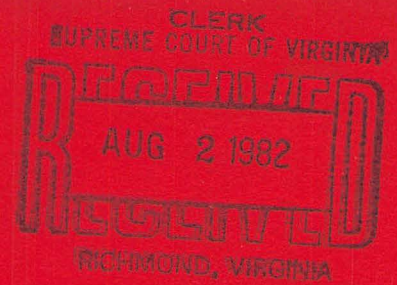


227 VA 580



IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

THE BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA,

Appellant,

v.

BLAIR W. CUPP,
DOROTHY S. CUPP, and
WOLF TRAP NURSERY, INC.,

Appellees.

RECORD NO. 811632

APPENDIX TO THE BRIEF
FROM THE CIRCUIT COURT OF
FAIRFAX COUNTY

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MOTION FOR DECLARATORY JUDGMENT

Filed April 15, 1980

COME NOW the Complainants, Blair W. Cupp, Dorothy S. Cupp, and Wolf Trap Nursery, Inc, by counsel, pursuant to Code of Virginia of 1950, as amended, Section 8.01-184 et seq., and respectfully represent as follows:

1. That the Complainants are the owners of certain real estate located in Fairfax County, Virginia and more particularly described as 9439 Leesburg Pike, Vienna, Virginia 22180, Tax Map Reference 28-2 ((1)) 19, consisting of approximately 6.7208 acres.

2. That the Complainants have operated a nursery under the trade name of Wolf Trap Nursery, Inc. on the above described premises since May, 1972.

3. That at the time the Complainants commenced the operation of Wolf Trap Nursery, the subject property was zoned RE-1, and under the then existing Fairfax County Zoning Ordinance (1959) Section 30-2.1, such a nursery was interpreted to be a use permitted by right.

4. That since it commenced operations, the physical layout of the nursery has consisted of three greenhouses, a small office which connects two of the greenhouses, and several open air sheds which provide protection for potted and healed-in plants not grown in the greenhouse.

5. That approximately eighty-five percent (85%) of the retail sales of the nursery are attributable to sales of the plants and the remaining fifteen percent (15%) of

receipts are derived from landscaping services and from the sale of certain accessory items which are incidental to the sale of plants --- insecticides, pesticides, fungicides; sprayers; plant foods (liquid and granular); lawn foods (liquid and granular); weed killers; flower and grass seeds; peat moss; mulch; potting soil; pots; garden tools; and bird baths.

6. That on or about September 17, 1979, the Petitioners filed an application to the Board of Supervisors for a special exception (Special Exception No. 091-D-79) under Section 3-104 and 9-003 of the Zoning Ordinance, for the following proposed use:

..."modification and expansion of existing plant nursery, with variance to additional standards for the use to allow an existing lath house and parking area to remain close to the abutting R district then allowed by those additional standards."

A copy of the application is attached hereto, marked Exhibit A and made a part hereof.

7. That on December 5, 1979, the Planning Commission voted to recommend to the Board of Supervisors approval of SE 091-D-79, conditioned on conformance with certain development conditions, including the following:

a. Construction of a deceleration/right turn lane for entrance to the plant nursery.

b. Dedication of right-of-way to 100 feet from the centerline for a third eastbound lane and a standard service

drive, the exact amount of dedication to be set by DEM at the time of site plan review.

8. That the Staff also recommended conditioning approval of SE 091-D-79 on compliance with the Zoning Ordinance provision concerning plant nurseries (Article 20, Part 3), approved on October 22, 1979, subsequent to the filing of Petitioners' application, which provision permits only the sale of "...items designed solely to maintain and preserve the life and health of nursery stock such as fungicides, insecticides, chemicals, peat moss, humus, mulches, and fertilizers."

9. That at a regular meeting of the Board of Supervisors held on March 10, 1980, the Board denied SE 091-D-79.

10. That the above mentioned amendment to the Fairfax County Zoning Ordinance, dated October 22, 1979, pertaining to plant nurseries, is unreasonable and arbitrary on its face, and therefore unconstitutional in that it bears no reasonable relationship to the public health, safety and welfare.

11. That the October 22, 1979 Zoning Ordinance amendment is unconstitutional as applied to Complainants' property.

12. That the Board of Supervisors acted arbitrarily, capriciously and unreasonably in denying SE 091-D-79, in that its decision was based on compliance by the

Complainant on the above mentioned unconstitutional zoning provision.

13. That the Complainants have a vested right in developing their nursery businesss, and the action of the Board of Supervisors constitutes a confiscation and unreasonable taking of Complainants' property.

14. That the Board did not have the authority under the enabling statute or local ordinances to require the Complainants to meet the development conditions specified in paragraph 7 of this Motion for Declaratory Judgment.

15. That the Board acted arbitrarily, capriciously and unreasonably, and therefore unconstitutionally, in applying the said development conditions to Complainants' property, in that Complainants' proposed development does not create the need for the dedication or deceleration lane.

WHEREFORE, your Complainants respectfully pray that the Court grant the following relief:

1. Declare unconstitutional, on its face and as applied to Complainants' property, Article 20, Part 3 of the Fairfax County Zoning Ordinance, which provision permits only the sale in plant nurseries of "...items designed solely to maintain and preserve the life and health of nursery stock such as fungicides, insecticides, chemicals, peat moss, humus, mulches, and fertilizers."

2. Declare unconstitutional the imposition by the Board of the development conditions applied to Complainants' property.

3. Declare that Complainants are entitled to modify and expand their nursery as a use existing on the effective date of the Zoning Ordinance, and that Complainants are in compliance with all zoning regulations.

4. Direct Fairfax County to issue the appropriate permits to allow Complainants to modify and expand their nursery and enjoin Fairfax County from interfering with Complainants' development.

5. Grant such other relief as may to the Court seem just.

BLAIR W. CUPP, DOROTHY S. CUPP,
and WOLF TRAP NURSERY, INC.
By Counsel

* * *

ANSWER AND GROUNDS FOR DEFENSE

Filed May 13, 1980

COMES NOW, Defendant Board of Supervisors, by counsel, and responds to Complainants' Motion for Declaratory Judgment as follows:

1. Defendant admits that Complainants Blair W. Cupp and Dorothy S. Cupp are owners of real property located in Fairfax County, Virginia, at 9439 Leesburg Pike, Vienna, Virginia 22180, consisting of approximately 6.7208 acres (hereinafter, the subject property). The rest of the allegations of Paragraph 1 are denied.

2. Defendant admits that Complainants Blair W. Cupp and Dorothy S. Cupp operate a nursery called Wolf Trap Nursery on the subject property. Defendant is without knowledge to determine when Wolf Trap Nursery began and therefore denies the rest of the allegations of Paragraph 2.

3. Assuming that Wolf Trap Nursery began in 1972, Defendant admits that the subject property was zoned RE-1 at that time. The rest of the allegations of Paragraph 3 are denied.

4. Defendant is without facts to verify the allegations in Paragraph 4 and therefore denies the same.

5. Defendant is without facts to verify the allegations in Paragraph 5 and therefore denies the same.

6. Admitted, except that no Exhibit A was attached to Defendant's copy of the Motion for Declaratory Judgment.

7. Admitted.

8. Defendant admits that the staff recommendation approval of SE 091-D-79 so long as Wolf Trap Nursery complied with the Zoning Ordinance provision concerning plant nurseries (Article 20, Part 3) approved on October 22, 1979, subsequent to the filing of Complainants' application. Defendant denies the rest of the allegations in Paragraph 8.

9. Admitted.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

15. Denied.

16. Defendant denies all allegations not otherwise admitted.

WHEREFORE, having answered the allegations contained in the Motion for Declaratory Judgment, Defendant requests this Court to:

1. Dismiss Complainants' Motion for Declaratory Judgment; and

2. Award Defendant such additional relief as the Court may deem appropriate.

GROUND FOR DEFENSE

COMES NOW, Defendant Board of Supervisors, by counsel, and states the following Grounds for Defense:

1. The Defendant Board of Supervisors action to deny SE 091-D-79 was reasonable, justified, constitutional and bore a reasonable relationship to the public health, safety and welfare.

2. The October 22, 1979 Zoning Ordinance is constitutional as applied to the subject property.

3. The Complainants have no vested right in developing their nursery business.

4. The Defendant Board of Supervisors has authority under the enabling legislation and local ordinances to require the Complainants to meet the development conditions.

5. Complainants have not alleged an actual case or controversy and none exists.

6. Complainants are estopped from bringing this action because they requested the Defendant Board of Supervisors to deny SE 091-D-79 and were granted their request.

7. Complainants have failed to exhaust their administrative/legislative remedies.

8. Complainants, having requested the Defendant Board of Supervisors to deny SE 091-D-79, have taken inconsistent positions to the detriment and prejudice of the Defendant Board of Supervisors.

9. Complainants are barred from bringing this action by the doctrine of approbate and reprobate.

BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA
By Counsel

* * *

PLEA IN BAR

Filed May 13, 1980

COMES NOW, Defendant Board of Supervisors, by counsel, and files this Plea in Bar and grounds therefor alleges that Complainants, by counsel, requested denial of their Special Exception application, SE 091-D-79, and were granted their request, and thus no case or controversy exists.

BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA
By Counsel

* * *

ORDER

Entered May 14, 1980

THIS CASE came on before this Court on agreement of counsel as follows, and

IT APPEARING TO THE COURT that Petitioners' Petition for Writ of Certiorari and Writ of Certiorari shall be quashed, and

IT FURTHER APPEARING TO THE COURT that Respondent shall pose no objection to Petitioners' case Blair W. Cupp, et al. v. Board of Supervisors, In Chancery No. 66424, based on the fact that it is styled a Declaratory Judgment, and shall pose no objection on procedural grounds to Petitioners raising the issues set forth in the Declaratory Judgment action,

IT IS HEREBY ADJUDGED, ORDERED and DECREED that Petitioners' Petition for Writ of Certiorari and Writ of Certiorari shall be quashed and this case is dismissed.

THIS ORDER IS FINAL.

ENTERED this 14th day of May, 1980.

LEWIS D. MORRIS

* * *

MOTION TO AMEND GROUNDS FOR DEFENSE

Filed September 2, 1980

COMES NOW, Defendant Board of Supervisors, by counsel, and respectfully moves this Court to grant its Motion to Amend Grounds for Defense by adding three grounds as Paragraphs 10, 11 and 12 as follows:

10. The October 22, 1979 Zoning Ordinance amendment concerning nurseries is reasonable and justified on its face and bears a reasonable relationship to the public health, safety and welfare.

11. That Defendant Board of Supervisors' action to deny SE-091-D-79 in no way constitutes a confiscation and unreasonable taking of Complainants' property.

12. That Defendant Board of Supervisors' action, if it had applied the proposed development, would not have been arbitrary, capricious or unreasonable.

The reasons for this Motion are:

1. To insure that Defendant Board of Supervisors has all grounds of defense available to it at trial; and

2. To give Complainants ample notification of such additional ground (there are still seven weeks before trial at the time of sending a copy of this Motion to counsel for Complainants).

Motions to amend pleadings are generally liberally granted to further the ends of justice. See Rule 1:8 of the Rules of the Supreme Court of Virginia. See also 1B M.J., Amendments, §§ 4, 6 and 10, Haymore v. Brizendine, 210 Va.

578, 172 S.E.2d 774 (1970) and Griffin v. Rainer, 212 Va. 627, 186 S.E.2d 10 (1972).

WHEREFORE, Defendant respectfully requests this Court to grant its motion to Amend Grounds for Defense.

BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA
By Counsel

* * *

DECREE

Entered September 30, 1980

THIS MATTER came on to be heard on August 15, 1980 upon the Defendant's Plea in Bar, upon due and timely notice, upon argument of counsel, and having been duly considered by the Court; it is hereby

ADJUDGED, ORDERED and DECREED that the Plea in Bar is hereby dismissed.

ENTERED this 30th day of September, 1980.

RICHARD J. JAMBORSKY

:

* * *

LETTER OPINION OF JUDGE
JAMES C. CACHERIS

April 17, 1981

Dear Counsel:

The Court has reviewed the pleadings, evidence, authorities and arguments of counsel.

Complainants, Blair and Dorothy Cupp (Cupp), instituted this suit to have a County zoning ordinance declared unconstitutional and to have declared as unconstitutional certain developmental conditions.

The Cupps own and operate Wolf Trap Nursery which contains 6.7208 acres. The property is zoned R-1, except for a small subdivision zoned R-2. The nursery is located at 9439 Leesburg Pike, Vienna, Virginia, along the busy Route 7 corridor.

On September 17, 1979 Cupp filed an application to the Board for a special exception in order to expand the nursery.

On December 5, 1979 the Planning Commission recommended approval with certain developmental conditions.

I
Ordinance

The ordinance was passed on October 22, 1979 and the pertinent amendments provide:

"GARDEN CENTER: An area or establishment engaged in the retail sales of items for the landscaping and maintenance of gardens, grounds and yards such as trees, shrubs, plants, seeds, bulbs, mulches, fertilizers, garden tools, pottery, statues, bird baths and other such items. Landscape contracting of items sold on the property shall be permitted as an accessory use. For the purpose of this Ordinance, garden centers shall be deemed RETAIL SALES ESTABLISHMENTS.

4. Delete the term and definition of NURSERY, PLANT in entirety and substitute in lieu thereof, in its proper alphabetical sequence, a new term and definition of PLANT NURSERY to read as follows:

PLANT NURSERY: An area or establishment for the propagation, cultivation and growing of nursery stock such as trees, plants, shrubs and vines. Retail sales from the site may be permitted as an accessory use and shall be limited to

nursery stock grown on the property and items designed solely to maintain and preserve the life and health of nursery stock such as fungicides, insecticides, chemicals, peat moss, humus, mulches and fertilizers. Retail sales of items not designed solely to maintain and preserve the life and health of nursery stock such as garden tools, hoses, pottery, statues and bird baths shall be deemed a GARDEN CENTER and shall be prohibited. Landscape contracting of nursery stock grown on the property shall be permitted as an accessory use.

For the purpose of this Ordinance, growing of nursery stock shall include stock which is grown on the premises and stock which is purchased elsewhere and transplanted for growth on the premises."

The sale of plants is the principal retail business of the nursery. In addition, the nursery sells plant food, pots, weed killer, fertilizer, sprayers, garden tools and other items accessory to sale of plants.

Philip Yates, Zoning Administrator, testified as to a list of items that would be allowed and not allowed to be sold under the amendment to the Ordinance:

Hand Sprayer	Allowed
Bug Sprayer	Allowed
Sprayer with water	Not Allowed
Sprayer with fertilizer	Allowed
Plastic Watering Can	Not allowed
Tree in a ceramic pot	Allowed to sell tree but not the pot
Ceramic pot with plate	Not Allowed
Terra cotta duck	Not Allowed
Tree Wrap	Allowed
House plant spikes (fertilizer)	Allowed
Pruning shears	Not Allowed
Bulb planter	Not Allowed
Booklet on care of plants	Not Allowed

Mr. Yates testified to a number of other items that would be allowed to be sold under the Ordinance and items that would be prohibited. He testified no studies were undertaken before the Ordinance was promulgated.

Complainant, Blair Cupp, testified that a plastic container is necessary to control plant moisture.

In Board of Supervisors of Fairfax County v. Allman, 215 Va. 434, 444, 445 (1975), the Supreme Court of Virginia stated in quoting from other cases:

"The general principles applicable to a judicial review of the validity of

zoning ordinances are well settled. The legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. The burden of proof is on him who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare. The court will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable it must be sustained. (citing cases)

...

In Fairfax County v. Snell Corp., 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974), we quoted from Carper and then said:

"Inherent in the presumption of legislative validity stated in Carper is a presumption of reasonableness. but, as Carper makes plain, the presumption of reasonableness is not absolute. Where presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must be met by some evidence of reasonableness. If evidence of reasonableness is sufficient to make the question fairly debatable, the ordinance 'must be sustained'. If not, the evidence of reasonableness defeats the presumption of reasonableness and the ordinance cannot be sustained.'"

On June 10, 1976 in the General District Court for the County of Fairfax, in dismissing a criminal prosecution against Cupp, the Court held the Ordinance unconstitutional.

Under the Ordinance the nursery is allowed to sell a plant, but not its ceramic container, nor a plastic watering can, nor a booklet on its care, nor pruning shears.

The Court concludes that the Ordinance's ban on the sale of accessories is not reasonably related to the public health, safety and welfare.

II
Special Exception

The Cupps have applied for a special exception for modification and expansion of the nursery.

The Board required road improvements as a condition to the expansion.

On December 5, 1979 the Planning Commission voted unanimously to recommend to the Board approval of Cupp's special exception, subject to two conditions; construction of a deceleration right turn lane for entrance to the plant nursery; and dedication of a right of way 100 feet from the centerline for a third eastbound lane and a standard service drive.

Robert Moore, a Transportation Planner for Fairfax County, testified as to the need for a deceleration lane on Route 7.

Section 15.1-491(c), Va. Code, as amended, provides that a zoning ordinance may provide for the granting of special exceptions under suitable regulations and safeguards. Section 15.1-494(f) provides the Board may hear application for special exceptions and may impose conditions relating to the use for which a permit is granted.

The Court find that the proposed road improvements are reasonably related to the public health, safety and welfare.

Mr. Lawson should prepare the appropriate Order and submit the same to counsel for approval as to form.

JAMES C. CACHERIS

* * *

DECREE

Entered June 24, 1981

THIS MATTER CAME on to be heard on the 22nd and 27th days of October, 1980, after due and timely notice, upon appearance of the parties and the witnesses, upon the Court

hearing evidence ore tenus, upon argument of counsel, upon submission of authorities by counsel, and

IT APPEARING TO THE COURT that the Complainant, Wolf Trap Nursery, is selling accessory products incidental to the sale of plants, and

IT FURTHER APPEARING TO THE COURT that the amendments to the Fairfax County Zoning Ordinance, Article 20, Part 13, passed on October 22, 1979, defining the terms "GARDEN CENTER" and "PLANT NURSERY," prohibit plant nurseries from selling accessory products incidental to the sale of plants, customarily sold by the plant nurseries, as developed by the evidence in this cause, and that such prohibition is not reasonably related to the public health, safety and welfare, and

IT FURTHER APPEARING TO THE COURT that the Complainants filed an application for a Special Exception to the Fairfax County Board of Supervisors to modify and expand Wolf Trap Nursery and that if the Special Exception were granted by the Board of Supervisors, two conditions would be imposed: (1) construction of a deceleration right-turn lane for entrance to Wolf Trap Nursery and (2) dedication of a right of way 100 feet from the center line for a third east bound lane and a standard service drive, the construction of which would be deferred until future redevelopment of the site, and

IT FURTHER APPEARING TO THE COURT that Section 15.1-491(c) of the 1950 Code of Virginia, as amended, provides that a zoning ordinance may provide for the granting of

special exceptions under suitable regulations and safeguards, and that Section 15.1-495(f) provides that the Board may hear applications for special exceptions and may impose conditions relating to the use for which a permit is granted, and

IT FURTHER APPEARING to the Court that the two conditions, proposed by the Fairfax County staff, should the Defendant Board of Supervisors act favorably on the Complainants' Special Exception, are reasonably related to the public health, safety and welfare, it is therefore

ADJUDGED AND DECREED that the amendments to the Fairfax County Zoning Ordinance, Article 20, Part 13, dated October 22, 1979, defining "GARDEN CENTER" and "PLANT NURSERY" are hereby declared unconstitutional on their face and as applied to Wolf Trap Nursery, and

IT IS FURTHER ADJUDGED AND DECREED that the dedication and road improvements proposed by the Fairfax County staff, should the Defendant-Board of Supervisors act favorably on the Special Exception, are valid.

FURTHER ORDERED: That this Order is stayed pending further appeal.

AND THIS DECREE IS FINAL.

ENTERED this 24th day of June, 1981.

JAMES C. CACHERIS

* * *

ASSIGNMENT OF ERROR

1. The trial court erred when it held that an individual had standing to maintain an action against an Urban County Board of Supervisors where the individual lacked standing to challenge the general constitutionality of definitions which had been adopted by the Board of Supervisors, lacked standing to challenge the constitutionality of those definitions as applied, and lacked standing to challenge the imposition of conditions such as dedication of right-of-way. In this case, the individual lacked standing by virtue of his failure to allege or prove how he was harmed by definitions which were adopted by the Board of Supervisors.

WITNESS: PHILIP G. YATES

* * *

[9]

1 THRUST OF THE AMENDMENT IN RELATION TO THE PRODUCTS WAS TO
2 PROHIBIT THE SALE OF MAN-MADE PRODUCTS?

3 A THAT WAS ONE OF THE UNDERLYING OBJECTIVES.

4 Q ALL RIGHT. NOW, LET ME GIVE YOU A FEW PRODUCTS
5 HERE, IF I MIGHT.

6 MR. LAWSON: I GUESS, YOUR HONOR, WE'LL HAVE TO
7 INTRODUCE THESE INDIVIDUALLY.

8 THE COURT: 12.

9 (THE ARTICLE HERETOFORE REFERRED
10 TO WAS MARKED PLAINTIFF'S EXHIBIT
11 NO. 12 FOR IDENTIFICATION.)

12 BY MR. LAWSON:

13 Q AND JUST SO PEOPLE WON'T BE MORE CONFUSED AND
14 PROBABLY ALREADY ARE; BUT I'D LIKE TO RUN THROUGH A FEW OF
15 THE PRODUCTS WITH YOU, IF I MIGHT.

16 IF YOU WOULD TELL HIS HONOR IN EACH PARTICULAR
17 INSTANCE WHETHER OR NOT THAT PARTICULAR PRODUCT WOULD BE
18 ALLOWED TO BE SOLD UNDER THIS AMENDMENT.

19 I HAND YOU COMPLAINANT'S EXHIBIT NO. 12, A HAND
20 SPRAYER, AND ASK IF YOU CAN TELL US WHETHER THAT WOULD BE
21 ALLOWED OR NOT.

22 A NO, IT WOULD NOT.

23 Q IT WOULD NOT BE, ALL RIGHT, SIR.

WITNESS: PHILIP G. YATES

[10]

1 MR. LAWSON: MARK THIS AS COMPLAINANT'S NO. 13.
2 THE COURT: 13.

3 MS. ANDERSON: COULD YOU STATE WHAT THAT IS,
4 PLEASE?

5 MR. LAWSON: WHITEFLY AND MEALYBUG SPRAY.

6 (THE ARTICLE HERETOFORE REFERRED
7 TO WAS MARKED PLAINTIFF'S EXHIBIT
8 NO. 13 FOR IDENTIFICATION.)

9 BY MR. LAWSON:

10 Q LET ME SHOW YOU COMPLAINANT'S EXHIBIT NO. 13. AS
11 A MATTER OF FACT, YOU PROBABLY WANT TO LOOK AT THAT AND TRY
12 TO FIGURE OUT WHAT IT IS; AND THEN, WILL YOU TELL US WHETHER
13 THAT PARTICULAR PRODUCT WOULD BE ALLOWED TO BE SOLD.

14 A YES, IT WOULD.

15 Q IT WOULD BE?

16 A YES.

17 Q THAT IS SOME SORT OF A SPRAY; ISN'T THAT CORRECT,
18 FOR BUGS?

19 A THAT'S CORRECT, FOR USE IN ORNAMENTAL PLANTS.

20 Q IT HAS A HAND-PUMPING ACTION, SPRAY ACTION ON IT?

21 A THAT'S RIGHT.

22 THE COURT: YOU SAID THAT WOULD BE ABLE TO BE SOLD?

23 MR. LAWSON: HE SAID IT WOULD BE, YES.

WITNESS: PHILIP G. YATES

[11]

1 THE WITNESS: YES.

2 (THE ARTICLE HEREINAFTER REFERRED
3 TO WAS MARKED PLAINTIFF'S EXHIBIT
4 NO. 14 FOR IDENTIFICATION.)

