

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2008-CP-32-04362

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SC Court of Appeals

Westside Meshekoff Family Limited Partnership Appellant,

v.

South Carolina Department of Transportation; DW Properties, LLC;
Danwood LLC; Robert W. Denton; and Alpine of SC, Inc., ... Defendants
Of whom South Carolina Department of Transportation is the Respondent.

RECORD ON APPEAL – VOLUME II

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1 that's fine with me.

2 MS. CLAYTON: Yes, Your Honor.

3 MR. BOOTH: We did receive it. I don't have
4 the exact date. Five days would be fine.

5 MS. CLAYTON: I would agree with Mr. Booth.
6 The letter is dated May 21, 2008, and then suit was
7 filed June 9, 2008.

8 THE COURT: And then Dr. Denton and Alpine
9 agree that the letter is the letter?

10 MR. QUINN: That's correct.

11 THE COURT: The addressee, one of them, is
12 Dr. Denton and Alpine?

13 MR. QUINN: That would be a suitable address.

14 MR. JETER: At a correct address, yes, sir.

15 THE COURT: At a correct address. Thank you..
16 Thank you very much. Anything else, Mr. Jeter or
17 Mr. McDonald?

18 MR. JETER: Nothing from the plaintiff.

19 MR. McDONALD: No, sir, Your Honor.

20 THE COURT: Mr. Frawley.

21 MR. FRAWLEY: Your Honor, at this point we
22 would move for directed verdict. I can go into great
23 detail or I can go into lesser detail and just kind of
24 point it out.

25 But before the motion for directed verdict,

1 Your Honor, I would like to move under Rule 15(b) to
2 amend my answer to conform to the evidence and add two
3 affirmative defenses, sounding in laches and unclean
4 hands, which are equitable defense.

5 We have one equitable defense in the
6 pleadings. Of course, originally there were four causes
7 of action. Three of them were legal. One was
8 negligence per se. The other was nuisance and then the
9 injunctive relief request, which would have been, of
10 course, equitable.

11 We responded to those, raised various
12 defenses. Their lead cause of action was equitable
13 apportionment of maintenance, which is what is still in.
14 We did not plead laches originally because -- we did
15 plead Statute of Limitations to the legal claims.

16 I was unclear on the connection between the
17 local property manager, the local property management
18 company, and the Meshekoff partnership. We went through
19 discovery. We deposed Mr. Meshekoff.

20 Dee Reeves was listed as a witness, but she
21 was listed as a witness in care of W.R.S., which was the
22 company she formerly worked with in Aiken. W.R.S.
23 subsequently became another company and was relocated.
24 So there was no W.R.S. for us to locate in Aiken.

25 We had some difficulty finding Ms. Reeves,

1 notwithstanding the fact that she has apparently stayed
2 at the same address for 35 years. The private
3 investigator I hired, it took him a while to do it.
4 Finally I told him, "I need her by next week or don't
5 send me a bill."

6 Then he suddenly found her a couple days after
7 that. Shortly after that we did depose her, I think
8 April 5th. In that deposition Ms. Reeves indicated, as
9 Mr. Meshekoff had indicated, that she was basically his
10 eyes and ears in South Carolina. She was responsive to
11 him whenever there was an issue and that what she
12 learned here, she would pass onto him.

13 Once that happened, I think even with the
14 equitable claims, I know there are other elements with
15 laches and time is not the only element, but at that
16 point it became clear to me that we did have sufficient
17 evidence to support it.

18 As far as the unclean hands issue, what we
19 have got in this case is a developer, in which Weldon
20 Wyatt was a general partner in that developer, Dayton
21 and Associates, which entered into the encroachment
22 permit.

23 Dayton and Associates conveyed the property to
24 Westside Plaza Associates, which Weldon Wyatt was a
25 general partner there. Then Westside Plaza Associates

1 conveyed it to Helen and Edward Meshekoff.

2 The deed to Helen and Edward Meshekoff has
3 handwritten on the front of it their address, care of
4 Wyatt Development Services -- or whatever his
5 development and management company was.

6 So clearly there is a connectin with Weldon
7 Wyatt, who developed the company, developed the shopping
8 center, his company signed off on the encroachment
9 permit and the Meshekoffs there.

10 Then Weldon Wyatt's development company,
11 initially Ms. Reeves -- when she will testify in our
12 side of the case -- indicated that she originally worked
13 for Wyatt Development Company as property manager for
14 this shopping center.

15 So there is a string in there. There is a
16 connection. One of the things that they are saying is
17 that they did not know of the encroachment permit.
18 Well, clearly there is a connection there,
19 notwithstanding the fact that they had the ability to
20 get that.

21 So the first thing I am asking -- and then
22 they are going to want to respond to it, I'm sure -- is
23 under Rule 15(b), we are asking to amend our pleadings.
24 I have got two cases I will cite to Your Honor.

25 One is Staubes, S-T-A-U-B-E-S, versus City of

1 Folly Beach, and then Kelly versus South Carolina Farm
2 Bureau Mutual insurance company. Staubes is 339
3 S.C.406, 529 S.E.2d 543. Then Kelly is 316 S.C. 319,
4 450 S.E.2d 59. If I could hand these up to Your Honor.

5 THE COURT: Yes, please.

6 (Hands to Court.)

7 MR. FRAWLEY: Staubes actually refers more to
8 Kelly. Staubes cites Kelly. Kelly has pretty good
9 language dealing with Rule 15(b). Of course, 15(b)
10 addresses amendments to conform to the evidence and
11 says:

12 "When issues not raised by the pleadings are
13 tried by express or implied consent of the parties, they
14 shall be treated in all respects as if they had been
15 raised in the pleadings."

16 THE COURT: Slow down just a little bit for
17 me, Mr. Frawley.

18 MR. FRAWLEY: Yes, sir.

19 THE COURT: Go right ahead.

20 MR. FRAWLEY: Such amendment of the pleadings,
21 as may be necessary to cause them to conform to the
22 evidence and to raise these issues may be made upon
23 motion of any party at any time even after judgment."

24 Staubes is a case where the Court of Appeals
25 in that case, I believe, said -- I'm sorry. It was the

1 Supreme Court in Staubes. They went ahead and allowed
2 the amendment even after it had been appealed to the
3 Supreme Court.

4 In Kelly, the Court of Appeals in Kelly, said
5 "The circuit court is to freely grant leave to amend
6 when justice requires, and there is no prejudice as to
7 either party." Of course, it's discretionary with Your
8 Honor.

9 There is no requirement. Your Honor is able
10 to assess our argument and any claim of prejudice on
11 their part. "A motion to amend is addressed to the
12 sound discretion of the trial judge, and the party
13 opposing the motion has the burden of establishing
14 prejudice.

15 "Further, where issues are not raised by the
16 pleadings but are tried by consent, amendments to the
17 pleadings are desirable because they bring the
18 pleadings in line with the issues actually developed
19 at the trial.

20 "Amendments to conform to the proof should be
21 liberally allowed when no prejudice to the opposing
22 party will result." Your Honor, that language is under
23 key notes, key numbers, 2, 3, 4, and 5, on page 5 of 7
24 of the copy I have given you.

25 Your Honor, in this case the evidence that has

1 come in, impliedly by consent, is that the initial
2 contact about the sinkhole was July 26, 2005. Through
3 Mr. Richardson there is significant testimony that he
4 came out there and repaired that and that that
5 connection, where the sinkhole was, was to line E, which
6 is the line that we are talking about here.

7 He testified that he went down in the manhole.
8 He walked through, duck walked through the S.C.D.O.T.
9 line. So he knew that the water came from the
10 S.C.D.O.T. line.

11 He also testified that he kept Ms. Reeves
12 informed, and as far as he could tell, Ms. Reeves had
13 informed Mr. Meshekoff as to what was going on. He
14 testified that he told Ms. Reeves that the water was
15 coming from the D.O.T. line.

16 So they knew who the person was who was
17 putting water in there as of July, August of 2005. He
18 also testified that Ms. Reeves actually climbed down
19 into a manhole, which I found admirable for a property
20 manager to do that, to go to that extent.

21 Initially before I examined Mr. Richardson, I
22 thought that manhole was up by the D.O.T. catch basin
23 near Number 1, and Mr. Richardson said, "No, it's
24 250 feet down the line."

25 He showed it on Exhibit 85, that it was at

1 least one-third of the way down line E. He indicated
2 initially that you could get down there and look around
3 and see some developing problems.

4 He knew there was developing problems.

5 Later in his testimony he crawfished a little bit on
6 that and said, "Well, we didn't know how badly they
7 developed."

8 If we are talking Statute of Limitations --
9 and we are not entirely but that was a defense we
10 raised -- at that point they would have known the
11 identity of the supposed tortfeasor.

12 They would have known that there was damage
13 there, although they would not have known the full
14 extent of it, and that should have been enough to have
15 tolled the Statute of Limitations at that point or at
16 least put them on inquiry notice that there was a
17 potential problem there, and they needed to look harder
18 at it.

19 Two years later they did look harder at it
20 when they hired a company to run remote cameras down the
21 line where they could see what was there. Just talking
22 about Statute of Limitations, there is evidence there.

23 Now, in this context, since they have gotten
24 rid of all their legal causes of action, Statute of
25 Limitations in and of itself is not available to me.

1 There is no evidence that there was a verified damages
2 claim filed with S.C.D.O.T. or the State Budget and
3 Control Board, as would have been required under the
4 Tort Claims Act, I believe Section 15-78-08.

5 I think they have six months within which they
6 discover damage to file that verified damages claim, and
7 the effect of that, if they do file, is that they have a
8 three-year Statute of Limitations within which to file
9 their lawsuit. If they do not file within that six
10 months, they then have a two-year Statute of
11 Limitations.

12 If they discover the damage July, August of
13 2005 with a two-year Statute of Limitations, they would
14 have to file and get their matter begun, commenced,
15 through service by or before July or August of 2007, and
16 they were about ten months after that.

17 Now, again, Statute of Limitations is not here
18 because we have an equitable cause of action. They
19 tanked on all of their legal claims. So laches still
20 has a time element. It is there but there's other
21 issues in there, a time element delay, whether the delay
22 was reasonable, and then the prejudice is the third
23 element.

24 We would argue that there is prejudice to
25 S.C.D.O.T. because at this point we are fixing to be

1 kind of hung over the detention pond -- no pun
2 intended -- with regard to a \$325,000 price tag or
3 something in that neighborhood, when this thing should
4 have been resolved three years earlier.

5 The first notice that they have that was sent
6 to us, I think the earlier stipulation was a May 20th
7 letter of 2008, that was sent about two or three weeks
8 before the lawsuit was filed. So that's as to laches.

9 As to the clean hands doctrine, they are
10 claiming that S.C.D.O.T. has somehow damaged them or
11 expedited the maintenance requirements for their pond --
12 although that sounds a whole lot more like repairs than
13 maintenance -- by releasing our storm water into their
14 system which we did for years before they ever built
15 their system.

16 Apart from that they are saying that is what
17 we have done wrong. Even though they have got no
18 evidence that we exceeded the 98 cubic feet per second,
19 their people, their predecessor, agreed to and bound his
20 successors and assigns by signing the acceptance of that
21 permit in 1987.

22 But they are also saying that we have somehow
23 done something wrong which causes inequity -- them to
24 get some kind of relief -- when the initial document
25 they are relying on is an encroachment permit, pursuant

1 to which their predecessor in title agreed to put a
2 better quality pipe into the ground, which according to
3 their own expert, Mr. Richardson, could have lasted
4 forever and would not have deteriorated to the effect it
5 did, either from the corrosive water they say was going
6 in there -- even though that same corrosive water would
7 have been going there in 1987 -- and from the defective
8 installation.

9 So the argument we are making and asking Your
10 Honor to allow us to amend to bring unclean hands in
11 there is that while they are coming before this Court
12 seeking equity, seeking equitable relief, they are
13 seeking equitable relief based on a document pursuant to
14 which their predecessor in title did not live up to what
15 they were doing, what they said they were going to do.
16 That, in fact, is what has caused the problem here.

17 So based on that, based on Kelly, based on
18 Staubes, we are asking Your Honor to allow us to amend
19 our pleadings. None of that evidence, none of that
20 testimony was objected to. In fact, some of it was
21 offered by their own -- in their own direct examination.

22 As far as the dates, exhibit -- the \$31,000
23 invoice that went in, I think it's their Exhibit 19 -- I
24 can't remember what number it is -- but it's the
25 August 10, 2005, \$31,000 bill for that original thing.

1 They put it in.

2 So we would ask Your Honor to consider
3 allowing us to amend our pleadings to add those two
4 affirmative defenses. Thank you, Your Honor.

5 THE COURT: Mr. Jeter.

6 MR. JETER: Your Honor, I don't agree that
7 this evidence came in by consent or that these issues
8 were tried by consent. All the evidence he mentioned
9 was relevant to our easement claim and to the costs
10 incurred in that easement claim. I will tell the Court
11 I think other parties have raised those two defenses in
12 their pleadings.

13 With respect to laches, they've established no
14 prejudice. They were put on notice -- he says this
15 thing could have been resolved earlier. They made no
16 attempt to pay a penny or resolve this case since they
17 were put on notice three years ago in May of 2008.

18 They made no attempt to help with the
19 maintenance that was on going at the time they were put
20 on notice, and it continued after they were put on
21 notice. So they have not -- all they have said is their
22 only prejudice is they are exposed to \$325,000 in costs.

23 Time has shown, whether we asserted that a
24 year earlier or when we did, wouldn't change anything.
25 They have not attempted to resolve anything or reduce

1 those costs.

2 With respect to unclean hands, I think
3 Mr. Blakely's testimony resolves that issue. He says we
4 didn't use the material that we told them we were going
5 to use.

6 Of course, Mr. Blakely spoke definitely to
7 that issue saying that there was nothing improper about
8 the materials. They don't seek to control materials
9 used by the landowner on its property and that nothing
10 done by my client invalidated the claim.

11 THE COURT: Thank you. Thank you very much.
12 I am going to allow them to amend their answer to
13 include those two defenses. It appears to me
14 Mr. Blakely's testimony doesn't end that inquiry because
15 the Court is the finder of fact. So I don't have to
16 accept that in its entirety.

17 There is testimony otherwise and it's clear
18 that Plaintiff's Number 1, the encroachment permit,
19 called for R.C.P. So in that regard I will allow them
20 to amend within my discretion to include that defense.

21 Also, as to laches -- I'm not sure now of the
22 correct pronunciation or the spelling for that matter --
23 but as to that I would further allow them in my
24 discretion to amend their answer to include that.

25 Based on the evidence and the testimony, it is

1 clear the events -- and I don't need to rehash those
2 events as far as my ruling is concerned -- the dates and
3 time of the original sinkhole and the original
4 involvement by Mr. Richardson's firm at the time, the
5 utility firm.

6 Do you have any other motions, Mr. Frawley?

7 MR. FRAWLEY: I do, Your Honor, we move for a
8 directed verdict. I will be fairly brief on these. We
9 move for a directed verdict. One of our first defenses
10 is under South Carolina Rule of Civil Procedure 12(b)(6)
11 that the complaint fails to state facts sufficient to
12 constitute a cause of action upon which relief can be
13 granted.

14 The plaintiffs are attempting to extend the
15 equitable apportionment of maintenance costs that is set
16 out in the Hayes versus Tompkins case, which was a road
17 case, to a surface water case.

18 That's despite the common enemy rule, which is
19 the law of this State. Their cause of action does not
20 state facts sufficient to constitute a cause of action
21 under 12(b)(6), and we would move for a directed verdict
22 under that.

23 Additionally, Your Honor, under the unclean
24 hands cause of action that we recently added, I
25 mentioned earlier that in their original encroachment

1 And while they may not have known the entire
2 development of it, they knew then it was a problem, and
3 they didn't do anything till more than three years
4 later -- I'm sorry -- more than two years later.

5 The Statute of Limitations under the Tort
6 Claims Act would be two years. Now, if Your Honor --
7 well, I won't get into that because there is no hard and
8 set Statute of Limitations in laches. It's inequity.

9 Was the delay unreasonable? Well, they knew
10 at that point -- Ms. Reeves would have known according
11 to Mr. Richardson's testimony -- that the D.O.T. fed
12 that line. She climbed down in a manhole in line E. So
13 she knew it would have been line E.

14 The testimony is uncontradicted that what she
15 knew, she passed on to Mr. Meshekoff. So the agent
16 would have passed that on to the principal; so they
17 would have known it at that point. If they were going
18 to do something, they should have done it then.

19 Now, Mr. Jeter has said that we can't show
20 prejudice. There is also prejudice in this. Had we
21 been told back in 2005 before this entire line was dug
22 up and replaced with reinforced concrete pipe, there
23 could have been a negotiation process where D.O.T. could
24 have gotten involved.

25 He says -- and he rightly says -- that there

1 was no offer by D.O.T. to pay any costs of the
2 maintenance prior to -- we still haven't done it --
3 prior to this lawsuit. There was no requirement that we
4 do it. The law didn't require it.

5 The 1987 encroachment permit is silent as to
6 maintenance. There is nothing in there that says, "We
7 are going to put in this storm drain system. And, oh,
8 by the way, you guys need to help us dredge the pond
9 every other year." There is no mention in there of it
10 at all.

11 Had we known in 2005 that we could have gone
12 back in there, and they would have to replace this
13 entire line, and they would have done it to the tune of
14 the \$325,000, maybe there would have been a negotiating
15 process then. Maybe there wouldn't have been.

16 We never got that opportunity. This letter
17 that they sent, this demand letter, two and a half weeks
18 before the lawsuit was filed, the one Barbara Wessinger
19 of our Office of General Counsel got, I think was dated
20 May 20, 2008, around the same time as the other
21 defendants.

22 The work was pretty much done by then, I think
23 the invoices for the \$235,000 and the \$36,000, which is
24 the pipe itself, are within two weeks after that. In
25 fact, I think it was two weeks to the day. I think it

1 was June 23, 2008, two weeks to the day after the
2 lawsuit was filed and the last invoice was sent out. So
3 there is prejudice there.

4 There could have been some discussions then,
5 some negotiation, and maybe we still would have been
6 here now, but there certainly was prejudice at that
7 point. So based on laches we ask for it as well.

8 We have also raised as an affirmative defense
9 waiver and estoppel. What we argue for that, Your
10 Honor, is that they had the right back then to have --
11 when I say back then, they had the right in 2005 to have
12 brought us in, brought the action, and they did not do
13 it. They waived that right.

14 They knew it was S.C.D.O.T. They knew that
15 there was a potential problem with line E. For whatever
16 their reasons, they didn't bring it then. Instead they
17 chose to commission an engineer to go out there and do a
18 drain field study on the entire watershed and bring in
19 some another defendants.

20 On the estoppel side, we have to show that
21 there was a misrepresentation. There was reasonable
22 reliance of that misinterpretation and that there was
23 detriment to our end.

24 Clearly, there is a misrepresentation.
25 Whether it was intentional or just as an oversight, I

1 this existing catch basin, that the rate of flow is any
2 higher now than it was then. Back then they agreed to
3 take 98 cubic feet per second. Their own expert says
4 they are getting 65 cubic feet per second now.

5 As far as the artificial diversion of surface
6 water, it was there when they acquired the property. We
7 have that existing catch basin already there. So they
8 can't say that we rerouted anything.

9 The old parties here who have rerouted any
10 drainage was the plaintiff's predecessor in title when
11 they did that to accommodate their development of the
12 property.

13 So we would ask under the common enemy rule
14 that they also have not proven their case, and we should
15 be entitled to a directed verdict. I will sit down now.
16 Thank you, Your Honor.

17 THE COURT: Thank you, Mr. Frawley.
18 Mr. Jeter.

19 MR. JETER: Your Honor, as we stand here today
20 in this equity case, there is only one victim in this
21 case. That is my client who has paid out \$325,000 to
22 repair a line that the S.C.D.O.T. is using 80 percent
23 of.

24 My client had nothing to do with the
25 encroachment permit. The current client bought it ten

1 years later. Some of the family members bought it three
2 years later. They had nothing to do with it.

3 There is no evidence that any of them even
4 knew of the encroachment permit. There is no evidence
5 that any of them knew what had been put -- how the pipe
6 had been installed. All that took place well before any
7 of my clients got involved.

8 What we have is the D.O.T. telling this Court
9 that you cannot stop them from using this pipeline, and
10 you cannot force them to pay for the maintenance and
11 repair of that pipeline.

12 They chose not to condemn the pipeline. They
13 chose not to charge the upstream users. They chose not
14 to restrict the upstream users. It is our position that
15 we have to prove an easement, and I think we have.

16 The evidence before the Court is that from
17 1970 until 1987, the D.O.T. collected and discharged in
18 violation of the common enemy rule. They cannot rely on
19 the common enemy rule because Mr. Blakely said we
20 collected and discharged in greater volume the water
21 from improved property, impervious improved property,
22 upstream onto the land.

23 They didn't do that for 20 years where they
24 had an easement by prescription. They only did it for
25 17 years. When the negotiations took place in 1987, the

1 D.O.T. had no right pursuant to the common enemy rule
2 and no right pursuant to easement to dump any water on
3 the land that our predecessors owned.

4 They were at the mercy of the owners of the
5 land that Westside is on. They were either, unless they
6 got cooperation from the owners of Westside, they were
7 either going to have to condemn the land to handle their
8 storm drainage and pay for it and maintain it, pay to
9 maintain it, or they were going to have to either
10 charge -- according to Mr. Blakely -- they were either
11 going to have to charge or restrict the flow of water
12 from the upstream people. Those people would have had
13 to have built their own systems to handle it.

14 What happened then is that the D.O.T., without
15 any rights, negotiated an easement with the owners of
16 the land at that time. I asked Mr. Blakely, "An
17 easement is an agreement for the use of land?" I asked
18 Mr. Blakely that.

19 First I established that they had abandoned --
20 if they had any rights before 1987 -- they abandoned
21 them by letting it be filled in and asphalted, and they
22 haven't dumped water over there in 24 years. He
23 acknowledged all that.

24 He also acknowledged they don't -- they could
25 only show that they had been using the dumping off point

1 for 17 years, which is not enough, not the 20 years you
2 need to have a prescriptive easement.

3 Mr. Blakely acknowledged that pursuant to the
4 encroachment permit, they were entitled to discharge
5 water into our land -- in the pipeline and into our land
6 and have it carried away. That is an agreement for the
7 use of land.

8 He also testified that they would seek to
9 enforce those rights against any subsequent landowner.
10 So it's an agreement running with the land. In fact, I
11 think they have asserted an easement in this case in the
12 interrogatory answers and in the pleadings.

13 But regardless, Mr. Blakely testified to an
14 agreement to use land that was reached with the
15 predecessor. That is an easement. So as far as whether
16 we have proven our case, if the pleadings and the
17 interrogatory answers don't prove it, Mr. Blakely proved
18 that the D.O.T. has an easement across our land and has
19 been using it under an adverse claim for 24 years.

20 Mr. Blakely also established that the common
21 enemy rule would apply in 1987. So if D.O.T. is using
22 that easement, then it seems to me -- it's not damages
23 and it's not based on fault. They simply have an
24 obligation as the dominant tenant, the owner of the
25 easement, to maintain and repair the easement.

1 That is the sole duty of the dominant tenant.
2 However, according to Hayes versus Tompkins, if the
3 owner of the servient estate, the landowner, also uses
4 it, then they allocate costs between those parties based
5 on their use. We have given you a reasonable basis to
6 allocate that costs.

7 Now, I don't see how it's equitable for the
8 D.O.T., who had no rights in 1987 and refused to condemn
9 and failed to cut off upstream people, can now claim
10 they are entitled to keep using this pipeline without
11 paying any maintenance or repair costs for anything that
12 has happened in the past.

13 He next said that the work we did out there
14 wasn't maintenance. It was a repair. Well, according
15 to Hayes versus Tompkins, ordinarily the owner of an
16 easement has the duty to keep it in repair.

17 They use that word, and they used that word a
18 couple of times. So clearly he characterizes it as a
19 repair. I agree it was a repair. That's exactly what
20 Hayes versus Tompkins covers.

21 With regard to waiver, there is no evidence
22 before the Court that there was a knowing and
23 intelligent waiver of any rights against the D.O.T. in
24 2005.

25 Mr. Meshekoff had no understanding at that

1 THE COURT: Do any of the attorneys know of
2 such a case? Yes or no?

3 MR. BOOTH: The answer is no.

4 THE COURT: I'm not sure if you knew and there
5 was a case on point that didn't apply to D.W., y'all
6 would have had it enlarged and highlighted. Nothing
7 wrong with that, Mr. Booth.

8 MS. CLAYTON: Your Honor, I'm not aware of any
9 case.

10 MR. FRAWLEY: Your Honor, the S.C.D.O.T. is
11 aware of no such line of cases.

12 MR. QUINN: Your Honor, my law clerk is aware
13 of no such case.

14 THE COURT: I'm sure mine is not aware of one.
15 Thank you very much. I am going to look at these cases
16 tonight. I will take it under advisement. We will
17 start back at 9:30 in the morning. Thank you. Thank
18 you very much.

19 (Whereupon the proceedings were concluded for
20 April 20, 2011.)

21 (The following proceedings were reported on
22 April 21, 2011.)

23 THE COURT: As to the directed verdicts from
24 the defendants, I will take them also in the reverse
25 order in which the attorneys argued. I will take

1 Mr. Quinn's argument on behalf of Alpine and Dr. Denton
2 first.

3 In reviewing and attempting to analyze Hayes
4 versus Tompkins, which actually I find the courtroom
5 fascinating. It's a fascinating case. I am sure you
6 are all aware of who argued this case. Now the Court of
7 Appeals Judge Henry Floyd and Judge Welmaker, a South
8 Carolina circuit court judge.

9 They were in practice together at that time
10 and they argued on behalf of Mr. Hayes, and I did not
11 know the lawyer that argued on behalf of Tompkins,
12 Mr. Finney. It's not former Chief Justice Finney. I
13 can't imagine he was up in Pickens County arguing an
14 easement case.

15 When I read it, I realized Highway 8 -- I am
16 sure you are all familiar with Highway 8. Is anybody
17 familiar with Highway 8 in Pickens County? Anybody?

18 MR. FRAWLEY: I'm not, Your Honor.

19 THE COURT: It's kind of a fascinating area of
20 the State also. It runs right through Pumpkintown,
21 South Carolina. There is a road called Pumpkintown.
22 Highway 8 goes due north up through one of the prettiest
23 areas in South Carolina, I think, Cherokee Trail and
24 Table Rock.

25 If you take a right on Pumpkintown Road -- I

1 know y'all are all interested in listening to me --
2 Soapstone Baptist Church on Liberia Road is one of the
3 oldest African-American churches in this area, and right
4 now Clemson University and some others are doing an
5 archeological dig up there. They located a former slave
6 cemetery up there. I went by there a couple of weeks
7 ago to see that particular site.

8 Be that as it may, I'm not sure that this is
9 that part of Highway 8 or the lower end of Pickens
10 County. Hayes, as an initial matter and everybody
11 knows, this is a road case, not a storm water drainage
12 system case.

13 The Hayes case, going back in his title to his
14 father, was an original tract of 65 acres, out of which
15 he was deeded 10 acres, I believe in 1937. Down the
16 line Tompkins received about a 10-acre tract, I believe,
17 somewhere down the line through Hayes' mother that took
18 title by intestate and her children at the death of the
19 father and transferred their interest in this property
20 to the mother.

21 It appears Hayes had frontage on Highway 8
22 that was a ditch and a gully. Of course, he went
23 through this road that was on Tompkins' property.
24 Tompkins' admitted that he structured Hayes' access to
25 the property.

1 The Court found that there was a way of
2 necessity over Tompkins' land founded on implied grant.
3 So you have the grantee claiming an implied easement of
4 necessity. You certainly don't have that here. The
5 defendants here are saying, "We don't have an easement."

6 What you have is a person, that if you try to
7 analogize this case to our factual situation here,
8 Westside would be Tompkins. Hayes, if you try to
9 analogize it, the closest in point would be D.O.T.
10 because everybody else is removed. They are not on that
11 property, in my mind at least. I racked my brain trying
12 to get an analogy.

13 For example -- and the analogy never quite
14 held up for me -- that Hayes rented to somebody on his
15 property. That doesn't quite fit because you just don't
16 have that factual situation.

17 Of course, our Court said, "Yes, there was an
18 easement. Yes, there should be." Hayes' appeal was,
19 "Yeah, I got my easement, but I don't want to pay it
20 for. I don't want to maintain it." I guess that goes
21 back to the old saying, "I just want the cheese. I
22 don't want no part of the trap." I guess that is what
23 Hayes was saying.

24 It looks like back then the maintenance,
25 periodic maintenance, amounted annually to 300- to \$350

1 a year. So Hayes would have been responsible for
2 one-third of that, \$117, whatever figure that would be.

3 Then, of course, the argument becomes, would
4 this apply to the storm water drainage in that the three
5 parties -- I call them more than parties -- but the
6 upstream parties are third party beneficiaries.

7 As I understand the flow, Denton and Alpine
8 don't flow directly into D.O.T. They flow into Danwood;
9 so they are even a little bit more removed, I think,
10 maybe another step in that regard.

11 For third party beneficiary, Mr. Jeter relies
12 on the Kingman case, which is the interpretation of an
13 insurance contract. Kingman has been cited in other
14 cases since then.

15 What I could find on third party beneficiaries
16 is you have to look at the intent of the parties as to
17 whether or not the parties to a contract intended for
18 the unnamed parties to be beneficiaries.

19 Of course, the analogy is that the plaintiffs
20 won the encroachment permit in 1987, that D.O.T. and
21 Westside intended that these upper landowners would be
22 beneficiaries of that encroachment permit.

23 If there is any evidence of that, according to
24 Mr. Jeter, the evidence of that is because there was an
25 increased flow to 98 C.F.S., which is kind of an implied

1 issue with the third party beneficiaries.

2 As to Mr. Denton and Alpine, directing a
3 verdict on their behalf, I find they are not third party
4 beneficiaries. That is a simple question, probably
5 simple for you lawyers that have done this for many,
6 many years. When y'all take me out of my criminal roots
7 so to speak, it's not so simple to me.

8 But the number two question on the plaintiff's
9 trial brief is: Are the defendant landowners third
10 party beneficiaries or de facto assignees of the D.O.T.
11 encroachment permit such that alternately they should
12 bear their equitable allocation of the costs of
13 maintenance and repair?

14 As to Denton and Alpine, I find they are not
15 either third party beneficiaries or de facto assignees.
16 I have looked at the evidence in the light most
17 favorable to the non-moving party, that being the
18 plaintiff, and I find there is a failure of proof in
19 that regard.

20 As to D.W. Properties, D.W., of course, as we
21 heard throughout acquired the property in '04. The
22 building was up in '05. It was on the blacktop pavement
23 developed by Kimbrell's, who was the predecessor of
24 Kroger.

25 Again, I would find that they are not third

1 party beneficiaries or de facto assignees, and I am
2 directing a verdict or granting the verdict, directed
3 verdict motion, of D.W. Properties in their favor
4 looking at the evidence in the light most favorable to
5 the non-moving party, that being the plaintiff in this
6 case.

7 As to Danwood, my review of the evidence and
8 testimony in the case and the encroachment permit, not
9 getting to what originally was marked 4-A for
10 identification initially, but just looking at the
11 encroachment permit, it was issued in 1985.

12 When you look at the sketch plan, that sketch
13 plan brings the predecessor in interest drainage system,
14 West Columbia Development Company, across Number 1
15 highway.

16 They actually placed the water pipe, the
17 48-inch R.C.P. water pipe, designed to carry 98 C.F.S.
18 under Number 1 highway, they being the predecessor in
19 interest to Danwood.

20 So I think they stand in a little bit
21 different position than does D.W. Properties or Alpine
22 or Denton, also as to 4-A, which, of course, was
23 objected to by the defendant Danwood.

24 At this time based on that, I am going to deny
25 Danwood's motion for a directed verdict, as I say,

1 looking at the evidence in the light most favorable to
2 the non-moving party.

3 I cannot see how -- D.O.T. is still in. Of
4 course, and Danwood based on my ruling is still in.
5 D.W. Properties, Alpine, and Dr. Denton are now out.

6 Anything you want to put on the record in that
7 regard, Mr. Jeter?

8 MR. JETER: No, Your Honor.

9 THE COURT: Ms. Clayton or anyone else?

10 MS. CLAYTON: Your Honor, I did not have an
11 opportunity to respond to Mr. Jeter's argument regarding
12 4-A and if I could be heard in that respect.

13 THE COURT: All right. Yes, ma'am. I wasn't
14 trying to prohibit you from being heard in that regard,
15 Ms. Clayton. I would be glad to hear from you.

16 MS. CLAYTON: Thank you, Your Honor. Exhibit
17 4-A that Your Honor has referenced is the October 4,
18 1985, letter from West Columbia Development Company,
19 which is the predecessor or one of the predecessors to
20 Danwood, L.L.C. That letter was actually sent to Joe
21 Strauss with Strauss Greenberg.

22 Strauss Greenberg evidently had an option to
23 purchase the Dreher property which later became Westside
24 Plaza. Your Honor, Mr. Blakely's testimony was that
25 that option was never exercised, and Strauss Greenberg

1 THE COURT: I just checked my e-mails, and I
2 noticed, Mr. Frawley, I have got an e-mail concerning
3 your witness.

4 MR. FRAWLEY: Yes, sir. I have copied
5 everyone on the e-mails, and we have discussed it. I
6 know we had several people out here the last few days.
7 Ms. Reeves is the former property manager for the
8 property. We have mentioned her name several times.

9 She and her husband were here. She was under
10 subpoena. I think I had her under subpoena, and I think
11 Mr. Booth also had her under subpoena. She has been in
12 bad health. You probably heard while we were arguing --
13 and I could hear her coughing back there, and she has
14 had some upper respiratory problems.

15 At the end of yesterday, I was going to call
16 her as my witness, and Mr. Booth wanted her live. I
17 would have been okay with deposition excerpts, but Bill
18 felt that he needed her live. So we were going to bring
19 her in since she was going to be my witness about
20 mid-afternoon the day before yesterday.

21 When it became clear that she was not going to
22 testify the day before yesterday, I sent her home and
23 said that we would call her in the evening and let her
24 known when we needed her up here yesterday, assuming we
25 would have -- in telling her that, I would have assumed

1 that we would have gotten through Mr. Lambrecht earlier
2 yesterday, and we would have been able to get to her.

3 So we called her about 10:00 o'clock and asked
4 her to be here about 10:00 o'clock. She got up here
5 and, of course, sat here the rest of the day. It went a
6 little longer that we expected.

7 So toward the end of the day, as soon as I
8 think we finished yesterday, I walked up there with her
9 and told her if she needed to see a doctor, see a doctor
10 and then let us know accordingly.

11 When I got in the office this morning about
12 quarter after eight, I got an e-mail telling me that she
13 would fax me something. She attached something to the
14 e-mail which didn't produce.

15 I had to wait until staff, who actually know
16 how to run our computers got in about 8:30, and then
17 they printed off the e-mail, and I forwarded it. It was
18 basically two pages.

19 The first page looked like it was something
20 that she typed out that was very faint. I think what I
21 forwarded to everybody barely comes out. But what she
22 said in there, I copied and put it in my e-mail.

23 It was basically that she had seen a doctor.
24 He had given her some additional medication, and for me
25 to let her know and advise her as to whether she needed

1 to do -- what she needed to do today.

2 To that she attached -- I think it says work
3 waiver report or something from a doctor. It's actually
4 signed by a family nurse practitioner, not a doctor, but
5 it does say that she has got a couple of upper
6 respiratory issues, and it may need two to three days to
7 recover.

8 It doesn't explicitly say that she can't come
9 here for the hearing. I talked to Mr. Booth before,
10 before he was dismissed. At that time he would have
11 been okay with just submitting her deposition in lieu of
12 live testimony.

13 I have got her on standby. I called her. I
14 could barely hear what she was saying. If I couldn't
15 hear her on the phone, I'm pretty sure Ms. Pantsari
16 would not be able to understand her either.

17 I told her to be on standby until we told her
18 if we needed her. I am planning on calling her as my
19 witness, but I am willing to put in her deposition in
20 lieu of live testimony. Since Mr. Booth is no longer
21 here, that's a moot point with him.

22 So what I would propose to do is offer Your
23 Honor her deposition. It's not terribly long. I think
24 there's three of us who asked questions at it, and I
25 would like to put that in.

1 Since we don't have excerpts to give Your
2 Honor, I will put the whole thing in under the rule,
3 subject to the other attorneys, what they want to do.
4 She is on standby. We can get her here, but she is in
5 Aiken. So it would be at least 45 minutes or longer
6 until she gets here.

7 THE COURT: Ms. Clayton?

8 MS. CLAYTON: I have no objection to her
9 deposition transcript coming in, Your Honor.

10 MR. JETER: That's fine with us, Your Honor.

11 THE COURT: All right. Then the deposition
12 transcript will come in, and I will read it.

13 MR. FRAWLEY: I have it here, Your Honor.

14 THE COURT: Thank you. Thank you very much,
15 Mr. Frawley and Ms. Clayton. We will make this a
16 Court's exhibit.

17 (Court's Exhibit Number 2 is marked for
18 purposes of the record.)

19 MR. FRAWLEY: Your Honor, Mr. Blakely was
20 going to be my principal witness. He has already
21 testified. The plaintiff called him in their side of
22 the case, and what ground I needed to cover with
23 Mr. Blakely I have covered on cross. So I will not be
24 recalling him. So at this point S.C.D.O.T. rests.

25 THE COURT: Thank you. Thank you,

1 Mr. Frawley.

2 MR. FRAWLEY: I understand if there is any
3 further evidentiary motions we need to make, we will
4 make at the conclusion of all the parties' presentation.

5 THE COURT: Thank you, Mr. Frawley.

6 MR. FRAWLEY: Thank you, Your Honor.

7 THE COURT: Ms. Clayton.

8 MS. CLAYTON: Your Honor, we would call Ron
9 Swinson.

10 THE COURT: Mr. Swinson, if you would come
11 around and be sworn, please.

12 RONALD OWEN SWINSON, JR.,
13 being first duly sworn, testifies as follows:

14 CLERK: When you are comfortably seated, state
15 your full name.

16 THE WITNESS: My full name is Ronald Owen
17 Swinson, Jr.

18 DIRECT EXAMINATION

19 BY MS. CLAYTON:

20 Q Good morning, Mr. Swinson.

21 A Good morning.

22 Q What is your relationship to the Danwood Shopping
23 Center?

24 A I am a member, the managing member, of Danwood,
25 L.L.C., which is the ownership entity of the

1 Danwood Shopping Center.

2 Q Are you one of the only members of Danwood, L.L.C.
3 or are there others?

4 A There are three other members.

5 Q And who are those members?

6 A Harold Pickerel, Jeff Dootson, and Ronald Johnson,
7 through his I.R.A.

8 Q And I understand that you are the managing member
9 of Danwood, L.L.C. but tell the Court what you do
10 for a living, sir.

11 A I'm in the commercial real estate -- general real
12 estate development business and investment business
13 as well, real estate.

14 Q How long have you been in the real estate business?

15 A Since 1980.

16 Q And you mentioned commercial development as well as
17 investment or acquisition. Tell us a little bit
18 about your development experience.

19 A The commercial development I have developed from my
20 own account or with partners grocery-anchored
21 shopping centers --

22 THE COURT: Say that again.

23 THE WITNESS: Grocery-anchored shopping
24 centers.

25 THE COURT: All right. I just didn't

1 are other shopping centers that we have acquired,
2 just the whole -- there might be others, but that's
3 it.

4 Q What kind of due diligence do you generally do when
5 acquiring existing shopping centers?

6 A The first thing obviously is a visual inspection.
7 I will personally go to the site and just do a
8 general walk-around. We hire engineers and
9 attorneys to do inspections of the facilities.

10 We have a surveyor obviously who will do a
11 survey of the as-built which will denote what is on
12 the ground, what the facilities are. We generally
13 will have an environmental phase one, at the very
14 least done, and if required then a phase two.

15 Title is searched. All the utilities are
16 located. Obviously mortgages, anything that could
17 affect the title or the functioning or the
18 operation of the existing shopping center, we will
19 investigate and ascertain any issues.

20 Q Let's talk a little bit about the Danwood Shopping
21 Center. Describe that center for us, please.

22 A Danwood is, as you have seen, a shopping center in
23 West Columbia. It's on about six acres, about 54-,
24 5,000 square feet, multi-tenant. It actually was
25 where Bi-Lo was originally.

1 Q To your knowledge has anything been done to the
2 property that would increase the surface water
3 coming from the Danwood Shopping Center?

4 A No.

5 Q When Danwood, L.L.C. acquired the Danwood Shopping
6 Center, what understanding did you have concerning
7 the storm water runoff from the Danwood Shopping
8 Center?

9 A Well, my understanding was, as verified by the
10 experts we hired, the engineer and surveyor, our
11 storm water drainage was through a D.O.T. catch
12 basin on U.S.1.

13 Q Mr. Swinson, I am going to show you Exhibit 95-A.
14 Do you recognize this document?

15 A I do.

16 Q What is this?

17 A It's an as-built survey that we had done for the
18 acquisition of Danwood?

19 MS. CLAYTON: Your Honor, at this time we
20 would move to introduce Exhibit Number 95-A.

21 MR. FRAWLEY: Without objection from D.O.T.,
22 Your Honor.

23 MR. JETER: I don't think I have looked at
24 that one. If I could look at it a moment, Your Honor.

25 THE COURT: Certainly.

1 (Attorneys confer.)

2 MR. JETER: No objection, Your Honor.

3 THE COURT: Exhibit 95-A is in evidence
4 without objection.

5 (Defendant's Exhibit Number 95-A is received
6 into evidence.)

7 BY MS. CLAYTON:

8 Q I will let you hold on to this, Mr. Swinson.

9 A Okay.

10 Q What did 95-A tell you about the storm water runoff
11 from the Danwood Shopping Center?

12 A Well, a couple of things. You can look at the
13 survey and see that the pipe, storm water pipe, in
14 the parking lot, it's various sizes of reinforced
15 concrete pipe.

16 Then the surveyor's certification over to the
17 side, which is the narrative notes that I won't
18 read the whole thing, but number 5 said, "Unless
19 specifically noted hereon, municipal water service,
20 storm sewer, sanitary sewer facilities and
21 telephone, electric and gas services are available
22 to the premises without need for easements across
23 the land of others.

24 Q That language that you just read, how about you
25 highlight that for us on Exhibit 95-A.

1 A (Witness complies.)

2 Q And is this what you were referring to earlier in
3 your testimony when you said that you hired
4 engineers to tell you that there were utilities in
5 place at Danwood Shopping Center to take care of
6 the storm water runoff?

7 A Yes, this is one of several things of the engineers
8 and surveyors.

9 Q Are surveys of this nature in Exhibit 95-A the type
10 of information that you generally look at when you
11 are acquiring shopping centers to determine what is
12 happening with the storm water runoff?

13 A I would always get an as-built survey before
14 acquiring, absolutely.

15 Q Was it your understanding that the storm water
16 runoff from the Danwood Shopping Centering was
17 being handled by the Department of Transportation?

18 A Yes, ma'am.

19 Q Did you ever look any further downstream to see
20 where that water might be going?

21 A I did not.

22 Q Why did you not?

23 A There was no need to do that. The D.O.T. -- our
24 water was going into the D.O.T.'s catch basin, and
25 in all the development I have done, once you get to

1 THE COURT: Whichever way y'all want to go
2 would suit me.

3 MR. FRAWLEY: I would be glad for the
4 plaintiff to go first, Your Honor.

5 THE COURT: Mr. Jeter.

6 MR. JETER: Thank you, Your Honor.

7 CROSS EXAMINATION

8 BY MR. JETER:

9 Q Good morning, Mr. Swinson.

10 A Good morning.

11 Q Let me go over a couple of things you just
12 testified about first, and then we will get into my
13 original question. You said it was not uncommon to
14 have upstream water come across your property?

15 A Correct.

16 Q You gave the example of the Bi-Lo, which is over
17 near my home. You are talking about the one where
18 Jackson Boulevard comes in --

19 A No, no. This is down Pineview -- where Pineview
20 changes into -- it's past the new Walmart on the
21 left.

22 Q Oh, I'm sorry.

23 A It's farther down.

24 THE COURT: Going towards Lower Richland?

25 THE WITNESS: Going towards Lower Richland.

1 BY MR. JETER:

2 Q You testified that you, as the developer, paid for
3 an extensive ground water installation to handle
4 ground water as part of your original construction;
5 right?

6 A Storm water.

7 Q You are exactly right. I misspoke, storm water as
8 part of your original construction; right?

9 A That's correct.

10 Q And you did not seek to obtain the costs of
11 original construction from any of the upstream
12 properties; right?

13 A Yes.

14 Q Are you aware that Westside has sought any of the
15 costs of its original construction from any of the
16 upstream landowners?

17 A I'm not.

18 Q What you have not testified to is that you have
19 made \$325,000 of repairs to that system that you
20 then sought compensation from upstream landowners
21 for; correct?

22 A Correct. I have not sought anything for any
23 repairs to any of our ground water, storm water
24 system from any upstream. That is a massive
25 watershed that we have up north of us or to the

1 upstream from us at the Bi-Lo. It would go to
2 hundreds of property owners up above us. We took
3 it on as our responsibility and assumed that it
4 would continue.

