bothered to file any discovery whatsoever. I think the
22 Court can see the requests that were filed are pretty well
23 boilerplate type of discovery. We objected to most of that;

1 we argued before Judge Hancock; he ruled against me. That is
2 clearly the Court's ruling.

3 What is important, Your Honor, in this case, and
4 as the County knows, and has known for a while, is Lee
5 Landing Development is basically defunct. They have not been
6 in operation for quite some time. This project goes back and
7 starts in 1983, when the Court -- in approximately the last
8 two years, there has been no work at all done; the
9 corporation has not operated. The files were put away and
10 they are in dead storage, as we indicated in the supplemental
11 response.

12 Rule 4:8 provides that the party to whom discovery
13 interrogatories are propounded has an option to produce the
14 business records. If I can read briefly, it says: "Where
15 the answer to the interrogatory may be derived or ascertained
16 from the business records of the party upon whom the
17 interrogatory has been served, or from examination or the
18 inspection of such business records, etcetera, and the burden
19 of deriving or ascertaining the answer is substantially the
20 same for the party serving the interrogatory as for the party
21 served, it is a sufficient answer to such interrogatory to
22 specify the records from which the answer may be derived or
23 ascertained, and to afford the party serving the

1 interrogatory reasonable opportunity to examine, audit, or
2 inspect." Your Honor, that is exactly what we have done in
3 response to Judge Hancock's ruling that we had to provide
4 answers.

5 We answered exactly as the rules provide, and, as a
6 matter of fact, I tried to make arrangements with Ms. Snyder
7 to have her come and look at the records. The day before, on
8 Tuesday -- we argued the motion on Friday; Judge Hancock said
9 we had to produce the responses by Wednesday at noon. On
10 Tuesday I spoke to Ms. Snyder and indicated to her that the
11 records were in storage and arrangements could be made. I
12 then got some times and dates from my client in order to
13 have her come in and inspect them. That's what the rules
14 allow.

15 They are there -- every single one of the questions
16 can be ascertained -- the answer can be ascertained by
17 examining the records. She has also taken, by the way, the
18 deposition the other day of Mr. Strothman who was the
19 operations manager of Lee Landing and in charge of the
20 day-to-day operations. Anything else that she needs to know,
21 and it was a fairly thorough deposition -- anything else is
22 obvious, simply from looking at the request, that these are
23 information that is contained in business records. To the

1 extent those records still exist, they were available, and
2 they were offered to Ms. Snyder for examination. On Tuesday
3 afternoon, after our initial conversation, when I told her
4 that they would be available, I left two messages in her
5 office Tuesday to get back to me; she did not do that.

6 On Wednesday morning, the day before Thanksgiving,
7 I had delivered to me a motion setting down this past Monday
8 a hearing on another matter, which she apparently is not
9 bringing before the Court today. But in response to that,
10 and also because of the matter of these responses, I called
11 her office three times on Wednesday morning and left
12 messages to please call me that day. She never returned any
13 of those calls. I know, from talking to my co-counsel, that
14 she apparently was in the office on Wednesday. When the
15 answers and the box of documents that were available were
16 delivered to her office at approximately 12:30 that day, she
17 was in the office. She did not return any of those phone
18 calls.

19 The answer clearly states that the defendant has
20 made diligent search, the records are available, and the
21 remaining records are located in dead storage and can be
22 examined and copied at a mutually agreed upon time.

23 We made every effort to contact her to let her come

1 -- to go to the storage facility and examine the records.
2 We are talking about numerous boxes. I would be the first to
3 admit, Your Honor, that they are not very well separated or
4 designated or anything else, but she did not make the
5 slightest effort to go and examine them. We had them
6 available; they could have been available at any time; she
7 never even got back in contact or response.

8 I think that we have answered fully in accordance
9 with what the rules require. The rules say if it is equally
10 burdensome, then, if we can make them available, she has the
11 burden of going ahead and examining them. That is what we
12 have done. We made them available, we said they were
13 available, and she had the option to come out and examine
14 them at any time.

15 She didn't even go out there and then complain that
16 they were in such disarray that they couldn't be useful --
17 any useful information could be obtained. I haven't seen
18 them personally, but that's what my client advises me, that
19 they are not in very good shape. Maybe she would have found
20 what she was looking for; I don't know.

21 But I would submit, Your Honor, that under the
22 facts of this case, where they waited -- and she knew -- I
23 think it is important that the County recognized that Lee

1 Landing was defunct; that waiting until pretty much the
2 eleventh hour to file any discovery at all, and then
3 expecting them to put together all of the records and the
4 answers, and deliver it to her in a nice package just is not
5 acting in good faith and is not feasible, and simply is not
6 required.

