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CV-1997-000085.00
CIRCUIT COURT OF
SHELBY COUNTY, ALABAMA
MARY HARRIS, CLERK

IN THE CIRCUIT COURT FOR SHELBY COUNTY, ALABAMA

MARION RUTHERFORD, as Trustee of the
Inter Vivos Trust created by FLORENCE L.
RUTHERFORD, now deceased,

Plaintiff,

v.

RITA RUTHERFORD; JOSHUA LONGNECKER,
a minor (now an adult); PHILLIP RONEL
RUTHERFORD; TOBY ALLEN RUTHERFORD;
TROY RUTHERFORD; HEATH RUTHERFORD;
HEATHER RUTHERFORD; ADAM
RUTHERFORD; a minor (now an adult), et al.,

Defendants.

v.

RITA KATHRYN RUTHERFORD, individually,
and as virtual representative of the Estate of
FLORENCE L. RUTHERFORD, deceased,

Counter-Claim Plaintiff,

v.

MARION RUTHERFORD, individually, and in his
representative capacities as former Attorney-in-Fact
for FLORENCE L. RUTHERFORD under the
Durable Power of Attorney dated August 24, 1990,
and Trustee of the *Inter Vivos* Trust dated
September 5, 1990, et al.,

Counter-Claim Defendants,

v.

RITA KATHRYN RUTHERFORD, individually,
and as virtual representative of the Estate of
FLORENCE L. RUTHERFORD, deceased,

Cross-Claim Plaintiff,

v.

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Shelby Cnty Judge of Probate, AL
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CIVIL ACTION NO.

CV-1997-085

12/9/10

Mary H. Harris

JOSHUA LONGNECKER, a minor (now an adult);)
PHILLIP RONEL RUTHERFORD; TOBY)
ALLEN RUTHERFORD; TROY RUTHERFORD;)
HEATH RUTHERFORD; HEATHER)
RUTHERFORD; ADAM RUTHERFORD; a)
minor (now an adult), et al.,)

Cross-Claim Defendants.)

v.)

Estate of FLORENCE L. RUTHERFORD,)
deceased, by and through its former Personal)
Representative, FRANK C. ELLIS, JR.,)

Party added upon the Estate's removal)
from Probate Court to this Court)
and consolidation herewith.)


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Shelby Cnty Judge of Probate, AL
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ORDER GRANTING RELIEF
UNDER RULE 60(b)(6)

This cause came before the Court upon the Motion for Relief from Judgment Under **Rule 60(b)(6)** (the "Motion") filed on October 15th, 2010, by RITA K. RUTHERFORD ("Rita," or "Movant," as appropriate), individually, and as Trustee of the RITA KATHRYN RUTHERFORD IRREVOCABLE TRUST created under Agreement dated October 6, 1999.

The Court has reviewed the prior pleadings in the file and notes that this action was closed by entry of a Final Order entered December 28, 1999, and that no filings have been made, orders have been entered, and no other substantive activity has occurred with respect to this action since said date, with the exception of this Court's *Nunc Pro Tunc* Order of January 13, 2000.

This action was previously heard by then-Shelby County Circuit Judge, Hon. D. AL CROWSON ("Judge Crowson"), now retired. Any and all cases formerly under the jurisdiction

of Judge Crowson were transferred to the undersigned, who thus has the requisite authority to hear any post-judgment motions in this action, including the Motion.

The Court reviewed the Motion and the attached Exhibits, as well as the prior pleadings in the file. The Court considered the statements of Movants' counsel in support of the Motion, and considered the statements of parties, former parties, or counsel for those or other interested parties provided with notice and/or certificate of service copies and/or courtesy copies of the Motion.

Based on the foregoing, the Court makes the following findings of fact:

1. This action pertained to certain matters related to the Estate of FLORENCE L. RUTHERFORD, deceased ("Mrs. Rutherford"), and her family members, including her daughter, Movant, and her other adult children, PHILLIP RONEL RUTHERFORD ("Phillip") and MARION RUTHERFORD ("Marion"), and their respective children (collectively, the "Parties").
2. Judge Crowson entered certain orders with regard to various matters at issue in this action, and the Parties reached a settlement of other matters at issue in this action, which settlement was approved by Judge Crowson. Those matters included the disposition of certain real property formerly owned by Mrs. Rutherford, i.e., an approximately 29-acre parcel located on Valleydale Road (the "Valleydale Road Property").
3. An additional one-acre parcel of real property located adjacent to and contiguous to certain portions of the Valleydale Road Property (the "One-Acre Parcel") had been conveyed by Mrs. Rutherford to Marion during her lifetime. The One-Acre Parcel was not at issue in this action, but its disposition was later affected by the settlement of this action and subsequent activities as the result of the Parties' settlement.



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4. As the result of both the various orders entered by Judge Crowson in this case, and the settlement agreement of the Parties, the Valleydale Road Property was (i) determined to be an asset of Mrs. Rutherford's probate estate; (ii) distributed in three (3) certain parcels of approximately 9.5 acres each (the "9.5 Acre Parcels") then deeded to Movant, Phillip, and Marion, respectively, by Mrs. Rutherford's Estate in accordance with the terms of Mrs. Rutherford's Will; (iii) the respective 9.5 Acre Parcels were deeded by Movant, Phillip, and Marion to respective *Inter Vivos* Trusts created by each of them (the "Trusts," or a "Trust," as appropriate); and (iv) made subject to certain Restrictive Covenants executed by Movant, Marion, and Phillip, as Trustee of his/her respective Irrevocable Trust, recorded on March 8, 2000, in the Office of the Shelby County, Alabama, Judge of Probate as Instrument #2000-07407 (the "Restrictive Covenants").

5. The Restrictive Covenants were the result of a separate agreement made by the Parties with respect to that certain lawsuit in the Jefferson County, Alabama, Circuit Court, Case No. CV-97-387, styled, Edward M. Beck et al. v. City of Hoover, et al. (the "Zoning Action"), and specifically an agreement with the Plaintiffs in that action, EDWARD M. BECK and wife, MARY LOUISE BECK (the "Becks"), and JOSEPH NADLER and wife, LINDA NADLER¹ (the "Nadlers") (collectively, the "Zoning Dispute Plaintiffs"). By Marion's agreement, the One-Acre Parcel was also made subject to the Restrictive Covenants.

6. The Restrictive Covenants included certain setback and buffer requirements for the Valleydale Road Property and the One-Acre Parcel, as well as certain zoning restrictions. In this action, Judge Crowson reviewed the Restrictive Covenants and approved the Parties' settlement that resulted in the execution and recordation of the Restrictive Covenants.

¹ The Motion and various pleadings or orders in the Zoning Action incorrectly referred to Mr. Nadler's wife as "Diane Nadler," rather than Linda Nadler.



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7. Marion, individually, and as Trustee of Mation's Trust, later encumbered the One-Acre Parcel and his Trust's 9.5 Acre Parcel of the Valleydale Road Property, respectively, with mortgages to First National Bank of Shelby County, which mortgages were foreclosed upon, and the said parcels were sold at a foreclosure sale on January 8, 2003. Specifically, the said 9.5 Acre Parcel was sold to SHELBY RESOURCES, INC. ("Shelby Resources"), and the One Acre Parcel was sold to LARRY WEEMS ("Weems"). Shelby Resources and Weems thus succeeded to all rights, duties, and obligations pertaining to said real property that arose under the Restrictive Covenants.

8. Weems later conveyed the One-Acre Parcel to L & W VALLEYDALE, LLC, an Alabama limited liability company ("L&W"). The One-Acre Parcel is hereinafter referred to as the "Levine-Weems Parcel."

9. Shelby Resources later conveyed the 9.5 Acre Parcel formerly owned by Marion's Trust to PROVIDENCE PARK PARTNERS II, LLC ("Providence Park II"), an Alabama limited liability company.

10. Thus, L&W and Providence Park II (and any subsequent assignee, transferee, or grantee of either of them) also succeeded to all rights, duties, and obligations that arose under the Restrictive Covenants pertaining to the One-Acre Parcel and the 9.5 Acre Parcel formerly owned by Martion and Marion's Trust, respectively.

11. Paragraph 18 of the Restrictive Covenants included certain language, as follows:

This instrument is to be interpreted under the laws of the State of Alabama. These covenants are enforceable by (i) the owners of all adjoining property (including their heirs, successors and assigns to their respective interests in the Property); (ii) the owners of the Property (including their heirs, successors and assigns to their respective interests in the Property); (iii) anyone owning property within 500 feet of the Property (including their heirs, successors and assigns to their respective interests in the Property); and (iv) the City of Hoover.

(Referred to herein as the "Paragraph 18 Enforcement Language").

12. After L&W acquired title to the Levine-Weems Parcel, in order to develop same in a commercially reasonable manner, L&W negotiated with the Nadlers and WILLIAM E. ALLEN and wife, MALORIE P. ALLEN (collectively, the "Allens") (successors in title to the Becks) to obtain a reduction of the setbacks and buffers burdening the One-Acre Parcel. Those negotiations resulted in the Amendment to Declaration of Restrictive Covenants (the "Amended Restrictive Covenants"), executed by L&W, the Nadlers and the Allens (the "Amended Restrictive Covenants"). The Amended Restrictive Covenants were recorded on June 3, 2010, in the Office of the Shelby County, Alabama, Judge of Probate as Instrument #2010-0603000175360.

13. The Amended Restrictive Covenants amended the Restrictive Covenants so that section 5 thereof was replaced in its entirety to state as follows:

Exclusive of that portion of the Property shown on Exhibits C-1, C-2, and C-3, there shall be a forty (40) feet wide undisturbed buffer along the entire length of the southern border of the Property, and an additional ten (10) feet wide planted buffer shall adjoin such forty (40) feet wide undeveloped buffer. Provided, however, that for the portion of the Property shown in Exhibit 2010B – the "Levine/Weems Parcel" – the aforesaid forty (40) feet and ten (10) feet wide buffers and undisturbed/undeveloped areas are inapplicable to the Levine/Weems Parcel; instead, the Levine/Weems Parcel is burdened by the buffers and setbacks set forth in Exhibit 2010B which requirements shall burden the Levine/Weems Parcel in perpetuity, shall run with the land and shall inure to the benefit of the [former Plaintiffs in the Zoning Action Dispute and/or their heirs and assigns] owners of the real properties shown on the attached Exhibit 2010B-1. The 100 feet wide buffer on the Levine/Weems Parcel shown on Exhibit B is no longer a valid encumbrance thereon, as it is replaced with the restrictions set forth hereinabove.

