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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 960062

DAVID AUERBACH and SUSAN C. ORTMANN,

Appellants,

v.

COUNTY OF HANOVER;
HUBERT C. MENTZ and PAMELA M. MENTZ,

Appellees.

JOINT APPENDIX

FEB 12 1997

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Susan C. Ortmann

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Hubert C. Mentz and
Pamela M. Mentz

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

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HANOVER COUNTY
P. O. BOX 470
HANOVER, VIRGINIA 23069-0470

JOHN F. BERRY
COUNTY ADMINISTRATOR

RICHARD R. JOHNSON
DEPUTY COUNTY ADMINISTRATOR

STERLING E. RIVES, III
COUNTY ATTORNEY

September 8, 1994

RECEIVED
SEP 14 1994
GOODFELLOW JALBERT BEARD AND ASSOCIATES, INC.

Charles S. Gittings
Goodfellow, Jalbert, & Beard
P.O. Box 539
Mechanicsville, VA 23111

RE: Mentz Subdivision, Plat by Goodfellow, Jalbert, Beard & Associates, dated June 17,1994, resubmitted to the Planning Office August 15, 1994

Dear Mr. Gittings:

After a final review of the resubmittal of the above-captioned subdivision, the plat has been **DISAPPROVED.** The following reasons are provided:

1. In order to meet the requirement of the Hanover County Subdivision Ordinance, Title III, for a 50-foot easement providing access to your subdivision you have proposed the easement which was retained by Mentz in a deed recorded in Deed Book 972, Page 341. The reservation of access in that deed was limited to a tract designated "Parcel B" consisting of 7.4 acres, depicted in a plat recorded in Plat Book 35, Page 69. Thus, the easement does not provide access to all of the property being proposed for subdivision. You have not provided any additional information regarding right of access. (Sections 5-12 and 6-4-8(d)).

2. No information has been provided to indicate if the private road names have been approved by Richmond Regional Planning District Commission. (Property Numbering & Street Naming Manual, adopted May 22,1987, revised May, 1993).

EXHIBIT

3. The Health Department has not approved any drainfield sites on this property at this time (Section 5-10).

4. Note Seven is incorrect. The correct Tax Parcel numbers should be 85-89 (part) and 85-89A (Section 6-4-2(f)).

If you have any questions, please call me at 537-6171.

Sincerely

Michael E. Crescenzo
Deputy Director

VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

H. C. MENTZ and PAMELA M. MENTZ, Plaintiffs, v. COUNTY OF HANOVER, SERVE: Sterling E. Rives, III County Attorney Hanover Courthouse Hanover, Virginia 23069 Defendant.	)

425-94

APPEAL FROM DECISION OF SUBDIVISION AGENT

H. C. Mentz and Pamela M. Mentz, by counsel, for their appeal from the decision of Michael Crescenzo, Deputy Director of Planning, Hanover County, Virginia in disapproving the "Mentz Subdivision" represent unto the Court the following:

1. H. C. and Pamela M. Mentz are the owners of 129.5 acres of land situated in Cold Harbor District, Hanover County, Virginia.

2. This parcel of land is served by an easement for ingress and egress to Route 606 reserved in a Deed recorded in Deed Book 972, Page 340 in the Clerk's Office, Circuit Court of Hanover County, Virginia.

3. The 129.5 acre parcel is made up of a 122.5 acre parcel and a 7.422 acre parcel which the County required to be added on to the 122.5 acre parcel before approving a sale of 2.578 acres to David Auerbach and Susan C. Ortmann, the Deed of

Filed in the Clerk's Office the 13 day of Oct 1994
Writ Tax
Sheriff's Fee
Clerk's Fee
Total Paid $ 60.00
Richard L. Sheahan Clerk
D.C.

Conveyance being recorded in Deed Book 972, Page 340 of aforesaid Clerk's Office. (Exhibit A letter of W. R. Johnson dated September 3, 1992 attached).

4. The right of way reservation was ingress to Parcel B which included the entire 129.5 acres.

5. Inquiry was made to Hanover's planning staff regarding the proposed subdivision resulting in a letter from John H. Hodges to William F. Goodfellow dated August 30, 1993 relating to the add on provisions. (Exhibit B attached hereto.)

6. On June 17, 1994, application was made for approval of the Mentz subdivision resulting in a disapproval dated July 22, 1994. (Exhibit C attached hereto.)

7. On August 12, 1994, the request for approval was resubmitted (Exhibit D) and this resubmitted application and plat was disapproved on September 8, 1994. (Exhibit E attached.)

8. The reasons for disapproval are not properly based on the ordinance and are arbitrary and capricious and the County is now estopped from asserting that there are two separate parcels of land sought to be served by the access road when the County required that the parcels be joined before approving a conveyance of the servient tract now owned by Auerbach.

9. The parcels are assessed as one for tax purposes.

Petitioners' request the Court to reverse the County's action and require approval of the subdivision plat.

H. C. MENTZ
and
PAMELA M. MENTZ

By _____
Of Counsel

Andrew J. Ellis, Jr., VSB No. 9078
MAYS & VALENTINE
P. O. Box 1122
Richmond, Virginia 23208-1122
(804) 697-1200

VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

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7 - 8 1994

CLERK'S OFFICE
HANOVER CIRCUIT COURT

H. C. MENTZ and PAMELA M. MENTZ,	Plaintiffs,	)
v.		)
COUNTY OF HANOVER,	Defendant.	)

Case No. 425-94

ANSWER

The County of Hanover, Virginia, a political subdivision of the Commonwealth of Virginia, by counsel, for its response to the Appeal From Decision of Subdivision Agent, represents to the Court the following:

1. The Defendant is without knowledge as to the allegation of paragraph 1 of the Appeal, regarding ownership of the real estate in question, and does not admit or deny the allegation that H. C. and Pamela M. Mentz are the owners of a tract of 129.5 acres of land.

2. The Defendant denies the allegation of paragraph 2 of the Appeal that the parcel of land of 129.5 acres is served by an easement for ingress and egress reserved in a deed recorded in Deed Book 972, page 340, in the Clerk's Office of this Court.

3. The Defendant denies the allegation of paragraph 3 of the Appeal that it "required" two parcels of real estate to be combined, or that the County took any action "approving" a conveyance in this matter. A representative of the Defendant informed a representative of William Goodfellow that a proposed

scenario for dividing 2.578 acres off from a 10 acre parcel would be acceptable if the remaining 7.422 acres were added to another parcel and not used to create an additional lot.

4. The Defendant denies the allegation of paragraph 4 of the Appeal that the easement for ingress and egress reserved by Mr. and Mrs. Mentz in a Deed recorded in Deed Book 972, page 340, provides access to a tract of 129.5 acres.

5. The Defendant admits the allegation of paragraph 5 of the Appeal that the letter from John H. Hodges to William F. Goodfellow, dated August 30, 1993, was the result of inquiries made to the Defendant's Planning staff.

6. The Defendant admits the allegations of paragraph 6 that application was made for approval of a subdivision, and that the application was disapproved.

7. The Defendant admits the allegations of paragraph 7 of the Appeal that there was a resubmission of the subdivision application and that the application was disapproved.

8. The Defendant denies that the disapproval was arbitrary or capricious and denies that the doctrine of estoppel is applicable, in any way, to this proceeding. The Defendant denies that the Defendant "required" that any parcels be joined, or that there was any "approval" of a conveyance. The disapproval of the subdivision applications was based on the failure of the applicant to comply with ordinance requirements.

9. The Defendant denies that there is a parcel assessed in the name of H. C. Mentz and Pamela M. Mentz, containing 129.5

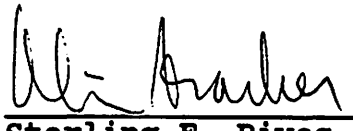
acres, listed in the Hanover County Land Book, for tax assessment purposes, and denies that this fact has any relevance to this proceeding.

10. The substantive issue of this Appeal is the question of the extent of the property rights retained by Mr. and Mrs. Mentz in the deed referred to above. That issue is to be adjudicated in another case filed in this Court, styled H. C. Mentz and Pamela M. Mentz v. David Auerbach and Susan C. Ortmann, Chancery No. 423-94. To provide for efficient use of the Court's resources, the Defendant, by counsel, requests that this Court proceed with adjudication of that declaratory judgment action. Adjudication of that suit will eliminate the need for litigation of this Appeal.

For the reasons stated above, the Defendant requests that the Court dismiss this Appeal.

HANOVER COUNTY, VIRGINIA

By Counsel



Sterling E. Rives, III
County Attorney
A. Lisa Barker
Senior Assistant County Attorney
Hanover County Attorney's Office
P. O. Box 470
Hanover, Virginia 23069
(804) 537-6035

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Answer** was mailed, postage prepaid, this 8th day of November, 1994, to Andrew J. Ellis, Jr., Esq., Mays & Valentine, P. O. Box 1122, Richmond, Virginia 23208-1122.

A. Lisa Barker

VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

HUBERT.C. MENTZ
PAMELA M. MENTZ

PLAINTIFFS,

v.

Case No. CH 425-94

COUNTY OF HANOVER

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CLERK
HANOVER CIRCUIT COURT

DEFENDANT

PETITION TO INTERVENE

David Auerbach and Susan C. Ortmann (the "Petitioners"), pursuant to Rule 2:15 of the Supreme Court of Virginia, respectfully Petition to intervene in the above styled case on the grounds that:

1. Hubert C. Mentz and Pamela M. Mentz, (the "Plaintiffs") have filed a Motion for Declaratory Judgment in this Court against the Petitioners, styled as H.C. Mentz and Pamela M. Mentz, Plaintiffs, v. David Auerbach and Susan C. Ortmann, Defendants, Case No. CH 423-94, alleging conspiracy, slander of title and other tortious acts by the Petitioners against the Plaintiffs, all allegedly arising from an easement Petitioners granted the Plaintiffs when the Plaintiffs sold property to the Petitioners. The Plaintiffs seek an injunction, damages and other relief arising out of these allegations.

2. Plaintiffs allege in their Motion for Declaratory Judgment, *inter alia*, "[t]hat an actual antagonistic assertion of right exist between these parties as to the interpretation of [an] easement."

3. Plaintiffs made application with Hanover County for subdivision approval. Both the Plaintiffs' and the Petitioners' views on the scope of the easement were requested by and provided to representatives of the Plaintiffs and to Hanover County.

4. Hanover County disapproved the application. The disapproval of the application by Hanover County was predicated, in part, on Hanover County's interpretation of restrictive language in the deed from the Plaintiffs to Petitioners granting Plaintiffs an easement over the Petitioners' property, which easement also is the subject of the instant action.

5. Plaintiffs have not exhausted their remedies under the applicable Hanover County ordinance from the denial of the application for a subdivision and, thus, are pursuing an appeal in this Court in this case.

6. Plaintiffs have filed pleading in two cases in this court in which they allege contradictory theories for relief:

a. In the case against the Petitioners, the Plaintiffs have alleged a conspiracy between the Petitioners and "others" and "Hanover County officials" to deny approval of the Petitioners' subdivision application. However, the Petitioners have failed to identify the "others" or the "Hanover County Officials" by name or name the "others", "Hanover County Officials", or Hanover County as defendants.

b. In the instant case filed against Hanover County appealing denial of the subdivision application, the Plaintiffs have only alleged that Hanover County's "...reasons for disapproval are not properly based on the ordinance and are arbitrary and capricious..."

7. Both of the theories of relief proffered by the Plaintiffs can not at the same time be true.

8. The alleged statements, interpretation of the deed and other actions alleged by the Plaintiffs are contested matters and the evidentiary resolution of the dispute will be substantially laid to rest when the deed in question is interpreted by this Court in consideration of the Plaintiffs' appeal for denial of the subdivision application.

9. The Plaintiffs are requesting an Order from this Court to interpret the language in the Deed concerning the extent of the easement and to obtain relief which may or may not be granted in their appeal action pending before this Court.

10. The Plaintiffs' filing of the action against Petitioners, the Plaintiffs forces the Petitioners to personally defend against allegations that they are responsible for the denial of the application by Hanover County.

11. Petitioner's Motion for Declaratory Judgment refers to other occurrences and statements by the parties in connection with the easement, events which, if they occurred, have already occurred.

12. Declaratory judgments are intended to supplement rather than to supersede ordinary causes of action. Preventive relief is the moving purpose. Therefore, the Plaintiffs should be compelled by this Court to exhaust their remedies under the Hanover County

Ordinance and proceed in this case against Hanover County for relief from an official ruling by Hanover County that has already occurred rather than against the Petitioners for alleged actions, if they did occur, also have already occurred and are properly pursued as a law action.

13. The Petitioners have a right and interest to protect in seeking the completion of the appeal process in this case prior to their having to defend as a private litigant the denial by a governmental entity of a subdivision application, a denial over which they had no control.

WHEREFORE, your Petitioner pray that the court enter an order allowing the Petitioners to intervene in this case for the purpose of seeking an expedited conclusion of the appeal process to avoid duplicate and unnecessary expenses and hardship in defending themselves against a Hanover County administrative decision in which they have no official involvement.

DAVID AUERBACH
SUSAN C. ORTMANN

By Charles J. McCall
Of Counsel

Charles J. McCall, Esq.
VSB 17022
Attorney for Petitioners
5104 W. Village Green Drive
Suite 105
Midlothian, Virginia 23112-4851
(804) 744-0300

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VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

H. C. MENTZ and PAMELA M. MENTZ, Plaintiffs, v. COUNTY OF HANOVER, Defendant.	))))))))))	Case No. 425-94

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JAN 5 1995
CLERK'S
HANOVER CIRCUIT COURT

PLAINTIFFS' ANSWER
TO PETITION TO INTERVENE

Hubert C. Mentz and Pamela M. Mentz, by counsel, for their Answer to the Petition to Intervene filed by David Auerbach and Susan C. Ortmann state unto the Court as follows:

1. The allegations contained in Paragraph 1 of the Petition to Intervene are admitted except for the fact that all the allegations alleged in the case styled Mentz v. Auerbach, Chancery No. 423-94 do not arise from the easement.

2. The allegations contained in Paragraph 2 of the Petition to Intervene are admitted.

3. The allegations of Paragraph 3 of the Petition to Intervene stating that plaintiffs made application for subdivision approval are admitted, but the remaining allegations contained in Paragraph 3 are denied.

4. The allegations contained in Paragraph 4 of the Petition to Intervene are admitted.

5. The allegations contained in Paragraph 5 of the Petition to Intervene are denied.

6. The allegations contained in Paragraph 6 of the Petition to Intervene are denied.

7. The allegations contained in Paragraph 7 of the Petition to Intervene are denied.

8. The allegations contained in Paragraph 8 of the Petition to Intervene are denied.

9. The allegations contained in Paragraph 9 of the Petition to Intervene are denied.

10. The allegations contained in Paragraph 10 of the Petition to Intervene are denied.

11. Plaintiffs are unaware of the occurrences and statements referred to in Paragraph 11 of the Petition to Intervene and thus cannot admit or deny the same.

12. The allegations contained in Paragraph 12 of the Petition to Intervene appear to be allegations of law to be determined by the Court.

13. The allegations contained in Paragraph 13 of the Petition to Intervene appear to be allegations of law to be determined by the Court.

14. Plaintiffs assert that petitioners have alleged no legal right to permit them to intervene in this proceeding and have asserted contradictory rights none of which is germane to the subject matter of the subdivision appeal.

WHEREFORE, plaintiffs, Hubert C. Mentz and Pamela M. Mentz, pray that petitioners be denied the request to intervene in this action.

H. C. MENTZ
and
PAMELA M. MENTZ

By _____
Of Counsel

Andrew J. Ellis, Jr., VSB No. 9078
MAYS & VALENTINE
P. O. Box 1122
Richmond, Virginia 23208-1122
(804) 697-1200

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 1995, I caused to be mailed, postage prepaid, a true and correct copy of Plaintiffs' Answer to Petition to Intervene to Sterling E. Rives, III, Esquire, County Attorney, Hanover Courthouse, Hanover, Virginia 23069, A. Lisa Barker, Esquire, Senior Assistant County Attorney, Hanover County, Post Office Box 470, Hanover, Virginia 23069 and Charles J. McCall, Esquire, 5104 W. Village Green Drive, Suite 105, Midlothian, Virginia 23112-4851.

_____

VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

RECEIVED and/or FILED

JAN 20 1995

CLERK'S OFFICE
HANOVER CIRCUIT COURT

H. C. MENTZ and PAMELA M. MENTZ, Plaintiffs,	)	
v.	)	Case No. 425-94
COUNTY OF HANOVER, Defendant.	)	

MEMORANDUM OF HANOVER COUNTY

This memorandum is submitted to the Court by counsel for Hanover County ("the County"), in support of the decision of the subdivision agent disapproving a subdivision proposed by the Plaintiffs. The disapproval of the subdivision was based on the lack of access to the subdivision meeting ordinance requirements. The Plaintiffs ("Mentz") have appealed that decision. The sole issue in this appeal is the extent of the rights of Mentz in an access easement retained by Mentz in a conveyance of real estate to David Auerbach and Susan C. Ortmann ("Auerbach/Ortmann") by deed dated March 31, 1993, recorded April 2, 1993, in Deed Book 972, page 340 ("the Deed") (Exhibit A). The resolution of that issue by this Court will be relied upon by the County in review of any subdivision applications including access derived from that easement.

This issue is also the subject of a related suit, Chancery No. 423-94, H. C. Mentz and Pamela M. Mentz v. David Auerbach and Susan C. Ortmann. Because of the interest of Auerbach/Ortmann in determination of the nature of the retained easement, the County

does not object to the intervention of Auerbach/Ortmann in this suit, pursuant to the Petition filed by counsel for Auerbach/ Ortmann.

Statement of Facts

The Hanover County Subdivision Ordinance, Title III, Section 5-12 (Exhibit B), requires that all private road rights-of-way be no less than 50 feet in width. The definition of "private road", Section 2-2 (Exhibit C) requires that the right-of-way provide "access" to abutting properties. In 1994, Mentz twice submitted subdivision applications to the County for approval. The County disapproved the applications for several reasons, including the lack of the required 50-foot access. The access proposed by Mentz to satisfy the ordinance requirement was the easement retained in the Deed. Although Mentz has other access to the property, that access does not meet subdivision requirements and thus, could not be used for maximum development of the property.

In the opinion of County officials, including the subdivision agent, that easement was not available for access to the whole tract to be subdivided, but only to a tract of about 7.4 acres ("Parcel B"). The last disapproval, by letter dated September 8, 1994, signed by Michael E. Crescenzo, Deputy Director (Exhibit D), is the disapproval which is the subject of this Appeal. That disapproval came after several discussions and exchanges of correspondence among counsel for Mentz, Auerbach/Ortmann and the County regarding the nature of the easement retained in the deed of conveyance to Auerbach and Ortmann. Correspondence includes:

1. Letter dated April 16, 1993, from Andrew J. Ellis, Jr. to Charles J. McCall referencing the decision in Hayes v. Aquia Marina, Inc., 243 Va. 255 (Exhibit E);

2. Letter dated August 12, 1994, from Andrew J. Ellis, Jr. to A. Lisa Barker (Exhibit F); and,

3. Letter dated August 30, 1993 from Charles J. McCall to John Hodges with attached copy of a letter from Mr. McCall to Andrew J. Ellis, Jr. dated April 15, 1993 (Exhibit G).

The issue of adequacy of access to the proposed Mentz subdivision first came to the attention of County officials when engineers for Mentz submitted informal proposals for subdivision of the property. Advice provided to Planning Department officials, related to disapproval of the subdivision plats is included in a memorandum dated November 9, 1993, from A. Lisa Barker to John H. Hodges (Exhibit H). That memorandum summarizes the County's analysis of the issue which is the subject of this suit.

The Deed refers to reservation of an easement for the benefit of Mentz for access to a property designated "Parcel B" shown "on the hereinabove described plat" ["plat of two parcels of land drawn by Goodfellow, Jalbert, Beard and Associates, Inc., dated January 9, 1991, as revised on August 18, 1992"]. The marginal notation on that deed states "See P.B. #35, Pg. 69". That plat (Exhibit I) shows "Parcel B" consisting of 7.422 acres.

Sometime after recordation on April 2, 1993, and after the Clerk sent counsel for Auerbach/Ortmann the recorded deed, another marginal notation was made: "See PB#35, Pg.#94 for corr. plat."

The plat referred to in that notation (Exhibit J), was the same one referred to above, but with revisions dated April 19, 1993. It shows Parcel B consisting of approximately 7.4 acres. The plats state that Parcel B is an "add-on parcel to the property of H. C. Mentz and Pamela M. Mentz." The term "add-on" is one which has traditionally been used by Planning Department staff to refer to boundary adjustments or other exchanges between adjoining lots, which are exempt from subdivision requirements (and from any County review or approval) pursuant to the Hanover County Subdivision Ordinance. (A copy of Title III, Section 2-6 is attached as Exhibit K).

In response to an inquiry from William F. Goodfellow, engineer for Mentz (Exhibit L), W. Randolph Johnson, Jr., Zoning Administrator, had sent a letter to William Goodfellow dated September 3, 1992, regarding the status of tax parcel 85-86 (Exhibit M). In that letter, Johnson stated that Mentz would be allowed to add the 7.422 acre parcel designated as Parcel B to tax parcel 85-89 owned by Mentz containing 122.50 acres, "creating a new 129± acre parcel." The letter further stated that the parcel of 2.578 acres labelled Parcel A would be considered a "first division of the entire parcel." The inquiry and the response resulted from the apparent desire of Mentz to develop the property (129 acres) to the maximum density using the County's "25-acre Rule". That development requires use of the provisions of the County's subdivision and zoning ordinances exempting the first division of a parcel from subdivision review and from the minimum

ten acre lot size requirement. In this case, "combination" of the 7.4 acre parcel with the undivided parcel of 122.50 acres and treatment of the 2.5 acre conveyance as an exempt "first division" would allow Mentz the maximum density on the property owned by Mentz. In addition, because Mentz obtained the ten acre parcel (Parcels A and B) as a division from another parcel, the development of the 7.4 and 2.5 acre parcels (subdivided lots, less than ten acres) would have violated the zoning and subdivision ordinances, and the Johnson suggestion resolved that problem.

A letter from John Hodges to William F. Goodfellow, dated August 30, 1993 (Exhibit N), further addresses the intention of Mentz of providing for maximum development of the property and states finally that recorded divisions of the entire property, in accordance with the "25-acre Rule" would be required in order to assure compliance with the "25-acre Rule".

Neither the Johnson letter nor the Hodges letter addresses access requirements. No County official ever advised any applicant that a subdivision application without required access would be approved. Such advice, in any case, would be in error and would have no effect on the County's ordinance enforcement or subdivision review.

Argument

The County was provided with the positions of both counsel for Mentz and counsel for Auerbach/Ortmann prior to a decision being made regarding the subdivision applications for the Mentz property. Mentz was advised repeatedly that further consideration would be

given to the application for subdivision, if evidence of access meeting ordinance requirements was provided to the County, including documentation of a judicial determination of the broader interpretation of the access easement. No such evidence was provided.

Subdivision is a ministerial function and a subdivision cannot be approved unless the proposed division meets the requirements of applicable ordinances. Board of Supervisors v. Horne, 216 Va. 113 (1975). In this case, the application did not meet the access requirements of the subdivision ordinance.

Counsel for Mentz makes reference in pleadings to the letter from Mr. Johnson referring to the combination of properties, and to the tax assessment for the property (designating the 129 acre combination as one parcel), as support for the contention of Mentz that the reserved easement provides access to a parcel of 129 acres. Advice of the zoning administrator relating to combination of parcels for the purpose of development pursuant to the ordinances does not alter the rights which were reserved in the Deed. The designation of parcels by the Real Estate Assessor also does not alter the nature of property rights retained in the Deed. The language of the Deed itself is the basis for interpretation of the Deed, not actions or intentions precedent to or contemporaneous with execution of an unambiguous deed. Camp v. Camp, 220 Va. 595 (1979). In this case, counsel for Mentz goes so far as to contend that actions occurring after execution of the Deed (designation of the property for tax assessment purposes) should determine the

nature of the reserved access rights. Counsel for Mentz also argues that the "combination" of properties for purposes of zoning and subdivision compliance governs interpretation of the easement language. The Deed is clear and unambiguous and is subject to definitive interpretation from the text itself. The Deed limits access to that necessary for the parcel of 7.4 acres.

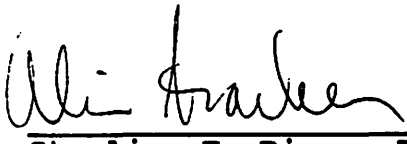
Conclusion

The decision of the agent disapproving the Mentz subdivision because of the failure of the proposed subdivision to meet ordinance requirements is correct and should be upheld.

For the reasons stated above, the County respectfully asks this Court to uphold the decision of the subdivision agent, and to dismiss this Appeal.

HANOVER COUNTY, VIRGINIA

By Counsel



Sterling E. Rives, III
County Attorney
A. Lisa Barker
Senior Assistant County Attorney
Hanover County Attorney's Office
P. O. Box 470
Hanover, Virginia 23069
(804) 537-6035

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum was faxed and mailed, postage prepaid, this 20th day of January, 1995, to Andrew J. Ellis, Jr., Esq., Mays & Valentine, P. O. Box 1122, Richmond, Virginia 23208-1122 and Charles J. McCall, 5104 West Village Green Dr., Suite 105, Midlothian, Virginia 23112-4851.

A. Lisa Barker

THIS DEED made this 31st day of March, 1993 between HUBERT C. MENTZ and PAMELA M. MENTZ, his wife, parties of the first part and DAVID AUERBACH and SUSAN C. ORTMANN, his wife, parties of the second part:

W I T N E S S E T H :

The said parties of the first part for and in consideration of the sum of Ten Dollars ($10.00) to them cash in hand paid the receipt of which is hereby acknowledged do hereby grant, bargain, sell and convey unto the said parties of the second part as tenants by the entirety with the right of survivorship as at common law with General Warranty and English Covenants of Title the following described property, to-wit:

See P.B. #35 Pg. 69

See PB#35 Pg#94 for corr. Plat

ALL that certain piece or parcel of land lying and being in Cold Harbor District, Hanover County, Virginia containing 2.578 acres and being more particularly described as Parcel A on a plat of two parcels of land drawn by Goodfellow, Jalbert, Beard and Associates Inc. dated January 9, 1991 as revised on August 18, 1992 and recorded herewith.

BEING a portion of the same property conveyed to Hubert C. Mentz and Pamela M. Mentz, his wife, by Deed from Mary Jane Trimmer, also known as Mary Jane Tucker Trimmer, widow, dated February 5, 1991 and recorded February 22, 1991 in the Clerk's Office, Circuit Court of Hanover County, Virginia in Deed Book 849, Page 726.

The said parties of the first part hereby reserve an easement of right-of-way 50 feet in width along the western line of Parcel A leading from State Route 606 to Parcel B as a means of ingress and egress to and from Parcel B and State Route 606, said

Deed # 4078
Orig. Returned: Grantor ___ Grantee ___
Other: Charles J. McCall
RICHARD L. SHELTON, CLERK atty

BOOK 972 PAGE 340

EXHIBIT A

(52)

easement being shown as lying on the westerly side of Parcel A on the hereinabove described plat.

The said parties of the first part do further grant and convey unto the parties of the second part a first right of refusal to purchase Parcel B consisting of 7.422 acres should the parties of the first part sell that parcel of land.

The parties of the first part do hereby correct a certain plat drawn by Goodfellow, Jalbert, Beard and Associates Inc. dated January 9, 1991 and recorded in Deed Book 934, Page 6[illegible], Clerk's Office of the Circuit Court of Hanover County, which plat contains a description of 10 acres including Parcel A hereinabove described. The aforesaid plat recorded herewith is substituted for the plat recorded in Deed Book 934, Page 653 and the description is corrected to refer to two parcels, A and B. Parcel B containing 7.422 acres is added on to the property described in Deed Book 659, Page 707 as an add-on, not for the purposes of creating additional building lots.

WITNESS the following signatures and seals:

Hubert C. Mentz (SEAL)
HUBERT C. MENTZ

Pamela M. Mentz (SEAL)
PAMELA M. MENTZ

BOOK 972 PAGE 341

STATE OF VIRGINIA

~~CITY~~/COUNTY OF Hanover, to-wit:

The foregoing instrument was acknowledged before me this 1st day of ~~March~~ April, 1993 by HUBERT C. MENTZ.

~~Notary Public~~
Commissioner in Chancery

My commission expires: Circuit Court of Hanover County.

STATE OF VIRGINIA

~~CITY~~/COUNTY OF Hanover, to-wit:

The foregoing instrument was acknowledged before me this 1st day of ~~March~~ April, 1993 by PAMELA M. MENTZ.

~~Notary Public~~
Commissioner in Chancery

My commission expires: Circuit Court of Hanover County.

1 Old Church Tavern
Hanover, Va.

[illegible] Hanover County, to-wit:
In the Clerk's Office of the County and State aforesaid this 2 day of April, 1993 at 11:05 o'clock A.M. the foregoing writing was presented and admitted to record, together with the annexed certificate of acknowledgment and recorded in Deed Book No. 972 page 340 [illegible] tax imposed by Section 58.54-1 in the amount of $ 192.00 has been paid.
Teste: R. D. Shelton Clerk

BOOK 972 PAGE 342

line for the purpose of adjusting a lot boundary or combining two (2) or more lots, but which does not involve the creation of additional building lots or the vacation of any street, alley, easement for public passage, or other public area. For the purposes of review and approval of a resubdivision made under this part (b), the Director of Planning shall be the Agent.

(c) The vacation of any feature of any approved subdivision, other than a lot line, which may be vacated under the provisions of (b) above, shall be subjected to the provisions of state law governing the vacation of a subdivision. (Ord. No. 82-10, § 1, 6-23-82)

LOTS

5-7 Shape: The lot arrangement, design, and shape shall be such that lots will provide satisfactory and desirable sites for buildings, and be properly related to topography and conform to requirements set forth herein.

5-8 Location: Each lot shall abut upon a private road reserved by the subdivision plat.

5-9 Remnants: All remnants of lots below minimum size left over after subdividing a tract may be added to adjacent lots, or otherwise disposed of and are allowed to remain as unusable parcels. (Ord. No. 84-27, § 12, 9-26-84)

5-10 Septic tanks: In private road subdivisions where septic tanks or individual wells are contemplated and the health department determines that there are factors of drainage, soil conditions, or other conditions to cause potential health problems, the agent shall require the data from percolation tests be submitted as a basis for passing upon subdivisions depending upon septic tanks as a means of sewage disposal.

PRIVATE ROADS

5-11 Alignment and layout: The arrangement of private roads in new subdivisions shall make provision for the continuation of existing private roads in adjoining areas. The road arrangement must be such as to cause no unnecessary hardship to owners of adjoining property when they plat their land and seek to provide for convenient access to it. Where in the opinion of the agent, it is desirable to provide for road access to adjoining property, proposed roads shall be extended by reservation to the boundary of such property. Half roads along the boundary of land proposed for subdivision may not be permitted. Whenever possible, roads should intersect at right angles. In all hillside areas, roads running with contours shall be required to intersect at angles of not less than sixty (60) degrees, unless approved by the agent. All road intersections shall have a distance of at least two hundred (200) feet between center lines.

5-12. Approach angle: Roads shall approach each other at angles of not less than eighty (80) degrees, unless the agent shall approve a lesser angle of aproach for reasons of contour, terrain or matching of existing patterns. The minimum width of all private road rights-of-way shall in no case be less than fifty (50) feet in width.

EXHIBIT B

Section 1. Purpose and title.

1-1 Purpose: The purpose of this ordinance is to establish certain private road subdivision standards and procedures for Hanover County, Virginia, and such of its environs as come under the jurisdiction of the Board of Supervisors as provided by the 1950 Code of Virginia, as amended. These are part of a long-range county plan to guide and facilitate the orderly beneficial growth of the community, and to promote the public health, safety, convenience, comfort, prosperity and general welfare. More specifically, the purposes of these standards and procedures are to provide orderly growth with a reasonable density of population; to provide a guide for the change that occurs when land and acreage is reduced in area as a result of development for residential, business or industrial purposes, to provide assurance that the purchasers of lots are buying a commodity that is suitable for development and use; and to make possible the provision of public services in a safe, adequate and efficient manner.

1-2 Title: This ordinance is known and may be cited as the Ten Acre to Twenty-Five Acre Tract Private Road Subdivision Ordinance of Hanover County, Virginia.

Section 2. Definitions.

Words and terms: For the purpose of this ordinance, certain words and terms used herein shall be interpreted or defined as follows: Words used in the present tense include the future, words in the singular number include the plural, and the plural the singular, unless the natural construction of the word indicates otherwise; the word "lot" includes the word "tract," the word "shall" is mandatory and not directory; the word "approve" shall be considered to be followed by the words "or disapprove;" any reference to this ordinance includes all ordinances amending or supplementing the same; all distances and areas refer to measurement in a horizontal plane.

2-1 Definitions adopted by reference: Such of those definitions which are set forth in Title II [of this Appendix] that are applicable to and used in this ordinance are hereby adopted by reference.

2-2 Private road: The restricted use of a specific area of right-of-way as a means of private access to two (2) or more abutting properties which have been cut into parcels or tracts under this ordinance.

2-3 Restrictive covenants: Those easements, restrictions, and conditions which are made of record upon the title to a subdivision or one or more of its tracts, which are subject to this ordinance.

2-4 Affidavit: A written statement duly signed, acknowledged and recorded by a buyer of a tract which is subject to this ordinance, whereby the buyer recognizes the private nature of the road or roads in a subdivision.

2-5 Road width: The total width of the strip of land reserved for private travel, including roadway.

EXHIBIT

BOARD OF SUPERVISORS

WILLIAM T. BOLLING, CHAIRMAN
CHICKAHOMINY DISTRICT

R. J. KLOTZ, JR., VICE CHAIRMAN
HENRY DISTRICT

WILLIAM C. FRAZIER
SOUTH ANNA DISTRICT

RICHARD S. GILLIS, JR.
ASHLAND DISTRICT

AUBREY M. STANLEY, JR.
BEAVERDAM DISTRICT

ELTON J. WADE, SR.
COLD HARBOR DISTRICT

J. T. "JACK" WARD
MECHANICSVILLE DISTRICT

HANOVER COUNTY
P. O. BOX 470
HANOVER, VIRGINIA 23069-0470

JOHN F. BERRY
COUNTY ADMINISTRATOR

RICHARD R. JOHNSON
DEPUTY COUNTY ADMINISTRATOR

STERLING E. RIVES, III
COUNTY ATTORNEY

September 8, 1994

Charles S. Gittings
Goodfellow, Jalbert, & Beard
P.O. Box 539
Mechanicsville, VA 23111

RE: Mentz Subdivision, Plat by Goodfellow, Jalbert, Beard & Associates, dated June 17,1994, resubmitted to the Planning Office August 15, 1994

Dear Mr. Gittings:

After a final review of the resubmittal of the above-captioned subdivision, the plat has been **DISAPPROVED**. The following reasons are provided:

1. In order to meet the requirement of the Hanover County Subdivision Ordinance, Title III, for a 50-foot easement providing access to your subdivision you have proposed the easement which was retained by Mentz in a deed recorded in Deed Book 972, Page 341. The reservation of access in that deed was limited to a tract designated "Parcel B" consisting of 7.4 acres, depicted in a plat recorded in Plat Book 35, Page 69. Thus, the easement does not provide access to all of the property being proposed for subdivision. You have not provided any additional information regarding right of access. (Sections 5-12 and 6-4-8(d)).

2. No information has been provided to indicate if the private road names have been approved by Richmond Regional Planning District Commission. (Property Numbering & Street Naming Manual, adopted May 22,1987, revised May, 1993).

EXHIBIT D

3. The Health Department has not approved any drainfield sites on this property at this time (Section 5-10).

4. Note Seven is incorrect. The correct Tax Parcel numbers should be 85-89 (part) and 85-89A (Section 6-4-2(f)).

If you have any questions, please call me at 537-6171.

Sincerely

Michael E. Crescenzo
Deputy Director

(804) 597-1282 11582.001

April 16, 1993

Charles J. McCall, Esquire
5104 W. Village Green Drive, Suite 105
Midlothian, Virginia 23112-4851

Re: Auerbach v. Mentz
Case No. CH2001116-00

Dear Jeff:

Without trying to belabor the easement problem between Auerbach and Mentz, I feel compelled to respond to your letter of April 15, 1993 so there will be no misunderstanding as to Mr. Mentz' intentions.

From the outset of Mr. Mentz' acquisition of the 10 acre parcel of land which included the Old Church Tavern, he intended to use a portion as a right of way to the parcel that he previously owned containing 122.5 acres situated generally to the northeast of the 10 acre parcel. During the various discussions with Mr. Auerbach leading up to the execution of a contract and ultimately the sale of the property, I understand that Mr. Auerbach was made aware of this intention and indeed the first plat showed the 50 foot easement. A subsequent plat which Mr. Auerbach refused to accept indicated the retention of a 50 foot strip in fee.

Mr. Auerbach made application for his building permit, and the only way that this permit was approved was for the County to treat the 7.422 acres (Parcel B) as an add on parcel to the 122.5 acres already owned by Mr. Mentz thereby creating a new 129 acre parcel. The parties having agreed to this, Parcel A was then permitted as an out conveyance to Mr. Auerbach. (See W. R. Johnson's letter of September 3, 1992.) This proposal was acknowledged and implicitly accepted in your letter of September 3, 1992 to Jeffrey Zwerdling, a copy of which was sent to Mr. Auerbach. (See the first full paragraph on the second page of your letter.) The last sentence of the deed of conveyance, dated March 31, 1993 explicitly adds on Parcel B to the original parcel 122.5 acres owned by Mr. Mentz. This language was insisted upon by Mr. Auerbach.

EXHIBIT E

The deed reserves a 50 foot easement for ingress and egress which is not limited in use, to Parcel B which was merged into or added onto the 122.5 acre parcel.

The 122.5 acre parcel has been used for residential purposes and Mr. Mentz is in the process of building his home on that parcel. Mr. Auerbach visited that home during the contract negotiations.

Mr. Mentz intends to develop the entire parcel into large acreage residential lots and to use the 50 foot easement reserved over Parcel A as a means of ingress and egress to the property. He further intends to construct reasonable improvements on the easement in order to utilize this access.

It is my opinion that Mr. Mentz is entitled to use the easement as outlined above and that this proposed use is supported by the case of Hayes v. Aquia Marina, Inc., 243 Va. 255 to which reference has previously been made.

Very truly yours,

Andrew J. Ellis, Jr.

42/449
cc: Mr. Hubert C. Mentz

MAYS & VALENTINE
NationsBank Center
1111 East Main Street
P. O. Box 1122
Richmond, Virginia 23208-1122
(804) 697-1200
Telex 322063 (MAYSVAL UD)
Telecopier (804) 697-1339

NORTHERN VIRGINIA
110 SOUTH UNION STREET
P.O. BOX 149
ALEXANDRIA, VIRGINIA 22313-0149
TELEPHONE (703) 519-8000
TELECOPIER (703) 519-0140

HAMPTON ROADS
THE EIGHTH FLOOR
TOWN POINT CENTER
NORFOLK, VIRGINIA 23510
TELEPHONE (804) 627-5800
TELECOPIER (804) 627-5200

DIRECT DIAL (804) 697-1282

FILE NO. 11582.003

August 12, 1994

A. Lisa Barker, Esquire
Senior Assistant County Attorney
Hanover County
Post Office Box 470
Hanover, Virginia 23069

Re: Mentz Subdivision - Hanover County

Dear Lisa:

This is a follow up to my letter of July 25, 1994 indicating that we would be resubmitting the above application.

Bill Goodfellow has prepared responses to Items 2 through 12 of Mike Crescenzo's letter of July 22, 1994 and enclosed are five revised and unsigned prints with other documents, the mylar plats will be prepared if we obtain a favorable ruling.

The purpose of this letter is to respond to Paragraph 1 contained in Mike Crescenzo's letter.

We have not obtained any additional easement to the property, but I believe that you should be aware of the background. In 1991, H. C. Mentz and Pamela M. Mentz were the owners of a parcel of land containing approximately 122.50 acres situated at Old Church. In order to gain a 50 foot right of way from this property to Route 606, Mr. Mentz purchased a parcel containing approximately 10 acres with the Old Church Tavern situated partially thereon. The Deed to this property was recorded in Deed Book 849, Page 726 in the Clerk's Office, Circuit Court of Hanover County, Virginia.

Mr. Mentz advertised a portion of this property for sale and entered into a contract for sale of 2.578 acres with David Auerbach and Susan Ortmann. Almost immediately, a personality conflict developed between Mr. Auerbach and Mr. Mentz which resulted in a suit for specific performance being brought by Mr. Auerbach and ultimate settlement through the execution of a Deed

6D

EXHIBIT
F

by Mr. and Mrs. Mentz conveying 2.578 acres to Mr. and Mrs. Auerbach. During negotiations Mr. Auerbach was advised that Mr. Mentz intended to develop his 122 acres and further intended to reserve an easement across the Old Church property to his property.

It developed when a building permit was applied for by Mr. Auerbach, which was prior to the sale being consummated, that there had been a prior division of a parcel containing the 10 acres, thereby prohibiting, under the Hanover Zoning Ordinance, any out conveyances from the 10 acres. A solution was developed through the planning office and memorialized in W. R. Johnson's letter of September 3, 1992 to William Goodfellow which specifically provided that Parcel B, shown on the plat used in connection with the sale, would be added on to the 122.50 acres thereby creating a new 129 acre parcel. It was only upon this condition that the conveyance of Parcel A to Mr. Auerbach was approved. The County tax map has been revised and the division line between the original parcel B and the 122 acres has been removed.

The plat drawn by William F. Goodfellow dated January 9, 1991, revised on August 18, 1992 and recorded with the Deed of Conveyance to Auerbach specifically provides in a note "Parcel A is first division of property. Parcel B is an add-on parcel to the property of H. C. Mentz and Pamela M. Mentz, Deed Book 659, Page 707 (the 122.50 acres)." Further the Deed of Conveyance itself specifically provides that Parcel B is added on to the 122.50 acre Mentz parcel.

The Deed further recognizes a distinction between Parcel B as an add-on and Parcel B as the 7.422 acres in that the easement is dedicated as access to Parcel B without any limitation and the first right of refusal granted to Auerbach refers to Parcel B containing 7.422 acres.

Unlike the cases which have addressed restricted easements in Virginia, there is no attempt in this instance to use the particular easement to benefit any place other than that for which it was originally established. The easement in this case was established to benefit Parcel B which had been added on to and become a part of the 122.50 acres, if not prior to the creation of the easement, at least simultaneously therewith.

We are requesting approval of the subdivision plan pursuant to the provisions of the subdivision and zoning ordinances of the County which are the same ordinances under which the add-on provision was dictated. The conveyance to Mr. Auerbach would not have been approved in the first instance without compliance with this directive. I do not understand how the County can require one course of conduct, i.e. the add-on provision, to satisfy one part of the ordinance, and on the other hand, rule that course of action meaningless under another requirement of the ordinance, i.e. unrestricted access.

If Mr. Auerbach sees fit to bring suit against us, we are prepared to defend it.

Very truly yours,

Jack

Andrew J. Ellis, Jr.

Enclosures, Copies:
1. Johnson letter of September 3, 1992
2. Deed of March 31, 1993
3. Plat recorded with deed
4. Corrected plat (line between Auerbach and Williams)
5. Tax map
6. Five prints

42/449
cc: Mr. William F. Goodfellow (w/out enclosures)
Mr. Michael E. Crescenzo (w/out enclosures)
Mr. Hubert C. Mentz (w/out enclosures)

CHARLES J. McCALL
ATTORNEY AT LAW
5104 WEST VILLAGE GREEN DRIVE
SUITE 105
MIDLOTHIAN, VIRGINIA 23112-4851

(804) 744-0300
FAX (804) 744-6543

August 30, 1993

BY FAX ONLY
John Hodges
Director of Planning
Hanover County Virginia
Hanover, Virginia

RE: Hubert C. Mencz
and David Auerbach
and Susan Ortmann

Dear Mr. Hodges:

I represent David Auerbach and Susan Ortmann.

In reference to the captioned individuals and a certain parcel of land located in Hanover County, described in attached deed from Mr. & Mrs. Mentz to Auerbach and Ortmann, this is to advise you that there is a dispute as to the use by Mencz of the easement over the parcel and as described in the attached letter to Mentz.

It has come to my clients' attention that certain permits are or have been applied for with Hanover County to build a roadway or other access over the easement described in the deed. My clients dispute the extent to which the easement may be improved by Mr. Mentz, given the limitations contained in the deed for the access to Parcel B and the limitation on building lots, a condition imposed by the County.

There is a pending civil dispute between the parties over this issue and we hereby request that all applications by Mr. Mentz or his agents for permits pertaining to this access easement be denied until this matter is formally resolved between the parties or otherwise.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Charles J. McCall

Charles J. McCall

EXHIBIT 6

RECEIVED
AUG 31 1993
HANOVER COUNTY PLANNING OFFICE

(64)

April 15, 1993

BY FAX ONLY
Andrew J. Ellis, Jr., Esquire
Mays & Valentine
NationsBank Center
1111 East Main Street
PO Box 1122
Richmond, VA 23208-1122

RE: Auerbach v. Mentz
Case No. CH2001116-00

Dear Jack:

Thank you for sending me a copy of the Hayes case. I can well understand why you like the case.

Without a complete discourse on the case itself, the case is distinguishable from the present situation. First, the easement in Hayes was initially established for a specific purpose, i.e. a marina, and the expanded use was consistent therewith. Second, the easement was established without limitations on its use. Third, it involved improvements, i.e. pavement of the easement, that the court found to be reasonable.

The easement granted to Mentz was expressly for the purpose of ingress and egress to Parcel "B", and nowhere else. Moreover, Hanover County expressly limited attachment of Parcel "B" to Mentz's other property by stating that it was not for the purpose of creating additional building lots.

Accordingly, I can see no reason for a gravel road to Parcel "B", much less a paved road. I still think a little common courtesy by your client would go a long way.

Very truly yours,

CM

Charles J. McCall

CJM/mkf
cc: David Auerbach by fax

c:\wp51\data\auerbach.Re\specperf\ell1s15.ltr

OFFICIAL RECEIPT
HANOVER CIRCUIT COURT
DEED RECEIPT

DATE: 04/02/93 TIME: 11:05:57 ACCOUNT: 0[illegible]CLR0077 RECEIPT: 92000004A0S
CASHIER: PBL REG: MN13 TYPE: DES PAYMENT: FULL PAYMENT
INSTRUMENT : 2077 BOOK: 0 PAGE: 0 RECORDED: 04/02/93 AT 11:05
GRANTOR NAME : MENTZ/HUBERT C & WFE EX: N LOCALITY: CO
GRANTEE NAME : AUERBACH/DAVID ETAL EX: N PERCENT: 100%
AND ADDRESS : 1 OLD CHURCH TAVERN, HANOVER VA
RECEIVED OF : C J MCALL DATE OF DEED: 03/31/93
CHECK : $320.00
DESCRIPTION 1: 2.578 AC COLD HARBOR
2: CK0723
CONSIDERATION: 102,000.00 ASSUMPTION: .00 MAP:

CODE	DESCRIPTION	PAID	CODE	DESCRIPTION	PAID
301	DEEDS	22.00	145	VSLF	1.00
039	DEEDS AND CONTRACTS	153.00	038	DEEDS OF CONVEYANCE	51.00
213	COUNTY GRANTEE TAX	51.00	212	TRANSFER FEES	1.00
220	GRANTOR TAX	51.00			

TENDERED : 200.00
AMOUNT PAID: 300.00
CHANGE OUT : .00

CLERK OF COURT: RICHARD L. SHELTON

DC-101(4/88)

THIS DEED made this 21st day of March, 1993 between HUBERT C. MENTZ and PAMELA M. MENTZ, his wife, parties of the first part and DAVID AUERBACH and SUSAN C. GRIMANN, his wife, parties of the second part:

W I T N E S S E T H :

The said parties of the first part for and in consideration of the sum of Ten Dollars ($10.00) to them cash in hand paid the receipt of which is hereby acknowledged do hereby grant, bargain, sell and convey unto the said parties of the second part as tenants by the entirety with the right of survivorship as at common law with General Warranty and English Covenants of Title the following described property, to-wit:

See D.B. #35 Pg. 69

ALL that certain piece or parcel of land lying and being in Cold Harbor District, Hanover County, Virginia containing 2.578 acres and being more particularly described as Parcel A on a plat of two parcels of land drawn by Goodfellow, Jalbert, Beard and Associates Inc. dated January 9, 1991 as revised on August 18, 1992 and recorded herewith.

BEING a portion of the same property conveyed to Hubert C. Mantz and Pamela M. Mentz, his wife, by Deed from Mary Jane Trimmer, also known as Mary Jane Tucker Trimmer, widow, dated February 5, 1991 and recorded February 22, 1991 in the Clerk's Office Circuit Court of Hanover County, Virginia in Deed Book 849, Page 726.

The said parties of the first part hereby reserve an easement of right-of-way 50 feet in width along the western line of Parcel A leading from State Route 606 to Parcel B as a means of ingress and egress to and from Parcel B and State Route 606, said

Deed # 4077
Org. Returned: Grantor ___ Grantee ___
Owner: Charles J. McCall
RICHARD L. SHELTON, CLERK atty

BOOK 972 PAGE 340

easement being shown as lying on the westerly side of Parcel A on the hereinabove described plat.

The said parties of the first part do further grant and convey unto the parties of the second part a first right of refusal to purchase Parcel B consisting of 7.422 acres should the parties of the first part sell that parcel of land.

The parties of the first part do hereby correct a certain plat drawn by Goodfellow, Jalbert, Baard and Associates Inc. dated January 9, 1991 and recorded in Deed Book 934, Page 653, Clerk's Office of the Circuit Court of Hanover County, which plat contains a description of 10 acres including Parcel A hereinabove described. The aforesaid plat recorded herewith is substituted for the plat recorded in Deed Book 934, Page 653 and the description is corrected to refer to two parcels, A and B. Parcel B containing 7.422 acres is added on to the property described in Deed Book 659, Page 707 as an add-on, not for the purposes of creating additional building lots.

WITNESS the following signatures and seals:

Hubert C. Mentz (SEAL)
HUBERT C. MENTZ

Pamela M. Mentz (SEAL)
PAMELA M. MENTZ

BOOK 972 PAGE 341

STATE OF VIRGINIA

CITY/COUNTY OF Hanover, to-wit:

The foregoing instrument was acknowledged before me this 15 day of ~~March~~ April, 1993 by HUBERT C. MENTZ.

Notary Public
Commission in Perpetuity

My commission expires: Circuit Court of Hanover County.

STATE OF VIRGINIA

CITY/COUNTY OF Hanover, to-wit:

The foregoing instrument was acknowledged before me this 15 day of ~~March~~ April, 1993 by PAMELA M. MENTZ.

Notary Public
Commission in Perpetuity

My commission expires: Circuit Court of Hanover County.

1 Old Church Tavern
Hanover, Va.

Hanover County, Virginia
In the Clerk's Office of the Circuit Court this 2 day of April, 1993 at 11:05 o'clock A.M. the foregoing writing was presented and admitted to record, together with the annexed certificate of acknowledgment and recorded in Deed Book No. 972 page 340 for which tax imposed by Section 58.54-1 in the amount of $ 100.00 has been paid. Teste: [illegible] Clerk

BOOK 972 PAGE 342

BOARD OF SUPERVISORS

J. T. "JACK" WARD, CHAIRMAN
MECHANICSVILLE DISTRICT

WILLIAM T. BOLLING, VICE CHAIRMAN
CHICKAHOMINY DISTRICT

WILLIAM C. FRAZIER
SOUTH ANNA DISTRICT

RICHARD S. GILLIS, JR.
ASHLAND DISTRICT

R. J. KLOTZ, JR.
HENRY DISTRICT

AUBREY M. STANLEY, JR.
BEAVERDAM DISTRICT

ELTON J. WADE, SR.
COLD HARBOR DISTRICT

HANOVER COUNTY
P. O. BOX 470
HANOVER, VIRGINIA 23069-0470

JOHN F. BERRY
COUNTY ADMINISTRATOR

RICHARD R. JOHNSON
DEPUTY COUNTY ADMINISTRATOR

STERLING E. RIVES, III
COUNTY ATTORNEY

File No.: TZF

****
CONFIDENTIAL - ATTORNEY/CLIENT PRIVILEGED COMMUNICATION
****

M E M O R A N D U M

TO: John H. Hodges, Director of Planning
W. Randolph Johnson, Jr., Zoning Administrator

FROM: A. Lisa Barker, Senior Assistant County Attorney

DATE: November 9, 1993

RE: Auerbach/Ortmann/Mentz

I received an inquiry from your department as to whether an easement conveyed by Deed dated March 31, 1993, recorded in Deed Book 972, page 340, provides access for a tract of about one hundred acres owned by Mr. and Mrs. Mentz. That property adjoins property formerly owned by Mentz, described as Parcel B, containing about seven acres. The Deed which was recorded, when returned to the attorney for Auerbach and Ortmann, included a marginal note referring to a plat in Plat Book 35, page 69. Apparently, a marginal note was later added by the Clerk referring to Plat Book 35, page 94. Both plats designate portions of the property as Parcel A and Parcel B.

