
In The
Supreme Court Of Virginia

RECORD NO. 002784



PYRAMID DEVELOPMENT, L.L.C.,

Appellant,

v.

D&J ASSOCIATES,

Appellee.

JOINT APPENDIX

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

D&J ASSOCIATES

Plaintiff,

v.

PYRAMID DEVELOPMENT, LLC

Serve: Christopher M. Malone,
Registered Agent
100 Shockhoe Slip
Richmond, Virginia 23219

Defendant.

Chancery No. _____

BILL OF COMPLAINT - PRELIMINARY INJUNCTIVE RELIEF SOUGHT

This is a suit for Temporary and Permanent Injunctive Relief and other damages resulting from the Defendant's unlawful infringement of the Complainant's rights of ingress, egress, parking, and other easement rights in real property. In support thereof, Complainant, D&J Associates, Inc. (D&J), by counsel, states as follows:

Parties

1. D&J Associates is a Virginia general partnership which maintains its principal place of business in the City of Richmond.
2. Defendant Pyramid Development, L.L.C. ("Pyramid") is a Virginia limited liability company which maintains an office at 1707 Summit

Avenue in the City of Richmond, and which otherwise regularly transacts business in the City of Richmond.

Jurisdiction and Venue

3. This Court has jurisdiction over this suit pursuant to Virginia Code §§ 8.01-260, 59.1-337 and 17-123.
4. Venue is proper in this judicial district pursuant to Virginia Code §8.01-262(1) and (3), in that the defendant is a resident of and regularly transacts business in this jurisdiction.

Facts

5. By a Deed dated March 30, 1984 and recorded among the land records of the City of Richmond in Deed Book 2, page 253, a true copy of which is attached hereto as Exhibit A (the "Deed"), D&J acquired a single-story brick building (the "Building") known as 1719-1721 Summit Avenue, together with appurtenant easement rights (the "Easement") described in the Deed over property to the southeast of the Building for the purpose of ingress and egress to the Building and the parking of vehicles. In addition, D&J and its predecessors in title to the Building have consistently and openly used the Easement area for ingress and egress and parking for a period in excess of fifteen (15) years.

6. D&J has leased the Building to Radac Corporation ("Radac") since February, 1997. The use of the Easement for ingress and egress and parking is essential to D&J's use and enjoyment of the Building.
7. Pyramid has caused to be erected concrete barriers and has locked gates which unreasonably impede and deny D&J and its tenant their rights of ingress, egress, and common use of the Easement. This activity has blocked their access to loading docks and other commercial entrances to the Building, which has caused hardship to D&J and Radac, including but not limited to restricting deliveries to the property requiring the use of smaller delivery trucks, and thereby delaying deliveries. As a result, Radac has demanded that D&J remedy this situation or risk termination of the lease with Radac.
8. Further, Pyramid has informed D&J that should D&J not enter into a certain agreement proposed by Pyramid for the maintenance and continued use of the Easement, Pyramid will continue to barricade the Easement and tow any vehicles of D&J, its tenant, or its tenants customers or agents which are parked within the Easement area. In addition, Pyramid has demanded that D&J pay monthly parking fees for the use of the Easement area.

9. D&J states that it is entitled to injunctive relief because:

(a) It is likely to prevail on the merits as to the causes of action for which it seeks injunctive relief in that Pyramid has no legal basis for the actions described herein;

(b) Injunctive relief is necessary to maintain the status quo and to prevent continued and future wrongdoing by defendant during the pendency of this litigation;

(c) D&J has suffered, and will continue to suffer absent injunctive relief, irreparable injury for which there is no adequate remedy at law.

Specifically, D&J stands to lose its tenant(s) in the Building as a result of the Defendant's wrongful conduct, including the loss of future rents and tenants which cannot be easily quantified in money damages, and will incur additional expense such as vehicle recovery fees, potential liability from tenants and others affected by the Defendant's unlawful conduct, and other expenses as a result of the Defendants' threatened actions. Further, the Defendant will be unjustly enriched and will wrongfully infringe upon the complainant's right absent injunctive relief.

(d) The balance of hardships warrants injunctive relief, because D&J stands to suffer irreparable injury if defendant is not enjoined from continued wrongful conduct, while on the other hand the Defendant will sustain minimal losses if subject to the injunction sought;

WHEREFORE, D&J seeks the entry of a preliminary injunction for the duration of this lawsuit requiring:

- (i) the removal of barriers and a means of access through locked gates in a manner to allow the full use of its property rights;
- ii) a that Defendant take no action to tow, remove, or otherwise restrict the parking of vehicles by D&J, its tenant, or its tenant's agents, employees, customers, or common carriers from that portion of the property that D&J has such rights in; and
- iii) that Defendant take no other action which restricts or infringes from D&J's property and other rights during the pendency of this proceeding

Respectfully submitted,

D&J ASSOCIATES

By: 

Of Counsel

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Facsimile:(804) 225-8706
Counsel for Complaint, D&J Associates

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THIS DEED, made this 30th day of March, 1984, between S & W ASSOCIATES, a Virginia Limited Partnership, hereinafter designated "Grantor", and D & J ASSOCIATES, a Virginia General Partnership, hereinafter designated "Grantee";

WITNESSETH:

That for and in consideration of the sum of Ten Dollars (\$10.00) to Grantor in hand paid, and other good and valuable consideration, the receipt whereof is hereby acknowledged, the Grantor does hereby grant and convey, WITH GENERAL WARRANTY AND ENGLISH COVENANTS OF TITLE, unto the Grantee, the following described property:

ALL of those certain lots, pieces or parcels of land, lying and being in the City of Richmond, Virginia, on the eastern line of Summit Avenue between Patton Avenue and Norfolk Street, with improvements thereon, known and designated as Nos. 1719 and 1721 Summit Avenue, and all rights, ways and appurtenances to the same belonging or in any wise appertaining, and bounded and described as follows, to-wit:

BEGINNING at a point on the eastern line of Summit Avenue distant two hundred thirty-three and eighty-five hundredths (233.85) feet north of the intersection of the eastern line of Summit Avenue with the northern line of Norfolk Street (which point of beginning is opposite the center of a party wall for the use of the premises No. 1719 Summit Avenue and the property adjoining on the south known as No. 1717 Summit Avenue) and from said point of beginning running northwardly along and fronting on the eastern line of Summit Avenue a distance of forty-eight and ninety-four hundredths (48.94') feet, more or less, (which point is opposite the center of a party wall for the use of the premises known as 1721 Summit Avenue and the property adjoining immediately on the north known as 1723 Summit Avenue) and from said front running back eastwardly between parallel lines and passing through the center of said party walls aforesaid a distance of one hundred forty-two and ten hundredths (142.10') feet, more or less, to the property now or formerly owned by Davis Brothers, Incorporated, on which are located spur tracks and sidings, constructed and operated under the provisions of a certain ordinance of the Council of the City of Richmond, approved July 17, 1923, together with the right, privilege and easement to use in common the said spur tracks and sidings, and so much of the property of Davis Brothers, Incorporated, in the block bounded by Patton Avenue, the Boulevard, Altamont Avenue, Norfolk Street, and Summit Avenue,

and abutting said spur tracks and sidings as may be necessary to afford the property hereby conveyed and the improvements thereon free and convenient access to and use of the said spur tracks and sidings; the location of said spur tracks and sidings being shown on a plat made by Charles H. Fleet, Certified Civil Engineers, dated May 24, 1924, a blue print copy of which was recorded with a deed of trust from Davis Brothers, Incorporated, to Pollard and Bagby, Incorporated, Trustee, said plat being recorded in the Clerk's Office, Circuit Court, City of Richmond, Division I, Virginia, in Plat Book 6, page 91.

The property hereby conveyed is further described on a plat by Harvey L. Parks, Inc., dated March 27, 1984, and entitled "Improvements on No. 1719 & 1721 Summit Avenue, City of Richmond, Virginia," a copy of which is attached hereto and recorded herewith.

BEING the same real estate conveyed to S & W Associates, a Limited Partnership, by deed from Robert L. Fischer and Catherine E. Fischer, his wife, dated March 23, 1981, recorded April 2, 1981, in the Clerk's Office, Circuit Court, City of Richmond, Division I, Virginia, in Deed Book 780, page 153.

This conveyance is made subject to restrictions, easements and agreements of record, if any, insofar as the same may lawfully apply to said land.

WITNESS the following signatures and seals:

S & W ASSOCIATES, a Virginia Limited Partnership

By J. Gordon Wimmer (SEAL)
J. Gordon Wimmer, General Partner

By W. W. Simmers, Jr. (SEAL)
W. W. Simmers, Jr., General Partner

STATE OF VIRGINIA

CITY/COUNTY OF Albemarle, to-wit:

The foregoing instrument was acknowledged before me this 31st day of March, 1984, by J. Gordon Wimmer, General Partner, on behalf of S & W Associates, a Virginia Limited Partnership.

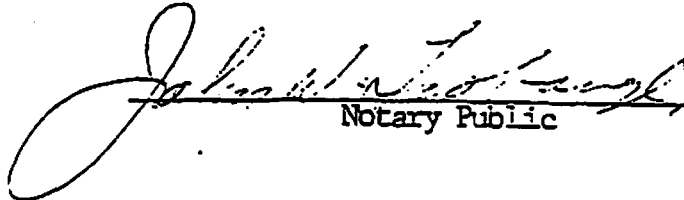
My commission expires: Aug 1, 1986

Donald A. [Signature]
Notary Public

CITY/COUNTY OF Rockingham to-wit:

The foregoing instrument was acknowledged before me this 31 day
of March, 1984, by W. W. Simmers, Jr., General Partner, on behalf
of S & W Associates, a Virginia Limited Partnership.

My commission expires: 3-18-87


Notary Public

VIRGINIA: IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF THE CITY OF
RICHMOND, .

Tax Imposed by Sec. 58-54.1

Code of Va. has been paid.

This deed was presented, and, with the Certificate annexed, admitted to record on

APR 13 1984

at 10:45 o'clock A . M.

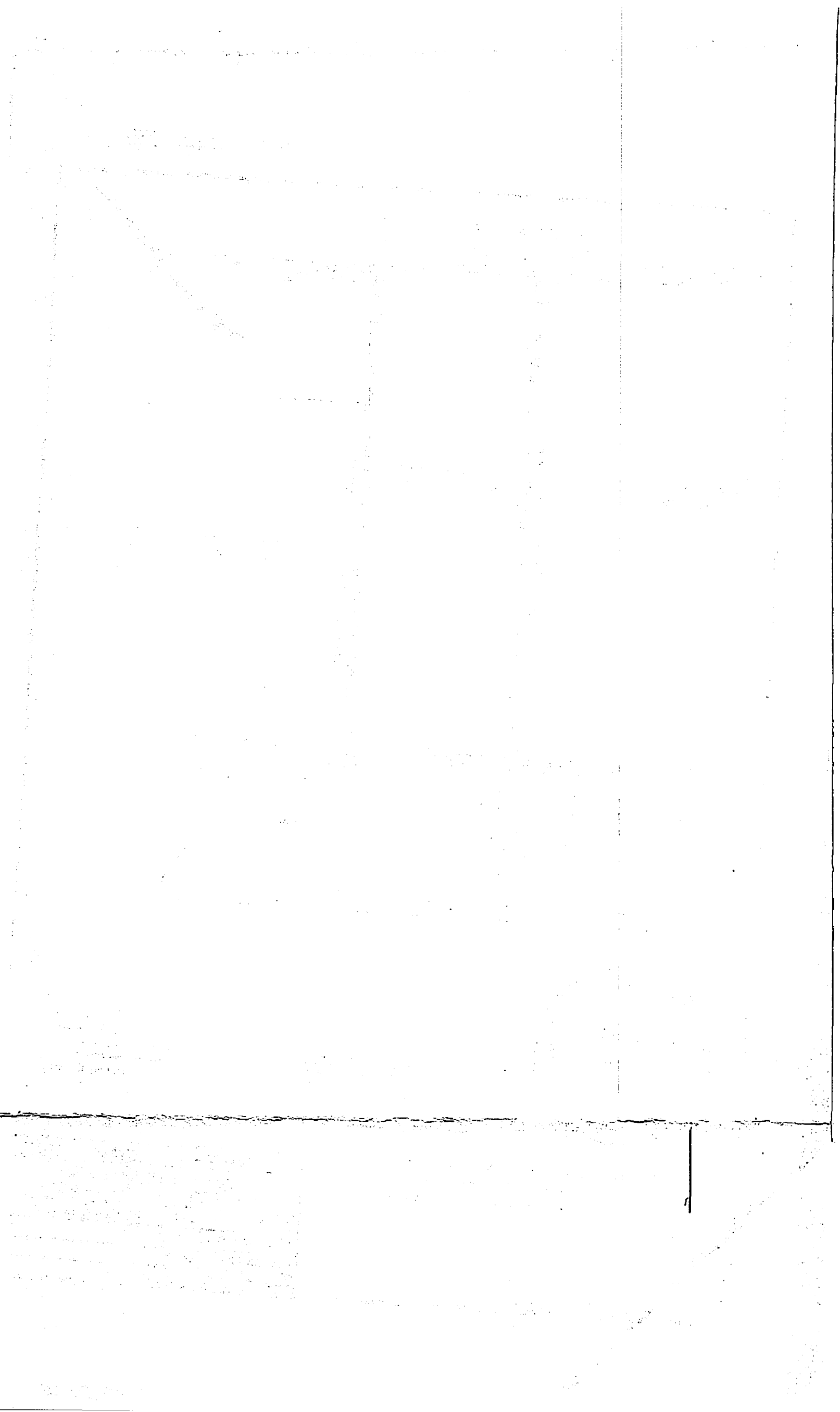
Clerk's Fee 12.00
Transfer Fee 1.00
State Tax 180.00
City Tax 60.00
Grantor's Tax 120.00
Total 373.00

File: Herschler, Fleischer

Teste:

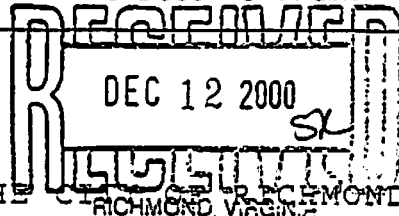
James P. Purdy Clerk

CS139047



002784

CLERK
SUPREME COURT OF VIRGINIA



1

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

JOHN MARSHALL COURTS BUILDING

RECEIVED & FILED
CIRCUIT COURT

OCT 04 2000

SEVEN HUNDRED EIGHTY FIVE

BY: [Signature] 845

D & J ASSOCIATES

vs.

PYRAMID DEVELOPMENT, LLC

Chancery No.
HN-1135

CERTIFIED COPY

June 14, 2000

Richmond, Virginia

Complete transcript of the testimony and other incidents, when heard before the Honorable T. J. Markow, Judge, without a jury.

COOK & WILEY, INC.
Registered Professional Reporters
Post Office Box 14582
Richmond, Virginia 23221
(804) 359-1984

1 APPEARANCES:

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 6 Counsel for the Plaintiff

7 Christopher M. Malone, Esquire
 8 THOMPSON & MCMULLAN, PC
 9 100 Shockoe Slip
 10 Richmond, Virginia 23219-4140
 11 Counsel for the Defendant

12 I N D E X

	DIRECT	CROSS	REDIRECT	RECROSS
13 JOHN C. CULLATHER	11	21		
14 BRADLEY A. ROSENTHAL	23	29		
15 DAVID LEE WYATT	35			

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(Court was convened at 3:00 p.m.)

THE COURT: Good afternoon.

MR. COSBY: If I may, Your Honor --

THE COURT: You-all have got a half hour.

MR. COSBY: I'll try.

THE COURT: Don't try, that's what you
were given.

MR. COSBY: If I may, Judge, I have a set
of exhibits that I've exchanged with counsel,
and I think this is going to speed some things
along. The first document, if I may, Judge,
is simply a copy of the building plan.

THE COURT: Why would you give me another
one of these?

MR. COSBY: Well, I needed to entitle
this something, so I thought a copy of the
building plan with the case title would make
it --

THE COURT: All right.

MR. COSBY: The second --

THE COURT: I always have a rule, give me
what you expect me to read, but don't give me
anything more. I already read it. I'm going

1 to pull that out from the file.

2 MR. COSBY: Filing that as the notice,
3 and that can be omitted as well. Then we head
4 to the meat of it -- and these are either
5 public documents in just three cases. The
6 first document you see is the deed by which
7 the plaintiff acquired title of the property.
8 The second document, which is Exhibit 3, is
9 the deed by which the defendant acquired title
10 of the property. The next deed is the deed by
11 which his sellers acquired title. And then
12 the third deed, which is after Tab 5, by which
13 his seller's seller acquired title. And I'll
14 save those legal documents for argument at the
15 end of the case. And then I have three cases,
16 which are the next three exhibits. I'll argue
17 those next three cases at the conclusion of
18 the evidence.

19 THE COURT: All right.

20 MR. COSBY: If I may, Judge, Jim Cosby
21 for the plaintiff; the plaintiff is D & J
22 Associates. D & J Associates is a company
23 with which Mr. Cullather is associated with.
24 Mr. Cullather's company owns a warehouse
25 building which is being used for commercial

1 purposes, which he purchased in 1984. He
2 purchased that property pursuant to the deed,
3 which is Exhibit 2, which I handed to the
4 Court. Under his deed, in language that I can
5 direct the Court to later, he has an easement
6 to use a common area that runs behind his and
7 each adjacent building on the block. The deed
8 describes the property that is subject to the
9 common-use easement, and attached to the deed
10 is a plat that identifies the common-use area
11 and some references. With the Court's
12 permission, I can show an enlarged copy.

13 THE COURT: I have it in front of me. I
14 can see it.

15 MR. COSBY: The language that describes
16 the easement is at the bottom of the text on
17 page 253 -- and I'm referring again to Exhibit
18 2. If you look at the fourth line up from the
19 bottom, the language says that the grantee has
20 the right, privilege and easement to use in
21 common the said spur tracks and sitings --
22 those are the rails that are lying in the
23 area -- and so much of the property of Davis
24 Brothers, Incorporated, interlocked boundary
25 by those streets. And I think we can

1 stipulate that the property we're talking
2 about is the rectangular piece of common-use
3 are that is identified on the plat. You see
4 the plat, which is the legal-length page at
5 the end of that same exhibit. You see a
6 highlighted boundary which shows the brick
7 building that is owned by Mr. Cullather's
8 company. It's identified as No. 1719 and No.
9 1721. To the south of that building, as you
10 can see, is an area that is described as
11 easements to use in common. There's also an
12 identification of two spur tracks in that
13 easement. The prior use of that common area,
14 which is identified on Mr. Cullather's plat,
15 was for truck access, commercial deliveries
16 and commercial shipment by truck, as well as
17 parking. That was the use of Mr. Cullather's
18 seller; that was the use by the owner of the
19 common-use area at the time, which was JGB
20 Incorporated; and that was also the use by Mr.
21 Cullather after he bought his property in
22 1984, as well as the use of the property by
23 all the adjoining landowners.

24 In 1998, defendant bought their
25 warehouse, which is one of the buildings in

1 this row actually on the other side of this
2 common-use area. And I understand that the
3 defendant is in the process of converting the
4 use of that property from warehouse use to
5 office use. In connection with that, he is
6 also improving the property, which he owns,
7 which is the common-use area, which D & J
8 Associates have an easement. We have no
9 objection to him converting the use of his
10 warehouse to office use; we have no objection
11 to him improving the common-area use there;
12 what we do have an objection to are his
13 restrictions on our right of ingress and
14 egress that came with that easement to use the
15 area in common.

16 What has occurred, and we can show, a
17 fence has been erected to the west side of
18 that property which was not there before. It
19 restricts access to only automobiles, not to
20 the trucks and commercial deliveries that have
21 been used on the property up until that time.
22 There is also a posted sign that requires
23 parking spaces to be leased and paid for or
24 they will be towed. There are also concrete
25 abutments which are presently located right at

1 the loading ramp to the rear of our building,
2 which is making it impossible for trucks of
3 the size that make deliveries and shipments
4 from that building, that do business with our
5 tenant, to load and unload. There is also a
6 dumpster on the other side -- and I can have
7 Mr. Cullather identify these from photographs
8 and also an enlarged area of the plat.

9 THE COURT: You're using up all your time
10 with your opening statement.

11 MR. COSBY: That really is the end of my
12 statement. I'll reserve the rest for argument
13 based on the documents that are in the public
14 record and the cases that we have. I
15 appreciate it.

16 THE COURT: Do you plan to put on any
17 evidence?

18 MR. COSBY: Yes, sir. We have one
19 witness.

20 MR. MALONE: Very briefly, just by way of
21 opening, Your Honor, as the Court can see from
22 their deed -- first of all, we don't agree
23 that this would affect our chain of title in
24 any event -- but the easement that they assert
25 they maintain their deed is an easement to

1 access to railroads and sitings in the area
2 that the fee simple title to which now rests
3 with my client. First of all, those railroads
4 are no longer in use, haven't been in use for
5 quite a number of years. So the Court has a
6 legal question before it whether or not the
7 abandonment of the railroad lease extinguishes
8 the easement to the extent it exists anyway.

9 More importantly, Your Honor, at this
10 point in time there are two means of ingress
11 and egress to the rear of Mr. Cullather's
12 property; one from Norfolk Street and the
13 other one from Patton Avenue at the other end
14 of the property. As we sit here today,
15 Mr. Cullather, or anybody else who's on the
16 other side of the barrier they referenced, has
17 free ingress and egress to the rear of
18 Mr. Cullather's building from Patton Avenue.

19 What's underway at this property is,
20 Mr. Wyatt, who owns Pyramid Development, is in
21 the process of paving that lot and improving
22 that lot. He's gotten to a certain point
23 where, in fact, there are concrete barriers
24 there, and they've been there for some period
25 of time. It's not something that happened

1 last week. He's in the process of moving
2 forward with the balance of that paving when
3 additional capital funds become available to
4 him. As of right now, those barriers there
5 protect the pavement to the point where it's
6 terminated. But there will be no evidence
7 before the Court that suggests they don't have
8 ingress and egress, because they come right up
9 Summmit Avenue, turn right on Patton and turn
10 off of Patton into the parking lot or into
11 this area that is behind the buildings. So I
12 don't see why we're here on the injunction
13 since what they're claiming they need a right
14 to have they've already got as we stand here
15 today.

16 MR. COSBY: Well, Judge, we're here
17 because those aren't the facts, and I'll be
18 glad to call Mr. Cullather at this time.

19 THE COURT: All right.

20
21 JOHN C. CULLATHER, the Plaintiff, called on
22 his own behalf, first being duly sworn, testified as
23 follows:
24
25

~~DIRECT~~ EXAMINATION-

BY MR. COSBY:

MR. COSBY: Judge, may I have Mr. Cullather refer to an enlarged copy of the plat? I'd like to draw on there where these abutments are, and then that will demonstrate that we don't have the same level of use that we had before.

THE COURT: Are they not on here?

MR. COSBY: No, sir, that's a clean photocopy of the public plat.

THE COURT: I don't care, but I don't want that part of the record.

MR. COSBY: That's fine. We'll use them as demonstrative evidence only.

MR. MALONE: Your Honor, I have photographs that we can use.

THE COURT: Why don't we use that, Mr. Cosby?

MR. COSBY: That's fine, Judge. I'd be happy to use my photos. May I approach?

THE COURT: Sure.

Q Mr. Cullather, can you identify what I'm handing you?

1 A These are some pictures I took within the
2 last two weeks.

3 Q How many of them are there?

4 A Five of them.

5 Q Did you take those yourself?

6 A Yes, I did -- six of them.

7 Q Just referring to Mr. Malone's statement
8 about the access of ingress and egress of the
9 property, do you and your tenant currently have the
10 same degree of access of ingress of the property
11 today as you did before the erection of the barriers
12 and such?

13 A Absolutely not.

14 Q Can you describe the use that the common
15 area was put to by you before the defendant acquired
16 title to the property; also the use by which the
17 defendant seller allowed to be conducted on the
18 property.

19 A Yes. When I bought this property -- I
20 had a furniture company leasing the space, and I
21 bought it from the furniture company. They would
22 buy wholesale furniture by tractor-trailer loads and
23 bring it down the common area, back the trailer in
24 and come over, back in and unload the furniture and
25 then go back out the Patton way, which is how my

1 current ~~tenant does it~~. The only reason they leased
2 the space is because they can unload a
3 tractor-trailer; an 18-wheeler comes every day to
4 unload radiators. He comes in off Norfolk, backs
5 in, and then goes on out on Patton, which is the
6 other end of Summit.

7 When they put the fence up down at the
8 Norfolk end, which is a ten-foot link, barbed wire
9 fence that blocked that entrance, they also at that
10 time put some concrete barriers down towards the
11 other end -- not at my property, but closer, further
12 down. My tenants notified me that things had
13 changed, they wanted to get out of the lease, and I
14 said is there any way you could work around it --

15 MR. MALONE: Your Honor, I would object
16 to hearsay from his tenants.

17 THE COURT: He just said they wanted out
18 of the lease.

19 MR. MALONE: He said they notified him
20 and said they wanted out of the lease, Your
21 Honor.

22 THE COURT: All right.

23 A I have a letter here somewhere -- but
24 anyway, they were not happy with what had happened,
25 and they got with the trucking company; they had the

1 trucking company they come down to Summit. As they
2 described, they would have to back the 18-wheeler
3 back down to the garage to the loading area, back in
4 and unload it. About three weeks ago, I got a call
5 from them that they were very upset, that there were
6 these concrete barriers that had been put up right
7 at our loading dock and were angled across -- and
8 I'll be happy to draw --

9 Q Just tell us what you observed. Let me
10 go to the gate, which is at the western-most portion
11 of the common-use area.

12 A The western would be at Norfolk Avenue.

13 Q Was there a gate there before the
14 defendants purchased their property?

15 A No. The gate went in six months ago.

16 Q Is there sufficient room through the gate
17 when the gate is open for these tractor-trailer
18 trucks to make their deliveries and shipments from
19 your tenant's property?

20 A No, they cannot get through the gate.

21 Q Is that true up until this minute?

22 A It's true right now.

23 Q Let's go to the concrete abutments that
24 you described. Can you show Judge Markow a
25 photograph that will identify the concrete abutments

1 and also ~~refer to the loading dock~~ that the
2 commercial entrance would need to use.

3 A Yes, sir. There are abutments, and
4 here's a better picture. We moved the pickup truck
5 into the driveway so that you could see how tight
6 they were; that a tractor-trailer -- it's impossible
7 to get there -- including all the dumpsters were
8 moved down from the other tenants that are on both
9 Altamont and Summit. Here's another picture that
10 shows the unimproved area, and then a picture of the
11 ten-foot gate down at Norfolk with the
12 private-parking sign.

13 Q Mr. Cullather is referring to a
14 photograph that shows the pickup truck that is
15 backed up to your loading dock in the rear of your
16 building. The pickup truck is sitting in the
17 common-use area?

18 A That's on the ramp in the common area.

19 Q That's your pickup truck; is that right?

20 A It belongs to one of my brothers.

21 Q Do any commercial deliveries or shipments
22 to your tenant, have they ever been handled by a
23 pickup truck?

24 A No.

25 Q By what type of truck?

1 A ~~Eighteen-wheelers~~ they bring the product
2 to them. They may go out in other entities, but an
3 18-wheeler comes in every day.

4 Q So the deliveries are by 18-wheelers?

5 A That's right.

6 THE COURT: Are you offering these?

7 MR. COSBY: Yes, I am, Judge.

8 THE COURT: All right, four photographs.

9 Any objection?

10 MR. MALONE: No, Your Honor.

11 THE COURT: This will be 7, I guess?

12 MR. COSBY: Yes, sir.

13 THE COURT: Go ahead.

14 Q Do you have personal knowledge as to what
15 occurs presently when these trucks where unable to
16 come to the commercial entrance at the rear of the
17 property?

18 A I do not.

19 Q Do you have any personal knowledge as to
20 trucks having left without making a delivery?

21 A Yes, I was there the day that we found
22 out about these. Everybody was raising cane, and I
23 went over there. And at that time a truck had came
24 down, the guy cussed and drove away. He said, "What
25 do they expect me to do?" Then a trash --

1 waste-management truck came and he couldn't get to
2 the dumpsters at that time; he raised cane, and he
3 went away.

4 Q Have you been put on notice by any one of
5 the defendants of any restriction on your right to
6 use that common area in the future or to park there?

7 A In the future?

8 Q Yes, sir.

9 A Yes. We've been told the gate is going
10 to go up on both ends if we don't participate in the
11 paving expense and sign an agreement that they're
12 pushing around for everybody to sign.

13 Q Do you have any objection to the property
14 being improved, being paved?

15 A Not at all.

16 Q Have you been put on notice that your
17 tenant's vehicles or your tenant's employee's
18 vehicles would be towed from there in the future?

19 A Yes.

20 Q How did you receive that notice?

21 A It's in a sample agreement that was sent
22 out.

23 Q Is the agreement from the defendant?

24 A Yes, his attorney.

25 Q The use of the property when the

1 common-use area which is at issue here, was owned
2 by JGB, are you familiar with the use of the
3 property at that time?

4 A Yes.

5 Q What was it?

6 A What it was when I bought it, there was
7 some tag numbers on there -- but when Highpoint
8 Street had closed, their employees were going to
9 lose their ability to parking on the public streets,
10 so they came over and started tagging the back of
11 these buildings. And it was at that time that Butch
12 Baker, I think it was, said he was going to park his
13 cars there. And I said, "Our people are going to be
14 parking there if they get there first."

15 Q If I can just --

16 MR. MALONE: Your Honor, there's an awful
17 lot of hearsay. I'm trying to be patient.

18 MR. COSBY: I just cut him off.

19 THE WITNESS: I apologize.

20 THE COURT: Go ahead.

21 Q What I want you to address your comments
22 to is at that time that Baker -- refer to JGB as
23 Baker -- at the time JGB owned the property before
24 it was sold to the defendant, were there any gates
25 or any other restrictions at either end of the

1 common-use area?

2 A No.

3 Q Was there any restriction on the size of
4 the type of vehicle that could be used there?

5 A No.

6 Q Was there any restriction on the number
7 of parking places that any of the adjacent property
8 owners could use?

9 A No.

10 Q Do you know whether or not there were any
11 yellow lines painted?

12 A There were no lines.

13 Q Are you aware of whether or not the
14 property was paved at that time?

15 A It was not.

16 Q Was it gravel or dirt?

17 A Gravel and dirt.

18 Q The use that you've described that was
19 conducted on the property when it was owned by
20 Baker, did that continue to be the use or did those
21 uses discontinue after you purchased the property?

22 A I purchased my property before Baker
23 purchased his property.

24 Q In 1984?

25 A In '84.

1 Q Tell us briefly the first time that you
2 noticed any restrictions as to access at either end
3 or the type and size of vehicles or the location of
4 parking.

5 A Four or five months ago when the gate
6 went up down at the far end.

7 Q That was after the purchase by the
8 defendant. Have you requested the defendants to
9 move the concrete abutments so the tractor-trailers
10 can back up to your -- unload at your loading dock?

11 A I attempted to talk to this gentleman
12 sitting over the bar back there, and he kept
13 walking. He wouldn't come over to address our
14 concerns.

15 Q Have you attempted to address the issue
16 of the locked gate at the west end of the common-use
17 area?

18 A No, I have not.

19 Q Have you personally seen whether or not a
20 tractor-trailer of the type that makes deliveries to
21 your tenant can make it through the gate when it's
22 wide open?

23 A It can't make it through the way the gate
24 is open now. I stepped it off yesterday.

25 MR. COSBY: I don't have any further

1 questions. Judge

2 THE COURT: Do you wish to cross-examine?

3

4 CROSS-EXAMINATION

5 BY MR. MALONE:

6

7 Q Mr. Cullather, while Baker owned the

8 property, they attempted to assert control of the

9 parking area, didn't they, the area behind the

10 buildings?

11 A They attempted to, yes.

12 Q And they told you that they have the

13 right to control parking there?

14 A I told them I didn't think they did.

15 Q Are you aware that other people may have

16 entered the parking area of Baker during the period

17 of time they owned the property?

18 A I have not.

19 Q You bought your property in 1984; is that

20 correct?

21 A That's right.

22 Q Has any railroad run behind that building

23 since 1984?

24 A Not to my knowledge.

25 Q So the tracks haven't been in use since

1 the time you've owned it?

2 A Track is still there.

3 MR. COSBY: Judge, I just need to make an
4 objection for the record to the relevance of
5 that question. I think the authorities made
6 as to whether trains run up and down those
7 tracks is a big red herring. I've made my
8 objection.

9 MR. MALONE: We may have disagreements to
10 the law.

11 Q It's not your testimony today that people
12 can't get to the rear of your property from Patton
13 Avenue?

14 A No, the 18-wheelers cannot get to the
15 loading dock where they used to unload.

16 Q That's your certain knowledge; you know
17 that for a fact?

18 A I do.

19 Q And you've seen that happen?

20 A I was standing there.

21 MR. MALONE: No further questions, Judge.

22 THE COURT: All right. You can step
23 down.

24

25 (Witness stood down.)

1 THE COURT: Anything else?

2 MR. COSBY: That's all, Judge. Thank
3 you.

4 THE COURT: Mr. Malone?

5 MR. MALONE: Your Honor, if that's their
6 evidence, I move to strike on that.

7 THE COURT: Are you going to rise or fall
8 on that?

9 MR. MALONE: I'll be glad to put on
10 evidence.

11 THE COURT: It's not going to please me
12 one way or the other.

13 MR. MALONE: I'll call Mr. Rosenthal.

14

15 BRADLEY A. ROSENTHAL, a Witness, called by the
16 Defendant, first being duly sworn, testified as
17 follows:

18

19 DIRECT EXAMINATION

20 BY MR. MALONE:

21

22 Q Mr. Rosenthal, please state your full
23 name for the Court.

24 A Bradley Allen Rosenthal.

25 Q Where are you employed, sir?

1 A Pro Construction Services.

2 Q Where does Pro maintain its offices?

3 A 1707 Summit Avenue.

4 Q Is Mr. Wyatt here the owner of Pro? He's
5 also the owner of Pyramid Development?

6 A That's correct.

7 Q He owns the property at what address?

8 A 1707 Summit Avenue.

9 Q And Pyramid also, to your knowledge, owns
10 the property behind 1707, which is the subject to
11 this proceeding?

12 A Yes, sir.

13 Q I'd like for you to turn your attention
14 first of all to the matters of access to the rear of
15 Mr. Cullather's property. Are you familiar with his
16 property?

17 A Yes, sir, I am.

18 Q Are you familiar with the location of the
19 concrete barriers as we speak today?

20 A Yes, sir.

21 Q Can you explain to the Judge where they
22 are located with respect to his property.

23 A They are located adjacent to his loading
24 ramp, which is on Pyramid's property in the back.
25 They can go across the back area and then go to the

1 building on the other side, which is facing
2 Altamont.

3 Q Why are they located at that position
4 today?

5 A They were there to keep heavy equipment
6 off of the asphalt improvements that Pyramid has
7 been making across the back. It's not designed at
8 this point in time to take heavy trucks.

9 Q Is it your knowledge or intention to
10 complete the improvements down the balance of the
11 parking area --

12 A Yes, sir, it is.

13 Q -- or the areas behind the buildings.

14 Let me ask you to look at these photos.
15 They're computer-generated pictures.

16 THE COURT: Are these something different
17 than what I have?

18 MR. MALONE: Your Honor, they may be a
19 little different. They may show completely
20 the other end of the lot, which I think will
21 be significant for the Court.

22 Q Did you take those photographs?

23 A Yes, sir, I did.

24 Q Look at the first one of those. What
25 does that show?

1 MR. COSBY: Which one is the first?

2 MR. MALONE: The one on top.

3 THE COURT: All right, gentlemen, let's
4 move. You've got four minutes left.

5 A That is a view from the Norfolk end of
6 the parking lot from the finished area, which is
7 paved, looking down towards Mr. Cullather's
8 property.

9 Q Since those concrete barriers were placed
10 at that point, have you had occasion to receive any
11 requests for moving those concrete barriers from
12 anybody?

13 A Yes. The day we moved them over there,
14 there was a fair amount of excitement out back. And
15 the people at Radac said that it was very tight on
16 the opposite side of the common area, so we took the
17 backhoe and pushed the barriers back to allow them
18 some more room to access their dock.

19 Q Since that date, have you observed the
20 use of the access area by Radac?

21 A Yes, sir, their trucks come in just like
22 they have for the last nine months since we started
23 all of this.

24 Q For the last nine months, they have been
25 making entry to that area off of Patton Avenue?

1 A Yes, sir.

2 Q To the best of your knowledge, daily or
3 weekly, however often, are they able to back up to
4 that ramp?

5 A They're backing in the same place they've
6 been backing in since we started the improvements
7 last year.

8 Q You've not witnessed anybody having any
9 difficulty with that?

10 A No, sir, not anything. Trucks come all
11 the time; the pickups and vans go up the ramp like
12 they have.

13 THE COURT: What about the 18-wheelers?

14 THE WITNESS: The 18-wheelers never
15 backed up that ramp, they just backed up in
16 that vicinity and they unloaded from that
17 point, and they do the same thing now. They
18 come in from Patton Avenue and back right up
19 towards the side of the ramp and unload
20 everything right there.

21 MR. MALONE: May I approach the witness?

22 Q Let's hand this one up to the Judge, if
23 we can.

24 THE COURT: Are you doing them all at
25 once? It's much quicker if you're going to do

1 it.

2 MR. MALONE: That's fine.

3 Q Take a look at these two pictures and
4 tell me what they show.

5 A These pictures show the Patton Avenue
6 end of the parking area, which is the area the
7 18-wheelers are coming in.

8 Q That area is still free and open for
9 access?

10 A Yes, sir. It has no restrictions.

11 Q What does this photograph show?

12 A This shows from the north end looking
13 towards the Patton Avenue direction, and it shows
14 the concrete barriers adjacent to Mr. Cullather's
15 property.

16 Q It also shows a number of other vehicles
17 parked back there?

18 A Yes, sir. They're vehicles that belong
19 to some of the other neighbors or Mr. Cullather's
20 tenant. I'm not sure.

21 MR. MALONE: I offer those four
22 collectively, then.

23 THE COURT: All right. Defendant's 1
24 through 4.

25 MR. MALONE: I have no further questions

1 for Mr. Rosenthal, Judge.

2 THE COURT: Cross-examination?

3

4 CROSS-EXAMINATION

5 BY MR. COSBY:

6

7 Q How long have you worked at your present
8 location?

9 A At the Summit Avenue location or with Pro
10 Construction?

11 Q At the Summit Avenue location.

12 A Since we moved in last fall.

13 Q You moved in last fall. And before then
14 you worked where?

15 A We were at another office location a few
16 blocks away.

17 Q Are you aware that D & J Associates
18 bought the property in 1984?

19 A Only as I heard it today here.

20 Q So from 1984 to last fall, you don't know
21 what type of specific uses were down in that
22 common-use area, do you?

23 A No, sir.

24 Q How wide is that gate in feet and inches?

25 A Approximately 12 feet. I'd have to

1 measure it to give you an exact.

2 Q Have you ever looked at it with the
3 intention of estimating its width?

4 A Nope.

5 Q How wide is an 18-wheel tractor-trailer?

6 A I couldn't tell you.

7 Q Let me refer you to the photograph that
8 shows the -- since they're not numbered, I have to
9 hold it up -- this is, it shows the concrete
10 abutments going up to the door; do you see that?

11 A Yes.

12 Q I understand from your testimony that
13 those concrete abutments were put there to protect
14 the asphalt from trucks being driven on it?

15 A From heavy trucks, that's correct.

16 Q Like the types of trucks that used to
17 make deliveries to Mr. Cullather's tenant, or did
18 you not notice that up until last fall?

19 A I don't understand what you're asking me.

20 Q Let me ask you this: Take a look at the
21 left edge of those concrete abutments in that
22 photograph. When was the last time you were on the
23 property?

24 A Today.

25 Q Now, if you were standing there today and

1 looking at the edge of that concrete abutment
2 looking over this way to the surface -- do you see
3 where I'm pointing?

4 A Yes.

5 Q That in fact is soil. It's not asphalt,
6 is it?

7 A It's gravel.

8 Q The asphalt starts some ways up further
9 to the left?

10 A That's correct.

11 Q So isn't it possible, sir, that if your
12 intention was actually to protect the asphalt rather
13 than to restrict the access to the loading dock,
14 these concrete abutments could be straight and they
15 could be further to the left, couldn't they?

16 A We moved them to allow for more parking
17 on the other side because there are other people
18 there that are parking cars --

19 Q My question, sir, is --

20 A -- and it does not obstruct access to the
21 dock.

22 Q Do you know whether or not an 18-wheeler
23 tractor-trailer can back up to that dock?

24 A Never did.

25 Q You never did know that. Thank you.

1 Now, isn't it a fact --

2 A An 18-wheeler never backed up to the door
3 even before we made the improvement.

4 Q As far as you know, as recently as last
5 fall?

6 A Same tenant was in there before we moved
7 in, before we did the improvements, and they didn't
8 back up to the door.

9 Q Do you have personal knowledge of
10 discussions between Mr. Cullather and Pyramid from
11 last fall up until now addressing the common use of
12 this lot?

13 A I know there have been meetings and
14 letters. As to the exact nature, no, sir.

15 Q Have you attended those meetings?

16 A No, sir.

17 Q Just my final point on this photograph,
18 if you -- if the distance between -- well, the fact
19 of the matter is that the asphalt here could be
20 protected from traffic from the right just as easily
21 if these concrete abutments were moved to the left
22 to the asphalt, couldn't it?

23 A Could be.

24 Q Okay. Do you have a construction
25 schedule; have you prepared a construction schedule?

1 A For?

2 Q For the paving of this property.

3 A Not at the present time, no.

4 Q Have you got a completion date?

5 A No.

6 Q Is the project fully funded?

7 A Not at the present time, no.

8 Q Is there any paving activities going on
9 right now?

10 A Nope.

11 Q There's no paving equipment out there,
12 either, is there?

13 A No, sir. I don't see what that has to do
14 with this.

15 Q I appreciate that.

16 A The dock is on Pyramid's property to
17 begin with, the ramp.

18 Q Thank you. My question is: When is the
19 work going to start again?

20 A That depends on their meetings. It has
21 nothing to do with me or anything I'm involved in,
22 so I can't answer that.

23 Q So you don't know?

24 THE COURT: He said that, please.

25 Q Do you know whether or not the gate was

1 there before last fall?

2 A Are you referring to --

3 Q There's only one gate.

4 A -- Summit Avenue?

5 Q There's only one gate, am I right? How
6 many gates are on the property?

7 A Three; one, two, three -- three.

8 Q How many gates go across the entrance to
9 the west and the entrance to the east of the
10 property? There's just one, isn't it?

11 A That's correct.

12 MR. COSBY: I don't have any further
13 questions, Your Honor.

14 THE COURT: Any redirect?

15 MR. MALONE: No, Your Honor.

16 THE COURT: You may step down.

17

18 (Witness stood down.)

19

20 MR. MALONE: I just have one more
21 witness, Your Honor.

22 THE COURT: You-all are out of time,
23 though.

24 MR. MALONE: I just wanted to have him
25 identify the plat of the property, Your Honor.

1 THE COURT: I don't see how you-all
2 thought this could be done in a half hour.

3 MR. MALONE: I didn't schedule it, Your
4 Honor.

5
6 DAVID LEE WYATT, a Witness called by the
7 Defendant, first being duly sworn, testified as
8 follows:

9

10 DIRECT EXAMINATION

11 BY MR. MALONE:

12

13 Q Would you state your full name for the
14 Court.

15 A David Lee Wyatt.

16 Q What is your relationship to Pyramid
17 Development?

18 A I'm the manager of the LLC.

19 Q You're the owner of the property?

20 A Yes.

21 Q And Pyramid Development purchased two
22 parcels from JGB Industries in 1998, correct?

23 A That's correct.

24 Q I'm going to show you and ask you if this
25 is a copy of the plat that shows the two pieces of

1 property that you purchased at that time?

2 A Yes, sir, it is.

3 Q And there's two parcels shown on there,
4 correct?

5 A Yes, sir.

6 Q The first parcel is actually the one
7 that's been referred to as the warehouse parcel,
8 which is parcel B?

9 A Yes, sir.

10 Q There's a second parcel which is this
11 property behind your building and other buildings
12 that runs up to Patton Avenue?

13 MR. COSBY: Judge, if I may object, I may
14 have rebuttal evidence to put on here. But if
15 that's a plat of the public record, it says
16 what it says, and we can all argue about it.
17 I don't think the witness needs to agree to
18 it.

19 MR. MALONE: I'd offer that as an
20 exhibit, Your Honor.

21 MR. COSBY: Is that plat recorded?

22 MR. MALONE: No, it's his.

23 MR. COSBY: I understand that, but is it
24 recorded?

25 MR. MALONE: No.

1 Q Mr. Wyatt, can you attest to the fact
2 that as to access to the back of Mr. Cullather's
3 real estate -- to the best of your knowledge, is
4 there still access from Patton Avenue?

5 A Yes.

6 Q Have you observed trucks coming and going
7 into his property?

8 A Yes.

9 Q Have you observed any of those trucks
10 having any difficulty in making access into his
11 property as we speak?

12 A No.

13 MR. MALONE: No further questions, Judge.

14 THE COURT: Cross-examination?

15 MR. COSBY: I don't have any questions
16 for Mr. Wyatt.

17 THE COURT: You may step down, sir.

18

19 (Witness stood down.)

20

21 MR. COSBY: Judge, my last piece of
22 evidence is a letter which rebuts the direct
23 testimony of one of Mr. Malone's witnesses,
24 that there were no complaints from the tenant
25 regarding access. If I may, I'd like to --

1 MR. MALONE: It's not directed to us,
2 Your Honor, but I do object to it as hearsay.

3 MR. COSBY: I appreciate that it's not
4 directed to you -- if you'd let me finish --
5 it's directed to Mr. Cullather; it's part of
6 his business records, and it rebuts the direct
7 testimony of his witness. I don't think
8 there's any issue as to its authenticity.

9 THE COURT: All right, let me have it.

10 MR. MALONE: I haven't had a chance to
11 read it.

12 THE COURT: You haven't seen it?

13 MR. MALONE: Well, I saw --

14 THE COURT: Let him see it.

15 MR. COSBY: He's welcome to keep that
16 copy, and I'll hand-deliver another copy.

17 THE COURT: All right. You-all have a
18 quick closing argument.

19 MR. COSBY: That's all we have, Judge.

20 THE COURT: All right. You've got about
21 two minutes.

22 MR. COSBY: Judge, if I may, and I think
23 this is the most important thing that needs to
24 be said: If you take a pen and go to the plat
25 which is attached to Exhibit 2, and if you

1 were to take a pen and strike through easement
2 to use in common and change that to read,
3 "Reserved for a future railroad siting," what
4 you have is the Strickland case, which is
5 identified as behind Tab No. 6. That's what
6 you get in the Strickland case was the issue
7 was whether or not a strip of land, which was
8 identified in the plat as being reserved for a
9 future railroad siting, whether or not that
10 granted the owners of the adjoining parcels
11 the easement rights of ingress and egress
12 including parking -- not for anything
13 associated with railroads -- but motor
14 vehicles. And the Court, in granting an
15 injunction that was requested by the
16 plaintiffs, adjoining landowners, entered the
17 injunction. And they found that the adjoining
18 landowner clearly had easement rights to
19 operate motor vehicles on that strip of land,
20 and the Supreme Court affirmed. What they
21 found was that the notation on the plat, just
22 like the notation on this plat that said
23 "Reserved for future railroad rights," and
24 here it says, "Easements to use in common,"
25 and then the deed, it says, "spur tracks" and

1 such, were words of description of the
2 property and not restriction on their use.

3 The property owner, the owner of fee
4 simple, made the exact same argument that
5 Mr. Malone made to you, that was without the
6 railroad tracks there, there is no easement.
7 Mr. Malone would argue that without the spur
8 tracks and such being in use, there is no
9 easement there. That is the exact same
10 argument that was made and rejected, and I'll
11 just leave the Strickland case to you. Not
12 only did the Strickland case make that ruling
13 based on the language of the deed and the
14 operation of law, but they also accepted parol
15 evidence. Even if the deed is ambiguous in
16 that it doesn't answer the question of what
17 rights the adjoining property owners have when
18 there are no railroad tracks there, then what
19 the Court will do is to look at parol
20 evidence, and they looked at the prior change
21 of title. If you look at the prior change of
22 title, you find in their chain of title --
23 their chain, not ours. If you go back to
24 their ultimate grantor, which is after page
25 five, what you find is their use is

1 restricted. Somebody may be able to throw us
2 off the property or restrict our easement, but
3 it's not Pyramid; because if you take a look
4 at page 427, and this is after Tab 5, page
5 427 -- and I'm referring to the deed up in the
6 right-hand corner -- there, of record, is the
7 language from the grantor that restricts the
8 use of that common-use area only for railroad
9 purposes. That is in their chain of title,
10 not in ours. If anybody has got a restricted
11 use, it's them, not us. What is in our chain
12 of title, on the other hand, the deed language
13 that's quoted in our bill of complaint and
14 appears in our deed; that's in two parts.
15 What it says is we have rights to use all that
16 land -- and then it refers to boundaries --
17 and the land abutting the spur tracks and
18 sittings, as may be necessary for two things --

19 THE COURT: Was your grantor or one of
20 the prior grantors of one of your owners in
21 your chain of title a common owner of the
22 easement that you're talking about?

23 MR. COSBY: We haven't found it, yet,
24 Judge. And even if it was, then the same
25 restrictions start at the same place. They

1 don't have any greater use to it than we do
2 because it would have been granted to them.