14. The only part of said section 5 different from section 5 contained in the Restrictive Covenants was the setbacks and buffers burdening the Levine/Weems Parcel

(specifically, reducing the 100-foot wide buffer on the Levine/Weems Parcel as shown on Exhibit B of the Restrictive Covenants, to the setbacks and buffers set forth in Exhibit 2010B-1 of the Amended Restrictive Covenants).

15. The Amended Restrictive Covenants stated the following in its final unnumbered paragraph:

By signing this instrument, the undersigned make no alterations to the Covenants other than those set forth herein. The ongoing efficacy of the Covenants is affirmed by all of the undersigned. The undersigned agree that this fully executed document shall be recorded in the Office of the Judge of Probate of Shelby County, Alabama. This document is deemed to be drafted equally by both parties with no bias (as per construction) against any party signing this instrument.

16. L&W also sought and obtained a variance from the City of Hoover Board of Zoning Adjustments as to certain uses and purposes permitted under the City of Hoover's zoning for the One-Acre Parcel (i.e., C-P zoning for "preferred commercial district"). Such a variance was obtained after notice was given to the landowners adjacent to the Levine/Weems Parcel pursuant to pertinent regulations of the City of Hoover Board of Zoning Adjustments.

17. In the Motion, Movant avers that, on or about September, 2010, she discovered that certain questions have arisen as to the intent of the parties who entered into the Restrictive Covenant with respect to the Paragraph 18 Enforcement Language, namely, the interpretation and application of the Paragraph 18 Enforcement Language as to the legal effect of the Amended Restrictive Covenants. Movant avers it was not intended that any persons or entities other than the parties to the Zoning Action (i.e., the Nadlers, the Allens [as successors to the Becks], and the City of Hoover) would have the right to enforce the Restrictive Covenants so as to prevent L&W, the Nadlers, and the Allens from changing the setbacks and buffers as to the real property

described in the Amended Restrictive Covenants (i.e., the Levine/Weems Parcel), which only burdens the Levine/Weems Parcel and not any part of the Valleydale Road Property.

18. Given the foregoing, Movant seeks relief under **Rule 60(b)(6)** of the *Alabama Rules of Civil Procedure*, requesting that this Court exercise its equity jurisdiction to construe by written order the Restrictive Covenants, and in particular the Paragraph 18 Enforcement Language, as (i) not preventing the actions of the Nadlers, the Allens and L&W in the making of the Amended Restrictive Covenants, and (ii) approving and confirming that the Amended Restrictive Covenants were lawfully accomplished and of full and complete legal effect for all purposes.

19. Movant has now requested an order that alters or amends certain relief previously granted in the Court's Final Order entered December 29, 1999, namely, the approval by Judge Crowson at hearing on December 13, 1999, of the Restrictive Covenants as referenced in said Final Order.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED as follows:

A. That, after due consideration of **Rule 60(b)(6)**, and the Restrictive Covenants and the Amended Restricted Covenants, the Court has determined that the Motion is well taken, and that no additional notice of this Motion and any hearing on same is required to be provided to any parties other than to those counsel for Parties that were listed on the Motion's certificate of service, and the list of counsel reflected on such certificate as having been provided with courtesy copies of the Motion. The Court specifically takes judicial notice of the Waivers of Notice/Consents to relief sought filed in this proceeding by the Nadlers, the Allens, and L&W (with the qualified waiver of notice by the Nadlers and the Allens). Moreover, the Court finds

that no additional notice of the Motion or any hearing on same is required to be provided to any landowner adjacent to or in proximity to the Valleydale Road Property and/or the Levine/Weems Parcel.

B. The Court finds that Paragraph 18 Enforcement Language of the Restrictive Covenants did not prevent the actions of the Nadlers, the Allens and L&W in the making of the Amended Restrictive Covenants.

C. The Final Order entered December 29, 1999, in this action (a copy of which is attached hereto and incorporated herein by reference as **Exhibit A**) is hereby amended as follows:

(1) The Restrictive Covenants (a copy of which is attached hereto as **Exhibit B**) are approved and confirmed in all respects, retroactively to December 29, 1999;

(2) The Amended Restrictive Covenants (a copy of which is attached hereto as **Exhibit C**) were lawfully accomplished and of full and complete legal effect for all purposes, and are hereby approved and confirmed in all respects;

(3) The setbacks and buffers set forth in section 5 of the Restrictive Covenants were and are at all times hereafter replaced by the setbacks and buffers set forth in the Amended Restrictive Covenants; and

(4) The Restrictive Covenants, except as altered by the Amended Restrictive Covenants (specifically, section 5 only), are hereby otherwise ratified in all respects, thus preserving their ongoing efficacy.

D. A copy of this Order, together with its **Exhibits A, B, and C**, shall be placed of record in the Office of the Judge of Probate of Shelby County, Alabama. Said Exhibits B and C shall have affixed to each of them a legend to the effect that same were recorded previously in

the Office of the Judge of Probate of Shelby County, Alabama, but that a copy of same is being re-recorded in connection with the recording of this Order.

E. This Order is a final judgment pursuant to **Rule 54(b)** of the *Alabama Rules of Civil Procedure*.

F. Costs to be taxed to the Movant.

DONE AND ORDERED this 2nd day of December, 2010.


Hon. HEWITT L. CONWILL, Circuit Judge

cc: J. Sanford Mullins, III, Esquire
SIROTE & PERMUTT, P.C.
2311 Highland Avenue South
P. O. Box 55727
Birmingham, Alabama 35205 (35255-5727)

Frank C. Ellis, Jr., Esquire
WALLACE, ELLIS, FOWLER & HEAD
P. O. Box 587
Columbiana, AL 35051

Phillip Ronel Rutherford, in his fiduciary capacity
as Trustee of the Phillip Ronel Rutherford Irrevocable
Trust dated November 1, 1999
1106 Coodey Road
Clanton, AL 35045-8312

Carl E. Chamblee, Jr., Esquire
CHAMBLEE & FURR
5582 Apple Park Drive
Birmingham, AL 35235

Frank C. Galloway, III, Esquire
GALLOWAY & SCOTT, LLC
2200 Woodcrest Place, Suite 310
Birmingham, Alabama 35209

James R. Moncus, Jr., Esquire
1313 Alford Avenue, Suite 102
Birmingham, AL 35226

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

MARION RUTHERFORD, et al.
PLAINTIFF

VS

RITA RUTHERFORD, et al.,
DEFENDANTS



CIVIL ACTION NUMBER

CV-97-085

FINAL ORDER

THIS CAUSE came back before the Court on December 13, 1999 for a final order and to finalize the estate of Florence Rutherford, deceased.

The Court reviewed the restrictive covenants drafted by Frank Galloway as previously directed.

Further, the Court heard testimony from both Marion Rutherford and Bobby Boyd, much of said testimony concerning time spent by Marion Rutherford.

Subsequently, the Court received word that the re-appraisal reduced the estimated value of Marion Rutherford's parcel of the land by \$49,000.00, which re-appraisal did not impact the previously appraised value of Phillip Rutherford's parcel or Rita Rutherford's parcel.

Having considered the above, the Court finds:

FINDINGS

The re-appraised value of each parcel is now:

	Marion's <u>Parcel</u>	Phillip's <u>Parcel</u>	Rita's <u>Parcel</u>
Original appraised value before buffer agreement	\$ 1,489,000	\$ 1,358,000	\$ 1,273,750
Reduction as a result of re-appraisal	<u>(49,000)</u>	<u>---</u>	<u>---</u>
December 20, 1999 re-appraisal as a result of buffer agreement	\$ <u>1,440,000</u>	\$ <u>1,358,000</u>	\$ <u>1,273,750</u>

The original appraised values were used as part of the total distributed Estate assets. That total was used by Special Master Boyd to calculate the percentage used to allocate Estate liabilities (Estate Reserve Requirement). Therefore, the revised appraisal amounts will be used to revise the allocation of the previously-established Estate Reserve Requirement. This revision was calculated by Special Master Boyd is as follows:

	<u>Marion</u>	<u>Phillip</u>	<u>Rita</u>
Previous total of Estate assets used to allocate reserve requirement	\$1,625,309	\$1,442,833	\$1,341,583
Appraisal change 12/20/99	(49,000)	---	---
Revised total of Estate assets used to allocate reserve requirement	<u>\$1,576,309</u>	<u>\$1,442,833</u>	<u>\$1,341,583</u>
Revised percentages used to allocate reserve requirement	36.15%	33.09%	30.76%
Original percentage used to allocate reserve requirement	36.86%	32.72%	30.42%
Original allocation of reserve requirements	\$ 431,112	\$ 382,691	\$ 355,790
Change in percentage due to reallocation	(.71%)	.37%	.34%
Dollar change due to reallocation	\$ (8,304)	\$ 4,328	\$ 3,976

Therefore, as a result of the re-allocation of the reserve requirement, Phillip shall now be obligated to pay \$4,328.00 to the So-Called Trust, Rita \$3,976.00 to the So-Called Trust, and therefore Marion is to receive \$8,304.00 therefrom.

The following fees and reimbursement of expenses were awarded by the Court in a November Court Order and remain unpaid at this time. These amounts are ordered to be paid:

<u>Recipient</u>	<u>Amount</u>
Personal Representative Ellis and his counsel, Ms. Felton	\$ 853.01

demonstrate that Marion had any educational background or experience to justify any higher hourly rates. Further, no evidence or testimony was offered which demonstrated that more hours than were estimated by Special Master Boyd had been rendered by Marion. The court noted that Marion hired specialized lawyers, accountants, engineers and other professionals to handle complex matters related to rezoning of the Valleydale Road land and related to Internal Revenue Service Matters. Considerable professional fees were paid to the various professionals retained. Since Marion is not the Executor of the Rutherford Estate, he is not entitled to an Executor's fee determined as a percentage of Estate assets. Therefore, the Court orders no further fiduciary fees to be paid to Marion Rutherford. The Court recognizes that Marion has exerted considerable effort on behalf of the So-Called Trust and therefore recognizes that the total amount of \$70,456.00 paid from the Trust by fiduciary Marion Rutherford to himself is reasonable.