In the Deed, Mr. and Mrs. Mentz reserved "an easement of right-of-way fifty feet in width along the western line of Parcel A [now owned by Ortmann and Auerbach] leading from State Route 606 to Parcel B [retained by Mentz] as a means of ingress and egress to and from Parcel B and State Route 606, said easement being shown as lying on the westerly side of Parcel A on the hereinabove described plat [which designates a Parcel B consisting of about 7.4 acres]." The Deed further refers to Parcel B being "added on" to the property described in Deed Book 659, page 707 "as an add-on, not for the purposes of creating additional building lots."

The specific language of the reservation in the deed conveying property from Mentz to Auerbach and Ortmann restricts access to Parcel B as described in that Deed, consisting of about 7.4 acres.

EXHIBIT
4

Jack Ellis, who represents Mentz, has cited Hayes v. Aquia Marina, Inc., 243 Va. 255 (1992) in support of the theory that although the reservation is for access to Parcel B, the easement may be used for all the property owned by Mentz. That decision of the Supreme Court involved expansion of the use of an easement, not an issue of the description of property included in the "dominant estate." While certainly the argument can be made that access reserved for Parcel B allows access to other portions of the Mentz property (and Mr. Ellis is making that argument), I do not find any conclusive evidence of unrestricted access to property other than Parcel B.

Of course, I have not conducted a title examination and there may be other rights of access, including equitable rights, such as those created by adverse possession or necessity. Any such rights would not, absent a judicial decision adequately defining the rights, satisfy ordinance requirements.

Please let me know if you need further information.

ALB:cdc

P.B. 35 Pg. 69

NOTE: PARCEL "A" IS FIRST DIVISION OF PROPERTY. PARCEL "B" IS AN ADD-ON PARCEL TO THE PROPERTY OF H.C. MENTZ AND PAMELA M. MENTZ DB 659 PG 707.

NOTE: This property does not lie in a H.U.D. Designated Flood Hazard Zone A as shown on panel 510237 0375A. This property does lie in Flood Zone C.

This is to certify that on JAN. 9, 1991 I made an accurate field survey of the premises shown hereon, that all improvements and easements known or visible are shown hereon, that there are no encroachments by improvements either from adjoining premises, onto subject premise or from subject premises onto adjoining premises other than as shown hereon. Title report not furnished. Easements and/or rights-of-way may exist.

Paul A. Jalbert C.L.S.
Cert. No. 1434 B

N/F MENTZ
DB. 659 PG. 707

FENCE GENERALLY ALONG PROPERTY LINE OR EAST OF PROPERTY LINE

S17°02'12"W 1093.97'

100' VA. POWER EASE. FORMERLY VEPCO.

OLD PARCEL LINE

PARCEL "B"
7.422 AC.

PROP. LINE ALONG NORTHSIDE OF OLD R.R. RIGHT-OF-WAY

1171.17'

N14°38'56"E 1621.17'

CONC. MON. FD. FEN COR.

237.84'

S17°57'22"W 392.73'

ROD SET

S83°38'00"E 270.53'

FRAME BLDGS.

344.95'

PARCEL "A"
2.578 AC.

50' EASEMENT FOR INGRESS & EGRESS

430.00'

NOTE:
* PARCEL "A" REVISED ON AUGUST 18, 1992
REMOVED TWO FRAME BUILDINGS.
PLAT REVISED FOR DAVID C. AUERBACH AND SUSAN C. ORTMANN.

COMMONWEALTH OF VIRGINIA
PAUL A. JALBERT
No. 1434 B
LAND SURVEYOR
61-6941

PLAT OF TWO PARCELS OF LAND LOCATED ON THE NORTH SIDE OF STATE ROUTE 606 IN THE COLD HARBOR DISTRICT HANOVER COUNTY, VIRGINIA.

*PRESENT OWNERS • HUBERT C. MENTZ AD AND PAMELA M.R. MENTZ
DEED BOOK 649 PAGE 726

775' TO THE ℄ RTE. 628

STATE ROUTE 606

PROPERTY LINE • ℄ ROAD

DWELLING DETAIL
1" = 25'

NOTE: PROPERTY LINE CENTERED BETWEEN TWO WALLS OF BRICK AND FRAME DWELLINGS PER DEED DESCRIPTION RECORDED IN DB 27 PG 357

TWO STORY BRICK DWELLING W/ BASEMENT

2 STORY FRAME DWELLING

PORCH 1.5' W. OF PROP. LINE

30' PRESCRIPTIVE V.D.O.T. EASEMENT

℄ OF ST. RTE. 606

STATE ROUTE 606

JOB NO.--3827-0012

Job no. 3419 - 0020 date JAN. 9, 1991 scale 1" = 100'

Goodfellow, Jalbert, Beard and Associates Inc.
6520 Mechanicsville Turnpike — PO Box 530
Mechanicsville, Virginia 23111 (804) 746-7067
ENGINEERING • SURVEYING • PLANNING

EXHIBIT

42

(73)

Recorded Book 4 1993 PB35 Page 44

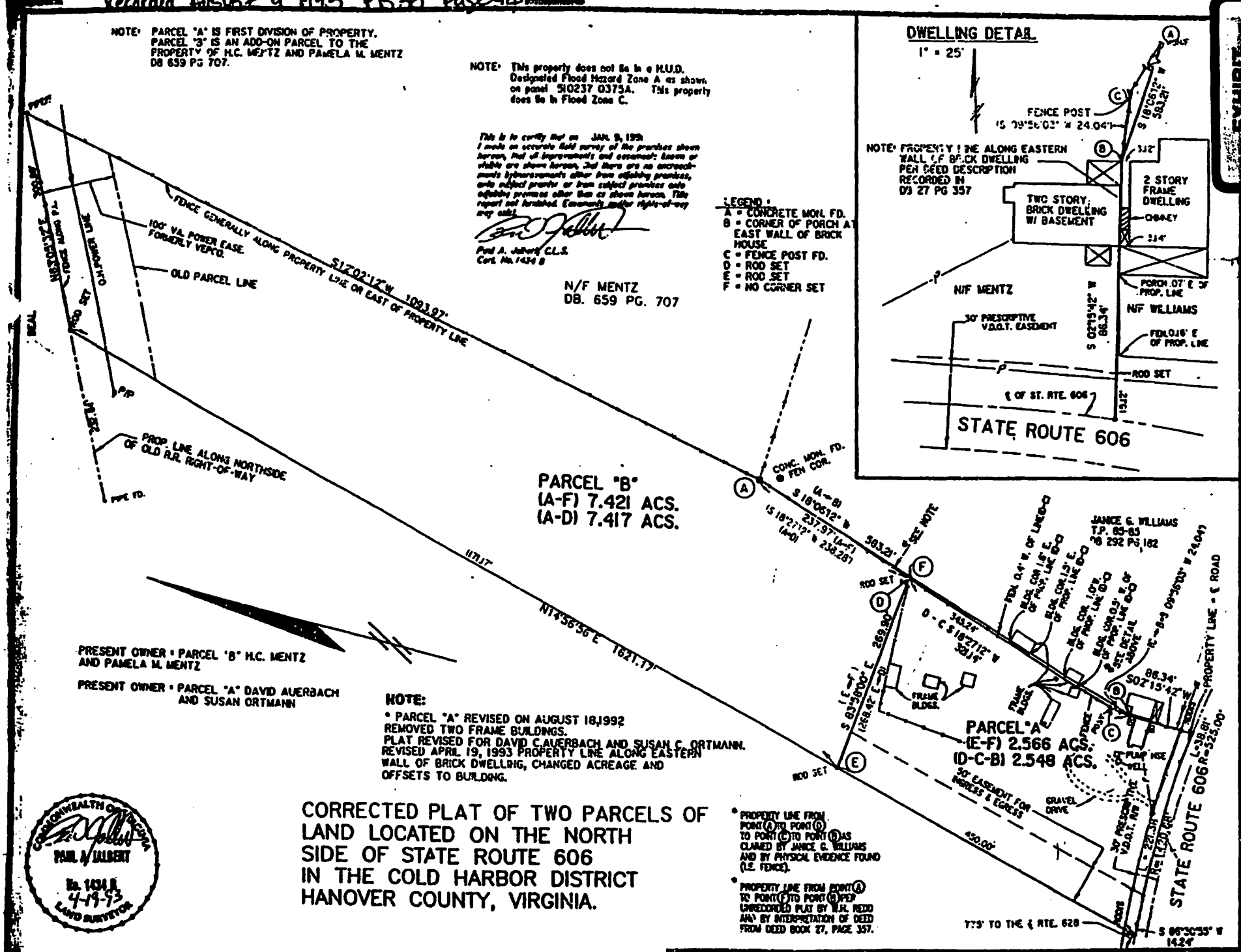
NOTE: PARCEL "A" IS FIRST DIVISION OF PROPERTY. PARCEL "B" IS AN ADD-ON PARCEL TO THE PROPERTY OF H.C. MENTZ AND PAMELA M. MENTZ DB 659 PG 707.

NOTE: This property does not lie in a H.U.D. Designated Flood Hazard Zone A as shown on panel 510237 0375A. This property does lie in Flood Zone C.

This is to certify that on JAN. 9, 1993 I made an accurate field survey of the premises shown hereon, that all improvements and encroachments known or visible are shown hereon, that there are no encroachments by improvements either from adjoining premises, onto subject premise or from subject premise onto adjoining premises other than as shown hereon. Title report not furnished. Easements and/or rights-of-way may exist.

Paul A. Julbert C.L.S.
Cert. No. 1434 B

LEGEND:
A = CONCRETE MON. FD.
B = CORNER OF PORCH AT EAST WALL OF BRICK HOUSE
C = FENCE POST FD.
D = ROD SET
E = ROD SET
F = NO CORNER SET



NOTE:
- PARCEL "A" REVISED ON AUGUST 18, 1992 REMOVED TWO FRAME BUILDINGS.
PLAT REVISED FOR DAVID C. AUERBACH AND SUSAN C. ORTMANN. REVISED APRIL 19, 1993 PROPERTY LINE ALONG EASTERN WALL OF BRICK DWELLING, CHANGED ACREAGE AND OFFSETS TO BUILDING.

CORRECTED PLAT OF TWO PARCELS OF LAND LOCATED ON THE NORTH SIDE OF STATE ROUTE 606 IN THE COLD HARBOR DISTRICT HANOVER COUNTY, VIRGINIA.

- PROPERTY LINE FROM POINT (A) TO POINT (B) TO POINT (C) TO POINT (D) AS CLAIMED BY JANICE G. WILLIAMS AND BY PHYSICAL EVIDENCE FOUND (I.E. FENCE).
- PROPERTY LINE FROM POINT (A) TO POINT (F) TO POINT (E) PER UNRECORDED PLAT BY W.R. REDD AND BY INTERPRETATION OF DEED FROM DEED BOOK 27, PAGE 357.

COMMONWEALTH OF VIRGINIA
PAUL A. JULBERT
No. 1434 B
4-19-93
LAND SURVEYOR

JOB NO. 3827-0012

Goodlettsville Julbert Board and Associates Inc.

EXHIBIT 5

43

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2-6 Subdivision: The division of a tract or parcel of land into three (3) or more parts, any of which contain an area of ten (10) or more acres, but less than twenty-five (25) acres, for the purpose, whether immediate or at some future time, of transfer of ownership of any such parcels. The sale or exchange of parcels between adjoining lot owners where such sale or exchange does not create additional building lots shall be exempt from the provisions of this ordinance. The division or partitioning of land in an estate by court order or by the heirs of the original owner shall also be exempted from the provisions of this ordinance.

2-7 Tract: A parcel of land with an area of between ten (10) and twenty-five (25) acres.

Section 3. Administration.

3-1 Administrator: The agent appointed by the board of supervisors is hereby delegated to administer this ordinance. In so acting, the agent shall be considered the agent of the governing body and approval or disapproval as though it were given by the governing body. In the event the agent is not the commission, the agent may consult with the commission on matters contained herein.

3-2 Duties: The agent shall perform its duties, as regards subdivision and subdividing in accordance with this ordinance.

3-3 To consult: In the performance of its duties, the agent may call for opinions or decisions, either verbal or written, from other departments in considering details of any submitted plat.

3-4 Additional authority: In addition to the regulations herein contained for the platting of the private road subdivision, the agent may, from time to time, establish any reasonable additional administrative procedures deemed necessary for the proper administration of this ordinance.

Section 4. Procedure for making and recording plats.

4-1 Platting required: The owner or developer of any tract of land situated within Hanover County who subdivides the same into a private road subdivision shall cause a plat of such subdivision, with reference to known or permanent monuments, to be made and recorded in the office of the clerk of the Circuit Court of Hanover County, Virginia. No such plat of subdivision shall be recorded unless and until it shall have been submitted, approved and certified by the agent in accordance with the regulations set forth in this ordinance. No tract shall be sold in any such subdivision before the plat shall have been recorded.

4-1.1 In the event a plan for subdivision is disapproved by the agent, the subdivider may appeal to the circuit court as provided in section 15.1-475 of the Code of Virginia.

4-2 Draw and certify: Every such plat shall be prepared by an engineer or surveyor duly licensed by the State of Virginia, who shall endorse upon each plat a

EXHIBIT

Goodfellow, Jalbert, Beard and Associates Inc.
6528 Mechanicsville Turnpike — P.O. Box 539
Mechanicsville, Virginia 23111
(804) 746-7097
ENGINEERING • SURVEYING • PLANNING
FAX NO: (804) 730-7275

FACSIMILE TRANSMITTAL

DATE: 8-21-92

TO: BILL JOHNSON FIRM: HANOVER CO. PLANNING

NO. OF PAGES 3 INCLUDING COVER PAGE

PLEASE CALL IMMEDIATELY IF YOU DO NOT RECEIVE ALL PAGES OF THIS TRANSMISSION.

REFERENCE: MENTZ PROPERTY PROJECT NO:

THESE ARE TRANSMITTED AS CHECKED BELOW:

___ For approval ___ For your use ___ As requested ✓ For review & comment

REMARKS: Please call about this when you have time to research it.

FAX NO. 537-5443

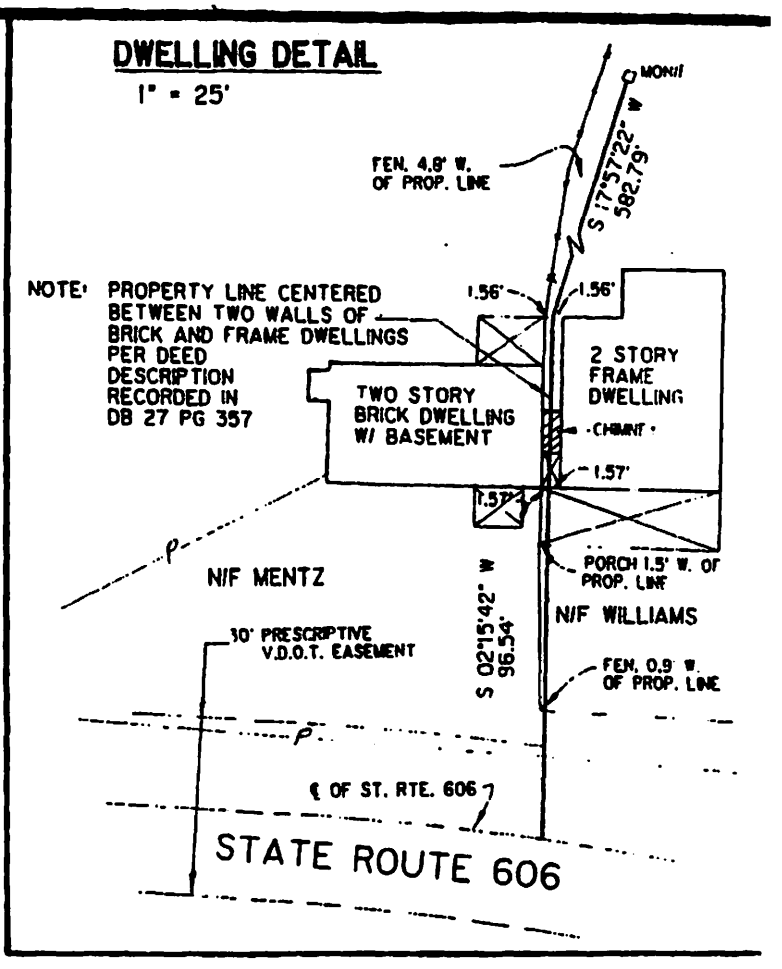
Bill Goodfellow
SIGNATURE

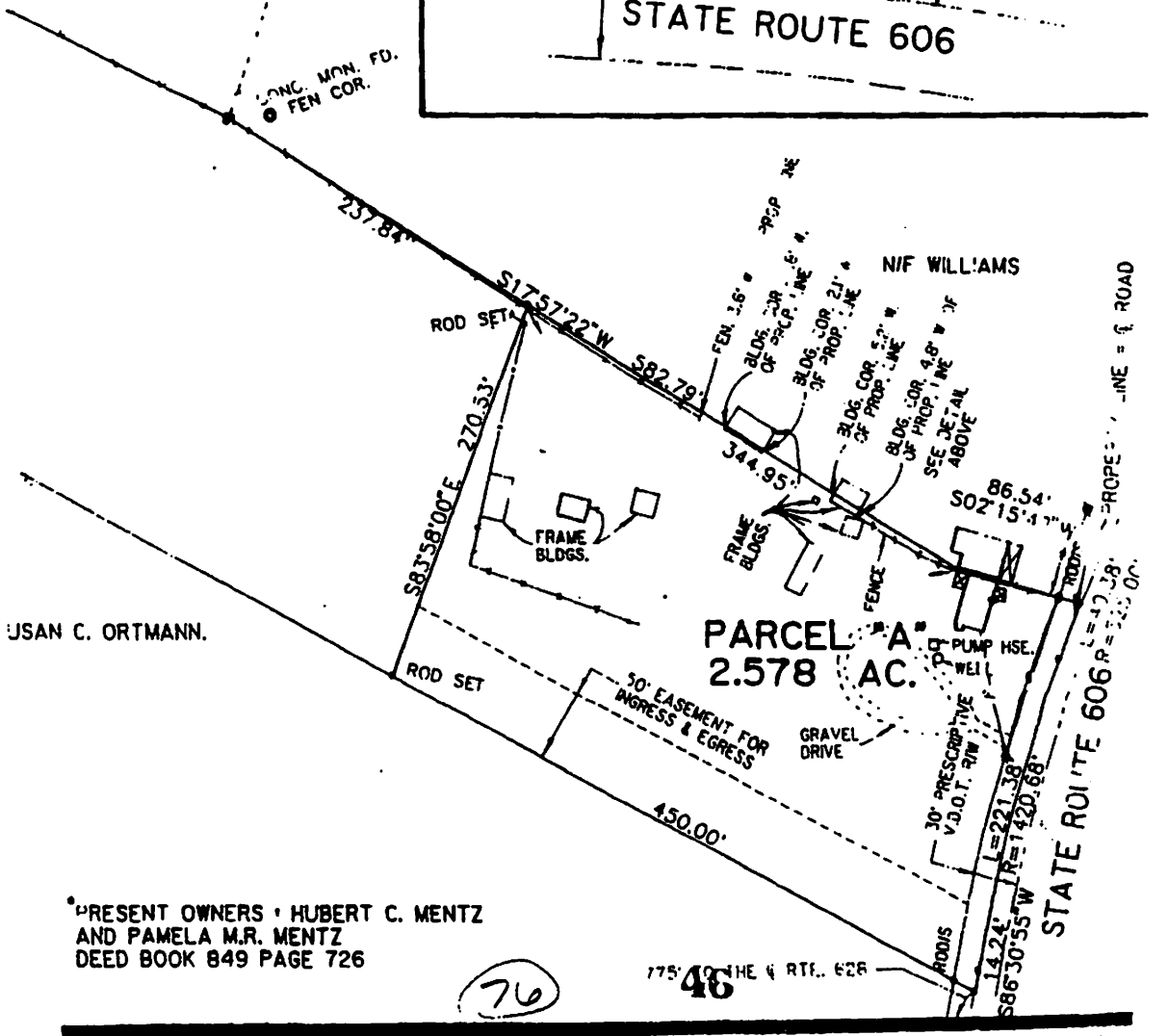
EXHIBIT

75

in a H.U.D.
one A as show-
Thi

91
premises shown
ments known or
a no encroach-
ning premises,
remises onto
hereon. Title
rights-of-way





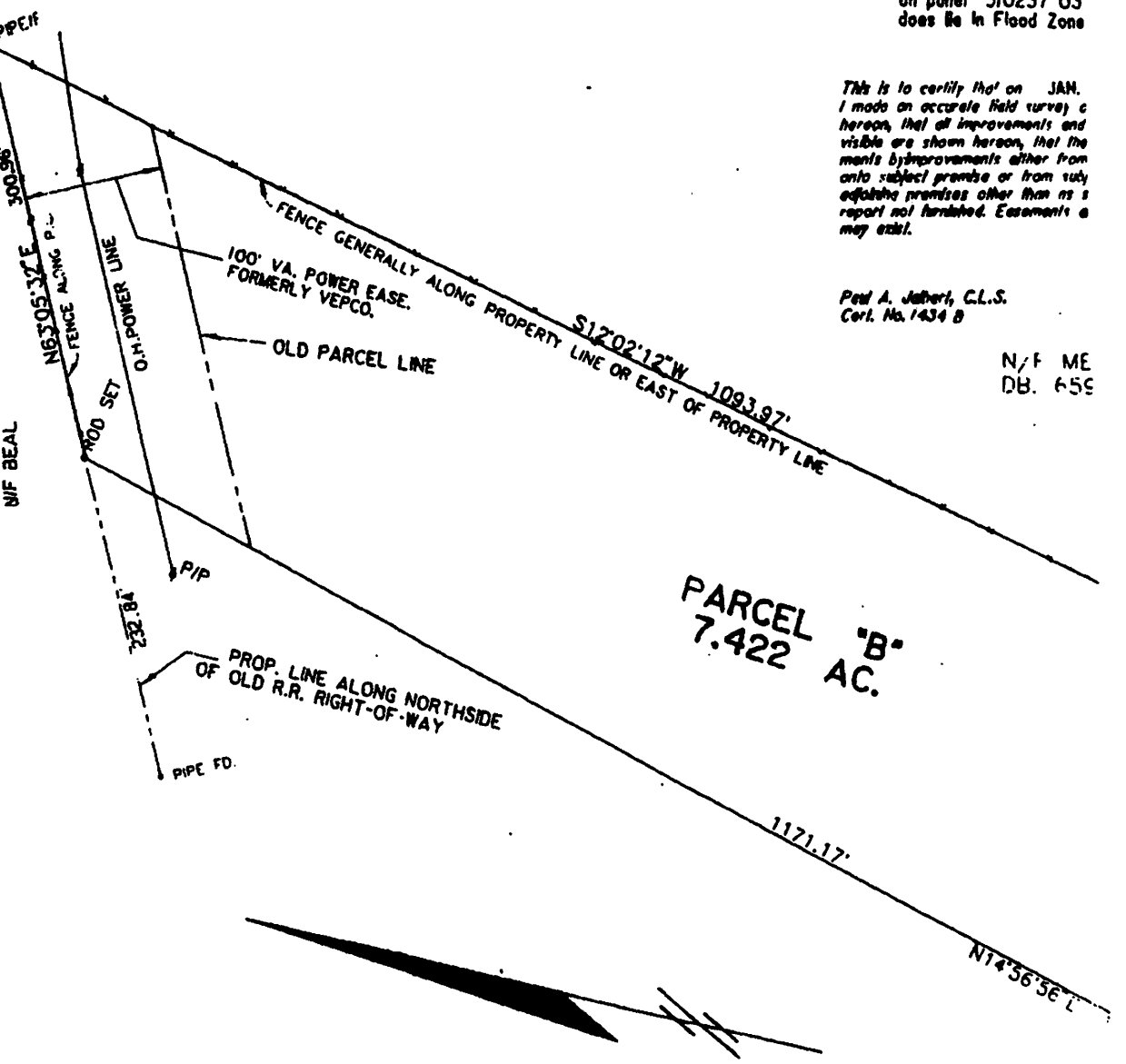
Goodfellow, Gilbert, Bond and Associates, Inc.
6526 Mechanicsville Turnpike — P.O. Box 539
Mechanicsville, Virginia 23111 (804) 746-7097

NOTE: PARCEL "A" IS FIRST DIVISION OF PROPERTY.
PARCEL "B" IS AN ADD-ON PARCEL TO THE
PROPERTY OF H.C. MENTZ AND PAMELA M. MENTZ
DB 659 PG 707.

NOTE: This property does no
Designated Flood Haza
on panel 510237 03
does lie in Flood Zone

*This is to certify that on JAN.
I made an accurate field survey c
hereon, that all improvements and
visible are shown hereon, that the
ments byimprovements either from
onto subject premise or from subj
adjoining premises other than as s
report not furnished. Easements a
may exist.*

Paul A. Jetheri, C.L.S.
Cert. No. 1434 B



NOTE:

* PARCEL "A" REVISED ON AUGUST 18,19
REMOVED TWO FRAME BUILDINGS.
PLAT REVISED FOR DAVID C.AUERBACH A

PLAT OF TWO PARCELS OF
LAND LOCATED ON THE N
SIDE OF STATE ROUTE 606
IN THE COLD HARBOR DIST
HANOVER COUNTY, VIRGINIA.

47

(77)

JOB NO.--3827-0012

job no. 3419 - 0020 **date** JAN. 9, 1991 **scale** 1" = 100'

THIS DEED, made this 14th day of August, 1961, by and between Edward P. Simpkins, Jr., Special Commissioner as hereinafter mentioned, party of the first part, and Mary Jane Tucker Trimmer, party of the second part,

W I T N E S S E T H :

WHEREAS, on the 2nd day of August, 1961, the Circuit Court of Hanover County, by a decree entered in a certain cause then depending on the chancery side of said court between Maria E. Tucker et als, complainants, and Thomas Duane Tucker et al, defendants, allotted and confirmed to Mary Jane Tucker Trimmer a certain parcel of real estate hereinafter described and directed the said Mary Jane Tucker Trimmer within ten days from the date of said decree to deposit in The Tri-County Bank, Mechanicsville, Virginia, to the credit of the court in this cause, the sum of $8086.01 and to take the bank's receipt for said sum and deliver the same to Edward P. Simpkins, Jr., who was also by said decree appointed a special commissioner and ordered and directed as such to prepare, execute and deliver a good and sufficient deed conveying to Mary Jane Tucker Trimmer with special warranty, subject to the dower of Maria E. Tucker, the parcel of land hereinafter described; and,

WHEREAS, Mary Jane Tucker Trimmer has deposited the sum of $8086.01 in The Tri-County Bank, Mechanicsville, Virginia, to the credit of the court in this cause and has delivered the receipt evidencing said deposit to the undersigned, all in accordance with the decree entered on August 2, 1961;

NOW, THEREFORE, for and in consideration of the premises and of the said sum of $8086.01 paid by the said Mary Jane Tucker Trimmer in accordance with the terms of the decree of August 2, 1961, in this cause at and before the sealing and delivery of this deed, the receipt whereof is hereby acknowledged, Edward P. Simpkins, Jr., Special Commissioner as aforesaid, pursuant to said decree, doth grant, bargain, sell and convey unto the said Mary Jane Tucker Trimmer subject to the dower of Maria E. Tucker as widow of St. George Tucker, the parcel of land above referred to and more particularly described as follows:

> All that certain tract, piece or parcel of real estate with all improvements thereon and appurtenances thereunto belonging, lying and being in Henry District, Hanover County, Virginia, near Old Church, containing 32 acres, more or less, which property is bounded on the north by the right of way of the old Richmond-Rappahannock River Railway, on the east by the property now or formerly of C. W. Elliott and B. B. Williams Estate, on the south by the main county road running from Richmond to Old Church, and on the west by the county road running from stated last-mentioned road to Highway 360.
>
> Being the same property conveyed to St. George Tucker by J. M. Ruffin and others, Trustees of Immanuel Church, by deed dated November 27, 1925, and recorded April 25, 1938, in Deed Book 107, at page 13 in the Clerk's Office of the Circuit Court of Hanover County, excepting therefrom a parcel of land containing 24 acres conveyed to John Beal, Jr. and Mary Atkins Beal, his wife, by the widow and heirs of St. George Tucker by deed dated April 1, 1950, and recorded April 5, 1950, in Deed Book 137 at page 287 in the Clerk's Office of the Circuit Court of Hanover County, Virginia.

This deed is executed on behalf of Mary Jane Tucker Trimmer, Sarah Mountcastle Tucker, Thomas Duane Tucker and Maria Lena Tucker.

WITNESS the following signature and seal:

Edward P. Simpkins, Jr. (SEAL)
Special Commissioner

STATE OF VIRGINIA,

CITY OF RICHMOND, to-wit:

I, Elsie Ernest Wattinger, a Notary Public in and for the City and State aforesaid, do certify that Edward P. Simpkins, Jr., Special Commissioner, whose name is signed to the foregoing writing bearing date on the 14th dayof August, 1961, has this day acknowledged the same before me in my City aforesaid.

Given under my hand this 21 day of August, 1961.

My commission expires April 30, 1963.

Elsie Ernest Wattinger
Notary Public

Virginia: Hanover County, to-wit:
In the Clerk's Office of the County and State aforesaid the 29 day of August, 1961, at 3:00 o'clock P. M. the foregoing writing was presented and admitted to record, together with the annexed certificate of acknowledgment and recorded in Deed Book No. 209, page 612.
Teste: F. A. Taylor Clerk

LAST WILL AND TESTAMENT

OF

SHIRLEY V. TRIMMER, JR.

I, SHIRLEY V. TRIMMER, JR., of the County of Hanover, State of Virginia, being of sound and disposing mind and memory and over the age of eighteen (18) years, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all former Wills and Codicils heretofore made by me.

ARTICLE I

I direct my Executor, hereinafter named, to pay as a cost of the administration of my estate all my just debts, expenses of last illness and funeral expenses, including the acquisition of burial plot, markers and engraving, all estate and inheritance taxes upon or with respect to any property which is required to be included in my gross estate for such tax purposes. I also direct that my Executor shall not require that any part of such taxes be recovered from, paid by, or apportioned among the recipients of or those interested in such property.

ARTICLE II

I give and bequeath as a specific bequest the sum of TEN THOUSAND DOLLARS ($10,000.00) to SHIRLEY AMANDA TRIMMER, my daughter, if she survives me.

ARTICLE III

I give and bequeath as a specific bequest the sum of ONE THOUSAND DOLLARS ($1,000.00) to the Trustees of IMMANUEL EPISCOPAL CHURCH, located at Old Church, Virginia, with directions that this bequest be used by the Trustees solely for the up keep and maintenance of the cemetery of the said church.

ARTICLE IV

All the rest, residue and remainder of my estate, real, personal or mixed, of whatsoever kind or nature and howsoever situated, I give, devise and bequeath to my wife, MARY JANE TRUMMER, if living, in fee simple and absolutely to the express exclusion of all other persons whether now born or born hereafter.

ARTICLE V

In the event my wife, MARY JANE TRUMMER, predeceases me, then I give and bequeath my entire Residuary Estate to ROBERT P. BEAVER, Trustee, to be held, administered and disposed of by my Trustee for the benefit of my daughter, SHIRLEY AMANDA TRUMMER, upon the following trust:

A. So long as my daughter, SHIRLEY AMANDA TRUMMER, is living and under the age of Fifty (50) years, my Trustee shall maintain the trust fund. The trust fund, including personal property and real estate that I may own at the time of my death which is part of my Residuary Estate that becomes a part of the trust fund, my Trustee shall have the right in his sole discretion to sell any of the property held in trust at any time for such price as my Trustee in his uncontrolled discretion shall deem reasonable and the net proceeds of said sale or sales shall become a part of the trust fund. In addition, my Trustee in his sole discretion shall be permitted to convey my real estate known as "Rocketts", located in Hanover County, Virginia, to my daughter, SHIRLEY AMANDA TRUMMER, if my daughter desires same and my Trustee believes it to be in her best interest to make such conveyance, but my Trustee is not required to do so.

B. While said trust is being so held, my Trustee shall pay quarterly of each year so much of the income and principal of the trust fund as my Trustee in his uncontrolled discretion shall deem necessary for SHIRLEY AMANDA TRUMMER's general welfare and comfort, meaning support, maintenance, education

and medical expenses.

C. Upon SHIRLEY AMANDA TRIMMER attaining the age of Fifty years (50), the trust as then constituted shall be paid over and delivered to my daughter, SHIRLEY AMANDA TRIMMER, and the trust terminated.

D. In the event that my daughter, SHIRLEY AMANDA TRIMMER, dies before she attains Fifty (50) years of age, upon her death, the trust shall terminate and the trust as then constituted shall be paid over and delivered to THOMAS DUANE TUCKER and MARIE LENA TUCKER FERGUSON, in equal shares, share and share alike. In the event one of those persons is deceased, the entire balance of the trust shall be paid to the survivor.

ARTICLE VI

I do hereby appoint MARY JANE TRIMMER as Executor of this my Last Will and Testament, and I direct that she be allowed to qualify as Executor without being required to give security on her bond and that an appraisal of my estate be waived.

Should the named Executor predecease me or if she refuses to accept the appointment or is unable to accept before or serve after her qualification, then I do hereby nominate and appoint ROBERT P. BEAVER, as Executor, and I direct that he be allowed to qualify as Executor and be required to give security on his bond and that an appraisal of my estate be waived.

In the event my wife, MARY JANE TRIMMER, predeceases me and the trust herein created is necessary, then I direct that my Trustee, upon his qualification, post surety bond, however, no appraisal is required.

Should the named Trustee predecease me or if he refuses to accept the appointment or is unable to accept before or serve after his qualification,

then I do hereby nominate and appoint ELMO G. CROSS, as Trustee, and I direct that he be allowed to qualify as Trustee and be required to give security on his bond and that an appraisal of my estate be waived.

ARTICLE VII

For the purpose of carrying out all of the provisions of this Will, including and making any and all distribution herein provided, in addition to all other powers granted by law, I hereby give and grant to my Executor and Trustee all of the powers set forth in Section 64.1-57 of the Code of Virginia, as now in force and effect, and I do hereby incorporate by this reference to said Statute all of the powers therein set forth, which are hereby made a part of this Will to the same extent as if expressly recited herein.

IN WITNESS WHEREOF, I have hereunto set my hand and seal to this my Last Will and Testament, this 23 day of August, 1988.

Shirley V. Trimmer, Jr. (SEAL)
Shirley V. Trimmer, Jr.

We, the undersigned, do hereby certify that SHIRLEY V. TRIMMER, JR., has signed, sealed, acknowledged and declared the foregoing paper as and for his Last Will and Testament in the presence of us, two competent witnesses, who, in his presence, at his request, and in the presence of each other, all present together at the same time, have hereunto subscribed our names as attesting witnesses, this 23rd day of August, 1988.

Clifton D Parker — Richmond, Virginia
Witness — Address

Deborah H. Mitgarian — Richmond Virginia
Witness — Address

-4-

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STATE OF VIRGINIA
COUNTY/CITY OF RICHMOND, to-wit:

Before me, the undersigned authority, on this day personally appeared SHIRLEY V. TRIMMER, JR., CYNTHIA D. PARKER and DESPINA Y. MATZANIAS, known to me to be the testator and the witnesses, respectively, whose names are signed to the foregoing Will and all of these persons being by me first duly sworn, SHIRLEY V. TRIMMER, JR., the testator, declared to me and to the witnesses in my presence that said instrument is his Last Will and Testament and that he had willingly signed and executed it in the presence of said witnesses as his free and voluntary act for purposes therein expressed; that said witnesses stated before me that the foregoing Will was executed and acknowledged by the testator as his Last Will and Testament in the presence of said witnesses who, in his presence and at his request, and in the presence of each other did subscribed their names thereto as attesting witnesses on the day of the date of said Will, and that the testator, at the time of the execution of said Will, was over the age of eighteen (18) years and of sound and disposing mind and memory.

Shirley V. Trimmer Jr.
Testator

Cynthia D. Parker
Witness

Despina Y. Matzanias
Witness

Subscribed, sworn and acknowledged before me by SHIRLEY V. TRIMMER, JR., the testator; subscribed and sworn before me by CYNTHIA D. PARKER and DESPINA Y. MATZANIAS, witnesses, this 23rd day of August, 1988.

My commission expires: 2-20-89

Bonni B. Powell
Notary Public

VIRGINIA:

IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF HANOVER COUNTY
August 28, 1989

A paper writing dated August 23, 1988, purporting to be the last will and testament of Shirley Virginus Trimmer, Jr., a/k/a Shirley V. Trimmer, Jr., deceased, who died August 14, 1989, was this day presented to the Clerk, in his office, and offered for probate and having been fully proven by Cynthia D. Parker and Despina Y. Matzanias, witnesses, who appeared before Bobbi B. Powell, Notary Public, on August 23, 1988, pursuant to Section 64.1-87.1, Code of Virginia, as amended; thereupon, the said paper writing bearing date of August 23, 1988, is admitted to probate and Ordered to be recorded as the true last will and testament of Shirley Virginus Trimmer, Jr., a/k/a Shirley V. Trimmer, Jr., deceased.

On motion of Mary Jane Trimmer, the Executor named in the will, who made oath as the law directs and entered into a bond in the penalty of Four Hundred Five Thousand ($405,000.00) Dollars, but without surety, none being required of her, which bond being signed, sealed and acknowledged by the obligor, therein, is Ordered to be recorded.

Certificate is granted the said Mary Jane Trimmer, as Executor of the will of Shirley Virginus Trimmer, Jr., a/k/a Shirley V. Trimmer, Jr., deceased

It is ORDERED that the Executor of the will of Shirley Virginus Trimmer, Jr., a/k/a Shirley V. Trimmer, Jr., deceased, file an inventory with the Commissioner of Accounts of this Court.

TESTE: Richard L. Shelton, Clerk

BY: Brenda A. Ostrowski
Deputy Clerk

E5-2:e01301991

THIS DEED, made February 5, 1991, by and between MARY JANE TRIMMER, a/k/a Mary Jane Tucker Trimmer, widow, herein called Grantor, and HUBERT C. MENTZ and PAMELA M. MENTZ, husband and wife, herein called Grantees.

WITNESSETH:

That in consideration of Ten Dollars ($10.00) and other valuable consideration, the receipt of which is hereby acknowledged, the Grantor hereby grants and conveys with General Warranty and with English Covenants of title except as hereinafter set forth unto the Grantees, as tenants by the entireties with the right of survivorship as at common law, the following described real estate:

ALL that certain lot, piece or parcel of land, with all improvements thereon and appurtenances thereto belonging, lying and being in Cold Harbor District, Hanover County, Virginia, containing 10.0 acres fronting along northern line of Virginia State Route 606 and more particularly described as follows:

Commencing at a point marking the center line of Virginia State Route 606 which point is approximately 775' East of the center line of Virginia State Route 628; thence N 14 degrees 56 minutes 56 seconds E 1621.17' to a rod marking the southernmost line of property now or formerly owned by Beal; thence N 63 degrees 05 minutes 32 second E 300.96' along a fence to a pipe found in the southern line of property now or formerly owned by Beal; thence S 12 degrees 02 minutes 12 seconds W 1093.97' to a concrete monument at a fence corner; thence S 17 degrees 57 minutes 22 seconds W 582.79' to a point approximately 1.56' from the corner of a two-story frame dwelling; thence S 2 degrees 15 minutes 42 seconds W 86.54' to a point in the center line of Virginia State Route 606; thence westwardly along the center line of said road with a curve to the left, said curve having a radius of 525.00' and a length of 40.38' to a point; thence along a curve to the left, said curve having a radius of 1420.68 feet and a length of 221.38' to a point in the center of said road; thence S 86 degrees 30 minutes 55 seconds W 14.24' to the point in center of said road, the point of commencement.

BEING a part of a 32 acre, more or less, parcel conveyed to Mary Jane Tucker Trimmer by deed from Edward P. Simpkins, Jr., Special Commissioner, dated August 14, 1961, and recorded August 24, 1961, in Deed Book 209 at Page 612 in the Clerk's Office of the Circuit Court of Hanover County, Virginia. By deed of record in Deed Book 209, page 615, Mary Jane Tucker Trimmer and Shirley V. Trimmer, Jr., her husband, conveyed unto Shirley V. Trimmer, Jr., an undivided one-half interest in the aforesaid property, subject to the dower of Maria E. Tucker, widow of St. George Tucker. The said Shirley V.

Org. Returned: Grantor ___ Grantee #1486
Others: Jacqueline Chapman
RICHARD L. SHELTON, CLERK

BOOK 5 J PAGE 126

Trimmer, Jr., (a/k/a Shirley Virginus Trimmer, Jr.), died testate on August 14, 1989, and by his Will probated in Will Book 31, page 598, devised the rest, residue and remainder of his estate (real, personal or mixed), including his one-half undivided interest in the property acquired in Deed Book 209, page 615, to his widow, the said Mary Jane Trimmer.

AND ALSO BEING a part of a 4 acre, more or less, parcel conveyed to Shirley V. Trimmer, Jr. and Mary Jane Trimmer, his wife, as tenants by the entirety with the right of survivorship, by deed from James A. Rawls, Jr., single, dated November 9, 1961, recorded November 21, 1961, in Deed Book 211, page 693. The said Shirley V. Trimmer, Jr. has since died, and by operation of law, his widow, Mary Jane Trimmer (a/k/a Mary Jane Tucker Trimmer) acquired title to this portion of the property.

This conveyance is made subject to recorded conditions, restrictions, and easements affecting the property hereby conveyed.

WITNESS the following signature and seal:

Mary Jane Trimmer (SEAL)
MARY JANE TRIMMER (a/k/a Mary Jane Tucker Trimmer)

STATE OF VIRGINIA,

County of Hanover, to-wit:

The foregoing instrument was acknowledged before me this 6th day of February, 1991, by Mary Jane Trimmer (a/ka/ Mary Jane Tucker Trimmer), widow.

Marguerite D. Kapinos
Notary Public

My commission expires: March 31, 1991

Grantee's Address: 1010 W. Nine Mile Road
Richmond, VA 23111

Hanover County, to-wit:
In the Clerk's Office of the County aforesaid the 22 day of February, 1991, at 12:37 o'clock P.M. the foregoing writing was presented and admitted to record, together with the annexed certificate of acknowledgment and recorded in Deed Book No. 849 page 726
The tax imposed by Section 58.1-801 in the amount of $135.00 has been paid.
Teste: [signature] Clerk

BOOK 849 PAGE 727

BOOK 211 PAGE 693

THIS DEED, made this 9 day of November, 1961, between James A. Rawls, Jr., single, of Richmond, Virginia, hereinafter called "Grantor", and Shirley V. Trimmer, Jr., and Mary Jane Trimmer, his wife, hereinafter called "Grantees";

SLEDD, WILLIAM B., ET UX

TO

TRIMMER, SHIRLEY V., JR. ET UX

(2158)

Orig. mailed to S.V. Trimmer, Jr. Old Church Rd. Ashland, Va. 12/15/61

WITNESSETH:

That for the sum of $10 and other good and valuable considerations, the receipt whereof is hereby acknowledged, the Grantor hereby grants and conveys unto the Grantees, subject to the exceptions and reservations hereinafter set forth, with special warranty of title, as tenants by the entirety with the right of survivorship as at common law, the following described property:

A certain strip of land located in Hanover County, Virginia, which was acquired by the Richmond & Rappahannock River Railway Company by certain condemnation proceedings in the Circuit Court of Hanover County styled "Richmond & Rappahannock River Railway Company vs. S. O. Southall and others, Trustees of Emmanuel Protestant Episcopal Church", which was granted to Virginia Electric and Power Company by Belle L. W. Willard by deed dated March 18, 1930, recorded in the Clerk's Office of the Circuit Court of said County in Book 93, Page 409, and which was granted to James A. Rawls, Jr., by Virginia Electric and Power Company by deed dated October 21, 1960, recorded in said Clerk's Office in Book 203, Page 323, said strip of land being described in said deed dated March 18, 1930, as follows:

"Second: - A strip of land 100 feet in width, lying 50 feet on each side of the center line of the former Richmond & Rappahannock River Railway and extending a distance of 1740.5 feet, more or less, throughout the lands of the Trustees of Emmanuel Protestant Episcopal Church, from the lands (now or formerly) of T. E. West, Trustee, on the west, to the lands (now or formerly) of L. F. Phillips and others on the east, containing 4.0 acres, more or less, and bounded as follows:

Beginning at a stake at survey station 748 plus 13.5 where the center line of the former Richmond & Rappahannock River Railway intersects the line of the center of the County Road, between the lands (now or formerly) of T. E. West, Trustee, and the Trustees of Emmanuel Protestant Episcopal Church, thence on a tangent North 45 degrees 57 minutes East 560.1 feet, more or less, to a point of curve, thence on a 2 degree curve to the right a distance of 702.5 feet, more or less, to a point of tangent, thence North 60 degrees East 477.9 feet, more or less, to survey station 765 plus 54 in the dividing lines between the lands (now or formerly) of the Trustees of Emmanuel Protestant Episcopal Church and L. F. Phillips, Caroline Phillips, Mrs. C. R. French and Mrs. M. C. Elliott."

Grantor excepts from this conveyance and reserves unto the Virginia Electric and Power Company, hereinafter called "Company", its successors and assigns, the electric line facilities, including poles, wires, attachments, ground connections, equipment and accessories now located on the lands hereby conveyed.

Grantor further excepts from the conveyance and reserves unto Company, its successors and assigns, the perpetual right, privilege and easement of right of way to construct, operate and maintain one or more lines of poles, towers or structures, as Company may from time to time deem expedient or advisable, for the purpose of transmitting electric power by one or more circuits, including all wires, poles, towers, attachments, ground connections, equipment, accessories and appurtenances desirable in connection therewith (hereinafter referred to as "facilities"), over, upon and across the above strip of land where a pole line is now located, said right of way being described as follows:

> Beginning at a corner common to Grantor's property and property now or formerly owned by St. George Tucker on property now or formerly owned by L. F. Phillips and others; thence S. 10° 10' W. 131 feet, more or less, along the property line dividing Grantor's property and property now or formerly owned by L. F. Phillips and others to a corner common to Grantor's property and property now or formerly owned by St. George Tucker on property now or formerly owned by L. F. Phillips and others; thence S. 60° 00' W. 435.7 feet along the property line dividing Grantor's property and property now or formerly owned by St. George Tucker to a point; thence westwardly along the last-mentioned property line, following a curve to the left having a radius of 2814.9 feet, an arc distance of 420 feet, more or less, to a point; thence westwardly 135 feet, more or less, through Grantor's property to a point in the property line dividing Grantor's property and property now or formerly owned by St. George Tucker; thence eastwardly along the last-mentioned property line, following a curve to the right having a radius of 2914.9 feet, an arc distance of 610 feet, more or less, to a point; thence N. 60° 00' E. 469.1 feet along said property line to the point of beginning; as shown on the plat marked "Plat Showing Parcel of Land in Hanover County, Virginia", hereto attached and made a part hereof.

The facilities constructed and maintained on the easement hereby excepted and reserved shall remain the property of Company. Company shall have the right to inspect, rebuild, remove, repair, improve, relocate on the

easement; and make such changes, alterations, substitutions, additions to or extensions of its facilities as Company may from time to time deem advisable; all conductors shall be strung at a distance above the ground of not less than that specified by the National Electrical Safety Code in effect at the time of construction.

Company shall at all times have the right to keep the easement clear of all buildings or structures (except fences), trees and undergrowth.

For the purpose of constructing, inspecting, maintaining or operating its facilities, Company shall have the right of ingress and egress over the land hereby conveyed.

Grantee, his successors and assigns, may use the land within the easement for any purpose not inconsistent with the rights hereby excepted and reserved, provided such use complies with the requirements of the National Electrical Safety Code and does not interfere with or endanger the construction, operation or maintenance of Company's facilities, and provided further that any roads, streets, or railroad tracks hereafter constructed on the land within the easement shall cross the land in such manner that the angle between the center line of any such road, street or railroad track and the northerly and southerly boundary lines of said land shall be not less than sixty degrees. Grantee may construct fences upon the land within the easement, but no buildings or other structures may be constructed thereon above ground except roads, streets and railroad tracks as hereinabove provided.

IN WITNESS WHEREOF, James A. Rawls, Jr. has caused his name to be signed hereto, as of the day and year first above written.

James A. Rawls, Jr.

COMMONWEALTH OF VIRGINIA)
) To-wit:
CITY OF RICHMOND)

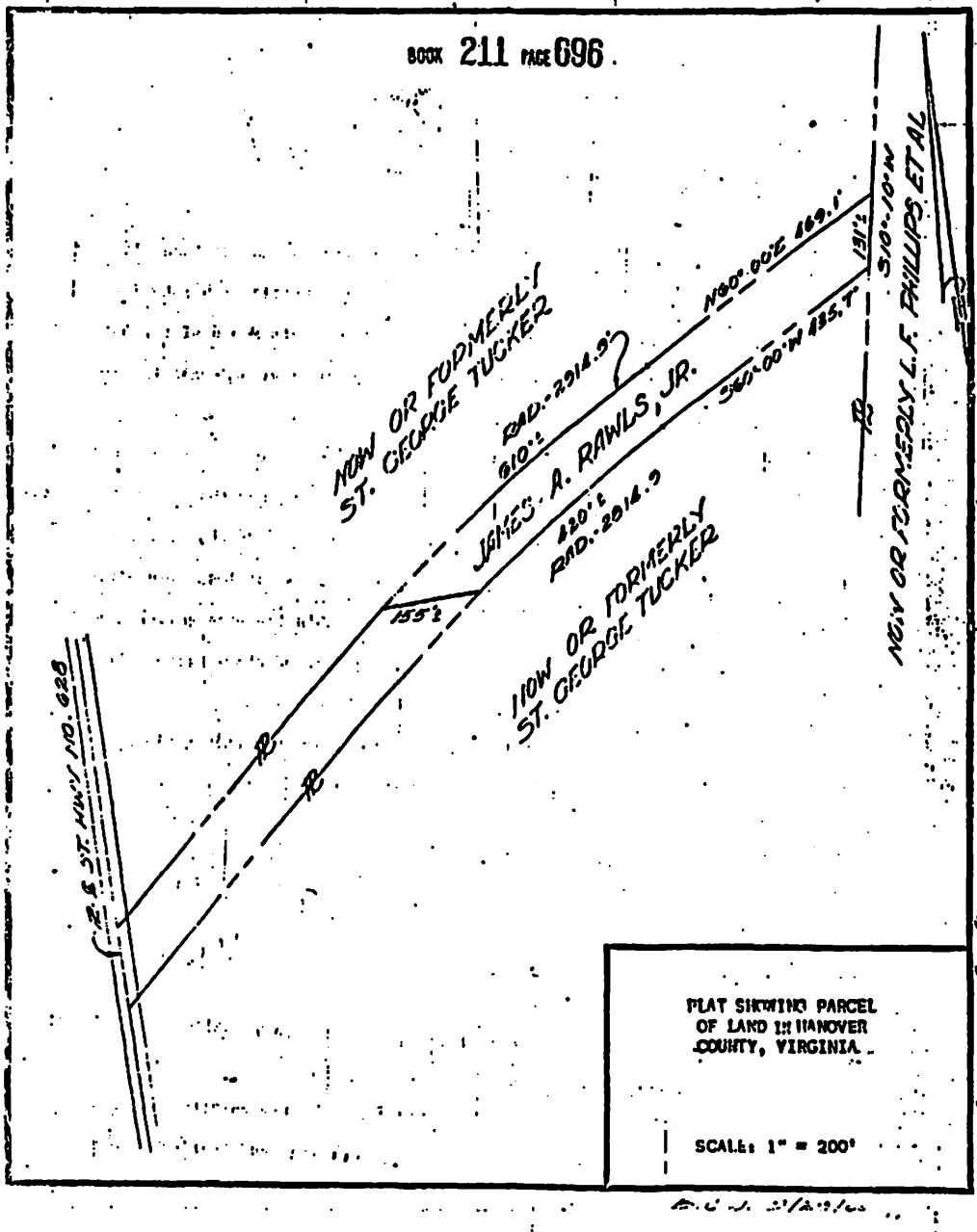
I, W. H. Sutherland, a Notary Public in and for the City aforesaid, in the Commonwealth of Virginia, whose commission expires on the 12 day of February, 1963, do hereby certify that James A. Rawls, Jr., whose name is signed to the foregoing deed bearing date the 9 day of November, 1961, has acknowledged the same before me in the City aforesaid this 9 day of November, 1961.

W. H. Sutherland
Notary Public

My Commission Expires February 12, 1963

Virginia: Hanover County, to-wit: In the Clerk's Office of the County and State aforesaid the 21 day of Nov., 1961, at 10:40 o'clock A M., the foregoing writing was presented and admitted to record, together with the annexed certificate of acknowledgment and recorded in Deed Book No. 211 page 693
Teste: F. A. Taylor Clerk.

