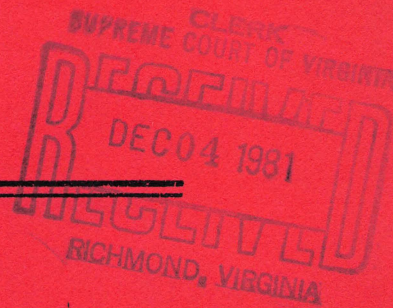


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IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

[JAN 31 1984]

RECORD NO. 810319

BOARD OF SUPERVISORS OF STAFFORD COUNTY,

Appellant

v.

SAFECO INSURANCE COMPANY OF AMERICA,

Appellee

APPENDIX

William H. Harris  
HARRIS & HARRIS  
809 William Street  
Fredericksburg, Virginia 22401

Counsel for Appellant

William M. Sokol  
R. Scott Pugh  
918 Princess Anne Street  
Fredericksburg, Va. 22401

Counsel for Appellee



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EXHIBITS - - SEPARATE VOLUME



VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

BOARD OF SUPERVISORS OF STAFFORD COUNTY  
STAFFORD, VIRGINIA 22554,

Plaintiff

vs.

AT LAW  
NO. \_\_\_\_\_

SAFECO INSURANCE COMPANY OF AMERICA  
SAFECO PLAZA  
SEATTLE, WASHINGTON 98185

SERVE: Edward R. Parker  
5511 Staples Mill Road  
Richmond, Virginia 23228

Defendant

MOTION FOR JUDGMENT

TO: THE HONORABLE JUDGES OF THE CIRCUIT COURT OF STAFFORD  
COUNTY, VIRGINIA

The Board of Supervisors of Stafford, Virginia, by its  
counsel, hereby moves for judgment against Defendant, Safeco  
Insurance Company of America and as grounds therefore states:

1. Plaintiff is the duly constituted Board of Supervisors of  
Stafford County, Virginia, with principal offices at  
Stafford, Virginia.
2. Defendant, Safeco Insurance Company of America (hereinafter  
Safeco) is a corporation organized under the laws of the  
State of Washington, with principal offices in Seattle,  
Washington.

COUNT I

3. This is an action on bond in favor of Plaintiff posted by  
Crows Nest Harbour, a Virginia partnership (hereinafter  
Crows Nest) as Principal, and Safeco, as Surety.

4. On or about October 2, 1973, Crows Nest as Principal, by its authorized agent, and Safeco as Surety and by its authorized agent, for a valuable consideration, executed a Bond in favor of Plaintiff. A copy of said Bond is attached as Exhibit "A".
5. Crows Nest intended for Plaintiff to rely upon said Bond.
6. Safeco intended for Plaintiff to rely upon said Bond.
7. Plaintiff relied upon said Bond.
8. All conditions precedent to the duty of Safeco to perform have occurred.
9. Plaintiff has demanded performance from Safeco.
10. Safeco has refused to perform.
11. By reason of the foregoing facts, Safeco owes Plaintiff the sum of \$311,254.00.
12. Plaintiff re-alleges paragraphs 1, 2 and 3 as though set forth again in full.

COUNT II

13. On or about October 2, 1973, Crows Nest, as principal, by its authorized agent, for a valuable consideration, executed a Bond in favor of Plaintiff. A copy of said Bond is attached as Exhibit "B".
14. Plaintiff re-alleges paragraph 5 through 10 as though set forth again in full.
15. By reason of the foregoing facts, Safeco owes Plaintiff the sum of \$410,949.00.

COUNT III

16. Plaintiff re-alleges paragraphs 1, 2 and 3 as though set forth again in full.
17. On or about October 2, 1973, Crows Nest, as Principal, by its



authorized agent, and Safeco, as Surety and by its authorized agent, for a valuable consideration, executed a Bond in favor of Plaintiff. A copy of said Bond is attached as Exhibit "C".

18. Plaintiff re-alleges paragraph 5 through 10 as though set forth again in full.
19. By reason of the foregoing facts, Safeco owes Plaintiff the sum of \$373,041.00.

COUNT IV

20. Plaintiff re-alleges paragraphs 1, 2 and 3 as though set forth again in full.
21. On or about October 2, 1973, Crows Nest, as Principal, by its authorized agent, for a valuable consideration, executed a Bond in favor of Plaintiff. A copy of said Bond is attached as Exhibit "D".
22. Plaintiff re-alleges paragraph 5 through 10 as though set forth again in full.
23. By reason of the foregoing facts, Safeco owes Plaintiff the sum of \$192,248.00.

WHEREFORE, the Plaintiff demands judgment be rendered against Safeco, with interest from October 2, 1975, and costs of this action and attorney's fees, in the following amounts:

COUNT I - \$311,254.00  
COUNT II - \$410,949.00  
COUNT III - \$373,041.00  
COUNT IV - \$192,248.00

BOARD OF SUPERVISORS OF  
STAFFORD COUNTY, VIRGINIA

BY: William H. Harris  
Of Counsel

William H. Harris  
County Attorney  
Stafford County  
809 William Street  
Fredericksburg, Virginia  
22401



ATTACHMENT A - Bond

ATTACHMENT B - Bond

ATTACHMENT C - Bond

ATTACHMENT D - Bond

PRINTERS NOTE:

The above mentioned Attachments are the same as Plaintiff's Exhibits Numbered 1, 2, 3 and 4. Said exhibits may be found on pages 9 thru 24 of the Exhibit Volume.

ANSWER AND GROUNDS OF DEFENSE  
OF SAFECO INSURANCE COMPANY OF AMERICA

TO: THE HONORABLE JUDGES OF THE CIRCUIT COURT OF STAFFORD  
COUNTY, VIRGINIA

Comes now defendant Safeco Insurance Company of  
America, by its counsel, and for its answer and grounds of  
defense to the Motion for Judgment filed herein by the  
Board of Supervisors of Stafford County alleges as follows:

FIRST DEFENSE

1. In response to the numbered paragraphs of the Motion for Judgment herein, this Defendant admits the allegations of paragraphs 1 through 4, states that it is without information or knowledge permitting it to admit or deny paragraph 5 and therefore denies the said paragraph, admits the allegations of paragraph 6, states that it is without information or knowledge permitting it to admit or deny paragraph 7 and therefore denies the said paragraph, denies the allegations of paragraph 8, admits the allegations of paragraphs 9, denies the allegations of paragraphs 10 and 11 and admits the allegations of paragraph 12.

SECOND DEFENSE

2. By way of further defense, Defendant asserts that the bonds here in question are performance bonds within the meaning of Section 11-23 of the Code of Virginia (1950) (as amended) and that the present action cannot be main-



tained and is barred since it was not timely filed within the limits specified by the said Section 11-23.

### THIRD DEFENSE

3. By way of further defense, Defendant asserts that the bonds here in question, upon which Plaintiff's claim is based, require the payment of funds by Defendant only to complete the construction of certain specified improvements and utilities. The improvements and utilities in question have not been begun. Accordingly, there has been a failure of condition precedent to the bond contract herein and no liability can exist on the part of Defendant until such time as Plaintiff shows that the work in question has been completed.

### FOURTH DEFENSE

4. By way of further defense, Defendant asserts that there was a want and failure of consideration for the obligation of Defendant on the bonds in question herein and that Defendant therefore cannot be held liable to Plaintiff on the basis of the said bonds.

### FIFTH DEFENSE

5. By way of further defense, Defendant asserts that, by reason of lack of funds, no work was ever commenced by Defendant's principal, Crow's Nest Harbour, on the improvements and utilities covered by the bond contracts

herein. There is presently no work being done on such utilities and improvements and no prospect of such work ever being done. The full penal sum of the bonds, moreover, would not pay for the costs of all improvements to which such sum must be devoted. Since the work in question has not and will not be done, and since the bonds at issue here are restricted to the specified improvements and utilities on which work is neither being done nor is contemplated, the contract is impossible of performance and the surety is discharged.

#### SIXTH DEFENSE

6. By way of further defense, Defendant asserts that the parties to the bond contracts here in question contemplated that any sums paid pursuant to such bonds would be so paid only to defray damages to Plaintiff from the costs incurred by it in the building and completion of the specified improvements and utilities covered by the bonds. Defendant further asserts that the construction of the improvements and utilities covered by the bonds which are the subject of this suit has never taken place and will not take place. Accordingly, Plaintiff herein has incurred no costs and suffered no damages within the purview of the bonds here at issue. Any recovery by Plaintiff herein would therefore be contrary to the intentions of the parties and would amount to recovery of a forfeiture or penalty and would be void as against



the public policy of the Commonwealth of Virginia.

#### SEVENTH DEFENSE

7. By way of further defense, Defendant asserts that the bonds in question herein are performance bonds within the meaning of Section 11-23 of the Code of Virginia (1950) (as amended) and, as such, contemplate the payment of no sums pursuant to such bonds save and except to compensate Plaintiff for actual costs, expenses and damages incurred by Plaintiff in the completion of the improvements and utilities specified in such bonds. Since such improvements and utilities have not been begun, and will not be begun or completed, Plaintiff has incurred no expenses, costs or damages which are cognizable under the bonds in question herein and no liability can attach to Defendant pursuant to such bonds.

#### EIGHTH DEFENSE

8. By way of further defense, Defendant asserts that any obligation of the Defendant on the bonds at issue here was intended by the parties to such bonds to be limited to costs and expenses necessary to complete certain specified utilities and improvements. Any amounts paid by Defendant pursuant to such bonds must therefore be used solely for such improvements and utilities and may not be merged with any general funds of Plaintiff.

Since the improvements in question have never been begun, and will not be undertaken, since the full penal sums of the bonds here at issue will not suffice to build the improvements and utilities to which such sums are limited, and since Plaintiff can point to no damages or costs incurred by reason of the failure to complete the specified improvements and utilities, Defendant is without obligation under the bonds in question because the purpose of the bond contracts here at issue cannot be served by payment of any sums under the bonds.

#### NINTH DEFENSE

9. By way of further defense, Defendant asserts that Plaintiff has incurred no expenses and suffered no damages by reason of failure to complete the specified improvements and utilities to which Defendant's obligation on the bonds herein is restricted. The specified improvements and utilities have been neither begun nor completed and there is no prospect of such improvements and utilities being begun or completed. The penal sums of the bonds in question must be used solely to construct the utilities and improvements to which they are explicitly limited and dedicated in such bonds, although such penal sums will not suffice to construct such utilities and improvements. Any recovery by Plaintiff on the bonds herein would thus constitute a windfall to Plaintiff, unjustly enriching Plaintiff, since there is no prospect of such amounts being used as required by the bond contract.

#### TENTH DEFENSE

10. By way of further defense, Defendant asserts that Diversified Mortgage Investors (DMI), a Massachusetts business trust organized under the laws of the Commonwealth of Massachusetts and with offices in Coral Gables, Florida, and Burlington, Massachusetts, was the direct and proximate cause of any and all damage or loss for which this Defendant may be held liable. DMI is not before this Court; and, in its absence, Defendant cannot present an adequate defense and will not be accorded relief to which it is entitled, all in violation of its rights to due process of law. Further, Defendant asserts that any sums for which it may ultimately be held liable on its bonds must be used to construct the improvements and utilities to which such sums are explicitly dedicated. Such utilities and improvements cannot be constructed without the participation of DMI, which participation cannot be achieved unless the rights and liabilities of DMI are adjudicated by this Court.

#### ELEVENTH DEFENSE

11. By way of further defense, Defendant asserts that it is entitled to be subrogated, upon payment of any sums under its bonds here in question, to all rights of Plaintiff, including lien rights, contractual rights, and other rights of whatever nature.

12. Any sums paid to Plaintiff by Defendant pursuant to its bonds here in question may be used by Plaintiff only in the construction of the utilities and improvements to which such sums are explicitly dedicated. To the extent any such payments by Defendant are used by Plaintiff, directly or indirectly, to construct such improvements and utilities, Plaintiff is entitled under Sections 15.1-239 through 15.1-249.1 of the Code of Virginia (1950) (as amended) to levy taxes and assessments upon property owners abutting the land where such improvements and utilities are constructed. Pursuant to Section 58-762 of the Code of Virginia (1950) (as amended) such taxes and assessments would constitute priority liens upon the real estate. Defendant is entitled to be subrogated to Plaintiff's rights in regard to such taxes and assessments, any proceeds realized therefrom, any liens based thereon and any proceeds from such liens.

#### TWELFTH DEFENSE

13. By way of further defense, Defendant asserts that, in any event, it is not liable for attorney's fees or interest herein since its liability is specifically limited by the bond contracts here in question to the penal amount specified in such bond contracts.

#### THIRTEENTH DEFENSE

14. By way of further defense, Defendant asserts that Section 8-353 of the Code of Virginia (1950) limits any liability of Defendant on its bonds herein to the amounts specified in such bond and that the limitation specified by the said Section 8-353 was relied upon by Defendant when it entered the bond contracts at issue herein. Such limitation provided by the said Section 8-353 should therefore be applied herein as a matter of substantive right and in the interests of justice.

#### FOURTEENTH DEFENSE

15. Defendant admits the allegation of paragraph number 13 of the Motion for Judgment herein.
16. By way of answer and grounds of defense to paragraph 14 of the Motion for Judgment herein, Defendant re-alleges paragraphs 1 through 14 of this Answer and Grounds of Defense as if set forth again in full.
17. By reason of the foregoing facts, Defendant denies paragraph 15 of the Motion for Judgment herein.

#### FIFTEENTH DEFENSE

18. Defendant admits the allegations of paragraphs 16 and 17 of the Motion for Judgment herein.
19. By way of answer to paragraph 18 of the Motion for Judgment herein, Defendant re-alleges paragraphs 1

through 14 of this Answer and Grounds of Defense as if set forth again in full.

20. By reason of the foregoing facts, Defendant denies the allegation of paragraph number 19 of the Motion for Judgment herein.


SIXTEENTH DEFENSE

21. Defendant admits the allegations of paragraphs 20 and 21 of the Motion for Judgment herein.
22. By way of answer and grounds of defense to paragraph 22 of the Motion for Judgment herein, Defendant re-alleges paragraphs 1 through 14 of this Answer and Grounds of Defense as if set forth again in full.
23. By reason of the foregoing facts, Defendant denies the allegation of paragraph number 23 of the Motion for Judgment herein.

WHEREFORE, having fully answered, Defendant Safeco Insurance Company of America prays as follows:

- (1) That it be dismissed, with its costs herein expended; and
- (2) For such other relief as this Court may deem appropriate.

SAFECO INSURANCE COMPANY OF AMERICA

  
By-Counsel



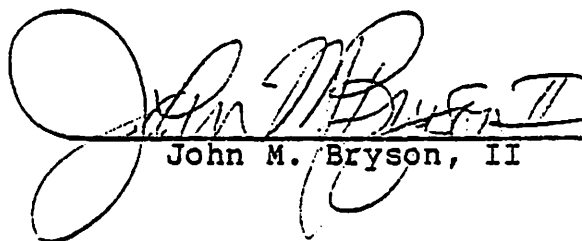
James V. Dolan, Esq.  
Jeffrey P. Moran, Esq.  
STEPTOE & JOHNSON  
1250 Connecticut Avenue, N.W.  
Washington, D.C. 20036

John Bryson, Esq.  
P.O. Box 396  
133 Park Street, N.E.  
Vienna, Virginia 22180

Counsel for Safeco Insurance Company of  
America

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing  
Answer and Grounds of Defense of Safeco Insurance Company  
of America was mailed first-class postage prepaid to  
William H. Harris, Attorney for Plaintiff, 809 William  
Street, Frederickburg, Virginia 22401 this 19th day of  
October, 1977.

  
John M. Bryson, II

O R D E R

This day came Board of Supervisors of Stafford County, by Counsel, and requested leave to amend the Motion for Judgment to make an allegation and a prayer of relief for consequential damages;

WHEREAS, the Court is of the opinion that the Board of Supervisors should be permitted to amend their Motion for Judgment to include consequential damages and the Court is further of the opinion that the matter should be continued generally;

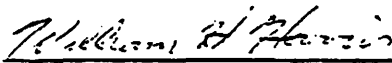
Upon consideration whereof, this Court does hereby grant the plaintiff, Board of Supervisors of Stafford County, the right to amend the Motion for Judgment to include consequential damages. Said amendment to be made within fourteen (14) days of the date of entry of this Order, and the Defendant shall have twenty-one (21) days from the date the amended Motion for Judgment is filed to file the Defendant's answer, and this case is continued generally.

ENTER:

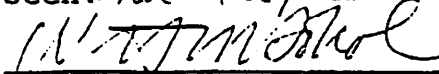
DATE:

 JUDGE

I ask for this:

  
William H. Harris, p. q.

Seen and accepted to:

  
William M. Sokol, p. d.

AMENDED MOTION FOR JUDGMENT

TO: THE HONORABLE JUDGES OF THE CIRCUIT COURT OF STAFFORD  
COUNTY, VIRGINIA

The Board of Supervisors of Stafford, Virginia, by its counsel, hereby moves for judgment against Defendant, Safeco Insurance Company of America and as grounds therefore states:

1. Plaintiff is the duly constituted Board of Supervisors of Stafford County, Virginia, with principal offices at Stafford, Virginia.

2. Defendant, Safeco Insurance Company of America (hereinafter Safeco) is a corporation organized under the laws of the State of Washington, with principal offices in Seattle, Washington.

COUNT I

3. This is an action on bond in favor of Plaintiff posted by Crows Nest Harbour, a Virginia partnership (hereinafter Crows Nest) as Principal, and Safeco, as Surety.

4. On or about October 2, 1973, Crows Nest as Principal, by its authorized agent, and Safeco as Surety and by its authorized agent, for a valuable consideration, executed a Bond in favor of Plaintiff. A copy of said Bond is attached as Exhibit "A" to the Original Motion for Judgment and incorporated herein and made a part hereof.

5. Crows Nest intended for Plaintiff to rely upon said Bond.

6. Safeco intended for Plaintiff to rely upon said Bond.

7. Plaintiff relied upon said Bond.

8. All conditions precedent to the duty of Safeco to perform

have occurred.

9. Plaintiff has demanded performance from Safeco on June 21, 1976.

10. Safeco has refused to perform.

11. By reason of the foregoing facts, Safeco owes Plaintiff the sum of \$311,254.00.

#### COUNT II

12. Plaintiff re-alleges paragraphs 1, 2 and 3 as though set forth again in full.

13. On or about October 2, 1973, Crows Nest, as principal, by its authorized agent, for a valuable consideration, executed a Bond in favor of Plaintiff. A copy of said Bond is attached as Exhibit "B" is attached to the original Motion for Judgment and made a part hereof, incorporated herein.

14. Plaintiff re-alleges paragraph 5 through 10 as though set forth again in full.

15. By reason of the foregoing facts, Safeco owes Plaintiff the sum of \$410,949.00.

#### COUNT III

16. Plaintiff re-alleges paragraphs 1, 2 and 3 as though set forth again in full.

17. On or about October 2, 1973, Crows Nest, as Principal, by its authorized agent, and Safeco, as Surety and by its authorized agent, for a valuable consideration, executed a Bond in favor of Plaintiff. A copy of said Bond is attached as Exhibit "C", is attached to the original Motion for Judgment and incorporated herein and made a part hereof.

18. Plaintiff re-alleges paragraph 5 through 10 as though set forth again in full.

19. By reason of the foregoing facts, Safeco owes Plaintiff the sum of \$373,041.00.

#### COUNT IV

20. Plaintiff re-alleges paragraphs 1, 2 and 3 as though set forth again in full.

21. On or about October 2, 1973, Crows Nest, as Principal, by its authorized agent, for a valuable consideration, executed a Bond in favor of Plaintiff. A copy of said Bond is attached as Exhibit "D", to the original Motion for Judgment and incorporated herein and made a part hereof.

22. Plaintiff re-alleges paragraphs 5 through 10 as though set forth again in full.

23. By reason of the foregoing facts, Safeco owes Plaintiff the sum of \$192,248.00.

#### COUNT V

24. On or about June, 1976, the cost of completing the bonded improvements identified in said bond exceeded the amount of bonds for Sections A, B, C & D of Crows Nest Harbour (hereinafter Project).

25. The cost of completing the bonded improvements was increasing due to inflation and unless the sums were paid it would be unlikely all or a portion of the bonded improvements could be completed for the sum of the bonds.

26. The total monetary damages that the Plaintiff will have suffered by reason of the Developer's failure to complete the project and Safeco's failure to perform its obligations under

the said bond cannot be precisely determined until the project is completed. However, the engineering report of Safeco's engineering consultant, Surety Consultants, Inc., reflects the costs of completing the bonded improvements for Sections A, B, C and D exceeded the total amount due under the said bonds. As of March 28, 1979, the costs of the improvements covered by the subject bond are as follows:

<u>Section</u>	<u>Amount of Bond</u>	<u>Estimated Cost of Improvements</u>	<u>Consequential Damages Difference</u>
A	\$410,949	\$1,629,830	\$1,218,881
B	311,254	683,562	372,308
C	192,248	378,789	186,541
D	<u>373,041</u>	<u>1,013,704</u>	<u>640,663</u>
TOTAL	\$1,287,492	\$3,705,885	\$2,418,393

27. Safeco several times communicated either directly or by way of intermediaries to Plaintiff, since about July 1, 1976, Safeco will not agree to hire a contractor to complete the Project or pay the amount of the bonds.

28. The facts and circumstances hereinbefore described in paragraphs 24 through 27 inclusive, of this Motion for Judgment have been known, or should have been known, to Safeco, since July, 1976 or October 10, 1976, and they are known to Safeco now.

29. Safeco knowing the extent of its liabilities to Plaintiff under the Bond, has intentionally chosen to breach its obligations to Plaintiff under said bonds; and it has refused to make payment on the said bonds, in bad faith, fraudulently and maliciously, for purposes of obfuscating that clear liability which exists to Plaintiff and providing some pretext upon which it might rely to



excuse or justify its non-performance of such obligations to Plaintiff; while at the same time using the economic coercion extant upon Plaintiff in the facts and circumstances for purposes of coercing Plaintiff to agree to an unreasonable settlement of the valid claims Plaintiff possesses against Safeco.

30. The County suggested the following alternatives in an attempt to resolve Safeco's liability on the bonds:

- a. Development of the project on a reduced scale
- b. donating part of the land to the State for a park and having the State construct the access road.
- c. finding another developer who would be willing to complete the project and having Safeco increase the amount of the bond on the project.
- d. buy out the approximately 300 property owners who have purchased lots in Crows Nest Harbour at less than their actual costs.

None of the alternatives were acceptable to Safeco for various reasons.

31. Safeco's Counsel (at one time), Michael K. Wyatt, wrote on May 20, 1977 that "the cost to complete the improvements as originally specified is presently substantially in excess of the bond amounts."

32. In furtherance of such intentional, wrongful and malicious plan, intention and/or scheme to delay payment on the bonds or avoid payment on the bonds altogether, Safeco have wrongfully claimed that there is no plan for the specific improvements and that Safeco has no liability to provide funds under its bonds; that Safeco can take no action toward the payment of the bonds without DMI's participation; that payment by Safeco

would provide no solution to the overall problem, since the cost to complete the improvements as originally specified is presently substantially in excess of the bond amounts; that if the development, as originally conceived, will not actually be built, Safeco has no liability on its bonds; and that ownership of the development had to be determined before Safeco would pay the bonds

WHEREFORE, the Plaintiff demands judgment be rendered against Safeco, with interest from June 21, 1976 and costs of this action and attorney's fees, in the following amounts:

Count I	- \$	311,254.00
Count II	-	410,949.00
Count III	-	373,041.00
Count IV	-	<u>192,248.00</u>

Sub-TOTAL - \$1,287,492.00

and compensatory damages in such an amount as this Court shall determine to be proper and legally recoverable against Safeco but in at least the following amounts:

<u>Section</u>	<u>Amount of Consequential Damages as of March 28, 1979</u>
A	\$1,218,881
B	372,308
C	186,541
D	<u>640,663</u>
Sub-TOTAL	\$2,418,393
TOTAL	\$3,705,885

And such other and further relief as to this Court may seem just and proper in the circumstances, including but not limited to the right to amend the pleadings to conform with evidence produced at trial.

BOARD OF SUPERVISORS OF  
STAFFORD COUNTY, STAFFORD, VIRGINIA

By William H. Harris  
Of Counsel

William H. Harris, p.q.  
County Attorney  
Stafford County  
809 William Street  
Fredericksburg, Va. 22401

CERTIFICATE

I hereby certify that on this the 19<sup>th</sup> day of June, 1979, a true copy of the foregoing Amended Motion for Judgment was mailed, postage prepaid, or hand delivered, to William M. Sokol, Esquire, Counsel for Defendants, 618 Princess Anne Street, Fredericksburg, Virginia, 22401.

William H. Harris  
William H. Harris

## GROUND OF DEFENSE

The Defendant, Safeco Insurance Company of America, by counsel, for its Grounds of Defense to Counts I, II, III and IV of the Amended Motion for Judgment, states as follows:

### COUNT I

1. The Defendant admits the allegations contained in paragraphs 1, 2, 3 and 4 of the Amended Motion for Judgment. The Defendant need not respond to paragraphs 5 and 7 of the Amended Motion for Judgment, since the allegations contained therein make reference to subjective factors relating to others. The Defendant, in response to paragraph 6 of the Amended Motion for Judgment, makes reference to the bond attached as an exhibit to the Amended Motion for Judgment, since this bond contains no reference with respect to any such intention of the Defendant. The Defendant denies the allegations contained in paragraphs 8, 9, 10 and 11 of Count I of the Amended Motion for Judgment.

### COUNT II

2. The Defendant admits the allegations contained in paragraphs 12 and 13 of the Amended Motion for Judgment. The Defendant, in response to paragraph 14 of the Amended Motion for Judgment, relies on its previously given responses to paragraphs 5 through 10 of the Amended Motion for Judgment. The Defendant denies paragraph 15 of the Amended Motion for Judgment.

### COUNT III

3. The Defendant admits the allegations contained in paragraphs 16 and 17 of the Amended Motion for Judgment. The Defendant, in response to paragraph 18 of the Amended Motion for Judgment, relies on its previously given responses to paragraphs 5 through 10 of the Amended Motion for Judgment. The Defendant denies paragraph 19 of the Amended Motion for Judgment.

### COUNT IV

4. The Defendant admits the allegations contained in paragraphs 20 and 21 of the Amended Motion for Judgment. The Defendant, in response to paragraph 22 of the Amended Motion for Judgment, relies on its previously given responses to paragraphs 5 through 10 of the Amended Motion for Judgment. The Defendant denies paragraph 23 of the Amended Motion for Judgment.

### COUNT V

5. The Defendant neither admits nor denies the allegations contained in paragraphs 24 through 32 of Count V of the Amended Motion for Judgment. The Defendant files a Demurrer to Count V, and all allegations therein contained, which Demurrer is filed simultaneously with this Grounds of Defense.

6. By way of further defense, the Defendant hereby adopts and incorporates by reference paragraphs 2 through 14 of its Answer and Grounds of Defense to the Plaintiff's original Motion for Judgment. The Defendant adopts the said paragraphs as part of this Grounds of Defense in the same manner and to the

same extent as though each of the said paragraphs were fully set out herein.

7. By way of further defense, the Defendant asserts that the subject bonds were conditioned on the continued legal efficacy of the subject subdivision plats. The subject subdivision plats were conditioned upon the construction of a central water and sewer system, the construction of adequate access roads and the continuation of a plan to develop a subdivision upon the Crows Nest Harbour property. None of these conditions have been, or will be, fulfilled. The subdivision plats are thus void and of no legal effect. The Plaintiff cannot recover under the subject bonds for the construction of specified improvements and utilities, because the subdivision is no longer in existence.

8. By way of further defense, the Defendant asserts that the Plaintiff has the right to require the specified improvements and utilities only so long as the need for such improvements and utilities is substantially generated by the proposed development. Since the development as originally contemplated cannot, and will not, exist, the County can no longer, constitutionally or otherwise, require the Defendant to pay under the bonds for specified improvements and utilities when the need therefor no longer exists.

9. By way of further defense, the Defendant asserts that the purpose of the subject bonds was to insure the construction of specified public improvements and utilities to be operated in conjunction with related public improvements, utilities, and facilities, including, among other things, a public water and sewer system and adequate access roads, and



the provision of related public services, including, among other things, public water. Since the related public improvements, utilities and facilities will not be constructed and the related public services will not be provided, the purpose of the Defendant's undertaking has been frustrated and its performance has been rendered impossible.

10. By way of further defense, the Defendant asserts that the Plaintiff has modified its comprehensive plan for the subject property and has rezoned the subject property. The rezoning and change in the comprehensive plan have had the effect of prohibiting the construction of the Crows Nest Harbour Development as originally contemplated. The Plaintiff cannot require the Defendant to pay under its bond, for the construction of specified public improvements and utilities, after it has effectively prevented the development to be built as originally contemplated. To require the Defendant to pay under its bond for such specified public improvements and utilities, considering the wrongful action by the Plaintiff would be unjust and unreasonable and would involve an illegal forfeiture. In addition, the Plaintiff has breached its agreement with Crows Nest Harbour partnership, the principal, to provide appropriate zoning for the subject property, and, therefore, has discharged the Defendant, as surety.

11. By way of further defense, the Defendant asserts that it entered into the subject bonds with the reasonable expectation and anticipation that the Plaintiff would enter into and abide by agreements with Crows Nest Harbour for the construction of related public improvements, utilities and facilities,

including among other things, a public water and sewer system and adequate access roads, and the provision of related public services, including, among other things, public water. The Plaintiff wrongfully failed to enter into and abide by such agreements and, therefore, by reason of same, has discharged the Defendant as surety and has otherwise forfeited its rights against the Defendant.

12. By way of further defense, the Defendant asserts that the subject bonds are severable and divisible into two separate components: first, the construction of streets in the aggregate sum of \$758,400.00; second, the construction of water and sewer lines in the aggregate sum of \$529,092.00. The Plaintiff, therefore, must prove independently its rights to recover the amount of the bonds attributable to the construction of streets, and also, its rights to recover the amount of the bonds attributable to the construction of water and sewer lines.

13. Any and all allegations contained in Counts I, II, III and IV of the Amended Motion for Judgment, which have not been expressly admitted herein, are denied.

WHEREFORE, having fully answered the allegations contained in Counts I, II, III and IV of the Amended Motion for Judgment filed herein, the Defendant, Safeco Insurance Company of America, prays that such counts be dismissed, that it be awarded its costs herein expended and that the Court grant whatever other relief as it may deem appropriate.

SAFECO INSURANCE COMPANY OF AMERICA

By

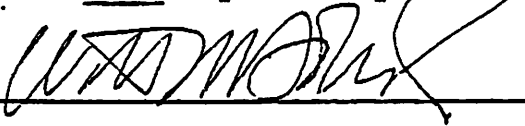


Counsel

WHITTICAR, SOKOL & LEDBETTER  
P.O. Box 593  
918 Princess Anne Street  
Fredericksburg, Virginia 22401

CERTIFICATE

I, William M. Sokol, hereby certify that I have  
mailed, postage pre-paid, a copy of the foregoing Grounds of  
Defense to William H. Harris, Esquire, 809 William Street,  
Fredericksburg, Virginia 22401, this 9<sup>th</sup> day of July, 1979.

  
\_\_\_\_\_

### DEMURRER

The Defendant, Safeco Insurance Company of America, by counsel, files this Demurrer to Count V of the Amended Motion for Judgment, including all of those allegations contained in paragraphs 24 through 32 thereof, representing as follows:

1. The Plaintiff alleges in Count V that Safeco acted in bad faith, fraudulently, maliciously and wrongfully. These allegations are too vague, indefinite and conclusory to state a cause of action against the Defendant for such conduct. The identities of the agents, officers and employees who are alleged to have perpetrated the wrongful acts are not revealed. The details of the time and place where the alleged wrongful acts occurred are not set forth. The allegations of wrongful conduct set forth in Count V are insufficient as a matter of law to set forth a cause of action against the Defendant. Tuscarora v. BVA, 218 Va. 849 (1978).

2. The Plaintiff asserts that the Defendant has acted in bad faith, fraudulently, maliciously and wrongfully. The basis of this assertion is the Plaintiff's contention that if it believes it has a valid claim, it has one, and if the other party disagrees and makes an effort to defend itself, it acts in a fraudulent, malicious and wrongful manner. A principle of law, deeply rooted in American jurisprudence and Virginia common law, is that a party has a right, in both criminal and civil cases, to defend itself against claims made against it. A party, who is a potential defendant in a case, also has the

right, in both criminal and civil cases, to require the Plaintiff to prove its case against it. The grounds cited by the Plaintiff as establishing wrongful conduct are insufficient as a matter of law to state a cause of action against the Defendant.

3. The Plaintiff asserts that it has a right to recover monies in excess of the total sum of the subject bonds. In Virginia, the Plaintiff's damages for the recovery under a subdivision bond, are the reasonable costs of completing the public improvements not to exceed the amount of the bond. The Plaintiff, as a matter of law, cannot recover the damages it seeks herein. Supervisors v. Ecology I, 219 Va. 29 (1978).

4. The Plaintiff's allegations in Counts I, II, III and IV sound in contract. The circumstances alleged in Counts I, II, III and IV do not arise out of the same transactions or occurrences as those alleged in Count V. Furthermore, the evidence which will be introduced in support of the allegations contained in Count V are inadmissible, as a matter of law, in a lawsuit concerning the allegations contained in Counts, I, II, III and IV. The Plaintiff, as a matter of law, cannot properly join into a single lawsuit Counts I, II, III and IV with Count V. Virginia Code §8.01-272.

WHEREFORE, the Defendant, Safeco Insurance Company of America, by counsel, prays the Court to dismiss Count V of the Amended Motion for Judgment and that it be awarded its costs expended herein.

SAFECO INSURANCE COMPANY OF AMERICA

By W. J. M. J. J.  
Of Counsel

WHITTICAR, SOKOL & LEDBETTER  
918 Princess Anne Street  
P.O. Box 593  
Fredericksburg, Virginia 22401

CERTIFICATE

I, William M. Sokol, hereby certify that I have  
mailed, postage pre-paid, a copy of the foregoing Demurrer  
to William H. Harris, Esquire, 809 William Street, Fredericksburg,  
Virginia 22401, this 9<sup>th</sup> day of July, 1979.

WATM Sokol



JUDGES

EDWARD P. SIMPKINS, JR.  
HANOVER, VIRGINIA 23069  
(804) 798-6061

DIXON L. FOSTER  
P. O. Box 152  
LANCASTER, VIRGINIA 22503  
(804) 462-3001

JOHN A. JAMISON  
P. O. Drawer 29  
FREDERICKSBURG, VIRGINIA 22401  
(703) 373-3796

JERE M. H. WILLIS, JR.  
P. O. Box 441  
FREDERICKSBURG, VIRGINIA 22401  
(703) 371-0373

# Commonwealth of Virginia

## FIFTEENTH JUDICIAL CIRCUIT



November 5, 1979

COUNTIES OF

NORTHUMBERLAND

WESTMORELAND

SPOTSYLVANIA

KING GEORGE

LANCASTER

CAROLINE

STAFFORD

RICHMOND

HANOVER

ESSEX

CITY OF FREDERICKSBURG

Mr. William Sokol  
918 Princess Anne Street  
Fredericksburg, Va. 22401

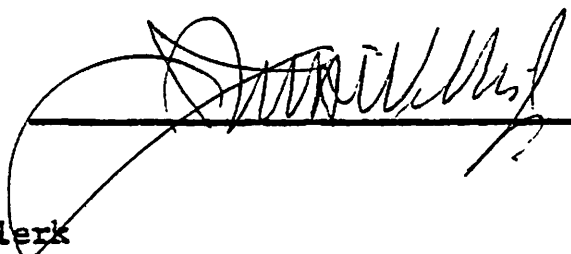
Mr. William H. Harris  
✓ 809 William Street  
Fredericksburg, Va. 22401

Re: Board of Supervisors  
Vs: Safeco Insurance Company of America

Gentlemen:

I have reviewed the file and the authorities which you submitted, and have considered your arguments. I have determined that the demurrer to Count V of the Amended Motion for Judgment will be sustained.

Counsel will submit an Order in accord with these views.

  
\_\_\_\_\_  
Judge

CC: Mr. S. L. Alexander, Clerk

**HARRIS & HARRIS**  
**ATTORNEYS AT LAW**  
**FREDERICKSBURG, VIRGINIA 22401**

WILLIAM H. HARRIS  
JOHN P. HARRIS, III

December 4, 1979

809 WILLIAM STREET  
(703) 371-4941

The Honorable J. M. H. Willis, Jr.  
Judge, 15th Judicial Circuit  
P. O. Box 441  
Fredericksburg, Virginia 22401

Re: Board of Supervisors of Stafford County  
vs.  
Safeco Insurance Company of America  
Law No. 307-77

Dear Judge:

On November 5th, 1979, you sustained a demurrer to Count V of the Amended Motion for Judgment. Your letter advising us of your opinion does not state whether the Board of Supervisors will have the right to amend and/or whether Count V of the Amended Motion for Judgment was dismissed with or without prejudice to the plaintiff. Please advise Mr. Sokol and myself. A copy of your letter is enclosed for your convenience.

Thank you very much.

Yours truly,

*William H. Harris*

William H. Harris  
Stafford County Attorney

WHH/ms

CC: William Sokol, Esq.

JUDGES

EDWARD P. SIMPKINS, JR.  
HANOVER, VIRGINIA 23069  
(804) 798-6081

DIXON L. FOSTER  
P. O. Box 152  
LANCASTER, VIRGINIA 22503  
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JOHN A. JAMISON  
P. O. DRAWER 29  
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(703) 373-3766

JERE M. H. WILLIS, JR.  
P. O. Box 441  
FREDERICKSBURG, VIRGINIA 22401  
(703) 371-0373

# Commonwealth of Virginia

## FIFTEENTH JUDICIAL CIRCUIT



COUNTIES OF

NORTHUMBERLAND

WESTMORELAND

SPOTSYLVANIA

KING GEORGE

LANCASTER

CAROLINE

STAFFORD

RICHMOND

HANOVER

ESSEX

CITY OF FREDERICKSBURG

December 5, 1979

Mr. Wm. M. Sokol  
918 Princess Anne Street  
Fredericksburg, Va. 22401

Mr. Wm. H. Harris  
809 William Street  
Fredericksburg, Va. 22401

Re: Board of Supervisors of Stafford County  
Vs: Safeco Insurance Co. of America

Gentlemen:

I have Mr. Harris' letter concerning my sustaining the Demurrer to Count V of the Amended Motion for Judgment in this case. That Count will be stricken and may not be amended.

Very truly yours,

J. M. H. Willis, Jr.  
Judge

CC: Mr. S. L. Alexander, Clerk

O R D E R

On October 29, 1979, the parties appeared, by counsel, and argued the Demurrer of Safeco Insurance Company to Count V of the Amended Motion for Judgment of the Board of Supervisors of Stafford County. Upon consideration whereof, it is the opinion of the Court that the Demurrer of the defendant is well taken, and accordingly, it is ADJUDGED, ORDERED, and DECREED that the Demurrer be, and it hereby is, sustained, and Count V of the Amended Motion for Judgment shall be deemed dismissed, with prejudice to the plaintiff.

ENTER:

151

JUDGE

DATE: 12/10/79

I ASK FOR THIS:

W. M. Sokol  
William M. Sokol, p. d.

SEEN AND EXCEPTED TO:

William H. Harris  
William H. Harris, p. q.

THIRD PARTY MOTION FOR JUDGMENT

Comes now Safeco Insurance Company of America, third party plaintiff, by counsel, pursuant to Rule 3:10 of the Rules of the Supreme Court of Virginia, as amended, and moves the Court for judgment against Diversified Mortgage Investors, third party defendant, in the amount of One Million, Two Hundred Eighty-seven Thousand, Four Hundred Ninety-two Dollars . (\$1,287,492.00), with interest from October 2, 1975, and costs and attorney's fees, for the reasons hereinafter set forth:

1. The third party defendant is a non-resident who engages in purposeful activity in the Commonwealth of Virginia, and has not designated an agent for an acceptance of service of process. Jurisdiction is exercised and conferred under the provisions of Section 8.01-328.1 et. seq., of the Code of Virginia, in that the third party defendant transacts business in the Commonwealth of Virginia, contracts to supply services in the Commonwealth of Virginia, and has an interest in real property located in Stafford County, Virginia. This cause of action arises from such acts and interest, as set forth and described hereinbelow.

2. On or about September 20, 1977, the plaintiff filed in the Clerk's Office of the Circuit Court of Stafford County a Motion for Judgment against Safeco Insurance Company of America, demanding in four (4) separate counts judgments totaling \$1,287,492.00, with interest from October 2, 1975, and costs and attorney's fees.

3. The plaintiff attached to its Motion for Judgment

ment Exhibits A, B, C & D — Subdivision Bonds issued by Safeco Insurance Company of America relating to the completion of proposed real estate developments undertaken by Crows Nest Harbour Limited Partnership in Aquia Magisterial District, Stafford County, Virginia.

4. On or about October 19, 1977, Safeco Insurance Company of America filed its Answer and Grounds of Defense, asserting sixteen (16) separate defenses to the Motion for Judgment, generally denying any liability under the aforesaid Subdivision Bonds, and moving to be dismissed.

5. On or about September 13, 1973, the third party defendant, Diversified Mortgage Investors, by Burton A. Hartman, Ass't. Sec., and Crows Nest Harbour Limited Partnership, and Safeco Insurance Company of America, entered into a contract and agreement, consisting of two pages, identified and titled "Contingent Assignment of Interest", a true copy marked Safeco's Exhibit 1, attached hereto, and expressly made a part of this Third Party Motion for Judgment as though fully recited in its entirety.

6. Diversified Mortgage Investors and Crows Nest Harbour Limited Partnership had entered into separate agreements, including the Loan Agreement referred to in Exhibit 1, the effect of which were to create a substantial interest by Diversified Mortgage Investors in Crows Nest Harbour Limited Partnership developing approximately 4720 acres located in Stafford County, Virginia.

7. Diversified Mortgage Investors agreed and entered into the Contingent Assignment of Interest for the purpose of

inducing the third party plaintiff to issue the Subdivision Bonds to permit Crows Nest Harbour Limited Partnership to comply with requirements imposed by the Board of Supervisors of Stafford County.

8. As Surety, Safeco Insurance Company of America, issued certain Subdivision Bonds on or about October 2, 1973, in penal sums matching the amounts shown (Sections A, B, C & D) in paragraph 1 of the Contingent Assignment of Interest, in reliance upon the representations, covenants, guarantees and protections assumed and undertaken by Diversified Mortgage Investors.

9. Crows Nest Harbour Limited Partnership has failed to perform the grading, paving, water drainage, catch basins and sewer work with respect to the Sections of the Project which were described in the Subdivision Bonds and the Contingent Assignment of Interest.

10. Under the terms and provisions of the Contingent Assignment of Interest, the third party plaintiff is entitled to the amount sued for herein, the same having been allocated by the third party defendant to serve the purpose which has arisen by reason of the default of Crows Nest Harbour Limited Partnership.

11. In the event the plaintiff recovers any sum of the defendant, the third party defendant is liable to the third party plaintiff for all or part of the claim asserted by the Board of Supervisors of Stafford County.

WHEREFORE, the third party plaintiff moves for judg-

ment against the third party defendant as aforesaid.

SAFECO INSURANCE COMPANY OF AMERICA

By

  
Counsel

WILLIAM M. SOKOL, ESQUIRE  
Whitticar, Sokol & Ledbetter  
P. O. Box 593  
918 Princess Anne Street  
Fredericksburg, Virginia 22401

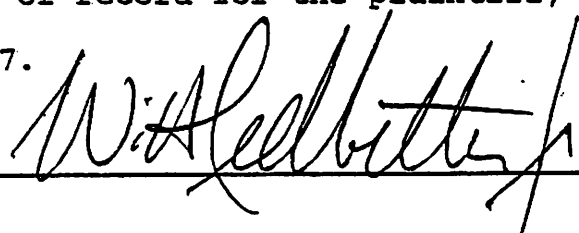
JAMES V. DOLAN, ESQUIRE  
JEFFREY P. MORAN, ESQUIRE  
Steptoe & Johnson  
1250 Connecticut Avenue, N. W.  
Washington, D. C. 20036

JOHN BRYSON, ESQUIRE  
P. O. Box 396  
133 Park Street, N. E.  
Vienna, Virginia 22180

Counsel for Safeco Insurance Company of America

CERTIFICATE

I hereby certify that a true and correct copy of  
this Third Party Motion for Judgment was mailed, postage prepaid  
to William H. Harris, Esquire, 809 William Street, Fredericks-  
burg, Virginia 22401, counsel of record for the plaintiff, this  
3<sup>d</sup> day of November, 1977.

  
\_\_\_\_\_



CONTINGENT ASSIGNMENT  
OF INTEREST

WHEREAS, DIVERSIFIED MORTGAGE INVESTORS, (hereinafter referred to as "DMI"), has entered into a loan Agreement with CROWS NEST HARBOUR LIMITED PARTNERSHIP, (hereinafter referred to as "Principal"), by which DMI has agreed to provide to Principal certain funds for the development of a project described as recreational homesites development on approximately 4,720 acres located in Stafford County, Virginia (hereinafter referred to as the "Project"), and

WHEREAS, it is required under the laws of the State of Virginia that certain performance and maintenance bonds be provided by Principal, and

WHEREAS, Principal has requested SAFECO INSURANCE COMPANY OF AMERICA (hereinafter referred to as the "Surety"), to execute said bond, or bonds, as Surety thereon, and

WHEREAS, the Surety is agreeable to executing said bond, or bonds, as aforesaid, on the condition that Principal assign to the Surety its rights under the aforementioned Loan Agreement, subject to the conditions set forth herein, and,

WHEREAS; DMI consents to this assignment as set forth herein.

NOW, THEREFORE, in consideration of the premises, the execution of the bond, or bonds, hereinafter set forth, and of other good and valuable considerations, the parties hereto stipulate and agree as follows:

1. The Surety will execute as Surety the following described bond, or bonds, for the construction cost of certain of the improvements in the Project, the description of which and the amount of said bond, or bonds, being as follows:

Grading, paving, water drainage, catch basins  
and sewers in the following Sections of the  
Project:

Section A	\$410,949
" B	311,254
" C	192,248
" D	373,041
" E	294,916
" E <sub>1</sub>	<u>1,062,262</u>

\$2,644,670

2. DMI represents to the Surety that from the total loan funds it has allocated the amount of \$2,644,670 for the aforementioned improvements and will disburse such funds in accordance with the Loan Agreement, and will not

permit the use of the funds allocated for the improvement covered by the bond, for any other purpose except with the written consent of the Surety.

3. Should Principal fail to complete its obligation under the said bond, or bonds, or should Principal default under the terms of the Loan Agreement with DMI, Principal, for itself and its successors and assigns, hereby assigns all of its right, title and interest in the undisbursed portion of the loan funds allocated for the aforementioned improvements covered by said bond, or bonds, to the Surety. DMI agrees that it will make available to the Surety in accordance with the terms of the Loan Agreement the undisbursed portion of the funds allocated for such improvements whether said improvements have been satisfactorily completed but not paid for, or not completed, provided that the Surety shall within 30 days of notice by DMI that the Principal has failed to complete its obligation under the said bond, or bonds, or defaulted under the terms of the Loan Agreement, undertake to promptly complete the improvements and obligations covered by said bond, or bonds. DMI shall have the option to complete the improvements covered by said bond, or bonds, and to pay all amounts due for work already satisfactorily performed but not paid for, and should it notify the Surety that it has exercised the option to so complete, and pay such sums, this Assignment of Interest to the Surety shall be of no force and effect. In the event DMI should acquire the real property through foreclosure, this agreement shall nevertheless continue in full force and effect.

4. In no event shall the Surety be entitled to more funds hereunder than the amount required to complete the obligations of the bond, or bonds.

5. It is further understood that the acceptance of this Agreement by the Surety does not obligate the Surety to any additional responsibility or obligation that might have been incurred by any contractor, or others, other than those specific obligations described in the surety or bond instrument, or instruments.

6. All of the parties hereto agree to cancel the effect of this instrument, when the full amount set forth herein has been disbursed by DMI for the purposes described herein.

7. This assignment shall be binding upon the successors and assigns of the parties to this Agreement.

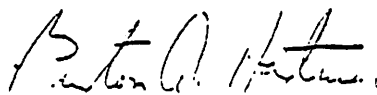
8. Subject to the provisions of Paragraph 3 above, this is an irrevocable commitment of funds which is not subject to recall unless DMI shall undertake to complete the improvements at its own expense, or the Loan has been repaid by CROWS NEST HARBOUR LIMITED PARTNERSHIP, or unless the Surety has been released from liability under the aforesaid bonds.

Dated this 17th day of September, 1973.

The name Diversified Mortgage Investors is the designation of the Trustees for the time being under a Declaration of Trust dated July 13, 1969, as amended, and all persons dealing with Diversified Mortgage Investors must look solely to the Trust property for the enforcement of any claims against Diversified Mortgage Investors as neither the Trustees, officers, agents or share holders assume any personal liability for obligations entered into on behalf of Diversified Mortgage Investors.

DIVERSIFIED MORTGAGE INVESTORS,  
a Massachusetts business trust

By:



Burton A. Hartman, Ass't Sec.

ATTEST:

[Signature]

ATTEST:

OB [Signature]

D. B. Seibert  
Attorney-in-Fact

ATTEST:

[Signature]

PRINCIPAL:

CROWS NEST HARBOUR LIMITED PARTNERSHIP

By: FVM CORPORATION

By:

[Signature]  
Richard J. Ford, President

SURETY:

SAFECO INSURANCE COMPANY OF AMERICA

By:

Eugene S. Gosney  
Eugene S. Gosney  
Assistant Vice President

PRINCIPAL:

CROWS NEST HARBOUR LIMITED PARTNERSHIP

BY: RESEARCH HOMES, INC.

By:

[Signature]  
Richard J. Ford, President

: REQUEST FOR ADMISSIONS  
ADDRESSED TO  
SAFECO

Please read Rule 4:11 of the Rules of the Supreme Court of Virginia carefully before responding.

SAFECO is requested to admit:

1. Crows Nest Harbour, a Virginia partnership, (hereinafter Crows Nest), presented to the Board of Supervisors of Stafford County, Virginia, (hereinafter Board), for recordation of a plat of subdivision in Aquia Magisterial District, Stafford County, Virginia, (hereinafter Aquia), made by G. W. Clifford and Associates, (hereinafter Clifford), dated March, 1972, designated Section "C", Crows Nest Harbour Subdivision.

2. Crows Nest presented to the Board for recordation a plat of subdivision in Aquia made by Urban Engineering and Associates dated September, 1972, designated Section "D", Crows Nest Harbour Subdivision.

3. Crows Nest presented to the Board for recordation a plat of subdivision in Aquia made by Clifford dated September, 1971, designated Section "A", Crows Nest Harbour Subdivision.

4. Crows Nest presented to the Board for recordation a plat of subdivision in Aquia made by Clifford dated September, 1971, designated Section "B", Crows Nest Harbour Subdivision.

5. A condition of approval and recordation of the plat referred to in Paragraph 1 above was construction of the streets and water and sewer lines therein in accordance with the specifications shown on the plat referred to in Paragraph 1 above.

6. A condition of the approval and recordation of the

plat referred to in Paragraph 2 above was construction of the streets and water and sewer lines therein in accordance with the specifications shown on a plat referred to in Paragraph 2 above.

7. A condition of the approval and recordation of the plat referred to in Paragraph 3 above was construction of the streets and water and sewer lines therein in accordance with the specifications shown on a plat referred to in Paragraph 3 above.

8. A condition of the approval and recordation of the plat referred to in Paragraph 4 above was construction of the streets and water and sewer lines therein in accordance with the specifications shown on a plat referred to in Paragraph 4 above.

9. Crows Nest did not complete the water and sewer lines and streets referred to in Paragraph 5 above in a workmanlike manner in accordance with the specifications referred to in Paragraph 5 above within 24 months of October 2nd, 1973.

10. Crows Nest did not complete the water and sewer lines and streets referred to in Paragraph 6 above in a workmanlike manner in accordance with the specifications referred to in Paragraph 6 above within 24 months of October 2nd, 1973.

11. Crows Nest did not complete the water and sewer lines and streets referred to in Paragraph 7 above in a workmanlike manner in accordance with the specifications referred to in Paragraph 7 above within 24 months of October 2nd, 1973.

12. Crows Nest did not complete the water and sewer lines and streets referred to in Paragraph 8 above in a workmanlike manner in accordance with the specifications referred

to in Paragraph 8 above within the 24 months of October 2nd, 1973.

13. Plaintiff was not a party to the September 13, 1973, agreement and contract identified and titled "Contingent Assignment of Interests" and marked "Safeco's Exhibit 1".

14. Prior to October 30, 1975, Safeco did not inform the Plaintiff that Safeco had entered into the September 13, 1973, agreement and contract identified and titled "Contingent Assignment of Interests" and marked "Safeco's Exhibit 1".

15. Crows Nest has failed to perform the grading, paving, water drainage, catch basins and sewer work in respect to the sections of the project which were described in the subdivision's bonds attached to the Motion for Judgment as Exhibits A, B, C and D.

BOARD OF SUPERVISORS OF  
STAFFORD COUNTY, VIRGINIA

By: William H. Harris  
Of Counsel

William H. Harris  
Attorney for Stafford County, Va.  
809 William Street  
Fredericksburg, Virginia 22401

CERTIFICATE

I hereby certify that a true and correct copy of this Request for Admissions Addressed To Safeco was mailed, postage prepaid, or hand-carried to William M. Sokol, Esquire, P. O. Box 593, 918 Princess Anne Street, Fredericksburg, Virginia, 22401; James V. Dolan, Esquire and Jeffrey P. Moran, Esquire, 1250 Connecticut Avenue, N. W., Washington, D. C. 20036; John Bryson, Esquire, P. O. Box 396, 133 Park Street, N. E., Vienna, Virginia, 22180; Howard A. Tulman, 208 S. LaSalle Street, Chicago, Illinois, 60604; Stuart C. Economou, 122 South Royal Street, P.O. Box 701; Alexandria, Virginia 22313, Robert B. Goodall, P.O. Box 316, Stafford, Virginia 22554.

William H Harris

RESPONSE TO REQUEST FOR ADMISSIONS

Comes now the defendant and third party plaintiff, SAFECO INSURANCE COMPANY OF AMERICA (SAFECO), by counsel, in response to the Request for Admissions filed herein by the plaintiff, and states as follows:

1-4. In response to Requests 1, 2, 3 and 4, Safeco admits that recitations are contained in four subdivision Bonds (Nos. 221952, 2219521, 2219520, and 2219519 respectively) that Crows Nest presented to the Board for recordation plats of subdivision for Sections C, D, A, and B, Crows Nest Harbour. All such statements were based upon information and/or representations of Crows Nest and/or the Board, provided to Safeco. Therefore, only Crows Nest and members of the Board, or others who may have been in attendance, can vouch for the accuracy of the facts sought to be admitted by the Board. Safeco has no information which would justify its denying the same, but represents that such matters should be properly proven by the Board.

5-8. In response to Requests 5, 6, 7 and 8, Safeco admits that such recitations are contained in the same four subdivision bonds, upon information and/or representations provided to Safeco by Crows Nest and/or the Board. Safeco cannot admit a fact which is within the knowledge of the Board, but not within the knowledge of Safeco. It can state that it has no information which would justify its denying the same.

9-12. In response to Requests 9, 10, 11 and 12, Safeco cannot respond to the requests as presented by the plaintiff. Safeco has made reasonable inquiry and the infor-



mation known to it is to the effect that Crows Nest Harbour did not complete the installation of water and sewer lines and streets in Sections A, B, C, and D of Crows Nest Harbour Subdivision.

13. Request 13 is admitted.

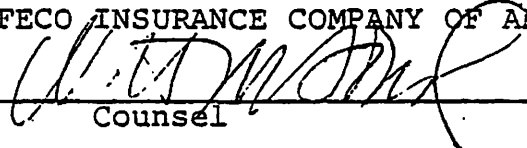
14. Upon information presently available to Safeco, it admits Request 14. It states, however, that it is attempting to determine through communications with persons no longer employed by Safeco, whether the Board was informed of the "Contingent Assignment of Interests" prior to October 30, 1975, and reserves the right to amend this Response should facts develop indicating such information was conveyed to the Board.


Further, Safeco believes that officials in the employ of the plaintiff may have had information or knowledge of the "Contingent Assignment of Interests" as provided by Crows Nest and/or Research Homes, Inc.

15. Safeco restates the response provided herein-above (9-12).

SAFECO INSURANCE COMPANY OF AMERICA

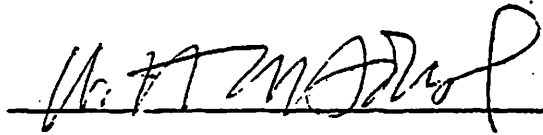
BY

  
Counsel

  
WILLIAM M. SOKOL, ESQUIRE  
WHITTICAR, SOKOL & LEDBETTER  
918 Princess Anne Street  
P. O. Box 593  
Fredericksburg, Virginia 22401  
Counsel for Defendant

CERTIFICATE

I, William M. Sokol, hereby certify that I have mailed, postage pre-paid, a copy of the foregoing Response to Request for Admissions to William H. Harris, Esquire, 809 William Street, Fredericksburg, Virginia 22401, and to Stuart C. Economou, Esquire, 122 South Royal Street, P. O. Box 701, Alexandria, Virginia 22313 and to Robert B. Goodall, Esquire, P. O. Box 316, Stafford, Virginia 22554, this 16<sup>th</sup> day of January, 1978.



O R D E R

This day came William H. Harris, Counsel for Plaintiff, and William M. Sokol, Counsel for Defendant, Safeco Insurance Company of America (Safeco), upon Plaintiff's Motion to determine the sufficiency of the Answers of Defendant Safeco in their Response for Admissions and was argued by Counsel.

Upon consideration whereof, the Court being of the opinion that the following order should be entered, it is ORDERED, ADJUDGED and DECREED that the Defendant has denied paragraphs 1, 2, 3, 4, 5, 6, 7 and 8, of Request for Admissions addressed to Safeco.

It is further ADJUDGED, ORDERED and DECREED that Defendant has admitted paragraphs 13 and 14 of Request for Admissions Addressed to Safeco.

It is further ADJUDGED, ORDERED and DECREED that Defendant has admitted the following paragraphs of the Request for Admissions Addressed to Safeco, with the following wording:

9. Crows Nest did not complete the water and sewer lines and streets referred to in paragraph 5 within twenty-four (24) months of October 2, 1973.

10. Crows Nest did not complete the water and sewer lines and streets referred to in Paragraph 6 above in accordance with the specifications referred to in Paragraph 6 within 24 months of October 2, 1973.

11. Crows Nest did not complete the water and sewer lines and streets referred to in Paragraph 7 in accordance with the specifications referred to in Paragraph 7 within 24 months of October 2, 1973.

12. Crows Nest did not complete the water and sewer lines and streets referred to in Paragraph 8 in accordance with the specifications referred to in Paragraph 8 within the 24 months of October 2, 1973.

15. Crows Nest has not completed the grading, paving, water drainage, catch basins and sewer work in respect to the sections of the project which were described in the subdivision's bonds attached to the Motion for Judgment as Exhibits A, B, C and D.

ENTER:

/s/ \_\_\_\_\_, JUDGE

DATE: May 9, 1978

I ask for this:

\_\_\_\_\_  
William H. Harris  
Attorney for Stafford County  
Board of Supervisors  
809 William Street  
Fredericksburg, Va. 22401

Seen:  
STEPTOE & JOHNSON  
James V. Dolan, Esquire  
Jeffrey P. Moran, Esquire  
1250 Connecticut Avenue, N.W.  
Washington, D.C. 20036

William M. Sokol, Esquire  
WHITTICAR, SOKOL & LEDBETTER  
918 Princess Anne Street  
Fredericksburg, Va. 22401

Attorneys for Safeco

By \_\_\_\_\_  
William M. Sokol

Stuart C. Economou, Esquire  
122 South Royal Street  
P.O. Box 701  
Alexandria, Virginia 22313

Robert B. Goodall, Esquire  
P.O. Box 316  
Stafford, Virginia 22554

Attorneys for DMI

By \_\_\_\_\_  
Robert B. Goodall

REQUEST FOR PRODUCTION OF DOCUMENTS

TO: Safeco Insurance Company of America  
c/o William M. Sokol, Esq.  
Whitticar, Sokol & Ledbetter  
918 Princess Anne Street  
Fredericksburg, Virginia, 22401

Pursuant to Rule 4:9 of the Rules of the Supreme Court of Virginia, Plaintiff requests Defendant Safeco Insurance Company of America to produce for Plaintiff's inspection and copying at the law offices of Mr. William H. Harris, 809 William Street, Fredericksburg, Virginia, on March 6, 1979 at 2:00 P.M. the documents identified hereinafter.

CERTAIN DEFINITIONS

1. The word "Document" shall be construed to mean any writing or recording of any kind whatsoever in the control, custody or possession of the Defendant Safeco Insurance Company of America or its agents and attorneys, including but not limited to, letters or other correspondence, memoranda, notes, entries in desk or other calendars, diaries, contracts or agreements, files, minutes, tape recordings, pictures, charts and graphs.

2. The pronouns "you", "your" or "yours" refer to Safeco Insurance Company of America, its officers, directors, employees, agents, attorneys, successors and assigns.

DOCUMENTS REQUESTED

1. A copy of the agreement between Safeco and DMI settling third party claim.

2. Any notes which Ken Holloway had of the July 21st, 1976 meeting with William H. Harris, Wayne Jensen and a representative from DMI.

3. The underwriting file on the four bonds which are the subject of this suit.

BOARD OF SUPERVISORS OF  
STAFFORD COUNTY, VIRGINIA

By: William H. Harris  
Counsel

William H. Harris

William H. Harris, Esquire  
Attorney for Stafford County, Virginia  
809 William Street  
Fredericksburg, Virginia, 22401

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Request for Production of Documents was mailed, postage prepaid, this 26<sup>th</sup> day of February, 1979, to William M. Sokol, Esq., Counsel for Defendant, 918 Princess Anne Street, Fredericksburg, Virginia, 22401.

William H. Harris  
William H. Harris

WRITTEN RESPONSE TO REQUEST FOR  
PRODUCTION OF DOCUMENTS

Comes now the Defendant and Third-Party Plaintiff, SAFECO INSURANCE COMPANY OF AMERICA (hereinafter Safeco), by counsel, pursuant to Rule 4:9 of the Supreme Court Rules, and files its Written Response to the Request for Production of Documents of the Plaintiff, the BOARD OF SUPERVISORS OF STAFFORD COUNTY (hereinafter The Board), as follows:

1. With respect to all requests made by the Plaintiff Board, Defendant and Third-Party Plaintiff Safeco objects insofar as such requests demand discovery, in part or in whole, of trial preparation materials. Pursuant to Rule 4:1 of the Supreme Court Rules, such materials will not be furnished unless and until Plaintiff Board establishes that it has a substantial need of the materials in the preparation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

2. Inspection and related activities of the information requested by the Plaintiff will be permitted on March 30, 1978 at 10:00 a.m. at the chambers of the Board of Supervisors of Stafford County, Stafford, Virginia.

SAFECO INSURANCE COMPANY OF AMERICA

BY

  
Counsel



WILLIAM M. SOKOL, ESQUIRE

WHITTICAR, SOKOL & LEDBETTER

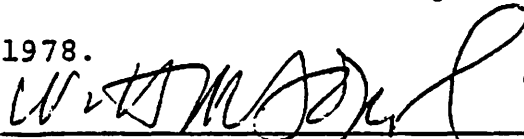
P. O. Box 593

918 Princess Anne Street  
Fredericksburg, Virginia 22401

Counsel for Defendant and Third-Party  
Plaintiff

CERTIFICATE

I, William M. Sokol, hereby certify that I have mailed, postage pre-paid, a copy of the foregoing Response to Request for Production of Documents to William H. Harris, Esquire, 809 William Street, Fredericksburg, Virginia 22401, and to Stuart C. Economou, Esquire, 122 South Royal Street, P. O. Box 701, Alexandria, Virginia 22313, and to Robert B. Goodall, Esquire, P. O. Box 316, Stafford, Virginia 22554, this 21<sup>st</sup> day of March, 1978.



William M. Sokol

WRITTEN RESPONSE TO REQUEST FOR  
PRODUCTION OF DOCUMENTS

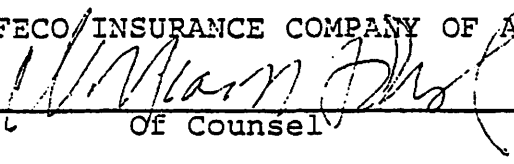
Comes now the Defendant, SAFECO INSURANCE COMPANY OF AMERICA (hereinafter Safeco), by counsel, pursuant to Rule 4:9 of the Supreme Court Rules, and files its Written Response to the Request for Production of Documents of the Plaintiff, the BOARD OF SUPERVISORS OF STAFFORD COUNTY (hereinafter The Board), as follows:

I. DMI and the plaintiff herein are presently engaged in litigation in the Circuit Court of Stafford County. Safeco will not voluntarily produce a copy of its agreement with DMI unless and until DMI authorizes the release of that agreement.

2. DMI contends that the Board is not entitled to have the handwritten notes of Ken Holloway, but nonetheless produces photocopies of those notes with the express condition that Safeco is not thereby waving its right to resist the production of any further internal memoranda upon request by the Board.

3. The Board is not entitled to the production of Safeco's entire files, and Safeco will not voluntarily relinquish such files.

SAFECO INSURANCE COMPANY OF AMERICA

By   
Of Counsel

WHITTICAR, SOKOL & LEDBETTER  
P. O. Box 593  
918 Princess Anne Street  
Fredericksburg, Virginia 22401

Counsel for Defendant and Third-Party Plaintiff

CERTIFICATE

I, William M. Sokol, hereby certify that I have mailed, postage pre-paid, a copy of the foregoing Response to Request for Production of Documents to William H. Harris, Esquire, 809 William Street, Fredericksburg, Virginia 22401, this 8<sup>th</sup> day of March, 1979.

  
WILLIAM M. SOKOL

Meeting w/ Atty Harris

7-21-76  
4pm

Co wants us to keep Bonds  
in force. and when  
property is sold, add'l  
Bonds would be required  
for any add'l amt. to  
complete project properly.

Co is aware of L/S by  
CNH against DMI.

Would like to see someone  
to buy property and  
to give Replacement Bonds.

Co feels that they may  
try to down zone property.  
Co feels that DMI would  
not want that & would  
file suit.

# Meeting Today w/ County atty

① How do we get our Grade Release?

② & DMV visit to take property to they need zoning to remove in force.

③ Could record property owner's name.

④ Put owner into something even and clearing that area

⑤ or record it to the title

⑥ other notes

① The only way we can get our Bonds released is to have the plat vacated and then need of our Bonds would be eliminated.

② If there was a sale then we would want to make sure new Bonds were issued by new owner to the Co.

③ We would have to make sure no sale would take place w/o our being involved.

④ Our Bond runs for 24 mos after ~~issue~~ it is issued. Default would not occur until after 24 mos.

→ Talk to County atty.

Why was Claim Made.

Of principal is in B'ruptcy.

⑤ Some Co managers do not want property to be liquidated.

- ③ Our \$ is not enough to complete.
  - ④ We feel that claim is early until CO has expended \$.
  - ⑤ Can we get copy of Plate Filed - Please = Spec. etc.
-

PLAINTIFF'S INTERROGATORIES #2

TO: SAFECO INSURANCE COMPANY OF AMERICA, DEFENDANT

Plaintiff requests that the Defendant answer the following Interrogatories separately and fully in writing and under oath, pursuant to the rules of the Supreme Court of Virginia, Rule 4:8, and that the answers be signed by the person making them and be served on William H. Harris within 21 days after service of these Interrogatories.

For the purposes of these Interrogatories, the term "identify" is outlined as follows:

- (a) When applied to a person, state his name, present home address, present business address, business affiliation, job title and home and office telephone numbers;
- (b) When applied to a writing, book, record or document, state or describe its nature, its contents, its date, the names and addresses of the parties thereto or of the writer and recipients thereof, its present location and the custodian thereof.

For the purposes of these Interrogatories, the terms "books", "records", "documents" or "writings" are defined to include any paper, book or record containing information, whether written, typewritten, printed, coded, orally transcribed or in any other form, and/or copies thereof, including reports, records, memoranda, correspondence, telegrams, schedules, or any other documents or writings of any kind whatsoever.

1. What does the defendant contend was the purpose of each of the bonds, which is the subject of this action (Attached to Plaintiff's Motion for Judgment as Exhibits A, B, C and D)?

2. Plaintiff alleged in its Motion for Judgment "SAFECO refused to perform". Defendant denied this allegation. Does Defendant now deny that SAFECO refused to perform? If answered in the affirmative, state in detail every fact on which Defendant will rely in so contending.



3. Plaintiff alleged in its Motion for Judgment "SAFECO has refused to perform". Defendant denied this allegation. Identify every document on which Defendant relies in denying this allegation.

4. Does defendant contend that Crow's Nest Harbor, a Virginia partnership (hereinafter Crow's Nest), did not present to the Board of Supervisors of Stafford County, Virginia (hereinafter Board), for recordation of a plat of subdivision in Aquia Magisterial District, Stafford County, Virginia (hereinafter Aquia), made by G. W. Clifford and Associates (hereinafter Clifford), dated March, 1972, designated Section "C", Crow's Nest Harbor Subdivision? If the answer is in the affirmative, state in detail every fact on which Defendant will rely in so contending.

5. Does Defendant contend that Crow's Nest did not present to the Board for recordation a plat of subdivision in Aquia made by Urban Engineering and Associates, dated September, 1971, designated Section "D", Crow's Nest Harbor Subdivision? If the answer is in the affirmative, state in detail every fact on which Defendant will rely in so contending.

6. Does Defendant contend that Crow's Nest did not present to the Board for recordation a plat of subdivision in Aquia made by Clifford dated September, 1971, designated Section "A", Crow's Nest Harbor Subdivision? If the answer is in the affirmative, state in detail every fact on which Defendant will rely in so contending.

7. Does Defendant contend Crow's Nest did not present to the Board for recordation a plat of subdivision in Aquia made by Clifford, dated September, 1971, designated Section "B", Crow's Nest Harbor Subdivision? If the answer is in the affirmative, state in detail every fact on which Defendant will rely in so contending.

8. Does Defendant contend that construction of the streets and water and sewer lines, in accordance with the specifications shown on the

plat referred to in Interrogatory 4 above, was not a condition of approval and recordation of a plat referred to in Interrogatory 4 above? If answered in the affirmative, state in detail every fact on which Defendant will rely in so contending.

9. Does Defendant contend that construction of the streets and water and sewer lines, in accordance with the specifications shown on the plat referred to in Interrogatory 5 above, was not a condition of approval and recordation of a plat referred to in Interrogatory 5 above? If answered in the affirmative, state in detail every fact on which Defendant will rely in so contending.

10. Does Defendant contend that construction of the streets and water and sewer lines, in accordance with the specifications shown on the plat referred to in Interrogatory 6 above, was not a condition of approval and recordation of a plat referred to in Interrogatory 6 above? If answered in the affirmative, state in detail every fact on which Defendant will rely in so contending.

11. Does Defendant contend that construction of the streets and water and sewer lines, in accordance with the specifications shown on the plat referred to in Interrogatory 7 above, was not a condition of approval and recordation of a plat referred to in Interrogatory 7 above? If answered in the affirmative, state in detail every fact on which Defendant will rely in so contending.

12. Does Defendant contend the Plaintiff has failed to fulfill any conditions precedent to the duty of SAFECO to perform its obligations under the bonds which are the subject of this action? If answered in the affirmative, identify each condition precedent which the defendant contends Plaintiff has failed to fulfill.

13. Identify the persons referred to in the Defendant's Response

to Request for Admissions, filed January 16, 1978, as "persons no longer employed by SAFECO".

14. Identify the officials in the employ of the Plaintiff, which SAFECO believes had knowledge of the "Contingent Assignment of Interest" as provided by Crow's Nest and/or Research Homes, Incorporated.

15. For each person identified in the preceding Interrogatory, state the date each person obtained knowledge and from whom such knowledge was obtained.

BOARD OF SUPERVISORS OF  
STAFFORD COUNTY, VIRGINIA

By W.H.H.  
Of Counsel

William H. Harris, p.q.  
County Attorney  
Stafford County  
809 William Street  
Fredericksburg, Virginia 22401

CERTIFICATE

I certify a true and exact copy of the foregoing Interrogatories was mailed, postage prepaid, this 20<sup>th</sup> day of Oct, 1978, to William M. Sokol, Esq., Counsel for Defendant, 918 Princess Anne Street, Fredericksburg, Virginia, 22401.

W.H.H.

O R D E R

The plaintiff, Stafford County Board of Supervisors, having moved this Court for an order compelling the defendant, Safeco, to answer written interrogatories heretofore regularly served on him by the moving party, the matter coming on duly for hearing, the Court having heard the arguments of counsel, and being fully informed herein,

It is hereby ORDERED that the defendant, Safeco, serve plaintiff with answers to the following interrogatories 12, 13, 14, within 14 days of service on him of this Order.

It appearing to the Court that refusal to answer the interrogatories was without substantial justification, it is further ordered that the defendant, Safeco, pay to plaintiff the sum of \_\_\_\_\_ dollars, reasonable expenses of obtaining this Order, and the further sum of \_\_\_\_\_ dollars, as reasonable attorney's fees incurred by plaintiff in obtaining this Order.

ENTERED

*[Signature]*  
J. M. H. Willis

JUDGE

DATE

*November 20, 1978*

I ask for this:

*William H. Harris*  
William H. Harris, p.q.,  
BOARD OF SUPERVISORS OF  
STAFFORD COUNTY

*objects to refusal to require answers to questions 1, 3, 11 and 15 and the denial of any costs.*

Seen (and Objected to):

*[Signature]*  
William M. Sokol, p.d.,

SAFECO INSURANCE COMPANY OF AMERICA

*How order book  
P-17-536*

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

BOARD OF SUPERVISORS OF  
STAFFORD COUNTY

VS.

SAFECO INSURANCE COMPANY  
OF AMERICA

ORDER

The motion of the Board of Supervisors of Stafford County of Virginia for the Court to reconsider its earlier ruling on interrogatories is denied.

ENTER:

  
\_\_\_\_\_  
Judge

December 20, 1978

*Seen and objected  
William H Harris p. 2*

  
\_\_\_\_\_  
Clerk

NOTICE OF DEPOSITION

To: SAFECO, Defendant, and William M. Sokol, the Attorney of said Defendant

Notice is hereby given that on Jan 11, 1977, at 9:50 o'clock, A.m., in the office of Harris & Harris, Attorneys-at-Law, located at 809 William Street in the city of Fredericksburg, Virginia, the attorney for plaintiff will take the deposition of SAFECO Insurance Company of America, which is a private corporation, through such officers, directors, managing agents, or other persons as may be designated by said deponent, pursuant to Rule 4:5(b)(6), Rules of the Supreme Court of Virginia. The deposition will be taken upon oral examination at said time and place and will continue from day to day until completed.

The matters upon which examination is requested, and as to which the deponent will be examined are:

1. The bonds, which are the subject of this action, their making, their purpose, their effect, all actions taken by the defendant in regard to those bonds, any agreements entered into in regard to said bonds, etc.;
2. Recordation of plats of the Aquia Subdivision, made by G.W. Clifford and Associates, Incorporated, dated March, 1972, designated Section C, Crow's Nest Harbor;
3. Plats of the subdivision in Aquia Harbor, made by Urban Engineering and Associates, dated September, 1971, designated Section D;
4. Plats of the subdivision in Aquia made by Clifford and Associates, dated September, 1971, designated Section A, Crow's Nest Harbor Subdivision;
5. Plats of subdivision in Aquia Harbor made by Clifford and Associates, dated September, 1971, designated Section B, Crow's Nest Harbor Subdivision;

6. Knowledge and extent of construction of streets and water lines in Crow's Nest Harbor;

7. Names, addresses and telephone numbers of persons contacted regarding subject of this suit.

BOARD OF SUPERVISORS OF  
STAFFORD COUNTY, VIRGINIA

By

John P. Harris III  
Of Counsel

Harris & Harris, p.q.  
Attorneys-at-Law  
809 William Street  
Fredericksburg, Virginia 22401

CERTIFICATE

I certify a true and exact copy of the foregoing Notice of Deposition was mailed, postage prepaid, this 19<sup>th</sup> day of December, 1979, to William M. Sokol, 918 Princess Anne Street, Fredericksburg, Virginia 22401, Counsel for Defendant.

John P. Harris III

NOTICE

To: SAFECO INSURANCE COMPANY

You are hereby notified that pursuant to the provisions of Rule 4:9 of the rules of the Supreme Court of Virginia, you are hereby required to produce at the office of Harris and Harris, Attorneys at Law, 809 William Street, Fredericksburg, Virginia at 10:00 a.m. on the Third day of April 1979, all of the following documents in your possession, custody or control:

1. The file referred to by Donald Arthur Reedy on page 52 at line three of his deposition taken on March 6, 1979.
2. The files referred to on page 9 line two of the deposition of Peter H. Brown taken March 6, 1979.
3. A copy of the standard subdivision bond form referred to on page 35 lines 20-22 of the deposition of Peter H. Brown taken March 6, 1979.
4. A copy of the settlement agreement referred to on page 36 lines 13-21 of the deposition of Peter H. Brown taken March 6, 1979.
5. All files relating to Crows Nest Harbor or Stafford County created or maintained by (a) Kenneth Holloway (b) Mr. Gosney, the Regional Surety Underwriter who had a position similar in type to the position occupied by Emmett William Dougherty (c) Dwaine Stevenson (d) Donald Arthur Reedy (e) Peter H. Brown (f) Wayne Jensen (g) Don Spickard.

BOARD OF SUPERVISORS OF STAFFORD COUNTY

By: \_\_\_\_\_

Of Counsel

William H. Harris, p.d.  
Harris and Harris  
809 William Street  
Fredericksburg, Virginia 22401



CERTIFICATE

I certify true and exact copy of the foregoing notice was mailed postage prepaid, this 27th day of March, 1979 to William M. Sokol, Whitticar, Sokol and Ledbetter, 819 Princess Anne Street, Fredericksburg, Virginia.

  
\_\_\_\_\_  
William H. Harris

RESPONSE AND OBJECTIONS TO  
REQUEST FOR PRODUCTION OF DOCUMENTS

Safeco Insurance Company, by counsel, makes the following response and enters the following objections to the request for the production of documents filed by the plaintiff on or about March 27, 1979:

1. Safeco hereby provides to the County photocopies of the following letters:

- (a) William G. O'Brien  
Administrative Assistant  
Stafford County of Stafford  
Letter of January 10, 1973 to  
Mr. S. M. Vandevender,  
President, Research Homes, Inc., and
- (b) D. K. Cook,  
County Administrator  
County of Stafford  
Letter of May 15, 1973 to  
Mr. H.P.C. Vandenberg  
Corporate Engineers  
Research Homes, Inc.

documenting Safeco's conclusion that the subdivision bond form was provided by representatives of the Board of Supervisors of Stafford County.

