

**IN THE COURT OF SPECIAL APPEALS OF MARYLAND**

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**September Term, 2006**

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No. 916

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**JOHN M. ZUPANCIC, III, ET AL.**

**APPELLANTS,**

**v.**

**PAUL ABBOTT, ET AL.**

**APPELLEES.**

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**Appeal from the Circuit Court for St. Mary's County  
(Karen H. Abrams, Judge)**

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**REPLY BRIEF OF APPELLANTS**

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**I. The trial court prejudicially erred in ruling, as a matter of law, that there was no material breach of contract by the proposed buyer of a parcel of real property when the buyer insisted that a deed be prepared, signed, delivered and *actually successfully recorded* before the seller was paid despite the complete lack of any recordation contingency in the contract.**

The contract in this case did not contain a contingency for: 1) execution and delivery of the deed prior to payment; 2) an investigation regarding any *lis pendens* on the property; and 3) recordation of the deed. *See* E. 0093; 0095. Nevertheless, Abbott and Barker refused to settle without imposing these preconditions. As such, Abbott and Barker breached the contract, thus releasing Mrs. Bartos from performance thereunder.

In response to the foregoing, Abbott and Barker claim that the contract did in fact require the seller to record the deed. *See* Appellees' Brief at 25. This argument misses the point entirely. The question is not whether the contract requires recordation, but whether recordation is *a precondition to payment*. In other words, even if the contract required that the deed be recorded, it does not require that the deed be recorded *before Mrs. Bartos was paid*.

Moreover, the same could be said regarding the execution of the deed and the investigation in connection with the *lis pendens* - neither were preconditions to payment listed in the contract. Interestingly, the Appellees fail to address either of these two issues. The Appellees make no contention, for instance, that the contract permitted time for an investigation into the *lis pendens* issue prior to payment to Mrs. Bartos. Thus, even if recording the deed were required by the contract and even if this was required to be done before payment, the Appellees still clearly insisted on additional conditions not found in the contract.

Next, the Appellees argue that even if recordation prior to payment “was not contractually required,” it did not “impose any additional or extra-contractual obligations.” *See* Appellees’ Brief at 27. This argument is facially absurd. Either the contract required recordation prior to payment or it did not - if it did not, this requirement was, by definition, both “additional” and extra-contractual.”

Finally, the Appellees aver that their breach of the contract in insisting on terms not found in the contract was not sufficient to relieve Mrs. Bartos of her obligation to perform. *See* Appellees’ Brief at 28. The cases the Appellees cite on this point demonstrate the weakness in the Appellees’ argument. For instance, the Appellees cite *Maslow v. Vanguri*, 168 Md. App. 298, 323-324 (2006) for the proposition that, contract *rescission* is permitted when the “act failed to be performed [goes] to the root of the contract or ... render[s] the performance of the rest of the contract a thing different in substance from that which was contracted for.” Requiring execution and delivery of the deed, an investigation regarding the filing of a *lis pendens* suit and recordation of the deed prior to payment quite literally “render[s] the performance of the rest of the contract a thing different in substance from that which was contracted for.” This was contrary to the plain language of the contract in that: 1) the contract had no recording contingency; and 2) the contract did not require Mrs. Bartos to bear the risk of signing and tendering a deed and waiting for days thereafter to *potentially* be paid.

Moreover, the standard the Appellees apply from *Maslow* is the wrong standard. *Maslow* discuss contract rescission. This case is not one involving contract rescission.

Instead, the plaintiff in this case prevailed only on a count for specific performance. As the Court of Appeals has held:

**The general rule is well established in this State that in order to be entitled to specific performance of a contract for the sale of real estate, the purchaser must be ‘ready, desirous, prompt and eager’ to consummate the contract, whether or not time is of the essence thereunder.** See *Doering v. Fields*, 187 Md. 484, at 488-489, 50 A.2d 553, at 554-555; *Garbis v. Weistock*, 187 Md. 549, 51 A.2d 154; *Vincenti v. Kammer*, 189 Md. 523, 530, 56 A.2d 688; *Triton Realty Co. v. Frieman*, 210 Md. 252, 256, 123 A.2d 290; *Chapman v. Thomas*, 211 Md. 102, at 108, 126 A.2d 579, at 582 (rule recognized, not found applicable); and Miller, Equity Procedure, § 661.