5 Q But you have not made extensive repairs at this
6 time; have you?

7 A Not extensive repairs. I think we have done
8 ongoing maintenance.

9 Q Now, you said you sweep four times a week?

10 A I don't. We have somebody under contract that does
11 that.

12 Q Why is that?

13 A To make sure that it stays clean.

14 Q And what are you concerned about?

15 A Just general debris in the parking lot and dust and
16 whatever would be residual in the parking lot.

17 Q And you find it necessary to sweep four times a
18 week to be sure you are controlling that?

19 A Feel like it's appropriate just to make sure it
20 stays clean.

21 Q That's dust that either car tires may carry in or
22 that wind carries in?

23 A Yes, sir, whatever.

24 Q And if you didn't sweep it four times a week, would
25 you find a good bit of sand out there eventually

1 accumulating?

2 A I don't have any knowledge to respond to that, but
3 I would assume there would be something if you
4 didn't maintain it like it should be.

5 Q Now, you pointed to some language in the
6 certificate of your surveyor saying that there were
7 no easements required?

8 A Yes.

9 Q To get to the storm water --

10 A Correct.

11 Q -- for collection. That implies that in some
12 situations there may be easements required to get
13 to your storm water drop-off point; correct?

14 A I don't think so. I think it lists several
15 different utilities. In my experience an easement
16 for storm water, we have never, as I can recall,
17 had to acquire an easement. Once we get to the
18 D.O.T., we have dealt with D.O.T.

19 But it lists -- if you would read the
20 highlighted portion, it lists sanitary sewer,
21 electricity, all of that, which it is not uncommon
22 to acquire easements lumped all together. So I
23 wouldn't say that it directly implied that there
24 may be instances where storm water would require an
25 easement.

1 Q But it's telling you that you don't have to worry
2 about getting an easement in this particular case
3 for storm water or the other utilities; correct?

4 A Any of those utilities, that's correct.

5 Q In that particular case; correct?

6 A Correct.

7 Q And you paid someone to go out there and check for
8 that; didn't you?

9 A I did.

10 Q Okay. And did you assume that the D.O.T. had made
11 suitable arrangements with the downstream landowner
12 for the handling of the storm water you were going
13 to dump into that system?

14 MS. CLAYTON: Objection.

15 MR. FRAWLEY: I will -- well, I don't care.

16 MS. CLAYTON: Your Honor, the witness has
17 already testified that he relied upon D.O.T. and the
18 surveyor's certificate that his water was going to the
19 D.O.T., and he did not do anything further.

20 THE COURT: Does that answer your question?

21 MR. JETER: I don't think it did.

22 THE COURT: Ask your question again.

23 BY MR. JETER:

24 Q I said, did you assume that the D.O.T. had made
25 suitable arrangements with the downstream

1 landowners for the handling of the storm water that
2 you were going to put or discharge into their
3 system?

4 A I assume that the D.O.T. did whatever was necessary
5 to take care of the storm water.

6 Q You never knew about this encroachment permit; huh?

7 A I did not.

8 Q I heard that story before.

9 MR. FRAWLEY: So have I.

10 BY MR. JETER:

11 Q Your attorneys didn't find it?

12 A Not to my knowledge.

13 Q Your engineers didn't find it?

14 A Correct.

15 Q In all that due diligence that you hired people to
16 do, nobody ever brought you this encroachment
17 permit?

18 A To the best of my knowledge, they did not.

19 Q I understand. Now, this due diligence that you did
20 do, are those lender requirements?

21 A I'm sure they are. In addition, yes.

22 Q Did the lender require you to video the storm
23 drainage system at Danwood?

24 A Did not.

25 Q Did you do that?

1 A Did not.

2 Q Did the lender require you to physically enter the
3 storm drain system at Danwood?

4 A I don't believe so, no.

5 Q Did you do that?

6 A Don't recall if we did. I don't believe so, no.

7 Q All right, sir. And Danwood does not have on its
8 property any system in place that slows down or
9 treats its storm water; is that correct?

10 A Yes. The only reason I am hesitating is there's no
11 specific system. I would imagine that the
12 engineers designed the pipes in such a way that
13 would be appropriate to enter into the D.O.T. catch
14 basin.

15 If that involves different slopes, it's
16 conceivable that underground that could be
17 accomplished. I am not aware of that being
18 separately done.

19 Q What you are aware of is they collect your storm
20 water and then discharge it at one point into the
21 D.O.T. system?

22 A I believe that is correct. I believe it's one
23 point.

24 Q You said that your tenants' structure has been
25 pretty consistent, maybe one or two minor tenants

1 have changed, but it has mainly been consistent
2 since you owned the center?

3 A When we first acquired the center, it was not fully
4 tenanted. Once he re-tenanted the center, it has
5 been relatively consistent since then. In the
6 beginning there was a little more vacancy than
7 there is currently.

8 Q When did you get to that point of pretty much full
9 occupancy?

10 A That I don't recall. It was within a year I feel
11 certain.

12 Q So 2005 sometime?

13 A Okay. That's fair.

14 Q And what is your rent roll out there now?

15 A What is my rent roll?

16 Q What is your gross rents coming in each month?

17 MS. CLAYTON: Objection, Your Honor,
18 relevancy.

19 THE COURT: What is the relevancy of that?

20 MR. JETER: It goes to the equities, Your
21 Honor. They have sufficient money flowing in to do
22 either payment out of gross proceeds or the C.A.M.
23 They asked us about C.A.M. My client was asked
24 about C.A.M.

25 THE COURT: I don't need that figure if I

1 decide that they owe money.

2 MS. CLAYTON: Thank you, Your Honor.

3 THE COURT: I don't think it will put them in
4 bankruptcy, but I don't need that figure if I decide
5 they should equitably contribute to it. If I make that
6 decision, I will not, not order them to pay equitably
7 just because I haven't heard the answer to that
8 question.

9 MR. JETER: All right, sir. I understand.

10 BY MR. JETER:

11 Q But you do charge your tenants C.A.M.; is that
12 correct?

13 A We do.

14 Q And since receiving the letter in May of '08 from
15 me, has Danwood, L.L.C. done anything to assist
16 Westside in the financial burden Westside is under
17 to make repairs to the system that handles your
18 water?

19 A No. I would disagree they are handling our water.
20 The way you characterized it, I think, is wrong.

21 Q That's fair. I won't hold you to my premise.

22 A Thank you.

23 Q Thank you very much.

24 THE COURT: Mr. Frawley.

25 MR. FRAWLEY: May it please the Court.

1 CROSS EXAMINATION

2 BY MR. FRAWLEY:

3 Q Mr. Swinson, how are you doing this morning?

4 A Pretty well.

5 Q Been better on other days though; right?

6 A Yes.

7 Q Let's talk about your due diligence. When you
8 acquired this particular -- when I say you, I'm
9 talking about your organization, not you
10 personally.

11 A I understand.

12 Q But when your organization acquired this piece of
13 property, you did your due diligence, and that
14 involved, I think you said, always checking out
15 as-built plans; correct?

16 A Yes. Acquiring an existing center, I would --
17 before closing -- I would have an as-built survey,
18 correct.

19 Q And that's kind of a no-brainer. If you are paying
20 big money for something, you want to be able to
21 know what it is you are acquiring; correct?

22 A Correct.

23 Q And your as-built plan, which I think Ms. Clayton
24 put in as Exhibit 95-A, is this your as-built plan?

25 A Yes, sir.

1 your yard so you can police it up; correct?

2 A Correct.

3 Q Up to and including sweeping it four times a week?

4 A Correct.

5 Q Mr. Jeter asked you a question that when you
6 acquired your property with regard to surface
7 water, were you assuming that S.C.D.O.T. made
8 suitable arrangements with downstream property
9 owners for the disposal of storm water? Do you
10 remember that question?

11 A I do.

12 Q I think you testified that when you acquire
13 property, you take whatever measures you can
14 through your due diligence to make sure that the
15 storm drain system on your property is properly
16 handling the water. You do that; don't you?

17 A Correct.

18 Q And you did do that here; didn't you?

19 A Yes.

20 Q Then at some point your storm water or storm water
21 that comes from your properties -- maybe it has
22 come from another property uphill from you -- but
23 it has come through your property and you release
24 it into the S.C.D.O.T. system; correct?

25 A Correct.

August 21, 1987

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS
AND PUBLIC TRANSPORTATION
COLUMBIA
FORM 638 Rev. 11-77

ENCROACHMENT PERMIT

No. D-32-4172

To Dayton & Associates XVII

County Lexington
Route U.S. Hwy. #1
Road S-32-275

In compliance with your request and pursuant to statutory authority and subject to all the provisions, terms, conditions, and restrictions written herein, including General Provisions contained on the other side of this sheet, YOU ARE HEREBY AUTHORIZED AND PERMITTED TO:

Construct ~~two~~ drives on road S-32-275, three drives along U.S. Hwy. #1, and to connect existing catchbasin along U.S. Hwy. #1 with a new 48" RCP as shown on application dated July 15, 1987, a copy of which is attached hereto and made a part of this permit.

SPECIAL PROVISIONS

(In case of conflict between Special Provisions and General Provisions, Special Provisions shall govern.)

There shall be no excavation of soil nearer than two feet of any public utility line or appurtenant facility except with the consent of the owner thereof, or except upon special permission of this Department after an opportunity to be heard is given the owner of such line or appurtenant facility.

All excavated material shall be placed on the side of the trench away from the traveled roadway.

All jacking or boring shall be done in such a way as not to disturb the highway surfacing.

The permittee shall make the installation under the supervision of the Department, shall not block traffic at any time, and shall provide proper warning signs and lights.

Where pavement is cut in the traveled way of this road or route, the work shall be done in clear weather when traffic is lightest. There shall be no trench left open in the traveled way during rush hour traffic or during the hours of darkness.

PLAINTIFF'S
EXHIBIT

1

This permit shall not become operative until a written acceptance of same by permittee shall have been received by this Department and further shall become null and void unless the work contemplated herein shall have been completed prior to February 1, 1988

SOUTH CAROLINA DEPARTMENT
OF HIGHWAYS AND PUBLIC TRANSPORTATION

By

☐ State Highway Engineer.

☒ District Engineer.

I (We) accept the permit herein granted and agree to comply with all the provisions, terms, conditions, and restrictions set out herein. I (We) do hereby agree, and bind my (our) heirs, successors and assigns, to assume any and all liability this Department might otherwise have in connection with accidents or injuries to persons, or damage to property, including the highway, that may be caused by the construction, maintenance, use moving or removing of the encroachment contemplated herein and agree to indemnify this Department for any liability incurred or injury or damage sustained by reason of the past, present, or future existence of said encroachment.

Date

Signed

Plaintiff 0232

Application for Encroachment Permit

Date 7/15/87

Name of Applicant:
Dayton & Associates XVII
Post Office Box 1519
Aiken, South Carolina 29802

County Lexington
Route U.S. Hwy. No. 1
Road S-32-275

Gray Engineering Consultants, Inc.; Fran Creel - 803-297-3027
The undersigned applicant hereby applies to the South Carolina Department of Highways and Public Transportation for permit for encroachment on State Highway Right-of-Way as shown by sketch plan below.

SKETCH PLAN

Applicant requests permission to construct two driveway entrances onto Dreher Road S-32-275, as shown on the attached sketch. The entrances will serve a new 195,972 S.F. shopping center.

Applicant requests permission to construct three driveway entrances along U.S. Hwy. No. 1 as shown on the attached sketch. These entrances will also serve the shopping center.

Applicant requests permission to connect onto an existing catch basin along U.S. Hwy. No. 1 with a new 48" R.C.P. The 98 C.F.S. from the existing 48" R.C.P. will be carried around the shopping center site in a 48" R.C.P. to the detention pond.

permittee shall be responsible at any time in the future for any and all damages to Hwy facilities that occurs as a direct result of this installation.

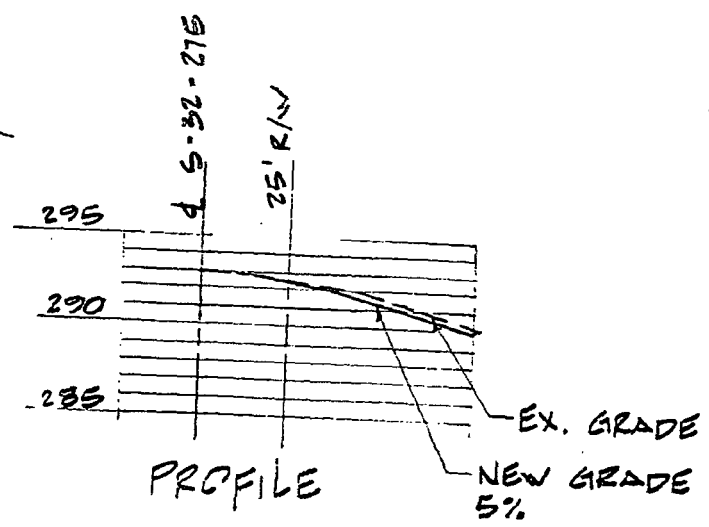
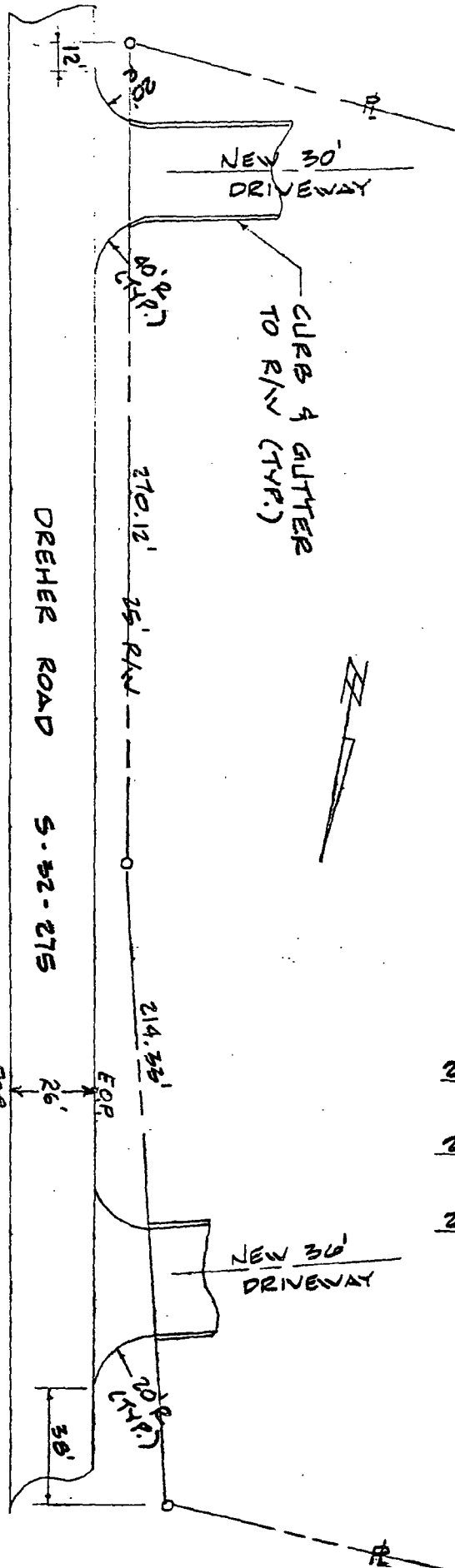
The Permittee shall be responsible for maintaining proper erosion control during and after construction for a period of 1 year.

THE ENTIRE DISTURBED AREA SHALL BE
TOPSOILED WITH 3" OF SELECT MATERIAL
AND REGRASSED TO SCDHPT SPECS.

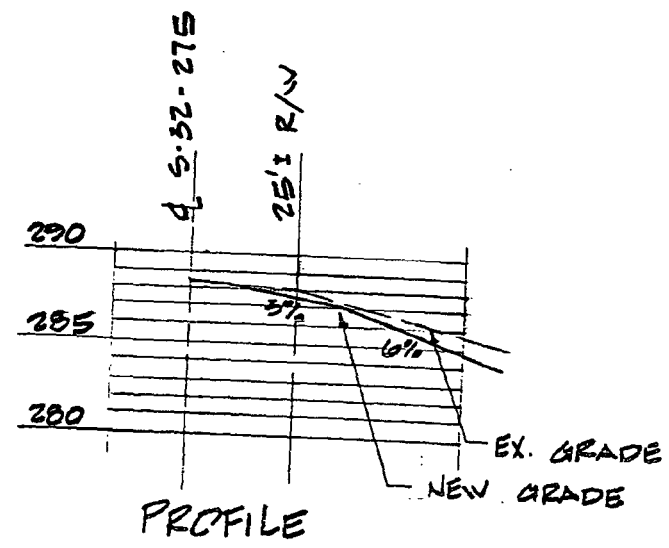
Plaintiff 0233

Date received by Res. Maint.	_____
Engr. or Maint. Supt.	_____
1 forwarded by Res. Maint.	_____ 1987
Engr. or Maint. Supt.	_____
Date received by Dist. Engr.	_____
Date forwarded by Dist. Engr.	_____

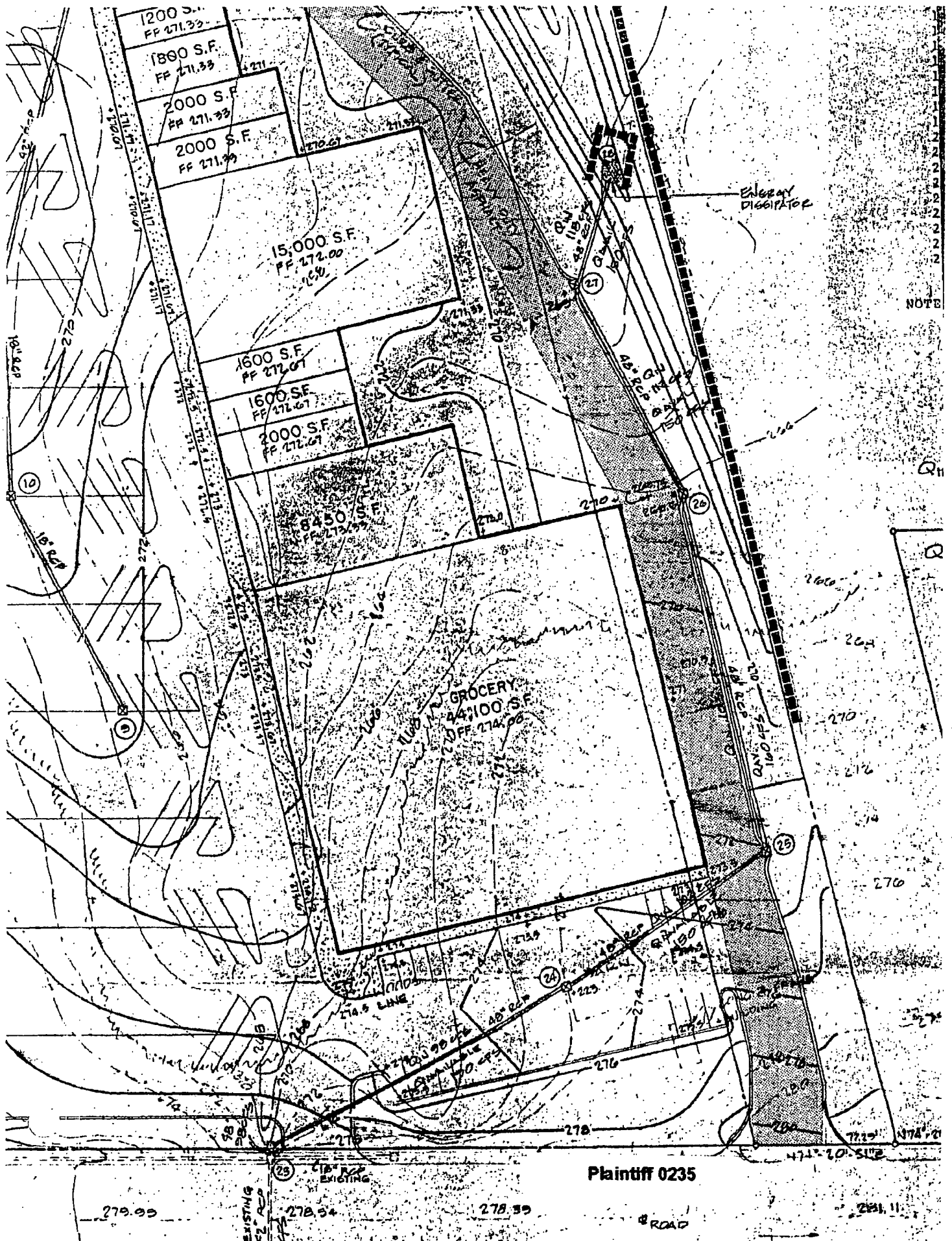
Signed: _____	
Applicant	Date
Dayton & Assoc.	7/15/87
Recommended: _____	
M.	
Dist. Engr.	Date
Res. Maint. Engr.	_____

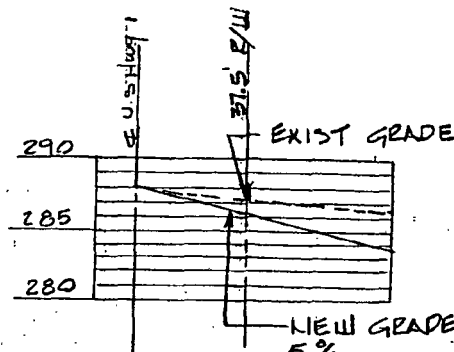
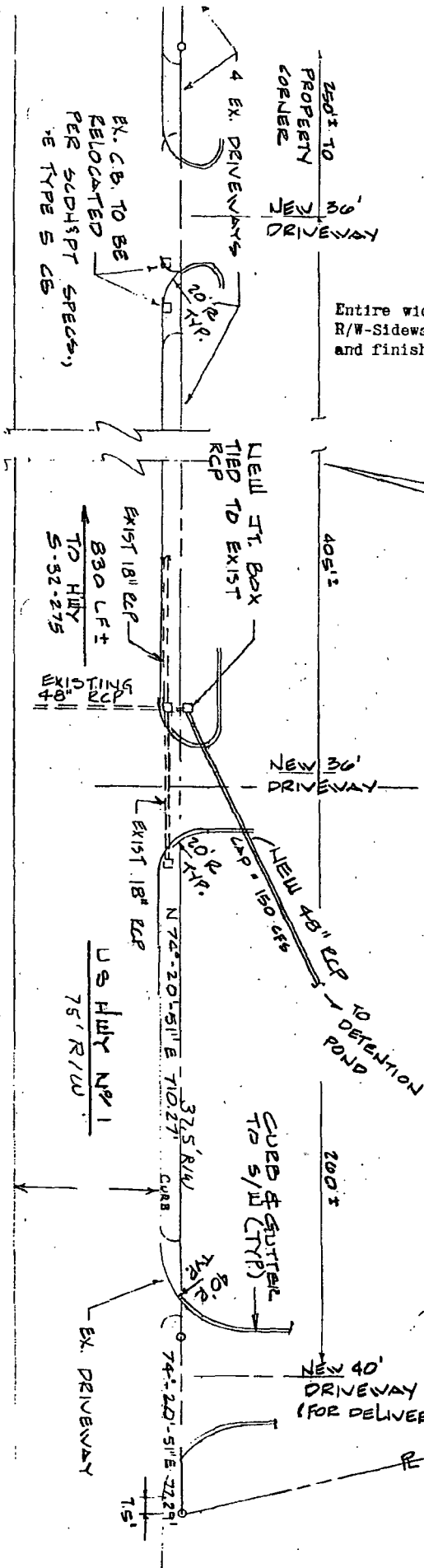


Driveway to consist of a min. 4" stabilized Aggregate Base or 6" Sand Clay Base and resurfaced with 2" of Asphalt concrete.



Plaintiff 0234

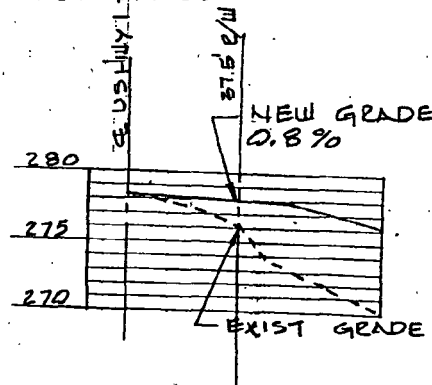




Entire width of sidewalk to be removed and disposed of off R/W-Sidewalk to be replaced using Class "B" concrete, 4" thick, and finished to S.C.H.D. Specifications.

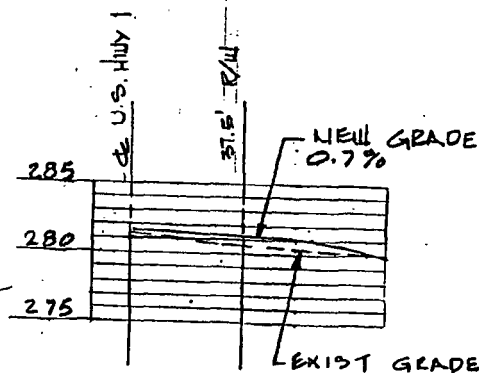
NOTES:

1. ALL EX. DRIVEWAYS (S) TO BE CLOSED. SIDEWALK & CURB & GUTTER TO BE INSTALLED IN OPENINGS PER SCDHPT SPECS.
2. 5' HANDICAP RAMPS TO BE INSTALLED IN SIDEWALK AT NEW DRIVES.



Driveways to be constructed of S.C.H.D. Class "B" concrete, 6" thick, and in accordance with details for street intersections and driveways - S.C.H.D. Dwg. No. CG40-B.

Pipe used in this installation to be reinforced and meet current S. C. H. D. specifications.



Plaintiff 0236

Aug. 24, 1981

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS
AND PUBLIC TRANSPORTATION
COLUMBIA
FORM 638 Rev. 11-77

ENCROACHMENT PERMIT

No. 4-40470

To

Gulf Oil Company USA
P.O. Box 7117-Station C
Atlanta, Georgia 30357

County
Route
Road

Lexington
U.S. Route 1 and S-32-30

In compliance with your request and pursuant to statutory authority and subject to all the provisions, terms, conditions, and restrictions written herein, including General Provisions contained on the other side of this sheet, YOU ARE HEREBY AUTHORIZED AND PERMITTED TO:

Construct two 35' drive entrances with drainage facilities on the west side of U.S. Route 1 and Road S-32-30 as shown on application dated July 13, 1981, a copy of which is attached hereto and made a part of this permit.

SPECIAL PROVISIONS

(In case of conflict between Special Provisions and General Provisions, Special Provisions shall govern.)

There shall be no excavation of soil nearer than two feet of any public utility line or appurtenant facility except with the consent of the owner thereof, or except upon special permission of this Department after an opportunity to be heard is given the owner of such line or appurtenant facility.

The permittee shall make the installation under the supervision of the Department, shall not block traffic at any time, and shall provide proper warning signs and lights.

PLAINTIFF'S
EXHIBIT
2

This permit shall not become operative until a written acceptance of same by permittee shall have been received by this Department and further shall become null and void unless the work contemplated herein shall have been completed prior to Nov. 1, 1981

SOUTH CAROLINA DEPARTMENT
OF HIGHWAYS AND PUBLIC TRANSPORTATION

By _____

☒ State Highway Engineer.

☐ District Engineer.

I (We) accept the permit herein granted and agree to comply with all the provisions, terms, conditions, and restrictions set out herein. I (We) do hereby agree, and bind my (our) heirs, successors and assigns, to assume any and all liability this Department might otherwise have in connection with accidents or injuries to persons, or damage to property, including the highway, that may be caused by the construction, maintenance, use moving or removing of the encroachment contemplated herein and agree to indemnify this Department for any liability incurred or injury or damage sustained by reason of the past, present, or future existence of said encroachment.

Date

9/1/81

Signed

Gulf Oil Company USA
[Signature]

Plaintiff 0253

Aug 13, 1982

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS
AND PUBLIC TRANSPORTATION
COLUMBIA
FORM 638 Rev. 11-77

ENCROACHMENT PERMIT

No. 0246

To
Center Concepts
2026 Powers Ferry Road - Suite 230
Atlanta, Ga. 30339

County Lexington
Route U. S. Route 1, S.C. Route 30,
Road and Road S-32-312

In compliance with your request and pursuant to statutory authority and subject to all the provisions, terms, conditions, and restrictions written herein, including General Provisions contained on the other side of this sheet, YOU ARE HEREBY AUTHORIZED AND PERMITTED TO:

Close existing drives and construct four 30' drive entrances with necessary drainage facilities on the side of U.S. Route 1, S.C. Route 30, and Road S-32-312 as shown on application dated June 23, 1982, a copy of which is attached hereto and made a part of this permit.

SPECIAL PROVISIONS

(In case of conflict between Special Provisions and General Provisions, Special Provisions shall govern.)

There shall be no excavation of soil nearer than two feet of any public utility line or appurtenant facility except with the consent of the owner thereof, or except upon special permission of this Department after an opportunity to be heard is given the owner of such line or appurtenant facility.

The permittee shall make the installation under the supervision of the Department, shall not block traffic at any time, and shall provide proper warning signs and lights.



This permit shall not become operative until a written acceptance of same by permittee shall have been received by this Department and further shall become null and void unless the work contemplated herein shall have been completed prior to Dec. 1, 1982

SOUTH CAROLINA DEPARTMENT
OF HIGHWAYS AND PUBLIC TRANSPORTATION

By _____
☒ State Highway Engineer.
☐ District Engineer.

I (We) accept the permit herein granted and agree to comply with all the provisions, terms, conditions, and restrictions set out herein. I (We) do hereby agree, and bind my (our) heirs, successors and assigns, to assume any and all liability this Department might otherwise have in connection with accidents or injuries to persons, or damage to property, including the highway, that may be caused by the construction, maintenance, use moving or removing of the encroachment contemplated herein and agree to indemnify this Department for any liability incurred or injury or damage sustained by reason of the past, present, or future existence of said encroachment.

Date August 13, 1982

Signed Carroll D. Moss

Plaintiff 0246

Application for Encroachment Permit

SHEET 1 OF 6

Date 6/23/82

Name of Applicant:

CENTER CONCEPTS, INC
4026 POWERS FERRY RD. SUITE 230
ATLANTA, GA. 30339

County LEXINGTON

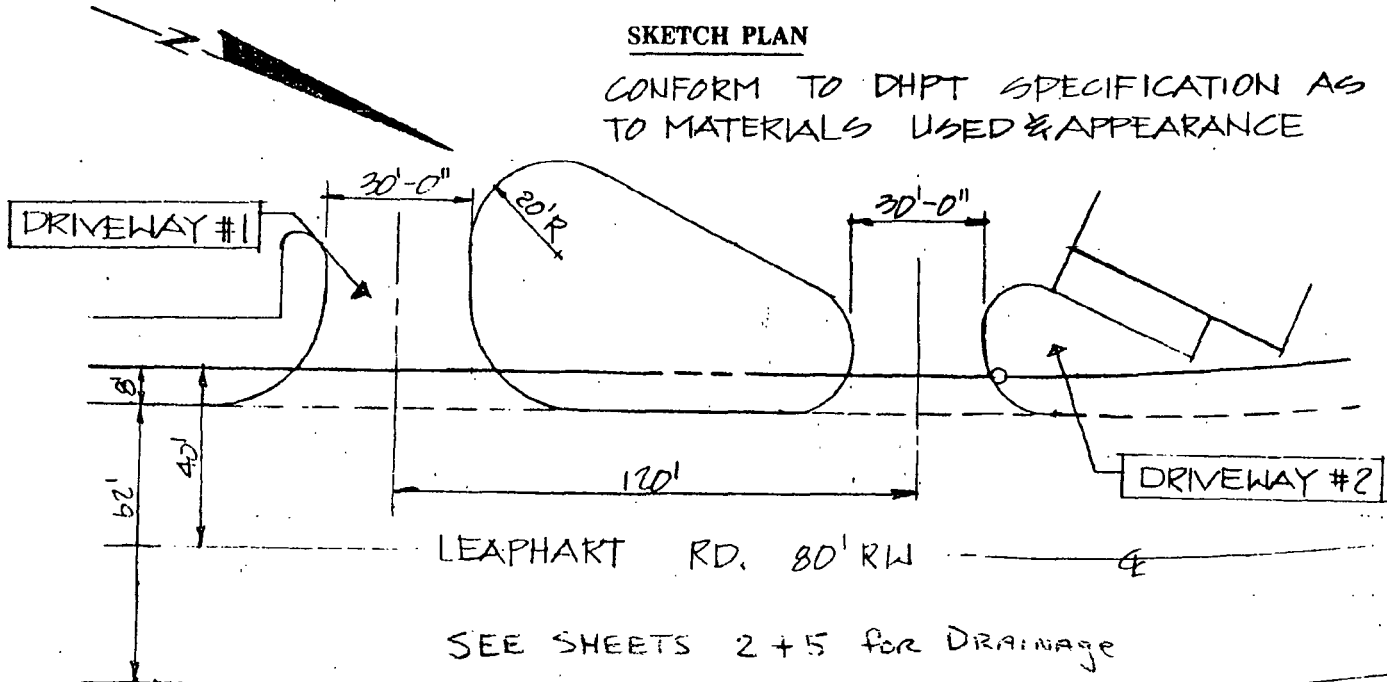
Route S.C. #30, U.S. #1, S. 32-312

Road LEAPHART RD.

The undersigned applicant hereby applies to the South Carolina Department of Highways and Public Transportation for permit for encroachment on State Highway Right-of-Way as shown by sketch plan below.

SKETCH PLAN

CONFORM TO DHPT SPECIFICATION AS
TO MATERIALS USED & APPEARANCE



Proposed to Install New Driveways
on Leaphart, U.S. #1, + WACE ST. as
shown. Request permission to close
Existing Drives on U.S. #1.

SEE SHEET 4 OF 6

The permittee shall be responsible at any time in
the future for any and all damages to Hwy. facilities
that occurs as a direct result of this installation.

ENTRANCE DRIVEWAY SKETCH

SCALE 1"=40'-0"

SEE SHEETS 2 OF 5 AND 3 OF 5 FOR LARGE SCALE DETAILS.

Plaintiff 0247

Date received by Res. Maint. 6-30-82 (RFE)
Engr. or Maint. Supt.
Date forwarded by Res. Maint. 8-13-82 (RFE)
Engr. or Maint. Supt.
Date received by Dist. Engr. _____
Date forwarded by Dist. Engr. _____

Signed: Douglas R. White
Applicant Date 6/23/82
Recommended: [Signature]
Dist. Engr. Date
Res. Maint. Engr.

Application for Encroachment Permit

SHEET 2 OF 6

Date 6/23/82

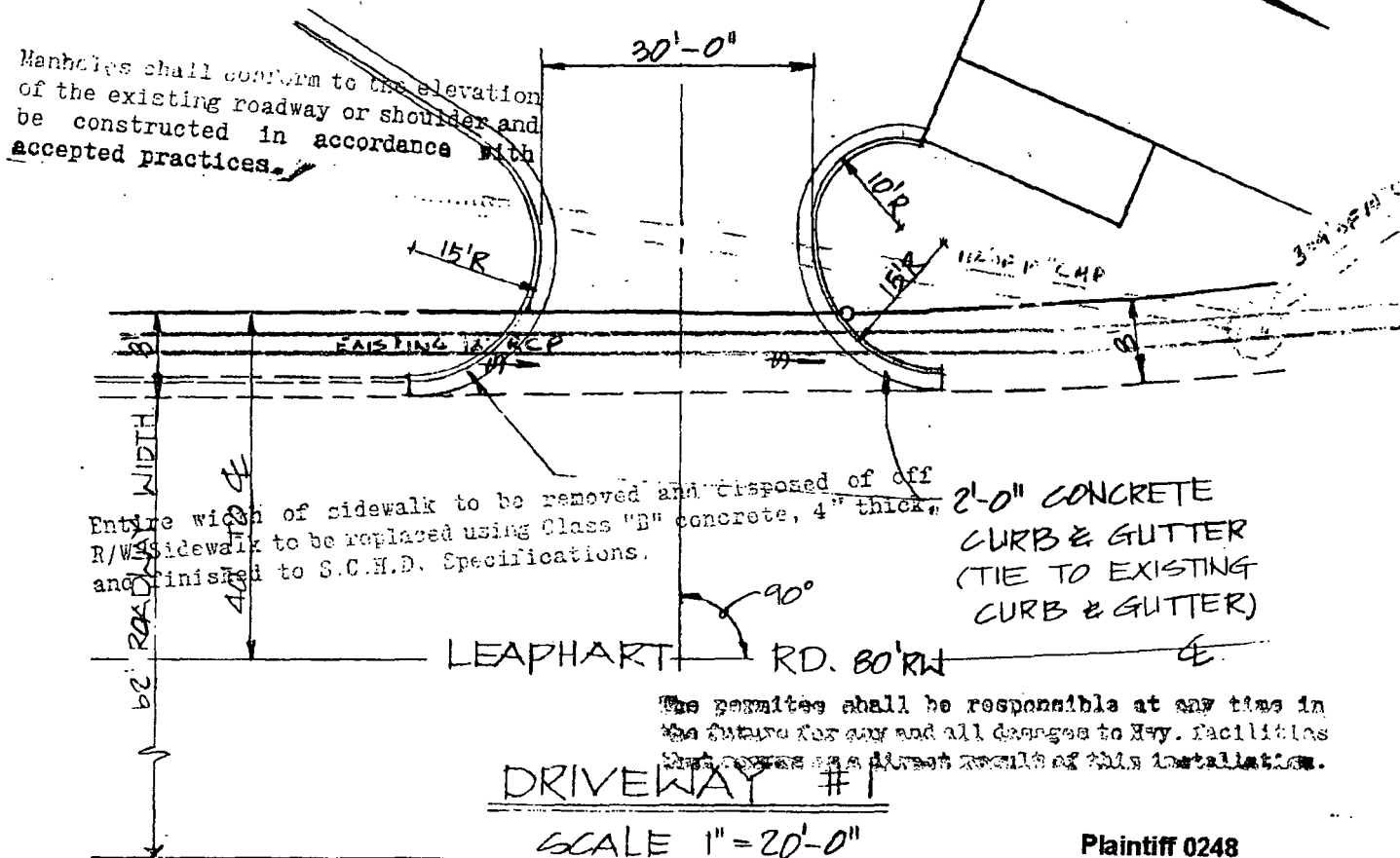
Name of Applicant:
CENTER CONCEPTS, INC.
2026 POWERS FERRY RD. SUITE 230
ATLANTA, GA. 30339

County LEXINGTON
Route S.C. #30
Road LEAPHART RD.

The undersigned applicant hereby applies to the South Carolina Department of Highways and Public Transportation for permit for encroachment on State Highway Right-of-Way as shown by sketch plan below.

SKETCH PLAN

CONFORM TO DHPT SPECIFICATION AS
TO MATERIALS USED & APPEARANCE



Plaintiff 0248

Date received by Res. Maint. 6-30-82 (SHE)
Engr. or Maint. Supt.
Date forwarded by Res. Maint. 8-13-82 (SHE)
Engr. or Maint. Supt.
Date received by Dist. Engr. _____
Date forwarded by Dist. Engr. _____

Signed: Douglas R. White
Applicant Date 6/23/82
Recommended:
Dist. Engr. Res. Maint. Engr. Date

Application for Encroachment Permit

SHEET 3 OF 6

Date 6/23/82

Name of Applicant:

CENTER CONCEPTS, INC
2026 POWERS FERRY RD. SUITE 230
ATLANTA GA. 30339

County LEXINGTON

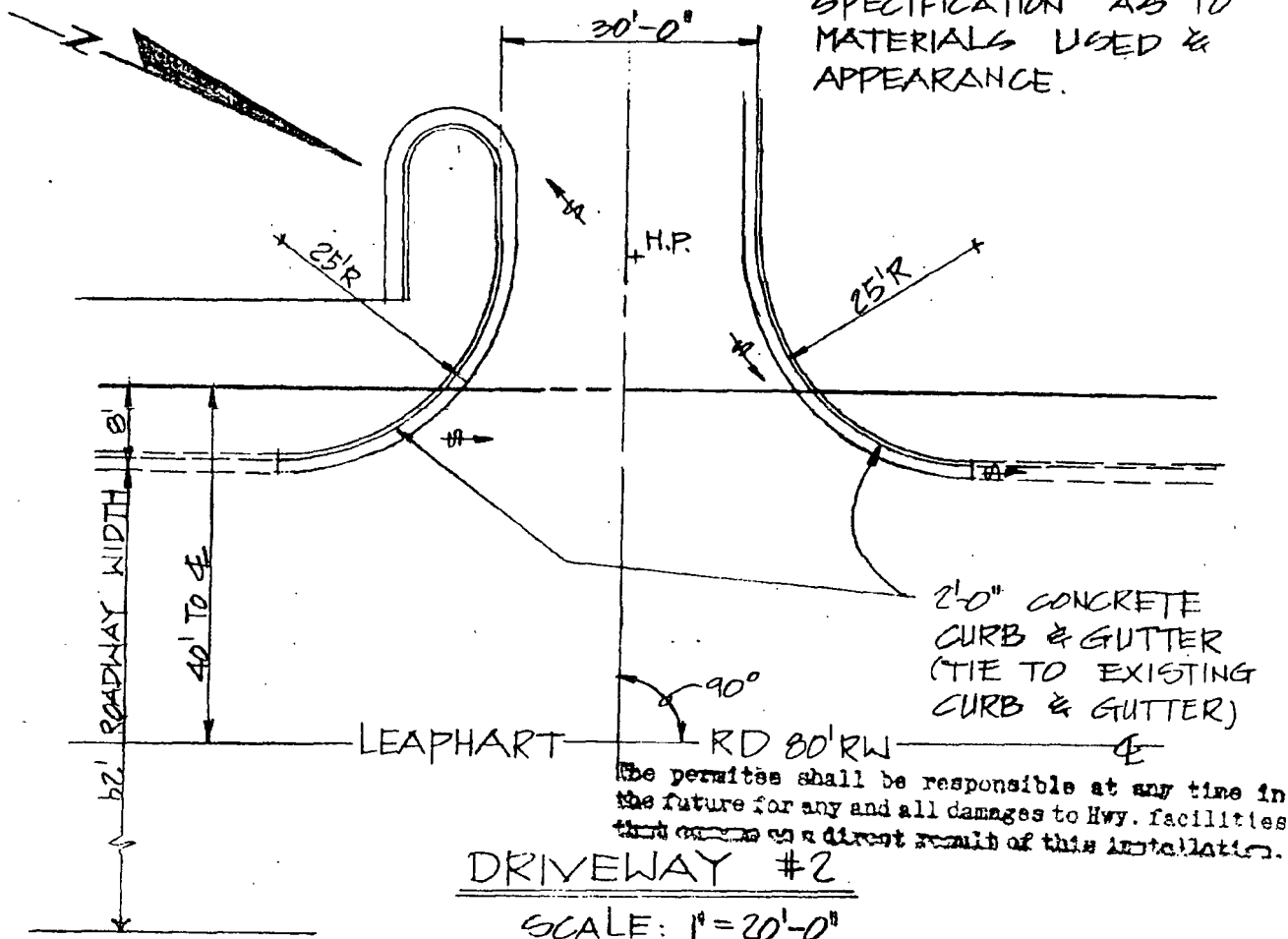
Route S.C. #30

Road LEAPHART RD.

The undersigned applicant hereby applies to the South Carolina Department of Highways and Public Transportation for permit for encroachment on State Highway Right-of-Way as shown by sketch plan below.

SKETCH PLAN

CONFORM TO DHPT
SPECIFICATION AS TO
MATERIALS USED &
APPEARANCE.



DRIVEWAY #2

SCALE: 1" = 20'-0"

Plaintiff 0249

Date received by Res. Maint. 6-30-82
Engr. or Maint. Supt.

Date forwarded by Res. Maint. 8-13-82
Engr. or Maint. Supt.

Date received by Dist. Engr.

Date forwarded by Dist. Engr.

Signed:

Douglas R. White

Applicant

Date 6/23/82

Recommended:

Dist. Engr.
Res. Maint. Engr.

