okeeffem@optonline.net

From:	Joseph Bollhofer <jab@bollhoferlaw.com>
Sent:	Monday, May 15, 2023 9:45 AM
To:	Clerk Head of the Harbor (okeeffem@optonline.net)
Cc:	Jeff Fischer (jfischer@absnet.com); gordon@framerica.com; Dahlgard Douglas (doug34 @optonline.net); dwwhothtrustee@gmail.com; 'Judith C. Ogden'
Subject:	FW: Timothy House Application
Attachments:	USDOJ Civ. Rts Div. ltr RLUIPA 12-15-16.pdf; Timothy House (TH) Recorded Historic Place and Open Space Easement Back Drive Right of Way over TH Lot 37 To TH Stable Property incl 1973.doc; ANDON, LLC v. City of Newport News, Va., 813 F. 3d 510 - Court of Appeals, 4th Circuit 2016.pdf

Hi Margaret,

Per the request of trustee White, please include my email correspondence below and the attachments in the public hearing record regarding this matter.
Then please notify trustee White that it is part of the public hearing record, so that he may consider it, or disregard it.
I have also included a copy of the Federal Court of Appeals decision in *Andon*, which I realize was inadvertently not included in my original email..

My correspondence is sent as a private village resident and not in any official capacity.
Likewise, as stated at the bottom of that correspondence, the communication is not legal advice, and no attorney-client relationship shall be inferred.

Please feel free to contact me if you have any questions. Thank you for your assistance.

Joseph A. Bollhofer, Esq.
Joseph A. Bollhofer, P.C.
291 Lake Ave.
St. James, NY 11780
(631)584-0100
fax (631)584-2304
info@bollhoferlaw.com
www.bollhoferlaw.com
Member, National Academy of Elder Law Attorneys (NAELA)

From: Joseph Bollhofer <jab@bollhoferlaw.com>
Sent: Friday, May 12, 2023 12:23 PM
To: Jeff Fischer (jfischer@absnet.com) <jfischer@absnet.com>; gordon@framerica.com
Cc: Dahlgard Douglas (doug34@optonline.net) <doug34@optonline.net>; DWWHOTHTrustee@gmail.com; 'Judith C.

Ogden' <judy@ogdens.com>
Subject: Timothy House

Hi Jeff and Gordon,

Per our telephone conversations, attached are:

1. U.S. Justice Dep't 2016 letter to municipal officials outlining the operation of the Religious Land Use law.

2. 1973 and 1997 covenants and restrictions put on the land by Barbara Van Liew (pgs 3-13 from a title abstract).

The 1973 document is somewhat hard to read in spots, but only substantively differs from the 1997 document in that BVL elaborated in the latter on what she considered to be important architectural features of the house and, importantly, unlike the 1997 document, does not contain any comment that the Village does not have a legal obligation to enforce the provisions. The 1997 document does not state that it supercedes the 1973 document, which therefore stands on its own. I believe that the Village has a legal obligation to enforce the C&Rs. I also believe the Village has a moral and ethical obligation to enforce the second document on behalf of its residents. Otherwise, what would be the purpose of the restrictions running with the land and binding all owners subsequent to BVL?

However, even if the Village chose not to enforce the 1997 C&Rs, those in the 1973 C&Rs are identical and require that:

"The open space and natural character of the Property shall be maintained as a landscaped environment so as to enhance the setting of the House as a historic landmark . . .." and
"No activities shall be carried on on the Property which would destroy or impair the historic and open space value of the Property."

Clearly, these requirements show that the restrictions on the property are not just concerned with the preservation of the house itself, but with the entire open space character of the property. If a structure such as proposed were to be built, frankly I cannot see how anyone could claim that these C&Rs would not be violated. The existence of the C&Rs is a material difference between this matter and all other cases that I have read, most of which were Federal Court of Appeals cases.

The USDOJ explains in its letter that the law provides safeguards to prevent use of unjustifiably burdensome regulations against religious exercise, but does not provide a blanket exemption from local zoning or landmarking laws. It discusses an example of where a church "had a reasonable expectation that it could develop its new property". That is not what we have in the Monastery's application. The covenants and restrictions("C&Rs") placed on the property run with the land and are binding on all owners. When the church officials bought the property, the are deemed to have known about the C&Rs and are bound by them, just like every property owner.

I have also attached a federal Court of Appeals case decided in 2016, *Andon, LLC v. City of Newport News, Virginia.* It contains an instructive review of other cases, distinguishing each on its facts, and a detailed explanation of the reasoning behind the law. Please take the time to read it. In that case, a church entered into a lease of property contingent on municipal approval of relief from a setback requirement. After that request was denied and the applicant sued, the District Court dismissed the case. The Court of Appeals agreed, stating that the substantial burdens alleged by the church were self-imposed hardships, that it never had a reasonable expectation that the property could be used as a church, and that the church assumed the risk of an unfavorable decision. Importantly, under these circumstances, the Court held that the applicant had not satisfied the "substantial burden" requirement under RLUIPA. Therefore, it never even got to the issue of whether the municipality had a "compelling interest".

The Monastery's application likewise is one in which the "substantial burden" on religious exercise is self-imposed. With the C&Rs in place, and the applicant's deemed knowledge of those restrictions prior to purchase, I cannot see how any

judge would find that the applicant still would have the right to build a structure on the property. It would render the C&Rs meaningless.

I am not even addressing the Village ordinance provisions governing whether a special exception should be granted, including what I consider to be significant parking and traffic issues. The Village should do an independent traffic study, at the applicant's expense. The issue of parking also ties into the C&Rs. A parking lot of the size needed for this application itself I believe would violate the open space provisions of the C&Rs.

The *Andon, LLC* case is not an outlier. There are other Court of Appeals cases, some cited in *Andon*, that concur with its reasoning that we must look to whether the applicant had a reasonable expectation that the property could be used as a church. If not, the hardship is self-imposed. Facts are all-important, and in this case the C&Rs can't be ignored.

I believe the Court in *Andon* well summarized the interaction of RLUIPA and the role and obligations of local governments when it said:

"We further observe that if we agreed with the plaintiffs that the BZA's denial of a variance imposed a substantial burden on their religious exercise, we effectively would be granting an automatic exemption to religious organizations from generally applicable land use regulations. Such a holding would usurp the role of local governments in zoning matters when a religious group is seeking a variance, and impermissibly would favor religious uses over secular uses. *See Petra Presbyterian Church*, 489 F.3d at 851 (reasoning that the substantial burden requirement must be taken seriously, or religious organizations would be free "from zoning restrictions of any kind"); *Civil Liberties for Urban Believers*, 342 F.3d at 762 (explaining that no "free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise").

"The plain language of RLUIPA, however, prevents such a result. By requiring that any substantial burden be imposed by governmental action and by carefully balancing individual rights and compelling governmental interests, the language of RLUIPA demonstrates that Congress did not intend for RLUIPA to undermine the legitimate role of local governments in enacting and implementing land use regulations. *See Petra Presbyterian Church*, 489 F.3d at 851; *Civil Liberties for Urban Believers*, 342 F.3d at 762."

I'm sorry this is so long. The more I researched this issue, the more I became convinced that this is not a good application. I am sending copies to Doug, Dan and Judy as well.

Joe

Joseph A. Bollhofer, Esq.
Joseph A. Bollhofer, P.C.
291 Lake Ave.
St. James, NY 11780
(631)584-0100
fax (631)584-2304
info@bollhoferlaw.com
www.bollhoferlaw.com
Member, National Academy of Elder Law Attorneys (NAELA)

Unless stated otherwise, this communication shall not be deemed legal advice, and no attorney-client relationship shall be deemed to have been created.

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 15, 2016

Re: The Religious Land Use and Institutionalized Persons Act

Dear State, County, and Municipal Officials:

I am writing to you today to highlight the obligation of public officials to comply with the various provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), and to inform you about documents previously issued by the Department of Justice (Department) that may be of assistance to you in understanding and applying this important Federal civil rights law.

The freedom to practice religion according to the dictates of one's conscience is among our most fundamental rights, written into our Constitution and protected by our laws. In our increasingly diverse nation, the Department continues to steadfastly defend this basic freedom and ensure that all people may live according to their beliefs, free of discrimination, harassment, or persecution.

Over the years Congress has passed a number of laws that protect the religious liberties of those who live in America, including the landmark Civil Rights Act of 1964 and the 1996 Church Arson Prevention Act. In 2000 Congress, by unanimous consent, and with the support of a broad range of civil rights and religious organizations, enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq. In enacting RLUIPA, Congress determined that there was a need for Federal legislation to protect religious individuals and institutions from unduly burdensome, unreasonable or discriminatory zoning, landmarking, and other land use regulations.[1] Congress heard testimony that houses of worship, particularly those of minority religions and start-up churches, were disproportionately affected, and in fact often were actively discriminated against, by local land use decisions. Congress also found that, as a whole, religious institutions were treated worse than secular places of assembly like community centers, fraternal organizations, and movie theaters, and that zoning authorities frequently violated the United States Constitution by placing excessive burdens on the ability of congregations to exercise their faiths.

[1] RLUIPA also contains provisions that prohibit regulations that impose a "substantial burden" on the religious exercise of persons residing or confined in an "institution," unless the government can show that the regulation serves a "compelling government interest" and is the least restrictive way for the government to further that interest. 42 U.S.C § 2000cc-1.

RLUIPA includes a private right of action, which allows private individuals to enforce its provisions. Congress also gave the U.S. Attorney General the authority to enforce RLUIPA, and the Department of Justice has been active in enforcing this important civil rights law since its enactment. To date, the Department has opened nearly 100 formal investigations and filed nearly 20 lawsuits related to RLUIPA's land use provisions.[2] Through these efforts, as well as those by private parties, RLUIPA has helped secure the ability of thousands of individuals and institutions to practice their faiths freely and without discrimination.

Yet, sixteen years after RLUIPA's enactment, far too many people and communities remain unaware of the law, or do not fully understand the scope of its provisions. Earlier this year, the Department's Civil Rights Division launched *Combating Religious Discrimination Today*, an initiative bringing together community leaders around the country to discuss challenges regarding religious discrimination, religion-based hate crimes, and religious freedom, and to discuss possible solutions. One of the issues raised repeatedly from participants was that municipal, county, and other state and local officials are insufficiently familiar with the land use provisions of RLUIPA and their obligations under this Federal civil rights law. Participants also reported that houses of worship, particularly those from less familiar religious traditions, often face unlawful barriers in the zoning and building process. Additionally, participants explained that, in their experience, litigation frequently was avoided when the communities informed local officials of their obligations under RLUIPA early in the process. Participants recommended that the Department take proactive measures to ensure that state and local officials are properly educated about RLUIPA's land use provisions.[3]

In light of this, we are sending this letter to you and other officials throughout the country to remind you about the key provisions of RLUIPA. Ensuring that our constitutional protections of religious freedom are protected requires that Federal, state, and local officials work together, and to that end, we encourage you to share this letter with your colleagues. We hope that you will continue to work with the Department of Justice going forward and view us as a partner and ally in ensuring that no individuals in this country suffer discrimination or unlawful treatment simply because of their faiths.

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[2] This work is detailed in reports on enforcement issued in September 2010 (available at https://www.justice.gov/crt/rluipa_report_092210.pdf) and July 2016 (available at https://www.justice.gov/crt/file/877931/download).

[3] The *Combating Religious Discrimination Today* report is available at https://www.justice.gov/Combating_Religious_Discrimination.

1. **RLUIPA provides broad protections for religious individuals and institutions.**

RLUIPA's land use provisions provide a number of protections for places of worship, faith-based social service providers and religious schools, and individuals using land for religious purposes. Specifically, RLUIPA provides for:

- *Protection against substantial burdens on religious exercise*: Section 2(a) of RLUIPA prohibits the implementation of any land use regulation that imposes a "substantial burden" on the religious exercise of a person or institution except where justified by a "compelling government interest" that the government pursues using the least restrictive means.[4]

- *Protection against unequal treatment for religious assemblies and institutions*: Section 2(b)(1) of RLUIPA provides that religious assemblies and institutions must be treated at least as well as nonreligious assemblies and institutions.

- *Protection against religious or denominational discrimination*: Section 2(b)(2) of RLUIPA prohibits discrimination "against any assembly or institution on the basis of religion or religious denomination."

- *Protection against total exclusion of religious assemblies*: Section 2(b)(3)(A) of RLUIPA provides that government must not totally exclude religious assemblies from a jurisdiction.

- *Protection against unreasonable limitation of religious assemblies*: Section 2(b)(3)(B) of RLUIPA provides that government must not unreasonably limit "religious assemblies, institutions, or structures within a jurisdiction."

While the majority of RLUIPA cases involve places of worship such as churches, synagogues, mosques, and temples, the law is written broadly to cover a wide range of religious uses. The "substantial burden" provision in Section 2(a) of the statute applies to burdens on "a person, including a religious assembly or institution." The remaining provisions apply to any religious "assembly or institution." Thus, RLUIPA applies widely not only to diverse places of worship, but also to religious schools, religious camps, religious retreat centers, and religious social service facilities such as group homes, homeless shelters, and soup kitchens, as well as to individuals exercising their religion through use of property, such as home prayer gatherings or Bible studies.