7 THE COURT: Mr. Zelnick, what about the answers to
8 interrogatories?

9 MR. ZELNICK: Well, that's what I'm saying, Your
10 Honor. Rule 4:8 says that if the answers to the
11 interrogatories can be derived from business records and it
12 is equally burdensome, then, if we produce the records, or we
13 make them available -- it doesn't even say produce them -- it
14 says: "If the burden of deriving or ascertaining the answer
15 is substantially the same for the party serving the
16 interrogatory as for the party served, it is sufficient
17 answer to specify the records from which the answer may be
18 derived and to afford the party serving the interrogatory
19 the reasonable opportunity to examine, audit, or inspect, and
20 make copies, etcetera." That is what we did.

21 THE COURT: I don't have a copy of your response.
22 I was given the original interrogatories, and I was also
23 given --

1 MR. ZELNICK: I thought it was all part of the
2 package.

3 THE COURT: Let me just keep looking; maybe it is
4 down here. I'm sorry; I do have it.

5 MR. ZELNICK: The interrogatories she is talking
6 about, except for -- No. 13, she asks since 1980 state the
7 policy with respect to the retention of documents. We say,
8 no formal policy existed; there just wasn't a policy. But
9 all the other ones -- they say identify the contractors, in
10 No. 12, who did any work. No. 11, identify the personnel who
11 did any work. The only person who really matters is Mr.
12 Strothman, and his deposition was taken.

13 Most of this -- I realize this Court cannot go back
14 and rehear the motion or the objections that I raised before
15 Judge Hancock, but I think certainly the Court can take into
16 account, in ruling on a motion for a default, as to how
17 relevant any of these answers are and how relevant these
18 documents are. This is a case for the completion bond.

19 Your Honor, I can proffer we are not going to be
20 submitting any documents; she hasn't been sandbagged. We
21 don't have any documents to submit. So this isn't a case
22 where I have been holding back something and then I'm going
23 to try to introduce it at trial. If the Court wants to rule

1 I can't introduce anything, that's fine; but I will state
2 right now, for the record, we do not have any documents to
3 tender, other than the ones that the plaintiff is submitting
4 on their own.

5 No. 14 asks to identify the documents relating to
6 the project that are known to be missing, and we told them
7 right in our first answer -- in No. 14: Lee Landing is
8 defunct and has not actively operated for two years. The
9 corporate offices were moved; various documents are missing;
10 they cannot be identified. So we can't give a list.

11 You are talking about a project of a 64-townhouse
12 project, and she is asking for every single piece of paper
13 that ever affected that project, every subcontractor, every
14 supplier, every laborer who ever worked there. She wants to
15 see every one of those pieces of paper, and, again, I
16 objected to that; the Court said we have to provide that. We
17 called her and said they are available; we made them, in
18 accordance with the rules, available for her inspection. She
19 had the opportunity to come down and do it. She wouldn't
20 respond to the phone calls; she never made an effort.

21 Everything they asked for, Your Honor, is derived
22 from business records. Mr. Strothman had information
23 concerning day-to-day management. He was deposed; he

1 answered all questions fully. There were no objections. He
2 did not refuse to answer any of the questions that were posed
3 to him in his deposition. Anything else is simply a matter
4 of getting the information that exists in the business
5 records.

6 They want the dates of meetings; they want -- all
7 of the questions concerning who did the work, etcetera; that
8 is something nobody knows off the top of their head. That is
9 something that exists in the records. The only way you are
10 going to know if the work was done and who did the work, and
11 when it was performed, and how much it cost, is to go back
12 and look through your contracts and look through your
13 invoices, and look through your records to see what work was
14 performed. The County had the -- I don't want to beat a dead
15 horse, but they had the opportunity to review it; they had
16 the opportunity to see it as well as my client, and I would
17 submit, Your Honor, they have not proffered any reason or
18 suggested any reason why it would be more difficult for them
19 to do it than it would be for us.

20 And Rule 4:8 is not just the request for
21 production, Rule 4:8 specifically says that is a sufficient
22 response to an interrogatory, and I think we have done that.
23 I think a default would be a sanction that is completely out

1 of proportion to any violation that may have existed.