Date

Application for Encroachment Permit

SHEET 4 of 6

Date 6/23/82

Name of Applicant:

CENTER CONCEPTS, INC.
2026 POWERS FERRY RD. ST. 230
ATLANTA, GA. 30339

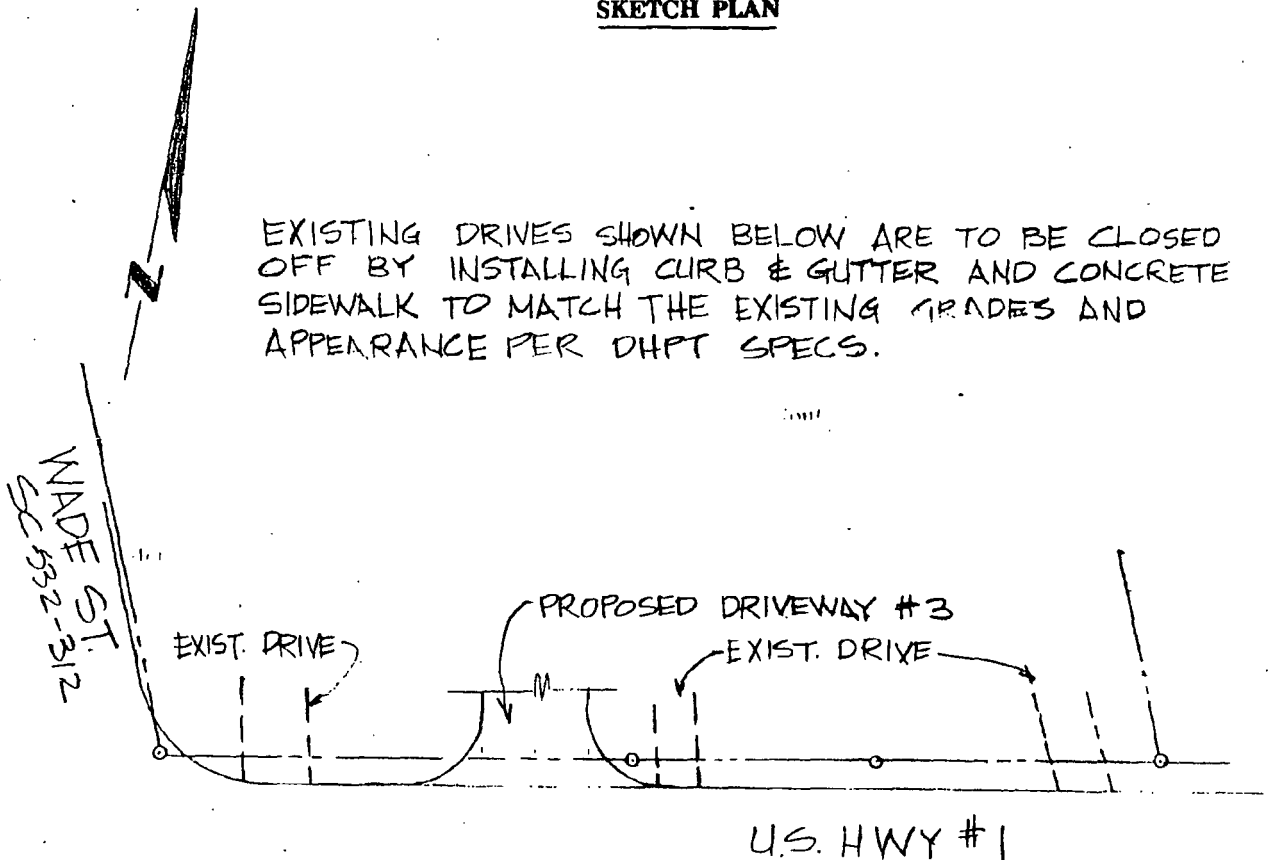
County LEXINGTON

Route US #1

Road AUGUSTA RD.

The undersigned applicant hereby applies to the South Carolina Department of Highways and Public Transportation for permit for encroachment on State Highway Right-of-Way as shown by sketch plan below.

SKETCH PLAN



The permittee shall be responsible at any time in the future for any and all damages to Hwy. facilities that result in a direct result of this installation.

Plaintiff 0250

Date received by Res. Maint. Engr. or Maint. Supt.	6-30-82
Date forwarded by Res. Maint. Engr. or Maint. Supt.	8-13-82
Date received by Dist. Engr.	
Date forwarded by Dist. Engr.	

Signed: <u>Douglas R. White</u>	
Applicant	Date 6/23/82
Recommended:	
Dist. Engr.	Date
Res. Maint. Engr.	

Application for Encroachment Permit

SHEET 5 OF 6

Date 6/23/82

Name of Applicant:

CENTER CONCEPTS, INC.
2026 POWERS FERRY RD. SUITE 230
ATLANTA GA. 30339

County LEXINGTON

Route U.S. #1

Road AUGUSTA RD.

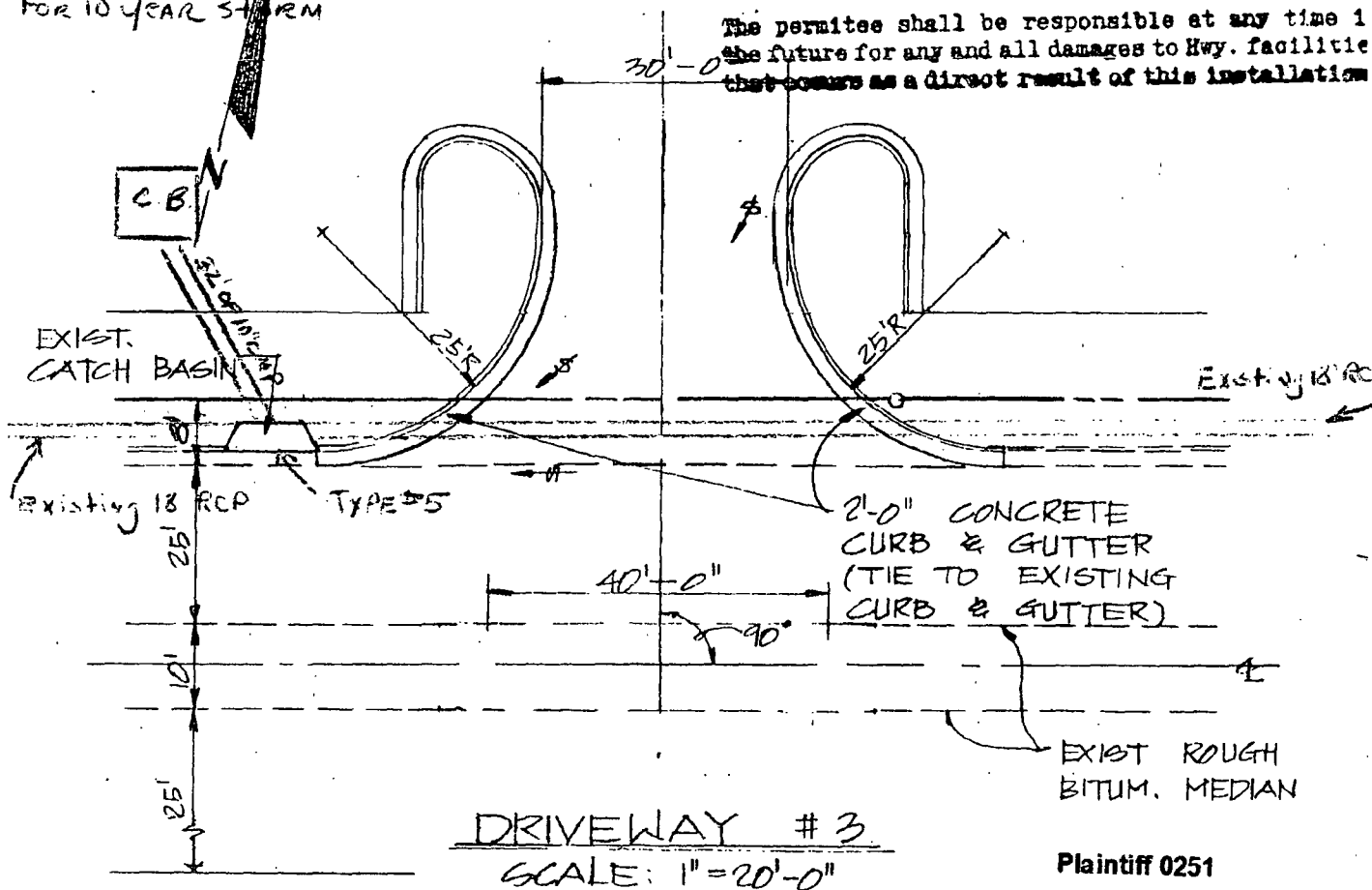
The undersigned applicant hereby applies to the South Carolina Department of Highways and Public Transportation for permit for encroachment on State Highway Right-of-Way as shown by sketch plan below.

SKETCH PLAN

PLACE 32' OF 10" CMP
to tie to existing
Type #5 C.B.
Total Discharge = 31 CFS TO MATERIALS USED & APPEARANCE.
FOR 10 YEAR STORM

CONFORM TO DHPT SPECIFICATION AS
USED & APPEARANCE.

The permittee shall be responsible at any time in the future for any and all damages to Hwy. facilities that occur as a direct result of this installation



DRIVEWAY #3

SCALE: 1"=20'-0"

Plaintiff 0251

Date received by Res. Maint. 6-30-82 (S)

Date forwarded by Res. Maint. 8-13-82 (S)

Date received by Dist. Engr. _____

Date forwarded by Dist. Engr. _____

Signed:

Douglas R. White

Applicant

Date

6/23/82

Recommended:

Dist. Engr.

Res. Maint. Engr.

Date

82074

Application for Encroachment Permit

SHEET 6 OF 6

Date 6/23/82

Name of Applicant:

CENTER CONCEPTS, INC.
2026 POWERS FERRY RD. SUITE 230
ATLANTA, GA. 30339

County LEXINGTON

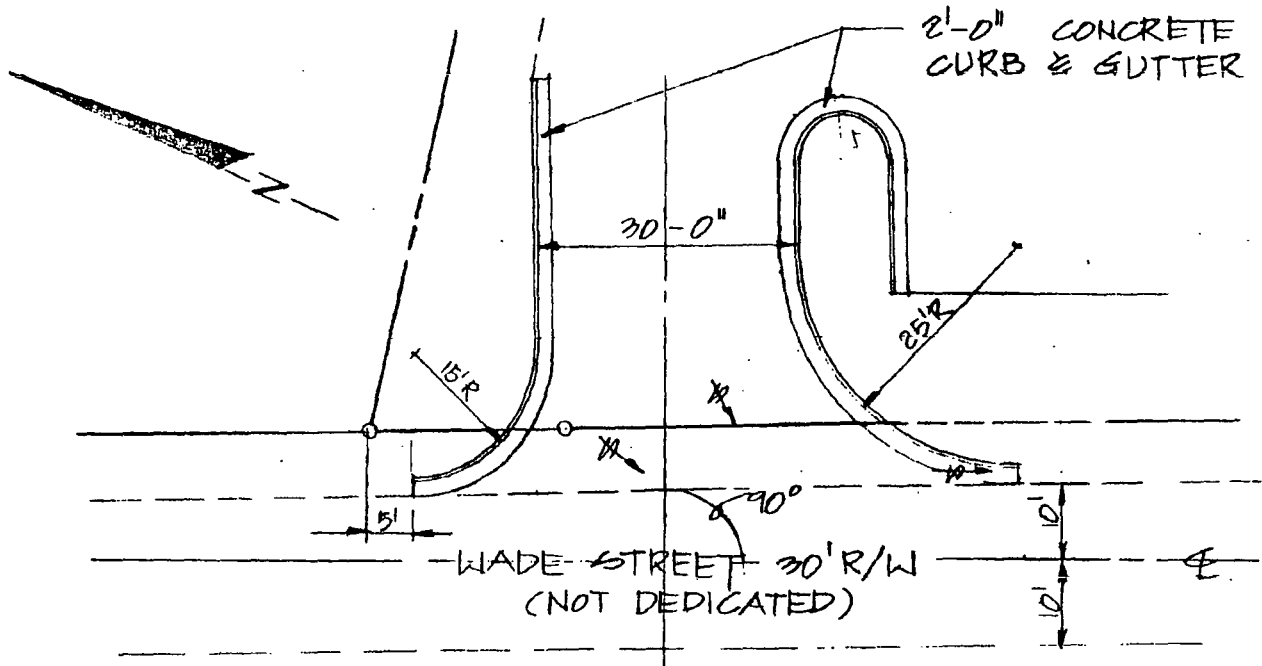
Route 632-312

Road WADE ST.

The undersigned applicant hereby applies to the South Carolina Department of Highways and Public Transportation for permit for encroachment on State Highway Right-of-Way as shown by sketch plan below.

SKETCH PLAN

CONFORM TO DHPT SPECIFICATION AS
TO MATERIALS USED & APPEARANCE.



The permittee shall be responsible at any time in the future for any and all damages to Hwy. facilities that result as a direct result of this installation.

DRIVEWAY #4

SCALE: 1" = 20'-0"

Plaintiff 0252

Date received by Res. Maint. 6-30-82
Engr. or Maint. Supt.

Date forwarded by Res. Maint. 8-13-82
Engr. or Maint. Supt.

Date received by Dist. Engr. _____

Date forwarded by Dist. Engr. _____

Signed:

Douglas L. White

Applicant

Date

6/23/82

Recommended:

Dist. Engr.

Res. Maint. Engr.

Date

December 4, 1985

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS
AND PUBLIC TRANSPORTATION
COLUMBIA

ENCROACHMENT PERMIT

No. D-32-2158

FORM 32 Rev. 11-77

To West Columbia Development Co.
c/o ECU, Inc.

County Lexington
Route U.S. 1
Road

In compliance with your request and pursuant to statutory authority and subject to all the provisions, terms, conditions, and restrictions written herein, including General Provisions contained on the other side of this sheet, YOU ARE HEREBY AUTHORIZED AND PERMITTED TO:

Construct one 30' drive entrance, re-construct two existing drives and replace 24" RCP with 42" RCP along U.S. Route 1, as shown on application dated 10/16/85 a copy of which is attached hereto and made a part of this permit.

SPECIAL PROVISIONS

(In case of conflict between Special Provisions and General Provisions, Special Provisions shall govern.)

There shall be no excavation of soil nearer than two feet of any public utility line or appurtenant facility except with the consent of the owner thereof, or except upon special permission of this Department after an opportunity to be heard is given the owner of such line or appurtenant facility.

All excavated material shall be placed on the side of the trench away from the traveled roadway.

The permittee shall make the installation under the supervision of the Department, shall not block traffic at any time, and shall provide proper warning signs and lights.

Where pavement is cut in the traveled way of this road or route, the work shall be done in clear weather when traffic is lightest. There shall be no trench left open in the traveled way during rush hour traffic or during the hours of darkness.



This permit shall not become operative until a written acceptance of same by permittee shall have been received by this Department and further shall become null and void unless the work contemplated herein shall have been completed prior to June 1, 1986

SOUTH CAROLINA DEPARTMENT
OF HIGHWAYS AND PUBLIC TRANSPORTATION

By _____
☐ State Highway Engineer.
☒ District Engineer.

I (We) accept the permit herein granted and agree to comply with all the provisions, terms, conditions, and restrictions set out herein. I (We) do hereby agree, and bind my (our) heirs, successors and assigns, to assume any and all liability the Department might otherwise have or incur from accidents or injuries to persons, or damage to property, including the roadway, that may be caused by the construction, maintenance, moving or removing of the encroachment contemplated herein and agree to indemnify this Department for any liability assumed or injury or damage sustained by reason of the past, present, or future existence of said encroachment.

Date 12-6-1985

Signature [Signature]

Plaintiff 0237

Application for Encroachment Permit

Date

Name of Applicant:

West Columbia Development Co
C/O ETE, Inc.
744 Sunset Blvd. Suite 201
Columbia, SC (Design Firm)

County Lexington

Route U.S. HWY #1

Road Augusta Road

The undersigned applicant hereby applies to the South Carolina State Highway Department for permit for encroachment on State Highway Right-of-Way as shown by sketch plan below.

SKETCH PLAN

- 1.) Applicant request permission to construct a 30' driveway entrance into U.S. Hwy #1.
- 2.) Applicant also requests permission to re-construct two (2) exist catch basins and open out U.S. Hwy #1 to replace 24" RCP with 42" RCP.
- 3.) Driveway entrance to be constructed of S.C.H.D. class "B" concrete, 6" thick, and in accordance with details for street intersections and driveways S.C.H.D. Dwg. No. CG40.B
- 4.) Pavement to be cut to neat lines and the trench backfilled using select materials and tamped in 6" layers to S.C.H.D. requirements.
- 5.) Pipe used in this installation to be reinforced and meet current S.C.H.D. specifications.
- 6.) Hwy cut must be temporarily covered with a steel plate or asphalt until a permanent patch has been made.
- 7.) Applicant shall be responsible for maintaining proper erosion control during and after construction for a period of one year.
- 8.) Applicant shall be responsible at anytime in the future for any and all damages to Hwy. facilities that occurs as a direct result of this installation.
- 9.) Construction on the drainage line across Highway #1 will be done on weekends only. *A TRAFFIC LANE WILL BE MAINTAINED IN EACH DIRECTION AT ALL TIMES*
- 10.) Contractor will furnish all necessary equipment and material required to direct traffic during the construction phase.

Plaintiff 0238

Date received by Res. Maint.
Engr. or Maint. Supt.

10-24-85

Date forwarded by Res. Maint.
Engr. or Maint. Supt.

10-28-85

Date received by Dist. Engr.

Date forwarded by Dist. Engr.

Signed:

Applicant
West Columbia
Development

Date

10-16-85

Recommended:

Dist. Engr.

Date

12-4-85

Application for Encroachment Permit

Date

Name of Applicant:

West Columbia Development Co
C/O ETE, Inc.
744 Sunset Blvd. Suite 201
Columbia, SC (Design Firm)

County

Lexington

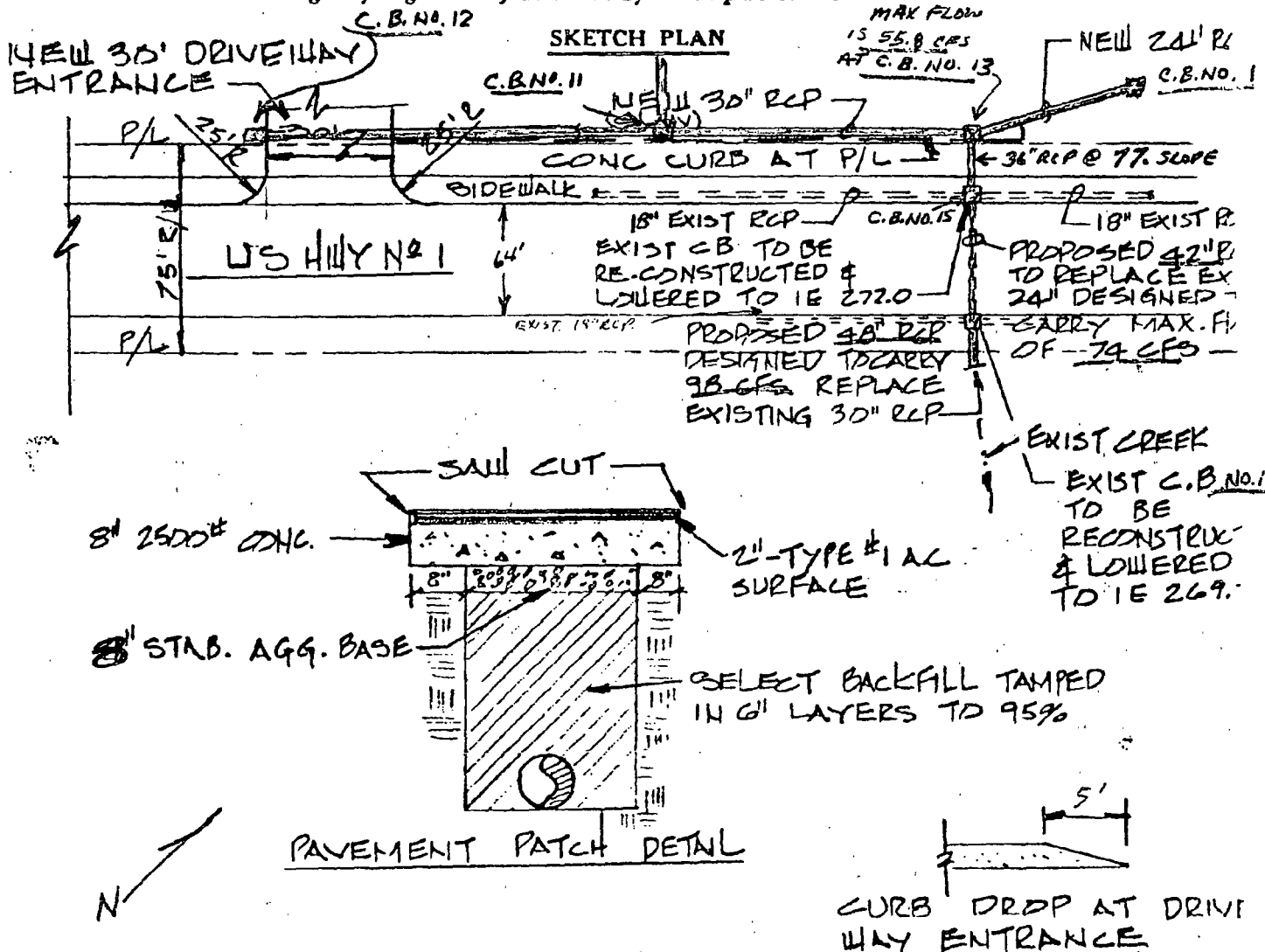
Route

U.S. Hwy #1

Road

Augusta Road

The undersigned applicant hereby applies to the South Carolina State Highway Department for permit for encroachment on State Highway Right-of-Way as shown by sketch plan below.



Date received by Res. Maint.
Engr. or Maint. Supt.

10-24-85

Date forwarded by Res. Maint.
Engr. or Maint. Supt.

10-28-85

Date received by Dist. Engr.

Date forwarded by Dist. Engr.

Plaintiff 0239

Signed

[Signature]

Applicant

West Columbia Development Co.

Date

10-16-85

Recommended:

Dist. Engr.

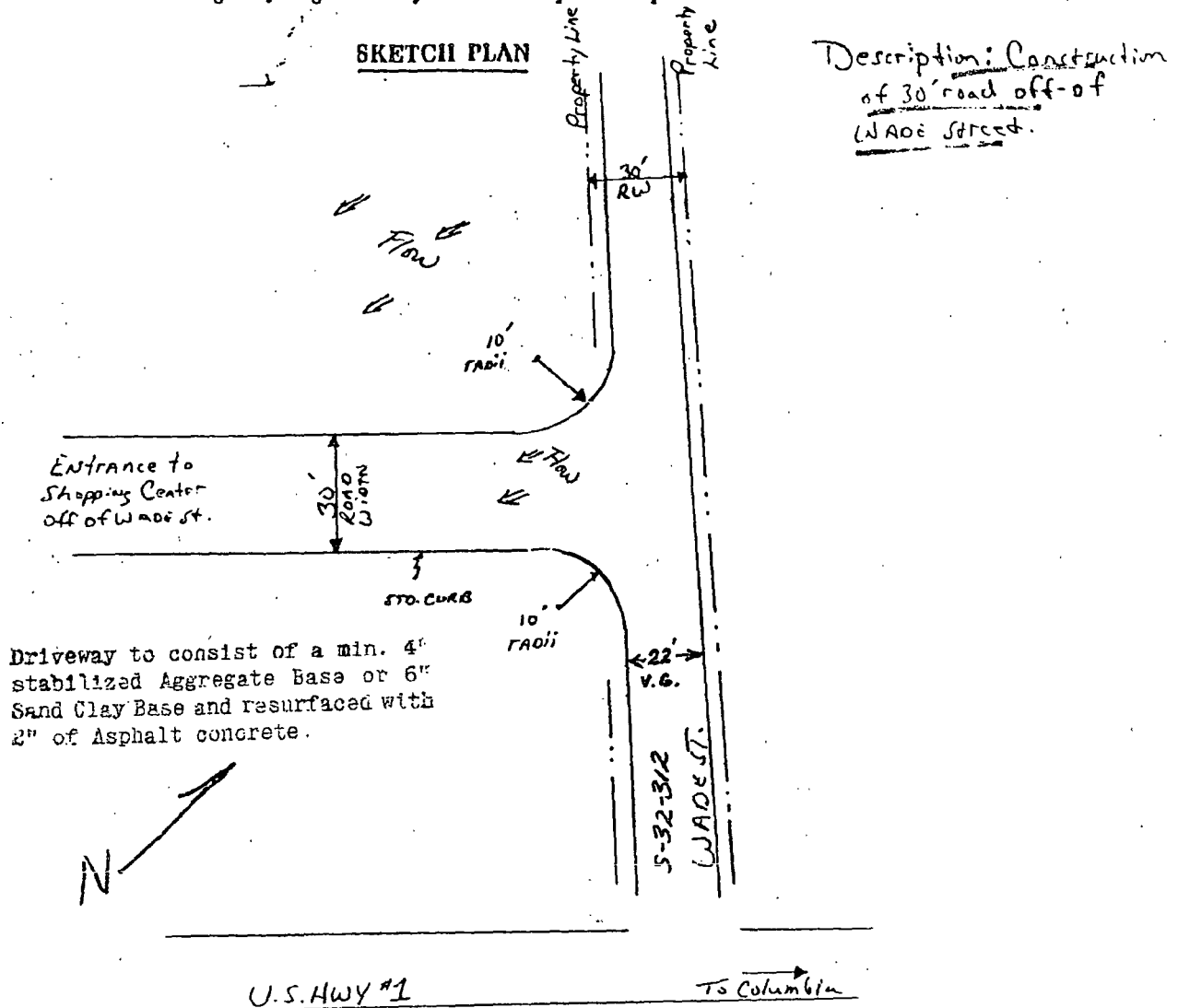
Date

Date: August 16, 1985

Name of Applicant:
West Columbia Development Company
C/O ETE, Inc.
7 Sunset Blvd. Suite 201
Columbia, SC (Design Firm)

County Lexington
Route S-32-312
Road Wade Street

The undersigned applicant hereby applies to the South Carolina Department of Highways and Public Transportation for permit for encroachment on State Highway Right-of-Way as shown by sketch plan below.



BI-LO SITE DEVELOPMENT

Received by Res. Maint. 10-24-85

gr. or Maint. Supt. 10-28-85

Received by Dist. Engr. _____

Forwarded by Dist. Engr. _____

Signed: <u>Ed Russell</u>	
Applicant: <u>West Columbia Development Co.</u>	Date: <u>8-16-85</u>
Recommended:	
Dist. Engr. _____	Date _____
Res. Maint. Engr. _____	

Plaintiff 0240

LEO EISENBERG Co.

A Complete Real Estate Service SINCE 1938

1122 LADY ST. STE 410 • COLUMBIA, SC 29201 • 803 / 794 9844
P.O. BOX 7848 • COLUMBIA, SC 29202 / 848

October 4, 1985

Mr. Joe Strouse
Strouse Greenberg
1626 Locust Street
Philadelphia, Penn. 19103

In re: Danwood Shopping Center
U. S. Highway #1
West Columbia, S. C.

Dear Joe:

As you are aware, we are in the process of beginning to develop our property which is located near West Columbia, South Carolina, across U. S. Highway #1 from a tract of land which you have under option from Holmes C. Dreher and his wife Roxie. The Dreher land consist of a 40.03 acre tract and is referred to by you as Parcels D-1 and D-2 in connection with your site.

In planning for the disposal of the surface water from our site, we have been advised that it is necessary for us to replace the present 24" pipe which runs from our site under U.S. #1 and empties into a creek on the Dreher Property with a 48" pipe. We have spoken to the Dreher's concerning this and they have indicated that they have no objection but that since this property is under option to you that they would need your consent before agreeing to our request. We recognize that this may increase your cost of disposing of this water when you begin to develop the Dreher property. In light of this, I would like to propose that in consideration of you and the Dreher's consenting to allowing us to install the 48" pipe and allowing this water to be placed in the creek, we would agree to share or contribute financially to the surface storm water disposal system which you would install in connection with the development of the Dreher property. According to the engineering calculations of Environmental Technology Engineering, Inc., the installation of this 48" pipe and the development of our project would increase the flow from time to time from 44.4 cubic feet per second (CFS) to a maximum of 68.6 CFS. In this connection, we would propose to pay an amount equal to the increased cost of installing your system which would be attributed to this increased flow of 24.2 CFS. The exact amount of this would be finally determined by a mutually agreed upon engineering firm, the decision of which we would both agree to be bound. B.P. Barber & Associates Inc. of Columbia, South Carolina is herein declared mutually acceptable.

Certified Commercial Investment Member • International Council of Shopping Centers • Certified Property Manager • Certified Shopping Center Manager
Accredited Management Organization • Building Owners and Managers Association • Institute of Real Estate Management • National Association of Real Estate
Brokers • Realtors National Marketing Institute • American Chapter of International Real Estate Federation

Plaintiff 0241

Me. Joe Strouse

2

October 4, 1985

If you are agreeable to this arrangement, I would request that you so indicate by signing the enclosed copy of this letter. We would then be in a position to obtain the consent of the Dreher's and move forward with our development.

WEST COLUMBIA DEVELOPMENT COMPANY

By:

C. W. Ansell
C. W. Ansell, Project Manager and
General Partner

LEO EISENBERG CO.

By:

David W. Bloom
David W. Bloom, Vice President

Agreement of the above is hereby acknowledged:

STROUSE GREENBERG AND CO. INC.

By:

John H. Strouse
Its VICE-CHAIRMAN

OWNERS:

Holmes C. Dreher
Holmes C. Dreher

Roxie W. Dreher
Roxie Dreher

Plaintiff 0242

Exhibit 7 is oversized and pursuant to Rule 210(f) the appellant will be filing it separately.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON) N THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Westside Meshekoff Family)
Limited Partnership,) CIVIL ACTION NO.: 2008-CP-32-04362
)

Plaintiff,)
)

vs.)

**DEFENDANT SCDOT'S
RESPONSES TO PLAINTIFF'S
FIRST SET OF INTERROGATORIES**

South Carolina Department of)
Transportation; APAM, Inc.,)
Kimbrell's Investment Company,)
Inc.; RI CS2, LLC; DW Properties,)
LLC; Danwood, LLC; Boom, Inc.;)
Robert W. Denton; and Alpine)
Of SC, Inc.,)

Defendants.)
)

TO: CHARLES H. McDONALD, ESQUIRE, AND EDWIN R. JETER,
ESQUIRE, COUNSEL FOR THE PLAINTIFF:

The Defendant SCDOT, by and through their undersigned attorney and pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, respectfully submits the following Responses to Plaintiff's First Set of Interrogatories.



13. Prior to the commencement of this action, did you ever have any discussions with the Plaintiff, or anyone acting on the Plaintiff's behalf, about contributing toward any costs associated with maintenance and/or repair of any storm drainage systems located on the Westside Plaza property owned by Plaintiff? If so, set forth the names of the persons who had such discussions, the identity of the party or parties on whose behalf they were acting, the date such discussions took place and a description of the nature and substance of such discussions.

RESPONSE: This Defendant has had no such discussions.

15. Do you contend that storm water from your property does not drain into the storm water system located on the Westside Plaza property owned by the Plaintiff? If so, set forth all facts known to you which support your contention.

RESPONSE: No. Storm water from US Highway 1 has drained into and through the property on which Westside Plaza currently is situated long before Westside Plaza ever existed.

16. Do you contend that you have a legal or equitable right to have storm water from your property discharged onto the Westside Plaza property owned by the Plaintiff? If so, set forth all facts known to you which support your contention.

RESPONSE: Yes. By prescription, storm water from US Highway 1 has drained into and through the property on which Westside Plaza currently is situated long before Westside Plaza ever existed. Also, by agreement of Plaintiff's predecessor in title, which agreed to accept storm water from US Highway 1 and the culvert, which had existed prior to the development of the property, in the

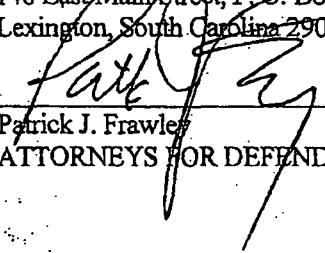
Box 1
RR

Encroachment Permit, pursuant to which the Plaintiff's predecessor in title was permitted three driveways entering US Highway 1 and two driveways entering Dreher Road, both public ways maintained by this Defendant for public use, which public, using such highways, have over the years utilized this Defendant's public ways, and the afore-mentioned five driveways, to patronize the shops and merchants of the Plaintiff's shopping center, thereby benefitting the Plaintiffs through the rental income they have derived from the shopping center over the years.

17. Have you ever had a study or analysis done on your property to determine the amount and/or volume of storm water that is discharged from your property? If so, identify the name and address of the person or entity who performed the study or analysis and the date which such was performed.

RESPONSE: No. Not yet.

NICHOLSON, DAVIS, FRAWLEY,
ANDERSON & AYER, LLC
140 East Main Street, P. O. Box 489
Lexington, South Carolina 29071

BY: 

Patrick J. Frawley
ATTORNEYS FOR DEFENDANT SCDOT

Lexington, South Carolina
October 9, 2009

BK4045P6096

AFFIDAVIT

FILED

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON FEB 11 11 54 AM '97 DEED

EDWARD H. GUNTER
KNOW ALL MEN BY THESE PRESENTS, that THE FOURM MESHEKOFF
FAMILY LIMITED PARTNERSHIP, a Delaware Limited Partnership
("Grantor"), in the State aforesaid, for and in consideration of
the sum of FIVE (\$5.00) DOLLARS AND OTHER VALUABLE CONSIDERATION
paid by WESTSIDE MESHEKOFF FAMILY LIMITED PARTNERSHIP, a Delaware
Limited Partnership ("Grantee"), the receipt of which is hereby
acknowledged, has granted, bargained, sold, and released, and by
these Presents does grant, bargain, sell, and release unto:

WESTSIDE MESHEKOFF FAMILY LIMITED PARTNERSHIP, DOCUMENTARY TAX
its successors and assigns: STATE EXEMPT

the following described property, to wit:

FEB 11 1997

SEE ATTACHED EXHIBIT A

COUNTY EXEMPT

This being the property conveyed to The Fourm Meshekoff
Family Limited Partnership by deed of Edward Meshekoff Revocable
Trust and Helen Meshekoff Revocable Trust, dated November 1, 1995
and recorded in the Office of the RMC for Lexington County in
Deed Book 3711 at page 302.

GRANTEE'S ADDRESS: 190 East 72nd Street
New York, NY 10021

This conveyance is made subject to easements and restric-
tions of record and otherwise affecting the property.

TOGETHER with all and singular the Rights, Members,
Hereditaments and Appurtenances to the said Premises belonging
or in any wise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said Premises
before mentioned unto the said Grantee, Grantee's successors and
assigns forever.

And the said Grantor does hereby bind itself and its
successors and assigns to warrant and forever defend all and
singular the said Premises unto the said Grantee, Grantee's
successors and assigns, against Grantor and Grantor's

05848

PLAINTIFF'S
EXHIBIT

13

Danwood 00159

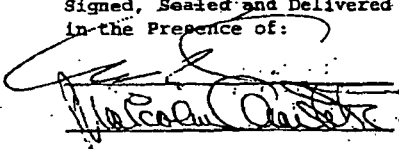
BK4045PG097

successors and against every person whosoever lawfully claiming,
or to claim the same, or any part thereof.

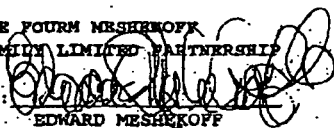
IN WITNESS WHEREOF, the Grantor has executed this Deed.

DATED: January 31, 1997

Signed, Sealed and Delivered
in the Presence of:



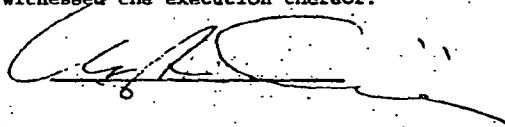
THE FOURM MESHEKOFF
FAMILY LIMITED PARTNERSHIP

BY: 
EDWARD MESHEKOFF

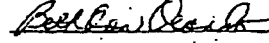
ITS: GENERAL PARTNER

STATE OF NEW YORK
COUNTY OF NEW YORK

PERSONALLY APPEARED before me the undersigned witness and
made oath that (s)he saw the within-named THE FOURM MESHEKOFF
FAMILY LIMITED PARTNERSHIP, by its General Partner, EDWARD
MESHEKOFF, as Grantor, sign, seal and, as Grantor's act and deed,
deliver the within Deed, and that (s)he with the other witness
whose signature appears above, witnessed the execution thereof.



Sworn to before me this 31st
day of January, 1997



Notary Public for New York
My Commission Expires:

BETH ANN OCANDO
Notary Public, State of New York
No. 30-4582117
Qualified in Nassau County
Commission Expires April 30, 1998

P:\WP51\DOCUMENT\DEED-MES.V70

BK4045PGD98

EXHIBIT A

Property Description

All that certain piece, parcel or tract of land, situate, lying and being in West Columbia, in Lexington County, South Carolina, containing 23.206 acres and shown on plat of West Side Plaza, prepared by Ayer, Graham and Associates, Inc., dated March 18, 1988, revised July 11, 1988 recorded in Plat Book 226, at Page 64, records of Lexington County, reference to which plat is hereby made for a more complete and accurate description. Said property is bounded and measures as follows: Beginning at a point on the southern right-of-way of Augusta Road (U.S. Highway No. 1) 215 feet in a generally westerly direction from the center line of Draher Road at the northwestern corner of property owned now or formerly by the Frank Caughman Estate (Point of Beginning); thence S 25-53-27 E, 10.05 feet to a point; thence S 30-22-26 E, 491.09 feet to a point; thence N 74-19-54 E, 177.71 feet to a point; thence S 35-12-22 E, 214.38 feet to a point; thence S 30-39-30 E, 269.94 feet to a point; thence S 74-26-25 W, 1173.49 feet to a point; thence N 29-30-06 W, 981.37 feet to a point; thence along the southern right-of-way of Augusta Road (U.S. Highway No. 1) N 74-25-21 E, 77.29 feet to a point; thence along said right-of-way N 74-26-38 E, 710.71 feet to a point; thence along the said right-of-way N 73-20-23 E, 55.92 feet to a point; thence along said right-of-way N 83-05-12 E, 6.70 feet to a point; thence along said right-of-way N 76-21-32 E, 111.50 feet to Point of Beginning.

TMS: 004669-01-002 and 004669-01-003

Danwood 00161

WESTSIDE MESHEKOFF FAMILY, LP

DATE	INVOICE NO	DESCRIPTION	ACCOUNT	INVOICE AMOUNT
6-06-08	01852-2			235,635.35
RECEIVED JUN 25 2008				
CHECK DATE	CHECK NUMBER	TOTAL		
6-23-08		235,635.35		

SECURITY WARNING: THE FACE OF THIS DOCUMENT FEATURES A COLORED BACKGROUND AND MICROPRINT BORDERS - THE REVERSE SIDE FEATURES ARTIFICIAL WATERMARKS

WESTSIDE MESHEKOFF FAMILY, LP

d/b/a WESTSIDE PLAZA
P. O. BOX 7339
AIKEN, SC 29804
803-649-1411

WACHOVIA BANK, N.A.
1797 WHISKEY ROAD
AIKEN, SC 29803

67-776
532

DATE
June 23, 2008

CHECK NO.
4078

AMOUNT
\$****235,635.35

Pay: *****235* thousand *635* dollars and 35 cents

TO THE
ORDER OF

IDEAL CONSTRUCTION COMPANY, INC
P O BOX 705
WHITE ROCK, SC 29177

Arthur J. Hester

⑈000004078⑈ ⑆053207766⑆ 2003207273651⑈



THIS IS YOUR RECEIPT

All items are credited
subject to payment

BB&T

BB&T® Phone24 BB&T® OnLine
1-800-BANK-BBT 1-888-BBT-ONLINE
(1-800-226-5228) (1-888-228-6654)

BBT.com

Member FDIC

0002000185
Rev. 04/01/06

*Dollar General
& Bilo*

Location/Date/Transaction #

Amount

8026811 08837 006 #00051 15:40 06/25/08
#XXXXXXXXX4906 DEPOSIT \$240,633.35
CREDIT NEXT BUSINESS DAY DUPLICATE

DEPOSITS MAY NOT BE AVAILABLE FOR IMMEDIATE WITHDRAWAL.

Plaintiff 0139

DEPOSIT

Ideal Construction

BB&T

Account Number: 5128114906

DEPOSIT

Ideal Construction

POST OFFICE BOX 705

WHITE ROCK, SC 29177

Phone: 803-732-4721

Date: June 30, 2008

Amount: \$235,635.35

BB&T

Memo: Bilo - 01852-2

Credit	Account	Description	Amount
Acct:	00100-Current Asse	A/R WASH ACCOUNT	\$235,635.35
		Total:	\$235,635.35

Plaintiff 0140

Sharon Shealy

From: Sharon Shealy [sharon@idealconstructioncompany.biz]
ent: Tuesday, June 10, 2008 2:31 PM
o: 'tkideal2@aol.com'
Subject: FW: Scanned from E-35 [scan to_email]



Doc2.2d0806.pdf
(62 KB)

Ms. Reeves - This is our invoice for the work completed at the Bilo parking lot in West Columbia. I am copying Tim with this email and will contact you immediately if there are any changes. As always - it has been great working with you.

Sharon Shealy
Ideal Construction Co Inc,
732-4721 ext 110

-----Original Message-----

From: Ideal Construction [mailto:sharon@idealconstructioncompany.biz]
Sent: Wednesday, June 11, 2008 2:22 AM
To: sharon@idealconstructioncompany.biz
Subject: Scanned from E-35 [scan to_email]

Scanned from E-35

Public Scan

scan to_email

Date:06/11/2008 06:21

Pages:2

Resolution:200

Plaintiff 0141

Ideal Construction

ESTABLISHED - 1958

POST OFFICE BOX 705
 WHITE ROCK, SC 29177
 803-649-4721
 Federal ID: 57-0426436

INVOICE

#: 01852-2

SALES ORDER #:

Page 1 of 2

SOLD TO:

WRS Real Estate Investments
 P.O. Box 7339
 Aiken, SC 29804
 803-649-1411

SHIPPED TO:

WRS Real Estate Investments
 P.O. Box 7339
 Aiken, SC 29804
 803-649-1411

INVOICE DATE	YOUR ORDER #	PAYMENT TERMS	SALESMAN	ORDER SOURCE
06/06/08		Upon Receipt	Tim Richardson	QUOTATION

Qty	Ship	BO	Item #	Description	Disc	Tax	Price	Amount
0.00	0.00	0.00		Phase two - Bilo West Columbia, SC	0.0%	☐	\$0.00	\$0.00
739.00	739.00	0.00		LF - 54" RCP	0.0%	☐	\$90.10	\$66,583.90
739.00	739.00	0.00		LF - backfill sand clay(includes spoils removal)	0.0%	☐	\$29.67	\$21,926.13
5472.00	5472.00	0.00		SF - asphalt patching	0.0%	☐	\$2.50	\$13,680.00
466.00	466.00	0.00		remove & replace curb	0.0%	☐	\$25.00	\$11,650.00
178.00	178.00	0.00		hrs - CAT 325	0.0%	☐	\$135.00	\$24,030.00
178.00	178.00	0.00		hrs - CAT 930	0.0%	☐	\$97.00	\$17,266.00
178.00	178.00	0.00		hrs - CAT-CS423E	0.0%	☐	\$85.00	\$15,130.00
178.00	178.00	0.00		hrs - Laymore sweeper	0.0%	☐	\$65.00	\$11,570.00
10	178.00	0.00		hrs - trench roller	0.0%	☐	\$35.00	\$6,230.00
20.00	20.00	0.00		hrs - Low boy (63 ton)	0.0%	☐	\$125.00	\$2,500.00
1.00	1.00	0.00		lump sum - survey - compaction testing	0.0%	☐	\$2,400.00	\$2,400.00
178.00	178.00	0.00		hours - 5 men - misc. labor	0.0%	☐	\$84.94	\$15,119.32
1.00	1.00	0.00		LS - 1,160 ton #57 stone to spring line	0.0%	☐	\$27,550.00	\$27,550.00
1.00	1.00	0.00		Rock box - included	0.0%	☐	\$0.00	\$0.00
1.00	1.00	0.00		Trench box - plus stacker - included	0.0%	☐	\$0.00	\$0.00
2.00	2.00	0.00		Tri-axle dump - included in backfill price	0.0%	☐	\$0.00	\$0.00
0.00	0.00	0.00		Mobilize and de-mobilize - included in 63 ton lowboy	0.0%	☐	\$0.00	\$0.00
0.00	0.00	0.00		Traffic control (seighted barrels) included in overall cost	0.0%	☐	\$0.00	\$0.00
0.00	0.00	0.00		Connect to existing structures - included in overall cost	0.0%	☐	\$0.00	\$0.00
0.00	0.00	0.00		Remove & replace fence @ pond - included in overall cost	0.0%	☐	\$0.00	\$0.00

Comments:

PLEASE SEE PAGE TWO FOR TOTAL

SUBTOTAL:	\$235,635.35
FREIGHT:	\$0.00
5.00% TAX:	\$0.00
OTHER TAX:	\$0.00
RETAINAGE:	\$0.00
TOTAL	\$235,635.35

PAYMENTS:

AMOUNT DUE \$235,635.35

Plaintiff 0142

Shipping

Ideal Construction

ESTABLISHED - 1958

POST OFFICE BOX 705
VINE ROCK, SC 29177
803-32-4721
Federal ID: 57-0426436

INVOICE

#: 01852-2

SALES ORDER #:

Page 2 of 2

SOLD TO:

WRS Real Estate Investments
P.O. Box 7339
Aiken, SC 29804
803-649-1411

SHIPPED TO:

WRS Real Estate Investments
P.O. Box 7339
Aiken, SC 29804
803-649-1411

INVOICE DATE			YOUR ORDER #	PAYMENT TERMS	SALESMAN	ORDER SOURCE		
06/06/08				Upon Receipt	Tim Richardson	QUOTATION		
0.00	0.00	0.00		Restripe parking in side parking area - included in overall cost		0.0%	☐	\$0.00 \$0.00
0.00	0.00	0.00		Grassing & restoration - included in overall cost		0.0%	☐	\$0.00 \$0.00
0.00	0.00	0.00		Final clean up - included in overall cost		0.0%	☐	\$0.00 \$0.00

Comments:

PLEASE SEE PAGE TWO FOR TOTAL

SUBTOTAL:	\$235,635.35
FREIGHT:	\$0.00
5.00% TAX:	\$0.00
OTHER TAX:	\$0.00
RETAINAGE:	\$0.00
TOTAL	\$235,635.35

AMOUNT DUE \$235,635.35

Plaintiff 0143

Shipping

WESTSIDE MESHEKOFF FAMILY, LP

DATE	INVOICE NO	DESCRIPTION	ACCOUNT	INVOICE AMOUNT
3-31-08	01852-1			36013.60
CHECK DATE	4-10-08	CHECK NUMBER	4060	TOTAL >
				36013.60

PLEASE DETACH AND RETAIN FOR YOUR RECORDS

SECURITY WARNING: THE FACE OF THIS DOCUMENT FEATURES A COLORED BACKER, BIND AND MICROPRINT BORDERS. THE REVERSE SIDE FEATURES MICROTYPED NUMBERS.