3 What is clear under the Strickland case
4 is that words such as -- if they wanted to
5 restrict us to the use of the railroad, it
6 would have said that. It would have said, So
7 long as train access is there, or only for
8 access to and from trains. What the
9 Strickland case found was that it also granted
10 access by motor vehicles and parking and going
11 from the area where the tracks -- the tracks
12 there didn't even exist -- at least we had
13 tracks here -- they were never even built for
14 future use for railroad purposes in that.
15 Even in the Strickland case they found that an
16 incidental, permissible use was to access the
17 rear, the commercial entrances of those
18 buildings, and the parking and use of motor
19 vehicles there.

20 The second case, and it's the second out
21 of three that I'll point out to you for the
22 Court to review, is the Wagner case. That
23 flies in the face of Mr. Malone's argument.
24 He says, again, since there's no more railroad
25 use there then there's no more easement. What

1 the Wagner case said, that involved an
2 easement in a wagon-haul road. What the Court
3 held there was not only could they still run
4 wagons on it, but commercial trucks and motor
5 vehicles on it; because they're talking about
6 just a future mode of transportation as we
7 move forward in time. The exact same thing
8 has occurred here. Rail service is no longer
9 necessary; now we deliver things mostly by
10 truck. The trucks are using the exact same
11 land where those spur tracks are located. And
12 the spur tracks are still there because I
13 stepped over them this morning. I hope there
14 won't be any dispute as to that.

15 I just commend -- and I know we've run
16 over. I think my case in chief is 15
17 minutes -- I just commend these three cases to
18 you. And again, if you strike through
19 "easement to use in common" and pretend it
20 says "reserved for future railroad sitings" --
21 which would be more restrictive than the
22 language that's on this plat -- even then, the
23 Strickland case says that those are means of
24 description and they're not limitations; and
25 they did give the adjacent property owners

1 full ingress and egress on both sides by motor
2 vehicles. I appreciate the evidence they put
3 on about restrictions of ingress and egress.
4 One person can tell you about what it was
5 eight months ago, but obviously a survey or
6 any kind of detailed study has not been made.

7 The Court can look at the photographs,
8 even their photographs that show that you
9 might get a pickup truck through that
10 entrance, but you can't get a tractor-trailer
11 in there. The story is told by the sign on
12 that fence. What Pyramid Development has
13 done -- they bought the property, fine; they
14 want to improve the lot, fine; they are
15 converting it to office space, that's fine,
16 too; they need parking spaces, to get their
17 permit to do that. They've gone into the
18 parking business. They put a sign on the
19 front on the fence that says, "Violators will
20 be towed." They put an agreement in front of
21 us and said, "Sign it and pay or you're going
22 to get towed." There's no evidence to rebut
23 Mr. Cullather's testimony.

24 It's no coincidence that the construction
25 stopped right up to edge of our loading dock

1 and the abutments go around it in a cute
2 little way to make it hard to get in there;
3 they had the dumpsters moved to the other side
4 so it's hard for them to get in and out of
5 there with their delivery trucks. The
6 testimony that this is only to protect the
7 asphalt, I've seen a 747 land on asphalt. I
8 don't know what's the big deal with commercial
9 trucks. There's no construction scheduled;
10 there's no completion date; it's just run out
11 right there. If they wanted to protect the
12 asphalt, they wouldn't have all that gap of
13 gravel between the end of the asphalt and the
14 abutment. That's the case, Judge.

15 THE COURT: All right. Mr. Malone?

16 MR. MALONE: First of all, is there a
17 burden to show any irreparable damage and
18 harm, and I don't think we've come close to
19 carrying that burden today. Secondly, I'd
20 like to take some rather extreme differences
21 with what Mr. Cosby has put before the Court.
22 He cites a portion of Tab 5, Your Honor. I'd
23 ask the Court to look closely at Tab 5. First
24 off all, page 422 and 423 from the deed. What
25 he's attached next is page 427, Your Honor.

1 Don't be mislead by that. That portion of
2 page 427 is what the Court will well remember;
3 you used to have to report your corporate
4 resolution authorizing the transaction. That
5 language is a corporate resolution and does
6 not have a dang thing to do with the nature of
7 the grant that was made or any restrictions in
8 this case. So I take great offense at the
9 attempt to mislead the Court.

10 With respect to the Strickland case, Your
11 Honor, the Strickland case stands precisely
12 for what we're talking about. In Strickland,
13 the Supreme Court said the plat that said,
14 "Reserved for future railroad siting" -- and
15 they never built the railroad siting -- that
16 doesn't mean they don't still have rights
17 because they might build a railroad siting
18 there. It was a potential future railroad
19 siting to which everyone was guaranteed
20 access. And the Supreme Court said just
21 because they never built it, that doesn't mean
22 that your rights are gone. Here we have the
23 exact opposite. We have uncontested evidence
24 that the very specific grant that they say
25 they've gotten here -- first of all, they

1 haven't proved it's in our chain of title
2 anyway, it's in their chain of title -- says
3 they have the right of ingress and egress to
4 and from the spur tracks and railroad sitings.
5 That's all they've got. Your Honor, the
6 Supreme Court of Virginia has said in McCreery
7 vs. Chesapeake -- I'm quoting the Amoco case
8 here. Give me a second here, Your Honor.
9 I'll summarize from the case, Your Honor --
10 here it is. Well, it held that when Amoco
11 gave access, it closed the easement, was the
12 cessation of the purpose for what it was
13 granted; no railroad under Amoco, under the
14 purposes for which it was granted for to and
15 from the railroad spurs; hence the easement is
16 extinguished in any event, even if it was our
17 chain of title, by the fact the purpose for
18 which it was granted, a very specific purpose
19 that they bring --

20 THE COURT: Where do you say that's the
21 sole purpose of this?

22 MR. MALONE: Read what they have offered
23 to the Court as their exhibits. Their Exhibit
24 No. 2, Your Honor, the very bottom of the
25 first page on page 253. (As read) "The

1 rights, privilege and easements used in common
2 on the said spur tracks and sitings and so
3 much of the property and so on, and abutting
4 said spur tracks and sitings maybe necessary
5 to afford the property hereby convened and the
6 improvements thereon free from any access to
7 and use of the said spur tracks and sitings."
8 Period. The said spur tracks and sitings are
9 no longer used, I believe that establishes the
10 Supreme Court precedent; the use for which the
11 easement is granted has been extinguished.
12 And finally, Your Honor, I think the evidence
13 is uncontroverted. They come before the Court
14 and say they have irreparable harm and injury
15 because we've denied them access. We've not
16 denied access. We've got photographs showing
17 that they've got free access from Patton
18 Avenue. They've got access to and from their
19 property. You see the vehicles parked in that
20 area, there's no infringement on their rights.
21 So I don't think they've come close --

22 THE COURT: Seems to me the closeness
23 with the Jersey wall, is really what they are,
24 the barriers are to their -- it's right there.

25 MR. MALONE: Your Honor, you've heard

1 Mr. Rosenthal's testimony. They asked him to
2 move the barriers back and he did.

3 THE COURT: The picture that was given by
4 the plaintiff, Plaintiff's 7, is that an
5 inaccurate picture?

6 MR. MALONE: I don't believe it is, but
7 it's a practical matter. He told you he's
8 there every day. He's observed their trucks
9 coming in and out and nobody appears to have
10 trouble. And he discussed it with them, and
11 they said -- they also told you that they've
12 never pulled tractor trailers up to that --

13 THE COURT: Mr. Malone, I tell you what,
14 I don't think it takes an expert -- and I'm
15 using your Exhibit 1 --

16 MR. MALONE: Yes, Your Honor.

17 THE COURT: -- you can't get an
18 18-wheeler back up in there.

19 MR. MALONE: Mr. Rosenthal said --

20 THE COURT: I don't care what he said.
21 He can tell me that elephants fly. I don't
22 believe it even though he's under oath.

23 MR. MALONE: It's their burden to --

24 THE COURT: If it's a question of
25 credibility, I don't believe that. That

1 doesn't make sense to me.

2 MR. MALONE: That they didn't pull
3 tractor-trailers --

4 THE COURT: I'm saying that you can't
5 back an 18-wheeler up in that space; can't do
6 it.

7 MR. MALONE: It never was their practice,
8 Your Honor.

9 THE COURT: Well, they say to the
10 contrary.

11 MR. MALONE: They've got the burden of
12 proving irreparable harm.

13 THE COURT: I'm saying you can't back it
14 up. Whether you can unload it by backing it
15 up perpendicular, that's a different question.
16 That's what Mr. Rosenthal says, and that may
17 be.

18 MR. MALONE: Your Honor, in any event,
19 they have the burden of proving, to the
20 satisfaction of this Court, certainly, that
21 they have a material right to access on the
22 merits. The evidence they put before the
23 Court shows a limited easement. Their
24 testimony admits the purpose for which that
25 easement was granted has not been

1 extinguished, and so should the easement be
2 extinguished.

3 THE COURT: That's the ultimate fact that
4 has to be decided, and I'm not going to decide
5 that today.

6 MR. MALONE: I would think until the
7 Court has proper evidence before it upon which
8 it can form an opinion as to the likelihood
9 they have on the success on that point --

10 THE COURT: I said I'm not going to
11 decide it; likelihood is a different question.
12 I'm not going to decide the question at this
13 point. That is the ultimate issue.

14 MR. MALONE: Yes, Your Honor.

15 MR. COSBY: Your Honor, if I could just
16 take 30 seconds --

17 THE COURT: No, I'm not going to let you
18 take 30 seconds. I'm going to ask you,
19 though, what is your evidence on the
20 irreparable harm?

21 MR. COSBY: The irreparable harm is we
22 are in danger of losing this tenant and any
23 subsequent renewal on that.

24 THE COURT: That's if it never gets
25 moved?

1 MR. COSBY: That's correct.

2 THE COURT: That's not what preliminary
3 injunction is all about. Preliminary
4 injunction is to maintain what is the status
5 quo to prevent irreparable harm prior to the
6 time we decide the case on its merits. That's
7 all we're here about today. I don't have any
8 evidence that tells me -- I think there's
9 plenty of evidence that this is harmful to
10 Mr. Cullather's company and his property. I
11 don't think there's any question about that.
12 There is evidence, however, that it's still
13 usable, though not the way they would like to
14 use it; I find that as a fact that
15 notwithstanding what Mr. Rosenthal says, I
16 think it can be used but not the way they
17 would like to use it. But is it such that the
18 extraordinary remedy of injunction is
19 appropriate because the harm to them will
20 never be able to be repaired or replaced?

21 MR. COSBY: Ultimately, Your Honor, the
22 Court, either in equity or at law, I suppose
23 can prepare any remedy, but it doesn't have to
24 be -- here, the threat is of tenancy, of
25 losing a tenant that is going to lose sales

1 and deliveries.

2 THE COURT: We don't know when that's
3 going to happen. We may be able to finish
4 this case in 30 days or 60 days, and that's
5 not very long. Is that going to mean that we
6 have to take this extraordinary measure of
7 imposing an injunction and requiring Mr.
8 Cullather's firm to file a bond?

9 MR. COSBY: Judge, that question -- the
10 answer to that question is also balanced as to
11 the likelihood of harm to the non-moving
12 party, to the defendant; that there is nothing
13 in the world that is prevented.

14 THE COURT: We've got to do it the other
15 way. You've got to prove irreparable harm,
16 then I have to start the balance.

17 MR. COSBY: That is correct, Judge. I
18 would submit to you that the effect of our
19 tenancy when we have a real threat of moving
20 this person, how can we quantify the monetary
21 damages?

22 THE COURT: I'm just -- are they leaving
23 tomorrow? If I don't enter this injunction,
24 are they leaving tomorrow, a week from now?

25 MR. COSBY: They very well could.

1 THE COURT: They could have gone today,
2 for that matter, but I don't have any evidence
3 to that effect is what I'm saying.

4 MR. COSBY: Well, I think you do have
5 evidence --

6 THE COURT: Evidence that there's a
7 problem and they're unhappy -- and I believe
8 they have every right to be unhappy -- but
9 whether that's enough to say they're leaving
10 before we can decide this case, I don't know.

11 MR. COSBY: I think it is when the uses
12 they purport to you are as bogus as they are.
13 Their witness says that they used the property
14 to --

15 THE COURT: That's not what I'm
16 interested in. If you got past the
17 irreparability problem, Mr. Cosby, I think I'd
18 probably rule for you, but I have a problem
19 with that.

20 MR. COSBY: I appreciate that, Judge.
21 What you need to keep in mind is the letter
22 from Radac, the tenant.

23 THE COURT: I'm looking at it.

24 MR. COSBY: It was written before these
25 barriers were moved. They're even in a worse

1 position right now.

2 THE COURT: All right, gentlemen, I'm
3 going to do this: I do not think that the
4 evidence of irreparability is proved; that
5 would require the Court to exercise
6 extraordinary power of injunction. However,
7 I'm going to exercise a power that's not
8 extraordinary. I don't need to hear from
9 either one of you-all on this. We're going to
10 try this case on the merits in no longer than
11 45 days. This is what, mid June? We'll try
12 it no later than August 1st. Vacations,
13 inconvenience, I could care less, you know,
14 unless somebody's telling me you've got an
15 irreparable problem that's going to be
16 occasioned by that, but you have to give me
17 more evidence than I heard here today. So get
18 yourselves a date with my docket clerk out
19 here, Ms. Connely, and we'll get this case
20 tried within 45 days. It can't be a very
21 complicated case to try. It's a question
22 primarily of the law. I want you-all to give
23 me whatever stipulated facts to the extent we
24 can, and we'll put on whatever evidence we
25 have to do within a short time. I want your

1 prior-to-trial memoranda of your respective
2 positions; a short memoranda.

3 MR. COSBY: Can I ask one question? In
4 the meantime, is there any reason the barriers
5 couldn't be moved five feet to the left?

6 THE COURT: Probably not, but I don't
7 think that's something I ought to order. It
8 would be helpful if they did that, Mr. Malone.

9 MR. MALONE: I understand the Court's
10 recommendation, Your Honor.

11 THE COURT: You-all get a date while
12 we're here. We'll get this thing resolved.
13 We can do this during a motions week, right,
14 hour and a half?

15 MR. COSBY: I think that's fine, Judge.

16 THE COURT: I mean, you-all are new to
17 the case, but just from what I've seen of
18 it -- what are we talking about?

19 MR. COSBY: Judge, as long as we don't
20 have witnesses say it was never our practice
21 when he was only on the property for six
22 months; I think if we can keep that stuff out
23 of here, it would go really fast.

24 THE COURT: It shouldn't take longer than
25 that, should it?

1 MR. MALONE: I'd certainly be prepared to
2 proceed on that schedule, Your Honor.

3 THE COURT: I'm just looking here at
4 motions week. That's a month from now.

5 MR. COSBY: That's fine, Judge.

6 THE COURT: And the sooner the better.

7 MR. MALONE: I'm planning on being out of
8 the country for ten days.

9 THE COURT: Do it before you leave.

10 You've got plenty of people up there,
11 send one of them up here.

12

13 (Court was adjourned at 4:00 p.m.)

14

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23

24

25





(606) 521-7500
(800) 436-5200
Fax: (606) 531-3724



Administrative Offices
1231 Fourth Avenue
Dayton, Ky 41074

March 6, 2000

Mr. John C. Cullather
Cullather Realty Company
P.O. Box 9316
Richmond, VA 23227

RE: Leased Property at 1719 Summit Avenue, Richmond, Virginia.


Dear Mr. Cullather:

We have occupied this space since February of 1997. One of our main requirements when looking for suitable space to lease for our warehouses is a dock high door and easy access to it by tractor-trailer rigs. We had this when we initiated the lease and when we agreed to a three-year extension. We no longer enjoy this requirement at the above location.

We have had to deal with this undue hardship by requiring all of our deliveries to be made from the far end of Summit Avenue. We receive at a minimum of one restock delivery from a Less-Than-Truckload (LTL) freight carrier each morning. We also receive other freight shipments, including UPS throughout the day. This inconvenience has led to our freight carriers having to use smaller trailers, and consequently end up delaying our deliveries. In addition, the dumpsters and dirt piled behind our building creates an undeserved obstacle course.

What are you going to do about the gate and concrete barriers? Why must all the dumpsters be stored behind our building? If steps are not taken quickly to remedy this untenable situation, Radac Corporation will find another location as soon as possible.

Sincerely,


Richard L. Johnston
Director, Branch Ops.

Cc Rick Morris, President



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D-1
6/14/00
JW

Image04.jpg (122x210x13M jpeg)



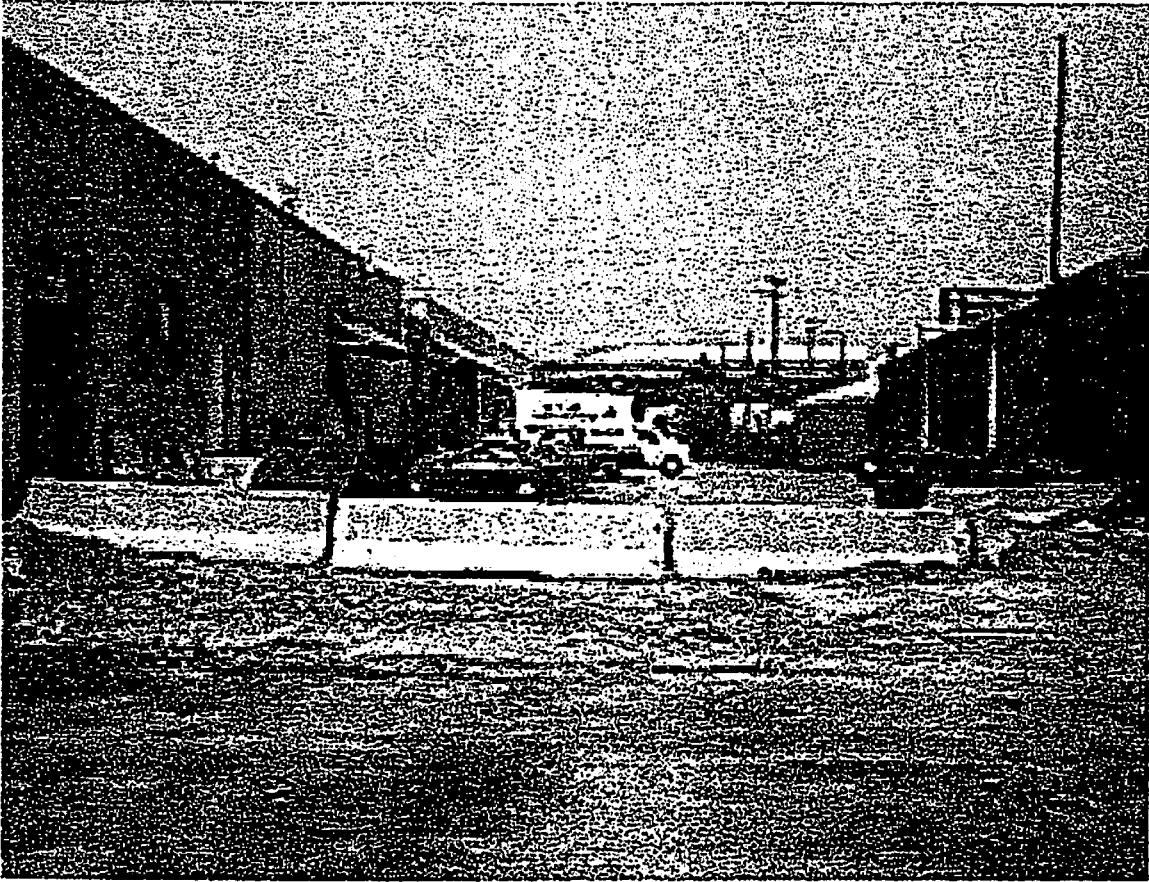
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D4
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THIS DEED, made this 30th day of March, 1984, between S & W ASSOCIATES, a Virginia Limited Partnership, hereinafter designated "Grantor", and D & J ASSOCIATES, a Virginia General Partnership, hereinafter designated "Grantee";

WITNESSETH:

That for and in consideration of the sum of Ten Dollars (\$10.00) to Grantor in hand paid, and other good and valuable consideration, the receipt whereof is hereby acknowledged, the Grantor does hereby grant and convey, WITH GENERAL WARRANTY AND ENGLISH COVENANTS OF TITLE, unto the Grantee, the following described property:

ALL of those certain lots, pieces or parcels of land, lying and being in the City of Richmond, Virginia, on the eastern line of Summit Avenue between Patton Avenue and Norfolk Street, with improvements thereon, known and designated as Nos. 1719 and 1721 Summit Avenue, and all rights, ways and appurtenances to the same belonging or in any wise appertaining, and bounded and described as follows, to-wit:

BEGINNING at a point on the eastern line of Summit Avenue distant two hundred thirty-three and eighty-five hundredths (233.85) feet north of the intersection of the eastern line of Summit Avenue with the northern line of Norfolk Street (which point of beginning is opposite the center of a party wall for the use of the premises No. 1719 Summit Avenue and the property adjoining on the south known as No. 1717 Summit Avenue) and from said point of beginning running northwardly along and fronting on the eastern line of Summit Avenue a distance of forty-eight and ninety-four hundredths (48.94') feet, more or less, (which point is opposite the center of a party wall for the use of the premises known as 1721 Summit Avenue and the property adjoining immediately on the north known as 1723 Summit Avenue) and from said front running back eastwardly between parallel lines and passing through the center of said party walls aforesaid a distance of one hundred forty-two and ten hundredths (142.10') feet, more or less, to the property now or formerly owned by Davis Brothers, Incorporated, on which are located spur tracks and sidings, constructed and operated under the provisions of a certain ordinance of the Council of the City of Richmond, approved July 17, 1923, together with the right, privilege and easement to use in common the said spur tracks and sidings, and so much of the property of Davis Brothers, Incorporated, in the block bounded by Patton Avenue, the Boulevard, Altamont Avenue, Norfolk Street, and Summit Avenue,

and abutting said spur tracks and sidings as may be necessary to afford the property hereby conveyed and the improvements thereon free and convenient access to and use of the said spur tracks and sidings; the location of said spur tracks and sidings being shown on a plat made by Charles H. Fleet, Certified Civil Engineers, dated May 24, 1924, a blue print copy of which was recorded with a deed of trust from Davis Brothers, Incorporated, to Pollard and Bagby, Incorporated, Trustee, said plat being recorded in the Clerk's Office, Circuit Court, City of Richmond, Division I, Virginia, in Plat Book 6, page 91.

The property hereby conveyed is further described on a plat by Harvey L. Parks, Inc., dated March 27, 1984, and entitled "Improvements on No. 1719 & 1721 Summit Avenue, City of Richmond, Virginia," a copy of which is attached hereto and recorded herewith.

BEING the same real estate conveyed to S & W Associates, a Limited Partnership, by deed from Robert L. Fischer and Catherine E. Fischer, his wife, dated March 23, 1981, recorded April 2, 1981, in the Clerk's Office, Circuit Court, City of Richmond, Division I, Virginia, in Deed Book 780, page 153.

This conveyance is made subject to restrictions, easements and agreements of record, if any, insofar as the same may lawfully apply to said land.

WITNESS the following signatures and seals:

S & W ASSOCIATES, a Virginia Limited Partnership

By J. Gordon Wimmer (SEAL)
J. Gordon Wimmer, General Partner

By W. W. Simmers, Jr. (SEAL)
W. W. Simmers, Jr., General Partner

STATE OF VIRGINIA

CITY/COUNTY OF Albermarle, to-wit:

The foregoing instrument was acknowledged before me this 31st day of March, 1984, by J. Gordon Wimmer, General Partner, on behalf of S & W Associates, a Virginia Limited Partnership.

My commission expires: June 1, 1986

STATE OF VIRGINIA,

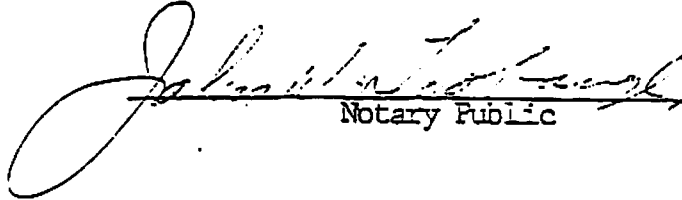
BOOK

2 PAGE 255

CITY/COUNTY OF Berkeley to-wit:

The foregoing instrument was acknowledged before me this 31 day
of March, 1984, by W. W. Simmers, Jr., General Partner, on behalf
of S & W Associates, a Virginia Limited Partnership.

My commission expires: 3-18-87


Notary Public

VIRGINIA: IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF THE CITY OF
RICHMOND, .

Tax Imposed by Sec. 58-54.2

Code of Va. has been paid.

This deed was presented, and, with the Certificate annexed, admitted to record on

APR 13 1984

at 10:45 o'clock A . M.

Clerk's Fee 12.00

Transfer Fee 1.00

State Tax 180.00

City Tax 60.00

Grantor's Tax 120.00

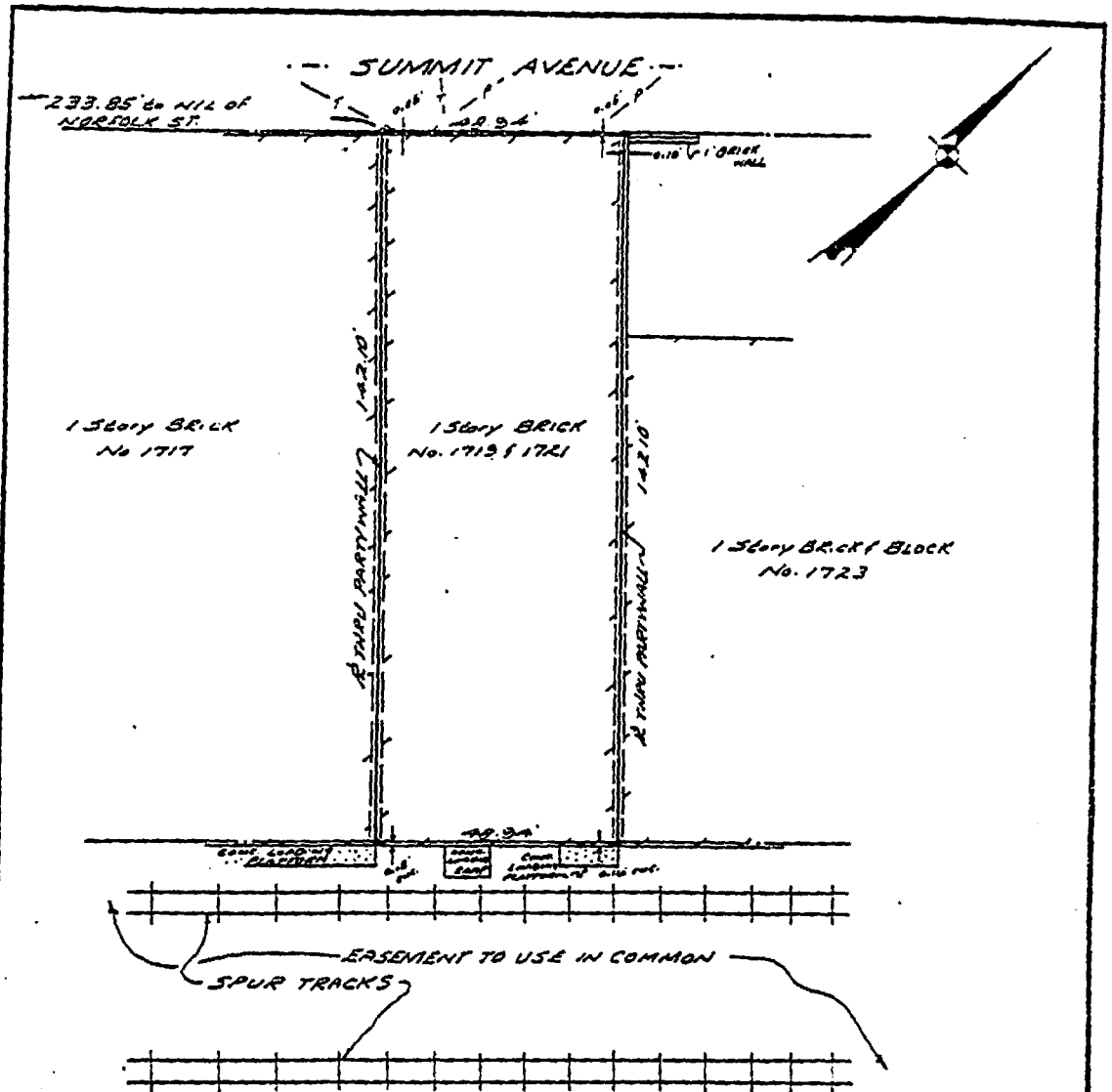
Total 373.00

File: Herschler, Fleischer

Teste:

Luca P. Berdy Clerk

CS139047



"This is to certify that on 3-27-84
I made an accurate survey of the premises hereon
shown and that there are no errors to be
corrected visible on the ground other than
those shown hereon."
Harvey L. Parks, Inc.

"I am not a party to this plat and I do not
know of any error in the plat
shown hereon."
Harvey L. Parks
C.L.S.

IMPROVEMENTS ON No. 1719 & 1721
SUMMIT AVENUE
CITY OF RICHMOND, VIRGINIA.

HARVEY L. PARKS, INC.	
4807 W. HUNDRED RD.	
CHESTER, VA. PH-748-8641	
DATE: 3-27-84	SCALE: 1" = 30'
DRAWN BY: W.E.C.	
CHECKED BY: H.P.	
JOB No. F.B.T. 33, P. 35	

PURCHASER: JOHN CUGGATHER

ATTESTED TRUE COPY

Prepared by:
Maloney, Huennekens, Parks, Gacker & Parsons, P.C.
1111 East Main Street, Suite 800
Richmond, Virginia 23219-3103
Tax Parcel: N000-1599/011 & N000-1599/030

THIS DEED made as of the 17th day of September, 1993, by
and between JGA INDUSTRIES, INC., a Virginia corporation
(hereinafter "Grantor"), and PYRAMID DEVELOPMENT L.L.C., a
Virginia limited liability company (hereinafter "Grantee"),
provides:

W I T N E S S E T H :

That for and in consideration of the sum of Ten Dollars
(\$10.00) and other good and valuable consideration paid to the
Grantor by the Grantee, receipt of which is hereby acknowledged,
the Grantor hereby grants and conveys unto the Grantee, in fee
simple, with General Warranty of Title and with English Covenants
of Title, except as hereinafter stated, the following described
real property, located in the City of Richmond, Virginia, to-wit:

See Schedule "A" attached hereto
and made a part hereof

This conveyance is also made expressly subject to all
easements, conditions, restrictions and agreements of record to
the extent lawfully applicable to the property hereby conveyed.

WITNESS the following signature and seal.

GRANTOR: JGB Industries, Inc.,
a Virginia corporation

By: Anthony M. Ill. President (SEAL)
Anthony M. Ill, President

Grantee's Address:
P.O. Box 25609
Richmond, VA 23260

COMMONWEALTH OF VIRGINIA

AT LARGE, co-wit:

"The foregoing Deed was acknowledged before me on this 17th
day of September, 1998, by Anthony M. Ill, President, JGB
Industries, Inc., in the City/Country of Richmond,
Virginia.

Brenda D. Harris
Notary Public

My commission expires:

Jan. 31, 2000

SCHEDULE "A"

Parcel 1:

ALL that certain lot, piece or parcel of land, with the improvements thereon and the appurtenances thereto belonging, lying and being in the City of Richmond, Virginia, known as Nos. 1707, 1709, 1711 and 1713 Summit Avenue, located on the eastern line of Summit Avenue between Norfolk Street and Patton Avenue, as more particularly described on a survey dated April 3, 1986, made by Dewberry & Davis, entitled "Plat Showing Improvements on 1707 through 1713 Summit Avenue, Richmond, Virginia", a copy of which is recorded in the Clerk's Office, Circuit Court, City of Richmond, Virginia, in Deed Book 80, page 728.

BEING the same property conveyed to JGB Industries, Inc., a Virginia corporation, by deed from Archie Straus and Katherine C. Straus, his wife, Alec Meyers and Sara Straus Meyers, his wife, Sara Straus Vitsky, widow and Miriam Straus Weinstein and Julian Weinstein, her husband, dated May 5, 1986 and recorded May 23, 1986, in the Clerk's Office, Circuit Court, City of Richmond, Virginia, in Deed Book 80, page 728.

Parcel 2:

ALL that certain lot, piece, or parcel of land and improvements and appurtenances thereunto belonging, including railroad tracks, lying, and being in the City of Richmond, Virginia, between Summit and Altamont Streets, known as 3014 Norfolk Street, containing .78 acres, and more particularly described by that certain plat of survey dated November 5, 1985, revised December 9, 1986, entitled "Plat Showing Survey of a Parcel of Land for J.G.B. Industries, Inc., situated in the City of Richmond, Virginia, prepared by DEWBERRY & DAVIS, certified surveyors, copy of which is attached hereto and made a part hereof and to which reference is hereby made for a more particular description of said real estate.

* BEING the same property conveyed to JGB Industries, Inc., a Virginia corporation, by deed from Richmond, Fredericksburg and Potomac Railroad Company, a Virginia corporation, dated December 22, 1986 and recorded December 23, 1986, in the Clerk's Office, Circuit Court, City of Richmond, Virginia, in Deed Book 106, page 1653.

24454

THIS DEED, made this 22nd day of December 1986, by and between the RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, a Virginia corporation, hereafter called "Grantor," and JGB INDUSTRIES, INC., a Virginia corporation, hereinafter called "Grantee";

W I T N E S S E T H :

For and in consideration of the sum of TEN DOLLARS (\$10.00) and other good and valuable consideration in hand paid, the receipt of which is hereby acknowledged, Grantor grants and conveys with SPECIAL WARRANTY OF TITLE, IN FEE SIMPLE, unto Grantee the following described real estate, to-wit:

ALL that certain lot, piece, or parcel of land and improvements and appurtenances thereunto belonging, including railroad tracks, lying, and being in the City of Richmond, Virginia, between Summit and Altamont Streets, known as 3014 Norfolk Street, containing .78 acres, and more particularly described by that certain plat of survey dated November 5, 1986, Revised December 9, 1986, entitled "Plat Showing Survey of a Parcel of Land for J. G. B. Industries, Inc., situated in the City of Richmond, Virginia, prepared by DEWBERRY & DAVIS, certified surveyors, copy of which is attached hereto and made a part hereof and to which reference is hereby made for a more particular description of said real estate.

BEING a portion of the same land conveyed to Grantor by deed from Richmond Land Corporation dated October 2, 1958, recorded December 17, 1958 in the Clerk's Office, Circuit Court, City of Richmond, Virginia, in Deed Book 590-B, Page 422.

This conveyance is made expressly subject to any and all easements, conditions, restrictions and agreements as are of record, and not of record, insofar as they are applicable to the property hereby conveyed.

IN WITNESS WHEREOF, Grantor has caused its name to be signed hereto and its corporate seal to be hereunto affixed and attested:

RICHMOND, FREDERICKSBURG AND POTOMAC
RAILROAD COMPANY

By

Frank A. Crovo, Jr.
President

Attest:

Carolyn K. Fleming
Asst. Secretary

STATE OF VIRGINIA:

to wit

CITY OF RICHMOND :

The foregoing deed was acknowledged before me this 22nd day of December, 1986, by Frank A. Crovo, Jr. and C. K. Fleming Assistant Secretary Wallace President and Secretary, respectively, on behalf of the Richmond, Fredericksburg and Potomac Railroad Company.

My commission expires: January 14, 1989

Loraine M. Pearson
Notary Public at Large

Grantee's Address:
P.O. Box 26509
Richmond, VA 23230

Plat BK 37 pgs 117 + 118

VIRGINIA:

IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF THE CITY OF RICHMOND

This deed was presented, and, with the Certificate annexed, admitted to record

on DEC 23 1986 at 11:21 o'clock A.M.

The Tax imposed by Sec. 58.1-802 Code of Va. has been paid.

301 Clerk's Fee	\$20.00
212 Transfer Fee	\$1.00
039 State Tax	\$30.60
214 City Tax	\$10.20
230 City Grantors Tax	\$10.25
038 State Grantors Tax	\$10.25
TOTAL	\$92.30

File: Mc Guire, Woods

TESTE:

Iva R. Purdy

Iva R. Purdy, Clerk

CS139047

THIS DEED, made as of this 2nd day of October, 1958, by and between RICHMOND LAND CORPORATION, a Virginia corporation, party of the first part, and RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, also a Virginia corporation, party of the second part;

WITNESSETH:

That for and in consideration of the sum of Fifteen Thousand Five Hundred Seventy-eight Dollars and Six Cents (\$15,578.06) paid by the party of the second part to the party of the first part, receipt of which is hereby acknowledged, the party of the first part hereby grants and conveys unto the party of the second part with General Warranty of Title, all those three (3) pieces or parcels of land in the City of Richmond, Virginia, more particularly described as follows:

Parcel 1

Beginning at a point on the western line of Terminal Place (formerly Mulberry Street) distant 700 feet north of the north-western intersection of Broad Street and Terminal Place;

Thence by a line making an interior angle of $128^{\circ} 14'$ with the westerly line of Terminal Place in a northerly direction 294.37 feet to a point, a corner with the property of the Southern Biscuit Company, Inc.;

Thence in a southerly direction along the easterly line of a 30-foot strip of land which is also the westerly property line of Southern Biscuit Company, Inc. 725.50 feet to the northerly line of an alley 20 feet wide, extending westwardly from and at right angles to Terminal Place;

Thence at right angles westwardly and across said 30-foot strip in a straight line which is a continuation of the northern line of the 20-foot alley 30 feet to a point on the western line of said 30-foot strip distant 160 feet north of the northern line of Broad Street;

Thence at a right angle northwardly and along the western line of the said 30-foot strip and in a straight line extending northerly therefrom and continuing the same a distance of 886.5 feet;

Thence eastwardly at a right angle Two and 25/100 feet;

Thence northwardly 80 feet, more or less, to the line of the land condemned by the Richmond Terminal Railway Company;

Thence extending southwardly along the line of the property of the said Richmond Terminal Railway Company, 80 feet, more or less, to a point;

Thence continuing southwardly along the line of the property of the said Richmond Terminal Railway Company, which is a curve with a radius of 500 feet, a distance of 400 feet to the western line of Terminal Place;

Thence southwardly and along the said western line of Terminal Place 39.33 feet to the point of beginning and containing 98,926 square feet, more or less.

The parcel hereby conveyed is the same parcel conveyed to the party of the first part by Southern Stock Yards Corporation by deed dated November 10, 1926, and recorded in the Clerk's Office of the Chancery Court in the City of Richmond, Virginia; in Deed Book 343D at page 48 less and excepting therefrom a portion of the

said parcel of land conveyed by the said Richmond Land Corporation to the Southern Biscuit Company, Inc. by deed dated May 16, 1947, and duly recorded in the Clerk's Office of the Chancery Court in the City of Richmond, Virginia.

The said parcel is more particularly shown outlined in red on the plat attached hereto as a part hereof marked "R. E. 2-37, R. F. & P. R.R. Co., Land Transferred From R. L. C. to R. F. & P. R.R. Co., Richmond, Virginia, Scale: 1" = 100', Oct. 2, 1956."

Parcel 2

Beginning at a point on the north line of Norfolk Street 146.00 feet east from the northeast intersection of Norfolk Street with Summit Avenue;

Thence in an easterly direction along said northern line of Norfolk Street 51.36 feet to a point;

Thence in a northerly direction along the line dividing, now or formerly, the property of H. L. Carpel, Incorporated, from that, now or formerly, of Davis Brothers, Incorporated, 100.61 feet to a point, said point being in the center line of a party wall distant 147.30 feet measured along the center line of said party wall, from the west line of Altamont Avenue;

Thence continuing in a northerly direction along the line dividing, now or formerly, the property of Barney Briel, et al. from that of, now or formerly, Davis Brothers, Incorporated, 148.5 feet to a point, said point being on the center line of a party wall, distant 147.30 feet, measured along the center line of said party wall, from the west line of Altamont Avenue;

Thence at right angles in a westerly direction along the center line of the last-mentioned party wall 0.20 feet to a point;

Thence in a northerly direction along the line dividing, now or formerly, the property of Aaron Jacobs, et al. from that, now or formerly, of Davis Brothers, Incorporated, 124.96 feet to a point, said point being on the center line of a party wall, distant 147.50 feet, measured along the center line of said party wall, from the west line of Altamont Avenue, extended;

Thence continuing according to a property line agreement hereinafter referred to made between Emmett T. Seaton and wife and Richmond Land Corporation as follows;

Thence by a line parallel to the said west line of Altamont Avenue in a northerly direction 30 feet to a point;

Thence by an angle of $3^{\circ} 28'$ to the left 25 feet to a point;

Thence by an angle of $3^{\circ} 36'$ to the left 25 feet to a point;

Thence by an angle of $4^{\circ} 39'$ to the left 25 feet to a point;

Thence by an angle of $4^{\circ} 28'$ to the left 25 feet to a point;

Thence by an angle of $5^{\circ} 01'$ to the left 25 feet to a point;

Thence by an angle of $4^{\circ} 36'$ to the left 25 feet to a point;

Thence turning an interior angle of $103^{\circ} 45'$ 19.95 feet to a point;

Thence turning an interior angle of $97^{\circ} 53'$ and running in a southerly direction 115.21 feet to a point;

Thence by an angle of $3^{\circ} 02'$ to the right 12 feet to a point;

Thence by an angle of $3^{\circ} 40'$ to the right 25 feet to a point;

Thence by an angle of $5^{\circ} 01'$ to the right 25 feet to a point;

Thence by an angle of $4^{\circ} 15'$ to the right 25 feet to a point;

Thence by an angle of $4^{\circ} 31'$ to the right 25 feet to a point;

Thence by an angle of $6^{\circ} 55'$ to the right 25 feet to a point on the line dividing the property, now or formerly, belonging to Aaron Jacobs from that of the property, now or formerly, belonging to Emmett T. Seaton;

Thence leaving the above-mentioned property line between Emmett T. Seaton and Richmond Land Corporation and continuing on the original courses and distances as follows;

Thence along the line dividing, now or formerly, the property of Davis Brothers, Incorporated, from that, now or formerly, of Aaron Jacobs, et al., in a southerly direction 40.75 feet to a

RICHMOND LAND CORPORATION

Sale to Richmond, Fredericksburg and Potomac
Railroad Company of Parcel of Land to the North
and West of the Southern Biscuit Works, Richmond, Va.

The President informed the Board that Richmond Land Corporation had purchased in 1926 a parcel of land lying to the north and west of the Southern Biscuit Works; that it had sold a portion of the land to the Southern Biscuit Works in past years for the enlargement of that plant; that the balance of the parcel remaining as shown as Parcel 1 (One) in deed and on plat entitled "R. E. 2-37, R. F. & P. R.R. Co., Land Transferred From R. L. C. to R. F. & P. R.R. Co., Richmond, Virginia, Scale: 1" = 100', Oct. 2, 1956" could be used only for right of way for rail service to this and other plants and for this reason should be transferred to the Richmond, Fredericksburg and Potomac Railroad Company;

Whereupon, on motion duly made and seconded, it was

RESOLVED, that the proper officers of the Richmond Land Corporation be, and they hereby are, authorized to convey the above described parcel of land shown as Parcel 1 (One) on plat to be attached to deed entitled "R. E. 2-37, R. F. & P. R.R. Co., Land Transferred From R. L. C. to R. F. & P. R.R. Co., Richmond, Virginia, Scale: 1" = 100', Oct. 2, 1956" to the Richmond, Fredericksburg and Potomac Railroad Company by a good and sufficient deed upon payment to the Richmond Land Corporation of the sum of Fourteen Thousand Eight Hundred Eighteen Dollars and Sixty Two Cents (\$14,818.62).

IT IS FURTHER RESOLVED, that the authority granted by resolution of this Board of April 26, 1957, covering this same property is hereby cancelled.

I hereby certify that the above is a true and correct excerpt from minutes of meeting of the Board of Directors of the Richmond Land Corporation held in Richmond, Va., on August 22, 1958.



R.E.2-37
R.F.&P.R.R.CO.
LAND TRANSFERRED
FROM R.L.C. TO R.F.&P.R.R.CO
RICHMOND, VIRGINIA
SCALE 1"=30' OCT. 2, 1956

City of Richmond—to-wit:

429

In the Office of the Court of Chancery for said City,
the 17th day of December, 1958

This deed was presented, and, with the Certificate ** 60.32* annexed, admitted
to record at 3:35 o'clock P. M.

Teste: *E. E. Harriner*, Clerk

382

THIS DEED, made this 14th day of December, 1958, between JEWEL W. TYSON and GLADYS L. TYSON, his wife, hereinafter called "Grantors", and the CITY OF RICHMOND, hereinafter called "Grantee":

WITNESSETH:

In consideration of the sum of One Hundred Sixty Dollars (\$160.00), paid to Grantors by Grantee, receipt whereof is hereby acknowledged, Grantors do grant and convey, with Special Warranty, unto Grantee an easement along the southern portion of the property of Grantors known as No. 13 River Road, Richmond, Virginia, and designated Parcel 41A, as shown on Sheet No. 3 of Department of Public Works' Drawing No. O-12853, a copy of which is recorded with a deed from Edward H. Thompson and wife to the City of Richmond, dated December 5th 1958, and recorded December 17th, 1958, in the Clerk's Office of the Chancery Court of the City of Richmond, Virginia, said easement being more particularly described as follows:

A temporary easement ten feet wide, as shown enclosed in green lines on said drawing, to be used in connection with the construction of underground sanitary sewer facilities upon property south of and contiguous to said temporary easement, but upon completion of such construction all rights of Grantee in and to said temporary easement shall cease and terminate.

The Grantee, as evidenced by its acceptance of this deed, agrees that the use of the easement hereinabove granted shall be in accordance with the terms and conditions contained in the offer of Grantors dated June 16, 1958, designated Exhibit No. 14, attached to Ordinance No. 58-252-217, adopted by Council of the City of Richmond, October 13, 1958, which Ordinance is on file in the City Clerk's Office, City Hall, Richmond, Virginia.

ORIGINAL DEED DEPTD 1-15-59

Harlan K. Kunkin

VIRGINIA:

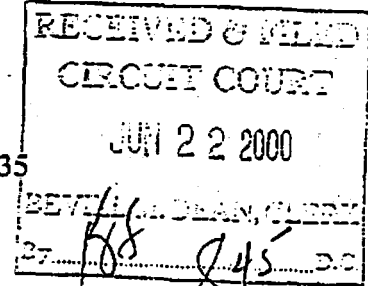
IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

D&J ASSOCIATES,
Plaintiff,

v.

Chancery No.: HN1135

PYRAMID DEVELOPMENT, LLC
Defendant.



ANSWER


Comes now the Defendant, Pyramid Development, LLC, hereinafter (Pyramid),
by counsel, as and for its Answer to the Bill of Complaint filed herin on behalf of
Plaintiff, D&J Associates, hereinafter (D&J), states as follows:

1. Pyramid does not have sufficient information to form an opinion as to the truth or falsity of the allegations in paragraph one of the Bill of Complaint and, accordingly denies the same.
2. The allegations of paragraph two are admitted.
3. The allegations of paragraph three set forth legal conclusions to which no response is required.
4. The allegations of paragraph four set forth legal conclusions to which no response is required.
5. The allegations of paragraph five are admitted to the extent that the document, attached as exhibit "A" appears to be a true and correct copy of a deed dated March 30, 1984 pursuant to which D&J acquired title to certain real property. All remaining allegations of paragraph five are denied.

6. Pyramid is without sufficient information to form an opinion as to the truth or falsity of the allegations of paragraph six of the Bill of Complaint as it relates to the asserted lease between D&J and Radac Corporation and, accordingly, these allegations are denied. All remaining allegations set forth in paragraph six are denied.
7. The allegations of paragraph seven are admitted to the extent that, in and about its efforts to improve the real estate owned by, Pyramid has commenced construction of improvements on the property and has placed concrete barriers at certain locations thereon in order to protect its improvements. All remaining allegations of paragraph seven are denied.
8. All of the allegations of paragraph eight are denied.
9. All of the allegations of paragraph nine are denied.

WHEREFORE, having fully answered, the defendant, Pyramid Development, LLC, respectfully moves this Court for entry of an appropriate Order denying the relief requested by D&J Associates in this proceeding, dismissing the Bill of Complaint, and awarding to Pyramid Development, LLC its fees and costs on its behalf expended.

PYRAMID DEVELOPMENT, LLC


By: 
Christopher M. Malone

Christopher M. Malone
Thompson & McMullan, P.C.
100 Shockoe Slip
Richmond, Virginia 23219
(804) 649-7545
(804) 780-1813

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2000, I mailed by US First Class Mail, postage prepaid this foregoing Answer to

James C. Cosby
Cantor, Arkema & Edmonds, PC
823 East Main Street
15th Floor
Richmond, VA 23218



Christopher M. Malone

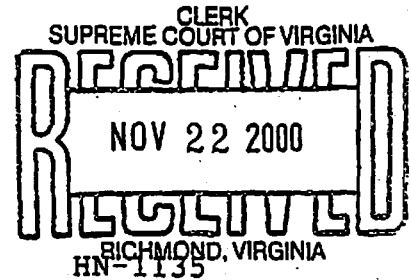
002784

1

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

JOHN MARSHALL COURTS BUILDING



D&J ASSOCIATES

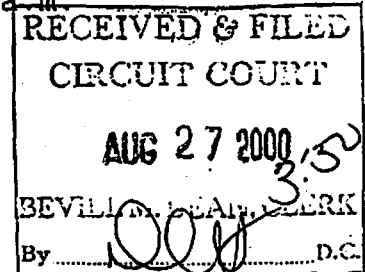
v.

PYRAMID DEVELOPMENT, LLC

ORIGINAL

August 3, 2000

Complete transcript of testimony and other incidents in the above, when heard before The Honorable T. J. Markow, Judge, beginning at 10:04 a.m.