5 BY MR. LAWSON:

6 Q LET ME SHOW YOU COMPLAINANT'S EXHIBIT NO. 14,
7 ANOTHER SPRAYER. NOW, LET'S SUPPOSE I SHOW YOU COMPLAINANT'S
8 EXHIBIT NO. 14, AND SUPPOSE MR. CUPP WOULD HAVE FILLED THAT
9 WITH WATER; AND, INSTEAD OF SELLING IT FOR \$1.79, HE SOLD
10 IT FOR \$1.89 BECAUSE IT CONTAINS WATER. WOULD HE BE ALLOWED
11 TO SELL THAT?

12 A WITH WATER?

13 Q YES, SIR.

14 A NO, HE WOULD NOT.

15 Q HE WOULD NOT BE ALLOWED TO SELL IT?

16 A NO.

17 Q ALL RIGHT, SIR. SUPPOSE HE WERE TO FILL IT WITH
18 SOME SORT OF A SPRAY -- FERTILIZER SPRAY OR BUG SPRAY OF
19 SOME SORT -- AND SELL IT FOR TEN CENTS MORE. WOULD HE BE
20 ALLOWED TO SELL THAT PRODUCT?

21 A IN MY JUDGMENT, YES.

22 Q HE WOULD BE, ALL RIGHT.

23 MR. LAWSON: THIS IS COMPLAINANT'S NO. 15.

;LJN

WITNESS: PHILIP G. YATES

[12]

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(THE ARTICLE HEREINAFTER REFERRED
TO WAS MARKED PLAINTIFF'S EXHIBIT
NO. 15 FOR IDENTIFICATION.)

BY MR. LAWSON:

Q I SHOW YOU COMPLAINANT'S EXHIBIT NO. 15. THIS IS
A LITTLE WATERING CAN, PLASTIC CAN, WHATEVER. WOULD HE BE
ALLOWED TO SELL THAT PARTICULAR PRODUCT?

A NO, HE WOULD NOT.

Q WOULD NOT, ALL RIGHT, SIR.

(THE ARTICLE HEREINAFTER REFERRED
TO WAS MARKED PLAINTIFF'S EXHIBIT
NO. 16 FOR IDENTIFICATION.)

BY MR. LAWSON:

Q NOW, I SHOW YOU COMPLAINANT'S EXHIBIT NO. 16,
WHICH CONSISTS OF A TREE OF SOME SORT IN A LITTLE CERAMIC
POT. WOULD HE BE ALLOWED TO SELL THAT PRODUCT?

TAKE ALL THE TIME YOU NEED. I DON'T MEAN TO RUSH
YOU.

A IT WOULD BE MY POSITION THAT HE COULD SELL THE
TREE ABSENT THE POT.

Q ABSENT THE POT, OKAY. A PERSON COULD COME IN AND
PUT THE DIRT IN HIS HAND AND WALK OUT WITH THE TREE BUT NOT
THE POT?

WITNESS: PHILIP G. YATES

[13]

1 A A PAPER BAG OR AS THE CASE MAY BE.

2 Q SO, THE NEXT ONE WILL BE EASY THEN. I SHOW YOU
3 COMPLAINANT'S EXHIBIT NO. 17 --

4 THE CLERK: 17.

5 (THE ARTICLE HEREINAFTER REFERRED
6 TO WAS MARKED PLAINTIFF'S EXHIBIT
7 NO. 17 FOR IDENTIFICATION.)

8 BY MR. LAWSON:

9 Q -- 17, WHICH IS THE VERY SAME CERAMIC POT ONLY
10 IT'S GOT A LITTLE PLATE UNDERNEATH THERE TO CATCH THE WATER
11 AS IT SEEPS THROUGH. WOULD HE BE ALLOWED TO SELL THAT
12 PRODUCT?

13 A NO, HE WOULD NOT.

14 MR. LAWSON: 18.

15 (THE ARTICLE HEREINAFTER REFERRED
16 TO WAS MARKED PLAINTIFF'S EXHIBIT
17 NO. 18 FOR IDENTIFICATION.)

18 MR. LAWSON: THANK YOU.

19 Q NO. 18, WHICH IS A LITTLE TERRA COTTA DUCK -- DON'T
20 TAKE THAT IN THE BATHTUB BECAUSE I DON'T THINK IT WOULD
21 FLOAT; BUT WOULD HE BE ALLOWED TO SELL THAT? THAT'S SOME-
22 THING THAT YOU WOULD PUT PLANTS IN.

23 A DEFINITELY NOT.

;LJN

WITNESS: PHILIP G. YATES

[14]

1 Q DEFINITELY NOT, OKAY.

2 MR. LAWSON: NOW, COMPLAINANT'S NO. 19.

3 (THE ARTICLE HEREINAFTER REFERRED
4 TO WAS MARKED PLAINTIFF'S EXHIBIT
5 NO. 19 FOR IDENTIFICATION.)

6 MR. LAWSON: YOU DON'T MIND IF I DON'T SHOW YOU
7 EACH ONE OF THESE? I ASSUME YOU CAN SEE THEM FROM HERE.

8 MS. ANDERSON: NO, I THINK I CAN SEE THEM.

9 MR. LAWSON: OKAY.

10 BY MR. LAWSON:

11 Q NO. 19, WHICH IS TITLED "CLARK'S TREE WRAP". TAKE
12 A LOOK AT THAT AND TELL US WHETHER OR NOT THAT -- HE COULD
13 SELL THAT.

14 A YES, HE COULD.

15 Q HE COULD, ALL RIGHT, SIR.

16 MR. LAWSON: 20.

17 (THE ARTICLE HEREINAFTER REFERRED
18 TO WAS MARKED PLAINTIFF'S EXHIBIT
19 NO. 20 FOR IDENTIFICATION.)

20 BY MR. LAWSON:

21 Q THIS IS TITLED "JOBE'S HOUSE PLANT SPIKES", SOME
22 SORT OF A FERTILIZER. WOULD HE BE ALLOWED TO SELL THAT?

23 A THIS IS A FERTILIZER?

0;LJN

WITNESS: PHILIP G. YATES

[15]

1 Q YOU LOOK AT IT, AND YOU TELL US.

2 GO AHEAD AND TAKE ALL THE TIME YOU NEED.

3 A YES, IN THE LIGHT THAT IT IS A FERTILIZER.

4 Q ALL RIGHT.

5 MR. LAWSON: NO. 21, I BELIEVE.

6 (THE ARTICLE HEREINAFTER REFERRED
7 TO WAS MARKED PLAINTIFF'S EXHIBIT
8 NO. 21 FOR IDENTIFICATION.)

9 BY MR. LAWSON:

10 Q NO. 21, WHICH ARE PRUNING SHEARS THAT YOU USE TO
11 PRUNE ROSEBUSHES AND OTHER THINGS LIKE THAT. WOULD HE BE
12 ALLOWED TO SELL THAT?

13 A NO, HE WOULD NOT.

14 Q WOULD NOT, OKAY.

15 MR. LAWSON: 22.

16 (THE ARTICLE HEREINAFTER REFERRED
17 TO WAS MARKED PLAINTIFF'S EXHIBIT
18 NO. 22 FOR IDENTIFICATION.)

19 BY MR. LAWSON:

20 Q I SHOW YOU EXHIBIT NO. 22, WHICH IS ENTITLED "BULB
21 PLANTER", SOMETHING TO DIG DOWN IN THE GROUND AND PUT THE
22 BULBS IN. IT'S MADE OF METAL. WOULD HE BE ALLOWED TO SELL
23 THAT?

WITNESS: PHILIP G. YATES

[16]

1 A NO, HE WOULD NOT.

2 Q OKAY.

3 MR. LAWSON: 23?

4 THE CLERK: YES.

5 (THE ARTICLE HEREINAFTER REFERRED
6 TO WAS MARKED PLAINTIFF'S EXHIBIT
7 NO. 23 FOR IDENTIFICATION.)

8 BY MR. LAWSON:

9 Q NO. 23. WOULD HE BE ALLOWED TO SELL THAT?

10 MS. ANDERSON: COULD YOU IDENTIFY THAT, PLEASE?

11 THE COURT: DO YOU WANT TO SEE THAT, MS. ANDERSON?

12 BY MR. LAWSON:

13 Q I'M SORRY. JUST READ IT.

14 A "FISH EMULSION FERTILIZER 5-1-1 FOR HOUSE PLANTS";
15 AND IT'S NON-BURNING; AND IT'S FISH DEODORIZED.

16 YES, HE WOULD.

17 Q THAT'S A PLASTIC BOTTLE, RIGHT?

18 A THAT'S CORRECT.

19 Q OKAY, SIR.

20 MR. LAWSON: 24.

21 (THE ARTICLE HEREINAFTER REFERRED
22 TO WAS MARKED PLAINTIFF'S EXHIBIT
23 NO. 24 FOR IDENTIFICATION.)

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1 BY MR. LAWSON:

2 Q NO. 24, WHICH IS "SPOT-GRO", HIGHLIGHTS PLANTS.
3 WOULD HE BE ALLOWED TO SELL THAT?

4 A NO, HE WOULD NOT.

5 (THE ARTICLE HEREINAFTER REFERRED
6 TO WAS MARKED PLAINTIFF'S EXHIBIT
7 NO. 25 FOR IDENTIFICATION.)

8 BY MR. LAWSON:

9 Q NO. 25, WHICH ARE VINE SUPPORTS, LITTLE DOODADS
10 THAT YOU TACK INTO A WALL BY WHICH A VINE WILL BE TRAINED
11 TO GROW UP ON A WALL. WOULD HE BE ALLOWED TO SELL THAT?

12 A NO, HE WOULD NOT.

13 Q WOULD NOT, ALL RIGHT, SIR.

14 MR. LAWSON: NO. 26.

15 (THE ARTICLE HEREINAFTER REFERRED
16 TO WAS MARKED PLAINTIFF'S EXHIBIT
17 NO. 26 FOR IDENTIFICATION.)

18 BY MR. LAWSON:

19 Q NO. 26 IS JUST SIMPLY A SAMPLE. IT'S A BOOKLET
20 ENTITLED "HOUSE PLANTS". MR. CUPP HAS A SERIES OF THESE ON
21 ROSES AND AZALEAS AND WHATEVER. IT TELLS YOU HOW TO CARE
22 FOR THEM AND PLANT THEM AND TAKE CARE OF THEM. WOULD HE BE
23 ALLOWED TO SELL THAT?

WITNESS: PHILIP G. YATES

[18]

1 A NO, HE WOULD NOT.

2 Q HE WOULD NOT, OKAY, SIR.

3 (THE ARTICLE HEREINAFTER REFERRED
4 TO WAS MARKED PLAINTIFF'S EXHIBIT
5 NO. 27 FOR IDENTIFICATION.)

6 BY MR. LAWSON:

7 Q NO. 27, WHICH IS "SHULTZ-INSTANT LIQUID PLANT FOOD".
8 IT'S IN A CARDBOARD BOX. IT'S A BOTTLE WHICH HAS GOT A
9 LITTLE CAP ON IT. WOULD HE BE ALLOWED TO SELL THAT?

10 A YES, HE WOULD.

11 Q OKAY. NOW, LET'S OPEN THIS UP. IT'S GOT A LITTLE
12 EYEDROPPER ATTACHED TO THE TOP OF IT, HAS IT NOT?

13 A YES, IT DOES.

14 Q SUPPOSE HE SELLS THE BOTTLE WITH, SAY, JUST A
15 REGULAR CAP; AND HE WERE TO SELL THE EYEDROPPER AS A
16 SEPARATE ITEM. WOULD HE BE ALLOWED TO SELL THE EYEDROPPER?

17 A NO, HE WOULD NOT.

18 Q HE WOULD NOT; BUT, IN COMBINATION, HE COULD SELL
19 IT; IS THAT CORRECT?

20 A YES, HE COULD.

21 Q ALL RIGHT, SIR.

22 MR. LAWSON: 28, IS IT?

23 THE CLERK: YES.

WITNESS: PHILIP G. YATES

[19]

(THE ARTICLE HEREINAFTER REFERRED
TO WAS MARKED PLAINTIFF'S EXHIBIT
NO. 28 FOR IDENTIFICATION.)

BY MR. LAWSON:

Q THIS IS TITLED "MIRACLE-GRO THERAPY FOR HOUSE
PLANTS". IT'S PLANT FOOD. IT'S GOT A LITTLE PLASTIC
MEASURER ON THE SIDE, WHICH IS CONTAINED IN THE BOX. WOULD
HE BE ALLOWED TO SELL THAT?

A YES, HE WOULD.

Q AGAIN, THE SAME QUESTION: IF THIS LITTLE MEASURER
WERE NOT PART OF THE BOX, I ASSUME HE WOULD NOT BE ALLOWED
TO SELL THE MEASURER, WOULD HE --

A THAT'S RIGHT.

Q -- SEPARATELY?

A THAT'S RIGHT.

(THE ARTICLE HEREINAFTER REFERRED
TO WAS MARKED PLAINTIFF'S EXHIBIT
NO. 29 FOR IDENTIFICATION.)

BY MR. LAWSON:

Q NO. 29, "TRANSPLANTONE, MAKES ROOTS GROW". WOULD
HE BE ALLOWED TO SELL THAT? IT'S NOT A FERTILIZER. IT'S
NOT AN INSECTICIDE. WOULD HE BE ALLOWED TO SELL IT?

A IS IT NOT A FORM OF A CHEMICAL OR --

1 Q I WANT YOU -- YOU'RE THE ENFORCER. I WANT YOU TO
2 LOOK AT IT AND YOU TELL US WHETHER HE CAN SELL IT. YOU'VE
3 GOT TO APPLY THIS ORDINANCE.

4 A I WOULD SAY, "NO".

5 Q YOU WOULD SAY, "NO". YOU HAVE SOME DOUBTS IN YOUR
6 MIND THOUGH; IS THAT CORRECT?

7 A THAT'S CORRECT.

8 Q ALL RIGHT, SIR. YOU'RE NOT SURE, I GUESS, IS A
9 BETTER WAY TO PHRASE THAT; IS THAT CORRECT?

10 A (NODDING HEAD.)

11 MR. LAWSON: NO. 30.

12 (THE ARTICLE HEREINAFTER REFERRED
13 TO WAS MARKED PLAINTIFF'S EXHIBIT
14 NO. 30 FOR IDENTIFICATION.)

15 BY MR. LAWSON:

16 Q NO. 30, WHICH IS A UNIVERSAL SWIVEL HOOK FOR
17 PLANTERS. THIS IS THE THING WHERE YOU HAVE MACRAMES HANGING
18 FROM THE CEILING THAT YOU BUMP YOUR HEAD INTO. I ASSUME YOU
19 ALL HAVE THEM IN YOUR OFFICES OVER THERE. WOULD HE BE
20 ALLOWED TO SELL THAT?

21 A NO, HE WOULD NOT.

22 Q HE WOULD NOT.

23 MR. LAWSON: 31.

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(THE ARTICLE HEREINAFTER REFERRED
TO WAS MARKED PLAINTIFF'S EXHIBIT
NO. 31 FOR IDENTIFICATION.)

BY MR. LAWSON:

Q NO. 31, A TROWEL FOR DIGGING IN THE GROUND. WOULD
HE BE ALLOWED TO SELL THAT?

A NO, HE WOULD NOT.

Q ALL RIGHT, SIR.

(THE ARTICLE HEREINAFTER REFERRED
TO WAS MARKED PLAINTIFF'S EXHIBIT
NO. 32 FOR IDENTIFICATION.)

BY MR. LAWSON:

Q NO. 32, THIS IS A LITTLE WICKER BASKET THAT YOU
WOULD PUT A POT WITH A PLANT IN IT. WOULD HE BE ALLOWED TO
SELL THAT?

A NO, HE WOULD NOT.

Q HE WOULD NOT.

(THE ARTICLE HEREINAFTER REFERRED
TO WAS MARKED PLAINTIFF'S EXHIBIT
NO. 33 FOR IDENTIFICATION.)

BY MR. LAWSON:

Q NO. 33, WHICH IS A -- EXCUSE ME, GO AHEAD AND OPEN
IT. IT'S SOME SORT OF A PAIR OF SHEARS OR WHATEVER. I'M

1 NOT SURE I KNOW WHAT IT IS MYSELF. WOULD HE BE ALLOWED TO
2 SELL THAT?

3 A IT LOOKS LIKE SOME TYPE OF SHEAR. IN ANY EVENT,
4 MY RESPONSE WOULD BE, "NO".

5 Q IT'S MADE OF METAL?

6 A RIGHT.

7 Q MADE IN CHINA, ISN'T IT, OR JAPAN, I BELIEVE.

8 A I THINK SO.

9 MR. LAWSON: 34. WE'RE GETTING CLOSE TO THE END,
10 JUDGE, TWO MORE.

11 (THE ARTICLE HEREINAFTER REFERRED
12 TO WAS MARKED PLAINTIFF'S EXHIBIT
13 NO. 34 FOR IDENTIFICATION.)

14 BY MR. LAWSON:

15 Q A PLASTIC TRAY, NO. 34, WHICH YOU PUT A PLANTER
16 ON TOP OF THAT TO KEEP THE WATER FROM RUNNING ONTO THE RUG.
17 WOULD HE BE ALLOWED TO SELL THAT?

18 A NO, HE WOULD NOT.

19 MR. LAWSON: 35.

20 (THE ARTICLE HEREINAFTER REFERRED
21 TO WAS MARKED PLAINTIFF'S EXHIBIT
22 NO. 35 FOR IDENTIFICATION.)

23 BY MR. LAWSON:

1 Q NO. 35, WHICH IS A PLASTIC CHRISTMAS DECORATION,
2 OBVIOUSLY MAN-MADE. WOULD HE BE ALLOWED TO SELL THAT?

3 A NO, HE WOULD NOT.

4 Q OKAY.

5 (THE ARTICLE HEREINAFTER REFERRED
6 TO WAS MARKED PLAINTIFF'S EXHIBIT
7 NO. 36 FOR IDENTIFICATION.)

8 BY MR. LAWSON:

9 Q I SHOW YOU NO. 36, WHICH IS A PHOTOGRAPH SHOWING
10 SOME BIRDBATHS AND FOUNTAINS --

11 MS. ANDERSON: WHERE IS THIS TAKEN?

12 MR. LAWSON: PARDON?

13 MS. ANDERSON: WHERE IS THIS TAKEN?

14 MR. LAWSON: TAKEN AT HIS PLACE. DO YOU OBJECT TO
15 IT?

16 MS. ANDERSON: NO.

17 BY MR. LAWSON:

18 Q I SHOW YOU NO. 36, WHICH IS A PHOTOGRAPH TAKEN AT
19 MR. CUPP'S PLACE OF BUSINESS; AND IT SHOWS SOME BIRDBATHS
20 AND A FOUNTAIN; AND ASK YOU IF HE'D BE ALLOWED TO SELL THOSE.

21 A NO, HE WOULD NOT.

22 Q ALL RIGHT, SIR. NOW, IN EACH INSTANCE, ALL OF
23 THESE PRODUCTS ARE MAN-MADE, ARE THEY NOT?

1 A THAT IS CORRECT.

2 Q AND --

3 A EXCEPT THE PLANT IN THE LITTLE CONTAINER THERE.

4 Q EXCEPT THE PLANT?

5 A RIGHT.

6 Q BUT EVERYTHING ELSE IS MAN-MADE, IS IT NOT?

7 A THAT'S MY RECOLLECTION.

8 Q SOME, HE'D BE ALLOWED TO SELL; SOME, HE WOULD NOT;

9 IS THAT CORRECT --

10 A THAT'S --

11 Q BY YOUR INTERPRETATION OF THE ORDINANCE?

12 A THAT'S CORRECT.

13 MR. LAWSON: THE COURT'S INDULGENCE FOR JUST ONE
14 MOMENT?

15 THE COURT: SURE.

16 MR. LAWSON: THAT'S ALL THE QUESTIONS I HAVE OF
17 THIS WITNESS.

18 THE COURT: CROSS EXAMINATION?

19 MS. ANDERSON: NO CROSS EXAMINATION, YOUR HONOR.

20 THE COURT: DO YOU WANT MR. YATES EXCUSED OR
21 SUBJECT TO RECALL?

22 MS. ANDERSON: HE'S SUBJECT TO RECALL BY MYSELF.

23 THE COURT: YOU CAN GIVE HIM A PHONE CALL LATER

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WITNESS: BLAIR W. CUPP

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1 DUE TO NURSERY STOCK LOST DURING THE DROUGHT; AND ALL OF THE
2 LOSSES OCCURRED OUTSIDE OF THE LATH AREAS. ANY -- I DIDN'T
3 LOSE ONE PLANT THAT WAS INSIDE OF THE SHADED AREAS. THEY
4 WERE ALL OUT IN THE HOT SUN, AND THAT'S THE MAIN REASON FOR
5 THAT.

6 OKAY, AND THIS IS 4M. THIS IS ANOTHER PICTURE OF
7 THE LATH AREA, WHICH IS TAKEN FROM THE PARKING LOT. NOW,
8 I MIGHT POINT OUT SOMETHING, IF I MAY?

9 Q GO AHEAD.

10 A THIS THING AROUND THE TOP EDGE OF THE LATH AREA
11 IS NOT FUNCTIONAL EXCEPT JUST FOR LOOKS. I JUST TRIED TO
12 MAKE IT LOOK AS PLEASING AS I COULD.

13 Q IT LOOKS LIKE A MANSARD ROOF?

14 A YES, RIGHT.

15 Q ALL RIGHT, THANK YOU. YOU MAY HAVE A SEAT.

16 BLAIR, I SHOULD HAVE ASKED THIS EARLIER: IS THIS
17 BUSINESS OF YOU AND YOUR WIFE THE SOLE MEANS OF YOUR
18 LIVELIHOOD?

19 A YES, IT IS.

20 Q ALL RIGHT, SIR. NOW, WOULD YOU DESCRIBE IN
21 DETAIL, IF YOU WOULD, TO HIS HONOR, WHAT PRODUCTS YOU SELL,
22 WHAT SERVICES YOU RENDER, AND, IN GENERAL, WHAT IS INVOLVED
23 IN THE FUNCTION OF A RETAIL NURSERY.

1 A WE SELL ALL MANNER OF PLANT MATERIAL, INCLUDING
2 ANNUALS, PERENNIALS, TREES, SHRUBS, AND ANYTHING NORMALLY
3 FOUND, I WOULD SAY, IN A FULL-SERVICE NURSERY. WE ALSO
4 OFFER LANDSCAPING AS A SERVICE. WE HAVE --

5 Q WHEN YOU SAY "LANDSCAPING", EXACTLY WHAT DO YOU
6 MEAN BY THAT?

7 A WHERE WE GO OUT TO THE HOMEOWNER'S PROPERTY AND
8 PLANT TREES.

9 Q IT'S OFF-SITE SERVICE?

10 A RIGHT.

11 Q ALL RIGHT.

12 A WE HAVE A FULL-TIME LANDSCAPE DESIGNER ON THE
13 STAFF WHO DESIGNS UP THESE PROJECTS THAT THE HOMEOWNER
14 COMES IN TO US AND ASKS US TO DO.