2. See Objection to Request 5.

3. Safeco appends a photocopy of a page from its forms' manual indicating that subdivision bonds forms are used by Safeco for California, Arizona, and Oregon. There are no bond forms for Virginia.

4. Safeco has previously responded to the County's request for the production of a settlement agreement between DMI and Safeco, setting forth the objections and reasons for not producing that settlement agreement. Further, Safeco objects

on the ground that such an agreement is not relevant to the matters in controversy between the Board of Supervisors of Stafford County and Safeco.

5. Request 5 does not comply with Rule 4:9 in requesting a designated document or thing. Further, Rule 4:1 (3) requires certain representations and criteria before trial preparation: materials may be subject to discovery. The Board of Supervisors of Stafford County has already taken the depositions of four (4) individual employees of Safeco. It is submitted that under no reasonable construction of Rule 4 of the Rules of the Supreme Court of Virginia may a party in litigation be required to turn over entire files to the adverse party.

SAFECO INSURANCE COMPANY


By 

Of Counsel

WHITTICAR, SOKOL & LEDBETTER  
P. O. Box 593  
918 Princess Anne Street  
Fredericksburg, Virginia 22401

CERTIFICATE

I hereby certify that a true and correct copy of this Response and objections to Request for Production of Documents was mailed, postage paid, to William H. Harris, Esquire, Harris and Harris, 809 William Street, Fredericksburg, Virginia 22401, counsel of record for the plaintiff, this 5<sup>th</sup> day of April, 1979.



COUNTY OF STAFFORD

STAFFORD, VIRGINIA 22554  
800-4121

January 10, 1973

BOARD OF SUPERVISORS

ALVIN E. HANCOCK  
CHAIRMAN

M. ALBERT PAGAN  
VICE CHAIRMAN

GEORGE W. LINDSEY

EDWARD HENRY A. LITTLE

WINIFRED L. PARRISH

SYLVESTER SILVER



D. K. COOK

COUNTY ADMINISTRATOR

Mr. S. M. Vandevender, President  
Research Homes, Inc.  
7777 Leesburg Pike  
Falls Church, Virginia 22043

Re: Crow's Nest Harbour,  
Sections A, B, C, D

Dear Mr. Vandevender:

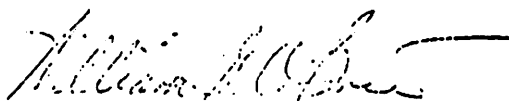
It appears that some confusion has arisen concerning the approval of the final plats for the above referenced sections. I will attempt to clarify this situation.

I am enclosing a copy of Article II of the County Subdivision Ordinance regarding plats and platting of land, and your attention is also called to the remainder of the ordinance regarding subdivision requirements of the County. You will be required to furnish a performance bond or other approved surety to the County, in lieu of construction, regarding the public improvements, and a certified statement from your engineer as to the estimated cost of the public improvements. Bonding in that amount will be required prior to final approval. I am enclosing a sample subdivision bond that may be used in lieu of the performance bond. You should also contact Mr. Charles E. Smith, County Engineer; regarding approval of your water and sewer plans.

You may submit the plats for signature by the Subdivision Agent after you have obtained approvals and signatures from the Highway Engineer, Health Officer, and Chairman of the Planning Commission.

If I may be of further assistance, please let me know.

Very truly yours,

  
William G. O'Brien  
Administrative Assistant

Encl:

CC: Mr. D. K. Cook, County Administrator  
Mr. Charles E. Smith, County Engineer



# COUNTY OF STAFFORD

STAFFORD, VIRGINIA 22084

659-2100

May 15, 1973

## BOARD OF SUPERVISORS

ALVIN Y. HANBY

Chairman

M. ALBERT LARSEN

Vice Chairman

GEORGE W. EMMERY

LIMBERGH A. LITTLE

WINIFRED L. PARRISH

SYLVESTER SILVER

D. K. COOK

COUNTY ADMINISTRATOR

Mr. H. P. C. Vandenberg  
Corporate Engineers  
Research Homes, Inc.  
7777 Leesburg Pike  
Falls Church, Virginia 22043

Dear Mr. Vandenberg:

Reference is made to a letter submitted to this office dated April 24, 1973 from Mr. J. Edgar Sears requesting approval of preliminary development cost estimates for Sections A, B, C and D of Crow's Nest Harbour in the amount of \$1,200,000.

Mr. S. M. Vandevender was advised by letter on January 10, 1973, as to what would be required prior to approval of final plats for these sections. We also have a letter on file from Mr. J. Edgar Sears dated November 14, 1972 estimating the total construction cost for these four sections to be \$1,287,492, and bonding or other approved surety will be required in that amount. I have also requested that you contact the County Engineer regarding approval of water and sewer plans as well as the feasibility of water being supplied by the Sanitary District to the project.

The total estimate as outlined in your letter of November 14, 1972 is acceptable to the County, provided that a certified statement to this effect is provided by your engineer.

It is suggested that you contact Mr. N. C. Sharp, the incoming County Administrator, regarding the bonding requirements, water and sewer approvals as well as other requirements of the County.

Very truly yours,

D. K. Cook

<u>Bond</u>	<u>Number</u>	<u>Division or State</u>
Performance and Payment -		
Co-Surety - Public Work	S-1324	Idaho
Performance and Payment -		
Co-Surety - Public Work	S-1325	Louisiana
Performance and Payment -		
Co-Surety - Public Work	S-1323	Oregon
Performance and Payment -		
Co-Surety - Public Work	S-1313	Washington
Performance and Payment -		
Private Work	S-1264	Louisiana
Performance and Payment -		
Private Work	S-636	Nevada
Performance and Payment -		
Public Work	S-604	Idaho
Performance and Payment -		
Public Work	S-1263	Louisiana
Performance and Payment -		
Public Work	S-544	Oregon
Performance and Payment -		
Public Work	S-444	Washington
Proposal - Public Work	S-914	North Carolina
Statutory Payment	S-1406	Pennsylvania
Statutory Payment - Private Work	S-1407	Arizona
Statutory Payment - Private Work	S-1216	Texas
Statutory Performance	S-1405	Pennsylvania
Statutory Performance and Payment	S-820	Arkansas
Statutory Performance and Payment -		
Co-Surety	S-1326	Arkansas
Statutory Performance and Payment -		
Public Work	S-1263	Louisiana
Statutory Performance and Payment -		
Public Works	S-1084	New Jersey
Subcontract - Payment	S-859	
Subcontract - Performance and		
Payment	S-1211	
Subdivision Improvement - Payment	S-822	California
Subdivision Improvement -		
Performance	S-1293	Arizona
Subdivision Improvement -		
Performance	S-821	California
Subdivision Improvement -		
Performance	S-1362	Oregon
Supply	S-1449	

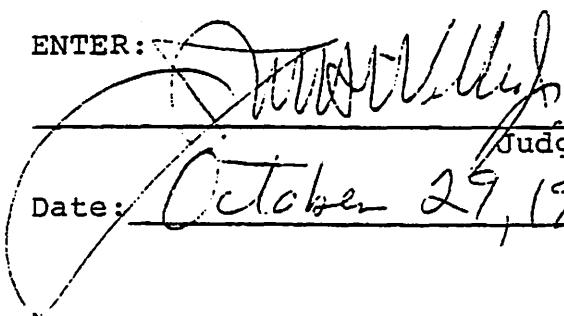
#### First National

Bid Bond - AIA	S-1298	
Bid Bond - All Purpose	S-1139	
Bid Bond - Construction	S-1306	New Jersey
Maintenance	S-1141	
Payment - AIA	S-1143	
Performance	S-1207	
Performance - AIA	S-1142	
Performance and Payment	S-1144	
Subcontract	S-1161	
Subcontract - Payment	S-1412	

O R D E R

This day came the parties on the Plaintiff's Motion to Compel the Production of Documents, and was argued by counsel.

On Consideration Whereof, it is the opinion of the Court that the Plaintiff is entitled to have produced by the Defendant a copy of the agreement between Safeco and DMI, and is not entitled to have the underwriting files maintained by the representatives of Safeco, or other files maintained by Donald Reedy or Peter H. Brown. Further, the Court is of the opinion that the Defendant has satisfactorily responded in the matter of the production of a standard subdivision bond form.

ENTER: 

Judge

Date: October 29, 1979

SEEN AND EXCEPTED TO:

William H. Harris

William H. Harris  
Harris & Harris  
809 William Street  
Fredericksburg, Virginia 22401

SEEN:

William M. Sokol

William M. Sokol  
Whitticar, Sokol & Ledbetter  
P.O. Box 593  
918 Princess Anne Street  
Fredericksburg, Virginia 22401

A COPY, TESTE

S. L. Alexander

By: Barbara G. Decatur, D.C.

Law Order BK 18  
File 563  
Indep

PLAINTIFF'S INTERROGATORIES III

TO: Safeco Insurance Company of America  
c/o William M. Sokol  
WHITTICAR, SOKOL & LEDBETTER  
918 Princess Anne Street  
Fredericksburg, Virginia 22401

COMES NOW your Plaintiffs, Board of Supervisors of Stafford County, by counsel, and propound the following Interrogatories to be answered under oath by Safeco Insurance Company of America or by their authorized agent within the time prescribed by the Rules of the Supreme Court of Virginia:

(a) These Interrogatories are continuing in nature pursuant to Rule 4:1(e) (1) and (2) so as to require the filing of supplemental answers and responses without further request should additional information or information inconsistent with the information contained in the answers and responses to these interrogatories become available to the party or parties to whom these Interrogatories are directed.

(b) Where information or knowledge in the possession of a party is requested, such request includes knowledge of the party's agents, employees, next friend, guardian, representative and, unless privileged, the party's attorneys.

(c) If information with respect to any documents is withheld under any claim of privilege, furnish a list identifying each document for which the privilege is claimed, together with the following information: date; sender, recipient; recipient of copy; subject matter of document; and the basis upon which privilege is claimed.

(d) With respect to any document about which information is requested, the answer to the question shall indicate the file



where the document is stored and the name, address and telephone number of the person or persons who maintain such file.

(e) Where the name of a person or entity is requested, you must indicate the full name, business firm, business address, home address and telephone number, if applicable.

(f) The pronoun "you" or "your" refers to respectively Safeco Insurance Company of America and the persons and/or entities mentioned in clause "b" above.

(g) "Documents" means any item which is within the scope of Rule 4:9.

(h) Receipt by mail of copies of documents requested hereinbelow at the offices of Harris & Harris, 809 William Street, Fredericksburg, Virginia, 22401, within 24 days of the date of receipt hereof with a notarized affidavit under oath of the Defendant's or their attorney that the copies of the documents are true and complete will be satisfactory compliance with this pleading.

1. State the names, positions and occupations of all persons you intend to call as expert witnesses, if any, at the trial of this case and identify which matter they will be called as experts in.

2. With respect to each expert witness who you intend to call, state the purpose of which the expert witness is to be called and a brief summary of the testimony you expect the expert witness to give, together with a list or summary of the resource documents and/or materials upon which each expert witness will rely and state in detail the precise conclusion and/or opinion that each expert witness called by you is anticipated to give.

3. Do you intend to call any other witnesses other than those, if any, described in paragraphs No. 3 and No. 4 above.

4. If the answer to #3 is in the affirmative, give the names, addresses, telephone numbers, positions and occupations of each other witness.

5. With respect to each witness listed in response to paragraph #4 above, state the purpose for which that witness is to be called, and a short summary of the testimony you expect that witness to give.

6. Describe the verbatim contents of each and every document which you intend to produce as evidence in the trial of this matter; in lieu of such description, include a copy or copies thereof in response to this pleading. As to each, identify the specific issue or factual purpose for which the document will be introduced into evidence.

7. With respect to each document described in paragraph #6 above, state the witness or witnesses who will introduce the document into evidence and the name, address and telephone number of the current custodian of the document.

8. State the name of any person or entity, together with their addresses and telephone numbers (including, without limitation, any attorneys) with whom you have had contact with respect to the controversy which is the subject of this proceeding.

9. Describe the verbatim contents of each and every document (other than those described in paragraph #6 above) written or received by you from any party to the litigation or any other person or entity with respect to the controversy which is the

subject of this litigation. In lieu of such description, include a copy or copies thereof in response to this pleading. For each document so described, give the name, address and telephone number of the current custodian of the document.

10. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 1 of the Grounds of Defense filed on or about July 9, 1979, (hereinafter "Grounds of Defense").

11. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 2 of the Grounds of Defense heretofore filed in this case.

12. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 3 of the Grounds of Defense heretofore filed in this case.

13. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 4 of the Grounds of Defense heretofore filed in this case.

14. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 5 of the Grounds of Defense heretofore filed in this case.

15. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 7 of the Grounds of Defense heretofore filed in this case.

16. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 8 of the Grounds of Defense heretofore filed in this case.

17. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 9 of the Grounds of Defense heretofore filed in this case.

18. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 10 of the Grounds of Defense heretofore filed in this case.

19. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 11 of the Grounds of Defense heretofore filed in this case.

20. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 12 of the Grounds of Defense heretofore filed in this case.

21. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 2 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Motion for Judgment.

22. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 3 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Motion for Judgment.

23. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 4 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Motion for Judgment.

24. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 5 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Motion for Judgment.

25. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 6 of Defendant's Answer and Grounds of Defense to the Plaintiff's

original Motion for Judgment.

26. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 7 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Motion for Judgment.

27. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 8 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Motion for Judgment.

28. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 9 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Motion for Judgment.

29. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 10 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Motion for Judgment.

30. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 11 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Motion for Judgment.

31. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 12 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Motion for Judgment.

32. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 13 of Defendant's Answer and Grounds of Defense to the Plaintiff's

original Motion for Judgment.

33. State all facts, knowledge and information upon which you rely in making the allegations contained in paragraph 14 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Motion for Judgment.

34. List all minutes, resolutions and/or other documents in existence within the files or offices of Safeto Insurance Company of America or any of its agents or employees concerning Crow's Nest Harbour Subdivision Bonds or anything related thereto. State in full and complete detail any and all meetings, formal or informal, during which Crow's Nest Harbour Subdivision Bonds were discussed by Safeco or any of its agents or employees whether or not the minutes, notes or memorandum of such meetings were kept and if such documents were kept concerning said meetings, describe the verbatim contents of each and every such documents. In lieu of such description, include a copy or copies thereof in response to this pleading. For each such document so described, give the name, address and telephone number of the current custodian of said document. For any meeting or discussion which is the subject of this Interrogatory for which no written documents are known to exist, state in full and complete detail the date and place of said meeting or discussion, the persons participating in the meeting and/or discussion, and provide a full and complete description of the meeting and discussion, including what each participant said during such meeting and/or discussion.

35. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the

allegations set out in paragraph 1 of the Grounds of Defense.

36. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 2 of the Grounds of Defense.

37. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 3 of the Grounds of Defense.

38. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 4 of the Grounds of Defense.

39. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 5 of the Grounds of Defense.

40. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 7 of the Grounds of Defense.

41. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 8 of the Grounds of Defense.

42. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 9 of the Grounds of Defense.

43. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 10 of the Grounds of Defense.

44. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 11 of the Grounds of Defense.

45. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 12 of the Grounds of Defense.

46. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 2 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Motion for Judgment (hereinafter "original Answer").

47. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 3 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Answer.

48. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 4 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Answer.

49. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 5 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Answer.

50. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 6 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Answer.

51. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 7 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Answer.



52. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 8 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Answer.

53. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 9 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Answer.

54. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 10 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Answer.

55. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 11 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Answer.

56. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 12 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Answer.

57. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 13 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Answer.

58. State in full and complete detail all facts, knowledge and/or information upon which you will rely to prove the allegations set out in paragraph 14 of Defendant's Answer and Grounds of Defense to the Plaintiff's original Answer.

BOARD OF SUPERVISORS OF STAFFORD COUNTY

By

W. H. Harris  
Of Counsel

William H. Harris, p. q.  
County Attorney for  
Stafford County, Virginia  
809 William Street  
Fredericksburg, Virginia 22401

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing Interrogatories was mailed, postage pre-paid, or hand-delivered this 4<sup>th</sup> day of October, 1979, to William M. Sokol, Esquire, counsel for Defendants, 918 Princess Anne Street, Fredericksburg, Virginia, 22401.

W. H. Harris  
William H. Harris

M O T I O N

The defendant, Safeco Insurance Company of America, by counsel, moves the Court for a protective order, in accordance with Part 4 of the Rules of the Supreme Court of Virginia, with specific respect to the fifty-eight (58) interrogatories propounded by counsel for the Board of Supervisors of Stafford County, and in support of its motion Safeco submits the following:

1. The County filed its Motion for Judgment two (2) years ago, and has thereafter inundated the defendant with pre-trial discovery outside the scope and intent of Part 4 of the Rules of the Supreme Court.

2. Heretofore, the plaintiff has filed and propounded upon the defendant its interrogatories labeled plaintiff's Interrogatories I and II.

3. To each set of interrogatories the defendant has responded, and has objected to answering those interrogatories which were clearly inappropriate.

4. The Court has heard argument and ruled on the previous sets of interrogatories, and notwithstanding such rulings the County filed its motion that the Court reconsider its Orders.

5. In addition to the extensive interrogatories heretofore filed, the County filed twenty (20) separate requests for admissions of fact which were responded to by the defendant.

6. Despite the fact that the defendant voluntarily supplied the plaintiff with hundreds of documents, the defendant filed a request for the production of documents which sought production of the defendant's entire underwriting file. In its

written response, the defendant has taken the position that the County is not entitled to the defendant's underwriting file.

7. Further, during the course of this litigation, with substantial expense and inconvenience to the defendant, the plaintiff has insisted that depositions be taken at its convenience in Fredericksburg, Virginia, and the defendant has produced the following persons in Fredericksburg, Virginia, to be deposed by counsel for the County:

(a) On January 16, 1979, Ken S. Holloway of Safeco Insurance Company of America came from Atlanta, Georgia, to be deposed by Mr. Harris;

(b) On March 6, 1979, Emmett William Dougherty, formerly employed by Safeco Insurance Company of America, came from Atlanta, Georgia, to be deposed by Mr. Harris.

(c) On March 6, 1979, Donald Arthur Reedy of Safeco Insurance Company of America came from Atlanta, Georgia, to be deposed by Mr. Harris;

(d) On March 6, 1979, Peter H. Brown of Safeco Insurance Company of America, came from St. Louis, Missouri, to be deposed by Mr. Harris;

8. Two (2) years after the filing of its initial pleading, the County now serves fifty-eight (58) written interrogatories upon the defendant. The composition of the questions, individually and collectively, considered in light of the protracted duration of this litigation and the burdensome discovery listed hereinabove, and the nature of the questions posed, is inappropriate and legally vexatious.

WHEREFORE, the defendant seeks and moves for the entry of a protective Order consistent with the intent expressed in Part 4 of the Rules of the Supreme Court of Virginia.

SAFECO INSURANCE COMPANY OF AMERICA

By 

Of Counsel

NOTICE OF MOTION

TO: William H. Harris, Esquire  
Harris & Harris  
809 William Street  
Fredericksburg, Virginia 22401

TAKE NOTICE that on the 29th day of October, 1979, at 10:00 a. m., or as soon thereafter as counsel may be heard, I will move that the Circuit Court of Stafford County enter an appropriate order.

SAFECO INSURANCE COMPANY OF AMERICA

By 

Of Counsel

WILLIAM M. SOKOL  
Whitticar, Sokol & Ledbetter  
918 Princess Anne Street  
P. O. Box 593  
Fredericksburg, Virginia 22401

CERTIFICATE

I certify that a copy of the foregoing Motion and Notice of Motion was mailed, postage prepaid, this 23rd day of October, 1979, to William H. Harris, Esquire, Harris & Harris, 809 William Street, Fredericksburg, Virginia 22401, Counsel for the plaintiff.



O R D E R

This day came the parties on the Motion of Safeco Insurance Company of America for entry of a protective order with respect to the fifty-eight (58) written Interrogatories propounded by the Plaintiff, and was argued by counsel.

Upon Consideration Whereof, it is the opinion of the Court that questions 1 through 5 are proper and within the scope of discovery as provided in Rule Four, and the Defendant shall provide answers to Interrogatories 1 through 5 within fourteen (14) days of the date of entry of this Order.

With respect to Interrogatories 6 and 7, the Defendant shall list the documents which it intends to produce at the trial of this case, with sufficient description of the originator of the document and its present location, as well as the identity of the witness who will introduce the document into evidence, and the Defendant shall so answer Interrogatories 6 and 7 within fourteen (14) days of the date of entry of this Order.

With respect to Interrogatories 8 through 58, the Court is of the opinion that such Interrogatories as propounded are not proper and are not within the scope of discovery as provided in Rule Four, and accordingly, the Defendant shall be relieved from any responsibility to provide answers to Interrogatories 8 through 58.

ENTER:

Date:

Judge

*John M. Wilby*  
*October 29, 1979*

SEEN AND EXCEPTED TO:

William H. Harris  
William H. Harris  
Harris & Harris  
809 William Street  
Fredericksburg, Virginia 22401

SEEN:

William M. Sokol  
William M. Sokol  
Whitticar, Sokol & Ledbetter  
P.O. Box 593  
918 Princess Anne Street  
Fredericksburg, Virginia 22401

CCFL 18512

S. L. Alexander

By: Barbara G. Decatur, D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF STAFFORD COUNTY

BOARD OF SUPERVISORS OF STAFFORD COUNTY

Plaintiff

V.

AT LAW NO. 307-77

SAFECO INSURANCE COMPANY OF AMERICA

Defendant

REQUESTS FOR ADMISSION

TO: BOARD OF SUPERVISORS  
OF STAFFORD COUNTY, VIRGINIA  
c/o William H. Harris,  
County Attorney  
809 William Street  
Fredericksburg, Virginia 22401

The Defendant, Safeco Insurance Company of America (hereinafter referred to as Safeco), by counsel, pursuant to Rule 4:11 of the Rules of the Supreme Court of Virginia, files its Requests for Admission upon the Plaintiff, the Board of Supervisors of Stafford County, Virginia (hereinafter referred to as the Board), to be answered within the time and in the manner prescribed by said Rule.

The Exhibits referred to in the following Requests have been provided to the Board during discussions in the preparation of Stipulations of Fact. The numbers used herein correspond to the numbers used for the Exhibits referred to in the Stipulations of Fact set forth in Safeco's Trial Brief.

Safeco requests that the Board make the following admissions:

1. That Crows Nest Harbour Limited Partnership



(hereinafter referred to as CNHLP) is a Virginia Limited Partnership, started on October 5, 1971.

2. That CNHLP was comprised of Coke Gage and FVM Corporation, a Virginia corporation, general partners, Research Homes, Inc., a Delaware corporation, limited partner, and Woodrow D. Marriott, Frank K. Johnson, William J. Durkin and Bicknell A. Robbins, special limited partners.

3. That Diversified Mortgage Investors (hereinafter referred to as DMI) is a Massachusetts business trust.

4. That by deed dated October 28, 1971, St. Charles City, Inc., a Maryland corporation, conveyed to CNHLP 4,725 acres in Stafford County, Virginia, which deed was recorded in the Clerk's Office of the Circuit Court of Stafford County, Virginia.

5. That in order to finance the purchase of this land, CNHLP executed two promissory notes: a promissory note payable to St. Charles City, Inc., which was secured by a first deed of trust on the property purchased, and a note payable to DMI, which was secured by a second deed of trust on the land.

6. That CNHLP planned to construct a new town community on the 4,725-acre tract to be known as Crows Nest Harbour development.

7. That, as planned, Crows Nest Harbour development was to provide housing, shopping, schools, recreation, community facilities for at least 20,000 people.

8. That, as planned, Crows Nest Harbour development was to be constructed over a 15-year period.

9. That, as planned, Crows Nest Harbour development

was to include a system of roadways, pedestrian ways and bridle paths; a central water and sewer system; extensive recreational facilities, including golf courses, a complete equestrian center, a large marina, tennis courts and swimming pools; and schools and parks.

10. That Exhibit 1 is a true and correct copy of a Development Report, relating to the plans for Crows Nest Harbour development.

11. That Exhibit 2 is a true and correct copy of an Appraisal Report, relating to the plans for the Crows Nest Harbour development.

12. That in 1971, CNHLP applied to the Board for rezoning of the 4,725-acre tract and advised the Board of its development plans and intentions for the construction of a new town community of at least 20,000 people.

13. That, on December 8, 1971, the Board approved category R-1 zoning for planned Sections A, B, C and D. R-1 zoning permitted single-family dwellings. The Board approved category R-2 and B-1 zoning for sections of the development outside of Sections A, B, C and D. Category R-2 zoning permitted multi-family dwellings and category B-1 zoning permitted commercial development.

14. That the rezoning, mentioned in paragraph 13, permitted the construction of 12,000 units on the entire development, which could involve a total of approximately 35,000 individuals.

15. That Exhibit 4 is a true and correct copy of a

Concept Plan, relating to the plans for the Crows Nest Harbour development.

16. That, in 1971, CNHLP applied to the Board for approval of final subdivision plats for Section A, B, C and D.

17. The Board approved the final subdivision plats on the following dates: (a) Section A, on October 13, 1971; (b) Section B, on October 13, 1971; (c) Section C, on November 10, 1971; (d) Section D, on December 8, 1971; (e) Revised final subdivision plans for Sections C and D, on March 16, 1972.

18. That Exhibit 6 is a true and correct copy of a letter, dated October 18, 1972, from D. K. Cook to Richard Johnson.

19. That D. K. Cook, on October 18, 1972, was the County Administrator for Stafford County.

20. That Exhibit 6 is a true and correct copy of a letter, dated November 28, 1972, from William G. O'Brien to Jack Burlbaugh.

21. That William G. O'Brien, on November 28, 1972, was the administrative assistant to the County Administrator of Stafford County.

22. That Exhibits A, B, C and D are true and correct copies of abstracts of the minutes of the Board of its meetings of October 13, 1971, November 10, 1971, December 8, 1971 and March 16, 1972. Such Exhibits are attached hereto.

23. That Exhibit 7, attached hereto, is a true and correct copy of a letter, dated January 10, 1973, from William G. O'Brien to S. M. Van Devender.

24. That William G. O'Brien, on January 10, 1973, was the administrative assistant to the County Administrator of Stafford County.

25. That CNHLP entered into the following understandings with Stafford County with respect to providing public facilities to the Crows Nest Harbour development:

(a) CNHLP agreed<sup>v</sup> to participate in the payment of the costs of upgrading approach roads to the development;

(b) CNHLP agreed to pay the costs of constructing all roads and storm sewers within the subdivision;

(c) CNHLP agreed to pay the costs of constructing water lines in the development to the Stafford County water lines;

(d) CNHLP agreed to construct a sewerage treatment facility, a sewerage collection system and a water distribution system on the Crows Nest Harbour development;

(e) CNHLP agreed to post subdivision bonds to cover the costs of completing subdivision roads, storm sewer, and water and sewer lines within the Crows Nest Harbour development.

26. By September, 1973, CNHLP had entered into agreements with various persons for the sale of virtually every lot within Sections A, B, C and D.

27. That, in October, 1973, CNHLP obtained all the required approvals (albeit conditional) for the filing of the final subdivision plats on Sections A, B, C and D and these plats were recorded, on October 19, 1973, in the Clerk's Office of the Circuit Court of Stafford County.

28. That Exhibits 10, 11, and 12 are true and correct copies of the final plats mentioned in paragraph 26.

29. That after the recordation of the final subdivision plats for Sections A, B, C and D, CNHLP delivered deeds to those individuals who had agreed to purchase lots in those sections.

30. That, as of December, 1974, CNHLP had done the following work: it had cleared and burned some acreage, had delivered gravel to the site and had done a limited amount of stakeout and grading on the site.

31. That, after December, 1974, CNHLP did no more work on the Crows Nest Harbour development site.

32. That the general and limited partners of CNHLP filed bankruptcy petitions in the United States Bankruptcy Court.

33. That, on July 17, 1975, the Board approved the Stafford County Comprehensive Development Plan, which recommended that the Crows Nest Harbour development property be developed as low density residential, which was not as planned by CNHLP.

34. Exhibit 13 is a true and correct copy of the Stafford County Comprehensive Development Plan.

35. That, in 1978, the Community Development Department of Stafford County recommended that the Crows Nest Harbour development property be rezoned. The opinion of this department was that the 4,725-acre tract should not be developed into the densities that were proposed by CNHLP and that, in fact, the property could not sustain that sort of development. The department was also of the opinion that the adverse impacts upon

the property far outweighed any of the benefits to be gained by such zoning. These adverse impacts included the following facts:

(a) That the existing state road leading to the Crows Nest Harbour development was insufficient to handle a development of that size;

(b) That there were no plans to provide a central water and sewer system servicing the area;

(c) That the area could not be served by well and septic tanks with drainage fields under the existing zoning;

(d) The state-wide requirements for erosion sedimentation control would prohibit certain construction activity which would be necessitated by such a development.

36. That, on June 20, 1978, the Board approved the zoning ordinance, adopting the recommendation of the community development department covering the Crows Nest Harbour development.

37. That this zoning ordinance rezoned the entire property to category A-2 (rural residential) zoning.

38. That this zoning ordinance would permit a maximum of 12,000 individuals on the 4,725-acre tract.

39. That Exhibit 14 is a true and correct copy of the Stafford County Zoning ordinance.

40. That, on November 14, 1972, Urban Engineering and Associates submitted a cost estimate for the construction of roads, storm sewer, and water and sewer lines in Sections A, B, C and D.

41. That Exhibit 15 is a true and correct copy of the cost estimate mentioned in paragraph 39.

42. That Exhibit 16 is a true and correct copy of a letter, dated April 24, 1973, from J. Edgar Sears, Jr. to H. P. C. Vandenburg.

43. That Exhibit 17 is a true and correct copy of a letter, dated May 15, 1973, from D. K. Cook to H. P. C. Vandenburg.

44. That, on May 15, 1973, D. K. Cook was the County Administrator of Stafford County.

45. That Exhibit 18 is a true and correct copy of a letter, dated May 18, 1973, from Barry B. Smith to N. C. Sharp.

46. That, on or about October 2, 1973, CNHLP, as principal, by its authorized agent, and Safeco, as surety, by its authorized agent, for valuable consideration, executed four subdivision bonds, in favor of Stafford County with respect to the roads, storm sewer and water and sewer lines in Sections A, B, C and D.

47. That Exhibits 19, 20, 21 and 22 are true and correct copies of the subdivision bonds (hereinafter referred to as the subject bonds).

48. That the subject bonds were executed and posted with and at the request of Stafford County, pursuant to the Stafford County subdivision ordinance then in effect.

49. That Exhibit 23 is a true and correct copy of the Stafford County subdivision ordinances in effect between 1971 and 1973.

50. That, on October 18, 1973, the Board approved the subject bonds.

51. That Exhibit 24 is a true and correct copy of a letter dated October 19, 1973, from N. C. Sharp to S. M. Van Devender.

52. That, on October 19, 1973, N. C. Sharp was the County Administrator for Stafford County.

53. With reference to the construction of roads, storm sewer, and water and sewer lines in Sections A, B, C and D, CNHLP performed only the work described in paragraph 30 above. The roads, storm sewer, and water and sewer lines which are the subject of the subject bonds have never been completed.

54. That, by letter dated June 21, 1976, the Board by its counsel, advised Safeco that the roads, storm sewer, and water and sewer lines in Sections A, B, C and D had not been completed in accordance with the subject bonds and requested that Safeco pay to Stafford County the total amount of the subject bonds.

55. That Exhibit 25 is a true and correct copy of the letter mentioned in paragraph 54.

56. That Safeco has not constructed, and has not hired a contractor to construct, the roads, storm sewer, and water and sewer lines in Sections A, B, C and D as described in the subject bonds. Safeco has not paid to Stafford County, any individual, or any person, any sum of money for such construction.

57. That the Board has not constructed, and has not hired a contractor to construct, the roads, storm sewer, and water and sewer lines in Sections A, B, C and D as described in the subject bonds. The Board has not paid to any individual or



person any sum of money for such construction.

58. That the cost of construction of the roads, storm sewer, and water and sewer lines in Sections A, B, C and D, in accordance with the requirements of the subject bonds, exceeds the total amount of the subject bonds (\$1,287,492.00).

59. That the cost of construction of the roads and storm sewer in Section A, B, C and D, in accordance with the requirement of the subject bonds, exceeds the total amount of the bonds (\$1,287,492.00).

60. That the cost of construction of the water and sewer lines in Sections A, B, C and D, in accordance with the requirements of the subject bonds, exceeds the total amount of the subject bonds (\$1,287,492.00).

61. That the Board has no plans to appropriate or commit the dollar difference between the total amount of the subject bonds and

(a) the estimated cost of constructing the roads, storm sewer, and water and sewer lines in Sections A, B, C and D;

(b) the estimated costs of constructing the roads and storm sewer, in Sections A, B, C and D;

(c) the estimated costs of constructing the water and sewer lines in Sections A, B, C and D.

62. That no person presently lives on the 4,725-acre tract and that no building permits have been granted permitting anyone to build a residence anywhere on the tract.

63. That portions of Section A, B, C and D are not

suitable for septic tank and drainage field sewage disposal systems.

64. That CNHLP planned to construct an on-site central sewer system on the 4,725-acre tract.

65. That, in November, 1971, the Board accepted CNHLP's proposal for connecting the county water line to the Crows Nest Harbour development. This acceptance was conditioned upon CNHLP's promise to construct, at its own expense, a water line from the Crows Nest Harbour development to Stafford County's then-existing water line at U.S. Route 1.

66. That Exhibit 26 is a true and correct copy of a letter, dated November 12, 1971, from W. Hansford Abel to Sherman M. Van Devender.

67. That W. Hansford Abel, on November 12, 1971, was the Chairman of the Board.

68. That the ultimate construction of the water line mentioned in paragraph 65 was dependent upon CNHLP either obtaining easements over the property between the Crows Nest Harbour development and U.S. Route 1 or securing permission to construct the water line along the right-of-way of the State Highway Department.

69. That, in July, 1971, the State Health Department and the State Water Control Board approved the request of CNHLP for a water discharge point on the Potomac Creek for CNHLP's proposed sewerage treatment facility.

70. That, by December 31, 1972, CNHLP obtained from Urban Engineering and Associates, a Virginia partnership, plans

for a sewerage treatment facility and sewerage collection system to be constructed on the Crows Nest Harbour development.

71. That the plans mentioned in paragraph 70 were submitted for approval, and approved, by the State Health Department and State Water Control Board. The State Health Department, by its authorized agent, signed the final subdivision plats for Sections A, B, C and D.

72. That, in ~~October~~, 1973, CNHLP and Stafford County entered into an Agreement whereby CNHLP, among other things, agreed to construct, at its own expense, a sanitary sewer system on the Crows Nest Harbour development site.

73. That Exhibit 31 is a true and correct copy of the Agreement executed by Stafford County.

74. That, at the Board's meetings of December 20, 1973 and July 1, 1974, some members of the Board expressed concern whether it could, or should, supply water to Crows Nest Harbour development.

75. That Exhibit 32 is a true and correct copy of excerpts from the December 20, 1973 and July 1, 1974 meetings of the Board.

76. That CNHLP never obtained any easements, never commenced construction of water and sewer lines and never commenced construction of a sewerage treatment facility, sewerage collection system or water distribution system.

77. That there are no known plans to construct a sewerage treatment facility, sewerage collection system, water distribution system, or water and sewer lines on or near the Crows Nest Harbour development property.

78. That there are no known plans to construct water lines from Stafford County's water lines to the Crows Nest Harbour development property.

79. That the Stafford County Comprehensive Development Plan, Exhibit 13, adopted July 16, 1975, does not plan for or recommend the installation of public water and sewerage treatment facilities servicing the Crows Nest Harbour development property.

80. That, at all times between 1971 and the present time, the only approach roads to the Crows Nest Harbour development property were, and are, State Routes 608 and 609. State Route 608 was and is a two-lane paved country road. State Route 609 was, and is, an unpaved road.

81. That Exhibit 33 is a true and correct copy of a general highway map of Stafford County, Virginia.

82. That, at the time the plans were developed for the Crows Nest Harbour development, State Routes 608 and 609 were not sufficient to handle the Crows Nest Harbour development as planned.

83. That Exhibit 34 is a true and correct copy of a Traffic Study which was prepared to determine the amount of the traffic which would pass over State Routes 608 and 609 if the Crows Nest Harbour development was constructed as planned.

84. That, in 1973, the State Highway Department developed plans to upgrade and construct state roads for access to the Crows Nest Harbour development property.

85. That Exhibit 35 is a true and correct copy of a letter, dated February 6, 1973, from Andrew Myruski to John M.

Porter.

86. That Exhibit 36 is a true and correct copy of a letter, dated June 13, 1973, from Andrew Myruski to N. C. Sharp.

87. That Exhibit 37 is a true and correct copy of an Access Study-Report prepared with reference to the Crows Nest Harbour development.

88. That CNHLP agreed to "bear the brunt of the cost" to upgrade State Routes 608 and 609.

89. CNHLP never provided any funds for upgrading State Routes 608 and 609.

90. That there are no known plans to upgrade State Routes 608 and 609 or to construct other access roads to the Crows Nest Harbour development.

91. That, in 1972, CNHLP was advised by Stafford County that all streets in Sections A, B, C and D could not be private roads but would have to be constructed in such a manner that they would be eligible for acceptance into the Virginia State Secondary System of Highways.

92. That, in 1972, CNHLP was advised by the State Highway Department that in order for the subdivision streets to be eligible for acceptance into such system they would have to be designed and constructed in accordance with the then-applicable standards and specifications of the State Highway Department, being the 1972 Road Designs and Standards.

93. That Exhibit 40 is a true and correct copy of a letter, dated November 21, 1972, from Andrew Myruski to Jack C. Burlbaugh.

94. That during 1972 and 1973, CNHLP, through Urban Engineering and Associates, submitted various plans for the construction of subdivision roads within Sections A, B, C and D. At the request of the State Highway Department, revisions in these plans were made. The plans called for the construction of various subdivision streets and the construction of State Route 609 to connect with State Route 608.

95. That Exhibit 41, attached hereto, is a true and correct copy of a letter dated January 23, 1973, from Andrew Myruski to Urban Engineering and Associates.

96. That CNHLP prepared final plans for the subdivision roads, which were submitted for approval, and approved, by the State Highway Department. The State Highway Department, by its authorized agent, signed the final subdivision plans for Sections A, B, C and D.

97. That the standards and specifications for subdivision streets have been modified since 1972.

98. That there are no known plans to construct any subdivision roads within Sections A, B, C and D.

99. That, in 1975, CNHLP and its general partners and limited partner, filed a lawsuit against DMI in the United States District Court for the Eastern District of Virginia. DMI filed a counterclaim against CNHLP. By judgment order, entered December 3, 1976, DMI obtained a judgment against CNHLP in the amount of \$4,580,325.37.

100. That Exhibit 45 consists of a true and correct copy of pleadings in this lawsuit.

101. That, in 1978, DMI commenced foreclosure proceedings against the owners of lots in Sections A, B, C and D, including CNHLP and others.

102. That, on July 13, 1978 property owners of lots in Sections A, B, C and D filed a lawsuit against CNHLP, all of CNHLP's partners individually, and DMI, in the Circuit Court of Fairfax County, Virginia. These property owners have requested the Court to rescind and void their agreements to purchase these lots; to order the defendants to return to them all monies paid by them for these lots; to void all promissory notes and deeds of trust executed by them with reference to these lots; to award them attorney's fees; and to award them punitive damages of \$5,000,000.00. These property owners request, if the Court refuses to grant them that relief, that it award them a judgment of \$2,425,900.00. Most of the property owners in Sections A, B, C and D are involved in this suit. None of the property owners are residents of Stafford County, Virginia.

103. That Exhibit 46 consists of true and correct copies of pleadings in this lawsuit.

104. That this lawsuit has not yet been tried before a judge or jury.

105. The DMI and these property owners have entered into an Agreement and Stipulation with respect to their rights.

106. That Exhibit 47 consists of a true and correct copy of this Agreement and Stipulation.

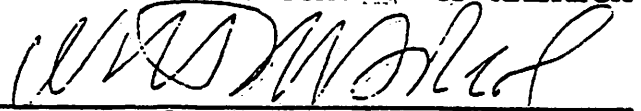
107. That DMI has filed a lawsuit against the Board.

in the Circuit Court of Stafford County.

108. That Exhibit 48 consists of a true and correct copy of the pleadings in this lawsuit.

SAFECO INSURANCE COMPANY OF AMERICA

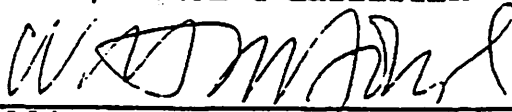
BY



Of Counsel

WHITTICAR, SOKOL & LEDBETTER

BY



William M. Sokol  
918 Princess Anne Street  
P. O. Box 593  
Fredericksburg, Virginia 22401

CERTIFICATE

I certify that on this 18<sup>th</sup> day of Sept,

1980, I mailed the enclosed Requests for Admission, postage prepaid, to William H. Harris, Harris & Harris, 809 William Street, Fredericksburg, Virginia 22401, counsel for the plaintiff, the Board of Supervisors of Stafford County, Virginia.



WHITTICAR, SOKOL & LEDBETTER  
by William M. Sokol



RESPONSE TO REQUEST FOR ADMISSIONS

COMES NOW the Plaintiff, Board of Supervisors of Stafford County, by Counsel, in response to the request for admissions filed herein by the Defendant, and states as follows:

A. In every request where Safeco refers to CNHLP, the County responds that it is without knowledge as to whether Crows Nest Harbour is a general or limited partnership and denies that portion of each request.

B. In every request where Safeco requests the County to admit a document is a true and correct copy, the County will not concede or admit to the accuracy of the contents or the admissibility of the documents without appropriate foundation and further reserves the right to make other appropriate objections.

C. With respect to every request, the County will not concede or admit to the admissibility of the facts contained in the request without appropriate foundation and further reserves the right to make other appropriate objections.

D. With respect to every request where the County denies same on the basis that it is without knowledge, the County states that it made a good faith effort to determine the truth or accuracy of the Request.

1) In response to Request 1, Board of Supervisors of Stafford County (hereinafter "County") admits that Crows Nest Harbour is a Virginia Partnership and it started about October 5, 1972. The remaining facts are denied, as the County is without knowledge.

2) With respect to Request 2, the Board admits that Coke Gage, F. V. M. Corporation, a Virginia Corporation, Research Homes, Inc., a Delaware Corporation, Woodrow D. Marriott, Frank

K. Johnson, William J. Durkin and Bicknel A. Robbins were partners of Crows Nest Harbour. With respect to the remaining facts, the County is without knowledge and therefore denies same.

3) With respect to Request 3, the County admits Diversified Mortgage Investors is now a Florida Corporation, the remainder of the facts in the request are denied, as the County is without knowledge.

4) The County admits the information contained in Request 4.

5) The information contained in Request 5 of the Request is admitted.

6) With respect to Request 6, the County admits the allegations contained in the request.

7) The facts in Request 7 are admitted.

8) The County is without knowledge as to the facts contained in Request 8 and denies same.

9) The facts in Request 9 are admitted.

10) With respect to Request 10, the County is without knowledge as to whether Exhibit 1 is a true and correct copy of a development report and denies this request. The Report came from Safeco's files.

11) With respect to Request 11, the County is without knowledge as to whether Exhibit 2 is a true and correct copy of an appraisal report and further states the County's copy is not legible and denies that portion of this request. The Report came from Safeco's files.

12) With respect to Request 12, the County admits the facts contained in the Request.

13) With respect to Request 13, the County admits the facts contained in the Request.

14) With respect to the facts contained in Request 14, the County admits same, except it emphasizes that from a zoning standpoint 35,000 individuals could be permitted on the project; however, there may be other considerations that would prevent that number of people, and/or units from being located on the property.

15) With respect to Request 15, the County is without knowledge as to whether Exhibit 4 is a true and correct copy of a concept plan and denies this request. The Report came from Safeco's files.

16) With respect to Request 16, the County admits that in 1971 Crows Nest Harbour applied to the Board for approval of final subdivision plats for Sections A, B, C, and D, but denies the remainder.

17) The facts contained in paragraph 17 are admitted, except the approval was subject to the approval of other state agencies and bonds being posted with the County.

18) The facts contained in Request 18 are denied.

19) The facts contained in Request 19 are admitted.

20) With respect to Request 20, the County admits that Exhibit 6 is a true and correct copy of a letter dated November 28, 1972, from William G. O'Brien to Jack Burlbaugh.

21) The facts contained in Request 21 are admitted.

22) With respect to the facts contained in Request 22, the Board states Exhibits A, B, C and D are true and correct copies of a portion of the minutes of the Board of Supervisors

of Stafford County, for October 13, 1971, November 10, 1971, December 8, 1971 and March 16, 1972, respectively, but the County is without knowledge as to whether the statements made by various people reported in the minutes are factually correct and denies the same. The County does admit that the statements were made, but denies the truth or accuracy of the statements.

23) With respect to Request 23 the County admits that Exhibit 7 is a true and correct copy of a letter dated January 10, 1973, from William G. O'Brien to S.M. Vandevender.

24) The facts contained in Request 24 are admitted.

25) With respect to Request 25 the County admits the facts contained in the request except water to the development was originally to be supplied by wells on site; Crows Nest Harbour agreed to upgrade the portions of the approach road as shown on the road plans and further that the understandings listed in this request may not have been the complete understandings of the parties.

26) With respect to Request 26, the County admits that of the 346 lots in Sections A, B, C and D, 33 lots shall remain titled in Crows Nest Harbour, but the County has no knowledge of unrecorded contracts. The remainder of Request 26 is denied.

27) The facts contained in Request 27 are admitted, except to state that by October, 1973, Crows Nest Harbour obtained all the required approvals (albeit conditional) for the filing of the final subdivision plats in Sections A, B, C and D.

28) With respect to Request 28, the County admits that Exhibits 10, 11 and 12 are true and correct copies of the final plats mentioned in Request 26.

29) With respect to Request 29, the County admits that after the recordation of the final subdivision plats for Sections A, B, C and D, Crows Nest Harbour (Partnership) delivered deeds to those individuals who had agreed to purchase lots in those sections. The remaining facts in this Request are denied.

30) With respect to Request 30, the County admits that as of December, 1974, Crows Nest Harbour Partnership had done or had a contractor do the following work:

- Cleared 90% of the acreage for roads.
- Had burned some acreage.
- Had delivered gravel to the site and had done a limited amount of stake-out and grading on the site.

31) The facts contained in Request 31 are denied as the County is without knowledge concerning this matter.

32) With respect to Request 32, the County admits F. V. M. Corporation, general partner in Crows Nest Harbour Limited Partnership filed a petition in the United States Bankruptcy Court, but the County is without knowledge as to any other facts in the request and denies same.

33) With respect to Request 33, the County admits that on July 17, 1975, the Board approved the Stafford County Comprehensive Development Plan, which recommended that Crows Nest Harbour Development property be developed as low density residential. The remaining facts in this Request are denied as the County is without knowledge as to exactly what Crows Nest Harbour planned.

34) With respect to Request 34, the County admits that Exhibit 13 is a true and correct copy of the Stafford County Comprehensive Development Plan.

35) With respect to Request 35, the County admits that in 1978 the Community Development Department of Stafford County, recommended that Crows Nest Harbour Development property be rezoned; that the opinion of this department was that the 4,725 acre tract should not be developed into the densities that were proposed by Crows Nest Harbour and that, in fact, the property could not sustain that sort of development; that the department was also of the opinion that the adverse impacts upon the property far outweighed any benefits to be gained by such zoning; and that these adverse impacts included but were not limited to the following facts:

a) That the existing State Road leading to Crows Nest Harbour was insufficient to handle a development of that size;

b) That there were no plans to provide central water and sewer service in the area.

c) That the area could not be served by well and septic with drainfields under the existing zoning, but that with the changed zoning it could be.

d) The state-wide requirements for erosion sedimentation control would prohibit certain construction activity which would be necessitated by such development. The County would further state that these may not be all the adverse impacts and that it also may not be all of the reasons that the County felt the property should not be developed into the densities that were proposed.

36) The facts contained in Request 36 are admitted.

37) The facts contained in Request 37 are admitted.

38) With respect to the facts contained in Request 38, the

County admits same, except it emphasizes that from a zoning standpoint 12,000 individuals could be permitted on the project; however, there may be other considerations that would prevent that number of people, and/or units from being located on the property.

39) The facts contained in Request 39 are admitted.

40) The facts contained in Request 40 are admitted, except Urban Engineering and Associates submitted the estimate on behalf of Crows Nest Harbour.

41) The facts contained in Request 41 are admitted, except it is paragraph 40 rather than 39.

42) The facts contained in Request 42 are admitted.

43) The facts contained in Request 43 are admitted.

44) The facts contained in Request 44 are admitted.

45) The facts contained in Request 45 are admitted.

46) As to the facts contained in Request 46, the County admits that on or about October 2, 1973, Crows Nest Harbour, as principal, by its authorized agent, and Safeco, as surety, by its authorized agent, for valuable consideration, executed four subdivision bonds in favor of Stafford County with respect to the roads, storm sewer and water and sewer lines in Sections A, B, C, and D.

47) The facts in Request 47 are admitted.

48) The facts in Request 48 are admitted.

49) The facts contained in Request 49 are denied, in that Exhibit 23 does not contain the complete text of the ordinance.

50) The facts contained in Request 50 are admitted.

51) The facts contained in Request 51 are admitted.

- 52) The facts contained in Request 52 are admitted.
- 53) The facts contained in Request 53 are admitted, except as provided in response 30 above.
- 54) The facts contained in Request 54 are admitted, except County gave Safeco the option of completing the improvements.
- 55) The facts contained in Request 55 are admitted.
- 56) The facts contained in Request 56 are admitted.
- 57) The facts contained in Request 57 are admitted.
- 58) The facts contained in Request 58 are admitted.
- 59) The facts contained in Request 59 are admitted.
- 60) The facts contained in Request 60 are admitted.
- 61) The facts contained in Request 61 are admitted, but the County would state that it has authority to raise the difference in cost between the total amount of the subject bonds and items a), b) and c).
- 62) The facts contained in Request 62 are denied.
- 63) The County denies the facts in Request 63, as the County is without knowledge.
- 64) With respect to Request 64, the County admits that Crows Nest Harbour planned to construct an on-site central sewer system on the 4,725 acre tract, which includes Sections A, B, C & D.
- 65) The County admits that with respect to Request 65, that in November, 1971, the Board was receptive to Crows Nest Harbour's proposal for connecting the County water line to the Crows Nest Harbour development upon the condition that Crows Nest Harbour construct, at its expense, a water line from the Crows Nest Harbour development to Stafford County's then existing water line



at U. S. Route 1

66) The County admits that Exhibit 26 is a true and correct copy of a letter dated November 12, 1971 from W. Hansford Abel to Sherman M. Vandevender.

67) The facts contained in Request 67 are admitted.

68) With respect to Request 68, the County admits that obtaining easements over the property between the Crows Nest Harbour development and U. S. Route 1 or securing permission to construct the water line along the right-of-way of the State Highway Department was one element required in the construction of the said water line but County denies all other facts.

69) The facts contained in Request 69 are admitted.

70) The facts contained in Request 70 are admitted.

71) The facts contained in Request 71 are admitted.

72) The facts contained in Request 72 are admitted, except the date was November 20, 1973.

73) The facts contained in Request 73 are admitted, except the exhibit does not reflect the County executed the agreement and the date of the agreement is November 20, 1973.

74) The facts contained in Request 74 are admitted.

75) The facts contained in Request 75 are admitted, but other excerpts are also included in Exhibit 32.

76) With respect to Request 76, the County admits Crows Nest Harbour never commenced construction of a sewerage treatment facility; denies Crows Nest Harbour never obtained any easements and it without knowledge as to facts contained in the remainder of the request.

77) With respect to Request 77, the County is without

knowledge as to what Safeco means by "plans"; engineering plans, financial plans or an intention to construct, and, therefore, denies the request.

78) With respect to Request 78 the County is without knowledge as to what Safeco means by "plans"; engineering plans, financial plans or an intention to construct, and, therefore, denies the request.

79) The facts contained in Request 79 are admitted.

80) The facts contained in Request 80 are admitted.

81) The facts contained in Request 81 are admitted.

82) The facts contained in Request 82 are admitted, but would state that Routes 608 and 609 would be sufficient to handle Sections A, B, C and D.

83) The County admits Exhibit 34 is a true and correct copy of a preliminary traffic study which was prepared to determine the amount of traffic which would pass over State Route 608 and 609, if the entire Crows Nest Harbour tract (4,725 acres) was developed as planned. However, the County does not admit that the data contained in this study or the assumptions made in this study are true and correct or are based on sound engineering data and/or information.

84) With respect to Request 84, the County is without knowledge of the facts contained in that paragraph, and denies same.

85) The County admits the facts contained in Request 85.

86) The County admits the facts contained in Request 86.

87) The County admits Exhibit 34 is a true and correct copy of a preliminary traffic study which was prepared to

determine the amount of traffic which would pass over State Route 608 and 609, if the entire Crows Nest Harbour tract was developed as planned. However, the County does not admit that the data contained in this study or the assumptions made in this study are true and correct or are based on sound engineering data and/or information.

88) With respect to Request 88, the County admits that Crows Nest Harbour Partnership agreed to bear the brunt of the costs to upgrade State Route 608 and 609.

89) With respect to Request 89, the County admits that Crows Nest Harbour Partnership never provided any funds for the upgrading of State Route 608 and 609.

90) With respect to Request 90, the County admits the facts contained in paragraph 90, except that Mr. Andrew Myruski indicated approximately one year ago, interest in constructing or improving a portion of Route 608 and 609 adjacent to the Crows Nest Harbour Development, and the bonds themselves provide funds in part to improve Route 609, and the County will use these funds in part for that purpose.

91) The facts contained in Request 91 are admitted.

92) The County admits the facts contained in Request 92.

93) The County admits the facts contained in Request 93.

94) The County admits the facts contained in Request 94.

95) The County admits the facts contained in Request 95.

96) The County admits the facts contained in Request 96.

97) The County admits the facts contained in Request 97.

98) With respect to Request 98, the County is without knowledge as to what Safeco means by "plans"; engineering plans,

financial plans or an intention to construct, and, therefore, denies the request.

99) The County is without knowledge as to whether or not the facts contained in Request 99 are true and correct, and can neither admit nor deny the Request. The County, however, has seen documents that tend to indicate the information is correct.

100) With respect to Request 100, the County is without knowledge as to whether the documents are in fact true and correct copies of the pleadings, or whether or not they are all the pleadings in this lawsuit and can neither admit nor deny the request. However, the County will state that the documents appear to be at least portions of the pleadings in the aforementioned lawsuit.

101) The County admits the facts contained in Request 101.

102) With respect to Request 102, the County is without knowledge other than the fact that it has seen copies of the pleadings which Safeco has produced in regards to this lawsuit and can neither admit nor deny the request, except the County specifically denies none of the property owners are residents of Stafford County, Virginia (See EXHIBIT 46), James D. Hittle is a resident of Stafford County, Virginia. The County is without knowledge as to whether any other residents of Stafford County owns lots in Crows Nest Harbour. The County further states that it is without knowledge as to whether most of the property owners in Sections A, B, C and D are involved in the Virgil L. Harris v. Crows Nest Harbour Limited Partnership suit, but Exhibit 1 referred to in the Bill of Complaint and which was not part of Exhibit 46 in the Request for Admissions in Law No.

307-77 should be helpful to Safeco on this point.

103) The County is without knowledge to know whether the documents are in fact true and correct copies of the pleadings or whether or not they are all the pleadings in this lawsuit. However, the County will state that the documents appear to be at least portions of the pleadings in the aforementioned lawsuit.

104) The County has no knowledge of the information contained in paragraph 104, but the County believes this information to be correct.

105) The County is without knowledge as to the information contained in Request 105 and can neither admit nor deny same.

106) The County is without knowledge as to the information contained in Request 106 and can neither admit nor deny same.

107) The facts contained in Request 107 are admitted.

108) The County admits that Exhibit 48 is a true and correct copy of the Bill of Complaint and Answer.

BOARD OF SUPERVISORS OF  
STAFFORD COUNTY

By William H. Harris  
Of Counsel

William H. Harris, p.q.  
County Attorney for Stafford County  
809 William Street  
Fredericksburg, Virginia 22401

CERTIFICATE

I hereby certify that a true copy of the foregoing Response to Request for Admissions was mailed, postage prepaid, or hand delivered this 17th day of November, 1980, to William M. Sokol, Esquire, Whitticar, Sokol & Ledbetter; 918 Princess Anne Street, Fredericksburg, Virginia, 22401, and Robert B. Goodall, Esquire, Goodall & Jacoby; Post Office Box 316, Stafford, Virginia, 22554.

William H. Harris

REQUESTS FOR ADMISSION

TO: SAFECO INSURANCE COMPANY  
OF AMERICA  
c/o William H. Sokol, Esquire  
PO Box 593  
918 Princess Anne Street  
Fredericksburg, Virginia 22401

The plaintiff, Board of Supervisors of Stafford County, (hereinafter referred to as Board), by counsel, pursuant to Rule 4:11 of the Rules of the Supreme Court of Virginia, files its Requests for Admission upon the defendant, Safeco Insurance Company of America, (hereinafter called Safeco), to be answered within the time and in the manner prescribed by said Rule.

Board requests that Safeco make the following admissions:

1. That the cost of construction of the roads, storm sewer, and water and sewer lines in Section A, in accordance with the requirements of the subject bond, exceeds, \$410,949.00, the total amount of the bond for Section A.
2. That the cost of construction of the roads and storm sewer in Section A, in accordance with the requirements of the subject bond, exceeds \$410,949.00, the total amount of the bond for Section A.
3. That the cost of construction of the water and sewer lines in Section A, in accordance with the requirements of the subject bonds, exceeds \$410,949.00 the total amount of the bond for Section A.
4. That the cost of construction of the roads, storm sewer, and water and sewer lines in Section B, in accordance with the requirements of the subject bond, exceeds \$311,254.00, the total amount of the bond for Section B.

5. That the cost of construction of the roads and storm sewer in Section B, in accordance with the requirements of the subject bond, exceeds \$311,254.00, the total amount of the bond for Section B.

6. That the cost of construction of the roads, storm sewer, and water and sewer lines in Section C, in accordance with the requirements of the subject bond, exceeds \$192,248.00, the total amount of the bond for Section C.

7. That the cost of construction of the roads and storm sewer in Section C, in accordance with the requirements of the subject bond, exceeds \$192,248.00, the total amount of the bond for Section C.

8. That the cost of construction of the roads, storm sewer, and water and sewer lines in Section D, in accordance with the requirements of the subject bond, exceeds \$373,041.00, the total amount of the bond for Section D.

9. That the cost of construction of the roads and storm sewer in Section D, in accordance with the requirements of the subject bonds, exceeds \$373,041.00, the total amount of the bond for Section D.

10. The cost of construction of the roads, storm sewer, and water and sewer lines in Section A, B, C and D, in accordance with the requirements of the four subdivision bonds, exceeds \$1,287,492.00, to-wit:

As of July 1, 1976, the estimated cost to construct these improvements:

<u>SECTION</u>	<u>A</u>	<u>B</u>	<u>C</u>	<u>D</u>	<u>TOTAL</u>
Roads	634,021	338,128	199,671	502,312	1,674,132
Water & Sewer	617,703	194,661	95,571	287,798	1,195,733
	<u>1,251,724</u>	<u>532,789</u>	<u>295,242</u>	<u>790,110</u>	<u>2,869,865</u>

As of October 7, 1976, the estimated cost to construct these improvements.

<u>SECTION</u>	<u>A</u>	<u>B</u>	<u>C</u>	<u>D</u>	<u>TOTAL</u>
Roads	667,891	355,924	210,810	528,749	1,762,244
Water & Sewer	650,714	204,906	100,601	302,945	1,258,666
	<u>1,317,605</u>	<u>560,830</u>	<u>310,781</u>	<u>831,694</u>	<u>3,020,911</u>

As of January 19, 1980, the estimated cost to construct these improvements:

<u>SECTION</u>	<u>A</u>	<u>B</u>	<u>C</u>	<u>D</u>	<u>TOTAL</u>
Roads	894,800	477,200	281,800	708,900	2,362,700
Water & Sewer	898,000	274,700	134,900	406,200	1,713,800
	<u>1,792,800</u>	<u>751,900</u>	<u>416,700</u>	<u>1,115,100</u>	<u>4,076,500</u>

BOARD OF SUPERVISORS OF  
STAFFORD COUNTY

BY: William H. Harris  
Of Counsel

William H. Harris  
Stafford County Attorney  
809 William Street  
Fredericksburg, Virginia 22401

CERTIFICATION

I hereby certify that a true and correct copy of the foregoing instrument was mailed, postage prepaid, or hand delivered on this 9<sup>th</sup> day of October, 1980 to: William H. Sokol, Esquire, PO Box 593, 918 Princess Anne Street, Fredericksburg, Virginia 22401.

William H. Harris  
WILLIAM H. HARRIS



RECEIVED  
11-14-80

VIRGINIA:

IN THE CIRCUIT COURT OF STAFFORD COUNTY

BOARD OF SUPERVISORS OF STAFFORD COUNTY

Plaintiff

V.

AT LAW NO. 307-77

SAFECO INSURANCE COMPANY OF AMERICA

Defendant

O R D E R

THIS DAY came the parties, by counsel, upon the Defendant's Motion to require the Plaintiff to answer the Defendant's Requests for Admission, which Motion was argued by counsel.

UPON CONSIDERATION WHEREOF, it appearing to the Court that both parties should respond to the Requests for Admission filed herein, it is accordingly,

ADJUDGED, ORDERED and DECREED:

- (1) That the Plaintiff file its responses to the Defendant's Requests for Admission on or before November 7, 1980;
- (2) That the Defendant file its responses to the Plaintiff's Requests for Admission on or before November 7, 1980;
- (3) That in the event any Request contains a factual inaccuracy and/or omission, the party upon whom the request is made shall state specifically why such request contains an inaccuracy and/or omission and shall also state the true fact or the fact which has been omitted; and
- (4) That the parties otherwise respond to all requests made in a responsive and good faith manner in accordance with

Rule 4:11 of the Rules of the Supreme Court of Virginia.

By endorsement of this Order neither party waives any right to object under the Rules of Evidence to any matter admitted at the trial of this matter.

ENTER: B/ J. M. H. Willis, Jr  
JUDGE

DATE: November 5, 1980

SEEN:

WHITTICAR, SOKOL & LEDBETTER

By

William M. Sokol  
918 Princess Anne Street  
P. O. Box 593  
Fredericksburg, Virginia 22401  
Counsel for the Defendant,  
Safeco Insurance Company of America

William H. Harris  
William H. Harris  
Stafford County Attorney  
809 William Street  
Fredericksburg, Virginia 22401  
Counsel for the Plaintiff,  
Board of Supervisors of Stafford  
County

A COPY TESTED:

Lillian I. Knight  
CLERK  
by: Edward B. Aspay, Jr.

VIRGINIA

IN THE CIRCUIT COURT OF STAFFORD COUNTY

BOARD OF SUPERVISORS OF STAFFORD COUNTY

PLAINTIFF

v

LAW 307-77

SAFECO INSURANCE COMPANY OF AMERICA

DEFENDANT

MEMORANDUM

1. The bonds in this case do not fall within the scope of Section 11-23 of the Code of Virginia. The plea of the Statute of Limitations set forth in Safeco's second defense, will be overruled.

2. An obligation to "complete" necessarily involves the obligation to begin. Thus the failure of CNHLP to begin the guaranteed project is not a failure of condition precedent which will afford a defense to Safeco's guarantee of the project's completion. Safeco's third defense will be overruled.

3. Safeco's plea of failure of consideration, set forth in its fourth defense, will be overruled.

4. Safeco's tenth defense will be stricken by agreement of the parties.

5. Safeco's claim of the right of subrogation, set forth in its eleventh defense, is not a defense to this action and is not properly an issue in this case. Safeco's eleventh defense will be stricken.

6. Safeco's twelfth defense will be sustained insofar as it denies liability for attorneys' fees. No ruling is made as to its denial of liability for interest, that being an issue properly reserved for trial.

7. Safeco's thirteenth defense will be sustained, subject to the reservation of ruling on the question of liability for interest, as set forth in the preceding paragraph.

8. The Court does not have before it the parties necessary for a determination of the continuing validity of the subdivision plat. Therefore, the defense set forth in paragraph 7 of Safeco's Grounds of Defense to the Amended Motion for Judgment will be stricken.

9. The issues raised by Paragraph 11 of Safeco's Grounds of Defense to the Amended Motion for Judgment cannot be decided summarily. The determination of the rights and obligations created by the documents and plans secured by the bonds requires proof of the terms of those documents and plans.

10. By their terms, the bonds provide a unitary liability for the performance of the several projects secured. Safeco is liable to the full extent on each bond until all the projects therein guaranteed are fully completed. The defense set forth in Paragraph 12 of Safeco's Grounds of Defense to the Amended Motion for Judgment will be overruled.

11. Safeco was not obligated under the bonds to do anything more than pay money in the event of default. The County had no right to expect more. The case of Continental Realty Corporation v Andrew J. Crevolin Co., 380 F sup 246 is inapposite. The prayer for consequential damages has heretofore been overruled. That ruling is reaffirmed.

12. By its fifth, sixth, seventh, eighth and ninth defenses set forth in its original Grounds of Defense, reaffirmed

in its Grounds of Defense to the Amended Motion for Judgment, and in Paragraphs eight, nine and ten of its Grounds of Defense to the Amended Motion for Judgment, Safeco sets forth the following defenses:

- a. That because the cost of completing the project far exceeds the amount of the bonds, it is impossible to achieve the purpose of the bonds.
- b. That because the County hasn't undertaken the projects, the projects were designed and intended to relate to other projects which have not been accomplished, that because there is no need for the guaranteed improvements, and that because the zoning of the area has been changed so that the intended project would no longer be permissible, the purpose of the bonds has been frustrated.
- c. That the bonds are indemnifying in their nature. That the County has incurred and will incur no costs in pursuing the guaranteed projects.

The foregoing three issues are central to this case. While there may be some dispute over minor details, it appears from the Briefs of the parties that the essential facts are not in question. The problem which underlies these issues is the inadequacy of the bonds. The bonds are inadequate in amount in that they are insufficient to accomplish the guaranteed projects. They are inadequate in scope in that they fail to provide for the complimentary improvements and facilities required for the purposeful accomplishment of the guaranteed projects.

The inadequacy of the bonds is not itself a defense to Safeco. It undertook an obligation, and the mere inadequacy of its contribution alone is not a defense to its performing to the extent undertaken by it toward the accomplishment of the stated goal. On the other hand, the County cannot avoid responsibility for the inadequacy of the bonds. Safeco undertook the obligation specified to it. The County cannot require Safeco to perform in vain while itself shunning responsibility for the unguaranteed portion of the projects.

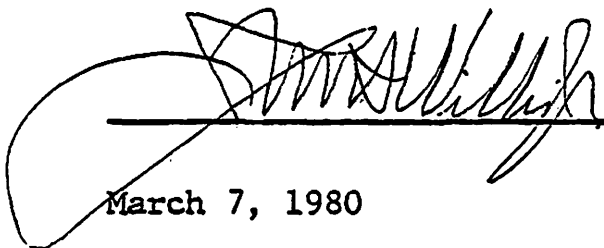
The construction of the facilities guaranteed by the bonds has not been rendered impossible. The defense of impossibility will be overruled.

The purpose of the bonds has been frustrated by the failure of the beneficiaries of the bonds to pursue the projects, by the rezoning of the property, and by the general abandonment of the project. This repudiation of the project by the County absolves Safeco of liability to it on the bonds. The defenses of frustration of purpose will be sustained.

The bonds are not penal, but indemnifying in nature. Board of Supervisors v Ecology One, 219 Va. 29. The County has incurred, and will incur, no costs with respect to the guaranteed projects. Hence there can be no liability on principles of indemnification. The County seeks to have the funds represented by the bonds set aside in escrow against the day when some interested party may decide to undertake and complete the guaranteed projects. Such nebulous speculation cannot be the foundation for a judgment in excess of \$1,000,000.00. Such a result would impose liability on Safeco while effecting no

demonstrable benefit to anyone entitled to benefit under the bonds. Such a result would, in effect, render the bonds penal, rather than indemnifying.

Counsel will submit an Order in accord with the findings and opinions contained in this Memorandum.

  
JUDGE

March 7, 1980

VIRGINIA:

IN THE CIRCUIT COURT OF STAFFORD COUNTY

BOARD OF SUPERVISORS OF STAFFORD COUNTY, Plaintiff

V.

AT LAW NO. 307-77

SAFECO INSURANCE COMPANY OF AMERICA,

Defendant

PRE-TRIAL ORDER

Two pre-trial conferences were held in the above-entitled case before the undersigned Judge of this Court, on January 18, 1980, and March 7, 1980, after the Plaintiff and the Defendant had filed Briefs on January 18, 1980, and Reply Briefs on February 8, 1980. The purpose of these pre-trial conferences was to simplify the issues as framed by the pleadings.

The Court having reviewed the Briefs of the parties, and the argument of counsel;

It is ORDERED that the following defenses pled in the Grounds of Defense to the original and amended motions for Judgment, as a matter of law, are stricken:

1) The statute of limitations under §11-23 of the Code of Virginia, Safeco's second and seventh defenses (with respect to the statute of limitations).

2) The failure of CNHLP to begin the guaranteed project, a failure of condition precedent and Safeco's third defense.

3) The failure of consideration, Safeco's fourth defense.

4) The failure to join DMI, Safeco's tenth defense.



5) The right of subrogation, Safeco's eleventh defense.

6) The validity of the subdivision plat, paragraph 7 of Safeco's Grounds of Defense to the amended Motion for Judgment.

7) The severability and divisibility of the bonds, paragraph 12 of Safeco's Grounds of Defense to the amended Motion for Judgment.

8) The defense of impossibility, insofar as this defense is raised in Safeco's fifth defense or in paragraphs 9 and 10 of Safeco's Grounds of Defense to the amended Motion for Judgment.

9) The defense that the bonds are inadequate in amount, insofar as this defense is raised in Safeco's fifth, eighth and ninth defenses.

It is further ORDERED that the following defenses pled in the Answers to the original amended Motion for Judgment will not be stricken:

10) The first defense setting forth denials of allegations contained in the original Grounds of Defense.

11) The sixth defense.

12) The seventh defense, except as provided hereinabove in paragraph 1).

13) The eighth defense, except as provided hereinabove in paragraph 9).

14) The ninth defense, except as provided hereinabove in paragraph 9).

15) The twelfth defense, and the Court further rules

as a matter of law that irrespective of the outcome the Plaintiff is not entitled to recover attorney's fees.

16) The thirteenth defense.

17) The defense pled by the Defendant under Count V, paragraph 6 of the amended Grounds of Defense.

18) The defense pled by the Defendant under Count V, paragraph 8 of its amended Grounds of Defense.

19) The defense pled by the Defendant under Count V, paragraph 9 of its amended Grounds of Defense.

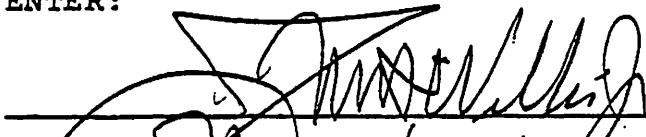
20) The defense pled by the Defendant under Count V, paragraph 10 of its amended Grounds of Defense.

21) The defense pled by the Defendant under Count V, paragraph 11 of its amended Grounds of Defense.

22) The matters pled by the Defendant and identified as the fourteenth, fifteenth and sixteenth defenses in the original Answer and Grounds of Defense.

It is further ORDERED that the Plaintiff's prayer and allegations contained in the amended Motion for Judgment with respect to consequential damages are stricken and overruled.

ENTER:

  
\_\_\_\_\_, JUDGE

DATE:

 November 17, 1980

SEEN, OBJECTED TO AND  
EXCEPTION NOTED:

William M. Sokol

SEEN, OBJECTED TO AND  
EXCEPTION NOTED:

---

William H. Harris

VIRGINIA:

*Send copy to Fair  
file in 100-  
Biology #3 file*

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

BOARD OF SUPERVISORS OF STAFFORD COUNTY

VS.

SAFECO INSURANCE COMPANY

This day came the parties in person and by counsel, and the defendants having heretofore filed their grounds of defense, herein, issue is joined.

Whereupon came a jury, to-wit: Sharon M. Tedeton, William E. Braxton, Glenda L. White, Max J. McCrory, Gerald L. Young, Barbara A. Alvey and Linds S. McNeil who were sworn to well and truly try the issue joined and a true verdict give according to the evidence and the law.

The evidence of the Plaintiff was presented and at the conclusion thereof the defendant by counsel moved to strike the evidence of the Plaintiff on grounds stated in the record, which motion was granted.

Thereupon it is the order of the Court that this case is dismissed.

It is further ordered that on motion of the Plaintiff by counsel the transcripts of this trial and all pre-trial proceedings be made part of the records of this proceeding.

It is further noted by the Court that the Plaintiff by counsel notes its appeal to the Supreme Court of Virginia.

A COPY TESTE:

*Lillian J. Knight*  
CLERK  
*by: Wm B. Ashby, Jr.*

Enter:

J.M.H. Willis, Jr., Judge

November 21, 1980

WHITTICAR, SOKOL & LEDBETTER

RALPH M. WHITTICAR, JR.  
RALPH M. WHITTICAR, III  
WILLIAM M. SOKOL  
WM. H. LEDBETTER, JR.  
KEVIN S. JONES  
RANDAL C. PALAMAR

ATTORNEYS AT LAW

P O. BOX 593

918 PRINCESS ANNE STREET

FREDERICKSBURG, VIRGINIA 22401

TELEPHONE  
(703) 373-1001

R. SCOTT PUGH

December 27, 1979

William H. Harris, Esquire  
Harris & Harris  
Attorneys at Law  
809 William Street  
Fredericksburg, Virginia 22401

RE: Board of Supervisors vs. Safeco

Dear Bill:

As we have agreed on many occasions, the material facts and the relevant correspondence and documents should be reducible to stipulations in this litigation.

To that end, we have drafted stipulations of fact, consisting of fourteen (14) pages and forty-eight (48) Exhibits. I am enclosing a photocopy of the fourteen pages. The correspondence, plans, documents, etc. making up the exhibits are too "weighty" for reproduction and delivery to you, but surely your file already contains every one of these items.


I am forwarding a copy of this letter to Judge Willis so that he may be advised of our efforts. I have not forwarded to Judge Willis our proposed stipulations or exhibits. Of course, our mutually agreeing to these stipulations will not preclude either of us from preparing other stipulations or introducing other evidence, testimonial or documentary, but it will considerably condense the incidents of trial, all of which should serve a constructive purpose.

We look forward to hearing from you.

Very truly yours,

WHITTICAR, SOKOL & LEDBETTER

By

  
William M. Sokol

WMS:st

Enc.

Copy: J. M. H. Willis, Jr., Judge

REPLY BRIEF  
OF SAFECO

PRELIMINARY STATEMENT

In this Reply Brief, Safeco will respond to the arguments made in the "Legal Brief for Plaintiff" in their order of presentation. The Board's arguments fall into two categories: first, that the Board is entitled to damages in excess of the penal sum of the bonds, and, second, that the defenses raised by Safeco should be stricken. To assist the Court in reviewing Safeco's replies to the Board's arguments, Part I will address the consequential damages argument and Part II will address the legal sufficiency of Safeco's defenses.

PART I - CONSEQUENTIAL DAMAGES

The Board devotes 29 pages of its "Legal Brief" to this argument. Safeco's response is threefold:

- (1) This Court has already ruled that the Board is not entitled to consequential damages;
- (2) If this Court were to permit such damages, it would depart from sound precedent in Virginia.
- (3) Even if the Court were to embark on making new law in Virginia, the authorities which the Board has asked the Court to rely upon are inapplicable to the present case.

\* \* \*

PART II - LEGAL SUFFICIENCY

(A) STATUTE OF LIMITATIONS

SAFECO'S SECOND DEFENSE. (Legal Brief of Plaintiff, pages 29 to 30) states:

SECOND DEFENSE

"By way of further defense, Defendant asserts that the bonds here in question are performance bonds within the meaning of Section 11-23 of the Code of Virginia (1950) (as amended) and that the present action cannot be maintained and is barred since it was not timely filed within the limits specified by the said Section 11-23."

Virginia Code §11-23 provides in pertinent part as follows:

"No contract...to which any...county...is a party, for the construction...of any...highway ...sewer or other construction work, shall be entered into unless and until the person contracting to construct...the work shall have entered into the following bonds with surety thereon to such...county...:

(a) A performance bond solely for the protection of such...county...conditioned upon the faithful performance of the work in strict conformity with the plans, specifications and conditions for same.

\* \* \*

...No action on any bond required under subparagraph (a) hereof shall be brought unless within one year after (1) completion of the contract, including the expiration of all warranties and guarantees, or (2) defect or breach of warranty if the action be for such, is discovered."

CNHLP contracted with the County to complete public improvements. The completion date was October 2, 1975. CNHLP did not do so. The County filed its Motion for Judgment on September 9, 1977, more than one (1) year after October 2, 1975. By its terms, Virginia Code §11-23 bars the County's action.

(B) CONDITION PRECEDENT: FAILURE TO COMMENCE  
CONSTRUCTION

SAFECO'S THIRD DEFENSE. (Legal Brief of Plaintiff,

pages 31 to 36) states:

THIRD DEFENSE

"By way of further defense, Defendant asserts that the bonds here in question, upon which Plaintiff's claim is based, require the payment of funds by Defendant only to complete the construction of certain specified improvements and utilities. The improvements and utilities in question have not been begun. Accordingly, there has been a failure of condition precedent to the bond contract herein and no liability can exist on the part of Defendant until such time as Plaintiff shows that the work in question has been completed."

The Board affirmatively alleges in its Amended Motion for Judgment that "All conditions precedent to the duty of Safeco to perform have occurred." The Board now adopts the unique position that it is not required to prove this allegation and that Safeco is estopped from denying it. This position is wholly without merit. The obligee has the burden of proving the necessary allegation that all conditions precedent to its recovery have occurred. The Board's citation of Lapke v. Hunt, 443, P.2d 493 (Mont. 1968) is of no avail. That decision recognizes that estoppel cannot be raised by a party to the instrument, absent exceptional circumstances.

Safeco's position has been set out in Part I of its Trial Brief. The County of Yuba decision, discussed on pages 21 to 24 thereof, is directly applicable to this case.

The County of Yuba decision applies a rule of reason. Subdivision bonds are required to guarantee that a subdivision



(13) will be served by specified improvements. However, if there is not going to be a subdivision, then there is no reason to complete the specified public improvements. This rule of reason is compelling when work on the subdivision never really commences.

