

APPLICATION FOR ZONING ACTION

TO: Boone County Planning Commission City of Union Board of Adjustment
 City of Florence Board of Adjustment City of Walton Board of Adjustment
 Boone County Board of Adjustment Zoning Enforcement Officer

OR: Zoning Text Amendment Zoning Map Amendment
 Comprehensive Plan Change Preliminary Plat Approval
 Improvement Plat Approval Final Plat or Deed Plat
 Conditional Use Permit Site Plan Review
 Concept Development Plan Historic District Overlay
 Preliminary Development Plan Sign Permit or Zoning Permit
 Change of Non-Conforming Use Appeal or Variance
 Design Review Board Hearing and Certificate of Appropriateness

Applicant: LOOMIS ENTERPRISES INC & ODELL BERRY Owner Agent

Address: 5 W 5TH ST.

COVINGTON, KY Telephone: 606-581-5343

Location: A765 BURLINGTON PIKE, BURLINGTON, KY 41005

Name of Owner: SAME

Address of Owner: SAME

Zone: I-3 SURFACE MINING DIST Area in Acres: 68

Deed Book: 306 Page No.: 279 Group No.: 2028
310 251

Description of Request: DIMENSIONAL VARIANCE TO DELETE

HAUL ROAD FROM RESTRICTIONS ON BUFFER STRIPS,
LOOMIS ENTERPRISES INC.

Owner's Signature: Robert L. Loomis Pres.

Date: 12/14/83 Applicant's Signature: Odell Berry

FOR PLANNING COMMISSION USE: 100.00
50.00 pub. deposit

Application date and fee of \$ 150.00 Received: December 16, 1983

Referred to: _____ For Meeting Date: _____

Action: _____ Date: _____

BOARD OF ADJUSTMENT AND ZONING APPEALS

CHECKLIST

I. General Information

1. Applicant's name: Loomis Enterprises, Inc. & Odell Berry

Interest in property: OWNERS

2. Location and/or address of property: Located on Ky. 18 being about
800 feet west of the intersection of Woolper Road on the south
side of the road.
Deed book and page number: BOOK: 306,310 PAGE:279,251 GRUOP:2028

3. Request of the applicant: The request is to permit a variance from
the requirements of the haul road setback from both adjoining
zones and from the requirement from the setback for the distance
from a residence in the adjoining zones.

4. Present zoning of subject property including page number and
section number(s) of the Zoning Order (Ordinance): Presently
zoned Rural Suburban, Agricultural, and Agricultural Estate.

The request is to permit the variance while the rezoning request is being
heard for the 1-3 zoning.

5. Present use of the subject property: Presently the property is
not in use but is planned to become a gravel extraction location.

Present use of the adjoining properties: All adjoining
properties are currently in use as residential and agriculture with
undeveloped land.

III. Variance Requests

1. What variance is needed and what section of the Zoning Order (Ordinance) does it apply to? A variance is needed in the requirement as provided for under Section, 1055 Number 16. The road as shown for the development will be 17 feet from the next zone and 150
2. What could be the unique conditions justifying the variance? 250, and 150 from nearby houses.
 1. the entrance to the site is located as an access easement to the site and was located at the time that at least one house and maybe the others had not been built as of the time of the provision of the easement to the tract.
3. What reasonable use of the land will be denied the applicant if the variance is not granted? If the request is denied and the site cannot be provided with the required setback for the haul road, then the development of the gravel extraction could not be on the land.
4. Has the applicant caused the unique conditions? This tract existed prior to the current regulations, along with the easement.
5. Will the variance be detrimental to the public welfare or preserve it and how? Will it alter the essential character of the neighborhood? If granted, This will put an industrial truck road very close to existing residences. Traffic would essentially be semi-trucks hauling gravel from a planned gravel extraction pit. This will not change the character because of the existence of a number of drives near to each other up and down Ky. 18.

Though The Gravel Extraction Industry will be new, and this will be new and would change the character if the zone change is recommended eventually at the Commission level and the Fiscal Court level would approve the zone change request.

BOONE COUNTY BOARD OF ADJUSTMENT

MINUTES

JANUARY 11, 1984

6:30 P.M.

Vice Chairman Archambault called the Boone County Board of Adjustment meeting to order at 6:33 p.m.. Three members were present; Chairman Whitton and Mr. Nevel were absent. Staff members present were Mr. Wilson, Mr. Block, Mr. Lynn and Mrs. Ryan.

Vice Chairman Archambault called for any discussion regarding the minutes of December 14, 1983. Mr. Ryan moved to approve the minutes of December 14, 1983; Mr. Houston seconded. The motion carried unanimously.

Vice Chairman Archambault proceeded to hear the request of Loomis Enterprise Inc. and Odell Berry for a Dimensional Variance to delete the requirements for the haul road as stated in Section 1055, No. 16 for the Industrial Three, I-3, zone, Surface Mining District, of the Boone County Zoning Regulations on a parcel of land located at 5765 Burlington Pike, Burlington, Boone County, Kentucky, in an Agriculture One (A-1) and Agriculture Two (A-2) zoning district.

Mr. Block presented the Enforcement Officer's Report and pointed out that Mr. Lynn, himself, had visited the site. Mr. Block gave a slide presentation of the site.