To be clear, RLUIPA does not provide a blanket exemption from local zoning or landmarking laws. Rather, it contains a number of safeguards to prevent discriminatory, unreasonable, or unjustifiably burdensome regulations from hindering religious exercise. Ordinarily, before seeking recourse from RLUIPA, those seeking approval for a religious land

[4] Section 2 of RLUIPA is codified at 42 U.S.C § 2000cc.

use will have to apply for permits or zoning relief according to the regular procedures set forth in the applicable ordinances, unless doing so would be futile, or the regular procedures are discriminatory or create an unjustifiable burden. While zoning is primarily a local matter, where it conflicts with Federal civil rights laws such as the Fair Housing Act or RLUIPA, Federal law takes precedence.

Each of the aforementioned protections in RLUIPA are discussed in greater detail below.[5]

2. **RLUIPA protects against unjustified burdens on religious exercise.**

Land use regulations frequently can impede the ability of religious institutions to carry out their mission of serving the religious needs of their members. Section 2(a) of RLUIPA bars imposition of land use regulations that create a "substantial burden" on the religious exercise of a person or institution, unless the government can show that it has a "compelling interest" for imposing the regulation and that the regulation is the least restrictive way for the government to further that interest. A mere inconvenience to the person or religious institution is not sufficient, but a burden that is substantial may violate RLUIPA. For example, in a case in which the United States filed a friend-of-the-court brief in support of a Maryland church's challenge to a rezoning denial, a Federal appeals court ruled that the church had "presented considerable evidence that its current facilities inadequately serve its needs," and that the "delay, uncertainty and expense" in looking for a different property may create a substantial burden on the church's religious exercise in violation of RLUIPA.[6] The court relied on facts including that the church had to hold multiple services, turn away worshipers, and curtail a number of important activities at its current location, and that it had a reasonable expectation that it could develop its new property. Similarly, the Department of Justice filed suit in a California Federal district court alleging that a city's denial of zoning approval for a mosque to take down the aging and inadequate structures in which it had been worshipping and construct a new facility imposed a substantial burden on the congregation.[7] The mosque, which was grandfathered for its current use, consisted of a group of repurposed buildings for its various activities and a large tent for overflow from the prayer hall. However, the city prohibited the mosque from replacing the buildings and tent with a single building. The case was resolved by a consent decree in Federal court.

If imposition of a zoning or landmarking law creates a substantial burden on religious exercise, such imposition is invalid unless it is supported by a compelling governmental interest pursued through the least restrictive means. RLUIPA does not define "compelling interest," but

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[5] Further information may be found in the *Statement of the Department of Justice on Land Use Provisions of the Religious Land Use and Institutionalized Persons Act* (available at https://www.justice.gov/crt/rluipa_q_a_9-22-10.pdf), and at the Department of Justice Civil Rights Division RLUIPA information page (https://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act).

[6] *Bethel World Outreach v. Montgomery Cnty. Council*, 706 F.3d 548, 557-558 (4th Cir. 2013).

[7] *United States v. Lomita*, No. 2:13-CV-00707 (E.D. Cal. filed March 3, 2013).

the U.S. Supreme Court has previously explained that compelling interests are "interests of the highest order."[8]

3. RLUIPA protects equal access for religious institutions and assemblies.

Section 2(b)(1) of RLUIPA – known as the "equal terms" provision – mandates that religious assemblies and institutions be treated at least as well as nonreligious assemblies and institutions. For example, a Federal appeals court ruled that zoning restrictions that a city applied to places of worship but not to lodges, union halls, nightclubs, and other assemblies, violated the equal terms provision.[9] This included a requirement that places of worship, but not other assembly uses, obtain the permission of 60% of neighbors in a 1,300-foot radius. The Department of Justice filed a friend-of-the-court brief arguing that the distinction violated RLUIPA. Similarly, the Department brought suit under RLUIPA's equal terms provision against a town in Illinois that permitted clubs, lodges, meeting halls, and theaters in its business districts, but excluded places of worship.[10] The case was prompted after the town served notice of violation on four small churches operating in locations where these nonreligious assembly uses were permitted. The case was resolved by consent decree.

4. RLUIPA protects against religious discrimination in land use.

Section 2(b)(2) of RLUIPA bars discrimination "against any assembly or institution on the basis of religion or religious denomination." Thus if an applicant is treated differently in a zoning or landmarking process because of the religion represented (e.g., Christian, Jewish, Muslim), or because of the particular denomination or sect to which the applicant belongs (e.g., Catholic, Orthodox Jewish, or Shia Muslim), then RLUIPA will be violated. The Department of Justice filed suit alleging that a mosque in Georgia was discriminated against in violation of Section 2(b)(2), based on statements by city officials indicating bias, evidence that the city sought to appease citizens who had expressed bias, and evidence that the city had previously approved numerous similarly sized and located places of worship of other faiths.[11] The case was resolved by consent decree. Similarly, the Department filed suit in order to challenge a zoning change enacted by a New York municipality that prevented the construction of a Hasidic Jewish boarding school.[12] The case was resolved by consent decree.

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[8] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

[9] *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279 (5th Cir. 2012).

[10] *United States v. Waukegan*, No. 08-C-1013 (N.D. Ill. filed February 19, 2008).

[11] *United States v. City of Lilburn* 1:11-CV-2871 (N.D. Ga. filed August 29, 2011).

[12] *United States v. Village of Airmont*, 05 Civ. 5520 (S.D.N.Y filed June 10, 2005).

5. **RLUIPA protects against the total or unreasonable exclusion of religious assemblies from a jurisdiction.**

Under section 2(b)(3) of RLUIPA, a zoning code may not completely, or unreasonably, limit religious assemblies in a jurisdiction. Thus, if there is no place where houses of worship are permitted to locate, or the zoning regulations looked at as a whole deprive religious institutions of reasonable opportunities to build or locate in the jurisdiction, this provision will be violated. For example, a Federal district court in Florida granted summary judgment to a synagogue on its unreasonable limitations claim, holding that RLUIPA was violated where "there was limited availability of property for the location of religious assemblies, religious assemblies were subject to inflated costs in order to locate in the City, and religious assemblies were subject to more stringent requirements than other similar uses."[13]

* * * *

The Department of Justice is committed to carrying out Congress's mandate and ensuring that religious assemblies and institutions do not suffer from discriminatory or unduly burdensome land use regulations. We look forward to working collaboratively with you and all other stakeholders on these important issues. Should you have questions about the contents of this letter, or other issues related to RLUIPA, I encourage you to contact Eric Treene, Special Counsel for Religious Discrimination, at 202.514.2228 or Eric.Treene@USDOJ.gov.

Sincerely,

Vanita Gupta
Principal Deputy Assistant Attorney General
Civil Rights Division

[13] *Chabad of Nova, Inc. v. City of Cooper City*, 575 F. Supp. 2d 1280, 1290 (S.D. Fla. 2008).

TIMOTHY HOUSE (TH)
481 NORTH COUNTRY ROAD
ST. JAMES, NEW YORK 11780

TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)

CHICAGO TITLE INSURANCE COMPANY

SCHEDULE B-1

Title No.: 3606-45298

The policy will not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of the following exceptions unless they are disposed of to our satisfaction:

A Taxes, tax liens, tax sales, water rates, sewer and assessments set forth in schedule herein.

B NOTE: If the subject transaction is one involving a sale subject to the mortgage(s) returned in this exception, and since many lenders now have the mortgage instrument, state that the debt will become due and payable at the option of the mortgagee upon any transfer of title. It is recommended that the applicant examine the mortgage document(s) as well as the note(s) and bond(s) and any agreement modifying said mortgage(s) or make inquiry of the mortgagee of the current terms of such instrument(s) especially with respect to acceleration of the maturity date in case of a sale. Upon request, we will obtain and furnish a copy of the recorded mortgage(s) for cost.

C Any state of facts which an accurate survey might show.
or
Survey exceptions set forth herein.

D Rights of tenants or persons in possession.

1. MORTGAGE(S) (1) AND ASSIGNMENT(S) THEREOF AS DESCRIBED IN THE SCHEDULE ANNEXED.

2. UNTIL A GUARANTEED SURVEY IS RECEIVED AND READ INTO TITLE, POLICY WILL NOT INSURE THE EXACT DISTANCES, COURSES AND DIMENSIONS OF THE PREMISES AND WILL EXCEPT ANY STATE OF FACTS AN ACCURATE SURVEY MAY SHOW, INCLUDING COMPLIANCE WITH COVENANTS AND RESTRICTIONS.

3. HISTORIC PLACE AND OPEN SPACE EASEMENT IN LIBER 7412 CP 245 AND LIBER 11929 CP 781.
RESTRICTIONS AS RECITED ON FILED MAP.
RIGHT OF WAY IN LIBER 3467 CP 585. ← ROW OVER BACK DRIVE (LOT 37)

TIMOTHY HOUSE (TH)
481 NORTH COUNTRY ROAD
ST. JAMES, NEW YORK 11780

TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)

11929 781 16346

RECORDED
98 NOV 20 AM 11:39
EDWARD P. ROMAINE
SUFFOLK COUNTY

1 2 RECEIVED
$ 0
REAL ESTATE
NOV 20 1998
TRANSFER TAX
SUFFOLK
COUNTY
16346

3

Number of pages 9

TORRENS
Serial #
Certificate #
Prior Ct. #

Deed / Mortgage Instrument | Deed / Mortgage Tax Stamp | Recording / Filing Stamps

4 FEES

Page / Filing Fee	25.	Mortgage Amt.	
Handling	5.	1. Basic Tax	
TP-584	5.	2. Additional Tax	
Notation		Sub Total	
EA-5217 (County)	Sub Total 34.	Spec./Assit. or Spec./Add.	
EA-5217 (State)		TOT. MTG. TAX	
R.P.T.S.A.	10.00	Dual Town ____ Dual County ____ Held for Apportionment ____	
Comm. of Ed.	5. 00	Transfer Tax	
Affidavit		Mansion Tax	
Certified Copy		The property covered by this mortgage is or will be improved by a one or two family dwelling only. YES ____ or NO ____ If NO, see appropriate tax clause on page # ____ of this instrument.	
Reg. Copy			
Other	Sub Total 25.		
	GRAND TOTAL 42.		

5 Real Property Tax Service Agency Verification

	Dist.	Section	Block	Lot
Stamp	0801	007.00	03.00	039.001
Page	0801	007.00	03.00	037.000
Index				

6 Title Company Information
First American Title Insurance Company
Company Name
03 [illegible]3070
Title Number

Steve & Norma's
Suite 105
1513 Veterans Memorial
Hauppauge, NY 11788

7 RECORD & RETURN TO (ADDRESS)

8 FEES PAID BY:
Cash ____ Check ✓ Charge ____
Payer same as R & R ____
NAME: First American Title Insurance Company of New York
ADDRESS: 666 Old Country Road
Garden City NY 11530
869 Harrison Avenue
2nd Floor
Riverhead NY 11901

9 **Suffolk County Recording & Endorsement Page**

This page forms part of the attached Historic, Open Space Easement made by:
(SPECIFY TYPE OF INSTRUMENT)

[illegible] Land Trust

TO

The Village of Head of the Harbor

The premises herein is situated in SUFFOLK COUNTY, NEW YORK.

In the Township of Smithtown

In the VILLAGE or HAMLET of St. James

BOXES 5 THRU 9 MUST BE TYPED OR PRINTED IN BLACK INK ONLY PRIOR TO RECORDING OR FILING.

TIMOTHY HOUSE (TH)
481 NORTH COUNTRY ROAD
ST. JAMES, NEW YORK 11780

TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)

HISTORIC PLACE AND OPEN SPACE EASEMENT DEED

This Indenture, made the 5th day of November, 1997, between BARBARA FERRIS VAN LIEW, residing at 481 North Country Road, St. James, Town of Smithtown, County of Suffolk, State of New York, hereinafter referred to as the Grantor, and the INCORPORATED VILLAGE OF HEAD-OF-THE-HARBOR, a municipality of the State of New York, having its principal address of 500 North Country Road, St. James, Town of Smithtown, County of Suffolk, State of New York, hereinafter referred to as the Grantee.

WITNESSETH:

WHEREAS it is the public policy of the State of New York and the local government of the County of Suffolk to preserve properties and historic and open space value; and

WHEREAS the Grantor is the owner of certain property hereinafter described on which is located a structure of historic and architectural importance and which is characterized by natural scenic beauty; and

WHEREAS the property is located on the historic North Country Road, Town of Smithtown, County of Suffolk and State of New York, the character of which it is desirable to preserve as a historic resource; and

WHEREAS the existing structure and present state of use of said property, and would enhance the present or potential value of abutting or surrounding properties and of historic North Country Road, and would maintain and enhance the conservation of natural, scenic and historic resources; and

WHEREAS the Grantor and the Grantee wish to preserve the environment in which the historic structure on the property now exists so as to realize its great educational and cultural value, and wish to prevent any unsightly developments that will tend to mar or to detract from such environment which would materially affect the historic value of said structure or of historic North Country Road, by altering its surroundings; and

WHEREAS the Grantor and the Grantee wish to protect the architectural features

-1-

TIMOTHY HOUSE (TH)
481 NORTH COUNTRY ROAD
ST. JAMES, NEW YORK 11780

TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)

of the historic structure and to that end, to exercise such reasonable controls over the property as is hereinafter described as may be necessary and expedient to accomplish such objectives.

