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RECORD NOS. 970069 and 970071

GEORGE ATKISSON, *et al.*,

Appellants/Cross-Appellees,

v.

WEXFORD ASSOCIATES, INC. *et al.*,

Appellees/Cross-Appellants.

CONSOLIDATED JOINT APPENDIX
VOLUME I

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FILED

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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

GEORGE ATKISSON
CARLOTTA T. ATKISSON, WIFE
10194 Hillington Court
Vienna, Virginia 22180
Plaintiffs,

v.

C. STEWART PORTER
RESIDENT AGENT
WEXFORD ASSOCIATES, INC.
7728 Carleigh Parkway
Springfield, Virginia 22152

and

WEXFORD ASSOCIATES, INC.
8318 Arlington Boulevard
Fairfax, Virginia 22031

and

IN EQUITY: 97823

CHARLES B. HAWTHORNE
AUDREY HAWTHORNE, WIFE
c/o William J. Gorman
107 Maple Avenue West
Vienna, Virginia 22180

and

JAMES E. HENRY
SUSAN H. HENRY, WIFE
2026 Spring Branch Road
Vienna, Virginia 22180

and

HERBERT VOGEL
BARBARA VOGEL, WIFE
2032 Spring Branch Road
Vienna, Virginia 22180

and

FAIRFAX COUNTY PARK AUTHORITY
c/o LAWRENCE W. PHELPS
ASSISTANT COUNTY ATTORNEY
4100 Chain Bridge Road
Fairfax, Virginia 22030,

DEFENDANTS

BILL OF COMPLAINT
(Injunction, Trespass on Land, Damages)

The Plaintiffs by Counsel move the Court for judgment against the Defendants on the grounds and in the amount as hereinafter set forth:

1. Plaintiffs, George and Carlotta Atkisson ("Atkissons") are sole owners of a private family cemetery lot established during the time of the civil war located in close proximity to but not adjacent to Defendants James and Susan Henry's ("Henrys") and Robert and Barbara Vogel's ("Vogels") improved parcels of land in the Wendover III subdivision of Fairfax County, Virginia.

2. The Atkissons also own a fifteen foot wide easement/right of way leading to said family cemetary lot and running along the land as described in Plaintiff's exhibit A, the original grant of said easement as referenced below. Before becoming obstructed, said easement/right of way afforded the Atkissons and their family the only available access to said cemetery lot. The right of way was expressly granted by deed from Mary C. Saunders, George Atkisson's great, great aunt to Thomas Adams, George Atkisson's grandfather, recorded among the land records of Fairfax County, Virginia in Liber P, No. 5, page 361 in the year 1882. See Plaintiffs' Exhibit A.

3. That said right of way ran.appurtenant to the servient estates known as parcel 48 then owned by Mary Saunders and parcel 49 then owned by Robert Adams and was necessary for Thomas Adams to have a means of egress and ingress for his land including the family cemetery situated therein.

4. That said right of way established for ingress and egress to

the ascendants of George Atkisson's parcel has been used notoriously, openly and continuously under the referenced conveyence at Liber P, No. 5, page 361 for over one hundred years since its inception in 1882 up until late 1983, when defendants' joint and severable trespass and obstruction of said right of way began. Additionally, said right of way has been peacefully enjoyed by the Atkissons and those family members who have previously held title and has not been abandoned or relinquished by said owners of record nor extinguished or challenged by outside parties.

5. The Atkisson's obtained title to said right of way and family cemetery lot through purchase by them and Hunter Mill Forest Partnership of said 62 acres belonging to the heirs of Thomas Adams. Said sale occurred on the condition that said cemetery lot be preserved. Trustee Harold Miller by deed recorded among the Fairfax County Virginia Land records, Deed Book 5344, Page 575 granted to the Atkissons sole ownership of said right of way leading to said cemetery lot in order for the Atkissons and their family to have a means of ingress and egress to said cemetery lot for maintenance and visitation purposes. See Plaintiffs' Exhibit B. In addition, by deed recorded in the Fairfax County Land Records, book 5572, page 775, Harold Miller, Trustee conveyed to the Atkissons sole ownership of said family cemetery lot. See Plaintiffs' Exhibit C. Since that time, the Atkissons are the owners of record, receive tax bills and have kept up and maintained said cemetery lot including repairing headstones, posting signs and fencing the family lot. The Atkissons have used extensively both the cemetery lot and easement up until

1983.

6. That after Mary Saunders death, her interest in parcel 49 was conveyed to Harry Smith, whose daughter Kathleen Smith inherited said parcel and by deed recorded among the Fairfax County, Virginia Land records, Book 3392, page 72 conveyed her interest to Defendant Charles Hawthorne, sole owner.

7. That the heirs of Robert Adams acquired title to said lot 49 by judicial decree during which time the disputed owner, Hamil Adams, unsuccessfully attempted to obtain an injunction to block the heirs of Thomas Adams from use of the right of way to the cemetery lot.

8. That the heirs of Robert Adams then by deed recorded among the Fairfax County Land records, book 3688, page 356 granted title to parcel 48 to Daniel S. Capper and his wife Ellyn G. Capper. ("Cappers")

9. The Cappers had full knowledge as to the existence of said private cemetery lot and right of way. At one time the Cappers had agreed to allow the Atkissons as representatives of the Thomas Adams' heirs to widen said right of way to fifty feet in accordance with State standards for the construction of a road to allow continued ingress and egress to the Thomas Adams parcel and cemetery lot from the Southeast. Defendant Hawthorne, then sole owner of parcel 49, was also approached by Plaintiffs regarding the widening of said right of way. However, said plan was discarded due to the conveyance of parcel 48 to Defendants Charles and Audrey Hawthorne ("Hawthornes").

10. The Cappers by warranty deed recorded in Deed Book 4603,

page 343 on 4/18/77, with full knowledge of the existence of said right of way, granted title in parcel 48 to the Hawthornes, who already held title to adjacent parcel 49.

11. The Hawthornes' knowledge of the existence of said right of way was confirmed during rezoning hearings concerning their application for rezoning, #RZ79-C-095, at which George Atkisson testified as to the existence of said right of way. In addition, prior to the approval of Hawthornes' application, their attorney, Robert A. Lawrence acknowledged an obligation to investigate said easement and resolve any existing property rights of the Atkissons in the access easement across the Hawthorne property as evidenced by a letter dated 9/18/1980 from Sidney R. Steele, Chief Zoning Evaluation Branch, Office of Comprehensive Planning, to George Atkisson. See Plaintiff's Exhibit D, letter dated September 18, 1980 from Sidney R. Steele to George Atkisson.

12. In spite of Defendants Hawthornes' knowledge of said right of way and their agent's assurances to speak with the Atkissons and the Atkissons continued efforts to resolve the matter, the Hawthornes, without regard to obligations to the Atkissons conveyed to Defendant Wexford Associates ("Wexford") parcels 48 and 49 by deed recorded among the land records of Fairfax County, Virginia at book 5772, page 497 in 1983.

13. Mr. Atkisson, upon discovering the conveyance by the Hawthornes of the parcels across which their access easement ran, contacted Wexford to notify them of the situation, namely Wexford's legal duty not to obstruct or to trespass on the Atkissons' right of way and to seek a solution which would allow Wexford to develop the parcels while preserving the Atkisson's

and their many relatives ability to access said family cemetery.

14. Plaintiff then personally met with Wexford's agent, Stewart Porter and their engineer, Pete Nyce at Wexford's property to identify said right of way and family cemetery lot.

15. Soon thereafter, Wexford, relying solely on the Title Insurance Policy issued for the parcels, informed Mr. Atkisson they had no obligation to respect his right of way and would proceed to develop the parcels.

16. Plaintiff then met with an officer of First American Title Company who admitted that the right of way had been overlooked in the issuance of said policy to Wexford. However, said Title Insurance company offered no assistance in remedying the situation.

17. The Atkissons in their concern to preserve their right of way, it being the only direct route to said private family cemetery lot, attempted to contact Defendant Wexford. However Wexford, with deliberate disregard to the Atkissons' property rights developed on two parcels in the Wendover III subdivision two homes which directly infringe upon Plaintiff's right of way. Said homes, located upon lots 5 and 23 are currently owned by Defendants Henrys and Vogels respectively. See Plaintiffs' exhibit E, survey of Wendover III and path of right of way.

18. In addition, Wexford has further obstructed the Atkisson's right of way with a detention pond installed for the purpose of future development in the subdivision. See Plaintiffs' exhibit E.

19. As said right of way is the sole means of ingress and egress

to the cemetary lot, the cemetery lot has been land locked since the inception of said trespass and obstruction by Defendants. These obstructions have made it impossible for Plaintiff or his family members to care for or visit their family cemetery lot since 1983 without illegally trespassing upon lands of neighboring owners.

20. Defendant Fairfax County Park Authority ("Park Authority") has trespassed directly upon said family cemetery lot and has removed barriers placed by Mr. Atkisson in an attempt keep out trespassers. Said Park Authority has used a path contrary to the easement/right of way which the Atkissons dedicated to be used for horseback riding, and has trampled directly upon the resting places of Atkisson relations.

21. The Atkissons have continuously sought to resolve this matter without judicial intervention but the acts and omissions of said Defendants, particulary Wexford and the Hawthornes, have deprived George and Carlotta Atkisson of the rightful enjoyment of said right of way to the family cemetary lot which their relatives have used for over a century. The conduct of Defendants Hawthornes and Wexford has been so outrageous and so wanton that the Atkissons, in addition to family members with loved ones laid to rest in the family cemetery, have been totally locked out of the use of said access easement to the family cemetery lot. Said cemetery lot contains the remains of the following family members: Charles W. Adams, great grandfather of George Atkisson; Adeline Adams, great grandmother of George Atkisson; Mary Saunders, sister of Adeline Adams and great, great aunt of George Atkisson; C.W. Adams, son of Charles and Adeline

Adams; Joseph Adams, son of Charles and Adeline Adams; Margaret Adams, daughter of Charles and Adeline Adams; Oscar Adams, son of Charles and Adeline Adams; Nicholas Saunders, father of Adeline Adams; Leroy McDaniels, grandson of Charles W. Adams; and Goldie McDaniels, granddaughter of Charles W. Adams. Presently, there are plots reserved for future burials of close family members. Said deprivation of the right of way will continue to create problems for future burials of close relatives, as neither mourners nor heavy equipment to prepare the ground for internment will have a route of ingress or egress to said private cemetery lot.

WHEREFORE, Plaintiffs demand:

1. A permanent injunction against all Defendants to prevent further trespass and obstruction to the right of way and family cemetery;

2. To have the current obstructions to said right of way removed at the expense of all Defendants, jointly and severably excluding Defendant Park Authority;

3. Damages in the amount of ONE HUNDRED THOUSAND AND 00/100 DOLLARS ($100,000.00) to be paid jointly and severably by all Defendants excluding Defendant Park Authority for the deprivation of the use of the right of way during the past three years;

4. Exemplary damages in the amount of THREE HUNDRED THOUSAND DOLLARS AND 00/100 DOLLARS ($300,000.00) to be paid jointly and severably by all Defendants excluding Park Authority due to outrageous conduct and wanton behavior towards George and Carlotta Atkisson;

5. That Defendants be ordered to pay jointly and severably for

reasonable Attorney's fees and Plaintiffs' costs in this matter expended;

6. And, such other equitable and legal relief as this court deems appropriate and adequate.

GEORGE ATKISSON

CARLOTTA ATKISSON

PINAK MEHTA
Plaintiffs' Counsel
7236 Bona Vista Court
Springfield, Virginia 22150
Phone: 202-822-8787

GEORGE AND CARLOTTA ATKISSON, both having been duly sworn and upon their oath, according to law, depose and say that they have read the foregoing Motion for Judgment, by them subscribed, and that they know the contents thereof, and that the matters and things therein set forth they verily believe to be true.

GEORGE ATKISSON

CARLOTTA ATKISSON

SUBSCRIBED AND SWORN TO BEFORE ME THIS 16th DAY OF JULY, 1986.

My Commission Expires: May 19, 1986

NOTARY PUBLIC

Beginning at a point in the line of the first tract
1692 [illegible] Township of Chesterfield, South of the
first tract and from the [illegible] part of the second
tract both of Burlington County, Thence
(1) Westerly that the same part of the first tract
was by agreement of the three Commissioners
running each way from the Rancocas
Creek the [illegible] part of the same
part of the second tract the [illegible] course of
[illegible] Easterly parallel [illegible] said Creek
Creek and the same part of the second tract a
certain tract of land situate in Pemberton Town-
ship Burlington Co. N.J. more particularly described as follows. Beginning at a point in the middle of Rancocas
Creek on the South East boundary of the W. J. &
N. Y. Railroad thence (1) along said boundary S. 35° 45' E.
264 ft. to a stake in the line of other land of
Thomas Stevens thence (2) along the line of the same
land S. 29° 15' W. 1320 ft. to a stake in the line of land of
the W. J. & N. Y. Railroad thence (3) along said line
S. 60° 30' W. 1320 ft. to a stake in a Black Oak tree
S. 60° 30' W. 182 ft. to a Red White Oak tree S. 88°
40' W. 326 ft. to a stake in a Chestnut tree S. 40° 30' W.
1.99 ft. to a stake in a Chestnut tree S. 21° W. 40 ft. to a
stake in a tree S. 8° 30' E. passing through a tree
on the West bank of Rancocas Creek 1320 ft.
1151 ft. to the point in the middle of the
Creek thence (4) up the middle of said Creek
& the meanderings thereof to the place of
beginning containing 42 acres
Also the right of way from the above land to a
road 15 ft. wide from the South East corner of
the above land 880 feet along the line of land
of Thomas Stevens to a road or lane thence
(1) Northerly 30 feet to a stake in the line of land of
Thomas Stevens thence (2) N. 32° 30' E. 880 ft. to a
point in the middle of the Public Road leading
from Pemberton to Vincentown thence (3) Westerly
along the middle of said Public Road 30 ft. to the
place of beginning. Subject however to the
right of Thomas Stevens his heirs and assigns
to pass and repass over the above described
road to and from his land.

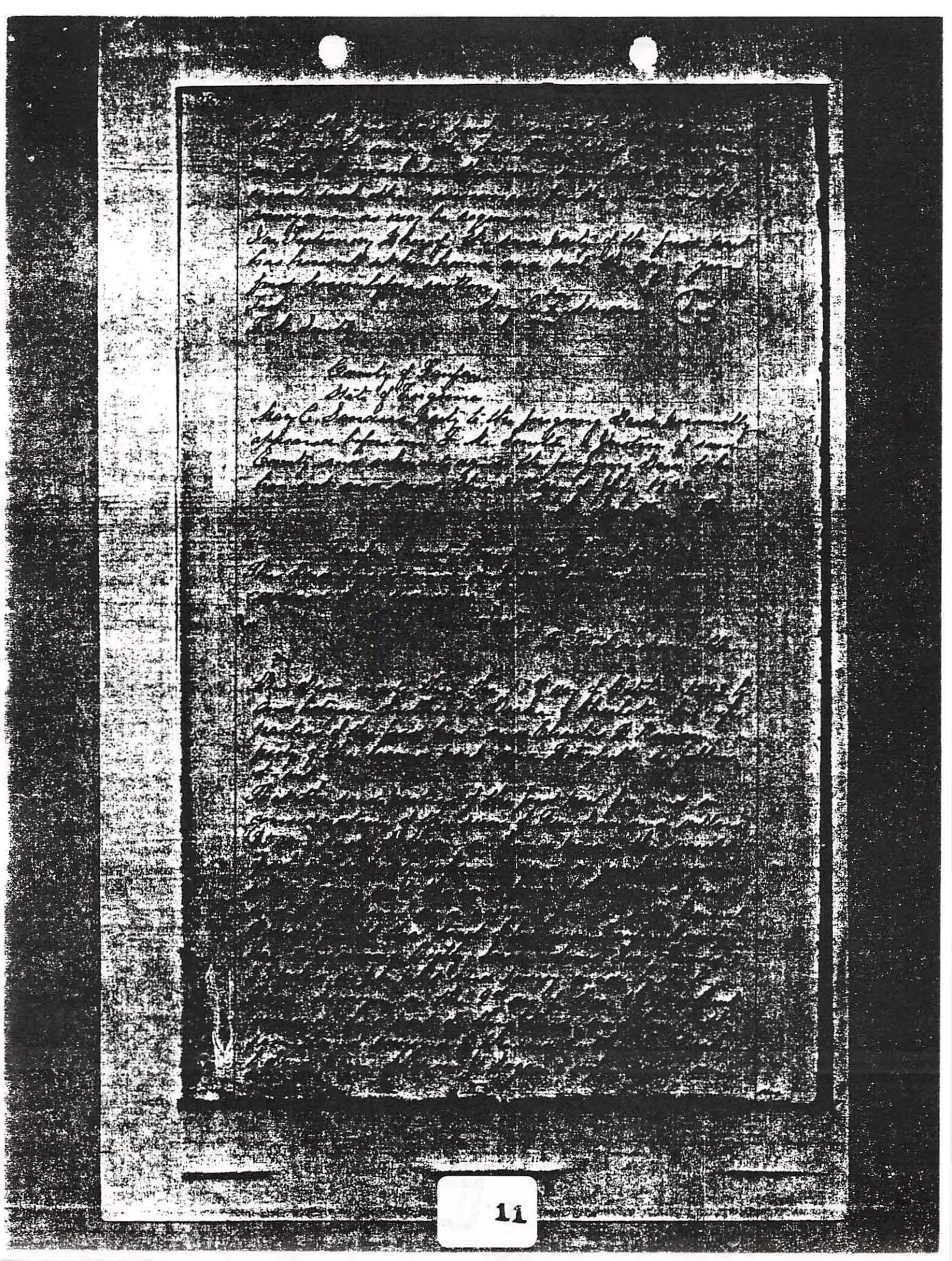
Also all the right title and interest of the said
party of the first part of, in and to the bed of
the Rancocas Creek and the land under the
water in front of the above described premises
to the middle thereof.

Also all the right title and interest of the said
party of the first part of, in and to the land
lying between the above described premises
and the Rancocas Creek.

Also all the right title and interest of the said
party of the first part of, in and to the land
lying between the above described premises
and the Public Road.

Also all the right title and interest of the said
party of the first part of, in and to the land
lying between the above described premises
and the Public Road.

PLAINTIFF'S EXHIBIT A 10



89070

CORRECTION

Gift Deed — No Consideration
Return to: Harold O. Miller
G. Atkisson
2862 Hill Rd.
Vienna, VA. 22180

THIS DEED OF GIFT, made this 10th day of October, 1978, by and between HAROLD O. MILLER, Trustee, who joins in this Deed for the purpose of releasing his right, title and interest in and to the subject ptoperty, party of the first part; and GEORGE B. ATKISSON and CARLOTTA T. ATKISSON, his wife, parties of the second part.

W I T N E S S E T H:

THAT, for and in consideration of the sum of Ten Dollars ($10.00) the receipt of which is hereby acknowledged, the said party of the first part does hereby bargain, grant, sell and convey unto the parties of the second part, all of that right of way from the land herein conveyed and described as follows:

> "A road fifteen feet wide from G, the southwest corner of the land 880 feet along the line of Mrs. Adams to near a pair of bars and across Mrs. Mary C. Sanders' land S. 32° E. 320 feet to a point near a pair of bars at her stable; thence, passing near her house and with the present outlet used by her through her land and through R. L. Adams to the country road, but, nevertheless, the same parties of the first part reserve to themselves the right to erect as many gates across the land hereby granted for a right of way from the southwest corner of the land hereby conveyed to Thomas S. Adams to the county road as may be deemed necessary."

Said property herein conveyed is the same property conveyed to Thomas S. Adams by Deed recorded in Deed Book P-5, at page 361, among the aforesaid land records of Fairfax County, Virginia.

This property is conveyed subject to any and all easements, restrictions and rights of way of record.

The party of the first part covenants that he has the right to convey the subject property to the parties of the second part; that he has done no act to encumber the same and that the parties of the second part shall have quiet and peaceable possession thereof; and further, that he, the party of the first part,

PLAINTIFF'S EXHIBIT B

12

12

will execute such further assurances to and of the said land as may be deemed necessary.

WITNESS the following signature and seal:

_____ (SEAL)
HAROLD O. MILLER, Trustee

STATE OF VIRGINIA

COUNTY OF FAIRFAX, to-wit:

The foregoing instrument was acknowledged before me this 10th day of October, 1978, by HAROLD O. MILLER.

_____
Notary Public

My Commission expires: 4-9-79

This instrument with certificate annexed, admitted to record-Office of Circuit Court Fairfax County, Va. OCT 11 1978 at 10:40A
Teste: James E. Hoffman Clerk.

_____ (SEAL)
HAROLD O. MILLER, TRUSTEE

STATE OF VIRGINIA

COUNTY OF FAIRFAX, to-wit:

Re-acknowledged before me this 5th day of November, 1979 by HAROLD O. MILLER, TRUSTEE.

_____
NOTARY PUBLIC

My commission expires: May 3, 1928

This instrument with certificate annexed, admitted to record-Office of Circuit Court Fairfax County, Va. NOV 5 1979 at 3:49P
Teste: James E. Hoffman Clerk

81-044395 BK5572 0775

THIS DEED, made this 16th day of February, 1981, by and between HAROLD O. MILLER, Trustee, herein called Grantor; and GEORGE B. ATKISSON, Trustee, herein called Grantee,

W I T N E S S E T H:

THAT, for and in consideration of the sum of TEN DOLLARS ($10.00) and other good and valuable consideration, the receipt of which is hereby acknowledged, the said Grantor does hereby bargain, sell, grantn and convey unto the Grantee, in fee simple and with General Warranty of Title, the following described real estate, located, lying and being in the County of Fairfax, State of Virginia, and more particularly described as follows:

Outlot "A", HUNTER MILL FOREST, as duly dedicated, platted and recorded in Deed Book 5244, page 774, among the land records of Fairfax County, Virginia.

AND BEING the same property conveyed unto the Grantor by Deed dated May 2, 1974 and recorded in Deed Book 4027, page 578, among the aforesaid County land records.

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

The said Trustee shall have the power to sell, lease, mortgage, encumber or subdivide the subject property in whole or in part, and the requisite power to sign, acknowledge and deliver deeds, contracts, easements, rights of way and deeds of trust without the necessity of the noteholder or noteholders, if any, joining therein, or without the necessity of the purchaser or purchasers, lessee or lessees seeing to the proper application of the purchase funds or rents.

The Grantor covenants that he has the right to convey such land to the Grantee; that he has done no act to encumber such land; that the said Grantee shall have quiet and peaceable possession thereof, free from any and all encumbrances; and that the said Grantor will execute such further assurances of the land as may be deemed necessary and requisite.

PLAINTIFF'S EXHIBIT C

14

WITNESS the following signature and seal,

HAROLD O. MILLER, TRUSTEE (SEAL)

STATE OF VIRGINIA

COUNTY OF FAIRFAX, to-wit:

The foregoing instrument was acknowledged before me this 16th day of February, 1981, by Harold O. Miller, Trustee.

NOTARY PUBLIC

My commission expires: May 3, 1982

RECORDED W/CERTIFICATE ANNEXED
1981 JUL 15 PM 3:09
FAIRFAX COUNTY, VA.
TESTE: CLERK

15

COMMONWEALTH OF VIRGINIA

COUNTY OF FAIRFAX

4100 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

September 18, 1980

Mr. George Atkisson
2852 Hill Road
Vienna, Virginia 22180

Dear Mr. Atkisson:

As you requested, I am responding to your inquiries regarding aspects of the Hawthorne Rezoning RZ 79-C-095.

I have discussed with Mr. Lawrence, counsel for the applicant, your claim of an access easement crossing the Hawthorne property and the matter of a slave cemetery on the property. Mr. Lawrence has acknowledged previous discussions with you on these matters. He assures me that he will investigate both matters further and that any obligations will be fulfilled. He indicated to me that an initial effort by a survey party to locate the cemetary was unsuccessful. At my request, Mr. Lawrence indicated he would contact you directly. For your information, a letter to Mr. Lawrence confirming our discussion is enclosed.

With regard to the error in the property boundary, this error was acknowledged by Mr. Lawrence at the public hearing. A check with the Mapping Division revealed that the error had already been corrected on the County's Official Zoning Map.

All of the above matters were discussed with Supervisor Pennino as you requested. She was aware of the matters discussed above from your meeting with her prior to the Board hearing as well as from your public testimony. Because these matters were of private concern between you and Mr. Hawthorne and did not impact on the proposed change in zoning which you did not oppose, she did not feel they presented a bar to action on the rezoning by the Board of Supervisors. The County Attorney's Office confirms the propriety of her analysis.

PLAINTIFF'S EXHIBIT D

16

September 18, 1980

I trust the above information responds satisfactorily to your inquiries. If I can be of further assistance, please call me.

Sincerely,

Sidney R. Steele, Chief
Zoning Evaluation Branch
Office of Comprehensive Planning

RSR:har

Enclosure: a/s

CC: Supervisor Pennino
Robert A. Lawrence

17

September 18, 1980

Mr. Robert A. Lawrence
P. O. Box 547
Fairfax, Virginia 22030

COPY

Re: 79-C-095

Dear Mr. Lawrence:

This letter confirms our recent discussion concerning the Hawthorne Application that was rezoned to the R-1 District on July 28, 1980.

It is my understanding that you have acknowledged Mr. George Atkisson's concern regarding an access easement across the Hawthorne property and the matter of a slave cemetery located on the property. Further, that an investigation will be made into both of these concerns and that any obligation will be fulfilled by your client.

May I also remind you that you agreed to contact Mr. Atkisson directly concerning these matters.

A copy of my response to Mr. Atkisson concerning his inquiries is enclosed for your information.

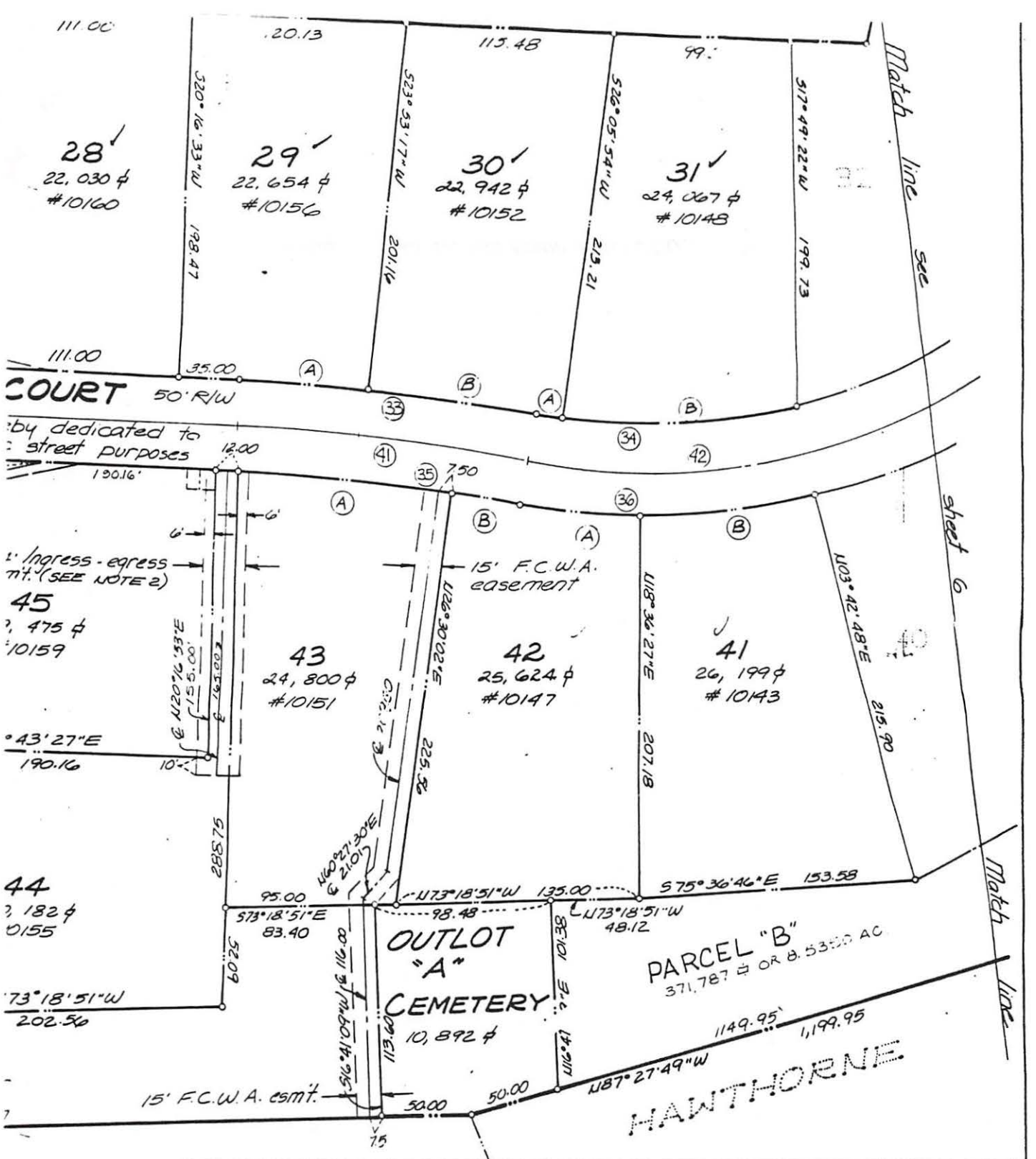
Sincerely,

Sidney R. Steele, Chief
Zoning Evaluation Branch
Office of Comprehensive Planning

SRS:har

Enclosure: a/s

cc: Mr. George Atkisson



REVISIONS

RECORD PLAT

HUNTER MILL FOREST

19 Centreville District
Fairfax County Virginia

SCALE 1" = 50'	DATE MAR. 1979	DRN JEK	CKD

PLAINTIFF'S EXHIBIT 5

Engineers Planners Surveyors Landscape Architects
Pattullo, Simmons & Associates, Ltd.
8027 Maple Avenue Vienna, Va. 22180

19

FILE DKW - 21

Pages 20-24 intentionally omitted by the printer.

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON and
CARLOTTA T. ATKISSON, his Wife,
Plaintiffs,

v. CHANCERY: 97823

WEXFORD ASSOCIATES, INC.
Serve: C. STEWART POTTER,
Registered Agent
7728 Carleigh Parkway
Springfield, VA 22152

and

CHARLES B. HAWTHORNE and
AUDREY HAWTHORNE, his Wife
c/o William J. Gorman
107 Maple Avenue, West
Vienna, VA 22180

and

JAMES E. HENRY and
SUSAN H. HENRY, his Wife
2026 Spring Branch Drive
Vienna, VA 22180

and

HERBERT VOGEL and
BARBARA VOGEL, his Wife
2032 Spring Branch Drive
Vienna, VA 22180

and

GORDON K. MAY and
WITNEY S. MAY, his Wife
2000 Spring Branch Drive
Vienna, VA 22180

126

and

DAVID A. KUNKO and
CHRISTINA KUNKO, his Wife
2001 Spring Branch Drive
Vienna, VA 22180

and

WILLIAM B. LAMMERSON and
LINDA J. LAMMERSON, his Wife
2011 Spring Branch Drive
Vienna, VA 22180

and

KENNETH R. ARNOLD and
MICHELLE M. ARNOLD, his Wife
2029 Spring Branch Drive
Vienna, VA 22180

and

MICHAEL A. DANIELS and
BONNIE L. DANIELS, his Wife
2030 Spring Branch Drive
Vienna, VA 22180

and

JOHN WHITACRE and
GENEVIEVE WHITACRE, his Wife
2008 Carrhill Road
Vienna, VA 22180

and

DONALD D. HALL and
JOAN P. HALL, his Wife
10098 Bird Road
Vienna, VA 22180

and

JOHN KOWALCZYK and
KATHERINE KOWALCZYK, his Wife
2024 Spring Branch Drive
Vienna, VA 22180

and

127

PATRICK G. DEASY and
JANE M. DEASY, his Wife
2022 Spring Branch Drive
Vienna, VA 22180

and

CHARLES E. ANDREWS and
JEAN S. ANDREWS, his Wife
2020 Spring Branch Drive
Vienna, VA 22180

and

BRIAN T. McVAY and
ELIZABETH J. McVAY, his Wife
2016 Spring Branch Drive
Vienna, VA 22180

and

M. JACK WILKENFELD and
JOANNE WILKENFELD, his Wife
2016 Spring Branch Drive
Vienna, VA 22180

and

PATRICK M. BYRNE and
KARYN A. BYRNE, his Wife
2014 Spring Branch Drive
Vienna, VA 22180

and

JACK A. WINTERS and
BERNADETTE WINTERS, his Wife
2012 Spring Branch Drive
Vienna, VA 22180

and

JOHN H. ALVIS and
LOIS J. ALVIS, his Wife
2025 Spring Branch Drive
Vienna, VA 22180

and

BERNARD P. RECA and
ROSEMARY B. RECA, his Wife
2027 Spring Branch Drive
Vienna, VA 22180

128

and

WALTER T. MORGAN and
BETH A MORGAN, his Wife
2028 Spring Branch Drive
Vienna, VA 22180

and

MICHAEL A. PERRY and
JEAN D. PERRY, his Wife
2021 Willow Branch Court
Vienna, VA 22180

and

THOMAS G. MORR and
KAREN T. MORR, his Wife
2023 Willow Branch Court
Vienna, VA 22180

and

DALE A. MOSS and
KATHLEEN S. MOSS, his Wife
2025 Willow Branch Court
Vienna, VA 22180

and

JOHN F. KARASZEWSKI and
LYNN S. KARASZEWSKI, his Wife
2024 Willow Branch Court
Vienna, VA 22180

and

KEITH F. HIGGINBOTHAM and
WENDY J. HIGGINBOTHAM, his Wife
2022 Willow Branch Court
Vienna, VA 22180

and

JUSTIN A. HOLMES and
CLAUDIA J. HOLMES, his Wife
10097 Bird Road
Vienna, VA 22180

and

129

JAMES A. EVANS and
JACQUELYN F. EVANS, his Wife
10099 Bird Road
Vienna, VA 22180

and

THOMAS A. SHOEMAKER and
JOAN C. SHOEMAKER, his Wife
2006 Carrhill Road
Vienna, VA 22180

and

JAMES S. HOOKER and
MAUREEN A. HOOKER, his Wife
2004 Carrhill Road
Vienna, VA 22180

and

LARRY D. CORDELL and
GALE M. CORDELL, his Wife
2002 Carrhill Road
Vienna, VA 22180

and

DONALD C. MINOQUE and
SUSAN A. MINOQUE, his Wife
2000 Carrhill Road
Vienna, VA 22180

and

LAWRENCE W. WYTE and
DIANE B. WYTE, his Wife
2005 Carhill Road
Vienna, VA 22180

and

RAYMOND C. CAVANAUGH and
EILEEN B. CAVANAUGH, his Wife
2007 Carrhill Road
Vienna, VA 22180

and

MICHAEL R. WALLER and
DIANE U. WALLER, his Wife
2009 Carrhill Road
Vienna, VA 22180

130

and)
)
FAIRFAX COUNTY PARK AUTHORITY)
c/o Lawrence W. Phelps, Esq.)
Assistant County Attorney)
4100 Chain Bridge Road)
Fairfax, VA 22030)

AMENDED BILL OF COMPLAINT

THE PLAINTIFFS, by counsel, move the Court for relief against the Defendants on the grounds and in the amount as hereinafter set forth:

1. Plaintiffs, GEORGE and CARLOTTA ATKISSON ("Atkissons") are sole owners of a private family cemetery lot adjacent to Section III of the Wendover Subdivision in Fairfax County, Virginia, and identified as such on the attached tax map marked Exhibit A.

2. That Defendant, WEXFORD ASSOCIATES, INC., is the sole owner of Lot Nos. 12, 13, 14, 15, and 17 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

3. That Defendants, GORDON K. MAY and WHITNEY S. MAY, are the sole owners of Lot No. 10 in Wendover Subdivision, Section III, in Fairfax County, Virginia.

4. That Defendants, DAVID A. KUNKO and CHRISTINA KUNKO, are the sole owners of Lot No. 11 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

5. That Defendants, WILLIAM B. LAMMERSEN AND LINDA J. LAMMERSON, are the sole owners of Lot No. 16 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

6. That Defendants, KENNETH R. ARNOLD and MICHELLE M. ARNOLD, are the sole owners of Lot No. 22 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

7. That Defendants, HERBERT D. VOGEL JR., and BARBARA C. VOGEL, are the sole owners of Lot No. 23 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

8. That Defendants, MICHAEL A. DANIELS and BONNIE L. DANIELS, are the sole owners of Lot No. 24 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

9. That Defendants, JOHN WHITACRE and GENEVIEVE WHITACRE, are the sole owners of Lot No. 33 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

10. That Defendants, DONALD D. HALL and JOAN P. HALL, are the sole owners of Lot No. 1 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

11. That Defendants, JAMES E. HENRY, JR., and SUSAN H. HENRY, are the sole owners of Lot No. 2 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

12. That Defendants, JOHN KOWALCZYK and KATHERINE KOWALCZYK, are the sole owners of Lot No. 3 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

13. That Defendants, PATRICK G. DEASY and JANE M. DEASY, are the sole owners of Lot No. 4 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

14. That Defendants, CHARLES E. ANDREWS and JEAN S. ANDREWS, are the sole owners of Lot No. 5 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

15. That Defendants, BRIAN T. McVAY and ELIZABETH J. McVAY, are the sole owners of Lot No. 6 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

16. That Defendants, M. JACK WILKENFELD and JOANNE WILKENFELD, are the sole owners of Lot No. 7 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

17. That Defendants, PATRICK M. BYRNE and KARYN A. BYRNE, are the sole owners of Lot No. 8 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

18. That Defendants, JACK A. WINTERS and BERNADETTE WINTERS, are the sole owners of Lot No. 9 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

19. That Defendants, CHARLES B. HAWTHORNE and AUDREY K. HAWTHORNE, are the sole owners of Lot No. 18 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

20. That Defendants, CHARLES B. HAWTHORNE and AUDREY K. HAWTHORNE, are the sole owners of Lot No. 19 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

21. That Defendants, JOHN H. ALVIS and LOIS J. ALVIS, are the sole owners of Lot No. 20 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

22. That Defendants, BERNARD P. RECA and ROSEMARY B. RECA, are the sole owners of Lot No. 21 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

23. That Defendants, WALTER T. MORGAN and BETH A. MORGAN, are the sole owners of Lot No. 25 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

133

24. That Defendants, MICAHEL A. PERRY and JEAN D. PERRY, are the sole owners of Lot No. 26 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

25. That Defendants, THOMAS G. MORR and KAREN T. MORR, are the sole owners of Lot No. 27 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

26. That Defendants, DALE A. MOSS and KATHLEEN S. MOSS, are the sole owners of Lot No. 28 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

27. That Defendants, JOHN F. KARASZEWSKI and LYNN S. KARASZEWSKI, are the sole owners of Lot No. 29 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

28. That Defendants, KEITH F. HIGGINBOTHAM and WENDY J. HIGGINBOTHAM, are the sole owners of Lot No. 30 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

29. That Defendants, JUSTIN A. HOLMES and CLAUDIA J. HOLMES, are the sole owners of Lot No. 31 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

30. That Defendants, JAMES A. EVANS and JACQUELYN F. EVANS, are the sole owners of Lot No. 32 in the Wendover Subdivison, Section III, in Fairfax County, Virginia.

31. That Defendants, THOMAS A. SHOEMAKER and JOAN C. SHOEMAKER, are the sole owners of Lot No. 34 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

32. That Defendants, JAMES S. HOOKER and MAUREEN A. HOOKER, are the sole owners of Lot No. 35 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

33. That Defendants, LARRY D. and GALE M. CORDELL, are the sole owners of Lot No. 36 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

34. That Defendants, DONALD C. MINOQUE and SUSAN A. MINOQUE, are the sole owners of Lot No. 37 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

35. That Defendants, LAWRENCE W. WYTE and DIANE B. WYTE, are the sole owners of Lot No. 38 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

36. That Defendants, RAYMOND C. CAVANAUGH and EILEEN B. CAVANAUGH, are the sole owners of Lot No. 39 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

37. That Defendants, MICHAEL R. WALLER and DIANE V. WALLER, are the sole owners of Lot No. 40 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

38. That the real property now comprising Wendover Subdivision, Section III, and now owned by the aforesaid persons, hereinafter referred to as "lot owners" collectively, was previously referred to among the land records as Parcel 48 and Parcel 49.

39. That in or about 1892, Mary C. Saunders, then owner of Parcel 49, expressly conveyed by Deed, a fifteen (15) foot wide easement, right-of-way, leading to certain property, including the family cemetery lot, owned at that time by Thomas Adams, grandfather of Plaintiff, George Atkisson. The express granting of the easement/right-of-way is recorded among the land records of Fairfax County, Virginia at Deed Book Liber P, No. 5, Page 361, and attached hereto as Exhibit B.

40. That Parcel 48 was conveyed to Robert Adams, by a deed which expressly made said land subject to the easement/right-of-way of the estate owned at that time by Thomas Adams. The express reservation and/or granting of said easement/right-of-way is recorded among the land records of Fairfax County, Virginia at Deed Book Liber H, No. 5, Page 237.

41. That the said easement/right-of-way in favor of the land owned by Thomas Adams was the only means of ingress and egress to his land, including the family cemetary lot situated therein, and ran appurtenant to the servient estates known as Parcel 49 owned by Mary Saunders and Parcel 48 owned by Robert Adams.

42. Plaintiffs obtained title to said easement/right-of-way and family cemetery lot through purchase by them of that certain real property belonging to the heirs of Thomas Adams. Said sale occurred on the condition that said cemetery lot be preserved.

43. By Deed recorded in the Fairfax County Land Records, Book 5572, Page 775, Harold Miller, Trustee of the heirs of Thomas Adams, conveyed to the Atkissons sole ownership of said family cemetery lot. See Plaintiffs' Exhibit C.

Harold Miller, by Deed recorded among the Fairfax County, Virginia Land Records, Deed Book 5344, Page 575 granted to the Atkissons sole ownership of said right-of-way leading to said cemetery lot in order for the Atkissons and their family to have a means of ingress and egress to said cemetery lot for maintenance and visitation purposes. See Plaintiffs' Exhibit D.

44. Since that time, the Atkissons are the sole owners of record of the Cemetery Lot, receive tax bills, and have kept up and

maintained said cemetery lot, including repairing headstones, posting signs, and fencing the family lot. The Atkissons used both the cemetery lot and the easement/right-of-way up until late 1983 and attempted thereafter, on occasion, to visit the cemetery by use of the easement/right-of-way.

45. That after Mary Saunders death, her interest in Parcel 49 was conveyed to Harry Smith, whose daughter, Kathleen Smith, inherited said parcel and by deed recorded among the Fairfax County, Virginia, Land Records, Book 3392, Page 72, conveyed her interest to Defendant, Charles Hawthorne, sole owner.

46. That the heirs of Robert Adams granted title to Parcel 48 to Daniel Capper and his wife, Ellyn G. Capper, by a deed recorded among the land records among the land records of Fairfax County, Virginia, at Deed Book 3688, Page 356.

47. That the Cappers in turn granted title to Parcel 48 to Charles Hawthorne and his wife, Audrey K. Hawthorne, by a deed recorded among the land records of Fairfax County, Virginia at Deed Book 4603, Page 343.

48. That the Hawthornes had full knowledge as to the existence of said cemetery lot and easement/right-of-way by way of discussions with the Plaintiff regarding the proposed widening of said easement/right-of-way.

49. That during the 1979 re-zoning hearings on the application of Defendant, Charles Hawthorne, for the re-zoning of Parcel 48 and Parcel 49 for residential development, George Atkisson testified as to the existence of said easement/right-of-way.

50. That prior to the approval of the Hawthornes' application, their attorney, Robert A. Lawrence, received correspondence from Sidney R. Steele, Chief Zoning Evaluation Branch, Fairfax County Office of Comprehensive Rezoning, setting forth an obligation to investigate and resolve any existing property rights of the Atkissons in the access right-of-way/easement across the Hawthorne property. A copy of said letter is attached hereto as Exhibit E.

51. Notwithstanding Defendant Hawthornes' knowledge of said right-of-way, their obligation to resolve the property rights of the Atkissons, and the Atkissons' continued efforts to resolve the matter, the Hawthornes, without regard to their obligation to the Atkissons, conveyed to Defendant, Wexford Associates, Inc. ("Wexford"), Parcel 48 and Parcel 49 by Deed recorded among the land records of Fairfax County, Virginia at Book 5772, Page 497 in 1983.

52. That Mr. Atkisson, upon discovering the conveyance by the Hawthornes of the parcels across which their easement ran, contacted Defendant Wexford to notify them of its legal duty not to obstruct or to trespass on the Atkissons' right-of-way and to seek a resolution which would allow Wexford to develop the parcels while preserving the Atkissons' access to the family cemetery.

53. That in late 1983, Defendant, Wexford Associates, Inc., with deliberate malicious and wanton disregard to the Atkissons' property rights, began the development of residences known as Section III of Wendover Subdivision, physically destroying the site of the easement/ right-of-way and obstructing Plaintiffs' use thereof.

54. That Defendant Wexford has further obstructed the said easement/right-of-way by the development of a detention pond.

55. That said easement/right-of-way is the sole means of ingress and egress from the cemetary lot to the Clark Crossing outlet road leading to Post Road. Since the inception of said trespass and obstruction by Defendant, Wexford Associates Inc., and the continuing trespass and obstruction by both Defendant Wexford and Defendant "lot owners", the cemetary has been landlocked. These obstructions have made it impossible for Plaintiff or his family members to care for or visit their family cemetery lot since 1983 without arguably trespassing upon land of neighboring owners. Said lot contains the remains of at least ten (10) members of the Plaintiffs' family.

56. That the said easement/right-of-way has been used notoriously, continuously, exclusively, and openly by Thomas Adams and his descendants, including George Atkisson, from the time of conveyance, from Mary Saunders and Robert Adams up until late in 1983.

57. Defendant Fairfax County Park Authority, hereinafter "Park Authority", has trespassed directly upon said cemetery lot and has removed barriers placed by Mr. Atkisson in an attempt to keep out trespassers. Said Park Authority has used a path contrary to an easement/right-of-way which the Atkissons dedicated to be used for horseback riding, and has trampled directly upon the resting places of the Atkissons' ancestors.

58. Defendant Park Authority also owns land adjacent to Wendover Subdivision, Section III, which was deeded and/or otherwise

granted to said Defendant by Defendant Hawthorne from Parcel 48 and/or Parcel 49.

59. That the said easement/right-of-way in favor of the Atkisson cemetery property runs appurtenant to the servient estate of said land owned by the Park Authority.

60. That the Park Authority has or is planning to interrupt and obstruct the Plaintiffs' easement/right-of-way from the cemetery to the Clark Crossing outlet road leading to Post Road by construction of a parking lot on or near said easement/right-of-way.

61. That the Plaintiffs have no plain, adequate, and complete remedy at law.

COUNT I

Injunction and Damages for Obstruction of Express Easement

62. That the allegations of Paragraphs 1 through 61, inclusive, are re-alleged and incorporated herein by reference.

63. That the Plaintiffs have an express easement/right-of-way appurtenant by deed in favor of the dominant estate (cemetery lot) which is traceable by a direct chain of title through to the Defendants herein, having conveyed with the land.

64. That the actions of Defendant, Wexford Associates, Inc., and the lot owners constitute an ongoing and continuing trespass and obstruction of Plaintiffs' easement/right-of-way which has resulted in damages and disrepair to the cemetery lot, violation of property rights, diminuation in value of the cemetery lot, deprivation of use of the cemetary lot by Plaintiffs, and has caused

emotional distress of related personal injury to be suffered by the Plaintiffs.

65. That Defendant Park Authority is prospectively engaged in the obstruction of said easement/right-of-way.

66. W H E R E F O R E, the Plaintiffs demand a permanent injunction against all Defendants to prevent further trespass and obstruction to the family cemetery lot and the easement/right-of-way leading thereto, to have any existing impediments and obstructions removed at the expense of Defendants, jointly and severably, and to have a declaration of existence and extent of the easement/ right-of-way.

(a) Plaintiffs further demand compensatory damages in the amount of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) to be paid jointly and severally by all Defendants for damages to the dominant estate, diminuation in value, deprivation of use of real property, intentional infliction of emotional distress, and related personal injury.

(b) Plaintiffs further demand punitive damages in the amount of FIVE HUNDRED THOUSAND ($500,000.00) to be paid jointly and severally by all Defendants, excluding the Park Authority, for the intentional, malicious, and wanton trespass and deprivation of property rights of the Plaintiffs.

(c) Plaintiffs further request that Defendants be orderd to pay all reasonable attorneys' fees and costs incurred by the Plaintiffs and for such other equitable relief as the Court deems appropriate and just.

COUNT II

Injunction and Damages for Obstruction of Implied Easement by Necessity

67. That the allegations of Paragraphs 1 through 66, inclusive, are re-alleged and incorporated herein by reference.

68. That, in the alternative, the Defendants in fact have or had actual and/or constructive notice of the easement/ right-of-way and until late 1983 it was, and certain areas remained, visible and well defined.

69. That no other means of egress or ingress to the cemetery lot can be substituted at the reasonable expense of the Plaintiffs and that said easement/right-of-way is necessary for the reasonable enjoyment of the dominant estate.

70. That the actions of Defendant, Wexford Associates, Inc., and the lot owners constitute an ongoing and continuing trespass and obstruction of Plaintiffs' easement/right-of-way which has resulted in damages and disrepair to the cemetary lot, violation of property rights, diminuation in value of the cemetery lot, deprivation of use of the cemetary lot by Plaintiffs, and has caused emotional distress of related personal injury to be suffered by the Plaintiffs.

71. That Defendant Park Authority is prospectively engaged in the obstruction of said easement/right-of-way.

72. W H E R E F O R E, the Plaintiffs demand that the Court find an implied easement/right-of-way by necessity exists in favor of the cemetery lot and issue a permanent injunction against all Defendants to prevent further trespass and obstruction to the

easement/right-of-way of the family cemetery lot, to have any existing impediments and obstructions removed at the expense of Defendants, jointly and severably, excluding Defendant Park Authority.

(a) Plaintiffs further demand compensatory damages in the amount of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) to be paid jointly and severally by all Defendants for damages to the dominant estate, diminuation in value, deprivation of use of real property, intentional infliction of emotional distress, and related personal injury.

(b) Plaintiffs further demand punitive damages in the amount of FIVE HUNDRED THOUSAND ($500,000.00) to be paid jointly and severally by all Defendants excluding the Park Authority for the intentional, malicious, and wanton trespass and deprivation of property rights of the Plaintiffs.

(c) Plaintiffs further request that Defendants be orderd to pay all reasonable attorneys' fees and costs incurred by the Plaintiffs and for such other equitable relief as the Court deems appropriate and just.

COUNT III

Injunction and Damages for Obstruction of Prescriptive Easement

73. That the allegations of Paragraphs 1 through 72, inclusive, are re-alleged and incorporated herein by reference.

74. That, in the alternative, the Plaintiffs adverse use of a private way through the described property owned by Defendants had been exclusive, continuous, and notorious for a period of time exceeding 20 years.

75. That the Defendants and their predecessor owners of the land now comprising Wendover Subdivision, Section III, knowingly acquiesced in the use of said private way by Plaintiffs and Plaintiffs' family for a period exceeding 20 years.

76. That the actions of Defendant, Wexford Associates, Inc., and the lot owners constitute an ongoing and continuing trespass and obstruction of Plaintiffs' easement/right-of-way which has resulted in damages and disrepair to the cemetery lot, violation of property rights, diminuation in value of the cemetery lot, deprivation of use of the cemetary lot by Plaintiffs, and has caused emotional distress of related personal injury to be suffered by the Plaintiffs.

77. That Defendant Park Authority is prospectively engaged in the obstruction of said easement/right-of-way.

78. W H E R E F O R E, the Plaintiffs demand that the Court find an easement/right-of-way by prescription exists in favor of the cemetery lot and issue a permanent injunction against all Defendants to prevent further trespass and obstruction to the easement/right-of-way of the family cemetery lot, to have any existing impediments and obstructions removed at the expense of Defendants, jointly and severably, excluding Defendant Park Authority.

(a) Plaintiffs further demand compensatory damages in the amount of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) to be paid jointly and severally by all Defendants for damages to the dominant estate, diminuation in value, deprivation of use of real property, intentional infliction of emotional distress, and related personal injury.

(b) Plaintiffs further demand punitive damages in the amount of FIVE HUNDRED THOUSAND ($500,000.00) to be paid jointly and severally by all Defendants excluding the Park Authority for the intentional, malicious, and wanton trespass and deprivation of property rights of the Plaintiffs.

(c) Plaintiffs further request that Defendants be orderd to pay all reasonable attorneys' fees and costs incurred by the Plaintiffs and for such other equitable relief as the Court deems appropriate and just.

COUNT IV

Inverse Condemnation

79. That the allegations of Paragraphs 1 through 78, inclusive, are re-alleged and incorporated herein by reference.

80. That Defendant, Fairfax County Park Authority, is a political subdivision of the Commonwealth of Virginia established pursuant to Title 15.1, Chapter 27 of the Code of Virginia.

81. That Defendant Fairfax County Park Authority hereinafter "Park Authority", has trespassed directly upon said cemetery lot and has removed barriers placed by Mr. Atkisson in an attempt to keep out trespassers. Said Park Authority has used a path contrary to an easement/right-of-way which the Atkissons dedicated to be used for horseback riding, and has trampled directly upon the resting places of the Atkissons' ancestors, and/or allowed Park patrons to trample upon the cemetery grounds.

82. That said actions of Defendant Park Authority in allowing patrons to cross Plaintiffs' property constitutes an on-

going and continuing trespass upon the property of the Plaintiffs and violation of property rights which has resulted in damage and disrepair to the cemetery lot for public use, deprivation of value to the property for public use, and increased costs of repair and maintenance to the property, and headstones erected thereupon, and emotional distress and related personal injury to the Plaintiffs.

83. That Article 1, Section 11 of the Virginia Constitution guarantees compensation to private property owners for property damaged by public use by the Park Authority.

84. W H E R E F O R E, the Plaintiffs demand compensatory damages against the Park Authority for the private property damaged for public use in the amount of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) against the Fairfax County Park Authority.

George Atkisson
GEORGE ATKISSON
By Counsel

ANDERSON, QUINN, & WYLAND

By: Quentin R. Corrie by Ltr
QUENTIN R. CORRIE
Counsel for Plaintiff
8111 Gatehouse Road, Suite 409
Falls Church, VA 22047
(703) 573-3520

and

Pinak A. Mehta by Ltr
PINAK A. MEHTA
Co-Counsel for Plaintiff
7236 Bona Vista Court
Springfield, VA 22150

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Amended Complaint has been mailed, postage prepaid, this 29th day of January, 1988, to Stephen K. Fox, Esq., Fox & Proffitt, P.C., 10385 Main Street, Suite 203, Fairfax, VA 22030; Sally A. Hostetler, Odin, Feldman & Pittleman, P.C., 10505 Judicial Drive, Suite 300, Fairfax, VA 22030; Lawrence W. Phelps, Esq., County Attorney's Office, 4100 Chain Bridge Road, Fairfax, VA 22030; ~~and~~

Quentin R. Corrie

QUENTIN R. CORRIE

(1)

ATKISSON CHAIN P.S-361

361.

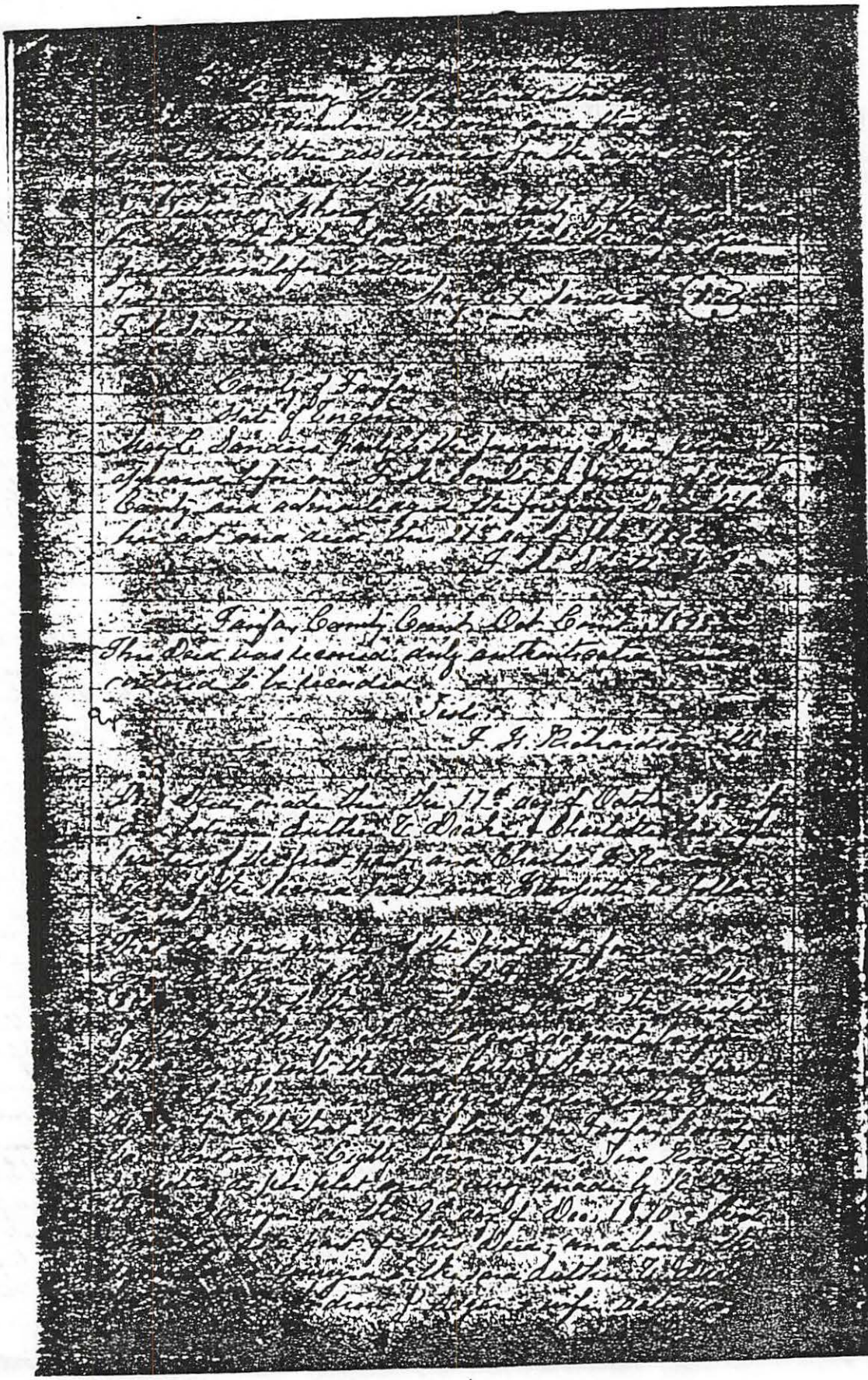
Plat

This Indenture, made this — day of ——— A.D. 1892. by and between Mrs. Mary C. Sanders, party of the first part, and Mark L. Adams, party of the second part, both of Fannin County, Tex:

Witnesseth, That the said party of the first part, for and in consideration of the sum of Three hundred dollars each, and her as hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey unto the said party of the second part, a certain tract of land, situated in Precinct No. Four, Fannin Co., Tex and described in Joseph Berry's survey, dated May 14th 1892. as follows: Plat attached. Beginning at a point in the middle of Bois Branch, same on the South-west boundary of the M. C. & R. R. R.; thence with said boundary, S. 38° 15' W. 36 9/10 ft. to B, a stake on the line of Mrs. Sarah Adams; thence with the line of Mrs. Adams, South 89° 14' W (bearing taken from the middle of the R. R. track), passing through a White Oak tree on the R. R. cut, 823 1/10 ft. to C., a Black Oak tree, S. 00° 50' W. 185 9/10 ft. to D. a White Oak tree; S. 33° 50' W. 826 1/10 ft. to E. a Hickory tree; S. 48° 52' W. 429 4/10 ft. to F. a Cherry tree; S. 21° W. 40 ft. to G, a stone; thence S. 83° 15' E. passing through a stone on the West bank of Bois Branch at 131 4/10 ft; 1131 4/10 ft. to H. a point in the middle of the Branch; thence with the meanders of said Branch S. the beginning, containing (15) acres.