Vice Chairman Archambault outline the manner in which the meeting would be conducted.

Mr. Wilson stated the Board would not be taking final action on this variance request tonight as the application involves two requests. Mr. Wilson stated that the applicant has applied for a zone change request to be heard by the Boone County Planning Commission which is set for a Public Hearing date January 25, 1984, at 8:00 P.M. at this location. Mr. Wilson pointed out that this variance is on the haul road, not to change the zoning. Mr. Wilson stated this Board feels uncomfortable making any kind of final action in favor or denial of this variance request before action is taken on the zone change request as they feel action may somehow influence that request. He continued the applicant has agreed to waive the time limitations so that final action will not be taken by this Board until action has been taken on the zone change. Vice Chairman Archambault called for comments from those in favor of the variance request.

Mr. Jerry Dusing, Attorney, Florence, Kentucky stepped forward representing the applicant. Mr. Dusing introduced Mr. Robert Loomis, retired engineer; Mr. Robert Kirby, a principal of A & K Resources; and Odell Berry, partial land owner

with Mr. Loomis. Mr. Dusing submitted to Board members the perspective development plan. Mr. Dusing pointed out they were present tonight because of requirement B 16 under Section 1055 in the I-3 zone of the zoning regulations that requires a buffer strip. Mr. Dusing stated the regulations indicate no excavation, embankment, stock pile, spoil pile or haul road shall be constructed within 50 feet of another zone or within 250 feet of a residence located in another zone. Mr. Dusing pointed out that as shown on the development plan the site is 809 feet back from Ky. 18 which he felt was the intent of the drafting of a buffer strip. Mr. Dusing stated they were requesting a dimensional variance because of the longtime existing road is within 50 feet of another zone which is across the street. Mr. Dusing stated it was interesting to him to see that requirement, because it would mean a dimensional variance would be needed anytime you were not completely surrounded by I-3. Mr. Dusing stated the only residence located within the 250 foot requirement is on the southside of Ky 18, owned by Mrs. Ossie Banks. The location of this residence was pointed out to Board members on the site plan. Mr. Dusing presented a letter for the record signed by Mrs. Ossie Banks stating she was not in opposition to the request. Mr. Dusing stated this road has existed for many years and continues back to the Western Union tower. He continued it only makes sense from an engineering standpoint to use the existing road. Mr. Dusing stated the road would be widened and asphalted. Mr. Dusing stated that Mr. John Hensley purchased the property between Ky 18 and the gravel extraction operation in August at which time he was told of their intentions before selling him the property and he had no opposition to the facility and operation behind him. Mr. Dusing submitted a letter for the record signed by Mr. Hensley stating he had no opposition to the request. Mr. Dusing added he felt that the intent of the buffer strips made sense, but here there is over an 800 foot buffer strip. He continued with respect to the haul road there is one home on that side of Ky 18 which is approximately 150 feet away which is the reason for the dimensional variance along with the home across the street from Ky 18. Mr. Dusing stated there is a significant amount of gravel truck traffic at the bottom of the hill as there has been for many years along this stretch of Ky 18. Mr. Dusing stated with respect to the technical requirement of being within 50 foot of another zone, the variance is needed because of the other zone across the street. Vice Chairman Archambault called for any further questions. Vice Chairman Archambault stated the Board would now hear the opposition.

Mrs. Bushelmann stated although she was not familiar with the laws relating to the haul road she was present to state she does not want a gravel pit, road, or the trucks. Mrs. Bushelman stated in her opinion if the variance was granted it is another step in getting it zoned in the direction that they need. In response to Mr. Archambault, Mrs. Bushelmann stated her property is almost directly across from haul road. Mrs. Bushelmann stated her opposition to this request.

Mr. Mike Martin stepped forward and stated the obvious thing that he could see is that the property valuation from that point on back to the intersection would decrease. It might sound in the other direction but those trucks alone would be enough to do it. In response to Vice Chairman Archambault, Mr. Martin stated he was closer to Mr. Walton's property than to Commissary Road. Mr. Martin stated he purchased the property with the intention of building a house but if this gravel pit went in he did not know if he would still want to build.

Mrs. Bushelmann asked if there was any more gravel further down and if they planned to extend the operation toward Belleview. Vice Chairman Archambault stated it was his understanding that this request as presented was all that is going to be developed. In response to Mr. Archambault, Mr. John Walton stated to his knowledge this Glacial material is a hard thing to follow. He continued his