15 WE ALSO -- IN THE COURSE OF LANDSCAPING, WE ARE
16 SOMETIMES REQUIRED TO BUILD A GARDEN OR THINGS LIKE THAT
17 WHERE YOU MIGHT HAVE ORNAMENTS, A FOUNTAIN, OR SOMETHING
18 THAT THE CUSTOMER WANTS.

19 Q SPEAK UP.

20 THE COURT: WHY DON'T YOU GET HIM SOME WATER, IT
21 MIGHT HELP HIM.

22 (THEREUPON, THE OFFICER OF THE COURT COMPLIED WITH
23 THE REQUEST.)

1 THE WITNESS: THAT'S ESSENTIALLY WHAT WE DO.

2 BY MR. LAWSON:

3 Q COULD YOU GIVE US AN ARRAY OF THE PLANTS THAT YOU
4 SELL?

5 A THE TYPE OF PLANTS?

6 Q YES, SIR.

7 A WE SELL SHADE TREES, AZALEAS, RHODODENDRONS,
8 NEEDLE EVERGREENS, DECIDUOUS SHRUBS. THAT WOULD COVER IT.

9 Q ALL RIGHT, SIR. TELL US, SIR, APPROXIMATELY HOW
10 MANY OF THOSE PLANTS YOU MIGHT HAVE AT A GIVEN TIME ON YOUR
11 SITE, APPROXIMATELY?

12 A NUMBERS OF PLANTS? GEE, IN THE SPRINGTIME, IN
13 THE HEIGHT OF THE SEASON, THERE MAY BE TEN THOUSAND
14 INDIVIDUAL PLANTS, IF YOU'RE COUNTING THE LITTLE GREENHOUSE
15 PLANTERS AS PLANTS.

16 Q WE'LL GET INTO THAT. NOW, A LOT OF THESE PLANTS,
17 ARE THEY ALL GROWN ON SITE OR DO YOU YIELD SOME IN OR
18 EXPLAIN THAT TO HIS HONOR?

19 A I PURCHASE SOME OF THEM ELSEWHERE AND WE BRING
20 THEM IN AND HOLD THEM UNTIL THEY'RE SOLD. WE BRING THEM IN
21 AND MULCH THEM. WE GROW SOME OF THEM THERE. I HAVE TREES
22 GROWING IN THE GROUND. I GROW PLANTS IN MY GREENHOUSE,
23 PROPAGATED FROM SEEDS.

* * *

WITNESS: BLAIR W. CUPP

[43]

1 Q AND, ON THAT OCCASION, DID THAT PARTICULAR JUDGE
2 TAKE A VIEW OF YOUR PLACE OF BUSINESS?

3 A YES, HE CAME OUT.

4 Q ALL RIGHT, SIR; AND, OBVIOUSLY THERE WAS A
5 VARIATION OF THE PARTICULAR PRODUCTS; BUT THE PRODUCT LINE --
6 WAS THE PRODUCT LINE DISPLAYED THEN THE SAME AS IT IS TODAY?

7 A IN THE SAME PLACE, IN FACT.

8 Q NOW, LET'S TALK IN TERMS OF THE PERCENTAGE OF
9 SALES THAT YOU MAKE. LET ME SHOW YOU A DOCUMENT WHICH WILL
10 BE MARKED AS COMPLAINANT'S -- WHAT'S THE NEXT NUMBER?

11 THE CLERK: 37.

12 MR. LAWSON: 37 FOR IDENTIFICATION.

13 (THE DOCUMENT HERETOFORE REFERRED
14 TO WAS MARKED PLAINTIFF'S EXHIBIT
15 NO. 37 FOR IDENTIFICATION.)

16 BY MR. LAWSON:

17 Q -- COMPLAINANT'S EXHIBIT NO. 37, AND ASK YOU
18 WHETHER OR NOT YOU HAD PREPARED THAT DOCUMENT.

19 A YES, I DID.

20 Q OKAY.

21 MR. LAWSON: COUNSEL HAS A COPY OF THIS. I WOULD
22 LIKE TO OFFER THIS --

23 THE COURT: ANY OBJECTION?

1 MR. LAWSON: -- INTO EVIDENCE.

2 MS. ANDERSON: NO, YOUR HONOR.

3 THE COURT: 37 IS ADMITTED.

4 (THE DOCUMENT HERETOFORE MARKED
5 FOR IDENTIFICATION AS PLAINTIFF'S
6 EXHIBIT NO. 37 WAS RECEIVED IN
7 EVIDENCE.)

8 BY MR. LAWSON:

9 Q THE TOP PART OF THE DOCUMENT, WOULD YOU EXPLAIN
10 THAT TO HIS HONOR; AND YOU HAVE BROKEN DOWN INTO PERCENTAGES
11 SALES OF CERTAIN PRODUCTS, WOULD YOU EXPLAIN THAT TO HIS
12 HONOR?

13 A YES, SEVERAL YEARS AGO, I PURCHASED A CASH
14 REGISTER THAT WOULD GIVE ME A BREAKDOWN OF SALES MUCH WIDER
15 THAN WHAT I HAD BEEN USING PRIOR TO THAT. IT ENABLED ME TO
16 GIVE ME A TOTAL AT THE END OF A PERIOD OF DIFFERENT
17 CATEGORIES OF MERCHANDISE; AND, BY DIVIDING THE TOTAL SALES
18 OVERALL BY THE TOTAL IN ANY ONE CATEGORY, IT WOULD GIVE ME
19 THE PERCENTAGE OF SALES; AND I HAVE PREPARED THIS DOCUMENT
20 TO SHOW WHAT THE PERCENTAGE OF SALES WERE IN THE CHEMICALS,
21 CONTAINERS, AND HARDWARE, AND THE TOTAL VOLUME.

22 WOULD YOU LIKE ME TO READ THIS?

23 Q YES, IF YOU WOULD.

1 A OKAY. IN 1978, THE PERCENTAGE OF SALES THAT WERE
2 SOLD OF CHEMICALS WAS 2.6 PERCENT, OF CONTAINERS WAS 2.9
3 PERCENT, AND HARDWARE WAS 1.6.

4 IN '79, IT WAS CHEMICALS 1.5 PERCENT, CONTAINERS
5 WAS 2.6, AND HARDWARE WAS .08 PERCENT.

6 FOR THE FIRST SIX MONTHS OF 1980, CHEMICALS WERE
7 1.6 PERCENT, CONTAINERS 3.0 PERCENT, AND HARDWARE .06
8 PERCENT.

9 Q NOW, WHAT CONSTITUTES THE PERCENTAGE OF THE REST
10 OF THE SALES?

11 A I'M SORRY?

12 Q WHAT CONSTITUTES THE PERCENTAGE OF THE REST OF
13 YOUR SALES?

14 A ALL THE OTHER ITEMS THAT WE SELL.

15 Q WHICH ARE WHAT?

16 A PLANT MATERIAL, LABOR, MULCH, PEAT MOSS, AND ALL
17 THE MANY OTHER ITEMS THAT WE SELL.

18 Q WHAT? PLANTS?

19 A YEAH, PLANTS.

20 Q ALL RIGHT. YOU'VE GOT TO SPEAK UP AND TELL US.
21 PLANTS AND VARIOUS FORMS OF PLANTS ARE OBVIOUSLY THE
22 OVERWHELMING MAJORITY OF YOUR SALES?

23 A OVERWHELMING.

1 REASON FOR DOING THEM?

2 A THE MOTIVATION WAS I WANT MAINLY TO BE ABLE TO
3 OPERATE MORE EFFICIENTLY THAN I DO BECAUSE IT'S CUMBERSOME
4 TO OPERATE. I WANT TO PROTECT THE PLANTS FROM THE SUN,
5 FROM DRYING OUT. THAT'S THE REASON FOR THE ADDITIONAL
6 LATH AREA.

7 Q SPEAK UP.

8 A AND I JUST WANT TO ACCOMMODATE THE BUSINESS THAT
9 I HAVE.

10 Q DOES THIS ENTAIL OR DOES IT INVOLVE ANY EXPANSION
11 OF YOUR PRODUCT LINE OR YOUR SERVICES?

12 A NO, SIR. WE ALREADY OFFER ALL THE SERVICES THAT
13 I INTEND TO OFFER OR EVEN WANT TO OFFER.

14 Q I SHOW YOU EXHIBIT NO. -- COMPLAINANT'S EXHIBIT
15 NO. 11, WHICH IS THE AMENDMENT WHICH WAS ADOPTED BY THE
16 BOARD ON OCTOBER 22, '79. YOU -- OBVIOUSLY YOU HAVE READ
17 THAT BEFORE, HAVE YOU NOT?

18 A YES, I HAVE.

19 Q WHAT EFFECT DO YOU FEEL -- AS A NURSERYMAN
20 OPERATING IN FAIRFAX COUNTY, WHAT EFFECT DO YOU FEEL THAT
21 WOULD HAVE ON YOUR BUSINESS?

22 MS. ANDERSON: YOUR HONOR, I'M GOING TO HAVE TO
23 OBJECT IN LINE WITH MY OPENING ARGUMENT THAT THIS ISN'T

1 RELEVANT. THE ORDINANCE HASN'T BEEN APPLIED TO MR. CUPP.

2 MR. LAWSON: I DON'T THINK THE COUNTY, YOUR HONOR,
3 CAN SERIOUSLY CONTEND THAT THE ORDINANCE WOULD NOT APPLY IN
4 THE EVENT THAT THIS SE WERE TO BE GRANTED AND HE WERE TO
5 DEVELOP HIS SITE AS PLANNED.

6 I MEAN, THAT'S THE WHOLE ISSUE AND I THOUGHT WAS
7 THE WHOLE ISSUE IN THE FIRST ARGUMENT.

8 THE COURT: I'LL OVERRULE THE OBJECTION.

9 MS. ANDERSON: NOTE MY EXCEPTION.

10 THE COURT: GO AHEAD.

11 THE WITNESS: WHAT WAS YOUR QUESTION?

12 BY MR. LAWSON:

13 Q YOU HAVE READ THAT ORDINANCE?

14 A YES, I HAVE.

15 Q AS A NURSERYMAN IN FAIRFAX COUNTY, WOULD YOU TELL
16 US WHAT YOU FEEL THE EFFECT THAT ORDINANCE WOULD HAVE ON
17 YOUR BUSINESS IN THE EVENT IT WOULD BE APPLIED TO YOUR
18 BUSINESS?

19 A FOR EIGHT YEARS, I'VE BEEN SELLING ANCILLARY
20 PRODUCTS TO THE CUSTOMERS AS THEY COME IN. NOW, FOR ME TO
21 SUDDENLY SAY, "NO, I CAN'T DO THAT ANYMORE." IF A CUSTOMER
22 CAME IN TO BUY A ROSEBUSH, I'D BE ALLOWED TO SELL THAT; BUT,
23 IF I WANTED TO SELL THEM AN APPLICATOR TO SPRAY FOR

1 BLACKSPOTS, I COULDN'T DO THAT. I'D HAVE TO SEND THEM DOWN
2 TO MY NURSERYMAN RIGHT ACROSS -- DIAGONALLY ACROSS THE
3 ROAD -- FROM ME WHO CAN SELL THEM.

4 THERE ISN'T ANY REASON WHY THE CUSTOMER WOULD
5 COME BACK TO ME FOR THE ROSEBUSH IF THEY COULDN'T ALSO BUY
6 SOMETHING TO APPLY THE INSECTICIDE TO THE PLANTS FROM.
7 THERE'S NO REASON TO STOP AT MY PLACE. THEY MIGHT JUST AS
8 WELL GO TO THE OTHER PLACE IN THE FIRST PLACE AND FIND THE
9 WHOLE THING.

10 SO, THAT'S THE DETRIMENTAL EFFECT IT WOULD HAVE.

11 Q THAT'S JUST ONE EXAMPLE?

12 A THAT'S ONE EXAMPLE OF THE EFFECT, YES. I
13 COULDN'T BE COMPETITIVE.

14 Q DO YOU FEEL, SIR, THAT IT IS NECESSARY AND
15 IMPORTANT TO YOUR BUSINESS TO UPGRADE IT AS YOU HAD PLANNED
16 HERE IN YOUR DEVELOPMENT PLAN?

17 A YES, I DO.

18 Q AND, BUT FOR THE ORDINANCE, THAT YOU WOULD DO
19 THIS; IS THAT WHAT YOU'RE TELLING US?

20 A THAT'S EXACTLY CORRECT.

21 Q NOW, ARE YOU AWARE OF YOUR GENERAL KNOWLEDGE,
22 MR. CUPP, HAS THERE EVER BEEN ANY COMPLAINTS OF YOUR
23 BUSINESS ESTABLISHMENT THERE IN TERMS OF PRODUCTS SOLD OR

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* * *

WITNESS: ROSSER H. PAYNE

[12]

1 IN MY OPINION, TO DRAW THE LINE ON THE BASIS OF PRODUCTS.
2 IF YOU HAVE A SAFEWAY IN A NEIGHBORHOOD SHOPPING CENTER THAT
3 HAS 27,000 SQUARE FEET BECAUSE IT'S A SMALL NEIGHBORHOOD
4 CENTER AND IF YOU HAVE A SAFEWAY, FOR EXAMPLE, IN A
5 REGIONAL CENTER WITH 200,000 SQUARE FEET, THAT IS A LAND-USE
6 CONTROL. THE IDEA TO SAY THAT ONE SAFEWAY CAN ONLY SELL
7 "DUZ" AND THE OTHER SAFEWAY CAN ONLY SELL "TIDE" IS
8 ABSOLUTELY LUDICROUS FROM A PLANNING STANDPOINT. IT IS
9 IMPOSSIBLE TO DEAL WITH.

10 Q DOES IT ALSO CREATE A PROBLEM WITH THE ENFORCEMENT?

11 A WELL, I WOULD HATE TO BE THE ENFORCEMENT OFFICER
12 WHO HAS TO DISTINGUISH BETWEEN PRODUCTS THAT WERE SOLD. I
13 THINK IT'S A MATTER OF TASTE AND A VALUE JUDGMENT.

14 Q DO YOU THINK IN THIS --

15 A WHAT --

16 Q I'M SORRY. GO AHEAD.

17 A WHAT MIGHT BE A VIOLATION TO ONE INSPECTOR WOULD
18 BE PERFECTLY APPROPRIATE TO ANOTHER.

19 Q DO YOU FEEL, IN THIS PARTICULAR INSTANCE, THAT
20 THIS ORDINANCE CREATES PROBLEMS FROM AN ENFORCEMENT STAND-
21 POINT?

22 A GIVEN THE HISTORY IN THIS COUNTY, WITH NEARLY
23 A FORTY-YEAR HISTORY OF ZONING OF NURSERIES TODAY; AND

1 ALMOST ALL OF THEM ARE IN RESIDENTIAL ZONES, WHICH HAVE
2 PERMITTED THE SALE OF ANCILLARY ITEMS TO INCLUDE THIS PLANT
3 EQUIPMENT WHICH ARE RELATED TO THE CARE, PROPAGATION, AND
4 MAINTENANCE OF SUCH PRODUCTS ALONE; AND, TO JUST SIMPLY
5 DROP THAT OUT WOULD BE A RATHER DIFFICULT ENFORCEMENT
6 PROBLEM.

7 IT ALSO CREATES A DIFFICULT PROBLEM IN TERMS OF
8 THE PERSON WHO COMES TO BUY THESE HORTICULTURAL, FLORI-
9 CULTURAL, AND AGRICULTURAL ITEMS BECAUSE, IF THEY CAN'T GET
10 THE THINGS THAT THEY NEED AS ADVISED BY THE PROFESSIONAL
11 PEOPLE WHO RAISE THESE PRODUCTS, THEY THEN MUST GET IN THE
12 CAR AND MAKE ANOTHER TRIP TO THE LOCAL COMMUNITY CENTER OR
13 REGIONAL CENTER OR NEIGHBORHOOD CENTER SOMEWHERE TO BUY THE
14 INDEPENDENT ITEM, WHICH CERTAINLY DOES NOT PROMOTE THE
15 PUBLIC HEALTH AND SAFETY.

16 IF THERE'S BEEN NO EMERGENCY, IF THERE'S BEEN NO
17 STUDY, IF THERE'S BEEN NO VIOLATION OF THE PUBLIC USES LAW,
18 THEN THERE'S NO BASIS FOR SUCH A REGULATION FROM THE
19 PLANNING STANDPOINT.

20 Q IT'S LIKE BUYING THE SPRAY BUT YOU COULDN'T BUY
21 THE SPRAYER. YOU'D HAVE TO GET IN YOUR CAR AND DRIVE
22 SOMEPLACE ELSE?

23 A THAT'S PRECISELY RIGHT.

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* * *

1 THOSE PARTICULAR EXHIBITS; AND WOULD YOU EXPLAIN THOSE TO
2 THE COURT?

3 MS. ANDERSON: JUDGE, IF I MAY JUST MAKE A
4 GENERAL OBJECTION TO THIS TESTIMONY JUST IN LINE WITH MY
5 EARLIER CONTENTION THAT THESE WOULD NOT APPLY AND ARE NOT
6 AT ISSUE. I WOULD OBJECT TO THE TESTIMONY IN GENERAL
7 RATHER THAN JUMP UP AT EACH QUESTION.

8 THE COURT: ALL RIGHT.

9 THE WITNESS: THERE ARE THREE EXHIBITS. THE FIRST
10 IS AN EXHIBIT WHICH SHOWS THE EXTENT AND THE AREA OF THE
11 DEDICATION THAT WOULD BE REQUIRED ALONG ROUTE 7 IN
12 ACCORDANCE WITH THE STAFF REPORT THAT WAS DONE IN
13 CONNECTION WITH THIS SPECIAL EXCEPTION CASE.

14 THERE WAS A STRIP OF LAND 41 FEET WIDE BY
15 APPROXIMATELY 500 FEET LONG WHICH CONSTITUTES AN AREA OF
16 20,474 SQUARE FEET. THIS IS THE RED CROSS-HASHED AREA
17 SHOWN ON THIS DRAWING.

18 Q THAT'S COMPLAINANT'S EXHIBIT NO. 1; IS THAT
19 CORRECT?

20 A THAT'S CORRECT.

21 Q DOES THAT INFRINGE -- DOES THAT ACTUALLY INFRINGE
22 ON THE LATH HOUSE THAT'S SHOWN THERE.

23 A YES, THIS DRAWING INDICATES A PROPOSED LATH HOUSE

1 WHICH WOULD BE 40½ FEET FROM THE RIGHT-OF-WAY LINE OF
2 ROUTE 7. THERE'S ALSO AN EXISTING LATH HOUSE THERE, WHICH,
3 IT APPEARS, MIGHT BE AFFECTED BY THIS LINE. I CAN'T REALLY
4 TELL FROM THE DRAWING.

5 Q ALL RIGHT. NOW, EXHIBIT A AND B, WHICH ARE
6 COMPLAINANT'S EXHIBITS 2 AND 3, WOULD YOU EXPLAIN THOSE TO
7 THE COURT?

8 A EXHIBIT A INDICATES THE NATURE AND EXTENT OF THE
9 RIGHT-TURN LANE WHICH WOULD BE REQUIRED BY THE COUNTY --
10 FAIRFAX COUNTY -- AND THE VIRGINIA DEPARTMENT OF HIGHWAYS
11 AND TRANSPORTATION AS A CONDITION TO THE SITE PLAN APPROVAL
12 FOR THE CHANGE IN USE -- NOT CHANGE IN USE, BUT CHANGE IN
13 THIS PROPERTY -- SPECIAL EXCEPTION TO THIS PROPERTY.

14 EXHIBIT --

15 Q WAIT JUST A SECOND BEFORE YOU GO ANY FURTHER.
16 WOULD YOU JUST EXPLAIN THE LENGTH AND THE BREADTH OF THAT
17 PARTICULAR IMPROVEMENT, WHAT'S INVOLVED; AND, ALSO, DID YOU
18 DO A COST ANALYSIS OF WHAT IT WOULD COST TO PUT THAT
19 IMPROVEMENT IN?

20 A THIS RIGHT-TURN LANE HAS A LENGTH OF 300 FEET IN
21 A NORTHWESTERLY DIRECTION, WHICH WOULD BE A 14-FOOT WIDENING
22 OF ROUTE 7 WITH CURB AND GUTTER. IN ADDITION TO THAT, WOULD
23 BE A 100-FOOT TAPER OR TRANSITION AREA. AT THIS END, WOULD

1 BE A 60-FOOT TRANSITION AREA WITH A TAPER.

2 WE HAVE ESTIMATED THE COST OF THIS CONSTRUCTION
3 TO BE \$41,564.

4 Q NOW, WOULD YOU SHOW EXHIBIT B AND EXPLAIN THAT TO
5 THE COURT?

6 A EXHIBIT B DEPICTS THE ULTIMATE IMPROVEMENTS TO
7 ROUTE 7 WHICH ARE REFERRED TO IN THE STAFF RECOMMENDATIONS.
8 THIS CONSISTS OF THE WIDENING OF ROUTE 7 FOR THE ENTIRE
9 FRONTAGE OF THE PROPERTY, WHICH IS 500 FEET. IN ADDITION,
10 THERE WOULD BE A 125-FOOT TRANSITION TAPER ON THE NORTHWEST
11 END, AND A 60-FOOT TRANSITION TAPER ON THE SOUTHEAST END.

12 Q ARE THOSE OFF-SITE?

13 A THESE WOULD BE OFF-SITE. THE WIDENING, IN THIS
14 CASE, IS 14 FEET WITH CURB AND GUTTER ALONG THE ENTIRE
15 FRONTAGE AND THE CONSTRUCTION OF AN ENTRANCE, A 20-FOOT
16 MEDIAN -- GRASS MEDIAN, CONSTRUCTION OF A 26-FOOT WIDE
17 SERVICE ROAD WITH CONCRETE SIDEWALK ALONG THE SOUTHWESTERN
18 EDGE. THIS WOULD GO FROM ONE PROPERTY LINE TO THE OTHER.

19 Q IS THERE ANYTHING ON EITHER SIDE OF THE
20 PROPERTY AT THIS TIME?

21 A THERE'S NO SERVICE ROAD, NO, ON EITHER END AT
22 THIS POINT THAT THE CONNECTION COULD BE MADE TO.

23 Q AND CAN YOU ESTIMATE THE COST OF PUTTING THOSE

1 IMPROVEMENTS IN?

2 A THE ESTIMATED COST OF THESE IMPROVEMENTS IS
3 \$101,070.

4 Q NOW, THE STAFF REPORT RECOMMENDS THE ENTIRE
5 DEDICATION WHICH WOULD INCLUDE THESE IMPROVEMENTS; IS THAT
6 CORRECT?

7 A THE STAFF REPORT RECOMMENDS THE DEDICATION WHICH
8 IS SHOWN ON THE FIRST EXHIBIT OF 41 FEET, WHICH IS THIS
9 STRIP. THIS IS THE BACK LINE OF THAT. THIS IS CONSISTENT
10 WITH THE CROSS-HASHED AREA SHOWN ON THE FIRST EXHIBIT, AND
11 THE FUTURE IMPROVEMENT OF THESE.