Therefore, considering the above, the amounts due from Phillip Rutherford and Rita Rutherford are as follows:

	Due From <u>Phillip</u>	Due From <u>Rita</u>
Re-allocation of reserve requirement	\$ 4,328.00	\$ 3,976.00
Share of final Special Master Fee	496.00 -----	461.00 -----
Total due from Phillip and Rita	<u>\$ 4,824.00</u>	<u>\$4,437.00</u>

The following then is the net amount due to Marion:

Due to Marion from reserve re-allocation	\$ 8,304.00
Less amount previously due from Marion	(6,102.00)
Less Marion's share of Special Master fee	(542.00) -----
Total due to Marion	<u>\$ 1,660.00</u>

In summary, all remaining transactions ordered by the Court are set forth below:-

Cash on hand	\$ 999.00
Payment due from Rita	4,437.00
Payment due from Phillip	4,824.00
Payment due to Marion	(1,660.00)
Payment for professional fees and reimbursements	(6,101.00)
Payment for Special Master summary fee	(1,500.00)
Payment to appraiser	(500.00)
Payment for Court costs	(250.00)
Balance to be paid to personal representative Ellis to apply to expenses	(249.00)

The above transactions will conclude all So-Called Trust financial matters.

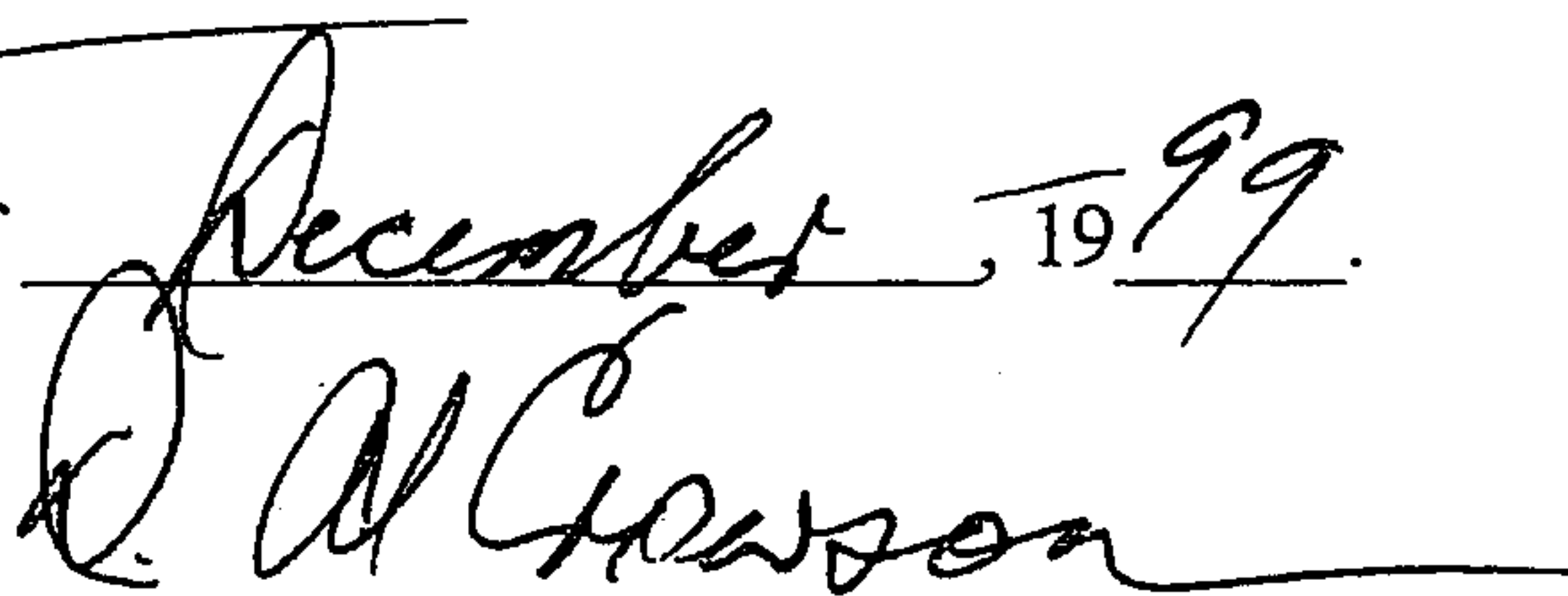
The Court further finds that:

1. More than six (6) months have elapsed since the Executor, Frank C. Ellis, Jr., was appointed;
2. That Notice was given to all creditors pursuant to Code of Alabama, §43-2-61, and that all debts of the decedent and all legal charges against decedent's estate have been paid in full (excludes orders heretofore set forth);
3. All notices of the final hearing were given in accordance with the law;
4. That all legatees and distributees have received their respective shares;
5. And that the Executor, Frank C. Ellis, Jr., should be discharged upon the above transactions being completed.

ORDER

It is **ORDERED** that Rita Rutherford shall pay the sum of \$4,437.00 to Frank C. Ellis, Jr., as personal representative and that Phillip Rutherford shall pay to Frank C. Ellis, Jr., as personal representative the sum of \$4,824.00.

The said Frank C. Ellis, Jr. shall then pay: \$1,660.00 to Marion Rutherford; \$853.01 to himself as personal representative; \$2,272.86 to Sandy Mullins; \$1,856.12 to Jim Pino; \$302.64 to Carl Chamblee; \$561.13 to Bobby Thomas as Guardian ad Litem; \$1,755.66 to Bobby Boyd; \$500.00 to the appraiser; then payment of Court costs and reimbursement of expenses of the personal representative. Any monies thereafter left shall be distributed to Marion, Phillip and Rita according to the revised percentages used to allocate reserve requirement. The personal representative shall report to the Court once the above monies have been paid.

DONE and ORDERED this 28th day of December, 1999.

D. Al Crowson
Circuit Judge

STATE OF ALABAMA)

SHELBY COUNTY)



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Shelby Cnty Judge of Probate, AL
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This instrument prepared by:

Frank C. Galloway III

Galloway & Moss, L.L.C.

11 Oak Street

Birmingham, AL 35213

DECLARATION OF RESTRICTIVE COVENANTS

COME NOW, the undersigned Marion Rutherford as trustee of the Marion Rutherford Irrevocable Trust dated November 1, 1999 (referred to hereinafter as the "Marion Trust"), Rita Kathryn Rutherford as trustee of the Rita Kathryn Rutherford Irrevocable Trust dated October 6, 1999 (referred to hereinafter as the "Rita Trust") and Phillip Ronel Rutherford as trustee of the Phillip Ronel Rutherford Irrevocable Trust dated November 1, 1999 (referred to hereinafter as the "Phillip Trust") and hereby issue the following restrictive covenants on the properties described herein:

As determined by the Circuit Court of Shelby County, Alabama in CV 97-085 (the "Case"), the Marion Trust, the Rita Trust, and the Phillip Trust each own fee simple title to those three adjoining properties which are cumulatively referred to hereinafter as the "Property" and which are more particularly described on the attached Exhibit A.

The undersigned agree, that in consideration for the agreement by Edward M. Beck, Mary Louise Beck, Joseph Nadler and Diane Nadler (collectively referred to hereinafter as the "Plaintiffs") to dismiss with prejudice the lawsuit they filed against the City of Hoover, Alabama, et al. (CV 97-387 in the Circuit Court of Jefferson County, Alabama - the "Zoning Case") they hereby burden the Property with the following restrictive covenants:

1. The Property is in the shape of a triangle, the hypotenuse of which is the northwesterly border of the Property and which abuts the southern side of Valleydale Road. The junction of the two sides of the Property other than the aforesaid hypotenuse is the southeasternmost part of the Property, and is the point of the Property closest to Indian Crest Drive (the "Point"). From the Point, continuing northwesterly downwards a path perpendicular to the hypotenuse to a point 175 feet from the Point and then easterly and westerly parallel to the hypotenuse until intersection with the aforesaid two sides of the Property. Such description of a triangular portion of the Property is depicted on the attached Exhibit B, and is referred to hereinafter as the "Triangle".
2. The Triangle shall not be used for any purposes other than for single family residential dwellings, and no cleaning or grading of the Triangle may be done except as the minimum amount needed to facilitate construction of the single family residential dwelling(s) on the Triangle. Furthermore, there shall never be more than three single family residential dwellings located on the Triangle and the undersigned agree that no such dwelling thereon shall be constructed

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EXHIBIT B

Inst # 2000-07407

- until such time as the Triangle has been divided into three individual fee interests of the undersigned, at which time, each such portion of the Triangle may have one single family dwelling thereon, but no more.
3. Notwithstanding the imposition of the aforesaid restrictions in paragraph 2, the Triangle shall be burdened with a forty (40) feet undisturbed buffer along its southern border as set forth in Exhibit B.
 4. The portions of the Property shown on the attached Exhibits C-1, C-2 and C-3 are presently owned by Marion and the Marion Trust are hereby burdened by a restrictive covenant that such lands therein shall forever remain undisturbed and in their present undeveloped and natural state. However, the Marion Trust, its successors and assigns to ownership of that portion of the Property on which the lands shown in Exhibit C-1, C-2 and C-3 are located may, by a duly authorized and executed easement instrument filed of record in the Office of the Judge of Probate of Shelby County, Alabama, declare void, and unenforceable this covenant as to two of the three lands (i.e. the owner may issue a written revocation that this covenant no longer encumbers the land shown on Exhibit C-1 and C-2). However, should the Marion Trust, its successors and assigns to ownership of such properties issue such a revocation, this covenant shall continue to encumber fully the land on which this covenant was not revoked. Therefore, regardless of any overlap in the boundaries of the properties shown in Exhibit C-1, C-2 and C-3, the issuance of any revocation as set forth hereinabove, this covenant shall continue to encumber the entire land depicted in the remaining exhibit.
 5. Exclusive of that portion of the Property shown on Exhibits C-1, C-2 and C-3, there shall be a forty (40) feet wide undisturbed buffer along the entire length of the southern border of the Property, and an additional ten (10) feet wide planted buffer shall adjoin such forty (40) feet wide undeveloped buffer. Provided, however, that for that portion of the Property shown in Exhibit B that adjoins the BP Station, there shall be, in addition to and overlapping with the aforesaid, forty (40) feet wide undisturbed buffer, a one hundred (100) feet wide planted buffer on the westernmost portion of the Marion Trust parcel *not* on the property on which the BP station is located.
 6. All buffers and undisturbed areas described herein are deemed to subsume and overlap with any required buffer areas by any municipal, county, state or federal government or agency.
 7. Any clearing, grading or other form of development work on the Property shall be done in conformity with the "Erosion Control and Stormwater Plan" requirements of the Birmingham Watershed Protection Ordinance.