NOW, THEREFORE, in recognition of the foregoing and in consideration of the sum of One ($1.00) Dollar and other valuable consideration, the receipt of which is hereby acknowledged, the Grantor does hereby grant and convey to the Grantee an easement in the structure referred to in the preambles hereto (hereinafter called the "House") and in the parcel of land, consisting of 4.609 acres, on which the House is located (hereinafter, collectively with the House, called the "Property"), situate, lying and being in the incorporated Village of Head-of-the-Harbor, in the Town of Smithtown, County of Suffolk, and State of New York, all as more particularly described in a survey made in April, 1971, by Theodore S. Prime, a copy of which is annexed hereto as Schedule A and is hereby made a part hereof, subject to the following restrictions which are hereby imposed on the use of the Property for the purpose of accomplishing the intent of the parties hereto and to preserve, protect and maintain the historic and open space value of the Property:

1A. The House shall be maintained and preserved in its present state as nearly as practicable, though structural changes, alterations, additions, or improvements as would not, in the opinion of the Grantee or its agents, fundamentally alter the historic character of the House and the open space character of the Property, may be made thereto by the owner, provided that the prior written approval of Grantee or its agents to such alteration, addition or improvement shall have been obtained.

1B. Fundamental Features of Exterior and Interior Dated Circa 1800 That Should Be Given Special Consideration.

(1) Exterior.

(a) Gothic detail on cornice of front facade.
(b) Front entrance stoop, roof and octagonal (Gothic) posts.
(c) Sweeping Dutch roof overhang on wing.
(d) Large iron kettle on porch of wing was removed from the slave kitchen (now laundry) where it was built into the brick chimney and used to heat water.

-2-

TIMOTHY HOUSE (TH)
481 NORTH COUNTRY ROAD
ST. JAMES, NEW YORK 11780

TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)

(2) Interior.

(a) Original pine floors throughout.

(3) First Floor - Front Hall.

(a) Transoms over front and rear hall doors.
(b) Strap hinges on front and rear hall doors.
(c) Stair railing and turned balusters.
(d) Closet under stairs, untouched back door, Snuff Box with snuff above the door.
(e) Paneled arch in front hall.
(f) Original hardware on door to dining room.
(g) Original hardware on door to closet under stairs.
(h) Original paint sample on red dado, and on door.

(4) First Floor - Living Room.

(a) Original "Adamesque" mantel in living room, probably moved from dining room when living room and two bedrooms above were added circa 1909.

(5) First Floor - Dining Room.

(a) Original rubbed green paint on trim around doors and windows.

(6) First Floor - Library.

(a) Paint test sample on cupboard door.
(b) "Adamesque" mantel.
(c) Rising butt hinge on door to dining room.

(7) First Floor - Breakfast Room.

(a) Wide horizontal boards on side walls.
(b) Double-leaf board doors to porch with strap hinges and original hardware and transom over doors.
(c) Narrow door on east wall was formerly at entrance to steep stairs to wing attic (stairs now reversed as stairs to cellar).
(d) Batten door to the kitchen made of two very wide boards.
(e) Remains of original whitewash on ceiling joists.
(f) Brick lined walls on south and north sides of the room.

(8) First Floor - Kitchen.

(a) Small door by iron range was originally in slave kitchen (now laundry) at foot of steep stairs to trap door in floor of slave quarters (over the breakfast room).

(9) Second Floor - NE Bedroom.

(a) "Adamesque" mantel.
(b) Original brass hardware on cupboard.

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TIMOTHY HOUSE (TH)
481 NORTH COUNTRY ROAD
ST. JAMES, NEW YORK 11780

TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)

(10) Second Floor - SE Bedroom.

(a) Original dark blue paint on woodwork.
(b) Original brass hardware on cupboard.

(11) Second Floor - Main Bathroom.

(a) Chair rail and trim around window.

(12) Second Floor - Slave Quarters - SE Room in Wing.

(a) Trap door on leather hinges in corner led down to slave kitchen (now laundry).
(b) Batten door to hall of unplaned rough-sawn boards.

2. The open space and natural character of the Property shall be maintained as a landscaped environment so as to enhance the setting of the House as a historic landmark, but nothing herein contained shall prohibit the parking, in a designated part of the premises approved by the Grantee or its agents, of registered operating motor vehicles in use by the owner or occupants of or visitors to the Property.

3. No activities shall be carried on on the Property which would destroy or impair the historic and open space value of the Property.

4. The Property shall not be subdivided.

5. No sign, billboard or outdoor advertising structure shall be displayed on the Property other than one sign not exceeding four (4) square feet for each of the following purposes:

A. to state the name of the Property and the name and address of the occupant;

B. to advertise the activity permitted on the Property;

C. to advertise the Property for sale or rental;

provided, however, that this Paragraph 5 shall not limit the Grantee's right hereinafter to display on the Property at its discretion, a marker or sign four (4) square feet evidencing its ownership of the easement thereby granted.

The Grantee and its representatives may enter the Property by appointment:

A. from time to time for the purpose only of inspection; and

B. in its discretion to erect the aforementioned marker or sign.

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TIMOTHY HOUSE (TH)
481 NORTH COUNTRY ROAD
ST. JAMES, NEW YORK 11780

TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)

Nothing herein shall be construed to convey a right to the public of access or use of the Property, and the Grantor, her heirs, executors, administrators, successor and assigns shall retain exclusive right to such access and use for all purposes, present and future, subject only to the provisions herein recited.

6. It is understood by the parties hereto that this easement deed is not intended to nor shall it be interpreted to impose upon the Village, its Architectural Review Board, or other agencies of the Village, a legal obligation to enforce the provisions of this easement against present or future owners of the property, their successors and/or assigns.

If, at any time, the Grantee shall cease to exist, then on the happening of such event, this easement and the rights and privileges by this instrument granted and given to Grantee shall cease and determine to the same effect as though this instrument had never been executed by the Grantor.

TO HAVE AND TO HOLD the aforegranted easement with all its rights and privileges to the Grantee, its successors and assigns, forever.

This easement shall constitute a covenant running with the land and binding upon the owners of the property, their respective heirs, successors, administrators and assigns, subject to the limitations herein contained.

IN WITNESS WHEREOF, the Grantor has caused this instrument of easement to be executed the day and year first written above.

Barbara Ferris Van Liew
BARBARA FERRIS VAN LIEW

STATE OF NEW YORK)
) ss.:
COUNTY OF SUFFOLK)

On this 5th day of November, 1997, before me personally came BARBARA FERRIS VAN LIEW, to me personally known and known to me to be the person described in and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

Ellen C. Edwards
NOTARY PUBLIC

ELLEN C. EDWARDS
NOTARY PUBLIC, State of New York
No. 4987966
Qualified in Suffolk County
Commission Expires October 31, 1998

TIMOTHY HOUSE (TH)
481 NORTH COUNTRY ROAD
ST. JAMES, NEW YORK 11780

TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)

SCHEDULE A

Legal Description

DISTRICT: 0801; SECTION: 007.00; BLOCK: 03.00; LOT: 029.000

ALL that certain plot, piece, or tract of land, with the buildings and improvements thereon, situate, lying, and being in Incorporated Village of Head of the Harbor, Town of Smithtown, County of Suffolk and State of New York, being more particularly bounded and described as follows:

COMMENCING at a concrete monument placed for a bound in the northwesterly side of the North Country Road, which said monument is distance northeasterly as measured along the northwesterly side of North Country Road 726.45 feet from the point formed by the intersection of the easterly side of Private Road, sometimes known as Timothy Woods Road, and the northwest side of the North Country Road, and running from said point of beginning thence (1st) North 44 degrees 07 minutes 20 seconds West by and with land of Weiss the distance of 209.00 feet to a concrete monument placed for a bound;

RUNNING THENCE North 52 degrees 25 minutes 00 seconds West 283.36 feet to a point;

THENCE North 23 degrees 09 minutes 30 seconds West 116.19 feet to a point;

THENCE North 49 degrees 33 minutes 40 seconds East 248.17 to a point;

THENCE North 82 degrees 07 minutes 50 seconds East 79.46 feet to a point;

THENCE South 44 degrees 57 minutes 30 seconds East 158.84 feet to a point;

THENCE South 43 degrees 18 minutes 40 seconds East 56.16 feet to a point

THENCE North 8 degrees 20 minutes 40 seconds West 85.47 feet to a point;

THENCE South 43 degrees 18 minutes 40 seconds East 399.94 feet to northwest side of North Country Road; and

THENCE along the northwest side of North Country Road the following four (4) courses and distances;

1) South 58 degrees 17 minutes 30 seconds West 122.75 feet;

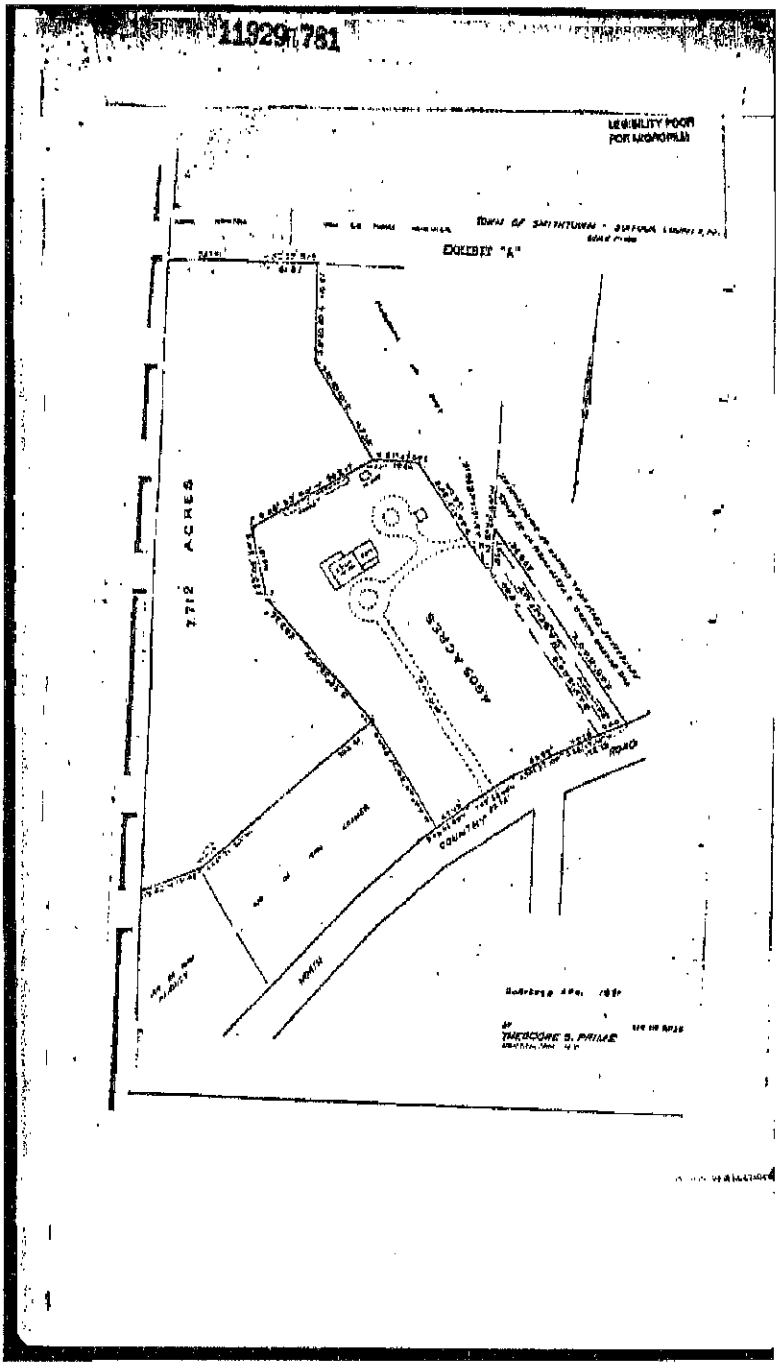
2) South 54 degrees 22 minutes 10 seconds West 89.92 feet;

3) South 49 degrees 33 minutes 40 seconds West 88.24 feet; and

4) South 45 degrees 52 minutes 40 seconds West 63.98 feet to the POINT OR PLACE OF BEGINNING.