12 Q THEY ARE RECOMMENDING A WAIVER AT THIS TIME?

13 A THAT'S CORRECT.

14 Q THE ACTUAL AMOUNT OF LAND INVOLVED IN BOTH
15 INSTANCES IS THE SAME; IS THAT CORRECT?

16 A YES.

17 Q ALL RIGHT, SIR. NOW, CAN YOU TELL US,--
18 MR. PHILLIPS, CAN YOU TELL US WHETHER YOU HAVE AN OPINION
19 WHETHER OR NOT IT IS NECESSARY FROM THE TRAFFIC SAFETY
20 STANDPOINT TO MAKE THE DEDICATION AT THIS PARTICULAR TIME
21 IN ACCORDANCE WITH THE STAFF REPORT?

22 MS. ANDERSON: YOUR HONOR, I BELIEVE HE'S
23 CERTIFIED AS AN ENGINEER. IF HE'S ASKING A TRANSPORTATION

1 TYPE OF QUESTION, I'M NOT SURE IT IS PART OF THE STIPULATED
2 AGREEMENT.

3 MR. LAWSON: I THINK HIS QUALIFICATIONS, YOUR
4 HONOR, WHEN I SPOKE TO THAT IS HE WORKS -- I CAN GO AHEAD
5 AND QUALIFY HIM IN THAT AREA.

6 THE COURT: WHY DON'T YOU QUALIFY HIM IN THAT
7 AREA.

8 MR. LAWSON: ALL RIGHT, SIR. I THINK IT'S
9 CONTAINED PROBABLY IN HIS QUALIFICATIONS. IT SHOULD BE
10 HERE SOMEWHERE.

11 BY MR. LAWSON:

12 Q COULD YOU OUTLINE FOR US, MR. PHILLIPS, WHAT
13 BEING A GRADUATE LICENSED ENGINEER WHAT YOU -- WHAT TYPE
14 OF WORK THAT YOU'RE ENGAGED IN, AND PARTICULARLY IN FAIRFAX
15 COUNTY?

16 A WELL, I'VE BEEN INVOLVED IN THE LAND DEVELOPMENT
17 ENGINEERING PRACTICE IN FAIRFAX COUNTY SINCE 1959. OUR
18 WORK CONSISTS ALMOST EXCLUSIVELY OF SITE PLANNING OF
19 COMMERCIAL, INDUSTRIAL AND RESIDENTIAL SITES IN THE COUNTY
20 IN ACCORDANCE WITH THE FAIRFAX COUNTY SITE PLAN ORDINANCE.

21 THIS INVOLVES, TO A LARGE EXTENT, THE WIDENING
22 OF EXISTING ROADS, THE PREPARATION OF DRAWINGS FOR SERVICE
23 ROADS, RIGHT-TURN LANES, ENTRANCES, DRAINAGE, AND EVERY

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1 OTHER ASPECT OF THE DEVELOPMENT PROCESS.

2 Q DOES THIS INVOLVE HAVING TO WORK WITH THE STATE
3 DEPARTMENT OF HIGHWAYS AS WELL AS FAIRFAX COUNTY?

4 A YES, IT DOES. WE WORK WITH THE HIGHWAY
5 DEPARTMENT AS WELL AS FAIRFAX COUNTY.

6 Q ARE YOU REQUIRED TO MAKE RECOMMENDATIONS TO THE
7 PROPERTY OWNER AS TO WHAT THE CONFIGURATION AND THE
8 LOCATION OF THE ROAD AND ROAD IMPROVEMENTS SHOULD BE?

9 A YES, WE ARE. THE SITE PLAN ORDINANCE REQUIRES
10 THAT CERTAIN IMPROVEMENTS BE MADE; AND, IN ALMOST EVERY
11 INSTANCE, WE ARE IN A POSITION TO DISCUSS THESE WITH THE
12 COUNTY AND WITH THE HIGHWAY DEPARTMENT.

13 Q AND DOES THAT INVOLVE YOU THEN IN TURN ALSO MAKING
14 RECOMMENDATIONS AS TO TRAFFIC IMPROVEMENT, NOT ONLY TO
15 FAIRFAX COUNTY BUT TO THE HIGHWAY DEPARTMENT?

16 A WELL, NORMALLY, THE NATURE AND EXTENT OF THE
17 IMPROVEMENTS TO THE EXISTING HIGHWAY ARE A SUBJECT OF THE
18 PERMIT THAT IS ISSUED BY THE HIGHWAY DEPARTMENT.

19 WE MAY MAKE RECOMMENDATIONS; BUT, USUALLY, THEY
20 TELL US WHAT MUST BE DONE.

21 Q OFTEN TIMES, IS THAT A MATTER OF NEGOTIATION WITH
22 THE PARTIES AND THE HIGHWAY DEPARTMENT AND FAIRFAX COUNTY
23 IN WORKING OUT THE DETAILS?

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1 A OFTEN TIMES, IT'S NECESSARY TO MAKE FIELD VISITS,
2 TO MAKE SPECIAL ENGINEERING STUDIES TO DETERMINE WHAT WOULD
3 BE THE PROPER THING TO DO IN THAT PARTICULAR CASE.

4 Q AS TO TRAFFIC SAFETY, I WOULD PRESUME?

5 A CORRECT.

6 Q HAVE YOU BEEN QUALIFIED BEFORE TO TESTIFY IN THIS
7 COURT AS TO MATTERS THAT RELATE TO TRAFFIC SAFETY?

8 A I HAVE TESTIFIED IN COURT A NUMBER OF TIMES
9 REGARDING THIS TYPE OF WORK. I'M NOT A TRAFFIC ENGINEER,
10 PER SE.

11 Q BUT THE BULK OF YOUR WORK INVOLVES HIGHWAY PLANS
12 AND WORKING WITH THE HIGHWAY DEPARTMENT AND FAIRFAX COUNTY.

13 MR. LAWSON: YOUR HONOR, I THINK HE'S QUALIFIED.

14 THE COURT: DO YOU WANT TO VOIR DIRE.

15 MS. ANDERSON: YOUR HONOR, JUST FROM WHAT I'VE
16 HEARD, I DON'T BELIEVE HE'S QUALIFIED AS A TRANSPORTATION
17 PLANNER OR ENGINEER, WHICH SEEMS TO BE AT ISSUE HERE.

18 THE COURT: I'LL HAVE TO OVERRULE YOUR OBJECTION,
19 AND I'LL NOTE YOUR EXCEPTION. GO AHEAD.

20 BY MR. LAWSON:

21 Q SO, COULD YOU ANSWER THE QUESTION THEN? DO YOU
22 HAVE AN OPINION AS TO WHETHER OR NOT IT IS NECESSARY FROM
23 A TRAFFIC SAFETY STANDPOINT TO REQUIRE THE DEDICATION IN

1 THIS INSTANCE?

2 A THE RIGHT-TURN LANE WHICH HAS BEEN REQUIRED AND IS
3 THE SUBJECT OF EXHIBIT 2, I BELIEVE, IS ENTIRELY WITHIN THE
4 EXISTING RIGHT-OF-WAY OF ROUTE 7; AND, IN MY OPINION, THERE
5 IS NO NEED TO PROVIDE AN ADDITIONAL RIGHT-OF-WAY FOR THAT
6 IMPROVEMENT.

7 Q ARE YOU AWARE AFTER -- I ASSUME THAT YOU HAVE MADE
8 AN INVESTIGATION -- WHETHER OR NOT THERE ARE ANY HIGHWAY --
9 STATE HIGHWAY DEPARTMENT PLANS FOR SPECIFIC IMPROVEMENTS
10 AS TO ROUTE 7?

11 A THERE IS NO PROJECT AT THIS TIME FOR
12 IMPROVEMENTS TO ROUTE 7 IN THIS AREA.

13 Q AS ENVISIONED OR AS SHOWN ON THESE PARTICULAR
14 PLANS; IS THAT CORRECT?

15 A THAT'S CORRECT.

16 MR. LAWSON: THE COURT'S INDULGENCE FOR A MOMENT.
17 ONE FURTHER QUESTION.

18 BY MR. LAWSON:

19 Q DID YOU SUPPLY THE FINANCIAL DATA TO MACK DOWNS?

20 A YES.

21 MR. LAWSON: THAT'S ALL THE QUESTIONS I HAVE.

22 MS. ANDERSON: NO CROSS, YOUR HONOR.

23 THE COURT: OKAY. DO YOU WANT MR. PHILLIPS

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1 THE PROPERTY; AND, BY MEANS OF WHAT MIGHT BE TERMED "THE
2 MARKET DATA APPROACH", DID ASCERTAIN THE VALUE OF THE LAND
3 IN QUESTION AND ALSO THE VALUE OF THE IMPROVEMENTS AND THE
4 IMPACT IN VALUE ON THIS PROPERTY BY THIS PROPOSED
5 DEVELOPMENT.

6 BY MR. LAWSON:

7 Q ALL RIGHT, SIR. NOW, WOULD YOU TELL US VERY
8 BRIEFLY WHAT YOU TOOK INTO CONSIDERATION IN ORDER TO PREPARE
9 YOURSELF IN ORDER TO MAKE THESE EVALUATIONS?

10 A WELL, BASICALLY, YOUR HONOR, FROM THE STANDPOINT
11 OF ESTABLISHING THE LAND VALUE, I EXAMINED SALES IN THE
12 GENERAL AREA TO DETERMINE JUST WHAT THE VALUES WERE. BASED
13 ON THAT RESEARCH, I ARRIVED AT A VALUE OF ABOUT \$1.25 PER
14 SQUARE FOOT ON THE LAND.

15 THERE IS ABOUT 20,474 SQUARE FEET WITHIN THIS
16 AREA UNDER CONSIDERATION; THEREFORE, IT WOULD HAVE A VALUE
17 OF ABOUT \$25,592. NOW, INCLUDED WITHIN THIS TAKE, SINCE
18 THIS IS AN ACTIVE AREA THAT IS ACTIVELY BEING UTILIZED IN THE
19 PRESENCE OF A NURSERY BUSINESS, THERE ARE TWO LARGE, BRICK
20 GATEPOSTS WHICH DO LEND VALUE TO THE PROPERTY FROM AN
21 AESTHETIC STANDPOINT. THEY ARE KEPT --

22 Q I SHOW YOU COMPLAINANT'S EXHIBIT 4A. DOES THAT
23 SHOW THOSE PARTICULAR IMPROVEMENTS?

1 A PLAINTIFF'S EXHIBIT 4A, YOUR HONOR, DOES SHOW THE
2 ENTRANCE; AND THERE ARE TWO GATEPOSTS THAT YOU CAN SEE KEPT
3 AT THIS LOCATION. THERE IS ALSO A -- AND YOU CAN SEE IN
4 THE PICTURE, YOUR HONOR -- AN IRON GATE -- A DOUBLE IRON
5 GATE -- HINGED FROM EACH OF THE POSTS.

6 IN ADDITION TO THAT, THERE IS A SUBSTANTIAL AMOUNT
7 OF PERMANENT SHRUBBERY. THIS IS NOT SOMETHING THAT'S ON
8 THE EXHIBIT THERE TO BE SOLD, YOUR HONOR. THIS IS A
9 LANDSCAPING THAT IS AESTHETICALLY DESIRABLE FOR THE
10 OPERATION.

11 IN ADDITION TO THAT, THERE IS ONE LARGE, FREE-
12 STANDING SIGN AT THIS LOCATION. THERE'S ALSO ANOTHER FREE-
13 STANDING SIGN OVER AT THIS LOCATION ON THE RIGHT SIDE OF
14 THE PHOTOGRAPH.

15 INCLUDED WITHIN THIS AREA ALSO IS THE DRIVEWAY
16 ENTRANCE, THE PARKING AREA, WHICH WOULD BE DISPLACED, AND
17 A PORTION OF ONE LATH HOUSE WOULD ALSO BE WITHIN THIS AREA.
18 THIS ALL HAS VALUE. CERTAIN DISPLAY BEDS WHICH ARE LOCATED
19 THERE WOULD HAVE TO BE RELOCATED.

20 SO, THE ACTUAL REQUIREMENT HAS A VERY SUBSTANTIAL
21 IMPACT ON THE VALUE OF THIS PROPERTY; AND, OF COURSE, THE
22 ACTUAL COST OF PUTTING IN THESE ROAD IMPROVEMENTS AS SUCH,
23 HAS ALSO A VERY SIGNIFICANT IMPACT IN THE VALUE.

1 SO, IN MY ESTIMATION, THE VALUE OF THE LAND
2 COUPLED WITH THE IMPROVEMENTS HAVE A TOTAL VALUE OF ABOUT
3 \$30,392. THIS IS LAND AND IMPROVEMENTS WITHIN THAT AREA;
4 AND, WITH RESPECT TO THE VALUE OF THE IMPROVEMENTS, I FELT
5 THAT CERTAIN OF THEM COULD BE RELOCATED. SO, IT'S ACTUALLY
6 A COST OF RELOCATION AS OPPOSED TO AN ACTUAL COMPENSATION
7 FOR THE PARTICULAR SIGN OR THE BED THEMSELVES WHICH WOULD
8 HAVE TO BE RELOCATED.

9 IN ADDITION TO THAT, RELYING ON THE ESTIMATE OF
10 MR. PHILLIPS AS TO COST IF THE ULTIMATE SECTION WERE
11 CONSTRUCTED, OF \$101,070, THAT, COUPLED WITH THE \$30,392
12 WOULD MEAN COST OR AN IMPACT ON VALUE OF \$131,500.

13 IF THE RIGHT-TURN LANE ONLY WAS PUT IN, THEN WE
14 WOULD HAVE A TOTAL OF \$41,564 FOR THAT; AND THAT, COUPLED
15 WITH THE VALUE OF LAND AND IMPROVEMENTS AND/OR MOVE OF
16 THESE IMPROVEMENTS WOULD AMOUNT TO \$71,956 OR ABOUT \$72,000.

17 NOW, BASICALLY, WHAT THIS AMOUNTS TO, EVEN IF THE
18 APPRAISER DISREGARDS THE VALUE OF THE LAND, THE COST OF
19 PUTTING IN THESE IMPROVEMENTS AND RELOCATING THE IMPROVE-
20 MENTS THAT ARE ACTUALLY IN PLACE -- THE LATH HOUSE,
21 ET CETERA -- WOULD MEAN THAT THERE IS AN OBLIGATION THERE
22 WHICH WOULD TAKE A TREMENDOUS INCREASE AND IMPROVEMENT IN
23 THE NET OPERATION IN ORDER TO CURTAIL THAT.

1 ASSUMING -- AND THIS WOULD BE EXTREMELY
2 REASONABLE -- ASSUMING, SAY, A FIFTEEN-PERCENT INTEREST
3 RATE AND A FIFTEEN-YEAR LOAN TO CURTAIL THAT, THAT WOULD
4 MEAN THAT YOU'D HAVE ANNUAL PAYMENTS OF \$17,781 PER YEAR
5 JUST TO CURTAIL THESE IMPROVEMENTS CHANGE WHICH ARE REQUIRED
6 BECAUSE OF THIS INCONTESTABLE EXPANSION, SO TO SPEAK, OF
7 THE OPERATION OF THE BUSINESS.

8 NOW, THAT WOULD MEAN, IN ORDER TO DO THAT TO
9 CURTAIL THAT, THE OPERATION WOULD HAVE TO INCREASE ITS
10 NET -- ITS NET -- ABOUT FIFTY-SEVEN PERCENT, WHICH IS
11 COMPLETELY UNREALISTIC. IT WOULD BE VIRTUALLY IMPOSSIBLE
12 FROM AN APPRAISER'S STANDPOINT TO INCREASE THAT BUSINESS
13 BY THAT AMOUNT EVEN IF SUBSTANTIAL IMPROVEMENTS ARE MADE
14 TO THE EXISTING IMPROVEMENTS ONLY.

15 THIS ROAD IMPROVEMENT ACTUALLY CONTRIBUTES
16 NOTHING THAT WOULD INCREASE HIS REVENUE FROM AN APPRAISAL
17 STANDPOINT.

18 LOOKING AT FROM THE STANDPOINT OF THE RIGHT-TURN
19 LANE ONLY, THAT WOULD AMOUNT TO \$46,364. THE ANNUAL
20 CURTAILMENT OF THAT OVER A FIFTEEN-YEAR PERIOD AMOUNTS TO
21 \$7,787; AND THAT AMOUNTS TO ABOUT A TWENTY-FIVE PERCENT
22 INCREASE IN HIS NET JUST TO CURTAIL THAT EXPENSE.

23 SO, THERE IS A VERY SUBSTANTIAL IMPACT ON THE

1 VALUE OF THIS BY THIS REQUIREMENT -- BY THE COUNTY
2 REQUIREMENT.

3 ACTUALLY, WHAT IT AMOUNTS TO IS THAT THE OPERATOR
4 WOULD HAVE TO GIVE UP A PRODUCT LINE, SO TO SPEAK, HE WOULD
5 LOSE LAND, HE WOULD LOSE IMPROVEMENTS, HE WOULD HAVE A COST
6 OF PUTTING IN THESE IMPROVEMENTS, WHICH WOULD BE REQUIRED
7 BY THE COUNTY; AND, IN OTHER WORDS, THE ORDINANCE WOULD
8 WORK TO THE OWNER'S DISADVANTAGE; BUT, OVER AND ABOVE THAT,
9 THE TEARING DOWN OF A GREENHOUSE AND REPLACING IT WITH A
10 SLIGHTLY LARGER GREENHOUSE, THE INCREASE IN THE SIZE OF THE
11 LATH HOUSE AND DISPLACEMENT OF ONE WOULD HAVE ABSOLUTELY
12 NO ADVERSE EFFECT ON ANY OF THE EXISTING AND POTENTIAL
13 HOUSING IN THE IMMEDIATE AREA. IT IS A LOGICAL AND
14 REASONABLE EXTENSION OF THIS EXISTING OPERATION.

15 SO, FROM AN APPRAISAL STANDPOINT, I WOULD SAY
16 THAT THE NURSERY IS COMPATIBLE TO THIS AREA --

17 MS. ANDERSON: YOUR HONOR, IT'S HARDLY AN
18 APPRAISAL STANDPOINT. THIS IS--

19 THE COURT: SUSTAINED.

20 BY MR. LAWSON:

21 Q WELL, LET ME ASK YOU THIS, MR. DOWNS: WOULD YOU
22 ELABORATE A LITTLE FURTHER -- YOU STARTED INTO THIS -- AS
23 TO WHETHER OR NOT -- I THINK IT DOES, YOUR HONOR. I THINK

1 RESIDENTIAL DEVELOPMENT. AN EXAMINATION OF SALES WOULD
2 INDICATE THAT THEY FOLLOW THE SAME UPWARD TREND IN VALUE
3 AS PROPERTIES WHICH ARE ISOLATED FROM SUCH USES.

4 AS A MATTER OF FACT, THIS REALLY SATISFIES THE
5 DEMAND IN AN AREA WHERE THERE IS GROWTH TO WHERE THE
6 PROPERTY OWNER GOES OUT AND DOES A SUBSTANTIAL AMOUNT OF
7 HIS OWN LANDSCAPING.

8 SO, IT DOES PROVIDE A GOOD OUTLET; AND THE
9 CONTEMPLATED IMPROVEMENTS TO THIS USE; THAT IS, THE NEW
10 LATH HOUSE, THE NEW GREENHOUSE, AND SO FORTH, WOULD ACTUALLY
11 UPGRADE THE IMPROVEMENTS THAT NOW EXIST AND ACTUALLY
12 BROADEN THE TAX BASE.

13 SO, ACTUALLY, I THINK THAT THE CONTEMPLATED
14 IMPROVEMENTS IMPROVE IT RATHER THAN ACTUALLY DO ANYTHING
15 TO DOWNGRADE IT; AND THE REQUIREMENT OF A DECELERATION LANE
16 AND SERVICE ROAD AT THIS LOCATION HAS NO HELPFUL ASPECT TO
17 THE SUBJECT PROPERTY ALSO.

18 MR. LAWSON: YOUR HONOR, I'D LIKE TO OFFER THIS
19 INTO EVIDENCE.

20 THE COURT: WHAT EXHIBIT?

21 THE CLERK: 38.

22 THE COURT: 38. ANY OBJECTION?

23 MS. ANDERSON: I HAVEN'T SEEN IT, YOUR HONOR.

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[9]

1 MR. LAWSON: I WOULD LIKE TO MAKE THIS A PART OF
2 THE RECORD, IF WE MIGHT INTRODUCE THAT, YOUR HONOR?

3 THE COURT: ANY OBJECTION, MS. ANDERSON?

4 MS. ANDERSON: NO, YOUR HONOR.

5 THE COURT: OKAY.

6 (THE DOCUMENT HERETOFORE REFERRED
7 TO WAS MARKED PLAINTIFF'S EXHIBIT
8 NO. 39 FOR IDENTIFICATION AND WAS
9 RECEIVED IN EVIDENCE.)

10 BY MR. LAWSON:

11 Q INDICATED IN THERE IN THAT PARTICULAR LETTER IS
12 THAT WE OBJECTED TO THE DEDICATION AND THE ROAD IMPROVEMENTS;
13 ISN'T THAT CORRECT?

14 A THAT'S CORRECT.

15 Q NOW, I SHOW YOU -- WELL, LET ME WITHDRAW THAT.

16 LOOK AT THE LETTER OF JANUARY 4, 1980, FROM
17 ROBERT DAVIS ADDRESSED TO ME.

18 A I HAVE IT.

19 Q YOU DO HAVE THAT LETTER?

20 A UH-HUH.

21 Q OKAY. SOB DAVIS INDICATES IN THERE THAT THIS
22 NEW AMENDMENT WOULD PROHIBIT THE SALE OF RETAIL ITEMS NOT
23 SPECIFICALLY DESIGNATED SOLELY TO MAINTAIN AND PRESERVE THE

1 LIFE AND HEALTH OF NURSERY STOCK, SUCH AS GARDEN TOOLS,
2 HOSES, POTTERY, STATUES, AND BIRDBATHS; ISN'T THAT CORRECT?

3 A THAT'S CORRECT.

4 Q AND HE ALSO STATES IN THERE; AND I QUOTE,
5 "SUBSEQUENT TO THE PLANNING COMMISSION HEARING WHERE THE
6 STAFF RECOMMENDED APPROVAL, MR. CUPP INFORMED ME THAT THESE
7 ITEMS WERE CURRENTLY BEING SOLD ON SITE. UNLESS THESE
8 ITEMS ARE REMOVED FROM THE SITE AS SALES ITEMS, THE STAFF
9 WILL HAVE TO RECOMMEND A DENIAL PENDING SPECIAL EXCEPTION
10 APPLICATION TO THE BOARD OF SUPERVISORS"; ISN'T THAT
11 CORRECT?

12 A THAT'S A CORRECT STATEMENT, YES.

13 Q SO, IN OTHER WORDS, IT WAS THE POSITION OF THE
14 STAFF AT THAT TIME THAT, EVEN BEFORE THIS MATTER WAS TO BE
15 HEARD BY THE BOARD OF SUPERVISORS, THAT MR. CUPP WOULD HAVE
16 TO, YOU MIGHT SAY, SORT OF IN PREPARATION OF HAVING THIS
17 SE APPROVED, BRING HIMSELF INTO CONFORMANCE WITH THE NEW
18 ORDINANCE?