*Silver Holding Corp. v. Sheeler*, 231 Md. 35, 37, 188 A.2d 562, 563 (1963). Likewise:

**There can be little doubt that one seeking the execution of a contract must, as a general rule, be able to show that he has fully, not partially, performed everything required to be done on his part, or, under some circumstances, that he is ready and desirous to comply with the contract on his part, and has the ability to perform it.** *O'Brien v. Pentz*, 48 Md. 562; *Raith v. Cohen*, 142 Md. 38, 50, 119 A. 700; *DeCrette v. Bonaparte*, 139 Md. 252, 262, 114 A. 880; *Suburban Garden Farm Homes Corp. v. Adams*, 171 Md. 212, 218, 188 A. 808; Miller, Equity Procedure, § 659.

*Clayten v. Proutt*, 227 Md. 198, 203, 175 A.2d 757, 760 (1961).

Thus, the question for the Court is *not* the *rescission* standard of whether an “act failed to be performed [goes] to the root of the contract or ... render[s] the performance of the rest of the contract a thing different in substance from that which was contracted for.”

*Maslow v. Vanguri*, 168 Md. App. 298, 323-324 (2006). Instead, the question for the

Court is whether the Appellees “**fully, not partially, performed everything required to be done on [their] part**” to entitle them to the specific performance they were granted by

the Circuit Court. *Clayten v. Proutt*, 227 Md. 198, 203, 175 A.2d 757, 760 (1961). As

demonstrated above, this standard clearly cannot be met here and the Appellees do not even bother to argue that it can.

Furthermore, the additional conditions which the Appellees sought to impose on the contract changed the contract materially and substantially. These changes would have shifted significant risk properly born under the contract by the Appellees to Mrs. Bartos. For instance, given that the contract does not permit an investigation after signing of the deed but before payment into whether a *lis pendens* had been filed, adding this provision shifts the risk that such an action was filed from the Appellees to Mrs. Bartos. Mrs. Bartos quite simply wished to be paid at the same time she tendered the executed deed - this is what the contract required and the contract was violated in that the Appellees never tendered payment under these conditions. This failure to tender payment as required is clearly a material breach of the contract.

**II. There Was Prejudicial Error in the Trial Court’s Ruling, as a Matter of Law, that the Property Should be Sold to the Proposed Buyer Instead of a Back-Up Buyer Despite the Fact that the Initial Buyer Never Tendered Performance as Required by the Terms of the Contract.**

The Appellees failed to tender performance<sup>1</sup> as required by the contract in the following ways: 1) the HUD-1 settlement sheet presented to Mrs. Bartos at settlement reflected a closing date of February 21, 2005 while the contract required settlement on or

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<sup>1</sup> The Court of Special Appeals has “recently defined ‘tender’ as ‘an offer to perform a condition or obligation, coupled with the present ability of immediate performance, so that if it were not for the refusal of cooperation by the party to whom tender is made, the condition or obligation would be immediately satisfied.’ ...To be valid and effective, *i.e.*, to relieve the debtor of the obligation to pay costs, interest and attorney's fees after the date of tender, a tender ‘must be either in the exact amount due, or a larger amount without requiring the making of change...and unconditional.’ *Platsis v.*

before January 24, 2005 *see* E. 0449-0450; 0648; 2) the payment called for under the contract was never paid into the settlement attorney's account - instead, the settlement attorney merely held uncashed personal checks and, therefore, the settlement attorney was not in a position to act as a trustee and guarantor of the funds; and 3) Abbott and Barker required the additional preconditions to payment discussed above.

In response, the Appellees suggest merely that the HUD-1 settlement sheet contained a typographical error. Even if true,<sup>2</sup> this allegation does not change the fact that the HUD-1 settlement sheet presented to Mrs. Bartos at settlement did not reflect the terms of the addendum to the Sales Agreement which she had previously executed on June 24, 2004. *See* E. 0648. The addendum required settlement on or before January 24, 2005, while the settlement sheet executed by the plaintiffs at settlement and proffered to Mrs. Bartos reflected a settlement on the subject property as of February 21, 2005. *See* E. 0648. This change is significant because a later date affects the taxes to be paid and the resulting disbursements to be made. If Mrs. Bartos were to settle under the new contract, she would have had to cover the taxes on the property for an additional month. This violated the contract terms and, specifically, Abbott and Barker's obligation to close by January 24, 2005 - whether or not this was an alleged typographical error.