2 Your Honor, really the only violation we are
3 talking about here is that we were two weeks late in
4 providing the initial answers, and for the County to have
5 waited ten months before they filed anything, in a case that
6 they knew to be fairly complex, and the Court file reflects
7 when the suit was filed, and their own interrogatories
8 reflect when the interrogatories were filed -- for them to
9 have waited that period of time, knowing the trial date was
10 set back in February, I believe -- the term day -- February
11 or March -- for them to have all that time and to have done
12 nothing, and then waited until the last second, and then
13 basically say that default should be entered because we
14 cannot, in the brief period of time that is then available,
15 put together a package and deliver it to them -- and we say
16 here are the records. We gave them everything we had
17 available. They could have examined the rest. I don't see
18 any reason that a default would be appropriate under these
19 circumstances. Thank you.

20 THE COURT: You have the right to close.

21 MS. SNYDER: Your Honor, what Mr. Zelnick is saying
22 is that he apparently has someplace where there are numerous
23 boxes full of documents. If that is what his purported

1 response to the interrogatories and the request for
2 production of documents is, I would suggest to the Court that
3 that is inadequate.

4 The Rule states that you are supposed to state with
5 reasonable specificity what documents are available, and, if
6 he is just going to throw me in a warehouse full of boxes, I
7 don't think that is an adequate response.

8 In addition, the Court's order was that he should
9 provide these documents by noon of Wednesday; he did not do
10 so. In his answer he says, and we can provide these things
11 at a later date. As I advised him on Tuesday -- I said,
12 well, you've got to respond to the Court's order by
13 Wednesday. They apparently chose not to do that, but to give
14 me some rather unresponsive -- very unresponsive documents,
15 documents which included information far beyond the scope of
16 what I asked for. He claims that I asked for information
17 about everything that ever happened on the project, and that
18 is absolutely not true, as you can see from the
19 interrogatories and the request for production of documents.

20 He gave me information about kitchen counter tops,
21 kitchen appliances, carpet colors, things that absolutely
22 have nothing to do with this lawsuit. I did not get the sort
23 of information that I'm entitled to.

1 Additionally, from the deposition of Mr. Strothman,
2 it was apparent that the information was available to Mr.
3 Zelnick as to who the contractors were, as I was able to get
4 some of that information from Mr. Strothman. If he had sat
5 down with his client, he certainly could have provided the
6 information that was sought in the interrogatories without
7 any difficulty, and, yet, I had to drag him into Court to get
8 an order to compel, and still he did not respond.

9 He had over two months to respond to this document
10 request. The Rules provide that he is supposed to do it in
11 21 days; the Court recognized that, and ordered that he
12 provide them within a period of time -- Wednesday, which he
13 did not do.

14 Additionally, I was out of the office Wednesday
15 afternoon after the useless box of documents was delivered.
16 I attempted to contact him Wednesday evening; there was no
17 one in the office. I attempted to contact them Friday; there
18 was no one in the office. So there has been no response to
19 this.

20 Mr. Zelnick also says, well, there is no prejudice,
21 because I'm not going to introduce any documents. Well,
22 maybe he's not prejudiced, but I may well be prejudiced
23 because what about the documents that may be there that I

1 might have found to have been damaging to his case; what
2 about those documents? I don't know where they are or
3 whether they exist, but I haven't been afforded the
4 opportunity to examine them.

5 So, therefore, I would say that it is certainly
6 appropriate and that Mr. Zelnick has not complied with the
7 Court's ruling, and that there is, indeed, prejudice to the
8 County, and that the appropriate remedy is entry of a default
9 judgment.

10 THE COURT: Ms. Snyder, am I correct, as I review
11 the file, it appears to me that we are in three counts --

12 MS. SNYDER: Yes, Your Honor.

13 THE COURT: -- and one is that Lee failed to
14 perform under its agreement to timely complete the terms of
15 the first agreement, the September 30th, '83 agreement. The
16 second is the bond count, and the third being the
17 conservation agreement account, which, quite honestly, I
18 could not read the conservation agreement that is attached,
19 so I don't know what it says, but there is a \$20,000 damage
20 claim on that.

21 How is the issue of what happened with their
22 subcontractors going to affect whether they did or did not
23 complete the agreement?

1 MS. SNYDER: Well, Your Honor, it is hard to say
2 without looking at the documents. However, in being able to
3 look at those documents, I could have perhaps contacted the
4 contractors. The work may have been done defectively in the
5 first place; there may have been all sorts of difficulties
6 with payment.

7 I did get some information that there were some
8 mechanic's liens problems on the property not related to the
9 bonded improvements, but there may have been additional
10 problems with the bonded improvements for all I know.

11 It's just almost not possible for me to say, except
12 that through examining those documents, knowing who those
13 contractors are, I may have been able to use them as
14 witnesses. And, without that information, there was no way
15 that I could do that.