19 A THAT WAS THE STATEMENT AS PRESENTED, BUT IT'S MY
20 RECOLLECTION THAT THAT WAS LATER CLARIFIED.

21 Q RIGHT. WE'LL GET TO THAT, BUT THAT'S THE POSITION
22 OF THE STAFF AT THAT TIME, IS IT NOT?

23 A YES. I THINK WHAT HE IS PROBABLY TRYING TO SAY

1 WAS FINAL APPROVAL OF THE SPECIAL EXCEPTION WOULD
2 NECESSITATE THE REMOVAL OR THE NONSALE OF THESE ITEMS.

3 Q WELL, WE'LL GET TO THAT. SO, ON JANUARY THE 10TH,
4 DO YOU HAVE MY LETTER TO BOB DAVIS?

5 A THAT'S CORRECT.

6 Q AND, IN THAT LETTER, DID I OBJECT TO THAT
7 POSITION; AND AGAIN REITERATE OUR OBJECTION TO THE ROAD
8 IMPROVEMENTS; ISN'T THAT CORRECT?

9 A THAT'S CORRECT.

10 Q AND WE ALSO TAKE THE POSITION THAT MY CLIENT HAS
11 THE RIGHT TO CONTINUE THE SALE OF PRODUCTS THAT WERE IN
12 SALE OR BEING SOLD AT THAT TIME; ISN'T THAT CORRECT?

13 A THAT'S THE POSITION YOU PRESENTED IN THAT LETTER,
14 SIR.

15 Q OKAY, SIR. NOW, IN RESPONSE TO THAT, BOB DAVIS
16 WROTE TO ME ON JANUARY THE 23RD, 1980; ISN'T THAT CORRECT?

17 A THAT'S CORRECT.

18 Q AND THAT'S IN THE RECORD?

19 A THAT'S CORRECT.

20 Q ALL RIGHT, SIR; AND HE STATES THERE AS YOU JUST
21 EARLIER STATED, HE BACKS OFF OF THE POSITION THAT WE HAD
22 TO BRING OURSELVES INTO CONFORMANCE PRIOR TO THE HEARING;
23 BUT, THAT SUBSEQUENT, ONCE THE APPLICATION WOULD BE APPROVED,

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[12]

1 THEN HE WOULD HAVE TO CEASE THE SALE OF MAN-MADE PRODUCTS;
2 ISN'T THAT CORRECT?

3 A THAT'S CORRECT.

4 Q SO, IN OTHER WORDS, THEN THAT WAS THE POSITION OF
5 THE COUNTY STAFF THEN THAT, IF AND WHEN THIS APPLICATION
6 WERE TO BE APPROVED, THEN WOLF TRAP NURSERY WOULD HAVE TO
7 CEASE THE SALE OF MAN-MADE PRODUCTS; ISN'T THAT CORRECT?

8 A THAT IS CORRECT. THERE IS NO WAY THAT WE COULD
9 RECOMMEND TO THE BOARD OR THE BOARD COULD ADOPT, IN MY
10 JUDGMENT, A SPECIAL EXCEPTION FOR THIS USE THAT WAS NOT IN
11 CONFORMANCE WITH THE PROVISIONS IN THE THEN CURRENT ZONING
12 ORDINANCE.

13 Q ALL RIGHT, SIR. I WOULD ASSUME THEN ARE YOU
14 TELLING US THAT IT IS CURRENTLY THE POSITION THEN OF THE
15 COUNTY THAT ONCE THIS APPLICATION WERE APPROVED, THEN THE
16 APPLICANT WOULD THEN HAVE TO BRING HIMSELF INTO COMPLIANCE
17 WITH THE OCTOBER 10 AMENDMENT; ISN'T THAT CORRECT?

18 A THAT'S CORRECT. OCTOBER 22 I BELIEVE IT WAS.

19 Q WHAT DID I SAY? THE 10?

20 A 10.

21 Q I BEG YOUR PARDON. AGAIN, I WROTE TO MR. DAVIS
22 ON JANUARY THE 29TH, DID I NOT?

23 A YES.

1 Q AND THAT'S ALSO A PART OF THE RECORD?

2 A YES, IT IS.

3 Q AND, IN THE SECOND PARAGRAPH, PARTICULARLY, I
4 STATED THAT IT WAS MY CLIENT'S POSITION WE OBJECTED TO THE
5 STAFF'S INTERPRETATION OF THE ORDINANCE AND AS TO THE
6 CONDITIONS OF THE SPECIAL EXCEPTION?

7 A YES, YOU DID.

8 Q AND CITES LEGAL ARGUMENTS IN THERE; IS THAT
9 CORRECT?

10 A THAT'S CORRECT.

11 Q OKAY, AND I ALSO OBJECTED TO THE ROAD IMPROVEMENTS?

12 A THAT'S CORRECT.

13 Q AND PARTICULARLY THE SECOND PARAGRAPH OR REALLY
14 THE FIRST FULL PARAGRAPH OF PAGE 2. WOULD YOU READ THAT
15 PARAGRAPH TO THE COURT?

16 A "IT HAS BEEN THE POSITION OF MY CLIENT AND
17 CONTINUES TO BE HIS POSITION THAT HE SEEKS THE SPECIAL
18 EXCEPTION (WITHOUT THE CONDITIONS AND LEGAL INTERPRETATION
19 GIVEN TO IT BY THE STAFF) ONLY AS A METHOD OF EXHAUSTING
20 HIS ADMINISTRATIVE REMEDIES FOR IT IS MR. CUPP'S POSITION
21 THAT HE HAS THE RIGHT TO APPLY FOR AND SEEK APPROVAL OF A
22 BUILDING PERMIT TO CONSTRUCT THE IMPROVEMENTS AS SHOWN ON
23 THE DEVELOPMENT PLAN ASSUMING, OF COURSE, THAT APPLICABLE

(Vol. IV, pg. 14)

WITNESS: PHILIP G. YATES

[14]

1 REQUIREMENTS OF THE BUILDING CODE ARE MET WITH PRIOR BOARD
2 APPROVAL; AND THAT HE HAS A VESTED RIGHT TO CONTINUE HIS
3 BUSINESS AND TO ACCOMMODATE ITS NORMAL, NATURAL GROWTH."

4 Q SO, YOU UNDERSTOOD, DID YOU NOT, AT THAT TIME
5 THAT IT WAS THE APPLICANT'S POSITION THAT HE REALLY DIDN'T
6 EVEN HAVE TO BRING HIMSELF UNDER THIS ORDINANCE; AND IT WAS
7 QUITE CLEAR ALL ALONG THAT WE CONTESTED THE LEGAL POSITION
8 THAT THE COUNTY WAS ASSUMING UNDER THIS ORDINANCE; IS THAT
9 NOT CORRECT?

10 A THAT IS CORRECT.

11 Q YOU DIDN'T HAVE ANY DOUBTS IN YOUR MIND WHAT THE
12 POSITION OF MR. CUPP WAS ASSUMING THAT IN THIS CASE, DID
13 YOU?

14 A NO, WE DEFINITELY RECOGNIZED THAT HIS POSITION
15 WAS CONTRARY TO THAT OF OURS.

16 Q AND WOULDN'T IT BE FAIR TO CHARACTERIZE THAT IT
17 WAS CERTAINLY THE POSITION OF THE COUNTY THAT THIS ORDINANCE
18 WAS CONSTITUTIONAL AND VALID AND ALSO THAT IT WAS APPLICABLE
19 TO MR. CUPP'S BUSINESS? THERE WASN'T ANY QUESTION IN THE
20 COUNTY'S MIND; ISN'T THAT CORRECT?

21 MS. ANDERSON: MR. YATES CAN ONLY SPEAK ON HIS
22 BEHALF, NOT ON BEHALF OF THE COUNTY.

23 THE COURT: SUSTAINED.

1 MR. LAWSON: WELL, YOUR HONOR, I THINK THE COUNTY
2 CAN ONLY OBVIOUSLY SPEAK THROUGH ITS AGENTS.

3 THE COURT: IN HIS POSITION AS ZONING ADMINISTRATOR.

4 MR. LAWSON: OKAY.

5 BY MR. LAWSON:

6 Q AND, IT IS YOUR POSITION AS ZONING ADMINISTRATOR
7 AND THE ONE WHO IS IN CHARGE OF THE DRAFTING OF ORDINANCES
8 AS WELL AS ENFORCING THE ORDINANCES, AND PARTICULARLY IN
9 CHARGE OF THE PREPARATION OF THIS PARTICULAR APPLICATION
10 AND MAKING THE PRESENTATION TO -- NOT YOU PERSONALLY, BUT
11 BEING IN CHARGE OF THE PRESENTATION -- TO THE BOARD OF
12 SUPERVISORS, IT WAS ALWAYS, AND I ASSUME STILL IS, YOUR
13 POSITION THAT THE ORDINANCE WAS VALID AND CONSTITUTIONAL;
14 IS THAT CORRECT?

15 A MOST CERTAINLY.

16 Q AND YOU HAD HAD NO INDICATION FROM THE BOARD OR
17 ANYONE ELSE IN THE COUNTY THAT A CONTRARY POSITION WAS
18 GOING TO BE TAKEN, DID YOU?

19 A THAT A CONTRARY -- THAT SOMEBODY ELSE --

20 Q THAT A CONTRARY POSITION WAS TO BE TAKEN?

21 A NO, I DID NOT, SIR.

22 Q ALL RIGHT, SIR; AND THAT WOULD EQUALLY BE TRUE OF
23 THE ROAD IMPROVEMENTS THAT WERE SOUGHT BY THE COUNTY IN THIS

1 PARTICULAR INSTANCE -- THAT THEY WERE VALID AND THAT,
2 LEGALLY, THAT THE COUNTY COULD MAKE A DEVELOPER MAKE THESE
3 IMPROVEMENTS; ISN'T THAT CORRECT?

4 A THAT'S CORRECT.

5 Q ALL RIGHT, SIR. NOW, THIS PARTICULAR CASE WAS
6 FIRST SCHEDULED IN FEBRUARY OF 1980; ISN'T THAT CORRECT,
7 AND THEN SUBSEQUENTLY DEFERRED FOR ONE MONTH UNTIL MARCH
8 THE 10TH?

9 A THAT'S MY RECOLLECTION.

10 Q AND THAT DEFERRAL WAS MADE AT THE REQUEST OF
11 SUPERVISOR FALCK; ISN'T THAT RIGHT?

12 A I DON'T REALLY RECALL.

13 Q ALL RIGHT, SIR. DO YOU RECALL A LETTER THAT I
14 WROTE TO YOU ON FEBRUARY 14, '80? IT'S IN THE PACKAGE. IT
15 SHOULD BE. IF IT'S NOT, I'LL GIVE YOU A COPY.

16 A NO, I SEEM TO RUN OUT IN JANUARY.

17 MR. LAWSON: MARK THIS FOR IDENTIFICATION.

18 THE WITNESS: I'M SORRY. I DO HAVE IT.

19 BY MR. LAWSON:

20 Q YOU DO?

21 A UH-HUH.

22 Q FEBRUARY THE 14TH, MY LETTER ADDRESSED TO YOU?

23 A THAT'S CORRECT.

1 Q SO THAT OBVIOUSLY WOULD HAVE BEEN DURING THE
2 PERIOD OF TIME THAT THE CASE WAS DEFERRED BY THE BOARD;
3 ISN'T THAT CORRECT?

4 A THAT'S CORRECT.

5 Q AND YOU AND I HAD TALKED ABOUT THIS, HAD WE NOT,
6 ABOUT THE POSSIBILITY OF AN AMENDMENT TO THE ORDINANCE?

7 A YES, WE HAD.

8 Q IN THIS PARTICULAR LETTER OF FEBRUARY THE 14TH,
9 I PROPOSED AN AMENDMENT TO THE ORDINANCE WHICH IS THE
10 POSITION OF MR. CUPP THAT THIS WOULD TAKE CARE OF HIS
11 PARTICULAR SITUATION; ISN'T THAT CORRECT?

12 A THAT'S CORRECT.

13 Q AND I TAKE IT, IT WAS YOUR POSITION THAT THIS
14 WAS NOT AN AMENDMENT THAT YOU WERE WILLING TO RECOMMEND TO
15 THE BOARD OF SUPERVISORS?

16 A THAT'S CORRECT, BASED UPON CONSULTATION WITH THE
17 COUNTY ATTORNEY'S OFFICE.

18 Q ALL RIGHT, SIR; AND, SO, THIS ATTEMPT TO AMEND
19 THIS PARTICULAR APPLICATION -- OR, EXCUSE ME, TO AMEND THE
20 ORDINANCE -- TO TAKE CARE OF THIS PARTICULAR SITUATION, THAT
21 APPLICATION WAS REVOKED THEN; ISN'T THAT CORRECT?

22 A THAT'S CORRECT.

23 Q ALL RIGHT. NOW, TURNING PARTICULARLY TO -- OH,

1 LET ME MAKE SURE THAT MR. CUPP'S LETTER OF FEBRUARY THE
2 4TH, 1980, IS ALSO IN THAT PACKAGE.

3 A IT IS.

4 Q I'M SURE THAT'S PART OF IT.

5 A IT IS.

6 Q OKAY, FINE. NOW, IT WAS THE RECOMMENDATION OF
7 THE STAFF, IS IT, IN THIS PARTICULAR CASE, THAT THE
8 APPLICATION BE APPROVED; ISN'T THAT CORRECT?

9 A THAT'S CORRECT, AS LONG AS IT FULLY CONFORMED
10 WITH THE CURRENT PROVISIONS OF THE ZONING ORDINANCE.

11 Q AND JUST TO MAKE THAT -- THAT NOBODY HAS ANY
12 AMBIGUITY IN THEIR MIND ABOUT THAT, THAT ONCE THIS THING
13 WAS APPLIED -- I MEAN ONCE THE SE WAS GRANTED -- THEN, OF
14 COURSE, THE ORDINANCE WOULD HAVE BEEN APPLIED; ISN'T THAT
15 CORRECT, AFTER?

16 A THAT'S CORRECT.

17 Q OKAY. NOW, APPARENTLY, YOUR STAFF, UNDER YOUR
18 DIRECTION AND SUPERVISION HAD NO PROBLEM WITH THE LOCATION
19 OF THE RETAIL/COMMERCIAL NURSERY AT THIS PARTICULAR SPOT, I
20 TAKE IT; ISN'T THAT CORRECT, BECAUSE YOU HAD RECOMMENDED
21 FAVORABLE ACTION ON THIS?

22 A YOU SAY A RETAIL/COMMERCIAL NURSERY. WE DID HAVE
23 PROBLEMS WITH THE FULL RANGE OF COMMERCIAL ACTIVITIES AS

(Vol. IV, pg. 80)

WITNESS: ROBERT L. MOORE

* * *

[80]

1 A ROBERT L. MOORE.

2 Q AND WHAT IS YOUR CURRENT POSITION IN FAIRFAX
3 COUNTY.

4 A I'M A PRINCIPAL PLANNER IN THE FAIRFAX COUNTY
5 OFFICE OF TRANSPORTATION.

6 Q AND HOW LONG HAVE YOU BEEN WITH THE COUNTY?

7 A I'VE BEEN WITH THE COUNTY SINCE MAY OF 1974.

8 Q WAS THAT ALWAYS IN THE OFFICE OF TRANSPORTATION?

9 A PRIOR TO BECOMING A SEPARATE OFFICE, WE WERE
10 THE TRANSPORTATION PLANNING BRANCH OF THE COMPREHENSIVE
11 PLANNING OFFICE. WE HAVE BEEN THE TRANSPORTATION OFFICE
12 FOR A FEW YEARS NOW -- TWO OR THREE YEARS.

13 Q ARE YOU FAMILIAR WITH THE SUBJECT APPLICATION?

14 A YES, I AM.

15 Q WHAT CONDITIONS WERE RECOMMENDED BY STAFF WITH
16 REGARD TO ROAD IMPROVEMENTS FOR THE SUBJECT APPLICATION?

17 A OKAY. THE STAFF RECOMMENDED THAT RIGHT-OF-WAY
18 BE DEDICATED TO ACCOMMODATE THE FUTURE WIDENING OF ROUTE 7,
19 THAT AN ADDITIONAL LANE BE CONSTRUCTED, A SERVICE DRIVE BE
20 CONSTRUCTED, AND THE DECELERATION -- A DECELERATION -- LANE
21 BE CONSTRUCTED.

22 I BELIEVE THE STAFF ALSO INDICATED THAT THE
23 CONSTRUCTION AND DEDICATION OF ALL OF THOSE IMPROVEMENTS

1 COULD BE DEFERRED EXCEPT FOR THE DECELERATION, RIGHT-TURN
2 LANE.

3 Q COULD YOU STATE WHY THOSE CONDITIONS WERE
4 RECOMMENDED?

5 MR. LAWSON: YOUR HONOR, I THINK THE STAFF REPORT
6 COULD SPEAK FOR ITSELF. THERE IS A REPORT FROM THE
7 DEPARTMENT OF TRANSPORTATION, AND I WOULD OBJECT. I DON'T
8 SEE THE POINT BECAUSE, AS I SAY, THE STAFF REPORT DOES
9 SPEAK TO THE QUESTION.

10 MS. ANDERSON: YOUR HONOR, I THINK HE CAN STATE
11 FROM HIS EXPERIENCE IN THE COUNTY.

12 THE COURT: OKAY. I'LL OVERRULE THE OBJECTION.
13 GO AHEAD.

14 THE WITNESS: WELL, OUR RESPONSIBILITY IS TO
15 RECOMMEND TO THE BOARD OF SUPERVISORS THOSE ROAD
16 IMPROVEMENTS, WHICH, NUMBER ONE, ARE NECESSARY TO
17 ACCOMMODATE THE LONG-RANGE PLAN OF THE COUNTY; AND, NUMBER
18 TWO, ARE NECESSARY TO ACCOMMODATE A SITE'S SPECIFIC ACCESS
19 NEEDS.

20 THE DEDICATION AND FUTURE CONSTRUCTION ARE
21 CONSISTENT WITH THE LONG-RANGE PLAN OF THE COUNTY. THE
22 DECELERATION, RIGHT-TURN LANE IS SOMETHING THAT WE FELT WAS
23 NECESSARY TO IMPROVE THE ACCESS IN AND OUT OF THE SITE.



COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

APPLICATION FOR SPECIAL EXCEPTION, SPECIAL PERMIT, VARIANCE OR APPEAL
AS PROVIDED IN THE FAIRFAX COUNTY ZONING ORDINANCE

Application No. D.E. 091-D-79
Assigned by Staff

August 2, 19 79

The undersigned hereby applies for the special exception, special permit, variance, or appeal as indicated below, for property owned and described as follows:

Name of Applicant: Blair W. and Dorothy S. Cupp

Name of Property Owner: Blair W. and Dorothy S. Cupp

Postal Address of Property: 9439 Leesburg Pike, Vienna, VA 22180

Name of Subdivision: None

County Property Identification Map Reference: 19-3 25-2 (11) 19

Lot Area: 6.7203 acres District: Dranesville Zoning: R-1

The undersigned has the power to authorize and does hereby authorize Fairfax County staff representatives on official business to enter on the subject property as necessary to process the application.

NATURE OF THIS APPLICATION

(Applicant is to complete only one of the following boxes. If a Variance is needed in conjunction with a Special Exception or a Special Permit, separate application for Variance must be filed.)

SPECIAL EXCEPTION* Section <u>3-104</u> Proposed Use: <u>Modification and expansion of existing plant nursery, with variance to additional standards for the use to allow existing lot to be used</u>	- Application to Board of Supervisors under provisions of the Zoning Ordinance.
SPECIAL PERMIT* Section <u>1</u> Proposed Use: <u>parking area to remain closer to existing R-1 than allowed by applicable additional standards</u>	- Application to Board of Zoning Appeals under provisions of the Zoning Ordinance.
VARIANCE Section _____ Request: _____	- Application to Board of Zoning Appeals under provisions of the Zoning Ordinance.
APPEAL Section _____ Appeal: _____	- Application to Board of Zoning Appeals under provisions of the Zoning Ordinance.

* See requirement for affidavit on back.

Thomas O. Lawson
Signature of Applicant or Agent
Thomas O. Lawson, Esquire
Address _____ Zip _____
4103 Chain Bridge Road

Fairfax, VA 22030

Telephone Number 273-1950

BELOW THIS LINE FOR STAFF USE

Application, complete with all required submissions, received: 9/17/79

Filing Fee paid: \$50.00

Receiving Staff Member: Hy

AFFIDAVIT

I, Blair W. Cupp, do hereby make oath or affirmation that to the best of my knowledge and belief the foregoing information contained in this application is true; and:

1. (a) That the following constitutes a listing of names and last known addresses of all applicants, title owners, contract purchasers, or lessees of the land described in the application, and if any of the foregoing is a trustee, each beneficiary having an interest in such land, and all attorneys, real estate brokers, and all agents who have acted on behalf of any of the foregoing with respect to the application:

Name Blair W. & Dorothy S. Cupp Address 39 Leesburg Pike Relationship Owners
~~Thomas S. Lawson, 4103 Chain Bridge Road, Fairfax, VA Attorney~~

- (b) That the following constitutes a listing of the shareholders of all corporations of the foregoing who own ten (10) per cent or more of any class of stock issued by said corporation, and where such corporation has ten (10) or less shareholders, a listing of all the shareholders:

Name	Address	Relationship

- (c) That the following constitutes a listing of all partners, both general and limited, in any partnership of the foregoing:

Name	Address	Relationship

2. That no member of the Fairfax County Board of Supervisors, Planning Commission or Board of Zoning Appeals owns or has any interest in the subject land or has any interest in the outcome of the decision.

NONE EXCEPT AS FOLLOWS: (If none, so state)

3. That within the five (5) years prior to the filing of this application, no member of the Fairfax County Board of Supervisors, Planning Commission, or Board of Zoning Appeals or any member of his immediate household and family, either directly or by way of partnership in which any of them is a partner, employee, agent or attorney, or through a partner of any of them, or through a corporation in which any of them is an officer, director, employee, agent or attorney or holds outstanding bonds or shares of stock with a value in excess of fifty dollars (\$50), has or has had any business or financial relationship, other than any ordinary depositor or customer relationship with or by a retail establishment, public utility or bank, including any gift or donation having a value of fifty dollars (\$50) or more with any of those listed in Par. 1 above.

NONE EXCEPT AS FOLLOWS: (If none, so state)

WITNESS the following signature this 4th day of Sept, 19 79.

Blair W. Cupp
Applicant

The above affidavit was subscribed and confirmed by oath or affirmation before me this 4th day of September, 19 79, in the State of Virginia.

Donna J. Richards
Notary Public

My commission expires: March 19, 1982

ADOPTION OF AN AMENDMENT TO CHAPTER
112 (ZONING) OF THE 1976 CODE OF
THE COUNTY OF FAIRFAX, VIRGINIA

At a regular meeting of the Board of Supervisors of Fairfax County, Virginia, held in the Board Room in the Massey Building, at Fairfax, Virginia, on Monday, October 22, 1979, the Board, after having first given notice of its intention so to do, in the manner prescribed by law, adopted an amendment to Chapter 112 (Zoning), of the 1976 Code of the County of Fairfax, Virginia, said amendment so adopted being in the words and figures following, to-wit:

BE IT ORDAINED BY THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA:

Amend Chapter 112 (Zoning) as follows:

Amend Article 20, Part 3, Definitions, as follows:

1. Revise the definition of AGRICULTURE to read as follows:

AGRICULTURE: The use of a tract of land not less than five (5) acres for (a) the tilling of the soil; (b) the growing of crops or plant growth of any kind, including forestry; (c) pasturage; (d) horticulture; (3) dairying; (f) floriculture; or (g) raising of poultry and livestock.