WESTSIDE MESHEKOFF FAMILY, LP

d/b/a WESTSIDE PLAZA

P. O. BOX 7339

AIKEN, SC 29804

803-649-1411

WACHOVIA BANK, N.A.
1797 WHISKEY ROAD
AIKEN, SC 29803

67-776
532

DATE
April 10, 2008

CHECK NO.
4060

AMOUNT
\$*****36,013.60

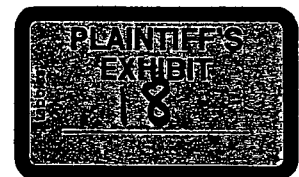
Pay: *****Thirty-six thousand thirteen dollars and 60 cents

TO THE
ORDER OF

IDEAL CONSTRUCTION COMPANY, IN
P O BOX 705
WHITE ROCK, SC 29177

Lina T. Way

⑈000004060⑈ ⑆053207766⑆ 200320727365⑈



THIS IS YOUR RECEIPT

All items are credited
subject to payment

BB&T

BB&T Phone24 BB&T OnLine
1-800-BANK-BBT 1-888-BBT-ONLINE
(1-800-226-6226) (1-888-226-6654)

BBT.com

Member FDIC

Location/Date/Transaction #

Amount

8025211 15574 010 #00071 16:47 04/17/08

XXXXXXXXXX4986 DEPOSIT

\$36,371.21

CREDIT NEXT BUSINESS DAY

DUPLICATE

DEPOSITS MAY NOT BE AVAILABLE FOR IMMEDIATE WITHDRAWAL

C0028000185
Rev. 04/01/05

Plaintiff 0146

DEPOSIT

Ideal Construction

BB&T

Account Number: 5128114906

DEPOSIT

Ideal Construction

POST OFFICE BOX 705

WHITE ROCK, SC 29177

Phone: 803-732-4721

Date: April 16, 2008

Amount: \$36,013.60

BB&T

Memo: 01852-Bilo

Credit	Account	Description	Amount
Acct:	00100-Current Asse	A/R WASH ACCOUNT	\$36,013.60
		Total:	\$36,013.60

Plaintiff 0147

Ideal Construction

ESTABLISHED - 1958

POST OFFICE BOX 705
WYCK ROCK, SC 29177
803-32-4721
Federal ID: 57-0426436

INVOICE

#: 01852-1

SALES ORDER #:

Page 1 of 1

SOLD TO:

WRS Real Estate Investments
P.O. Box 7339
Aiken, SC 29804
803-649-1411

SHIPPED TO:

WRS Real Estate Investments
P.O. Box 7339
Aiken, SC 29804
803-649-1411

INVOICE DATE	YOUR ORDER #	PAYMENT TERMS	SALESMAN	ORDER SOURCE
03/31/08		Upon Receipt	Tim Richardson	QUOTATION

Qty	Ship	BO	Item #	Description	Disc	Tax	Price	Amount
118.00	118.00	0.00		LF of RCP - please see attached quote	0.0%	☐	\$305.20	\$36,013.60

Comments:

SUBTOTAL:	\$36,013.60
FREIGHT:	\$0.00
5.00% TAX:	\$0.00
OTHER TAX:	\$0.00
RETAINAGE:	\$0.00
TOTAL	\$36,013.60

PAYMENTS:**PAID**

AMOUNT DUE \$0.00

DEP TO ACCT	DATE PAID	CHECK/CARD NUM	EXP DATE	AMT PAID	AMT RECVD	AUTHORIZATION
A/R WASH ACCOUNT	04/16/08	4060		\$36,013.60	\$36,013.60	
Total:				\$36,013.60		

Shipping

Plaintiff 0148

DEPOSIT

Ideal Construction

BB&T

Account Number: 5128114906

DEPOSIT

Ideal Construction

POST OFFICE BOX 705

WHITE ROCK, SC 29177

Phone: 803-732-4721

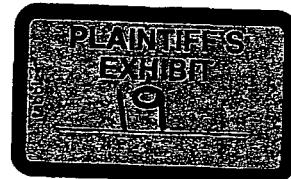
Date: August 10, 2005

Amount: \$31,000.00

BB&T

Memo: WRS Real Estate - Westside - Bilo

Credit	Account	Description	Amount
Acct:	00100-Current Asse	A/R WASH ACCOUNT	\$31,000.00
		Total:	\$31,000.00



Plaintiff 0180

Ideal Construction

ESTABLISHED - 1958

POST OFFICE BOX 705
W E ROCK, SC 29177
803-732-4721
Federal ID: 57-0426436

INVOICE

#: Westside Bilo

SALES ORDER #:

Page 1 of 1

SOLD TO:

WRS Real Estate Investments
P.O. Box 7339
Aiken, SC 29804
803-649-1411

SHIPPED TO:

WRS Real Estate Investments
P.O. Box 7339
Aiken, SC 29804
803-649-1411

INVOICE DATE	YOUR ORDER #	PAYMENT TERMS	SALESMAN	ORDER SOURCE
08/10/05				CONTRACT

Qty	Ship	BO	Item #	Description	Disc	Tax	Price	Amount
1.00	1.00	0.00		Westside Plaza - Bilo storm drain	0.0%	☐	\$31,000.00	\$31,000.00
0.00	0.00	0.00		Dee Reeves	0.0%	☐	\$0.00	\$0.00

Comments:

Dee Reeves
WRS Real Estate Investments

SUBTOTAL:	\$31,000.00
FREIGHT:	\$0.00
5.00% TAX:	\$0.00
OTHER TAX:	\$0.00
RETAINAGE:	\$0.00
TOTAL	\$31,000.00

MENTS:**PAID**

AMOUNT DUE \$0.00

DEP TO ACCT	DATE PAID	CHECK/CARD NUM	EXP DATE	AMT PAID	AMT RECVD	AUTHORIZATION
A/R WASH ACCOUNT	08/10/05	3783		\$31,000.00	\$31,000.00	
Total:				\$31,000.00		

Shipping

Plaintiff 0181

WESTSIDE MESHEKOFF FAMILY, LP

DATE	INVOICE NO	DESCRIPTION	ACCOUNT	INVOICE AMOUNT
10-19-06	aPP # 1-SE			45528.00
10-19-06	APP# 1			51840.00
<i>Brito</i> <i>018</i> <i>retailer</i>				
CHECK DATE	10-24-06	CHECK NUMBER	3907	TOTALS

PLEASE DETACH AND RETAIN FOR YOUR RECORDS

SECURITY WARNING: THE FACE OF THIS DOCUMENT FEATURES A COLORED BACKGROUND AND MICROPRINT BORDERS. THE REVERSE SIDE FEATURES A METALLIC WATERMARK.

WESTSIDE MESHEKOFF FAMILY, LP

WESTSIDE PLAZA
P. O. BOX 7339
AIKEN, SC 29804
803-649-1411

WACHOVIA BANK, N.A.
1797 WHISKEY ROAD
AIKEN, SC 29803

67-776
532

DATE: October 24, 2006
CHECK NO.: 3907
AMOUNT: \$*****97,368.00

Pay: ****Ninety-seven thousand three hundred sixty-eight dollars and no cents

PAY TO THE ORDER OF
IDEAL CONSTRUCTION COMPANY, IN
P O BOX 705
WHITE ROCK, SC 29177

Loa T. Webb

⑈000003907⑈ ⑆053207766⑆ 2003207273651⑈



Plaintiff 0161

DEPOSIT**Ideal Construction****BB&T****Account Number: 5128114906****DEPOSIT****Ideal Construction**

POST OFFICE BOX 705

WHITE ROCK, SC 29177

Phone: 803-732-4721

Date: October 31, 2006

Amount: **\$45,528.00****BB&T**

Memo: 01831 Bilo ret pond

Credit
Acct

Account	Description	Amount
00100-Current Asse	A/R WASH ACCOUNT	\$45,528.00
Total:		\$45,528.00

Plaintiff 0162

APPLICATION AND CERTIFICATE FOR PAYMENT AIA DOCUMENT G702

TO (OWNER): WRS Real Estate Investments
P.O. Box 7339
Aiken, SC 29804

PROJECT: Bilo Retention Pond

APPLICATION #:

Distribution to:

1

☐ OWNER

PERIOD TO:

☐ ARCHITECT

10/12/06

☐ CONTRACTOR

ARCHITECT'S

☐

PROJECT NO:

☐

FROM (CONTRACTOR) Ideal Construction Co Inc
POST OFFICE BOX 705
WHITE ROCK, SC 29177

VIA(Architect):

CONTRACT FOR:

CONTRACT DATE:

CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for Payment, as shown below, in connection with the Contract. Continuation Sheet, AIA Document G703, is attached.

Change Order Summary		
Change Orders approved in Previous months by Owner Total	Additions	Deductions
	0.00	0.00
Approved this month	0.00	0.00
Number	Dated Approved	
Totals	0.00	0.00
Net change by Change Orders	0.00	0.00

The undersigned contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.

CONTRACTOR: Ideal Construction Co Inc

By: Tim Richardson Date: 10/13/06

1. ORIGINAL CONTRACT SUM..... \$ 45,528.00
2. Net change by Change Orders \$ 0.00
3. CONTRACT SUM TO DATE (line 1+2)..... \$ 45,528.00
4. Total Completed & STORED TO DATE..... \$ 45,528.00
(Column G on G703)
5. Retainage:
 - 10.00% of Completed Work \$ 4,552.80
(column D + E on G703)
 - 10.00% of Stored Material \$ 0.00
(column F on G703)
 - Total Retainage (Line 5a + 5b or total in Column 1 of G703)..... \$ 4,552.80
6. TOTAL EARNED LESS RETAINAGE \$ 40,975.20
(Line 4 less Line 5 total)
7. LESS PREVIOUS CERTIFICATES FOR PAYMENT (Line 6 from prior Certificate) \$ 0.00
8. CURRENT PAYMENT DUE..... \$ 40,975.20
9. BALANCE TO FINISH, PLUS RETAINAGE..... \$ 4,552.80
(LINE 3 LESS LINE 6)

State of: SC County of: Richland
Subscribed and sworn to before me this 13 day of October, 19 2006
Notary Public: Robert A. Richardson
My Commission Expires: 10/08/08

Architect's Certificate of Payment

In accordance with the contract documents, based on on-site observations and the data comprising the above application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

AMOUNT CERTIFIED..... \$

(Attached explanation if amount differs from the amount applied for.)

Architect:

Plaintiff 0163

By:

Date:

This Certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein. Issuance, payment and acceptance of payment are without prejudice to any rights of the Owner or Contractor under this Contract.

APPLICATION AND CERTIFICATE FOR PAYMENT AIA DOCUMENT G702

TO (OWNER): WRS Real Estate Investments PROJECT: Bio Retention Pond APPLICATION #: 2 Distribution to:
P.O. Box 7339 ARCHITECT
Aiken, SC 29804 CONTRACTOR

FROM (CONTRACTOR) Ideal Construction Co Inc VIA(Architect): ARCHITECT'S
POST OFFICE BOX 705 PROJECT NO:
WHITE ROCK, SC 29177

CONTRACT FOR: CONTRACT DATE:

CONTRACTOR'S APPLICATION FOR PAYMENT

Change Order Summary		
Change Orders approved in Previous months by Owner	Additions	Deductions
Total	0.00	0.00
Approved this month	0.00	0.00
Number	Dated Approved	
Totals	0.00	0.00
Net change by Change Orders	0.00	0.00

The undersigned contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.

CONTRACTOR: Ideal Construction Co Inc

By: Tim Richardson Date: 10/25/06

Application is made for Payment, as shown below, in connection with the Contract. Continuation Sheet, AIA Document G703, is attached.

- ORIGINAL CONTRACT SUM..... \$ 45,528.00
- Net change by Change Orders \$ 0.00
- CONTRACT SUM TO DATE (line 1+2)..... \$ 45,528.00
- Total Completed & STORED TO DATE..... \$ 45,528.00
(Column G on G703)
- Retainage:
0.00% of Completed Work \$ 0.00
(column D + E on G703)
0.00% of Stored Material \$ 0.00
(column F on G703)
Total Retainage (Line 5a + 5b or total in Column 1 of G703) \$ 0.00
- TOTAL EARNED LESS RETAINAGE \$ 45,528.00
(Line 4 less Line 5 total)
- LESS PREVIOUS CERTIFICATES FOR PAYMENT (Line 6 from prior Certificate) \$ 40,975.20
- CURRENT PAYMENT DUE..... \$ 4,552.80
- BALANCE TO FINISH, PLUS RETAINAGE..... \$ 0.00
(LINE 3 LESS LINE 6)

State of: SC County of: Richland
Subscribed and sworn to before me this 25 day of October, 19 2006
Notary Public: Robert A. Richardson
My Commission Expires: 10/08/08

Architect's Certificate of Payment

In accordance with the contract documents, based on on-site observations and the data comprising the above application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

AMOUNT CERTIFIED \$
(Attached explanation if amount differs from the amount applied for.)
Architect:

Plaintiff 0164

By: Date:
This Certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein. Issuance, payment and acceptance of payment are without prejudice to any rights of the Owner or Contractor under this Contract.

PROPOSAL

This proposal is submitted to :

Reeves

Date: 10/09/06

WRS Realty

PO Box 7339

Project name: Retention Pond

Aiken, SC 29804

Project address:

Contractor

Insurance Agency #: 803-749-0100

Ideal Construction Company, Inc.

Agent : John Schelble

P.O. Box 705

Contractor federal ID #: 57-0426436

White Rock, SC 29177

Contractor license number: G-10813

Description of work to be performed:

Clean pond and repair outfall structure and piping, remove 60 lf of CMP and replace with 60 lf of RCP, replace 24" riser pipe @ outfall structure, adjust outlet invert, regrass slope @ pond,

Remove and replace fence as needed, install 24" riser @ manhole at south corner

If you have any questions, or need additional information you can reach Tim Richardson at 803-513-4592.

If you are in agreement with this proposal, please sign and return via fax to 1-803-732-3369 or 1-803-732-7230

Payment schedule:

due on or before

due on or before

due on or before

due on or before

for the total price of \$: 45,528.00 Due upon completion

Work shall start on: and shall be complete within number of days.

Owner's signature:

Contractor's signature: Ideal Construction Co Inc.

Date:

Date: 10/09/06

Plaintiff 0167



ENGINEERING CONSULTANTS, INC.

1300 12th Street • P.O. Box 2299 • Cayce, SC 29171 • (803) 791-1400 • FAX: (803) 791-8110

INVOICE

DATE: October 17, 2006

INVOICE NO.: 06-621

PROJECT NO.: 06-043

Meshekoff Family, LP / Matthew Meshekoff
C/O Mrs. Dee Reeves, WRS Realty
Director of Property Management
PO Box 7339
Aiken, SC 29804

Telephone: 803 / 649-1411

PROFESSIONAL CIVIL ENGINEERING SERVICES
EVALUATION OF STORMWATER COLLECTION
AND DETENTION SYSTEM AT
WEST SIDE PLAZA SHOPPING CENTER
WEST COLUMBIA
LEXINGTON COUNTY, SOUTH CAROLINA

Through September 30, 2006

ITEM	CONTRACT AMOUNT	% COMPLETE	TOTAL
Topographic Surveying Services	\$ 5,330.00	50%	\$ 2,665.00
Schedule and Review Video Tape	\$ 1,980.00		
Prepare Existing Conditions	\$ 2,160.00	50%	\$ 1,080.00
Prepare Recommendation Services	\$ 4,370.00		
TOTAL			\$ 3,745.00
LESS PREVIOUS INVOICES			(\$ 0.00)
TOTAL DUE THIS INVOICE			\$ 3,745.00

Terms: Per our proposal/agreement signed September 14, 2006

Thank You!

American Engineering Consultants, Inc.



WESTSIDE PLAZA	
APPROVED	DATE
	10-18-06
APPROVED	DATE
	10-18-06
ACCT. NO.	
2040	



ENGINEERING CONSULTANTS, INC.

1300 12th Street • P.O. Box 2299 • Cayce, SC 29171 • (803) 791-1400 • FAX: (803) 791-8110

INVOICE

DATE: November 14, 2006

INVOICE NO.: 06-663

PROJECT NO.: 06-043

Meshekoff Family, LP / Matthew Meshekoff
C/O Mrs. Dee Reeves, WRS Realty
Director of Property Management
PO Box 7339
Aiken, SC 29804

Telephone: 803 / 649-1411

**PROFESSIONAL CIVIL ENGINEERING SERVICES
EVALUATION OF STORMWATER COLLECTION
AND DETENTION SYSTEM AT
WEST SIDE PLAZA SHOPPING CENTER
WEST COLUMBIA
LEXINGTON COUNTY, SOUTH CAROLINA**

Through October 31, 2006

ITEM	CONTRACT AMOUNT	% COMPLETE	TOTAL
Topographic Surveying Services	\$ 5,330.00	100%	\$ 5,330.00 <i>pd 2665</i>
Schedule and Review Video Tape	\$ 1,980.00	90%	\$ 1,782.00
Prepare Existing Conditions	\$ 2,160.00	100%	\$ 2,160.00 <i>pd 1080</i>
Prepare Recommendation Services	\$ 4,370.00	25%	\$ 1,093.00
TOTAL			\$ 10,365.00
LESS PREVIOUS INVOICES			(\$ 3,745.00)
TOTAL DUE THIS INVOICE			\$ 6,620.00

Terms: Per our proposal/agreement signed September 14, 2006

Thank You!
American Engineering Consultants, Inc.



APPROVED	DATE
<i>DD</i>	11-17-06
APPROVED	DATE
<i>DD</i>	11-17-06
ACCT. NO.	
2040	



ENGINEERING CONSULTANTS, INC.

1300 12th Street • P.O. Box 2299 • Cayce, SC 29171 • (803) 791-1400 • FAX: (803) 791-8110

INVOICE

DATE: December 11, 2006

INVOICE NO.: 06-709

PROJECT NO.: 06-043

Meshekoff Family, LP / Matthew Meshekoff
C/O Mrs. Dee Reeves, WRS Realty
Director of Property Management
PO Box 7339
Aiken, SC 29804

Telephone: 803 / 649-1411

**PROFESSIONAL CIVIL ENGINEERING SERVICES
EVALUATION OF STORMWATER COLLECTION
AND DETENTION SYSTEM AT
WEST SIDE PLAZA SHOPPING CENTER
WEST COLUMBIA
LEXINGTON COUNTY, SOUTH CAROLINA**

APPROVED <i>DD</i>	DATE <i>12-14-06</i>
APPROVED <i>DD</i>	DATE <i>12-14-06</i>
ACCT. NO. <i>2040</i>	

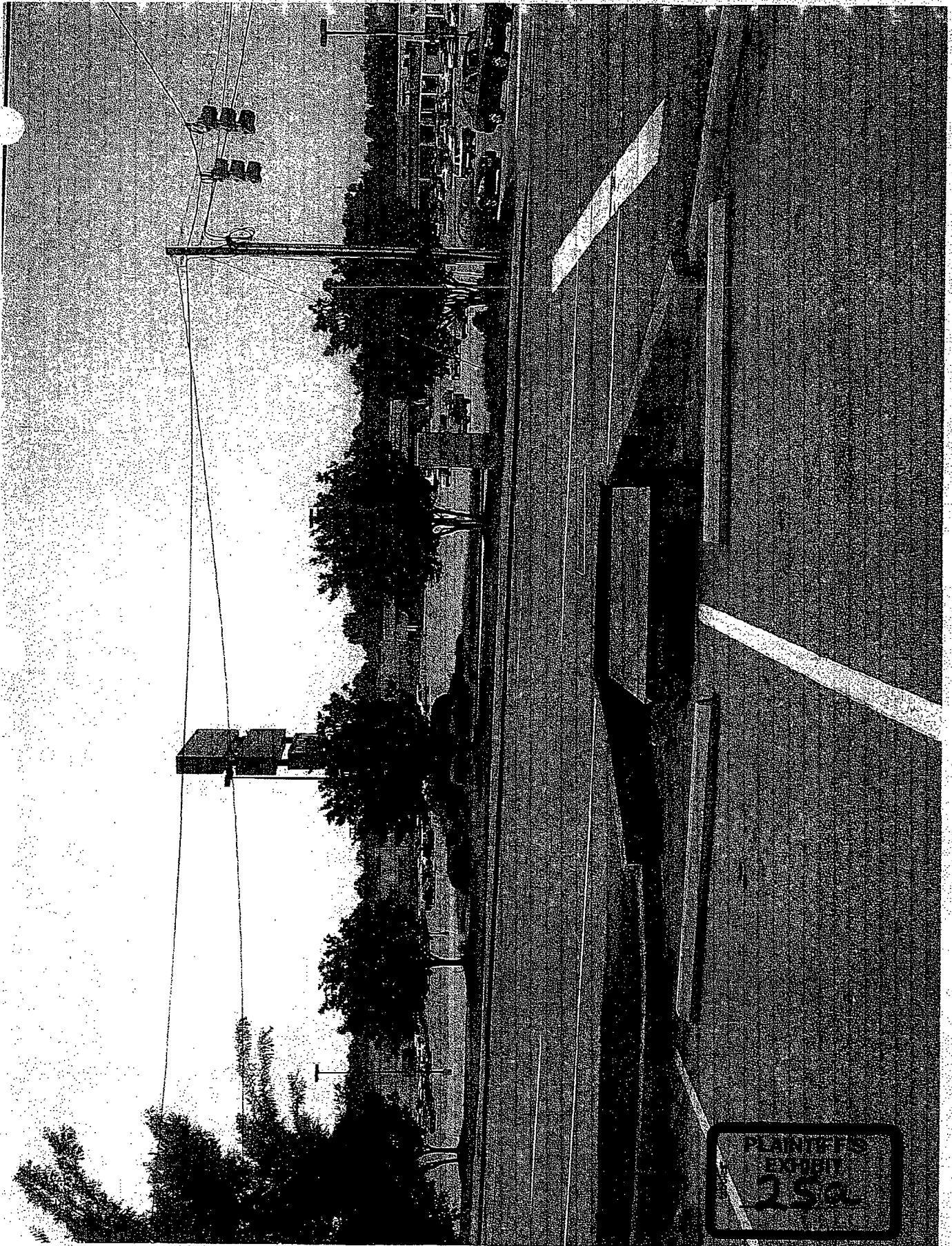
Through November 30, 2006

ITEM	CONTRACT AMOUNT	% COMPLETE	TOTAL
Topographic Surveying Services	\$ 5,330.00	100%	\$ 5,330.00
Schedule and Review Video Tape	\$ 1,980.00	100%	\$ 1,980.00
Prepare Existing Conditions	\$ 2,160.00	100%	\$ 2,160.00
Prepare Recommendation Services	\$ 4,370.00	100%	\$ 4,370.00
TOTAL			\$ 13,840.00
LESS PREVIOUS INVOICES			<u>(\$ 10,365.00)</u>
TOTAL DUE THIS INVOICE			\$ 3,475.00

Terms: Per our proposal/agreement signed September 14, 2006

Thank You!
American Engineering Consultants, Inc.





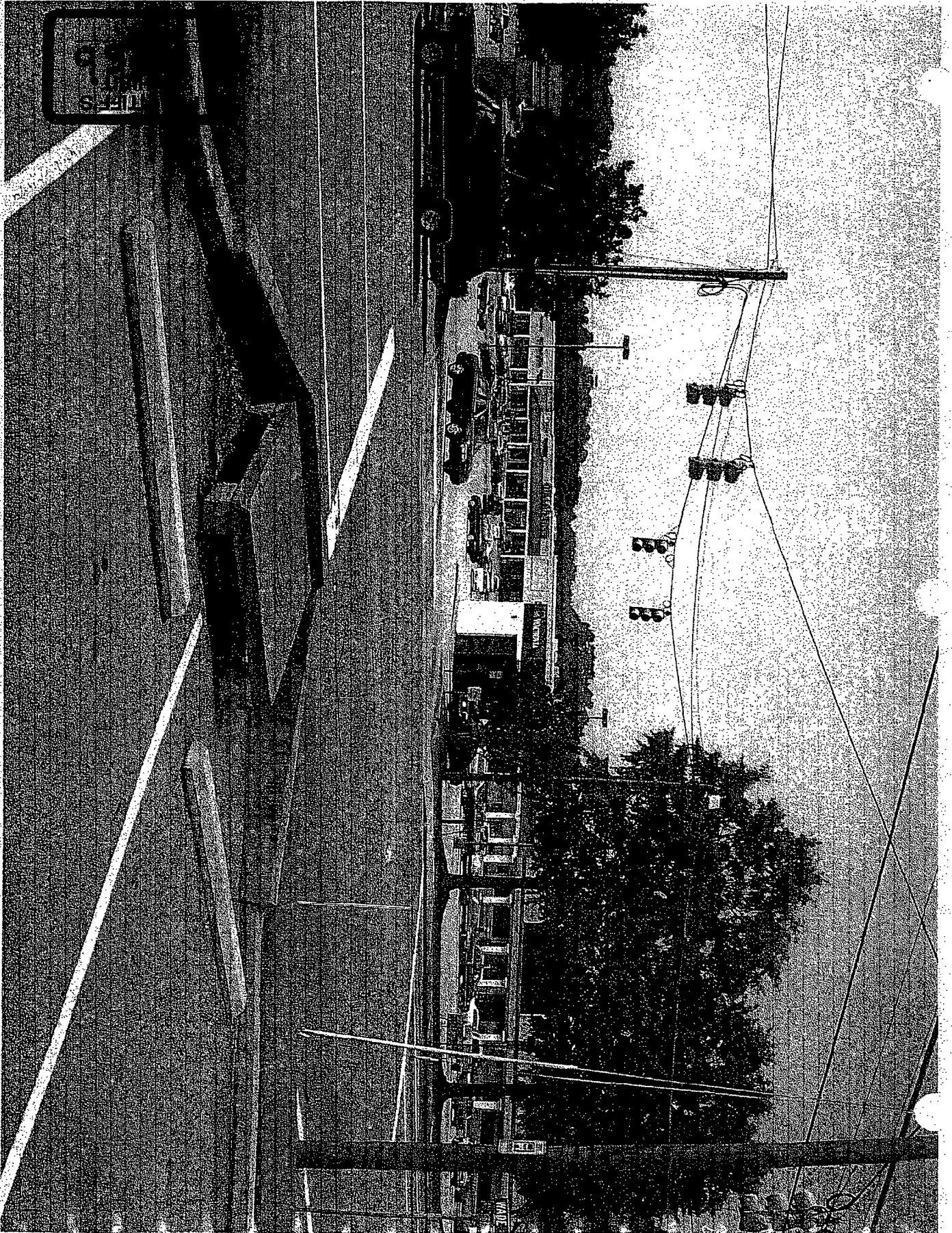


Exhibit 39 is oversized and pursuant to Rule 210(f) the respondent will be filing it separately.

Real Estate Paralegal Services, LLC

MEMORANDUM

TO: NICHOLSON LAW FIRM

ATTN: Patrick J. Frawley, Esq.

FROM: Debra B. Cheney

RE: Westside Plaza

FILE NO.: 08-0245

YOUR FILE NO.: 24768

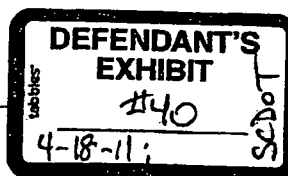
DATED: April 13, 2011

Mr. Frawley:

Per your request, I have researched the records of Lexington County regarding the property commonly known as Westside Plaza from the point of development of the shopping center, and found the following, regarding easements and ownership:

859/165 – to Dayton & Associates – XVII – Tract A - 21.383 acres per plat 213-G/97
859/165 – to Dayton & Associates-XVII – Tract B- 1.686
1105/198 – to West Side Plaza Associates – Tract A & B – per plat 213-G/97
1133/328 – corrective deed of 859/169 – per plat 226/29
1133/330 – corrective deed of 859/165 – per plat 226/29
1147/134 – corrective deed of 1105/198 – Tracts A & B - per plat 226/29
1575/14-to Edward Meshekoff and Helen Meshekoff-23.206 acres per 226/64
2160/250 – ½ int. to Edward Meshekoff Revocable Trust-Tracts A&B per plat 213-G/97
2160/252- ½ int. to Helen Meshekoff Revocable Trust- Tracts A&B per plat 213-G/97
3711/302- to The Fourm Meshekoff Family Limited Partnership-23.206 acres per plat 226/64
4045/90- Affidavit of partnership for the Fourm Meshekoff Family Limited Partnership
4045/93- Affidavit of partnership for the Westside Meshekoff Family Limited Partnership
4045/96- to Westside Meshekoff Family Limited Partnership-23.206 acres per plat 226/64
4048/275-Affidavit of partnership for Westside Meshekoff Family Limited Partnership
4048/272-Affidavit of partnership for The Fourm Meshekoff Family Limited Partnership

409 Byron Place
Columbia, SC 29212



Phone: 803-479-3608
Fax: 803-732-7935

2576.95

33515

511390

BOOK 859 PAGE 165

TITLE TO REAL ESTATE
The E. L. Bryan Company, Columbia, S.C.

FILED

1986 DEC 29 PM 2:28

JOANNE B. TRIBBLE
RMC
LEXINGTON COUNTY, S.C.

State of South Carolina,

COUNTY OF LEXINGTON

Know All Men by These Presents, That Holmes C. Dreher, a/k/a H. C. Dreher, Jr.

(hereinafter whether singular or plural the "Grantor")

LEXINGTON COUNTY
DOCUMENTARY TAX
PAID: 2576.95
MARJORIE H. SHARPE
Treasurer

STATE OF SOUTH CAROLINA
SOUTH CAROLINA TAX COMMISSION
DOCUMENTARY TAX STAMP
DEC 22 '86 900.00
RD 11329

in the State aforesaid, for and in consideration of the sum of Two Million, Three Hundred Twenty-four Thousand, Three Hundred Thirty-two / Dollars (\$2,324,332.10) to the Grantor paid by DAYTON & ASSOCIATES - XVII (hereinafter whether singular or plural the "Grantee") has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto the said Grantee the following described property.

See Attached "Exhibit A" for legal description

Grantee's Address: P. O. Box 1519
Aiken, S. C. 29802

STATE OF SOUTH CAROLINA
SOUTH CAROLINA TAX COMMISSION
DOCUMENTARY TAX STAMP
DEC 22 '86 900.00
RD 11329

Portion of

04669-01-002
STATE OF SOUTH CAROLINA
SOUTH CAROLINA TAX COMMISSION
DOCUMENTARY TAX STAMP
DEC 22 '86 900.00
RD 11329

050813
STATE OF SOUTH CAROLINA
SOUTH CAROLINA TAX COMMISSION
DOCUMENTARY TAX STAMP
DEC 22 '86 613.90
RD 11329

DEFENDANT'S
EXHIBIT
A

BOOK 859 PAGE 166

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

To HAVE AND TO HOLD all and singular the premises before mentioned unto the said Grantee,
Dayton & Associates - XVII, its successors,

Heirs and Assigns forever.

And the Grantor does hereby bind himself and his Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said Grantee and the Grantee's Heirs and Assigns, against the Grantor and the Grantor's Heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

WITNESS the Hand and Seal of the Grantor this 29th day of December

in the year of our Lord one thousand nine hundred and eighty-six

and in the two hundredth and eleventh

year of the Sovereignty

and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

Amelia C. Dreher
Roxie W. Dreher

Holmes C. Dreher (SEAL)
Holmes C. Dreher a/k/a H. C. Dreher, Jr.

Roxie W. Dreher (SEAL)
Roxie W. Dreher, spouse of Holmes C. Dreher,

joins in this instrument for the purposes of conveying any vested special equity and ownership right in the premises which may have been created under S. C. Code Section 20-7-471 et. seq.

BOOK 859 PAGE 166

STATE OF SOUTH CAROLINA. }

RICHLAND COUNTY. }

BOOK 859 PAGE 167

PERSONALLY appeared before me the undersigned witness and made oath that s/he saw the within named Grantor
And his Spouse
sign, seal and, as the Grantor's act and deed, deliver the within-written Deed for the uses and purposes therein mentioned
and that a/he, with the other witness whose signature appears above witnessed the execution thereof.

SWORN to before me this

29th day of December, 19 86
David H. Hanson (I.S.)
Notary Public of S. C.

My Commission Expires: 5-30-90

Willie S. [Signature]
Witness

BOOK 859 PAGE 167

BOOK 859 PAGE 163

EXHIBIT A

LEGAL DESCRIPTION

All that certain piece, parcel or tract of land, situate, lying and being near West Columbia, in Lexington County, South Carolina, containing 21.383 acres and shown as Tract A on plat prepared by B. P. Barber & Associates, Inc., dated December 23, 1986, reference to which plat is hereby made for a more complete and accurate description. Said property is bounded and measures as follows: Beginning at a point on the southern right-of-way of Augusta Road (U.S. Highway No. 1) 215 feet in a generally westerly direction from the center line of Dreher Road at the northwestern corner of property owned now or formerly by the W. Frank Caughman Estate (Point of Beginning); thence S 26°10'14"E 10.07 feet to a point; thence S 30°18'42"E 493.19 feet to a point; thence N 72°58'48"E 177.71 feet to a point; thence S 34°57'48"E 214.38 feet to a point; thence S 30°39'29"E 270.12 feet to a point; thence S 74°20'51"W 1094.09 feet to a point; thence N 29°34'07"W 978.72 feet to a point; thence along the southern right-of-way of Augusta Road (U.S. Highway No. 1) N 74°20'51"E 710.27 feet to a point; thence along said right-of-way N 73°21'13"E 56 feet to a point; thence along said right-of-way N 82°58'22"E 6.69 feet to a point; thence along said right-of-way N 76°22'37"E 111.53 feet to Point of Beginning.

Being a portion of the property conveyed to grantor by deed of Lula Mae E. Dreher dated June 30, 1953, and recorded in Title Book 17-O, page 438, together with the property conveyed to grantor by deed of H. C. Dreher dated March 1, 1951, and recorded in Title Book 6-X, page 106, Records of Lexington County, South Carolina.

BOOK 859 PAGE 163

208

FOR PLAT, SEE PLAT BK 213 PAGE 92

222.75

33516

445.50

BOOK 859 PAGE 169

TITLE TO REAL ESTATE
The R. L. Bryan Company, Columbia, S. C.

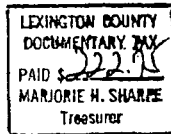
Form 14
(Revised 4-1-86)

FILED

1986 DEC 29 PM 2:28

JOANNE B. TRIBBLE
RMC
LEXINGTON COUNTY, S.C.

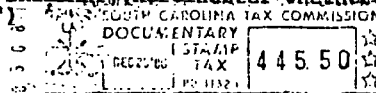
State of South Carolina,



Know All Men by These Presents, That

(hereinafter whether singular or plural the "Grantor")

We, WADE F. HOOK (being one and the same as WADE FRANKLIN HOOK), SARA WILLETTE HOOK, GRETCHEN ANN HOOK AND MELANIE HOOK RICE (formerly MELANIE PADGETT HOOK), by and through our attorney in fact, RICHARD J. BRIEBART, (hereinafter whether singular or plural the "Grantor"),



in the State aforesaid, for and in consideration of the sum of Two Hundred Two Thousand Three Hundred Twenty (\$202,320)-- Dollars to the Grantor paid by DAYTON & ASSOCIATES-XVII, A South Carolina General Partnership P. O. Box 1519, Aiken, SC 29802 whether singular or plural the "Grantee") has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto the said Grantee the following-described property, its successors and assigns, forever, the following described real estate, to wit:

All that certain piece, parcel or tract of land, situate, lying and being near West Columbia, in Lexington County, South Carolina, containing 1.686 acres and shown as Tract B on plat prepared by B. P. Barber & Associates, Inc., dated December 23, 1986, reference to which plat is hereby made for a more complete and accurate description. Said property is bounded and measures as follows: Beginning at a point on the southern right-of-way of Augusta Road (U.S. Highway No. 1) 1099.49 feet in a generally westerly direction from the center line of Dreher Road at the northwestern corner of property designated as Parcel A on said tract, in the process of conveyance from Holmes C. Dreher to grantee herein (Point of Beginning); thence S29°34'07"E 978.72 feet to a point; thence S 74°20'51"W 77.29 feet to a point; thence N 29°34'07"W 978.72 feet to a point; thence along the southern right-of-way of Augusta Road (U.S. Highway No. 1) N 74°20'51"E 77.29 feet to Point of Beginning.

Being a portion of the property conveyed to Mary Ann D. Hook by deed of H. C. and Carrie E. Dreher, dated April 10, 1946, and recorded in Title Book 6-A, page 146, Records of Lexington County, South Carolina; Mary Ann D. Hook having conveyed a one-eighteenth interest each to Melanie Padgett Hook, now Melanie H. Rice, and Gretchen Ann Hook by deed dated August 6, 1976, and recorded in Title Book 158, page 211, Records of Lexington County, and a one-eighteenth interest to Wade Franklin Hook as Trustee for Sara Willette Hook by deed dated 158, page 208, Records of Lexington County. Mary Ann D. Hook died testate on January 31, 1984, leaving her Will which is filed in the Office of the Probate Court for Lexington County wherein she devised the remaining interest in said property to Wade F. Hook.

Parcel No 04670-01-001 Portion 1.

BOOK 859 PAGE 169

FOR PLAT, SEE PLAT BK 2134, PAGE 92

DEFENDANT'S
EXHIBIT
B

BOOK 859 PAGE 170

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Grantee, its successors,

Heirs and Assigns forever.

And the Grantor does hereby bind ourselves and our Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said Grantee and the Grantee's Heirs and Assigns, against the Grantor and the Grantor's Heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

WITNESS the Hand and Seal of the Grantor this 29th day of December in the year of our Lord one thousand nine hundred and eighty-six and in the two hundredth and eleventh year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

Henry P. Goodner, Jr.
Robert S. Dulan
BOOK 859 PAGE 170

Walter F. Hook by Richard J. Hook (SEAL)
Sara Wallace Hook by Richard J. Hook (SEAL)
Richard J. Hook by Richard J. Hook power of attorney
Melanie A. Rice by Richard J. Hook power of attorney

STATE OF SOUTH CAROLINA.
LEXINGTON COUNTY.

Pursuant to Power of Attorney recorded
In _____, page _____
Records of Lexington County, SC

PERSONALLY appeared before me the undersigned witness and made oath that s/he saw the within named Grantor sign, seal and, as the Grantor's act and deed, deliver the within-written Deed for the uses and purposes therein mentioned and that s/he, with the other witness whose signature appears above witnessed the execution thereof.

SWORN to before me this 29th

day of DECEMBER 19 86.
Wm. S. O'Leary (L.S.)
Notary Public of S. C.

My Commission Expires: 10/16/89

Henry P. Goodwin, Jr.
Witness

BOOK 859 PAGE 171

BOOK 859 PAGE 171

BOOK 1105 PAGE 198
STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

14513
TITLE TO REAL ESTATE

AFT: 107
KNOW ALL MEN BY THESE PRESENTS, that,
DAYTON & ASSOCIATES-XVII, a South Carolina General
Partnership (hereinafter whether singular or plural the
"Grantor"), in the State aforesaid, for and in
consideration of the assumption of indebtedness and other
good and valuable consideration, as shown by attached
affidavit, to the Grantor paid by WEST SIDE PLAZA
ASSOCIATES, a South Carolina General Partnership
(hereinafter whether singular or plural the "Grantee"),
receipt of which is hereby acknowledged, has granted,
bargained, sold and released, and by these presents does
grant, bargain, sell and release unto the said WEST SIDE
PLAZA ASSOCIATES, a South Carolina General Partnership, its
successors and assigns forever, the following described
real estate:

(SEE ATTACHED EXHIBIT A)

TOGETHER with all and singular, the
rights, members, hereditaments and appurtenances to the
said premises belonging or in anywise incident or
appertaining.

TO HAVE AND TO HOLD all and singular the
premises before mentioned unto the said Grantee, WEST SIDE
PLAZA ASSOCIATES, a South Carolina General Partnership, its
successors and assigns forever.

And Grantor does hereby bind itself and its
successors and assigns to warrant and forever defend all
and singular the said premises unto the said Grantee, and
the Grantee's heirs and assigns, against the Grantor and
the Grantor's heirs and assigns and against every person

Grantor Address:
PO Box 1519
Aiken SC 29802
BOOK 1105 PAGE 198

FILED
JUN -3 PM 11:52
JOANNE B. TRIBBLE
REC
LEXINGTON COUNTY, S.C.

DEFENDANT'S
EXHIBIT
C

SCDOT 00001

whomsoever lawfully claiming, or to claim, the same or any part thereof.

WITNESS the Hand and Seal of the Grantor this 3rd day of June in the year of our Lord one thousand nine hundred and eighty-eight and in the two hundred and eleventh year of the Sovereignty and Independence of the United States of America.

DAYTON & ASSOCIATES-XVII, a South Carolina General Partnership

By: 7 OAKS, a South Carolina General Partnership, its General Partner

By: [Signature] (SEAL)
Weldon B. Wyatt, General Partner and Managing Partner

By: DAYTON PARTNERS LIMITED PARTNERSHIP, an Ohio Limited Partnership, its General Partner

By: DAYTON PARTNERS, an Ohio General Partnership, its General Partner

By: [Signature] (SEAL)
L. Keith Brunner, its Managing Partner

Signed, Sealed & Delivered in the Presence of:

[Signature]

[Signature]
As to 7 Oaks, a South Carolina General Partnership

[Signature]

[Signature]
As to Dayton Partners Limited Partnership, an Ohio Limited Partnership

BOOK 1105 PAGE 200

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

PERSONALLY APPEARED before me the undersigned witness and made oath that s/he saw the within Dayton & Associates-XVII, a South Carolina General Partnership by its appropriate General Partner, 7 OAKS, a South Carolina General Partnership, by its Managing Partner and General Partner, Weldon E. Wyatt, sign, seal and, as its act and deed, deliver the within-written Deed for the uses and purposes therein mentioned and that s/he, with the other witness whose signature appears above witnessed the execution thereof.

Arthur J. Kiper

SWORN TO before me this
3rd day of June, 1988.

Nellie P. Medlock
Notary Public for South Carolina
My Commission Expires: 4-16-92

STATE OF OHIO

COUNTY OF Montgomery

PERSONALLY APPEARED before me the undersigned witness and made oath that s/he saw the within-named Dayton & Associates-XVII, a South Carolina General Partnership, by its appropriate General Partner, Dayton Partners Limited Partnership, an Ohio Limited Partnership, by its General Partner, Dayton Partners, an Ohio General Partnership, by its Managing Partner, L. Keith Brunner, sign, seal and, as its act and deed, deliver the within-written Deed for the uses and purposes therein mentioned and that s/he, with the other subscribing witness witnessed the execution thereof.

Laura A. Deo

SWORN TO before me this
27th day of May, 1988.

Carolyn J. Summers
Notary Public for Ohio
My Commission Expires: 10/27/91

CAROLYN J. SUMMERS, Notary Public
In and for the State of Ohio
My Commission Expires October 27, 1991



BOOK 1105 PAGE 200

EXHIBIT A
LEGAL DESCRIPTION

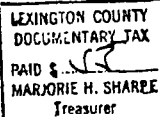
BOOK 1105 PAGE 201

All that certain piece, parcel or tract of land, situate, lying and being near West Columbia, in Lexington County, South Carolina, containing 23.069 acres and shown as Tracts A and B on plat prepared by B. P. Barber & Associates, Inc., dated December 23, 1986, reference to which plat is hereby made for a more complete and accurate description. Said property is bounded and measures as follows: Beginning at a point on the southern right-of-way of Augusta Road (U.S. Highway No. 1) 215 feet in a generally westerly direction from the center line of Dreher Road at the northwestern corner of property owned now or formerly by the W. Frank Caughman Estate (Point of Beginning); thence S 26°10'14"E 10.07 feet to a point; thence S 30°18'42"E 493.19 feet to a point; thence N 72°58'48"E 177.71 feet to a point; thence S 34°57'48"E 214.38 feet to a point; thence S 30°39'29"E 270.12 feet to a point; thence S 74°20'51"W 1171.38 feet to a point; thence N 29°34'07"W 978.72 feet to a point; thence along the southern right-of-way of Augusta Road (U.S. Highway No. 1) N 74°20'51"E 787.56 feet to a point; thence along said right-of-way N 73°21'13"E 56 feet to a point; thence along said right-of-way N 82°58'22"E 6.69 feet to a point; thence along said right-of-way N 76°22'37"E 111.53 feet to Point of Beginning.