8. The Property shall be developed in compliance with the site development plan approved by the City of Hoover which is attached hereto as Exhibit D.
9. The recommendations of the Traffic Study submitted with the zoning application shall be implemented, along with the City of Hoover Engineer's recommendations concerning traffic which are contained in his Memorandum dated November 20, 1996 attached hereto as Exhibit E.
10. The Birmingham Water Works Board established guidelines for the control and management of storm water near Lake Purdy. Development of the Property shall comply with those guidelines.
11. Free standing signs shall not exceed sixteen (16) feet in height.
12. All lots shall front a public street.
13. Either cul-de-sac the proposed service road on the east end or install a traffic signal at the intersection with Valleydale Road.
14. Implement a contingency plan for slope failure prior to issue of a land disturbance permit for any parcel zoned "CP".
15. All buildings located on lots which front Valleydale Road shall face Valleydale Road.
16. The following uses (as defined by the City of Hoover Zoning Code and/or as contemplated by the City of Hoover when approving the rezoning of the Property with the Stipulation that the following uses shall be prohibited thereon) shall not be permitted on the Property:
 - a. automobile dealership;
 - b. building material sales;
 - c. veterinary clinic;
 - d. domestic equipment rental with outside storage or parking of equipment;
 - e. commercial recreation and amusement facilities with outdoor activity;
 - f. shopping center;
 - g. hospital;
 - h. mini-warehouses;
 - i. live entertainment;
 - j. gasoline service station;
 - k. oil change facility; and
 - l. establishments where the on-premise sale of alcoholic beverages is the primary use or business activity.

17. All of the restrictive covenants created herein are ones that run with the land and burden the Property as set forth herein and therefore shall be binding on the undersigned's successors and assigns to their respective interests in the Property.
18. This instrument is to be interpreted under the laws of the State of Alabama. These covenants are enforceable by (i) the owners of all adjoining property (including their heirs, successors and assigns to their respective interests in the Property); (ii) the owners of the Property (including their heirs, successors and assigns), (iii) anyone owning property within 500 feet of the Property (including their heirs, successors and assigns), and (iv) the City of Hoover. The prevailing party bringing in any judicial action to enforce these covenants shall be entitled to a judgment awarding them their attorney fees and costs associated with such actions from all non-prevailing parties.



20101209000412790 20/37 \$129.00
Shelby Cnty Judge of Probate, AL
12/09/2010 01:38:12 PM FILED/CERT

Done this 13th day of December, 1999

THE MARION RUTHERFORD
IRREVOCABLE TRUST
DATED November 1, 1999

BY: Marion Rutherford
Marion Rutherford
Its: Trustee

STATE OF ALABAMA)
:
SHELBY COUNTY)

I, the undersigned, a Notary Public in and for said County, in said State, hereby certify that Marion Rutherford, whose name as Trustee of the Marion Rutherford Irrevocable Trust dated November 1, 1999 is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day, that being informed of the content of said instrument, he, with full authority as such Trustee, executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this 13th day of December,
1999.

Frank C. Halloway
Notary Public
My commission expires: 11-15-01

20101209000412790 21/37 \$129.00
Shelby Cnty Judge of Probate, AL
12/09/2010 01:38:12 PM FILED/CERT

Done this 4th day of February, 2000.

THE RITA KATHRYN RUTHERFORD
IRREVOCABLE TRUST
DATED OCTOBER 6, 1999

BY: Rita Kathryn Rutherford
Rita Kathryn Rutherford
Its: Trustee

STATE OF Virginia)
Powhatan COUNTY)

I, the undersigned, a Notary Public in and for said County, in said State, hereby certify that Rita Kathryn Rutherford, whose name as Trustee of the Rita Kathryn Rutherford Irrevocable Trust dated October 6, 1999 is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day, that being informed of the content of said instrument, she, with full authority as such Trustee, executed the same voluntarily on the day the same bears date.

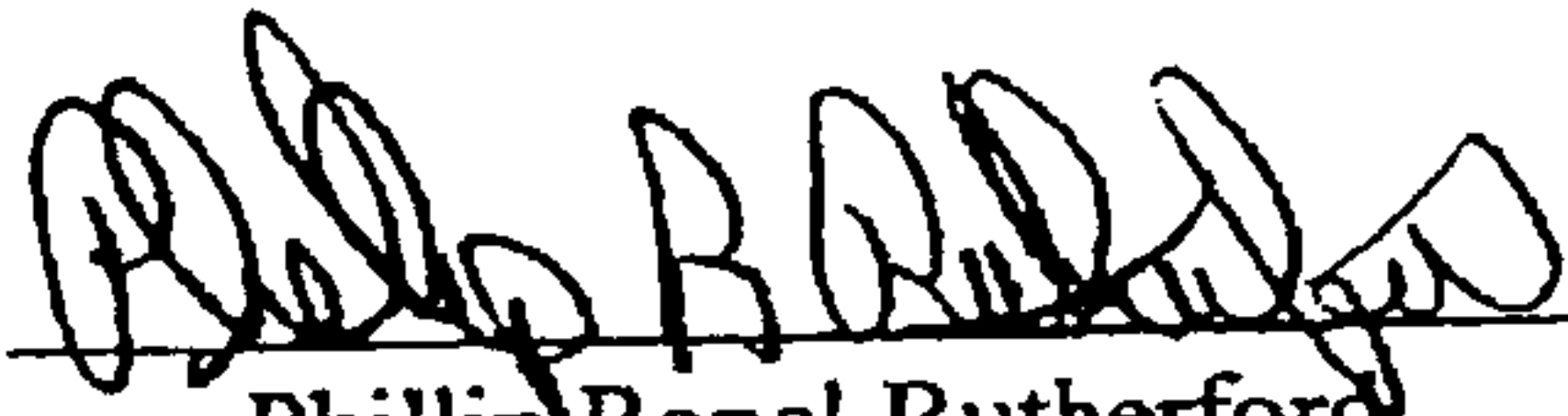
Given under my hand and official seal this 4th day of February, 2000.

David C. Otten
Notary Public
My commission expires: My Commission Expires April 30, 2003

20101209000412790 22/37 \$129.00
Shelby Cnty Judge of Probate, AL
12/09/2010 01:38:12 PM FILED/CERT

Done this 13th day of December, 1999

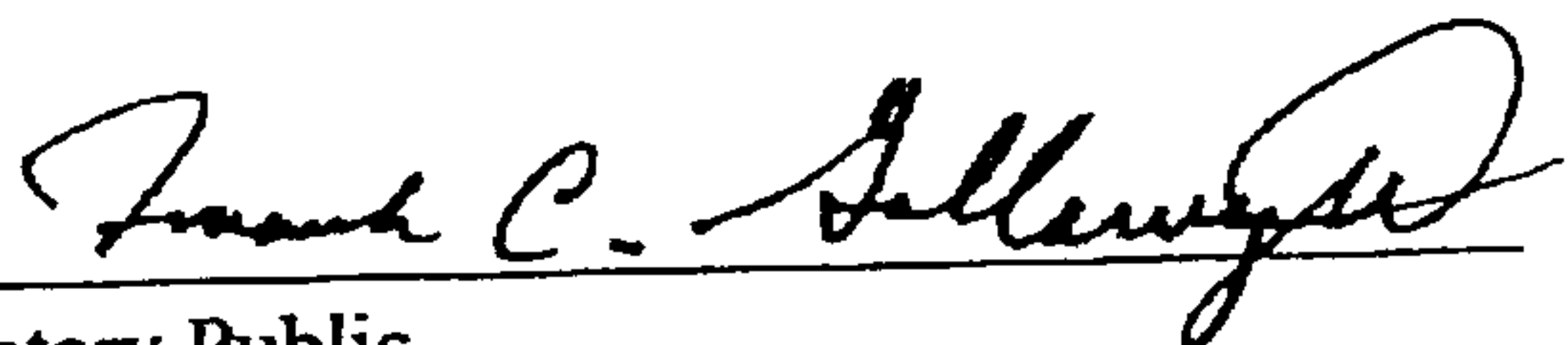
THE PHILLIP RONEL RUTHERFORD
IRREVOCABLE TRUST
DATED November 1, 1999

BY: 
Phillip Ronel Rutherford
Its: Trustee

STATE OF ALABAMA)
SHELBY)
SHELBY COUNTY)

I, the undersigned, a Notary Public in and for said County, in said State, hereby certify that Phillip Ronel Rutherford, whose name as Trustee of the Phillip Ronel Rutherford Irrevocable Trust dated November 1, 1999 is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day, that being informed of the content of said instrument, he, with full authority as such Trustee, executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this 13th day of December,
1999


Notary Public
My commission expires: 11-15-01



20101209000412790 23/37 \$129.00
Shelby Cnty Judge of Probate, AL
12/09/2010 01:38:12 PM FILED/CERT

Phillip Ronel Matherford

A parcel of land situated in the SW 1/4 of the SE 1/4 of the SE 1/4 and the NW 1/4 of the SE 1/4 of Section 20, Township 19 South, Range 2 West, Shelby County, Alabama, more particularly described as follows: Begin at the SE corner of the SW 1/4 of the SE 1/4 of said section; thence in a westerly direction along the south line of said 1/4-1/4 section, a distance of 102.00 feet; thence 70 degrees, 23 minutes right, in a northwesterly direction a distance of 1177.02 feet to the southeasterly Right of Way line of Valleydale Road; thence 68 degrees, 00 minutes, 33 seconds right, in a northeasterly direction along said Right of Way line a distance of 232.06 feet to a point of curve to the left, having a radius of 5769.65 feet; thence continue in a northeasterly direction along said Right of Way and said curve to the left a distance of 390.92 feet to the east line of the NW 1/4 of the SE 1/4 of said section; thence 132 degrees, 07 minutes, 13 seconds right from chord of said curve, in a southerly direction along the east line of said 1/4-1/4 sections, a distance of 1533.11 feet to the Point of Beginning, containing 9.5 acres more or less.