The term 'agriculture' shall not include the following uses: (a) the maintenance and operation of plant nurseries; (b) the feeding of garbage to animals; (c) the raising of fur-bearing animals as a principal use; (d) the operation of maintenance of a commercial stockyard or feed yard, or (e) the retail sales of agricultural products except in accordance with the provisions of Par. 27 of Sect. 10-102. However, the definition of agriculture shall not be deemed to preclude: (a) the keeping of livestock on parcels of two (2) acres in size as permitted by Sect. 2-512; or (b) gardening, as permitted as an accessory use in Sect. 10-102.

2. Revise the definition of CONTRACTOR'S OFFICES AND SHOPS to read as follows:

CONTRACTOR'S OFFICES AND SHOPS: Establishments for the installation and servicing of such items as air conditioners, electrical equipment, flooring, heating, painting, plumbing, roofing, tiling and ventilating and establishments for the

planting and maintenance of gardens, grounds and yards such as landscape contractors and lawn maintenance services.

3. Add a new term and definition of GARDEN CENTER in its proper alphabetical sequence:

GARDEN CENTER: An area or establishment engaged in the retail sales of items for the landscaping and maintenance of gardens, grounds and yards such as trees, shrubs, plants, seeds, bulbs, mulches, fertilizers, garden tools, pottery, statues, bird baths and other such items. Landscape contracting of items sold on the property shall be permitted as an accessory use. For the purpose of this Ordinance, garden centers shall be deemed RETAIL SALES ESTABLISHMENTS.

4. Delete the term and definition of NURSERY, PLANT in entirety and substitute in lieu thereof, in its proper alphabetical sequence, a new term and definition of PLANT NURSERY to read as follows:

PLANT NURSERY: An area or establishment for the propagation, cultivation and growing of nursery stock such as trees, plants, shrubs and vines. Retail sales from the site may be permitted as an accessory use and shall be limited to nursery stock grown on the property and items designed solely to maintain and preserve the life and health of nursery stock such as fungicides, insecticides, chemicals, peat moss, humus, mulches and fertilizers. Retail sales of items not designed solely to maintain and preserve the life and health of nursery stock such as garden tools, hoses, pottery, statues and bird baths shall be deemed a GARDEN CENTER and shall be prohibited. Landscape contracting of nursery stock grown on the property shall be permitted as an accessory use.

For the purpose of this Ordinance, growing of nursery stock shall include stock which is grown on the premises and stock which is purchased elsewhere and transplanted for growth on the premises.

Amend Article 3, Residential District Regulations, R-P and R-C Districts, Section 3-P04 and 3-C04, Special Exception Uses, by revising Par. 3 to read as follows:

3. Category 5 - Commercial and Industrial Uses of Special Impact, limited to:

- A. Marinas, docks and boating facilities, commercial
- B. Offices
- C. Plant nurseries

Amend Article 5, Industrial District Regulations, as follows:

1. Amend the I-4 District, Sect. 5-404, Special Exceptions Uses, by adding a new Par. 4I to read as follows:

I. Plant nurseries

2. Amend the I-5 and I-6 Districts, Sections 5-502 and 5-602, Permitted Uses, by adding a new Par. 19 to read as follows:

19. Plant nurseries

Amend Article 9, Special Exceptions, Sect. 9-502, Districts In Which Category 5 Uses May Be Located, as follows:

1. Amend Par. 1 by revising the following two entries to read as follows:

I-5 District: Limited to uses 8, 14, 16, 20, 21 and 23

I-6 District: Limited to uses 14, 16, 20, 21 and 23

2. Amend Par. 2 by revising the following three entries to read as follows:

R-P, R-C Districts: Limited to uses 13, 14 and 16

I-3 District: Limited to uses 3, 5, 7, 12, 13, 15, 18 and 19

I-4 District: Limited to uses 3, 5, 7, 12, 13, 15, 16, 18 and 19

Amend Article 9, Special Exceptions, by revising Sect. 9-514 to read as follows:

9-514 Additional Standards for Plant Nurseries

1. In the R-A through R-4 Districts, no plant nursery shall be established except on a lot which has a minimum lot area of one (1) acre and has frontage on an arterial street as defined in the adopted comprehensive plan.

2. In the R-A through R-4 Districts, no building or structure used for or in connection with such use shall be located closer than 100 feet to any lot line which abuts an R district.

3. In the R-A through R-4 Districts, no off-street parking or loading space shall be located closer than fifty (50) feet to any lot line which abuts an R district.

4. Plant nurseries shall be subject to the regulations of the zoning district in which located. In addition, in the R-A through R-4 Districts, the Board shall impose such conditions and restrictions as it may deem necessary to assure that the use will be compatible with the adjacent residential area. In particular, the Board may condition the following:

- A. Location, size, height and use of structures
- B. Location and number of commercial vehicles
- C. Lighting and hours of operation
- D. Location of materials stored outside

5. In the R-A through R-4 Districts, notwithstanding the provisions of Sect. 9-003, the Board may vary, modify or waive the provisions of Paragraphs 1, 2 and 3 above and the provisions of Article 13 for a plant nursery which is accessory to a single family detached dwelling, provided such dwelling is the domicile of the nursery operator.

Amend Article 13, Landscaping and Screening, the Transitional Screening and Barrier Matrix, by adding plant nurseries to Par. 9.

GIVEN under my hand this 22nd day of October, 1979.

Ethel Wilcox Register
Ethel Wilcox Register
Clerk to the Board



STAFF REPORT

APPLICATION NUMBER SE-091-D-79

DRANESVILLE DISTRICT

Applicant: Blair & Dorothy Cupp

Subject Parcel: 19-3 ((1)) 19

Present Zoning: R-1

Acreage: 6.7208 acres

Proposed Use: Plant Nursery Expansion

Applicable Zoning Ordinance Provision: 3-104 and 9-003

Application Filed: September 17, 1979

Planning Commission Hearing Date: December 5, 1979

Board of Supervisors Hearing Date: February 4, 1980 at 3:00 P.M.

Staff Recommendation: The staff recommends approval of SE-091-D-79, subject to the conditions noted in Appendix 1 of this report. The staff also recommends modification of the transition yard along the east and south sides of the site, subject to the approval of the Director of the Department of Environmental Management. The transition yard and barrier should be waived along the west side of the parcel.

It is further recommended that the Board of Supervisors modify the additional standards of Paras. 2 and 3 of Sect. 9-514, as amended, to allow the lath house and proposed parking lot to remain closer to the lot line which abuts the R District.



SPECIAL EXCEPTION APPLICATION

Number: SE-091-D-79

District: DRANESVILLE

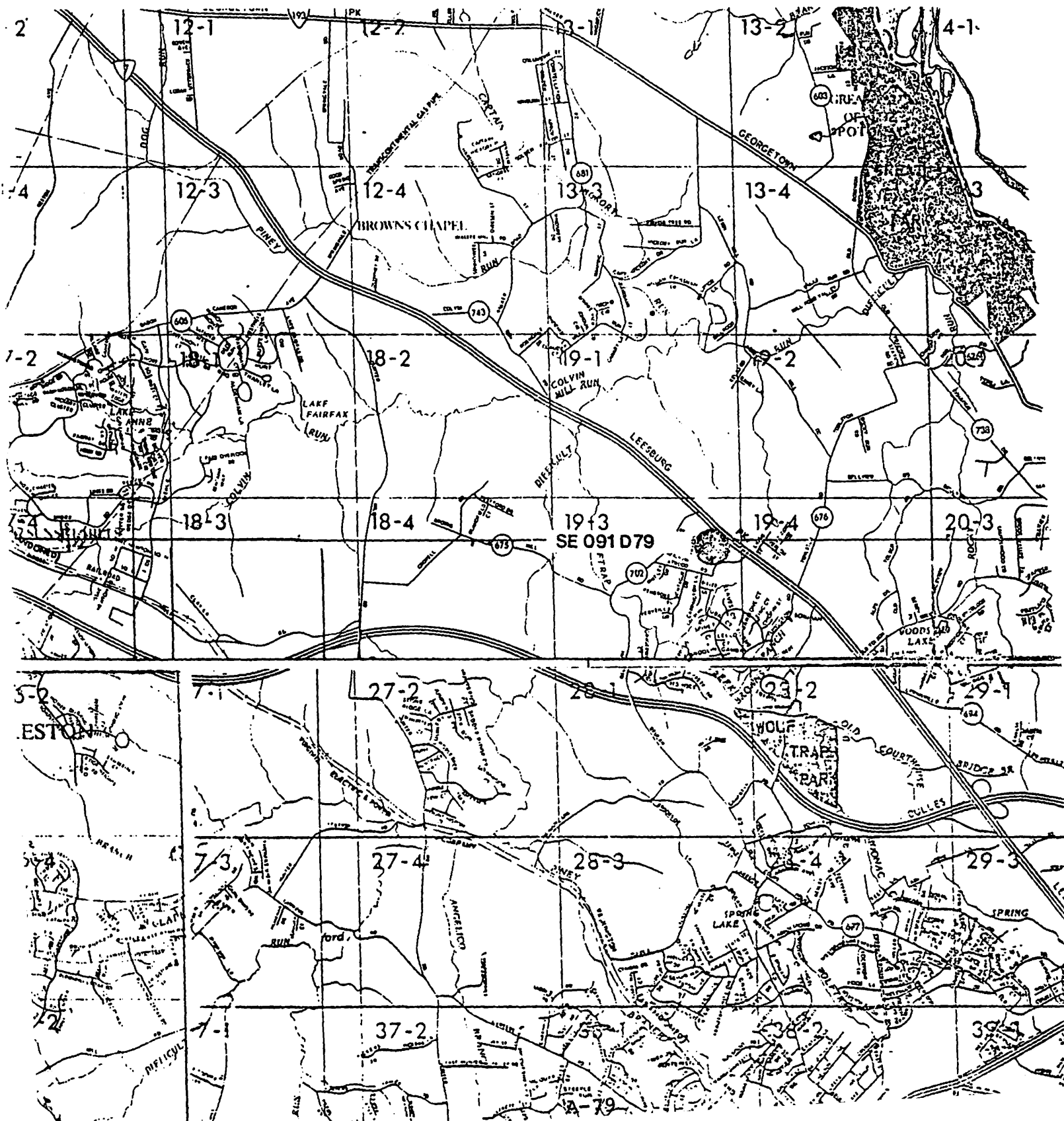
Acreage: 6.7208

Subject Parcel: 19-3 ((1)) 19

Existing Zoning: R-1

Applicant: Blair & Dorothy Cupp

Proposed Use: Plant Nursery Expansion





DESCRIPTION OF THE APPLICATION

Mr. and Mrs. Cupp request approval of a special exception application for modification and expansion of a plant nursery which has been operating at its present location for seven years. The applicants also request a variance (Sect. 9-003) to the additional standards for plant nurseries, as amended (Sect. 9-514), to allow the existing lath house and parking area to remain closer to the abutting R-District than allowed by those additional standards.

The facility is in operation seven days a week from 8:30 a.m. to 5:00 p.m. with a maximum of seven employees at a time.

A plant nursery is a Category 5 Special Exception Use within the R-1, Residential District, one dwelling unit/acre. Approval of this application must satisfy pertinent standards contained in the Zoning Ordinance, an extract of which is Appendix 4.

LOCATION AND CHARACTER OF THE AREA

The 6.7 acre site is located at 9439 Leesburg Pike (Route 7) approximately 550 feet east of Beulah Road (Route 702).

The site and the surrounding area are zoned R-1. The property to the west was recently rezoned to the R-2 Zoning Category (78-D-60).

CONFORMANCE WITH THE COMPREHENSIVE PLAN

The subject property is in the M7, Wolf Trap Community Planning Sector of the McLean Planning District of Area II.

The Plan states:

"C. Land along the south side of Route 7 should maintain the pattern of an average density of 1-2 units per acre but permit cluster development so that land immediately adjacent to the highway would remain as open space and provide a buffer for the residential area.

D. To maintain the present scenic attractiveness of Route 7 in this area, site plans for all developments should be encouraged to continue to feature greater than normal setbacks from the highway and natural buffering as many recent developments have done. To implement this policy proposal a zoning ordinance amendment policy should be considered.

E. Route 7 through this sector should be kept free of additional commercial-industrial development west of the Dulles Airport Access Road."

The adopted Plan Map shows residential use at 1-2 dwelling units/acre.

STAFF ANALYSIS

Transportation Analysis

The Office of Transportation would not object to approval of this application provided the applicant makes improvements noted in the development conditions of Appendix 1. See Appendix 5.

Environmental Analysis

There are no significant environmental constraints to the proposed development. See Appendix 6.

Preliminary Site Plan Analysis

The proposed on-site buildings must satisfy the 100-foot setback requirement of Paragraph 2, Sect. 9-514, as amended. The parking area must be located to meet the 50 foot setback required in Paragraph 3 of Sect. 9-514, as amended, and must be of a dustless surface. See Appendix 4. The applicant requests a modification of these requirements by the Board of Supervisors. Ref. Sect. 9-003. Modification of those requirements appears to be appropriate.

Retail and wholesale sales are proposed on the site. A retail sales establishment in an R-1 District requires Transitional Screening 3 between the commercial and adjacent residential uses. This screening is required on the eastern, western and southern side of this site. Transitional Screening 3 consists of an unbroken 50 foot wide strip of landscaped open space and a barrier fence in accordance with the provisions of Par. 3C of Sect. 13-109 of the Zoning Ordinance. Construction of a Transition Screening 3 on the eastern portion of the site would require removal of part of the existing lath house.

Peripheral landscaping could satisfy modification requirements of Par. 2 of Sect. 13-111 by minimizing adverse impact with architectural and landscaping techniques.

The single-family dwelling of the applicant is situated between the plant nursery and the rezoned parcel to the west, which is approximately 280 feet from the nursery. In this instance the staff feels that a Transition Screening 3 Yard is not necessary. The staff, therefore, recommends waiver of this screening requirement pursuant to Par. 2 of Sect. 13-111. Likewise, the existing vegetation and growing nursery stock (i.e., trees, shrubs and plants) on the southern portion of the site provides adequate screening along that border. Staff feels that the Transition Screening 3 requirement should be modified on the south to retain and use the existing vegetation. Any landscaping or screening deemed necessary should be provided to the satisfaction of the Director of Environmental Management.

Service drives are usually required along primary roads. However, in approving a preliminary plat for R-2 development on the

property west of the nursery the service drive required was waived because public street access was provided through the rezoned property from Beulah Road to the Cupp property. Therefore, unless the Cupp property is redeveloped, no functional service drive is required for the development proposed under this special exception. At the time of redevelopment of the Cupp property, extension of the public street from the west may be required in lieu of a service road.

A standard deceleration lane should be provided in order to insure uninhibited traffic movement on the existing two eastbound lanes of Route 7.

STAFF CONCLUSIONS AND RECOMMENDATIONS

The special exception proposed conforms to the Plant Nursery definition, as amended, in Article 20 of the Zoning Ordinance.

The setback requirements noted in Paras. 2 and 3 of Sect. 9-514, as amended, and the screening requirement of Article 13 can be modified by the Board of Supervisors. Any waiver or modification of the screening requirements must be approved by the Director of Environmental Management.

Parking must be of a dustless surface.

The staff recommends approval of SE-091-D-79, subject to the conditions noted in Appendix 1 of this report. The staff also recommends that the transition yard along the east and south sides of the site be modified pursuant to Par. 2 of Sect. 13-111 of the Zoning Ordinance. The transition yard and barrier should be waived along the west side of the parcel.

It is further recommended that the Board modify the additional standards of Pars. 2 and 3 of Sect. 9-514 to allow the lath house and proposed parking lot to be located closer to the lot line which abuts the R District.

APPENDICES

1. Proposed Development Conditions
2. Affidavit
3. Statement of Justification
4. General Standards
5. Transportation Analysis
6. Environmental Analysis

PROPOSED DEVELOPMENT CONDITIONS

If it is the intent of the Board of Supervisors to approve SE-091-D-79 located as Tax Map 19-3 ((1)) 19 for use as a plant nursery pursuant to Sects. 3-104 and 9-003 of the Fairfax County Zoning Ordinance, the staff recommends that the Board condition the approval by requiring conformance with the following development conditions:

1. This Special Exception is granted for the location indicated in the application and is not transferable to other land.
2. This Special Exception is granted for the buildings and uses indicated on the plats submitted with the application only.
3. A copy of this Special Exception SHALL BE POSTED in a conspicuous place along with the Residential/Non-Residential Use Permit on the property of the use and be made available to all Departments of the County of Fairfax during hours of operation of the permitted use.
4. Submission and approval of a site plan prepared in accordance with the provisions of Article 17. The revised site plan will satisfy ordinance requirements for parking, landscaping and screening, subject to approval of the Director, Department of Environmental Management.
5. Construction of a deceleration/right turn lane for entrance to the plant nursery.
6. Dedication of right-of-way to 100 feet from the centerline for a third eastbound lane and a standard service drive, the exact amount of dedication to be set by DEM at the time of site plan review. Construction of the third lane and the service drive can be deferred until such time as the site redevelops.
7. Provision of peripheral landscaping along the eastern side of the site to minimize adverse impact to the adjoining residential property.
8. Retention of existing vegetation along the eastern, western, and southern property boundaries where waivers or modifications to the screening requirements are granted.
9. This approval, contingent on the above noted conditions, shall not relieve the applicant from compliance with the provisions of any applicable ordinances regulations or adopted standards. The applicant shall be himself responsible for obtaining the required Residential/Non-Residential Use Permit through established procedures, and this Special Exception shall not be valid until this has been complied with.

AFFIDAVIT

I, Blair W. Cupp, do hereby make oath or affirmation that to the best of my knowledge and belief the foregoing information contained in this application is true; and:

1. (a) That the following constitutes a listing of names and last known addresses of all applicants, title owners, contract purchasers, or lessees of the land described in the application, and if any of the foregoing is a trustee, each beneficiary having an interest in such land, and all attorneys, real estate brokers, and all agents who have acted on behalf of any of the foregoing with respect to the application:

Name	Address	Relationship
Blair W. & Dorothy S. Cupp	9439 Leesburg Pike	Vienna, VA Owners
Thomas O. Lawson	4103 Chain Bridge Road	Fairfax, VA Attorney

- (b) That the following constitutes a listing of the shareholders of all corporations of the foregoing who own ten (10) per cent or more of any class of stock issued by said corporation, and where such corporation has ten (10) or less shareholders, a listing of all the shareholders:

Name	Address	Relationship
NONE		

- (c) That the following constitutes a listing of all partners, both general and limited, in any partnership of the foregoing:

Name	Address	Relationship
NONE		

2. That no member of the Fairfax County Board of Supervisors, Planning Commission or Board of Zoning Appeals owns or has any interest in the subject land or has any interest in the outcome of the decision.

NONE EXCEPT AS FOLLOWS: (If none, so state)

3. That within the five (5) years prior to the filing of this application, no member of the Fairfax County Board of Supervisors, Planning Commission, or Board of Zoning Appeals or any member of his immediate household and family, either directly or by way of partnership in which any of them is a partner, employee, agent or attorney, or through a partner of any of them, or through a corporation in which any of them is an officer, director, employee, agent or attorney or holds outstanding bonds or shares of stock with a value in excess of fifty dollars (\$50), has or has had any business or financial relationship, other than any ordinary depositor or customer relationship with or by a retail establishment, public utility or bank, including any gift or donation having a value of fifty dollars (\$50) or more with any of those listed in Par. 1 above.

EXCEPT AS FOLLOWS: (If none, so state)

NONE

WITNESS the following signature this 4th day of Sept, 19 79.

Blair W. Cupp
Applicant

The above affidavit was subscribed and confirmed by oath or affirmation before me this 4th day of September, 19 79, in the State of Virginia.

KELLY, LOUK, LAWSON & KELLY

ATTORNEYS AT LAW

4103 CHAIN BRIDGE ROAD

FAIRFAX, VIRGINIA 22030

703, 273 1950

H. WISE KELLY, JR.
RALPH G. LOUK
THOMAS O. LAWSON
H. WISE KELLY, III
W. BREWSTER COCKRELL

OF COUNSEL
ROBERT B. HOOD, JR.

September 4, 1979

Members, Fairfax County
Board of Supervisors

Re: SE Plant Nursery
Blair W. and Dorothy S. Cupp
T/A Wolf Trap Nursery

Ladies and Gentlemen:

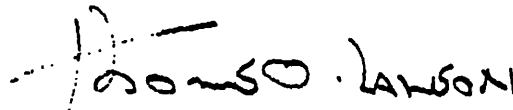
The above applicants have been operating a plant nursery at 9439 Leesburg Pike, Vienna, VA for seven years and now that Capers Nursery has gone out of business, they are virtually the only full service plant nursery in this area. Thus, it serves a real need for this area.

The Cupps also live on the premises and thus assure the continued maintenance of an attractive and esthetically pleasing environment. The business is in operation seven days a week from 8:30 a.m. to 5:00 p.m. with a maximum number of employees at any given time of 7. The maximum number of customers at any one time would be 15; thus, the operation has a minimal effect on the traffic on Route 7.

The proposed modifications are really more in the nature of rearranging the location of activities on the site rather than their expansion. For example one greenhouse is being moved closer to an existing greenhouse and the sales and display building. The same is true of the lath house and the existing sales and display area is being expanded. In each instance the changes will move the various activities away from the property lines and in closer proximity to the applicants' house.

Since the site consists of 6.7+ acres of land there is obviously more than enough area to accommodate these modifications.

Very truly yours,


Thomas O. Lawson

TOL/dfr

Enclosures

General Standards

In addition to the specific standards set forth hereinafter with regard to particular special exception uses, all such uses shall satisfy the following general standards:

1. The proposed use at the specified location shall be in harmony with the policies embodied in the adopted Comprehensive Plan.
2. The proposed use shall be in harmony with the general purpose and intent of the applicable zoning district regulations.
3. The proposed use shall be such that it will not adversely affect the use or development of the neighboring properties in accordance with the applicable zoning district regulations and the applicable provisions of the adopted Comprehensive Plan. The location, size and height of buildings, structures, walls and fences, and the nature and extent of screening, buffering and landscaping shall be such that the use will not hinder or discourage the appropriate development and use of adjacent or nearby land and/or buildings or impair the value thereof.
4. The proposed use shall be such that pedestrian and vehicular traffic generated will not be hazardous or conflict with existing and anticipated traffic in the neighborhood.
5. In addition to the standards which may be set forth in this Article for a particular category or use, the Board shall require landscaping and screening in accordance with the provisions of Article 13.
6. Open space shall be provided in an amount equivalent to that specified for the zoning district in which the proposed use is located.
7. Adequate utility, drainage, parking, loading and other necessary facilities to serve the proposed use shall be provided. Parking and loading requirements shall be in accordance with the provisions of Article 11.
8. Signs shall be regulated by the provisions of Article 12, except as may be qualified in the parts that follow for a particular category or use. However, the Board may impose more strict standards for a given use than those set forth in this Ordinance.