property joined through the west side and had some of the same type formation but whether it was ever mined or if it would ever be worth mining he could not say at this point. Mr. Walton stated he had known Mr. Berry for years and in his opinion this is an ambitious project to get material of this glacial matter out of there. Mr. Walton pointed out glacial material is sort of unique in the fact that it is transported material, put here by glaciers some 40 million years ago. Mr. Walton stated if there is that much gravel with in their boundaries, they might sell if they are lucky. Mr. Walton continued he had used some of his deposits; it makes good base material. Mr. Walton stated whether this gravel pit would trade off of Belleview remain was questionable. Mr. Archambault called for any further comments in opposition. Mr. Mike Martin stated his concern that once money was spent on the haul road the request would be locked up. Vice Chairman Archambault stated as far as the Board was concerned the money would not be spent until there was a zone change. Vice Chairman Archambault pointed out they are inquiring as to whether a variance can be granted to develop this road based on what is presented. Vice Chairman Archambault stated the Board is inclined to defer action on this request until the zone change has been made. He continued the Board is not going to make a decision tonight. Vice Chairman Archambault asked if Western Union owned the piece of land where the tower was. Mr. Dusing stated, "Yes", and they use the proposed haul road as access to their tower. In response to Mr. Ryan, Mr. Dusing stated there are 68 acres in the proposed development tract. Mrs. Bushelmann stated she felt that the road was misrepresented, as it is seldom used and is not like an ordinary road. Vice Chairman Archambault stated he could see the concern regarding the traffic. Mrs. Bushelmann stated her concern regarding the truck traffic.

In response to Vice Chairman Archambault, Mr. Wilson stated since the applicants have agreed to waive the time limitations on this request until action has been taken on the zone change his recommendation to the people interested in this request leave their name and phone number to be notified of the date a meeting will be scheduled to hear final action on this dimensional variance request. Mr. Wilson notified those interested in the zone change the Public Hearing would be January 25, 1984, at 8:00 P.M. at the Boone County Administration Building. Vice Chairman Archambault suggested that the people involved be at the hearing as this would be a Public Hearing, a chance to voice their opinion. Vice Chairman Archambault pointed out a zone change has been made it enables the Board of Adjustment to act on variance request. Mr. Mike Susko asked if the zone is changed to Industrial and the gravel pit did not stay on the site if the property would remain industrial. Vice Chairman Archambault stated it would stay industrial. Mr. Dusing stated technically it would remain industrial; however, in the zone change application they are bound to this development plan. He continued in order to place another type of development on the site they would have to submit an application for review. Vice Chairman Archambault asked for further comments. Mr. Ryan moved this be deferred until action is made by the Planning Commission regarding the zone change. Vice Chairman Archambault asked for any further discussion. No one responded. Mr. Houston seconded the motion. The motion carried unanimously.

Mr. Ryan moved for adjournment; Mr. Houston seconded. The meeting adjourned at 7:05 P.M..

RESPECTFULLY SUBMITTED:

Sandra G. Ryan

SANDRA G. RYAN, CLERK

APPROVED: _____

CHAIRMAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 84-295

LOOMIS ENTERPRISES, INC., ET AL

PLAINTIFFS

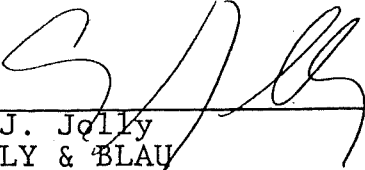
VS.

BOONE COUNTY, KENTUCKY, ET AL

DEFENDANTS

MOTION FOR SUMMARY JUDGMENT

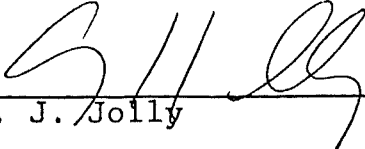
Comes now the Plaintiff and moves the Court to grant it partial summary judgment on the issue of law as to the constitutionality of the Boone County Zoning Ordinance as applied to the lands of the Plaintiff. A memorandum in support is attached hereto.



A. J. Jolly
JOLLY & BLAU
30 W. Fourth Street, P.O. Box 368
Newport, Kentucky 41072
ATTORNEY FOR PLAINTIFFS

CERTIFICATION

I hereby certify that a copy of the foregoing Motion and Memorandum was mailed this 15TH day of April, 1985 to Hon. Dale T. Wilson, 7699 Tanners Lane, Suite 100, Florence, KY 41042 and to Hon. Larry Crigler, 2995 Washington Street, Burlington, KY 41005.



A. J. Jolly

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 84-295

LOOMIS ENTERPRISES, INC., ET AL

PLAINTIFFS

VS.

BOONE COUNTY, KENTUCKY, ET AL

DEFENDANTS

PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

The Plaintiff herein, Loomis Enterprises, Inc., [Loomis], is a Kentucky corporation which is the owner in fee simple of a 68 acre tract of land situated in Boone County, Kentucky. This tract contains valuable deposits of sand, gravel and limestone.

The Defendants are the various entities and individuals authorized to enact and/or administer and enforce planning and zoning ordinances and regulations pursuant to KRS Chapter 100.

On or about January 4, 1984, Loomis contracted with A & K Development to extract mineral deposits from its land for the sums of 20¢ per ton for sand and gravel and 30¢ per ton for limestone and concrete products, with a minimum guarantee of \$14,000 per year for ten years. See Exhibit "E" attached to complaint.

Loomis' property is zoned, pursuant to the 1980 Boone County Comprehensive Plan and accompanying Zoning Ordinance, "Agricultural" ("A-1" and "A-2") which does not allow, as either a permitted,

accessory, or conditional use, surface mining extraction of minerals. Generally speaking, the ordinance regulates and defines the use of land in Boone County, Kentucky by placing each parcel in what is referred to as a Euclidean Zone and then defining or limiting the uses allowed in each zone.