COOK & WILEY, INC.
Registered Professional Reporters
Post Office Box 14582
Richmond, Virginia 23221
(804) 359-1984

1 APPEARANCES:

2 James C. Cosby, Esquire
3 Cantor, Arkema & Edmonds
4 823 East Main Street
5 Richmond, Virginia 23219
6 Counsel for the plaintiff

7 Christopher M. Malone, Esquire
8 Thompson & McMullan
9 100 Shockoe Slip
10 Richmond, Virginia 23219
11 Counsel for the defendant

12 I N D E X

13 DIRECT CROSS REDIRECT RECROSS

14 PLAINTIFF'S EVIDENCE

15 N. RAY TIPTON	12	22	25
16 GEORGE E. YESBECK, JR.	26	33	35
17 RICHARD L. JOHNSTON	37	44	49
18 JOHN C. CULLATHER	51	66	75

19 DEFENDANT'S EVIDENCE

20 DAVID T. WILCOX	76	78	86
21 DAVID L. WYATT	87	93	

1 (The court reporter was duly sworn.)

2
3 THE COURT: All right, let's proceed.

4 MR. COSBY: May I, sir?

5 THE COURT: Yes.

6 MR. COSBY: Good morning, Judge. James Cosby for
7 the plaintiff, D&J Associates. By way of brief opening,
8 Judge, the facts that will be introduced today in
9 addition to the facts The Court heard in the prior
10 hearing will establish that the plaintiff, D&J
11 Associates, has an easement throughout an alleyway that
12 runs behind our building and those buildings of
13 adjoining landowners. The easement was by grant.

14 The Court will note that there were no words of
15 restriction in the grant of easement, that permitted
16 uses include access to the building, to our building
17 from both ends of the alleyway, that there is no
18 limitation on that access and that the prior use has
19 included delivery trucks, heavy trucks, trailers, vans,
20 cars, etc., that the only limitation on the use of our
21 easement is that it be in common with the rights of
22 others that have rights on that property. In other
23 words, the facts will be that we certainly cannot use
24 our easement to the exclusion of other adjoining
25 landowners that also have rights to that easement.

1 The evidence will also show that continuous -- that
2 the use that I've described in the easement, right up
3 until today, has been continuous and that there has been
4 no interruption at all until the deed to the property
5 was purchased by the Pyramid Development Company. Since
6 Pyramid Development's purchase of it, our rights in that
7 property have unquestionably been infringed. They have
8 denied access effectively from one end of the property,
9 they have placed obstacles, they have plans to lease
10 parking spaces and to rent parking spaces and to
11 dedicate other areas in that easement to parking which
12 will make the access to the commercial rear of our
13 building impossible if that plan continues.

14 The evidence will also show that the justification
15 for these impediments that were offered to The Court at
16 the last hearing are simply bogus. There has been no
17 construction on the property since the time we last
18 heard even though that was the proffered explanation for
19 the concrete abutments and such.

20 That's the conclusion of my remarks and we're ready
21 to present evidence when The Court is ready.

22 THE COURT: All right. Mr. Malone.

23 MR. MALONE: Yes, Your Honor. I'd make a motion to
24 exclude witnesses at this point.

25 THE COURT: We'll do it when you finish.

1 MR. MALONE: Your Honor, I do have a book of
2 exhibits I will use today. I'll hand it up and I
3 provided a copy to Mr. Cosby. During argument it might
4 be helpful to point out -- opening it might be helpful
5 to point out a few things in that exhibit book.

6 THE COURT: You don't get a chance to argue yet,
7 this is opening statement.

8 MR. MALONE: I apologize, Your Honor, I was trying
9 to make opening statement. Judge, if you will look
10 quickly at this book, you'll see that the first four
11 exhibits in that book are actually copies of deeds.
12 They are deeds in chain of title of my client. They
13 begin with the deed to my client in 1998 and proceed
14 back through Exhibits 2, 3 and 4 which are prior deeds
15 in our chain of title.

16 The fifth document, the fifth exhibit in this book,
17 Your Honor, is the exhibit The Court is going to need to
18 pay the most attention to, I think. Although it's a
19 very old deed, it's a deed from 1925 between Davis
20 Brothers, Incorporated, and Cornwall Realty Corporation.
21 That deed is the deed that contains the easement
22 language that they seek to enforce here today. On the
23 second page of that deed is the language that brings us
24 here to court today. It's a very specific grant in that
25 deed itself.

1 Eleven lines down beginning with the line, "42 and
2 10/100ths feet, more or less," immediately after that,
3 "To the property of Davis Brothers, Incorporated, which
4 are located spur tracks or sidings constructed and
5 operating under the conditions of a certain ordinance,"
6 so on, "hereto grant together with the right, privilege
7 and easement to use in common the said spur track and
8 sidings of so much of the property of Davis Brothers,
9 Inc., in the block bounded by Patton Avenue Boulevard,
10 Altamont Avenue, Norfolk Street and Summit Avenue and
11 abutting said spur tracks and sidings as may be
12 necessary to afford the property hereby conveyed and
13 improvements thereon free and convenient access to and
14 use of the said spur tracks and sidings."

15 That's the easement that they got. It's a very
16 specific grant of use, very specific as to the use of
17 railroad spur tracks and sidings located on a specific
18 parcel of property. My client owns that parcel of
19 property. His predecessors in title held it for quite
20 some years. If The Court were to look at Exhibits 6, 7,
21 8, 9, that's the balance of the chain of title for the
22 plaintiff today.

23 The plaintiff's chain of title in each case
24 contains exactly that same language. They're granted
25 the right to their predecessor in title to exactly the

1 same language with the exception of the deed with
2 respect to which they took. Excuse me, even the deed
3 they took, which is Exhibit 10 in my book, has exactly
4 the same language, same restrictive language and the
5 same restrictions in terms of use being limited to
6 ingress and egress for purposes of use of the spur
7 tracks and siding.

8 The testimony today, Your Honor, is that the spur
9 tracks and sidings were abandoned quite some time ago.
10 They have been abandoned. They are no longer used.
11 They are cut off from both ends of the property, both at
12 Altamont and Patton Avenue. The spur tracks and the
13 railroad tracks have been abandoned quite some time ago,
14 during the period of time that the property was owned by
15 RF&P Railroad Company. And the deed that they held is
16 in here. RF&P held the property until 1986 at which
17 time they conveyed the property to our predecessor in
18 title which was JGB Industry or Baker Equipment.

19 We believe there will be evidence before The Court
20 today that will establish, at least during the tenure of
21 ownership by Baker Equipment, they posted the property,
22 stated that they had -- it was their private property,
23 that anybody who parked there in violation of their
24 rights would be towed. There will be evidence that at
25 least one of the adjoining landowners entered into a

1 parking lease with respect to use of the property.

2 I believe they intend to proceed today on the
3 theory that they've got some adverse rights, but I
4 believe the evidence won't support that conclusion. I
5 believe The Court has a legal issue before it. It's
6 going to have to determine what the extent of the rights
7 are that are granted by that easement where we have
8 clearly the abandonment of the original essential
9 purpose for that easement which was access to railroad
10 spur tracks and sidings. The railroad spur tracks and
11 sidings don't exist. There may be portions of those
12 railroad tracks still buried in the ground, but they
13 don't go anywhere.

14 The plaintiff seeks to expand from that limited
15 right to assert to The Court that they now have the
16 right to ingress and egress from public streets, both
17 Altamont Avenue and Patton Avenue, and they have the
18 right to continue to maintain use of the property and
19 continue to make deliveries to and from the property and
20 continue to park on the property. We believe to the
21 extent that has occurred in the past, it has been
22 permissible.

23 There is going to be no evidence that they utilized
24 the property under the essential requirement for adverse
25 possession, that their use was open, notorious, hostile

1 and adverse to our claim because there is no adverse
2 claim to their chain of title. So, we believe they are
3 not going to be able to sustain the burden of proof.

4 THE COURT: All right, Mr. Cosby, who is your first
5 witness?

6 And let me ask that all people who are going to be
7 witnesses step outside. Remain there. Don't discuss
8 the case except when you are on the witness stand until
9 the case is concluded.

10
11 (The prospective witnesses left the courtroom.)
12

13 THE COURT: Can we stipulate that these documents
14 are, in fact, the documents of title that he's talked
15 about here so we don't have to waste time of offering
16 them?

17 MR. COSBY: Yes, sir.

18 MR. MALONE: Your Honor, I have a duty to tell The
19 Court one thing. I noted this morning that there is a
20 page missing in my Exhibit Number 6. It goes from 54 to
21 56 and I apologize to The Court. I don't think it is
22 any consequence, but I do want to bring it to The
23 Court's attention so that Counsel is not surprised by
24 that. There is one page missing. I'll represent to The
25 Court that I viewed it on the screen yesterday and it

1 doesn't say anything adverse to the position we're
2 taking here, but if you want me to withdraw that
3 exhibit, I'll be glad to withdraw it.

4 THE COURT: We need them in here. We have to get
5 that one page. Don't we have that in another thing
6 anyway?

7 MR. MALONE: Your Honor, I don't know that that is
8 the same exhibit. If Your Honor wants a copy, I can
9 provide that.

10 THE COURT: Yes.

11 MR. MALONE: Your Honor, I can get it in two
12 minutes if The Court --

13 THE COURT: Well, we don't have to have it right
14 this second, but at some point just so there won't be a
15 question. Other than that, Defendant's Exhibits 1
16 through, what, 7?

17 MR. MALONE: Ten is the last.

18 THE COURT: They're all exhibits, all stipulated as
19 the chain of title?

20 MR. COSBY: Yes, sir, all but 6 until he completes
21 it.

22 THE COURT: All right. Go ahead. Who is your
23 first witness?

24 MR. COSBY: I'd like to call Ray Tipton, Your
25 Honor. If I can just ask The Court an administrative

1 question in the meantime. I just want to confirm that
2 The Court has a copy of the plat that Mr. Malone
3 introduced into evidence in the prior.

4 THE COURT: Whatever you all have given me. I
5 mean, that's not the record for today. We can take them
6 out probably make exhibits of them and use them.

7
8 N. RAY TIPTON, was duly sworn.

9
10 THE COURT: You all want to take these? To the
11 extent you want to use them, give them to me.

12 MR. COSBY: Yes, sir.

13 THE COURT: I don't want to have to duplicate them.
14 Is this what you're talking about?

15 MR. COSBY: If I can just look at it, I'll answer
16 my own question. Yes, sir. It might assist The Court
17 to leave it open because I'm going to ask a number of
18 questions.

19 THE COURT: Whatever you have of these, just come
20 get them and offer them. They are the exhibits from the
21 preliminary injunction hearing.

22 MR. COSBY: Do you have any objection to The Court
23 to continue to receive exhibits that we introduced in
24 the last hearing?

25 MR. MALONE: That's fine by me.

1 THE COURT: What's that?

2 MR. MALONE: No objection, Your Honor.

3 THE COURT: To what?

4 MR. COSBY: He has agreed to the introduction of
5 the prior exhibits.

6 THE COURT: Do I need them?

7 MR. COSBY: Yes, you do, Your Honor.

8 THE COURT: All of them?

9 MR. COSBY: You do, yes, sir.

10 THE COURT: All right, that's fine. So, 1 through
11 8 dated 6/14 are accepted into evidence and marked as
12 noted there. Defendants and plaintiff's?

13 MR. COSBY: Yes, sir.

14 THE COURT: All right.

15

16 DIRECT EXAMINATION BY MR. COSBY:

17

18 Q Mr. Tipton, could you tell The Court your name?

19 A Noel Ray Tipton.

20 Q And your address?

21 A 2010 Park Avenue, Richmond, 23220.

22 MR. COSBY: If I may, can I ask Mr. Tipton to refer
23 to a copy of the plat?

24 THE COURT: Go ahead. And this is marked as
25 Defendant's 5, this plat.

1 MR. MALONE: Your Honor, may I approach?

2 THE COURT: Yes.

3 Q Mr. Tipton, could you take a look at the plat that
4 I've showed you and indicate the property that you own?

5 A I own from 1733 Summit Avenue to 1739 plus the
6 parking lot on the north side.

7 Q Could you point to the property that you own on the
8 plat?

9 A Starts here (indicating), goes all the way down to
10 Patton Avenue.

11 Q Okay. How long have you owned that property?

12 A I bought the property in the late '60s.

13 Q Are you familiar with the use of that property
14 since your purchase of it in the late '60s?

15 A Yes, I am.

16 Q Do you recall the specific date? Was it 1968 that
17 you purchased the property?

18 A Yes.

19 Q Are you also familiar with the use of the property
20 that is shown as the area to the south?

21 MR. COSBY: Can we get a stipulation that I'm
22 referring to the property in dispute?

23 MR. MALONE: That's fine.

24 Q Are you also familiar with the use of the alleyway
25 behind to the south of your property?

1 A Yes, I am.

2 Q And what has been the use of that property since
3 1968?

4 A For deliveries and some parking.

5 Q Deliveries by what means?

6 A By trucks.

7 Q Okay. Have you also seen rail service in there
8 during the period from '68 to the present?

9 A Yes. The rail service, I believe, stopped in the
10 '70s.

11 Q Okay. Do you recall whether there was also truck
12 deliveries through the property during the time period that
13 the rail service was there?

14 A Oh, yes.

15 Q Okay. Can you describe the types of vehicles that
16 used the property for access to and from your building?

17 A Well, my tenant used delivery trucks for 7-Up,
18 Canada Dry and they had their vending department in the
19 building there and they used the loading dock and they parked
20 their vending trucks back there.

21 Q Your tenant was a 7-Up/Canada Dry distributor?

22 A Right.

23 Q Okay. What other types of vehicles used the
24 property for access to your building as well as parking?

25 A Big tractor trailers, 18-wheelers and some smaller

1 delivery trucks.

2 Q Okay. Was the property also used for deliveries
3 and access by vans?

4 A Oh, yes, it was all types of vehicles.

5 Q Private automobiles as well?

6 A Yes, private automobiles.

7 Q Okay. Was there any parking by private automobiles
8 behind your property in the easement area?

9 A Yes, there was. Personally, I didn't use it for
10 parking, but other people did.

11 Q Okay. Was access to the property from both ends of
12 the alleyway?

13 A Yes. It was very convenient.

14 Q Was access to either end of the alleyway ever
15 restricted from your purchase of your property from 1968
16 forward?

17 A No, sir.

18 Q Okay. Did anybody ever tell you as a property
19 owner in this area that you were not to use this property for
20 access, ingress and egress to your building?

21 A I doubt if I had bought it if they had restricted
22 it because of loading docks back there.

23 Q Okay. Did you rely on the ability to load and
24 unload from the rear of your property when you bought your
25 property?

1 A Yes.

2 Q Including by truck and by van?

3 A Yes.

4 Q Okay. Did anybody ever indicate to you from 1968
5 forward that there was any -- that there were any
6 restrictions on your use of this property? And I'm referring
7 to the alleyway.

8 A No. It was being used for delivery and parking
9 when I bought it.

10 Q Okay. And was it -- did it continue to be used as
11 such --

12 A Yes, it did.

13 Q -- up until?

14 A Present.

15 Q Okay. The prior use of this alleyway that you
16 described, would that also include the use of the property
17 that is indicated as 1719 through 1721? Do you see that
18 parcel on the property?

19 A Yes, I do.

20 Q Was the use that you described consistent with the
21 use that this property owner had used?

22 A That's correct.

23 Q Okay. Do you know of any -- let me ask you a
24 different question. Are you aware of the -- are you aware of
25 the prior owner of this right-of-way of the lot behind your

1 building?

2 THE COURT: You're talking about who now?

3 MR. COSBY: I'm sorry?

4 THE COURT: Are you talking about the land that is
5 now owned by Pyramid?

6 MR. COSBY: Yes, sir.

7 Q Are you aware of who owned the parcel that is
8 marked as the easement area, the property in question?

9 A Seemed like there was a food distributing business
10 in there.

11 Q Did you have any conversations with the prior owner
12 of -- well, let's identify the properties owned by Pyramid
13 Development. I can represent to you, Mr. Tipton, that the
14 property owned by Pyramid Development is indicated as parcel
15 B on the flat. Do you see that?

16 A I see that.

17 Q And it's been represented that Pyramid Development
18 also owns the alleyway, the common use area that we've
19 referred to --

20 A Yes.

21 Q -- that runs along the rear of your building and
22 the adjoining properties.

23 A Yes, sir. (Unintelligible) Strauss was in the
24 building for years, a beer distributor.

25 Q Did you have any conversations with Baker, with

1 JGB, Baker Equipment when they owned the property that
2 Pyramid now bought?

3 A Yes, I did.

4 Q All right. Did you have any conversations with
5 anyone from Baker Equipment as to their understanding of the
6 use of the easement area?

7 A I did.

8 MR. MALONE: Judge, I'm going to have to object to
9 the hearsay.

10 THE COURT: Isn't that hearsay?

11 MR. COSBY: No, I don't think it's -- I don't think
12 it's being offered for the proof of the matter asserted.
13 I think the intention of the grantor of the property
14 indicates the permitted use.

15 THE COURT: If the prior owner said, You may use
16 it?

17 MR. COSBY: Yes, sir.

18 THE COURT: That's not offered for the truth?

19 MR. COSBY: No, sir. I think it's the effect on
20 the listener. I think, as we will see, that was the
21 purpose that was communicated to these others. Under
22 the case law that we've submitted, the scope of the
23 allowed use in an easement where it's ambiguous -- in
24 the Strickland case it shows that that can be determined
25 by permitted uses and also by representations from the

1 grantor on which people who used that property relied.

2 MR. MALONE: Your Honor, first of all, Baker is not
3 the grantor to this party or any other party with
4 respect to the easement issue.

5 MR. COSBY: No, that's correct, but Baker is the
6 grantor of the servient tenement of the property that
7 your client owns. That's exactly my point.

8 THE COURT: I'll overrule the objection.

9 BY MR. COSBY:

10 Q Who did you speak to at Baker?

11 A Glenn Baker.

12 Q I'm sorry, Glenn Baker?

13 A Glenn Baker.

14 Q What was his capacity with Baker?

15 A He owns it, I guess. He's president anyway.

16 Q Okay. What did Mr. Baker tell you about his
17 understanding of the use of the property which he owned at
18 that time which is now the property, the easement area that
19 is owned by Pyramid?

20 A Mr. Baker told me that when he bought the property
21 from RF&P, it was with the understanding that each end would
22 be open for any egress and ingress.

23 Q When did he tell you that?

24 A After Pyramid contacted me to pay them for parking
25 back there.

1 Q Okay. What did Pyramid tell you when they asked
2 you to pay for parking back there?

3 A They wanted \$14,000 for paving and so much a year
4 maintenance.

5 Q All right. What was your response to Pyramid?

6 A I really haven't told them yes or no.

7 Q Okay. When you say you talked to Pyramid, are you
8 talking about Mr. Wyatt?

9 A I think.

10 Q Who did you speak to at Pyramid?

11 A I didn't speak to them other than the fact I was in
12 the meeting with them in the beginning.

13 Q Okay. Well, who said that they required \$14,000 to
14 pay for parking?

15 A Their attorney.

16 Q And who was that? Do you recall who their attorney
17 was?

18 THE COURT: Why does that matter?

19 MR. COSBY: Okay.

20 Q Did Pyramid indicate what they would do to this
21 property if you did not pay the amount of money to pay for
22 the paving?

23 A They were going to close both ends and we could not
24 use it until we participated in -- I paid the 14,000. They
25 were going to block it off and I couldn't get in there to my

1 loading docks.

2 Q Okay. Has there been any blockage of the common
3 use area, this easement area?

4 A On the south side there next to Norfolk Street,
5 they've got that blocked.

6 Q Can you point to where that is?

7 A It runs from about here (indicating) all the way to
8 Norfolk Street.

9 Q Okay. How frequent was the rail service at the
10 time you purchased the property in 1968?

11 A Two or three times a week, I would say, they had
12 cars come in there. They would leave the freight cars, come
13 back and get them later.

14 Q Did you ever use any of the freight service that
15 came --

16 A No, I did not, not the railroad.

17 Q You always used delivery by other means?

18 A See, my plant across the street was bottling and
19 the trucks brought the raw materials over there.

20 Q How did you take delivery to the rear of the
21 property?

22 A By truck.

23 MR. COSBY: Okay. I don't have any further
24 questions from Mr. Tipton.

25 THE COURT: Cross-examine?

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CROSS-EXAMINATION BY MR. MALONE:

Q Mr. Tipton, just so I'm clear, you have not at any time used the portion of my client's property behind your building for parking, have you?

MR. COSBY: Objection, asked and answered. Judge, he said that --

THE COURT: He's got him on cross-examination.

MR. MALONE: I don't believe you asked the question.

Q You haven't used it for parking, have you?

A My tenants.

Q But you don't know of any -- anybody in your tenant using it for parking now, do you?

A I have four tenants in the building and they all used it at one time or another.

Q Do you have any personal knowledge today that they are using it for parking?

A Yes. The Taste of California, the fellow that's manager there, he parks back there.

Q You referenced -- Mr. Cosby asked you about a meeting you attended with Mr. Wyatt at his offices. Do you recall that meeting?

A I recall that meeting.

1 Q Do you recall stating at that time that neither you
2 nor your tenants parked back there, so you weren't interested
3 in the transaction?

4 A I said I was not personally interested.

5 Q Did you say that neither you nor your tenants
6 parked back there?

7 A I just told you that the director of Taste of
8 California did.

9 Q And the railroad continued to run through there,
10 you think, until sometime in at least the late 1970s?

11 A I don't know the exact date that they stopped
12 delivery.

13 Q And after Baker took title to the property that's
14 behind your building, they regularly used that area for
15 parking for their employees, didn't they?

16 A They didn't utilize very much of it, but they had
17 some parking spaces.

18 Q In fact, they had numbers on the back of your
19 building for assigned parking spaces?

20 A Yes, they did.

21 Q And those assigned parking space numbers continue
22 today, don't they? They are still on the back of your
23 building?

24 A There are some numbers there, yes.

25 Q And during the period of time that Baker Equipment

1 owned the property, they also had the property posted, did
2 they not, saying that it was private property and private
3 parking? Did they not?

4 A I can't answer that, I don't know.

5 Q You don't know. But you are aware that they
6 asserted the right to have their employees park throughout
7 that area?

8 A I have -- I didn't see anything that gave them the
9 right, but they put the signs up.

10 Q In fact, their employees did park immediately
11 behind your building from time to time, didn't they?

12 A I never saw very many.

13 Q But you do know that they did?

14 A I suppose that they did.

15 Q That would have been during the tenure of their
16 ownership which began sometime, I believe, in 1986 through
17 1998?

18 A Could you state that again?

19 Q That would have been during the tenure of Baker's
20 ownership which was sometime in the mid 1980s until about
21 1998?

22 A Well, actually when I sold the 7-Up franchise, the
23 Canada Dry and 7-Up, they took that building over and they
24 stayed there for 19-and-a-half years in that building.

25 Q But during the period of time that Baker owned it,

1 they regularly asserted a right to park in there, didn't
2 they?

3 A I can't answer that.

4 Q The signs were on the back of your building for
5 purposes of parking by their employees, were they not?

6 A They didn't have any signs on my loading dock.

7 Q But there were numbers on each space all up the
8 back of your building?

9 A They actually were not allowed to put numbers on my
10 building, --

11 Q They weren't?

12 A -- but I didn't say anything to Glenn.

13 Q But they did put the numbers on there and you
14 didn't object to that?

15 A I didn't object.

16 MR. MALONE: No further questions, Your Honor.

17 THE COURT: Redirect.

18

19 REDIRECT EXAMINATION BY MR. COSBY:

20

21 Q Mr. Tipton, I don't have any question about your
22 statement that Baker may have used the area for parking, what
23 I want to ask you is did Baker ever communicate to you not
24 only are we going to park there, but you can't park there?

25 A Oh, no.

1 MR. COSBY: Thank you.

2 THE COURT: May he be excused?

3 MR. COSBY: I think he can, Judge, with Mr. Malone.

4 MR. MALONE: Certainly.

5 THE COURT: All right, sir, you may step down. You
6 are now free to leave if you wish.

7

8 (The witness was excused.)

9

10 THE COURT: Who is your next witness?

11 MR. COSBY: The next witness is George Yesbeck.

12

13 GEORGE E. YESBECK, JR., first being duly sworn,
14 testified as follows:

15

16 DIRECT EXAMINATION BY MR. COSBY:

17

18 Q Mr. Yesbeck, could you state your full name?

19 A George Yesbeck, Jr.

20 Q And where do you live?

21 A I live in Chesterfield County.

22 MR. COSBY: If I may approach the witness and show
23 him the same plat that we've been referring to. I'd
24 like to refer to it by the exhibit number.

25 THE COURT: Defendant's 5.

1 Q Mr. Yesbeck, I'd like to refer you to a plat that
2 has been marked as Defendant's Exhibit Number 5. Take a look
3 at that. Can you indicate on the plat any property that you
4 own?

5 A I own this corner here (indicating) at Norfolk
6 Street and Summit Avenue.

7 Q And it's identified by what number do you see
8 there?

9 A 1701 to 1705.

10 Q Okay. All right. Let me ask you a couple of
11 questions about this plat. From -- from your familiarity
12 with the property, what does this line going across this
13 strip indicate?

14 A That's a fence that's been erected across there.

15 Q Okay. And who has erected it?

16 A Pyramid Development.

17 Q Okay. Where is Pyramid Development?

18 A They're right next door to my building.

19 Q Okay. Can you show where the gate is located and
20 the fence? Can you indicate where that is?

21 A The gate is located over here (indicating). Where
22 they have drawn these parking spaces, would be located
23 partially in the parking space area and partially in this
24 drive-through area.

25 Q Let me ask you: Do you see the diagonal lines

1 drawn throughout the common use area that we've been
2 referring to?

3 A Uh-huh.

4 Q Are those lines painted on the ground right now?

5 A No.

6 Q So, those are proposed parking lots?

7 A Correct.

8 Q Now, is the gate to the fence in the dead center of
9 the fence or is it to one side or the other?

10 A It is towards the side over here (indicating), the
11 side closest to my building.

12 Q Towards your property, okay. Are you familiar with
13 the types of vehicles that have come in and out of the east
14 end, the Norfolk Street side of this strip?

15 A Just about any kind of vehicle that's on the road
16 comes through here, tractor trailers, cars, trucks, vans,
17 just about anything.

18 Q Okay. How long have you owned your property?

19 A Since '84.

20 Q Since '84 have you used the area in the common use
21 area to the rear of your building for personal parking?

22 A Very little personal parking, mostly delivery
23 trucks.

24 Q Okay. Do the delivery trucks and other vehicles
25 park there while they're making deliveries and pickups?

1 A Yes.

2 Q Okay. All right. Has anybody, by the way, ever
3 indicated to you that a car can't park there?

4 A No.

5 Q Now, based on the location of where the gate is and
6 this fence, and you said it was up towards your property
7 rather than in the center?

8 A Right.

9 Q Now, are you able to answer, is this a fairly
10 accurate representation of the dimensions of the property?

11 A Somewhat, yeah.

12 Q Looking at the -- go ahead and would you mind
13 marking two Xs about where the gate is on the plat?

14 A (Complying.)

15 Q Would you put your initials by the two Xs that show
16 the gate?

17 A (Complying.)

18 Q Okay. All right. Are you able to say whether or
19 not, for instance, an 18-wheel truck -- you know what I'm
20 referring to, don't you?

21 A Uh-huh.

22 Q Whether or not an 18-wheel truck can access this
23 common use area through that gate if, in fact, these assigned
24 parking spaces are taken?

25 A There is no way.

1 Q Why do you say that?

2 A Because the cars would be in the way, all these
3 vehicles would be in the way. I can't even get an 18-wheeler
4 back up to my door here --

5 Q Why is that?

6 A -- even if there are no cars there. Because the
7 gate is so close to my property, there is no way he can
8 maneuver in and turn the truck where we could use that
9 overhead door.

10 Q Okay. Can you tell us what this strip of land to
11 the east side of your property indicates?

12 A I own a four-foot section of this land, it's a
13 sidewalk area, to the side of my building here from Summit
14 Avenue all the way back to the alley. And Pyramid has taken
15 an iron gate and attached it to my building on both ends and
16 run it straight across and closed off both ends, concreted
17 it, put in a drain and now they have a gas grill and
18 furniture sitting on my property.

19 Q All right. Did you make protest to Pyramid?

20 A Yes.

21 Q What did they say?

22 A They offered me a couple of spaces in the back of
23 the building.

24 Q If they could keep the improvement on that
25 property?

1 A If they could keep the improvement on my property,
2 yes.

3 MR. MALONE: Judge, I don't know the relevance that
4 this has to the issue before The Court.

5 THE COURT: I'm not sure either.

6 MR. COSBY: I'll move on, Judge. May I have a
7 photograph marked for identification purposes?

8 THE COURT: Is this something we haven't already
9 introduced?

10 MR. COSBY: Yes.

11 THE COURT: Just tell him what it is and when you
12 offer it, we'll mark it.

13 Q Mr. Yesbeck, take a look at that photograph.

14 A (Complying.)

15 Q Is that a fair and accurate representation of the
16 property as it appears today?

17 A Yes, it sure is.

18 Q Does that show the gate looking from Norfolk
19 Street, from the west side?

20 A Yes.

21 Q So, your property is right through that gate to the
22 left; is that right?

23 A To the left.

24 MR. COSBY: I'd like to have that introduced as
25 Plaintiff's Exhibit --

1 THE COURT: Nine, I think it is.

2 MR. COSBY: -- 9 if I can.

3 THE COURT: All right.

4 Q If I can show you my copy, Mr. Yesbeck. So, that
5 is the entrance from Norfolk Street and your property is just
6 to the left of that photograph; is that right?

7 A Correct.

8 Q Can you tell me -- in the foreground at the
9 entrance of the parking area you see the much lighter color,
10 what kind of surface is that?

11 A That's concrete.

12 Q Was the concrete there when you bought your
13 property?

14 A No.

15 Q All right. When was the concrete put down?

16 A That was put in approximately the same time the
17 alley was paved.

18 Q Okay. Do you have any indication as to the purpose
19 of that concrete?

20 A Well, Sealtest was across the street, they're on
21 this side (indicating), the other side of Norfolk. And in
22 order for them to be able to maneuver their trucks into their
23 warehouse, they needed to have somewhere to pull in and
24 that's why the concrete was put there.

25 MR. COSBY: I have no further questions for

1 Mr. Yesbeck.

2 THE COURT: All right. Cross-examine.

3 MR. MALONE: Yes, Judge.

4

5 CROSS-EXAMINATION BY MR. MALONE:

6

7 Q Mr. Yesbeck, you've owned this property since 1984?

8 A Correct.

9 Q So, all of your testimony today relates only to the
10 period from that date forward?

11 A Yes. Correct.

12 Q And you have no personal knowledge of the use made
13 of the property prior to that date?

14 A Correct.

15 Q With respect to the time that you've been there,
16 you know that Baker Equipment owned this property for some
17 period of time; do you not?

18 A Yes.

19 Q During the period of time that they owned this
20 property, they actually had the property posted with the
21 sign, did they not, saying it was private property for their
22 parking only?

23 A I do not ever recall seeing that. That may have
24 been. I don't ever recall seeing that.

25 Q Do you recall having seen numbers on the back of

1 your building for assigned parking spaces?

2 A There are numbers on the back of my building.

3 Q During the period of time that Baker owned the
4 property, they, in fact, parked their vehicles behind your
5 building, did they not?

6 A No, they did not.

7 Q You don't know that?

8 A No, I don't know that.

9 THE COURT: You don't know that or they didn't do
10 it?

11 THE WITNESS: From time to time there may be a
12 vehicle there, but I was never -- I have no idea who
13 owned the building or who owned the vehicle that was
14 there, whether it was somebody from one of the other
15 warehouses or someone just parking there. I don't know
16 because I rented the building out. I know that no one
17 parked there when we were -- on a regular basis because
18 we used both of those doors.

19 Q But you do know that there are numbers -- as we
20 stand here today, there are numbers on the back of your
21 building for assigned parking spaces, don't you?

22 A There are numbers there, yes.

23 Q And they've been there for quite some period of
24 time?

25 A Yes.

1 Q At least since the 1980s?

2 A We didn't put them there.

3 Q Were they on your building when you bought your
4 building?

5 A Yes.

6 Q So, they preceded 1984, then?

7 A I take that back. I assume they were on the
8 building when we bought it, I don't know. They are just
9 small little numbers.

10 MR. MALONE: No further questions.

11 THE COURT: Redirect?

12

13 REDIRECT EXAMINATION BY MR. COSBY:

14

15 Q Mr. Yesbeck, during the period you owned your
16 property up until now, did Baker ever restrict access to the
17 rear of your property through that alleyway?

18 A None whatsoever.

19 Q All right. Are you aware of whether or not they
20 ever restricted the access of anybody else?

21 A No.

22 Q No?

23 A Absolutely not.

24 Q Whether it was a tenant, an adjoining landowner, a
25 visitor, a deliveryman, a customer?

1 A Never.

2 MR. COSBY: Okay. Thank you.

3 THE COURT: Let me ask you: Do you -- is the back
4 of your building used to load and unload materials for
5 that building?

6 THE WITNESS: Yes, sir.

7 THE COURT: There is a loading dock back there; is
8 that right?

9 THE WITNESS: Yes, sir.

10 THE COURT: During the time that you've owned it,
11 has it been regularly used for the purpose of loading
12 and unloading?

13 THE WITNESS: Absolutely.

14 THE COURT: From the rear?

15 THE WITNESS: From the rear.

16 THE COURT: And has anybody ever told you that you
17 didn't have the right to do that or that you couldn't do
18 that or in any way restricted your use of that?

19 THE WITNESS: Never until the fence went up.

20 THE COURT: And that was when?

21 THE WITNESS: That was -- I don't know the date.
22 I'm going to guess a year ago.

23 THE COURT: All right. Thank you. You can step
24 down.

25 May the witness be excused? May he be excused?

1 MR. COSBY: Yes, sir.

2 MR. MALONE: Yes, Judge.

3 THE COURT: You're free to leave if you wish.

4

5 (The witness was excused.)

6

7 MR. COSBY: The next witness is Mr. Dick Johnston,
8 Richard Johnston.

9

10 RICHARD L. JOHNSTON, first being duly sworn,
11 testified as follows:

12

13 DIRECT EXAMINATION BY MR. COSBY:

14

15 Q Could you state your full name, Mr. Johnston?

16 A Richard L. Johnston.

17 Q And what do you do?

18 A I'm the director of depot operations for RADAC
19 Corporation.

20 Q And does RADAC Corporation conduct business in
21 Richmond?

22 A Yes.

23 Q Where does it do business from?

24 A I'm not sure of the exact address, it's the Summit,
25 Summit address.

1 Q Who owns the property where you conduct business?

2 A I think it's Jack.

3 Q D&J Associates?

4 A Yeah, that's what it is. We have 21 branches, so I
5 don't know all the specifics about every one.

6 Q All right. If I can ask you to look at the plat
7 that's been identified as Defendant's Exhibit 5, are you
8 familiar with that document? Have you seen this document
9 before?

10 A Yes.

11 Q Can you indicate where you're leasing premises from
12 D&J Associates?

13 A Actually, this one here is broken up into two and
14 this is ours where this drive-up thing is right there
15 (indicating).

16 Q Okay. And you're indicating 1719 through 1721; is
17 that right?

18 A Right.

19 Q Are you leasing all of 1719 through 1721?

20 A No. There is an open space next to us.

21 Q Okay. All right. Are you familiar with the use of
22 the open property, this common use area that fronts the rear
23 of the building here?

24 A Yeah.

25 Q Okay. And what has the use of that strip been for?

1 A Well, we use it for deliveries. We have -- every
2 day we have either two types of trucks depending on whether
3 the freight company wants to send either an 18-wheeler or a
4 smaller box truck which is in excess of 24 foot. We have
5 deliveries every day back here (indicating).

6 Q Okay. At that loading dock?

7 A At that loading dock. Plus, you know, we used to
8 park vehicles back there, but we haven't been able to.

9 Q Why do you say that?

10 A Well, they have an embankment back there and we
11 can't get to it.

12 Q Okay. Is there an embankment there right now?

13 A Yes.

14 Q Would you mind drawing on the plat -- let me ask
15 you this: Can I call them abutments, these are the concrete --

16 A They are like you have on the freeways where
17 they're doing repairs and stuff. They're big concrete
18 things, but they're curved. They look a little curved, maybe
19 not curved.

20 Q Okay. Are those concrete abutments on the property
21 right now?

22 A Uh-huh.

23 Q As of this morning?

24 A Uh-huh.

25 Q How do you know that?

1 A I was there.

2 Q Okay. All right. Would you indicate on the plat
3 as to where those concrete abutments are located?

4 A Okay. Right now they are out from here
5 (indicating). They are like in sections, like 15-foot
6 sections, something like that, I'm not sure. It's like
7 spaces between them, but they're straight, but they form a
8 thing where you can't get by. They've got some up here at
9 the other end, but they're not blocking anything, but they're
10 just there.

11 Q Okay. Where?

12 A Right up here (indicating).

13 Q You're talking about the east end?

14 A I don't know if it's east.

15 Q Do you know why they're sitting there?

16 A Yeah. They had four up there before because they
17 was going to block it off and then they decided not to. They
18 left two.

19 Q All right. Could you put your initials next to the
20 drawing you made?

21 A (Complying.)

22 Q And also on the east end.

23 A (Complying.)

24 Q What has been the effect on ingress and egress to
25 the property that you're operating from of these concrete

1 abutments that are sitting there today?

2 A Well, we can't -- the biggest problem is backing in
3 the -- our delivery service every day, they complain to us
4 quite frequently. They have to back all way down here and
5 then they have to get to that concrete slab so that they can
6 drop off pallets.

7 Q Right.

8 A So, that's why they have to back in down to there.
9 They happens every day, they make a delivery every day. Our
10 trucks, we've got a dock up front that is not always
11 accessible and we bring our trucks around and pick up a van
12 to load out of this. Now, at one point in time, these
13 concrete abutments were right up against our thing. We
14 couldn't get to it. They've moved them out since then, so we
15 can at least access them, but we can't park anything there.
16 And we don't have any room for our dumpsters sitting over
17 here (indicating) and we have some use pallets that were
18 sitting here that we need some room for. So, basically we
19 can't -- we have to park on the street.

20 Q Do you know where the dumpsters are located on this
21 property?

22 A Well, they moved them.

23 Q Where they did move them?

24 A They was sitting right here (indicating), and when
25 they put these concrete abutments in, they moved them back

1 over here.

2 Q All right.

3 A So, it would be right -- where this right-of-way is
4 (indicating) that goes up into a ramp, it's right next to
5 that.

6 Q Speaking of the dumpsters --

7 A Yeah.

8 Q -- can you tell whether or not the truck that -- I
9 don't know how to describe the truck that loads up the
10 dumpster. The waste vehicle that picks up the dumpster, do
11 you have any idea how that would be able to operate if there
12 were cars parked there?

13 A Couldn't do it.

14 Q Why do you say that?

15 A He comes in frontways and has to come at an angle,
16 so he's got to come out and come in. You can't have cars on
17 both sides.

18 Q Okay.

19 A If you didn't have anything over here (indicating),
20 he could come out here and come into it like that.

21 Q What's the state of your ability to access the
22 property from the Norfolk Street entrance right now?

23 A You can't. I mean, you can walk, you can walk
24 through the little space about three feet here (indicating).

25 Q Have you seen any construction or any paving

1 activity, say, since June of this year?

2 A No.

3 Q Have you visited the property since June of this
4 year?

5 A Oh, yeah.

6 Q Have you seen any construction equipment staged
7 there, parked there, paving equipment or anything like that?

8 A No.

9 Q Have you seen any materials stored there that would
10 be used in paving?

11 A No. Well, I haven't seen anything like you speak
12 of since they paved that other part and they put up the
13 abutments and then I haven't seen anything since that.

14 Q Since the beginning of June, have you seen any
15 indication of paving or improvement to the west of the
16 abutments?

17 A No.

18 Q And that includes right up until today?

19 A Yes, until this morning.

20 Q How important is the access to the property that
21 you are leasing right now from either end to RADAC?

22 A Well, our lease comes up in January and if this
23 doesn't get settled to my satisfaction, we are going to go
24 somewhere else. Would that explain it?

25 Q I think that explains it.

1 A All right.

2 Q Mr. Johnston, has -- the entire time that RADAC has
3 been a tenant in D&J's building, can you tell me when that
4 started?

5 A Well, actually it was three and a half years ago,
6 actually three years ago. We took over the last part of a
7 lease from somebody else and then we've leased since that.
8 So, the exact date, I'm not sure.

9 Q Okay. Has anybody ever instructed you as to any
10 restrictions other than Pyramid, Pyramid Development?

11 A No.

12 Q Has anybody instructed you to as to any restriction
13 as to the use of this easement area?

14 A No.

15 MR. COSBY: I don't have any further questions.

16 THE COURT: All right. Cross-examine.

17

18 CROSS-EXAMINATION BY MR. MALONE:

19

20 Q You have no knowledge of what use was made of the
21 property prior to your tenancy three and a half years ago, do
22 you?

23 A No.

24 Q And am I correct that there is, in fact, a loading
25 dock on the front end of the property?

1 A That's correct.

2 MR. MALONE: If I may, Your Honor, approach and
3 show him a portion of Exhibit 11.

4 Q Let me ask if you can identify this.

5 MR. MALONE: It's in the book.

6 THE COURT: Go ahead.

7 Q Let me ask if you could --

8 MR. MALONE: And, Your Honor, if you might look
9 too. I've got the pictures marked.

10 Q Is the first of these pictures the front of your
11 building?

12 A Yes.

13 Q And that shows a loading dock?

14 A That is correct.

15 Q And is that loading dock at normal truck loading
16 dock height?

17 A At truck loading dock height, yes.

18 Q And Exhibit 2 --

19 MR. COSBY: Judge, I object because we are not
20 claiming an easement by necessity. His argument might
21 have some relevance if we are saying that there is no
22 other way in there. We're claiming an easement by
23 grant. The fact that he's got access to the property in
24 the front doesn't impact the issue of an easement by
25 grant or an easement by prescription.

1 MR. MALONE: Your Honor, I believe we're entitled
2 to show exactly what type of access they want. They
3 maintain that their right of access to a railroad siding
4 has somehow matured into a right of access for all
5 purposes. I think we're entitled to show that they've
6 got access.

7 MR. COSBY: Judge, that's not our argument.

8 THE COURT: Overruled. Go ahead.

9 BY MR. MALONE:

10 Q Anyway, the series of photographs 1 through 5 do,
11 in fact, show the front of your building?

12 A Uh-huh.

13 Q And actually show a delivery being made from a van?

14 A That's our van, yeah.

15 Q And how frequently is it used for that purpose?

16 A We use it all the time, every day.

17 Q All right, sir. And you could also make delivery
18 from a tractor trailer there, could you not?

19 A No, we cannot.

20 Q Why not?

21 A Because they can't back in with the cargo.

22 Q With respect to the back of your building -- first
23 of all, I'll show you Exhibit Number 5 here. Photo number 5
24 of Exhibit Number 11. Are there, in fact, numbers on the
25 back of your building?

1 A I don't know.

2 Q You don't know?

3 A No.

4 Q And number 5 actually shows up a truck pulled up
5 the way you normally pull up to the building, correct?

6 A Correct.

7 Q In fact, you all haven't been able to use that ramp
8 that's there for unloading tractor trailers?

9 A No, that's not for the tractor trailers, that's
10 just for our pickups, right. They have to get to the
11 concrete.

12 Q But you've never made any use of this ramp where
13 you would actually back a tractor trailer up the ramp, have
14 you?

15 A No. You have to back it up -- no, not up the ramp,
16 but to the ramp. You've got to be able to be over the ramp
17 and then they have a lift that comes down and so it's on the
18 actual concrete.

19 Q So, in fact, this has never been used for pulling
20 tractor trailers up to the building?

21 A Not to the building, no.

22 Q In fact, the dock height that is here is actually a
23 railroad siding dock height, is it not?

24 A I don't know.

25 Q You don't know that, but Exhibits 5 through 9

1 actually show a -- excuse me, 5 through 10 actually show a
2 tractor trailer making a delivery to your building?

3 MR. COSBY: I'm sorry, my 5 through 10 are not
4 photographs.

5 MR. MALONE: Photographs 5 through 10 of Exhibit
6 11. Pardon me.

7 A Yeah, that is. That's a picture.

8 Q And you're able to do that today, are you not?

9 A Well, yeah. We can't get that close to it, but we
10 can get there. So, yes, effectively, yes. But the thing is
11 that doing the front, we have to be able to drop the pallets
12 down on something so -- and the ramp we can pull it up with a
13 pallet jack, but on the front you'd have to actually back up
14 to the building in order to off-load it.

15 MR. MALONE: I understand. No further questions,
16 Judge.

17 THE COURT: Any redirect?

18 MR. MALONE: I have just one more, excuse me.

19 Q Prior to the time that Pyramid purchased their
20 property, were you aware that Baker Equipment owned the
21 property behind your building?

22 A I was not.

23 Q Did you visit the lot back there frequently?

24 A Yes. I was the one that went with the landlord and
25 made the decision that that was where we were going to move

1 in.

2 Q At any time did you see a sign posted at the
3 Norfolk end of the lot saying it was private property owned
4 by Baker Brothers?

5 A No.

6 Q You don't recall?

7 A No.

8 MR. MALONE: Thank you.

9

10 REDIRECT EXAMINATION BY MR. COSBY:

11

12 Q Mr. Johnston, were you aware of any actions by
13 Baker Equipment to restrict access to this property to
14 anybody or any kind of vehicle?

15 A No.

16 Q Let me get you to refer to the photograph that's
17 marked as exhibit -- I'm sorry. I'm going to ask you to
18 refer to the photograph that has a little number 5 on it. It
19 is behind Tab 11 of these exhibits that Mr. Malone was asking
20 you about, defendant's exhibit. Do you see the vehicle
21 there?

22 A Right.

23 Q That's not an 18-wheel truck?

24 A No, it's not. They have their choice, whatever is
25 available that day.

1 Q How often do you take deliveries from 18-wheel
2 tractor trailer trucks?

3 A Well, I checked with my manager and he said it's
4 more 18-wheelers than not.

5 Q Okay. Now, the photograph that is labeled as
6 Exhibit 1 behind Tab 11, do you see that?

7 A Yes.

8 Q Okay. And that is the front of the property that
9 you're leasing; is that right?

10 A That's correct.

11 Q And that is 1719; is that right?

12 A I think so.

13 Q Now, next-door to you is property that D&J
14 Associates also owns; is that right?

15 A That's true.

16 Q Is there any front loading dock on the D&J property
17 next to you?

18 A No. Well, I don't think so.

19 Q I don't have any further questions.

20 THE COURT: May he be excused?

21 MR. MALONE: Yes, Your Honor.

22 THE COURT: All right, sir, you may step down. You
23 are free to leave if you wish.

24

25 (The witness was excused.)

1

2

THE COURT: Who is your next witness?

3

4

MR. COSBY: Next witness is Mr. Cullather and he's right here.

5

6

THE COURT: All right, sir. Come forward and let me swear you in.

7

8

9

JOHN C. CULLATHER, first being duly sworn, testified as follows:

10

11

DIRECT EXAMINATION BY MR. COSBY:

12

13

14

15

16

17

Q Mr. Cullather, since the last time we appeared in court in early June, have you seen -- have you made -- have you regularly looked at the property, not only the property that you own, but the easement, the common use area that comes up to the rear of your property?

18

A I've been over there three or four times, yes.

19

20

Q Okay. Have you ever seen any paving activity since the last time we were in court?

21

A No, sir.

22

Q Have you ever seen any construction activity?

23

A No, sir.

24

25

Q Let me just ask you: Are the spur tracks still on the property?

1 A Yes, sir.

2 Q How do you know that?

3 A I took pictures of them.

4 Q Did you see them yourself?

5 A Yes.

6 Q When did you see them?

7 A Either last Friday or Saturday a week ago.

8 Q I think the records show that you own -- your
9 company owns 1719 through 1721 on the plat that's been
10 identified as Defendant's Exhibit 5. What is the status of
11 your tenants? We heard from RADAC. What is the status of
12 your other tenant?

13 A Well, my wife and I own it. It's a partnership.
14 And the other building is empty.

15 Q And how long has it been empty?

16 A About a month.

17 Q Did that tenant's lease expire?

18 A Yes, it did.

19 Q Did they choose -- they chose not to renew?

20 A Correct.

21 Q Do you know why they chose not to renew?

22 A I think he was scaling down some.

23 Q Okay. Have you shown the property in the last
24 month?

25 A Morton G. Thalhimer has a prospective tenant. I

1 can't do anything right now. I have not shown it. I didn't
2 rent to RADAC, Thalhimer did.

3 Q You're in the real estate business yourself?

4 A Yes, I am.

5 Q Okay. How much did that space that is now vacant
6 rent for?

7 A They were paying about \$1,300 a month, that was
8 kind of escalated because we worked them in at a lower rent
9 for the first year and then went on up.

10 Q Are you aware from your experience in the real
11 estate business as to the fair rental value of that property?

12 A We'd be putting it on the market around 1,100 a
13 month.

14 Q Do you have any debt service on that property?

15 A I do not.

16 Q Are there any expenses that you pay on the
17 property?

18 A We pay the taxes.

19 Q Is that the sole expense?

20 A Yes, sir, and roof.

21 Q How much is the real estate tax on your property?

22 A It's assessed for \$275,000.

23 Q Okay.

24 A I can't swear unless we are right at tax season,
25 Your Honor.

1 Q Okay. Let me refer you to the plat that's been
2 identified as defendant's -- it's been introduced as
3 Defendant's Exhibit 5. Do you see the -- I want to refer you
4 to the slash marks that are shown going down the common use
5 area that's subject to the easement that we're talking about.
6 Do you see the marks?