9-514 Additional Standards for Plant Nurseries

1. In the R-A through R-4 Districts, no plant nursery shall be established except on a lot which has a minimum lot area of five (5) acres and has frontage on an arterial street as defined in the adopted comprehensive plan.
2. In the R-A through R-4 Districts, no building or structure used for or in connection with such use shall be located closer than 100 feet to any lot line which abuts an R district.
3. In the R-A through R-4 Districts, no off-street parking or loading space shall be located closer than fifty (50) feet to any lot line which abuts an R district.
4. Plant nurseries shall be subject to the regulations of the zoning district in which located. In addition, in the R-A through R-4 Districts the Board shall impose such conditions and restrictions as it may deem necessary to assure that the use will be compatible with the adjacent residential area. In particular the Board may condition the following:
 - A. Location, size, height and use of structures
 - B. Location and number of commercial vehicles
 - C. Lighting and hours of operation
 - D. Location of materials stored outside

Article 20

PLANT NURSERY: An area or establishment for the propagation, cultivation and growing of nursery stock such as trees, plants, shrubs and vines. Retail sales from the site may be permitted as an accessory use and shall be limited to nursery stock grown on the property and items designed solely to maintain and preserve the life and health of nursery stock such as fungicides, insecticides, chemicals, peat moss, humus, mulches and fertilizers. Landscape contracting of nursery stock grown on the property shall be permitted as an accessory use.

For the purpose of this Ordinance, growing of nursery stock shall include stock which is grown on the premises and stock which is purchased elsewhere and transplanted for growth on the premises.

FAIRFAX COUNTY, VIRGINIA

MEMORANDUM

TO: Sidney R. Steele, Chief
Zoning Evaluation Branch, OCP DATE November 8, 1979

FROM: Shiva K. Pant, Director *S. K. Pant*
Office of Transportation

FILE NO: 3-5, SE-091-D-79

SUBJECT: Transportation Impact

REFERENCE: SE-091-D-79, 19-3

IMPACT ANALYSIS AND DESIGN CONSIDERATIONSCompatibility with the Adopted Plan

The site is located on the south side of Leesburg Pike (Rt. 7) southeast of Beulah Road. Route 7 is classified as a principal arterial, the main function of which is to provide for through traffic. The road is four lanes in this area with a median divider. There are separate turn lanes on Route 7 at some intersections including that with Beulah Road. The 1978 traffic count on Route 7 in the vicinity site was 34,965 vpd. This is the latest traffic count available and is reported by VDH&T. The level of service in this area is very poor due to the high volumes of traffic.

The transportation element of the Countywide Plan recommends the widening of Route 7 to a six lane divided facility. Public hearings for this project have not been scheduled at this time. In addition, service drives are required along primary roads such as Route 7. Therefore, sufficient right-of-way should be dedicated for a third eastbound lane, and a standard service drive. Dedication should include right-of-way to about 100 feet from the centerline, the exact amount to be set by the Department of Environmental Management at the time of site plan review. Construction of the third lane and the service drive can be deferred until such time as the site redevelops.

A trip generation rate for plant nurseries is unavailable, therefore, an estimate of the number of trips to and from the facility is undetermined.

Access to the Surrounding Street System

The existing site has direct access to Route 7 and no change in this situation is proposed by the applicant. There is a break in the median divider on Route 7 at the entrance to the site. In addition, there are separate left turn lanes at this location.

November 8, 1979

The applicant should construct a deceleration/right turn lane on eastbound Route 7, such that vehicles reducing speed to enter the site will not disrupt traffic flow on Route 7.

RECOMMENDATION

The Office of Transportation would not object to the approval of this application provided the applicant:

- o dedicates right-of-way to about 100 feet from centerline along the frontage of the site, the exact amount to be set by the Department of Environmental Management at the time of site plan review,
- o constructs a deceleration/right turn lane for entrance to the plant nursery.

SKP/tlh

ENVIRONMENTAL SITE ANALYSIS

Project Number: SE-091-D-79 Location: 19-3 ((1)) 19
 Existing Zoning: _____ Proposed Zoning and/or Use: Nursery Acreage: 6.7

Site Features	Presence		Comments
	yes	no	
A. Geology: Coastal Plain, Piedmont, Triassic			
1. shallow bedrock	_____	x	
2. groundwater resource	_____	x	
3. mineral resources	_____	x	
B. Topography:			
1. steep slopes (≥15%)	_____	x	
2. irregular landform	_____	x	
C. Hydrology:			
1. water features	x	_____	C. Difficult Run watershed 1. Stream located in southeast corner of the site. No disturbance to the stream is proposed. 3. The property is located upstream of the Potomac water intake. Proposed modifications will not significantly impact the water quality of the Potomac.
2. critical location in watershed	_____	x	
3. water supply watershed	x	_____	
D. Soils:			
1. marine clays	_____	x	D. 4., 5., 6. - Meadowville silt loam found adjacent to the stream in the southeast corner of the site. No construction is planned on this soil
2. shrink-swell clays	_____	x	
3. highly erodible soils	_____	x	
4. high water table soils	x	_____	
5. soils with low bearing strength	x	_____	
6. poor infiltration soils	x	_____	
E. Vegetation, Wildlife & Open Space:			
1. quality vegetation	_____	x	
2. wildlife habitat	_____	x	
3. adopted EQC	_____	x	
Environmental Quality	Problems		Comments
	yes	no	
F. Noise:			
1. airport noise	_____	x	F. 2. Some of the nursery buildings fall within the unacceptable noise zone of Route 7. However, this noise will not significantly affect this commercial use.
2. highway noise	_____	x	
3. railroad noise	_____	x	
4. other types of noise	_____	x	
G. Water:			
1. point source pollution	_____	x	
2. non-point source pollution	_____	x	
H. Air:			
1. mobile source pollution	_____	x	
2. stationary source pollution	_____	x	
I. Aesthetics: For example:			
internal views, views from site, views of site from adjacent development	_____	x	
J. Other:			

Addendum To

SE 091-D-79

BACKGROUND

On December 5, 1979, the Planning Commission voted to recommend to the Board of Supervisors approval of SE 091-D-79, which is an application to expand an existing plant nursery in an R-1, Residential District in Dranesville District.

The special exception application was recommended for approval based on the staff's conclusion (page 3, Staff Report) that the use will conform to the Plant Nursery definition, as amended October 22, 1979, in Article 20 of the Zoning Ordinance. The staff recommendation is based solely on the plant nursery being in conformance with the amendment provisions adopted on October 22, 1979. Enclosure #2 of this addendum presents the adopted plant nursery definition and additional standards.

STAFF COMMENTS

Presently, retail sales of such items as garden tools, hoses, pottery, statues and bird baths are taking place at Wolftrap Nursery. The application for special exception to expand the nursery brings the use within the present Zoning Ordinance provisions. Consequently, retail sales of the items noted and similar such items are expressly prohibited as part of a plant nursery. The staff cannot recommend approval of this special exception application unless the sale of such items is terminated. Strict compliance with the revised definition and additional standards would make the use a compatible use in the R-1 District for which staff would recommend approval.

The single family detached dwelling shown on the preliminary site plan is the domicile of the nursery operator with the plant nursery as an accessory use. Par. 5 of Sect. 9-514, as amended, provides the Board of Supervisors with the authority to vary, modify or waive the provisions of Paragraphs 1, 2 and 3 of the additional standards for plant nurseries and the provisions of Article 13 for a plant nursery which is accessory to a single family detached dwelling. Thus, those modifications and waivers requested by the applicant to allow the existing lath house and parking lot to remain closer to the abutting R district than allowed by the additional standards for plant nurseries are permitted. Modifications and waivers of screening requirements are also permitted by the section noted above. In this instance, where modification or waiver is granted, retention of existing vegetation would be appropriate.

STAFF CONCLUSIONS AND RECOMMENDATIONS

Sales at the present facility are not in accordance with the recently adopted provisions of the Zoning Ordinance with regard to a plant nursery. Thus, the staff cannot recommend approval of expansion of the enterprise without the operation being brought into conformance with the ordinance.

Therefore, should the applicants intend to continue sales of merchandise now prohibited at a plant nursery, the staff recommends denial of the application. With the understanding that sales would conform to the current provisions of the Zoning Ordinance, the staff recommends approval of the application subject to the development conditions listed in Revised Appendix 1, Proposed Development Conditions. Enclosure #1. In that instance, the staff would also recommend that the Board modify the transition yard along the south side of the site and waive the transition yard and barrier along the east and west sides of the parcel provided existing vegetation is retained along the eastern, western, and southern property boundaries where the modifications and waivers are granted.

It is further recommended that the Board modify the additional standards of Pars. 2 and 3 of Sect. 9-514 to allow the existing lath house and the proposed parking lot to be located not closer than 13 feet from the lot line which abuts the R District.

PROPOSED DEVELOPMENT CONDITIONS

If it is the intent of the Board of Supervisors to approve SE 091-D-79 located as Tax Map 19-3 ((1)) 19 for use as a plant nursery pursuant to Sects. 3-104 and 9-003 of the Fairfax County Zoning Ordinance, the staff recommends that the Board condition the approval by requiring conformance with the following development conditions:

1. This Special Exception is granted for the location indicated in the application and is not transferable to other land.
2. This Special Exception is granted for the buildings and uses indicated on the plats submitted with the application only.
3. A copy of this Special Exception SHALL BE POSTED in a conspicuous place along with the Residential/Non-Residential Use Permit on the property of the use and be made available to all Departments of the County of Fairfax during hours of operation of the permitted use.
4. Submission and approval of a site plan prepared in accordance with the provisions of Article 17. The revised site plan will satisfy ordinance requirements for parking, landscaping and screening, subject to approval of the Director, Department of Environmental Management.
5. Construction of a deceleration/right turn lane for entrance to the plant nursery.
6. Dedication of right-of-way to 100 feet from the centerline for a third eastbound lane and a standard service drive, the exact amount of dedication to be set by DEM at the time of site plan review. Construction of the third lane and the service drive can be deferred until such time as the site redevelops.
7. Retention of existing vegetation along the eastern, western and southern property boundaries where waivers or modifications to the screening requirements are granted.
8. This approval, contingent on the above noted conditions, shall not relieve the applicant from compliance with the provisions of any applicable ordinances, regulations or adopted standards. The applicant shall be himself responsible for obtaining the required Residential/Non-Residential Use Permit through established procedures, and this Special Exception shall not be valid until this has been complied with.

PLANT NURSERY: An area or establishment for the propagation, cultivation and growing of nursery stock such as trees, plants, shrubs and vines. Retail sales from the site may be permitted as an accessory use and shall be limited to nursery stock grown on the property and items designed solely to maintain and preserve the life and health of nursery stock such as fungicides, insecticides, chemicals, peat moss, humus, mulches and fertilizers. Retail sales of items not designed solely to maintain and preserve the life and health of nursery stock such as garden tools, hoses, pottery, statues and bird baths shall be deemed a GARDEN CENTER and shall be prohibited. Landscape contracting of nursery stock grown on the property shall be permitted as an accessory use.

For the purpose of this Ordinance, growing of nursery stock shall include stock which is grown on the premises and stock which is purchased elsewhere and transplanted for growth on the premises.

9-514 Additional Standards for Plant Nurseries

1. In the R-A through R-4 Districts, no plant nursery shall be established except on a lot which has a minimum lot area of one (1) acre and has frontage on an arterial street as defined in the adopted comprehensive plan.

2. In the R-A through R-4 Districts, no building or structure used for or in connection with such use shall be located closer than 100 feet to any lot line which abuts an R district.

3. In the R-A through R-4 Districts, no off-street parking or loading space shall be located closer than fifty (50) feet to any lot line which abuts an R district.

4. Plant nurseries shall be subject to the regulations of the zoning district in which located. In addition, in the R-A through R-4 Districts, the Board shall impose such conditions and restrictions as it may deem necessary to assure that the use will be compatible with the adjacent residential area. In particular, the Board may condition the following:

- A. Location, size, height and use of structures
- B. Location and number of commercial vehicles
- C. Lighting and hours of operation
- D. Location of materials stored outside

5. In the R-A through R-4 Districts, notwithstanding the provisions of Sect. 9-003, the Board may vary, modify or waive the provisions of Paragraphs 1, 2 and 3 above and the provisions of Article 13 for a plant nursery which is accessory to a single family detached dwelling, provided such dwelling is the domicile of the nursery operator.

December 6, 1979

Robert L. Davis
Office of Comprehensive Planning
Zoning Evaluation Branch
The Massey Building
4100 Chain Bridge Road
Fairfax, VA 22030

Re: SE-091-D-79
Blair and Dorothy Cupp

Dear Bob:

I would like the application to reflect the fact that the operating entity for the nursery will be the Wolf Trap Nursery, Inc. My original letter of justification dated September 4, 1979, does reference this fact in the re; however, I would assume that the board, upon issuing the SE, would want to include the operating entity in the permit as well as the owners of the property. In this instance the Cupps are the sole owners of the corporation as well.

On another matter I would like the record to reflect that the applicants object to the requirement of the dedication of a right-of-way up to 100 feet from the centerline of Route 7 and the construction of a deceleration right turn lane at the entrance. Am I correct in assuming that the staff's recommendation is that both the construction and the dedication of the 100 foot right-of-way be deferred until a later redevelopment of the site?

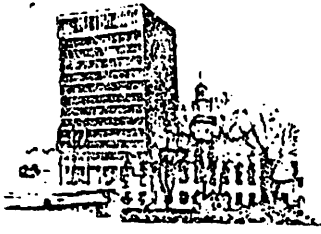
Also, I would appreciate it if the staff would clarify exactly what transitional yard is going to be required on the eastern boundary adjacent to the present lathe house. The vegetation that exists on the entire perimeter of the site is more than adequate to screen the facility from the adjacent properties; and, I would therefore request a waiver of the transitional yard requirement on all of the side yards.

Very truly yours,

Thomas O. Lawson

TOL/dfr

cc: Blair Cupp



COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

4100 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

January 4, 1980



Mr. Thomas O. Lawson
Attorney-at-Law
4103 Chain Bridge Road
Fairfax, Virginia 22030

Re: SE-091-D-79 - Blair and Dorothy Cupp

Dear Tom:

The pending application will reflect the fact that the operating entity for the plant nursery is Wolf Trap Nursery, Inc.

Your assumptions that construction of the deceleration lane and the dedication will be deferred until a later redevelopment of the site is incorrect. Construction of a deceleration/right turn lane for entrance to the plant nursery is to take place at the time that the proposed improvements are made onsite. Likewise, dedication of right-of-way up to 100 feet from the centerline of Route 7 for a third eastbound lane and a standard service drive should occur upon approval of the site plan for the special exception. Construction of the third eastbound lane and the service drive can be deferred until such time as the site redevelops.

I agree that the vegetation that exists along the eastern boundary of the site is adequate to screen the facility from the adjacent property. A waiver of that transitional yard requirement would be in order and will be recommended to the Board of Supervisors.

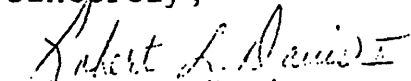
The pending special exception application for expansion of Wolftrap Nursery, Inc. brings it under the current regulations of the Zoning Ordinance. Conformance with the Ordinance definition for plant nurseries would prohibit the retail sales of items not designed solely to maintain and preserve the life and health of nursery stock such as garden tools, hoses, pottery, statues and bird baths. Subsequent to the Planning Commission hearing, where the staff recommended approval, Mr. Cupp informed me that these items were currently being

January 4, 1980

sold onsite. Unless these items are removed from the site as sales items the staff will have to recommend denial of the pending special exception application to the Board of Supervisors.

If you have further questions regarding this application, please contact me.

Sincerely,



Robert L. Davis
Staff Coordinator
Zoning Evaluation Branch
Office of Comprehensive Planning

RLD:cd

January 10, 1980

Robert L. Davis
Office of Comprehensive Planning
Zoning Evaluation Branch
The Massey Building
4100 Chain Bridge Road
Fairfax, VA 22030

Re: SE-091-D-79
Blair and Dorothy Cupp

Dear Bob:

I have reviewed your letter of January 4, 1980, with Mr. Cupp and I am disturbed by your interpretation of the existing zoning ordinance regarding Wolf Trap Nursery's present operations. You say that Mr. Cupp must cease to sell a number of items even prior to the approval of this application. The clear implication of your letter ignores the fact that Mr. Cupp's business is grandfathered as a pre-existing use. In fact approximately 4 years ago Mr. Cupp was prosecuted by the County for the sale of these same items and Judge Griffith found him not guilty. I am surprised that you would state in effect that before the staff would consider recommending favorably on this request Mr. Cupp must comply with an ordinance which is not applicable to him.

Additionally it is my client's position that even if the SE is approved, his business will continue as a grandfathered, non-conforming use and the new ordinance would not be applicable to him. All Mr. Cupp seeks to do is rearrange his facilities in a more efficient manner with a diminuous amount of expansion and to continue doing what he has been doing for the last seven years. He is not seeking to expand his operation in terms of the activities that are conducted thereon.

Finally, Mr. Cupp also objects to the requiring of the dedication of the right-of-way up to 100 feet from the center line of Route

Robert L. Davis
January 10, 1980
Page 2

7 for the third east bound lane and service drive and the requirement that he construct a deceleration/right turn lane. I have already stated the reasons why he objects to this, and would simply add that the expense is out-of-line with the requirement. Additionally I think that Hylton Enterprises v. The Board of Supervisors of Prince William County, 258 S.E. 2d 577, decided October 5, 1979, by the Virginia Supreme Court prohibits the County from making this requirement.

I would request that this letter as well as your letter of January 4, 1980, be made a part of the board package and a part of the record in this case.

Very truly yours,

Thomas O. Lawson

TOL/dfr

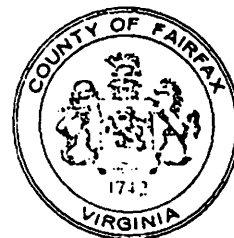
cc: Blair Cupp



COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

4100 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

January 23, 1980



Mr. Thomas O. Lawson
Kelly, Louk, Lawson & Kelly
4103 Chain Bridge Road
Fairfax, Virginia 22030

Dear Tom:

It was not my intention in my letter of January 4, 1980 to imply that items not designed solely to maintain and preserve the life and health of nursery stock should cease to be sold prior to the approval of the special exception application for the expansion of Wolftrap Nursery, Inc. I made the statement so that you and Mr. Cupp will understand that if the special exception is approved it must come into compliance with the current Zoning Ordinance definition and regulations for plant nurseries.

Your client's position that even if the special exception is approved, his business will continue as a grandfathered, nonconforming use and the new ordinance would not be applicable is in error. Par. 2 of Sect. 15-101 states:

"Any use existing prior to the effective date of this Ordinance, which is allowed within a particular zoning district as a special permit or a special exception use by the provisions of this Ordinance, shall not be deemed to be a nonconforming use in such district. However, any subsequent replacement or enlargement of such use or of any building in which the same is conducted or the construction of any additional building for such use beyond the extent which existed prior to the effective date of this Ordinance, shall be subject to a special permit or special exception obtained in accordance with the provisions of this Ordinance. Such special permit or special exception shall be approved only if the resulting use complies with the standards set forth in Articles 8 or 9 for the particular use in question."

The last sentence clearly states that the resulting use, if approved, must come into compliance with the ordinance provisions concerning plant nurseries.

Staff recommendations regarding improvements to Route 7 will remain as stated.

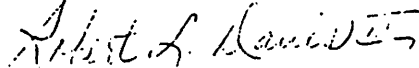
Thomas O. Lawson

2

January 23, 1980

As requested, your letter of January 10, 1980, as well as my letters of January 4 and January 17, 1980 will be made a part of the Board package on the subject Special Exception application.

Sincerely yours,



Robert L. Davis, III
Staff Coordinator
Zoning Evaluation Branch
Office of Comprehensive Planning

RLD:cd

January 29, 1980

Robert L. Davis
Office of Comprehensive Planning
Zoning Evaluation Branch
The Massey Building
4100 Chain Bridge Road
Fairfax, VA 22030

Re: SE-091-D-79
Blair and Dorothy Cupp
T/A Wolf Trap Nursery, Inc.

Dear Bob:

Attached to this letter are ten copies of a site layout of Blair Cupp's property at the Wolf Trap Nursery, Inc. located on Leesburg Pike, Route 7. You will see that the sales office expansion has been reduced and that the proposed new lathe house and greenhouse have been extended to where they now join. I would appreciate it if you would substitute these for the plats now in the file. This will be Mr. Cupp's final submission.

For the record I would like to make it clear that my client objects to the staff's interpretation of the ordinance for the conditions that would attach to the special exception result in an unwarranted confiscation of a portion of Mr. Cupp's business and, therefore, would be illegal and void. Obviously these conditions would seriously damage his business and he would be foolish to accept the special exception under these circumstances.

The required dedication and road improvements are also unreasonable, illegal and not related to the public health, safety and welfare. This is particularly true in this instance since the modifications in Mr. Cupp's business are so diminuous that they will not measurably impact the public welfare or safety, particularly traffic on Route 7. This is a development of such a nature that it would be impossible for him to pass on the cost of such road improvements to the consuming public which is normally the case with a developer of houses or a commercial enterprise. In the later two instances road improvement costs can simply be added on

Robert L. Davis
January 29, 1980
Page 2

as a cost of the project and passed on to the ultimate purchaser. That obviously would be impossible in the case of a business of this type for when you sell rose bushes, azaleas, etc. your price has to be competitive with the market.

It has been the position of my client and continues to be his position that he seeks the special exception (without the conditions and legal interpretation given to it by the staff) only as a method of exhausting his administrative remedies, for it is Mr. Cupp's position that he has the right to apply for and seek approval of a building permit to construct the improvements as shown on the development plan assuming, of course, that applicable requirements of the building code are met without prior board approval and that he has a vested right to continue his business and to accommodate its normal, natural growth.

I would appreciate it if you would make this letter a part of the board package and part of the record in this case.

Very truly yours,

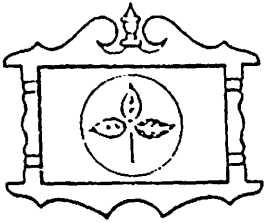
Thomas O. Lawson

TOL/dfr

Enclosures

cc: Blair Cupp
Nancy K. Falck

:



WOLF TRAP *Nursery, Inc.*

9439 LEESBURG PIKE / VIENNA, VIRGINIA 22180 / PHONE (703) 759-2424

Blair W. Cupp

February 4, 1980 Dorothy S. Cupp

Mr. John F. Herrity, Chairman,
Fairfax County Board of Supervisors,

Dear Mr. Herrity:

My wife and I opened our business on May 6, 1972, and fortunately for us, and the community which we serve, our business has prospered. Some time after we opened we began receiving calls items that we were forbidden to sell under the ordinance existing at that time. I obtained a copy of the County ordinance and I noticed that on the first page there appeared a declaration which read something like this: "The purpose and intent of this Fairfax County ordinance is to promote the health, safety and welfare of the general public". My first reaction to this was very positive, because this is the very nature of our business. Every time we plant a tree or shrub we are providing 'clean air machines', as each item of green foliage provides all with oxygen, literally our breath of life. Then as I read further into the ordinance I discovered item after item that is designed to restrict, rather than promote the health, safety and welfare of the citizens. The ordinance failed to recognize that in a competitive world, the more narrow the scope of a business, the less is its chance of survival. For example, if we were to attempt to sell only Star roses, and nothing else, we would not survive. The one who pays all of our bills and makes our business possible, and indeed makes this governing body possible, the consumer, is demanding more and more to be able to do one stop shopping. Gasoline is now \$1.18 per gallon and is projected to reach \$2. by the end of the year. It is too precious to waste unnecessarily.

I recognized early that in order to be competitive I must be able to sell these ancillary products that the consumer was demanding, and failing to recognize anything detrimental to the health safety and welfare of the public that might occur from the sale of such items, we decided to test the validity of the ordinance in court. The rest of the story is now history. After an inspection of our premises by the court, where many man made objects such as pruning shears, concrete products, water hoses etc., were on display and being offered for sale, the court ruled against the restrictive ordinance in favor of the people. Is it not in the best interest of the people that items



GROWERS OF BEAUTIFUL PLANTS



which they need and want be made available to them without governmental interference, as long as there is no threat to their health, safety or welfare?

