

**RECORD OF RELOCATION OF ACCESS ROAD AND RIGHT OF WAY BETWEEN
TOWN HIGHWAY 59 AND TEN BENDS DRIVE, HYDE PARK, VERMONT**

LAMOILLE VALLEY PROPERTY OWNERS' ASSOCIATION

This Record of Relocation of Access Road and Right of Way is being recorded by the Lamoille Valley Property Owners' Association ("LVPOA") in order to provide an official record of the relocation of an access road and right of way that runs across land and premises shown upon a survey plan entitled "Plan of Lot 7 'The Farmhouse at Ten Bends' in Hyde Park, Vermont" prepared by Spear Surveying, Inc. Stowe, Vermont, Job No. 73-124E, dated January 1990 and recorded in Map Book III, Pages 60-61 of the Hyde Park Land Records (the "Property").

1. The Property was conveyed to George K. and Aimee B. Stearns by Warranty Deed from the LVPOA dated March 13, 1990 and recorded in Book 62, at Page 239 of the Hyde Park Land Records. In this Warranty Deed the LVPOA reserved a right of way described therein as follows:

A portion of "Former Town Highway No. 59" and a separate access road extend from current Town Highway No. 59 through the herein conveyed lands and premises to Grantor's remaining lands. The locations of said former town highway and access road are shown upon the above-referenced survey plan. There is hereby excepted and reserved unto the herein Grantor, its successors and assigns a right of way in common with the herein Grantees, 50 feet in width, the centerline of said right of way being the centerline of the travelled way of the former town highway and access road, as the same are currently layed out and located. Said common right of way shall be for purposes of roadway maintenance, repair and replacement and for purposes of access to Grantor's remaining lands, Grantees' lands and to individual lots owned by members of Lamoille Valley Property Owners Association, Inc. A survey plan of those lots which derive their access from the above-referenced former town highway and access road is recorded at Map Book 2, Pages 29-32 of the Hyde Park Land Records.

(Hereafter referred to as "the Access Road and Right of Way").

2. The above-mentioned Warranty Deed also granted the right for the Grantees, their heirs and assigns, to relocate an intersection of the Access Road and Right of Way as follows:

Notwithstanding the hereinabove excepted and reserved rights of way, the herein Grantees shall be entitled, at their sole cost and expense, to relocate the existing intersection of the access road with current Town Highway No. 59 from its present location as shown on the survey plan first hereinabove referenced in a southerly direction to a point located between said present location and that property boundary extending from the iron rod located on the westerly sideline of current Town Highway No. 59 S 58° W 31 feet, more or less, passing through an iron rod to a point in the centerline of former Town Highway No. 59. In the event the herein Grantees should relocate the access road intersection, the centerline of the travelled way of the new access road extending from its relocated intersection with current Town Highway No. 59 to that point where it reconnects to the existing access road shall constitute the centerline of a relocated 50-foot wide right of way in common in favor of the herein Grantor, the herein Grantees and members of Lamoille Valley Property Owners Association, Inc.

3. George K. and Aimee B. Stearns conveyed the Property to Thomas and Christine Fuss by Warranty Deed dated October 27, 2000 and recorded in Volume 94, at Page 1 of the Hyde Park Land Records.
4. Thomas and Christine Fuss relocated the Access Road and Right of Way in the summer of 2004.
5. The relocation of the Access Road and Right of Way became the subject of various disputes which resulted in a number of court rulings in relation to the relocation.
6. In order to provide an official record of the relocated Access Road and Right of Way LVPOA now references or records the following documents:
 - i. Warranty Deed from the LVPOA to George K. and Aimee B. Stearns dated March 13, 1990 and recorded in Volume 62, at Page 239 of the Hyde Park Land Records and

Warranty Deed from George K. Stearns and Aimee B. Stearns to Thomas Fuss and Christine Fuss dated October 27, 2000 and recorded in Volume 94, at Page 1 of the Hyde Park Land Records.


- ii. Letter from Thomas and Christine Fuss dated June 20, 2002 requesting the LVPOA to approve relocation of the access road and right of way (matters unrelated to the access road and right of way have been redacted).
- iii. Minutes of the Spring 2002 Lamoille Valley Property Owner's Association Trustees Meeting dated June 22, 2002 (matters unrelated to the access road and right of way have been redacted).
- iv. Letter from the Lamoille Valley Property Owner's Association to Thomas and Christine Fuss dated August 7, 2002 in response to Fuss's request to the trustees to relocate the Access Road and Right of Way. The remainder of this letter refers to matters unrelated to the Access Road and Right of Way and has therefore been redacted. Also attached is a copy of the referenced letter from Bill Kelk, Esq. to Thomas Fuss (content unrelated to the access road and right of way has also been redacted).
- v. Application to the Town of Hyde Park by Thomas Fuss requesting permission to relocate the Access Road and Right of Way (including some of the plans and documents submitted with application or during permit process).
- vi. Town of Hyde Park Permit No. V2002-12 dated March 4, 2003 approving the relocation of the Access Road and Right of Way.
- vii. Letter from David Ring of Shire Town Engineering to the Town of Hyde Park dated June 5, 2004 with enclosed revised site plan showing wetland locations.
- viii. Letter from Thomas and Christine Fuss to Diana Peduzzi of the District 5 Environmental Commission with attachments.
- ix. Jurisdictional Opinion #5-3-01 dated February 19, 2003.
- x. Request for Reconsideration of Act 250 Jurisdictional Opinion #5-3-01, filed by Thomas and Christine Fuss dated March 17, 2003 in relation to the relocation of the Right of Way, together with attached plans.
- xi. Copy of Reconsideration of Jurisdictional Opinion #5-03-01 from Diana Peduzzi dated June 18, 2003.

- xii. Decision and Order of the Lamoille County Superior Court dated May 27, 2005.
- xiii. Supplemental Order of the Lamoille County Superior Court dated June 3, 2005.
- xiv. State of Vermont Supreme Court Entry Order dated March 29, 2006.
- xv. Decision and Order of the Lamoille County Superior Court dated December 31, 2007.
- xvi. Final Judgment of the Lamoille County Superior Court dated January 24, 2008.
- xvii. Entry Order of the Lamoille County Superior Court dated April 28, 2008.

DATED at Burlington, Vermont this 23rd day of September, 2008.

Lamoille Valley Property Owners' Association
("LVPOA")

By:



Murphy Sullivan Kronk
275 College Street
Burlington, Vermont 05401
42342

MS
MURPHY
SULLIVAN
KRONK

WARRANTY DEED

KNOW ALL PERSONS BY THESE PRESENTS That Lamoille Valley Property Owners Association, Inc., a Vermont corporation having an office and principal place of business at Hyde Park, County of Lamoille and State of Vermont, Grantor, in the consideration of TEN AND MORE DOLLARS paid to its full satisfaction by George K. Stearns and Aimee B. Stearns, of Hyde Park, County of Lamoille and State of Vermont, Grantees, by these presents, does freely GIVE, GRANT, SELL, CONVEY AND CONFIRM unto the said Grantees, George K. Stearns and Aimee B. Stearns, husband and wife as tenants by the entirety, and their heirs and assigns forever, a certain piece of land in Hyde Park in the County of Lamoille and State of Vermont, described as follows, viz:

Being a portion of those lands and premises conveyed to Lamoille Valley Property Owners Association, Inc. by Warranty Deed of River Properties, Inc., dated April 3, 1972 and recorded at Book 39, Pages 343-346 of the Hyde Park Land Records; and being more particularly described as follows:

Beginning at the northerly corner of the property at an iron rod on the top of the bank of the Lamoille River; thence

S 63° 08' E 6.3 feet to a point on the westerly side of the Lamoille Valley Railroad which is N 63° 08' W 18.2 feet from an iron rod; thence

Southerly 98.24 feet by a 1,037 foot radius curve to the right along the westerly side of said Lamoille Valley Railroad to a point on the westerly side of Town Highway #59; thence

S 16° 07' W 216.7 feet to a point of curvature; thence

S 166.75 feet by a 216.75 foot radius curve to the left to an iron rod;

The previous two courses are along the westerly side of said Town Highway # 59; thence

S 58° W 31 feet, more or less, passing through an iron rod to a point in the center of former Town Highway #59; thence

Southeasterly 610 feet, more or less, along the center of said former Town Highway #59 to a point; thence

N 82° 30' W 793 feet, more or less, passing through an iron rod to a point in the center of the Access Road; thence

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Southwesterly 118 feet, more or less, along the center of said Access Road to a point; thence

N 80° 00' W 106 feet, more or less, to iron rod on the top of the bank of the Lamoille Bank; thence

N 17° 41' E 91.4 feet to an iron rod; thence

N 16° 03' E 108.1 feet to an iron rod; thence

N 21° 28' E 159.9 feet to an iron rod; thence

N 29° 50' E 153.8 feet to an iron rod; thence

N 40° 29' E 181.6 feet to an iron rod; thence

N 87° 58' E 99.4 feet to an iron rod; thence

N 18° 49' E 108.1 feet to an iron rod; thence

N 62° 36' E 187.1 feet to an iron rod; thence

N 30° 40' E 110.5 feet to an iron rod; thence

N 41° 21' E 57.9 feet to an iron rod; thence

N 26° 53' E 101.4 feet to the point of beginning.

The previous 11 courses are along the approximate top of the bank of the Lamoille River.

The herein conveyed lands and premises contain 10.1 acres of land, together with farmhouse, shed and related improvements located thereon, and is sometimes referred to as the so-called Ten Bends Farmhouse, the Office Lot and/or Lot 7. Said lands and premises are shown upon a survey plan entitled "Plan of Lot 7 'The Farmhouse at Ten Bends' in Hyde Park, Vermont," prepared by Spear Surveying, Inc., Stowe, Vermont, Job No. 73-124E, dated January, 1990 and recorded at Map Book III, Pages 60-61 of the Hyde Park Land Records.

A portion of the boundary of the herein conveyed property extends along the centerline of what is described as "Former Town Highway No. 59." Said former town highway now serves as a private road providing access to lands of the herein Grantor and to individual lots owned by members of the Lamoille Valley Property Owners Association, Inc. There is hereby excepted and reserved unto the herein Grantor, its successors and assigns, a right of way over and upon a twenty-five (25) wide strip of land lying immediately westerly of the property boundary extending along the above-referenced centerline of "Former Town Highway No. 59." Said right of way shall be in common with the herein Grantees and shall be for purposes of roadway maintenance, repair and replacement and for purposes of access to Grantor's remaining lands, to Grantees' lands and to individual lots owned by members

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of Lamoille Valley Property Owners Association, Inc. There is hereby included herein a right of way over and upon a twenty-five (25) foot wide strip of land lying immediately easterly of the property boundary extending along the above-referenced centerline of "Former Town Highway No. 59." Said right of way shall be in common with the herein Grantor and its members and shall be for purposes of roadway maintenance, repair and replacement and for purposes of access to the herein conveyed property, to Grantor's remaining lands and to individual lots owned by members of Lamoille Valley Property Owners Association, Inc.

A portion of "Former Town Highway No. 59" and a separate access road extend from current Town Highway No. 59 through the herein conveyed lands and premises to Grantor's remaining lands. The locations of said former town highway and access road are shown upon the above-referenced survey plan. There is hereby excepted and reserved unto the herein Grantor, its successors and assigns a right of way in common with the herein Grantees, 50 feet in width, the centerline of said right of way being the centerline of the travelled way of the former town highway and access road, as the same are currently layed out and located. Said common right of way shall be for purposes of roadway maintenance, repair and replacement and for purposes of access to Grantor's remaining lands, Grantees' lands and to individual lots owned by members of Lamoille Valley Property Owners Association, Inc. A survey plan of those lots which derive their access from the above-referenced former town highway and access road is recorded at Map Book 2, Pages 29-32 of the Hyde Park Land Records.

Notwithstanding the hereinabove excepted and reserved rights of way, the herein Grantees shall be entitled, at their sole cost and expense, to relocate the existing intersection of the access road with current Town Highway No. 59 from its present location as shown on the survey plan first hereinabove referenced in a southerly direction to a point located between said present location and that property boundary extending from the iron rod located on the westerly sideline of current Town Highway No. 59 S 58° W 31 feet, more or less, passing through an iron rod to a point in the centerline of former Town Highway No. 59. In the event the herein Grantees should relocate the access road intersection, the centerline of the travelled way of the new access road extending from its relocated intersection with current Town Highway No. 59 to that point where it reconnects to the existing access road shall constitute the centerline of a relocated 50-foot wide right of way in common in favor of the herein Grantor, the herein Grantees and members of Lamoille Valley Property Owners Association, Inc.

The following covenants, agreements and restrictions have heretofore been made applicable to the areas of the real estate known as Ten Bends in the townships of Hyde Park and Morrystown, in the County of Lamoille and State of Vermont and previously owned by River Properties, Inc. and as shown upon a plan entitled "Plan of Ten Bends, Hyde Park and Morrystown, Vermont," prepared

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by J.P.R. Associates, Inc., Registered Land Surveyor, Stowe, Vermont, dated June 1973, revised August, 1973, February, 1975 and April, 1975, and recorded at Map Book 2, Pages 29-32 of the Hyde Park Land Records and at Big Book #1, Pages 90 a-d of the Morrystown Land Records, and the same are incorporated herein:

"1. River Properties, Inc. hereby grants to the owner of each lot, as appurtenant thereto, rights of way in common with others over the roads and foot paths as shown upon said plan unless and until said roads are accepted as public roads.

"2. No more than one (1) single family dwelling house and one (1) garage of not more than a three-car capacity shall be placed, erected or maintained on each of said lots, except Lot #7, being the River Properties, Inc. office lot.

"3. None of said lots shall be subdivided for sale purposes or otherwise.

"4. No house trailers or mobile homes shall be built or placed or permitted to remain for any period of time upon said lots.

"5. Said lots shall be used for residential purposes only and no part of said lots shall be used for merchantile, mechanical or manufacturing business and no trade, business or calling shall be conducted on said lots for profit, except on Lot #7, being the River Properties, Inc. office lot.

"6. River Properties, Inc. reserves for itself and its successors and assigns, such rights of way over said lots as shall be necessary for the purposes of laying any utility and service pipes and lines under or over said lots and for the purposes of repairing, constructing and maintaining such lines. But River Properties, Inc. shall not be liable for the laying of such utility lines from the nearest pole to the structures erected on said lots.

"7. The purchasers of each lot shall accept membership and shall require any purchaser of such lots from them to accept membership in Lamoille Valley Property Owners Association, Inc. organized for the purpose, among others, of maintaining areas used in common by all of the owners of said lots and shall be subject to and abide by all of the laws, rules and regulations of said Association.

"8. The burden of the covenants, agreements and restrictions above set forth shall run with the land affected thereby and shall be construed as covenants real."

The hereinabove incorporated covenants, agreements and restrictions specifically except the herein conveyed property from application of covenant numbers 2 and 5. Notwithstanding said exceptions, no trade, business or calling shall be conducted on the herein conveyed property for profit, except for an owner-

operated lodging facility of not more than six rooms and serving meals to not more than 12 guests, unless otherwise approved in writing by the herein Grantor.

In the event the herein Grantees should desire to sell or to list for sale the herein conveyed property, they shall first notify the herein Grantor, in writing, of that price at which they are prepared to sell the property. Grantor shall have twenty-one (21) days following its receipt of said notice to exercise a right to purchase the property at the stated price. Grantor shall exercise its right by delivery of written notice of its exercise to Grantees within said twenty-one (21) day period. Should Grantor exercise its right, the closing shall be held within sixty (60) days of the date of exercise, at which time Grantor shall tender to Grantees, by cashier's or certified check, the full purchase price. Should Grantor fail to exercise its right to purchase within the twenty-one (21) day period, Grantees shall be free to thereafter sell the property for any sum equal to or greater than the specified price. Should Grantees thereafter receive an offer at a lesser price, which offer Grantees have accepted or are prepared to accept, Grantor shall have a right of first refusal to purchase the herein conveyed property at said lesser price and on the same terms and conditions as contained in the offer. Grantees shall provide Grantor with a copy of any written offer or a summary of any verbal offer, which offer Grantees have accepted or are prepared to accept. Grantor shall have ten (10) days from the date of receipt of the offer to exercise its right of first refusal. Notice of Grantor's exercise of its right of first refusal must be delivered to Grantees within the ten (10) day period. Should Grantor fail to exercise its right of first refusal within said ten (10) day period, Grantees shall be free to thereafter sell the property in accordance with the terms and conditions contained in the offer. The right to purchase and the right of first refusal established herein are limited in their applications to the first sale by the herein named Grantees, or the survivor of them, and shall not pertain to any subsequent sales by the Grantees' successors in title to the herein conveyed property.

This conveyance is made subject to and with the benefit of any utility easements, spring rights, easements for ingress and egress and rights incident to each of the same as may appear more particularly of record, provided that this paragraph shall not reinstate any such encumbrance previously extinguished by the Marketable Records Title Act, subchapter 7, Title 27, Vermont Statutes Annotated.

Reference is hereby made to the above-mentioned deed and its record and to all prior deeds and their records as they apply to and affect the land and premises being conveyed for a more particular description of the land and premises herein conveyed.

TO HAVE AND TO HOLD said granted premises, with all the privileges and appurtenances thereof, to the said Grantees,

George K. Stearns and Aimee B. Stearns, husband and wife as tenants by the entirety, and their heirs and assigns, to their own use and behoof forever;

And the said Grantor, Lamoille Valley Property Owners Association, Inc., for itself and its successors, executors and administrators, do covenant with the said Grantees, George K. Stearns and Aimee B. Stearns, and their heirs and assigns, that until the ensembling of these presents, it is the sole owner of the premises, and has good right and title to convey the same in manner aforesaid, that they are FREE FROM EVERY ENCUMBRANCE; except as aforesaid.

And it hereby engages to WARRANT AND DEFEND the same against all lawful claims whatever, except as aforesaid.

IN WITNESS WHEREOF, the undersigned duly authorized agent of Lamoille Valley Property Owners Association, Inc. hereunto sets his hand and seal this 13 day of MARCH, 1990.

Witnessed: Lamoille Valley Property Owners Association, Inc.

[Signature]
HAN'S KRETSCHMAN

[Signature]
SOLMAN #4423

By: [Signature]
John Prenetta, its president and duly authorized agent

STATE OF NEW YORK
COUNTY OF MANHATTAN, SS.

At 245 PARK AVE. NYC, in said County, this 13 day of March, 1990, John Prenetta, president and duly authorized agent of Lamoille Valley Property Owners Association, Inc., personally appeared and he acknowledged this instrument, by him sealed and subscribed, to be his free act and deed and the free act and deed of Lamoille Valley Property Owners Association, Inc.

Before me [Signature]
Notary Public

MARY GULOTTA
NOTARY PUBLIC, State of New York
No. 43-4946112
Qualified in Richmond County
Commission Expires January 27, 1991

Vermont Property Transfer Tax
32 V.S.A. Chap. 251
ACKNOWLEDGMENT
Return No. 23-90
Signed [Signature] Clerk
Date 3/19/90

WARRANTY DEED

KNOW ALL PERSONS BY THESE PRESENTS that George K. Stearns and Aimee B. Stearns, of Hyde Park, Vermont (Grantors), in consideration of TEN AND MORE DOLLARS paid to their full satisfaction by Thomas A. Fuss and Christine R. W. Fuss, of Hyde Park, Vermont (Grantees), by these presents do freely GIVE, GRANT, SELL, CONVEY AND CONFIRM unto the said Grantees, Thomas A. Fuss and Christine R. W. Fuss, husband and wife as tenants by the entirety, and their heirs and assigns forever, certain land and premises (the "Premises") located in the Town of Hyde Park, County of Lamoille, and State of Vermont, described as follows, viz:

Being all and the same lands and premises conveyed to George K. Stearns and Aimee B. Stearns by Warranty Deed of Lamoille Valley Property Owners Association, Inc., dated March 13, 1990 and recorded at Book 62, Pages 239-244 of the Hyde Park Land Records. Said lands and premises contain 10.1 acres, more or less, together with farmhouse, shed and related improvements located thereon, and is sometimes referred to as the so-called Ten Bends farmhouse, the Office Lot and/or Lot 7. Said lands and premises are shown upon a survey plan entitled "Plan of Lot 7 'The Farmhouse at Ten Bends' in Hyde Park, Vermont," prepared by Spear Surveying, Inc., Stowe, Vermont, dated January 1990 and recorded at Map Book III, Pages 60-61 of the Hyde Park Land Records.

Said lands and premises are subject to and benefited by those rights-of-way, rights, covenants, agreements and restrictions set forth or referred to in the aforesaid Warranty Deed. It should be noted that the right of first refusal set forth in said Warranty Deed was released, relinquished and extinguished pursuant to that certain Release of Lamoille Valley Property Owners Association, Inc., dated June 28, 1999 and recorded at Book 89, Page 207 of the Hyde Park Land Records.

This conveyance is made subject to and with the benefit of all utility easements, spring rights and water rights, easements for ingress and egress and rights incident to each of the same, as may appear of record; provided, however, that this paragraph shall not reinstate any such interest extinguished heretofore by provisions of the Vermont Marketable Record Title Act as set forth in Title 27 Vermont Statutes Annotated §§601-606 and any amendments thereto.

For further particulars of description of the Premises, reference is hereby made to the deed(s) and instrument(s) recited hereinbefore and the descriptions and references contained therein.

TO HAVE AND TO HOLD said granted Premises, with all the privileges and appurtenances thereof, to the said Grantees, Thomas A. Fuss and Christine R. W. Fuss, husband and wife as tenants by the entirety, and their heirs and assigns, to their own use and behoof forever.

PAGE 2

*Stearns
Fuss p. 2*

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And the said Grantors, George K. Stearns and Aimee B. Stearns, for themselves and their heirs and assigns, do covenant with the said Grantees, Thomas A. Fuss and Christine R. W. Fuss, and their heirs and assigns, that until the ensembling these presents they are the sole owners of the Premises, that they have good right and title to convey the same in the manner aforesaid, and that the Premises are FREE FROM EVERY ENCUMBRANCE, except as aforesaid.

And the said Grantors, George K. Stearns and Aimee B. Stearns, hereby engages to WARRANT AND DEFEND the same against all lawful claims whatever, except as aforesaid.

Dated at Stowe, Vermont on this 27th day of October, 2000.

In Presence Of:

Jeanie Newton
Witness as to both

George K. Stearns
George K. Stearns

Aimee B. Stearns
Aimee B. Stearns

STATE OF VERMONT
COUNTY OF LAMOILLE, SS.

At Stowe, in said County, on this 27th day of October, 2000, George K. Stearns and Aimee B. Stearns personally appeared, and they acknowledged this instrument, by them sealed and subscribed, to be their free acts and deeds.

Before me *Jeanie Newton*
Notary Public

Vermont Property Transfer Tax
32 V.S.A. Chap. 231
-ACKNOWLEDGEMENT-
Return Rec'd - Tax Paid - Board of Health Cert. Filed
vt. Land Use & Development Plans Ad. Cert. Rec'd
year 11/1/00
Jeanie Newton
November 1, 2000

Hyde Park Town Clerk's Office November 1, A.D. 2000 at 11 o'clock 30 minutes A.M.
Received for recording a deed of which the foregoing is a true record.

Attest: *Jeanie Newton* Town Clerk

Thomas and Christine Fuss
454 Black Farm Road
Hyde Park VT 05655

Lamoille Valley Properties Owners Association
Attention: Trustees
Hyde Park VT 05655

June 20, 2002

Dear Trustees:

As members of the LVPOA, we respectfully request that the following issues concerning our property and membership be addressed when you convene for your annual spring meeting on June 21, 2002.

- I. The relocation of the LVPOA access road right of way. Since the spring meeting of 2001, we studied at length the relocation of the road both in terms of: (A.) the location proposed at that time and finding a better location, (B.) the legal concerns raised by John Preneta at that meeting and (C.) a further legal interpretation of the deeded rights we wish to exercise and the role of the association in proceeding with legal clarity.
 - A. Location
 1. Our first proposal called for the establishing a new access point through the gap in the trees at the location where Old Highway 59 once existed. The Town of Hyde Park and selectman Ken Harvey issued a permit to use this point of access. This point continues to be our recommend new point of access for many reasons.
 - a. Under the conditions of the permit, a large flat area will be established at the intersection allowing both trucks and cars to stop on a flat surface during icy winter condition.
 - b. Locating the intersection at the south end will establish good sight lines in both direction and southbound traffic will approach in the outside lane increasing the line of sight to over 200 feet (conservatively). This is opposed to the current situation where traffic hugs the small knoll opposite the intersection when traveling in the north bound direction and is shielded by landscaping when approaching from the south.
 - c. The knoll opposite the entrance will no longer impede trucks making right-hand turns. Trucks cannot make this turn in the current location of the access point. Note that a proposal to close Black Farm Road to through traffic is being addresses by Hyde Park and the LVPOA will need to facilitate truck access.
 - d. Because a road once existed in this location and it is sheltered by trees relocation to this spot will cause minimal disruption to the landscape and allow for gradual even grading.
 2. Our first proposal then called for the road to turn to the west and meet with the meadow at the northeast corner and follow the existing drainage ditch to rejoin the western access road at the point of the gate and culvert. In further studying this location, I can no longer recommend it for the following reasons:
 - a. The northeast corner of the field is a geographic low point and is very susceptible to flooding. Remedying this would call for a large culvert, a tremendous amount of fill and grading, and the roadbed would still be susceptible to erosion and washout.
 - b. The grade at this location could be problematic in winter.
 - c. The removal of trees and the addition of large amount of fill may prove to be unsightly.
 - d. Location of the road within the boundary of Lot 7 may leave open the possibility for relocation to the property boundary in the future if the ownership of Lot 7 should change hands.
 3. We now propose that the east west linkage of the Old Highway 59 and the western "Bridge" road of the LVPOA be located at the boundary of Lot 7 located approximately 610 feet south of the point of access down Old Highway 59 and approximately 915 feet south of the gate and culvert on the western "Bridge" road for the following reasons.
 - a. It is a nearly constant flat grade located in place in the meadow that I observed to be among the last parts of the meadow to flood. The road would lie in a place virtually free of erosion.
 - b. Fill would only be introduced to elevate the roadbed making it less susceptible to flooding and not to change the grade and appearance of a hill making the road's location seem more natural.
 - c. The east west distance along the property line of Lot 7 is approximately 915 feet meaning that there would be no net loss of meadow. This would be a one to one relocation.
 - d. By removing the existing north south road that parallels the river, the meadow can be re-graded for better drainage toward the riverside. It would also allow for more efficient agricultural use by opening up corners of the field that posed a problem in maneuvering large agricultural equipment.
 - e. Locating the road at the property line of Lot 7 should be a permanent location. We cannot imagine a future owner of Lot 7 moving the road at their own expense to bisect the lot and any other location.
 4. To facilitate a smooth turn at the western point of linkage, I submit that the road be allowed to gently turn from the Lot 7 property line onto the common land at that meeting point. The amount of common land used will be a minimized in order to avoid added construction expense, yet establish smooth navigation for cars and truck alike. Note that all other parts of this new section of road would lie entirely within the boundary of Lot 7.