(C) FAILURE OF CONSIDERATION

SAFECO'S FOURTH DEFENSE. (Legal Brief of Plaintiff, pages 37 to 38):

FOURTH DEFENSE

"By way of further defense, Defendant asserts that there was a want and failure of consideration for the obligation of Defendant on the bonds in question herein and that Defendant therefore cannot be held liable to Plaintiff on the basis of the said bonds."

The Board states that the "consideration" involved was "the recording of the plats". However, as discussed in Safeco's Trial Brief, pages 41 to 45, the Board had no right to prevent CNHLP from recording the plats.

"Any agreement by one to do what he is already legally bound to do is not a good consideration for a promise made to him." 4B, M.J., Contracts, §34 (1974).

In support of this proposition, the authors cite the following case:

"Illustrative Case - Where claimant agreed to permit the state to dump refuse on his property in exchange for improved maintenance of a state road, the state road commission's preexisting obligation in law to maintain the road was not legal consideration for such a contract. Smith v. State Rd. Comm'n, 7 W.Va. Ct.Ct. 141 (1968)."

The present case is indistinguishable from the Smith decision. According to the Board, the "consideration" for Safeco's promise

was its "recording of the plat". However, the Board, at the time of Safeco's promise, was under a "preexisting obligation in law" to record the plat. Hence, there was no legal consideration.

(D) IMPOSSIBILITY AND FRUSTRATION OF PURPOSE

SAFECO'S FIFTH DEFENSE AND AMENDED PARAGRAPH NINE.

(Legal Brief of Plaintiff, pages 39 to 46, 52 to 54):

FIFTH DEFENSE

"By way of further defense, Defendant asserts that, by reason of lack of funds, no work was ever commenced by Defendant's principal, Crow's Nest Harbour, on the improvements and utilities covered by the bond contracts herein. There is presently no work being done on such utilities and improvements and no prospect of such work ever being done. The full penal sum of

(14) the bonds, moreover, would not pay for the costs of all improvements to which such sum must be devoted. Since the work in question has not and will not be done, and since the bonds at issue here are restricted to the specified improvements and utilities on which work is neither being done nor is contemplated, the contract is impossible of performance and the surety is discharged."

"By way of further defense, the Defendant asserts that the purpose of the subject bonds was to insure the construction of specified public improvements and utilities to be operated in conjunction with related public improvements, utilities, and facilities, including, among other things, a public water and sewer system and adequate access roads, and the provision of related public services, including, among other things, public water. Since the related public improvements, utilities and facilities will not be constructed and the related public services will not be provided, the purpose of the Defendant's undertaking has been frustrated and its performance has been rendered impossible."

The Board adopts some unusual positions on this matter.

These positions must be reviewed:

"[R]epresented by the County acting in parens patriae, are three hundred lot purchasers who paid millions of dollars in cash and notes and received legal title to lots by reference to the recorded plats; but cannot get to their lots because the roads are not completed; the County also represents members of the general public who, without payment by the surety, would have to bear the burden of any construction."

The following comments appear appropriate. First, the County is not acting in parens patriae.

"parens patriae doctrine...The doctrine that all orphans, dependent children and incompetent persons, are within the special protection, and under the control of the State."  
Ballentine's Law Dictionary (3d ed. 1969)

In fact, the County has acted in opposition to the lot owners. DMI is the primary lot owner in Crow's Nest Harbour. DMI has sued the County because it has rezoned the property. Most of the other lot owners in Sections A, B, C and D have no desire to have those sections completed. They have sued to rescind their agreements to purchase their lots. Second, the Board

(15) implies that the lot owners relied upon the plats in purchasing their lots. This implication is erroneous. The lot owners purchased their lots prior to the recordation of the plats. Third, the Board states that the general public must bear the burden of any construction, without payment by the surety. The Board is fully aware that it has no duty to the lot owners to construct anything. See Va. Code §15.1-479, cited by the Board on page 34 of its "Legal Brief".

The Board also adopts the position that "Safeco is asserting impossibility because of extreme expense". Safeco

fails to understand the reasons why the Board is making this statement - Safeco's liability has at all times been limited to the penal sums of the bonds.

The Board makes numerous references to the first Restatement of Contracts, adopted in 1932. Safeco would ask that this Court consider the appropriate sections of the second Restatement of Contracts, adopted in 1974.

§281. DISCHARGE BY SUPERVENING IMPRACTICALITY. Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or circumstances indicate the contrary."

§283. DESTRUCTION OR DETERIORATION OF THING NECESSARY FOR PERFORMANCE. If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction or such deterioration as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made."

§284. PREVENTION BY GOVERNMENTAL REGULATION OR ORDER. If the performance of a duty is made impracticable by having to comply with a foreign or domestic governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.

(16) §285. DISCHARGE BY SUPERVENING FRUSTRATION. Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary."

The application of these principles to the present is straightforward and direct. The parties agree that any money

recovered by the Board must be used for the construction of the specified improvements.

With regard to water and sewer lines, a basic assumption of the parties was that there would be a central water and sewer system to which they would connect. There is no central water and sewer system; there are no plans to construct such a system; no one is under any obligation to construct such a system; and the County has rezoned the property to make the construction of such a system impracticable. It is difficult to understand why the County wants to construct water and sewer lines which can connect to nothing, and, therefore, will serve no purpose whatsoever. It is equally difficult to understand how the County can seriously contend that the purpose behind Safeco's promise to pay monies for the completion of water and sewer lines is not frustrated by the nonexistence of the system to which they were to connect.

With regard to streets, a basic assumption of the parties was that streets would be, in fact, completed. The purpose of the bonds was to insure the completion of the streets. If the streets are not going to be completed, the purpose of the bonds has been frustrated. At the very least, the County must submit a viable plan to complete the streets. As Safeco points out in its Trial Brief, the County has no such plan.

Furthermore, a basic assumption of the parties was that a subdivision would be constructed. With regard to the reconstruction of upgrading of State Route 609, the parties

(17)  
assumed that such construction work was necessitated by the development of a new town community. The parties also assumed that State Route 609 was to be an access road to a new town community. The County, by rezoning the tract, has made the construction of a new town community impossible. In fact, DMI, CNHLP's successor in interest, is suing the County for this specific reason. With regard to other streets, the parties assumed that the streets would serve residents of the subdivision. There are no residents. In fact, the owners of the lots have sued to rescind their deeds. Their suit might insure that there will be no residents.

The defenses of frustration of purpose and impossibility are clearly viable defenses in the present case. They are principles framed in reason and common sense.

(E) LOSS OR DAMAGE

SAFECO'S SIXTH, SEVENTH, EIGHTH AND NINTH DEFENSES.

(Legal Brief of Plaintiff, pages 47 to 54):

SIXTH DEFENSE

"By way of further defense, Defendant asserts that the parties to the bond contracts here in question contemplated that any sums paid pursuant to such bonds would be so paid only to defray damages to Plaintiff from the costs incurred by it in the building and completion of the specified improvements and utilities covered by the bonds. Defendant further asserts that the construction of the improvements and utilities covered by the bonds which are the subject of this suit has never taken place and will not take place. Accordingly, Plaintiff herein has incurred no costs and suffered no damages within the purview of the bonds here at issue. Any recovery by Plaintiff herein would therefore be contrary to the intentions of the parties and would amount to recovery of a forfeiture or penalty and would be void as against the public policy of the Commonwealth of Virginia."

SEVENTH DEFENSE

"By way of further defense, Defendant asserts that the bonds in question herein are performance bonds within the meaning of Section 11-23 of the Code of Virginia (1950) (as amended) and, as such, contemplate the payment of no sums pursuant to such bonds save and except to compensate Plaintiff for actual costs, expenses and damages incurred by Plaintiff in the completion of the improvements and utilities specified in such bonds. Since such improvements and utilities have not been begun, and will not be begun or completed, Plaintiff has incurred no expenses, costs or damages which are cognizable under the bonds in question herein and no liability can attach to Defendant pursuant to such bonds."

EIGHTH DEFENSE

"By way of further defense, Defendant asserts that any obligation of the Defendant on the bonds at issue here was intended by the parties to such bonds to be limited to costs and expenses necessary to complete certain specified utilities and improvements. Any amounts paid by Defendant pursuant to such bonds must therefore be used solely for such improvements and utilities and may not be merged with any general funds of Plaintiff. Since the improvements in question have never been begun, and will not be undertaken, since the full penal sums of the bonds here at issue will not suffice to build the improvements and utilities to which such sums are limited, and since Plaintiff can point to no damages or costs incurred by reason of the failure to complete the specified improvements and utilities, Defendant is without obligation under the bonds in question because the purpose of the bond contracts here at issue cannot be served by payment of any sums under the bonds."

NINTH DEFENSE

"By way of further defense, Defendant asserts that Plaintiff has incurred no expense and suffered no damages by reason of failure to complete the specified improvements and utilities to which Defendant's obligation on the bonds herein is restricted. The specified improvements and utilities have been neither begun or completed and there is no prospect of such improvements and utilities being begun or completed. The penal sums of the bonds in question must be used solely to construct the utilities and improvements to which they are explicitly limited and dedicated in such

bonds, although such penal sums will not suffice to construct such utilities and improvements. Any recovery by Plaintiff on the bonds herein would thus constitute a windfall to Plaintiff, unjustly enriching Plaintiff, since there is no prospect of such amounts being used as required by the bond contract."

(19) Safeco has fully set out these defenses in its Trial Brief, pages 15 through 24. However, a few comments on the Board's positions must be made.

On page 53 of its "Legal Brief", the Board states:

"The County will act as trustee and apply the proceeds of the suit to the bonded improvements as far as possible."

Apparently the Board believes it can just spend any recovery "as far as" it goes and then just stop. Otherwise stated, the Board may do 50% of the streets and 50% of the water and sewer lines and then stop. The question arises as to whether such an action would promote anyone's cause. A half-finished street is not better than, and is probably worse than, no street at all. The question also arises whether such an action would promote the purpose behind the bonds. The bonds were intended to guarantee "completion", not 50% of completion. A half-completed subdivision is no better than, and is probably worse than, no subdivision at all. The Board must offer a plan to "complete" the improvements; otherwise, it is likely to waste all of the monies, that it may recover, in a senseless task.

On pages 53 to 54 of its Legal Brief, the Board states:

"The County has established through discovery that Safeco was paid \$450,000.00 by Diversified Mortgage Investors to be released from the third party Motion for Judgment in this case....The only party who would receive a windfall if Safeco were not held liable in this case would be Safeco."



This statement is irresponsible. Last year, the Board's counsel obtained the Agreement between Safeco and DMI. That Agreement provides that Safeco must return to DMI the \$450,000.00 if Safeco is not held liable in this case. It is regrettable that the Board has falsely asserted in its Legal Brief to this Court that Safeco would receive a windfall.

(2c) (F) DMI

SAFECO'S TENTH DEFENSE. (Legal Brief of Plaintiff, page 55):

TENTH DEFENSE

"By way of further defense, Defendant asserts that Diversified Mortgage Investors (DMI), a Massachusetts business trust organized under the laws of the Commonwealth of Massachusetts and with offices in Coral Gables, Florida, and Burlington, Massachusetts, was the direct and proximate cause of any and all damage or loss for which this Defendant may be held liable. DMI is not before this Court; and, in its absence, Defendant cannot present an adequate defense and will not be accorded relief to which it is entitled, all in violation of its rights to due process of law. Further, Defendant asserts that any sums for which it may ultimately be held liable on its bonds must be used to construct the improvements and utilities to which such sums are explicitly dedicated. Such utilities and improvements cannot be constructed without the participation of DMI, which participation cannot be achieved unless the rights and liabilities of DMI are adjudicated by this Court."

Safeco agrees that this defense should be stricken.

(G) SUBROGATION

SAFECO'S ELEVENTH DEFENSE. (Legal Brief of Plaintiff, pages 55a to 55b)

#### ELEVENTH DEFENSE

"By way of further defense, Defendant asserts that it is entitled to be subrogated, upon payment of any sums under its bonds here in question, to all rights of Plaintiff, including lien rights, contractual rights, and other rights of whatever nature.

Any sums paid to Plaintiff by Defendant pursuant to its bonds here in question may be used by Plaintiff only in the construction of the utilities and improvements to which such sums are explicitly dedicated. To the extent any such payments by Defendant are used by Plaintiff, directly or indirectly, to construct such improvements and utilities, Plaintiff is entitled under Sections 15.1-239 through 15.1-249.1 of the Code of Virginia (1950) (as amended) to levy taxes and assessments upon property owners abutting the land where such improvements and utilities are constructed. Pursuant to Section 58-762 of the Code of Virginia (1950) (as amended) such taxes and assessment would

(21) constitute priority liens upon the real estate. Defendant is entitled to be subrogated to Plaintiff's rights in regard to such taxes and assessments, any proceeds realized therefrom, any liens based thereon and any proceeds from such liens."

Safeco agrees with the Board that "being entitled to subrogation upon payment of a claim, is no defense to payment of the claim". However, if Safeco is held to be liable in any amount, it will ask the Court to determine its rights to subrogation.

#### (H) ATTORNEY'S FEES AND INTEREST

#### SAFECO'S TWELFTH AND THIRTEENTH DEFENSES. (Legal

Brief of Plaintiff, pages 56 to 57):

#### TWELFTH DEFENSE

"By way of further defense, Defendant asserts that, in any event, it is not liable for attorney's fees or interest herein since its liability is specifically limited by the bond contracts here in question to the penal amount specified in such bond contracts."

### THIRTEENTH DEFENSE

"By way of further defense, Defendant asserts that Section 8-353 of the Code of Virginia (1950) limits any liability of Defendant on its bonds herein to the amount specified in such bond and that the limitation specified by the said Section 8-353 was relied upon by Defendant when it entered the bond contracts at issue herein. Such limitation provided by the said Section 8-353 should therefore be applied herein as a matter of substantive right and in the interests of justice."

(1) Attorney's fees. The Board cites no authority, and can cite no authority, that it is entitled to recover attorney's fees in this case.

(2) Interest. The Board cites no Virginia cases in its brief. It does cite Virginia Code §8.01-382. That Section provides, in part, as follows:

"[I]n any action at law or suit in equity, the verdict of the jury, or if no jury the judgment or decree of the court, may provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence...If a judgment or decree be rendered which does not provide for interest, the judgment or decree awarded shall bear interest from its date of entry..." (Cum. Supp. 1979)

(22) Assuming arguendo that this section is applicable to this case, it would appear that the question as to the date from which interest would run is one for the trier of fact. Thus, a question for the trier of fact is necessarily presented.

However, Virginia Code §8.01-382 is not applicable to this case. Rather, as fully discussed on pages 7 to 8 above, Virginia Code §8-353 is applicable. This section specifically provides that a surety is not liable for interest. This section specifically recognizes that a surety may limit its liability.

Safeco specifically did:

"[I]t being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated."

(I) CONDITION OF PLATS

GROUND'S OF DEFENSE TO AMENDED MOTION - PARAGRAPH #7.

(Legal Brief of Plaintiff, pages 58 to 59):

"By way of further defense, the Defendant asserts that the subject bonds were conditioned on the continued legal efficacy of the subject subdivision plats. The subject subdivision plats were conditioned upon the construction of a central water and sewer system, the construction of adequate access roads and the continuation of a plan to develop a subdivision upon the Crow's Nest Harbour property. None of these conditions have been, or will be, fulfilled. The subdivision plats are thus void and of no legal effect. The Plaintiff cannot recover under the subject bonds for the construction of specified improvements and utilities, because the subdivision is no longer in existence."

As noted on pages 31 to 32 of its Trial Brief, the construction of a central water and sewer system was an express condition of subdivision plat approval by the Health Department. A central water and sewer system does not exist and will likely not exist in the foreseeable future. In addition, the subdivision plats were conditioned upon the development of a new town community. A new town community does not and will not exist.

(23) The subdivision plats, by reason of the nonexistence of conditions to approval, are void and of no legal effect. The plats have no legal efficacy. Void plats should be vacated. However, the question whether the plats are void and of no legal

effect, is separate and distinct from the question whether the plats should be vacated. Virginia Code §15.1-482 is inapplicable to the question before this Court.

(J) CONSTITUTION

GROUND OF DEFENSE TO AMENDED MOTION - PARAGRAPH #8.

(Legal Brief of Plaintiff, page 60):

"By way of further defense, the Defendant asserts that the Plaintiff has the right to require the specified improvements and utilities only so long as the need for such improvements and utilities is substantially generated by the proposed development. Since the development as originally contemplated cannot, and will not, exist, the County can no longer, constitutionally or otherwise, require the Defendant to pay under the bonds for specified improvements and utilities when the need therefor no longer exists."

With regard to streets, this defense is fully discussed on pages 35 to 38 of Safeco's Trial Brief. It should be noted that the Rowe decision holds that the need for the improvements must be substantially generated by the proposed development. With regard to water and sewer lines there is not even a need for the improvements, since there is and will be no central water and sewer system. The Board wants to, arbitrarily and capriciously, take Safeco's property (money) for no legitimate purpose to fulfill no real need.

(K) REZONING

GROUND OF DEFENSE TO AMENDED MOTION - PARAGRAPH #10.

(Legal Brief of Plaintiff, pages 63 to 64).

"By way of further defense, the Defendant asserts that the Plaintiff has modified its comprehensive plan for the subject property and has rezoned the subject property. The rezoning and change in the comprehensive plan have had the effect of prohibiting the construction of the Crows Nest Harbour Development as originally contemplated. The

Plaintiff cannot require the Defendant to pay under its bond, for the construction of specified public improvements and utilities, after it has effectively prevented the development to be built as originally contemplated. To require the Defendant to pay under its bond for such specified public improvements and utilities, considering the wrongful action by the Plaintiff would be unjust and unreasonable and would involve an illegal forfeiture. In addition, the Plaintiff has breached its agreement with Crows Nest Harbour partnership, the principal, to provide appropriate zoning for the subject property, and, therefore, has discharged the Defendant as surety."

Safeco has fully set out this defense in its Trial Brief, pages 32 to 35. A few comments must be made. The Board, on page 63 of its Legal Brief, states that "The County's rezoning was responsive to ...Crow's Nest Harbour's default". This statement is inaccurate.

The Board had reservations about the Crow's Nest Harbour Development almost from its inception. The evidence to be adduced at trial will establish as follows:

Crow's Nest Harbour Development was to be a new town community. The Board insured at an early stage that it would not be. Sections A, B, C and D were to include single family dwellings. In the fall of 1971, the plats for these sections were approved. Nonetheless, the County delayed recordation of the plats for nearly two years. Sections E-1, F and G were to include multi-family dwellings and commercial areas. In the fall of 1972, the plats for these sections were submitted for approval. The Board delayed action until the spring of 1973. The Board apparently never approved plats involving high density and commercial areas.

In the fall of 1973, CNHLP tried to enter into

(25) agreements with the Board, including an agreement with regard to the central water and sewer system. The Board says no agreements were ever executed. In the fall of 1973, CNHLP asked the County to cooperate with it in obtaining the necessary permits, easements and the like to construct a central water and sewer system. The County resisted. In December, 1973, the Board, at its meetings, began to express second thoughts about the Crow's Nest Harbour Development. By July, 1974, it adopted a "go it alone" attitude.

In 1973 and 1974, the Planning Commission developed certain "goals, objectives and policies" with respect to the development of Stafford County. As a result of the Planning Commission's work, a Comprehensive Development Plan was developed. On July 17, 1975, still within the bond period, the Plan was adopted by the Board. It provided for no access roads, no central water and sewer, and no commercial development relating to Crow's Nest Harbour.

The Board's statement that the rezoning was "responsive to Crow's Nest Harbor's default" is a misstatement of fact. The rezoning was the culmination of a decision-making process commenced as early as 1973. One of the major decisions made was that there should be no new town community on the Crow's Nest Harbour site.

During the past seven years Stafford County has pursued a policy and a course of action in opposition to the construction of a central water and sewer system servicing Crow's Nest Harbour development. The Board seeks recovery of Safeco to pay for water

and sewer lines when no such systems exist, and are not likely to exist in the foreseeable future. The Board wants Safeco to reconstruct and upgrade State Route 609, as an access road to a new town community, when there exists, and will exist, no such community.

Most kindly expressed, the Board's position is unsupported by reason or prudence.

(L) BREACH OF CONTRACTS

GROUND OF DEFENSE TO AMENDED MOTION - PARAGRAPH #10.

(26) (Legal Brief of Plaintiff, page 65).

"By way of further defense, the Defendant asserts that it entered into the subject bonds with the reasonable expectation and anticipation that the Plaintiff would enter into and abide by agreements with Crows Nest Harbour for the construction of related public improvements, utilities and facilities, including among other things, a public water and sewer system and adequate access roads, and the provision of related public services, including, among other things, public water. The Plaintiff wrongfully failed to enter into and abide by such agreements and, therefore, by reason of same, has discharged the Defendant as surety and has otherwise forfeited its rights against the Defendant."

The Court has limited the present briefs to issues upon which the Court may rule as a matter of law. The questions raised by this paragraph involve jury questions. 4B M.J. Contracts, §92 (1974) ("Questions of Law and Fact"). If the Board wants Safeco to further specify the agreements, it can exercise its rights to discovery.

(M) SEVERABILITY

GROUND OF DEFENSE TO AMENDED MOTION - PARAGRAPH #12.

"By way of further defense, the Defendant



asserts that the subject bonds are severable and divisible into two separate components: first, the construction of streets in the aggregate sum of \$758,400.00; second, the construction of water and sewer lines in the aggregate sum of \$529,092.00. The Plaintiff, therefore, must prove independently its rights to recover the amount of the bonds attributable to the construction of streets, and also, its rights to recover the amount of the bonds attributable to the construction of water and sewer lines."

Safeco addressed this issue on pages 24 to 29 of its Trial Brief. The Board apparently adopts an "all-or-nothing" approach to this litigation.

(27) For example, if this Court holds that the purpose behind Safeco's promise to pay for water and sewer lines has been frustrated or otherwise rendered impossible, it must still determine whether the bonds are entire or severable. If the Court then determines that the bonds are severable, it may, if legally justified, require Safeco to pay \$758,400.00 for the streets.

"Where a promisor makes two or more bargains and facts then exist or subsequently occur that on grounds of impossibility prevent the imposition of a duty to perform all the promises in their entirety, or that discharge a duty to do so that has arisen, but partial performance capable of ratable apportionment of the several bargains is possible, the promisor is under a duty to make such apportionment and is otherwise discharged." 17A C.J.S., Contracts, §461 (1963), citing Restatement of Contracts, 1st, §464(1). See also Restatement of Contracts, 2d, §290.

However, if the Court determines that the bonds are entire, the Board recovers nothing. If an entire contract is impossible of performance as to any part, it is unenforceable in its entirety. 17A C.J.S., Contracts, §461 (1963).

The doctrine of severability of contracts was developed

to help the promisee and not the promisor. The question as to whether a contract is severable arises in cases where some part of a contract is illegal, invalid or otherwise nonperformable. If some part of a contract is illegal, invalid or otherwise nonperformable, a court, only if the contract is severable, can save the remainder.

The Board apparently does not fully appreciate the doctrine of the severability of contracts. If the Board convinces this Court that the bonds are entire, then it cannot recover anything under the bonds, if any part of the bonds is illegal, invalid or otherwise nonperformable. Such a result would obviously benefit Safeco, not the Board.

In addition, the Board misconstrues the doctrine. ~~The~~ primary question is not whether a contract is actually two contracts. Rather, the primary question is whether a contract is "susceptible of apportionment", that is, whether the contract can be separated into two or more parts. The subject bonds can be separated into two parts: first, a promise to pay \$529,092.11 for water and sewer lines and, second, a promise to pay \$758,400.00 for streets.

(28) The Board makes the argument that the bonds are entire because of certain language in the bonds. The bonds state:

"NOW, THEREFORE, if the said Principal shall well and faithfully do and perform the things agreed by it to be done, as hereinabove stipulated, then this obligation shall be void."

The Board states that the use of the phrase "this obligation" makes the bond entire. This position, if adopted, would render nugatory the doctrine of severability of contracts. Practically

every contract contains phrases such as "This Agreement"; "This Contract" or "This Obligation". In the present case, these phrases could be used interchangeably in the subject bonds. The question is not whether each bond is a single contract; rather, the question is whether each bond can be divided into two or more parts. The quoted paragraph itself indicates that each bond can be divided into "the things agreed by it to be done".

The bonds also state:

"[I]t being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as hereinafter stated."

The Board says this clause,

"very plainly permits the liability of the surety for any one claim to equal the penal amount of the bond."

This statement has no foundation in law or in fact. The subject clause is a standard bond clause, which has been utilized, in various forms, in countless bonds for years. It is used in bonds for a single manifest purpose - to limit the surety's total liability to the penal sum. It was drafted so that, under no conceivable circumstance, could the surety's total liability exceed the penal sum. In Part II of its "Legal Brief" (Consequential Damages), the Board failed to acknowledge the clear and unmistakable meaning of this clause. Here, the Board fails to acknowledge the clear and unmistakable purpose of this clause. This clause has one purpose, and one purpose alone - to limit Safeco's total liability to the penal sum. The Board's position, that the clause somehow expands Safeco's liability as to streets or as to water and sewer lines, totally disregards the clause's

language and purpose.

The Board's position is also inherently contradictory. It apparently claims that the bond is entire insofar as Safeco must pay \$1,287,400.00 but is severable insofar as the Board need not use the \$1,287,400.00 to complete both the streets and the water and sewer lines. The Board contends that the bonds are entire with respect to amount, but severable with respect to the expungement of the construction of water and sewer lines. The bonds are either entire, as to the Board's rights and duties, or severable, as to the Board's rights and duties. No court has held otherwise.

#### CONCLUSION

Before a resolution of the various defenses asserted by Safeco, the Board, at the least, should be compelled to advise the Court what it has done in grappling with two questions posed by the default of Crow's Nest Harbour.

I. If the Board had access to \$758,400.00 for the construction of streets in Sections A, B, C and D as platted and the upgrading of Route 609, what plan would be adopted for the funding necessary to begin and complete construction of streets (an additional \$1,604,300.00 by the Board's estimate)?

II. If the Board had access to \$529,092.00, would the Board adopt a plan to install water and sewer lines without central water and sewer systems? And, to proceed to the ridiculous, what plan would be adopted for the funding necessary to begin and complete construction (an additional \$1,184,708.00 by the Board's estimate) to the non-existent central water and sewer systems?

Respectfully submitted,

SAFECO INSURANCE COMPANY OF AMERICA

BY \_\_\_\_\_  
Of Counsel

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CERTIFICATE

I, William M. Sokol, Attorney at Law, hereby certify that a true and correct copy of the foregoing Reply Brief was mailed, postage prepaid, this \_\_\_\_\_ day of February, 1980, to: William H. Harris, Esquire, Harris & Harris, 809 William Street, Fredericksburg, Virginia 22401, counsel for Plaintiff.

\_\_\_\_\_  
William M. Sokol

VIRGINIA:

IN THE CIRCUIT COURT OF STAFFORD COUNTY

BOARD OF SUPERVISORS OF STAFFORD COUNTY Plaintiff

V. AT LAW NO. 307-77

SAFECO INSURANCE COMPANY OF AMERICA Defendant

TRIAL BRIEF

STATEMENT OF THE CASE

In September, 1976, the Board of Supervisors of Stafford County, Virginia (hereinafter the Board) filed a Motion for Judgment against Safeco Insurance Company of America (hereinafter Safeco). The Board alleged that it was entitled to recover the sum of \$1,287,492.00, the total amount of four subuivision bonds upon which Safeco was the surety and Crows Nest Harbour Limited Partnership (hereinafter CNHLP) was the principal. The Board also claimed interest from October 2, 1975, costs of this action and attorney's fees.

Safeco thereafter filed an Answer and Grounds of Defense as well as a Third Party Motion for Judgment against Diversified Mortgage Investors (hereinafter DMI). On October 16, 1978, this Third Party Motion for Judgment was dismissed with prejudice as agreed.

In June, 1979, the Board was granted leave to amend the Motion for Judgment to make an allegation and a prayer of relief for consequential damages. Safeco thereafter filed a Grounds of Defense as well as a Demurrer to the Board's prayer of relief for consequential damages. In November, 1979, the Demurrer was sustained with prejudice.

## STATEMENT OF FACTS

The following statement of facts consists of Stipulations of Fact, prepared by Safeco and submitted to the Board for approval (with several insubstantial changes since delivery to the Board).

### STIPULATIONS OF FACT

-I-

#### PERSONS INVOLVED

1. The Board is the duly constituted Board of Supervisors of Stafford County, Virginia, with its principal offices in that County. The Board is the obligee named in the subject subdivision bonds.

2. Safeco is a corporation organized under the laws of the State of Washington, with its principal offices in Seattle, Washington. Safeco is the surety named in the subject subdivision bonds.

3. CNHLP was/is a Virginia limited partnership, started on October 5, 1971, and comprised of Coke Gage and FVM Corporation, a Virginia corporation, general partners, Research Homes, Inc., a Delaware corporation, limited partner, and Woodrow D. Marriott, Frank K. Johnson, William J. Durkin and Bicknell A. Robbins, special limited partners. The principal office of CNHLP was/is in Fairfax County, Virginia. CNHLP is the principal named in the subject subdivision bonds.

4. DMI is a Massachusetts business trust, with its principal offices in Boston, Massachusetts. DMI presently is the major property owner in Crows Nest Harbour Development.

BACKGROUND ON THE CROWS NEST HARBOUR DEVELOPMENT

5. By deed dated October 28, 1971, St. Charles City, Inc., a Maryland corporation, conveyed to CNHLP 4,725 acres in Stafford County, Virginia.

6. In order to finance the purchase of this land, CNHLP executed a promissory note payable to the order of St. Charles City, Inc., secured by a First Deed of Trust on the land purchased, and a promissory note payable to DMI, secured by a Second Deed of Trust on the land.

7. CNHLP planned to construct a new town community on the 4,725-acre tract to be known as Crows Nest Harbour Development. Crows Nest Harbour Development was to provide housing, shopping, schools, recreation and community facilities for at least 20,000 people. It was to be constructed over a 15-year period and was to include a system of roadways, pedestrian ways and bridle paths; a central water and sewer system; extensive recreational facilities, including golf courses, a complete equestrian center, a large marina, tennis courts and swimming pools; and schools and parks. Development plans, marked Exhibits 1, 2 and 3, are furnished herewith.

8. In 1971, CNHLP applied to the Board for rezoning of the 4,725-acre tract and advised The Board of its development plans and intentions for the construction of a new town community of at least 20,000 people. On December 8, 1971, the Board approved category R-1 zoning for planned Sections A, B, C and D. Category R-1 zoning permitted single-family dwellings. The Board approved category R-2 and B-1 zoning for sections of the



development outside Sections A, B, C and D. Category R-2 zoning permitted multi-family dwellings and category B-1 zoning permitted commercial development. This zoning permitted the construction of 12,000 units on the entire development, which would involve a total of approximately 35,000 individuals. A concept plan, marked Exhibit 4, is furnished herewith.

9. In 1971, CNHLP applied to the Board for approval of final subdivision plats for Sections A, B, C and D. The Board approved the final subdivision plats on the following dates: Section A, on October 13, 1971; Section B, on October 13, 1971; Section C, on November 10, 1971; and Section D, on December 8, 1971. Revised final subdivision plats for Sections C and D were approved by the Board on March 16, 1972. See Exhibit 6.

10. By letter dated October 18, 1972, the County Administrator of Stafford County requested the Virginia State Department of Health (hereinafter referred to as the Health Department) to withhold signing the final subdivision plats for Sections A, B, C and D until satisfactory arrangements were made to provide subdivision bonds "to cover the construction of roads, public utilities and other improvements" within these sections. By letter dated November 28, 1972, the Administrative Assistant to the County Administrator for Stafford County advised Research Homes, Inc., limited partner of CNHLP, of the pendency of the approval of subdivision bonds by the Board, of the approval of water and sewer systems by the Health Department and of the approval of streets and drainage facilities by the Virginia State Department of Highways (hereinafter referred to

as the Highway Department). By letter dated January 10, 1973, Research Homes, Inc., was again advised of the required approvals. These letters, marked Exhibits 5, 6, and 7 respectively, are furnished herewith.

11. During 1973, CNHLP entered into numerous understandings with Stafford County with respect to providing certain public facilities to the Crows Nest Harbour Development. Specifically, CNHLP agreed to participate in the payment of the costs of upgrading approach roads to the development; to pay the costs of constructing all roads and storm sewers within the subdivision; to pay the costs of constructing water lines from the development to the Stafford County water line; to construct a sewage treatment facility, sewage collection system and water distribution system on the Crows Nest Harbour Development; and to post subdivision bonds to cover the costs of completing the subdivision roads, storm sewers, and water and sewer lines. These agreements will be reviewed in greater detail below.

12. By May, 1973, CNHLP had cleared approximately 80 acres of the tract, burned approximately 20 acres of the tract and cleared and burned approximately 20 acres of the tract. Some gravel was delivered to the site. See letter, marked Exhibit 8, which is furnished herewith.

13. By September, 1973, CNHLP had entered into agreements with various persons for the sale of every lot within Sections A, B, C and D. See letter, marked Exhibit 9, furnished herewith.

14. In October, 1973, CNHLP obtained all the required approvals (albeit conditional) for the filing of the final sub-

division plats on Sections A, B, C and D and these plats were recorded, on October 19, 1973, in the Clerk's Office of the Circuit Court of Stafford County, Virginia. These final plats, marked Exhibits 10, 11, and 12, are furnished herewith.

15. After the recordation of the final subdivision plats for Sections A, B, C and D, CNHLP delivered deeds to those individuals who had agreed to purchase lots in those sections.

16. After the recordation of the final plats for Sections A, B, C and D, CNHLP did a limited amount of stakeout and grading work on the development. By December, 1974, CNHLP had abandoned the development.

17. The general and limited partners of CNHLP thereafter filed bankruptcy petitions in the United States Bankruptcy Court. Lawsuits between CNHLP, DMI and the purchasers of lots in Sections A, B, C and D are discussed in greater detail below.

18. On July 17, 1975, the Board approved the Stafford County Comprehensive Development Plan, which recommended that the Crows Nest Harbour development property remain undeveloped. This plan, marked Exhibit 13, is furnished herewith.

19. In 1978, the Community Development Department of Stafford County recommended that the Crows Nest Harbour development property be rezoned. The opinion of this department was that the 4,725-acre tract should not be developed into the densities that were proposed by CNHLP and that, in fact, the property could not sustain that sort of development. The department was also of the opinion that the adverse impacts upon the property far outweighed any of the benefits to be gained by

such zoning. These adverse impacts included the facts that the existing state roads leading to the Crows Nest Harbour development were insufficient to handle a development of that size; that there were no plans to provide a central water and sewer system servicing the area and that the area could not be served by well and septic tanks with drainage fields; that the terrain, which included steep slopes, made it questionable whether the area could be developed in compliance with new state and federal laws; and that state-wide requirements for erosion sedimentation control would prohibit certain construction activity which would be necessitated by such a development.

20. On June 20, 1978, the Board approved a zoning ordinance covering the Crows Nest Harbour development. This ordinance rezoned the entire property to category A-2 zoning. This zoning would permit a maximum of 12,000 individuals on the 4,725-acre tract. The ordinance, marked Exhibit 14, is furnished herewith.

-III-

SUBDIVISION BONDS

21. As noted in paragraph 10 above, in 1972, CNHLP was advised that the final subdivision plats for Sections A, B, C and D would not be signed by the appropriate officials until CNHLP, among other things, posted subdivision bonds covering the construction of the roads, storm sewers, and water and sewer lines within those sections.

22. On November 14, 1972, at the request of Stafford County, Urban Engineering and Associates submitted a cost estimate for the construction of roads, storm sewers, and water and

sewer lines in Sections A, B, C and D. The cost estimate was as follows:

Road Construction	\$689,200.00
Storm Sewer	+ 69,200.00
Total Road	<u>\$758,400.00</u>
Water and Sewer Line Construction	\$801,740.00
Secured Fee Commitments from others	- 262,648.00
Total Sewer	<u>\$529,092.00</u>
Total Road	\$758,400.00
Total Sewer	529,092.00
Total Cost=	<u>\$1,287,492.00</u>

See letter, marked Exhibit 15, which is furnished herewith.

23. In May, 1973, at the request of Stafford County, Urban Engineering and Associates certified, under the seal of a professional engineer, that the total construction cost for the roads, storm sewer, and water and sewer lines for Sections A, B, C and D was estimated to be \$1,287,492.00. See letters, dated April 24, 1973, May 15, 1973 and May 18, 1973, marked Exhibits 16, 17 and 18 respectively, and furnished herewith.

24. On or about October 2, 1973, CNHLP, as principal, by its authorized agent, and Safeco, as surety, by its authorized agent, for valuable consideration, executed four subdivision bonds, in favor of Stafford County with respect to the streets and water and sewer lines in Sections A, B, C and D. The total amount of the four bonds is \$1,287,492.00. These subdivision bonds, marked as Exhibits 19, 20, 21 and 22, respectively, are furnished herewith.

25. These subdivision bonds were executed at the request of Stafford County, <sup>allegedly</sup> pursuant to the Stafford County Subdivision Ordinance. The ordinances in effect between 1971 and 1973, marked Exhibit 23, are furnished herewith.

26. These subdivision bonds, after execution, were posted with Stafford County.

27. On October 18, 1973, the Board approved the four (4) subdivision bonds. See letter, marked Exhibit 24, furnished herewith.

28. On October 19, 1979, the final subdivision plats for Sections A, B, C and D were recorded.

29. With reference to the construction of roads in Sections A, B, C and D, CNHLP performed only the work described in paragraphs 12 and 16 above. With reference to the storm sewers and water and sewer lines in Sections A, B, C and D, CNHLP commenced no work whatsoever.

30. By letter dated June 21, 1976, the Board, by its counsel, advised Safeco that the roads, storm sewer, and water and sewer lines in Sections A, B, C and D had not been completed in accordance with the four subdivision bonds and requested that Safeco pay to Stafford County the total amount of the subdivision bonds, that is, \$1,287,492.00. This letter, marked Exhibit 25, is attached hereto.

31. Safeco has not constructed, and has not hired a contractor to construct, the roads, storm sewer, and water and sewer lines in Sections A, B, C and D as described in the four subdivision bonds. Safeco has not paid to any individual or person any sum of money under the said subdivision bonds.

32. The Board has not constructed, and has not hired a contractor to construct, the roads, storm sewer, and water and sewer lines in Sections A, B, C and D as described in the four subdivision bonds.

33. The cost of construction of the roads, storm sewer, and water and sewer lines in Sections A, B, C and D, in accordance with the requirements of the four subdivision bonds, exceeds \$1,287,492.00, to-wit: as of March 28, 1979, the estimated cost to construct these improvements was \$3,705,885.00.

34. The Board has no plans to appropriate, commit or collect the sum of \$2,418,393.00, the difference between the total amount of said subdivision bonds and the estimated cost of constructing the improvements provided for therein. The Court has ruled that the Board cannot maintain an action against Safeco for a sum in excess of the amounts of the bonds.

35. No person presently lives on the 4,725-acre tract and no building permits have been granted permitting anyone to build a residence anywhere on the tract.

-IV-

WATER AND SEWER SYSTEM

36. The 4,725-acre tract has large areas which are not suitable for septic tank and drainage field sewage disposal systems. CNHLP planned to construct an on-site central sewer system.

37. In November, 1971, the Board accepted the CNHLP's proposal for connecting the county water line to the Crows Nest Harbour development. This acceptance was conditioned upon CNHLP's promise to construct, at its own expense, a water line from the Crows Nest Harbour development to Stafford County's then existing water line U.S. Route 1. A letter, dated November 12, 1971 and marked Exhibit 26, is furnished herewith. The ultimate construction of this water line was dependent upon

CNHLP either obtaining easements over the property between the Crows Nest Harbour development and U.S. Route 1 or securing permission to construct the water line along the right-of-way of the Highway Department.

38. In July, 1971, the Health Department and the Virginia State Water Control Board (hereinafter referred to as the Water Control Board) approved the request of CNHLP for a water discharge point on Potomac Creek for CNHLP's proposed sewage treatment facility. Two letters, dated July, 1972 and collectively referred to as Exhibit 27, are furnished herewith.

39. By December, 1972, CNHLP obtained from its engineers, Urban Engineering and Associates, a Virginia partnership, plans for a sewage treatment facility, sewage collection system and water distribution system to be constructed on the Crows Nest Harbour development. These plans, collectively will be marked Exhibit 28, on their acquisition. Two letters, dated December, 1972, and marked Exhibits 29 and 30 respectively, are attached hereto.

40. The aforesaid plans were submitted for approval, and approved, by the Health Department and the Water Control Board. The Health Department, by its authorized agent, signed the final subdivision plats for Sections A, B, C and D. Each of these plats contained the following "Notes".

"3. Water supply to be by central water system as required by the County of Stafford.

4. Sanitation disposal by central sewer system and treatment as required by State Board of Health.

\* \* \*

6. This plat is being approved by the Health Dept. with the understanding that this project will be served by public water and public sewer



which has been approved by the Dept. of Sanitary Engineering-Va. State Health Dept."

These notes and the signatures of the authorized agents of the Health Department were placed on the subdivision plats prior to their recordation.

41. In October, 1973, CNHLP and Stafford County entered into an agreement whereby CNHLP, among other things, agreed to construct, at its own expense, a sanitary sewer system on the Crows Nest Harbour development property. This agreement, marked Exhibit 3], is furnished herewith.

42. At the Board's meetings of December 20, 1973 and July 1, 1974, members of the Board expressed concern over whether it could, or should, supply water to the Crows Nest Harbour development. Excerpts from the minutes of these meetings, collectively marked Exhibit 32, are attached hereto.

43. CNHLP never obtained any easements, never commenced construction of water lines and never commenced construction of a sewage treatment facility, sewage collection system or water distribution system.

44. Under the present zoning for the Crows Nest Harbour development, it would be economically unfeasible to construct the water and sewage facilities as originally contemplated by CNHLP.

45. There are no known plans to construct a sewage treatment facility, sewage collection system, water distribution system, or water and sewer lines on or near the Crows Nest Harbour property at the present time. There are no known plans to construct water lines from Stafford County's water lines to

the Crows Nest Harbour development property at the present time.

46. There is a known and adopted plan (Stafford County Comprehensive Development Plan, Exhibit 13), which excludes the installation of public water and sewage treatment facilities from the area known as Crows Nest Harbour.

-V-

#### STREETS AND ROADS

##### (A) Access Roads

47. At all times between 1971 and the present time, the only approach roads to the Crows Nest Harbour development property were, and are, State Routes 608 and 609. State Route 608 was and is a two-lane paved country road. State Route 609 was, and is, an unpaved road. A general highway map of Stafford County, marked Exhibit 33, is furnished herewith.

48. At the time the plans were developed for the Crows Nest Harbour development, State Routes 608 and 609 were not sufficient to handle the Crows Nest Harbour development as planned. A traffic study was prepared to determine the amount of traffic which would pass over these roads. This traffic study, marked Exhibit 34, is furnished herewith.

49. In 1973, the Highway Department developed plans to upgrade and construct state roads for access to the Crows Nest Harbour development property. By letters dated February 6, 1973 and June 13, 1973, the Highway Department advised Stafford County of these plans. These letters, marked Exhibits 35 and 36 respectively, are furnished herewith. The Highway Department had an Access Study-Report prepared, marked Exhibit 37, and furnished herewith.

50. CNHLP agreed to "bear the brunt of the cost" to upgrade State Routes 608 and 609. [See Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County, 219 Va. - (October 5, 1979), Exhibit 37A]

51. CNHLP never provided any funds for upgrading State Routes 608 and 609. There are no known plans to upgrade State Routes 608 and 609 or to construct other access roads to the Crows Nest Harbour development at the present time.

(B) Subdivision Roads

52. In 1972, CNHLP was advised by Stafford County that all streets in Sections A, B, C and D could not be private roads but would have to be constructed in such a manner that they would be eligible for acceptance into the Virginia State Secondary System of Highways. See Exhibit 38, furnished herewith.

53. In 1972, CNHLP was advised that in order for the subdivision streets to be eligible for acceptance into such system they would have to be designed and constructed in accordance with the then-applicable standards and specifications of the Highway Department, being the 1972 Road Designs and Standards, marked Exhibit 39 and furnished herewith. By letter dated November 21, 1972, the Highway Department advised CNHLP of its requirements. This letter, marked Exhibit 40, is furnished herewith.

54. During 1972 and 1973, CNHLP, through Urban Engineering and Associates, submitted various plans for the construction of subdivision roads within Sections A, B, C and D. At the request of the Highway Department, revisions in these plans were made. The plans called for the construction of

various subdivision streets and the construction of State Route 609 to connect with State Route 608. See letter, dated January 23, 1973 and marked Exhibit 41, which is furnished herewith. See plans, collectively referred to as Exhibit 42, which are furnished herewith.

55. CNHLP prepared final plans for the subdivision roads, which were submitted for approval, and approved, by the Highway Department. The Highway Department, by its authorized agent, signed the final subdivision plats for Sections A, B, C and D. Each of these plats contain the following "Note":

"All roads to be designed for public use and to meet requirements of Virginia Department of Highways."

56. As noted in paragraphs 12 and 16 above, the subdivision roads were not constructed.

57. The standards and specifications for subdivision streets have been modified. The 1978 Road Designs and Standards, marked Exhibit 43, is furnished herewith. The Stafford Subdivision Ordinance, presently effective, marked Exhibit 44, is furnished herewith.

58. There are no known plans to construct any subdivision roads within Sections A, B, C and D.

-VI-

#### OTHER LAWSUITS

59. In 1975, CNHLP and its general partners and limited partner, filed a lawsuit against DMI in the United States District Court for the Eastern District of Virginia. DMI filed a counterclaim against CNHLP. By Judgment Order, entered December 3, 1976, DMI obtained a judgment against CNHLP in the

amount of \$4,580,325.37. Pleadings in this lawsuit, collectively marked Exhibit 45, are furnished herewith.

60. In 1978, DMI commenced foreclosure proceedings against the owners of lots in Sections A, B, C and D, including CNHLP and others.

61. On July 13, 1978, property owners of lots in Sections A, B, C and D filed a lawsuit against CNHLP, all of CNHLP's partners individually, and DMI, in the Circuit Court of Fairfax County, Virginia. These property owners have requested the Court to rescind and void their agreements to purchase these lots; to order the Defendants to return to them all monies paid by them for these lots; to void all promissory notes and deeds of trust executed by them with reference to these lots; to award them attorney's fees; and to pay them punitive damages of \$5,000,000.00. These property owners request, if the Court refuses to grant them that relief, that it award them a judgment of \$2,425,900.00. Most of the property owners in Sections A, B, C and D are involved in this suit. None of the property owners are residents of Stafford County, Virginia. Pleadings in this case, collectively marked Exhibit 46, are furnished herewith. This lawsuit has not yet been tried before a judge or a jury.

62. DMI and these property owners have entered into an Agreement and Stipulation with respect to their rights. This Agreement and Stipulation, marked Exhibit 47, is furnished hereby.

63. DMI has filed a lawsuit against the Board in the

Circuit Court of Stafford County. Pleadings in this lawsuit, collectively referred to as Exhibit 48, are furnished herewith.

#### PRELIMINARY STATEMENT

This brief will address only those issues upon which the Court may rule as matters of law. Questions of fact which ultimately raise issues of law (such as whether the County breached its promise to supply water) will not be included in this brief.

The present case involves four subdivision bonds which were posted with the County to cover the completion of two separate and distinct improvements: first, the completion of streets, and, second, the completion of water and sewer lines. The evidence is clear that no construction commenced on these improvements.

The Board has adopted the view that if subdivision bonds have been executed, the County can and should recover of the Surety. This view, unimpeded by law or reason, fails to take into account the purposes behind the bonds and disregards pertinent facts arising after the execution of the bonds. Part I of this brief will inquire as to the purposes behind the bonds.

The Board has also adopted the view that it can wholly disregard the fact that the subdivision bonds, by their own terms, cover the construction of two separate and distinct improvements. Because of the separate and distinct nature of these improvements, arguments dealing with the construction of subdivision streets are not necessarily applicable to arguments dealing with the construction of water and sewer lines. For this reason Part III of this brief will deal primarily with the construction of water

and sewer lines, and Part IV will deal primarily with the construction of streets. Part II will address the question whether the subdivision bonds are severable into two parts, i.e. first, water and sewer lines, and, second, streets.

Finally, Part V will address issues which are not conveniently included in Parts I through IV.

#### PART I - SUBDIVISION BONDS

The authority of a county to require subdivision bonds is statutory. Virginia Code §15.1-466, as in effect in 1973, provided as follows:

"A subdivision ordinance may include, among other things, reasonable regulations and provisions that apply to or provide:

\* \* \*

(f) For the acceptance of dedication for public use of any right-of-way located within any subdivision which is constructed therein, or proposed to be constructed therein, any street, curb, gutter, sidewalk, drainage or sewerage system or other improvement financed or to be financed, in whole or in part, by private funds only if the owner or developer... furnishes to the governing body...a bond, with surety satisfactory to the governing body, in an amount sufficient for and conditioned upon the construction of such facilities.

The Stafford County Subdivision Ordinance, as in effect in 1973, provided as follows:

"4-2-2...

(2) The subdivider shall furnish to the County Board of Supervisors, or their appointed agent, a...bond, with surety approved by the governing body...sufficient to cover the costs of all the improvements required to be installed by the subdivider...to guarantee the installation and completion of said improvements within such period of time as shall be specified in the bond."

The subject subdivision bonds set forth CNHLP's under-

taking as follows:

"CROWS NEST HARBOUR has undertaken to complete said water and sewer lines and streets in a workmanlike manner..."

Until recently, the Supreme Court of Virginia had not inquired into the purpose of subdivision bonds. In Board of Supervisors v. Ecology One, 219 Va. 29 (1978), the Court construed a subdivision bond similar to the subject bonds. There the street improvements were 60 percent complete at the time of the developer's abandonment of the subdivision. The Court addressed the question whether the "bond was an indemnification bond rather than a penal or forfeiture bond, which fixed the face amount of the bond as the appropriate measure of damages." The Court stated:

"The sole purpose for requiring Ecology to give a bond with surety was to provide a means by which the County could insure completion of the public improvements in the subdivision which Ecology agreed to undertake in its contract with the County.

\* \* \*

Whether the bond in question is a penal bond or an indemnifying bond is to be determined by the language of the state enabling statute, the county ordinance, and the bond itself.

Virginia Code §15.1-466 (Repl. Vol. 1973), authorizes a county or municipality to adopt an ordinance requiring a subdivider, who is seeking approval of a subdivision plat, to execute a bond in an amount sufficient for and conditioned upon the construction of the public improvements in the subdivision.

Section 23-12 of the County ordinance provides, so far as pertinent here, that a subdivider shall construct in the subdivision such physical improvements as required by the County and "execute a bond with surety in the amount of the estimated cost of the physical improvements as determined by the Director."

One of the main purposes of the enabling act and the County's ordinance is to require a subdivider to lay out and construct streets and



other improvements in accordance with the state and county standards before the maintenance is taken over by a public agency and to relieve the public to this extent of the burden that would otherwise exist.

There is nothing in the language of the bond, the state statutes, or the county ordinance to suggest that the bond was intended as a punishment for non-performance. On the contrary, the bond was intended to be an amount sufficient to pay construction costs, and upon failure of completion of the public improvements by the subdivider, the bond provided funds to the extent of the amount of the bond to cover the cost of completion of the improvements as then remained. ...We are of the opinion that the bond given by Ecology was a performance or indemnification bond and not a penal bond."

The foregoing case clearly establishes that the mere execution of, and default under, the bonds are not sufficient grounds/<sup>by</sup> themselves, to require a surety to pay the face amount of the bonds. A subdivision bond is an indemnification bond in that it promotes the purpose of compensating for loss or damage. A subdivision bond is a performance bond in that it guarantees performance. Without proof of loss or damage or without a plan for performance, the County is not entitled to recover, since payment would not serve the purposes for which the bonds were originally executed.

The subject bonds are not penal or forfeiture bonds. Rather they are indemnification bonds, that is, they indemnify the County for loss or damage occasioned by the principal's failure to complete the specified improvements. Therefore, the County must show that it has suffered loss or damage by reason of the failure to complete the specified improvements. In the present case the County has suffered no loss or damage. It is an elementary principle of Virginia jurisprudence that if a party cannot establish that it has suffered a loss, it is not entitled

to recover damages.

In Virginia, at least three cases support the proposition that in order to recover under an indemnification bond that the obligee must show actual loss or damage sustained.

In American National Bank v. Ames, 169 Va. 711, 748 (1938), it is stated:

"It is uniformly held that there can be no recovery on an indemnity obligation where there has been no actual loss or damage. 14 R.C.L., P. 55, sec. 13; 29 ann. Cas. P. 1152, Note."

In City of Richmond v. Branch, 205 Va. 424 (1964), the plaintiff was injured when his car fell into a deep hole in a city street caused by settling of the earth where a sewer line had been laid some months before. The work had been performed by a contractor for the City. The City and the contractor were both named defendants, and the City attempted to file a Cross-Claim against the contractor for the reason that it was entitled to be indemnified by them if it was held liable for damages arising out of the performance of a contract it had with the contractors. The Court stated:

"City had no cause of action against [the contractor] at the time of the institution of the suit. In its Cross-Claim, it denied that it was liable for damages for any injury suffered by the plaintiff...it asserted that under a contract with [the contractor], the [contractor] agreed to 'indemnify and save it harmless against liabilities for injuries to persons or property arising out of the performance' of the sewer project. It further alleged that, 'if the plaintiff is entitled to any recovery,\*\*\*such city should not be required to pay any part thereof, but that all of such recovery should be paid by one or more of the defendants here.' In other words, it based its right to indemnification upon the contingencies or possibilities that it would be required to compensate [the plaintiff] for his injuries.

The right to indemnification arises only where there has been actual loss or damage. Here,

the City had not suffered any loss or damage at the time it filed its Cross-Claim. It was not subject to actual loss or damage, unless and until the plaintiff recovered and collected from it..." (Holding modified by Rule of the Supreme Court of Virginia)

Finally, in Allied Productions v. Duesterdick, 217 Va. 763 (1977), the Supreme Court held that a client who had suffered a judgment for money damages as the proximate result of his lawyer's negligence could not recover until he could show that he had actually paid part of such judgment. In that case, the Court cited with approval the proposition that "there can be no recovery on an indemnity obligation where there has been no actual loss or damage." 217 Va. at 766.

The County may contend that it will suffer a loss when it constructs the specified improvements. However to sustain this argument the County, at the very least is required to show that it is statutorily empowered to proceed and that it has a plan, with available financial resources, to construct the specified improvements as originally planned. That is, the County must show that it has a plan to use the proceeds of a performance bond to perform the contract and obtain completion of the project. Without such a plan, the County is likely to receive an unjustified windfall. In Section III below, it will be made clear that the County has no plans to construct water and sewer lines. In fact, the County has taken actions deliberately intended to restrain or prevent the construction of a central water and sewer system. In Section IV below, it will become clear that the County has no plan to construct the streets. In fact, the County is not empowered to spend monies on streets.

For present purposes, it is sufficient to state that the County has no plans, notwithstanding the fact that for four years Safeco has requested the County to provide it with plans.

There are at least two out-of-state cases which have dealt with situations where a municipality has attempted to obtain monies or land when they have had no concrete plan to use them. In 181 Incorporated v. Salem County Planning Board, 133 N.J. Super. 350, 336 A2d 501 (1975), an owner of land challenged, as unconstitutional, certain actions of the planning board compelling it to dedicate to the county a portion of land, owned by it, bordering upon a county road, as a condition precedent to approval by the county of a site plan submitted for the construction of a building. The planning commission justified the condition on the fact that it had a plan to eventually widen the street on which their property fronted.. The court stated:

"The vice in the County's resolution is that it sets up a blanket policy of taking frontage along every county road without regard to present need, imminency of proposed use or, indeed, of any standard whatsoever.

\* \* \*

There should be, at the bare minimum, a proposal for the imminent use of the land, not a mere 'banking' for unscheduled future use. While it is true that road appropriations are made on an annual basis it is also true that plans for road work involve 'lead time' if the county does not intend to use the land proposed to be taken within such 'lead time', to take it without compensation merely because opportunity presents itself runs afoul of the Constitution.

The planning board felt that there was a sufficient rational nexus between the proposed use in widening in futuro of [the street] to justify the requirement of a compulsory dedication. This finding constitutes error.

\* \* \*

In sort, for the nexus test to apply, thus making a compulsory dedication constitutionally valid, the nexus must be rational. This means it must be substantial, demonstrably clear and

present. It must definitely appear that the proposed action by the developer will either proceed forthwith or in the demonstrably immediate future to so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specific and presently contemplated immediate improvements - not for the purpose of 'banking' the land use in a projected but unscheduled possible future use."

On appeal, this decision was affirmed. 140 N.J. Super. 247 (1976).

In Curry v. Oklahoma City, 519 P.2d 910 (S.Ct. Okla. 1974), the city planning commission refused to approve a deed which subdivided a 2.6-acre tract into two 1.3-acre lots because the developer refused to dedicate a 17-foot street right-of-way as a condition for approval. The Court held:

"Appellants' 1.3-acre lot abuts Memorial Road and this area is not programmed for specific road improvements and no improvement is anticipated within the next five years. If this street right-of-way were not needed or was not necessary to require the dedication in 1965 when the 1965 deed to the 2.6-acre tract was approved without the dedication, there has been no change in the area that would justify the requirement that the dedication be made at this time. In view of all the circumstances, we hold that the commission's refusal to approve appellants' deed to the 1.3-acre lot without the dedication of the street right-of-way was arbitrary, was unreasonable and capricious and the trial court erred in sustaining the commission's refusal to approve the deed."

In County of Yuba v. Central Valley National Bank, 20 Cal. App.3d 109, 97 Cal. Rptr. 369 (1971) [a case which has directly addressed the type of situation involved here.], a bank, as a condition of subdivision approval, executed an "instrument of credit" for "\$35,020.00" which guaranteed the "faithful performance" of a subdivider's agreement with the County to complete the streets and drainage facilities within the

subdivision. A local Air Force base was closed; the contractor was unable to obtain financing; and "no construction or development of [the subdivision] was ever begun."

The trial court found, under these circumstances, that the parties contemplated that a residential subdivision would be built; that the construction of streets would serve no useful purpose in the absence of such a subdivision; and that none of the parties intended streets to be completed except as part of a subdivision. With these findings in mind, the court concluded (1) that to require the bank to pay the county "when no part of the work or improvements" had begun would be to uphold "an illegal forfeiture"; (2) that substantial reduction of the value of the bank's performance as a result of uncontrollable conditions made the doctrine of "frustration of purpose" or "commercial frustration" applicable; and (3) that "an implied condition" of the instrument of credit was the Bank's liability would arise "only if work were actually commenced on" the subdivision.

The Appeal Court affirmed this decision primarily on the basis of the trial Court's third conclusion.

The issue on appeal is whether Bank remains liable to County in the absence of commencement of any development of (the tract) or any construction of the improvements therein. For the following reasons, we hold that Bank is not liable.

First, the language of the instrument of credit executed by Bank indicates that the parties intended to provide security for full completion of improvements whose construction had already begun. Said document expressly provided a "Guarantee" ... 'pledged to meet the performance of completed street improvements' and that 'In the event the work is not completed' in accordance with the appropriate County ordinance... then Bank would pay said sum 'for the completion of said improvements.'

...Moreover, since the purpose for requiring security for street improvement work is to insure faithful performance of a subdivider's obligation to place streets in a proper condition for use by the public, ... no purpose is served by construing a security instrument to relate to construction of streets where development of neither the subdivision nor the streets was ever commenced.

In this vein it may also be observed that County's interest in the streets and easements offered for dedication was necessarily limited by the conditional nature of its acceptance thereof, which depended for finality upon a subsequent acceptance after satisfactory completion of the street improvements.

\* \* \*

....(T)he underlying contract itself demonstrates that the sole basis for the relationship between County, (Developer) and Bank was the development of (the tract) as a residential subdivision. All of the parties' transactions must therefore be construed with reference to this basic purpose.

The foregoing shows that the instrument of credit was executed by Bank and County with the expectation that the performance it secured related to improvement work which would at least have commenced. The purpose of the instrument was to insure full completion of streets and drainage facilities in order to protect and serve the public. The existence of this purpose, the inclusion in the instrument of credit of references to "completed street improvements" and "completion of said improvements", and the presence of the parties' one mutual interest in development of a residential subdivision, support the trial court's conclusion that at least partial improvement of the land and construction of the streets was contemplated as a prerequisite to the emergence of the obligations owed by Bank and (Developer) to County. ...

In addition to the absence of any breach of contract, the record discloses no damage whatsoever to County. We agree with the trial court that to permit recovery in the circumstances of this case would be to uphold an "illegal forfeiture."

The language of the instrument of credit in the County of Yuba parallels the language in the subject bonds, both as to the purpose of the surety's undertaking and as to the relationship between the surety and the County. Furthermore, the facts

in the County of Yuba decision parallel the facts in this case. Here the only work done on any part of the subdivision was some clearing, stakeout and delivery of gravel to the site (Facts, paragraphs 12 and 16). Such work clearly shows that the construction of the residential subdivision, and the specified improvements therein, never really commenced. In fact, a view of the Crows Nest Harbour Development will show that it has practically reverted to a state of nature.

The County of Yuba decision stands for an eminently sensible principle. A promise to complete work presumes a beginning and continuation of work until disruption. Applied to this case, a promise to complete presumes that one might visit the site and recognize that a subdivision is in the process of being constructed and that streets and water and sewer lines have been constructed, though not completed. In short, a recognizable subdivision must exist.

There is no recognizable subdivision in platted Sections A, B, C and D, and no recognizable development within the 4,725-acre tract. Hence, there can be no recovery permitted under a bond insuring completion.

Further, the County of Yuba decision stands for the proposition that a County may not recover under subdivision bonds for work it has no actual plans to perform or no financial wherewithal to perform. For the County suffers no damages and incurs no liability, if the work is not performed.

The County's position is - bonds were executed; the specified improvements were not built; it collects \$1,287,492.00 plus interest, costs and attorney's fees. This position is



premised on the mistaken view that the subject bonds are penal or forfeiture bonds. They are not. They are indemnification bonds; that is, they are given to indemnify one for loss or damage. They are performance bonds; that is, they are given to complete something which has begun. In this case, the fact that the specified improvements were never begun and the fact that the County has suffered no loss or damage compel the conclusion that there can be no recovery under the bonds.

#### PART II - SEVERABILITY OF BONDS

The County's position, that it is entitled to recover \$1,287,492.00, plus interest, costs and attorney's fees, does not take into account that the subdivision bonds involved separate and distinct undertakings, first, a promise to complete water and sewer lines to be connected to a central water and sewer system to be constructed by CNHLP, and, second, a promise to complete subdivision streets and upgrade and reconstruct an existing State road. The evidence is abundantly clear that a distinction between these undertakings was made by all parties concerned.

As noted in paragraph 10 of the Facts, in 1972 and 1973, the County advised CNHLP that its plans for streets had to be approved by the State Department of Highways and that its plans for a central water and sewer system, including water and sewer lines, had to be approved by the State Department of Health. Thereafter, CNHLP submitted its central water and sewer plans to the Health Department and its street plans to the Highway Department.

In November, 1972, CNHLP's engineers, at the request of the County, provided a cost estimate which specifically delineated the estimated construction costs for water and sewer lines (\$529,092.00 plus \$262,648.00 "from others") and the estimated construction costs for streets (\$758,400.00) for a total of \$1,287,492.00 (Facts paragraph 22, Exhibit 15). This cost estimate served as the precise basis for fixing the total amount of the bonds (Facts paragraph 23, Exhibits 16, 17 and 18).

The bonds themselves clearly maintain a distinction between the construction of streets and the construction of water and sewer lines. Each one of the bonds contain the following statement:

"whereas, a condition of the approval of said plat is the construction of the streets and water and sewer lines therein in accordance with the specifications shown on said plat."

Each plat sets forth separate and distinct requirements for streets and water and sewer lines. With regard to streets, each plat states:

"All roads to be designed for public use and to meet requirements of Virginia Department of Highways."

With regard to water and sewer, each plat states:

"Water supply to be by central water systems as required by the County of Stafford  
...Sanitation disposal by central water systems as required by State Board of Health.

\* \* \*

...This plat is being approved by the Health Department with the understanding that this project will be served by public water and sewer which has been approved by the Department of Sanitary Engineering - Va. State Dept. of Health."

It is obvious that the construction of subdivision

streets and the construction of a central water and sewer system, including water and sewer lines, are separate and distinct undertakings. One is not dependent on the other.

The doctrine of severability of contracts is applicable to bonds. In 3A M.J., Bonds, §10 (1976), it is stated:

"At common law a bond conditioned to do several things may be void for illegality as to one part, and yet be good as to the other part. 2 Thos. Coke, p. 19, n.p. The same rule applies as to bonds taken by virtue of a statute unless indeed the statute expressly or by necessary implication avoids it to all intents and purposes. Gibson v. Beckham, 57 Va. (16 Gratt.) 321 (1862).

"In United States v. Mora (N.Y.), 97 U.S. 413, 24 L.Ed. 1013 (1862), it is said: "Where two conditions of a bond are severable, and one of them is good and the other not sustainable, the bond can be enforced as to the good condition." Eagle Indemnity Co. v. United States, 22 F.2d 388 (4th Cir. 1927), aff'g 18 F.2d 135 (E.D. 1926), cert. denied, 48 S.Ct. 304, 72 L.Ed. 737 (1928).

In Virginia, a severable contract is defined as follows:

"A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. Hence, an action may be maintained for a breach of it in one respect and not necessarily in another, or for several breaches, while in other material respects it remains intact. In such a contract the consideration is not single and entire as to all its several provisions as a whole. Until it is performed it is capable of division and apportionment." 4B M.J., Contracts, §5 (1974).

The question arises whether the subject bonds are "susceptible of" or "capable of" "division and apportionment". The answer is clearly in the affirmative.

The cost estimate used in determining the amount of the subject bonds sets forth separate estimates: \$529,092.00 for

water and sewer lines and \$758,400.00 for streets. Courts have generally concluded that if a contract includes separate matters involving separate considerations, the contract is severable.

In 17 A.M. Jur.2d, Contracts, §326 (1964), it is stated:

"In construing a contract to determine whether it is entire or severable, many of the courts have regarded the singleness or apportionability of the consideration as an important test--that is, if the consideration is single, the contract is entire, but if the consideration is expressly or by necessary implication apportioned. Thus, where several things are to be done under a contract, and the money consideration to be paid is apportioned to each of the items, the contract is ordinarily regarded as severable."

In 17 A. C.J.S., Contracts, §334 (1963), it is stated:

"A frequent test of the entirety or severability of a contract is the character of the consideration as entire or divisible, that is, if the consideration is single, the contract is entire, but if the consideration is either or by necessary implication apportioned, the contract will be regarded as severable...."

In applying the above tests, the courts have held that contracts like the present one are severable. In Wetherall v. State Road Comm'n, 8 W.Va. Ct. Cl. 1 (1969), it was held that a contract providing for highway and dam construction was severable, where such contract encompassed two divisible projects, payment for which was to be received on the bases of unit prices assigned to each project. Cited in 4 M.J., Contracts, §5 (Cum. Supp. 1978). In Hart v. New York, 201 N.Y. 45, 94 N.E. 219 (1911), it was held that a written undertaking to construct a sewage disposal plant and a sewer in connection therewith, of which the part relating to the sewage plant is void for deficiency in specifications, may be treated either as two separate contracts in one writing or as one contract for two separate things and the sewer

part upheld. Cited in 17 Am. Jur. 2d, Contracts, §327, p. 761, n. 7 (1964).

Furthermore, the subject bonds cover two separate and distinct undertakings: the construction of streets and the construction of water and sewer lines. They are independent undertakings as shown by the facts that separate approvals were sought from separate agencies under separate procedures, involving separate plans and specifications.

The determination that the bonds are severable into two component parts is important for at least two reasons. First, the Board must independently prove its entitlement to funds attributable to streets and to funds attributable to water and sewer lines. Second, the Board (if it could establish its entitlement to funds) must use any monies recovered for water and sewer lines for water and sewer lines and must use any monies recovered for streets for streets. With regard to this reason, it is necessary to discuss why the County must use the monies recovered for the specified improvements.

As noted above, the Virginia Code, §15.1-466 (f) permits a County to require a "bond...conditioned upon the construction of" specified improvements; the Stafford County Subdivision Ordinance requires a bond "to guarantee the installation and completion of said improvements".

In Virginia the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication. Bd. of Supervisors v. Horne, 216 Va. 113 (1975). In addition, the Board is limited by its own ordinances. Under both the state statute and the County Subdivision Ordinance the governing body can only require a

bond "to guarantee the installation and completion of [necessary] improvements." Since the bond is required for a specific purpose, the necessary implication of the enabling statute and County Subdivision Ordinance is that the monies recovered under such a bond can be used only for that specific purpose. To use the monies recovered for totally unrelated purposes would be in violation of the powers bestowed upon the County pursuant to the enabling statute and the County's own ordinance. Furthermore, in this case, the bond itself limits the use of the monies recovered to the construction of the bonded improvements.

As noted in the Berman v. Aetna Casualty and Surety Co., 40 Cal. App. 3d 908, 115 Cal. Rptr. 566 (Ct.App.1974), the municipality is not entitled to treat as a windfall the proceeds of a faithful performance bond realized as a consequence of work not performed. This view has been adopted in a number of other states. For example, in Pacific County v. Sherwood Pacific, Inc., 17 Wash. App. 790, 567 P.2d 642 (Ct.App. 1977), the Court addressed this issue in a subdivision bond default case, as follows:

"As obligee on the bonds, the County's legal interest - quite apart from the contractual terms of the bond itself - was that of a trustee who was required, should the developer fail to make the secured improvements, to attempt to recover the funds from the bonding company and use them ultimately to complete improvements. University City v. Frank Miceli and Sons Realty and Bldg. Co., 347 S.W.2d 131 (Mo. 1961); Oakland v. DeGuarda, 95 Cal. App. 270, 272 P. 779 (1928); E. Yokley, Law of Subdivisions, Section 59, P. 150 (1963). It is the same as if the bond verbiage read "if the improvements are not completed as proposed within the time limits, the bond shall be forfeited and the money shall be collected by the County and used to complete the specified improvements." Cf. Medina v. Holdridge, 46 Ohio App. 2d 152, 346 N.E.2d 339 (1970); M. Zerman

Realty & Bldg. Corp. v. Westwood, 64 N.J. 590, 319 A2d 441 (1974); See also Evola v. Wendt Constr. Co., 170 Cal. App.2d 21, 338 P. 2d 498 (1959); Barry v. Drumright, 110 Okl. 223, 237 P. 102, 102 (1925); Law of Subdivisions, supra, §61, p. 152.

Therefore, under both Virginia and out-of-state authority, it is clear that any monies recovered under the bonds must be used for the specified improvements. In the present case, since the subject bonds are severable, the County's maximum recovery for water and sewer lines would be \$526,092.00, which amount, if recovered, would have to be used for such improvements. Similarly, the County's maximum recovery for streets would be \$758,400.00, which amount, if recovered, would have to be used for such improvements. Any attempt to shift funds attributable to one improvement to another would be in total disregard of the severable nature of the bonds and would change the very nature of the surety's undertaking.

However, if the Court concludes that the subject bonds are entire, it must be emphasized that the County is entitled to no recovery if one portion of the bonds is invalid or unenforceable.

### PART III. WATER AND SEWER LINES

(A) Impossibility and Frustration of Purpose. As noted in paragraph 12 of the Facts, CNHLP agreed to pay the costs of constructing water lines from the development to the Stafford County water line near U.S. Route 1; to obtain easements over the property between the development and U.S. Route 1 or to secure permission to construct the water lines along the right-of-way of the Highway Department; to construct a sewage treatment

facility, sewage collection system and water distribution system; and to construct water and sewer lines within the development. CNHLP failed to do any of these things. The general partners of CNHLP have gone bankrupt.

The general principles underlying the doctrines of impossibility and frustration of purpose are well stated in Restatement of Contracts 2d, §285:

"Where, after a contract is made, a parties' principal purpose is substantially frustrated without his fault by the occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the circumstances indicate to the contrary."

And Restatement of Contracts, 1st, §460:

(1) Where the existence of a specific thing... is, either by the terms of a bargain or in the contemplation of both parties, necessary for the performance of a promise in the bargain, a duty to perform the promise.

\* \* \*

(b) is discharged if the thing...is not in existence in time for seasonable performance."

Two Virginia cases have applied these general principles. In Housing Authority v. East Tenn., Etc., 183 Va. 64 (1944), the plaintiff claimed the defendant utility had breached its contract to furnish natural gas. The utility based its defense on the ground that performance had become impossible because the subject matter essential to the performance had ceased to exist, that is, a supply of natural gas. This defense prevailed. In Paddock v. Mason, 187 Va. 809 (1948), the defendant hired the plaintiff, a detective, to attempt to ascertain who was taking the defendant's cattle and substituting an inferior grade therefor. On the next day, the defendant discovered that the theft of her pure bred



cattle had been accomplished and, on the same day, notified the plaintiff that his services were no longer required. The defendant was permitted to raise this defense, that is, under the terms of the contract the plaintiff was employed to put an end to the depredation, which became impossible when all of the cattle had been stolen.

Safeco faces a similar dilemma. It undertook to complete water and sewer lines to be connected to a central water and sewer system. However, there is no central water and sewer system. CNHLP is bankrupt; no one is under any obligation to build the system; and the County has no plans to build one. The nonexistence of a central water and sewer system clearly frustrates the purpose of (and renders impossible) the surety's undertaking to complete water and sewer lines to connect to a central water and sewer system. Even without resort to legal principles, common sense dictates this conclusion. The County must use the money recovered for the bonded improvements, that is, \$529,092.00 for water and sewer lines. When the County constructs the water and sewer lines they have benefited no one. Water and sewer lines serve no function by themselves. To construct water and sewer lines, without an existing or planned central water and sewer system to which they can connect, is to embark on a mindless mission.

(B) Conditional Approval. It is undisputed that the County advised CNHLP that it would not approve the final subdivision plats on Sections A, B, C and D unless the Health Department approved its water and sewer plans.

Virginia Code §62.1-44.19, as in effect in 1973,

authorizes the Health Department to approve, disapprove or conditionally approve water and sewer plans. It is undisputed that the third option, conditional approval, was adopted in the present case. On each of the subdivision plats the following appears: The "Certificate of Approval", pertaining to the Health Department, states: "See Note #6"; Note #6 states:

"6. This plat is being approved by the Health Dept. with the understanding that this project will be served by public water and public sewer which has been approved by the Dept. of Sanitary Engineering - Va. State Health Dept."

These statements establish that the construction of a central water and sewer system was an express condition of subdivision plat approval by the Health Department. There is no such system and there are no plans to construct such a system. The non-occurrence of an express condition to the Health Department's approval has a definite effect. It transforms a conditional approval into no approval at all.

The County adopted the position that the plats had to contain Health Department approval. The plats no longer contain such approval. Safeco requests the Court to do that which the County has failed to do, to vacate plats which are no longer valid. Safeco has no legal obligation to pay money for a subdivision which is no longer legally extant. The subdivision plats should be vacated. Because of the nonexistence of a condition necessary to their continued legal viability - Health Department approval - Safeco should thus be discharged from any obligation to build or pay for either of the bonded improvements.

(C) County's Breach of Implied Conditions.

An obligee of a bond cannot disregard its obligations to the principal and then seek recovery under the bond from the surety.

"An obligee would have no right to recover on the bond of a contractor, if it had itself breached the bond in any material respect. ...The action of the government in preventing [a contractor] from performing the contract, may relieve the surety of liability of non-performance." 10 Appleman, Insurance Law and Practice, §5834.

This general rule has been applied to cases similar to the present one. In Yokley, The Law of Subdivisions §59 (Cum.Supp. 1978), the author cites the case of Medford v. Fellsmere Realty Co., 187 N.E. 2d 849 (Mass. 1963), for the following proposition:

"A surety may not be held liable on a performance bond conditioned upon installations of sewer and water lines by a subdivider where the failure to complete such work is caused by a water board's failure to authorize the installations under the terms of the bond."

CNHLF planned to construct a new town community on the 4,725-acre tract. Its plans included providing housing, shopping, schools, recreation and community facilities for at least 20,000 people. In 1971, CNHLF advised the Board of its development plans. On December 8, 1971, the Board rezoned the tract, R-1, R-2 and B-1, which permitted residential construction for approximately 35,000 individuals. Between December 8, 1971 and October 2, 1973, CNHLF prepared plans for an extensive water and sewer system and road network in and around the development. Of course, CNHLF never proceeded past the planning stages.

The Board subsequently decided that Crows Nest Harbour should not be developed into a new town community. On July 17, 1975, the Board adopted a Comprehensive Development Plan.

(Exhibit 13). One of the "overall goals for growth and development" formulated by this plan was "to grow in an orderly and controlled fashion, with intensive urban development being clustered or concentrated in certain defined strategic areas, thus maximizing the utilization of existing facilities." The Crows' Nest Harbour development was definitely not one of these areas. A close review of the plan shows that the County decided to omit the Crows Nest Harbour Development from consideration for new roads, upgraded roads, water and sewer facilities, schools and recreation facilities. On June 20, 1978, the Board approved a county zoning ordinance. The development was rezoned "A-2 Rural Residential", which would permit a maximum of 12,000 individuals on the 4,725-acre tract.

Safeco acknowledges that even with these changes the subdivision streets can be built and water and sewer lines can be laid. However, the importance of the Comprehensive Plan and the Zoning Ordinance is at least twofold.

First, CNHLP did not approach the Board solely with Sections A, B, C and D in mind. Rather, CNHLP approached the Board with plans to develop a new town community. As early as 1971, the Board rezoned the entire 4,725 tract with this objective in mind.

Since, 1973, the Board has decided that the planned development of a new town community on the tract was ill-advised. The County's development plans and its rezoning of the tract, effectively prevents the development of Crows Nest Harbour as planned. The project envisioned dense residential development

and extensive commercial areas. Under the present "A-2 Rural Residential" zoning, dense residential development is impossible, since the minimum lot size is one acre and extensive commercial development is impossible, since no business uses are permitted. The County is attempting to isolate one small part of a project, the plan for single family dwellings on two-acre tracts, from the rest of the development, areas planned for commercial, industrial and dense residential use. In doing so, the County is asking the surety to build public improvements envisioned to be built in conjunction with a large community, for example, building water and sewer lines to connect to an extensive central water and sewer system and upgrading and reconstructing Route 609 to gain access to an entire new town community. The County cannot be permitted to require Safeco to pay the costs of improvements contemplated to be part of a large community and, at the same time, prevent a large community from being built.

Second, it is important to take into account the legislative determination made by the Board in rezoning the 4,725-acre tract. The zoning ordinance states in reference to "A-2 Rural Residential" districts:

"Such districts may also include areas potentially suitable for development at higher densities but where location and timing of public utilities will not support such higher densities."