16 THE COURT: Am I oversimplifying the case? It
17 seems to me that what you have pled is they were supposed to
18 do A, B, and C within 30 months, and they didn't do A, B, and
19 C within 30 months; isn't that pretty much count one?

20 MS. SNYDER: Basically, Your Honor, yes.

21 THE COURT: I'm going to review what has been
22 filed.

23 (The Court reviewed the documents.)

1 THE COURT: Mr. Zelnick, in terms of approaching
2 your affirmative defenses, I'm trying to recall from my quick
3 review, is there an affirmative defense that has been raised
4 as to the County's actions?

5 MR. ZELNICK: Your Honor, basically, our defense in
6 this case is going to revolve around the fact that we
7 complied or offered to comply with the terms of the approved
8 plans that were submitted and approved by the County, and
9 that the work that has not been done was either not required
10 by the plans, or any claim for deterioration would not be a
11 valid claim, that it would be somewhat like a theory of
12 estoppel, because the County delayed getting the final
13 approval of this by unreasonably refusing to accept the
14 offers that were made and the proffer of completion that
15 would have been in accordance with the plan. Those would
16 really be the only type of affirmative defenses we would be
17 submitting. The Court can look at the request for
18 production, specifically, where she complains that we gave
19 her useless documents. She asked for every --

20 THE COURT: Mr. Zelnick, you have already argued
21 that.

22 MR. ZELNICK: I'm sorry, Your Honor. I think the
23 Court can see, simply based on that, that we have provided

1 what we could, and that most of it, as the Court can see from
2 examination of the pleadings, has nothing to do with what
3 this case is about.

4 THE COURT: Well, as I see it at this point, I
5 don't feel that you are in compliance with the order of the
6 Court, but I don't feel that default is the appropriate
7 remedy; that motion is denied.

8 MS. SNYDER: Will the Court impose any other
9 sanctions on the defendant?

10 THE COURT: What other sanctions are being
11 requested? At this point I only had a single sanction
12 request.

13 MS. SNYDER: Well, I indicated such other and
14 further relief.

15 THE COURT: You see, the formal motion is not
16 before the Court. I have everything except for that, unless
17 it was attached in what was handed to me in chambers. I do
18 not have the motion. I have the motion to compel and I have
19 the documents that were submitted, but I don't have the
20 motion.

21 THE CLERK: Here's the motion, Your Honor.

22 THE COURT: Thank you. That was not in the file.

23 MS. SNYDER: I think it would be appropriate to

1 exclude Lee Landing from defending the case.

2 THE COURT: Well, that constitutes the default.

3 MS. SNYDER: Certainly for attorney's fees for
4 bringing this motion, Your Honor.

5 THE COURT: I will take that issue under advisement
6 until we conclude the case. I am not excluding it, because I
7 do find that there is a failure to comply with the order of
8 the Court, but I will reserve the issue of what sanction
9 would be appropriate in terms of attorney's fees, etcetera.

10 MR. ZELNICK: Will I be able to argue that later,
11 Your Honor?

12 THE COURT: Yes, sir.

13 Having ruled on that matter, I believe the next
14 matter up would be the Sentry Insurance motion for summary
15 judgment.

16 MR. NEALON: Yes, Your Honor, may I proceed?

17 THE COURT: Yes, sir.

18 MR. NEALON: Your Honor, for the record, my name is
19 Joseph Nealon, and with me is Amy Owen, and we'll be
20 representing Sentry in this matter.

21 Your Honor, as you can see, the motion is a very
22 simple motion. It indicates that the County did not file
23 suit within six months as required under the bond.

1 Under the bond, the County has a number of options.
2 It can complete the project and then sue for the actual cost
3 of completion, or it can choose to bring suit for the
4 reasonable cost of completion; it may not complete the
5 improvements itself at that point in time.

6 If it chooses that latter option under the bond, it
7 has to file suit within six months of the contractor's
8 default. As we have pointed out in our motion, Your Honor,
9 we were provided notice of the contractor's alleged default
10 no later than March 6, 1987, by a letter of that date sent
11 registered mail from Ms. Snyder. And a suit was not filed
12 until Christmas Eve, December the 24th, 1987. So the Court
13 can see the suit was not filed within six months.

14 The County has elected to proceed under 5C. It was
15 required to file suit within six months; it did not do so.
16 Accordingly, the case against Sentry should be dismissed.

17 Your Honor, there's a real simple reason why that
18 provision is in the bond -- it's the County's own bond form.
19 If the County is going to proceed and file suit and ask for
20 the reasonable cost of completion, obviously the surety
21 wants the suit brought within a reasonable period of time;
22 otherwise, the County could delay it forever.