- B. The concern of increased legal liability brought up by John Preneta at the 2001 spring meeting should be assuaged by:
1. A letter from Jeffery Miller of S. R. Miller Insurance which we presented to Deborah Reid last fall concluding that the moving of the road added no greater insurance risk.
 2. A letter from Jim Mahony, esq. Attorney. He concluded that no added legal liability would result from the moving the road.
 3. The new access point permit provided by the Town of Hyde Park.
- C. Other Legal Issues.
1. During the spring meeting of 2001, the LVPOA decided that movement of the road, as proposed last year was a deeded right and not an issue subject to the approval of the Board of Trustees.
 2. The new access point approved by the Town of Hyde Park is the re-establishment of what was once an existing road in an established location and direction. It allows for use of Town of Hyde Park land in order to make this re-establishment possible. The Warrantee Deed for Lot 7 allows for the movement of the access point of the road to the edge of Lot 7 and established the boundary on Black Farm Road. Deeds are obviously bounded by points of land ownership meaning that the deed cannot offer the owners of Lot 7 the ability to move the road beyond Lot 7 onto Town of Hyde Park land. However, when permitted by the Town of Hyde Park new access points can be establish on Hyde Park land. Without approval by the LVPOA Board of Trustees a deviation from the original deed poses a highly unlikely but possible consequence for Thomas and Christine Fuss as owners of Lot 7 at the time of the road movement. During a future sale of Lot 7 the title search would show this inconsistency. It is of little or no consequence because the purchaser would never insist that the access point be moved to further encroach on the property they are about to purchase. It has been recommended by legal council representing Thomas and Christine Fuss that situation be remedied by:
 - a. A vote by the Board of Trustees to approve or not approve the new access point location and the deviation from the deed.
 - b. Upon approval, the Board of Trustees authorize the President of the LVPOA the power to sign a legal document restating the approval to be drafted by the attorney for Thomas and Christine Fuss upon notification of approval.
 3. In studying the positioning of the new access point, I found many advantages over the position written in the deed for both Lot 7 and the LVPOA.
 - a. The deeded position moves the access point so that the knoll opposite the road would impede the progress of trucks and autos towing trailers when making a right hand turn onto Black Farm Road.
 - b. The grade at the deeded point is steep and falls away in two directions adding expense and logistical problems.
 - c. There is a greater encroachment on the privacy of Lot 7 with this greater expense.
 - d. The Town of Hyde Park has not granted permit to the deeded position.
 4. The construction of a private road over a flood prone field may require further permits. When I addressed this issue a year ago, I was informed that a private road over entirely private land in agricultural use did not pose a problem, but further research is being done. The elevation of the new road is somewhat limited by the existing elevation of the two roads it would connect.

**Spring 2002 Trustees Meeting
June 21, 2002**

Present: Paul Trudell, Deb Wickwire, Trim Conklin, Cindy Miller, John Frost, Phil Clark, Angela Norder, Brian Norder, Aimee Stearns

All, except for Aimee, met at the farmhouse at 7 p.m. to look at Tom Fuss' new proposed re-alignment of the road.

The trustees reconvened at Deb's house at 7:45 p.m. Aimee announced that she was abstaining from all discussions and votes regarding the farmhouse for the meeting.

There was lengthy discussion on the request by Tom Fuss to move the intersection and access road. The new proposal has the access road follow Woodland Trails to the far end of the Fuss property, make a right angle turn to cross the meadow, and then a left turn to connect with the existing road to the bridge. Trustees did not agree with moving the access road to this proposed new location. Some discussion comparing the two proposed locations for the access road ensued. Trustees agreed that the former proposal, having the road run alongside the drainage ditch, was more desirable than this new proposal. Trustees agreed that Tom and Christine should move only the intersection, and agree that the proposed location for the intersection will improve visibility and will move traffic further away from the Fuss' yard.

Trustees agreed as follows: Variance was granted to change the access with intersection of Town Highway 59 as specified in the deed to allow the Fuss's to access Town Highway 59 across land owned by Town of Hyde Park. This is subject to design by a Vermont licensed engineer and the obtaining of all proper government permits. Trustees voted that Deb Wickwire will sign all legal documents in this matter on behalf of the Association.

The meeting was adjourned at 9:45.

Respectfully submitted,
Angela Norder

L.V.P.O.A.

August 7, 2002

Tom and Christine Fuss
454 Black Farm Road
Hyde Park, Vermont 05655

Dear Tom and Christine,

At the Spring Meeting of the LVPOA (Ten Bends), June 22, 2002, it was decided that there was a disagreement between your understanding of what the warranty deed for your property entitles you to do in regards to the Ten Bends road, and the understanding of the Ten Bends Trustees and the Ten Bends legal counsel, Attorney Ed French. I contacted Attorney Bill Kelk of Stowe. Bill Kelk has no prior connection to Ten Bends. I sent him a copy of your deed and a copy of your proposal, and I instructed him to render an opinion about whether the deed entitles you to move the road. A copy of Attorney Kelk's letter is attached. The Trustees agree that the intersection of the access road to old town highway 59 should be moved away from your home and that is why there is a paragraph in your deed permitting it. The Trustees have agreed to allow you to move the intersection off your land and onto Hyde Park Town land if you so choose.

2

Respectfully,

Deborah Reid Wickwire
President

Encl: 2

Cc: Clark, Clark, Frost, Holowacz, Miller, Norder, Preneta, Trudell

WILLIAM A. KELK
ATTORNEY AT LAW

P.O. BOX 1347
344 MOUNTAIN ROAD
STOWE, VERMONT 05672

PHONE (802) 253-4354
(802) 253-9947
FAX: (802) 253-9942

July 18, 2002

Deborah Wickwire, President
Lamoille Valley Property Owners Association
27 Talcott Notch
Avon, CT 06001

Re: Potential Relocation of Access Road on Lot 7, Ten Bends

Dear Deborah:

You have asked for an opinion letter regarding your Association's rights and responsibilities concerning the potential relocation of an access road on Lot 7, Ten Bends. You have supplied me with, and I have reviewed 1) the warranty deed from Lamoille Valley Property Owners Association, Inc. to George K. Stearns and Aimee B. Stearns, said deed dated March 19, 1990 and recorded in Book 62, Pages 239-244 of the Hyde Park Land Records; 2) a map plan prepared by Spear Surveying dated January 1990 entitled "Plan of Lot 7 - The Farmhouse at Ten Bends in Hyde Park, Vermont and 3) a copy of a letter dated June 20, 2002 from Thomas and Christine Fuss, the current owners of Lot 7.

The deed from your Owners Association to the Stearns' has a number of grants and reservations. Together with the deeding of 10.1 acres, a farmhouse, shed and other improvements, all as depicted on the above-referenced Spear Surveying map, your association also reserved a right of way over portions of former Town Highway #59 and granted a right of way to the Stearns' over a 25 foot strip of land lying easterly of the property boundary extending along the centerline of former Town Highway #59. This granted right of way is in common with your Association. Your Association also reserved a 50 foot wide right of way (in common with the Stearns) over a portion of former Town Highway #59 and a separate access road. Both of these reserved rights of way provide access to lots owned by your Association and your members.

The second full paragraph of page 3 of the deed contains language regarding the grantees' right to relocate the existing intersection of the access road with current Town Highway No. 59. This paragraph is reprinted in its entirety below:

"Notwithstanding the hereinabove excepted and reserved rights of way, the herein Grantees shall be entitled, at their sole cost and expense, to relocate the existing intersection of the access road with current Town Highway No. 59 from its present location as shown on the survey plan first hereinabove referenced in a southerly direction to a point located between said present location and that property boundary extending from the iron rod located on the westerly sideline of current Town Highway No. 59 S 58° W 31 feet, more or less, passing through an iron rod to a point in the centerline of former Town Highway No. 59. In the event the herein Grantees should relocate the access road intersection, the centerline of the travelled way of the new access road extending from its relocated intersection with current Town Highway No. 59 to that point where it reconnects to the existing access road shall constitute the centerline of a relocated 50-foot wide right of way in common in favor of the herein Grantor, the herein Grantees and members of Lamaille Valley Property Owners Association, Inc."

The access road intersection discussed in the above paragraph runs quite close to the farmhouse and yard, and I can only surmise that this right to relocate was meant to allow the owners of the farmhouse to get separation from the noise and dust associated with the road.

Some of the concepts contained in this paragraph are 1) The Grantees are entitled to relocate the road to the specified location. This is not an event that calls for a vote of your Association. 2) The relocation will be done at their sole cost and expense. Your Association is not to be financially involved. 3) The relocation of the road can only be to a certain spot, i.e. "from its present location as shown on the survey plan first hereinabove referenced in a southerly direction to a point located between said present location and that property boundary extending from the iron rod located on the westerly sideline of current Town Highway No. 59 S 58° W 31 feet, more or less, passing through an iron rod to a point in the centerline of former Town Highway No. 59."

The June 20 letter from Mr. and Mrs. Fuss seeks to relocate the access road to a different position than that specifically set forth in the deed. While there is nothing wrong with their asking your Association for the right to move the road to another position, your Association is under no obligation to grant this request. The specific language of the 1990 deed controls (emphasis added). If the road is to be relocated, Mr. and Mrs. Fuss only have a right to relocate it to the position set forth in the deed.

In a related matter, you inquired about

I hope this letter has helped you in your deliberations. Please do not hesitate to contact me if you need further clarification.

Sincerely,

W. A. Kelk

William A. Kelk

WAK:deg

VILLAGE OF HYDE PARK
APPLICATION FOR HEARING BEFORE THE DEVELOPMENT REVIEW BOARD

Tax Map Number: 920-059-029 Permit Number: V2002-12

XX

All questions **MUST** be completed in full or application will be **DENIED**.
(Please print or type information)

Road Name: West Main and Black Road

Property Owner: Thomas A. Fuss

Mailing Address: 454 Black Road, Hyde Park VT 05655

Applicant: Thomas A. Fuss

Mailing Address: 454 Black Road Hyde Park VT 05655

Telephone Number: Work: 802-888-5539 Home: 802-888-5539

Engineer of Plan: David Ring

Mailing Address: 112 Main St., Stowe VT

Telephone Number: Work: 253-2161 Fee: \$ 89⁰⁰ Paid: Y N

Nature of Request: Conditional Use: Variance: Appeal:
Site Plan:

Description of Project: A site plan must be submitted in triplicate with this application.

Zoning District: Commercial/Residential Residential/Agricultural Residential
Small Industry/Residential Flood Hazard:

Existing Use of Property: Residential Drive

Proposed Use of Property: Residential Drive

Describe the proposed project: We intend to move the intersection of Ten Bends Drive and Black Road from its current location which is only approximately 15 yards from our house to the opposite side of the Bend on West Main Street. The existing

road will be reconnected to the intersection by crossing the large meadow^{field} along our property line and sharing the existing road on the eastern side of the meadow. A 2 1/2 foot diameter culvert will be removed and replaced by 2 x 3 foot culverts greatly improving the drainage and agricultural use of the meadow. Other benefits will include better safety at the new - over-

Intersection through greatly increased sight lines, better level ~~water~~ grade of the access road for winter safety, shortening of the existing road surface by approximately 600 feet and most of all ~~we~~ improve the current safety problem near our house for pedestrian traffic and children at play. This will also bring better privacy ~~for~~ our home.

Project Dimensions: 793 feet x 18 feet Lot Size: 10.1
x 24 inches

Parking Spaces: Required: n/a Planned: n/a

Setbacks: Side: 5 feet, 5 feet Front: * Rear: * *Connects to existing roads

Lot Frontage: 482 feet Access Permit: (Y) N Sewage Permit: Y N/A

Landscape Plan: Y N/A Traffic Flow Plan: (Y) N Light Plan: Y N/A

The undersigned hereby request an appearance before the Development Review Board for the land development described above. Any permit issued as a result of this application shall be null and void in the event of misrepresentation or failure to complete construction within two years from approval. In order for a permit to issue, the Applicant must be in compliance with ALL Town Ordinances and Town Regulations.

[Signature] Same 10/28/02
 Signature of Owner Signature of Applicant Date Submitted

XX
 For Administrative Use Only:

Date filed with Administrative Officer: 10/31/02

Date first reviewed by Development Review Board: 11/19/02

Notice of Hearing: 10/31/02

Notice of Surrounding Landowners: 10/30/02

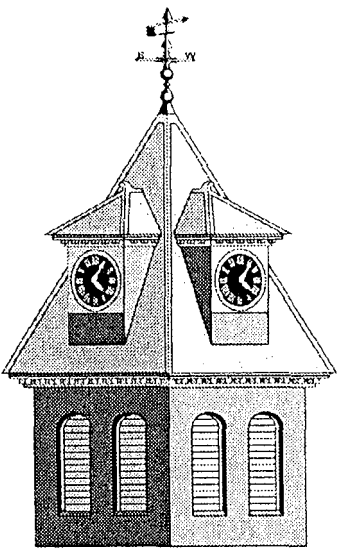
Date of Hearing(s): 11/19/02 12/3/02
2/4/03 3/4/03

Date of Decision: 3/4/03 Approved: ✓ Denied: _____

On the basis of the following findings of facts and conditions attached to the permit, see minutes of: 11/19/02 12/3/02
2/4/03 3/4/03

[Signature] 3/4/03
 Administrative Officer Date

See DRB Decision 3/4/03
 Chair, Development Review Board Date



SHIRE TOWN

ENGINEERING, LAND PLANNING AND SURVEYING

David Ring, PE, PLS

PO Box 936, Stowe, VT 05672-0936 • t. 802-253-2161 • f. 802-253-2162
 www.shiretownengineering.com • info@shiretownengineering.com

November 11, 2002

Development Review Board
 Town of Hyde Park
 P.O. Box 98
 Hyde Park, VT 05655

RE: Thomas Fuss Road Reconstruction Project details & meeting with Carl Jurenkoff

Dear Members of the Board:

A meeting was held on Friday, November 1, 2002 with Carl Jurenkoff, Flood Plain Specialist, from the State of Vermont. Carl made the determination, after reviewing the FEMA Panel 14 of 20 FLOODWAY Map that the field and the roadway that Mr. Fuss would like to remove, along with the roadway that Mr. Fuss proposes to construct are within the 100 year flood plain. The road construction is, by State and Federal Regulations, permitted within the 100 year and 500 year floodplain. Furthermore, this road construction is considered a "road replacement with little or no gain since the road being removed will be replaced with the road being constructed. There is to be no road construction or work done with the Floodway. Fill being placed within a floodplain is not an issue with this roadway.

Furthermore, Mr. Jurenkoff had no objections to increasing the culvert size form the existing 2.5 foot diameter to a 3' diameter. He stated, in fact, that this would help the draining of the flood plain storage area within the field, allowing the farmer quicker access to the fields for cropping.

It is the opinion of this Engineer that there are no adverse concerns regarding the relocation of the access road across the farm field. Design plans have been enclosed showing the planned centerline alignment of the road, road cross-sections, access details onto the Hyde Park Town Highway #59, aka Black Farm Road. Road construction starting times will be up to Mr. Fuss and his contractors schedule.

A summary of the actual Ten Bens road construction has been included for your review which further explains the historical development of these roads within Morrystown and Hyde Park.

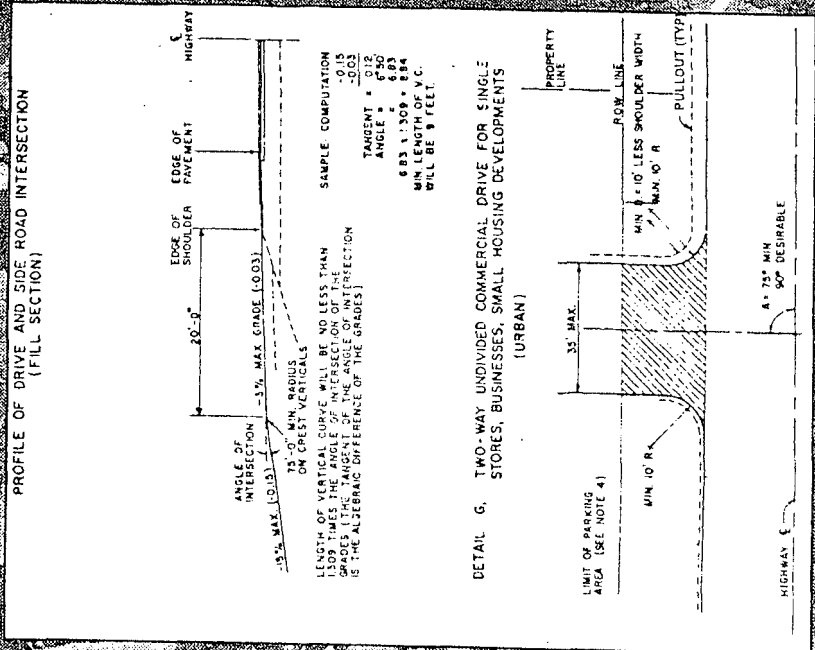
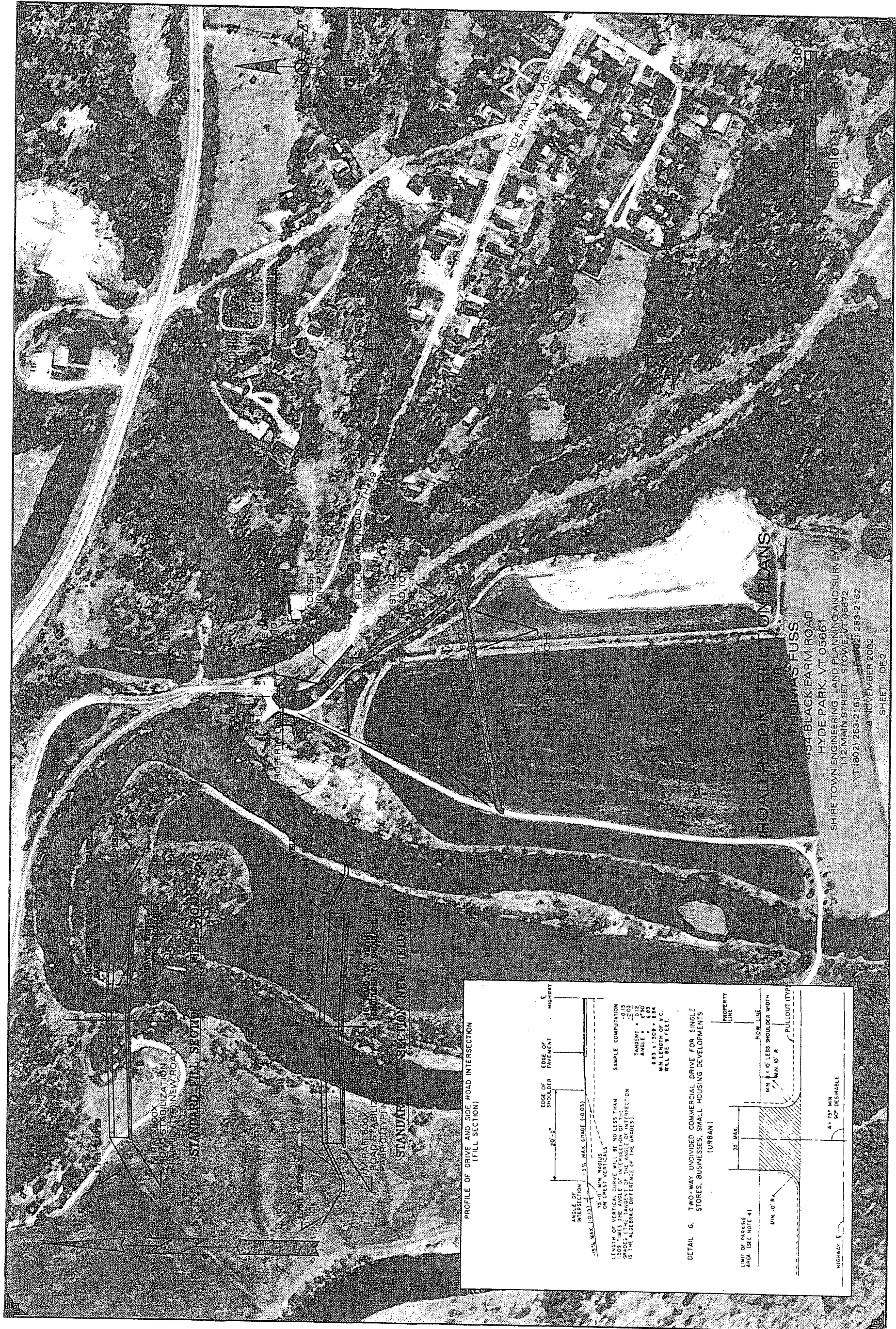
Sincerely,

David Ring, PE, PLS

CC: Thomas Fuss

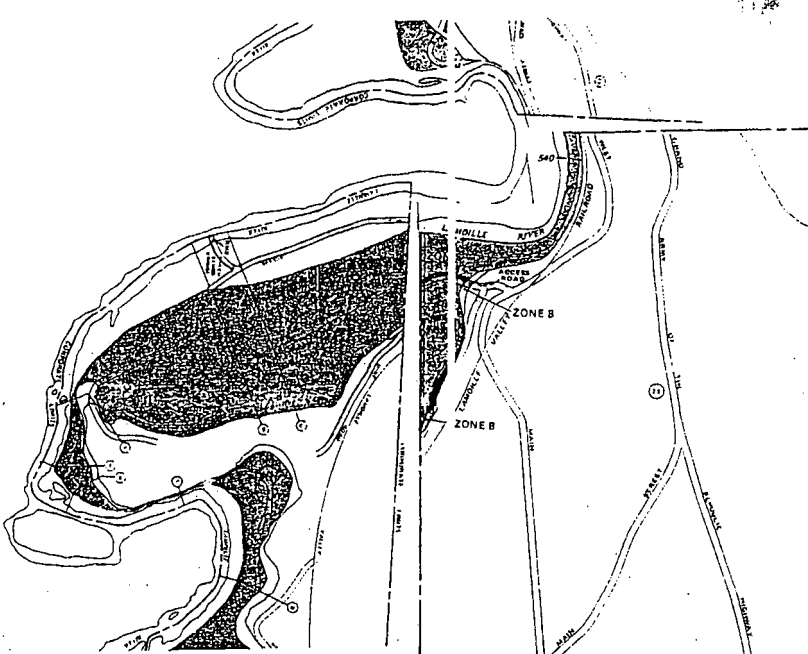
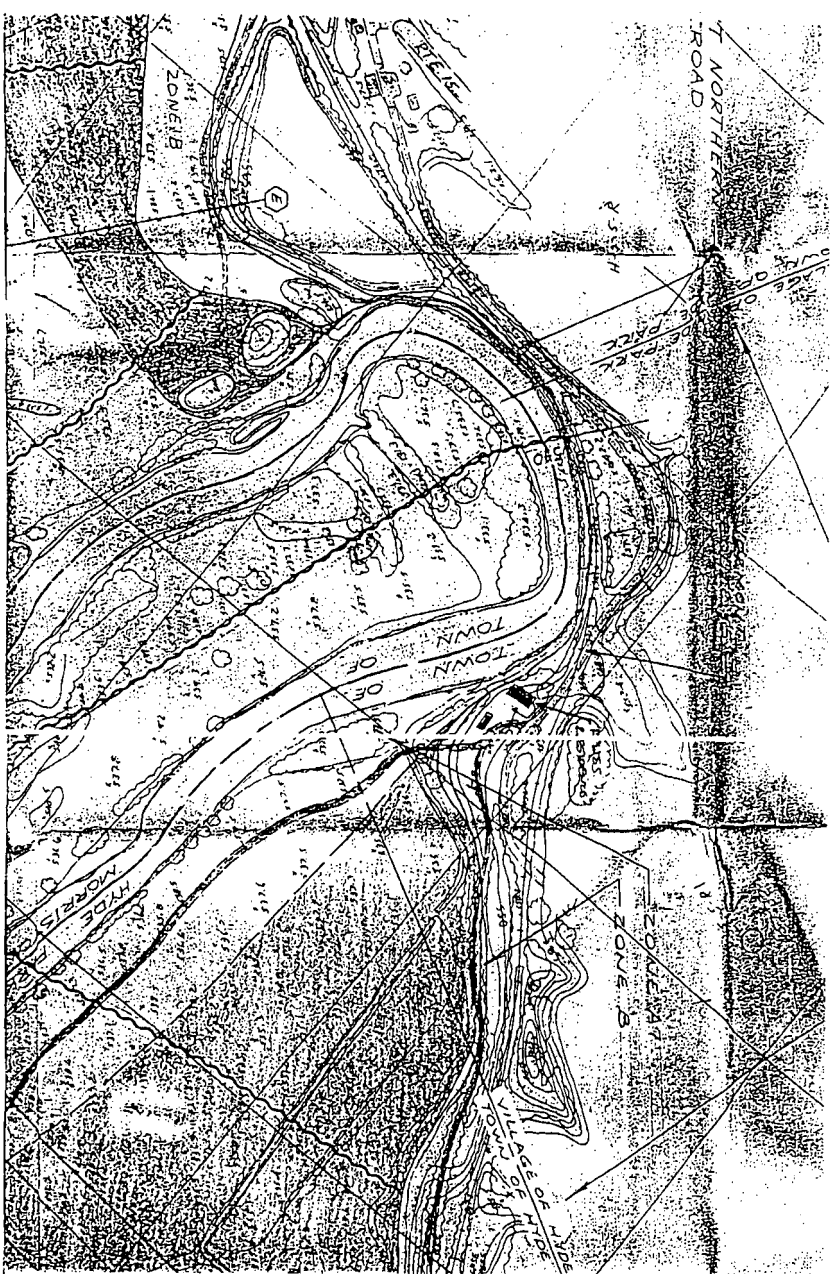
Enclosure:

Aerial Site Plan for Road Reconstruction, Sheet 1 of 2
 Design Details - Sheet 2 of 2
 Boundary Survey of Thomas Fuss Property - JPR Surveying
 Supporting letter from David Ring



SHIRE TOWN ENGINEERING, LAND PLANNING AND SURVEY
172 MAIN STREET STOWEE, VT 05672
T: (802) 253-2161
F: (802) 253-2162
8 NOVEMBER 2002
SHEET 1 OF 2

454 BLACK FARM ROAD
HYDE PARK, VT 05661
TOMAS STUSS
ROAD ALIGNMENT CONSTRUCTION PLANS



KEY TO MAP

1. Flood Boundary
 2. Flood Hazard
 3. Flood Hazard
 4. Flood Hazard
 5. Flood Hazard
 6. Flood Hazard
 7. Flood Hazard
 8. Flood Hazard
 9. Flood Hazard
 10. Flood Hazard
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 16. Flood Hazard
 17. Flood Hazard
 18. Flood Hazard
 19. Flood Hazard
 20. Flood Hazard