7 A Yes, sir.

8 Q Do you understand those to be proposed parking
9 spaces?

10 A I think that's what the -- yes, sir.

11 Q As a matter of fact, it says spaces, doesn't it?

12 A Yes, it does.

13 Q Can you testify as to what the effect would be on
14 the ability to ship and deliver, to load and unload from your
15 property if automobiles are leased to specific people in
16 these indicated spaces?

17 A Well, 1721 could not be considered a warehouse
18 anymore, it has no way of loading. It would have to be
19 converted to an office space and you wouldn't have any
20 parking. So, you couldn't get a CO for an office without
21 having specified parking spaces. Basically that makes 1721
22 (indicating).

23 Q Describe how 18-wheel trucks would unload and
24 deliver from your property there.

25 A Well, when Bob Fisher owned it, Fisher Furniture,

1 back in the early '70s, I bought some furniture from him, he
2 had tractor trailers come in here and would pick up, back in
3 and would then load his furniture to take it to the market.
4 He then sold it to S&W Furniture who were a large wholesaler.
5 They bought from businesses who would go out of business,
6 would buy all their furniture. They would bring it in by
7 tractor trailer, which could come in here, back in, form an L
8 there, unload on this dock right here (indicating), 1721.
9 They had both sides, that's why there is a hole in the wall
10 between the buildings. They would unload here and then the
11 tractor trailer would go out. They then would break down the
12 large purchases and I bought a couple of desks from them
13 before we bought the building. That was in approximately
14 1975 when I started the real estate business.

15 Q Okay. If these assigned spaces are all being used,
16 if these proposed spaces are all assigned and leased to
17 people and they are all full, then how would a truck have to
18 operate to load and unload from the building?

19 A If they do what they're proposing here, they're
20 ripping off my loading docks, first of all.

21 Q Are these two --

22 A This is a loading dock and that's a loading dock
23 (indicating), that's a ramp, actually.

24 Q And the proposed spaces are drawn right in front of
25 one loading dock and on top of one ramp, right?

1 A Correct.

2 Q Okay. All right.

3 A The question was -- what was the question?

4 Q Well, did 18-wheel trucks ever back up to your
5 building?

6 A Yes. 1721 is dock loading. They would come in,
7 back in and L it. And before I bought the building, I
8 watched them do it because that was important to the next
9 tenant I had that he had to have accessibility. Actually,
10 S&W sold me the building and leased it back from me while
11 they got a building ready on the Boulevard which they moved
12 to. They outgrew the space we had.

13 Q And was there enough room for an 18-wheel truck?

14 A Yes, there was. And if there wasn't, you just
15 asked the people to move the car.

16 Q So, there is room as long as there isn't parking
17 right there and parking right there (indicating)?

18 A Yes, there is.

19 Q All right. And how was the ramp used by 18-wheel
20 trucks?

21 A The ramp was for redistribution of the breakdown of
22 the furniture. Big loads would come in here (indicating).
23 If you wanted to go out, they ramp it down and put it on the
24 back of your pickup.

25 Q How large is the product that's shipped and

1 delivered to RADAC? Are you familiar with that?

2 A They're radiators, but they come in bulk.

3 Q What kind of radiators?

4 A Car and truck radiators. And they might get other
5 parts, I don't know.

6 Q Do you know of any way that those radiators can be
7 taken in and out of your building if parking is going to be
8 assigned and allowed all the way across the rear of your
9 building?

10 A Not from the rear.

11 Q The front of your property Mr. -- a prior witness
12 testified that there was a loading dock at the front of the
13 property. Is there a loading dock as to the other piece of
14 property?

15 A There is not.

16 Q You're familiar with Summit Avenue?

17 A Yes, I am.

18 Q Is that a public right-of-way?

19 A Yes, it is.

20 Q Do you know whether or not loading and unloading is
21 allowed on Summit Avenue?

22 A There is a loading zone, no parking area right
23 there. That is a joke. Parking is so tough in that area
24 that it's impossible to find a space most of the time on
25 Summit.

1 Q And anybody in the public at large is free to park
2 on Summit?

3 A They are.

4 Q And do they?

5 A Oh, yeah.

6 Q Have you ever had any conversations with anyone at
7 Pyramid -- with anyone at Baker Equipment, who was the prior
8 owner of both the common use area and the building that
9 Pyramid owns, did you have any conversation with anyone at
10 Baker as to any exclusive uses for parking or any
11 restrictions as to the property?

12 A Yes, on at least two or three occasions.

13 Q All right.

14 A And it really came to court when Baker went to the
15 city to close High Point.

16 Q High Point?

17 A High Point Street. The city gave them High Point
18 Street, which is between two of their manufacturing
19 facilities, and the case came up that that's why they needed
20 parking in the back was to take more public parking away from
21 High Point, which is a block away, that they wanted that area
22 for their employee parking.

23 Q All right.

24 A The previous one or two tenants before was a
25 cabinet manufacturer and he had a spray booth in the back of

1 the building. And one of the people from Baker said that we
2 were spraying on their cars or that my tenant was spraying on
3 their cars and that they wanted it to stop. And I said there
4 is no way they're going to stop, that's where they're putting
5 lacquers on those cabinets. And he said -- I said park
6 somewhere else. And then a later instance came when one of
7 my tenants were parked there and they had these numbers --
8 they came and put numbers on the building.

9 Q On your building?

10 A On my building. And he said, We want your tenant
11 to move or we're going to have him towed. I asked him to
12 please let me bring my car over, if he thought that he had
13 that right, to tow my car so he wouldn't tow my tenant and we
14 would let the court resolve those rights. And I'm not sure
15 if it was Skip Baker or not, but nothing ever happened.

16 Q Let me ask a couple of follow-up questions. This
17 was after High Point was closed; is that right?

18 A I believe it was.

19 Q Now, before High Point was closed, Baker still
20 owned this common use area of the property; is that right?

21 A They didn't immediately -- I don't think they
22 immediately went as soon as they bought it and started
23 tagging those buildings.

24 Q That's my question. At any time before High Point
25 was closed, did Baker ever assert any right to park in the

1 property? And I'm referring to the common use area.

2 A Ask your question again.

3 Q Sure. Anytime before -- anytime before High Point
4 Road was closed, did Baker, to your knowledge, assert any
5 rights to park in this common use area?

6 A I can't swear to the timing. I believe they had to
7 have put those numbers up. If I were doing it, before I
8 asked the city to close the street, I'd say I've got this
9 area to park.

10 Q So, it's your recollection that this followed the
11 closure of the road that Baker had been using to park on
12 before?

13 A It followed the closing of the road.

14 Q Was it your understanding from Baker that they now
15 needed additional spaces to park for some reason?

16 A Correct. That's why they bought the land because I
17 looked at buying that land, too.

18 Q I'm sorry?

19 A When they were in their boonday, you could not find
20 a parking space in Scotts Addition. This was a natural thing
21 to make into a parking lot, but I couldn't do it.

22 Q Why couldn't you do it?

23 A My lawyer at the title company at that time said I
24 couldn't get clear title.

25 MR. MALONE: Judge, I've been very patient with

1 hearsay.

2 THE COURT: I agrees. That's hearsay. Sustain the
3 objection.

4 Q Now, when Baker told you that they were going to
5 assign spaces behind the building, did you -- you talked
6 about if you're going to tow a car, tow mine. Were you
7 agreeable -- did you communicate any agreement or consent or
8 did you disagreement with their ability to --

9 A Baker never told me that they were going to assign
10 parking spaces. They came and put numbers on everybody's
11 building.

12 Q I understand.

13 A And just started parking there.

14 Q Right. Right. Did you ever defend against Baker,
15 though, your rights to park there as well?

16 A I had no need to. I was prepared to.

17 Q Did you threaten to?

18 A Just what I told you earlier.

19 Q Okay. What was Baker's reaction?

20 A Nothing happened.

21 Q Okay. When you purchased the property, did you
22 have any understanding -- and you purchased it when?

23 A 1984, I want to say.

24 Q Did you have any understanding as to what the
25 permitted uses of the common use area were?

1 A Did I have an understanding?

2 Q Yes, sir.

3 A Yes.

4 Q What was your understanding?

5 MR. MALONE: Your Honor, I'm going to object unless
6 he can tell us how he formed that understanding;
7 however, I think that's going to be hearsay.

8 THE COURT: I think it would be, too.

9 Q How did you gain this understanding?

10 A I went over and watched S&W's trucks load and
11 unload to make sure an 18-wheeler could back up to the door.
12 I knew my tenants -- I bought this for investment, not for
13 personal use. So, I had to be able to say you can park out
14 here on a first come, first serve type basis and you can load
15 and unload your goods in the back. No one told me anything
16 except what I observed and I observed it before I bought the
17 building and after I bought the building because S&W
18 continued renting from me until they got their building on
19 the Boulevard renovated and were able to move into it.

20 Q And was the use that you observed on the property
21 consistent with the use that you saw by other adjoining
22 landowners? Was that the same use you saw?

23 A Yes, that's correct.

24 Q Have you had discussions with anyone at Pyramid as
25 to the embankments that -- the concrete barriers that are

1 sitting on the property?

2 A It was very brief with the gentleman that was here
3 last time, the foreman, I believe.

4 Q The fellow that worked for Pro Construction?

5 A Right.

6 Q Which works out of Pyramid's building?

7 A Correct.

8 Q How did that work?

9 A Well, I don't know what prompted them, everything
10 was trying to work its way out, but whatever that was going
11 to be. All of a sudden the barricades got moved up so my
12 tenant -- they were moved up right next to the ramp. And
13 when I saw that and they called me and the agent called me
14 and everybody was raising Cain, I went over there and that
15 gentleman was parking a truck up there by that and I hollered
16 to him and I said, What are you try to do? I said, I think
17 it's the straw that broke the camel's back.

18 MR. MALONE: Your Honor, I'm going to object to
19 anything he said because he's not a party.

20 MR. COSBY: He's testified previously.

21 MR. MALONE: He testified previously. If you
22 wanted him, you could have subpoenaed him today.

23 THE COURT: Overruled. Let's go.

24 Q Mr. Cullather, has anyone from Pyramid or anyone
25 acting on their behalf told you anything as to your ability

1 to continue to have access from your property from either end
2 of this common use area including deliveries and parking that
3 would be incidental with those deliveries as well as personal
4 parking for customers and employees?

5 A I got a letter from Mr. Malone indicating that if
6 we didn't go with an agreement that they were going to
7 barricade both ends and that we could rent spaces for \$50 a
8 month I believe was the number that was in the letter.

9 Q Okay. Has there been any demand on you to pay for
10 Pyramid's cost for improving the property?

11 A I was invited to participate.

12 Q Does it make any difference to you in your use of
13 the property whether it has new asphalt on it or not?

14 A It's not me, it's my tenants, and I don't think
15 they cared at all.

16 Q And as we speak, do you have access to your
17 property from Norfolk Street?

18 A No.

19 Q Okay. So, your access to the rear of your property
20 through this easement area has now been diminished by half;
21 is that right?

22 A By what?

23 Q It's been diminished by half; is that right?

24 A Yes.

25 Q I'm going to show you a photograph that has been

1 identified as Plaintiff's Exhibit Number 9.

2 A All right. I took this picture.

3 Q Okay. When did you take it?

4 A Saturday.

5 Q I'm sorry?

6 A I think Saturday a week ago.

7 Q Okay. All right. And does this continue to --

8 A It was last Saturday, excuse me.

9 Q And does this show the location of the gate as of
10 this morning?

11 A Yes, it does.

12 Q Look right through the middle of the gate, okay?

13 A Uh-huh.

14 Q That is, I guess, how a truck or a van or a car or
15 anybody, the direction they would go to get to your property,
16 right?

17 A Correct.

18 Q Your property is on the left and down?

19 A That's correct.

20 Q I'm going to point you to some light objects that
21 are placed across the roadway there. Are those still there?

22 A Yes, they are.

23 Q Are those the concrete barriers?

24 A Yes, they are.

25 MR. COSBY: I don't have any further questions.

1 THE COURT: Let's take a short break at this time.
2 Stand in recess.

3
4 (A recess was taken.)

5
6 THE COURT: All right. You want to cross-examine?

7 MR. MALONE: Yes, sir.

8
9 CROSS-EXAMINATION BY MR. MALONE:

10
11 Q Mr. Cullather, your knowledge of the use of the
12 building and use of the property behind your building relates
13 to the time that you've owned the property, correct?

14 A The building behind my building?

15 Q The property behind your building.

16 A That's correct, and what I saw when S&W owned it
17 before I bought it.

18 Q And how long was that before you bought it that you
19 saw that?

20 A Well, I bought furniture from Bob Fisher, Fisher
21 Furniture that owned the building before S&W owned it. I may
22 even have been involved in a commission on that, I can't
23 swear to that.

24 Q But you're not sure of the dates there?

25 A It was the '70s when Fisher owned it.

1 Q And you've owned the property since 1984, correct?

2 A Correct.

3 Q So, most of your knowledge relates to the use that
4 you've made of the property, your tenants made of the
5 property since 1984?

6 A Mr. Malone, to reiterate, I bought furniture from
7 Bob Fisher. I still have it. He sold the building to S&W
8 Furniture. They leased it from me after I owned it, but I
9 bought furniture from S&W, desks that I put into my real
10 estate business. So, I am very familiar with that property
11 before I owned it.

12 Q When did numbers get put on the side of your
13 building?

14 A I'm going to say, and I am purely speculating here,
15 19 -- it had to do with High Point, something before that, so
16 I'm going say around 1990 or '91, something like that.

17 Q JGB or Baker Industries owned the property from
18 1986 forward; is that correct?

19 A That's correct.

20 Q I do believe it was sometime after they took title
21 that they put the numbers on the building.

22 A I believe it had a tie-in -- now, they can answer
23 that -- to do with the closing of High Point.

24 Q And you testified previously that you understood
25 that Baker was asserting the right to have their people park

1 behind your building, did they not?

2 A Oh, they parked there, yes.

3 Q And you didn't tell them that they couldn't park
4 behind your building, did you?

5 A No.

6 Q In fact, you understood that they claimed the right
7 to park behind your building?

8 A When he told me about the fumes coming out and that
9 he wanted my -- one of my people to move.

10 Q Okay. And that was the case from -- the whole time
11 that they owned the property, you understood that they
12 maintained the right to park back there?

13 A Everybody parked back there. They parked back
14 there before they owned it.

15 Q Okay. And with respect to the railroad tracks,
16 they're not still connected to anywhere, are they?

17 A I can't answer that. It doesn't -- it looks like --
18 they're still there, but I don't believe -- it's not in use.

19 Q And they haven't been in use during your tenure of
20 ownership?

21 A I don't believe so.

22 Q Now, your counsel provided me copies earlier of
23 some photographs. Let me ask you if these are pictures you
24 might have taken. This is a black-and-white version. Is
25 that a picture you took?

1 A There are some color pictures over there.

2 Q I understand there may be, but they're not in my
3 possession.

4 A Yes, I took these last Saturday.

5 Q And they show the condition of the tracks to the
6 extent they still exist?

7 MR. COSBY: Judge, we'll stipulate that there is no
8 rail service on these tracks.

9 THE COURT: All right.

10 MR. MALONE: All right. Accept the stipulation.

11 Q And after Pyramid -- let me ask you before that.
12 During the period of time that Baker owned the property, do
13 you recall ever having seen signs posted at the Norfolk end
14 of the property saying it was private property for Baker's
15 use only?

16 A No, I didn't.

17 Q You never saw that sign? And after Pyramid
18 purchased the property, you are aware that they asserted the
19 right to control the use of the property behind your
20 building, right?

21 MR. COSBY: I'm going to object to the
22 characterization of the testimony. The record shows
23 what it was that he testified to. I don't have any
24 problem with him answering.

25 THE COURT: He's on cross-examination. Overruled.

1 BY MR. MALONE:

2 A Ask it again.

3 Q You're aware that after Pyramid purchased the
4 property that they asserted the right to control use of the
5 property behind your building?

6 A I had lunch with Dave at Curles Neck Dairy after
7 they had bought the property and he told me what his plans
8 were of paving the area. And I said that I thought that
9 would be great for the property, but at that time made it
10 very clear that I didn't expect to have any of my uses
11 hindered.

12 Q And you believe that -- any use or right that you
13 have, you believe to be derived from the title documents that
14 you have, correct?

15 MR. COSBY: I object to that. That's a legal
16 argument.

17 THE COURT: That's a legal question.

18 Q What makes you think you have the right to use the
19 property?

20 THE COURT: That's a legal question. What he
21 thinks about it other than that doesn't matter.

22 Q You've had discussions with representatives of
23 Pyramid about their plans with respect to the property,
24 correct?

25 A Not really. I came in late. I had the times mixed

1 up when they had the initial meeting. It was kind of
2 breaking up at that time. Other than that, your
3 correspondence really has been the only conversation. I take
4 that back. I believe there was another meeting that involved
5 Great Atlantic

6 Q You represented that you had been offered, invited
7 to participate in making improvements back there; is that
8 correct?

9 A That's correct.

10 Q And you were actually provided an agreement for
11 that purpose; do you recall that?

12 A I recall three or four or five agreements have been
13 coming forth.

14 Q I'm going to show you this document.

15 MR. COSBY: Objection to the relevance of this.

16 THE COURT: What's the relevance of that?

17 MR. MALONE: Well, Your Honor, they are asserting
18 that we're interfering with their rights. I would like
19 to offer what we propose. I think it suggests that
20 we're doing all kind of things unilaterally in
21 contravention. This is what we propose.

22 MR. COSBY: Well, Judge, if this impeaches the
23 testimony that, for instance, Mr. Tipton gave, -- and
24 that was that these folks said, If you don't pay, then
25 we're going to block off either end -- then that's fine.

1 But I don't know how this can do it. This is also a
2 draft agreement from Mr. Malone and I'm not sure it's
3 right for him to start putting in correspondence and
4 draft agreements that he has drafted. That may make him
5 a witness. But this is an invitation for Mr. Cullather
6 to pay for improvements which he is just not interested
7 in doing. I think the issue is does he have to.

8 MR. MALONE: I'll leave it to The Court, Your
9 Honor.

10 THE COURT: I'm not sure, Mr. Malone, that I'm
11 understanding why it is relevant.

12 MR. MALONE: Your Honor, it's relevant because it
13 shows the intentions of my client to the effect of what
14 he proposes to do to the property, confirms his intent
15 to improve it for the common use of all parties subject
16 to this agreement.

17 MR. COSBY: Judge, we stipulate he is free to
18 improve the property. He can pave it. He can Astro turf
19 it.

20 THE COURT: Well, he says it goes beyond that. He
21 is saying that it still makes it available for the
22 common use of all.

23 MR. MALONE: For those that participate in this
24 agreement, it confirms it. This will grant him the
25 right that he seeks.

1 THE COURT: But it restricts the right. I mean it
2 adds a condition to the right that they claim they
3 already have.

4 MR. MALONE: Yes, Your Honor.

5 MR. COSBY: Judge, that's a non sequitur. This
6 would confirm -- if this would grant him --

7 THE COURT: I just said it places a condition on it
8 and that's what he agrees. It does do that.

9 MR. MALONE: To the extent he has any right, yes,
10 it does, Your Honor.

11 MR. COSBY: I'm saying this places a condition on
12 the right.

13 THE COURT: I'm not sure, Mr. Malone, that that is --
14 I mean, how is that different than if he came, your
15 client came to me with that offer and said, Look, if you
16 will pay X number of dollars to pave Black Acre or part
17 of Black Acre and whatever else the conditions are, you
18 then have a right to use it? That doesn't give me -- I
19 mean give them who are adjoining owners greater rights
20 than I would have, would it?

21 MR. MALONE: Well, Your Honor, to the extent --

22 THE COURT: I can do that with anything.

23 MR. MALONE: If The Court thinks it's not useful --

24 THE COURT: I'm not sure I really see what its
25 relevance is.

1 BY MR. MALONE:

2 Q But you have declined to participate in the
3 proposal that has been made by Mr. Wyatt; is that correct?

4 A Mr. Malone, in a meeting that we had with the other
5 neighbors, anyone can do what they want, but it was my
6 thought that if the rights that I believe I have prevail, any
7 property owner in there could disrupt any kind of agreement
8 that Mr. Wyatt wanted to give. So, I wasn't going to sign
9 anything that I had to pay to do and to give up anything.

10 Q Throughout the period of time the property was
11 owned by Baker, you certainly understood that they maintained
12 the right to control parking behind the building?

13 A Absolutely not.

14 Q They didn't?

15 A No, sir.

16 Q The fact that they posted numbers on your building
17 and told you that they were going to park their employees
18 didn't tell you that they thought they had control?

19 A I'm in the real estate business and if I put a sign
20 in somebody's yard, it's not for sale unless they sign an
21 agreement with me.

22 MR. MALONE: No further questions.

23 THE COURT: Any redirect?
24
25

1 REDIRECT EXAMINATION BY MR. COSBY:

2

3 Q Did Baker Equipment ever restrict your right of
4 access to the rear of your property from both ends of this
5 common use area by any vehicle whatsoever?

6 A No, sir.

7 MR. COSBY: Thank you.

8 THE COURT: All right, sir. You may step down.

9

10 (The witness was excused.)

11

12 THE COURT: Any other witnesses?

13 MR. COSBY: No, sir.

14 THE COURT: All right. Who is your witness,

15 Mr. Malone?

16 MR. MALONE: Pardon me, Your Honor?

17 THE COURT: Who is your witness?

18 MR. MALONE: I'd call Mr. Wilcox.

19 THE COURT: What's the first name?

20 MR. MALONE: David, I believe.

21

22 DAVID T. WILCOX, was duly sworn.

23

24 THE COURT: You may take the stand. Take the
25 witness stand, please.

DIRECT EXAMINATION BY MR. MALONE:

Q Mr. Wilcox, could you state your name for The Court, please?

A David T. Wilcox.

Q You maintain a business in Richmond, do you not?

A Yes.

Q What is the name of that business?

A H&M Parts Warehouse of Virginia.

Q Where is that located?

A 1723 through 31 Summit Avenue.

Q And you're familiar with the issues that bring you before The Court today?

A Yes.

Q Let me ask you: How long have you owned that property?

A The corporation of which I own, we purchased that in the early '70s, I believe, under the name of QZ Traders and then we sold to H&M.

Q When you purchased the property, was there still rail service on the property?

A Yes. Well, excuse me. When I first went to work there, it was rail service. When I purchased it, it was going about the same time.

1 Q So, sometime in the mid to late '70s, the rail
2 service was discontinued?

3 A I'd say mid '70s.

4 Q And after that point in time you became familiar
5 that Baker Equipment owned the property behind your building?

6 A Yes. They purchased it, yes.

7 Q And when they owned the property, they asserted the
8 right to -- excuse me. When they owned the property, what
9 steps, if any, did they take to establish their rights to the
10 property behind your building?

11 A Well, they indicated that they did own it and they
12 wanted to lease me parking space behind there and they laid
13 out parking spaces.

14 Q And did you, in fact, execute an agreement that
15 acknowledged -- did you enter into an agreement for that
16 purpose?

17 A Yes.

18 Q Is this a copy of that agreement?

19 MR. COSBY: Judge, I'm going to object. It's the
20 same agreement.

21 MR. MALONE: No, it's different.

22 MR. COSBY: I'm sorry.

23 MR. MALONE: It's the agreement he had with Baker.

24 MR. COSBY: Can I have a copy of it, then? Judge,
25 can I have a minute to review it?

1 THE COURT: I'm not sure. It will take too long.
2 It's a lease.

3 MR. MALONE: It's simply a parking lease, Your
4 Honor.

5 A Yes, this is the agreement.

6 Q And that was signed on behalf of H&M?

7 A Yes, by me.

8 Q And you understood that you signed that agreement
9 to insure that you had parking behind your building?

10 A Yes.

11 Q And you understood that Baker maintained the right
12 to control parking behind your building?

13 A Yes.

14 MR. MALONE: No further questions, Judge. I would
15 offer that as an exhibit, please.

16 THE COURT: Six, I think it is Defendant's Exhibit
17 6.

18 MR. COSBY: Well, I object to the exhibit.

19 THE COURT: All right. Objection is overruled.

20
21 CROSS-EXAMINATION BY MR. COSBY;

22
23 Q Mr. Wilcox, my name is Jim Cosby. It's nice to see
24 you this morning.

25 THE COURT: Mr. Cosby, with all respect, we do that

1 at lawn parties and cocktail parties. We're in court
2 now. You don't have to introduce yourself, just ask him
3 questions.

4 MR. COSBY: All right.

5 BY MR. COSBY:

6 Q Mr. Wilcox, the agreements that you have just --
7 that were just introduced is labeled as Exhibit A. Do you
8 know what that is an exhibit to?

9 A Do I have a what?

10 Q Let me show you the agreement.

11 MR. COSBY: Can I get the exhibit number? I'm
12 sorry.

13 THE COURT: Six, Defendant's 6.

14 Q I'm going to show you what's been labeled as
15 Defendant's Exhibit 6. Do you see in the upper right-hand
16 corner where it says Exhibit A?

17 A Yes.

18 Q Do you know what this document was Exhibit A to,
19 what it was an exhibit to?

20 A Off the top of my head, no. This is one I just
21 looked at, yeah.

22 Q Okay. All right. This is an agreement, is it not,
23 that you entered into with JGB Industries; is that right?

24 A Correct.

25 Q Not Baker Equipment?

1 A They're one and the same.

2 Q Is that correct?

3 A Well, as far as I'm concerned, they were, anyway.

4 Q All right. This was an agreement, was it not, that
5 you entered into with JGB about the time that High Point
6 Avenue -- is it High Point Avenue or High Point Road?

7 A High Point Avenue, I believe, was closed.

8 Q Okay. And you entered into this agreement with JGB
9 about the time that High Point Avenue was closed, right?

10 A Correct.

11 Q Okay. And this was to resolve any dispute that you
12 would have had with Baker's closure of High Point, right?

13 A Well, not really. They may have thrown that into
14 the mix, but that really wasn't part of the criteria, not in
15 my mind anyway, maybe it was in theirs.

16 Q Paragraph 19 says, The parties agree to make best
17 efforts to keep the terms and conditions of this agreement
18 confidential. Are you aware of that?

19 A Now that you've mentioned it to me, okay.

20 Q Do you have JGB's consent to the introduction of
21 this?

22 A Do I have their consent? No.

23 Q This references the parties as JGB Industries and
24 H&M Parts Warehouse, right?

25 A Okay, if you're reading it.

1 Q Are you familiar with your agreement?

2 A Vaguely. I had forgotten about it, tell you the
3 truth. I was just reminded of it, but I do remember it, yes.

4 Q Okay. D&J Associates isn't a party to this
5 agreement, are they?

6 A Not that I know of.

7 Q As a matter of fact, the only property that is
8 referenced in the text of the agreement recital is 1723
9 through 1731 of Summit Avenue; is that right?

10 A If that's what you're reading, yes.

11 Q Yes, sir. Do you know the address of the property
12 that's owned by D&J Associates?

13 A It's 17 -- I'm not sure.

14 Q It's some other property; isn't that right?

15 A Yes.

16 Q Okay. Now, this speaks to the rights of ingress
17 and egress. As a matter of fact, this is JGB -- in the
18 recital, the fourth paragraph -- the fourth paragraph speaks
19 to -- if I can approach. I don't want you to worry about if
20 I'm reading it right. The fourth paragraph says in the
21 recital that JGB disputes H&M's claim of a legal right of
22 ingress and egress through H&M's loading dock and the parking
23 lot.

24 A It does say that.

25 Q Okay. Now, what property are they referring to as

1 the parking lot?

2 A They are referring to the alley behind our address.

3 Q Okay. Who prepared this agreement?

4 A Oh.

5 Q Was it your lawyer or was it Baker's, JGB's lawyer?

6 A No, it was JGB's lawyer.

7 Q So, it's correct, then, that JGB's lawyer is
8 referring to the subject property here as a parking lot,
9 isn't it?

10 A I would assume so, yes.

11 Q Okay. And they have a dispute with your legal
12 right of ingress and egress to the parking lot because they
13 say in the fourth --

14 A They indicated that, yes.

15 Q It doesn't indicate that they had any dispute with
16 D&J Associates' rights of ingress and egress to the parking
17 lot, does it?

18 A I don't know.

19 Q Okay. And it also in paragraph 2 --

20 MR. COSBY: I withdraw my objection to this
21 document, by the way.

22 Q With regard to paragraph 2, it indicates, Subject
23 to the terms and conditions stated herein, JGB hereby leases
24 to H&M that portion of, again, the parking lot, which is the
25 term they used, which is the 88-foot space immediately behind

1 and along the rear of H&M property. Right?

2 A Correct.

3 Q Could you mark on the -- could you indicate on the
4 plat that's been identified as Defendant's Exhibit 5 as to
5 where your property is?

6 A There is my property here (indicating). It's
7 clearly indicated.

8 Q Okay. All right.

9 MR. COSBY: And, Judge, can I be excused to ask my
10 client one question?

11 THE COURT: Go ahead.

12 Q I'm sorry. I'll help you hold it. The property
13 that is described by this agreement, in paragraph 2 it says,
14 JGB hereby leases to H&M that portion of the parking lot
15 which is the 88-foot space immediately behind and along the
16 rear of H&M's property. Now, looking at the -- see the scale
17 to the plat down in the lower right-hand?

18 MR. MALONE: It's a different plat.

19 MR. COSBY: May I?

20 Q Do you see the scale in the lower right-hand?

21 A Yes.

22 Q That looks like one inch equals 25 feet; is that
23 right?

24 A Yes.

25 Q How many feet is from the easternmost boundary of

1 1731 to the westernmost boundary of 1735?

2 A Do you have ruler? I'll measure it off.

3 Q Do you know?

4 A Off the top of my head, I think there about 80
5 something feet.

6 Q Okay. So, what they're describing as leasing to
7 you is the property at the rear of your building, correct?

8 A Correct.

9 Q Did you ever lease -- did you ever pay Baker to
10 lease the parking spaces behind your property?

11 A Yes.

12 Q Okay. But you didn't pay him to lease any spaces
13 behind anybody else's property, did you?

14 A No.

15 Q Okay. And you don't know that anybody at D&J
16 Associates or any of their tenants has ever been asked by
17 Baker to pay to lease any parking spaces, do you?

18 A Not that I know of.

19 Q Paragraph 3 of the agreement says that H&M shall
20 have the option to renew the terms of this agreement for two
21 additional periods of time, two additional periods of five
22 years. Have you renewed the agreement?

23 A That hasn't been renewed since Baker sold the
24 property.

25 Q Oh, is that right? Is anybody paying for parking

1 behind your property right now in the common use area?

2 A I have recently just engaged in a contract with
3 Pyramid Corporation.

4 Q Okay. And that's an invitation from Pyramid for
5 you to pay for cost of the improvement?

6 A Yes.

7 Q Okay. When did you buy your property, Mr. Wilcox?

8 A Mid '70s. I bought one section of it early '70s
9 and mid '70s I bought another piece of it.

10 Q Okay. And you're familiar with the use of this
11 common use area from the mid '70s forward, right?

12 A Yes.

13 Q And, now, actually you're probably familiar with it
14 longer than that because you used to work there?

15 A Since 1969.

16 Q Since 1969, so you're actually aware, then, of uses
17 of the property of adjoining landowners; is that right?

18 A Yes.

19 Q So, some of the adjoining landowners were
20 Mr. Williams, Mr. Fisher, people like that, right?

21 A Yes.

22 Q Now, it's a fact, is it not, Mr. Wilcox, that --
23 excluding your use of the property, it's a fact, isn't it,
24 that from your observation that this common use area was used
25 by adjoining landowners for every purpose imaginable; isn't

1 that right?

2 A Yes.

3 MR. COSBY: Thank you.

4 MR. MALONE: One question on redirect, Your Honor.

5 THE COURT: All right.

6

7 REDIRECT EXAMINATION BY MR. MALONE:

8

9 Q Mr. Wilcox, during the period of time that JGB
10 Industries or, as we know them, Baker Equipment owned the
11 property, did they post any signs on the property to indicate
12 that --

13 MR. COSBY: Judge, we'll stipulate they may have
14 had signs that said private property.

15 MR. MALONE: If he'll stipulate to that, we agree
16 to it. No further questions.

17 THE COURT: May this witness be excused?

18 MR. MALONE: Yes, Your Honor.

19 THE COURT: Sir, you may step down.

20

21 (The witness was excused.)

22

23 MR. COSBY: Just for the record, I want to renew my
24 objection to Defendant's Exhibit 6 for the reasons of
25 relevance.

1 THE COURT: You want to make up your mind? This is
2 the third motion you've made with regards to it and two
3 of them are consistent and one is inconsistent. Where
4 are we now?

5 MR. COSBY: You have no idea how much I would like
6 to make up my mind, Judge, but I would like to object to
7 it.

8 THE COURT: Overruled. Next witness.

9 MR. MALONE: We'll call Mr. Wyatt, Your Honor.

10 THE COURT: Mr. Wyatt, all right.

11

12 DAVID L. WYATT, first being duly sworn, testified
13 as follows:

14

15 DIRECT EXAMINATION BY MR. MALONE:

16

17 Q Mr. Wyatt, state your full name.

18 A David Wyatt.

19 Q You're the owner of Pyramid Development, correct?

20 A Yes.

21 Q And Pyramid purchased the property at issue here
22 pursuant to a deed entered into in 1998, correct?

23 A Yes.

24 Q And what was your understanding prior to the time
25 you purchased the property as to the ability to use the

1 property at issue here today which is the property behind
2 1717 Summit?

3 A Yes. The transaction consisted of two parcels, the
4 building and land that the building sat on and the adjacent
5 parking area to the rear that we were told was for parking
6 for that building.

7 Q Did you inspect the property before you purchased
8 it?

9 A Yes, I did.

10 Q What did you observe on the property when you
11 inspected it in terms of your ability to use it for parking?
12 What did you observe about the property in terms of
13 accessibility and usefulness for parking?

14 A It had access from two ends and it represented
15 suitable parking.

16 Q Did you notice any signs on the property?

17 A Yes.

18 Q What did you notice?

19 A On the Norfolk entry side there was a sign, a
20 rather large sign that met the code requirements for signs,
21 advised all parties that this was a private parking lot for
22 Baker Equipment.

23 Q And Baker Equipment or JGB Industries was the
24 person that you purchased the property from?

25 A Yes.

1 Q Did you also notice whether or not there were any
2 parking space numbers posted on any of the buildings?

3 A Yes.

4 Q And where did you see these?

5 A Up and down the entire length.

6 Q So, the entire length of that parking area?

7 A Both sides, all buildings.

8 Q Let me ask you, if you can, to quickly look at a
9 portion of Exhibit 11 beginning with the photograph number
10 16, just ask you to quickly look at 16 through 20. Does that
11 show the numbers on various buildings back there?

12 A Yes, it does.

13 Q You say they ran on every building --

14 A Yes.

15 Q -- that adjoined that property that you purchased?

16 A Yes, sir.

17 Q And after you purchased the property, what use did
18 you make of the parking area that was behind those buildings?

19 A I'm sorry?

20 Q After you purchased the property, what uses did you
21 make of the parking area behind your building, first of all?

22 A The improvements?

23 Q Behind your building, first of all, you've used it
24 for parking for your employees?

25 A Yes, of course.

1 Q And what is your intention with respect to the
2 balance of the area that you own?

3 A The balance of the area we had hoped to improve it
4 for the all the adjacent owners so that we could get better
5 use of it and all benefit from it. The city is foursquare
6 behind us on this. The property represents a negative aspect
7 of that area and we felt like we could go forward and improve
8 it with participation.

9 Q There has been a lot of testimony about a gate.
10 Can you tell The Judge about the gate and where it's
11 positioned?

12 A Yes. The gate, we've moved it once already. It
13 was set up as a security measure primarily. It's never been
14 locked, it's always been opened. We put the gate in to
15 facilitate security.

16 Q And the location of that gate is as has been
17 testified to previously, correct?

18 A Yes.

19 Q And what steps have you taken to improve the area
20 since you've owned it?

21 A We've put in paving in the areas adjacent to our
22 building and those owners adjacent to us.

23 Q And is it your intention to continue those
24 improvements?

25 A Yes.

1 Q And you expect ultimately to continue those
2 improvements all the way down the lot down to the Patton
3 Avenue end of the lot, correct?

4 A Yes.

5 Q And once you've done that, what is your intention
6 with respect to use of the property?

7 A Our intention is to allow parking by agreement to
8 all participants who have helped us pay for the cost of the
9 improvements. I might add, if you don't mind, Chris, that
10 there are some nonparticipants and we intend to absorb that
11 cost and continue the improvements. It's not going to stop
12 the improvements. But in order to try and recover our costs,
13 we'd like to -- we need to rent the spaces to those that
14 don't want to participate or I'll use them myself. It really
15 doesn't matter.

16 Q Have you had any discussions with Mr. Cullather
17 about your intentions with respect to the property?

18 A Yes.

19 Q And tell The Court about those discussion.

20 A As Mr. Cullather indicated, we had lunch one day
21 with the agent who represented us on the purchase and JGB on
22 the sale and I advised him basically of what we had planned
23 to do and the conversation was pretty much as he indicated.

24 Q Other than that conversation, have you had any
25 further discussions with Mr. Cullather?

1 A Only in our office, we had a meeting with the
2 adjacent owners and he attended.

3 Q Since we were last in court, have you taken any
4 action to adjust or move the barriers that are proximate to
5 D&J's property?

6 A Yes, I have. Based on The Court's recommendation,
7 we have moved the barrier back.

8 Q And to your knowledge does RADAC have free access
9 to its loading dock?

10 A I spoke with the people at RADAC, I told them what
11 our intentions were. They said, We appreciate that. It was
12 a very conciliatory account.

13 Q And the photographs, again, photographs, I guess, 6
14 through 10 of Exhibit 11, do they actually show one of the
15 RADAC vehicles, delivery vehicles coming in?

16 A Yes, sir.

17 Q And that's the way they've made access since at
18 least March when you completed these improvements?

19 MR. COSBY: I'm sorry, can you refer me to the
20 exhibit?

21 MR. MALONE: Exhibit 11, photographs 6 through 10.

22 A RADAC unloads two ways. This is one of the
23 approaches they take that we've noted and the other one is to
24 park parallel to the building and unload.

25 Q And they also make loading in and out of their

1 building from the front where they've got a dock?

2 A Yes.

3 Q And exhibits 1 through 4 would show that -- excuse
4 me, photos 1 through 4 of Exhibit 11?

5 A Yes.

6 Q And they do that daily?

7 A Yes, sir.

8 Q Have you ever told anybody since you owned the
9 property that they had the right to park back there?

10 A No, sir.

11 MR. MALONE: No further questions.

12 MR. COSBY: We agree to stipulate that he believes
13 they don't.

14 MR. MALONE: No further questions, Judge.

15 THE COURT: Cross-examine.

16

17 CROSS-EXAMINATION BY MR. COSBY:

18

19 Q Mr. Wyatt, Mr. Malone asked you about the due
20 diligence, if you will, that you took before you purchased
21 the property.

22 A We inspected it.

23 Q My question, Mr. Wyatt, is: You are aware that
24 there were easements in that common use area that we're
25 talking about?

1 A We got -- we had a title policy taken out that the
2 bank required, of course.

3 Q Yeah, I appreciate that. As a matter of fact, the
4 front page, the very first page of your deed says that the
5 conveyance is subject -- is made expressly subject to all
6 easements.

7 A I'm not familiar with that.

8 Q You're not familiar with your deed?

9 A I'm not familiar with that specific item, no.

10 Q Would you agree with me that I've read it
11 correctly? I'm going to show it to you.

12 MR. MALONE: We'll stipulate that the deed says
13 that, Your Honor.

14 THE COURT: All right. It's already in evidence.
15 This is just argument.

16 Q And when you or your title company or anyone else
17 had done their due diligence, they would have seen -- are you
18 aware that they saw the conveyance to D&J Associates for
19 their property?

20 A No. Quite frankly, I don't get into those sorts of
21 things. I turn it over to my lawyer.

22 Q Okay. You said the gate is there -- you said the
23 gate was already moved one time?

24 A Yes.

25 Q Why was it moved?

1 A It was moved to facilitate Mr. Yesbeck. We felt
2 like we had an agreement with him based upon another matter
3 and we moved to facilitate his loading docks.

4 Q But that hasn't stopped you from improving and
5 restricting access to property that you don't have any claim
6 to; isn't that right?

7 A I don't know what you mean by that.

8 Q Well, you fenced off Mr. Yesbeck's alley and
9 improved it, have you not?

10 A We did not fence off Mr. Yesbeck's alley.
11 Mr. Yesbeck -- there is a gate on either end of Mr. Yesbeck's
12 alley.

13 Q Did you ask Mr. Yesbeck for permission?

14 A I spoke to Mr. Yesbeck and we came to agreement
15 that we were going to do that work. I don't believe it was
16 done by him.

17 MR. MALONE: Your Honor, we're getting into
18 something that I don't believe has any relevance.

19 THE COURT: I agree. Sustained.

20 Q Mr. Wyatt, you said that fence was up for security;
21 is that right?

22 A Long-term security.

23 Q Security for what?

24 A We ultimately had planned and talked over with
25 other adjacent owners the fact that when you are able to pass

1 totally through from one end to the other when all
2 improvements are in place, we could gate the areas in the
3 evening and not necessarily lock them, but we have made
4 allowances for card access for all adjacent owners if that
5 was an option.

6 Q So, for any meaningful security, then, you would
7 have to gate the other entrance to the property, correct?

8 A And, again, this would be for nonoperational hours.

9 Q I understand. How about the uses in the area have
10 always been warehouse until yours, right?

11 A No.

12 Q That's not correct?

13 A No, it's not correct.

14 Q The -- do you plan on granting access to D&J
15 Associates? You say there might be some passkey or pad or
16 card on the fence; is that right?

17 A Yes.

18 Q Okay. Do you plan on granting him access on that
19 fence or ingress and egress to his property after hours?

20 A I think anyone who is a participant would have to
21 have access after hours or anyone who rented spaces would
22 have to have access after hours.

23 Q And a participant means what?

24 A Someone who helped us with the improvements for the
25 benefit of the entire area.

1 Q I understand, meaning whoever pays you for the cost
2 of improvements. The improvements are the asphalt, right?

3 A Whoever pays for the improvements, not me, pays for
4 the improvements.

5 MR. COSBY: Okay. I don't have any further
6 questions.

7 THE COURT: Any redirect?

8 MR. MALONE: No, Your Honor.

9 THE COURT: Let me ask you this: If the parking
10 spaces you have marked on this exhibit, Defendant's
11 Exhibit 5, if all of those spaces are filled with
12 automobiles, you can't get a truck in there to the
13 loading dock, right?

14 THE WITNESS: What we have done and what we've
15 discussed with the adjacent landowners who we've had
16 dialogue with, we've allocated spaces. They're not
17 necessary parking spaces even though that's the way they
18 are illustrated. These businesses needs dumpsters and
19 they need loading docks and the allocation is for
20 parking spaces to be used for whatever purpose might be
21 needed.

22 THE COURT: I understand, but if somebody is
23 parking across the -- if somebody on one side of what
24 you've illustrated here as a throughway, somebody on one
25 side has cars parked there and someone on the other side

1 has a place to load or unload at a dock, it would be
2 very difficult, it would seem to me, to get a big truck
3 into the dock, would it not?

4 THE WITNESS: It would, and I believe that would be
5 the case even without that design.

6 THE COURT: Is it not true that people do -- in
7 addition to the plaintiff, other people bring trucks in
8 and out, big trucks, little trucks to load and unload
9 from the backs of these building?

10 THE WITNESS: They're largely box vans as near as I
11 can perceive. The only large trucks that I see coming
12 in, and i don't even see large trucks come in with
13 Mr. Wilcox, are for RADAC and that is usually one, two --
14 I want to say two to three times a week probably.

15 THE COURT: Didn't Mr. Yesbeck say that he had them
16 come to his place?

17 THE WITNESS: I've never seen Mr. Yesbeck unload a
18 truck at those docks. He loads from the street each and
19 every time I've seen him. He has a dock door on the
20 street side also. I've been there year and I haven't
21 seen the first truck unload.

22 THE COURT: What about the first witness,
23 Mr. Tipton?

24 THE WITNESS: Mr. Tipton in our meeting in our
25 offices indicated to me in front of counsel that he had

1 no use for parking or unloading in that area, he did not
2 want to participate in the agreement. Until this day,
3 that's how we were approaching it, we were going to
4 absorb his costs.

5 THE COURT: All right, sir. You can step down.

6 MR. COSBY: Can I ask one question?

7 THE COURT: I usually get the last questions. Go
8 ahead. What is your question? You don't get to
9 cross-examine my questions.

10 MR. COSBY: Well, it's going to be hard for me to
11 ask the question.

12 THE COURT: Well, I think it will be. I would say
13 no. Go ahead.

14
15 (The witness was excused.)
16

17 THE COURT: Any other witnesses, Mr. Malone?

18 MR. MALONE: No, Your Honor.

19 THE COURT: Any rebuttal?

20 MR. COSBY: No, Judge.

21 THE COURT: All right. Do you all wish to argue?

22 MR. COSBY: Yes, sir.

23 Judge, without question we have granted to us an
24 easement both to use the tracks and to use the land and
25 that easement was by grant and it's in our deed. And it

1 refers both to -- our grant gives us an easement in the
2 text to two different things. It says not only do we
3 have the easement right and privilege to use in common
4 the said spur tracks and sidings, it also says, And so
5 much of the property, and then it describes it, of Davis
6 Brothers as it's boundaried. How much of the property?
7 It says -- and it also describes the property as not
8 only does it go to all these boundaries, but it goes
9 wide to Altamont Avenue and Patton Avenue, it goes deep
10 to Norfolk Street and Summit Street, and it also
11 includes all the property that abuts the spur tracks
12 that are there. The spur tracks are --

13 THE COURT: To do what in?

14 MR. COSBY: Well, that's the issue, what is the
15 access for. There is no question that our conveyance
16 does not have a limitation on that. It could have said
17 to --

18 THE COURT: What does it say?

19 MR. COSBY: Well, what it says is, it says so much
20 of the property of Davis Brothers and it says etc. --

21 THE COURT: What are you reading?

22 MR. COSBY: I'm reading our conveyance.

23 THE COURT: Where is it?

24 MR. MALONE: It's Exhibit Number 10, Your Honor.

25 MR. COSBY: Well, it's Plaintiff's Exhibit Number

1 2. Our exhibits are clipped together, Judge, you may
2 have a duplicate copy.

3 If you look at the bottom of the first page, it
4 says that we have title to the property together with
5 the right, privilege and easement to use in common.
6 Well, to use in common what? First, the said spur
7 tracks and sidings. So, we can use the spur tracks and
8 sidings. Now, it doesn't say what we have to use them
9 for. I don't think anybody would say anybody ever had a
10 right to operate a train on those tracks. Only RF&P had
11 that at one time. So, it's going to be something else.

12 But it also grants us the easement to use in common
13 and so much of the property. And then it describes the
14 property as being that entire area of Davis Brothers,
15 Incorporated, the block boundary, it says that. And
16 then it says and it also says, And abutting the spur
17 tracks and sidings. So, in other words, including that
18 property that abuts the spur tracks and sidings. So,
19 not only can we use the property, Judge, that goes all
20 the way out to the street, we can use that extent of the
21 property that happens to abut the spur tracks and
22 sidings.

23 How much of it? As may be necessary to afford the
24 property hereby conveyed and the improvements thereon
25 two things; the first thing is free and convenient

1 access to the spur tracks and, number two, use of the
2 said spur tracks. So, the conveyance is clearly saying
3 two different things. They think that it only says use
4 of.

5 The cases that we have submitted will support that
6 those terms are descriptive, that are restrictive of any
7 use. Even if -- and let me go down this road first.
8 Even if they were restrictive of the use, the case that
9 we've given to The Court, one of the two cases, Wagoner
10 versus Jack's Creek Coal, says this, When a right-of-way
11 is granted or reserved -- it's cited in our papers and
12 we've also given The Court a copy. It says, Where a
13 right-of-way is granted or reserved, it may be used for
14 any purpose to which the land accommodated. Thereby,
15 may reasonably be devoted unless the grant of
16 restriction specifically limits the use. No question we
17 don't have that here.

18 And the beneficiary of the right is not restricted,
19 we're going on, Therefore the beneficiary of the right
20 is not restricted to the type of vehicles or mode of
21 travel existing at the time the easement was created,
22 but he may use the way for any vehicle which his
23 reasonable needs may require in the development of his
24 estate.

25 So, after the rail service ceased -- and one thing

1 I want to remind The Court is Mr. Tipton -- we're going
2 to get to the prior uses -- Mr. Tipton said that even at
3 the time there was rail service, there was delivery by
4 truck, van, trailer, vehicle, he said that. So, then we
5 go on. Is it reasonable for commercial loading,
6 unloading by trailer, truck, by van or car? That is
7 certainly reasonable.

8 This area -- you haven't heard any testimony from
9 any adjoining landowner that indicates that the uses
10 here were anything other than warehouse and commercial.
11 It's also true that because most of the witnesses here
12 have testified that they own it or they are tenants,
13 there are investment properties. So, uses are going to
14 change, but this has always certainly been commercial
15 property.

16 It is completely reasonable, it is a completely
17 reasonable use to load and unload shipments and
18 deliveries to the rear of these properties. That is as
19 reasonable as it was to do it by train. And, again, the
20 evidence was -- it was by all, even their witness,
21 Mr. Wilcox said that, I think I characterized it as
22 every use imaginable and he said yes. It is also
23 completely reasonable if you are going to have the
24 shipments and deliveries, to park. They're not going to
25 say we've got to make shipments and deliveries from

1 moving vehicles. I don't think the trains were moving.
2 The trucks and the vehicles are certainly entitled to
3 stop.