23 The County has the option: They can complete the

1 improvements, and then file suit, and there is no time
2 limitation. But they haven't done that in this case. They
3 haven't completed one improvement they're asking for. They
4 have chosen to file under 5C; they're bound by 5C; they
5 didn't file suit within six months. The case should be
6 dismissed against Sentry. Thank you, Your Honor.

7 THE COURT: Response, please.

8 MS. SNYDER: Your Honor, I think it is important to
9 look not so much at what Sentry states in its motion, but at
10 the bond language itself. I would point Your Honor to --
11 they've got it as Exhibit A, initially page 4, paragraph No.
12 5 -- I'm trying to point the Court to the right line -- the
13 eighth line of that paragraph. This says: "In the event of
14 default, the County may elect any of these following
15 procedures." And then it goes on and we have A: we may
16 terminate the principal or the co-principal or the surety to
17 perform work on the project; we can take over or re-let the
18 work.

19 And the paragraph that Mr. Nealon is talking about
20 is paragraph C, which is on page 5. And I would really ask
21 the Court to read that language very carefully, because what
22 Mr. Nealon attempts to say that it means is not what the
23 contract language says. The six-month period is certainly

1 not a time limitation or a statute of limitation -- a
2 contractual statute of limitation in this contract. It
3 says, in paragraph C: "Within six months of default, as
4 defined in paragraph 4A, the County may bring suit, action or
5 proceeding to enforce the provisions of this bond" -- and
6 note this, Your Honor -- "except that the County shall not be
7 required to file suit." And, then, going down, there is the
8 next area where it says, and it specifically says in language
9 -- contemplates that the County is not required to file suit
10 within the six-month period, because it says: " -- provided
11 however that should the County delay in filing suit beyond
12 six months after the default."

13 So, clearly, it's not a contractual statute of
14 limitations. Clearly, the contract contemplates that the
15 County may well delay beyond six months before filing suit,
16 and, therefore, I think that the motion is not well based.

17 Additionally, I did want to point out to the Court
18 that Sentry did not respond within the time period which was
19 specified in the agreement. They didn't respond within 45
20 days.

21 They did finally make a response, which I can show
22 to the Court, on July 15th, at which point, basically, they
23 said: "As the contractor is willing to negotiate, and is

1 doing so, we feel that we should not be involved at this
2 time." So, what they were saying is, well, things seem to
3 be going along all right, so we're not going to take any
4 particular action at this time; we're not saying yea or nay;
5 that we should continue to deal with the contractor. And
6 they regarded, apparently, the contractor's negotiations as
7 good as Sentry's performance. And I would submit that
8 letter to the Court.

9 THE COURT: Mr. Nealon?

10 MR. NEALON: Your Honor, I'll be brief, since we
11 are running late this morning. Your Honor, I would suggest
12 the Court also read the letter, which is Exhibit B, attached
13 to the motion. It's the letter from Ms. Snyder, which
14 indicates that if we didn't respond with 45 days, the County
15 would proceed with its legal options.

16 She has not denied that the County is proceeding
17 under 5C. She reads only portions of the language to the
18 Court. I don't see how she contends it's not a time
19 limitation, because the full sentence reads: "Within six
20 months of default, as defined in paragraph 4A, brings suit,
21 action, or proceeding to enforce the provisions of this bond,
22 except that the County shall not be required to file suit,
23 and the six-month limitation shall not be tolled during the

1 period in which the surety has elected to perform, and is
2 performing the obligations of the principal under paragraph
3 4B."

4 We didn't elect to perform at all. And it's clear
5 in the language, and this is the County's bond form, that
6 that is a time limitation; that only if we elect to perform
7 is the period not tolled. We didn't perform. It's a simple
8 question of mathematics.

9 She gave us notice on March 6, 1987. She has not
10 denied she is proceeding under this section, and she didn't
11 file suit within six months of this section. We believe the
12 language is clear. If there is any ambiguity, it would have
13 to be construed against the County, since it is their form.
14 She should have filed suit within that six months. They
15 didn't do so. We believe we should be dismissed from the
16 case, Your Honor. Thank you.

17 THE COURT: Let me review it.

18 (The Court reviewed the documents.)

19 THE COURT: Mr. Nealon, would you concur that the
20 letter of July 13, 1987, submitted by the County in response
21 to your motion is not an election not to assume the
22 obligation of the principal?

23 MR. NEALON: I haven't seen the letter, Your Honor.

1 She didn't show it to me.

2 THE COURT: I'm sorry; would you approach and take
3 a look at it?

4 MR. NEALON: Thank you.

5 (Mr. Nealon reviewed the document.)