Perhaps more importantly, the Appellees entirely fail to address the fact that the payment called for under the contract was never paid into the settlement attorney's

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*Diafokeris*, 68 Md.App. 257, 262, 511 A.2d 535, 537 - 538 (1986) (multiple citations omitted).

<sup>2</sup> the Appellants understand that the February date was one desired by Abbot and Barker because they wished to go to a February Board of Appeals meeting related to the building permit for the property before finally closing.

account. This meant that the settlement attorney was not in a position to act as a trustee and guarantor of the funds. Coupled with the fact that the Appellees were demanding that Mrs. Bartos wait until some uncertain date to be paid (after a *lis pendens* investigation and recordation), the failure to have verifiable funds on deposit with a settlement attorney is a material breach of the agreement. Mrs. Bartos literally had no assurances whatsoever that if she signed over her house and allowed the deed to be recorded, she would be paid. It is hard to imagine a more material violation of settlement procedures. As this issue was not address by the Appellees, there is little more to say on the topic except that this issue alone is sufficient to demonstrate a complete failure of tender on the part of the Appellees, thus relieving Mrs. Bartos from any obligation to perform.

Given the foregoing, it is clear that the Appellees did not meet the standard for the specific performance they were awarded. Specifically, the Appellees did not “**fully, not partially, perform[ ] everything required to be done on [their] part.**” *Clayten v.*

*Proutt*, 227 Md. 198, 203, 175 A.2d 757, 760 (1961).

### **III. The Contract the Trial Court Ordered the Parties to Follow Violates the Rule Against Perpetuities.**

In their initial Brief in this matter, Appellants Zupancic and Gordon noted that the contract at issue is unenforceable because it violates the Rule Against Perpetuities (RAP).

*See Cattail Associates, Inc. v. Sass*, WL 2639872, 5 -7 (2006) (*citing Dorado Ltd.*

*Partnership v. Broadneck Development Corp.*, 317 Md. 148, 562 A.2d 757 (1989)).

Specifically, the contract at issue here is contingent upon the issuance of a building permit.

In almost identical circumstances, the Court of Appeals has dealt with a contract which was contingent upon issuance of a sewer allocation. *See id.* Like the sewer allocation at

issue in *Dorado*, “[i]t is uncertain when, if ever [the Appellees] will obtain the [building permit],” and, therefore, “[i]t is *conceivable* that it could occur after a life in being plus 21 years.” *See id.* Therefore, here, as in *Dorado*, “the contract is invalid under the Rule Against Perpetuities.,” and, “the contract was unenforceable because it violated the rule.”<sup>3</sup>

In response to this important issue, the Appellees make a multi-pronged argument. First, the Appellees suggest that the contract can be construed to avoid application of the RAP. *See* Appellees’ Brief at 34. In making this agreement, the Appellees ask this court to entirely re-write the Contract.

Specifically, the Contract provides as follows:

**The settlement date will be 7 months from the date of this signed agreement or as soon as the Purchasers are able to obtain a building permit, which they shall diligently pursue.**

*See* 0629.

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<sup>3</sup> The Court of Special Appeals recently discussed the application of the RAP in the *Dorado* case:

In *Dorado*, Broadneck Development Corp. agreed to sell 112 lots to Dorado L.P. Settlement was contingent on Broadneck's obtaining “sewer allocations” from the county.... When, due to a government moratorium on sewer allocations, the sale had not been completed, Dorado brought a declaratory judgment action.... The Court of Appeals stated that it was “immaterial” that Dorado had obtained equitable title by execution of the contract.... “If legal title might not vest within a life in being and 21 years, then the contract is invalid under the Rule Against Perpetuities.” *Id.* The Court therefore concluded that the contract was unenforceable because it violated the rule:

**Settlement is contingent upon a county sewer allocation. It is uncertain when, if ever, Broadneck will obtain the sewer allocation. It is conceivable that it could occur after a life in being plus 21 years.**

*Cattail Associates, Inc. v. Sass*, WL 2639872, 5 -7 (2006) (citing *Dorado Ltd. Partnership v. Broadneck Development Corp.*, 317 Md. 148, 562 A.2d 757 (1989)).