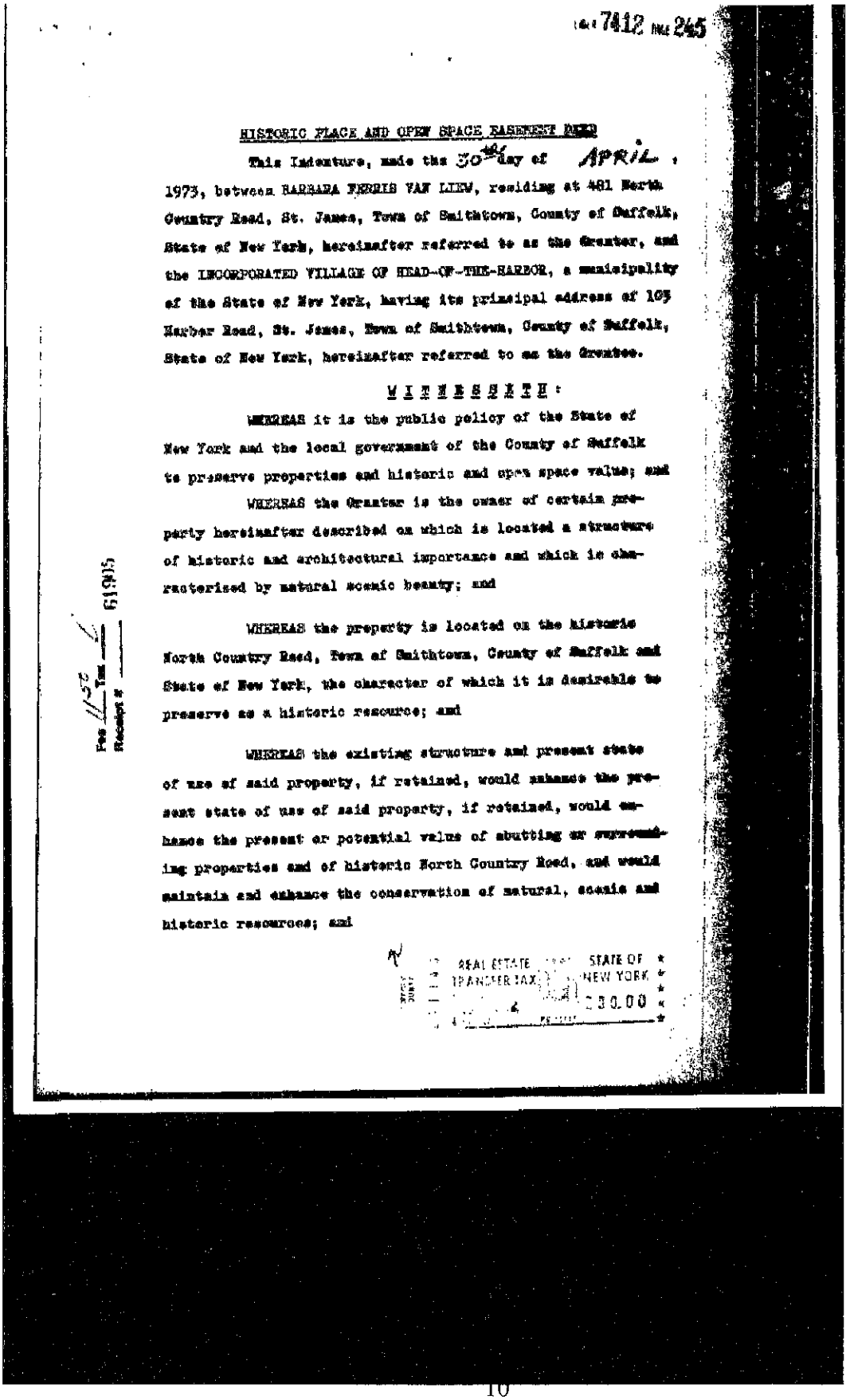
TIMOTHY HOUSE (TH)
481 NORTH COUNTRY ROAD
ST. JAMES, NEW YORK 11780

TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)



TIMOTHY HOUSE (TH)
481 NORTH COUNTRY ROAD
ST. JAMES, NEW YORK 11780

TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)



L 7412 PAGE 245

HISTORIC PLACE AND OPEN SPACE EASEMENT DEED

This Indenture, made the 30th day of APRIL, 1973, between BARBARA FERRIS VAN LIEW, residing at 481 North Country Road, St. James, Town of Smithtown, County of Suffolk, State of New York, hereinafter referred to as the Grantor, and the INCORPORATED VILLAGE OF HEAD-OF-THE-HARBOR, a municipality of the State of New York, having its principal address at 105 Harbor Road, St. James, Town of Smithtown, County of Suffolk, State of New York, hereinafter referred to as the Grantee.

WITNESSETH:

WHEREAS it is the public policy of the State of New York and the local government of the County of Suffolk to preserve properties and historic and open space value; and

WHEREAS the Grantor is the owner of certain property hereinafter described on which is located a structure of historic and architectural importance and which is characterized by natural scenic beauty; and

WHEREAS the property is located on the historic North Country Road, Town of Smithtown, County of Suffolk and State of New York, the character of which it is desirable to preserve as a historic resource; and

WHEREAS the existing structure and present state of use of said property, if retained, would enhance the present state of use of said property, if retained, would enhance the present or potential value of abutting or surrounding properties and of historic North Country Road, and would maintain and enhance the conservation of natural, scenic and historic resources; and

Fee 11.50 Tax — 61905 Receipt #

REAL ESTATE TRANSFER TAX STATE OF NEW YORK $30.00

TIMOTHY HOUSE (TH)
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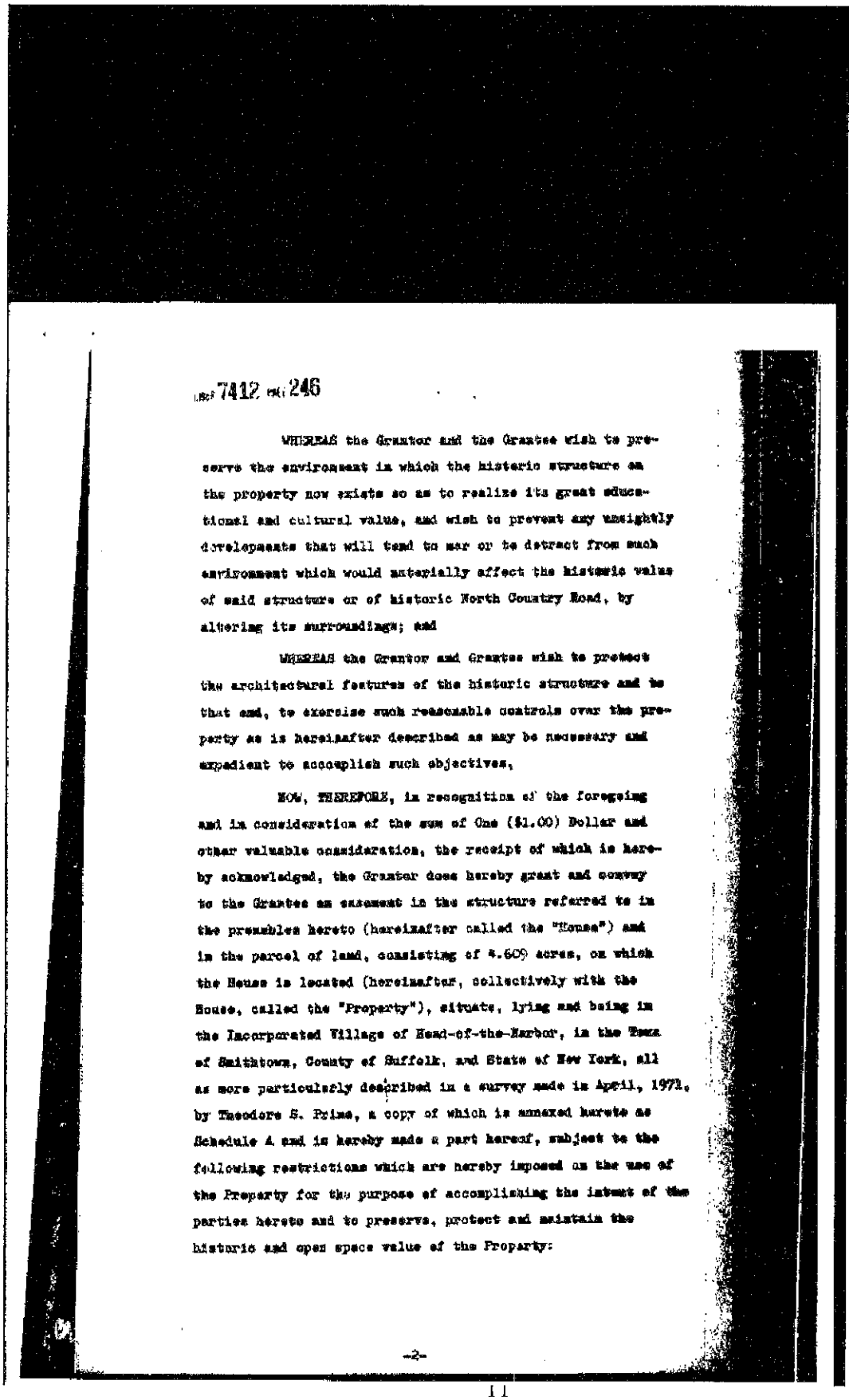
TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)



LIBER 7412 PAGE 246

WHEREAS the Grantor and the Grantee wish to preserve the environment in which the historic structure on the property now exists so as to realize its great educational and cultural value, and wish to prevent any unsightly developments that will tend to mar or to detract from such environment which would materially affect the historic value of said structure or of historic North Country Road, by altering its surroundings; and

WHEREAS the Grantor and Grantee wish to protect the architectural features of the historic structure and to that end, to exercise such reasonable controls over the property as is hereinafter described as may be necessary and expedient to accomplish such objectives,

NOW, THEREFORE, in recognition of the foregoing and in consideration of the sum of One ($1.00) Dollar and other valuable consideration, the receipt of which is hereby acknowledged, the Grantor does hereby grant and convey to the Grantee an easement in the structure referred to in the preambles hereto (hereinafter called the "House") and in the parcel of land, consisting of 4.609 acres, on which the House is located (hereinafter, collectively with the House, called the "Property"), situate, lying and being in the Incorporated Village of Head-of-the-Harbor, in the Town of Smithtown, County of Suffolk, and State of New York, all as more particularly described in a survey made in April, 1972, by Theodore S. Prime, a copy of which is annexed hereto as Schedule A and is hereby made a part hereof, subject to the following restrictions which are hereby imposed on the use of the Property for the purpose of accomplishing the intent of the parties hereto and to preserve, protect and maintain the historic and open space value of the Property:

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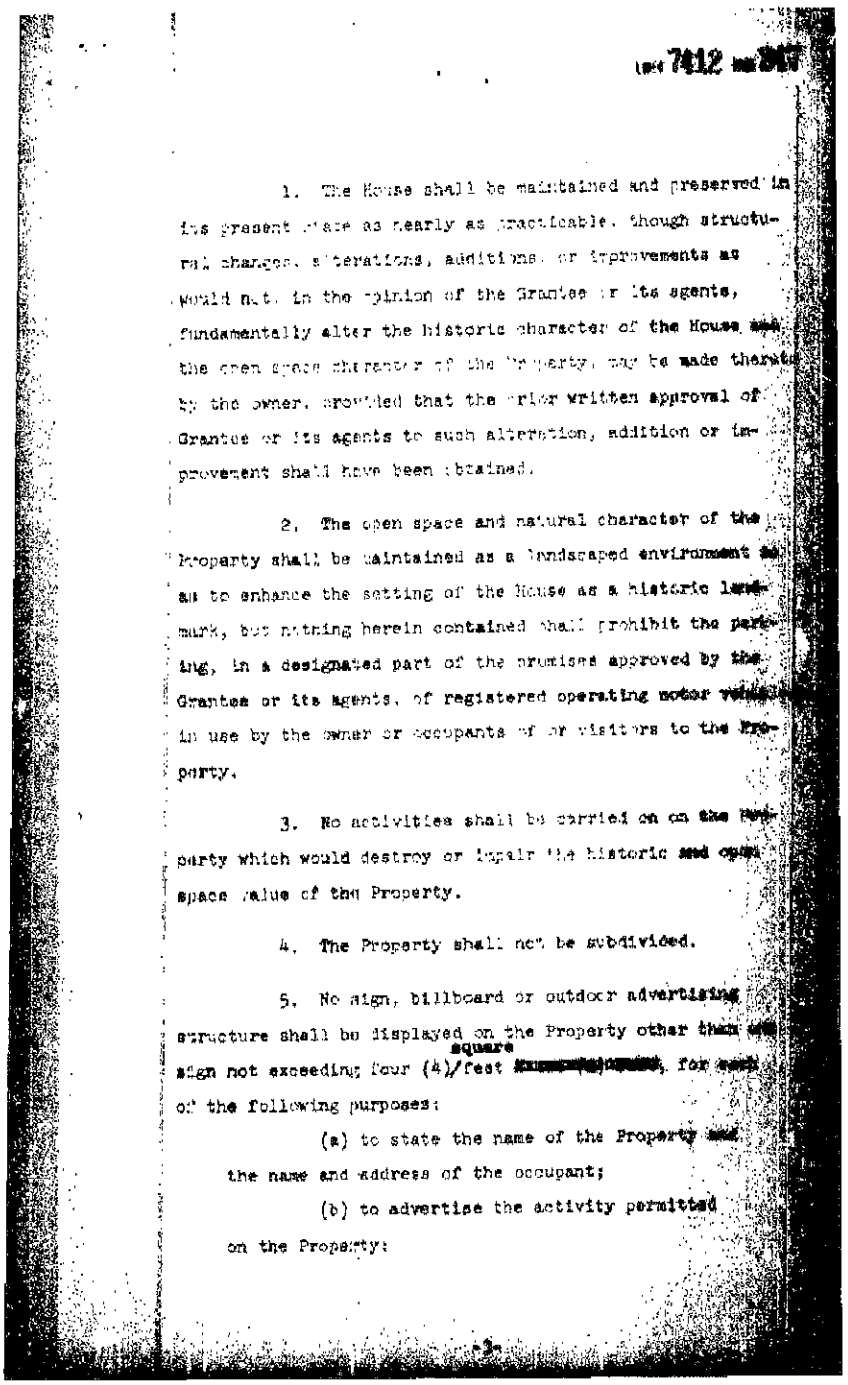
TIMOTHY HOUSE (TH)
481 NORTH COUNTRY ROAD
ST. JAMES, NEW YORK 11780

TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)



7412 ... 307

1. The House shall be maintained and preserved in its present state as nearly as practicable, though structural changes, alterations, additions or improvements as would not, in the opinion of the Grantee or its agents, fundamentally alter the historic character of the House and the open space character of the Property, may be made thereto by the owner, provided that the prior written approval of Grantee or its agents to such alteration, addition or improvement shall have been obtained.