Immediately prior to entering into the contract, on December 14, 1983, Loomis applied for a zone change for the property from Agricultural to "Industrial" ("i-3"), which would permit, as a use of the property, extracting the minerals by surface mining. This application was made pursuant to Article 3 of the Boone County Zoning Ordinance covering "zone changes", or more correctly, "Amendments to the Zoning Ordinances." See Exhibit "C" attached to complaint.

Pursuant to KRS 100.211, "Amendments to Zoning Regulations" ^{1/} and KRS 100.213, "Zoning Map Amendments" ^{2/} before any map amendment may be granted, the planning commission or the fiscal court must find:

- 1) That the proposed amendment is in agreement with the comprehensive plan, or
- 2) That one or more of the following factors are present:
 - a. the original zoning classification was inappropriate or improper.
 - b. major changes of an economic, physical or social nature within the area, which were not

^{1/} This encompasses an owner's proposal to rezone a particular parcel of property. City of Louisville v. McDonald, Ky. 470 S.W.2d 173 (1971).

^{2/} This describes the method of rezoning a particular parcel of property. Id.

anticipated in the comprehensive plan, have occurred which have substantially altered the basic character of the area. 3/

Pursuant to KRS 100.211, 100.213 and Article 3 of the Ordinance, a public hearing was held by the Planning Commission to determine the disposition of Loomis' application.

The Commission, by Resolutions R-6-84 and R-7-84, recommended approval of the zone change/map amendment and made two findings:

- (1) That there have been major changes of an economic, physical, or social nature within the area involved which were not anticipated in the Comprehensive Plan and which have substantially altered the basic character of such area.
- (2) That the proposed use will not adversely affect surrounding land uses.

As required by statute and by the ordinance, the Planning Commission forwarded to the Boone County Fiscal Court the records of its proceedings and its recommendations.

On March 27, 1984, at its regular meeting, without holding a trial-type hearing of its own 4/, the Boone County Fiscal Court denied the zone change/map amendment and incorporated into its Resolution denying same, the following findings of its own:

3/ Section 311 of Article 3 of the Boone County Ordinance is virtually identical with KRS 100.213.

4/ The legislative body may review the record of the proceedings before the Planning Commission or it may hold its own trial-type hearing. City of Louisville v. McDonald, Ky. 470 S.W.2d 173 (1971).

1. The Map Amendment is not in agreement with the Comprehensive Plan.
2. The original zoning classification given to the property is not inappropriate or improper.
3. There have been no major changes of an economical, physical or social nature within the area involved which are not anticipated within the Comprehensive Plan and which have substantially altered the basic character of such area.
4. That since the area of concern has been properly designated in the County's Comprehensive Plan as being environmentally sensitive and since the applicant's concept development plan has not adequately addressed the environmental concerns for this area nor demonstrated beyond a reasonable doubt that a mining operation as proposed would not have an adverse affect on the surrounding area.
5. The economic condition in the area has not significantly changed to warrant the zone change.

As set forth in the affidavit of Robert Daniels, a real estate appraiser, the land in question is predominately hilly with marginal soil which is not suitable for agricultural use. See also minutes of hearing before Planning and Zoning Commission attached to complaint as Exhibit "G". The vast majority of the land is not suitable for any other developmental purpose and in any case, the Agricultural 1 and 2 zoning does not permit any other

development. Since the land (other than the possible exception of the 6.7 level portion which could be used as a building site) is not suitable for farming, and the applicable zoning does not permit any other use, there is no alternative, economically viable use for this property. See Exhibit "J", Affidavit of Robert M. Daniels.

PRELIMINARY

This case does not present to the Court a question of merely reviewing the actions of the Boone County Zoning Agencies. Rather this case presents questions expressly eliminated in this Court's opinion in Stratford v. State-House, Inc., 542 F.Supp. 1008 (E.D. Ky. 1982) at 1013, that is, is the Boone County Zoning unconstitutional as applied to the Plaintiffs' property and does its application to the land of the Plaintiffs deprive the Plaintiffs of property without just compensation in violation of the Fourteenth and Fifth Amendments to the United States Constitution?

In its simplest sense, the argument of unconstitutionality herein is based on an anomaly which occurs due to the fact that euclidean zoning is not the proper vehicle to regulate subsurface mineral rights. Since the extraction of minerals must take place in predestined areas (i.e., where they are found) a zoning body cannot, for all practical purposes, plan and define a "mining zone" when it enacts a comprehensive plan. Rather, the use of land for the extraction of subsurface minerals must be established by one who first discovers the subsurface minerals (generally as the result of geological or engineering studies) and then elects to use the land for that purpose.

The argument below establishes that the Plaintiffs have a constitutionally protected right to extract its subsurface minerals in its agricultural or undeveloped lands but that the Boone County Ordinance prohibits that lawful and constitutionally protected use by effectively failing to provide for the placement of a mining district upon the zoning map.

I.