It is submitted that one of the public utilities to which this statement refers is the existence of a central water and sewer system. The effect of the rezoning is to retard development of the Crows Nest Harbour Development so that the County in the foreseeable future will not be required to construct such a

system. Furthermore, in light of the number of individuals who can be expected to move into this type of district the County has deliberately intended to make it less feasible for anyone else to do it. It thus becomes unreasonable for a surety to pay monies for water and sewer lines when such lines have no prospective use. To require the surety to pay for water and sewer lines under the bond would, under such circumstances, permit an illegal forfeiture.

The County has made a determination that it has no duty to CNHLP to permit the tract to be developed as contemplated. In fact, it is presently involved in litigation with CNHLP's successor, DMI, over this precise issue. The County's relationship with CNHLP was one involving mutual obligations. The County cannot forsake and eschew its obligations to CNHLP and at the same time ask a court to enforce CNHLP's obligations to it.

#### PART IV - STREETS

(A) State Route 609. State Route 609 was, and still is, an unpaved road. With regard to state maintenance, it was, and still is, a dead end road. (See General Highway Map of Stafford County, Exhibit 33). The subdivision plats require CNHLP to upgrade and reconstruct this road in Sections A, B, C and D (Exhibits 10, 11 and 12, Acorn Drive and Chinkapin Lane). The plans for Route 609 were based upon traffic projections for the entire development (See plats and Preliminary Traffic Study, Exhibit 34).

There are two arguments against requiring Safeco to pay for the upgrading and reconstruction of State Route 609.

First, there is no longer a need for such construction. Second, the County has no legal right to require Safeco to pay for same.

When the bonds were executed, there may have been a need to upgrade and reconstruct State Route 609 in the manner set forth in the subdivision plats. However there is no such need at the present. The anticipated number of residents and the projected vehicle trips per day along this road is significantly less. In light of these facts, the County no longer has the right to require that such improvements be built as originally planned unless the County can establish that the need for such improvements is "substantially generated" by public traffic demands of the development of Sections A, B, C and D. Support for this argument is found in Bd. of Supervisors v. Rowe, 216 Va. 128 (1975). There landowners brought an action seeking to have a zoning ordinance declared unconstitutional. The ordinance established a special business zone for a strip of property abutting a major thoroughfare between Williamsburg and the Busch Gardens amusement park. Within this zone, landowners were required, inter alia, to set all buildings back at least 75 feet from the highway, dedicate 50 feet of this "set-back" for a service road, curbs, sidewalk and median strips, and construct a service road on the dedicated land conforming to standards set by the Virginia Department of Highways and Transportation. The Court held that the dedication requirements of the ordinance violated the Virginia Constitution, since landowners were deprived of their right under the Constitution to be compensated for property taken for public use. The Court arrived at this

conclusion because the "need" for the dedicated land was "substantially generated by public traffic demands other than by the proposed development." The Court also held that the construction requirement was unconstitutional because the private money necessary to fund the performance of such requirements was property and that the Constitution of Virginia provided "no person shall be deprived of his life, liberty, or property without due process of law."

In Trichelo, "Subdivision Exactions: Virginia Constitutional Restrictions", 11 U.Rich. 21 (1976), the author summarizes the effect of Rowe decision as follows:

"The exactions challenged in Rowe do not substantially relate to the projected needs of the proposed development, and for this reason, the Court held them to be violative of the provision of the Constitution of Virginia insuring that private property will not be taken without just compensation. Thus, any municipal exaction authorized by existing statutes must either be reasonably or substantially related to the needs of the proposed development. Rowe does not define or explain what constitutes a 'reasonable' or 'substantial' relationship. Yet, there can be little doubt that under contemporary Virginia law, a municipality cannot constitutionally transfer the cost of facilities, predominantly public in nature, to either a subdivision developer or to future residents of that subdivision."

In Recent Decision, 10 U.Rich. 440 (1976), the authors summarize the effect of Rowe as follows:

"As an alternative ground, enabling statutes delegate no power to impose dedication requirements upon a developer, unless the need for such dedication arises out of public demand generated by his development. Therefore, even if the landowner in Rowe had been a subdivider, if his development did not generate a specific need for a public dedication, none could be required."



Or, as the Rowe decision states:

"The Board cites nothing in the Constitution, enabling statutes, or case law of Virginia which empowers the sovereign to require private landowners, as a condition precedent to development, to construct or maintain public facilities on land owned by the sovereign, when the need for such facilities is not substantially generated by the proposed development. The private money necessary to fund the performance of such requirements is 'property', and we hold that such requirements violate the constitutional guarantee that 'no person shall be deprived of his life, liberty or property without due process of law...' Constitution of Virginia, Art. I, §11."

The plans to upgrade and reconstruct State Route 609 were based on a need generated by traffic demands of 25,000 people - that is, an entire new town community. Such a need no longer exists. In this case we are dealing with a need generated by the projected traffic demands of the future residents, if any, of Sections A, B, C and D. To the extent the County requests that roads be constructed which are not necessitated by such residents it acts in derogation of the principles of the Rowe decision, and, therefore, unconstitutionally. The Rowe decision places the burden to prove the need for the roads upon the County. Safeco asks the Court to require the County to discharge its burden.

Even if the County can prove that such work is necessitated by the future residents of Sections A, B, C and D, the County has no legal right to require Safeco to pay funds for upgrading and reconstructing State Route 609. In Hylton Enterprises v. Board of Supervisors, 219 Va. \_\_\_\_ (October 5, 1979) (Exhibit 37A), the Board refused to approve Hylton's final subdivision plats because of Hylton's refusal to reconstruct portions of two

secondary roads, State Routes 640 and 643 abutting the subdivision. The evidence was sufficient to show that the need for such improvements was substantially generated by the proposed subdivision. The Court held:

"Neither the enabling statutes nor local ordinances provided the County with express authority to exact of Hylton construction costs for portions of Routes 640 and 643. Nor do we find any necessarily implied authority for that purpose.

\* \* \*

We hold, therefore, that there was no authority, express or necessarily implied, for the County to require Hylton to construct portions of Routes 640 and 643...."

Likewise, in the present case, the County cannot require Safeco to pay the costs of upgrading and reconstructing existing State Route 609.

(B) Plans. In Section I of this brief, it was stated that in order for the County to recover it should at least have a plan to construct the streets. Cases were cited which held that counties cannot "bank" another person's money or land for some "unscheduled future use" and that counties cannot gain a "windfall" at the expense of a surety. These concerns are of particular significance when future street construction is considered.

The bonds limits for construction of streets and drainage facilities is \$758,400.00. The Board, by its own estimate, represents that the construction of such improvements, if commenced on January 18, 1980, will cost \$2,362,700.00. The Board has set forth no plan as to how it will obtain the additional \$1,604,300.00 (\$2,362,700.00 minus

\$758,400.00). It is submitted that the County has offered no plan because it cannot.

In 1932, the General Assembly enacted the Byrd Road Law. The act's primary effects are set forth in two Code Sections.

Virginia Code §33.1-69 states:

"The control, supervision, management and jurisdiction over the secondary system of State highways shall be vested in the Department of Highways and the maintenance and improvements, including construction and reconstruction, of such secondary system of State highways shall be by the State.... The boards of supervisors...of the several counties...shall have no control, supervision, management and jurisdiction over such public roads....

Virginia Code §33.1-225 states:

"The boards of supervisors...of the several counties shall not make any levy of county... road taxes or contract any further indebtedness for the construction, maintenance or improvement of roads....

The Hylton Enterprises decision, rendered on October 5, 1979, makes it clear that the Byrd Road Law remains in force:

"Ever since 1932, financing the construction, repair and maintenance of the State primary and secondary highway systems has constituted a major function of our State government. The theory of centralized control in and allocation of funds by an objective arbiter presupposes that priorities for highway improvements will be established on a statewide basis in accordance with traffic demands scientifically ascertained, and will not comprise a disconnected assortment of decisions made under the influence of local pressures. Determination of the appropriate method or methods of funding highway projects is a policy decision affecting all areas of the State, a decision that is peculiarly within the exclusive province of the General Assembly." (Although there are limited exceptions to this rule, none of them pertain to the present situation. See, for example, Virginia Code §33.1-72.1, dealing with subdivision streets which already have been constructed and were in use prior to July 1, 1975).

As set forth in the Stafford County Comprehensive Development Plan and as stated by the Resident Engineer of the State Highway Department, the Department has no plans to commit \$2,362,700.00 to build the streets within Sections A, B, C and D. As set forth above, the County can make no plans without the consent and approval of that Department.

Furthermore, since 1973, the General Assembly has enacted an Erosion and Sediment Control Law, Virginia Code §21-89.3 and Stafford County has enacted a Soil Erosion and Sedimentation Control Ordinance. Under these enactments, and the regulations issued pursuant thereto, the streets within Sections A, B, C and D may not be permitted to be constructed.

No street construction has been accomplished now more than six (6) years after the execution of the bonds. The history of this project points to and virtually assures the fact that there is no present realistic concept or plan established by the County, and as a result, Safeco is not liable for \$758,400.00.

The problem raised here is similar to the one raised in Allied Productions v. Duestenck, 217 Va. 763 (1977). In that case a lawyer allegedly failed to defend a suit against his client. As a result, the client suffered a default judgment. The client sued his lawyer. The Court held that since the client had not alleged that he had paid any part of this judgment, he had not suffered any actual damages and could not recover. The Court stated:

"Insofar as the client in the present case claims damages on account of the default judgment it is in the nature of a claim for indemnity in which the client seeks to have

the attorney save him harmless from the debt owed to the judgment-creditor. But until the client has made a payment on that debt he has suffered no actual loss or damage."

The present situation involves an indemnity obligation as well. If the Allied Productions case were strictly applied to the present situation, the County could not recover anything until it had paid something. At the very least, the County should be required to proffer into Court a plan between the County, with its anticipated recovery here, and the State (Highway Department), with the additional funds, to construct the streets. Safeco knows of no doctrine of law, and submits that none exists, which permits a party to recover money for damages which may never occur. The orderly administration of justice would surely not be served by developing such a doctrine.

PART V - MISCELLANEOUS  
[BOARD'S ACTS ULTRA VIRES]

(A) Prima Facie Case. Safeco anticipates that the Board, on brief, will argue that it has set forth a prima facie case. Without attempting to summarize all previous arguments, it must be emphasized that the subject bonds are indemnification bonds. In order to recover under such bonds, the Board must prove that it has suffered loss or damage.

Furthermore in its Motion for Judgment and Amended Motion for Judgment (paragraphs 7, 14, 18 and 22 thereof) the Board alleged that it "relied upon" the subject bonds. This allegation has not been established. In fact, in this case, the Board acted in violation of Virginia Code provisions, pertaining to subdivisions, and its own subdivision ordinance, in requiring the bonds.

The Virginia Code §15.1-465 through §15.1-485 set forth the enabling statutes for subdivision ordinances and procedures. Code §1 5.1-473, as in effect in 1973, provides as follows:

"After the adoption of a subdivision ordinance in accordance with this chapter, the following provisions shall be effective in the territory to which such ordinance applies:

(a) No person shall subdivide land without making and recording a plat of such subdivision and without fully complying with the provisions of this article and of such ordinance.

(b) No such plat of any subdivision shall be recorded unless and until it shall have been submitted to and approved by the local commission or by the governing body or its duly authorized agent, of the county or municipality having a subdivision ordinance, in which any part of the land lies.

\* \* \*

(e) No clerk of any court shall file or record a plat of a subdivision required by this article to be recorded until such plat has been approved as required herein.

Code §15.1-475 provides:

"Whenever the owner or proprietor of any tract of land located within any territory to which a subdivision ordinance applies desires to subdivide the same, he shall submit a plat of the proposed subdivision to the local commission of the county or municipality, or an agent designated by the governing body thereof for such purpose. When the land involved lies wholly or partly within an area subject to the joint control of more than one political subdivision, the plat shall be submitted to the local commission or other designated agent of the political subdivision in which the tract of land is located.

If a local commission or other agent fails to approve or disapprove the proposed plat within sixty days after it has been officially submitted for approval the subdivider, after ten days' written notice to the commission, or agent, may petition the circuit or corporation court of the county or municipality in which the land involved, or the major part thereof, is located, to decide whether the plat should or should not be approved. The court shall hear the matter and make and enter such order with respect thereto as it deems proper.

If a local commission or other agent disapproves a plat and the subdivider contends that such disapproval was not properly based on the ordinance applicable thereto, or was arbitrary or capricious, he may appeal to the circuit or corporation court having jurisdiction of such land and the court shall hear and determine the case as soon as may be.

Nothing in this article shall be deemed to prohibit the local governing body from providing in its ordinance for the submission of preliminary subdivision plats for tentative approval under such rules of preparation and procedure as may be set forth in said ordinance."

Code §15.1-476 provides:

"Every subdivision plat which is intended for recording shall be prepared by a certified professional engineer or land surveyor, who shall endorse upon each such plat a certificate signed by him setting forth the source of title of the owner of the land subdivided and the place of record of the last instrument in the chain of title; when the plat is of land acquired from more than one source of title, the outlines of the several tracts shall be indicated upon such plat. Provided, however, that nothing herein shall be deemed to prohibit the preparation of preliminary studies, plans, or plats of a proposed subdivision by the owner of the land, city planners, land planners, architects, landscape architects, or others having training or experience in subdivision planning or design."

Code §15.1-477 provides:

"Every such plat, or deed of dedication to which the plat is attached, shall contain in addition to the professional engineer's or land surveyor's certificate a statement as follows: The platting or dedication of the following described land (here insert a correct description of the land subdivided) is with the free consent and in accordance with the desire of the undersigned owners, proprietors, and trustees, if any. The statement shall be signed by such persons and duly acknowledged before some officer authorized to take acknowledgment of deeds. When thus executed and acknowledged, the plat, subject to the provisions herein, shall be filed and recorded in the office of the Clerk of court where deeds are admitted to record for the lands contained in the plat, and indexed in the general index to deeds under the names of the owners of lands signing such statement, and under the name of the

subdivision."

Code §15.1-480 provides:

"If the owners of any such subdivision desire to construct in, on or under any streets or alleys located in such subdivision any gas, water, sewer or electric light or power works, pipes, wires, fixtures or systems, they shall present plans or specifications therefor to the governing body of the county or municipality in which the subdivision is located or its authorized agent, for approval. If the subdivision is located beyond the corporate limits of a municipality but within the limits set forth in §15.1-467, such plans and specifications shall be presented for approval to the governing body of such municipality, or its authorized agent, if the county has not adopted a subdivision ordinance. The governing body, or agent, shall have thirty days in which to approve or disapprove the same. In event of the failure of any governing body, or its agent, to act within such period, such plans and specifications may be submitted, after ten days' notice to the county or municipality, to the judge of the circuit or corporation court having jurisdiction within such county or city for his approval or disapproval, and his approval thereof shall, for all purposes of this article be treated and considered as the approval of the municipality or county or its authorized agent."

These sections set forth a simple and straightforward approach to subdivisions. An owner desiring to subdivide his land must submit a plat of the proposed subdivision. This plat must comply with the local subdivision ordinance, if valid. The County may have a procedure for preliminary approvals. However, the owner, eventually, must submit the subdivision plats for final approval. At such time the Board is under a clear duty, (or ministerial duty), to approve or disapprove the plats. Prince William Co. v. Hylton Enterprises, 216 Va. 582 (1976). If the Board gives its final approval, the Clerk is under a clear duty, (or ministerial duty), to record them. Otherwise stated,



the Board's rights to request changes in the plats terminates when the Board approves the final subdivision plats. In addition, it must be emphasized that in Virginia, the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication. Bd. of Supervisors v. Horne, 216 Va. 113 (1975). See also Nat. Realty Corp. v. Virginia Beach, 209 Va. 172 (1968). The Virginia Code is clear on this point--the Board has the right to approve or disapprove a final plat. It has no right to take actions to prevent recordation after it has given its approval.

This conclusion is also mandated by the Stafford County Subdivision Ordinance. In 1971 and 1972, the Stafford County Subdivision Ordinance, Section 22-26, provided:

"The final plat shall not be approved until the subdivider has complied with the general requirements and minimum standards of design in accordance with this chapter, and has made satisfactory arrangements for a performance bond, cash or cash bond to cover necessary improvements (in lieu of construction)....The subdivider shall record such plat within one year after final approval; otherwise the agent shall mark the plat 'void' and return same to the subdivider."

In 1973, the Stafford County Subdivision Ordinance, Section 4-2-2, provided:

"Bonding Requirements - (1) All improvements required by this ordinance shall be bonded before approval of final plat."

In the present case, the Board cannot prove its allegation that it "relied upon" the bonds, which proof is indispensable to its recovery. The Board approved the final plats in the fall of 1971 and the spring of 1972. At such time, the Board had not required performance bonds. At such time,

the Board, or its authorized agent, was under a ministerial duty to sign the plats. Since the plats were not recorded within a year after final approval, under the County's own ordinance, the plats were "void".

In obtaining performance bonds, the Board did not follow the Virginia Code and its own ordinance. Rather, the Board, acting in an illegal and ultra vires manner, prevented CNHLP from recording the final plats. In October, 1972, the Board advised the Clerk of the Circuit Court not to record the plats; it advised the Health Department not to sign the plats. (Exhibit 5). In January, 1973, it advised CNHLP that it would not obtain the signatures necessary for recordation until it provided performance bonds. (Exhibit 7).

The Board, in this case, did not "rely upon" the bonds in approving the final plats. In fact, it only obtained the bonds by following an illegal and ultra vires modus operandi. The Board has no right to recover under bonds which it only obtained in violation of State law and its own ordinance.

(B) Attorney's Fees and Interest.

The subject bonds state,

"[I]t being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated."

When the County requests the Court to award interest and attorneys' fee, it requests the Court to disregard the express language of the subject bonds.

In Board of Supervisors v. Ecology One, 219 Va. 29 (1978), the subject bond stated:

"Provided, that in no event shall the liability to the surety hereunder exceed the penal sum of this bond...."

The Court held:

"[T]he bond was intended to be an amount sufficient to pay construction costs, and upon failure of completion of the public improvements by the subdivider the bond provided funds to the extent of the amount of the bond to cover the cost of completion of the improvements as then remained." (Emphasis added).

At the time Safeco executed the subject bonds this result was statutorily mandated. Virginia Code §8-353, as in effect in 1973, provides:

"When there is recovery on a bond with condition for the payment of money the judgment shall be for the penalty of the bond to be discharged by the payment of the principal and interest due thereon, but when the judgment is against a surety of limited liability in such bond the sum to be paid by such surety in discharge thereof shall not exceed the amount to which he has limited his liability on such bond." (Emphasis added).

Safeco executed the bonds in reliance on this Code section and the specific language of the bonds. In no event was Safeco's liability to exceed the penal amounts of the bonds. The Board is bound by the bonds into which they entered and cannot be permitted seven years after their execution to change the nature of Safeco's express undertaking.

(C) Other Matters. Safeco has found it difficult to determine which legal issues may be decided by the Court as a matter of law and which may not be. Therefore, Safeco reserves the right to develop additional arguments if the Court rules that there exist additional issues upon which it can rule as a matter of law, and Safeco expressly reserves the right to advance all arguments and authorities in support of its defenses.

PART VI - CONCLUSION

The folly of this attempt on the part of the County is that it cannot and should not be encouraging the acquisition and expenditure of funds for a project which was doomed from the outset.

Its efforts are tantamount to acquiring and spending \$10,000.00 for the construction of a basement, with no funds or authority to construct a planned dwelling house.

The County can only make matters worse since the land has been virtually undisturbed. Under the present circumstances nothing quite serves the County so well as the status quo. The inescapable irony is that the citizens of Stafford County's best interests are served by the failure of their Board of Supervisors in this case.

Respectfully submitted,

SAFECO INSURANCE COMPANY OF AMERICA

BY 

Of Counsel

William M. Sokol  
Whitticar, Sokol & Ledbetter  
918 Princess Anne Street  
P. O. Box 593  
Fredericksburg, Virginia 22401

\* \* \*

PRINTERS NOTE:

Exhibit Number 46 attached to above brief may be found on Appendix page numbers 507-567. Exhibit Number 47 attached to above brief may be found on Appendix page numbers 568-574.

HARRIS & HARRIS  
ATTORNEYS AT LAW  
FREDERICKSBURG, VIRGINIA 22401

WILLIAM H. HARRIS  
JOHN P. HARRIS, III

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March 17, 1980

**FILED**  
CLERK'S OFFICE

MAR 20 1980

The Honorable J.M.H. Willis, Jr.  
Judge, Circuit Court of Stafford County  
Stafford Courthouse  
Stafford, Virginia 22554

RE: Board of Supervisors vs. Safeco

STAFFORD COUNTY, VA.  
BY *Barbara H. Decatur*  
*Dept.* CLERK

Dear Judge Willis:

Following the distribution of the Court's memorandum opinion, Your Honor asked counsel to consider whether a trial was still necessary given the holdings of the memorandum.

A trial is necessary for the following reasons:

1. Paragraphs One through Eleven of the Court's memorandum were rulings on the issues of law and not fact. Those paragraphs leave open for trial the issues of interest (Paragraphs 6 and 7) and the defenses raised in Paragraph Eleven of Safeco's Grounds of Defense to its Amended Motion for Judgment (Court's memorandum, Paragraph 9).
2. Paragraph Twelve of the Court's memorandum makes both rulings of law and findings of fact based on the Court's conclusion that the "essential facts are not in question".

Because no motion for summary judgment was before the Court the County did not describe the facts that are in dispute. Because the hearing before the Court was a pretrial conference the County discussed only the issues which are not disputed with the goal of limiting the evidence to be presented before a jury.

3. We respectfully submit that essential facts are in question and that the Plaintiff is entitled to a jury trial. The County is prepared to prove that with:
  - A. The penal sum of the bond (and given the Court's ruling on severability in Paragraph

Ten of the Court's memorandum, the County can collect the full penal sum on account of and to be applied to the construction of the roads) and interest (allowed by the Court's memorandum, Paragraphs 6 and 7); and if necessary

- B. A reduction in the size of the project with the cooperation of DMI and other lot owners, and if necessary
- C. The creation of a sanitary district to raise any additionally needed funds for roads.

Then the County can build the platted roads to enough lots which are suitable for well and septic systems under the current appropriate zoning to satisfy the lot purchasers.

Given proof of these facts which are in dispute, the County submits that the facts described in Paragraph Twelve of the Court's memo (holding that the purpose of the bonds are frustrated) would be changed as follows:

A. Adequacy of Bond Amount:

The amount of the bonds would be adequate;

B. The Adequacy of the Bond's Scope:

Under the current zoning there would be no need for central water and sewer; the scope of the bonds includes road building and the bonds would be used for this purpose;

C. That the County has not undertaken the Project:

Under Ecology One, the County is entitled to await receipt of the surety's funds which it will use to complete the work;

D. That the bonded projects are related to other projects which have not been accomplished:

These other projects are central water and sewer which will not be necessary under the current zoning as all platted lots exceed two acres;

E. There is no need for the guaranteed improvements:

The County will produce lot owners and evidence to prove the need for the improvements;

March 17, 1980

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- F. The zoning has changed so that the project is not permissible:

Safeco has conceded in its brief that the project is permissible under the current zoning; in addition, the County can always change the zoning;

- G. That the County cannot receive the bond funds and hold them indefinitely:

It is the County's duty to proceed within a reasonable time to complete the project as described above.

We respectfully submit that these issues of fact justify a jury trial at the earliest possible date.

We reiterate our request that Safeco specify the nature of its intended proof under Paragraph Eleven of its Grounds of Defense to the Amended Motion for Judgment. Safeco's response in its reply brief has been to say that the County should employ further discovery. We point out in the deposition of Wayne Jensen, Vice President in charge of Surety Claims, that he stated that the County had not done or failed to do anything which would justify Safeco's failure to pay. We believe it is an appropriate function of the pre-trial conference to isolate these issues; and we fear that if they are not specified, this single defense left to Safeco will become a catch-all for the many defenses which the Court has stricken.

Sincerely yours,

*William H Harris*

William H. Harris  
County Attorney  
Stafford County

WHH: cm

cc: William M. Sokol

### ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO STRIKE.
2. THE TRIAL COURT ERRED IN REFUSING TO PERMIT PLAINTIFF TO CLAIM COMPENSATORY DAMAGES.
3. THE TRIAL COURT ERRED IN HOLDING THAT SAFECO'S OBLIGATION UNDER THE BONDS WAS AN OBLIGATION OF INDEMNITY AND WAS TO BE STRICTLY CONSTRUED.
4. THE TRIAL COURT ERRED IN ALLOWING THE DEFENDANT TO ASSERT THE DEFENSE OF FRUSTRATION OF PURPOSE.
5. THE TRIAL COURT ERRED IN FAILING TO GRANT THE PLAINTIFF MOTION TO COMPEL THE PRODUCTION OF THE DEFENDANT'S FILES WHICH RELATE TO THE CROWS NEST HARBOUR PROJECT.
6. THE TRIAL COURT ERRED IN REFUSING TO ADMIT INTO EVIDENCE PLAINTIFF'S EXHIBITS A, B, C AND D, THE FLEADINGS OF THE DEFENDANT.

### ASSIGNMENTS OF CROSS-ERROR

1. THE TRIAL COURT ERRED BY RULING THAT THE SUBJECT BONDS WERE UNITARY?
2. THE TRIAL COURT ERRED BY RULING THAT THE ISSUE OF INTEREST WAS AN ISSUE RESERVED FOR TRIAL.
3. THE TRIAL COURT ERRED BY RULING THAT THERE WAS ADEQUATE CONSIDERATION FURNISHED BY THE BOARD.
4. THE TRIAL COURT ERRED BY RULING THAT THE PARTIES - NECESSARY TO DETERMINATION OF THE VALIDITY OF THE SUBJECT SUBDIVISION PLATS WERE NOT BEFORE THE COURT.
5. THE TRIAL COURT ERRED BY RULING, AS A MATTER OF LAW, THAT THE CONSTRUCTION OF THE FACILITIES GUARANTEED BY THE BONDS HAD NOT BEEN RENDERED IMPOSSIBLE.



\* \* \*

1 Whereupon,

2 PETER H. BROWN,  
3 a witness, called for examination by counsel for  
4 the plaintiff, and, after having been first duly sworn by  
5 the Notary Public, was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. WILLIAM HARRIS:

8 Q State your name, please.

9 A Peter H. Brown.

10 Q Who do you work for?

11 A Safeco Insurance Company of America.

12 Q How long have you worked for them?

13 A Ten and a half years.

14 Q In what capacities?

15 A I started out as a claims adjuster. I was  
16 promoted to a casualty insurance supervisor and now I am  
17 regional surety claims manager.

18 Q How long have you been a regional surety claims  
19 manager?

20 A Two and a half years.

21 Q Did you replace Mr. Dougherty?

22 A Yes.

23 Q Did you have any discussions concerning whether

1 the four bonds shown as Exhibits 1 through 4 would be paid  
2 or not?

3 MR. SOKOL: Those, indeed, are the bonds that  
4 are in issue in this case, Mr. Brown.

5 THE WITNESS: Yes, that's what this is all  
6 about.

7 BY MR. WILLIAM HARRIS:

8 Q Did you make a decision as to whether those  
9 bonds should be paid?

10 A Yes, under the advice of counsel we made that  
11 decision.

12 Q What was the basis -- what were the facts on  
13 which you based your decision not to pay the bonds?

14 A Well, the primary reason is that there is no  
15 project going forward. There appears to be no possibility of  
16 the project being finished. There is no ownership standing  
17 forward to take the project forward. There would be no  
18 benefit derived by anybody by making any payment.

19 Q What do you mean by, there is no project?

20 A Well, as far as I can tell, as far as I am  
21 aware, the ownership of the development is not interested in  
22 developing it.

23 Q Who is the owner that you are referring to?

1 A Well, I believe Diversified Mortgage Investors,  
2 is the owner now.

3 Q Are you saying that the project, section A  
4 through D, is owned at the present time by the principal?

5 A I would say that they are developers. Of  
6 course, there is still, I presume, some lot owners that  
7 are making payments and haven't been foreclosed out yet.  
8 I have no idea on how many. I can't believe there are very  
9 many.

10 Q What do you consider many?

11 A Well, I really have no idea how many.

12 Q When did you make the decision not to pay?

13 MR. SOKOL: To make that a complete question,  
14 the decision not to pay 1.3 million dollars. That was what  
15 the decision was, I believe.

16 THE WITNESS: Right. I would have to say that  
17 that decision was made following the litigation that was  
18 brought.

19 BY MR. WILLIAM HARRIS:

20 Q When was Safeco first notified of the demand?

21 A To the best of my recollection, it would be the  
22 fall of 1976..

23 Q When did you decide not to pay?

1 MR. SOKOL: 1.3 million dollars.

2 THE WITNESS: I presume the decision was made  
3 either when the lawsuit was brought or when a demand was  
4 brought for us to pay that amount.

5 BY MR. WILLIAM HARRIS:

6 Q Was that after September, 1977, or prior to  
7 September, 1977, or when? I am asking you when you made the  
8 decision.

9 A The date I had mentioned was September, 1976.  
10 Now, I may be wrong on the dates. I don't have anything to  
11 refer back to on that.

12 Q Have you ever seen that letter before  
13 (indicating)?

14 MR. SOKOL: May I see that, please.

15 MR. WILLIAM HARRIS: Would you mark that as  
16 Exhibit No. 12.

17 (The document referred to  
18 above was marked Brown  
19 Deposition Exhibit No. 12  
for identification.)

20 BY MR. WILLIAM HARRIS:

21 Q When did you see that letter?

22 A I would presume probably in September or late  
23 August, 1976.

1 Q How did you happen to see that letter?

2 A I believe it was after the files that Mr.  
3 Dougherty set up. I am not sure that he did have files on  
4 this, but if he did they were sent to me in St. Louis and  
5 this would be the first I would have seen of that.

6 Q Who did you have discussions with concerning  
7 that letter?

8 A It would be Ken Holloway and Wayne Jensen.

9 Q What was the substance of the discussion you  
10 had with Ken Holloway?

11 A Well, the essence of it was that I felt it was  
12 pretty important to communicate with you on behalf of the  
13 County, and to sit down and discuss this, and find out what  
14 was happening out there.

15 Q What did you advise the County?

16 A Which we did.

17 Q What did you advise the County?

18 A We had an engineering service looking at this  
19 to see what it would cost to complete. At the time we were  
20 meeting with the Crows Nest people, who had at the time  
21 still the idea that this project could be completed if  
22 they were successful in their lawsuit against Diversified  
23 Mortgage Investors.

\* \* \*

1 Whereupon,

2 EMMITT WILLIAM DOUGHERTY,  
3 a witness, was called for examination by counsel for  
4 the plaintiff, and, after having been first duly sworn by  
5 the Notary Public, was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. WILLIAM HARRIS:

8 Q State your full name, please.

9 A Emmitt W. Dougherty.

10 Q Would you spell your last name?

11 A D-o-u-g-h-e-r-t-y (spelling).

12 Q Who do you work for now?

13 A Van Gerpen, Bovis, Kyle & Burch, attorneys,  
14 Atlanta, 53 Perimeter Center, East. That's in Atlanta.

15 Q How long have you worked for them?

16 A About two years.

17 Q Prior to that who did you work for?

18 A Safeco.

19 Q How long did you work for Safeco?

20 A 30 years.

21 Q In what capacity?

22 A In various capacities. The last job I had when  
23 I retired was surety claims manager.

1 Q What other positions did you hold?

2 A Prior to that?

3 Q Yes.

4 A Well, I was an assistant division claims  
5 manager in St. Louis. I was claims manager in Chicago.

6 Q Have you always been a claims manager?

7 A No.

8 Q What other positions have you held?

9 A Do you mean with other companies?

10 Q With Safeco.

11 A That's all.

12 Q That's all with Safeco?

13 A Yes.

14 Q What other companies have you worked for?

15 A Hardward Mutuals. I started with them as a  
16 claims representative, and then after military service I  
17 was their claims procedure manager in their home office.

18 Q Any other companies you worked for?

19 A No.

20 Q You always worked in insurance?

21 A Upon graduation from law school I spent a year  
22 cleaning up my father's estate.

23 Q Are you a licensed attorney?

1 A Yes.

2 Q How long have you been licensed?

3 A Since 1938.

4 Q Have you always specialized in insurance law?

5 A Except for the time that I was cleaning up my  
6 father's estate.

7 Q What does a claims representative do?

8 A It depends upon his capacity. There are various  
9 levels of claims representatives, it could be a clerk in  
10 an office.

11 Q What did you do?

12 A I started out first in a school with Hardware  
13 Mutuals, and I went to Chicago, where I worked until I  
14 went into military service. At that time I covered the  
15 northern part of Illinois, including the suburbs of  
16 Chicago. I worked in Chicago for a while, and then I went  
17 and took over the north Illinois territory.

18 That means investigation adjustment of all  
19 kinds of claims, mostly in those liability and  
20 compensation.

21 Q How about just prior to your leaving Safeco,  
22 what were your duties, what did you do?

23 A I was regional surety claims manager.



1 Q What did you do in that capacity?

2 A I managed, I would oversee, I would assist  
3 in surety claims. They had local representatives in each  
4 of the division offices. It started out with four divisions  
5 and then reduced it as they came close to retirement age,  
6 and turned it over to other people.

7 Q What regions of the divisions were you  
8 responsible for?

9 A The eastern 38 states, four divisions.

10 Q Was Ken Holloway under you?

11 A Yes.

12 Q How long was he under you?

13 A I would say approximately two years.

14 Q Were you the individual who made decisions as  
15 to whether claims or demands should be paid on bonds?

16 A With some qualifications, primarily, yes.

17 Q Could you give me those qualifications?

18 A Well, there is a long ramification of that. In  
19 this business you have a whole bunch of people that you  
20 are thinking about, including the principal, the obligee,  
21 sometimes reinsurers, sometimes home office people. I had  
22 authority pretty well to discharge most claims. In doing  
23 that, however, you had to consider other things that became

\* \* \*

1 Whereupon,

2 DONALD ARTHUR REEDY,

3 a witness, was called for examination by counsel for  
4 the plaintiff, and, after having been first duly sworn by  
5 the Notary Public, was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. WILLIAM HARRIS:

8 Q Would you state your full name, please?

9 A Donald Arthur Reedy.

10 Q Who do you work for?

11 A Safeco Insurance Company.

12 Q How long have you worked for them?

13 A 20 years.

14 Q In what capacities have you worked for them?

15 A As an insurance adjuster, resident adjuster,  
16 adjuster in charge, branch claims manager, surety claims  
17 supervisor, and surety claims representative.

18 Q Any other capacities?

19 A No.

20 Q You stated surety claims adjuster --

21 A No. I said surety claims supervisor and surety  
22 claims representative.

23 Q What are the duties with respect to each one

1 evaluation, no.

2 Q But you do get involved in costs? In other  
3 words, you are familiar with the cost of construction of  
4 improvements?

5 A Somewhat, yes.

6 Q Have you always worked in the insurance  
7 business?

8 A Yes, sir.

9 Q Always for Safeco?

10 A No, sir. I was with a firm called Crawford  
11 and Company, an independent insurance adjusting firm, for  
12 a period of about six months after college.

13 Q Other than that, you have always worked for  
14 Safeco?

15 A Right.

16 Q What have you done for Safeco with respect  
17 to the settlement of claims on subdivision bonds?

18 A I don't know that I have really done anything  
19 in so far as concerning subdivision bonds. Most of the  
20 problems that I have personally experienced over the last  
21 few years have been payment performance bonds on Federal,  
22 State, and private jobs.

23 Q Did you replace Ken Holloway?

1           A.     Yes.

2           Q.     You took over his position?

3           A.     He and I both worked together in the same  
4 office in Atlanta, Georgia. He expressed an interest in  
5 getting into the underwriting department, and at that  
6 time he went into it. I continued with my responsibilities  
7 and I assumed all of his. So, we had a staff of two and  
8 we reduced it to a staff of one.

9           Q.     What is the difference between a subdivision  
10 bond and a payment bond?

11          A.     A subdivision -- a payment bond -- let me  
12 back up. A payment bond is generally required because  
13 those individuals, firms, corporations, etcetera, who  
14 furnish labor or material to a project, such as a courthouse,  
15 can get their money because they don't have lien rights  
16 against the Federal or State owned property.

17                     And the bond acts as in substitution for their  
18 lien rights. Generally, in private cases where a sub-  
19 stantial amount of money is involved the owner will acquire  
20 a bond, because if he doesn't those who do furnish labor  
21 and material can lien and foreclose on his property.

22                     With a subdivision bond generally you are not  
23 concerned with the payment provisions of the bond. In

1 other words, if you have got a developer he is doing it  
2 himself. There is no third party beneficiary to come  
3 into play.

4 Q You stated what a payment bond is for; what  
5 is a subdivision bond, in simple terms?

6 A Well, my experience in this area is limited,  
7 but as an overview I would say that your subdivision  
8 bonds are intended to protect the County when a developer  
9 has to go in and put in streets, road signs, and gutters,  
10 and sewer systems, and things of that nature for dedication  
11 to the County.

12 The developer generally will agree with the  
13 County, or City, or some municipality that they will do  
14 this, and in exchange for that the County will let them  
15 develop this property for sale and for profit of that  
16 particular corporation.

17 Q How long have you been into the claims part,  
18 in a position where you are handling claims?

19 A Surety claims?

20 Q Yes.

21 A I started handling surety claims in June,  
22 1971.

23 Q Are you familiar with the bonds that Safeco

1 is obligated on?

2 MR. SOKOL: I object to the form of the question  
3 and ask that it be restated.

4 BY MR. WILLIAM HARRIS:

5 Q Have you seen these four subdivision bonds  
6 before (indicating), 2219519, 2219520, 2219521, and 2219522?

7 A Yes, sir.

8 MR. WILLIAM HARRIS: Would you mark this one  
9 as Reedy Exhibit No. 1. These will be Exhibit Nos. 2, 3, and  
10 4.

11 (The documents referred  
12 to above were marked  
13 Reedy Deposition  
14 Exhibit Nos. 1, 2, 3,  
15 and 4 for identification)

16 BY MR. WILLIAM HARRIS:

17 Q How did you come into contact with these bonds?

18 A When Holloway left I became the custodian of  
19 all his files, and was basically responsible for all his  
20 files. In reviewing the lawsuit file I ran across these  
21 bonds.

22 Q What do you know about as to why or why not  
23 the bonds have or have not been paid?

24 A Well, the bonds have not been paid for a  
25 number of reasons. One, on the value of its face --

\* \* \*

1 because there are a lot of things we can't do with that  
2 money. Although we are dealing with surety we are under  
3 insurance laws. I think you get in the neighborhood of  
4 five to six percent on those funds where a reserve has  
5 been established, because the insurance commissioner  
6 limits the type of investments you can put your money into.

7 Q You say the insurance company?

8 A The insurance commissioner.

9 Q Which state are you referring to? Are you  
10 referring to Virginia? Are you referring to Washington?

11 A We are incorporated in the State of Washington,  
12 and that's my understanding, although I don't invest any of  
13 the company's money. But I understand that when the matters  
14 are in reserve there is a limitation upon the type of  
15 investments that we can make.

16 Q Does Safeco have a standard subdivision bond  
17 form it uses?

18 A That would be an underwriting matter, a matter  
19 dealing with underwriting. I would say, no.

20 Q This appears to be a form of Safeco (indicating)?

21 A No, that is not. I understand that Stafford  
22 County is the author of that bond. It was just typed on  
23 Safeco letterhead.

1 Q Where did you get that understanding from?

2 A Our file.

3 Q Do you know what part of your file?

4 A No, sir.

5 Q Could you look at your file and let me know

6 what part of your file it was, not necessarily today?

7 Would you do that for me?

8 A Yes, sir.

9 Q What would Stafford County have to do to get  
10 Safeco to pay on the bond?

11 A At this late stage, I don't know.

12 Q At any stage.

13 A Well, I think that if Stafford County had gone  
14 ahead and completed the roads, the sewer, and the water  
15 themselves and paid for it, I would certainly think that it  
16 would be Safeco's obligation to come in and pay them back the  
17 penal sum of the bonds.

18 Q Did Safeco ever advise the County of this fact?

19 A I didn't attend the meetings. I don't know  
20 what all those discussions were about.

21 Q Do you know whether Safeco did? Did you do it?

22 A No.

23 MR. SOKOL: I think that these are questions



1 that ultimately will have to be put to Wayne Jensen, who was  
2 in the last line of responsibility with respect to when  
3 payment would be paid and when it would not be voluntarily  
4 made.

5 BY MR. WILLIAM HARRIS:

6 Q Has Safeco refused to perform under the bonds?

7 A That presupposes there is an obligation. Safeco  
8 has not paid its bond penalty or any portion thereof to  
9 the County.

10 Q What do you view Safeco's obligation under these  
11 bonds as being?

12 A At what point in time?

13 Q The time demand is made.

14 A If the County had completed the work that was  
15 originally described in the plats, streets, sewer, water,  
16 and all that had been installed by the County and paid for,  
17 if the County spent a million dollars it would have been  
18 Safeco's obligation at that time to indemnify them for a  
19 million dollars. If the County had spent a million and  
20 five, our obligation would have been the bond, which  
21 combined penalties are a little less than a million five,  
22 about a million two something.

23 Q Would Safeco have had to pay the money to the

\* \* \*



\* \* \*

direct - Holloway

1 A He would know whether or not they  
2 acquired it.

3 Q Did Safeco generally require copies  
4 of the plats at the time bonds are issued?

5 A I don't know.

6 Q Who would know that answer?

7 A The same two people. They were  
8 in the Underwriting Department at the time.

9 Q What is your job with Safeco?

10 A At the moment?

11 Q At the moment.

12 A I am Surety Representative for the  
13 State of Georgia.

14 Q What does the Surety Representative  
15 do?

16 A Marketing and underwriting, all  
17 types of surety bonds.

18 Q What other positions have you held  
19 with Safeco?

20 A I started out as a claims adjustor  
21 for two years, and then I moved into surety claims for four

C  
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Y



direct - Holloway

1 years, and then in the first of 1978, I moved into under-  
2 writing, and I have been training since then.

3 Q What percentage of insurance does  
4 Safeco issue dealing with subdivision bonds, performance  
5 bonds, that type of insurance?

6 A I don't have any knowledge of what  
7 insurance we --

8 Q No breakdown?

9 A No.

10 Q Who could give us that information?

11 A Are you speaking of bonds or  
12 insurance?

13 Q Well, surety bonds, performance  
14 bonds, what percentage --

15 MR. SOKOL: In terms of dollar  
16 volume on all premiums collected from any  
17 source?

18 MR. WILLIAM HARRIS: Yes.

19 A I don't have the knowledge of that.  
20  
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\* \* \*

1 THE COURT: I see one that you filed  
2 on --

3 MR. SOKOL: There have been three  
4 requests for production of documents, Your Honor.

5 THE COURT: I see one on October  
6 18th and one on October 23rd. Is that the same  
7 motion twice?

8 MR. HARRIS: No. They're two  
9 different, Your Honor.

10 THE COURT: Two different ones. Then,  
11 there's a third motion for the production of  
12 documents?

13 MR. HARRIS: Well, really, the third  
14 one is not a motion for production of documents.  
15 I have filed a set of interrogatories which Mr.  
16 Sokol has asked for a protective order on.

17 THE COURT: All right. Well, let's  
18 talk first about your motions for the production  
19 of documents.

20 MR. HARRIS: All right. The first  
21 one I filed a request for production of documents



1 in February for a copy of the agreement between  
2 Safeco and DMI settling their third party claim.

3 I think --

4 THE COURT: You filed that in  
5 February?

6 MR. HARRIS: Yes, Your Honor.

7 MR. SOKOL: Maybe March.

8 MR. HARRIS: February, March, something  
9 like that.

10 THE COURT: I'm looking at the ones  
11 you just filed. You told me there were two  
12 motions. I've got one October 18th and one  
13 October 23rd. Is there another one?

14 MR. HARRIS: Let me look just a  
15 second, Your Honor. These are the two.

16 NOTE: Mr. Harris now  
17 approaches the Bench with several paperwritings.  
The discussion at the Bench is not reported.

THE COURT: These were filed in  
October; not in February.

244-A

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1 MR. HARRIS: Right. The motion to  
2 compel was filed then. The request for  
3 production was filed earlier.

4 THE COURT: All right.

5 MR. HARRIS: Concerning the one  
6 reflecting this document, numbers one and three, I  
7 asked for a copy of the settlement agreement  
8 between Safeco and DMI concerning how they  
9 resolved the third party claim. It was my  
10 understanding that there was an agreement.

11 I think clearly that that  
12 may not be relevant at trial, but it certainly  
13 may lead me to some discoverable evidence. And  
14 I think I am entitled to it. It's clearly  
15 relevant. It involves these bonds. It's my  
16 understanding that when the bonds were entered  
into, there was an agreement with DMI that should  
the bonds be called, that DMI would pay the money.

They have a loan that  
was supposedly to offset any money that might  
have to be paid by Safeco. They were to put it



1 in a separate account. I think it could possibly  
2 clearly lead to relevant evidence.

3 All right. The third  
4 item that I asked was I asked for the underwriting  
5 file on the four bonds which are the subject of  
6 this suit. I think that clearly is relevant to  
7 this case. The underwriting file, as I understand  
8 it, will show the basis on which the bonds were  
9 executed; what the conditions were; what  
10 possibly, what the understandings were behind the  
11 bonds, other than the fact of the document.

12 And there is some  
13 argument by Safeco that the bond amount per  
14 section should be broken down as to what went  
15 for roads; what went for utilities; what went  
16 for drainage.

17 I think those two are  
18 clearly relevant, and I think Safeco should be  
19 required to provide that information.

20 Do you want to go to the  
21 other motion to compel?

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P  
Y





1 THE COURT: Yes.

2 MR. HARRIS: The other motion to  
3 compel: We asked for the file that Donald Arthur  
4 Reedy mentioned in his deposition on March 6th  
5 at page 52, which was his file on the bond.  
6 Now, the response we  
7 received was --

8 THE COURT: Who is Donald Arthur  
9 Reedy?

10 MR. HARRIS: He is one of Safeco's  
11 employees, an underwriter. Let me see.

12 MR. SOKOL: He is not an underwriter;  
13 he is just a claimsman in the surety department  
14 of Safeco Insurance Company.

15 MR. HARRIS: He's a claimsman.

16 THE COURT: You want Mr. Reedy's file?

17 MR. HARRIS: Right.

18 THE COURT: Why do you want that?

19 MR. HARRIS: There again, I think it  
20 will give us some background into the information  
21 we need to prove. I don't know what it will show



1 me, but it is a bond dealing with -- I mean, it  
2 is a file dealing with the subject matter of  
3 this suit.

4 He was a claims manager.  
5 He came in and made a report to his company. I  
6 want to know what report he made to his company.

7 And also, the files in  
8 number two, the files of Peter H. Brown referred  
9 to on page nine.

10 THE COURT: Peter H. who?

11 MR. HARRIS: Brown.

12 THE COURT: Brown?

13 MR. HARRIS: He is also an employee  
14 of Safeco. He was a claims adjustor and is now  
15 the regional surety claims manager.

16 All right. He is apparent  
17 the claimsman that investigated the claim that  
18 we made against Safeco. And he says on page 9,  
19 "I believe it was after the files that Mr.  
20 Dougherty sent up."

21 There, the files we want



1 are the files that Mr. Dougherty sent to Mr.  
2 Brown in relation to these bonds. And I think  
3 clearly we should be entitled to look through  
4 those files. They're relevant --

5 THE COURT: What category of discovery  
6 do you think they fall into?

7 MR. HARRIS: I don't understand your  
8 question, Your Honor.

9 THE COURT: Okay. That's four.  
10 What's the fifth one?

11 MR. HARRIS: All right. Under three,  
12 we asked for a copy of their standard subdivision  
13 bond. They gave us a list of their bond forms,  
14 but they did not give us a copy of their  
15 subdivision bond.

16 I think it could be  
17 relevant. I don't know that it necessarily is,  
18 but it would show what their standard bond  
19 provides. And they're making at least some  
20 defense that the bond was provided by the county  
and they have done everything they were required  
to do.



1 THE COURT: Well, assuming this  
2 bond was different from the usual bond, what's  
3 that got to do with this case?

4 MR. HARRIS: I just think we should  
5 be entitled to see it. I think it could be  
6 relevant. It may not be, but I think it's  
7 related to subdivision bonds and their requirement  
8 and how they operate as to -- see, the county  
9 wrote and asked them to either pay the money or  
10 hire a contractor. Now, the bond in question  
11 of these suits, it says the money will be paid.  
12 But, it doesn't say that the other option is a  
13 right for them to hire a contractor.

14 Basically, we gave them  
15 an option: Did they want to pay us, or did they  
16 want to hire a contractor to do the work? But,  
17 that's not in the bond.

What I think their bond  
would show is that, what is normally in there, is  
that you either pay the money or the surety hires  
a contractor to do the work.



1 So, I think it's relevant  
2 to show that the normal practice of what they  
3 normally do is that they have the option. So,  
4 I think it is relevant.

5 Item four is a copy,  
6 again, of that. We're requesting a copy, again,  
7 of that DMI-Safeco settlement of the third party  
8 claim.

9 Item five is: We would  
10 like all the files relating to Crows Nest Harbour  
11 of Stafford County created or maintained by  
12 Ken Holloway; Mr. Gosney, the regional surety  
13 underwriter who had a position similar in type  
14 to the --

15 THE COURT: Files by Ken Holloway;  
16 Gosney?

17 MR. HARRIS: Gosney, I believe it  
18 is.

19 --Dwayne Stevenson,  
20 Donald Arthur Reedy, Peter H. Brown, Wayne Jensen,  
21 and Donald Spickard.



1 THE COURT: You have already asked  
2 for Reedy and Brown's file.

3 MR. HARRIS: We're just asking again.

4 THE COURT: Wayne Jensen and who  
5 else?

6 MR. HARRIS: Donald Spickard,  
7 S-P-I-C-K-A-R-D.

8 I think clearly all of  
9 these files could have relevant information.  
10 They could show understandings between the parties  
11 They could show the basis of their refusal to pay.  
12 Then again, it may not show anything, but I  
13 think we're entitled to clearly review these  
14 files.

15 THE COURT: Who are Ken Holloway and  
16 Gosney?

17 MR. HARRIS: I don't know their exact  
18 title, but they're all, almost every one of these  
19 people, are attorneys that work for Safeco in  
20 some claims adjustment or regional manner.

21 THE COURT: Are they attorneys, or are  
22 they employees of the company?



1 MR. HARRIS: They are employees of  
2 the company, but I believe they all have legal  
3 training and legal background. They all -- I'm  
4 not sure about Donald Spickard, but Reedy is;  
5 Dougherty is; Holloway is. I believe Gosney is;  
6 Brown is; and I think also Dwayne Stevenson.

7 So, I think you get down  
8 to the question of, first, you said that there was  
9 a refusal on their part to pay. All right. And  
10 I think reviewing the file will indicate  
11 possibly what the basis of that refusal was, or  
12 it may not indicate anything. It may indicate  
13 merely the understandings at the time the bond --

14 THE COURT: How big are these files?

15 MR. HARRIS: I have no idea. They  
16 may not be any bigger than that (indicating).  
17 They may be that big (indicating). I don't know.

18 MR. SOKOL: Mr. Harris, you have  
19 seen. You know they're bigger than that.

20 MR. HARRIS: I don't know, Bill. I  
21 really don't know.



1 THE COURT: Do you seriously expect  
2 me to have them photocopy reams of paper and bring  
3 them to you?

4 MR. HARRIS: I'd be happy to go look  
5 at their files, Your Honor. All I'm trying to  
6 get is access to review their files.

7 THE COURT: All right. Is that  
8 everything?

9 MR. HARRIS: Yes, sir, on those  
10 motions.

11 THE COURT: All right. Mr. Sokol.

12 MR. SOKOL: If Your Honor please,  
13 at the outset of this litigation there was a  
14 request for the production of documents filed  
15 by the Board of Supervisors; and acting on that  
16 request as counsel for Safeco, I put together  
17 every document that I thought was relevant and  
18 brought those documents to either at my office  
19 or here at the Courthouse, I can't remember which,  
20 and laid them all out for Mr. Harris. And there  
21 were hundreds of them, literally hundreds of them,





1 maybe more, I don't know; too many to count  
2 individually. But, Mr. Harris took those and  
3 copied perhaps all of them, I don't know, and  
4 gave them back to me.

5 And at that point, I  
6 believed and still do that Safeco, acting in good  
7 faith, gave Mr. Harris and the Board of Super-  
8 visors of Stafford County every relevant  
9 document that it had.

10 Now, he comes --

11 THE COURT: What was the request  
12 that you were responding to in furnishing those  
13 documents?

14 MR. SOKOL: I think it was a -- I  
15 can't recall. It was in the file, Your Honor.  
16 Just a general request for the production of  
17 documents which were relevant to the issues in  
18 controversy. It was very general, very broad;  
19 and maybe we could have resisted that kind of  
20 broad question, but we gave them all that we had.

21 THE COURT: Did you give him any of  
22 the documents that he's requesting here?



1 MR. SOKOL: Yes, sir, I did, as part  
2 of those files.

3 THE COURT: What did you give him?

4 MR. SOKOL: Correspondence, documents,

5 THE COURT: Did you give him the  
6 underwriting files related to the bond?

7 MR. SOKOL: No, we didn't give him  
8 the impressions, the opinions, the strategies of  
9 each of these lawyers and myself that pertained  
10 to this litigation, no, we did not, Your Honor.  
11 And I believe that Rule Four protects us with  
12 respect to those matters.

13 That was what was  
14 withheld: our opinions, our judgments, and our  
15 strategies, and our reasoning as to why we believe  
16 we had good and sufficient defenses to the matters  
17 alleged by the Board of Supervisors.

18 He doesn't have those,  
19 and we're resisting in giving him those. We  
20 say, simply, that he is not entitled to them.

21 THE COURT: Well, let's go down the  
22 list now of what he wants.



1 Sheriff, bring me  
2 volume two of the Code, please.

3 MR. SOKOL: I have the --

4 THE COURT: Okay. He wants the  
5 agreement between Safeco and DMI.

6 MR. SOKOL: Yes, sir.

7 THE COURT: Have you given him that?

8 MR. SOKOL: I have not.

9 THE COURT: Why not?

10 MR. SOKOL: In the first place, I  
11 made the judgment that it's not relevant to this  
12 litigation. Secondly --

13 THE COURT: Is relevance required  
14 for discovery?

15 MR. SOKOL: No, it's not. But  
16 secondly, this had to do with a third party  
17 motion for judgment that Safeco filed against  
18 DMI on a document called a Contingent Assignment  
19 of Interest. Now, that document Mr. Harris has.  
20 I don't know that he had it, but we voluntarily  
21 gave him that document.



1 But, representatives of  
2 Safeco and representatives of DMI met in  
3 Alexandria, Virginia, last summer. We negotiated  
4 a conditional settlement of that third party  
5 motion for judgment that was dependent on the  
6 outcome of the principal litigation between the  
7 Board of Supervisors and Safeco.

8 And that's all the  
9 document amounts to: how much the consideration  
10 was and what it was contingent upon and what  
11 would happen in the event that the county prevailed  
12 to a certain amount of money or in the event  
13 that Safeco prevailed. And that's all it had to  
14 do.

15 And I simply believe that  
16 the county is not entitled to have that independent  
17 settlement between Safeco and the third party  
18 defendant.

19 I don't know upon what  
20 basis the county could find value in it except  
21 its curiosity and perhaps deriving some judgment



1 as to what Safeco believes the settlement value  
2 of the county's claim, if any, is.

3 It doesn't bear on any of  
4 these issues about why Crows Nest Harbour wasn't  
5 developed; what the county did or failed to do  
6 with respect to that development; what the present  
7 posture of Crows Nest Harbour is. None of those  
8 matters are really germane to this litigation.

9 But, most importantly,  
10 we just refuse to turn over the underwriting  
11 files in toto. Why does Mr. Harris have any  
12 right to know about what I think about the case?  
13 He doesn't. Rule Four provides that he doesn't.

14 THE COURT: Well, would your opinions  
15 be in the underwriting file?

16 MR. SOKOL: I think some of them  
17 probably would be, yes, sir.

18 Subparagraph 3 on page  
19 659, the Supreme Court Rules, Rule Four, the last  
20 sentence of --

21 THE COURT: Wait a minute. You're  
22 looking at Rule Four what?



1 MR. SOKOL: I'm looking at Rule 4c1.

2 THE COURT: Subparagraph three?

3 MR. SOKOL: Subparagraph (3), the  
4 last sentence in that paragraph.

5 "In addition to a showing  
6 of, by the parties seeking the documents, that  
7 it wouldn't incur undue hardship," the provision  
8 goes on to say that, "the Court shall protect  
9 against disclosure of the mental impressions,  
10 conclusions, opinions, or legal theories of an  
11 attorney or other representatives of a party  
12 concerning litigation."

13 MR. HARRIS: Your Honor, these  
14 underwriting files, as I understand them, are not  
15 what, would not have or maybe they do, but I'm  
16 surprised that Mr. Sokol said that. They would not,  
17 in my opinion, have his legal opinions. They  
18 would have the opinions of their underwriter.  
19 The fact that he may be an attorney should not  
20 prevent me from seeing those underwriting files.

They're clearly relevant

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32.

1 to the issues before the case or could be, or  
2 they may lead to some evidence that may be  
3 relevant. And if there are legal opinions in  
4 there, I would suggest to the Court that they  
5 should not have the protection of a situation  
6 where Mr. Sokol would be giving his opinion.  
7 That's not what I'm seeking. I'm seeking to  
8 see what's in those files once the county made  
9 a demand or what existed prior to the county's  
10 making a demand that's in those underwriting  
11 files.

12 MR. SOKOL: Your Honor, I don't  
13 believe that the Supreme Court of Virginia ever  
14 intended that when parties have a dispute and  
15 the matter comes to litigation that a party can  
16 come before a Court and obtain an order saying,  
17 "My adversary must open up all of its files for  
18 my perusal." I don't believe the scope of  
19 discovery was ever intended to be that broad. And  
20 I think it's mind-boggling what this kind of thing  
21 could augur for the future. It would mean people



1 would keep secret files in their heads; in their  
2 basements. It would promote all kinds of  
3 deception.

4 THE COURT: I'm going to require the  
5 production of the agreement between Safeco and  
6 DMI, but I am going to deny all of the other  
7 documents that were sought.

8 MR. HARRIS: Would you note my  
9 objection, Your Honor?

10 THE COURT: Objection is noted.

11 MR. SOKOL: And we will voluntarily  
12 accord with Your Honor's order to produce that  
13 agreement; but for the record, let me note my  
14 exception.

15 THE COURT: All right.

16 Now, what else do you  
17 have, Mr. Harris?

18 MR. HARRIS: Mr. Sokol has a  
19 protective order, I believe, that he wants to  
20 argue. And I believe we were also supposed to  
21 have a pretrial conference today. I don't know  
22 whether it still suits or not.



1       brief, Your Honor, and authorities cited.

2               THE COURT:   The roads and the sewers have  
3       never been constructed?

4               MR. SOKOL:   Never begun, never commenced.

5               THE COURT:   Never begun.   All right.

6               MR. SOKOL:   Paragraph number four is  
7       failure of consideration and we have nothing  
8       included in the trial brief.   We do not believe  
9       that's a meritorious defense, Your Honor, and it  
10      was not drafted by us at the outset.

11              THE COURT:   All right.   So you won't  
12      pursue that?

13              MR. SOKOL:   No, sir.

14              Paragraph five is   impossibility of  
15      performance, discharging the surety.   And again,  
16      without going into the facts, that matter is  
17      covered in the trial brief and authorities given.

18              THE COURT:   What is -- you say it's  
19      covered in the trial brief but what is the  
20      impossibility?

21              MR. SOKOL:   All right.   Well, we have to  
22      divide the improvements between water and sewer  
23      lines and road construction.   With respect to water

1       that you've made in your brief?

2               MR. SOKOL:     We submit that they do,  
3       Your Honor.

4               THE COURT:   Well, I think it's  
5       questionable whether I'm going to have to  
6       determine the existence of facts in ruling on  
7       these issues, because I'm not going to decide  
8       whether the facts exist, but whether they are  
9       facts that are properly considered in the case.

10              And if you contend that the fact is  
11     provable, then my decision is not going to be  
12     whether the fact exists, but whether, assuming it's  
13     provable as you contend, it's something to be  
14     taken up in the case.

15              So I think it's likely that I won't  
16     need these documents. But if in reading the  
17     briefs I decide I do, I'll call for them and hear  
18     you on them.

19              All right, gentlemen, is there anything  
20     further that you think we need to take up today on  
21     this?

22              MR. SOKOL:   No, sir.

23              MR. WILLIAM HARRIS:   Your Honor, I would

\* \* \*

\* \* \*

1 THE COURT: ALL RIGHT. WELL, GENTLEMEN, I  
2 HAVE READ YOUR BRIEFS THOROUGHLY AND GIVEN THE CASE A LOT  
3 OF THOUGHT, AND I HAVE ACTED ON WHAT HAS BEEN TOLD ME IN THE  
4 BRIEFS AND IN THE ARGUMENTS AS TO THE POSITIONS OF THE  
5 PARTIES AND THEIR APPROACH TO THE CASE. THE CASE IS VERY  
6 COMPLEX. THERE ARE A NUMBER OF ISSUES RAISED, AND I HAVE  
7 TRIED TO SYNTHESIZE YOUR BRIEFS AND HAVE WRITTEN A MEMORANDUM...

8 (WHEREUPON, THE COURT HANDED OUT DOCUMENTS TO  
9 SOME OF THE PARTIES.)

10 MR. GOODALL: IS THERE AN EXTRA COPY PERCHANCE,  
11 YOUR HONOR?

12 THE COURT: WELL, YOU CAN GO IN THE CLERK'S  
13 OFFICE AND MAKE ONE.

14 MR. GOODALL: THANK YOU, YOUR HONOR.

15 (WHEREUPON, MR. GOODALL LEFT THE  
16 CONFERENCE ROOM.)

17 (WHEREUPON, THERE WAS A PAUSE IN THE  
18 PROCEEDINGS WHILE THE PARTIES READ THE  
19 DOCUMENT HANDED THEM BY THE COURT.)

20 THE COURT: IF YOU ALL WANT TO THINK ABOUT  
21 THAT FOR A WHILE BEFORE YOU DECIDE WHERE YOU GO FROM HERE,  
22 YOU CAN; BUT I DON'T THINK THERE'S ANYTHING LEFT TO BE  
23 DECIDED IN THE CASE.

24 MR. SOKOL: WE WILL ATTEMPT TO DRAFT AN  
25 ORDER SETTING FORTH THE COURT'S RULING, YOUR HONOR.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED  
AT 3:28 P.M., 7 MARCH 1980.)

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1 ARE TOO MANY...

2 THE COURT: No, no, no. You're wrong on that,  
3 Mr. Harris.

4 MR. W. HARRIS: Well, I'm very pleased to hear  
5 that.

6 THE COURT: I had understood from you in  
7 argument and from your brief that these facts were not in  
8 issue. Now, if I was mistaken in understanding that, I'm  
9 not going to foreclose you from proof. Well, let me ask  
10 you this: in argument, I think -- not in your brief -- but  
11 in argument, you told me at one point that the County just  
12 wanted to recover this money and that it would put it in a  
13 savings account at interest against the day when somebody,  
14 some party at interest, might decide to complete these  
15 facilities. Now, how would that pursue the purpose for which  
16 the bonds were tendered?

17 MR. W. HARRIS: Your Honor, I think you are  
18 misunderstanding exactly what I said. If that's what I  
19 said, and I don't remember making that exact statement, I  
20 will tell you now what I meant. What I meant was that the  
21 County would come up with a plan to do the improvements  
22 before it actually spent the money. In other words, if we  
23 got the money today, we wouldn't just at random run out  
24 and do it. We would try to come up with a plan to build all  
25 the roads, which would mean we would have to come up with

1 THE DIFFERENCE; AND WHAT I WAS TRYING TO INDICATE TO YOU,  
2 AS AN OPTION WE COULD PUT THE MONEY IN AN ACCOUNT THAT EARNED  
3 INTEREST WHILE WE WERE NEGOTIATING ON HOW TO COME UP WITH  
4 THE DIFFERENCE. THAT'S WHAT I INTENDED.

5 THE COURT: WELL, YOU, THIS IS A LITTLE BIT  
6 COLLATERAL WITH THIS CASE, PERHAPS, BUT DO YOU THINK THE  
7 COUNTY HAS THE RIGHT OR THAT IT'S A PROPER FUNCTION OF THE  
8 COUNTY TO BE TRYING TO GET THESE ROADS BUILT?

9 MR. W. HARRIS: YES, SIR, I DO.

10 THE COURT: CAN THE COUNTY UNDERTAKE THAT  
11 PROJECT ITSELF?

12 MR. W. HARRIS: I THINK IT CAN UNDERTAKE THE  
13 PROJECT IN THAT THE COUNTY IS THE AGENCY THAT APPROVES AND  
14 CONTROLS THE GROWTH AND DEVELOPMENT OF SUBDIVISIONS, COMMERCIAL,  
15 ALL OF THAT. NOW, IT'S BY FAR BETTER TO HAVE THE DEVELOPER  
16 COME IN AND DO THE WORK AND THEN DEDICATE THEM TO THE COUNTY,  
17 WITHOUT A DOUBT. BUT WHEN THEY DON'T DO THAT, WHAT HAVE WE  
18 DONE WHEN WE APPROVE THE SUBDIVISION PLAT AND LET IT GO  
19 TO RECORD? WE TO SOME EXTENT HAVE INDICATED TO THE PUBLIC  
20 THAT THE FACILITIES ARE AVAILABLE AND THAT THEY ARE GOING TO BE  
21 PUT IN. NOW, I THINK, IF IT'S NOT...

22 THE COURT: YOU ARE INCURRING THE RESPONSIBILITY  
23 TO THAT EFFECT?

24 MR. W. HARRIS: DO I THINK WE HAVE A...

25 THE COURT: DOES THE COUNTY...

1 MR. W. HARRIS: Yes, I...

2 THE COURT: ... INCUR ANY LIABILITY OR  
3 RESPONSIBILITY TO THAT...

4 MR. W. HARRIS: I THINK WE HAVE RESPONSIBILITY  
5 I DON'T THINK WE NECESSARILY HAVE LIABILITY IF THE IMPROVE-  
6 MENTS DON'T GO IN; BUT WE CERTAINLY HAVE RESPONSIBILITY TO  
7 DO EVERYTHING IN OUR POWER TO GET THE MONEY AND THEN AWARD  
8 THE CONTRACT TO SOME CONTRACTOR TO BUILD THOSE ROADS AND GET  
9 THEM IN AND HAVE THEM TAKEN INTO THE STATE SYSTEM. I THINK  
10 THAT'S CLEARLY THE PURPOSE FOR HAVING THE BONDS PUT UP,  
11 WITHOUT A DOUBT.

12 THE COURT: ALL RIGHT, NOW. BEFORE YOU  
13 SIT DOWN, GO THROUGH THIS MEMORANDUM AND TELL ME WHAT  
14 POINTS, THE PARAGRAPHS ARE NUMBERED, TELL ME WHAT POINTS YOU  
15 THINK THERE WILL BE PROOF ON.

16 MR. W. HARRIS: WELL, ONE HAS BEEN STRICKEN.  
17 WE DON'T HAVE THAT AS A DEFENSE.

18 THE COURT: ALL RIGHT.

19 MR. W. HARRIS: TWO HAS BEEN STRICKEN. WE  
20 DON'T HAVE THAT AS A DEFENSE. THREE HAS BEEN STRICKEN AS  
21 A DEFENSE. FOUR HAS BEEN STRICKEN AS A DEFENSE. WE'VE ALL  
22 AGREED THAT SUBROGATION IS NOT A DEFENSE, AND SO THAT'S GOING  
23 TO BE STRICKEN, ALSO. SIX IS A DEFENSE ONLY WITH RESPECT  
24 TO ATTORNEYS' FEES, AS TO THE INTEREST BEING A MATTER THAT  
25 WOULD BE RESERVED FOR TRIAL.

\* \* \*

1 BASED ON THE COURT'S RULING, IF WE CAN PROVE THAT, THEN WE  
2 CAN RECOVER UP TO 1.2 MILLION DOLLARS; AND I THINK THERE  
3 MAY POSSIBLY BE A LITTLE BIT OF EVIDENCE, BUT I THINK IT'S  
4 ALREADY BEEN ADMITTED BY SAFECO THAT THE COSTS CLEARLY  
5 EXCEED THE AMOUNT OF THE BOND.

6 ALL RIGHT, THE COURT MAY DESIRE TO HAVE THE  
7 COUNTY PUT ON SOME EVIDENCE AS TO WHETHER IF WE RECOVER THE  
8 FULL AMOUNT OF THE BOND, THAT WE WILL BE ABLE TO COME UP  
9 WITH A PLAN OR HAVE AT LEAST A BARE SKELETON PLAN OF HOW  
10 WE INTEND TO RAISE THE DIFFERENCE AND THE COST NEEDED TO  
11 PUT IN THE IMPROVEMENTS; OR PART OF THE IMPROVEMENTS IN THIS  
12 CASE, BECAUSE I THINK WE ARE ALL HOMED IN THAT WE'RE TRYING  
13 TO GET THE ROADS IN, THAT TO SOME EXTENT WE'VE BEEN ABLE TO  
14 HANDLE THE WATER AND SEWER BY THE REZONING. SO I THINK THE  
15 BIG ITEM IS TO GET THE ROADS TO STATE STANDARD AND HAVE THEM  
16 TAKEN INTO THE STATE SYSTEM. SO THE COURT MAY DESIRE THAT  
17 WE PRESENT SOME EVIDENCE ON THAT.

18 SAFECO MAY DESIRE TO PRODUCE EVIDENCE AS TO  
19 WHETHER WE HAVE IN FACT NOT MADE ANY ATTEMPT TO PROVIDE THE  
20 COMPLEMENTARY IMPROVEMENTS OR FACILITIES. I DON'T SEE IT  
21 AS AN ISSUE, BUT YOU ASKED ME TO ADDRESS THE THINGS THAT I  
22 FELT MAY BE SOME EVIDENCE PRODUCED ON.

23 THE COURT: WELL, THE COMPLEMENTARY FACILITIES  
24 WOULD RELATE ONLY TO THE WATER AND SEWER, WOULDN'T THEY?

25 MR. W. HARRIS: THAT'S CORRECT. ALL RIGHT,

\* \* \*



1 AFFECTS THEM DEFINITELY FINANCIALLY.

2 THE COURT: IS THAT A PART THAT IS NOT  
3 COVERED BY THESE BONDS?

4 MR. W. HARRIS: THAT'S CORRECT. THAT PART IS  
5 NOT COVERED BY THE BONDS. MR. SOKOL HAS ALLUDED TO THE FACT  
6 THAT NOTHING HAS OCCURRED SINCE '75. I THINK MR. SOKOL  
7 KNOWS VERY WELL THAT WE HAD NUMEROUS MEETINGS WITH REPRESENTATIVES  
8 FROM SAFECO AND CORRESPONDENCE WITH THEIR COUNSEL BEFORE  
9 HE EVEN BECAME THEIR COUNSEL LOCALLY, SO THE COUNTY HAS DONE  
10 THINGS; AND IF THE COURT WANTS TO HEAR EVIDENCE ON THAT, WE  
11 WILL PROVIDE IT, OF COURSE.

12 MR. SOKOL ALLUDED TO THE FACT THAT THE PROJECT  
13 HAS BEEN ABANDONED. THE PROJECT CERTAINLY HAS BEEN ABANDONED  
14 BY THE PRINCIPAL. WHETHER IT HAS BEEN ABANDONED BY THE  
15 COUNTY I THINK IS AT LEAST A JURY ISSUE; AND I SUBMIT TO  
16 THE COURT THAT IT CLEARLY HAS NOT BEEN ABANDONED BY THE  
17 COUNTY. WE HAVE DONE EVERYTHING IN OUR POWER; WE'VE MET  
18 WITH D.M.I.; WE'VE MET WITH SAFECO TO TRY TO WORK OUT A  
19 SOLUTION TO THE PROBLEM; AND WE ONLY FILED SUIT IN FRUSTRATION  
20 BECAUSE SAFECO WOULDN'T COME UP WITH ANY PLAN, TO TELL US  
21 WHAT THEY WANTED US TO DO, ALTHOUGH MR. SOKOL HAS ALLUDED,  
22 ON SEVERAL OCCASIONS, TO THE COURT AND TO ME THAT THEY'VE  
23 ASKED US FOR A PLAN. THEY HAVEN'T REALLY ASKED US FOR A  
24 PLAN. CAN THE COUNTY ASSIGN THE FUNDS, IS THE QUESTION  
25 THAT YOU ASKED MR. SOKOL AND HE ATTEMPTED TO REPLY TO IT.

1 I THINK THESE BONDS COULD BE ASSIGNED BY THE COUNTY. I  
2 THINK THERE'S LAW IN VIRGINIA FOR THAT POINT. NOW, YOU SEEM  
3 TO BE CONCERNED ABOUT WHETHER THE COUNTY HAS A RIGHT TO BUILD  
4 THE ROADS. I SUBMIT THAT THE COUNTY, AS FAR AS RECOVERING  
5 THE MONEY, AND ONCE IT RECOVERS THE MONEY, IT HAS A DUTY TO  
6 SPEND THAT MONEY IN THE SUBDIVISION; AND BECAUSE THE AUTHORITY  
7 ENABLING LEGISLATION GIVES THE POWER TO REQUIRE THE BONDS,  
8 CERTAINLY THE COUNTY HAS THE RIGHT TO EXPEND THOSE BONDS AND  
9 HIRE A CONTRACTOR TO GO IN AND BUILD THE ROADS. BUT IT DOES  
10 NOT HAVE THE RIGHT TO USE THE GENERAL FUNDS OF THE COUNTY TO  
11 DO THAT. IT HAS THAT RIGHT ONLY IF IT RECOVERS THE MONEY  
12 UNDER THE BONDS.

13 IS IT A WISE EXPENDITURE TO USE GENERAL FUNDS  
14 TO FINANCE THE COMPLETION OF THESE ROADS AND OTHER IMPROVEMENTS  
15 BEFORE THE COUNTY SUES ON THE BONDS? IT'S CLEARLY NOT A  
16 WISE EXPENDITURE. WHAT IF THE COUNTY EXPENDS THE 1.2 MILLION  
17 DOLLARS AND NEVER RECOVERED FROM SAFECO? AND IF...

18 THE COURT: WELL, LET ME INTERRUPT YOU. DO I  
19 UNDERSTAND YOU TO SAY THAT THE COUNTY CAN BE INDEMNIFIED FOR  
20 A PROSPECTIVE LOSS? IT NEED NOT HAVE SUFFERED THE LOSS?

21 MR. W. HARRIS: IF YOU WANT TO CHARACTERIZE  
22 IT THAT WAY; YES, YOUR HONOR, THAT'S CORRECT.

23 THE COURT: AND THAT THE PROSPECTIVE LOSS  
24 CAN BE CONSTITUTED BY THE COUNTY'S RECEIVING THE FUND AND  
25 BEING SUBJECT TO...

1 MR. W. HARRIS: BEING REQUIRED TO...

2 THE COURT: ... MANDAMUS TO EXPEND IT. IS  
3 THAT WHAT YOU'RE SAYING?

4 MR. W. HARRIS: CORRECT.

5 THE COURT: WELL, SUPPOSE THAT DONE, IT TURNS  
6 OUT THAT THE FUND IS INADEQUATE TO ACCOMPLISH ANYTHING  
7 SIGNIFICANT FOR COMPLETING THE PROJECT, AND THE COUNTY CAN'T  
8 SECURE COOPERATION FROM ANYBODY ELSE TO COMPLETE THE PROJECT.  
9 WHAT HAPPENS THEN?

10 MR. W. HARRIS: THEN I THINK YOU WOULD SEE A  
11 POLITICAL REACTION FROM THE PROPERTY OWNERS IN THERE IN SOME  
12 MANNER, AND THE LOCAL GOVERNING BODY WOULD ADDRESS IT IN SOME  
13 FORM. I THINK WHAT THEY WOULD MOST LIKELY DO IS PROBABLY  
14 CREATE SOME SANITARY DISTRICT AND ASSESS THE LOT OWNERS IN  
15 THAT AREA FOR THOSE IMPROVEMENTS, AND WORK IT AND HAVE IT  
16 SORT OF WORK ITSELF OUT OF THE PROBLEM; BUT I DON'T THINK THAT  
17 IS REALLY THE CASE IN THIS SITUATION. I THINK IT WOULD BE  
18 THE CASE IF WE HAD ABSOLUTELY TO GO TO CENTRAL WATER AND  
19 SEWER, BUT I DON'T THINK WE DO AT THIS POINT; AND I THINK,  
20 IF D.M.I. WERE TO SELL THE REMAINING PROPERTY OUT THERE, AND  
21 THEN THEY, AS THE DEVELOPER THEY SELL IT TO, OR IF THEY ARE  
22 THE DEVELOPER, THERE IS A POSSIBILITY THAT THE WATER AND  
23 SEWER COULD BECOME AVAILABLE, BUT IN THESE FIRST FOUR SECTIONS,  
24 BY REZONING THE PROPERTY, IN MOST CASES I AM OF THE OPINION  
25 THAT YOU WOULD HAVE WELL AND SEPTIC, WHICH SOLVES A MAJOR --

1 SOLVES HALF THE COST OF THE ESTIMATED COST OF THE ENTIRE  
2 PROJECT. THEN WITH THE ROADS, IF SAFECO WOULD PAY US THE  
3 1.2 PLUS THE INTEREST DUE, I FEEL ALMOST CERTAIN THAT WE  
4 COULD WORK WITH THE REMAINING PROPERTY OWNERS AND D.M.I. AND  
5 GET THOSE ROADS IN.