Also, the right of way from the above land by a road 15 ft. wide from G. the South-west corner of the above land, 880 feet along the line of Mrs. Adams, to near a pair of bars and thence across Mrs. Mary C. Sanders land, S. 82° 30' E. 320 ft. to a point near a pair of bars at her stable, thence passing near her house and with the present cattle-road of her through through her land and through C. L. Adams to the County Road, but nevertheless the said party of the first part reserves to herself the right to erect as many gates across the land hereby granted for a right-way from the South-west corner of the land hereby sold to Thos. L. Adams to the County Road, as she may deem necessary. And the

Exhibit B



81-044395 BK5572 0775

Grantee Address 10194 Hillington Ct. Vienna Va 22181

Return to: G. Miller

THIS DEED, made this 16th day of February, 1981, by and between HAROLD O. MILLER, Trustee, herein called Grantor; and GEORGE B. ATKISSON, Trustee, herein called Grantee,

W I T N E S S E T H:

THAT, for and in consideration of the sum of TEN DOLLARS ($10.00) and other good and valuable consideration, the receipt of which is hereby acknowledged, the said Grantor does hereby bargain, sell, grant and convey unto the Grantee, in fee simple and with General Warranty of Title, the following described real estate, located, lying and being in the County of Fairfax, State of Virginia, and more particularly described as follows:

> Outlot "A", HUNTER MILL FOREST, as duly dedicated, platted and recorded in Deed Book 5244, page 774, among the land records of Fairfax County, Virginia.
>
> AND BEING the same property conveyed unto the Grantor by Deed dated May 2, 1974 and recorded in Deed Book 4027, page 578, among the aforesaid County land records.
>
> This conveyance is made subject to recorded conditions, restrictions, easements and rights of way of record affecting the property hereby conveyed.

The said Trustee shall have the power to sell, lease, mortgage, encumber or subdivide the subject property in whole or in part, and the requisite power to sign, acknowledge and deliver deeds, contracts, easements, rights of way and deeds of trust without the necessity of the noteholder or noteholders, if any, joining therein, or without the necessity of the purchaser or purchasers, lessee or lessees seeing to the proper application of the purchase funds or rents.

The Grantor covenants that he has the right to convey such land to the Grantee; that he has done no act to encumber such land; that the said Grantee shall have quiet and peaceable possession thereof, free from any and all encumbrances; and that the said Grantor will execute such further assurances of the land as may be deemed necessary and requisite.

Exhibit C

WITNESS the following signature and seal,

HAROLD O. MILLER, TRUSTEE (SEAL)

STATE OF VIRGINIA

COUNTY OF FAIRFAX, to-wit:

The foregoing instrument was acknowledged before me this 16th day of February, 1981, by Harold O. Miller, Trustee.

NOTARY PUBLIC

My commission expires: May 8, 1982

RECORDED W/CERTIFICATE ANNEXED
1981 JUL 15 PM 3:09
FAIRFAX COUNTY, VA.
TESTE: CLERK

89070

CORRECTION

Gift Deed—No Consideration
Return to: Harold O. Miller
G. Atkisson
2862 Hill Road
Vienna, VA. 22180

THIS DEED OF GIFT, made this 10th day of October, 1978, by and between HAROLD O. MILLER, Trustee, who joins in this Deed for the purpose of releasing his right, title and interest in and to the subject ptoperty, party of the first part; and GEORGE B. ATKISSON and CARLOTTA T. ATKISSON, his wife, parties of the second part.

W I T N E S S E T H:

THAT, for and in consideration of the sum of Ten Dollars ($10.00) the receipt of which is hereby acknowledged, the said party of the first part does hereby bargain, grant, sell and convey unto the parties of the second part, all of that right of way from the land herein conveyed and described as follows:

> "A road fifteen feet wide from G, the southwest corner of the land 880 feet along the line of Mrs. Adams to near a pair of bars and across Mrs. Mary C. Sanders' land S. 32° E. 320 feet to a point near a pair of bars at her stable; thence, passing near her house and with the present outlet used by her through her land and through R. L. Adams to the country road, but, nevertheless, the same parties of the first part reserve to themselves the right to erect as many gates across the land hereby granted for a right of way from the southwest corner of the land hereby conveyed to Thomas S. Adams to the county road as may be deemed necessary."

Said property herein conveyed is the same property conveyed to Thomas S. Adams by Deed recorded in Deed Book P-5, at page 361, among the aforesaid land records of Fairfax County, Virginia.

This property is conveyed subject to any and all easements, restrictions and rights of way of record.

The party of the first part covenants that he has the right to convey the subject property to the parties of the second part; that he has done no act to encumber the same and that the parties of the second part shall have quiet and peaceable possession thereof; and further, that he, the party of the first part,

Exhibit D

September 18, 1980

Mr. Robert A. Lawrence
P. O. Box 547
Fairfax, Virginia 22030

COPY

Re: 79-C-095

Dear Mr. Lawrence:

This letter confirms our recent discussion concerning the Hawthorne Application that was rezoned to the R-1 District on July 28, 1980.

It is my understanding that you have acknowledged Mr. George Atkisson's concern regarding an access easement across the Hawthorne property and the matter of a slave cemetary located on the property. Further, that an investigation will be made into both of these concerns and that any obligation will be fulfilled by your client.

May I also remind you that you agreed to contact Mr. Atkisson directly concerning these matters.

A copy of my response to Mr. Atkisson concerning his inquiries is enclosed for your information.

Sincerely.

Sidney R. Steele, Chief
Zoning Evaluation Branch
Office of Comprehensive Planning

SRS:har

Enclosure: a/s

cc: Mr. George Atkisson

Exhibit E

81-044395 BK5572 0775

Grantee Address 10194 Hunglen Ct. Vienna Va 22181

THIS DEED, made this 16th day of February, 1981, by and betwee HAROLD O. MILLER, Trustee, herein called Grantor; and GEORGE B. ATKISSON, Trustee, herein called Grantee,

W I T N E S S E T H:

THAT, for and in consideration of the sum of TEN DOLLARS ($10. and other good and valuable consideration, the receipt of which is hereby acknowledged, the said Grantor does hereby bargain, sell, grant and con unto the Grantee, in fee simple and with General Warranty of Title, the following described real estate, located, lying and being in the County o Fairfax, State of Virginia, and more particularly described as follows:

Outlot "A", HUNTER MILL FOREST, as duly dedicated, platted and recorded in Deed Book 5244, page 774, among the land records of Fairfax County, Virginia.

AND BEING the same property conveyed unto the Grantor by Deed dated May 2, 1974 and recorded in Deed Book 4027, page 578, among the aforesaid County land records.

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

The said Trustee shall have the power to sell, lease, mortgage encumber or subdivide the subject property in whole or in part, and the requisite power to sign, acknowledge and deliver deeds, contracts, easemen rights of way and deeds of trust without the necessity of the noteholder o noteholders, if any, joining therein, or without the necessity of the purchaser or purchasers, lessee or lessees seeing to the proper applicatio the purchase funds or rents.

The Grantor covenants that he has the right to convey such lan to the Grantee; that he has done no act to encumber such land; that the said Grantee shall have quiet and peaceable possession thereof, free from and all encumbrances; and that the said Grantor will execute such further assurances of the land as may be deemed necessary and requisite.

EXHIBIT C

WITNESS the following signature and seal,

Harold O. Miller (SEAL)
HAROLD O. MILLER, TRUSTEE

STATE OF VIRGINIA

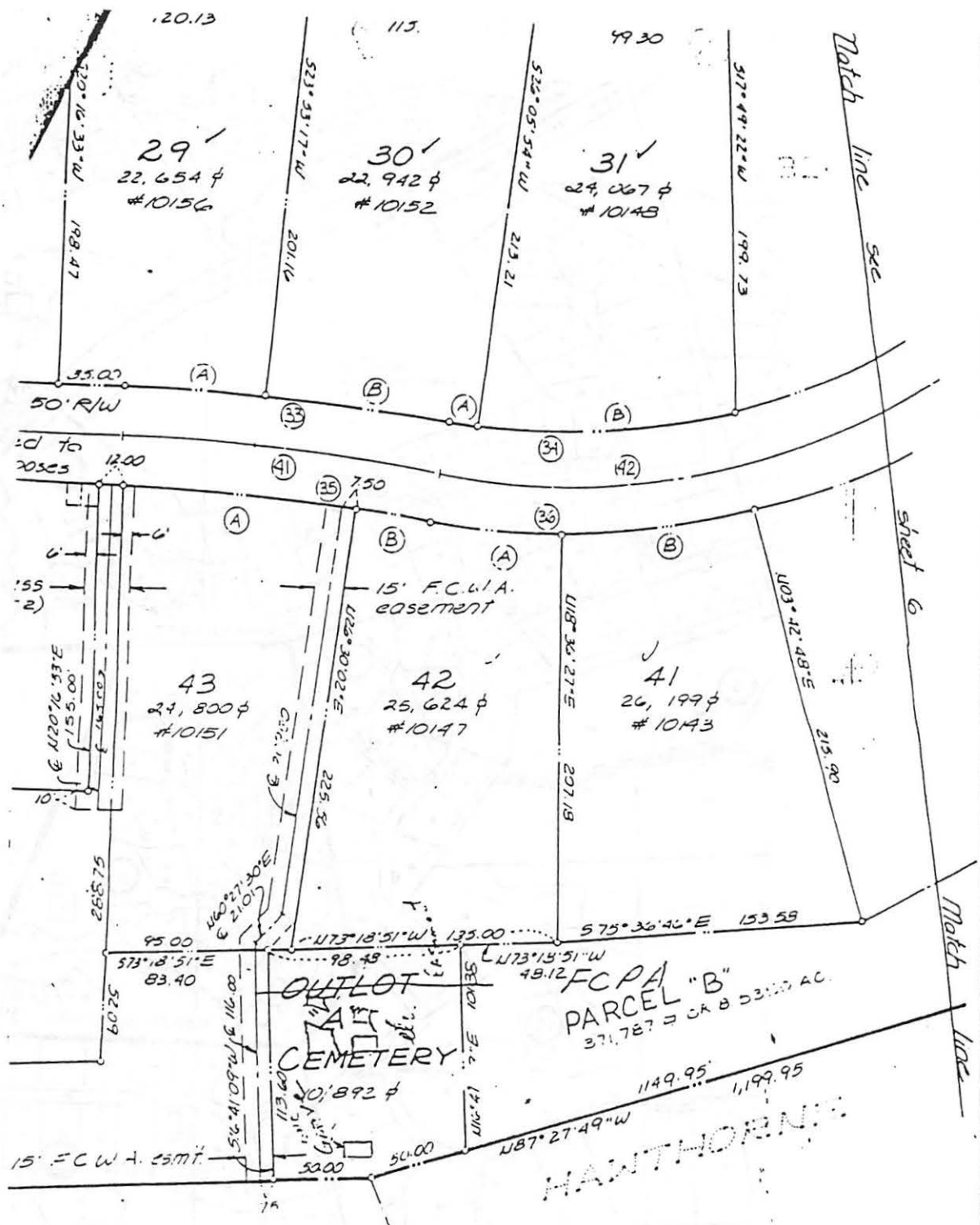
COUNTY OF FAIRFAX, to-wit;

The foregoing instrument was acknowledged before me this 16th day of February, 1981, by Harold O. Miller, Trustee.

Rita C. Sudick
NOTARY PUBLIC

My commission expires: May 3, 1982

RECORDED W/CERTIFICATE ANNEXED
1981 JUL 15 PM 3:09
FAIRFAX COUNTY, VA.
TESTE: [illegible] CLERK



REVISIONS	RECORD PLAT
	HUNTER MILL FOREST
	Centreville District Fairfax County Virginia
	SCALE 1" = 50' | DATE MAR. 1973 | DRN JEK | CKD
	Rinaldi Simmons & Associates, Inc. Engineers Planners Surveyors Landscape Architects Alexandria, Va. 22314

FILE PKH-21

SHEET 5 OF 6

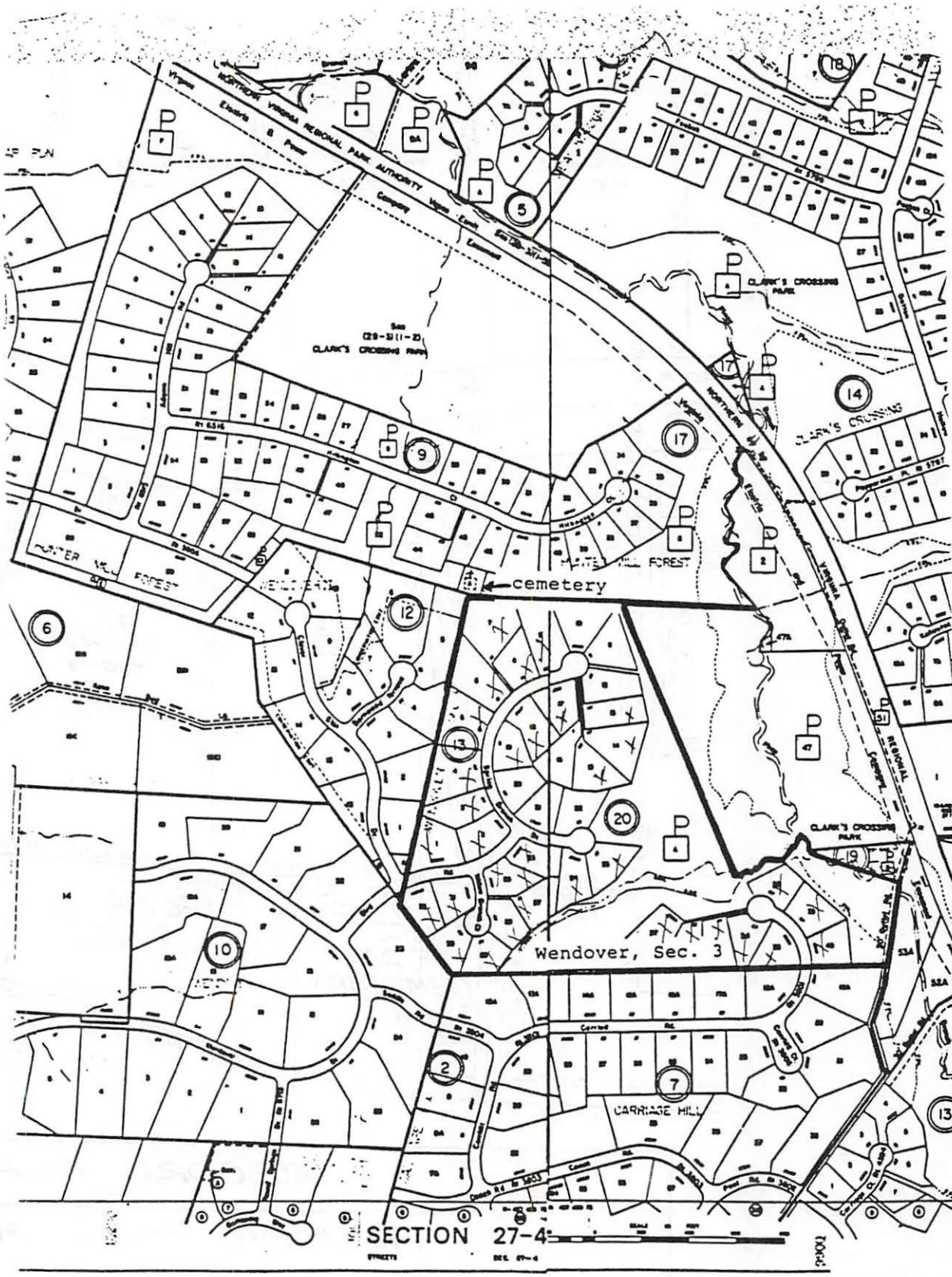


EXHIBIT A

89070

correction

THIS DEED OF GIFT, made this 10th day of October, 1978, by and between HAROLD O. MILLER, Trustee, who joins in this Deed for the purpose of releasing his right, title and interest in and to the subject ptoperty, party of the first part; and GEORGE B ATKISSON and CARLOTTA V. ATKISSON, his wife, parties of the second part.

Gift Deed—No Consideration
Return to: Harold O. Miller
GEORGE ATKISSON
2862 Hill Road
Vienna, VA. 22180

W I T N E S S E T H:

THAT, for and in consideration of the sum of Ten Dollars ($10.00) the receipt of which is hereby acknowledged, the said party of the first part does hereby bargain, grant, sell and convey unto the parties of the second part, all of that right of way from the land herein conveyed and described as follows:

> "A road fifteen feet wide from G, the southwest corner of the land 880 feet along the line of Mrs. Adams to near a pair of bars and across Mrs. Mary C. Sanders' land S. 32° E. 320 feet to a point near a pair of bars at her stable; thence, passing near her house and with the present outlet used by her through her land and through R. L. Adams to the country road, but, nevertheless, the same parties of the first part reserve to themselves the right to erect as many gates across the land hereby granted for a right of way from the southwest corner of the land hereby conveyed to Thomas S. Adams to the county road as may be deemed necessary."

Said property herein conveyed is the same property conveyed to Thomas S. Adams by Deed recorded in Deed Book P-5, at page 361, among the aforesaid land records of Fairfax County, Virginia.

This property is conveyed subject to any and all easements, restrictions and rights of way of record.

The party of the first part covenants that he has the right to convey the subject property to the parties of the second part; that he has done no act to encumber the same and that the parties of the second part shall have quiet and peaceable possession thereof; and further, that he, the party of the first part,

EXHIBIT D

will execute such further assurances to and of the said land as may be deemed necessary.

WITNESS the following signature and seal:

HAROLD O. MILLER, Trustee (SEAL)

STATE OF VIRGINIA

COUNTY OF FAIRFAX, to-wit:

The foregoing instrument was acknowledged before me this 10th day of October, 1978, by HAROLD O. MILLER.

Kay M. Smith (Notarial Seal)
Notary Public

My Commission expires: 4-9-79

This instrument with certificate annexed, admitted to record-Office of Circuit Court Fairfax County, Va. OCT 11 1978 at 10:40A.
Teste: James E. Hoofnagle Clerk.

HAROLD O. MILLER, TRUSTEE (SEAL)

STATE OF VIRGINIA

COUNTY OF FAIRFAX, to-wit:

Re-acknowledged before me this 5th day of November, 1979 by HAROLD O. MILLER, TRUSTEE.

Vida C. Stokes
NOTARY PUBLIC

My commission expires: May 3, 1928

This instrument with certificate annexed, admitted to record-Office of Circuit Court Fairfax County, Va. NOV 5 1979 at 3:19 P.
Teste: James E. Hoofnagle Clerk

Enclosure 1

September 18, 1980

Mr. Robert A. Lawrence
P. O. Box 547
Fairfax, Virginia 22030

COPY

Re: 79-C-095

Dear Mr. Lawrence:

This letter confirms our recent discussion concerning the Hawthorne Application that was rezoned to the R-1 District on July 28, 1980.

It is my understanding that you have acknowledged Mr. George Atkisson's concern regarding an access easement across the Hawthorne property and the matter of a slave cemetary located on the property. Further, that an investigation will be made into both of these concerns and that any obligation will be fulfilled by your client.

May I also remind you that you agreed to contact Mr. Atkisson directly concerning these matters.

A copy of my response to Mr. Atkisson concerning his inquiries is enclosed for your information.

Sincerely.

Sidney R. Steele, Chief
Zoning Evaluation Branch
Office of Comprehensive Planning

SRS:har

Enclosure: a/s

cc: Mr. George Atkisson

EXHIBIT E

(1)

ATKISSON CHOIR P.S-361

361.

This Indenture, made this — day of ——— A.D. 1892, by and between Mary Ann C. Adams, party of the first part, and Thos. L. Adams, party of the second part, both of Fulton County, Ga.

Witnesseth, That the said party of the first part, for and in consideration of the sum of Three hundred dollars cash, and other valuable considerations in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey unto the said party of the second part, a certain tract of land, situate in Provinces District, Fulton Co., Ga., and described in Fourth Berry's Survey, dated May 14th 1892, as follows: Start at Marked Spring N.E. a point in the middle of Sandy Branch, and on the South-west boundary of the W. & A. R.R.; thence with said boundary, S. 33° 15' W. 5 69 2/10 ft. to B, a stake in the line of Mrs. Adams; thence with the line of Mrs. Adams, South 89° 14' W. (crossing Road from the middle of the R.R. track), passing through a White Oak tree on the N.E. bank, 823 1/10 ft. to C, a Black Oak tree, S. 00° 30' W. 185 6/10 ft. to D, a White Oak tree; S. 33° 30' W. 82 6/10 ft. to E, a Hickory tree; S. 75° 32' W. 429 4/10 ft. to F, a Hickory tree; S. 21° W. 40 ft. to G, a stone; thence S. 83° 15' E. passing through a stone on the East bank of Sandy Branch at 1131 4/10 ft; 1151 4/10 ft. to H, a point in the middle of the Branch; thence with the meanderings of said Branch to the beginning, containing (15) acres.

Also, the right of way from the above land by a road 15 ft. wide from G, the South-west corner of the above land, 880 feet along the line of Mrs. Adams, to near a pair of bars and thence across Mrs. Mary C. Sanders's land, S. 32° 30 E. 320 ft. to a point near a pair of bars at her stable, thence passing near her house and with the present cart-road of her through through her land and through T. L. Adams to the County Road, but nevertheless the said party of the first part reserves to herself the right to erect as many gates across the land hereby granted for a right-way from the South-west corner of the land hereby sold to Thos. L. Adams to the County Road, as she may deem necessary. And the

EXHIBIT B

RECEIVED
MAR 25 1993
5+A

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON and CARLOTTA T. ATKISSON, Plaintiffs, v. WEXFORD ASSOCIATES, INC. and FAIRFAX COUNTY PARK AUTHORITY, et al., Defendants.	)	CHANCERY NO. 97823

FINAL ORDER

THIS MATTER CAME ON TO BE HEARD upon the Complaint of the plaintiffs, George Atkisson and Carlotta T. Atkisson, and upon the trial of this matter during which time plaintiffs presented evidence and then nonsuited as to defendants Michael A. Daniels, Bonnie L. Daniels, John Whitacre, Genevieve Whitacre, Donald D. Hall, Joan P. Hall, Patrick M. Byrne, Karen A. Byrne, Jack A. Winters, Bernadette Winters, Michael A. Perry, Jean D. Perry, Thomas G. Morr, Karen T. Morr, Dale A. Moss, Kathleen S. Moss, John F. Karaszewski, Lynn S. Karaszewski, Keith F. Higginbotham, Wendy J. Higginbotham, Justin A. Holmes, Claudia J. Holmes, James A. Evans, Jacquelyn F. Evans, Thomas A. Shoemaker, Joan C. Shoemaker, James S. Hooker, Maureen A. Hooker, Larry D. Cordell, Gale M. Cordell, Donald C. Minoque, Susan A. Minoque, Raymond C. Cavanaugh, Eileen B. Cavanaugh, Michael R. Waller, and Diane U. Waller, and Wexford Associates, Inc., in its capacity as lot owner only, for lots number 12, 13, 14, 15 and 17. The defendants then presented their evidence, following which this Court determined that

plaintiffs owned an easement through the real property of defendants by way of an express easement and an easement by prescription. The Court determined that this easement is located across the affected properties in accordance with the express grant contained in the Deed of 1892 located in Fairfax County Land Records at Deed Book P-5, Page 361. A view of the easement was taken by the parties and the Court, following which a letter opinion dated July 15, 1992, herein incorporated by reference, was issued by this Court wherein this Court requested that a subsequent hearing be held on the issues of the monetary value of the easement and alternative easements. At that hearing, the plaintiffs and defendants submitted evidence on the issue of damages, and the Court issued a letter opinion dated February 9, 1993, which is hereby incorporated by reference, wherein the Court ordered the following:

1. Each homeowner whose house blocked the plaintiffs' easement shall pay nominal damages to the plaintiffs of One Hundred Dollars ($100.00) per homeowner;

2. The Fairfax County Park Authority is to provide an easement to the plaintiffs for access to the cemetery of the plaintiffs that is accessible by an ordinary motor vehicle; and

3. The defendant, Wexford Associates, Inc., oppressively or maliciously, interfered with the plaintiffs' easement and therefore shall pay punitive damages in the amount of Ten Thousand Dollars ($10,000.00) to the plaintiffs, George Atkisson and Carlotta T. Atkisson; and therefore, it is

ADJUDGED, ORDERED AND DECREED that the plaintiffs' Motion for Nonsuit as to defendants Michael A. Daniels, Bonnie L. Daniels, John Whitacre, Genevieve Whitacre, Donald D. Hall, Joan P. Hall, Patrick M. Byrne, Karen A. Byrne, Jack A. Winters, Bernadette Winters, Michael A. Perry, Jean D. Perry, Thomas G. Morr, Karen T. Morr, Dale A. Moss, Kathleen S. Moss, John F. Karaszewski, Lynn S. Karaszewski, Keith F. Higginbotham, Wendy J. Higginbotham, Justin A. Holmes, Claudia J. Holmes, James A. Evans, Jacquelyn F. Evans, Thomas A. Shoemaker, Joan C. Shoemaker, James S. Hooker, Maureen A. Hooker, Larry D. Cordell, Gale M. Cordell, Donald C. Minoque, Susan A. Minoque, Raymond C. Cavanaugh, Eileen B. Cavanaugh, Michael R. Waller, and Diane U. Waller, and Wexford Associates, Inc., in its capacity as lot owner only, for lots number 12, 13, 14, 15 and 17, is hereby granted.

ADJUDGED, ORDERED AND DECREED that the plaintiffs, George Atkisson and Carlotta T. Atkisson, are the owners of an easement by express grant and by prescription and is located across the affected properties in accordance with the express grant contained in the Deed of 1892 located in the Fairfax County Land Records at Deed Book P-5, Page 361; and, it is further

ADJUDGED, ORDERED AND DECREED that each defendant whose residential dwelling blocks the easement of the plaintiffs shall pay to the plaintiffs One Hundred Dollars ($100.00); and, it is further

ADJUDGED, ORDERED AND DECREED that defendant Fairfax County Park Authority shall, at its own expense, provide an easement

across Fairfax County Park Authority land to allow access by the plaintiffs to the cemetery of the plaintiffs. This easement shall be accessible by an ordinary motor vehicle; and, it is further

ADJUDGED, ORDERED AND DECREED that defendant Wexford Associates, Inc., shall pay to plaintiffs, George Atkisson and Carlotta T. Atkisson, punitive damages in the amount of Ten Thousand Dollars ($10,000.00); and, it is further

ADJUDGED, ORDERED AND DECREED that the names of all interested parties, as found in the recorded lis pendens pertaining to the captioned case, a copy of the first page of which is attached, be, and hereby is, listed and provided to the Clerk of this Court and the Clerk shall not record the Order or make the entry until after the expiration of the time in which such appeal or writ of error may be applied for, or if applied for, after refusal thereof, or if granted, after final judgment or decree is entered by the appellate court.

ENTERED this 10 day of March, 1993.

(Sgd) Thomas A. Fortkort, Judge

THOMAS A. FORTKORT, Judge

SEEN AND OBJECTED TO:
On the grounds that this Court did not award adequate compensatory damages and should not award nominal damages, that the punitive damages are insufficient and that the proper relief is the re-establishment of easement of plaintiff at the expense of defendants, including compensatory and punitive damages, costs and attorney's fees.

ANDERSON & CORRIE

By: _____
SCOTT E. SNYDER, VSB #26233
12450 Fair Lakes Circle, #370
Fairfax, Virginia 22033
(703) 222-2200
Counsel for Plaintiffs

SEEN AND OBJECTED TO:

DAVID P. BOBZIEN
COUNTY ATTORNEY

By: _____
RUTH SOULIER
Assistant County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035
(703) 324-2421
Counsel for Defendant Fairfax
County Park Authority

SEEN AND OBJECTED TO:
On the grounds that this Court should not have found an express easement or prescriptive easement in favor of plaintiffs and should not have awarded nominal damages or punitive damages to plaintiffs and should have dismissed the case for lack of necessary parties and additionally objects on the grounds set forth in Fairfax County Park Authority's Addendum to Final Order.

_____
BERNARD E. GOODMAN
GOODMAN AND ASSOCIATES
8245 Boone Boulevard, Suite 800
Vienna, Virginia 22182
(703) 848-2828
Counsel for Defendants
Wexford Associates, Inc.
and Individual Lot Owners

atkisson.ord (H)

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON and CARLOTTA T. ATKISSON, Plaintiffs, v. WEXFORD ASSOCIATES, INC. and FAIRFAX COUNTY PARK AUTHORITY, et al., Defendants.	)	CHANCERY NO. 97823

ADDENDUM TO FINAL ORDER

COMES NOW the Fairfax County Park Authority ("hereinafter "Park Authority"), by and through counsel, and submits this its List of Exceptions to the rulings of this Honorable Court:

SEEN AND OBJECTED TO FOR THE FOLLOWING REASONS:

1. The Court's ruling erroneously concludes that Plaintiffs have an express easement.

2. The Court's ruling erroneously relies on Preshlock v. Brenner, 234 Va. 407, 362 S.E.2d 696 (1987), to conclude that Plaintiffs have a prescriptive easement.

3. The Court's ruling erroneously relies on Conrad v. Strickler, 215 Va. 454, 211 S.E.2d 248 (1975), and Lindsey v. Clark, 193 Va. 522, 69 S.E.2d 342 (1952), to conclude that an alternate easement must be provided by Defendant Park Authority.

4. The Court's ruling erroneously awards punitive damages after the Court previously struck the punitive damage count during

the Motion to Strike at the conclusion of Plaintiffs' case. (July 31, 1991 Tr. at 172-174, 200.)

5. Defendant Park Authority further notes and preserves all of the additional arguments it has made to the Court, both orally and in writing, relative to the issues decided in this Final Order.

DAVID P. BOBZIEN
COUNTY ATTORNEY

By: _____

RUTH SOULIER
Assistant County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035
(703) 324-2421
Counsel for Defendant Fairfax
County Park Authority

atkisson.add

KSH

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 8th day of September, 1993.

Fairfax County Park Authority, Appellant,

against Record No. 930819
Circuit Court No. C-97823

George Atkisson, et al., Appellees.

From the Circuit Court of Fairfax County

Upon the petition of the Fairfax County Park Authority an appeal is awarded it from a judgment rendered by the Circuit Court of Fairfax County on the 10th day of March, 1993 in a certain chancery cause then therein depending, wherein George Atkisson and another were plaintiffs and the said petitioner and others were defendants; no security being required.

Reference is made to the said petition for the names of all the appellees involved in this appeal.

A Copy,

Teste:

Clerk

CERTIFICATE OF APPEAL

Pursuant to Rule 5:23, I, David B. Beach, Clerk of the Supreme Court of Virginia, do hereby certify that on September 8, 1993 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the lower court indicated in the order and to all counsel of record.

Given under my hand this 9th day of September, 1993.

David B. Beach
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 19th *day of* August, 1993.

George Atkisson, et al., Appellants,

against Record No. 930812
Circuit Court No. C-97823

Wexford Associates, et al., Appellees.

From the Circuit Court of Fairfax County

On June 10, 1993 came the appellants, by counsel, and filed a petition for appeal in the above-styled case.

Thereupon came the appellees, by counsel, and filed a brief in opposition to the petition for appeal and a motion to dismiss. Thereafter came the appellants and filed a memorandum in opposition to said motion to dismiss.

On consideration whereof, the Court grants the motion to dismiss for failure to state assignments of error, and the petition for appeal is dismissed. Rule 5:17(c).

A Copy,

Teste:

David B. Beach, Clerk

By: D. A. [illegible]
Deputy Clerk

TAF
C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 17th *day of* September, 1993.

George Atkisson, et al., Appellants,

against Record No. 930812
Circuit Court No. C-97823

Wexford Associates, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 19th day of August, 1993 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

David B. Beach

Clerk

TAF

VIRGINIA:

94 DEC 21 FILED

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 10th *day of* June, 1994.

Fairfax County Park Authority, Appellant,

against Record No. 930819
Circuit Court No. C-97823

George Atkisson, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Fairfax County on the 10th day of March, 1993.

For reasons stated in writing and filed with the record, the Court is of opinion that there is error in part in the judgment appealed from. Accordingly, the judgment is affirmed in part and reversed in part, and the case is remanded to the said circuit court with direction to enter an order requiring that the lot owners and Wexford Associates, Inc. provide an easement at their expense for the Atkissons, if the lot owners, Wexford Associates, and the Atkissons can agree upon a location and description of the new easement. In the event the litigants are unable to agree, then the chancellor is directed to order that Wexford Associates and the lot owners remove any obstructions that interfere with the Atkissons' use of the express easement.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Clerk

Appellant's costs:

Printing briefs	$ 200.00
Printing appendix	2,322.75
Attorney's fee	50.00

Teste:

Clerk

Supreme Court of Virginia

Fairfax County Park Authority, Appellant,

against Record No. 930819
Circuit Court No. C-97823

George Atkisson, et al., Appellees.

Itemized Statement of Costs

I, David B. Beach, Clerk of the Supreme Court of Virginia, do hereby certify that the appellant shall recover from appellees Wexford Associates, Inc. and the individual defendants costs in this case as follows:

Appellant's costs:

Printing briefs	$ 200.00
Printing appendix	2,322.75
Attorney's fee	50.00

Given under my hand this 20th day of December, 1994.

0471 74

Clerk

Present: All the Justices

FAIRFAX COUNTY PARK AUTHORITY

v. Record No. 930819 OPINION BY JUSTICE LEROY R. HASSELL
June 10, 1994

GEORGE ATKISSON, ET AL.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
Thomas A. Fortkort, Judge

This appeal involves legal issues relating to the obstruction of an express easement that provides ingress and egress to a family cemetery.

I.

George B. Atkisson and his wife, Carlotta T. Atkisson, filed their amended bill of complaint against the Fairfax County Park Authority, Wexford Associates, Inc., and 56 owners of lots located in the Wendover Subdivision, Section III, in Fairfax County. The Atkissons alleged that they own a property interest in an easement that provides ingress and egress to their family cemetery and that the defendants had constructed obstructions that interfere with the Atkissons' use of the easement. The Atkissons sought a declaration of the existence and extent of their easement and compensatory and punitive damages.

The trial court granted the defendants' demurrer to the amended bill. We awarded the Atkissons an appeal from that judgment, and we reversed the judgment by an unpublished order and remanded the case to the trial court for further proceedings. Atkisson v. Wexford Associates, Inc., Record No. 890169 (April 26, 1989).

Upon remand, the parties had a trial on the merits. During the trial, the Atkissons nonsuited 38 of the 56

defendants who were lot owners. The case proceeded against the remaining lot owners, Wexford Associates, and the Park Authority.

The chancellor held, among other things, that the Atkissons have an express easement that granted them access to the cemetery. The chancellor established the location of the easement, but decided that he would not grant injunctive relief to the dominant owners because such relief would have required the servient owners to remove improvements such as homes and swimming pools. The chancellor entered a decree requiring that each lot owner, whose lot obstructs the easement, pay $100 to the Atkissons and that Wexford Associates pay the Atkissons $10,000 in punitive damages. Neither the lot owners nor Wexford Associates assigned error to the chancellor's decree. The chancellor also ordered that the Park Authority, at its expense, provide a new easement for the Atkissons on land owned by the Park Authority. We awarded the Park Authority an appeal.

We will state the facts in the light most favorable to the Atkissons, the parties who prevailed in the trial court. In the late 1800s, Mary C. Saunders, Mr. Atkisson's aunt, owned several parcels of land in Fairfax County. She conveyed a 15-acre parcel to Thomas S. Adams, Mr. Atkisson's grandfather, by an 1892 deed. This recorded deed creates an express easement, described as a right-of-way 15 feet wide, over several tracts of land and extending to a public road. The easement allows ingress and egress to the 15-acre parcel.

In 1896, as a result of a decree that had been entered in a partition suit, Mr. Adams received other property referred to as Lot No. 2, that adjoined his 15-acre parcel. The cemetery lot is located on either or both of these properties.

Mr. Adams died intestate, and his heirs inherited both properties, including the easement. By a deed dated March 1978, the heirs of Mr. Adams conveyed their interest in the property to Harold O. Miller, trustee.

In 1977, Charles and Audrey Hawthorne acquired a large parcel of property that was burdened with the easement. The Hawthornes initiated proceedings to obtain the necessary permits and zoning amendments so that the property could be subdivided into residential lots. In 1980, Mr. Atkisson appeared before two public hearings of the Fairfax County Board of Supervisors and contested the Hawthornes' proposed subdivision plan because it interfered with the easement that provided access to the cemetery. The Hawthornes "acknowledged" Mr. Atkisson's concerns regarding the easement.

After the property had been rezoned, the Hawthornes conveyed it to Wexford Associates. After the conveyance, Mr. Atkisson contacted J. Stewart Porter, an officer of Wexford Associates, and inquired what Wexford Associates intended to do regarding the easement on the property. Porter informed Mr. Atkisson that he (Porter) would "be in touch with [him]." Later, Mr. Atkisson met with Porter and a surveyor retained by Wexford Associates. Mr. Atkisson

showed them the location of the easement on the property. At that time, Mr. Atkisson thought that Wexford Associates would not obstruct the easement.

Wexford Associates subdivided its property into 40 residential building lots and an unimproved parcel. Wexford Associates conveyed the unimproved parcel to the Park Authority. The easement transverses part of the parcel conveyed to the Park Authority. Wexford Associates made no provision in its deed of dedication or in its recorded plat for the easement.

After construction of the subdivision began, Mr. Atkisson contacted Wexford Associates' employees and sent a letter to Porter inquiring about the easement. Mr. Atkisson also contacted a vice-president of Wexford Associates' title insurance company and retained counsel. Wexford Associates ignored Mr. Atkisson's concerns, continued to develop the property, and constructed houses and other improvements on the easement. The houses were subsequently conveyed to the lot owners, who are defendants in this litigation.

II.

A.

The Park Authority argues that the Atkissons do not own an express easement because the Atkissons "failed to establish at trial that they owned the dominant estate to which the access easement is appurtenant." The Atkissons argue that they presented evidence from which the chancellor could infer that they had an ownership interest in the

cemetery that is a part of the dominant estate. We agree with the Atkissons.

The decree that was entered as a result of the partition suit of 1896 preserved a portion of land for the family cemetery. The partition decree does not contain a metes and bounds description of the cemetery. A factual dispute arose at trial regarding the location of the cemetery. The chancellor made a factual finding that a portion of the cemetery was located on the 15-acre parcel that had been owned by Mr. Adams. The chancellor's factual finding is supported by the testimony of a surveyor who was able to locate certain monuments in the 1892 deed. As mentioned earlier, this 15-acre parcel was the dominant estate that was served by the express easement created in the 1892 deed from Ms. Saunders to Mr. Adams.

The chancellor implicitly found that Mr. Atkisson owned a property interest in the cemetery, and the evidence of record supports the chancellor's finding. David Carr, who was the Atkissons' expert witness, testified that he examined the title to the property involved in this litigation, and the records show that Mr. Atkisson, as an heir of Mr. Adams, owns an interest in the cemetery lot.

The Park Authority also asserts that the Atkissons do not have an interest in the cemetery because, purportedly, a deed dated March 1978 conveyed the 15-acre parcel and Lot No. 2 to Miller as trustee, who subsequently conveyed his interest in the land without exception to a land development company. This company subsequently conveyed its interest in

the property to a partnership that subdivided the land and created a subdivision. The Park Authority asserts that the cemetery is now a part of the newly created subdivision and that the Atkissons do not have an ownership interest in the dominant estate or the appurtenant easement. We disagree.

The 1978 deed states, in relevant part:

> THAT, for and in consideration of the sum of Ten Dollars ($10.00), the receipt of which is hereby acknowledged, the said parties of the first part do hereby grant, bargain, sell and convey unto the party of the second part, in fee simple except as to existing cemetery, and with General Warranty of Title, all of that certain lot or parcel of land, with its improvements and appurtenances thereunto belonging, located in the County of Fairfax, Commonwealth of Virginia, and more particularly described in Attachment A attached hereto and made a part hereof.
>
> . . . .
>
> This conveyance is made subject to any and all easements, restrictions and rights of way of record, and existing cemetery.

Our review of the language contained in the March 1978 deed reveals that the deed did not convey the cemetery to Miller. Rather, in an interlineation, this deed explicitly exempts the cemetery from the property that was conveyed. Furthermore, the restriction contained in the deed makes it clear that the grantors did not convey the cemetery to the trustee.

B.

The chancellor's decree stated in part, that "defendant Fairfax County Park Authority shall, at its own expense, provide an easement across Fairfax County Park Authority land to allow access by the [Atkissons] to the

cemetery . . . This easement shall be accessible by an ordinary motor vehicle." The Park Authority states that the chancellor's decree changes the location of the easement located on the servient estate, and also encumbers Park Authority property that had never been part of the servient estate. The Park Authority argues that the chancellor lacks the authority to require it to relocate the easement. The Atkissons concur with the Park Authority's argument. Wexford Associates and the lot owners argue, however, that the chancellor's decree is appropriate because it merely requires the relocation of the existing easement.

We agree with the Park Authority. In Eureka Land Co. v. Watts, 119 Va. 506, 89 S.E. 968 (1916), we considered whether an easement may be relocated without the consent of the owners of the dominant and servient estates. J. Allen Watts, owner of a tract of land, conveyed 40 acres to C. O'Leary. The deed of conveyance reserved "a right of way through the land for ingress, egress and regress, the said way to be of sufficient width and good grade for the passage of vehicles and persons." Subsequently, O'Leary conveyed the land to Eureka Land Company reserving the reserved right-of-way. Eureka Land Company acquired the property with the purpose of subdividing it into residential lots. Eureka Land Company's plan of development ignored the right-of-way and provided a new and different route to be used by the owners of the easement. Id. at 507-08, 89 S.E. at 969.

Eureka Land Company argued that there had never been any location of the right-of-way provided for in the deeds

and that it had the right to locate the right-of-way subject only to the restriction that the right-of-way be of good grade and of sufficient width. Rejecting Eureka Land Company's contention, we held, "[w]hen a way is once located it cannot be changed by either party without the consent of the other." Id. at 509, 89 S.E. at 970. See also Wagoner v. Jack's Creek Coal Corp., 199 Va. 741, 746, 101 S.E.2d 627, 630 (1958).

Neither Wexford Associates, the lot owners, nor the Atkissons could have changed the location of the easement that transverses the Park Authority's land without the Park Authority's consent. Likewise, we do not believe that the chancellor has the authority to interfere with the Park Authority's property rights by relocating the express easement on land owned by the Park Authority that was never burdened by the easement. Therefore, we hold that the chancellor did not have the authority to interfere with the Park Authority's property interest in land that was not encumbered by the express easement.[1]

III.

We will remand this proceeding to the chancellor with the following directions. The chancellor is directed to

---

[1]Wexford Associates and the lot owners argue that at trial the Park Authority agreed to provide a new easement and that the Park Authority may not retract its purported consent. Our review of the record reveals that, at best, the Park Authority offered to provide the Atkissons permissive access to the cemetery. Wexford Associates and the individual lot owners also argue that "[the Park Authority's] appendix does not contain sufficient material to be considered by [this Court]." We find no merit in this argument.

enter an order requiring that the lot owners and Wexford Associates provide an easement at their expense for the Atkissons, if the lot owners, Wexford Associates, and the Atkissons can agree upon a location and description of the new easement. In the event the litigants are unable to agree, then the chancellor is directed to order that Wexford Associates and the lot owners remove any obstructions that interfere with the Atkissons' use of the express easement.[2] See Lindsey v. Clark, 193 Va. 522, 527, 69 S.E.2d 342, 345 (1952).

Affirmed in part, reversed in part, and remanded.

A Copy,
Teste:
Clerk

[2]The Park Authority has represented to this Court that it has not obstructed that portion of the easement that transverses its property. Assuming the Park Authority has made no such obstructions, then the Atkissons would not be entitled to any relief against it.

12-1-94

TAF 2/

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 1st *day of* August, 1994.

Fairfax County Park Authority, Appellant,

against Record No. 930819
Circuit Court No. C-97823

George Atkisson, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of appellees Wexford Associates, Inc., and Individual Defendants to set aside the judgment rendered herein on the 10th day of June, 1994 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

David B. Beach, Clerk

By: Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON	:	
AND	:	
CARLOTTA T. ATKISSON,	:	
Plaintiffs,	:	
v.	:	IN CHANCERY NO. 97823
WEXFORD ASSOCIATES, INC.	:	
AND	:	
FAIRFAX COUNTY PARK AUTHORITY, et al.,	:	
Defendants.	:	

DECREE

THIS CAUSE came to be heard on the 10th day of February 1995, upon the request of Defendant Fairfax County Park Authority (hereinafter "Park Authority"), by counsel, to have the Court enter a decree reflecting the June 10, 1994, decision of the Supreme Court of Virginia as it relates to the Park Authority; and

IT APPEARING TO THE COURT that, in the Final Order entered in this case on March 10, 1993, this Court ordered the Park Authority, at its own expense, to provide an easement across the Park Authority's land to allow access by George and Carlotta T. Atkisson (hereinafter "the Atkissons") to the Atkisson cemetery; and

IT FURTHER APPEARING TO THE COURT that in an order and a written decision in Fairfax County Park Authority v. George Atkisson, et al., 248 Va. 142, 445 S.E.2d 101 (1994), on June 10, 1994, the Supreme Court of Virginia reversed in part this Court's March 10, 1993, decision, finding that this Court did not have the authority to interfere with the Park Authority's property interest in land that was not encumbered by the express easement, and affirmed in part and remanded the case to this Court with direction to enter an order requiring that the lot owners and Wexford Associates, Inc., provide an easement at their expense for the Atkissons, if the lot owners, Wexford Associates, and the Atkissons can agree upon a location and description of the new easement; and

IT FURTHER APPEARING TO THE COURT that in the event that the litigants are unable to agree, then this Court is directed to order that Wexford Associates and the lot owners remove any obstructions that interfere with the Atkissons' use of the express easement; and

IT FURTHER APPEARING TO THE COURT that the Supreme Court of the United States denied the petition for a writ of certiorari in Wexford Associates, Inc., et al. v. George Atkisson, et al., Record No. 94-767, on December 12, 1994; and

IT FURTHER APPEARING TO THE COURT that, given the ruling of the Supreme Court in Fairfax County Park Authority v. George Atkisson, et al., 248 Va. 142, 445 S.E.2d 101 (1994), the Atkissons are not entitled to relief against the Park Authority; now, therefore, it is

ADJUDGED AND DECREED that the Atkissons are not entitled to relief against the Park Authority; and it is

FURTHER ADJUDGED AND DECREED that no judgment shall be granted and no order entered against the Park Authority in favor of the Atkissons; and it is

FURTHER ADJUDGED AND DECREED that this matter is final with respect to the Park Authority.

THIS MATTER IS CONTINUED for entry of a decree consistent with the June 10, 1994, decision and order of the Supreme Court of Virginia in Fairfax County Park Authority v. George Atkisson, et al., 248 Va. 142, 445 S.E.2d 101 (1994) as it relates to the lot owners, Wexford Associates, Inc., and the Atkissons.

ENTERED this 10th day of February 1995.

Thomas Forkert

JUDGE
FAIRFAX COUNTY CIRCUIT COURT

WE ASK FOR THIS:

DAVID P. BOBZIEN
COUNTY ATTORNEY

By _____
Jan L. Brodie
Assistant County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035-0064
(703) 324-2421
Counsel for Complainant

SEEN:

By _____
Scott E. Snyder, Esquire
Quentin R. Corrie, Esquire
Anderson & Corrie
12600 Fair Lakes Circle, Suite 220
Fairfax, Virginia 22033
(703) 222-2200
Counsel for Plaintiffs

SEEN and objected to:

By _____
Bernard E. Goodman, Esquire
Goodman, Gary & Lickstein, P.C.,
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828
Counsel for Defendants, Wexford Associates, Inc.,
and Individual Defendants

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON, Plaintiffs	)	
v.	)	IN CHANCERY NO. 97823
WEXFORD ASSOCIATES, INC. AND FAIRFAX COUNTY PARK AUTHORITY, et al., Defendants	)	

ORDER

THIS MATTER came on to be heard upon the motion of George Atkisson and Carlotta T. Atkisson, by Counsel, for entry of a decree requiring that defendants, Wexford Associates, Inc., and the individual lot owners be ordered to re-establish the original easement pursuant to the opinion of the Virginia Supreme Court of June 10, 1994, and, upon due consideration, it is hereby

ADJUDGED, ORDERED and DECREED that Defendant Wexford Associates, Inc., and the individual lot owners are to provide an easement at their expense for the Atkissons if the lot owners, Wexford Associates, Inc., and the Atkissons can agree upon a location and description of the new easement on or before March 15, 1995. ~~In the event these parties are unable to agree, then Defendant Wexford Associates, Inc., and the individual lot owners are to remove any obstructions that interfere with the Atkissons' use of the express easement, at the expense of Wexford Associates and the individual lot owners.~~ the Plaintiffs are to advise the court as to whether or not such easement is acceptable to them or not acceptable. In the event the easement provided is considered unacceptable, then the plaintiffs are to state their objections thereto in writing. If the court finds such objections are reasonable then the obstructions are to be cleared from the express easement as defined in Plaintiff's Exhibit #2

ENTERED this 7th day of March, 19 95.

Thomas Fortkort

Thomas A. Fortkort, Judge

I ASK FOR THIS: ~~objected to~~ on the ground that the Plaintiffs need not accept a "reasonable" alternative

Scott E. Snyder, VSB #26233
Anderson & Corrie
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
(703) 222-2200
Counsel for Plaintiffs

SEEN AND OBJECTED TO: because Exh ZZZ is not a survey of the express easement.

Bernard E. Goodman, VSB #15463
Goodman, Gary & Lickstein, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828
Counsel for Wexford Associates

SEEN AND _____:

Jan L. Brodie, VSB #26799
Assistant County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035-0064
(703) 324-2421
Counsel for Fairfax County Park Authority

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON and CARLOTTA T. ATKISSON,	)	
Plaintiffs,	)	
v.	)	IN CHANCERY NO. 97823
WEXFORD ASSOCIATES, INC. ET AL.	)	
Defendants.	)	

MOTION BY SPECIAL APPEARANCE TO ADVISE COURT OF LACK OF JURISDICTION OVER LOT 3 AND OWNERS OF LOT 3

COMES NOW David D. O'Brien and Jane B. O'Brien, appearing specially by counsel, and for their motion to advise the court of the lack of jurisdiction over Lot 3 and the owners of Lot 3 of the Wendover Subdivision, state as follows:

1. On or about June 4, 1986, Wexford Associates, Inc. conveyed Lot 3 of the Wendover Subdivision, Fairfax County ("Lot 3"), to John Kowalczyk and Katherine Kowalczyk (the "Kowalczyks") by Deed recorded in Deed Book 6391 at Page 1639 among the land records of Fairfax County, Virginia.

2. On July 16, 1986, George Atkisson and Carlotta T. Atkisson (the "Atkissons") filed a Bill of Complaint herein against Wexford Associates, Inc., but failed to include the Kowalczyks who were the record owners of Lot 3 at the time of filing.

3. On July 18, 1986, the Atkissons recorded a Lis Pendens attaching a copy of the Bill of Complaint, again with no

reference to the Kowalczyks, or to Lot 3 of Wendover Subdivision. The Lis Pendens is recorded in Deed Book 6432 at Page 1596.

4. On February 16, 1988, the Atkissons filed an Amended Bill of Complaint adding the individual lot owners, including the Kowalczyks as the owners of Lot 3. However, no lis pendens has ever been filed referencing the Kowalczyks or Lot 3.

5. By order entered November 11, 1988, Judge Quinlan H. Hancock dismissed the Amended Bill of Complaint on demurrer.

6. On May 22, 1989, the Supreme Court of Virginia reversed the decision of Judge Hancock and remanded the case for further proceeding.

7. By Deed dated June 15, 1992, and recorded June 16, 1992, in Deed Book 8160 at Page 277 among the land records of Fairfax County, Virginia, the Kowalczyks conveyed Lot 3 to David D. O'Brien and Jane B. O'Brien (the "O'Briens").

8. As a result of the failure of the Atkissons to properly record and index a lis pendens in the O'Briens' chain of title, the O'Briens purchased Lot 3 without notice, actual or constructive, of the Atkisson's legal action to establish an easement in the Wendover subdivision.

9. By letter dated February 24, 1995, just three months ago, the O'Briens received a letter from counsel for Defendants, notifying them of the existence of the litigation for the first time.

10. Under Virginia Code § 8.01-268, as bona fide purchasers without actual notice of the lis pendens, the O'Briens are not bound by the lis pendens and, therefore, are not bound by the various trial court orders and Virginia Supreme Court mandates entered herein. The object of the statute is to provide a means by which one desiring to purchase land, such as the O'Briens, may by an examination of the deed books ascertain whether or not there is a pending suit which may affect the title. Vicars v. Sayler, 111 Va. 307, 310, 68 S.E. 988 (1910).

11. Moreover, because of the failure of the Atkissons to include the O'Briens, a necessary party to any action to establish an easement over Lot 3, any prior judgments are null and void. Patterson v. Anderson, 194 Va. 557, 570-571, 74 S.E.2d 195, cert. denied, 345 U.S. 965, 73 S. Ct. 952 (1953); McDougle v. McDougle, 214 Va. 636, 637-38, 203 S.E.2d 131 (1974).

> No judicial proceeding can deprive a man of his property without giving him an opportunity to be heard in accordance with the provisions of the law, and if a judgment is rendered against him without such opportunity to be heard, it is absolutely void. A void judgment is in legal effect no judgment. By it no rights are divested and from it no rights are obtained. All claims flowing out of it are void. It may be attacked in any proceeding by any person whose rights are affected.

Harris v. Deal, 189 Va. 675, 686-87, 54 S.E.2d 161 (1949). See also Mendenhall v. Douglas L. Cooper, Inc., 239 Va. 71, 387 S.E.2d 468 (1990); Allen v. Chapman, 242 Va. 94, 406 S.E.2d 186 (1991).

WHEREFORE, David D. O'Brien and Jane B. O'Brien, appearing specially by counsel, respectfully request that this court not enter any order concerning or relating to Lot 3, Wendover Subdivision, and that this Court take no action to the detriment of the O'Briens, who are not parties to this action and never have been.

DAVID D. O'BRIEN and
JANE B. O'BRIEN
By Counsel

BLANKINGSHIP & KEITH
4020 University Drive
Suite 312
Fairfax, Virginia 22030
(703) 691-1235

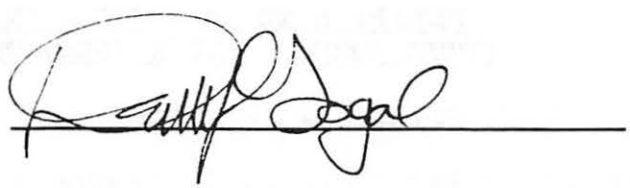
By: _____
DAVID J. GOGAL, VSB No. 28815
Counsel for David D. O'Brien
and Jane O'Brien

CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of May, 1995, a true and correct copy of the foregoing was sent via facsimile and mailed by first class mail, postage prepaid to the following:

Scott E. Snyder, Esquire
ANDERSON & CORRIE
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
Counsel for Plaintiffs

Bernard E. Goodman, Esquire
GOODMAN, GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
Counsel for Defendants



V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON and CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	IN CHANCERY NO. 97823
WEXFORD ASSOCIATES, INC., ET AL.	)	
Defendants.	)	

PETITION TO INTERVENE IN ORDER TO REQUEST THE COURT VACATE PRIOR JUDGMENTS AND SET A NEW TRIAL

COME NOW David D. O'Brien and Jane B. O'Brien, by counsel, and for their Petition to Intervene to Request the Court Vacate the Prior Judgments and Set a New Trial, state as follows:

1. On or about June 4, 1986, Wexford Associates, Inc. ("Wexford") conveyed Lot 3 of the Wendover Subdivision, Fairfax County ("Lot 3"), to John Kowalczyk and Katherine Kowalczyk (the "Kowalczyks") by Deed recorded in Deed Book 6391 at Page 1639 among the land records of Fairfax County, Virginia.

2. On July 16, 1986, George Atkisson and Carlotta T. Atkisson (the "Atkissons") filed a Bill of Complaint herein against Wexford Associates, Inc., but failed to include the Kowalczyks who were the record owners of Lot 3 at the time of filing.

3. On July 18, 1986, the Atkissons recorded a Lis Pendens attaching a copy of the Bill of Complaint, again with no reference to the Kowalczyks, or to Lot 3 of Wendover Subdivision. The Lis Pendens is recorded in Deed Book 6432 at Page 1596.

4. On February 16, 1988, the Atkissons filed an Amended Bill of Complaint (the "Complaint") adding the individual lot owners, including the Kowalczyks as the owners of Lot 3. However, no lis pendens has ever been filed referencing the Kowalczyks or Lot 3.

5. In their Complaint, the Atkissons sought to establish access through an express easement, prescriptive easement or an easement by necessity.

6. By Order entered November 11, 1988, Judge Quinlan H. Hancock dismissed the Amended Bill of Complaint on demurrer.

7. On May 22, 1989, the Supreme Court of Virginia reversed the decision of Judge Hancock and remanded the case for further proceedings.

8. By Deed dated June 15, 1992, and recorded June 16, 1992, in Deed Book 8160 at Page 277 among the land records of Fairfax County, Virginia, the Kowalczyks conveyed Lot 3 to David D. O'Brien and Jane B. O'Brien (the "O'Briens").

9. In the course of the litigation and before the entry of judgment, the Atkissons became aware of the conveyance of Lot 3 to the O'Briens, but took no steps to add the O'Briens as parties to the case.

10. On March 10, 1993, Judge Thomas A. Fortkort entered a final order, ruling that the Atkissons owned an express and prescriptive easement across the Wendover Subdivision, including Lot 3, but holding that the easement should be relocated across the property of the Fairfax County Park Authority. An appeal was filed by both the Fairfax County Park Authority and the Atkissons.

Significantly, no appeal was filed by the developer, Wexford, nor the various lot owners.

11. On information and belief, following the entry of Judge Fortkort's judgment, the position of Wexford and the lot owners was that they had no reason to appeal the decision. Although they disagreed with the findings of the trial judge and had several issues to raise on appeal, they did not believe they were significantly harmed by the relief granted, (i.e., $100.00, nominal damages against each lot owner and $10,000 punitive damages against Wexford), and, thus, did not raise several valid objections to the court's final order.

12. Upon appeal, the Virginia Supreme Court determined that the Atkissons possessed an express easement through the Wendover Subdivision and that the trial judge had no authority to relocate the easement onto Fairfax County Park Authority property. The Court thus held that the express easement should be cleared of obstructions unless the parties can reach an agreement as to alternative access. Significantly, the Virginia Supreme Court could not address several objections noted by Wexford below because they were not raised on appeal, nor did the Court specifically locate the easement.

13. As a result of the failure of the Atkissons to properly record and index a lis pendens in the O'Briens' chain of title, the O'Briens purchased Lot 3 without notice, actual or constructive, of the Atkissons' legal action to establish an easement in the Wendover Subdivision.

14. By letter dated February 24, 1995, the O'Briens received a letter from counsel for Defendants, notifying them of the existence of the litigation for the first time.

15. Under Virginia Code § 8.01-268, as bona fide purchasers without actual notice of the lis pendens, the O'Briens are not bound by the lis pendens and, therefore, are not bound by the various trial court orders and Virginia Supreme Court mandates entered herein.

16. Moreover, because of the failure of the Atkissons to include the O'Briens, a necessary party to any action to establish an easement over Lot 3, any prior judgments are null and void.

17. If the Court were to proceed to locate an easement over and across the property of Lot 3 without providing the O'Briens a full and fair opportunity to litigate <u>all</u> issues in this case, it would constitute a violation of the O'Briens' due process rights under both the Fourteenth Amendment, U.S. Const. Amend. XIV, § 1 and Article I, § 11 of the Constitution of Virginia.

18. The issues, not raised on appeal by Wexford, but pertinent to the merits of the easement claim, include, but are not limited to, the following:

(a) Whether the express easement was abandoned in favor of the prescriptive easement route? In other words, did the predecessors of the Atkissons change the route of the easement as depicted in Plaintiffs' Exhibit ZZZ? [It should be noted that the route depicted on Plaintiffs' Exhibit ZZZ completely misses the O'Briens' pool.]

(b) Whether under Va. Code § 55-50, the owners of the lots in the Wendover Subdivision have the right to petition the court to relocate the easement?