THE PLAINTIFFS HAVE A CONSTITUTIONAL
RIGHT TO EXTRACT SAND, GRAVEL AND
LIMESTONE FROM ITS LANDS WHICH CANNOT
BE PROHIBITED BY ZONING LAWS

It is basic Kentucky law that underlying minerals are a part of the reality and a rule of property in this State that the owner of the surface is the absolute owner in fee of everything permanently situated beneath the surface. Big Sandy Co. v. Ramsey, Ky. 172 S.W. 508 (1915). It is just as basic and fundamental that a landowner has the right to use his property as he sees fit, subject of course, to the exercise of the police power of the State to insure that in the process of that use that the public health, safety and general welfare of this neighbors is not impaired. The law is, that the right to remove minerals from one's own land is a fundamental property right protected by the Constitution, subject however, to the reasonable regulation of the State.

The Supreme Court established in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), that a governmental regulation affecting an owner's use of his property may constitute a "taking" under the Fifth Amendment. Pennsylvania Coal Company case involved a statute

which prohibited the deep mining of coal where the owner of the mineral rights was not the owner of the surface rights and the mining would cause a residence to subside. The court utilized a practical, economic analysis to decide that such a statute effected a "taking" under the Fifth Amendment saying, "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." Id at 414.

Similarly, the Supreme Court has established that the taking clause of the Fifth Amendment is applicable to a zoning regulation, Agins v. City of Tiburon, 447 U.S. 255 (1980) when it effectively denies an owner an economically viable use of his land. Penn Central Trans. Co. v. New York City, 438 U.S. 104, 138 N. 36 (1978).

While it is conceded that, pursuant to the exercise of zoning powers, a public body may advance legitimate state interests, no other application of the concept of zoning as a valid exercise of the police power requires such careful application then when the concept is applied to the regulation of mineral rights. The courts of this land have consistently held that there is a marked difference between a zoning regulation which effects a prohibition of conventional manufacturing or commercial businesses which may be located elsewhere with equal profit and advantage, and a prohibition which has the effect of depriving the owner of land of its valuable mineral content and of the right to remove and process them. c.f. Village of Terrace Park v. Errett, 12 F.2d 240, 243 (6th Cir. 1926). In the simplest of terms, Courts across the land

have recognized that while a planning commission may, from the standpoint of the best interest of the community, determine the most advantageous location of a plant to manufacture steel, it does not have the ability or power to change God's plan in locating mineral deposits used in the manufacture of that steel.

This is not to say however, that the courts or the constitution have granted carte blanche authority for the extraction of minerals of every kind and in all places, nor is the extraction of minerals beyond the reasonable regulation by the State. For example, the courts hold that the extraction of oil and gas are attended with unusual fire hazards, which if conducted within a municipality would require and validate restrictive or even prohibitory regulations. However, the law as it relates to the subject at hand, holds that while the extraction of oil and gas may be prohibited, the extraction of sand, gravel and limestone, which is not inherently hazardous, nor a nuisance per se, cannot be prohibited in an agricultural or undeveloped area, but is only subject to reasonable regulations.

In support of this proposition, i.e., that the mining of minerals may be regulated but not prohibited, we cite Herman v. Hillsdale, (Ill.) 155 N.E.2d 47; Morton v. Superior Court, (Cal.) 269 P.2d 81 (1954); Daverson v. Lill, (Mo.) 35 S.W.2d 942; Miller v. Zinn, (Pa.) 53 VLC 169; Menges Inc. v. North Jersey Quarry Co., (N.J.) 67 Atl.2d 358; East Fairfield Coal Co. v. Booth, (Ohio) 143 N.E.2d 309.

For example, the Plaintiffs in Stone v. Kindall, (Texas) 268 S.W. 759, were the operators of a gravel pit within the limits of a city which had an ordinance prohibiting the making of any excavation on any premises within the city for the purpose of removing dirt or gravel from such premises. An injunction was granted to enjoin city officials from enforcing this ordinance against them as there was no showing that the operation of the gravel pit would necessarily or even probably injuriously affect the health, safety, comfort or welfare of the inhabitants and as it was not a nuisance per se which could be summarily prohibited. The Court said that while it was true that the gravel pit could be operated in such a manner as to become a nuisance, it was not necessarily so, and under such circumstances the ordinance was an arbitrary and unwarranted limitation upon the lawful use and enjoyment of private property.

In Pacific States Supply Co. v. San Francisco, (CC Cal.) 171 F 727, where the complainant applied for an injunction to prevent interference in the operation of a rock quarry and a rock crushing plant, the defendant contested the constitutionality of four different ordinances. One ordinance made it a misdemeanor to use explosive material for the purpose of blasting without a permit, and the court held that the ordinance was a proper and valid exercise of the police power. Another ordinance made it a

misdemeanor to maintain or operate any rock or stone quarry within certain portions of the city, within which portions and complainant's quarry was situated, and the court observed, as to this ordinance, that it was "obvious, as held by the Supreme Court of California, that the ordinance is void as an attempt to prohibit, rather than regulate, a perfectly legitimate business."