The Appellees ask this Court to ignore all of the underlined language - simply reading it out of the contract. Instead of requiring settlement in 7 months or as soon as a building permit was obtained, the Appellees request that the Court read this language “as requiring the earlier settlement date.” *See* Appellees’ Brief at 34. In other words, the Appellees have suggested that settlement must be in 7 months without regard to the building permit. This is simply contrary to the plain language of the contract.

“Maryland follows the objective law of contract interpretation and construction.” *Owens-Illinois, Inc. v. Cook*, 386 Md. 468, 496, 872 A.2d 969, 985 (2005); *Taylor v. NationsBank, N.A.*, 365 Md. 166, 178-79, 776 A.2d 645, 653 (2001); *Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232, 251, 768 A.2d 620, 630 (2001). As the Court of Appeals has explained, “**when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed.**” *Garfink v. Cloisters at Charles, Inc.*, 392 Md. 374, 392-393, 897 A.2d 206,217 (2006). This is precisely such a case - the provisions which violate the RAP are plain and unambiguous and the Court should give effect to the plain meaning of these terms.

Moreover, the argument that the contract does not really say what it says is nothing more than an attempt by the Appellees to re-write history for their benefit. Lest there be any true question about the meaning of this portion of the contract, *the Appellees themselves* wrote a letter to Mrs. Bartos, the owner, telling Mrs. Bartos to, “**understand that...the contract allows for us to have as much time as is necessary to obtain a**

**building permit.”**<sup>4</sup> See E. 0672. The fact that the Appellees admitted having “as much time as is necessary to obtain a building permit” before they must close demonstrates that the Appellees themselves did not interpret the contract as only giving them 7 months as now suggested in the Appellees’ Brief.

Next, the Appellees suggest that *Brown v. Parran*, 120 Md.App. 653 (1998) establishes an exception to the RAP which is allegedly applicable here. The Court in *Brown* dealt with a contract conditioned upon issuance of a building permit, but held that in *Brown*, there was no reason to assume that a decision regarding the building permit might take as long as 21 years. See *id.* The *Brown* Court distinguished *Dorado Ltd. Partnership v. Broadneck Development Corp.*, 317 Md. 148, 562 A.2d 757 (1989) by noting that in *Dorado*, there was a moratorium on the issuance of sewer allocations, and, thus, the issuance of such allocations was well beyond the control of the parties.

This case is more similar to *Dorado* than to *Brown*. First, evidence and testimony below showed that the land at issue in this case has been illegally subdivided. Specifically, the office of the settlement attorney hired by Abbott and Barker for settlement, and also as counsel for plaintiffs in their original specific performance lawsuit against Bartos, wrote a letter dated January 24, 2005 to Catherine Bartos providing as follows:

I have inquired as to whether or not “one half of lot fourteen , section one,” Cornfield Harbor is a legally subdivided parcel of record. **I have been advised that that parcel, consisting of “one half of lot fourteen , section one,” Cornfield Harbor is an illegal subdivision of land. This fact, in**

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<sup>4</sup> The plaintiffs attempted to waive the requirement for a building permit at the settlement table. Nevertheless, the contract at issue was unenforceable when written because it contained this provision. Having been void *ab initio* as a result of the RAP, the contract was never enforceable and did not become so do to the waiver at the settlement table.

**and of itself, requires correction, which my clients are willing to undertake.**

See E. 0696.

At trial, the testimony of the settlement attorney hired by Abbott and Barker for settlement, and also as counsel for plaintiffs in their original specific performance lawsuit against Bartos, F. Michael Harris, clarifies what impact this “**illegal subdivision of land**” has on the possibility of Abbott and Barker ever being issued a building permit by St. Mary’s County:

I also advised them about the parcel of record issue, although in my opinion it doesn’t – its not a title issue, *it certainly creates a use problem* until you fix it and they were willing to go to settlement regardless of those two outstanding issues being resolved.