EXPLANATION OF ZONE DESIGNATIONS

1. Zone A - Flood Hazard
 2. Zone B - Flood Hazard
 3. Zone C - Flood Hazard
 4. Zone D - Flood Hazard
 5. Zone E - Flood Hazard
 6. Zone F - Flood Hazard
 7. Zone G - Flood Hazard
 8. Zone H - Flood Hazard
 9. Zone I - Flood Hazard
 10. Zone J - Flood Hazard
 11. Zone K - Flood Hazard
 12. Zone L - Flood Hazard
 13. Zone M - Flood Hazard
 14. Zone N - Flood Hazard
 15. Zone O - Flood Hazard
 16. Zone P - Flood Hazard
 17. Zone Q - Flood Hazard
 18. Zone R - Flood Hazard
 19. Zone S - Flood Hazard
 20. Zone T - Flood Hazard

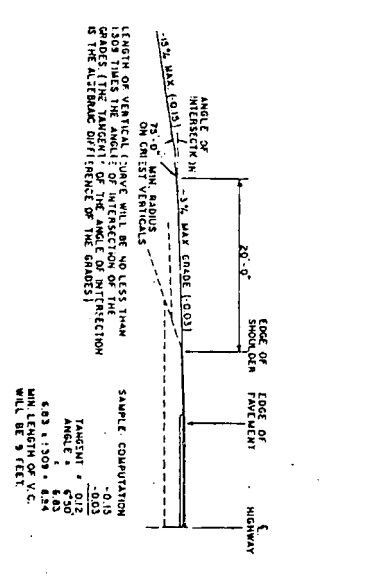
NOTES TO USER

1. This map was prepared from aerial photography taken in 1981.
 2. The flood boundaries shown on this map are based on the Flood Hazard Study conducted by the Vermont State Police in 1981.
 3. The flood hazard zones shown on this map are based on the Flood Hazard Study conducted by the Vermont State Police in 1981.
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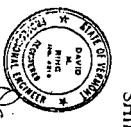
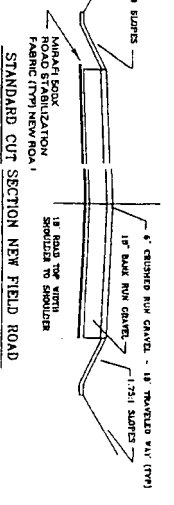
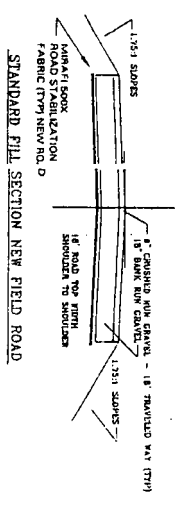
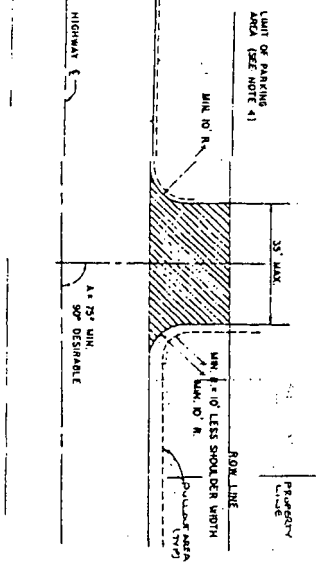
NATIONAL FLOOD INSURANCE PROGRAM
FLOODWAY BOUNDARY AND FLOODWAY MAP
TOWN OF HYDE PARK, VERMONT
LAMOILLE COUNTY
PANEL 14 OF 20
COMMUNITY PANEL NUMBER 500230 00 14
EFFECTIVE DATE: NOVEMBER 4, 1981

State of Vermont
 Vermont State Police
 Flood Hazard Study Administration

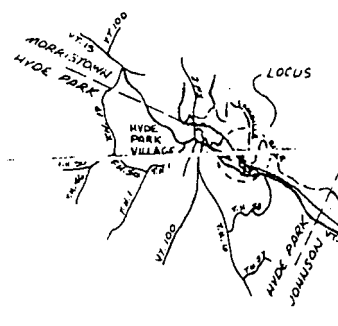
PROFILE OF DRIVE AND SIDE ROAD INTERSECTION (FILL SECTION)



DETAIL G. TWO-WAY UNIMPROVED COMMERCIAL DRIVE FOR SINGLE STORES, BUSINESS SMALL HOUSING DEVELOPMENTS (URBAN)

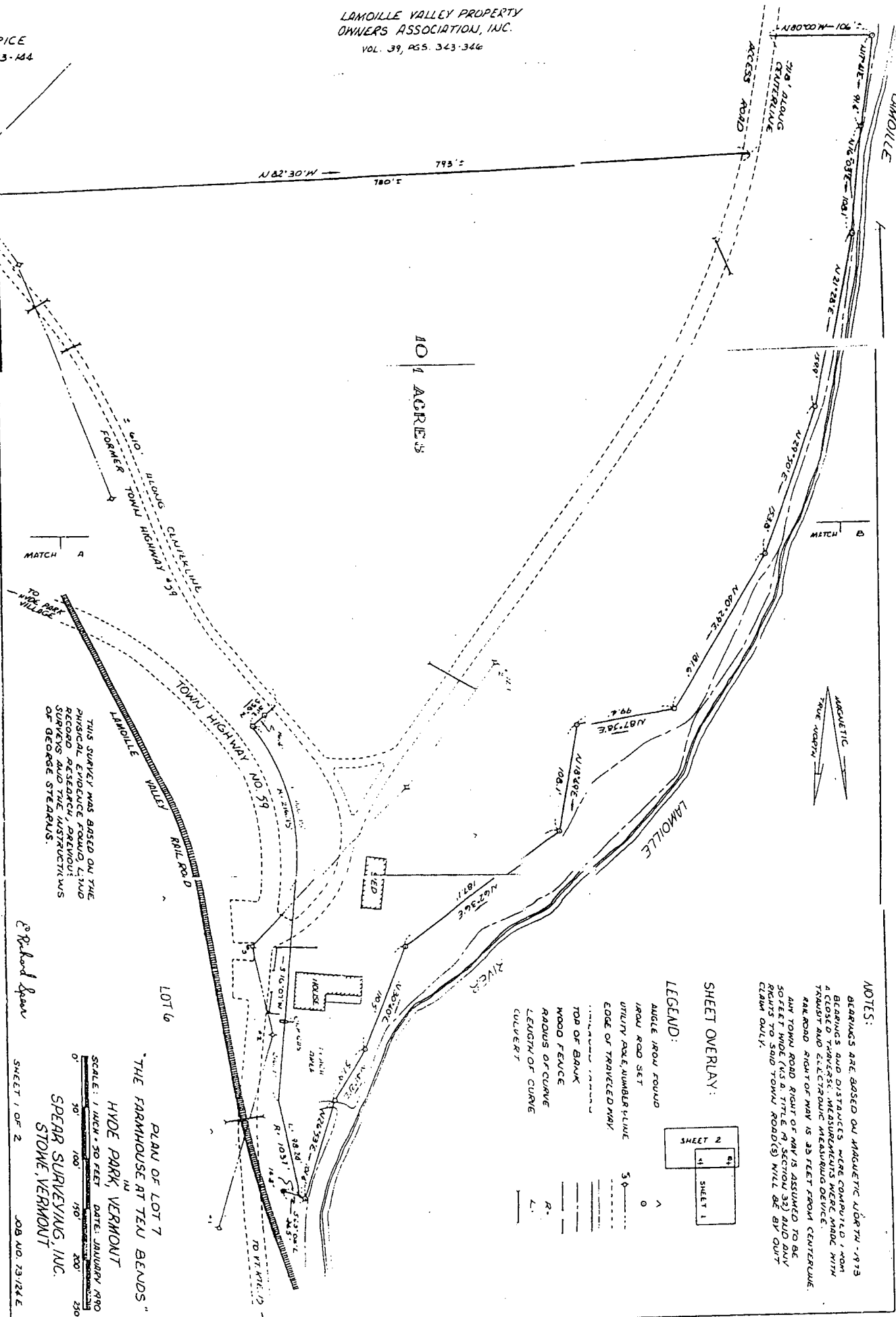


FLOOD PLAIN & ROAD DETAILS
 FOR
THOMAS S. FUOSS
 454 BLACK FAIRM ROAD
 HYDE PARK, VT 05661
 SHIRE TOWN ENGINEERING, LAND PLANNING AND SURVEYING
 112 MAIN STREET STOWE, VT 05672
 T: (802) 253-2161 F: (802) 253-2162
 8 NOVEMBER 2002
 SHEET 2 OF 2



LAMOILLE VALLEY PROPERTY OWNERS ASSOCIATION, INC.
VOL. 39, PGS. 343-346

JOAN B. PRICE
VOL. 52, PGS. 143-144
LOT 5

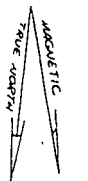
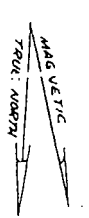


THIS SURVEY WAS BASED ON THE PHYSICAL EVIDENCE FOUND, LIND RECORD RESEARCH, PENNONT SURVEYS AND THE INSTRUCTIONS OF GEORGE STEADMAN.

PLAN OF LOT 7
"THE FARMHOUSE AT TEU BEADS"
HYDE PARK, VERMONT
SPEAR SURVEYING, INC.
STOWE, VERMONT
JOB NO. 73/166 E
SHEET 1 OF 2

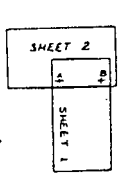


RECEIVED
MAR 18 2003
DIST. 5 COMM.

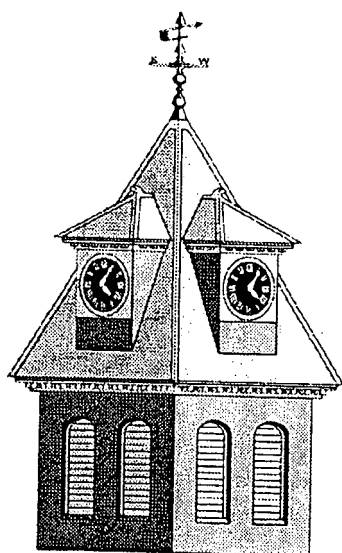


NOTES:
BEARINGS ARE BASED ON MAGNETIC NORTH - 1973
BEARINGS AND DISTANCES WERE COMPUTED FROM
A CLOSED TRAVERSE. MEASUREMENTS WERE MADE WITH
TRUST AND ELECTRONIC MEASUREMENT DEVICES.
RAILROAD RIGHT OF WAY IS 35 FEET FROM CENTERLINE.
ANY TOWN ROAD RIGHT OF WAY IS ASSUMED TO BE
SOFFET WIDE (V.S.A. TITLE # 100) AND TO ADJUT
RIGHT TO SAID TOWN ROAD(S) WILL BE BY QUITY
CLAIM ONLY.

SHEET OVERLAY:



LEGEND:
ANGLE IRON FOUND
IRON ROD SET
UTILITY POLE, NUMBER & LINE
EDGE OF TRAVELLED WAY
TOP OF BANK
WOOD FENCE
RADIUS OF CURVE
LENGTH OF CURVE
CULVERT



SHIRE TOWN

ENGINEERING, LAND PLANNING AND SURVEYING

David Ring, PE, PLS

PO Box 936, Stowe, VT 05672-0936 • t. 802-253-2161 • f. 802-253-2162
www.shiretownengineering.com • info@shiretownengineering.com

November 11, 2002

Development Review Board
 Town of Hyde Park
 P.O. Box 98
 Hyde Park, VT 05655

RE: Thomas Fuss Road Reconstruction Project Supporting Information

Dear Members of the Board:

A brief discussion of the history of the road construction may be in order to properly explain the circumstances and situation that Thomas Fuss is dealing with.

In the late 1960's and early 1970's a consortium of Collie Richardson and Baird Hall, and possibly others purchased the Ten Bends property and retained Allie Ring, my father to construct the roads within the Ten Bends property, as it now exists. The property surveying was done by a combination of Eli Hall and JPR Associates.

The road construction commenced at the southerly end of the property, as it exists today, with road materials being taken from the the "Duhamel Pit" , so called at the time. This pit, road construction and road are located within the Town of Morrystown. This pit is now owned by the Town of Morrystown. Road construction during the year of 1972 or thereabouts continued progressing northerly along upland glacial terraces where roads had never been before. This first year the road was constructed to the small pond and a bridge was constructed to cross the pond outfall. During the second year, 1973 or thereabouts, the road was completed further north to where the new bridge was to be constructed to cross the Lamoille. Everett Wallace was retained by Allie Ring to push in the "big fill" in the valley westerly of new Lamoille Bridge. At this time, Thomas Pinella, was retained to construct the bridge across the Lamoille River. It was during the second year of road construction that the bridge was built.

Up until this time, very little road construction activity had occurred on the Hyde Park side of the Ten Bends property. Some very limited "spot graveling" had been done on the "old Town Highway" leading to the residence occupied by Joan and Dan Price. At this time, only a "farmers field road" existed across the large open field - and was only used to haul crops and access the bridge construction. Occasional loads of gravel were dumped to facilitate trucks getting to the bridge.

Back on the Morrystown side of the Lamoille River, trucks and equipment were "hailed" over to the pit by the "Ross" property. This pit was located on the most northerly end of the road. Plans were to continue north to the best gravel in an old pit that had once been accessed by crossing the Lamoille River (driving

trucks right through the river from a field access by the northermost meadow (Pinetta area?). This river crossing had been done in the mid 1960's and at one time large culverts had been installed across the Lamoille River - only to be washed out in a large flood - and never replaced.

Road construction then proceeded from the "Ross pit" southerly back toward the new bridge. The plan was to haul material from this direction, as it was a shorter haul. Once the bridge was constructed, the field roads on the Hyde Park side would be constructed.

The third year of road construction saw the road from the "Ross Pit" completed to the bridge and farm field road construction then commenced. The loop from the old town road to Joan and Dan Price through the woods and back around to the bridge was completed. The road construction then proceeded from the new bridge back across the farm field toward the "Clubhouse". It was at time that I and my father, Allie Ring, distinctly remember discussion of whether the road would cut across the meadow, approximately paralleling the boundary line of the clubhouse property, as it exists today, or continue along the old farm field road in a direct line to the clubhouse. Much discussion between Mr. Richardson and others ensued, with the result being that with new larger culverts installed in the ditch line near the clubhouse entrance and with more gravel the farm field road would be sufficient. Quite a bit of gravel, by this time, had already been placed on this farm field road to make it passable for concrete trucks and construction vehicles. The clubhouse, at that time, provided for a sales office and more security was afforded with all traffic close to it with a gated entrance.

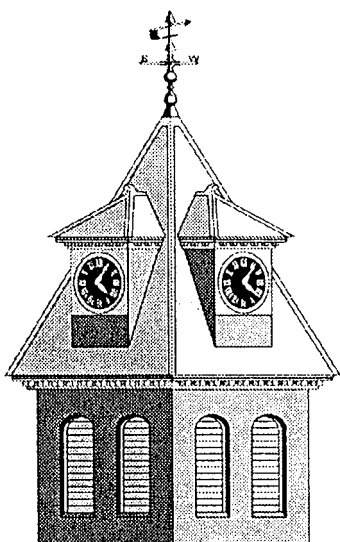
The conclusion, at that time, resulted with the installation of new larger culverts and the placement of more gravel from the "Ross Pit" on the portion of farm field road that crosses the property of Thomas Fuss on the section that he now proposed to remove. A gate was installed near the Clubhouse and all traffic was directed through the clubhouse entrance, as it exists today.

This pretty much ended the main access road construction on both sides of the Ten Bends property southerly of the "Clubhouse". Road construction then began on the Ten Bends property accessed from VT Route 15 to several future lots northerly of the clubhouse. This material was hauled from the Ross Pit, across the new bridge, down the Black Farm Road, crossing the Lamoille Valley Railroad and onto the adjoining Ten Bends property. This more or less completed any road construction serving the Ten Bends property. The pit northerly from the Ross Pit and adjacent to the Lamoille River was never reached or used in any road construction with the above mentioned roads.

This testimony has come from my personal experiences, with some details provided by my father Allie Ring, of Hyde Park, Vermont.

David Ring

David Ring, PE, PLS



SHIRE TOWN

ENGINEERING, LAND PLANNING AND SURVEYING

David Ring, PE, PLS

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 www.shiretownengineering.com • info@shiretownengineering.com

November 12, 2002

Development Review Board
 Town of Hyde Park
 P.O. Box 98
 Hyde Park, VT 05655

RE: Thomas Fuss Road Reconstruction Project DRB Application Overview

Dear Members of the Board:

Enclosed please find the supporting documentation to supplement the application of Thomas Fuss for the construction of a section of roadway to serve the Ten Bends Association properties.

Thomas Fuss proposes to construct an access road through the FEMA designated flood areas, Zone B (500 year) and Zone A7 (100 year). In accordance with your current zoning regulations, Section 322, Mr. Fuss has to apply for a permit to construct within one or both of these areas. An overview of each of the subsections within Section 322 is outlined below.

323. Review Procedures

- 323.1 Not applicable - no new buildings being constructed.
- 323.2 Not applicable - not altering a watercourse.
- 323.3 Reviewed by Carl Jurenkoff - VT DEC, Water Quality Division.

324. Base Flood Elevations and Floodway Limits

- 324.1 FEMA Flood Boundary and Floodway Maps are provided within this documentation.
- 324.2 Not applicable, FEMA information available.

325. Development Standards in Floodway Areas.

- 325.1 *David Ring, Registered Professional Engineer does certify that the proposed development will not result in any increase in flood levels during the occurrence of the base flood.*
- 325.2 Not applicable.

326. Development Standards in Fringe Areas

- 326.1 All development shall be designed to:
- (a) minimize flood damage to the proposed development and to public facilities and utilities. ***This condition is satisfied by the fact that the road being constructed will have no greater a flood impact within the 100 year or 500 year floodplain than the existing road. There are no public facilities or utilities involved.***
 - (b) the roadway will be constructed so as to not create drainage pattern changes. Culverts will be installed in swales and the roadway surface will be at the same grade as the existing field.
- 326.2 Not applicable - No structures being constructed.
- 326.3 Not applicable.
- 326.4 Not applicable.

We hope that this information assists you with your review process such that a decision is forthcoming as soon as possible. Mr. Fuss is in hope of constructing this road as soon as possible. Russell Lanphear is desirous of tilling the entire fields in the spring of 2003 and would like to have the road constructed in the fall of 2002 so that he may till the old road to be abandoned at the same time as the remaining lands are done. In addition, he can better plan his tilling operation with knowledge of the new road placement.

Thank you for your timely review of this application.

Sincerely,

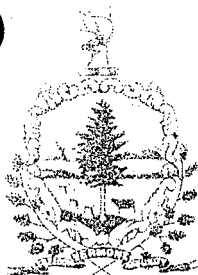


David Ring, PE, PLS

Cc: Thomas Fuss

Enclosure:

Aerial Site Plan for Road Reconstruction, Sheet 1 of 2
Design Details - Sheet 2 of 2
Boundary Survey of Thomas Fuss Property - JPR Surveying
Supporting letter from David Ring
Meeting letter - Carl Jurenkoff



State of Vermont

Department of Fish and Wildlife
 Department of Forests, Parks and Recreation
 Department of Environmental Conservation
 State Geologist
 RELAY SERVICE FOR THE HEARING IMPAIRED
 1-800-253-0191 TDD>Voice
 1-800-253-0195 Voice>TDD

AGENCY OF NATURAL RESOURCES
 Department of Environmental Conservation
WATER QUALITY DIVISION
 103 South Main Street
 Building 10 North
 Waterbury, VT 05671-0408

FAX 802-241-3287
 TEL 802-241-3770

November 1, 2002

Julia Compagna
 Zoning Administrator
 PO Box 98
 Hyde Park, VT 05655

Subject: Proposed relocation of Ten Bends Road.

Dear Ms. Compagna:

At your request, Thomas Fuss contacted me. Enclosed is a copy of the work map used for the Flood Insurance Study on which I have plotted the approximate location of the proposed relocation. The surface of the new road will be at essentially the same grade as the existing ground. There will be no floodway obstruction.

I see absolutely no problem with the proposal as far as the floodplain issue is concerned.

These comments are offered in accordance with 24 V.S.A. 4409 and 4412.

Sincerely,

Karl L. Jurentkuff
 Floodplain Management Engineer

KLJ/sl

enclosure

cc: Thomas Fuss



Exhibit I 12/3/02
Fuss

- Club House to Private Residence
 - Assess Road Maximizes exposure of house to all roads (picture)
 - Privacy and safety limited by design
 - ▼ 30 year old placement
 - Aproximately 15 yards from the house
 - Done long after farm was built and compromizes old pole barn (picture)
 - ▼ poor sightlines in both directions
 - ▼ Blind access for trucks and farm equipment coming from north
 - danger to pedestrians and children in vacinity of house
 - Several Construction projects in the coming year
 - 180 degree turn for traffic coming from south (picture)
 - ▼ Poor Winter grade
 - Approximately 6 cars per winter slide off
 - Thanksgiving of 2000 near miss
 - ▼ Solution
 - Move the access point and reestablish links to roads
 - Town Permit in May 2001 for new access point on corner of Black Farn and Main
 - Reconnect the roads
 - ▼ Right possition
 - ▼ Allie Ring's suggestion in 1973 was to put road across field (picture)
 - Reduces grade from Black Farm Road to field level gradually
 - Roads converge well away from intersection simplifying intersection
 - Simple one direction grade for winter (level across road)
 - Natural Site for relocation
 - ▼ Maximizes Privacy
 - Well away from any children's play area
 - Nearest Neighbor is approx. 1175 feet from road
 - ▼ Key Benifits
 - 1 to 1 exchange on A7 flood plain NO Increase
 - Utilizes exising road on east side
 - Reduces road surface by 600 feet
 - Flat grade across field free of Erosion
 - ▼ Removal of existing culvert
 - ▼ One 2.5 foot culvert to be removed
 - Once river level rises above this culvert all of the drainage is impeded
 - Three culverts to be put in place away from low point on north side of field
 - 2 Three foot culverts will greatly improve drainage time
 - Agricultural use of field will be improved
 - ▼ Astetics
 - Tree lined drive (picture)
 - Head on view of White Face crossing field (picture)
 - ▼ Engineers Recomendations

TOWN OF HYDE PARK
PLANNING & ZONING OFFICE
PO BOX 98
HYDE PARK, VT 05655
(802) 888-7784

COPY

Permit #V2002-12
Fuss
March 7, 2003

Thomas Fuss
454 Black Road
Hyde Park, Vermont 05655

Dear Mr. Fuss;

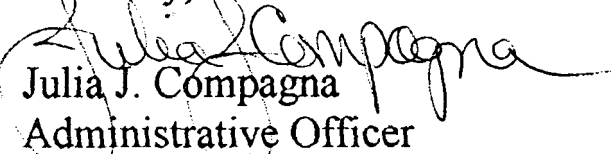
I am pleased to tell you that the Hyde Park Development Review Board has approved your permit application #V2002-12. You must adhere to all conditions specified on your application, site plan, in all documents submitted, and in the written decision of the Development Review Board.

Enclosed please find your approved zoning permit. A notice of this approval has been sent to all adjoining and adjacent landowners. A copy of your permit will be posted for thirty (30) days in the Town Clerk's office. Any interested party may appeal your permit to the Vermont Environmental Court. This must be done within thirty (30) days of the issuance of this permit. This permit is not valid until the thirty-day appeal period has passed.

This zoning permit constitutes a local zoning permit only. To find out what other permits may be needed, please contact the District #5 Environmental Commission at 479-3621, the Department of Labor and Industry at 828-2286, and the Department of Health at 800-439-8550 for information regarding lead and asbestos requirements. Residential Energy Standards certification is required for all new dwellings and additions of 500 square feet or more, built after July 1, 1997 on land that has an Act 250 permit; and July 1, 1998 for dwellings and additions 500 square feet and more that did not require and Act 250 permit. The certification must be filed in the land records of the Town within 30 days of construction, you may call 1-888-373-2255 for more information.

If you have any questions, please do not hesitate to contact me.

Sincerely,


Julia J. Compagna
Administrative Officer

cc: file

Development Review Board

Village of Hyde Park
P.O. Box 98
Hyde Park, VT 05680-0098
(802) 888-2300

ZONING PERMIT

Zoning Permit No. V2002-12 Expiration Date 3/4/05
Name of Landowner Thomas Fuss
Address 454 Black Road, Hyde Park, VT 05655
Name of Applicant Thomas Fuss
Address 454 Black Road, Hyde Park, VT 05655
Tax Map Description: Sheet 920 Lot 059-029
Property Location: 454 Black Road, Hyde Park, VT

This permit certifies that the building or use at the above location conforms to the approved plans filed with the administrative officer and with all applicable provisions of the town zoning regulations. No construction may be commenced or change of use made in any building or on any premise which is inconsistent with this permit.

Conditions set forth:

See Development Review Board Decision dated 3/4/03.

Approved use: Residential Drive - Flood Hazard District

Type of permit: Permitted Use _____ Conditional Use _____ Variance _____
Site Plan _____ Flood Hazard X

Signed Julia J. Compagna Date 3/4/03
Julia J. Compagna, Administrative Officer

TOWN OF HYDE PARK DEVELOPMENT REVIEW BOARD
NOTICE OF DECISION
March 4, 2003

The request for Flood Hazard District project approval came before the Hyde Park Development Review Board on the application of Thomas Fuss, for a residential driveway.

Application #V2002-12, requests approval for the construction of an 18X793 foot driveway and two three-foot culverts located off Black Road.

Board members present at the hearing on 11/19/02 were Melvin Harvey, Craig Fowler, Brickett Bailey and Graham Govoni. Melvin Harvey recused himself due to a conflict of interest, thus there was not a quorum. Board members present at a hearing on 12/3/02 were Eric Aither, Craig Fowler, Brickett Bailey and Graham Govoni. A hearing scheduled for 2/4/03 was recessed due to inclement weather. Board members present at a hearing on 3/4/03 were Brickett Bailey, David Gagnier, Craig Fowler and Malcolm Teale. David Gagnier and Malcolm Teale reviewed previous meeting minutes in addition to hearing a brief summary of the project evidence by Thomas Fuss.

A quorum was thus established. Others present were Bill Murphy, Roy Marble, Nathan Martin, Wayne Chase, Brian Norder, Wendy Price, Thomas Fuss, Christina Fuss and the Administrative Officer Julia J. Compagna. The meeting was called to order for the above-mentioned business at 7:30 p.m., March 4, 2003.