20101209000412790 24/37 \$129.00
Shelby Cnty Judge of Probate, AL
12/09/2010 01:38:12 PM FILED/CERT

Marion Rutherford

A parcel of land situated in the SW 1/4 of the SE-1/4 and the SE 1/4 of the SW 1/4, of Section 20, Township 19 South, Range 2 West, Shelby County, Alabama, more particularly described as follows: Commence at the SE corner of the SW 1/4 of the SE 1/4 of said section, thence in a westerly direction along the south line of said 1/4-1/4 section a distance of 312.00 feet to the Point of Beginning; thence continue westerly along the south line of said 1/4-1/4 section, a distance of 995.84 feet; thence 71 degrees, 34 minutes, 22 seconds right, in a northwesterly direction, a distance of 243.22 feet to the southeasterly Right of Way line of Valleydale Road, said point being on a curve having a radius of 6287.09 feet; thence 68 degrees, 56 minutes, 46 seconds right to chord of said curve, in a northeasterly direction along said southeasterly Right of Way, and curve to the left, a distance of 197.00 feet to the end of said curve; thence 24 degrees, 01 minutes 45 second left from chord of said curve along said Right of Way in a northeasterly direction, a distance of 199.45 feet; thence 21 degrees, 54 minutes, 10 seconds right, in a northeasterly direction along the southeasterly Right of Way line of said road, a distance of 241.75 feet; thence 88 degrees, 29 minutes right, in a southeasterly direction, a distance of 952.27 feet to the south line of the SW 1/4 of the SE 1/4 of said section and being the Point of Beginning, containing 9.5 acres more or less.

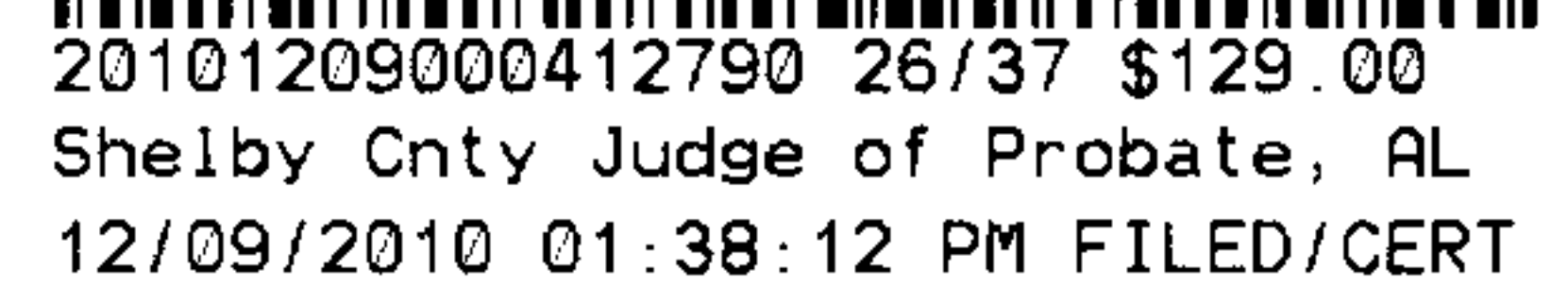
EXHIBIT A (PAGE 2)



20101209000412790 25/37 \$129.00
Shelby Cnty Judge of Probate, AL
12/09/2010 01:38:12 PM FILED/CERT

Rita Rutherford

A parcel of land situated in the SW 1/4 of the SW 1/4 of Section 20, Township 19 South, Range 2 West, Shelby County, Alabama, more particularly described as follows: Commence at the SE corner of said 1/4-1/4 section; thence in a westerly direction, along the south line of said 1/4-1/4 section, a distance of 102.00 feet to the Point of Beginning; thence continue westerly along the south line of said 1/4-1/4 section, a distance of 210.00 feet; thence 45 degrees, 52 minutes, 33 seconds right in a northwesterly direction a distance of 952.27 feet to the southeasterly Right of Way line of Valleydale Road; thence 91 degrees, 31 minutes right in a northeasterly direction along said Right of Way, a distance of 622.97 feet; thence 111 degrees, 59 minutes, 27 seconds right, in a southeasterly direction, a distance of 1177.02 feet to the south line of said 1/4-1/4 section and being the Point of Beginning, containing 8.5 acres more or less.

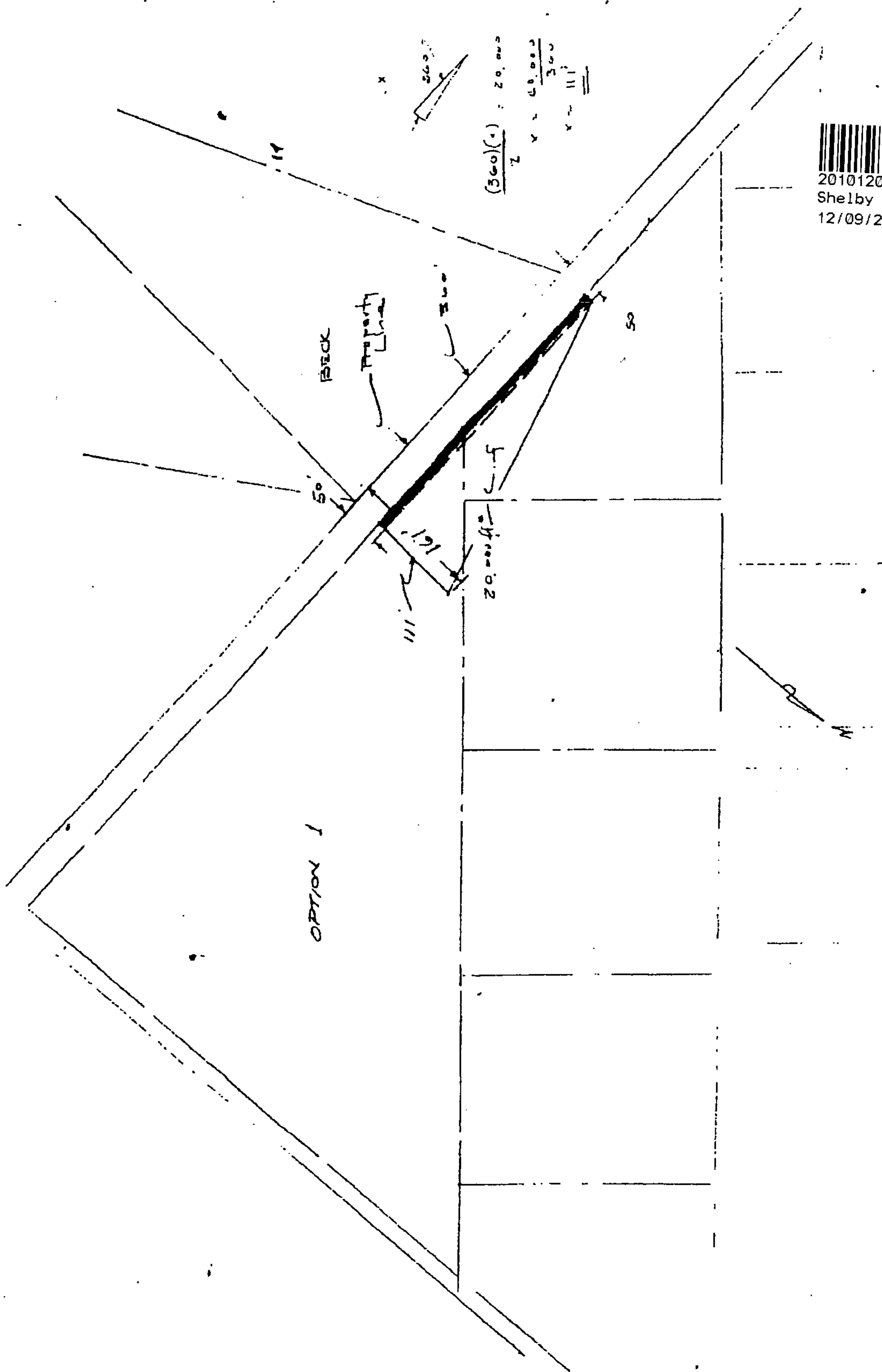
[illegible]

* DRINKING WATER ON TO PLANT
ARE NOT TO SCALE *

EXHIBIT B



20101209000412790 27/37 \$129.00
Shelby Cnty Judge of Probate, AL
12/09/2010 01:38:12 PM FILED/CERT