Being the same property conveyed to Grantor by deed of Holmes C. Dreher and deed of Wade Franklin Hook, et. al., recorded in Deed Book 859, Page 165 and Deed Book 859, Page 869, respectively, in the Lexington County, S. C. RMC Office.

TAX MAP PARCEL NUMBER: 04669-01-002

BOOK 1105 PAGE 201



18500

FILED

 STATE OF SOUTH CAROLINA
 COUNTY OF LEXINGTON

TITLE TO REAL ESTATE

1988 JUL 11 AM 11:23

JOANNE B. TRIGBLE
RMC

WHEREAS, by deed dated December 29, 1986, Lexington County, South Carolina, the undersigned, Wade Franklin Hook, Sara Willette Hook, Gretchen Ann Hook and Melanie Hook Rice, the grantors herein, conveyed to Dayton & Associates-XVII, the grantee herein, certain real estate shown as Tract 9 on plat prepared by B. P. Barber & Associates, Inc., dated December 23, 1986, and recorded in Plat Book 213-G, at page 97, records of Lexington County, which plat contains certain erroneous information, including designation of the acreage as 1.686 acres, whereas in fact, the acreage was 1.690 acres; and

WHEREAS, it is the desire of the grantors to disclaim any interest in the properties intended to be conveyed in the aforesaid deed, and to make proper conveyance of the premises, and it is the desire of the grantee to reimburse grantors for the acreage actually conveyed and to receive proper title to the premises;

NOW, THEREFORE, for and in consideration of the sum of Four Hundred Eighty and No/100 (\$480.00) Dollars to the Grantors paid by Grantee, and by way of correction to the aforesaid deed, the Grantors have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said

DAYTON & ASSOCIATES-XVII, a South Carolina General Partnership, its successors and assigns forever, the following described property, to wit:

All that certain piece, parcel or tract of land, situate, lying and being ~~more or less~~ West Columbia, in Lexington County, South Carolina, containing 1.690 acres and shown as Tract B on plat of Westside Plaza prepared by Ayer, Graham and Associates, Inc. dated March 31, 1988, to be recorded simultaneously herewith, reference to which plat is hereby made for a more complete and accurate description. Said property is bounded and measures as follows: Beginning at a point on the southern right-of-way of Augusta Road (U.S. Highway No. 1) 1099.83 feet in a generally westerly direction from the center line of Dreher Road at the northwestern corner of property designated as Parcel A on said tract, (Point of Beginning); thence S 29-30-05 E, 981.39 feet to a point; thence S 74-26-25 W, 77.29 feet to a point; thence N 29-30-06 W, 981.37 feet to a point; thence along the southern right of way of Augusta Road (U. S. Highway No. 1) N 74-25-21 E, 77.29 feet to Point of Beginning.

It is grantors' intention to convey, and they do hereby convey, to grantee, its successors and assigns, all of their right, title and interest in and to the property shown as Tracts A and B on said plat of Westside Plaza prepared for Dayton & Associates-XVII by Ayer, Graham and Associates, Inc., dated March 31, 1988, and grantors do hereby quitclaim any interest they might have in and to the said premises.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in any wise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Grantee, DAYTON & ASSOCIATES-XVII, a South Carolina General Partnership, its successors and assigns forever.

And the Grantors do hereby bind themselves, their heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said Grantee and the Grantee's successors and assigns, against the Grantors and the Grantors' heirs and against every person whomsoever lawfully claiming, or to claim, the

00466-90-1m2

 DEFENDANT'S
 EXHIBIT
 D

same or any part thereof, except insofar as the portion of the premises quitclaimed hereinabove.

WITNESS the Hands and Seals of the Grantors this 11 day of July, in the year of our Lord one thousand nine hundred and eighty-eight and in the two hundredth and thirteenth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED)
In the Presence of)

Tanner W Kixel
Milly S. Dufour

Wade F. Hook by Richard J. Hook
(SEAL)

WADE F. HOOK
Pursuant to Power of Attorney
recorded in Deed Book 871, at Page
203, records of Lexington County, SC

Sara Willette Hook by Richard J. Hook
(SEAL)

SARA WILLETTE HOOK
Pursuant to Power of Attorney
recorded in Deed Book 871, at Page
242, records of Lexington County, SC

Gretchen Ann Hook by Richard J. Hook
(SEAL)

GRETCHEN ANN HOOK
Pursuant to Power of Attorney
recorded in Deed Book 871, at Page
209, records of Lexington County, SC

Melanie Hook Rice by Richard J. Hook
(SEAL)

MELANIE HOOK RICE
Pursuant to Power of Attorney
recorded in Deed Book 871, at Page
206, records of Lexington County, SC

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

PERSONALLY appeared before me the undersigned witness and made oath that s/he saw the within-named Grantors sign, seal and, as the Grantors' act and deed, deliver the within-written Deed for the uses and purposes therein mentioned and that s/he, with the other subscribing witness witnessed the execution thereof.

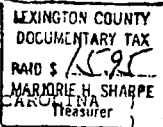
SWORN to before me this 11th
day of July, 1988.

Tanner W Kixel (L.S.)
Notary Public for South Carolina
My Commission Expires: 5/1/94

Milly S. Dufour

STATE OF SOUTH

COUNTY OF LEXINGTON



18501

TITLE TO REAL ESTATE

FILED

1988 JUL 11 AM 11:23

WHEREAS, by deed dated December 29, 1986, and recorded in Title Book 859, page 165, records of Lexington County, South Carolina, the undersigned, Holmes C. Dreher, a/k/a H. C. Dreher, the grantor herein, conveyed to Dayton & Associates-XVII, the grantee herein, certain real estate shown as Tract A on plat prepared by B. P. Barber & Associates, Inc., dated December 23, 1986, and recorded in Plat Book 213-G, at page 97, records of Lexington County, South Carolina, which plat contains certain erroneous information, including designation of the acreage as 21.383 acres, whereas in fact, the acreage was 21.516 acres; and

WHEREAS, it is the desire of the grantor to disclaim any interest in the properties intended to be conveyed in the aforesaid deed, and to make proper conveyance of the premises, and it is the desire of the grantee to reimburse grantor for the acreage actually conveyed and to receive proper title to the premises;

NOW, THEREFORE, for and in consideration of the sum of Fourteen Thousand Four Hundred Fifty-seven and 10/100 (\$14,457.10) Dollars to Grantor paid by Grantee, and by way of correction to the aforesaid deed, Grantor has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto the said

DAYTON & ASSOCIATES-XVII, a South Carolina General Partnership, its successors and assigns forever, the following described real estate, to wit:

All that certain piece, parcel or tract of land, situate, lying and being near West Columbia, in Lexington County, South Carolina, containing 21.516 acres and shown as Tract A on plat of Westside Plaza prepared by Ayer, Graham and Associates, Inc., dated March 31, 1988, to be recorded simultaneously herewith, reference to which plat is hereby made for a more complete and accurate description. Said property is bounded and measures as follows: Beginning at a point on the southern right-of-way of Augusta Road (U.S. Highway No. 1) 215 feet in a generally westerly direction from the center line of Dreher Road at the northwestern corner of property owned now or formerly by the W. Frank Caughman Estate (Point of Beginning); thence S 25-53-27 E, 10.05 feet to a point; thence S 30-22-26 E, 493.09 feet to a point; thence N 74-19-54 E, 177.71 feet; thence S 35-12-22 E, 214.38 feet to a point; thence S 30-39-30 E, 269.94 feet to a point; thence S 74-26-25 W, 1096.20 feet to a point; thence N 29-30-05 W, 981.39 feet to a point; thence along the southern right of way of Augusta Road (U. S. Highway No. 1) N 74-26-38 E, 710.71 feet to a point; thence along the said right of way N 73-20-23 E, 55.92 feet to a point; thence along said right of way N 83-05-12 E, 6.70 feet to a point; thence along said right of way N 76-21-32 E, 111.50 feet to Point of Beginning.

It is grantor's intention to convey, and he does hereby convey, to grantee, its successors and assigns, and does hereby convey, all of his right, title and interest in and to the property shown as Tracts A and B on plat of Westside Plaza prepared for Dayton & Associates-XVII by Ayer, Graham and Associates, Inc., dated March 31, 1988, and grantor does hereby quitclaim any interest he might have in and to the said premises.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in any wise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Grantee, DAYTON & ASSOCIATES-XVII, a South Carolina General Partnership, its successors and assigns forever.

00466-90-1002

FOR PLAT, SEE PLAT BK 226, PAGE 22

DEFENDANT'S
EXHIBIT
E

And the Grantor does hereby bind himself, his heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said Grantee and the Grantee's successors and assigns, against the Grantor and the Grantor's heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof, except insofar as the portion of the premises quitclaimed hereinabove.

WITNESS the Hand and Seal of the Grantor this 11 day of July, in the year of our Lord one thousand nine hundred and eighty eight and in the two hundredth and thirteenth year of the Sovereignty and Independence of the United States of America.

Holmes C. Dreher (SEAL)
HOLMES C. DREHER

SIGNED, SEALED AND DELIVERED
In the Presence of

E. L. S. 87
Miley S. S. S. 87

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

PERSONALLY appeared before me the undersigned witness and made oath that s/he saw the within-named Grantor sign, seal and, as the Grantor's act and deed, deliver the within-written Deed for the uses and purposes therein mentioned and that s/he, with the other subscribing witness witnessed the execution thereof.

SWORN to before me this 11
day of July, 1988.

Miley S. S. S. 87 (L.S.)
Notary Public for South Carolina
My Commission Expires: 10/16/89

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)

TITLE TO REAL ESTATE

AFFIDAVIT

FILED
 1988 JUL 28 AM 11:18
 JOANNE B. TRIDDLE
 RMC
 LEXINGTON COUNTY, S.C.

WHEREAS, by deed dated June 3, 1988, and recorded in Title Book 1105, page 198, records of Lexington County, South Carolina, Dayton & Associates-XVII, the grantor herein, conveyed to West Side Plaza Associates, the grantee herein, certain real estate shown as Tracts A and B on plat prepared by B. P. Barber and Associates, Inc., dated December 23, 1986, reference being made to the said plat; and

WHEREAS, the aforesaid plat contained certain erroneous information, including designation of the total acreage of the two tracts as 23.069, whereas in fact, the total acreage was 23.206 acres; and

WHEREAS, Holmes C. Dreher has executed his deed conveying to Dayton & Associates-XVII the additional acreage and quitclaiming all further interest in the said shopping center, which deed is recorded in Title Book 1133, Page 330, records of Lexington County, South Carolina, and Wade Franklin Hook, et al, have executed their deed conveying to Dayton & Associates-XVII the additional acreage and quitclaiming all further interest in the said shopping center, which deed is recorded in Title Book 1133, Page 328, records of Lexington County, South Carolina; and

WHEREAS, it is the intention of Dayton & Associates-XVII, the grantor herein, to convey to West Side Plaza Associates, grantee, all of its right, title and interest in and to all properties known as West Side Plaza, and shown as Tracts A and B on plat prepared for Dayton & Associates-XVII by Ayer, Graham and Associates, Inc., dated March 31, 1988;

NOW, THEREFORE, for and in consideration of the sum of Five Dollars to grantor paid by grantee, and by way of correction to the aforesaid deed, grantor has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto the said

WEST SIDE PLAZA ASSOCIATES, A SOUTH CAROLINA GENERAL PARTNERSHIP, its successors and assigns forever, the following described real estate, to wit:

All that certain piece, parcel or tract of land, situate, lying and being in West Columbia, in Lexington County, South Carolina, containing 23.206 acres and shown as Tract A and Tract B on plat of Westside Plaza prepared by Ayer, Graham and Associates, Inc., dated March 31, 1988, recorded in Plat Book 226, at page 29, records of Lexington County, reference to which plat is hereby made for a more complete and accurate description. Said property is bounded and measures as follows: Beginning at a point on the southern right-of-way of Augusta Road (U.S. Highway No. 1) 215 feet in a generally westerly direction from the center line of Dreher Road at the northwestern corner of property owned now or formerly by the Frank Caughman Estate (Point of Beginning); thence S 25-53-27 E, 10.05 feet to a point; thence S 30-22-25 E, 493.09 feet to a point; thence N 74-19-54 E, 177.71 feet to a point; thence S 35-12-22 E, 214.38 feet to a point; thence S 30-39-30 E, 269.94 feet to a point; thence S 74-26-25 W, 1173.49 feet to a point; thence N 29-30-06 W, 981.37 feet to a point; thence along the southern right of way of Augusta Road (U. S. Highway No. 1) N 74-25-21 E, 77.29 feet to a point; thence along said right-of-way N 74-26-38 E, 710.71 feet to a point; thence along the said right of way N 73-20-23 E, 55.92 feet to a point; thence along said right of way N 83-05-12 E, 6.70 feet to a point; thence along said right-of way N 76-21-32 E, 111.50 feet to Point of Beginning.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in any wise incident or appertaining.

Grantor's Address: 951 Millbrook Avenue, Aiken, S.C. 29801

Parcel No. 04669-01-002

DEFENDANT'S
 EXHIBIT
 1

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Grantee, WEST SIDE PLAZA ASSOCIATES, a South Carolina General Partnership, its successors and assigns forever.

And the Grantor does hereby bind itself and its successors, to warrant and forever defend all and singular the said premises unto the said Grantee and the Grantee's successors and assigns, against the Grantor and the Grantor's successors and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

WITNESS the Hand and Seal of the Grantor this 15th day of July, in the year of our Lord one thousand nine hundred and eighty-eight and in the two hundredth and thirteenth year of the Sovereignty and Independence of the United States of America.

DAYTON & ASSOCIATES-XVII, a South Carolina General Partnership

By: 7 OAKS, a South Carolina General Partnership, its General Partner

By: Weldon E. Wyatt (SEAL)
Weldon E. Wyatt, General Partner and Managing Partner

By: DAYTON PARTNERS LIMITED PARTNERSHIP, an Ohio Limited Partnership, its General Partner.

By: DAYTON PARTNERS, an Ohio General Partnership, its General Partner

By: Keith Brunner (SEAL)
Its Managing Partner

Signed, Sealed & Delivered in the Presence of

Arthur J. Kiper
Gale Kearns
As to 7 Oaks, a South Carolina General Partnership

Deanne M. Jaska
Ohelma Lincoln
As to Dayton Partners Limited Partnership, an Ohio Limited Partnership

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

PERSONALLY appeared before me the undersigned witness and made oath that s/he saw the within-named Dayton & Associates-XVII, a South Carolina General Partnership, by its appropriate General Partner, 7 OAKS, a South Carolina General Partnership, by its Managing Partner and General Partner, Weldon E. Wyatt, sign, seal and, as its act and deed, deliver the within-written Deed for the uses and purposes therein mentioned and that s/he, with the other subscribing witness witnessed the execution thereof.

SWORN to before me this 15th

day of July, 1988.

Arthur J. Kiper

Gale Kearns (L.S.)

Notary Public for South Carolina

My Commission Expires: 1-20-98

STATE OF OHIO)

COUNTY OF MONTGOMERY)

PERSONALLY appeared before me the undersigned witness and made oath that s/he saw the within-named Dayton & Associates-XVII, a South Carolina General Partnership, by its appropriate General Partner, Dayton Partners Limited Partnership, an Ohio Limited Partnership, by its General Partner, Dayton Partners, an Ohio General Partnership, by L. Keith Brunner sign, seal and, as its act and deed, deliver the within-written Deed for the uses and purposes therein mentioned and that s/he, with the other subscribing witness witnessed the execution thereof.

SWORN to before me this 15th

day of July, 1988.

Sharon M. Jaker

Thelma Lincoln (L.S.)

Notary Public for Ohio

My Commission Expires: May 13, 1990

THELMA LINCOLN, Notary Public
In and for the State of Ohio
My Commission Expires May 13, 1990

BK 1575 PG 014

STATE OF SOUTH CAROLINA
SOUTH CAROLINA TAX COMMISSION
DOCUMENTARY

Warranty Deed

STAMP
TAX 900.00

AFFIDAVIT

The State of South Carolina,

COUNTY OF Lexington

KNOW ALL MEN BY THESE PRESENTS, THAT

West Side Plaza Associates, a South Carolina general partnership

in the State aforesaid, for and in consideration of the sum of Five Dollars (\$5.00) and other good and valuable consideration as shown by a separate affidavit to West Side Plaza Associates in hand paid at and before the sealing of these presents by Helen Meshekoff and Edward Meshekoff

in the State aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto said Helen Meshekoff and Edward Meshekoff

for and during their joint lives and upon the death of either of them, then to the survivor of them, his or her heirs and assigns, forever, in fee simple, together with every contingent remainder and right of reversion, the following described property, to wit:

STATE OF SOUTH CAROLINA
SOUTH CAROLINA TAX COMMISSION
DOCUMENTARY

See attached Exhibit A

STAMP
TAX 900.00

980 MAY -1 PM 12:57
JOANNE B. TRIBLE
REC
LEXINGTON COUNTY, S.C.

FILED

STATE OF SOUTH CAROLINA
SOUTH CAROLINA TAX COMMISSION
DOCUMENTARY
STAMP
TAX 900.00

PAID \$ 286.00

LEXINGTON COUNTY
DOCUMENTARY TAX
PAID \$ 286.00
MARJORIE H. SHARPE
Treasurer

Grantor's Address: Helen & Edward Meshekoff
c/o Wyatt Development Company
Property Management Division

P.O. Box 1519

Aiken, S.C. 29802

STATE OF SOUTH CAROLINA
SOUTH CAROLINA TAX COMMISSION
DOCUMENTARY

STAMP
TAX 320.00

STATE OF SOUTH CAROLINA
SOUTH CAROLINA TAX COMMISSION
DOCUMENTARY
STAMP
TAX 900.00

DEFENDANT'S
EXHIBIT
G

12215

SCDOT 00002

BK1575PG015

Together with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said Premises before mentioned unto the said

Helen Meshekoff and Edward Meshekoff

for and during their joint lives and upon the death of either of them then to the survivor of them, his or her heirs and assigns, forever, in fee simple, together with every contingent remainder and right of reversion, and

West Side Plaza Associates does ~~XX~~ hereby bind itself, its ~~XXXX XXXXX~~ ^{Successors and Assigns}

~~XXXX XXXXX~~, to warrant and forever defend all and singular the said Premises unto the said

Helen Meshekoff and Edward Meshekoff, their heirs and assigns as hereinabove provided

against West Side Plaza Associates and its Successors and Assigns ~~XXXX~~ and any person or persons whomsoever lawfully claiming or to claim the same, or any part thereof.

WITNESS the hand and seal this 30th day of April

in the year of our Lord one thousand nine hundred and ninety

Signed, Sealed and Delivered
in the Presence of

Patricia A. Bass
Gerriann Fernandez

WEST SIDE PLAZA ASSOCIATES, a (SEAL)

South Carolina general partnership (SEAL)

By: Weldon E. Wyatt (SEAL)
Managing Partner

THE STATE OF SOUTH CAROLINA,

County of Aiken

PERSONALLY appeared before me Patricia Bass

and made oath that she saw the within-named Weldon E. Wyatt as Managing Partner of West

Side Plaza Associates, sign, seal, and as his Act and Deed, deliver

a SC general partnership the within-written Deed; and that she with Gerriann Fernandez

witnessed the execution thereof.

SWORN to before me this 30th day of April, A. D. 1990

(SEAL)

Gerriann Fernandez
My commission expires: 3-5-2000

Patricia A. Bass

BK1575PG016

050190

EXHIBIT A

LEGAL DESCRIPTION

All that certain piece, parcel or tract of land, situate, lying and being in West Columbia, in Lexington County, South Carolina, containing 23.206 acres and shown on plat of West Side Plaza prepared by Ayer, Graham and Associates, Inc., dated March 18, 1988, revised July 11, 1988 recorded in Plat Book 226, at Page 64, records of Lexington County, reference to which plat is hereby made for a more complete and accurate description. Said property is bounded and measures as follows: Beginning at a point on the southern right-of-way of Augusta Road (U.S. Highway No. 1) 215 feet in a generally westerly direction from the center line of Dreher Road at the northwestern corner of property owned now or formerly by the Frank Caughman Estate (Point of Beginning); thence, S 25-53-27 E, 10.05 feet to a point; thence, S 30-22-26 E, 493.09 feet to a point; thence, N 74-19-54 E, 177.71 feet to a point; thence, S 35-12-22 E, 214.38 feet to a point; thence, S 30-39-30 E 269.94 feet to a point; thence, S 74-26-25 W, 1173.49 feet to a point; thence, N 29-30-06 W, 981.37 feet to a point; thence along the southern right-of-way of Augusta Road (U.S. Highway No. 1) N 74-25-21 E, 77.29 feet to a point; thence, along said right-of-way N 74-26-38 E, 710.71 feet to a point; thence, along the said right-of-way N 73-20-23 E, 55.92 feet to a point; thence, along said right-of-way N 83-05-12 E, 6.70 feet to a point; thence, along said right-of-way N 76-21-32 E, 111.50 feet to Point of Beginning.

Being the same property conveyed to Grantor by deed of Dayton & Associates XVII dated July 15, 1988 and recorded in Deed Book 1147 at page 134, records of Lexington County, South Carolina.

Tax Map Parcel Number: 04669-01-002

sjk3/west/side/plaza/legal

BK 1575PG017

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON) AFFIDAVIT

West Side Plaza Associates, a
South Carolina general partnership

TO

New York Property Holding Corporation

PERSONALLY APPEARED before me, Jacqueline F. Busbee, who being duly sworn says that the truthful and complete consideration of the above stated deed is Eleven Million Four Hundred Thousand Dollars (\$11,400,000). Purchaser will take possession subject to the unpaid principal balance of a loan to West Side Plaza Associates from Nationwide Life Insurance Company in the original principal amount of Seven Million Eight Hundred Thousand Dollars (\$7,800,000) and the unpaid principal balance of a loan to West Side Plaza Associates from Employer's Life Insurance Company in the original principal amount of One Million Dollars (\$1,000,000) secured by a mortgage recorded in the RMC Office for Lexington County, SC in Mortgage Book 1147, Page 138. The balance shall be paid in cash, in the sum of Two Million Six Hundred Thousand (\$2,600,000.) Dollars.

SWORN to before me this
17 day of May, 1990.

Patricia J. Buss (L.S.)
Notary Public for S.C.
Commission Expires: 6-20-99

Jacqueline F. Busbee
Attorney for Grantor/
Grantee

Return to: (enclose self-addressed stamped envelope)

Name: Stuart Estate Planning
2424 N. Federal Highway
Address: Boca Raton, FL 33431

1 800 433-9867

This instrument Prepared by:

Address:

Property Appraiser's Parcel Identification (Folio) Number(s):

Grantee(s) S.B. # (s):

QUIT-CLAIM DEED
BK2160PG250

FILED

MAY 21 11 33 AM '92

JOANNE B. TRIBALE
RMC
LEXINGTON COUNTY

RANCO FORM 8

DEFENDANT'S
EXHIBIT
H

SPACE ABOVE THIS LINE FOR PROCESSING DATA

SPACE ABOVE THIS LINE FOR RECORDING DATA

This Quit-Claim Deed, Executed this 13 day of MAY, A.D. 1992, by
EDWARD MESHEKOFF and HELEN MESHEKOFF, husband and wife
first party, to EDWARD MESHEKOFF REVOCABLE TRUST, EDWARD MESHEKOFF, Trustee
whose post office address is 190 East 72nd Street, Apt. 3C, New York, NY 10021

second party:

(Wherever used herein the terms "first party" and "second party" shall include singular and plural, heirs, legal representatives, and assigns of individuals, and the successors and assigns of corporations, wherever the context so admits or requires.)

Witnesseth, That the said first party, for and in consideration of the sum of \$ 10.00 (Ten Dollars) in hand paid by the said second party, the receipt whereof is hereby acknowledged, does hereby remise, release and quit-claim unto the said second party forever, all the right, title, interest, claim and demand which the said first party has in and to the following described lot, piece or parcel of land, situate, lying and being in the County of Lexington, State of South Carolina, to-wit:

An undivided one-half (1/2) interest in fee simple in and to all that certain piece or parcel of real property more fully bounded and described as set forth in Exhibit A attached hereto and incorporated herein by reference.

To Have and to Hold The same together with all and singular the appurtenances thereunto belonging or in anywise appertaining, and all the estate, right, title, interest, lien, equity and claim whatsoever of the said first party, either in law or equity, to the only proper use, benefit and behoof of the said second party forever.

In Witness Whereof, The said first party has signed and sealed these presents the day and year first above written.

Signed, sealed and delivered in the presence of:

Joanne Huja
Witness Signature (as to first Grantor)

Printed Name: Joanne Huja

Witness Signature (as to first Grantor)

Printed Name: Nicholas Paleveda

Joanne Huja
Witness Signature (as to Co-Grantor, if any)

Printed Name: Joanne Huja

Witness Signature (as to Co-Grantor, if any)

Printed Name: Nicholas Paleveda

STATE OF New York

COUNTY OF New York

EDWARD AND HELEN MESHEKOFF

known to me to be the person described in and who executed the foregoing instrument, who acknowledged before me that

executed the same, that I rolled upon the following form of identification of the above-named person

DRIVERS LICENSE

and that on oath (was/was not) taken.

NOTARY RUBBER STAMP SEAL

JEFFREY MARCUS
Notary Public, State of New York
No. 24118
Commission Expires August 31, 1993

EDWARD MESHEKOFF

Printed Name

Post Office Address: 190 East 72nd Street, Apt. 3C,
New York, New York 10021

HELEN MESHEKOFF

Co-Grantor Signature, if any

Printed Name

Post Office Address: 190 East 72nd Street, Apt. 3C,
New York, New York 10021

I hereby Certify that on this day, before me, an officer duly authorized

to administer oaths and take acknowledgments, personally appeared

and that on oath (was/was not) taken.

Witness my hand and official seal in the County and State last aforesaid this

13 day of MAY, A.D. 1992

Notary Signature: Jeffrey Marcus

Printed Notary Signature: JEFFREY MARCUS

1993

BK 2160 PG 251

040390

EXHIBIT A

LEGAL DESCRIPTION

All that certain piece, parcel or tract of land, situated, lying and being near West Columbia, in Lexington County, South Carolina, containing 23.069 acres and shown as Tracts A and B on plat prepared by B.P. Barber & Associates, Inc., dated December 23, 1986, reference to which plat is hereby made for a more complete and accurate description. Said property is bounded and measures as follows:

Beginning at a point on the southern right-of-way of Augusta Road (U.S. Highway No. 1) 215 feet in a generally westerly direction from the center line of Dreher Road at the northwestern corner of property owned now or formerly by the W. Frank Caughman Estate (Point of Beginning); thence S 26-10-14 E 10.07 feet to a point; thence S 30-18-42 E 493.19 feet to a point; thence N 72-58-48 E 177.71 feet to a point; thence S 34-57-48 E 214.38 feet to a point; thence S 30-39-29 E 270.12 feet to a point; thence S 74-20-51 W 1,171.38 feet to a point; thence N 29-34-07 W 978.72 feet to a point; thence along the southern right-of-way of Augusta Road (U.S. Highway No. 1) N 74-20-51 E 787.56 feet to a point; thence along said right-of-way N 73-21-13 E 56 feet to a point; thence along said right-of-way N 82-58-22 E 6.69 feet to a point; thence along said right-of-way N 76-22-37 E 111.53 feet to Point of Beginning.

Being the same property conveyed to Grantor by deed of Holmes C. Dreher and deed of Wade Franklin Hook, et. al., recorded in Deed Book 859, Page 165 and Deed Book 859, Page 869, respectively, in the Lexington County, S.C. RMC Office.

Tax Map Parcel Number: 04669-01-002

BK 2160PG252

QUIT-CLAIM DEED

RAMCO

Return to (unless self-addressed stamped envelope)

Name: Stuart Estate Planning
2424 N. Federal Highway
Address: Boca Raton, FL 33431

1 800 433-9867

This instrument Prepared by:

Address:

Property Appraisers Parcel Identification (Folio Number(s)):

Grantee(s) S.B. # (s):

FILED

MAY 21 11 33 AM '92

JOANNE B. TRIBBLE
RMC
LEXINGTON COUNTY

DEFENDANT'S
EXHIBIT
I

SPACE ABOVE THIS LINE FOR PROCESSING DATA

SPACE ABOVE THIS LINE FOR RECORDING DATA

This Quit-Claim Deed, Executed this 13 day of MAY, A.D. 19 92, by
EDWARD MESHEKOFF and HELEN MESHEKOFF, husband and wife
first party, to HELEN MESHEKOFF REVOCABLE TRUST, HELEN MESHEKOFF, Trustee
whose post office address is 190 East 72nd Street, Apt. 3C, New York, NY 10021

second party:

(Wherever used herein the terms "first party" and "second party" shall include singular and plural, heirs, legal representatives, and assigns of individuals, and the successors and assigns of corporations, wherever the context so admits or requires.)

Witnesseth, That the said first party, for and in consideration of the sum of \$ 10.00 (Ten Dollars) in hand paid by the said second party, the receipt whereof is hereby acknowledged, does hereby remise, release and quit-claim unto the said second party forever, all the right, title, interest, claim and demand which the said first party has in and to the following described lot, piece or parcel of land, situate, lying and being in the County of Lexington, State of South Carolina, to-wit:

An undivided one-half (1/2) interest in fee simple in and to all that certain piece or parcel of real property more fully bounded and described as set forth in Exhibit A attached hereto and incorporated herein by reference.

We Have and to Hold The same together with all and singular the appurtenances thereunto belonging or in anywise appertaining, and all the estate, right, title, interest, lien, equity and claim whatsoever of the said first party, either in law or equity, to the only proper use, benefit and behoof of the said second party forever.

In Witness Whereof, The said first party has signed and sealed these presents the day and year first above written.

Signed, sealed and delivered in the presence of:

Witness Signature (as to first Grantor)
Joanne Hujsa

Printed Name
Nicholas Palaveda

Witness Signature (as to first Grantor)
Joanne Hujsa

Printed Name
Nicholas Palaveda

Witness Signature (as to Co-Grantor, if any)
Joanne Hujsa

Printed Name
Joanne Hujsa

Witness Signature (as to Co-Grantor, if any)
Nicholas Palaveda

Printed Name
Nicholas Palaveda

STAT OF NEW YORK
COUNTY OF NEW YORK

EDWARD AND HELENE MESHEKOFF

known to me to be the person described in and who executed the foregoing instrument, who acknowledged before me that

executed the same, that I rolled upon the following form of identification of the above-named person

DRIVERS LICENSE and that on oath (was) (was not) taken.

NOTARY PUBLIC STAMP REAL

JEFFREY MARCUS
Notary Public, State of New York
No. 81-23116
Qualified in New York County
Commission Expires August 31, 1993

Witness my hand and official seal in the County and State last aforesaid this
13 day of MAY, A.D. 19 92

20772

Notary Signature
JEFFREY MARCUS
Printed Notary Signature

Grantor Signature
EDWARD MESHEKOFF

Printed Name
EDWARD MESHEKOFF

Post Office Address
190 East 72nd Street, Apt. 3C,
New York, New York 10021

Co-Grantor Signature, if any
HELEN MESHEKOFF

Printed Name
HELEN MESHEKOFF

Post Office Address
190 East 72nd Street, Apt. 3C,
New York, New York 10021

I hereby Certify that on this day, before me, an officer duly authorized to administer oaths and take acknowledgments, personally appeared

BK2160PG253

040390

EXHIBIT A

LEGAL DESCRIPTION

All that certain piece, parcel or tract of land, situated, lying and being near West Columbia, in Lexington County, South Carolina, containing 23.069 acres and shown as Tracts A and B on plat prepared by B.P. Barber & Associates, Inc., dated December 23, 1986, reference to which plat is hereby made for a more complete and accurate description. Said property is bounded and measures as follows:

Beginning at a point on the southern right-of-way of Augusta Road (U.S. Highway No. 1) 215 feet in a generally westerly direction from the center line of Draher Road at the northwestern corner of property owned now or formerly by the W. Frank Caughman Estate (Point of Beginning); thence S 26-10-14 E 10.07 feet to a point; thence S 30-18-42 E 493.19 feet to a point; thence N 72-58-48 E 177.71 feet to a point; thence S 34-57-48 E 214.38 feet to a point; thence S 30-39-29 E 270.12 feet to a point; thence S 74-20-51 W 1,171.38 feet to a point; thence N 29-34-07 W 978.72 feet to a point; thence along the southern right-of-way of Augusta Road (U.S. Highway No. 1) N 74-20-51 E 787.56 feet to a point; thence along said right-of-way N 73-21-13 E 56 feet to a point; thence along said right-of-way N 82-58-22 E 6.69 feet to a point; thence along said right-of-way N 76-22-37 E 111.53 feet to Point of Beginning.

Being the same property conveyed to Grantor by deed of Holmes C. Dreher and deed of Wade Franklin Hook, et. al., recorded in Deed Book 859, Page 165 and Deed Book 859, Page 869, respectively, in the Lexington County, S.C. RMC Office.

Tax Map Parcel Number: 04669-01-002

BK3711PG302

DEED

FILED

APR 29 5 12 PM '96

JOANNE B. TRIGGLE
RMC
LEXINGTON COUNTY

Mailing address of Grantee
190 East 72nd Street
New York, NY 10021

THE STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

KNOW ALL MEN BY THESE PRESENTS, that EDWARD MESHEKOFF REVOCABLE TRUST, EDWARD MESHEKOFF, TRUSTEE, and HELEN MESHEKOFF REVOCABLE TRUST, HELEN MESHEKOFF, TRUSTEE in the State aforesaid, for and in consideration of the sum of Five Dollars (\$5.00) and other good and valuable consideration as shown by a separate affidavit to them in hand paid at and before the sealing of these presents by The Fourm Meshekoff Family Limited Partnership in the State aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant bargain sell and release unto said The Fourm Meshekoff Family Limited Partnership, their heirs and assigns, forever, in fee simple, together with every contingent remainder and right of reversion, the following described property, to-wit:

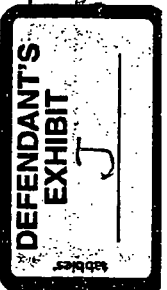
SEE ATTACHED EXHIBIT A

Together with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said Premises before mentioned unto the said The Fourm Meshekoff Family Limited Partnership, their heirs and assigns, forever, in fee simple, together with every contingent remainder and right of reversion.

WITNESS the hand and seal this 1st day of November, in the year of our Lord one thousand nine hundred and ninety five.

16306



8K3711PG303

Signed, sealed and delivered
in our presence:

EDWARD MESHEKOFF REVOCABLE TRUST

By Edward Meshekoff
Edward Meshekoff, Trustee

Joseph P. Leuzzi
Deborah M. Hulick

HELEN MESHEKOFF REVOCABLE TRUST

By Helen Meshekoff
Helen Meshekoff, Trustee

Joseph P. Leuzzi
Deborah M. Hulick

PERSONALLY appeared before me Joseph P. Leuzzi and made oath
that he saw the within-named Edward Meshekoff sign, seal, and as his
Act and Deed, deliver the within-written Deed; and that he with
Deborah M. Hulick witnessed the execution thereof.

SWORN to before me this 1st day of November, A.D.
1995.

(SEAL)

Joseph P. Leuzzi

JOSEPH P. LEUZZI
NOTARY PUBLIC, STATE OF NEW YORK
NO. 32-7563965
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1996

PERSONALLY appeared before me Joseph P. Leuzzi and made oath
that he saw the within-named Helen Meshekoff sign, seal, and as his
Act and Deed, deliver the within-written Deed; and that he with
Deborah M. Hulick witnessed the execution thereof.

SWORN to before me this 1st day of November, A.D.
1995.

(SEAL)

Joseph P. Leuzzi

JOSEPH P. LEUZZI
NOTARY PUBLIC, STATE OF NEW YORK
NO. 32-7563965
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1996

BK3711PG304

050190

EXHIBIT A

LEGAL DESCRIPTION

All that certain piece, parcel or tract of land, situate, lying and being in West Columbia, in Lexington County, South Carolina, containing 23.206 acres and shown on plat of West Side Plaza prepared by Ayer, Graham and Associates, Inc., dated March 18, 1988, revised July 11, 1988 recorded in Plat Book 226, at Page 64, records of Lexington County, reference to which plat is hereby made for a more complete and accurate description. Said property is bounded and measures as follows: Beginning at a point on the southern right-of-way of Augusta Road (U.S. Highway No. 1) 215 feet in a generally westerly direction from the center line of Dreher Road at the northwestern corner of property owned now or formerly by the Frank Caughman Estate (Point of Beginning); thence, S 25-53-27 E, 10.05 feet to a point; thence, S 30-22-26 E, 493.09 feet to a point; thence, N 74-19-54 E, 177.71 feet to a point; thence, S 35-12-22 E, 214.38 feet to a point; thence, S 30-39-30 E 269.94 feet to a point; thence, S 74-26-25 W, 1173.49 feet to a point; thence, N 29-30-06 W, 981.37 feet to a point; thence along the southern right-of-way of Augusta Road (U.S. Highway No. 1) N 74-25-21 E, 77.29 feet to a point; thence, along said right-of-way N 74-26-38 E, 710.71 feet to a point; thence, along the said right-of-way N 73-20-23 E, 55.92 feet to a point; thence, along said right-of-way N 83-05-12 E, 6.70 feet to a point; thence, along said right-of-way N 76-21-32 E, 111.50 feet to Point of Beginning.

Being the same property conveyed to Grantor by deed of Dayton & Associates XVII dated July 15, 1988 and recorded in Deed Book 1147 at page 134, records of Lexington County, South Carolina.

Tax Map Parcel Number: 04669-01-002

ajk3/west/side/plaza/legal

BK3711PG305

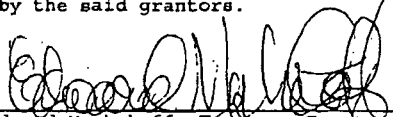
STATE OF NEW YORK)
) Affidavit
COUNTY OF NEW YORK)

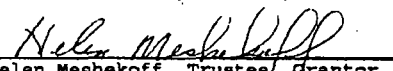
EDWARD MESHEKOFF REVOCABLE TRUST AND
HELEN MESHEKOFF REVOCABLE TRUST

TO

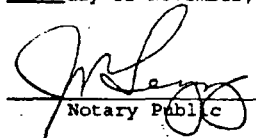
THE FOURM MESHEKOFF FAMILY LIMITED PARTNERSHIP

Personally appeared before me Edward and Helen Meshekoff being duly sworn say that the truthful and complete consideration of the above stated deed is Zero (0). This conveyance represents a mere change in the form of ownership by the said grantors.


Edward Meshekoff, Trustee, Grantor


Helen Meshekoff, Trustee, Grantor

Sworn to before me this
1st day of November, 1995.


Notary Public

JOSEPH P. LEUZZI
NOTARY PUBLIC, STATE OF NEW YORK
NO. 32-7563965
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1995

BK4045PG090

FILED

FILED IN THE COUNTY OF LEXINGTON

STATE OF NEW YORK
FEB 11 11 51 AM '97

AFFIDAVIT

COUNTY OF NEW YORK
DEBRA H GUNTER)
RMC

TO ALL WHOM THESE PRESENTS MAY COME:
LEXINGTON COUNTY

WHEREAS, The Fourm Meshekoff Family Limited Partnership (the "Partnership") is a Delaware limited partnership which owns interest in all that certain real property more fully described in Exhibit A attached hereto; and

FILED IN THE COUNTY OF LEXINGTON

WHEREAS, this Affidavit is being filed for record pursuant to SOUTH CAROLINA CODE OF LAWS § 33-42-300, as amended.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that the undersigned Partnership, being duly authorized and empowered, does cause this Affidavit to be executed on its behalf by the undersigned General Partner, who after being duly sworn, certifies as follows:

1. The name of the limited partnership which owns interest in that certain real property (the "Property") described in Exhibit A attached hereto is The Fourm Meshekoff Family Limited Partnership.
2. The Certificate of Limited Partnership of the Partnership, and all amendments thereto, have been filed for record in the Office of the South Carolina Secretary of State.
3. Helen Meshekoff, a General Partner of the Partnership, is authorized to sign all documents related to the Property on behalf of the Partnership, including (without limitation) all deeds, mortgages, assignments, security agreements, and other documents of lien, security, conveyance, or transfer.
4. All parties dealing with the Partnership shall be entitled to rely on the sole and exclusive authority of Helen Meshekoff to execute and deliver all documents related to the Property without further inquiry and the recording and indexing of this Affidavit in the Deed Book shall be conclusive evidence of such authority.

TO BE INDEXED IN BOTH GRANTOR AND GRANTEE
INDICES FOR DEEDS

05846

DEFENDANT'S
EXHIBIT

K

BK4045P6092

All that certain piece, parcel or lot of land with the improvements thereon, situate, lying and being in the State of South Carolina, County of Lexington, and in the City of West Columbia, and being shown and delineated on an ALTA/ACSM Class "A" Land Title Survey of Westside Plaza prepared by B.P. Barber & Associates, Inc., dated December 30, 1996, last revised February 3, 1997, recorded in the office of the RMC for Lexington County in Plat Slide ___, page __ (the failure to record said plat or to insert the recording data herein shall not affect the validity hereof); and having the following metes, bounds, courses and distances, to wit:

Beginning at a concrete monument on the southern right-of-way of Augusta Road - US Highway No. 1, being 215'± west of the centerline of Dreher Road (Road S-32-275), which is the POINT OF BEGINNING. From the POINT OF BEGINNING, thence turn and run S 18°57'59" E for a distance of 10.05' along property now or formerly of Edens KW Dreher Partners - 89 to a concrete monument found; thence run S 23°15'00" E for a distance of 492.86' along property now or formerly of Edens KW Dreher Partners - 89 to a 1" pipe; thence turn and run N 81°32'31" E along property now or formerly of Edens KW Dreher Partners - 89 for a distance of 177.41' to a ½" rebar; thence turn and run along the western right-of-way of Dreher Road S 27°53'23" E for a distance of 215.42' to a ¾" rebar; thence continue S 23°37'43" E along the western right-of-way of Dreher Road for a distance of 268.89' to a ½" rebar; thence turn and run S 81°32'05" W along property now or formerly of Dreher Family Limited Partnership and property now or formerly of South Carolina Real Estate Development Company, Inc. for a distance of 1,171.81' to a ½" rebar; thence turn and run N 22°25'52" W along property now or formerly of South Carolina Real Estate Development Company, Inc. for a distance of 981.76' to a ½" rebar; thence turn and run N 81°30'52" E along the southern right-of-way of Augusta Road - US Highway No. 1 for a distance of 77.29' to a mag nail set; thence continue N 81°32'09" E along the southern right-of-way of Augusta Road - US Highway No. 1 for a distance of 710.71' to a mag nail set; thence run N 80°25'54" E along the southern right-of-way of Augusta Road - US Highway No. 1 for a distance of 55.92' to a mag nail set; thence run N 88°38'14" E along the southern right-of-way of Augusta Road - US Highway No. 1 for a distance of 6.5' to a ½" rebar; thence turn and run N 83°32'8" E along the southern right-of-way of Augusta Road - US Highway No. 1 for a distance of 111.48' to a concrete monument found, which is the POINT OF BEGINNING; be all measurements a little more or less.

TMS: 004669-01-003 and 004669-01-002

Derivation: Deed of Edward Meshekoff Revocable Trust, Edward Meshekoff, Trustee and Helen Meshekoff Revocable Trust, Helen Meshekoff, Trustee to The Fourm Meshekoff Family Limited Partnership dated November 1, 1995, recorded April 29, 1996 in Book 3711, page 302.

1763.001\descrip..

Exhibit A

BK4045PG093

FILED

FILED IN THE COUNTY OF LEXINGTON

STATE OF NEW YORK FEB 11 11 52 AM '97

AFFIDAVIT

COUNTY OF NEW YORK DEBRA H GUNTER

RMC

LEXINGTON COUNTY

TO ALL WHOM THESE PRESENTS MAY COME:

WHEREAS, Westside Meshekoff Family Limited Partnership (the "Partnership") is a Delaware limited partnership which owns interest in all that certain real property more fully described in Exhibit A attached hereto; and

FILED IN THE COUNTY OF LEXINGTON

WHEREAS, this Affidavit is being filed for record pursuant to SOUTH CAROLINA CODE OF LAWS § 33-42-300, as amended.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that the undersigned Partnership, being duly authorized and empowered, does cause this Affidavit to be executed on its behalf by the undersigned General Partner, who after being duly sworn, certifies as follows:

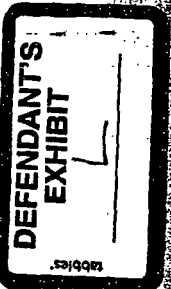
5. The name of the limited partnership which owns interest in that certain real property (the "Property") described in Exhibit A attached hereto is Westside Meshekoff Family Limited Partnership.
6. The Certificate of Limited Partnership of the Partnership, and all amendments thereto, have been filed for record in the Office of the South Carolina Secretary of State.
7. Helen Meshekoff, a General Partner of the Partnership, is authorized to sign all documents related to the Property on behalf of the Partnership, including (without limitation) all deeds, mortgages, assignments, security agreements, and other documents of lien, security, conveyance, or transfer.
8. All parties dealing with the Partnership shall be entitled to rely on the sole and exclusive authority of Helen Meshekoff to execute and deliver all documents related to the Property without further inquiry and the recording and indexing of this Affidavit in the Deed Book shall be conclusive evidence of such authority.