2. The open space and natural character of the Property shall be maintained as a landscaped environment so as to enhance the setting of the House as a historic landmark, but nothing herein contained shall prohibit the parking, in a designated part of the premises approved by the Grantee or its agents, of registered operating motor vehicles in use by the owner or occupants of or visitors to the Property.

3. No activities shall be carried on on the Property which would destroy or impair the historic and open space value of the Property.

4. The Property shall not be subdivided.

5. No sign, billboard or outdoor advertising structure shall be displayed on the Property other than one sign not exceeding four (4) square feet [illegible], for each of the following purposes:

(a) to state the name of the Property and the name and address of the occupant;

(b) to advertise the activity permitted on the Property;

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TIMOTHY HOUSE (TH)
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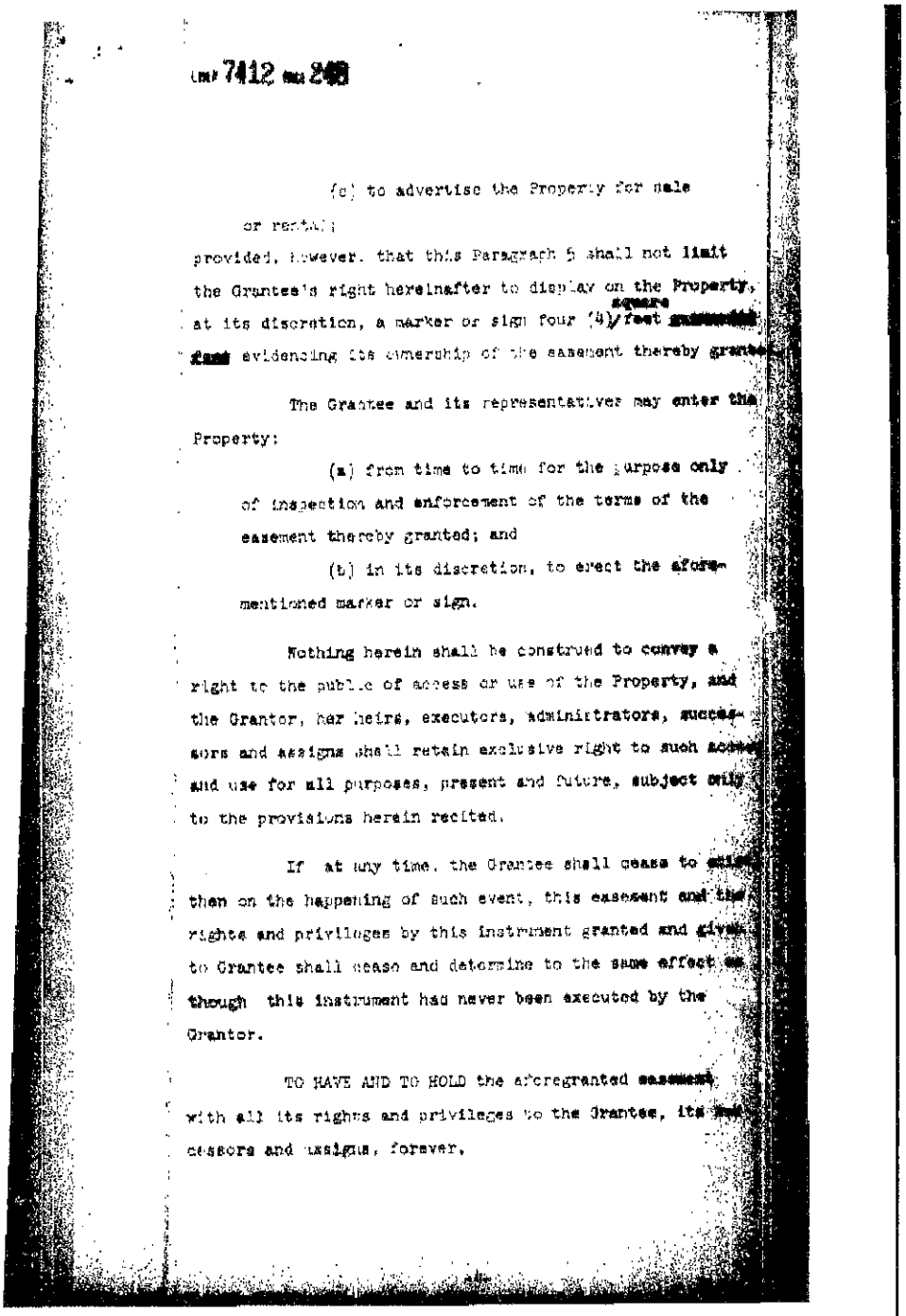
ST. JAMES, NEW YORK 11780

TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)



liber 7412 page 288

(c) to advertise the Property for sale or rental;

provided, however, that this Paragraph 5 shall not limit the Grantee's right hereinafter to display on the Property, at its discretion, a marker or sign four (4) square feet in area evidencing its ownership of the easement thereby granted.

The Grantee and its representatives may enter the Property:

(a) from time to time for the purpose only of inspection and enforcement of the terms of the easement thereby granted; and

(b) in its discretion, to erect the aforementioned marker or sign.

Nothing herein shall be construed to convey a right to the public of access or use of the Property, and the Grantor, her heirs, executors, administrators, successors and assigns shall retain exclusive right to such access and use for all purposes, present and future, subject only to the provisions herein recited.

If at any time, the Grantee shall cease to exist, then on the happening of such event, this easement and the rights and privileges by this instrument granted and given to Grantee shall cease and determine to the same effect as though this instrument had never been executed by the Grantor.

TO HAVE AND TO HOLD the aforegranted easement, with all its rights and privileges to the Grantee, its successors and assigns, forever.

TIMOTHY HOUSE (TH)
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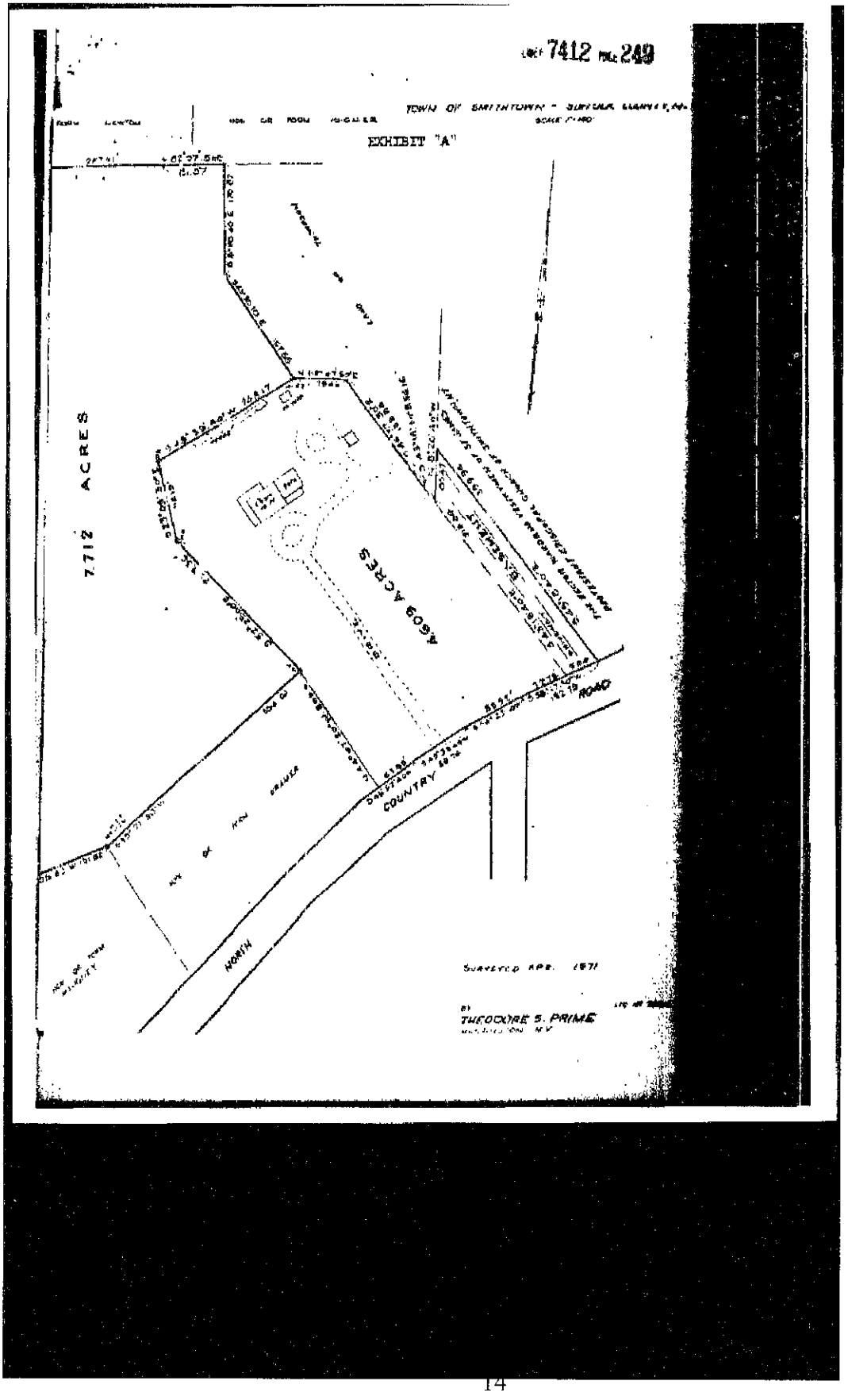
ST. JAMES, NEW YORK 11780

TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)