BOOK 211 PAGE 696



PLAT SHOWING PARCEL
OF LAND IN HANOVER
COUNTY, VIRGINIA

SCALE: 1" = 200'

DRAWER NO. 5 (4) SHEET NO. 6 of 9

BOARD OF SUPERVISORS

WILLIAM C. FRAZIER, CHAIRMAN
SOUTH ANNA DISTRICT

J. T. "JACK" WARD, VICE CHAIRMAN
MECHANICSVILLE DISTRICT

WILLIAM T. BOLLING
CHICKAHOMINY DISTRICT

RICHARD S. GILLIS, JR.
ASHLAND DISTRICT

R. J. KLOTZ, JR.
HENRY DISTRICT

AUBREY M. STANLEY, JR.
BEAVERDAM DISTRICT

ELTON J. WADE, SR.
COLD HARBOR DISTRICT

HANOVER COUNTY
P. O. BOX 470
HANOVER, VIRGINIA 23069-0470

JOHN F. BERRY
COUNTY ADMINISTRATOR

RICHARD R. JOHNSON
DEPUTY COUNTY ADMINISTRATOR

STERLING E. RIVES, III
COUNTY ATTORNEY

September 3, 1992

Mr. William Goodfellow
Goodfellow, Jalbert, Beard & Associates
Post Office Box 539
Mechanicsville, Virginia 23111

RE: Division Status of Tax Parcel 85-86

Dear Sir:

In response to your request of August 21, 1992, the above-referenced tax parcel containing 10 acres, owned by H. C. and Pamela Mentz, is not eligible for division as represented by your submitted plat (copy attached).

According to a deed recorded February 22, 1991, in Deed Book 849, Page 726, Parcel 85-86 is the first division of Parcel 85-86B which is the remainder of a 32± acre parcel.

After review by the staff it is agreed that Mr. Mentz, who owns Tax Parcel 85-89 containing 122.50 acres which joins Parcel 85-86, will be allowed to add on 7.422 acres which is represented as Parcel B on your submitted plat, thereby creating a new 129± acre parcel.

The remaining 2.578 acre parcel which is shown as Parcel A will be considered a first division of the entire parcel. Please forgive the delay in my response to your request, however, if I can be of any further assistance, please do not hesitate to phone me at 730-6171.

Sincerely,

W. R. Johnson, Jr.

W. R. Johnson, Jr.
Zoning Administrator

/hg/johnson
cc: David Auerbach

EXHIBIT M

BOARD OF SUPERVISORS

J. T. "JACK" WARD, CHAIRMAN
MECHANICSVILLE DISTRICT

WILLIAM T BOLLING, VICE CHAIRMAN
CHICKAHOMINY DISTRICT

WILLIAM C. FRAZIER
SOUTH ANNA DISTRICT

RICHARD S. GILLIS, JR.
ASHLAND DISTRICT

R. J KLOTZ, JR
HENRY DISTRICT

AUBREY M STANLEY, JR.
BEAVERDAM DISTRICT

ELTON J. WADE, SR.
COLD HARBOR DISTRICT

HANOVER COUNTY
P O. BOX 470
HANOVER, VIRGINIA 23069-0470

JOHN F BERRY
COUNTY ADMINISTRATOR

RICHARD R. JOHNSON
DEPUTY COUNTY ADMINISTRATOR

STERLING E. RIVES, III
COUNTY ATTORNEY

August 30, 1993

Mr. William F. Goodfellow, P. E.
P. O. Box 539
Mechanicsville, Virginia 23111

RE: Zoning Inquiry 93-39, Mentz Subdivision and the Application of the Twenty-Five Acre Rule in Regards to Add-Ons for Adjoining Property (Tax Parcels 85-86 (part) and 85-89), COLD HARBOR MAGISTERIAL DISTRICT

Dear Bill:

In response to a complaint received in this office regarding the status of the proposed "Mentz" Subdivision of an approximate 129 acre tract in Old Church, you have provided the following information:

1. A copy of a Title IV plat identified as "A Plat of a Parcel of Land Containing 25.67± Acres of Land..."

2. "A Plat of a Parcel of Land Containing 2.035 Acres..." The proposed first division of the 25 under the 25 Acre Rule of "Parcel A" and a Sketch Plan of Proposed Division of "Mentz" Subdivision dividing 129 acres into three (3) twenty-five plus acre tracts and one (1) fifty-four plus acre property.

In response, I would have the following comments:

1. This is to confirm your acknowledgement that the private road construction cannot proceed without a land disturbing permit. I understand that Mr. Mentz has ceased work pending approval by the Public Works Department.

   Note: This will also confirm the requirements of the County Engineer for a Land Disturbing Permit and E&S Plan are required <u>before</u> proceeding with Title III road construction.

EXHIBIT
N

2. This would confirm our understanding that the "sale or exchange of parcels between adjoining lot owners, where such sale or exchange does not create additional building lots, shall be exempt from the provision of the Ordinance." (Article 2, Section 2, Title I. Zoning Ordinance) This is understood to mean that the residual, (approximate seven acres of Tax Parcel 85-86 (part)) can be added to an approximate 120 acre tract identified as Tax Parcel 85-89, and the 25 Acre Rule applies so long as it can be shown that the addition of this seven acres does not create any new building lots on Tax Parcel 85-86B. We have reviewed the proposed "Mentz" Subdivision as a whole, and we would agree that, as represented, it would represent no more lots than could be achieved off Tax Parcel 85-89 under the sketch plan. However, this sketch plan has no legal status, and the division of 54 acres could be into 8 lots instead of the 5 lots you represent on the sketch.

Therefore, the recordation of only the front 25 acre section does not assure that the plan will be followed regarding the remaining sections and that, in fact, the developer's plans could change and the overall density would, therefore, change.

To address this concern, it is our belief that in order to apply the 25 Acre Rule to "Parcel A" as identified, then the remaining 25+ acre divisions and 54 acre division must be recorded in the Clerk's Office under the Title IV provisions in order to assure the Staff that the appropriate density has not been increased as a result of the conveyance of an add-on to the Mentz property Tax Parcel 85-89.

Therefore, in summary, if the 7± acre add-on (85-86 (part)) is subtracted from the 25.67 acre Parcel A, then another 7 acres from the balance of 85-89 would have to be added to get 4 lots in this section. Before this office would agree that the 2.035 acre and subsequent division of "Parcel A" (25.67± acres) can be divided into four lots under the 25 Acre Rule evidence of the recordation of the balance of the property in accordance with your "Mentz Subdivision" plan will be required. Without this information, we could not rely on a sketch plan as this sketch plan only has the status of a concept as to how the property might be developed under the 25 Acre Rule, not how it actually will be subdivided. We could not assure the complainant that the applicant has made a good faith effort to, in fact, divide the balance of the property as proposed.

I would be glad to discuss this with you further as necessary. By copy of this letter, I am advising Mr. Auerbach and The Honorable Elton J. Wade, Sr., of Mr. Mentz's plans in this area and our concurrence with those plans, subject to the recordation of Title IV plats.

Very truly yours,

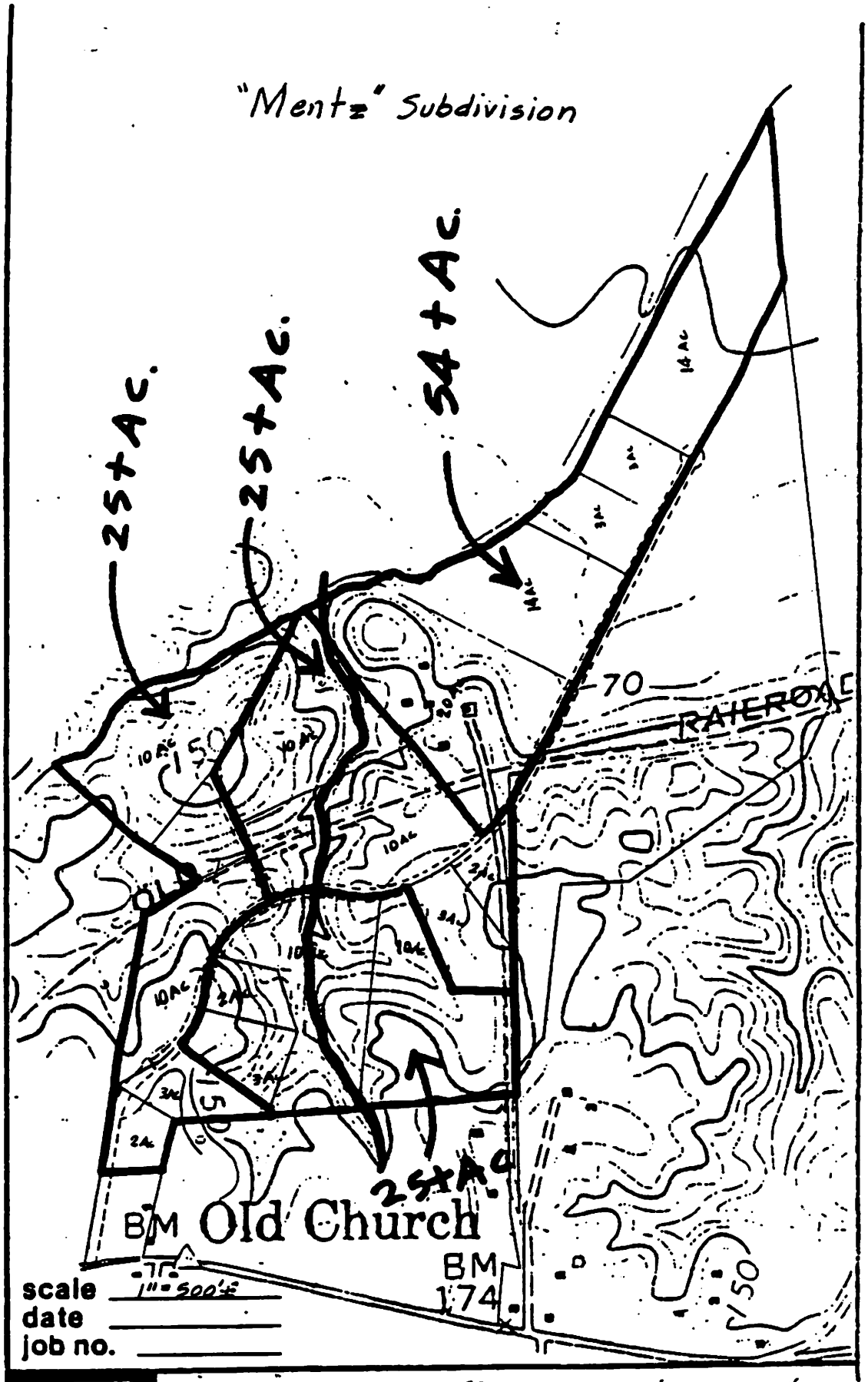
John H. Hodges, AICP
Director of Planning

/jds/JHH 93-2

cc: The Honorable Elton J. Wade, Sr.
Supervisor, Cold Harbor District
Mr. David Auerbach
Richard F. Wood
Richard Bartell
W. Randolph Johnson, Jr.
Michael E. Crescenzo
J. Keith Thompson
A. Lisa Barker, Esq.
File: Zoning Inquiry

The recipient of this notice may have a right to appeal the notice of the zoning violation or a written order within thirty days of the date of this notice in accordance with Va. Code § 15.1-496.1. This decision shall be final and unappealable if not appealed within thirty days of the date of this notice.

Date _____



Goodfellow, Jalbert, Beard and Associates Inc.

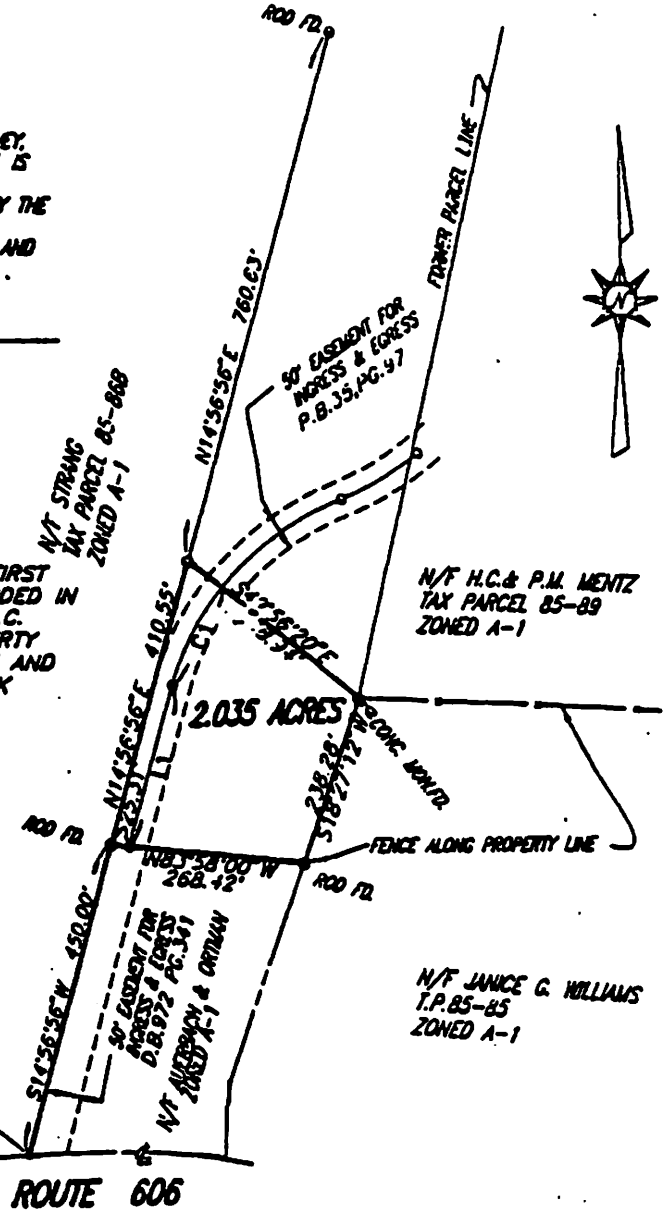
6526 Mechanicsville Turnpike—P.O. Box 339
Mechanicsville Virginia 23111 (804) 746-7087 Fax 730-7275
ENGINEERING • SURVEYING • PLANNING

	DELTA	RADIUS	LENGTH	CHORD BEARING	CHORD
L1			228.06'	N14°56'56"E	
C1	22°41'11"	395.41'	156.57'	N26°17'31"E	155.54'

I HEREBY CERTIFY THAT THIS BOUNDARY SURVEY, TO THE BEST OF MY KNOWLEDGE AND BELIEF, IS CORRECT AND COMPLIES WITH THE MINIMUM PROCEDURES AND STANDARDS ESTABLISHED BY THE VIRGINIA STATE BOARD OF ARCHITECTS, PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND CERTIFIED LANDSCAPE ARCHITECTS.

PAUL A. JALBERT, L.S. #1434 B.

• NOTE : THIS PARCEL IS THE FIRST DIVISION FROM A PARCEL RECORDED IN PLAT BOOK 35 PAGE 97– H.C.C.C. AND BEING PART OF THE PROPERTY CONVEYED TO HUBERT C. MENTZ AND PAMELA M. MENTZ IN DEED BOOK 849 PAGE 729



COMMONWEALTH OF VIRGINIA
PAUL A. JALBERT
No. 1434 B
8-20-93
LAND SURVEYOR

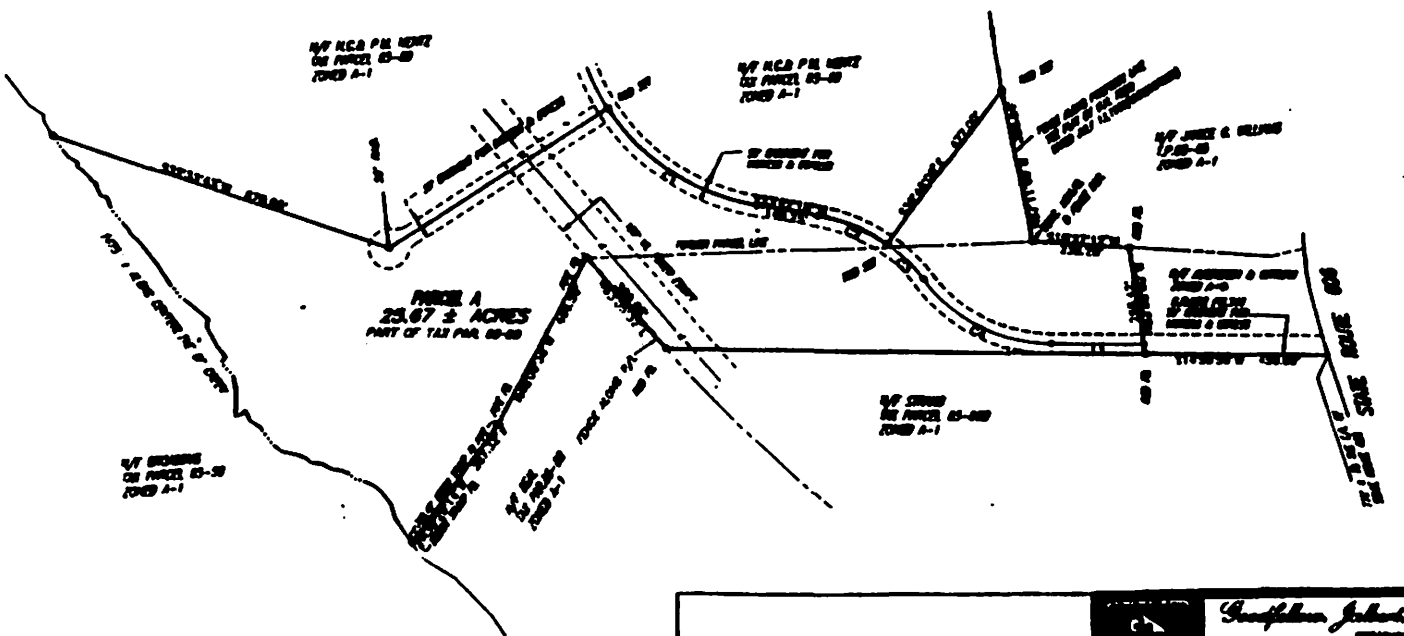
PLAT OF A PARCEL OF LAND CONTAINING 2.035 ACRES AND BEING SITUATED NORTH OF STATE ROUTE 606 IN THE COLD HARBOR DISTRICT, HANOVER COUNTY, VIRGINIA.

scale 1" = 200'
date AUGUST 20, 1993
job no. 3419-0053-2.035ACS.

GJB
Goodfellow, Jalbert, Beard and Associates Inc.
8528 Mechanicsville Turnpike – PO Box 539
Mechanicsville, Virginia 23111 (804) 746-7097 Fax 730-7275
ENGINEERING • SURVEYING • PLANNING

	DELTA	RADIUS	LENGTH	CHORD BEARING	CHORD
C1	47°28'48"	550.00'	455.77'	S47°28'41"W	442.84'
C2	28°35'24"	400.00'	199.63'	S37°00'00"W	183.97'
L1			220.00'	S14°30'34"W	
C3	17°42'18"	400.00'	123.60'	N50°08'51"E	123.11'
C4	33°03'06"	383.41'	368.13'	N41°28'28"E	353.18'

MAGNETIC NORTH



Approved Block

Graefflin, Jolliff, Brand and Associates Inc.

PLAT OF A PARCEL OF LAND CONTAINING 25.6705 ACRES OF LAND AND BEING SITUATED NORTH OF STATE ROUTE 606 IN THE COLD HARBOR DISTRICT, HANOVER COUNTY, VIRGINIA

Designed: P. JULIFF	Date: AUGUST 18, 1993		Sht. No.
Drawn: CABB	Scale: 1" = 200'		1
Checked: P. JULIFF	P.N. 3419-0053		1

Recorded PB 19, 97

69

90

VIRGINIA:
IN THE CIRCUIT COURT OF HANOVER COUNTY

HUBERT.C. MENTZ
PAMELA M. MENTZ

PLAINTIFFS,

v. Case No. CH 425-94

COUNTY OF HANOVER

DEFENDANTS,

DAVID AUERBACH
SUSAN C. ORTMANN

INTERVENORS.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Comes now David Auerbach and Susan C. Ortmann, (the "Intervenors"), by Counsel, pursuant to Rule 3:18 of the Supreme Court of Virginia, and move for partial summary judgment against the plaintiffs, Herbert C. Mentz and Pamela M. Mentz (the "Plaintiffs") on the following grounds:

1. The Plaintiffs filed a Motion for Declaratory Judgment in this Court against the Petitioners, styled as H.C. Mentz and Pamela M. Mentz, Plaintiffs, v. David Auerbach and Susan C. Ortmann, Defendants, Case No. CH 423-94, alleging conspiracy, slander of title and other tortious acts by the Intervenors against the Plaintiffs, all allegedly arising from an easement Intervenors granted the Plaintiffs when the Plaintiffs sold property to the Intervenors. The Plaintiffs seek an injunction, damages and other

relief arising out of these allegations.

2. Plaintiffs allege in their Motion for Declaratory Judgment, *inter alia*, "[t]hat an actual antagonistic assertion of right exist between these parties as to the interpretation of [an] easement."

3. Plaintiffs made application with Hanover County for subdivision approval. Both the Plaintiffs' and the Intervenors' views on the scope of the easement were requested by and provided to representatives of the Plaintiffs and to Hanover County.

4. Hanover County disapproved the application. The disapproval of the application by Hanover County was predicated, in part, on Hanover County's interpretation of restrictive language in the deed from the Plaintiffs to Intervenors granting Plaintiffs an easement over the Intervenors' property, which easement also is the subject of the instant action.

5. Interpretation of the deed by this Court will substantially reduce the evidence required to resolve the dispute in both cases.

6. Intervenors allege that there is no material fact in dispute with respect to the language in the deed, that is speaks for itself and that it is proper for the Court to construe the language in the deed.

WHEREFORE, the Intervenors pray that they have partial summary judgment against the Plaintiffs, and their costs expended in this action.

DAVID AUERBACH
SUSAN C. ORTMANN

By _____
Of Counsel

Charles J. McCall, Esq.
VSB 17022
Attorney for Intervenors
5104 W. Village Green Drive
Suite 105
Midlothian, Virginia 23112-4851
(804) 744-0300

CERTIFICATE OF SERVICE

I do hereby certify that a true copy of the foregoing Motion For Partial Summary Judgment was faxed and mailed to Andrew J. Ellis, Jr., Esq., Attorney for Plaintiffs, at Mays & Valentine, 1111 East Main Street, Richmond, Virginia 23208-1122 and A. Lisa Barker Senior Assistant County Attorney, Hanover County Attorney's Office, P.O. Box 470, Hanover, Virginia 23069, this March 10, 1995.

_____
Charles J. McCall

VIRGINIA:
IN THE CIRCUIT COURT OF HANOVER COUNTY

HUBERT.C. MENTZ
PAMELA M. MENTZ

PLAINTIFFS,

v. Case No. CH 425-94

COUNTY OF HANOVER

DEFENDANTS,

DAVID AUERBACH
SUSAN C. ORTMANN

INTERVENORS.

ORDER

The Court having heard argument on Intervenors' Motion To Intervene on January 24, 1995, it is

ORDERED that said motion be and the same is hereby GRANTED.

ENTER: 3/28/95

Judge

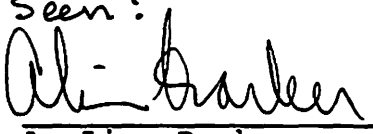
I ASK FOR THIS:

Charles J. McCall, Esq.
VSB 17022
Attorney for
5104 W. Village Green Drive
Suite 105
Midlothian, Virginia 23112-4851
(804) 744-0300Charles J. McCall, Esquire

SEEN: and object

Andrew J. Ellis, Jr., Esq.
Attorney for Plaintiffs
Mays & Valentine
1111 East Main Street
Richmond, Virginia 23208-1122

Seen:



A. Lisa Barker
Senior Assistant County Attorney
Hanover County Attorney's Office
P.O. Box 470
Hanover, Virginia 23069

VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

H. C. MENTZ and PAMELA M. MENTZ, Plaintiffs, v. COUNTY OF HANOVER, Defendant.	)))))))))))	Case No. 425-94

ORDER

Upon Motion by all parties, by counsel, it is ORDERED that all discovery obtained in the case styled H. C. Mentz and Pamela M. Mentz v. David Auerbach and Susan C. Ortmann may be used as discovery herein.

ENTER: 4/7/95

Judge

Andrew J. Ellis, Jr.

Charles J. McCall

A. Lisa Barker

VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

H. C. MENTZ and PAMELA M. MENTZ, Plaintiffs, v. COUNTY OF HANOVER, Defendants.	)))))))))))	Case No. 425-94

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs, H. C. Mentz and Pamela M. Mentz, by counsel, pursuant to Rule 3:18 of the Virginia Supreme Court, hereby move the Court for entry of summary judgment in this matter as set forth in plaintiffs' supporting memorandum filed contemporaneously with this motion.

WHEREFORE, plaintiffs request that the Court enter summary judgment in their favor and award plaintiffs all relief sought in plaintiffs' Bill of Complaint.

H. C. MENTZ
and
PAMELA M. MENTZ

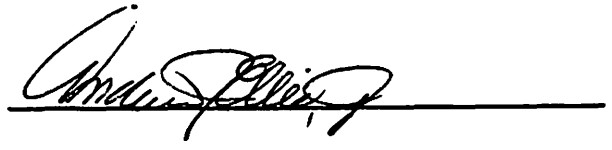
By _____
Of Counsel

Andrew J. Ellis, Jr., VSB No. 9078
Andrew G. Mauck, VSB No. 35177
MAYS & VALENTINE
P. O. Box 1122
Richmond, Virginia 23208-1122
(804) 697-1200

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of July, 1995, I caused to be mailed, postage prepaid, a true and correct copy of **Plaintiffs' Cross-Motion for Summary Judgment** to Charles J. McCall, Esquire, 5104 W. Village Green Drive, Suite 105, Midlothian, Virginia 23112-4851, William B. Kerkam, III, Esquire, Bremner, Baber & Janus, 701 E. Franklin Street, Richmond, Virginia 23219 and A. Lisa Barker, Esquire, Senior Assistant County Attorney, Hanover County, Post Office Box 470, Hanover, Virginia 23069.



VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

H. C. MENTZ and PAMELA M. MENTZ, Plaintiffs, v. COUNTY OF HANOVER Defendants.	))))))))))))	Case No. 425-94

MEMORANDUM IN OPPOSITION TO AUERBACH AND ORTMANN'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by counsel, for their memorandum in opposition to Auerbach's motion for partial summary judgment and in support of plaintiffs' cross-motion for summary judgment state as follows:

FACTS

In 1986, H.C. Mentz and Pamela M. Mentz (collectively "Mentz") purchased six parcels of land situated at Old Church in Hanover County, by deed recorded in Deed Book 659, page 707; the property was accessed by an easement to State Route 606 limited to agricultural and personal vehicles of residents. Deed and Easement Agreement Attached as Exhibit 1. Mentz desired to subdivide the Property as evidenced by a soil feasibility study prepared by Tim P. Sexton, Inc. for Mentz's subdivision. Study Attached as Exhibit 2. On February 5, 1991, Mentz purchased a 10 acre parcel owned by Mary Jane Trimmer that was bordered by an

increased frontage on Route 606 and the 122.50 acre parcel on another. Deed attached as Exhibit 3.

In 1991, a plat was prepared by Goodfellow, Jalbert & Beard, the surveyors hired by Mentz to carry out his plans. January 9, 1991 Plat Attached as Exhibit 4. The 1991 plat divides the 10 acre parcel into two parcels of 7.422 acres and 2.578 acres and provides that "Parcel 'A' is first division of Property. Parcel 'B' is an add-on parcel to the property of H.C. Mentz and Pamela M. Mentz DB 659 PG 707." (emphasis added).

In 1991, Mentz listed for sale the 2.578 acres of the 10 acre parcel as shown on the 1991 plat and subsequently entered into a contract for sale with David Auerbach and Susan C. Ortmann (collectively "Auerbach"). Before closing, Auerbach applied for a building permit from Hanover County (the "County") as required in the Contract. Mentz requested approval by the County for division of the 10 acre parcel but that request was denied because there had been a prior division of the 10 acre parcel by Ms. Trimmer and, under the County Subdivision Ordinance, no further out conveyances from the 10 acres were allowed. A solution to the problem was proposed by the County as contained in a letter dated September 3, 1992 from W. R. Johnson, the County Zoning Administrator, to William Goodfellow of Goodfellow, Jalbert & Beard. Letter Attached as Exhibit 5.

> In response to your request of August 21, 1992, the above referenced tax parcel [85-86] containing 10 acres, owned by [Mentz], is not eligible for division as represented by your submitted plat.

> According to a deed recorded February 22, 1991 . . . Parcel 85-86 is the first division of Parcel 85-86B which is the remainder of a 32+ acre parcel.
>
> After review by the staff it is agreed that Mr. Mentz, who owns Tax Parcel 85-89 containing 122.50 acres which joins Parcel 85-86, will be allowed to add on 7.422 acres which is represented as Parcel B on your submitted plat, thereby creating a new 129 + acre parcel.
>
> The remaining 2.578 acre parcel which is shown as Parcel A will be considered a first division of the entire parcel.

(emphasis added). The same day, Charles McCall, counsel for Auerbach, wrote a letter to Jeffrey Zwerdling, then counsel for Mentz, that reiterated the County's denial of the division of the 10 acres. Letter Attached as Exhibit 6. McCall explicitly recognized that the County "did suggest a way in which the problem could be resolved" -- a single 129.50 acre parcel would be created.

Subsequently, John Hodges, County Director of Planning, and David Auerbach met and discussed the language that needed to be added to the deed to satisfy the County. This meeting is evidenced by their handwritten notes on a draft deed attached hereto as Exhibit 7. See County Admissions Attached hereto as Exhibit 8, Nos. 54, 57. Hodge's handwritten notes state:

> 7.422 acres (Parcel B) shall be added to Deed Book 659, Page 707, as an "add-on not for the purposes of creating additional building lots."

(emphasis in original). David Auerbach's handwritten notes read:

> John: 85-86 = TP# for property being divided
> 85-89 = TP# for property being added to
> Thanks Again & Again!
> Dave

"85-86 = TP#" refers to the taxpayer number for the 10 acre parcel from which the 2.578 acres would be sold to Auerbach. "85-89 = TP#" refers to the taxpayer number for the 122.50 acre parcel owned by Mentz. See Exhibit 5 and County Tax Card Attached as Exhibit 9.

On March 19, 1993, the County advised Mentz that it had revised the tax assessment on the Mentz property as follows:

> The assessment on your property has been revised due to an acreage change. The new value was assigned effective January 1, 1993, and is as follows:
>
> | | |
> |---|---|
> | Account #: | 022119 |
> | Parcel #: | 085 |
> | Acreage: | 129.872 |
> | Legal: | Near Hwy. 606 |

Letter to Mentz from County Assessor's Office, Attached as Exhibit 10 (emphasis added). Moreover, the County tax card was revised to indicate that the parcels were merged to create a single 129+ acre parcel. See Exhibit 9.

On March 31, 1993, Charles J. McCall sent a letter by telecopier to Andrew J. Ellis, counsel for Mentz, that stated:

> We have received the required information from Hanover Count [sic] regarding "attaching" Parcel "B" to Mentz's other property. The required language is "7.422 acre Parcel B shall be added to the property described in Deed Book 659 Page 707 as an 'add-on, not for the purpose of creating additional lots'."

Letter Attached as Exhibit 11 (emphasis added). Later that day, McCall telefaxed Ellis another letter stating

> I would further suggest that the language inserted be "The 7.422 acre parcel described as Parcel 'B' on the hereinabove described plat shall be added to the property conveyed to the parties of the first part as described in Deed Book 659, Page 707. Said additional

> shall be as an 'add-on,' not for the purposes of creating additional lots."

Letter attached as Exhibit 12. All parties agreed on the "add-on" language and the sale occurred. The Deed, dated March 31, 1993 and recorded April 2, 1993, included the "add-on" language as drafted and approved by the County and Auerbach (the "Deed"). Deed Attached as Exhibit 13. Five days later, on April 7, the County approved Auerbach's building permit.

On June 21, 1993, Goodfellow wrote the County and stated that Mentz

> would like to develop approximately seventy five acres of parcel 85-89 by the 25 acre rule and Title III of the Hanover County subdivision ordinance. This development will include the previously mentioned piece of land that was added-on and the remainder from original parcel 85-86.

Letter Attached as Exhibit 14. The County preliminarily <u>approved</u> the development by letter dated August 30, 1993 from Hodges to Goodfellow. Letter Attached as Exhibit 15. Hodges' only concern was that the appropriate density requirements be complied with, and he asked Mentz to record certain divisions of the property in the County Clerk's Office. Hodges recognized the "add-on" of the 7.422 acres and wrote: "By copy of this letter, I am advising Mr. Auerbach . . . of Mr. Mentz's plans in this area and <u>our concurrence</u> with those plans . . ." (emphasis added).

Apparently upon learning that the County was planning to approve Mentz's subdivision plan, Auerbach's attorney wrote the County the same day, August 30, 1993, and asked that "all permits pertaining to this access easement be denied." McCall letter

attached as Exhibit 16. Only after receipt of McCall's letter did the County take the position that access to the 129.50 acres was questionable. Subsequently, the County denied Mentz's application primarily based on lack of access to the property. July 22, 1994 and September 8, 1994 Letters Attached as Exhibit 17-18.

Plaintiffs filed suit against the County on the grounds that (1) the County's denial of Mentz's application was arbitrary and capricious and (2) the County should be estopped from changing its position with regard to access to the merged Mentz parcels. Auerbach intervened and filed a motion for partial summary judgment to which this memorandum responds. A memorandum filed by the County on or about January 20, 1995, in the form of a Motion to Dismiss, is of no legal significance, and the County has not moved for summary judgment.

DISCUSSION

The sole issue in this case is the scope of access provided under the easement created by the Deed that transferred 2.578 acres of land from Mentz to Auerbach. Plaintiffs contend that the easement provides them access to all 129.50 acres of their property consisting of the original 122.50 acres and the 7.422 acres remaining from the 10 acre parcel. Defendants claim that the easement only provides access to the 7.422 acres. Plaintiffs' claim is supported first and foremost by the unambiguous language of the Deed which (1) transferred the 2.578 acres, Parcel A, to Auerbach, (2) created a 50 foot wide easement across Parcel A to allow Mentz ingress and egress to State Route 606, and (3) created a first right of refusal in favor of Auerbach

to the residual 7.422 acres. Most importantly for the purposes of this case, the Deed also specifically "added-on" the residual 7.422 acres to the Mentz's 122.50 acre parcel to create a single parcel of 129.50 acres. The 7.422 acre parcel ceased to exist when the Deed was recorded. In addition, the undisputed actions of the parties with respect to the Deed support plaintiffs' interpretation of the easement and make clear that the County is now estopped from changing its position.

I. The Unambiguous Language of the Deed States That the Residual 7.422 Acre Parcel is "Added-on" to the 122.50 Acre Parcel to Create A Single Parcel of 129.50 Acres.

Virginia law on the interpretation of written instruments is well-established. Whether a written instrument is ambiguous is a question of law to be determined by the court. Ross v. Craw, 231 Va. 206, 213 (1986). The construction of a deed is a question for the court. 5C Michie's Jurisprudence Deeds § 71 at 383 (1983). The whole deed should be considered in determining the meaning of any or all of its parts. The court must read the deed as a single document, the meaning of which is gathered from all its associated parts when assembled as the unitary expression of the agreement of the parties. Id. at §§ 57, 60. A written instrument must be construed so as to give effect to every part thereof. Id. at § 61; Allen v. Green, 229 Va. 588, 593 (1985). The primary consideration in construing a deed is to determine the intention of the parties. Poindexter v. Molton, 237 Va. 448, 450 (1989).

A. Four Goals Accomplished by the Language of Deed.

The Deed accomplished four specific goals of the parties. First, it conveyed Parcel A "containing 2.578 acres" from Mentz to Auerbach. Second, the Deed provided for the reservation of an

> easement of right-of-way 50 feet in width along the western line of Parcel A leading from State Route 606 to Parcel B as a means of ingress and egress to and from Parcel B and State Route 606, said easement being shown as lying on the westerly side of Parcel A on the hereinabove described plat.

(emphases added).

The language of the Deed confirms Mentz's intent to gain access to State Route 606 "as a means of ingress and egress to and from Parcel B and State Route 606." The scope of the easement is evidenced by the easement being 50 feet in width. For parcels of property greater than 10 acres, the "minimum width of all private road rights-of-way shall in no case be less than fifty (50) in width." Hanover County Code § 5-12. The reservation of an exceptionally wide easement that comports with the County requirements for accessing parcels larger than 10 acres was no accident; it reflects the intention that the easement provide access to all 129.50 acres owned by Mentz.

Third, the Deed created a first right of refusal in favor of Auerbach. The right of refusal, however, only applies to the 7.422 acres that remained from the 10 acre parcel after the sale of 2.578 acres to Auerbach. In order to distinguish between the 129.50 acres owned by Mentz, and the residual 7.422 acres, the Deed states:

> The said parties of the first part do further grant and convey unto the parties of the second part a first right of refusal to purchase Parcel B consisting of 7.422 acres should the parties of the first part sell that parcel of land.

(emphasis added). If "Parcel B" is merely the 7.422 acres, as the defendants contend, then there is no need for the language "consisting of 7.422 acres." But under the well-established rules of construction, no word "is to be treated as meaningless, if any meaning reasonable and consistent with other parts of the contract can be given to it." Foster v. Wilson, 139 Va. 82, 89 (1924). The presumption always is that the parties have not used words aimlessly and that no provision is merely a superfluity unless it is plainly a repetition. Ames v. American Nat. Bank, 163 Va. 1, 39 (1934). Unless two provisions in a deed are irreconcilably inconsistent, courts must assume that the parties intended both to have meaning and give effect to both. Faison v. Union Camp Corp., 224 Va. 54, 60 (1982). Defendants would have the court read out the language "consisting of 7.422 acres" as mere surplusage, and this the court cannot do. Instead, this language makes clear that in the Deed, "Parcel B" is all 129.50 acres owned by Mentz, and "Parcel B consisting of 7.422" acres is the 7.422 acres subject to the first right of refusal.

Stated another way, defendants claim that the easement and the first right of refusal both only apply to the 7.422 acres. Yet the language in the easement section is different from the language in the first right of refusal section, the former being broader and not including the "consisting of 7.422 acres language."

B. The Deed unequivocally merges the 7.422 acre parcel into the 122.50 acre parcel to create a single 129.50 acre parcel.

Any doubt as to the effect of the Deed is resolved by the language in the Deed that merges the 7.422 acres into the 122.50 acres to create a single 129.50 acre parcel. The Deed states:

> The aforesaid plat recorded herewith is substituted for the plat recorded in Deed Book 934, Page 643 and the description is corrected to refer to two parcels, A and B. Parcel B containing 7.422 acres is added on to the property described in Deed Book 659, Page 707 as an add-on, not for the purposes of creating additional building lots.

(emphasis added).[1] In addition, the Plat attached to and made part of the Deed states:

> Parcel "A" is first division of Property. Parcel "B" is an add-on parcel to the property of H.C. Mentz and Pamela M. Mentz DB 659 PG 707.

Page 707 of Deed Book 659 describes the 122.50 acre parcel owned by Mentz. Exhibit 1. The terms of every deed are to be understood in their plain and ordinary sense. 5C Michie's Jurisprudence Deeds § 66 at 372.[2] Therefore, the very same instrument that created the easement and both the servient and

---

1 Again, the language of the Deed distinguishes between "Parcel B" and "Parcel B containing 7.422 acres." In addition, the language "not for the purposes of creating additional building lots" refers to the building density requirements of the County. See Hodges Letter August 30, 1993, Exhibit 15.

2 The word "add" is defined to mean "to join or unite so as to bring about an increase or improvement (adds 60 acres to his land) . . . to combine . . . to come together or unite by addition." Webster's Ninth New Collegiate Dictionary (1989). Black's Law Dictionary defines "add" to mean "unite; attach; annex; join." (6th Ed. 1990).

dominant estates relative to that easement, specifically combines the 122.50 acre parcel and the 7.422 acre parcel into a single parcel.

"It is elementary that when language in a deed or other instrument is to be construed, '[t]he grantor's intention, as expressed in the instrument, must prevail unless contrary to some principle of law or rule of property.'" Allen v. Green, 229 Va. 588, 593 (1985) (emphasis added) citing Austin v. Dobbins, 219 Va. 930, 936 (1979). The grantor's intent is clear -- the "7.422 acres is added on to the" 122.50 acres. The clear effect of these provisions is that upon recordation of the Deed on April 2, 1993, both the 122.50 acre parcel and the 7.422 acre parcel ceased to exist; there remained but one parcel of 129.50 acres to which the easement provides access from Route 606.

In order to properly construe a written instrument, it is the duty of the court, as nearly as may be, to place itself in the position of the parties, and in order to do so the court may take notice of surrounding and attending circumstances and construe the language used in light of such circumstances. Ford v. Street, 129 Va. 437 (1921); 5C Michie's Jurisprudence Deeds § 57 at 360 (1983). The intent of the parties to a deed must be ascertained with reference to the circumstances existing at the time of its execution. Allen v. Green, 229 Va. 588, 593 (1985); 5C Michie's Jurisprudence Deeds § 64 (1983). It borders on the incredible to contend that Mentz, who clearly intended to develop the 122.50 acre parcel, would purchase an adjoining property that would provide access to Route 606 necessary for development, and

then sell a portion of that property but only reserve an easement to the residue of the 10 acre parcel and not the entire acreage. Defendants are asking the Court to bury its head in the sand and ignore the undisputed facts that are consistent with plaintiffs' theory that the easement was intended to access all their property.

II. Parole Evidence Supports Plaintiff's Interpretation that the "Add-On" Provisions in the Deed Combined the 7.422 Acres of the 122.50 Acres to Create a Single 129.50 Acre Parcel.

Should the court find that the language of the Deed is ambiguous, parole evidence can be admitted to clarify ambiguous terms. Anden Group v. Leesburg Joint Venture, 237 Va. 453, 458 (1989); Allen, 229 Va. at 593. Therefore, parole evidence is admissible to clarify the "add-on" language in the deed and the plat. The construction of a deed dependent upon extrinsic evidence, when the facts are undisputed, is a question for the court. 5C Michie's Jurisprudence Deeds § 71 at 383 (1983).

In addition, it is a familiar legal maxim that ambiguous contractual provisions are construed strictly against their author. American Realty Trust v. Chase Manhattan Bank, 222 Va. 392 (1981). As the undisputed facts demonstrate, the "add-on" language contained in the Deed was drafted by the County and Auerbach and, therefore, must be construed strictly against them and in favor of the plaintiffs.

A. All Defendants Admit and Recognize that the "Add-on" Language Combined the Properties to Create a Single 129.50 Acre Parcel.

The "add-on" language was required for the division of the 10 acre parcel. See Johnson Letter September 3, 1992 and

McCall Letter March 31, 1993, Exhibits 5, 11. Therefore, defendants are left in the absurd position of now arguing that the properties were considered merged for that purpose (and for County tax assessments) but not for others. They cannot, however, have it both ways; the properties are either merged or they are not.

The County states in its Memorandum submitted to the Court that:

> Advice of the zoning administrator relating to the combination of parcels for the purpose of development pursuant to the ordinances does not alter the rights which were reserved in the Deed. The designation of parcels by the Real Estate Assessor also does not alter the nature of the property rights retained in the Deed.

Memorandum at 6 (emphasis added). This statement admits that the parcels were combined and, as argued below, the County is now estopped from arguing the parcels are not combined. In addition, the County's argument is flawed because the County did not simply give "advice." It required that the parcels be joined into one parcel before it would issue a building permit and allow the sale of the 2.578 acres. The "advice" was incorporated verbatim into the Deed, clearly reflecting the intent of the parties to create a single 129.50 acre parcel. The fact that the County Assessor treated the Mentz property as a single 129.50 acre parcel is further evidence of the effect of the add-on language as is the County's preliminary approval of Mentz's subdivision plans that were based on the easement accessing all 129.50 acres.

B. Interpretation Placed on Deed by Parties.

Finally, it is well-settled that in the case of doubt or ambiguity as to the terms of a written instrument, a "court will follow the interpretation placed thereon by the parties themselves." Foster, 139 Va. at 90; 5C Michie's Jurisprudence Deeds § 63 at 368 (1983). Such constructions are not only entitled to great weight, but are often conclusive. Id. "Practical construction" of written instruments is that given to agreements by the parties themselves by acts subsequently done with reference to the instrument. 4B Michie's Jurisprudence Contracts § 47 at 77 (1986). As described herein, Auerbach, the County, and Mentz understood that the "add-on" was necessary. Auerbach understood that the Deed would include the "add-on" language and accepted those provisions. As a result of the merger of the properties, the County allowed the sale of the 2.578 acres and issued the Auerbach building permit.

III. The County Should Be Estopped from Changing Its Position as Mentz Properly Relied on the County's Representations to Their Detriment.

Equitable estoppel is a well-established concept invoked by courts to aid a party who, in good faith, has relied, to his detriment, upon the representations of another. 7A Michie's Jurisprudence Estoppel § 14 at 465 (1985). The elements necessary to establish equitable estoppel are a representation, reliance, a change of position and detriment. Latait v. Commercial Indus. Constr., Inc., 223 Va. 59, 63 (1982).

The County represented to Mentz on numerous occasions that the properties would be combined to create a single 129.50

acre parcel. The letter from W. R. Johnson, the County Zoning Administrator, to Mentz's surveyor, William Goodfellow, is crystal clear: the 7.422 acre parcel could be added on to the 122.50 acre parcel "thereby creating a new 129.50+ acre parcel . . . The remaining 2.578 parcel which is shown as Parcel A will be considered a first division of the entire parcel." Exhibit 5. (emphasis added). The County revised Mentz's tax assessment "due to an acreage change" to "129.872" acres. Exhibit 8. And, until Auerbach complained, the County approved the Mentz subdivision plan that was based on the easement providing access to all 129.50 acres. Exhibit 14.

Mentz properly relied on the County's representations. In fact, Mentz had no choice but to merge the properties into a single parcel if County approval to sell the 2.578 acres was to be obtained. As a direct result of the County's requirement that the "add-on" language be incorporated into the Deed and the properties merged, Mentz changed their position -- they sold the 2.578 acres to Auerbach. They also spent monies to develop a subdivision plan for the 129.50 acre parcel.

IV. Additional Argument in Opposition to Auerbach's Motion for Partial Summary Judgment.

Auerbach cites to only one case in their memorandum in support of their motion for partial summary judgment, Camp v. Camp, 220 Va. 595 (1979), which applies a rule of construction utilized in circumstances where a deed contains two irreconcilable and repugnant clauses. Auerbach Supporting Memorandum at 4. In Camp, the court held that

> the language "as tenants in common" is totally repugnant to the words "with right of survivorship as at common law." The two portions are absolutely incapable of being reconciled . . . This is a case of "rigorous necessity" in which the harsh common-law rule must be applied if the deed is to have some effect rather than being a nullity.

Id. at 599 (emphasis added). The court held that the conflicting language was unambiguous and, therefore, no parole evidence was admissible. Id. at 598. One can infer from Auerbach's reliance on Camp that they agree that the Deed contains two distinct and different descriptions of property, and that the issue is whether the descriptions are "totally repugnant" and "absolutely incapable of being reconciled."

Auerbach, however, fails to identify the language of the Deed that they consider irreconcilable or explain to the Court the nature of the repugnancy. Their reliance on Camp, therefore, is misplaced. In contrast, the language of the Deed, however, makes clear that no repugnancy exists.[3]

Auerbach also fails to address Faison v. Union Camp, 224 Va. 54 (1982), in which the court considered the interpretation of a deed. In Faison, the deed of conveyance contained two descriptive clauses referring to separate predecessor deeds. Id. A plat attached to the deed, however, indicated that the two

---

[3] See Section I of this memorandum that considers all of the language in the Deed and Plat, and presents to the court an interpretation that reconciles the various provisions of the Deed and is consistent with the obvious intent of the parties; section II presents parole evidence, in case the Court deems the Deed ambiguous, that makes clear that the intention of the parties was to "add" the 7.422 acre parcel to the 122.50 acre parcel to create a single, merged parcel.

predecessor parcels had been combined into one parcel. The plat also contained a note that read "See Deed Book 52 page 540 for deed recorded," which referred to two separate parcels. The court reconciled the seemingly inconsistent provisions by first holding that the content of the deed referenced in the plat "became as much a part of the plat as the plat was part of the deed." Id. at 59. "The two instruments, cross-referenced as they were, must be construed together to determine the description of the land conveyed." Id. The court then held that "[u]nless two provisions in a deed are irreconcilably inconsistent, courts must assume that the parties intended both to have meaning and give effect to both." Id. at 60. There was nothing inconsistent in the descriptive clauses of the deed referring to separate predecessor deed, and it was unreasonable to conclude that the second clause was "inadvertent surplusage." Id.

Similarly, the references in the Deed ("Deed Book 659, Page 707") and the Plat ("DB 659 PG 707"), become a part of the Deed and "must be construed together." Id. at 59. Auerbach's memorandum, however, fails to address the references to Mentz's 122.50 acre parcel, and ignores entirely the "add-on" language of the Deed and the Plat and the language "consisting of 7.422 acres" and "containing 7.422 acres."

Finally, although discovery deposition testimony (Rule 4:1) may not be considered for purposes of granting summary judgment, there is no prohibition against its use in opposing a motion for summary judgment. The deposition testimony of John Hodges and Bill Johnson makes clear that (1) the properties were

required to be merged as a prerequisite for County approval of the sale of the 2.578 acres and Auerbach's building permit; (2) Auerbach knew that merger of the properties was required and approved the "add-on" language; (3) the County's opinion was that Mentz should be able to develop all 129.5 acres; and (4) the County believed that the easement accessed all 129.50 acres.

Hodges testified:

> Q All right. And after 85 dash 86, we have an equal TP number sign; is that the --
>
> A Tax parcel.
>
> Q -- tax parcel number "for property being devided" [sic]? And then we have immediately below that 85-89 equal TP number sign "for property being added to".
>
> Do you recall what the property-being-divided notation was referring to?
>
> A I believe they were referring to proposed division of tax parcel 85-86 and that tax parcel 85-89 was the property being added onto.
>
> Q And that would have been Mr. Mentz's property?
>
> A Yes.
>
> Q All right. And do you recall a discussion with Mr. Auerbach at or about the time of these notations made by you were made to the deed?
>
> A I'm not sure I recalled discussing it, but it may have occurred. I don't recall particular discussions. I would acknowledge that that's my writing on the right-hand column under where it says, "7.422 acres (Parcel B) shall be added to Deed Book 659, Page 707 as an 'add-on not for the purposes of creating additional building lots'".

Q That is your handwriting?

A That's my handwriting and my quotes.

Q And your quotes.

And the purpose of your making that notation was so that would be included in the final form of the deed; is that correct?

A Yes, so that it would meet the zoning requirements. So as far as I was concerned, Mr. Mentz would be able to develop his property. In accordance with the letter, I wrote to Mr. Goodfellow and it would meet the requirements of the ordinance.

Q And so that Mr. Auerbach could get his building permit; isn't that correct?

A Yes.

Hodges Deposition, Attached as Exhibit 19, pp. 39-40. Hodges further testified:

Q Did you ever discuss with Mr. Auerbach any distinguishing feature of the access, as to whether or not it was to Parcel B containing 7.4 acres or to the entire property of Mr. Mentz's?

A I don't recall the discussion of distinguishing features of Parcel B. The subdivision was filed after my letter written to Mr. Goodfellow, which in my opinion to Mr. Goodfellow as Mr. Mentz added the property to the whole. He should be able to develop it.

Q Is that still your opinion?

A Not based on subsequent information and advice of counsel.

Q It was your opinion at the time that you wrote that letter, though, was it not?

A In 1993, yes. If I was aware of a problem, I would have alerted Mr. Goodfellow, and Mr. Mentz through Mr. Goodfellow, that there was a problem.

Exhibit 19, p. 50. Johnson testified:

BY MR. ELLIS:

Q Now you indicate that the 10-acre parcel was not divisible as requested; is that correct?

A That's correct.

Q Why was that?

A The ordinance states that after the first accountable division, all lots thereafter must be 10 acres or greater, and the division status of a property is determined by the parent tract and when that property was created.

Q All right. So the ten acres, which is the subject of this letter, was not the parent tract, was it?

A No, it was not.

Q That, in effect, was a first division, the 10-acre parcel --

A Of the larger tract, yes.

Q -- which had been conveyed to Mr. Mentz -- the 10 acres was owned by Mr. Mentz at the time of your letter dated September 3rd, 1992?

A Yes.

Q And so Mr. Mentz was desirous of conveying to Mr. Auerbach two-plus acres out of the 10 acres; is that correct?

A Right.

Q And that division could not be effected as requested, because it would have been a second division; is that correct?

A That's correct.

Q So in order to effectuate or permit that division, the residual seven acres would have to be added on to Mr. Mentz's other property; is that correct?

A That's correct.

Q And if that were not done, then Mr. Auerbach could not get a building permit for the improvements on his two-acre parcel; is that correct?

A That's correct.

Q Did you discuss that fact with Mr. Auerbach? I see you sent a copy of that letter to him.

A I had met Mr. Auerbach on several occasions and that could have been, that could have been discussed. I can't verify that, yes, I actually talked to him about that. But, yes, I think we did discuss the situation about the 10 acres versus the two, the two-acre lot.

Q Did you discuss the adding on requirement by the County with Mr. Auerbach?

A I'm thinking that we did discuss how he could obtain his objective by adding the property back.

Johnson Deposition, pages 15-17, Attached as Exhibit 20.

Based on this testimony and the other arguments contained in this memorandum, plaintiffs respectfully request the Court to deny Defendant Auerbach's motion for partial summary judgment and, based on the unambiguous language of the Deed and the other undisputed facts represented herein, grant plaintiff's cross-motion for summary judgment.