4 That was the undisputed prior uses here until
5 Pyramid comes in and they are trying to change it. And
6 Mr. Wilcox says he owns it, and there is no question
7 that he does own it, but he owns it subject to the
8 easement right of others and that's the issue here.

9 Now, then the Wagoner case also said, had the
10 exception. That was unless the easement restricts the
11 use. Here it clearly does not as I mentioned, although
12 it could, it could. Now, is the use -- and here is
13 their argument. Is the use of the land restricted in
14 the light of the easements reference to spur tracks and
15 sidings. The answer is no. And the reason it is no,
16 first of all, the easement doesn't say, But only so long
17 as -- only for loading and unloading rail. The Wagoner
18 case is illustrative because --

19 THE COURT: Let me ask you this: Is your
20 contention that this language gives the adjoining
21 landowners an unlimited use of the easement?

22 MR. COSBY: No, sir. We do have limitations on our
23 use. In the case law of Wagoner, we are limited to only
24 reasonable uses that do not unnecessarily --

25 THE COURT: Reasonable uses for what?

1 MR. COSBY: Well, --

2 THE COURT: Anything?

3 MR. COSBY: Well, that's when we go to the prior
4 use because the deed is, at best, ambiguous. At worst,
5 it doesn't contain restrictions. That's why we look at --
6 just like the court did in Strickland, they looked at
7 well, what has this thing been used for. And in
8 Strickland there was a strip of land reserved for future
9 railroad use, even more restrictive than the terms on
10 our conveyance. People were using that -- there wasn't
11 even a railroad track built and there never would be.
12 People were using that for access to and from vehicles.

13 THE COURT: Let me ask you this.

14 MR. COSBY: Yes, sir.

15 THE COURT: Could your clients lease the space back
16 there to other people for parking?

17 MR. COSBY: Could they lease their easement?

18 THE COURT: Well, no. Just say look, We have the
19 right to use this for the benefit of our property,
20 therefore, this is now an office building and we would
21 like to -- we'll lease to the tenant here ten spaces,
22 any spaces you can find back there, ten of them are
23 yours. Can they do that?

24 MR. COSBY: I don't think we even can subdivide the
25 property specifically parking space for parking space.

1 I don't think we can do that.

2 THE COURT: Well, no, you just find a space back
3 there and you can park there if you pay me 30 bucks a
4 month. Can they do that?

5 MR. COSBY: We can do that, but it's got to be
6 subject to the uses in common by others.

7 THE COURT: I agree. If you can't find it, you're
8 out on the street, but if you get here early enough to
9 get a space, you can park there to the exclusion of
10 other people, obviously, because if you park, only one
11 car can occupy the same space at the same time.

12 MR. COSBY: Sure. Sure. There is no more
13 restriction on the use that The Court just mentioned
14 than on any other use as long as it is a reasonable use
15 of the tenant.

16 THE COURT: Suppose the tenant decides that he has
17 some type of activity, I can't think of one right
18 offhand, but some activity that would make it desirable
19 for him to go outside to work. Maybe he assembles
20 widgets and he would rather assemble widgets outside
21 than inside on pretty days. Anyway, so he sets up
22 whatever, sawhorses or whatever they do to assemble
23 widgets outside there.

24 MR. COSBY: Sure, manufacturing, something like
25 that?

1 THE COURT: Covers the whole space, blocks the
2 road. Can he do that?

3 MR. COSBY: No, sir.

4 THE COURT: Why?

5 MR. COSBY: Two reasons. One, that is inconsistent
6 with the prior uses of the property. It has never been
7 done, used for --

8 THE COURT: So would be parking.

9 MR. COSBY: The parking isn't. The prior uses of
10 the property by the testimony of Mr. Tipton and
11 everybody after him is that there has been parking as
12 well as shipments and deliveries. There has to be
13 parking with shipments and deliveries, but they --

14 THE COURT: That's not parking, that's delivery.

15 MR. COSBY: But they also testified that there has
16 been incidental parking by visitors to those buildings.
17 There is no more restriction on a parked car than on a
18 parked van sitting in that space, but he can't take up
19 the whole space because he -- he can't take up the whole
20 alleyway.

21 THE COURT: Could he put a dumpster back there?

22 MR. COSBY: Yes, he can.

23 THE COURT: How many?

24 MR. COSBY: How many?

25 THE COURT: Yes.

1 MR. COSBY: Oh, I think as many as is a reasonable
2 accommodation to his estate. That is the extent of the
3 right-of-way.

4 THE COURT: Could he put several dumpsters back
5 there, allow people to park and to have loading and
6 unloading facilities back there too?

7 MR. COSBY: To his own property?

8 THE COURT: Yes.

9 MR. COSBY: Yes.

10 THE COURT: He can do all those things?

11 MR. COSBY: Yes. There are dumpsters --

12 THE COURT: Even though it would take more to do
13 that than the space directly behind his building?

14 MR. COSBY: Well, no.

15 THE COURT: He's got five dumpsters because they
16 generate a huge amount of trash. Five dumpsters and
17 that's going to cover up more space than he's got there
18 and he also has a bunch of employees and all of them
19 have to park there, ten cars, and he wants to use it for
20 tractor trailer access.

21 MR. COSBY: No, sir, he couldn't do it.

22 THE COURT: Why?

23 MR. COSBY: Because the only -- the one limitation
24 on his use that we have is what's written on his plat
25 and that says, Easement to use in common. So, there are

1 two reasons --

2 THE COURT: No. No. No. Other people can do the
3 same thing as long as -- he's not saying you can't use
4 space, but obviously nobody can use the same space at
5 the same time.

6 MR. COSBY: That's right.

7 THE COURT: All right. So, wherever you've got
8 dumpsters, nobody else can get there. Wherever he's got
9 cars parked, nobody else can get there. When he backs
10 up trucks to the things, nobody else can use that.
11 That's inherent.

12 MR. COSBY: Sure.

13 THE COURT: You're saying he could do one car, he
14 could do one dumpster and one truck backed up there. I
15 want to know why he couldn't do five of each.

16 MR. COSBY: He can probably do five. He can
17 certainly continue the uses that have been consistent
18 with the prior uses. Nobody, Judge, has ever put a
19 dumpster or has made any public parking in a manner that
20 has prohibited anybody from using their property.

21 THE COURT: You can't use the property when there
22 is a dumpster there.

23 MR. COSBY: Well, we have to talk about which
24 property. He can use his -- he can certainly --

25 THE COURT: Let's get one thing straight, as I

1 understand it anyway, what we're talking about easement
2 here is nobody's property but Pyramid's.

3 MR. COSBY: They own title to it, Judge.

4 THE COURT: Sure. Pyramid is the only one that has
5 title to it. All right. So, that's not D&J's property
6 or Yesbeck's or anybody else. Their property runs from
7 the easement to the street, Summit Street, right? So,
8 wherever you put the dumpster up, you're putting it on
9 Pyramid's property.

10 MR. COSBY: There is no question, but certainly D&J
11 has an easement to use that property and the whole
12 question is for what.

13 THE COURT: That's what I'm asking you, trying to
14 test how far you say they can use it.

15 MR. COSBY: Sure. They don't deny that D&J has an
16 easement. They argue that it's been extinguished by the
17 removal of the rail service. That's the whole issue,
18 what was the purpose of the easement. They also have
19 not alleged that D&J has ever violated the extent of
20 rights that they have granted to them. They've never
21 alleged that. So, it's got to be that the uses that D&J
22 has taken of the property up to this date has been
23 consistent and reasonable.

24 They're just saying that when those rails stopped,
25 then you lose. That's all they're saying, but that's

1 the nut of the issue and that is did these people have
2 an easement to walk up to a train or did they have an
3 easement for something else. And I think, I think it's
4 got to be the latter because, again, the language
5 doesn't have that restriction. The language speaks to
6 an easement to use both the rails and the property, not
7 only the property abutting the rails, but also the
8 property that goes all the way to Altamont, that goes
9 all the way to Norfolk, that goes all the way elsewhere
10 because those are the boundaries. The trains don't run
11 on the land --

12 I mean it's really very similar to the Wagoner case
13 because there the easement was labeled as a wagon haul
14 road. And the question before the court was what
15 happens when wagons, when coal wagons stop because
16 technology replaced them. The landowner, the
17 complaining landowner there said that you've lost your
18 easement when the wagon trains stopped, when the coal
19 wagons stopped rolling through there and the court said
20 no. They said that that was a descriptive term, not
21 restrictive, and when the wagons went away, the easement
22 holders continued to use the right of ingress and egress
23 with motor vehicles. And they cited the case that I
24 read to you which said or cited the language from the
25 case that I read to you that talks about where a

1 right-of-way is granted, it can be used for any purpose.

2 The analogy really is, for instance, with Virginia
3 Power. Virginia Power has an easement going across the
4 back of my property and they've got elevated power lines
5 and big bulky poles and things like that. If I adopted
6 their argument, then when Virginia Power invents some
7 fiber-optic cable that's the size of a thread and now
8 they can lay into the ground to deliver a power surge to
9 their customers all the way down my road, if I had their
10 argument, I'd say, "No, the easement is labeled for
11 power lines and poles, that meant for power lines and
12 poles. When the power lines and poles went away, you
13 lose your easement."

14 That can't be and that would be contrary to the
15 Wagoner case because they agreed that the nomenclature
16 used describing the easement was simply descriptive of
17 the property subject to the easement, it's not a
18 restriction of the use. This could have restricted the
19 use, but it doesn't.

20 Again, in interpreting -- and we need to interpret
21 what is permitted on this easement. Don't forget the
22 Strickland case. There the easement said reserved for
23 future railroad site. There wasn't even a track in the
24 ground in that case, but the court said that the
25 adjacent landowners could drive their cars for access to

1 their property. And there is nothing more offensive to
2 the servient tenement about parking as there is driving
3 back and forth about it.

4 Why? There are a number of factors there. Some
5 are definitely not present in this case, but there are
6 other factors that are present in this case. One of
7 them was reliance on the representation by the
8 defendant's grantor. Next was the construction placed
9 on the language by the grantee. And here the entire
10 evidence in the record is, again -- and this is where I
11 go back to Mr. Tipton's testimony -- even when trains
12 ran in and out of here way back when before any of us
13 got started, there were still trucks, wagons and motor
14 vehicles going in and out of there even then. So,
15 obviously the purpose of the easement -- even back when
16 RF&P ran through, obviously the purpose of the easement
17 was for more than just rail service.

18 That's the same here. No one has stopped us. No
19 one had stepped up to stop us from parking, from picking
20 up, from dropping off. All they can point to is
21 numbers. Well, you can hang a sign on anything, but no
22 one has testified that Baker walked in here and
23 restricted anybody's use to park there.

24 The closest we came to that is Mr. Cullather's
25 testimony when there was a dispute, one specific

1 instance where there was a discussion as to some towing
2 was going to go on. Mr. Cullather testified that there
3 was litigation suggested. He talked about tow my car so
4 when we're in front of the judge, we will be talking
5 about towing my car and not my tenant's. And he also
6 testified that he talked about litigation and Baker
7 backed off. That is as compelling as anything that
8 Baker considers this easement subject to the parking
9 rights of people there.

10 Another thing, I know I objected to it, but it's
11 already in the record, that was the agreement of
12 Mr. Tipton that Mr. Tipton testified was prepared by
13 JGB. He testified that was the same thing as Baker,
14 that's not really true, but JGB is James G. Baker
15 Equipment. He testified that was prepared by their
16 lawyers. And look at how they describe it.

17 THE COURT: Not Tipton, that was Wilcox.

18 MR. COSBY: I'm sorry, you're right. Look at how
19 they describe it, they call it a parking lot. That's
20 how they refer to it. So, I'm very happy to rely on
21 that language there.

22 THE COURT: On that are you still objecting to
23 that? Do you want -- is it in or out? I don't really
24 know.

25 MR. COSBY: It's in the record.

1 THE COURT: For the record now, for the Supreme
2 Court when it gets down there, what are you really
3 saying?

4 MR. COSBY: Well, I've objected to the admission of
5 it.

6 THE COURT: No, you haven't. You've agreed to it
7 and you've adopted it. Which is it?

8 MR. COSBY: I've been a mess over that piece of
9 paper. If it's in, I want to make what use of it that I
10 can. I don't have any further position on that.

11 THE COURT: I think they call that harmless error.

12 MR. COSBY: They call a lot harmless error, Judge,
13 and some lawyers wish they wouldn't.

14 Then the issue is have they been infringed on.
15 They talk about trucks can still get in and out of
16 there, but the evidence includes a photograph that's
17 labeled as Plaintiff's 9. The Court has the original.
18 And the fact is that a truck can't get in and out of
19 there. As The Court noted itself, if the proposed
20 parking spaces, which they've identified as going all
21 the way up and down the road, are there, a truck can't
22 get in, particularly an 18-wheeler. If the parking
23 spaces go all the way to the fence and they've got them
24 drawn as going all the way to the fence, a truck simply
25 can't get in there. You can see that because you can

1 see the front end of the truck, of this truck parked
2 right there coming right out.

3 Even if they could get in there, they can't get
4 further because you can see the concrete abutments that
5 he has got laying across the middle of the property.
6 Now, Mr. Rosenthal, I think was his name, who testified
7 for Pyramid at the injunction hearing said, Judge, we're
8 just trying to put down the asphalt. But he admitted to
9 me that there was no construction schedule, there was no
10 equipment on-site, there was nothing. The Court should
11 not be surprised today that the evidence is that there
12 has been no further construction activity, nothing
13 staged there.

14 THE COURT: Let me ask you this.

15 MR. COSBY: Yes, sir.

16 THE COURT: Suppose all of the other landowners,
17 adjoining landowners and Pyramid are all in agreement
18 that, well, let's go on and use this the way that it's
19 laid out here, primarily for parking and so small trucks
20 back into the docks and the only one that really wants
21 the big trucks coming into the docks is your client.
22 Now, these other people could not use their property
23 consistent with this plan and have your client bring the
24 18-wheelers and back in.

25 MR. COSBY: That's right. Well, they're the ones

1 that are going to have to give way.

2 THE COURT: Who?

3 MR. COSBY: If I'm understanding you right, the
4 other property owners that say fine, go ahead with the
5 plan, put the fence up, assign the space.

6 THE COURT: No, forget the fence. The fence has
7 got nothing to do with it. My question is: If the
8 other people are using this parking space that's
9 supposedly here and assuming they're all in agreement
10 with that, your client couldn't back the 18-wheeler into
11 his loading dock?

12 MR. COSBY: Not if they're -- you're right, not if
13 they're parked behind our property or on the other side.

14 THE COURT: On the other side is what I'm thinking.

15 MR. COSBY: Right, there is not enough space.

16 THE COURT: But what you're saying, though, imposes
17 a restriction on the use of the easement by the
18 landowner on the opposite side of the easement.

19 MR. COSBY: Well, that's right. That's right, just
20 as if he had an 18 -- and I agree that if he had an
21 18-wheeler backing up to his loading dock and that guy
22 couldn't back up because we've got a visitor or an
23 employee got his car, we would have to move our car for
24 him as well. The fact is that's how it's worked.
25 That's how -- there is no evidence, amazingly -- well, I

1 don't think it's that amazing. There is no evidence of
2 any prior dispute among these people subject to the
3 common understanding that they had.

4 That's why I think that the Strickland case is so
5 important because it talks about it, it talks about
6 leeway to use as indicated by these other folks. And,
7 again, the point is do we have an infringement right
8 now. There is no question about that. We can't get to
9 the property from this end.

10 THE COURT: How much longer are you going to be?
11 I've got to let him argue.

12 MR. COSBY: Just one minute. They say -- they're
13 essentially saying you can still get to the other end.
14 That's like saying you've still got your left leg.
15 There is no question, I hope, that our access rights,
16 our use to this property have been diminished. They
17 have been diminished by 50 percent. The only
18 justification they've given is we're in construction and
19 that is bogus because nothing has happened from the last
20 time we were here until now.

21 They say that that surface can't support trucks
22 right now, but it didn't stop them from pouring concrete
23 right here for the Sealtest trucks when they back up. I
24 guess they're going to roll over us and not Sealtest,
25 but that's the situation, Judge.

1 I think the evidence supports a permanent
2 injunction to be entered that would prohibit any further
3 use by Pyramid, any other further obstruction to our
4 rights to ingress and egress to our property as they
5 existed before. We can debate the language that will go
6 into the order, but I think it will be a very similar
7 order to what we saw in Strickland and what we saw in
8 the Wagoner case.

9 What's going on here, you don't have to be too
10 sophisticated, they have paved up until our point and
11 stopped. They have totally blocked our access from the
12 west end. And from Mr. Wyatt's testimony himself, you
13 can hear their position is, We'll finish it and we're
14 letting you in if you pay us. He is free to pave the
15 parking area. He is not free to require us to pay for
16 it and restrict our access if we don't and that's a
17 fact.

18 THE COURT: All right, sir.

19 MR. COSBY: Appreciate it.

20 THE COURT: Mr. Malone.

21 MR. MALONE: Your Honor, when we started this
22 morning, I suggested The Court should look at the
23 language of the grant of the easement that they've
24 indicated gives them the rights they asserted here. I
25 think I pointed originally to Exhibit Number 5 which is

1 where the easement originated, but it runs from there
2 into their deed. It is exactly the same language that
3 their predecessor in title had. And I would submit to
4 The Court that it is for The Court to determine the
5 extent of that easement.

6 I believe it is a very specific easement. It is an
7 easement for a very specific purpose, for the purpose of
8 both ingress and egress and access to one thing only,
9 spur tracks and sidings. One use only, spur tracks and
10 sidings. It doesn't say you've got ingress or egress
11 from Altamont Avenue or Patton Avenue. It doesn't say
12 you've got ingress and egress permanently. It says
13 you've got ingress -- you've got the right to use in
14 common to a set of spur tracks and sidings that no
15 longer are in existence.

16 THE COURT: How does it mean -- how could it mean
17 that they have the right to use the spur tracks?

18 MR. MALONE: They have the right to --

19 THE COURT: Railroads use spur tracks.

20 MR. MALONE: Yes, Your Honor. They have the right
21 to make use of it.

22 THE COURT: To do what?

23 MR. MALONE: Having --

24 THE COURT: They would never use the spur track
25 unless they owner of this property was a railroad.

1 MR. MALONE: Well, Your Honor, RF&P was the owner
2 of the property.

3 THE COURT: I understand, but it wasn't giving the
4 easement to itself, RF&P wasn't.

5 MR. MALONE: Your Honor, they have the right to
6 make use of those.

7 THE COURT: How would they use the spur tracks?

8 MR. MALONE: They would use the spur track by
9 having a carload of material for them pushed down that
10 spur track, parked next to it.

11 THE COURT: That's the railroad using it.

12 MR. MALONE: They're the ones who are making the
13 request that the railroad come down and deliver goods to
14 their property. They have the right when that car is
15 sitting out there to take goods off of it, and from
16 their building, any goods they manufacture could come
17 across our property and put goods on it.

18 THE COURT: That's access. What's the use?

19 MR. MALONE: That's the use. The use is the right
20 to bring a car down there, Your Honor, at their request.
21 And I think they've got that right so long as there is a
22 spur track and siding there. It's a very specific
23 grant. It's a grant for that purpose.

24 Mr. Cosby has cited the Wagoner case and relied on
25 it a great deal. The Wagoner case, Your Honor, you'll

1 see it, I'm sure. The Wagoner case involved a case of a
2 right-of-way was given, specifically given, and was
3 described as a wagon haul road and it was a right-of-way
4 to cross another person's property. The description is
5 wagon haul road. At some point in the future,
6 obviously, motor vehicles began to be used. And in that
7 case, the owner of the servient estate said, You are not
8 using wagons anymore, you can't come across my road
9 anymore.

10 The Supreme Court said, no, no, no. You look to
11 the essential purpose. The essential purpose was a
12 right-of-way. The fact that they're now using motor
13 vehicles as opposed to wagons doesn't change the fact
14 that you have a right-of-way. The intent was to give a
15 right-of-way across the property. The intent here is to
16 give a right-of-way to spur tracks and railroads,
17 period. That use has terminated.

18 The Supreme Court of Virginia in two separate cases
19 that I've cited previously, Your Honor -- and I made
20 copies of them, they're in the exhibits that I offered,
21 Exhibits 12 and 13, the McCreery case and Amoco case.
22 And both cases -- I want to read specifically from the
23 Amoco case.

24 In the Amoco case the Supreme Court of Virginia
25 without question adopted the following, it's on page

1 652: Easements once created may be extinguished in the
2 the following ways; one, by a cessation of the purposes
3 for which the easement was created -- this is behind Tab
4 Number 13. If the particular purpose for which the
5 easement was granted is fulfilled or otherwise ceases to
6 exist, the easement also falls to the ground. In
7 determining questions of this sort, the terms of the
8 grant are to be implied from the circumstances from
9 which the implication arises are to be looked to in
10 order to ascertain the scope and extent of the easement.

11 None of that applies here, Your Honor. It's a
12 specific easement.

13 THE COURT: Let me ask you: Are you contending
14 that at the very beginning of the creation of this
15 easement that it was the intention that whoever was
16 going to use this building, this property that we're
17 talking about here, would have the right to have goods
18 brought to it and taken away from it by rail --

19 MR. MALONE: Yes, Your Honor.

20 THE COURT: -- along the back? And along the back,
21 that would be only way that goods could be moved in and
22 out of the building?

23 MR. MALONE: Well, Your Honor, I'm saying that's
24 the specific purpose of the easement they were given.
25 They were given a specific right and can use it for that

1 purpose only.

2 THE COURT: That's what I'm saying. While the
3 railroad tracks were there and while it was used for
4 that purpose, it would be an impermissible use to bring
5 a truck in there and unload things at the back door?

6 MR. MALONE: Your Honor, it may have been permitted
7 use, but it wasn't a granted use.

8 THE COURT: How is it permitted?

9 MR. MALONE: By the permission of the owner of the
10 servient estate.

11 THE COURT: Not by permission, they just didn't do
12 anything about it.

13 MR. MALONE: Yes, Your Honor.

14 THE COURT: Is that right?

15 MR. MALONE: Yes, but they've not brought --

16 THE COURT: That was not within the easement is
17 what you're saying, not within the grant; is that right?

18 MR. MALONE: Yes, Your Honor. And they put no
19 evidence before The Court to suggest that they did that
20 in a way that was openly notorious and adverse and
21 hostile to our claim of right.

22 THE COURT: They haven't?

23 MR. MALONE: They testified that it was permitted.

24 THE COURT: I don't think that's pled, but
25 assuming, what would they have to do to show it was all

1 of those things that they haven't done? It's certainly
2 open and it was obvious.

3 MR. MALONE: First it would have to be under claim
4 of right.

5 THE COURT: Pardon?

6 MR. MALONE: It has to be under claim of right and
7 there is nothing in their deed or anywhere else that
8 says they've got any right other than specifically set
9 forth in that easement. They have no claim of right
10 which is an essential portion of the claim for adverse
11 possession.

12 But moving back to the cases, Your Honor, I'd ask
13 The Court to look very closely at both the Amoco case
14 and the McCreery case because they both stand for the
15 proposition that I think you have to resolve and that is
16 where use is granted for a specific purpose, that
17 specific purpose is abandoned or terminated, then the
18 easement falls to the ground.

19 THE COURT: I agree with that. I think the problem
20 is what is the purpose here. Is it as restrictive as
21 you say or is it as broad as Mr. Cosby says.

22 MR. MALONE: Well, Your Honor, to get to
23 Mr. Cosby's view, you have to go way off to determine --
24 he relies on the Strickland case. The Strickland case,
25 I would ask The Court again to pay very close attention.

1 The Strickland case involves parol evidence. One of the
2 primary reasons the court introduced parol evidence in
3 that case was because there had been lots of confusion,
4 lots of ambiguity. In fact, there were different
5 references in the deeds, different descriptions in the
6 deeds as to the manner in which that proposed railroad
7 site was reserved.

8 And the Supreme Court said, Look, look at all this
9 stuff, it's clear that -- and they pointed to a
10 particular deed and that deed says you've got the right
11 of use of various areas. One of them was the right to
12 area C which is the reserved railroad site. The Supreme
13 Court said, Exactly, you've been given the right of use
14 of that, it's not reserved. The Supreme Court said that
15 under that circumstance, there is parol evidence.

16 Here there is no need for parol evidence. The
17 restriction is clear from the easement itself. The
18 language they've got says a specific purpose. It
19 doesn't say for parking. It doesn't say for whatever
20 use they want to make of it. It says to get to the spur
21 tracks and sidings which no longer exist. The absence
22 of those spur tracks and sidings, I submit, Your Honor,
23 terminates the easement in accordance with the two cases
24 I cited.

25 The Court has discussed that there is no argument

1 being made with respect to adverse rights here, so I
2 won't address that. I will say that all the testimony
3 that has come in the record today is inconsistent with
4 anyone having exercised any rights on an adverse basis
5 for more than 20 years and that's the law. The best
6 testimony they've got is that the railroad usage stopped
7 sometime in the 1970, mid '70s is what I heard more than
8 one time.

9 Some 20 years forward from that we know that during
10 the period of time Baker owned the property, they were
11 very clear about their position that they owned the
12 property and they had the right to control uses back
13 there. They permitted people to do things. Permissive
14 use is not adverse, Your Honor. And it's very clear
15 from the testimony here that they were permitted to do
16 things. Baker -- it is stipulated there was a sign that
17 Baker put up that said it was private property and for
18 their own purposes. If they agreed and permitted people
19 to come on the property and use that property, so be it.
20 It's not adverse, Your Honor, it's permissible.

21 With adverse possession they have to prove open,
22 notorious, hostile, exclusive and without permission in
23 order to be adverse. The evidence just doesn't carry
24 their burden in any way on the suggestion that they've
25 got an adverse right that has matured beyond any right

1 they might have in the easement. I think the easement
2 language is clear and I'd ask The Court to so find.

3 MR. COSBY: Judge, I think you can make a finding
4 based on adverse possession because I think we've
5 established our easement based on any means recognized
6 by law. How much more adverse can it be, think about
7 it, if Baker has got a sign that says stay off and we
8 drove by it every day and keep using it? How much more
9 adverse can that be? The first time Baker speaks up,
10 and the only evidence we have of that was with
11 Mr. Cullather, they said, We're going to lease the
12 spaces behind your building. And Mr. Cullather says,
13 The heck you are. Tow my car and I'll see you in court.
14 And then they back up off. How much more adverse can
15 that be?

16 They need to put evidence on to show we knew they
17 were doing that and that was always fine with us. Where
18 is Baker? Baker is still in business in Richmond. They
19 could have called Baker any time to say, No, they
20 weren't supposed to park there. We fought a
21 never-ending battle. They could have had Baker here to
22 testify about anything they're saying here Baker
23 believed.

24 We don't need Baker's testimony because we put on
25 our prima facie case. We have put into evidence our

1 conveyance. We have put into evidence consistent prior
2 use. And we have put into evidence the infringement
3 here. What he is -- Mr. Malone says that, well, it was
4 permissive and it was -- excuse me, it was always
5 everybody's understanding that they only had rail
6 service. No one, from the evidence that The Court has
7 has, has indicated any understanding that that was
8 correct. As The Court has noted, even when rail service
9 was there, there was motor vehicle access.

10 The Amoco case, and I think The Court is depending
11 on that, it just begs the question, it's just a
12 cessation of purpose case. The question is what's the
13 purpose. The purpose here is that people need access to
14 the rear of the building that is different from the
15 access that they need to the front of the building.
16 What was the access they needed? They needed shipping
17 and receiving. They certainly have other needs.

18 Think of this, if he says all you've got to do, all
19 you've got is the right to use the rails, The Court is
20 correct, nobody has the right to use the rails but RF&P.
21 How do you -- you obviously also have the right to bring
22 goods from the rails to your property. I mean, you also
23 have that right. And if you have the right to take
24 goods from the train to your property, what is more
25 unreasonable than the words of the Wagoner case about

1 taking property into your loading bay by a truck or by a
2 van? Nothing is more disruptive to other people's uses
3 than a railroad train. There is simply no evidence that
4 they have put on that is a permissive use.

5 We talked about Strickland, well they come up with
6 parol evidence. Well, Mr. Malone has put parol evidence
7 in the record. They've introduced parol evidence here.

8 Another thing that we need to keep in mind is what
9 is a spur track, what is a siding. Those are ambiguous.
10 I don't understand them to be terms of art. Mr. Malone
11 did mention the absence of the spur tracks and siding.
12 I'm sorry to see that issue pop up right now because
13 Mr. Cullather testified that they are still there,
14 anybody could have been put on to contradict whether or
15 not that is a fact. We were prepared to put on
16 photographs of that, but we didn't think we needed to.
17 So, I ask The Court to rely on his testimony. Thank
18 you, Judge.

19 THE COURT: All right. I'll let you all know
20 something.

21 MR. MALONE: Judge, if I may supplement that page --

22 THE COURT: Is it necessary?

23 MR. COSBY: I don't think it is.

24 THE COURT: All right. Let's don't worry about it.

25 MR. COSBY: It's his exhibit. Judge, at the time

1 the court transcript is prepared, I'd be happy to make
2 one available to The Court.

3 THE COURT: I don't want a transcript. Why are you
4 going to have one prepared? Why are you having one
5 prepared? You might win. You might not.

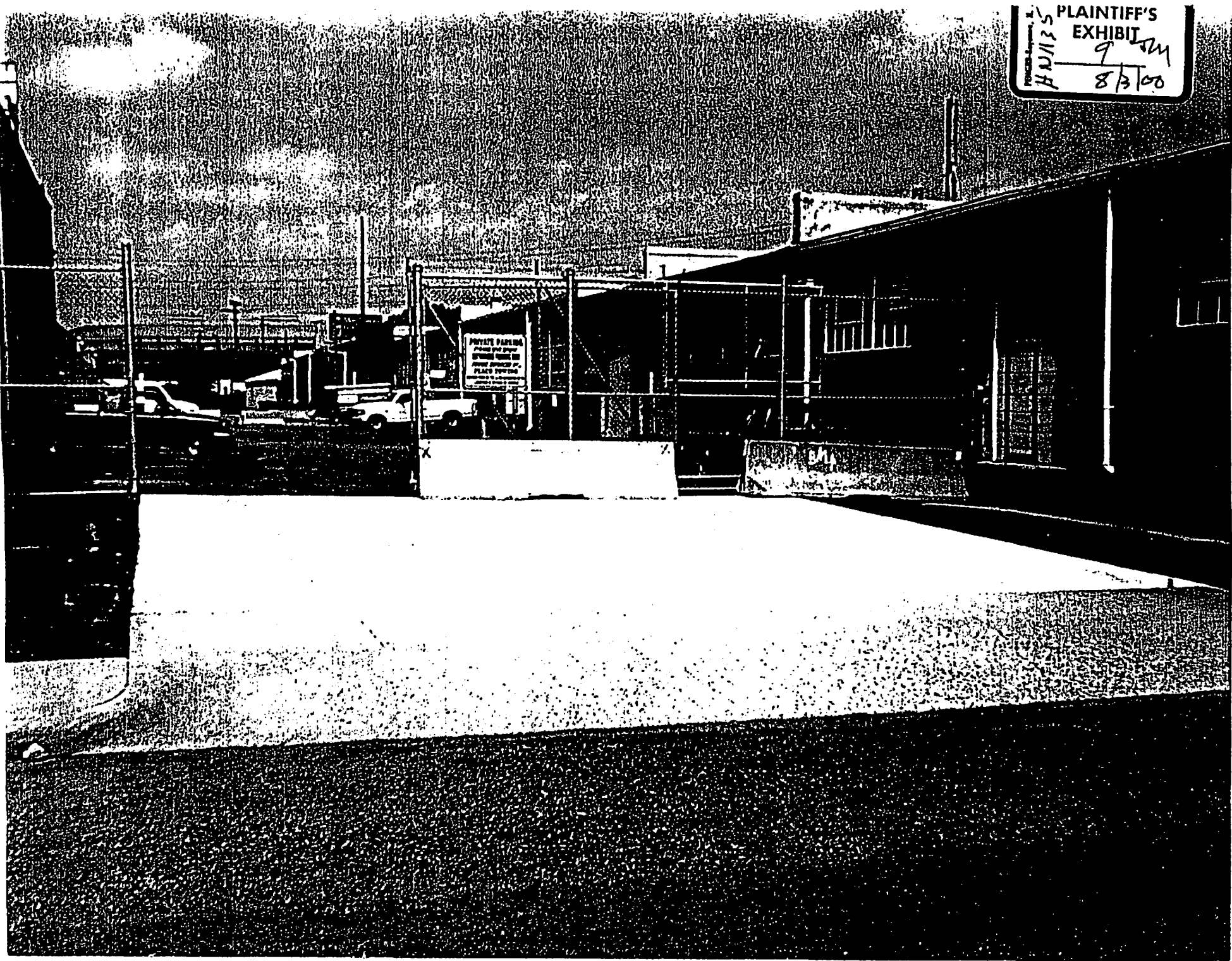
6
7 AND FURTHER THIS DEPONENT SAITH NOT.

8 SIGNATURE WAIVED BY AGREEMENT

9 OF COUNSEL AND THE DEPONENT.

10
11 (The trial concluded at 12:52 p.m.)
12
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PLAINTIFF'S
EXHIBIT
9
8/3/00



**OVERSIZED PLAT
CAN BE OBTAINED AT THE CLERK'S OFFICE OF
THE SUPREME COURT OF VIRGINIA**

EXHIBIT A

PARKING AGREEMENT

THIS PARKING AGREEMENT is made as of the _____ day of August, 1994, between JGB Industries, Inc., a Virginia corporation ("JGB") and H&M Parts Warehouse of Virginia, Inc., a Virginia corporation ("H&M").

RECITALS

JGB owns that certain real property located between Summit Avenue and Altamont Street in the City of Richmond, Virginia described in that certain deed recorded in the Clerk's Office, Circuit Court, City of Richmond, Virginia (the "Clerk's Office") in Deed Book 0106, Page 1553 (the "Parking Lot").

H&M owns that certain real property located at 1723-1731 Summit Avenue in the City of Richmond, Virginia (the "H&M Property").

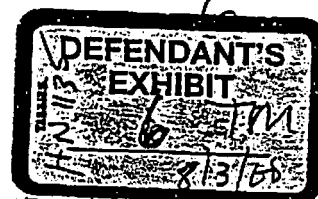
H&M believes it possesses a legal right of ingress and egress to its loading docks and the Parking Lot.

JGB disputes H&M's claim of a legal right of ingress and egress to H&M's loading docks and the Parking Lot.

JGB and H&M want to avoid litigation at this time regarding the legal right of ingress and egress to H&M's loading docks and the Parking Lot and wish to enter the following agreement regarding H&M's use of the Parking Lot.

W I T N E S S E T H

NOW, THEREFORE, for and in consideration of the mutual covenants contained herein, the parties hereby agree as follows:



1. H&M shall have the right of ingress and egress through the Parking Lot to the loading docks presently existing at the rear of the H&M Property for the term and any renewal term of this Agreement; and thereafter, so long as JGB owns the Parking Lot. Upon request, an easement for such right of ingress and egress will be prepared in recordable form for execution by the parties and recording in the Clerk's Office, Circuit Court of the City of Richmond, Virginia, at H&M's option.

2. Subject to the terms and conditions stated herein, JGB hereby leases to H&M that portion of the Parking Lot which is the 88' space immediately behind and along the rear of the H&M Property, including parking spaces Numbers 171 and 172, as outlined in black on EXHIBIT A attached hereto and by this reference made a part hereof (the "Parking Area"), in the Parking Lot.

3. The initial term of this Agreement shall be for a period of five (5) years (the "Initial Term"), commencing on September 1, 1994 ("Commencement Date") and terminating on August 31, 1999. H&M shall have the option to renew the term of this Agreement for two (2) additional periods of five (5) years (respectively, the "First and Second Renewal Term"). The First and Second Renewal Terms will automatically become effective unless H&M provides written notice to JGB of its intention not to so renew at least ninety (90) days prior to the expiration of then existing term.

4. H&M agrees to pay rent in the amount of One and 00/100 Dollar (\$1.00) monthly for the Parking Area during the Initial

Term (the "Initial Rent"). During the First Renewal Term, H&M shall pay rent in the amount of Three and 00/100 Dollars (\$3.00) monthly for the Parking Area (the "First Renewal Rent"). During the Second Renewal Term, H&M shall pay rent in the amount of Thirty and 00/100 Dollars (\$30.00) monthly for the Parking Area.

5. Payment of the Rent shall be due in advance on the first day of each and every month. If the Commencement Date is not on the first day of a month, the Rent for the first and last months of any term shall be pro-rated. The Initial Rent shall be pro-rated at the rate of No and 03/100 (\$0.03) per day. The First Renewal Rent shall be pro-rated at the rate of No and 10/100 Dollars (\$0.10) per day. The Second Renewal Rent shall be pro-rated at the rate of One and 00/100 Dollar (\$1.00) per day.

6. H&M shall have the exclusive right to use the Parking Area for deliveries and the parking of passenger vehicles of its officers, employees, agents, tenants and guests.

7. H&M shall indemnify and hold JGB harmless from any and all damages, costs and expenses on account of any negligent acts or omissions of H&M's officers, employees, agents, tenants and guests committed in the exercise of the rights under this Agreement.

8. H&M may not assign its rights hereunder without the prior written consent of JGB, whose consent may not be unreasonably withheld.

9. H&M shall have, hold and enjoy peaceably the Parking Area for the Term of this Agreement so long as H&M makes timely

Rent payments and complies with the terms and conditions of this Agreement.

10 JGB may terminate this Agreement within thirty (30) days after written notice from JGB to H&M of any breach of the provisions of this Agreement and the failure of H&M to cure such default within such thirty (30) day period.

11. This Agreement shall automatically terminate if H&M brings or participates in an action at law or suit of any kind that challenges JGB's rights to the Parking Lot, unless such action is brought to enforce H&M's rights hereunder.

12. Neither JGB nor H&M by execution of this Agreement waives any of its legal claims or rights regarding the ingress and egress of H&M to its loading docks and the Parking Lot that either party may have by virtue of previously recorded easements, deeds or otherwise.

13. H&M, its officers, employees, agents, tenants and guests, shall at all times exercise its rights hereunder in such a manner consistent with JGB's rights in the Parking Lot.

14. H&M, its officers, employees, agents, tenants and guests, shall keep the center travel lane of the Parking Lot open.

15. H&M, its officers, employees, agents, tenants and guests, shall not erect or place any structures of any kind in the Parking Lot.

16. H&M, its officers, employees, agents, tenants and guests, shall not store or discharge any hazardous materials or waste in the Parking Lot.

17. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia.

18. This Agreement constitutes the entire Agreement between JGB and H&M relative to the Parking Area, and supersedes all prior and contemporaneous negotiations, understandings and agreements, written or oral, between the parties.

19. The parties agree to make best efforts to keep the terms and conditions of this Agreement confidential. Further, the parties shall make best efforts not to disclose said terms and conditions of this Agreement without the prior consent of the other party, except (i) in the event of a sale of the H&M.... Property or the Parking Lot, the terms of this Agreement shall be disclosed to the purchaser; and (ii) in order for the parties to defend its rights hereunder.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above pursuant to due corporate authority.

JGB INDUSTRIES, INC.,
a Virginia corporation

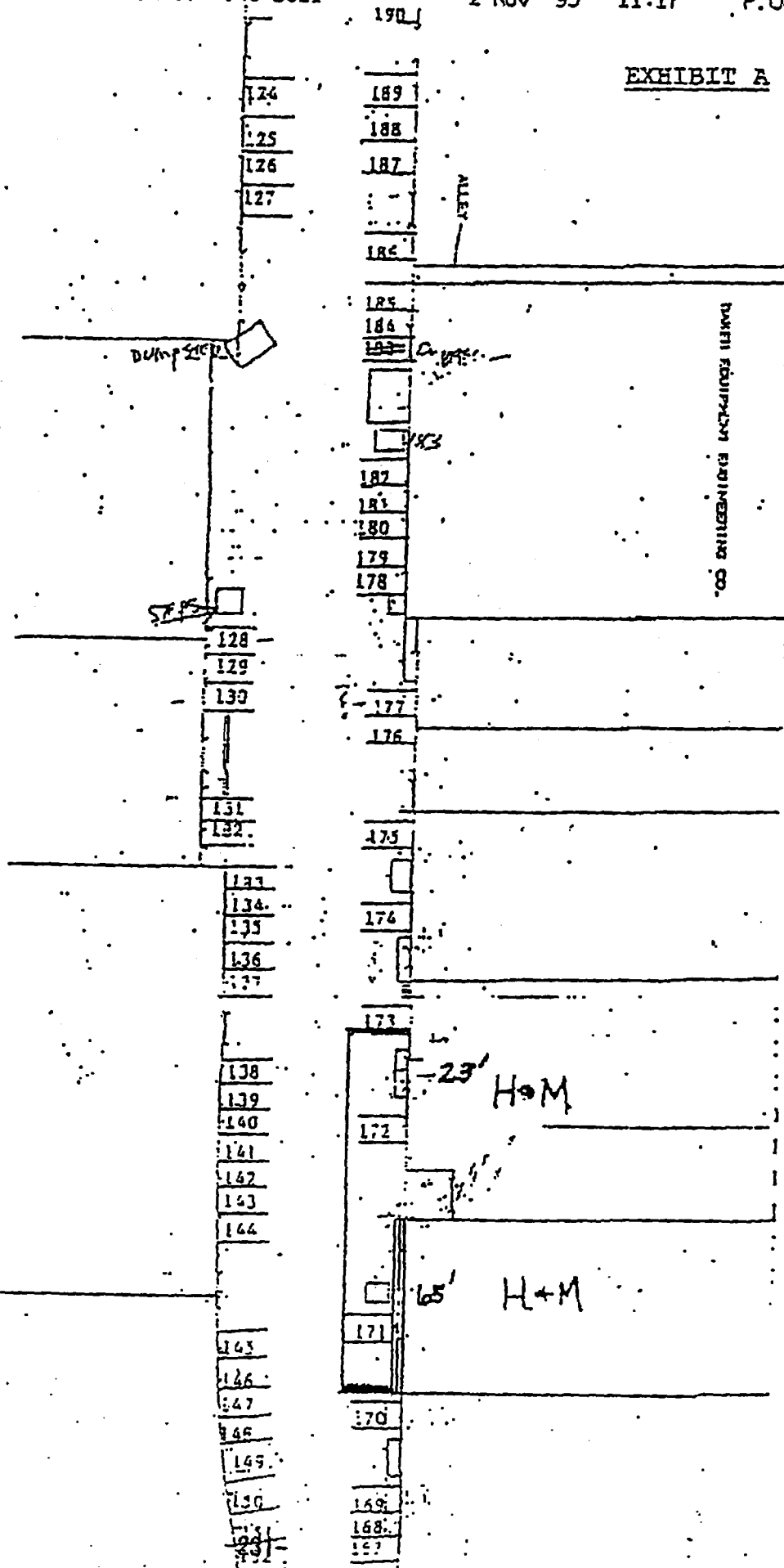
By: M. R. Rice

Title: VICE PRESIDENT - FINANCE

H&M PARTS WAREHOUSE OF
VIRGINIA, INC., a Virginia
corporation

By: Th. Lee

Title: VP

EXHIBIT A

PG0356 SEP 18 88

Prepared by:

Maloney, Huennkens, Parks, Gecker & Parsons, P.C.

1111 East Main Street, Suite 800

Richmond, Virginia 23219-3103

Tax Parcel: N000-1599/011 & N000-1599/030

25162

THIS DEED made as of the 17th day of September, 1998, by
and between JGB INDUSTRIES, INC., a Virginia corporation
(hereinafter "Grantor"), and PYRAMID DEVELOPMENT, L.L.C., a
Virginia limited liability company(hereinafter "Grantee"),
provides:

W I T N E S S E T H :

That for and in consideration of the sum of Ten Dollars
(\$10.00) and other good and valuable consideration paid to the
Grantor by the Grantee, receipt of which is hereby acknowledged,
the Grantor hereby grants and conveys unto the Grantee, in fee
simple, with General Warranty of Title and with English Covenants
of Title, except as hereinafter stated, the following described
real property, located in the City of Richmond, Virginia, to-wit:

See Schedule "A" attached hereto
and made a part hereof

This conveyance is also made expressly subject to all
easements, conditions, restrictions and agreements of record to
the extent lawfully applicable to the property hereby conveyed.

WITNESS the following signature and seal.

GRANTOR: JGB Industries, Inc.,
a Virginia corporation

By: Anthony M. Ill, President (SEAL)
Anthony M. Ill, President

Grantee's Address:
P.O. Box 25609
Richmond, VA 23260

COMMONWEALTH OF VIRGINIA

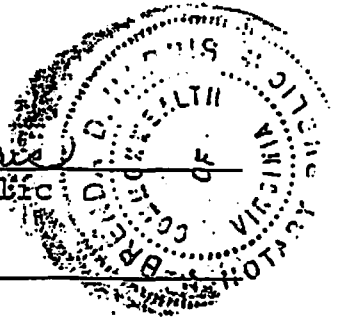
AT LARGE, to-wit:

The foregoing Deed was acknowledged before me on this 17th
day of September, 1998, by Anthony M. Ill, President, JGB
Industries, Inc., in the City/County of Richmond,
Virginia.

Brenda D. Harris
Notary Public

My commission expires:

Jan. 31, 2000



SCHEDULE "A"

Parcel 1:

ALL that certain lot, piece or parcel of land, with the improvements thereon and the appurtenances thereto belonging, lying and being in the City of Richmond, Virginia, known as Nos. 1707, 1709, 1711 and 1713 Summit Avenue, located on the eastern line of Summit Avenue between Norfolk Street and Patton Avenue, as more particularly described on a survey dated April 3, 1986, made by Dewberry & Davis, entitled "Plat Showing Improvements on 1707 through 1713 Summit Avenue, Richmond, Virginia", a copy of which is recorded in the Clerk's Office, Circuit Court, City of Richmond, Virginia, in Deed Book 80, page 728.

BEING the same property conveyed to JGB Industries, Inc., a Virginia corporation, by deed from Archie Straus and Katherine C. Straus, his wife, Alec Meyers and Sara Straus Meyers, his wife, Sara Straus Vitsky, widow and Miriam Straus Weinstein and Julian Weinstein, her husband, dated May 5, 1986 and recorded May 23, 1986, in the Clerk's Office, Circuit Court, City of Richmond, Virginia, in Deed Book 80, page 728.

Parcel 2:

ALL that certain lot, piece, or parcel of land and improvements and appurtenances thereunto belonging, including railroad tracks, lying, and being in the City of Richmond, Virginia, between Summit and Altamont Streets, known as 3014 Norfolk Street, containing .78 acres, and more particularly described by that certain plat of survey dated November 5, 1986, revised December 9, 1986, entitled "Plat Showing Survey of a Parcel of Land for J.G.B. Industries, Inc., situated in the City of Richmond, Virginia, prepared by DEWBERRY & DAVIS, certified surveyors, copy of which is attached hereto and made a part hereof and to which reference is hereby made for a more particular description of said real estate.

BEING the same property conveyed to JGB Industries, Inc., a Virginia corporation, by deed from Richmond, Fredericksburg and Potomac Railroad Company, a Virginia corporation, dated December 22, 1986 and recorded December 23, 1986, in the Clerk's Office, Circuit Court, City of Richmond, Virginia, in Deed Book 106, page 1653.

INSTRUMENT #980023162
RECORDED IN THE CLERK'S OFFICE OF
CITY OF RICHMOND ON
SEPTEMBER 18, 1986 AT 02:03PM
\$350.00 GRANTOR TAX WAS PAID AS
REQUIRED BY SEC. 58.1-802 OF THE VA. CODE
STATE: \$175.00 LOCAL: \$175.00
BEWILL, J.A. DEAN, CLERK

21451

THIS DEED, made this 22nd day of December 1986, by and between the RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, a Virginia corporation, hereafter called "Grantor," and JGB INDUSTRIES, INC., a Virginia corporation, hereinafter called "Grantee";

W I T N E S S E T H :

For and in consideration of the sum of TEN DOLLARS (\$10.00) and other good and valuable consideration in hand paid, the receipt of which is hereby acknowledged, Grantor grants and conveys with SPECIAL WARRANTY OF TITLE, IN FEE SIMPLE, unto Grantee the following described real estate, to-wit:

ALL that certain lot, piece, or parcel of land and improvements and appurtenances thereunto belonging, including railroad tracks, lying, and being in the City of Richmond, Virginia, between Summit and Altamont Streets, known as 3014 Norfolk Street, containing .78 acres, and more particularly described by that certain plat of survey dated November 5, 1986, Revised December 9, 1986, entitled "Plat Showing Survey of a Parcel of Land for J. G. B. Industries, Inc., situated in the City of Richmond, Virginia, prepared by DEWBERRY & DAVIS, certified surveyors, copy of which is attached hereto and made a part hereof and to which reference is hereby made for a more particular description of said real estate.

BEING a portion of the same land conveyed to Grantor by deed from Richmond Land Corporation dated October 2, 1958, recorded December 17, 1958 in the Clerk's Office, Circuit Court, City of Richmond, Virginia, in Deed Book 590-B, Page 422.

This conveyance is made expressly subject to any and all easements, conditions, restrictions and agreements as are of record, and not of record, insofar as they are applicable to the property hereby conveyed.