(c) Whether the Atkissons actually own the "family cemetery" described as outlot A?

(d) Whether there are other heirs who have an interest in the cemetery, and, therefore, must be added as necessary parties.

(e) Whether the deed to Harold Miller, trustee, of the 15-acre parcel plus the right-of-way, but excepting the cemetery, effectively extinguished the cemetery owners' right to the easement?

(f) Whether, as opined by First American, the easement was extinguished by the Deed of Gift purporting to convey the easement to the Atkissons because it constituted a severance of the right-of-way from the dominant estate?

(g) Whether, as argued by Wexford, the cemetery is located outside of the 15 acres and thus not on the dominant estate to which the easement is appurtenant?

(h) Whether the O'Briens obtained title free and clear of the Atkissons' claim because of the failure of the Atkissons to file a lis pendens as to lot 3?

(i) Whether the owners of Lot 1 are necessary parties, and, thus, must be brought into the suit.

WHEREFORE, David D. O'Brien and Jane B. O'Brien, by counsel, respectfully request that this Court vacate the prior judgments and rulings in this matter and set a new date for trial on all issues, allowing the O'Briens a sufficient period of time in which to conduct discovery, and that this Court take no action to the detriment of the O'Briens, who have not been parties to this action, notwithstanding that they are necessary parties.

DAVID D. O'BRIEN and
JANE B. O'BRIEN
By Counsel

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Counsel for David D. O'Brien
and Jane O'Brien

CERTIFICATE OF SERVICE

I hereby certify that on this the 28th day of July, 1995, a true and correct copy of the foregoing was mailed by first class mail, postage prepaid to the following:

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Bernard E. Goodman, Esquire
GOODMAN, GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
Counsel for Defendant Wexford
Associates, Inc.

_____

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON and CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	IN CHANCERY NO. 97823
WEXFORD ASSOCIATES, INC., ET AL.	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PETITION TO INTERVENE IN ORDER TO REQUEST THE COURT VACATE PRIOR JUDGMENTS AND SET A NEW TRIAL

I. FACTS

On June 4, 1986, Wexford Associates, Inc., ("Wexford"), a developer, conveyed Lot 3 of the Wendover Subdivision, Fairfax County ("Lot 3"), to John Kowalczyk and Katherine Kowalczyk (the "Kowalczyks"). On July 16, 1986, George Atkisson and Carlotta T. Atkisson (the "Atkissons") filed a Bill of Complaint herein against Wexford to establish an easement in the Wendover Subdivision, but failed to include the Kowalczyks who were the record owners of Lot 3 at the time of filing. On July 18, 1986, the Atkissons recorded a notice of lis pendens attaching a copy of the Bill of Complaint, again with no reference to the Kowalczyks, or to Lot 3 of Wendover Subdivision.

On February 16, 1988, the Atkissons filed an Amended Bill of Complaint adding the individual lot owners, including the Kowalczyks as the owners of Lot 3. However, no notice of lis pendens has ever been filed referencing the Kowalczyks or Lot 3.

On June 15, 1992, the Kowalczyks conveyed Lot 3 to David D. O'Brien and Jane B. O'Brien (the "O'Briens"). As a result of the failure of the Atkissons properly to record and index a lis pendens notice in the O'Briens' chain of title, the O'Briens purchased Lot 3 without notice, actual or constructive, of the Atkissons' legal action to establish an easement in the Wendover Subdivision.

It was only in late February or early March of this year, that the O'Briens were first notified of the existence of the litigation and the easement claim. They received a letter dated February 24, 1995, from counsel for Defendants, requesting permission to go on the O'Briens' property to conduct a survey of the claimed easement.

II. ARGUMENT

A. O'BRIENS NOT SUBJECT TO PRIOR ORDERS/JUDGMENTS IN ABSENCE OF PROPERLY FILED NOTICE OF LIS PENDENS

It is undisputed that the Atkissons failed to file a proper notice of lis pendens prior to the O'Briens' purchase of Lot 3. Under Virginia Code § 8.01-268, as bona fide purchasers without actual or constructive notice of the lis pendens, the O'Briens are not bound by the lis pendens and, therefore, are not bound by the various trial court orders and Virginia Supreme Court mandates entered herein. The object of the statute is to provide a means by which one desiring to purchase land, such as the O'Briens, may by an examination of the deed books, ascertain whether or not there is a pending suit which may affect the title. Vicars v. Sayler, 111 Va. 307, 310, 68 S.E. 988 (1910).

B. O'BRIENS ARE NECESSARY PARTIES

Moreover, because of the failure of the Atkissons to include the O'Briens, a necessary party to any action to establish an easement over Lot 3, any prior judgments are null and void. Patterson v. Anderson, 194 Va. 557, 570-571, 74 S.E.2d 195, cert. denied, 345 U.S. 965, 73 S. Ct. 952 (1953); McDougle v. McDougle, 214 Va. 636, 637-38, 203 S.E.2d 131 (1974).

> No judicial proceeding can deprive a man of his property without giving him an opportunity to be heard in accordance with the provisions of the law, and if a judgment is rendered against him without such opportunity to be heard, it is absolutely void. A void judgment is in legal effect no judgment. By it no rights are divested and from it no rights are obtained. All claims flowing out of it are void. It may be attacked in any proceeding by any person whose rights are affected.

Harris v. Deal, 189 Va. 675, 686-87, 54 S.E.2d 161 (1949). See also Mendenhall v. Douglas L. Cooper, Inc., 239 Va. 71, 37 S.E.2d 468 (1990); Allen v. Chapman, 242 Va. 94, 406 S.E.2d 186 (1991).

C. DUE PROCESS RIGHTS UNDER BOTH U.S. AND VIRGINIA CONSTITUTIONS REQUIRE GRANTING PETITION

Under the Fourteenth Amendment of the United States Constitution, § 1, no state shall ". . . deprive any person of life, liberty, or property, without due process of law . . .." Under Article I, § 11 of the Constitution of Virginia, the same due process rights are reiterated: ". . . no person shall be deprived of his life, liberty, or property, without due process of law . . .." These two due process clauses provide identical rights. Leftwich v. Berilacqua, 635 F. Supp. 238 (W.D. Va. 1986).

Notice and opportunity to be heard are fundamental to the notion of due process. Holmes v. Conway, 241 U.S. 624, 631-32 (1916); Walt Robbins, Inc. v. Damon Corp., 232 Va. 43, 47, 348 S.E.2d 223, 226 (1986). Due process requires that the opportunity to be heard be at a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545 (1965)(natural father receiving notice only after decree entered allowing adoption of his child was not accorded due process when subsequent hearing to set aside decree placed heavier burden on natural father than original proceeding would have). See also Ward Lumber Co. v. Henderson-White Mfg. Co., 107 Va. 626, 59 S.E. 476 (1907); Commission of Fisheries v. Hampton Rds. Oyster Packers & Planters Assn., 109 Va. 565, 64 S.E. 1041 (1909)(due process of law requires that a person shall have reasonable notice and a reasonable opportunity to be heard).

In sum, in order to protect the O'Briens' rights to due process, the court must grant their petition and provide them with a meaningful and reasonable opportunity to be heard on all issues that concern their property.

D. INTERVENTION IS APPROPRIATE TO PROTECT O'BRIENS' PROPERTY RIGHTS.

The O'Briens, as the owners of Lot 3, are entitled to intervene in the pending litigation to protect their property interests. Pursuant to Rule 2:15 of the Rules of the Supreme Court of Virginia, "[a] new party may by petition filed by leave of court assert any claim or defense germane to the subject matter of the suit." In Layton v. Seawall Enterprises, Inc., 231 Va. 402, 344

S.E.2d 896 (1986), the Virginia Supreme Court noted that "[i]n order for a stranger to become a party by intervention, he must assert some right involved in the suit." Id. at 406; quoting Lile's Equity Pleading and Practice at 91 (3rd Ed. 1952).

The O'Briens unquestionably have a right to defend against the establishment or enforcement of an easement through their property. Indeed, the Atkissons seek to have the O'Briens' pool filled in, thereby significantly affecting their enjoyment of their home and greatly reducing the fair market value of their property.

E. CONCLUSION

The O'Briens should be granted leave to intervene in the pending litigation to protect their property interests in Lot 3. In the absence of a properly filed notice of lis pendens, the O'Briens are not subject to the prior rulings in this matter and are entitled to a new trial on all issues in the case after a reasonable period to conduct discovery. Indeed, as they are necessary parties, all prior judgments are void. Finally, if the court were to deny the O'Briens' petition and proceed to establish or enforce the easement over Lot 3, it would constitute a violation of both the Fourteenth Amendment of the United States Constitution, § 1, as well as Article 1, § 11 of the Constitution of Virginia.

DAVID D. O'BRIEN and
JANE B. O'BRIEN
By Counsel

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(703) 691-1235

By: _____
DAVID J. GOGAL, VSB No. 28815
Counsel for David D. O'Brien
and Jane O'Brien

CERTIFICATE OF SERVICE

I hereby certify that on this the 1st day of August, 1995, a true and correct copy of the foregoing was sent via facsimile and mailed by first class mail, postage prepaid to the following:

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Counsel for Plaintiffs

Bernard E. Goodman, Esquire
GOODMAN, GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
Counsel for Defendant Wexford
Associates, Inc.

_____

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON and
CARLOTTA T. ATKISSON)

Plaintiff(s),)

VERSUS)

WEXFORD ASSOCIATES, INC.)

Defendant(s).)

Chancery NO.: 97823

This cause came on to be heard on the 3rd day of August 19 95 on the ~~Plaintiff~~ Intervenors's/~~Defendant's~~ motion for Petition to Intervene In Order to Request the Court Vacate Prior Judgments and Set a New Trial:

Upon the matters presented to the Court at the hearing it is

ADJUDGED, ORDERED, and **DECREED** as follows:

the Petition is granted and a new trial is set for October 30, 1995. (time estimate 3 days)

Entered this 30 day of August 19 95.

Jge Marcus Rouse
JUDGE

SEEN: and objected to as contrary to the mandate of the Supreme Ct of Virginia

Counsel for ~~Plaintiff~~(s)

Bernard E Gardner
Counsel for Defendant(s)

Counsel for Intervenors
David B. O'Brien
Jane B. O'Brien

061J

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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GEORGE ATKISSON AND CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	CHANCERY NO. 97823
WEXFORD ASSOCIATES INC., et al.	)	
Defendants.	)	

INTERVENORS DAVID D. O'BRIEN'S AND JANE B. O'BRIEN'S MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO DECLARE PRIOR JUDGMENTS VOID DUE TO LACK OF NECESSARY PARTIES

COME NOW Intervenors David D. and Jane O. O'Brien, by counsel, and respectfully request that this Court rule that the previous judgment in this case issued by the Honorable Thomas A. Fortkort, and sustained in part and reversed in part by the Supreme Court of Virginia, is null and void and not binding upon the parties on the grounds set forth in the Motion and Memorandum In Support of Motion To Declare Prior Judgments Void Due To Lack Of Necessary Parties filed by Defendants Wexford Associates, Inc. and the individual Defendants, which Motion and Memorandum Intervenors David D. O'Brien and Jane B. O'Brien hereby adopt and incorporate as if fully set forth herein.

DAVID D. O'BRIEN and
JANE B. O'BRIEN
By Counsel

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Fairfax, Virginia 22030
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By: _____
JOHN A.C. KEITH, VSB # 14116
DAVID J. GOGAL, VSB # 28815
Counsel for Intervenors

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, first class postage prepaid, this 1st day of December, 1995, to:

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Vienna, Virginia 22182
Counsel for Defendant Wexford Associates, Inc.

_____

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	CHANCERY NO. 97823
WEXFORD ASSOCIATES INC., et al.	)	
Defendants.	)	

INTERVENORS DAVID D. O'BRIEN'S AND JANE B. O'BRIEN'S MOTION TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTIES

COME NOW Intervenors David D. and Jane O. O'Brien, by counsel, and hereby move to dismiss this action for failure to join indispensable parties, as more fully set forth in the attached Memorandum In Support Of Motion To Dismiss For Failure To Join Indispensable Parties.

DAVID D. O'BRIEN and
JANE B. O'BRIEN
By Counsel

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(703) 691-1235

By: _____
JOHN A.C. KEITH, VSB # 14116
DAVID J. GOGAL, VSB # 28815
Counsel for Intervenors

CERTIFICATE OF SERVICE

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Counsel for Plaintiffs

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Counsel for Defendant Wexford Associates, Inc.

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V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	CHANCERY NO. 97823
WEXFORD ASSOCIATES INC., et al.	)	
Defendants.	)	

INTERVENORS DAVID D. O'BRIEN'S AND JANE B. O'BRIEN'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTIES

I. BACKGROUND

In this action, the Plaintiffs, George and Carlotta T. Atkisson, seek to establish and enforce an easement to a family cemetery (the "Adams Family"). They have alleged three theories for such an easement: (1) express easement; (2) implied easement by necessity; and (3) prescriptive easement.

At the present, the parties before the court consist of Plaintiffs George and Carlotta T. Atkisson and the Defendants: Wexford Associates, Inc.; James E. and Susan H. Henry (owners of Lot 2); Herbert and Barbara Vogel (owners of Lot 23); Katherine Kowalczyk (former owner of Lot 3); Mark L. Eckman and Vivian D. Datoff (owners of Lot 4); Patrick G. and Jane M. Deasy (former owners of Lot 4); Charles E. and Jean S. Andrews (owners of Lot 5); Brian T. and Elizabeth S. McVay (owners of Lot 6); M. Jack and Joanne Wilkenfeld (owners of Lot 7); Walter T. and Beth A. Morgan (owners of Lot 25);

Lawrence W. and Dianne B. Wyte (owners of Lot 38); and, Intervenors David D. and Jane B. O'Brien (current owners of Lot 3).

Plaintiffs, however, have failed to join all of the necessary parties to this litigation. The missing indispensable parties are: (1) the owners of Lot 1, over which the alleged express easement is located; (2) the heirs of Thomas Adams who excepted, and, thus, retained their interests in the family cemetery at the time of the conveyance of the property to Mr. Miller, Trustee, for development as a residential subdivision; and (3) the heirs of the family members and parties to the Partition Decree recorded in Deed Book X5 at Page 363, whose interest in the cemetery were reserved, and, thus, excluded from the conveyance of Partition Lot 2, to Thomas Adams.

II. THE ABSENT NECESSARY PARTIES

A. Absence of Owners of Lot 1

The alleged express easement as described in Deed Book, P5 at Page 361 apparently runs over and through Lots 7, 6, 5, 4, 3, 2 and 1. A copy of the plat prepared by Herman Courson of Springfield Engineering Corporation, P.C., dated March 3, 1995 and entitled "Plat Showing Express Easement Route on a Portion of Lots 1 Through 7" is attached as Exhibit A. The owners of Lot 1, Donald D. Hall and Joan P. Hall, however, are not currently parties to this litigation. On July 31, 1991, Plaintiffs nonsuited the owners of Lot 1 at the same time that they nonsuited other lot owners of Wendover who they believed were not involved in the easement dispute. A copy of the

pertinent portion of the transcript from the trial is attached as Exhibit B.

The absence of the owners of Lot 1 was raised by Judge Jane Marum Roush at the hearing on Intervenors' Petition To Intervene In Order To Request The Court Vacate Prior Judgments And Set A New Trial held on August 3, 1995. Judge Roush stated:

> . . . I'm very concerned about Lot 1, I'm not going to hide the ball on that. Lot 1 has a little corner under at least one plat I saw, you might want to look hard and see if you want [to] bring Lot 1 into it.

A copy of the pertinent portion of the transcript of the hearing is attached as Exhibit C.

Despite the Court's admonition and the fact that the owners of Lot 1 are necessary parties to litigation concerning the potential establishment of an easement over their property, the Plaintiffs have failed to add the owners of Lot 1 as parties to this case.

B. **Absence of Heirs of Thomas Adams**

It cannot be disputed that Carlotta T. Atkisson has no interest in any Adams family cemetery, and, thus, has no standing in this case. To the extent George Atkisson has any interest, it would be only in his capacity as a sub-heir of Thomas Adams through his mother Florence Atkisson, as argued by Plaintiffs before the Supreme Court of Virginia.[1]

---

[1] George Atkisson may also lack standing if his mother, Florence Atkisson, still is alive. In response to Intervenors' interrogatory number 13, the Atkissons represented that Florence Atkisson is a "living heir" of Thomas Adams. If this is true, she would be the interested party, and not her son. The entire action, thus, would need to be dismissed for lack of standing on the part of the Plaintiffs.

In the case of Fairfax County Park Authority v. Atkisson, 248 Va. 142, 445 S.E.2d 101 (1994), U.S. cert. denied in 115 S.Ct. 735 (1994), the Supreme Court of Virginia analyzed the 1978 deed from the heirs to Mr. Miller as trustee and ruled in favor of Plaintiffs that "the deed did not convey the cemetery to Miller." Id. at 147. Although the judgment is void and not binding because of the absence of necessary parties, it certainly is persuasive on this one precise issue. Indeed, there is no reason to believe on appeal that in the event of further review, the Court's interpretation of the 1978 deed would be any different. Consequently, as the Supreme Court of Virginia has previously noted, to the extent Mr. Atkisson has an interest in the cemetery, it is in his capacity as ". . . an heir of Mr. Adams . . .." Id. at 146. A copy of the decision of the Supreme Court of Virginia is attached as Exhibit D.

Inexplicably, Plaintiffs have failed to add as parties all of the other heirs of Thomas Adams, who likewise own an interest to the Adams' cemetery, and, therefore, are necessary parties to any litigation seeking easement rights for such cemetery.

In response to discovery, the Atkissons stated that the living heirs of Thomas Adams include:

> Beulah A. Young; Carla A. Money; Agnes K. adams; Florence A. Atkisson; Oscar E. Krombholz; Louise A. Krombholz; DeWilton A. Adams; Ethel D. Adams; Charles P. Adams; Jeannette K. Adams; Stan Adams; Thomas E. Adams, Jr.; Mary E. Adams; Bert K. Adams; Betty K. Adams; Donald C. Baker; Agnes Elizabeth A. Baker; Robert B. Adams; Carma C. Adams; Norman Gresham; Anne A. Gresham; william M. Vipperman; Joan Vipperman; John Adams; and Mona Adams.

The Atkissons significantly also admitted that:

> The above-stated individuals are referenced in paragraph 39 of the Complaint, but as shown by the Deed to which these individuals are a party [the 1978 Miller Deed], the property they owned was conveyed without the conveyance of an interest in the cemetery.

A copy of the Plaintiffs' answer to interrogatory number 7 is attached as Exhibit E.

Furthermore, in response to Intervenors' request for documents number 13 seeking "[a]ny and all documents relating or referring to any agreement between the Atkissons and any heirs concerning, reflecting or relating to any deed of their interests as alleged in paragraph 39 of their Complaint." The Atkissons had the following response:

> There are no such documents other than the deed itself from the heirs to Harold Miller . . ..

A copy of Intervenors' Request for Production of Documents and the Atkissons' supplemental responses are attached as Exhibit F.

Since the heirs of Thomas Adams have not deeded their interests to the Atkissons as erroneously alleged in paragraph 39 of the Complaint, the heirs remain necessary and indispensable parties.

C. **Absence of Heirs of Other Family Members**

Plaintiff George Atkisson traces his interest in the Adams cemetery to a partition decree recorded in Deed Book X5 at Page 356 (the "Partition Decree"), wherein his grandfather, Thomas Adams, acquired his interest in "Lot 2," a tract of 27 1/2 acres ("Partition Lot 2"). By the express terms of the Partition Decree, a copy of

which is attached as Exhibit G, the Adams' cemetery is described and located as "[a] burial lot of one fourth of an acre in the southeast corner of Lot No. 2 . . . reserved as a family burial lot." (Emphasis added.)

Moreover, the survey contained in the Partition Decree clearly provides that the conveyance of the 27 1/2 acres to Thomas Adams is ". . . exclusive of burial lot, which is one fourth of an acre and in the southeast corner of [Partition Lot 2]." Finally, the Decree itself states that " . . . the burial ground . . . with ingress thereto and egress thereto shall remain for the permanent use of the families of the aforesaid parties."

Thomas Adams, thus, never exclusively owned the 1/4 acre cemetery located on his Partition Lot 2. Instead, Thomas Adams' interest was in his capacity as a family member and party to the partition suit, an interest which he shared with other family members and parties to the partition suit. The other family members and parties involved in the partition suit include: Mary Saunders; R. L. Adams; Carrie Powell; Effie Powell; Olivia Adams; Adelbert Adams; Harmonia Adams; Irene Adams; Edna Adams; Sidney Adams; Truman Adams; Oscar Adams; Russell Adams; Lewis Adams; Rose McDaniel and Belle Smith ("the Family Members")(See Exhibit G).

Although heirs of the Family Members have a legal interest in the Adams cemetery, no less an interest than that of Plaintiff George Atkisson, Plaintiffs have made no effort to locate any such heirs or add them as parties to this litigation.

III. **ARGUMENT**

In the absence of the owners of Lot 1, the heirs of Thomas Adams, and the heirs, of the other Family Members, all indispensable parties to this litigation, this action must be dismissed, or Plaintiffs must be required to add such parties to this litigation.

The Supreme Court of Virginia has consistently held that a court cannot render a valid judgment when necessary parties to the proceeding are not before the Court.

> Necessary parties include all persons, natural or artificial, however numerous, materially interested either legally or beneficially in the subject matter or event of the suit and who must be made parties to it, and without whose presence in court no proper decree can be rendered in the cause. This rule is inflexible, yielding only when the allegations of the bill state a case so extraordinary and exceptional in character that it is practically impossible to make all parties in interest parties to the bill, and, further, that others are made parties who have the same interest as have those not brought in, and are equally certain to bring forward the entire merits of the controversy as would the absent persons.
>
> This cardinal principle governing as to parties to suits in equity is founded upon the broad and liberal doctrine that courts of equity delight to do complete justice by determining the rights of all persons interested in the subject matter of litigation, so that the performance of the decree rendered in the cause may be perfectly safe to all who are required to obey it and that further litigation touching the matter in dispute may be prevented.

Allen v. Chapman, 242 Va. 94, 99, 406 S.E.2d 186 (1991); citing McDougle v. McDougle, 214 Va. 636, 637, 203 S.E.2d 131, 133 (1974). The reason for the rule is to prevent a multiplicity of suits and to avoid depriving a person of his or her property without giving that

person an opportunity to be heard. Id. at 100; McDougle, 214 Va. at 637, 203 S.E.2d at 133.

The Supreme Court of Virginia has on several occasions reversed judgments and dismissed actions with prejudice for the failure to add all indispensable parties. See James T. Bush Construction Co. v. Patel, 243 Va. 84, 86-87, 412 S.E.2d 703 (1992)(subsequent beneficiary of deed of trust is necessary party to mechanic's lien enforcement suit); Allen v. Chapman, 242 Va. 94, 100, 406 S.E.2d 186 (1991)(junior lienors are necessary parties to a bill to foreclose on a deed of trust); Mendenhall v. Cooper, 239 Va. 71, 76, 387 S.E.2d 468, 471 (1990)(owners, trustee and beneficiary of deed of trust are necessary parties to mechanic's lien enforcement suit); See also Harris v. Deal, 189 Va. 675, 685-89, 54 S.E.2d 161 (1949)(commissioner's deed void in absence of heirs who were indispensable parties).

In the case of Ferrel v. Giles, 178 Va. 518, 17 S.E.2d 390 (1941), the court confirmed that trial courts are without jurisdiction to adjudicate interests in land without all parties who have a joint interest in such land. The Ferrell case concerned a partition suit where the heirs of one of the owners were not made parties until after the decree of sale. The Supreme Court of Virginia held that since the land in question was jointly owned by the Plaintiff and the heirs, there could be no legal sale until all such heirs were made parties to the suit.

> After it came to the knowledge of the court that the land in question was jointly owned, then, in our opinion, the court was without jurisdiction to sell the land as a whole.

Id at 523.

Likewise, now that this court is aware of the joint interests of the heirs of Thomas Saunders, as well as the interest of the heirs of the Family Members, it is clear that this court is without jurisdiction to adjudicate the interests in the cemetery and easement and this action must be dismissed in their absence. Moreover, in the absence of the owners of Lot 1, necessary and indispensable parties to an action to establish and enforce an easement over their property, any judgment rendered in their absence will be void.

In sum, in the absence of these necessary parties, Defendants and Intervenors are threatened with multiplicitous and inconsistent litigation. In addition, these omitted parties are threatened with the adjudication, albeit invalid, of their property rights without due process afforded by both the Constitution of Virginia and the Constitution of the United States of America.

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JANE B. O'BRIEN
By Counsel

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By: _____
JOHN A.C. KEITH, VSB # 14116
DAVID J. GOGAL, VSB # 28815
Counsel for Intervenors

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, first class postage prepaid, this 1st day of December, 1995, to:

Scott E. Snyder, Esquire
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Bernard E. Goodman, Esquire
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8500 Leesburg Pike, Suite 7000
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Counsel for Defendant Wexford Associates, Inc.

RECEIVED
DEC 04 1995

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON, Plaintiffs v. WEXFORD ASSOCIATES, INC., et al., Defendants	)	In Chancery No. 97823

MOTION IN LIMINE

COME NOW, the Plaintiffs, GEORGE ATKISSON and CARLOTTA T. ATKISSON, by Counsel, and respectfully move that Defendants WEXFORD ASSOCIATES, INC., JAMES E. HENRY, SUSAN H. HENRY, HERBERT VOGAL, BARBARA VOGAL, JOHN KOWALCZYK, KATHERINE KOWALCZYK, PATRICK DEASEY, JANE DEASEY, CHARLES ANDREWS, JEAN ANDREWS, BRIAN McVAY, ELIZABETH McVAY, M. JACK WILKINFELD, JOANNE WILKINFELD, WALTER T. MORGAN, BETH A. MORGAN, LAWRENCE W. WYTE, DIANE B. WYTE, MARK ECKMAN and VIVIAN DATOFF be prohibited from presenting evidence and/or argument on any issues that have been previously argued or might have been ruled upon in the prior proceedings. A memorandum of points and authorities in support of this Motion is attached and incorporated by reference herein.

RESPECTFULLY SUBMITTED,

GEORGE ATKISSON
CARLOTTA T. ATKISSON
By Counsel

ANDERSON & CORRIE

BY: _____
Scott E. Snyder, VSB #26233
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Counsel for Plaintiffs

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing was sent via U.S. Mail, postage prepaid, this 30 day of ~~September~~ November, 1995, to:

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_____
Scott E. Snyder, Esq.

c:\s\ms\Atkisson\MOinLIM.001

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE T. ATKISSON and CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	In Chancery No. 97823
WEXFORD ASSOCIATES, INC., et al	)	
Defendants.	)	

MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO DECLARE PRIOR JUDGEMENT VOID DUE TO LACK OF NECESSARY PARTIES

COMES NOW, Defendants, Wexford Associates, Inc. ("Wexford"), James E. and Susan H. Henry, Herbert and Barbara Vogel, John and Katherine Kowalczyk, Patrick G. and Jane M. Deasy, Charles E. and Jean S. Andrews, Brian T. and Elizabeth J. McVay, Joanne Wilkenfeld, M. Jack Wilkenfeld, Walter T. and Beth A. Morgan, Mark Eckman, Vivian P. Datoff, and Lawrence W. and Diane B. Wyte (collectively "Individual Defendants"), and respectfully request that this Court rule that the previous judgement in this case issued by the Honorable Judge Forkort is null and void and not binding upon the parties, and in support thereof state the following:

MOTION

1. On July 16, 1986, George and Carlotta Atkisson ("Atkisson") filed a Bill of Complaint against Wexford, Charles and Audry Hawthorne, James and Susan Henry, Herbert and Barbara Vogel, and the Fairfax County Park Authority. The Bill of Complaint sought relief

against Wexford solely as the developer, Hawthorne as Wexford's grantor and not as a lot owner, and against Henry and Vogel as lot owners. On July 18, 1986, Atkisson recorded a makeshift notice of *lis pendens* which consisted of the Bill of Complaint with the hand written heading of "*Lis Pendens*" arguably against lots 2, 12, 13, 14, 15, 16, 18 and 23. The "*Lis Pendens*" made no reference to any other owners or lots of the Wendover Subdivision Section III. On February 16, 1988, Atkisson filed an Amended Bill of Complaint against Wexford, the Fairfax County Park Authority and the Individual Defendants with the exception of Mark Eckman ("Eckman") and Vivian P. Datoff ("Datoff") who purchased Lot 4 on June 10, 1994. No new *lis pendens* has ever been filed, and the only lots or lot owners that have not been non-suited and arguably encompassed by the *lis pendens* are lots 2 (Henry) and 23 (Vogel).

2. At the present, the parties before the court consist of Plaintiffs George and Carlotta T. Atkisson; Defendants include: Wexford Associates, Inc.; James E. and Susan H. Henry (owners of Lot 2); Herbert and Barbara Vogel (owners of Lot 23); Katherine Kowalczyk (former owner of Lot 3); Mark L. Eckman and Vivian D. Datoff (owners of Lot 4); Patrick G. and Jane M. Deasy (former owners of Lot 4); Charles E. and Jean S. Andrews (owners of Lot 5); Brian T. and Elizabeth McVay (owners of Lot 6); M. Jack and Joanne Wilkenfeld (owners of Lot 7); Walter T. and Beth A. Morgan (owners of Lot 25); Lawrence W. and Dianne B. Wyte (owners of Lot 38); and, Intervenors David D. and Jane B. O'Brien.

3. This matter came before the Honorable Thomas A. Fortkort of the Circuit Court of Fairfax County and testimony was taken on July 30, 1991, July 31, 1991 and August 20, 1991 regarding the existence of the alleged easement. On February 27, 1992, testimony was given before Judge Fortkort regarding the location of the alleged easement and on January 27, 1993,

regarding the value of the alleged easement.

4. By Deed dated June 15, 1992, and recorded June 16, 1992, in Deed Book 8160 at Page 277 among the land records of Fairfax County, Virginia, John and Katherine Kowalczyk ("Kowalczyks") conveyed Lot 3 to David D. and Jane B. O'Brien ("O'Brien"). O'Brien purchased the property without notice of the suit.

5. During the course of litigation and before the entry of judgement, Atkisson became aware of the conveyance of Lot 3 and took no steps to join O'Brien as parties.

6. On March 10, 1993, Judge Thomas A. Forkort entered a Final Order, ruling that Atkisson owned an express and prescriptive easement across the Wendover Subdivision and relocating that easement to Fairfax County Park Authority property.

7. Upon appeal, the Supreme Court of Virginia ruled that the Trial Court had no authority to relocate the easement and ordered that the easement be established through the Wendover Subdivision. Fairfax County Park Authority v. Atkisson, 248 Va. 142, 149, 445 S.E.2d 101, cert. denied, 115 S.Ct. 668 (1994). The Supreme Court also held the express easement should be cleared of obstructions unless the parties could reach an agreement for alternate access. Id at 149. Significantly, the objections of Wexford and the Individual Defendants below were not addressed because they were not presented on appeal, nor did the Supreme Court specifically locate the easement. Id.

8. On May 25, 1995, the Honorable Judge Keith heard Petitioner's Motion for Entry of an Order consistent with the mandate of the Supreme Court of Virginia. Wexford and the Individual Defendants excepting Eckman and Datoff asserted that a portion of the easement was terminated as a matter of law (5/25/95 Tr. at 35), and that the judgment was void as all necessary

parties were not before the Court. Judge Keith scheduled another hearing on this matter for August 3, 1995 for the purpose of taking evidence on the termination of the easement, and then recused himself from the case.

9. On August 3, 1995, the Honorable Judge Roush heard argument on O'Brien's Petition to Intervene. After hearing testimony and argument on this matter, Judge Roush granted O'Brien's Petition and scheduled a new trial, currently set for March 18, 1996. Specifically, the Circuit Court ruled:

> " that the O'Briens were necessary parties, without which the Court could not afford complete relief and (I) do not believe that their interests were adequately represented or that there was an identity of interest. I note that Judge Fortkort made all of his rulings or most of his dispositive rulings . . . after the O'Briens were already in title . . . and completely unaware of the suit. (8/3/95 Tr. at 69-70).

Since a new trial was granted, Judge Roush did not take evidence on the termination of the easement.

10. Because of the failure of Atkisson to join O'Brien, necessary party to any action to establish any easement over Lot 3, any prior judgement is null and void and not binding upon any party. The Code of Virginia Section 8.01-428(c) (1950 as Amended); Gulfstream Building Associates v. Britt, 239 Va. 178 (1990).

11. On September 27, 1995, Atkisson filed a Motion to Add Additional Parties requesting that the Court add Eckman and Datoff as defendants. Eckman and Datoff purchased Lot 4 Wendover Section III from Deasy on June 10, 1994. As noted above, Lot 4 was not included in the *lis pendens* filing on July 18, 1986.

12. At the time Eckman and Datoff entered into the contract and went to settlement

Judge Fortkort had ruled that Atkisson had a prescriptive and express easement, and had relocated that easement onto Fairfax County Property. Furthermore, the decision had been appealed solely by the Fairfax County Park Authority. Atkisson had no appeal or cross error pending and Wexford and the Individual Defendants chose not to appeal.

13. Eckman and Datoff's title insurance policy makes no mention of this litigation. (See Exhibit "1"). Plaintiff had no claims in the land records against Lot 4.

14. On December 1, 1995, Wexford and the Individual Defendants filed a Motion to Add Additional Party Plaintiffs as Atkisson claims an interest in the burial lot and easement as an heir of Thomas Adams and all heirs are not present in this action.

15. Because all the necessary parties were not before this Court, any prior judgement is null and void. The Code of Virginia Section 8.01-428(c) (1950 as Amended); Gulfstream Building Associates v. Britt, 239 Va. 178 (1990).

MEMORANDUM IN SUPPORT

I. THE JUDGMENT OF THE CIRCUIT COURT WAS VOID AS A MATTER OF LAW AS ALL NECESSARY PARTIES WERE NOT BEFORE THE COURT.

The enforcement of the easement route claimed by Plaintiff, but never expressly located by any Court, would necessarily affect the property rights of parties who were not before the trial court, namely O'Brien, Eckman and Datoff. This Court reaffirmed the broad definition of "necessary parties" set forth in Gaddess v. Norris, 102 Va. 625, 630 (1904) by repetition in Mendenhall v. Cooper, 239 Va. 71, 75 (1990), and Raney v. Four Thirty Seven Land Co., 233 Va. 513, 519-20 (1987) as follows:

> Where an individual is in the actual enjoyment of the subject matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's

> claim, in such case he has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit.

Because of the failure of Atkisson to include O'Brien, Eckman, Datoff and the Saunders' and Adams' heirs in the law suit any prior judgment is null and void. Patterson v. Anderson, 194 Va. 557, 570-71 (1953); McDougle v. McDougle, 214 Va. 636, 637-38 (1974).

> No judicial proceeding can deprive a man of his property without giving him an opportunity to be heard in accordance with the provisions of law, and if such a judgment is rendered against him without such opportunity to be heard, it is absolutely void. A void judgment is in legal affect no judgment. By it no rights are divested and from it no rights were obtained. All claims flowing out of it are void. It may attacked at any proceeding by any person whose rights are affected. (Emphasis Added).

Harrison v. Deal, 189 Va. 675, 686-87 (1949). See also, Mendenhall v. Douglas L. Cooper, Inc., 239 Va. 71 (1990); Allan v. Chapman, 242 Va. 94 (1991).

On July 25, 1995, O'Brien filed a Petition to Intervene ("Petition") in Atkisson v. Wexford Associates, Inc., et al., Chancery No. 97823. Atkisson failed to include O'Brien's grantors, Kowalczyk, who had purchased Lot 3 in June 1986, in their Bill of Complaint filed July 16, 1986, and also failed to include Kowalczyk or Lot 3 in their recorded *lis pendens*. On February 16, 1988, Atkisson filed an Amended Bill of Complaint adding several individual lot owners, including Kowalczyk as parties to the suit. However, no *lis pendens* has ever been filed against Kowalczyk or Lot 3. (5/25/95 Tr. at 22, 10-13).

Between June 15, 1992, when O'Brien purchased Lot 3, and the entry of judgment in the instant case on March 10, 1993, Petitioner had actual and constructive notice of the sale, but took no actions to join O'Brien in this action. Due to Atkisson's failure to record a *lis pendens*, O'Brien had no actual or constructive knowledge of the lawsuit and/or the alleged easement until

February 1995 when they received a letter from counsel for Wexford and the Individual Defendants.

On March 10, 1993, Judge Fortkort entered a final Order, ruling that Atkisson owns an express and prescriptive easement across Wendover, but relocating that easement across Fairfax County Park Authority property. On June 10, 1994, Eckman and Datoff purchased Lot 4 from Deasy. Eckman and Datoff had some vague knowledge that there had been a law suit against Deasy regarding an easement. No *lis pendens* was ever filed against Lot 4 and the title insurance policy does not mention any litigation or claims against Lot 4. (Exhibit "1"). However, at the time of contract and settlement Judge Fortkort had ruled that the easement was to be relocated across Fairfax County Park Authority property and would therefore not effect Lot 4. The sole appellant in this matter was the Park Authority who contested the finding of an easement and the Court's authority to relocate said easement.

Also on June 10, 1994, The Virginia Supreme Court determined Petitioner possessed an express easement through Wendover to the burial lot, and the trial judge had no authority to relocate said easement onto Fairfax County Park Authority property. However, the Supreme Court never specifically located the easement.

On August 3, 1995, Judge Roush heard Petitioner's Motion for Entry of an Order consistent with the mandate of the Supreme Court. O'Brien asserted that the ruling of the Court was void as to them, as they were *bona fide* purchasers for value without notice. Judge Roush specifically found that O'Briens had no notice of the lawsuit, (8/3/95 Tr. at 69-70), and granted the Petition and scheduled a new trial.

When a necessary party is not joined, the Court has the authority to set aside the judgment

and order a new trial pursuant to the Code of Virginia §8.01-428(c) (1950) and Gulfstream Building Associates v. Britt, 239 Va. 178 (1990). In Gulfstream, Daniel Smith instituted an adverse possession suit to clear the title to his land ("Lot 7"). Id at 180. In the adverse possession suit, Smith v. Stone, the Princess Anne County School Board (School Board) held title to Lot 5, the adjoining lot, and was not made party to the suit. Id at 181. Smith was awarded an overlapping portion of Lot 5 in that suit. Id at 180. Gulfstream, the plaintiff, took title to Lot 5 from the School Board. Id at 181. In 1984, the Brinkleys (Smith's successor in interest) filed an action of ejectment against Gulfstream. Id. Gulfstream then brought suit in Chancery under Code of Virginia §8.01-428(c) and the Court's inherent equity power. The Court, in accordance with the Commissioner's findings ruled that "the metes and bounds description of Lot 7 in the Smith v. Stone decree was 'null, void, and of no effect' to the extent that it affected Lot 5." Id. Upon appeal the Circuit Court ruled "a non-party . . . may maintain a suit to set aside the allegedly damaging judgment if he has an interest which is jeopardized by enforcement of the judgment and the circumstances support a present grant of relief." Id at 181-182, citing Evons v. Asphalt Coach, Etc., Co., 194 Va. 165, 175-76 (1952); Wilcher v. Robertson, 78 Va. 602, 617 (1884).

In the instant case, O'Brien, Eckman and Datoff were not joined as parties to the suit and no *lis pendens* was ever filed on Lots 3 and 4. As noted above, the Trial Court found that O'Brien took possession of Lot 3 without notice of the suit. (Tr. 8-3-95 at p.67, 12-23 and 70, 1). O'Brien therefore, took title as a *bona fide* purchaser for value without notice. Additionally, Eckman and Datoff had no knowledge that the suit would actually effect their property. At the time of purchase and settlement there was a judgment that did not effect their property and the

Plaintiff's had no appeal or cross error pending in the Supreme Court. It was impossible to know the Supreme Court would address itself to an issue not before the court, in violation of its own Rules, and order an easement be established over Wendover III. Eckman and Datoff took title as *bona fide* purchasers for value without notice. O'Brien, Eckman and Datoff clearly have interests in Lots 3 and 4 that are jeopardized by the Supreme Court's finding of an express easement that Atkisson contends crosses Lots 3 and 4. O'Brien's, Eckman's and Datoff's rights and interests in Lots 3 and 4 attached prior to any judgment being rendered. As such, the "circumstances support a present grant of relief" as the damage to O'Brien, Eckman and Datoff is permanent and severe. Gulfstream, 239 Va at 181.

This Court went on to clarify when non-party relief is appropriate in Charles v. Precision Tune, Inc., 243 Va 313 (1992). The court stated that §8.01-428(c) "does not create any new rights or remedies, but merely preserves a court's inherent equity power to entertain an independent action." 243 Va at 317, citing, Gulfstream, 239 Va at 178. The Court then stated the elements for this independent action in equity:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law. 243 Va. at 317-18.

The above-mentioned test has been met in this case. First, the Atkisson judgment ought not, in equity and good conscience, be enforced against a non-party as it would result in a taking without due process of law. Second, O'Brien, Eckman and Datoff had no notice of the pending suit and is a *bona fide* purchaser for value. Third, it is Atkisson's own mistake or failing which

caused the prejudice to O'Brien, Eckman and Datoff. Fourth, as noted above, the Court found that O'Brien was without notice because no *lis pendens* was filed, thus, O'Brien is not at fault. Eckman and Datoff were not additionally not at fault as they also were without notice. Finally, O'Brien, Eckman and Datoff have no adequate remedy at law as they did not become aware of the suit and its effect until the appeals process was completed.

The property interests of O'Brien, Eckman and Datoff were not affected by the Final Order entered by Judge Fortkort in the instant case. However, the directions in the Supreme Court's opinion regarding the removal of obstructions on the express easement cannot, as a matter of law, be ordered in the absence of these necessary parties. James T. Bush Construction Co. v. Patel, 243 Va. 84 (1992); Walt Robbins, Inc. v. Damon Corporation, 232 Va. 43 (1986). See Carter v. Sullivan, 281 Mass. 217, 183 N.E. 343 (1932); Di Leo v. Pecksto Holding Corp., 304 N.Y. 505, 109 N.E.2d 600 (1952).

The prior judgement affects the interests of necessary parties who were not part of the litigation, in violation of the tenets of Virginia law articulated in James T. Bush Construction Co., 243 Va. at 88, and Mendenhall, 239 Va. at 76. By virtue of principles of due process of law, O'Brien, Eckman and Datoff, are necessary parties in this case as Atkisson attempts to affect the property rights of these parties. James T. Bush Construction Co., 243 Va. at 88, 412 S.E.2d at 705; Mendenhall, 239 Va. at 75; Walt Robbins, Inc., 232 Va. at 47-48. Relief affecting the necessary parties may therefore not be ordered. James T. Bush Construction Co., 243 Va. at 88; Mendenhall, 239 Va. 74; Peatross v. Gray, 181 Va. 847, 859 (1943).

Additionally, the judgment may not be enforced against any previous party as it is absolutely void. Harrison, 189 Va. at 686-87. The finding by Judge Roush that O'Brien was a

necessary party and not a part of the original lawsuit voided the judgment in Atkisson v. Wexford, Chancery No. 97823. "A void judgment is in legal effect no judgment (and) . . . may be attacked at any proceeding by any person whose rights are affected." Harrison, 189 Va. at 686-87. Additionally, the invalidity of the judgment as a whole and not just to necessary parties is a logical necessity in this case. Were the judgment to be void only as to O'Brien, Eckman and Datoff but binding on Wexford and the other Individual Defendants there could be dramatically inconsistent results. If the necessary parties were to prevail and no easement was found Wexford and the Individual Defendants' would be required to provide a useless easement. The plat, attached hereto as Exhibit "2" and incorporated be reference herein, depicts a portion of the easement described in the 15 Acre Deed. Without Lots 3 and 4 the easement is useless as it provides no access to the County Road. Also, inconsistent rulings could also occur if Atkisson prevailed at the trial against O'Brien, Eckman and Datoff. The Court could award different types of easements or more importantly different routes for the easement. Therefore, Wexford and the Individual Defendants are also not bound by the previous judgment.

Therefore, the judgment of the Circuit Court in Atkisson v. Wexford, et al., is void as to all parties as a matter of law as not all necessary parties were before the Court.

Respectfully submitted,
WEXFORD ASSOCIATES, INC. and
INDIVIDUAL DEFENDANTS
By Counsel

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(703) 848-2828

By: _____
Bernard E. Goodman
Counsel for Wexford Associates, Inc.
and Individual Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion and Memorandum in Support of Motion to Declare Prior Judgment Void Due to Lack of Necessary Parties was mailed first class, postage prepaid, on this 1st day of December, 1995 to the following:

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE T. ATKISSON and CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	In Chancery No. 97823
WEXFORD ASSOCIATES, INC., et al	)	
Defendants.	)	

MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO DETERMINE IF ALLEGED EASEMENT IS TERMINATED AS A MATTER OF LAW AT BIRD ROAD

COMES NOW, Defendants, Wexford Associates, Inc. ("Wexford"), James E. and Susan H. Henry, Herbert and Barbara Vogel, John and Katherine Kowalczyk, Patrick G. and Jane M. Deasy, Charles E. and Jean S. Andrews, Brian T. and Elizabeth J. McVay, M. Jack Wilkenfeld, Joanne Wilkenfeld, Walter T. and Beth A. Morgan, Mark Eckman, Vivian P. Datoff, and Lawrence W. and Diane B. Wyte (collectively "Individual Defendants"), by counsel, respectfully request that this Court rule that the alleged easements terminate at Bird Road, and in support thereof, state the following:

MOTION

1. The express easement claimed by the George T. and Carlotta T. Atkisson ("Atkisson"), was created by a deed located in Deed Book H5 at Page 237 in 1892 in the land records of Fairfax County, Virginia, ("the 15 Acre Deed") granting Thomas Adams a 15 acre parcel. The easement begins at Point G and provides access for the 15 Acre parcel to the "County Road." The easement was intended to serve solely as access to the 15 acre parcel.

2. Atkisson also alleges an easement by necessity and a prescriptive easement both of which allegedly follow the path of the express easement.

3. The express easement was intended to serve as access from the 15 acre parcel to the "County Road."

4. An easement by necessity only lies until access to a county road is provided.

5. The purpose of the alleged easements is carried out once the alleged easements reach Bird Road, as access to the County Road has been provided.

6. Due to the cessation to the purpose for which the portion of the easement southward of the northern edge of Bird Road was granted, this portion of the easement has been extinguished. American Oil Co. v. Leaman, 199 Va. 637, 653, 101 S.E.2d 540, 552 (1958).

MEMORANDUM IN SUPPORT

The 1892 deed granted the express easement for the purpose of granting access from Point G "to the County Road" for the land conveyed by the deed to Thomas S. Adams. As a result of the development of Wendover a new county road, Bird Road, was placed in the center of the subdivision. As a matter of law, the easement of Petitioner is terminated after Bird Road as the purpose of the easement has been fulfilled. McCreery v. The Chesapeake Corporation of Virginia, 220 Va. 227 (1979); American Oil Co. v. Leaman, 199 Va. 637, 653 (1958).

The "County Road" referred to in the deed is no longer useable, as evidenced by the copies of the photographs attached hereto and incorporated by reference as Exhibit "1". Additionally, this fact may be perceived by observation of the "County Road" in two directions at the point were it intersects Post Road. The area of the thirty (30) foot outlet road that leads from the easement terminating point to the nearest public road (Post Road) now contains a

narrow foot path behind the back yards of subdivision housing. It is filled with trees and brush. At one point it is crossed by a gully. Moreover, in 1983, the last time Petitioner contends he was able to maintain the easement, there were fallen trees across the road (7/3/91 Tr. at 44). It is not useable by vehicular traffic.

More importantly, reaching the "County Road" referred to in the 1892 deed is no longer necessary in order to access the public road system, because the route of the express easement leads to Bird Road which is a part of the public road system that leads to all other public roads. Due to the cessation of the purpose for which the portion of the express easement southward of the northern edge of Bird Road was granted, this portion of the easement has been extinguished. McCreery, 220 Va. at 232; Leaman, 199 Va. at 653; Hudson v. American Oil Co., 152 F.Supp. 757, 764, affirmed, 253 F.2d 27 (4th Cir. 1958); Kogod v. Cogito, 200 F.2d 743 (D.C. Cir. 1952).

The 1892 Deed specified that the easement was granted to achieve access from the land granted to Thomas A. Adams "to the County Road." (emphasis added). Plaintiff may not expand the use of the easement to the benefit of another property owned by Plaintiff some hundred years after the grant of the easement, because doing so would impose an additional burden on the servient estate that was not intended by the 1892 Deed. Walton v. Holland, 238 Va. 687, 690 (1989). The use of the easement must be restricted to the terms and purposes of the grant. Nishanian v. Sirohi, 243 Va. 337, 339 (1992). Atkisson rejected a proposed easement to the street in 1986 because "he took unlicensed vehicles over there (the burial plot) and access from a public street wouldn't help him." (8/2/91 Tr. at 47.) Access to Atkisson's privately owned land has nothing to do with access to the fifteen (15) acre parcel or burial plot. Access from the burial plot to the public road is more conveniently achieved by following the express easement

route, or the alternate easement route proposed by Wexford, to Bird Road. (The alternate easement stopped at Lot 3 as O'Brien was not subject to the Courts jurisdiction.) Further extension of the easement has been terminated by operation of law as the thirty (30) foot outlet road no longer exists and Bird Road is much closer to the burial plot. McCreery, 220 Va. at 232; Leaman, 199 Va. at 653.

Respectfully submitted,
WEXFORD ASSOCIATES, INC. and
INDIVIDUAL DEFENDANTS
By Counsel

GOODMAN GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828

By:
Bernard E. Goodman
Counsel for Wexford Associates, Inc.
and Individual Defendants

CERTIFICATE OF SERVICE

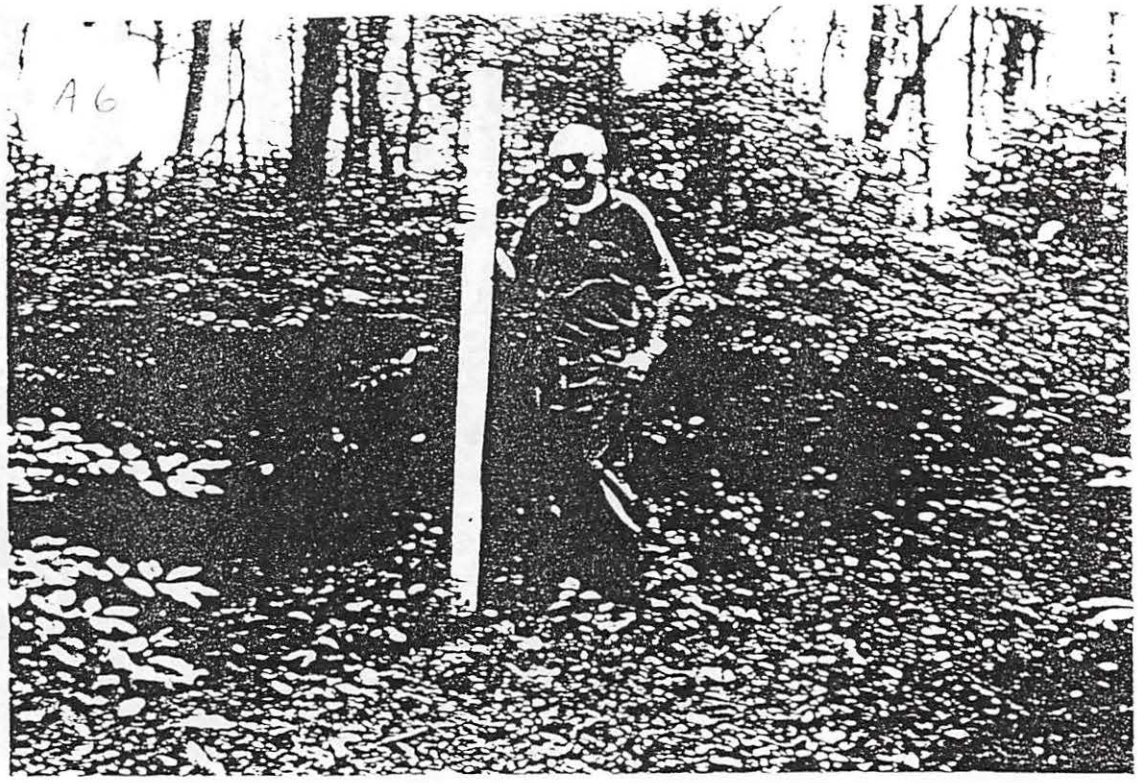
I hereby certify that a true and accurate copy of the foregoing Motion and Memorandum in Support of Motion to Determine if Alleged Easement is Terminated as a Matter of Law at Bird Road, first class, postage prepaid, on this 1st day of December, 1995 to the following:

Scott E. Snyder, Esquire
Anderson & Corrie
12600 Fair Lakes Circle, Suite 220
Fairfax, VA 22033-4904

David J. Gogal, Esquire
Blankingship & Keith, P.C.
4020 University Drive, Suite 312
Fairfax, VA 22030

Bernard E. Goodman

B/b:atkisson disk/wexf1130.mot



A6 "T" intersection of trail running behind lots 38, 39, and 40 with Outlet Road taken with camera facing SE

A12 Camera facing NE with subject on Outlet Road 50' NE of "T" intersection

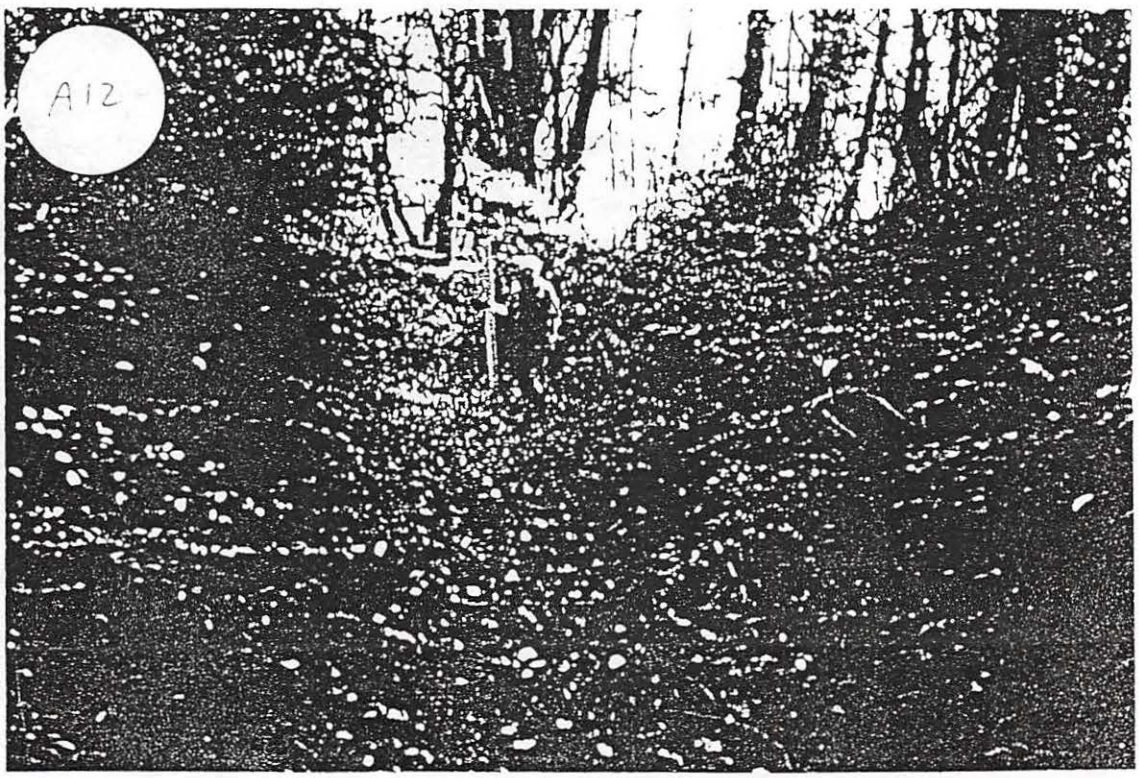
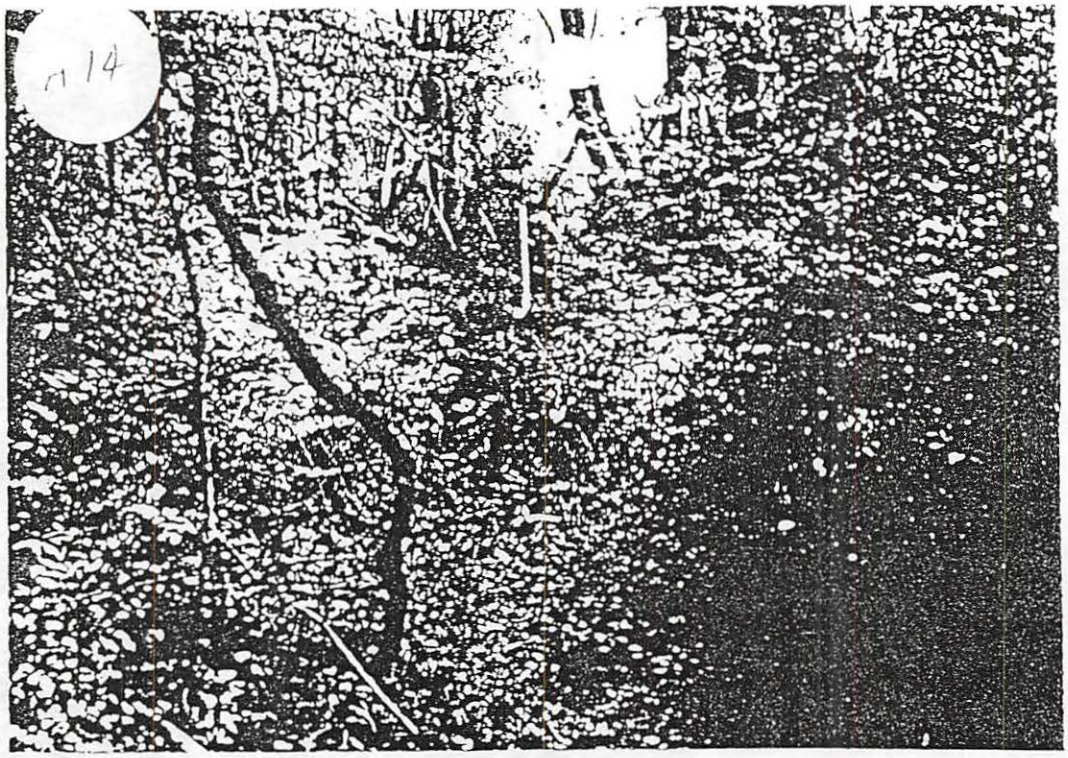
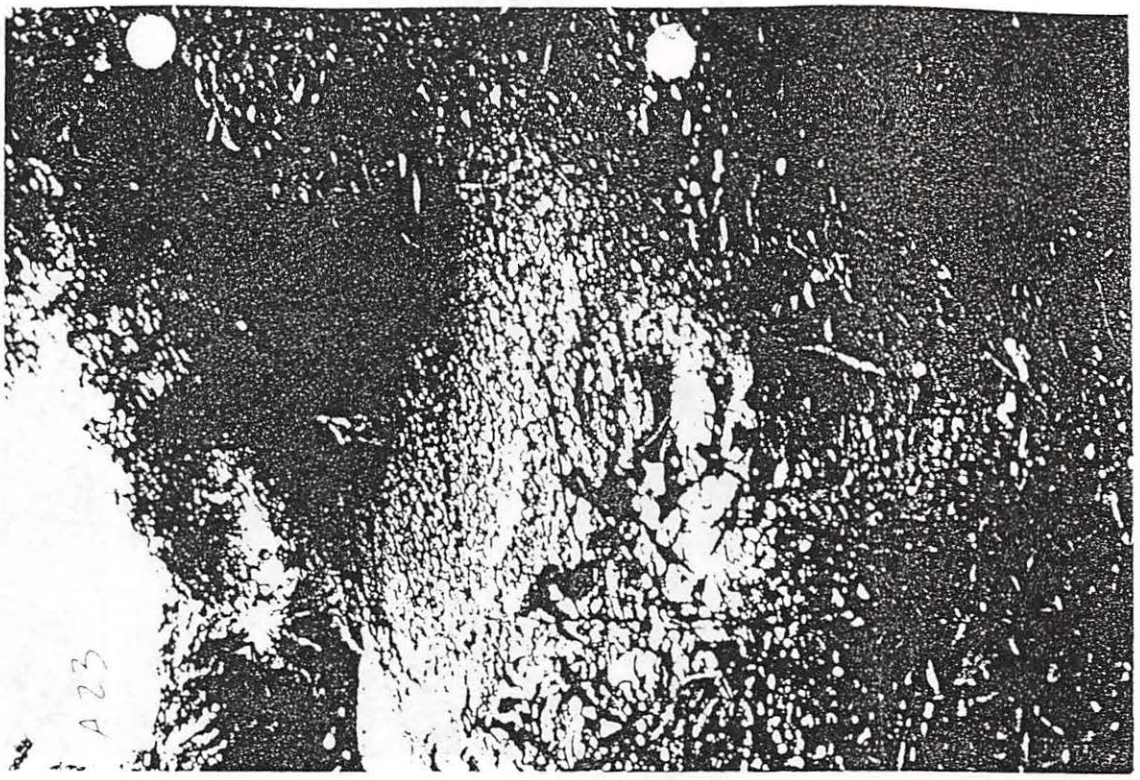