H. C. MENTZ
and
PAMELA M. MENTZ

By _____
Of Counsel

Andrew J. Ellis, Jr., VSB No. 9078
Andrew G. Mauck, VSB No. 35177
MAYS & VALENTINE
P. O. Box 1122
Richmond, Virginia 23208-1122
(804) 697-1200

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of July, 1995, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Memorandum in Opposition to Auerbach's Motion for Partial Summary Judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment to Charles J. McCall, Esquire, 5104 W. Village Green Drive, Suite 105, Midlothian, Virginia 23112-4851, William B. Kerkam, III, Esquire, Bremner, Baber & Janus, 701 E. Franklin Street, Richmond, Virginia 23219 and A. Lisa Barker, Esquire, Senior Assistant County Attorney, Hanover County, Post Office Box 470, Hanover, Virginia 23069.

_____

DEED OF BARGAIN AND SALE

Date of Deed: December 12, 1986

Grantor: PAUL VON MILLE, unmarried, and MARIA VON MILLE LENGYEL ar LAZSLO J. LENGYEL, her husband

Grantee: H. C. MENTZ and PAMELA M. MENTZ, husband and wife

Address of Grantee: Route 1, Box 270, Mechanicsville, Virginia 231

For Ten Dollars ($10.00) and other valuable consideration, the receipt of which is hereby acknowledged, the Grantor hereby, grants and conveys subject to such matters as are set out herein with GENERAL WARRANTY and ENGLISH COVENANTS unto the Grantee as tenants by the entirety with the right of survivorship as at common law, the real estate described on Schedule A, a copy of which is attached hereto and made a part hereof.

This conveyance is made subject to such conditions, restrictions and easements of record as may legally affect the real estate hereby conveyed.

Words of any gender used in this instrument shall be held to include any other gender, and words in the singular shall be held to include the plural when the sense requires.

WITNESS the following signatures and seals

(SEAL)
Paul Von Mille

(SEAL)
Maria Von Mille Lengyel

(SEAL)
~~Lazslo~~ J. Lengyel
LASZLO

Deed # 1629
Org. Returned: Grantor ___ Grantee ___
Other: ___
Clerk

659 707

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EXHIBIT
1

PARCEL I

ALL that certain tract or parcel of land with all improvements thereon, lying and being in Henry Magisterial District, Hanover County, Virginia, containing 118.8 acres, as shown on plat bearing date April 6th, 1934, made by E. K. Taylor, Surveyor, and recorded in the Clerk's Office of the Circuit Court of Hanover County, Virginia, in Plat Book 12, page 65, Plat No. 1, and according to said plat, said land is bounded and described as follows:

BEGINNING at a sassafras tree corner to the land of Sallie Williams, Estate, and the land of St. George Tucker; thence north 11 degrees east 1096 feet to a sta- ; thence north 48 degrees west 529 feet; thence north 48 degrees west 319 feet to a beech tree on a creek; thence in a northeasterly direction along said creek as it meanders 4640 feet, more or less, to the intersection of said creek with a ditch; thence south 0 degress, 30 minutes west 960 feet; thence south 32 degrees west 2400 feet to a post; thence south 27 degrees west 183 feet to a stake; thence south 7 degrees west 1485 feet; thence north 87 degrees west 946 feet to a red oak; then north 86 degrees west 586 feet to the point of beginning at said sassafras.

PARCEL II

ALL that certain strip or parcel of land, located in Hanover County, Virginia, which was conveyed to Virginia Electric and Power Company, containing 3.1 acres by Belle L. W. Willard by a certain deed dated March 18, 1930, recorded in the Clerk's Office of the Circuit Court of said County, in Book 93, page 409, being designated strip or parcel "First" in said deed.

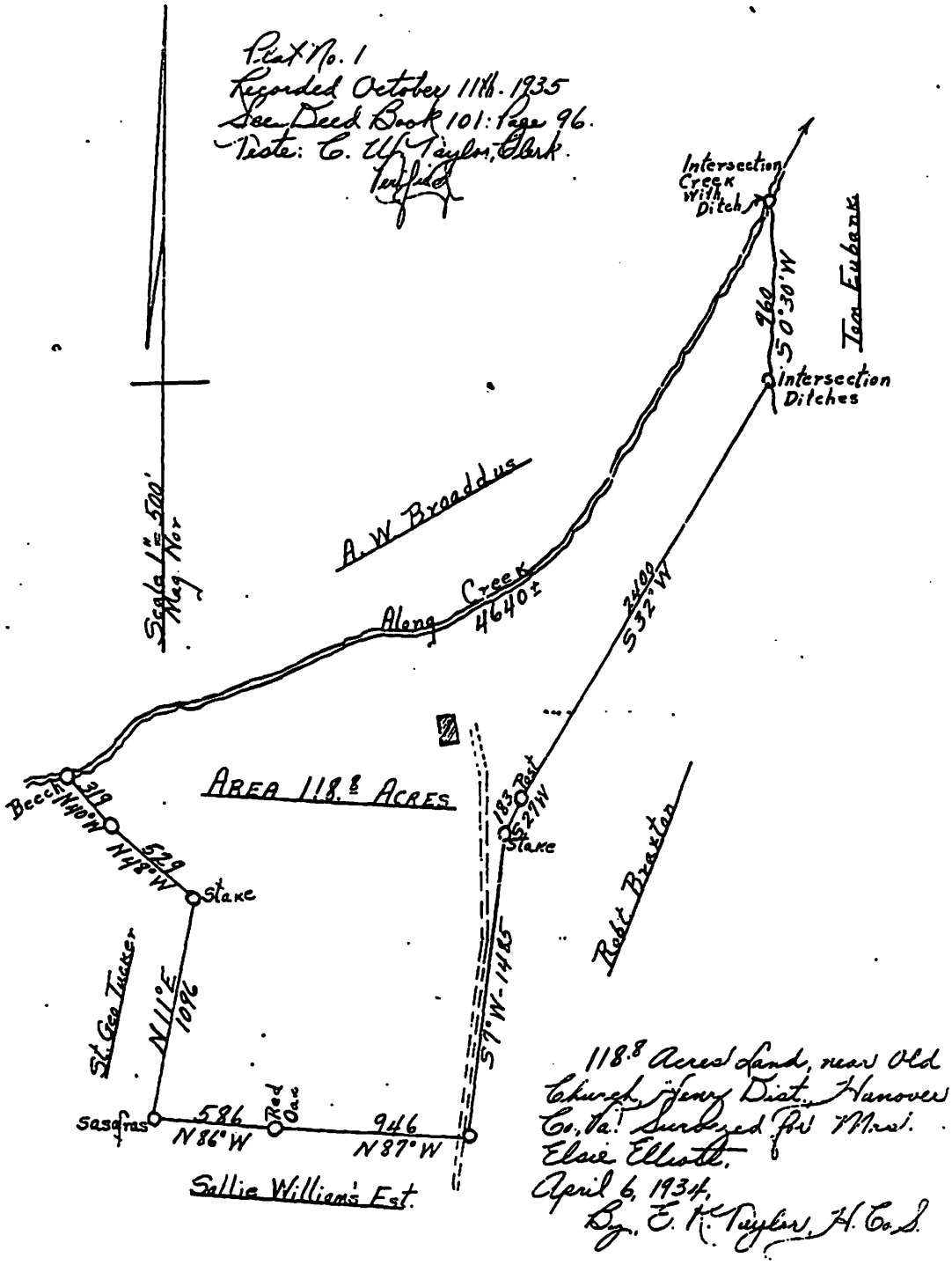
PARCEL III

ALL that certain lot, piece or parcel of land with all improvements thereon and appurtenances thereto appertaining, containing 27 acres, more or less lying and being in Henry Magisterial District, Hanover County, Virginia, and more particularly described as follows:

BEGINNING at a point which is the intersection of two ditches and is 960 feet, more or less, south of the northeast corner of a 118.8 acre tract of land presently owned by the parties of the second part hereto, said point being shown and marked as "Intersection Ditches" on a plat of survey dated April 6, 1934, made by E. K. Taylor, Surveyor, recorded in the Clerk's Office of the Circuit Court of Hanover County, Virginia, in Plat Book 12, page 65, Plat No. 1, and said point being the northeast corner of the property herein conveyed and described; thence along the line of S. L. Eubank, said line being the center of a ditch, south 0 degrees, 32 minutes west 1729.5 feet, more or less, to a point; thence south 31 degrees, 17 minutes west to the northern line of the old Richmond-Tappahannock Railroad right-of-way, which has been abandoned; thence along the northern line of the old abandoned Richmond-Tappahannock Railroad right-of-way in a westerly direction (as shown on a plat recorded in the aforesaid Clerk's Office made by William Hugh Redd, Surveyor, dated January 15, 1948, made at the request of S. L. Eubank and I. B. Jones) to a point on the eastern line of the 118.6 acre tract, hereinabove referred to, that presently belongs to the parties of the second part herein, said point being 2400 feet in a southerly direction from the point of beginning; thence along the east line of the aforesaid 118.8 acre tract, north 32 degrees east 2400 feet to the point of beginning.

BOOK 659 PAGE 739

159



118.8 Acres Land, near Old Church, Henry Dist., Hanover Co., Va. Surveyed for Mrs. Elsie Elliott.
April 6, 1934.
By. E. H. Taylor, H. Co. S.

Bill
G

EASEMENT AGREEMENT

This Easement Agreement, made and entered into as of this 7th day of January, 1987, by and between Paul Mark Von Mille, unmarried, and Maria Von Mille Lengyel and Laszlo J. Lengyel, her husband, parties of the first part, David D. Beattie and Eleanore Beattie, husband and wife, parties of the second part, S. V. Trimmer, Jr. and Jane Trimmer, husband and wife, parties of the third part, Hattie Braxton unmarried, party of the fourth part, and Elizabeth D. Thorpe and Delmore Steine Thorpe, her husband, provides as follows:

WHEREAS, the parties of the first part are the owners of those certain tracts of land described at Schedule A hereof, situated north of State Route 606 (Old Church Road), which tracts of land are designated on the Hanover County Real Estate Tax Assessors Maps as parcels 85c, 90c, 89, 90a, 90b, and 90e of map number 85. The only means of "ingress-egress" from said tracts of land to and from State Route 606 is via that certain private road shown on the aforesaid numbered map, a copy of which is attached hereto as Schedule B;

WHEREAS, all parties hereto desire to ~~all parties hereto recognize that the said private road shown on said map number has been used in excess of twenty years by all of the parties hereto, or their predecessors in title, and that all parties hereto desire to~~ establish in writing a non-exclusive easement appurtenant of right-of-way for "ingress-egress" to and from their respective properties and State Highway Route 606 recited herein over upon and across said road;

WHEREAS, the parties of the second part are the owners of that certain tract of land containing .75 acre situated on the northern line of said State Route 606, being further designated as parcel number 84 on the aforesaid tax map;

WHEREAS, the parties of the third part are the owners of that certain tract of land situated on the northern side of said State Route 606 designated as parcel 91 on the aforesaid tax map;

WHEREAS, the party of the fourth part are the owners of that certain tract of land designated on the aforesaid tax map as parcel 90;

WHEREAS, the parties of the fifth part are the owners of that certain tract of land designated on the aforesaid tax map as parcel 90h;

NOW, THEREFORE, WITNESSETH;

That for and in consideration of the sum of $1.00 cash in hand paid, and other good and valuable consideration, inclusive of the mutual benefits to be derived herefrom, the receipt of all of which is hereby acknowledged by all the parties hereto, the said parties of the first part, second part, third part, fourth part, and fifth part, expressly subject to the further provisions and limitations hereof, do hereby grant and convey, ~~confirm, ratify~~ each unto the other, their respective heirs, devisees, successors in interest as the same may appear, reciprocally, a non-exclusive easement of right-of-way for ingress-egress over upon and across the said private road, ~~a part of which was formerly designated by the Virginia State Highway Department as~~

~~Route 600,~~ as the same runs north from Virginia State Highway Route 606 into two segments, in order to provide access to and from the aforesaid respectively owned tracts of land to and from State Route 606, said road being all as more particularly shown on the aforesaid copy of map number 85 of the Hanover County Real Estate Tax Assesors records. It is understood and agreed by the parties hereto that this agreement establishes and defines the rights of the parties, that under no circumstances ~~The parties hereto furthermore ratify and confirm and agree that said road has been in existence for more than a period of twenty years, that the same has been used for ingress-egress to and from the respective properties and State Route 606 by themselves and/or their predecessors in title~~ on the servient tracts to be subjected to any greater burden than at present, that traffic shall be limited to normal agricultural and personal vehicles of residents of the existing residences, or their replacements, and that the width of such private road shall not be deemed enlarged in any wise by the grants made hereby. * ~~and furthermore that there has never been any disagreement as to the existence of nor to the right to use said road among them or lives.~~

Witness the following signatures and seals:

* This agreement shall become effective only upon execution by all parties hereto and the holders of any interest in the respective parcels by way of lien.

Paul Mark Von Mille (SEAL)
Paul Mark Von Mille

Maria Von Mille Lengyel (SEAL)
Maria Von Mille Lengyel

Lazslo J. Lengyel (SEAL)
Lazslo J. Lengyel

David D. Beattle (SEAL)
David D. Beattle

Eleanore Beattle (SEAL)
Eleanore Beattle

S. V. Trimmer, Jr. (SEAL)
S. V. Trimmer, Jr.

_____ (SEAL)
Jane Trimmer

_____ (SEAL)
Hattie Braxton

_____ (SEAL)
Elizabeth D. Thorpe

_____ (SEAL)
Delmore Steine Thorpe

STATE OF VIRGINIA

CITY/COUNTY OF Hanover, to-wit:

The foregoing instrument was acknowledged before me this 23 day of January, 1987, by Paul Mark Von Mille, unmarried.

My commission expires:
July 28, 1987

_____
Notary Public

STATE OF PENNSYLVANIA

CITY/COUNTY OF Montgomery, to-wit:

The foregoing instrument was acknowledged before me this 23 day of January, 1987, by Maria Von Mille Lengyel and Lazslo J. Lengyel, husband and wife.

My commission expires:

NOTARY PUBLIC
LANSDALE, MONTGOMERY COUNTY, PA.
MY COMMISSION EXPIRES JAN. 31, 19..

_____
Notary Public

Tim P. Sexton, Inc.
Soil & Land Use Consultants

SOIL-FEASIBILITY STUDY

75± acres located on the north side of Route 606 at the intersection of Route 628, Hanover County, Virginia

May, 1991

P.O. BOX 955, CHESTERFIELD, VIRGINIA 23832 • (804) 790-0119

EXHIBIT
2

SOIL FEASIBILITY STUDY

75± acres located on the north side of Route 606 at the intersection of Route 628, Hanover County, Virginia

SCOPE OF STUDY

This study was designed to determine the suitability of the soils of this tract for use as septic tank drainfield sites. It is acknowledged that soil scientists may disagree as to the suitability of lands for use with septic tank drainfields. It is acknowledged that the local health department may approve sites that this writer does not believe to be suitable and may disapprove sites that this writer believes to be suitable, since suitability in many marginal areas is a matter of judgment and experts may have an honest difference of opinion.

IN NO EVENT SHALL TIM P. SEXTON, INC., ITS AGENTS OR EMPLOYEES BE LIABLE FOR LOSS OF PROFITS OR OTHER SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES ARISING AS A RESULT OF THIS REPORT OR THE WORK PERFORMED BY TIM P. SEXTON, INC., ITS AGENTS AND EMPLOYEES, WHICH IS THE SUBJECT OF THIS REPORT.

The soil feasibility map was prepared using information provided by the client and is intended for use as a preliminary planning and decision-making tool. The soil feasibility study is not suited for detailed drainfield locations and determinations.

Detailed on-site investigations should be performed when tentative lot lines have been established and preliminary engineering staking is completed. This will assure that each lot has a sufficient amount of soils to meet the local health department's requirements for use as septic tank drainfield sites.

The soil feasibility map was prepared from a detailed soils map using a 1" to 500' aerial photograph obtained from the Virginia Department of Transportation. The soil feasibility map and accompanying air photo are being maintained in the files of Tim P. Sexton, Inc.

Recommendations pertaining to septic tank drainfields are based on the soil's physical characteristics and the current rules and regulations of the State Department of Health relative to septic tank drainfield suitability. These guidelines are subject to periodic change by the State and local health departments.

SEPTIC TANK DRAINFIELD SUITABILITY

Soil Feasibility Group #1

The soils of this feasibility group are deep and well drained. They have developed from sandy and loamy sediments of the Coastal Plain Physiographic Province and are rated fair to good for use as septic tank drainfield sites.

The subsoil and substratum horizons of these soils consist of sandy clay loam to light clay loam materials which have moderate permeability rates. Depths to seasonal water tables are greater than 45" below the surface, and septic tank drainfields are normally installed at depths of 24" to 30".

These soils normally meet the local health department's requirements for septic tank drainfield sites without serious problems when wells and septic tanks are used on lots which contain approximately 1 acre of the soils of this feasibility unit.

Soil Feasibility Group #2

The soils of this feasibility group are deep and well drained. They have developed from loamy sediments of the Coastal Plain Physiographic

Province and are rated fair for use as septic tank drainfield sites.

The subsoil and substratum horizons of these soils consist of clay loam to clay materials which have slow permeability rates. Depths to seasonal water tables are at 36" to greater than 45" below the surface, and septic tank drainfields are normally installed at 18" to 20".

These soils do not always meet the local health department's requirements for septic tank drainfield sites because of anticipated slow permeability rates.

When sewage disposal systems are located within this feasibility unit, they are usually considerably larger than normal to compensate for the slower permeability rates.

These soils can usually be developed on lots which contain approximately 2 to 3 acres of the soils of this feasibility unit when wells and septic tanks are used.

Soil Feasibility Group #3

The soils of this feasibility group occupy steep side slopes adjacent to drainageways and swales and, in some places, have been subjected to severe gullying and erosion. They have developed from stratified sediments of the Coastal Plain Physiographic Province, are very complex, and have great variability over short horizontal and vertical distances. These soils are rated marginal for use as septic tank drainfield sites.

The subsoil and substratum horizons of these soils range from sandy clay loam to heavy clay materials which have slow permeability rates.

These soils do not always meet the local health department's requirements for septic tank drainfield sites because of steep side slopes, gullying, and great variability within the subsoils.

It is likely that an occasional drainfield site may be located within this feasibility unit; however, extensive evaluation will be necessary before

any drainfield areas can be established.

Because of the variability within the subsoils of this feasibility unit, greater fluctuations may be anticipated when detailed soils investigations are conducted.

Soil Feasibility Group #4

The soils of this feasibility group are deep and moderately well drained. They have developed from loamy sediments of the Coastal Plain Physiographic Province and are rated marginally to poorly suited for use as septic tank drainfield sites.

The subsoil and substratum horizons of these soils consist of clay materials which have slow permeability rates. Depths to seasonal water tables range from 24" to 30" below the surface.

These soils do not normally meet the local health department's requirements for septic tank drainfield sites because of problems relating to slow permeability rates and seasonal high water tables.

For development purposes, the soils of this feasibility unit should be discounted for use as septic tank drainfields.

Soil Feasibility Group #5

The soils of this feasibility group are deep and moderately well to somewhat poorly drained. They occupy drainageways and swales that have developed from nearby Coastal Plain areas. These soils have seasonal high water tables at or near the surface during portions of the year and, in some areas, may be subject to periodic ponding. The soils of this feasibility group are poorly suited for use as septic tank drainfield sites and are not recommended for development as homesites using septic tank drainfields.

COMMENTS

Detailed evaluations of Soil Feasibility Groups #1, #2, and #3 may yield the number of drainfield sites needed to develop this property on large tracts; however, final drainfield locations in Feasibility Group #3 is speculative and great flexibility in final lot line establishment will be required to maximize the yield.

The property was evaluated in May, 1991.

Respectfully submitted,

Tim P. Sexton
Soil Scientist

SOIL SUITABILITY TERMINOLOGY AND DEFINITIONS

Septic tank drainfield use rated as:

* Good - Soils rated good for septic tank drainfield use are deep and well-drained. The subsoil and substratum horizons of these soils consist of sandy loams to loamy sands in Texture Groups I and II according to the State Health Department's regulations and have permeability rates which will meet the local health department's requirements for use as septic tank drainfield sites without problems.

* Fair - Soils rated as fair for septic tank drainfield use are normally deep and well-drained and have some minor problems related to the location or installation of drainfield systems. The problems may be related to topography, the depth of installation, the homesite location, floor and plumbing elevations, etc. The subsoil and substratum horizons of these soils may have textures of sandy clay loams to clay loams which fall into Texture Groups II and III of the State Health Department's regulations, or they can have sandy loam to loamy sand subsoils with shallow water tables and fall into Texture Groups I or II. When planning is done to compensate for these minor problems, these soils can normally be used for drainfield sites and will normally meet the local health department's requirements.

* Marginal - Soils rated as marginal for drainfield use usually have some serious soil-related problems which may materially influence their use for drainfield sites. The subsoil and substratum horizons of these soils may be clay loam to clay textures and fall into Texture Groups III and IV of the State Health Department's regulations; or these soils could have a sandy clay loam subsoil, seasonal high water tables at less than 32", and/or fall into Texture Groups II or III. Careful study and planning of these areas is necessary in order to obtain the local health department's approval for drainfield sites in these soils because of slow permeability rates or seasonal high water tables at depths of 24" to 32". These soils require extensive evaluation and may result in alternative drainfield systems being designed in order to attempt to obtain drainfield permits.

* Poor - Soils rated poorly suited for drainfield use have major problems associated with them, such as seasonal water tables at depths of less than 24", impermeable clays which fall into Texture Group IV of the State Health Department's regulations, or are subject to periodic ponding or flooding. The soils in this feasibility group are not recommended for development as homesites utilizing septic tank drainfields.

While these are the principal terms used in defining drainfield suitabliity, the soils are frequently rated between these defined groups. The term used first in the sequence is the more important. For example, a soil rated fair to marginal would be better suited for a drainfield than a soil rated marginal to fair.

These definitions represent our current evaluation of how soils should be used for septic tank drainfield sites and follow the State Health Department's Sewage Handling and Disposal Regulations and Guidelines. However, they do not necessarily represent the way each individual health department within the State is applying soil science to the approval of homesites for drainfield use.

LEGEND

Road

Property Line

Soil Boundary & Symbol

Gravelly

Drainageways & Streams

Lakes & Ponds

Marsh or Swamp

Spring

Rock Outcrops

Railroad

Woods road or driveway

Overhead power line

Severe gullying

Borrow pit B.P.

Tim P. Sexton, Inc.
Soil & Land Use Consultants
P.O. BOX 955, CHESTERFIELD, VIRGINIA 23832
(804) 790-0119

JOB #91-1000, [illegible] acres, Hanover County, Va.

SHEET NO. 8 OF 8

SCALE 1" = 500'

1000, 75± acres, Han

8 o

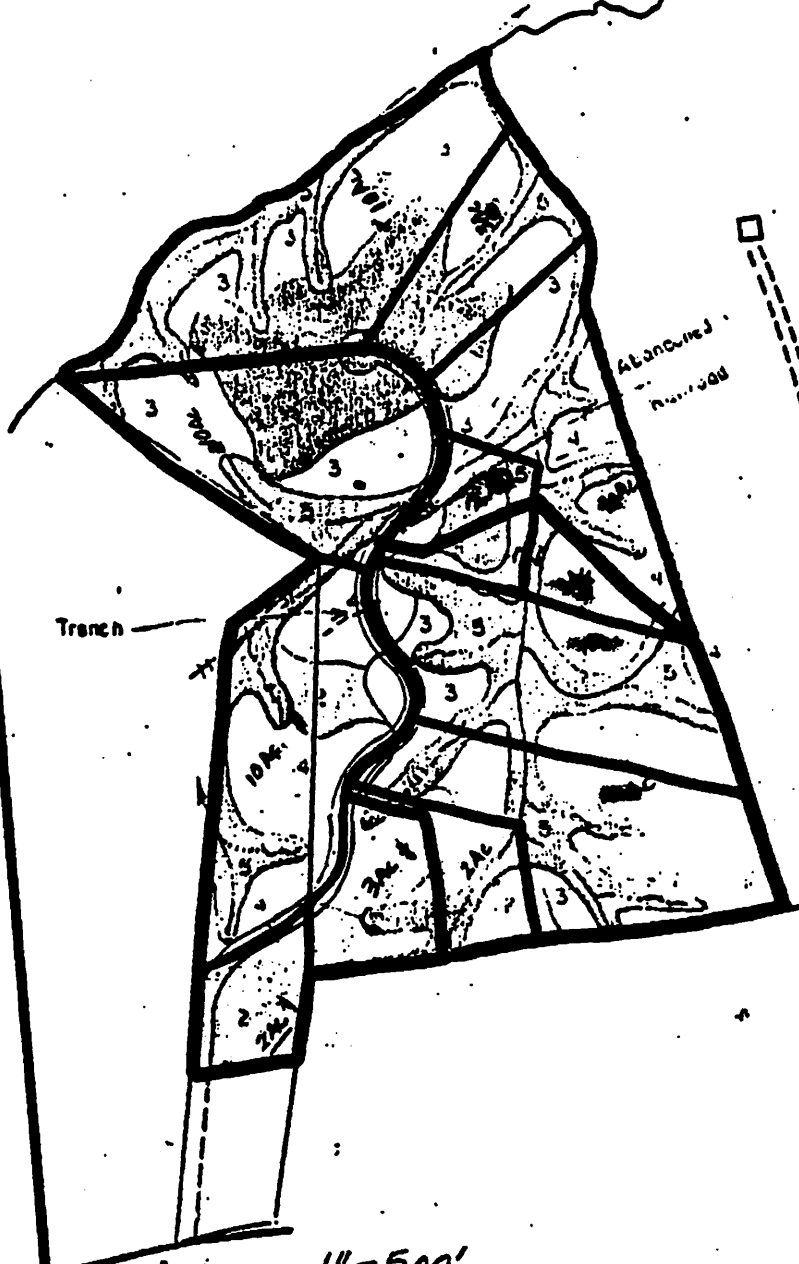
: 500'

Tim P. Sexton, Inc.

Soil & Land Use Consultants

P.O. BOX 55, CHESTERFIELD, Virginia 23832

(804) 790-0119



scale 1" = 500'

date ~~116~~

job no

176

Org. Returned: Grantor ___ Grantee #1486
Others: Jennifer Alphin
RICHARD L. SHELTON, CLERK

BOOK 223 PAGE 126

ES-2:e01301991

THIS DEED, made February 5, 1991, by and between MARY JANE TRIMMER, a/k/a Mary Jane Tucker Trimmer, widow, herein called Grantor, and HUBERT C. MENTZ and PAMELA M. MENTZ, husband and wife, herein called Grantees.

WITNESSETH:

That in consideration of Ten Dollars ($10.00) and other valuable consideration, the receipt of which is hereby acknowledged, the Grantor hereby grants and conveys with General Warranty and with English Covenants of title except as hereinafter set forth unto the Grantees, as tenants by the entireties with the right of survivorship as at common law, the following described real estate:

ALL that certain lot, piece or parcel of land, with all improvements thereon and appurtenances thereto belonging, lying and being in Cold Harbor District, Hanover County, Virginia, containing 10.0 acres fronting along northern line of Virginia State Route 606 and more particularly described as follows:

Commencing at a point marking the center line of Virginia State Route 606 which point is approximately 775' East of the center line of Virginia State Route 628; thence N 14 degrees 56 minutes 56 seconds E 1621.17' to a rod marking the southernmost line of property now or formerly owned by Beal; thence N 63 degrees 05 minutes 32 second E 300.96' along a fence to a pipe found in the southern line of property now or formerly owned by Beal; thence S 12 degrees 02 minutes 12 seconds W 1093.97' to a concrete monument at a fence corner; thence S 17 degrees 57 minutes 22 seconds W 582.79' to a point approximately 1.56' from the corner of a two-story frame dwelling; thence S 2 degrees 15 minutes 42 seconds W 86.54' to a point in the center line of Virginia State Route 606; thence westwardly along the center line of said road with a curve to the left, said curve having a radius of 525.00' and a length of 40.38' to a point; thence along a curve to the left, said curve having a radius of 1420.68 feet and a length of 221.38' to a point in the center of said road; thence S 86 degrees 30 minutes 55 seconds W 14.24' to the point in center of said road, the point of commencement.

BEING a part of a 32 acre, more or less, parcel conveyed to Mary Jane Tucker Trimmer by deed from Edward P. Simpkins, Jr., Special Commissioner, dated August 14, 1961, and recorded August 24, 1961, in Deed Book 209 at Page 612 in the Clerk's Office of the Circuit Court of Hanover County, Virginia. By deed of record in Deed Book 209, page 615, Mary Jane Tucker Trimmer and Shirley V. Trimmer, Jr., her husband, conveyed unto Shirley V. Trimmer, Jr., an undivided one-half interest in the aforesaid property, subject to the dower of Maria E. Tucker, widow of St. George Tucker. The said Shirley V.

EXHIBIT
3

(178)

Trimmer, Jr., (a/k/a Shirley Virginus Trimmer, Jr.), died testate on August 14, 1989, and by his Will probated in Will Book 31, page 598, devised the rest, residue and remainder of his estate (real, personal or mixed), including his one-half undivided interest in the property acquired in Deed Book 209, page 615, to his widow, the said Mary Jane Trimmer.

AND ALSO BEING a part of a 4 acre, more or less, parcel conveyed to Shirley V. Trimmer, Jr. and Mary Jane Trimmer, his wife, as tenants by the entirety with the right of survivorship, by deed from James A. Rawls, Jr., single, dated November 9, 1961, recorded November 21, 1961, in Deed Book 211 page 693. The said Shirley V. Trimmer, Jr. has since died, and by operation of law, his widow, Mary Jane Trimmer (a/k/a Mary Jane Tucker Trimmer) acquired title to this portion of the property.

This conveyance is made subject to recorded conditions, restrictions, and easements affecting the property hereby conveyed.

WITNESS the following signature and seal:

Mary Jane Trimmer (SEAL)
MARY JANE TRIMMER (a/k/a Mary Jane Tucker Trimmer)

STATE OF VIRGINIA,

City of Williamsburg, to-wit:

The foregoing instrument was acknowledged before me this 6th day of February, 1991, by Mary Jane Trimmer (a/ka/ Mary Jane Tucker Trimmer), widow.

Marcella D. Kapinos
Notary Public

My commission expires: March 31, 1991

Grantee's Address: 1618 W. Third Miles Road
Williamsburg, VA 23188

[illegible] County, to-wit:
In the [illegible] County aforesaid this 22 day of February, 19[illegible] at 2:32 o'clock P.M. the foregoing writing was presented and admitted to record, together with the annexed certificate of acknowledgment and recorded in Deed Book No. 849 page 726 [illegible] in the amount of $ 13.00 has been paid.
Teste: [illegible] Clerk

BOOK 849 PAGE 727

(179)

New Construction only
See Construction
Permit Application

on panel 510237 0379A this property does lie in Flood Zone C

This is to certify that on JUL 9, 1991 I made an accurate field survey of the premises shown hereon, that all improvements and encroachments known or visible are shown hereon, that there are no encroachments by improvements either from adjoining premises onto subject premises or from subject premises onto adjoining premises other than as shown hereon. This report not furnished. Easements and/or rights-of-way may exist.

Paul A. Jalbert, C.L.S.
Cert. No. 1434 B

N/F MENTZ
DB. 659 PG. 707

S12°02'12"W 1083.87'

FENCE GENERALLY ALONG PROPERTY LINE OR EAST OF PROPERTY LINE

100 VA. POWER EASE. FORMERLY VEPCO

OLD PARCEL LINE

OH POWER LINE

PARCEL "B"
7.422 AC.

PROP. LINE ALONG NORTHSIDE OF OLD R.R. RIGHT-OF-WAY

CONC. MON. FD. @ FEN COR.

N14°38'38"E 1621.17'

NOTE:
* PARCEL "A" REVISED ON AUGUST 18,1992
REMOVED TWO FRAME BUILDINGS.
PLAT REVISED FOR DAVID C.AUERBACH AND SUSAN C. ORTMANN.
PARCEL "A" & "B" REVISED ON SEPT. 3, 1992 TO SHOW
RECONFIGURATION OF PARCELS.

PARCEL "A"
2.578 AC.

N/F WILLIAMS

FRAME BLDG.

GRAVEL DRIVE

30' EASEMENT FOR INGRESS & EGRESS

543.05'

775' TO THE ℄ RTE. 620

STATE ROUTE 606

PROPERTY LINE • ℄ ROAD

NOTE: PROPERTY LINE CENTERED BETWEEN TWO WALLS OF BRICK AND FRAME DWELLINGS PER DEED DESCRIPTION RECORDED IN DB 27 PG 357

TWO STORY BRICK DWELLING W/ BASEMENT

2 STORY FRAME DWELLING

CHIMNEY

N/F MENTZ

30' PRESCRIPTIVE V.D.O.T. EASEMENT

N/F WILLIAMS

℄ OF ST. RTE. 606

STATE ROUTE 606

119

191

COMMONWEALTH OF VIRGINIA
PAUL A. JALBERT
No. 1434 B
LAND SURVEYOR

PLAT OF TWO PARCELS OF LAND LOCATED ON THE NORTH SIDE OF STATE ROUTE 606 IN THE COLD HARBOR DISTRICT HANOVER COUNTY, VIRGINIA.

*PRESENT OWNERS • HUBERT C. MENTZ AND PAMELA M.R. MENTZ, DEED BOOK 849 PAGE 726

JOB NO.--3827-0012

BOOK 934 PAGE 653

Goodfellow, Jalbert, Beard and Associates Inc.

EXHIBIT
4

NOTE: PARCEL "A" IS FIRST DIVISION OF PROPERTY.
PARCEL "B" IS AN ADD-ON PARCEL TO THE
PROPERTY OF HC MENTZ AND PAMELA M MENTZ
DB 659 PG 707

NOTE: This property does not lie in a HUD
Designated Flood Hazard Zone A as shown
on panel 510237 0375A This property
does lie in Flood Zone C

This is to certify that on JAN. 9, 1991
I made an accurate field survey of the premises shown
hereon, that all improvements and easements known or
visible are shown hereon, that there are no encroach-
ments upon adjoining premises or from adjoining premises
onto subject premises other than as shown hereon. This
report not furnished if easements and/or rights-of-way
may exist.

PAUL A. HUBERT L.S.
Cert. No. 1434 B

N/F MENTZ
DB. 659 PG. 707

FENCE GENERALLY ALONG PROPERTY LINE OR EAST OF PROPERTY LINE

S17°02'12"W 1083.07'

"DO" VA. POWER EASE.
FORMERLY VEPCO

OLD PARCEL LINE

PARCEL "B"
7.422 AC.

PROP. LINE ALONG NORTHSIDE
OF OLD R.R. RIGHT OF WAY

1121.17'

N17°58'38"E 1821.17'

2378.84'

S17°27'12"W 302.77'

S17°27'12"W 278.53'

ROD SET

ROD SET

450.00'

NOTE:
* PARCEL "A" REVISED ON AUGUST 18,1992
REMOVED TWO FRAME BUILDINGS.
PLAT REVISED FOR DAVID C.AUERBACH AND SUSAN C. ORTMANN.

PARCEL "A"
2.578 AC.

S02°15'47"E

PROPERTY LINE

STATE ROUTE 606

TRAVEL ZONE

FRAME BLDG.

PLAT OF TWO PARCELS OF
LAND LOCATED ON THE NORTH
SIDE OF STATE ROUTE 606
IN THE COLD HARBOR DISTRICT
HANOVER COUNTY, VIRGINIA.

*PRESENT OWNERS • HUBERT C. MENTZ AND
AND PAMELA M.R. MENTZ
DEED BOOK 649 PAGE 726

119 FT TO THE ℄ RTE. 620

COMMONWEALTH OF VIRGINIA
PAUL A. HUBERT
No. 1434 B
LAND SURVEYOR

DWELLING DETAIL

NOTE: PROPERTY LINE CENTERED
BETWEEN TWO WALLS OF
BRICK AND FRAME DWELLINGS
PER DEED
DESCRIPTION
RECORDED IN
DB 27 PG 337

TWO STORY
BRICK DWELLING
W/ BASEMENT

2 STORY
FRAME
DWELLING

1.50'

1.50'

PORCH 1.0' N. OF
PROP. LINE

10' PRESCRIPTIVE
V.E.P.C. EASEMENT

1.0' N. OF
PROP. LINE

℄ OF ST. RTE. 606

STATE ROUTE 606

JOB NO.--3827-0012

job no. 3419 - 0020 date JAN. 9, 1991 scale 1" = 100'

Bandfellow, Jathen, Board and Associates Inc.
ENGINEERING • SURVEYING • PLANNING

Complete Exhibit # 4 substituted herein
120

BOARD OF SUPERVISORS

WILLIAM C. FRAZIER, CHAIRMAN
SOUTH ANNA DISTRICT

WILLIAM T. BOLLING
CHICKAHOMINY DISTRICT

RICHARD S. GILLIS, JR.
ASHLAND DISTRICT

R. J. KLOTZ, JR.
HENRY DISTRICT

AUBREY M. STANLEY, JR.
BEAVERDAM DISTRICT

ELTON J. WADE, SR.
COLD HARBOR DISTRICT

HANOVER COUNTY
P. O. BOX 470
HANOVER, VIRGINIA 23069-0470

JOHN F. BERRY
COUNTY ADMINISTRATOR

STERLING E. RIVES, III
COUNTY ATTORNEY

September 3, 1992

Mr. William Goodfellow
Goodfellow, Jalbert, Beard & Associates
Post Office Box 539
Mechanicsville, Virginia 23111

RE: Division Status of Tax Parcel 85-86

Dear Sir:

In response to your request of August 21, 1992, the above-referenced tax parcel containing 10 acres, owned by H. C. and Pamela Mentz, is not eligible for division as represented by your submitted plat (copy attached).

According to a deed recorded February 22, 1991, in Deed Book 849, Page 726, Parcel 85-86 is the first division of Parcel 85-86B which is the remainder of a 32± acre parcel.

After review by the staff it is agreed that Mr. Mentz, who owns Tax Parcel 85-89 containing 122.50 acres which joins Parcel 85-86, will be allowed to add on 7.422 acres which is represented as Parcel B on your submitted plat, thereby creating a new 129± acre parcel.

The remaining 2.578 acre parcel which is shown as Parcel A will be considered a first division of the entire parcel. Please forgive the delay in my response to your request, however, if I can be of any further assistance, please do not hesitate to phone me at 730-6171.

Sincerely,

W. R. Johnson, Jr.

W. R. Johnson, Jr.
Zoning Administrator

/hg/johnson
cc: David Auerbach

EXHIBIT
5

184

EXHIBIT
6

CHARLES J. MCCALL
ATTORNEY AT LAW
5104 WEST VILLAGE GREEN DRIVE
SUITE 105
MIDLOTHIAN, VIRGINIA 23112-4651

ADMITTED TO PRACTICE IN
VIRGINIA
DISTRICT OF COLUMBIA

TELEPHONE (804) 744-0300
TELECOPIER (804) 744-6545

September 3, 1992

355-5719

VIA FAX AND REGULAR MAIL
Jeffrey Zwerdling, Esquire
Zwerdling, Oppleman and Paciocco
Attorneys at Law
5020 Monument Avenue
Richmond, Virginia 23230

Re: Purchase of One Old Church Tavern

Dear Jeff:

Prior to our recent telephone conference, my client requested that I make a record of some of the events that occurred to delay the closing. Therefore, I am still sending you a letter that was dictated prior to our talk.

This contract of sale has encountered numerous delays in trying to get it closed. Hopefully, we can bring this to a close early next week.

As you are aware, your client advertised and distributed [illegible]res for the sale of the property, indicating that the [illegible]erty was subdivided into a Parcel A of 2.578 acres, and a [illegible]el B of 7.422 acres. A copy of the plat that he used, dated [illegible]ary 9, 1991 and prepared by Goodfellow, Jalbert, Beard & [illegible]iates, Inc. of Mechanicsville, Virginia, is enclosed.

The title policy, however, reflects that the property went to record as a parcel of ten acres, and not as Parcels A and B, as above described. This misrepresentation of the character of the property, which was discovered through a title examination, has caused considerable difficulties and delay to my client. He had scheduled various contractors to commence work about ten days ago, in anticipation that the closing would occur in an expedited manner. As you are aware, he has expended considerable effort in dealing with the various county authorities to cure a titl[illegible]ect which is really the obligation of your client under the c[illegible]

In the course of preparing for closing, my client [illegible] William Goodfellow, who p[illegible]ared the above-referenced pl[illegible] asked for an updated survey. Consequently, Goodfellow upda[illegible] the survey and failed to check the public records before indi[illegible]ing that the parcels were divided as represented in the plat and by your client. After it was brought to Mr. Goodfellow's attention,

VIA FAX AND REGULAR MAIL
Jeffrey Zwerdling, Esquire
Zwerdling, Oppleman and Paciocco
September 3, 1992
Page 2

he submitted a request on August 21, 1992 regarding the buildable status of the Mentz property. That request was confirmed by correspondence dated August 24, 1992 from W. Randolph, Jr., Zoning Administrator of Hanover County, to Mr. Goodfellow (copy enclosed).

By correspondence dated September 3, 1992 from W. R. Johnson, Jr., Zoning Administrator, to Mr. Goodfellow, Mr. Goodfellow was advised that the subject property, that is the ten acres, "...is not eligible for division as represented by your submitted plat (copy attached)." (Copy enclosed.) The response did suggest a way in which the problem could be resolved. Therefore, I would appreciate your preparing the deed as expeditiously as possible so that this matter can be resolved and we can close on this property.

Regarding another outstanding item, you suggested that I give your client a figure regarding the other termite questions. In our previous telephone conversations, I had advised you that we would no longer request items 1 and 2 contained in the August 20, 1992 estimate from Encore Builders (copy enclosed). The remaining items, that is, items 3, 4, 5, and 6, can be repaired for $415.00. My client is willing to resolve this particular question by receiving a credit of $300.00 at closing, as offered by you in our telephone conversation this afternoon, in addition to the credit of $450.00 being the estimate by Four Square for the termite treatment.

As I have previously indicated, my client wants Orkin to do the termite treatment work. He will only request the credit of $450.00 from your client for this item. Finally, regarding the remaining items on the Encore Builders' estimate, my client wishes to do the work himself and does not wish to have Mr. Mentz perform any of the work or have anyone on his behalf perform the work, since this is historical property and he is very concerned about the quality of the repair work.

I am not aware that there are any other outstanding items in order to close this matter. If there are, I would appreciate your bringing them to my attention immediately. Not only has my client lost valuable time because of the upcoming winter weather, but he also has been caught up in the ripple effect of the recent hurricane. The prices of building materials have already escalated as much as 60%. This appeared on the 6:00 p.m. Channel 8 News last night.

Sincerely

Charles J. McCall

CJM/mss
Enclosures
cc: David Auerbach
[illegible]

188

John: 86 = TP# for property being devided
85-89 = TP# for property being added to

File → Zoning Variance # = A-7-92 Works Again + Again!

3/31

THIS DEED made this ____ day of March, 1993 between HUBERT C. MANTZ and PAMELA M. MANTZ, his wife, parties of the first part and DAVID AUERBACH and SUSAN C. CHEMAN, his wife, parties of the second part:

WITNESSETH:

The said parties of the first part for and in consideration of the sum of Ten Dollars ($10.00) to them cash in hand paid the receipt of which is hereby acknowledged do hereby grant, bargain, sell and convey unto the said parties of the second part as tenants by the entirety with the right of survivorship as at common law with General Warranty and English Covenants of Title the following described property, to-wit:

ALL that certain piece or parcel of land lying and being in Cold Harbor District, Hanover County, Virginia containing 3.578 acres and being more particularly described as Parcel A on a plat of two parcels of land drawn by Geoffellow, Jalbert, Beard and Associates Inc. dated January 9, 1991, and recorded herewith. " 7.422 acres (Parcel B) shall be added to DB 659 Pg 707 as an "add" not for the purpose of creating additional Building lots

*INSERT Additional LANGUAGE →

SAVING a portion of the same property conveyed to Hubert C. Mantz and Pamela M. Mantz, his wife, by Deed from Mary Jane Trimmer, also known as Mary Jane Tucker Trimmer, widow, dated February 8, 1991 and recorded February 22, 1991 in the Clerk's Office, Circuit Court of Hanover County, Virginia in Deed Book 649, Page 726.

The said parties of the first part hereby reserve an easement of right-of-way 30 feet in width along the western line of Parcel A leading from State Route 606 to Parcel B as a means of ingress and egress to and from Parcel B and State Route 606, said easement being shown as lying on the westerly side of Parcel A on the hereinabove described plat.

* As revised on August 18, 1993,

EXHIBIT 7

The said parties of the first part do further grant and convey unto the parties of the second part a first right of refusal to purchase Parcel B consisting of 7.422 acres should the parties of the first part sell that parcel of land.

The parties of the first part do hereby correct a certain plat drawn by Goodfellow, Jalbert, Beard and Associates Inc. dated January 9, 1991 and recorded in Deed Book 934, Page 653, Clerk's Office of the Circuit Court of Hanover County, which plat contains a description of 10 acres including Parcel A hereinabove described. The aforesaid plat recorded herewith is substituted for the plat recorded in Deed Book 934, Page 653 and the description is corrected to refer to two parcels, A and B.

WITNESS the following signatures and seals:

_____(SEAL)
HUBERT C. HERTZ

_____(SEAL)
PAMELA M. HERTZ

STATE OF VIRGINIA

CITY/COUNTY OF _____, to-wit:

The foregoing instrument was acknowledged before me this ____ day of March, 1993 by HUBERT C. HERTZ.

_____
Notary Public

My commission expires: _____.

STATE OF VIRGINIA

CITY/COUNTY OF _____, to-wit:

The foregoing instrument was acknowledged before me this ____ day of March, 1993 by PAMELA H. MEPPE.

_____
Notary Public

My commission expires: _____.

VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

H. C. MENTZ and PAMELA M. MENTZ, Plaintiffs, v. COUNTY OF HANOVER, Defendants.	))))))))))	Case No. 425-94

HANOVER COUNTY'S RESPONSE TO
PLAINTIFFS' FIRST REQUEST FOR ADMISSIONS

Defendant County of Hanover, Virginia (the "County"), by counsel, in answer to Plaintiffs' First Requests for Admission states as follows:

1. The County admits that Exhibit 1 to the Request for Admissions is a true and accurate copy of a letter from Andrew J. Ellis, Jr. to Keith Thompson dated March 29, 1993.

2. The County admits that Exhibit 2 to this Request for Admissions is a true and accurate copy of a cover sheet and a draft deed telecopied from Andrew Ellis, Jr. to Keith Thompson on March 31, 1993.

3. The County admits that Exhibit 3 to this request for Admissions is a true and accurate copy of a letter dated March 31, 1993 from Charles J. McCall to Andrew J. Ellis, Jr., a copy of which is included in the County file; however, the County is without knowledge as to the original of this letter, its delivery to the addressee, or any other specifics regarding this letter.

4. The County admits that Exhibit 4 to the Request for Admissions is a true and accurate copy of a public notice issued by

EXHIBIT
8

W. R. Johnson, Jr., Zoning Administrator for Hanover County, Board of Zoning Appeals, referencing a Tuesday, August 11, 1992 public hearing.

5. The County admits that Exhibit 5 to the Request for Admissions is a true and accurate copy of a telefax from Ted and Pam Mentz to W. R. Johnson, Jr. dated 8/11/92 referencing the Auerbach variance.

6. The County admits that Exhibit 6 to the Request for Admissions is a true and accurate copy of a letter from W. R. Johnson, Jr. to David Auerbach dated August 18, 1992.

7. The County admits that Exhibit 7 to the Request for Admissions is a true and accurate copy of a letter from W. R. Johnson, Jr. to Mr. William Goodfellow dated September 3, 1992.

8. The County admits that Exhibit 8 to the Request for Admissions is a true and accurate copy of a letter from William F. Goodfellow to W. R. Johnson, Jr. dated June 21, 1993.

9. The County admits that Exhibit 9 to the Request for Admissions is a true and accurate copy of a letter from W. Randolph Johnson, Jr. to William F. Goodfellow dated June 22, 1993.

10. The County admits that Exhibit 10 to the Request for Admissions is a true and accurate copy of a letter from Charles J. McCall to Jeffrey Zwerdling dated September 3, 1992, a copy of which is included in the County file; however, the County is without knowledge as to the original of this letter, its delivery to the addressee, or any other specifics regarding this letter.

11. The County denies that Exhibit 11 to the Request for Admissions is a true and accurate copy of a handwritten memo from Joann Morgan to Bill Johnson dated 4/13. The County admits that Exhibit 11 to the Request for Admissions is a true and accurate copy of a handwritten memorandum from John Hodges to Bill Johnson dated April 13.

12. The County admits that Exhibit 12 to the Request for Admissions is a true and accurate copy of a letter from Michael E. Crescenzo, Deputy Director of Planning for Hanover County, to David Auerbach dated September 15, 1992.

13. The County admits that Exhibit 13 to the Request for Admissions is a true and accurate copy of a letter from Michael E. Crescenzo to Charles S. Gittings dated July 22, 1994.

14. The County admits that Exhibit 14 to the Request for Admissions is a true and accurate copy of a letter from Michael E. Crescenzo to Charles S. Gittings dated September 8, 1994.

15. The County admits that Exhibit 15 to the Request for Admissions is a true and accurate copy of a letter from Charles J. McCall to John Hodges dated August 30, 1993.

16. The County admits that Exhibit 16 to the Request for Admissions is a true and accurate copy of a letter from Charles J. McCall to William F. Goodfellow dated September 8, 1993, a copy of which is included in the County file; however, the County is without knowledge as to the original of this letter, its delivery to the addressee, or any other specifics regarding this letter.

17. The County admits that Exhibit 17 to the Request for Admissions is a true and accurate copy of a letter from Charles J. McCall to Andrew J. Ellis, Jr. dated March 31, 1993, a copy of which is included in the County file; however, the County is without knowledge as to the original of this letter, its delivery to the addressee, or any other specifics regarding this letter.

18. The County admits that Exhibit 18 to this Request for Admissions is a true and accurate copy of a plan labeled "'Preliminary Plan', Mentz Property" dated May 10, 1994.

19. The County admits that Exhibit 19 to the Request for Admissions is a true and accurate copy of a letter from Roland Pitts and Duke Price to Keith Thompson dated September 19, 1994.

20. The County admits that Exhibit 20 to the Request for Admissions is a true and accurate copy of a letter from John H. Hodges, Director of Planning for Hanover County, to William F. Goodfellow dated August 30, 1993.

21. The County admits that Exhibit 21 to the Request for Admissions is a true and accurate copy of a memorandum from John H. Hodges to J. Keith Thompson, Principal Planner at Hanover County, dated October 29, 1993.

22. The County admits that Exhibit 22 to the Request for Admissions is a true and accurate copy of an attested deed recorded April 2, 1993.

23. The County admits that Exhibit 23 to the Request for Admissions is a true and accurate copy of the plat referred to in

the deed described in Request No. 22 and recorded at Plat Book 35 at page 69.

24. The County admits that Exhibit 24 to this Request for Admissions is a true and accurate copy of a draft deed with the handwritten notes of David Auerbach stating "John: 85-86 = TP# for property being divided 85-89 = TP# for property being added to Thanks Again + Again! Dave".

25. The County admits that Exhibit 24 to the Request for Admissions is a true and accurate copy of a draft deed with the handwritten notes of John Hodges stating "7.422 acres (Parcel B) shall be added to DB 659 Pg 707 as an '<u>add on not for the purposes of creating additional building lots</u>'."

26. The County admits that Exhibit 25 to the Request for Admissions is a true and accurate copy of a letter from W. R. Johnson, Jr. to David Auerbach dated August 18, 1992.

27. The County admits that Exhibit 26 to the Request for Admissions is a true and accurate copy of a memorandum from W. R. Johnson, Jr. to the Hanover County Board of Zoning Appeals dated May 4, 1993.

28. The County admits that Exhibit 27 to the Request for Admissions is a true and accurate copy of an application for a hearing before the Hanover County Board of Zoning Appeals for a variance submitted by David Auerbach and Susan Ortmann.

29. The County does not admit or deny the accuracy of Exhibit 28 because it is without information as to the origin or accuracy of a copy of a document purported to be a memorandum from Paul

Jalbert dated April 20, 1993 titled "Property Line Between Janice Williams and David Auerbach and His Wife, Susan Ortmann."

30. The County admits that Exhibit 29 to the Request for Admissions is a true and accurate copy of a tax card on 2.548 acres owned by David Auerbach and Susan Ortmann.

31. The County admits that Exhibit 30 to the Request for Admissions is a true and accurate copy of a letter from the Hanover County Assessor's Office to Hubert C. and Pamela M. Mentz dated March 19, 1993.

32. The County admits that Exhibit 31 to this Request for Admissions is a true and accurate copy of a plat of a parcel of land labelled as containing 2.035 acres north of Route 606 dated August 20, 1993, a copy of which is included in the County file; however, the County is without knowledge as to the original of this plat, or any other specifics regarding this plat.

33. The County admits that Exhibit 32 to this Request for Admissions is a true and accurate copy of a building permit for David Auerbach and Susan Ortmann.

34. The County admits that Exhibit 33 to the Request for Admissions is a true and accurate copy of a tax card on 2.035 acres owned by H. C. Mentz and Pamela M. Mentz.

35. The County admits that Exhibit 34 to the Request for Admissions is a true and accurate copy of a portion of a tax map reflecting tax parcels in Hanover County.