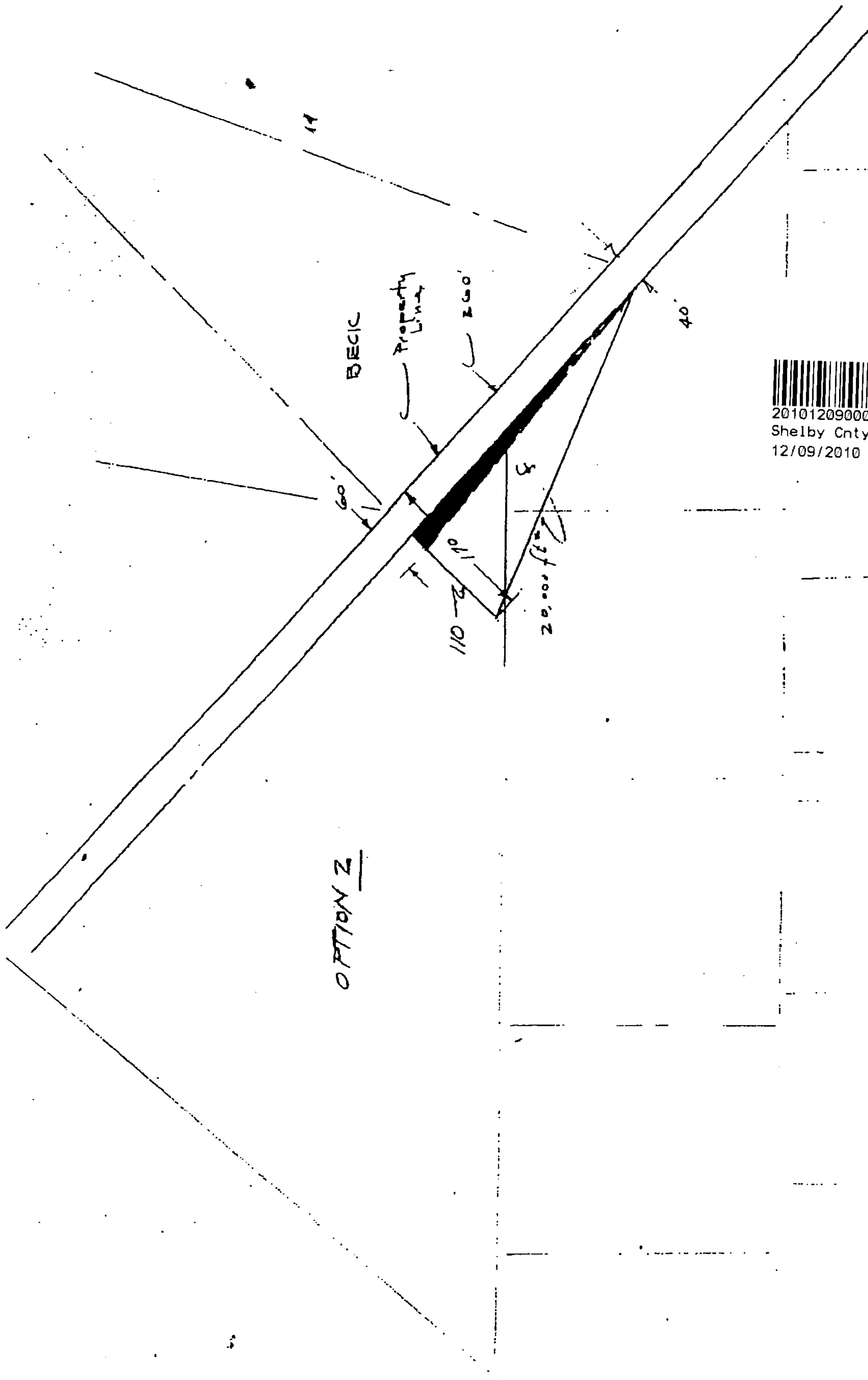
$$\frac{(360)(1)}{2} = 180$$

$$\frac{180}{111} = 1.62$$

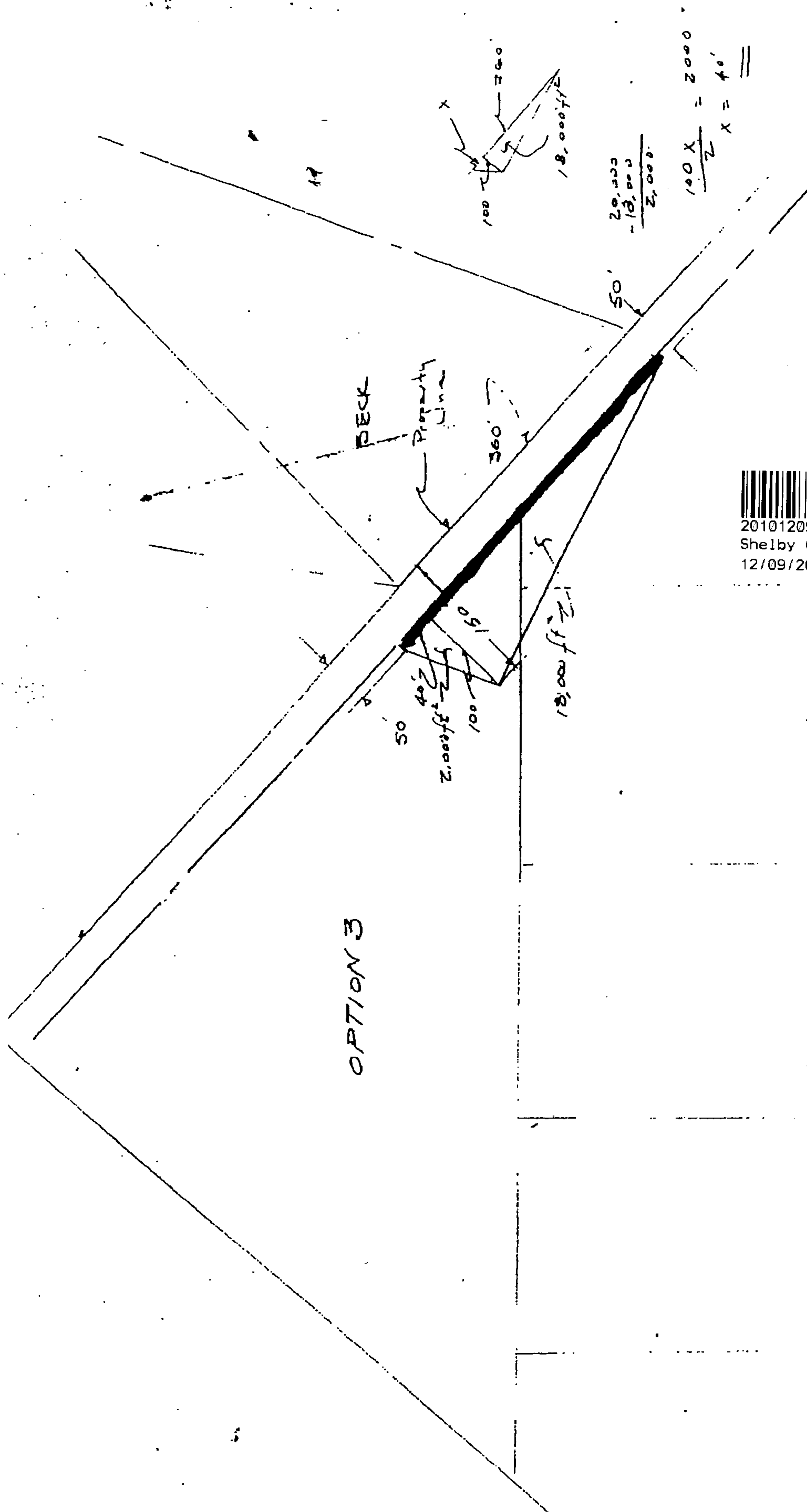
$$\frac{1.62}{2} = 0.81$$

$$\frac{0.81}{111} = 0.0073$$

EXHIBIT C-1



20101209000412790 28/37 \$129.00
Shelby Cnty Judge of Probate, AL
12/09/2010 01:38:12 PM FILED/CERT



20101209000412790 29/37 \$129.00
 Shelby Cnty Judge of Probate, AL
 12/09/2010 01:38:12 PM FILED/CERT

C:\960405\9644E01\9644E01A Tue Dec 03 05:11:05 1996



20101209000412790 30/37 \$129.00
Shelby Cnty Judge of Probate, AL
12/09/2010 01:38:12 PM FILED/CERT

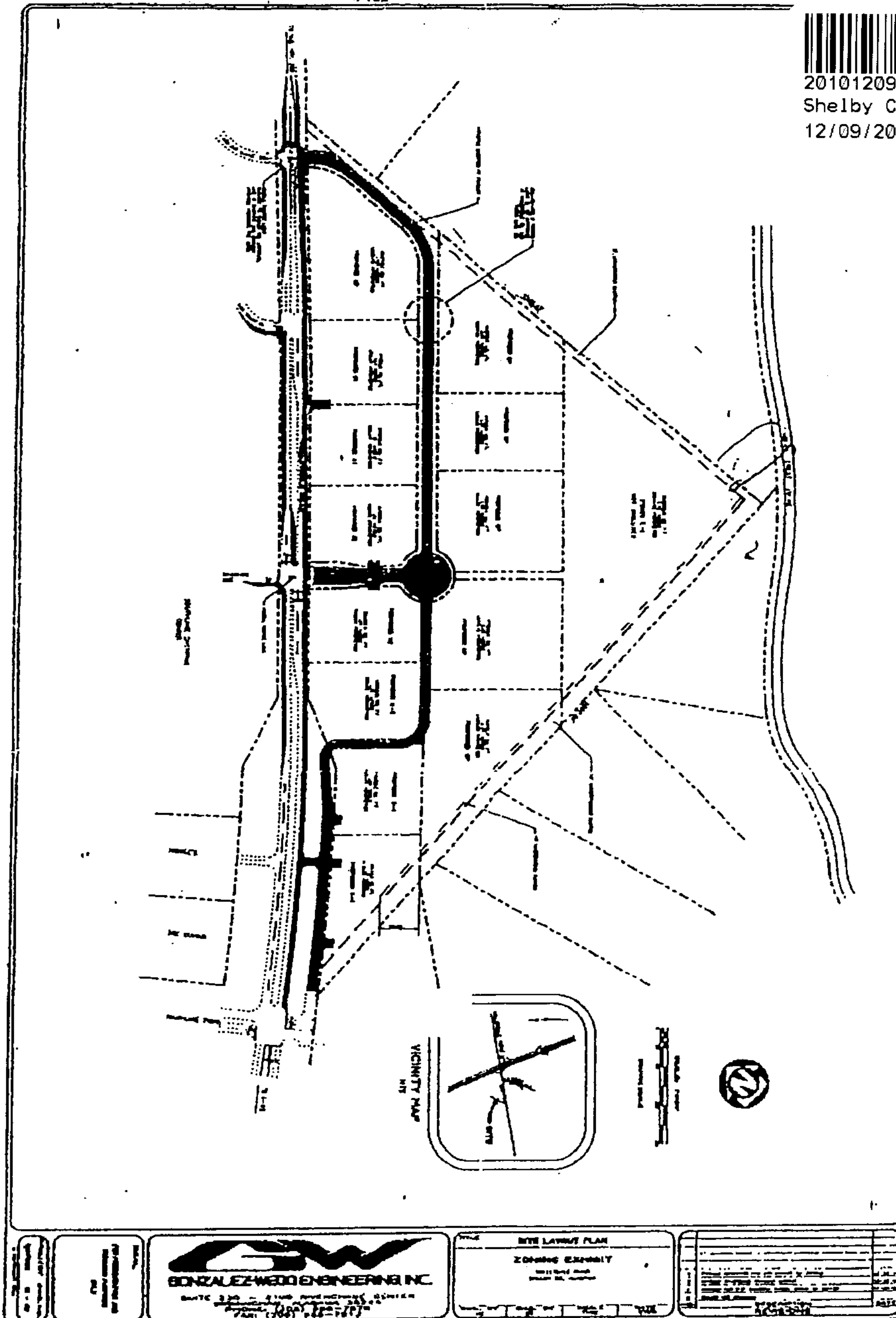
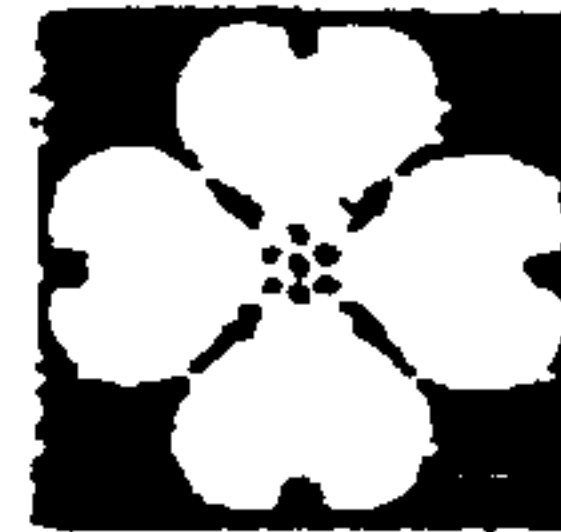


EXHIBIT D

**Engineering Department
City of Hoover**

100 MUNICIPAL DRIVE
POST OFFICE BOX 380228
HOOVER, AL 36238-0228
TEL: (205) 968-4444 FAX: (205) 968-7745

Timothy J. Westhoven, P.E.
City Engineer



HOOVER

Memorandum



20101209000412790 31/37 \$129.00
Shelby Cnty Judge of Probate, AL
12/09/2010 01:38:12 PM FILED/CERT

To: Bob House

From: Tim Westhoven

Date: November 20, 1996

Re: Review of Traffic Impact Study Titled
"Valleydale Road Mixed-Use Development"

CC: Allen Pace

I have completed the review of the referenced traffic study. I found the study to be complete and thorough study done in accordance with nationally accepted methods and practices. I am in concurrence with the distribution and growth assumptions outlined in the report. I am also in concurrence with the recommendation outlined in the "Conclusions" section of the report. These indicate the following:

1. A traffic signal will be required at the intersection of Valleydale Road at Southlake Lane.
2. Construction of an additional eastbound lane on Valleydale Road across the frontage of the proposed development.
3. Developer provide the necessary matching funds for an additional westbound lane to be added to the existing Shelby County TOPICS project.
4. All intersections with Valleydale Road shall have left turn lanes on Valleydale Road.
5. All new accesses shall provide two exit lanes and one entrance lane.
6. An additional lane will be added to the southbound approach on Southlake Lane.