6 THE COURT: That being the response to the surety.

7 MR. NEALON: Yes, Your Honor, we were electing not
8 to proceed. We were not going to take up the obligations.

9 THE COURT: So that is your interpretation of the
10 letter?

11 MR. NEALON: Yes, Your Honor, the fact, and I
12 don't think the County will dispute it, is Sentry didn't go
13 out there to assume any of the work which the County said
14 had not been completed.

15 This case is -- everyone says it's complicated, but
16 it comes down to the County wants a six-foot brick wall
17 built that's not shown on the plans and specifications; the
18 County wants over 400 trees planted, although the plans --
19 and it's specified by number -- show 142 trees. Well, we
20 weren't going to do those things. We believe Lee Landing was
21 well within its rights. So we were --

22 THE COURT: Well, I'm not into the aspects of who
23 struck John in that. I'm trying to make a determination, at

1 this point, as to what your letter or Sentry's letter of July
2 13 stand is. Let me read it again.

3 (The Court reviewed the document.)

4 MR. NEALON: You Honor, if I may just make -- when
5 you're through reading -- two other points, and I'll sit
6 down.

7 THE COURT: I'm not quite ready for you.

8 MR. NEALON: Okay.

9 THE COURT: Now, Mr. Nealon, you said you had two
10 other points to make?

11 MR. NEALON: Just briefly, Your Honor, as Ms.
12 Snyder indicated, that no response was provided by Sentry
13 within 45 days, and paragraph 5 of the introduction
14 specifically states that if no response is provided, then the
15 County can proceed with one of these options, and Ms. Snyder
16 has indicated the County did proceed with 5C.

17 Secondly, Your Honor, we've cited a case in our
18 brief motion. The law in Virginia is clear: we don't have
19 to show any prejudice; if there is a time limitation as a
20 condition precedent, then it must be strictly enforced by the
21 Court. And that's what we have in this instance, Your Honor.

22 It's not our fault the County didn't file within
23 six months; they certainly had the opportunity to do so. We

1 believe the case law in Virginia is clear. Any ambiguity
2 that the Court finds in the terms of the bond should be
3 construed against the County, and, therefore, we ask for the
4 entry of summary judgment. Thank you.

5 THE COURT: Ms. Snyder, some new matters were
6 raised in that argument. Did you wish to respond?

7 MS. SNYDER: It seems to me I would have a hard
8 time representing this to the Court without checking through
9 my files, but it is my recollection that there were at least
10 some oral responses from Sentry, if not a written response.
11 And I couldn't say at what time period, that is, without
12 having a -- going through my file. If the Court would give
13 me a brief opportunity to look?

14 THE COURT: I will put it in these terms: I have
15 read all of paragraph 5 now twice. I find an ambiguity
16 between 5C, the first paragraph, and 5C, the paragraph, or at
17 least the portion after the numbered indentations starting
18 with "provided however." But I find there is a six-month
19 limitation with specific basis by which it can be tolled.

20 So I am going to take a recess, and let you look
21 through your files, and see if there is anything by which the
22 actions of Sentry have delayed the filing of suit. Because
23 the ambiguity, this being the County's bond form, would have

1 to be interpreted against it, and a limitation phrase -- the
2 six-month limitation is not ambiguous. It is clear what
3 that is supposed to be. And the reference to tolling makes
4 it clear that it's supposed to be deemed as a statute of
5 limitations contractually. So let me give you a few minutes
6 to look through your files, and see whether there is
7 something further to respond.

8 The Court will be in recess.

9 (Brief recess)

10 THE COURT: Ms. Snyder?

11 MS. SNYDER: Your Honor, I need some additional
12 time to refer to my file, and to consult with my office.

13 THE COURT: How much time are you going to need?

14 MS. SNYDER: If you can give me 30 minutes, Your
15 Honor.

16 THE COURT: Which brings us to 1:00 o'clock, which
17 will be the lunch break. As this appears to be a rather
18 dispositive motion, why don't I take a recess now, and return
19 at 2:00 o'clock, and, at that time, I'll hear any response
20 the County has. I've tried to outline where I see the
21 problem in the case based upon the motion, and, if at that
22 time, the County has nothing to change the circumstance, the
23 motion will be granted.

1 Court will be in recess until 2:00 o'clock.

2 (Whereupon, at 12:35 o'clock p.m., the hearing was

3 recessed for lunch, to reconvene at 2:00 o'clock p.m.)

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AFTERNOON SESSION

(Whereupon, at 2:00 o'clock p.m., the hearing was reconvened.)

THE COURT: Ms. Snyder, where do we stand at this time?