TIMOTHY HOUSE (TH)
481 NORTH COUNTRY ROAD
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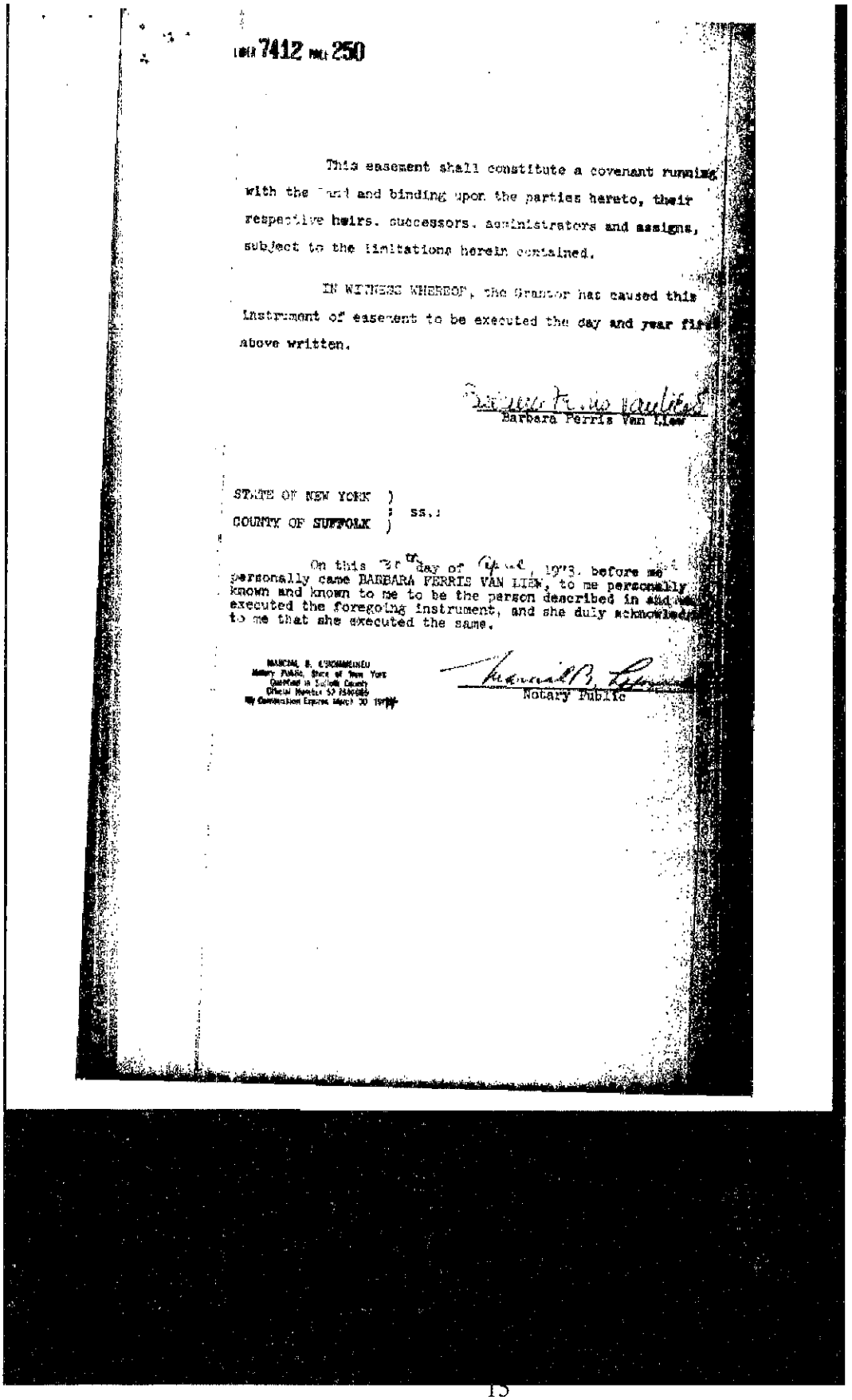

LIBER 7412 PAGE 250

This easement shall constitute a covenant running with the land and binding upon the parties hereto, their respective heirs, successors, administrators and assigns, subject to the limitations herein contained.

IN WITNESS WHEREOF, the Grantor has caused this instrument of easement to be executed the day and year first above written.

Barbara Ferris Van Lien

STATE OF NEW YORK)
: ss.:
COUNTY OF SUFFOLK)

On this 3rd day of [illegible], 1973, before me personally came BARBARA FERRIS VAN LIEN, to me personally known and known to me to be the person described in and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

MARCIAL B. [illegible]
Notary Public, State of New York
Qualified in Suffolk County
Official Number 52-[illegible]
My Commission Expires March 30 19[illegible]

Notary Public

TIMOTHY HOUSE (TH)
481 NORTH COUNTRY ROAD
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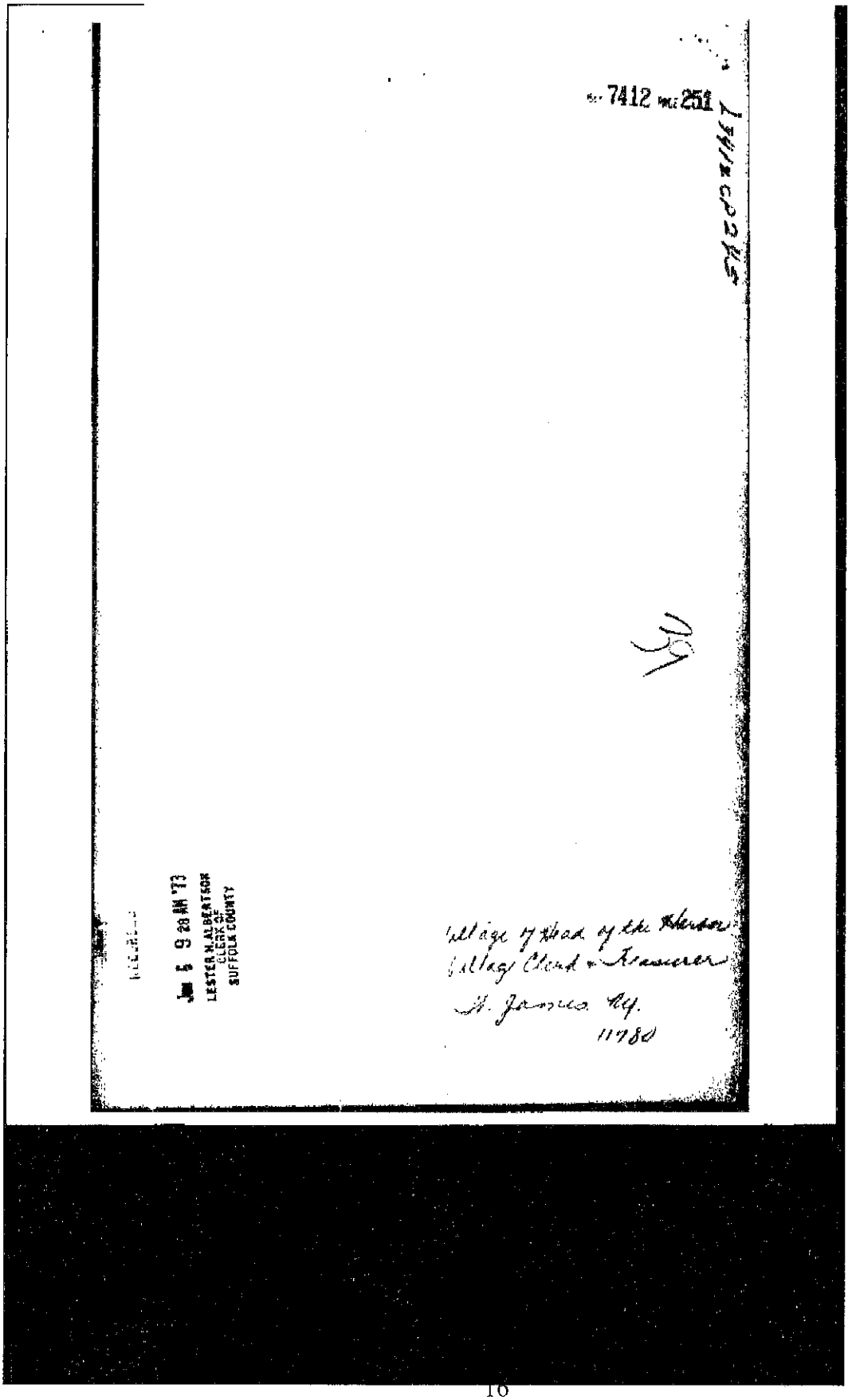
TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)



TIMOTHY HOUSE (TH)
481 NORTH COUNTRY ROAD
ST. JAMES, NEW YORK 11780

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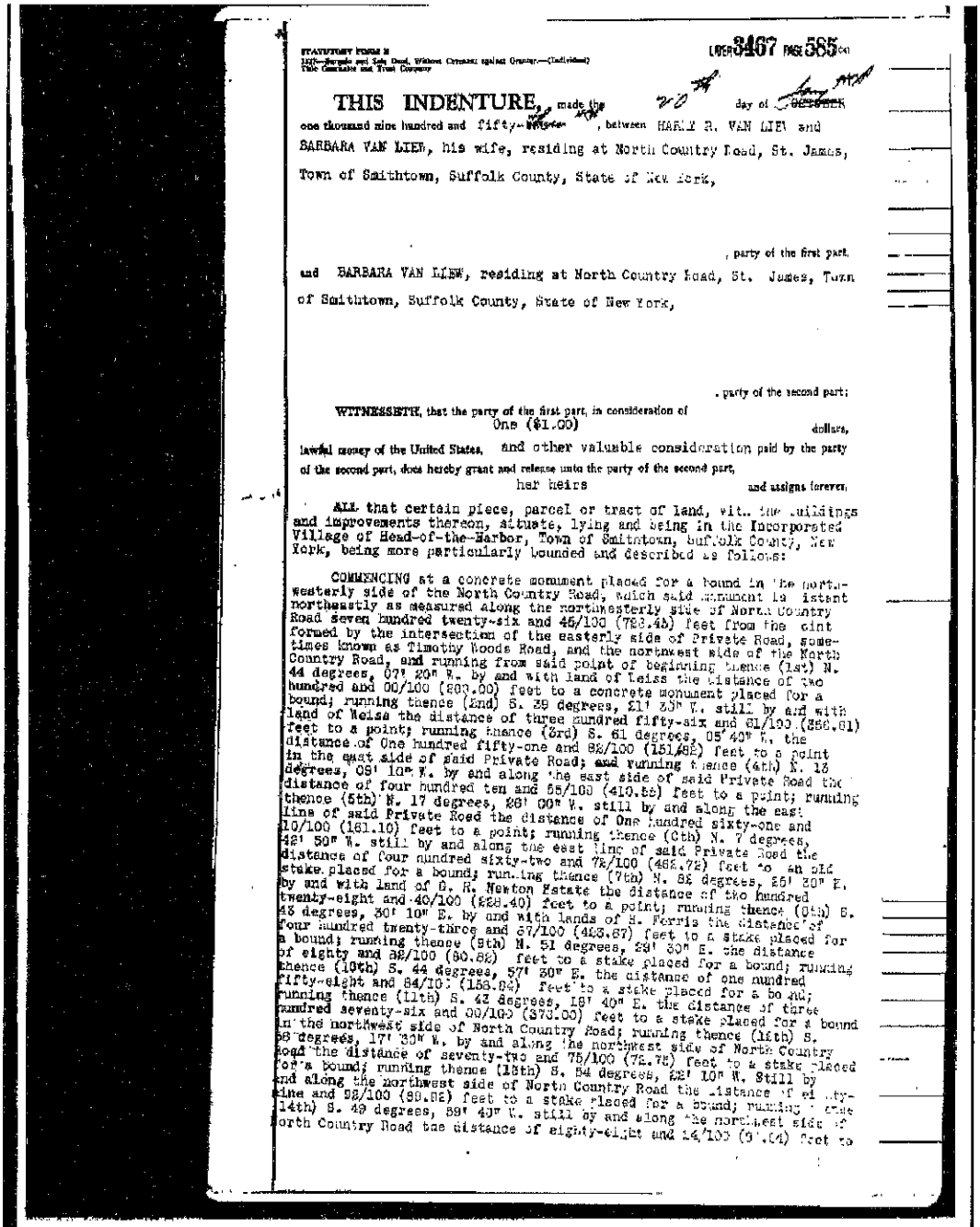

STATUTORY FORM 3
Bargain and Sale Deed, Without Covenant against Grantor—(Individual)
The Guardian and Trust Company

LIBER 3467 PAGE 585 (30)

THIS INDENTURE, made the 20th day of October
one thousand nine hundred and fifty-seven, between HARLY R. VAN LIEW and
BARBARA VAN LIEW, his wife, residing at North Country Road, St. James,
Town of Smithtown, Suffolk County, State of New York,

, party of the first part,

and BARBARA VAN LIEW, residing at North Country Road, St. James, Town
of Smithtown, Suffolk County, State of New York,

, party of the second part;

WITNESSETH, that the party of the first part, in consideration of
One ($1.00) dollars,
lawful money of the United States, and other valuable consideration paid by the party of the second part, does hereby grant and release unto the party of the second part,
her heirs and assigns forever,

ALL that certain piece, parcel or tract of land, with the buildings and improvements thereon, situate, lying and being in the Incorporated Village of Head-of-the-Harbor, Town of Smithtown, Suffolk County, New York, being more particularly bounded and described as follows:

COMMENCING at a concrete monument placed for a bound in the northwesterly side of the North Country Road, which said monument is distant northeastly as measured along the northwesterly side of North Country Road seven hundred twenty-six and 45/100 (726.45) feet from the point formed by the intersection of the easterly side of Private Road, sometimes known as Timothy Woods Road, and the northwest side of the North Country Road, and running from said point of beginning thence (1st) N. 44 degrees, 07' 20" W. by and with land of Weiss the distance of two hundred and 00/100 (200.00) feet to a concrete monument placed for a bound; running thence (2nd) S. 29 degrees, 21' 30" W. still by and with land of Weiss the distance of three hundred fifty-six and 61/100 (356.61) feet to a point; running thence (3rd) S. 61 degrees, 05' 40" E. the distance of One hundred fifty-one and 82/100 (151.82) feet to a point in the east side of said Private Road; and running thence (4th) N. 18 degrees, 09' 10" W. by and along the east side of said Private Road the distance of four hundred ten and 55/100 (410.55) feet to a point; running thence (5th) N. 17 degrees, 26' 00" W. still by and along the east line of said Private Road the distance of One hundred sixty-one and 10/100 (161.10) feet to a point; running thence (6th) N. 7 degrees, 42' 50" W. still by and along the east line of said Private Road the distance of four hundred sixty-two and 72/100 (462.72) feet to an old stake placed for a bound; running thence (7th) N. 82 degrees, 55' 30" E. by and with Land of G. R. Newton Estate the distance of two hundred twenty-eight and 40/100 (228.40) feet to a point; running thence (8th) S. 43 degrees, 30' 10" E. by and with lands of H. Ferris the distance of four hundred twenty-three and 67/100 (423.67) feet to a stake placed for a bound; running thence (9th) N. 51 degrees, 29' 30" E. the distance of eighty and 88/100 (80.88) feet to a stake placed for a bound; running thence (10th) S. 44 degrees, 57' 30" E. the distance of one hundred fifty-eight and 84/100 (158.84) feet to a stake placed for a bound; running thence (11th) S. 42 degrees, 18' 40" E. the distance of three hundred seventy-six and 00/100 (376.00) feet to a stake placed for a bound in the northwest side of North Country Road; running thence (12th) S. 38 degrees, 17' 30" W. by and along the northwest side of North Country Road the distance of seventy-two and 75/100 (72.75) feet to a stake placed for a bound; running thence (13th) S. 54 degrees, 22' 10" W. Still by and along the northwest side of North Country Road the distance of eighty-nine and 98/100 (89.98) feet to a stake placed for a bound; running thence (14th) S. 49 degrees, 58' 40" W. still by and along the northwest side of North Country Road the distance of eighty-eight and 14/100 (88.14) feet to