36. The County admits that Exhibit 35 to the Request for Admissions is a true and accurate copy of a portion of a tax map reflecting tax parcels in Hanover County.

37. The County admits that Exhibit 36 to the Request for Admissions is a true and accurate copy of a tax card on 102.422 acres owned by H. C. Mentz and Pamela M. Mentz.

38. The County admits that Exhibit 37 to the Request for Admissions is a true and accurate copy of a tax card on 27.45 acres owned by H. C. Mentz and Pamela M. Mentz.

39. The County denies that Exhibit 38 to this Request for Admissions is a true and accurate copy of a "Final/Streamline Subdivision Plan" dated 6/27/94 with a handwritten note at the bottom stating "Public water and sewer are not affected." The County admits that Exhibit 38 to this Request for Admissions is a copy of a cover sheet for a "Final/Streamline Subdivision Plan."

40. The County denies that Exhibit 39 to this Request for Admissions is a true and accurate copy of a map titled "'Mentz' Subdivision." The County admits that Exhibit 39 to this Request for Admissions is a copy of a map with a handwritten label, "'Mentz' Subdivision."

41. The County denies that Exhibit 40 to this Request for Admissions is a true and accurate copy of a boundary survey dated August 18, 1993 of portions of property owned by H.C. Mentz and Pamela M. Mentz. Exhibit 40 is illegible. However, it does appear to be a copy of a plat labeled "A Plat of a Parcel of Land . . . ."

42. The County admits that Exhibit 41 to the Request for Admissions is a true and accurate copy of an "Application for Final Approval" for the "MENTZ SUBDIVISION," date of submittal June 21, 1994.

43. The County denies that Exhibit 42 to this Request for Admissions is a true and accurate copy of a "Final/Streamline Subdivision Plan" for the "Mentz Subdivision, Section A" with handwritten note at bottom stating "1 remove topography". The exhibit is an accurate copy of a subdivision plan cover sheet for that subdivision.

44. The County denies that Exhibit 43 to this Request for Admissions is a true and accurate copy of a "Final/Streamline Subdivision Plan" for the "Mentz Subdivision, Section A" with handwritten note at the bottom beginning "Please review my . . . " The exhibit is an accurate copy of a subdivision plan cover sheet for that subdivision.

45. The County denies that Exhibit 44 to this Request for Admissions is a true and accurate copy of a "Final/Streamline Subdivision Plan" for the "Mentz Subdivision, Section A" with handwritten note at the bottom stating "No soil work has been submitted to the Health Dept." The exhibit is an accurate copy of a subdivision plan cover sheet for that subdivision.

46. The County denies that Exhibit 45 to this Request for Admissions is a true and accurate copy of a "Final/Streamline Subdivision Plan" for the "Mentz Subdivision, Section A" with handwritten note at the bottom stating "Please # Residual parcel".

The exhibit is an accurate copy of a subdivision plan cover sheet for that subdivision.

47. The County denies that Exhibit 46 to this Request for Admissions is a true and accurate copy of a "Final/Streamline Subdivision Plan" for the "Mentz Subdivision, Section A" with handwritten note at the bottom stating "Traffic Zone is wrong". The exhibit is an accurate copy of a subdivision plan cover sheet for that subdivision.

48. The County denies that Exhibit 47 to this Request for Admissions is a true and accurate copy of a "Final/Streamline Subdivision Plan" for the "Mentz Subdivision, Section A" with a handwritten date of 7/8/94. The exhibit is an accurate copy of a subdivision plan cover sheet for that subdivision.

49. The County denies that Exhibit 48 to this Request for Admissions is a true and accurate copy of a "Final/Streamline Subdivision Plan" for the "Mentz Subdivision, Section A." The exhibit is an accurate copy of a subdivision plan cover sheet for that subdivision.

50. The County admits that Exhibit 49 to the Request for Admissions is a true and accurate copy of a letter dated August 24, 1992 from W. Randolph Johnson to William Goodfellow.

51. The County admits that Exhibit 50 to the Request for Admissions is a true and accurate copy of a facsimile transmittal from Bill Goodfellow to Bill Johnson dated 8/21/92 with attachments.

52. The County denies that Exhibit 51 to this Request for Admissions is a true and accurate copy of a "Final/Streamline Subdivision Plan" for the "Mentz Subdivision, Section A" with a handwritten note stating that "Developer did Apply for Permit to Place Entrance Pipe & Stone if Existing Road is to Serve 3 Homes - Another Permit is to be obtained to Pave 25' back from Existing EP." The exhibit is an accurate copy of a subdivision plan cover sheet for that subdivision.

53. The County denies that Exhibit 52 to this Request for Admissions is a true and accurate copy of a "Final/Streamline Subdivision Plan" for the "Mentz Subdivision, Section A" with a handwritten note stating "Need to address access concerns Lots meet minimum zoning requirements." The exhibit is an accurate copy of a subdivision plan cover sheet for that subdivision.

54. The County admits that the handwriting on the copy of the Deed attached as Exhibit 24 stating "John: 85-86 = TP # for property being divided, 85-89 = TP # for property being added to. Thanks again and again. Dave" is that of David Auerbach.

55. The County neither admits nor denies that the handwritten language on Exhibit 24 "85-86" refers to the 10 acre parcel owned by the Mentzes from which Auerbach and Ortmann purchased 2.578 acres in that the author's intent is not stated in the notation, and the County is without knowledge as to the author's intent.

56. The County neither admits nor denies that the handwritten language on Exhibit 24 "85-89" refers to the 122.50 acre parcel owned by the Mentzes in that the author's intent is not stated in

the notation, in that the author's intent is not stated in the notation, and the County is without knowledge as to the author's intent.

57. The County admits that the handwriting in the right hand margin of the copy of the Deed attached as Exhibit 24 stating "7.422 acres (Parcel B) shall be added to Deed Book 659, Page 707 as an 'add on' not for the purpose of creating additional building lots" is the handwriting of John Hodges, Hanover County Planning Director.

58. The County admits that the building permit dated April 5, 1993 issued to David Auerbach and Susan Ortmann attached as Exhibit 32 would not have been approved and issued had not H. C. Mentz and Pamela M. Mentz, his wife, agreed to the provision in the Deed to David Auerbach and Susan Ortmann dated March 31, 1993 providing "Parcel B containing 7.422 acres is added on to the property described in Deed Book 659, Page 707 as an add on not for the purposes of creating additional building lots."

59. The County denies that the conveyance of 2.578 acres described as Parcel A in the Deed from Hubert C. Mentz and Pamela M. Mentz, his wife to David Auerbach and Susan C. Ortmann dated March 31, 1993 would not have been approved by Hanover County had not H. C. Mentz and Pamela Mentz agreed to the language in the Deed providing: "Parcel B containing 7.422 acres is added on to the property described in Deed Book 659, Page 707 as an add on not for the purposes of creating additional building lots." The County

did not "approve" the conveyance, but provided advice as to compliance with County ordinances.

60. The County admits that the letter from W. R. Johnson dated September 3, 1993 to William F. Goodfellow, attached as Exhibit 7, with a copy to David Auerbach notified Goodfellow of the "add on" provision.

61. The County neither admits nor denies that David Auerbach received a copy of the letter from W. R. Johnson to Goodfellow dated September 3, 1993, attached as Exhibit 7 in that the County has no knowledge as to receipt by David Auerbach.

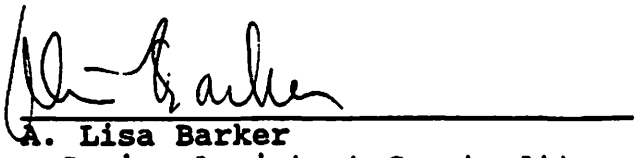
62. The County admits that the building permit dated April 5, 1993 issued to David Auerbach and Susan Ortmann attached as Exhibit 32 would not have been approved and issued had not David Auerbach and Susan Ortmann agreed to the provision in the Deed to David Auerbach and Susan Ortmann dated March 31, 1993 providing "Parcel B containing 7.422 acres is added on to the property described in Deed Book 659, Page 707 as an add on not for the purposes of creating additional building lots."

63. The County denies that the conveyance of 2.578 acres described as Parcel A in the Deed from Hubert C. Mentz and Pamela M. Mentz, his wife to David Auerbach and Susan C. Ortmann dated March 31, 1993 would not have been approved by Hanover County had not David Auerbach and Susan Ortmann agreed to the language in the Deed providing: "Parcel B containing 7.422 acres is added on to the property described in Deed Book 659, Page 707 as an add on

not for the purposes of creating additional building lots" in that the County did not "approve" such a conveyance.

COUNTY OF HANOVER

By Counsel



A. Lisa Barker
Senior Assistant County Attorney
P. O. Box 470
Hanover, Virginia 23069
(804) 537-6035

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Response to Request for Admissions was mailed, postage prepaid, this 14th day of July, 1995, to Andrew J. Ellis, Jr., Mays & Valentine, P. O. Box 1122, Richmond, Virginia 23208-1122; Charles J. McCall, 5104 West Village Green Dr., Suite 105, Midlothian, Virginia 23112-4851; and William B. Kerkam, Esq., Bremner, Baber & Janus, 701 E. Franklin Street, Richmond, VA 23219.

A. Lisa Barker

COUNTY OF HANOVER, VIRGINIA

RECORD OF OWNERSHIP

ENTZ, H C & PAMELA M R/S
~~O BOX 384~~
ECHANICSVILLE VA 23111

DATE RECORDED	03/87
DEED OR WILL BOOK	DB-659/707
CONSIDERATION	
DATE RECORDED	
DEED OR WILL BOOK	
CONSIDERATION	
DATE RECORDED	
DEED OR WILL BOOK	
CONSIDERATION	
DATE RECORDED	
DEED OR WILL BOOK	
CONSIDERATION	

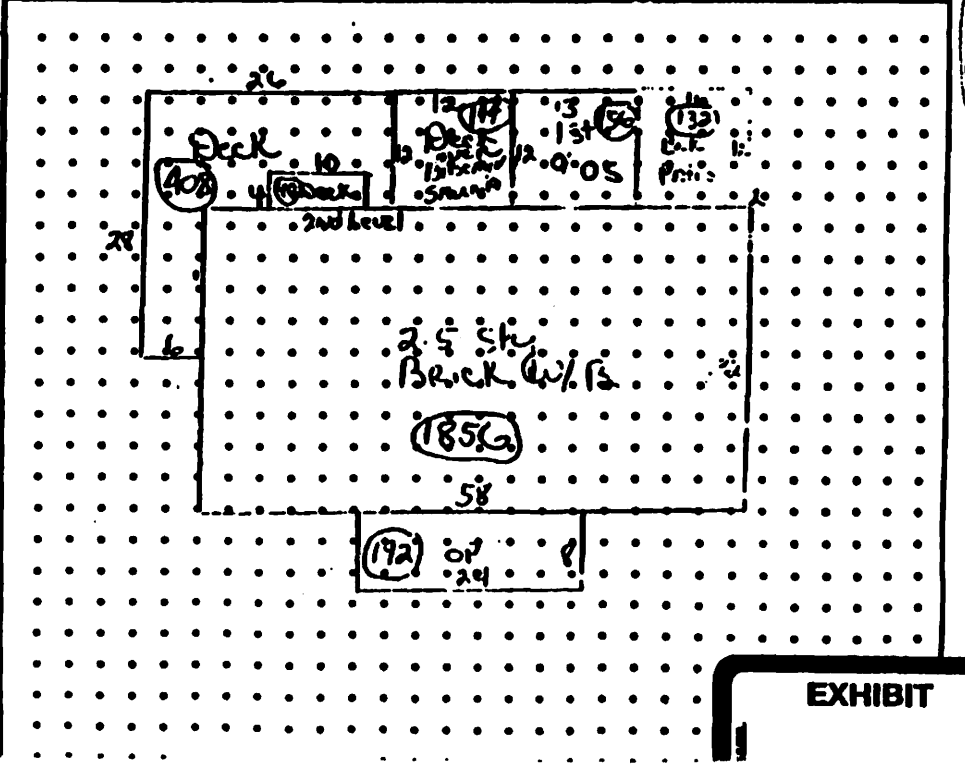
DIST	MAP NO.	ACCT.
COLD HARBOR	085 89	022119

ZONE	CLASS	LEGAL
A 1	6	NEAR HWY 606
ACREAGE AC		OTHER PARCEL LTS 89, 90B, & 90C

YEAR	VALUE OF LAND	VALUE OF BUILDING	TOTAL VALUE
1988	92,600	use 55,300 value ~~31,500~~	124,100
1992	187100	2000	189100
1993	199200	142000	341200
1994	157600	550200	707800
1995	154700	550200	704900

TRANSFER DATA 9/3/92 7.422 AC from Mentz, Hubert C. & Pamela
1. pcl 85-86 by plat DB-934/653
/20/93 25.67 AC to Mentz, H. C. & Pamela M. pcl 85-89A
by plat PB-35/97

BUILDING SKETCH



BASIC DATA ELEMENTS

TYPE OF STRUCTURE	TYPE OF HEAT
EXTERIOR FINISH	AIR CONDITIONING
MAIN BLDG. SQ FT	GARAGE-CARPORT
NO. OF ROOMS	GARAGE-CARPORT
NO. OF BATHS	PORCH SQ. FT.
NO. OF FIREPLACES	PORCH SQ. FT.
TOTAL BSMT SQ FT	PORCH SQ. FT.
BSMT FINISH	DECK
ROOF	NO. OF OTHER BLDGS.
GRADE	ACREAGE
CONDITION	ACCT. NUMBER

NOTES:

LAND USE

EXHIBIT

141

208

BOARD OF SUPERVISORS

J. L. "Jack" Ward, Chairman
Mechanicsville District

Richard S. [illegible] Jr
[illegible] District

R. T. Kelly, Jr
[illegible] District

Aubrey M. Stanley, Jr
Beaverdam District

Elton F. Wade, Sr
Cold Harbor District

ASSESSOR'S OFFICE
Hanover County
P. O. Box 470
Hanover, Virginia 23069-0470

March 19, 1993

(C)

H. C. & Pamela M. Mentz
P. O. Box 389
Mechanicsville, Virginia 23111

Re: Change in Value Due to an Acreage Change

The assessment on your property has been revised due to an acreage change. The new value was assigned effective for January 1, 1993, and is as follows:

Account #: 022119
Parcel #: 085 89
Acreage: 129.872
Legal: Near Hwy. 606

RECOMMENDED ASSESSMENT

Land	199,200
Bldg	142,000
Total	341,200

If you wish to discuss this change; contact the Assessor's Office within fifteen days of this notice.

Hanover County Assessor's Office

EXHIBIT
10

CHARLES J. MCCALL
ATTORNEY AT LAW
9104 WEST VILLAGE GREEN DRIVE

ADMITTED TO PRACTICE IN
VIRGINIA
DISTRICT OF COLUMBIA

EXHIBIT
11

March 31, 1993

BY FAX ONLY
Andrew J. Ellis, Jr., Esquire
Mays & Valentine
NationsBank Center
1111 East Main Street
PO Box 1122
Richmond, VA 23208-1122

RE: Auerbach v. Mentz
Case No. CH2091116-00

Dear Jack:

We have received the required information from Hanover Count regarding "attaching" Parcel "B" to Mentz's other property.

The required language is "7.422 acre Parcel B shall be added to property described in Deed Book 659 Page 707 as an 'add-on, not for the purposes of creating additional building lots.'"

I have been unsuccessful in locating Beverly Figg. May I suggest that the deed be sent to Mentz by messenger and then on to me, with the key.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Charles J. McCall

CJM/bhc
cc: David Auerbach by fax
Susan C. Ortmann by fax

CHARLES J. MCCALL
ATTORNEY AT LAW
5104 WEST VILLAGE GREEN DRIVE
SUITE 105
NORTHERN VIRGINIA [illegible]

ADMITTED TO PRACTICE IN
VIRGINIA
DISTRICT OF COLUMBIA

TELEPHONE [illegible]
TELECOPIER [illegible]

EXHIBIT
12

March 31, 1993

BY FAX ONLY
Andrew J. Ellis, Jr., Esquire
Mayo & Valentine
NationsBank Center
1111 East Main Street
PO Box 1122
Richmond, VA 23208-1122

RE: Auerbach v. Mentz
Case No. CH2001116-00

Dear Jack:

I would suggest that the required language be inserted after the "BEING" clause and be the first paragraph before that paragraph reserving the 50 ft. easement.

I would further suggest that the language inserted be "The 7.422 acre parcel described as Parcel "B" on the hereinabove described plat shall be added to that property conveyed to the parties of the first part as described in Deed Book 659 Page 707. Said addition shall be as an "add-on", not for the purposes of creating additional building lots."

Please do not hesitate to contact me if you have any questions.

Sincerely,

Charles J. McCall

CJM/bhc
cc: David Auerbach by fax
Susan C. Ortmann by fax

EXHIBIT

13

THIS DEED made this 31st day of March, 1993 between HUBERT C. MENTZ and PAMELA M. MENTZ, his wife, parties of the first part and DAVID AUERBACH and SUSAN C. ORTMANN, his wife, parties of the second part:

W I T N E S S E T H :

The said parties of the first part for and in consideration of the sum of Ten Dollars ($10.00) to them cash in hand paid the receipt of which is hereby acknowledged do hereby grant, bargain, sell and convey unto the said parties of the second part as tenants by the entirety with the right of survivorship as at common law with General Warranty and English Covenants of Title the following described property, to-wit:

See P.B. #35 Pg. 69

See PB#35 Pg#94 for corr. Plat

ALL that certain piece or parcel of land lying and being in Cold Harbor District, Hanover County, Virginia containing 2.578 acres and being more particularly described as Parcel A on a plat of two parcels of land drawn by Goodfellow, Jalbert, Beard and Associates Inc. dated January 9, 1991 as revised on August 18, 1992 and recorded herewith.

BEING a portion of the same property conveyed to Hubert C. Mentz and Pamela M. Mentz, his wife, by Deed from Mary Jane Trimmer, also known as Mary Jane Tucker Trimmer, widow, dated February 5, 1991 and recorded February 22, 1991 in the Clerk's Office, Circuit Court of Hanover County, Virginia in Deed Book 849, Page 726.

The said parties of the first part hereby reserve an easement of right-of-way 50 feet in width along the western line of Parcel A leading from State Route 606 to Parcel B as a means of ingress and egress to and from Parcel B and State Route 606, said

Deed # 4078
Orig. Returned: Grantor ___ Grantee ___
Other: Charles McCall
RICHARD L. SHELTON, CLERK atty

BOOK 972 PAGE 340

216

easement being shown as lying on the westerly side of Parcel A on the hereinabove described plat.

The said parties of the first part do further grant and convey unto the parties of the second part a first right of refusal to purchase Parcel B consisting of 7.422 acres should the parties of the first part sell that parcel of land.

The parties of the first part do hereby correct a certain plat drawn by Goodfellow, Jalbert, Beard and Associates Inc. dated January 9, 1991 and recorded in Deed Book 934, Page 6[illegible], Clerk's Office of the Circuit Court of Hanover County, which plat contains a description of 10 acres including Parcel A hereinabove described. The aforesaid plat recorded herewith is substituted for the plat recorded in Deed Book 934, Page 653 and the description is corrected to refer to two parcels, A and B. Parcel B containing 7.422 acres is added on to the property described in Deed Book 659, Page 707 as an add-on, not for the purposes of creating additional building lots.

WITNESS the following signatures and seals:

Hubert C. Mentz (SEAL)
HUBERT C. MENTZ

Pamela M. Mentz (SEAL)
PAMELA M. MENTZ

BOOK 972 PAGE 341

STATE OF VIRGINIA

~~CITY~~/COUNTY OF Hanover, to-wit:

The foregoing instrument was acknowledged before me this 1st day of ~~March~~ April, 1993 by HUBERT C. MENTZ.

~~Notary Public~~ Commissioner in Chancery

My commission expires: Circuit Court of Hanover County.

STATE OF VIRGINIA

~~CITY~~/COUNTY OF Hanover, to-wit:

The foregoing instrument was acknowledged before me this 1st day of ~~March~~ April, 1993 by PAMELA M. MENTZ.

~~Notary Public~~ Commissioner in Chancery

My commission expires: Circuit Court of Hanover County.

1 Old Church Tavern
Hanover, Va.

[illegible] 2
in the Clerk's Office of the County and [illegible] 93 at 11:05 o'clock A.M. the foregoing
day of April 1993, writing was presented and admitted to record, together with the annexed certificate
of acknowledgment and recorded in Deed Book No. 972 page 340
Fee tax imposed by Section 58.54-1 in the amount of $ 192.00 has been paid
Teste: R. D. Hiller Clerk

BOOK 972 PAGE 342

Goodfellow, Jalbert, Beard and Associates Inc.
6526 Mechanicsville Turnpike — P.O. Box 539
Mechanicsville, Virginia 23111
(804) 746-7097
ENGINEERING • SURVEYING • PLANNING

June 21, 1993

Hanover County Planning Department
P.O. Box 470
Hanover, VA 23069-0470

Attn: Mr. W. R. Johnson, Jr.
Zoning Administrator

Dear Bill,

As you requested during our recent meeting I am writing to outline the intent of my clients, Ted and Pam Mentz as relates to their property near Old Church. (Tax Parcel 85-89)

You will recall that a portion of parcel 85-86 was added to their tract as a result of a purchase of an adjacent ten (10) acres and a subsequent sale of approximately two and one-half (2.5) acres to another party.

We now would like to develop approximately seventy five acres of parcel 85-89 by the 25 acre rule and Title III of the Hanover County subdivision ordinance. This development will include the previously mentioned piece of land that was added-on and the remainder from original parcel 85-86.

Please review what we intend to do and confirm for us that it is possible to divide, by the aforementioned procedure, the added-on parcel along with our other property.

Please call me if you have any questions on our plans.

Sincerely,

Bill

William F. Goodfellow, P.E.

cc: Ted and Pam Mentz
W. Richard Hairfield, Esq.

EXHIBIT
14

Bill

BOARD OF SUPERVISORS

[illegible]

[illegible]
CHICKAHOMINY DISTRICT

WILLIAM C FRAZIER
SOUTH ANNA DISTRICT

RICHARD S GILLIS JR
ASHLAND DISTRICT

R J KLOTZ JR
HENRY DISTRICT

AUBREY M STANLEY JR
BEAVERDAM DISTRICT

ELTON J WADE SR
COLD HARBOR DISTRICT

HANOVER COUNTY
P O BOX 470
HANOVER, VIRGINIA 23069-0470

JOHN F BERRY
[illegible]

RICHARD H [illegible]
DEPUTY COUNTY ADMINISTRATOR

STERLING E RIVES III
COUNTY ATTORNEY

EXHIBIT
15

August 30, 1993

Mr. William F. Goodfellow, P. E.
P. O. Box 539
Mechanicsville, Virginia 23111

RE: Zoning Inquiry 93-39, Mentz Subdivision and the Application of the Twenty-Five Acre Rule in Regards to Add-Ons for Adjoining Property (Tax Parcels 85-86 (part) and 85-89), COLD HARBOR MAGISTERIAL DISTRICT

Dear Bill:

In response to a complaint received in this office regarding the status of the proposed "Mentz" Subdivision of an approximate 129 acre tract in Old Church, you have provided the following information:

1. A copy of a Title IV plat identified as "A Plat of a Parcel of Land Containing 25.67± Acres of Land..."

2. "A Plat of a Parcel of Land Containing 2.035 Acres..." The proposed first division of the 25 under the 25 Acre Rule of "Parcel A" and a Sketch Plan of Proposed Division of "Mentz" Subdivision dividing 129 acres into three (3) twenty-five plus acre tracts and one (1) fifty-four plus acre property.

In response, I would have the following comments:

1. This is to confirm your acknowledgement that the private road construction cannot proceed without a land disturbing permit. I understand that Mr. Mentz has ceased work pending approval by the Public Works Department.

   Note: This will also confirm the requirements of the County Engineer for a Land Disturbing Permit and E&S Plan are required <u>before</u> proceeding with Title III road construction.

2. This would confirm our understanding that the "sale or exchange of parcels between adjoining lot owners, where such sale or exchange does not create additional building lots, shall be exempt from the provision of the Ordinance." (Article 2, Section 2, Title I. Zoning Ordinance) This is understood to mean that the residual, (approximate seven acres of Tax Parcel 85-86 (part)) can be added to an approximate 120 acre tract identified as Tax Parcel 85-89, and the 25 Acre Rule applies so long as it can be shown that the addition of this seven acres does not create any new building lots on Tax Parcel 85-86B. We have reviewed the proposed "Mentz" Subdivision as a whole, and we would agree that, as represented, it would represent no more lots than could be achieved off Tax Parcel 85-89 under the sketch plan. However, this sketch plan has no legal status, and the division of 54 acres could be into 8 lots instead of the 5 lots you represent on the sketch.

Therefore, the recordation of only the front 25 acre section does not assure that the plan will be followed regarding the remaining sections and that, in fact, the developer's plans could change and the overall density would, therefore, change.

To address this concern, it is our belief that in order to apply the 25 Acre Rule to "Parcel A" as identified, then the remaining 25+ acre divisions and 54 acre division must be recorded in the Clerk's Office under the Title IV provisions in order to assure the Staff that the appropriate density has not been increased as a result of the conveyance of an add-on to the Mentz property Tax Parcel 85-89.

Therefore, in summary, if the 7± acre add-on (85-86 (part)) is subtracted from the 25.67 acre Parcel A, then another 7 acres from the balance of 85-89 would have to be added to get 4 lots in this section. Before this office would agree that the 2.035 acre and subsequent division of "Parcel A" (25.67± acres) can be divided into four lots under the 25 Acre Rule evidence of the recordation of the balance of the property in accordance with your "Mentz Subdivision" plan will be required. Without this information, we could not rely on a sketch plan as this sketch plan only has the status of a concept as to how the property might be developed under the 25 Acre Rule, not how it actually will be subdivided. We could not assure the complainant that the applicant has made a good faith effort to, in fact, divide the balance of the property as proposed.

I would be glad to discuss this with you further as necessary. By copy of this letter, I am advising Mr. Auerbach and The Honorable Elton J. Wade, Sr., of Mr. Mentz's plans in this area and our concurrence with those plans, subject to the recordation of Title IV plats.

Very truly yours,

John H. Hodges, AICP
Director of Planning

/jds/JHH 93-2

cc: The Honorable Elton J. Wade, Sr.
Supervisor, Cold Harbor District
Mr. David Auerbach
Richard F. Wood
Richard Bartell
W. Randolph Johnson, Jr.
Michael E. Crescenzo
J. Keith Thompson
A. Lisa Barker, Esq.
File: Zoning Inquiry

The recipient of this notice may have a right to appeal the notice of the zoning violation or a written order within thirty days of the date of this notice in accordance with Va. Code § 15.1-496.1. This decision shall be final and unappealable if not appealed within thirty days of the date of this notice.

Date _____

CHARLES J. McCALL
ATTORNEY AT LAW
5104 WEST WILLIAM GREEN DRIVE
SUITE 105
MIDLOTHIAN, VIRGINIA 23112-4851
(804) 744-0300
FAX (804) 744-6545

EXHIBIT
16

August 30, 1993

BY FAX ONLY
John Hodges
Director of Planning
Hanover County Virginia
Hanover, Virginia

RE: Hubert C. Mencz
and David Auerbach
and Susan Ortmann

Dear Mr. Hodges:

I represent David Auerbach and Susan Ortmann.

In reference to the captioned individuals and a certain parcel of land located in Hanover County, described in attached deed from Mr. & Mrs. Mentz to Auerbach and Ortmann, this is to advise you that there is a dispute as to the use by Mencz of the easement over the parcel and as described in the attached letter to Mentz.

It has come to my clients' attention that certain permits are or have been applied for with Hanover County to build a roadway or other access over the easement described in the deed. My clients dispute the extent to which the easement may be improved by Mr. Mentz, given the limitations contained in the deed for the access to Parcel B and the limitation on building lots, a condition imposed by the County.

There is a pending civil dispute between the parties over this issue and we hereby request that all applications by Mr. Mentz or his agents for permits pertaining to this access easement be denied until this matter is formally resolved between the parties or otherwise.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Charles J. McCall

Charles J. McCall

RECEIVED
AUG 31 1993
HANOVER COUNTY PLANNING OFFICE

WILLIAM T BOLLING CHAIRMAN
CHICKAHOMINY DISTRICT

R J KLOTZ, JR VICE CHAIRMAN
[illegible] DISTRICT

[illegible]

RICHARD S [illegible] JR
ASHLAND DISTRICT

AUBREY M STANLEY JR.
BEAVERDAM DISTRICT

ELTON J. WADE, SR
COLD HARBOR DISTRICT

J T "JACK" WARD
MECHANICSVILLE DISTRICT

HANOVER COUNTY
P O BOX 470
HANOVER, VIRGINIA 23069-0470

JOHN F DERRY
COUNTY ADMINISTRATOR

RICHARD R JOHNSON
[illegible]

July 22, 1994

RECEIVED
JUL 25 1994
GOODFELLOW JALBERT BEARD
AND ASSOCIATES, INC.

Charles S. Gittings
Goodfellow, Jalbert, & Beard
P.O. Box 539
Mechanicsville, VA 23111

RE: Mentz Subdivision, Plat by Goodfellow, Jalbert, Beard & Associates, dated June 17, 1994, and filed at the Planning Office June 23, 1994

Dear Mr. Gittings:

After a final review of the above-captioned subdivision, the plat has been DISAPPROVED. The following reasons are provided:

1. In order to meet the requirement of the Hanover County Subdivision Ordinance, Title III, for a 50-foot easement providing access to your subdivision you have proposed the easement which was retained by Mentz in a deed recorded in Deed Book 972, Page 341. The reservation of access in that deed was limited to a tract designated "Parcel B" consisting of 7.4 acres, depicted in a plat recorded in Plat Book 35, Page 69. Thus, the easement does not provide access to all of the property being proposed for subdivision. If there is any additional right of access which would meet the Ordinance requirements, please provide information regarding that matter, or inform us as to any other resolution of this matter (Sections 5-12 and 6-4-8(d)).

2. The Residual Parcel should be referenced as Lot 3 (Section 9-1).

3. For the first division, please reference the Deed Book and Page Number and also the acreage (Section 6.4.8 (a)).

EXHIBIT
17

Jul 22 1994

4. The traffic zone is incorrect (Hanover County Policy 84-7).

5. The Source of Title must be completely filled in (Section 6-2-15).

6. The private road names must be approved by Richmond Regional Planning District Commission, and you must provide evidence of that approval. Please contact Karen Props at 358-3684 (Property Numbering & Street Naming Manual, adopted May 22, 1987, revised May, 1993).

7. State Route 606 has been named "Old Church Road." Please reference this on the plat (Section 6-4-8(c)).

8. Please provide copies of the first division deed (Section 6.5)

9. Health Department has received no soils work. We must have Health Department approval prior to recordation (Section 5-10).

10. Please reference the Tax Parcel number for "Auerbach and Ortman" (Section 6-4-11).

11. It appears that the Tax Parcel number should be 85-89 (part) and 85-89A. (Section 6-4-2(f)).

12. On Lot 1 you reference a former parcel line; however, it is not clear where the former line was located (Sections 6-2-2(f), 6-2-8(f)).

Upon resubmittal, the plats will be approved if the additional information is provided and the corrections made. There is no fee for a resubmittal. For a resubmittal, remove the topographic contours and submit:

a. Two (2) 16" x 24" mylars. Only the original or a first generation unreduced black line copy of the original shall be accepted for recordation. Original signatures required.

JUL 25 1994

b. Five (5) 16" x 24" paper prints with signatures.
c. Two (2) mylar plat reductions at 1":600'.
d. Recordation fee, at $13.00 per sheet for the record set, payable to R.L. Shelton, Clerk.

The following is additional information regarding the subdivision process:

1. Please note the private road must be built to the following standards before issuance of any building permits:

   "*Private roads shall include no less than eighteen (18) feet of usable road surface covered with gravel of a minimum depth of one inch at the time of inspection, exclusive of drainage facilities, cleared of obstructions, with positive drainage.*" (Sections 5-13.1, 5-13.2).

2. If subdivision is to be recorded prior to the construction of the road a Deed of Easement must be executed. This would be done when final mylars are submitted (Section 9-2).

3. The developer has applied for a Virginia Department of Transportation (VDOT) Permit to place entrance pipe and stone. Another permit will be required to pave 25' back from the existing edge of pavement. (VDOT Code Requirement).

If you have any questions please call me at 537-6171.

Sincerely,

Michael E. Crescenzo
Deputy Director

JAM/sm/SUB

BOARD OF SUPERVISORS

WILLIAM T. BOLLING, CHAIRMAN
CHICKAHOMINY DISTRICT

SOUTH ANNA DISTRICT

RICHARD B. GILLIS, JR.
ASHLAND DISTRICT

AUBREY M. STANLEY, JR.
BEAVERDAM DISTRICT

ELTON J. WADE, SR.
COLD HARBOR DISTRICT

J. T. JACK WARD
MECHANICSVILLE DISTRICT

HANOVER COUNTY
P. O. BOX 470
HANOVER, VIRGINIA 23069-0473

JOHN F. BERRY
COUNTY ADMINISTRATOR

September 8, 1994

RECEIVED
SEP 14 1994
GOODFELLOW JALBERT BEARD AND ASSOCIATES, INC.

Charles S. Gittings
Goodfellow, Jalbert, & Beard
P.O. Box 539
Mechanicsville, VA 23111

RE: Mentz Subdivision, Plat by Goodfellow, Jalbert, Beard & Associates, dated June 17,1994, resubmitted to the Planning Office August 15, 1994

Dear Mr. Gittings:

After a final review of the resubmittal of the above-captioned subdivision, the plat has been **DISAPPROVED**. The following reasons are provided:

1. In order to meet the requirement of the Hanover County Subdivision Ordinance, Title III, for a 50-foot easement providing access to your subdivision you have proposed the easement which was retained by Mentz in a deed recorded in Deed Book 372, Page 341. The reservation of access in that deed was limited to a tract designated "Parcel B" consisting of 7.4 acres, depicted in a plat recorded in Plat Book 35, Page 69. Thus, the easement does not provide access to all of the property being proposed for subdivision. You have not provided any additional information regarding right of access. (Sections 5-12 and 6-4-8(d)).

2. No information has been provided to indicate if the private road names have been approved by Richmond Regional Planning District Commission. (Property Numbering & Street Naming Manual, adopted May 22,1987, revised May, 1993).

EXHIBIT
18

3. The Health Department has not approved any drainfield sites on this property at this time (Section 5-1).

4. Note Seven is incorrect. The correct Tax Parcel numbers should be 85-89 (part) and 85-89A (Section 6-4-2(f)).

If you have any questions, please call me at 537-6171.

Sincerely

Michael E. Crescenzo
Deputy Director

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

3

4 ----------

5

6 H. C. MENTZ,
and
7 PAMELA M. MENTZ, Plaintiffs,

8

v. CASE # 425-94

9

10 COUNTY OF HANOVER, Defendant.

11

12

13

14 The deposition of JOHN H. HODGES, taken by the Plaintiff
15 before Kristi Roberts Hall, a Notary Public for the State
16 of Virginia at Large, on the 8th day of June, 1995,
17 beginning at 9:00 a.m., at the Hanover County
18 Administrative offices, Hanover, Virginia.

19

20

21

22

23

CERTIFIED COPY

24

REPORTED BY: Kristi Roberts Hall, RPR, CM, Awd.Exc.

25

EXHIBIT

19

1 BY MR. ELLIS:

2 Q Something is missing there. That was an 85

3 dash 86 on the first line; is that correct?

4 MS. BARKER: That is the tax map sheet

5 that's involved (indicating in the affirmative).

6 BY MR. ELLIS:

7 Q All right. And after 85 dash 86, we have an

8 equal TP number sign; is that the --

9 A Tax parcel.

10 Q -- tax parcel number "for property being

11 devided" [sic]? And then we have immediately below that

12 85-89 equal TP number sign "for property being added to".

13 Do you recall what the property-being-

14 divided notation was referring to?

15 A I believe they were referring to proposed

16 division of tax parcel 85-86 and that tax parcel 85-89 was

17 the property being added onto.

18 Q And that would have been Mr. Mentz's

19 property?

20 A Yes.

21 Q All right. And do you recall a discussion

22 with Mr. Auerbach at or about the time these notations

23 made by you were made to the deed?

24 A I'm not sure I recalled discussing it, but it

25 may have occurred. I don't recall particular discussions.

1 I would acknowledge that that's my writing on the
2 right-hand column under where it says, "7.422 acres
3 (Parcel B) shall be added to Deed Book 659, Page 707 as an
4 'add-on not for the purposes of creating additional
5 building lots'".
6 Q That is your handwriting?
7 A That's my handwriting and my quotes.
8 Q And your quotes.
9 And the purpose of your making that notation
10 was so that would be included in the final form of the
11 deed; is that correct?
12 A Yes, so that it would meet the zoning
13 requirements. So as far as I was concerned, Mr. Mentz
14 would be able to develop his property. In accordance with
15 the letter, I wrote to Mr. Goodfellow and it would meet
16 the requirements of the ordinance.
17 Q And so that Mr. Auerbach could get his
18 building permit; isn't that correct?
19 A Yes.
20 Q Immediately above your initials is a file
21 notation with an arrow; is that your handwriting?
22 A The arrow is my handwriting and the circle, I
23 believe, is my handwriting. The zoning variance case
24 number I don't recognize.
25 Q And "Thanks again & again! Dave"; do you

1 recognize that handwriting?

2 A It looks to me like Dave, yes.

3 Q Would that be Mr. Auerbach?

4 A That's who I believe it would be.

5 Q That's who you were discussing these items

6 with; is that correct?

7 A Or he left it with me, I don't recall.

8 Q All right. There is an asterisk on the

9 left-hand side of the margin of the deed which says,

10 "Insert Additional Language" and some arrows; do you know

11 whose language or whose writing that is?

12 A I don't recognize it.

13 Q Then at the bottom of the deed is an

14 asterisk, "AS REVISED ON AUGUST 18, 1983"; do you know

15 whose handwriting that is?

16 A I don't recognize that.

17 Q Do you recall if the purpose of lodging this

18 draft deed with you was to get the necessary language for

19 it?

20 A My understanding or best recollection was to

21 get the language relating to the add-on added to the deed

22 so that it would not trigger subdivision approval; that

23 would be an add-on as opposed to an accountable first

24 division.

25 Q All right, sir.

1 would prevent subdivision of the property. And my best
2 recollection, that issue was referred to the County
3 Attorney's Office, Mrs. Barker, to be addressed in the
4 context of the subdivision proposal.
5 Q Did you ever discuss with Mr. Auerbach any
6 distinguishing feature of the access, as to whether or not
7 it was to Parcel B containing 7.4 acres or to the entire
8 property of Mr. Mentz's?
9 A I don't recall the discussion of
10 distinguishing features of Parcel B. The subdivision was
11 filed after my letter written to Mr. Goodfellow, which in
12 my opinion to Mr. Goodfellow was Mr. Mentz added the
13 property to the whole. He should be able to develop it.
14 Q Is that still your opinion?
15 A Not based on subsequent information and
16 advice of counsel.
17 Q It was your opinion at the time that you
18 wrote that letter, though, was it not?
19 A In 1993, yes. If I was aware of a problem, I
20 would have alerted Mr. Goodfellow, and Mr. Mentz through
21 Mr. Goodfellow, that there was a problem.
22 (Discussion off the record.)
23 BY MR. ELLIS:
24 Q Just so I'm clear, Mr. Hodges, under your
25 interpretation of the subdivision ordinance, if a parcel

1 is a first division of an overall parcel in the context of
2 your administration of the subdivision ordinance, are
3 developers permitted to make a first division; is that
4 correct?
5 A That's correct.
6 Q And the requirements of the subdivision don't
7 apply, subdivision ordinance don't apply; is that correct?
8 A That's correct. I would modify that to say
9 if the developer wishes to use the 25-acre rule and
10 exercise the right to get a first division on each 25
11 rather than a first division on the whole 122 acres, then
12 they would have to go through what we call Title IV
13 subdivision review -- create parcels that are greater than
14 25 acres, and then each one of those 25-acre plus lots has
15 a two-acre first division, which is not reviewed by this
16 office when it's created. We do review or stamp in and
17 record. We don't really review it, the 25-acre tracts.
18 And then when you come in and create your first divisions,
19 you do that in the clerk's office. We review the
20 subsequent divisions, the 10 acres and residual three
21 acres.
22 Q So if the divisions are less than 25 acres
23 and it is a second division, then the subdivision
24 ordinance would apply and you would have to comply with
25 it; is that correct?

1 A The second division, second subsequent
2 division of a tract less than 25 acres.
3 Q Would have to comply with the requirements of
4 the subdivision ordinance?
5 A Would have to, yes. And we would review any
6 previous divisions to ensure that the second division was,
7 in fact, the second division, and subsequent divisions
8 were consistent to regulations.
9 Q And --
10 A We do it after the fact, in other words.
11 Q And you would have to see that the second
12 division met the requirements of the subdivision ordinance
13 before you would recommend approval of a building permit
14 for that second division; is that correct?
15 A Before we would record the subdivision plat
16 and issue a building permit.
17 MR. ELLIS: Those are all the questions
18 I have of Mr. Hodges.
19 MR. McCALL: Can I take a short break?
20 Is there someone we can --
21 MS. BARKER: I have a couple of
22 questions. Could we ask those questions before we do?
23
24
25

1 CITY OF RICHMOND, TO-WIT:

2 STATE OF VIRGINIA

3

4

5 I, JOHN H. HODGES, hereby certify that I have

6 read this deposition and that it is a true and correct

7 transcript of my testimony, on this _____ day of

8 _____ 1995.

9

10

11

12 _____

13 (JOHN H. HODGES)

14

15 Witnessed By:

16

17 _____

Notary Public

18

19 My commission expires _____.

20

21

CERTIFIED COPY

22

23

24

25

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

3

4 ----------

5

6 H. C. MENTZ,
and
7 PAMELA M. MENTZ, Plaintiffs,

8

v. CASE # 425-94

9

10 COUNTY OF HANOVER, Defendant.

11

12

13

14 The deposition of W. RANDOLPH JOHNSON, JR., taken by the
15 Plaintiff before Kristi Roberts Hall, a Notary Public for
16 the State of Virginia at Large, on the 8th day of June,
17 1995, beginning at 10:55 a.m., at the Hanover County
18 Administrative offices, Hanover, Virginia.

19

20

21

22

23

24 CERTIFIED COPY

REPORTED BY: Kristi Roberts Hall, RPR, CM, Awd.Exc.

25

EXHIBIT

20

244

1 3rd. The date on the original had a highlight on it and
2 caused a smudge mark.
3 MR. ELLIS: I don't believe you will
4 disagree that that letter that I've just handed him is, in
5 fact, dated September 3rd, 1992; is that correct, Mrs.
6 Barker?
7 MS. BARKER: Yes, I have no problem with
8 that.
9 MR. ELLIS: Excuse me?
10 MS. BARKER: I have no problem with that
11 date. I agree it's September 3rd.
12 MR. ELLIS: All right.
13 BY MR. ELLIS:
14 Q And ask you if that's a letter that you wrote
15 to Mr. Goodfellow regarding the division of Mr. Mentz's
16 property?
17 A Yes.
18 MR. ELLIS: I ask that be marked as
19 Exhibit 4.
20 (Johnson Deposition Exhibit 4 was marked for
21 identification.)
22 BY MR. ELLIS:
23 Q Now you indicate that the 10-acre parcel was
24 not divisible as requested; is that correct?
25 A That's correct.

1 Q Why was that?
2 A The ordinance states that after the first
3 accountable division, all lots thereafter must be 10 acres
4 or greater, and the division status of a property is
5 determined by the parent tract and when that property was
6 created.
7 Q All right. So the ten acres, which is the
8 subject of this letter, was not the parent tract, was it?
9 A No, it was not.
10 Q That, in effect, was a first division, the
11 10-acre parcel --
12 A Of the larger tract, yes.
13 Q -- which had been conveyed to Mr. Mentz --
14 the 10 acres was owned by Mr. Mentz at the time of your
15 letter dated September 3rd, 1992?
16 A Yes.
17 Q And so Mr. Mentz was desirous of conveying to
18 Mr. Auerbach two-plus acres out of the 10 acres; is that
19 correct?
20 A Right.
21 Q And that division could not be effected as
22 requested, because it would have been a second division;
23 is that correct?
24 A That's correct.
25 Q So in order to effectuate or permit that

1 division, the residual seven acres would have to be added
2 on to Mr. Mentz's other property; is that correct?
3 A That's correct.
4 Q And if that were not done, then Mr. Auerbach
5 could not get a building permit for the improvements on
6 his two-acre parcel; is that correct?
7 A That's correct.
8 Q Did you discuss that fact with Mr. Auerbach?
9 I see you sent a copy of that letter to him.
10 A I had met Mr. Auerbach on several occasions
11 and that could have been, that could have been discussed.
12 I can't verify that, yes, I actually talked to him about
13 that. But, yes, I think we did discuss the situation
14 about the 10 acres versus the two, the two-acre lot.
15 Q Did you discuss the adding on requirement by
16 the County with Mr. Auerbach?
17 A I'm thinking that we did discuss how he could
18 obtain his objective by adding the property back.
19 Q All right. Now, you indicated that after
20 review by the staff -- Who comprised the staff that
21 reviewed this proposal?
22 A Keith Thompson, Mike Crescenzo.
23 Q And yourself
24 A And myself, yes.
25 Q And if the 7.422 acres referred to in your

1 CITY OF RICHMOND, TO-WIT:

2 STATE OF VIRGINIA

3

4

5 I, W. RANDOLPH JOHNSON, JR., hereby certify

6 that I have read this deposition and that it is a true and

7 correct transcript of my testimony, on this _____ day of

8 _____ 1995.

9

10

11

12 _____

13 (W. RANDOLPH JOHNSON, JR.)

14

15 Witnessed By:

16

17 _____

Notary Public

18

19 My commission expires _____.

20

21

22 CERTIFIED COPY

23

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1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

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5 H. C. MENTZ,
and
6 PAMELA M. MENTZ, Plaintiffs,

7 v. CASE NO.:425-94

8 COUNTY OF HANOVER, Defendant.

9

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14 P-R-O-C-E-E-D-I-N-G-S

15 Honorable RICHARD H. C. TAYLOR, Judge

16 9:00 a.m.

17 July 25, 1995

18

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25 Reported By: Kristi Roberts Hall, RPR, CM, Awd.Exc.

1 APPEARANCES:

2

3 ANDREW J. ELLIS, JR., ESQUIRE
ANDREW G. MAUCK, ESQUIRE
4 Counsel for the Plaintiffs

5

WILLIAM B. KERKAM, III, ESQUIRE
6 CHARLES JEFFREY McCALL, ESQUIRE
Counsel for the Mr. Auerbach and Mrs. Ortmann
7

8 AGNES L. BARKER, ESQUIRE
Counsel for the County of Hanover, Defendant
9

ALSO PRESENT:
10

H. C. Mentz
11

Mr. David Auerbach
12 Mrs. Susan Ortmann

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3 P-R-O-C-E-E-D-I-N-G-S
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6 THE COURT: All right. Good morning.
7 MR. ELLIS: Good morning, Your Honor.
8 THE COURT: Take all this down, young
9 lady.
10 Mr. Ellis is present, Mr. McCall is present,
11 Mr. Kerkam is present, Ms. Barker is present. All right.
12 MR. ELLIS: Excuse me, Your Honor, Andy
13 Mauck from my office is also present --
14 THE COURT: Yes, sir, Mr. Mauck. I'm
15 sorry.
16 MR. ELLIS: -- as assistant counsel.
17 And my client, Mr. Mentz, is also present.
18 THE COURT: All right. There are several
19 motions that have been filed. I think you started all
20 this, Mr. Ellis. Do you want to start or Mr. McCall?
21 MR. McCALL: Your Honor. Our motion was
22 filed in March.
23 THE COURT: All right, sir.
24 MR. McCALL: We have the motion for
25 partial summary judgment, but there is another motion

1 filed, I think it's a preliminary matter. If the Court
2 please, I'd like to address the cross-motion filed by Mr.
3 Ellis.
4 THE COURT: All right, sir.
5 MR. McCALL: That was filed on the 18th,
6 last week. It was received in my office on the 19th.
7 There was no notice attached. I note in the cover
8 letter, it doesn't refer to a notice being transmitted to
9 the Court. I became aware that Mr. Ellis intended to
10 have that motion heard today when he and I spoke by
11 telephone on Friday. I think Mr. Kerkam -- and Ms.
12 Barker, of course, can address herself -- but I don't
13 think any of us were aware that he intended to argue that
14 motion until Friday afternoon. And even if we had
15 received the notice itself, I don't think the motion was
16 timely filed in order for us to respond today. It was a
17 22 page motion, Your Honor. I think that needs to be
18 scheduled for another time.
19 MR. ELLIS: May it please the Court.
20 THE COURT: Yes, Mr. Ellis.
21 MR. ELLIS: Mr. McCall is perfectly
22 correct. His motion for summary judgment was filed in
23 March.
24 THE COURT: Yes, sir.
25 MR. ELLIS: His memorandum in support of

1 that motion was filed on July 17th. We responded the
2 next day --
3 THE COURT: Yes, sir.
4 MR. ELLIS: -- with our opposition to
5 that motion, and filed a cross-motion on the same day,
6 July the 18th.
7 THE COURT: Isn't it all going to the
8 same basic issue, one way or the other?
9 MR. ELLIS: Our opposition is all
10 intertwined with our cross-motion for summary judgment.
11 So if we argue one, we of necessity have to argue the
12 other. And we did not include a notice with Mr. McCall
13 and Ms. Barker that we intended to argue today, but
14 presumptively having filed a memorandum in opposition and
15 a cross-motion all at the same time, we assumed that he
16 would realize that we intended to argue it. Maybe it was
17 an improper assumption.
18 I did talk to him on the telephone on Friday
19 and I promptly made him a -- faxed him a notice we would
20 present it today.
21 THE COURT: All right, sir. Well, let's
22 go forward, Mr. McCall, with your motion for partial
23 summary judgment and go from there.
24 MR. McCALL: All right, Your Honor.
25 THE COURT: I kind of agree with Mr.

1 Ellis and what we argued about last time around, we're all
2 coming down to the same thing.
3 MR. McCALL: I think today there's
4 probably one issue that we all three agree upon, that's
5 this language in the deed.
6 THE COURT: Okay. What it means is
7 another problem.
8 MR. McCALL: Yes, sir. As the Court is
9 aware, the pending matter before the Court in the County
10 case, which we are here for today, is the appeal from the
11 decision of the subdivision agent. And the appeal noted
12 three bases for their disagreement with the decision.
13 One, it was not properly based on the
14 ordinance, the decision was arbitrary and capricious and
15 there was a --they claim that the county was estopped from
16 denying that the add-on provisions contained in the deed
17 and the actions taken by the County did not lead to two
18 separate lots for identification, or two pieces of
19 property, but one property for identification.
20 The problem is that there was a subdivision
21 application filed, as the Court is aware, and for a number
22 of reasons, the County denied the application. But the
23 one that's the focus in this motion today is the lifted
24 access that the County determined was the case with
25 respect to this easement.

1 One thing that we all agree upon is that this
2 easement language in the deed is the central focus of this
3 case. The distinction between our respective positions,
4 that is the position taken by the County and the position
5 taken by my client versus Mr. Mentz, is we believe that
6 the access stops at the borders of parcel B, parcel B
7 being the parcel B described in the plat that's attached
8 to the deed that conveyed property to my clients, Mr. and
9 Mrs. Auerbach.
10 The County effectively took the same position
11 when they denied the subdivision application. Mr. Mentz
12 claims that the easement allows him access to his other
13 property, his other property being 122.5 acres that's
14 contiguous to parcel B. Our position is that the language
15 in the deed is clear. It's concise. There's no ambiguity
16 to it. It says in its own terms that it is for the
17 purpose of ingress and egress to and from parcel B and
18 Highway 606 or State Route 606.
19 There's no reference to any other property in
20 the deed. There's no uncertainty as to where the easement
21 goes to and from. By its own terms, it's limited as to
22 where it goes.
23 We think it's appropriate for the Court under
24 the circumstances to construe the language in the deed.
25 It would save a lot of litigation time. It is ultimately

1 the issue the Court will have to address when this matter
2 comes to trial, I believe, in October. If there are any
3 other issues that would have to be resolved, certainly
4 they would come after the Court ruled on the exact meaning
5 of this language in the deed.
6 In fact, if the Court rules that the easement
7 language is restrictive, as we propose that is is, then
8 this case, in my opinion, is effectively mooted, because
9 the County could take no arbitrary and capricious action
10 with respect to an easement that is, in effect, limited,
11 as they say it is, and I think it naturally follows that
12 they could not take any action that did not comply with
13 the ordinance with respect to the interpretation of this
14 particular language.
15 Now, there may be yet other issues involved,
16 but I think effectively with respect to the action taken
17 by the County on this language, those issues would become
18 moot.
19 The County filed a memorandum asking the
20 Court to dismiss the action early on. And the Court has
21 not reviewed that. I think that needs to be considered
22 along with our memorandum for the Court to determine the
23 position of both the County and our client.
24 I think that says it all, Your Honor. This
25 is one of those times there's not really anything to say

1 because I think the language in the deed really does speak
2 for itself. If the Court has any questions, I'll be
3 available.
4 THE COURT: All right. Now, Ms. Barker,
5 do you want to say something before I call Mr. Ellis?
6 MS. BARKER: Your Honor, --
7 THE COURT: Okay.
8 MS. BARKER: -- the County supports Mr.
9 McCall's position and Mr. McCall's clients' position. Of
10 course, when we were asked to review that deed involving
11 access, we interpreted it in the same manner as Mr. McCall
12 is interpreting it now.
13 We agree with Mr. McCall, of course, that the
14 language in the deed is clear. Mr. Ellis repeatedly
15 refers to the planning director's interpretations of
16 various zoning and subdivision provisions. Our review of
17 the deed, prior to the access issue coming to our
18 attention, was limited to issues involving the combination
19 of parcels and minimum acreage and subdivision issues,
20 other than access. We did not look at the access issue,
21 and normally do not, if we have a prime facie indication
22 that there is an easement that meets ordinance
23 requirements, we do not do a title examination or anything
24 of that sort before we approve a subdivision plat.
25 That matter was brought to our attention by

1 Mr. McCall and when we looked at that deed, we came to the
2 same conclusion he did.
3 So, Mr. Ellis' references to our dealing with
4 access are incorrect in implying that we dealt with that
5 issue, early on. We really didn't.
6 Mr. Ellis' motion for summary judgment and
7 his memorandum include what we consider a number of
8 misconstructions of law. In fact, of course, we would
9 like an opportunity to respond to that with a memorandum
10 also. Mr. Ellis refers to the County being estopped from
11 changing its position. The County did not change its
12 position regarding access. The County initially had that
13 prime facia indication of access to a subdivision. And we
14 later found that there were problems with it when we
15 totally looked at the issue.
16 Our position is that the language in the deed
17 is clear and we agree with Mr. McCall that the Court must
18 construe that language and depending on the outcome of
19 that decision, the rest of the case may be moot.
20 Certainly from our standpoint, it would be resolved.
21 Thank you.
22 THE COURT: Now, Mr. Kerkam, do you want
23 to say anything before Mr. Ellis starts?
24 MR. KERKAM: Judge, I have nothing to
25 say, Your Honor.