EXHIBIT "1"



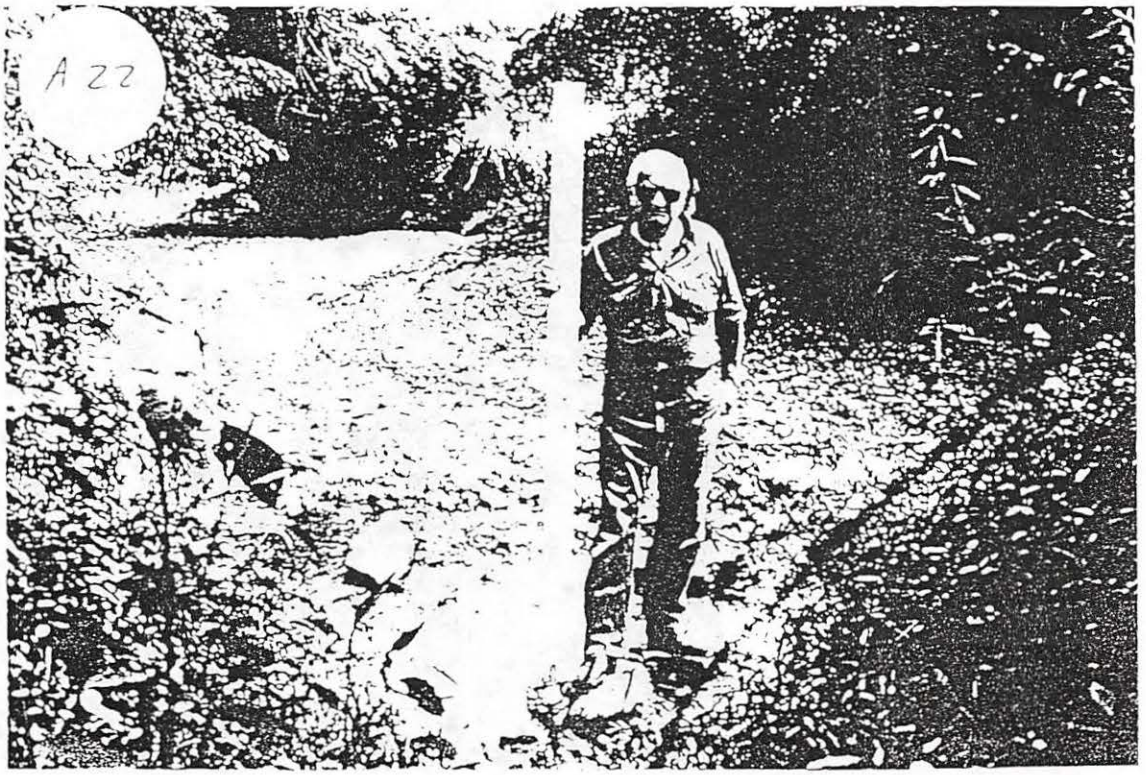
A14 Camera facing NE with subject on Outlet Road 100' NE of "T" intersection

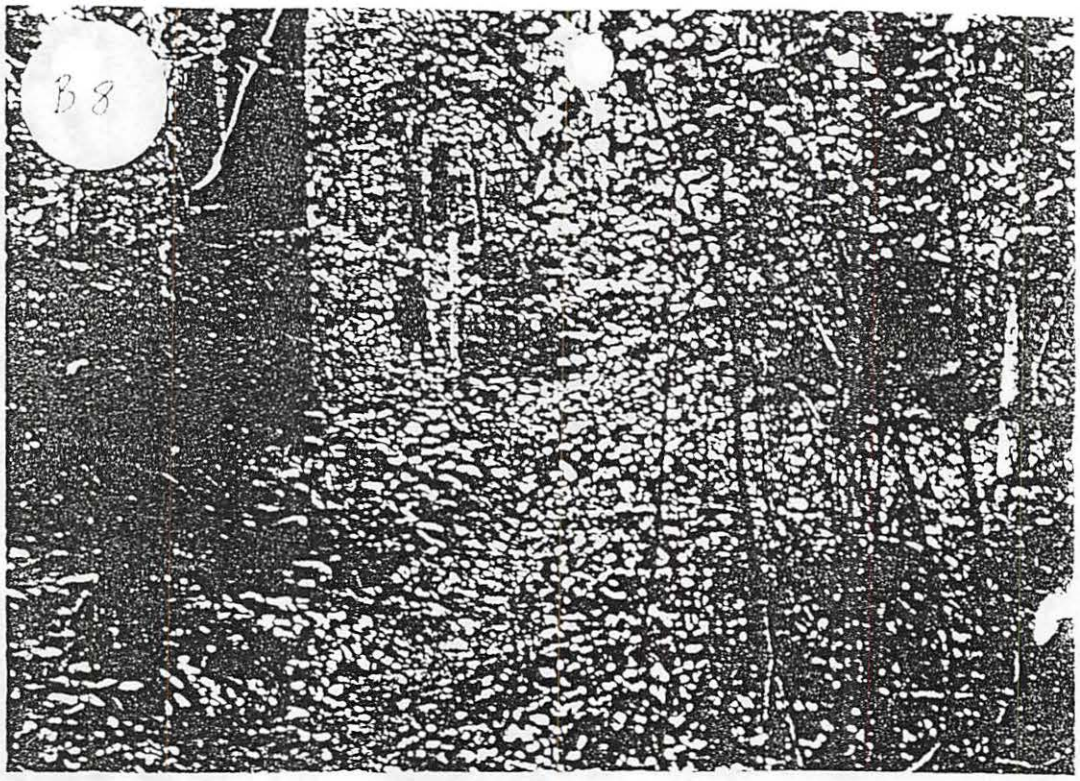
A16 Camera facing NE with subject on Outlet Road 200' NE from "T" intersection and 7' from stream



A23 Camera facing NE showing trail on Outlet Road leading into stream

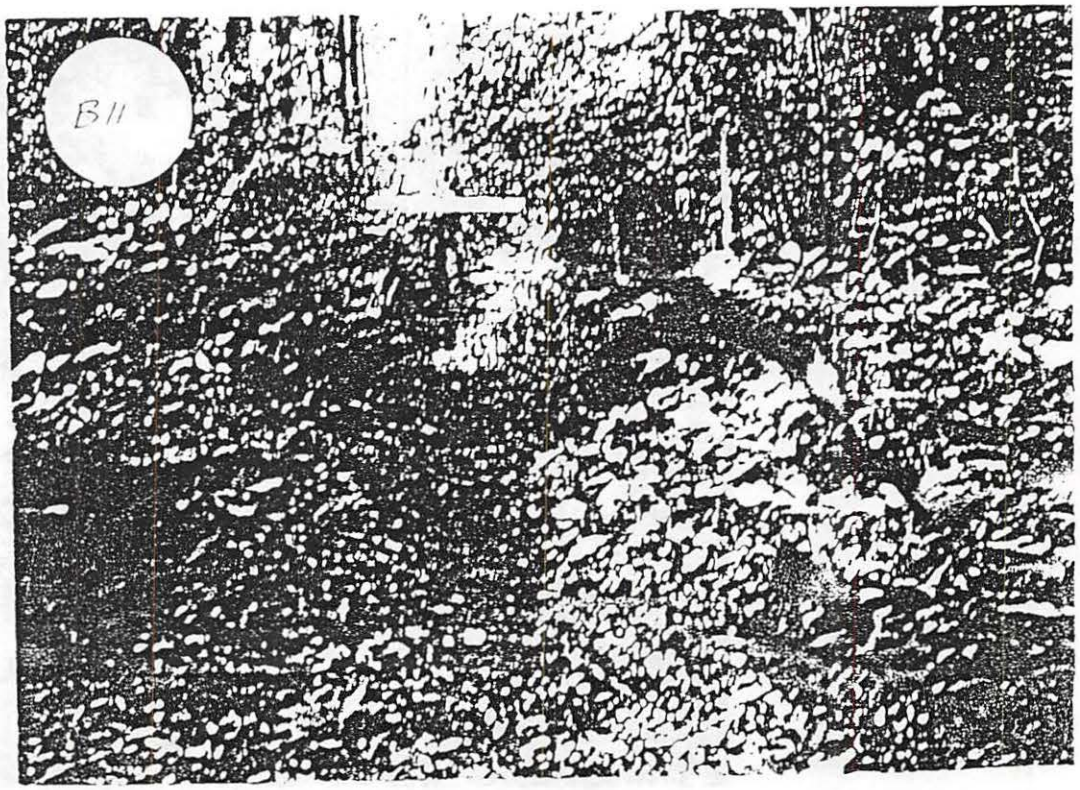
A22 Camera facing NE with subject on rocks in stream intersecting trail on Outlet Road





B8 Taken with camera on Outlet Road facing SW with subject 265' SW of "T" intersection

B11 Taken with camera on Outlet Road facing SW with subject 325' SW of "T" intersection



VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE T. ATKISSON and CARLOTTA T. ATKISSON Plaintiffs, v. WEXFORD ASSOCIATES, INC., et al Defendants.	)	In Chancery No. 97823

MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO COMPEL PLAINTIFFS TO JOIN ADDITIONAL PARTY PLAINTIFFS OR DISMISS THE CASE

COMES NOW, Defendants, Wexford Associates, Inc. ("Wexford"), James E. and Susan H. Henry, Herbert and Barbara Vogel, John and Katherine Kowalczyk, Patrick G. and Jane M. Deasy, Charles E. and Jean S. Andrews, Brian T. and Elizabeth J. McVay, Joanne Wilkenfeld, M. Jack Wilkenfeld, Walter T. and Beth A. Morgan, Mark Eckman, Vivian P. Datoff, and Lawrence W. and Diane B. Wyte (collectively "Individual Defendants"), and respectfully request that this Court compel Plaintiffs, George Atkisson and Carlotta Atkisson ("Atkisson") to join additional party plaintiffs in this matter or dismiss the case against them, and as grounds therefore state the following:

1. Plaintiffs George T. Atkisson and Carlotta T. Atkisson ("Atkisson") claim an interest in a family burial lot referenced in Deed Book X5 at Page 356 in the land records of Fairfax County ("Partition Deed") as heirs of Thomas Adams.

2. The Partition Suit was brought to partition the land of Mary Saunders between her

Family Members ("Family Members"). The other family members and parties involved in the partition suit include: Mary Saunders; R. L. Adams; Carrie Powell; Effie Powell; Olivia Adams; Adelbert Adams; Harmonia Adams; Irene Adams; Edna Adams; Sidney Adams; Truman Adams; Oscar Adams; Russell Adams; Lewis Adams; Rose McDaniel and Belle Smith. The Partition Deed created several partition lots including Partition Lot 2 which was conveyed to Thomas Adams. The Partition Deed references a burial lot on Partition Lot 2 of "one fourth an acre in the South east corner of Lot No. 2" (Partition Deed at Page 358) and created an express easement to Partition Lot 2. The entire partition property and each of seven partition lots was measured exactly by metes and bounds. The burial lot has no metes and bounds. Thus the precise shape and exact location are unknown. However, the Partition Deed contained a plat of the properties and depicts the rough location of the burial lot. A copy of this plat is attached hereto and incorporated by reference as Exhibit "1". The Partition Deed expressly reserved the right of use and access to the family burial lot for the Family Members. To this day, the Family Members and their heirs retain an interest in the burial lot under the Partition Deed.

3. Thomas Adams died intestate in 1941. (7/31/91 Tr. at 83). Thus Partition Lot 2 designated as containing the burial lot in the Partition Deed passed by intestate succession to the heirs of Thomas Adams. Plaintiff George Atkisson claims to be the grandson of Thomas Adams. (7/31/91 Tr. at 7). Carlotta T. Atkisson is not an heir of Thomas Adams.

4. The Supreme Court of Virginia in Fairfax County Park Authority v. Atkisson, 248 Va. 142 (1994) expressly adopted Plaintiff's argument and ruled that the family burial lot was not conveyed to Harold Miller as Trustee by the deed recorded in Deed Book 4865 at Page 13 in the land records of Fairfax County ("Heir's deed"). While this decision is not binding and is in fact

void, it is persuasive authority as to how the Supreme Court will rule on the Deed if it is presented with that issue. The family burial lot did not validly pass in any documents and all of the Family Members' heirs and Thomas Adams' heirs retain an interest in it. Even assuming arguendo that the Heir's Deed validly conveyed the interest of the heirs of Thomas Adams in the burial lot, it does not effect the rights of the heirs of the Family Members.

5. Plaintiff George Atkisson testified under oath in open court that: he would maintain the "road" with his uncles and brothers (7/31/91 Tr. at 24); that he "had committed to about fifty people (who were). . . . the heirs and sub-heirs, if you will, their children" of Thomas Adams that he would maintain the road (7/31/91 Tr. at 68-69); and that Thomas and Ida Adams had nine children of whom 2 were still living (at the time of the trial in 1991). (7/31/91 Tr. at 75).

6. There is no allegation that George Atkisson represents the interest of the Family Members' heirs, and no proof he represents the interest of the Thomas Adams heirs.

7. To avoid duplicitous proceedings, all interested and necessary parties must be before the court. Were the Defendants to receive a judgement in their favor another heir could institute the same action and force them to defend this issue again.

8. The Court has the authority under the Code Of Virginia Section 8.01-5(A) (1950 as Amended) and Rule 3:9A of the Rules of the Supreme Court of Virginia (1950 as Amended) and its equity powers to join additional parties when the ends of justice require.

MEMORANDUM

The Code of Virginia Section 8.01-5(A) states in part "whenever such nonjoinder shall be made to appear by affidavit or otherwise, new parties may be added . . . by order of the court

at any time as the ends of justice may require." Joinder is warranted when (1) complete relief cannot be granted to the parties without him or (2) he claims an interest that may subject the parties to double, multiple or inconsistent obligations. Rule 3:9A of the Rules of the Supreme Court of Virginia (1950 as Amended). Such a nonparty may be made a plaintiff, a defendant or an involuntary plaintiff. Id. The purpose of §8.01-5 is to allow the adding or dropping of parties "until all parties necessary for the just disposition of the case are before the court." Revisers' Note to §8.01-5. Additionally, this court has determined that the permissive language "may" in §8.01-5 will be interpreted as "shall" in the statute which seeks to further the ends of justice. Lee v. Mutual Reserve Fund Life Ass'n, 97 Va. 160, 33 S.E. 556 (1899). (decided under former §8-96).

In the instant case, the heirs of the Family Members and Thomas Adams retain an interest in the family burial lot. Were the Defendants to receive a judgment in their favor another heir, not a party to the current litigation, could reassert the claims brought by Mr. Atkisson. The Defendants would thus again be required to incur costs, expenses and the inability to sell their land in connection with the new lawsuit. The current litigation is rapidly approaching its tenth year. It is in the interest of justice and all the parties to require the presence of all necessary parties before the court. The failure to join the heirs would subject the Defendants to a substantial risk of double multiple or inconsistent obligations. Rule 3:9A.

Additionally, where a necessary party is not subject to the Court's jurisdiction it must be dismissed as any judgment rendered in the absence of said party is void. Mendenhall v. Cooper, 239 Va. 71, 387 S.E.2d 468 (1990).

WHEREFORE, Defendants Wexford, James E. and Susan H. Henry, Herbert and Barbara

Vogel, John and Katherine Kowalczyk, Patrick G. and Jane M. Deasy, Charles E. and Jean S. Andrews, Brian T. and Elizabeth J. McVay, Joanne Wilkenfeld, M. Jack Wilkenfeld, Walter T. and Beth A. Morgan, Mark Eckman, Vivian P. Datoff, and Lawrence W. and Diane B. Wyte respectfully request that this Court compel the Plaintiffs to join the additional parties plaintiff or dismiss this case with prejudice and award Wexford and the Individual Defendants its costs and attorney's fees and any other relief it deems just and reasonable.

Respectfully submitted,
WEXFORD ASSOCIATES, INC. and
INDIVIDUAL DEFENDANTS
By Counsel

GOODMAN GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828

By: Bernard E. Goodman
Bernard E. Goodman
Counsel for Wexford Associates, Inc.
and Individual Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion and Memorandum in Support of Motion to Compel Plaintiffs to Join Additional Party Plaintiffs or Dismiss the Case first class, postage prepaid, on this 1st day of December, 1995 to the following:

Scott E. Snyder, Esquire
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Fairfax, VA 22033-4904

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Bernard E. Goodman

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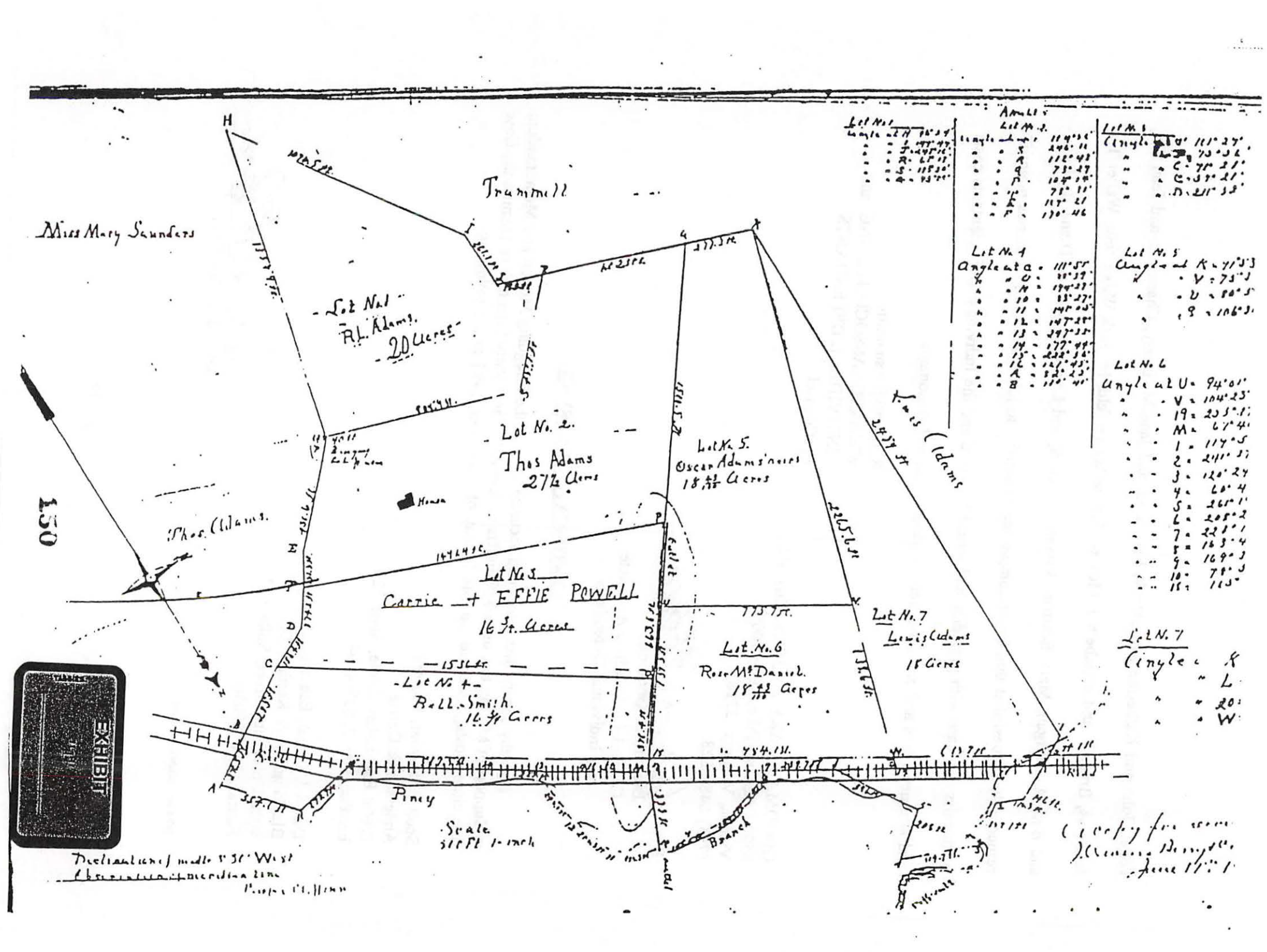
Miss Mary Saunders
Trammell
Lot No 1
R.L. Adams.
20 Acres
Lot No. 2.
Thos Adams
27½ Acres
Lot No. 5.
Oscar Adams's heirs
18 11/16 Acres
Lot No 3
Carrie + EFFIE POWELL
16 Ft. Acres
Lot No. 6
Rose McDaniel.
18 11/16 Acres
Lot No. 7
Lewis Adams
18 Acres
Lot No 4
Bell-Smith.
16 ½ Acres
Thos. Adams.
Piney
Scale
Branch
150
EXHIBIT

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE T. ATKISSON and CARLOTTA T. ATKISSON Plaintiffs, v. WEXFORD ASSOCIATES, INC., et al Defendants.	)	In Chancery No. 97823

MOTION FOR DISMISSAL WITH PREJUDICE OF IMPROPER PARTIES

COMES NOW, Defendants John and Katherine Kowalczyk ("Kowalczyk") and Patrick G. and Jane M. Deasy ("Deasy"), by and through counsel, and for their Motion for Dismissal with Prejudice of Improper Parties, state as follows:

1) On or about June 4, 1986, Wexford Associates, Inc. conveyed Lot 3 of the Wendover III Subdivision, Fairfax County ("Lot 3"), to Kowalczyk by deed recorded in Deed Book 6391 at Page 1639 among the land records of Fairfax County, Virginia.

2) By a deed dated June 15, 1992, and recorded June 16, 1992, in Deed Book 8160 at Page 277 among the land records of Fairfax County, Virginia, Kowalczyk conveyed Lot 3 to David D. O'Brien and Jane B. O'Brien ("O'Brien").

3) On or about 1992 John Kowalczyk was murdered in Fairfax County, Virginia.

4) On or about October, 1993 Katherine Kowalczyk moved to California. Her current address is unknown to counsel.

5) On or about August 1, 1995, O'Brien filed a Petition to Intervene in the above-captioned matter and on August 3, 1995 by Order of the Honorable Jane M. Roush were added

as Interveners to the suit.

6) On or about June 10, 1994, Deasy conveyed Lot Number 4 in the Wendover III Subdivision ("Lot 4) in Fairfax County to Mark L. Eckman ("Eckman") and Vivian P. Datoff ("Datoff").

7) On a Motion of Plaintiffs, Eckman and Datoff were added as additional parties by Order of the Honorable Jane M. Roush on October 6, 1995.

8) Plaintiff's Bill of Complaint, Amended Bill of Complaint, and Second Amended Bill of Complaint seeks to establish an easement over the relevant lots. As Kowalczyk and Deasy are no longer lot owners, a judgment commanding them to grant access over lots they no longer own would be meaningless.

9) As John Kowalczyk is deceased the Court cannot enter a judgment against him. Were John Kowalczyk a proper party, his estate would be the proper defendant. Rule 2:16 of the Rules of the Virginia Supreme Court (1950 as Amended).

10) This Court cannot enter a meaningful or enforceable judgment against Kowalczyk and Deasy.

WHEREFORE, John Kowalczyk, Katherine Kowalczyk, Patrick G. Deasy and Jane M. Deasy, by counsel, respectfully request this Court enter a dismissal with Prejudice in their favor in the above-captioned matter.

JOHN KOWALCZYK
KATHERINE KOWALCZYK
PATRICK DEASY
JANE DEASY
By Counsel

GOODMAN GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828

By:
Bernard E. Goodman, Esquire
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion for Dismissal with Prejudice of Improper Parties was mailed first class, postage prepaid, on this 1st day of December, 1995 to the following:

Scott E. Snyder, Esquire
Anderson & Corrie
12600 Fair Lakes Circle, Suite 220
Fairfax, VA 22033-4904

David J. Gogal, Esquire
Blankingship & Keith, P.C.
4020 University Drive, Suite 312
Fairfax, VA 22030

Bernard E. Goodman

B/b:atkisson disk/wexf1120.mot

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DEC 15 1995
CGVC

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON, Plaintiffs v. WEXFORD ASSOCIATES, INC., et al., Defendants	)	In Chancery No. 97823

OPPOSITION OF PLAINTIFFS, GEORGE ATKISSON AND CARLOTTA T. ATKISSON, TO MOTION TO COMPEL TO JOIN ADDITIONAL PARTY PLAINTIFFS OR DISMISS THE CASE

COMES NOW, Plaintiffs, George Atkisson and Carlotta Atkisson, by counsel, and submit the following in opposition to the Motion to Compel Plaintiffs to Join Additional Party Plaintiffs or Dismiss the Case of Wexford Associates, Inc. and the individual Defendants:

1. Defendants assert in their Motion that heirs of the family members to the petition suit set forth in Deed Book X5 at page 356 must be added to the suit as additional Plaintiffs as they retain an interest in the burial lot under the Partition Deed.

2. The heirs of Thomas Adams have quit-claimed their interest in the cemetery to George and Carlotta Atkisson, contrary to the assertions of Defendants.

3. The assertion that the family members subject to the partitioned deed are necessary parties is not supported by the language of the partition decree. Thomas Adams received Lot 2, which contains a portion of the cemetery, in fee simple. See Book X5, page 357. The order of the Court in the partition decree states:

> that the burial ground designated therein with ingress thereto and egress therefrom shall remain for the permanent use of the families of the aforesaid parties.

Book X5, page 363

This reservation of use in no way diminishes the granting of this real property to Thomas Adams in fee simple.

4. The interest that the other family members have in this property is not defined by the partition decree and is certainly not sufficient of an interest to require their addition to this suit as necessary parties.

5. Any interest that the family members may have in this cemetery has been clearly abandoned. Since the partition decree of 1896, from which Defendants assert the family members interest was created, no family member has attempted to assert any ownership interest and/or use in said cemetery. To require the addition of numerous and unidentified parties as necessary parties to this lawsuit, who have not asserted any claim or use in said cemetery for nearly a century would be a gross injustice. Additionally, it is unknown who the heirs are of the family members, who is alive and who is deceased, and it would involve great expense and time to ascertain the heirs' present identities and addresses. To require the Plaintiffs to undergo such great expense and further delay is not equitable and certainly is not reasonable given the uncertain nature of the family members interest in the family cemetery.

WHEREFORE, Plaintiffs, George Atkisson and Carlotta Atkisson, by counsel, respectfully request that the Motion of Defendants to Compel Additional Party Plaintiffs or Dismiss the Case should be denied.

RESPECTFULLY SUBMITTED,

GEORGE ATKISSON
CARLOTTA T. ATKISSON
By Counsel

ANDERSON & CORRIE

BY: _____
Scott E. Snyder, VSB #26233
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
(703) 222-2200
Counsel for Plaintiffs

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing was sent via U.S. Mail, postage prepaid, this 15 day of December, 1995, to:

David J. Gogal, Esquire
Blankingship & Keith
4020 University Drive
Suite 312
Fairfax, VA 22030

Bernard E. Goodman, Esq.
Goodman, Gary & Lickstein, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182

_____
Scott E. Snyder, Esq.

c:\s\ms\atkisson\OPP2MO2.ADD

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V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON, Plaintiffs v. WEXFORD ASSOCIATES, INC., et al., Defendants	)	In Chancery No. 97823

OPPOSITION OF PLAINTIFFS, GEORGE ATKISSON AND CARLOTTA T. ATKISSON, TO MOTION OF INTERVENORS, DAVID O'BRIEN AND JANE O'BRIEN FOR FAILURE TO DISMISS FOR FAILURE TO JOIN INDISPENSIBLE PARTIES

COMES NOW, Plaintiffs, George Atkisson and Carlotta Atkisson, by counsel, and submit the following in opposition to the Motion of Intervenors, David O'Brien and Jane O'Brien, for Failure to Dismiss for Failure to Join Indispensible Parties:

1. The first necessary party that the Intervenors allege are absent are the owners of Lot 1. Plaintiffs' Exhibit ZZZ clearly demonstrates that the Atkisson easement is not encroached upon the property line of Lot 1. The plat prepared by Herman Corsen and identified as Exhibit A to the Intervenors' Motion indicates that the express easement doesn encroach upon Lot 1. It is the Plaintiffs' position that the testimony at trial in this matter will demonstrate that the location of the easement is as depicted on Plaintiffs' Exhibit ZZZ.

If the Court is of the opinion that it is necessary for the full and fair adjudication of all interested parties interest that the owners of Lot 1 be added as an indispensible party, Plaintiffs will not object to said addition.

2. The heirs of Thomas Adams, who signed the 1978 Deed to Harold Miller have, in fact, quit-claimed their interest to George and Carlotta Atkisson. Copies of the Quit-claim Deeds are attached and have been recorded in Land Records.

By a footnote in Intervenors' Motion, it appears as if they are presenting the argument that Mr. Atkisson's mother is still living and therefore Mr. Atkisson has no standing to pursue this action. Plaintiffs demand and eagerly await evidence of the resurrection of Mr. Atkisson's mother.

3. Intervenors also allege in their Motion that the heirs to the family members referenced in their Partition Decree located at Deed Book X5 at page 356 must be added as additional parties.

4. The assertion that the family members subject to the partitioned deed are necessary parties is not supported by the language of the partition decree. Thomas Adams received Lot 2, which contains a portion of the cemetery, in fee simple. See Book X5, page 357. The order of the Court in the partition decree states:

> that the burial ground designated therein with ingress thereto and egress therefrom shall remain for the permanent use of the families of the aforesaid parties.

Book X5, page 363

This reservation of use in no way diminishes the granting of this real property to Thomas Adams in fee simple.

5. The interest that the other family members have in this property is not defined by the partition decree and is certainly not sufficient of an interest to require their addition to this suit as necessary parties.

6. Any interest that the family members may have in this cemetery has been clearly abandoned. Since the partition decree of 1896, from which Defendants assert the family members interest was created, no family member has attempted to assert any ownership interest and/or use in said cemetery. To require the addition of numerous and unidentified parties as necessary parties to this lawsuit, who have not asserted any claim or use in said cemetery for nearly a century would be a gross injustice. Additionally, it is unknown who the heirs are of the family members, who is alive and who is deceased, and it would involve great expense and time to ascertain the heirs' present identities and addresses. To require the Plaintiffs to undergo such great expense and further delay is not equitable and certainly is not reasonable given the uncertain nature of the family members interest in the family cemetery.

WHEREFORE, Plaintiffs, George Atkisson and Carlotta Atkisson, by counsel, respectfully request that the Motion of Defendants to Compel Additional Party Plaintiffs or Dismiss the Case should be denied.

WHEREFORE, for the reasons stated above, Plaintiffs, George Atkisson and Carlotta Atkisson, by counsel, respectfully request that the Motion of Intervenors, David O'Brien and Jane O'Brien, for Failure to Dismiss for Failure to Join Indispensible Parties should be denied.

RESPECTFULLY SUBMITTED,

GEORGE ATKISSON
CARLOTTA T. ATKISSON
By Counsel

ANDERSON & CORRIE

BY: _____
Scott E. Snyder, VSB #26233
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
(703) 222-2200
Counsel for Plaintiffs

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing was sent via U.S. Mail, postage prepaid, this 15 day of December, 1995, to:

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Bernard E. Goodman, Esq.
Goodman, Gary & Lickstein, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182

_____
Scott E. Snyder, Esq.

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V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON Plaintiff, v. WEXFORD ASSOCIATES, INC., et al., Defendants.	)	IN CHANCERY NO.: 97823

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DECLARE PRIOR JUDGMENT VOID

COMES NOW, the Plaintiffs, George Atkisson and Carlotta Atkisson, by Counsel, and for their opposition to Defendant's Motion state as follows:

ARGUMENT

In their Motion, Defendant's rely on Virginia Code § 8.01 - 428 (d) [1] (1992, as amended), for the proposition that, because Mark Eckman, Vivian Datoff, and David D. and Jane B. O'Brien were not made parties in the underlying lawsuit, any prior judgment is null and void as to all Defendants.

As a preliminary matter, Defendants have procedurally erred in bringing this matter as a Motion. Under §8.01 - 428 (d), an independent action may be brought to relieve a party from any judgment or proceeding, or to set aside a judgment. The Defendants have failed to do this by filing their Motion as part of the same underlying case, rather than as a separate action. Because the equity power of the Court to set aside a

[1] Defendants erroneously cite Virginia Code § 8.01-428 (c) (1950, as amended), which was amended in 1992 and which redesignated former subsection C as present subsection D.

judgment is properly exercised only in an independent proceeding, the Defendants' motion to vacate the judgment should be refused. See Byrum v. Lavoe and Gordon, 225 Va. 362, 365 (1983); Basile v. America Filter Service, 231 Va. 34, 38 (1986); McEwen Lumber v. Lipscomb Bros. Lumber, 234 Va. 243 (1987).

II.

Defendants assert that Eckman, Datoff and O'Brien were necessary parties to the underlying suit, and that failure to join them as parties renders the entire judgement void as to all Defendants. Despite the Defendants' assertions however, the facts at issue in Judge Fortkort's decision reveal that Eckman, Datoff, and O'Brien were not necessary parties.

In Allen v. Chapman, 242 Va. 94 (1991), the Supreme Court of Virginia defined necessary partes as " all persons ... materially interested either legally or beneficially in the subject matter or event of the suit and must be made parties to it, and without whose presence in Court no proper decree can be rendered in the cause." Id. at 99 (emphasis added). Plaintiffs do not dispute that the individual property owners in this case had a material interest in the outcome of this lawsuit; however, their presence was not necessary in the decision made by Judge Fortkort. Judge Fortkort's ruling was based solely upon the fact that, at the time Wexford decided to develop the subject property, it had knowledge that the land over which it planned to build contained an easement. Judge Fortkort's decision, therefore, was made independently of any of the individual defendants and was based only upon the actions taken by Wexford Associates, Inc., which pre-dated the individual defendants purchase of the subject property.

III.

The Defendants' claim that Eckman and Datoff are necessary parties is unfounded. As set forth in Defendants' statement of facts, Eckman and Datoff did not become owners of the property known as "Lot 4" until June 10, 1994, over one year after Judge Fortkort's final order dated March 10, 1993. Clearly it would have been impossible for Plaintiffs to name Eckman and Datoff at any time during the underlying proceeding.

Furthermore, Eckman and Datoff's predecessors in title to "Lot 4", Patrick G. and Jane M. Deasey, were parties to the suit, and therefore shared the same interest in the litigation as Eckman and Datoff. Based on the foregoing, it is clear that Eckman and Datoff were not necessary parties to this lawsuit.

Moreover, any assertion that Eckman and Datoff purchased Lot 4 without actual notice of the lawsuit is baseless. Both have admitted to being informed of a possible lawsuit prior to taking title, and in fact Mr. Eckman admitted during deposition that he had purchased additional title insurance for that very reason.

Regardless of the foregoing, however, Eckman and Datoff's complaints over lack of lis pendens is inapposite in this proceeding, and should have no effect on determining the validity of Judge Fortkort's ruling.

IV.

Finally, even if the O'Briens are considered necessary parties to the lawsuit, that alone should not be grounds for declaring the entire judgment void as Defendants argue. In support of their assertion, Defendants rely primarily on Virginia Code §8.01 - 428 (d) and the Virginia Supreme Court case of Gulfstream Building Associates v. Britt,

239 Va. 178 (1990). The Defendants' reliance on these authorities is misplaced.

Significantly, § 8.01 - 428 (d) states specifically that the only grounds upon which a judgment may be set aside is for fraud upon the Court. Similarly, in the Gulfstream case, the Court based its decision to set aside the decree upon the findings of extrinsic fraud by the former owner of the property. Id. at 184-185. Because fraud is not at issue in the instant case, that portion of § 8.01 - 428 (d) is inapplicable as is the holding in Gulfstream.

The Defendants rely upon the first part of subsection D which states that "this section does not limit the power of the Court to entertain at anytime an independent action to relieve a party from any judgment or proceeding . . . " Virginia Code § 8.01 - 428 (d) (emphasis added). By stating that a party may be relieved of a judgment, as opposed to all parties, it logically follows that this Code section specifically is allowing for situations in which an otherwise valid judgment need not be applied to an individual party. Virginia Code § 8.01 - 428 (d) would therefore permit the Court in this case to set aside the judgment as it pertains to Lot 3 and the O'Briens, but not to the other Defendants in this action. This view is reinforced by the decision of the Virginia Supreme Court in Charles v. Precision Tune, 243 Va. 313 (1992), wherein the Court noted that the language in Code § 8.01 - 428 (c) must be given a narrow construction to preserve the integrity of judgments.

This view is further reinforced by the Virginia Supreme Court case of McDougle v. McDougle, 214 Va. 636, in which the Court enunciated the following exception to the general rule that a Court cannot render a valid judgment when necessary parties are absent from the proceedings:

> An exception exists where an absent party's interests are separable from those of the parties before the Court so that the Court may enter a decree without prejudicing the rights of the absent party . Id. citing Bosnal v. Camp, 111 Va. 595, 600-01 (1911).

In the instant case, the interests of the O'Briens are separable from those of the other Defendants. As the Defendants have acknowledged, the location of the easement has not yet been determined. Rather, Judge Fortkort's decision merely established that an easement exists. This latter issue can be re-litigated by the O'Brien's without necessitating the voiding of the entire judgment as it applies to the remaining Defendants.

This decision also would uphold the well-recognized principle that judicial proceedings must have a certainty of result, and a high degree of finality. Charles v. Precision Tune, Inc., 243 Va. 313, 317 (1992).

Moreover, the remaining Defendants, all of whom were represented in the lawsuit, should not be provided a windfall opportunity to re-litigate the identical case merely because the Plaintiffs did not name the O'Briens as parties. Whether or not a conflict of decisions results is of no concern to the remaining Defendants, who already have had their chance to defend on this matter.

CONCLUSION

In conclusion, the judgment of Judge Fortkort should not be rendered void due to lack necessary parties in the underlying lawsuit. Even if the O'Briens are determined to be necessary parties, however, the judgment should be rendered void only as to the O'Briens and not the remaining Defendants.

RESPECTFULLY SUBMITTED,

GEORGE ATKISSON
CARLOTTA T. ATKISSON
By Counsel

ANDERSON & CORRIE

BY: _____
Scott E. Snyder, VSB #26233
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
(703) 222-2200
Counsel for Plaintiffs

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing was sent via U.S. Mail, postage prepaid, this _____ day of December, 1995, to:

David J. Gogal, Esquire
Blankingship & Keith
4020 University Drive
Suite 312
Fairfax, VA 22030

Bernard E. Goodman, Esq.
Goodman, Gary & Lickstein, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182

_____
Scott E. Snyder, Esq.

Fidelity National Title Insurance Company
of New York
A Stock Company

POLICY NUMBER 5312- 9136

OWNER'S POLICY OF TITLE INSURANCE

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK, a New York corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated herein;

2. Any defect in or lien or encumbrance on the title;

3. Unmarketability of the title;

4. Lack of a right of access to and from the land.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

IN WITNESS WHEREOF, FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK, has caused this policy to be signed and sealed by its duly authorized officers as of Date of Policy shown in Schedule A.

FIDELITY NATIONAL TITLE INSURANCE COMPANY
OF NEW YORK

Countersigned _____
Authorized Signature
(PLEASE PRINT NAME)

SEAL

By: _____
President

Attest: Charles H. Wimer
Secretary

EXHIBIT

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. (a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
   (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.
3. Defects, liens, encumbrances, adverse claims or other matters:
   (a) created, suffered, assumed or agreed to by the insured claimant;
   (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;
   (c) resulting in no loss or damage to the insured claimant;
   (d) attaching or created subsequent to Date of Policy; or
   (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy.
4. Any claim which arises out of the transaction vesting in the Insured the estate or interest insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights law, that is based on:
   (i) the transaction creating the estate or interest insured by this policy being deemed a fraudulent conveyance or fraudulent transfer; or
   (ii) the transaction creating the estate or interest insured by this policy being deemed a preferential transfer except where the preferential transfer results from the failure:
      (a) to timely record the instrument of transfer; or
      (b) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A, and, subject to any rights or defenses the Company would have had against the named insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.

(b) "insured claimant": an insured claiming loss or damage.

(c) "knowledge" or "known": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.

(d) "land": the land described or referred to in Schedule A, and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions From Coverage, "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.

(g) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE AFTER CONVEYANCE OF TITLE

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. DEFENSE AND PROSECUTION OF ACTIONS; DUTY OF INSURED CLAIMANT TO COOPERATE

(a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its own choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

5. PROOF OF LOSS OR DAMAGE

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in the above paragraph shall terminate any liability of the Company under this policy as to that claim.

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance.

To pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay.

Upon the exercise by the Company of this option, all liability and obligations to the insured under this policy, other than to make the payment required, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.

(b) To Pay or Otherwise Settle With Parties Other than the Insured Or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs (b)(i) or (ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. DETERMINATION, EXTENT OF LIABILITY AND COINSURANCE

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A; or,

(ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the Amount of Insurance stated in Schedule A at the Date of Policy is less than 80 percent of the value of the insured estate or interest or the full consideration paid for the estate or interest, whichever is less, or if subsequent to the Date of Policy an improvement is erected on the land which increases the value of the insured estate or interest by at least 20 percent over the Amount of Insurance stated in Schedule A, then this Policy is subject to the following:

(i) where no subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that the amount of insurance at Date of Policy bears to the total value of the estate or interest at Date of Policy; or

(ii) where a subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that 120 percent of the Amount of Insurance stated in Schedule A bears to the sum of the Amount of Insurance stated in Schedule A and the amount expended for the improvement.

The provisions of this paragraph shall not apply to costs, attorneys' fees and expenses for which the Company is liable under this policy, and shall only apply to that portion of any loss which exceeds, in the aggregate, 10 percent of the Amount of Insurance stated in Schedule A.

(c) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. APPORTIONMENT

If the land described in Schedule A consists of two or more parcels which are not used as a single site, and a loss is established affecting one or more of the parcels but not all, the loss shall be computed and settled on a pro rata basis as if the amount of insurance under this policy was divided pro rata as to the value on Date of Policy of each separate parcel to the whole, exclusive of any improvements made subsequent to Date of Policy, unless a liability or value has otherwise been agreed upon as to each parcel by the Company and the insured at the time of the issuance of this policy and shown by an express statement or by an endorsement attached to this policy.

9. LIMITATION OF LIABILITY

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title or otherwise establishes the lien of the insured mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto.

11. LIABILITY NONCUMULATIVE

It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy to the insured owner.

12. PAYMENT OF LOSS

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

13. SUBROGATION UPON PAYMENT OR SETTLEMENT

(a) The Company's Right of Subrogation.

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to these rights and remedies in the proportion which the Company's payment bears to the whole amount of the loss.

If loss should result from any act of the insured claimant, as stated above, that act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(b) The Company's Rights Against Non-insured Obligors.

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

14. ARBITRATION

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of $1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

16. SEVERABILITY

In the event any provision of the policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

17. NOTICES, WHERE SENT

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at: 2 Park Avenue, New York, NY 10016

SCHEDULE A

Policy No. 5312-9136

Date of Policy: June 10, 1994
1:41 P.M.

Amount: $715,000.00

INSURED

Mark L. Eckman and Vivian P. Datoff

1. Title to the estate or interest covered in this policy at the date hereof is vested in the insured.

2. The estate or interest in the land described to in this Schedule covered by this policy is Fee Simple.

3. The land referred to in this policy is situated in the County of Fairfax in the State of Virginia and is described as follows:

Lot 4, Section 3, WENDOVER, as the same appears duly dedicated, platted and recorded in Deed Book 6050 at Page 1636 among the land records of Fairfax County, Virginia.

SUBURBAN TITLE COMPANY

By: _____
CHARLES R. RAINEY, JR.
President

FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK

Policy No. 5312-9136

SCHEDULE B

EXCEPTIONS

This policy shall not insure against loss or damage resulting from the following:

1. Any discrepancies, conflicts or shortages in area or boundary lines, or any encroachments or any overlapping of improvements or other boundary or location disputes which an accurate survey of the property would disclose.

2. Rights or claims of parties in possession, and not of record in the public records; liens for labor, services or material or claims to same which are not of public record in the public records,

3. Any roadway or easement, similar or dissimilar, on, under, over or across said property, or any part thereof and not of record in said public records.

4. Community property, survivorship, dower, curtesy or homestead rights, if any, of any spouse or any individual insured.

5. Any titles or rights asserted by anyone, including but not limited to persons, corporation, governments or other entities, to tide lands, or lands comprising the shores or bottoms of navigable rivers, lakes, bays, ocean or gulf, or lands beyond the line of the harbor or bulkhead lines as established or changes by the United States Government or riparian rights, if any.

6. Taxes subsequent to the first half of 1994, which taxes are not yet due and payable, and any and all taxes posted subsequent to the date of this policy.

7. Conditions, covenants and restrictions recorded in Deed Book 5756 at Page 485 as incorporated by reference in Deed Book 6050 at Page 1636.

8. Easement to Virginia Electric and Power Company recorded in Deed Book 6533 at Page 322.

9. Easement to Chesapeake & Potomac Telephone Company recorded in Deed Book 6106 at Page 1652.

10. The record plat notes the following: (1) 10' storm sewer easement.

11. Reservation of easements for the installation and maintenance of utilities and drainage facilities as set forth in the Restrictive Covenants.

12. No liability is assumed for the payment of maintenance assessments as set forth in the Restrictive Covenants.

Policy No. 5312-9136
Schedule B cont.

13. Deed of Trust from Mark L. Eckman and Vivian P. Datoff, husband and wife, to George L. Edwards, Trustee, securing Crestar Mortgage Corporation in the principal sum of $499,850.00 dated June 9, 1994 and recorded June 10, 1994 in Deed Book 9149 at Page 1055 among the land records of Fairfax County, Virginia.

FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK

Fidelity National Title Insurance Company
OF NEW YORK

New York, New York

Attached to and made part of FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK'S Policy Number 5312-9136

The Company, recognizing the current effect of inflation on real property valuation and intending to provide additional monetary protection to the Insured Owner named in said policy, hereby modifies said policy, as follows:

1. Notwithstanding anything contained in said policy to the contrary the amount of insurance provided by said policy, as stated in Schedule A thereof, is subject to cumulative annual upward adjustments in the manner and to the extent hereinafter specified.

2. "Adjustment Date" is defined, for the purpose of this Endorsement, at 12:01 A. M. of the first January 1 which occurs more than six months after the date of policy, as shown in Schedule A of the policy to which this Endorsement is attached, and on each succeeding January 1.

3. An upward adjustment will be made on each of the Adjustment Dates, as defined above, by increasing the maximum amount of Insurance provided by said policy (as said amount may have been increased theretofore under the terms of this Endorsement) by the same percentage, if any, by which the United States Department of Commerce Composite Construction Cost Index (base period 1967) for the months of September immediately preceding exceeds such index for the month of September one year earlier; provided, however, that the maximum amount of insurance in force shall never exceed 150% of the amount of insurance stated in Schedule A of said policy, less the amount of any claim paid under said policy which, under the terms of the Conditions and Stipulations, reduces the amount of insurance in force. There shall be no annual adjustment in the amount of insurance for years in which there is no increase in said Construction Cost Index.

4. In the settlement of any claim against the Company under said policy, the amount of insurance in force shall be deemed to be the amount which is in force as of the date on which the insured claimant first learned of the assertion of such claim, or as of the date of receipt by the Company of the first notice of such claim, whichever shall first occur.

PROVIDED, HOWEVER, this endorsement shall be effective only if one of the following conditions exists at Date of Policy:

a. The land described in this policy is a parcel on which there is only a one-to-four family residential structure, including all improvements on the land related to residential use, in which the Insured Owner resides or intends to reside; or,
b. The land consists of a residential condominium unit, together with the common elements appurtenant thereto and related to residential use thereof, in which the Insured Owner resides or intends to reside.

THIS ENDORSEMENT is made a part of the policy or commitment and is subject to all terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy or commitment and prior endorsements, if any, nor does it extend the effective date of the policy or commitment and prior endorsements or increase the face amount thereof.

his endorsement, when countersigned by an authorized signatory, is made a part of the policy and is subject to of the terms and provisions thereof and of any prior endorsements thereto.

cept to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior dorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase face amount thereof.

gned and sealed this 10th day of June , 19 94 .

OUNTERSIGNED

FIDELITY NATIONAL TITLE INSURANCE COMPANY
OF NEW YORK

AUTHORIZED SIGNATORY
PLEASE PRINT NAME BELOW

SEAL

By: President

Attest: Charles H. Wimer
Secretary

Inflation Rider

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ORM 26-005-80 (4/93)

BLANK ENDORSEMENT

Fidelity National Title Insurance Company

of New York

IMPORTANT INFORMATION TO POLICYHOLDERS

"In the event you need to contact someone about this policy for any reason, please contact your agent. If you have additional questions you may contact the insurance company issuing this policy at the following address and telephone number:

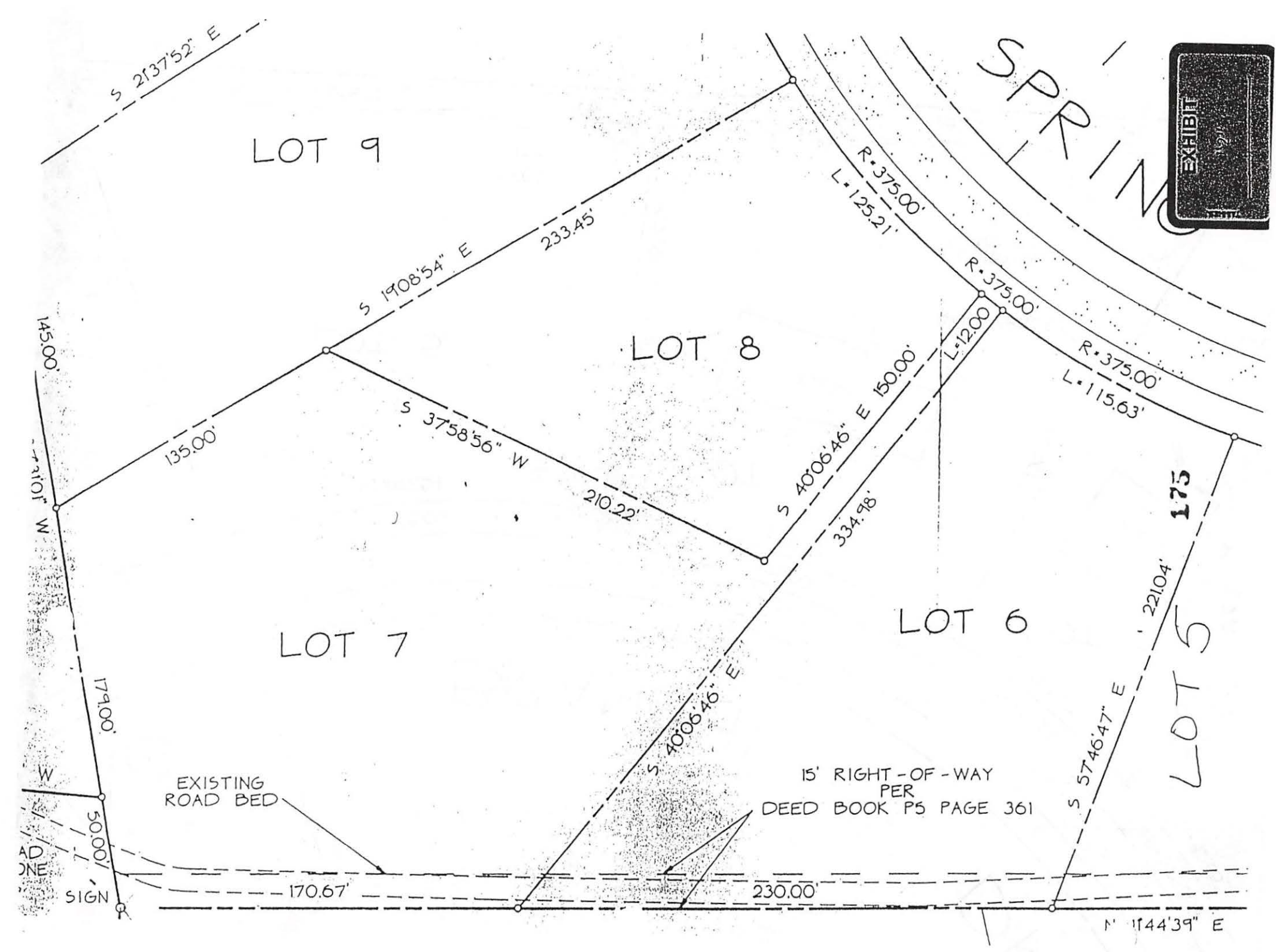
Fidelity National Title Insurance Company of New York
Two Park Avenue
New York, New York 10016
1-800-523-4491
(212) 481-5858

If you have been unable to contact or obtain satisfaction from the company or the agent, you may contact the Virginia Bureau of Insurance at:

State Corporation Commission
Bureau of Insurance
Property and Casualty Division
1220 Bank Street - Jefferson Building
P. O. Box 1157
Richmond, Virginia 23209
Telephone: (800) 552-7945 (in VA)
(804) 786-3741 (outside VA)

Written correspondence is preferable so that a record of your inquiry is maintained. When contacting your agent, company or the Bureau of Insurance, have your policy number available."

ATTACH TO ALL POLICIES PRIOR TO ISSUE [Code of VA § 38.2-305B]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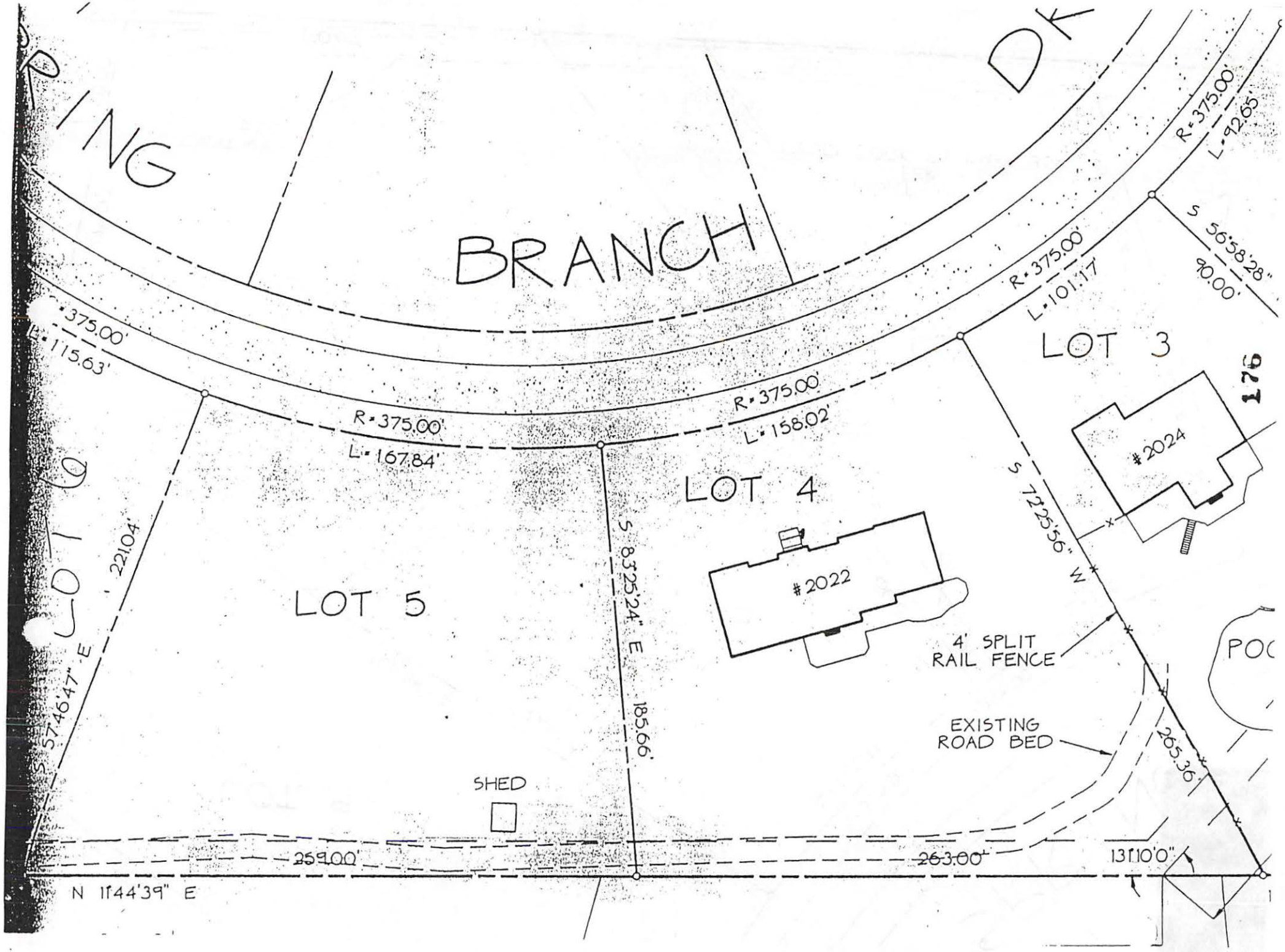
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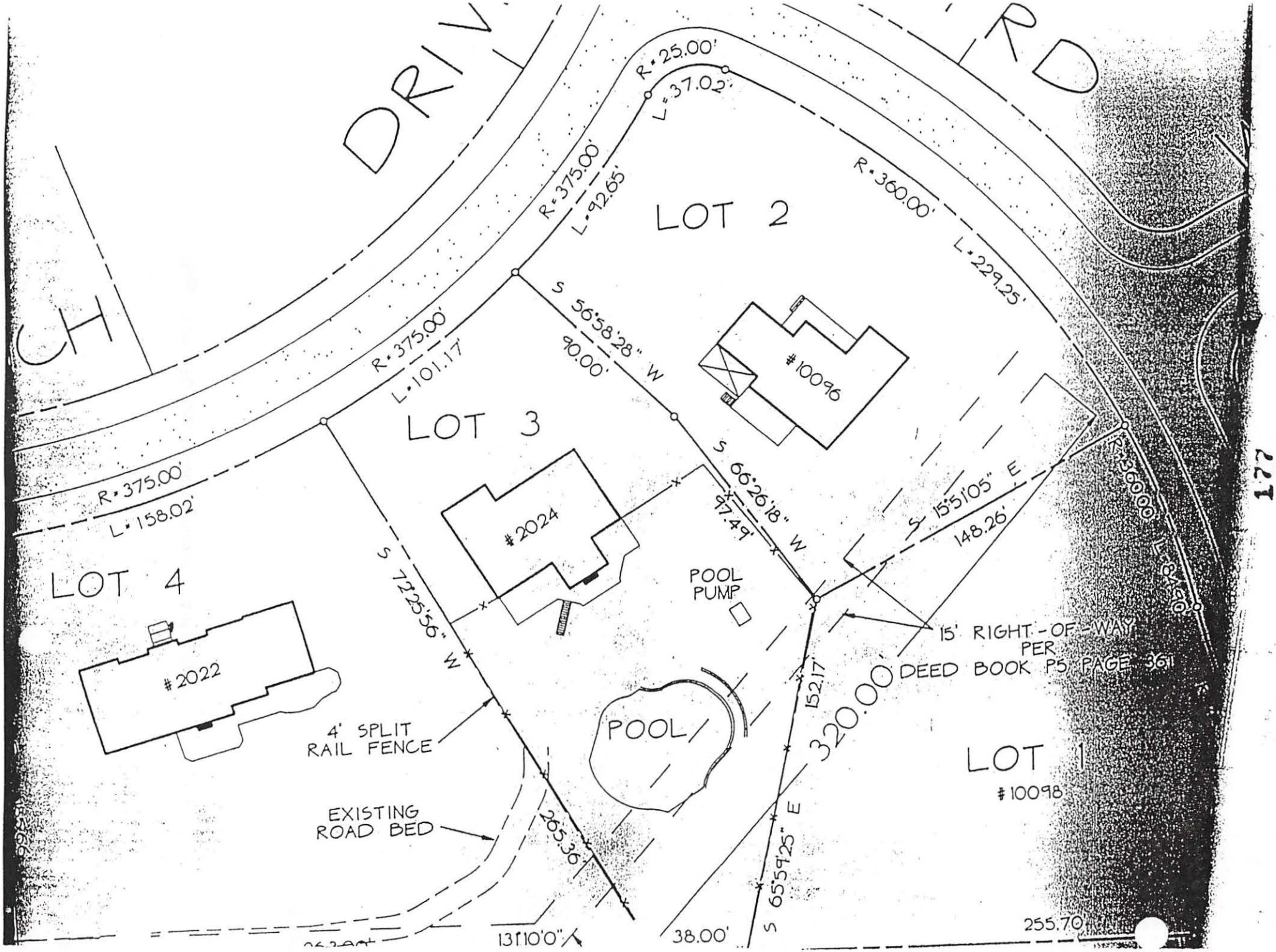
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177

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RECEIVED
DEC 15 1995

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON,	)	
Plaintiffs,	)	
vs.	)	In Chancery No. 97823
WEXFORD ASSOCIATES, INC., et al.	)	
Defendants.	)	

OPPOSITION OF PLAINTIFFS, GEORGE ATKISSON AND CARLOTTA T. ATKISSON, TO MOTION TO DETERMINE IF THE ATKISSON EASEMENT IS TERMINATED AS A MATER OF LAW AT BIRD ROAD

COMES NOW, Plaintiffs, George Atkisson and carlotta Atkisson, by counsel, and submit the following in opposition to the Motion to Determine if Atkisson Easement is Terminated as a Matter of Law at Bird Road:

1. Defendant should be barred from presenting this argument again as it has been previously ruled on by this Court. On March 7, 1995 a hearing was held before Judge Fortkort wherein counsel for Defendants presented several arguments to the Court, including the argument that is being presented here, relying upon the same case authorities cited in his most recent version of their Motion. The Honorable Judge Fortkort held, at the conclusion of their argument that the express easement is defined in Plaintiff's Exhibit ZZZ, which over-ruled Defendants argument of a termination by act of law. Defendants objected to said Order on the grounds that it was their belief that Exhibit ZZZ was not a survey of the express easement. However, this Order was entered, overruling objections of Defendants. These Defendants have never requested a

reconsideration of said ruling nor have they appealed said ruling. For these reasons, the law of the case is that the easement was not terminated as a matter of law and that Exhibit ZZZ is a survey of the express easement.