TIMOTHY HOUSE (TH)
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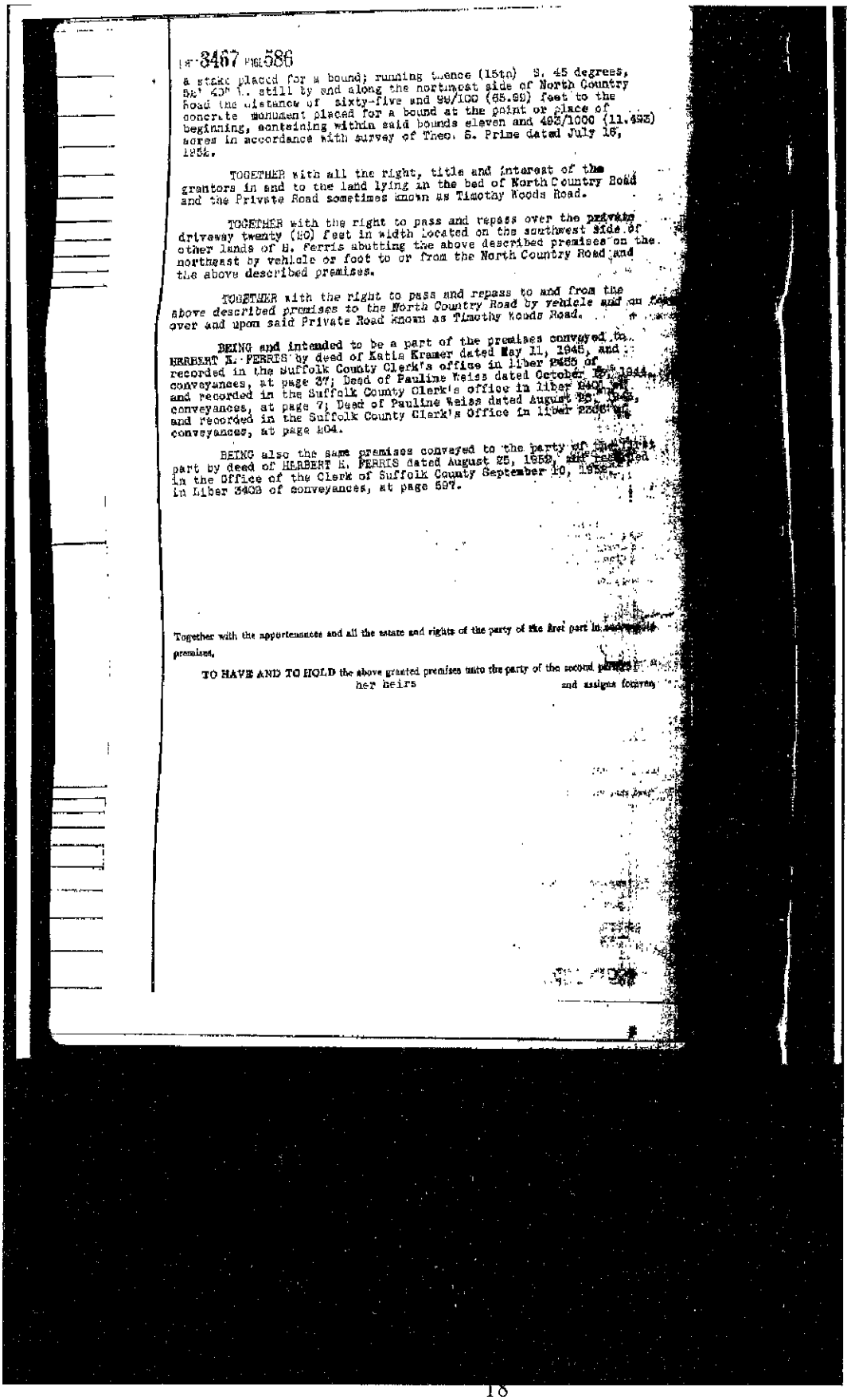
ST. JAMES, NEW YORK 11780

TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)



LIBER 3467 PAGE 586

a stake placed for a bound; running thence (15th) S. 45 degrees, 58' 45" E. still by and along the northwest side of North Country Road the distance of sixty-five and 99/100 (65.99) feet to the concrete monument placed for a bound at the point or place of beginning, containing within said bounds eleven and 493/1000 (11.493) acres in accordance with survey of Theo. S. Prime dated July 16, 1954.

TOGETHER with all the right, title and interest of the grantors in and to the land lying in the bed of North Country Road and the Private Road sometimes known as Timothy Woods Road.

TOGETHER with the right to pass and repass over the private driveway twenty (20) feet in width located on the southwest side of other lands of H. Ferris abutting the above described premises on the northeast by vehicle or foot to or from the North Country Road and the above described premises.

TOGETHER with the right to pass and repass to and from the above described premises to the North Country Road by vehicle and on foot over and upon said Private Road known as Timothy Woods Road.

BEING and intended to be a part of the premises conveyed to HERBERT H. FERRIS by deed of Katie Kramer dated May 11, 1945, and recorded in the Suffolk County Clerk's office in Liber 2455 of conveyances, at page 37; Deed of Pauline Weiss dated October [illegible], 1944, and recorded in the Suffolk County Clerk's office in Liber 2407 of conveyances, at page 7; Deed of Pauline Weiss dated August [illegible], 1945, and recorded in the Suffolk County Clerk's Office in Liber 2506 of conveyances, at page 404.

BEING also the same premises conveyed to the party of the first part by deed of HERBERT H. FERRIS dated August 25, 1959, and recorded in the Office of the Clerk of Suffolk County September 10, 1959 in Liber 3403 of conveyances, at page 597.

Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises,

TO HAVE AND TO HOLD the above granted premises unto the party of the second part, her heirs and assigns forever.

TIMOTHY HOUSE (TH)
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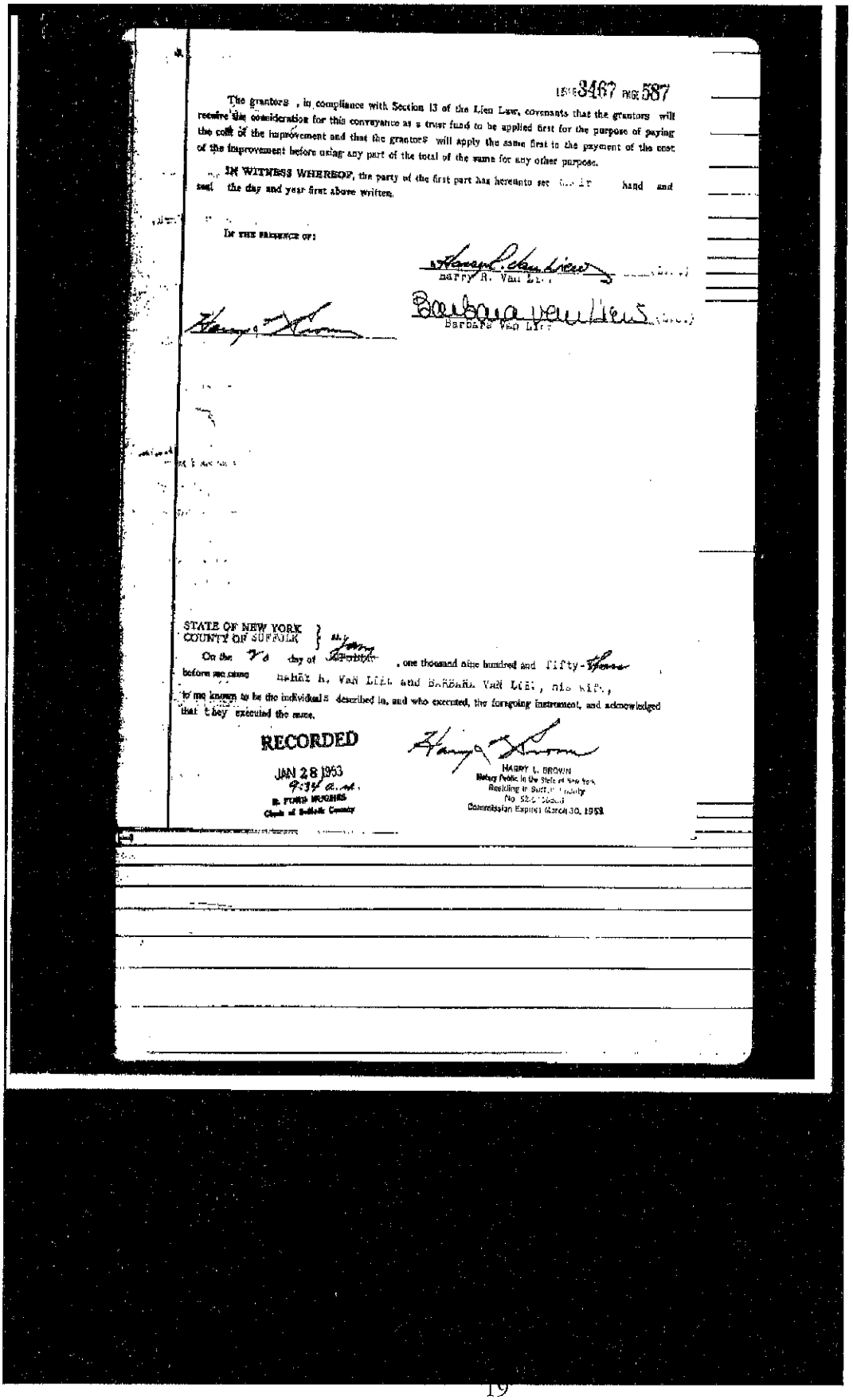
TH RECORDED HISTORIC PLACE AND OPEN SPACE EASEMENTS & RECORDED RIGHT OF WAY (ROW) OVER TH LOT 37 (BACK DRIVE)



LIBER 3467 PAGE 587

The grantors , in compliance with Section 13 of the Lien Law, covenants that the grantors will receive the consideration for this conveyance as a trust fund to be applied first for the purpose of paying the cost of the improvement and that the grantors will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

IN WITNESS WHEREOF, the party of the first part has hereunto set [illegible] hand and seal the day and year first above written.

IN THE PRESENCE OF:

Harry R. Van Lier

Barbara Van Liers

STATE OF NEW YORK
COUNTY OF SUFFOLK } ss:

On the 26 day of January, one thousand nine hundred and fifty-three before me came HARRY R. VAN LIER and BARBARA VAN LIER, his wife, to me known to be the individuals described in, and who executed, the foregoing instrument, and acknowledged that they executed the same.

RECORDED
JAN 28 1953
9:34 a.m.
R. FORD ROGERS
Clerk of Suffolk County

HARRY L. BROWN
Notary Public in the State of New York
Residing in Suffolk County
No. 52-0[illegible]
Commission Expires March 30, 1953

813 F.3d 510 (2016)

ANDON, LLC; Reconciling People Together in Faith Ministries, LLC, Plaintiffs-Appellants,

v.

The CITY OF NEWPORT NEWS, VIRGINIA, Defendant-Appellee.

No. 14-2358.

United States Court of Appeals, Fourth Circuit.

Argued: December 9, 2015.
Decided: February 9, 2016.

511 *511 Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. (4:14-cv-00076-RGD-LRL), Robert G. Doumar, Senior District Judge.

ARGUED: Michael Bruce Ware, Schempf & Ware, PLLC, Yorktown, Virginia, for Appellants. Darlene P. Bradberry, Office of the City Attorney for the City of Newport News, Newport News, Virginia, for Appellee. ON BRIEF: Adrienne Michelle Sakyi, Schempf & Ware, PLLC, Yorktown, Virginia, for Appellants.

512 *512 Before WILKINSON, KEENAN, and HARRIS, Circuit Judges.

Affirmed by published opinion. Judge KEENAN wrote the opinion, in which Judge WILKINSON and Judge HARRIS joined.