EXHIBIT E (PAGE 1)

November 20, 1996

Page 2 of 2
Review of Traffic Impact Study Titled -
"Valleydale Road Mixed-Use Development"

20101209000412790 32/37 \$129.00
Shelby Cnty Judge of Probate, AL
12/09/2010 01:38:12 PM FILED/CERT

In addition to these requirements, I would recommend the following be added:

1. When traveling eastbound from I-65 toward Southlake on Valleydale Road, Valleydale goes from two through lanes to one through and one left turn lane. I recommend the proposed additional eastbound land be additionally extended approximately 300-500 feet to provide two through lanes in the eastbound direction. The current proposal starts at the entrance to BP Station. My recommendation would start at the existing right turn lane for the residence adjacent to the BP Station to the west.
2. No building permits be issued for this development without the additional westbound lane being under contract for construction. The developer should have the option of also providing this lane at their expense.
3. A short left turn lane should be required for the southbound approach on Indian Lake Drive. It should be capable of storing two vehicles.

The interstate ramps are shown to be currently operating at unacceptable levels of service. This will continue under the current proposal. There are two projects currently planned to address some of this congestion. One project addresses the southbound ramp and is awaiting ALDOT permit approval. The other project addresses the northbound ramp and is scheduled to be designed this year.

Storm water detention will be required for this site. The developer's engineer has indicated he would propose detention on each individual site. This is acceptable. However, for aesthetic purposes, I would recommend that if individual detention is chosen that it be required to be underground detention.

I believe this covers all of the concerns for this project. I'm sorry I won't be at the meetings to address any other concerns. Let me know if I can help further.

Inst # 2000-07407

03/08/2000-07407
02:05 PM CERTIFIED
SHELBY COUNTY JUDGE OF PROBATE
017 HNS 48.50

2

EXHIBIT E (PAGE 2)

STATE OF ALABAMA)
SHELBY COUNTY)

20101209000412790 33/37 \$129.00
Shelby Cnty Judge of Probate, AL
12/09/2010 01:38:12 PM FILED/CERT

This instrument prepared by:
Frank C. Galloway III
Galloway & Somerville, LLC
11 Oak Street
Birmingham, AL 35213

**AMENDMENT TO
DECLARATION OF RESTRICTIVE COVENANTS**

COME NOW, the undersigned Joseph B. Nadler, Jr. and his wife, Linda K. Nadler (collectively, the "Nadlers") and William E. Allen and his wife, Malorie P. Allen (collectively, the "Allens"), the owners of real properties that are the intended beneficiaries of the hereinafter referenced provisions of certain of the Restrictive Covenants created by the instrument recorded in the Office of the Judge of Probate of Shelby County, Alabama on March 8, 2000 as Instrument # 2000-07407 (the "Covenants"), and Ira Levine in his representative capacity for the owner of the parcel of land to be burdened by the Covenants (said owner being L & W Valleydale, LLC), which parcel is next to the BP Station, and which land is acknowledged to be presently burdened by the Covenants, and agree as follows:

In consideration of payment of Twenty Thousand and 00/100 Dollars (\$20,000.00) and other good and valuable consideration, the sufficiency of which is hereby acknowledged¹ by L & W Valleydale, LLC, the owner of the aforesaid parcel (which is more particularly identified in the attached Exhibit 2010B – the "Levine/Weems Parcel") to the Nadlers and the Allens, jointly, and the payment of attorney fees due to Frank C. Galloway III in regards to this matter, the undersigned agree to amend the Covenants so that section 5 on the second page thereof is replaced in its entirety to state as follows:

¹ The terms of the payment of such monies are set forth in a separate instrument. However, the obligation to pay such monies is hereby acknowledged to be a lien on the Levine/Weems Parcel until paid in full. If such lien is not paid upon an event of transfer of title of the Levine/Weems Parcel from its current owner, the Nadlers and the Allens may then execute on the balance owing of such lien.



20101209000412790 34/37 \$129.00
Shelby Cnty Judge of Probate, AL
12/09/2010 01:38:12 PM FILED/CERT



20100603000175360 2/5 \$26.00
Shelby Cnty Judge of Probate, AL
06/03/2010 12:35:59 PM FILED/CERT

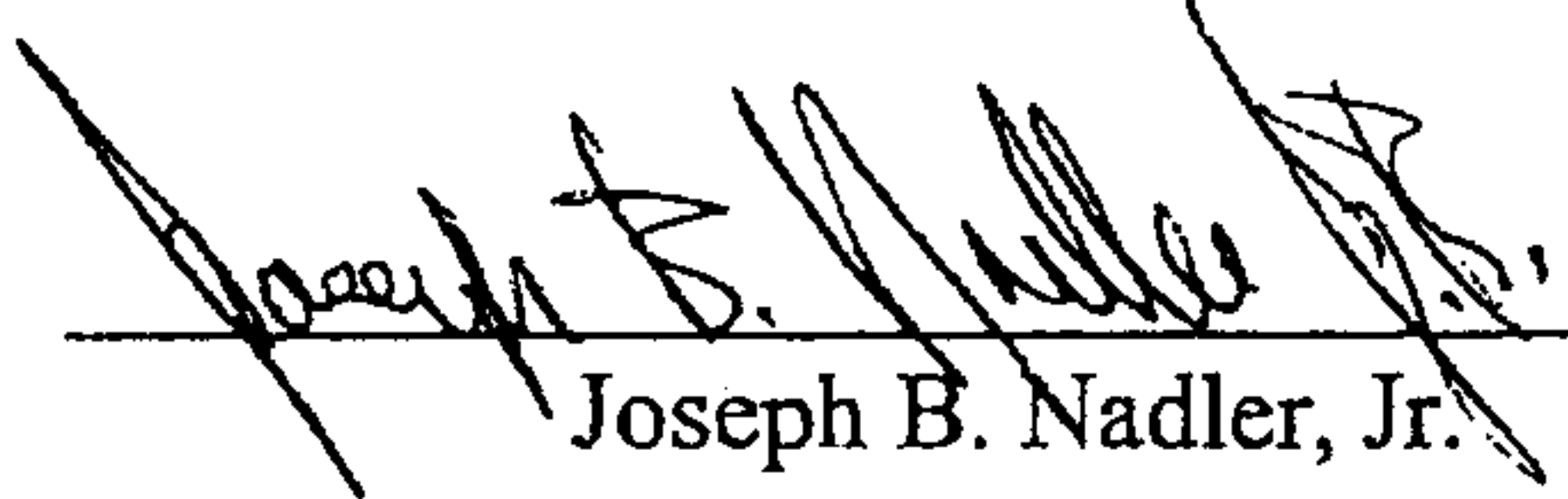
Exclusive of that portion of the Property shown on Exhibits C-1, C-2 and C-3, there shall be a forty (40) feet wide undisturbed buffer along the entire length of the southern border of the Property, and an additional ten (10) feet wide planted buffer shall adjoin such forty (40) feet wide undeveloped buffer. Provided, however, that for the portion of the Property shown in Exhibit 2010B - the "Levine/Weems Parcel" - the aforesaid forty (40) feet and ten (10) feet wide buffers and undisturbed /undeveloped areas are inapplicable to the Levine/Weems Parcel; instead, the Levine/Weems Parcel is burdened by the buffers and setbacks set forth in Exhibit 2010B which requirements shall burden the Levine/Weems Parcel in perpetuity, shall run with the land and shall inure to the benefit of the Nadlers and the Allens, their heirs and assigns as owners of the real properties shown on the attached Exhibit 2010B-1. The 100 feet wide buffer on the Levine/Weems Parcel shown on Exhibit B is no longer a valid encumbrance thereon, as it is replaced with the restrictions set forth hereinabove.

In addition to the foregoing, Ira Levine and Larry Weems agree that the Levine/Weems Parcel is hereby burdened with a covenant (in favor of the Nadlers and the Allens, their heirs and assigns - and which shall run with the land of the residences of the Nadlers and the Allens which have the addresses of 100 Highgate Hill Road, Indian Springs, AL 35124 and 114 Highgate Hill Road, Indian Springs, AL 35124, respectively and which are more particularly described on the attached Exhibit 2010B-1) that the Levine/Weems Parcel shall only be used for uses and purposes permitted under the City of Hoover's C-P zoning. The Nadlers and/or their counsel hereby agree to write a letter to the Hoover Board of Zoning Adjustment in support of the proposed variance and proposed medical building development and, if necessary, to attend any Hoover City meeting to speak in support of the development, subject to the terms of the amended covenants.