In the California case of Morton v. Superior Court, (Cal.) 166 P 2d 81, (1954), the defendant Morton applied to the Planning Commission for a permit to mine and it was denied, the defendant then petitioned for a writ of mandamus to review the validity of the denial. The court said that the Commission was empowered to deny the application for the permit because the defendants were operating in a manner contrary to several of the regulatory provisions of the zoning ordinance, but that under the facts, the denial could not be given the effect of an absolute prohibition against conducting the business by the devise of using these deficiencies as the basis of an injunction. The court held that whether the attempt to regulate is by zoning ordinance or injunction that the approach must be reasonable, the court pointing out that the operating of a quarry was a lawful business, not a nuisance per se, and therefore, could be regulated but not prohibited. We think it would be helpful to set forth the following lengthy excerpt from that opinion, viz:

"There can be no doubt but that the injunction, insofar as it is based on the second and third causes of action, is much too broad in that it prohibits the operation of the quarry, and does not give the defendants the alternative of correcting the manner of their operations. The operation of a quarry is, of course, a lawful business. It is not a nuisance per se. Of course, if in fact it is being operated so as to constitute a nuisance, the acts constituting the nuisance may and should be enjoined. It is even possible, where the facts justify it, that is where the evidence shows that the business cannot be operated at all without creating a nuisance, to prohibit the operation completely. This same result may be reached by a proper and reasonable zoning ordinance. In re Angelus, 65 Cal App 23 441, 150 P2d 908. But that is not this case. Here the trial court made no finding that the conditions creating the nuisance could not be rectified. The evidence, had such a finding been made, would not support such a finding. As already pointed out, the evidence is all to the contrary."

"There is a vast difference between regulating the methods of operation of a lawful business by injunction or ordinance, and in completely prohibiting the carrying on of such business. In re Lawrence, 55 Cal App 2d 491, 497, 131 P 2d 27. Quarry property is generally a one-use property. The rock must be quarried at the site where it exists, or not at all. An absolute prohibition, therefore, practically amounts to a taking of the property since it denies the owner the right to engage in the only business for which the land is fitted. While under the police power, such complete prohibition against operating the property can be decreed, it can only be justified where irreparable injury to others necessarily results and the condition cannot be rectified except by complete prohibition."

"An injunction against operating property for the only lawful purpose for which it is fitted is an unusual and heroic remedy. It should only be employed where no other means of protecting the complaining public exists. Whether the attempt to regulate be by ordinance or by injunction the approach must be reasonable."

And, in Certain-Teed Products Corp. v. Paris Twp., 351 Mich. 434, 88 N.W.2d 705 (1958) a township zoning ordinance designating the property optioned by the plaintiff for gypsum mining purposes, for agricultural use only, was attached as invalid. Among the actions brought, the plaintiff filed a bill of complaint for a declaratory decree alleging, inter alia, that the township had no authority under its zoning ordinances to prevent or interfere with the deep mining of gypsum in a reasonable manner. Injunctive relief against the township was also sought. On this point the lower court decided that the zoning ordinance prohibited subsurface mining because the chapter dealing with agricultural use of land did not list subsurface mining as a permitted use, however, the lower court further held that an ordinance prohibiting subsurface mining altogether was not unconstitutional as violative of due process if it was reasonable, which the ordinance in question was held to be. On appeal, in an exhaustive opinion, and concurring opinion, the appellate court reversed and decided, inter alia, that in light of the state of the evidence, the zoning prohibition in question was plainly unconstitutional as not founded on any public need, since, to the extent that plaintiff could effectively mine the gypsum without interfering with normal uses and living, the operation could not be prohibited.

As recently as 1982, the Michigan Supreme Court reaffirmed Certain-Teed Products Corp. holding that zoning regulations which

actually or practically prevent the extraction of natural resources are invalid unless "very serious consequences" will result from the proposed extraction. Silva v. Township of Ada, 330 N.W.2d 663 (Mich. 1982).

II.

THE BOONE COUNTY ORDINANCE IS
INVALID AS APPLIED TO PLAINTIFFS'
LAND BECAUSE IT DOES NOT ALLOW
THE PLAINTIFFS TO ELECT TO
EXTRACT MINERALS THEREFROM

As been established above, the Plaintiff has a constitutionally protected right to recover the minerals from his agricultural or undeveloped land subject only to reasonable regulations.

A zoning ordinance which is otherwise valid, may be invalid as it applies to a particular piece of property. Louisville Timber Co. v. City of Beechwood, Ky. 376 S.W.2d 690 (1964). In addition, the general validity of the zoning ordinance is irrelevant since it is the application of a general zoning ordinance to a particular property which may effect the "taking". Agins v. Tiburon, 447 U.S. 255, 260 (1980); c.f. Amen v. City of Dearborn, 718 F.2d 789 (6th Cir. 1983). As the Supreme Court stated in Agins:

"The application of a general zoning law to a particular property effects a taking if the ordinance does not advance legitimate state interests, see Nectow v. Cambridge, 277 U.S. 183, 188 (1928) or denies an owner economically viable use of his lands. See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 138 N. 36 (1978)."

Thus, the validity of the application of a general zoning scheme, must be tested by the constitutional principle applicable to a piece of property, in this case, the principle is that extraction

of sand, gravel and limestone from agricultural or undeveloped rural land may be regulated, but not prohibited.