6 MR. SOKOL REPRESENTED THAT I ASKED THE COURT  
7 TO SET CERTAIN CONDITIONS. I DID NOT ASK THE COURT TO SET  
8 CERTAIN CONDITIONS. I SAID IF THE COURT FELT IT NEEDED TO  
9 SET THOSE CONDITIONS, IT COULD PLACE CONDITIONS ON THE  
10 JUDGMENT. I MUCH PREFER THAT THE COURT NOT SET ANY CONDITIONS  
11 ON THE COUNTY'S RECOVERING THE MONEY, AND IF SOMEBODY IS  
12 DISSATISFIED WITH THE COUNTY'S HANDLING OF THE MONEY, THEY  
13 CAN FILE THAT MANDAMUS ACTION, I AM SURE, WITHOUT QUESTION.  
14 THE LAW IS CLEAR. THE COUNTY HAS A DUTY TO EXPEND THAT MONEY  
15 IN THAT SUBDIVISION. IF SOME PROPERTY OWNER FEELS THAT WE  
16 ARE NOT EXPENDING IT, WE'RE SITTING ON OUR HANDS, HE CAN  
17 CERTAINLY COME TO THIS COURT AND SAY, THE COUNTY HAS A DUTY.  
18 THE COURT COULD ORDER US TO EXPEND THE MONEY. IT COULD NOT  
19 SAY EXACTLY HOW WE SPENT THE MONEY, IN MY OPINION, UNLESS  
20 IT WAS SHOWN IT WAS GROSSLY INADEQUATE OR A RIDICULOUS CLAIM.  
21 IN OTHER WORDS, FOR EXAMPLE, IF THE COUNTY DECIDED, WELL,  
22 WE'RE JUST GOING TO PUT IN THE WATER AND SEWER LINES AND  
23 WE'RE NOT GOING TO TOUCH THE ROADS. I THINK CLEARLY IN  
24 THAT SITUATION THE COURT COULD PREVENT US FROM SPENDING  
25 THE MONEY ON THE WATER AND SEWER LINES. THE MOST APPROPRIATE

1 EXPENDITURE WOULD BE ON THE ROADS.

2 THE COURT: WELL, SUPPOSE YOU COULD -- AGAIN,  
3 COMING BACK TO THE PROPOSITION THAT YOU CAN'T GET ANY  
4 ADDITIONAL MONEY FROM ANYBODY ELSE. SUPPOSE THE MILLION-TWO  
5 WOULD ONLY PUT IN A ROAD TO SOME OF THE LOTS AND LEAVE THE  
6 OTHER LOTS WITHOUT ROADS. COULD THE COURT ORDER THE COUNTY  
7 TO USE THE MONEY TO BENEFIT SOME OF THE LOT OWNERS AND TO  
8 LEAVE THE OTHERS HIGH AND DRY?

9 MR. W. HARRIS: I THINK THE COURT COULD, AND  
10 I WOULD SUBMIT TO THE COURT THAT IF YOU COULDN'T BUILD ALL THE  
11 ROADS, TO THE EXTENT THAT YOU WERE ABLE TO BUILD THE ROADS,  
12 THOSE OTHER LOTS COULD BENEFIT, BECAUSE THEY WOULD HAVE LESS  
13 UNIMPROVED ROADS TO HAVE TO CROSS, OR UNIMPROVED LAND TO CROSS,  
14 TO THEIR LOT, AND I SUBMIT THAT EVEN THE 1.2, PLUS THE INTEREST,  
15 WOULD BUILD MUCH MORE THAN HALF OF THE ROADS IN THERE, AND  
16 I THINK CLEARLY THAT EVEN IF ALL THE ROADS COULD NOT BE BUILT,  
17 THAT ALL OF THE PROPERTY OWNERS WOULD BENEFIT, MAYBE NOT TO  
18 THE SAME EXTENT.

19 THE COURT: GENTLEMEN, I DO NOT HAVE BEFORE  
20 ME AND DID NOT HAVE BEFORE ME AT THE TIME THE BRIEFS WERE  
21 SUBMITTED AND THE MEMORANDUM WAS PREPARED A MOTION FOR SUMMARY  
22 JUDGMENT. IT IS CORRECT THAT THESE MATTERS WERE SUBMITTED TO  
23 THE COURT FOR PRETRIAL RULINGS AS TO ISSUES ; AND I THINK I  
24 MISCONSTRUED SOME THINGS THAT WERE TOLD ME BY COUNSEL, AND I  
25 CONSTRUED AS ACKNOWLEDGEMENTS OF FACTS WHAT WERE INTENDED

1 ONLY AS SUPPOSITIONS TO ILLUMINATE THE DECISION ON THE ISSUES;  
2 AND I MISUNDERSTOOD IN THAT RESPECT. SO I'M NOT GOING TO HOLD  
3 EITHER SIDE TO ANY OF THOSE STATEMENTS OF SUPPOSITIONS, AND  
4 WILL GIVE A TRIAL ON THE ISSUES OF FACT IN THE CASE, AND  
5 WILL CONSIDER THE MEMORANDUM NOT AS DECISIVE IN THE CASE  
6 BUT SIMPLY AS REFINING SOME OF THE ISSUES, AND I THINK THAT  
7 PARAGRAPHS 1 THROUGH 11 OF THE MEMORANDUM ARE SIMPLY DISPOSITIVE  
8 OF ISSUES , AND A PRETRIAL ORDER SHOULD BE DRAWN SETTING  
9 FORTH THOSE DECISIONS.

10 MR. W. HARRIS: YOUR HONOR, I'VE PREPARED ONE.  
11 I BELIEVE IT'S IN THE COURT FILE.

12 THE COURT: ALL RIGHT. WELL, LET ME FINISH  
13 FIRST.

14 PARAGRAPH 12 OF THE MEMORANDUM WILL BE INCOR-  
15 PORATED INTO THE PRETRIAL ORDER ONLY AS SETTING FORTH ISSUES  
16 TO BE DECIDED IN THE TRIAL; AND NOT AS SETTING FORTH ANY  
17 FACTUAL DETERMINATIONS; AND I THINK IT WOULD BE CORRECT TO  
18 SUMMARIZE THAT BY SAYING THAT I HAVE FOUND THAT THE MERE  
19 INADEQUACY OF THE BONDS TO COMPLETE THE PROJECT DOES NOT OF  
20 ITSELF CONSTITUTE A DEFENSE OF IMPOSSIBILITY. HOWEVER, I  
21 AM HOLDING THAT THE BONDS ARE INDEMNIFYING IN NATURE AND  
22 THAT IT WILL BE NECESSARY FOR THE COUNTY, IN ORDER TO  
23 PREVAIL, TO SHOW THAT IT HAS INCURRED A LOSS. NOW, I THINK  
24 PERHAPS SOME FURTHER RESEARCH BY COUNSEL AS TO WHAT IS MEANT  
25 BY LOSS IN THAT SENSE WOULD BE IN ORDER, BECAUSE THAT WAS NOT

1 ADDRESSED IN THE BRIEFS; THAT IS, WHETHER THE LOSS MUST OR  
2 MAY BE PROSPECTIVE, AND PERHAPS THE PECULIAR NATURE OF THE  
3 COUNTY WILL HAVE A BEARING ON THAT. I THINK THE QUESTION  
4 OF ABANDONMENT WILL ALSO BE IN ISSUE IN THE CASE. I DON'T  
5 KNOW WHETHER YOU GENTLEMEN THINK THERE WILL BE AN ISSUE IN  
6 THE CASE AS TO WHETHER SAFECO WOULD HAVE ANY RIGHT TO SEE  
7 THE PROJECT ACCOMPLISHED UPON PAYING ITS MONEY, IF IT PAYS  
8 ITS MONEY. NOW, I HAVE HELD THAT THE AMOUNT OF THE BOND IS  
9 UNITARY AND NOT SEVERABLE, A PENAL SUM, AND I SUPPOSE IT  
10 WILL NECESSARILY FOLLOW THAT IF SAFECO IS HELD FOR THE FULL  
11 AMOUNT OF THE BONDS FOR ROAD WORK, IT WOULD NOT HAVE THE  
12 RIGHT TO INSIST THAT THE WATER AND SEWER ALSO BE PUT IN,  
13 BUT THAT'S AN ISSUE THAT YOU MIGHT THINK WOULD BE PROPER  
14 TO BE RAISED. PURSUING THAT A LITTLE BIT FURTHER, IF SAFECO  
15 IS TO BE HELD LIABLE UNDER ITS BONDS FOR THE ROADS, DOES IT  
16 HAVE THE RIGHT TO INSIST THAT THE ROAD PROJECT BE COMPLETED?  
17 AND I AM THINKING THERE ABOUT SAFECO'S RIGHTS OF INDEMNITY,  
18 IF ANY, AGAINST THE PRINCIPAL.

19 SO FAR IN THE CASE THERE HAS BEEN NO QUESTION  
20 RAISED AS TO THIRD-PARTY BENEFICIARIES. THERE ARE NO THIRD  
21 PARTIES IN THE SUIT, BUT THE THOUGHT COMES TO MY MIND WHETHER  
22 ENGAGEMENTS BY THIRD PARTIES COULD SUPPORT A CLAIM BY THE  
23 COUNTY UNDER THE BONDS. IN OTHER WORDS, WOULD ENGAGEMENTS BY  
24 INTERESTED THIRD PARTIES CONSTITUTE A LOSS BY THE COUNTY WHICH  
25 COULD BE INDEMNIFIED UNDER THESE BONDS?

1 THE COURT (CONTINUED): I THINK THAT WILL  
2 BRING THE ISSUES FOR TRIAL DOWN TO THE QUESTIONS OF ABANDON-  
3 MENT BY THE COUNTY OR BY OTHER PARTIES AND INTERESTS, AND THE  
4 QUESTION OF WHETHER AN INDEMNIFIABLE LOSS IS SHOWN; AND I'LL  
5 HEAR EVIDENCE ON THOSE ISSUES AT TRIAL.

6 MR. SOKOL: AS WELL AS THE DEFENSE OF FRUSTRATION OF PURPOSE, I THINK, YOU SAID WOULD BE SUSTAINED. I  
7 THINK THAT'S IN THERE.

8 THE COURT: YES, THE DEFENSE OF FRUSTRATION  
9 OF PURPOSE, YES, I'LL HEAR EVIDENCE ON THAT. I THINK THAT  
10 TIES IN VERY CLOSELY WITH ABANDONMENT, MR. SOKOL.

11 MR. W. HARRIS: YOUR HONOR, ALONG THE LINE  
12 WITH THE FRUSTRATION OF PURPOSE, WOULD YOU EITHER DO ONE  
13 OF TWO THINGS: PERMIT ME TO HAVE ADDITIONAL DISCOVERY  
14 ALONG THAT LINE TO HAVE SAFECO IDENTIFY THE EXACT FRUSTRATION  
15 THAT WE'RE TALKING ABOUT IN SOME GREAT DETAIL; OR WOULD THE  
16 COURT ORDER THAT HE PROVIDE US WITH THIS INFORMATION, EITHER  
17 WAY? IN OTHER WORDS, I DRAFT THEM, OR I SUBMIT AN ORDER  
18 TO YOU SAYING THESE ARE THE THINGS THAT I THINK WOULD HELP  
19 THE COURT...

20 THE COURT: YOU MEAN, HAVE HIM IDENTIFY TO  
21 YOU THE WAY IN WHICH THE PURPOSE IS FRUSTRATED?

22 MR. W. HARRIS: THAT'S RIGHT.

23 THE COURT: I'LL DO THIS, MR. HARRIS: I'LL  
24 REQUIRE MR. SOKOL TO FILE A BILL OF PARTICULARS SETTING FORTH  
25



1 PARTICULARLY HOW HE CONTENDS THE PURPOSE WAS FRUSTRATED. I'M  
2 NOT GOING TO REQUIRE ANY MORE PRODUCTION OF DOCUMENTS OR  
3 THE ANSWERING OF INTERROGATORIES. HOW SOON CAN YOU DO THAT,  
4 MR. SOKOL?

5 MR. SOKOL: TWENTY-ONE DAYS.

6 THE COURT: ALL RIGHT.

7 MR. SOKOL: IF YOUR HONOR PLEASE, MAY I ASK  
8 FOR SOME CLARIFICATION UNDER PARAGRAPH 10 OF YOUR MEMORANDUM  
9 IN YOUR STATEMENT TODAY? I WOULD SUSPECT IN THE USUAL  
10 DISPUTE ON A BOND WHERE THE COUNTY MAY BE SEEKING TO MAKE  
11 THE BOND SEVERABLE, IN THAT THEY WOULD WISH TO COLLECT FOR  
12 ROAD CONSTRUCTION WHEN THEY KNEW THAT THEY HAD NO FEASIBLE  
13 MEANS FOR THE INSTALLATION OF WATER AND SEWAGE LINES, AND  
14 THEREFORE THEY WOULD BE TRYING TO SUSTAIN THAT PART OF THE  
15 BONDS. THEY HAVEN'T DONE THAT IN THIS CASE; THEY'VE ASKED  
16 THAT THE BONDS BE DEEMED TO BE UNITARY SO THAT THE FULL AMOUNT  
17 MIGHT BE COLLECTABLE IF THEY CAN MAKE THEIR CASE. BUT I  
18 UNDERSTAND THE LAW TO BE, AND I'M ASKING FOR SOME CLARIFICATION  
19 NOW, THAT IF THEY WANT TO PROCEED ON THE BASIS THAT THE BONDS  
20 ARE UNITARY, THAT THE SECOND SENTENCE IN YOUR HONOR'S  
21 MEMORANDUM OF PARAGRAPH 10 IS WHAT THEY MEAN AND WHAT THE  
22 COURT MEANS, TO WIT: SAFECO IS LIABLE TO THE FULL EXTENT  
23 OF EACH BOND UNTIL ALL -- THE WORD ALL -- THE PROJECTS  
24 THEREIN GUARANTEED ARE FULLY COMPLETED. NOW, 'ALL' MEANS  
25 ROADS, WATER AND SEWAGE LINES. DO I UNDERSTAND THAT

1 CORRECTLY, YOUR HONOR? THAT THE COUNTY MUST COME FORWARD TO  
2 SHOW HOW THEY MUST BE INDEMNIFIED FOR THE INSTALLATION OF  
3 WATER AND SEWER LINES AND THE CONSTRUCTION OF ROADS COMPRISING  
4 ALL.

5 THE COURT: ALL RIGHT, WELL, I WILL ANSWER  
6 YOUR QUESTION. THE HOLDING IN PARAGRAPH 10 IS THAT IF WE WERE  
7 HERE TODAY, WITH THE WATER AND SEWER COMPLETELY IN AND  
8 THREE-QUARTERS OF THE ROADS ALREADY BUILT, WITHOUT SAFECO'S  
9 LAYING OUT A NICKEL, BUT THAT IT WAS GOING TO TAKE A MILLION-  
10 TWO TO COMPLETE THE ROADS, THEN PARAGRAPH 10 SAYS SAFECO  
11 WOULD HAVE TO PUT UP THE MILLION-TWO TO COMPLETE THE ROADS.  
12 IN OTHER WORDS, ITS LIABILITY ON THE BONDS CONTINUES UNTIL  
13 EITHER THE BONDS HAVE BEEN EXHAUSTED OR THE PROJECT SECURED  
14 BY THE BONDS IS FULLY COMPLETED. NOW, WHAT I WAS JUST  
15 SPECULATING ON A FEW MINUTES AGO WAS THE CONVERSE OF THAT,  
16 AND IT WAS SPECULATION. I DON'T KNOW THE ANSWER TO THIS:  
17 WHETHER SAFECO HAS THE RIGHT TO DEMAND ANY DEGREE OF ACCOMPLISH-  
18 MENT, EXTENT OF ACCOMPLISHMENT, AS A CONDITION OF ITS  
19 LIABILITY.

20 MR. SOKOL: ACCOMPLISHMENT INCLUDING THE  
21 INSTALLATION OF WATER AND SEWER.

22 THE COURT: IN OTHER WORDS, IF THE MILLION-  
23 TWO WILL ONLY BUILD THE FIRST FIFTY FEET OF ROADS, DOES  
24 SAFECO HAVE TO COME IN AND BUILD THE FIRST FIFTY FEET OF  
25 ROADS, AND NOBODY ELSE EVER DOES ANYTHING? THAT'S THE QUESTION

\* \* \*



\* \* \*

1 Second of all, I do  
2 have another matter, if I could be just a minute.  
3 In our request for admissions, we asked in four  
4 different paragraphs, for example, in paragraph  
5 seventy-seven. We got the responses to these  
6 on Tuesday, late Tuesday afternoon, plus the  
7 notice for this particular hearing, but it says,  
8 for example, there are no known plans to construct  
9 a sewage treatment facility through a selection  
10 system or a water distribution system or water  
11 and sewer lines at any of the other subsequent  
12 development property.

13 We have three questions  
14 which basically asks the same type of question:  
15 whether there are known plans to construct these  
16 particular amenities.

17 In response to those  
requests, the County has stated as follows. With  
respect to the request seventy-seven, the County  
is without knowledge as to what Safeco means  
by "plans." Engineering plans, financial plans



1 or an intention to construct and, therefore,  
2 denies the same.

3 Please note that the  
4 order entered in this case says that the parties,  
5 otherwise, respond to all requests made in a  
6 responsive and good-faith manner and in accordance  
7 with Rule 4:1, that says, "In any event any requests  
8 contains a factual inaccuracy and/or omission  
9 the party upon whom the request is made shall  
10 state specifically why such request contains  
11 an inaccuracy and/or omission and shall also  
12 state the true fact or facts that has been omitted.

13 We are talking about  
14 good faith in this particular situation to  
15 questions which are very important to this case.  
16 The use of the word "plan" comes directly off  
17 the stipulations, which were prepared while Mr.  
18 Harris was sitting right across the desk, and  
19 the use of the word "plan" at that time was not  
20 objectionable.

I have a copy of a



1 transcript here of a hearing on April 17 of this  
2 year. Mr. Harris used the word "plan" at least  
3 a dozen times. I will give you a couple notations.

4 First of all, on page  
5 seven, it says: "The plan that the County had  
6 and the plan that comes into Court is something  
7 that the County was very concerned with and when  
8 it first addressed the question to me, I was  
9 thinking of a plan in the sense of a plan to  
10 build the road. I think what the Court was concerned  
11 with was the plan to complete the project. All  
12 right, the plan to complete the project is that  
13 you rezone the property," et cetera.

14 There are other references.  
15 For example, on page nine, he says: ". . . we  
16 have had negotiations with DMI attempting to  
17 work out the plan. as I see it that the Court  
18 wants, and the plan, as I see it, is a plan to  
19 provide the water and sewer."

20 On page twenty-three,  
there is another reference where the Court uses  
the expression "plan."



Now, a plan incorporates setting forth a plan whereby monies will be obtained for a central water and sewer system, which will apply to this particular project. I think the language is clear enough, and has been clear enough during the entire course of this litigation, if there is any type of plan, of course, Mr. Harris feels does not fall under that language, he is under a duty to qualify.

Therefore, I would suggest to the Court that the Court order him to respond to these requests in a responsible manner.

THE COURT: Which ones, number seventy-seven?

MR. PUGH: Seventy-seven, seventy-eight, ninety, and ninety-eight.

MR. HARRIS: May I respond?

MR. PUGH: That is all I have.

MR. HARRIS: First, I would object to even the Court considering this matter at this time. I was given absolutely no notice



1 of this. I have talked to Mr. Pugh yesterday,  
2 the day before -- correction, not yesterday,  
3 but Friday; I talked with him this morning,  
4 and he didn't even mention it to me.

5 With respect to whether  
6 it is proper notice to have it served on Mr.  
7 Sokol, there is a code section in the Code of  
8 Virginia that says --

9 THE COURT: (Interjecting) What is  
10 that section?

11 MR. HARRIS: I would have to look it  
12 up for the Court. I don't remember the section,  
13 but I will provide it to the Court, and it says  
14 that the plaintiff may -- well, a party may summon  
15 the other other party's officers, et cetera,  
16 by serving notice or having the subpoenas served  
17 on counsel, and unless the attorney objects within  
18 a certain time frame, he has to produce. That  
19 may not be an exact wording. I haven't read  
20 it recently, and I will be glad to provide it  
21 to the Court, but I would object at this late



1 date. That subpoena has been out sometime, and  
2 I am sure that Mr. Sokol has known that I have  
3 subpoenaed these people through him for sometime  
4 now. If he had wanted to raise it earlier, I  
5 would have waived the objection, but it is my  
6 position that it is too late to address it.

7 They are employees of  
8 the defendant, and we are entitled to have them  
9 present.

10 With respect to the  
11 request for admissions --

12 THE COURT: (Interjecting) Are you  
13 prepared to pay the costs of bringing them here  
14 from Seattle?

15 MR. HARRIS: If necessary. If the  
16 Court finds that we should pay, we will pay.

17 With respect to the  
18 request for admissions, I know what I mean when  
19 I said plans, but I am not sure I know what Safeco  
20 meant when they said plans. Plans can mean many  
21 different things, and I feel certain that plans





1 is going to be one of the issues in the case,  
2 and I am not required to admit an ultimate issue  
3 in the case. I don't know whether it is going  
4 to be, but when he says "plans,", it can be  
5 financial plan. It can be an engineering plan.  
6 It can be plans to sell the project.. How do  
7 we get it across?

8 THE COURT: A plan to sell what project?

9 MR. HARRIS: Well, to get the project  
10 built in the sense of how do you get resolved  
11 all of these many issues and come up with an  
12 overall, long-term approach to all the problems  
13 that would result from this. Some of those  
14 plans would not even be --

15 THE COURT: (Interjecting) Mr. Harris,  
16 when you were here before, you were told that  
17 you were to make good-faith answers to those  
18 interrogatories. If you don't -- you say you  
19 haven't had notice of this issue today, so I  
20 won't decide it, but if it comes up and you have  
21 not made a proper response, you can stand to



1 have the issues decided against you on that  
2 basis.

3 MR. HARRIS: I feel that I have made  
4 a good-faith response.

5 THE COURT: Well, you had better be  
6 sure you have.

7 MR. PUGH: Your Honor, just one comment.  
8 There have been depositions taken on both Mr.  
9 Jensen and Mr. Holliday in this case, and, of  
10 course, subject to the normal rules of depositions,  
11 there is also a rule for the depositions of  
12 witnesses beyond a hundred miles or outside of  
13 the Commonwealth, and they can be introduced  
14 into evidence, subject to our objections as to  
15 relevancy and hearsay. They are in the Court  
16 file. Thank you.

17 THE COURT: I will let you know what  
18 order I will enter, gentlemen.

19 MR. HARRIS: Thank you. I have another  
20 matter if you want to take it at this time?

21 THE COURT: All right.

C  
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1 MR. PUGH: Your Honor, can Mr. Sokol  
2 stand by the nonproduction of Mr. Jensen and  
3 Mr. Holliday?

4 THE COURT: There is no way that I  
5 can tell you that. You say there are depositions  
6 which are sufficient. I don't know whether they  
7 are sufficient or not. I certainly can't read  
8 them now. Mr. Harris says there is a code section  
9 which authorizes this method of summons. I will  
10 have to look that up later.

11 It is just like his  
12 answer to interrogatories. Counsel can take  
13 a position, but if counsel takes a position,  
14 he is going to have to stand or fall on it in  
15 the trial, and the trial is Thursday.

16 MR. PUGH: Thank you.  
17  
18  
19

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HEARING CONCLUDED AT 11:00 a.m.

1 intend to call them.

2 THE COURT: Why do you have them here then?

3 MR. WILLIAM HARRIS: Because I may need them  
4 in rebuttal and I don't know how the case is going to  
5 progress but I do not really intend to call them, but  
6 I don't know how the case is going to progress.

7 THE COURT: I'm going to sustain the objection  
8 to these gentlemen being called as witnesses. However,  
9 if you want to, if you decide to call them in rebuttal,  
10 you can tender them and I will hear what Mr. Sokol says  
11 and I'll review the circumstances which underlie that  
12 effort on your part and we'll rule then. But they cannot  
13 be called in your case in chief.

14 MR. WILLIAM HARRIS: I don't intend to, Your  
15 Honor.

16 MR. SOKOL: May I also get a ruling that in  
17 his opening statement Mr. Harris will not make references  
18 to what D.M.I. will do?

19 MR. WILLIAM HARRIS: I have no problem with that,  
20 Your Honor.

21 THE COURT: Now, gentlemen, are you ready to  
22 proceed.

23 MR. SOKOL: Yes, sir.

1 MR. WILLIAM HARRIS: Your Honor, it would  
2 seem it would speed things up if at this point in time  
3 we do what we discussed in Chambers just before trial  
4 and that is --

5 THE COURT: Put the stipulated documents in,  
6 all right.

7 MR. SOKOL: Your Honor, this is a Jury  
8 Instruction.

9 MR. WILLIAM HARRIS: Let me explain what it is,  
10 Your Honor. It is the compiling of the facts that  
11 Safeco has admitted either in their Answers, in Requests  
12 for Admissions, and we would ask the Court to read to the  
13 jury the uncontroverted facts rather than us having to  
14 go through and put on a whole lot of evidence as to what  
15 the facts are. These facts are admitted and we would  
16 like -- we feel the best way would be to simply have  
17 the Court tell the jury what is not controverted,  
18 undisputed, sort of a stipulation.

19 He's admitted these facts, they are admissible  
20 as pleadings and it just seems it would greatly speed up  
21 the trial.

22 MR. JOHN HARRIS: By way of example, in the  
23 Motion for Judgment we have Paragraphs One and Two, we have

1 in the Answer and Grounds of Defense we admit One and Two.  
2 The same is true as to Three and Four.

3 Now, what I've done, I've gone through and  
4 I have excised the portions which are not admitted to  
5 each and every plea. By way of example --

6 THE COURT: I'm not going to read the Motion  
7 for Judgment.

8 MR. JOHN HARRIS: No, sir, I'm not asking you  
9 to read the Motion for Judgment but the facts that are  
10 admitted are judicial admissions.

11 THE COURT: The way to do that is to prepare  
12 a stipulation and counsel for both sides sign it.

13 MR. JOHN HARRIS: That is effectively what  
14 this is. This is something that is already agreed by  
15 virtue of the pleadings. It is a judicial admission,  
16 something from which he cannot now retract.  
17 There are certain which are not judicial admissions  
18 but which are evidentiary admissions which are statements  
19 that Safeco has made and those as evidentiary admissions  
20 are still entitled to come in. The question then gets  
21 to be how would Your Honor like for us to put them in.  
22 Would you like for us to put them in as evidentiary  
23 admissions where it is a written document and it is an

1 admitted fact and do we put in the document or does Your  
2 Honor read from a prepared list or how would you prefer  
3 that we do that?

4 MR. SOKOL: May I make a suggestion, Judge.  
5 I have no objection to stipulating facts so long as I have  
6 an opportunity to review them. I've been handed for the  
7 first time and maybe at lunch I can look this over with  
8 my client and with Mr. Pugh and see what's in it and  
9 whether it's complete and whether it's accurate but I  
10 don't want to stand here in front of Your Honor and read  
11 these seven pages now for the first time. I have looked  
12 at -- Mr. Pugh has looked at and I thought the purpose of  
13 putting this table out now was to vouch for the  
14 authenticity of these documents that we've all had for  
15 years.

16 THE COURT: Gentlemen, let's go on and do one  
17 thing at a time and get it done here in the course of the  
18 trial and if you have a stipulation that you want, that  
19 should have been prepared days or weeks ago not here in  
20 the middle of the trial.

21 MR. JOEN HARRIS: Your Honor, it's not a  
22 stipulation.

23 THE COURT: I'm not going to give a Jury

1     Instruction before the opening statements are made,  
2     Mr. Harris, I'm not going to argue about that. Do you  
3     have any documents now to be authenticated?

4             MR. JOHN HARRIS: Yes, sir, we have to be  
5     authenticated the portions of the Answers of Safeco  
6     which have been excised down to the portion but only  
7     to facts which are admitted or remain in them other  
8     than the -- something sufficient to identify  
9     what they are. And the law on the subject would be  
10    expressed admissions and pleadings in determining the  
11    effect of admissions in case pleadings as necessary  
12    to divide such pleadings into two classes.

13            The first class is composed of final  
14    pleadings which define the issues in the case and upon  
15    which the case goes to trial. Any admission of fact  
16    in such a pleading is a judicial admission. It  
17    conclusively establishes that fact for purposes of the  
18    instant litigation. No explanation or rebuttal is  
19    allowed and no other proof of that fact is necessary.  
20    Such admissions can be offered -- such admissions can be  
21    the sole basis for a verdict without other proof being  
22    offered.

23            The second class includes all other types of



1 pleadings, including pleadings which have been amended  
2 or withdrawn and pleadings in another case and any  
3 other type of pleading which does not define the issues  
4 in the case and is therefore only collateral to the main  
5 issues. The admissions made in such pleadings are not  
6 judicial admissions and are not conclusive or binding  
7 on the party. Nevertheless, they are evidentiary admissions  
8 admissible against the party just as any written or  
9 oral statement of that party would be admitted. Thus  
10 if a party withdraws or amends the pleadings, substituting  
11 another for it, the new pleading will, if it defines the  
12 issues in the case as in a Motion for Judgment, become  
13 a judicial admission while the old pleading though  
14 withdrawn or amended is still admissible as an evidential  
15 admission. It is a past utterance of the party and  
16 as such can be introduced into evidence.

17           Such pleadings, like other evidential admis-  
18 sions, are not conclusive or binding. They may be  
19 explained by the party and the weights given the  
20 evidential admission and the explanation of manners  
21 to the jury.

22           Pleadings of any kind offered by the same  
23 party in another case, whether involving the same or

1 different opponents, are evidential admissions and  
2 admissible under the principles just discussed.

3 THE COURT: What do you want to do?

4 MR. JOHN HARRIS: What I'd like to do is  
5 either way, either let those facts be read to the jury  
6 as admissions by Safeco or let us put in the excised  
7 documents and argue to them that they've admitted -- this  
8 is what they've admitted. I didn't know which way  
9 Your Honor would prefer to do it so I tried to anticipate  
10 and do it both ways.

11 THE COURT: What do you think of that,  
12 Mr. Sokol?

13 MR. SOKOL: Your Honor, I'm in the dark  
14 because I don't know what Mr. Harris has in hand.

15 MR. WILLIAM HARRIS: Your Honor, I think if  
16 Mr. Sokol would agree that -- he has previously represented  
17 repeatedly that the facts are not in dispute. I think it  
18 would take him less than five minutes to read these.

19 THE COURT: Will you tell me why they weren't  
20 given to him a week ago?

21 MR. WILLIAM HARRIS: Because of the repeated  
22 representations that he says that the facts aren't in  
23 dispute here.

1 THE COURT: Let me tell you something, you  
2 spent ten or fifteen minutes here telling me something  
3 that's coherent to me and going nowhere. We've got a  
4 long trial and I'm not going to sit around and flounder.  
5 Now, do I understand that there are some stipulations  
6 or documents to come into evidence now or at least be  
7 received now?

8 MR. JOHN HARRIS: This is so you can  
9 physically see what we're talking about. For instance,  
10 this is the allegation and that's the first allegation  
11 in the Motion for Judgment and this is where we say  
12 that he has admitted that and this is true all the way  
13 through.

14 Now, because I know Your Honor would not want  
15 to have the problem of picking out --

16 THE COURT: You let Mr. Sokol look at this  
17 sometime when he has time.

18 MR. SOKOL: I'll look at this at lunch,  
19 Your Honor. If we could get on with documents that  
20 exist, we could move right along.

21 THE COURT: Do you have any documents,  
22 Mr. Harris, to put in?

23 MR. WILLIAM HARRIS: Yes, we'd like to put in

1       these, Your Honor. The first one is a preliminary water  
2       master plan.

3               THE COURT: Mr. Sokol, do you have any  
4       objection to it coming into evidence?

5               MR. SOKOL: No, sir.

6               THE COURT: Shall I receive it as an Exhibit;  
7       are you entering it as an Exhibit? This is Plaintiff's  
8       Exhibit One.

9               MR. PUGH: We asked them for everything in  
10      the Request for Production. We also asked them to note  
11      what the Admissions are.

12              THE COURT: Did you disclose this in  
13      discovery, Mr. Harris?

14              MR. WILLIAM HARRIS: No, Your Honor, I did not  
15      disclose this but I told Mr. Sokol that I was not aware  
16      of this plan until this morning.

17              THE COURT: What's the date of the plan?

18              MR. WILLIAM HARRIS: The date of the plan is  
19      April 21, 1973.

20              THE COURT: Where's it been since -- for seven  
21      and a half years?

22              MR. WILLIAM HARRIS: I guess it's been in the  
23      files of the Planning Department.

1 THE COURT: All right, objection sustained.  
2 It will not be received.

3 MR. WILLIAM HARRIS: Your Honor, Mr. Sokol  
4 said to me this morning he had no objection to this  
5 drawing.

6 MR. SOKOL: So long as I know it's the  
7 authentic. You put this thing in front of me.

8 THE COURT: Gentlemen, do you want me to  
9 continue this trial so you can get straight. It's five  
10 minutes to eleven and the only thing you've done in the  
11 last half hour is argue over, trying to -- do you object  
12 to this or not, Mr. Sokol?

13 MR. PUGH: I guess we can look at this while  
14 we're at lunch, too, with the other documents.

15 THE COURT: Mr. Harris, you can tender this  
16 later if you are so advised.

17 MR. WILLIAM HARRIS: The four bonds.

18 THE COURT: Any objection to them coming into  
19 evidence. That will be Plaintiff's Exhibit One through  
20 Four, four bonds.

21 MR. SOKOL: If Your Honor please, if Mr.  
22 Harris will agree, Mr. David Jensen has been excluded as  
23 a witness. Mr. Pugh tells me that if Mr. Pugh shows him,

1 Mr. Jensen can tell him whether these are the plans  
2 that are submitted.

3 MR. PUGH: He can tell me what these plans  
4 indicate and I can see if they check what our files  
5 indicate as to plans.

6 MR. SOKOL: If Mr. Harris will agree and the  
7 Court has no objection, can Mr. Pugh consult with  
8 excluded witness, Mr. Jensen?

9 MR. WILLIAM HARRIS: I don't have any  
10 problem with that.

11 THE COURT: Go ahead and consult with  
12 Mr. Jensen on those plans. What else do you have?

13 MR. WILLIAM HARRIS: This letter dated  
14 June 21, 1976.

15 MR. SOKOL: No objection.

16 THE COURT: Gentlemen, I'm going to assume  
17 that you're tendering things as Exhibits into evidence  
18 in the case unless you tell me something to the contrary.  
19 This letter will be Plaintiff's Exhibit Five.

20 What else, Mr. Harris?

21 MR. WILLIAM HARRIS: I'd like to tender this  
22 set of drawings which includes the road drawings and also  
23 I think in the back -- I'd just like to tender this entire

1 set of drawings. It's entitled, Key Map, Crows Nest  
2 Harbour, Aquia Sanitary District. It's prepared by  
3 Irving Engineering and Associates and it's dated June of  
4 '72. These are the plans that came from the Planning  
5 Office of Stafford County.

6 MR. SOKOL: Mr. Sears has been called as a  
7 witness, Judge, and I have no objection to these plans  
8 being received in evidence with the understanding that  
9 Mr. Sears may or may not testify that these were the  
10 final plans that he submitted. These plans are dated  
11 June, '72. Do they bear a signature in any way?

12 THE COURT: Mr. Sokol, the posture of the  
13 matter right now is if these things are stipulated into  
14 evidence, I'll receive them. If you want to wait to see  
15 if they can be properly established, they'll have to be  
16 held.

17 MR. SOKOL: I'd like to hold these until the  
18 appropriate time.

19 MR. WILLIAM HARRIS: Your Honor, this is a  
20 copy of the Stafford County Code, Chapter Twenty-two.  
21 It also includes a cover page of the entire Code plus the  
22 preface.

23 MR. SOKOL: No objection.

1 THE COURT: This will be Plaintiff's Exhibit  
2 Six.

3 MR. WILLIAM HARRIS: Your Honor, I would  
4 tender Plat Book Five, Pages two seventy-four through  
5 two eighty-one, which are the subdivision plats.

6 MR. SOKOL: No objection.

7 THE COURT: This is received as Plaintiff's  
8 Exhibit Seven.

9 MR. JOHN HARRIS: The entire set as one  
10 Exhibit?

11 THE COURT: That's what I understood the way  
12 it was tendered; is that correct, Mr. Harris?

13 MR. WILLIAM HARRIS: That's correct.  
14 Your Honor, I would tender Subdivision Plat for Section  
15 C which is Plat Book Pages two eighty-two through two  
16 eighty-four.

17 THE COURT: Any objection, Mr. Sokol?

18 MR. SOKOL: No objection.

19 THE COURT: That's received as Plaintiff's  
20 Exhibit Eight.

21 MR. WILLIAM HARRIS: I would tender Subdivision  
22 Plat for Section D, Plat Book Pages two eighty-five through  
23 two eighty-nine.



1 MR. SOKOL: No objection.

2 THE COURT: That's received as Plaintiff's  
3 Exhibit Nine.

4 MR. WILLIAM HARRIS: We tender the  
5 Virginia Department of Highways Roads and Standards,  
6 1972.

7 MR. SOKOL: No objection.

8 THE COURT: That'll be received as Plaintiff's  
9 Exhibit Ten.

10 MR. SOKOL: With the Court's permission, again,  
11 this is the first time we've seen these. Mr. Sears is  
12 an excluded witness but if Mr. Pugh with the consent of  
13 the County and with the approval of the Court can go out  
14 and talk with Mr. Sears and ask him to authenticate these  
15 if he can, we have no objection to them but I can't  
16 myself without Sears.

17 THE COURT: What do you want to do about  
18 that?

19 MR. WILLIAM HARRIS: I'm willing to let him  
20 take it out but I think we can get it in through  
21 Mr. Heaney but I think it would speed things up; that's  
22 agreeable.

23 THE COURT: Mr. Pugh has taken both sets of

1 documents. It's agreed it can be discussed with  
2 Mr. Sears.

3 MR. SOKOL: Mr. Jensen if he sees him.

4 MR. WILLIAM HARRIS: That's agreeable.

5 (The documents heretofore referred to  
6 were marked Plaintiff's Exhibits One  
7 through Ten and were received in evidence.)

8 MR. WILLIAM HARRIS: I object to the relevancy  
9 of that document, Your Honor. I don't object that it's  
10 a true copy of that document.

11 MR. SOKOL: I want to tender it.

12 THE COURT: For identification only.

13 MR. SOKOL: For identification only, a letter  
14 dated October 18, 1972 from Mr. D. K. Cook, who was then  
15 County Administrator, to Mr. Richard Johnson.

16 THE COURT: Do I understand, Mr. Harris, you  
17 have no further documents you want to tender at this time?

18 MR. WILLIAM HARRIS: Not at this time; I have  
19 other documents.

20 THE COURT: I understand you have no objection  
21 to this letter being received for identification only.

22 MR. WILLIAM HARRIS: For identification only,  
23 I have no objection, Your Honor.

1 THE COURT: The letter from Mr. Cook to  
2 Mr. Johnson of October 18, 1972, is received as  
3 Defendant's Exhibit One for identification.

4 (The document heretofore referred to was  
5 marked Defendant's Exhibit One for  
6 identification.)

7 MR. SOKOL: The next Exhibit, Your Honor, is  
8 a letter dated November 22, 1972, and signed by  
9 Mr. William G. O'Brian to Mr. Jack Earlbach,  
10 Research Homes, Inc., setting out approval dates of  
11 the County.

12 MR. WILLIAM HARRIS: I have no objection to  
13 that, Your Honor.

14 THE COURT: That's Defendant's Exhibit Two.

15 (The document heretofore referred to was  
16 marked Defendant's Exhibit Two and was  
17 received in evidence.)

18 MR. WILLIAM HARRIS: Your Honor, we would  
19 object to the next Exhibit as containing hearsay. It's  
20 a true and correct copy of the Minutes of the Board of  
21 Supervisors but there's much hearsay. It would be the  
22 County's position that only those Minutes referring to the  
23 actions taken by the Board be admissible and not reports of

1 what people said at various Board meetings. We would  
2 object to those as being hearsay. If he wants to  
3 extract the action of the Board, we would not object  
4 to admitting any action taken by the Board as shown in  
5 the Minutes but we would object to reports of what  
6 individuals said at a particular Board meeting.

7 MR. SOKOL: I have here, Your Honor, six  
8 sheets labeled Exhibits A, B, C and D which represent  
9 Minutes of the Board of Supervisors of Stafford County  
10 on specific dates and have reference to Crows Nest  
11 Harbour Subdivision. These Minutes are signed and  
12 certified by Mr. N. C. Sharp, County Administrator, and  
13 I ask the Court receive them in evidence on behalf of the  
14 defendant.

15 THE COURT: Well, Mr. Sokol, these Minutes,  
16 for example, refer to a Mr. Vandevender saying that the  
17 land will not perk according to the Health Department;  
18 why isn't that hearsay?

19 MR. SOKOL: Well, it is hearsay but I would  
20 like it for identification.

21 THE COURT: I'll receive this for identifica-  
22 tion, gentlemen, to authenticate it and it can be  
23 tendered for use if it becomes competent, Mr. Sokol.

1 This will be Defendant's Three for identification.

2 (The document heretofore referred to was  
3 marked Defendant's Exhibit Three for  
4 identification.)

5 MR. SOKOL: I next have to tender, Your Honor,  
6 as an Exhibit, the Comprehensive Development Plan of  
7 Stafford County which was prepared and approved in 1975  
8 along with a Stafford County Comprehensive Development  
9 Plan which sets out by color scheme the various areas  
10 and densities which we received from the office of  
11 Mr. Heaney and I tender these.

12 MR. WILLIAM HARRIS: Your Honor, I would  
13 object to that on grounds of relevancy. I do not see  
14 that as being relevant to the issue before us which is  
15 payment of subdivision bonds and if he can establish the  
16 relevancy with the Court, the Court I'm sure will --

17 THE COURT: Do you think it would be  
18 appropriate for me to receive it for identification?

19 MR. WILLIAM HARRIS: Certainly, I'm not saying  
20 it's not a correct and true document.

21 THE COURT: I can't rule on the dispute as to  
22 relevancy at this stage, Mr. Sokol, but I'll receive it  
23 as Defendant's Exhibit Four for identification only and

1 this is with the plan inserted into it.

2 (The document heretofore referred to  
3 was marked Defendant's Exhibit Four  
4 for identification.)

5 THE COURT: This is a 1975 plan; is that  
6 correct?

7 MR. SOKOL: Yes, sir.

8 THE COURT: All right, gentlemen, what next?

9 MR. SOKOL: I have now the proposed Zoning  
10 Ordinance which was adopted June 20, 1978, of Stafford  
11 County setting out the various classifications and uses.

12 MR. WILLIAM HARRIS: Your Honor, we make  
13 again an objection as to relevancy. We're not saying it's  
14 not a true and correct document, we're saying we object  
15 on the grounds of relevancy.

16 THE COURT: I'll receive that then as  
17 Defendant's Exhibit Five for identification only.

18 (The document heretofore referred to  
19 was marked Defendant's Exhibit Five  
20 for identification.)

21 MR. SOKOL: Let me go back, Judge, these  
22 documents that already have been admitted by -- hadn't  
23 they been admitted by the County?

1 MR. WILLIAM HARRIS: I think if you look in  
2 my Response to the Request for Admissions and also the  
3 Order that was entered, it stated that we would admit  
4 whether they were true and correct but we were reserving  
5 evidentiary objections until trial.

6 MR. SOKOL: Let me go ahead and identify all  
7 these and have them admitted for identification purposes.

8 MR. WILLIAM HARRIS: I think some of them  
9 I'll agree on.

10 MR. SOKOL: Here's a letter dated November 14,  
11 1972, to J. Edgar Sears, Jr., to Mr. Keith Cook setting  
12 out the cost estimates for sewer and water construction  
13 costs and road construction costs.

14 MR. WILLIAM HARRIS: I have no objection to  
15 that.

16 THE COURT: All right, that's Defendant's  
17 Exhibit Six.

18 (The document heretofore referred to was  
19 marked Defendant's Exhibit Six and was  
20 received in evidence.)

21 MR. SOKOL: A letter dated April 24, 1973, from  
22 Mr. Sears to Vandenburg, Crows Nest Harbour, setting up  
23 again the cost estimates.

1 MR. WILLIAM HARRIS: I have no objection to  
2 that, Your Honor.

3 THE COURT: That's Defendant's Exhibit Seven.

4 (The document heretofore referred to  
5 was marked Defendant's Exhibit Seven and  
6 was received in evidence.)

7 MR. SOKOL: Next is a copy of a signed letter  
8 from D. K. Cook, County Administrator, dated May 15, 1973,  
9 to Mr. H. P. C. Vandenburg.

10 THE COURT: Any objection to that, Mr. Harris?

11 MR. WILLIAM HARRIS: I would object on  
12 relevancy.

13 THE COURT: This is Defendant's Eight for  
14 identification.

15 (The document heretofore referred to  
16 was marked Defendant's Exhibit Eight  
17 for identification.)

18 MR. SOKOL: Next is a letter dated May 18, 1973,  
19 from Barry B. Smith, Professional Engineer, to Mr.  
20 N. C. Sharp setting out again construction costs and A, B,  
21 C and D.

22 MR. WILLIAM HARRIS: I have no objection.

23 THE COURT: That will be Defendant's Exhibit



1 Nine.

2 (The document heretofore referred to  
3 was marked Defendant's Exhibit Nine  
4 and was received in evidence.)

5 MR. SOKOL: I tender for identification then  
6 the Subdivision Ordinance of the Stafford County Board of  
7 Supervisors, November, 1973.

8 MR. WILLIAM HARRIS: The date was November 15th,  
9 '73, I believe, was the date that ordinance was adopted.  
10 I would object on the grounds of relevancy.

11 THE COURT: This is Defendant's Exhibit  
12 Ten for identification.

13 (The document heretofore referred to  
14 was marked Defendant's Exhibit Ten  
15 and was received in evidence.)

16 MR. SOKOL: A letter dated October 19, 1973,  
17 from Mr. N. C. Sharp to Mr. Vandevender, Research Homes,  
18 a one paragraph letter.

19 MR. WILLIAM HARRIS: I have no objection.

20 THE COURT: That's received as Defendant's  
21 Exhibit Eleven.

1 (The document heretofore referred to  
2 was marked Defendant's Exhibit Eleven  
3 and was received in evidence.)

4 MR. SOKOL: Here's a letter dated November 12,  
5 1971, from Hansford Abel to Sherman Vandevender.

6 THE COURT: Any objection, Mr. Harris?

7 MR. WILLIAM HARRIS: Relevancy; we're willing  
8 to stipulate that the County entered into an agreement.  
9 I feel it just clutters the record but I will stipulate.

10 THE COURT: Are you objecting to the relevancy?

11 MR. WILLIAM HARRIS: Yes, I'll object to  
12 relevancy.

13 THE COURT: This will be Defendant's Twelve  
14 for identification.

15 (The document heretofore referred to  
16 was marked Defendant's Exhibit Twelve  
17 for identification.)

18 MR. SOKOL: Next is an agreement dated  
19 October 1, 1973, for Crows Nest Harbour in Stafford County,  
20 Virginia, consisting of eight pages with respect to the  
21 disposal of sewage.

22 MR. WILLIAM HARRIS: I would object again on  
23 grounds of relevancy, Your Honor.

1 THE COURT: This is Defendant's Thirteen for  
2 identification.

3 MR. WILLIAM HARRIS: Also the date is incor-  
4 rect. This is not an exact copy of what was ultimately  
5 executed. The date should be November 20th and this  
6 document does not show that the County signed it. It was  
7 signed by Alvin Bandy and Mr. Sharp. I'm not disputing  
8 that this is almost a complete copy; I'm saying this is  
9 not a correct copy.

10 MR. SOKOL: Who signed it, Mr. Bandy and  
11 Mr. Sharp?

12 MR. WILLIAM HARRIS: Mr. Bandy, Mr. Sharp and  
13 the date is the 20th of November.

14 MR. JOHN HARRIS: What he's saying, if you  
15 change this to November, we will agree that the signatures  
16 are there. This copy is not executed.

17 MR. WILLIAM HARRIS: I still object on  
18 relevancy.

19 MR. SOKOL: I'd like to tender it for  
20 identification, Judge. Permit me to tender it for  
21 identification and we'll ask Mr. Sharp about it later.

22 THE COURT: Do you want to just hold it and  
23 present it?

1 MR. SOKOL: Let me go ahead and withdraw it  
2 then, Judge. All of these Exhibits that are presented  
3 for identification, may I have them for my use during  
4 the course of the trial, Your Honor?

5 THE COURT: They'll be right there on the  
6 table.

7 MR. SOKOL: The next is a series of  
8 authenticated Minutes of the Board of Supervisors of  
9 Stafford County, authenticated by Mr. Sharp.

10 MR. WILLIAM HARRIS: I'd make the same  
11 objection that I made previously to the Minutes, I would  
12 object to the hearsay information in it, I would not  
13 object to the actions taken by the Board.

14 THE COURT: This is received for identification  
15 as Defendant's Exhibit Thirteen.

16 (The document heretofore referred to  
17 was marked Defendant's Exhibit Thirteen  
18 for identification.)

19 MR. SOKOL: Next is a letter dated February 6,  
20 1973, from Andrew Myruski to John Porter, setting forth  
21 road requirements for Crows Nest Harbour.

22 THE COURT: Any objection to that, Mr. Harris?

23 MR. WILLIAM HARRIS: I would again object on

1 grounds of relevancy.

2 THE COURT: That's Defendant's Fourteen for  
3 identification only.

4 (The document heretofore referred to was  
5 marked Defendant's Exhibit Fourteen for  
6 identification.)

7 MR. SOKOL: The next is just a general highway  
8 map, Stafford County, roads correct to January 1, 1975,  
9 general highway map.

10 MR. WILLIAM HARRIS: I would again object on  
11 grounds of relevancy, Your Honor.

12 THE COURT: It's 1975?

13 MR. SOKOL: Yes, sir.

14 THE COURT: It'll be Defendant's Exhibit  
15 Fifteen for identification.

16 (The document heretofore referred to  
17 was marked Defendant's Exhibit Fifteen  
18 for identification.)

19 MR. SOKOL: Next is a letter dated June 13,  
20 1973, two pages, from Andrew Myruski to Mr. N. C. Sharp.

21 MR. WILLIAM HARRIS: I would object on grounds  
22 of relevancy, Your Honor.

23 THE COURT: That's Defendant's Sixteen.

1 for identification only.

2 (The document heretofore referred to  
3 was marked Defendant's Exhibit Sixteen  
4 for identification.)

5 MR. SOKOL: Next is a letter dated  
6 November 21, 1972, from Andrew Myruski to Mr. Jack C.  
7 Burlbaugh, Crows Nest Harbour.

8 MR. WILLIAM HARRIS: I would object on  
9 grounds of relevancy.

10 THE COURT: That's Defendant's Seventeen for  
11 identification.

12 MR. SOKOL: Next letter dated January 23,  
13 1973, from Mr. Andrew Myruski to Urban Engineers and  
14 Associates consisting of two pages.

15 THE COURT: Any objection, Mr. Harris?

16 MR. WILLIAM HARRIS: Grounds of relevancy,  
17 Your Honor.

18 THE COURT: That's Defendant's Eighteen for  
19 identification only.

20 (The documents heretofore referred to  
21 weremarked Defendant's Exhibits Seventeen  
22 and Eighteen for identification.)  
23

1 THE COURT: These are extracts of pleadings  
2 or copies of the pleadings?

3 MR. SOKOL: Copies of the pleadings.

4 THE COURT: These are copies of the pleadings  
5 in a different suit, Mr. Harris. What you tendered were  
6 extracts, selected extracts, of pleadings of this suit.

7 MR. WILLIAM HARRIS: I would object on  
8 grounds of relevancy, Your Honor.

9 THE COURT: All right, this is received as  
10 Defendant's Exhibit Twenty for identification only.

11 (The document heretofore referred to  
12 was marked Defendant's Exhibit Twenty  
13 for identification.)

14 MR. SOKOL: That's it.

15 MR. JOHN HARRIS: Sir, a point of clarification,  
16 did I understand there would be no objection to the  
17 pleadings we tendered if we tender the entire pleadings  
18 rather than the extract?

19 MR. SOKOL: That's the pleadings in this case.  
20 I don't think the jury is entitled to take those pleadings.

21 THE COURT: Those are pleadings in this case,  
22 Mr. Harris, because the pleadings are part of the  
23 proceeding in this case and they don't need to be put into

1 evidence. You can, of course, examine the parties on  
2 their pleadings and when it comes time for the Court  
3 to analyze the issues of the case.

4 MR. WILLIAM HARRIS: Would you note our  
5 objection for the Court's record.

6 THE COURT: I note your objection.

7 MR. PUGH: Can I speak with reference to what  
8 I found out about these documents here. First of all,  
9 with reference to --

10 THE COURT: I don't mean to cut you off,  
11 Mr. Pugh, but are you prepared to stipulate those  
12 documents or not?

13 MR. PUGH: The Sanitary Sewer Plan, yes.

14 THE COURT: Are you tendering that, Mr. Harris,  
15 the Master Sanitary Sewer Plan?

16 MR. WILLIAM HARRIS: Yes, we are.

17 THE COURT: Are you stipulating that into  
18 evidence, gentlemen?

19 MR. SOKOL: Yes.

20 THE COURT: That'll be Plaintiff's Exhibit  
21 Eleven.

22

23



1 MR. PUGH: Mr. Sears says he can't tell us  
2 whether or not this was actually the last.

3 THE COURT: So you cannot stipulate that.

4 MR. PUGH: This is the Sanitary Master Water  
5 Plan. He said that this is showing that there were wells  
6 to be dug that was an alternative that was put on this  
7 same plan. I think it needs some explanation if it's  
8 going to be introduced into evidence as to whether or not  
9 these are alternatives or whether or not this was the plan,  
10 and that's what he told me so it doesn't speak for itself.

11 THE COURT: Are you or are you not going to  
12 stipulate?

13 MR. PUGH: No.

14 THE COURT: Give this back to Mr. Harris  
15 then.

16 MR. WILLIAM HARRIS: You're not objecting to  
17 the authenticity of it; are you?

18 MR. PUGH: He believes that this is the plan  
19 but it needs some explanation to come into evidence without  
20 testimony. I would object. The road plans he said he  
21 couldn't verify.

22 THE COURT: Now, gentlemen, are these all the  
23 documents to come in at this point?

1 MR. SOKOL: At this point, yes, sir.

2 MR. WILLIAM HARRIS: Your Honor, we would  
3 again ask the Court if it was not willing to accept the  
4 excised copies of the pleadings in this case into evidence,  
5 we would ask the Court to admit the complete copy of the  
6 pleadings in this case and what we'd ask, and I'd like  
7 to put on the record, is what we want the Court to admit  
8 into evidence. We would ask the Court to admit the  
9 first Request for Admissions addressed to Safeco at the  
10 time the suit was filed within that first-month period.  
11 I'm not certain of the exact date but it was right at  
12 the beginning.

13 THE COURT: Are you talking now about a  
14 Request for Admissions?

15 MR. WILLIAM HARRIS: Yes, Your Honor.

16 THE COURT: Have you shown that to Mr. Sokol?

17 MR. SOKOL: I believe Your Honor entered  
18 an Order after that Request.

19 MR. WILLIAM HARRIS: That's correct; I want  
20 the Order, too.

21 MR. SOKOL: Whatever the Order --

22 MR. WILLIAM HARRIS: This is the Order; it's  
23 not signed. I would get a certified copy; I think it's in

1 the Court's file. It was entered May 9th, 1978.

2 MR. SOKOL: If I could just at lunch review  
3 this material to be sure that this is indeed what's  
4 admitted.

5 THE COURT: Okay, review it at lunch.  
6 Now, gentlemen, are you ready for anything further?

7 MR. SOKOL: I'd like to bring up one other  
8 thing, Your Honor, I'd like to get a ruling from the  
9 Court preliminarily on pleadings that have been filed  
10 in the Circuit Court of Stafford County, Diversified  
11 Mortgage Investors versus the Board of Supervisors  
12 which was tendered for identification as Defendant's  
13 Exhibit Twenty consisting of the Bill of Complaint,  
14 a Demur and an Answer.

15 Now, the Answer consists of four sheets. The  
16 Clerk I'm sure if Mr. Harris desires can determine that  
17 this is indeed a pleading that was filed by Mr. Harris  
18 and, I take it, signed by Mr. Harris with the authority  
19 of the Board of Supervisors, and in it the Board sets out  
20 exactly what the Board's position is; for instance -- the  
21 jury is not here -- the Board says the 1971 zoning of  
22 R-1 or 2 and B-1 was not consistent with the Comprehensive  
23 Plan. It goes on to say that the zoning that was adopted

1 in '71 was not proper, and these are judicial admissions  
2 in pleadings filed in this very Court, Your Honor, which  
3 are germane and relevant to this proceeding, having to  
4 do particularly with this zoning on Sections A, B, C and D  
5 of Crows Nest Harbour.

6 Now, I don't think that the County having  
7 filed this pleading, it never having been amended in any  
8 way up to today, can say that this is not relevant in  
9 terms of the admissions made by the County through  
10 Mr. Harris in this proceeding. And I ask, therefore,  
11 that these judicial admissions set out in the Answer  
12 of the Board of Supervisors of Stafford County deemed  
13 be an Exhibit accepted by the Court and relevant on  
14 behalf of the defendant in this proceeding.

15 THE COURT: Mr. Sokol, you see at this point  
16 I have no evidence before me and I have some recollection  
17 of the issues of the case based on your prior appearances.  
18 I know I reviewed their pleadings but I don't think I  
19 can rule on the relevancy of that admission until the  
20 time that it is tendered into evidence. Now, you say  
21 the County admits there that the zoning was contrary to  
22 the Comprehensive Plan. That may very well be relevant  
23 to this case but at this point I don't have before me in

1 this trial the framework within which to make that  
2 determination.

3 MR. SOKOL: All right, let me put a question  
4 to the Court then, Mr. Harris filed a pleading, I mean,  
5 he files it in the name of the Board of Supervisors.  
6 The Board of Supervisors is not a person I can put on the  
7 stand. I take it I'll have leave of Court to put  
8 Mr. Harris on the stand unless he's willing to admit  
9 it now to say that this is a pleading that he filed.

10 THE COURT: I think it's been received and  
11 identified as that. The only objection to it is to  
12 relevancy and as the case progresses to the point that  
13 that admission is relevant, then you can propose that  
14 that document be received into evidence and you can read  
15 it to the jury.

16 MR. SOKOL: All right, thank you.

17 THE COURT: Now, are there any other documents  
18 to come in?

19 MR. JOHN HARRIS: No, sir, but there is one  
20 other matter to take up. At some point in this trial  
21 we expect to read the deposition of Ken Holloway and  
22 we would like for the jury to know that he was subpoenaed  
23 and there was a notice of deposition given in which it was

1 requested -- the matters upon which examination is requested  
2 and asked upon which the deponent will be examined are  
3 and thereafter we set out certain qualifications to  
4 Safeco as to what we wanted to examine their representa-  
5 tive on and that he came as their representative to  
6 answer these questions. And I would like for the jury to  
7 know that prior to the reading of the deposition,  
8 and we're in the same boat that he's in, our parties  
9 are legal entities and not people so we can't put  
10 Mr. Safeco on the stand and say, Mr. Safeco, did you  
11 send Mr. Holloway as your representative to answer these  
12 questions.

13 MR. SOKOL: I don't know what Mr. Harris is  
14 talking about, Judge, Mr. Holloway was previously an  
15 employee of Safeco, he came over my protest to Stafford  
16 County, the City of Fredericksburg, and he was deposed,  
17 and he answered questions put to him by Mr. Harris.

18 Now, Mr. Harris, about ten days ago perhaps,  
19 served on me a summons for Mr. Holloway's attendance.  
20 Mr. Holloway lives in Atlanta, Georgia, he's no longer  
21 employed by Safeco and hasn't been for some time, but I  
22 don't have any objection to his reading into evidence  
23 what Mr. Holloway had to say during his deposition.

1 I don't know exactly what you want to tell the jury.

2 MR. JOHN HARRIS: All right, then notice of  
3 deposition went to Safeco and it prescribed that Safeco  
4 was a corporation and that we wished to depose Safeco  
5 Insurance Company of America, which is a private corpora-  
6 tion, through such officers, directors, managing agents  
7 or other persons as who may be designated by said deponent  
8 pursuant to Rule Five Colon B Six, Rules of the Supreme  
9 Court of Virginia. The deposition will be taken upon  
10 oral examination, the matters upon which examination is  
11 requested and upon which the deponent will be examined  
12 are the bonds which are the subject of this action and  
13 making the purpose their effect.

14 THE COURT: You're saying that in your notice  
15 you asked Safeco to send an appropriate person, appropriate  
16 one of its employees who could testify on this subject  
17 and you did not ask specifically for Mr. Holloway but  
18 he was sent by Safeco to fill that qualification. Well,  
19 I think that's proper to be told to the jury as descriptive  
20 of Mr. Holloway. Now, is there anything else, gentlemen?

21 MR. WILLIAM HARRIS: Yes, Your Honor, we'd  
22 like to go over the Request for Admissions, get those  
23 facts that we both agree on.

1 THE COURT: Gentlemen, did it ever occur to  
2 you to get this business straight before the day of  
3 trial?

4 MR. SOKOL: A year ago perhaps, Your Honor,  
5 we gave Mr. Harris many, many sheets setting out  
6 stipulations of fact. Mr. Harris took them to the  
7 Board and came back and said, no, no. We tried.

8 THE COURT: All right, Mr. Harris, get along  
9 with it.

10 MR. WILLIAM HARRIS: Okay, the first Request,  
11 the Crows Nest Harbour Limited Partnership in the  
12 Virginia partnership started on October 5th, 1971. We  
13 admit that it's a general partnership and that it started  
14 on October 5th, 1972, I believe.

15 MR. SOKOL: These Admissions are in the record,  
16 Judge, do we have to go through it right now?

17 MR. WILLIAM HARRIS: Your Honor, I think really  
18 we'd save time by going through them.

19 MR. SOKOL: Why, they're in the record.

20 MR. WILLIAM HARRIS: I would like them before  
21 the jury and I'd like to have the Court instruct the  
22 jury as to what we've agreed to.

23 MR. SOKOL: Go ahead and tell the jury in an



1 opening statement if it conforms to the Admissions. Then  
2 there is no problem. There are one hundred and eight of  
3 these. You're talking about --

4 MR. WILLIAM HARRIS: The ones you drafted.  
5 The Court entered an Order that the parties should respond.  
6 I would like to get these facts before the jury. I have  
7 admitted them, you have asked him to admit him.

8 MR. SOKOL: Let me just say this, I have here  
9 these sheets, now we've marked out that you've admitted  
10 one with some interlineations, two, three, four, five, six,  
11 seven, nine, twelve, thirteen, fourteen -- I mean, I can  
12 recite those. Why do we have to read them all again?

13 MR. WILLIAM HARRIS: I would like to get them  
14 into evidence, Your Honor. I would like you to give a  
15 Jury Instruction as to these facts that have been admitted  
16 by Safeco right at the beginning of the evidence so I don't  
17 have to go through it and prove all this stuff that's been  
18 admitted. I would like the Court to go over it now.

19 THE COURT: Mr. Harris, if you have a stipula-  
20 tion of facts, I'll be glad to accept that and to verify it  
21 and you can submit that to the jury but if you have a  
22 dispute as to what's been admitted, that dispute should be  
23 submitted to the jury. It's not up to me to set up and

1 tell the jury who's admitted what. That's a comment on  
2 the evidence.

3 MR. WILLIAM HARRIS: I'm not asking that;  
4 Your Honor.

5 THE COURT: What do you want me to do?

6 MR. WILLIAM HARRIS: I would like you to  
7 read the facts that are admitted in this Request for  
8 Admissions, at least the ones I want to be admitted.  
9 Now, we agreed --

10 THE COURT: Do you want me to read them?

11 MR. WILLIAM HARRIS: To the jury.

12 THE COURT: You want me to read the Request  
13 for Admissions to the jury.

14 MR. WILLIAM HARRIS: The ones that are agreed  
15 upon.

16 THE COURT: In other words, you want the  
17 Judge to set up and recite to the jury, presumably telling  
18 the jury that he vouches for the fact that these facts  
19 have been proven; doesn't that come pretty close to being  
20 a comment on the evidence?

21 MR. WILLIAM HARRIS: I don't think so.

22 THE COURT: I think it does. You get your  
23 things in proper form to be submitted and I'll be glad

1 to entertain them.

2 MR. WILLIAM HARRIS: Could we have an early  
3 recess for lunch and let Mr. Sokol look at these, the  
4 set of facts that we say as agreed and it would seem it  
5 would really save time by not having to put on evidence  
6 as to all of these facts that they've already admitted to.

7 MR. SOKOL: Your Honor, I've told Mr. Harris  
8 yesterday that I was available to him if he could come to  
9 my office. I think that's an imposition for me to take my  
10 lunchtime, the few precious minutes I have, to sit down  
11 and do something that we've been trying to do for three  
12 years.

13 THE COURT: I'm going to send the jury away  
14 and I'm going to tell them to come back at one-thirty  
15 and I hope that by then you'll be ready to go forward  
16 with this trial and I don't know how long you expect  
17 to take to try this case but I'm not much impressed with  
18 the preparation that's gone into it and I don't propose  
19 to string this thing out interminably while you flounder  
20 with all sorts of bizarre procedural efforts.

21 Sheriff, go back in and tell the jury they  
22 are excused until one-thirty, to get some lunch, and be  
23 back then ready to go forward.

1 MR. PUGH: Your Honor, may the witnesses be  
2 advised as well.

3 THE COURT: Tell all of the witnesses to come  
4 back at one-thirty. Before we recess, let's try to go  
5 ahead and get this business worked out. What do you want  
6 to do?

7 MR. WILLIAM HARRIS: I would like to have  
8 Mr. Sokol go over those proposed Jury Instruction or  
9 stipulation, whatever you want to call it, as to the  
10 facts that are undisputed. He's admitted certain things  
11 in his Answers, certain things in response to his Request  
12 for Admissions; I've admitted certain facts. He has  
13 repeatedly told me there's no problem over the facts.

14 THE COURT: Mr. Harris, the Court doesn't  
15 instruct the jury on what facts are admitted or what  
16 facts have been proven. Now, listen to me and understand  
17 this. I'm not going to instruct the jury that a single fact  
18 has been admitted or proven. The facts must be determined  
19 by the jury from the evidence which is submitted to it.  
20 That is the facts that are admitted, the facts that are  
21 proven. Now, you get your materials in order to submit  
22 the facts to the jury. If you want to read to the jury  
23 an admission, you can do that and it will be up to the jury

1 to decide whether it is an admission and, if so, what it's  
2 an admission of. I'm not going to tell them.

3 MR. WILLIAM HARRIS: Are you saying I can read  
4 the Request for Admissions and the Response?

5 THE COURT: I'm saying if it becomes relevant  
6 and competent in the case, you can.

7 MR. WILLIAM HARRIS: Would the Court prefer I  
8 did that or prefer that I get with Mr. Sokol and we  
9 agree on a stipulation that the Court could read to the  
10 jury?

11 THE COURT: I'm not going to read any stipula-  
12 tion to the jury. If you make a stipulation, one of you  
13 can read it to the jury. It's not a question of what I  
14 prefer, Mr. Harris, it's a question of what the law  
15 requires. Now, if you gentlemen want to go over some  
16 things, I'll sit right here and wait for you because I'd  
17 certainly like to get this settled before lunch.

18 (Brief recess.)

19 THE COURT: All right, gentlemen, have you  
20 got anything worked out?

21 MR. JOHN HARRIS: We're still working on it,  
22 sir.

23 MR. WILLIAM HARRIS: I think we're making

1 progress, Your Honor, but I think we need a little more  
2 time.

3 THE COURT: I'm going to recess now for  
4 lunch until twenty-five minutes after one and if when  
5 I get back you have something ready to come in, then I'll  
6 consider it; otherwise, I'm just going to suspend this  
7 phase of the proceedings and go forward with opening  
8 statements and you'll just have to prove your case within  
9 the normal course if you can. Until one twenty-five.

10 (Thereupon, at 12:30 o'clock p.m., the Court  
11 recessed to reconvene at 1:25 o'clock p.m. the same day.)  
12  
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## 1 AFTERNOON SESSION

2 THE COURT: All right, gentlemen, do you have  
3 any other stipulations?

4 MR. WILLIAM HARRIS: Your Honor, we're making  
5 a lot of progress. If we could have a few more minutes,  
6 I think we could greatly shorten this trial.

7 THE COURT: Do you agree with that?

8 MR. SOKOL: We're down pretty far along.

9 THE COURT: How much more time do you want?

10 MR. SOKOL: I would say ten minutes ought to  
11 do it, Judge.

12 MR. WILLIAM HARRIS: I think thirty minutes  
13 is realistic.

14 THE COURT: All right, I want you to bear in  
15 mind that thirty minutes from now the jury will have been --  
16 the witnesses must remain out of the Courtroom please.  
17 This jury has been impounded four hours and has yet to  
18 hear anything substantial in this case. Is thirty minutes  
19 going to bear fruit?

20 MR. WILLIAM HARRIS: I feel like it will, Your  
21 Honor.

22 MR. SOKOL: It will bear fruit in the sense  
23 that we will have a document to present to you for you to

1 make certain rulings on. I suppose there are one hundred  
2 and eight of these; I think there are eighty we agree on.  
3 The other twenty-eight Mr. Harris has agreed on but he wants  
4 you to make a ruling as to relevancy.

5 THE COURT: How can I make a ruling as to  
6 relevancy when the trial hasn't even begun. Now, if you  
7 have stipulations to come in that are agreed between you,  
8 I will receive them. If they are matters that require  
9 proof or the authentication or the establishment of  
10 documents, you can come on in, proper force.

11 MR. SOKOL: All right, if we do that. Let's  
12 see what we do in a half an hour, Judge, we're trying.

13 THE COURT: Are you going to stipulate  
14 documents and facts?

15 MR. SOKOL: We're trying to stipulate facts;  
16 that's what I'm trying to do, stipulate facts. There are  
17 facts that I don't know how they can be contradicted;  
18 they're there.

19 THE COURT: All right, I'll recess for half an  
20 hour. Get the jury into the jury room and tell them that  
21 the delay in this trial is because the lawyers are working  
22 on some stipulations they hope will expedite the trial.

23 (Brief recess.)



1 MR. WILLIAM HARRIS: We've taken time, Your Honor,  
2 to go over the Request. I believe that we're in  
3 agreement as to what the facts are with respect to the  
4 Request for Admissions. We're having a little disagreement  
5 on the procedure and how to handle it. It's my suggestion  
6 that we handle it as follows: That the County be given  
7 an opportunity to present its evidence and when it gets  
8 to wanting to put in the Request for Admissions, that we  
9 read from the Request those portions of the Request that  
10 the County feels is its side of the case.

11 Then when it becomes Mr. Sokol's turn to  
12 put on Safeco's side, then he would read those portions  
13 from the Request that he desires. I believe we have now  
14 gotten the wording down and we're in agreement that the  
15 facts as stated in here are the facts as best we know them  
16 as of this day.

17 THE COURT: The facts stated?

18 MR. WILLIAM HARRIS: In the Request for  
19 Admissions.

20 THE COURT: What Request for Admission is it?

21 MR. WILLIAM HARRIS: This is the last one.

22 THE COURT: Is it Safeco's Request?

23 MR. WILLIAM HARRIS: Safeco's Request of the

1 County.

2 THE COURT: Mr. Sokol, what's your point?

3 MR. WILLIAM HARRIS: One further point, and  
4 as the Requests come in as the trial goes on, each party  
5 would make any objections as to relevancy or appropriateness  
6 but we agree these are the facts and it's merely whether  
7 the Court believes this is relevant to the issue to be  
8 decided.

9 MR. SOKOL: These one hundred and eight Requests  
10 are all Requests of Safeco's, Judge. Nearly all of them  
11 were admitted by the County in the Response to the Request.  
12 However, some were qualified by the test of relevancy.

13 Mr. Harris and I have gone over the wording  
14 in some of them and reconciled to that but in drafting,  
15 and Mr. Pugh is the principal draftsman in this, in drafting  
16 this, we have tried to put together a cohesive recitation  
17 of the facts of this case, the background of this case.  
18 And if, at the outset of this trial the jury is to be read  
19 the Requests and the Admissions, I object to a method whereby  
20 only a part of them are given to the jury by Mr. Harris.  
21 I believe that fairness requires in cohesiveness and  
22 coercion requires that all of them are admitted through  
23 this pre-trial device be submitted to the jury at the same

1 time.

2 THE COURT: All right, gentlemen, I will  
3 permit either side at whatever time you think is proper  
4 in the presentation of evidence to read the entire Request  
5 for Admissions and the Answers to the jury, the entire  
6 documents. Now, they must be read in their entirety not  
7 just selected excerpts. If it is appropriate, those  
8 Requests and Answers or the Answers can be used to cross  
9 examine any witnesses that may testify but I will permit  
10 either side to read the entire documents but not excerpts  
11 at an appropriate time in the case. Now, is there anything  
12 else before we go forth with the trial?

13 MR. WILLIAM HARRIS: Are you saying that we  
14 have to read the entire but can we make objections as to  
15 relevancies of portions of the Requests; in other words,  
16 we're saying the facts are true and correct and we have  
17 admitted them but we reserved our objections in our  
18 Answers to the relevancy of the Request. It seems that if  
19 the Court rules at this point that we have to read the  
20 entire thing, then we answered it under a false premise.

21 THE COURT: Well, Mr. Harris, I've agreed to  
22 let you read them and actually they're requests or  
23 admissions by your client. It seems strange for you to

1 build your case on your own client's admissions. I think  
2 you should have some more concrete method of proof so I'm  
3 going to say whoever undertakes to read those Admissions  
4 is going to have to go on and read them but if the other  
5 side wants to object to the relevancy and he has any question  
6 about the competency of it, he can do it.

7 MR. WILLIAM HARRIS: Would you note my  
8 objection.

9 THE COURT: Are you ready to go forward.

10 MR. WILLIAM HARRIS: Yes, Your Honor.

11 MR. SOKOL: Yes, Your Honor.

12 THE COURT: Bring the jury in.

13 (The jury returned to the courtroom and  
14 resumed their place in the jury box.)

15 THE COURT: Ladies and gentlemen, we will  
16 now go forward with the trial of the case. You'll first  
17 hear opening statements from the plaintiff's attorney  
18 and the defendant's attorney if they care to make them.  
19 I caution you that these statements are not evidence and  
20 should not be considered by you as evidence or proof in the  
21 case. Their only purpose is to acquaint you with the  
22 issues of the case and with what each side intends to  
23 prove. There will come times, there have already come times

\* \* \*

1 ever attempt to do any of these things, to put in streets,  
2 to put in water and sewer lines; the answer, no.

3 So Safeco says very simply, number one,  
4 as a matter of law, we don't owe the money; number two,  
5 the concept from the beginning was foolhearty; number  
6 three, without a plan to show what you're going to do  
7 with the money, it makes absolutely no sense whatsoever.  
8 We have no legal or moral obligation to make payment on  
9 the bonds and that is the reason why we are here today.  
10 Thank you.

11 THE COURT: Call your first witness.

12 MR. JOHN HARRIS: Yes, sir, I would like to  
13 call by his deposition Ken Holloway who was a representa-  
14 tive of Safeco and, if it please the Court, would you  
15 please instruct the jury on the significance of the  
16 testimony by Mr. Holloway.

17 THE COURT: Do you have Mr. Holloway's  
18 deposition?

19 MR. JOHN HARRIS: I do, sir.

20 THE COURT: Ladies and gentlemen, counsel is  
21 now going to read to you the deposition of a witness.  
22 The witness was put under oath and he was asked questions  
23 just as a witness would be on a witness stand. A court

1 reporter was present and took down the questions and  
2 the answers and has transcribed them. You should consider  
3 the questions and answers of this deposition just as  
4 though Mr. Holloway were present in person and was  
5 testifying before you. All right, Mr. Harris.

6 MR. JOHN HARRIS: Your Honor, may I approach  
7 the Bench?

8 Ladies and gentlemen of the jury, Ken  
9 Holloway was the individual that Safeco sent to answer  
10 for them. As you see, Safeco is like the County, it is  
11 a legal entity and not a person so we can't take a  
12 deposition of Mr. Safeco. The representative that they  
13 sent to answer the question was Ken Holloway.

14 What I will do is I will read a question  
15 and then read the response that was given. For instance:

16 Q Please state your name.

17 A Ken S. Holloway.

18 Q Who do you work for?

19 A Safeco Insurance Company of America.

20 Q How long have you been working for Safeco?

21 A I started Safeco in September of 1970,  
22 so it's been about eight years.

23 Q Are you familiar with the bonds that

1     Stafford County is the beneficiary on in which Safeco  
2     is the surety covering Crows Nest Harbour's Sections  
3     A, B, C and D?

4             A     Yes.

5             MR. JOHN HARRIS:  If it please the Court,  
6     I'd like to pass the bonds at this time.  There are four  
7     bonds, all virtually the same, different sections,  
8     different amounts, but they're all very, very similar,  
9     only the blanks I think you will find are different.

10            Proceeding now to page nine, at line nine.

11            MR. SOKOL:  Is there any reason we're not  
12     going to --

13            THE COURT:  Why are you going from page four  
14     to page nine?

15            MR. JOHN HARRIS:  Your Honor, that is the  
16     section I would deem relevant.

17            THE COURT:  No, sir, if you're going to  
18     read the deposition --

19            MR. JOHN HARRIS:  (Reading the deposition.)

20            Q     At this time, I would like to give you  
21     Safeco Insurance Company Bond Numbers 2219520, 2219519,  
22     2219522 and 2219521, which are the bonds for Sections A, B,  
23     C and D in Crows Nest.

1 MR. JOHN HARRIS: How would you like to  
2 handle Mr. Sokol's interjections?

3 THE COURT: You can read your own interjections,  
4 Mr. Sokol.

5 MR. SOKOL: (Reading the deposition) Take a  
6 look at the four of those.

7 MR. JOHN HARRIS: (Reading the deposition)

8 Q On behalf of Safeco Insurance Company of  
9 America, a Robert W. Hudson executed the bonds. To your  
10 knowledge, did he have authority at the time to execute  
11 that as an attorney in fact for Safeco Insurance Company?

12 A I did not know Mr. Hudson and I am not  
13 able to answer that.

14 Q There is an affidavit at the back of them  
15 that indicates that he did. Do you know whether that --

16 A This is an old form.

17 MR. SOKOL: May I interrupt just for a  
18 second, Your Honor, maybe we can save a lot of time.  
19 Is there something -- we stipulated the bonds were in  
20 effect.

21 MR. JOHN HARRIS: No, I would like to read  
22 the sections that I have proposed and, if necessary, I will  
23 read the whole deposition.



1 THE COURT: All right, let's go ahead.

2 MR. JOHN HARRIS: (Reading the deposition)

3 Q We are talking about Holloway's Exhibits  
4 One, Two, Three and Four. Do you know whether Safeco's  
5 records reflect that these bonds are the same as what  
6 you have in your files?

7 A Yes, these are the same. The power of  
8 attorney is attached to the back of the bonds, which  
9 would give him the authority to execute the bonds.

10 Q So, to your knowledge, he did have authority;  
11 is that correct?

12 A Yes, the documents indicate. This is normal  
13 in the course of business to attach a power of attorney.

14 Q Do you know whether Safeco Insurance Company  
15 received premiums on the bonds represented by Holloway's  
16 Exhibits One through Four?

17 A I do not have personal knowledge that we  
18 received premiums.

19 Q Who would have personal knowledge?

20 A Our records would indicate, but I did not  
21 check our records in that regard.

22 MR. SOKOL: (Reading the deposition) If you  
23 want a stipulation as to that, we can prepare a stipulation,

1 and the records of Safeco will show what premiums we  
2 have received. I do not have that immediately available,  
3 but I do know that premiums were paid and received.