By signing this instrument, the undersigned make no alterations to the Covenants other than those set forth herein. The ongoing efficacy of the Covenants is affirmed by all of the undersigned. The undersigned agree that this fully executed document shall be recorded in the

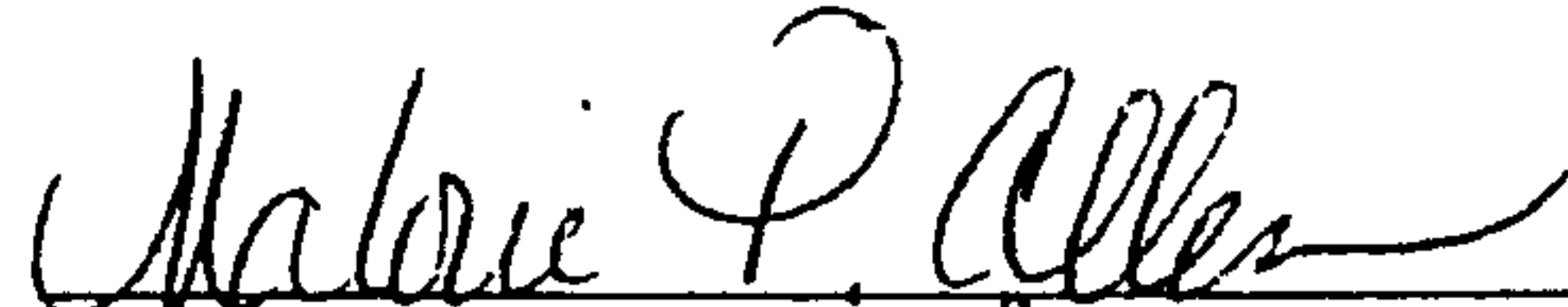
Office of the Judge of Probate of Shelby County, Alabama. This document is deemed to be drafted
equally by both parties with no bias (as per construction) against any party signing this instrument.

Done this 2 day of June, 2010.


Joseph B. Nadler, Jr.


Linda K. Nadler


William E. Allen
WEA


Malorie P. Allen
MPA

L&W VALLEYDALE, LLC
BY: LEVINE LIVING TRUST
Dated December 7, 2000
Its: Managing Member

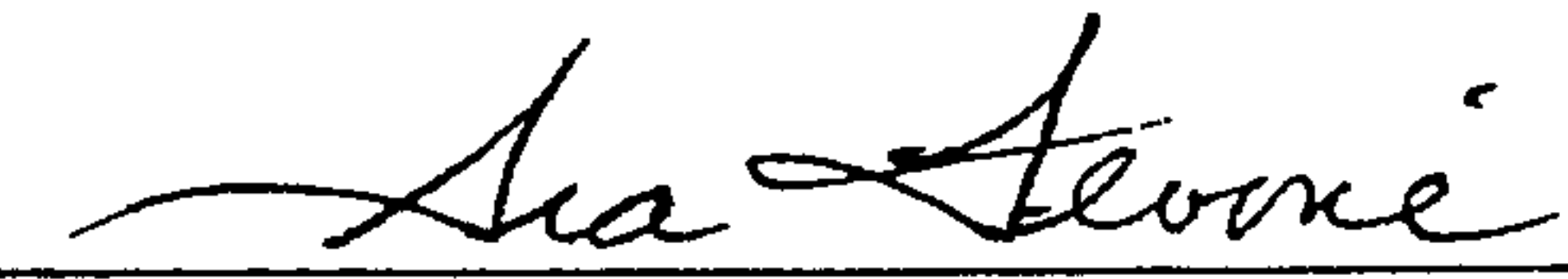
BY: 
Ira D. Levine
ITS: Trustee

EXHIBIT 2010B-1

Nadler Property located at 100 Highgate Hill Road, Indian Springs, AL 35124

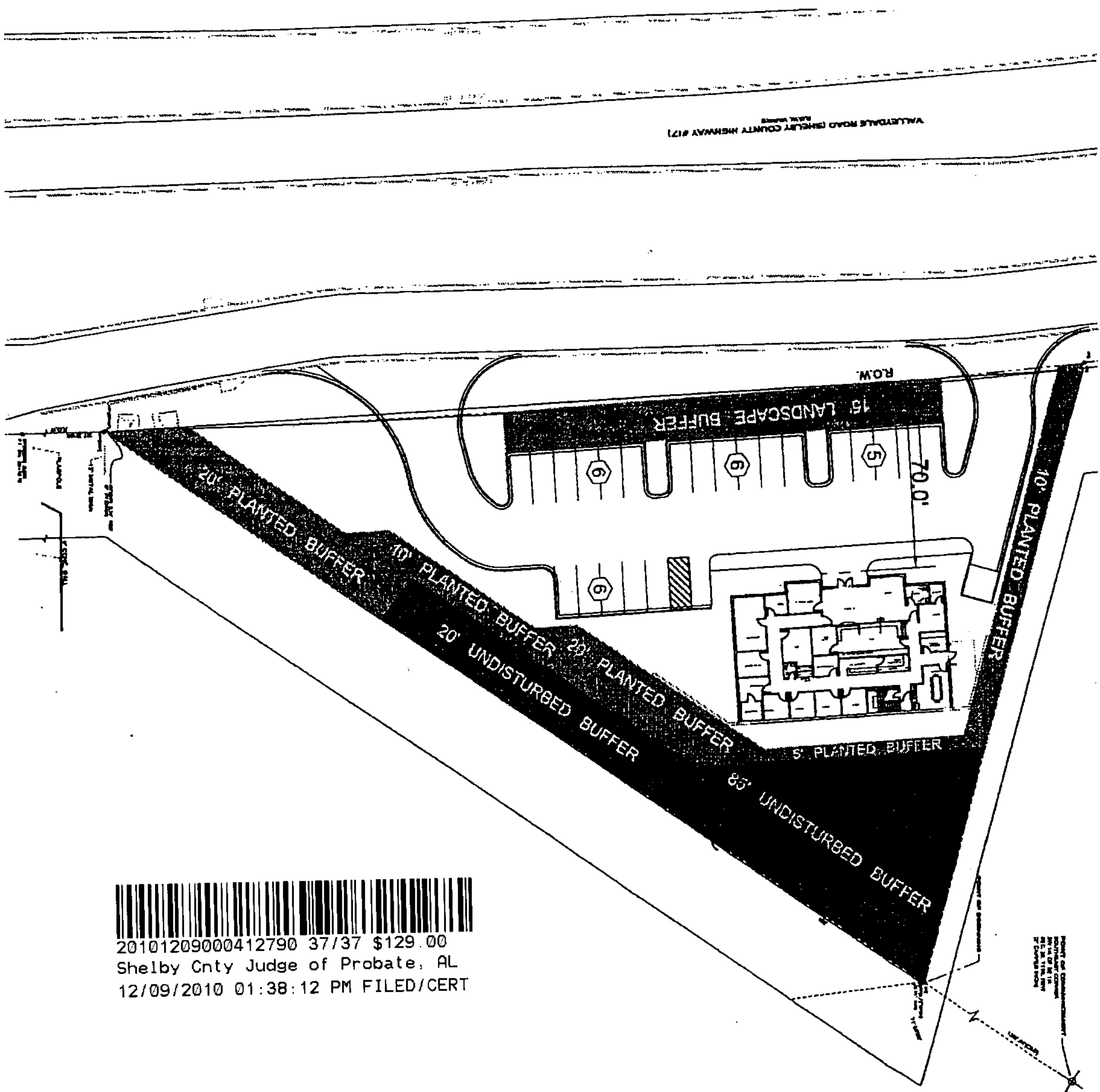
Lot 1, according to the Survey of Narz Estate, as recorded in Map
Book 8, page 155 in the Probate Office of Shelby County, Alabama.

Allen Property located at 114 Highgate Hill Road, Indian Springs, AL 35124

Lot 2, according to the Survey of Narz Estate, as recorded in Map
Book 8, page 155 in the Probate Office of Shelby County, Alabama.

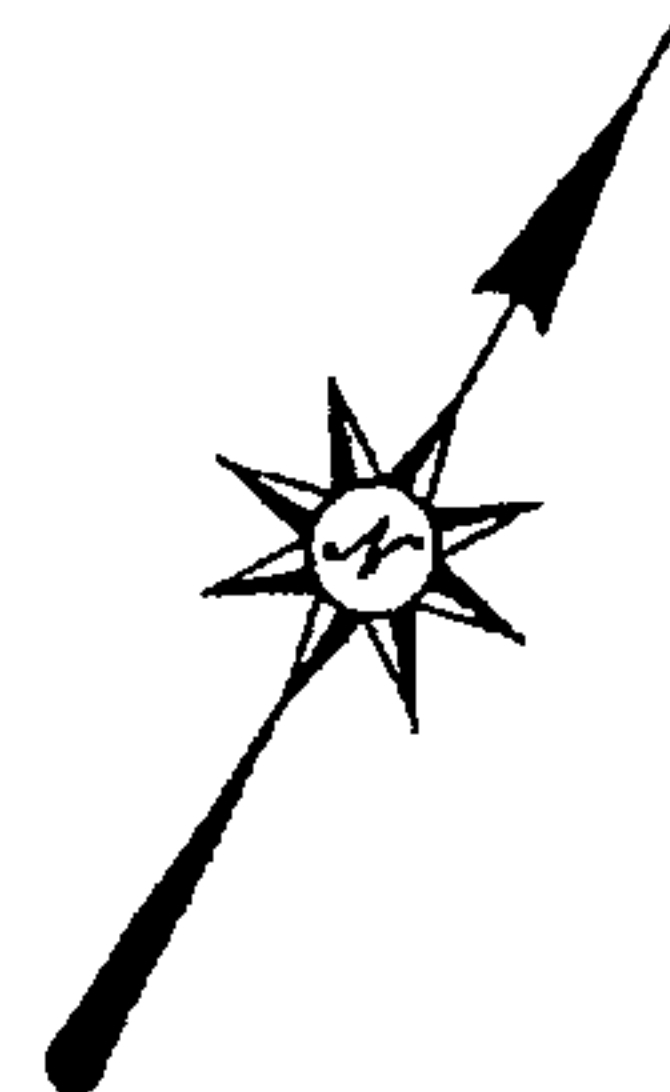


20100603000175360 5/5 \$26.00
Shelby Cnty Judge of Probate, AL
06/03/2010 12:35:59 PM FILED/CERT



20101209000412790 37/37 \$129.00
Shelby Cnty Judge of Probate, AL
12/09/2010 01:38:12 PM FILED/CERT

EXHIBIT 2010B



DATE
BY



GONZALEZ - STRENGTH & ASSOCIATES, INC.
CIVIL ENGINEERING, LAND SURVEYING, PLANNING, TRAFFIC & TRANSPORTATION
3176 PARKWAY LAKE DRIVE
HOOVER, ALABAMA 36044
PHONE: (205) 943-3486
FAX: (205) 943-3488
www.Gonzalez-Strength.com

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FILE

BZA EXHIBIT

MEDICAL OFFICE BUILDING

VALLEYDALE ROAD
HOOVER, ALABAMA
LDA

HOVENOMAH, ALABAMA

DATE BY
T.L.

DATE BY
M.A.S.

SCALE
NONE

DATE

REVISIONS

DESCRIPTION

DATE