A review of the current Boone County zoning regulations reveals that the ordinance divides the County into zones or districts and prescribes the uses which are permitted in each of these. This type of zoning is called euclidean zoning in reference to the landmark case of Euclid v. Amber Realty Co., 272 U.S. 365 (1926) in which the Supreme Court first upheld this concept as a valid exercise of the police power. However, strict euclidean zoning as contained in the Boone County Ordinance, is unconstitutional when applied to certain lawful special uses, such as the extraction of minerals, unless special provisions are made for the imposition of those special uses upon the map in predetermined areas and in accordance with a prescribed set of standards. See Bellemeade Co. v. Pribble, Ky. 503 S.W.2d 734.

At the present time, the Boone County Zoning Ordinance creates a district designated "Industrial Three" ("i-3") which does permit surface mining extraction of natural resources. However, the only lands within Boone County which were placed in said districts were those lands which were being mined at the time of the adoption of the comprehensive plan and the ordinance. Contiguous and similar lands, where the owners had not yet made the election to extract minerals, were zoned agricultural.

The problem with euclidean zoning as it applies to the plaintiff's lands, and all other lands containing minerals in rural or undeveloped areas, is that it creates and describes a mining district, yet it fails to provide as to where and upon what conditions

the district may eventually be placed upon the zoning map. While it is entirely proper to initially omit such districts from a zoning map since the extraction of minerals must take place in predestined areas, (i.e., where they are found), so a zoning commission cannot for all practicable purposes plan and define a mining district at the time of the comprehensive plan.^{5/} Rather such districts must be established by one, who as a result of geologic or engineering studies, elects to use their lands for that purpose.

The problem presented here, where the planning commission creates a special district, but makes no provision for its placement upon the map at the election of the landowner, has frequently been passed upon by the courts. The courts see such omission for what it is, i.e., a subterfuge to exclude an otherwise lawful use and consequently hold such ordinances to be unconstitutional as applied to the tract of land in question. In the case of Anderson v. Highland, (1969) Mich. 174 N.W.2d 909, the court declared that the failure to allocate any land on the zoning map to a "trailer park district" created by the ordinance was an unconstitutional attempt on the part of planners to exclude an otherwise lawful use. See also East Pikeland Township v. Bus Bros., Pa. 319 A2d 701; Taxpayers Assoc. v. Weymouth Township, Pa. 319 A2 701; Gust v. Anton Township, Mich. 70 N.W.2d 772 (1955).

^{5/} With the exception, as in Boone County, of those mining operations already in existence at the time of the adoption of the ordinance which must be allowed to continue as, at the very least, a non-conforming use. KRS 100.253.

Although Section 10.50 of the Boone County Ordinance establishes a Euclidean Mining District ("i-3"), the only lands placed in "i-3" districts were those lands being mined at the time of the ordinance, as required by law. KRS 100.253. The unconstitutionality of this euclidean zoning ordinance as applied to the lands of the plaintiff is even more apparent because although such a district was created, no provision is made for its eventual placement on the map. Rather the plaintiff's lands were zoned "agricultural use only" which has the arbitrarily effect of prohibiting the extraction of minerals from the plaintiff's lands.

The only method afforded by the ordinance to place a mining district upon the map is through the map amendment process as set forth in KRS 100.213. Meeting the requirements of this statute, viz: (1) that the original zoning (i.e., agricultural) was improper, or (2) that basic character of the area has changed, would impose an impossible burden upon any applicant who elected to change his land use from agricultural to mining. Moreover, such "standards" have no relationship to the use of the property for the purpose of extracting minerals from land of a basically agricultural character. Since the "standards" have no relationship to the regulation of mining activities they are unreasonable and violative of the constitution principles enunciated above. Thus, the availability of the amendment process (KRS 100.213) to Loomis to utilize its lands for the lawful business of extracting minerals, is dependent upon the whim of the planning commission and the fiscal court

which are without standards as to where and under what circumstances the mining district described in the ordinance may be placed on previously agricultural land. ^{6/}

The lack of reasonable standards is obvious in this case as evidenced by the contradictory findings of the zoning bodies in Boone County. On the one hand, the Planning Commission found that the "basic character" of the area had changed and "the proposed mining operation would have no adverse effect" while the Fiscal Court on the same evidence found that there had been "no major changes" and that "the operation would have an adverse effect". Clearly, both entities were struggling due to the absence of appropriate standards, and because of the unconstitutional anomaly inherent in the ordinance, as applied to the facts of this case.

CONCLUSION

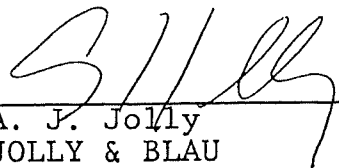
The constitutional right to extract minerals from agricultural lands is not properly conditioned nor subjected to a proper exercise of police power by an amendment process as required by the Boone County ordinance. This ordinance requires as a condition precedent to receiving a permit to extract minerals (1) that the proposed amendment be in agreement with the comprehensive plan; (2) that the original zoning clarification was inappropriate or improper; or (3) that major changes of an economic, physical or social nature within the area which have not anticipated in the compre-

6/ The case of Bellemeade v. Pribble, Ky. 503 S.W.2d 734 sets forth the proper method to constitutionally zone for those special uses which are not compatible with the euclidean approach to zoning. The subject ordinance is not in compliance with the rules set forth in that case.

hensive plan have occurred which have substantially altered the basic character of the area.