TO BE INDEXED IN BOTH GRANTOR AND GRANTEE
INDICES FOR DEEDS

D:\map\deed

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BK4045PG094

EXECUTED to be effective as of the 5th day of February, 1997.

PARTNERSHIP:
Westside Meshekoff Family Limited
Partnership, a Delaware limited
partnership

By Its General Partner

WITNESSES:

Robert A. Clark
[Signature]

Helene Meshekoff
Its: General Partner

STATE OF NEW YORK)
COUNTY OF NEW YORK)

PROBATE

Personally appeared before me the undersigned witness
and made oath that s/he saw the within named Westside Meshekoff
Family Limited Partnership, by its General Partner, Helene Meshekoff
[Signature], sign, seal and, as its act and
deed, deliver the foregoing Affidavit and that s/he, together
with the other witness, witnessed the execution thereof.

Robert A. Clark

SWORN TO and subscribed before me
this 5th day of FEBRUARY, 1997

Malcolm G. [Signature] (SEAL)
Notary Public for New York
My Commission Expires:

MA MALCOLM G. [Signature]
Notary Public, State of New York
No. 0510325
Qualified in Westchester County
Commission Expires January 31, 1998

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AFFIDAVIT

FILED

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON FEB 11 12 57 PM '97 DEED

DEBRA H GUNTER
KNOW ALL MEN BY THESE PRESENTS, that THE FOURM MESHEKOFF
FAMILY LIMITED PARTNERSHIP, a Delaware Limited Partnership
("Grantor"), in the State aforesaid, for and in consideration of
the sum of FIVE (\$5.00) DOLLARS AND OTHER VALUABLE CONSIDERATION
paid by WESTSIDE MESHEKOFF FAMILY LIMITED PARTNERSHIP, a Delaware
Limited Partnership ("Grantee"), the receipt of which is hereby
acknowledged, has granted, bargained, sold, and released, and by
these Presents does grant, bargain, sell, and release unto:

WESTSIDE MESHEKOFF FAMILY LIMITED PARTNERSHIP,

its successors and assigns:

DOCUMENTARY TAX
STATE EXEMPT

the following described property, to wit:

FEB 11 1997

SEE ATTACHED EXHIBIT A

COUNTY EXEMPT

This being the property conveyed to The Fourm Meshekoff
Family Limited Partnership by deed of Edward Meshekoff Revocable
Trust and Helen Meshekoff Revocable Trust, dated November 1, 1995
and recorded in the Office of the RMC for Lexington County in
Deed Book 3711 at page 302.

GRANTEE'S ADDRESS: 190 East 72nd Street
New York, NY 10021

This conveyance is made subject to easements and restric-
tions of record and otherwise affecting the property.

TOGETHER with all and singular the Rights, Members,
Hereditaments and Appurtenances to the said Premises belonging
or in any wise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said Premises
before mentioned unto the said Grantee, Grantee's successors and
assigns forever.

And the said Grantor does hereby bind itself and its
successors and assigns to warrant and forever defend all and
singular the said Premises unto the said Grantee, Grantee's
successors and assigns, against Grantor and Grantor's

05848



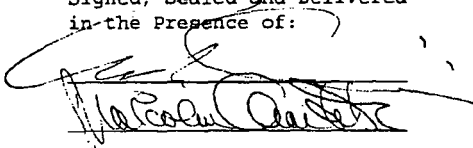
BK4045PG097

successors and against every person whomsoever lawfully claiming,
or to claim the same, or any part thereof.

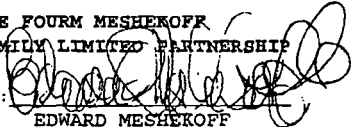
IN WITNESS WHEREOF, the Grantor has executed this Deed.

DATED: January 31, 1997

Signed, Sealed and Delivered
in the Presence of:



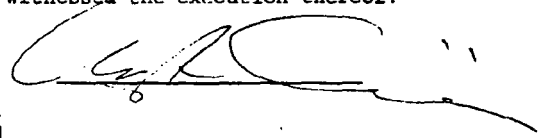
THE FOURM MESHEKOFF
FAMILY LIMITED PARTNERSHIP

BY: 
EDWARD MESHEKOFF

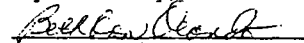
ITS: GENERAL PARTNER

STATE OF NEW YORK
COUNTY OF NEW YORK

PERSONALLY APPEARED before me the undersigned witness and
made oath that (s)he saw the within-named THE FOURM MESHEKOFF
FAMILY LIMITED PARTNERSHIP, by its General Partner, EDWARD
MESHEKOFF, as Grantor, sign, seal and, as Grantor's act and deed,
deliver the within Deed, and that (s)he with the other witness
whose signature appears above, witnessed the execution thereof.



Sworn to before me this 31st
day of January, 1997


Notary Public for New York
My Commission Expires:

BETH ANN OCANDO
Notary Public, State of New York
No. 3D-4882117
Qualified in Nassau County
Commission Expires April 30, 1998

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EXHIBIT A

Property Description

All that certain piece, parcel or tract of land, situate, lying and being in West Columbia, in Lexington County, South Carolina, containing 23.206 acres and shown on plat of West Side Plaza prepared by Ayer, Graham and Associates, Inc., dated March 18, 1988, revised July 11, 1988 recorded in Plat Book 226, at Page 64, records of Lexington County, reference to which plat is hereby made for a more complete and accurate description. Said property is bounded and measures as follows: Beginning at a point on the southern right-of-way of Augusta Road (U.S. Highway No. 1) 215 feet in a generally westerly direction from the center line of Dreher Road at the northwestern corner of property owned now or formerly by the Frank Caughman Estate (Point of Beginning); thence S 25-53-27 E, 10.05 feet to a point; thence S 30-22-26 E, 493.09 feet to a point; thence N 74-19-54 E, 177.71 feet to a point; thence S 35-12-22 E, 214.38 feet to a point; thence S 30-19-30 E, 269.94 feet to a point; thence S 74-26-25 W, 1171.49 feet to a point; thence N 29-30-06 W, 981.37 feet to a point; thence along the southern right-of-way of Augusta Road (U.S. Highway No. 1) N 74-25-21 E, 77.29 feet to a point; thence along said right-of-way N 74-26-38 E, 710.71 feet to a point; thence along the said right-of-way N 73-20-23 E, 55.92 feet to a point; thence along said right-of-way N 83-05-12 E, 6.70 feet to a point; thence along said right-of-way N 76-21-32 E, 111.50 feet to Point of Beginning.

TMS: 004669-01-002 and 004669-01-003

BK4048PG272

FILED IN THE COUNTY OF LEXINGTON

STATE OF NEW YORK

COUNTY OF NEW YORK

AFFIDAVIT

FILED
Feb 10 4 05 PM '97

TO ALL WHOM THESE PRESENTS MAY COME:

DEBRA H GUNTER

WHEREAS, The Fourth Meshekoff Family Limited Partnership (the "Partnership") is a Delaware limited partnership which owns interest in all that certain real property more fully described in Exhibit A attached hereto; and

WHEREAS, this Affidavit is being filed for record pursuant to SOUTH CAROLINA CODE OF LAWS § 33-42-300, as amended.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that the undersigned Partnership, being duly authorized and empowered, does cause this Affidavit to be executed on its behalf by the undersigned General Partner, who after being duly sworn, certifies as follows:

1. The name of the limited partnership which owns interest in that certain real property (the "Property") described in Exhibit A attached hereto is The Fourth Meshekoff Family Limited Partnership.
2. The Certificate of Limited Partnership of the Partnership, and all amendments thereto, have been filed for record in the Office of the South Carolina Secretary of State.
3. Edward Meshekoff and Helen Meshekoff, or any one of them, General Partners of the Partnership, are authorized to sign all documents related to the Property on behalf of the Partnership, including (without limitation) all deeds, mortgages, assignments, security agreements, and other documents of lien, security, conveyance, or transfer.
4. All parties dealing with the Partnership shall be entitled to rely on the sole and exclusive authority of Edward Meshekoff and Helen Meshekoff, or any one of them, to execute and deliver all documents related to the Property without further inquiry and the recording and indexing of this Affidavit in the Deed Book shall be conclusive evidence of such authority.

TO BE INDEXED IN BOTH GRANTOR AND GRANTEE
INDICES FOR DEEDS

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DEFENDANT'S
EXHIBIT

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5. The deed of conveyance from The Fourm Meshekoff Family Limited Partnership, a Delaware limited partnership, to Westside Meshekoff Family Limited Partnership, a Delaware limited partnership, dated January 31, 1997 and recorded February 11, 1997 in the Office of the RMC for Lexington County is hereby ratified as the act and the deed of the partnership.

EXECUTED to be effective as of the 10th day of FEBRUARY, 1997.

PARTNERSHIP:
The Fourm Meshekoff Family Limited Partnership, a Delaware limited partnership

By Its General Partner

WITNESSES:

[Signature]
J. Vartana
[Signature]
J. Vartana

[Signature]
Edward Meshekoff
Its: General Partner

[Signature]
Helen Meshekoff
Its: General Partner

STATE OF NEW YORK
COUNTY OF NEW YORK

PROBATE

Personally appeared before me the undersigned witness and made oath that s/he saw the within named The Fourm Meshekoff Family Limited Partnership, by its General Partners, Edward Meshekoff and Helen Meshekoff, sign, seal and, as its act and deed, deliver the foregoing Affidavit and that s/he, together with the other witness, witnessed the execution thereof.

[Signature]
SWORN TO and subscribed before me
this 10th day of FEBRUARY, 1997

[Signature]
Notary Public for New York
My Commission Expires:

1763.001\ltdptnr.aff

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MALCOLM CHAFETZ
Notary Public, State of New York
No. 0610425
Qualified in Westchester County
Commission Expires January 31, 1998

FEB 13 '97 03:52PM CALLISON TIGHE

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All that certain piece, parcel or lot of land with the improvements thereon, situate, lying and being in the State of South Carolina, County of Lexington, and in the City of West Columbia, and being shown and delineated on an ALTA/ACSM Class "A" Land Title Survey of Westside Plaza prepared by B.P. Barber & Associates, Inc., dated December 30, 1996, last revised February 3, 1997, recorded in the office of the RMC for Lexington County in Plat Slide _____, page _____ (the failure to record said plat or to insert the recording data herein shall not affect the validity hereof); and having the following metes, bounds, courses and distances, to wit:

Beginning at a concrete monument on the southern right-of-way of Augusta Road - US Highway No. 1, being 215'± west of the centerline of Dreher Road (Road S-32-275), which is the POINT OF BEGINNING. From the POINT OF BEGINNING, thence turn and run S 18°57'59" E for a distance of 10.05' along property now or formerly of Edens KW Dreher Partners - 89 to a concrete monument found; thence run S 23°15'00" E for a distance of 492.86' along property now or formerly of Edens KW Dreher Partners - 89 to a 1" pipe; thence turn and run N 81°32'31" E along property now or formerly of Edens KW Dreher Partners - 89 for a distance of 177.41' to a ½" rebar; thence turn and run along the western right-of-way of Dreher Road S 27°53'23" E for a distance of 215.42' to a ¾" rebar; thence continue S 23°37'43" E along the western right-of-way of Dreher Road for a distance of 268.89' to a ½" rebar; thence turn and run S 81°32'05" W along property now or formerly of Dreher Family Limited Partnership and property now or formerly of South Carolina Real Estate Development Company, Inc. for a distance of 1,171.81' to a ½" rebar; thence turn and run N 22°25'52" W along property now or formerly of South Carolina Real Estate Development Company, Inc. for a distance of 981.76' to a ½" rebar; thence turn and run N 81°30'52" E along the southern right-of-way of Augusta Road - US Highway No. 1 for a distance of 77.29' to a mag nail set; thence continue N 81°32'09" E along the southern right-of-way of Augusta Road - US Highway No. 1 for a distance of 710.71' to a mag nail set; thence run N 80°25'54" E along the southern right-of-way of Augusta Road - US Highway No. 1 for a distance of 55.92' to a mag nail set; thence run N 88°38'14" E along the southern right-of-way of Augusta Road - US Highway No. 1 for a distance of 6.5' to a ½" rebar; thence turn and run N 83°32'8" E along the southern right-of-way of Augusta Road - US Highway No. 1 for a distance of 111.48' to a concrete monument found, which is the POINT OF BEGINNING; be all measurements a little more or less.

TMS: 004669-01-003 and 004669-01-002

Derivation: Deed of Edward Meshekoff Revocable Trust, Edward Meshekoff, Trustee and Helen Meshekoff Revocable Trust, Helen Meshekoff, Trustee to The Fourm Meshekoff Family Limited Partnership dated November 1, 1995, recorded April 29, 1996 in Book 3711, page 302.

1763.001\descrip.

Exhibit A

BK4048PG275

FILED IN THE COUNTY OF LEXINGTON

STATE OF NEW YORK)
COUNTY OF NEW YORK)

AFFIDAVIT FILED

10 10 4 06 PM '97

TO ALL WHOM THESE PRESENTS MAY COME:

WHEREAS, Westside Meshekoff Family Limited Partnership (the "Partnership") is a Delaware limited partnership which owns interest in all that certain real property more fully described in Exhibit A attached hereto; and

WHEREAS, this Affidavit is being filed for record pursuant to SOUTH CAROLINA CODE OF LAWS § 33-42-300, as amended.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that the undersigned Partnership, being duly authorized and empowered, does cause this Affidavit to be executed on its behalf by the undersigned General Partner, who after being duly sworn, certifies as follows:

1. The name of the limited partnership which owns interest in that certain real property (the "Property") described in Exhibit A attached hereto is Westside Meshekoff Family Limited Partnership.
2. The Certificate of Limited Partnership of the Partnership, and all amendments thereto, have been filed for record in the Office of the South Carolina Secretary of State.
3. Edward Meshekoff and Helen Meshekoff, or any one of them, General Partners of the Partnership, are authorized to sign all documents related to the Property on behalf of the Partnership, including (without limitation) all deeds, mortgages, assignments, security agreements, and other documents of lien, security, conveyance, or transfer.
4. All parties dealing with the Partnership shall be entitled to rely on the sole and exclusive authority of Edward Meshekoff and Helen Meshekoff, or any one of them, to execute and deliver all documents related to the Property without further inquiry and the recording and indexing of this Affidavit in the Deed Book shall be conclusive evidence of such authority.

TO BE INDEXED IN BOTH GRANTOR AND GRANTEE
INDICES FOR DEEDS

Dimap/deed

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DEFENDANT'S
EXHIBIT

BK4048PG276

EXECUTED to be effective as of the 10 day of February, 1997.

PARTNERSHIP:
Westside Meshehoff Family Limited
Partnership, a Delaware limited
partnership

By its General Partner

Edward Meshehoff
Its: General Partner

Helen Meshehoff
Helen Meshehoff
Its: General Partner

STATE OF NEW YORK
COUNTY OF NEW YORK

PROBATE

Personally appeared before me the undersigned witness and made oath that s/he saw the within named Westside Meshehoff Family Limited Partnership, by its General Partners, Edward Meshehoff and Helen Meshehoff, sign, seal and, as its act and deed, deliver the foregoing Affidavit and that s/he, together with the other witness, witnessed the execution thereof.

SWORN TO and subscribed before me
this 10 day of February, 1997

Notary Public for New York
My Commission Expires:

MALCOLM CHAIFETZ
Notary Public, State of New York
No. 0610425
Qualified in Westchester County
Commission Expires January 31, 1998

Disp/Deed

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BK4048PG277

All that certain piece, parcel or lot of land with the improvements thereon, situate, lying and being in the State of South Carolina, County of Lexington, and in the City of West Columbia, and being shown and delineated on an ALTA/ACSM Class "A" Land Title Survey of Westside Plaza prepared by B.P. Barber & Associates, Inc., dated December 30, 1996, last revised February 3, 1997, recorded in the office of the RMC for Lexington County in Plat Slide _____, page _____ (the failure to record said plat or to insert the recording data herein shall not affect the validity hereof); and having the following metes, bounds, courses and distances, to wit:

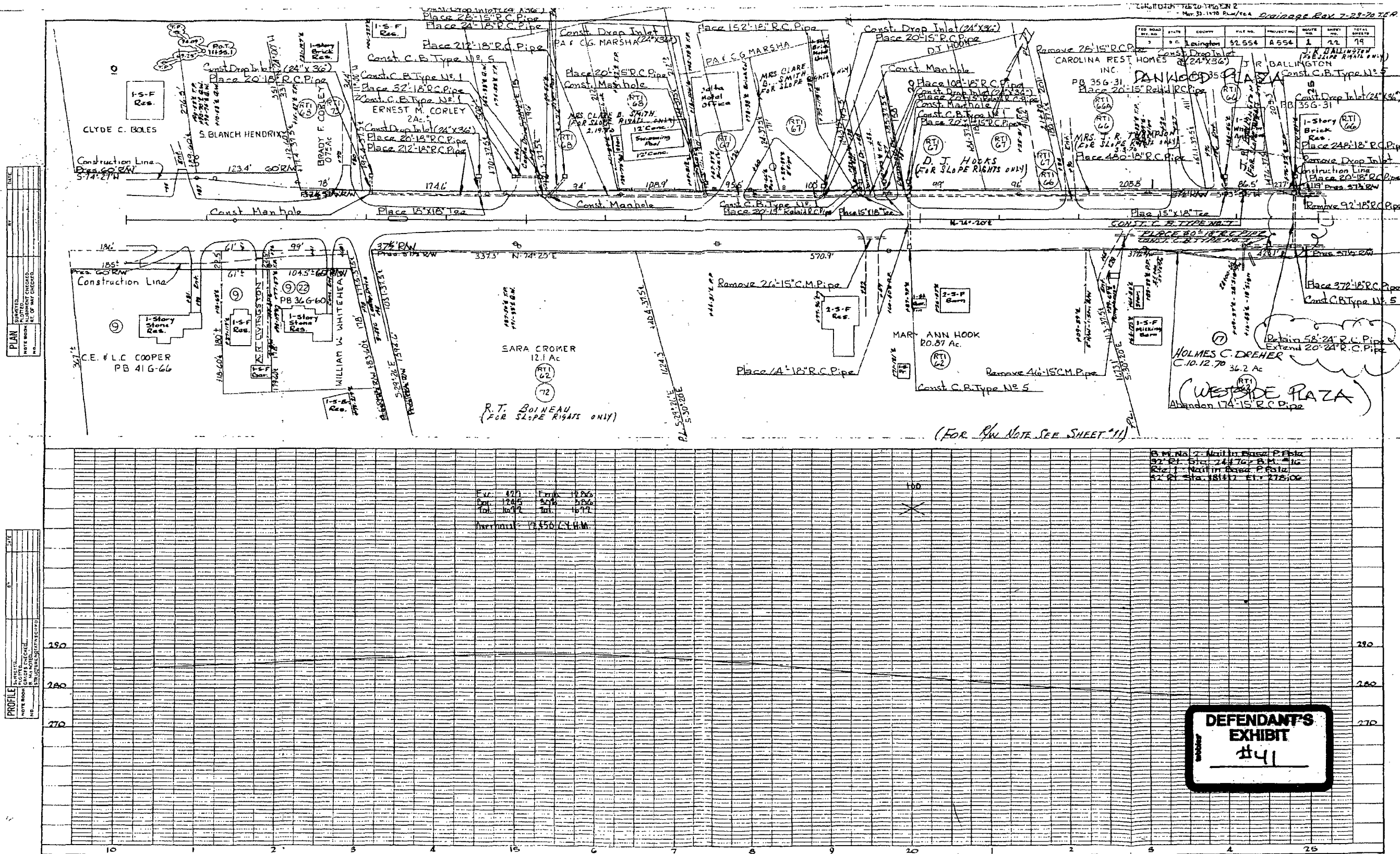
Beginning at a concrete monument on the southern right-of-way of Augusta Road - US Highway No. 1, being 215.1' west of the centerline of Dreher Road (Road S-32-275), which is the POINT OF BEGINNING; From the POINT OF BEGINNING, thence turn and run S 18°57'59" E for a distance of 10.05' along property now or formerly of Edens KW Dreher Partners - 89 to a concrete monument found; thence run S 23°15'00" E for a distance of 492.86' along property now or formerly of Edens KW Dreher Partners - 89 to a 1" pipe; thence turn and run N 81°32'31" E along property now or formerly of Edens KW Dreher Partners - 89 for a distance of 177.41' to a 1/2" rebar; thence turn and run along the western right-of-way of Dreher Road S 27°53'23" E for a distance of 215.42' to a 3/4" rebar; thence continue S 23°37'43" E along the western right-of-way of Dreher Road for a distance of 268.89' to a 1/2" rebar; thence turn and run S 81°32'05" W along property now or formerly of Dreher Family Limited Partnership and property now or formerly of South Carolina Real Estate Development Company, Inc. for a distance of 1,171.81' to a 1/2" rebar; thence turn and run N 22°25'52" W along property now or formerly of South Carolina Real Estate Development Company, Inc. for a distance of 981.76' to a 1/2" rebar; thence turn and run N 81°30'52" E along the southern right-of-way of Augusta Road - US Highway No. 1 for a distance of 77.29' to a mag nail set; thence continue N 81°32'09" E along the southern right-of-way of Augusta Road - US Highway No. 1 for a distance of 710.71' to a mag nail set; thence run N 80°25'54" E along the southern right-of-way of Augusta Road - US Highway No. 1 for a distance of 55.92' to a mag nail set; thence run N 88°38'14" E along the southern right-of-way of Augusta Road - US Highway No. 1 for a distance of 6.5' to a 1/2" rebar; thence turn and run N 83°12'8" E along the southern right-of-way of Augusta Road - US Highway No. 1 for a distance of 111.48' to a concrete monument found, which is the POINT OF BEGINNING; be all measurements a little more or less.

TMS: 004669-01-003 and 004669-01-002

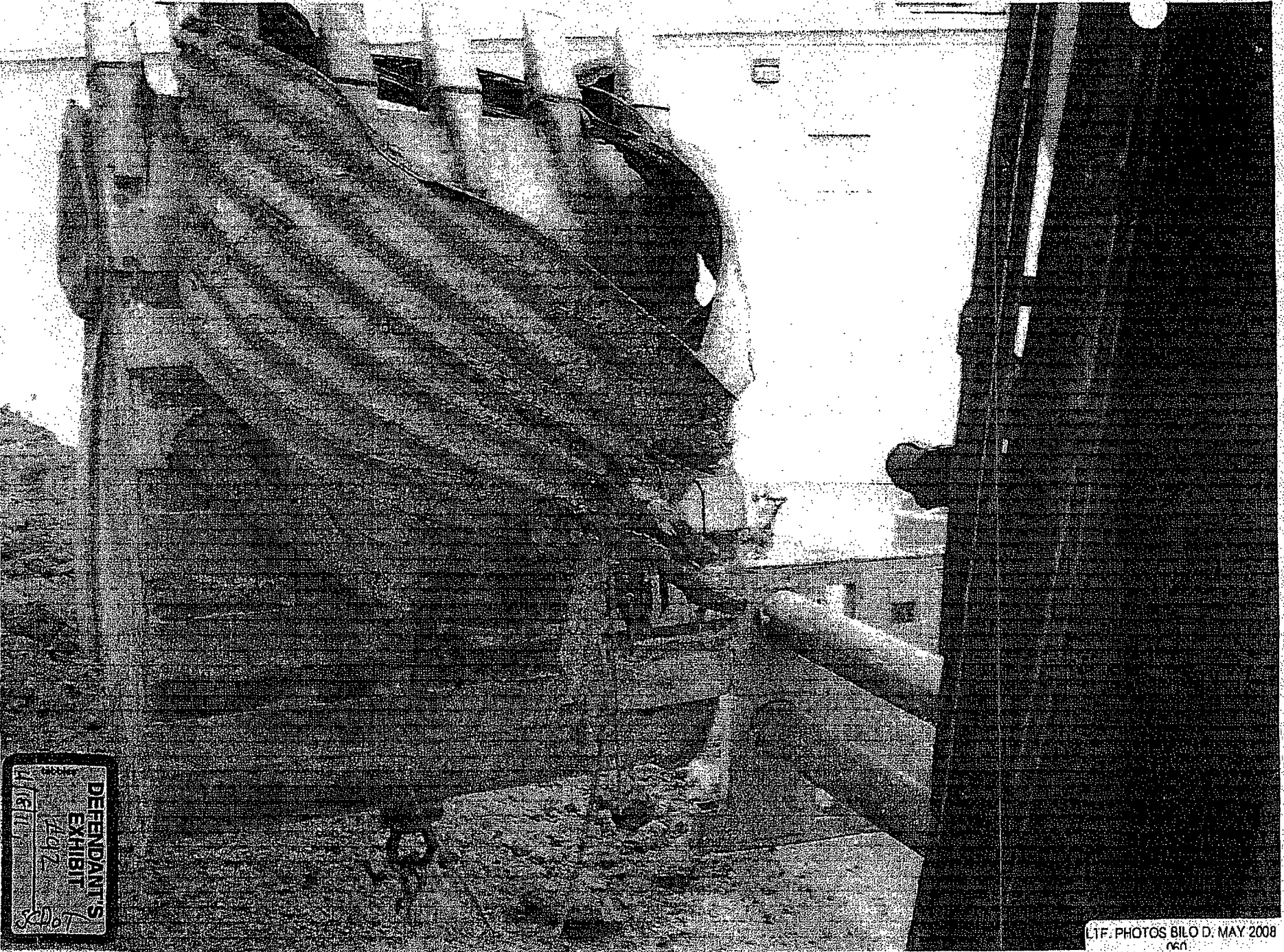
Derivation: Deed of Edward Meshekoff Revocable Trust, Edward Meshekoff, Trustee and Helen Meshekoff Revocable Trust, Helen Meshekoff, Trustee to The Fourm Meshekoff Family Limited Partnership dated November 1, 1995, recorded April 29, 1996 in Book 3711, page 302.

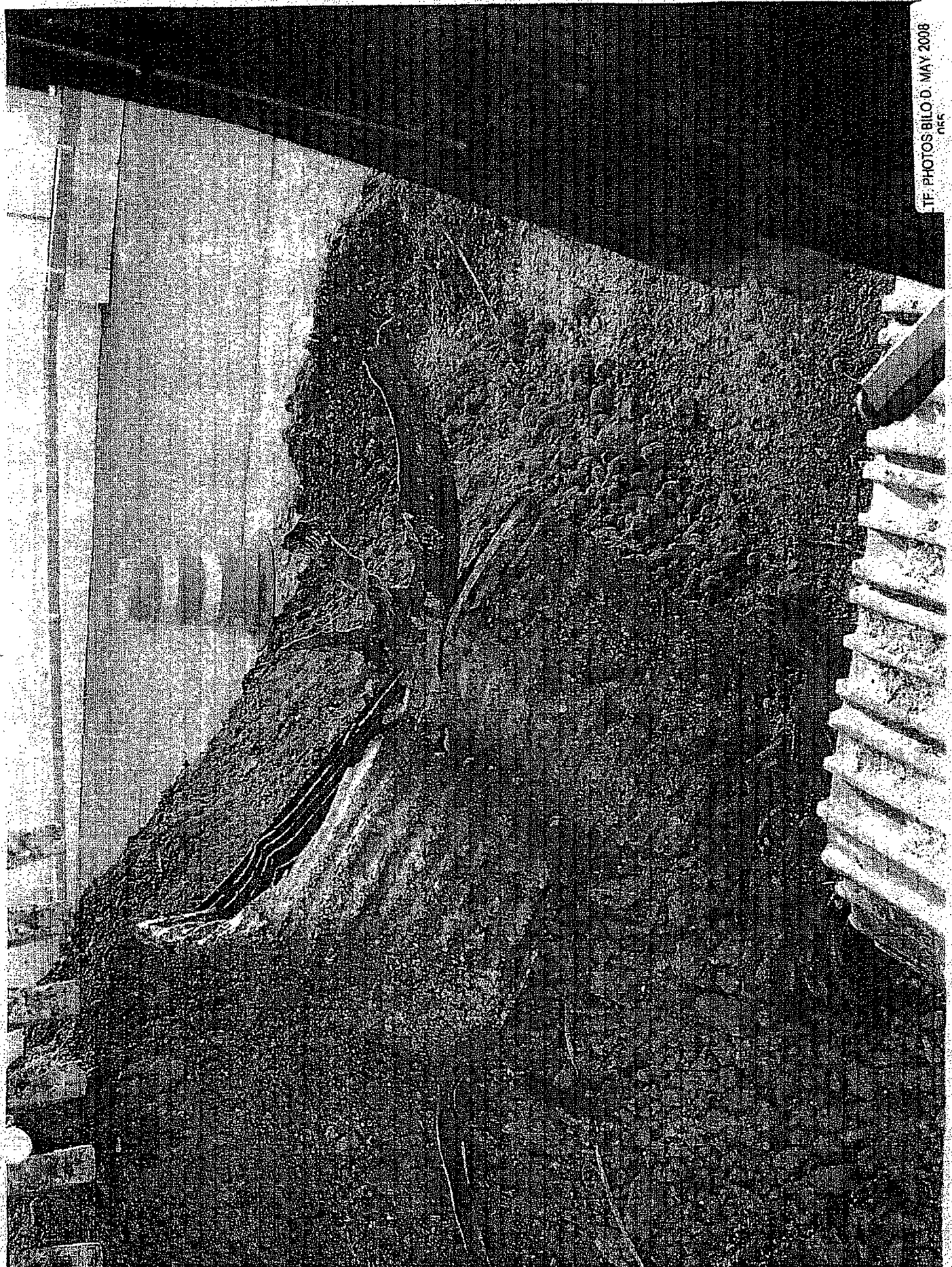
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Exhibit A



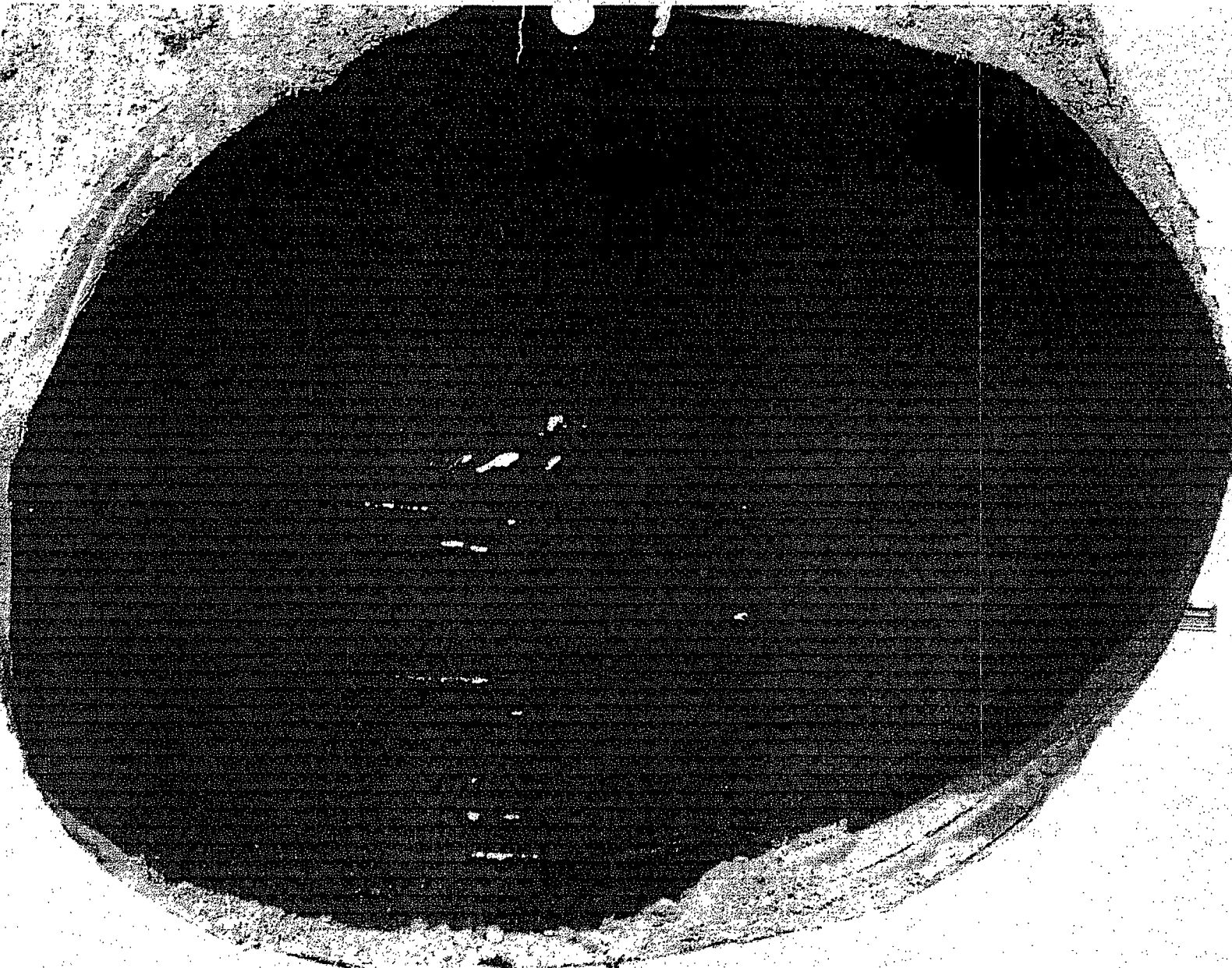




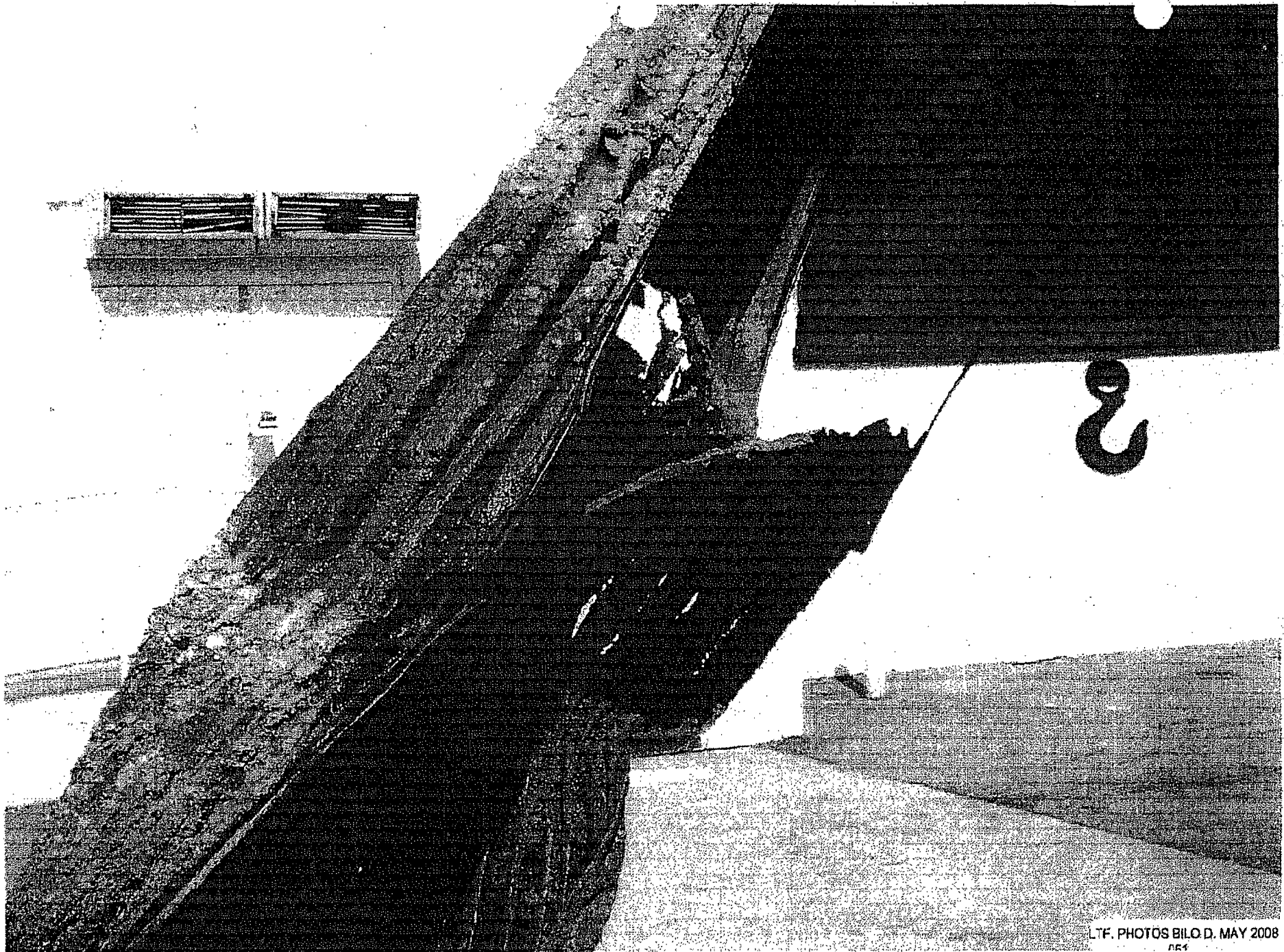


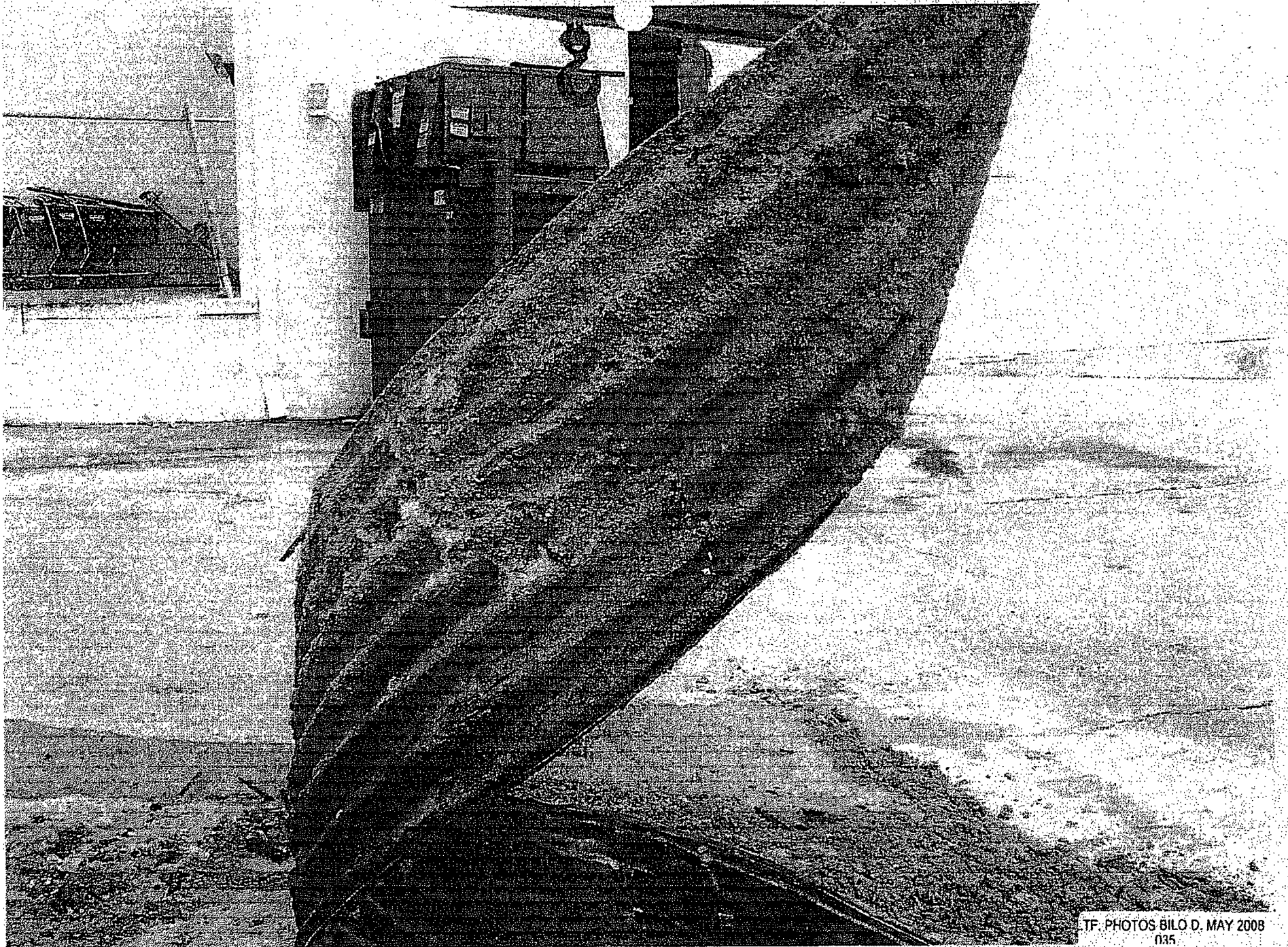
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TF. PHOTOS BILO D. MAY 2008
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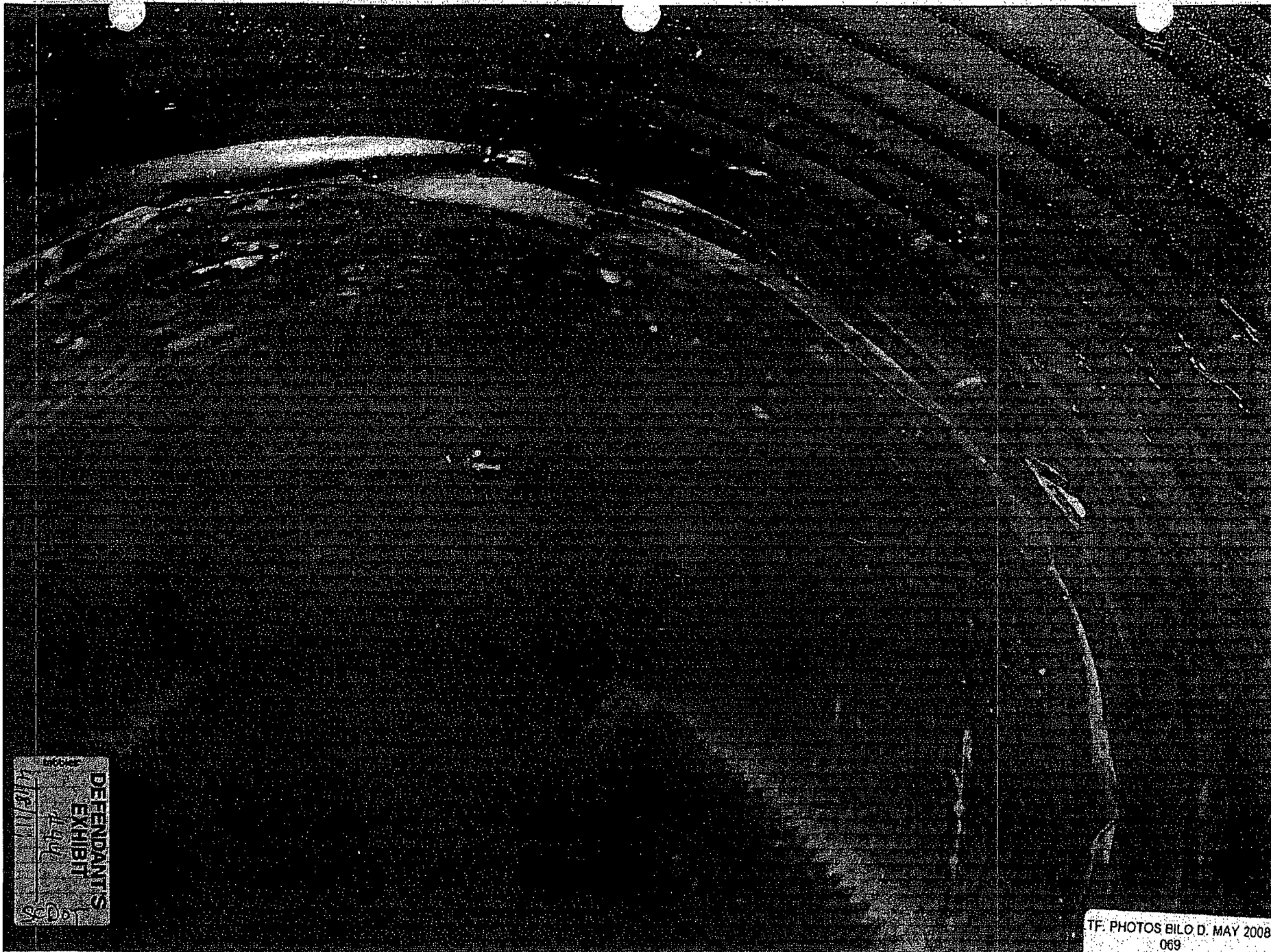