Based upon the testimony provided at the above mentioned public hearings and the documents submitted, the Hyde Park Development Review Board finds, concludes and decides as follows:

Findings of Fact

1. Thomas Fuss owns approximately ten acres of land located on Black Road in the Village of Hyde Park. Located at this site is a single-family residence, occupied by Mr. Fuss and his family.
2. The applicant, Thomas Fuss wishes to relocate a driveway from its present location, approximately 15 yards from his house, to the opposite side of his property. A portion of this driveway falls within the Flood Hazard District. The dimensions of the drive would be 18X793 feet, and 24 inches thick. The drive would include the installation of 2 three-foot culverts to improve drainage, replacing a single existing 2.5-foot culvert.

Pursuant to Sections 320 of the Village Zoning Bylaws the following information was provided:

3. Pursuant to Section 323.1, Mr. Fuss submitted a copy of his application to the Vermont Department of Environmental Conservation. Mr. Fuss received a site visit by State Flood Hazard Specialist Karl Jurentkoff. The Administrative Officer received a written determination from Mr. Jurentkoff that the proposed project "would not create floodway obstruction" nor "create a problem as far as the floodplain issue is concerned." The proposed project does not include any construction within the Floodway.
4. Pursuant to Section 321.2d, Mr. Fuss testified that it is his intention to continue leasing the property for agricultural use.

Conclusions

Using Village Bylaw Section 320 as a guide, the Development Review Board finds that:

1. The proposed project will not adversely affect conditions within the Flood Hazard District.
2. The proposed project will allow for the continuance of wise use of agricultural land in flood-prone areas.

Decision

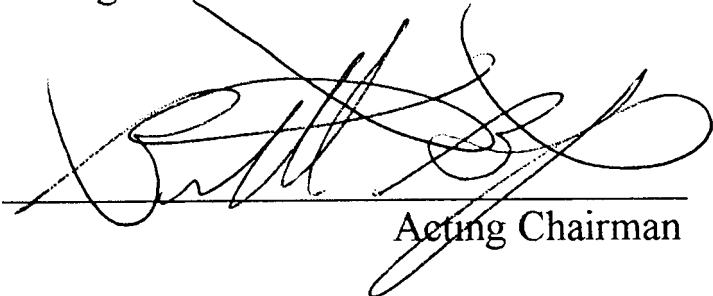
Based upon the findings and conclusions set forth above, this Board approves the Applicants' request for project approval within the Flood Hazard District.

Conditions of Approval:

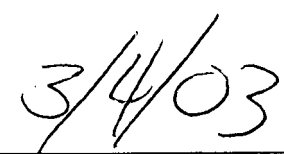
- 1) Any change in the proposed project will require review by the Development Review Board.
- 2) The proposed project must adhere to the plans, exhibits and testimony submitted.
- 3) Should Act 250 jurisdiction apply to this project, approval of this permit is contingent upon compliance with any criteria and/or conditions imposed.

This application is granted by the Hyde Park Development Review Board on March 4, 2003.

Voting In Favor: Brickett Bailey, David Gagnier, Craig Fowler, Malcolm Teale.
 Voting Against: None
 Voting To Abstain: None



 Acting Chairman



 Date

TOWN OF HYDE PARK

MEMORANDUM OF MUNICIPAL ACTION
24 V.S.A. Section 4443(C)

RECORD TITLE OWNER(S) OF PROPERTY (GRANTOR):

Fuss, Thomas

APPLICANT(S) IF DIFFERENT FROM RECORD TITLE OWNER(S):

SAME AS ABOVE

PROPERTY DESCRIPTION (COMPLETE AT LEAST ONE):

ADDRESS OF PARCEL: 454 Black Road

TAX MAP PARCEL NUMBER: 920-059-029

DEED REFERENCE: VOLUME: _____ PAGE: _____

TYPE OF MUNICIPAL ACTION(S):

TYPE	PERMIT NUMBER <i>if applicable</i>	DATE ISSUED	LOCATION OF RECORD	APPEALED TO DATE?
* Zoning Permit	V2002-12	3/4/03	MUNICIPAL OFFICE	N/A

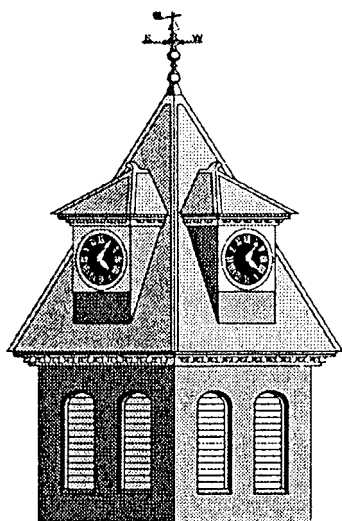
*Residential Drive-Flood Hazard District

Received for Record

March 10 AD 2003 at 8:10 o'clock AM ~~PM~~

Recorded in Book 106 Page 82

Attest *Laura Anderson*
Town Clerk/Assistant Town Clerk



SHIRE TOWN

ENGINEERING, LAND PLANNING AND SURVEYING

*Rec'd
6/17/04*

David Ring, PE, PLS

PO Box 936, Stowe, VT 05672-0936 • t. 802-253-2161 • f. 802-253-2162
www.shiretownengineering.com • info@shiretownengineering.com

June 5, 2004

Julia Compagna
 Town of Hyde Park - Planning & Zoning
 P.O. Box 98
 Hyde Park, VT 05655

RE: Thomas Fuss Revised Site Plan

Dear Julia:

Enclosed please find the revised site plan showing the Class 2 wetlands that were marked in the field by Shannon Morrison, wetlands specialist with the State of Vermont. The boundary line between Mr. Fuss and the Association has also been placed on the plans and staked in the field from the original surveyors records.

If you have any further questions, please contact me.

Sincerely,

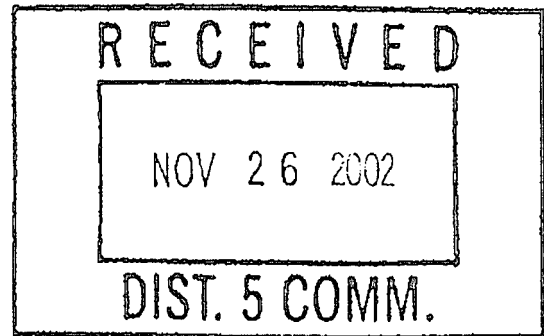
David Ring

David Ring, PE, PLS

CC: Thomas Fuss

Enclosure: Site Plan Thomas Fuss Revised June 3, 2004

Thomas A. Fuss
454 Black Farm Road
Hyde Park VT 05655
Phone: (802) 888-5539



Diana Peduzzi
District #5 Environmental Commission
Assistant Coordinator
324 North Main Street
Barre Vermont 05641

Dear Diana:

I spoke with you by phone at the end of October about our proposed road relocation in Hyde Park at the "Ten Bends" site and received the application you sent me shortly thereafter. Thank you for your prompt response.

Karl Jurentkuff from the Agency of Natural Resources Department of Environmental Conservation visited our house on Friday November 1, 2002. He promptly sent Julia Compagna, the Zoning Administrator for Hyde Park, a letter stating that there was "absolutely no problem" with the proposal and sent me a copy. I am enclosing a copy of that letter. I then had David Ring of Shire Town Engineering review the project and had him create the appropriate drawings and Aerial Site Plan. He then drafted a letter to the Development review board that I am also enclosing.

In review of the criteria for an Act 250 permit, our project does not affect any of the 10 criteria under Act 250.

Criteria 1: Our project is a relocation of an existing private road across land that is in agricultural use and lying on a flat plain. It is not near any headwater, water conservation, wetland, shoreline or stream and will not affect the floodway as attested to by Karl Jurentkuff. It is not near any waste disposal site.

Criteria 2: No change in existing conditions.

Criteria 3: No change in existing conditions

Criteria 4: Will not affect soil erosion or the ability of the land to hold water because the field is very flat and is rated at less than one "T" erosion value meaning that the field is virtually erosion free. Our project is simply a relocation of an existing road that lies on a plain from a north-south direction to an east-west direction.

Criteria 5: Does not apply.

Criteria 6: Does not apply

Criteria 7: Does not apply

Criteria 8: Our project will enhance the aesthetics of our lot and the surrounding area. Our house is a 140-year-old farmhouse known over the years as Black Farm because farmer Norman Black once owned it. The house and property was bought by the Lamoille Valley Property Owner's Association who used the house

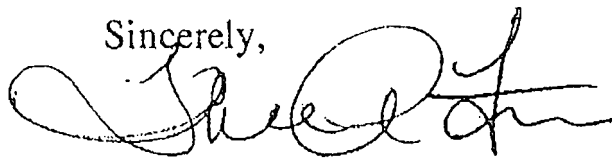
as a clubhouse. The road was put in its current location 29 years ago when the house was a clubhouse for the association, and set in such a way as to maximize exposure of the house to the road so that a caretaker in the house could monitor traffic using the road. The road is placed close to a 100-year-old pole barn/shed next to the house. This placement and the road's high grade level causes water to drain into the foundation rather than around it and the foundation is deteriorating. Our new placement of the road will correct this. Enclosed are pictures and a historical overview prepared by David Ring, who along with his father, Allie, put in the road in the first place. Allie Ring suggested 30 years ago that the road be placed where we are proposing that it be placed today. This is simply a continuation of the conversion of a clubhouse back to a privately deeded house and lot. The new road location will be more aesthetically pleasing because the road will utilize an existing tree lined road, then turn to face White Face mountain making for a spectacular drive across the field.

Criteria 9: The movement of the road will not cause any growth in the area, as it is a private road. Part B will not apply because the top soil will be conserved during road construction and be re-laid on the site of the existing road once the existing roadbed is removed and added to the new road site. All other parts of Criteria 9 do not apply.

Criteria 10: We will conform to all local requirements.

Thank you so very much, Diana, for your careful consideration and for the assistance you provided by phone. It is my hope that by moving ahead with this project in the timeliest way, Russell Lanphear our local farmer can reseed the field as he has planned to do in the early spring.

Sincerely,



Thomas Fuss

Enclosers:

One letter from Karl Jurentkuff

One letter from Shire Town Engineering

Photographs



State of Vermont

Department of Fish and Wildlife
Department of Forests, Parks and Recreation
Department of Environmental Conservation
State Geologist
RELAY SERVICE FOR THE HEARING IMPAIRED
1-800-253-0191 TDD>Voice
1-800-253-0195 Voice>TDD

AGENCY OF NATURAL RESOURCES
Department of Environmental Conservation
WATER QUALITY DIVISION
103 South Main Street
Building 10 North
Waterbury, VT 05671-0408

FAX 802-241-3287
TEL 802-241-3770

November 1, 2002

Julia Compagna
Zoning Administrator
PO Box 98
Hyde Park, VT 05655

Subject: Proposed relocation of Ten Bends Road.

Dear Ms. Compagna:

At your request, Thomas Fuss contacted me. Enclosed is a copy of the work map used for the Flood Insurance Study on which I have plotted the approximate location of the proposed relocation. The surface of the new road will be at essentially the same grade as the existing ground. There will be no floodway obstruction.

I see absolutely no problem with the proposal as far as the floodplain issue is concerned.

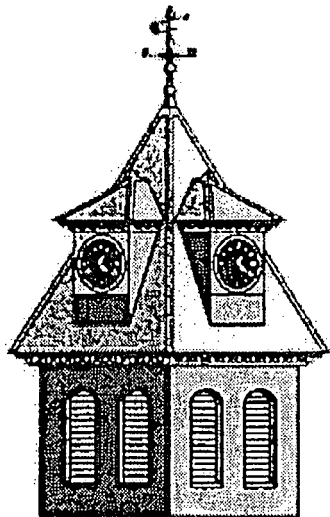
These comments are offered in accordance with 24 V.S.A. 4409 and 4412.

Sincerely,
Karl L. Jurentkuff
Karl L. Jurentkuff
Floodplain Management Engineer

KLJ/sl

enclosure

cc: Thomas Fuss



SHIRE TOWN

ENGINEERING, LAND PLANNING AND SURVEYING

David Ring, PE, PLS

PO Box 936, Stowe, VT 05672-0936 • t. 802-253-2161 • f. 802-253-2162
 www.shiretownengineering.com • info@shiretownengineering.com

November 11, 2002

Development Review Board
 Town of Hyde Park
 P.O. Box 98
 Hyde Park, VT 05655

RE: Thomas Fuss Road Reconstruction Project details & meeting with Carl Jurenkoff

Dear Members of the Board:

A meeting was held on Friday, November 1, 2002 with Carl Jurenkoff, Flood Plain Specialist, from the State of Vermont. Carl made the determination, after reviewing the FEMA Panel 14 of 20 FLOODWAY Map that the field and the roadway that Mr. Fuss would like to remove, along with the roadway that Mr. Fuss proposes to construct are within the 100 year flood plain. The road construction is, by State and Federal Regulations, permitted within the 100 year and 500 year floodplain. Furthermore, this road construction is considered a "road replacement with little or no gain since the road being removed will be replaced with the road being constructed. There is to be no road construction or work done with the Floodway. Fill being placed within a floodplain is not an issue with this roadway.

Furthermore, Mr. Jurenkoff had no objections to increasing the culvert size from the existing 2.5 foot diameter to a 3' diameter. He stated, in fact, that this would help the draining of the flood plain storage area within the field, allowing the farmer quicker access to the fields for cropping.

It is the opinion of this Engineer that there are no adverse concerns regarding the relocation of the access road across the farm field. Design plans have been enclosed showing the planned centerline alignment of the road, road cross-sections, access details onto the Hyde Park Town Highway #59, aka Black Farm Road. Road construction starting times will be up to Mr. Fuss and his contractors schedule.

A summary of the actual Ten Bens road construction has been included for your review which further explains the historical development of these roads within Morristown and Hyde Park.

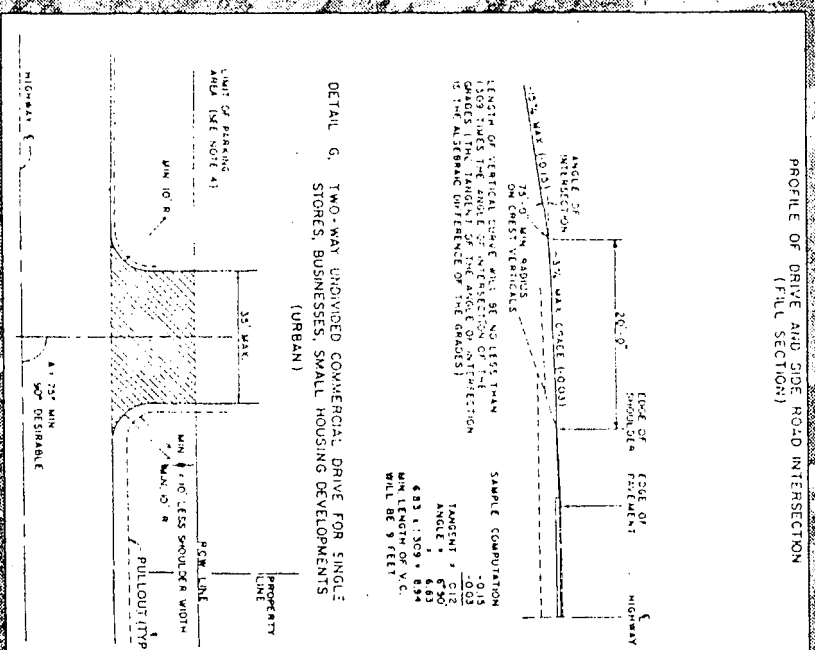
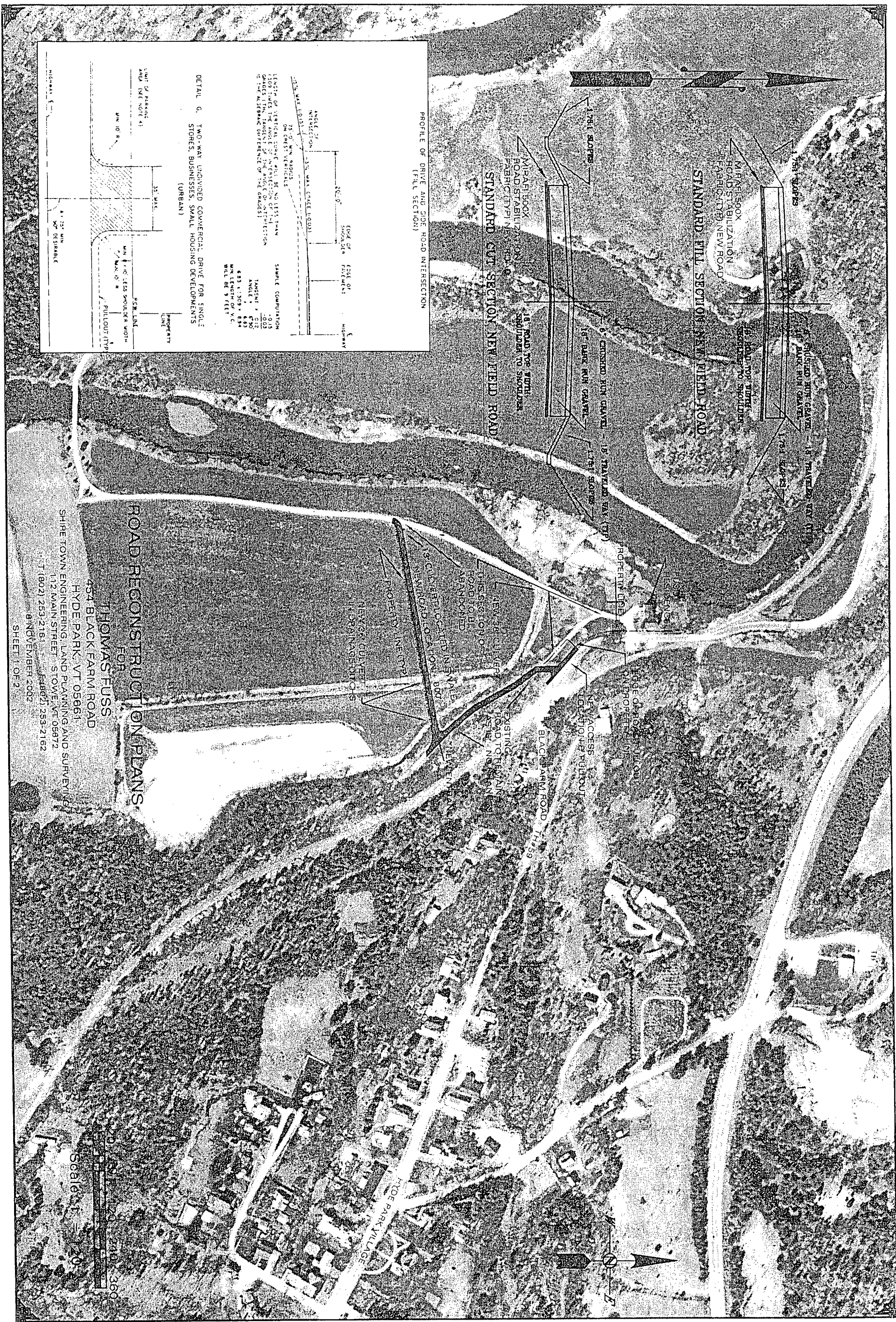
Sincerely,

David Ring, PE, PLS

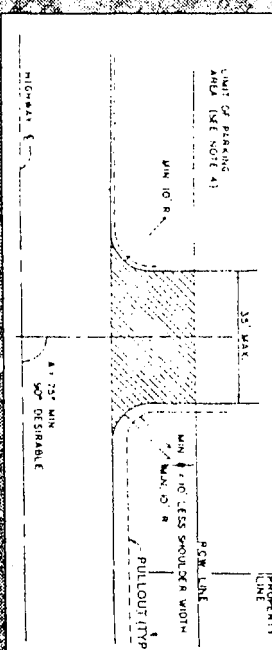
CC: Thomas Fuss

Enclosure:

Aerial Site Plan for Road Reconstruction, Sheet 1 of 2
 Design Details - Sheet 2 of 2
 Boundary Survey of Thomas Fuss Property - JPR Surveying
 Supporting letter from David Ring



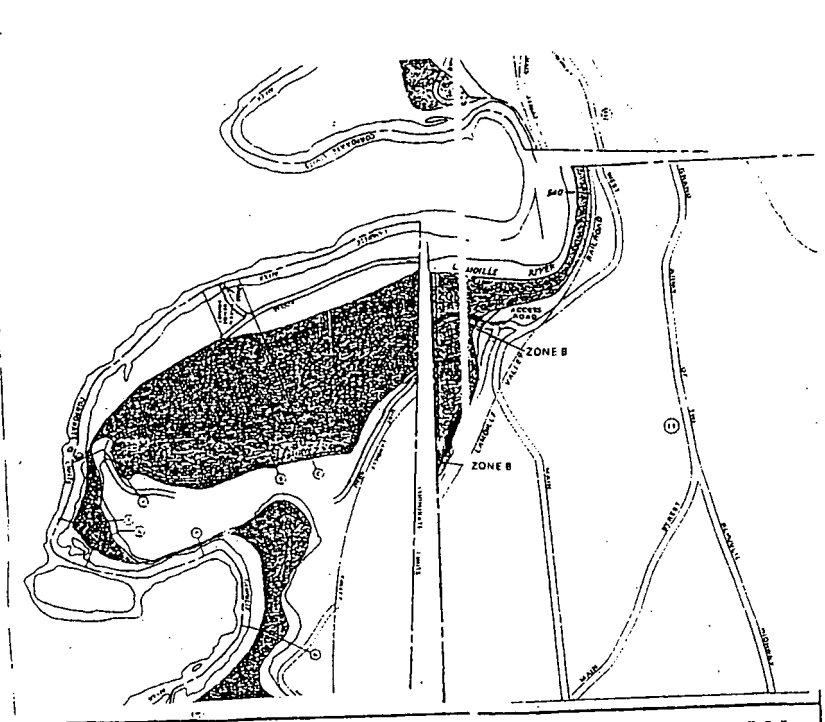
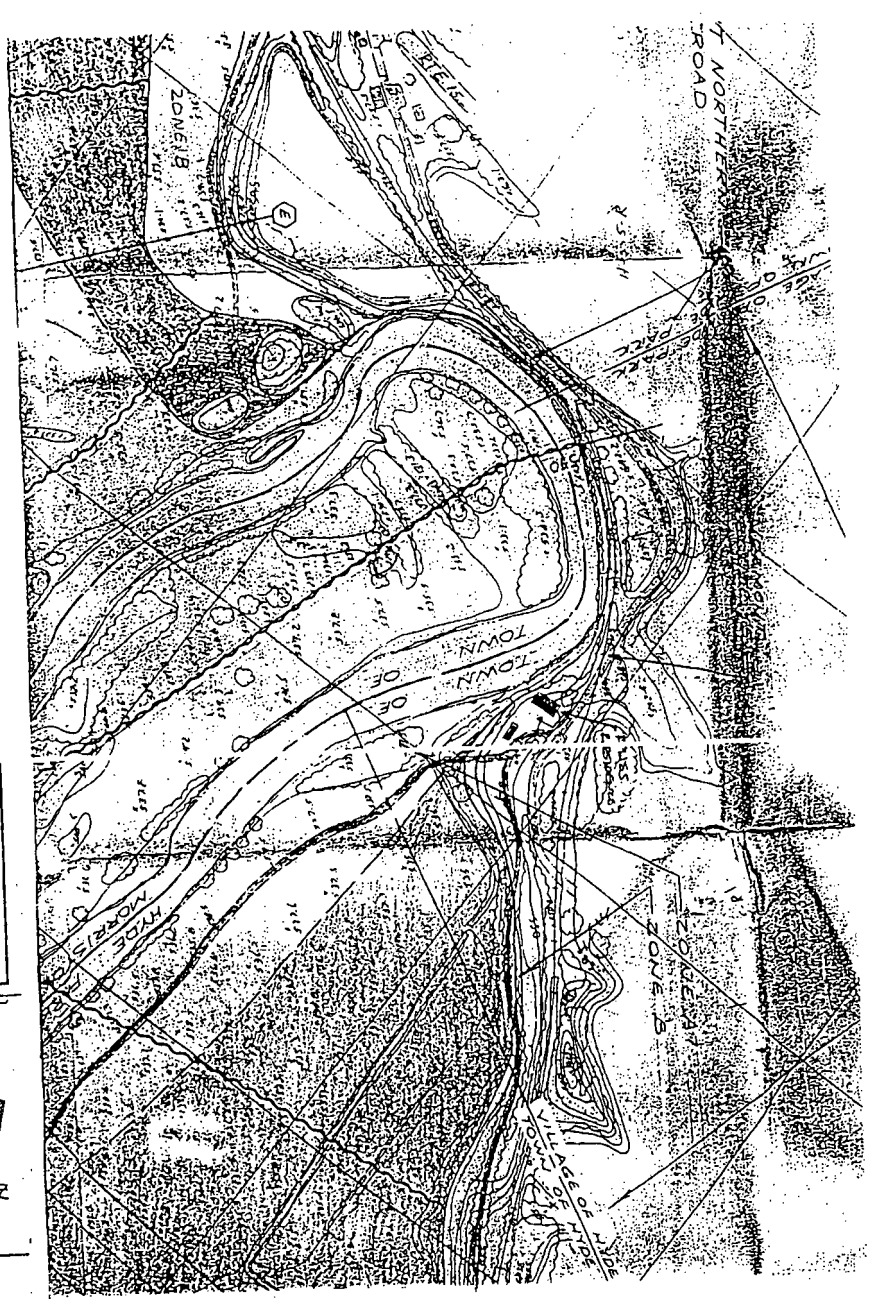
DETAIL G. TWO-WAY UNDIVIDED COMMERCIAL DRIVE FOR SINGLE STORES, BUSINESSES, SMALL HOUSING DEVELOPMENTS (URBAN)



ROAD RECONSTRUCTION PLANS

FOR
THOMAS FUSS
 454 BLACK FARM ROAD
 HYDE PARK VT 05661
 SHINE TOWN ENGINEERING, LAND PLANNING AND SURVEYING
 112 MAIN STREET STOWEE VT 05672
 T: (802) 253-2161 FAX: (802) 253-2162
 8 NOVEMBER 2005
 SHEET 1 OF 2