4 MR. JOHN HARRIS: (Reading the deposition)  
5 Premiums were paid and received on all four bonds?

6 MR. SOKOL: (Reading the deposition) I would  
7 have to check that out. I only ask the questions at one  
8 point if premiums were received and I got the answer, yes.  
9 If you want a clarification on that, we can get it.

10 MR. JOHN HARRIS: (Reading the deposition)

11 Q Mr. Holloway, Exhibit One refers to a plat  
12 made by Gilbert W. Clifford and Associates, dated  
13 September 1971, designated as Section A, representing the  
14 plat of the subdivision, that section of Crows Nest  
15 Harbour. Do you know whether Safeco has a copy of those  
16 plats, or is aware of what those plats contain or show?

17 A I personally did not see the plats. Our  
18 engineers may have obtained them.

19 Q Who were the engineers.

20 A At the time I employed Surety Consultants  
21 out of Atlanta.

22 Q Do you know where they obtained copies of the  
23 plats?

1           A       I would assume the County records, public  
2 records.

3           Q       Did Safeco, at the time the bonds were  
4 issued, request copies of the plats?

5           A       I asked our engineer to obtain them.

6           MR. SOKOL: We asked.

7           MR. JOHN HARRIS: We asked, excuse me,  
8 we asked our engineer to obtain them.

9           (Reading the deposition)

10          Q       Now, at the time the bonds were issued?

11          A       No, not that I know of. I was not involved  
12 at that point.

13          Q       Do you know who would know that answer?

14          A       Yes.

15          Q       Who would know that answer?

16          A       A guy by the name of Doug Sibert, S-i-b-e-r-t,  
17 or a division manager at that time was Gene Gosney,  
18 G-o-s-n-e-y.

19          Q       It is my understanding that Gene Gosney no  
20 longer works for Safeco; is that correct?

21          A       That is correct.

22          MR. SOKOL: Go on.

23          MR. JOHN HARRIS: (Reading the deposition.)

1 Q So, you would not know with respect to  
2 Exhibits Two, Three and Four whether the plats were  
3 described in the bonds -- whether copies of the plats  
4 described in the bonds were actually obtained by Safeco  
5 at the time the bonds were executed; is that correct?

6 A That is correct.

7 Q But, the gentleman you mentioned before  
8 would know the answer?

9 A He would know whether or not they acquired it.

10 Q Did Safeco generally require copies of the  
11 plats at the time bonds are issued?

12 A I don't know.

13 Q Who would know that answer?

14 A The same two people. They were in the  
15 Underwriting Department at the time.

16 Q What is your job with Safeco?

17 A At the moment?

18 Q At the moment.

19 A I am Surety Representative for the State of  
20 Georgia.

21 Q What does the Surety Representative do?

22 A Marketing and underwriting, all types of  
23 surety bonds.

1 Q What other positions have you held with  
2 Safeco?

3 A I started out as a claims adjustor for two  
4 years, and then I moved into surety claims for four years,  
5 and then in the first of 1978, I moved into underwriting,  
6 and I have been training since then.

7 Q What percentage of insurance does Safeco  
8 issue dealing with subdivision bonds --

9 MR. SOKOL: Your Honor, I object to that  
10 question.

11 MR. JOHN HARRIS: I don't believe that's  
12 relevant. I would suggest the next relevant section  
13 begins on page twelve at line two.

14 MR. SOKOL: All right, go ahead.

15 THE COURT: That is agreed; go on to page  
16 twelve, line two.

17 MR. JOHN HARRIS: (Reading the deposition)

18 Q Do you know of any reason why the bonds  
19 represented by Exhibits One through Four would not have  
20 been in effect at the time they were issued?

21 A No.

22 Q Do you know any reason why the bonds would  
23 not be in effect now?

1 A No.

2 Q The bonds covered the improvements for the  
3 roads, water and sewer connecting systems, not the  
4 plant or the water plant itself, drainage facilities;  
5 is that correct? Do you want to look at it and see what  
6 they cover?

7 A Construction of the streets and water and  
8 sewer lines therein, according to the plat.

9 Q To your knowledge, have those improvements in  
10 Sections A through D for Crows Nest Harbour been completed?

11 A No, they have not.

12 Q Do you know whether any work has been done  
13 on any of the improvements?

14 A That come under the bond?

15 Q Yes.

16 A No.

17 Q You don't know?

18 A I don't believe any work has been done.

19 Q Would the clearing of trees for the roads  
20 come under the bonds?

21 A I wouldn't think so -- part of them maybe.  
22 To my knowledge, when I first got involved in this  
23 matter, the clearing -- the entrance way to the project

1 was all completed before our bonds were issued. The  
2 clearing that is there now, that has been done. That  
3 work was done, was done before we issued our bonds.

4 Q So, you are saying that the clearing was  
5 done before the bonds were issued?

6 A That was my understanding.

7 Q What is the purpose of a subdivision bond?

8 A It is normally required by the County or  
9 municipal body to protect them against loss, I assume.

10 Q All right, but isn't it to assure that  
11 certain improvements are completed whether, in fact,  
12 they are started or now?

13 MR. SOKOL: (Reading the deposition) I think  
14 that you are asking for a legal opinion that he is not  
15 qualified to make. You are not a lawyer, are you,  
16 Mr. Holloway?

17 THE WITNESS: No.

18 MR. JOHN HARRIS: Would you want to skip to  
19 page fifteen, line ten?

20 THE COURT: Do you want to skip down to that,  
21 Mr. Sokol?

22 MR. SOKOL: I was just reading down through  
23 there, Judge. Line ten, all right, that's fine.

1 MR. JOHN HARRIS: (Reading the deposition)

2 Q What efforts has Safeco made to determine  
3 whether the work in Sections A, B, C and D of Crows  
4 Nest Harbour has either been commenced or completed?

5 A When we first received notice from the  
6 County that Crows Nest Harbour was in default, we  
7 immediately acknowledged that notice to the County's  
8 attorney. We provided the services of an engineering  
9 firm to review the project to determine the current  
10 status. We also employed legal counsel to assist us in  
11 the legal aspects of the problem.

12 Q Did you send anyone on site to make an  
13 inspection of the property?

14 A Yes.

15 Q Who did you send on site?

16 A Surety Consultants Firm.

17 Q Did they make a report to you?

18 A They made a brief written report, yes.

19 Q What did they report to you?

20 A It basically consisted of a breakdown on  
21 the cost to complete the improvements.

22 Q What was the cost to complete the improvements?

23 A I can't remember the specific amount, but it



1 was somewhere in the area of a million, six.

2 Q And, when was that estimate given?

3 A Seems like it was sometime in the fall of  
4 1977, '76, rather.

5 Q Now, a million, six was for the completion  
6 of the streets, the water and sewer lines, and the  
7 drainage facilities; is that correct?

8 A As best could be determined by our engineers.  
9 They did not have all of the plans. There were some  
10 pages missing from the plans and specs that we were able  
11 to obtain, so that in some areas, they had to give a  
12 general engineering estimate based on their knowledge.

13 Q Do you know what plans and specs were  
14 missing?

15 A I do not know what specific plans and specs  
16 were not obtained.

17 Q Do you have a copy of the report that Surety --  
18 or correction that -- what was the name of the engineering  
19 firm?

20 A Surety Consultants.

21 Q Surety Consultants gave you.

22 A Yes, we have one in our records.

23 Q Can we have a copy of it?

1 MR. SOKOL: (Reading the deposition) Surely.  
2 Didn't you receive a copy previously? I don't know that  
3 I have it. If I don't have it, I will write to Safeco  
4 to get it.

5 MR. JOHN HARRIS: (Reading the deposition)

6 Q What did Surety Consultants tell you had  
7 been completed?

8 A They said that some of the clearing was  
9 completed.

10 Q Anything else?

11 A No.

12 Q Did they indicate anything had been com-  
13 menced? Any of the improvements had been started?

14 A No.

15 Q Your further defense in your answer -- have  
16 you seen that?

17 A I don't believe I have. I haven't been  
18 handling this case but for about a year and a half now.

19 Q I think previously you had indicated that  
20 there had been consideration made for the bonds; is that  
21 correct?

22 A If our records so indicate.

23 MR. SOKOL: (Reading the deposition) Premium

1 was tendered and accepted.

2 MR. JOHN HARRIS: (Reading the deposition)  
3 Premium was tendered and accepted?

4 MR. SOKOL: (Reading the deposition) To the  
5 best of my knowledge as attorney. If there is any change  
6 in that, I will let you know but at the present time  
7 that is my best recollection.

8 MR. JOHN HARRIS: (Reading the deposition)

9 A I did not investigate to check and see  
10 whether or not we had received premiums.

11 Q Will you do that and so advise me?

12 A Yes.

13 MR. SOKOL: (Reading the deposition) I will do  
14 that.

15 MR. JOHN HARRIS: (Reading the deposition)

16 Q Now, it states your further defense is want  
17 and failure --

18 MR. SOKOL: Your Honor, now we're getting  
19 into legal differences.

20 MR. JOHN HARRIS: I suggest we skip to page  
21 twenty-four, commencing at line eleven.

22 MR. SOKOL: All right, go ahead.

23 THE COURT: Page twenty-four, line eleven.

1 MR. JOHN HARRIS: Yes, sir; this is an  
2 answer. (Reading the deposition)

3 A It was not brought to my attention that  
4 there was any problem with the plats.

5 Q Were there any problems with the bonds?

6 A Not to my knowledge.

7 Q Do you have any knowledge that there was any  
8 problem with the bonds?

9 A I don't understand the question.

10 Q Well, do you have any knowledge to why  
11 payment should not be made on the bonds?

12 A There are certainly defenses that we have  
13 raised.

14 Q Factual items that you know of, or somebody  
15 has told you of, any knowlege of any information -- for  
16 example, say the bond was not signed. That would be a  
17 factual matter that you could testify to. Do you know  
18 of any factual matters, other than what you have stated  
19 in your defenses, that would indicate to you that those  
20 bonds were not valid?

21 A To my knowledge, there is nothing improper  
22 about our bonds on their face.

23 Q Or the plats?

1           A       Or the plats.

2           Q       Who have you discussed the bonds or the  
3 plats with?

4           A       Only the people in my company and legal counsel.

5           Q       Who are the people in your company that you  
6 have discussed it with?

7           A       The person I was immediately reporting to is  
8 Mr. E. W. Dougherty, D-o-u-g-h-e-r-t-y.

9           Q       What is his position with the company?

10          A       At that time he was regional manager of  
11 surety claims for the Atlanta Division.

12          Q       What is he now?

13          A       He is now counsel with a law firm in Atlanta  
14 called Vangerpy, V-a-n-g-e-r-p-y, and Bovis, B-o-v-i-s.

15          Q       Who else did you discuss them with?

16          A       During the two years, or three years I  
17 handled this matter, I talked with Mr. Wayne Jensen.

18          Q       What is his position?

19          A       He is surety claims manager for Safeco Insur-  
20 ance Company for the entire country.

21               MR. JOHN HARRIS: With your permission I  
22 would like to skip ahead. I would suggest page thirty,  
23 line two.

1 THE COURT: Is that agreeable?

2 MR. SOKOL: Yes, sir.

3 MR. JOHN HARRIS: (Reading the deposition)

4 Q What investigation did you make?

5 A After we received the County's notice,  
6 we employed an engineering firm and legal counsel. The  
7 engineering firm reviewed the project. This is normal  
8 in my job at that time. The normal sequence is if you  
9 receive a notice of default or any notice from anyone as  
10 far as a claim is concerned under our bond, that you  
11 acknowledge the notice, you investigate the situation by  
12 reviewing all documents, reviewing the project --

13 Q What documents did you review?

14 A Any documents that I could obtain.

15 Q Did you review the bonds?

16 A Of course, that is the first document.

17 Q Did you find anything that would affect  
18 the validity of the bonds?

19 A I did not.

20 Q Did you review the plats?

21 A I did not personally review the plats.

22 MR. JOHN HARRIS: With your permission, again,  
23 I would suggest that we skip to page forty-three, line

1     eighteen.

2                   MR. SOKOL: I think you should go on to  
3     page thirty-one.

4                   MR. JOHN HARRIS: All right. (Reading the  
5     deposition)

6                   Q     Did you go on site where the project was and  
7     view the project?

8                   A     Yes, I did.

9                   Q     What did you find there?

10                  A     I found some area that was cleared near the  
11     entrance, and a few roadways, or looked what would be  
12     roadways, where some trees were cut down.

13                  Q     Was there any grading done?

14                  A     Not to my knowledge. You could see hills and  
15     valleys and things like that where trees were simply cut  
16     down.

17                  Q     Did you see any grading, actual work being  
18     performed?

19                  A     No, nothing was going on.

20                  Q     Did you see where it had been done?

21                  A     I saw where some, obviously some trees had  
22     been removed, but there was a lot of brush that had  
23     grown up.

1           Q       You saw no evidence of any type of  
2 grading whatsoever; is that right?

3           A       Only thing I remember is there is a two-  
4 lane pathway for a road, or where cars and trucks had  
5 gone back in there, I guess, but as far as being able to  
6 get off of that one --

7           Q       Describe what you saw. You said there was  
8 a path?

9           A       It looked like what I called a pig trail.

10          Q       Was it the beginnings of a road, or what?

11          A       It could have been. Obviously a car had  
12 been driven down there; and the grass was grown up  
13 between the two bare spots.

14          Q       Was there a ditch along the edge?

15          A       Not that I recall.

16          Q       You employed an engineer. What did the  
17 engineer report to you?

18          A       Originally they reported preliminary figures  
19 on the phone.

20          Q       What facts do you remember that they reported  
21 on the phone, and who did you talk to?

22          A       I talked to a person by the name of Buddy  
23 Duckett.



1 Q What did he tell you?

2 A He told me their preliminary projections  
3 were somewhere in the neighborhood of a million, six to  
4 get the improvements under the bond.

5 Q Did he give you a breakdown of that figure.

6 A He gave me a breakdown of each of the four  
7 bonds, and they totaled up to a million whatever it is.  
8 It is the same numbers in the report that you have a  
9 copy of.

10 Q So, anything else that you did in relation  
11 to reviewing the claims being made by the County?

12 A We had various discussions with the attorney  
13 representing the County, we had several meetings. We had  
14 a meeting with the County's Attorney, and I believe it  
15 is the County Commissioner. Is that what they call him  
16 here?

17 Q You are talking about County Administrator?

18 A Administrator, yes.

19 Q What were the purposes of these meetings?

20 A To further discuss the problem and get a  
21 better understanding.

22 Q Is this the report you received from Surety  
23 Consultants?

1           A       Yes. I notice here that Buddy Ducket's  
2 name is actually Clyde, C-l-y-d-e, Ducket.

3           MR. JOHN HARRIS: (Reading the deposition)  
4 I would like to put that in as an Exhibit, Holloway  
5 Number Five.

6                    Would you like to skip ahead, Bill?

7           MR. SOKOL: Where to?

8           MR. JOHN HARRIS: To page forty-three, line  
9 eighteen.

10           MR. SOKOL: All right.

11           MR. JOHN HARRIS: (Reading the deposition)

12           Q       Do you agree that the bonds in question are  
13 subdivision bonds?

14           A       Yes, they state on their face that they  
15 are subdivision bonds, and I have no reason to question  
16 that.

17           Q       What is a performance bond?

18           A       A performance bond --

19           MR. SOKOL: Your Honor, please, I'm going to  
20 object here on the ground they're asking for questions  
21 calling for legal interpretations of the bond from a  
22 nonlawyer witness.

23           THE COURT: Objection is overruled.

1 MR. JOHN HARRIS: I'll begin it again.

2 (Reading the deposition)

3 Q What is a performance bond?

4 A A performance bond? It is a form of  
5 financial guaranty.

6 Q What are you guarantying?

7 A Against financial loss.

8 Q Who generally requests performance bonds?

9 A An owner of a piece of land that wants some  
10 improvements under a contract.

11 Q Do generally public owners request performance  
12 bonds? I mean in local governments, state governments?

13 A Yes, and private. It guarantees a  
14 contract will be performed.

15 Q Who was to perform the work that was covered  
16 by the subdivision bonds?

17 A The developer was Crows Nest Harbour. I  
18 don't know who the actual contractor was they employed or  
19 were going to employ to complete the work. I have no  
20 knowledge of that.

21 Q Stafford County was not to do the work; is  
22 that correct?

23 A It is my understanding they were not.

1 Q Nor was Stafford County responsible for the  
2 completion of that work?

3 MR. SOKOL: Again I object that does require  
4 a legal interpretation as to who's responsible for the  
5 completion of the work.

6 MR. JOHN HARRIS: The witness answers the  
7 question down at the bottom, sir, line fifteen.

8 THE COURT: The objection is sustained.

9 MR. JOHN HARRIS: (Reading the deposition)

10 Q Who was responsible?

11 A Crows Nest Harbour, according to the  
12 plats that were on file with the County, and to the best  
13 of my knowledge.

14 Q What is a payment bond?

15 A A payment bond is issued to cover labor and  
16 material bills incurred in completing a project, proper  
17 claims.

18 Q So, if I understand you correctly, Safeco  
19 was guarantying to the County, by way of the subdivision  
20 bond, that Crows Nest Harbour would complete the work; is  
21 that correct?

22 A Yes, as originally planned and platted.

23 MR. JOHN HARRIS: We then get to a legal

1 matter and I have no wish to read any of the rest of this  
2 unless you would want for me to, sir.

3 MR. SOKOL: Rest of what?

4 MR. JOHN HARRIS: Rest of the deposition.

5 MR. SOKOL: Can I take a look at it. I can't  
6 look in one minute, Judge.

7 THE COURT: All right, gentlemen, if it  
8 will be satisfactory to you to permit Mr. Harris to  
9 read this deposition and reserving to you, Mr. Sokol,  
10 the right to read the rest of it if you care to.

11 MR. JOHN HARRIS: Yes, sir, that's satisfactory,  
12 sir.

13 MR. WILLIAM HARRIS: Your Honor, we'd call  
14 George Smerigan.

15 (The witness was sworn.)  
16 Thereupon,

17 GEORGE SMERIGAN,  
18 a witness, was called for examination by counsel for the  
19 plaintiff, and, having been duly sworn, was examined and  
20 testified as follows:

21 DIRECT EXAMINATION

22 BY MR. WILLIAM HARRIS:

23 Q Would you state your name and spell your name

1 for the court reporter.

2 A It's George Smerigan, S-m-e-r-i-g-a-n.

3 Q What is your current address?

4 A 8946 Elm Street, Kirkland, Ohio.

5 Q Were you a former employee of Stafford County?

6 A Yes, I was.

7 Q What position did you hold and how long did  
8 you hold it?

9 A I was the Community Development Director for  
10 the County from 1973 through '79, '80.

11 Q When did you leave the County?

12 A In April of this year.

13 Q Would you tell the jury in general terms  
14 what your duties were as Community Development Director?

15 A I was in charge of planning activities for  
16 the County, administration of the subdivision zoning  
17 regulations, supervision of the Building Inspection  
18 Department. I provided advice to the Planning Commission,  
19 the Board of Zoning Appeals and Board of Supervisors with  
20 regard to land development matters.

21 Q What is your educational background?

22 A I have a Master's Degree in city regional  
23 planning.

1 Q Mr. Smerigan, I show you Plaintiff's Exhibit  
2 Nine and ask you if you've ever seen that document before?

3 A Yes, I have.

4 Q I show you Plaintiff's Exhibit Eight; have  
5 you ever seen that document before?

6 A Yes.

7 Q I show you Plaintiff's Exhibit Number Seven;  
8 have you ever seen that document before?

9 A Yes, I have.

10 Q What are those documents?

11 A These are copies of the subdivision plats  
12 for Sections A through D of Crows Nest Harbour.

13 Q Were you involved in the approval of those  
14 plats?

15 A Indirectly I was. The plats were approved  
16 by the Board of Supervisors in 1971 which was prior to my  
17 time with the County. However, the final authorizations  
18 and signatures and posting of the bonds and the recording  
19 of these plats did not occur until 1973 when I was with the  
20 County so I participated in it in the very end.

21 Q Would you explain the approval procedure you  
22 went through with those plats, please, to the jury?

23 A It was a standard subdivision approval process.

1 The typical procedure with a subdivision plat, final sub-  
2 division plat, would be that it would be submitted to the  
3 Planning Commission who would review it and make a recom-  
4 mendation to the Board of Supervisors. The Supervisors  
5 would review it and either approve it or deny it. If they  
6 approved it, that was authorization for the County Admin-  
7 istrator to place his signature on the plat once the bond  
8 had been posted.

9 After the approval it required a signature  
10 at the time of a representative of the Health Department,  
11 the State Health Department, a representative from the  
12 State Highway Department, a chairman or secretary from  
13 the Planning Commission, and the chairman or the agent  
14 which was the County Administrator for the Board of  
15 Supervisors. All four of those signatures had to be on  
16 the plat prior to its being recorded.

17 Q What was the general procedure as to the  
18 order of approval?

19 A Typically what would happen is the Planning  
20 Commissioner and the Board of Supervisors would review the  
21 plats and approve them and then following that approval,  
22 it was necessary for the developer or his agent to obtain  
23 the signatures of each of those individuals, the Health



1 Department, the Highway Department and the two signatures  
2 from the County and the two signatures -- the signatures  
3 from the Health Department and the Highway Department are  
4 based on their technical review of the road plans, and the  
5 water and sewer plans, or wells and drain fields, if that  
6 was the case. And the County signatures were two things.  
7 They were to verify the posting of the bond and a verifica-  
8 tion of the Board's action in approving it.

9 Q Mr. Smerigan, I show you Plaintiff's Exhibits  
10 One through Four; have you seen those documents before?

11 MR. WILLIAM HARRIS: Your Honor, could I  
12 show the Exhibits to the jury?

13 THE COURT: Is that Seven, Eight and Nine?

14 MR. WILLIAM HARRIS: Yes, Your Honor.

15 THE COURT: Yes, they can go to the jury.

16 THE WITNESS: In answer to your question, yes,  
17 I have seen these before.

18 BY MR. WILLIAM HARRIS:

19 Q What are those documents?

20 A Those are the subdivision bonds that were  
21 posted for Sections A through D.

22 Q Would you look at this document and see if you've  
23 seen that before?

1 A Yes, many times.

2 Q What is that document?

3 A This was generalized development plan for  
4 the entire Crows Nest Harbour project. It showed the  
5 master water layout.

6 Q What does this show with respect to which  
7 sections this covers?

8 A Well, Sections A through G are actually  
9 designated on here although the entire Crows Nest Harbour  
10 is covered by the drawing.

11 Q Your previous testimony dealt with Sections A,  
12 B, C and D; is that correct?

13 A That's correct and all four of those sections  
14 are shown.

15 Q So your testimony to this point is limited to  
16 the Sections A through D?

17 MR. SOKOL: Wait a minute, Your Honor, he's  
18 identifying a master plan for the entire subdivision,  
19 I believe, right there.

20 MR. WILLIAM HARRIS: Your Honor, I'd like to  
21 tender this as an Exhibit. One further question.

22 BY MR. WILLIAM HARRIS:

23 Q Mr. Smerigan, where did you see this document?

1           A       It was on file in the Community Development  
2 Office.

3                   MR. WILLIAM HARRIS: Your Honor, I would like  
4 to tender this as an Exhibit.

5                   MR. SOKOL: So long as it's an Exhibit showing  
6 exactly what it shows, master plan for the entire sub-  
7 division.

8                   THE COURT: Do you have any objection to that  
9 coming in?

10                  MR. SOKOL: No, sir.

11                  THE COURT: It will be received as Plaintiff's  
12 Exhibit Twelve.

13                               (The document heretofore referred to  
14 was marked Plaintiff's Exhibit Twelve  
15 and was received in evidence.)

16                  BY MR. WILLIAM HARRIS:

17                  Q       Mr. Smerigan, will you look at Plaintiff's  
18 Exhibit Eleven.

19                  A       This is the master sewer plan on the Crows  
20 Nest project.

21                  THE COURT: Has that been received into  
22 evidence?

23                  MR. JOHN HARRIS: Yes, sir, it's tagged and

1 marked as Plaintiff's Exhibit Eleven.

2 MR. SOKOL: No objection.

3 BY MR. WILLIAM HARRIS:

4 Q Mr. Smerigan, both of these last two Exhibits,  
5 Eleven and Twelve, show more than Sections A, B, C and D  
6 and you've testified that Sections A through D had been  
7 approved; do you know whether any other sections were  
8 approved?

9 A No other sections were ever given final  
10 approval as far as being able to be recorded.

11 Q I show you this document and ask have you  
12 ever seen that document before?

13 A Yes, I have.

14 Q What does that document represent?

15 A These are the detailed road plans for the first  
16 four sections of Crows Nest Harbour, Sections A through D.  
17 They are the road profiles and the overall drainage plan  
18 in those four sections.

19 Q Where have you seen that before?

20 A These were on file in the Community Development  
21 Office.

22 MR. WILLIAM HARRIS: Your Honor, I tender them  
23 as an Exhibit.

1 MR. SOKOL: I have no objection.

2 THE COURT: The detailed road plan is received  
3 as Plaintiff's Exhibit Thirteen.

4 (The document heretofore referred to  
5 was marked Plaintiff's Exhibit Thirteen  
6 and received in evidence.)

7 BY MR. WILLIAM HARRIS:

8 Q Do you know when these -- when the Board of  
9 Supervisors approved the bonds?

10 A It was in October of 1973.

11 Q Do you know how many lots are within Sections  
12 A, B, C and D?

13 A As I recall, there are about three hundred  
14 and forty-six, I believe it was.

15 Q Do you know whether or not any of these lots  
16 have been sold?

17 A Yes, many of them had been sold.

18 Q Do you know how many had been sold?

19 A I -- as I recall, Crows Nest Harbour still  
20 holds title to thirty-three of the lots so all but thirty-  
21 three had been transferred in title.

22 Q Would you state whether or not any improvements  
23 called for under the subdivision bonds, and let me let you

1 look at those, would you take a moment and look at the  
2 subdivision bonds and tell me whether any of the improve-  
3 ments called for under the bonds have been completed?

4 A No, none of these have been completed.

5 Q Is there a requirement by Stafford County  
6 that bonds be posted?

7 A Yes, there is.

8 MR. WILLIAM HARRIS: Would you answer  
9 Mr. Sokol's questions, please.

10 CROSS EXAMINATION

11 BY MR. SOKOL:

12 Q When did you begin working for the County,  
13 Mr. Smerigan?

14 A It was either May or June of 1973.

15 Q And I take it by that time you became --  
16 one of the first tasks was to familiarize yourself with  
17 Crows Nest Harbour development; is that right?

18 A That was an initial task, yes.

19 Q Now, the Crows Nest Harbour development  
20 consisted in its entirety of something over four thousand  
21 acres; did it not?

22 A Yes, it did.

23 Q Did it include -- are you familiar with the

1 zoning that applied to that?

2 A Yes.

3 Q All right, what was the zoning that applied?

4 MR. WILLIAM HARRIS: Your Honor, I would  
5 object, there's no relevancy at all to the zoning of those  
6 four sections.

7 THE COURT: Objection overruled.

8 BY MR. SOKOL:

9 Q What zoning applied to the development known  
10 as Crows Nest Harbour?

11 A A portion of it was zoned R-1, which is a  
12 single family residential zone; there was a portion zoned  
13 R-2, which is a multi-family residential zoning, and  
14 some of it was zoned M-1 which was like industrial zoning,  
15 and there was a portion zoned for commercial use; I believe  
16 it was B-1.

17 Q All right, if we view the Crows Nest Harbour  
18 area then, would it be fair to say it was a high density  
19 area as it was zoned in '73?

20 A Portions of it were.

21 Q And that zoning had been adopted in 1971;  
22 is that right?

23 A That's correct.

1 Q Let's talk about water first of all. The  
2 residents of A, B, C and D were to have central water  
3 supply; right?

4 A That's correct.

5 Q State the obvious, if you will, what does  
6 central water supply mean?

7 A It meant that there would be a source that  
8 would provide water to each of the lots, that they would  
9 not have to rely on an individual system on each lot.

10 Q And what was the central source to be for  
11 the residents of Sections A, B, C and D?

12 A At the very earliest point it was -- there  
13 was discussion of an on-site well which would then serve  
14 the entire area. I don't mean wells individually on the  
15 lots but I mean a central well which would then be pumped  
16 through a line system to serve those lots. At a later  
17 point that was revised and there were arrangements made  
18 for them to connect to the County's existing water system  
19 and use County water.

20 Q That would mean in not only Sections A, B, C  
21 and D but the entire Crows Nest Harbour development would  
22 be the recipient of what we call County water; is that  
23 right?



1           A       That was the intention at the time; that's  
2 right.

3           Q       At the time; what do you mean, what time?

4           A       At the time they switched from using on-site  
5 wells to using the County water, the understanding was  
6 the County would provide water for the entire development.

7           Q       But the last understanding between Crows  
8 Nest Harbour and the County was that the County would  
9 provide water; is that correct?

10          A       That's correct.

11          Q       Now, where would the point of entry be from  
12 outside Crows Nest, the closest point in the County that  
13 Crows Nest could hook up some lines?

14          A       They were to connect to the main transmission  
15 line that's in the right of way up Route 1.

16          Q       How far away is that?

17                 MR. WILLIAM HARRIS: Your Honor, I would  
18 object to exceeding the scope of direct. If he wants to  
19 call him, I'm not going to release Mr. Smerigan, he can  
20 call him.

21                 THE COURT: Objection overruled.

22                 MR. WILLIAM HARRIS: Would you note my  
23 exception.

1 BY MR. SOKOL:

2 Q How far away would it be from the nearest  
3 point before this point of access that you see on the  
4 plans to the County connector?

5 A Several miles.

6 Q How many miles?

7 A I don't recall exactly. I know we figured it  
8 at one point but thinking back -- it would be easier if I  
9 had some kind of reference material, but I'd say probably  
10 somewhere close to five.

11 Q So in order for this plan to work, lines would  
12 have had to have been laid from Crows Nest Harbour to the  
13 County connector five miles away; right?

14 A That's correct.

15 Q Now, there would be -- was there a Highway  
16 Department right of way that they could have followed?

17 A Yes.

18 Q Would that have been more than five miles  
19 if you went the Highway Department way?

20 A I don't remember the exact distance. I know  
21 at the time that we discussed -- when I discussed with the  
22 Crows Nest Harbour people their alternatives for reaching  
23 water supply, we looked at the possibility of utilizing the

1 highway right of way as a means of getting there and we  
2 calculated the mileage but I don't remember the exact  
3 figure.

4 Q Do you know whether any approval had been  
5 obtained from the Highway Department for laying the water  
6 lines along the Highway Department right of way?

7 A I wasn't aware of any.

8 Q You're not aware of any approval; are you?

9 A No.

10 Q If there had been one -- how long has it been  
11 since you left the County?

12 A I left in April of this year.

13 Q This past April and when you left you were  
14 still connected with zoning?

15 A That's correct.

16 Q If there had been an agreement struck with  
17 the Highway Department for using their right of way,  
18 I take it that George Smerigan would have known about it?

19 A That's correct.

20 Q So is it fair to assume there was no agreement  
21 reached?

22 A Yes.

23 Q Now, if you didn't go the Highway Department

1 way, would you have to go across private property to  
2 fulfill this five miles of water line?

3 A. Yes.

4 Q. Would that require the acquisition of ease-  
5 ments?

6 MR. WILLIAM HARRIS: Your Honor, could I note  
7 a couple of objections as to relevancy? I don't know  
8 whether you want to have the jury excluded while I make  
9 the argument.

10 THE COURT: State your grounds of objection.

11 MR. WILLIAM HARRIS: It's relevancy and he's  
12 exceeding the scope, and also that it's a matter that the  
13 principal would not have as a defense and therefore the  
14 surety does not have that defense so all of this material  
15 is totally irrelevant.

16 THE COURT: Objection overruled.

17 MR. WILLIAM HARRIS: Note my exception.

18 BY MR. SOKOL:

19 Q. Well, would Crows Nest Harbour had to have  
20 required easements over private property over a distance of  
21 five miles if they hadn't gotten the Highway Department  
22 right of way or were to reach the Interceptor water line?

23 A. Yes.

1 Q Do you know if any such easements had ever  
2 been obtained for the laying of water lines between  
3 Crows Nest and the Interceptor line?

4 A To my knowledge, none were.

5 Q If those easements had been obtained, would  
6 George Smerigan have known about them by the time you left  
7 in 1979?

8 A Most probably.

9 Q So is it fair then to conclude that no easements  
10 were obtained because George Smerigan did not know about it?

11 A That's probably a fair assumption.

12 Q Now, I take it you have a substantial cost  
13 whether you went by way of the Highway Department right of  
14 way or private easements in actually laying the water line;  
15 correct?

16 A Yes.

17 Q That means the cost of the line, itself?

18 A Yes.

19 Q It means the cost of installation of the line?

20 A Correct.

21 Q Now, based on your review of the water lines,  
22 was any part of this improvement bonded by any of the four  
23 bonds posted by Safeco?

1           A       The bonds did not relate to any outside  
2 improvements.

3           Q       Any outside improvements whatsoever;  
4 correct?

5           A       That's correct.

6           Q       Now, let's go on to the master sewer plan  
7 of Crows Nest Harbour. If you look at that plan again  
8 with respect to the removal of sewage, how was sewage to  
9 be removed from Crows Nest Harbour?

10          A       There was to be a treatment plant, sanitary  
11 sewage treatment plant, constructed on the site so that  
12 all the sewage would be treated at that treatment plant.

13          Q       All right, is that location shown on this  
14 plat?

15          A       Yes, it is.

16          Q       Would you mark with this green pen the  
17 location of the sewage disposal facility and would you  
18 write in there, sewage facility?

19          A       It says it right on here.

20          Q       Would residents of Sections A, B, C and D  
21 have sewer lines that would eventually lead to this  
22 sewage treatment facility?

23          A       Yes.

1 Q Now, I take it, based on your experience --

2 MR. WILLIAM HARRIS: Could I have my  
3 objection as a continuing objection?

4 THE COURT: Your objection is noted as a  
5 continuing objection.

6 BY MR. SOKOL:

7 Q Now, what is a sewage treatment facility?

8 A I don't know if I understand exactly.

9 Q Give the jury some idea, this particular  
10 sewage treatment facility shown on this plat, what is it?

11 A It's a facility whose function is to take all  
12 sewage and process it so that the affluent or the end  
13 product is pure enough to be placed back into free-flowing  
14 streams.

15 Q Would it be fair to say that that is a  
16 substantial project by way of engineering?

17 A Yes.

18 Q Would it be fair to say that that is a very  
19 costly project by way of actually realizing and constructing  
20 it?

21 A Yes.

22 Q Was any work done on Crows Nest Harbour with  
23 respect to the installation of the sewage treatment

1 facility?

2 A There were plans that were drawn and submitted  
3 for review. To my knowledge, those plans were never  
4 approved by the State Health Department, State Water  
5 Control Board, who had the regulating responsibility  
6 with regard to sewage treatment plants.

7 Q So those plans would have been submitted  
8 sometime in the early '70's, '74, '73?

9 A Yes.

10 Q And those plans languished, did they not,  
11 with the State Departments?

12 A As I recall what happened at the time, the  
13 initial plans were drawn to meet the standards that  
14 existed at that time. Well, during the review process  
15 the plans for affluent release in that particular area  
16 requirements were raised by the Environmental Protection  
17 Agency so that the plans then had to require some redrafting  
18 in order to meet those new standards.

19 Q And those plans were never redrafted; were  
20 they, and submitted?

21 A I don't know whether or not they were redrafted.  
22 To my knowledge, revised drawings were not resubmitted.

23 Q Now, the sewage treatment facility, that sewage



1 treatment plant, isn't it an integral part of what we  
2 call central sewage, is it not?

3 A Yes.

4 Q I mean, without that kind of plant, you do  
5 not have central sewage based on these plans; correct?

6 A Well, eventually -- eventually the sewage  
7 has to be treated someplace.

8 Q And that's where it was going to be treated  
9 at Crows Nest Harbour; right, under the plan?

10 A The proposal under the plan was to treat it  
11 at that location.

12 Q Now, you have reviewed the four bonds; correct?

13 A Yes, I have.

14 Q Was the installation -- the cost of the  
15 installation of the sewage treatment facility a part of the  
16 bonded improvements under the four bonds posted by Safeco?

17 A No, it was not.

18 Q Should it have been, Mr. Smerigan?

19 MR. JOHN HARRIS: Objection, Your Honor, it  
20 calls for a conclusion by the witness which he may not be  
21 qualified to provide the answer.

22 THE COURT: Objection sustained.  
23

1 BY MR. SOKOL:

2 Q But the central water and the central sewer  
3 involved sewage lines, sewage and water lines; right,  
4 installation of sewage and water lines?

5 A A water distribution center and a sewage  
6 collection system.

7 Q Now, when you went to the subdivision  
8 Sections A, B, C and D, there was no work performed  
9 whatsoever in terms of laying water and sewer lines;  
10 was there?

11 A In terms of installing anything, no, there  
12 was nothing installed.

13 Q Now, let's talk about in the course of your  
14 duties, again reviewing this project, the matter of  
15 approach roads came up; did it not?

16 A Yes, it did.

17 Q You were involved with that aspect of it?

18 A Yes.

19 Q And those approach roads would service  
20 A, B, C and D and the rest of the subdivision; right?

21 A That's correct.

22 Q And were studies done to show the increase  
23 in traffic flow to the area by reason of the development?

1 MR. WILLIAM HARRIS: Your Honor, I think we're  
2 changing subjects, I would make the same objection and have  
3 it be a continuing objection. I would assume the Court  
4 would rule the same way. I do not see the approach roads  
5 as being relevant to the cost of the improvements in  
6 Sections A, B, C and D.

7 THE COURT: Objection is overruled.

8 MR. WILLIAM HARRIS: Would you note my  
9 exception.

10 MR. SOKOL: Strike the question.

11 BY MR. SOKOL:

12 Q In the course of your review of the development  
13 of A, B, C and D and the entire development known as Crows  
14 Nest, did the matter of the adequacy of approach roads  
15 come within your consideration?

16 A Yes, it did.

17 Q Would those approach roads have been 608 and  
18 609?

19 A Yes, among others.

20 Q Were studies conducted that you were aware of  
21 with respect to traffic volume into the subdivision as it  
22 developed?

23 A Traffic volume generated by the subdivision, yes.

1 Q And was the conclusion reached that the  
2 approach roads were not sufficient for that purpose?

3 A Yes, it was.

4 Q And was the conclusion reached that those  
5 approach roads would have to be upgraded?

6 A Yes, it was.

7 Q And what does upgraded mean?

8 A At that time it was felt that there would  
9 probably have to be some expansion of the roads, widening,  
10 to increase the potential carrying capacity of the road  
11 to handle the volume of traffic.

12 Q Was it necessary also to extend one of the  
13 roads?

14 A That may have been possible as well. We  
15 looked at several alternatives for providing better access  
16 and there were different alternatives and one of those  
17 alternatives, or more than one, may well have dealt with  
18 extending some.

19 Q How about the matter of whether or not, in  
20 your review of the bonds, whether the cost of upgrading  
21 the approach roads was a part of the bonded improvements  
22 covered by Safeco's bonds?

23 A No, the bonds did not cover any outside road

1 work at all.

2 Q At all?

3 A None at all.

4 Q Let's talk about the nature of the property,  
5 itself, Crows Nest Harbour, much of it is a marshland;  
6 right?

7 A Some of it is.

8 Q Wetland?

9 A Some of it wetland, yes.

10 Q And the area being wetland; does that require  
11 meeting certain standards when you go in and improve  
12 property there?

13 A Wetlands are basically --

14 MR. WILLIAM HARRIS: I would object, Your  
15 Honor, unless he shows that this question provided --  
16 what is the time period we're talking about?

17 THE COURT: Objection sustained.

18 MR. SOKOL: May I then go on to the matter of  
19 erosion control.

20 BY MR. SOKOL:

21 Q Did Stafford subsequently enact an Erosion  
22 Control Act?

23 A Yes, they did.

1 Q What is erosion control, Mr. Smerigan?

2 A Erosion is the loss of soil either through  
3 being carried by the water, or wind, as the result of the  
4 lack of vegetation or whatever, the whole setting place.

5 MR. WILLIAM HARRIS: Your Honor, I make the  
6 same objection. If he continues this line of questioning,  
7 I think he should show a time period we're talking about.

8 THE COURT: Get the time frame into it,  
9 Mr. Sokol.

10 MR. SOKOL: Let me move onto another area,  
11 maybe I can tie it in when I get into that, Your Honor.

12 BY MR. SOKOL:

13 Q Mr. Smerigan, when you walked onto the  
14 property sometime, or did you walk and inspect the  
15 property sometime late 1974?

16 A Yes, I did.

17 Q There had just been a little bit of clearing  
18 done by that time; right?

19 A Had been some clearing and some minimal  
20 grading.

21 Q But there had been no, not the first bit  
22 of any road construction, had there?

23 A Well, the clearing and the grading would be

1 initial work as far as road construction. You have to do  
2 that before you can do anything else.

3 Q But there hadn't been actually the installation  
4 of any roads per se?

5 A There had been no asphalt, or concrete or  
6 anything of that nature put down, no.

7 Q Now, when you first came to the County,  
8 Mr. Smerigan, did the matter of the consideration of rural  
9 County zoning come to your attention or shortly after you  
10 arrived here?

11 A Yes.

12 Q Did you study the matter of zoning in Stafford  
13 County?

14 A Yes.

15 Q I show you this document and I ask you to  
16 look at it and ask if you can identify it?

17 MR. WILLIAM HARRIS: Your Honor, I would  
18 object on the grounds of relevancy to this line of  
19 questioning. That document again is not relevant to the  
20 issue before us today.

21 THE COURT: I don't know what the document is,  
22 sir.

23 MR. SOKOL: It's a Comprehensive Development

1 Plan for the County, Your Honor, including Crows Nest  
2 Harbour, the area of Crows Nest Harbour.

3 THE COURT: The objection is overruled.

4 MR. WILLIAM HARRIS: Your Honor, could I  
5 state a little further my objection. That document  
6 according to the case law of Virginia is nothing more  
7 than a guideline. It is not a mandatory requirement on  
8 the County, it is purely a guideline and I would cite the  
9 case of Board of Supervisors versus Williams, 216 Virginia  
10 correction, 216 Southeast 2d at page 33 and page 46.  
11 This Board of Supervisors correctly maintains the  
12 Comprehensive Plan is not a zoning ordinance but is merely  
13 a guideline. This is merely a guideline. In addition,  
14 it occurs in 1975, almost two years after the bonds were  
15 approved, and four years after the zoning, the initial  
16 zoning, was approved. And the Code of Virginia requires  
17 that this Comprehensive Plan be updated regularly.

18 I see it as totally irrelevant to the issues  
19 in this case and I would object to testimony on it.

20 MR. SOKOL: If Your Honor please, Mr. Harris  
21 has introduced into evidence a letter that he wrote in  
22 1976, June of 1976, to Safeco Insurance Company and he  
23 asked Safeco to come in and pay some money for the



1 installation of the roads and the laying of water and sewer  
2 lines as a representative of Stafford County.

3 Now, one year earlier and even before that  
4 as Mr. Smerigan will testify I know, Mr. Smerigan put in  
5 untold hours in the formulation of a plan that bears  
6 directly on whether or not water and sewer lines can go  
7 into Crows Nest Harbour or into Sections A, B, C and D.  
8 This is not a sketch or a diagram, this is a work product  
9 of substantial significance.

10 And to ask a surety to come in and lay a  
11 water and sewer line and say this plan that the County,  
12 itself, has adopted is irrelevant, I can't understand that.

13 THE COURT: Mr. Sokol, are you saying that the  
14 did the County take action pursuant to that plan?

15 MR. SOKOL: It did later.

16 THE COURT: The objection is overruled.

17 MR. WILLIAM HARRIS: Can I cite one other  
18 case, Your Honor. The case is 202 Virginia 862, the cite  
19 I'm giving is 120 Southeast 2d at page 372, it's  
20 Pennsylvania State Shopping Plazas, Inc., versus Olive.  
21 This was a case dealing with zoning. The Food Fair Company  
22 argued in support that it was excused from performance  
23 under the contract of a lease because of the impossibility

1 of performance under the county zoning ordinances. The  
2 zoning had been changed, they came in and said, well, we  
3 can't comply with this contract because the zoning laws  
4 were changed. The Supreme Court stated at page 375,  
5 there is no merit in this contention.

6 I renew my objection, it is not relevant.  
7 A change in zoning is not relevant unless there is vested  
8 rights. There are no vested rights in this because the  
9 change occurred after the time of performance and a  
10 Comprehensive Plan is nothing more than a guideline, but  
11 the actual change in zoning occurred after the time of  
12 performance. So all of this is totally irrelevant and I  
13 renew my objections.

14 THE COURT: Objections overruled.

15 BY MR. SOKOL:

16 Q I show you this Comprehensive Plan,  
17 Mr. Smerigan, and ask you if you had anything to do  
18 with its formulation?

19 A Yes, I did.

20 Q Were you intimately involved in the formula-  
21 tion of that Comprehensive Plan?

22 A Yes, I was.

23 Q What did the Comprehensive Plan undertake to do,

1 Mr. Smerigan?

2 A To set forth a blueprint or a guide for the  
3 future growth and development of the County.

4 Q And what areas did it address itself insofar  
5 as the future development of the County?

6 A It covered the entire County -- you don't  
7 mean geographically?

8 Q I don't mean geographically, areas like soil  
9 suitability; was that one?

10 A We looked at every factor that we could  
11 reasonably conceive might have an impact on the use of  
12 land within the County and the provision of services  
13 and facilities for the people that would be living here.

14 Q And is the area known as Crows Nest Harbour  
15 shown on various maps that are dotted throughout this  
16 Comprehensive Plan?

17 A Yes, it is.

18 MR. SOKOL: Your Honor, I would like for this  
19 plan to be tendered on behalf of the defendant.

20 MR. WILLIAM HARRIS: I would object again for  
21 this same reason and ask the Court to note my exception.

22 THE COURT: The Comprehensive Plan is  
23 received as Defendant's Exhibit Four.

1 (The document heretofore marked  
2 Defendant's Exhibit Four was received  
3 in evidence.)

4 BY MR. SOKOL:

5 Q I believe, Mr. Smerigan, this plan was  
6 adopted by the Planning Commission in July of 1975; is  
7 that right?

8 MR. WILLIAM HARRIS: Your Honor, could I  
9 approach the Bench.

10 BENCH CONFERENCE

11 MR. WILLIAM HARRIS: Your Honor, by permitting  
12 Mr. Sokol to exceed direct you're putting me in a position  
13 where I cannot, possibly cannot call certain witnesses to  
14 rebut because this is my case in chief, and at the end of  
15 this, his testimony, and the others if you continue this  
16 practice, then I won't be able, possibly won't be able to  
17 call people in rebuttal and he won't need to call anybody  
18 because he's gotten it all out on my side of the case.

19 And I would ask the Court to reconsider if  
20 he's exceeding the scope and let him call them as witnesses  
21 and then I can rebut it.

22 THE COURT: No, I'm going to let him testify  
23 to everything that is relevant to the basic issues of this

1 case.

2 MR. WILLIAM HARRIS: Would you note my  
3 exception on the procedural aspect.

4 OPEN COURT

5 BY MR. SOKOL:

6 Q Was this plan adopted by the Planning Commis-  
7 sion in July, 1975?

8 A It was adopted by the Board of Supervisors  
9 in 1975.

10 Q I beg your pardon, Board of Supervisors in  
11 1975, summer of '75?

12 A Right.

13 Q I take it looking at the breadth of the plan,  
14 would it be fair to say, years in the making?

15 A There was some substantial amount of time  
16 spent on it, yes.

17 Q More than a year?

18 A Yes.

19 Q By George Smerigan?

20 A Yeah.

21 Q Mr. Smerigan, I call your attention, with  
22 Your Honor's indulgence, to the section shown under public  
23 utilities, you have a certain narrative there on public

1 utilities; do you not?

2 A Yes.

3 Q Did you draft this narrative by any chance?

4 A There were a number of people who worked on  
5 this. As to which specific items I may have had authorship  
6 of, I don't really recall.

7 MR. SOKOL: Your Honor, can I take this over  
8 to the jury and have them -- it's the only way I can depict  
9 what is shown here.

10 THE COURT: Yes, you may.

11 MR. JOHN HARRIS: What are you referring to?

12 MR. SOKOL: Pages 106 to 107.

13 BY MR. SOKOL:

14 Q Now, Mr. Smerigan, we see two areas on this  
15 map under Sanitary District and growth areas that are  
16 shaded in light orange; is that right?

17 A Right.

18 Q What does the shading in light orange mean?

19 A Those were the designated growth areas. The  
20 plan was based on a growth area concept, that there were  
21 certain areas that were most suited to intensive, urban  
22 type use and those were referred to as growth areas, and  
23 those are the approximate boundaries of those growth areas.

1 Q I ask you to point where Crows Nest Harbour  
2 Subdivision is located.

3 A It would be located in this area out here  
4 (indicating).

5 Q That's not covered at all; is it?

6 A No, it was not considered part of the higher  
7 growth area.

8 Q So would it be fair to say that within the  
9 Comprehensive Plan Crows Nest Harbour was outside the  
10 designated growth area?

11 A Yes.

12 Q It was not in the designated growth area?

13 A That's correct.

14 Q Now, I want you to read, Public Utilities,  
15 Number Two; what does that say?

16 A Two says that water and sewer service should be  
17 extended only within the designated urban growth areas.

18 Q Does it mean then through simple reasoning  
19 that, according to the Comprehensive Plan, water and sewer  
20 service should not be extended to Crows Nest Harbour?

21 A Let me explain that like this, in the reference  
22 there was referring to the County or the Sanitary District's  
23 extension of facilities, the idea being that they should not

1 extend their facilities beyond the boundary lines of the  
2 growth area. At the time that the basic work on that  
3 document was done, the agreements with Crows Nest Harbour  
4 for the construction of the sewage treatment plant and the  
5 connection of the water line already existed, I think,  
6 taking that as a given -- what that statement is saying  
7 is that the boundaries of the growth areas should not be  
8 violated with extension of utilities.

9 Q We know there is no sewage treatment plant  
10 at Crows Nest Harbour; right?

11 A That's correct.

12 Q Today, would you run central water based on  
13 this plan to Crows Nest Harbour from County facilities?

14 MR. JOHN HARRIS: Objection as to relevancy  
15 as to what would be done today. We're talking about the  
16 breach of contract back in 1975.

17 THE COURT: I think both times are relevant.  
18 You can ask him about that time in 1975 and about the time  
19 coming down to today.

20 BY MR. SOKOL:

21 Q I'd like to ask you today, Mr. Smerigan,  
22 based on this Comprehensive Plan and knowing what you know  
23 right now, there is nothing at Crows Nest Harbour; right?



1 A That's correct.

2 Q Sections A, B, C and D or otherwise; okay?

3 A Yes.

4 Q There are no water lines and no sewer lines;  
5 right?

6 A That's correct.

7 Q I'm asking you now as a planner and as one who  
8 was an author of this plan, you would not run -- you would  
9 not provide the County's water to Crows Nest Harbour,  
10 the area that is not shown as a designated growth area;  
11 isn't that correct?

12 A Let me ask one other question so I can answer,  
13 what are we considering the status of the approvals that  
14 were granted there in terms of plats, etcetera?

15 Q Let me ask you, the plats, you bring that up,  
16 I'll go into it. You mentioned that the plats were subject  
17 to the State Health Department approval; correct?

18 A That's true.

19 Q I am going to show you the plats for A, B, C  
20 and D, Mr. Smerigan, and I ask you if the name, Hibbon,  
21 means anything to you?

22 A Yes, it does.

23 Q Who was Dr. Hibbon?

1 A He was the Regional Health Director.

2 Q All right, and would he have had authority  
3 to execute plats for the Health Department?

4 A Yes, he would have.

5 Q And did he execute each of these plats for  
6 the Health Department?

7 A Yes, he did.

8 Q Now, each of the plats if you will look at  
9 them contains under his signature an asterisk for the  
10 State Health Department; right?

11 A That's correct.

12 Q And it says, see note, number six; correct?

13 A That's correct.

14 Q Now, I ask you does that note, number six,  
15 appear on each of the four plats?

16 A My recollection is that it did, I only have  
17 two of them here.

18 Q And what does that note say?

19 A It says that he is approving it with the  
20 understanding that it's to be served by public water and  
21 sewer.

22 Q So his execution of these plats for the  
23 State Health Department is conditioned upon public water and

1 public sewer going to Crows Nest Harbour and, specifically,  
2 also Sections A, B, C and D; correct?

3 A That's correct.

4 Q Does that change your answer in any way to  
5 the question I put to it?

6 A I don't think I've answered it yet.

7 Q The State Health Department has told you  
8 they're not approving the plats; okay?

9 A Well, the -- from a planning standpoint  
10 I would not at this time recommend the extension of  
11 utilities from our existing systems to this area.

12 Q That means you would not recommend servicing  
13 with County water to Crows Nest Harbour, A, B, C and D;  
14 correct?

15 A If we're taking, as an understanding here,  
16 that there is no development out there, we're taking into  
17 consideration the current zoning classification and the  
18 current boundaries of the existing Sanitary District, it  
19 would be my recommendation to that effect, yes.

20 Q That recommendation would be with respect  
21 to providing water; right?

22 A Either water or sewer.

23 Q Either water or sewer; right?

1 A Correct.

2 Q With that recommendation in mind -- I  
3 withdraw the question.

4 Now, did this Comprehensive Plan become the  
5 basis for the enactment of a zoning ordinance by the Board  
6 of Supervisors, Mr. Smerigan?

7 A Yes.

8 Q Forget the little handwriting scratches, that's  
9 mine on there, and I ask you if you recognize that document?

10 A Yes, I do.

11 Q What is that document?

12 A A copy of the Zoning Ordinances of Stafford  
13 County.

14 Q Was this Zoning Ordinance adopted on June 20,  
15 1978?

16 A That's my recollection, right.

17 MR. SOKOL: I would like to tender this; it  
18 was previously tendered for identification.

19 MR. WILLIAM HARRIS: I'd object, Your Honor,  
20 on grounds of relevancy and I'd also object that it's  
21 incomplete without the zoning map that goes with the  
22 ordinance, and I think that was around here. So I think  
23 if you're going to admit it, we should have the --

1 MR. SOKOL: I have no objection to the zoning  
2 map coming in with it, Mr. Harris. If you can find it, you  
3 can put it in any time you like. I introduce it for the  
4 purpose of the text, Your Honor.

5 MR. WILLIAM HARRIS: I would object on the  
6 grounds of relevancy and again as exceeding the scope of  
7 direct and have that as a continuing objection.

8 THE COURT: This ordinance is received as  
9 Defendant's Exhibit Five.

10 (The document heretofore marked  
11 Defendant's Exhibit Five was received  
12 in evidence.)

13 BY MR. SOKOL:

14 Q Mr. Smerigan --

15 MR. WILLIAM HARRIS: Your Honor, I think this  
16 should be made a part of that Exhibit if you want to admit  
17 it.

18 THE COURT: Have you seen this, Mr. Sokol?

19 MR. SOKOL: That's fine, Your Honor.

20 MR. WILLIAM HARRIS: Could I ask Mr. Smerigan  
21 a question concerning this, concerning the identification of  
22 it?

23 Mr. Smerigan, would you look at that and tell

1 me if that's the zoning map that goes with the ordinance  
2 the Court has marked as Defendant's Exhibit Five?

3 THE WITNESS: Yes.

4 MR. WILLIAM HARRIS: Will the record show  
5 that the zoning map is made part of Exhibit Five.

6 BY MR. SOKOL:

7 Q Mr. Smerigan, do you recall in June of 1978  
8 appearing before the Board of Supervisors of Stafford County  
9 and recommending the adoption of the Zoning Ordinance and,  
10 indeed, was adopted by the County?

11 A Yes, I do.

12 Q And did you appear as a proponent or an  
13 advocate for the adoption of that ordinance?

14 A I guess you could say that.

15 Q Were there changes made in zoning with respect  
16 the Crows Nest Harbour property?

17 A As part of that new ordinance?

18 Q Yes.

19 A Yes, there were.

20 Q What were the changes that were made in the  
21 R-1, R-2 and C-1, previous zoning permitted in 1971?

22 A The old ordinance didn't have the C, there  
23 was a B-1.

1 Q B-1, I beg your pardon.

2 A The 1978 ordinance had a category known as  
3 A-2, rural residential, and the bulk of the Crows Nest  
4 property was placed in that zoning category.

5 THE COURT: What was that zoning?

6 THE WITNESS: A-2.

7 BY MR. SOKOL:

8 Q I call your attention to the Zoning Ordinance,  
9 itself, under A-2 and I ask that you read the purpose and  
10 intent of A-2 zoning; that's June, '78 zoning.

11 A It says, this district is intended for  
12 application in areas which are rural and/or have difficult  
13 terrain so that the character of such area is protected  
14 and premature urbanization is prevented; however, such  
15 districts may also include areas potentially suitable for  
16 development in higher densities but where location and  
17 timing of public utilities will not support such high density  
18 areas.

19 Q And you believe that this purpose and intent  
20 that you just recited, obviously, was applicable to Crows  
21 Nest Harbour?

22 A That's correct.

23 Q Including Sections A, B, C and D; correct?

1 A That's correct.

2 Q When you appeared, did you state to the Board  
3 of Supervisors that the down zoning of Crows Nest Harbour  
4 was defensible on the theory that the property was not  
5 presently developable because it lacked central water?

6 A I may have said that, I don't recall my  
7 specific words at that meeting.

8 Q But that's consistent with what you would  
9 have said?

10 A Yeah, it sounds reasonable.

11 Q I want to know the other reasons that you  
12 recommended the other properties of this Crows Nest  
13 Harbour be down zoned; a lack of central water was not  
14 the only reason, was it, Mr. Smerigan?

15 A No.

16 Q There were many other reasons; were there not?

17 A That's right.

18 Q I want you to tell the jury what the other  
19 reasons were that led you to make this recommendation?

20 A We thought that that property was more con-  
21 sistent with the nature and intent of the A-2 zoning than  
22 it was with the higher density zoning categories that  
23 were listed for the property under the old zoning



1 classification, in terms of the terrain on the site, in  
2 terms of the lack of adequate facilities at that point in  
3 time, in terms of the accessibility problems for that area,  
4 and several other minor reasons we felt that the most  
5 appropriate current zoning for the property would be  
6 a low density residential type of use.

7 Q Does it follow therefore that the 1971 zoning  
8 of R-1, R-2 and B-2 was not consistent with this Compre-  
9 hensive Plan and the reasons and purposes behind the down  
10 zoning of Crows Nest and A, B, C and D; is that correct?

11 A Well, the '71 zoning was not consistent with  
12 the '78 zoning, yes.

13 Q Now, there came a time thereafter, if you know,  
14 that Diversified Mortgage Investors filed a suit against  
15 Stafford County based on the zoning change; are you  
16 familiar with that?

17 A Yes, I am.

18 Q Did you see the papers that were filed by  
19 Diversified Mortgage Investors and served on Stafford County?

20 A Yes, I did.

21 Q I show you a copy of this Bill of Complaint --

22 MR. JOHN HARRIS: Objection as to relevancy,  
23 Your Honor, and further objection that some portions of it

1 although they are a Court record some portions may be  
2 relevant; other portions may not. The portions which are  
3 not relevant should be excised.

4 THE COURT: I think I'm going to have to  
5 look at the papers, Mr. Sokol, and see what the issues  
6 raised were; then I'll rule.

7 The objection is overruled.

8 BY MR. SOKOL:

9 Q I ask you to look at this Bill of Complaint  
10 of Diversified Mortgage Investors consisting of four  
11 pages and ask you if you've ever seen that before?

12 A Yes.

13 Q In your capacity as an official of Stafford  
14 County, were you asked to comment on it and to assist with  
15 Mr. Harris in preparations for this suit in answering this  
16 Bill of Complaint?

17 A Yes, I was.

18 MR. SOKOL: I'd like to introduce, Your Honor,  
19 the Bill of Complaint. We'll keep this together and go on  
20 to some more questions.

21 BY MR. SOKOL:

22 Q Now with respect to response of Stafford County  
23 called an Answer, I ask if you've ever seen this four-page

1 Answer of Stafford County in the same suit? You'll notice  
2 the style at the top of the suit?

3 A Yes, I've seen it.

4 Q Do you recognize that as the Answer of  
5 Stafford County that you helped participate in?

6 A Yes, I believe so.

7 MR. SOKOL: Your Honor, I'd like to tender  
8 the pleadings in this suit, Diversified Mortgage  
9 Investors versus Board of Supervisors, as the next  
10 Exhibit, Your Honor.

11 THE COURT: Do you want to be heard on that?

12 MR. JOHN HARRIS: Your Honor, we do not object  
13 if it is being admitted as an evidentiary admission,  
14 and this was discussed prior as you will recall. We will  
15 call upon the Court to make a similar ruling at a later  
16 time again regarding in one case we'll be asking for a  
17 rule on the judicial admission and at a later time we'll  
18 be asking for a rule on another evidential admission.  
19 We would ask for a consistency and at this time we do not  
20 have an objection. I stand corrected.

21 MR. WILLIAM HARRIS: We would object to the  
22 admission of this --

23 MR. JOHN HARRIS: Yes, sir, he is senior

1 counsel.

2 MR. WILLIAM HARRIS: We object to the  
3 . admissibility of those documents.

4 THE COURT: What grounds?

5 MR. WILLIAM HARRIS: Relevancy. There are  
6 many portions of that document that should be excluded.  
7 It's totally irrelevant and it should be condensed down  
8 to the portion that Mr. Sokol desires at the very  
9 minimum although I think the whole thing is irrelevant  
10 and on those grounds I would object.

11 THE COURT: Gentlemen, there is no way that  
12 I can edit these documents at this point and no way that  
13 I ought to at any point, and I think they do contain  
14 material that is relevant. So this package of documents  
15 is received as Defendant's Exhibit Twenty.

16 (The documents heretofore marked  
17 Defendant's Exhibit Twenty were  
18 received in evidence.)

19 BY MR. SOKOL:

20 Q Mr. Smerigan, I'd like to just ask for some  
21 response from you with respect to several of the matters  
22 contained in this Answer. Paragraph Seventeen, are you  
23 familiar with this Answer that the sewage treatment plant

1 with reference to Crows Nest Harbour will not be con-  
2 structed and Stafford County is not obligated to construct  
3 same; are you familiar with that?

4 A Yes.

5 Q Is that consistent with the information  
6 shared between Mr. Harris and yourself in drafting this  
7 Answer?

8 A Yes, it is.

9 Q Next Paragraph, Number Eighteen, at the  
10 present time or in the immediate future -- present time  
11 being January 25, 1979 -- or in the immediate future  
12 Stafford County has no plans to extend sewer service  
13 into the Crows Nest Harbour area; is that the Answer  
14 that you and Mr. Harris, as well as others, put together  
15 for Stafford County; is that correct?

16 A That's the Answer that's there so I assume  
17 it's the Answer we put together.

18 Q Number Twenty, talking about Crows Nest  
19 again, that since the property was initially zoned in  
20 '71 a traffic study was done which indicated the adverse  
21 impact the development would have on the roads serving  
22 Crows Nest Harbour tract; is that correct?

23 A Yes.

1 Q And if you down zone the property, I take it  
2 that one of the reasons for down zoning it would be to  
3 avoid the adverse impact of increased traffic; is that  
4 correct?

5 A Obviously by controlling density, we control  
6 traffic flow.

7 Q That's one of the purposes; right?

8 A That's correct.

9 Q Now, the Declarative Statement Number Twenty-  
10 one, that the Crows Nest Harbour property was improperly  
11 zoned in 1971; was that your opinion at the time this  
12 Answer was filed?

13 A Yes.

14 Q Number Twenty-two, the considerations for  
15 appropriate zoning have changed since 1971; is that  
16 correct?

17 A Yes.

18 Q Now, apart from all the adverse impacts on  
19 this property that the previous zoning had regarding  
20 roads that you testified to, water and sewer that you  
21 testified to, I'd like to call your attention just to a  
22 few others that you mentioned in a deposition at a  
23 previous time. The state-wide requirements for erosion

1 and sedimentation control prohibiting certain construction  
2 activity which would be necessitated by such a develop-  
3 ment; do you recall making that statement?

4 A Yes, I do.

5 Q And can you tell the jury what that means?

6 A The County has currently a Soil Erosion  
7 Sedimentation Control Ordinance.

8 Q I show this to you; is this the  
9 ordinance?

10 A Yes, it is.

11 MR. SOKOL: I would ask that this be  
12 admitted as the Defendant's next Exhibit.

13 MR. WILLIAM HARRIS: Could we approach the  
14 Bench, Your Honor.

15 BENCH CONFERENCE

16 MR. WILLIAM HARRIS: Your Honor, this is not  
17 one of the Exhibits that Mr. Sokol advised me that he was  
18 going to tender. I would object to it on that basis.  
19 I was not aware he was going to raise this point at this  
20 time. I also think it's totally irrelevant, immaterial  
21 to the case before us. I would like the right, if the  
22 Court decides it's relevant, to ask Mr. Smerigan a couple  
23 of questions concerning it but I would object to it being

1 immaterial and not a document that Mr. Sokol advised me  
2 he was going to ask to be admitted.

3 MR. SOKOL: Just let me say, I didn't hear  
4 it, I think it's pertinent in that this witness has just  
5 identified for the first time the fact that this ordinance  
6 applied to the part of his thinking in recommending the  
7 change in zoning and, in order to comply with the ordinance,  
8 that this property would not be amenable to the kind of  
9 improvements and construction that the high density  
10 would necessitate.

11 THE COURT: I'm going to sustain the  
12 objection.

13 MR. SOKOL: But may I ask another question  
14 regarding that?

15 THE COURT: You can ask him what he con-  
16 sidered in making his recommendation.

17 MR. WILLIAM HARRIS: Your Honor, could I  
18 make an objection as to that, to the last ruling. I would  
19 like to explain my objection to the Court in permitting  
20 cross examination on this. First I view it as being  
21 Mr. Sokol's witness because he's exceeded the scope of  
22 direct; second, this again in my opinion ties into the  
23 question of the rezoning, which I say is irrelevant as to



1 Sections A, B, C and D. It may be relevant as to  
2 something concerning the remainder of the property but  
3 Sections A, B, C and D, as far as to --

4 THE COURT: Why is that irrelevant?

5 MR. WILLIAM HARRIS: It's irrelevant because  
6 the zoning does not affect the use of those lots, we  
7 cannot vacate those plats, the zoning does not change the  
8 subdivision of those lots. They stay the same regardless  
9 of the zoning. The only change in the zoning that  
10 occurs that affects those lots is the fact that by  
11 rezoning --

12 THE COURT: Let me give the jury a break.  
13 All right, now, Mr. Harris, state why in your opinion  
14 the zoning change is irrelevant.

15 MR. WILLIAM HARRIS: The zoning change is  
16 irrelevant, Your Honor, because once these lots are  
17 subdivided the County cannot, in effect, prevent them  
18 from using that lot because of the zoning. The use may  
19 change but the zoning change --

20 THE COURT: What do you mean, the use might  
21 change?

22 MR. WILLIAM HARRIS: Level of density in A, B,  
23 C and D. The only change, and I think the Court can take

1 judicial notice of the ordinance and I can question  
2 Mr. Smerigan, and the only change that affects those  
3 lots that it goes from R-1 to A-2. What that means as  
4 far as those lots are concerned is that you can use well  
5 and septic systems in an A-2 zoning but you cannot under  
6 a R-1 zoning. So that is the only affect that this  
7 rezoning has on these lots so any change in zoning  
8 does not affect whether --

9 THE COURT: You say you can use well and  
10 septic systems in the A-2 zoning; do you have any lots  
11 with those requirements?

12 MR. WILLIAM HARRIS: Yes, sir, and all these  
13 lots read those requirements and we have the plats in  
14 evidence.

15 THE COURT: Suppose the lots won't perk?

16 MR. WILLIAM HARRIS: That is a potential  
17 problem.

18 THE COURT: Wasn't there evidence somewhere  
19 here that these lots would not support septic systems?

20 MR. WILLIAM HARRIS: I don't think there's  
21 any evidence so far, Your Honor.

22 THE COURT: I've heard somewhere today; I  
23 don't think I imagined it.

1 MR. WILLIAM HARRIS: I think you heard it  
2 when we were discussing some of the Exhibits that  
3 Mr. Vandevender testified. that the lots would not perk.  
4 It's my understanding those Exhibits are not in at this  
5 point. The zoning has nothing to do with A, B, C and D.  
6 It may have something to do with the remainder of the  
7 Crows Nest property but we're here today to address  
8 Sections A, B, C and D, and I would ask the Court to  
9 restrict the testimony and evidence to Sections A, B, C  
10 and D and not the entire project because that clouds the  
11 issues. Once the people have the plats approved, the  
12 County cannot vacate those plats by its wishes.

13 THE COURT: Is central water and sewer  
14 permissible under A-2?

15 MR. WILLIAM HARRIS: No, Your Honor, central  
16 water is not permitted under A-2.

17 THE COURT: Central water and sewer?

18 MR. WILLIAM HARRIS: That's correct.

19 THE COURT: How can they build the central  
20 water and sewer lines if they're not permitted?

21 MR. WILLIAM HARRIS: At this point, Your  
22 Honor, we're trying to solve the problem --

23 THE COURT: At this point we're trying the

1 case, Mr. Harris.

2 MR. WILLIAM HARRIS: The County's position,  
3 I think the Court understands, that we want to recover  
4 the money to build the roads. The County is in the  
5 position that if it can come up with a plan for the  
6 central water and sewer, it could rezone Sections A, B, C  
7 and D to permit this. The reason it was rezoned to A-2  
8 was to permit those lots that would perk to use well and  
9 septic. And any other effect of the zoning is totally  
10 irrelevant and I would ask the Court to restrict the  
11 evidence to Sections A, B, C and D.

12 What's happening in the remainder of the  
13 Crows Nest property is totally irrelevant as to Sections  
14 A, B, C and D.

15 THE COURT: I think the rezoning of A, B, C  
16 and D is relevant.

17 MR. WILLIAM HARRIS: How about the remainder?

18 THE COURT: We're only talking about A, B,  
19 C and D, I believe. I've ruled before in this trial  
20 that that was relevant and from what you've told me in  
21 this argument, it reinforces that opinion on my part,  
22 Mr. Harris.

23 MR. WILLIAM HARRIS: I think it is relevant

1 as to A, B, C and D but I have the impression that we're  
2 going beyond Sections A, B, C and D.

3 MR. SOKOL: Your Honor, we're talking about  
4 not only water and sewer but we're also talking about  
5 roads in A, B, C and D, and I took Mr. Smerigan's deposi-  
6 tion sometime last year, and we were talking about the  
7 down zoning of the property and the concerns he had,  
8 not only with the rest of the subdivision, but also A, B,  
9 C and D insofar as the steep slopes on the property  
10 and erosion sedimentation laws, and how all that impacted  
11 on the entire subdivision, on A, B, C and D, and eventually  
12 on all the zoning changes in that area, including A, B, C  
13 and D.

14 THE COURT: How does the zoning from R-1 and  
15 R-2 to A-2 have a bearing on the erosion?

16 MR. SOKOL: Well, it has bearing this way,  
17 Your Honor, they want to put the roads in there -- if they  
18 ever want to put the roads in there, they've got to put  
19 the roads in in a way that won't violate the Erosion  
20 Sedimentation Control laws. I think Mr. Smerigan is  
21 worried about that and concerned about it that they will  
22 violate those laws. Now, maybe that's not zoning per se  
23 but that has something to do with permitting a high density

1 area and I think he can answer that question. He answered  
2 it right here in his deposition.

3 MR. WILLIAM HARRIS: Your Honor, in addition  
4 I think what we're talking about ties into the question  
5 of what defenses does the surety have. Does the surety  
6 have the defense that maybe there would be problems  
7 with the Erosion Control Ordinance; would the principal  
8 have that defense?

9 MR. SOKOL: Let's get past that, Your Honor,  
10 the surety is not bound by --

11 THE COURT: Let him finish.

12 MR. WILLIAM HARRIS: The principal has  
13 certain defenses and those defenses are available to  
14 Safeco as the surety but the principal does not have  
15 the defense of I haven't complied with an ordinance  
16 because it would have to comply. What Mr. Sokol is  
17 saying is Safeco, because there may be a problem with  
18 complying with an ordinance that makes it difficult to do  
19 what is required in that, Safeco, who assumed the risk,  
20 who was compensated for the risk, says, in a sense,  
21 financial or difficulty is an excuse to me when it would  
22 not be an excuse to the principal.

23 And I would like to cite to the Court the case

1 of Cohen versus Mayflower.

2 THE COURT: Mr. Harris, let's cut through  
3 that, I know what you're saying, but I think in this  
4 case we're talking not only about what was not done in  
5 1975 and 1976 but we're talking about what can be done  
6 and will be done today in the near future and I think the  
7 feasibility of this project is relevant to the liability  
8 of Safeco under these bonds because they are indemnifying  
9 bonds and I think that's relevant and I'll let it in.

10 MR. WILLIAM HARRIS: I would like to cite  
11 to the Court one more case, Your Honor.

12 THE COURT: Mr. Harris, I've ruled, I don't  
13 see any need for you to cite the case into the record.

14 MR. WILLIAM HARRIS: I'd like with the  
15 Court's permission, I would like to further argue the  
16 point.

17 THE COURT: No, I've heard you on it and  
18 I've made a decision. Sheriff, bring the jury back.

19 (The jury returned to the courtroom and  
20 resumed their place in the jury box.)

21 OPEN COURT

22 BY MR. SOKOL:

23 Q Mr. Smerigan, among the concerns and

1 considerations you had by way of the down zoning was  
2 the matter of whether this Crows Nest is an environmentally  
3 sensitive marsh area or a wetland area; is that right?

4 A That's correct.

5 Q Would you tell the jury what consideration  
6 that you took into account with respect to the wetland  
7 area of Crows Nest Harbour?

8 MR. WILLIAM HARRIS: Your Honor, again it  
9 seems to me we're changing subjects again and I would  
10 object to testimony concerning the wetland situation.  
11 Again, it's irrelevant to Sections A, B, C and D.

12 THE COURT: Lay a foundation, Mr. Sokol,  
13 and show the wetlands are involved with A, B, C and D.

14 BY MR. SOKOL:

15 Q Were the wetlands involved in Sections A, B,  
16 C and D?

17 A I don't specifically recall that they were  
18 actually designated wetlands in A, B, C and D. They may  
19 have been fastlands in A, B, C and D.

20 Q What's fastlands?

21 A That's an area that immediately leads into  
22 wetlands and is somewhat of some concern environmentally  
23 as well.



1 Q With respect to A, B, C and D, were you  
2 concerned that it was an environmentally sensitive area?

3 A It had possibility of environmentally --  
4 impact of environmentally sensitive areas.

5 Q Would you tell the jury how it can impact  
6 on environmentally sensitive areas?

7 A You could have had problems in terms of  
8 development; frankly, A, B, C and D were not matters of  
9 particular concern environmentally because we were dealing  
10 with lots that were two acres and five. And with two  
11 acre lots the impact is rather minimal. The main concern  
12 in terms of those wetlands and environmental areas  
13 was from the more intense development, the multi-family  
14 development that was proposed further to the east.

15 Q How about the construction of roads in A, B,  
16 C and D; would the problem of erosion have anything to do  
17 with the construction of roads there?

18 A That's possible.

19 Q Tell the jury why that's possible.

20 A Any time you're disturbing the soil you have  
21 the possibility for erosion and obviously you have to  
22 disturb the soil in order to build the roads and the roads  
23 and drainage systems would have to be properly handled to

1 assure that there was not erosion. This did feed into  
2 an environmentally sensitive area.

3 Q And this was something that would have to be  
4 taken into account before you could put roads into A, B,  
5 C and D; would it not?

6 A I think it would be something that one would  
7 have to be cognizant of. You have to understand that the  
8 plans that were originally approved for the road construc-  
9 tion of A, B, C and D were approved in 1973 and the  
10 Erosion Control legislation didn't take effect until  
11 1975 if I recall correctly.

12 Q But if you wanted to build the roads in  
13 1980, you would have to consider the effect of the Erosion  
14 Control; would you not?

15 A Without a question.

16 Q Just describe generally the terrain in  
17 Sections A, B, C and D; would it be called rough terrain?

18 A It's fairly hilly, the rougher property  
19 went out to the east of A, B, C and D. Out there they  
20 had extremely steep slopes. There are portions of A, B,  
21 C and D that had some fairly steep slopes, there are some  
22 that are a little more gently rolling in nature.

23 Q But A, B, C and D is characterized as either

1 rolling lands or steep slopes; right?

2 A Yes.

3 Q And is that a problem when you're con-  
4 structing roads and worried about erosion?

5 MR. WILLIAM HARRIS: I would object on  
6 grounds of relevancy and competency of the witness to  
7 testify.

8 THE COURT: Objection overruled.

9 THE WITNESS: In steep terrain it is  
10 necessary to be careful on terms of roads, there's  
11 some concern primarily when you have certain soil types.

12 MR. SOKOL: That's all, thank you,  
13 Mr. Smerigan.

14 THE COURT: Redirect.

15 MR. WILLIAM HARRIS: Yes, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. WILLIAM HARRIS:

18 Q Mr. Smerigan, does the County have the  
19 power to approve as part of its subdivision ordinance  
20 plans for a sewage treatment plant?

21 MR. SOKOL: If Your Honor please, I think  
22 that relates to a matter of law that His Honor can  
23 interpret the powers of the County. With all respect to

1 Mr. Smerigan, his expertise, I don't think that's in his  
2 area.

3 THE COURT: Objection sustained.

4 BY MR. WILLIAM HARRIS:

5 Q Did the County approve a sewage treatment  
6 plant for this project?

7 A In the Crows Nest Harbour project?

8 Q Yes.

9 A Yes.

10 Q What did they do to approve it?

11 A There was an agreement signed with Crows  
12 Nest Harbour in which the Crows Nest Harbour -- the  
13 general partners of Crows Nest Harbour agreed to have  
14 constructed a sewage treatment plant to serve the needs  
15 of that project.

16 Q So when you say the County approved it, you  
17 mean they approved the agreement to do this but the County  
18 did not actually approve the plans?

19 A Plans, no, the County didn't approve any  
20 plans. Those would have had to have been approved by  
21 the Health Department and Water Control Board.

22 Q And the County is not the approval agency  
23 for the plans?

1 A Not for sewage treatment plans, no.

2 Q How about a water treatment plan?

3 A The same thing would apply there.

4 Q During the time that you were the Director  
5 of the Community Development Department, were you  
6 familiar with the requirements of subdividers to build  
7 roads inside of a subdivision being approved?