2. It is the Plaintiffs' understanding that the Motions to be argued on December 28, 1995 were to be legal arguments and would not include the presentation of factual testimony. It should be noted that, while Defendants' Motion is couched as a legal matter, it necessitates the presentation of factual testimony to support it, and, also requires the presentation of factual testimony to oppose said Motion. In the event that the Court holds that factual testimony will be allowed to support Defendants' Motion, Plaintiffs will request a continuance of the argument of this Motion so that factual witnesses can be subpoenaed to appear to testify.

Testimony will be presented at said hearing to show that the public road referred to in the Deed of 1982 is Clarks Crossing Road. At the time the easement was created, Clarks Crossing Road was the primary means of access to the public road system from the land deeded to Thomas Adams.

Testimony will also be presented at hearing that the outlet road leading to Clarks Crossing from the easement is a roadway that his not been abandoned and is still part of the Virginia Department of Transportation roadway system.

Defendants rely on American Oil Co. v. Leaman, 199 Va. 637 (1958) to support is position that the easement is terminated at Bird Road. In American Oil Co., the road in question was legally abandoned by the municipal entity responsible for the maintenance

of the road. The issue in that particular case was whether or not that governmental entity had properly abandoned the road in question.

As stated above, the Virginia Department of Transportation is the governmental entity that can abandon this road, and a representative of the Virginia Department of Transportation will testify that no such abandonment has occurred and that the roadway is still a part of the state roadway system.

Additional testimony will be presented that shows the roadway still exists except where it has been blocked by Defendant Wexford. As the Court has previously ruled, the blocking of the easement was a malicious act of Wexford, which warranted punitive damages. This finding and the award of punitive damages have never been appealed.

3. This identical Motion has been filed previously in this matter and an Opposition was previously asserted by the Plaintiffs, which is incorporated by reference herein and attached hereto.

WHEREFORE, for the reasons stated above, Plaintiffs, George Atkisson and Carlotta Atkisson, by counsel, respectfully request that the Motion to Determine if the Atkisson Easement is Terminated as a Matter of Law at Bird Road of Defendants is denied.

RESPECTFULLY SUBMITTED,

GEORGE ATKISSON
CARLOTTA T. ATKISSON
By Counsel

ANDERSON & CORRIE

By: _____
Scott E. Snyder, VSB #26233
Counsel for Plaintiffs
12600 Fair Lakes Circle, Suite 220
Fairfax, Virginia 22033
(703) 222-2200

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing was sent via U.S. Mail, postage prepaid, this 15 day of December, 1995, to:

David J. Gogal, Esquire
Blankingship & Keith
4020 University Drive
Suite 312
Fairfax, Virginia 22030

Bernard E. Goodman, Esquire
Goodman, Gary & Lickstein, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182

_____
Scott E. Snyder, Esquire

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V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	CHANCERY NO. 97823
WEXFORD ASSOCIATES INC., et al.	)	
Defendants.	)	

~~AGREED~~ ORDER

THIS MATTER was heard on December 28, 1995, on the motions of Defendant Wexford Associates, Inc., the Individual Defendants and Intervenors David and Jane O'Brien to compel Plaintiffs to join necessary parties or dismiss this matter with prejudice.

UPON CONSIDERATION WHEREOF and the briefs and argument of counsel; and

IT APPEARING to the court that the motion is proper and should be granted; it is hereby

ORDERED that the following parties are necessary parties: owners of Lot #1, Wendover III, heirs of Thomas Adams, and heirs of other family members who were parties to the Partition Deed recorded in Fairfax County, in Deed Book X-5 at Page 356; and it is further

ORDERED that Plaintiffs amend their Complaint to include these necessary parties ~~and initiate service on these additional parties~~ no later than January 18, 1996, or this matter will be dismissed with prejudice; and it is further

ORDERED that Plaintiffs effect service on these additional parties by personal or substituted service on any known parties and by order of publication on any unknown heirs. Plaintiff shall use reasonable diligence to locate the last known address for ~~reasonable~~ known parties.

ENTERED this 5 day of January, 1996.

Jane Marum Roush
The Honorable Jane M. Roush
Fairfax County Circuit Court

WE ASK FOR THIS:

GOODMAN, GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828

By: Bernard E. Goodman
BERNARD E. GOODMAN
Counsel for Defendant Wexford
Associates, Inc. and the
Individual Defendants

BLANKINGSHIP & KEITH
A Professional Corporation
4020 University Drive
Suite 312
Fairfax, Virginia 22030
(703) 691-1235

By: David J. Gogal
DAVID J. GOGAL, VSB #28815
Counsel for Intervenors
David O'Brien and Jane O'Brien

SEEN AND OBJECTED TO:

ANDERSON & CORRIE
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
(703) 222-2200

By: _____
SCOTT E. SNYDER
Counsel for Plaintiffs

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	CHANCERY NO. 97823
WEXFORD ASSOCIATES INC., et al.	)	
Defendants.	)	

~~ORDER~~ ORDER

THIS MATTER was heard on December 28, 1995 on Defendant Wexford Associates, Inc. and the Individual Defendants' Motion to preclude testimony of Plaintiff George T. Atkisson regarding the location of the express easement and the location of the burial lot anywhere except in the Partition Lot #2.

UPON CONSIDERATION WHEREOF and the briefs and argument of Counsel, it is hereby

ORDERED that Plaintiff George T. Atkisson may not testify regarding what anyone has told him as to the location of the express easement or the location of the quarter acre burial lot; it is also

ORDERED that George T. Atkisson may testify as to the location of monuments and headstones if he has any personal knowledge of such matters.

ENTERED this 5 day of January, 1996.

Jane Marum Roush

The Honorable Jane M. Roush
Fairfax County Circuit Court

WE ASK FOR THIS:

GOODMAN, GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828

By: Bernard E. Goodman
BERNARD E. GOODMAN
Counsel for Defendant Wexford
Associates, Inc. and the
Individual Defendants

SEEN:

BLANKINGSHIP & KEITH, P.C.
A Professional Corporation
4020 University Drive
Suite 312
Fairfax, Virginia 22030
(703) 691-1235

By: David J. Gogal
DAVID J. GOGAL, Bar No. 28815
Counsel for Intervenors David O'Brien
and Jane O'Brien

SEEN AND OBJECTED TO:

ANDERSON & CORRIE
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
(703) 222-2200

By:
SCOTT E. SNYDER
Counsel for Plaintiffs

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE T. ATKISSON and CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	In Chancery No. 97823
WEXFORD ASSOCIATES, INC., et al	)	
Defendants.	)	

ORDER

THIS CAUSE came to be heard upon the separate Motions of Intervenors' David D. O'Brien and Jane B. O'Brien and Wexford Associates, Inc. and the Individual Defendants Motion to Strike Plaintiff's Third Amended Bill of Complaint.; and

IT APPEARING TO THE COURT after argument of counsel and consideration of all relevant documents that the Plaintiff's, George Atkisson and Carlotta T. Atkisson, Third Amended Complaint should be amended to reflect that the new parties be added as parties defendant instead of as plaintiffs ~~stricken~~; and

IT FURTHER APPEARING TO THE COURT that Plaintiffs, George Atkisson and Carlotta T. Atkisson should have leave to properly amend and file their Complaint by February 28, 1996 and ~~commence~~ effect service, personal or substituted, on known parties ~~by February __, 1996~~ not served with the Third Amended Complaint and ~~commence~~ effect service by publication on unknown parties ~~no later than February __, 1996~~; and

NOW, THEREFORE, it is hereby

ORDERED that Plaintiffs, George Atkisson and Carlotta T. Atkisson, properly amend and file their Fourth Amended Complaint no later than February 28, 1996 or this matter will be dismissed with prejudice; and it is further

ORDERED that Plaintiffs, George Atkisson and Carlotta T. Atkisson commence personal or substituted service on all known parties who have not been served with the Third Amended Bill of Complaint and ~~commence~~ effect service by publication on unknown parties ~~no later than February ___, 1996 or this matter will be dismissed with prejudice.~~ and serve by mail all parties who have been served with a copy of the Third Amended Bill of Complaint.

ORDERED that the clerk send a copy teste to all counsel of record, upon payment of proper fees.

This cause is continued.

ENTERED this 16th day of February, 1996.

Jane Marum Roush

JANE MARUM ROUSH
Fairfax County Circuit Court Judge

WE ASK FOR THIS:

GOODMAN GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828

By: Bernard E. Goodman

Bernard E. Goodman, VSB# 15463
Counsel for Wexford Associates, Inc.
and the Individual Defendants

BLANKINGSHIP & KEITH
A Professional Corporation
4020 University Drive, Suite 312
Fairfax, Virginia 22030
(703) 691-1235

By: David J. Gogal

David J. Gogal, VSB# 28815
Counsel for Intervenors

SEEN AND OBJECTED TO:

ANDERSON & CORRIE
12600 Fair Lakes Circle, Suite 220
Fairfax, Virginia 22033
(703) 222-2200

By: _____
Scott E. Snyder, VSB# 23662
Counsel for George Atkisson and
Carlotta T. Atkisson

B/b:atkisson disk/wexf0214.ord

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

George Atkisson et al
Complainant,

vs.

Wexford Associates, Inc et al
Respondent.

Chancery No. 97823

ORDER

This case came to be heard on the 16th day of February, 1996 on the Complainant/~~Defendant~~'s motion for to add additional parties.

Upon the matters presented to the Court at the hearing it is

ADJUDGED, ORDERED, and DECREED as follows: The owners of Lots 39 and 40 and the Fairfax County Water Authority may be added as parties and to be filed by Feb. 28, 1996;

IT IS ALSO ORDERED that the Clerk give all counsel of record a copy teste of this order, upon payment of proper fees.

ENTERED, this 16th Day of Feb, 1996.

Jane Marum Roush
Circuit Court Judge

SEEN: Seen for this

Counsel for Plaintiff(s)

Bernard C. Gardner

Counsel for Defendant(s)

1091

194 Counsel for Intervenors

* subject to adding Lots 39 & 40

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON
and
CAROLOTTA ATKISSON

Plaintiffs,

v.

In Chancery No. 97823

WEXFORD ASSOCIATES, INC.

HERBERT D. VOGEL, JR.

BARBARA C. VOGEL

JAMES E. HENRY, JR.

SUSAN H. HENRY

JOHN KOWALCZYK

KATHERINE KOWALCZYK

PATRICK G. DEASY

JANE M. DEASY

MARK L. ECKMAN

VIVIAN D. DATOFF

CHARLES E. ANDREWS

JEAN S. ANDREWS

BRIAN T. McVAY

ELIZABETH McVAY

M. JACK WILKENFELD

JOANNE WILKENFELD

WALTER T. MORGAN

BETH A. MORGAN

LAWRENCE W. WYTE

DIANE B. WYTE

MICHAEL R. WALLER

DIANE V. WALLER)
KATHLEEN SMITH)
LUCILLE CHASE)
MIRTIE DYER)
MABLE HOHMANN)
WILLARD ADAMS)
FRANCIS YOUNG)
THOMAS E. ADAMS)
BYRD ADAMS)
ROBERT ADAMS)
ANNE GRESHAM)
BETTY BAKER)
JOAN VIPPERMAN)
JOHN VIPPERMAN)
JOHN ADAMS)
JOHN S. ATKISSON)
JAMES L. ATKISSON)
PAUL ATKISSON)
DEWILTON ADAMS)
ALLAN SMITH)
LARRY SMITH)
MRS. OSCAR KROMBHOLZ)
CHARLES P. ADAMS)
ETHEL ADAMS)
DONALD HALL)
10098 Byrd Road)
Fairfax, Virginia)

JOAN HALL
10098 Byrd Road
Fairfax, Virginia

RAYMOND CAVANAGH
20070 Carrhill Road
Vienna, Virginia 22181

EILEEN CAVANAGH
20070 Carrhill Road
Vienna, Virginia 22181

THOMAS HEALY
20090 Carrhill Road
Vienna, Virginia 22181

VICTORIA HEALY
20090 Carrhill Road
Vienna, Virginia 22181

DAVID D. O'BRIEN

JANE B. O'BRIEN

COUNTY OF FAIRFAX
and
The unknown heirs to:

MARY SAUNDERS

BELLE SMITH

R. L. ADAMS

LEWIS ADAMS

ROSE MCDANIELS

CARRIE POWELL

EFFIE POWELL

OLIVE ADAMS

ADELBERT ADAMS

HARMONIA ADAMS

IRENE ADAMS

EDNA ADAMS

SIDNEY ADAMS)
)
TRUEMAN ADAMS)
OSCAR ADAMS)
)
RUSSELL ADAMS)
)
THOMAS S. ADAMS)
)
Defendants.)

FOURTH AMENDED BILL OF COMPLAINT

The Plaintiffs, George and Carlotta Atkisson, by counsel, move the Court for relief against the Defendants on the grounds and in the amount as hereinafter set forth:

1. Plaintiffs, GEORGE and CARLOTTA ATKISSON ("Atkissons") are owners of a private family cemetery lot adjacent to Section III of the Wendover Subdivision in Fairfax County, Virginia, and identified as such on the attached tax map marked "Exhibit A".

2. The heirs to Mary Saunders, Belle Smith, R. L. Adams, Lewis Adams, Rose McDaniels, Carry Powell, Effie Powell, Olivia Adams, Adelbert Adams, Harmonia Adams, Irene Adams, Edna Adams, Sidney Adams, Trueman Adams, Oscar Adams, Russell Adams and Thomas Adams have been made necessary parties to this matter pursuant to the Order of this Court entered on January 5, 1996 as having an interest in the private family cemetary lot adjacent Section III of the Wendover Subdivision in Fairfax County, Virginia.

3. Kathleen Smith is the only known heir to Belle Smith, Lucille Chase is the only known heir to R. L. Adams, Myrtie Dyer, Mable Hohmann and Willard Adams are the only known heirs to Lewis Adams and the

following are the only known heirs to Thomas S. Adams:

Francis Young

Thomas E. Adams

Byrd Adams

Robert Adams

Anne Gresham

Betty Baker

Joan Vipperman

John Adams

John S. Atkisson

James L. Atkisson

Paul Atkisson

DeWilton Adams

Allan Smith

Larry Smith

Mrs. Oscar Krumholz

Charles P. Adams

Ethel Adams

4. The known heirs of Thomas Adams have quitclaimed their interest in the family cemetary lot adjacent to Section III of Wendover Subdivision of Fairfax County, Virginia to Plaintiffs, George and Carlotta Atkisson.

5. Donald Hall and Joan Hall are owners of Lot No. 1, Wendover 3 and pursuant to the Order of this Court dated January 5, 1996, they are necessary parties to this matter.

6. Raymond Cavanagh, Eileen Cavanagh, Thomas Healy, Victoria Healy and the County of Fairfax have been made additional parties to this matter

pursuant to the order of this Court dated February 16, 1996.

7. That Defendant, WEXFORD ASSOCIATES, INC., is the sole owner of Lot Nos. 12, 13, 14, 15 and 17 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

8. That Defendants, HERBERT D. VOGEL, JR. and BARBARA C. VOGEL, are sole owners of Lot No. 23 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

9. That Defendants, JAMES E. HENRY, JR. and SUSAN H. HENRY, are sole owners of Lot No. 2 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

10. That Defendants, JOHN KOWALCZYK and KATHERINE KOWALCZYK, sold Lot No. 3 in the Wendover Subdivision, Section III, to DAVID D. O'BRIEN and JANE B. O'BRIEN in Fairfax County, Virginia . The O'Brien's have intervened in this matter pursuant to their petition to intervene, previously granted by this Court.

11. On or about June 10, 1994, Defendants, PATRICK G. DEASY and JANE M. DEASY, sold Lot Number 4 in the Wendover Subdivision, Section III, in Fairfax County, Virginia, to the additional Defendants, MARK L. ECKMAN and VIVIAN D. DATOFF.

12. That Defendants, CHARLES E. ANDREWS and JEAN S. ANDREWS, are sole owners of Lot No. 5 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

13. That Defendants, BRIAN T. McVAY and ELIZABETH McVAY, are sole owners of Lot No. 6 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

14. That Defendants, M. JACK WILKENFELD and JOANNE WILKENFELD, are

sole owners of Lot No. 7 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

15. That Defendants, WALTER T. MORGAN and BETH A. MORGAN, are sole owners of Lot No. 25 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

16. That Defendants, LAWRENCE W. WYTE and DIANE B. WYTE, are sole owners of Lot No. 38 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

17. That Defendants, RAYMOND C. CAVANAUGH and EILEEN B. CAVANAUGH, are sole owners of Lot No. 39 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

18. That Defendants, MICHAEL R. WALLER and DIANE C. WALLER, sold Lot No. 40 in the Wendover Subdivision, Section III, in Fairfax County, Virginia to Thomas Healy and Victoria Healy on July 10, 1991.

19. That Defendant, County of Fairfax, to the best of Plaintiffs knowledge and belief, holds title to real property through which the Plaintiffs easement runs through. To the best of the knowledge and belief of Plaintiffs, there are no obstructions existing in those areas on Defendant, Fairfax County's real property where the easement exists.

20. That the real property now comprising Wendover Subdivision, Section III, and now owned in part by the aforesaid persons, hereinafter referred to as "lot owners" collectively, was previously referred to among the land records as Parcel 48 and Parcel 49.

21. That in or about 1892, Mary C. Saunders, then owner of Parcel 49, expressly conveyed by Deed, a fifteen (15) foot wide easement, right-of-way, leading to certain property, including the family cemetery lot,

owned at that time by Thomas Adams, grandfather of Plaintiff, George Atkisson. The express granting of the easement/right-of-way was recorded among the land records of Fairfax County, Virginia at Deed Book Liber P, No. 5, Page 361, and attached hereto as Exhibit B.

22. That Parcel 48 was conveyed to Robert Adams, by a deed which expressly made said land subject to the easement/right-of-way was recorded among the land records of Fairfax County, Virginia at Deed Book Liber H, No. 5, Page 237.

23. That the said easement/right-of-way in favor of the land owned by Thomas Adams was the only means of ingress and egress to his land, including the family cemetery lot situated therein, and ran appurtenant to the servient estates known as Parcel 49 owned by Mary Saunders and Parcel 48 owned by Robert Adams.

24. That the then heir of Thomas Adams conveyed the land comprising the dominant estate to Harold Miller, Trustee, by Deed recorded at Deed Book 4865, Page 13, among the land records of Fairfax County, Virginia. Said sale occurred on the condition that said cemetery lot be preserved.

25. By Deed recorded in the Fairfax County Land Records, Book 5572, Page 775 Harold Miller, Trustee, conveyed to the Atkissons sole ownership of said family cemetery lot. See Plaintiffs' Exhibit C.

26. By Deed recorded among the land records of Fairfax County, Virginia, at Deed Book 5344, Page 575, Harold Miller, Trustee, granted to the Atkissons sole ownership of said right-of-way leading to said cemetery lot in order for the Atkissons and their family to have a means of ingress and egress to said cemetery lot for maintenance and visitation purposes.

See Plaintiffs' Exhibit D.

27. That in the alternative, the Plaintiffs, as heirs of Thomas Adams, have an ownership interest in said cemetery lot. In addition thereto, all available heirs of Thomas Adams have deeded any remaining interest they have in the cemetery lot to the Plaintiffs.

28. Since that time, the Atkissons are the owners of record of the Cemetery Lot, receive tax bills, and have kept up and maintained said cemetery lot, including repairing headstones, posting signs, and fencing the family lot. The Atkissons used both the cemetery lot and the easement/right-of-way up until late 1983 and attempted thereafter, on occasion, to visit the cemetery by use of the easement/right-of-way.

29. That after Mary Saunders death, her interest in Parcel 49 was conveyed to Harry Smith, whose daughter, Kathleen Smith, inherited said parcel and by deed recorded among the Fairfax County, Virginia, Land records, Book 3392,Page 72, conveyed her interest to Defendant, Charles Hawthorne, sole owner.

30. That the heirs of Robert Adams granted title to Parcel 48 to Daniel Capper and his wife, Ellyn G. Capper, by a deed recorded among the land records of Fairfax County, Virginia, at Deed Book 3688, Page 356.

31. That the Cappers in turn granted title to Parcel 48 to Charles Hawthorne and his wife, Audrey K. Hawthorne, by a deed recorded among the land records of Fairfax County, Virginia, at Deed Book 4603, Page 343.

32. That the Hawthornes had full knowledge as to the existence of said cemetery lot and easement/right-of-way by way of discussions with the Plaintiff regarding the proposed widening of said easement/right-of-way.

33. That during the 1979 re-zoning hearings on the application of

Defendant, Charles Hawthorne, for the re-zoning of Parcel 48 and Parcel 49 for residential development, George Atkisson testified as to the existence of said easement/right-of-way.

34. That prior to the approval of the Hawthornes' application, their attorney, Robert A. Lawrence, received correspondence from Sidney R. Steele, Chief Zoning Evaluation Branch, Fairfax County Office of Comprehensive Rezoning, setting forth an obligation to investigate and resolve any existing property rights of the Atkissons in the access right-of-way/easement across the Hawthorne property. A copy of said letter is attached hereto as Exhibit E.

35. Notwithstanding Defendant Hawthornes' knowledge of said right-of-way, their obligation to resolve the property rights of the Atkissons, and the Atkissons' continued efforts to resolve the matter, the Hawthornes, without regard to their obligation to the Atkissons, conveyed to Defendant, Wexford Associates, Inc. ("Wexford"), Parcel 48 and Parcel 49 by Deed recorded among the land records of Fairfax County, Virginia at Book 5772, Page 497 in 1983.

36. That Mr. Atkisson, upon discovering the conveyance by the Hawthornes of the parcels across which their easement ran, contacted Defendant Wexford to notify them of its legal duty not to obstruct or to trespass on the Atkissons' right-of-way and to seek a resolution which would allow Wexford to develop the parcels while preserving the Atkissons' access to the family cemetery.

37. That in late 1983, Defendant Wexford, with deliberate malicious and wanton disregard to the Atkissons' property rights, began the development of residences known as Section III of Wendover Subdivision,

physically destroying the site of the easement/right-of-way and obstructing Plaintiffs' use thereof.

38. The Defendant Wexford has further obstructed the said easement/right-of-way by the development of a detention pond.

39. That said easement/right-of-way is the sole means of ingress and egress from the cemetery lot to the Clark Crossing outlet road leading to an improved road. Since the inception of said trespass and obstruction by Defendant Wexford and the continuing trespass and obstruction by the Defendant Wexford and Defendant "lot owners", the cemetery has been landlocked.

40. The obstructions created by Defendants have made it impossible for Plaintiff or his family members to care for or visit their family cemetery lot since 1983 without arguably trespassing upon land of neighboring owners. Said lot contains the remains of at least ten (10) members of the Plaintiffs' family.

41. That the said easement/right-of-way has been used notoriously, continuously, exclusively and openly by Thomas Adams and his descendants, including George Atkisson, from the time of conveyance, from Mary Saunders and Robert Adams up until late in 1983.

42. Fairfax County Park Authority has trespassed directly upon said cemetery lot and has removed barriers placed by Mr. Atkisson in an attempt to keep out trespassers. Fairfax County Park Authority has used a path contrary to an easement/right-of-way which the Atkissons dedicated to be used for horseback riding, and has trampled directly upon the resting places of the Atkissons' ancestors.

43. Fairfax County Park Authority also owns land adjacent to

Wendover Subdivision, Section III, which was deeded and/or otherwise granted to said Defendant by Defendant hawthorne from Parcel 48 and/or Parcel 49.

44. That the said easement/right-of-way in favor of the Atkisson cemetery property runs appurtenant to the servient estate of said land owned by the Fairfax County Park Authority.

45. That the Fairfax County Park Authority has or is planning to interrupt and obstruct Plaintiffs' easement/right-of-way from the cemetery to the Clark Crossing outlet road by construction of a parking lot on or near said easement/right-of-way.

46. That the Plaintiffs have no plain, adequate, and complete remedy at law.

COUNT I

Injunction and Damages for Obstruction of Express Easement

47. That the allegations of Paragraphs 1 though 58, inclusive, are re-alleged and incorporated herein by reference.

48. That the Plaintiffs, George and Carlotta Atkisson, have an express easement/right-of-way appurtenant by deed in favor of the dominant estate (cemetery lot) which is traceable by a direct chain of title through to the Defendants herein, having conveyed with the land.

49. that the actions of Defendant Wexford and the lot owners constitute an ongoing and continuing trespass and obstruction of Plaintiffs, George and Carlotta Atkisson's easement/right-of-way which has resulted in damages an disrepair to the cemetery lot, violation of property rights, diminution in value of the cemetery lot, deprivation of use of the cemetery lot by Plaintiffs, George and Carlotta Atkisson and

has caused emotional distress of related personal injury to be suffered by the Plaintiffs.

50. That the Fairfax County Park Authority is prospectively engaged in the obstruction of said easement/right-of-way.

51. WHEREFORE, the Plaintiffs, George and Carlotta Atkisson demand a permanent injunction against all Defendants to prevent further trespass and obstruction to family cemetery lot and the easement/right-of-way leading thereto, to have any existing impediments and obstructions removed at the expense of Defendants, jointly and severally, and to have a declaration of existence and extent of the easement/right-of-way.

(a) Plaintiffs, George and Carlotta Atkisson further demand compensatory damages in the amount of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) to be paid jointly and severally by all Defendants for damages to the dominate estate, diminution in value, deprivation of use of real property, intentional infliction of emotional distress and related personal injury.

(b) Plaintiffs, George and Carlotta Atkisson further demand punitive damages in the amount of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) to be paid jointly and severally by Defendant Wexford for the intentional, malicious and wanton trespass and deprivation of property rights of the Plaintiffs.

(c) Plaintiffs, George and Carlotta Atkisson further request that Defendants be ordered to pay all reasonable attorneys' fees and costs incurred by the Plaintiffs and for such other equitable relief as the Court deems appropriate and

just.

COUNT II

Injunction and Damages for Obstruction of Implied Easement by Necessity

52. That the allegations of Paragraphs 1 though 63, inclusive, are re-alleged and incorporated herein by reference.

53. That, in the alternative, the Defendants in fact have or had actual and/or constructive notice of the easement/right-of-way and until late 1983 it was, and in many areas remains, visible and well-defined.

54. That no other means of egress or ingress to the cemetery lot can be substituted at the reasonable expense of the Plaintiffs, George and Carlotta Atkisson and that said easement/right-of-way is necessary for the reasonable enjoyment of the dominate estate.

55. That the actions of Defendant Wexford and the lot owners constitute an ongoing and continuing trespass and obstruction of Plaintiffs, George and Carlotta Atkisonn's easement/right-of-way which has resulted in damages an disrepair to the cemetery lot, violation of property rights, diminution in value of the cemetery lot, deprivation of use of the cemetery lot by Plaintiffs, George and Carlotta Atkisson and has caused emotional distress of related personal injury to be suffered by the Plaintiffs, George and Carlotta Atkisson.

56. That the Fairfax County Park Authority is prospectively engaged in the obstruction of said easement/right-of-way.

57. WHEREFORE, the Plaintiffs, George and Carlotta Atkisson demand that the Court find an implied easement/right-of-way by necessity exists in favor of the cemetery lot and issue a permanent injunction against all Defendants to prevent further trespass and obstruction to the

easement/right-of-way of the family cemetery lot, to have any existing impediments and obstructions removed at the expense of Defendants, jointly and severally, excluding Fairfax County Park Authority.

(a) Plaintiffs, George and Carlotta Atkisson further demand compensatory damages in the amount of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) to be paid jointly and severally by all Defendants for damages to the dominate estate, diminution in value, deprivation of use of real property, intentional infliction of emotional distress and related personal injury.

(b) Plaintiffs, George and Carlotta Atkisson further demand punitive damages in the amount of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) to be paid jointly and severally by Defendant Wexford for the intentional, malicious and wanton trespass and deprivation of property rights of the Plaintiffs, George and Carlotta Atkisson.

(c) Plaintiffs, George and Carlotta Atkisson further request that Defendants be ordered to pay all reasonable attorneys' fees and costs incurred by the Plaintiffs and for such other equitable relief as the Court deems appropriate and just.

COUNT III

Injunction and Damages for Obstruction of Prescriptive Easement

58. That the allegations of Paragraphs 1 though 69, inclusive, are re-alleged and incorporated herein by reference.

59. That, in the alternative, the Plaintiffs, George and Carlotta

Atkisson adverse use of a private way through the described property owned by Defendants had been exclusive, continuous and notorious for the period of time exceeding twenty (20) years.

60. That the Defendants and their predecessor owners of the land now compromising Wendover Subdivision, Section III, knowingly acquiesced in the use of said private way by Plaintiffs and Plaintiffs' family for a period exceeding twenty (20) years.

61. That the actions of Defendant Wexford and the lot owners constitute an ongoing and continuing trespass and obstruction of Plaintiffs' easement/right-of-way which has resulted in damages an disrepair to the cemetery lot, violation of property rights, diminution in value of the cemetery lot, deprivation of use of the cemetery lot by Plaintiffs, and has caused emotional distress of related personal injury to be suffered by the Plaintiffs.

62. That the Fairfax County Park Authority is prospectively engaged in the obstruction of said easement/right-of-way.

63. WHEREFORE, the Plaintiffs, George and Carlotta Atkisson demand that the Court find an easement/right-of-way by prescription exists in favor of the cemetery lot and issue a permanent injunction against all Defendants to prevent further trespass and obstruction to the easement/right-of-way of the family cemetery lot, to have any existing impediments and obstructions removed at the expense of Defendants, jointly and severally, excluding Fairfax County Park Authority.

(a) Plaintiffs, George and Carlotta Atkisson further demand compensatory damages in the amount of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) to be paid jointly and severally

by all Defendants for damages to the dominate estate, diminution in value, deprivation of use of real property, intentional infliction of emotional distress and related personal injury.

(b) Plaintiffs, George and Carlotta Atkisson further demand punitive damages in the amount of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) to be paid jointly and severally by Defendant Wexford for the intentional, malicious and wanton trespass and deprivation of property rights of the Plaintiffs.

(c) Plaintiffs, George and Carlotta Atkisson further request that Defendants be ordered to pay all reasonable attorneys' fees and costs incurred by the Plaintiffs and for such other equitable relief as the Court deems appropriate and just.

GEORGE ATKISSON
CARLOTTA T. ATKISSON
By Counsel

ANDERSON & CORRIE

BY: _____
Scott E. Snyder, VSB #26233
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
(703) 222-2200
Counsel for Plaintiffs,
George and Carlotta Atkisson

c:\s\ms\atkisson\4THAMEND.COM

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON, et al., Plaintiffs	)	
v.	)	In Chancery No. 97823
WEXFORD ASSOCIATES, INC., et al., Defendants	)	

ORDER OF PUBLICATION

The object of this suit is to reestablish an easement to the Plaintiffs' family cemetery and this Court's ruling that there are or may be persons interested in the subject matter of this suit who's names are unknown, namely, the heirs, devisees and accessors in title of Mary Saunders, Belle Smith, R.L. Adams, Lewis Adams, Rose McDaniels, Cary Powell, Effie Powell, Olivia Adams, Adelbert Adams, Harmonia Adams, Irene Adams, Edna Adams, Trueman Adams, Oscar Adams, Russell Adams, Thomas S. Adams, and making said parties Defendants by the general description of "parties unknown" and an affidavit having been made and filed that they are unknown;

it is Ordered that the persons made Defendants by the general descriptions of "parties unknown" do appear, on or before April 29, 1996 and do what is necessary to protect their interest.

it is further Ordered that the foregoing portion of this Order be published once a week for four successive weeks in the Fairfax Journal, a newspaper published in Fairfax County, Virginia.

ENTERED this 28th day of Feb., 1996.

Jane M. Roush

The Honorable Jane M. Roush
Fairfax County Circuit Court

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I ASK FOR THIS:

Scott E. Snyder, Esquire
ANDERSON AND CORRIE
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
(703) 222-2200
Counsel for
George and Carlotta Atkisson

SEEN AND _____:

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Associates, Inc. and the
Individual Defendants

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Counsel for Intervenors
David O'Brien and Jane O'Brien

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009
(703) 246-2221 Fax (703) 385-4432

COUNTY OF FAIRFAX CITY OF FAIRFAX

RICHARD J. JAMBORSKY
F. BRUCE BACH
J. HOWE BROWN
JACK B. STEVENS
MICHAEL P. McWEENY
THOMAS S. KENNY
MARCUS D. WILLIAMS
GERALD BRUCE LEE
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ROBERT W. WOOLDRIDGE, JR.
ARTHUR B. VIEREGG, JR.
JANE MARUM ROUSH
M. LANGHORNE KEITH
DENNIS J. SMITH
DAVID T. STITT
JUDGES

DR. MARK A. ZAFFARANO
DIRECTOR, JUDICIAL OPERATIONS

JAMES KEITH
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BARNARD F. JENNINGS
LEWIS H. GRIFFITH
WILLIAM G. PLUMMER
THOMAS J. MIDDLETON
THOMAS A. FORTKORT
QUINLAN H. HANCOCK
RETIRED JUDGES

April 4, 1996

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Re: *Atkisson, et al. v. Wexford Associates, Inc., et al.*,
Chancery No. 97823

Dear Counsel:

This matter came on for a hearing on December 28, 1995, on several motions of the parties. After consideration of the briefs and arguments of the parties, I ruled on three of the eight motions before me, and I took the five remaining motions under advisement. Those motions under advisement are:

OPINION LETTER
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- Plaintiffs Atkissons' Motion in Limine (to prohibit Wexford Defendants from presenting evidence and/or argument on issues previously argued);

- Individual Defendants and Intervenors' Motion and Memorandum in Support of Motion to Declare Prior Judgments Void Due to Lack of Necessary Parties;

- Defendants Kowalczyks and Deaseys' Motion for Dismissal With Prejudice of Improper Parties;

- Defendants Eckman and Datoff's Motion to Compel Answers to Interrogatories and For Sanctions;

- Defendants' Motion to Determine if Easement is Terminated as a Matter of Law at Bird Road.

For the reasons stated below, the Plaintiffs' Motion in Limine is granted, the Court will defer ruling on the Motion to Determine if Easement is Terminated as a Matter of Law at Bird Road, and the three remaining motions are denied.

FACTS

Plaintiffs George and Carlotta Atkisson own an interest in an easement that provides ingress and egress to a family cemetery. That easement was originally created by deed in 1892 conveying a fifteen acre parcel and the easement to Thomas Adams, Mr. Atkisson's grandfather. In a decree rendered in connection with a partition suit in 1896, Adams received an adjoining piece of land referred to as Lot 2. The burial plot is located on the 15 acre parcel and/or Lot 2.

Over the intervening one hundred years, the land burdened by the easement has been subdivided and developed by, among others, defendant Wexford Associates, Inc. The easement is located on land now part of Wendover Subdivision, Section III, a subdivision of single-family houses.

In July of 1986, the Atkissons brought suit against the Fairfax County Park Authority, Wexford Associates, Inc. and certain of the lot owners in Wendover Subdivision, Section III in Fairfax County for a declaration of the existence and the extent of their easement and compensatory and punitive damages. Later, the Bill of Complaint was amended to include a total of 56 of the lot owners in Wendover.[1] Trial was held on July 30-31, 1991, August 20, 1991, February 27, 1992 and January 27, 1993. During the trial, the Atkissons non-suited 38 of the 56 lot owners. This Court's final order, entered by Judge Fortkort on March 10, 1993, held that the Atkissons own an express and prescriptive easement for ingress and egress to the family cemetery over property in the Wendover Subdivision; however, the Court did not order obstructions removed from the easement because the approximate location of the easement was improved by swimming pools and houses. The trial court ordered the property owners to pay the Atkissons nominal damages, Wexford Associates to pay the Atkissons $10,000 in punitive damages and the Fairfax County Park Authority to provide a new easement on adjoining park land.

The Park Authority appealed this Court's decision,[2] and in June of 1994, the Virginia Supreme Court held that the Chancellor did not have the authority to relocate

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[1] This Court initially sustained the defendants' demurrer to the bill of complaint. The Atkissons appealed that decision, which the Virginia Supreme Court reversed in an unpublished order. *Atkisson v. Wexford Associates, Inc.*, Record No. 890169 (April 26, 1989).

[2] Wexford Associates and the lot owners did not appeal the March 10, 1993 final order.

the express easement on park land. *Fairfax County Park Authority v. Atkisson*, 248 Va. 142, 445 S.E.2d 101 (1994), *cert. denied*, 115 S.Ct. 668 (1994). The Virginia Supreme Court remanded the case with the instructions that the Atkissons, Wexford and the property owners were to try to agree on a location of an alternate easement, or, barring agreement, the obstructions were to be removed from easement. On February 10, 1995, the trial court entered an order in accordance with the instructions of the Virginia Supreme Court directing the parties to try to agree on a new easement.

The parties were unable to agree on an alternate easement and the Atkissons moved the Court to order the obstructions removed from the easement in accordance with the Supreme Court's mandate. This Court was unable to grant that motion because it found that the easement had never been located by the Court in prior proceedings. The Court continued the motion for an evidentiary hearing to locate the easement.

Meanwhile, David and Jane O'Brien moved to intervene as defendants in the case. They are the owners of Lot 3 in Wendover Subdivision, having acquired the property from the Kowalczyks in June 1992. The Court granted the O'Briens' motion to intervene, after findings that they are necessary parties in that the approximate location of the easement transverses their property, and that they had no actual or constructive notice of the prior litigation.[3] Accordingly, the Court granted a new trial

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[3] Although the O'Briens acquired Lot 3 in June 1992 from the Kowalczyks, who were defendants in the case, they were not advised about the pending litigation, nor did the litigation appear in their chain of title, as the *lis pendens* recorded in the land records of Fairfax County regarding this cause did not include Lot 3 in the description of the property subject to the *lis pendens*. As this Court ruled, Judge Fortkort made all of his dispositive rulings after the O'Briens were in title and while they were completely unaware of this cause. Therefore, the interests of the O'Briens were not adequately represented by the Kowalczyks, their predecessors in interest.

to the O'Briens on all issues in the case, and a trial as to the other defendants limited to issue of locating the easement.

The trial is presently set to commence on September 16, 1996. The motions under consideration followed.

I. Plaintiffs' Motion in Limine

Plaintiffs assert that all defendants, except the O'Briens, should be prohibited from presenting evidence or argument on any issue that has been previously argued or that may have been ruled on in prior proceedings. No appeal has been taken from any of the prior judgments in this case by any party other than the Park Authority. Plaintiffs contend that, because these defendants had an opportunity to raise any and all defenses in the earlier proceedings, they are now barred by *res judicata*, from raising any factual or legal defenses that were or could have been raised earlier, except those issues related to the location of the easement. In their brief, plaintiffs point out several of the issues and defenses that were raised earlier by defendants.

The Court agrees that inasmuch as no defendant other than the Park Authority appealed the Mach 1993 final order in this case, all issues which were raised or could have been raised before are *res judicata,* except for the location of the easement. Therefore, all defendants who were represented at the prior trial in this cause will be prohibited from raising any factual or legal defenses which were raised or could have been raised in earlier proceedings. Defenses include but are not limited to: the existence of alternative access; plaintiffs' attempted separation of an appurtenant easement from the estate it was intended to serve; plaintiffs' attempted expansion of the use of the easement; that an easement by necessity is not supported because of the existence of an alternative easement option; and the right-of-way is not in the chain

of title of the plaintiffs. All defendants who participated in the earlier trial will be limited at the new trial to presenting evidence as to the location of the easement. For the foregoing reasons, the plaintiffs' motion in limine is granted.

II. Individual Defendants and Intervenors' Motion to Declare Prior Judgments Void Due to Lack of Necessary Parties

Defendants assert that any prior judgments in this case are void and not binding on any party as a matter of law, because all the necessary parties were not before the court. The O'Briens, purchasers of Lot 3, and Mr. Eckman and Ms. Datoff, purchasers of Lot 4, were not joined in this action at the time of the earlier orders. (The *lis pendens* did not cover either Lot 3 or Lot 4.)

In granting the O'Briens' motion to intervene in August 1995, this Court found that they had no actual or constructive notice of this litigation. A new trial was granted to them on all issues.

Ms. Eckman and Ms. Datoff are not in the same situation as the O'Briens. They acquired Lot 4 from the Deaseys on June 1994, long after the final order had been entered and the same day as the Virginia Supreme Court issued its ruling reversing the case. Although the *lis pendens* omitted Lot 4 from the property description, Mr. Eckman and Ms. Datoff purchased Lot 4 with notice of this litigation. After contracting to purchase the property, Mr. Deasey advised Mr. Eckman about the cemetery, the easement and the pendency of this litigation. Further, both Mr. Eckman and Ms. Datoff noticed the remnants of a road bed (the approximate area of the easement) on the property. Mr. Eckman, himself an attorney, purchased "extra title insurance" for that reason. Thereafter, Mr. Eckman and Ms. Datoff closed on their acquisition of Lot 4. Because they acquired their property with

actual notice of this litigation, they "stepped into the shoes" of their predecessors in title, the Deaseys, who adequately represented their interests in the litigation.

Defendants assert that the failure to join the O'Briens in this action as necessary parties before the prior judgment is a fatal defect to the prior judgment as to all parties, not just the O'Briens. Therefore, all issues could be relitigated, and *res judicata* would have no application. Defendants cite *Gulfstream Building Assoc., Inc. v. Britt*, 239 Va. 178 (1990) in support of this proposition.

Gulfstream involved a boundary dispute, and the parties failed to join one of the owners of the affected land, Gulfstream. A decree was entered by the court, and Gulfstream brought an independent action in chancery to set aside the decree under Virginia Code § 8.01-428 (C) [now § 8.01-428(D)]. The trial court set aside its earlier decree as null and void to the extent it affected the lot owned by Gulfstream. The Virginia Supreme Court affirmed the trial court's action in setting aside the decree, because the earlier decree prejudiced and jeopardized the rights of Gulfstream. Id. at 182-83.

Significantly, the Court in *Gulfstream* declared the prior judgment null and void only to the extent it affected the property owned by Gulfstream, the absent party. The Court did not, as defendants argue, void the judgment as to property owners who were properly before the trial court. Id. at 181.

The facts of this case are distinguishable from the mechanic's lien cases cited by the defendants. *See, e.g., Mendenhall v. Cooper, Inc.*, 239 Va. 71 (1990). Those cases hold that the absence of a necessary party is fatal to the determination of the validity of a mechanic's lien. Unlike the case at bar, the interests of the various claimants to the property covered by an mechanic's lien are not separable. In *McDougle v. McDougle*, 214 Va. 636, 637, 203 S.E.2d 131, 133 (1974), the Virginia

Supreme Court recognized exceptions to rule that all necessary parties must be before the court for a valid judgment to be entered:

> The only exceptions to the rule occur where it is "practically impossible" to join all parties in interest, and the absent parties are represented by others having the same interests, or where an absent party's interests are separable from those of the parties before the court, so that the court may enter a decree without prejudice to the rights of the absent party.

214 Va. at 637, 203 S.E.2d at 133 (citation omitted).

In this case, the interests of the O'Briens are separable from those of the other defendants. O'Briens have now been joined as parties. They have been granted a new trial as to all issues in the case. Under *Gulfstream* and *McDougle*, the failure to join them earlier does not render all prior judgments in this matter void as to all parties. All other parties to this suit who were parties at the time of trial had a full and fair opportunity to litigate all issues in the suit but for the location of the easement. For the reasons stated, the motion to void the prior judgments is denied.

III. Defendants Kowalczyks and Deaseys' Motion for Dismissal With Prejudice of Improper Parties

Defendants Kowalczyks and Deaseys move for the dismissal of Katherine Kowalczyk from this case, because she now lives in California and no longer owns Lot 3. John Kowalczyk, her former husband, died in 1993. Lot 3 has been conveyed to the O'Briens, who have been joined as defendants in this case.

Similarly, the Deaseys no longer own their property. They conveyed Lot 4 to Mark Eckman and Vivian Datoff in June of 1994. Mr. Eckman and Ms. Datoff were added as parties to this cause on October 6, 1995.

The Atkissons oppose the motion to dismiss Kowalczyk, Eckman and Datoff, noting that they have an unsatisfied judgment against them in this case. In the March 10, 1993 final order, this Court ordered that "Each homeowner whose house blocked the plaintiffs' easement shall pay nominal damages to the plaintiffs of One Hundred Dollars ($100.00) per homeowner." The June 1994 Supreme Court ruling did not reverse that aspect of the final order. The provision ordering the defendants to pay the Atkissons $100.00 each is still in effect.

It appearing to the Court that the Kowalczyks and the Deaseys still have an outstanding judgment against them, they will not be dismissed from this suit until such judgments are satisfied.

IV. Defendants Eckman and Datoff's Motion to Compel Answers to Interrogatories and For Sanctions

Eckman and Datoff's counsel served plaintiffs' counsel with discovery on November 17, 1995. The only responses received were copies of plaintiffs' responses to the O'Briens' discovery. The plaintiffs have refused any other discovery from Eckman and Datoff as they purchased their property with notice and are therefore barred from presenting any defenses that were raised or could have been raised earlier.

Eckman and Datoff purchased with notice of the litigation by their own testimony. As such, they stepped into the shoes of the Deaseys, their predecessors

in title. They are barred by the doctrine of *res judicata* from litigating any of the issues which were raised or could have been raised before the prior judgment. For this reason, their Motion to Compel Discovery is denied.

V.. Defendants' Motion to Determine if Easement is Terminated as a Matter of Law at Bird Road

Defendants assert that the necessity of a portion of the easement is extinguished as a matter of law because of the construction of Bird Road. Bird Road bypasses a portion of the easement and provides access to the easement by means of a public road.

The ruling on this motion is deferred until lot owners of property located on the area of the easement on the side of Bird Road that defendants now claim should be extinguished as a matter of law enter their appearances in this cause.

CONCLUSION

For all the reasons stated above, the plaintiffs' Motion in Limine is granted, the Court's ruling on the Motion to Determine Easement Terminated as a Matter of Law at Bird Road is deferred, and the remaining motions are denied. Mr. Snyder should prepare an order reflecting my rulings, circulate it among counsel, and present it to the Court for entry within fifteen days of the date of this letter.

Sincerely,

Jane Marum Roush

Jane Marum Roush

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MEMORANDUM OF LIS PENDENS

KNOW ALL MEN that I, GEORGE ATKISSON, Plaintiff in the cause described below, give Notice of Lis Pendens, by this Memorandum, filed in the Clerk's office of the Circuit Court of Fairfax County, this _____ day of March, 1996, which sets forth the following:

There is now pending in the Circuit Court of Fairfax County a certain cause of action by GEORGE ATKISSON and CARLOTTA T. ATKISSON against DONALD HALL, JOAN HALL, RAYMOND CAVANAGH, EILEEN CAVANAGH, THOMAS HEALY and VICTORIA HEALY, the object of which is to reestablish my easement and to have all obstructions erected upon my easement removed at the cost of the named Defendants above. The nature of the claim is primarily injunction, and the properties at issue is described as follows:

Tax Map Number 028-3-20-0039
commonly known as
2007 Carrhill Road, Vienna, Virginia 22181

Tax Map Number 028-3-20-0040
commonly known as
2009 Carrhill Road, Vienna, Virginia 22181

Tax Map Number 027-4-13-0001
commonly known as
10098 Byrd Road, Vienna, Virginia 22181

The names of the persons whose estates are intended to be affected by the pending suit are: DONALD HALL, JOAN HALL, RAYMOND CAVANAGH, EILEEN CAVANAGH, THOMAS HEALY and VICTORIA HEALY.

WITNESS my hand this 28th day of March, 1996.

George T. Atkisson
GEORGE ATKISSON

RP9677 0107

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX, to-wit:

SUBSCRIBED AND SWORN TO before me by GEORGE ATKISSON this 28th day of March, 1996.

I was originally commissioned as Theresa J. Urbina, Notary Public

Theresa J. Sullivan
Notary Public

My Commission expires: 6/30/96

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON, et al.,	)	
	)	
Plaintiffs	)	
v.	)	In Chancery No. 97823
	)	
WEXFORD ASSOCIATES, INC., et al.,	)	
	)	
Defendants	)	
	)	

AFFIDAVIT

COMES NOW, George Atkisson, after being duly sworn, states that the following individuals are non-residents of the Commonwealth of Virginia: Lucille Chase, 8723 C-S 93rd Lane, Okala, Florida 34481, Alan Smith, 16 Connies Drive, Coatesville, PA 19320, Larry Smith, 1061 Boot Road, Westchester, PA 19380, John Adams, 319 Nagle, Chicago, Illinois 60634, DeWilton Adams, 9109 Lela Court, Fort Washington, Maryland 20744, and that the above addresses are true and accurate to the best of its knowledge and belief.

Geo B. Atkisson
George Atkisson

STATE OF VIRGINIA
COMMONWEALTH AT LARGE, to-wit

Subscribed and sworn to before me, George Atkisson, this 28th day of March, 1996.

I was originally commissioned as Theresa J. Ubina, Notary Public

Notary Public

My Commission Expires: 6/30/96

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TESTE:

ANDERSON & CORRIE

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE T. ATKISSON and CARLOTTA T. ATKISSON Plaintiffs, v. WEXFORD ASSOCIATES, INC., et al Defendants.	)	In Chancery No. 97823

ANSWER AND GROUNDS OF DEFENSE FOR DEFENDANTS RAYMOND CAVANAGH AND EILEEN CAVANAGH

COMES NOW Defendants Raymond Cavanagh and Eileen Cavanagh (collectively "Defendants"), by and through counsel and for their Answer and Grounds of Defense state, in numbered paragraphs corresponding to the paragraphs in the Fourth Amended Bill of Complaint, as follows:

1. Denied.

2. Admitted.

3. These Defendants lack sufficient knowledge to respond to these allegations and therefore, deny these allegations.

4. Denied.

5-6. Admitted.

7. Denied.

8. Admitted.

9-10. These Defendants lack sufficient knowledge to respond to these allegations as the

parties referenced therein were non-suited by Plaintiff at the close of their case in August, 1991 and are no longer parties to the litigation. These Defendants, therefore, deny the aforementioned parties are also defendants.

11-12. Admitted.

13. Denied. In further answering, John Kowalczyk and Katherine Kowalczyk conveyed their interest in Lot 3 in the Wendover Subdivision, Section III, in Fairfax County, Virginia, to David D. O'Brien and Jane G. O'Brien ("O'Brien"). John Kowalczyk is deceased and Katherine Kowalczyk, upon information and belief, resides in California.

14-17. Admitted.

18-19. These Defendants lack sufficient knowledge to respond to these allegations as the parties referenced therein were non-suited by Plaintiff at the close of their case in August, 1991, and are no longer parties to this litigation. These Defendants, therefore, deny the aforementioned parties are also defendants.

20-21. These Defendants lack sufficient knowledge to respond to these allegations as Charles B. Hawthorne and Audrey K. Hawthorne were non-suited by an Order of Judge Fortkort at the commencement of trial in August, 1991 and are no longer parties to the litigation. These Defendants deny that the Hawthornes are also defendants.

22. Admitted.

23-33. These Defendants lack sufficient knowledge to respond to these allegations as the parties referenced therein were non-suited by Plaintiff at the close of their case in August, 1991 and are no longer parties to the litigation. These Defendants, therefore, deny the aforementioned parties are also defendants.

34-35. Admitted.

36. These Defendants lack sufficient knowledge to respond to these allegations as the parties referenced therein were non-suited by Plaintiff at the close of their case in August, 1991 and are no longer parties to the litigation. These Defendants, therefore, deny that the Wallers are also defendants.

37. Denied.

38. Admitted, to the extent the property was formerly referenced as Parcel 48 and Parcel 49, denied in part as to the alleged ownership of the various lots. The answers to paragraphs 7-37 are incorporated as if fully set forth herein.

39. Denied. In further answering, the land records of Fairfax County speak for themselves.

40. Admitted.

41. Denied. In further answering, these Defendants deny that the 15 acre parcel contained the burial lot, and the land records of Fairfax County speak for themselves.

42. Denied. In further answering, these Defendants deny that the totality of the land conveyed to Harold Miller, Trustee was dominant estate and that the burial lot was conveyed.

43. Denied.

44. Denied. The proported deed attempted to sever the easement from the estate it was intended to serve and as such was a nullity. In further answering, the means of ingress and egress to said burial lot was created in the 1896 Partition Deed located at Deed Book X-5 at Page 356, among the land records of Fairfax County, Virginia and creates an express easement running through what is now Hunter Mill Forest Subdivision. The Defendants deny that the Atkissons have any ownership interest in the right of way to the 15-acre parcel.

45. In responding to the first sentence of paragraph 45, the Defendants admit that as an heir of Thomas Adams, Mr. Atkisson, along with many other heirs, has an interest in the burial lot located in the southeast corner of Partition Lot 2 as described in the Partition Decree recorded in Deed Book X-5 at Page 356, among the land records of Fairfax County, Virginia. The Defendants deny that Carlotta T. Atkisson is an heir of Thomas Adams. The remaining allegations are denied.

46. Denied.

47-49. Admitted.

50-55. Denied.

56. Denied. In further answering, the detention pond which allegedly obstructs the Plaintiff's claimed easement is located on the property of the Fairfax County Park Authority.

57. Denied. In further answering, access to the burial lot was created in the 1896 Partition Deed and ran through what is now Hunter Mill Forest Subdivision. Mr. Atkisson, a partner in the development of Hunter Mill Forest Subdivision, purposefully obstructed that easement and cannot now claim the burial lot is landlocked due to another's actions.

58-59. Denied.

60-63. Denied for lack of information. These allegations do not affect these Defendants, however, they are denied out of an abundance of caution.

64. Denied, as Plaintiff's 4th Amended Bill of Complaint clearly requests several plain, adequate and complete remedies at law.

COUNT I

INJUNCTION AND DAMAGES FOR OBSTRUCTION OF EXPRESS EASEMENT

65. The answers in Paragraphs 1 through 64 are incorporated herein by reference.

66-67. Denied.

68. Denied for lack of information. These Defendants have no knowledge of this allegation, it is therefore denied out of an abundance of caution.

69. WHEREFORE, these Defendants pray that all claimed relief be denied and that they be reimbursed their attorneys fees and costs in this matter.

COUNT II

INJUNCTION AND DAMAGES FOR OBSTRUCTION OF IMPLIED EASEMENT BY NECESSITY

70. The answers in Paragraphs 1 through 69 are incorporated herein by reference.

71-73. Denied.

74. Denied for lack of information. These Defendants have no knowledge of this allegation, it is therefore denied out of an abundance of caution.

75. WHEREFORE, these Defendants pray that all claimed relief be denied and that they be reimbursed their attorneys fees and costs in this matter.

COUNT III

INJUNCTION AND DAMAGES FOR OBSTRUCTION OF PRESCRIPTIVE EASEMENT

76. The answers in Paragraphs 1 through 75 are incorporated herein by reference.

77-79. Denied.

80. Denied for lack of information. These Defendants have no knowledge of this allegation, it is therefore denied out of an abundance of caution.

81. WHEREFORE, these Defendants pray that all claimed relief be denied and that they be reimbursed their attorneys fees and costs in this matter.

GROUNDS OF DEFENSE

1. All allegations not expressly admitted are denied.

2. Adequate and alternate access is available to the alleged burial lot without the necessity of traversing any of the property owned by the Individual Defendants, Wexford Associates, Inc., these Defendants or O'Brien.

3. Plaintiffs' allegations with respect to the purported easement and the property which it was intended to serve are at variance with the land records of the Circuit Court of Fairfax County. Plaintiffs attempt to separate an appurtenant easement from the estate which it was intended to serve.

4. Plaintiffs attempt to expand the use of an express easement.

5. Plaintiffs' allegations in support of their claim of an implied easement by necessity are not supported by the land records of the Circuit Court of Fairfax County for the reason that adequate and alternate access is available to the cemetery. Additionally, the developers of the Hunter Mill Forest Subdivision, of which Plaintiff George Atkisson was a member, obstructed the express easement to the family burial lot granted in the 1896 Partition Deed. Therefore, Petitioner's own actions created the alleged necessity and equity should not grant the relief requested as Plaintiff has unclean hands.

6. The land records of this Court show that no such right-of-way exists in Petitioners'

purported Grantor, namely, the alleged right-of-way was not and is not in a discernible chain of title to the alleged Grantor for the purposes asserted by Plaintiffs.

7. Plaintiffs' allegations of a purported right-of-way arising out of Rezoning Application RZ 79-C-095 are insufficient on their face to confer any rights in the land.

8. Plaintiffs fail to allege facts sufficient to invoke an injunctive remedy. In fact, the pleading on its face alleges an adequate remedy at law.

9. Plaintiffs' allegations of compensatory damages are conclusory and not otherwise legally cognizable.

10. Plaintiffs' allegations of punitive damages are conclusory and not in accord with the requirements of case law.

11. Plaintiffs fail to allege facts sufficient to entitle them to attorneys fees.

12. Plaintiffs' claims are barred by the doctrine of laches.

13. Plaintiffs' claims are unfounded in the land records of this Court.

14. Plaintiffs fail to allege a cause of action against these Defendants.

15. Plaintiff, Carlotta T. Atkisson, lacks standing to maintain this action.

WHEREFORE, the premises considered, the Defendants move this Court to dismiss this action with prejudice and award their costs and attorneys fees incurred herein or for such other and further relief as the Court may deem appropriate.