1 MR. ELLIS: Mr. Kerkam I don't believe
2 has appeared in this case.
3 THE COURT: No, sir, but if all the
4 lawyers are here, I'm going to ask Mr. Mauck if he wants
5 to say anything after you go forward.
6 I notice that your clients have come in, Mr.
7 McCall. If you want them to sit on the bench behind you,
8 you may have them there. The bailiff will move.
9 MR. AUERBACH: Thank you, Your Honor.
10 THE COURT: Are you comfortable up there?
11 MR. AUERBACH: Thank you very much.
12 THE COURT: Go ahead, Mr. Ellis.
13 MR. ELLIS: May it please the Court. As
14 Mr. McCall has indicated, the same issue involved in the
15 proceeding today is before the Court in the case of Mentz
16 v. Auerbach, which is presently set for trial on October
17 20 and 21. And the motion was filed in this case out of
18 necessity. We must address it in this case at this time,
19 although if the Court will hear it at the appropriate
20 time, the evidence will be presented in the trial of the
21 Mentz v. Auerbach case.
22 I must say, Your Honor, that I'm somewhat
23 puzzled -- and perhaps "intrigued" would be the better
24 word -- by the County's position with respect to opposing
25 our request to the Court to declare this as access.

1 The denial of the subdivision request was
2 based primarily on the County's then interpretation, that
3 is August and July of 1993, that we didn't have access,
4 but they indicated during the course of discussions that
5 if we presented a Court order declaring there was access
6 that we could go forward with our subdivision.
7 We understand that's the case now, but they
8 are still taking the position of opposing our request and
9 have asked the Court for additional time to present
10 argument in response to the motion for summary judgment
11 that we filed.
12 Addressing the merits of the argument made by
13 Mr. McCall and the language contained in the deed, Mr.
14 McCall would direct the Court to one paragraph in the deed
15 that says that: parcel B is parcel B is parcel B and the
16 easement goes to parcel B, and that's all the deed
17 provides and it can never go anywhere else.
18 But, Your Honor, that's not all the deed
19 says. And his argument totally ignores all the language
20 in the deed except for the one paragraph that he refers
21 to, which establishes the easement.
22 The only case that he cites in his memorandum
23 that's been submitted to the Court in support of his
24 proposition is Camp v. Camp, 220 Va. 595, which deals with
25 the doctrine of rigorous necessity. That case holds that

1 if there is one clause in a deed that's irreconcilably
2 repugnant with another clause, then the first clause must
3 prevail.
4 I submit to the Court, there's been no
5 indication that there's any clause in the deed that's
6 repugnant to the clause which establishes the easement.
7 It's clarification; it modifies it and it adds on, so to
8 speak.
9 Camp v. Camp also states and stands for the
10 proposition that the cardinal principle in interpreting
11 the deed is the intention of the parties at the time that
12 the deed was executed and the circumstances attendant to
13 that execution.
14 And we submit to the Court that the law is
15 perfectly clear in construction of deeds, that the Court
16 must consider all the language that's contained in the
17 deed, and to the extent that it's possible, give effect to
18 all the language in the deed.
19 The deed, Exhibit 13, to our memorandum,
20 refers to the plat as recorded with it, the plat provides
21 in the upper left-hand corner -- and I must say, Judge, we
22 ran into a photocopying problem that I was unaware of
23 until I was reviewing it and the top portion of our plat
24 that we submitted as Exhibit 4, I believe, cut off the
25 reference that I'm referring to. And I will ask that the

1 sheriff hand up to the Court a correct copy, a true, if
2 you will, copy of the plat itself. And I'll hand counsel
3 one also.
4 Would you hand that to the Court and hand
5 that to counsel?
6 In the upper left-hand corner of that plat,
7 which is recorded with the deed, it is stated parcel A is
8 the first division of the property. Parcel B is an add-on
9 parcel to the property of H. C. Mentz and Pamela M. Mentz
10 in deed book 639, page 707.
11 The deed itself provides: Auerbach is
12 granted a first right of refusal to purchase parcel B
13 consisting of 7.422 acres, referring to the fact that the
14 easement portion does not limit parcel B as to the amount
15 of acreage that it's referred to. The deed also provides
16 that Parcel B, containing 7.422 acres, is added onto the
17 property, described in deed Book 659, page 707 -- the same
18 reference that's in the plat itself -- as an add-on, not
19 for the purpose of creating additional building lots.
20 Now, the only limitation to the add-on
21 provision is the limitation with respect to increasing the
22 number of building lots. And that refers to density, and
23 is fully explained in the letter from Mr. Hodges, dated
24 August 30th, 1993. And it's also addressed later in his
25 statement.

1 There's absolutely nothing in the plat or the
2 deed that's irreconcilably repugnant. The easement is
3 established to parcel B. Auerbach is given a first right
4 of refusal on parcel B, consisting of 7.422 acres, and
5 parcel B consisting of seven or containing 7.422 acres is
6 an add-on to the 122.5 acres, making a new 129.5 acre
7 parcel.
8 When the deed and the plat are read in their
9 entirety, the deed is perfectly clear, we submit, and
10 provides access to the 129.5 acre parcel. On the other
11 hand, if the Court should conclude that there's any
12 ambiguity in the provisions of the deed, the Court should
13 consider evidence to show the attendant circumstances
14 existing at the time the deed was executed, including the
15 situation of the parties and their relationship. That's
16 the proposition that's set forth in the Camp case as well
17 as in all cases in addressing deeds and their intent. And
18 the evidence is not offered to alter, modify or contradict
19 the terms of the deed, but is simply to show the attendant
20 circumstances.
21 The evidence in this case, Your Honor, could
22 not be clearer, and we submit to the Court that it's laid
23 out by documents -- primarily letters and correspondence
24 and requests for admission attached to our memorandum.
25 And let me suggest to the Court that nowhere

1 is it more evident than in this case that the County is an
2 unnamed party to this deed, because the County exercised
3 through its subdivision and zoning ordinances the
4 requirements concerning much of the language in the deed,
5 and whether or not certain benefits that flowed from this
6 transaction could be obtained by the parties.
7 The ordinance required, and it was provided
8 in the deed, that a 50-foot easement was provided to
9 access subdivision parcels of ten acres or more. Adding
10 on of the 7.422 acres, parcel B, to the 125.5 acre parcel
11 was done so that parcel A -- that was the piece that was
12 conveyed to Mr. Auerbach -- could be treated as a first
13 division of the entire parcel.
14 And that's the language, Your Honor, that's
15 in the letter form Mr. Johnson dated September 3rd, 1992;
16 that's his language.
17 MR. MCCALL: Your Honor, I object because
18 until the Court determines there's an ambiguity, I think
19 it would be inappropriate to be hearing any evidence at
20 all prior to the time that the deed was recorded. And Mr.
21 Ellis' memoranda is replete with references to events that
22 occurred prior to the recordation of the deed, all of
23 which are predicated upon the Court's finding, if there is
24 some need to hear parol or extrinsic evidence.
25 As Ms. Barker said, we would like the

1 opportunity to respond to this memoranda, too, but I think
2 for the purposes of this motion today, or at least in
3 response to the motion that we have filed, the
4 representations by Mr. Ellis need to be conveyed from the
5 date of the recordation of the deed forward, unless and
6 until the Court determines there's a need to hear parol or
7 extrinsic evidence, because otherwise we are going way
8 back; we are going back into an area the Court hasn't
9 ruled on prior to the time the deed is recorded. I
10 realize the cross-motion is based on events occurring
11 before the recordation of the deed, but we are getting far
12 afield from the motion today, and that's the language with
13 respect to this easement.
14 THE COURT: Well, doesn't he have the
15 right to argue what's on the plat and what's on the deed?
16 MR. MCCALL: He has the right to argue
17 what's on the plat and the deed for sure, Your Honor, but
18 the letter that he just referenced, dated in September of
19 '92, is not part of the deed; that's prior to recordation
20 of the deed in April of 1993.
21 He's referring to events and letters, and so
22 forth, that go into the question of the intent, all of
23 which would be premature until the Court rules on the
24 language in the deed. There's no groundwork at all, no
25 foundation for the admission of parol evidence or

1 extrinsic evidence prior to the time that the deed was
2 recorded.
3 THE COURT: Well, because of the lateness
4 of the filing of the memorandum by Mr. Ellis, I'm going to
5 allow you all to respond. But I'm trying to focus in on
6 the specific issue that would solve the whole thing, and
7 the specific issue that will solve the whole thing is the
8 interpretation of the deed and the plat, isn't it?
9 MR. MCCALL: Yes, Your Honor, but I would
10 point out to the Court that the appeal in this case, the
11 pleadings themselves, does not raise the issues of
12 ambiguities; it doesn't raise the issue of the intent of
13 the parties; it doesn't raise any of these issues.
14 The issue in the appeal was whether or not
15 the County complied with the ordinance in its
16 interpretation of this language that's in the deed that
17 described the easement. None of these other issues are
18 issues in the County case. This memorandum contains
19 issues that are part of the companion case, but that's not
20 before the Court this morning.
21 THE COURT: Well, I agree and disagree
22 with you, Mr. McCall. I think that in order to interpret
23 the deed, I've got to interpret the deed. And in order to
24 interpret the deed, I've got to look at the whole deed
25 from corner to corner, together with the plat.

1 MR. MCCALL: I agree, Your Honor, but at
2 the same time, that review necessarily must start with the
3 date that the deed is recorded and the document itself,
4 and not events or circumstances or documents that were
5 prepared prior to the recordation of that deed. The
6 doctrine of merger clearly would support that anything
7 prior to the execution of that deed, in this recordation,
8 is merged in the deed.
9 THE COURT: I'll overrule your objection,
10 at this point. You may respond to that question in your
11 memorandum when we get through.
12 Go ahead, sir.
13 MR. ELLIS: Thank you, Your Honor.
14 The further requirement, I mean further
15 documentary evidence that we produced to the Court shows
16 that the County -- and this is in conjunction with my
17 suggestion to the Court that the County was actually a
18 part of this deed, a named party -- actually dictated the
19 language that was used in the deed and construed that
20 language -- and I'm not talking about Ms. Barker or Mr.
21 Rives or anybody in the legal department, but I'm talking
22 about the people in the planning office who are charged
23 with the day-to-day administration of the ordinance
24 itself. The planning director construed that language to
25 mean that there was access to the entire 129.5 acre

1 parcel, because he gave a tentative approval to the
2 subdivision plans that were submitted on August 30th,
3 1993.
4 Indeed, and we filed as exhibits with our
5 memorandum, the tax records and the County letter, which
6 added on the property, for assessment purposes, to 129
7 acres, before the deed was executed. The letter that adds
8 it on was dated some two weeks before the deed was signed.
9 And I go back for a moment, Your Honor, to
10 refer again to the Camp case that says the intent may be
11 evidenced by the circumstances surrounding the parties at
12 the time the deed was executed.
13 The evidence is equally clear that Auerbach
14 and Ortmann knew of the add-on requirement and that's so
15 between the Johnson letter of September 3rd, 1992, McCall
16 letter of September 31, 1992, Auerbach's handwritten notes
17 on the deed, draft of the deed that's filed as an exhibit,
18 the County admission Number 62 and -- although we haven't
19 filed it because we got it just yesterday -- the Auerbach
20 admission Number 62, which we will file with the Court.
21 In short, Auerbach and Ortmann could not have
22 purchased parcel A and made their improvements unless
23 parcel B had been added onto the 125.5 acres, and they
24 knew that.
25 Your Honor, we are perfectly aware of the

1 rule that prohibits the use of deposition testimony as the
2 basis of a summary judgment motion, but I offer this
3 testimony in opposition to the summary judgment motion
4 that's been filed by the County, by Mr. Auerbach and Mrs.
5 Ortmann in this case, and the County. And I think it's
6 appropriate for the Court to consider it in considering
7 their motion.
8 This was Mr. Hodge's testimony --
9 MR. MCCALL: Excuse me. For the record,
10 may I interpose an objection to any use of the deposition
11 testimony. I don't believe it comports with the rules at
12 all, Rule 4.7. I can't find any exceptions that apply.
13 THE COURT: It may, again, and it may
14 not, Mr. McCall, but the only way we are going to get to a
15 conclusion of this matter is to continue to allow each
16 side to put in what it feels it can to vouch the record.
17 So I'm going to allow him to put it in anyway, and he
18 doesn't have to vouch the record. Your objection is
19 overruled. Your exception is noted.
20 Go ahead, Mr. Ellis.
21 MR. ELLIS: Your Honor, we are referring
22 in this deposition testimony, initially to the copy of the
23 deed that has the handwritten notes along the side of it,
24 if the Court recalls that copy of the deed. Do you have
25 it there?

1 THE COURT: Yes, sir, I saw it somewhere
2 in here. I can't put my hand right on it.
3 MR. ELLIS: It's Exhibit Number 7 to our
4 memorandum.
5 THE COURT: Go ahead, sir.
6 MR. ELLIS: And Mr. Hodges, who is the
7 planning director for Hanover County testified: "All
8 right." This is the question. "And after 85 dash 86, we
9 have an TP number sign; Is that the --"
10 Answer: "Tax parcel."
11 Question: "-- tax parcel number 'for
12 property being devided' [sic]? And then we have
13 immediately below that 85-89 equal TP number sign 'for
14 property being added to....'"
15 Answer: "I believe they were referring to
16 proposed division of tax parcel 85-86 and that tax parcel
17 ...was the property being added onto."
18 Question: "And that would have been Mr.
19 Mentz' property?"
20 Answer: "Yes."
21 Question: "All right. And do you recall a
22 discussion with Mr. Auerbach at or about the time these
23 notations made by you were made to the deed?"
24 Answer: "I'm not sure I recall discussing
25 it, but it may have occurred. I don't recall particular

1 discussions.

2 "I would acknowledge that that's my writing

3 on the right-hand column under where it says, '7.422 acres

4 (Parcel B) shall be added to Deed Book 659, Page 707 as an

5 'add-on not for the purposes of creating additional

6 building lots.'"

7 Question: "That is your handwriting?"

8 Answer: "That's my handwriting and my

9 quotes."

10 Question: "And your quotes. And the purpose

11 of your making that notation was so that would be included

12 in the final form of the deed; is that correct?"

13 Answer: "Yes, so that it would meet the

14 zoning requirements. So as far as I was concerned, Mr.

15 Mentz would be able to develop his property. In

16 accordance with the letter, I wrote to Mr. Goodfellow and

17 it would meet the requirements of the ordinance."

18 Question: "And so that Mr. Auerbach could

19 get his building permit; isn't that correct?"

20 Answer: "Yes."

21 Further: "Did you ever discuss with Mr.

22 Auerbach any distinguishing feature of the access, as to

23 whether or not it was to Parcel B containing 7.4 acres or

24 to the entire property of Mr. Mentz's?"

25 Answer: "I don't recall the discussion of

1 distinguishing features of Parcel B. The subdivision was
2 filed after my letter written to Mr. Goodfellow, which in
3 my opinion to Mr. Goodfellow was Mr. Mentz added the
4 property to the whole. He should be able to develop it."
5 Question: "Is that still your opinion?"
6 Answer: "Not based on subsequent information
7 and advice of counsel."
8 Question: "It was your opinion at the time
9 that you wrote that letter, though, was it not?"
10 Answer: "In 1993, yes. If I was aware of a
11 problem, I would have alerted Mr. Goodfellow, and Mr.
12 Mentz through Mr. Goodfellow, that there was a problem."
13 Now, Mr. Johnson testified, and he was the
14 subdivision administrator: "Now, you indicate that the
15 10-acre parcel was not divisible as requested; is that
16 correct?"
17 Answer: "That's correct."
18 Question: "Why was that?"
19 Answer: "The ordinance states that after the
20 first accountable division, all lots thereafter must be 10
21 acres or greater, and the division status of a property is
22 determined by the parent tract and when that property was
23 created."
24 Question: "All right. So, the ten acres,
25 which is the subject of this letter, was not the parent

1 tract, was it?"

2 Answer: "No, it was not."

3 Question: "That, in effect, was a first

4 division, the 10-acre parcel --"

5 Answer: "Of the larger tract, yes."

6 Question: "-- which had been conveyed to Mr.

7 Mentz -- the 10 acres was owned by Mr. Mentz at the time

8 of your letter dated September 3rd, 1992?"

9 Answer: "Yes."

10 Question: "And so Mr. Mentz was desirous of

11 conveying to Mr. Auerbach two-plus acres out of the 10

12 acres; is that correct?"

13 Answer: "Right."

14 Question: "And that division could not be

15 effected as requested, because it would have been a second

16 division; is that correct?"

17 Answer: "That's correct."

18 Question: "So in order to effectuate or

19 permit that division, the residual seven acres would have

20 to be added on to Mr. Mentz's other property; is that

21 correct?"

22 Answer: "That's correct."

23 Question: "And if that were not done, then

24 Mr. Auerbach could not get a building permit for the

25 improvements on his two-acre parcel; is that correct?"

1 Answer: "That's correct."

2 Question: "Did you discuss that fact with

3 Mr. Auerbach? I see you sent a copy of that letter to

4 him."

5 Answer: "I had met Mr. Auerbach on several

6 occasions and that could have been, that could have been

7 discussed. I can't verify that, yes, I actually talked to

8 him about that. But, yes, I think we did discuss the

9 situation about the 10 acres v. the two, the two-acre

10 lot."

11 Question: "Did you discuss the adding on

12 requirement by the County with Mr. Auerbach?"

13 Answer: "I'm thinking that we did discuss

14 how he could obtain his objective by adding the property

15 back."

16 Your Honor, we have here a position taken by

17 the County from a legal standpoint that's contrary to the

18 position that was enunciated and followed through and

19 dictated by the administrative people of the County, prior

20 to the County's receipt of a letter from Mr. McCall

21 indicating that legal action would be taken if the permit

22 was granted.

23 We submit to the Court that based on the

24 clear language of the deed, indeed the evidence attendant

25 to the circumstances surrounding the execution of the deed

1 and the parties' association and relative circumstances
2 themselves, it's clear that this easement goes to the
3 129.5 acres, and we would ask the Court to so find.
4 THE COURT: All right. Now, Mr. Mauck,
5 did he leave out anything?
6 MR. MAUCK: I think he did an admirable
7 job.
8 THE COURT: I come back around,
9 understanding, Mr. McCall, and Ms. Barker, and Mr. Kerkam
10 that I'm going to allow you all to file papers and allow
11 Mr. Ellis to respond to them. I think you ought to make
12 some comments on Mr. Ellis' comments.
13 MR. MCCALL: Thank you, Your Honor.
14 First, I want to clarify from our perspective the comments
15 regarding the Camp case. I think Mr. Ellis has
16 misconstrued the intent of our memoranda and the comments
17 made with respect to Camp. Camp is a case in which there
18 were repugnant clauses in a deed. I've got a copy of the
19 case for the Court, if the Court would like. Basically
20 it's a deed that said leaving, transferring property to
21 mother and son, tenants by the entirety, I believe, with
22 right of survivorship.
23 What the Court did in the Camp case was
24 simply go through the regimen of rules of construction
25 that it expected the courts in Virginia to follow, which

1 the courts in Virginia had followed. But then it looked
2 at that clause and stated that basically these rules don't
3 apply, we have repugnant clauses.
4 After going through its analysis, the Court
5 concluded that in the case of the repugnant clauses, that
6 the first clause would control, that was the ruling of the
7 Court. And the Court further held that is error for the
8 trial court to allow the testimony of the attorney who
9 drew the deed. The reason being is, and I think the whole
10 point of the Camp case is, that only under the most dire
11 circumstances should the courts venture outside the
12 language of the deed to garner the interpretation placed
13 on that deed by the parties. The Camp case stands, as we
14 stated in our memorandum, for the rigidity with which the
15 Supreme Court expects the courts of Virginia to follow the
16 rules.
17 There is no repugnant language, in our
18 estimation, in this deed. There's no repugnant language
19 whatsoever. The references that Mr. Ellis makes to the
20 parcel B v. another description of the 7.422 acres,
21 there's nothing repugnant about that.
22 It may be considered redundant, but it's not
23 repugnant. It's quite clear from the deed there is only
24 one parcel B, none other. So, we are not presenting to
25 the Court the Camp case for the proposition that there are

1 repugnant clauses in this deed, not at all. In fact,
2 again, as I said, we make the point that the Court's not
3 supposed to go outside of the deed unless there's no
4 reason for it. Even in the cases of these repugnant
5 clauses, the Court's saying you still have kind of a way
6 to resolve it, but we can apply the standard rules of
7 construction to this particular deed.
8 One of the things that Mr. Ellis made, one of
9 his comments was that there is clear language in the deed.
10 We concur in that. We think the language in the deed is
11 very, very clear. There's nothing uncertain in the deed
12 at all. What he is arguing is their interpretation of
13 what the add-on provision may, or the add-on language may
14 have in terms of impacting on the use of the easement.
15 But there's nothing presented in their memorandum that
16 addresses any authority by way of court cases, or county
17 ordinances, or any example of any positions that the
18 County has taken with respect to the add-on provision, to
19 support the interpretation that he wants this Court to
20 adopt.
21 As stated in the County's memoranda, whatever
22 the real estate tax assessor's office does for tax
23 purposes, for putting it on the tax records, which is one
24 of Mr. Ellis' exhibits, whatever position the County may
25 take with combining these properties for tax map purposes,

1 that's giving them the same parcel. Number one, you take
2 it the way you find it. And the point is that this deed
3 imposed certain restrictions on the use of this property.
4 And other references, whether it's the County or anyone
5 else referring to this property by any other designation
6 cannot change the basic character of this property, no
7 more than they could change the ownership simply because
8 they are going to call it a new name.
9 One of the exhibits that Mr. Ellis attached
10 to his memorandum was a deed of the property, the 122.5
11 acres that Mr. Mentz has. And there's a further reference
12 to an access easement that I believe I'm correct in saying
13 that was entered into by his predecessors in title. Mr.
14 Mentz isn't a party to that particular easement. That's
15 their Exhibit Number 1.
16 But Mr. Mentz, for example, could purchase
17 the underlying fee interest in that easement, and the
18 County might at his request or on its own initiative
19 combine it for tax purposes. That mechanical treatment of
20 that property in his subsequent ownership would not in any
21 way impact on the rights of those parties to that access
22 easement. It would impact upon their right to use it. It
23 would not expand the easement. It could not change the
24 characteristics of that easement. And what they are
25 asking the Court to do is change the characteristics of

1 this easement, which is clear by its own terms. Our
2 position is that you simply can't do that.
3 Now, I will make one final comment, Your
4 Honor, because there are a lot of areas that I wanted to
5 respond to with respect to the memorandum, which I think
6 significantly misstate a lot of the positions taken, but
7 if the Court will look at Exhibit 15, which is the letter
8 of August the 30th, 1993 from Mr. Goodfellow or to Mr.
9 Goodfellow from John Hodges, in the memorandum presented
10 to the Court, they indicate that this represents the
11 County's approval of Mr. Mentz's subdivision plan. I
12 carefully reviewed it. I don't believe the word
13 "approval" is in the letter. They do indicate in the
14 final paragraph that they would be notifying Mr. Auerbach
15 and Mr. Wade of Mr. Mentz's plans in this area and our
16 concurrence with those plans.
17 But Mr. Hodge's testimony in that deposition
18 that Mr. Ellis read clearly says that, yes, basically,
19 that was my initial opinion, but when I learned that there
20 was a dispute about the access -- and on advise of legal
21 counsel, we changed our position.
22 This particular letter makes a reference that
23 it's to a zoning inquiry. And it says: Dear Bill, In
24 response to a complaint received in this office regarding
25 the status of the proposed Mentz subdivision --

1 This letter in no way is an approval letter.
2 It's replete with conditions that have to be satisfied by
3 Mr. Mentz. I think It's a fair description of this letter
4 to state that Mr. Hodges is merely saying in response to
5 your inquiry, all things being equal, if you comply with
6 these certain conditions after we have reviewed your
7 initial sketch, and so on, we don't see a problem. It's
8 not an approval letter of a subdivision in any sense of
9 the word.
10 And I'm not trying to argue the County's
11 position, but I think it's fair to say from our
12 perspective the County could not approve anything, the
13 County had not taken any legal position. At best you
14 could say they were in a preliminary examination stage of
15 Mr. Mentz's subdivision plans. There was yet a lot of
16 work to be done.
17 And there are also some references in there
18 regarding the seven acres and the add-on, and so forth. I
19 think the distinction here, Your Honor, is that there is a
20 legal distinction between the effect of the County's
21 requirement of adding on the seven acres that was left
22 over to Mentz's other property, and what impact that
23 add-on process had on the legal character of the property
24 itself with respect to the use by other people of that
25 property, that is specifically the easement.

1 Our position is that while the deed is very
2 clear about the add-on and I believe Mr. Ellis said it's
3 very clear -- we don't dispute the add-on language
4 incidentally, Your Honor, it's very clear about what it
5 does. The distinction is that we submit that it does not
6 in any way, shape, form or fashion change the character of
7 the seven-acre parcel and the two-and-a-half-acre parcel
8 owned by my clients; that is, with respect to this
9 easement. That property's characteristics for the
10 purposes of add-on were not changed. Add-on is a process
11 to take care of having a lot that falls below the minimum
12 County requirements of a ten-acre lot.
13 And our position is that that's all the
14 add-on process did in this particular instance, it had no
15 other purpose. It served no other purpose other than to
16 remove an illegal lot and it does not, in any way, nor do
17 any of the exhibits or -- and Mr. Ellis didn't represent
18 to the Court that the add-on changed the easement
19 language, or anything. There's no references in any of
20 the County records about it. It simply says what it says,
21 they were for two different purposes: Number one, you
22 have language that establishes the easement, takes care of
23 that problem; number two, you have the add-on language
24 that takes care of the problem with the lot that would be
25 illegal because it's less than ten acres. Then you have

1 another provision regarding right of first refusal. Each
2 of those are independent, taking care of various aspects
3 of this transaction.
4 Thank you, Your Honor.
5 THE COURT: Ms. Barker?
6 MS. BARKER: Judge Taylor, I'm really
7 alarmed by Mr. Ellis' characterization of our
8 participation in this review as making us a party to the
9 deed.
10 We receive a number of inquiries relating to
11 our zoning and subdivision ordinances and compliance with
12 our ten-acre first division requirement in the A-1
13 district. And typically if there's been a prior division
14 that doesn't fit into that requirement, our planners
15 advise people to use this add-on language.
16 That advice does not constitute approval of a
17 subdivision nor does it constitute an opinion regarding
18 access or any other aspects of the subdivision or zoning
19 ordinance.
20 And we indicate our approval with a formal
21 stamp, which is signed by the director or the deputy
22 director of the department. So various letters that are
23 sent back and forth are not approvals of subdivisions.
24 And I'll just say, again, that we did not
25 complete a title examination of that access easement, nor

1 was any opinion rendered on it, and one would not have
2 been sent that this conflict or this issue was brought to
3 our attention. And at that point we had to deal with it
4 and did deal with it by determining that for our purposes
5 there wasn't adequate access. We would look to the Court
6 to interpret that.
7 THE COURT: Mr. Kerkam, do you want to
8 say anything?
9 MR. KERKAM: I have nothing to say, Your
10 Honor.
11 THE COURT: All right. Mr. Ellis, do you
12 want to respond shortly? I'm going to allow you to
13 respond in writing to the writing. I'm going to allow Ms.
14 Barker --
15 MR. ELLIS: I don't want to take up the
16 Court's time. At this point, we have what I think will be
17 short matters to take up with the Court.
18 THE COURT: How much time do you need,
19 Mr. McCall, to respond, because I'm going to give Mr.
20 Ellis a few days to respond after that. If Mr. McCall can
21 get to Ms. Barker, you all can respond together or you can
22 respond separately, whichever way you want to do it.
23 MS. BARKER: I think a separate response
24 would be fine, but we can do that in the same time frame.
25 MR. MCCALL: Two weeks, Your Honor?

1 THE COURT: Two weeks. All right. Two
2 weeks; 14 days. All right.
3 Mr. Ellis, you have five days after that to
4 respond, if you so desire.
5 MR. ELLIS: All right, sir.
6 THE COURT: All right, sir. Now, the
7 other matters you wanted me to listen to.
8 MR. ELLIS: Yes, sir, Your Honor.
9 First of all, I have a motion to amend the
10 complaint, the original papers of which I filed with the
11 Court, and the amendment does two things, basically: It
12 adds a paragraph to the bill of complaint to allege a
13 violation of Exhibit 18.2-499, and a request for treble
14 damages under 18.2-500. We are basing this request mainly
15 on some of the deposition testimony that's been discovered
16 and a recent case that's been decided by the Supreme Court
17 of Virginia, Commercial Business Systems v. Bell South
18 Services, decided last January, which provides that you
19 don't have to show actual malice to recover in a case of
20 this type of violation, but legal malice is all that's
21 necessary.
22 And we would move the Court to permit us to
23 make that amendment and to increase our addendum
24 provision. We also deleted one sentence in paragraph 22
25 of the bill of complaint, and that's our motion with

1 respect to that aspect of the case.

2 THE COURT: All right. Any other

3 position on this, Mr. McCall? You are not in this, Ms.

4 Barker, Mr. Kerkam?

5 MR. MCCALL: Your Honor, I don't object to

6 the basic amendment itself, but I think from a

7 housekeeping --

8 THE COURT: The rule says I'm supposed to

9 be very lenient in this area.

10 MR. MCCALL: Well, we don't object to the

11 amendment, Your Honor. I think there may be a couple

12 housekeeping things that are in order.

13 THE COURT: All right.

14 MR. MCCALL: The statute indicates they

15 get three full damages. I wonder if it's still

16 appropriate to request the punitives. I wouldn't think so

17 under the statute, Your Honor.

18 THE COURT: Are you saying you can't have

19 treble damages and punitive damages in the same action?

20 MR. MCCALL: According to the statute, it

21 only mentions treble damages.

22 MR. ELLIS: But we are alleging a

23 violation of that statute, which provides for treble

24 damages. We allege slander of title, for instance, which

25 doesn't provide for treble damages. We are seeking

1 punitive damages under that aspect of it.

2 MR. MCCALL: Well, my co-counsel suggests

3 they be set out in a separate count, perhaps a reworking

4 of the complaint, Your Honor.

5 THE COURT: Well, I think the easiest way

6 to do it is to allow the amendment and then you can

7 address it by responsive pleadings and we can amend,

8 again, if necessary.

9 MR. KERKAM: Judge, where we are is -- if

10 you don't mind, I'll be somewhat out of turn -- an

11 objection has been raised to the answering of

12 interrogatories having to do with punitive damages.

13 THE COURT: Yes.

14 MR. KERKAM: Mr. Ellis, in his initial

15 bill of complaint, asks for punitive damages and very

16 recently filed an interrogatory in June asking us to file

17 that information. Shortly on the heels of those

18 interrogatories, in early July, Mr. Ellis filed the

19 amended bill of complaint, which upon a fair reading

20 indicates to me that it is solely based on 18.2-499 or

21 500, which allows for treble damages and reasonable

22 attorney's fees. It does not provide nor allow for

23 punitive damages.

24 Therefore, we have filed an objection to

25 answering any interrogatories having to do with punitive

1 damages. This matter is not filed under counts, it is a
2 running stream of conscious paragraphs leading up to the
3 conclusion that the plaintiffs feel that they are entitled
4 to recover under 18.2-499; that's all they have asked to
5 recover under.
6 THE COURT: All right.
7 MR. KERKAM: And if, in fact, it is a
8 slander of title, it would be our position if they can
9 prove it, which we respectfully feel they cannot prove,
10 but that that would be one element of proof that they
11 would allege for purposes of showing a violation of
12 18.2-499.
13 We are on the horns of the dilemma, so to
14 speak, because at this point the way this amended bill of
15 complaint is prepared, and I think ultimately will be
16 filed, I don't believe that the plaintiffs are entitled to
17 ask or are entitled to request punitive damages. So the
18 additional matter that's before the Court is our objection
19 to responding to those large June interrogatories
20 requesting financial information from the defendants.
21 THE COURT: Mr. Ellis?
22 MR. ELLIS: Your Honor, their whole
23 objection is they don't want to give us a financial
24 statement and that's what we asked for in our
25 interrogatories because we filed that based on the fact

1 that we originally sought and we still seek punitive
2 damages.
3 The only paragraph that's been added to our
4 bill of complaint is paragraph 31. We notified them of
5 that amendment before the depositions were taken so there
6 wouldn't be any question about it, and then we
7 specifically asked for damages for slander of title for
8 damages to the easement, development costs and damages
9 under 18.2-500 and punitive damages.
10 THE COURT: Yes, sir. He's raised the
11 question. In my mind, I'm not going to rule on it now.
12 But once we get the pleadings in order, then we can have
13 an argument on his objections to answering a particular
14 interrogatory and then we can have a hearing.
15 MR. ELLIS: The pleadings are before the
16 Court. I have filed with the Court the amended bill of
17 complaint, and the only --
18 THE COURT: I don't know what the answer
19 is this morning. Off the top of my head, I've never
20 approached it as seeking treble damages in one count and
21 punitive damages in the next.
22 MR. ELLIS: We are certainly entitled to
23 allege as a basis of our claim various things such as
24 tortious interference with contract, slander of title,
25 violation of Section 18.2-499, each and every one of them.

1 18.2-500 just happens to provide for the recovery of
2 treble damages and attorney's fees by statute. That's the
3 remedy that's provided if we approve an intentional under
4 conspiracy to injure him in his trade or business, then we
5 are entitled to recover that. We also are entitled to
6 recover for those damages, plus punitives to punish Mr.
7 Auerbach for the type of actions that he conducted.
8 THE COURT: Yes, sir.
9 MR. ELLIS: Under those circumstances, we
10 want to get his financial statement.
11 THE COURT: The question in my mind is
12 whether you can set it out in one general prayer or
13 whether you have to set it out in separate counts.
14 MR. ELLIS: I haven't set it out in one
15 general count. Numbered paragraphs in accordance with the
16 rules, the rules don't say anything about counts and then
17 I've got separate numbered paragraphs for each element of
18 damages. That's what the rules provide, Your Honor.
19 THE COURT: Well, I think we are trying
20 to cross a bridge before we get to it.
21 MR. MCCALL: Your Honor, may I just make
22 one point?
23 THE COURT: If you want to, but I can't
24 rule on that until I get the pleadings in order, either.
25 MR. ELLIS: Will he permit me to file

1 that amended bill?

2 THE COURT: I'm trying to get to that

3 now. I want to know what other objections you've got for

4 the record.

5 MR. MCCALL: I just want to make one

6 comment, maybe for the point of consideration, Your Honor,

7 is that Mr. Ellis makes the argument of distinguishing for

8 the treble damages under the conspiracy, the punitives

9 under the slander of title. What do you do if by way of

10 hypothetically speaking, you find that there was a

11 conspiracy to slander title; does he get treble damages

12 under the conspiracy and punitive under the actual act? I

13 think that's one of the things that needs to be fleshed

14 out.

15 MR. ELLIS: Judge, he's asking me to try

16 my case right now.

17 THE COURT: Yes, sir. That's something

18 you are raising before we get the pleadings in order.

19 I'm going to allow him to file his amended

20 motion. I'm going to allow you to respond to it. What

21 else can I do to help you?

22 MR. MCCALL: Your Honor, one of the

23 things we wrestled with before, the Court will recall, in

24 the original bill of complaint we wrestled around with the

25 identification of the individuals described as others and

1 the County officials with respect to the alleged
2 conspiracy. We filed a bill of particulars. The Court
3 entered an order. We got a response we were not satisfied
4 with. We filed a motion to compel and the Court
5 instructed we could obtain that additional information
6 through discovery.
7 THE COURT: Yes, sir.
8 MR. MCCALL: In the amended bill of
9 complaint, paragraph 22, they have struck the language:
10 not satisfied with their conspiratorial acts between
11 themselves and County officials regarding the access road.
12 But that's a reference left in paragraph 18
13 regarding -- it says almost immediately following
14 settlement: Auerbach and Ortmann between themselves and
15 others undertook a course of action by combination of
16 agreement and conspiracy.
17 I think this is deja vu again, in trying to
18 determine who "others" are. What we are trying to
19 determine at this point is whether the dropping of any
20 reference to conspiracy with the County officials, that's
21 referenced in paragraph 22 of the original complaint,
22 means that the plaintiff is acknowledging that, therefore,
23 there is no conspiracy, if such conspiracy existed
24 involving County officials. We don't want to leave the
25 door open in a surreptitious way for others to come back

1 in and have the County back in this case again.
2 We don't have a problem with taking the
3 reference out to the County, we don't have a problem with
4 leaving the word "others" in, but we would like some
5 clarification so we know who the players are, that
6 "others" is not a veiled description to bring in the
7 County again.
8 MR. ELLIS: May it please the Court: --
9 MR. MCCALL: Excuse me just a second. I
10 see ourselves getting back to a motion to the bill of
11 particulars, going through all this again and reworking
12 discovery and we were hoping, maybe with the Court's
13 assistance, to get some clarification of the plaintiffs'
14 intent with respect to that particular modification of the
15 original bill of complaint.
16 MR. ELLIS: Your Honor, if Mr. McCall
17 objects so strenuously for me taking that portion of the
18 sentence out, we'll put it back in. The Court's ruled on
19 it --
20 THE COURT: Yes, sir.
21 MR. ELLIS: -- and directed that, but I
22 thought for clarification purposes if we deleted that
23 reference it would be clearer. So that's what I did.
24 THE COURT: Yes, sir. I thought you
25 deleted it on purpose also. I compared one to the other.

1 MR. ELLIS: Yes, sir, but if he wants it
2 back in, we will put it back in.
3 MR. MCCALL: Your Honor, I haven't said I
4 want it back in. I wasn't going to get into this. I
5 talked to Mr. Ellis on the phone and asked him did he mean
6 to exclude the County and he wouldn't, he said "others' is
7 still in there.
8 THE COURT: You are asking me to rule on
9 the pleadings before I get to the pleadings in a form that
10 I can understand them. I've got to allow Mr. Ellis --
11 when he files his amended bill of complaint, you should
12 raise the questions to what's wrong with that amended bill
13 of complaint, and then we cross that bridge when we get to
14 it; isn't that right?
15 MR. MCCALL: All right, Your Honor.
16 THE COURT: Let's do it that way. It's
17 ordered that you can file your amended bill of complaint.
18 MR. ELLIS: Thank you, Your Honor. I
19 have the order --
20 THE COURT: All right, sir.
21 MR. ELLIS: -- which I will submit to
22 counsel now.
23 THE COURT: Mr. McCall can note his
24 objection to it.
25 MS. BARKER: Your Honor, there have been

1 various references to County officials and, of course,
2 it's our position that there should be no references to
3 County officials in that pleading.
4 THE COURT: I understand. You made that
5 clear in your previous arguments.
6 All right. Mr. Ellis, what else have you
7 got?
8 MR. ELLIS: The other motion that we had,
9 Your Honor, was to require the defendants to answer our
10 third interrogatories, which were two questions, one of
11 which was to provide the financial statement, and I
12 understand the Court is going to defer a ruling on that.
13 THE COURT: I am, yes, sir.
14 MR. ELLIS: The other is to provide the
15 insurers' requirements provided in rule four eight. And
16 there's been no objection filed to that. We ask for the
17 provision of the insurance information of any insurance
18 policy that covered or possibly covered the damages that
19 we seek, and that's specifically provided for in the
20 rules. Twenty-one days has gone by. There's been no
21 objection filed. We would ask the Court to compel answers
22 to that.
23 THE COURT: All right. Have you got any
24 problems with answering that, Mr. Kerkam? Aren't you the
25 man who is handling that side of it?

1 MR. KERKAM: Judge, I believe I am.
2 THE COURT: Well, file something in
3 response.
4 MR. KERKAM: I will file something in
5 response.
6 THE COURT: All right, sir.
7 MR. ELLIS: Judge, I don't understand
8 what he's going to respond to. The 21 days has gone by.
9 There was never any objection filed. The motion to compel
10 was filed.
11 THE COURT: The rule is specific that you
12 have to furnish the information. Why can't you furnish
13 the information?
14 MR. KERKAM: Judge, I believe I've
15 already been ordered to respond.
16 THE COURT: Yes, sir.
17 MR. ELLIS: Thank you. That's all I
18 have.
19 THE COURT: Yes, sir. Anything else this
20 morning?
21 MR. ELLIS: No, sir.
22 MR. KERKAM: Judge, the order that Mr.
23 Ellis has provides to the Court a certain number of days
24 within which to respond. I believe before we can respond,
25 I would like to file a bill of particulars in terms of

1 paragraph 18 as to who the identification of "others" are
2 -- before we respond. And I'd like the Court to give me
3 time to file a bill of particulars, and then after that
4 information has been provided on the bill of particulars
5 --
6 THE COURT: Yes, but isn't a response for
7 the bill of particulars a response?
8 MR. ELLIS: Your Honor --
9 MR. KERKAM: I'm going to file a motion
10 for a bill of particulars. Isn't that a response?
11 MR. ELLIS: Your Honor, it's already been
12 ruled on by the Court back when Mr. Brenner was in the
13 case and Mr. McCall on paragraph 18, they requested a bill
14 of particulars and the Court granted it and then ruled
15 that they were entitled to no further information. We
16 have been through this all before.
17 MR. KERKAM: But, Judge, this is a new
18 lawsuit, entirely new lawsuit. Everything else has gone
19 by the boards. All the discovery's gone by the boards.
20 All the pleadings have gone by the boards. It's day one
21 today.
22 THE COURT: But, again, you are asking me
23 to make a ruling on something I just allowed the filing
24 of.
25 MR. KERKAM: For purposes of our filing

1 responsive pleadings to the amended bill of complaint, we
2 need to know who these individuals or entities are that
3 Mr. Ellis refers to as "others". He's taken the County
4 out now. I can't respond to this amended bill of
5 complaint without knowing that information. And I wish to
6 file a bill of particulars to have Mr. Ellis specifically
7 tell me who he is referring to, if he can. Then I can
8 adequately respond to this pleading.
9 MR. ELLIS: Your Honor, Mr. Kerkam is the
10 third counsel that we have had to deal with in this
11 matter. We have been through this identical --
12 THE COURT: I certainly ruled on the "
13 others" as to the bill of particulars, Mr. Kerkam.
14 MR. ELLIS: The Court's entered --
15 MR. KERKAM: That's fine, Judge. That
16 was in that lawsuit, if the Court is telling me that?
17 THE COURT: It's the same "others" and I
18 ruled on them.
19 MR. KERKAM: Well, Judge, it can't be the
20 same "others" because Mr. Ellis has taken all the County
21 officials out of this case.
22 THE COURT: Yes, but they were
23 specifically referred to as County officials, Mr. Kerkam.
24 MR. KERKAM: Well, if Mr. Ellis will tell
25 us that the "others" in this paragraph 18 do not or are

1 not County officials, that's all I need. That's all we
2 need. We need to find out whether or not this case
3 involves County officials again.
4 MR. ELLIS: This is the same argument
5 that we went through in chambers three months ago, Judge,
6 and the Court has ruled on it and it's the same paragraph
7 and it's the same language.
8 THE COURT: I thought I'd ruled on it,
9 too, Mr. Kerkam.
10 MR. KERKAM: In this lawsuit, Your Honor?
11 THE COURT: Well, I just filed this one.
12 MR. KERKAM: That's correct.
13 THE COURT: If you have got to raise
14 additional questions in your response, which I'm giving
15 you a specific time to file a response, can't you file a
16 response and say: I can't respond because of this?
17 MR. KERKAM: Well, I can do that, Judge,
18 but then we have got to start taking all this discovery
19 all over again. This is a brand new lawsuit.
20 THE COURT: We will cross that bridge
21 when we find out what the question is.
22 MR. KERKAM: The question is simple.
23 MR. ELLIS: Is Mr. Kerkam telling the
24 Court because we -- and I've got, I want to tell the
25 Court this right up front: That we told him that we were

1 going to amend before he ever deposed our people, and gave
2 him the language of the amendment and he had it before him
3 when he deposed Mr. Mentz. And he's telling the Court now
4 that all of the discovery that's gone on, everything
5 that's gone on before is not permissible, inadmissible in
6 this case, because we filed an amended bill of complaint
7 adding one paragraph?
8 MR. KERKAM: Judge, that's not what I'm
9 saying. We have to respond to factual allegations in the
10 amended bill of complaint.
11 THE COURT: Yes.
12 MR. KERKAM: And we simply need Mr. Ellis
13 to tell us if, in fact, the fact that he has deleted
14 reference in the amended bill of complaint to all County
15 officials and the conspiracy with County officials, does
16 that mean that they are not included within this
17 classification of "others", unnamed individuals. If Mr.
18 Ellis will tell us that, then the issue is done. If Mr.
19 Ellis is deleting a reference to County officials, but
20 then intends at a later time to come back and say, just
21 because I deleted it, I'm still going to consider them as
22 part of this allegation of "others", then we need to know
23 that and the Court needs to know that.
24 MR. ELLIS: Judge, this is the identical
25 argument that we had in chambers, and the Court's ruled on

1 it.

2 THE COURT: I think I have, too. And so

3 your objections and your motions are overruled, at this

4 time, Mr. Kerkam. And I've given you 14 days in which to

5 respond to this amended bill of complaint.

6 Mr. Ellis, you prepare a sketch for an order

7 and send it around for their objections.

8 MR. ELLIS: I gave the order --

9 THE COURT: I've got the order. I'm

10 talking about the rest of the things.

11 MR. ELLIS: On the insurance, yes, sir.

12 I have an order on that, but I included the other one.

13 THE COURT: Send me another one.

14 MR. ELLIS: All right, sir.

15 THE COURT: All right?

16 MR. ELLIS: Thank you. That's all.

17 THE COURT: Thank you. We will be in

18 recess until we get the criminal docket going.

19 MR. KERKAM: Thank you, Judge.

20 THE COURT: Thank you.

21 (The proceedings were concluded at 10:15 a.m.)

22

23

24

25

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COUNTY ATTORNEY

File No.: 5130

(804) 537-6035

August 8, 1995

The Honorable Richard H. C. Taylor, Judge
Hanover County Circuit Court
Hanover, Virginia 23069

Re: Mentz v. Hanover County
Case No. 425-94

Dear Judge Taylor:

In response to the motions filed by the parties and the discussion at the last hearing in this matter, the County relies on the "Memorandum of Hanover County" filed on January 20, 1995, with exhibits. That memorandum states the County's position.

Thank you for your consideration.

Sincerely,

A. Lisa Barker,
Senior Assistant County Attorney

ALB:cdc
cc: Andrew J. Ellis, Jr., Esq.
Charles J. McCall, Esq.
William B. Kerkam, Esq.

RECEIVED
AUG - 9 1995
JUDGE
HANOVER CIRCUIT COURT
HANOVER, VIRGINIA

VIRGINIA:
IN THE CIRCUIT COURT OF HANOVER COUNTY

HUBERT.C. MENTZ
PAMELA M. MENTZ

PLAINTIFFS,

v. Case No. CH 425-94

COUNTY OF HANOVER

DEFENDANTS,

DAVID AUERBACH
SUSAN C. ORTMANN

INTERVENORS.

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HANOVER CIRCUIT COURT

MEMORANDUM IN RESPONSE TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGEMENT AND PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

David Auerbach and Susan C. Ortmann, (the "Intervenors"), by counsel, submit this Memorandum in Opposition to Plaintiffs' Memorandum filed in this case on July 18, 1995.

INTRODUCTION

On March 10, 1995, Intervenors filed a Motion for Partial Summary Judgment requesting this Court construe language in a deed (the "Deed") (Attachment A to Intervenors' Motion for Partial Summary Judgment) from Plaintiffs to Intervenors relative to the respective rights of each party in an easement described in the Deed (the "Easement"). On July 17, 1995, the Intervenors filed a Memorandum in Support of Intervenors' Motion for Partial Summary Judgment ("Intervenors Memorandum"). On July 18, 1995, the Plaintiffs filed a Cross-Motion for Summary Judgment and a Memorandum in Opposition To Intervenors' Motion for Partial Summary Judgment and In Support of Plaintiffs' Cross-Motion for Summary

Judgment ("Cross-Motion Memorandum").

On July 25, 1995, this Court heard oral argument on the respective Motions. The Defendant (the "County") also appeared and was heard. All parties agree that the sole issue before this Court is the extent of the rights the Plaintiffs retained in the Easement.

The central argument advanced by the Intervenors is that the language in the Deed granting the Easement to Parcel B, which arose out of the settlement of a suit for specific performance by the Intervenors against the Plaintiffs, is clear and unambiguous. Nor has it been argued by the Plaintiffs that there was a mistake involved in drafting the Deed. As such, this Court is bound to review only the instrument. As set forth in Trailsend v. Va. Holding Corp., 228 Va. 319, 325-326 (1984), the Court held:

> Trailsend contends that where a deed is clear and unambiguous, no parol evidence should be used to help construe it. The latter argument best applies to this appeal.
>
> In our opinion, and in the opinion of the trial court, the language of the deed was clear and unambiguous. Where such is the case, a court called upon to construe such a deed should look no further than the four corners of the instrument under review. In Camp v. Camp, 220 Va. 595, 597-598, 260 S.E.2d 243, 245 (1979), which concerned construction of a deed that contained an inherent conflict in certain of its terms, we said the following about the use of parol evidence in the construction of deed:
>
>> The prime consideration, as with any writing, is to determine the intention of the parties executing the instrument. *The intention*, including a finding as to the estate conveyed, *should be ascertained from*

> *the language used in the deed, if possible,* .... If the language is explicit and the intention is thereby free from doubt, such intention is controlling, if not contrary to law or to public policy, and *auxiliary rules of construction should not be used.*
>
> (Citations omitted) (emphasis added). *Accord* Amos. v. Coffey, 228 Va. 88, 320 S.E. 2d 335 (1984). We expressed a similar view in Woodson v. Smith, 128 Va. 652, 656, 104 S.E.2d 794, 795 (1920), where we wrote that "[t]he rule is that when a deed is executed and accepted in performance of a prior preliminary contract, *the deed,* if unambiguous in its terms, and unaffected by fraud or mistake, *must be looked to alone* as the final agreement of the parties. [Emphasis in original]

The Plaintiffs argue that parol and extrinsic information should be considered by this Court. The Cross-Motion Memorandum contains extensive references to parol, extrinsic and deposition material. The bulk of the references in and exhibits with the Cross-Motion Memorandum relate to another case that the Plaintiffs have filed against the Intervenors, styled as H.C. Mentz and Pamela M. Mentz, Plaintiffs, v. David Auerbach and Susan C. Ortmann, Defendants, Case No. CH 423-94 ("Mentz v. Auerbach"). In that case, Plaintiffs allege conspiracy, slander of title and other tortious acts by the Intervenors, all arising from alleged events associated with the Easement.

In the instant case, Mentz v. Hanover County, appealing the denial of the Plaintiffs' subdivision application, the Plaintiffs allege that Hanover County's "...reasons for disapproval are not properly based on the ordinance and are arbitrary and capricious..." They further allege that the County "...is estopped

from asserting that there are two separate parcels of land sought to be served by the access road when the County required that the parcels be joined before approving a conveyance of the servient tract now owned by [the Intervenors]".

The alleged statements, interpretation of the Deed and other actions alleged by the Plaintiffs in Mentz v. Auerbach are contested matters and granting of a summary judgement in favor of the Plaintiffs would not be appropriate in Mentz v. Hanover County.