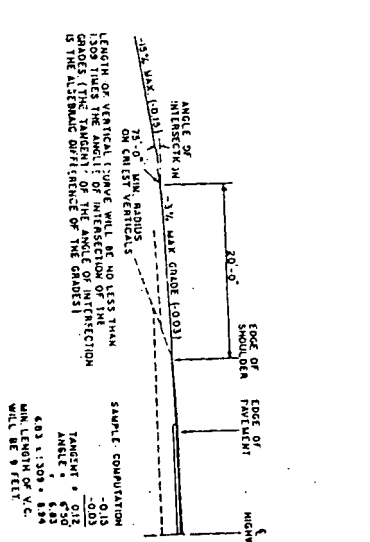


KEY TO MAP

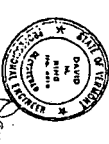
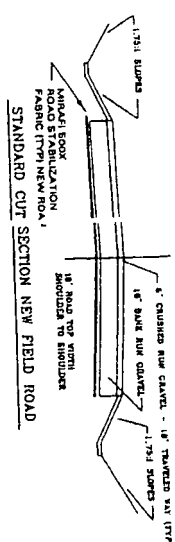
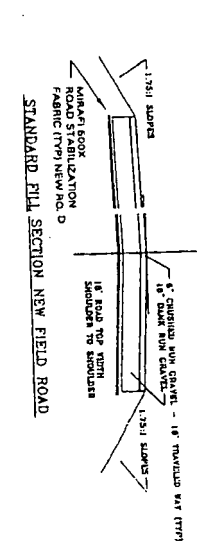
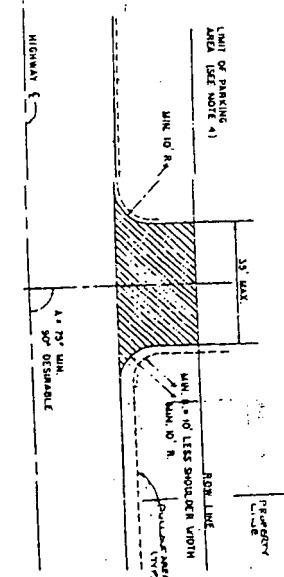
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97. Flood Hazard	98. Flood Hazard
99. Flood Hazard	100. Flood Hazard

NATIONAL FLOOD INSURANCE PROGRAM
FLOODWAY
FLOOD BOUNDARY AND
FLOODWAY MAP
TOWN OF HYDE PARK,
VERMONT
LANCASHIRE COUNTY
 PANEL 14 OF 20
 COMMUNITY PANEL NUMBER
 500230 0014
 EFFECTIVE DATE:
 NOVEMBER 4, 1981
 FEDERAL EMERGENCY MANAGEMENT AGENCY
 FEDERAL INSURANCE ADMINISTRATION

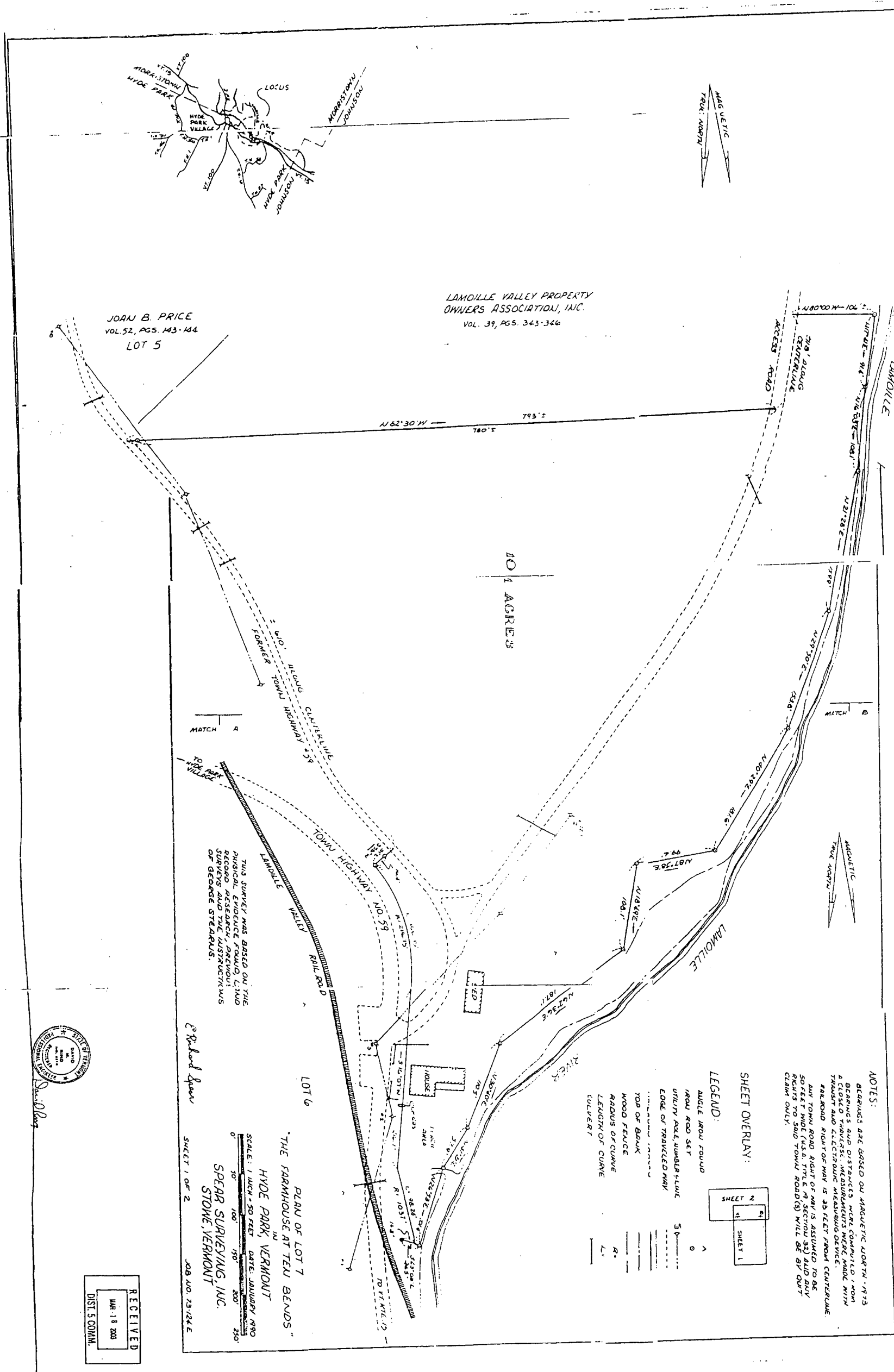
PROFILE OF DRIVE AND SIDE ROAD INTERSECTION
 (FILL SECTION)

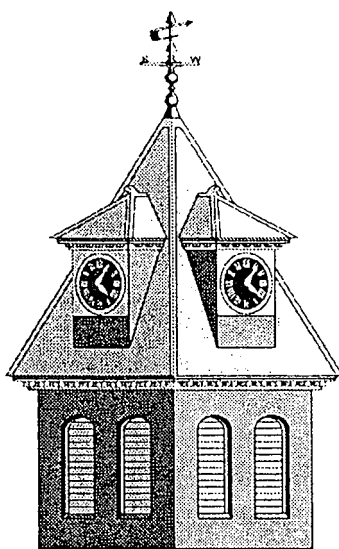


DETAIL G. TWO-WAY UNDIVIDED COMMERCIAL DRIVE FOR SINGLE
 STORE IS BUSINESS, SMALL HOUSING DEVELOPMENTS
 (URBANI)



FLOOD PLAIN & ROAD DETAILS
 FOR
THOMAS, FUSS
 454 BLACK FAIRM ROAD
 HYDE PARK, VT 05661
 SHIRE TOWN ENGINEERING, LAND PLANNING AND SURVEYING
 112 MAIN STREET STOWE, VT 05672
 T: (802) 253-2161 F: (802) 253-2162
 8 NOVEMBER 2002
 SHEET 2 OF 2





SHIRE TOWN

ENGINEERING, LAND PLANNING AND SURVEYING

David Ring, PE, PLS

PO Box 936, Stowe, VT 05672-0936 • t. 802-253-2161 • f. 802-253-2162
www.shiretownengineering.com • info@shiretownengineering.com

November 11, 2002

Development Review Board
 Town of Hyde Park
 P.O. Box 98
 Hyde Park, VT 05655

RE: Thomas Fuss Road Reconstruction Project Supporting Information

Dear Members of the Board:

A brief discussion of the history of the road construction may be in order to properly explain the circumstances and situation that Thomas Fuss is dealing with.

In the late 1960's and early 1970's a consortium of Collie Richardson and Baird Hall, and possibly others purchased the Ten Bends property and retained Allie Ring, my father to construct the roads within the Ten Bends property, as it now exists. The property surveying was done by a combination of Eli Hall and JPR Associates.

The road construction commenced at the southerly end of the property, as it exists today, with road materials being taken from the the "Duhamel Pit" , so called at the time. This pit, road construction and road are located within the Town of Morristown. This pit is now owned by the Town of Morristown. Road construction during the year of 1972 or thereabouts continued progressing northerly along upland glacial terraces where roads had never been before. This first year the road was constructed to the small pond and a bridge was constructed to cross the pond outfall. During the second year, 1973 or thereabouts, the road was completed further north to where the new bridge was to be constructed to cross the Lamoille. Everett Wallace was retained by Allie Ring to push in the "big fill" in the valley westerly of new Lamoille Bridge. At this time, Thomas Pinella, was retained to construct the bridge across the Lamoille River. It was during the second year of road construction that the bridge was built.

Up until this time, very little road construction activity had occurred on the Hyde Park side of the Ten Bends property. Some very limited "spot graveling" had been done on the "old Town Highway" leading to the residence occupied by Joan and Dan Price. At this time, only a "farmers field road" existed across the large open field - and was only used to haul crops and access the bridge construction. Occasional loads of gravel were dumped to facilitate trucks getting to the bridge.

Back on the Morristown side of the Lamoille River, trucks and equipment were "hailed" over to the pit by the "Ross" property. This pit was located on the most northerly end of the road. Plans were to continue north to the best gravel in an old pit that had once been accessed by crossing the Lamoille River (driving

trucks right through the river from a field access by the northermost meadow (Pinetta area?). This river crossing had been done in the mid 1960's and at one time large culverts had been installed across the Lamoille River - only to be washed out in a large flood - and never replaced.

Road construction then proceeded from the "Ross pit" southerly back toward the new bridge. The plan was to haul material from this direction, as it was a shorter haul. Once the bridge was constructed, the field roads on the Hyde Park side would be constructed.

The third year of road construction saw the road from the "Ross Pit" completed to the bridge and farm field road construction then commenced. The loop from the old town road to Joan and Dan Price through the woods and back around to the bridge was completed. The road construction then proceeded from the new bridge back across the farm field toward the "Clubhouse". It was at time that I and my father, Allie Ring, distinctly remember discussion of whether the road would cut across the meadow, approximately paralleling the boundary line of the clubhouse property, as it exists today, or continue along the old farm field road in a direct line to the clubhouse. Much discussion between Mr. Richardson and others ensued, with the result being that with new larger culverts installed in the ditch line near the clubhouse entrance and with more gravel the farm field road would be sufficient. Quite a bit of gravel, by this time, had already been placed on this farm field road to make it passable for concrete trucks and construction vehicles. The clubhouse, at that time, provided for a sales office and more security was afforded with all traffic close to it with a gated entrance.

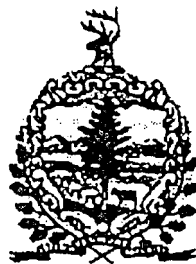
The conclusion, at that time, resulted with the installation of new larger culverts and the placement of more gravel from the "Ross Pit" on the portion of farm field road that crosses the property of Thomas Fuss on the section that he now proposed to remove. A gate was installed near the Clubhouse and all traffic was directed through the clubhouse entrance, as it exists today.

This pretty much ended the main access road construction on both sides of the Ten Bends property southerly of the "Clubhouse". Road construction then began on the Ten Bends property accessed from VT Route 15 to several future lots northerly of the clubhouse. This material was hauled from the Ross Pit, across the new bridge, down the Black Farm Road, crossing the Lamoille Valley Railroad and onto the adjoining Ten Bends property. This more or less completed any road construction serving the Ten Bends property. The pit northerly from the Ross Pit and adjacent to the Lamoille River was never reached or used in any road construction with the above mentioned roads.

This testimony has come from my personal experiences, with some details provided by my father Allie Ring, of Hyde Park, Vermont.

David Ring

David Ring, PE, PLS



STATE OF VERMONT
DISTRICT 5 ENVIRONMENTAL COMMISSION
 5 PERRY STREET, SUITE 60
 BARRE, VERMONT 05641-4267
 (802) 476-0185
 Fax: (802) 476-0131

February 19, 2003

Thomas A. Fuss
 454 Black Farm Road
 Hyde Park, Vermont 05655

RE: Jurisdictional Opinion #5-03-1, Land Use Permit #5L0214 (River Properties/Ten Bends), Hyde Park, VT

Dear Tom:

This is a jurisdictional opinion issued pursuant to Environmental Board Rule 3, in response to your request received on November 26, 2002. As further explained below, I have concluded that the proposed road relocation requires a Land Use Permit amendment because it qualifies as a substantial and material change to the underlying permitted project.

I. Facts

In completing this analysis I have relied on the information presented by Mr. Fuss as well as several letters provided by other owners in the subdivision and the Lamoille Valley Property Owner's Association.

Land Use Permit #5L0214 was issued in 1973 to River Properties, Inc., approving construction of a pond, a bridge and a road to serve as access to twenty parcels of land for sale. The project tract was described as 670 acres located in the towns of Hyde Park and Morristown. There have been no amendments issued to the original permit. A letter dated November 8, 1976 from W. C. Richardson indicates that the work approved in the permit was completed in August of 1976.

Tom Fuss is the owner of the Ten Bends property known as the "original clubhouse", a building which pre-dated the Act 250 jurisdiction but is nonetheless a part of the "project tract".

The main entry road to the Ten Bends subdivision passes very close to the front yard of the Fuss residence. Fuss proposes to re-locate the entry road, to a location farther from his dooryard. The proposed re-location is shown on exhibits presented with the November 26 letter. The proposed location runs through an open field and meets the existing road at a right angle. The existing road runs parallel to the river on the eastern edge of the existing field.

The proposed road would separate the field into two sections, approximately 1/4 to 1/3 of the field would be separated from the rest of the field.

II. Analysis

Environmental Board Rule 2(A)(1)(e) defines "development" to include "(e) Any construction of improvements which will be a substantial change of a pre-existing development, and any material or substantial change to an existing development over which the board or a district commission has jurisdiction".

Rule 2 (G) "Substantial change" means any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. § 6086 (a)(1) through (a)(10).

Rule 2 (P) "Material change" means any alteration to a project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act.

Substantial Change

Because this is a question of whether the proposed project constitutes a substantial or material change, I have not attempted to verify any of the "facts" represented by Mr. Fuss or other interested parties - the analysis of substantial or material change does not involve weighing of evidence or determination as to whether a project will have adverse impacts - it only involves consideration of whether there *may* be impacts. As the Environmental Board explained in Re: Robert and Barbara Barlow, Declaratory Ruling #234 (September 20, 1991), "the question is not whether the impacts will occur, but whether they may occur." On appeal, the Vermont Supreme Court state "while we agree that the Board may act on potential impacts, we believe a finding of *significant* impacts is necessary..." (Barlow, 160 VT. At 522)

The Board has developed a two-part test for "substantial change" - first, will there be a cognizable (physical) change to the development or subdivision? Second, will the change have the potential for significant impacts with respect to any of the Act 250 criteria?

Certainly, the road relocation will involve a physical change.

It is my conclusion that the project has the potential for significant impacts under Criterion 1D (Floodways), Criterion 4 (Soil Erosion), and Criterion 9(B) Agricultural Soils.

Although the site plan provided is a little difficult to read (I think the scale reads 1 inch = 120 feet) it appears that the construction might involve disturbance within 50 feet of the shoreline of the Lamoille River, such that there also may be potential impacts under Criterion 1F, Shorelines. Other issues flagged by other parties, including Criteria 1(G) Wetlands, 8 (Aesthetics), 8(A) Wildlife Habitat, 5 (Traffic Safety), and 10 (Town Plan conformance) should be addressed in a permit application but at this time I have not been convinced that these potential impacts would be likely to rise to the level of "significant".

Material Change

The proposed project is also a material change. The conditions issued with the original permit include:

1. The proposed development must be constructed in accordance with the revised plans and exhibits submitted and on file with the District Environmental Commission.

5. The road must be constructed in accordance with the plans and exhibits submitted and approved by the District Environmental Commission, and reflected in Findings of Fact numbers 6, 7 and 8.

The material change analysis also includes the question of whether the proposed change "affects one or more of the values protected by Act 250". Again I conclude that the project has the potential to affect several of those values, as listed above.

III. Summary

A permit amendment must be approved prior to construction of the new road. During the review process, the District Commission will review facts presented by the applicant and parties, and will determine whether the potential impacts noted in this analysis, are possibly adverse, and if so, whether the project design will adequately mitigate any potential adverse impacts.

IV. Reconsideration or Appeal

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007© and Environmental Board Rule 3(C)(3). Persons who qualify as parties under Environmental Board Rule 14(A) or who may be affected by the outcome of the opinion may request reconsideration of, or appeal, this jurisdictional opinion.

Reconsideration requests must be filed within 30 days of the mailing of the opinion and should be directed to the district coordinator at the above address.

Any appeal shall be by means of a petition for declaratory ruling pursuant to Environmental Board Rule 3(D). A petition for declaratory ruling must be filed within 30 days of the mailing of the jurisdictional opinion to the person appealing and must be directed to the Environmental Board, National Life Records Center Building, Drawer 20, Montpelier, Vermont 05620-3201. The petition for declaratory ruling must include a \$100 filing fee, an original and ten copies of the jurisdictional opinion and the petition for declaratory ruling, and a certificate of service indicating that the following persons have been served with the petition: all parties under Environmental Board Rule 14(A) and other persons on whom the district coordinator served the opinion.

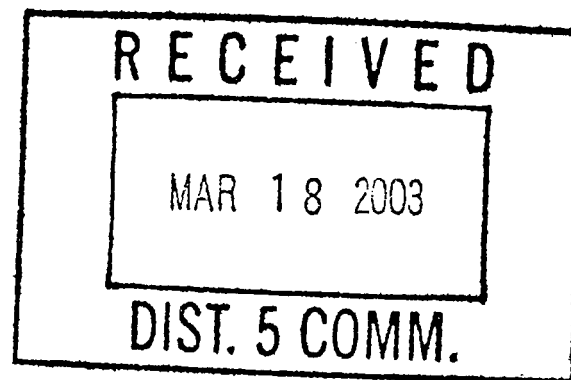
Failure to appeal within the prescribed period shall render the jurisdictional opinion the final determination with respect to jurisdiction under 10 V.S.A. §§ 6001-6062 unless the opinion has not been properly served on all persons identified in writing by the requestor, or known to the district coordinator, as either qualifying as parties under Environmental Board Rule 14(A) or who may be affected by the outcome of the opinion.

Sincerely,


Diana Peduzzi,
Assistant District Coordinator

cc: Certificate of Service

Thomas A. Fuss and
Christine R.W. Fuss
454 Black Farm Road
Hyde Park VT 05655
802-888-5539



State of Vermont
District 5 Environmental Commission
5 Perry Street, Suite 60
Barre VT 05641

March 17, 2003

Dear Mr. Stanak:

This is a request for the reconsideration of Jurisdictional Opinion #5-3-01, Land Use Permit #5L0214 (River Properties/Ten Bends), Hyde Park, VT.

Statistical errors appear not only in Diana Peduzzi's written opinion, but were cited by her as the basis of her opinion. Because of these errors we think our request deserves reconsideration. We hope also to reinforce our own request for waiver by submitting new evidence and greater documentation. We believe it was the quality of the copies we submitted to be the cause of these errors and request this reconsideration without bias toward Diana.

There are approximately 3.3 miles of roads equal to 17,424 feet in the Ten Bends development. Our plan calls for 793 feet of road to be built, but 1400 feet of road to be simultaneously removed with no additional points of access for this road. This is not a new road, but redirection of the existing road. The result is a net reduction of road surface by 600 feet which is .03 times the distance of the total road surface area. This is a reduction of only 3%. I emphasize reduction. We do not believe that this constitutes a material change in any greater sense than the numerous driveways built in the Ten Bends lots since the Land Use Permit was granted. We are redirecting a private drive by linking two existing roads. There will be no greater access to land or change in future development of Ten Bends because of our project. It is barely a change at all. Enclosed is a survey map of Ten Bends with the roads highlighted.

Diana Peduzzi states that: "The proposed road would separate the field into two sections, approximately 1/4 to 1/3 of the field would be separated from the rest of the field." We asked David Ring of Shire Town Engineering in Stowe to measure the field to accurately describe the actual reapportionment of the field. We submit our findings in a graphic overlay of the GIS survey photograph of the field included with this letter. The field is already divided into two parts. The total area of the field is approximately 52 acres. There is currently one 3.3 acre section and one 48.7 acre section (on which lies a dirt summer-only road). The area which Diana Peduzzi cited to be separated from the main 48.7 acre field is 3.2 acres. Since the field will not be divided, but will be

reapportionment the 3.2 acre section constitutes less than $\frac{1}{16}$ of the total 52 acre field area. We do not believe that reapportionment of only $\frac{1}{16}$ of the total field constitutes a substantial change. Diana's estimate stemmed from the GIS photograph we provided which showed only half the field. We hope aerial photographs of the whole field area will help in the understanding of our proposal.

Diana Peduzzi mentions that: "The board has developed a two-part test for 'substantial change' – first, will there be a cognizable (physical change) to the development or subdivision? Second will the change have the potential for significant impacts with respect to any of the Act 250 criteria." She asserts, "Certainly, the road will involve a physical change." The change involved with redirecting an already existing road is very minor and by these criteria will in no way involve a change to the development or subdivision. The change takes place entirely on our 10.1 acre lot and will cause no change in any other lots. Land access will be unchanged. It will be 1175 feet from the nearest other house. No greater traffic flow will be created. No reallocation or division of lots will take place. Property values will not be affected with the exception of our own. We strongly believe that this will leave the rest of the development completely unchanged in any material sense. One road to the bridge exists now and after our project only one road to the bridge will remain.

Diana Peduzzi states as the basis for her conclusion that our project will have significant impact on Act 250 criteria that "the construction might involve disturbance within 50 feet of the shoreline of the Lamoille River." We submit a survey plan of our property that shows the measured distance from our property boundary from the edge of the road to the edge of our property near the river to be 106 feet. There is an additional 15-foot buffer, which brings the total distance from the river to the existing road to 121 feet. Our project directs the road away from the river and no part of new construction is within 18 feet of the existing western side of the road so that new construction begins 139 feet from the riverbank.

We did not provide Diana with this survey and because of it she concludes that our "project has the potential for significant impacts under Criterion 1D (Floodways), Criterion 4 (Soil Erosion), and Criterion 9 (B) Agricultural Soils." We assert strongly that there is not even the slightest chance for any impact on any of these three criterions. We submitted to Diana a letter from Karl Jurentkuff of the Agency of Natural Resources Department of Environmental Conservation Water Quality Division. Karl is likely the most respected man in the state on the issue of floodways and flood plains. His letter states: "There will be no floodway obstruction. I see absolutely no problem with the proposal as far as the floodplain issue is concerned." This is not ambiguous and I can offer no greater proof at any hearing at any level of government review. Diana's conclusion that there is even the slightest potential for floodway impact contradicts his expert opinion.

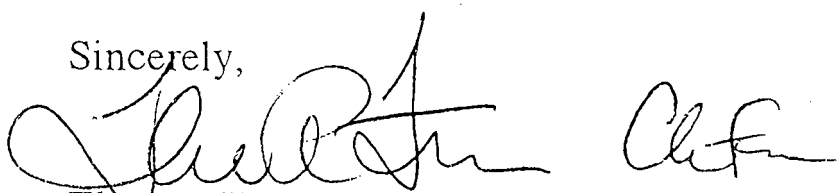
She asserts that this project has the potential for Criterion 4: Soil Erosion. An elevation chart provided by the Karl Jurentkuff and Karl Jurentkuff's letter shows that this cannot be a factor. His letter states, "The surface of the new road is at essentially the same grade

as the existing ground." There is only an approximate one foot deviation in elevation across the entire 793 foot length of new construction. In researching erosion, I found that three factors contribute to erosion and those are: velocity of water, slope, and distance traveled. Since velocity of water takes place in the floodway and Karl Jurentkuff has determined that our road will not affect the floodway, water velocity cannot be attributed to any further risk of erosion. Furthermore, the slope of our new construction is .012% so insignificant as to be listed as none. The distance traveled is also relatively short. We firmly assert that there is absolutely no potential for soil erosion because none of the contributing factors of soil erosion are present.


Diana concludes that there is the potential for significant impact under Criterion 9B Agricultural soils. There will be a net reduction of 600 feet of road surface and a net gain of 1/4 acre of land with agricultural potential. Agricultural soils will be completely conserved during the construction of our project. Soil will be lifted from the field in the area of the new construction and used to cover the area of the existing road after the gravel is lifted and recycled for use in the new road location. In the end there will be a net gain of 1/4 acre of "green" land. There is not the slightest potential for loss. We believe that the beauty of our design lies in its efficiency. The existing eastern road will be better utilized. Land will be reclaimed land rather than destroyed.

We hope that the documentation we are submitting with this letter will help correct the errors used as the basis for Diana's conclusions. In light of this information we hope that our request for a waiver from a permit amendment be upheld. This change to the Ten Bends development is very minor. Several driveways added to Ten Bends last year are more significant. We believe that poor diagrams we provided caused Diana's erred conclusions. This was not her fault. For this reason we are submitting full sized survey maps, diagrams and further graphical evidence. We hope that photographs on file with our original request be viewed and considered as well as the letters from engineers Karl Jurentkuff and David Ring. We also have one final sincere request that this reconsideration be made in a timely manner though we recognize the massive amount of time your work requires. Thank you so very much for this reconsideration.