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BOOK 0106 PAGE 1654

IN WITNESS WHEREOF, Grantor has caused its name to be signed hereto and its corporate seal to be hereunto affixed and attested:

RICHMOND, FREDERICKSBURG AND POTOMAC
RAILROAD COMPANY

BY Frank A. Crovo, Jr.
President

Attest:

Carol Ann Kerring
Asst. Secretary

STATE OF VIRGINIA: to wit
CITY OF RICHMOND :

The foregoing deed was acknowledged before me this 27th day of December, 1986, by Frank A. Crovo, Jr. and E. A. Wallace ^{C. K. Fleming}
Assistant
President and Secretary, respectively, on behalf of the Richmond, Fredericksburg and Potomac Railroad Company.

My commission expires: January 14, 1989

Loraine M. Pearson
Notary Public at Large

Grantee's Address:
P.O. Box 26509
Richmond, VA 23230

Plat BK 37 pgs 117 - 118

VIRGINIA:
IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF THE CITY OF RICHMOND

This deed was presented, and, with the Certificate annexed, admitted to record

on DEC 23 1986 at 11:21 o'clock A.M.

The Tax imposed by Sec. 58.1-802 Code of Va. has been paid.

301 Clerk's Fee \$ 20.00
212 Transfer Fee \$ 1.00
039 State Tax \$ 30.60
214 City Tax \$ 10.20
230 City Grantors Tax \$ 10.25
038 State Grantors Tax \$ 10.75
TOTAL \$ 92.30

File: Mc Guire, Woods

TESTE:

Iva R. Purdy
Iva R. Purdy, Clerk

CS 130047

381

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THIS DEED, made as of this 2nd day of October, 1958, by and between RICHMOND LAND CORPORATION, a Virginia corporation, party of the first part, and RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, also a Virginia corporation, party of the second part;

W I T N E S S E T H :

That for and in consideration of the sum of Fifteen Thousand Five Hundred Seventy-eight Dollars and Six Cents (\$15,578.06) paid by the party of the second part to the party of the first part, receipt of which is hereby acknowledged, the party of the first part hereby grants and conveys unto the party of the second part with General Warranty of Title, all those three (3) pieces or parcels of land in the City of Richmond, Virginia, more particularly described as follows:

Parcel 1

Beginning at a point on the western line of Terminal Place (formerly Mulberry Street) distant 700 feet north of the north-western intersection of Broad Street and Terminal Place;

Thence by a line making an interior angle of 128° 14' with the westerly line of Terminal Place in a northerly direction 294.37 feet to a point, a corner with the property of the Southern Biscuit Company, Inc.;

Thence in a southerly direction along the easterly line of a 30-foot strip of land which is also the westerly property line of Southern Biscuit Company, Inc. 725.50 feet to the northerly line of an alley 20 feet wide, extending westwardly from and at right angles to Terminal Place;

Thence at right angles westwardly and across said 30-foot strip in a straight line which is a continuation of the northern line of the 20-foot alley 30 feet to a point on the western line of said 30-foot strip distant 160 feet north of the northern line of Broad Street;

Thence at a right angle northwardly and along the western line of the said 30-foot strip and in a straight line extending northerly therefrom and continuing the same a distance of 886.5 feet;

Thence eastwardly at a right angle Two and 25/100 feet;

Thence northwardly 80 feet, more or less, to the line of the land condemned by the Richmond Terminal Railway Company;

Thence extending southwardly along the line of the property of the said Richmond Terminal Railway Company, 80 feet, more or less, to a point;

Thence continuing southwardly along the line of the property of the said Richmond Terminal Railway Company, which is a curve with a radius of 500 feet, a distance of 400 feet to the western line of Terminal Place;

Thence southwardly and along the said western line of Terminal Place 39.33 feet to the point of beginning and containing 98,926 square feet, more or less.

The parcel hereby conveyed is the same parcel conveyed to the party of the first part by Southern Stock Yards Corporation by deed dated November 10, 1926, and recorded in the Clerk's Office of the Chancery Court in the City of Richmond, Virginia; in Deed Book 343D at page 48 less and excepting therefrom a portion of the

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said parcel of land conveyed by the said Richmond Land Corporation to the Southern Biscuit Company, Inc. by deed dated May 16, 1947, and duly recorded in the Clerk's Office of the Chancery Court in the City of Richmond, Virginia.

The said parcel is more particularly shown outlined in red on the plat attached hereto as a part hereof marked "R. E. 2-37, R. F. & P. R.R. Co., Land Transferred From R. L. C. to R. F. & P. R.R. Co., Richmond, Virginia, Scale: 1" = 100', Oct. 2, 1956."

Parcel 2

Beginning at a point on the north line of Norfolk Street 146.00 feet east from the northeast intersection of Norfolk Street with Summit Avenue;

Thence in an easterly direction along said northern line of Norfolk Street 51.36 feet to a point;

Thence in a northerly direction along the line dividing, now or formerly, the property of E. L. Carpel, Incorporated, from that, now or formerly, of Davis Brothers, Incorporated, 100.61 feet to a point, said point being in the center line of a party wall distant 147.30 feet measured along the center line of said party wall, from the west line of Altamont Avenue;

Thence continuing in a northerly direction along the line dividing, now or formerly, the property of Barney Briel, et al. from that of, now or formerly, Davis Brothers, Incorporated, 148.95 feet to a point, said point being on the center line of a party wall, distant 147.30 feet, measured along the center line of said party wall, from the west line of Altamont Avenue;

Thence at right angles in a westerly direction along the center line of the last-mentioned party wall 0.20 feet to a point;

Thence in a northerly direction along the line dividing, now or formerly, the property of Aaron Jacobs, et al. from that, now or formerly, of Davis Brothers, Incorporated, 124.96 feet to a point, said point being on the center line of a party wall, distant 147.50 feet, measured along the center line of said party wall, from the west line of Altamont Avenue, extended;

Thence continuing according to a property line agreement hereinafter referred to made between Emmett T. Seaton and wife and Richmond Land Corporation as follows;

Thence by a line parallel to the said west line of Altamont Avenue in a northerly direction 30 feet to a point;

Thence by an angle of 3° 28' to the left 25 feet to a point;

Thence by an angle of 3° 36' to the left 25 feet to a point;

Thence by an angle of 4° 39' to the left 25 feet to a point;

Thence by an angle of 4° 28' to the left 25 feet to a point;

Thence by an angle of 5° 0' to the left 25 feet to a point;

Thence by an angle of 4° 36' to the left 25 feet to a point;

Thence turning an interior angle of 103° 45' 19.95 feet to a point;

Thence turning an interior angle of 97° 53' and running in a southerly direction 115.21 feet to a point;

Thence by an angle of 3° 02' to the right 12 feet to a point;

Thence by an angle of 3° 40' to the right 25 feet to a point;

Thence by an angle of 5° 01' to the right 25 feet to a point;

Thence by an angle of 4° 15' to the right 25 feet to a point;

Thence by an angle of 4° 31' to the right 25 feet to a point;

Thence by an angle of 6° 55' to the right 25 feet to a point

on the line dividing the property, now or formerly, belonging to Aaron Jacobs from that of the property, now or formerly, belonging to Emmett T. Seaton;

Thence leaving the above-mentioned property line between Emmett T. Seaton and Richmond Land Corporation and continuing on the original courses and distances as follows;

Thence along the line dividing, now or formerly, the property of Davis Brothers, Incorporated, from that, now or formerly, of Aaron Jacobs, et al., in a southerly direction 40.75 feet to a

point on the western line of Altamont Avenue, distant 336.14 feet from the northwest intersection of Altamont Avenue and Norfolk Street, measured along the western line of Altamont Avenue;

Thence in a northerly direction along the western line of Altamont Avenue 34.78 feet to the point where it is intersected by the western line of the Boulevard;

Thence along the western line of the Boulevard in a northerly direction 77.05 feet to the point where it is intersected by the eastern rail of a spur track running from the right of way of the R. F. & P. Railroad Company, said point being 214.5 feet south from the intersection of the southern line of Patton Avenue with the western line of the Boulevard, measured along said western line of the Boulevard;

Thence with the eastern rail of said last-mentioned spur track in a northwesterly direction 361 feet, more or less, to the point where said eastern rail intersects the south line of Patton Avenue, said point being 190 feet from the intersection of the southern line of Patton Avenue with the western line of the Boulevard, measured along the southern line of Patton Avenue;

Thence in a westerly direction along the southern line of Patton Avenue to a point that is 25.6 feet east from the intersection of the eastern line of Summit Avenue with the southern line of Patton Avenue;

Thence along the line dividing, now or formerly, the property of Davis Brothers, Incorporated, from that, now or formerly, of F. R. Brauer, in a southeasterly direction following along the side of a spur track from the main line of the R. F. & P. Railroad Company the following angles and distances all as contained in a property line agreement made between Theresa R. Brauer, et al. and the Richmond Land Corporation hereinafter referred to;

Thence by an angle of $29^{\circ} 34'$ to the right 50 feet to a point;
 Thence by an angle of $7^{\circ} 05'$ to the right 50 feet to a point;
 Thence by an angle of $7^{\circ} 07'$ to the right 25 feet to a point;
 Thence by an angle of $4^{\circ} 59'$ to the right 25 feet to a point;
 Thence by an angle of $5^{\circ} 44'$ to the right 25 feet to a point;
 Thence by an angle of $4^{\circ} 42'$ to the right 25 feet to a point;
 Thence by an angle of $5^{\circ} 36'$ to the right 40 feet to a point;
 Thence by an angle of $4^{\circ} 45'$ to the right 21.7 feet to a point;
 Thence by an angle of $6^{\circ} 35'$ to the right along a course parallel to and 146.0 feet east from the east line of Summit Avenue 58 feet, more or less, to the line of division extended between the property formerly belonging to F. R. Brauer and the property of the Cornwall Realty Corporation, said line of division between said properties being the center line of a party wall;

Thence at right angles in a westerly direction 3.90 feet to a point;

Thence in a southerly direction along the line dividing, now or formerly, the property of Davis Brothers, Incorporated, from that of the, now or formerly, Cornwall Realty Corporation, 167.27 feet to a point;

Thence at right angles in an easterly direction 3.90 feet to a point;

Thence in a southerly direction, by a line parallel to and 146.00 feet east from the east line of Summit Avenue 233.85 feet to the point of beginning.

Parcel 3

Beginning at a point on the north side of Moore Street 146.42 feet east of the northeast intersection of Moore Street and Summit Avenue;

Thence in an easterly direction along the north line of Moore Street 58.13 feet to a point;

Thence in a northerly direction along the line dividing the property, now or formerly, of Lucy G. Smith from that of, now or formerly, Davis Brothers, Incorporated, 119.50 feet to a point;

Thence in a westerly direction along the line dividing, now 425
or formerly, the property of Lucy G. Smith from that of, now or
formerly, the Argonaut Realty Corporation, extended, 7.30 feet
to a point;

Thence in a northerly direction along the line dividing, now
or formerly, the property of the Argonaut Realty Corporation from
that of, now or formerly, Davis Brothers, Incorporated, 180.37 feet
to a point in the south line of Norfolk Street, said point being
147.50 feet west of the southwest intersection of Altamont Avenue
and Norfolk Street;

Thence in a westerly direction along the south line of Norfolk
Street 50.96 feet to a point;

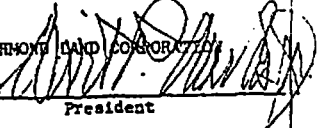
Thence in a southerly direction along the line dividing, now
or formerly, the properties of the Sanitary Grocery Company and
Lewis T. Metzger from that of, now or formerly, Davis Brothers,
Incorporated, said line being parallel to and 146.42 feet east
from the eastern line of Summit Avenue, 228.31 feet and 71.61 feet
to the point of beginning.

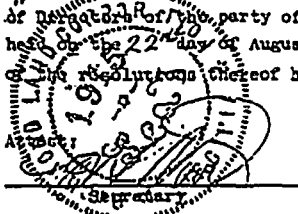
The said Parcels No. 2 and 3 hereinabove described are the
same parcels of land conveyed to the party of the first part by
H. O. Tiller, Receiver of Davis Brothers, Incorporated, by deed
dated January 31, 1935, and recorded in the Clerk's Office of the
Chancery Court in the City of Richmond, Virginia, in Deed Book
395D at page 99, said Parcel No. 2 being therein designated as Lot
No. 1 and Parcel No. 3 as Lot No. 2, less and except, the changes
brought about by the property line agreement between Emmett T.
Seaton and wife and Richmond Land Corporation dated July 3, 1935,
and recorded in the Clerk's Office of the Chancery Court of the
City of Richmond, Virginia, in Deed Book 397C at page 285, the
property line agreement dated February 14, 1936, between the Bank
of Commerce & Trusts of Richmond, Virginia, and Theresa H. Brauer,
Administrator, c.t.a. of F. R. Brauer, Deceased, and Richmond
Land Corporation and recorded in the Clerk's Office of the Chancery
Court of the City of Richmond, Virginia, in Deed Book 401D at page
445, and the deed dated November 22, 1937, between Richmond Land
Corporation and The Federal Foundry Supply Company and corrected
by deed dated January 17, 1938, to show that the grantee was The
Federal Foundry Supply Company, the prior deed being recorded
November 22, 1937, in Deed Book 409D at page 531 of the Chancery
Court of the City of Richmond, Virginia, and the deed of January
17, 1938, being of record in said Court. Parcels No. 2 and 3 above
are subject to the rights of abutting landowners heretofore given
them by deed from Davis Brothers, Incorporated, and subject to similar
rights in Davis Brothers, Incorporated and their successors in title
as owners of property known as 1715 Summit Avenue and fronting 30
feet on the east side of the said Avenue as shown on plat of survey
attached to the above described deed from H. O. Tiller to Richmond
Land Corporation.

The above Parcels 2 and 3 are shown outlined in red on the plat
attached hereto as a part hereof marked "R. E. 2-101, R. F. & P. R.R.
Co. Industrial Tracks Between Summit & Altamont Aves. On R. F. & P.
R.R., Scale 1" = 50', April, 1935, Revised Sept. 7, 1937, Revised
Aug. 6, 1958."

IN WITNESS WHEREOF, the party of the first part has caused this deed to be
signed by its President and its corporate seal to be hereunto affixed and duly
attested by its Secretary, pursuant to two (2) resolutions of the Board
of Directors of the party of the first part at a meeting duly called and
held on the 22nd day of August, 1958, as will appear from a certified copy of each
of the resolutions thereof hereto attached.

RICHMOND LAND CORPORATION

By 
President



STATE OF VIRGINIA:
to wit
CITY OF RICHMOND :

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I, P. A. Rice, a Notary Public at Large in and for the State of Virginia,
do certify that Wirt P. Marks, Jr. and *H. S. Wood*, whose names, as
President and _____ Secretary respectively of the RICHMOND LAND CORPORATION,
are signed to the above writing bearing date the *2nd* day of *October*,
1958, this day each personally appeared and acknowledged the same before me in
the city and state aforesaid.

Given under my hand this *2nd* day of *October*, 1958.

My commission expires October 31, 1961.

P. A. Rice
Notary Public at Large

RICHMOND LAND CORPORATION

Sale to Richmond, Fredericksburg and Potomac
Railroad Company of Two Parcels of Land Between
Altamont and Summit Avenues, Richmond, Virginia

The President informed the Board that the Richmond Land Corporation acquired in
1935 two parcels of land lying between Altamont and Summit Avenues, Richmond,
Virginia, one, marked Parcel 3, extending from Moore Street to Norfolk Street, and
the other, marked Parcel 2, from Norfolk Street to Putton Avenue, with a small branch
out to Altamont Avenue; that these two parcels of land were acquired to protect and
give rail service to the owners of the adjoining industrial property; that these two
parcels of land are used now and can be used in the future only in conjunction with
rail service to the owners of the adjoining industrial property and for this reason
should be transferred to the Richmond, Fredericksburg and Potomac Railroad Company,
and are shown as Parcels 2 and 3 on plat entitled "RE2-101, R. F. & P. R.R. Co.,
Industrial Tracks Between Summit & Altamont Aves. on R. F. & P. R.R., Scale 1" = 50',
April, 1935, Revised Sept. 7, 1937, Revised Aug. 6, 1958" to be attached to deed;

Whereupon, on motion duly made and seconded, it was

RESOLVED, that the proper officers of the Richmond Land Corporation be, and
they hereby are, authorized to convey the above described two parcels of land
shown as Parcels 2 and 3 on plat to be attached to deed entitled "RE2-101, R. F. &
P. R.R. Co., Industrial Tracks Between Summit & Altamont Aves. on R. F. & P. R.R.,
Scale 1" = 50', April, 1935, Revised Sept. 7, 1937, Revised Aug. 6, 1958" to the
Richmond, Fredericksburg and Potomac Railroad Company by a good and sufficient deed
upon payment to the Richmond Land Corporation of the sum of Seven Hundred Fifty Nine
Dollars and Forty Four Cents (\$759.44).

IT IS FURTHER RESOLVED, that the authority granted by resolution of this
Board of April 26, 1957, covering this same property is hereby cancelled.

I hereby certify that the above is a true and correct excerpt
from minutes of meeting of the Board of Directors of the Richmond Land
Corporation held in Richmond, Va. on August 22, 1958.



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RICHMOND LAND CORPORATION

Sale to: Richmond, Fredericksburg and Potomac
Railroad Company of Parcel of Land to the North
and West of the Southern Biscuit Works, Richmond, Va.

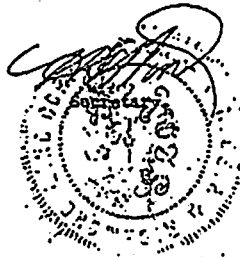
The President informed the Board that Richmond Land Corporation had purchased in 1926 a parcel of land lying to the north and west of the Southern Biscuit Works; that it had sold a portion of the land to the Southern Biscuit Works in past years for the enlargement of that plant; that the balance of the parcel remaining as shown as Parcel 1 (One) in deed and on plat entitled "R. E. 2-37, R. F. & P. R.R. Co., Land Transferred From R. L. C. to R. F. & P. R.R. Co., Richmond, Virginia, Scale: 1" = 100', Oct. 2, 1956" could be used only for right of way for rail service to this and other plants and for this reason should be transferred to the Richmond, Fredericksburg and Potomac Railroad Company;

Whereupon, on motion duly made and seconded, it was

RESOLVED, that the proper officers of the Richmond Land Corporation be, and they hereby are, authorized to convey the above described parcel of land shown as Parcel 1 (One) on plat to be attached to deed entitled "R. E. 2-37, R. F. & P. R.R. Co., Land Transferred From R. L. C. to R. F. & P. R.R. Co., Richmond, Virginia, Scale: 1" = 100', Oct. 2, 1956" to the Richmond, Fredericksburg and Potomac Railroad Company by a good and sufficient deed upon payment to the Richmond Land Corporation of the sum of Fourteen Thousand Eight Hundred Eighteen Dollars and Sixty Two Cents (\$14,818.62).

IT IS FURTHER RESOLVED, that the authority granted by resolution of this Board of April 25, 1957, covering this same property is hereby cancelled.

I hereby certify that the above is a true and correct excerpt from minutes of meeting of the Board of Directors of the Richmond Land Corporation held in Richmond, Va., on August 22, 1958.



Verified 12/18/58
City of Richmond—to-wit:

429.

In the Office of the Court of Chancery for said City,
the 17th day of December, 1958

This deed was presented, and, with the Certificate of G. L. T. annexed, admitted
to record at 3:35 o'clock P. M.

Teste: E. C. Warriner, Clerk

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THIS DEED, made this 17th day of December, 1958, between JEWEL W. TYSON
and GLADYS L. TYSON, his wife, hereinafter called "Grantors", and the CITY OF
RICHMOND, hereinafter called "Grantee":

W I T N E S S E T H:

In consideration of the sum of One Hundred Sixty Dollars (\$160.00), paid
to Grantors by Grantee, receipt whereof is hereby acknowledged, Grantors do
grant and convey, with Special Warranty, unto Grantee an easement along the
southern portion of the property of Grantors known as No. 13 River Road, Rich-
mond, Virginia, and designated Parcel 41A, as shown on Sheet No. 3 of Department
of Public Works' Drawing No. O-12858, a copy of which is recorded with a deed
from Edward H. Thompson and wife to the City of Richmond, dated December 5th
1958, and recorded December 17th, 1958, in the Clerk's Office of the Chancery
Court of the City of Richmond, Virginia, said easement being more particularly
described as follows:

A temporary easement ten feet wide, as shown
enclosed in green lines on said drawing, to
be used in connection with the construction of
underground sanitary sewer facilities upon prop-
erty south of and contiguous to said temporary
easement, but upon completion of such construc-
tion all rights of Grantee in and to said tempo-
rary easement shall cease and terminate.

The Grantee, as evidenced by its acceptance of this deed, agrees that the
use of the easement hereinabove granted shall be in accordance with the terms
and conditions contained in the offer of Grantors dated June 16, 1958, designat-
ed Exhibit No. 14, attached to Ordinance No. 58-252-217, adopted by Council of the
City of Richmond, October 13, 1958, which Ordinance is on file in the City Clerk's
Office, City Hall, Richmond, Virginia.

ORIGINAL DEED DEL'D 12-18-58

[Signature]

Tiller Receiver
Davis Bros. Inc.
To: B & S

Ed. L. Corp.

3-8-35-#67

Plat Book #8

Page 126

Rev. stamps

#2.37 Cancelled

*Plat Book #8
June 6, 1935
H. O. Tiller
(By Receiver)*

This deed made this 31st day of January, 1935, by and between H. O. Tiller, Receiver of Davis Brothers, Incorporated, so appointed by decree of the Law and Equity Court, Part II, of the City of Richmond, in proceedings in equity W. S. Bell, et als, V. Davis Brothers, Incorporated, party of the first part, and Richmond Land Corporation, a corporation organized and existing under the laws of the State of Virginia, party of the second part.

Witnesseth: That pursuant to the decree in the Law & Equity Court Part II, of the City of Richmond, entered the 23rd day of January, 1935, in the aforementioned cause W. S. Bell, et als, V. Davis Brothers, Incorporated, and the compliance with the conditions required to be performed by the said party of the second part in said decree, the said H. O. Tiller, Receiver of Davis Brothers, Incorporated, as aforesaid, does hereby grant and convey with Special Warranty, unto the Richmond Land Corporation, its successors and assigns, all the right, title and interest of Davis Brothers, Incorporated in and to the two parcels of land located in the City of Richmond, fully described as follows:

Lot No. 1 Beginning at a point on the north line of Norfolk Street 146.00 feet east from the northeast intersection of Norfolk Street with Summit Avenue.

Thence in an easterly direction along said northern line of Norfolk Street 31.36 feet to a point;

Thence in a northerly direction along the line dividing the property of H. L. Carpal, Incorporated, from that of Davis Brothers, Incorporated, 100.61 feet to a point, said point being in the center line of a party wall distant 147.30 feet measured along the center line of said party wall, from the west line of Altmont Avenue.

Thence continuing in a northerly direction along the line dividing the property of Barney Briel et al. from that of Davis Brothers, Incorporated, 148.95 feet to a point, said point being on the center line of a party wall, distant 147.30 feet measured along the center line of said party wall, from the west line of Altmont Avenue.

Thence at right angles in a westerly direction along the center line of the last mentioned party wall 3.20 feet to a point.

Thence in a northerly direction along the line dividing the property of Aaron Jacobs, et al. from that of Davis Brothers, Incorporated, 124.95 feet to a point, said point being on the center line of a party wall, distant 147.30 feet measured along the center line of said party wall, from the west line of Altmont Avenue, extended.

Thence along the line dividing the property of Emmett Seaton from that of Davis Brothers, Incorporated in a northerly direction along the line of the spur track from the R. F. & P. Railroad Company's main track belonging to Davis Brothers, Incorporated, 172.82 feet to a point.

Thence in a straight line, in an easterly direction 29.00 feet to a point;

Thence southwardly along the line of another spur track from the main line of the R. F. & P. Railroad Company and belonging to Davis Brothers, Incorporated, 227.5 feet to a point opposite the center line of last mentioned party wall, said point being 135.90 feet east from the point above described at the west end of said party wall and measured along the center line of same.

Thence along the line dividing the property of Davis Brothers Incorporated, from that of Aaron Jacobs, et al. in a southerly direction 40.75 feet to a point on the western line of Altamont Avenue, distant 356.14 feet from the northwest intersection of Altamont Avenue and Norfolk Street, measured along the western line of Altamont Avenue.

Thence in a northerly direction along the western line of Altamont Avenue 34.75 feet to the point where it is intersected by the western line of the Boulevard

Thence along the western line of the Boulevard in a northerly direction 77.05 feet to the point where it is intersected by the eastern rail of a spur track running from the right of way of the N.Y. & P. Railroad Company, said point being 214.5 feet south from the intersection of the southern line of Patton Avenue with the western line of the Boulevard, measured along said western line of the Boulevard.

Thence with the eastern rail of said last-mentioned spur track in a northwesterly direction 361 feet, more or less, to the point where said eastern rail intersects the south line of Patton Avenue, said point being 190 feet from the intersection of the southern line of Patton Avenue with the western line of the Boulevard, measured along the southern line of Patton Avenue

Thence in a westerly direction along the southern line of Patton Avenue 13.20 feet to a point, said point being 36.80 feet east from the intersection of the eastern line of Summit Avenue with the southern line of Patton Avenue

Thence along the line dividing the property of Davis Brothers Incorporated, from that of F.M. Brauer, in a southeasterly direction following along the side of a spur track from the main line of the N.Y. & P. Railroad Company, 127 feet, more or less, to a point which is 127.94 feet from the eastern line of Summit Avenue.

Thence continuing along the said last mentioned property line 59.35 feet to a point.

Thence still continuing along the said last mentioned property line by a line parallel to and 142.15 feet east from the eastern line of Summit Avenue 79.75 feet to a point in the line dividing the property of F.M. Brauer, from that of the Cornwall Realty Corporation, said line being the center of a party wall between the two properties;

Thence at right angles in a westerly direction 0.05 feet to a point;

Thence in a southerly direction along the line dividing the property of Davis Brothers Incorporated, from that of the Cornwall Realty Corporation, 191.32 feet to a point that is on the center line of a party wall on the line dividing the properties of the Cornwall Realty Corporation from that of Davis Brothers Incorporated, known as #1715 Summit Avenue.

Thence at right angles in an easterly direction 3.90 feet to a point.

Thence in a southerly direction, by a line parallel to and 146.00 feet east from the east line of Summit Avenue, being the line dividing the property of Davis Brothers Incorporated, herewith to be conveyed, from the Lot known as #1715 Summit Avenue belonging also to Davis Brothers Incorporated; the property belonging to R.E.V. Farrar; and the property belonging to the National Radiator Corporation, 209.80 feet to the point of beginning.

Beginning at a point on the northside of Moore Street 144.42 feet east of the northeast intersection of Moore Street and Summit Avenue.

Thence in an easterly direction along the north line of Moore Street 58.13 feet to a point

Thence in a northerly direction along the line dividing the property of Lucy G. Smith from that of Davis Brothers, Incorporated, 119.60 feet to a point.

Thence in a westerly direction along the line dividing the property of Lucy G. Smith from that of the Argonaut Realty Corporation, extended 7.30 feet to a point.

Thence in a northerly direction along the line dividing the property of the Argonaut Realty Corporation from that of Davis Brothers, Incorporated 180.37 feet to a point in the south line of Norfolk Street, said point being 147.80 feet west of the southwest intersection of Altamont Avenue and Norfolk Street.

Thence in a westerly direction along the south line of Norfolk Street 50.95 feet to a point.

Thence in a southerly direction along the line dividing the properties of the Sanitary Grocery Company and Lewis T. Metgat from that of Davis Brothers, Incorporated, said line being parallel to and 146.42 feet east from the eastern line of Summit Avenue 228.31 feet and 71.61 feet to the point of beginning.

The said parcels or lots of land are more particularly shown outlined in red on the map attached hereto to be made a part hereof, marked "R.E. 2-101. R.F. & P.R.M. Co., Land near southwest intersection, Boulevard and Right of Way, Richmond Va. dated December 17, 1934."

Subject, however to the rights of abutting landowners heretofore given them by deeds from Davis Brothers, Incorporated, and subject to similar rights in Davis Brothers, Incorporated, and their successors in title as owners of property known as No. 1715 Summit Avenue and fronting thirty (30) feet on the east side of said Avenue as shown on plat of survey hereto attached.

Witness the signature and seal of the party or the first part.

H.O. Tiller (Seal)
Receiver of Davis Brothers, Incorporated.

State of Virginia

City of Richmond, to-wit:

I, L.H. Rady, a Notary Public in and for the city and state aforesaid, certify that H.O. Tiller, whose name is signed to the foregoing writing as Receiver of Davis Brothers, Incorporated, has acknowledged the same before me in my city and state aforesaid this 12th day of February 1935.

My commission expires on the 31st day of March 1936.

L.H. Rady, Notary Public.

See Plat Book #8 page 123

City of Richmond, to-wit:

In the Office of the Court of Chancery for said City
the 6th day of March 1935

This deed was presented, and with the Certificate and plat annexed

admitted to record at 10:00 o'clock A.M.

Teste: Chas. O. Saville, Clerk.

general, interest parties to the deed, 1925, 1927, and obligation himself to the said
and not with the said Isabelle May Wilhelm business as is evidenced by his
signature of this deed.

The said Isabelle May Wilhelm covenants that she has the right
to convey the said land to the party of the second part, that she has done so and
thereafter the said land under the aforesaid deed of trust, that the party of
the second part shall have quiet possession of said land, free from all encumbrances
except the aforesaid deed of trust and that they, the said parties of the first
part, will execute such further assurance of the said land as may be required.

Witness the following signatures and seals:

Isabelle May Wilhelm (SEAL)

Joseph P. Wilhelm (SEAL)

State of Virginia
City of Richmond, to-wit:

I, J. H. Radd a Notary Public for the City aforesaid in the
State of Virginia, do certify that Isabelle May Wilhelm and Joseph P. Wilhelm
whose names are signed to the within writing bearing date on the 26th day of August
1925, have acknowledged the same before me in my City aforesaid. Given under
my hand this 31st day of August 1925.

My commission expires 31st day of Decr. 1927.

J. H. Radd, N. P.

City of Richmond, to-wit:

In the Office of the Court of Chancery for said City,
the 20th day of October 1925.

This deed was presented, and, with the certificate annexed,
admitted to record at 4:40 o'clock P. M.

Teste: Chas. O. Saville Clerk.

Ex. 1000

THIS DEED Made this First day of October in the year One Thousand
Nine Hundred and Twenty five between Davis Brothers incorporated a corporation
chartered and existing under the laws of the State of Virginia, party of the first
part, and Cornwall Realty Corporation, of the City of Richmond, Virginia, party of
the second part;

WITNESSETH: That in consideration of the sum of Ten Dollars and
other valuable considerations, the said Davis Brothers, incorporated, doth grant
unto the said parties of the second part, with general warranty, all that certain
lot, piece or parcel of land, together with improvements thereon and appurtenances
thereto belonging known as Nos. 1717-1719 1721, 1723 1725-1727 1729 and 1731 Summit
Avenue, lying and being in the City of Richmond, Virginia, on the eastern line of
Summit Avenue between 24th Avenue and Norfolk Street and all rights ways, etc.
to the same belonging or in any wise appertaining and bounded as follows, to-wit:

See page 2

1731

with the northern line of Norfolk Street (which point of beginning is opposite the center of the party wall for the use of the premises No. 1717 Summit Avenue, and the premises to be hereafter erected on the property adjoining same on the south and known as No. 1715 Summit Avenue) and from said point of beginning, running northwardly along and fronting on the said eastern line of Summit Avenue one hundred and ninety one and thirty two one hundredths (191.32) feet to a point opposite the center of a party wall for the joint use of the property No. 1731 Summit Avenue and the property adjoining the same on the north and known as No. 1733 Summit Avenue, and running back eastwardly from said front and between lines about parallel passing through the center of the aforesaid party wall one hundred and forty two and ten one hundredths (142.10) feet, more or less, to the property of Davis Bros., Inc., on which are located spur tracks or sidings constructed and operating under provisions of a certain ordinance of the Council of the City of Richmond, Va., approved July 17th, 1923, together with the right, privilege and easement to use in common the said spur track and sidings and so much of the property of Davis Bros., Inc., in the block bounded by Patton Avenue Boulevard Altamont Avenue, Norfolk Street and Summit Avenue, and abutting said spur tracks and sidings as may be necessary to afford the property hereby conveyed and improvements thereon free and convenient access to and use of the said spur tracks and sidings; location of said spur tracks and sidings being shown on a plat made by Chas. H. Fleet Certified Civil Engineer, dated May 24th 1924, a blue print copy of which is attached to and recorded with a deed of trust from Davis Bros., Inc., to Pollard & Bagby Inc., Trustee dated July 1st, 1924, conveying a part of the property above described.

For authority to close certain streets and alleys reference is made to (a) a certain deed of dedication between Davis Bros., Inc., and the City of Richmond, dated July 31st, 1923, and recorded in the Clerk's Office of Richmond Chancery Court in D.E. 297-3 page 247 (b) a certain ordinance of the Council of the City of Richmond, approved July 17th, 1923, a copy of which is attached to and recorded with said deed of dedication; and (c) an acceptance of Davis Bros., Inc., of the provisions of said ordinance filed with the City Clerk on September 10th, 1923.

Being a part of the same real estate conveyed to the said Davis Brothers Incorporated, by deed from Fannie Hansen Scott Executrix of will of said Scott deceased, and Fannie Hansen Scott in her own right dated August 7th, 1921, and duly recorded in said Clerk's Office in D.E. 241-3 page 441.

But this conveyance is made, however subject to six (6) certain deeds of trust now on the property as follows: Four (4) of said deed of trust being from the said Davis Bros., Inc., to Pollard & Bagby Inc., Trustee two of which are dated July 1st, 1924, one secured by property No. 1721 Summit Avenue and securing the payment of the sum of \$3000.00 together with interest thereon, as evidenced by four notes for \$750.00 each, numbered from S-2993 to S-3007 both inclusive, and payable on the first day of July 1929 with interest one per cent for \$50.00 each therein stipulated, payable semi-annually, representing interest on the said \$1500.00 bonds. The other secured by property on Nos. 1723, 1725 and 1727 Summit Avenue and securing the payment of the sum of \$12,000.00 together with interest thereon, evidenced by 12 promissory notes for \$1000.00 each, numbered from S-3100 to S-3112 both inclusive and payable on the first day of July 1929 together with interest thereon at the rate of one per cent per annum.

The other two deeds of trust being dated December 27th, 1934, one secured on No. 1717 Summit Avenue and the other on No. 1719 Summit Avenue each securing the payment of the sum of \$4000.00 as evidenced by five notes for \$800.00 each (on No. 1717 numbered from 2-2803 to 2-2807 both inclusive, and on No. 1719 numbered from 2-2808 to 2-2812 both inclusive) together with interest coupons for the sum of \$30.00 each being attached to each note representing interest on same payable semi-annually; also two deeds of trust from said Davis Bros. Inc. to Richard W. Cartington and J. Jordan Leake Trustees, dated July 18th, 1934, and recorded in the aforesaid Clerk's office given to secure the payment of the sum of \$4000.00 each as evidenced by 13 certain negotiable notes drawn by the said Davis Bros. Inc. by Lee Davis President and payable to bearer at the West End Bank of Richmond, Incorporated of Richmond Virginia, one note being a principal note for the sum of \$4000.00 payable three years after date, and the others being interest notes payable quarterly for \$75.00 each one secured on property No. 1749 Summit Avenue and the other secured on property No. 1751 Summit Avenue.

The said General Realty Corporation hereby assumes the payment of the aforesaid deeds of trust, together with all notes and interest thereon, and any renewals thereof, and obligates itself, to pay the same and save the said Davis Bros., Inc., harmless as is evidenced by its acceptance of this deed.

The said Davis Brothers Incorporated, covenants that when the right to convey the said land to the grantee, that it has been set to remember the said land; that the grantee shall have quiet possession of the said land, free from all encumbrances; and that it, the said party of the first part, will execute such further assurance of the said land as may be requisite.

IN WITNESS WHEREOF The party of the first part has caused its name to be signed hereto by its President, and its seal placed and attested by its Secretary pursuant to authority of a resolution of the board of directors of said Davis Brothers Incorporated, adopted May 26, 1941 a certified copy of which is hereto annexed as a part of this deed.



DAVIS BROTHERS INCORPORATED.
By J. Lee Davis President (SEAL)

Attest:
L. Thornton Davis
Secretary.

EXTRACTS FROM MINUTES OF A MEETING OF THE BOARD OF DIRECTORS
HELD MAY 26, 1941

BE IT RESOLVED: That the President and the Vice-President be, and each is hereby authorized for and in behalf of this corporation, and in its name to enter into such contracts for the purchase or sale, or taking or letting on lease of real estate, as they, or either of them, may in their judgment deem to be for the interest of the corporation such contracts to contain such terms and to be upon such conditions as the said officers or the one acting, shall determine; and, for the purpose aforesaid to execute or cause to be executed such deeds of bargain and sale, deeds of trust, mortgages and deeds of lease, and to execute in as grantee, for the purpose of assuming the payment of any indebtedness secured by lien upon the property thereby conveyed, such deeds of bargain and sale as they, or the one acting, shall deem proper and to execute such bonds notes

And, that all such deeds shall be executed on behalf of the corporation either by having its name affixed thereto by the President, and by having its seal affixed and attested by the Treasurer or Secretary, or by having its name affixed thereto by the Vice-President and its seal affixed thereto and attested by the Secretary.



Attest:

L. Thornton Davis.
Secretary.

State of Virginia,
City of Richmond, to-wit:

I, H. E. Watts a Notary Public in and for the City of Richmond in the State of Virginia do hereby certify that J. Lee Davis, President and L. Thornton Davis, Secretary of Davis Brothers Incorporated, by whom the foregoing deed, bearing date on the first day of October 1945, is executed on behalf of Davis Brothers Incorporated, have each acknowledged the same before me in my City aforesaid as and for the act and deed of said Corporation and declared that the corporate seal thereto affixed is the genuine seal of said Corporation and that they have executed said deed and affixed said seal by authority of the Board of Directors of said Corporation.

My commission expires August 17th, 1948.

Given under my hand this 5th day of October 1945.

H. E. Watts Notary Public.

City of Richmond, to-wit:

In the office of the Court of Chancery for said City
the 29th day of October 1945,

This deed was presented, and, with the certificate of resolution annexed,
admitted to record at 4:40 o'clock

Teste: Chas. C. Saville Clerk.

Examined

THIS DEED made this first day of October in the year 1945, between Cornwall Realty Corporation a corporation chartered and existing under the laws of the State of Virginia, party of the first part and Frank S. Richeese and Eust. C. Byline, trustees, of the City of Richmond, Virginia, parties of the second part:

~~WITNESSETH~~ That the said party of the first part doth grant and convey with general warranty unto the said parties of the second part, the following property to-wit: All that certain lot, piece or parcel of land, together with improvements thereon and appurtenances thereto belonging known as Nos. 1712, 1719 1721 1723 1725 1727 1729 and 1731 Summitt Avenue, lying and being in the City of Richmond, Virginia, on the eastern line of Summitt Avenue between Patton Avenue and Street and all rights, ways, etc. to the same belonging or in any wise being now claimed as follows to-wit: Beginning at a point on the eastern

TRUSTEES' DEED OF BARGAIN AND SALE

THIS DEED, made this 21st day of JANUARY, 1947,
between Frank S. Richeson and Robert C. Bayliss, Trustees,
parties of the first part, and, EDWARD I. WALLERSTEIN,
party of the second part:

WHEREAS, Cornwall Realty Corporation, a Virginia
Corporation, did, by deed bearing date on the first day of
October, 1925, and recorded in the clerk's office of Richmond
Chancery Court in Deed Book 324-C, page 399, convey to Frank
S. Richeson and Robert C. Bayliss, Trustees, (in trust to secure
the payment of the sum of \$25,500.00, evidenced by 65 certain
negotiable notes, dated October 1, 1925, drawn by Cornwall
Realty Corporation by H.S. Wallerstein, President, and fully
described in said deed of trust,) the following property, to-wit:

All of those certain lots, pieces or parcels
of land, lying and being in the City of Rich-
mond, Virginia, on the eastern line of Summit
Avenue between Patton Avenue and Norfolk Street,
with improvements thereon, known and designated
as Nos. 1719, 1721, 1723, 1725, 1727, 1729 and
1731 Summit Avenue, and all rights, ways and
appurtenances to the same belonging or in any
wise appertaining, and bounded and described
as follows, to-wit:

BEGINNING at a point on the eastern line of
Summit Avenue distant two hundred and thirty-
three and 85/100 (233.85) feet north of the
intersection of the eastern line of Summit
Avenue with the northern line of Norfolk Street
(which point of beginning is opposite the center
of a party wall for the use of the premises No.
1719 Summit Avenue and the property adjoining on
the south known as No. 1717 Summit Avenue) and
from said point of beginning running northwardly
along and fronting on the eastern line of Summit
Avenue a distance of one hundred and sixty-seven
and 27/100 (167.27) feet, more or less, (which
point is opposite the center of a party wall for
the use of the premises No. 1731 Summit Avenue
and the property adjoining immediately on the
north known as No. 1733 Summit Avenue) and from
said point running back eastwardly between parallel
lines and passing through the center of said party

W. I. Wallerstein 1/22/62

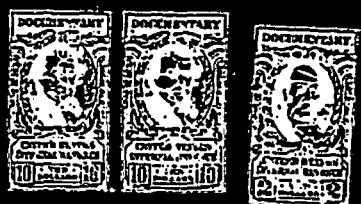
became the purchaser of said property at the price of TWENTY THOUSAND (\$20,000.00) DOLLARS, said sale being subject to prior liens on said property, said prior liens being evidenced by five (5) certain deeds of trust, all recorded in the aforesaid Clerk's office, three (3) from Davis Brothers, Incorporated, to Pollard and Bagby, Inc., Trustee, one conveying 1719 Summit Avenue, dated December 20, 1924 and recorded in Deed Book 513-C, page 208; one conveying 1721 Summit Avenue dated July 1, 1924 and recorded in Deed Book 306-B, page 401; one conveying 1723, 1725 and 1727 Summit Avenue dated July 1, 1924, and recorded in Deed Book 306-B, page 405, and two from Davis Brothers, Inc. to Richard W. Carrington and J. Gordon Leslie, Trustees, one conveying 1739 Summit Avenue, dated July 18, 1924 and recorded in Deed Book 306-B, page 408, and the other conveying 1731 Summit Avenue dated July 18, 1924 and recorded in Deed Book 307-A, page 406, and

whereas, the said EDWARD E. WALLERSTEIN, having complied with the terms of sale and having paid the sum of TWENTY THOUSAND (\$20,000.00) DOLLARS each, has requested that the aforesaid property be conveyed to him, the said EDWARD E. WALLERSTEIN.

Y TO ALL, THEREFORE, WITNESSETH: That the said Frank C. Nicholson and Robert C. Bayless, Trustees, in their capacity as such, in consideration of the sum of TWENTY THOUSAND (\$20,000.00) DOLLARS in each paid to them by said EDWARD E. WALLERSTEIN, the receipt whereof is hereby acknowledged, do grant unto the said EDWARD E. WALLERSTEIN, with Special Warranty, the above-described property subject to the above-described prior liens.

WITNESS the following signatures and seals:

Frank S. Nicholson (SEAL)
Trustee
Robert S. Bayless (SEAL)
Trustee



STATE OF VIRGINIA,

CITY OF RICHMOND, to-wit:

I, H.S. Booth, a Notary Public in and for the City aforesaid in the State of Virginia, do certify that Frank S. Nicholson and Robert S. Bayless, Trustees, whose names are signed to the foregoing writing bearing date on the 21st day of January, 1927, have each acknowledged the same before me in my City aforesaid.

Given under my hand this 31st day of January 1927.

H.S. Booth
Notary Public

My commission expires 23-1930

[Faint, illegible handwritten notes and signatures at the bottom of the page.]

THIS DEED, made this 1st day of November, 1969, between EDWARD I. WALKERSTEIN, unmarried, party of the first part, and CAMPBELL & ASSOCIATES, INC., party of the second part;

W I T N E S S E T H

In consideration of the sum of TEN DOLLARS (\$10.00) and other valuable consideration, the said party of the first part does grant and convey, with General Warranty, unto the said party of the second part, in and to the following real estate, to-wit:

All of those certain lots, pieces or parcels of land, lying and being in the City of Richmond, Virginia, on the eastern line of Summit Avenue between Jettos Avenue and Norfolk Street, with improvements thereon, known and designated as Nos. 1719 and 1721 Summit Avenue, and all rights, ways and appurtenances to the same belonging or in any wise appertaining, and bounded and described as follows, to-wit:

BEGINNING at a point on the eastern line of Summit Avenue distant two hundred thirty-three and eighty-five hundredths (233.85') feet north of the intersection of the eastern line of Summit Avenue with the northern line of Norfolk Street (which point of beginning is opposite the center of a party wall for the use of the premises No. 1719 Summit Avenue and the property adjoining on the south known as No. 1717 Summit Avenue) and from said front of beginning running northwardly along and fronting on the eastern line of Summit Avenue a distance of forty-eight and ninety-four hundredths (48.94') feet, more or less, (which point is opposite the center of a party wall for the use of the premises No. 1721 Summit Avenue and the property adjoining immediately on the north known as 1721 Summit Avenue) and from said front running back eastwardly between parallel lines and passing through the center of said party walls aforesaid a distance of one hundred forty-two and ten hundredths (142.10') feet, more or less, on the north, to the property now or formerly owned by Davis Brothers, Incorporated, on which are located spur tracks or sidings, constructed and operated under the provisions of a certain ordinance of the Council

44-6610-727

of the City of Richmond, approved July 17, 1923, together with the right, privilege and easement to use in common the said spur tracks and sidings, and so much of the property of Davis Brothers, Incorporated, in the block bounded by Paxton Avenue, the Boulevard, Altamont Avenue, Norfolk Street and Summit Avenue, and abutting said spur tracks and sidings as may be necessary to afford the property hereby conveyed and the improvements thereon free and convenient access to and use of the said spur tracks and sidings; the location of said spur tracks and sidings being shown on a plat made by Charles H. Fleet, Certified Civil Engineer, dated May 24, 1926, a blue print copy of which was recorded with a deed of trust from Davis Brothers, Incorporated, to Pollard and Bagby, Incorporated, Trustee, said plat being recorded in the Clerk's Office, Chancery Court of the City of Richmond, Virginia, in Plat Book 6, page 91.

BEING a portion of the same real estate conveyed to Edward I. Wallerstein by deed from Frank S. Peterson and Robert C. Bayliss, Trustees, dated January 21, 1947, and recorded in the aforesaid Clerk's Office on February 3, 1947, in Deed Book 491A, page 10.

Except as above set forth the said EDWARD I. WALLERSTEIN covenants that he will warrant generally the property hereby conveyed, free from all encumbrances; that he has the right to convey the said land to the grantees; that the grantees shall have quiet possession of the said land; that he has done no act to encumber the said lands; and that he will execute such further assurances of the said lands as may be requisite.

WITNESS the following signature and seal:

Edward I. Wallerstein (SEAL)
Edward I. Wallerstein

STATE OF VIRGINIA)

: to-wit:

CITY OF RICHMOND)

I, John J. Knight, a Notary Public in and for the City aforesaid, in the State of Virginia, do certify that EDWARD I. WALLERSTEIN, whose name is signed to the writing above bearing date on the 1st day of November, 1969, has acknowledged the same before me in my City aforesaid.

My term of office expires: Nov. 2, 1971
Given under my hand this 29 day of October

John J. Knight
Notary Public

THIS DEED WAS MADE THIS 10TH DAY OF DECEMBER, 1913, BY AND BETWEEN
JAMES L. FISHER, JR., a Virginia Corporation, party of the
first part, and ROBERT L. FISHER and CATHERINE E. FISHER, his
wife, parties of the second part:

W I T N E S S E T H

That for and in consideration of the sum of TEN DOLLARS
(\$10.00) and other good and valuable considerations in hand paid
to the party of the first part by the parties of the second part,
receipt whereof is hereby acknowledged, the said party of the
first part doth grant and convey unto the said parties of the
second part as Tenants by the entireties with the right of sur-
vivorship as at common law with GENERAL WARRANTY, the following
described real estate, to-wit:

ALL of those certain lots, pieces or parcels of land,
lying and being in the City of Richmond, Virginia, on
the eastern line of Summit Avenue between Patton Avenue
and Norfolk Street, with improvements thereon, known
and designated as Nos. 1719 and 1721 Summit Avenue, and
all rights, ways and appurtenances to the same belonging
or in any wise appertaining, and bounded and described
as follows, to-wit:

BEGINNING at a point on the eastern line of Summit
Avenue distant two hundred thirty-three and eighty-
five hundredths (233.85') feet north of the inter-
section of the eastern line of Summit Avenue with the
northern line of Norfolk Street (which point of beginning
is opposite the center of a party wall for the use of
the premises No. 1719 Summit Avenue and the property
adjoining on the south known as No. 1717 Summit Avenue)
and from said point of beginning running northwardly
along and fronting on the eastern line of Summit Avenue
a distance of forty-eight and ninety-four hundredths
(48.94') feet, more or less, (which point is opposite
the center of a party wall for the use of the premises
known as 1721 Summit Avenue and the property adjoining
immediately on the north known as 1723 Summit Avenue)
and from said front running back eastwardly between
parallel lines and passing through the center of said
party walls aforesaid a distance of one hundred forty-
two and ten hundredths (142.10') feet, more or less,

BOOK 677B PAGE 625

to the property now or formerly owned by Davis Brothers, Incorporated, on which are located spur tracks and sidings, constructed and operated under the provisions of a certain ordinance of the Council of the City of Richmond, approved July 17, 1923, together with the right, privilege and easement to use in common the said spur tracks and sidings, and so much of the property of Davis Brothers, Incorporated, in the block bounded by Patton Avenue, the Boulevard, Altamont Avenue, Norfolk Street, and Summit Avenue, and shutting said spur tracks and sidings as may be necessary to afford the property hereby conveyed and the improvements thereon free and convenient access to and use of the said spur tracks and sidings; the location of said spur tracks and sidings being shown on a plat made by Charles H. Fleet, Certified Civil Engineer, dated May 24, 1924, a blue print copy of which was recorded with a deed of trust from Davis Brothers, Incorporated, co Pollard and Bagby, Incorporated, Trustee, said plat being recorded in the Clerk's Office, Chancery Court of the City of Richmond, Virginia, in Plat Book A, page 91.