Plaintiffs' Cross-Motion Memorandum also refers to other occurrences and statements by the parties in connection with the Easement, events which, if they occurred, are all contested matters. None of these issues are alleged in the appeal in Mentz v. Hanover County, and the hearsay, parol evidence, and deposition testimony proffered by the Plaintiffs in support of their Memorandum should not be considered by the Court.

Without waiving its objections regarding the contents of the Plaintiffs' Cross-Motion Memorandum, reliable case authority requires this Court to interpret the Easement through the language of the Deed, the Intervenors are compelled to respond to the allegations and exhibits presented by the Plaintiffs.

BACKGROUND

In 1986, Plaintiffs became the owners of a 122.5-acre parcel of land in Hanover County, Virginia. In January of 1991, Plaintiffs became the owner of an undivided 10-acre parcel of land adjoining the 122.5-acre parcel. Plaintiffs had the 10-acre parcel surveyed and purported to divide it into Parcel A containing 2.578

acres ("Parcel A") and Parcel B containing 7.422 acres ("Parcel B"), represented by a plat (the "Plat") (Exhibit No. 1 Attached) prepared by Goodfellow, Jalbert & Beard ("Goodfellow").

Plaintiffs marketed the Old Church Tavern located on Parcel A through a sale brochure ("Sales Brochure") (Exhibit No. 2, Attached). Attached to the Sales Brochure was a copy of a only a portion of the Plat ("Partial Plat"), which contained no reference to "add-on". In June of 1992, Plaintiffs entered into a contract to sell Parcel A to the Intervenors (the "Contract") (Exhibit No. 3, Attached). In the Contract, the Intervenors reserved a first right of refusal to purchase Parcel B. In August of 1992, as a result of a title search in preparation for closing on the purchase, the Intervenors first learned that the Plat had <u>never</u> been filed of record in Hanover County and that the representation concerning the division of the 10-acre parcel and the Plaintiffs ability to perform under the Contract were false. The Intervenors' notified Plaintiffs' then counsel, Jeffrey Zwerdling (Exhibit No. 4, Attached).

Under certain circumstances, the Hanover County Subdivision Ordinance requires that when a portion of a larger parcel of land is purchased by someone already owning adjoining property, and concurrent with recording the purchase, the purchased portion may be further plated and divided and an even smaller portion sold to a third party. This is allowed so long as the remainder of the land retained by the purchaser/seller is, concurrent with the purchase/sale, "attached" to the purchaser/seller's adjoining

property by an administrative process referred to by the Hanover County Planning Department as the "add-on" provision. This is called the "right of first division"

Thereafter, the portion of land "added-on" is then treated by the County as a new parcel of land containing the purchaser/seller's other property and the property that is subjected to the "add-on" procedure. That is, the combined properties will appear in Hanover County tax records and on tax maps as one parcel only for tax purposes.

Because the Plaintiffs had not recorded the Plat when they took title to the 10-acre parcel, they lost their "right of first division" and were unable to convey Parcel A to the Intervenors as called for under the Contract without complying with the Hanover County Subdivision Ordinance.

In early August of 1992, when the Plaintiffs first learned that the Plat was not recorded, they had another plat, with a different configuration for Parcel A and Parcel B, prepared by Goodfellow and recorded (the "New Plat") (Exhibit No. 5, Attached). The Plaintiffs did not disclose this information to the Intervenors.

When the Plaintiffs refused to convey Parcel A to the Intervenors as described in the Plat, the Intervenors filed a Bill of Complaint for Specific Performance in the Circuit Court of Hanover County, Chancery Number 92001116-00, David Auerbach and Susan C. Ortmann v. Herbert C. Mentz and Pamela M. Mentz to compel Plaintiffs to perform under the Contract. A settlement was

reached, and the Plaintiffs conveyed Parcel A to the Intervenors under the Deed now under review.

The Deed and the Plat were then put to record. The Plaintiffs conveyed to the Intervenors Parcel A, and retained Parcel B, which was the balance of the original 10.0 acre parcel. In the Deed, the Plaintiffs reserved an Easement across Parcel A as a means of ingress and egress to and from Parcel B and State Route 606.

ARGUMENT

The Plaintiffs' raise the following arguments in their oral argument and Cross-Motion Memorandum:

1. The Plaintiffs, the Intervenors and the County each knew that Plaintiffs intended to develop the 122.5 acres of land adjoining Parcel B into a subdivision and utilize the Easement over Parcel A as access to the 122.5 acres to satisfy the subdivision access requirement imposed by the Hanover County Subdivision Ordinance.

2. The Plaintiffs, the Intervenors and the County each expressed their knowledge and approval of Plaintiffs' intentions by their participation in the "add-on" procedure, that is, combining of the 122.5 acres and Parcel B into one parcel for tax purposes.

3. The language in the Deed is clear and gives Plaintiffs the right to access the 122.5 acres through Parcel B and does not limit Plaintiffs' access only to and from Parcel B and Route 606.

4. If the language in the Deed does limit Plaintiffs' access only to and from Parcel B and Route 606, then it is ambiguous and should be construed against the Intervenors who drafted the Deed.

5. The County is estopped from asserting that there are two separate parcels of land sought to be served by the Easement when the County required that the parcels be joined before approving a conveyance of the servient tract now owned by the Intervenors.

ARGUMENT

1. **THE PLAINTIFFS, THE INTERVENORS AND THE COUNTY EACH KNEW THAT PLAINTIFFS INTENDED TO DEVELOP THE 122.5 ACRES OF LAND ADJOINING PARCEL B, AND PARCEL B, INTO A SUBDIVISION AND UTILIZE THE EASEMENT OVER PARCEL A AS ACCESS TO THE 122.5 ACRES TO SATISFY THE SUBDIVISION ACCESS REQUIREMENT IMPOSED BY THE HANOVER COUNTY SUBDIVISION ORDINANCE.**

Plaintiffs first ask this Court to accept the proposition that Plaintiffs' intention to develop the 122.5 acres and Parcel B (the "Property") was conveyed to the Intervenors and the County.

The events cited by the Plaintiffs in their Memorandum that occurred prior to the execution, delivery and recordation of the Deed, do not indicate any knowledge of the Intervenors of any alleged intent to subdivide on the part of the Plaintiffs. Further, the Plaintiffs' intent to subdivide the Property is not manifest in any exhibits to the Cross-Motion Memorandum, nor does Plaintiffs' Exhibit No. 2 contain the Plaintiffs' name, identify the owner of the property examined, or contain any reference to subdivision or use of the property.

In fact, when Plaintiffs' did not record the Plat in 1991, the "right of first division" in favor of the Plaintiffs was lost. They would then be required to make subsequent application to the Hanover County Planning Department, which was done to allow the Contract to be performed. Moreover, if the Plaintiffs had intended to use the Easement described in the Plat as they now represent, they did not undertake any action prior to entering into the Contract to have the Plat recorded or make application for a

subdivision. Indeed, the conduct of the Plaintiffs should be construed as a clear indication that they did not want to alert the County or prospective purchasers of Parcel A of their future plans to subdivide the property.

The Plaintiffs were notified by Intervenors' counsel by a letter to Jeffrey Zwerdling (Exhibit No. 4, Attached) that the Plat had not been recorded and that Parcel A as represented for sale by the Plaintiffs did not exist. Plaintiffs' initial reaction was not to correct the problem and preserve their rights to subdivide their property, but to prepare and record the New Plat, voiding the Intervenors' variance, blocking issuance of their building permit and refusing to close on the Contract. This led to the suit for specific performance. Moreover, Plaintiffs only contacted Hanover County Planning Department regarding the possibility of using the right of first division of the 10-acre parcel after the filing of the specific performance action, not as part of their voluntarily compliance with their duties under the Contract.

The allegation that Auerbach and John Hodges, County Planning Director, met and prepared the "add-on" language is simply not factual. In fact, nowhere in Mr. Hodges' deposition testimony does he state that he and Auerbach met and prepared any language that was ultimately used in the Deed. Mr. Hodges, at best, may have spoken with Auerbach on this subject. Hodges said: "I'm not sure I recalled discussing it, but it may have occurred. I don't recall particular discussions." He further stated that, with respect to the language, his handwritten notes were on the Deed and the

language was "...so it [the deed] would meet the zoning requirements." (Page 18-19 of Cross-Motion Memorandum)

The Plaintiffs would have this Court believe that the Deed, the Easement language and the "add-on" language were created by Auerbach and Hodges and that the Plaintiffs were passive bystanders. This is hardly the case! The admissions referenced by the Plaintiffs on Page 3 of their Cross-Motion Memorandum states the County' position with respect to the requirement that the language appear in the Deed, not that Auerbach participated in the creation of the language or the requirement that it be used in the Deed.

Although, the Plaintiffs make a lot of noise concerning their intentions to subdivide the Property, the silence is deafening when one listens for utterances from the written documents prior to recording the Deed and the Plat.

The Plaintiffs also fail to bring to the Court's attention letters from their counsel to Hanover County Planning Department:

1. Letter dated March 29, 1993, to Keith Thompson, Hanover County Planning Office, with attached proposed Deed (Exhibit No. 6, Attached)

2. Facsimile Letter dated March 31, 1993, to Keith Thompson. (Exhibit No. 7, Attached)

If, as Plaintiffs say, they had the intention to subdivide, why, prior to recording the Deed and Plat, is there not one reference of their intention in the Plat, in any of the documents preceding the signing of the Contract, in the Contract, in the Deed, or in any contact they or their counsel had with the County?

While the Contract does mention Parcel B, it does not mention the Easement or the Plat. Though Plaintiffs' counsel inquired of the County "...if this deed is satisfactory.", (See Exhibit No. 7, Attached) he made no inquiry concerning the Easement, nor is there any indication that the County provided any information regarding the Easement.

2. **THE PLAINTIFFS, THE INTERVENORS AND THE COUNTY EACH EXPRESSED THEIR KNOWLEDGE AND APPROVAL OF PLAINTIFFS' INTENTIONS BY THEIR PARTICIPATION IN THE "ADD-ON" PROCEDURE, THAT IS, COMBINING OF THE 122.5 ACRES AND PARCEL B INTO ONE PARCEL FOR TAX PURPOSES.**

Fundamental to understanding the communication among the Plaintiffs' counsel, Goodfellow, Mr. Auerbach, Intervenors' counsel, and Mr. Hodges is recognizing that the entire "add-on" process was initiated by the discovery that the Plaintiffs had contracted to sell a parcel of property that did not exist in a recorded form.

While the Plat showed that it existed, the legal description in the deed conveying the 10-acre parcel to the Plaintiffs only described a 10-acre parcel, not a Parcel A and Parcel B. Thus, the 10-acre parcel went to record to the Plaintiffs as a single parcel.

The Plaintiffs are asking the Court to find as a matter of fact that the Intervenors had knowledge and an understanding of the "add-on" procedure prior to closing. There is no evidence of the allegation before the Court. Plaintiffs make reference to Auerbach's participation in drafting the "add-on" language, but most of the language first appeared on the Plat in January of 1991. Thus, the Plaintiffs and Goodfellow were aware of the "add-on"

concept and language no later than January of 1991. Plaintiffs offer no evidence of communication with the County prior to preparation of the Plat, so presumably Goodfellow needed no guidance or clarification from the County concerning the procedure.

The Intervenors first became aware of this property around March of 1992. The Sales Brochure provided by the Plaintiffs contained only the Partial Plat, which did not contain the references to "add-on", and Intervenors were unaware of the Plat until around July of 1992 when they made application for a variance and building permits.

All of these communications had one goal in mind. Simply stated, was there a method to transfer Parcel A to the Intervenors and avoid the consequence of the forfeiture of the right of first division? The County suggested that there was a way, provided that the "add-on" language was added to the Deed. The add-on language does not, nor was it intended to, do any more than remove the obstacle of the transfer of Parcel A without Parcel B remaining as an illegal size lot of less than 10 acres.

Plaintiffs argue that the actions of the County tax authority in combining the 122.5 acres and Parcel B into one parcel for tax purposes, as reflected by designating the property with a new tax parcel number on the County tax map and on the tax card, creates a new parcel of 129+ acres, which the Plaintiffs now ask the Court to recognize as Parcel B. The Intervenors do not disagree that the County tax authority could designate the new parcel in any manner it choose. Such a designation would have no impact beyond the tax

entities' statutory authority, nor could it have any effect upon or change the characteristics of the Deed or the Plat, which make clear reference to Parcels A & B.

Although the Plaintiffs argue that the new parcel designation action taken by the County tax authorities would have the impact they urge this Court to adopt, the Plaintiffs argument is not based on any regulatory, statutory or case authority for changing the characteristics of property or altering language in a deed, plat or contract. It is not, because no such authority exists.

Plaintiffs' Exhibit No. 1 to their Cross-Motion Memorandum includes an Easement Agreement providing the Plaintiffs' access from State Route 606 to and from the 122.5 acres owned by the Plaintiffs. This Easement Agreement is clearly a restrictive right-of-way easement for the benefit of the owners of the properties served by the easement.

When the Plaintiffs purchased the 122.5 acres they took title subject to this Easement Agreement which runs with the land. If, for example, the Plaintiffs were to purchase the underlying fee ownership of the property affected by their easement, they would <u>not</u> be able to unilaterally change the terms of the Easement Agreement. Similarly, were the County tax authority to create a new tax parcel of the newly acquired land and the 122.5 acres owned by the Plaintiffs, a procedure that would be identical to the instant case, it would not change the character of the land or the Easement Agreement.

Plaintiffs' entire case is predicated on convincing the Court

that the "add-on" procedure was for the sole benefit of the Intervenors, that the concept was created by Auerbach and John Hodges, that the language was provided to Plaintiffs' counsel by the Intervenors' counsel, that Plaintiffs' counsel was instructed by the Intervenors' counsel on where the language should be inserted in the Deed, that the Plaintiffs and their counsel relied on the County's representations, and that the Plaintiffs and their counsel were passive participants. Nothing could be further from the truth. How can the Plaintiffs argue that the "add-on" language was the product of a meeting between Auerbach and John Hodges when the Plaintiffs' and Goodfellow were well aware of the "add-on" provision when the Plat was prepared in 1991, more than a year before the Intervenors became aware of Parcel A.

Plaintiffs must pursue this argument, however, because their counsel drafted the Deed and the Easement language and made no inquires regarding the "add-on" language..

3. **THE LANGUAGE IN THE DEED IS CLEAR AND GIVES PLAINTIFFS THE RIGHT TO ACCESS THE 122.5 ACRES THROUGH PARCEL B AND DOES NOT LIMIT PLAINTIFFS' ACCESS ONLY TO AND FROM PARCEL B AND ROUTE 606.**

The language in question from the Deed is clear and unambiguous and states:

> The said parties of the first part [Plaintiffs] hereby reserve an Easement 50 feet in width along the western line of Parcel A leading from State Route 606 to Parcel B **as a means of ingress and egress to and from Parcel B and state Route 606**, said easement being shown as lying on the westerly side of Parcel A on the here and above described plat." [Emphasis added]

This language does not say as a means of ingress and egress to Parcel B. It says ingress and egress to and from a certain location, Parcel B and State Route 606 . The Easement language does not say "through" Parcel B to "the Plaintiffs' adjoining 122.5 acres", "to the Plaintiffs' 129+ acres" or "to the Plaintiffs' adjoining property." If that had been Plaintiffs' intention at the time, it would not have been a difficult exercise for the drafter of the Easement language to have expressed that intent.

As the Plaintiffs drafted the Deed, they have no basis on which to attack it other than to focus on the "add-on" procedure. However, they cannot absolve themselves because of their counsel's active participation in fashioning a resolution to settle the suit for specific performance and the inserting the resultant language in the Deed.

Moreover, the Plaintiffs' are bound by their knowledge of the Easement Agreement and the type of language that is found in such a document. In the case at bar, the Easement Agreement is very explicit and details the purpose for which the it was created. The Easement Agreement provides, inter alia, that:

> WHEREAS, all parties hereto desire to establish in writing a non-exclusive easement appurtenant of right-of-way for "ingress and egress" **to and from their respective properties and State Route 606** recited herein over upon and across said road; [Emphasis added]

4. **IF THE LANGUAGE IN THE DEED DOES LIMIT PLAINTIFFS' ACCESS ONLY TO AND FROM PARCEL B AND ROUTE 606, THEN IT IS AMBIGUOUS AND SHOULD BE CONSTRUED AGAINST THE INTERVENORS WHO DRAFTED THE DEED.**

Contrary to this assertion, this Court will find upon a fair reading of the Deed and the Plat recorded therewith that the language in both documents is clear and unambiguous. Plaintiffs cite a panoply of cases dealing with the construction of deeds and contracts, all of which represent prevailing case authority in Virginia and do not need to be distinguished by the Intervenors as this Court must find that there is no ambiguity.

While the Plaintiffs argue that the Intervenors and the County were on notice of the Plaintiffs' intentions, the Court will note that as of the date of recording of the Deed and Plat, the Plaintiffs had a number opportunities to put the parties on notice of their alleged intentions to subdivide their property. For example:

A. They did not record the Plat;

B. They did not to divulge their intentions in the Sales Brochure;

C. They only disclosed the Partial Plat in their sales efforts with the Intervenors;

D. They did not divulge their intentions in the Contract;

E. They did not, in several written communications with the Hanover County Planning Department, inquire about subdivision access;

F. They did not in any communications with Hanover County inquire about subdivision access;

G. They did not in any communications with the Intervenors during the pendency or settlement of the Intervenors' Bill of Complaint for Specific Performance divulge their intentions to subdivide; and,

H. They did not include any reference in the Deed or the Plat to indicate any intent to subdivide.

The only ambiguity that the Plaintiffs point to is language in the Deed describing the first right of refusal. The Deed states:

> The said parties of the first part do further grant and convey unto the parties of the second part a first right of refusal to purchase Parcel B consisting of 7.422 acres should the parties of the first part sell that parcel of land. [Emphasis added]

Under its merger argument, Plaintiffs now claim that Parcel B described in the Deed and the Plat no longer exists, and that the only Parcel B now existing is a "new" Parcel B consisting of the 122.5 acres and the 7.422 acres of the Parcel B described in the Deed and the Plat. Thus, the County's actions regarding combining the two parcels and forming a new tax parcel completely eliminated Parcel B as Parcel B existed prior to and on the date that the Deed and Plat were recorded. In other words, "Now you see it, now you don't"! The Plaintiffs now argue that the reference to Parcel B consisting of 7.422 acres is only to distinguish that part of the New Parcel B that would be subject to the first right of refusal.

This is no more than smoke and mirrors. There is, has been, and always will be only one Parcel B, and that Parcel B contains 7.422 acres. And yet the Plaintiffs argue that "[t]he 7.422 acre parcel ceased to exist when the Deed was recorded." (See Plaintiffs' Memorandum, Page 7) Again, now you see it, now you don't! As the Court must recognize the validity of the Intervenors' first right of refusal to purchase Parcel B consisting of 7.422 acres under the Contract, Deed and Plat, the absurdity of the Plaintiffs' argument becomes all the more clear. Massie v.

Firmstone, 134 Va. 450, 14 S.E. 652 (1922).

The Plaintiffs offer nothing demonstratively to support their theory that a "New" Parcel B has ever come into existence or has ever been plated, designated, recorded or recognized as Parcel B by anyone other than the Plaintiffs. They offer no evidence that what the Plaintiffs now refer to as Parcel B has ever been described in any communication with the County. In fact, in Plaintiffs' Exhibit 5, there is no reference to Parcel B, except as a 7.422 acre parcel; in Plaintiffs' Exhibit 10 there is no reference to Parcel B; and, in Plaintiffs' Exhibit No. 15, there is no reference to what the Plaintiffs now refer to as Parcel B.

5. **THE COUNTY IS ESTOPPED FROM ASSERTING THAT THERE ARE TWO SEPARATE PARCELS OF LAND SOUGHT TO BE SERVED BY THE EASEMENT WHEN THE COUNTY REQUIRED THAT THE PARCELS BE JOINED BEFORE APPROVING A CONVEYANCE OF THE SERVIENT TRACT NOW OWNED BY THE INTERVENORS.**

Plaintiffs Cross-Motion Memorandum states that:

> Equitable estoppel is a well-established concept invoked by the courts to aid a party who, in good faith, has relied, to his detriment, upon the representation of another. 7A Michie's Jurisprudence Estoppel Section 14 at 465 (1985). The elements necessary to establish equitable estoppel are a representation, reliance, a change of position and detriment. Latait v. Commercial Indus. Constr., Inc., 223 Va. 59, 63 (1982).

What representations were made by the County? The County represented to the Plaintiffs and the Intervenors that inclusion of the required "add-on" language in the Deed was necessary for the Deed to comply with the Hanover County Ordinance and for the

Plaintiffs to obtain a building permit. The methodology was the "add-on" procedure that resulted in the previously described combining of parcels for tax purposes.

Reliance must be reasonable. One cannot rely to one's detriment when one has had the opportunity to investigate and has not undertaken such investigation. In this case, the Court is aware that the Plaintiffs' drafted the Deed, had the opportunity to communicate with the County in preparing the Deed, and had every opportunity to further communicate, investigate and confirm the legal ramifications and consequences of the "add-on" language and procedure as they would impact on the Plaintiffs.

If, as the Plaintiffs now argue, there is an ambiguity in the language of the Deed, the Plaintiffs should be estopped from alleging any such ambiguity. Further, there is no evidence before the court in document or other form to support the allegation that the County represented to the Plaintiffs any more than the content of the required "add-on" language. There is no evidence that the County made any representations to anyone of any nature as to the consequences of the "add-on" language or procedure in this case, particularly as it would affect the Plaintiffs.

Plaintiffs have cited no County ordinance, rule, regulation, statute or other case authority to support their argument that the "add-on" procedure should create the result that they now urge upon this Court.

Plaintiffs cannot be heard to contest the Easement language because they drafted the Deed (See Plaintiffs' Response to

Defendants' First Set of Request for Admissions, No. 32, Mentz v Auerbach, Exhibit No. 8, Attached). Therefore, the Intervenors admit of no ambiguity in the Deed, should any exist, that ambiguity must be construed against the Plaintiffs and in favor of the Intervenors.

For the foregoing reasons and arguments, the Intervenors pray that the affirmative relief requested by the Plaintiffs in their Cross-Motion Memorandum be denied; and that this Court grant Intervenors Motion For Partial Summary Judgment.

David Auerbach
Susan C. Ortmann

By Charles J. McCall
Of Counsel

Charles J. McCall, Esq.
VSB 17022
Attorney for Intervenors
5104 W. Village Green Drive
Suite 105
Midlothian, Virginia 23112-4851
(804) 744-0300

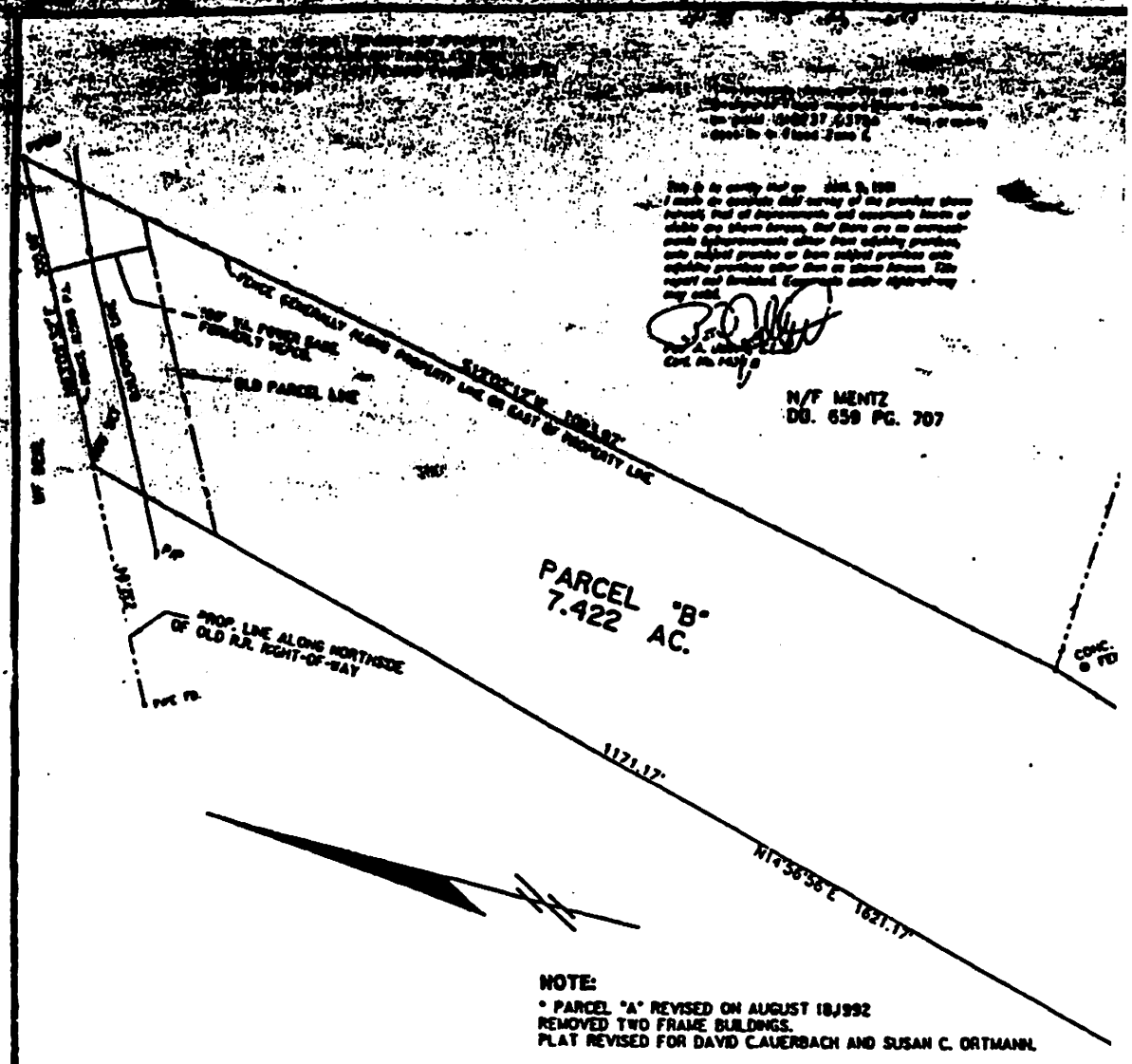
CERTIFICATE OF SERVICE

I do hereby certify that a true copy of the foregoing **MEMORANDUM IN RESPONSE TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGEMENT AND PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT** was faxed and mailed to Andrew J. Ellis, Jr., Esq., Attorney for Plaintiffs, at Mays & Valentine, 1111 East Main Street, Richmond, Virginia 23208-1122, A. Lisa Barker, Senior Assistant County Attorney, Hanover County Attorney's Office, P.O. Box 470, Hanover, Virginia 23069 and William B. Kerkam, Esq., Bremner & Janus, Suite 1500, 7th & Franklin Building, 701 East Franklin Street, P.O. Box 826, Richmond, Virginia 23207, this August 11, 1995.

Charles J. McCall

Charles J. McCall

EXHIBIT



NOTE:
* PARCEL "A" REVISED ON AUGUST 18,1992
REMOVED TWO FRAME BUILDINGS.
PLAT REVISED FOR DAVID C.AUERBACH AND SUSAN C. ORTMANN.

COMMONWEALTH OF VIRGINIA
PAUL A. LAMBERT
No. 1434 B
61-6941
LAND SURVEYOR

PLAT OF TWO PARCELS OF LAND LOCATED ON THE NORTH SIDE OF STATE ROUTE 606 IN THE COLD HARBOR DISTRICT HANOVER COUNTY, VIRGINIA.

*PRESENT OWNERS • H
AND PAMELA MR. ME
DEED BOOK 849 PAG

JOB NO.--3827-0012

job no. 3419 - 0020 date JAN. 9, 1991 scale 1" = 100'

GJB

245

THE OLD CHURCH TAVERN

CIRCA 1753

HISTORIC OLD CHURCH - HANOVER COUNTY

$~~135,000~~ $109,000

SANDRA WORSHAM

779-2802
779-2347

276 246

OLD CHURCH TAVERN

At one time, this old ordinary was situated at what was a busy cross roads, leading from New Kent County to Hanovertown, Studley, and to the Courthouse, and from Cold Harbor to Newcastle on the Pamunkey River. The name "Old Church" probably was taken from the site of an old church which was located in the area about 1718 or earlier. Later, this community was known as Old Church with a post office by that name.

There are signs of the old road, next to the ordinary, leading to Newcastle, and there is also an old tombstone which still can be seen int he backyard of the frame building. It reads" Alexander Mathy, died 30th July 1752, in the 20th year of his age, son of Gabriel Mathy. This is a slab stone, flat on the ground and the engraving on it is very dim and hard to read. The working refers to his being a merchant of Greenock. This old road is no longer useable and is a part of the yard. The present road no longer crosses route 606. All four corners of the old road and the present road were a part of the land identified in the records as "Old Church tract." Being an important intersection on a much travelled highway, it was natural that taverns, ordinaries, and stores would be located here to accommodate the many travellers. It was a stage coach stop and also used as a post office.

Because of the lack of deeds, it is difficult to trace the owners of this ordinary through the years. This history begins in 1853 when Lewis Johnson ran an ordinary here. He paid a merchant and ordinary license for that year. He was charged on the tax list for that year for 99½ acres adjoining Bently Wicker's (Rocketts) and transferred from Peter Crutchfield's estate. Lewis Johnson was of Richmond in 1836 when he married Judith C. Mantlo of Hanover, according to the Rev. Charles Talley's Register.

In 1858, James A. Lipscomb purchased "Old Church" from Lewis Johnson consisting of 90½ acres. James A. Lipscomb was born ca. 1821 and his wife, Mary F. ca. 1828, both of King William County, and are shown on the 1850 census of that county. He was a merchant there. The Lipscomb's ran this ordinary, or later referred to as a hotel for fifteen years, including the Civil War years, when the Union Cavalry camped here as shown in one of Brady's photographs.

Information taken from *Old Homes of Hanover County, Virginia*. Published by the Hanover Historical Society.

General Description

6 over an English basement
Brick Colonial - CA. 1753
2 acres - up to 50 acres additional
4 dependencies to include smokehouse, slave quarters
Early corn crib other storage building
Historical marker in front of home
Metal roof

Interior Description

First Level

Rear and front double mortise and pegged heart pine doors

Large foyer - staircase to upper floors

Parlor - sunlit room, fireplace with early mantle and two arched alcoves with sidelights

Second Level

Master Bedroom - fireplace

Second Bedroom

Large passage

Third Level

2 Bedrooms

Dormer Windows

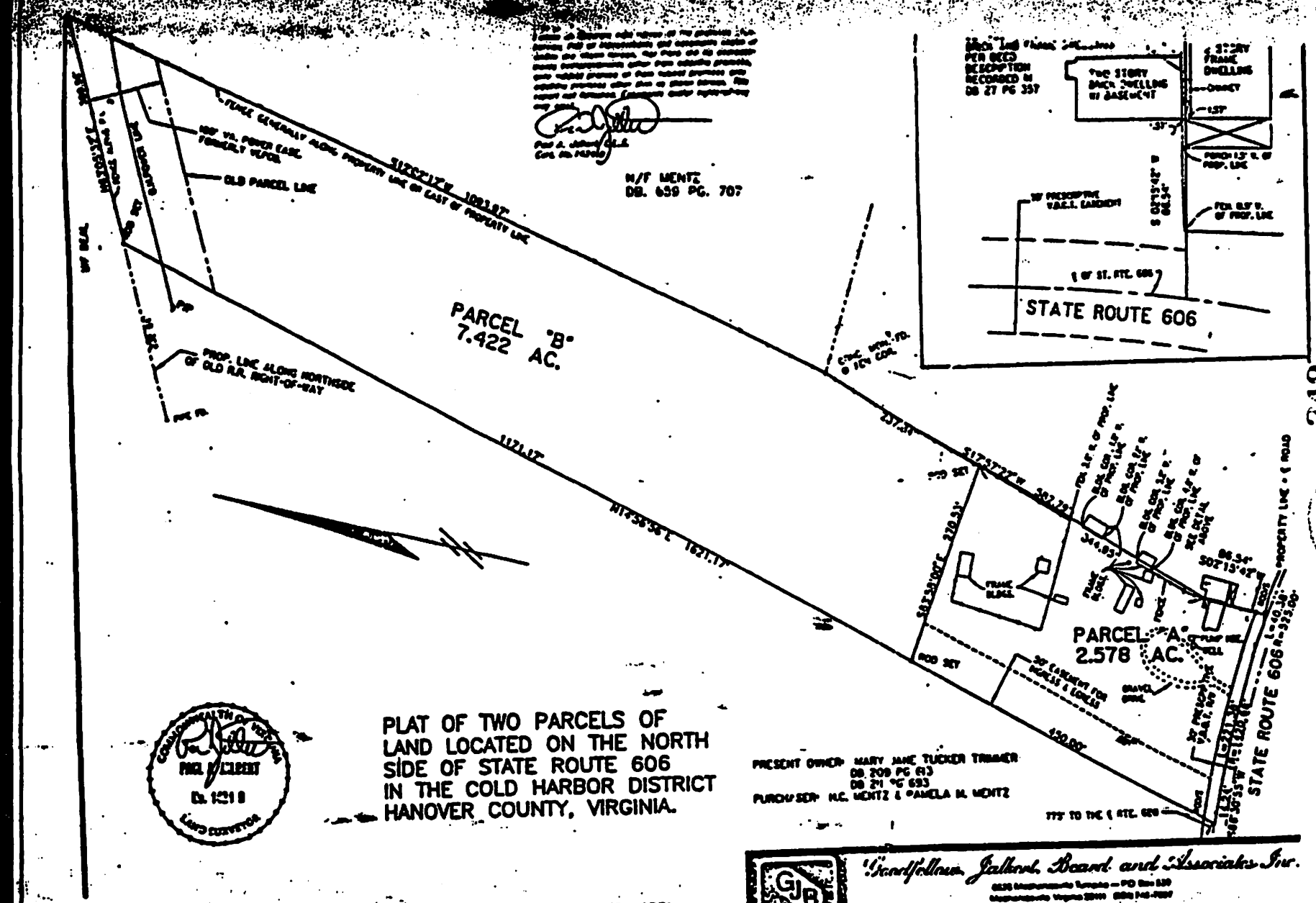
English Basement

Kitchen with fireplace

Dining Room

This home remains in very much the same condition as it was in early colonial times and awaits your careful placement of modern conveniences.

Possible commercial potential.



PLAT OF TWO PARCELS OF LAND LOCATED ON THE NORTH SIDE OF STATE ROUTE 606 IN THE COLD HARBOR DISTRICT HANOVER COUNTY, VIRGINIA.

249

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EXHIBIT 3

ALL-STATE LEGAL SUPPLY CO.

VIRGINIA LANDMARK CORPORATION

-REALTORS-

~~P. O. Box 6379~~
1801 Libbie Avenue
Richmond, Virginia 23226
(804) 285-3935

6518 Ironbridge Road
Richmond, Virginia 23234
(804) 271-5500

THIS CONTRACT made among Susan C. Ortmann and David Auerbach (hereinafter called "Purchaser"), and H.C. and Pamela Mentz (hereinafter called "Seller"), and Virginia Properties Virginia Landmark Corporation Corp. (hereinafter called "Realtor") provides that Purchaser agrees to buy from Seller, through Realtor, and Seller agrees to sell to Purchaser the following described real estate, and all improvements thereon, located in Hanover Virginia, known as 1 OLD CHURCH TAVERN, and legally described as North side of state Route 606 in Cold Habor District (parcel A)

together with the following items of personal property, all of which hereinafter are called "the property" (if any) Contract subject to acceptable inspections being made by a licensed engineer at purchaser's expense within 15 days of contract acceptance. Contract subject to purchaser obtaining the desired building permits. Contract subject to acceptable well water tests, and purchaser obtaining approval to modification of existing permits for a new septic system. Contract subject to legal review. Purchaser to apply for building permit within 5 days. Purchasers to be granted a 1st right of refusal on 7.427 acre parcel described as parcel B subject to release of existing contract 6/8/92

Entire balance including interest and principal balance due on or before one year from the date of settlement.

for the purchase price of ~~$160,000~~ * Please see attached addendum Dollars ~~($ 160,000)~~ which shall be paid as follows: Contract subject to purchasers being approved for a 30 year mortgage at the prevailing interest rates. Purchasers to make a 25% down payment and to pay seller 9 1/4% interest, adjusting to a new rate to be determined by rates charged to Mr. Mentz for his loan if needed, Adjusting at the end of first 6 months and to be deferred until final settlement. Cont. see above.

Purchaser has deposited by cheque $1000.00 with Realtor to bind this contract which shall be held in escrow by Realtor until the date of settlement and then applied to the purchase price, or returned to Purchaser if the title to the property is not marketable or if this offer is not accepted.

Seller agrees to convey the property to Purchaser by General Warranty Deed with the usual English covenants of title and free and clear from all encumbrances, tenancies, liens (for taxes or otherwise), except as may be otherwise provided herein, but subject to applicable restrictive covenants and utility easements of record which would not adversely affect the marketability of the property. Seller further agrees to deliver possession of the property to Purchaser on the date of settlement unless otherwise agreed and agrees to pay the Seller's recordation tax and deed preparation charges.

Settlement shall be made at the offices of Realtor or at attorney's office on or before July 27th, 1992, or as soon thereafter as title can be examined and necessary documents prepared, allowing a reasonable time for Seller to correct any defects reported by the title examiner.

All taxes, interest, rent and FHA or similar escrow deposits, if any, shall be prorated as of the date of settlement.

Seller covenants that any improvements located on the premises will be in substantially the same condition on the date of settlement as at the time of acceptance of this offer. All risks of loss or damage to the property by fire, windstorm, casualty, or other cause is assumed by Seller until the date of settlement. The Purchaser and the Seller hereby acknowledge that neither has relied upon any oral representation or agreement by the other or by the Realtor, and no such oral representation or agreement shall affect or in any way the terms of this written agreement. 2% paid to V.L.C. / 3% paid to V.P.

Upon the execution of this contract by the parties, Seller contracts to pay Realtor for services rendered a cash fee of 5.5% percent of the purchase price except as herein provided. If either Purchaser or Seller defaults under this contract, such defaulting party shall be liable for the cash fee of Realtor and any expenses incurred by the non-defaulting party or Realtor including reasonable attorney's fees in connection with this transaction and the enforcement of the contract. Purchaser and Seller agrees that ~~any money deposited pursuant to this agreement shall be first payable to Realtor satisfactory to Purchaser has been made of the property, and~~ Purchaser agrees to accept the property in its inspected condition.

Except as may be otherwise agreed herein, it is understood that any expenses in connection with this purchase including title search, title insurance premiums, survey, recording costs and attorney's fees for preparation of papers and for closing shall be borne by the Purchaser.

The Purchaser, agrees to purchase the fuel oil, if any, remaining in the fuel oil tank and will pay therefor the prevailing rate per gallon over and above the purchase price stipulated herein.

Unless original sale of the property, Seller agrees to furnish Purchaser a termite inspection report from a recognized termite control company by the date of settlement. If active infestation or damage caused by termites or other wood destroying insects is found in the house structure, Seller agrees to have the house treated and repaired and bonded for one year. Such inspection, treatment and repair shall all be at the expense of Seller.

This contract constitutes the entire agreement between the parties and may not be modified or changed except by written instrument executed by all the parties and this contract shall be construed, interpreted and applied according to the law of the Commonwealth of Virginia and shall be binding upon and shall inure to the benefit of the heirs, personal representatives, successors and assigns of the parties, but such contract shall not become effective unless it has been duly executed by all parties on or before 6/8/92 6/8/92 @ 10:00am, 1992

WITNESS the following signatures and seals:

Seller H.C. Mentz 6-8-92 (SEAL) Purchaser Susan C. Ortmann (SEAL)

Seller Pamela M. Mentz 6/8/92 (SEAL) Purchaser David Auerbach (SEAL)

Date _____ Date 6/9/92

250

(280)

VIRGINIA LANDMARK
CORPORATION
·REALTORS·

P. O. Box 17070 • 1807 Libbie Avenue • Richmond, Virginia 23226 • (804) 285-3935
FAX (804) 282-4742

This is an Addendum to the Real Estate Purchase Agreement dated 6/9, 1992, between Susan C. Ortman and David C. Auerbach (Purchaser) and H.C and Pamela Mentz (Seller) to be attached to said Agreement and made a part thereof:

Purchase price to be One hundred and ~~one~~ four Thousand. 4000 PMM

Seller's attorney to prepare the first mortgage note.

Seller to pay for the following expenses ~~related to settlement on property.~~ PMM

1- Zoning Variance application fee	$500.
2- Title Insurance policy	$400.
3- Updated title search	$75.
4- Updated Survey	$150.
5- Building Permit	$60. +/-
6- Recording fees and tax	$100.
7- well water test	$50.

Seller attorney to prepare note

Seller to pay one thousand ($1000) toward closing cost. None PMM

NO HCMentz 6-15-92

WITNESS the following signatures and seals at Richmond, Virginia, this 16th day of June, 192

H.C. Mentz 6-15-92 (SEAL) Seller

Pamela M. Mentz 6/15/92 (SEAL) Seller

Beverly R. Figg 6/16/92 (SEAL) Realtor

(SEAL) Purchaser

X Susan C. Ortman (SEAL) Purchaser

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EXHIBIT 4

CHARLES J. MCCALL
ATTORNEY AT LAW
5104 WEST VILLAGE GREEN DRIVE
SUITE 105
MIDLOTHIAN, VIRGINIA 23112-4651

ADMITTED TO PRACTICE IN
VIRGINIA
DISTRICT OF COLUMBIA

TELEPHONE (804) 794-0300
TELECOPIER (804) 794-6315

September 3, 1992

355-5719

VIA FAX AND REGULAR MAIL
Jeffrey Zwerdling, Esquire
Zwerdling, Oppleman and Paciocco
Attorneys at Law
5020 Monument Avenue
Richmond, Virginia 23230

Re: Purchase of One Old Church Tavern

Dear Jeff:

Prior to our recent telephone conference, my client requested that I make a record of some of the events that occurred to delay the closing. Therefore, I am still sending you a letter that was dictated prior to our talk.

This contract of sale has encountered numerous delays in trying to get it closed. Hopefully, we can bring this to a close early next week.

As you are aware, your client advertised and distributed [illegible]res for the sale of the property, indicating that the [illegible]rty was subdivided into a Parcel A of 2.578 acres, and a [illegible]el B of 7.422 acres. A copy of the plat that he used, dated [illegible]ary 9, 1991 and prepared by Goodfellow, Jalbert, Beard & [illegible]iates, Inc. of Mechanicsville, Virginia, is enclosed.

The title policy, however, reflects that the property went to record as a parcel of ten acres, and not as Parcels A and B, as above described. This misrepresentation of the character of the property, which was discovered through a title examination, has caused considerable difficulties and delay to my client. He had scheduled various contractors to commence work about ten days ago, in anticipation that the closing would occur in an expedited manner. As you are aware, he has expended considerable effort in dealing with the various county authorities to cure a titl[illegible] not which is really the obligation of your client under the c[illegible]

In the course of preparing for closing, my client c[illegible] William Goodfellow, who p[illegible]ared the above-referenced pl[illegible] asked for an updated survey. Consequently, Goodfellow upda[illegible] the survey and failed to check the public records before indi[illegible]ing that the parcels were divided as represented in the plat and by your client. After it was brought to Mr. Goodfellow's attention,

he submitted a request on August 21, 1992 regarding the buildable status of the Mentz property. That request was confirmed by correspondence dated August 24, 1992 from W. Randolph, Jr., Zoning Administrator of Hanover County, to Mr. Goodfellow (copy enclosed).

By correspondence dated September 3, 1992 from W. R. Johnson, Jr., Zoning Administrator, to Mr. Goodfellow, Mr. Goodfellow was advised that the subject property, that is the ten acres, "...is not eligible for division as represented by your submitted plat (copy attached)." (Copy enclosed.) The response did suggest a way in which the problem could be resolved. Therefore, I would appreciate your preparing the deed as expeditiously as possible so that this matter can be resolved and we can close on this property.

Regarding another outstanding item, you suggested that I give your client a figure regarding the other termite questions. In our previous telephone conversations, I had advised you that we would no longer request items 1 and 2 contained in the August 20, 1992 estimate from Encore Builders (copy enclosed). The remaining items, that is, items 3, 4, 5, and 6, can be repaired for $415.00. My client is willing to resolve this particular question by receiving a credit of $300.00 at closing, as offered by you in our telephone conversation this afternoon, in addition to the credit of $450.00 being the estimate by Four Square for the termite treatment.

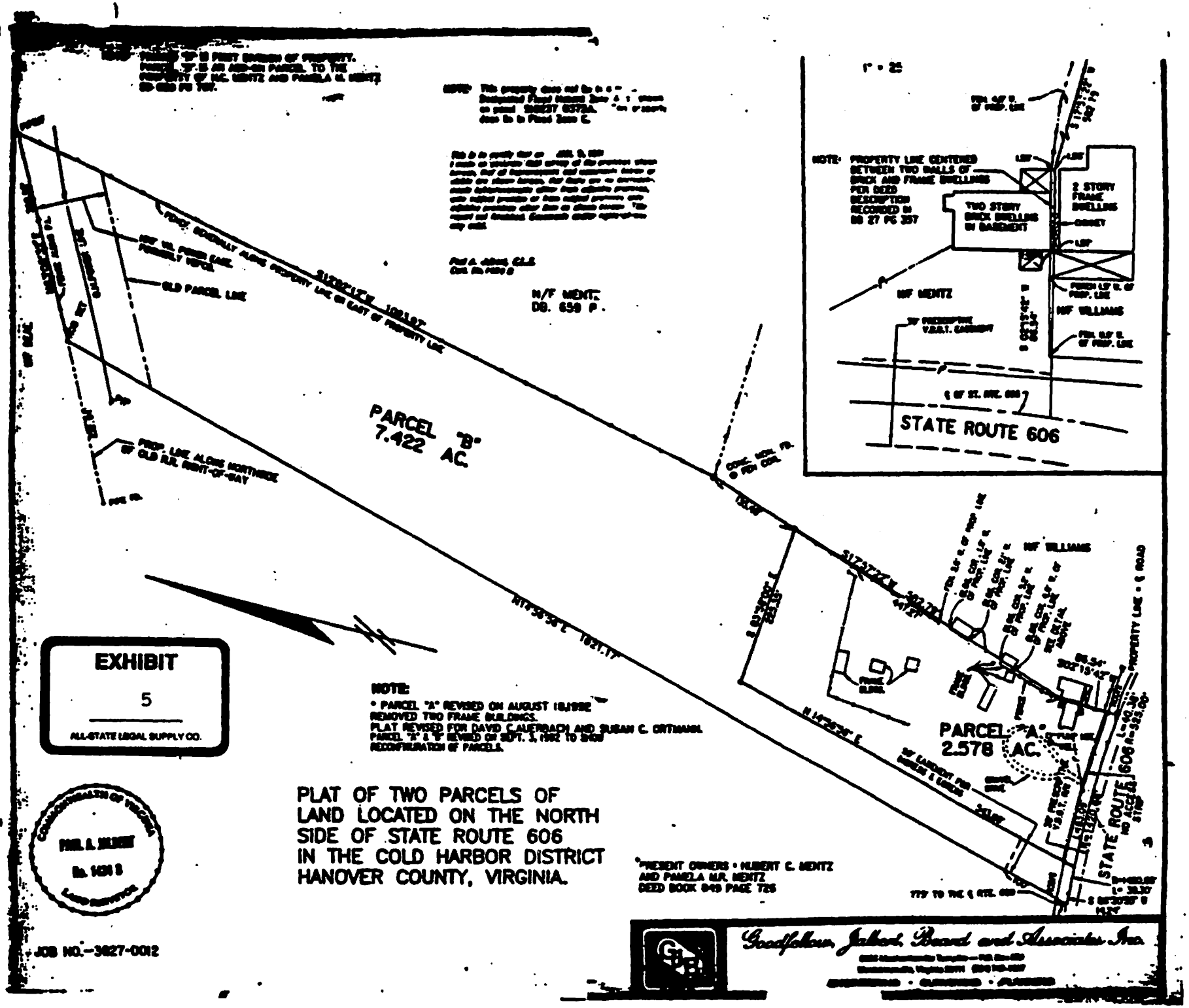
As I have previously indicated, my client wants Orkin to do the termite treatment work. He will only request the credit of $450.00 from your client for this item. Finally, regarding the remaining items on the Encore Builders' estimate, my client wishes to do the work himself and does not wish to have Mr. Mentz perform any of the work or have anyone on his behalf perform the work, since this is historical property and he is very concerned about the quality of the repair work.

I am not aware that there are any other outstanding items in order to close this matter. If there are, I would appreciate your bringing them to my attention immediately. Not only has my client lost valuable time because of the upcoming winter weather, but he also has been caught up in the ripple effect of the recent hurricane. The prices of building materials have already escalated as much as 60%. This appeared on the 6:00 p.m. Channel 8 News last night.

Sincerely,

Charles J. McCall

CJM/mes
Enclosures
cc: David Auerbach
[illegible]


PARCEL "B"
7.422 AC.
PARCEL "A"
2.578 AC.
STATE ROUTE 606
N/F MENTZ
DB. 659 P.
OLD PARCEL LINE
PROP. LINE ALONG NORTHSIDE OF OLD R.R. RIGHT-OF-WAY
S17°27'27"E 1021.07'
N17°38'38"E 1021.17'
S17°27'27"E 302.72'
N17°38'38"E
N/F WILLIAMS
FRAME BLDG.
TWO STORY BRICK DWELLING IN BASEMENT
2 STORY FRAME DWELLING
NOTE: PROPERTY LINE CENTERED BETWEEN TWO WALLS OF BRICK AND FRAME DWELLINGS PER DEED DESCRIPTION RECORDED IN DB 27 PG 357
EXHIBIT
5
ALL-STATE LEGAL SUPPLY CO.
NOTE:
* PARCEL "A" REVISED ON AUGUST 18, 1992 REMOVED TWO FRAME BUILDINGS.
PLAT REVISED FOR DAVID C. AUERBACH AND SUSAN C. ORTMANN.
PARCEL "A" & "B" REVISED OF SEPT. 3, 1992 TO SHOW RECONFIGURATION OF PARCELS.
PLAT OF TWO PARCELS OF LAND LOCATED ON THE NORTH SIDE OF STATE ROUTE 606 IN THE COLD HARBOR DISTRICT HANOVER COUNTY, VIRGINIA.
*PRESENT OWNERS - HUBERT C. MENTZ AND PAMELA M.R. MENTZ DEED BOOK 949 PAGE 725
JOB NO.-3627-0012
Goodfellow, Jubert, Board and Associates Inc.

255

285

FILE: A-7-92

MAYS & VALENTINE

NATIONSBANK CENTER
1111 EAST MAIN STREET
P. O. BOX 1122
RICHMOND, VIRGINIA 23208-1122

(804) 697-1200
TELEX 322063 (MAYSVAL UD)
TELECOPIER (804) 697-1339

NORTHERN VIRGINIA
110 SOUTH UNION STREET
P. O. BOX 140
ALEXANDRIA, VIRGINIA 22313-0140
TELEPHONE (703) 519-6000
TELECOPIER (703) 519-0140

HAMPTON ROADS
THE EIGHTH FLOOR
TOWN POINT CENTER
NORFOLK, VIRGINIA 23510
TELEPHONE (804) 627-5500
TELECOPIER (804) 627-5300

DIRECT DIAL (804) 697-1282

44 2.0

FILE NO. 11582.001

March 29, 1993

Mr. Keith Thompson
Planning Office
Hanover County
Hanover, Virginia 23069

Re: Auerbach/Ortmann v. Mentz

Dear Keith:

Enclosed is a proposed Deed from Hubert Mentz and wife to David Auerbach and Susan Ortmann.

Please advise me if the language on page 2 of the Deed relating to the old plat is satisfactory.

Very truly yours,

Andrew J. Ellis, Jr.

42/449
Enclosure
cc: Charles J. McCall, Esquire 744-0300
Mr. Hubert C. Mentz

EXHIBIT
6
ALL-STATE LEGAL SUPPLY CO.

THIS DEED made this ____ day of March, 1993 between HUBERT C. MENTZ and PAMELA M. MENTZ, his wife, parties of the first part and DAVID AUERBACH and SUSAN C. ORTMANN, his wife, parties of the second part:

W I T N E S S E T H :

The said parties of the first part for and in consideration of the sum of Ten Dollars ($10.00) to them cash in hand paid the receipt of which is hereby acknowledged do hereby grant, bargain, sell and convey unto the said parties of the second part as tenants by the entirety with the right of survivorship as at common law with General Warranty and English Covenants of Title the following described property, to-wit:

> ALL that certain piece or parcel of land lying and being in Cold Harbor District, Hanover County, Virginia containing 2.578 acres and being more particularly described as Parcel A on a plat of two parcels of land drawn by Goodfellow, Jalbert, Beard and Associates Inc. dated January 9, 1991 and recorded herewith.
>
> BEING a portion of the same property conveyed to Hubert C. Mentz and Pamela M. Mentz, his wife, by Deed from Mary Jane Trimmer, also known as Mary Jane Tucker Trimmer, widow, dated February 5, 1991 and recorded February 22, 1991 in the Clerk's Office, Circuit Court of Hanover County, Virginia in Deed Book 849, Page 726.