Sincerely,






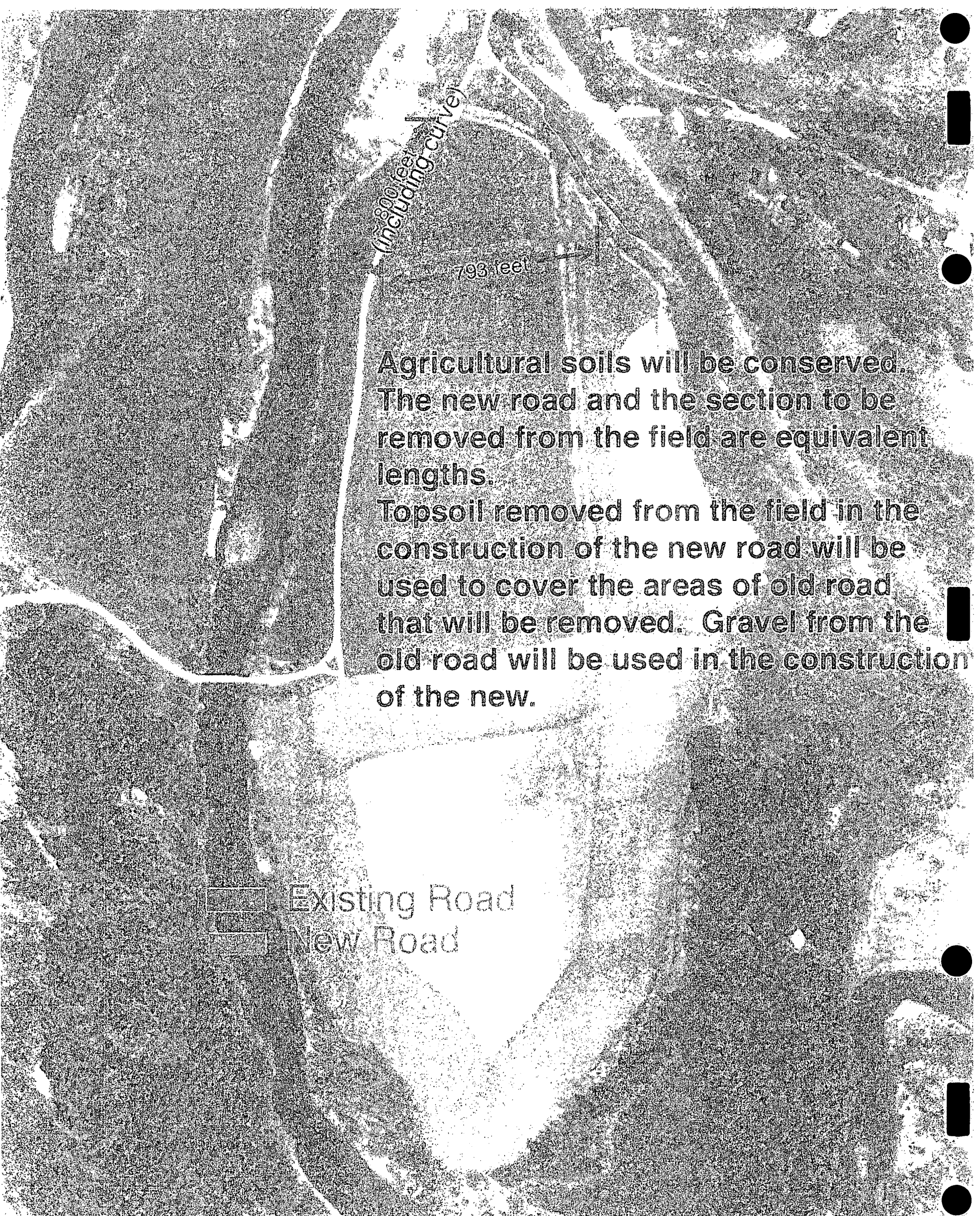
Thomas Fuss and Christine Fuss

An aerial photograph showing a road construction site. The image is heavily textured and grainy. A road is visible, with a bridge or overpass structure in the upper portion. The text is overlaid on the central part of the image.

Proposed Road Construction
(prepared by engineer David Ring)

600 feet of the 1400 feet of existing road to be removed (in blue) will be eliminated completely because existing road surfaces (in purple) will be better utilized.

-  * Existing Road to be removed
-  Existing Road
-  New Road



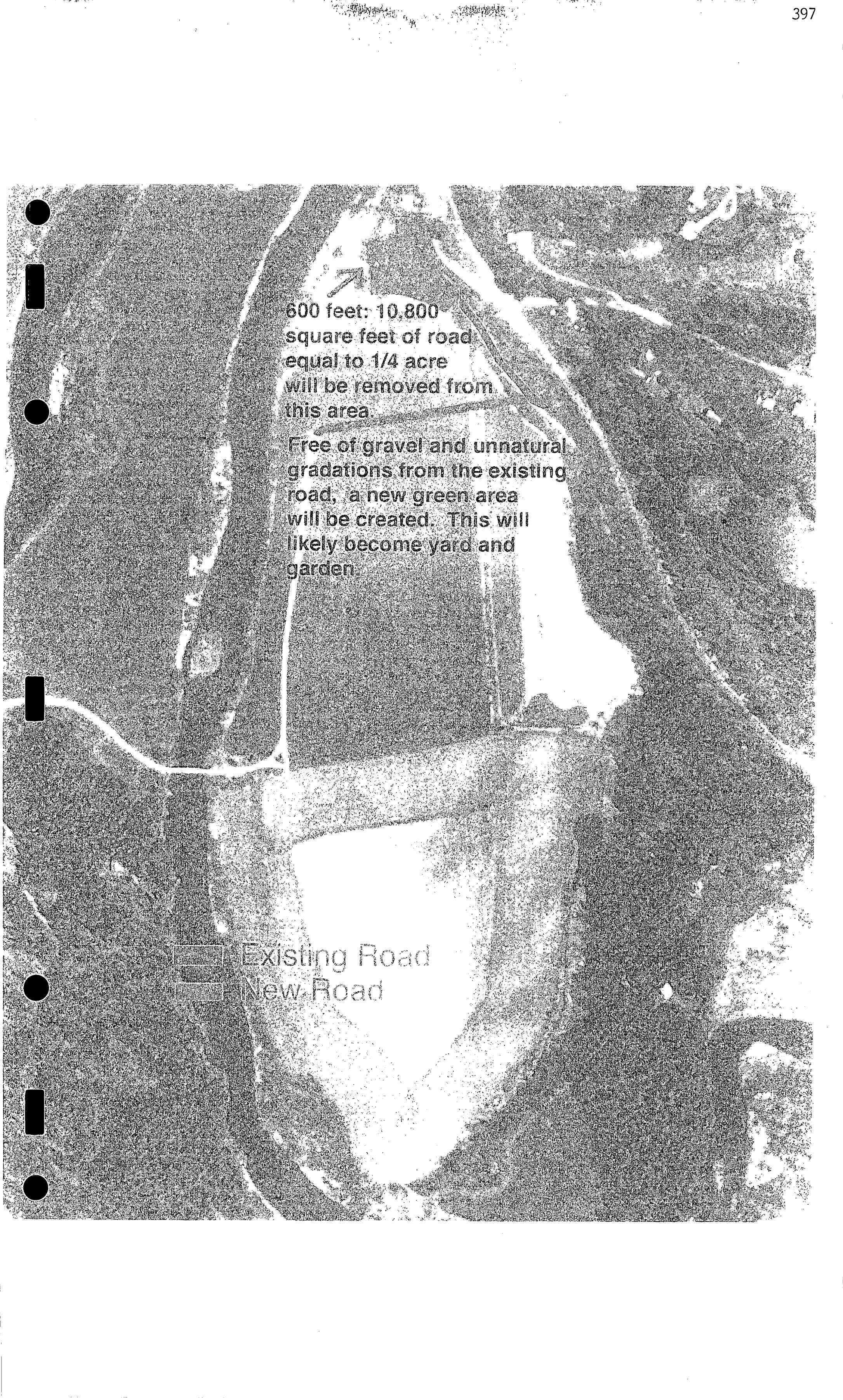
(including curve)
800 feet

793 feet

Agricultural soils will be conserved. The new road and the section to be removed from the field are equivalent lengths.

Topsoil removed from the field in the construction of the new road will be used to cover the areas of old road that will be removed. Gravel from the old road will be used in the construction of the new.

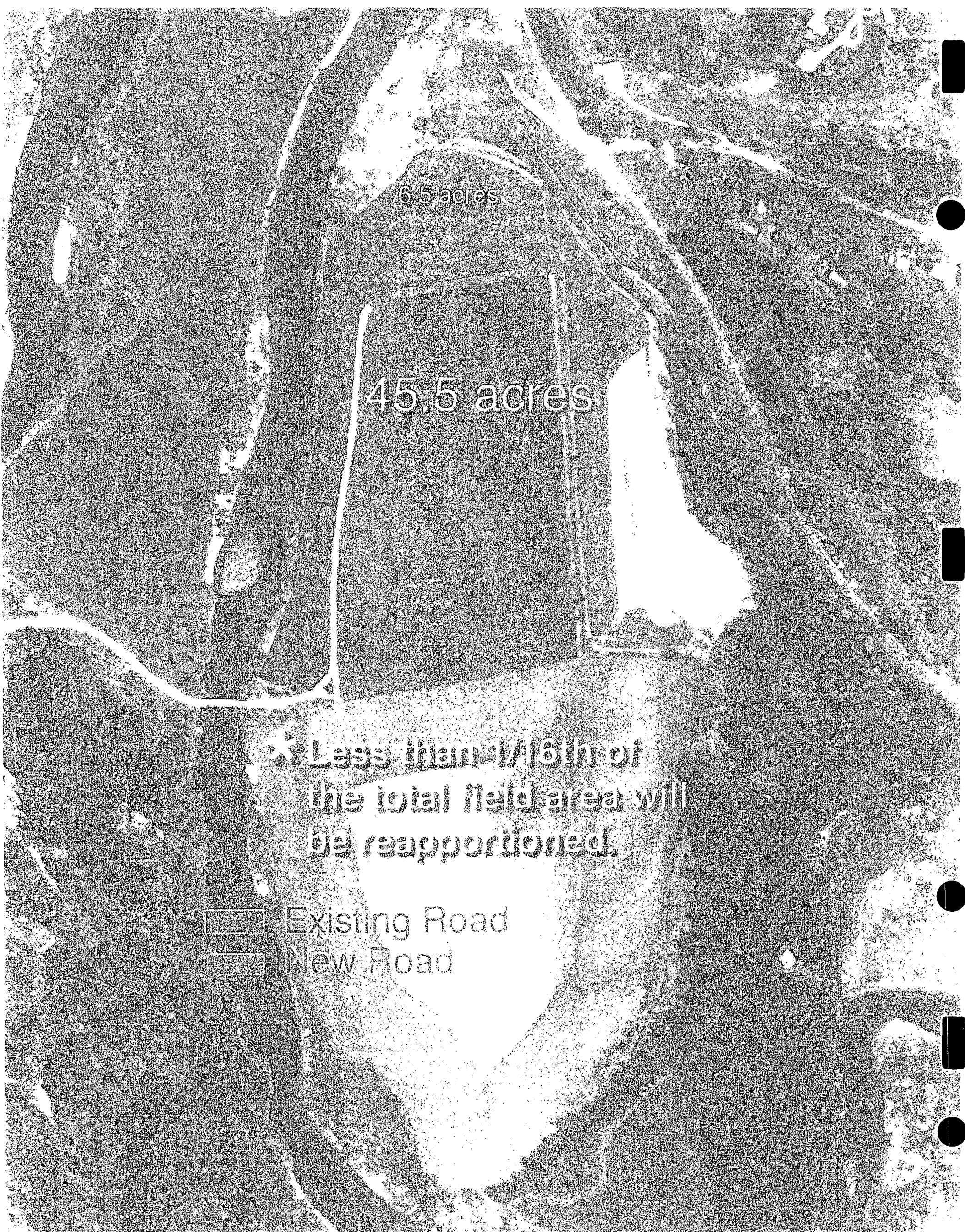
- Existing Road
- New Road

An aerial photograph showing a road network. A legend in the lower-left corner identifies 'Existing Road' with a solid line and 'New Road' with a dashed line. A text block in the upper-middle section, with an arrow pointing to a specific road segment, states: '600 feet: 10,800 square feet of road equal to 1/4 acre will be removed from this area'. Below this, another text block explains: 'Free of gravel and unnatural gradations from the existing road, a new green area will be created. This will likely become yard and garden.'

600 feet: 10,800 square feet of road equal to 1/4 acre will be removed from this area

Free of gravel and unnatural gradations from the existing road, a new green area will be created. This will likely become yard and garden.

Existing Road
New Road

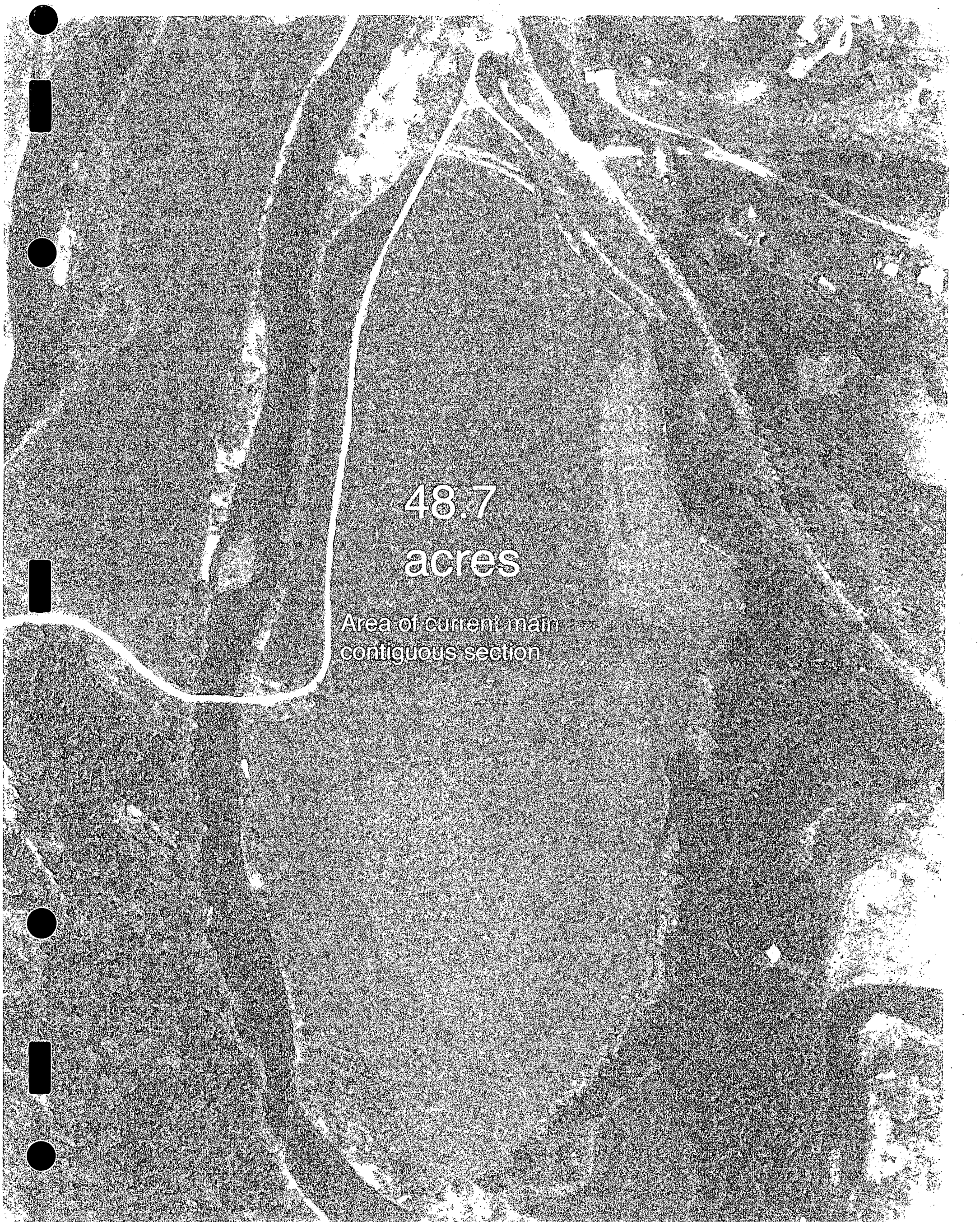


6.5 acres

45.5 acres

* Less than 1/16th of the total field area will be reappropriated.

- Existing Road
- New Road



48.7
acres

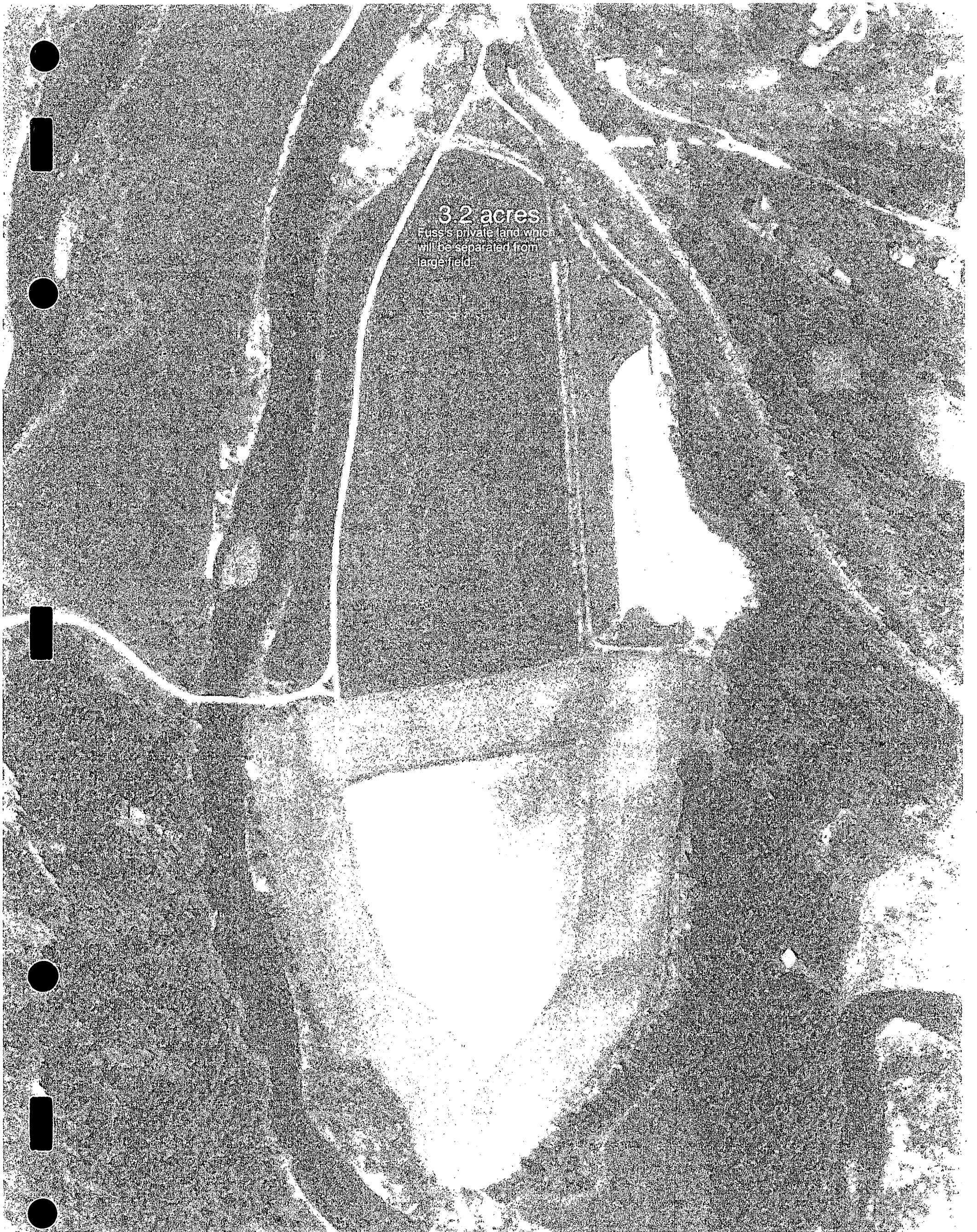
Area of current main
contiguous section

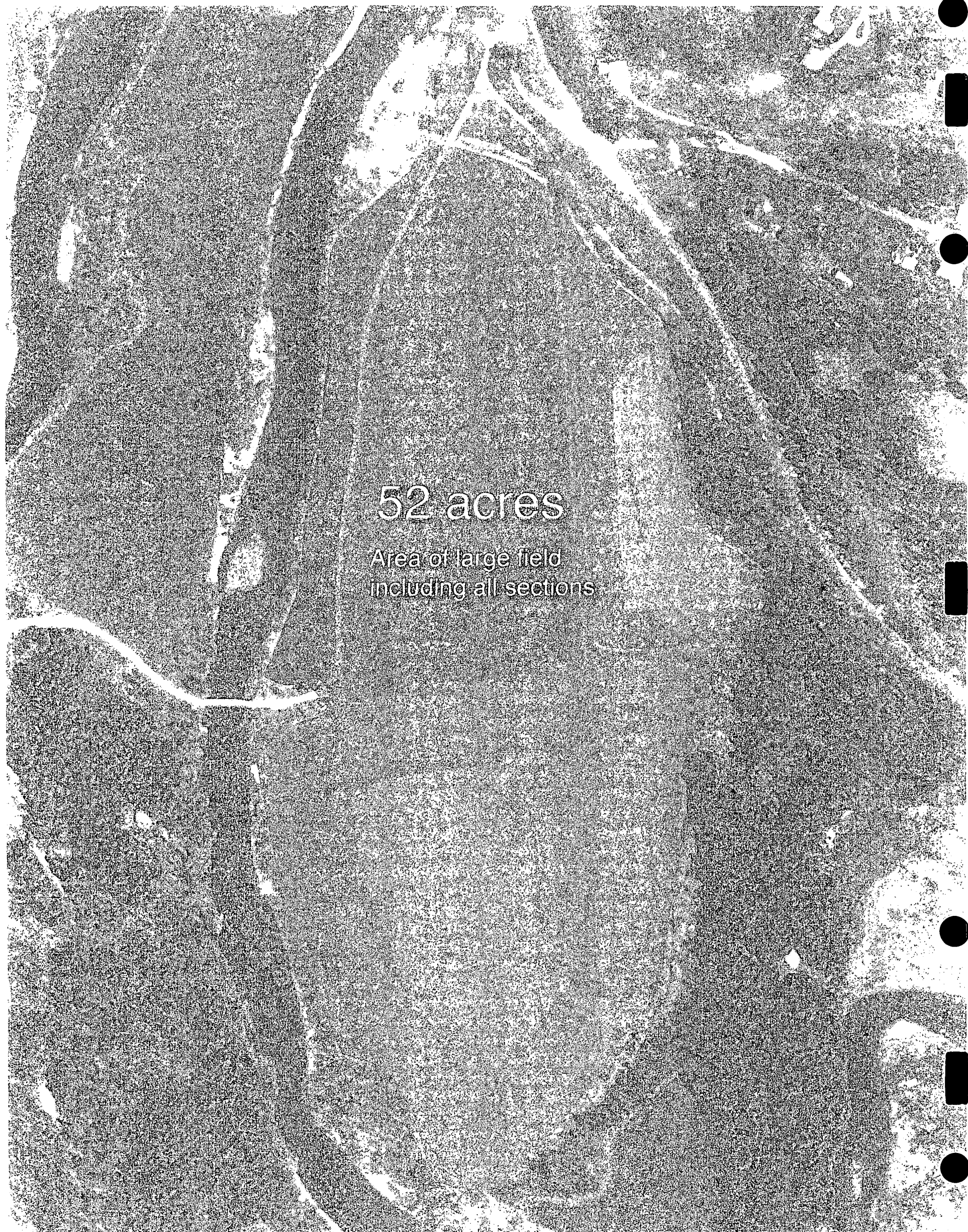


3.3
acres

area of
current
riverside
section

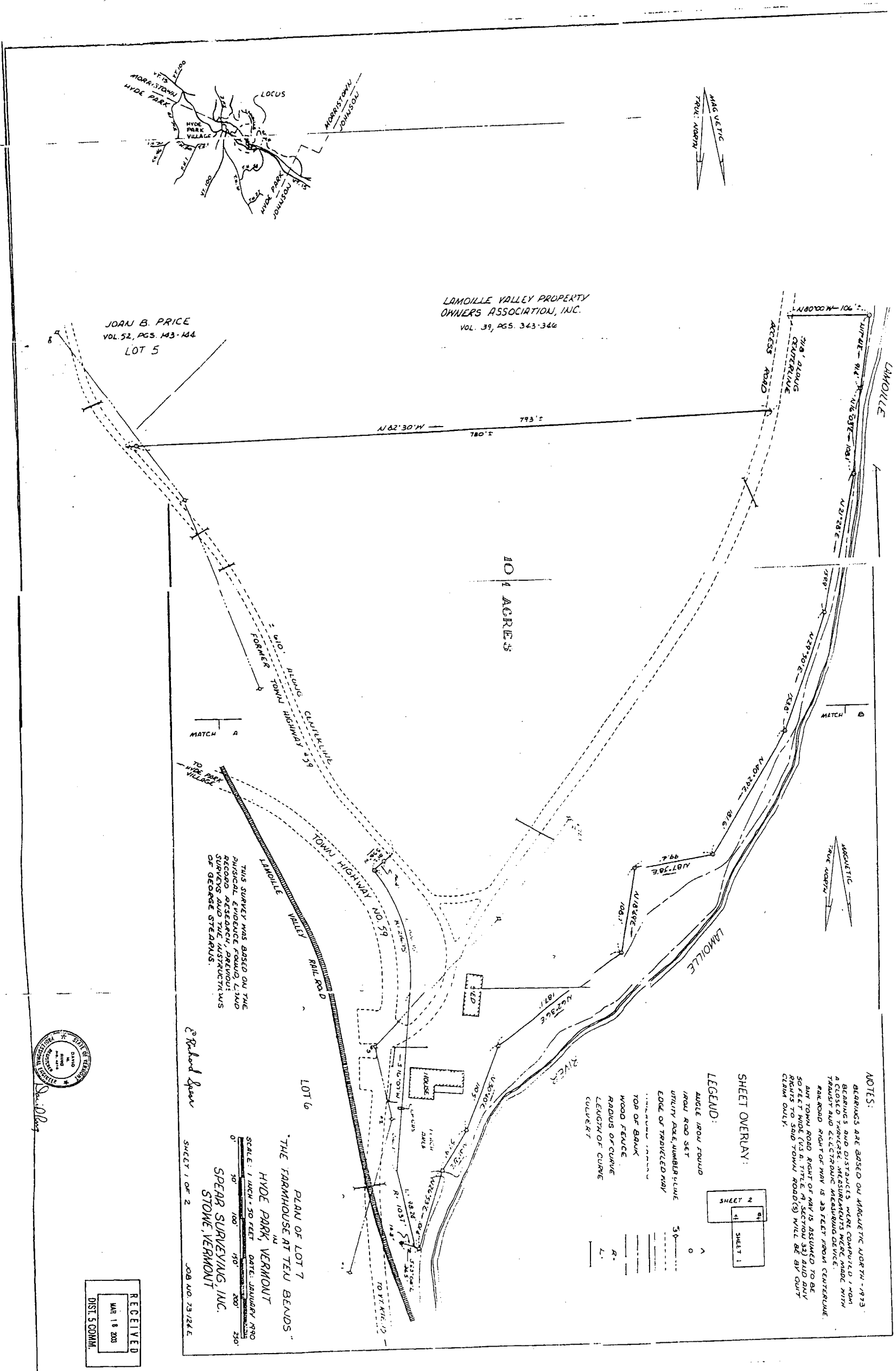
3.2 acres
Fuss's private land which
will be separated from
large field.