MS. SNYDER: Your Honor, I'd like to argue the motion further.

THE COURT: All right.

MS. SNYDER: Your Honor, I do have some documents which indicate the negotiations that were going on between the parties, of which Sentry was advised. There are three letters dated June 29, 1987, August 25, 1987, and September 24, 1987. Sentry was well aware of the negotiations that were going on, on behalf of the principal.

Additionally, in referring, Your Honor, to the terms of the bond itself, I think it's important to point out several aspects of the language in the agreement. From what I understand of the Court's interpretation of paragraph 5C regarding the bond, the Court apparently has determined that there is an ambiguity and it's thinking that it should elect to enforce it against the Board of Supervisors. However, what I would like to point out is, very specifically, the second part of paragraph 5 specifically relates to the

1 situation in which the County does not file suit within six
2 months. And it specifically contemplates that by saying that
3 costs recoverable by the County hereunder shall nonetheless
4 be determined as of a date not later than 24 months from the
5 date of default.

6 So what this whole section actually does is that --
7 the very most what it does is it changes or may change the
8 damages which may be recoverable against the surety. It's
9 apparent from its face that it does not contemplate that the
10 action would be altogether inappropriate or tolled in any
11 way.

12 And, in addition, if the Court were to not look at
13 that language, which is what the Court seems to be doing, or
14 trying to say, that that language is of no effect, the Court
15 can't strike that language, and -- I mean, that language is
16 in the contract, it is part of the contract, and to construe
17 it to have absolutely no meaning would be improper.

18 Additionally, I would like to point the Court to
19 page 2 of the bond agreement. It's at the bottom of that
20 page, under paragraph B, which specifically says that "the
21 failure or refusal of the obligee to take any action,
22 proceeding, or step to enforce any remedy or exercise any
23 right under the agreement, or the taking of any action or

1 proceeding or step by the obligee acting in good faith, upon
2 the belief that the same is permitted by the provisions of
3 the agreement, shall not in any way release the principal,
4 surety, or either of them."

5 And so what I would set forth is that that
6 paragraph is not a contractual statute of limitations. At
7 the most, what paragraph 5C does is set a limitation on
8 damages that can be recoverable against the surety, but the
9 Court must construe the entire document as it exists, and not
10 throw out certain portions that -- it must construe the
11 entire document. And I think that the bond is clear that the
12 only thing that is affected in the case is damages, and not
13 the cause of action itself.

14 THE COURT: Did you wish those letters to be
15 considered by the Court?

16 MS. SNYDER: Yes, Your Honor.

17 THE COURT: For the purpose of the motion, they
18 will be considered. I'll note your exception if you wish to
19 object?

20 MR. NEALON: Yes, Your Honor.

21 THE COURT: If I may see those letters, please. I
22 really don't need responsive argument. As I review the
23 language that is referred to -- and I have read the entire

1 bond before I came in this morning, and the points that you
2 have raised are worthy of consideration.

3 As I look at 5C, it appears to me that there are
4 two clauses. The second clause is ambiguous unto itself.
5 The question is: how is it to be applied and when?

6 I don't think it's ambiguous as to the first
7 clause. The first clause is fairly clear to me: it sets
8 forth the limitation, which limitation expired.

9 The second clause might determine the issue of
10 damages under conditions whereby the County was not required
11 to file suit, but I don't think it's intended to create a
12 different limitation or extend the limitation. I grant the
13 motion for summary judgment.

14 MR. NEALON: Thank you, Your Honor.

15 MS. SNYDER: The Court will note my exception.

16 THE COURT: Yes, ma'am.

17 MR. ZELNICK: Your Honor, if you'd give us a few
18 moments, I think we might be able to shorten the Court's
19 docket considerably with respect to this matter.

20 THE COURT: All right. I'll take a recess if you
21 feel it would be of benefit at this stage.

22 MR. ZELNICK: We just need about five minutes, Your
23 Honor.

(Brief recess)

MR. ZELNICK: Your Honor, I think we can shorten the Court's docket considerably here. Without conceding any of the factual allegations, the defendant, Lee Landing Development Corporation, with respect to count 1 of the motion for judgment is prepared to consent to judgment in the amount of \$98,665.16, which is, from my discussions with Ms. Snyder, my understanding as to the amount that the County desires with respect to count 1, and as conditioned upon count 2 and 3 being dismissed, which I understand is part of the agreement.

MS. SNYDER: That correctly states the agreement, Your Honor.

THE COURT: Then the appropriate thing, I think, would be to prepare an order that provides both in a single order, which would resolve all issues for you, as well.