Please allow me to illustrate this point. A fair amount of our greenhouse business is done in the sale of Bonsai trees, miniature trees grown only in containers. Some of these trees are a number of years old and are relatively expensive for their size. We also sell the miniature trees separately as starters to those who wish to grow and train their own from a seedling. Bonsai trees need a special container with certain size drainage holes, and we also offer these for sale. I have brought one of these starter pots along with me today for your inspection, and with your permission would like to pass it around. Now, the new ordinance enacted a couple of months ago, with which the county staff is recommending that in order to be granted this application we must comply, specifically forbids the sale of this item. This new ordinance says to my customer, yes, you may purchase a Bonsai starter from Wolf Trap Nursery, but it is not in your best interest to allow Wolf Trap Nursery to sell you the special container to grow it in. Therefore, if you wish to complete your purchase you must spend your time and expensive fuel and try to locate this item elsewhere. The most logical conclusion for this customer to reach is to go elsewhere for the entire purchase, having a depressing effect on the customer's living expense, and our business. This same principle applies to the sale of other items.

We do happen to sell Star roses, and anyone familiar with roses that they need care. Among other things, they are subject to a fungus called 'black spot', creating a need for frequent spraying with a fungicide. Fungicide comes only in wettable powder form, and must be mixed and diluted with water in order to be properly applied. This requires some sort of spraying device. The ordinance states that I can sell the powder, but the customer must go elsewhere to purchase the sprayer with which to apply the solution. Is this needless waste of time and gasoline in the best interest of the public? I believe that you will agree with me, and my clientel as well, that it is not.

When plant material is stored above ground it takes almost constant watering to maintain life. In our case, this water is supplied by a deep well. In summer, the three horse power pump at the bottom of this well runs almost constantly during the day, consuming large amounts of electrical energy. For convenience and accessibility we are attempting to consolidate the areas where the plant material is stored. It helps considerably to retard water evaporation if we can shade these plants from the sun. This is best accomplished by means of a shade or lath house. This term is a mis-nomer, for it is not a house. In fact it is not even a building. It is only a support so that we may lay snow fence over top of the plants, and still have room beneath it to work and service the plants. This reduces by 50% the amount of sunlight reaching the plants, retarding evaporation and greatly reduces watering requirements, resulting not only in a reduction in labor, but a substantial savings of electrical energy as well. The county staff is saying that for me to implement these energy saving measures by erecting the snow

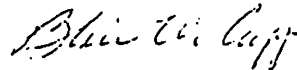
fence, I must forgo my present status and bring my entire operation under the provisions of the newly enacted ordinance, giving up the sale of the very item which the county court has already ruled on.

Now let us examine some of the other conditions attached to the approval of this application. I happen to live on this property, and have for the past twenty one years. When I built our home it suitable for the size of our family, but now the kids have left the nest and the house is much too large for our present needs. My wife may one day decide that smaller living quarters would be more suitable and wish to move into an apartment. But the ordinance says - not so, you cannot do this, it is against the rules, in this case for you not to live where you work. By what authority does any county apply restrictions as to where individual tax paying citizens shall live? Does the house that I reside in have any effect, adversely or otherwise, on the health, safety or welfare of any other citizen?

Another condition attached to the granting of this application is that I donate a strip of land approximately 60' x 500' across the front of my property, for future highway widening, and that I also construct at my own expense a deceleration lane on the east bound lane of route seven. I stongly object to the approval of this application conditional upon my making road improvements to an existing public highway. I believe that we have constitutional guarantees as to private ownership of property, and I happen to hold title to this strip of land, and if there have been any offers by the State to purchase this property it has not come to my attention. In the past when the Hlghway Department needed additional right of way, even in condemnation, the property owner was paid for his land. Why should a citizen whose misfortune is to own property abutting a busy highway, be the one to bear the brunt of this expense? When my children needed to go to school we didn't buy the bus or build the school, individually. If it was for the common good the burden was, and still is, shared by all. The question also arises as to the need for a deceleration lane. Have there been any studies conducted at this site that show a need? According to the latest traffic count made, I believe within the last twelve months, by the Department of Hlghways, the number of vehicles passing my door in a twenty four hour period was 34,956. The cash register that we use provides us, at the end of a given period, with an accurate count of the number of customers. Last year, according to this record, our average number of customers was only twenty five per day. Can anyone claim that this small operation is having an adverse impact on the traffic on route seven? Isn't it reasonable to assume that if because of our small operation there is a clear and present danger on route seven, in a period of $7\frac{1}{2}$ years, with 34,956 cars per day passing our door, at least one would have collided with one of the twenty five entering or leaving our premises? A check with both the County and State police, and also the Hlghway Department in Culpeper where such records are kept, shows that there has not been one single accident involving any vehicle leaving or entering our place of business since we began. If there were abnormal danger here, there would, in this length of time be evidence of it.

In closing let me say that what we propose to do is not the result of any expansion program . . . it is a result of a natural, orderly growth of business. It is just a natural outgrowth of pride of accomplishment. Not striving to be the biggest, only the best. When you really want to excell you do the things necessary to bring about excellency. You keep your place neat and clean, will not allow trash to accumulate. You will keep bulky material, which of necessity must be stored out of doors, covered at all times. You will offer high grade plant material, that is well cared for, at a reasonable cost. You will conform to good taste in the architectural style of your buildings, being in keeping with your neighborhood. When you do all of these things, people just naturally want to trade with you. Good business practices inevitably result in natural business growth. As I stated in the beginning, our business has prospered, and we have every reason to believe that it will continue. But the time has come for us to consolidate and become more energy efficient, and at the same time make the daily work load a little easier.

Sincerely,



Blair W. Cupp,
President

	<u>1978</u>	<u>1979</u>	<u>First 6 mos. 1980</u>
Chemicals	2. 6%	1. 5%	1. 6%
Containers	2. 9%	2. 6%	3%
Hardware	1. 6%	. 08%	. 06%

BUILDING PERMITS FOR STRUCTURES ON PROPERTY

<u>Date</u>	<u>Building</u>	<u>Permit number</u>
12/4/70	Sales Office	P 70784
10/22/71	Greenhouse	P 79666
6/19/74	Lath Areas	111909
9/17/76	Warehouse	76090677

CUPP SITE

RIGHT TURN LANE

Route 7 Widening:

Surface - 1½" S-5 - 591 SY @ \$2/SY/IN	\$ 1,773
Base - 5½" B-3 - 591 SY @ \$1.80/SY/IN	5,851
Subbase - 12" Stone - 282 CY @ \$18/CY	5,076
Gravel Shoulders - 72 SY @ \$3/SY	216
Delineators - 19 @ \$27/EA	513
Curb & Gutter - 300 LF @ \$10/LF	3,000
CG-10A Entrance - 1 @ \$2,500	2,500
Clearing & Grubbing - 0.15 AC @ \$1,800/AC	270
Grading - 1632 CY Fill @ \$4.50/CY	7,344

Drainage:

10' 24" Pipe @ \$60/LF	600
1' - 24" EW	960

Guardrail:

250 LF @ \$30/LF	7,500
20 Posts @ \$27/EA	<u>540</u>

Sub-Total	\$36,143
Contingencies - 15%	<u>5,421</u>

Total	\$41,564
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CUPP SITE

ULTIMATE SECTION

Route 7 Widening:

Surface - 1½" S-5 - 811 SY @ \$2/SY/IN	\$ 2,433	
Base - 5½" B-3 - 811 SY @ \$1.80/SY/IN	8,029	
Subbase - 12" Stone - 326 CY @ \$18/CY	<u>5,868</u>	
		\$ 16,330

Service Drive:

Surface - 2" S-5 - 1331 SY @ \$2/SY/IN	\$ 5,324	
Base - 6" Spec. 210 - 1331 SY @ \$.60/SY/IN	4,792	
Subbase - 8" - 345 CY @ \$18/CY	<u>6,210</u>	
		16,326

Gravel Shoulder - 90 SY @ \$3/SY 270

Delineators - 21 @ \$27/EA 567

Header Curb - 470 LF @ \$9/LF 4,230

Curb & Gutter - 938 LF @ \$10/LF 9,380

Barricades - 2 @ \$800/EA 1,600

Sidewalk - 470 LF @ \$8/LF 3,760

Seeding Median - 1035 SY @ \$1/SY 1,035

CG-10A Entrance - 1 @ \$2,500 2,500

Clearing & Grubbing - 0.78 AC @ \$1,800/AC 1,404

Grading - 5,375 CY Fill @ \$4.50/CY 24,188

Drainage:

60' - 24" Conc. Pipe @ \$60/LF	\$ 3,600	
1' - DI-3	1,800	
1 - EW	<u>960</u>	
		<u>6,360</u>
Sub-Total		\$ 87,887
Contingencies - 15%		<u>13,183</u>
Total		\$101,070

WALTER L. PHILLIPS
INCORPORATED
CIVIL ENGINEERS
LAND SURVEYORS
PLANNERS

DIRECTORS

WALTER L. PHILLIPS, P.E.
CHAIRMAN OF THE BOARD
W. LEE. PHILLIPS, JR., P.E.
PRESIDENT
ROBERT A. KINSEY, P.E.
VICE PRESIDENT

ASSOCIATE

JERRY A. MCKNIGHT, C.L.S.

RESUME'

Name: Walter L. Phillips, Jr.
Address: 221 Midvale Street,
Falls Church, Virginia 22046
Birthplace: Falls Church, Virginia
Date of Birth: March 19, 1935
Education: Graduated from the University of Virginia
with a degree in Civil Engineering in 1956,
Tau Beta Pi and Raven Society
Registration: Holds both Engineering and Land Surveying
Registration in Virginia

Entered the engineering firm of Walter L. Phillips in 1959 and
became President of the corporation in 1971.

Professional Activities:

Member of National Society of Professional Engineers, Virginia
Society of Professional Engineers and the Northern Virginia
Chapter of Virginia Society of Professional Engineers.

Mr. Phillips has served on the Board of Directors of the Northern
Virginia Chapter of Virginia Society of Professional Engineers,
as Chairman of Professional Engineers in Private Practice
Functional Section of the Northern Virginia Chapter, and as
State Secretary-Treasurer of Professional Engineers in Private
Practice. Mr. Phillips has also served as the member repre-
senting the Northern Virginia Chapter of Virginia Society of
Professional Engineers on the National Capital Area Water
Study Committee of the National Society of Professional Engineers.
This committee addressed itself to the critical water supply
problems of this area and was composed of engineering repre-
sentatives of all Metropolitan Washington engineering societies.

Member of Building Code Appeals Board of the City of Falls
Church, Virginia.

Resume' of Walter L. Phillips, Jr.
Page 2

Mr. Phillips is an Affiliate Member of the American Institute of Planners.

Member of Northern Virginia Builders Association since 1960 having served three years on the Board of Directors and one year as Secretary.

Mr. Phillips was elected "Engineer of the Year" by the Northern Virginia Chapter of the Virginia Society of Professional Engineers in 1970.

Business Activities:

The firm of Walter L. Phillips, Incorporated, since 1945, has been involved in the land development phase of Civil Engineering. The firm has specialized in storm drainage, sewer and water system design, and deal almost entirely with private developers, local municipalities, and the State Government of Virginia.

Non-Professional Activities:

Member Board of Directors First Virginia Bank, former member of the Board of Directors of Falls Church Bank (before merger with Old Dominion and Mount Vernon Banks).

Member of Falls Church Lions Club.

Member of Falls Church Presbyterian Church.

Member of Washington Golf and Country Club and Chesapeake Country Club.

APPRAISAL QUALIFICATIONS

N. McK. Downs
P. O. Box 363
Fairfax, Va. 22030

Professional Affiliations:

Society of Real Estate Appraisers, S.R.A.
Northern Virginia Board of Realtors, Broker
National Association of Real Estate Boards
Virginia Real Estate Association
American Right of Way Association
National Association of Review Appraisers, C.R.A.

Education:

A.S.T.P. Certificate - Civil Engineering
University of Virginia - 1937-1938
Rutgers University - 1942-1943
Army Language School, Monterey, California - 1950
National Institute of Real Estate Appraisal Courses
George Washington University - 1948
University of Virginia - 1958
University of Tampa - 1971

Appraisal Clients: (Partial List)

Virginia Department of Highways and Transportation
City of Alexandria, Va.
City of Fairfax, Va.
City of Falls Church, Va.
Arlington County, Va.
Fairfax County, Va.
Loudoun County, Va.
Prince William County, Va.
Town of Warrenton, Va.
Town of Leesburg, Va.
Town of Lovettsville, Va.
Town of Vienna, Va.
Toan of Hamilton, Va.
Town of Purcellville, Va.
United States Department of Justice
Northern Virginia Regional Park Authority
Northern Virginia Community College

Virginia Electric and Power Co.
Chesapeake and Potomac Telephone Co.
American Telephone and Telegraph Co.
Washington Gas Light Co.
American Water Works

Appraisal Qualifications - N. McK. Downs

Southern Railway System
R.F. and P. Railroad Co.
Lehigh Portland Cement Co.
Colonial Pipeline Co.
Mobil Oil Co.
Texaco Oil Co.
American Oil Co.
Reston Land Corp.
Northern Virginia Steel Corp.
Costain-Washington, Inc.

National Bank of Fairfax
Bank of Virginia
George Mason Bank
First Virginia Bank
1st American Bank of Virginia
First and Merchants National Bank
Riggs National Bank
Arlington Fairfax Savings and Loan Association
Suburban Savings and Loan Association

Various Law Firms and individuals of Northern Virginia, District of Columbia, Richmond, Va., Fredericksburg, Va., etc.

Appraisal Experience:

Engaged in the appraisal of residential, commercial and industrial properties from 1948 to date. Assignments consisted of valuation of easements and fee acquisitions for condemnation purposes, annexation valuations, zoning valuations, assessment valuations, loan valuations, etc.

Served as review appraiser for City of Fairfax on Route 50 road expansion project and also as review appraiser for Newgate Savings and Loan Association while serving on Board of Directors.

Qualified as Expert Witness in United States District Court for Eastern District of Virginia and also District of Columbia, Circuit Courts of Arlington County, Fairfax County, Fauquier County, Frederick County, Stafford County, Rappahannock County, Spotsylvania County, Warren County, City of Alexandria and District Court of Fairfax County.

QUALIFICATIONS

Telephone: 273-4227

N. McK. Downs
P. O. Box 363
Fairfax, Va. 22030

Office: 4015 Chain Bridge
Road

1. Licensed real estate broker from 1948 to date.
2. Engaged in the listing, sale, management, and appraisal of residential, commercial, and industrial real estate from 1948 to date.
3. Member of Northern Virginia Board of Realtors and National Association of Real Estate Boards. Also member of American Right of Way Association and Society of Real Estate Appraisers, with SRA designation.
4. Formal education includes A.S.T.P. Certificate in Civil Engineering - University of Virginia, 1937-38; Rutgers University, 1942-43. Graduate of Army Language School, Monterey, California. Satisfactory completion of Appraisal courses at George Washington University, University of Virginia, and University of Tampa as conducted by the National Institute of Real Estate Appraisers.
5. 1954-55 engaged in selection, acquisition, and supervision of construction of all microwave sites in France for U.S. Army Signal Corps.
6. Fee appraisal assignments:
 - (a) Virginia Department of Highways on projects in Fairfax, Loudoun, Fauquier, Prince William, Frederick, and Arlington Counties and City of Alexandria, City of Fairfax, City of Falls Church.
 - (b) Fairfax County School Board - site acquisition and easement valuations.
 - (c) Fairfax County Division of Land Acquisition - land acquisition projects and easement valuations.
 - (d) City of Fairfax - land acquisition valuations, easement valuations, and as review appraiser on various projects.
 - (e) Town of Warrenton - appraiser and consultant on land acquisition, and R/W for water reservoir project.
 - (f) American Telephone and Telegraph Company as appraiser and consultant on R/W and site acquisition.

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 - (a) Virginia Department of Highways on projects in Fairfax, Loudoun, Fauquier, Prince William, Frederick, and Arlington Counties and City of Alexandria, City of Fairfax, City of Falls Church.
 - (b) Fairfax County School Board - site acquisition and easement valuations.
 - (c) Fairfax County Division of Land Acquisition - land acquisition projects and easement valuations.
 - (d) City of Fairfax - land acquisition valuations, easement valuations, and as review appraiser on various projects.
 - (e) Town of Warrenton - appraiser and consultant on land acquisition and R/W for water reservoir project.
 - (f) American Telephone and Telegraph Company as appraiser and consultant on R/W and site acquisition.

QUALIFICATIONS - N. McK. Downs

- (g) Virginia Electric and Power Company on transmission line R/W and site acquisition.
- (h) Atlantic Seaboard Corporation on gas line R/W.
- (i) Washington Gas Light Company on R/W and site acquisition valuation.
- (j) Colonial Pipe Line Company on gas line R/W and site location studies.
- (k) (1) Mobil Oil Company - site valuation for service stations.
(2) Texaco Oil Company - site valuation for service stations.
(3) American Oil Company - site valuation for service stations.
- (l) Town of Vienna - site acquisition and R/W appraisals.
- (m) Town of Hamilton - sewerage treatment plant site acquisition and R/W appraisals.
- (n) Fairfax County Water Authority as appraiser and consultant on R/W and site acquisition.
- (o) Town of Leesburg, R/W appraiser and consultant for various projects, including sewerage treatment plant, sewer easements, drainage easements, etc.
- (p) Town of Lovettsville - easement valuations.
- (q) Town of Purcellville - easement valuations.
- (r) City of Falls Church - appraisal of site acquisition and R/W for water tower sites, water pumping station sites, and road expansion projects, etc.
- (s) Chesapeake and Potomac Telephone Company - R/W and site acquisition valuations.
- (t) R/W and site valuations for R.F.&P. Railroad and Southern Railroad.
- (u) Appraiser and consultant for Potomac Bank and Trust Company. Also serve as appraiser for trust departments of Arlington Trust Company, National Bank of Fairfax, Riggs National Bank, Mount Vernon National Bank, Woodlawn National Bank, First Virginia Bank, First & Merchants National Bank.

QUALIFICATIONS - N. McK. Downs

- (v) County of Loudoun - appraiser and consultant on real estate assessments and various other projects.
 - (w) Various law firms, lending institutions, and individuals in the Northern Virginia area on all types of appraisal work.
7. Served as member of Town of Fairfax Planning Commission; also served as Chairman of Board of Zoning Appeals, City of Fairfax.
 8. Qualified as expert in circuit courts in Arlington, Fairfax, Loudoun, Fauquier, and Frederick Counties, in Corporation Court of City of Alexandria, and in United States District Court for Eastern District of Virginia.

CEPPT: Fairfax County Board of Supervisors meeting
of March 10, 1980, re: Special Exception No.
091-D-79 (Blair W. and Dorothy S. Cupp)

CHAIRMAN HERRITY: Disclosures by Board Members in this case: O.k., who appears for the applicant in this case? Mr. Lawson, you state your name for the record, please, Sir.

MR. LAWSON: For the record, my name is Tom Lawson. I appear here on behalf of the applicant, uh what I'm going to ask the Board to do in this case and just to save you time, my client and I'm sure that few of you on the Board are aware of this, we have had a number of conversations with the Staff on this particular case in attempting to work out some sort of an amendment that my client could live with. My client was in operation prior to the adoption of the new ordinance on August the 14th of 1978, and the new ordinance and the interpretation that's being given to us by the Staff is such that we are not able to live with the Staff's interpretation as to the effect of that a the new ordinance on this SE and so in view of that we would ask the Board to turn down this application ah which may sound a bit unusual to you but we are not able to economically, it's not feasible for us to live with it and a also the various letters and correspondence that you have from me on behalf of my client, of course, I would appreciate that being part of the record. I also have a letter from the CUPPS ah which is dated February the 4th 1980, and for the record I would also like to make that a part of the record, if I might. Really, in view of the position we are taking that's really all that I would have to say at this time. If any of you do have any questions, I'd be glad to try to...

CHAIRMAN HERRITY: Are there any questions? O.K., this is a public hearing Ladies and Gentlemen. Those citizens who wish to speak either for or against this application at the public hearing, any takers, O.K., ah, are there items for the record? The public hearing is closed. The Staff and Planning Commission report, please?

MR. DAVIS: Thank you, Mr. Chairman. The Staff recommends approval of Special Exception No. 091-D-79 subject to the conditions noted in Appendix I of this report. The Staff also recommends modification of the transitional yard along the east and south sides of the site, subject to the approval of the Director of the Department of Environmental Management. The Transitional yard and barrier should be waived along the west side of the parcel. It is further recommended that the Board of Supervisors modify the additional standards of paragraphs 2 and 3 of Section 9-514 as amended to allow the lath house and proposed parking lot to remain closer to the lot line which abutts the R District. On Wednesday, December 5, 1979, the Planning Commission voted unanimously to recommend to the Board of Supervisors approval of Special Exception No. 091-D-79 subject to the conditions noted in Appendix I of the Staff Report. Commission further voted unanimously to recommend to the Board of Supervisors the modification of the additional standards of Paragraph 2 and 3 of Section 9-514 as amended to allow the lath house and proposed parking lot to remain closer to the lot line which abutts the R District. Thank you.

CHAIRMAN HERRITY: O.K. What's the pleasure of the Board?
Mrs. Falck.

SUPERVISOR FALCK: May I begin by asking Mr. Lawson a question? Did I understand you correctly, Mr. Lawson? That you are requesting this Board to deny this Special Exception?

MR. LAWSON: Yes, that's correct. In view of the interpretation of the Staff - that the Staff is giving to the ordinance and the development plan conditions which are attached to this, it's just not economically feasible for the CUPPS to go ahead with the project.

SUPERVISOR FALCK: Under those circumstances, why don't you just withdraw this request for a special exception?

MR. LAWSON: Well, that's not what we would like to do, we would like the Board to act on it one way or another and...

CHAIRMAN HERRITY: Mrs. Falck, I believe he is asking the Board to withdraw indicating withdrawal by implication.

MR. LAWSON: Well, we're not withdrawing the case an ...

CHAIRMAN HERRITY: A half a dozen of eggs are six eggs, Mr. Lawson, you're either petitioning this Board for something or you're not.

MR. LAWSON: Well, we did, and and what the Staff has come up with is something that we're not able to live with and it would seem to me that the Board would have to vote that up or down one way or another.

CHAIRMAN HERRITY: It might be appropriate to the Board to act to allow you to withdraw your original application if you no longer desire the use.

MR. LAWSON: Well, I've, I've huh, I really don't think that's what we want to do. We'd like to ask the Board to vote up or down on it.

CHAIRMAN HERRITY: O.K. Further discussion?

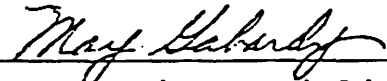
SUPERVISOR FALCK: Mr. Chairman.

CHAIRMAN HERRITY: Mrs. Falck.

SUPERVISOR FALCK: In view of the fact that the applicant has asked for denial in this case I will simply move that the Board deny it.

SUPERVISOR PENNINO: Second.

CHAIRMAN HERRITY: O.K. All in favor of the motion indicate by saying "AYE". Opposed vote "NAY", Chair votes "AYE", motion carried.



Verbatim Specialist
for Clerk to the Board