52 acres

Area of large field
including all sections



JOAN B. PRICE
VOL. 52, PGS. 143-144
LOT 5

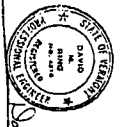
LAMOILLE VALLEY PROPERTY
OWNERS ASSOCIATION, INC.
VOL. 39, PGS. 343-346

10.4 ACRES

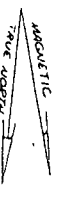
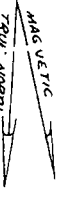
THIS SURVEY WAS BASED ON THE
PHYSICAL EVIDENCE FOUND, LAND
RECORD RESEARCH, PREVIOUS
SURVEYS AND THE INSTRUCTIONS
OF GEORGE STEARNS.

Richard Spear

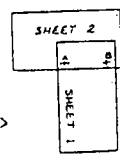
PLAN OF LOT 7
"THE FARMHOUSE AT TEU BENDS"
HYDE PARK, VERMONT
DATE: JANUARY 1990
SCALE: 1 INCH = 20 FEET
SPEAR SURVEYING, INC.
STOWE, VERMONT
JOB NO. 73124 E
SHEET 1 OF 2



RECEIVED
MAY 18 2003
DIST. 5 COMM.



LEGEND:
ANGLE IRON ROD
IRON ROD SET
UTILITY POLE NUMBERED
EDGE OF TRAVELED HWY
TOP OF BANK
WOOD FENCE
RADIUS OF CURVE
LENGTH OF CURVE
CULVERT



NOTES:
BEARINGS ARE BASED ON MAGNETIC NORTH - 7° 23'
BEARINGS AND DISTANCES WERE COMPARED WITH
A CLOSED TRAVELER MEASURING DE VICE WITH
TRAVELER AND ELECTRIC MEASURING DE VICE.
RAILROAD RIGHT OF WAY IS 33 FEET FROM CENTERLINE.
ANY TOWN ROAD RIGHT OF WAY IS ASSUMED TO BE
50 FEET WIDE (SEE SECTION 32) AND ANY
SECTION 32 TOWN ROAD(S) WILL BE BY OWN
CLAIM ONLY.



STATE OF VERMONT
DISTRICT 5 ENVIRONMENTAL COMMISSION
5 PERRY STREET, SUITE 60
BARRE, VERMONT 05641-4267
802-476-0185
Fax: 802-476-1031

June 18, 2003

Thomas A. Fuss
Christine R. W. Fuss
454 Black Farm Road
Hyde Park, Vermont 05655

RE: Reconsideration of Jurisdictional Opinion #5-03-01

Dear Tom and Christine:

I have reviewed the additional information you submitted with your Request for Reconsideration, and have solicited and reviewed information and comments from the other interested parties in this case.

Criterion 9(B) Primary Agricultural Soil:

I now see that my original analysis of the potential impact on agricultural soils was incorrect. Three acres out of 52 acres is 6%, not the one-fourth to one-third I estimated based on the partial site plan submitted earlier. This amount would not generally qualify as a significant reduction in the agricultural potential of the tract. As well, the three acres will still be available for use as agricultural soil as long as they aren't built upon. Finally, the area of the road to be removed will be returned to agricultural availability after you remove the gravel and replace it with topsoil. I therefore conclude that the proposed road re-location does not have the potential to result in significant impacts under Criterion 9(B).

Criteria 1(E) Streams and 1(F) Shorlines:

You also corrected my error in reading the reduced-scale site plan, and as a result, I can now see that the existing road is not as close to the top of the river bank as I had first believed. In addition, the road re-location will be farther from the river bank. Thus I conclude that the project does not have the potential to result in significant impacts under Criteria 1E (streams) and 1(F) Shorelines, because the river bank will not be touched in any way.

Thomas A. Fuss
Page 2
June 18, 2003

Criterion 1(D) Floodways:

To supplement your letter from Karl Jurentkuff regarding flood plain impacts, I spoke with Barry Cahoon, the state's river corridor management expert. He is very familiar with the Lamoille river and its many twists and turns, including Ten Bends, and the field in question. It is his opinion (and I did not get this in writing) that moving a portion of the road farther away from the river will only lessen the potential for impacts on the river bank, and that the extent of road damage during flooding would not be significantly different if the road was moved from its current alignment. It is my opinion that the project does not have the potential to result in significant impacts under Criterion 1(D) Floodways.

Criterion 4, Soil Erosion and Runoff:

Projects are generally reviewed for erosion potential during the construction phase. The proposed road site, because it is primarily flat, and because it is not adjacent to running water, does not pose a high potential for soil erosion during construction. Because the existing road is not as close to the top of the bank as I originally thought, the erosion potential is even less. Post-construction erosion potential will not be changed from the present situation because the total amount of gravel road surface will be similar. When the existing road bed is removed, and the area returned to field, you will want to make sure that the work is completed and stabilized in a short period of time to eliminate erosion potential closer to the river bank.

The Lamoille Valley Property Owners Association submitted a report by Doug Hewitt, P.E. He reviewed the proposed plan and analyzed the turning radius for turns onto the town road, and raised other questions about construction details. He noted that a complete engineering design has not been provided. I also would feel much more comfortable if there was a more complete road design including elevations (final level of the road surface) and drainage. However, no facts have been offered to indicate that, despite the lack of these details, the project has the potential to result in significant adverse impacts under Criterion 5 (Traffic Safety) or Criterion 4 (Soil Erosion and Runoff). Clearly, if the road is poorly constructed, it will be more costly to maintain. It would be advisable to either invest in additional design work or have the actual construction overseen by your engineer.

As I explained more fully in my original Jurisdictional Opinion, the Environmental Board and the Vermont Supreme Court have each provided guidance and direction on the "substantial change" analysis. The Supreme Court in In re Barlow, 160 VT. 513, 522 (1993) stated:

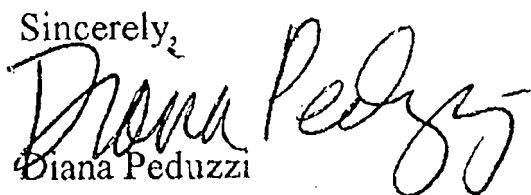
"Our concern ... is that sufficient emphasis be placed on the significance of any potential impacts found by the Board. We recognize that too loose an interpretation of EBR 2(G) effectively eliminates this element of the substantial change test. Any change of use has the potential for some impact on the statutory criteria. Thus, while we agree that the Board may act on potential impacts, we believe a finding of significant impacts is necessary if the requirement of "substantial change" is not to be illusory. The Board may not merely look, as petitioners suggest, for any potential impact, but must find that any such impacts are significant."

Thomas A. Fuss
Page 3
June 18, 2003

There is a certain level of environmental risk associated with any project that involves earth disturbance, such as a road construction project. However, the change you propose is relatively benign in the scope of things we review under Act 250. The construction area is basically flat, tree removal/clearing will be limited to a very small area, and culverts will be installed in existing ditches. As long as the road is higher than the surrounding field, and the surface is crowned, water should drain naturally as it does from the existing road. I have no reason to believe that the road construction work itself will be inadequate. As long as your engineer has certified that the road will be adequate to allow safe passage by the occupants of Ten Bends, and you have agreed to build the road to the specifications he recommends, any risks should be minimized. I am somewhat concerned that the road remain passable during construction, and that any delays be of minimum duration. You indicated that there is another access road available for summer use at the other end of the field, for traffic heading toward the bridge.

In conclusion, it is my revised opinion that, as long as the project is constructed in accordance with all of the representations made by you and your engineer, and high quality construction practices are followed, the proposed road re-location does not have the potential to result in significant impacts under any of the Act 250 criteria. A Land Use Permit Amendment will not be required.

Sincerely,


Diana Peduzzi
Assistant District Coordinator

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Environmental Board Rule 3(C)(3). Persons who qualify as parties under Environmental Board Rule 14(A) or who may be affected by the outcome of the opinion may appeal this jurisdictional opinion.

Any appeal shall be by means of a petition for declaratory ruling pursuant to Environmental Board Rule 3(D). A petition for declaratory ruling must be filed within 30 days of the mailing of the jurisdictional opinion to the person appealing and must be directed to the Environmental Board, National Life Records Center Building, Drawer 20, Montpelier, Vermont 05620-3201. The petition for declaratory ruling must include a \$100 filing fee, an original and ten copies of the jurisdictional opinion and the petition for declaratory ruling, and a certificate of service indicating that the following persons have been served with the petition: all parties under Environmental Board Rule 14(A) and other persons on whom the district coordinator served the opinion. Failure to appeal within the prescribed period shall render the jurisdictional opinion the final determination with respect to jurisdiction under 10 V.S.A. §§ 6001-6062 unless the opinion has not been properly served on all persons identified in writing by the requestor, or known to the district coordinator, as either qualifying as parties under Environmental Board Rule 14(A) or who may be affected by the outcome of the opinion.

FILED

MAY 27 2005

STATE OF VERMONT
LAMOILLE COUNTY, SS.Lamoille County Superior Court
Hyde Park VermontLAMOILLE VALLEY PROPERTY
OWNERS' ASSOC. INC.,
Plaintiff,

SUPERIOR COURT OF VERMONT

v.

DOCKET NO. 259-12-02 Lecv

THOMAS FUSS &
CHRISTINA FUSS.,
Defendants.**Decision and Order**

This case, filed on December 3, 2002, involves a dispute between landowners in the Ten Bends development in Hyde Park. Plaintiff Lamoille Valley Property Owners' Association ("Association") claims Defendants, in relocating the common right of way, violated the other owners' rights. Defendants argue that their deed allows them to unilaterally move the right of way without consent of the other lot owners. Defendants had previously filed a Motion for Summary Judgment on August 29, 2003, which Judge Cheever denied in a May 12, 2004 decision. Plaintiff filed its own Motion for Summary Judgment on February 14, 2005. This Court, in its March 25, 2005 ruling, denied Plaintiff's summary judgment motion and asked the parties to brief the issue of why this Court should not reopen and grant Defendants' August 29, 2003 motion for summary judgment.

Since that time parties have submitted a number of filings. On April 11, 2005 Plaintiff filed a memoranda addressing whether this Court should reopen and grant Defendant's summary judgment motion, with Defendant replying on April 18, 2005. Both parties have also made additional filings on those issues. Additionally on April 11, 2005, four individual property owners filed a Motion to Intervene as plaintiffs and Plaintiff filed a Motion to Amend Complaint. These shall be discussed in turn.

Standard

This matter is before the Court on the parties' cross motions for summary judgment, pursuant to V.R.C.P. 56. Summary judgment is "appropriate only when there are no genuine issues of material fact and a party is entitled to judgment as a matter of law." LoPresti v. Rutland Regional Health Services, Inc., 2004 VT 105, ¶ 14. The Rule states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." V.R.C.P. 56 (c)(3). In making such a determination, this Court "will take as true the facts alleged by the nonmoving party, and give the nonmoving party the benefit of all reasonable doubts and inferences." Fireman's Fund Ins. Co. V. CNA Ins. Co., 2004 VT 93, ¶ 8 (citation omitted). Further, "[i]t is

not the function of the trial court to resolve disputed facts when ruling on a motion for summary judgment.” Quinn v. Grimes, 2004 VT89, ¶ 7.

Analysis

Case law indicates that this Court may open an earlier summary judgment decision made by another judge. First, there is no violation of procedural rules in doing so. Myers v. LaCasse, 2003 VT 86A, ¶ 10. “Indeed, the grant of a motion for summary judgment by itself is an interlocutory order and not a final judgment.” Id.; Morrisville Lumber Co. v. Okcuoglu, 148 Vt. 180, 182 (1987). As such, this Court has the power to modify such an interlocutory order. Id., ¶ 11. The Vermont Supreme Court “will not require a judge to perpetuate error or take a more roundabout way to arrive at an ultimately necessary judgment.” Myers, 2003 VT at ¶ 11; Morrisseau v. Fayette, 164 Vt. 358, 364 (1995) (“[W]here a court ruled on an issue of law in the course of denying summary judgment, it retained the power to reopen what had been decided.” (internal marks omitted)).

Accordingly, this Court reopens Defendant’s August 29, 2005 summary judgment motion to determine whether this Court previously erred in its ruling. Upon analysis, this Court finds it did err in its May 12, 2004 decision. Looking at the facts in the light most favorable to Plaintiff, Defendant is entitled to judgment as a matter of law, as Plaintiff can produce no evidence or set of facts to overcome the Rule 56 standard.

In opposition to Defendants’ motion for summary judgment, Plaintiff argues that it retains an interest in the *location* of the right of way, thereby requiring Defendant to obtain all lot owners’ approval to move the right of way, notwithstanding the explicit language to the contrary in the 1990 deed granted by Plaintiff to Defendants’ predecessor. At the same time Plaintiff acknowledges the rule in Shantee that “a way, once located, cannot be changed thereafter without the mutual consent of the owners of the dominant and servient estates [except that] parties may agree to grant or reserve to either or both parties the power unilaterally to relocate the easement.” In re Shantee Point, Inc., 174 Vt. 248, 261 (2002); *see also* Holden v. Pilini, 124 Vt. 166, 170 (1964).

This Court’s “first responsibility in a deed construction case is to determine whether the deed is ambiguous.” Id. Such a determination is a matter of law. Id.; Mann v. Levin, 2004 VT 100, ¶ 14. “An ambiguity exists when a writing in and of itself supports a different interpretation from that which appears when it is read in light of the surrounding circumstances, and both interpretations are reasonable.” Mann, 2004 VT at ¶ 14 (internal marks omitted). In the present case, an examination of the pertinent deed language indicates that, as a matter of law, there is no ambiguity. Accordingly, this Court must give plain meaning to its terms, and in doing so, finds that the Fuss’ deed grants them the right to unilaterally move the right of way pursuant to the conditions in the deed.

The Fuss’ deed, executed on October 27, 2000, preserved the “rights, covenants, agreements and restrictions set forth or referred to in the aforesaid Warranty Deed [dated March

13, 1990].¹ The 1990 deed provides the following:

the herein Grantees shall be entitled, at their sole cost and expense, to relocate the existing intersection of the access road with current Town highway No. 59 from its present location as shown on the survey plan.... In the event the herein Grantees should relocate the access road intersection, the centerline of the traveled way of the new access road extending from its relocated intersection with current Town Highway no. 59 to that point where it reconnects to the existing access road shall constitute the centerline of a relocated 50-foot wide right of way common in favor of the herein Grantor, the herein Grantees and members of Lamoille Valley Property Owners Association, Inc.

Further, the original deed, dated April 13, 1972, conveying property from River Properties, Inc. to Plaintiff, reserves the right to establish a right of way. Finally, the 2000, 1990, and 1972 deeds include language indicating that the easements, covenants, and rights run with the land.

Plaintiff argues that despite this explicit language in the 1990 deed, Defendants still require consent from affected landowners. More specifically, Plaintiff claims that the easement at issue derives from the 1972 deed, and since affected property owners' rights originate with the 1972 deed, they have "stepped into the shoes of River Properties, Inc." Further, since River Properties never granted the right to unilaterally move the right of way, these present day owners retain the power to essentially veto an attempt to move the right of way pursuant to the 1990 easement language. This argument fails.

First, the Court finds it ironic that Plaintiff essentially argues that its 1990 unilateral grant to relocate the right of way was either unlawful or contingent upon the approval of the other landowners in the Association. Nonetheless, more dispositive of the issues here is the fact that deeds of affected landowners in the record grant only a "right of way in common with others," a right which remains unaffected by the relocation of the right of way, and a right which does not bestow veto power over the Fuss' ability to relocate the right of way pursuant to the 1990 deed. Additionally, the record demonstrates that these same affected landowners are required to join the Association which serves to maintain and regulate these rights in common, and who granted the right to relocate the right of way.

While Plaintiff argues that the affected landowners "stepped into the shoes of River

¹ This Court reiterates its footnote from its March 25, 2005 ruling: While not dispositive of the issues before this Court, the Court notes that Defendants applied for and received the proper permits from the Town of Hyde Park. Further, the surrounding landowners were notified of the public hearing on November 19, 2002. Apparently there was no public opposition with the Fuss' plan to relocate the right of way. Additionally, in a letter dated August 7, 2002 from Plaintiff to the Defendants, the President of the Association states that "[t]he Trustees agree that the intersection of the access road to old town highway 59 should be moved away from your home and that is why there is a paragraph in your deed permitting it. The Trustees have agreed to allow you to move the intersection off your land and onto Hyde Park Town land if you so choose."

Properties," there is no indication that any of these deeds contained more than the granting of "a right in common." Accordingly, even assuming, *arguendo*, that some affected landowners possess a title that derives from River Properties without passing through Plaintiff's ownership, their deeds do not reserve the rights argued by Plaintiff. The only right reserved is a right in common with other Association members, a right unaffected by the relocation of the right of way and a right which does not interfere with the unambiguous language granting Defendant the right to unilaterally relocate the right of way.


Conclusion

In the end, Shantee controls. Plaintiff itself explicitly, unilaterally and unambiguously granted Defendants a right relocate the right of way pursuant to the requirements of the 1990 deed language. Further, the record demonstrates that affected landowners retained only a right in common, that is, a right to use the way, but not necessarily the right to approve or disapprove of its location. Accordingly, as a matter of law, Defendants were entitled to relocate the right of way on their property without the consent of other landowners in the development.²

In turning to the Motion to Intervene and Amend Complaint, this Court denies both motions. The effort to add additional parties and file a new proposed amended complaint are unavailing because the legal theory is the same as that already rejected by this Court. Therefore, the motion to amend the complaint and motion to intervene are denied.

Accordingly, Defendants are entitled to summary judgment as a matter of law. Therefore, Defendant's motion for summary judgment is reopened and **granted**. Parties' Motion to Intervene and Motion to Amend Complaint are **denied**, as is Defendant's Motion To Strike.

So Ordered at Hyde Park, Vermont, this 27th day of May 2005.


Howard E. VanBenthuyzen
Superior Judge
Presiding
Lamoille Superior Court

9/19/08 Certified to be
a true copy of the original
as the same appears on
file in this office.


Clerk, Lamoille Superior Court

²There is no argument before this Court that the relocation, notwithstanding the threshold issue of whether Defendants had a right to relocate the right of way in the first place, did not conform to the requirements in the 1990 deed.

FILEDSTATE OF VERMONT
LAMOILLE COUNTY, SS.

JUN - 7 2005

Lamoille County Superior Court
Hyde Park VermontLAMOILLE VALLEY
PROPERTY OWNERS
ASSOCIATION, INC.
Plaintiff,

SUPERIOR COURT OF VERMONT

v.

THOMAS FUSS and
CHRISTINA FUSS,
Defendants.

DOCKET NO. 259-12-02 Lecv

SUPPLEMENTAL ORDER

The Court issued its last Order in this case on May 27th, 2005 granting the re-opened motion for summary judgment of Defendants. On June 3rd the Sheriff presented the Court with a fax from Plaintiff's attorney dated 6/2/05 purporting to assert a continuing right to use the former, now extinguished, right of way across Defendant's property.

There has been no request for a stay of the Court's 5/27/05 Order pursuant to V.R.C.P. 62, nor any motion to reconsider or for permission to appeal. Given the history of this case, which includes very hard feelings, a rather large quantum of bitterness, and at least one simple assault by Defendant¹ on a member of the Plaintiff Association, it seems necessary and prudent at this point to clarify the respective rights of the Parties pending further proceedings either in this Court or in the Supreme Court.

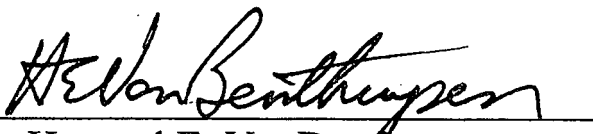
The extinguishment and relocation of the former right of way to a new location of necessity extinguishes the right in Plaintiffs to use the former right of way. Common sense dictates that the termination of the old right of way (and construction of the new one) also terminates the right to use it. In the same vein, the relocation and Order upholding it of necessity require that only the new location be used by the Plaintiffs. A review of the relevant caselaw revealed no case in which the extinguishment and relocation of a former right of way nevertheless was held to permit continued use of the former way. In order to prevent further unnecessary tension and possible further breach of the peace over this property issue, the Court believes it is appropriate to supplement the Order granting Defendant's Motion for Summary Judgment.

¹ See, State of Vermont v. Thomas Fuss, 232-4-03 Lecr, Judgment of Guilty on simple assault charge after court trial on 12/23/03; Affirmed by the Supreme Court on 9/7/04.

Accordingly, to clarify the Order of 5/27/05, the Court hereby holds and Orders that the Plaintiffs are no longer entitled to use the former, now extinguished and relocated, right of way running across Defendant's lands and premises in close proximity to their residence. Defendants are entitled to erect temporary barriers on that former right of way to control or block access thereto. While there might be further proceedings in this, and ultimately, at the Supreme Court, pending further Order of this Court or the Supreme Court, the Plaintiffs are hereby Ordered to use only the newly located right of way, and are further Ordered to take no steps to use the former right of way nor to remove any temporary signs or barriers Defendants might choose to erect.

The Parties are invited to brief what if any issues they view as remaining appropriate to litigate in this matter.

So Ordered at Hyde Park, Vermont this 3rd day of June, 2005.



Howard E. VanBenthuyzen
Presiding Judge
Lamoille Superior Court

Encl: Fax from Plaintiff's Attorney to Sheriff Marcoux, 6/2/05
Cc: Parties

9/19/08 Certified to be
a true copy of the original
as the same appears on
file in this office.


Clerk, Lamoille Superior Court

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

certify this document to be a true copy of the original on file in the office the Clerk of the Vermont Supreme Court, this

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

11th day of Sept 28 2005 VERMONT SUPREME COURT DOCKET NO. 2005-362

MARCH TERM, 2006

MAR 29 2006

Edward A. McHenry
Clerk/Deputy Clerk

Lamoille Valley Property Owners' Association }

APPEALED FROM:

v.

Lamoille Superior Court

Thomas Fuss and Christina Fuss }

DOCKET NO. 259-12-02 Lecv

Trial Judge: Howard E. VanBenthuyesen

In the above-entitled cause, the Clerk will enter:

Defendants Thomas and Christina Fuss appeal pro se from a superior court order denying their motion for an award of costs, attorneys' fees, and punitive damages. We affirm.

This case began when plaintiff Lamoille Valley Property Owners' Association (Association), which represents property owners in a development known as Ten Bends in the Town of Hyde Park, filed a complaint for declaratory and injunctive relief against defendants, who own a parcel within the development. The complaint alleged that an intersection between Town Highway 59 and an access road to the development is located on defendants' property; that the access road benefits other lots owned by members of the Association; and that defendants were in the process of seeking municipal approval to relocate the intersection, contrary to the terms of their deed, and without the requisite consent of other owners who benefit from the access road.

Defendants answered and counter-claimed, and subsequently moved for summary judgment, arguing that they were entitled under the plain terms of their deed to relocate the intersection anywhere they wished on their property. The Association opposed the motion, arguing that any deeded right to relocate was personal to defendants' predecessor-in-interest and did not run with the land, and that the Association did not have the authority in the first instance to grant the right to unilaterally relocate the intersection.¹ The Association noted that the deeds of the other lot owners granted them common access to the road, and argued that their consent was therefore required for any relocation that would affect the common right-of-way.

¹ The 1990 deed from the Association to George and Aimee Stearns, defendants' predecessor-in-interest, provided that the "[g]rantees shall be entitled, at their sole cost and expense, to relocate the existing intersection of the access road with current Town Highway No. 59 from its present location as shown on the survey plan . . . in a southerly direction to a point located between said present location" and a certain point on Town Highway 59. The deed from the Stearns to defendants expressly preserved the rights, covenants and agreements contained in the prior deed from the Association to the Stearns.

The trial court (Judge Cheever) denied defendants' motion for summary judgment, finding that it was unclear from the face of their deed whether the right to relocate the intersection ran with the land and whether the Association had the authority to grant rights in an easement to one property owner that affected all of the other property owners. The Association later filed its own motion for summary judgment. The court (Judge VanBenthuyzen) not only denied the Association's motion, but also invited defendants to file a request to reconsider Judge Cheever's earlier ruling. Defendants did so, and the court subsequently issued a written decision granting their motion for summary judgment. The court concluded that the deed language authorizing defendants to relocate the intersection was clear and unambiguous; that the deed contained additional language plainly indicating that the right runs with the land; and that there was no support for the Association's claims that it lacked authority to grant a unilateral right to relocate the road, or that the other owners' consent was required. The court issued a supplemental order clarifying its decision to mean that the Association and its members were no longer entitled to use the old intersection and access road.

Following the court's decision, defendants filed a pro se motion requesting an award of costs, attorneys' fees, and punitive damages.² The court denied the motion in a brief entry order stating that it did "not find the kind of bad faith here necessary to justify a departure from the American Rule." This appeal of the court's ruling on costs and fees followed.

We address preliminarily the Association's claim, raised for the first time in its appellee's brief, that the appeal should be dismissed because it is not from a final order. Although it appears that the court intended its summary judgment order to be final—the docket entries include the notation "Summary Judgment for Defendant. Case closed"—the court did not sign, and the clerk did not enter, a final judgment, as required by V.R.C.P. 58. "Without such an order, the docket entry of the court's decision does not constitute entry of judgment and does not commence the running of the appeal period." Powers v. Hayes, 170 Vt. 639, 640 (2000) (mem.). Nevertheless, because it does not appear that any material issues remain to be decided, the parties have briefed the issue on appeal, and a dismissal for entry of a final judgment would merely postpone our decision and incur additional costs, we exercise our authority under V.R.A.P. 2 to suspend the rules for good cause in order to address the instant appeal. See State v. CNA Ins. Cos., 172 Vt. 318, 322-23 (2001).³

Defendants' principal claim is that the court erred in denying their request for attorneys' fees. As the trial court correctly observed, however, under the "American Rule" that we follow in Vermont a party is generally not entitled attorneys' fees, regardless of the outcome, "absent a specific statutory provision or an agreement of the parties." Galkin v. Town of Chester, 168 Vt. 82, 91 (1998).

In their motion, defendants did not argue that they were entitled to attorneys' fees under any statutory provision or agreement between the parties. Nevertheless, on appeal they assert that the standard provision of their warranty deed committing the grantor, the Association, to "DEFEND

² Although defendants had been represented by counsel throughout the summary judgment proceedings, counsel later moved to withdraw, the court granted the request, and defendants thereafter appeared pro se.

³ Although the Association cites language from the court's last entry order referring to the possibility of "further proceedings in this, and ultimately, at the Supreme Court," nothing in the court's decision indicates that issues remained to be resolved at trial, and the Association has not demonstrated otherwise.