BEING the same property conveyed to Campbell & Associates, Inc. by deed from Edward I. Wallenstein, unmarried, dated November 1, 1969, and recorded November 12, 1969 in the Clerk's Office, Chancery Court of the City of Richmond, Virginia, in Deed Book 661 C, page 726.

This conveyance is made subject to restrictions and easements of record, if any, to the extent that same may lawfully affect the above real estate.

This deed is executed pursuant to resolutions duly adopted at a meeting of the directors of Campbell & Associates, Inc. recorded in the minute book of said corporation, such resolutions having not been altered, rescinded or modified.

Subject to the foregoing, the said party of the first part covenants that it has the right to convey said land to the parties of the second part; that it has done no act to encumber the said land; that the said parties of the second part shall have quiet possession of the said land, free from all encumbrances, and that the said party of the first part will execute

128 6770 526

such further assignments of the said land as may be requisite.

IN WITNESS WHEREOF, the said party of the first part has caused its corporate name to be hereunto subscribed by its President and its duly attested seal to be hereunto affixed by its Secretary.

CAMPBELL & ASSOCIATES, INC.

By [Signature] (SEAL)
President

ATTEST:

[Signature]
Secretary

STATE OF VIRGINIA

City of Richmond, to-wit:

I, Norman C. Patten, a Notary Public in and to the City aforesaid, in the State of Virginia, do certify that Frank J. Campbell and Richard W. Hall President and Secretary, respectively, of Campbell & Associates, Inc., whose names are signed to the writing above, bearing date on the 29th day of June, 1972 have acknowledged the same before me in my City and State aforesaid.

Given under my hand this 30 day of June, 1972.

My Commission expires: 18 day of May, 1973.

[Signature]
Notary Public

CG 74200

City of Richmond-to-wit:

73 James

This deed was presented, not, with the Certificate

Clerks Fee 8.00
Transfer Fee 1.50
State Tax 2.50
City Tax 2.50
Recorder's Tax 2.40
Total 16.90

Tax imposed by Sen. 38-34.1
Code of Va. has been paid.

In the Office of the Court of Chancery for said City, the 30th day of June, 1972, at 3:45 O'clock P.M.

Tester: [Signature] Clerk

VERIFIED
JUL 10 1972

DEED OF BARGAIN AND SALE

Date of Deed: March 23, 1981

Grantor: ROBERT L. FISCHER and CATHERINE E. FISCHER,
his wife

Grantee: S&W ASSOCIATES, a Virginia limited partnership,
LIMITED PARTNERSHIP,

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

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

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

WITNESS the following signatures and seals.

Robert L. Fischer (SEAL)

Robert L. Fischer

Catherine E. Fischer (SEAL)

Catherine E. Fischer

STATE OF VIRGINIA

CITY/COUNTY OF Richmond, to-wit:

The foregoing instrument was acknowledged before me this 24th day of March, 1981, by Robert L. Fischer and Catherine E. Fischer, his wife.

My commission expires: 12/31/81

Robert E. Longfellow
Notary Public

The Grantee's address:
c/o Mr. J. Gordon Wimmer
2307 Greenbrier Drive
Charlottesville, VA 22901

WITNESS: *Robert C. Roane*
Robert C. Roane

Ernestine Roane
Ernestine Roane

STATE OF VIRGINIA

CITY OF RICHMOND, to-wit:

I, *Rose J. Winter* Notary Public in and for the City and State aforesaid, do certify that Robert C. Roane and Ernestine Roane who are signed to the foregoing writing and who state that on the 22nd day of December, 1970, have acknowledged the foregoing writing.

Given at

the County of

the State of Virginia, this 22nd day of December, 1970.

Tax imposed by Sec. 13-14-31
Code of Va. has been paid.

In the Clerk's Office of
City and County of Richmond,
Virginia, this instrument was presented

DEC 7 1970
12350 24
and with Certificate annexed,
admitted to record.

Clerk's Fee	\$ 0.00
Tax for Fee	1.00
Notary Fee	1.00
City and County's	2.00
Ind. ...	4.00
Total	21.00

Teste: *E. E. Warner*
Clerk

VERIFIED
M.C.
DEC

ORIGINAL DEED MAILED
TO *3026 3*
3026 3

SCHEDULE "A"

ALL those certain lots, pieces or parcels of land, lying and being in the City of Richmond, Virginia, on the eastern line of Summit Avenue between Patton Avenue and Norfolk Street, with improvements thereon, known and designated as Nos. 1719 and 1721 Summit Avenue, and all rights, ways and appurtenances to the same belonging or in any wise appertaining, and bounded and described as follows, to-wit:

BEGINNING at a point on the eastern line of Summit Avenue distant two hundred thirty-three and eighty-five hundredths (233.85) feet north of the intersection of the eastern line of Summit Avenue with the northern line of Norfolk Street (which point of beginning is opposite the center of a party wall for the use of the premises No. 1719 Summit Avenue and the property adjoining on the south known as No. 1717 Summit Avenue) and from said point of beginning running northwardly along and fronting on the eastern line of Summit Avenue and a distance of forty-eight and ninety-four hundredths (48.94) feet, more or less, (which point is opposite the center of a party wall for the use of the premises known as 1721 Summit Avenue and the property adjoining immediately on the north known as 1723 Summit Avenue) and from said front running back eastward between parallel lines and passing through the center of said party walls aforesaid a distance of one hundred forty-two and ten hundredths (142.10) feet, more or less, to the property now or formerly owned by Davis Brothers, Incorporated, on which are located spur tracks and sidings, constructed and maintained under the provisions of a certain ordinance of the Council of the City of Richmond, approved July 17, 1923, together with the right, privilege and easement to use in common the said spur tracks and sidings, and so much of the property of Davis Brothers, Incorporated in the block bounded by Patton Avenue, the Boulevard, Altamont Avenue, Norfolk Street, and Summit Avenue, and abutting said spur tracks and sidings as may be necessary to afford the property hereby conveyed and the improvements thereon free and convenient access to and use of the said spur tracks and sidings; the location of said spur tracks and sidings being shown on a plat made by Charles H. Fleet, Certified Civil Engineer, date May 24, 1924, a blue print copy of which was recorded with a deed of trust from Davis Brothers, Incorporated, to Pollard and Bagby, Incorporated, Trustees, said plat being recorded in the Clerk's Office, Chancery Court of the City of Richmond, Virginia, in Plat Book 6, page 91.

BEING the same real estate conveyed to Robert L. Fischer and Catherine E. Fischer, as tenants by the entirety with the right of survivorship as at common law, by deed from Campbell & Associates, Inc., a Virginia corporation, dated June 29, 1972, filed for record June 30, 1972, Clerk's Office, Chancery Court of Richmond, Virginia in Deed Book 667-B, page 624.

VIRGINIA: IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I.

Tax imposed by Sec. 58-54.1

This deed was presented, and, with the Certificate of Compliance, to the Clerk of the Circuit Court of the City of Richmond, Virginia, for recording.

APR 2 1981

10 55 o'clock A

Clerk's Fee 10.00
Transfer Fee 1.00
State Tax 1447.50
City Tax 27.50
Grantor's Tax 95.00
Total 2481.00

Teste

John McGuire, Notary
Edward L. Kidd

Clerk

THIS DEED, made this 30th day of March, 1984, between S & W ASSOCIATES, a Virginia Limited Partnership, hereinafter designated "Grantor", and D & J ASSOCIATES, a Virginia General Partnership, hereinafter designated "Grantee";

WITNESSETH:

That for and in consideration of the sum of Ten Dollars (\$10.00) to Grantor in hand paid, and other good and valuable consideration, the receipt whereof is hereby acknowledged, the Grantor does hereby grant and convey, WITH GENERAL WARRANTY AND ENGLISH COVENANTS OF TITLE, unto the Grantee, the following described property:

ALL of those certain lots, pieces or parcels of land, lying and being in the City of Richmond, Virginia, on the eastern line of Summit Avenue between Patton Avenue and Norfolk Street, with improvements thereon, known and designated as Nos. 1719 and 1721 Summit Avenue, and all rights, ways and appurtenances to the same belonging or in any wise appertaining, and bounded and described as follows, to-wit:

BEGINNING at a point on the eastern line of Summit Avenue distant two hundred thirty-three and eighty-five hundredths (233.85) feet north of the intersection of the eastern line of Summit Avenue with the northern line of Norfolk Street (which point of beginning is opposite the center of a party wall for the use of the premises No. 1719 Summit Avenue and the property adjoining on the south known as No. 1717 Summit Avenue) and from said point of beginning running northwardly along and fronting on the eastern line of Summit Avenue a distance of forty-eight and ninety-four hundredths (48.94') feet, more or less, (which point is opposite the center of a party wall for the use of the premises known as 1721 Summit Avenue and the property adjoining immediately on the north known as 1723 Summit Avenue) and from said front running back eastwardly between parallel lines and passing through the center of said party walls aforesaid a distance of one hundred forty-two and ten hundredths (142.10') feet, more or less, to the property now or formerly owned by Davis Brothers, Incorporated, on which are located spur tracks and sidings, constructed and operated under the provisions of a certain ordinance of the Council of the City of Richmond, approved July 17, 1923, together with the right, privilege and easement to use in common the said spur tracks and sidings, and so much of the property of Davis Brothers, Incorporated, in the block bounded by Patton Avenue, the Boulevard, Altamont Avenue, Norfolk Street, and Summit Avenue,

and abutting said spur tracks and sidings as may be necessary to afford the property hereby conveyed and the improvements thereon free and convenient access to and use of the said spur tracks and sidings; the location of said spur tracks and sidings being shown on a plat made by Charles H. Fleet, Certified Civil Engineers, dated May 24, 1924, a blue print copy of which was recorded with a deed of trust from Davis Brothers, Incorporated, to Pollard and Bagby, Incorporated, Trustee, said plat being recorded in the Clerk's Office, Circuit Court, City of Richmond, Division I, Virginia, in Plat Book 6, page 91.

The property hereby conveyed is further described on a plat by Harvey L. Parks, Inc., dated March 27, 1984, and entitled "Improvements on No. 1719 & 1721 Summit Avenue, City of Richmond, Virginia," a copy of which is attached hereto and recorded herewith.

BEING the same real estate conveyed to S & W Associates, a Limited Partnership, by deed from Robert L. Fischer and Catherine E. Fischer, his wife, dated March 23, 1981, recorded April 2, 1981, in the Clerk's Office, Circuit Court, City of Richmond, Division I, Virginia, in Deed Book 780, page 153.

This conveyance is made subject to restrictions, easements and agreements of record, if any, insofar as the same may lawfully apply to said land.

WITNESS the following signatures and seals:

S & W ASSOCIATES, a Virginia Limited Partnership

By J. Gordon Wimmer (SEAL)
J. Gordon Wimmer, General Partner

By W. W. Simmers, Jr. (SEAL)
W. W. Simmers, Jr., General Partner

STATE OF VIRGINIA

CITY/COUNTY OF Albemarle, to-wit:

The foregoing instrument was acknowledged before me this 27 day of March, 1984, by J. Gordon Wimmer, General Partner, on behalf of S & W Associates, a Virginia Limited Partnership.

My commission expires: July 1, 1986

STATE OF VIRGINIA,

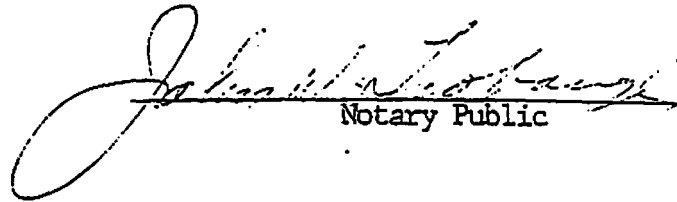
BOOK

2 PAGE 255

CITY/COUNTY OF Rockingham to-wit:

The foregoing instrument was acknowledged before me this 31 day
of March, 1984, by W. W. Simmers, Jr., General Partner, on behalf
of S & W Associates, a Virginia Limited Partnership.

My commission expires: 3-15-85


Notary Public

VIRGINIA: IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF THE CITY OF
RICHMOND, . . .

Tax Imposed by Sec. 58-54.3

Code of Va. has been paid.

This deed was presented, and, with the Certificate annexed, admitted to record on

APR 13 1984

at 10:45 o'clock A .M.

Clerk's Fee 12.00

Transfer Fee 1.00

State Tax 180.00

City Tax 60.00

Grantor's Tax 120.00

Total 373.00

File: Herschler, Fleischer

Teste:

James F. Purdy Clerk

CS139047

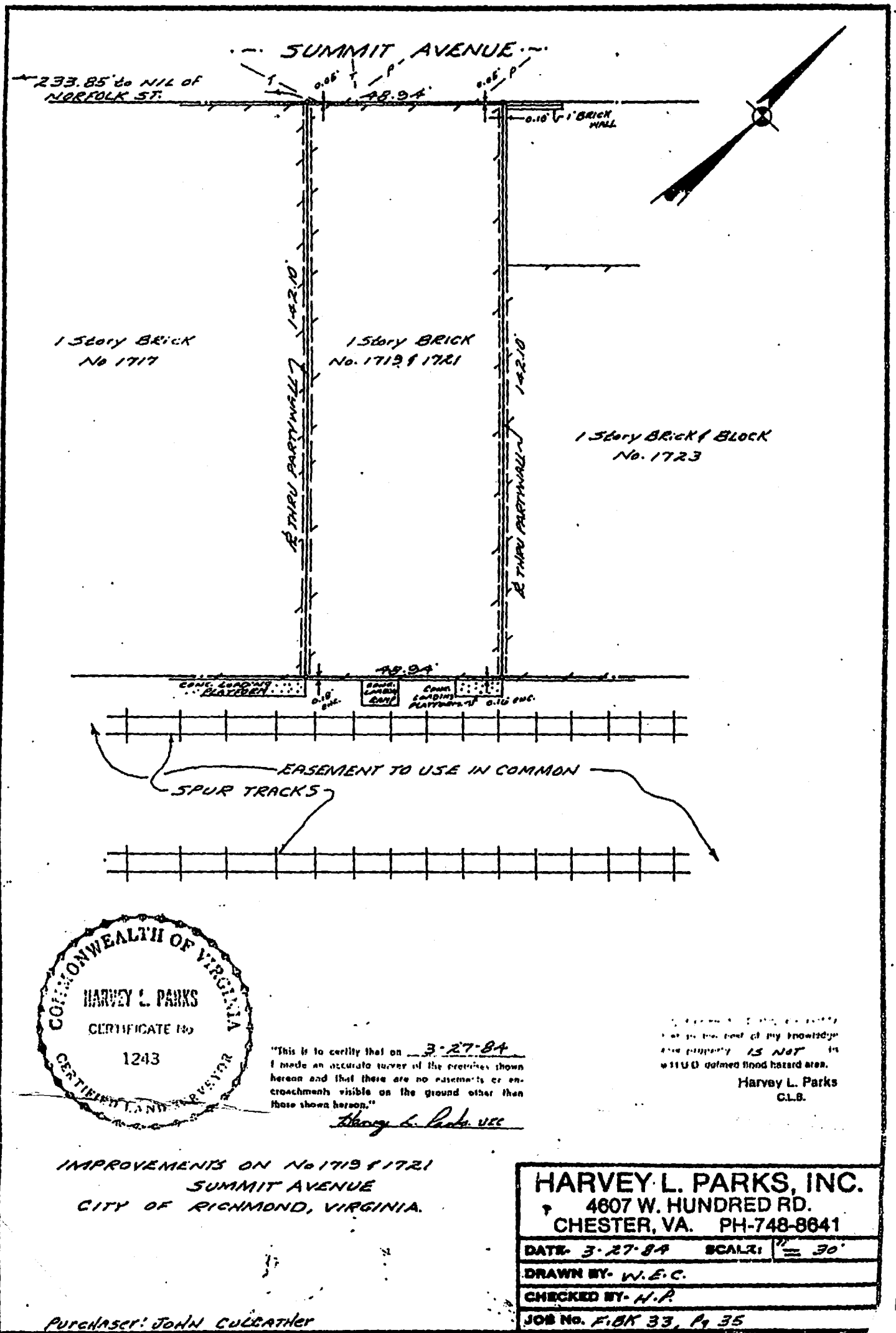
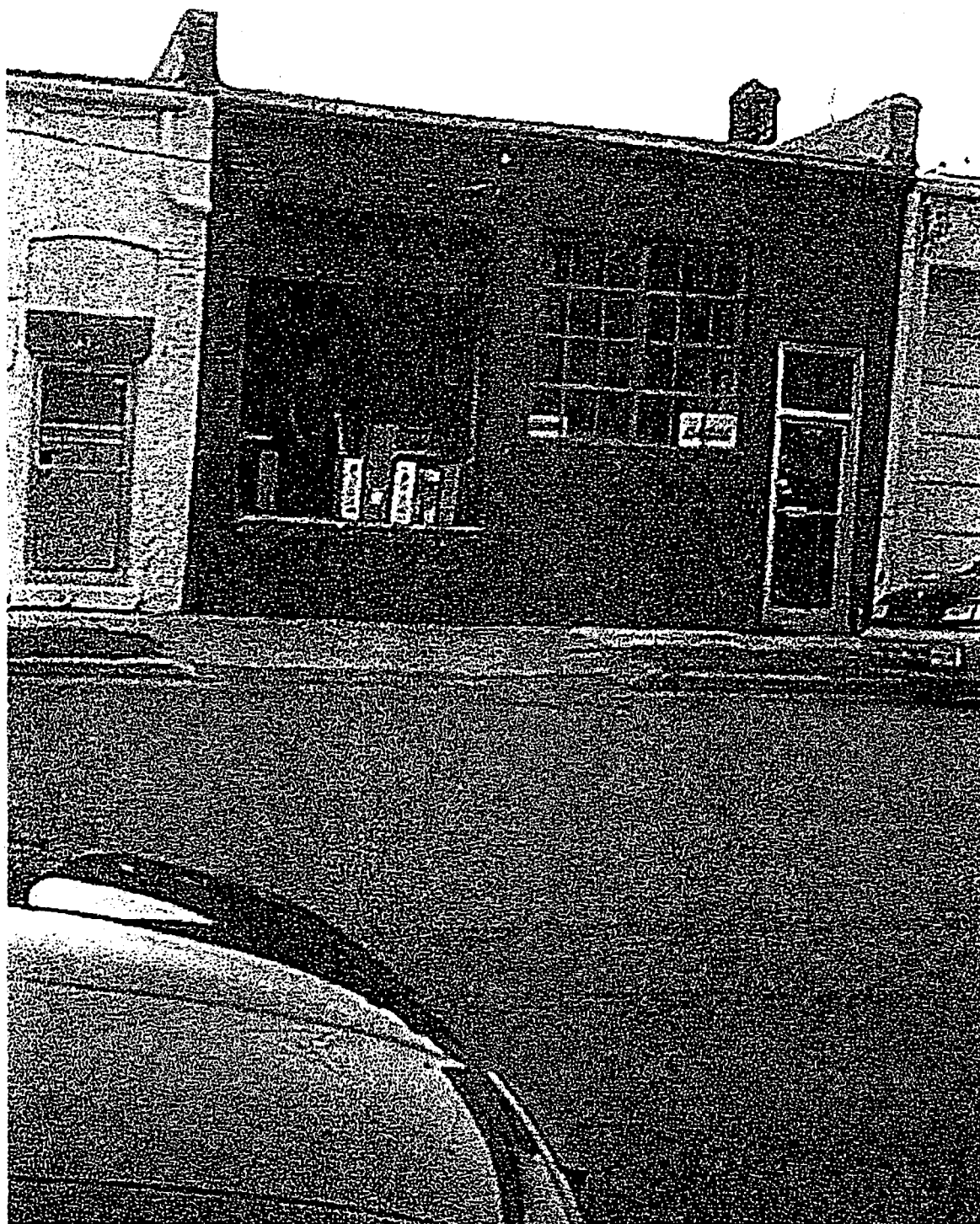


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*mu*

Image02.jpg (640x480x16M jpeg)



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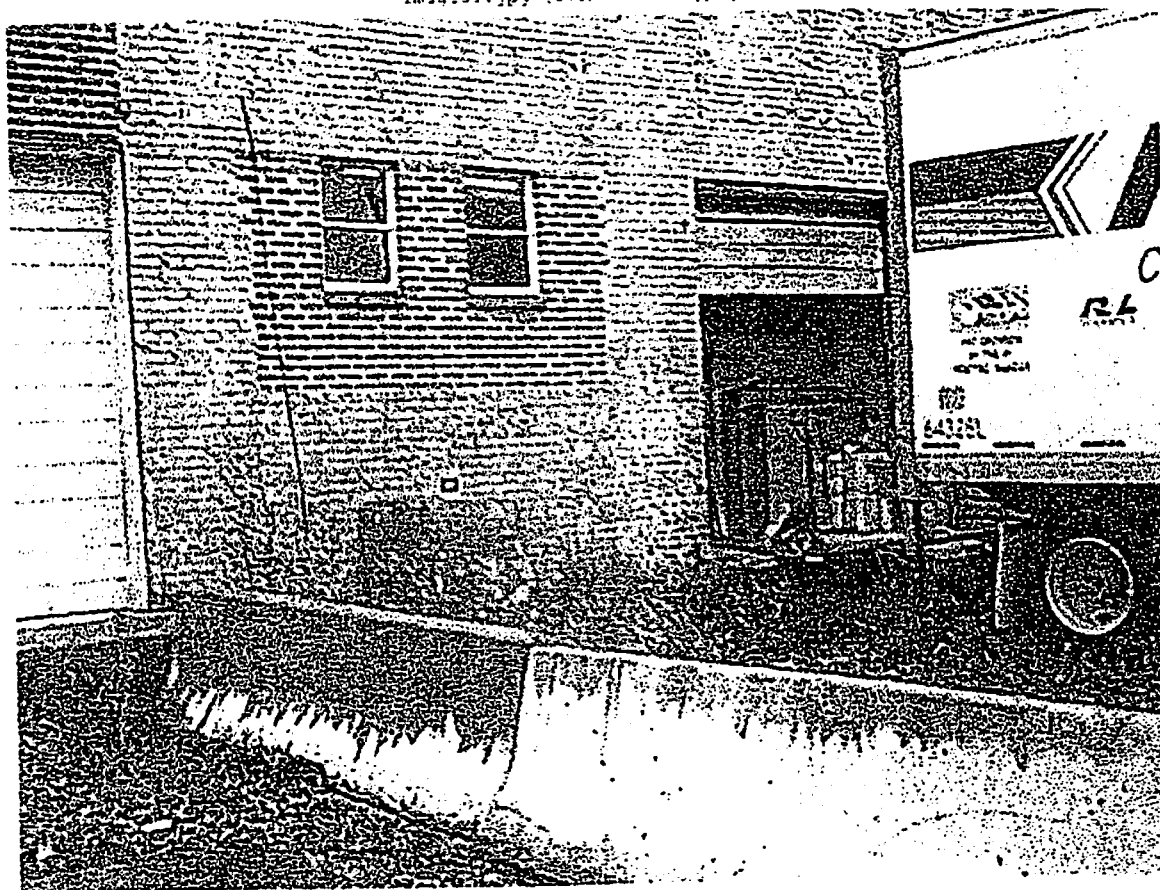
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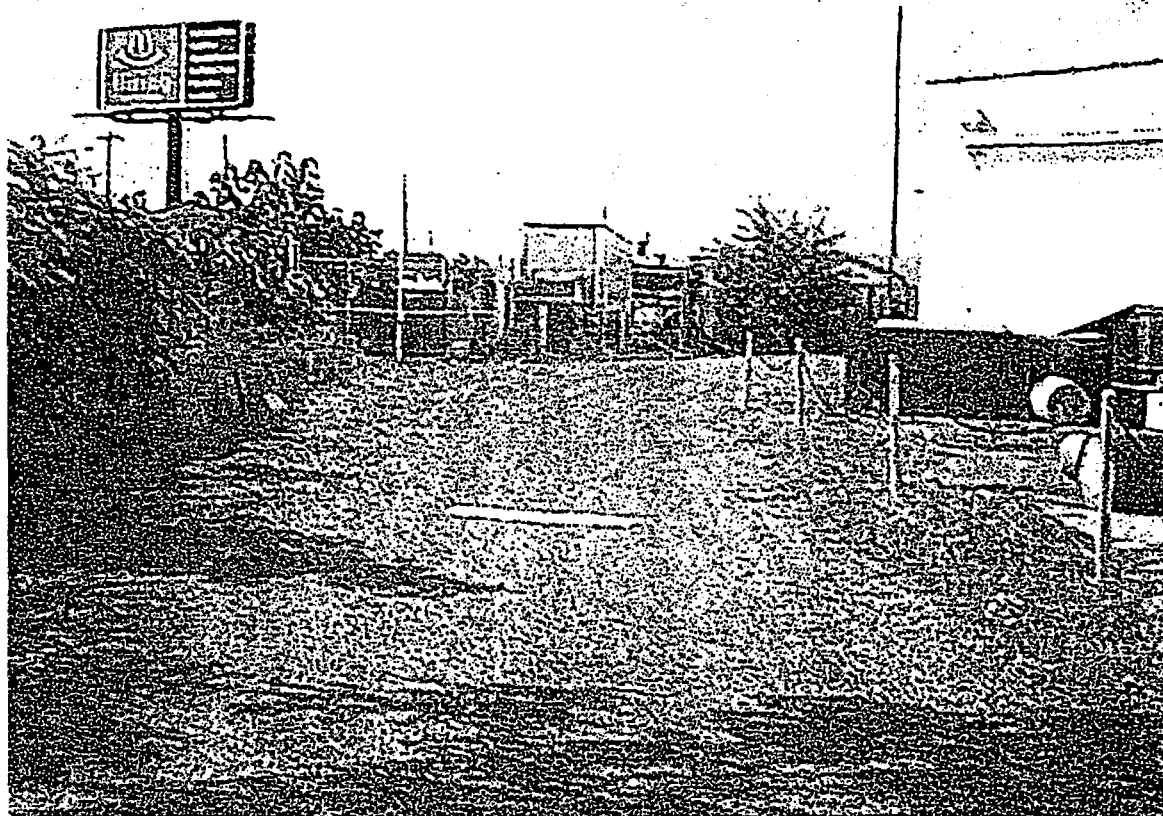


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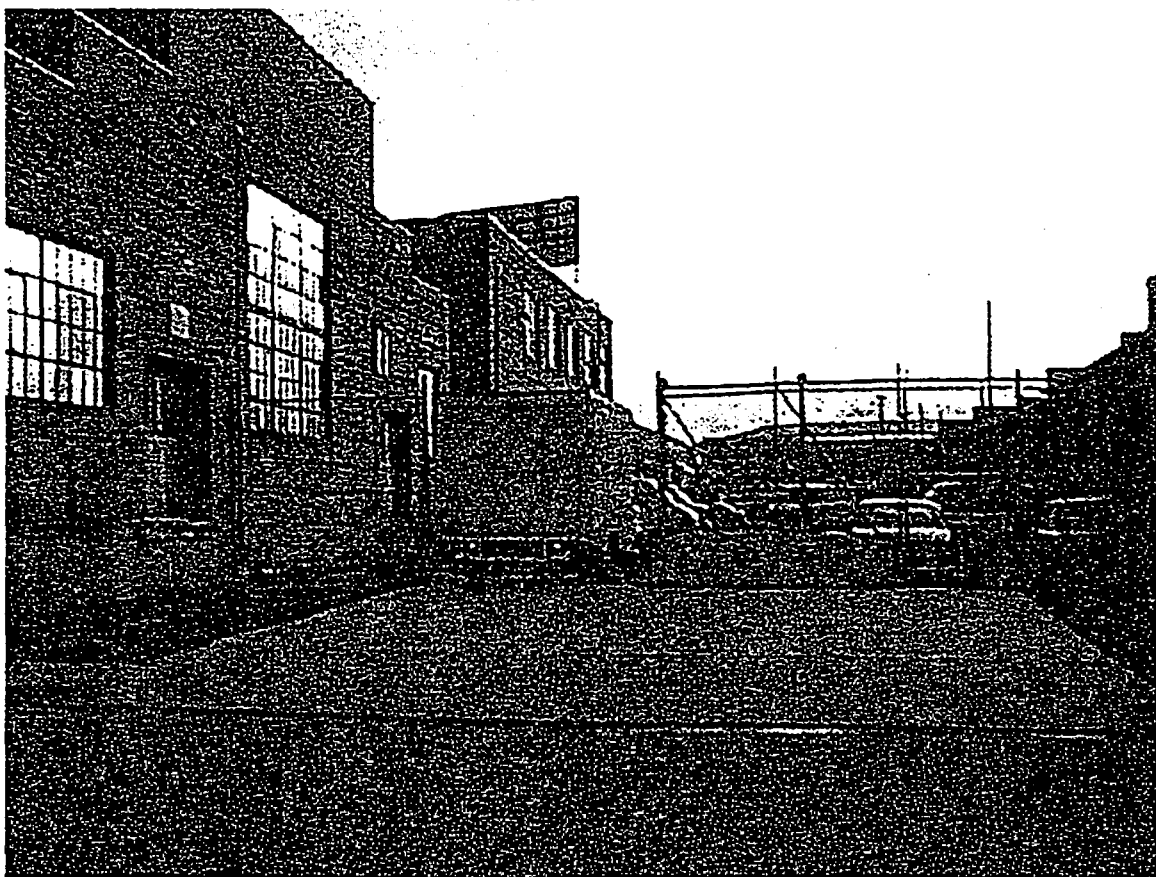


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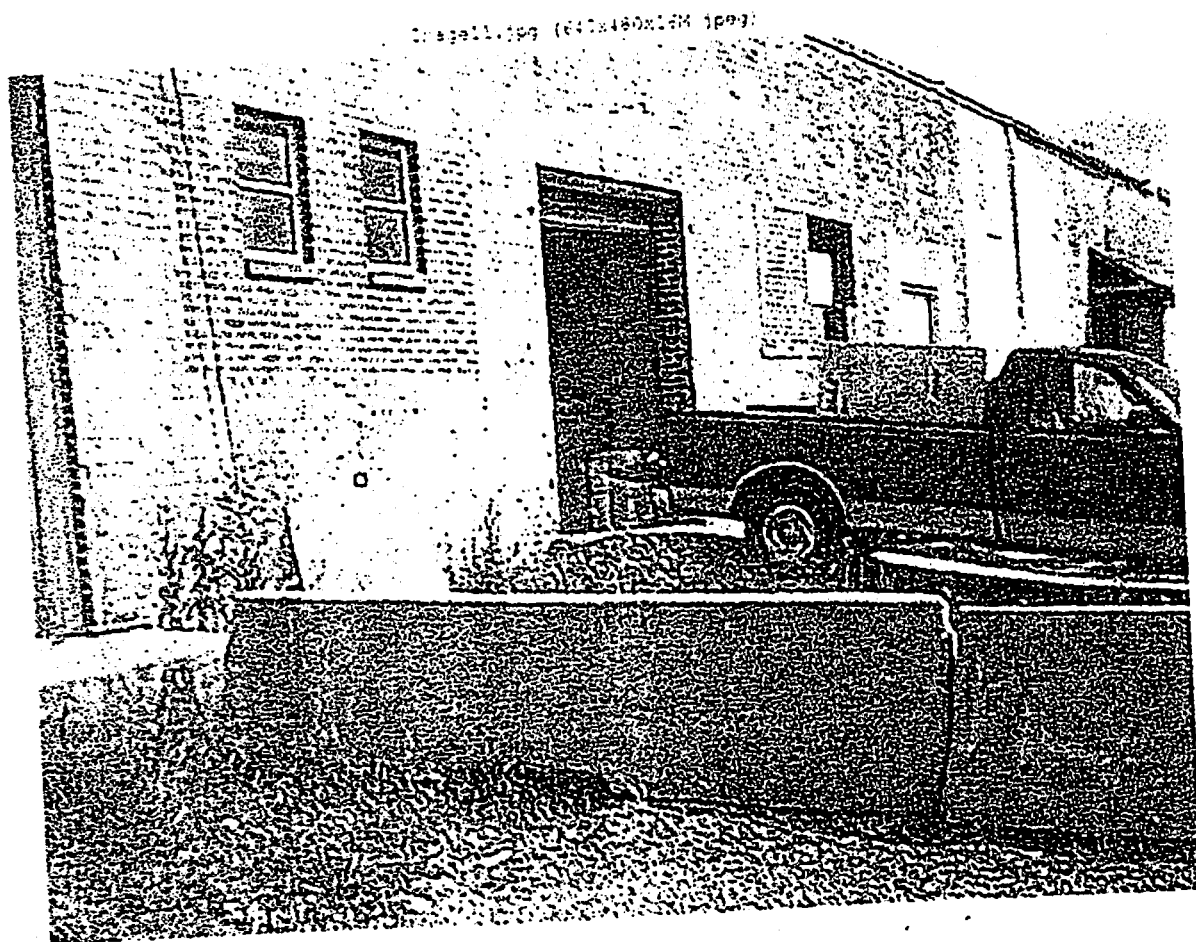


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image11.jpg 640x480x16M jpeg

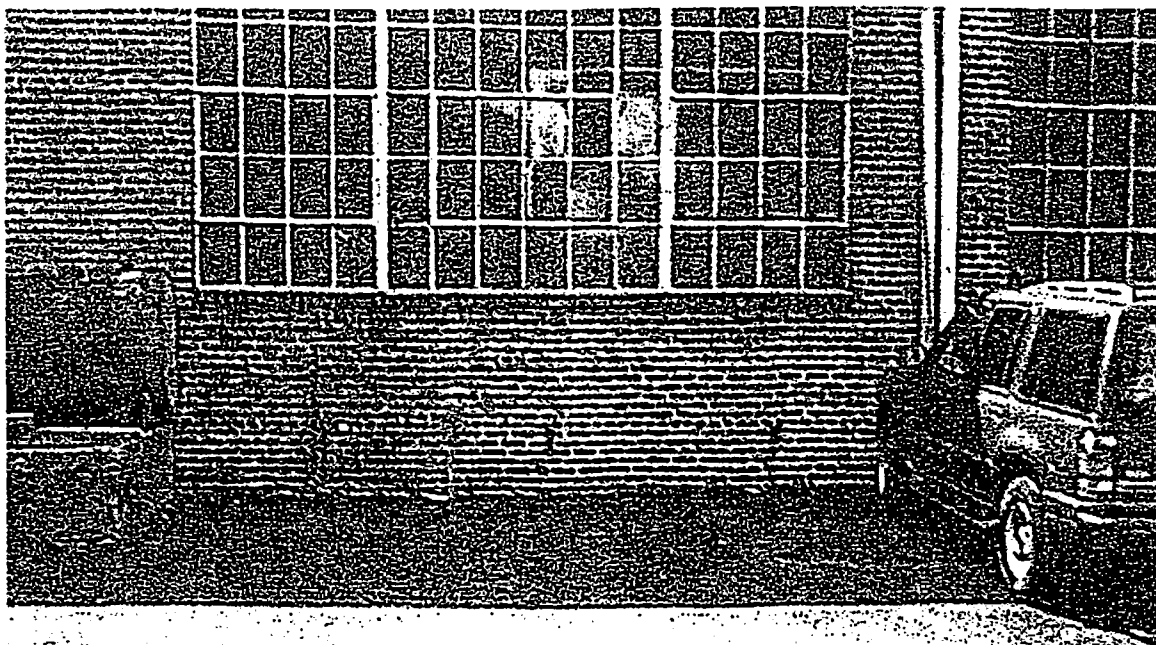


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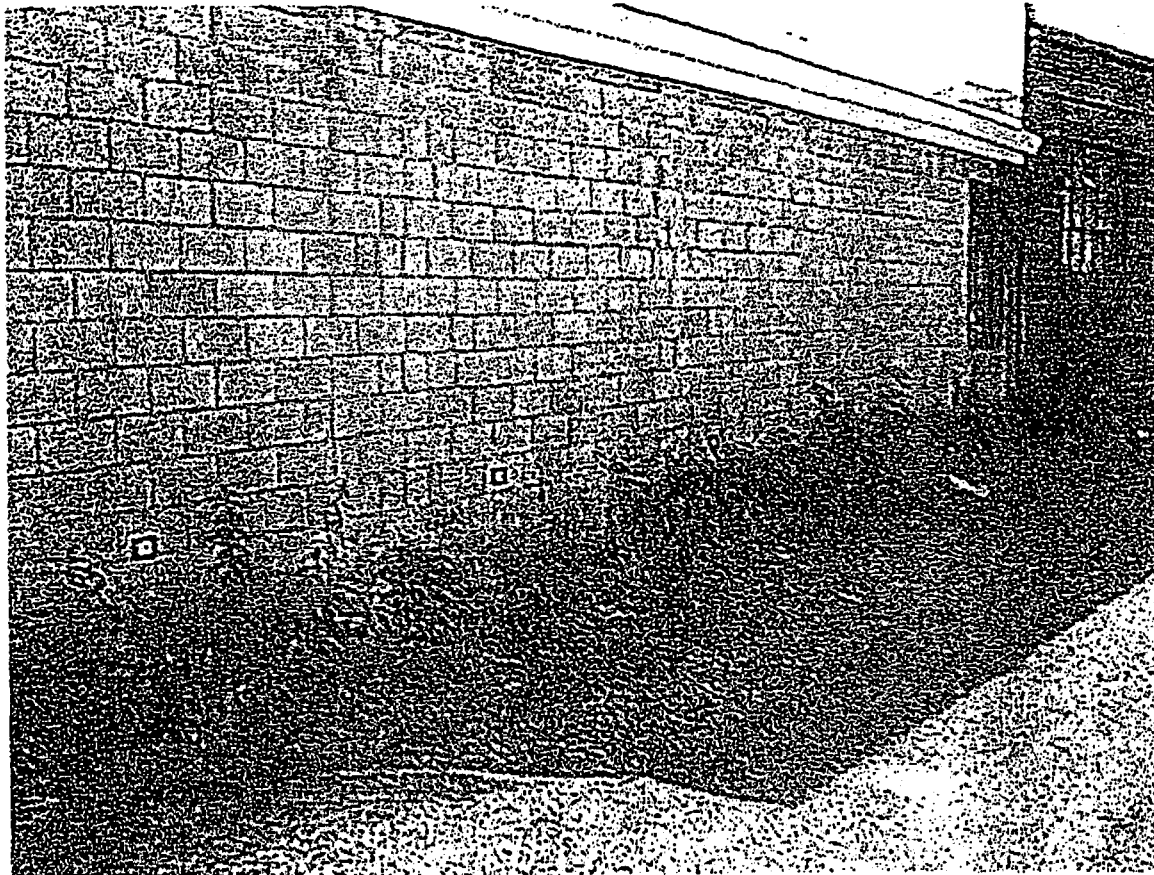
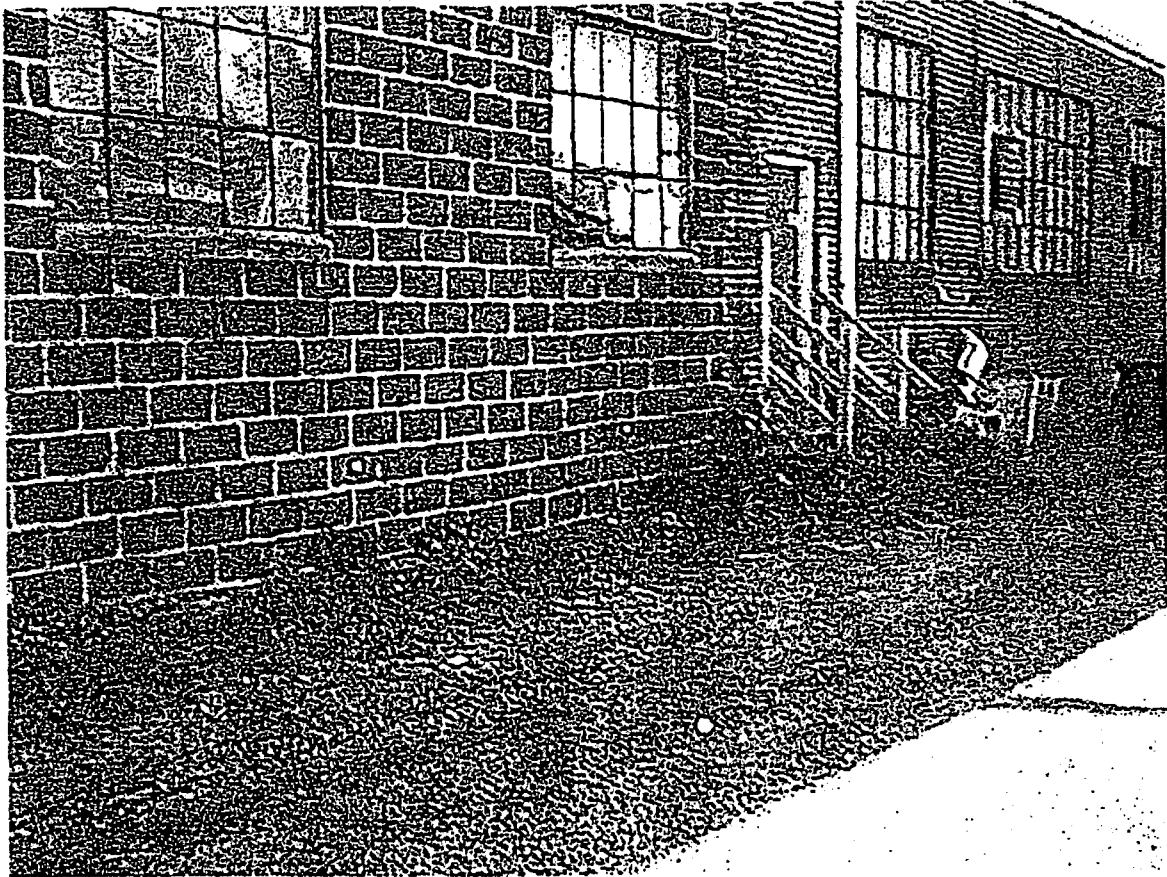


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Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

D&J ASSOCIATES

Plaintiff

v.

HN-1135

PYRAMID DEVELOPMENT, L.L.C.

Defendant

OPINION AND ORDER

The parties appeared for trial on the Plaintiff D&J Associates' Bill of Complaint seeking injunctive relief from Defendant Pyramid Development, L.L.C.'s preventing plaintiff's access to the back of plaintiff's building known as 1719-1721 Summit Avenue in the City of Richmond by delivery vehicles and evidence was presented and argument was heard.

A deed dated March 30, 1984 grants plaintiff property mentioned above and "all rights and ways" to spur tracks which existed behind the building. The tracks were taken out of service sometime in the mid 1970s according to the testimony on direct examination of two witnesses, one testifying for plaintiff and the other for defendant. Both parties agree that the deed is valid and was properly recorded with a grant of an easement. Relevant to the easement, the deed also grants:

"the right, privilege and easement to use in common the said spur tracks and sidings, and so much of the property of Davis Brothers, Incorporated, in the block bounded by Patton Avenue, the Boulevard, Altamont Avenue, Norfolk Street, and Summit Avenue, and abutting said spur tracks and sidings as may be necessary to afford the property hereby conveyed and the improvements thereon free and convenient access to and use of the said spur tracks and sidings"

The parties agree that the easement as described in the above paragraph was properly conveyed to plaintiff.

Plaintiff subsequently used the way, over which the spur tracks existed, to access the old railroad sidings to load and unload delivery vehicles ranging from vans to 18 wheelers in the course of his business. Plaintiff also used the area for parking the private vehicles of its employees during work hours. Plaintiff never had a problem with the former owners of the way except for one incident where the former owner told plaintiff to remove the private vehicles from the way. Plaintiff refused claiming the right to park and nothing further came of it. The former owners, for whatever reason, never complained again and plaintiff continued its regular use of the way.

Thereafter, defendant bought the property over which the way runs. By letter in 1999, defendant told plaintiff that access to the building would be blocked unless plaintiff helped pay for improvements to the property. Plaintiff refused and commenced this

suit. Defendant then erected a fence to prevent access from one direction and placed barriers which made access to plaintiff's loading dock difficult.

The only issue is whether plaintiff can continue his use the way to access the building in the manner employed throughout its ownership. The court finds that it can.

In *Strickland v. Barnes*, 209 Va. 438 (1968), the issue was whether a deed which granted an easement to access a future railroad siding allowed access by motor vehicle prior to the siding's construction. The language of the deed granted title subject to easements and restrictions shown on a plat. See *Strickland*, 209 Va. 438. The plat showed a 25 foot strip of land where it was written, "Reserved for future R.R. Siding." See 209 Va. at 441. The Court stated defendants' version of the issue, "[I]f [defendant] conveyed to [plaintiff] any easement across the 25-foot strip, he conveyed only an easement to use the strip for a railroad siding after a siding had been constructed. This presents the crucial question in this case: What easement or right of way across the 25-foot strip was intended by the words 'Reserved for future R.R. Siding'?" 209 Va. at 442. Agreeing with the trial court that the language of the conveyance was ambiguous, the Court condoned the use of parol evidence and affirmed the finding that

the grant encompassed the use of motor vehicles. See 209 Va. 438.

The language in the grant in this case is equally ambiguous and so the court finds it appropriate to employ parol evidence in determining whether trucks and other vehicles used by plaintiff are within the scope of the conveyance. Here, an easement for the use of tracks was granted and continued for years after the tracks were taken out of service. Plaintiff regularly used the way for the loading and unloading of trucks, vans and other vehicles from its building in the course of business.

When parking was questioned by the grantor, plaintiff asserted that the deed granted it the right to use the way in a reasonable manner for the purpose of conducting its business. Plaintiff also asserted that using the way to temporarily park while working was a part of such reasonable use.

Plaintiff brought as witnesses numerous others who used the way in the same manner as plaintiff. They also have been contacted by the new owner and each was dealing with the situation in different ways.

The court finds that the easement granted to plaintiff by the 1984 deed includes the use of the way to access plaintiff's building in a reasonable manner in the ordinary course of plaintiff's business. This result is also supported under a

related theory as described in *Wagoner v. Coal Corporation*, 199 Va. 741 (1958).

In *Wagoner*, the Court held:

[W]here a right of way is granted or reserved it may be used for any purpose to which the land accommodated thereby may reasonably be devoted unless the grant or reservation specifically limits the use, and the beneficiary of the right is not restricted to the type of vehicles or mode of travel existing at the time the easement was created, but he may use the way for any vehicle which his reasonable needs may require in the development of his estate.

199 Va. at 744. There, defendants changed their coal distribution method from wagon to trucks as technology advanced. See *Wagoner*, 199 Va. 741. The Court explained:

The easement created by the plaintiff's predecessor was a road to be used for hauling. It was described as a wagon haul road, not as a limitation on the method but to emphasize its purpose, the wagon being the most efficient vehicle for hauling known in that community at the time of the grant. Hauling by truck, the modern substitute for the wagon, did not violate the terms of the easement.

199 Va. at 744-45.

Likewise in this case, the more modern use of motor vehicles to access plaintiff's building instead of the spur tracks does not violate the terms of the easement at issue. The easement was granted to allow the plaintiff to load and unload delivery vehicles in the back of the building. Such regular, reasonable and open use of the vehicles is encompassed in the language of the easement.

Therefore, plaintiff's request for injunctive relief is granted.

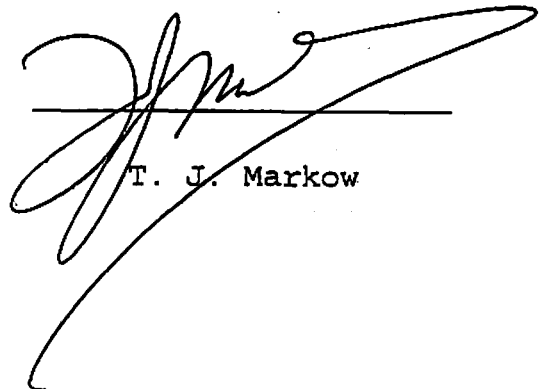
It is, therefore, ORDERED, that defendant Pyramid Development, L.L.C. is hereby enjoined from impeding plaintiff D&J Associates, its tenants, tenant's agents, employees, customers, or common carriers doing business with the same access to the back of the property known as 1719-1721 Summit Avenue between Patton Avenue and Norfolk Street through the way described in the 1984 deed from S&W Associates to D&J Associates.

Defendant's objections are noted. Signatures of the parties are waived pursuant to Rule 1:13. And nothing further to be done herein, this suit is ORDERED to be stricken from the docket and filed among the ended causes.

Copies of this order were this day mailed to counsel of record.

ENTER

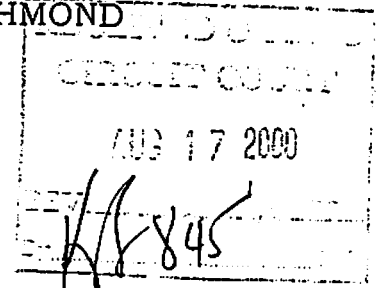
8-4-00



T. J. Markow

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
John Marshall Courts Building



D&J ASSOCIATES,

Plaintiff,

v.

Chancery No. HN-1135

PYRAMID DEVELOPMENT, LLC,

Defendant.