See E. 0139 (Trial Transcript). On re-direct examination, Mr. Harris further clarified as follows:

I think there’s a mixed interpretation of the parcel of record. It clearly – if a – if a property in St. Mary’s County is not deemed to be a parcel of record, you – it clearly impacts its – its use because the planning and zoning department won’t approve anything for it **so you can’t get a building permit** or process a site plan until you create – overcome that issue. Its called an illegal subdivision. My opinion is that’s not a title problem, it’s a use issue, but I know there are people in St. Mary’s County who conduct settlements that consider a parcel of record to be a title issue.

See E. 0190 (Trial Transcript). In other words, the testimony at trial from an attorney once retained by the Appellees was that, at the present time, a building permit cannot legally be issued in this case.

The foregoing is not merely the opinion of a witness at trial, but it is an entirely accurate statement of the law. In *Bd. of Co. Com’rs of St. Mary’s County, MD, et al. v. Potomac River Ass’n. of St. Mary’s Co., Inc. et al.*, 113 Md.App. 580, 688 A.2d

515 (1997) this Court reviewed the decades-long history of illegal subdivisions in St. Mary's County and the effect such illegal subdivisions have had on the properties at issue. While this opinion is extensive and the page limitations of this Reply Brief do not permit a careful review of it in its entirety, it is important to note that in that case, the Court recognized as follows:

**The trial court also granted appellees an injunction enjoining the Director of the Office of Planning and Zoning "from issuing building permits and other permits for development of land which has been subdivided in violation of Article 66B and Section 104(b) of the Subdivision Regulations of St. Mary's County. . . ." Appellants do not challenge that portion of the relief.**

*Id.* This injunction remains in effect and operates as a bar to the issuance of the building permit at issue here just as the moratorium operated as a bar to the issuance of the sewer allocation on Dorado. As a building permit cannot presently be legally issued for this property, this case is much more similar to the *Dorado* with its moratorium on sewer applications than to *Brown* which involved no bar to receipt of the relevant permit whatsoever.

Next, the Appellees suggest that the clear operation of the RAP in this matter should be disregarded because prior counsel did not raise it on behalf of the Appellants at the trial level. However, the Court of Appeals has held that:

an appellate court *ordinarily* will not consider an issue that was not raised or decided by the trial court." *Id.* **The prohibition, however, is not absolute.** *Id.* We concluded that, based on the plain language of the Rule, "*an appellate court has discretion to excuse a waiver or procedural default and to consider an issue even though it was not properly raised or preserved by a party.*" *Jones*, 379 Md. at 713, 843 A.2d at 783.

*General Motors Corp. v. Seay*, 388 Md. 341, 361-364, 879 A.2d 1049, 1061 - 1062 (2005);

*Jones v. State*, 379 Md. 704, 843 A.2d 778 (2004). The Court of Appeals has further held

that:

**Md. Rule 8-131(a) grants the Court discretion to decide an unpreserved issue.... “there is no fixed formula for the determination of when discretion should be exercised, and there are no bright line rules to conclude that discretion has been abused.”** *Jones*, 379 Md. at 713, 843 A.2d at 784. **We set forth two questions that an appellate court should ask itself when deciding to exercise its discretion: (1) whether the exercise of its discretion will work unfair prejudice to either of the parties; and (2) whether the exercise of its discretion will promote the orderly administration of justice.** *Jones*, 379 Md. at 714-15, 843 A.2d at 784....By way of example, we noted that, with respect to the parties, **a new argument presented by the State would work unfair prejudice to a criminal defendant if its validity depended upon evidence not adduced at the trial level.** In such a case, an appellate court's consideration of the argument would be an abuse of discretion under Rule 8-131(a) because it would be manifestly unfair to the defendant who had no opportunity to respond to the argument with his own evidence to the contrary. Similarly, unfair prejudice may result if counsel fails to bring the position of her client to the attention of the lower court so that that court can pass upon and correct any errors in its own proceedings. In addition, the reviewing court should look to the reasons for the default or waiver. **The court should consider whether the failure to raise the issue was a considered, deliberate one, or whether it was inadvertent and unintentional.** *Jones*, 379 Md. at 714, 843 A.2d at 784 (internal citations omitted).