BARBARA MILANO KEENAN, Circuit Judge:

In this appeal, we consider whether the district court erred in dismissing with prejudice a complaint filed by two entities, Andon, LLC, and Reconciling People Together in Faith Ministries, LLC (collectively, the plaintiffs) against the City of Newport News, Virginia (the City, or Newport News). The plaintiffs' complaint alleged that the City, acting through its Board of Zoning Appeals (BZA), violated the Religious Land Use and Institutionalized Persons Act (RLUIPA, or the Act), 42 U.S.C. § 2000cc *et seq.*, by denying the plaintiffs' request for a variance to permit a certain property to be used as a church facility.

Upon our review, we conclude that the plaintiffs failed to state a claim that the BZA's decision imposed a substantial burden on the plaintiffs' right of religious exercise. We also conclude that the district court did not abuse its discretion in denying the plaintiffs' request to amend their complaint, because any such amendment would have been futile. We therefore affirm the district court's judgment.

I.

In 2012, Walter T. Terry, Jr. formed a congregation for religious worship known as

Reconciling People Together in Faith Ministries, LLC (the congregation) in Newport News, and served as its pastor. Although the members of the congregation initially gathered to worship in a local business owned by Terry, they later sought a larger location for their use.

Terry ultimately found a suitable property, which included an office building (the building) and a small parking lot, that was offered for "lease or sale" by Andon, LLC (Andon). The property is located at 6212 Jefferson Avenue in Newport News (the property).

Andon had purchased the property, a 0.32-acre parcel of land, in 2011. Since 1997, the property continuously has been classified for commercial use under the City's zoning ordinance. The ordinance provides that properties zoned for commercial use may be used for a "community facility," including a "place of worship" or church, only when four conditions are satisfied:

> (a) access is provided from a public street directly to the property; (b) no use is operated for commercial gain; (c) no building or structure, nor accessory building or structure is located within 100 feet of any side or rear property line which is zoned single-family residential; and, (d) any parking lot or street serving such use is located 25 feet or more from a side or rear property line zoned single family residential.

Newport News, Va. Municipal Code § 45-519.

Although the property complied with three of these conditions, the property did not satisfy the "setback" requirement in subsection (c), because the building is located fewer than 100 feet from the rear and side property lines that are adjacent to properties zoned for "single-family residential" use.[1] Despite knowledge of this problem, the congregation
513 entered into a written lease agreement with Andon that *513 was contingent on Andon obtaining "City approval" allowing operation of a church facility on the property. Seeking to satisfy this contingency in the lease agreement, Andon filed with the BZA an application requesting a variance from the setback requirement.

After reviewing Andon's application, the City Codes and Compliance Department (the Compliance Department) filed a report with the BZA concerning the variance request. The report stated that the BZA, prior to issuing a variance, must first find that: (1) "strict application of the ordinance would produce an undue hardship" relating to the property "not shared generally by other properties"; (2) such a variance "will not be of substantial detriment to adjacent property"; and (3) "the character of the district will not be changed" by granting the variance. *See* Newport News, Va. Municipal Code § 45-3203(c). Based on these restrictions, the Compliance Department recommended that the BZA deny the variance, because the property could be used for other purposes without a variance, and because denial of a variance would not cause Andon to suffer a hardship unique among other commercial property owners in the vicinity.

After holding a public hearing, the BZA adopted the Compliance Department's recommendation and voted to deny the variance request. Andon appealed from the BZA decision to a Virginia state circuit court, which upheld the BZA's determination.

The plaintiffs filed the present suit in federal district court alleging that the BZA's denial of their variance request imposed a substantial burden on the plaintiffs' religious exercise in violation of RLUIPA, 42 U.S.C. § 2000cc(a)(1) (the substantial burden claim). The

plaintiffs alleged that the BZA's action caused "delay in obtaining a viable worship location" and "uncertainty as to whether ... the [c]ongregation will be able to go forward with the lease of the [p]roperty."

The plaintiffs attached to their complaint an affidavit from Terry, who stated that he "could not find a[n alternate property] that was the appropriate size, location, and price" to serve as a place of worship for the congregation. He also stated in the affidavit that " [m]any of the [alternative] buildings were too large and too expensive for [the] young congregation."

The City moved to dismiss the complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The district court granted the City's motion, denied the plaintiffs' request to file an amended complaint, and entered judgment in favor of the City.[2] The plaintiffs timely filed this appeal.

II.

We review de novo the district court's dismissal of a complaint under Rule 12(b)(6) for failure to state a claim. *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 455 (4th Cir.2013). To survive a motion to dismiss, a complaint must "state a
514 claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 *514 S.Ct. 1937, 173 L.Ed.2d 868 (2009). When reviewing the district court's action, we consider the factual allegations in the plaintiffs' complaint as true. *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 764 (4th Cir.2003).

The plaintiffs argue that the district court erred in dismissing their complaint of a RLUIPA violation, contending that the BZA's action denying a variance imposed a substantial burden on their religious exercise. Citing our decision in *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548 (4th Cir.2013), the plaintiffs assert that they plausibly alleged a claim under RLUIPA, because, as a result of the BZA's action, the congregation has been unable to find a suitable location in the City for worship, and the plaintiffs have suffered "delay, expense, and uncertainty" in establishing a church location and in executing the lease agreement. The plaintiffs alternatively contend that the district court abused its discretion in refusing their request to amend their complaint. We disagree with the plaintiffs' arguments.

RLUIPA contains two provisions limiting governmental regulation of land use with respect to religious exercise.[3] The first such RLUIPA provision prohibits governmental entities from imposing land use restrictions that: (1) treat a religious organization "on less than equal terms" with a nonreligious organization; or (2) discriminate against any organization on the basis of religion. 42 U.S.C. § 2000cc(b)(1), (2).

The second RLUIPA provision addressing governmental regulation of land use, on which the plaintiffs base their claim, does not require a showing of discriminatory governmental conduct. 42 U.S.C. § 2000cc(a)(1); *see Bethel*, 706 F.3d at 557. Instead, this provision prohibits a governmental entity from imposing or implementing a

> land use regulation ... that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental

> interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1).

To state a substantial burden claim under RLUIPA, a plaintiff therefore must show that a government's imposition of a regulation regarding land use, or application of such a regulation, caused a hardship that substantially affected the plaintiff's right of religious exercise. *See* Bethel, 706 F.3d at 556; *Guru Nanak Sikh Soc'y of Yuba City v. Cty. of Sutter*, 456 F.3d 978, 988-89 (9th Cir.2006); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir.2003). We addressed the scope of substantial burden claims under RLUIPA in our decision in *Bethel*.

The plaintiff in *Bethel* asserted a substantial burden claim against a county that had adopted two land use regulations after the plaintiff had purchased property for the then-permitted purpose of constructing a large church. 706 F.3d at 553-55. The first
515 regulation at issue in *Bethel* banned *515 extension of public water and sewer services to certain classifications of property, including the plaintiff's property. *Id.* at 553. In response to the county's implementation of this regulation, the plaintiff modified its construction plans and proposed to build a smaller church that operated on a private septic system. *Id.* at 554. Before those plans were approved, however, the county adopted a second regulation applicable to the plaintiff's property, which prohibited the construction of private institutional facilities including churches. *Id.*

Although the county regulations we considered in *Bethel* did not target religious exercise and applied generally to both secular and religious uses, we concluded that the plaintiff nevertheless presented a triable RLUIPA claim, because the regulations substantially pressured the plaintiff to modify and ultimately to abandon its pre-existing plan to construct a church. *Id.* at 556-59. And, we explained, although other real property may have been available for the plaintiff to purchase, the "delay, uncertainty, and expense" of selling the plaintiff's property and finding an alternate location increased the burden imposed on the plaintiff's religious exercise. *Id.* at 557-58. In reaching this conclusion, we emphasized that a critical function of RLUIPA's substantial burden restriction is to protect a plaintiff's reasonable expectation to use real property for religious purposes. *Id.* at 556-57; *see* Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir.2007) (explaining that when an organization buys property "reasonably expecting to obtain a permit, the denial of the permit may inflict hardship" on the organization).

The circumstances of the present case are materially different from those presented in *Bethel*. The plaintiffs here never had a reasonable expectation that the property could be used as a church. When the plaintiffs entered into the prospective lease agreement, the property was not a permitted site for a community facility such as a church, and had not met applicable setback requirements for that type of use for at least 14 years. Before Andon filed the application seeking a variance, the Zoning Administrator had informed Andon that the application would not be approved for failure to meet the setback requirement. Thus, the plaintiffs assumed the risk of an unfavorable decision, and chose to mitigate the impact of such a result by including the contingency provision in the lease. Accordingly, unlike the governmental action at issue in *Bethel*, the BZA's denial of the variance in the present case did not alter any pre-existing expectation that the plaintiffs would be able to use the property for a church facility, or cause them to suffer delay and uncertainty in locating a place of worship.

Because the plaintiffs knowingly entered into a contingent lease agreement for a non-conforming property, the alleged burdens they sustained were not imposed by the BZA's action denying the variance, but were self-imposed hardships. *See* Petra Presbyterian Church, 489 F.3d at 851 (because the plaintiff purchased property with knowledge that the permit to use the property for a church would be denied, the plaintiff "assumed the risk of having to sell the property and find an alternative site for its church"). A self-imposed hardship generally will not support a substantial burden claim under RLUIPA, because the hardship was not imposed by governmental action altering a legitimate, pre-existing expectation that a property could be obtained for a particular land use. *See* Bethel, 706 F.3d at 556-58; Petra Presbyterian Church, 489 F.3d at 851. Therefore, we hold that under these circumstances, the plaintiffs have not satisfied the "substantial burden" requirement of governmental *516 action under RLUIPA.[4] *See* Bethel, 706 F.3d at 556; *Guru Nanak Sikh Soc'y of* Yuba City, 456 F.3d at 988-89; Civil Liberties for Urban Believers, 342 F.3d at 761.

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Our conclusion is not altered by the plaintiffs' further contention that they have been unable to find another property that meets the congregation's desired location, size, and budgetary limitations. The absence of affordable and available properties within a geographic area will not by itself support a substantial burden claim under RLUIPA. *See* Civil Liberties for Urban Believers, 342 F.3d at 762 (concluding that the "scarcity of affordable land available" and costs "incidental to any high-density urban land use" represent "ordinary difficulties associated with location" and do not support a substantial burden claim under RLUIPA).

We further observe that if we agreed with the plaintiffs that the BZA's denial of a variance imposed a substantial burden on their religious exercise, we effectively would be granting an automatic exemption to religious organizations from generally applicable land use regulations. Such a holding would usurp the role of local governments in zoning matters when a religious group is seeking a variance, and impermissibly would favor religious uses over secular uses. *See* Petra Presbyterian Church, 489 F.3d at 851 (reasoning that the substantial burden requirement must be taken seriously, or religious organizations would be free "from zoning restrictions of any kind"); Civil Liberties for Urban Believers, 342 F.3d at 762 (explaining that no "free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise").

The plain language of RLUIPA, however, prevents such a result. By requiring that any substantial burden be imposed by governmental action and by carefully balancing individual rights and compelling governmental interests, the language of RLUIPA demonstrates that Congress did not intend for RLUIPA to undermine the legitimate role of local governments in enacting and implementing land use regulations. *See* Petra Presbyterian Church, 489 F.3d at 851; Civil Liberties for Urban Believers, 342 F.3d at 762.

Finally, we conclude that the district court did not abuse its discretion in denying the plaintiffs' request to amend their complaint. *See* HealthSouth Rehab. Hosp. v. Am. Nat'l Red Cross, 101 F.3d 1005, 1010 (4th Cir.1996) (stating the applicable standard of review). Because the plaintiffs did not have a reasonable expectation to use the property as a church and any burden on their religious exercise was self-imposed, the plaintiffs cannot articulate any set of facts demonstrating that an amendment would survive the City's motion to dismiss. Thus, we agree with the district court that any amendment to the complaint would have been futile. *See* Scott v. Family Dollar Stores, Inc., 733 F.3d

105, 121 (4th Cir.2013) ("Denying leave to amend is appropriate when ... the amendment would have been futile.").

III.

For these reasons, we affirm the district court's judgment dismissing with prejudice the plaintiffs' complaint against the City.

AFFIRMED

[1] The building is located 33 feet, 85 feet, and 80 feet away from the rear and side property lines abutting neighboring residential properties.

[2] The City also argued in its motion to dismiss that Andon lacked standing to bring the RLUIPA claim. The district court disagreed, and the City does not challenge this ruling on appeal. Although a litigant's standing presents a jurisdictional question that may be considered sua sponte by this Court, *see* Benham v. City of Charlotte, 635 F.3d 129, 134 (4th Cir.2011), we need not address the district court's ruling regarding Andon's standing, because the congregation unquestionably had standing to file suit alleging a violation under RLUIPA.

[3] Under RLUIPA, "'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). And "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7)(B).

[4] We do not reach the merits of the plaintiffs' separate, speculative contention that if the congregation had purchased the property, instead of entering into a contingent lease agreement, the financial loss sustained would have been sufficient to state a substantial burden claim. We decline to pass judgment on facts not before us.