RAYMOND CAVANAGH
EILEEN CAVANAGH
By Counsel

GOODMAN GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828

By: _____
Bernard E. Goodman, VSB# 15463
Counsel for Defendants
Raymond Cavanagh and Eileen Cavanagh

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Answers and Grounds of Defense for Defendants, Raymond Cavanagh and Eileen Cavanagh were mailed first class, postage prepaid, on this 23rd day of April, 1996 to the following:

Scott E. Snyder, Esquire
Anderson & Corrie
12600 Fair Lakes Circle, Suite 220
Fairfax, VA 22033-4904

David J. Gogal, Esquire
Blankingship & Keith, P.C.
4020 University Drive, Suite 312
Fairfax, VA 22030

_____
Bernard E. Goodman

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE T. ATKISSON and CARLOTTA T. ATKISSON Plaintiffs, v. WEXFORD ASSOCIATES, INC., et al Defendants.	)	In Chancery No. 97823

MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

COMES NOW, Defendants, Wexford Associates, Inc. ("Wexford"), James E. Henry, Susan H. Henry, Herbert Vogel, Barbara Vogel, John Kowalczyk, Katherine Kowalczyk, Patrick G. Deasy, Jane M. Deasy, Charles E. Andrews, Jean S. Andrews, Brian T. McVay, Elizabeth J. McVay, Joanne Wilkenfeld, M. Jack Wilkenfeld, Walter T. Morgan, Beth A. Morgan, Mark Eckman, Vivian P. Datoff, Lawrence W. Wyte, and Diane B. Wyte (collectively "Individual Defendants"), and respectfully request that this Court reconsider its April 4, 1996 letter opinion and subsequent Order ruling that these Defendants would be precluded in the new trial, currently scheduled for September 16, 1996, from presenting any evidence except as to the location of the alleged easement, and in support thereof state the following:

FACTS

Given the extensive history of this case, this Memorandum will only include a brief summary of the facts relevant to this Motion. On August 3, 1995, Judge Roush heard argument on David O'Brien's and Jane O'Brien's ("O'Brien") Petition to Intervene. After hearing testimony

and argument on this matter, Judge Roush granted O'Brien's Petition and scheduled a new trial, currently set for September 16, 1996. Specifically, the Circuit Court ruled:

> "that the O'Briens were necessary parties, without which the Court could not afford complete relief and (I) do not believe that their interests were adequately represented or that there was an identity of interest. I note that Judge Fortkort made all of his rulings or most of his dispositive rulings . . . after the O'Briens were already in title . . . and completely unaware of the suit. (8/3/95 Tr. at 69-70).

This ruling was premised on Atkisson's failure to give O'Brien notice of the lawsuit which would have been easily accomplished by filing a *lis pendens* against Lot 3.

On December 1, 1995, Wexford and the Individual Defendants filed a Motion to Add Additional Parties Plaintiffs as Atkisson claims an interest in the burial lot and easement as an heir of Thomas Adams. Thus, all heirs are necessary parties to this action. On December 28, 1995, Judge Roush heard argument on several motions including the effect of the lack of the necessary parties on the prior rulings in this case. The Court granted the Defendants' Motion to Add Additional Parties Plaintiffs from the bench. On April 4, 1996, Judge Roush issued a letter opinion treating the effect of the lack of necessary parties in the first trial.

More specifically, Judge Roush ruled that as Wexford and the Individual Defendants, with the exception of Eckman and Datoff, had the opportunity to litigate this case before Judge Fortkort, they would be precluded from "raising any factual or legal defenses which were raised or could have been raised in earlier proceedings." (Ltr. Opinion at 5). The Court also ruled that the O'Brien's interest is separable from those of the other defendants. (Ltr. Opinion at 8). Additionally, although the December 28, 1995 argument was not an evidentiary hearing, the Court allowed counsel for Plaintiff to proffer evidence as to Mr. Eckman's knowledge of this

litigation and title insurance. (12/28/95 Tr. at 54-56). The Court limited Eckman and Datoff's participation in the upcoming trial based on this proffer, without an opportunity for rebuttal.

ARGUMENT

I. THE INTERESTS OF O'BRIEN ARE NOT SEPARABLE FROM THOSE OF WEXFORD AND THE INDIVIDUAL DEFENDANTS.

It is undisputed that the Atkissons failed to give notice by *lis pendens* or other means to O'Brien prior to O'Brien's purchase of Lot 3. Under Va. Code Ann. §8.01-268 (Michie 1950 as amended), as *bona fide* purchasers without notice O'Brien is not bound by the various trial court orders and the Virginia Supreme Court's mandate entered herein. Swetnam v. Antonsanti, 150 Va. 534, 540-42 (1978). Any and all prior judgments are absolutely null and void. Patterson v. Anderson, 194 Va. 557, 570-571, *cert. denied*, 345 U.S. 965 (1953).

The Supreme Court in Patterson was confronted with the issue of whether the legitimacy of the plaintiff established in an earlier proceeding was *res judicata* in a subsequent action to determine if she was entitled to share in the estate of her alleged father. The court observed that in the legitimacy hearing not all necessary parties were before the court. The court then held that *res judicata* did not bar the relitigation of the legitimacy issue as "a valid judgment cannot be rendered where there is a want of necessary parties, and a court cannot properly adjudicate matters involved in a suit when necessary and indispensable parties are not before it . . . . A judgment rendered where necessary parties are not before the court does not operate to bar a subsequent action." Id (emphasis added).

The Patterson Court restated earlier law in Virginia that:

> No judicial proceeding can deprive a man of his property without giving him an opportunity to be heard in accordance with the provisions of law, and if such a judgment is rendered against him

> without such opportunity to be heard, it is absolutely void. A void judgment is in legal affect no judgment. By it no rights are divested and from it no rights were obtained. All claims flowing out of it are void. It may be attacked at any proceeding by any person whose rights are affected. Harris v. Deal, 189 Va. 675, 686-87 (1949). (Emphasis added).

Atkisson argues that the void judgment can only be attacked by and invalidated for the unjoined necessary party. (12/28/96 Tr. at 15). Harris is not so limited. The clear language of Harris is that "any person whose rights are affected" may attack the void judgment for want of necessary parties. 189 Va. at 686-87.

The Court denied these Defendants participation in the upcoming trial under the separateness doctrine in Gulfstream Building Assoc. Inc v. Britt, 239 Va. 178 (1990) (Ltr. Opinion at 7). In the cited case, Gulfstream's interest was truly separable from the other defendants. Gulfstream involved two lawsuits. In the first suit, an adverse possession proceeding, Smith instituted an uncontested adverse possession suit to clear title to Lot 7. Id at 180. Smith was awarded possession of Lot 7 based on a survey that contradicted an earlier survey drafted to clarify the boundaries of Lots 1, 2, and 5, including the boundary between Lots 5 and 7, and was thus awarded a portion of Lot 5. Id. In the second suit, Gulfstream, the owner of Lot 5 and not a party to the first suit, brought suit under Code §8.01-428(C) (now §8.01-428(D)) to vacate the judgment in the adverse possession claim. Id at 181. The boundary line error in the adverse possession suit only affected Lot 5 and no other surrounding lot was injured. The Court found that Gulfstream's rights had been jeopardized and vacated the judgment in the adverse possession suit to the extent that it affected Lot 5, on the theory that Gulfstream's interest was separable from the joined defendants in the adverse possession litigation. The Court could, therefore, adjust the boundary line between lots 5 and 7 without affecting any other interests.

In the instant case, O'Brien's interest is not separable from the other Defendants. Were O'Brien to prevail at the upcoming trial, while Wexford and the Individual Defendants were bound by the rulings of Judge Fortkort, this Court would be faced with fundamentally inconsistent results. Without Lot 3, any easement established by the Court would be useless to the Plaintiff. O'Brien was found to be a necessary party specifically because the prior judgment was meaningless without their property and their interest was not separable as "the Court could not afford complete relief" without them. (8/31/95 Tr. at 69-70). Additionally, counsel for Wexford and the Individual Defendants offered Plaintiff an easement traversing their lots but stopping on both sides of Lot 3. Plaintiff's Objections filed March 16, 1995, incorporated by reference and attached hereto as Exhibit "1", stated the proposed easement was "unacceptable, as the only way to use this easement would be to travel across Lot 3 . . . . In order to use the easement, as proposed by Defendants, it would be necessary to travel by helicopter, hovercraft or some other unknown means to transport users from Lot 2 to Lot 4." (Objections of Plaintiff at 2).

Counsel for Plaintiff argued on December 28, 1995, that Atkisson should not be "sanctioned" for their failure to file a *lis pendens*. (12/28/95 Tr. at 48-49). They also argued that had Plaintiff received an unfavorable judgment below and then sought to have it voided due to their failure to join necessary parties the Court would deny them relief as they "can't rely upon (their) own negligence" to vacate an otherwise valid judgment. (12/28/95 Tr. at 48-49). However, it is Plaintiff's negligence in failing to give notice by filing a *lis pendens* or other means that has created the void judgment and continuing litigation. Any argument that these Defendants would receive a windfall is disingenuous as the void judgment did not result from

Defendants' actions. However, this Court's mistaken reliance on the separability doctrine in Gulfstream has effectively relieved the Plaintiff of the results of their own negligence in failing to give notice, and allows Plaintiff to retain the benefits of litigation that is void for failure to join necessary parties.

Additionally, in Jeffries v. Jeffries' Ex'or, 123 Va. 147 96 S.E. 197 (1918), a fraudulent conversion case, the missing parties were the children of a defendant who had been a party throughout the litigation. An objection as to the lack of necessary parties was raised for the first time on appeal. The court noted that notwithstanding fact that the case had been pending for over ten years with numerous depositions and over 500 pages of testimony in the record, the court had to reverse the judgment and remanded the case for a new trial as to all parties. Specifically the court noted:

> The parties . . . have at great trouble and expense endeavored to prepare the suit for a hearing on the merits, and have presented . . . a record of upwards of five hundred pages. The suit was brought in 1907 . . . and it is with regret that we find, on account of defect of parties, the matters in controversy can not now be determined on their merits. Id at 149.

The children were the remaindermen on a parcel of property subject to their mother's life estate. The plaintiff, seeking recission of the deed, alleged that the property was conveyed fraudulently. In remanding the case, the Court noted that the interests of the children were so intimately connected with their mother, that the interest of the mother could not be passed upon without also passing upon the interest of the children. Id at 155.

Similarly, the interest of O'Brien, one of the successors-in-interest to Mary Saunders, who granted the easement, is so intimately connected with these Defendants, the other successors-in-interest, that the interest of one cannot be adjudicated without passing upon the interest of the

other. Indeed, whether Atkisson owns an easement and where such easement is located must be resolved in one adjudication in order to avoid the threat of inconsistent judgments and continued litigation.

Finally in In re: Dwyer, 18 Va. App. 437 (1994), the Court of Appeals addressed the ability of the trial court to proceed without a necessary party. In Dwyer, the plaintiff sought to have her adoption set aside and failed to make her adoptive father party to the suit. Id. The court held that the adoptive father was a necessary party and that without him the Court could not render a valid judgment. Id, *citing*, Allen v. Chapman, 242 Va. 94, 99 (1991). The court went on to rule that because the adoptive father "was not a party to the proceeding, but was necessary for its resolution, neither the trial court nor this court may determine whether the adoption should be set aside." Dwyer, 18 Va. App. 437. The action was remanded to the trial court so the adoptive father could be joined as a party and the issues litigated.

Since this Court has ruled that there were various unjoined necessary parties that must be brought into the litigation, if all parties are allowed to participate in the upcoming trial, an end to this litigation rapidly approaching its tenth anniversary will be in sight, while preclusion of Wexford and the Individual Defendants may necessitate a third trial on the merits.

Wexford and the Individual Defendants expressly adopt Intervenor's Memorandum for Reconsideration as if fully set forth herein.

Wexford and the Individual Defendants pray that this Court reconsider its April 4, 1996 Letter Opinion and resulting Order, award them their costs and attorney's fees in connection with this Motion and any other relief this Court deems just and proper.

Respectfully submitted,
WEXFORD ASSOCIATES, INC.
AND THE INDIVIDUAL DEFENDANTS
By Counsel

GOODMAN GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828

By: Bernard E. Goodman

Bernard E. Goodman, VSB#15463
Counsel for Wexford Associates, Inc.
and the Individual Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion and Memorandum in Support of Motion for Reconsideration was mailed first class, postage prepaid, on this 25th day of April, 1996 to the following:

Scott E. Snyder, Esquire
Anderson & Corrie
12600 Fair Lakes Circle, Suite 220
Fairfax, VA 22033-4904

David J. Gogal, Esquire
Blankingship & Keith, P.C.
4020 University Drive, Suite 312
Fairfax, VA 22030

Bernard E. Goodman

B/b:fatico disk/wexf0411.mnt

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON, Plaintiffs v. WEXFORD ASSOCIATES, INC. AND FAIRFAX COUNTY PARK AUTHORITY, et al., Defendants	)	In Chancery No. 97823

OBJECTIONS OF PLAINTIFFS

COME NOW, George Atkisson and Carlotta Atkisson, by counsel, and pursuant to the Order of this Court of March 7, 1995, requiring the plaintiffs to advise the Court in writing as to what objections to the new easement proposed by defendants, state as follows:

1. The plaintiffs do not find the new easement acceptable, as the Order of the Supreme Court of Virginia did not require them to accept any easements whether reasonable or not. The ruling of the Supreme Court of Virginia states that if the new easement is not acceptable to the plaintiffs, then the obstructions to the express easement are to be removed at the expense of Wexford Associates and the individual lot owners. Based upon this ruling, the plaintiffs do not accept the easement proposed by defendants and request that this Court enter an order requiring the obstructions to be cleared from the express easement as defined in plaintiffs' Exhibit ZZZ.

2. The plaintiffs also object to the proposed easement, as pursuant to the letter of proposal of March 15, 1995, from counsel for defendants, the proposed easement runs from the cemetery along the back of Lots 7, 6,

5 and 4 and stops at the beginning of Lot 3. The easement then resumes at the beginning of Lot 2 and proceeds along the property line of Lot 2 until it intersects with Bird Road. This proposal is unacceptable, as the only way to use this easement would be to travel across Lot 3. However, in the proposal of March 15, 1995, counsel for defendant states that lot owners of Lot 3 do not consent to the use of their lot for the purposes of an easement. Consequently, the proposed easement by defendants is not usable.

In order to use the easement, as proposed by defendants, it would be necessary to travel by helicopter, hover craft or some other unknown means to transport users from Lot 2 to Lot 4. By any stretch of the imagination, the proposal is not reasonable.

3. Plaintiffs also object to this proposed easement on the basis that even if the helicopter or hover craft were available to the plaintiffs for transversing Lot 3, the remainder of the easement starting at Bird Road and terminating at the original end of the easement, causes great inconvenience to plaintiffs. As Mr. Atkisson testified at trial in this matter, he owns real property at the termination point of the easement. Mr. Atkisson is entitled to travel from his property along the length of the easement to the cemetery. This proposal would not allow him to travel directly from his property along his easement to his cemetery. Consequently, the proposed easement is unacceptable.

WHEREFORE, plaintiffs, George Atkisson and Carlotta Atkisson, by counsel, respectfully request this Court, pursuant to its Order of March 7, 1995, to enter an Order requiring that the obstructions be cleared from the express easement as defined in plaintiffs' Exhibit ZZZ, at the expense of the defendants.

RESPECTFULLY SUBMITTED,

GEORGE ATKISSON
CARLOTTA T. ATKISSON
By Counsel

ANDERSON & CORRIE

BY: _____
Scott E. Snyder, VSB #26233
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
(703) 222-2200
Counsel for Plaintiffs

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing was mailed first class and postage prepaid this 3/6 day of March, 1995, to:

Bernard E. Goodman, Esq.
Goodman, Gary & Lickstein, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182

_____
Scott E. Snyder, Esq.

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON and CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	IN CHANCERY NO. 97823
WEXFORD ASSOCIATES, INC., ET AL.	)	
Defendants.	)	

INTERVENORS DAVID D. O'BRIEN'S AND JANE B. O'BRIEN'S MOTION FOR CLARIFICATION AND FOR RECONSIDERATION

COME NOW Intervenors, David D. O'Brien and Jane B. O'Brien, by counsel, and respectfully request this Court reconsider and to clarify its ruling contained in its letter opinion of April 4, 1996, on grounds and as more specifically set forth in the attached Memorandum in Support of Motion for Clarification and for Reconsideration.

DAVID D. O'BRIEN and
JANE B. O'BRIEN
By Counsel

BLANKINGSHIP & KEITH, P.C.
Suite 312
4020 University Drive
Fairfax, Virginia 22030
(703) 691-1235

By: _____
JOHN A.C. KEITH, VSB # 14116
DAVID J. GOGAL, VSB # 28815
Counsel for Intervenors

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, first class postage prepaid, this 25th day of April, 1996, to:

Scott E. Snyder, Esquire
ANDERSON & CORRIE
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
Counsel for Plaintiffs

Bernard E. Goodman, Esquire
GOODMAN, GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
Counsel for Defendant Wexford Associates, Inc.

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON, et al.,	)	
	)	
Plaintiffs	)	
v.	)	In Chancery No. 97823
	)	
WEXFORD ASSOCIATES, INC., et al.,	)	
	)	
Defendants	)	
	)	

ORDER

THIS MATTER came on to be heard upon the following Motions:

1. Plaintiffs Atkissons' Motion in Limine (to prohibit Defendants from presenting evidence and/or argument on issues previously argued);

2. Individual Defendants and Intervenors' Motion and Memorandum in Support of Motion to Declare Prior Judgments Void due to Lack of Necessary Parties;

3. Defendants Kowalczyks and Deaseys' Motion for Dismissal With Prejudice of Improper Parties;

4. Defendants Eckman and Datoff's Motion to Compel Answers to Interrogatories and For Sanctions; and

5. Defendants' Motion to Determine if Easement is Terminated as a Matter of Law at Bird Road.

UPON CONSIDERATION of the briefs and arguments of the parties of this Court, it is decided, pursuant to the letter opinion dated April 4, 1996, and incorporated by reference herein that Plaintiffs' Motion in Limine be granted that Individual Defendants and Intervenors' Motion to Declare Prior Judgment Void due to Lack of Necessary Parties be denied that Defendant Kowalczyks and Deaseys' Motion for Dismissal With Prejudice of Improper Parties be denied that Defendants Eckman and Datoff's Motion to

Compel Answers to Interrogatories and For Sanctions be denied, and the Court defers ruling on Defendants' Motion to Determine if Easement is Terminated as a Matter of Law at Bird Road. Therefore, it is hereby

ADJUDGED, ORDERED and DECREED that Plaintiffs Atkissons' Motion in Limine (to prohibit Defendants Wexford Associates, Inc., James E. Henry, Jr., Susan H. Henry, John Kowalczyk, Kathrine Kowalczyk, Patrick G. Deasy, Janes M. Deasy, Mark Eckman, Vivian Datoff, Charles E. Andrews, Jean S. Andrews, Brian T. McVay, Elizabeth McVay, M. Jack Wilkenfeld, Joanne Wilkenfeld, Walter T. Morgan, Beth A. Morgan, Herbert D. Vogel, Barbara C. Vogel, Lawrence W. Wyte, Diane B. Wyte from presenting evidence and/or argument on issues previously argued, with the exception of the location of the easement) is granted for those reasons set forth in the April 4, 1996 letter opinion of this Court; and, it is further

ADJUDGED, ORDERED and DECREED that Individual Defendants and Intervenors' Motion to Declare Prior Judgments Void due to Lack of Necessary Parties is denied, for those reasons set forth in the April 4, 1996 letter opinion of this Court; and, it is further

ADJUDGED, ORDERED and DECREED that Defendant Kowalczyks and Deaseys' Motion for Dismissal With Prejudice of Improper Parties is denied for those reasons set forth in the April 4, 1996 letter opinion of this Court; and, it is further

ADJUDGED, ORDERED and DECREED that Defendants Eckman and Datoff's Motion to Compel Answers to Interrogatories and For Sanctions is denied for those reasons set forth in the April 4, 1996 letter opinion of this Court; and, it is further

ADJUDGED, ORDERED and DECREED that the Court will defer ruling on the

Defendants' Motion to Determine if Easement is Terminated as a Matter of Law at Bird Road for those reasons set forth in the April 4, 1996 letter opinion of this Court.

This cause is continued.

ENTERED this 6th day of May, 1996.

Jane Marum Roush
The Honorable Jane M. Roush
Fairfax County Circuit Court

SEEN AND AGREED:

Scott E. Snyder
Scott E. Snyder, Esquire
Anderson & Corrie
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
(703) 222-2200
Counsel for Plaintiffs

SEEN AND OBJECTED TO ON THE GROUNDS SET FORTH IN WEXFORD AND THE INDIVIDUAL DEFENDANTS MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION.

Bernard E. Goodman
Bernard E. Goodman, Esq.
Goodman, Gary & Lickstein, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828
Counsel for Defendant Wexford Associates, Inc. and the Individual Defendants

SEEN AND OBJECTED TO ON GROUNDS SET FORTH IN MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR CLARIFICATION AND FOR RECONSIDERATION

David J. Gogal
David J. Gogal, Esquire
Blankingship & Keith
4020 University Drive
Suite 312
Fairfax, VA 22030
(703) 691-1235
Counsel for Intervenors David O'Brien and Jane O'Brien

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	In Chancery No. 97823
	)	
WEXFORD ASSOCIATES, INC., et al.	)	
	)	
	)	
Defendants.	)	

ORDER

IT APPEARING THAT Defendant Wexford Associates, Inc. and the Individual Defendants have moved for reconsideration of this Court's April 4, 1996 ruling precluding these Defendants from presenting evidence except as to the location of the alleged easement at the trial of this matter currently scheduled for September 16, 1996, it is hereby

ORDERED THAT Defendants' Motion for Reconsideration is denied.

IT APPEARING FURTHER that Intervenors David and Jane O'Brien have moved this Court to reconsider its ruling of April 4, 1996, and for clarification of the Court's letter opinion, it is hereby

ORDERED that the Court's opinion letter dated April 4, 1996, is hereby clarified as follows: the Statement of Fact does not constitute the factual findings of this Court in this matter as to the O'Briens, except as provided herein; the Intervenors' Motion for Reconsideration is denied.

Dated this 7th day of May, 1996.

Jane Marum Roush
Circuit Court Judge

THE SIGNATURES OF COUNSEL ARE WAIVED PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON	:	
and	:	
CARLOTTA T. ATKISSON,	:	
Plaintiffs	:	
v.	:	**CHANCERY NO. 97823**
WEXFORD ASSOCIATES, INC.	:	
and	:	
COUNTY OF FAIRFAX, *et al.*,	:	
Defendants.	:	

DECREE

THIS CAUSE came to be heard on the 12th day of July 1996; and

IT APPEARING TO THE COURT that on February 10, 1995, pursuant to the ruling of the Supreme Court of Virginia in *Fairfax County Park Authority v. George Atkisson, et al.*, 248 Va. 142, 445 S.E.2d 101 (1994), then Fairfax County Circuit Court Judge Thomas A. Fortkort entered a Decree in this case that found that Plaintiffs George Atkisson and Carlotta T. Atkisson ("Atkissons") are not entitled to relief against the Fairfax County Park Authority ("Park Authority") and that no judgment shall be granted and no order entered against the Park Authority in favor of the Atkissons; and

IT FURTHER APPEARING TO THE COURT that twenty-one days have passed since the entry of the February 10, 1995, Decree; and

IT FURTHER APPEARING TO THE COURT that on February 16, 1996, this Court entered an Order that provided that "[t]he owners of Lots 39 and 40 and the Fairfax County Park Authority may be added as parties and to be filed by Feb. 28, 1996;" and

IT FURTHER APPEARING TO THE COURT that on February 28, 1996, the Atkissons filed with the Clerk of this Court a Fourth Amended Bill of Complaint which does not name the Fairfax County Park Authority as a party; and

IT FURTHER APPEARING TO THE COURT that the Fairfax County Park Authority has agreed to submit to this Court's jurisdiction in this case solely to the extent which may be necessary for the Court to locate an easement claimed by the Atkissons across the Park Authority's property shown on the Fairfax County Real Property Identification Maps as Tax Map No. 28-3((20)) parcel A; and

IT FURTHER APPEARING TO THE COURT that the Park Authority should not be required to answer the Fourth Amended Bill of Complaint or to respond to any discovery relating to issues other that the location of the easement; now, therefore, it is hereby

ADJUDGED AND DECREED that the Park Authority has submitted to this Court's jurisdiction only to the extent which may be necessary for the Court to locate the easement on property shown on the Fairfax County Real Property Identification Maps as Tax Map No. 28-3((20)) parcel A, the establishment of such easement on parcel A to be done, if at all, by persons other than the Park Authority; and it is

FURTHER ADJUDGED AND DECREED that the Park Authority shall not be required to answer the Fourth Amended Bill of Complaint and shall only be subject to discovery relating to the location of the Atkissons' easement.

THIS CAUSE IS CONTINUED.

ENTERED this 12 day of July 1996.

Jane Marum Roush

JANE MARUM ROUSH
JUDGE, FAIRFAX COUNTY CIRCUIT COURT

WE ASK FOR THIS:

DAVID P. BOBZIEN
COUNTY ATTORNEY

By _____

Jan L. Brodie (VSB No. 26799)
Assistant County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, Virginia 22035-0064
(703) 324-2421
Counsel for Respondent Fairfax County Park Authority

SEEN AND Agreed **:**

ANDERSON & CORRIE

By _____

Scott E. Snyder, Esquire (VSB No. 26233)
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
(703) 222-2200
Counsel for Plaintiffs

SEEN AND _____:

BLANKINGSHIP & KEITH

By _____

David J. Gogal, Esquire (VSB No. 28815)
4020 University Drive, Suite 312
Fairfax, Virginia 22030
(703) 691-1235
Counsel for Intervenors David D. O'Brien and Jane B. O'Brien

SEEN AND _____:

GOODMAN, GARY & LICKSTEIN, P.C.

By Bernard E. Goodman by Jan L. Brodie as attorney-in-fact

Bernard E. Goodman (VSB No. 15463)
8500 Leesburg Pike, Suite 700
Vienna, Virginia 22182
(703) 848-2828
Counsel for Defendants Raymond Cavanagh and Eileen Cavanagh

9.16 T (OTHR)

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE T. ATKISSON and CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	In Chancery No. 97823
WEXFORD ASSOCIATES, INC., et al	)	
Defendants.	)	

ORDER

THIS CAUSE came to be heard upon the Motion of Wexford Associates, Inc., the Individual Defendants, Raymond Cavanaugh and Eileen Cavanaugh's Motion to Strike Plaintiff's Fourth Amended Bill of Complaint, which Motion has been joined in by Intervenors David D. O'Brien and Jane B. O'Brien; and

IT APPEARING TO THE COURT after argument of counsel and consideration of all relevant documents that the Plaintiff's, George Atkisson and Carlotta T. Atkisson, Fourth Amended Complaint should not be stricken for failure to serve or diligently attempt to serve Defendants Joan Hall and Donald Hall; since Plaintiffs Counsel represents that Joan Hall and Donald Hall were served July 30, 1996.

NOW, THEREFORE, it is hereby

ORDERED that the Motion to Strike Plaintiffs, George Atkisson and Carlotta T. Atkisson's Fourth Amended Complaint is denied. ~~struck and this matter is dismissed with prejudice.~~

~~This order is final~~.

ENTERED this 2 day of August, 1996.

Jane Marum Roush

JANE MARUM ROUSH
Fairfax County Circuit Court Judge

Seen and Objected To:
~~WE ASK FOR THIS:~~

GOODMAN GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828

By: _____
Bernard E. Goodman, VSB# 15463
Counsel for Wexford Associates, Inc.,
The Individual Defendants,
Raymond Cavanaugh and Eileen Cavanaugh

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(703) 691-1235

By: _____
David J. Gogal, VSB# 23815
Counsel for Intervenors

SEEN AND ~~OBJECTED TO:~~ agreed

ANDERSON & CORRIE
12600 Fair Lakes Circle, Suite 220
Fairfax, Virginia 22033
(703) 222-2200

By: _____
Scott E. Snyder, VSB# 26233
Counsel for George Atkisson and
Carlotta T. Atkisson

B/b:atkisson disk/wexf0725.ord

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE T. ATKISSON and CARLOTTA T. ATKISSON Plaintiffs, v. WEXFORD ASSOCIATES, INC., et al Defendants.	)	In Chancery No. 97823

ORDER

THIS CAUSE came to be heard upon the Motion of Wexford Associates, Inc., the Individual Defendants, Raymond Cavanaugh and Eileen Cavanaugh's Motion to Strike Plaintiff's Fourth Amended Bill of Complaint, which Motion has been joined in by Intervenors David D. O'Brien and Jane B. O'Brien; and

IT APPEARING TO THE COURT after argument of counsel and consideration of all relevant documents that the Plaintiff's, George Atkisson and Carlotta T. Atkisson, Fourth Amended Complaint should not be stricken for failure to serve or diligently attempt to serve Defendants Joan Hall and Donald Hall; since Plaintiffs Counsel represents that Joan Hall and Donald Hall were served July 30, 1996.

NOW, THEREFORE, it is hereby

ORDERED that the Motion to Strike Plaintiffs, George Atkisson and Carlotta T. Atkisson's Fourth Amended Complaint is denied. ~~struck and this matter is dismissed with prejudice.~~

~~This order is final~~.

ENTERED this 2 day of August, 1996.

Jane Marum Roush

JANE MARUM ROUSH
Fairfax County Circuit Court Judge

259

Seen and Objected To:
~~WE ASK FOR THIS.~~

GOODMAN GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828

By: _____
Bernard E. Goodman, VSB# 15463
Counsel for Wexford Associates, Inc.,
The Individual Defendants,
Raymond Cavanaugh and Eileen Cavanaugh

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A Professional Corporation
4020 University Drive, Suite 312
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(703) 691-1235

By: _____
David J. Gogal, VSB# 28815
Counsel for Intervenors

SEEN AND ~~OBJECTED TO:~~ agreed

ANDERSON & CORRIE
12600 Fair Lakes Circle, Suite 220
Fairfax, Virginia 22033
(703) 222-2200

By: _____
Scott E. Snyder, ~~VSB# 26233~~
Counsel for George Atkisson and
Carlotta T. Atkisson

B/b:atkisson disk/wexf0725.ord

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V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CHANCERY NO. 97823
	)	
WEXFORD ASSOCIATES, et al.,	)	
	)	
Defendants.	)	

NOTICE OF ENTRY OF APPEARANCE

THE CLERK OF THE COURT will please enter the appearance of William L. Stauffer, Jr., Lora A. Brzezynski, and the law firm of Stauffer & Abraham, L.L.C. as counsel for defendants, Thomas and Victoria Healy, in this action.

Respectfully submitted,

STAUFFER & ABRAHAM, L.L.C.

Lora A. Brzezynski

William L. Stauffer, Jr., #14208
Lora A. Brzezynski, #36151
Suite 1000
8300 Greensboro Drive
McLean, Virginia 22102-3604
(703) 893-4670

CERTIFICATE OF SERVICE

I do hereby certify that on the 26th day of August, 1996, I caused a copy of the foregoing to be mailed first-class, postage prepaid, to:

Scott E. Snyder
Anderson & Corrie
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033

Bernard E. Goodman
Goodman, Gary & Lickstein
8500 Leesburg Pike
Suite 7000
Vienna, Virginia 22182

David J. Gogal, Esq.
Blankingship & Keith
4020 University Drive
Suite 312
Fairfax, Virginia 22030

LORA A. BRZEZYNSKI

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON Plaintiffs, v. WEXFORD ASSOCIATES INC., et al. Defendants.	)	CHANCERY NO. 97823

AGREED ORDER

THIS DAY came the parties, by counsel, and represented to the Court that they have agreed that Intervenors, David D. O'Brien and Jane B. O'Brien, may file an answer and grounds of defense to the Fourth Amended Bill of Complaint on or before August 29, 1996; it is therefore,

ORDERED, ADJUDGED AND DECREE that Intervenors, David D. O'Brien and Jane B. O'Brien, may file their answer and grounds of defense to the Fourth Amended Bill of Complaint on or before August 29, 1996.

ENTERED this 26 day of August, 1996.

The Honorable Jane M. Roush
Fairfax County Circuit Court

WE ASK FOR THIS:

Deputy County Attorney
Counsel for Board of County
Supervisors

BLANKINGSHIP & KEITH
A Professional Corporation
4020 University Drive
Suite 312
Fairfax, Virginia 22030
(703) 691-1235

By: _____
DAVID J. GOGAL, VSB #28815
Counsel for Intervenors
David O'Brien and Jane O'Brien

GOODMAN, GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828

By: _____
BERNARD E. GOODMAN
Counsel for Defendant Wexford
Associates, Inc. and the
Individual Defendants

SEEN & OBJECTED TO:

ANDERSON & CORRIE
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
(703) 222-2200

By: _____
SCOTT E. SNYDER
Counsel for Plaintiffs

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	CHANCERY NO. 97823
WEXFORD ASSOCIATES INC., et al.	)	
Defendants.	)	

PRETRIAL ORDER

THIS DAY came the parties, by counsel, and agreed that the parties will exchange exhibits and a list of witnesses on or before Wednesday, September 4, 1996, with all objections to any exhibits to be filed on or before Tuesday, September 10, 1996; it is therefore,

ORDERED, ADJUDGED and DECREE that the parties will exchange exhibits and a list of witnesses on or before Wednesday, September 4, 1996, and any objections to the exhibits will be filed on or before Tuesday, September 10, 1996.

ENTERED this 26 day of August, 1996.

Jane Marum Roush

The Honorable Jane M. Roush
Fairfax County Circuit Court

WE ASK FOR THIS:

BLANKINGSHIP & KEITH
A Professional Corporation
4020 University Drive
Suite 312
Fairfax, Virginia 22030
(703) 691-1235

By: _____
DAVID J. GOGAL, VSB #28815
Counsel for Intervenors
David O'Brien and Jane O'Brien

GOODMAN, GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828

By: _____
BERNARD E. GOODMAN
Counsel for Defendant Wexford
Associates, Inc. and the
Individual Defendants

ANDERSON & CORRIE
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
(703) 222-2200

By: _____
SCOTT E. SNYDER
Counsel for Plaintiffs

DAVID P. BOBZIEN
COUNTY ATTORNEY

By: _____
Jan L. Brodie
Assistant County Attorney
12000 Government Center
Parkway
Suite 549
Fairfax, Virginia 22035-0
(703) 324-2421
Counsel for Fairfax County
Park Authority

filed in open court 8/26/96 @ 9:45 a.m.

GEORGE T. ATKISSON, ET AL.
V.
WEXFORD ASSOCIATES, INC., ET AL.

In Chancery No. 97823

STIPULATIONS

1. In the late 1800s, Mary C. Saunders, Mr. Atkisson's ancestor, owned several parcels of land in Fairfax County. She conveyed a 15-acre parcel to Thomas S. Adams, her nephew and Mr. Atkisson's grandfather, by an 1892 deed. This recorded deed created an express easement, described as a right-of-way 15 feet wide, over several tracts of land and extending to the County road (the "15-acre Parcel Easement"). The easement allowed ingress and egress to the 15-acre parcel and was recorded in Deed Book P-5 at Page 361.

2. The easement, although largely undefined and never platted in the land records, contains metes and bounds measurements which today are located through Wendover lots 1, 3 THROUGH 7, and part of lot 2. However, the path apparently used in the past does not completely adhere to the metes and bounds description set forth in the land records.

3. In 1896, as a result of a decree that had been entered in a partition suit, Mr. Thomas S. Adams received other property referred to as Lot No. 2 ("Partition Lot 2"), a parcel of 27 1/2 acres that adjoined his 15-acre parcel. The partition decree recorded in Deed Book X-5 at Page 356 references a burial lot, 1/4 acre in size in the southeast corner of Partition Lot 2. An outlet road 15 feet wide between lots 3, 4, 5 and 6 to Piney Branch (the "Partition Easement") is reserved for access to Partition Lot 2 and the burial lot in the Partition Decree. The burial lot with ingress and egress thereto was to remain for the permanent use of the families of all of the parties to the Partition Decree.

4. Mr. Thomas S. Adams died intestate, and his heirs inherited both properties, including the easement, when his wife, Ida Adams, died in 1971. By a deed dated March 31, 1978, and recorded in Deed Book 4865 at Page 13, the heirs of Mr. Adams conveyed their interest in the property ("the Adams Estate") to Harold O. Miller, Trustee, specifically including the 15-acre Parcel Easement, but excepting the "existing cemetery."

5. By Deed dated October 5, 1978, and recorded October 11, 1978 in Deed Book 5009 at Page 848, Harold O. Miller, Trustee conveyed the entire Adams Estate to Anmar Development Company, Inc. ("Anmar").

6. After the Adams Estate had been sold to Anmar, Harold O. Miller, Trustee, executed a deed of gift of the 15-acre Parcel Easement solely to the Atkissons dated October 10, 1978 and recorded October 11, 1978 in Deed Book 5009 at Page 839. The right-of-way conveyance was dated after the conveyance to Anmar, but was recorded before such conveyance.

7. By Deed of Dedication, Subdivision and Restrictive Covenant dated June 7, 1979 and recorded July 27, 1979, in Deed Book 5244 at page 774, Hunter Mill Forest Partnership located the cemetery mostly on Partition Lot 2 but partly on the 15-acre parcel, thereby creating "Outlot A."

8. Prior to the dedication of the Hunter Mill Forest Subdivision, the only mention of the burial lot in the land records of Fairfax County was as a 1/4 acre burial lot in the southeast corner of Partition Lot 2 referenced in the Partition Deed recorded in Deed Book X5 at Page 356 in the land records of Fairfax County, Virginia dated October 20, 1896 ("Partition Deed"). (Response to Intervenors' Request for Admission #1).

9. Outlot A was created when Atkissons' surveyors created the Hunter Mill subdivision. (G. Atkisson Dep. 12/4/95 at p. 143).

10. The transfers to George Atkisson by Harold Miller, Trustee, of the naked easement in Deed Book 5009 at Page 839, and later, the burial lot, are nullities, as conceded by Plaintiffs' counsel in trial on August 20, 1991, at Page 186 of the transcript of testimony. (Response to Intervenors' Request for Admission #9).

11. By Deed dated June 29, 1979, and recorded on July 29, 1979, in Deed Book 5217 at Page 472, Anmar Development Company, Inc. conveyed the Adams Estate to the Hunter Mill Forest Partnership.

12. Harold O. Miller, Trustee, executed a deed dated February 16, 1981, in Deed Book 5572 at Page 0775, to convey the family cemetery solely to the Atkissons. However, the cemetery had never been conveyed to Miller as it was excepted from the heirs' deed recorded in Deed Book 4865 at Page 13.

13. In 1977, Charles and Audrey Hawthorne acquired a large parcel of property, through which the 15-acre Parcel Easement ran. The Hawthornes initiated proceedings to obtain the necessary permits and zoning amendments so that the property could be subdivided into residential lots.

14. The property was rezoned and the Hawthornes conveyed it to Wexford Associates by Deed dated May 18, 1983 and recorded in Deed Book 5772 at Page 497.

15. Wexford Associates subdivided its property into 40 residential building lots and an unimproved parcel ("Wendover III Subdivision"). Wexford Associates conveyed the unimproved parcel to the Park Authority. Wexford Associates made no provision in its deed of dedication or in its recorded plat for the easement claimed by Plaintiffs herein.

16. On June 4, 1986, Wexford conveyed Lot 3 of the Wendover Subdivision to John and Katherine Kowalczyk by deed recorded in Deed Book 6391 at Page 1639.

17. On July 16, 1986, the Atkissons filed a Bill of Complaint against Wexford Associates, *inter alia*, but did not include the Kowalczyks who were the record owners of Lot 3.

18. A copy of the Bill of Complaint was recorded on July 18, 1986, in Deed Book 6432 at Page 1596, with the handwritten words "*lis pendens*" written across the top, with no reference to the Kowalczyks or lot 3, or any of the other individual lot owners, except Individual Defendants, Henry, Vogel and Charles B. and Audrey Hawthorne.

19. On February 16, 1988, the Atkissons filed an Amended Bill of Complaint, adding the individual lot owners, including the Kowalczyks. However, at such time no *lis pendens* was filed referencing the Kowalczyks or any of the other individual lot owners.

20. By deed dated June 15, 1992, and recorded in Deed Book 8160 at Page 277, the Kowalczyks conveyed Lot 3 to David D. O'Brien and Jane B. O'Brien.

21. The Court has determined that the O'Briens first learned of the Atkissons' easement claim when they were contacted by Mr. Goodman, counsel for Wexford and the Individual Defendants in February 1995.

22. The Plaintiffs, George and Carlotta Atkisson, have never paid any real estate taxes for the family cemetery or "Outlot A." (G. Atkisson Dep., 12/4/95, p. 87).

23. The only persons buried in the family cemetery are those listed on the granite marker. (G. Atkisson Dep. 12/4/95, p. 89).

24. Before December 31, 1987, George Atkisson did not have a present heir's interest in the family cemetery because his mother, Florence A. Atkisson, was still alive.

25. Florence Atkisson died on December 31, 1987, and is buried at Andrew's Chapel on Route 7 in Vienna, Virginia. (Response to Intervenor Jane B. O'Brien's Interrogatory #8).

26. George Atkisson does not currently have any relationship to Hunter Mill Forest Partnership. (Response to Intervenor Jane B. O'Brien's Interrogatory #1).

27. Fairfax County Park Authority property now exists on the eastern and western sides of the Adams family burial lot. (Response to Intervenors' Request for Admission #8).

28. George T. Atkisson, born in 1923, does not recall a funeral being held during his lifetime at the Adams family burial lot.

BLANKINGSHIP & KEITH
A Professional Corporation
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(703) 691-1235

By: _____
JOHN A.C. KEITH
DAVID J. GOGAL
Counsel for Intervenors,
David and Jane O'Brien

ANDERSON & CORRIE
12600 Fair Lakes Circle
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Fairfax, VA 22033-4904

By: _____
SCOTT E. SNYDER
Counsel for Plaintiffs

GOODMAN, GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182

By: _____
BERNARD E. GOODMAN
Counsel for Defendant
Wexford Associates, Inc.,
Individual Defendants
and Defendants Raymond
Cavanaugh and Eileen
Cavanaugh

FAIRFAX COUNTY ATTORNEY
12000 Government Center
Parkway
Suite 549
Fairfax, Virginia 22035-0064

By: _____
JAN L. BRODIE
Counsel for Fairfax County
Park Authority

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON and CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	IN CHANCERY NO. 97823
WEXFORD ASSOCIATES, INC., ET AL.	)	
Defendants.	)	

ANSWER AND GROUNDS OF DEFENSE OF DAVID D. O'BRIEN AND JANE B. O'BRIEN

COME NOW Intervenors, David D. O'Brien and Jane B. O'Brien (the "O'Briens"), by counsel, and for their Answer and Grounds of Defense to the Fourth Amended Bill of Complaint, state as follows:

1. Denied.

2. Admitted, except the cemetery lot is not adjacent to Wendover III.

3-5. The O'Briens are without knowledge sufficient to admit or deny the allegations in these paragraphs and therefore deny the same.

6. Admitted.

7-12 The O'Briens are without knowledge sufficient to admit or deny the allegations in these paragraphs and therefore deny the same.

13. Denied.

14-36. The O'Briens are without knowledge sufficient to admit or deny the allegations in these paragraphs and therefore deny the same.

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37. Denied.

38. Admitted to the extent the property, Wendover III, was formerly referenced as Parcel 48 and Parcel 49, but denied in part as to the alleged ownership of the lots.

39. Denied as stated. In further answering, the deed recorded in Deed Book P-5 at Page 361 among the land records of Fairfax County speaks for itself.

40. In response to the allegations of paragraph 40, the land records of Fairfax County, and particularly Deed Book Liber H, No. 5, Page 37, speak for themselves.

41. Denied, as stated. In further answering, the O'Briens deny that the 15-acre parcel contained the burial plot, and the land records of Fairfax County speak for themselves.

42. Denied as stated. In further answering, the land records of Fairfax County, and particularly Deed Book 4865, Page 13, speak for themselves.

43. Denied. The deed attached as Exhibit C appears to be a genuine copy of a deed recorded in the land records and speaks for itself. The O'Briens deny that the Atkissons have sole ownership of the family cemetery and deny the validity of the Deed recorded in Deed Book 5572 at Page 775, among the land records of Fairfax County, Virginia.

44. Denied. The Deed attached as Exhibit D appears to be a genuine copy of a deed recorded in the land records and speaks for itself. The O'Briens deny that the Atkissons have any ownership of the right-of-way and deny the validity of the Deed

recorded in Deed Book 5572 at Page 775 among the land records of Fairfax County, Virginia. The purported deed attempted to sever the easement from the estate it was intended to serve and as such was void *ab initio*. In further answering, the means of ingress and egress to said burial lot was created in the 1896 Partition Decree recorded in Deed Book X-5 at Page 356, among the land records of Fairfax County which provides an express easement through what is now Hunter Mill Forest subdivision.

45. In response to the first sentence of paragraph 45, the O'Briens admit that as an heir of Florence Atkisson, Mr. Atkisson, along with the heirs and sub-heirs of the parties to the Partition Decree recorded in Liber X-5 at Page 356, among the land records of Fairfax County, Virginia, has an interest in the burial lot located in the southeast corner of the former Lot 2 as described in said Partition Decree. The O'Briens deny that Carlotta Atkisson is an heir of Thomas Adams and deny that she has any ownership interest in the cemetery lot. The remaining allegations are denied.

46. Denied.

47. Denied as stated. In further answering, the land records of Fairfax County, and particularly Deed Book 3392 at Page 72, speak for themselves.

48. Admitted.

49. Denied as stated. In further answering, Charles R. Hawthorne acquired title to Parcel 48 at Deed Book 4603, Page 343, with a marital status of "unmarried."

50-51. Denied.

52. Denied. In further answering, the copy of the letter attached as Exhibit E is admitted and is its own best evidence of its meaning.

53. Denied. In further answering, the conveyance of Parcels 48 and 49 by deed recorded in Deed Book 5772 at Page 497 in 1983 is admitted, which deed speaks for itself.

54-59. Denied.

60-61. The O'Briens are without sufficient knowledge to admit or deny these allegations and therefore deny the same.

62-63. Denied.

64. No response is required to paragraph 64 as it calls for a legal conclusion. To the extent a response is required, the O'Briens aver that Plaintiffs have no remedy because they have no right to any remedy, at law or in equity.

COUNT I

INJUNCTION AND DAMAGES FOR OBSTRUCTION OF EXPRESS EASEMENT

65. The answers in paragraphs 1 through 58 are incorporated herein by reference.

66-68. Denied.

69. WHEREFORE, these Intervenors pray that all claimed relief be denied and that they be reimbursed their attorneys fees and costs in this matter.

COUNT II

INJUNCTION AND DAMAGES FOR OBSTRUCTION

OF IMPLIED EASEMENT BY NECESSITY

70. The answers in paragraphs 1 through 63 are incorporated herein by reference.

71-74. Denied.

75. WHEREFORE, these Intervenors pray that all claimed relief be denied and that they be reimbursed their attorneys fees and costs in this matter.

COUNT III

INJUNCTION AND DAMAGES FOR OBSTRUCTION

OF PRESCRIPTIVE EASEMENT

76. The answers in paragraphs 1 through 69 are incorporated herein by reference.

77-80. Denied.

81. WHEREFORE, these Intervenors pray that all claimed relief be denied and that they be reimbursed their attorneys fees and costs in this matter.

GROUNDS OF DEFENSE

1. All allegations not expressly admitted are denied.

2. Plaintiffs failed to file a notice of *lis pendens* and, thus, the O'Briens, bona fide purchasers without actual or constructive notice, took free of any easement claim by Plaintiffs.

3. Adequate and alternate access is available to the alleged cemetery lot without the necessity of traversing any of the

properties owned by the O'Briens and the individual lot owner Defendants.

4. Plaintiffs' allegations with respect to the purported easement and the property which it was intended to serve are at variance with the land records of the Circuit Court of Fairfax County and the documents referenced in Plaintiffs' pleading.

5. Plaintiffs impermissibly attempt to separate an appurtenant easement from the estate which it was intended to serve.

6. Plaintiffs impermissibly attempt to expand the use of an express easement.

7. Plaintiffs' allegations in support of their claim of an implied easement by necessity are not supported by the land records of the Circuit Court of Fairfax County for the reason that adequate and alternate access is available to the cemetery, as specified in the 1896 Partition Decree.

8. Plaintiffs' Exhibits C and D, purporting to be grants to Plaintiffs, can rise no higher than the rights of the supposed Grantor. The land records of this Court show that no such rights exist in the purported Grantor; namely, the alleged right-of-way was not and is not in the discernible chain of title to the alleged Grantor for the purposes asserted by Plaintiffs.

9. Plaintiffs' allegations of a purported right arising out of Rezoning Application RZ 79-C-095 are insufficient on their face to confer any rights in the land.

10. Plaintiffs fail to allege facts sufficient to invoke an injunctive remedy. In fact, the pleading on its face seeks the recovery of money damages.

11. Plaintiffs' allegations of compensatory damages are conclusory and otherwise not legally cognizable.

12. Plaintiffs fail to allege facts sufficient to entitle them to attorneys fees.

13. Plaintiffs' claims are barred by laches and unclean hands.

14. Plaintiffs lack standing to establish and/or enforce the 1892 easement as they have no interest in the 15-acre Parcel to which the easement was appurtenant.

15. Plaintiffs fail to join all necessary parties.

16. Plaintiff Carlotta Atkisson lacks standing to maintain this claim as she has no interest in the litigation as an heir or otherwise.

17. Plaintiffs fail to allege a cause of action against the O'Briens.

18. The heirs and sub-heirs of Thomas Adams, including Plaintiff, George Atkisson, conveyed away any interest they may have had to the 15-acre Parcel Easement.

19. Should the Court determine that an easement to the cemetery traverses the property of Intervenors David D. O'Brien and Jane B. O'Brien, the O'Briens reserve the right pursuant to Va. Code § 55-50 to relocate the easement anywhere on the original servient estate.

WHEREFORE, the Intervenors, David D. O'Brien and Jane B. O'Brien, move the Court to dismiss this action with prejudice and award them their costs and attorneys fees incurred herein and for such other and further relief as the court may deem appropriate.

DAVID D. O'BRIEN and
JANE B. O'BRIEN
By Counsel

BLANKINGSHIP & KEITH
A Professional Corporation
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Suite 312
Fairfax, Virginia 22030
(703) 691-1235

By: _____
JOHN A.C. KEITH, VSB #14116
DAVID J. GOGAL, VSB #28815
Counsel for David D. O'Brien
and Jane B. O'Brien

CERTIFICATE OF SERVICE

I hereby certify that on this the 29th day of August, 1996, a true and correct copy of the foregoing was mailed by first class mail, postage prepaid to the following:

Scott E. Snyder, Esquire
ANDERSON & CORRIE
12600 Fair Lakes Circle, #220
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Counsel for Plaintiffs

Bernard E. Goodman, Esquire
GOODMAN, GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
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Counsel for Defendant Wexford
Associates, Inc., Individual Defendants
and the Cavanaughs

Jane L. Brodie
FAIRFAX COUNTY ATTORNEY
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035-0064
Counsel for Fairfax County
Park Authority

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE T. ATKISSON and CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	Chancery No. 97823
WEXFORD ASSOCIATES, INC., et al	)	
Defendants.	)	

ANSWER AND GROUNDS OF DEFENSE FOR DEFENDANTS DONALD D. HALL AND JOAN P. HALL

COMES NOW Defendants Raymond Cavanagh and Eileen Cavanagh (collectively "Defendants"), by counsel and for their Answer and Grounds of Defense state, in numbered paragraphs corresponding to the paragraphs in the Fourth Amended Bill of Complaint, as follows:

1. Denied.

2. Admitted.

3. These Defendants lack sufficient knowledge to respond to these allegations and therefore, deny these allegations.

4. Denied.

5-6. Admitted.

7. Denied.

8. Admitted.

9-10. These Defendants lack sufficient knowledge to respond to these allegations

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as the parties referenced therein were non-suited by Plaintiff at the close of their case in August, 1991 and are no longer parties to the litigation. These Defendants, therefore, deny the aforementioned parties are also defendants.

11-12. Admitted.

13. Denied. In further answering, John Kowalczyk and Katherine Kowalczyk conveyed their interest in Lot 3 in the Wendover Subdivision, Section III, in Fairfax County, Virginia, to David D. O'Brien and Jane G. O'Brien ("O'Brien"). John Kowalczyk is deceased and Katherine Kowalczyk, upon information and belief, resides in California.

14-17. Admitted.

18-19. These Defendants lack sufficient knowledge to respond to these allegations as the parties referenced therein were non-suited by Plaintiff at the close of their case in August, 1991, and are no longer parties to this litigation. These Defendants, therefore, deny the aforementioned parties are also defendants.

20-21. These Defendants lack sufficient knowledge to respond to these allegations as Charles B. Hawthorne and Audrey K. Hawthorne were non-suited by an Order of Judge Fortkort at the commencement of trial in August, 1991 and are no longer parties to the litigation. These Defendants deny that the Hawthornes are also defendants.

22. Admitted.

23-33. These Defendants lack sufficient knowledge to respond to these allegations as the parties referenced therein were non-suited by Plaintiff at the close of their case in August, 1991 and are no longer parties to the litigation. These Defendants, therefore, deny the aforementioned parties are also defendants.

34-35. Admitted.

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36. These Defendants lack sufficient knowledge to respond to these allegations as the parties referenced therein were non-suited by Plaintiff at the close of their case in August, 1991 and are no longer parties to the litigation. These Defendants, therefore, deny that the Wallers are also defendants.

37. Denied.

38. Admitted, to the extent the property was formerly referenced as Parcel 48 and Parcel 49, denied in part as to the alleged ownership of the various lots. The answers to paragraphs 7-37 are incorporated as if fully set forth herein.

39. Denied. In further answering, the land records of Fairfax County speak for themselves.

40. Admitted.

41. Denied. In further answering, these Defendants deny that the 15 acre parcel contained the burial lot, and the land records of Fairfax County speak for themselves.

42. Denied. In further answering, these Defendants deny that the totality of the land conveyed to Harold Miller, Trustee was dominant estate and that the burial lot was conveyed.

43. Denied.

44. Denied. The purported deed attempted to sever the easement from the estate it was intended to serve and as such was a nullity. In further answering, the means of ingress and egress to said burial lot was created in the 1896 Partition Deed located at Deed Book X-5 at Page 356, among the land records of Fairfax County, Virginia and creates an express easement running through what is now Hunter Mill Forest Subdivision. The Defendants deny

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that the Atkissons have any ownership interest in the right of way to the 15-acre parcel.

45. In responding to the first sentence of paragraph 45, the Defendants admit that as an heir of Thomas Adams, Mr. Atkisson, along with many other heirs, has an interest in the burial lot located in the southeast corner of Partition Lot 2 as described in the Partition Decree recorded in Deed Book X-5 at Page 356, among the land records of Fairfax County, Virginia. The Defendants deny that Carlotta T. Atkisson is an heir of Thomas Adams. The remaining allegations are denied.

46. Denied.

47-49. Admitted.

50-55. Denied.

56. Denied. In further answering, the detention pond which allegedly obstructs the Plaintiff's claimed easement is located on the property of the Fairfax County Park Authority.

57. Denied. In further answering, access to the burial lot was created in the 1896 Partition Deed and ran through what is now Hunter Mill Forest Subdivision. Mr. Atkisson, a partner in the development of Hunter Mill Forest Subdivision, purposefully obstructed that easement and cannot now claim the burial lot is landlocked due to another's actions.

58-59. Denied.

60-63. Denied for lack of information. These allegations do not affect these Defendants, however, they are denied out of an abundance of caution.

64. Denied, as Plaintiff's 4th Amended Bill of Complaint clearly requests several plain, adequate and complete remedies at law.

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COUNT I

INJUNCTION AND DAMAGES FOR OBSTRUCTION OF EXPRESS EASEMENT

65. The answers in Paragraphs 1 through 64 are incorporated herein by reference.

66-67. Denied.

68. Denied for lack of information. These Defendants have no knowledge of this allegation, it is therefore denied out of an abundance of caution.

69. WHEREFORE, these Defendants pray that all claimed relief be denied and that they be reimbursed their attorneys fees and costs in this matter.

COUNT II

INJUNCTION AND DAMAGES FOR OBSTRUCTION OF IMPLIED EASEMENT BY NECESSITY

70. The answers in Paragraphs 1 through 63 are incorporated herein by reference.

71-73. Denied.

74. Denied for lack of information. These Defendants have no knowledge of this allegation, it is therefore denied out of an abundance of caution.

75. WHEREFORE, these Defendants pray that all claimed relief be denied and that they be reimbursed their attorneys fees and costs in this matter.

COUNT III

INJUNCTION AND DAMAGES FOR OBSTRUCTION OF PRESCRIPTIVE EASEMENT

76. The answers in Paragraphs 1 through 69 are incorporated herein by reference.

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77-79. Denied.

80. Denied for lack of information. These Defendants have no knowledge of this allegation, it is therefore denied out of an abundance of caution.

81. WHEREFORE, these Defendants pray that all claimed relief be denied and that they be reimbursed their attorneys fees and costs in this matter.

GROUNDS OF DEFENSE

1. All allegations not expressly admitted are denied.

2. Adequate and alternate access is available to the alleged burial lot without the necessity of traversing any of the property owned by the Individual Defendants, Wexford Associates, Inc., these Defendants or O'Brien.

3. Plaintiffs' allegations with respect to the purported easement and the property which it was intended to serve are at variance with the land records of the Circuit Court of Fairfax County. Plaintiffs attempt to separate an appurtenant easement from the estate which it was intended to serve.

4. Plaintiffs attempt to expand the use of an express easement.

5. Plaintiffs' allegations in support of their claim of an implied easement by necessity are not supported by the land records of the Circuit Court of Fairfax County for the reason that adequate and alternate access is available to the cemetery. Additionally, the developers of the Hunter Mill Forest Subdivision, of which Plaintiff George Atkisson was a member, obstructed the express easement to the family burial lot granted in the 1896 Partition Deed. Therefore, Petitioner's own actions created the alleged necessity and equity should not

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grant the relief requested as Plaintiff has unclean hands.

6. The land records of this Court show that no such right-of-way exists in Petitioners' purported Grantor, namely, the alleged right-of-way was not and is not in a discernible chain of title to the alleged Grantor for the purposes asserted by Plaintiffs.

7. Plaintiffs' allegations of a purported right-of-way arising out of Rezoning Application RZ 79-C-095 are insufficient on their face to confer any rights in the land.

8. Plaintiffs fail to allege facts sufficient to invoke an injunctive remedy. In fact, the pleading on its face alleges an adequate remedy at law.

9. Plaintiffs' allegations of compensatory damages are conclusory and not otherwise legally cognizable.

10. Plaintiffs' allegations of punitive damages are conclusory and not in accord with the requirements of case law.

11. Plaintiffs fail to allege facts sufficient to entitle them to attorneys fees.

12. Plaintiffs' claims are barred by the doctrine of laches.

13. Plaintiffs' claims are unfounded in the land records of this Court.

14. Plaintiffs fail to allege a cause of action against these Defendants.

15. Plaintiff, Carlotta T. Atkisson, lacks standing to maintain this action.

WHEREFORE, the premises considered, the Defendants move this Court to dismiss this action with prejudice and award their costs and attorneys fees incurred herein or for such other and further relief as the Court may deem appropriate.

DONALD D. HALL
JOAN P. HALL
By Counsel

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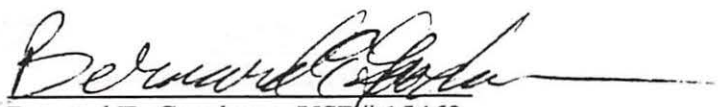
By: 
Bernard E. Goodman, VSB# 15463
Counsel for Defendants
Donald D. Hall and Joan P. Hall

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Answers and Grounds of Defense for Defendants, Donald D. Hall and Joan P. Hall were hand delivered on this 9th day of September, 1996 to the following:

Scott E. Snyder, Esquire
Anderson & Corrie
12600 Fair Lakes Circle, Suite 220
Fairfax, VA 22033-4904
Counsel for Plaintiffs George Atkisson and Carlotta Atkisson

David J. Gogal, Esquire
Blankingship & Keith, P.C.
4020 University Drive, Suite 312
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Counsel for Defendants David O'Brien and Joanne O'Brien

Jan L. Brodie, Esquire
Assistant County Attorney
12000 Government Ctr Parkway, Suite 549
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Counsel for Fairfax County Park Authority

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Lora A. Brzezynski, Esquire
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Counsel for Defendants Thomas Healy and Victoria Healy

Bernard E. Goodman

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V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CHANCERY NO. 97823
	)	
WEXFORD ASSOCIATES, et al.,	)	
	)	
Defendants.	)	

ANSWER OF THOMAS AND VICTORIA HEALY

Defendants, Thomas and Victoria Healy (collectively the "Healys"), by counsel, answer the Fourth Amended Bill of Complaint ("Complaint") as follows:

FIRST DEFENSE

Responding to the numbered paragraphs of the Complaint, ad seriatim, the Healys:

1. Deny the allegations of paragraph 1.

2. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 2.

3. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 3.

4. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 4.

5. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 5.

6. State that they have been made party defendants in this matter. State that they are without knowledge or information

sufficient to admit or deny the remaining allegations of paragraph 6.

7. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 7.

8. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 8.

9. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 9.

10. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 10.

11. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 11.

12. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 12.

13. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 13.

14. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 14.

15. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 15.

16. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 16.

17. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 17.

18. Admit the allegations of paragraph 18.

19. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 19.

20. Admit that their lot is part of the Wendover Subdivision, Section III and further state that they are without knowledge or information sufficient to admit or deny the remaining allegations of paragraph 20.

21. State that no document purportedly granting the easement/right of way alleged in paragraph 21 was attached to the Complaint. State that they are without knowledge or information sufficient to admit or deny the remaining allegations of paragraph 21.

22. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 22.

23. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 23.

24. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 24.

25. State that the terms of Exhibit C speak for themselves. To the extent the allegations of paragraph 25 differ from the express terms of this document, deny same.

26. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 26.

27. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 27.

28. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 28.

29. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 29.

30. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 30.

31. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 31.

32. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 32.

33. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 33.

34. State that, assuming the referenced Exhibit E is that letter dated September 18, 1980 from Sidney R. Steele to Mr. Robert A. Lawrence, the letter speaks for itself. To the extent the allegations of paragraph 34 differ from the express terms of this letter, deny same.

35. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 35.

36. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 36.

37. Admit that Wexford developed residences in Section III of Wendover Subdivision but state that they are without knowledge or information sufficient to admit or deny the remaining allegations of paragraph 37.

38. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 38.

39. Deny any "continuing trespass and obstruction" by them and further state they are without knowledge or information sufficient to admit or deny the remaining allegations of paragraph 39.

40. Deny any obstruction created by them and further state they are without knowledge or information sufficient to admit or deny the remaining allegations of paragraph 40.

41. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 41.

42. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 42.

43. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 43.

44. Deny any easement/right-of-way claimed by Atkisson as to their property and further state that they are without knowledge or information sufficient to admit or deny the remaining allegations of paragraph 44.

45. State that they are without knowledge or information sufficient to admit or deny the allegations of paragraph 45.

46. State that paragraph 46 seeks a legal conclusion to which no response is required of these defendants. To the extent a response is deemed to be required of these defendants, deny the allegations of paragraph 46.

COUNT I

47. Incorporate by reference their responses to paragraphs 1 through 58 [sic].

48. Deny the allegations of paragraph 48.

49. Deny the allegations of paragraph 49.

50. State that paragraph 50 is directed at the Fairfax County Park Authority, and no response is therefore required from the Healys. To the extent a response is deemed to be required, deny the allegations of paragraph 50.

51. Deny the allegations of paragraph 51.

COUNT II

52. Incorporate by reference their responses to paragraphs 1 through 63 [sic].

53. Deny the allegations of paragraph 53.

54. Deny the allegations of paragraph 54.

55. Deny the allegations of paragraph 55.

56. State that paragraph 56 is directed at the Fairfax County Park Authority, and no response is therefore required from the Healys. To the extent a response is deemed to be required, deny the allegations of paragraph 56.

57. Deny the allegations of paragraph 57.

COUNT III

58. Incorporate by reference their responses to paragraphs 1 through 69 [sic].

59. Deny the allegations of paragraph 59.

60. Deny the allegations of paragraph 60.

61. Deny the allegation of paragraph 61.

62. State that paragraph 61 is directed at the Fairfax County Park Authority, and no response is therefore required from the Healys. To the extent a response is deemed to be required, deny the allegations of paragraph 62.

63. Deny the allegations of paragraph 63.

These defendants further deny (i) any allegations not specifically responded to above and (ii) that plaintiffs are entitled to any relief whatsoever against them.

SECOND DEFENSE

Plaintiffs' claims are barred by the doctrine of estoppel and/or abandonment of the purported easement.

THIRD DEFENSE

Plaintiffs' claims are barred by the doctrine of unclean hands.

FOURTH DEFENSE

Plaintiffs' claims are barred because they are not supported by the land records of the Circuit Court of Fairfax County.

FIFTH DEFENSE

Plaintiffs are not entitled to an injunction as the Complaint, on its face, alleges an adequate remedy at law.

SIXTH DEFENSE

Plaintiffs' fail to allege facts sufficient to entitle them to attorneys' fees.

SEVENTH DEFENSE

Plaintiffs' claims are barred by the doctrine of laches.

EIGHTH DEFENSE

Plaintiffs lack standing to maintain this action.

NINTH DEFENSE

Adequate and alternate access is available to the alleged cemetery lot without the necessity of traversing any of the property owned by the Healys.

TENTH DEFENSE

The alleged easement, if it exists at all, has been terminated, as a matter of law, at Bird Road.

ELEVENTH DEFENSE

The Healys adopt by reference, and as applicable, any affirmative defenses filed by any co-defendants.

THOMAS AND VICTORIA HEALY

BY COUNSEL

STAUFFER & ABRAHAM, L.L.C.

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Lora A. Brzezynski, #36151
Suite 1000
8300 Greensboro Drive
McLean, Virginia 22102-3604
(703) 893-4670
Counsel for defendants,
Thomas and Victoria Healy

CERTIFICATE OF SERVICE

I do hereby certify that on the 11th day of September, 1996, I caused a copy of the foregoing to be sent by telecopier and mailed first-class, postage prepaid, to:

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Anderson & Corrie
12600 Fair Lakes Circle, #220
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Counsel for Fairfax County Park
Authority

Lora A. Brzezynski
LORA A. BRZEZYNSKI

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE T. ATKISSON and CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	In Chancery No. 97823
WEXFORD ASSOCIATES, INC., et al	)	
Defendants.	)	

AGREED ORDER

THIS DAY came the parties, by counsel, and represented to the Court that they have agreed that Defendants Donald D. Hall and Joan P. Hall may file an answer and grounds of defense to the Fourth Amended Bill of Complaint on or before September 10, 1996, subject to the Pre Trial Order entered August 26, 1996, and adopt the Exhibit lists and Witness lists filed by defendants on September 4, 1996; it is therefore,

ORDERED, ADJUDGED AND DECREED that Defendants Donald D. Hall, may file their answer and grounds of defense to the Fourth Amended Bill of Complaint on or before September 10, 1996, subject to the Pre Trial Order entered August 26, 1996, and adopt the Exhibit lists and Witness lists filed by defendants on September 4, 1996.

ENTERED this 12 day of September, 1996.

Jane Marum Roush

The Honorable Jane M. Roush
Fairfax County Circuit Court

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WE ASK FOR THIS:

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By: Bernard E. Goodman
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Individual Defendants
Raymond Cavanagh, Eileen Cavanagh, Donald D. Hall and Joan P. Hall

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By: Lora A. Brzezynski
LORA A. BRZEZYNSKI
Counsel for Defendants
Thomas Healy and Victoria Healy

DAVID P. BOBZIEN
COUNTY ATTORNEY

By: Jan L. Brodie
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SEEN:

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By: _____
SCOTT E. SNYDER
Counsel for Plaintiffs

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V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	CHANCERY NO. 97823
WEXFORD ASSOCIATES INC., et al.	)	
Defendants.	)	

INTERVENORS' TRIAL BRIEF

I. INTRODUCTION

This case was brought by Plaintiff George Atkisson[1] to, in his own words, purportedly "reestablish" his right to an easement for "his family cemetery." In fact, the cemetery does not belong solely to Mr. Atkisson, but instead belongs to all of the descendants of those buried there. More importantly, the easement Mr. Atkisson seeks to use was never intended to benefit the cemetery (which was always located, according to the land records and the physical evidence, on a particular parcel ("Partition Lot 2")), but rather was to be used for the separate "15-acre parcel."

In truth, this case is about the effort by one George Atkisson, a developer and descendant of ancestors buried in the cemetery, to relocate the boundaries of the cemetery in contravention of the land records either by grave mistake or more

[1] Although Carlotta Atkisson, the spouse of George Atkisson, is named as a Plaintiff, she has no standing as she has no interest in the cemetery.

likely a creative plan to shift the obligation of providing an easement for the cemetery to a neighboring development, Wendover.

The pertinent facts are either stipulated and/or admitted. The land records reveal that the 1/4 acre cemetery is located in the southeast corner of Partition Lot 2. The cemetery belongs to all of the descendants of a Partition Decree entered in 1896, not just George Atkisson, who is merely one grandson of only one of the parties to the Decree. In 1979 when "Outlot A" was created by Atkisson's Hunter Mill surveyors as a way to include in the 1/4 acre cemetery a portion of the 15-acre parcel, he had no legal interest in the cemetery. Atkisson was not an heir at the time and as a developer he had no right to relocate the family cemetery, which specifically had been excepted from the 1978 conveyance to his developer partner.

In his argument to "reestablish" the easement, Atkisson raises three theories, none of which support his claim. First, he maintains he has a right to an express easement, but the land records do not support such a theory. Alternatively, he argues for a prescriptive easement, but he cannot possibly substantiate the strict requirements of adverse, exclusive, open, continuous, uninterrupted use for 20 years with the knowledge and acquiescence of the owners of the land over which it passes by clear and convincing evidence. Finally, Mr. Atkisson claims an implied easement by necessity, an argument which displays a fundamental misunderstanding of the doctrine. The parent tract of the cemetery is Partition Lot 2. Any easement by necessity

would have to run through Partition Lot 2 (now Hunter Mill Forest subdivision), not Wendover.

II. UNDISPUTED FACTUAL BACKGROUND

A. Title History

In the late 1800s, Mary C. Saunders, Mr. Atkisson's ancestor, owned several parcels of land in Fairfax County. She conveyed a 15-acre parcel to Thomas S. Adams, her nephew and Mr. Atkisson's grandfather, by an 1892 deed. This recorded deed created an express easement, described as a right-of-way 15 feet wide, over several tracts of land and extending to the County road (the "15-acre Parcel Easement"). The easement allowed ingress and egress to the 15-acre parcel and was recorded in Deed Book P-5 at Page 361. (Stip.[2] #1)

The easement, although largely undefined and never platted in the land records, contains metes and bounds measurements which today are located through Wendover lots 1, 3 through 7, and part of lot 2. However, the path apparently used in the past does not completely adhere to the metes and bounds description set forth in the land records. (Stip. #2)

In 1896, as a result of a decree that had been entered in a partition suit, Mr. Thomas S. Adams received other property referred to as Lot No. 2 ("Partition Lot 2"), a parcel of 27 1/2 acres that adjoined his 15-acre parcel. The Partition Decree

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[2] "Stip." refers to the Stipulations submitted to the Court at the Pretrial Conference held on August 26, 1996.

recorded in Deed Book X-5 at Page 356 references a burial lot, 1/4 acre in size in the southeast corner of Partition Lot 2. An outlet road 15 feet wide between lots 3, 4, 5 and 6 to Piney Branch (the "Partition Easement") is reserved for access to Partition Lot 2 and the burial lot in the Partition Decree. The burial lot with ingress and egress thereto was to remain for the permanent use of the families of all of the parties to the Partition Decree. (Stip. #3)

Mr. Thomas S. Adams died intestate, and his heirs inherited both properties, including the easement, when his wife, Ida Adams, died in 1971. By a deed dated March 31, 1978, and recorded in Deed Book 4865 at Page 13, the heirs of Mr. Adams conveyed their interest in the property ("the Adams Estate") to Harold O. Miller, Trustee, specifically including the 15-acre Parcel Easement, but excepting the "existing cemetery." (Stip. #4)

By Deed dated October 5, 1978, and recorded October 11, 1978 in Deed Book 5009 at Page 848, Harold O. Miller, Trustee, conveyed the entire Adams Estate to Anmar Development Company, Inc. ("Anmar"). (Stip. #5). After the Adams Estate had been sold to Anmar, Harold O. Miller, Trustee, executed a deed of gift of the 15-acre Parcel Easement solely to the Atkissons dated October 10, 1978 and recorded October 11, 1978 in Deed Book 5009 at Page 839. The right-of-way conveyance was dated after the conveyance to Anmar, but was recorded before such conveyance. (Stip. #6)

By Deed of Dedication, Subdivision and Restrictive Covenant dated June 7, 1979 and recorded July 27, 1979, in Deed Book 5244 at page 774, Hunter Mill Forest Partnership located the cemetery mostly on Partition Lot 2 but partly on the 15-acre parcel, thereby creating "Outlot A." (Stip. #7). By Deed dated June 29, 1979, and recorded on July 29, 1979, in Deed Book 5217 at Page 472, Anmar Development Company, Inc. conveyed the Adams Estate to the Hunter Mill Forest Partnership. (Stip. #11).

Harold O. Miller, Trustee, executed a deed dated February 16, 1981, in Deed Book 5572 at Page 0775, to convey the family cemetery solely to the Atkissons. However, the cemetery had never been conveyed to Miller as it was excepted from the heirs' deed recorded in Deed Book 4865 at Page 13. (Stip. #12)

In 1977, Charles and Audrey Hawthorne acquired a large parcel of property, through which the 15-acre Parcel Easement ran. The Hawthornes initiated proceedings to obtain the necessary permits and zoning amendments so that the property could be subdivided into residential lots. (Stip. #13). The property was rezoned and the Hawthornes conveyed it to Wexford Associates by Deed dated May 18, 1983 and recorded in Deed Book 5772 at Page 497. (Stip. #14).

Wexford Associates subdivided its property into 40 residential building lots and an unimproved parcel ("Wendover III Subdivision"). Wexford Associates conveyed the unimproved parcel to the Park Authority. Wexford Associates made no provision in its deed of dedication or in its recorded plat for the easement

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claimed by Plaintiffs herein. (Stip. #15). On June 4, 1986, Wexford conveyed Lot 3 of the Wendover Subdivision to John and Katherine Kowalczyk by deed recorded in Deed Book 6391 at Page 1639. (Stip. #16).

On July 16, 1986, the Atkissons filed a Bill of Complaint against Wexford Associates, *inter alia*, but did not include the Kowalczyks who were the record owners of Lot 3. (Stip. #17). A copy of the Bill of Complaint was recorded on July 18, 1986, in Deed Book 6432 at Page 1596, with the handwritten words "*lis pendens*" written across the top, with no reference to the Kowalczyks or Lot 3, or any of the other individual lot owners, except Individual Defendants, Henry, Vogel and Charles B. and Audrey Hawthorne. (Stip. #18).

On February 16, 1988, the Atkissons filed an Amended Bill of Complaint, adding the individual lot owners, including the Kowalczyks. However, at such time no *lis pendens* was filed referencing the Kowalczyks or any of the other individual lot owners. (Stip. #19).

By deed dated June 15, 1992, and recorded in Deed Book 8160 at Page 277, the Kowalczyks conveyed Lot 3 to David D. O'Brien and Jane B. O'Brien. (Stip. #20). The Court has determined that the O'Briens first learned of the Atkissons' easement claim when they were contacted by Mr. Goodman, counsel for Wexford and the Individual Defendants in February 1995. (Stip. #21).

B. **The Family Cemetery**

Prior to the dedication of the Hunter Mill Forest Subdivision, the only mention of the burial lot in the land records of Fairfax County was as a 1/4 acre burial lot in the southeast corner of Partition Lot 2 referenced in the Partition Deed recorded in Deed Book X5 at Page 356 in the land records of Fairfax County, Virginia dated October 20, 1896 ("Partition Deed"). (Stip. #8, Response to Intervenors' Request for Admission #1). Outlot A was created when Atkissons' surveyors created the Hunter Mill subdivision. (Stip. #9, G. Atkisson Dep. 12/4/95 at p. 143).

The transfers to George Atkisson by Harold O. Miller, Trustee, of the naked easement in Deed Book 5009 at Page 839, and later, the burial lot, are nullities, as conceded by Plaintiffs' counsel in trial on August 20, 1991, at Page 186 of the transcript of testimony. (Stip. #10, Response to Intervenors' Request for Admission #9). The Plaintiffs, George and Carlotta Atkisson, have never paid any real estate taxes for the family cemetery or "Outlot A." (Stip. #22, G. Atkisson Dep., 12/4/95, p. 87).

The only persons buried in the family cemetery are those listed on the granite marker. (Stip. #23, G. Atkisson Dep. 12/4/95, p. 89). There is no one buried on the 15-acre parcel. (G. Atkisson Dep. 12/4/95, p. 159). George T. Atkisson, born in 1923, does not recall a funeral being held during his lifetime at the Adams family burial lot. (Stip. #28).

Fairfax County Park Authority property now exists on the eastern and western sides of the Adams family burial lot. (Stip. #27, Response to Intervenors' Request for Admission #8).

C. **Atkisson's Interest**

Florence Atkisson died on December 31, 1987, and is buried at Andrew's Chapel Cemetery on Route 7 in Vienna, Virginia. (Stip. #25, Response to Intervenor Jane B. O'Brien's Interrogatory #8). Before December 31, 1987, George Atkisson therefore did not have a present heir's interest in the family cemetery because his mother, Florence A. Atkisson, was then still alive. (Stip. #24)

George Atkisson currently does not have any relationship to Hunter Mill Forest Partnership. (Stip. #26, Response to Intervenor Jane B. O'Brien's Interrogatory #1).

III. PROCEDURAL STATUS OF CASE

By Order entered November 11, 1988, Judge Quinlan H. Hancock dismissed the Amended Bill of Complaint on demurrer. On May 22, 1989, the Supreme Court of Virginia reversed the decision of Judge Hancock and remanded the case back to Fairfax Circuit Court for further proceedings.

The trial was held in July of 1991, before Judge Thomas A. Fortkort, but the final order was not entered until March 10, 1993. Judge Fortkort ruled: (1) that the Atkissons owned a right-of-way over the property of the defendants by way of an express and a prescriptive easement which is located according to the 1892 deed recorded in Deed Book P-5, at Page 361; (2) that

each homeowner whose house blocked the easement was required to pay $100.00 in nominal damages; (3) that the Fairfax County Park Authority was required to provide an easement for the Plaintiffs for access to the cemetery accessible by motor vehicle; and (4) that Wexford Associates was required to pay $10,000.00 in punitive damages.

An appeal was filed by both Fairfax County and the Atkissons; however, the appeal of the Atkissons was dismissed for failure to assign errors. An appeal was not filed by Wexford Associates or any of the lot owners. In a decision dated June 10, 1994, the Virginia Supreme Court reversed Judge Fortkort's ruling that Fairfax County provide the easement and remanded the case back to Fairfax Circuit Court with the following mandate:

> The chancellor is directed to enter an order requiring that the lot owners and Wexford Associates provide an easement at their expense for the Atkissons, if the lot owners, Wexford Associates, and the Atkissons can agree upon a location and description of the new easement. In the event the litigants are unable to agree, then the chancellor is directed to order that Wexford Associates and the lot owners remove any obstructions that interfere with the Atkissons' use of the express easement.

On March 3, 1995, Wexford Associates and the lot owners filed a Motion for Hearing to determine: (1) the location of the route of the easement; (2) that the route of such easement terminates at Bird Road; and (3) that there are no obstructions that interfere with the Atkisson's use of the express easement that may be removed by Wexford Associates and the lot owners. The motion was heard, along with the Atkisson's Motion for Entry of a

Decree, on March 7, 1995, before Judge Fortkort. The Court ruled (1) that Wexford Associates and the lot owners had until March 15, 1995, to provide alternative access for the Atkissons; (2) that the Atkissons must state any objections in writing; and (3) that if the court finds that such objections are reasonable, then the obstructions are to be cleared from the express easement as defined in plaintiffs' exhibit ZZZ [admitted into evidence at the trial in 1991].

On March 15, 1995, Wexford Associates and the defendant lot owners, filed their letter of the same date proposing an alternate route, which route traverses through the rear end of lots 2 through 7 to Bird Road. The Atkissons filed objections to the proposed route and a hearing was set for May 25, 1995.

On May 23, 1995, the O'Briens filed a Motion by Special Appearance to Advise Court of Lack of Jurisdiction Over Lot 3 and Owners of Lot 3, and appeared at the hearing on May 25, 1995, to argue the motion. Two points were raised with the court:

(1) Under Virginia Code § 8.01-268, as bona fide purchasers without actual notice and in the absence of a lis pendens, the O'Briens are not bound by the litigation and, therefore, are not bound by the various court orders and Virginia Supreme Court mandates entered in the pending litigation;

(2) As a result of the failure of the Atkissons to include the O'Briens, a necessary party to any action to establish an easement over Lot 3, any prior judgments are null and void.

In response to argument by the O'Briens that they should be entitled to their day in court and to fully litigate issues

concerning ownership, location and validity of the easement, Judge M. Langhorne Keith stated that unless the O'Briens intended to make an appearance, then issues of res judicata, estoppel, and whether the O'Briens obtained title free and clear of the easement would be left for another day when the O'Briens are properly before the Court.

Judge Keith then continued the case for August 3, 1995, to hold an evidentiary hearing concerning the location of the easement and, specifically, whether the old county road still exists.

On August 3, 1995, Judge Jane Marum Roush held a hearing to consider the O'Briens' Petition To Intervene In Order To Request The Court Vacate Prior Judgments And Set A New Trial. After hearing testimony and receiving evidence, Judge Roush granted the Petition, ruling:

> [T]he O'Briens were necessary parties, without which the Court could not afford complete relief and (I) do not believe that their interests were adequately represented or that there was an identity of interest. I note that Judge Fortkort made all of his rulings or most of his dispositive rulings . . . after the O'Briens were already in title owner and completely unaware of the suit.

(Tr. 8/3/95 at 69-70). The Court further held that ". . . a new trial is granted, as to all issues as to the O'Briens." (Tr. 8/3/95 at p. 73).

On December 28, 1995, Judge Roush conducted a special one-day hearing for preliminary motions. At the hearing, Judge Roush ruled from the bench that George Atkisson could not testify regarding what anyone has told him as to the location of the

express easement or the location of the 1/4 acre burial lot. He only is permitted to testify as to the location of monuments and headstones if he has personal knowledge of such matters. Judge Roush also held that the following are necessary parties who must be added to the case: owners of lot #1, heirs of Thomas Adams, and heirs of other family members who were parties to the Partition Deed recorded in Deed Book X-5 at Page 356.

By letter opinion dated April 4, 1996, Judge Roush also granted Plaintiffs' Motion in Limine, deciding that the interests of the O'Briens were "separable," and therefore, that the prior judgments were not void as to those parties who participated in the prior litigation. Defendants and Intervenors filed motions for reconsideration and for clarification of this decision on April 25, 1996. On May 7, 1996, Judge Roush denied the Motion For Reconsideration, but clarified that the "Statement of Facts" does not constitute the factual findings of the Court as to the O'Briens.

IV. ARGUMENT

A. No Express Easement

1. Atkisson's Only Interest Is As One of Many Heirs

It is undisputed, indeed confirmed by the Supreme Court of Virginia, that Atkisson's only interest in the litigation is as a descendant of Thomas Adams, who was 1 of the 16 parties to the Partition Decree of 1896. The conveyances from Harold O. Miller in 1978 and 1981, in which Atkisson purported to acquire

sole interest in the cemetery were void *ab initio*. (Stip. #10). Harold O. Miller never obtained the cemetery as it was excepted and reserved by the family members in the 1978 conveyance of the "Adams Estate" (Partition Lot 2 and 15-acre parcel). Fairfax County Park Authority v. Atkisson, 248 Va. 142, 146-147, 445 S.E.2d 101 (1994)[3] Moreover, by the time of the purported conveyances to Atkisson, Miller, as trustee, had already conveyed his entire interest in the Adams Estate to Anmar, a developer.

In short, to the extent Atkisson has any interest, it is the same interest held by some 50 other heirs, and the same interest that was excepted in 1978 when the Adams Estate was sold for development.

2. 15-Acre Parcel Easement Does Not Serve Cemetery

It is undisputed that the express 15-acre Parcel Easement was created for the 15-acre parcel. (Stip. #1) It also is undisputed that in the land records of Fairfax County, at least until the creation of the Hunter Mill subdivision, the cemetery is described as a 1/4 acre burial lot in the southeast corner of Partition Lot 2. (Stip. #8). Consequently, under Virginia law, Atkisson cannot use the 15-acre Parcel Easement for the benefit of the cemetery located on Partition Lot 2. Walton v. Holland, 238 Va. 687, 690, 385 S.E.2d 609 (1989)(an express easement may not be expanded to benefit other properties because

[3] Although the Virginia Supreme Court decision is not binding on the O'Briens, there is no reason to believe the Court would interpret the 1978 deed any differently here. Thus, Atkisson only has an interest as an heir in common with the numerous other heirs.

that would impose an additional burden on the servient estate which was not intended in the grant); citing Robertson v. Robertson, 214 Va. 76, 81, 197 S.E.2d 183, 187 (1973).

The attempt by Atkisson (and his partners and successors in the development of Hunter Mill Forest) to draw the 1/4 acre cemetery to include a portion of the 15-acre parcel in order to make a claim on the 15-acre Parcel Easement is transparent and also ineffectual on several grounds. First, there is absolutely no basis in the land records for the surveyors to have drawn the 1/4 acre to include a portion of the 15-acre parcel. Second, as they had no interest in the cemetery,[4] Atkisson and his partners had no authority to locate the cemetery anywhere other than in the southeast corner of Partition Lot 2, as referenced in the land records. Moreover, any decision to relocate the cemetery or even fix its location on Partition Lot 2 would have required the consent of the descendants of parties to the Partition Decree of 1896, all of whom have an interest in the cemetery. Finally, the heirs in the 1978 conveyance to Miller made it clear that the 15-acre Parcel Easement did not serve the cemetery when they excepted the cemetery, but specifically conveyed away the 15-acre Parcel Easement. (Stip. 4, Defendants' Exhibit 6). Indeed, the cemetery has its own express easement, an outlet road 15-feet wide between partition lots 3, 4, 5 and 6 to Piney Branch, (the "

[4] Atkisson, at that time in 1979, was not an heir since his mother was alive until December 31, 1987. (Stip. #24).

"Partition Easement"), reserved in the 1896 Partition Decree. (Stip. #3, Defendants' Exhibit 5).

3. **Summary**

In sum, Atkisson's only interest in this litigation is as an heir with a common interest in a cemetery. According to the land records, the cemetery is located as a 1/4 acre in the southeast corner of Partition Lot 2. Since Atkisson and his partners and successors had no authority to change its location in contravention of the land records, the 15-acre Parcel Easement cannot be held to serve the cemetery, which is located entirely on Partition Lot 2, with its own express easement.

B. **No Prescriptive Easement**

1. **Elements of Prescriptive Easement**

To establish a private right-of-way by prescription over land of another, the claimant must prove, by clear and convincing evidence, that his use of the roadway was adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owners of the land over which it passes, and that the use has continued for at least 20 years. Umbarger v. Phillips, 240 Va. 120, 124, 393 S.E.2d 198 (1990). The prescriptive use must occur often and long enough so that it gives the landowner reasonable notice that a right adverse to his interest is being exercised. McNeil v. Kingrey, 237 Va. 400, 404, 377 S.E.2d 430, 432 (1989). Although a failure to show the origin of the use raises a presumption that the easement originated either adversely or by grant, the presumption

only rises after proof that a way has been thus used, openly, uninterruptedly, continuously, and exclusively for a period of more than 20 years. McNeil v. Kingrey, supra, p. 404; citing, Williams v. Green, 111 Va. 205, 207, 68 S.E. 253, 254 (1910).

The extent of the prescriptive easement is measured by the character of the use. Pettus v. Keeling, 232 Va. 483, 490, 352 S.E.2d 321, 326 (1987). See McNeil v. Kingrey, 237 Va. 400, 405 (1989)(trial court erred in failing to limit easement to agricultural purposes where the evidence was insufficient to support a finding that there was a prescriptive easement for anything but agricultural purposes).

A claimant must establish when the prescriptive period began to run. McNeil v. Kingrey, 237 Va. 400, 405 (1989); citing, Clatterbuck v. Clore, 130 Va. 113, 121, 107 S.E. 669, 672 (1921). A landowner may not tack his usage onto the former landowner's period of use of a prescriptive easement where the use had terminated some months before the current landowner acquired the parcel of land. McNeil v. Kingrey, 237 Va. 400, 405 (1989).

The imposition of a prescriptive easement is the taking of a property right of the servient owner without payment of compensation. This is why [the Supreme Court] has said that the law is jealous of a claim to an easement. McNeil v. Kingrey, 237 Va. 400, 406; citing Pettus, supra, 232 Va. 486, 487, 352 S.E.2d 324.

One who claims a prescriptive easement has the burden of showing the nature and character of the proposed change of his

use of the easement, that it is in degree only, and that it imposes no additional burden on the servient estate. McNeil v. Kingrey, 237 Va. 400, 406 (1989). A change in the character of the surrounding area should not be a factor in deciding whether to further burden a servient owner's land by an existing prescriptive easement. "The alternate use of a prescriptive easement should place no additional burden upon the servient estate." McNeil v. Kingrey, 237 Va. 400, 407; citing, Virginia Hot Springs v. Lowman, 126 Va. 424, 430, 101 S.E. 326, 328 (1919).

Where the use of a roadway by persons owning property in the immediate area has been in common with use of the way by members of the general public, the essential element of exclusiveness is lacking because the use of the way is dependent upon the enjoyment of similar rights by others. Callahan v. White, 238 Va. 10 (1989); citing, Pettus, supra, 232 Va. 486, 352 S.E.2d 324 (1987). Where the essential element of exclusiveness is lacking, no presumption of a claim of right arises from evidence of long use. Callahan v. White, 238 Va. 10, 381 S.E.2d 1 (1989); citing, Reid v. Garnett, 101 Va. 47, 49, 43 S.E. 182, 183 (1903).

2. No Basis for Prescriptive Easement

Atkisson cannot carry his burden of proving a prescriptive easement by clear and convincing evidence. The primary reason is that to the extent he or his wife, Carlotta, have used the easement in the past, it was in connection with the use of the 15-acre parcel where the house was located in which

Mr. and Mrs. Atkisson lived for a short period of time in the late 1940's. Atkisson cannot establish that the use was adverse when it in fact was permitted by virtue of the 1892 15-acre express easement until the 15-acre parcel was sold in 1978. Furthermore, he cannot establish that such use was open, continuous, uninterrupted, and exclusive for at least 20 years with the owner's knowledge and acquiescence.[5] In short, given that Atkisson's family had a right under the 1892 deed to use the 15-acre parcel easement until the 15-acre parcel was sold in 1978, it cannot be maintained that the owner of the servient estate would have reasonable notice that a right adverse to his or her interest is being exercised. There simply is no basis for the allegation of a prescriptive easement and certainly nothing that could meet the heightened scrutiny of clear and convincing evidence. This claim too must be stricken.[6]

C. **No Easement By Necessity**

The final theory, easement by necessity, again has no application to the facts of this case. It appears that Atkisson misunderstands the doctrine's concept. In a relatively recent case, Russakoff v. Scruggs, 241 Va. 135, 400 S.E.2d 529 (1991), Justice Lacy explained the application of an implied easement by necessity:

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[5] The evidence will be that there was no such continuous use even to access the house on the 15-acre parcel.

[6] It is interesting to note that the prescriptive easement claim was implicitly rejected by the Supreme Court of Virginia, when it was not upheld on appeal.

> Such an easement is based on the legal principle that when one conveys land, he is presumed to transfer all that is necessary to the use and enjoyment of the land conveyed. While one cannot have an easement on land he owns, if, before severance, one part of the land was used for the benefit of another part, a "quasi-easement" exists over the "quasi-servient" portion of the land.
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> [T]he existence of the easement right is established on a showing that (1) the dominant and servient tract originated from a common grantor, (2) the use was in existence at the time of the severance, and that (3) the use is apparent, continuous, and reasonably necessary for the enjoyment of the dominant tract.

Id. at 138-39 (citations omitted).

None of the above elements can be met by Atkisson. First, the alleged dominant estate (cemetery) and purported servient estate (Wendover subdivision) did not originate from a common grantor. The cemetery originated as a separate property interest by virtue of the 1896 Partition Decree, when the parcel containing the Wendover subdivision belonged to Mary Saunders (Parcel 49) and R.L. Adams (Parcel 48). There is no evidence, nor can there be any evidence, that in 1896, the 15-acre parcel easement was in use as access to the cemetery. On the contrary, the 1896 partition decree specifically reserves a 15' outlet road between partition lots 3, 4, 5 and 6 to Piney Branch for access to Partition Lot 2 and the cemetery. Thus, Atkisson cannot meet the third element for he cannot argue that access through the 15-acre parcel easement is reasonably necessary when access is provided for in the Partition Decree.

If any necessity exists today, it is by virtue of the subdivision of the parent tract, Partition Lot 2, upon creation

of the Hunter Mill subdivision in the late 70's and early 80's. An easement by necessity, if one were required to be drawn, would necessarily have to be drawn through the Hunter Mill subdivision which created the problem. In essence, when the heirs conveyed Partition Lot 2 to Miller in 1978, by implication they reserved an easement by necessity for the cemetery through the Hunter Mill subdivision.

D. Atkissons Lack Standing

It is undisputed that George Atkisson's only interest in this litigation is as one of many heirs, whose collective interest in the cemetery was reserved in the 1896 Partition Decree and excepted from the 1978 Deed to Miller Trustee.[7]

Carlotta Atkisson, however, has no interest in this litigation as she is not an heir of Florence Atkisson, and, thus, has no interest in the cemetery.

George Atkisson does not own "Outlot A,"[8] specifically he does not have any interest in the 15-acre parcel because the cemetery, according to the land records, solely is located in the southeast corner of Partition Lot 2. Moreover, the physical evidence confirms that the cemetery is located only on Partition

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[7] It is interesting to note that George Atkisson did not even have such an interest in 1986 when the suit was filed because his mother, Florence Atkisson, lived until December 31, 1987. Thus, George Atkisson had no standing as an heir at the time suit was filed.

[8] The heirs collectively own only that portion of Outlot A that lies in the southeast corner of Partition Lot 2.

Lot 2. Since the 15-acre Parcel Easement by its terms only serves the 15-acre parcel, Atkisson has no standing to "reestablish" such an easement which does not serve the cemetery, the only property in which he shares an interest.

E. Atkisson Estopped to Claim Interest In the 15-Acre Parcel Easement

It is important to remember that in the 1978 Deed from the Thomas Adams heirs (one of whom was Florence Atkisson) to Miller, Trustee, the heirs, while excepting the cemetery from the conveyance, specifically conveyed away to Miller their interest in the 15-acre Parcel Easement. The heirs' decision to convey the 15-acre Parcel Easement to Miller is consistent with the land records in existence as of 1978. Indeed, the heirs were in the same document conveying the 15-acre parcel to Miller so it naturally, and legally, follows that the 15-acre Parcel Easement, as an appurtenant easement, would likewise go to Miller. The heirs did not and could not retain the 15-acre Parcel Easement for their own use because it was not appurtenant to the cemetery (which is located as a 1/4 acre in the southeast corner of Partition Lot 2), and because the cemetery had its own access as provided in the Partition Decree of 1896. In other words, the 1978 deed is consistent with the location of the cemetery solely on Partition Lot 2 and inconsistent with Atkisson's attempt to locate it as "Outlot A" with a purported right to use the 15-acre Parcel Easement.

Virginia law is clear that Atkisson, having obtained his interest from Florence Atkisson, is estopped from now claiming

that he has an interest in the 15-acre Parcel Easement. Greenan v. Solomon, 252 Va. 50, 54, 472 S.E.2d 54 (1996). In Greenan, the Court reaffirmed the following principles of "estoppel by deed":

> It is well established that a party who purports to convey an estate is estopped as against his grantee from asserting anything in derogation thereof. That is to say, a grantor cannot deny his title to the prejudice of his grantee. See School Board v. Smith, 134 Va. 98, 104, 113 S.E. 868, 869 (1922). Similarly, '"those who derive title from or through the parties, ordinarily stand in the same position as the parties, and are bound by every estoppel that would have been binding on the parties."' Richmond Cedar Works v. West, 152 Va. 533, 543, 147 S.E. 196, 199 (1929).

Id.; citing Vepco v. Buchwalter, 228 Va. 684, 688, 325 S.E.2d 95, 97 (1985).

Atkisson, like his mother before him, is estopped, by virtue of the 1978 deed, from now claiming an interest in the 15-acre Parcel Easement.

F. Atkisson Barred by Unclean Hands

Atkisson, as a developer of Hunter Mill Forest subdivision, created the conditions which have landlocked the cemetery, thereby impeding the access provided in the 1896 Partition Decree. The aerial photos and topographic maps from 1937 to the 1970's reveal the existence of at least two roads, one of which is the Partition Easement and the other, a road running along the railroad right-of-way behind the 15-acre parcel. Atkisson replaced these existing roads with public roads, Hillington Court and Adams Hill Road, but failed to provide for new access to the cemetery.

The plats of Hunter Mill Forest demonstrate numerous opportunities to provide for the access as required in the 1896 Partition Decree, all of which were ignored because of Atkisson's desire to improperly shift the burden of providing access for the cemetery to the neighboring subdivision.

Atkisson's shenanigans in attempting to acquire sole bare interest in the easement and later sole interest in the cemetery further evidence a scheme to obtain leverage by threatening to enforce the 15-acre Parcel Easement for cemetery property it was never intended to serve.

Atkisson's actions in creating the conditions that lead to the cemetery becoming landlocked and his refusal to maintain the access required in the 1896 Partition Decree overwhelming demonstrate his unclean hands, which bars this suit in equity. Martin v. Bales, 7 Va. App. 141, 146 (1988)("he who comes into equity must come with clean hands").

G. O'Briens as Bona Fide Purchasers Without Notice Took Good Title Free of Latent Claims

It is uncontroverted, indeed previously determined by this Court, that the O'Briens were *bona fide* purchasers without notice of the litigation and the claims of Atkisson. As such, they only are bound by what is expressly set forth in the land records of Fairfax Circuit Court in their chain of title. They are not subject to "latent equities." Guss v. Realty Corporation, 204 Va. 65, 72, 129 S.E.2d 43 (1963), or matters that are not recorded. Bowman v. Holland, 116 Va. 805, 811, 83 S.E. 393 (1914).

In short, according to the land records, the family cemetery, excepted in the 1978 deed, is located in the southeast corner of Partition Lot 2. As such, the heirs have no claim to access through the 15-acre Parcel Easement, which they conveyed away in any event by virtue of the same 1978 deed. Any claim by Atkisson to relocate the cemetery according to where he might have plowed or other such claimed justifications have no basis in the land records. Consequently, the O'Briens took free of such claims when they purchased their property free of the litigation, in the absence of a *lis pendens*.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 13th day of September, 1996, a true and correct copy of Intervenors' Trial Brief was mailed by first class mail, postage prepaid to the following:

Bernard E. Goodman, Esquire
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AND telecopied and mailed this 13th day of September, 1996 to:

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V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE T. ATKISSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CHANCERY NO. 97823
	)	
WEXFORD ASSOCIATES, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' THOMAS AND VICTORIA HEALY'S
TRIAL BRIEF

Defendants', Thomas and Victoria Healy, by counsel, adopt by reference, and as applicable (i) Intervenors' David and Jane O'Brien's Trial Brief and (ii) Defendant Wexford Associates, Inc., Individual Defendants, Defendants' Cavanaughs, and Defendants' Halls' Trial Memorandum.

THOMAS AND VICTORIA HEALY

BY COUNSEL

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I do hereby certify that on the 16th day of September, 1996, I caused a copy of the foregoing to be hand-delivered to:

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LORA A. BRZEZYNSKI

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE T. ATKISSON and CARLOTTA T. ATKISSON Plaintiffs, v. WEXFORD ASSOCIATES, INC., et al Defendants.	)	In Chancery No. 97823

DEFENDANT WEXFORD ASSOCIATES, INC., THE INDIVIDUAL DEFENDANT'S, RAYMOND CAVANAUGH'S AND EILEEN CAVANAUGH'S AND DONALD D. HALL'S AND JOAN P. HALL'S TRIAL MEMORANDUM

COME NOW, Defendants, Wexford Associates, Inc. ("Wexford"), James E. and Susan H. Henry, Patrick G. and Jane M. Deasy, Charles E. and Jean S. Andrews, Brian T. and Elizabeth J. McVay, M. Jack and Joanne Wilkenfeld, Walter T. and Beth A. Morgan, Lawrence W. and Diane B. Wyte, Herbert and Barbara Vogel, and Mark L. Eckman and Vivian L. Datoff, (collectively "Individual Defendants"), Raymond Cavanaugh and Eileen Cavanaugh (collectively "Cavanaugh"), Donald D. Hall and Joan P. Hall (collectively "Hall"), by counsel, and submit the following as their Trial Memorandum:

PRELIMINARY STATEMENT

This matter comes before the Court on various rulings made by the Court during the last year, specifically:

(1) Wexford and the Individual Defendants, are bound by the ruling of the Virginia Supreme Court that Atkisson has an express easement over their property.

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(2) Wexford and the Individual Defendant may only litigate the location of the easement.

(3) George Atkisson may not testify regarding what anyone told him as to the location of the express easement or the location of the quarter acre burial lot but may testify from personal knowledge as to the location of monuments and heardstones.

(4) The Intervenors, David and Jane O'Brien (collectively "O'Brien") have a right to a full trial on the merits of this action and that they are not bound by the previous rulings of this Court prior to August 3, 1995 nor the Supreme Court of Virginia on any issue.

(5) Hall and Cavanaugh who were not parties to the first trial, should have a right to a full trial on the merits of this action. They should not be bound by the previous rulings of this Court or the Supreme Court of Virginia on any issue, as the Court, by Order dated August 26, 1996, held that Cavanaugh had the right to conduct discovery on all issues and was not limited to the location of the alleged easement.

STATEMENT OF FACTS

The express easement ("15 Acre Easement"), claimed by Plaintiffs George Atkisson and Carlotta Atkisson (collectively "Atkisson"), was created by a deed located in Deed Book P5 at Page 361 in 1892 in the land records of Fairfax County, Virginia ("15 Acre Deed") granting to Thomas Adams a 15 acre parcel of land ("15 Acre Parcel"). The easement begins at a "Point G" and runs to "the County Road." The easement was largely undefined and never platted in the land records. (Stipulations at Paragraph 2). The easement was intended to serve solely as access to the 15 Acre Parcel. In 1896, Thomas Adams received an additional grant

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of land ("Partition Lot 2") contiguous to the 15 Acre Parcel by virtue of a Partition Decree and subsequent deed recorded in Book X-5 at Page 356 in the land records of Fairfax County, Virginia. (Stipulations at Paragraph 3). According to the Partition Decree, Partition Lot 2 contained a family burial lot of 1/4 acre located in the southeast corner. Access to Partition Lot 2 and, thus, the burial lot, was expressly provided for in the Partition Decree and consisted of an easement running between Partition Lots 3, 4, 5, and 6. (Stipulations at Paragraph 3). Atkisson also claims that they own an easement by necessity and a prescriptive easement over the exact location of the express easement. They allege also that these easements were created in the 15 Acre Deed to provide access to the family burial lot.

At one time, George Atkisson and/or his relatives and ancestors owned nearly all the property in what is now the Hunter Mill Forest Subdivision ("Hunter Mill") and the Wendover III Subdivision ("Wendover"). Several of the lots involved in the Partition Decree including all or parts of Partition Lots 1, 2, 5 and 6, and the 15 Acre Parcel have become part of Hunter Mill, the earlier of the two subdivisions. Wendover encompasses the land through which the alleged easement is proported to run.

Atkisson was involved with the development of Hunter Mill. George Atkisson was a 50% partner in the organization that developed Hunter Mill. It was under his direction that a surveyor created "Outlot A" which straddles Point G. (Stipulations at Paragraph 9). Also, in the process of developing Hunter Mill, Atkisson dedicated land to the Fairfax County Park Authority including land on the eastern and western sides of Outlot A, granted an easement to the Fairfax County Water Authority from Hillington Court to Outlot A, built houses on the northern border of Outlot A, and destroyed the easement that was established by the Partition

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Decree to Partition Lot 2. (Plaintiff's Exh. JJ). Having thus "landlocked" the burial lot, which Atkisson now contends is Outlot A, Atkisson sought access to Outlot A through the property that ultimately became Wendover.

On July 16, 1986, Atkisson filed a Bill of Complaint against Wexford. (Stipulations at Paragraph 17). On February 16, 1988, Atkisson filed an amended Bill of Complaint adding thirty-four (34) individual lot owners including the John and Katherine Kowalczyk ("Kowalczyk") as owners of Wendover Lot 3 ("Lot 3"). (Stipulations at Paragraph 18). No notice of *lis pendens* was filed against most of the lots and lot owners at that time. (5-25-95 Tr. at 22, 10-13; Stipulations at Paragraph 19). Many of the lot owners, including Hall and Cavanaugh, were nonsuited at the start of the case as it appeared that the alleged easement would not transverse their property, and thus only Wexford and the Individual Defendants remained in the case. On June 15, 1992, Kowalczyk conveyed Lot 3 to David D. O'Brien and Jane B. O'Brien ("O'Brien").

Testimony was given before the Honorable Thomas A. Fortkort of the Circuit Court of Fairfax County on July 30, 1991, July 31, 1991 and August 20, 1991 regarding the existence of the alleged easement. Testimony was given on February 27, 1992, before Judge Fortkort regarding the location of the alleged easement and on January 27, 1993, regarding the value of the alleged easement.

On March 10, 1993, Judge Fortkort entered a final Order, ruling that Atkisson owned an express and prescriptive easement across Wendover, but relocating that easement on Fairfax County Park Authority property. This relocation was due to the extreme cost of clearing the path of the now developed easement. On appeal the Virginia Supreme Court

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determined Atkisson possessed an express easement through Wendover to the burial lot, and the Circuit Court had no authority to relocate said easement onto Fairfax County Park Authority property. Fairfax County Park Authority v. Atkisson, 248 Va. 142, 149 (1994). The Court also held the express easement should be cleared of obstructions unless the parties could reach an agreement for alternate access. Id. at 149. Significantly, the Supreme Court did not specifically locate the easement. Id.

On May 23, 1995, O'Brien, appearing specially by counsel, filed his Motion to Advise the Court of Lack of Jurisdiction Over Lot 3 and Owners of Lot 3, and appeared on May 25, 1995, to argue the motion. O'Brien asserted that they were *bona fide* purchasers for value without notice as no lis pendens was recorded in the land records and as such the prior judgement was void. As O'Brien was appearing specially, the Court continued the hearing until August 3, 1995 to hold an evidentiary hearing on the location of the easement.

On August 3, 1995, Judge Roush considered O'Brien's Petition to Intervene. After the presentation of evidence and argument on the Petition, the Court ruled that O'Brien was a necessary party and granted a new trial for O'Brien on all issues.

In the trial beginning on September 16, 1996, certain defendants (O'Brien, Cavanaugh, Hall and Thomas and Victoria Healy ("Healy")) will be able to litigate all issues including the existence of the alleged easement, while other defendants (Wexford, the Individual Defendants and the Fairfax County Park Authority) will be confined to litigating the path of the alleged easement.

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MEMORANDUM

I. PLAINTIFFS ARE NOT THE OWNERS OF ANY EASEMENT, WHETHER EXPRESS, IMPLIED, PRESCRIPTIVE OR BY NECESSITY, OVER WENDOVER.

Defendants Hall and Cavanaugh respectfully request that this Court rule that the Plaintiffs do not own any easement, whether express, implied, prescriptive or by necessity, through Wendover on the grounds set forth in the Trial Memorandum of Intervenors David O'Brien and Jane O'Brien, which Memorandum Defendants Hall and Cavanaugh hereby adopt and incorporate as if fully set forth herein.

II. CAVANAUGH AND HALL AS BONA FIDE PURCHASERS WITHOUT NOTICE TOOK GOOD TITLE FREE OF LATENT CLAIMS.

Cavanaugh and Hall took title to their properties subject only to claims that existed in the land records or where they had actual or constructive knowledge. They are bound only by what is expressly set forth in the land records of the Fairfax Circuit Court in their chain of title. They are not subject to "latent equities," Guss v. Realty Corporation, 204 Va. 65, 72 (1963), or matters that are not recorded. Bowman v. Holland, 116 Va. 805, 811 (1914). According to the land records, the family burial lot, excepted in the conveyance to Harold Miller, Trustee in the 1978 Deed, is located in the southeast corner of Partition Lot 2. In the 1978 Deed, the heirs of Thomas Adams specifically and expressly conveyed the 15 Acre Easement with the 15 Acre Parcel. Therefore, the heirs have no claim in the land records to access through the 15 Acre Easement, which they conveyed away. Any claim by Atkisson to relocate the burial lot according to where he might have plowed or any other claimed basis

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in order to take advantage of the 15 Acre Easement have no basis in the land records. Consequently, Cavanaugh and Hall took free of such claims when they purchased their property.

III. ASSUMING ARGUENDO THAT AN EASEMENT EXISTS FROM THE FAMILY BURIAL LOT THROUGH THESE DEFENDANTS' PROPERTY, SAID EASEMENT TERMINATES AS A MATTER OF LAW AT BIRD ROAD.

Wexford, the Individual Defendants, Cavanaugh and Hall respectfully request that the Court rule that, assuming arguendo that an easement exists, the easement terminates at Bird Road, the first "County Road," on the grounds set forth in the Motion and Memorandum in Support of Motion to Determine if Alleged Easement is Terminated as a Matter of Law at Bird Road filed by Wexford and the Individual Defendants on December 1, 1995 and the Reply Memorandum of Wexford and the Individual Defendants to Plaintiff's Opposition to the Termination of the Easement as a Matter of Law at Bird Road filed herein on December 22, 1995, attached hereto and incorporated by reference respectively as Exhibit "1" and "2", which memoranda Wexford, the Individual Defendants, Cavanaugh and Hall hereby expressly adopt as if fully set out herein.

IV. ASSUMING ARGUENDO THAT AN EASEMENT EXISTS, THE EASEMENT CAN BE RELOCATED BY THE CURRENT OWNERS OF THE PROPERTY BURDENED BY SAID EASEMENT.

Assuming arguendo that an easement exists, the easement described in the 15 Acre Deed as a

> right of way from the above land (the 15 Acre Parcel) by a road 15 ft. wide from G, the South-west corner of the above land, 880 feet along the line of Mrs. Adams, to near a pair of bars and thence across Mrs. Mary C. Saunders' land, S. 32°, 50' E. 320 ft. to a

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> point near a pair of bars at her stables; thence passing near her house and with the present outlet used by her through through (sic) her land and through R.L. Adams to the County Road.

The easement was largely undefined. (Stipulations at 2). Given the changes in the property since 1892, the exact path of the easement after Mrs. Saunders' stables can not be determined as there are no exact calls or directions for the path of the easement. The 15 Acre Easement, after it reaches a point near Byrd Road, has no existing monuments.

A. As the easement can not be established beyond the first two calls due to the loss of landmarks over time, the current owners can determine a "new" location for the path of the easement.

Once the easement passes the point formerly near Mrs. Saunders' stable, one can not determine the exact location of the easement as it was largely undefined in the 15 Acre Deed, which contained no specific calls and measurements for said easement. As was common for the time period, the parties defined the location of the easement by references to paths and landmarks that no longer exist. As such, Plaintiffs, at best, have an easement without a definite location. As a result the owners of the property burdened by said easement can determine its location for it to run.

When an easement is granted without a specific location and a later dispute arises as to its location, the owner of the servient estate can establish the path of the easement. Terry v. Tinsley, 140 Va. 240 (1924). Said path would then become the fixed easement route.

In Terry, a dispute arose over title to, proper location of and use of an express easement. Id. at 241. The easement in question was defined as:

> . . . a strip of land twenty (20) feet in width leading from a point on the Roanoke and Floyd turnpike, where the old original road intersects said pike, following the old road leading from said pike to

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> George Page's gate, running from thence on the north side of the fence and on the north side of George Page's house through the pine land and timber land to J. Coles Terry, Jr., line. The grantors of their assigns in using and locating said roadway shall have the right to make convenient location, but such location shall be confined to the pine and timber land." Id. at 242.

For approximately seven (7) years after the conveyance there was no dispute nor effort to locate the roadway. In the early 1920's a Mrs. Muncure built a home on the land north of the Tinsey land and claimed a right to use and locate said easement. Id at 243. The Court found that most of the easement was clearly located on the Page lands but was undefined when it crossed the pine and timber land. The Court ruled "the option to locate the roadway only exists as to that portion of it which was not located by the deed - that is, its further extension after it passed the gate and reached to the north side of the Page house," Id at 244, from that point on "it can be further defined and extended." Id at 245.

In the instant case, Atkisson alleges that all of the claimed easements are located as platted on Plaintiff's Exhibit ZZZ.[1] However, there is very little physical evidence to support the location of the easement as drawn on Plaintiff's Exhibit ZZZ. The shaded portions of Plaintiff's ZZZ represent the physical location of a path on the Defendants' property. As the evidence will show, this path is not a 15 foot road as provided for in the 15 Acre Deed and does not exactly follow the known path of the 15 Acre Easement. Large portions of Plaintiff's ZZZ are without the support of physical evidence except some old aerial photographs indicating the existence of a path and not a road. Additionally, the aerial photographs over

[1] At trial Atkisson submitted Plaintiff's Exhibit ZZZ solely for purposes of showing the path of the prescriptive easement. During final argument and at the further hearings in this litigation, Atkisson has contended that Plaintiff's Exhibit ZZZ represents the path of both the express and prescriptive easement.

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the years show that Plaintiff's ZZZ was not a 15 foot wide road, was largely overgrown and was little used. Further, a portion of Plaintiff's ZZZ is a ravine that still exists today. As such, Plaintiff's ZZZ is at best an inaccurate guess as to the location of the easements alleged by Atkisson. As the alleged easement in the instant case is "largely undefined" (Stipulations at P. 2), the owner of the servient estate can define it under the holding in Terry.

B. The Easement Can Be Relocated By The Owners Of The Servient Estate Under Equitable Principles As Established By Virginia Case Law.

Atkisson alleges that they were last able to use the easement in 1983. Prior to 1983, the servient estate was used by various individuals for hunting and running dirt bikes. Many paths crossed the servient estate and it would have been nearly impossible to tell which of the paths represented the 15 Acre Easement after it passes the point near Mrs. Saunder's stables. In the thirteen (13) years since the easement's last alleged use, the servient estate has been developed and as a result, there have been significant improvements on Plaintiff's claimed easement route as platted on Plaintiff's Exhibit ZZZ. There are strong reasons, previously stated, to question the accuracy of Plaintiff's Exhibit ZZZ.

As currently platted on Plaintiff's Exhibit ZZZ and Defendants' Exhibit 12, the easement runs next to several houses and through (1) a pool; (2) a house; (3) a storm water detention pond; and (4) two sheds. Where the Court to order that the easement be reestablished over Wendover as shown by either Plaintiff's Exhibit ZZZ or Defendants' Exhibit 12 the damages and costs to the lot owners would be staggering. The lot owners did not have actual or constructive knowledge that this easement existed, as the easement to the 15 Acre Parcel, described by the land records, does not run to the family burial lot. At the

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time Wendover was developed, the 15 Acre Parcel had become Hunter Mill and park land. The development of Hunter Mill included the creation of several new roads that lead to the state road system and eliminated the need for the 15 Acre Easement. Additionally, during the development of Wendover, George Atkisson met with Wexford's President, Stewart Porter, and his surveyor to investigate the course of the alleged easement so that Wexford would not cause obstructions. George Atkisson did not show them much of the path of his easement. They walked approximately 100 feet down from the burial lot on the easement path and then diverted and viewed a slave cemetery. Wendover was then built to not interfere with the known slave cemetery. Additionally, Stewart Porter offered Mr. Atkisson an easement route that would allow him access to the burial lot which Mr. Atkisson rejected because he could not take unlicensed vehicles on the county roads. (08/20/91 Tr. at 47). This is not a case where anyone "maliciously" or ignoring the rights of others developed property over an alleged easement path. Mr. Atkisson rejected access that was offered to him after being unable to show the path of his claimed easement.

The existence of the improvements provide an additional equitable basis to relocate the path of the easement. In Conroad v. Strickler, 215 Va. 454 (1975), the Virginia Supreme Court found that the servient estate owners had the right to re-route the easement around any permanent obstruction provided it was reasonably done and does not create an additional burden to the easement owner. The easement in that case was defined as:

> . . . an easement of right of way fifteen (15) feet wide extending from the southwestern corner of the property hereby conveyed across the land of Robert H. Strickler and Charles O. Strickler, along the line of property formerly owned by J. W. Hall, to the Keezletown and Harrisonburg road (State Route 925), which easement was conveyed to J. M. Liskey (a former

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> owner of part of the land hereby conveyed) by George B. Keezell and wife by deed dated March 28, 1913 recorded in Deed Book 97, at page 222. . (with reference to various other prior deeds for further description).

According to the facts in that case, the parties used an alternate easement under the mistaken belief that it was the express easement and a shed was erected across the path of the express easement by the owner of the servient estate. Id. The Trial Court found that the plaintiff was the owner of the easement but that they had the opportunity to elect between the two easement paths once surveyed and located. Id. However, the defendant was granted the right to relocate the easement path around the permanent obstructions provided that it was "reasonably done and does not create any additional burden." Id. The Virginia Supreme Court found that the trial court had the relocation of the easement within its "sound discretion (as it was) . . . seeking to do equity between adjoining property owners." Id.

It would be in the interests of justice and equity to relocate the 15 Acre Easement for two (2) reasons. First, no economic hardship will result from the relocation of said easement. As will be clearly evident at trial from aerial photographs beginning in 1937, the path of Plaintiff's Exhibit ZZZ is and always has been severely overgrown and could not have supported travel by a motor vehicle as alleged by Atkisson. Additionally, parts of the alleged path Plaintiff's Exhibit ZZZ follows is a ravine and would not be easily converted to an access route. It would be in Atkisson's best interest if the easement were relocated to an area that would provide easier access and allow for the use of a motor vehicle. Additionally, forcing Defendants to clear the path of Plaintiff's Exhibit ZZZ would be incredibly expensive and result in severe economic hardship to the lot owners, some of which stand to lose the entire

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value of their homes if the Court recognized and established Plaintiff's Exhibit ZZZ as the path of the easement.

Second, there would be no other hardship if the easement was relocated. Atkisson claims that they brought this suit to reestablish the easement so that they could care for and maintain the family burial lot. Relocation of the easement would allow Atkisson easier access into the burial lot and thus facilitate its care and maintenance. Also, the relocation of the easement would minimize the hardship of reestablishing and maintaining the easement as platted on Plaintiff's Exhibit ZZZ. This easement path would destroy valuable improvements to the property and destroy the privacy of several residences as it passes within a few feet of the exteriors of their homes. The location of the easement according to Plaintiff's ZZZ would constitute an undue hardship on the Plaintiffs, who would be faced with an unusable easement, and the Defendants, who would face thousands of dollars worth of property damage and the resultant diminution in value of their homes. Therefore, relocating the easement would not constitute a hardship on any party.

> "He who seeks equity must do equity." That means that "he who seeks the aid of any equity Court subjects himself to the imposition of such terms as the settled principles of equity require." Lindsey, *et al.* v. Clark, *et al.*, 193 Va. 522 (1952).

Additionally, "the Court will not require the expensive removal of (an) obstruction, so long as . . . (another right of way) is made available." Id.

Therefore, if an easement exists, it is within the discretion of this Court and comports with the principles of equity to allow the servient estate owners to relocate the easement on their property while fulfilling the purpose of the easement.

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CONCLUSION

WHEREFORE, Defendants Hall and Cavanaugh pray that the Court hold that the Plaintiffs do not own any easement, either express, prescriptive, by necessity or by implication, through their property for the reasons stated herein. Defendants Wexford, the Individual Defendants, Hall and Cavanaugh pray that if the Court determines that the Plaintiffs own an easement, under any theory, that the Court find that the easement terminates as a matter of law at Bird Road and that said Defendants have the right to relocate the easement for the reasons stated herein.

Respectfully submitted,
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EILEEN CAVANAUGH,
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Bernard E. Goodman, VSB# 15463
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Counsel for Wexford, the Individual Defendants,
Raymond and Eileen Cavanaugh, and
Donald D. and Joan P. Hall.