8 A Yes.

9 Q What power does the County --

10 MR. SOKOL: Objection again, Your Honor,  
11 he's calling for a very technical legal judgment.

12 THE COURT: Objection sustained.

13 MR. WILLIAM HARRIS: Your Honor, could I  
14 argue that, could I approach the Bench?

15 THE COURT: No, ask him about the facts  
16 relating in this case, Mr. Harris.

17 BY MR. WILLIAM HARRIS:

18 Q When you left Stafford County in April,  
19 were you requiring as a requirement to approve subdivision  
20 plans the upgrading of roads outside of the subdivision?

21 A No, we were not.

22 Q Did Crows Nest agree to upgrade the roads  
23 outside of the immediate area of Crows Nest Harbour?

1 A They did verbally.

2 Q You sort of indicated there was no written  
3 agreement to that; is that correct?

4 A That's correct.

5 Q Who was the first planner of Stafford County?

6 A I was.

7 Q How as zoning handled -- do you know how  
8 planning was handled prior to your arriving here?

9 A The only administrative officials that the  
10 County had prior to that was the County Administrator  
11 and he attempted to do those duties in addition to his  
12 own.

13 Q So at the time the plats were approved,  
14 there was no person who had the title of Planner in  
15 Stafford County; is that correct?

16 A That's correct.

17 Q When did you arrive?

18 A It was either May or June of 1973.

19 Q Mr. Smerigan, there was testimony concerning  
20 the Comprehensive Plan; is the Comprehensive Plan always  
21 followed with respect to rezoning?

22 A Not necessarily.

23 Q Could you give us an instance --

1 MR. SOKOL: I asked him if it was followed  
2 with respect to Crows Nest Harbour. I don't care if  
3 it was followed with respect to North Stafford.

4 THE COURT: Are you objecting?

5 MR. SOKOL: Yes.

6 THE COURT: Objection sustained.

7 BY MR. WILLIAM HARRIS:

8 Q You saw on the plats the notation that  
9 public water and sewer was required; do you know what  
10 effect not providing or public water and sewer not being  
11 available what effect that would have as to these plats?

12 A The notation on the plat was a standard  
13 notation that appeared on all the plats that had been  
14 proposed to be handled by water and sewer. The Health  
15 Department was required on subdivisions that had wells  
16 and drain fields to review each of the lots relative  
17 to their capability of handling a drain field. When  
18 they signed plats that had water and sewer proposed, they  
19 did not review those lots individually and, as a result,  
20 the only thing when they signed the plats, they also did  
21 not review in any detail, if you will, the sewer plans  
22 because the County had that responsibility through the  
23 Sanitary Districts.

1                   So what they would do is they would include  
2                   a note on the plat saying that they were signing it with  
3                   the understanding that it would be handled by water --  
4                   served by public water and sewer as an indication that  
5                   they had not studied each lot individually as to drain  
6                   fields.

7                   Q           In view of the rezoning that would permit  
8                   well and septic to be used on the lots in Crows Nest --

9                   A           The 1978 rezoning would not have prohibited,  
10                  in itself, the use of wells and drain fields in Sections  
11                  A through D.

12                  Q           That would have to be individual lot  
13                  inspection and test at the time a building permit was  
14                  requested; is that correct?

15                  A           I would say that that would be true and it  
16                  would also let -- I'm not certain, there may have had  
17                  to be some adjustment to the statement on the plats  
18                  that indicated that those would be served by public  
19                  water and sewer.

20                  Q           I believe you stated that the rezoning --  
21                  strike that.

22                               I give you Defendant's Exhibit Four, would  
23                  you turn to page 105, please, you see paragraph two up



1 there?

2 A Yes.

3 Q All right, it talks about outside these  
4 designated areas the development should be concentrated  
5 in the already committed growth nodes shown on map eight  
6 with low densities between one and three dwellings per  
7 acre. How does that statement relate to the fact  
8 that the County had already recorded -- the County hadn't  
9 recorded, the developer had recorded Sections A, B, C  
10 and D in Crows Nest?

11 MR. SOKOL: I think again he's asking for  
12 an interpretation of law, Your Honor, that he's not  
13 qualified to make.

14 MR. WILLIAM HARRIS: Your Honor, what I'm  
15 asking him to do is this document is in evidence.  
16 he says that he has written portions of it, I'm asking  
17 him to interpret this document which he had input in  
18 and how it relates to the facts that exist in the County.

19 THE COURT: The objection is sustained.

20 BY MR. WILLIAM HARRIS:

21 Q Mr. Smerigan, what was the policy with respect  
22 to your office as new requirements were imposed upon  
23 the development of land? We've had several comments

1 concerning the wetlands as being a requirement that  
2 occurred after a plat had been recorded; what was your  
3 office's policy as the law changed, did you enforce these  
4 new regulations?

5 MR. SOKOL: He's asking his witness if he  
6 obeyed the law.

7 THE COURT: Objection is overruled.

8 THE WITNESS: In many -- no, in many  
9 instances the regulations were directed at requirements  
10 toward new development and in many instances what  
11 happened was that you could not apply those retroactively  
12 to developments that had already been approved under a  
13 different set of criteria and were under construction.  
14 So as a result, some things that may have been required  
15 in later developments were not enforced against earlier  
16 ones simply from the standpoint that they were not  
17 required at the time the project was designed and  
18 approved so there is no provision for those things.

19 BY MR. HARRIS:

20 Q How about with respect to A, B, C and D  
21 were these new requirements being enforced against  
22 Sections A, B, C and D?

23 A No, not at that time they were not.

1 A, B, C and D -- the only requirements the changes for  
2 instance in the Soil Erosion and Sedimentation Control  
3 Ordinance would have required if they developed after  
4 its adoption would have required submission of erosion  
5 control plans and specifications along with a plat  
6 information, the detailed construction drawings. Since  
7 the plats were reviewed and approved prior to that,  
8 that would not have happened. There would not have been  
9 those plans so there would have been nothing to review  
10 on the site as to conformance with those plans.

11 We undoubtedly would have, you know, had  
12 some concern with regard to potential erosion from the  
13 project and would have attempted to take some steps to  
14 insure that that was considered, but you would have had  
15 no ability to enforce a set of plans at that point.

16 Q So you would enforce the changes in law  
17 unless they said they did not apply retroactively; is  
18 that correct?

19 A That's correct.

20 MR. WILLIAM HARRIS: That's all I have.

21 MR. SOKOL: I think the redirect requires  
22 some recross, Your Honor.

23 THE COURT: On what points, Mr. Sokol?

1 MR. SOKOL: The last point he made about  
2 resubmission of road plans, I'd like to develop that  
3 in terms of what do you have to do today.

4 THE COURT: I'll let you ask him that.

5 MR. SOKOL: And this agreement and what  
6 the Health Department does and what the Highway Department  
7 does, all those areas he brought up.

8 RECROSS EXAMINATION

9 BY MR. SOKOL:

10 Q These road plans were developed in 1973;  
11 correct?

12 A Correct.

13 Q If there were some road plans today in 1980,  
14 seven years later, wouldn't you as a Planner require,  
15 if nothing had been done in the meantime, no road put down  
16 whatsoever, wouldn't you require that it conform to the  
17 Erosion and Sedimentation law -- Ordinance?

18 A You're talking about an area that's covered  
19 primarily by the Highway Department. At that point if  
20 they had approved a construction permit from the Highway  
21 Department which they apparently did, unless there's some  
22 time frame in which those construction permits would have  
23 been voided, they could have continued to construct under

1 those permits. I would have had no basis on which to  
2 stop them.

3 Q Have you ever seen a letter from Mr. Myruski --  
4 who is Mr. Myruski?

5 A He was the Resident Engineer for the Highway  
6 Department.

7 Q Are you aware of the position that he took  
8 insofar as ecology and erosion and sedimentation as it  
9 related to roads, that he deferred to the County to see  
10 if the roads were in violation of the County's ordinances;  
11 are you aware of that?

12 A That's probably true. I haven't seen the  
13 letter you're referring to.

14 Q But you admit it's probably true?

15 A Right.

16 Q If roads are going to be built in 1980 in  
17 Crows Nest Harbour, I'm asking you in view of the fact  
18 that those submissions were in 1973 and that nothing  
19 has been done --

20 MR. WILLIAM HARRIS: Your Honor, I'd like to  
21 object to the question. May I approach the Bench to give  
22 my reasons?

23 THE COURT: All right.

## 1 BENCH CONFERENCE

2 MR. WILLIAM HARRIS: Your Honor, here again  
3 he's trying to say in subsequent legislation as a defense  
4 to the surety, the principal would have to comply with  
5 the appropriate changes in road design. I'm not saying  
6 that and I've never said that but what I'm saying is not  
7 everything -- strike that. The surety does not have the  
8 defense of subsequent legislation as being a defense to  
9 him. That's an impossibility, the Court has already struck  
10 an impossibility as defense and I say it's irrelevant  
11 and immaterial based on the Court's ruling.

## 12 OPEN COURT

13 THE COURT: The objection is overruled.

14 BY MR. SOKOL:

15 Q In 1980, if one were to present the plans  
16 or to present or to attempt to construct roads in Crows  
17 Nest Harbour, now, November, 1980, after the earliest  
18 previous submission was 1973 and no construction had  
19 been done in the intervening seven years, would the County  
20 be responsible for reviewing those plans to see if they  
21 conform with Erosion and Sedimentation Control Ordinance?

22 A Again, there's a difference between if you  
23 were going to submit plans and if you were to continue

1 construction based on a previously issued construction  
2 permit. If there was no --

3 Q No construction.

4 A If there was no authorization from the  
5 Highway Department to construct and he was submitting  
6 plans to go ahead, then those plans would be reviewed  
7 under the current standards.

8 Q And with particular reference to Crows  
9 Nest Harbour, A, B, C and D, Mr. Smerigan, today those  
10 plans would be reviewed to see if they conformed to  
11 the current standards and requirements?

12 A If plans were resubmitted today, they would  
13 be reviewed under today's standards.

14 Q Now, Mr. Harris asked you about the Health  
15 Department and their approval, doesn't the Health Depart-  
16 ment require before any drain field can be put into any  
17 individual lot that that individual lot be suitable for  
18 the installation of a septic tank?

19 A Yes, it does.

20 Q Each individual lot, you can't lump it;  
21 right?

22 A Yes, I think that's what I testified before.

23 Q Now, Mr. Harris asked you for the first time

1 with respect to a document I had tendered, Your Honor,  
2 an agreement you testified I believe as to an agreement  
3 between the County and Crows Nest Harbour regarding  
4 the sewage disposal facility; is that right?

5 A. Yes.

6 Q. Is this indeed, if you'll look at it, the  
7 agreement that you're making reference to?

8 A. This appears to be it, this one doesn't  
9 have the final signatures, I don't know if this is the  
10 final version but I assume it's the same one.

11 MR. JOHN HARRIS: Objection, Your Honor,  
12 if he doesn't know if it's the same one, he's making  
13 an assumption.

14 THE COURT: Objection sustained.

15 BY MR. SOKOL:

16 Q. Mr. Smerigan, did you go out to Sections A, B,  
17 C and D and check individual lots to see if you used the  
18 word, perked, or not?

19 A. No, I did not.

20 Q. But do you have a general overview of the  
21 area insofar as soil suitability to perking?

22 A. Yes.

23 Q. And did that review indicate there were



1 substantial problems with perking in the area?

2 A It indicated that soils in that area  
3 were marginal.

4 Q Soils in that area were marginal for  
5 perking; right?

6 A Yes.

7 MR. SOKOL: Thank you.

8 MR. WILLIAM HARRIS: One question, Your  
9 Honor.

10 FURTHER DIRECT EXAMINATION

11 BY MR. WILLIAM HARRIS:

12 Q What do you mean by marginal?

13 A It means it is somewhat questionable as to  
14 their ability to sustain drain fields. The soils were  
15 typically fairly poor in that area. It would be difficult  
16 to say that they could sustain drain fields without on-site  
17 tests but on-site tests would normally be the way you  
18 would determine it anyway.

19 Q Do you know whether on-site tests were made?

20 A We had none done, I'm not certain that there  
21 were any made with regard to using it as drain fields by  
22 Crows Nest Harbour.

23 THE COURT: All right, you may step down.

1 Gentlemen, I'm going to take a five-minute recess.

2 Ladies and gentlemen of the jury, as you can see we  
3 have a long way to go in this case. I'm going to go until  
4 six o'clock or maybe just a little after. Some of you  
5 may want to make calls and you can do that during this  
6 recess.

7 (Brief recess.)

8 Thereupon,

9 CLYDE HAMRICK,

10 a witness, was called for examination by counsel for  
11 the plaintiff, and, having been duly sworn, was examined  
12 and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. WILLIAM HARRIS:

15 Q State your name, please.

16 A My name is Clyde Hamrick.

17 Q What's your address?

18 A 419 Hamilton Street, Fredericksburg.

19 Q What is your occupation?

20 A I'm an employee of Virginia Department of  
21 Highways and Transportation.

22 Q What position do you hold with them?

23 A I'm a highway construction inspector in the

1        position of permit and subdivision inspector in the  
2        Fredericksburg residency.

3                Q        And how long have you held that position?

4                A        Ten years.

5                Q        In 1970 then; right?

6                A        This particular position, I've been with  
7        the Department eighteen years.

8                Q        What other positions have you held with  
9        them?

10              A        That of a highway construction inspector.

11              Q        I show you this document, have you seen this  
12       before?

13              A        No, sir.

14              Q        Have you seen this one before?

15              A        Yes, sir.

16              Q        What is that one?

17              A        This is the Department's Road Designs and  
18       Standards or they were as of 1972. We have a similar  
19       version now just updated that we use in conjunction with  
20       our construction projects. That deals with the various  
21       standards and what have you of materials in the construction  
22       of roadways.

23              Q        I show you Plaintiff Exhibit Thirteen which

1 are the road plans, would those standards be the ones  
2 that would be applied to those?

3 A Yes, sir.

4 Q I show you this, have you seen that before?

5 A Yes, sir.

6 Q What is that document?

7 A This brochure is something locally made up  
8 at our own highway office but in it there is a memorandum  
9 I believe dated 1968.

10 Q Could you take a look at that for one moment  
11 and see if that memorandum --

12 MR. WILLIAM HARRIS: So the record is straight  
13 we just referred to this document as being a document that  
14 would be -- he would use to review these plans or would  
15 apply to these plans.

16 MR. SOKOL: He didn't see these plans here  
17 I don't think, Judge.

18 MR. WILLIAM HARRIS: I showed him two.

19 THE COURT: You can cross examine him on it,  
20 Mr. Sokol.

21 MR. WILLIAM HARRIS: I would like to identify  
22 the standards he was referring to as Plaintiff's Exhibit  
23 Fourteen.

1 THE WITNESS: What I was getting ready to  
2 refer to, in 1968 the Highway Department put out a policy  
3 to the Boards of Supervisors pertaining to the construc-  
4 tion of subdivision streets. It's several pages long,  
5 I believe ten pages long.

6 Locally, at our own office, we took this  
7 memorandum along with some local policies as far as how  
8 developers would handle things administratively and made  
9 our own brochure so that as developers and engineers,  
10 and what have you, would come into our office, we  
11 could simply give them a brochure and of course we would  
12 talk with them but they could take it back with them and  
13 read over it. And then of course if they had any  
14 questions, they could call in.

15 BY MR. WILLIAM HARRIS:

16 Q And they were the standards that applied  
17 to subdivisions being approved from that time forward;  
18 is that correct?

19 A At that period of time, yes, sir.

20 Q Beginning in 1968?

21 A From 1968, yes, sir.

22 Q And has that brochure been changed?

23 A This subdivision standards were changed here

1 just about a year ago. I don't know the exact date.

2 Q What changes did that entail; do you recall?

3 A There were several changes in it pertaining  
4 to drainage designs, pertaining to roadway categories,  
5 pertaining to right of ways.

6 Q Would those changes significantly affect  
7 the cost as opposed to the old standards?

8 A The changes for the most part, I believe,  
9 were probably downgraded.

10 Q So the requirements would have been less?

11 A The requirements today, just casually  
12 thinking, I believe that they are less stringent than  
13 they were during this period of time.

14 MR. WILLIAM HARRIS: I would tender this  
15 Exhibit.

16 MR. SOKOL: I have no objection.

17 THE COURT: This brochure is received as  
18 Plaintiff's Exhibit Fourteen.

19 (The document heretofore referred to  
20 was marked Plaintiff's Exhibit Fourteen  
21 and received in evidence.)

22 BY MR. WILLIAM HARRIS:

23 Q I show you this document; have you seen this

1 document before?

2 A I have seen this and I'm generally familiar  
3 with it but it's out of my field.

4 Q Do you know whether or not they are the  
5 standards that the State applies --

6 MR. SOKOL: I didn't hear the question.

7 THE COURT: Repeat your question.

8 BY MR. WILLIAM HARRIS:

9 Q Do you know whether this document is the  
10 standards that apply for the Virginia Department of  
11 Highways since the date?

12 A In casually looking at it, it would appear  
13 that it is. I have a current Drainage Manual back there  
14 in one of those manuals that we're using.

15 Q Could you get it, please. Could you compare  
16 the two documents?

17 A Well, both of them are revised editions  
18 1974 Drainage Manual. I assume that if all the pages  
19 are in tact, it would be very similar to this.

20 MR. WILLIAM HARRIS: Your Honor, I tender  
21 this as an Exhibit.

22 MR. SOKOL: No objection.

23 THE COURT: The Highway Drainage Manual is

1 received as Plaintiff's Exhibit Fifteen.

2 (The document heretofore referred to  
3 was marked Plaintiff's Exhibit Fifteen  
4 and received in evidence.)

5 MR. WILLIAM HARRIS: Would you answer  
6 Mr. Sokol's questions.

7 CROSS EXAMINATION

8 BY MR. SOKOL:

9 Q How long have you been with the Highway  
10 Department at the local office, Mr. Hamrick?

11 A Currently served eighteen years.

12 Q Was a permit ever granted to Crows Nest  
13 Harbour to construct roads in Sections A, B, C and D;  
14 do you know?

15 A We don't get involved in the issuance of  
16 permits from a highway standpoint except if it involves  
17 the reconstruction of an existing roadway.

18 Q How about approval; is there an approval  
19 granted? There was an approval granted, I think, in  
20 1978?

21 A Correct, we review and once the reviews are  
22 complete we will render an approval from the Department  
23 standpoint; in other words, if we concur with the



1 engineers' proposals.

2 Q Is there any local policy with respect to  
3 when that approval expires; is it good forever to  
4 perpetuity?

5 A I would think that if the concept --

6 MR. WILLIAM HARRIS: Your Honor, I would  
7 object unless he knows.

8 THE COURT: If you don't know, just say so.

9 THE WITNESS: That approval would be good  
10 today; would that be okay.

11 BY MR. SOKOL:

12 Q Mr. Hamrick, you are a subdivision inspector;  
13 is that right?

14 A Yes, sir.

15 Q Did you go out to Crows Nest Harbour project  
16 at any time?

17 A A couple of times, not very many, and only  
18 on Route 609.

19 Q On Route 609?

20 A Yes, sir.

21 Q Is there any reason why you didn't go into  
22 Crows Nest Harbour area, itself?

23 A I didn't really feel that I had any reason to

1 and looking at 609 from my viewpoint, it was just some  
2 limited clearing and I didn't feel that the project had  
3 really progressed to the point that it would warrant  
4 an inspection on my part.

5 Q Would it be fair to say that the project  
6 progressed to no point whatsoever based on your inspection?

7 A Apparently it progressed some because of  
8 clearing of some of the wasteland but usually on sub-  
9 division jobs, unlike our own highway construction jobs,  
10 unless we're requested by the engineer or the contractor,  
11 or what have you, we won't make an inspection until it  
12 reaches probably subgrade.

13 Q You understand that there was an approval  
14 executed by Mr. Myruski with respect to this Crows Nest  
15 Harbour road development and its network; right?

16 A Right.

17 Q And when you execute that kind of approval,  
18 do you keep copies of those road plans and specifications  
19 at the Highway Department?

20 A Pertaining to all of our jobs or just that  
21 particular job?

22 Q Let's start with all of your jobs, this would  
23 be considered a major project; wouldn't it?

1           A       It would be considered a major project  
2 and as far as the specifications and what not are that  
3 they are as have been introduced in the Court and they  
4 would apply to all jobs. With regard to Crows Nest  
5 we normally keep plans. We do have all the plats,  
6 we do have some of the plans but some of the plans were  
7 purged.

8           Q       Some of the road plans of Crows Nest were  
9 purged?

10          A       We were given the impression it was dead.

11          Q       Who gave you that impression?

12          A       The local paper.

13          Q       So you had the impression that Crows Nest  
14 was a dead bird; is that right?

15          A       We were just in the process of cleaning  
16 house; normally, we do retain one set of plans.

17          Q       Did you retain one set of plans with respect  
18 to Crows Nest roads?

19          A       Not on Sections A, B, C and D, we do have E and  
20 E-1, I believe.

21          Q       You have E and E-1 but you threw out A, B, C  
22 and D; is that right?

23          A       That's correct.

1 MR. SOKOL: That's all.

2 THE COURT: You can step down. Do you want  
3 him excused, gentlemen?

4 MR. WILLIAM HARRIS: For today, yes, Your  
5 Honor.

6 THE COURT: Do you want Mr. Hamrick to come  
7 back tomorrow?

8 MR. WILLIAM HARRIS: No, I don't need him.

9 THE COURT: Thank you, Mr. Hamrick, you're  
10 excused.

11 MR. WILLIAM HARRIS: I would call Dan Heaney.  
12 Thereupon,

13 DAN J. HEANEY,  
14 a witness, was called for examination by counsel for the  
15 plaintiff, and, having been duly sworn, was examined and  
16 testified as follows:

17 DIRECT EXAMINATION

18 BY MR. WILLIAM HARRIS:

19 Q State your name, please.

20 A My name is Daniel J. Heaney.

21 Q With whom are you employed?

22 A Stafford County.

23 Q What is your educational background?

1           A       My education is in area regional analysis,  
2 urban planning.

3           Q       And what position do you hold with Stafford  
4 County?

5           A       Community Development Director.

6           Q       What positions have you held prior to coming  
7 to Stafford County?

8           A       I was the Director of Planning in  
9 Spotsylvania County and the Director of Physical Develop-  
10 ment prior to that for the Rappahanock Area Development  
11 Commission which is Planning District Sixteen.

12          Q       And how long have you been with Stafford  
13 County?

14          A       I have been with Stafford County three and a  
15 half months.

16          Q       Have you made yourself familiar with the  
17 standards and policies of the office of Community Develop-  
18 ment?

19          A       To the greatest extent possible in a short  
20 period.

21          Q       Have you seen this document before?

22          A       Yes, sir.

23          Q       What is that document?

1           A       It's a document concerning the development  
2 of storm drainage systems for various projects that  
3 require that kind of review.

4           Q       Would that apply to subdivisions?

5           A       Yes, it would and then it parallels the  
6 State's standards. In the case of a subdivision, the  
7 State draining system would be used in total. This would  
8 pick up areas that weren't covered by the plats when a  
9 system was needed.

10           MR. WILLIAM HARRIS: I offer this.

11           MR. SOKOL: I have no objection although I  
12 don't think it was ever tendered to us before but I don't  
13 think --

14           THE COURT: This is received as Plaintiff's  
15 Exhibit Sixteen.

16                   (The document heretofore referred to  
17 was marked Plaintiff's Exhibit Sixteen  
18 and received in evidence.)

19           BY MR. WILLIAM HARRIS:

20           Q       Are you familiar with the Crows Nest Harbour  
21 project?

22           A       To a reasonable extent.

23           Q       Do you know what the status of the improvements

1 are in Sections A, B, C and D?

2 A My review of the site indicates that only  
3 some preliminary alignment of the right of way is worked  
4 out, tree coating, possibly a little grading; it's hard  
5 to tell with the overgrowth.

6 Q So none of the improvements are installed  
7 today; is that correct?

8 A No, sir.

9 MR. WILLIAM HARRIS: Would you answer  
10 Mr. Sokol's questions.

11 CROSS EXAMINATION

12 BY MR. SOKOL:

13 Q Were you recently in Crows Nest Harbour  
14 area, Mr. Heaney?

15 A Yes, sir.

16 Q I take it whatever you could see had  
17 previously been done by way of clearing but most of  
18 that is overgrown again?

19 A Basically with brush and standard growth  
20 of brush and small trees.

21 Q So it's a relatively untouched area;  
22 correct?

23 A Relatively, yes, sir.

1 MR. SOKOL: All right, thank you, that's all.

2 THE COURT: You may step down.

3 MR. WILLIAM HARRIS: We'd call Henry Glauss.

4 Thereupon,

5 HENRY GLAUSS,

6 a witness, was called for examination by counsel for  
7 the plaintiff, and, having been duly sworn, was examined  
8 and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. WILLIAM HARRIS:

11 Q State your name, please.

12 A Henry Glauss.

13 Q And by whom are you employed?

14 A I'm employed by the consulting engineering  
15 firm of Russell and Axon.

16 Q In what capacity?

17 A I am a Chief Engineer of the Regional Office  
18 in Knoxville.

19 Q What is your educational background?

20 A I received a B.S. Degree from Tennessee  
21 Technological University in Cookeville in 1967, I received  
22 a Master of Science Degree from Oklahoma State University  
23 in 1970. I am currently a registered professional engineer



1 in Tennessee and three other states including Virginia,  
2 Kentucky and North Carolina, and I'm a member of several  
3 national organizations.

4 Q What are those organizations?

5 A The American Waterworks Association,  
6 Water Pollution Control Federation, the National Science  
7 of Professional Engineers and the American Society of  
8 Civil Engineering and Chi Epsilon Honor Fraternity.

9 Q Have you had any work experience in  
10 estimating costs of construction of roadways?

11 A My years of working in the field of civil  
12 engineering I've had a lot of varied experience and in  
13 experience, I've had the opportunity to make many types  
14 of cost estimates, take-offs on construction jobs  
15 which these costs have been used to present financial  
16 pictures and presentations to the client. Some of the  
17 experiences which related to -- which would be similar  
18 to this type project here was a five hundred acre sub-  
19 division in Nashville, Tennessee, which included water  
20 and sewer lines.

21 MR. SOKOL: I'll stipulate as to his  
22 qualifications.

23 THE COURT: All right, his qualifications are

1 stipulated to.

2 MR. WILLIAM HARRIS: Mr. Sokol, would you  
3 stipulate he's also qualified for giving costs estimates  
4 as to water and sewer lines?

5 MR. SOKOL: Let me go into that a little bit.

6 BY MR. WILLIAM HARRIS:

7 Q Would you give us your experiences as far  
8 as estimating costs of water and sewer lines?

9 A I've estimated many water and sewer line  
10 jobs of which are varying sizes. Recent projects that  
11 I've been involved in include a fourteen mile sewer line  
12 extension project in Washington County, Tennessee, which  
13 included fourteen pumping stations, forced main sewer  
14 lines of varying sizings and a million and a half gallon  
15 per day sewage treatment plant.

16 I've also recently performed cost estimates  
17 for a twenty-three mile water line extension project in  
18 rural West Tennessee and I've worked on varying projects  
19 with the firm as taken and done here in Stafford County  
20 over a number of years.

21 MR. WILLIAM HARRIS: I would move for him to  
22 be qualified as an expert as to estimating the cost of  
23 road and water and sewer construction.

1 MR. SOKOL: Did he say roads, I heard him say  
2 water and sewer.

3 THE WITNESS: Yes, sir, I did.

4 THE COURT: You stipulated his qualifications.

5 MR. SOKOL: I did.

6 THE COURT: He's received as an expert in both  
7 areas.

8 BY MR. WILLIAM HARRIS:

9 Q Would you explain to the Court and jury how  
10 you arrived at your estimates or the process you go through  
11 in determining -- in making an estimate?

12 A The process which I use is similar to the  
13 engineering field, it's very common. In this particular  
14 case I took the existing plans which were -- which existed  
15 on the project which were given to me as representative of  
16 the project facilities, went into the plans and reviewed  
17 them very carefully as to the specialities of the par-  
18 ticular construction project at hand, I took and figured  
19 the amount of cut and fill along the entire length of  
20 roadways and all four sections of the particular sub-  
21 division, I reviewed the various standards in Virginia  
22 since I was not intimately familiar with them at the time,  
23 reviewed them for particular cost specialities which may be

1 required. After doing this detailed take-off, very  
2 systematic approach, then I contacted several local  
3 contractors in Stafford County in order to determine  
4 what their -- what prices would be attached to the  
5 various quantities that I determined, such as the unit  
6 cost of moving dirt per cubic yard, what a linear foot  
7 of eight-inch sewer pipe would cost to put in place.  
8 These cost factors I took from each -- several different  
9 contractors.

10 I also consulted with several publications  
11 which are recognized in the field of engineering con-  
12 struction such as the Engineering News Record, Means  
13 Construction Cost Summary, Dodge Cost Summaries, and  
14 determined what an average unit cost would be. These  
15 unit costs were then applied to the quantities that I had  
16 computed and the total cost figure was arrived at.

17 In addition I also visited the site of the  
18 project on November the 19th to determine firsthand what  
19 the visual appearance of the area was and to determine  
20 exactly what work had taken place, if any, and I found  
21 that little to no work had been done in the area at all  
22 but I did observe it appeared that there may have been  
23 some clearing sometime in the past, maybe some rough

1 grading on some existing old logging roads or path of  
2 that nature but no extensive work had been done at all  
3 in my estimation.

4 Q All right, I show you Plaintiff's Exhibit  
5 Thirteen; are these the plans that you referred to that  
6 you reviewed for the roads and water and sewer?

7 A Yes, sir, they are.

8 Q I also show you Plaintiff's Exhibit Twelve;  
9 is that one of the documents that you reviewed?

10 A Yes, I did review this one for the water line  
11 take-offs.

12 Q I show you Plaintiff's Exhibit Eleven,  
13 would you look at that.

14 A Yes, sir, this was reviewed in conjunction  
15 with a larger set of plans underneath the sewer line lay-  
16 outs.

17 Q I show you Plaintiff's Exhibit Sixteen,  
18 Plaintiff's Exhibit Fourteen, Fifteen and Plaintiff's  
19 Exhibit Ten; are these the standards that you reviewed?

20 A Yes, they are.

21 Q After reviewing the plans and the standards,  
22 did you form an opinion as to what the costs were in  
23 Sections A, B, C and D on various dates?

1           A       Yes, sir, I did.

2           Q       Would you tell the jury what you estimated  
3 the cost to be for Sections A, B, C and D on October the  
4 3rd, 1975, with respect to road construction, and I would  
5 ask that you put this -- draw on this board the costs;  
6 if you go with the roads, first by section and then  
7 total figure.

8           A       As of October the 3rd, 1975, for Section A,  
9 roads, six hundred and eighteen thousand two hundred  
10 dollars; Section B, road, three hundred and twenty-nine  
11 thousand seven hundred dollars; Section C, roads, a  
12 hundred and ninety-four thousand seven hundred dollars;  
13 Section D, roads, four hundred and eighty-nine thousand  
14 eight hundred dollars, for a total of estimated costs  
15 on road construction of one million six hundred thirty-  
16 two thousand four hundred dollars.

17          Q       Would you give us the same by section with  
18 respect to water and sewer costs?

19          A       Water and sewer costs for Section A,  
20 six hundred twenty thousand five hundred dollars;  
21 Section B, one hundred and eight-nine thousand eight  
22 hundred dollars; Section C, ninety-three thousand two  
23 hundred dollars; Section D, two hundred and eighty

1 thousand six hundred dollars; total water and sewer line  
2 costs, one million one hundred eighty-four thousand  
3 one hundred dollars. The total for roads and water and  
4 sewer for all four sections is two million eight hundred  
5 and sixteen thousand five hundred dollars estimated costs.

6 Q Before you sit down did you form an opinion  
7 as to the cost in the various sections as of July 1, 1976,  
8 and would you put those figures on another page of that,  
9 just fold that back.

10 MR. SOKOL: He has a sheet, Your Honor, where  
11 he has shown all these for all these times and I have no  
12 objection to that being admitted into evidence rather than  
13 him going through this exercise.

14 MR. WILLIAM HARRIS: I think it's helpful  
15 to have the jury see it.

16 THE COURT: Why can't they see it if that  
17 sheet is put in Exhibit?

18 BY MR. WILLIAM HARRIS:

19 Q Would you look and verify if those figures  
20 are correct?

21 A. These numbers do agree with my calculations.

22 MR. SOKOL: No objection.

23 THE COURT: This calculation or projection of

1 costs is received as Plaintiff's Exhibit Seventeen.

2 (The document heretofore referred to  
3 was marked Plaintiff's Exhibit Seven-  
4 teen and received in evidence.)

5 BY MR. WILLIAM HARRIS:

6 Q Would you run through the figures as of  
7 7-1-76 and also as of October the 30th, 1980?

8 MR. SOKOL: Can't we just show that to the  
9 jury, Your Honor?

10 THE COURT: He can read them into the record.

11 THE WITNESS: Costs as of July the 1st,  
12 1976, for roads, Section A, six hundred thirty-four  
13 thousand and twenty-one dollars; B, three hundred and  
14 thirty-eight thousand one hundred twenty-eight dollars;  
15 Section C, one hundred and ninety-nine thousand six  
16 hundred and seventy-one dollars; Section D, five hundred  
17 and two thousand three hundred and twelve dollars, for  
18 a total road cost estimated cost of one million six  
19 hundred and seventy-four thousand one hundred and thirty-  
20 two dollars.

21 Costs of water and sewer facilities, Section  
22 A, six hundred and seventeen thousand seven hundred and  
23 three dollars; Section B, one hundred and ninety-four



1 thousand six hundred and sixty-one dollars; Section C,  
2 ninety-five thousand five hundred and seventy-one dollars;  
3 Section D, two hundred and eighty-seven thousand seven  
4 hundred and ninety-eight dollars, for a total water and  
5 sewer costs for Sections A, B, C and D, two million  
6 eight hundred and sixty-nine thousand eight hundred and  
7 sixty-five dollars.

8 As of October the 30th of 1980, Section A,  
9 roads, nine hundred and twenty-seven thousand three  
10 hundred dollars; Section B, four hundred and ninety-four  
11 thousand five hundred dollars; Section C, two hundred and  
12 ninety-two thousand dollars even; Section D, seven hundred  
13 and thirty-four thousand seven hundred dollars, for a  
14 total road costs of two million four hundred and forty-  
15 eight thousand five hundred dollars.

16 Water and sewer lines for Section A, nine  
17 hundred and thirty thousand seven hundred dollars;  
18 Section B, two hundred and eighty-four thousand seven  
19 hundred dollars; Section C, one hundred and thirty-nine  
20 thousand eight hundred dollars; Section D, four hundred  
21 and twenty thousand nine hundred dollars; total water and  
22 sewer line estimated costs, one million seven hundred  
23 seventy-six thousand one hundred dollars. The combined

1 costs for water and sewer facilities and road work,  
2 four million two hundred twenty-four thousand six hundred  
3 dollars.

4 MR. WILLIAM HARRIS: May I give this to the  
5 jury, Your Honor?

6 THE COURT: Yes.

7 BY MR. WILLIAM HARRIS:

8 Q You stated that you were out of the Knoxville  
9 office; is there any difference between estimating the  
10 road costs and water and sewer line costs in Tennessee  
11 than in Virginia?

12 A The methodology employed would be the same  
13 regardless -- for this type of work regardless of where  
14 the work would be located. The methodology, the engineer-  
15 ing technology that I would have to employ I would have  
16 to employ regardless of what state I was working in.

17 MR. WILLIAM HARRIS: Would you answer  
18 Mr. Sokol's questions.

19 CROSS EXAMINATION

20 BY MR. SOKOL:

21 Q Mr. Glauss, the figures that you presented,  
22 the detailed figures, are your best estimate; correct?

23 A They are, sir.

1 Q There are a few things I'd like to check on,  
2 you looked at these subdivision bonds; didn't you, to  
3 see what was bonded?.

4 A No, sir.

5 Q What were you told to estimate?

6 A I was told to review the existing construction  
7 drawings and plans on the various facilities and arrive  
8 at my own estimated costs for facilities.

9 Q You say, facilities, you mean roads in  
10 Sections A, B, C and D?

11 A Yes, sir.

12 Q Of Crows Nest Harbour?

13 A Yes, sir.

14 Q And just water and sewer lines within  
15 Sections A, B, C and D of Crows Nest Harbour; right?

16 A Yes, sir.

17 Q You didn't get into the matter of cost of  
18 upgrading approach roads; did you?

19 A No, sir.

20 Q Was that ever mentioned to you about coming  
21 up with that figure?

22 A No, sir.

23 Q Did you ever get into the costs of acquiring

1 and installing the water lines from Crows Nest Harbour  
2 to the County Interceptor point?

3 A No, sir.

4 Q Did you ever get into the costs of construc-  
5 tion of a sewage distribution facility at Crows Nest  
6 Harbour?

7 A Yes, sir, within the subdivision, itself,  
8 Sections A, B, C and D.

9 Q How about the cost of the sewage treatment  
10 plant, itself, the cost of construction of that plant?

11 A No, sir.

12 Q Now, this figure that you present for July 1,  
13 1976, totaled two million eight hundred sixty-nine  
14 thousand eight hundred sixty-five dollars, would that  
15 figure be any different for on or about June 21, 1976,  
16 some nine or ten days earlier?

17 A It would not be significantly different  
18 although it will vary.

19 Q Nine or ten days earlier would the figure  
20 have been at least two million eight hundred thousand  
21 dollars?

22 A I would be difficult for me to say.

23 Q Is it going to be within a very few dollars of

1 the figure you gave ten days later?

2 A It would be close, yes, sir.

3 Q And you're saying at the end of October of  
4 this year it would cost, your estimate is four million  
5 two hundred twenty-four thousand six hundred dollars  
6 to put water and sewer lines and roads in A, B, C and D;  
7 right?

8 A Yes, sir.

9 Q Sir, I'd like to read a letter to you,  
10 this is to certify -- this letter is dated May 18, 1973,  
11 this is to certify -- let me backtrack -- strike that.

12 Did the County tell you the amount of the  
13 costs per section for water, sewer lines and roads for  
14 the period of bonds, October, 1973, through October, 1975?

15 A Could I get you to repeat that question?

16 Q Were you advised by the County of the figures  
17 that were presented to the County by way of cost pro-  
18 jection for roads, water and sewer lines for Sections A, B,  
19 C and D for the period, October 3, 1973, through October 3,  
20 1975?

21 A I'm not sure, I need to look at my notes  
22 because I have a -- I have to look at what I have.

23 Q See if you have in your notes any kind of

1 letter from a Mr. Sears or Mr. Smith?

2 A Yes, I have a letter from Mr. Sears dated  
3 July 10th, 1972, land development costs.

4 Q Could I see that letter, please. You have  
5 a letter dated November 14, 1972, from Mr. Sears to  
6 Mr. Keith Cook right here; right? Is that letter with  
7 reference to Sections A, B, C and D of Crows Nest Harbour?

8 A Would you like me to read it, it says,  
9 the following is our cost estimate with reference to our  
10 client, Crows Nest Harbour, the roads, water and sewer  
11 for Sections A, B, C and D are as follows: road con-  
12 struction, all sections, six hundred eighty-nine  
13 thousand two hundred dollars; storm sewers, sixty-nine  
14 thousand two hundred dollars; total road including  
15 drainage, seven hundred and fifty-eight thousand four  
16 hundred dollars; sewer and water construction costs,  
17 eight hundred and one thousand seven hundred and forty  
18 dollars; and he's got, secured fee commitments from  
19 others, two hundred sixty-two thousand seven hundred and  
20 forty-eight -- two hundred and sixty-two thousand six  
21 hundred and forty-eight thousand, total necessary  
22 construction funds, five hundred and twenty-nine thousand  
23 and two dollars, total road including drainage, seven

1 hundred fifty-eight thousand four hundred dollars;  
2 total necessary construction funds, five hundred and  
3 twenty-nine thousand and ninety-two dollars; total con-  
4 struction costs, one million two hundred and eighty-seven  
5 thousand four hundred and ninety-two dollars.

6 Q Did you study those figures or consider  
7 those figures when you were arriving at your own?

8 A No, sir, I really did not.

9 Q Why didn't you?

10 A Because of the age of the figures. It's  
11 very difficult to look back and determine what the costs --  
12 figure constructions costs were that far back in time.

13 Q Here you went from 1980 back to 1975, a  
14 period of five years.

15 A That's correct.

16 Q And I take it if you can go back from 1980  
17 to 1975, that you can go back through 1975 to 1973;  
18 can't you?

19 A Yes, sir, but the thing, to look at his  
20 costs and to make a judgment on them, I would have had to  
21 really compare notes, his take-off with my take-off.  
22 I could have but I was not instructed to do so.

23 Q Let's just consider your take-off and forget

1 his take-off; is that figure one million two hundred  
2 and eighty-seven thousand four hundred and ninety-two  
3 dollars total construction realistic as of October, 1975?

4 A. I can't answer that in the affirmative  
5 without doing additional checking on my own.

6 Q The figure is some -- if you go -- your  
7 figures for the same period; you say you can't answer the  
8 question but you've testified that your figure as of  
9 October 3, 1975, is two million eight hundred sixteen  
10 thousand five hundred dollars; right?

11 A Yes, sir.

12 Q That's no little difference.

13 A No, sir.

14 Q This figure is less than fifty percent of  
15 yours; right?

16 A Yes, sir.

17 Q So based on that, can't you make the  
18 judgment or wouldn't you be prepared to say as an  
19 engineer and as a reasonable person that that figure is  
20 grossly inadequate?

21 A Let me answer your question with a statement,  
22 sir, costs in 1972 between 1972 and 1975 --

23 Q I'm talking about 1975.



1           A       I understand that but you're asking me to  
2 compare my 1975 dollars with his 1972 and make a judgment  
3 on his.

4           Q       No, I'm asking you to compare it on 1975  
5 dollars, this project was to be completed in 1975, '73 to  
6 '75.

7           A       Based on the difference between the two  
8 I would say that it appears that his costs may be low.

9           Q       Very low; right?

10          A       Low.

11          Q       Let's be candid, if your figure is two  
12 million eight hundred and sixteen, and we're talking  
13 about roughly the same time frame, his figure is  
14 one million two hundred and eighty-seven thousand; I  
15 mean is that low or is that very much lower?

16          A       Well, sir, it's not that we're dealing --  
17 we're dealing with unit costs for construction which  
18 vary considerably based upon the economy of the time.  
19 His figure is based on costs on 1972 dollars; my figure  
20 is based on costs on 1975 dollars and the factors there  
21 vary considerably is what I'm saying.

22          Q       If someone asked you in 1972 to give a cost  
23 estimate for work that was going to be done from 1973 to

1 1975, you wouldn't use 1972 figures; would you?

2 A No, sir, I surely wouldn't.

3 Q You'd base your figures on what you thought  
4 they'd be using the same old sliding scale sort of from  
5 '73 to '75; wouldn't you?

6 A I would project my costs forward through the  
7 period of construction but I cannot say whether he did or  
8 not.

9 Q But he should have; shouldn't he?

10 A In my opinion, yes.

11 Q And if he had, it's your judgment that that  
12 figure is grossly inadequate for that period?

13 A It would be, yes, sir.

14 MR. SOKOL: All right, that's all, thank you.

15 THE COURT: Do you want Mr. Glauss excused,  
16 gentlemen?

17 MR. WILLIAM HARRIS: Excused for today but not  
18 necessarily tomorrow.

19 THE COURT: You want him to come back  
20 tomorrow?

21 MR. WILLIAM HARRIS: Yes, sir.

22 THE COURT: You're excused for today,  
23 Mr. Glauss. Call your next witness.

1 MR. JOHN HARRIS: We call Wayne Jensen by  
2 his deposition. (Reading the deposition)

3 Q Your name is Wayne S. Jensen?

4 A Yes.

5 Q What company or corporation do you work for?

6 A Safeco Insurance Company.

7 Q And what is your position?

8 A Vice President in charge of Surety Claims.

9 MR. JOHN HARRIS: (Reading the deposition)  
10 We are going to stipulate that Mr. Jensen is under oath  
11 and that we are doing the deposition by telephone, he  
12 being in Seattle and Mr. Sokol and myself being in the  
13 City of Fredericksburg. Is that all agreed?

14 MR. SOKOL: Let me just for the record, this  
15 deposition was taken on Wednesday, January 9, 1980, by  
16 telephone. (Reading the deposition)

17 That is agreed.

18 MR. JOHN HARRIS: (Reading the deposition)

19 Q You were just telling us what your position is.

20 A Yes, I'm with Safeco Insurance Company of  
21 America and I am Assistant Vice President in charge of  
22 Surety Claims.

23 Q How long have you been the Assistant Vice

1 President in charge of Surety Claims?

2 A Since about 1974 -- November of 1974.

3 Q All right, are you familiar with the Crows  
4 Nest Harbour project?

5 A Yes, I am.

6 Q When did you first become familiar with it?

7 A It seems to be -- again, I don't have my  
8 file -- I believe it was around 1975 or 1976, probably  
9 1975.

10 Q All right, now, when did you become the Vice  
11 President in charge of Surety Claims; is that 1974?

12 A It would have been November of '74, yes.

13 Q Are you familiar with the bond executed by  
14 Safeco number 2219520 representing Section A of Crows Nest  
15 Harbour in the amount of \$410,949?

16 MR. SOKOL: Then I say at that time,  
17 Just let me say I think it is in the record of Mr. Brown's  
18 deposition and Mr. Reedy's deposition that Safeco does not  
19 deny the existence of the four bonds on the four sections.  
20 Mr. Jensen doesn't have the four bonds in front of him,  
21 but no one is going to deny the existence of those bonds.  
22 They will be stipulated.

23 MR. JOHN HARRIS: (Reading the deposition)

1           Q       Mr. Jensen, we are, in fact, stipulating  
2       four bonds that they were the bonds that were issued to  
3       Stafford County.

4                   MR. SOKOL: (Reading the deposition) For  
5       Crows Nest Harbour.

6                   MR. JOHN HARRIS: (Reading the deposition)

7           Q       For Stafford County's benefit --

8                   MR. SOKOL: Your Honor, you're going to have  
9       to make a ruling, I say, I object to that. That is a  
10      conclusion. There are four bonds that were issued and  
11      they speak for themselves and any legal interpretation  
12      might be put on them, but the word "benefit".

13                   Looks like to me it was supposed to be sent  
14      to Mr. Jensen, he was supposed to sign it and return it.  
15      Judge, this is basically cumulative of Mr. Holloway.  
16      How many times does Safeco have to say it?

17                   MR. JOHN HARRIS: If you wouldn't make me  
18      read the whole thing; I don't think it would be cumulative.  
19      There are a few pages I would like to read.

20                   MR. SOKOL: I'm going to object to it, it  
21      hasn't been signed by him, it's not in the Court file  
22      and if I thought I was doing anything wrong, I wouldn't  
23      do it.

1 THE COURT: Gentlemen, I can't permit this  
2 today, the deposition hasn't been properly certified.

3 MR. JOHN HARRIS: Your Honor, I originally  
4 subpoenaed Mr. Holloway and Mr. Jensen.

5 MR. SOKOL: I'm going to withdraw the  
6 objection.

7 MR. JOHN HARRIS: Mr. Sokol has the original,  
8 he probably also has a copy.

9 THE COURT: Do you object to this deposition,  
10 Mr. Sokol?

11 MR. SOKOL: No.

12 MR. JOHN HARRIS: Page five, line twenty-two,  
13 we'll resume. (Reading the deposition)

14 Q Stafford County is the beneficiary; am I  
15 correct, Mr. Jensen?

16 A We executed four bonds with Stafford County  
17 as the stated obligee, yes.

18 MR. JOHN HARRIS: And at this point I would  
19 like to go forward to page seven at line eighteen or I  
20 can continue reading.

21 MR. SOKOL: Go ahead.

22 MR. JOHN HARRIS: Page seven, line eighteen  
23 (Reading the deposition)

1 Q Is there anything at all invalid about the  
2 execution of the bonds?

3 A Not that I'm aware of.

4 Q Is there anything at all that makes the  
5 bonds invalid?

6 A In what respect?

7 Q In any respect in which you are aware, sir.

8 MR. SOKOL: My answer at the time,  
9 Again, I don't think you ought to answer the question  
10 as it is put, Mr. Jensen, as to whether or not the bonds  
11 are invalid. Again, it is a conclusiary kind of  
12 question and I don't see that it serves any purpose.  
13 What we are arguing about is whether or not there is any  
14 obligation on the part of Safeco to pay any amounts under  
15 the bonds. And if you ask him if he thinks they are  
16 obligated to pay the bonds, he can answer the question.

17 THE COURT: The next page and a half is taken  
18 up mainly by argument. I think you can go over to --

19 MR. JOHN HARRIS: Line nine, page nine.

20 (Reading the deposition)

21 THE WITNESS: If I knew what you meant by  
22 invalid. Are you talking about our liability under the  
23 bond or the execution of the bond?

1 Q I'm talking about the execution of the bonds.

2 A As far as I know, the bonds were properly  
3 executed.

4 Q And the bonds cover the construction of  
5 streets, water and sewer lines in Sections A, B, C and D  
6 of Crows Nest Harbour in Stafford in accordance with the  
7 specifications shown on the plats for each of those  
8 sections; is that correct?

9 A That's it to the best of my recollection.

10 Q And the plats were approved by the necessary  
11 parties; weren't they?

12 A I don't know that from my own knowledge,  
13 I can only assume that they were.

14 MR. JOHN HARRIS: I would suggest that we  
15 skip forward to page fourteen, line twenty-two.

16 MR. SOKOL: Okay, go ahead.

17 MR. JOHN HARRIS: (Reading the deposition)

18 Q Has Stafford County demanded payment on the  
19 bonds?

20 A Yes.

21 MR. JOHN HARRIS: I would again suggest we  
22 skip forward to page eighteen, line five.

23 MR. SOKOL: Okay.



1 MR. JOHN HARRIS: (Reading the deposition)

2 Q Now, who is the obligee on the bonds that we  
3 are talking about?

4 A Stafford County.

5 Q And who is the surety?

6 A It was either Safeco or General Insurance;  
7 I'm not sure.

8 Q And who was the principal?

9 A I believe Crows Nest Harbour or Research  
10 Homes.

11 Q Who is responsible for the performance in  
12 the work that was covered in the bonds that we are talk-  
13 ing about?

14 A The primary responsibility would have been  
15 the principal, Crows Nest Harbour or Research Homes.

16 Q And Stafford County was not responsible for  
17 the performance of the work that was covered by the bonds;  
18 was it?

19 MR. SOKOL: I object to that, again, that  
20 calls for legal conclusion and he's not conversant in  
21 Virginia law. The ultimate responsibility is before this  
22 Court not by Mr. Jensen.

23 THE COURT: Objection sustained.

1 MR. JOHN HARRIS: I would like to go to  
2 the question found at line twenty-two on page eighteen.

3 THE COURT: Doesn't that follow the same  
4 objection?

5 MR. JOHN HARRIS: No, sir, we go on and  
6 that leads to something else.

7 MR. SOKOL: I object, Your Honor.

8 MR. JOHN HARRIS: Page nineteen, line four.

9 MR. SOKOL: Same question.

10 THE COURT: Objection sustained.

11 MR. JOHN HARRIS: I would suggest that we  
12 resume again at page twenty-three, line ten.

13 MR. SOKOL: All right.

14 MR. JOHN HARRIS: (Reading the deposition)

15 Q All right, but we did establish, did we not,  
16 that these bonds are a form of indemnity insurance?

17 A No, they are not insurance at all and there is  
18 lots of confusion between insurance policies and a surety  
19 bond. They are two entirely different contents.

20 Q All right, would you explain the difference to  
21 me between a performance bond and an indemnity insurance?

22 A Indemnity insurance usually runs to the party  
23 purchasing the insurance to protect him against claims

1 presented by third parties. In the case of a performance  
2 bond, it is more or less a three way contract giving the  
3 principal and the surety and the obligee on the bond  
4 where the primary responsibility is that of the principal.  
5 The surety is more a guarantor of the financial ability  
6 of the principal to perform. But there is also a con-  
7 tractual relationship between the obligee and the surety.  
8 And there are certain duties and obligations on the part  
9 of the obligee before the surety is legally obligated to  
10 pay whatever damages might be sustained.

11 MR. SOKOL: If Your Honor please, this  
12 whole line of question and answer, I go on later on  
13 in this transcript and I say, let me just put this in  
14 the record. Mr. Jensen is not under any position to  
15 substitute his judgment of what the law is in Virginia  
16 or what the law applicable to this case may be. That's  
17 going to be ultimately for this Court to decide not for  
18 Mr. Jensen to say this shall be the law of this case.  
19 That follows right on through here. I mean Mr. Jensen  
20 can't out in the State of Washington tell this Court  
21 what the law is and I object.

22 THE COURT: Objection sustained.

23 MR. JOHN HARRIS: I'd like to go to page

1 twenty-seven, line eighteen. (Reading the deposition)

2 Q All right, one more time. I want to ask  
3 if you know of any facts, now if you don't know of any  
4 facts, tell me you don't know, but if you know something,  
5 I would like to know what it is. That is all I'm asking  
6 you. I'm not asking you for what you don't know about it,  
7 but if you know for instance the paper was folded incor-  
8 rectly and if it isn't folded that particular way, then  
9 Stafford County can't make a claim. And that's all I'm  
10 asking, do you know of any little fact like that or even  
11 big fact that Stafford County did not do to perfect their  
12 claim under the bond? Do you know of anything like that,  
13 sir?

14 A Personally, no.

15 Q Beg your pardon?

16 A No.

17 Q I'm sorry, I still couldn't hear.

18 A I said personally I do not.

19 THE COURT: All right with that, gentlemen.

20 MR. JOHN HARRIS: Yes, sir.

21 THE COURT: All right, gentlemen, I think  
22 it's time to recess for the day. Will counsel before  
23 you leave see that all the Exhibits are on this table and

1 the Court where it can be secured unless there's some  
2 objection, we'll just leave the Exhibits there.

3 Ladies and gentlemen, I'm going to reiterate  
4 this very positively because it looks like every time  
5 we start Court at nine o'clock everybody but one gets  
6 here because ten is the usual time but we're going to  
7 reconvene tomorrow morning at nine o'clock so everybody  
8 be here a few minutes before nine. We'll recess until  
9 nine o'clock tomorrow morning.

10 (Thereupon, at 6:07 o'clock p.m., the hearing  
11 in the above-entitled matter was concluded.)  
12  
13  
14  
15  
16  
17  
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19  
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22  
23

1 case, he would be available.

2 I feel that my client has been severely  
3 prejudiced.

4 THE COURT: Wait a minute, let's not  
5 leave it. You're saying Mr. Sokol has released  
6 Mr. Smerigan.

7 MR. WILLIAM HARRIS: That's correct.

8 THE COURT: How does that prejudice you?

9 MR. WILLIAM HARRIS: What I'm indicating  
10 is that in fact Mr. Sokol got whatever testimony he  
11 had wanted from Mr. Smerigan and it was not necessary  
12 for him to call him in his chief so it supports my  
13 contention that he was, in fact, presenting his side  
14 of the case and not just cross examining my witness  
15 on the information I put in.

16 THE COURT: The Motion is denied.  
17 Bring the jury in.

18 (The jury returned to the courtroom and  
19 resumed their place in the jury box.)

20 THE COURT: Call your next witness.

21 MR. JOHN HARRIS: Your Honor, we wish to  
22 introduce two copies of pleadings which were pleadings  
23 in this case, a copy of the Motion for Judgment in this

1 case, and it is no longer a pleading in this case simply  
2 because there has been filed an Amended Motion for Judgment  
3 and by that it has been superseded. It relates to the  
4 Answer in Grounds of Defense which was filed in response  
5 to the Motion for Judgment, that when the Amended Motion  
6 for Judgment was filed, they were permitted to file  
7 another Grounds of Defense, and so this also is super-  
8 seded. It is similar to the situation to the Court docu-  
9 ment that it has already before the Court in that that  
10 document has lost its force and effect because the suit  
11 has been settled, or dismissed or whatever.

12 THE COURT: Mr. Sokol.

13 MR. SOKOL: If Your Honor please, Stafford  
14 County Board of Supervisors filed a Motion for Judgment,  
15 we filed a Grounds of Defense. They apparently found  
16 something wrong with their Motion for Judgment; therefore,  
17 they came to this Court and asked that they be permitted  
18 to amend it and Your Honor granted that. Any reasonable  
19 construction on those events is that the previous Motion  
20 for Judgment and the previous Grounds for Defense are  
21 rendered mute by the filing of amended pleadings in this  
22 case and I see no relevance whatsoever in whatever effort  
23 Mr. Harris is now expending and I ask it be denied.

1 THE COURT: Mr. Harris, what authority do  
2 you have for receipt of the pleadings of the case into  
3 evidence?

4 MR. JOHN HARRIS: The same authority we  
5 went through yesterday, sir.

6 THE COURT: Let's not go through it again.  
7 These documents are rejected.

8 MR. JOHN HARRIS: Would you note my exception.

9 THE COURT: Yes.

10 MR. JOHN HARRIS: In the alternative if it  
11 is possible that some of the information in here would be  
12 objectionable because they are the allegations of the  
13 plaintiff, I would wish to tender to the Court a Motion  
14 for Judgment which all the portions we believe are not  
15 relevant have been deleted and the Grounds of Defense,  
16 which is arranged the same way, the portions which are  
17 not relevant or may otherwise be objectionable because  
18 they have not been admitted.

19 THE COURT: This is a selected editorial  
20 effort?

21 MR. JOHN HARRIS: No, sir, the portions which  
22 he had denied have been deleted. I seek for it to come in  
23 as admissions by a party and a portion that he has not



1 admitted I--presume that he would not want to the jury to  
2 read and re-read what our allegations were.

3 MR. SOKOL: He's talking about the original  
4 Motion for Judgment again.

5 MR. JOHN HARRIS: Yes.

6 MR. SOKOL: Your Honor, I make the same  
7 objection. We have an extant pleading before the  
8 Court. Any admissions that Safeco made in the now  
9 existing pleading on which this case is being tried  
10 we have no problems with.

11 MR. JOHN HARRIS: Could you mark them as  
12 refused.

13 THE COURT: Mr. Harris, tell me what these  
14 documents are.

15 MR. JOHN HARRIS: This is the Motion for  
16 Judgment.

17 THE COURT: It's what Motion for Judgment?

18 MR. JOHN HARRIS: The original Motion for  
19 Judgment; it was later amended.

20 THE COURT: How is it different from this  
21 original Motion for Judgment?

22 MR. JOHN HARRIS: It's the same thing except  
23 only the portions that the defendant admitted remain.

1 THE COURT: Who amended it, who selected  
2 what went into that document?

3 MR. JOHN HARRIS: It is this with a piece  
4 of paper.

5 THE COURT: I said who selected?

6 MR. JOHN HARRIS: I did.

7 THE COURT: So it's selected portions of  
8 the original Motion for Judgment compiled by you?

9 MR. JOHN HARRIS: That's right, yes, sir.

10 THE COURT: These documents are Plaintiff's  
11 Exhibits A, B, C and D, rejected. Call your next witness.

12 MR. WILLIAM HARRIS: Mr. Cook.

13 THE BAILIFF: He hasn't been seen yet this  
14 morning.

15 THE COURT: Call your next witness.

16 MR. WILLIAM HARRIS: Your Honor, I don't  
17 understand why he's not here.

18 THE COURT: Mr. Harris, I don't either but  
19 let's get going.

20 MR. WILLIAM HARRIS: I have no other witnesses,  
21 Your Honor, we would rest.

22 THE COURT: He's your last witness?

23 MR. WILLIAM HARRIS: Yes, Your Honor.

1 THE COURT: I'm not going to make you rest  
2 at this point if Mr. Cook's been delayed just a few  
3 minutes; go ahead and give him a ring and see if you can  
4 locate him.

5 Thereupon,

6 DONALD KEITH COOK,  
7 a witness, was called for examination by counsel for the  
8 plaintiff, and, having been duly sworn, was examined and  
9 testified as follows:

10 DIRECT EXAMINATION

11 BY MR. WILLIAM HARRIS:

12 Q State your name, please.

13 A I'm Donald Keith Cook.

14 Q Where do you presently reside?

15 A In Bedford, Virginia.

16 Q Were you ever employed by Stafford County?

17 A Yes, sir.

18 Q When and in what capacity?

19 A From January 1, 1972, until about I believe  
20 it was sometime around early May of 1973 and I was the  
21 Executive Secretary to the then County Administrator,  
22 County Administrator when I finally left here.

23 Q Where else have you been employed with

1 relation to local government?

2 A My first position in local government was  
3 the City of Fayetteville, North Carolina, where I was  
4 assistant to the -- Administrative Assistant to the  
5 City Engineer. Then Henrico County I was Administrative  
6 Assistant to the County Manager in 1966 to 1970 and then  
7 I was Executive Secretary of Caroline County from about  
8 1970 to coming to Stafford in '72, and presently I'm  
9 City Manager for Bedford, Virginia.

10 Q Did you become familiar with the Crows Nest  
11 Harbour project while you were employed by Stafford County?

12 A There were some sections that had been  
13 preliminarily approved prior to my coming here -- yes, I  
14 was familiar and then during my tenure here, there were  
15 correspondence and discussions with the developers of  
16 Crows Nest Harbour.

17 Q I show you Plaintiff's Exhibit Seven;  
18 was this one of those plats that you approved -- I mean  
19 that you referred to of being preliminarily approved?

20 A Prior to 1972 there were Sections A through  
21 D which had been approved by the Board of Supervisors,  
22 I believe these are December 1, '71, and this is Section B,  
23 looks like Section A, and, right, these are A and B. These

1 would appear to be -- of course, these were not finally  
2 approved while I was here because the bonding had not  
3 been completed -- yes, sir.

4 Q I show you Plaintiff's Exhibit Eight and  
5 I ask if that was also what you were referring to and  
6 I also show you Plaintiff's Exhibit Nine?

7 A These would appear to be, it's been a long  
8 time but these are the Sections numbers and I am assuming  
9 these are the plats because I'm not -- you know, it's  
10 been a long time, but these are Sections A through D  
11 and I would assume these are the same plats. I have no  
12 signature on here when I was here. They would appear to  
13 be the plats, yes, sir.

14 Q Is there anything on there that makes you  
15 think they're not the plats?

16 MR. SOKOL: I think that's already been  
17 admitted; isn't it, Your Honor?

18 THE WITNESS: I feel sure they are.

19 THE COURT: Are you making an objection?

20 MR. SOKOL: No, sir, I just wonder why we're  
21 going into it.

22 THE WITNESS: I feel sure they are, I have  
23 no reason to believe they're not. From eight years ago

1 it's hard to look at a piece of paper and say it is  
2 exactly that when my signature is not on there and I'm  
3 sure they are.

4 BY MR. WILLIAM HARRIS:

5 Q You stated these had been preliminarily  
6 approved, what was the policy of Stafford County with  
7 respect to approval of plats as to when they were finally  
8 approved?

9 A Plats were submitted, they of course went  
10 over -- they were submitted to the Planning Commission,  
11 the Planning Commission recommended the approval to the  
12 Board of Supervisors, the Board of Supervisors gave  
13 approval -- when I say approval, of course, that was  
14 approval, that was everything to be done, and of course  
15 they could not be recorded until signed by the subdivision  
16 agent. In other words, everything would be done and the  
17 plats and of course the final thing would be the bonding,  
18 and the final water and sewer arrangements and this type  
19 of thing.

20 Q Did the question arise as to whether the  
21 plats that had been approved in '71, which were the ones  
22 I just showed you, whether there was a problem about  
23 having them recorded since it was in 1973 that the bonds

1 were placed?

2 A The chairman of the Planning Commission  
3 discussed with me and it was a question -- and the  
4 subdivision ordinance stated that subdivisions shall  
5 record a plat within one year after final approval and,  
6 from my notes that I had when I was here, we did contact  
7 the County Attorney regarding the one year's duration  
8 and it was his opinion -- I do not have a written  
9 opinion -- but this is a letter to John Porter, that  
10 in his opinion that final approval would not be given  
11 until signed by the subdivision agent.

12 Q Mr. Porter was the chairman of the Planning  
13 Commission at that time?

14 A Yes, sir, I believe he was, I believe he was  
15 the chairman at that time -- yes, he was the chairman  
16 at that time in '73.

17 Q Could I see what you're looking at?

18 A Yes, sir, these are some things I had in  
19 my personal file which you may have copies of. I'm sure  
20 you have them, I'd like to have them back because I may  
21 need them.

22 Q Is this a copy of a letter that you wrote  
23 Mr. Porter on January 12th?

1           A.     That is correct, yes.

2                     MR. SOKOL:  No objection.

3                     MR. WILLIAM HARRIS:  I'd offer this as an  
4     Exhibit, Your Honor.

5                     THE COURT:  This letter is received as  
6     Plaintiff's Exhibit Eighteen.

7                             (The document heretofore referred to  
8                     was marked Plaintiff's Exhibit Eighteen  
9                     and received in evidence.)

10                    THE WITNESS:  Your Honor, would a copy of  
11     that be returned to me later.

12                    MR. WILLIAM HARRIS:  I'll have a copy made.  
13     Would you answer Mr. Sokol's questions, please.

14                             CROSS EXAMINATION

15                    BY MR. SOKOL:

16                    Q     By way of identifying just two more letters,  
17     Mr. Cook, I show you -- this is a letter October 18,  
18     1972, I show you a copy of the letter, it purports to  
19     be yours, October 18, '72, from D. K. Cook with copy to  
20     S. L. Alexander to Mr. Richard Johnson and ask if you  
21     recognize it?

22                    A     Yes, I do recognize it.

23                    Q     Do you recall sending this letter to



1 Mr. Johnson?

2 A Yes, sir.

3 MR. SOKOL: I'd like this previously marked  
4 for identification only to be tendered as the defendant's  
5 next numbered Exhibit, Your Honor.

6 THE COURT: Gentlemen, do you have any  
7 objections?

8 MR. WILLIAM HARRIS: No, sir.

9 THE COURT: This letter from Mr. Cook to  
10 Mr. Richard Johnson, October 18, 1972, is received as  
11 Defendant's Exhibit One.

12 (The document heretofore marked  
13 Defendant's Exhibit One was received  
14 in evidence.)

15 BY MR. SOKOL:

16 Q Mr. Cook, I take it the purpose of that  
17 letter is to tell Mr. Johnson to withhold approval of the  
18 plats until zoning is approved; is that correct?

19 A That is correct. At the time the letter is  
20 written -- I believe later on that I determined -- I  
21 think the time that letter was written, I believe later  
22 on I determined that there had not been any plats  
23 signed by the subdivision agent and I believe the purpose,

1 from my recollection at the time, was if they had been  
2 plats approved, you know, to withhold the final approval  
3 so they would not go to recordation so we could get  
4 bonding. But I believe later on I determined that none  
5 had been finally approved -- is that correct, none had  
6 been finally approved at the time?

7 THE COURT: Mr. Cook, you have to answer  
8 the questions not ask.

9 BY MR. SOKOL:

10 Q I show you one other letter and it's a  
11 photocopy of a letter that bears your signature, at  
12 least appears to, from yourself to H. P. C. Vandenburg, Corpor-  
13 ate Engineers Research Firm dated May 15, 1973; I ask you  
14 to look at that and see if you can authenticate the  
15 fact that that letter was indeed drafted and sent by  
16 you?

17 A I do not remember this letter, it very  
18 well could have been the letter that I wrote. I do --  
19 in fact, I looked over the Exhibits and I did come  
20 across it and it may have been but I really can't say  
21 exactly. It's May 15th, it's about the time I left and  
22 I really can't say to be honest with you.

23 Q Let me ask you this, you see the writing here

1 that's on top of D. K. Cook?

2 A. Yes, sir.

3 Q. That's a rather distinctive scratch, if you'll  
4 excuse that; does that appear to be yours?

5 A. It's not real legible, I really can't say  
6 if it is or isn't to be honest with you.

7 Q. So you don't know whether you sent this letter  
8 or not?

9 A. I really can't say a hundred percent I did;  
10 in all probability, yes, but I can't say a hundred percent  
11 to be honest with you.

12 MR. SOKOL: In all probability I submit is  
13 sufficient, Your Honor, since it bears and I tender  
14 that as the next Exhibit.

15 MR. WILLIAM HARRIS: I object in all  
16 probability.

17 THE WITNESS: I did not have that in my  
18 papers to be honest with you.

19 MR. SOKOL: Ask anyone to authenticate a  
20 seven-year-old letter is asking a lot.

21 THE COURT: Any objection?

22 MR. SOKOL: He said the scratch appears to be  
23 his scratch.

1 THE WITNESS: -There's some grammatical  
2 there that I may not have worded it that way but I  
3 probably did.

4 MR. WILLIAM HARRIS: I have no objection.

5 MR. SOKOL: I tender this as Defendant's  
6 Exhibit, Your Honor.

7 THE COURT: This letter from Mr. Cook to  
8 Mr. Vandenburg of May 15th, 1973, is received as  
9 Defendant's Exhibit Eight.

10 (The document heretofore marked  
11 Defendant's Exhibit Eight was  
12 received in evidence.)

13 BY MR. SOKOL:

14 Q Mr. Cook, you were here pretty much at the  
15 beginning of these presentations by Crows Nest Harbour  
16 of what they intended to do with this forty-five or  
17 forty-six hundred acre tract; weren't you?

18 A I was here from January, '72, until I left,  
19 yes, sir.

20 Q But by January, '72, they had gone through  
21 some preliminaries regarding this presentation of the  
22 plats and --

23 A Sections A through D.

1 Q You have looked, have you not, or you did  
2 at the time at the rather grandiose ambitions of Crows  
3 Nest Harbour for this area; is that right?

4 A Yes, sir.

5 Q Just on the chance you may recall, I'd like  
6 to show you a few documents. Do you recall seeing this  
7 development report for Crows Nest Harbour?

8 A No, sir.

9 Q How about these papers consisting of schemes  
10 for the development of the area and plans for develop-  
11 ment of the area?

12 A I don't remember seeing these while I was  
13 here, no, sir, I really don't.

14 Q Do you remember this, Mr. Cook, this was  
15 an area that was going to be a new town community, this  
16 forty-five hundred acre area; is that right?

17 A Yes.

18 Q I mean, Mr. Vandevender came here to  
19 Stafford County and he laid out actually --

20 MR. WILLIAM HARRIS: Your Honor, I would  
21 object again as exceeding the scope of direct.

22 THE COURT: Objection is overruled.  
23

1 BY MR. SOKOL:

2 Q Mr. Vandevender laid out literally velvet  
3 plans about what Crows Nest would be doing in that area;  
4 is that right?

5 A He had a plan of development.

6 Q And he was talking about high density  
7 residential area, was he not?

8 A He was talking about different levels of  
9 development, I believe a single-family, multi-family,  
10 to my knowledge.

11 Q He was talking about the construction of  
12 golf course in that area; right?

13 A I really don't remember but he probably was  
14 to be honest with you.

15 Q Do you remember that the whole plan was --  
16 underlying the whole plan was provisions for central water  
17 and central sewage; do you remember that?

18 A Not definitely.

19 Q Maybe it's being unfair to you, Mr. Cook,  
20 because we're going back eight or nine years but would it  
21 be fair to say that your memory is kind of fuzzy about  
22 everything that was going on with Crows Nest Harbour back  
23 in 1972; is that right?

1           A.       Yes, I think that would be correct, I think  
2       it was intended that they would have water and sewer but  
3       I don't think any plans were finally developed for it.

4           MR. SOKOL: All right, thank you, Mr. Cook.

5           THE COURT: Any redirect, Mr. Harris?

6           MR. WILLIAM HARRIS: No, Your Honor.

7           THE COURT: You may step down. Do you want  
8       Mr. Cook excused?

9           MR. WILLIAM HARRIS: I'd like to have him  
10       stay at least until lunch time.

11          We rest, Your Honor.

12          MR. SOKOL: I want to make a Motion.

13          (The jury retired to the jury room)

14          THE COURT: Gentlemen, before hearing the  
15       Motion and argument on the Motion, I'm going to take  
16       a fifteen-minute recess.

17          (Brief recess.)

18          THE COURT: All right, Mr. Sokol.

19          MR. SOKOL: Mr. Pugh will make the argument.

20          MR. PUGH: Your Honor, I'd like to make a  
21       Motion to Strike. We would like to state our grounds  
22       at this time. The Motion to Strike you take the  
23       evidence most favorable to the plaintiff and you make a

1 determination whether or not a prima facie case has been  
2 set forth which would entitle the plaintiff to relief.  
3 An underlying principle of law is also that when the  
4 essential facts are not genuinely disputed, a case no  
5 longer becomes one for a jury but becomes a matter of  
6 law which the Judge should rule upon.

7 I believe that the plaintiff has set forth  
8 his case which must be a prima facie case and I could go  
9 into all of our Defenses showing which ones are part of  
10 a prima facie case but that's not really necessary to do  
11 so in this case for the very simple reason is that it is  
12 set forth right in the initial pleadings on the Amended  
13 Motion for Judgment and right in the body of the Board's  
14 own Motion for Judgment.

15 In Paragraph Eight of the Board's Amended  
16 Motion for Judgment the Board says --

17 THE COURT: Do you have the Motion for  
18 Judgment; can you tell me the date it was filed?

19 MR. PUGH: June, 1979; June 20th, 1979.

20 THE COURT: Paragraph Eight.

21 MR. PUGH: Paragraph Eight. It says very  
22 simply, all condition precedent to the duties of Safeco  
23 to perform have occurred. This allegation was denied

\* \* \*



1 written to Safeco. Not a thing has been done by way of  
2 demonstrating a loss, a need or a plan. Thank you.

3 THE COURT: The Motion is granted and the  
4 suit is dismissed. I see no need to back that ruling up  
5 with an opinion at this point because the issues which  
6 underlie this ruling have been fully evaporated in the  
7 Brief and in the argument of counsel and in the  
8 Memorandum Opinion which I filed March 7th of this year.  
9 The suppositions which underlay that March 7th Opinion  
10 have been borne out by the evidence produced in the case  
11 and the conclusions reached in that Opinion are in my  
12 judgment still appropriate and valid.

13 I think that this case is controlled by the  
14 decision in Board against Ecology One. I think that the  
15 evidence does show plainly that the purposes for which  
16 these bonds were given have been frustrated. They have  
17 been frustrated by the acts of the County which is the  
18 stated obligee and they have been frustrated by the  
19 project's being abandoned and not only by the County but  
20 by the people, whoever they were, that bought the lots  
21 and financed the lots.

22 In my opinion it was incumbent upon the  
23 County, even should it be considered a trustee, to

1 present a case upon which a recovery could be had under  
2 principles of indemnity. Ecology One case requires that.

3 There's been no showing, there's been no  
4 evidence on which a conclusion can be reached that the  
5 County has suffered any loss. Despite the assertion of  
6 counsel that the County has the power to remedy this  
7 problem, I think it's very questionable that the County  
8 has the right, the power, to undertake obligations to  
9 develop a private subdivision for the benefit of private  
10 individuals. In fact, there's been no proof, whatever,  
11 of any damage or loss in this case which could be  
12 indemnified under these bonds. All right.

13 MR. FUGH: Your Honor, may I raise one  
14 issue? There were a number of Requests for Admissions  
15 made and they were admitted into evidence subject to  
16 relevancy ruling and all of those Requests were part of  
17 the original paragraphs in the Trial Briefs which we  
18 submitted to you. I believe your ruling based upon what  
19 was in the Trial Briefs, the facts stated there, would  
20 indicate that you believe those facts weren't, in fact,  
21 relevant and therefore we do have what we have in Requests  
22 and Admissions -- I mean, I'm talking about purposes of  
23 appeal in cases. There's a number of Requests we

1 made based specifically on the facts that were stated on  
2 the Trial Brief and there have been a number of relevancy  
3 objections made there to them and I'd hate to get up to  
4 the Supreme Court and have to get into a fight over a  
5 Request for Admissions.

6 MR. WILLIAM HARRIS: Your Honor, Mr. Sokol  
7 and I, as you recall, spent a considerable time  
8 yesterday trying to agree on changes and modifications  
9 to those Requests for Admissions. The Court ruled that  
10 either party may read them in and read in the entire  
11 thing. No one has read them in. They are not part of  
12 the record of this trial. They may be a part of the  
13 Court file but they're not in evidence and I would object.

14 MR. PUGH: An admission is an admission  
15 for all purposes under Rule Four colon Eight of the  
16 Supreme Court Rules; that's all I have to say.

17 THE COURT: Gentlemen, the truth of the  
18 matter is that except insofar as you directed my attention  
19 to them on argument, I have read neither the Request for  
20 Admissions nor the Responses and so I think that the  
21 plain fact is that my ruling was not based on those  
22 Requests or those Responses and I would have to say  
23 that my ruling has been based on the issues as framed by

1 the pleadings and on the evidence which will be reflected  
2 in the court reporter's transcript, this having been  
3 produced here at trial.

4 MR. WILLIAM HARRIS: Your Honor, could I make  
5 several requests of the Court. One is I think this case  
6 is extremely significant and I would request that the  
7 Court write a written opinion so that it will identify  
8 the basis of the opinion.

9 THE COURT: I'm not going to write a written  
10 opinion, Mr. Harris. I'm sorry, I don't have the  
11 capacity for doing that right now.

12 MR. WILLIAM HARRIS: I would ask that all  
13 transcripts be made part of the record with respect to  
14 all motions, all hearings. I would also note my appeal  
15 at this time.

16 THE COURT: Let the Trial Order show that  
17 on Motion of the plaintiff by his attorney, the transcripts  
18 of the trial and all pretrial proceedings are made a  
19 part of the record if and when filed in accordance with  
20 the requirements of the rules. Anything else?

21 MR. WILLIAM HARRIS: No, Your Honor.

22 THE COURT: Of course, the notation of your  
23 appeal is not a matter that is appropriate to the Trial

\* \* \*

## IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Virgil L. Harris, et al  
See Exhibit 1 attached for  
listing of all Complainants

Complainants,

vs.

CHANCERY NO. \_\_\_\_\_

CROWS NEST HARBOUR LIMITED PARTNERSHIP  
SERVE: Dwayne Stevenson  
7221 Dulany Drive  
McLean, Virginia 22101,

and

FVM CORPORATION  
SERVE: Dwayne Stevenson  
7221 Dulany Drive  
McLean, Virginia 22101,

and

RESEARCH HOMES, INC. (Delaware Corp.)  
SERVE: Dwayne Stevenson, R/A  
7221 Dulany Drive  
McLean, Virginia 22101,

and

\* DIVERSIFIED MORTGAGE INVESTORS, INC.  
c/o Daniel Kuzic  
5915 Ponce DeLeon Boulevard  
Coral Gables, Florida 22146,

and

\* COKE L. GAGE  
Box 241  
Decatur, Texas, . . .

and

\* WOODROW MARRIOTT  
4840 Dexter Street, N.W.  
Washington, D.C. 20007,

FILED  
IN CIRCUIT COURT  
CLERK'S OFFICE

JUL 13 1978

JAMES E. HOOFNAGLE  
CLERK, FAIRFAX COUNTY, VA.  
WHIT TAX PAID \$ 5-  
DEPOSIT. .... 20

and

\* FRANK K. JOHNSON  
900 Southern Building  
15th and H Street, N.W.  
Washington, D.C. 20005,

and

\* WILLIAM J. DURKIN, JR., EXECUTOR  
for the Estate of William J. Durkin  
5217 Wissioming Road  
Glen Echo Heights, Maryland 20016,

and

\* BICKNELL A. ROBBINS  
2188 Pleasant Way  
Salt Lake City, Utah 84121,

and

MATTHEW A. CLARY  
6417 Loisdale Road  
Springfield, Virginia 22150,

and

JOHN L. SCOTT  
6417 Loisdale Road  
Springfield, Virginia 22150,

Defendants.