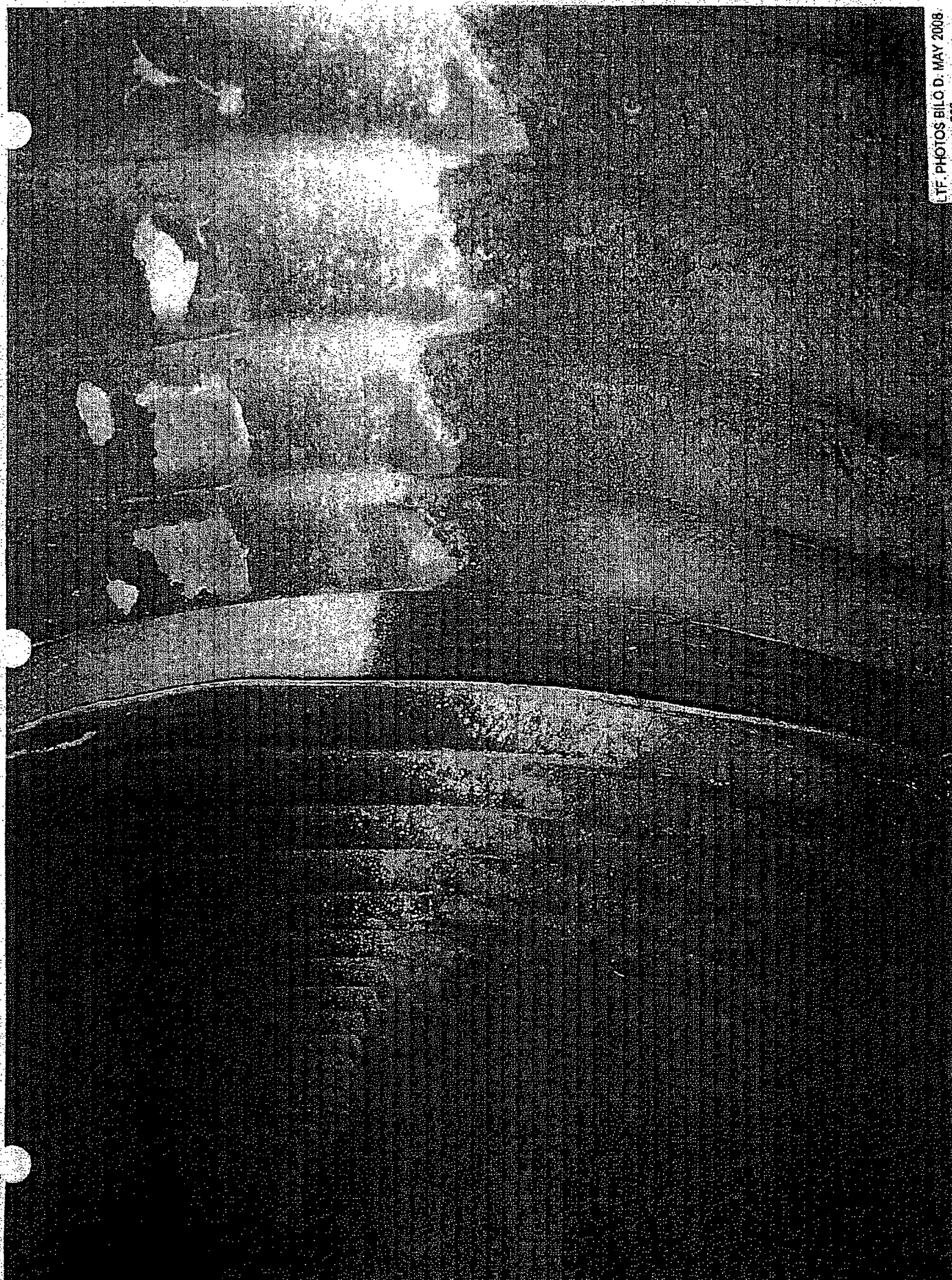
DEFENDANT'S
EXHIBIT
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4/18/11

TF PHOTOS BILO D. MAY 2008
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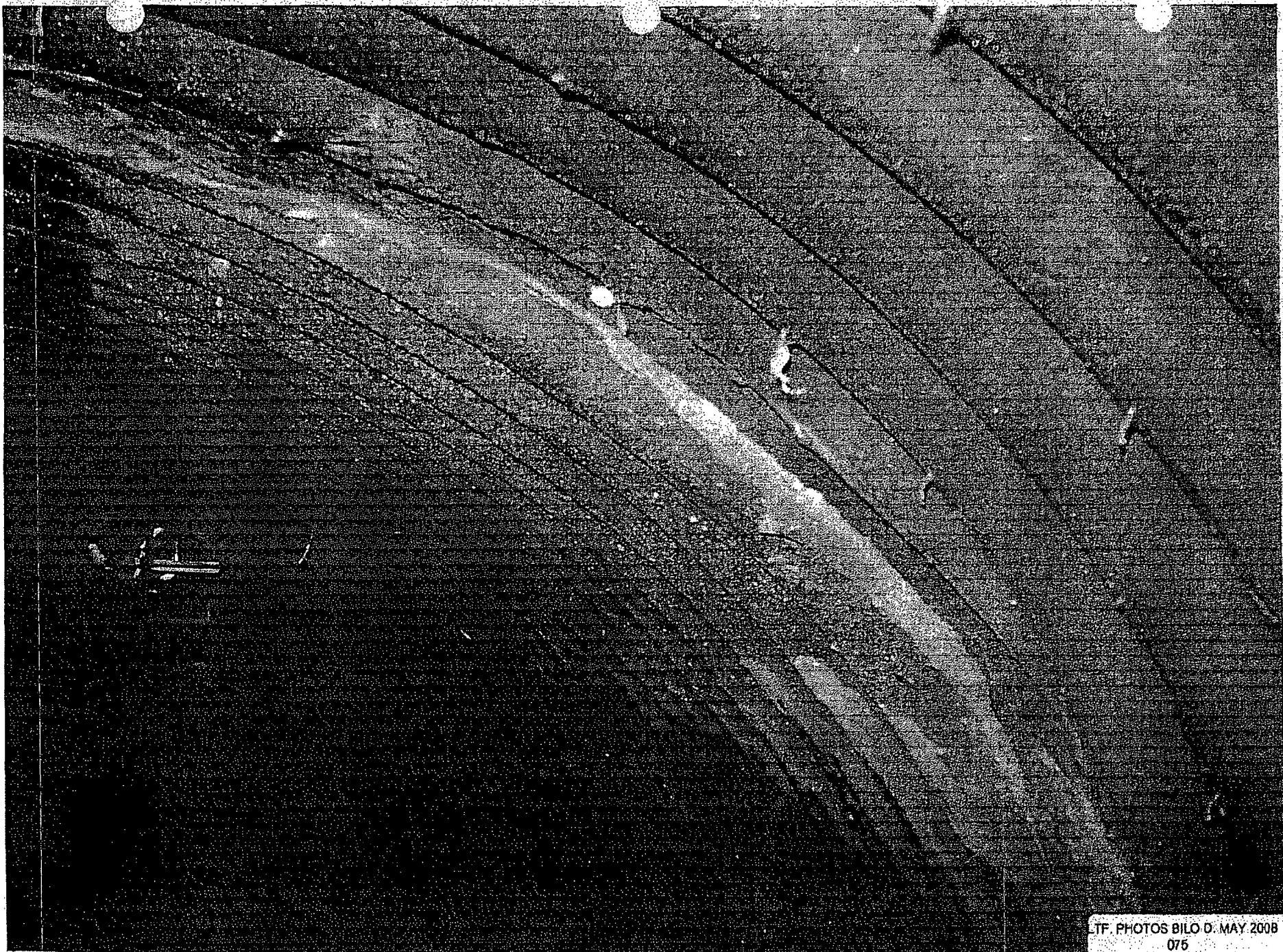


DEFENDANT'S
EXHIBIT
440
1/21/08

TF. PHOTOS BILO D. MAY 2008
069



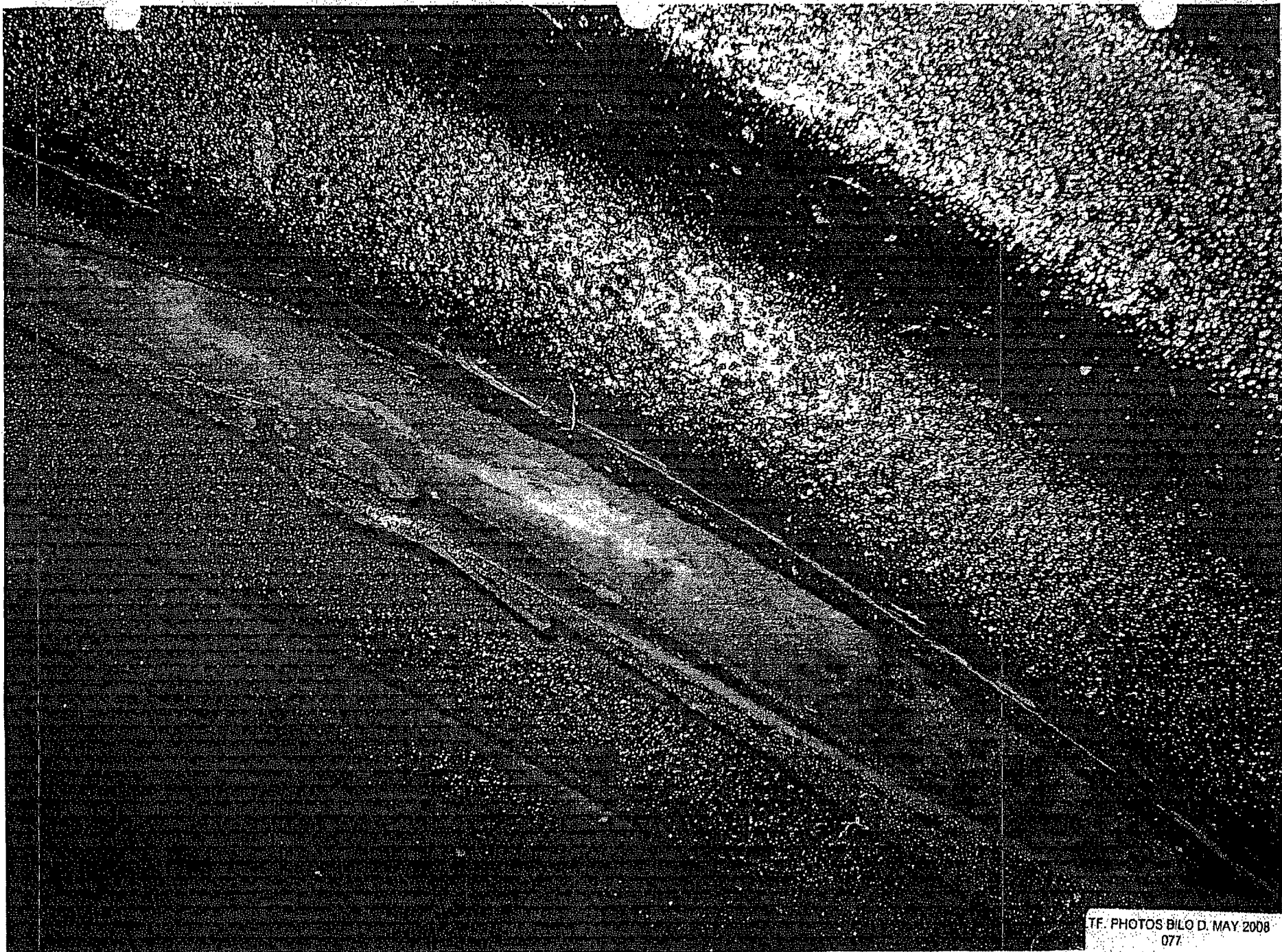
LTf. PHOTOS BLO D. MAY 2008.
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TF. PHOTOS BILO D. MAY 2008
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LTF: PHOTOS BILO D. MAY 2008
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TF. PHOTOS BILO D. MAY. 2008
077

Exhibit 83 is oversized and pursuant to Rule 210(f) the respondent will be filing it separately.

Exhibit 85 is oversized and pursuant to Rule 210(f) the respondent will be filing it separately.

STATE OF SOUTH CAROLINA **FILED**

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

COUNTY OF LEXINGTON

2011 JUL -1 P 12:53

Westside Meshekoff Family Limited
Partnership,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Civil Action No.: 2008-CP-32-04362

Plaintiff,

vs.

**PLAINTIFF WESTSIDE MESHEKOFF
FAMILY LIMITED PARTNERSHIP'S
RULE 59(e) MOTION**

South Carolina Department of
Transportation, APAM, Inc., Kimbrell's
Investment Company, Inc., R1 CS2, LLC,
DW Properties, LLC, Danwood, LLC,
Boom, Inc., Robert W. Denton, and
Alpine of S.C., Inc.,

Defendants.

TO: PATRICK J. FRAWLEY, Attorney for the South Carolina Department of Transportation ("DOT"), and MICHELLE P. CLAYTON, Attorney for Danwood LLC ("Danwood"):

PLEASE TAKE NOTICE that the Plaintiff, Westside Meshekoff Family Limited Partnership ("Westside"), through its undersigned attorneys, will move before the Honorable R. Knox McMahon, Presiding Judge for the Eleventh Judicial Circuit, in the Lexington County Courthouse, at 10:00 a.m. on the tenth day after service hereof, or at such other time and place as is convenient to the Court and counsel, as follows:

That the Plaintiff be granted reconsideration, alteration or amendment of the Judgment and Order entered on June 14, 2011, mailed on June 24, 2011, and received on June 25, 2011, on the following grounds:

I. The Encroachment Permit created the easement in 1987 and does not govern the parties' duties of maintenance and repair

1. That the Court erred in finding that the encroachment permit governed the maintenance and repair of the easement to discharge storm water on the Westside property, the error being the encroachment permit did not govern maintenance of Line E, which was not an encroachment as it was located off of the DOT right of way.

2. That the Court erred in finding that the encroachment permit governed the maintenance and repair of the easement to discharge storm water on the Westside property, the error being that there is no evidence that any repairs were made on the DOT right of way, the

evidence was that all repairs were made on the property of Westside.

3. That the Court erred in finding that the encroachment permit governed the maintenance and repair of the easement to discharge storm water on the Westside property, the error being that there is no evidence to support the Court's erroneous finding that the Plaintiff and DOT agreed that an easement existed prior to 1987 that allowed DOT to release storm water run-off from its catch basin onto the undeveloped property of Holmes Dreher, which later became Plaintiff's property. In fact, Plaintiff's position prior to, during, and after trial was that DOT had not established an easement by prescription by 1987, and that DOT never produced evidence of an easement by permit prior to the 1987 encroachment permit.

4. That the Court erred in finding that the encroachment permit governed the maintenance and repair of the easement to discharge storm water on the Westside property, the error being that there is no evidence of existence or terms of a prior easement, either by prescription or permit, before the encroachment permit in 1987.

5. That the Court erred in finding that the encroachment permit governed the Maintenance and repair of the easement to discharge storm water on the Westside property, the error being that there is no evidence to support the Court's erroneous finding that the Plaintiff and DOT agreed that an easement existed prior to 1987 that allowed DOT to release storm water run-off from its catch basin onto the undeveloped property of Holmes Dreher, which later became Plaintiff's property, as there is no evidence of an easement by prescription, as the only evidence was that the DOT's use started in 1970, which was less than 20 years prior to 1987.

6. That the Court erred in finding that the encroachment permit governed the maintenance and repair of the easement to discharge storm water on the Westside property, the error being that the encroachment permit only covered indemnification of the DOT for certain events within the DOT right of way and the DOT testified it was not making any claims under the indemnity provision

II. Right to Equitable Apportionment of Maintenance and Repair Costs is based on use by easement holder, not fault or causation.

7. That the Court erred in imposing proof requirements on the Plaintiff beyond those required by established South Carolina easement law as set forth in *Hayes v. Tomkins*, the error being that the Court required that Plaintiff prove the Defendants' rate of flow of storm water was a causal factor in the need to repair Line "E",

8. That the Court erred in instituting a requirement that Plaintiff prove the Defendants' rate of flow caused the "failure" of the drainage system, the error being that the Plaintiff has never contended that the rate of flow caused any damage since the system was designed to carry storm water. Plaintiff has contended that costs to repair and maintain an easement, from whatever cause, should be apportioned by the amount or percentage of use by the

parties using the easement.

9. That the Court erred in instituting a requirement that Plaintiff prove the Defendants' rate of flow caused the "failure" of the drainage system, the error being that this erroneous approach caused the Court to conclude that Plaintiff's proof of allocation of use was speculative.

III. Plaintiff's method of equitable apportionment is based upon acceptable principles of use established through standard and widely used engineering criteria.

10. That the court erred in finding that Plaintiff's proof of use was speculative, the error being that the approach used by Plaintiff's professional engineer was based on commonly used engineering standards and criteria for storm water design and analysis which is utilized by Lexington County and the SCDOT.

11. That the court erred in finding that Plaintiff's proof of use was speculative, the error being that there was no evidence offered as to any other approach to determine or allocate use, much less any more appropriate accepted engineering approach..

12. That the Court erred in finding that the Plaintiff's proof of Defendants' rate of flow was speculative, the error being that the evidence was sufficient to prove the percentage of use necessary to allocate costs.

13. That the Court erred in finding that the Plaintiff's proof of allocation of costs based upon Defendants' rate of flow was speculative, the error being that under South Carolina law Plaintiff is not required to establish the cause of failure to allocate costs, but is only required to provide a reasonable basis for allocating costs.

14. That the Court erred in attaching any weight to the use of corrugated metal pipe ("CMP") in lieu of reinforced concrete pipe ("RCP"), the error being that the DOT admitted that use of CMP in lieu of RCP would not breach the encroachment permit.

15. That the Court erred in attaching any weight to the use of corrugated metal pipe ("CMP") in lieu of reinforced concrete pipe ("RCP"), the error being that the uncontradicted evidence was that the length of service of the CMP on this property was within the span of a reasonable term of service for CMP.

IV. Laches requires a finding of the separate and distinct factors of unreasonable delay and prejudice, neither of which is supported by the evidence presented at trial.

16. That the Court erred in determining that the factors required for laches against the Plaintiff had been established, the error being that the Court erroneously equated delay with creating prejudice, without treating these distinct components as requiring proof of prejudice in

addition to delay.

17. That the Court erred in determining that the factors required for laches against the Plaintiff had been established, the error being that there is no evidence the Defendants changed their position to their detriment as a result of any delay.

18. That the Court erred in determining that the factors required for laches against the Plaintiff had been established, the error being that there was no prejudice to the defendants since Defendants have always taken the position that they are not liable for repair and maintenance costs and have never varied from that position.

19. That the Court erred in determining that the factors required for laches against the Plaintiff had been established, the error being that Plaintiffs brought their equitable claims within the three year statute of limitations for claims at law, thus there was no unreasonable delay.

20. That the Court erred in determining that the factors required for laches against the Plaintiff had been established, the error being that using the date that Plaintiff's predecessor acquired the property as initiating the laches period without regard for the fact that Plaintiff had no claims to assert at that point.

21. That the Court erred in determining that the factors required for laches against the Plaintiff had been established, the error being that the trial court ruling on an unreasonable delay effectively puts a landowner in the position of having to bring a declaratory judgment action as to their rights to recover maintenance and repair costs prior to those costs having been incurred or prior to the landowner deciding whether it would seek to recover those costs from owners of the easement.

V. Plaintiff's third party beneficiary theory had been appropriately raised and made a part of the case well before trial and Plaintiff presented evidence sufficient to establish that Danwood was an intended beneficiary of the SCDOT easement.

22. That the Court erred in determining that Plaintiff failed to plead its third party beneficiary claim against Danwood, the error being that there was no requirement that Plaintiff plead a claim at law (third party beneficiary) in order to plead a claim in equity for an equitable allocation.

23. That the Court erred in determining that Plaintiff failed to plead its third party beneficiary claim against Danwood, the error being there was no claim for a breach of a third party beneficiary contract, rather Danwood could be considered an owner of an easement, and therefore subject to a claim for equitable allocation because it was an intended beneficiary of an easement between the DOT and Plaintiff's predecessors in title. The claim was for an equitable allocation which was properly pled.

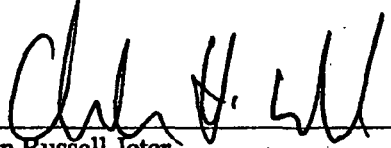
24. That the Court erred in determining that Plaintiff failed to plead its third party beneficiary claim against Danwood, the error being that the Court effectively overruled the prior order of another circuit court judge finding in July, 2010, almost a year before trial, at a hearing on summary judgment, that summary judgment should be denied, in part because Plaintiffs assert that the defendants are third party beneficiaries of an easement. This oral ruling was later confirmed by a written order which is in the record of this case.

25. That the Court erred in determining that Plaintiff failed to plead its equity claim because it failed to plead a third party beneficiary claim against Danwood, the error being that Plaintiff properly plead its equity claim against Danwood.

26. That the Court erred in determining there was no evidence or testimony submitted at trial supporting the claim that Danwood was a third party beneficiary of the encroachment permit, the error being that evidence was introduced that Danwood's predecessor was an intended beneficiary of the encroachment permit by virtue of the Danwood permit (which predated the Westside permit) which contained a letter from Danwood's predecessor in which it was seeking to use the anticipated storm drain system on what became Westside's property, to handle its own storm water. Danwood accepted the benefits of that permit.

27. The Court erred in stating that Plaintiff was seeking \$184,821 in costs against Danwood, the error being that Plaintiff was only seeking Danwood's equitable share of the total uncollected costs of \$184,821.00.

JETER & WILLIAMS, P. A.

for By: 
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Attorneys for the Plaintiff

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BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

FILED

July 1, 2011

COPY

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

Westside Meshekoff Family Limited
Partnership,

Plaintiff,

vs.

South Carolina Department of
Transportation; DW Properties, LLC;
Danwood, LLC; Robert W. Denton;
and Alpine Of SC, Inc.,

Defendants.

FILED

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT
2011 JUL -7 P 4: 47

BETH A. CARRIS
CLERK OF COURT
LEXINGTON SC

DEFENDANT SCDOT'S MOTION TO
ALTER OR AMEND JUDGMENT

The Defendant South Carolina Department of Transportation (hereinafter referred to as "SCDOT"), by and through its undersigned attorney, hereby moves, pursuant to SCRCR Rules 59(e) and 60(a), for an Order altering or amending the June 10, 2011 Order of the Honorable R. Knox McMahon, which Order was filed with the Office of the Clerk of Court for the County of Lexington on June 14, 2011, was mailed to attorneys of record June 24, 2011, and was received by the undersigned attorney for the Defendant SCDOT on June 27, 2011, in the following particulars:

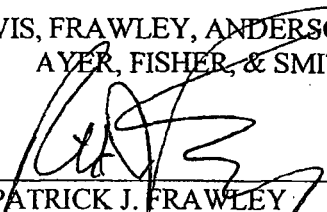
1. Changing scrivener's errors on page 3, line 15, page 10, footnote 2, and page 17, line 12 from "reinforced metal pipe" to "reinforced concrete pipe;"
2. Reconsidering, as additional sustaining grounds, the Defendant's affirmative defenses of Unclean Hands and Equitable Estoppel by imputing failures of the Plaintiff's predecessors in title to the Plaintiff, and finding that the Plaintiff's equitable claim is further barred by those defenses.

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This motion will be based upon the evidence at trial, arguments of counsel, rules of court, statutes, case law, and such other and further authority as the court may deem appropriate; and this Defendant is cognizant that this motion, and Rule 59 motions of all parties to this action, may, in the discretion of the Court, be determined without oral argument.

Respectfully submitted,

DAVIS, FRAWLEY, ANDERSON, McCAULEY,
AYER, FISHER, & SMITH, LLC

BY: 

PATRICK J. FRAWLEY
140 East Main Street
Lexington SC 29072

ATTORNEYS FOR DEFENDANT SCDOT

Lexington, South Carolina
July 7, 2011.



STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Westside Meshekoff Family Limited
Partnership,

Plaintiff,

vs.

South Carolina Department of
Transportation; DW Properties, LLC;
Danwood, LLC; Robert W. Denton;
and Alpine Of SC, Inc.,

Defendants.

CIVIL ACTION NO.: 2008-CP-32-04362

DEFENDANT SCDOT'S
POST- TRIAL BRIEF
AND SUMMATION

The Defendant South Carolina Department of Transportation (hereinafter referred to as "SCDOT") offers the following as its Post-Trial Brief and Summation for the captioned matter, which was tried April 18 through 21, 2011 :

I. THE PLAINTIFF IS BOUND BY THE ACTIONS OF ITS PREDECESSOR IN TITLE, DAYTON AND ASSOCIATES, AND IS ON NOTICE OF AND BOUND BY THE TERMS AND CONDITIONS OF THE 1987 ENCROACHMENT PERMIT THAT DAYTON AND ASSOCIATES APPLIED FOR AND ACCEPTED.

Despite managing partner Matthew Meshekoff's claims of selective ignorance as to the specifications of the Westside Plaza Shopping Center storm drainage system, virtually any salient facts of his partnership's chain of title, and, specifically, the 1987 Application for Encroachment Permit and the Encroachment Permit that was eventually issued by SCDOT and accepted by Dayton & Associates, XVII, the Plaintiff Westside Meshekoff Family Limited Partnership (hereinafter referred to as "the Plaintiff") is bound by the actions and representations of Dayton & Associates, the Plaintiff's predecessor in

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title, and is on notice of and bound by the terms and conditions of the 1987 Encroachment Permit that Dayton applied for and accepted.

Evidence at trial established that Weldon Wyatt, an Aiken County developer and owner of a property management company, *see*, April 5, 2011 Deposition of Dee Reeves (hereinafter cited as "Reeves Deposition"), p. 13, line 25 to p. 14, line 19, was a principal in both Dayton & Associates, the partnership that developed and built Westside Plaza Shopping Center, and West Side Associates, the partnership to which Dayton conveyed the property in 1988 and which, in turn, conveyed the property subject of this law suit to Edward and Helen Meshekoff in 1990, *see*, SCDOT Exhibits 40(C) and (G). Weldon Wyatt also owned Wyatt Development Company, which had a property management division, *see*, Reeves Deposition, p. 13, line 14 to page 17, line 3, which property management division managed Westside Plaza for the Meshekoffs, *id.*, p. 25, line 16 to p. 26, line 13. When Helen and Edward Meshekoff took title to the property from West Side Plaza Associates in 1990 pursuant to a deed signed by Weldon Wyatt, the "Grantees' Address" on the front of the deed, for the return of the original deed to them, was listed as "c/o Wyatt development Company, Property Management Division." SCDOT Exhibit 40 (G). From the time that Helen and Edward Meshekoff took ownership of the shopping center in 1990, up through and including the 2005-2008 time frame, Wyatt Development, and eventually "WRS, Inc.," a successor company in which Wyatt also had ownership interest, continued to manage the property, in the latter years with Dee Reeves as property manager. Reeves Deposition, p. 13, lines 14-24, p. 14, line 9 to p. 15, line 22, p. 24, line 17 to p. 25, line 1. From the time the Meshekoffs acquired the property in 1990, and throughout their ownership through various intra-familial

Exhibit 2 of 20
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conveyances to trusts and family limited partnerships, the one constant up through 2008 has been that a property manager with either Wyatt Development Company or its successor, WRS, Inc., both of which were owned by Weldon Wyatt, acted as the agent of and manager for the Meshekoffs.

Matthew Meshekoff is only able to disclaim knowledge because his parents are unable to testify—he testified that his father, Edward, passed away in 2010 and his mother, Helen, was in poor health. Yet the 1987 Encroachment Permit was accepted *for* Dayton & Associates *by* a representative of Wyatt Development Company, *see*, Plaintiff's Exhibit #1, bottom right of page one, signature: and, in accepting the terms of the Encroachment Permit, agreed to comply with all of the provisions, terms, conditions, and restrictions of the Permit, and agreed to bind its successors and assigns. *Id.* The Plaintiff should not be allowed to come before this Court in equity, and disclaim through ignorance, lack of information, or lack of means to that information, the acts and omissions of its predecessor in title in applying for and accepting the 1987 Encroachment Permit, when the very entity that signed the acceptance of the Encroachment Permit was not only the Plaintiff's predecessor in title, but also the property manager for the shopping center throughout the time that the Meshekoff family has owned it.

The Plaintiff has attempted to evade notice of and accountability for the terms and conditions of the 1987 Encroachment Permit by maintaining that the Encroachment Permit was not recorded in the Register of Deeds for Lexington County, was not readily accessible to the public at SCDOT, and that the Plaintiff, through its managing partner, Matthew Meshekoff, therefore had no notice of it. However, Matthew Meshekoff admitted on cross examination that he presumed his parents had attorneys representing

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them at the 1990 closing on their purchase of the property, and that those attorneys presumably would have been retained for the purpose of making sure that the property complied with local and state requirements. Ronald Swinson, the managing partner for the Defendant Danwood and Associates, testified that his purpose in retaining local counsel for a closing on a purchase of commercial property would be the same, and that he typically would review permits to make certain that the property was in compliance with local and state requirements.

The "As Built Survey" for The Westside Plaza Shopping Center—Plaintiff's Exhibit 7—which Matthew Meshekoff testified that he had reviewed, shows five driveways connecting the shopping center parking lot with state-maintained highways—three on U.S. Highway 1, and two on Dreher Road. Under *S.C. Code Ann.* § 57-5-1080 (1976 as amended) a permit for any such driveway is required—and was required in 1987. South Carolina statute would also give SCDOT the right to deny any permits for any driveways which, in the judgment of the Department, may create a hazard to the general public. Were Matthew Meshekoff as astute a businessman as he testified that he was with regard to the multi-faceted duties required of him in his former career as a television director, and had he been as thorough in his due diligence as Danwood's Ronald Swinson, similarly situated as managing partner for a company acquiring commercial property, he would have inquired into the status of any permits required for the driveways. It follows that his parents, Edward and Helen Meshekoff, would have similarly inquired in 1990, when they initially acquired the shopping center from an entity managed by the same man—Weldon Wyatt—who had been the managing partner and developer of the property only three years before, and whom the Meshekoffs trusted

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to serve as their property manager for several years after acquiring the property. Mr. and Mrs. Meshekoff were not mere novices in owning shopping centers—Matthew Meshekoff testified that they had owned at least four centers throughout the southeast, had at one point traded property in a “1031 exchange,” and passed ownership of the Westside Plaza to its current owner, the Plaintiff, through a labyrinthine series of conveyances and corrective affidavits involving the conveyance of their individual interests in the property to revocable trusts in their names, with themselves as trustees, then to an entity known as the “Fourm Meshekoff Family Limited Partnership,” then ultimately to the current Plaintiff. *See*, SCDOT Exhibit 40(H), (I), (J), (K), (L), (M), (N), and (O). Clearly this was no “Mom and Pop” operation, and to expect that the Meshekoffs would have been so naïve and unsophisticated as to remain blissfully ignorant and not exercise due diligence in examining the terms and conditions of the very permit required by statute for the ingress and egress to their parking lot—when the means to such knowledge, Weldon Wyatt, worked for them as their property manager—stretches the bounds of credibility.

The fact that the Encroachment Permits were not readily available at the local Register of Deeds office does not negate the notice to the Plaintiff and the Meshekoffs, as once Matthew Meshekoff got his attorneys in this case to acquire the Encroachment Permits for all defendants in this case for purposes of mobilizing for a lawsuit, the permits were readily available; as was the 1985 Encroachment Permit for Danwood’s predecessor in title also available when Ronald Swinson made his due diligence inquiry prior to his group acquiring Danwood Shopping Center, according to his testimony at trial. The five driveways providing ingress and egress to the Westside Plaza parking lot

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from U.S. Highway 1 and Dreher Road, and the requirements imposed by §§ 57-5-1080 and -1090 put the Meshekoffs on inquiry notice as to the 1987 Encroachment Permits. *Cf., Fuller-Ahrens Partnership v. S.C. Department of Highways and Public Transportation*, 311 S.C. 177, 427 S.E.2d 920 (S.C. App. 1993) (holding that filing of right-of-way deed and related documents in Highway Department's offices was sufficient to impart constructive notice to subsequent purchaser of the deed and its contents, just as though the transaction was recorded in the county where the land was situated).

Making the reasonable assumption from the foregoing circumstantial evidence that the Meshekoffs, being thus put on inquiry notice, did, in fact, obtain and review the 1987 Encroachment Permit and attachments prior to their purchase of the property, or had they discussed the matter with Weldon Wyatt, their trusted prospective grantor and eventual property manager—not to mention the developer of the shopping center—they would have read the language pursuant to which Dayton and Associates, by and through Wyatt Development Company, had accepted the terms and conditions of the permit, and had bound them and their successors and assigns to such terms and conditions. Had Edward and Helen Meshekoff found such terms and conditions so onerous a burden, they could have forgone the opportunity of purchasing the shopping center. The fact that they did not forgo that opportunity supports the reasonable inference that Mr. and Mrs. Meshekoff, as savvy and sophisticated commercial property owners, knew exactly what they were acquiring, and bound themselves and their familial partnership successors to the terms, conditions, and requirements set forth in the 1987 Encroachment Permit.

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II. IF SCDOT DID HAVE AN EASEMENT BY PRESCRIPTION FOR STORM WATER DRAINAGE ONTO AND THROUGH THE PROPERTY NOW OWNED BY THE PLAINTIFF, THAT EASEMENT EXISTED LONG BEFORE THE PLAINTIFF'S PREDECESSOR IN TITLE, DAYTON AND ASSOCIATES, TOOK OWNERSHIP OF THE PROPERTY, WAS WITHOUT LIMITATION AS TO THE FLOW CAPACITY, AND WAS ONLY LIMITED WHEN DAYTON AND ASSOCIATES APPLIED FOR AND WAS GRANTED THE 1987 ENCROACHMENT PERMIT.

In order to establish an easement by prescription, it is necessary to prove three things: 1) the continued and uninterrupted use or enjoyment of a right for the full period of 20 years; 2) the identity of the thing enjoyed; and 3) that use or enjoyment was adverse, or under claim or right. *See, e.g., Williamson v. Abbott*, 107 S.C. 397, ___, 93 S.E. 15, 15-16 (1917). Evidence at trial established that SCDOT's "existing catch basin" adjacent to U.S. Highway 1 referred to in the 1987 Encroachment Permit was probably in place since at least 1970, by virtue of SCDOT's Clarence Blakely's testimony and his reference to SCDOT Exhibit #41, sheets 22 and 23 of the plans for the widening of the highway in 1970, and that the "identity of the thing enjoyed" was the release of storm water run-off from the catch basin into natural drainage flowing in a south-westerly direction into and through the then-undeveloped property of Holmes Dreher, according to SCDOT Exhibit #39, the Westside Plaza Stake-out Plan, showing pre-development topography, as testified to by Michael Lambrecht, the Plaintiff's engineering expert. Lambrecht also testified that the pre-development drainage flow was probably from U.S. Highway 1 in that same south-westerly direction into and through the Dreher property for an undetermined period of years. There was not, however, any evidence with regard to whether the use of the Dreher property for storm water release from the catch basin or U.S. Highway 1 was adverse or under claim or right by SCDOT, or whether it was by

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permissive use through the kind-hearted and public spirited Mr. Dreher, who was, at one point, the Lexington County Clerk of Court. There was no evidence on the latter point at trial, one way or the other.

There was the SCDOT Answer to Interrogatory number 16—Plaintiff's Exhibit #8—in which SCDOT responded to the Plaintiff's inquiry into whether SCDOT "contend[ed] that [it] had a legal or equitable right to have storm water from [its] property discharged onto the Westside Plaza property," by responding, "Yes. By prescription: storm water from US Highway 1 has drained into and through the property on which Westside Plaza currently is situated long before Westside Plaza ever existed. Also, by agreement of Plaintiff's predecessor in title, which agreed to accept storm water from US Highway 1 and the culvert, which had existed prior to the development of the property, ..." without actually using the word "easement." There was also the 30(b)(6) deposition testimony of Clarence Blakely, of SCDOT, indicating his belief—and therefore, SCDOT's position—that the right to release storm water onto the Dreher property was an easement by prescription. *See also*, Answer of SCDOT, p. 10, Eleventh Defense, para. 33-34 (pleading "easement by prescription or otherwise" as affirmative defense).

If SCDOT did have an easement by prescription for storm water drainage prior to 1987, that easement was modified in 1970 with the widening of U.S. Highway 1, but only to the extent that the catch basin releasing storm water was moved in a southerly direction to allow for the widening of the highway. *See*, Blakely testimony and SCDOT Exhibit #41. Storm water still emptied from the catch basin into and through the natural contours of the Dreher property, and still flowed in a south-westerly direction away from

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U.S. Highway 1. Interestingly, there was no evidence at trial indicating any limitation of that easement as to the pre-development rate of flow. In the absence of any such limiting evidence, the release of the pre-development storm water from the “existing” catch basin adjacent to U.S. Highway 1 as it existed in 1987 was not yet fettered nor otherwise circumscribed by pipe capacity nor improper and inadequate materials, nor defective installation of the Westside storm water system, and the extent of the easement was limited only by the capacity of the 42 inch reinforced concrete pipe that carried storm water under U.S. Highway 1, which pipe capacity Michael Lambrecht testified was 261 CFS (Cubic Feet per Second). There was no evidence as to any maintenance costs associated with that easement by prescription for emptying up to 261 CFS of storm water drainage into and through the undeveloped Dreher property prior to 1987.

If the easement by prescription existed—and everyone at trial seems to admit that it did—it was without limitation—at least no evidence of limitation other than the pipe capacity running under U.S. Highway 1—and had no maintenance component.

Then in 1987, the Plaintiff’s predecessor in title, Dayton and Associates, applied to SCDOT for its Encroachment Permit, seeking to develop its property and thereby limit SCDOT’s easement. It represented in its application that it would install 48 inch reinforced concrete pipe to re-route the flow of storm water released from the existing catch basin, and agreed to accept—agreed to “limit”—the flow to 98 CFS. *See, generally*, Plaintiff’s Exhibit #1. Plaintiff’s counsel argued at the directed verdict stage of trial that SCDOT had contracted for “expanded use” of the easement when it approved Dayton’s 1987 application and issued the Encroachment Permit; but he was mistaken. In agreeing to issue the permit, SCDOT actually *limited* the unfettered flow capacity that it

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had enjoyed over the years to 98 CFS.

Plaintiff's predecessor in title limited that flow capacity in applying for and accepting the terms and conditions of the permit for itself, and binding its successors and assigns—including the Plaintiff herein. And in the language of the provision that includes Dayton's acceptance of the conditions of the permit and the binding of its successors and assigns, there appears for the first time in SCDOT's history of storm water drainage into and through the Dreher/Dayton property, any mention of liability for construction or maintenance. See, Plaintiff's Exhibit #1, bottom page 1, acceptance language.

In that language, on behalf of itself and its successors and assigns—including the Plaintiff herein—Dayton agreed “to assume any and all liability [SCDOT] might otherwise have in connection with ... damage to property, ... that may be caused by the construction, maintenance, use [,] moving[,], or removing of the encroachment contemplated herein” *Id.*

In that language, in partial consideration for SCDOT agreeing to limit the flow capacity of its storm water runoff to the 98 CFS figure proposed by Dayton in its application, Dayton agreed, and bound its successors and assigns—including the Plaintiff herein—to be responsible for the maintenance costs of the Westside Plaza storm drainage system.

III. HAYES VS. TOMPKINS IS DISTINGUISHABLE ON THE FACTS, AND INAPPLICABLE TO THE PLAINTIFF'S CLAIM AGAINST SCDOT, BECAUSE, FIRST, HAYES IS A ROAD CASE, NOT STORM WATER, AND SECOND, BECAUSE HAYES IMPOSES A DUTY TO MAINTAIN IN THE ABSENCE OF AN AGREEMENT, WHEN THE PLAINTIFF'S PREDECESSOR IN TITLE, DAYTON AND ASSOCIATES, BOUND ITSELF AND ITS SUCCESSORS TO

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**ASSUME ANY LIABILITY FOR DAMAGE CAUSED BY CONSTRUCTION OR
MAINTENANCE OF THE ENCROACHMENT CONTEMPLATED BY THE 1987
ENCROACHMENT PERMIT—IN EFFECT, AN AGREEMENT TO
MAINTAIN—WHICH INCLUDED THE STORM WATER SYSTEM.**

The Plaintiff relies on *Hayes v. Tompkins*, 287 S.C. 289, 337 S.E.2d 888 (S.C. Ap. 1985) for its equitable apportionment of maintenance costs theory of recovery, asking the Court to unreasonably extend the *Hayes* holding to include “easements” for storm water drainage. The extension is unreasonable because the *Hayes* easement is a road easement, while the “easement” before the Court currently is for storm water—or surface water—flow. Furthermore, *Hayes* is distinguishable on its facts, as it holds that, in the absence of an agreement, owners of the servient estate are under no duty to maintain and repair the easement, *see, id.* at 294, 337 S.E.2d at 891; while in the case currently before the Court, Dayton, for itself and its successors and assigns—including the Plaintiff herein—agreed assume any and all liability that SCDOT might otherwise have in connection with construction and maintenance of the encroachment subject of the 1987 Encroachment Permit.

South Carolina has historically followed the Common Enemy Rule with regard to surface water. *Irwin v. Michelin Tire Corp.*, 288 S.C. 221, 224, 341 S.E.2d 783, 784 (S. Ct. 1986). The Common Enemy Rule provides that surface water is a common enemy of all landowners, and every landowner has the right to deal with it in any manner as he sees fit, with two exceptions: he may not dam it up so as to create a nuisance, and he may not artificially divert the natural flow and release it in concentrated form upon his downstream neighbor. *Id.*, citing *Garmany v. Southern Railway, Co.*, 152 S.C. 205, 149 S.E. 765 (1929). Applying the common enemy rule to the facts of this case, as SCDOT has done in pleading it as its Twelfth Defense, SCDOT is entitled to ward off the

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common enemy in any manner as it sees fit. With regard to any Plaintiff's argument that the SCDOT storm water pipes running parallel to and under U.S. Highway 1, as an artificial diversion of surface water, amount to one of the two exceptions, SCDOT responds by pointing out that the artificial diversion and release of the storm water itself, was the easement that had existed for years before the 1987 Application for Encroachment Permit, that Dayton agreed to accept—and thereby to limit—SCDOT's rate of flow up to 98 CFS, and Michael Lambrecht's testimony at trial revealed that, for a 10-year, 24-hour storm model, his drainage study indicated that only 65 CFS would enter the Westside system from the SCDOT catch basin. With regard to any argument that the "debris and corrosives" running off of the road and into the Westside system amount to a nuisance, the Plaintiff's expert witness Tim Richardson testified that the same debris and "corrosives" likely flowed off of the oil-based road over which gasoline-powered vehicles riding on rubber tires travelled in and before 1987. There has simply been no evidence that the rate of flow has increased from 1987, nor that the "corrosives" were any more prevalent now than they had been in 1987, when Dayton committed itself and its successors and assigns—including the Plaintiff herein—to accept the storm water. The only variable has been that Dayton installed a lesser pipe that even the Plaintiff's own experts concede was more susceptible to rust and corrosion than the RCP it had represented it would install.

Adding to the Common Enemy Rule, is SCDOT's statutory mandate to provide adequate, safe, and efficient transportation services for the movement of people and goods, *S.C. Code Ann.* § 57-1-10 (1976 as amended), and to provide a state highway system that shall be maintained in a safe and serviceable condition. *Id.*, § 57-5-10 (1976

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as amended). As Clarence Blakely testified to, SCDOT must maintain safe roadways, which entails, in part, keeping the roadways free of surface and storm water. As Blakely testified, SCDOT has catch basins adjacent to virtually every state-maintained highway in numbers too many to count. Many of those catch basins release storm water into storm water systems of properties or developments down stream; and those properties and developments, in turn, release storm water further down stream. All of the releases of storm water could arguably be called easements, and if the *Hayes* holding is extended from road easements to storm water and surface water flow, then the financial impact upon SCDOT and the state would be devastating.

Beyond application of the Common Enemy Rule, the *Hayes* holding applies the equitable apportionment of maintenance costs in the absence of an agreement. 287 S.C. at 294, 337 S.E.2d at 891. As was argued above, Dayton agreed assume any and all liability that SCDOT might otherwise have in connection with construction and maintenance of the encroachment subject of the 1987 Encroachment Permit.

IV. THE PLAINTIFF'S CLAIM AGAINST SCDOT IS REALLY AN AT-LAW CASE, NOT EQUITY, AND SHOULD BE TIME-BARRED BY THE APPROPRIATE STATUTE OF LIMITATIONS UNDER THE SOUTH CAROLINA TORT CLAIMS ACT.

The Plaintiff's original causes of action included legal claims sounding in trespass and negligence. *See*, Complaint, pp. 7-9. The Plaintiff dropped the two legal causes of action and its injunctive cause of action, and has maintained that it is only pursuing the equitable claim. However, throughout the trial, Plaintiff's counsel have interchangeably used the term "damages" to describe the Plaintiff's expense figure they seek to have

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“equitably apportioned” among the Defendants, and it is clear that while the Plaintiff seeks to cloak its claim in equity, it is really asserting a legal tort claim for damages to its storm water system in order to avoid being time-barred by the applicable statute of limitations.