... against all lawful claims whatever” represents such an agreement. This claim was not raised below, however, and therefore was not preserved for review on appeal. Monahan v. GMAC Mortgage Corp., 2005 VT 110, ¶ 74. Furthermore, we note that the deed provision represents a warranty of title, not an undertaking to pay attorneys’ fees in a dispute between the grantor and grantee over the meaning and scope of an easement within the deed. The decision cited by defendant, Keeler v Wood, 30 Vt. 242, 244 (1858), allowed recovery of damages, including attorneys’ fees, in an action for breach of a covenant of title. That was not the claim here. See Albright v. Fish, 138 Vt. 585, 588-89 (1980) (distinguishing Keeler as limited to actions for breach of covenant of title and rejecting claim for attorneys’ fees in action for breach of restrictive covenant).

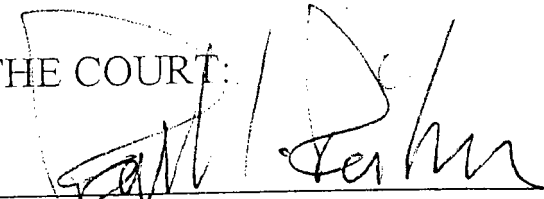
Defendants also contend the court erred in finding that the “bad faith” exception to the American Rule had not been met. See Cameron v. Burke, 153 Vt. 565, 576 (1990) (courts “may grant [attorneys’] fees in exceptional cases as justice requires,” such as where a litigant acts in bad faith, or vexatiously, or where a litigant’s conduct is obdurate). Although defendants allege that the Association’s lawsuit was patently unfounded, subjected them to multiple, unnecessary rounds of litigation, and contained an element of malice, the record does not support the claim. Indeed, the court initially denied defendants’ motion for summary judgment, and although it later (under a different judge) concluded that the deed unambiguously favored defendants, the record does not demonstrate that the Association’s arguments were frivolous, made in bad faith, or advanced for improper purposes. Accordingly, we find no abuse of discretion. See Burlington Free Press v. Univ. of Vt., 172 Vt. 303, 307 (2001) (we review trial court’s discretionary ruling on award of attorneys’ fees solely to determine whether court failed to exercise discretion or exercised it for reasons clearly untenable or unreasonable).

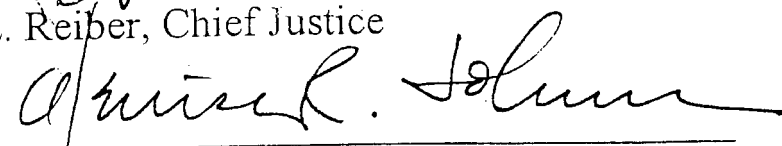
Defendants also contend the court erred in declining to award costs. The trial court enjoys broad discretion in a declaratory judgment action to award such costs “as may seem equitable and just,” 12 V.S.A. § 4720, and its decision—as in any other type of proceeding—will not be disturbed absent an abuse of discretion. See Peterson v Chichester, 157 Vt. 548, 553 (1991) (although plaintiff prevailed at trial, court did not abuse discretion in denying award of costs); In re Gadhue, 149 Vt. 322, 327 (1987) (court enjoys broad discretion in awarding costs in litigation). Apart from seeking attorneys’ fees, which are not generally included among a party’s “costs,” State v. Champlain Cable Corp., 147 Vt. 436, 438 (1986), defendants did not enumerate or substantiate in their motion any specific litigation costs incurred in the proceeding. For this reason, as well as those cited by the trial court in declining to award attorneys’ fees, we cannot conclude that the court abused its discretion in failing to award costs.

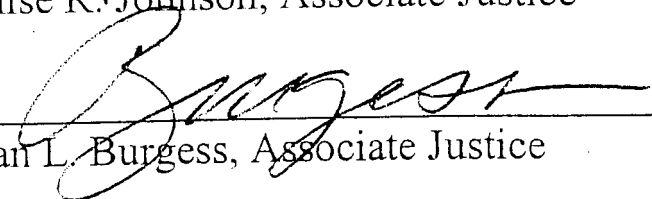
Finally, defendants contend the court erred in failing to award them punitive damages. The claim lacks merit for two reasons. First, in their motion for costs and damages defendants did not cite any evidence to support an award of compensatory damages, and the court did not award compensatory damages, which are a prerequisite to punitive damages. Sweet v. Roy, 173 Vt. 418, 447 (2002). Second, defendants have not shown that defendants acted with such malice as to warrant a conclusion that the court abused its discretion in declining to award punitive, much less compensatory, damages. See Wharton v. Tri-State Drilling & Boring, 2003 VT 19, ¶ 19, 175 Vt. 494 (mem.) (award of punitive damages requires showing of malice, and such damages are awarded at the trial court’s discretion). In support of their claim of malice, defendants refer to an e-mail from an officer of the Association which was attached as an exhibit to their memorandum submitted in response to the court’s invitation to reopen the motion for summary judgment. Defendants did not cite or rely upon the e-mail in support of their motion for costs and damages, and therefore cannot rely upon it on appeal. Monahan, 2005 VT 110, ¶ 74. We observe, however, that the e-mail in question, which states the author’s view that the road issue is less important than dealing with the contentious relationship between defendants and the Association, does not demonstrate that the court clearly erred in failing to find malice. Accordingly, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:


Paul L. Reiber, Chief Justice


Denise R. Johnson, Associate Justice


Brian L. Burgess, Associate Justice

STATE OF VERMONT
LAMOILLE COUNTY

FILED

DEC 31 2007

Lamoille County Superior Court
Hyde Park Vermont

Lamoille Valley Property Owners' Association, Inc.,)	
Plaintiff,)	
)	Lamoille County Superior Court
v.)	Docket No. 259-12-02 Lecv
)	
Thomas Fuss and Christine Fuss,)	
Defendants.)	

DECISION AND ORDER

This case is before the Court again after years of litigation. Presently before the Court are a number of motions filed by both parties.

The Plaintiff is represented by Liam Murphy, Esq. The Defendants appear before the Court *pro se*.

Factual History

The factual history of this case has been well-documented through the numerous filings by both parties over the years. Thus, the Court will undertake only a brief review of the relevant facts at this time.

The Plaintiff, the Lamoille Valley Property Owners Association (LVPOA), is a representative of property owners in a development known as the Ten Bends in Hyde Park. The Defendants own a parcel within the development.

The Defendants' deed was executed on October 27, 2000. This deed preserved the "rights, covenants, agreements and restrictions set forth or referred to in the aforesaid Warranty Deed [dated March 13, 1990]." The 1990 deed gave the Defendants the right "at their sole cost and expense, to relocate the existing intersection of the access road . . . from its present location as shown on the survey plan."

The Plaintiff was conveyed its deed by River Properties, Inc. The original deed for the LVPOA properties was dated April 13, 1972 and reserved the right to establish a right of way. The 2000, 1990, and 1972 deeds all included language that established easements, covenants, and rights which run with the land. More relevant to the Court's current inquiry, a 1990 deed to the Stearns, the Defendants' predecessor in interest, conveyed the right:

at [the Stearns] sole cost and expense . . . to relocate the existing intersection of the access road with current Town Highway No. 59 from its present location as shown on the survey plan . . . in a southerly direction to a point located between said present location and that property boundary extending from the iron rod located on the westerly sideline of current Town Highway No. 59 S 58° W 31 feet, more or less, passing through an iron rod to a point in the center line of former Town Highway No. 59. In the event the herein Grantees should relocate the access road intersection, the centerline of the travelled [sic] way of the new access road extending from its relocated intersection with current Highway No. 59 to that point where it reconnects to the existing access road shall constitute the centerline of a relocated 50-foot wide right of way in common in favor of the herein Grantor, the herein Grantees and members of Lamoille Valley Property Owners' Association, Inc.

The warranty deed of 2000 from the Stearns to the Defendants incorporated the entirety of the 1990 deed.

The Plaintiff initiated action under this docket number by filing a Complaint seeking declaratory and injunctive relief against the Defendants. The issue concerned an intersection between a town road and the development's access road, which is located on the Defendants' property. The other lot owners within the development benefited from this access road and held a right of way in common with others, as stated in their respective deeds. At that time, the Defendants sought to relocate the intersection, which was opposed by the Plaintiff and other property owners within the development.

The right of way originally ran directly past the Defendants' house. Eventually the Defendants relocated the right of way to run across a meadow adjacent to their house.

Procedural History

On December 3, 2002, the Plaintiff brought suit against the Defendants to prevent their relocation of the right of way. The deeds of the affected landowners granted only "a right of way in common with others." This Court denied the Plaintiff's request for relief and eventually granted the Defendants' Motion for Summary Judgment to relocate the right of way. In the Decision and Order dated March 25, 2005, this Court stated that "the plain language makes clear that no ambiguity exists, and that Defendants had the authority to unilaterally relocate the right of way farther from their home."

Upon the Defendants' renewed Motion for Summary Judgment, this Court stated that "the record demonstrates that the affected landowners retained only a right in common, that is, a right to use the way, but not necessarily the right to approve or disapprove of its location." Decision and Order, May 27, 2005. In the same Order, the

Court denied the Motion to Intervene filed by Thelma D. Barker, Susan D. Clark, Angela Norder, and Brian Norder, individual property owners within the Plaintiff's chain of title. In denying that motion, this Court held that the "efforts to add additional parties and file a new proposed amended complaint are unavailing because the legal theory is the same as that already rejected by this Court."

On June 3, 2005, the Court issued a Supplemental Order, in which the Court stated "the Plaintiffs are no longer entitled to use the former, now extinguished and relocated right of way running across Defendants' lands and premises . . . the Plaintiffs are hereby Ordered to use only the new right of way."

An attorney for Mr. Kirk Brisson, a property owner within the development, filed a Complaint against the Defendants with this Court on August 20, 2007. That case was assigned a docket number, and it has since been disposed of by the Court as being barred by the doctrine of *res judicata*.

For the purposes of establishing what is on the table at this time, the Court will list the pending motions in chronological order by the date each was filed.

On August 24, 2007, the Defendants filed a Motion for Contempt, and the Plaintiff filed their response on October 9, 2007. On October 19, 2007, the Plaintiff filed a Motion for Preliminary Injunction, a Motion to Enjoin Defendants from Interfering, and a Motion to Consolidate with Docket No. 61-3-07 Lecv. The Defendants filed a Motion for Rule 11(c) Sanctions, a Motion to Strike the Plaintiff's Motion for Preliminary Injunction, a Motion to Strike the Plaintiff's Motion to Enjoin Defendants from Interfering, and a Motion to Strike the Plaintiff's Motion to Consolidate on November 7, 2007. Both parties have since submitted additional responses to the aforementioned motions.

Discussion

Defendants' Motion for Contempt

The Defendants request this Court hold Mr. Kirk Brisson in contempt of court for "disobeying an order previously granted by this Court by claiming rights to the 'former, now extinguished and relocated, right of way running across Defendants' lands and premises in close proximity to their residence' as so described and extinguished by the Court in its Supplemental Order filed June 7, 2005." Motion for Contempt, at 1. The Defendants allege that Mr. Brisson is a "trustee" of the Plaintiff and breached the peace by presenting a letter claiming a right to the original right of way to the Defendants and filing a Complaint against the Defendants. The Defendants also claim that the Plaintiff should be held in contempt and has liability for Mr. Brisson's acts because "LVPOA is collectively responsible for the actions of its members in this case and there is no evidence that the LVPOA ever properly informed its members of the legal implications of the Court's ruling." Reply to Plaintiff's Opposition to Defendants' Motion for Contempt, at 1-2.

On November 7, 2007, the Defendants filed a Motion for Contempt Supplemental Pleading. In it, the Defendants restate many of their arguments from their Motion for Contempt. They also claim that some of the Plaintiff's statements in their motions currently before the Court are "so grossly inaccurate as to be considered misconduct and an action that interferes with the Court's ability to administer justice and insults the dignity of the court." Contempt Supplemental Pleading, at 4. The Defendants further complain that the Plaintiff's Motion to Enjoin Defendants, Motion for Preliminary Injunction, and Motion to Consolidate "directly disobey the Court's Supplemental Order . . . and interfere with Defendants' right to enjoy their property without further litigation." Id. at 5.

In the current Motion for Contempt, the Defendants cite 12 V.S.A. § 122 and Cameron v. Burke, 153 Vt. 565 (1990).

In Cameron, the Court affirmed the award of attorney's fees because, under V.R.C.P. 11, "a court may impose reasonable attorney's fees on a party who makes averments in pleadings, motions, or other papers merely to harass or cause unnecessary delay." Id. at 576. This Court decided in its Order for the suit between Mr. Brisson and the Defendants that Mr. Brisson's conduct did not rise to the level of "bad faith" required by the Cameron Court and therefore declines to again analyze this issue under that rubric.

The Court's power to punish under 12 V.S.A. § 122 is discretionary, and there must be a reasonable basis for the discretionary action of the trial court. Thompson v. Thompson, 171 Vt. 549 (2000). Civil contempt can be found where a party, although able, refuses to comply with a valid, specific court order. Andrews v. Andrews, 134 Vt. 47 (1975). "Mistaken judgment, without any suggestion of deceit, cannot be the basis for a finding of contempt." Mayo v. Mayo, 173 Vt. 459, 462 (2001). Furthermore, "before a person may be held in contempt for violating a court order, the order should inform him in definite terms as to the duties imposed upon him." State v. Pownal Tanning Co., 142 Vt. 601, 605 (1983). "The order must be specific and definite so that it leaves no reasonable basis for doubt as to its meaning." Id. A plaintiff in a contempt proceeding must prove that the defendant was able to comply with the court's order but refused to do so by clear and convincing evidence. See Vt. Women's Health Ctr. v. Operation Rescue, 159 Vt. 141, 146 (1992). Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." Black's Law Dictionary 596 (8th ed. 2004).

The Court notes the Plaintiff's argument that the alleged act of contempt was performed by Mr. Brisson, and not the Plaintiff in this matter. Plaintiff's Opposition to Defendants' Motion for Contempt, at 1. The Court agrees that Mr. Brisson was not acting on behalf of the Plaintiff, even though he is a trustee. Instead, Mr. Brisson was seeking to enforce what he believed to be his personal property interests. Although his assertion that he was entitled to certain rights was inaccurate, the Court does not find that his suit was filed in bad faith.

Nor does the Court find that it has imposed upon the Plaintiff in the earlier Decision and Order or Supplemental Order some affirmative duty to notify all affected property owners within the development.

The Court's consideration of this issue is founded on a presumption of good faith by Mr. Brisson and his attorney. The Defendants have failed to establish by clear and convincing evidence that Mr. Brisson or his attorney violated the Court's Order regarding the extinguished right of way. Although he did file suit to determine his rights, the Defendants have not established that Mr. Brisson or his attorney used or interfered with the right of way extinguished by the Order. The filing of Mr. Brisson's Complaint, without more, does not clearly and convincingly establish "bad faith."

Moreover, the Court considers the fact that a final judgment has not been entered in this case evidence of the lack of clarity, specificity, and definitiveness required by Pownal Tanning Co., supra. While the Plaintiff's current motions before the Court do subject the Defendant to additional litigation, the Court finds these motions were not filed in bad faith or in an attempt to violate the Court's previous orders. Rather, these motions are requesting assistance from the Court that will settle this long-standing dispute once and for all. Therefore, the Defendants' Motion for Contempt is **DENIED**.

Defendants' Motion for Rule 11 Sanctions

The Defendants also seek Rule 11 sanctions against the Plaintiff and its attorney for alleged misrepresentations of fact. The Plaintiff's filings on October 19, 2007, all allege in the recitation of the facts that the Defendants relocated the right of way on their property in 2003. Defendants contend, and the Court records show, that they did not relocate the right of way until this Court granted them Summary Judgment on May 27, 2005. Motion for Sanctions, at 2-3. The Defendants had constructed the relocated right of way during the summer of 2004 but maintained the disputed right of way until May 27, 2005. Id. at 3.

Rule 11 of the Vermont Rules of Civil Procedure provides a basis upon which a court may determine whether a suit is improperly motivated or filed without proper support. Under Rule 11(c), a court may impose sanctions if, "after notice and a reasonable opportunity to respond," the court determines that the requirements of Rule 11(b) have been violated. The court may order "an appropriate sanction upon the attorneys, law firms, or parties that have violated" Rule 11(b) or are responsible for such violation. V.R.C.P. 11(c).

Although the Plaintiff clearly misstated the timeline regarding the relocation of the right of way, the Court does not find that the Plaintiff's motions are without factual or legal basis or were filed for some bad purpose. Rather, this appears to be a misstatement and not an attempt to deceive the Court, especially considering the Court's familiarity with this case thanks to its repeated appearance in court over the years. Therefore, the Court will **DENY** the Defendants' Motion for Rule 11 Sanctions.

Plaintiff's Motion to Enjoin Defendants from Interfering

In this Motion, the Plaintiff seeks to enjoin the Defendants from interfering with the work of licensed surveyors and their assistants upon the Defendants' land. The ultimate purpose of this entry, according to the Plaintiff, is to determine the extent, location, and use of the relocated right of way. Motion to Enjoin, at 1. Moreover, the Plaintiff argues that the survey will determine whether the relocated right of way lies entirely on the Defendants' property, or whether any part of it encroaches on the Plaintiff's land. Id. at 2.

27 V.S.A. § 4 states that:

In cases wherein the title to lands, tenements or hereditaments may come into question, or in order to establish boundaries between abutting parcels, a licensed surveyor with the necessary assistants employed by any of the parties to such disputed title, may enter upon such lands or real estate or other lands for the purpose of running doubtful or disputed lines and locating or searching for monuments, establishing temporary monuments and ascertaining and deciding the location of the lines and monuments of a survey, doing as little damage as possible to the owners of such land.

The Plaintiff has alleged that a portion of the relocated right of way may be located on the Plaintiff's land.

In a separate Motion for Preliminary Injunction, discussed below, the Plaintiff argues it has met the requirements necessary for the Court to order the remedy sought. Motion to Enjoin, at 4. That motion is discussed briefly in the Plaintiff's Motion to Enjoin the Defendants from Interfering with the survey, which the Plaintiff argues is necessary in order for the Court to issue a final judgment. Id.

The Court finds that a determination of the scope and precise location of the previous and relocated rights of way may serve to bring closure to this ongoing dispute. The Plaintiff's Motion to Enjoin Defendants from Interfering with the Plaintiff's surveyor and any necessary assistants is thereby **GRANTED**.

Plaintiff's Motion for Preliminary Injunction to Preserve the Status Quo

The Plaintiff has likewise motioned this Court in favor of an injunction against the Defendants that would prevent them:

. . . from taking any action that will affect the land and the relocated right of way that is at issue in this case, and further to enjoin the Defendants from taking any action that

will affect or interfere with the use and maintenance of any part of the drainage system on any part of the Ten Bends Development . . . including the relocated right of way until a final determination is made by the court on the issues in this case.

Motion for Preliminary Injunction, at 1. The Plaintiff alleges that the Defendants have indicated an intention to remove the current right of way altogether and block drainage ditches that serve the Plaintiff's property. Id. at 2.

"The purpose of a preliminary injunction is to maintain the status quo pending determination of the action." Weinreb Mgmt., LLC v. KBD Mgmt., Inc., 22 A.D.3d 571, 572 (2005). In determining whether to grant a preliminary injunction, in advance of full consideration of all the issues in the case, as requested, the Court uses the following standard:

Generally, preliminary injunctive relief is appropriate when movant shows irreparable harm and either likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

International Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 70 (2d Cir. 1996).

The Plaintiff argues that, if the Defendants move the right of way before a final determination of the case, there will be a multiplicity of lawsuits and "a significant increase in expense if and when the relocated right of way is ordered to be reinstated." Motion for Preliminary Injunction, at 3. Likewise, the Plaintiff states that "there is likely to be further lawsuits whereby the Plaintiff will claim damages in addition to the reinstatement of the drainage ditches" if the Defendants block the drainage ditches. Id.

The Court does not typically issue anticipatory orders and has restricted authority to regulate the affairs of private citizens and entities. At this time, the Plaintiff has not satisfied the requirement of suffering irreparable harm, and therefore the Court will **DENY** the Motion for Preliminary Injunction.

Plaintiff's Motion to Consolidate

Pursuant to Rule 42(a), the Plaintiff has requested that the current case be consolidated with another pending case in this Court wherein the Plaintiff is also a party, Brisson v. LVPOA, Docket Number 61-3-07 Lecv. In that case, Mr. Brisson has sued the Plaintiff for allegedly depriving him of his property interest in the extinguished right of way due to the relocation. The Plaintiff argues that this Motion should be granted because "the questions of law and fact that the court will need to determine in both actions are in common with each other." Motion to Consolidate, at 3.

More particularly, the Plaintiff states that Mr. Brisson seeks to have the Plaintiff "record in the appropriate land records the Order confirming Brisson's right to use the relocated right of way and that right runs with the Brisson's title." *Id.* The Plaintiff claims one of its goals in the current action is to obtain a judgment "that all members of the LVPOA, including Brisson, be entitled to use the relocated right of way, and that the same be recorded in the appropriate land records."

The Defendants Motioned this Court to Strike Plaintiff's Motion to Consolidate on November 7, 2007, arguing pursuant to Rule 12(f) that the motion was based on uncertain facts, lacked privilege, and was redundant.

Under Rule 42, two actions may only be consolidated with the consent of the parties. See V.R.C.P. 42(a) (dictating that "full consolidation might be had only with the consent of the parties"). In this case, the Defendants have filed an opposition to the Plaintiff's Motion to Consolidate, and consent is clearly absent among the parties.

V.R.C.P. 42 also allows the courts to join together for hearing or trial "any or all the matters in issue" for actions "involving a common question of law or fact." In the case between Mr. Brisson and the Plaintiff, Mr. Brisson asks the Court, among other things, to order that he be allowed to use the original right of way, or that he may use the relocated right of way, and the Plaintiff be ordered to record this right in the appropriate land records.

In essence, parts of Mr. Brisson's Complaint against the Plaintiff relate to his rights to use the right of way in common with others that runs over the Defendants' property. These matters are not distinct either factually or legally, and the parties are likely to benefit from consolidation of these issues. Therefore, the Court will **GRANT IN PART** the Plaintiff's Motion to Consolidate. In particular, the matters to be consolidated are Mr. Brisson's use of the relocated right of way and the recording of such right in the appropriate land records. The remaining issues in that suit will remain separate and distinct from this lawsuit, if the parties in fact need to litigate them further after resolution of the matters of this case.

ORDER

For the foregoing reasons,

The Defendants' Motion for Contempt is **DENIED**.

The Plaintiff's Motion for Preliminary Injunction is **DENIED**.

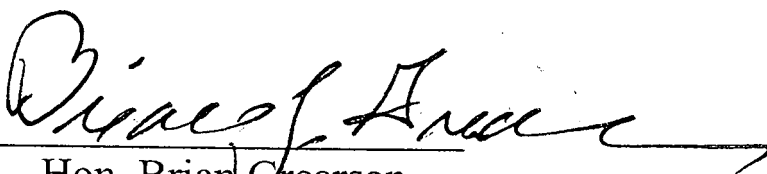
The Plaintiff's Motion to Enjoin Defendants is **GRANTED**.

The Plaintiff's Motion to Consolidate is **GRANTED IN PART**.

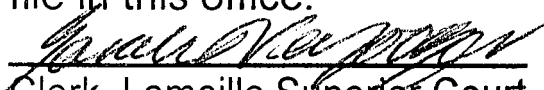
The Defendants' Motion for Rule 11 Sanctions is **DENIED**.

SO ORDERED.

Dated at Hyde Park, Vermont this 31 of December, 2007.


Hon. Brian Grearson
Superior Court Judge

9/19/08 Certified to be
a true copy of the original
as the same appears on
file in this office.


Clerk, Lamoille Superior Court

STATE OF VERMONT
LAMOILLE COUNTY

FILED

JAN 25 2008

Lamoille County Superior Court
Hyde Park, Vermont

Lamoille Valley Property Owners' Association, Inc.,
Plaintiffs,

v.

Thomas Fuss and Christine Fuss
Defendants.

Lamoille County Superior Court
Docket No. 259-12-02 Lecv

FINAL JUDGMENT

Pursuant to Vermont Rule of Civil Procedure 58, judgment is hereby entered in favor of Defendants Thomas and Christine Fuss, and against the Plaintiff, the Lamoille Valley Property Owners' Association, Inc., in accordance with the May 27, 2005, Decision and Order and the June 7, 2005, Supplemental Order.

The Defendants have the right to unilaterally relocate the right of way which constituted old town highway 59 pursuant to the conditions of their deed. The Plaintiff and its trustees continue to hold a right of way in common with others over the relocated right of way. Upon completion of the land survey, the coordinates of the relocated right of way will be established and can be entered into the appropriate town records.

The relocation of the right of way extinguished the former right of way on the Defendants' property. Use of the extinguished right of way by the Plaintiff or its trustees is prohibited. The Plaintiff and its trustees may use the relocated right of way, pursuant to the deeds conveyed from River Properties, Inc.

This action is terminated.

So ordered at Hyde Park, Vermont, this 24 day of January, 2008.

*Vacated
by 20 April 20 2008
BJ*

Brian J. Grearson

Hon. Brian J. Grearson
Superior Court Judge

9/19/08 Certified to be
a true copy of the original
as the same appears on
file in this office.

[Signature]
Clerk, Lamoille Superior Court

STATE OF VERMONT
LAMOILLE COUNTY

FILED

APR 28 2008

Lamoille County Superior Court
Hyde Park Vermont

Lamoille Valley Property Owners' Association, Inc.,
Plaintiffs,
v.
Thomas Fuss and Christine Fuss
Defendants.

Lamoille County Superior Court

Docket No. 259-12-02 Lecv

ENTRY ORDER

Striking the Court's Final Judgment Order of January 25, 2008

Upon further review of the entire record for this case, the Court realized that its Final Judgment Order of January 25, 2008, was unnecessary and improperly entered. Accordingly, the Court now strikes that Order from the record.

In sixth paragraph of the Supreme Court's Entry Order dated March 29, 2006, the Supreme Court noted that this Court failed to enter a final judgment order pursuant to V.R.C.P. 58, despite the fact that this Court "intended its summary judgment order to be final." Likewise, the Supreme Court did not find any material issues to be decided at that time in the case. Therefore, it exercised its authority under V.R.A.P. 2 to suspend the rules for good cause and address the parties' appeal.

In opting to hear the case on appeal rather than dismissing it for lack of a final judgment order, the Supreme Court closed and terminated the action. Thus in effect, a final judgment was previously entered, making it error for this Court to issue its January 25, 2008, Final Judgment Order. That Order shall be struck from the record.

So ordered.

Dated at Hyde Park, Vermont this 28 day of April, 2008.

Brian J. Grearson

Hon. Brian J. Grearson
Superior Court Judge

9/19/08 Certified to be a true copy of the original as the same appears on file in this office.

Carol A. [Signature]
Clerk, Lamoille Superior Court

Hyde Park, Vermont, Town Clerk's Office

September 24, A.D. 2008 at 1 o'clock 40 minutes P.M.

Received for record the instrument of which the foregoing is a true record.

Attest: *Mary Anderson* Town Clerk