MR. ZELNICK: Correct, sir.

THE COURT: You will prepare the order, Ms. Snyder?

MS. SNYDER: I will do that, Your Honor.

THE COURT: I would say that would conclude the proceedings for today under those circumstances.

MS. SNYDER: Yes, Your Honor; thank you.

MR. ZELNICK: Thank you, Your Honor.

1 THE COURT: The Court is adjourned.

2 (Whereupon, at 2:30 o'clock p.m., the hearing in

3 the above-captioned matter was concluded.)

CERTIFICATE OF COURT REPORTER

I, VICKY A. PECORD, a Verbatim Reporter, do hereby
certify that I took the notes of the foregoing hearing by
Stenomask and reduced the same to typewriting; that the
foregoing is a true record of said hearing to the best of my
knowledge and ability; that I am neither related to nor
employed by any attorney or counsel employed by the parties
thereto; nor financially or otherwise interested in the
action.

VICKY A. PECORD
Court Reporter

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V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

**BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA,**

Plaintiff,

vs.

SENTRY INSURANCE, et al.

Defendants.

At Law No. 82559

FINAL ORDER

THIS CAUSE came on to be heard for trial on the 30th day of November 1988, and

IT APPEARING TO THE COURT that Sentry Insurance A Mutual Company ("Sentry") moved for the entry of summary judgment against the Board of Supervisors of Fairfax County, Virginia ("Board") for the reasons set forth in its motion and during an oral argument, now, therefore, it is

ADJUDGED AND ORDERED that Sentry's motion for summary judgment against the Board is hereby granted for the reasons stated by the court from the bench and that the Board's Motion for Judgment against Sentry is hereby dismissed.


IT FURTHER APPEARING that Lee Landing Development Corp. consents to judgment being entered against it in favor of the Board in the amount of \$98,665.16, with respect to Count I of the Motion for Judgment, and agrees to the Board's use of the entire Conservation Escrow and accrued interest described in Count III of the Board's Motion for Judgment to partially satisfy said Consent Judgment, and

IT FURTHER APPEARING that the Board agrees to dismiss Count II and III of its Motion for Judgment against Defendant Lee Landing Development Corp., now therefore, it is further

ADJUDGED AND ORDERED that Judgment by Consent is hereby entered against Defendant Lee Landing Development Corporation in the amount of \$98,665.16 regarding Count I of the Board's Motion for Judgment, which is to be partially satisfied by the Board's retention of the Conservation Escrow and accrued interest described in Count III of the Board's Motion for Judgment and Counts II and III of the Board's Motion for Judgment against Defendant Lee Landing Development Corporation are hereby dismissed with prejudice.

AND THIS ORDER IS FINAL.

ENTERED this 24th day of March, 1989.


JUDGE MICHAEL R. MCWEENY
Circuit Court of Fairfax County

SEEN AND OBJECTED TO
AS TO THE COURT'S RULING ON SENTRY'S
MOTION FOR SUMMARY JUDGMENT:

DAVID T. ~~XXXX~~ STITT
COUNTY ATTORNEY

By David T. Stitt

~~XXXXXXXXXXXX~~ David T. Stitt
~~XXXXXX~~ County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
(703) 246-2421
Counsel for Plaintiff,
Board of Supervisors of
Fairfax County, Virginia

SEEN AND AGREED:
SZABO, MCCARTHY, QUINTO
WEBB AND ZELNICK

By Robert J. Zelnick

Robert J. Zelnick
12610 Lake Ridge Drive
Woodbridge, VA 22192
(703) 690-1620
Counsel for Defendant,
Lee Landing Development
Corp.

WE ASK FOR THIS:
MILES & STOCKBRIDGE

By Amy S. Owen

F. Joseph Nealon
Amy S. Owen
1701 Pennsylvania Avenue, N.W.
Suite 500
Washington, D.C. 20006
(202) 333-2350
Counsel for Defendant,
Sentry Insurance

Original retained in the office of
the Clerk of the Circuit Court of
Fairfax County, Virginia

96

A COPY TESTED:

WARREN E. BARRY, CLERK

By Richard Grayson

Deputy Clerk

ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment to a surety for hire on a developer's subdivision performance bond.

2. The trial court erred in construing a time period specified in a developer's subdivision performance bond to be a contractual limitation on the time for filing suit rather than a deadline related to the measure of damages.

3. The trial court erred in releasing a surety for hire on a developer's subdivision performance bond on the ground the obligee failed to file suit by a time specified in the bond, where the bond provided that the only consequence of failure to file suit by the time specified was an alteration in the method for measuring damages which favored the surety.