\*(PLEASE SERVE: Secretary of the)  
(Commonwealth, pursuant to )  
(\$8.01-329, Code of Virginia )

BILL OF COMPLAINT

TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF FAIRFAX COUNTY,  
VIRGINIA:

COME NOW, the Complainants, by counsel, and file this

their Bill of Complaint against the Defendants; Crows Nest Harbour Limited Partnership, hereinafter referred to as CNHLP; FVM Corporation, hereinafter referred to as FVM; Research Homes, Inc.; Diversified Mortgage Investors, Inc., hereinafter referred to as DMI; Coke L. Gage; Woodrow Marriott; Frank K. Johnson; William J. Durkin, Jr., Executor for the estate of William J. Durkin; Bicknell A. Robbins; Matthew A. Clary; and John L. Scott; and in support of this Bill of Complaint represent to this Court as follows:

#### COUNT I

1. Defendant, Crows Nest Harbour Limited Partnership (CNHLP), was a Virginia Limited Partnership whose principal office was in Fairfax County, Virginia and which was involved in the sale and development of a parcel of land in Stafford County, Virginia, known as Crows Nest Harbour.

2. Defendant, FVM Corporation (FVM), a Virginia Corporation, was a general partner of CNHLP; Defendant, Coke L. Gage, was also a general partner of CNHLP; and Defendants, Woodrow Marriott, Research Homes, Inc., Frank K. Johnson, William J. Durkin (deceased), and Bicknell A. Robbins originally were designated as limited partners of CNHLP.

3. Complainants have all entered into identical agreements with CNHLP, whereby CNHLP agreed to sell and improve and Complainants agreed to buy certain lots with amenities and improvements thereon in Stafford County, Virginia, in Sections A, B, C, D and E of a planned recreational community, subdivided by CNHLP in

accordance with the land use regulations and ordinances of Stafford County, Virginia, to be known as Crows Nest Harbour. Exhibit 2 attached hereto sets forth the lots purchased by each of the individual Complainants, and a copy of one of the identical agreements is attached hereto, marked Exhibit 3.

4. Complainants have each paid monies pursuant to their agreements with CNHLP.

5. Complainants, as listed in Exhibit 2 attached hereto, pursuant to their agreements with CNHLP, have executed promissory notes payable to CNHLP, which notes have to the best of Complainants' knowledge, been either assigned to the Defendant, DMI, or are still in the possession of CNHLP.

6. Complainants, as listed in Exhibit 2 attached hereto, in addition to their promissory notes have executed deeds of trust naming the Defendants Matthew A. Clary and John L. Scott as trustees, securing said promissory notes.

7. As consideration for and part of the aforestated agreement, CNHLP, through representations both oral and written including a property report supplied to each Complainant, a copy of said property report being attached hereto marked Exhibit 4, agreed inter alia to dedicate and construct on and for the benefit of said lots and within Crows Nest Harbour Subdivision, water and sewer facilities, roads, and underground utilities on or before December 31, 1974 and to set aside certain parcels of land for recreational purposes.

8. CNHLP recorded subdivision plats with Stafford



County for Sections A, B, C and D, but breached its agreement with Complainants and failed to construct, install, or provide any of the water and sewer facilities, roads, and underground utilities, and failed to provide any of the promised amenities for living and recreational purposes in the development, and failed to establish a subdivision by failing to record a subdivision plat for Section E of the development.

9. Complainants who purchased lots in Sections A, B, C or D, as listed in Exhibit 2 attached hereto, although they received title to their lots, received none of the agreed-upon water and sewer facilities, roads, underground utilities or other promised amenities for living and recreational purposes, and, as a result thereof, the land which has been conveyed to them is worth only a small fraction of the stated price in their agreements.

10. Complainants who purchased lots in Section E, as listed in Exhibit 2 attached hereto, not only failed to receive water and sewer facilities, roads, underground utilities and other amenities necessary for living and recreational purposes, but they failed to receive conveyance of title to the property as required under their agreement with CNHLP.

11. Subsequent to discovery of CNHLP failing to construct any of the improvements, on or about June 9, 1978, Complainants caused a written notice of rescission of said agreement to be mailed to all Defendants, a copy of which notice is attached hereto, marked Exhibit 5. Complainants thereby offered to return to Defendants everything of value received from Defendants on return to Complainants of the monies paid pursuant to their agreements and

upon cancellation of all evidences of indebtedness, deeds of trust and other documents.

12. Complainants have performed all of their obligations under said agreements. Defendants have refused, and still refuse, to accept the rescission of the agreements and to return to Complainants the amounts paid, and to cancel all evidences of indebtedness, deeds of trust and other documents.

13. On or about April 30, 1973, an amendment to the certificate of limited partnership of CNHLP, marked Exhibit 6 attached hereto, was filed in Fairfax County, Virginia, and the Defendants, Coke L. Gage, Woodrow Marriott, Frank K. Johnson, William J. Durkin (deceased), and Bicknell Robbins withdrew from CNHLP, and each individual at the same time withdrew the following from CNHLP.

(a) Coke L. Gage withdrew from CNHLP, Three Hundred and Eighty-Five Thousand Dollars (\$385,000.00) in cash, and promissory notes in the amount of One Million One Hundred and Fifteen Thousand Dollars (\$1,115,000.00).

(b) Woodrow D. Marriott withdrew from CNHLP, One Hundred Fifty-Four Thousand Dollars (\$154,000.00) in cash, and promissory notes in the amount of Three Hundred Sixty-Six Thousand Dollars (\$366,000.00).

(c) Frank K. Johnson withdrew from CNHLP, One Hundred Fifteen Thousand Five Hundred Dollars (\$115,500.00) in cash, and promissory notes in the amount of Two Hundred Seventy-Four Thousand Five Hundred Dollars (\$274,500.00).

(d) William J. Durkin (deceased) withdrew from CNHLP,

Seventy-Seven Thousand Dollars (\$77,000.00) in cash, and promissory notes in the amount of One Hundred Eighty-Three Thousand Dollars (\$183,000.00).

(e) Bicknell A. Robbins withdrew from CNHLP, Thirty-Eight Thousand Five Hundred Dollars (\$38,500.00) in cash, and promissory notes in the amount of Ninety-One Thousand Five-Hundred Dollars (\$91,500.00).

14. After the aforesaid amendment of CNHLP and the withdrawal of the above-named Defendants from CNHLP, the partnership continued to exist with FVM, acting as general partner and Research Homes, Inc., a Delaware Corporation, designated as a limited partner.

15. Defendant, Woodrow Marriott, though a limited partner, had taken part in the control of the business of CNHLP and with his consent was by words spoken and written, and by conduct, held out to the public as a general partner in CNHLP.

16. Defendant, Research Homes, Inc., took part in the control of the business of CNHLP and with its consent was by words spoken and written, and by conduct, held out to the public as a general partner in CNHLP.

17. Defendants, Coke L. Gage, Woodrow Marriott, Frank K. Johnson, William J. Durkin (deceased), and Bicknell A. Robbins, withdrew from CNHLP on April 30, 1973, at a time when CNHLP was insolvent and took money and promissory notes as set forth in Paragraph Thirteen without giving any notice to Complainants of the amount of money and obligations they were withdrawing.

18. Defendants, Coke L. Gage, Woodrow Marriott, Frank

K. Johnson, William J. Durkin (deceased), and Bicknell A. Robbins, withdrew from CNHLP on April 30, 1973, without setting forth in the amendment to the limited partnership the amount of money and obligations they were withdrawing and without properly signing or setting forth, in the amendment to the certificate of limited partnership, who was withdrawing from CNHLP.

19. Defendant, DMI, is a Massachusetts business trust organized under the laws of the Commonwealth of Massachusetts.

20. Defendant, DMI, entered into a loan agreement with CNHLP, a copy of which is attached hereto marked Exhibit 7, whereby DMI agreed to lend approximately Fourteen Million Six Hundred Thousand Dollars (\$14,600,000.00) for the development of Crows Nest Harbour.

*Done.*  
21. DMI acted as joint venturer or partner with CNHLP and maintained control over all phases of the Crows Nest Harbour project, and performed the following:

(a) Defendant, DMI, was entitled to and did receive a share of the profits from the sale of lots in the development of Crows Nest Harbour equal to Three Percent (3%) of the gross sales price or of the fair market value of each and every lot or parcel of land sold by CNHLP.

(b) Defendant DMI, was entitled to and did purchase One Hundred Fifty Thousand (150,000) shares of the capital stock of the Defendant, Research Homes, Inc., the limited partner of CNHLP which owned Ninety-Eight Percent (98%) of the partnership interests in CNHLP.

(c) Defendant, DMI, was entitled to and did review and approve the form, terms and conditions of all Agreements of sale, Promissory Notes, Deeds of Trust and all Property Reports supplied to each Complainant in accordance with the Interstate Land Sales Act.

(d) At the request and under the supervision of DMI, CNHLP sent letters to each Complainant asking each Complainants' approval of a rescission of all agreements and documents and refund of all monies paid.

*Defendant* (e) Defendant, DMI, through its written loan agreements and its oral understandings with CNHLP acted in concert with CNHLP as a joint venturer or partner in the sale and proposed development of Crows Nest Harbour.

*Defendant* 22. Defendant, DMI, had knowledge of the breaches of contract by CNHLP to provide water and sewer facilities, roads, underground utilities and other promised amenities for living and recreational purposes.

23. Pursuant to the terms of the loan agreement between DMI and CNHLP, after promissory notes were executed by Complainants, a majority of said notes were assigned to DMI, and on the promissory notes assigned, payments were made by Complainants directly to DMI through Guaranty Bank and Trust Company.

24. Complainants have suffered as a result of the breach of contract and failures of CNHLP, and due to withdrawal of Coke L. Gage, Woodrow Marriott, Frank K. Johnson, William J. Durkin (deceased), and Bicknell A. Robbins from CNHLP, and have paid monies

pursuant to their agreements to CNHLP or Diversified Mortgage Investors, Inc.

WHEREFORE, Complainants pray that said agreements be adjudged, rescinded and voided, and that Complainants have judgment against the Defendants, Crows Nest Harbour Limited Partnership, FVM Corporation, Research Homes, Inc., Coke L. Gage, Woodrow Marriott and Diversified Mortgage Investors, Inc., jointly and severally for all monies paid by Complainants, and that judgment be entered against Coke L. Gage, Woodrow Marriott, Frank K. Johnson, the Estate of William J. Durkin, and Bicknell A. Robbins, jointly and severally, to the extent of their legal liability and that an accounting be made by Diversified Mortgage Investors, Inc. of all sums received from Complainants pursuant to the assignment of their promissory notes; and that the promissory notes, deeds of trust and other documents in the hands of Crows Nest Harbour Limited Partnership, Diversified Mortgage Investors, Inc., or whomever shall be found to possess such documents, be voided and that a preliminary injunction be issued by this Court as to any execution on the promissory notes and deeds of trust involved in this action, and that interest, costs, and reasonable attorney's fees be awarded for the maintenance of this action and for such other relief as this Court deems proper.

#### COUNT II

1. Paragraphs numbered 1, 2, 3, 4, 5 and 6 of Count I are hereby incorporated herein and made a part of this Count II.
2. To induce Complainants to enter into said agreements,

*Allegation is only as to CNHLP*  
*so DM I should be struck as to the fact of state since it*

CNHLP falsely and fraudulently represented to Complainants that the purchase price being paid by Complainants was not merely for legal title to land but for improved lots in a subdivision so created as to require CNHLP to provide water and sewer facilities, roads and underground utilities, and other lands set aside for recreation purposes. Complainants relied on said representations at the time Complainants entered into their agreements, and they would not have entered into said agreements but for said representations.

3. Paragraphs numbered 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of Count I are hereby incorporated herein and made a part of this Count II.

WHEREFORE, Complainants pray that said agreements be adjudged, rescinded and voided, and that Complainants have judgment against the Defendants, Crows Nest Harbour Limited Partnership, FVM Corporation, Research Homes, Inc., Coke L. Gage, Woodrow Marriott and Diversified Mortgage Investors, Inc., jointly and severally for all monies paid by Complainants and for punitive damages in the sum of Five Million Dollars (\$5,000,000.00), and that judgment be entered against Coke L. Gage, Woodrow Marriott, Frank K. Johnson, the Estate of William J. Durkin, and Bicknell A. Robbins, jointly and severally, to the extent of their legal liabilities, and that an accounting be made by Diversified Mortgage Investors, Inc. of all sums received from Complainants pursuant to the assignment of their promissory notes; and that the promissory notes, deeds of trust and other documents in the hands of Crows Nest Harbour Limited Partnership, Diversified Mortgage Investors, Inc., or whomever shall be found to possess such documents, be voided and that a preliminary injunction be issued by this Court as to any

execution on the promissory notes and deeds of trust involved in this action and that interest, costs, and reasonable attorney's fees be awarded for the maintenance of this action and for such other relief as this Court deems proper.

COUNT III

In the alternative to the relief sought by way of rescission in Counts I and II, Complainants state:

1. Paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of Count I are hereby incorporated herein and made a part of this Count III.

2. Complainants have at all times performed all the stipulations, conditions, and agreements stated in said agreement to be performed on their part at the time and in the manner therein specified.

3. Defendants have failed and refused, and still fail and refuse, to perform said agreement on their part.

4. Paragraphs numbered 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 of Count I are hereby incorporated herein and made a part of this Count III.

5. As a result of the aforestated breaches by Defendants, Complainants have suffered damages in the total sum of One Million Six Hundred Fifty-Five Thousand Nine Hundred Dollars (\$1,655,900.00) the amount of damages as to each Complainant being set forth in Exhibit 2.

WHEREFORE, Complainants request that judgment be entered



against the Defendants, Crows Nest Harbour Limited Partnership, FVM Corporation, Research Homes, Inc., Coke L. Gage, Woodrow Marriott and Diversified Mortgage Investors, Inc., jointly and severally for One Million Six Hundred Fifty-Five Thousand Nine Hundred Dollars (\$1,655,900.00), together with interest, costs and attorneys fees, and that judgment be entered against the Defendants, Coke L. Gage, Woodrow Marriott, Frank K. Johnson, the Estate of William J. Durkin and Bicknell A. Robbins, jointly and severally, for Seven Hundred Seventy Thousand Dollars (\$770,000.00), plus interest from April 30, 1973, costs and attorneys fees.

a) Failure to state cause of action against DMI  
No & later DMI - to answer  
b) Stat. of F. rules

ODIN, FELDMAN & PITTLEMAN, P.C.  
4031 University Drive, Suite 202  
Fairfax, Virginia 22030  
(703) 591-7885

By: 

Dexter S. Odin,  
Counsel for Plaintiff

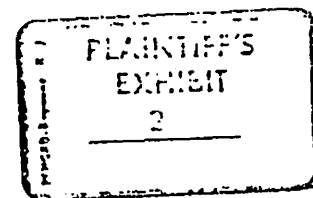


EXHIBIT 2  
COMPLAINANT INFORMATION COMPILATION

Name	Section (Section - Number)	Promissory Note Executed?	Deed of Trust Executed?	Was a Deed Received?	Damages For Count III
Anteroinen, Arvid C.	Section D Lot 47	Yes	Yes	Yes	\$17,300.00
Anteroinen, Margie N.	(co-owner)				
Bain, George F.	Section E Lot 101	Yes	No	No	\$20,000.00
Bain, Mildred B.	(co-owner)				
Baur, John P.	Section E Lot 18	Yes	No	No	\$20,000.00
Baur, Joan S.	(co-owner)				
Bell, David A.	Section A Lot 11 & 12	Yes	Yes	Yes	\$34,600.00
Bell, Janis K.	(co-owner)				
Bennion, Paul A.	Section D Lot 95	Yes	Yes	Yes	\$17,300.00
Berry, Patricia	Section A Lot 81	Yes	Yes	Yes	\$17,300.00
Berry, Steven L.	Section A Lot 80	Yes	Yes	Yes	\$17,300.00
Bonard, Glenn R.	Section B Lot 25	Yes	Yes	Yes	\$17,300.00
Bonard, Bonna L.	(co-owner)				
Boone, Daniel L.	Section D Lot 70	Yes	Yes	Yes	\$17,300.00
Boone, Joung-Ja K.	(co-owner)				
Burton, Len S.	Section C Lot 113	Yes	Yes	Yes	\$17,300.00
Burton, Patsy L.	(co-owner)				
Cameron, Velma H.	Section B Lot 33	Yes	Yes	Yes	\$17,300.00

221  
TOTALS

Name	(Section - Number)	Note Executed?	Trust Executed?	Has a Deed Received?	Damages For Count III
Carroll, Thomas J.	Section A Lot 93	Yes	Yes	Yes	\$17,300.00
Carroll, Lorraine T.	(co-owner)				
Cottam, Howard R.	Section A Lots 24 & 25	Yes	Yes	Yes	\$34,600.00
Cottam, Katherine S.	(co-owner)				
Cox, Lloyd G.	Section B Lot 9	Yes	Yes	Yes	\$17,300.00
CNH Associates (Richard F. Hildreth & Lewis A. Leake)	Section C Lots 115 & 116 (co-owners)	Yes	Yes	Yes	\$34,600.00
DeJong, Capt. H.	Section D Lot 77	Yes	Yes	Yes	\$17,300.00
Doerflein, Katie	Section B Lots 79 & 80	Yes	Yes	Yes	\$34,600.00
Dreslin, Christopher B.	Section A Lot 82	No	No	Yes	\$17,300.00
Dyke, Kermit R.	Section D Lot 31	Yes	Yes	Yes	\$17,300.00
Dyke, Barbara W.	(co-owner)				
Ellison, John, A.	Section E Lot 99	Yes	No	No	\$20,000.00
Everett, Joe N.	Section B Lot 36	Yes	Yes	Yes	\$17,300.00
Garafalo, Nicholas R.	Section A Lot 10	No	No	Yes	\$17,300.00
Garafalo, Anne G.	(co-owner)				
Gardner, James R.	Section A Lot 60	Yes	Yes	Yes	\$17,300.00
Gardner, Frances P.	(co-owner)				

TOTALS

Name	Lot (Section - Number)	Promissory Note Executed?	Deed of Trust Executed?	Was a Deed Received?	Damages For Count III
Gesling, Marion L.	Section C Lot 142	No	No	Yes	\$17,300.00
Gesling, Mary P.	(co-owner)				
GKRW Associates (William G. Reller, Raymond V. Gomez, Robert L. Kleyla, & Walter W. Woo).	Section A Lot 59 (co-owners)	Yes	Yes	Yes	\$17,300.00
Gill, Norman, W.	Section A Lots 94 & 95	Yes	Yes	Yes	\$34,600.00
Gill, Mary Ann.	(co-owner)				
Giltner, John S.	Section C Lot 111	Yes	Yes	Yes	\$17,300.00
Giltner, Peggy Lou	(co-owner)				
Greentree, Leo F.	Section B Lot 76	No	No	Yes	\$17,300.00
Greentree, Opal V.	(co-owner)				
Haraguchi, Wallace K.	Section B Lot 54	Yes	Yes	Yes	\$17,300.00
Hardesty, John O.	Section E Lot 70	No	No	No	\$20,000.00
Hardesty, Eileen H.	(co-owner)				
Hastings, Lionel D.	Section D Lots 7 & 8	Yes	Yes	yes	\$34,600.00
Hildebrand, Floyd G.	Section D Lots 61 & 62	Yes	Yes	Yes	\$34,600.00
Hildebrand, Dona R. H.	(co-owner)				
Hittle, James D.	Section D Lot 32	Yes	Yes	Yes	\$17,300.00

TOTALS

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Name	Section - (Section - Number)	Promissory Note Executed?	Deed of Trust Executed?	Was a Deed Received?	Damages For Count III
Howard, Edward B.	Section E Lots 41 & 42	Yes	Yes	No.	\$40,000.00
Howard, Wilrene W.	(co-owner)				
Howell, Barton, J.	Section C Lot 121	Yes	Yes	Yes	\$17,300.00
Howell, Lorraine C.	(co-owner)				
Hudson, Marguerite C.	Section C Lot 136	Yes	Yes	Yes	\$17,300.00
Huthwaite, Hope A.	Section A Lot 48	Yes	Yes	Yes	\$17,300.00
Huthwaite, Hope A.	Section A Lot 49	Yes	Yes	Yes	\$17,300.00
Huthwaite, Audrey H.	(co-owner)				
Ing, Robert I.	Section B Lot 37	Yes	Yes	Yes	\$17,300.00
Kampschror, Leslie D.	Section A Lot 92	Yes	Yes	Yes	\$17,300.00
Kowalk, Arthur J.	Section C Lots 103, 104, & 105	Yes	Yes	Yes	\$51,900.00
Liem, Som Goan	Section D Lot 87	Yes	Yes	Yes	\$17,300.00
Liem-Dessart, Jeanne Agnes	(co-owner)				
Martin, James H.	Section A Lot 75	Yes	Yes	Yes	\$17,300.00
Martin, Carol J.	(co-owner)				
May, Florence A.	Section C Lot 112	Yes	Yes	Yes	\$17,300.00

TOTALS

Name	Lot (Section - Number)	Was a Promissory Note Executed?	Was a Deed of Trust Executed?	Was a Deed Received?	Damages For Count III
Miner, Lewis C.	Section E Lot 4	Yes	No	No	\$20,000.00
Miner, Doris C.	(co-owner)				
Moore, Kenneth J.	Section B Lot 8	Yes	Yes	Yes	\$17,300.00
Morgan, Richard S.	Section C Lot 132	Yes	Yes	Yes	\$17,300.00
Morgan, Stephen L.	(co-owner)				
Mueller, Richard A.	Section B Lot 94	Yes	Yes	Yes	\$17,300.00
Myers, Earl, Jr.	Section B Lot 98	Yes	Yes	Yes	\$17,300.00
Nelson, Edward R., III	Section D Lot 43	Yes	Yes	Yes	\$17,300.00
Olson, Harold J.	Section B Lot 67	Yes	Yes	Yes	\$17,300.00
Olson, Marion A.	(co-owner)				
Olson, Howard C.	Section D Lot 33	Yes	Yes	Yes	\$17,300.00
Olson, Pauline T.	(co-owner)				
Ord, Susan	Section B Lot 30	Yes	Yes	Yes	\$17,300.00
Ord, Linda	Section B Lot 31	Yes	Yes	Yes	\$17,300.00
Plowman, R. Dean	Section D Lot 23	Yes	Yes	Yes	\$17,300.00
Plowman, Kathleen S.	(co-owner)				
TOTALS					

Name	Lot (Section - Number)	Promissory Note Executed?	Deed of Trust Executed?	Was a Deed Received?	Damages For Count III
Pucillo, Paul J.	Section D Lot 64	Yes	No	No	\$17,300.00
Pucillo, Jeanette C.	Section A Lot 16 (co-owner)	Yes	No	No	\$17,300.00
Puppe, Gerald C.	Section B Lot 85 (co-owner)	Yes	Yes	Yes	\$17,300.00
Puppe, Marsha J.					
Reiche, Harris G.	Section D Lot 19 (co-owner)	Yes	Yes	Yes	\$17,300.00
Reiche, Karen G.					
Reilly, Maurice R.	Section C Lot 125 (co-owner)	Yes	Yes	Yes	\$17,300.00
Reilly, Marian E.					
Richardson, Max L.	Section D Lot 40 (co-owner)	Yes	Yes	Yes	\$17,300.00
Richardson, Doris L.					
Roll, Stephen	Section A Lot 79 (co-owner)	Yes	Yes	Yes	\$17,300.00
Roll, Constance B.					
Sanders, Charles J.	Section E Lot 63	Yes	Yes	Yes	\$20,000.00
Shaver, Robert M.	Section B Lot 81 (co-owner)	Yes	Yes	Yes	\$17,300.00
Shaver, Linda K.					
Shiozawa, Sam	Section E Lot 35 (co-owner)	Yes	No	No	\$20,000.00
Shiozawa, Margaret					
Skaggs, Allen H.	Section E Lot 59	Yes	Yes	No	\$20,000.00

TOTALS



Name	Lot (Section - Number)	Was a Promissory Note Executed?	Was a Deed of Trust Executed?	Was a Deed Received?	Damages For Count III
Skaggs, Miriam M.	Section E Lot 69	Yes	Yes	No	\$20,000.00
Spittle, William L.	Section A Lot 17	Yes	Yes	Yes	\$17,300.00
Stafford Investors, Ltd.. (Virgil L. Harris)	Section B Lot 6	No	No	Yes	\$17,300.00
Stockwell, Willare E.	Section D Lot 68	Yes	Yes	Yes	\$34,600.00
Stockwell, Waltraud E.	(co-owner)				
Tackley, Margaret E.	Section C Lot 141	Yes	Yes	Yes	\$17,300.00
Thomas, Lindsay K.	Section C Lot 106	Yes	Yes	Yes	\$17,300.00
Thomas, Naomi B.	(co-owner)				
Verfuerth, Vincent P., Sr.	Section B Lot 93	No	No	Yes	\$17,300.00
Verfuerth, Vincent, Jr.	(co-owner)				
Wallace, James, Jr.	Section A Lot 42	Yes	Yes	Yes	\$17,300.00
Wallace, Barbara B.	(co-owner)				
Watson, W. R., Jr.	Section A Lot 96	Yes	Yes	Yes	\$17,300.00
Watson, Dolly N.	(co-owner)				
Watt, Raymond D.	Section A Lot 58	Yes	Yes	Yes	\$17,300.00
Watt, Bernice K.	(co-owner)				
Wegner, Alfred M.	Section D Lot 74	Yes	Yes	Yes	\$17,300.00
Wegner, Ruth E.	(co-owner)				

TOTALS

Name	Loc (Section - Number)	Promissory Note Executed?	Deed of Trust Executed?	Was a Deed Received?	Damages For Count III
White, Rabbi Harold S.	Section B Lot 7	Yes	Yes	Yes	\$17,300.00
Whitfield, Howard M.	Section B Lot 72	Yes	Yes	Yes	\$17,300.00
Whitfield, Linda M.	(co-owner)				
Williams, Robert R.	Section A Lot 71	Yes	Yes	Yes	\$17,300.00
Williams, Alice J.	(co-owner)				
Yates, Vern M.	Section D Lot 88	Yes	Yes	Yes	\$17,300.00
Yates, Morene	(co-owner)				
Yuan, Shui	Section D Lots 96 & 97	Yes	Yes	Yes	\$34,600.00

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

VIRGIL L. HARRIS, et al.	)	
	)	
Complainants	)	
	)	
vs.	)	CHANCERY NUMBER 58501
	)	
CROWS NEST HARBOUR LIMITED	)	
PARTNERSHIP, et al.	)	
	)	
Defendants	)	

DEMURRER

COMES NOW the defendant, Diversified Mortgage Investors (DMI), by counsel, pursuant to §8.01-273 of the Virginia Code as amended and respectfully states that Counts I, II and III of the Bill of Complaint fail to state a cause of action and fail to allege facts upon which the relief sought against DMI can be granted and are otherwise insufficient at law and as grounds therefor specifies the following:

COUNT I

(ACTION FOR RESCISSION OF CONTRACT BASED ON  
DEVELOPER'S FAILURE TO MAKE IMPROVEMENTS.)

A. Grounds Construing Loan Agreement As An Alleged Joint Venture:

1. The allegations allegedly establishing an oral joint venture between DMI and Crows Nest Harbour Limited Partnership (CNHLP) are insufficient at law to support any such conclusion.

2. Count I fails to allege the date, terms or essential elements of the alleged joint venture. Paragraphs 21(a) through (e) of the Bill of Complaint are merely excerpts from the Loan Agreement of March 30, 1973 (Complainants' Exhibit 7) which must

be read in the context of the entire Loan Agreement.

3. The Bill of Complaint, in fact, affirmatively shows the existence of no more than a straightforward lender-borrower relationship between DMI and CNHLP.

4. Count I fails to state the date or dates upon which the defendant, DMI, or the alleged joint venture is claimed to have breached any duty, obligation or agreement with the complainants.

B. Grounds Relating To Reliance Of The Complainants Upon Involvement, Participation Or Other Performance By DMI:

5. On information and belief, all of the complainants entered into contracts for the purchase of their lots before March 30, 1973, the execution date of the Loan Agreement between CNHLP and DMI which is identified in paragraph 2 above. Accordingly, no complainant herein could have relied upon any purported representations or involvement of DMI. The pleadings themselves admit that DMI was not then a lender to CNHLP.

6. Count I fails to state a cause of action against DMI because the HUD Report upon which complainant allegedly relied (Complainants' Exhibit 4) is dated December 6, 1971, and explicitly states that the only lien on the property is that in favor of St. Charles City, Inc. Hence no complainant herein could have relied upon any duty, obligation, agreement or alleged joint venture involving DMI or to which DMI was supposedly a party.

7. The HUD Report and the form of contract between CNHLP and complainants which is attached to the Complaint contains express disclaimers which preclude any reasonable reliance thereon by the complainants. These documents clearly state that all amenities

and/or improvements were only proposed and further that no guarantees could be made in connection therewith. Specifically, Complainants' Exhibits 3 and 4 state:

- (a) "Purchaser agrees that he has inspected the property and the same is to be conveyed 'as is'." (Exhibit 3, page 2)
- (b) "Paved roads, electricity, sewer, water and telephone are proposed to be installed at the cost of the developer on a progressive basis .... [and completed] by December 31, 1974, unless, prevented or delayed by governmental inaction or inaction beyond the developers control." (Exhibit 4, page 5)
- (c) "The subdivision [plat] has been approved by the Board of Supervisors of Stafford County, Virginia, but not recorded at the time of filing." (Exhibit 4, page 6)
- (d) The "developer" referred to above is "Crow's Nest Harbour" only. (Exhibit 4, page 1)

C. Grounds Relating To DMI's Involvement Or Participation:

8. Count I fails to allege privity of contract between the complainants and the defendant, DMI.

9. Count I fails to allege any duty, obligation or other commitment owed by DMI to the complainants.

10. The HUD Report is the document upon which the complainants are alleged to have relied. The Loan Agreement as noted above is the sole alleged basis of DMI's claimed duty or obligation to complainants and was first executed long after the complainants herein made their purchases.

D. Grounds Relating to Available Remedies:

11. Count I fails to allege facts that would warrant or entitle the complainants to rescission as against DMI and, among other things, fails to allege an inadequate remedy at law. Additionally,

there is a failure to allege a material and substantial breach sufficient to warrant the extraordinary remedy of rescission.

12. The prayer for injunctive relief fails to allege that there is an inadequate remedy at law and that complainants will suffer irreparable harm.

13. The Complaint fails to allege facts which would permit the award of attorneys' fees.

14. The Complaint fails to allege ownership in or conveyance of the property by DMI now or at the time the cause of action allegedly arose thus precluding any remedy of rescission as to DMI.

#### COUNT II

(ACTION FOR RESCISSION OF CONTRACT BASED ON ALLEGED FRAUDULENT REPRESENTATIONS BY THE DEVELOPER AS TO THE MAKING OF IMPROVEMENTS.)

1. The grounds set forth in paragraphs one through fourteen of the Demurrer to Count I above are incorporated by reference herein and made a part of the specific grounds on which the defendant, DMI, maintains that Count II of the Bill of Complaint is insufficient at law.

2. Defendant, DMI, emphasizes that the Loan Agreement executed between CNHLP and DMI was dated March 30, 1973, whereas the alleged misrepresentations inducing the complainants to enter into their agreements for the purchase of lots were made, if at all, years before the execution of the Loan Agreement or any other involvement or connection whatsoever between CNHLP and DMI.

3. Count II fails to allege any facts against DMI which legally amount to fraud.

4. The Bill of Complaint fails to allege any facts which would justify an award of punitive damages against DMI.

COUNT III

(ACTION FOR DAMAGES FOR ALLEGED BREACH  
OF CONTRACT TO MAKE IMPROVEMENTS.)

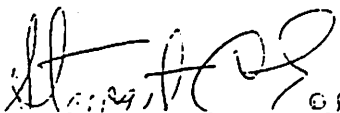
1. The grounds set forth in paragraphs one through fourteen of the Demurrer to Count I and paragraphs one through four of the Demurrer to Count II above are hereby incorporated by reference herein and made a part of the specific grounds on which the defendant, DMI, maintains that Count III of the Bill of Complaint is insufficient at law.

2. Count III is predicated on identical assertions as Count I and Count II and simply requests a different remedy.

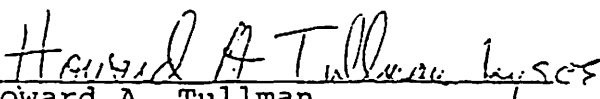
WHEREFORE, DMI, by counsel, requests that the Demurrer be granted and that the Bill of Complaint be dismissed.

DIVERSIFIED MORTGAGE INVESTORS  
By Counsel

EVANS, ECONOMOU AND PICKARD

By   
Stewart C. Economou  
Counsel for Diversified Mortgage Investors

LEVY AND ERENS

By   
Howard A. Tullman  
Counsel for Diversified Mortgage Investors

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

VIRGIL L. HARRIS, et al.	)	
	)	
Complainants	)	
	)	
vs.	)	CHANCERY NUMBER 58501
	)	
CROWS NEST HARBOUR LIMITED	)	
PARTNERSHIP, et al.	)	
	)	
Defendants	)	

PLEA IN BAR ON THE GROUNDS OF STATUTE  
OF LIMITATIONS, LACHES AND ESTOPPEL

COMES NOW the defendant, Diversified Mortgage Investors (DMI), by counsel, and moves the Court to dismiss the Bill of Complaint filed by Virgil Harris, et al. against DMI and as grounds therefor states to the Court that Counts I, II and III are barred by the Statute of Limitations, and the Doctrines of Laches and Estoppel. Specifically, the case is barred in that:

1. The Bill of Complaint herein is barred by §8.01-246(4) of the Virginia Code, which provides that a suit on an unwritten contract must be brought within three years after the cause of action shall have accrued; §8.01-248 of the Virginia Code, which provides that every personal action for which no limitation is otherwise prescribed, shall be brought within one year after the right to bring the action has accrued; and §8.01-249 of the Virginia Code, which provides that in actions for fraud or mistake and in actions for rescission of contract for undue influence the cause of action shall be deemed to accrue when such fraud, mistake or undue



influence is discovered or by the exercise of due diligence reasonably should have been discovered.

2. The complainants knew or should have known that all work ceased at Crows Nest Harbour in September 1974; that Crows Nest Harbour Limited Partnership (CNHLP) filed a proceeding for an Arrangement in the U. S. Bankruptcy Court in Alexandria, Virginia, 75-873-A, in November 1975; and that CNHLP and DMI were engaged in litigation in the Federal Court in Alexandria, Virginia in 1975-1976.

3. Knowing or charged with knowing the above facts, the complainants took no action against DMI.

4. The complainants are, therefore, barred from proceeding in this action against DMI by the applicable Statutes of Limitations and the Doctrines of Laches and Estoppel.

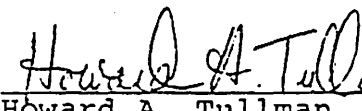
WHEREFORE, DMI, by counsel, requests that its Plea in Bar on the Grounds of Statute of Limitations, Laches and Estoppel be sustained.

DIVERSIFIED MORTGAGE INVESTORS  
By Counsel

EVANS, ECONOMOU AND PICKARD

By   
Stewart C. Economou  
Counsel for Diversified Mortgage  
Investors

LEVY AND ERENS

By   
Howard A. Tullman  
Counsel for Diversified Mortgage  
Investors

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

VIRGIL L. HARRIS, et al.	)	
	)	
Complainants	)	
	)	
vs.	)	CHANCERY NUMBER 58501
	)	
CROWS NEST HARBOUR LIMITED	)	
PARTNERSHIP, et al.	)	
	)	
Defendants	)	

PLEA IN BAR ON THE GROUNDS OF THE STATUTE OF FRAUDS

COMES NOW the defendant, Diversified Mortgage Investors (DMI), by counsel, and moves the Court to dismiss Counts I, II and III of the Bill of Complaint filed by Virgil Harris, et al. against DMI and as grounds therefor respectfully states to the Court that Counts I, II and III are barred by the statute of frauds as codified in §11-2 of the Virginia Code as amended in that:

1. DMI can have no liability with respect to any contract for the sale of real estate between complainants and the defendant, DMI, which is not in writing and signed by DMI.

2. The alleged agreement between complainants and DMI is necessarily an agreement that is not to be performed within a year and any such agreement, therefore, must be in writing and signed by DMI.

3. The Bill of Complaint purports to charge DMI with a promise to answer for the debt, default or misdoings of Crows Nest Harbour Limited Partnership (CNHLP). A writing signed by DMI in favor of the complainants is, therefore, required.

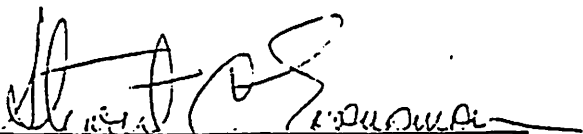
4. The lot owners attempt to charge DMI by reason of pur-

ported representations or assurances concerning the character, conduct, credit, ability, trade, or dealings of CNH with the intent or purpose such that CNHLP could obtain money from the lot owners. To sustain such a claim, a writing signed by DMI is required.

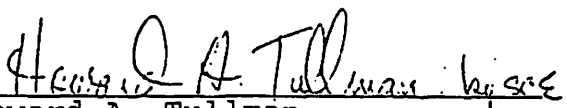
WHEREFORE, DMI, by counsel, requests that its Plea in Bar on the grounds of the Statute of Frauds be sustained.

DIVERSIFIED MORTGAGE INVESTORS  
By Counsel

EVANS, ECONOMOU AND PICKARD

By   
Stewart C. Economou  
Counsel for Diversified Mortgage  
Investors

LEVY AND ERENS

By   
Howard A. Tullman  
Counsel for Diversified Mortgage  
Investors

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

VIRGIL L. HARRIS, et al.	)	
	)	
Complainants	)	
	)	
vs.	)	CHANCERY NUMBER 58501
	)	
CROWS NEST HARBOUR LIMITED	)	
PARTNERSHIP, et al.	)	
	)	
Defendants	)	

PLEA IN BAR ON THE GROUNDS OF MERGER

COMES NOW the defendant, Diversified Mortgage Investors (DMI), by counsel, and moves the Court to dismiss the Complaint against DMI and as grounds therefor respectfully states that Counts I, II and III are barred by the Doctrines of Merger by Contract and Merger by Deed and more specifically states:

1. The Bill of Complaint filed by the lot owners alleges that Crows Nest Harbour Limited Partnership (CNHLP) and DMI were joint venturers.

2. The contract for purchase of the real estate lots between Crows Nest Harbour and the complainants (Exhibit 3 to the Complaint), however, provides:

a. "Seller and Purchaser agree that this is the only agreement between them and that no representations, oral or written have been made or relied upon which are not herein provided or set forth...."

b. "The Purchaser agrees that he has inspected the property and the same is to be conveyed 'as is'."

3. The complainants, therefore, are barred by the Doctrine


of Merger by Contract from seeking to include or incorporate terms, duties, and obligations in the purchase agreement that were not specifically set forth therein, and particularly as against DMI which never signed or was otherwise a party to any such agreement.

4. Those complainants who received deeds are further barred by the Doctrine of Merger by Deed.


WHEREFORE, DMI, by counsel, requests that its Plea in Bar on the Grounds of Merger by Contract and by Deed be sustained.

DIVERSIFIED MORTGAGE INVESTORS  
By Counsel

EVANS, ECONOMOU AND PICKARD.

By   
Stewart C. Economou  
Counsel for Diversified Mortgage  
Investors

LEVY AND ERENS

By   
Howard A. Tullman  
Counsel for Diversified Mortgage  
Investors

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

VIRGIL L. HARRIS, et al.	)	
	)	
Complainants	)	
	)	
vs.	)	CHANCERY NUMBER 58501
	)	
CROWS NEST HARBOUR LIMITED	)	
PARTNERSHIP, et al.	)	
	)	
Defendants	)	

PLEA IN BAR ON THE GROUND OF COLLATERAL ESTOPPEL

COMES NOW the defendant, Diversified Mortgage Investors (DMI), by counsel, and moves the Court to dismiss the Bill of Complaint filed by Virgil Harris, et al. against DMI and as grounds therefor states to the Court that Counts I, II and III are barred by the Doctrine of Collateral Estoppel and as grounds therefor states to the Court as follows:

1. In Crows Nest Harbour vs. Diversified Mortgage Investors, Civil Action No. 76-231-A in the United States District Court for the Eastern District of Virginia (Alexandria Division) judgment was entered on the merits in favor of DMI and against Crows Nest Harbour Limited Partnership (CNHLP) in a suit determining the rights and liabilities of those parties under the Loan Agreement of March 30, 1973. More particularly, the jury found that DMI was justified in refusing further funding of the CNH project and the trial Court directed a verdict in a Counter-Claim filed by DMI for \$4,580,325.87 with interest, attorneys' fees and court costs against CNHLP in a promissory note action. Certified copies

of the aforesaid judgments entered on November 2, 1976, and December 3, 1976, have been filed and marked Defendant's Exhibit "A" and "B" which are incorporated by reference in this Plea in Bar.

2. The Complaint filed by CNH against DMI in the Federal Court alleged four Counts:

- I. Breach of Contract
- II. Breach of Joint Venture Agreement  
between CNHLP and DMI
- III. Fraud
- IV. SEC Violations

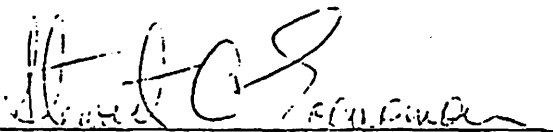
3. After CNHLP completed its case in chief and upon motion of DMI for a directed verdict, Judge Albert V. Bryan, Jr. struck Counts II, III and IV and allowed the matter to go to the Jury solely on the basis of Count I - Breach of Contract. Certified copies of the pleadings filed by CNH and DMI in Civil Action No. 76-231-A in the United States District Court are attached, marked Defendant's Exhibit "C", incorporated by reference herein and made a part hereof.

4. The issue, therefore, of whether CNH and DMI were joint venturers was previously litigated and decided in the Federal Court and the lot owners are now collaterally estopped to raise it.

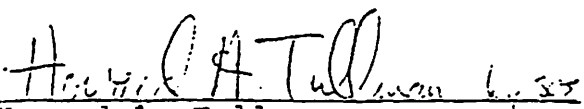
WHEREFORE, DMI, by counsel, requests that its Plea in Bar on the Ground of Collateral Estoppel be sustained.

DIVERSIFIED MORTGAGE INVESTORS  
By Counsel

EVANS, ECONOMOU AND PICKARD

By   
Stewart C. Economou  
Counsel for Diversified Mortgage  
Investors

LEVY AND ERENS

By   
Howard A. Tullman  
Counsel for Diversified Mortgage  
Investors



VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

VIRGIL L. HARRIS, et al.	)	
	)	
Complainants	)	
	)	
vs.	)	CHANCERY NUMBER 58501
	)	
CROWS NEST HARBOUR LIMITED	)	
PARTNERSHIP, et al.	)	
	)	
Defendants	)	

MOTION TO DISMISS ON THE GROUNDS OF MISJOINDER  
OF PARTIES PLAINTIFF AND DEFENDANT

COMES NOW the defendant, Diversified Mortgage Investors (DMI), by counsel, and moves the Court to dismiss Counts I, II and III of the Bill of Complaint filed herein and as grounds therefor respectfully states to the Court as follows:

1. The Bill of Complaint joins as party plaintiffs 80 of approximately 300 lot owners at Crows Nest Harbour.
2. Each lot owner has a separate and distinct cause of action because each lot owner purchased his property on a different date; the misrepresentations, if any, made to each lot owner would have been made on different dates and by different people and with different content; the date of the alleged breach may very well have been different in each case; and the amount of damages in each case is different. Furthermore, some of the lot owners have received Deeds to their property and others have not.
3. Virginia procedural law has no machinery established for class actions, if this action be considered as such.

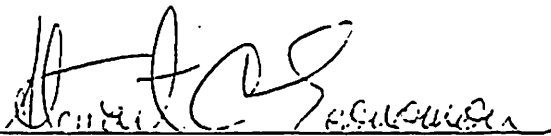
4. The Bill of Complaint misjoins the defendants because defendants, McClary and Scott, are merely trustees and the defendant, DMI, is in no way related to the defendants, Gage, Marriott, Johnson, Durkin, and Robbins.

5. This case does not come within the provisions of Rule 3:9(A) Joinder of Additional Parties of the Rules of the Supreme Court of Virginia.

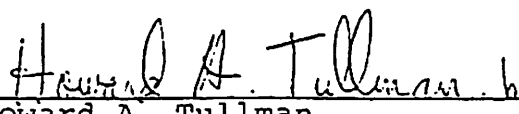
WHEREFORE, DMI, by counsel, requests that its Motion to Dismiss be granted.

DIVERSIFIED MORTGAGE INVESTORS  
By Counsel

EVANS, ECONOMOU AND PICKARD.

By   
Stewart C. Economou  
Counsel for Diversified Mortgage  
Investors

LEVY AND ERENS

By   
Howard A. Tullman  
Counsel for Diversified Mortgage  
Investors

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

VIRGIL L. HARRIS, et al.	)	
	)	
Complainants	)	
	)	
vs.	)	CHANCERY NUMBER 58501
	)	
CROWS NEST HARBOUR LIMITED	)	
PARTNERSHIP, et al.	)	
	)	
Defendants	)	

MOTION TO DISMISS FOR MULTIFARIOUSNESS

COMES NOW the defendant, Diversified Mortgage Investors (DMI), by counsel, and moves the Court to dismiss the Bill of Complaint filed on the following grounds:

1. Count I of the Bill of Complaint alleges a breach of contract against Crows Nest Harbour Limited Partnership (CNHLP) for the purchase and development of real property, it imputes liability as against DMI as a result of an alleged joint venture arrangement between CNHLP and DMI, it alleges a wrongful withdrawal of funds from CNHLP by defendants, Gage, Marriott, Johnson, Durkin, and Robbins, and it alleges no wrongdoing against defendants, McClary and Scott. All of these allegations are also incorporated in Counts II and III of the Bill of Complaint.

2. As a result of the interweaving of the various causes of action, the pleadings are hopelessly entangled and confused.

3. The Bill of Complaint unites several matters distinct in their nature against several defendants who are unconnected in interest and liability.

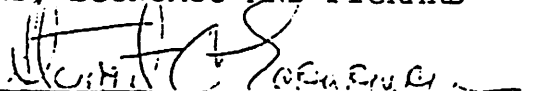
4. Defense of the Bill of Complaint in its present form requires the defendant, DMI, to incur unnecessary and undue expense from which it should be protected.

WHEREFORE, the defendant, DMI, by counsel, requests that its Motion to Dismiss for Multifariousness be granted.

EVANS, ECONOMOU AND PICKARD

DIVERSIFIED MORTGAGE INVESTORS  
By Counsel

By



Stewart C. Economou, Counsel  
for Diversified Mortgage Investors

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

VIRGIL L. HARRIS, et al.	)	
	)	
Complainants	)	
	)	
vs.	)	CHANCERY NUMBER 58501
	)	
CROWS NEST HARBOUR LIMITED	)	
PARTNERSHIP, et al.	)	
	)	
Defendants	)	

MOTION FOR A BILL OF PARTICULARS

COMES NOW the defendant, Diversified Mortgage Investors (DMI), by counsel, and pursuant to Rule 3:16(b) of the Rules of the Supreme Court of Virginia, moves the Court to Order the complainants to file a Bill of Particulars setting forth:

1. The dates on which each of the contracts for the purchase of lots were executed.
2. The date on which the alleged joint venture between Crows Nest Harbour Limited Partnership (CNHLP) and DMI was formed.
3. The dates on which CNHLP breached its alleged agreements with the complainants.
4. The dates on which DMI as an alleged co-venturer breached its alleged agreements with the complainants.
5. The dates on which the alleged fraudulent misrepresentations were made, the persons who made them, and the substance of the misrepresentations.

WHEREFORE, the defendant, DMI, by counsel, requests that its Motion for a Bill of Particulars be granted.

DIVERSIFIED MORTGAGE INVESTORS  
By Counsel

EVANS, ECONOMOU AND PICKARD

LEVY AND ERENS

By Stewart C. Economou  
Stewart C. Economou  
Counsel for Diversified Mortgage  
Investors

By Howard A. Tullman, Esq.  
Howard A. Tullman  
Counsel for Diversified Mortgage  
Investors

CERTIFICATE OF SERVICE

I hereby certify that a copy of the following:

1. Demurrer
2. Plea in Bar on the Grounds of Statute of Limitations, Laches and Estoppel
3. Plea in Bar on the Grounds of the Statute of Frauds
4. Plea in Bar on the Grounds of Merger
5. Plea in Bar on the Ground of Collateral Estoppel
6. Motion to Dismiss on the Grounds of Misjoinder of Parties Plaintiff and Defendant
7. Motion to Dismiss for Multifariousness
8. Motion for a Bill of Particulars

have been mailed this 31<sup>st</sup> day of August, 1978, to:

1. Robert K. Richardson, Counsel for  
Virgil L. Harris, et al.  
4031 University Drive  
Suite 202  
Fairfax, Virginia 22030
2. Alan S. Kerxton, Counsel for Crows Nest  
Harbour Limited Partnership, FVM  
Corporation and Research Homes, Inc.  
5454 Wisconsin Avenue  
Washington, D. C. 20015
3. Haynie S. Trotter, Counsel for Gage  
4085 University Drive  
Fairfax, Virginia 22030

4. James E. Ablard, Counsel for Marriott,  
Johnson, Durkin, and Robbins  
1925 North Lynn Street  
Arlington, Virginia 22209
5. Matthew A. Clary, pro se.  
6417 Loisdale Road  
Springfield, Virginia 22150
6. John L. Scott, pro se.  
6417 Loisdale Road  
Springfield, Virginia 22150

  
Stewart C. Economou

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

VIRGIL L. HARRIS, et al,	)	
	)	
Complainants,	)	
	)	
vs.	)	IN CHANCERY NO. 58501
	)	
CROWS NEST HARBOUR LIMITED	)	
PARTNERSHIP, et al,	)	
	)	
Defendants.	)	

O R D E R

THIS CAUSE came on to be heard on the Motions to Add and Dismiss Parties Complainants and upon the consent thereto of the Defendants, as indicated by endorsement of respective counsel below, such consent being given on the condition that it creates no prejudice to any responsive pleadings previously filed herein on behalf of any of the Defendants, it is therefore

ORDERED, ADJUDGED AND DECREED that the following parties should be deleted:

David A. Bell  
Janis K. Bell  
Section A, Lots 11 & 12  
  
Lawrence Davis  
Section E, Lots 113 & 119  
  
Ronald G. Robinett  
Section D, Lot 41

ORDERED, ADJUDGED AND DECREED that the following parties should be added:

✓ Norman D. Everett  
James C. Everett  
Section B, Lot 36  
  
✓ Audrey Huthwaite  
Co-Owner, Section A, Lot 49



- ✓ Helen Johnson  
Co-Owner, Section C, Lot 106
- ✓ Joseph J. & Margaret M. Ach  
Co-Owners, Section C, Lots 103, 104 & 105
- ✓ Weldon D. & Amalie H. Bigony  
Section B, Lot 69
- ✓ Brian & Stathia E. Boyd  
Section C, Lot 109
- ✓ Eugene V. & Irene Brennan  
Section D, Lot 6
- ✓ Donald Gold  
Section A, Lot 77
- ✓ Edward L. Grampp  
Section B, Lot 32
- ✓ Jay Kent Haache  
Section B, Lot 59
- ✓ Gen. & Mrs. Paul H. Hodges  
Section C, Lot 114
- ✓ Gen. Paul H. Hodges  
Allen C. Rozsa  
Section D, Lot 81
- ✓ Thomas C. & Betty Hopkins  
Section E, Lots 65 & 68
- ✓ Mickey C. Hughes  
Section B, Lot 57
- ✓ Jack E. & V. Jill King  
Section D, Lot 103
- ✓ Captain Dick Kloppe  
Section D, Lot 86
- ✓ Section E, Lots 92, 93 & 94
- ✓ Arthur J. & Emma D. Kowalk  
Co-Owners, Section C, Lots 103, 104, & 105
- ✓ Frances J. Kunchinsky  
Section E, Lot 8
- ✓ Bernard W. Lewis & Gordon P. Lewis  
Section A, Lot 69
- ✓ Dr. Robert H. & Vivian J. Miller  
Co-Owners, Section D, Lot 82
- ✓ Karl R. & Jean D. Morton  
Section D, Lot 98
- ✓ John & Hideko Plank  
Section D, Lots 10 & 11
- ✓ Chester & Lucyna Radlo  
Section A, Lot 8

- ✓ Lt. Col. & Mrs. Jesse T. Randall  
Lot 50, Section D
- ✓ Charles B. & Margaret Richardson  
Section B, Lot 66
- ✓ John G. & Nada A. Roberts  
Section A, Lot 66
- ✓ Robert & Karen Russo  
Co-Owners, Section C, Lot 138
- ✓ James W. & Mary R. Smith  
Co-Owners, Section D, Lot 82
- ✓ Melvin Tano  
Section D, Lot 20
- ✓ Mary Taube  
Section B, Lot 84
- ✓ Bruce Walker  
Section D, Lot 76
- ✓ Alan P. & Janet W. White  
Section E, Lot 108
- ✓ James W. Dyer  
Section A, Lots 3, 4, 5, 6, & 7
- ✓ Wiehl Land Co., Inc.  
Section B, Lots 77 & 78
- ✓ R. Mitchell  
Co-Owner, Section B, Lots 77 & 78
- ✓ C. Ramsdale  
Co-Owner, Section B, Lots 77 & 78
- ✓ J. Bayless  
Co-Owner, Section B, Lots 77 & 78
- ✓ W. Chadwell  
Co-Owner, Section B, Lots 77 & 78
- ✓ E. Schonborn  
Co-Owner, Section B, Lots 77 & 78
- ✓ W. Woolsey  
Co-Owner, Section B, Lots 77 & 78
- ✓ Wilford M. Farnsworth  
Section B, Lot 70  
Section C, Lot 120
- ✓ Crows Nest Harbour Alliance Partnership  
Section B, Lot 56  
Section C, Lots 119 & 120  
Section D, Lot 84

David M. Sagal  
Virginia N. Prater  
✓ A. Pierce Campbell  
Co-Owners, Section B, Lot 56  
Section C, Lots 119 & 120  
Section D, Lot 84

✓ Edward A. Page  
Co-Owner, Section A, Lot 18

Clifford M. Herman, M.D.  
✓ Section E, Lots 46 & 47

✓ Capt. Andrew L. Normand, Jr., USMC  
Co-Owner, Section C, Lot 138

✓ Weston R. Clark  
Section B, Lot 88

✓ Brent Clark  
Section B, Lot 89

It being the ruling of the Court that the addition of the foregoing parties shall create no prejudice to the responsive pleadings filed on behalf of any Defendants upon which the Court has not yet made a ruling.

ENTERED this \_\_\_\_\_ day of November, 1978.

\_\_\_\_\_  
J U D G E

PRESENTED:

ODIN, FELDMAN & PITTLEMAN, P.C.  
4031 University Drive, Suite 202  
Fairfax, Virginia 22030  
(703)591-7885

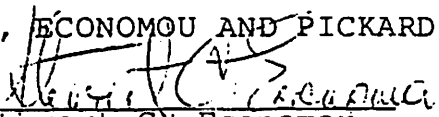
By:

Robert K. Richardson  
Counsel for Complainants

SEEN:

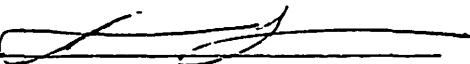
EVANS, ECONOMOU AND PICKARD

By:

  
Stewart C. Economou  
Counsel for DMI

LEVY AND ERENS

By:

  
Howard A. Tullman  
Counsel for DMI

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

VIRGIL L. HARRIS, et al.,

## Complainants,

**V.**

CROWS NEST HARBOUR LIMITED  
PARTNERSHIP, et al.,

**Defendants.**

CHANCERY NO. 58501

## ORDER

This cause came to be heard on January 31, 1979, for a hearing on the various Motions filed herein by the Defendants, and, following argument by counsel, the presentation of evidence, and the submission of Memoranda of Points and Authorities by the parties hereto, the issues raised were carefully considered by the Court and the ruling of the Court on each of the issues raised was set forth by Letter Opinion dated August 30, 1979, and

IT APPEARING TO THE COURT that the rulings made in said Letter Opinion should be set forth by formal Order, it is therefore

ORDERED, ADJUDGED and DECREED as follows:

1. That the Demurrer of Diversified Mortgage Investors to Counts I and III of the Bill of Complaint are hereby overruled;

2. That the Demurrer of Diversified Mortgage Investors to Count II of the Bill of Complaint is hereby sustained.

3. That the Complainants shall have twenty-one days from

the entry of this Order within which to file an amended Count II.

4. That a ruling on Diversified Mortgage Investors' Motion to Dismiss Count II on grounds of misjoinder of parties plaintiff is postponed until an amended Count II is filed, if Complainants elect to amend;

5. That Diversified Mortgage Investors' Motion to Dismiss Counts I and III on grounds of misjoinder of parties plaintiff and defendant is hereby denied;

6. That Diversified Mortgage Investors' Motion to Dismiss for multifariousness is hereby denied;

7. That Diversified Mortgage Investors' Plea In Bar on the Grounds of Statute of Limitations, Laches, and Estoppel is hereby denied;

8. That Diversified Mortgage Investors' Plea In Bar on the Grounds of the Statute of Frauds is hereby denied;

9. That Diversified Mortgage Investors' Plea In Bar on the Ground of Collateral Estoppel is hereby denied;

10. That Diversified Mortgage Investors' Plea In Bar on the Ground of Merger is hereby denied;

11. That Diversified Mortgage Investors' Motion to Amend Demurrer is hereby granted;

12. That the Demurrer of Coke L. Gage to Counts I and III is hereby overruled;

13. That the Demurrer of Coke L. Gage to Count II is hereby sustained, with leave granted to the Complainants as aforesaid to amend Count II;

14. That Coke L. Gage's Plea In Bar on the Grounds of

Statute of Limitations, Laches and Estoppel is hereby denied;

15. That the Motion to Quash Process filed herein by Woodrow Marriott, Frank K. Johnson, Bicknell A. Robins, and William J. Durkin, Jr., Executor for the Estate of William J. Durkin is hereby denied;

16. That no ruling is made at this time on Coke L. Gage's Motion to Dismiss on the ground of misjoinder of parties plaintiff; on Diversified Mortgage Investors' Amended Demurrer; and on the Motion to Quash Process Served on James E. Hoofnagle, Clerk, filed by Woodrow Marriott, Frank K. Johnson, Bicknell A. Robins, and William J. Durkin, Jr., Executor for the estate of William J. Durkin.

17. That all of the foregoing rulings are made for the reasons set forth in this Court's Letter Opinion dated August 30, 1979, which is hereby incorporated herein and made a part hereof.

ENTERED this \_\_\_\_ day of \_\_\_\_\_, 1979.

\_\_\_\_\_  
RICHARD J. JAMBORSKY  
Judge

PRESENTED AND OBJECTED TO  
AS TO PARAGRAPHS 2, 4, 13 & 16

ODIN, FELDMAN & PITTLEMAN, P.C.  
4031 University Drive, Suite 202  
Fairfax, Virginia 22030  
(703) 591-7885

By: \_\_\_\_\_  
Robert K. Richardson, Esquire

By: \_\_\_\_\_  
Dexter S. Odin, Esquire

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

VIRGIL L. HARRIS, et al.,  
Complainants,  
v.  
CROWS NEST HARBOUR LIMITED  
PARTNERSHIP, et al.,  
Defendants.

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CHANCERY NO. 58501

N O T I C E

PLEASE TAKE NOTICE that the attached Order will be presented to the Court for entry on October 19, 1979, at 10:00 A.M., or as soon thereafter as counsel may be heard.

VIRGIL L. HARRIS  
By Counsel

ODIN, FELDMAN & PITTLEMAN, P.C.  
4031 University Drive, Suite 202  
Fairfax, Virginia 22030  
(703) 591-7885

BY: Robert K. Richardson  
Robert K. Richardson, Esquire  
Counsel for the Complainant

BY: Dexter S. Odin  
Dexter S. Odin, Esquire  
Counsel for the Complainant

Certificate of Service

I hereby certify that true copies of the foregoing Order and Notice were mailed, postage prepaid, this 10th day of October, 1979, to each of the following individuals: Alan S. Kerxton, Esquire, 5454 Wisconsin Avenue, Washington, D.C. 20015; James E.



Albard, Esquire, 1050 17th Street, N.W., Washington, D.C. 20036; Matthew A. Clary, Esquire, 6417 Loisdale Road, Springfield, Virginia 22150; John L. Scott, Esquire, 6417 Loisdale Road, Springfield, Virginia 22150; Haynie S. Trotter, Esquire, 4103 University Drive, Fairfax, Virginia 22030; Howard A. Tullman, Esquire, 208 S. LaSalle Street, Chicago, Illinois 60604; and Stewart C. Economou, Esquire, 122 South Royal Street, Alexandria, Virginia 22314.

  
Robert K. Richardson, Esquire

4. That Diversified Mortgage Investors' Motion to Dismiss Count II on grounds of misjoinder of parties is postponed until an amended Count II is filed, if Complainants elect to amend;

5. That Diversified Mortgage Investors' Motion to Dismiss Counts I and III on grounds of misjoinder of parties plaintiff and defendant is hereby denied;

6. That Diversified Mortgage Investors' Motion to Dismiss for multifariousness is hereby denied; provided, however, that this ruling does not apply to Count II, which will be ruled upon after the Complainants file an amended Count III if they so elect;

7. That Diversified Mortgage Investors' Plea in Bar on the Grounds of Statute of Limitations, Laches, and Estoppel is hereby denied, provided, however, that ~~these rulings as to the Statute of~~

*are*  
~~Limitations is~~ made without prejudice to Defendants to renew these *as to substantive matters not previously presented to the Court* points at trial after presentation of Complainants' evidence;

8. That Diversified Mortgage Investors' Plea in Bar on the Grounds of the Statute of Frauds is hereby denied, without prejudice to defendant to renew the point at trial after presentation of Complainants' evidence;

9. That Diversified Mortgage Investors' Plea in Bar on the Ground of Collateral Estoppel is hereby denied;

10. That Diversified Mortgage Investors' Plea in Bar on the Ground of Merger is hereby denied;

11. That Diversified Mortgage Investors' Motion to Amend Demurrer is hereby granted;

12. That the Demurrer of Coke L. Gage to Counts I and III is hereby overruled;



in Bar, or other pleadings heretofore filed and ruled upon, may so indicate by an appropriate pleading and the previous rulings of this Court on such issues and questions shall apply to all such pleadings.

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

VIRGIL L. HARRIS, et al.,

Complainants,

vs.

CROWS NEST HARBOUR LIMITED  
PARTNERSHIP, et al.,

Defendants.

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CHANCERY NO. 58501

FIRST AMENDED COUNT II

COME NOW the Complainants, by counsel, and pursuant to the Order entered herein on October 19, 1979, file this First Amended Count II to the Bill of Complaint.

1. Paragraphs numbered 1, 2, 3, 4, 5 and 6 of Count I are hereby incorporated herein and made a part of this Count II.

2. To induce Complainants to enter into said agreements, Crows Nest Harbour Limited Partnership falsely and fraudulently misrepresented to Complainants that the purchase price being paid by Complainants was not merely for legal title to land but for improved lots in a subdivision so created as to require Crows Nest Harbour Limited Partnership to provide complete water and sewer facilities, all underground utilities, paved roads meeting Virginia Department of Highway standards providing ready access to each lot, water and fire hydrants, a complete planned city, and recreational facilities such as riding stables, playing fields and courts, established trails, marinas, beaches, a heli-

port and airport, community recreation center and swimming pools, an 18 hole golf course, a country club, a restaurant and similar facilities and improvements as set forth in the said HUD Property Report and other writings and means set forth herein. Complainants relied on said misrepresentations at the time Complainants entered into their said agreements, and they would not have entered into said agreements but for said misrepresentations.

3. Paragraphs numbered 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of Count I are hereby incorporated herein and made a part of this Count II.

4. The aforesaid misrepresentations were repeatedly and consistently made by Sherman Vandevender and L. Blaine Liljenquist, and by other members of the Crows Nest Harbour Limited Partnership sales staff at sales seminars or investment seminars attended by Complainants at the Tyson's Holiday Inn, Tyson's Corner, Virginia, on October 5, 7, 12, 14, 21, 26 and 28, 1971, on November 18, 22, 24, and 30, 1971, and on December 6 and 9, 1971; at the Twin Bridges Marriott, Arlington, Virginia on October 19, 1971; and at the Sheraton Motor Inn, Fredericksburg, Virginia, on October 27, 1971, and November 11, 1971. Such misrepresentations were made at such meetings orally by such individuals, and in writing by means of brochures, advertising material, and "fact sheets" distributed at such meetings and which specifically made such misrepresentations.

5. The aforesaid misrepresentations were also made to Complainants by the aforesaid individuals by means of direct mailing of such brochures, advertising materials, and "fact sheets".

6. The aforesaid misrepresentations were made to Complainants by the Crows Nest Harbour Newsletter dated October 21, 1971, provided to or mailed to the Complainants.

7. The aforesaid misrepresentations were made to Complainants by means of a letter dated January 11, 1973, from Sherman Vandevender to Warren O. Woolsey, President, Wiehle Land Company.

8. The names of the complete Crows Nest Harbour Limited Partnership sales staff are unknown to the Complainants, but known to the Defendants. The only names known to Complainants, in addition to those already stated, are Richard J. Ford, Janet L. Fenn, Raymond F. Pfohl, Emil P. Eschenberg, Jack Burlbaugh, John D. Chase, Lewis S. Franck, Tom D. Jones, Roger P. Lewis, Edward Marolda, Susan Snelling, Vaughn Stout, Jeanne Wells, and Ned Willgoos.

WHEREFORE, Complainants pray that said agreements be adjudged, rescinded and voided, and that Complainants have judgment against the Defendants, Crows Nest Harbout Limited Partnership, FVM Corporation, Research Homes, Inc., Coke L. Gage, Woodrow Marriott and Diversified Mortgage Investors, Inc., jointly and severally for all monies paid by Complainants and for punitive damages in the sum of Five Million Dollars (\$5,000,000.00), and that judgment be entered against Coke L. Gage, Woodrow Marriott, Frank K. Johnson, the Estate of William J. Durkin, and Bicknell A. Robbins, jointly and severally, to the extent of their legal liabilities, and that an accounting be made by Diversified Mortgage Investors, Inc. of all sums received from Complainants pursuant to the assignment of their promissory notes; and that the

promissory notes, deeds of trust and other documents in the hands of Crows Nest Harbour Limited Partnership, Diversified Mortgage Investors, Inc., or whomever shall be found to possess such documents, be voided and that a preliminary injunction be issued by this Court as to the execution of the promissory notes and deeds of trust involved in this action and that interest, costs, and reasonable attorney's fees be awarded for the maintenance of this action and for such other relief as this Court deems proper.

VIRGIL L. HARRIS, et al.

BY: 

Dexter S. Odin,  
Counsel for Complainants

ODIN, FELDMAN & PITTLEMAN, P.C.  
4031 University Drive, Suite 202  
P.O. Box 367  
Fairfax, Virginia 22030  
(703) 591-7885

BY: 

Robert K. Richardson, Esquire  
Counsel for the Complainant

BY: 

Dexter S. Odin, Esquire  
Counsel for the Complainant



Certificate of Service

I hereby certify that true copies of the foregoing First Amended Count II were mailed, postage prepaid, this 8<sup>th</sup> day of November, 1979, to each of the following individuals: Alan S. Kerxton, Esquire, 5454 Wisconsin Avenue, Washington, D.C. 20015; James E. Albard, Esquire, 1050 17th Street, N.W., Washington, D.C. 20036; Matthew A. Clary, Esquire, 6417 Loisdale Road, Springfield, Virginia 22150; John L. Scott, Esquire, 6417 Loisdale Road, Springfield, Virginia 22150; Haynie S. Trotter, Esquire, 4103 University Drive, Fairfax, Virginia 22030; Howard A. Tullman, Esquire, 208 S. LaSalle Street, Chicago, Illinois 60604; and Stewart C. Economou, Esquire, 122 South Royal Street, Alexandria, Virginia 22314.

  
ROBERT K. RICHARDSON, Esquire

JAN 2 1979

JAMES E. HUFFAGLE  
Judge of the Circuit Court  
of Fairfax County, Va.

V I R G I N I A :

## IN THE CIRCUIT COURT OF FAIRFAX COUNTY

VIRGIL L. HARRIS, et al.,	)	
	)	
Complainants	)	
	)	
vs.	)	CHANCERY NO. 58501
	)	
CROWS NEST HARBOUR LIMITED	)	
PARTNERSHIP, et al.,	)	
	)	
Defendants	)	

AGREEMENT AND STIPULATION

THIS AGREEMENT AND STIPULATION, made this 31<sup>ST</sup> day of January, 1979, by and among Diversified Mortgage Investors, hereinafter DMI, and all of the parties who are Complainants in the suit presently pending in the Circuit Court of Fairfax County, Virginia, captioned as Virgil Harris, et al. v. Crows Nest Harbour Limited Partnership, et al., Chancery No. 58501, hereinafter Complainants.

WHEREAS, each of the Complainants purchased a lot or lots or contracted to purchase a lot or lots in the Crows Nest Harbour development in Stafford County, Virginia, as the same is more particularly described among the pleadings in this case; and

WHEREAS, pursuant to such purchases or contracts, many of the Complainants made a cash down payment and executed a promissory note, some of which were secured by a deed of trust for the balance of the purchase price; and

WHEREAS, DMI is the present holder of such promissory notes;  
and

WHEREAS, while the parties are in dispute over the legal rights and duties arising out of the promissory notes and deeds of trust, and while the Complainants deny a default, the parties do agree that payments have not been made in accordance with the terms of the instrument; and

WHEREAS, DMI has instituted foreclosure proceedings against many of such Complainants by reason of such nonpayment, which foreclosure sales originally were scheduled for October 17, 1978;  
and

WHEREAS, the Complainants filed in the said Circuit Court proceedings a Motion for Injunctive Relief seeking to enjoin said foreclosure; and

WHEREAS, by agreement, said foreclosure as to the Complainants was rescheduled for November 7, 1978; and

WHEREAS, on November 7, 1978, DMI was permitted to proceed with foreclosure subject to the terms of a Decree presented to said Circuit Court, agreed to by counsel for the Complainants and counsel for DMI but was not timely entered by the Court; and

WHEREAS, the parties hereto have decided to proceed by way of this Agreement and Stipulation rather than by entry of the said Decree, all of the terms of which are incorporated herein, to accomplish the same purposes.

NOW, THEREFORE, in consideration of the covenants, conditions, and undertakings set forth herein, and for other good and valuable consideration, it is hereby agreed as follows:

1. The Complainants, subject to and in consideration of the

terms of this Agreement and Stipulation, hereby waive their objections to the foreclosure proceedings conducted on October 7, 1978, and November 7, 1978, including the failure of DMI to obtain leave of court prior to proceeding with foreclosure, the reasonableness of the notice, the reasonableness, good faith, and propriety of the manner in which the foreclosure sale was conducted by selling all foreclosed lots on one day, the reasonableness, good faith, and propriety of the conduct of the bidding and the purchase prices paid pursuant thereto, and all other objections available at law or in equity to said foreclosure proceedings.

2. Except as agreed in Paragraph 1, by agreeing to permit DMI to proceed with foreclosure, the Complainants waive no issues, rights, claims, or causes of action which have been or might be raised in the said Circuit Court proceedings, or in subsequent related proceedings if the Complainants sever their said pending common suit.

3. Except as herein set forth, DMI, by proceeding as herein set forth, waives no defenses to any claims or causes of action as aforesaid by the Complainants, nor does DMI waive any issues heretofore raised by its responsive pleadings in said litigation.

4. DMI shall be the foreclosure purchaser of record pursuant to the terms of this Agreement and Stipulation of each lot which was scheduled for foreclosure on November 7, 1978. If DMI breaches or has breached this condition, the sale at foreclosure to any third party shall be defective and voidable at the option of the affected Complainant or Complainants.

5. As foreclosure purchaser, DMI shall take title in trust for the benefit of the respective Complainants and shall hold title

in trust, free from the claims of any creditor or potential creditor of DMI other than the Complainants, and shall do nothing with or to the title to said property or to or with the said property itself to in any way encumber or modify the title or detract from the present value of the property.

6. DMI shall hold title as aforesaid and preserve the property as aforesaid until the final determination of the said Circuit Court proceedings or of subsequent related proceedings as aforesaid in accordance with this Agreement and Stipulation.

7. Upon entry of a Final Decree in the said Circuit Court proceedings or in such subsequent proceedings granting rescission as sought or awarding damages, or both, DMI shall be bound by such Final Decree (unless DMI elects to appeal any such Final Decree which DMI shall be free to do) and shall pay over to the Complainants such sums as set forth in such Decree within thirty (30) days of entry of said Decree or the final disposition of any appeal taken therefrom which wholly affirms such Decree or modifies such Decree and enters final judgment in favor of Complainants.

8. Upon entry of a Final Decree in the said Circuit Court proceedings or in such subsequent proceedings granting rescission as sought, upon payment by DMI as aforesaid, DMI shall be released from any requirement to hold the title in trust or to preserve the property and shall be free to deal with the previously foreclosed property or additional property obtained pursuant to rescission free of all claims by the Complainants.

9. Upon entry of a Final Decree in said Circuit Court proceedings or in such subsequent proceedings denying rescission but

awarding damages, DMI shall be bound by such Final Decree (unless DMI elects to appeal any such Final Decree which DMI shall be free to do) and shall make payment to the Complainants as ordered by the Decree within thirty (30) days of entry of the Final Decree or the final disposition of any appeal taken therefrom which wholly affirms such Decree or modifies such Decree and enters final judgment in favor of Complainants. Upon payment, neither party shall have further claims against the other.

10. Upon entry of a Final Decree in said Circuit Court proceedings or in such subsequent proceedings denying rescission but in any way reforming the contract, note, or deed of trust for any Complainant by reducing the amount payable thereunder, DMI shall be bound by such Final Decree unless DMI elects to appeal any such Final Decree which DMI shall be free to do. In such event, the affected Complainant shall have the option of electing to pay to DMI the amount so determined by this Court to be due, or of making no further payments and being released from all further liability under said contract, note, or deed of trust. If the affected Complainant elects to make such payment to DMI, then upon payment of said amount to DMI, DMI shall execute a Deed conveying title to said lot to the respective Complainant free of all claims by DMI. If the amount previously paid by the respective Complainant is in excess of the amount determined by this Court to have been properly payable under said contract, note, or deed of trust, DMI shall refund said overpayment to the respective Complainant and convey title to said lot to the Complainant. If a Complainant elects to make no further payments to DMI and desires to be released from all further liability, the Complainant shall, as a condition of any such release, be required to execute a general release in favor

of DMI of any and all claims he may have or have ever had against DMI as well as a quitclaim deed in recordable form conveying all of his right, title and interest in said lot to DMI or its designee. Upon receipt by DMI of both such documents, the Complainant's note shall be marked "cancelled" and returned to Counsel for Complainants. All payments to be made or deeds or releases to be executed and delivered pursuant to the terms of this paragraph shall be completed within sixty (60) days from the entry of the Final Decree unless an appeal is taken by DMI or by the Complainants. Any Complainant not making any election by the end of the sixty (60) day period provided above shall be deemed to have elected to generally release DMI and to have waived all right, title, and interest in his lot for all purposes and all time. For those Complainants who have continued making payments in accordance with the terms of their promissory notes, such Complainants shall not be required to accelerate their payments.

11. Upon entry of a Final Decree in said Circuit Court proceedings or in such subsequent proceedings denying rescission and determining that the contract, note, and deed of trust for each Complainant is enforceable and binding pursuant to their original terms, each Complainant against whom DMI previously has foreclosed shall, if they elect to repurchase their lot, have sixty (60) days from the entry of the Final Decree within which they may make payment of the amount determined by this Court to be due and, and upon payment of said amount, DMI shall convey title to the respective lot to the respective Complainant. If any Complainant elects not to repurchase their lot, they may rely upon the provisions of Paragraph 10 of this Agreement and Stipulation and will be released from any further liability under said contract, note, or deed of trust upon their execution of

the release and quitclaim deed referred to in Paragraph 10 above in favor of DMI and/or its designee.

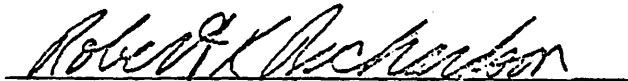
12. If further Complainants fail to make payments according to the terms of their note or otherwise become subject to foreclosure by DMI prior to the date of the Final Decree, they shall be accorded the same rights and benefits as provided by this Agreement and Stipulation to those originally subject to foreclosure on October 17, 1978.

13. This Agreement and Stipulation shall survive the entry of any Final Decree, Order of Dismissal, or interim or Final Order or Decree of any sort in these or subsequent related proceedings.

THIS Agreement and Stipulation is hereby entered into by the parties hereto by and through their counsel this 27th day of March, 1979.

VIRGIL L. HARRIS, et al.,  
Complainants

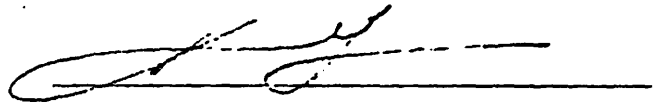
By: Their Counsel



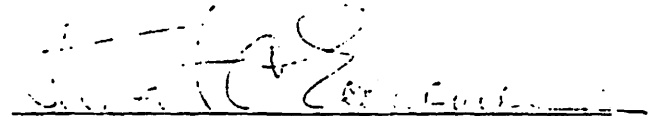
Robert K. Richardson for  
ODIN, FELDMAN & PITTLEMAN, P. C.

DIVERSIFIED MORTGAGE INVESTORS

By: Its Counsel



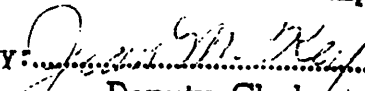
Howard A. Tullman for  
LEVY & ERENS



Stewart C. Economou for  
EVANS, ECONOMOU AND PICKARD

A COPY TESTE:

JAMES E. HOOFNAGLE, CLERK

By:  Deputy Clerk