GOODMAN GARY
& LICKSTEIN, P. C.
ORNEYS AND COUNSELLORS AT LAW
8500 LEESBURG PIKE
SUITE 7000
VIENNA, VIRGINIA 22182
(703) 848-2828

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Trial Memorandum was hand delivered on this 16th day of September to the following:

Scott E. Snyder, Esquire
Anderson & Corrie
12600 Fair Lakes Circle, Suite 220
Fairfax, VA 22033-4904

David J. Gogal, Esquire
Blankingship & Keith, P.C.
4020 University Drive, Suite 312
Fairfax, VA 22030

Jan L. Brodie, Esquire
Fairfax County Attorney
12000 Government Center Parkway
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Fairfax, VA 22035-0064

Laura A. Brzeynski, Esquire
Stauffer & Abraham. L.L.C.
Suite 1000
8300 Greensboro Drive
McLean, Virginia 22102-3604

Bernard E. Goodman

N/b:nandoc/wex0905.mem

GOODMAN GARY
& LICKSTEIN, P. C.
ORNEYS AND COUNSELLORS AT LAW
8500 LEESBURG PIKE
SUITE 7000
VIENNA, VIRGINIA 22182
(703) 848-2828

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON	:	
and	:	
CARLOTTA T. ATKISSON,	:	
Plaintiffs,	:	
v.	:	CHANCERY NO. 97823
WEXFORD ASSOCIATES, INC.	:	
and	:	
COUNTY OF FAIRFAX, *et al.*,	:	
Defendants.	:	

DEFENDANT FAIRFAX COUNTY PARK AUTHORITY'S TRIAL BRIEF

Defendant Fairfax County Park Authority, by counsel, adopts by reference, to the extent they address the location of an easement in this case, (i) Intervenors' David and Jane O'Brien's Trial Brief and (ii) Defendant Wexford Associates, Inc., Individual Defendants, Defendants' Cavanaughs, and Defendants' Halls' Trial Memorandum.

Respectfully submitted,

FAIRFAX COUNTY PARK AUTHORITY

By _____
Counsel

DAVID P. BOBZIEN
COUNTY ATTORNEY

BY _____

Jan L. Brodie (VSB No. 26799)
Assistant County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, Virginia 22035
(703) 324-2421
Counsel for Complainant

CERTIFICATE OF SERVICE

I do hereby certify that on the 17th day of September 1996, I caused a copy of the foregoing to be hand-delivered to:

Scott E. Snyder, Esquire
Anderson & Corrie
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033

Bernard E. Goodman, Esquire
Goodman, Gary & Lickstein
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182

David J. Gogal, Esquire
Blankingship & Keith
4020 University Drive, Suite 312
Fairfax, Virginia 22030

William L. Stauffer, Jr. Esquire
Lora A. Brzezynski, Esquire
Stauffer & Abraham, L.L.C.
8300 Greensboro Drive, Suite 1000
McLean, Virginia 22102

_____
Jan L. Brodie

JLB/nmo TRIALBRF.MMO

Filed in Open court 9/18/96 @10:38 a.m. JMR/dm

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	CHANCERY NO. 97823
WEXFORD ASSOCIATES INC., et al.	)	
Defendants.	)	

INTERVENORS' TRIAL MEMORANDUM ON ISSUE OF LOCATION

I. INTRODUCTION

As set forth in the Intervenors' Trial Brief, the O'Briens maintain that the Plaintiffs have no right to any easement through the parcel. If, however, the Court decides that such an easement exists, the evidence in this case establishes that there are no obstructions to the easement on the property of the O'Briens, i.e., the easement does not pass through the O'Briens' swimming pool.

II. ATKISSONS' ZZZ ROUTE MISSES POOL

The Atkissons have consistently argued that all three alleged easements (express, prescriptive, and implied) have the same location - Plaintiffs' Exhibit ZZZ - which depicts the existing path according to the Plaintiffs' surveyor, Mr. Simpson. See Defendants' Exhibit 32.

Both Plaintiffs' Exhibit ZZZ and Defendants' Exhibit 12, Courson's "Plat of 15-Acre Parcel Express Easement Route," confirm that the route actually used did not follow the metes and bounds stated in the 1892 deed (which would have gone through the

swimming pool), but instead runs away from the pool as it enters Lot 3. See attached Defendants' Exhibit 12. Furthermore, the photographs of the O'Briens' property confirm that the actual route used does not run through the swimming pool. Defendants' Exhibit 29. Indeed, large, old trees continue to grow in the path described by metes and bounds.

Virginia law makes it clear that the actual route used will prevail over the route depicted by metes and bounds. The Supreme Court of Virginia recently confirmed:

> Even where there has been a definite location of an easement, it may be changed with the express or implied consent of the persons interested. Such consent may be implied from the acts and acquiescence of the parties, and an estoppel to claim a former location to be the true one arises from acquiescence in the change.

Buxton v. Murch, 249 Va. 502, 508 (1995); citing Wagoner v. Jack's Creek Coal Corp., 199 Va. 741, 746, 101 S.E.2d 627, 630 (1958).

In short, if the Court decides to locate an easement through the O'Briens' property, the path chosen cannot run through the O'Briens' swimming pool as the Plaintiffs are estopped to claim the former location because of their acquiescence to the change in location. The matter is largely moot because Plaintiffs do not seek to establish an easement according to the metes and bounds.

DAVID D. O'BRIEN and
JANE B. O'BRIEN
By Counsel

BLANKINGSHIP & KEITH
A Professional Corporation
4020 University Drive
Suite 312
Fairfax, Virginia 22030
(703) 691-1235

By: _____
JOHN A.C. KEITH
DAVID J. GOGAL
Counsel for Intervenors,
David and Jane O'Brien

CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of September, 1996, a true and correct copy of the foregoing Intervenors' Trial Memorandum On Issue Of Location was hand-delivered to the following:

Bernard E. Goodman, Esquire
GOODMAN, GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
Counsel for Defendant Wexford Associates, Inc., Individual Defendants and Defendants Cavanaugh

Jan L. Brodie, Esquire
Fairfax County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035-0064
Counsel for Fairfax County Park Authority

Lora A. Brzezynski, Esquire
STAUFFER & ABRAHAM, L.L.C.
8300 Greensboro Drive, Suite 1000
McLean, Virginia 22102-3604
Counsel for Defendants Thomas and Victoria Healy

Scott E. Snyder, Esquire
ANDERSON & CORRIE
12600 Fair Lakes Circle, #220
Fairfax, Virginia 22033
Counsel for Plaintiffs

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON AND CARLOTTA T. ATKISSON	)	
Plaintiffs,	)	
v.	)	CHANCERY NO. 97823
WEXFORD ASSOCIATES INC., et al.	)	
Defendants.	)	

FINAL DECREE

THIS MATTER CAME ON TO BE HEARD upon the Fourth Amended Complaint of the Plaintiffs, George Atkisson and Carlotta T. Atkisson, and upon trial of this matter on September 16, 17 and 18, 1996, which began with a view of the properties by the Court, after which the Plaintiffs presented their evidence.

Defendants and Intervenors, owners and former owners of lots in the Wendover III subdivision, Fairfax County, then moved to strike the Plaintiffs' case, which motion was in part granted and in part taken under advisement. The Motion to Strike was granted to the extent that the Court ruled that the 15-acre parcel easement, if it still exists and serves the cemetery, terminates at Bird Road and any location of such easement beyond Bird Road would be speculative. As a result of this ruling from the bench, all claims against Defendants Walter Morgan and Beth Morgan ("Morgans")(Lot 25); Herbert Vogel, Jr. and Barbara Vogel ("Vogels")(Lot 23); Lawrence W. Wyte and Diane B. Wyte ("Wytes")(Lot 38); Raymond Cavanagh and Eileen Cavanagh ("Cavanaghs")(Lot 39); Thomas Healy

and Victoria Healy ("Healys")(Lot 40); and the Fairfax County Park Authority (Parcel A) were dismissed.

The remaining Defendants, Wexford Associates, Inc., Patrick G. and Jane M. Deasy, Katherine Kowalczyk, Donald D. Hall and Joan P. Hall ("Halls)(Lot 1); James E. Henry, Jr. and Susan M. Henry ("Henrys")(Lot 2); Mark L. Eckman and Vivian D. Datoff (Lot 4); Charles E. Andrews and Jean S. Andrews ("Andrews")(Lot 5); Brian T. McVay and Elizabeth McVay ("McVays")(Lot 6); M. Jack Wilkenfeld and Joanne Wilkenfeld ("Wilkenfelds")(Lot 7); and Intervenors, David D. O'Brien and Jane B. O'Brien ("O'Briens")(Lot 3), then presented their evidence, followed by brief rebuttal testimony of Plaintiff George Atkisson. Defendants and Intervenors then renewed their Motion to Strike on the remaining grounds, which motion again was taken under advisement.

After closing argument, the Court made the following factual findings: (1) the easement from the 1892 deed ("15-acre Parcel Easement") does not and was never intended to serve the cemetery; (2) according to the land records, the 15-acre Parcel Easement was created to provide ingress and egress from the 15-acre parcel to the County road; (3) according to the land records, the cemetery lot was located exclusively in Partition Lot Two, and no part of the cemetery lot was located in the 15-acre parcel; (4) in the 1896 Partition Decree, the Court provided an ingress/egress easement ("Partition Easement") between the partition lots as access for the cemetery for all parties to the Partition Decree; (5) there is no credible evidence that any part of the cemetery was located in the

15-acre parcel that was served by the 15-acre Parcel Easement as (a) the physical evidence, (b) the Court's view, (c) the Plaintiff George Atkisson's admission that nobody is buried on the 15-acre parcel, (d) the admission of the Plaintiffs' surveyor, Mr. Simpson, that there was no need to mention the cemetery in the 1892 deed because the cemetery was not on the 15-acre parcel, as well as (e) the archeologist's, Mr. Sachi's, location of graves and platting of said graves by the surveyor, Mr. Courson; all corroborate the evidence in the land records that the cemetery was located only on Partition Lot 2. The Court thus determined, as to the O'Briens (Lot 3) and the Halls (Lot 1), that there is no express easement on their property that provides access to the cemetery, and that any such attempt to do so would constitute an impermissible additional burden on the servient estate. The Court noted that this ruling does not apply to Defendants Henrys (Lot 2), Eckman and Datoff (Lot 4), Andrews (Lot 5), McVays (Lot 6) and Wilkenfelds (Lot 7) which Defendants the Court previously has ruled are bound by the prior holdings of the Court as affirmed by the Supreme Court of Virginia.

The Court also found that there has not been adverse, exclusive, open, and continuous use of the alleged easement for 20 years and, thus, determined that there is no prescriptive easement. The Court further reasoned that there is no implied easement by necessity through the Wendover properties since the Wendover subdivision and Partition Lot 2 did not originate from a common parcel and also access is provided for the cemetery in the 1896 Partition Decree.

The Court further determined, although not necessary to its ruling, that the doctrine of "Estoppel by Deed" applied and also barred the Plaintiffs from now claiming an interest in an easement which their predecessor-in-interest specifically conveyed away in 1978 with the land to which it was appurtenant.

The Court thus dismissed from the bench all claims against Defendants Halls (Lot 1) and Intervenors O'Briens (Lot 3).

The Court then heard argument as to the location of the express easement on Lots 2, 4, 5, 6 and 7, and determined that such location was set forth in Defendants' Exhibit 12 as platted by Mr. Courson and identified as the 15-foot right-of-way in accordance with Deed Book P5 at Page 361, with such right-of-way continuing in the same path for another 10 or 15 feet to Bird Road where it ends.

The Court then set a suspension of execution bond in the total amount of ~~$10,000~~ $1,000 for Defendants Henrys, Eckman, Datoff, Andrews, McVays, and Wilkenfelds in order to stay execution of the ruling of the Court until 120 days after the expiration of the period for filing an appeal if no appeal is taken or, if an appeal is taken, until 120 days after the final resolution of this case by the Supreme Court of Virginia; and accordingly,

UPON CONSIDERATION of the above factual findings, the evidence and testimony presented at trial and the argument of counsel, it is hereby

ADJUDGED, ORDERED and DECREED as follows:

1. that the Motion to Strike be and hereby is granted to the extent that the easement, to the extent one exists, terminates at

Bird Road, and any location of such easement beyond Bird Road would be speculative; and that judgment be and hereby is entered against Plaintiffs, George Atkisson and Carlotta T. Atkisson, and in favor of Defendants Thomas Healy, Victoria Healy, Raymond Cavanagh, Eileen Cavanagh, Lawrence W. Wyte, Diane B. Wyte, Herbert Vogel, Jr., Barbara Vogel, Walter Morgan, Beth Morgan and Fairfax County Park Authority that there is no express easement (Count I), no implied easement by necessity (Count II), and no prescriptive easement (Count III) on Lot 23 (tax map number 28-3 ((20))-23), Lot 24 (tax map number 28-3((20))-24), Lot 25 (tax map number 28-3 ((20))-25), Lot 38 (tax map number 28-3 ((20))-38), Lot 39 (tax map number 28-3 ((20))-39), and Lot 40 (tax map number 28-3 ((20))-40)), as well as Parcel A (tax map number 28-3 ((20))-A) of the Wendover III subdivision;

2. that judgment be and hereby is entered against Plaintiffs, George Atkisson and Carlotta T. Atkisson, and in favor of Defendants Donald D. Hall and Joan P. Hall, and Intervenors David D. O'Brien and Jane B. O'Brien; that there is no express easement (Count I), no implied easement by necessity (Count II), and no prescriptive easement (Count III) on Lot 1 (tax map number 27-4 ((13))-1) and Lot 3 (tax map number 27-4 ((13))-3) of the Wendover III subdivision.

3. that judgment be and hereby is entered against Plaintiffs, George Atkisson and Carlotta T. Atkisson, and in favor of Defendants James E. Henry, Jr., Susan M. Henry, Mark L. Eckman, Vivian D. Datoff, Charles E. Andrews, Brian T. McVay, Elizabeth

McVay, M. Jack Wilkenfeld and Joanne Wilkenfeld; that there is no implied easement by necessity (Count II), and no prescriptive easement (Count III) on Lot 2 (tax map number 27-4 ((13))-2), Lot 4 (tax map number 27-4 ((13))-4), Lot 5 (tax map number 27-4 ((13))-5), Lot 6 (tax map number 27-4 ((13))-6), and Lot 7 (tax map number 27-4 ((13))-7) of the Wendover III subdivision.

4. that the express easement for the cemetery recognized by the Supreme Court of Virginia in Fairfax County Park Authority v. Atkisson, 248 Va. 142, 149 (1994), be and hereby is located on Lot 2 (owned by Defendants James E. Henry, Jr. and Susan M. Henry), Lot 4 (owned by Defendants Mark L. Eckman and Vivian D. Datoff, Lot 5 (owned by Defendants Charles E. Andrews and Jean S. Andrews), Lot 6 (owned by Defendants Brian T. McVay and Elizabeth McVay), and Lot 7 (owned by Defendants M. Jack Wilkenfeld and Joanne Wilkenfeld) as set forth in Defendants' Exhibit 12, a survey prepared by Herman L. Courson of Springfield Engineering Corporation, P.C., dated March 3, 1995, which platted the 15-foot right-of-way identified per Deed Book P-5 at Page 361, with such right-of-way continuing along the same path for another 10 or 15 feet until it reaches Bird Road where it ends;

5. that in order to stay execution of this Order, Defendants, Henrys, Eckman, Datoff, Andrews, McVays, and Wilkenfelds, must post a bond in the total amount of ~~$10,000~~ $1,000- which will stay execution of this order until 120 days after the expiration of the period for filing an appeal if no appeal is taken

or, if an appeal is taken, until 120 days after the final resolution of this case by the Supreme Court of Virginia;

6. that the first "*lis pendens*" recorded on July 18, 1986, in Deed Book 6432 at Page 1596, the second "*lis pendens*" recorded on December 5, 1995, in Deed Book 9574 at Page 1544 and the third *lis pendens* recorded on April 16, 1996, in Deed Book 9677 at Page 107 be and hereby are quashed and resolved by the terms of this Final Decree;

7. that this Final Decree shall be duly filed and recorded by the Clerk among the Land records of Fairfax County within 60 days of the entry of this Decree, or, if an appeal is filed, within 60 days after the mandate is issued by the Supreme Court of Virginia;

8. that the clerk will, upon recordation, index this Decree with the Plaintiffs as both "Grantors" and "Grantees", with the Defendants and Intervenors in Paragraphs 1 and 2 as "Grantees" only, with Defendants in Paragraph 3 as "Grantees" and with the Defendants in paragraph 4 as "Grantors;" and

9. that the Clerk is directed to provide a copy teste of this Final Decree to each counsel of record.

AND THIS DECREE IS FINAL.

ENTERED this 11 day of October, 1996.

Jane Marum Roush

JUDGE JANE MARUM ROUSH
Fairfax County Circuit Court

SEEN AND AGREED, WHILE RESERVING OBJECTIONS:

AS TO THE LOCATION OF THE EASEMENT SINCE BY IMPLIED CONSENT THE PARTIES ARE ESTOPPED TO CLAIM THE FORMER "METES AND BOUNDS" LOCATION AS THE TRUE ONE. BUXTON v. MURCH, 249 Va. 502, 508 (1995);
~~AND AS TO ANY CHARACTERIZATION OF TREES AS OBSTRUCTIONS SINCE THE DOMINANT, NOT THE SERVIENT, OWNER HAS THE DUTY TO MAINTAIN THE EASEMENT.~~
~~LYNCHBURG v. CHESAPEAKE & OHIO RY. CO., 170 Va. 108, 113-14 (1938);~~
~~ONEY v. WEST BUENA VISTA LAND CO., 104 Va. 580, 585 (1905);~~
AND FINALLY, AS TO THE COURT'S DECISION TO HOLD OWNERS OF LOTS 2, 4, 5, 6, AND 7 BOUND BY PRIOR ADJUDICATIONS WHEN SUCH RULINGS ARE VOID UNDER HARRIS v. DEAL, 189 Va. 675, 686-87 (1949) AND IN ANY EVENT UNENFORCEABLE FOR AN EASEMENT IS A PRIVILEGE TO USE ANOTHER'S PROPERTY FOR A PARTICULAR PURPOSE, RUSSAKOFF V. SCRUGGS. 241 Va 135, 138 (1991), AND HERE THE PURPOSE NO LONGER EXISTS.

BLANKINGSHIP & KEITH
A Professional Corporation
4020 University Drive
Suite 312
Fairfax, Virginia 22030
(703) 691-1235

By: _____
DAVID J. GOGAL, VSB #28815
Counsel for Intervenors
David D. O'Brien and
Jane B. O'Brien

SEEN AND OBJECTED TO ON THE
FOLLOWING GROUNDS:

FAILURE TO VACATE THE PRIOR JUDGMENT AGAINST WEXFORD AND THE INDIVIDUAL DEFENDANTS ONCE A NECESSARY PARTY INTERVENED VIOLATED THE NECESSARY PARTIES DOCTRINE, HARRIS v. DEAL, 189 Va. 675, 54 S.E.2d 161, (1949); ~~AND THE CHARACTERIZATION OF TREES AS OBSTRUCTIONS BECAUSE ATKISSON ONLY HAS THE RIGHT TO HAVE THE EASEMENT RETURNED TO THE CONDITION IT WAS IN BEFORE HIS USE WAS OBSTRUCTED. PETTUS v. KEELING, 232 Va. 483, 490 (1987).~~ AND FINALLY, AS TO THE COURT'S DECISION TO HOLD OWNERS OF LOTS 2, 4, 5, 6, AND 7 BOUND BY PRIOR ADJUDICATIONS WHEN SUCH RULINGS ARE UNENFORCEABLE FOR AN EASEMENT IS A PRIVILEGE TO USE ANOTHER'S PROPERTY FOR A PARTICULAR PURPOSE, RUSSAKOFF V. SCRUGGS. 241 Va 135, 138 (1991), AND HERE THE PURPOSE NO LONGER EXISTS.

GOODMAN, GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182

By: Bernard E. Goodman
BERNARD E. GOODMAN
Counsel for Defendant Wexford Associates, Inc., Individual Lot Owners, Defendants Raymond C. Cavanagh and Ellen B. Cavanagh, and Defendants Donald Hall and Joan Hall

SEEN AND AGREED AS TO PARAGRAPHS NUMBERED 1, 6, 7, AND 8 ABOVE:

(ALL OBJECTIONS RESERVED AS TO NUMBERED PARAGRAPHS 2, 3, 4, AND 5 AS THIS DEFENDANT DID NOT PARTICIPATE AT TRIAL SUBSEQUENT TO SUCCESSFUL MOTION TO STRIKE, INCLUDING, BUT NOT LIMITED TO, THE COURT'S DECISION TO ENFORCE THE EASEMENT OVER THE PROPERTY OF THE ORIGINAL DEFENDANTS, DESPITE THE FACTUAL FINDING THAT SUCH EASEMENT DOES NOT SERVE THE CEMETERY, ON THE BASIS OF PRIOR JUDICATIONS, WHICH THE COURT KNOWS TO BE ERRONEOUS AND WHICH ARE VOID UNDER HARRIS v. DEAL, 189 Va. 675, 54 S.E.2d 161 ((1949)).

DAVID P. BOBZIEN
FAIRFAX COUNTY ATTORNEY
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035-0064

By: _____
JAN L. BRODIE
ASSISTANT COUNTY ATTORNEY
Counsel for the Fairfax County Park Authority

SEEN AND AGREED AS TO PARAGRAPHS NUMBERED 1, 6, 7, and 8 ABOVE:

(ALL OBJECTIONS RESERVED AS TO NUMBERED PARAGRAPHS 2, 3, 4, AND 5 AS THESE DEFENDANTS DID NOT PARTICIPATE AT TRIAL SUBSEQUENT TO SUCCESSFUL MOTION TO STRIKE)

STAUFFER & ABRAHAM, L.L.C.
8300 Greensboro Drive
Suite 1000
McLean, Virginia 22102-3604

By: Lora A. Brzezynski
LORA A. BRZEZYNSKI
Counsel for Defendants
Thomas and Victoria Healy

SEEN & OBJECTED TO ON THE FOLLOWING GROUNDS:

1.) Defendant O'Brien and Halls are subject to the prior rulings of the Supreme Court of Virginia.

2.) Judge Fortkort previously located the path of the Atkisson easement, as presented by Plaintiff in Exhibit 222.

3.) The evidence clearly established cemetery as located in part, on the 15 parcel.

4.) Termination of the easement on Bird Road is contrary to law and the prior ruling of Judge Fortkort and the Virignia Supreme Court.

5.) All defendants took subject to the express easement identified by the Virginia Supreme Court and located by Judge Fortkort.

ANDERSON & CORRIE
12600 Fair Lakes Circle
Suite 220
Fairfax, Virginia 22033

By: _____
Scott E. Snyder, Esquire
Counsel for Plaintiffs

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON	)	
	)	
and	)	
	)	
CARLOTTA T. ATKISSON	)	
	)	
v.	)	Chancery No.: 97823
	)	
WEXFORD ASSOCIATES, et al.	)	
	)	
Defendants.	)	

NOTICE OF APPEAL

The Plaintiffs, George Atkisson and Carlotta Atkisson, hereby give notice of appeal to the Supreme Court of Virginia from the Final Judgment Order of this Court entered on October 10, 1996, and further gives notice that the trial transcript covering the testimony and other incidents of trial will be filed, all in compliance with the Supreme Court of Virginia.

GEORGE ATKISSON
CARLOTTA ATKISSON
By Counsel

ANDERSON & CORRIE

BY: _____
Scott E. Snyder
Counsel for Plaintiffs
VA Bar No.: 26322
12600 Fair Lakes Circle
Fairfax, VA 22033
(703) 222-2200

CERTIFICATE

I, Scott E. Snyder, counsel of record for George Atkisson and Carlotta Atkisson hereby certify that:

1. Appellant is George Atkisson and Carlotta Atkisson, residing at 10194 Hillington Court, Vienna, Virginia 22182

2. Counsel for Appellant is Scott E. Snyder, Esquire, Anderson & Corrie, 12600 Fair Lakes Circle, Fairfax, VA 22033 (703) 222-2200

3. Appellees are as follows:

a.) David O'Brien and Jane O'Brien, represented by David Gogal, Esquire, Blankenship & Keith, 4020 University Drive, Suite 312, Fairfax, Virginia 22030 (703) 691-1235

b.) Wexford Associates, Inc., Raymond C. and Ellen B. Cavanagh, David and Joan Hall, James E. and Susan H. Henry, Patrick G. and Jane M. Deasy, Charles E. And Jean S. Andrews, Brian T. and Elizabeth J. McVay, M. Jack and Joanne Wilkenfeld, Walter T. and Beth A. Morgan, Lawrence W. and Diane B. Wyte, Herbert and Barbara Vogel, and Mark L. Eckman and Vivian L. Datoff, all of whom are represented by Bernard E. Goodman, Esquire, Goodman, Gary & Lickstein, P.C., 8500 Leesburg Pike, Suite 7000, Vienna, Virginia, 22812 (703) 848-2828.

c.) Fairfax County Park Authority, represented by Jan L. Brodie, Esquire, Fairfax County Attorney, 12000 Government Center Parkway, Suite 549, Fairfax, Virginia 22035-0064 (703) 324-2421

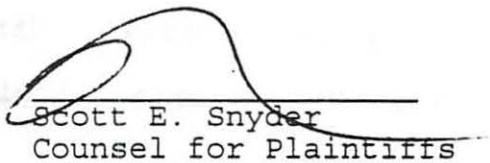
d.) Thomas and Victoria Healy represented by Laura Brzezynski, Esquire, Stouffer & Abraham, L.L.C, 8300 Greensboro Drive, Suite 1000, McLean, Virginia 22102-3604 (703) 506-4023

4. A copy of the transcript has been ordered from the court

reporter who recorded the cases.

5. A true copy of the foregoing notice was mailed to David Gogal of Blankenship & Keith counsel for David and Jane O'Brien, Bernard E. Goodman of Goodman, Gary & Lickstein, P.C. counsel for Wexford Associates, Inc., Raymond C. and Ellen B. Cavanagh, David and Joan Hall, James E. and Susan H. Henry, Patrick G. and Jane M. Deasy, Charles E. And Jean S. Andrews, Brian T. and Elizabeth J. McVay, M. Jack and Joanne Wilkenfeld, Walter T. and Beth A. Morgan, Lawrence W. and Diane B. Wyte, Herbert and Barbara Vogel, and Mark L. Eckman and Vivian L. Datoff, Jan Brodie, counsel for Fairfax County Park Authority, and Laura A. Brzezynski, Esquire, Stouffer & Abraham, L.L.C, counsel for Thomas and Victoria Healy at the addressed stated above.

ANDERSON & CORRIE

BY: 

Scott E. Snyder
Counsel for Plaintiffs
VA Bar No.: 26322
12600 Fair Lakes Circle
Fairfax, VA 22033
(703) 222-2200

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON	)	
	)	
and	)	
	)	
CARLOTTA T. ATKISSON	)	
	)	
v.	)	At Law No.: 97823
	)	
WEXFORD ASSOCIATES, et al.	)	
	)	
Defendants.	)	

NOTICE OF APPEAL

The Plaintiffs, George Atkisson and Carlotta Atkisson, hereby give notice of appeal to the Supreme Court of Virginia from the Final Judgment Order of this Court entered on October 10, 1996, and further gives notice that the trial transcript covering the testimony and other incidents of trial will be filed, all in compliance with the Supreme Court of Virginia.

GEORGE ATKISSON
CARLOTTA ATKISSON
By Counsel

ANDERSON & CORRIE

BY: _____
Scott E. Snyder
Counsel for Plaintiffs
VA Bar No.: 26322
12600 Fair Lakes Circle
Fairfax, VA 22033
(703) 222-2200

CERTIFICATE

I, Scott E. Snyder, counsel of record for George Atkisson and Carlotta Atkisson hereby certify that:

1. Appellant is George Atkisson and Carlotta Atkisson, residing at 10194 Hillington Court, Vienna, Virginia 22182

2. Counsel for Appellant is Scott E. Snyder, Esquire, Anderson & Corrie, 12600 Fair Lakes Circle, Fairfax, VA 22033 (703) 222-2200

3. Appellees are as follows:

a.) David O'Brien and Jane O'Brien, represented by David Gogal, Esquire, Blankenship & Keith, 4020 University Drive, Suite 312, Fairfax, Virginia 22030 (703) 691-1235

b.) Wexford Associates, Inc., Raymond C. and Ellen B. Cavanagh, David and Joan Hall, James E. and Susan H. Henry, Patrick G. and Jane M. Deasy, Charles E. And Jean S. Andrews, Brian T. and Elizabeth J. McVay, M. Jack and Joanne Wilkenfeld, Walter T. and Beth A. Morgan, Lawrence W. and Diane B. Wyte, Herbert and Barbara Vogel, and Mark L. Eckman and Vivian L. Datoff, all of whom are represented by Bernard E. Goodman, Esquire, Goodman, Gary & Lickstein, P.C., 8500 Leesburg Pike, Suite 7000, Vienna, Virginia, 22812 (703) 848-2828.

c.) Fairfax County Park Authority, represented by Jan L. Brodie, Esquire, Fairfax County Attorney, 12000 Government Center Parkway, Suite 549, Fairfax, Virginia 22035-0064 (703) 324-2421

d.) Thomas and Victoria Healy represented by Laura Brzezynski, Esquire, Stouffer & Abraham, L.L.C, 8300 Greensboro Drive, Suite 1000, McLean, Virginia 22102-3604 (703) 506-4023

4. A copy of the transcript has been ordered from the court

reporter who recorded the cases.

5. A true copy of the foregoing notice was mailed to David Gogal of Blankenship & Keith counsel for David and Jane O'Brien, Bernard E. Goodman of Goodman, Gary & Lickstein, P.C. counsel for Wexford Associates, Inc., Raymond C. and Ellen B. Cavanagh, David and Joan Hall, James E. and Susan H. Henry, Patrick G. and Jane M. Deasy, Charles E. And Jean S. Andrews, Brian T. and Elizabeth J. McVay, M. Jack and Joanne Wilkenfeld, Walter T. and Beth A. Morgan, Lawrence W. and Diane B. Wyte, Herbert and Barbara Vogel, and Mark L. Eckman and Vivian L. Datoff, Jan Brodie, counsel for Fairfax County Park Authority, and Laura A. Brzezynski, Esquire, Stouffer & Abraham, L.L.C, counsel for Thomas and Victoria Healy at the addressed stated above.

ANDERSON & CORRIE

BY: _____
Scott E. Snyder
Counsel for Plaintiffs
VA Bar No.: 26322
12600 Fair Lakes Circle
Fairfax, VA 22033
(703) 222-2200

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON and CARLOTTA T. ATKISSON	)	
Plaintiffs	)	
v.	)	Chancery No. 97823
WEXFORD ASSOCIATES, INC., *et al.*	)	
Defendants.	)	

NOTICE OF APPEAL

COME NOW Defendants, Wexford Associates, Inc. and James E. and Susan H. Henry, Katherine Kowalczyk, Patrick G. and Jane M. Deasy, Charles E. and Jean S. Andrews, Brian T. and Elizabeth J. McVay, Joanne Wilkenfeld, M. Jack Wilkenfeld, Mark Eckman and Vivian P. Datoff, (collectively "Individual Defendants"), by counsel, pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia, and hereby give notice of their appeal to the Supreme Court of Virginia, from the Final Decree of this Court entered on October 11, 1996. A transcript and other incidents of the case will be filed and a copy of the transcript has been ordered from the Court Reporters who reported the case.

Respectfully submitted,
WEXFORD ASSOCIATES, INC. and
INDIVIDUAL DEFENDANTS
By Counsel

GOODMAN GARY
& LICKSTEIN, P. C.
ATTORNEYS AND COUNSELLORS AT LAW
8500 LEESBURG PIKE
SUITE 7000
VIENNA, VIRGINIA 22182
(703) 848-2828

GOODMAN GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828

By: Bernard E. Goodman

Bernard E. Goodman
Counsel for Wexford Associates, Inc.
and Individual Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Notice of Appeal was mailed first class, postage prepaid, on this 7th day of November, 1996 to the following:

Scott E. Snyder, Esquire
Anderson & Corrie
12600 Fair Lakes Circle, Suite 220
Fairfax, VA 22033-4904

David J. Gogal, Esquire
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Jan L. Brodie, Esquire
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Lora A. Brzezynski, Esquire
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8300 Greensboro Drive, Suite 1000
McLean, VA 22102-3604

Bernard E. Goodman

B/b:atkisson disk/wexf1010.not

GOODMAN GARY
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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON and CARLOTTA T. ATKISSON	)	
Plaintiffs	)	
v.	)	Chancery No. 97823
WEXFORD ASSOCIATES, INC., *et al.*	)	
Defendants.	)	

NOTICE PURSUANT TO RULE 5:11(B) OF THE RULES OF THE SUPREME COURT OF VIRGINIA

COME NOW Defendants, Wexford Associates, Inc. and James E. and Susan H. Henry, Katherine Kowalczyk, Patrick G. and Jane M. Deasy, Charles E. and Jean S. Andrews, Brian T. and Elizabeth J. McVay, Joanne Wilkenfeld, M. Jack Wilkenfeld, Mark Eckman and Vivian P. Datoff, (collectively "Individual Defendants"), by counsel, pursuant to Rule 5:11(B) of the Rules of the Supreme Court of Virginia, and hereby give notice of the filing of the following original transcripts in this case as follows:

1) August 3, 1996 hearing (Necessary Party Hearing) was filed on December 10, 1996;

2) December 28, 1995 hearing (Various Motions) was filed on February 16, 1996;

3) September 16, 1996 hearing (Trial Day One) was filed on December 10, 1996;

4) September 17, 1996 hearing (Trial Day Two) was filed on December 10, 1996;

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5) September 18, 1996 hearing (Trial Day Three - Partial Transcript with Closing Arguments) was filed on December 10, 1996;

6) September 18, 1996 hearing (Trial Day Three- Partial Transcript with Court's Ruling) was filed on October 4, 1996; and

7) October 11, 1996 hearing (Final Order Entered) was filed on December 10, 1996.

Respectfully submitted,
WEXFORD ASSOCIATES, INC. and
INDIVIDUAL DEFENDANTS
By Counsel

GOODMAN GARY & LICKSTEIN, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia 22182
(703) 848-2828

By:

Bernard E. Goodman
Counsel for Wexford Associates, Inc.
and Individual Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Notice Pursuant to Rule 5:11(B) of the Rules of The Supreme Court of Virginia was mailed first class, postage prepaid, on this 10th day of December, 1996 to the following:

Scott E. Snyder, Esquire
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B/b:atkisson disk/wexf1206.not

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED
96 DEC 10 PM 3:33
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

GEORGE ATKISSON	)	
	)	
and	)	
	)	
CARLOTTA T. ATKISSON	)	
	)	
v.	)	Chancery No.: 97823
	)	
WEXFORD ASSOCIATES, et al.	)	
	)	
Defendants.	)	

NOTICE PURSUANT TO RULE 5:11(B) OF THE RULES OF THE SUPREME COURT OF VIRGINIA

COMES NOW, Plaintiffs, George and Carlotta Atkisson, by counsel, and hereby give notice that the transcripts for September 16, 1996, September 17, 1996, September 18, 1996 and October 11, 1996 were filed with this Court on December 10, 1996.

GEORGE ATKISSON
CARLOTTA ATKISSON
By Counsel

ANDERSON & CORRIE

BY: _____
Scott E. Snyder
Counsel for Plaintiffs
VA Bar No.: 26322
12600 Fair Lakes Circle
Fairfax, VA 22033
(703) 222-2200

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Notice of Rule 5:(B) of the Rules of the Supreme Court of Virginia was mailed postage pre-paid this 13 day of December, 1996 to:

Lora A. Brzezynski, Esquire
Stauffer & Abraham, L.L.C
8300 Greensboro Drive
McLean, Virginia 22102

David Gogal, Esquire
Blankenship & Keith
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Fairfax, Virginia 22030

Jan L. Brodie, Esquire
Fairfax County Attorney
12000 Government Center Parkway, Suite 549,
Fairfax, Virginia 22035-0064

Bernard E. Goodman, Esquire
Goodman, Gary & Lickstein, P.C.
8500 Leesburg Pike, Suite 7000
Vienna, Virginia, 22812

Scott E. Snyder

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GEORGE ATKISSON
and
CAROLOTTA ATKISSON

Plaintiffs,

v.

In Chancery No. 97823

WEXFORD ASSOCIATES, INC.

HERBERT D. VOGEL, JR.

BARBARA C. VOGEL

MICHAEL A. DANIELS

BONNIE L. DANIELS

JOHN WHITACRE

GENEVIEVE WHITACRE

DONALD D. HALL

JOAN P. HALL

JAMES E. HENRY, JR.

SUSAN H. HENRY

JOHN KOWALCZYK

KATHERINE KOWALCZYK

PATRICK G. DEASY

JANE M. DEASY

MARK L. ECKMAN

VIVIAN D. DATOFF

CHARLES E. ANDREWS

JEAN S. ANDREWS

BRIAN T. McVAY

ELIZABETH McVAY

M. JACK WILKENFELD

375

JOANNE WILKENFELD)
)
PATRICK M. BYRNE)
)
KARYN A. BYRNE)
)
JACK A. WINTERS)
)
BERNADETTE WINTERS)
)
CHARLES B. HAWTHORNE)
)
AUDREY K. HAWTHORNE)
)
WALTER T. MORGAN)
)
BETH A. MORGAN)
)
MICHAEL A. PERRY)
)
JEAN D. PERRY)
)
THOMAS G. MORR)
)
KAREN T. MORR)
)
DALE A. MOSS)
)
KATHLEEN S. MOSS)
)
JOHN F. KARASZEWSKI)
)
LYNN S. KARASZEWSKI)
)
KEITH F. HIGGINBOTHAM)
)
WENDY J. HIGGINBOTHAM)
)
JUSTIN A. HOLMES)
)
CLAUDIA J. HOLMES)
)
JAMES A. EVANS)
)
JACQUELYN F. EVANS)
)
THOMAS A. SHOEMAKER)
)
JOAN C. SHOEMAKER)
)
JAMES S. HOOKER)
)

MAUREEN A. HOOKER)
)
LARRY D. CORELL)
)
GALE M. CORELL)
)
DONALD C. MINOQUE)
)
SUSAN A. MINOQUE)
)
LAWRENCE W. WYTE)
)
DIANE B. WYTE)
)
MICHAEL R. WALLER)
)
DIANE V. WALLER)
)
KATHLEEN SMITH)
)
LUCILLE CHASE)
)
MIRTIE DYER)
)
MABLE HOHMANN)
)
WILLARD ADAMS)
)
FRANCIS YOUNG)
)
THOMAS E. ADAMS)
)
BYRD ADAMS)
)
ROBERT ADAMS)
)
ANNE GRESHAM)
)
BETTY BAKER)
)
JOAN VIPPERMAN)
)
JOHN VIPPERMAN)
)
JOHN ADAMS)
)
JOHN S. ATKISSON)
)
JAMES L. ATKISSON)
)
PAUL ATKISSON)
)

DEWILTON ADAMS)
)
ALLAN SMITH)
)
LARRY SMITH)
)
MRS. OSCAR KROMBHOLZ)
)
CHARLES P. ADAMS)
)
ETHEL ADAMS)
)
DONALD HALL)
10098 Byrd Road)
Fairfax, Virginia)
)
JOAN HALL)
10098 Byrd Road)
Fairfax, Virginia)
)
RAYMOND CAVANAGH)
20070 Carrhill Road)
Vienna, Virginia 22181)
)
EILEEN CAVANAGH)
20070 Carrhill Road)
Vienna, Virginia 22181)
)
THOMAS HEALY)
20090 Carrhill Road)
Vienna, Virginia 22181)
)
VICTORIA HEALY)
20090 Carrhill Road)
Vienna, Virginia 22181)
)
COUNTY OF FAIRFAX)
and)
The unknown heirs to:)
)
MARY SAUNDERS)
)
BELLE SMITH)
)
R. L. ADAMS)
)
LEWIS ADAMS)
)
ROSE MCDANIELS)
)
CARRIE POWELL)
)

EFFIE POWELL)
)
OLIVE ADAMS)
)
ADELBERT ADAMS)
)
HARMONIA ADAMS)
)
IRENE ADAMS)
)
EDNA ADAMS)
)
SIDNEY ADAMS)
)
TRUEMAN ADAMS)
OSCAR ADAMS)
)
RUSSELL ADAMS)
)
THOMAS S. ADAMS)
)
Defendants.)

FOURTH AMENDED BILL OF COMPLAINT

The Plaintiffs, George and Carlotta Atkisson, by counsel, move the Court for relief against the Defendants on the grounds and in the amount as hereinafter set forth:

1. Plaintiffs, GEORGE and CARLOTTA ATKISSON ("Atkissons") are owners of a private family cemetery lot adjacent to Section III of the Wendover Subdivision in Fairfax County, Virginia, and identified as such on the attached tax map marked "Exhibit A".

2. The heirs to Mary Saunders, Belle Smith, R. L. Adams, Lewis Adams, Rose McDaniels, Carry Powell, Effie Powell, Olivia Adams, Adelbert Adams, Harmonia Adams, Irene Adams, Edna Adams, Sidney Adams, Trueman Adams, Oscar Adams, Russell Adams and Thomas Adams have been made necessary parties to this matter pursuant to the Order of this Court entered on January 5, 1996 as having an interest in the private family

cemetary lot adjacent Section III of the Wendover Subdivision in Fairfax County, Virginia.

3. Kathleen Smith is the only known heir to Belle Smith, Lucille Chase is the only known heir to R. L. Adams, Myrtie Dyer, Mable Hohmann and Willard Adams are the only known heirs to Lewis Adams and the following are the only known heirs to Thomas S. Adams:

Francis Young

Thomas E. Adams

Byrd Adams

Robert Adams

Anne Gresham

Betty Baker

Joan Vipperman

John Adams

John S. Atkisson

James L. Atkisson

Paul Atkisson

DeWilton Adams

Allan Smith

Larry Smith

Mrs. Oscar Krumholz

Charles P. Adams

Ethel Adams

4. The known heirs of Thomas Adams have quitclaimed their interest in the family cemetary lot adjacent to Section III of Wendover Subdivision of Fairfax County, Virginia to Plaintiffs, George and Carlotta Atkisson.

5. Donald Hall and Joan Hall are owners of Lot No. 1, Wendover 3 and pursuant to the Order of this Court dated January 5, 1996, they are necessary parties to this matter.

6. Raymond Cavanagh, Eileen Cavanagh, Thomas Healy, Victoria Healy and the County of Fairfax have been made additional parties to this matter pursuant to the order of this Court dated February 16, 1996.

7. That Defendant, WEXFORD ASSOCIATES, INC., is the sole owner of Lot Nos. 12, 13, 14, 15 and 17 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

8. That Defendants, HERBERT D. VOGEL, JR. and BARBARA C. VOGEL, are sole owners of Lot No. 23 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

9. That Defendants, MICHAEL A. DANIELS and BONNIE L. DANIELS, are sole owners of Lot No. 24 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

10. That Defendants, JOHN WHITACRE and GENEVIEVE WHITACRE, are sole owners of Lot No. 33 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

11. That Defendants, DONALD D. HALL and JOAN P. HALL, are sole owners of Lot No. 1 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

12. That Defendants, JAMES E. HENRY, JR. and SUSAN H. HENRY, are sole owners of Lot No. 2 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

13. That Defendants, JOHN KOWALCZYK and KATHERINE KOWALCZYK, are sole owners of Lot No. 3 in the Wendover Subdivision, Section III, in

Fairfax County, Virginia.

14. On or about June 10, 1994, Defendants, PATRICK G. DEASY and JANE M. DEASY, sold Lot Number 4 in the Wendover Subdivision, Section III, in Fairfax County, Virginia, to the additional Defendants, MARK L. ECKMAN and VIVIAN D. DATOFF.

15. That Defendants, CHARLES E. ANDREWS and JEAN S. ANDREWS, are sole owners of Lot No. 5 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

16. That Defendants, BRIAN T. McVAY and ELIZABETH McVAY, are sole owners of Lot No. 6 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

17. That Defendants, M. JACK WILKENFELD and JOANNE WILKENFELD, are sole owners of Lot No. 7 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

18. That Defendants, PATRICK M. BYRNE and KARYN A. BYRNE, are sole owners of Lot No. 8 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

19. That Defendants, JACK A. WINTERS and BERNADETTE WINTERS, are sole owners of Lot No. 9 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

20. That Defendants, CHARLES B. HAWTHORNE and AUDREY K. HAWTHORNE, are sole owners of Lot No. 18 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

21. That Defendants, CHARLES B. HAWTHORNE and AUDREY K. HAWTHORNE, are sole owners of Lot No. 19 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

22. That Defendants, WALTER T. MORGAN and BETH A. MORGAN, are sole owners of Lot No. 25 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

23. That Defendants, MICHAEL A. PERRY and JEAN D. PERRY, are sole owners of Lot No. 26 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

24. That Defendants, THOMAS G. MORR and KAREN T. MORR, are sole owners of Lot No. 27 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

25. That Defendants, DALE A. MOSS and KATHLEEN S. MOSS, are sole owners of Lot No. 27 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

26. That Defendants, JOHN F. KARASZEWSKI and LYNN S. KARASZEWSKI, are sole owners of Lot No. 28 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

27. That Defendants, KEITH F. HIGGINBOTHAM and WENDY J. HIGGINBOTHAM, are sole owners of Lot No. 30 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

28. That Defendants, JUSTIN A. HOLMES and CLAUDIA J. HOLMES, are sole owners of Lot No. 31 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

29. That Defendants, JAMES A. EVANS and JACQUELYN F. EVANS, are sole owners of Lot No. 32 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

30. That Defendants, THOMAS A. SHOEMAKER and JOAN C. SHOEMAKER, are sole owners of Lot No. 34 in the Wendover Subdivision, Section III, in

Fairfax County, Virginia.

31. That Defendants, JAMES S. HOOKER and MAUREEN A. HOOKER, are sole owners of Lot No. 35 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

32. That Defendants, LARRY D. and GALE M. CORELL, are sole owners of Lot No. 36 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

33. That Defendants, DONALD C. MINOQUE and SUSAN A. MINOQUE, are sole owners of Lot No. 37 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

34. That Defendants, LAWRENCE W. WYTE and DIANE B. WYTE, are sole owners of Lot No. 38 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

35. That Defendants, RAYMOND C. CAVANAUGH and EILEEN B. CAVANAUGH, are sole owners of Lot No. 39 in the Wendover Subdivision, Section III, in Fairfax County, Virginia.

36. That Defendants, MICHAEL R. WALLER and DIANE C. WALLER, sold Lot No. 40 in the Wendover Subdivision, Section III, in Fairfax County, Virginia to Thomas Healy and Victoria Healy on July 10, 1991.

37. That Defendant, County of Fairfax, to the best of Plaintiffs knowledge and belief, holds title to real property through which the Plaintiffs easement runs through. To the best of the knowledge and belief of Plaintiffs, there are no obstructions existing in those areas on Defendant, Fairfax County's real property where the easement exists.

38. That the real property now comprising Wendover Subdivision, Section III, and now owned in part by the aforesaid persons, hereinafter

referred to as "lot owners" collectively, was previously referred to among the land records as Parcel 48 and Parcel 49.

39. That in or about 1892, Mary C. Saunders, then owner of Parcel 49, expressly conveyed by Deed, a fifteen (15) foot wide easement, right-of-way, leading to certain property, including the family cemetery lot, owned at that time by Thomas Adams, grandfather of Plaintiff, George Atkisson. The express granting of the easement/right-of-way was recorded among the land records of Fairfax County, Virginia at Deed Book Liber P, No. 5, Page 361, and attached hereto as Exhibit B.

40. That Parcel 48 was conveyed to Robert Adams, by a deed which expressly made said land subject to the easement/right-of-way was recorded among the land records of Fairfax County, Virginia at Deed Book Liber H, No. 5, Page 237.

41. That the said easement/right-of-way in favor of the land owned by Thomas Adams was the only means of ingress and egress to his land, including the family cemetery lot situated therein, and ran appurtenant to the servient estates known as Parcel 49 owned by Mary Saunders and Parcel 48 owned by Robert Adams.

42. That the then heir of Thomas Adams conveyed the land comprising the dominant estate to Harold Miller, Trustee, by Deed recorded at Deed Book 4865, Page 13, among the land records of Fairfax County, Virginia. Said sale occurred on the condition that said cemetery lot be preserved.

43. By Deed recorded in the Fairfax County Land Records, Book 5572, Page 775 Harold Miller, Trustee, conveyed to the Atkissons sole ownership of said family cemetery lot. See Plaintiffs' Exhibit C.

44. By Deed recorded among the land records of Fairfax County, Virginia, at Deed Book 5344, Page 575, Harold Miller, Trustee, granted to the Atkissons sole ownership of said right-of-way leading to said cemetery lot in order for the Atkissons and their family to have a means of ingress and egress to said cemetery lot for maintenance and visitation purposes. See Plaintiffs' Exhibit D.

45. That in the alternative, the Plaintiffs, as heirs of Thomas Adams, have an ownership interest in said cemetery lot. In addition thereto, all available heirs of Thomas Adams have deeded any remaining interest they have in the cemetery lot to the Plaintiffs.

46. Since that time, the Atkissons are the owners of record of the Cemetery Lot, receive tax bills, and have kept up and maintained said cemetery lot, including repairing headstones, posting signs, and fencing the family lot. The Atkissons used both the cemetery lot and the easement/right-of-way up until late 1983 and attempted thereafter, on occasion, to visit the cemetery by use of the easement/right-of-way.

47. That after Mary Saunders death, her interest in Parcel 49 was conveyed to Harry Smith, whose daughter, Kathleen Smith, inherited said parcel and by deed recorded among the Fairfax County, Virginia, Land records, Book 3392,Page 72, conveyed her interest to Defendant, Charles Hawthorne, sole owner.

48. That the heirs of Robert Adams granted title to Parcel 48 to Daniel Capper and his wife, Ellyn G. Capper, by a deed recorded among the land records of Fairfax County, Virginia, at Deed Book 3688, Page 356.

49. That the Cappers in turn granted title to Parcel 48 to Charles Hawthorne and his wife, Audrey K. Hawthorne, by a deed recorded among the

land records of Fairfax County, Virginia, at Deed Book 4603, Page 343.

50. That the Hawthornes had full knowledge as to the existence of said cemetery lot and easement/right-of-way by way of discussions with the Plaintiff regarding the proposed widening of said easement/right-of-way.

51. That during the 1979 re-zoning hearings on the application of Defendant, Charles Hawthorne, for the re-zoning of Parcel 48 and Parcel 49 for residential development, George Atkisson testified as to the existence of said easement/right-of-way.

52. That prior to the approval of the Hawthornes' application, their attorney, Robert A. Lawrence, received correspondence from Sidney R. Steele, Chief Zoning Evaluation Branch, Fairfax County Office of Comprehensive Rezoning, setting forth an obligation to investigate and resolve any existing property rights of the Atkissons in the access right-of-way/easement across the Hawthorne property. A copy of said letter is attached hereto as Exhibit E.

53. Notwithstanding Defendant Hawthornes' knowledge of said right-of-way, their obligation to resolve the property rights of the Atkissons, and the Atkissons' continued efforts to resolve the matter, the Hawthornes, without regard to their obligation to the Atkissons, conveyed to Defendant, Wexford Associates, Inc. ("Wexford"), Parcel 48 and Parcel 49 by Deed recorded among the land records of Fairfax County, Virginia at Book 5772, Page 497 in 1983.

54. That Mr. Atkisson, upon discovering the conveyance by the Hawthornes of the parcels across which their easement ran, contacted Defendant Wexford to notify them of its legal duty not to obstruct or to trespass on the Atkissons' right-of-way and to seek a resolution which

would allow Wexford to develop the parcels while preserving the Atkissons' access to the family cemetery.

55. That in late 1983, Defendant Wexford, with deliberate malicious and wanton disregard to the Atkissons' property rights, began the development of residences known as Section III of Wendover Subdivision, physically destroying the site of the easement/right-of-way and obstructing Plaintiffs' use thereof.

56. The Defendant Wexford has further obstructed the said easement/right-of-way by the development of a detention pond.

57. That said easement/right-of-way is the sole means of ingress and egress from the cemetery lot to the Clark Crossing outlet road leading to an improved road. Since the inception of said trespass and obstruction by Defendant Wexford and the continuing trespass and obstruction by the Defendant Wexford and Defendant "lot owners", the cemetery has been landlocked.

58. The obstructions created by Defendants have made it impossible for Plaintiff or his family members to care for or visit their family cemetery lot since 1983 without arguably trespassing upon land of neighboring owners. Said lot contains the remains of at least ten (10) members of the Plaintiffs' family.

59. That the said easement/right-of-way has been used notoriously, continuously, exclusively and openly by Thomas Adams and his descendants, including George Atkisson, from the time of conveyance, from Mary Saunders and Robert Adams up until late in 1983.

60. Fairfax County Park Authority has trespassed directly upon said cemetery lot and has removed barriers placed by Mr. Atkisson in an attempt

to keep out trespassers. Fairfax County Park Authority has used a path contrary to an easement/right-of-way which the Atkissons dedicated to be used for horseback riding, and has trampled directly upon the resting places of the Atkissons' ancestors.

61. Fairfax County Park Authority also owns land adjacent to Wendover Subdivision, Section III, which was deeded and/or otherwise granted to said Defendant by Defendant hawthorne from Parcel 48 and/or Parcel 49.

62. That the said easement/right-of-way in favor of the Atkisson cemetery property runs appurtenant to the servient estate of said land owned by the Fairfax County Park Authority.

63. That the Fairfax County Park Authority has or is planning to interrupt and obstruct Plaintiffs' easement/right-of-way from the cemetery to the Clark Crossing outlet road by construction of a parking lot on or near said easement/right-of-way.

64. That the Plaintiffs have no plain, adequate, and complete remedy at law.

COUNT I

Injunction and Damages for Obstruction of Express Easement

65. That the allegations of Paragraphs 1 though 58, inclusive, are re-alleged and incorporated herein by reference.

66. That the Plaintiffs, George and Carlotta Atkisson, have an express easement/right-of-way appurtenant by deed in favor of the dominant estate (cemetery lot) which is traceable by a direct chain of title through to the Defendants herein, having conveyed with the land.

67. that the actions of Defendant Wexford and the lot owners constitute an ongoing and continuing trespass and obstruction of Plaintiffs, George and Carlotta Atkisson's easement/right-of-way which has resulted in damages an disrepair to the cemetery lot, violation of property rights, diminution in value of the cemetery lot, deprivation of use of the cemetery lot by Plaintiffs, George and Carlotta Atkisson and has caused emotional distress of related personal injury to be suffered by the Plaintiffs.

68. That the Fairfax County Park Authority is prospectively engaged in the obstruction of said easement/right-of-way.

69. WHEREFORE, the Plaintiffs, George and Carlotta Atkisson demand a permanent injunction against all Defendants to prevent further trespass and obstruction to family cemetery lot and the easement/right-of-way leading thereto, to have any existing impediments and obstructions removed at the expense of Defendants, jointly and severally, and to have a declaration of existence and extent of the easement/right-of-way.

(a) Plaintiffs, George and Carlotta Atkisson further demand compensatory damages in the amount of THREE HUNDRED

THOUSAND DOLLARS ($300,000.00) to be paid jointly and severally by all Defendants for damages to the dominate estate, diminution in value, deprivation of use of real property, intentional infliction of emotional distress and related personal injury.

(b) Plaintiffs, George and Carlotta Atkisson further demand punitive damages in the amount of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) to be paid jointly and severally by Defendant Wexford for the intentional, malicious and wanton trespass and deprivation of property rights of the Plaintiffs.

(c) Plaintiffs, George and Carlotta Atkisson further request that Defendants be ordered to pay all reasonable attorneys' fees and costs incurred by the Plaintiffs and for such other equitable relief as the Court deems appropriate and just.

COUNT II

Injunction and Damages for Obstruction of Implied Easement by Necessity

70. That the allegations of Paragraphs 1 though 63, inclusive, are re-alleged and incorporated herein by reference.

71. That, in the alternative, the Defendants in fact have or had actual and/or constructive notice of the easement/right-of-way and until late 1983 it was, and in many areas remains, visible and well-defined.

72. That no other means of egress or ingress to the cemetery lot can be substituted at the reasonable expense of the Plaintiffs, George and Carlotta Atkisson and that said easement/right-of-way is necessary for the reasonable enjoyment of the dominate estate.

73. That the actions of Defendant Wexford and the lot owners constitute an ongoing and continuing trespass and obstruction of Plaintiffs, George and Carlotta Atkisonn's easement/right-of-way which has resulted in damages an disrepair to the cemetery lot, violation of property rights, diminution in value of the cemetery lot, deprivation of use of the cemetery lot by Plaintiffs, George and Carlotta Atkisson and has caused emotional distress of related personal injury to be suffered by the Plaintiffs, George and Carlotta Atkisson.

74. That the Fairfax County Park Authority is prospectively engaged in the obstruction of said easement/right-of-way.

75. WHEREFORE, the Plaintiffs, George and Carlotta Atkisson demand that the Court find an implied easement/right-of-way by necessity exists in favor of the cemetery lot and issue a permanent injunction against all Defendants to prevent further trespass and obstruction to the easement/right-of-way of the family cemetery lot, to have any existing impediments and obstructions removed at the expense of Defendants, jointly and severally, excluding Fairfax County Park Authority.

(a) Plaintiffs, George and Carlotta Atkisson further demand compensatory damages in the amount of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) to be paid jointly and severally by all Defendants for damages to the dominate estate, diminution in value, deprivation of use of real property, intentional infliction of emotional distress and related personal injury.

(b) Plaintiffs, George and Carlotta Atkisson further demand punitive damages in the amount of FIVE HUNDRED THOUSAND

DOLLARS ($500,000.00) to be paid jointly and severally by Defendant Wexford for the intentional, malicious and wanton trespass and deprivation of property rights of the Plaintiffs, George and Carlotta Atkisson.

(c) Plaintiffs, George and Carlotta Atkisson further request that Defendants be ordered to pay all reasonable attorneys' fees and costs incurred by the Plaintiffs and for such other equitable relief as the Court deems appropriate and just.

COUNT III

Injunction and Damages for Obstruction of Prescriptive Easement

76. That the allegations of Paragraphs 1 though 69, inclusive, are re-alleged and incorporated herein by reference.

77. That, in the alternative, the Plaintiffs, George and Carlotta Atkisson adverse use of a private way through the described property owned by Defendants had been exclusive, continuous and notorious for the period of time exceeding twenty (20) years.

78. That the Defendants and their predecessor owners of the land now compromising Wendover Subdivision, Section III, knowingly acquiesced in the use of said private way by Plaintiffs and Plaintiffs' family for a period exceeding twenty (20) years.

79. That the actions of Defendant Wexford and the lot owners constitute an ongoing and continuing trespass and obstruction of Plaintiffs' easement/right-of-way which has resulted in damages an disrepair to the cemetery lot, violation of property rights, diminution in value of the cemetery lot, deprivation of use of the cemetery lot by

Plaintiffs, and has caused emotional distress of related personal injury to be suffered by the Plaintiffs.

80. That the Fairfax County Park Authority is prospectively engaged in the obstruction of said easement/right-of-way.

81. WHEREFORE, the Plaintiffs, George and Carlotta Atkisson demand that the Court find an easement/right-of-way by prescription exists in favor of the cemetery lot and issue a permanent injunction against all Defendants to prevent further trespass and obstruction to the easement/right-of-way of the family cemetery lot, to have any existing impediments and obstructions removed at the expense of Defendants, jointly and severally, excluding Fairfax County Park Authority.

(a) Plaintiffs, George and Carlotta Atkisson further demand compensatory damages in the amount of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) to be paid jointly and severally by all Defendants for damages to the dominate estate, diminution in value, deprivation of use of real property, intentional infliction of emotional distress and related personal injury.

(b) Plaintiffs, George and Carlotta Atkisson further demand punitive damages in the amount of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) to be paid jointly and severally by Defendant Wexford for the intentional, malicious and wanton trespass and deprivation of property rights of the Plaintiffs.

(c) Plaintiffs, George and Carlotta Atkisson further request that Defendants be ordered to pay all reasonable attorneys' fees and costs incurred by the Plaintiffs and for

such other equitable relief as the Court deems appropriate and just.

GEORGE ATKISSON
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