*General Motors Corp. v. Seay*, 388 Md. 341, 361-364, 879 A.2d 1049, 1061 - 1062 (2005);

*Jones v. State*, 379 Md. 704, 843 A.2d 778 (2004).

The failure to raise an argument at the trial level is no bar to raising the argument on appeal provided that no unfair prejudice will result to the parties and consideration of the issue will promote the orderly administration of justice. Unfair prejudice may result by the presentation of a new argument on appeal if “its validity depended upon evidence not adduced at the trial level.”

The Appellees suggest that a determination of whether Dorado or Brown controls this matter turns on a determination of whether a “critical area variance” would be granted in connection with the property. This is a classic, “straw man” argument. The Appellants make no such claim. Instead, the Appellants rely only on issues explored in depth at trial by the Appellees themselves.

It was the Appellees own former attorney who testified at trial that a building permit could not currently be issued in connection with this property. It would be disingenuous in the extreme for the Appellees to claim now that, given the chance, they would have impeached their own former attorney who they examined as a witness at trial.

Perhaps more importantly, no factual record that the Appellants could possibly develop in this matter would defeat the Court’s holding in *Bd. of Com’rs of St. Mary’s County, MD, et al. v. Potomac River Ass’n. of St. Mary’s Co., Inc. et al.*, 113 Md.App. 580, 688 A.2d 515 (1997) precluding the issuance of the building permits at issue here. Based on the undisputed fact that the property at issue is subject to an illegal subdivision, no building permit may be issued as a matter of law. *See id.* There is no evidence proffered by the Appellees that does or could change this inevitable result.

Given the foregoing, if the Court applies the rule against perpetuities, no unfair prejudice will result to the parties and consideration of the RAP issue will promote the orderly administration of justice. The validity of the RAP argument in this case does not depend upon any evidence the Appellees were precluded from presenting at trial.

Moreover, the application of the RAP here will clearly promote the orderly administration of justice. The rule against perpetuities seeks to advance the important

public policy of increasing the upward mobility of the individual in society as well as to protect our free market economy through preservation of the ability to buy and sell real property. The Court of Appeals has held that:

**By voiding future interests that might vest too remotely, the rule against perpetuities facilitates the alienability of property, helps prevent uncertain title, and encourages owners to make effective use of their property.**

*Arundel Corp.*, 383 Md. at 495, 860 A.2d 886 (citations omitted). Given the paramount public importance of the RAP, its application here will clearly promote justice.

Finally, there is no evidence, nor any contention, that the failure to raise the RAP issue below was a considered, deliberate one. This issue was recognized for the first time by the undersigned when retained post-trial for purposes of the appeal. While neither the undersigned nor the firm now representing the Appellants served as trial counsel, trial counsel's failure to raise the RAP issue appears entirely inadvertent and unintentional as contemplated in circumstances in which the requirement of preservation has not been applied by the courts. *See General Motors Corp. v. Seay*, 388 Md. 341, 361-364, 879 A.2d 1049, 1061 - 1062 (2005).

In the final analysis, should the Court be persuaded that the Appellees were denied the opportunity to develop a full record, this matter should be remanded for such a record to be developed in recognition of the paramount public policy served by Maryland long-standing adherence to the rule against perpetuities.

## **CONCLUSION**

For the foregoing reasons, the Circuit Court's Judgment should be reversed with a mandate to enter judgment in favor of John M. Zupancic and Cheryl R. Gordon enforcing their contract to purchase the subject property.

## **CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify that the forgoing Brief was prepared with proportionately spaced type and has a typeface of 13 points, Times New Roman, and I hereby certify that two copies of the forgoing were sent via first class mail, postage prepaid, on the 6<sup>th</sup> day of December, 2006, to: Adam M. Spence, Esquire, 105 West Chesapeake Ave., Suite 400, Towson, Maryland 21204 and Christopher T. Longmore, Esquire, 22738 Maple Road, Suite 101, Lexington Park, Maryland 20653.

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Cary J. Hansel