SCDOT is an agency of the State of South Carolina, and as such is subject to suit under the terms, conditions, and limitations of the South Carolina Tort Claims Act, codified at *S. C. Code Ann.* §§ 15-78-10 through -220 (1986 as amended). The Tort Claims Act is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee’s official duty. *S.C. Code Ann.* § 15-78-200 (1985 as amended). The statute of limitations for actions brought under the South Carolina Tort Claims Act is two years, unless a verified damages claim has been timely filed pursuant to provisions of the Tort Claims Act. *See, S.C. Code Ann.* §§ 15-78-80(d), 15-78-110 (1985 as amended). There is no evidence that a verified damages claim has been filed by the Plaintiff in this case. The discovery rule is applicable to actions brought under the Tort Claims Act. *Young v. South Carolina Department of Corrections*, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (S.C.App. 1999). According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. *Id.* at 719, 511 S.E.2d at 416. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. *Id.* *See also, Wiggins v. Edwards*, 314 S.C. 126, ___, 442 S.E.2d 169, 170 (S.Ct. 1994)(exercise of reasonable diligence means simply that the injured party must act with some promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his

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has been invaded or that some claim against another party might exist, the statute of limitations begins to run from this point, and not when advice of counsel is sought or a fully-blown theory of recovery is developed).

Tim Richardson and Dee Reeves both testified that the first "sink-hole" appeared in the driveway of the Westside Plaza parking lot near the catch basin adjacent to U.S. Highway 1 in late-July, 2005, and was repaired by early August, 2005. *See, e.g.*, Reeves Deposition, p. 46, line 8 to p. 56, line 5. Richardson testified that the collapsing pipe causing the sink-hole was Line "E" in the storm drain system, which was the only line serving SCDOT's catch basin. Richardson further testified that he told Reeves that the source of the storm water entering Line "E" was the SCDOT pipe passing under U.S. Highway 1, and that he had Reeves climb down into a manhole along Line "E" some 250 feet up the line, well away from the area of collapse, to show the condition of the line. Although Richardson subsequently attempted to crawfish in his testimony as to whether the full extent of the damage to Line "E" was observable in Reeve's visit down the manhole, the evidence is clear that Reeves—and through her, Matthew Meshekoff—was aware that Line "E" was damaged, and that the source of the storm water entering Line "E" was the SCDOT pipe and catch basin, and that she and Matthew Meshekoff had that knowledge as early as late July, 2005. They may not have known the full extent of the damage by that point, but they knew the line was damaged, and they had reason to suspect that SCDOT might be the source of that damage.

With no verified damages claim being filed, the Plaintiff had a two-year statute of limitations within which to file its suit, yet it did not file until June 9, 2008, more than two years after Reeves' and Meshekoff's discovery of the damage. Had the Plaintiff continued

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with its tort claim, the action would have been time-barred. The attempt to pursue the tort claim as an equitable apportionment claim seeks to circumvent the two-year statute of limitations.

V. IF THE PLAINTIFF'S CLAIM AGAINST SCDOT IS DEEMED TO BE IN EQUITY, IT SHOULD BE BARRED BY THE EQUITABLE DOCTRINES OF LACHES, UNCLEAN HANDS, AND WAIVER AND ESTOPPEL.

At trial, SCDOT amended its Answer pursuant to SCRCP Rule 15(B) to conform to the evidence, and add affirmative equitable defenses of laches and unclean hands to the waiver and estoppel defense already pled. If the Plaintiff's claim is deemed an equitable claim, it should be dismissed pursuant to those defenses.

A. Laches

Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. *Emery v. Smith*, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (S.C. Ap. 2004). Laches is an equitable doctrine, which arises upon the failure to assert a known right. *Id.* The party seeking to establish laches must show 1) delay, 2) unreasonable delay, and 3) prejudice. Delay and unreasonable delay are established through Richardson's and Reeves' testimony with regard to the July-August 2005 discovery of the damage to Line "E," and the failure to file suit until June, 2008. SCDOT has been prejudiced in that, had the Plaintiff asserted its claim timely, perhaps the elder Meshekoffs could have been in a condition to have been deposed, in order to determine what level of knowledge they had as to the facts and circumstances of their acquisition of the shopping center and what due diligence, if any, they took prior to acquiring the shopping center. Instead, the only

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person who could testify as to the Plaintiff's level of knowledge was Matthew Meshekoff, who knew very little.

B. Unclean Hands

The maxim of "he who comes into equity must do so with clean hands" is more than a mere banality; it is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the Defendant. *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 997 (1945). One's misconduct need not have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character, and any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim. *Id.* at 815, 65 S.Ct. at 997-998. To successfully preclude a party from recovering in an action under the defense of unclean hands, the Defendant must prove 1) the Plaintiff acted unfairly, 2) in the matter that is subject of the litigation, and 3) to the prejudice of the Defendant. Randolph R. Lowell, Robert L. Reibold, Shealy Boland Reibold, *South Carolina Equity: A Practitioner's Guide*, p. 178 (S.C. Bar—CLE Division 2010).

Evidence at trial established that the Plaintiff's predecessor in title, Dayton, represented to SCDOT in its Application for Encroachment Permit and in its Acceptance of Encroachment Permit that it would install a storm drainage system using 48 inch reinforced concrete pipe, but used, instead, a pipe of lesser quality—corrugated metal—which was more susceptible to rust corrosion, and deterioration, installed the pipe defectively, and the lesser quality pipe and defective installation lasted far less time than

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a properly installed reinforced concrete pipe system would have lasted. The premature deterioration of the improperly installed CMP and the demise of the storm drainage system is the subject matter of the Plaintiff's suit for recovery of damages or equitable apportionment of repair costs. SCDOT is prejudiced in having to defend a lawsuit for recovery of repair costs to a system that, if properly installed using the RCP that Dayton represented it would use, would have lasted for up to 40 years, according to the testimony of Tim Richardson. Although the Plaintiff neither made the misrepresentation, willfully substituted a lesser pipe, nor presided over a defective installation, it has acquired the property from Dayton, is constructively on notice of Dayton's actions, and has benefitted from the Encroachment Permit, and should be held accountable for Dayton's unclean hands.

C. Equitable Estoppel

Courts apply the doctrine of equitable estoppel when one party, by his actions, conduct, words, or silence which amounts to a misrepresentation or concealment of material facts, causes another to alter his position to his prejudice or injury. *State Accident Fund v. South Carolina Second Injury Fund*, 388 S.C. 67, 76-77, 693 S.E.2d 441, 446 (S.C.App. 2010). With regard to the party estopped, the elements of equitable estoppel are: 1) conduct amounting to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; 2) the intention or expectation that such conduct shall be acted upon by the other party; and 3) actual or constructive knowledge of the real facts. *Id.* at 77, 693 S.E.2d at 446. As related to the party claiming the estoppel, the essential elements are: 1) lack of

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knowledge and of the means of knowledge of the truth as to the facts in question; 2) reliance upon the conduct of the party estopped; and 3) prejudicial change in position. *Id.*

The Plaintiff's predecessor in title, Dayton, 1) represented to SCDOT in its application for Encroachment Permit, and in its acceptance of Encroachment Permit, that it would install a storm drainage system using 48 inch RCP, 2) did so with the intention that SCDOT act upon that Application and issue the Permit, and 3) Dayton knew—or clearly should have known—that the pipe it installed was not RCP, but was a lesser pipe—CMP—which was poorly installed and was more susceptible to rust and premature deterioration. SCDOT 1) lacked the knowledge that Dayton was installing a lesser pipe despite Dayton's representations in its Application, and while the comment was made by Plaintiff's counsel that SCDOT could have over seen the installation to ensure that it was properly done and with the as-represented RCP, the Plaintiff's own engineering expert, Michael Lambrecht, testified that, in his experience, if an Application for Encroachment Permit specified to SCDOT that RCP was going to be installed, SCDOT should have been able to rely upon that representation without checking behind the applicant or overseeing the project; 2) as Lambrecht testified, SCDOT should have been able to rely—and did rely on the proper pipe being properly installed; and 3) SCDOT prejudicially changed its position by agreeing to limit a storm drainage easement into undeveloped land with virtually no flow rate limitations and no maintenance costs, for a poorly installed system that has deteriorated prematurely, and has subjected SCDOT to defending a law suit in which equitable apportionment of maintenance costs are being sought.

Equity dictates that the Plaintiff's claim be denied.

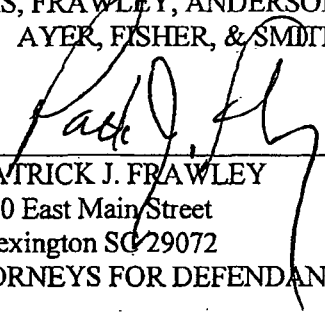
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VI. CONCLUSION.

For the foregoing reasons, SCDOT is entitled to judgment denying the Plaintiff's claim for equitable apportionment of maintenance costs.

Respectfully submitted,

DAVIS, FRAWLEY, ANDERSON, McCAULEY,
AYER, FISHER, & SMITH, LLC

BY: 

PATRICK J. FRAWLEY

140 East Main Street

Lexington SC 29072

ATTORNEYS FOR DEFENDANT SCDOT

Lexington, South Carolina
May 2, 2011.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
Westside Meshekoff Family Limited Partnership,	)	Civil Action No.: 2008-CP-32-04362
	)	
Plaintiff,	)	
	)	
vs.	)	POST-TRIAL BRIEF OF PLAINTIFF
	)	WESTSIDE MESHEKOFF
South Carolina Department of Transportation, APAM, Inc., Kimbrell's Investment Company, Inc., R1 CS2, LLC, DW Properties, LLC, Danwood, LLC, Boom, Inc., Robert W. Denton, and Alpine of S.C., Inc.,	)	FAMILY, LP
	)	
Defendants.	)	
	)	

INTRODUCTION

Plaintiff, Westside Meshekoff Family, Limited Partnership (hereinafter "Westside") brought this equity case for an equitable allocation of the costs of repairing and maintaining a stormwater line and detention pond heavily utilized by the Defendants. To date, all costs of maintaining the system and detention pond have been borne by Westside. The remaining Defendants, South Carolina Department of Transportation ("DOT") and Danwood, LLC, have done nothing to slow down or treat their discharge of stormwater prior to it being released, but instead have relied on Westside to transport and treat the stormwater from their respective properties. DOT and Danwood assert the following: (1) they have a right to discharge their stormwater onto Westside's property and have it treated in Westside's detention pond; (2) that they cannot be required to pay any repair or maintenance costs incurred in performing this service

for them; and (3) that Westside has no right to prevent them from using Westside's system. DOT has refused to exercise its right to condemn the storm drain system or any other of Westside's property for its use in protecting the driving public, preferring instead to burden Westside with all maintenance and repair costs. Danwood treats this case as one sounding in tort where concepts such as fault, proximate cause, and damages are relevant, and seems unwilling to acknowledge that equity looks at usage in allocating the costs of repair and maintenance. Based on the alleged lack of proof of fault and cause, Danwood argues it is entitled to continue its free use of Westside's property to handle and treat its stormwater.

At the conclusion of the trial, both DOT and Danwood indicated they desired to renew their motions for directed verdict and would do so through post-trial submissions. While these motions were couched in terms of "directed verdict" at trial, as this matter was tried non-jury, the motions were actually motions for involuntary dismissal under Rule 41(b).¹ Westside did not object to the terms used for these motions as it was clear the parties sought dismissal on the grounds sought "that upon the facts and the laws the plaintiff has shown no right to relief." Rule 41(b), SCRCP. From a review of the post-trial submissions, it appears that only Danwood seeks to renew its motion for a "directed verdict." In any event, rather than arguing that Plaintiff has shown no right to relief, both DOT and Danwood argue based upon their view of the facts in the light most favorable to them. Thus, their memoranda are of no assistance to the Court in deciding any post-trial motions under Rule 41(b). Accordingly, Westside submits that

¹ See *Waterpointe I Prop. Owner's Ass'n, Inc. v. Paragon, Inc.*, 342 S.C. 454, 458, 536 S.E.2d 878, 880 (S.C. Ct. App. 2000) ("We note initially that while Paragon's motion at the close of the evidence was couched as a 'directed verdict' motion, governed by Rule 50, SCRCP, this was a non-jury action. As Rule 50 by its nature is applicable to jury trials, the proper motion for Paragon to have made was a motion for involuntary non-suit under Rule 41, SCRCP."); see also *Ducworth v. Neely*, 319 S.C. 158, 159 n. 1, 459 S.E.2d 896, 897 n. 1 (Ct.App.1995) (noting that motion styled directed verdict in non-jury action actually was a motion for involuntary non-suit under Rule 41(b), SCRCP, and therefore reviewing as such).

these motions have effectively been abandoned and that this Court should proceed with deciding the case on the merits. For the reasons which follow, this Court should find in favor of Westside on its claim for equitable allocation of maintenance and repair costs and award appropriate relief.

PLAINTIFF'S EQUITABLE ALLOCATION CLAIM

To prevail on an equitable allocation claim, Westside must prove the existence of an easement, the costs of maintaining and repairing the easement, and provide evidence by which the Court can apportion those costs based upon some equitable method of determining use. *Hayes v. Tompkins*, 287 S.C. 289, 337 S.E.2d 888 (Ct.App. 1985). With respect to Danwood, Westside must also show that Danwood's predecessors in title were third party beneficiaries of the easement.

Common Use of Easement Gives Rise to Equitable Allocation of Repair and Maintenance

"An easement is a right which one person has to use the land of another for a specific purpose, and gives no title to the land on which the servitude is imposed." *Douglas v. Med. Investors, Inc.*, 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971) (citations omitted). An easement can arise by agreement, by prescription, or by other methods not relevant here. The owner of an easement ordinarily must keep the easement in repair. *Hayes v. Tompkins supra*. Unless there is an agreement to the contrary, the owner of a servient estate (Westside) does not have the duty to maintain and repair an easement for the benefit of the dominant estate (Defendants). *Id.* When both the dominant and servient estates use the property subject to the easement, a court may divide the responsibility for maintenance and repair, and may take into account such factors as the dominant tenant's duty of maintenance and repair, the burden of the easement on the servient tenant, and the extent of the servient tenant's use. *Id.*

In *Hayes v. Tomkins*, a dominant estate owner appealed the trial court's decision that he had to pay an equitable share of upkeep of a gravel road easement. The servient estate owner appealed the holding that an easement existed. The easement at issue was not an express easement; the trial court found that there was an implied easement of necessity.¹ The Court of Appeals stated that the servient estate owners were not under a duty to maintain the gravel road easement for the benefit of the dominant estate. *Id.* However, since the two parties both used the gravel road, the Court held that "the apportionment by the trial judge of the burden of maintenance and repair is equitable." *Id.* at 294, S.E.2d 891.

Other jurisdictions have also held that an express easement, even when silent on the issue, requires that the servient estate and dominant estate both maintain the easement if they both use it. The Supreme Court of Iowa held in *Bina v. Bina*, 2133 Iowa 432, 239 N.W. 68 (1931), cited by our Court of Appeals in *Hayes v. Tomkins* at 294, 337 S.E.2d at 891, that though the express easement grant did not address the issue, the servient estate could repair the easement road and recover from the dominant owner a proportionate share of the cost when the two parties both benefitted from the road. The Supreme Court of Colorado held in *Barnard v. Gaumer*, 146 Colo 409, 361 P.2d 778 (1961) that absent an agreement as to the maintenance of a private drive, the burden of upkeep should be distributed between the dominant and servient tenements in proportion to their relative use of the road. In *Hart v. Hart*, 27 Va. App. 46, 497 S.E.2d 496 (1998), the easement was one that had been created by the court in a divorce proceeding. The

¹ Though *Tomkins* involved an implied easement or, alternatively a prescriptive easement, the method of creation of an easement does not affect who should pay to maintain the easement, if there is no express agreement discussing such. A South Carolina court will examine the express easement and ascertain the intention of the parties so that the grant can be construed so as to carry out that intention. *Smith v. Commissioners of Pub. Works*, 312 S.C. 460, 441 S.E.2d 331 (Ct.App. 1994).

Court of Appeals of Virginia held that where an easement owner is not the sole user of a private right of way, but uses it in common with the servient estate, then the costs of the upkeep of the easement should be proportionately distributed among all users. *Id.*

Existence of Easement

On the issue of the existence of an easement to use the storm drain line, Westside provided the Court with persuasive evidence of the existence of an easement. Indeed, in its Answer and interrogatory responses, DOT acknowledges the existence of an easement to use the line. Interrogatory 16 and the DOT's response are as follows:

16. Do you contend that you have a legal or equitable right to have storm water from your property discharged onto the Westside Plaza property owned by the Plaintiff? If so, set forth all facts known to you which support your contention.

Answer: Yes. By prescription: storm water from US Highway 1 has drained onto and through the property on which Westside Plaza current is situated long before Westside Plaza ever existed. Also **by agreement** of Plaintiff's predecessor in title, which agreed to accept storm water from US Highway 1 and the culvert, which had existed prior to the development of the property, **in the Encroachment Permit**, pursuant to which the Plaintiff's predecessor in title was permitted three driveways entering US Highway 1 and two driveways entering Dreher Road

[Exhibit 8; DOT Answers to Interrogatories (Emphasis Added)].

The DOT's own witness, Clarence Blakely, in his live testimony before the Court, testified the encroachment permit was an agreement for the DOT to use Westside's land and system to transport the stormwater away from US Highway 1. He also testified that DOT considered the encroachment permit to be binding on any successors in title, and that DOT would take action to protect its use of the land if that use were denied by the landowner. There was no evidence contradicting Blakely's testimony that DOT entered into an agreement for the use of

Westside's land to transport stormwater away from the highway. This testimony is conclusive on the issue of the existence of an easement to use the Westside stormwater system (specifically Line "E" and the detention pond) by and through the Encroachment Permit. [Ex. 1.]

While Westside agrees that the Encroachment Permit created an express easement for DOT to utilize Line "E" and the Westside Detention Pond, the DOT has also claimed an easement by prescription. Clarence Blakely testified that DOT had been discharging stormwater into the Westside drain line and system since about 1987 under claim of right, which would provide the 20 years of use necessary for an easement by prescription to use the Westside system and pond. *See Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Revis v. Barrett*, 321 S.C. 206, 209 n. 1, 467 S.E.2d 460, 462 n. 1 (Ct.App.1996)(to establish a prescriptive easement, one must show: (1) continued use for 20 years, (2) the identity of the thing enjoyed, and (3) use which is either adverse or under a claim of right.) As Westside does not challenge the DOT's claim that it has an easement to utilize "Line E" and the detention pond, Westside will not further address DOT's alternative theory of easement by prescription.

Third-Party Beneficiary to Easement/Encroachment Permit

The South Carolina Supreme Court has recognized that individuals may be third party beneficiaries of public contracts. *Touchberry v. City of Florence*, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988)(citations omitted). A third-party beneficiary is a party that the contracting parties intend to directly benefit. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005)(citing *Touchberry supra*). Generally, a third person not in privity of contract with the contracting parties does not have a right to enforce the contract. *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 445, 494 S.E.2d 827, 833

(Ct.App.1997). "However, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." *Bob Hammond Constr. Co. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct.App.1994). The third party beneficiary is then entitled to claim the benefits of the contract, and is also bound by the terms. *See Kingman v. Nationwide Mut. Ins. Co.*, 243 S.C. 405, 134 S.E.2d 2176 (1964)("One who avails himself of the benefits of a contract entered into by others for his benefit, must bear the burden as well as the benefits.")

The encroachment permit does not, by its terms, subject third party beneficiaries to an obligation to participate in the repair and maintenance of the storm drainage system. It is the law of equity which subjects them to that obligation, because the third party beneficiary occupies the status of a dominant estate. Equity supplies the maintenance obligation once the landowner takes advantage of the benefit conferred and starts acting as a dominant estate owner by sending stormwater from their property through the Westside system. At that point, they become subject to the *Hayes v. Tomkins* duty of bearing an equitable share of the costs of maintenance and repair.

Equitable Allocation of Repair and Maintenance Costs to DOT and Danwood

Right to Equitable Allocation from DOT and Danwood

The foregoing, which is uncontroverted, is sufficient to establish the claim for an equitable allocation against the DOT. In order to recover alternative relief against Danwood, Westside sought to prove that Danwood was an intended third party beneficiary of the easement

o use the storm drain line. This proof consisted of three elements. First, that Danwood's predecessor in title discharged stormwater directly into the DOT system, which, as the Court noted, distinguished that predecessor from the Alpine, Denton, and DW Properties parties. Second, that DOT contracted for more capacity in the Westside system than it needed for its own stormwater, thus implying an intent to confer a benefit on the landowners who discharged into its highway lines, including Danwood's predecessor in title. Third, that Danwood's encroachment permit (issued to its predecessor in title) included a letter admittedly showing that the predecessor who obtained the encroachment permit did so based upon a clear intent to take advantage of the Westside system once it was built. [Ex. 4; Encroachment Permit for Danwood property]. There was no dispute, and Danwood admitted, that the system referred to in the letter in its encroachment permit was Westside's, and that the predecessor in title of Danwood used this letter to obtain an encroachment permit. Thus, Westside proved that DOT intended to obtain enough capacity to handle stormwater from other contributing landowners, and that Danwood's encroachment permit was based upon the representation of an explicit intent of using Westside's future system (which was exactly what was done) for the handling of the stormwater off of the Danwood property. This evidence demonstrates that Danwood's predecessor was an intended beneficiary who knowingly took advantage of Westside's system. Danwood, by virtue of its predecessor's conduct, falls squarely within the definition of a third party beneficiary. See *Kingman v. Nationwide Mut. Ins. Co.*, *supra*. Moreover, the encroachment permit runs with the land since owners such as Danwood are on constructive notice of the permit, a point which Danwood goes to great lengths to make in its memorandum (pp. 25-26 of Post Trial Brief and Motion of Danwood, LLC), therefore Danwood is bound by the acts and agreements of its

predecessor in connection with stormwater drainage.

Determining Equitable Allocation for DOT and Danwood

The civil engineer, Michael Lambrecht, testified he was asked to determine the proportion of usage of the system by each of the landowners discharging water into the system (with the exception of certain residential owners whose use would be immaterial according to Lambrecht). His calculation utilized peak flows based on a ten-year storm event. Lambrecht testified that this was a standing engineering benchmark to use for flow rate calculations, and that it is commonly used by DOT and Lexington County. He further testified that utilizing other methods would not materially change the percentage of water coming into the Westside system from the Defendants' properties. In his judgment, this approach was the best tool available to a civil engineer to approximate percentages of use.

Lambrecht testified that stormwater entering the Westside system at Line "E" from the DOT catch basin was 65 cubic feet per second (cfs) based on peak flow rates. Based on his calculations, Lambrecht testified that this represented approximately 80% of the stormwater that flows through Line "E." Based on totaling the peak flow rates from all properties whose stormwater eventually flows into Line "E," Lambrecht assigned 81.48% as the percentage of use of Line "E" by water flowing into it from the DOT catch basin. He further testified that his flow rate calculations showed 24.30 cfs of stormwater came from Danwood's property. [See also Exs. 28 & 29] Using Westside's suggested method for equitably apportioning repair and maintenance costs, this would equate to Danwood having responsibility for 22.62% of maintenance and repair costs.²

² Lambrecht's flow rate calculations with respect to stormwater flowing through Line "E" were as follows: Westside Plaza 19.9 cfs; U.S. 1 (SCDOT) 12.00cfs; APAM 12.00cfs; Kimbrell's 12.6 cfs; RI CS2 2.60 cfs; DW

Defendants cross-examined Lambrecht on his calculation, but he never disavowed his approach, and Defendants offered the Court no alternative approach for calculating use. Thus, the only evidence of use is the evidence offered by Lambrecht. While the Court, in its role of doing equity, may decide to use another approach based upon the evidence before it, Defendants have offered the Court no alternative. Moreover, if any party would be capable of offering a differing engineering alternative or analysis, one would think it would be the DOT, who chose not to do so. Westside submits that while there may be other ways to determine usage of Line "E" by DOT and other landowners, its methodology is based upon accepted engineering calculations. Moreover, adopting the calculations and methodology offered by Westside (i.e. percentage of use) would be in keeping with how prior courts have apportioned maintenance and repair costs for common easements.

Allocating Costs of Repair and Maintenance to DOT and Danwood

At trial, Westside established that it spent \$325,240 repairing Line "E" and in maintaining the detention pond. [Meshekoff Testimony; Exs.17-24]. The details of these costs were presented as follows:

Ideal Construction Invoices for Line "E"

-Invoice No. 01852-2 dated 6/06/2008 \$235,635.35
-Invoice No. 01852-1 dated 3/31/2008 \$ 36,013.60
- Invoice No. 01812IV-01830 dated 11/10/2006 \$31,000.00
-Ideal Engineering \$ 3,000.00
Total: \$305,648.95

Ideal Construction Invoice for Detention Pond

-Application for Payment #1 dated 10/13/2006 \$45,528.00
-Westside attributes 33% to Line "E" totaling **\$15,024.24**
American Engineering Invoice for Engineering Services \$13,840.00

Properties 5.20 cfs; Danwood 24.30 cfs; Boom 3.70 cfs; Denton 1.60 cfs; Alpine 8.90 cfs; Wade Street 2.50 cfs; Danwood Drive 2.10 cfs. Totalling these flow rates equals 107.40 cfs. Westside submits that dividing the individual flow rates by the aggregate flow rate gives a percentage that is appropriate for use in determining the equitable allocation of maintenance and repair costs.

-Westside attributes 33% to Line "E" totaling \$4,567.20

TOTAL: \$325,240.39

[Meshekoff Testimony; Exs.17-24].

The Court excluded \$3,000 of Westside's costs as not recoverable (the Ideal Engineering invoice, proposed Ex. 20), and Defendants do not otherwise address the issue of costs in their post-trial briefs. Thus, once accepting the exclusion of \$3,000 in costs, the uncontested evidence supports \$322,240 as Westside's repair and maintenance costs for Line "E" and the accompanying contribution of silt to the detention pond. Indeed, there has been no challenge by any of the Defendants as to the reasonableness of such costs and it is not in dispute that costs associated with Line "E" were incurred of necessity to maintain the system and protect the public (both on Westside's property and on Defendants' property). Tim Richardson testified as to the need for immediate repairs to Line "E" to prevent harm to the public and no party challenged the need for immediate repair work. Furthermore, no Defendant questioned the need for maintenance of the detention pond or the reasonableness of Westside's costs with respect to same.

Since Westside contributes 18.52% of the stormwater flowing through Line "E", Westside seeks an equitable apportionment from the remaining Defendants of 81.48% of the costs to repair and maintain Line "E" and the detention pond. Accounting for Westside's responsibility for maintenance and repair, which totals \$59,679 ($\$322,240 \times .1852$), the total sought from other property owners is \$262,561 ($\$322,240 - \$59,679$). To date, Plaintiff has collected \$77,740 in settlements with former parties to this action. Further accounting for these payments the total sought from the remaining Defendants, DOT and Danwood, is \$184,821.

Westside submits that the following is a just and equitable apportionment of the repair and maintenance costs:

- a. DOT is responsible for all uncollected costs of maintenance and repair totaling \$184,821; or
- b. DOT's responsibility should be reduced to account for Danwood's equitable contribution as follows: Danwood is responsible for 22.62% of all costs of maintenance and repair totaling \$59,391 ($.2262 \times \$262,561^3$) and DOT is responsible for the remaining amount of \$125,430 (\$184,821 - \$59,391).

DEFENDANTS' ARGUMENTS

Defendants' arguments are of two types: those which would bar or defeat Westside's claim; and, those which merely affect the balance of the equities.

Defendants Arguments as to Westside's Right to Equitable Allocation

A. The Encroachment Permit did not create a Maintenance Agreement

Clarence Blakely testified that, unlike the other commercial landowners who needed an encroachment permit to discharge water into the DOT system, the DOT was in the opposite position of seeking to discharge water onto the land of another (i.e. Westside's property). Blakely also testified that DOT does not seek to govern how a landowner transports stormwater across the owner's land. Thus, as it relates to Westside, the encroachment permit covers only the DOT right of way which includes certain driveways for Westside Plaza and a very small length of storm drainage pipe from a DOT catch basin to one located on Westside's property (see

³ Danwood should not get the benefit of an offset for any settlements by other contributing parties as it has an equitable duty to participate in accordance with its use of the system.

Line "E"). DOT claims that certain indemnification language in the Encroachment Permit bars Westside from seeking an equitable contribution for maintenance and repairs from DOT. [See Ex. 1]. However, the language in the permit concerning indemnity for damage to person or property can only be interpreted to apply to claims arising from encroachments on the DOT's right of way, not on Westside's property. Blakely further testified that DOT was making no claim for indemnity under that provision, which is consistent with it not applying to claims arising off the DOT right of way. Here, the claim is for repair and maintenance off of the DOT right of way. There was no maintenance agreement as to that work since the encroachment permit does not apply to private property.

B. The Common Enemy Rule

South Carolina follows the common enemy rule with respect to the diversion of surface waters naturally flowing across land. The rule allows a landowner to treat surface water as a common enemy and dispose of it as the landowner sees fit. There are, however, two exceptions. First, the common enemy rule is subject to the law of nuisance and an individual may not obstruct or alter the flow of water to create a nuisance *per se*. Second, except by contractual or prescriptive right, an upper landowner may not, by means of a ditch, impoundment or other artificial structure, collect surface water on his own land and cast it in a concentrated form upon lower adjoining land. *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 509-10, 598 S.E.2d 712, 714 (2004)(citations omitted).

Thus, the Rule does not apply when a party collects and then discharges stormwater onto the property of another. The right to discharge collected stormwater must be found in other legal or equitable principles. The evidence before the Court was that DOT had been collecting

and discharging water into the drainage ditch on the Dreher property, only since the major changes to U.S. Highway 1 in 1970. There was no evidence of any collection and discharge of water prior to that date. There was also no evidence whether Mr. Dreher agreed to the DOT discharging there in 1970 or whether he simply did not care. There was also no evidence presented as to any arrangements or agreements between Mr. Dreher and the DOT such as whether the DOT undertook to maintain and keep up that portion of the Dreher property it used to handle its storm water. Regardless, the DOT offered no explanation of what right they had to discharge water onto the Dreher property prior to the Encroachment Permit. What is clear is that DOT did not prove at trial that it had a prescriptive easement to discharge onto the Dreher property since, as of 1987 when the Westside system was installed, the evidence was that DOT had discharged storm water onto the Dreher property for 17 years, not the required 20 years that might support an easement by prescription.

Furthermore, the DOT commonly uses eminent domain for a number of purposes, including the acquisition of property or facilities necessary to handle and transport stormwater from its highways. See *Fuller-Ahrens Partnership v. South Carolina Dept. of Highways and Public Transportation*, 311 S.C. 177, 427 S.E.2d 920 (Ct. App. 1993)(inverse condemnation case where summary judgment granted for Highway Department on grounds that later purchaser of land on constructive notice of right of way deed for storm drainage system acquired by Highway Department through condemnation). For reasons not explained at trial, DOT failed to use its eminent domain powers to condemn the Westside property for drainage usage. Thus, since DOT was collecting and discharging water without condemnation or an easement, DOT failed to prove that in 1987 it had any right to continue collecting and discharging water into the drainage ditch

on the undeveloped Dreher property. Because Clarence Blakely testified that DOT was collecting and then discharging stormwater prior to and after 1987, the common enemy rule supplies no right for DOT to discharge collected water. It does just the opposite. It requires the DOT to have some contractual or prescriptive right to discharge onto the Westside property. The DOT obtained the right to continue discharging water onto Westside's property, only by virtue of the encroachment permit. As DOT admitted at trial, this encroachment permit, allowing DOT to discharge onto Westside's property, is an easement.

C. Laches

Both DOT and Danwood argue the equitable defense of Laches, although for contradictory reasons. DOT claims that Westside waited until 2008 to put DOT on notice of the claims arising from 2005-2008. Danwood, on the other hand, contends the delay began in 1990, when the first Meshekoff entity took title to the property. Neither party can demonstrate any prejudice they suffered from this "unreasonable delay."

DOT cannot deny that Westside put them on notice of the claims well within the normal three year statute of limitations period. The fact that the Statute of Limitations does not apply in equity, does not change the fact that this delay was not unreasonable.

DOT's alleged prejudice is that it did not have the opportunity to depose Edward Meshekoff when he perhaps would have been in condition to be deposed. Of course, DOT has not established Mr. Meshekoff's condition when the suit was filed when it could have deposed him, nor have they established whether his condition in 2005, 2006, or 2007 was materially better. That is simply speculation on the part of DOT as to what might have happened. Mrs. Meshekoff is still alive, but DOT did not depose her. Furthermore, the issues on which DOT

speculates Mr. Meshekoff might have testified, are of minor importance, relating essentially to whether he crawled through the pipes before purchasing the center. As DOT says elsewhere, Mr. Swinson has already established the "gold" standard on pre-purchase due diligence, and he neither inspected the stormwater system on his property (Danwood) nor did he learn of an encroachment permit during his due diligence efforts. DOT falls far short of establishing it suffered any prejudice.

Danwood takes the unusual position that the delay started in either 1990 or 1996 since the Meshekoffs were on constructive notice that water from the DOT was flowing through their system. Does that mean Westside's predecessors had the duty to inform Danwood or its predecessors that Danwood's water was flowing into the DOT which was then flowing into Westside? Danwood had the engineers and attorneys and surveyors looking in every corner of its property discovering everything that was to be known before purchasing the property (except the condition of their stormwater system and the encroachment permit with the DOT). Why was Danwood not supposed to protect its own interests by having one of the members of its due diligence army discover its own encroachment permit that would have put it on notice that its own stormwater was going to flow into the Westside system? Why was that Westside's responsibility? Danwood never says. What known right did Westside have in 1990 or 1996, fifteen years before any problems arose? Danwood never says.

Danwood's alleged prejudice is that it was not informed when it purchased the center in 2004, that it might have to pay for stormwater repairs. Of course, this was over a year before the first problem arose. Was Westside supposed to know that Danwood was thinking about purchasing the center, and go out and hire a team of inspectors to go in the pipes, so it could

warn Danwood before it purchased the property that there might be a future problem? According to the logic of Danwood's position, Westside was required to do those things. That absurdity demonstrates the absence of logic in Danwood's position.

Danwood also argues that it was not informed of the work before it began in 2005-2008. However, it can demonstrate no harm since in the intervening three years it has made no effort to contribute to the cost nor has it objected at trial to the scope or cost of the repairs and maintenance (beyond the \$3,000 the Court excluded).

D. Unclean hands

Unclean Hands cannot be imputed to Westside

The DOT and Danwood's argument is based solely upon the actions of Dayton & Associates, which they try to impute to Westside, without citing any authority for the proposition that in equity, a party who acts in good faith may be barred from asserting a claim by the conduct of a prior owner. Indeed, "unclean hands" cannot be imputed to a party who is simply a good faith purchaser of commercial property. The theories set forth in Defendants' briefs simply do not support a defense of unclean hands barring Westside's recovery.

The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct.App.1998). The expression 'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others." *Arnold v. City of Spartanburg*, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943). The rule must be understood to refer to some misconduct concerning the matter in litigation of which the opposing party can, in good conscience, complain in a court

of equity. *Id.*

Defendants' theories fall short of satisfying the initial element of unclean hands that the plaintiff (i.e. Westside) must have acted unfairly. Defendant Danwood's brief states that Westside has unclean hands by availing itself of the 1987 Encroachment Permit's benefits (which it defines as profiting from the drainage diversion) while seeking to divest itself of the burdens of the permit (which it defines as accepting the facts that Dayton's contractor used CMP rather than RCP and that the contractor incorrectly installed the CMP). Defendant DOT's brief acknowledges that Westside took no actions that would support an unclean hands defense, but seeks to impute Dayton's alleged unclean hands through Westside's constructive notice of the use of CMP pipe and its installation defects. Neither passive acceptance of a benefit from a contract entered into by its predecessor in title, nor constructive notice of defects constitute unfair actions on the part of the plaintiff for purposes of unclean hands.

On its face, the defense of unclean hands does not allow for imputation, since it requires that the plaintiff to be barred must have itself acted unfairly in the matter at issue in litigation, resulting in direct prejudice to the defendant. (*see First Union, supra* (emphasis added)). Unclean hands is a narrow doctrine that does not consider the effect of a transaction on other parties. *See Arnold v. City of Spartanburg*, 201 S.C. 523, 23 S.E.2d 735, 738 (1943) ("The expression "clean hands" means a clean record with respect to the transaction with the defendants themselves and not with respect to others."). While Westside denies that Dayton & Associates acted with unclean hands, to the extent the doctrine applied at all, it would apply only to Dayton & Associates. Danwood's theory that by passively accepting the benefits of the Encroachment Permit, Westside also accepts the Permit's burdens and Dayton's alleged unclean

hands does not establish a sufficient nexus between the wrong and the recovery sought. Here, Westside was not an initial party to the Encroachment Permit, so it could not have unclean hands regarding that transaction. The transaction with which Westside's alleged wrongdoing is associated is the purchase of the shopping center from Dayton, which is neither a transaction "with the defendants themselves" nor is it the subject of this litigation.

As conceded in Defendant DOT's brief, Westside only had constructive notice of the use of CMP and its improper installation. Constructive notice alone mitigates any allegation of unclean hands. *Anderson v. Buonforte*, 365 S.C. 482, 494, 617 S.E.2d 750, 756 (S.C. Ct. App. 2005). In *Anderson*, a title search run by Plaintiffs' attorney did not reflect the restrictive covenants set forth in their recorded deed. *Id.* The court found that because Plaintiffs did not have actual notice, they could not be barred from recovery by unclean hands. ("Thus, although the Buonfortes were on constructive notice of the restrictive covenants, they were not on actual notice, mitigating any allegation of unclean hands."). *Id.*

No Prejudice to Defendants

The DOT has already removed from the case any claim that substituting CMP for RCP pipe was an act of bad faith or caused prejudice. As the DOT testified, its position is that substituting CMP for RCP would be allowed and would not violate or void the encroachment permit. The record supports this testimony since the DOT allowed Kimbrell's to install a CMP system including using CMP on the DOT right of way to tie into the DOT system. (Ex. 4) In addition, it is uncontradicted that the CMP pipe in the Westside system functioned within the boundaries of its expected useful life (15 to 35 years per Lambrecht and Richardson). The argument that perhaps it could have lasted longer hardly demonstrates prejudice considering it

lasted a reasonable period of time.

In arguments presented at trial and in its brief, the DOT acts as though in 1987 it had the power to deprive Westside of driveway entrances if it did not get the RCP system it wanted. That is untrue as Blakely testified the DOT has no right to deprive an owner of reasonable access to the highway. Nor did DOT have any leverage to require the best RCP stormwater system possible on the property, since there is no evidence it had any right in 1987 to continue discharging concentrated water onto the property. Rather, DOT was going to have to accept what Dayton & Associates did with respect to storm drainage on its own property or it was going to have to exercise its power of eminent domain and take on the cost of building a system and the cost of maintaining it. Apparently, DOT chose the cheaper alternative and did not stop the open and obvious work that was going on as the developer of Westside Plaza installed a CMP system.

Defendants' Arguments as to Balancing of the Equities

Defendants next argue that the Court should balance the equities in their favor based on the arguments below. However, not every alleged equitable factor is relevant in every equity case. The reported decisions have focused on two issues in determining an equitable allocation. First, the burden on the landowner, and second, the amount of usage by the dominant estate. The Defendants have given the Court no authority from any state for allocating costs based on the factors they argue that are listed below.

E. Lack of due diligence by Plaintiff

Due diligence is a red herring in this case. First, it is not relevant to the issues. Second, the evidence is that before purchasing the property in 1997, Westside hired counsel, that plats and surveys were prepared, and that there were as-built drawings of record. There was no

evidence that Westside failed to conduct proper due diligence. Without putting up any evidence that such is the case, DOT and Danwood act as though Westside had a duty to inspect the stormwater lines, and find the encroachment permit. Both cite Ron Swinson's testimony about the efforts he went through before purchasing the Danwood property. However, they neglect to consider or even acknowledge his testimony on cross examination that the procedures he followed were those required by his lender (Westside had a lender as well), that he did not inspect the stormwater system, and that he did not discover the encroachment permit on the Danwood property. How can DOT attack Matthew Meshekoff for not being an astute enough businessman to inquire about the permit required for his driveways (the encroachment permit), while still praising the much more astute Swinson (who also failed to inquire about the permit required for his driveways)? Whether it matters or not, there is no evidence in this record that Westside failed to conduct reasonable due diligence when it acquired the property.

F. Improper installation

Defendants have cited no precedent that a court may consider the acts of a predecessor as an equity against a current landowner. Indeed, such would seem inequitable on its face. As South Carolina courts have held, in order to bar or reduce recovery because of inequitable conduct, such inequitable conduct must have been that of the party seeking recovery. *See First Union, supra*. In this instance, Westside has acted with "clean hands". Westside undertook to perform necessary repairs and maintenance to Line "E" at its expense in order to protect the public and to keep storm water flowing through Line "E". Stormwater that comes from the DOT and other commercial properties. Westside did not allow the storm drain system serving these properties to cease functioning. How can such conduct be deemed inequitable?

Thus, whether the original CMP storm drainage line for Line "E" was improperly installed is not relevant. The storm drainage system on Westside's property did not have to be flawlessly installed and of the highest quality. If the system reasonably carried out its function, equity is satisfied. The uncontradicted evidence established that the CMP on Line "E" did not fail prematurely. It lasted within its reasonable useful life and has now been replaced by Defendants' preferred pipe, RCP. There can be no inequity to be charged against Westside, as the current property owner, under such circumstances.

There was no testimony that there was improper maintenance. Further, there was no evidence that tied maintenance to any failure of the system. Further, as stated above, there was no evidence the system failed prematurely. For these reasons, it is understandable that neither Defendant has argued in their post-trial briefs, that the conduct of Westside in maintaining the system, is at issue.

G. Breach of the encroachment permit by Westside's predecessor

Both DOT and Danwood claim that the use of CMP pipe was a breach of the encroachment permit issued by DOT to Westside's predecessor, Dayton & Associates. While they dwell on the obvious--that Line "E" was originally RCP—they presented no evidence that the use of CMP constituted a breach of the encroachment permit. These defendants seek to equate a departure from the encroachment permit's reference to the use of RCP to a material breach of the encroachment permit. The evidence presented at trial runs contrary to this argument. The only evidence presented on this issue is that the use of CMP was not a breach of the encroachment permit. At trial, Westside submitted the Rule 30(b)(6) deposition testimony of the DOT. [Ex. 12]. The DOT admitted that the use of CMP for Line "E" did not violate the

terms of the Encroachment Permit. [Ex. 12 @ p. 31, l. 14-19.] Thus, the DOT cannot now claim there was a breach of its encroachment permit by virtue of the use of CMP by Dayton & Associates. It follows that if DOT cannot claim a breach of its agreement, then Danwood cannot claim there was a breach.

H. Equitable Estoppel

Once again DOT attempts to make Westside responsible in equity, for what purportedly is the inequitable conduct of its predecessor. Such conduct is not imputed in equity. *See e.g. First Union, supra.* There is also no evidence of a false representation or concealment of a material fact. While DOT points out that what was installed on private property is different from what is in the encroachment permit that applies only to the DOT right of way, there is no evidence that this difference was not understood at the time, or that a change was agreed to but not documented, or that DOT simply did not care whether or not the developer changed its mind about which type pipe to install. The construction of the CMP system would have been open and obvious for the DOT to see if it cared to observe the installation of Line "E". DOT presented no evidence on whether it did observe the installation of CMP and simply did not care or whether it did not care enough about it to observe the installation of Line "E". The record is devoid of any evidence that the change amounted to a misrepresentation or a concealment. Moreover, the DOT presented no evidence that it altered its position regarding the encroachment permit based upon the alleged concealed installation of CMP. As Clarence Blakely admitted at trial, the DOT has no right to dictate what type of pipe is installed on private property and it does not attempt to do so. There is simply no evidence to support the DOT's post-trial contention that it altered its position or suffered prejudice by Dayton & Associates decision to use CMP

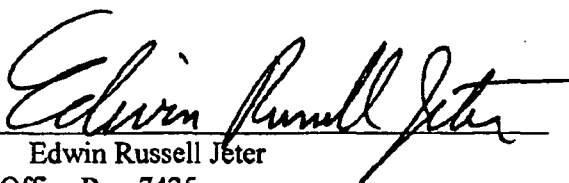
rather than RCP.

CONCLUSION

For the reasons stated, Plaintiffs ask that the Court award judgment in favor of Plaintiffs against Defendants in the amounts set forth herein.

Respectfully submitted,

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Attorneys for the Plaintiff

May 11, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2008-CP-32-04362

Westside Meshekoff Family Limited Partnership Appellant,

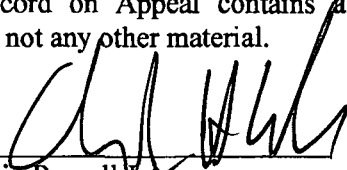
v.

South Carolina Department of Transportation; DW Properties, LLC;
Danwood LLC; Robert W. Denton; and Alpine of SC, Inc., ... Defendants
Of whom South Carolina Department of Transportation is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

October 31, 2012


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(THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2008-CP-32-04362

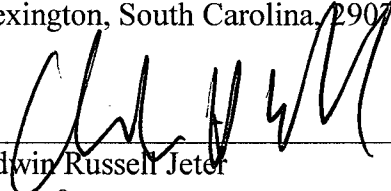
Westside Meshekoff Family Limited Partnership Appellant,

v.

South Carolina Department of Transportation; DW Properties, LLC;
Danwood LLC; Robert W. Denton; and Alpine of SC, Inc., ... Defendants
Of whom South Carolina Department of Transportation is the Respondent.

PROOF OF SERVICE

I certify that I have served the Record on Appeal by mailing a copy of same to the
Respondent's attorney of record, Patrick John Frawley, Davis, Frawley, Anderson, Ayer,
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December 20, 2012