The said parties of the first part hereby reserve an easement of right-of-way 50 feet in width along the western line of Parcel A leading from State Route 606 to Parcel B as a means of ingress and egress to and from Parcel B and State Route 606, said easement being shown as lying on the westerly side of Parcel A on the hereinabove described plat.

The said parties of the first part do further grant and convey unto the parties of the second part a first right of refusal to purchase Parcel B consisting of 7.422 acres should the parties of the first part sell that parcel of land.

The parties of the first part do hereby correct a certain plat drawn by Goodfellow, Jalbert, Beard and Associates Inc. dated January 9, 1991 and recorded in Deed Book 934, Page 653, Clerk's Office of the Circuit Court of Hanover County, which plat contains a description of 10 acres including Parcel A hereinabove described. The aforesaid plat recorded herewith is substituted for the plat recorded in Deed Book 934, Page 653 and the description is corrected to refer to two parcels, A and B.

WITNESS the following signatures and seals:

_____(SEAL)
HUBERT C. MENTZ

_____(SEAL)
PAMELA M. MENTZ

STATE OF VIRGINIA

CITY/COUNTY OF _____, to-wit:

The foregoing instrument was acknowledged before me this ____ day of March, 1993 by HUBERT C. MENTZ.

_____
Notary Public

My commission expires: _____.

STATE OF VIRGINIA

CITY/COUNTY OF _____, to-wit:

The foregoing instrument was acknowledged before me this ____ day of March, 1993 by PAMELA M. MENTZ.

_____
Notary Public

My commission expires: _____.

MAYS & VALENTINE

Northern Virginia | Richmond | Hampton

EXHIBIT 7
ALL-STATE LEGAL SUPPLY CO.

NationsBank Center
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TO	FIRM/COMPANY	FAX NUMBER
Keith Thompson	Hanover County	(804) 537-6232

FROM	PHONE NUMBER
Andrew J. Ellis, Jr.	(804) 697-1282

Total Pages, including Cover Page: 4

NOTES/MESSAGE:

Please call Jeff McCall at 744-0300 if this deed is satisfactory.

OKed w/Keith

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If you do not receive the number of pages specified above,
Please call Andrew J. Ellis, Jr. at the above listed number.

THIS DEED made this 31st day of March, 1993 between HUBERT C. MENTZ and PAMELA M. MENTZ, his wife, parties of the first part and DAVID AUERBACH and SUSAN C. ORTMANN, his wife, parties of the second part:

W I T N E S S E T H:

The said parties of the first part for and in consideration of the sum of Ten Dollars ($10.00) to them cash in hand paid the receipt of which is hereby acknowledged do hereby grant, bargain, sell and convey unto the said parties of the second part as tenants by the entirety with the right of survivorship as at common law with General Warranty and English Covenants of Title the following described property, to-wit:

> ALL that certain piece or parcel of land lying and being in Cold Harbor District, Hanover County, Virginia containing 2.578 acres and being more particularly described as Parcel A on a plat of two parcels of land drawn by Goodfellow, Jalbert, Beard and Associates Inc. dated January 9, 1991 as revised on August 18, 1992 and recorded herewith.
>
> BEING a portion of the same property conveyed to Hubert C. Mentz and Pamela M. Mentz, his wife, by Deed from Mary Jane Trimmer, also known as Mary Jane Tucker Trimmer, widow, dated February 5, 1991 and recorded February 22, 1991 in the Clerk's Office, Circuit Court of Hanover County, Virginia in Deed Book 849, Page 728.

The said parties of the first part hereby reserve an easement of right-of-way 50 feet in width along the western line of Parcel A leading from State Route 606 to Parcel B as a means of ingress and egress to and from Parcel B and State Route 606, said

easement being shown as lying on the westerly side of Parcel A on the hereinabove described plat.

The said parties of the first part do further grant and convey unto the parties of the second part a first right of refusal to purchase Parcel B consisting of 7.422 acres should the parties of the first part sell that parcel of land.

The parties of the first part do hereby correct a certain plat drawn by Goodfellow, Jalbert, Beard and Associates Inc. dated January 9, 1991 and recorded in Deed Book 934, Page 853, Clerk's Office of the Circuit Court of Hanover County, which plat contains a description of 10 acres including Parcel A hereinabove described. The aforesaid plat recorded herewith is substituted for the plat recorded in Deed Book 934, Page 853 and the description is corrected to refer to two parcels, A and B. Parcel B containing 7.422 acres is added on to the property described in Deed Book 859, Page 707 as an add-on, not for the purposes of creating additional building lots.

WITNESS the following signatures and seals:

_____(SEAL)
HUBERT C. MENTZ

_____(SEAL)
PAMELA M. MENTZ

STATE OF VIRGINIA

CITY/COUNTY OF _____, to-wit:

The foregoing instrument was acknowledged before me this _____ day of March, 1993 by HUBERT C. MENTZ.

_____
Notary Public

My commission expires: _____

STATE OF VIRGINIA

CITY/COUNTY OF _____, to-wit:

The foregoing instrument was acknowledged before me this _____ day of March, 1993 by PAMELA M. MENTZ.

_____
Notary Public

My commission expires: _____

EXHIBIT
8
ALL-STATE LEGAL SUPPLY CO.

RESPONSE: Admitted.

31. Admit that Deposition Exhibit No. 16 to Defendant David Auerbach's deposition taken on May 16-17, 1995, is a true and accurate copy of the original.

RESPONSE: Admitted.

32. Admit that the deed introduced as Exhibit 16 to Defendant David Auerbach's deposition taken on May 15-16, 1995, was prepared for the Plaintiff by the law firm of Mays & Valentine.

RESPONSE: Admitted except the language regarding the vacation of the plat and the add-on provision was directed by the County of Hanover and counsel for defendants.

33. Admit that Deposition Exhibit No. 17 to Defendant David Auerbach's deposition taken on May 16-17, 1995, is a true and accurate copy of the original.

RESPONSE: Admitted.

34. Admit that Deposition Exhibit No. 18 to Defendant David Auerbach's deposition taken on May 16-17, 1995, is a true and accurate copy of the original.

RESPONSE: Admitted.

35. Admit that Deposition Exhibit No. 19 to Defendant David Auerbach's deposition taken on May 16-17, 1995, is a true and accurate copy of the original.

RESPONSE: Admitted.

36. Admit that Deposition Exhibit No. 20 to Defendant David Auerbach's deposition taken on May 16-17, 1995, is a true and accurate copy of the original.

VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

H. C. MENTZ and PAMELA M. MENTZ, Plaintiffs, v. COUNTY OF HANOVER, Defendant.	)))))))))))	Case No. 425-94

RECEIVED and/or FILED
AUG 21 1995
CLERK'S OFFICE
HANOVER CIRCUIT COURT

PLAINTIFFS' REPLY MEMORANDUM TO DEFENDANT AUERBACH'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Hubert C. Mentz and Pamela M. Mentz submit this memorandum in reply to Auerbach's response to plaintiffs' motion for summary judgment.

I. All of the evidence submitted in plaintiffs' Memorandum in Support of Their Motion for Summary Judgment is admissible under Rule 3:18 of the Virginia Supreme Court.

Despite defendants' protestations, all the evidence introduced by the plaintiffs in their Memorandum in Opposition to Intervenors' Motion for Partial Summary Judgment and In Support of Plaintiffs' Cross-Motion for Summary Judgment is properly admissible. A motion for summary judgment may be supported by the pleadings, orders, admissions, interrogatories and documents of public record. Rules 3:18 and 4:8(d) of the Virginia Supreme Court. Auerbach fails to cite any particular fact he believes is

inadmissible but instead chooses to couch his protests in broad and unhelpful language.

Auerbach's argument that the "bulk of the references in and exhibits with the Cross-Motion Memorandum relate to another case, Mentz v. Auerbach," Response Mem. at 3, is contradicted entirely by this Court's order entered April 7, 1995 that states that all discovery obtained in that case may be used as discovery herein. Further, the interpretation of the Deed is at issue in both cases and the evidence relating to its interpretation is relevant in both cases. Auerbach's complaint about the utilization of the deposition testimony of County employees Hodges and Johnson is further contradicted by the fact that Auerbach was properly noticed for the depositions and attended each deposition with counsel. The deposition testimony was properly introduced in opposition to Auerbach's motion for partial summary judgment, and Auerbach has not cited any case or Rule of Court that prohibits such use of deposition testimony.

Plaintiffs agree with Auerbach that the courts initial focus should be on the language of the Deed itself. In addition, however, the court must take notice of the surrounding circumstances and construe the language in light of such circumstances. Ford v. Street, 129 Va. 437, 441 (1921); Allen v. Green, 229 Va. 588 (1985). Only if the court finds that the Deed is ambiguous, should it turn to parole evidence. Therefore, plaintiffs properly submitted parole evidence to the Court in the

event that the court finds an ambiguity. Plaintiffs' principal argument remains that the Deed, when construed as a whole and reconciling all of its provisions including the "add-on" provisions, unambiguously and simultaneously:

(1) conveyed 2.578 acres to Auerbach;
(2) created a first right of refusal to 7.422 acres in favor of Auerbach;
(3) created an easement from Mentz's property to Route 606; and
(4) "added-on" or merged the 7.422 acre parcel with Mentz's property referenced in Deed Book 659, Page 707.

Therefore, plaintiffs believe that its Motion for Summary Judgment and supporting Memorandum fully comport with the Rules of Court, and where appropriate, the court should consider all facts submitted therein.

II. A determination of the extent of access under the Easement in the Deed is only grounds for partial summary judgment.

Auerbach's motion is for partial summary judgment which, if granted, would leave unresolved the arbitrary and capricious and estoppel issues. This case concerns a challenge to a zoning decision by the County, and a ruling that the easement extends or does not extend to Mentz's 129.50 acre property does not end the case; the Court must decide if the County acted arbitrarily. And the Court must determine whether the County should be estopped from changing its position with

regard to the "add-on" language that the County required to be added to the Deed and the scope of access. See letter of Hodges to Goodfellow dated August 30, 1993. Therefore, an interpretation of the Deed is grounds only for partial summary judgment. Although styled as a cross-motion for summary judgment, plaintiffs' motion is in effect one for partial summary judgment as complete relief cannot be granted on the motions currently pending.

III. Auerbach's attempt to recharacterize plaintiffs' arguments does not alter the analysis; the Deed unambiguously added the 7.42 acre parcel to the 122.50 acre parcel to create a single 129.50 acre Parcel.

Plaintiffs laid out their arguments in specific fashion as follows: first, the language of the entire Deed is unambiguous and creates a single 129.50 acre parcel; and second, if the Court finds the Deed is ambiguous, parole evidence supports plaintiffs' interpretation and makes clear that defendants drafted the "add-on" language which, therefore, must be construed against them. Auerbach, however, employs the tactic of recharacterizing plaintiffs' arguments in a way that makes them easier to rebut. They create "straw man" arguments that they can then heroically destroy. For example, Auerbach recharacterized plaintiffs' argument to state:

> [I]f the language in the Deed does limit Plaintiffs' access only to and from Parcel B and Route 606, then it is ambiguous and should be construed against the Intervenors who drafted the Deed.

Response Mem. at 7. This recharacterization is nonsensical. If the language of the Deed can be construed by the court it is not ambiguous and the court need look no further. If the court finds that the Deed is ambiguous, then it must construe the language against the defendants because they drafted the language. The recharacterization is also incorrect. Plaintiffs have never argued that the easement is limited to the 7.422 acres. Instead they argue that the same instrument that created the easement, created the right of refusal, and conveyed 2.578 acres to Auerbach, also merged or added-on the 7.422 acres to the 122.50 acre parcel to create a 129.50 parcel to which the easement provides access.

In Section 3 of Auerbach's response memorandum, Auerbach argues that the language of the Deed is clear. However, he refers to <u>only one sentence of the Deed</u> ignoring all others. Response Mem. at 14. His argument is that "Parcel B is Parcel B is Parcel B," but he ignores the language of the Deed and the attached Plat indicating otherwise. He does this despite agreeing that the cases cited by plaintiffs on the construction of instruments are the "prevailing case authority." Response Mem. at 16. He incorrectly states that such cases do not need to

be distinguished because the court "must find that there is no ambiguity." Id. Plaintiffs' prevailing authority, however, states that a court must construe the deed as a whole, reconcile all provisions, and ignore no sentence or word contained therein to determine whether an ambiguity exists. No case holds that a court should determine whether a deed is ambiguous by considering only one sentence and ignoring all others.

Auerbach argues that the easement applies only to the 7.422 acres but also agrees that the right of refusal also applies only to the 7.422 acres. Therefore, one would expect the language describing the 7.422 acres to be identical in the easement and right of refusal provisions. However, the property described in the easement section ("to Parcel B") is different from the property described in the right of refusal section ("Parcel B consisting of 7.427 acres"). Auerbach makes no attempt to reconcile this difference but instead simply ignores the language "consisting of 7.422 acres" that evidences that "Parcel B" contemplates a larger property than "Parcel B consisting of 7.422 acres."

Most importantly, Auerbach cannot escape the clear import of the "add-on" language contained in the Deed and the Plat. The "add-on" language does what it says it does; it "creates a new 129+ acre parcel." September 3, 1992 letter from Johnson to Goodfellow. Auerbach's only recourse, therefore, is to muddle the issue by creating an argument, unsupported by the

facts, that Mentz "lost" the "right of first division" in 1991. Response Mem. at 8.

Auerbach's argument is a "red herring." Mentz purchased 10 acres from Mrs. Trimmer. The 10 acres was a first division of Mrs. Trimmer's property. Therefore, under the County Zoning Ordinance, Mentz could not subdivide the 10 acre parcel as the division would constitute a second division of the property. Because he owned the adjoining 122.50 acre parcel, however, the problem was solved by "adding on" the 7.422 acre parcel to the 122.50 acre parcel to create a single 129.50 acre parcel. The sale of 2.578 acres to Auerbach would then be a first division of Mentz's entire parcel. It makes no difference that the add-on occurred at the time of sale to Auerbach and not in 1991.

In both the Deed and the Plat, the 7.422 acres is "added on" to property described in "Deed Book 659, Page 707." Defendants refuse to address this language except to assert that it is meaningless. Plaintiffs in their supporting memorandum challenged Auerbach to address the holdings of Faison v. Union Camp, 224 Va. 54, 59 (1982). Plaintiffs' Supporting Mem. at 15-16. Auerbach failed to do so. The Faison decision is central to this case because the Faison Court held that the content of a deed referenced in a plat attached to a deed "becomes as much a part of the plat as the plat was part of the deed." Therefore, Deed Book 659, Page 707, referencing Mentz's 122.50 acre parcel, becomes as much a part of the Deed as any other provision. The

Deed, the Plat and Deed Book 659, Page 707, "cross referenced as they were, must be construed together to determine the description of the land conveyed." Id.

Finally, Auerbach makes the unbelievable statement to this Court that there is "no evidence" that the "Intervenors had knowledge and an understanding of the 'add-on' procedure prior to closing." Response Mem. at 11. This statement, however, cannot be reconciled with:

> (1) McCall's letter to Zwerdling dated September 3, 1992 in which McCall recognized that the County "did suggest a way in which the problem could be resolved" - a single, 129.50 acre parcel would be created;
>
> (2) Johnson's letter to Goodfellow dated September 3, 1992 that shows a copy being sent to "David Auerbach" and states that Mentz "will be allowed to add on 7.422 acres . . . thereby creating a new 129.5 acre parcel";
>
> (3) McCall's letter to Ellis dated March 31, 1993 in which McCall states: "We have received the required information from Hanover Count [sic] regarding 'attaching' Parcel 'B' to Mentz's other property. The required language is '7.422 acre Parcel B shall be added to the property described in Deed Book 659, Page 707 . . ..'";
>
> (4) McCall's second letter to Ellis dated March 31, 1993 in which McCall recites the language to be placed in the Deed: "The 7.422 acre parcel -- shall be added to the property conveyed to the parties of the first part as described in Deed Book 659, Page 707"; and

> (5) the handwritten notes of Auerbach on a draft deed that states -
> John:
> 85-86 = TP# for property being divided
> 85-89 = TP# for property being added to
>
> Thanks Again & Again!
> Dave.

(emphasis added). His own handwriting states "property being added to." He admits receiving a copy of Johnson's letter to Goodfellow dated September 3, 1992. Auerbach's Response to Plaintiffs' Third Set of Admissions, No. 61. Exhibit A hereto.

And Auerbach admits that:

> the building permit dated April 5, 1993 issued to David Auerbach and Susan Ortmann . . . would not have been approved and issued had not David Auerbach and Susan Ortmann agreed to the provision in the Deed to David Auerbach and Susan Ortmann dated March 31, 1993 providing "Parcel B containing 7.422 acres is added on to the property described in Deed Book 659, Page 707 as an add on . . ."

Id. at No. 62. Therefore, the undisputed documents and admissions make it absolutely, positively clear that Auerbach knew the meaning of, need for, and consequences of the "add-on" provisions prior to closing.

IV. The Easement was created in the same document and at the same time that the properties were merged.

Auerbach argues that the law does not permit an easement to be expanded to access properties beyond the original

dominant estate. Response Mem. at 13. For example, if the County added additional land to Mentz's property for tax purposes beyond the 129.50 acres, such additional property would not be accessible over the easement. Id. Plaintiffs agree that additional lands cannot be added after an easement is created. Auerbach's argument, however, misses the point because this is not a case where the dominant estate has been expanded. Instead, at the time of creation of the easement at issue, and in the very same document, the 7.422 parcel was added on to the land described in "Deed Book 659, Page 707," Mentz's 122.50 acre parcel. Finally, evidence of the County changing its tax records to reflect the merger of the properties into a single 129.50 acre parcel indicates one effect of the "add-on" provisions, not that the purpose of the "add-on" had anything to do with tax assessments.

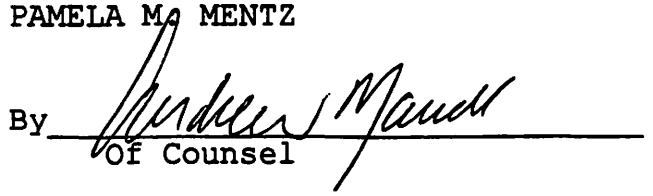
V. Intent of the Parties.

The polestar of contract interpretation is the intent of the parties. Poindexter v. Molton, 237 Va. 448, 450 (1989). Because this is a motion for partial summary judgment, however, plaintiffs are restricted to presenting facts to the court that are admissible under the Rules of Court. Therefore, it has submitted to the court the soil feasibility study prepared by Tim P. Sexton, Inc. for Mentz prior to the sale of 2.578 acres to Auerbach because it demonstrates an intent by Mentz to subdivide

all of his property. Plaintiffs have presented to the court facts from which the court can infer that Mentz purchased the 10 acre parcel in order to gain sufficient access to the 122.50 parcel for subdivision and not for the purpose merely of selling 2.578 acres to Auerbach and having an easement to only the residue 7.422 acres. The Deed itself provides for a 50 foot wide easement, the exact width required by the County for subdivisions of property greater than 10 acres. Mentz's intent to subdivide the entire property is further shown by the submittal of subdivision plans to the County after the sale to Auerbach.

Plaintiffs believe this evidence, coupled with the language of the Deed and all other admissible facts presented in its memorandum and during oral argument, makes clear that the easement was intended to access the singular 129.50 acre parcel. If, however, the court does not believe that it has enough facts before it to grant plaintiffs' motion for summary judgment, then plaintiffs ask the court to deny both parties' motions and proceed to trial where plaintiffs can prove through oral testimony that (1) Mentz intended to subdivide his property from the very beginning, (2) the 10 acre parcel that Mentz purchased for the express purpose of gaining proper access to the 122.50 acre parcel, and (3) that such intentions were conveyed to Auerbach prior to the sale.

H. C. MENTZ
and
PAMELA M. MENTZ

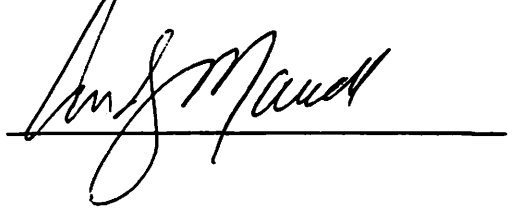
By 
Of Counsel

Andrew J. Ellis, Jr., VSB No. 9078
Andrew G. Mauck, VSB No. 35177
MAYS & VALENTINE
P. O. Box 1122
Richmond, Virginia 23208-1122
(804) 697-1200

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August, 1995, I caused to be mailed, postage prepaid, a true and correct copy of Plaintiffs' Reply Memorandum to Defendant Auerbach's Response to Plaintiffs' Motion for Summary Judgment to Charles J. McCall, Esquire, 5104 W. Village Green Drive, Suite 105, Midlothian, Virginia 23112-4851; William B. Kerkam, III, Esquire, Bremner, Baber & Janus, 701 E. Franklin Street, Richmond, Virginia 23219; and A. Lisa Barker, Esquire, Senior Assistant County Attorney, Hanover County, Post Office Box 470, Hanover, Virginia 23069.



VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

H. C. MENTZ and PAMELA M. MENTZ, Plaintiffs, v. COUNTY OF HANOVER Defendants.	)))))))))))	Case No. 425-94

PLAINTIFFS' FIRST REQUESTS FOR ADMISSION
TO HANOVER COUNTY AND DAVID AUERBACH AND SUSAN ORTMANN

Plaintiffs H.C. Mentz and Pamela C. Mentz, by counsel, pursuant to Rule 4:11 of the Supreme Court of Virginia, request defendants David Auerbach and Susan C. Ortmann and defendant County of Hanover to admit to the truth of the following matters:

61. Admit that David Auerbach received a copy of the letter from W. R. Johnson to Goodfellow dated September 3, 1993, attached as Exhibit 7.

Admitted

62. Admit that the building permit dated April 5, 1993 issued to David Auerbach and Susan Ortmann attached as Exhibit 32 would not have been approved and issued had not David Auerbach and Susan Ortmann agreed to the provision in the Deed to David Auerbach and Susan Ortmann dated March 31, 1993 providing "Parcel B containing 7.422 acres is added on to the property described in Deed Book 659, Page 707 as an add on not for the purposes of creating additional building lots."

Admitted

DAVID AUERBACH and SUSAN C. ORTMANN

By Charles J. McCall
Of Counsel

Charles J. McCall, VSB No. 17022
5104 West Village Green Drive, Suite 105
Midlothian, VA 23112

Counsel for Intervenors

I hereby certify that a true copy of the Response [illegible] for Admissions was mailed, postage prepaid, this 24 day of July, 1995, to Andrew J. Ellis, Jr., Mays & [illegible] Valentine, P.O. Box 1122, Richmond, Virginia [illegible] 23208-1122; and A. Lisa Barker, Senior Assistant County Attorney, P.O. Box 470, Hanover, Virginia 23069

Charles J. McCall
Charles J. McCall, Esquire

VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

H. C. MENTZ and PAMELA M. MENTZ, Plaintiffs, v. COUNTY OF HANOVER, Defendant.	)))))))))))	Case No. 425-94

RECEIVED and/or FILED
AUG 21 1995
CLERK'S OFFICE
HANOVER CIRCUIT COURT

PLAINTIFFS' REPLY MEMORANDUM TO HANOVER COUNTY'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Hubert C. Mentz and Pamela C. Mentz, by counsel, submit this memorandum in reply to Hanover County's Response to Plaintiff's Motion for Summary Judgment and state the following.

Hanover County seeks to adopt a "Memorandum of Hanover County" submitted to this court on January 20, 1995 with exhibits (the "County Memorandum") for its memorandum in response to the plaintiffs' motion for summary judgment. The County Memorandum was submitted in support of the subdivision agent disapproving plaintiffs' subdivision and concludes with a request that the court dismiss the appeal. The County, however, has never filed <u>any motion</u> either to dismiss or for partial or complete summary judgment. A motion to dismiss is not provided for in the Rules of Court

and would only be appropriate where there is lack of jurisdiction, where an adequate remedy at law exists, the case is brought on the wrong side of the court, or there is defective process. 6A Michie's Jurisprudence Dismissal §§ 6-9 (1991). Nor has there been any notice of a request to the court to hear the County's Memorandum, however that document may be construed

In addition, the County Memorandum is not a proper response memorandum. The exhibits attached to the County Memorandum include various deeds, plats, and correspondence between the parties and their attorneys, but no reference is made as to how such documents are properly in evidence to be considered on a motion for summary judgment. The County Memorandum also contains inadmissible factual allegations.

Finally, despite introducing considerable factual allegations extraneous to the Deed, the County's sole legal argument is that the "Deed is clear and unambiguous." County Mem. at 7. This argument is addressed at length in the memoranda of Mentz and Auerbach. The principal case cited by the County, Camp v. Camp, 220 Va. 595 (1979), is addressed in plaintiffs' supporting memorandum at pages 15-16.

For these reasons, the County Memorandum should not be considered by the Court in ruling on the Motions for partial summary judgment properly matured for consideration.

H. C. MENTZ
and
PAMELA M. MENTZ

By _____
Of Counsel

Andrew J. Ellis, Jr., VSB No. 9078
Andrew G. Mauck, VSB No. 35177
MAYS & VALENTINE
P. O. Box 1122
Richmond, Virginia 23208-1122
(804) 697-1200

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August, 1995, I caused to be mailed, postage prepaid, a true and correct copy of Plaintiffs' Reply Brief to Hanover County's Response to Plaintiffs' Motion for Summary Judgment to Charles J. McCall, Esquire, 5104 W. Village Green Drive, Suite 105, Midlothian, Virginia 23112-4851; William B. Kerkam, III, Esquire, Bremner, Baber & Janus, 701 E. Franklin Street, Richmond, Virginia 23219; and A. Lisa Barker, Esquire, Senior Assistant County Attorney, Hanover County, Post Office Box 470, Hanover, Virginia 23069.

_____

file copy

Commonwealth of Virginia

FIFTEENTH JUDICIAL CIRCUIT

JUDGES

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HANOVER, VIRGINIA 23069-0022
(804) 537-6161

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BOWLING GREEN, VIRGINIA 22427-0917
(804) 633-4541

COUNTIES OF
ESSEX
HANOVER
CAROLINE
STAFFORD
RICHMOND
LANCASTER
KING GEORGE
SPOTSYLVANIA
WESTMORELAND
NORTHUMBERLAND
CITY OF FREDERICKSBURG

August 24, 1995

Andrew J. Ellis, Jr., Esquire
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Richmond, Virginia 23208

A. Lisa Barker, Esquire
Assistant Hanover County Attorney
P. O. Box 470
Hanover, Virginia 23069

Charles J. McCall, Esquire
5104 W. Village Green Drive
Suite 105
Midlothian, Virginia 23112-4851

William B. Kerkam, III, Esquire
Bremner & Janus
701 East Franklin Street
P. O. Box 826
Richmond, Virginia 23207

Re: Mentz v. County of Hanover - Chancery No. 425-94

Dear Mr. Ellis, Ms. Barker, Mr. McCall and Mr. Kerkam:

After a thorough examination of the deed and plat in controversy, it is clear that the 50 foot easement reserved benefits the whole 129, more or less, acre tract of the Plaintiffs.

Mr. Ellis will prepare the appropriate decree sustaining the Plaintiff's motion for summary judgment and overruling the motions of the Defendants and Intervenors.

Very truly yours,

Richard H. C. Taylor
Judge

RHCT/nvs

960062

ORIGINAL

1

VIRGINIA:

THE CIRCUIT COURT OF THE COUNTY OF HANOVER

CLERK
SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

x- - - - - - - - - - - - - - - - - -x
HUBERT C. MENTZ and PAMELA M. MENTZ,
Plaintiffs,

-vs- Case No. 425-94

THE COUNTY OF HANOVER, et al,
Defendants.
x- - - - - - - - - - - - - - - - - -x

Complete transcript of the motion in the above matter when heard on Monday, October 16, 1995, before the Honorable Richard H.C.Taylor, Judge.

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1 A P P E A R A N C E S:

MAYS & VALENTINE
BY: ANDREW J. ELLIS, ESQUIRE
1111 East Main Street
Post Office Box 1122
Richmond, Virginia 23206-1122
Counsel for the Plaintiff

AGNES LISA BARKER, ESQUIRE,
Post Office Box 470
Hanover, Virginia 23069
Counsel for the County of Hanover

CHARLES J. MCCALL, ESQUIRE,
5104 West Village Drive, Suite 105
Midlothian, Virginia 23112
Counsel for David and Susan Auerback

Also Present:
WILLIAM B. KERKAM, III, ESQUIRE

1 THE COURT: I looked at Miss Barker's order and Mr. Ellis's order. They are awful close. What is the problem?

MR. ELLIS: Judge, I've sent several drafts to Mr. McCall and I haven't heard anything from him, but I think Miss Barker and I were talking about our problems. Number one, what I tried to do in my order was to track your language with respect to the easement.

(Mr. McCall enters the room.)

THE COURT: Have a seat, Mr. McCall.

MR. MCCALL: I am sorry, your Honor.

THE COURT: We were trying to find out where we were so by the time you got here, we would know where we are.

MR. MCCALL: I am sorry I missed that start up. I could use that myself.

MR. ELLIS: Well, the judge was asking us wherein we disagreed and I told

him that I had not really heard from you. I had sent several copies to you and had gotten to the point where you indicated you were waiting for the transcript. I understand you have that now. We all have that.

MR. MCCALL: I do. I do have the transcript.

MR. ELLIS: The decree which I submitted, Judge, first of all, that was to narrow what I understand the situation to be. It indicates that all parties agreed to the issue, and Judge, I think that you've got a second page there.

THE COURT: Yes, sir. I am looking at the second page.

MR. ELLIS: Which I sent to you, the second page there.

THE COURT: Right.

MR. ELLIS: The first page refers to the fact that all parties agreed that the sole issue in the case was the scope of the 50 foot, the scope of the land area served by the 50 foot easement.

THE COURT: Yes, sir.

MR. ELLIS: And I went through and wrote Miss Barker, sent a copy to Mr. McCall, the various excerpts from the various pleadings that all the parties said that that was the issue. Then I went ahead and tracked your language dealing with the adjudication of the rights in the easement, which is right from your letter.

THE COURT: Yes.

MR. ELLIS: The second paragraph on page two is also right from your letter. I want to point out to the Court at this juncture, the fact that in our motion for summary judgment we request a relief that is referred to in memorandum and then also referred to in the Bill of Complaint, well there was no Bill of Complaint filed in this appeal.

The Bill of Complaint, if there are any as such is in the other case, but the Appeal is not styled a petition or a Bill of Complaint and the reference in our motion for summary judgment was a

1 reference intended to refer to the appeal
2 papers in this case. And that's all that
3 it did and I refer the Court to the
4 language of that motion for summary
5 judgment.
6 THE COURT: Yes, sir.
7 MR. ELLIS: We simply ask that
8 the Court enter summary judgment in this
9 matter as set forth in plaintiff's
10 supporting memorandum filed
11 contemporaneously with this motion. Then
12 we ask that you enter summary judgment in
13 our favor and award plaintiff all
14 relief sought in plaintiff's Bill of
15 Complaint. The Bill of Complaint
16 is the Appeal we took and that is a
17 reference I wanted to make clear on
18 the record on that standpoint.
19 THE COURT: All right, sir.
20 MR. ELLIS: And then I
21 overruled the defendant's motion to
22 dismiss and enter motion for partial
23 summary judgment and this is written, I
24 believe, that Ms. Barker and I disagree
25 in the last line of the third

1 paragraph from the second page of the
2 order, ordering that the County of
3 Hanover provide subdivision plat
4 approval, which was denied in the
5 County's letter of September the 8th upon
6 the application answer, compliance with
7 paragraphs two, three and four of that
8 letter, Exhibit E to the appeal.
9 Well, if I interpret Ms.
10 Barker's proposed final order and what
11 she has told me this morning, she
12 believes we have to submit a new
13 subdivision plat. I take the position
14 that under statute, we appeal the denial
15 of the subdivision plat, which we filed
16 and the Court has removed the major
17 obstacle which was the question of the
18 access, leaving only those two, three and
19 four that we have to comply with.
20 That is the reason I have
21 worded it in the manner that I have done
22 and I object to any provision and any
23 order directing that we have to submit a
24 new subdivision plat, and I think that's
25 clearly what Miss Barker's order

1 contemplates.

2 THE COURT: Miss Barker, what

3 are your thoughts on that?

4 MS. BARKER: Well, your Honor,

5 the effect of Mr. Ellis's draft order, I

6 am having trouble finding it. You are

7 referring to your October 5th draft, Mr.

8 Ellis, one that was enclosed?

9 MR. ELLIS: This is the one I

10 sent with the notice for the appearance

11 today with the substituted second page I

12 sent.

13 THE COURT: Right. We received

14 it as the cover letter dated October 2.

15 MR. ELLIS: I gave you a copy

16 of it here.

17 MS. BARKER: I have a draft.

18 MR. ELLIS: I've got a

19 completed one right here for everybody.

20 MS. BARKER: Well, Judge

21 Taylor, to the extent that any order Mr.

22 Ellis has drafted says that the County

23 will approve that subdivision plat that

24 was submitted, we would object because I

25 think that the effect of that would be

2

1 that if at any point in the future Mr.
2 Ellis's client submits that subdivision
3 plat, we would have been ordered to
4 approve it and I don't think that is
5 appropriate.
6 Obviously, in the intervening
7 period, the County could have adopted
8 other ordinances. This situation could
9 have changed, other circumstances could
10 have changed. So I don't think that is
11 appropriate and I don't believe that
12 there is any reference to the statute to
13 the Court ordering the County to approve
14 a plat.
15 There were several problems
16 with that plat which we have not
17 discussed in this case because they were
18 minor problems, things like labelling and
19 so forth, but with the exception of that
20 access easement issue, we take the
21 position that the disapproval was
22 appropriate. And as with any other
23 applicant, Mr. Ellis's client would have
24 to submit a corrected plat. And in fact,
25 as I understand it, that's what he

2

1 contemplates, that his client would
2 submit another plat with those items
3 corrected.
4 THE COURT: But you listed
5 three specific things that had to be done
6 in addition to the problem that we had
7 and there would be compliance with
8 paragraphs two, three and four of the
9 September '94 letter that takes
10 care of it, doesn't it?
11 MS. BARKER: Well, if perhaps
12 he submitted that plat tomorrow, it would
13 assuming this case, the appeal period for
14 this case is run and so forth.
15 THE COURT: Right.
16 MS. BARKER: But the language
17 in that decree, as I recall it, referred
18 to approval at some unspecified time and
19 that is not appropriate. And further --
20 THE COURT: I think we have got
21 to start at the time of the ruling that
22 has been overruled and go forward from
23 there.
24 MS. BARKER: Well --
25 THE COURT: For instance, he is

2

1 using the same language you are, except
2 you put the word subsequently in yours.
3 MS. BARKER: Your Honor, we
4 believe that in entering an order of that
5 sort, you are giving Mr. Ellis's client
6 an invested right, in effect, because
7 normally anybody who submits a
8 subdivision plat is subject to all of the
9 regulations in effect of the time of that
10 final submission. And the effect of Mr.
11 Ellis's language is at any point in the
12 future his client could resubmit that
13 plat with a few corrections and have it
14 approved, and I don't think that's
15 consistent with the law or appropriate.
16 THE COURT: I agree with that,
17 but that is not what the order, as I
18 read it, says.
19 MR. ELLIS: Judge, paragraph
20 five of the Statute 15.1-475 is what we
21 appealed and we appealed a specific
22 disapproval of a plat. And all parties
23 agreed from the outset of this
24 litigation, I think, that the main
25 question in this case was access, of the

2

1 scope of the access.

2 THE COURT: Yes, sir. That is

3 all I addressed.

4 MR. ELLIS: That's right. So

5 what we are saying and we are asking and

6 we believe the Appeal addresses the

7 denial of the plat that we submitted. We

8 appeal that denial and we are simply

9 asking that the Court approve that plat

10 under the statute and direct that the

11 County approve the subdivision subject to

12 our compliance with items two, three and

13 four.

14 MS. BARKER: Judge Taylor, Mr.

15 Kerkam and I, he was just telling

16 me about the statute and the statute

17 indeed, in an appeal of disapproval of

18 the plat, does not provide for ordering

19 the approval of the plat and that's

20 contrast.

21 THE COURT: If you don't

22 approve the plat though, what is this all

23 about?

24 MS. BARKER: I think the Court

25 determines that the disapproval was not

2 1 consistent with the statute and the
2 ordinances, and the County, of course,
3 will act accordingly and that's what our
4 order provides for. And I think if we,
5 if someone failed to approve a set of
6 point plat based on that easement, I
7 think a writ of mandamus would be
8 appropriate.
9 MR. ELLIS: Judge, we would be
10 right back.
11 MS. BARKER: Judge Taylor --
12 MR. ELLIS: It wouldn't be a
13 final order.
14 MS. BARKER: We are not going
15 to be right back because the County is
16 provided for and the order I drafted
17 would act in accordance with that order
18 stating that the easements available to
19 the 129 acres.
20 MR. MCCALL: Your Honor, may I?
3
21 THE COURT: Yes, sir, Mr.
22 McCall.
23 MR. MCCALL: One of the
24 fundamental issues that I have with the
25 order as it's written is that the Court's

3

1 letter opinion only addressed
2 interpretation of the easement. The
3 Court made no findings with respect to
4 other portions of the appeal, as I
5 understand it. We have certainly
6 discussed, at least Miss Barker and I
7 have stipulated for the purposes of
8 appeal in the final order that the
9 County's actions were not in compliance
10 with the ordinance, but I think that's a
11 far cry from the Court ordering the
12 County to approve its subdivision plat.
13 I think it gets back to the
14 practical question of whether or not Mr.
15 Mentz, if he were to receive a final
16 decree here as we proposed, would choose
17 to proceed with his subdivision plans.
18 It is my understanding that
19 those subdivision plans would still have
20 to be in compliance with the ordinance
21 and that the County would be required to
22 approve the subdivision plan. And
23 there's still the remaining question that
24 I have posed to Miss Barker after the
25 hearing that we had before when she

3

1 indicated that the County -- well, excuse
2 me. When the discussion came up in our
3 last hearing and I believe that your
4 Honor posed the question as to whether
5 the County would approve a subdivision
6 plan, I believe in substance Miss Barker
7 indicated if the plat or the plan
8 complied with the ordinance, that they
9 would go forward with it, but I posed the
10 question to her after that, would one of
11 the conditions that the County might
12 impose include whether the case was still
13 on appeal, and therefore, subject to
14 being reversed.
15 There has not been a decision
16 by the County and we have not discussed
17 it since then in the context of her
18 stating one way or the other whether the
19 County had formed an opinion on that
20 particular question, but it seems to me
21 that as long as this case is on appeal,
22 that aside from the questions of the
23 ordinance providing for the Court to
24 order approval of the subdivision, I
25 think it would be more or less in limbo

1 in terms of whether or not the plan was
2 approved.
3 The County has to take its own
4 position with respect to that. But
5 certainly ordering the County to do so
6 would go beyond anything that the Court
7 addressed in its letter opinion.
8 MR. ELLIS: Mr. McCall is now
9 addressing the appellate procedures, your
10 Honor. If he wants to stay execution of
11 this order, he has the perfect right to
12 come before the Court and note his
13 appeal, filing his petition for appeal
14 and request a supersedeas or stay of
15 the order itself.
16 MR. MCCALL: I am not
17 suggesting that.
18 MR. ELLIS: That is another
19 issue.
20 MR. MCCALL: I am suggesting
21 for the Court of the County do anything
22 is beyond --
23 MR. ELLIS: May I finish,
24 please?
25 MR. MCCALL: Go ahead,

please.

MR. ELLIS: What we are doing, Judge, is simply preparing the decree and presenting it to the Court based on our appeal, which was an appeal of denial of that plat.

THE COURT: Yes, sir.

MR. ELLIS: And I understood from the statements made by counsel at our prior hearing, that everyone agreed that they wanted a final order so that Mr. McCall could appeal it.

He doesn't want an order that's not filed and he represented to the Court he wanted a final order and I have that representation here. Miss Barker represented she wanted a final order. That leaves nothing to be done aside from the administrative items two, three and four. It would be a final order, as I view it, and I am simply asking the Court to enter that final order.

MS. BARKER: Judge Taylor, I would just say that the County would not have any problem with the language in an

3

1 earlier draft from Mr. Ellis's office
2 that says the defendant County of Hanover
3 is directed to reconsider plaintiff's
4 subdivision plat an act of conformity
5 with this decree. We do intend to act in
6 conformity with the decree and I think
7 that language is probably appropriate,
8 but --
9 MR. ELLIS: Judge, we have
10 submitted the order and I've submitted
11 our position.
12 THE COURT: I think that you've
13 got to go back to September the 8th of
14 1994, and if the question that was raised
15 as the question for me to answer is
16 answered the way I answered it, then the
17 September 8, '94 plat should be approved
18 subject to the other conditions that have
19 to be done, it appears to me.
20 MS. BARKER: Your Honor,
21 normally we do, as a practical matter,
22 approve or disapprove a plat. In this
23 case, we disapprove with several reasons
24 for that disapproval.
25 THE COURT: Yes.

MS. BARKER: Mr. Ellis seems to object to filing another corrected plat and now Mr. Ellis is shaking his head. I would be interested in the procedure he envisions.

THE COURT: I would say that we wake up tomorrow morning and it's September the 9th, 1994 and we go forward from there and any conditions on the September '94 plat have to be complied with, it appears to me.

MS. BARKER: And I would just say okay, we can reword it.

THE COURT: Yes. I see nothing wrong with the way it is ordered. If it has somebody's name spelled wrong, then you have got to amend those types of things. If it comes down to saying that the 50 foot easement does not benefit the whole 129 acres, then you are in violation of my ruling. Other than that, I think you have to take it as it comes.

MR. ELLIS: Yes, sir. I have the decree, Judge, that I would ask.

THE COURT: All right. I am

4

1 going to enter Mr. Ellis's decree.

2 MR. KIRKLAND: May I make

3 one --

4 MR. ELLIS: If Mr. Kerkam is

5 addressing this decree, I am going to

6 object to it.

7 THE COURT: All right. Put

8 your objection as noted to the record to

9 say what you did. Mr. McCall, anything

10 else you want to put on the record file?

11 MR. MCCALL: Yes, your Honor.

12 The only thing I would suggest is that

13 the order, with respect to the cross

14 motion for summary judgment, state that

15 it be in the same hereby sustained in so

16 far as it requests interpretation of the

17 said deed and plat in the land area

18 served by the 50 foot easement because I

19 think that was the extent of the Court's

20 ruling at the time that it issued its

21 opinion and the introduction.

22 THE COURT: Other issues were

23 involved in that cross motion for summary

24 judgment.

25 MR. MCCALL: That is the issue

4

1 we were asking to be decided, your Honor,
2 but I am submitting that ordering the
3 County to approve a subdivision plat goes
4 beyond the Court's ruling that is
5 contained in the letter opinion, and I
6 understand the Court is addressing the
7 practical result of what would happen on
8 the next day, but at the same time that
9 adds finality to what is really an
10 interim situation because the case will
11 be on appeal and it's ordering the County
12 to go forward and approve the subdivision
13 plan while the order is on appeal.
14 THE COURT: We have got to take
15 it one step at a time and the step is to
16 make a final order that you can appeal.
17 That is what we talked about last time we
18 were here.
19 MR. ELLIS: If it is another
20 order, he can't appeal it, Judge.
21 MR. MCCALL: But your Honor, I
22 am trying to draw the distinction between
23 whether the County is ordered to approve
24 it or whether the County may choose to
25 approve it. If they choose to go ahead,

that is, Mr. Mentz asked the County to approve on the ordinance, the County may take the position that until the appeal is final, that Mr. Mentz is not in a position to comply with the ordinance.

THE COURT: Then the County should file an appeal of the ruling and file the necessary motion to stop the process.

MS. BARKER: Judge Taylor, I think actually as I see this happening, we have been ordered to approve the plat with those exceptions that are noted and that's what we will do unless Mr. McCall obtains an order otherwise.

THE COURT: Right. I think that is what you have to do under the order.

MR. MCCALL: Your Honor, may we ask that the order be amended to give us five days to append our objections to it?

MR. ELLIS: Your Honor, I am going to object.

THE COURT: No, sir. I am going to enter it. You can stay.

4

1 MR. MCCALL: I've got some
2 today I would like to attach to the
3 order, your Honor.
4 THE COURT: I am going to enter
5 the order today. We keep coming back
6 here.
7 MR. MCCALL: Can't I attach my
8 exceptions, your Honor? I mean, I
9 believe that is what the Court --
10 THE COURT: I thought you were
11 stating them for the record, Mr. McCall.
12 MR. MCCALL: Only with respect
13 to that one, but I do have exceptions I
14 would like to attach to the order which I
15 am entitled to under Lee versus Lee, your
16 Honor.
17 THE COURT: Yes, sir. But you
18 have had at least two weeks to get your
19 objection thoughts together.
20 MR. MCCALL: I have them
21 prepared, your Honor, to attach to the
22 order.
23 MR. ELLIS: He's had since
24 August the 25th when the Court issued
25 its ruling, Judge, and then we had a

4 1 hearing. He raised all these objections
2 and --
3 THE COURT: You have got them
4 written in. All you have got to do is
5 say they are attached this morning.
6 MR. ELLIS: I think we are
7 entitled to a final order.
8 THE COURT: I think you are,
9 too, Mr. Ellis.
10 MS. BARKER: Judge Taylor, I
11 just have to say that that August order
12 was not a final order. I think that was
13 probably an appropriate improvement we
14 made in the order.
5
15 THE COURT: Yes. I think
16 certainly the one that I've got, October
17 the 2nd, is a vast improvement on that
18 one. That's the one I am entering, but
19 that gave at least two weeks.
20 All right. Could I have the
21 order back?
22 MR. MCCALL: Yes, your Honor,
23 and I have some exceptions here I am
24 going to sign to go on there.
25 THE COURT: Yes, sir. And I am

5

1 going to give Mr. Ellis the file and he
2 can take it upstairs and get certified
3 copies for everybody.
4 MR. ELLIS: Yes.
5 THE COURT: Together with the
6 attachments.
7 MR. KERKAM: Judge, here is
8 an order from the Mentz -v- Auerback
9 case which has been endorsed by all
10 counsel.
11 THE COURT: All right, sir.
12 MR. KERKAM: I've got one for
13 you, Jack.
14 MR. ELLIS: Thank you.
15 THE COURT: I will let you take
16 this one upstairs.
17 MR. ELLIS: This is the order
18 of continuance I endorsed. That other
19 order, that is the order I noted my
20 objection and I have the final order
21 prepared by Mr. McCall.
22 THE COURT: All right, sir.
23 (Proceedings adjourned.)
24
25

5 1 CERTIFICATE OF COURT REPORTER

2

3 I, Carole T. Scott, a Certified Shorthand
4 Reporter, hereby certify that I was the Court
5 Reporter in the Circuit Court of the County of
6 Hanover on October 16, 1995, at the time of the
7 hearing herein.
8 I further certify that the foregoing
9 transcript is a true and accurate record of the
10 testimony and other incidents of the hearing
11 herein.
12 Given under my hand this 26th day of
13 October, 1995.
14
15
16
17 Carole T. Scott, CSR
Carole T. Scott
18 Certified Shorthand Reporter
19
20
21
22
23
24
25

VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

HUBERT C. MENTZ and PAMELA M. MENTZ, Plaintiffs, v. COUNTY OF HANOVER, Defendant, and DAVID AUERBACH and SUSAN ORTMANN, Intervenors.	)))))))))))))))))	Case No. 425-94

DECREE

This cause came on this day to be heard on the County's Motion to Dismiss, the Intervenors' Motion for Partial Summary Judgment, Plaintiffs' Cross Motion for Summary Judgment, the memoranda submitted by all parties, the exhibits filed herein and was argued by counsel.

It appearing to the Court that all parties agree that the sole issue in this case is a determination of the land area served by the 50 foot easement reserved in the Deed recorded in Deed Book 972, Page 340, Clerk's Office, Circuit Court of Hanover County and the Plat recorded therewith, and after a thorough examination of the Deed and Plat it is clear to the Court that the 50 foot easement reserved benefits the whole 129,

more or less, acre tract belonging to the plaintiffs, it so ADJUDGED, ORDERED and DECREED.

It is further ADJUDGED, ORDERED and DECREED that plaintiffs' Cross-Motion for Summary Judgment be and the same is hereby granted. Defendants' Motion to Dismiss and Intervenors' Motion for Partial Summary Judgment are OVERRULED.

It is further ORDERED that the County of Hanover approve the subdivision plat, the approval of which was denied in the County's letter of September 8, 1994, upon the applicant's compliance with paragraphs 2, 3 and 4 of that letter. (Exhibit E to the Appeal).

Nothing further remaining to be done it is hereby REMOVED from the pending docket of this Court and placed among the ended causes.

ENTER: 10/16/95

Judge

WE ASK FOR THIS:

Andrew J. Ellis, Jr., VSB No. 9078
Andrew G. Mauck, VSB No. 35177
MAYS & VALENTINE
Post Office Box 1122
Richmond, Virginia 23208-1122
(804) 697-1200
Counsel for Plaintiffs

SEEN:

Seen and objections noted as stated in hearing 10/16/95

Ali Barker

A. Lisa Barker
Senior Assistant County Attorney
Hanover County
Post Office Box 470
Hanover, Virginia 23069
Counsel for Defendant

Seen and Objections attached

Charles J. McCall

Charles J. McCall
5104 W. Village Green Drive, Suite 105
Midlothian, Virginia 23112-4851
Counsel for Intervenors

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER COUNTY

HUBERT C. MENTZ
and
PAMELA M. MENTZ,

Plaintiffs,

v. Case Number 425-94

COUNTY OF HANOVER,

Defendants,

DAVID AUERBACH
and
SUSAN C. ORTMANN,

Intervenors.

INTERVENORS' EXCEPTIONS TO FINAL DECREE

1. The language in the Deed is clear and unambiguous and the court erred in ruling that Plaintiffs have the right to access the 122.5 acres through Parcel B and not limiting Plaintiffs' access only to and from Parcel B and Route 606.

2. The Deed and the Plat are clear and unambiguous and the and the court erred when it allowed the introduction of extrinsic and parol evidence and considered same in rendering its decision prior to rendering an independent. decision that the Deed and Plat were ambiguous.

3. Plaintiffs' Cross Motion for Summary Judgment were not timely and properly noticed for oral argument and the court erred in not delaying argument of Plaintiffs Cross Motion for Summary Judgment and causing the Intervenors to orally argue without adequate preparation time.

4. The court erred by not making available additional time for oral argument prior to issuing its decision.

5. The Court erred by not including a finding of fact with its decision thereby preventing the Intervenors from determining the basis of the decision.

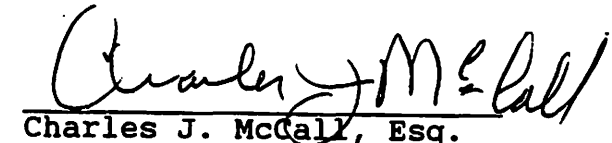
6. The court erred in allowing Plaintiffs' Memorandum in Response to Intervenors' Motion for Partial Summary Judgment to be improperly combined with Plaintiffs' Memorandum in Support of Plaintiffs' Cross Motion for Summary Judgment. Intervenors were unable to determine which material related to which of Plaintiffs' arguments.

7. The court erred in considering Plaintiffs' Memorandum in Response to Intervenors' Motion for Partial Summary Judgment and Plaintiffs' Memorandum in Support of Plaintiffs' Cross Motion for Summary Judgment which contained inadmissible and improper material, that is, extrinsic and parol material.

8. The Court erred in hearing oral argument and considering Plaintiffs' pleadings which contained inadmissible and extrinsic and parol evidence, most of which predated recordation of the Deed and Plat, both central to this case, without first rendering a decision whether the Deed and Plat were ambiguous.

9. The Intervenors specifically reserve all objections and exceptions articulated to the court in hearings before the court and arguments contained in the pleadings, memoranda, oral arguments to the court and other documentation which are part of the record in this case.

10. The decision is contrary to the law and evidence as enunciated to the court in the hearings before the court and arguments contained in the pleadings, memoranda, oral arguments to the court and other documentation which are part of the record in this case.



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ASSIGNMENTS OF ERROR

1. The language in the Deed is clear and unambiguous and the court erred in ruling that the Plaintiffs have the right to access the 122.5 acres through Parcel B and not limiting Plaintiffs' access only to and from Parcel B and Route 606.

2. The Deed and the Plat are clear and unambiguous and the court erred when it allowed the introduction of extrinsic and parol evidence and considered same in rendering its decision prior to rendering an independent decision that the Deed and Plat were ambiguous.

3. The Court erred by not including a finding of fact with its decision thereby preventing the Intervenors from determining the basis of the decision.

4. The court erred in allowing Plaintiffs' Memorandum in Response to Intervenors' Motion for Partial Summary Judgment to be improperly combined with Plaintiffs' Memorandum in Support of Plaintiffs' Cross Motion for Summary Judgment. Intervenors were unable to determine which material related to which of Plaintiffs' arguments.

5. The court erred in considering Plaintiffs' Memorandum in Response to Intervenors' Motion for Partial Summary Judgment and Plaintiffs' Memorandum in Support of Plaintiffs' Cross Motion for Summary Judgment which contained inadmissible and improper material, that is, extrinsic and parol material.

6. The Court erred in hearing oral argument and considering Plaintiffs' pleadings which contained inadmissible and extrinsic and parol evidence, most of which predated recordation of the Deed and Plat, both central to this case, without first rendering a decision whether the Deed and Plat were ambiguous.