MOTION FOR CLARIFICATION OF ORDER

Comes now the defendant, Pyramid Development, LLC, by counsel, and respectfully moves the Court for entry of a further order clarifying the Opinion and Order entered in this case on August 4, 2000, and, in support thereof states as follows:

1. The above-captioned matter was heard before the Court on August 3, 2000. At that time, various witnesses testified as to the historic uses of the easement area in question as well as to the terms and extent of the easement originally granted.

2. Pursuant to the terms of a certain Opinion and Order dated August 4, 2000, the Court ordered as follows: "that defendant Pyramid Development, LLC, is hereby enjoined from impeding plaintiff D&J Associates, its tenants, tenant's agents, employees, customers, or common carriers doing business with the same access to the back of the property known as 1719-

1721 Summit Avenue between Patton Avenue and Norfolk Street through the way described in the 1984 deed from S&W Associates to D&J Associates."

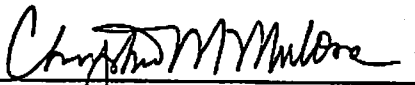
3. Since the date of entry of the Opinion and Order, counsel for the plaintiff has asserted that the Court's opinion is dispositive of the rights of the plaintiff and its employees and others to park in the easement area without limitation. Defendant reasonably believes that the rights and privileges intended to be granted by the Court relate to the right of access to the rear of the premises for purposes of loading and unloading of materials and the like.

4. In order to avoid additional litigation and disputes between the parties, it is respectfully requested that the Court provide clarification to the parties as to the intent and extent of the relief granted by the Court.

WHEREFORE, the premises considered, the defendant, Pyramid Development, LLC, respectfully moves the Court for entry of an appropriate order further clarifying the intent and purpose of the injunction granted by the Court in this matter.

PYRAMID DEVELOPMENT, LLC

By counsel



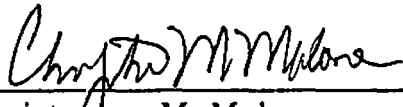
Christopher M. Malone
Thompson & McMullan, PC
100 Shockoe Slip, 3rd Floor
Richmond, Virginia 23219
(804) 649-7545
Fax: (804) 780-1813

CERTIFICATE OF MAILING

I hereby certify that a true and exact copy of the foregoing Motion for Clarification of Order was mailed first class, postage prepaid, to:

James C. Cosby, Esquire
Cantor Arkema & Edmonds
823 East Main Street
Post Office Box 561
Richmond, Virginia 23218-0561

on August 15, 2000.



Christopher M. Malone

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

D&J ASSOCIATES

Plaintiff,

v.

PYRAMID DEVELOPMENT, LLC

Defendant.

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Chancery No. 1135-3

**PLAINTIFF'S REPLY TO DEFENDANT'S
MOTION FOR CLARIFICATION OF ORDER**

A. Introduction

There is no reasonable basis for Pyramid's argument that the Court intended to restrict D&J's easement to access to the rear of its building "for purposes of loading and unloading" only, to the exclusion of the other permitted uses supported by the evidence and recognized in the Court's order. The right to park vehicles in a manner consistent with and incidental to the reasonable business purposes of the plaintiff, its tenant, agents, employees, and customers, as well as common carriers, is an equally reasonable use of the easement. Such rights are supported by the Court's ruling and is also proper given the record before the Court. Were there any question on this point, it should be resolved in the Plaintiff's favor.

B. The Court's ruling.

D&J's interpretation is supported by the Court's findings. The Court stated the issue as "whether plaintiff can continue his use of the way to access the building in the manner employed throughout its ownership. The court finds that it can." P. 3. In making this ruling, the Court had already found that such historical uses specifically included parking.

The Court had found that not only did the Plaintiff use the property “to load and unload delivery vehicles,” but that “Plaintiff also used the area for parking the private vehicles of its employees during work hours.” P. 2. (emphasis added). In fact, the Court had also found that the Plaintiff defended and continued such use after the former property owner objected, and that the owner never complained again. Id.

The Court also recognized the Plaintiff’s assertion that “the deed granted it the right to use the way in a reasonable manner for the purpose of conducting its business,” and that “using the way to temporarily park while working was a part of such reasonable use.” P. 4. (The Bill of Complaint also asserted parking as a reasonable use for the easement). Having already found that the Plaintiff could continue to use the way to access the building “in the manner employed throughout,” the Court then found that the easement granted the plaintiff “the use of the way to access plaintiff’s building in a reasonable manner in the ordinary course of the plaintiff’s business.” Id. The last page of the Court’s ruling enjoined Pyramid from impeding not only the use by common carriers of the property subject to the easement, but also the use by “D&J Associates, its tenants, tenant’s agents, employees,” and “customers” the “same” access to the property. As the Court had found, such uses included parking. Indeed, access would be of no value if it did allow such persons the right to park in connection with their legitimate business.

Pyramid does not explain how the Court, having found that the consistent prior use of the easement included the parking of employee’s vehicles during work hours, and that the Plaintiff could continue his use of the way “in the manner employed throughout,” at the same time meant to exclude such parking in the future as “unreasonable.” Nor does Pyramid explain how the parking of a privately owned vehicle of a customer, employee, or invitee is unreasonable, when the parking of tractor trailers, vans, and delivery cars throughout the day is not.

C. Discussion

The Supreme Court in Strickland did not exclude parking when it recognized the plaintiffs' easement for access to their properties by motor vehicle. The Court stated that "the language of the deed and the construction placed thereon and acted upon by the grantees and acquiesced in by the grantor for many years must determine the rights of the parties of this suit." 209 Va. at 444, quoting Hostetter v. Hutchings, 119 Va. 131, 134 (1916). Here, such acquiesced uses included parking. Nor did the Court in Wagoner exclude parking where incidental to the use of the easement. As this Court recognized, Wagoner affirmed that a right of way "may be used *for any purpose to which the land accommodated thereby may reasonably be devoted* unless the grant or reservation specifically limits the use."

Parking in the manner discussed above is a historical and reasonable use of the easement. There is also no reservation against such parking in D&J's deed, and this Court should not impose such a restriction given the record in this case. It bears repeating that Mr. Wilcox, called by Pyramid, agreed that since 1969 the easement was used for parking, which was among the uses enjoyed by adjoining property owners such as D&J. Both Pyramid's grantor, and Pyramid itself, have referred to the property as a "parking area." Accordingly, the Court's ruling concluded by stating that Pyramid is enjoined from impeding not only common carriers, but "D&J Associates, its tenants, tenant's agents, employees" and "customers" with the same access to the property. As many of these parties will continue to have to park in connection with their access to the building, for reasons other than "loading and unloading," a restriction against such incidental parking as Pyramid seeks is inconsistent with the Court's ruling and the case law and the record on which it is based.

Pyramid has also mischaracterized D&J's position. D&J has not asserted that its rights to park are "without limitation." As D&J represented to this Court, its rights of parking are those set forth above. For instance, D&J has not asserted that it has the right to run a vehicle repair operation in the easement, or to park vehicles for salvage, to store vehicles, or to park them in a manner that would wrongfully infringe on the easement rights of others, such as blocking access through the way in the manner that Pyramid has, or in the words of Wagoner, to park vehicles in "a manner other than any purpose to which the land accommodated therein may reasonably be devoted." This is because such uses are not consistent with the prior uses established by parol evidence, or they are unreasonable given the uses of the land accommodated.

The insincerity of Pyramid's position is exposed by the steps it has taken since the Court's ruling, which violate even those portions of the Court's ruling that it has no quarrel with. For instance, Pyramid has proceeded to divide the common use area into parking spaces that will restrict access to the rear of D&J's property, including by blocking large trucks attempting to enter through the gate in the fence it has erected. The positioning of the fence, given the parking spaces that will apparently be assigned, will block access for larger vehicles to make deliveries to the rear of D&J's building, frustrating the needs of D&J's tenant, Radac, Inc. ("Radac"). Pyramid continues to post signage restricting access to all but its own invitees or licensees and threatening to tow violators. The fence bears a sign stating, "Private Parking, Pyramid Development Authorized Parking Only, Towing Enforced." Such threatened action cannot co-exist with D&J's rights to allow its customers and invitees to access the property as the Court has ruled.

D. Other Issues

Should any modification to the Court's ruling be made, it should be an express denial of the restriction Pyramid proposes. Further, the record would support a modification that would award D&J its proven damages. A court of equity will do "complete justice between the parties, enforcing if necessary, legal rights and applying legal remedies to accomplish that end." Waskey v. Lewis, 224 Va. 206, 213 (1982). The Virginia Supreme Court confirmed an aggrieved party's entitlement to quantifiable compensatory damages for deprivation of easement rights. Dilloughan v. Hall, 225 Va. 1, 3-4 (1988). As held in a recent circuit court decision, "although the Plaintiff is entitled to injunctive relief in this case, only compensatory damages will provide complete justice between the parties." Westerra Weston, LLC, v. Walker, et al, Circuit Court of Fairfax County, Ch. No. 164601, June 2, 2000. Accordingly, D&J is entitled to damages in an amount not less than One Thousand One Hundred and 00/100 Dollars (\$1,100.00), representing the lost rental value of the property as of the date of this trial. The record is also sufficient to support such use by prescriptive or adverse use.

E. Conclusion

Any clarification or modification of the Court's order should be limited to confirming the parking rights of those parties mentioned in the Court's ruling, consistent with its opinion and the above discussion. The Court may also modify its order to award damages in the amount proven at trial.

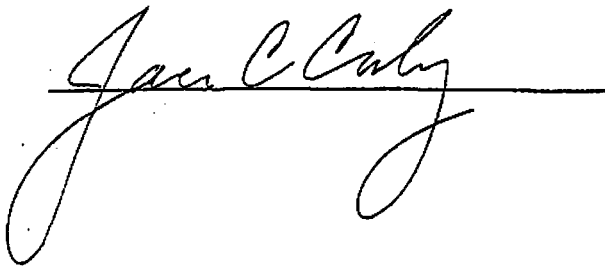
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CERTIFICATE OF SERVICE

I hereby certify that on August 23rd, 2000, a true copy of the foregoing was sent via hand delivery, to Christopher Malone, 100 Shockoe Slip, Richmond, Virginia 23219.


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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

John Marshall Courts Building

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SUPREME COURT OF VIRGINIA

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RICHMOND, VIRGINIA

D & J ASSOCIATES,

Plaintiff,

-vs-

PYRAMID DEVELOPMENT, LLC,

Defendant.

* Chancery Number:
* 1135-3
*
*
*

ORIGINAL

August 24, 2000

The complete transcript in the above, heard
before The Honorable T. J. Markow, Judge.

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

THE COURT: All right. Why are we here, Mr. Malone?

MR. MALONE: We're here on my motion.

THE COURT: I haven't seen your motion. When did you file it?

MR. MALONE: Your Honor, it was filed on the 15th, I believe.

THE COURT: I looked yesterday. I didn't see anything.

MR. MALONE: Your Honor, it was filed. I know Counsel received it on that date.

THE COURT: I got his response, but I didn't see anything you filed. Go ahead. Tell me what your situation is.

MR. MALONE: Well, your Honor, it's an unusual motion. It's an unusual case. We've asked the Court for some assistance in interpreting the Court's order. As the Court will recall, this matter was heard on August 3rd and 4th. The Court entered a written opinion and order that granted relief to the plaintiff upon certain terms. In reviewing the order, as entered by the

1 Court, the issue as to the extent and nature
2 of the parking rights that the Court
3 intended to grant to the plaintiffs in this
4 case has become a matter of concern to us,
5 and we're asking the Court if we couldn't
6 please clarify its intent in that regard.

7 THE COURT: I don't know how I can
8 clarify anything. You're asking for an
9 advisory opinion now.

10 MR. MALONE: Your Honor, I'm asking the
11 Court -- it's in the nature of a motion for
12 reconsideration, your Honor. What we're
13 concerned about here is that we believe that
14 the Court intended in its ruling to order
15 that we do nothing to interfere with access
16 to the rear of the premises owned by the
17 plaintiff for purposes of unloading and
18 loading materials. We acknowledge the
19 Court's ruling in that regard, and we intend
20 to comply with it.

21 Beyond that, we're uncertain as to what
22 the Court's intention was with respect to
23 other uses that may have been intended by
24 the Court to be accorded to the plaintiffs
25 by its opinion that may relate to unrelated

1 parking of vehicles by its employees or
2 others, for purposes other than loading and
3 unloading at the rear of the premises.

4 It's a matter of real concern to us,
5 Judge. As the Court well knows, opinions
6 such as this opinion speak to not just
7 today, but they speak through history. And
8 they speak through history to subsequent
9 owners and users of both of these
10 properties.

11 The Court made reference in its opinion
12 to the fact that there had been parking use
13 made by the plaintiff. The Court also noted
14 the testimony, again, that was before the
15 Court. We offered that the prior owners had
16 said they contested that right, but that the
17 plaintiff was allowed to continue to use it
18 for parking purposes associated with its
19 use.

20 THE COURT: Wasn't allowed to; he just
21 did it.

22 MR. MALONE: Yes, your Honor, without
23 further action by the then owner. Now
24 there's a real question in my mind as to
25 whether or not any adverse term of 20 years

1 was proved in that regard, but more
2 importantly, your Honor, I don't think that
3 there was adequate evidence to allow that,
4 that right, which we will concede, your
5 Honor, based on your opinion, has to be
6 granted with respect to the specific use of
7 loading and unloading materials and
8 equipment, to mature into something more.

9 THE COURT: Get practical with me,
10 Mr. Malone, and tell me what is it that they
11 could do or you think that they might do
12 that bother you-all from a practical
13 standpoint?

14 MR. MALONE: Well, your Honor, as we
15 sit here today, there's dumpsters back
16 there; there's trash behind the building.
17 And they have told us and told others they
18 intend to park their vehicles, of employees
19 and others, back there any time they want;
20 not only behind their building but in the
21 whole area.

22 My client has to own this real estate
23 and has to pay taxes on it. The City of
24 Richmond expects him to continue to maintain
25 the property. If something goes on there

1 improperly, he has to clean it up, and we
2 need to understand from the Court what the
3 extent of the right is that the Court
4 granted.

5 We believe the Court needs to go back
6 to the original grant, the deed, our Exhibit
7 Number 6, which says they've got the right
8 of ingress and egress. The Court so ruled
9 now, from either side of the property to get
10 to the rear of their buildings for purposes
11 of loading and unloading. We'll concede
12 that.

13 Beyond that, though, we ought to have
14 some economic use of our property, and we
15 need the Court's direction. They've got a
16 loading dock. We understand; we can't block
17 the loading dock, and they can get to it.
18 But what use can we make of the balance of
19 our property?

20 They would assert they can park their
21 vehicles anywhere behind our building, any
22 time they want, for any purpose they want.
23 We believe that's an unusual extension of
24 the easement, the written easement that was
25 of record.

1 Now, the Court has now accepted parole
2 evidence and said that original easement was
3 ambiguous. I don't know how far the Court
4 intends for that easement now to extend.
5 And I come quite candidly, your Honor --
6 would ask the Court to reconsider its
7 opinion and ask for a clarification on that
8 point, so we know what the parties are to do
9 in the future.

10 My client takes the Court's rulings
11 very seriously and wants to comply with the
12 Court's order. He wants not to be back
13 before this Court, with eight or nine other
14 adjoining land owners having this issue
15 raised. He wants not to be back before this
16 Court with somebody suggesting he's in
17 contempt of the Court's order. And I've got
18 to tell you, as his counsel, your Honor, I
19 can't, upon reviewing the opinion, determine
20 what the extent of the parking right granted
21 is, other than to say that it's very clear
22 to me that they're supposed to be able to
23 park in aid of loading and unloading of
24 vehicles. I understand that. Beyond that,
25 I don't know.

1 And I ask the Court please to help us
2 with that, because it's a very important
3 issue in terms of the economic value of this
4 property to my client. In terms of the
5 future rights of Mr. Cullather and his
6 tenants, he has a use there now. That use
7 may change in 5 years. And without some
8 understanding as to what his future tenants'
9 rights may be with respect to parking behind
10 the building, other than in aid of loading
11 and unloading, we're going to be back in
12 court again.

13 There's ample on-the-street parking for
14 these people. We need to know what the
15 Court's intent is.

16 THE COURT: Mr. Cosby?

17 MR. COSBY: Judge, thank you. This is
18 not an unusual case. It's not an unusual
19 case. It's no more unusual than Strickland
20 and Hostetter and Wagoner, all of which were
21 observed by this Court. If Mr. Malone fears
22 some limitless use of the property that is
23 subject to the easement -- excuse me -- if
24 his client fears that, I say with all due
25 respect, his client is ill-advised.

1 This Court, in making its ruling
2 followed the same framework as the Supreme
3 Court followed in Strickland. And that was
4 in finding where the conveyance was
5 ambiguous -- and the Court was correct, the
6 conveyance is ambiguous -- then the Court
7 looks to two things. It looks at the
8 historical uses that have been acquiesced in
9 by the owners. The historical uses that
10 have been acquiesced in by the owner here,
11 by the grantor here, have included parking.
12 They have included parking by employees,
13 parking by agents in connection with their
14 reasonable business purposes of the
15 property.

16 Then we also look at the language that
17 this Court quoted in Wagoner, which says
18 that the easement may be used for -- I have
19 it in my papers; I have a five-page
20 memorandum that really contains all of this.
21 But this Court has already quoted Wagoner in
22 the language that said, "The easement may be
23 used for any reasonable use to which the
24 lands will be dedicated." That incidental
25 parking consistent with the reasonable

1 business purposes of these invitees, of
2 these employees, of the owner himself, will
3 continue to be reasonably used.

4 THE COURT: Let me ask you this --

5 MR. COSBY: Yes, sir.

6 THE COURT: -- the owner, the plaintiff
7 here, as I understand the evidence, has had
8 the lot platted and spaces for parking
9 spaces marked off.

10 MR. COSBY: He has planned to do that.
11 He has not --

12 THE COURT: Let's assume he does. He's
13 got lines drawn where people are supposed to
14 park. And he has gone around to these other
15 owners, and said, you know, I'll -- we
16 talked about the deal; I forgot what it was
17 now. They would pay so much for the cost of
18 paving and so much a month, and they would
19 have the right to parking space 103 or 605
20 or whatever it may be.

21 MR. COSBY: That's right.

22 THE COURT: And let's assume that they
23 paid for that, and they have their people
24 parking in these particular spaces --

25 MR. COSBY: Uh-huh.

1 THE COURT: -- but one of them doesn't
2 come in before one of Mr. Cullather's
3 tenants, employees comes in. And this
4 employee parks in a place that was reserved
5 for somebody else. What does that other guy
6 do? What are his rights?

7 MR. COSBY: Well, that goes to my next
8 point, and that is there are limitations on
9 our use of the easement. For instance, we
10 can't -- other than some obvious things: We
11 can't park an airplane there. We can't
12 store vehicles --

13 THE COURT: I'm talking about a car.

14 MR. COSBY: We cannot use our easement
15 in a manner that would interfere with the
16 common uses that are vested in adjoining
17 property owners, and we cannot interfere
18 with --

19 THE COURT: Well, can the guy next-door
20 have the -- I think there was somebody,
21 somebody who testified said, Yeah, he came
22 to me, and I said, Okay, I will agree to
23 this and I want these four places here,
24 whatever the number is. Does that person
25 have the right to park in those four places?

1 MR. COSBY: I believe that absent any
2 other facts, he does.

3 THE COURT: Absent what?

4 MR. COSBY: Just based on those facts,
5 he would.

6 THE COURT: Suppose Mr. Cullather's
7 tenant has gotten there first that day?

8 MR. COSBY: Whose building is he
9 parking behind at this point?

10 THE COURT: His.

11 MR. COSBY: Not D & J's?

12 THE COURT: Right.

13 MR. COSBY: D & J's invitees and the
14 people whose rights are concurrent with the
15 Court's rulings cannot park in a manner that
16 will deprive the easement rights of others.
17 So he cannot block the access of somebody
18 else to his loading dock or --

19 THE COURT: We're not talking about
20 blocking the access of somebody's door.
21 We're talking about an employee of a
22 tenant's -- Mr. Cullather's tenants'
23 business.

24 He's got to park somewhere. He's going
25 to be there all day; comes in at

1 8:00 o'clock in morning; going to leave at
2 5:00.

3 MR. COSBY: That's correct.

4 THE COURT: All right. Can he park
5 behind some other landowner's building? Not
6 where -- I mean some of them, as I recall
7 didn't have loading docks back there.

8 MR. COSBY: Some do, and some don't;
9 that's correct.

10 THE COURT: So this is one with no
11 loading dock. This is just a vacant place
12 that day. Can he just pull in there and
13 park for the day?

14 MR. COSBY: As long as it does not
15 infringe on any other easement rights, he
16 can.

17 THE COURT: Well, it's clearly going to
18 infringe on somebody.

19 MR. COSBY: Well, then he can't --

20 THE COURT: No two bodies can occupy
21 the same space at the same time, so another
22 car can't park there. So what happens?

23 MR. COSBY: Well, he going to have to
24 move to allow for the fair use of that space
25 consistent with that person's right to use

1 it. If he has arranged for a private
2 agreement with Pyramid to have exclusive use
3 of that space, then I do not -- then I do
4 not prevent it, and it, it -- parking there
5 would not be seen as reasonable and
6 consistent use of the parking that we have
- 7 enjoyed consistently throughout. Then, no,
8 I don't think we can take that person's
9 space.

10 THE COURT: Tell me what you contend
11 is, under the order, the right of D & J's
12 tenants with regard to parking or other,
13 what do you call them, invitees?

14 MR. COSBY: Invitees, employees, and
15 people like that. I think that the proper
16 reading of the Court's ruling in this case
17 is that our easement includes parking
18 consistent with prior use and reasonable
19 uses.

20 THE COURT: Tell me what that means.
21 Let's talk about what that means.

22 MR. COSBY: The test of -- well, you
23 know, what is, what is clearly permitted and
24 what is clearly not permitted, the test
25 there is the historical uses of the easement

1 by the plaintiff in question. Here we have
2 never tried --

3 THE COURT: That means we've got to try
4 this case over every time there's a problem.

5 MR. COSBY: Well, you could say that
6 about every single injunction case.

7 THE COURT: No, we can write that into
8 the opinion.

9 MR. COSBY: Write what?

10 THE COURT: We can revise the opinion
11 in a way that says what the rights are. And
12 we should do that, I would think.

13 MR. COSBY: Well, this Court has
14 already properly ruled that D. & J continues
15 to have an easement with the same access to
16 the property in a reasonable matter that
17 includes the rights to park private
18 vehicles.

19 The Court mentioned in two places that
20 it was finding that the plaintiff continues
21 to have the same use of the easement. On
22 page 3 and on page 5, it found that. The
23 Court had already found in three places --

24 THE COURT: I know what I found,
25 Mr. Cosby. I'm trying to get practical with

1 you.

2 MR. COSBY: Yes, sir.

3 THE COURT: Your people and
4 Mr. Malone's have got to live with it.

5 MR. COSBY: That's right.

6 THE COURT: You and I and Mr. Malone
7 have the luxury of being able to argue
8 intellectually about all these things, but
9 one of these days you'll go back to doing
10 something else. Malone will go back
11 somewhere else, and I'll go another place,
12 but they're left to live with it. So we've
13 got to make it as easy as possible for them
14 to deal with.

15 MR. COSBY: And I agree with that, and
16 our client would be well-advised, I can
17 assure you or advised to the best of our
18 ability. Let me make sure the record is
19 clear, though, as to what the conditions are
20 out there right now. There is not trash
21 behind our space. You know what's behind
22 our space? As of yesterday morning, you
23 remember the Jersey walls, the concrete
24 barriers that were supposedly protecting
25 paving; well, the paving has now been

1 completed. Now there are nine of them that
2 have been collected, and guess where they're
3 stored? Right at the rear of our property.

4 THE COURT: What's that got to do with
5 what we're talking about today?

6 MR. COSBY: Because he has represented
7 that we have collected trash --

8 THE COURT: Please. You-all do that on
9 a show cause. Right now, all I want to know
10 is how are your clients, both of them, going
11 to live under this order? And if it's not
12 clear, then we need to make it clear.

13 MR. COSBY: Well, I think if any --

14 THE COURT: And I'm trying to find out
15 from you what it is your client contends
16 they have a right to do --

17 MR. COSBY: We have a right --

18 THE COURT: -- historically?

19 MR. COSBY: Yes, sir.

20 THE COURT: And when you say parking,
21 that's a broad term. You go downtown and
22 run into the 7-Eleven, you park while you go
23 in and get a Slurpy, but it's also when you
24 go into the parking deck where you work, you
25 park there for the day. Both are parking.

1 MR. COSBY: Judge, I don't own an
2 easement.

3 THE COURT: What are we talking about
4 here as parking?

5 MR. COSBY: What we're talking about
6 here is simply the same parking that has
7 been exercised up to this date. Let me
8 define that: That is parking that is
9 incidental to the reasonable business
10 purposes of this owner, his agents, his
11 employees.

12 THE COURT: That means nothing. Does
13 it mean all day parking?

14 MR. COSBY: It does.

15 THE COURT: It means more than just
16 parking there for the purpose of running in
17 picking up something and coming out?

18 MR. COSBY: Well, it does, because what
19 their burden is, they have to show that any
20 parking other than in connection with
21 loading and unloading of goods is a more
22 unreasonable use of the easement than
23 otherwise.

24 There is nothing more unreasonable
25 about a privately-owned vehicle sitting in

1 the same space where a common carrier, an
2 18-wheel truck, would be pulling in and out
3 of all day.

4 THE COURT: So the place they could
5 park would be right behind the loading dock
6 and nowhere else?

7 MR. COSBY: I believe that's correct.
8 I believe that's correct. Regarding
9 parking, I believe that's true. There's no
10 doubt about the extent of that parking.

11 THE COURT: And you don't contend that
12 the parking right is broader than that?

13 MR. COSBY: Well, I -- not necessarily.

14 THE COURT: It's important that we draw
15 these distinctions, Mr. Cosby, because I can
16 assure you these people are going to be
17 back, and I don't want them to have to
18 expend the money --

19 MR. COSBY: It's us who are going to be
20 back.

21 THE COURT: -- to deal with something
22 that we can deal with now. I mean, if you
23 and Mr. Malone were setting this up as a
24 deal, a commercial transaction between these
25 people, these matters would be resolved, and

1 we would get them pinned down. It's not a
2 commercial deal; I understand. But if we
3 can treat it like that, then I'd like to get
4 it resolved. So whatever their rights are
5 and whatever the rights of their successors
6 in interest are going to be established, I
7 would like to say for all time, but I'm
8 smart enough to know that isn't going to
9 happen; somebody will find something to
10 fight about.

11 MR. COSBY: Well, I think the facts are
12 going to show that we're going to have to be
13 here before you.

14 THE COURT: Well, let's try to avoid
15 that.

16 MR. COSBY: I agree with that. I
17 propose what we do then is to submit mutual
18 sketch orders that we believe properly
19 defines the extent of parking rights that
20 the Court has ruled on. But I believe that
21 the Court has already recognized the rights
22 of parking because twice, they say -- twice
23 the ruling says, and it's -- Strickland, the
24 Strickland case never excluded parking that
25 was incidental to the --

1 THE COURT: I understand, but I never
2 said -- and I guess I'm in my mind not clear
3 as to how -- what parking means in this
4 context.

5 MR. COSBY: Well, I think park--

6 THE COURT: It could mean that, you
7 know, they -- the premises of your client is
8 being used for some, I don't know, something
9 brings in lots of people, maybe church
10 meetings or whatever it may be. So
11 everybody, you've got to have a hundred
12 people have got to have parking places and
13 they all flood this space back here. I
14 wouldn't think that's included.

15 MR. COSBY: I wouldn't think so,
16 because that is not a reasonable use of the
17 property as it exists.

18 THE COURT: So we've got one car
19 parking at the loading dock to that, that we
20 could fight about. I'm trying to cut that
21 area down.

22 MR. COSBY: Well, I don't -- it is
23 really ridiculous to say that they have lost
24 all economic value of the property.

25 THE COURT: They would if the church

1 analogy was accepted. And I guess somebody
2 could argue that under this --

3 MR. COSBY: We don't have the right to
4 fill up that parking lot so nobody else can
5 park there. There's no question about that,
6 and we have never asserted that right.

7 THE COURT: How far would your rights
8 run?

9 MR. COSBY: I believe the reasonable
10 use for the uses of our employees and common
11 carriers.

12 THE COURT: Which means what?

13 MR. COSBY: Well, which means, no
14 question, parking at the rear of our
15 building and perhaps temporarily parking
16 while we can move one of our employees or
17 another common carrier, so we can bring that
18 delivery in and get them out of there.
19 That's how it's worked for years and years
20 and years.

21 I think we go too far when we fear
22 that, you know, a Pandora's box has been
23 opened up. Because the fact of the matter,
24 there's no dispute on record involving how
25 everybody uses these spaces until --

1 Mr. Malone is correct -- a change of use did
2 occur. But it is his client, he is now
3 changing the use of his building. And he is
4 just proceeding pell-mell over top of
5 easement rights that are of record.

6 I mean, that was clear with
7 Mr. Yesbeck's property whose lost an alley.
8 I mean, that is going to be addressed. But
9 I do not believe there's any fear that we
10 have started a chain of events into action
11 that is going to lead to unlimited turmoil.
12 The Strickland case, the Hostetter case, and
13 the Wagoner case did not -- I think in
14 almost every injunction case that I have
15 heard in this court and other courts, I
16 think the courts have been correct to
17 decline the invitation to get into a fine
18 line-drawing exercise as to, Well, you can
19 have a blue fence, but not a white one; you
20 can have a chain fence or be solid. The
21 courts have always said, You know what's
22 allowed.

23 THE COURT: I don't agree with that,
24 Mr. Cosby. I hope judges are wiser than
25 that, and I've never consciously done that.

1 Because I know if there's an area that's
2 gray, somebody will color it one color or
3 another, and that will make somebody else
4 unhappy.

5 MR. COSBY: I will agree with you
6 there, but I think what we are dealing with
7 is a motion for reconsideration, because the
8 Court has already ruled twice that the
9 individual, our owners -- excuse me, our
10 owner, our tenants, invitees, and employees
11 are entitled to the same use that it has
12 enjoyed historically.

13 There have been no abuses of other
14 people's property rights. No witness has
15 testified to that; even their witness
16 doesn't testify to that. And there's going
17 to be none in the future.

18 We will certainly propose language that
19 we believe will bring greater definition to
20 that, but I think -- I don't want, I don't
21 want the Court to fear that because such
22 rights can't be defined to the satisfaction
23 of the defendant, then such rights should no
24 longer be recognized, because I think the
25 Court's ruling is four square on point.

1 It follows, it follows Strickland,
2 Hostetter, and Wagoner. And in Strickland,
3 there was no exclusion. Strickland
4 confirmed the access rights of private
5 property owners adjoining an easement to
6 access their property by motor vehicle.
7 There, there was no evidence at all that
8 such access was for delivery and undelivery
9 [sic.]

10 It goes without saying, that if you can
11 drive to it, you ought to be able to stop
12 the car. I mean, I hope they're not saying
13 that unless somebody's carrying a package,
14 we've got to jump in and out of a moving
15 vehicle.

16 So then they have to say that there is
17 something more unreasonable about a car
18 being parked there because somebody is
19 making a delivery, versus a car being parked
20 there because somebody is working there.
21 And there are simply -- there's certainly
22 nothing more unreasonable about that. And
23 if anybody is inconvenienced by that, it
24 will be D & J. If we have an employee
25 parked there, and we have a delivery coming

1 in, the person that's going to be
2 inconvenienced by that is the tenant. And
3 the tenant is going to have to deal with
4 that. It's not going to affect their estate
5 at all.

6 And they do have economic value. They
7 have the right to park behind their
8 building. For these people that do not have
9 easement rights, and there are undoubtedly
10 some, they have the right to charge for
11 parking to assigned spaces there, as long as
12 it doesn't block the access we've had. And
13 I think they know how to do that, and that
14 is don't block that end. It doesn't become
15 too complicated.

16 THE COURT: All right. Mr. Malone?

17 MR. MALONE: I will try and be brief.
18 I do think there's an important issue and an
19 important point to be made here. Your
20 Honor, aside from those spaces that may
21 exist behind any other building here, we
22 need clarification from the Court as to what
23 it intends the easement to include behind
24 D & J's building.

25 We understand clearly, loudly, without

1 question, that they have a right to get to
2 their docks, to load and unload.

3 THE COURT: And parking, if that is in
4 accordance with historical usage.

5 MR. MALONE: Parking at the docks,
6 certainly, your Honor. But what about the
7 spaces in between? Do they have that too?
8 Can they park five vehicles back there
9 because --

10 THE COURT: Well, Mr. Cosby says they
11 don't want to do that. That's what he
12 described.

13 MR. MALONE: Well, if that's the
14 case --

15 THE COURT: Is that a problem?

16 MR. MALONE: That's not a problem. If
17 they want access to parking at the dock
18 sites and nothing further, we can deal with
19 that clarification, if that's what the Court
20 means --

21 THE COURT: Well, if that's what
22 you-all agree to, then I don't have to
23 decide what it means.

24 MR. MALONE: Your Honor, with no
25 disrespect, I still don't agree with the

1 opinion, but I'm trying to get clarification
2 on it. And I think we need the Court to
3 tell us what the Court intends. And again,
4 with no disrespect, I think there is a hole
5 in the opinion on this question, Judge, and
6 we come here sincerely --

7 THE COURT: There's no hole. It says
8 exactly what the law I think says. And that
9 is that you can use it consistent with
10 historical purposes. The problem is, what
11 does that mean?

12 MR. MALONE: Well, your Honor, I don't
13 think your opinion actually says that.
14 That's what Mr. Cosby says.

15 MR. COSBY: It does.

16 THE COURT: But that's your -- no,
17 that's neither here nor there. Assuming it
18 says that, you don't know what historical
19 purposes are, but more importantly, when
20 these people have passed on -- I don't mean
21 to a greater place, but passed on as
22 owners -- and somebody else is there,
23 they're not going to know what that means.
24 And they should be able to look somewhere to
25 see what it means.

1 MR. COSBY: Judge, it's -- the record
2 says what it was.

3 THE COURT: Mr. Cosby, nobody but
4 lawyers are going to have to come look to a
5 record. Nobody does that. Real people
6 don't do that. Lawyers do that. We've got
7 to make this for people beyond us.

8 MR. COSBY: Well, if there's a dispute,
9 a lawyer's going to get involved and --

10 THE COURT: We don't want a lawyer
11 involved. I'm trying to avoid that.

12 MR. MALONE: That's why I'm here,
13 Judge.

14 THE COURT: If he's in agreement with
15 what I thought he said, and is the right to
16 load and unload, which none of us thinks is
17 ambiguous. And the ability to park a
18 vehicle in that space where you load and
19 unload, i.e., at the loading dock, and I
20 assume a place to keep the dumpster, that
21 historically they've had a dumpster there;
22 that was my understanding of the evidence.

23 MR. MALONE: I don't know there's any
24 evidence they had a dumpster out there.
25 There's dumpsters out there. I don't know

1 whose they are.

2 THE COURT: I thought there was a
3 dumpster out there.

4 MR. COSBY: There is. In a commercial
5 area, everybody has a dumpster. The only
6 one who doesn't have a dumpster is his
7 client because he's converting for
8 commercial use --

9 THE COURT: But if we have these two
10 things, and that's all we're talking about,
11 and it seems to me I think that was the
12 evidence as to historical use, I will, I
13 will restrict the opinion to that extent.

14 MR. MALONE: Your Honor --

15 THE COURT: That does not mean, and I
16 think that would be your concern, that D & J
17 would have the right to park anywhere within
18 that easement, and I don't think they do.

19 MR. MALONE: Correct. Thank you, your
20 Honor.

21 THE COURT: And I don't think Mr. Cosby
22 asserts that they do?

23 MR. COSBY: No, I don't. There is one
24 distinction I do want to make. It doesn't
25 upset the apple cart, but I think Mr. Malone

1 has misunderstood me if he thinks I'm saying
2 that all we have to do, in terms of
3 privately-owned vehicles, or anybody's
4 vehicle -- let's say a common carrier. Say
5 it comes to have them sign an invoice. I
6 mean, that's why it's so silly to have it
7 restricted to loading and unloading. But I
8 have not said that it's our position that we
9 have, only have the right to park the car in
10 front of the loading bays.

11 MR. MALONE: See --

12 THE COURT: That's what you did say.

13 MR. COSBY: No, I haven't -- if I did,
14 let me make that more clear: As the Court
15 found in its findings of fact, the plaintiff
16 also used the area for parking private
17 vehicles of its employees during work hours.
18 What area are we talking about? We're
19 talking about the easement to the rear of
20 the building, which it says right there.
21 That is a correct finding of fact.

22 THE COURT: But that's all over is the
23 problem. The easement behind the building
24 runs from one street to the other, like an
25 alley.

1 MR. COSBY: The easement is what it is,
2 but the historical use of the easement has
3 been to use it to access our building and
4 including parking in the vicinity of our
5 building. We haven't shown a historical use
6 that we have stacked up cars to the rear of
7 the building that's now owned by Pyramid,
8 and that's why I don't think we have that.

9 MR. MALONE: Your Honor, I ask the
10 Court's guidance. I think the Court's
11 interpretation of what the Court meant as
12 stated a few minutes ago, is perfectly
13 acceptable, and that will give us the
14 guidance we need.

15 THE COURT: You don't agree to it, I
16 know.

17 MR. MALONE: No, your Honor. But if
18 you will give us the guidance --

19 THE COURT: Is that inconsistent, in
20 your opinion, with what the evidence was?

21 MR. MALONE: It's consistent with what
22 I thought the evidence could be interpreted
23 to be.

24 THE COURT: A version of the evidence.

25 MR. MALONE: Yes, your Honor.

1 MR. COSBY: I think what's going on is
2 he is whittling down -- he's trying to
3 whittle down the Court's ruling, and I don't
4 think that should be done.

5 THE COURT: I don't intend my ruling to
6 be global, Mr. Cosby.

7 MR. COSBY: And I don't think --

8 THE COURT: I know you would like to be
9 able to argue that.

10 MR. COSBY: I don't think it is, Judge.
11 I really don't.

12 THE COURT: Well, when I ask you to get
13 specific, you have a problem with that.

14 MR. COSBY: I don't. If I have a
15 problem, it's I simply have -- if there's a
16 problem, it is simply the problem with the
17 yardstick that has been provided to us by
18 the case law. And that is -- that has been
19 provided by Hostetter v. Hutchings, where it
20 says: "The language of the deed" -- now,
21 here, we've agreed that the deed is
22 ambiguous. "And the construction placed
23 thereon and acted upon by the grantees and
24 acquiesced in by the grantor for many years
25 must determined the rights of the parties at

1 this" --

2 THE COURT: All right. What are they?

3 That's just a statement of principal
4 that means something in this case and will
5 mean nothing to anybody else beyond that.
6 It is nothing but a fight from now on if we
7 don't define that.

8 MR. COSBY: I think what it tells us to
9 do is we have to look at the record, because
10 we have to see what was the construction
11 placed thereon.

12 THE COURT: All right. So
13 Mr. Cullather's tenant goes out there and
14 parks six cars somewhere.

15 MR. COSBY: Six cars --

16 THE COURT: And, and the --
17 Mr. Malone's client says, Look, you've got
18 too many cars here, and they're parked in
19 the wrong place. And they each say in
20 response to that, We've got to look at the
21 record. So what do they do? All of them,
22 the six cars, the tenant, and Mr. Malone's
23 client come running to the court; they pull
24 out the file and look at the record?

25 MR. COSBY: No, no --

1 THE COURT: Well, that's the whole
2 point. I'm trying to avoid -- let's get --
3 Look, these people have real lives to lead
4 when they leave us.

5 MR. COSBY: No question about that.

6 THE COURT: Well, let's make it easy.
7 You-all are trying to make it difficult.

8 MR. COSBY: It is easy. What we do --

9 THE COURT: That's not easy for me.
10 Maybe I'm not as smart as you or them, but I
11 don't think that's easy. I think we've got
12 to spell out what we mean.

13 MR. COSBY: Then we will spell out what
14 we mean. And where we go for that guidance
15 is what the record was before this Court,
16 and we'll put that in an order. If an order
17 needs to be set forth that says employee
18 parking in the vicinity of the rear of the
19 building is among the rights of parking that
20 this Court has recognized, then we will do
21 that. But that was the record before the
22 Court.

23 I agree; we don't have to send parties
24 to read transcripts, to come to the clerk's
25 office. If we need -- if the Court believes

1 that a more specific order is appropriate,
2 then I will gladly submit our interpretation
3 of that.

4 THE COURT: I think it does. It has to
5 be specific, and I think it has to be
6 specific in that I'd like to get it specific
7 with regard to exactly how many spaces,
8 where they are --

9 MR. MALONE: Your Honor, I certainly
10 agree with the Court's interpretation of a
11 few minutes ago. If, if the Court's intent
12 is that they have a right to gain access to
13 the loading docks and park in relationship
14 to that loading dock, so be it.

15 Beyond that, I don't know that any
16 logical interpretation of the easement or
17 the history says they've got rights beyond
18 that.

19 THE COURT: All right. Let's do this,
20 gentlemen. I hate to do this, but let's do
21 it. That's what I think the evidence
22 supports. What I want you-all to do is
23 this: First of all, I've got to have an
24 order that vacates this one from the
25 standpoint of the 21 days, because that's

1 tomorrow, isn't it?

2 MR. MALONE: Yes, your Honor.

3 THE COURT: I'll prepare an order today
4 that will do that, is vacate this one.

5 I want from you-all, I want a new
6 order. I mean a new opinion, an order and
7 all that, just a very simple, one- or
8 two-page document that spells out in detail
9 what the various rights are with regard to
10 parking. And we ought to include in that
11 access, just so that people can look for one
12 paper, rather than have to look at the other
13 one.

14 And I don't want you to go consider
15 that to mean an opportunity for either of
16 you to revise, and to let's say renegotiate
17 the deal.

18 MR. MALONE: No, your Honor.

19 THE COURT: I want you to draw up
20 something consistent with my opinion,
21 consistent with the evidence, that will
22 specify what parking places we're talking
23 about, where they are, what access in and
24 to, and that type of thing, and where it is,
25 and submit them to me with -- what's today?

1 Today is Thursday. By next Thursday.

2 MR. MALONE: Each of us submit them
3 separately, your Honor?

4 THE COURT: Unless you can agree.

5 MR. MALONE: I doubt it.

6 THE COURT: I doubt it too, but if you
7 could, that would be great.

8 MR. MALONE: Yes, sir.

9 THE COURT: We would preserve, in any
10 such order, the objection of the plaintiff.
11 You're the plaintiff, right?

12 MR. MALONE: He's the plaintiff.

13 THE COURT: Objection of the defendant
14 to any ruling that permits the access that
15 we're talking about, but that -- we'll go
16 from there.

17 Any problem with that?

18 MR. MALONE: No, sir.

19 MR. COSBY: I don't think so, Judge.

20 THE COURT: All right. Give me
21 something by Thursday.

22 MR. COSBY: All right, Judge.

23

24 (Proceedings concluded at 11:10 a.m.)

25

* * * * *

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

D&J ASSOCIATES

Plaintiff

v.

HN-1135

PYRAMID DEVELOPMENT, L.L.C.

Defendant

O R D E R

The order of August 4, 2000 is hereby vacated. Copies of this order were this day mailed to counsel of record.

Enter:

8,124,000

T. J. Markow

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

D&J ASSOCIATES

Plaintiff

v.

HN-1135

PYRAMID DEVELOPMENT, L.L.C.

Defendant

O R D E R

On August 3, 2000, the parties appeared, in person and by counsel, for trial on the merits of the plaintiff's Bill of Complaint and petition for permanent injunction and the defendant's Answer thereto. Upon consideration of the pleadings, the testimony of witnesses heard in open court, the exhibits offered by the parties, and argument of counsel, the court took the matter under advisement; and

Thereafter, on August 4, 2000, the court issued its opinion and order in this matter (the "Opinion"), reciting therein its findings of fact and conclusions of law based on consideration of the evidence and argument offered at trial, and granted to the plaintiff certain injunctive relief as therein described. Upon consideration of the defendant's Motion for Clarification of Order and argument thereon before the court on August 24, 2000, the court entered its order of August 24, 2000, vacating the Opinion; and

Upon further consideration of the pleadings, the testimony of the witnesses, the exhibits offered by the parties, and the argument of counsel, it is hereby ORDERED as follows:

Based upon the record and each of the findings of fact and conclusions of law set forth in the Opinion and order of this court dated August 4, 2000, the request of the plaintiff for injunctive relief is hereby granted upon and subject to the following terms:

The defendant, Pyramid Development, L.L.C., its successors and assigns, is hereby enjoined from materially restricting, impeding, or denying to the plaintiff, D&J Associates, its successors and assigns, as well as its tenants, tenant's agents, employees, customers, business invitees, or common carriers doing business with the owners or tenants of the property known and designated as 1719-1721 Summit Avenue, the non-exclusive right of ingress and egress over and across the property owned by the defendant generally known and designated as 3014 Norfolk Street, located between Patton Avenue and Norfolk Street within the City of Richmond, Virginia, for the purpose of access to the rear of 1719-1721 Summit Avenue for access to the building and for loading and unloading of vehicles, delivery and shipment of goods, including equipment, materials, and inventory, placement of a dumpster and for other purposes incidental to the operation of the business located at such premises. Plaintiff, its successors and assigns, as well as its tenants, tenant's agents, employees, customers, business invitees, and common carriers doing business with the owners or tenants of the premises known as 1719-1721 Summit Avenue shall have the additional non-exclusive right to park motor

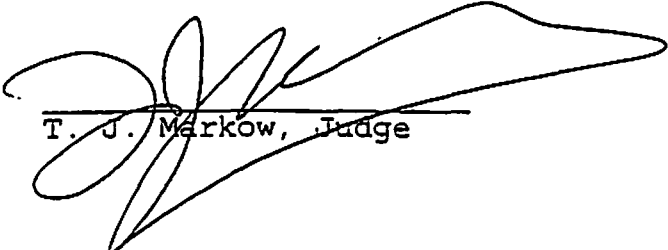
vehicles at the rear of 1719-1721 Summit Avenue while engaged in business on such premises, so long as such use does not unreasonably interfere with the continued use, ownership, and enjoyment of the property generally known and designated as 3014 Norfolk Street by the defendant, its successors and assigns for purposes not inconsistent with the right herein granted to plaintiff.

Defendant's objections are noted. Signatures of the parties are waived pursuant to Rule 1:13. And nothing further to be done herein, this suit is ORDERED to be stricken from the docket and filed among the ended causes.

Copies of this order were this day mailed to counsel of record.

ENTER

918100


T. J. Markow, Judge

VIRGINIA:

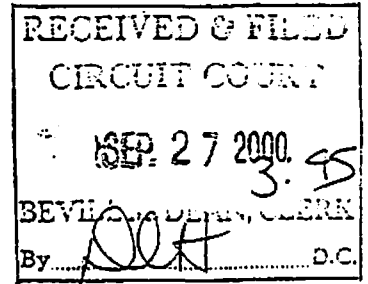
IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

D&J Associates,
Plaintiff

v.

Chancery No..HN-1135

Pyramid Development, L.L.C.,
Defendant



NOTICE OF APPEAL

The plaintiff, Pyramid Development, L.L.C., hereby gives notice of appeal to the Supreme Court of Virginia from the final judgment order of this Court entered on the 8th day of September, 2000, and further gives notice that a transcript of the proceedings will be filed.

Pyramid Development, L.L.C.

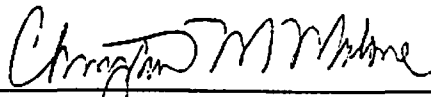
By Christopher M. Malone
Counsel

Christopher M. Malone (VSB No. 18678)
William W. Snidow, Jr. (VSB No. 43219)
Thompson & McMullan, P.C.
100 Shockoe Slip, 3rd Floor
Richmond, Virginia 23219
(804) 649-7545 (Telephone)
(804) 780-1813 (Fax)

CERTIFICATE

I, Christopher M. Malone, Counsel of Record for Pyramid Development, L.L.C., hereby certify that:

1. The name and address of the appellant is:
Pyramid Development, L.L.C.
P.O. Box 11469
Richmond, Virginia 23230
2. The name, address, and telephone number of counsel for appellant is:
Christopher M. Malone
Thompson & McMullan, P.C.
100 Shockoe Slip, 3rd Floor
Richmond, Virginia 23219
(804) 649-7545 (Telephone)
(804) 780-1813 (Fax)
3. The name of appellee is:
D&J Associates
4. The name, address, and telephone number of counsel for appellees is:
James C. Cosby
Andrew P. Stepanian
Cantor, Arkema & Edmonds, P.C.
823 E. Main Street, 15th Floor
Richmond, Virginia 23218-0561
(804) 644-1400 (Telephone)
(804) 225-8706 (Fax)
5. Counsel for appellant has ordered from the Court reporter who reported the case the transcript for filing as required by Rule of the Supreme Court of Virginia 5:11(a).
6. A copy of this Notice of Appeal has been mailed or delivered to all opposing counsel and to the Clerk of the Supreme Court of Virginia this 27th day of September, 2000.


Counsel

ASSIGNMENTS OF ERROR

1. The trial court erred in finding an easement still existed, since it was extinguished when the subject of the easement ceased to exist.
2. The trial court erred by considering parol evidence to determine the scope of the easement, since there was no ambiguity in the grant of easement.
3. The trial court erred in finding the easement allowed the plaintiff ingress and egress over the defendant's property by motor vehicles, since the easement only applied to use of the spur tracks and sidings.
4. The trial court erred in finding the easement allowed the plaintiff to park and place a dumpster on the defendant's property, since the easement only applied to use of the spur tracks and sidings.