The establishment of either of these three conditions has no reasonable relation to the only proper condition to Plaintiff's constitutional right to extract minerals from his lands. The only condition that can properly, appropriately be imposed on Plaintiff's constitutional right to extract minerals from his lands is a reasonable regulation to prevent injury to the health, safety, comfort and welfare of affected inhabitants of the County.

Respectfully submitted,



A. J. Jolly
JOLLY & BLAU
30 W. Fourth Street, P.O. Box 368
Newport, Kentucky 41072
ATTORNEY FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

LOOMIS ENTERPRISES, INC., ET AL

PLAINTIFFS

VS.

AFFIDAVIT OF
ROBERT M. DANIELS

BOONE COUNTY, KENTUCKY, ET AL

DEFENDANTS

Comes now the Affiant, Robert M. Daniels, and after being duly cautioned and sworn states as follows:

1. That he is a qualified real estate appraiser with his professional office located in Covington, Kentucky. That attached hereto as Appendix "1" and hereby incorporated by reference is a summary of my qualifications.

2. That at the request of Mr. Robert Loomis, President of Loomis Enterprises, Inc., I conducted an investigation into a certain parcel of property known as "68 acres located off U.S. Highway 18, Boone County, Kentucky" more fully described in a deed recorded in Deed Book 324, Page 82 of the Boone County Clerk's records with a copy of said deed attached hereto as Appendix "2".

3. The subject property consists of approximately 68 acres (as per the owner's description) of unimproved land with only sixty feet of road frontage along Highway 18. Highway 18, at the subject property, is a two lane asphalt road with few amenities and only minimal development. Land use consists of single family home sites and small farms. Highway 18 is considered to be typical of other

such roads in the county. Entrance to the subject is located approximately four miles south of Burlington.

The subject property, as mentioned earlier, fronts sixty feet along Highway 18 at which point the only entrance to the acreage is located. The entrance drive extends just over eight hundred feet and contains approximately 0.9 acres. To the rear of the entrance drive the property lies fairly flat and appears to be tillable. This section consists of approximately 6.7 acres. The balance of the acreage is steeply sloping and is considered to be unuseable for development or farming purposes. At the time of the appraiser's inspection Western Union held a twenty-five foot easement through the property to their adjoining site on which is located a radio tower. With the exception of the frontage along Highway 18, the subject property is land locked. Electricity is available. Spring water is found along the creek level which is located at the lowest point of the subject's slope. With the exception of the gravel entrance drive there are no improvements which add value to the site. See also four color photographs attached as Appendix "3-a" and "3-b".

4. The property is currently assessed at \$51,000 by the Boone County Property Valuation Administrator, which reflects the purchase price of the property paid in August of 1983.

5. The Boone County Zoning Administrator currently designates the property as being zoned agricultural-2 at the level section of the property and agricultural-1 along the sloping sections. The pertinent section of the zoning map is attached hereto as Appendix "4".

6. That he has reviewed a document designated "Lease and Royalty Agreement" dated January 4, 1984 between Loomis Enterprises and Odell Berry, a Kentucky General Partnership and A & K Resources, Inc. and marked as Exhibit "E" to the complaint in the within action.

7. That he has reviewed the application for the zoning map amendment and the documents and minutes of the proceedings before the Boone County Planning Commission and the Boone County Fiscal Court relative to the subject property designated Exhibits "B", "F", "G", "H" and the engineering report of G.J. Thelen & Associates designated as Exhibit "D".

8. That this appraiser believes that the "sloping acreage" (all acreage except for the 6.7 acre section located to the rear of the entrance drive which is fairly flat) is not tillable nor suitable for farming and that the current zoning laws would, in any event, not permit any other use. The highest and best use of the 6.7 acre section with its current zoning would be as a building site for a single family home. There is little to no value to the sloping acreage except as auxiliary land for the level acreage home site.

9. That this appraiser believes that based upon the recent purchase price for the property, the engineering report and his investigation, that the highest and best use of the property is the extraction of its subsurface minerals but that under current zoning, the acreage taken as a whole, and particularly the 60+ "sloping acres", has no remaining significant value. That based upon all of the above, the property, other than for the extraction of the subsurface minerals, has no other economically viable use.

Further Affiant sayeth naught.

Robert M. Daniels
Robert M. Daniels

SUBSCRIBED AND SWORN to before me, a Notary Public, on this
12th day of April, 1985 by Robert M. Daniels.

John Walsburger
Notary Public

My commission expires:

10-18-88



QUALIFICATIONS OF APPRAISER ROBERT M. DANIELS

MEMBERSHIPS

Society of Real Estate Appraisers - SRA Designation (1969)
 American Right of Way Association - SR/RW Designation (1968)
 National Association of Review Appraisers - CRA Designation (1978)
 National Association of Real Estate Boards - CRB Designation (1976)
 Cincinnati Board of Realtors
 Kentucky Real Estate Association
 Ohio Association of Realtors

PROFESSIONAL EXPERIENCE

Six years as a staff and review appraiser with the Kentucky Department of Transportation. Three years as a staff appraiser with the Federal Housing Administration. Actively engaged in real estate sales and fee appraising of residential, commercial, acreage and special purpose properties since 1969. Clients served include, but are not limited to the following:

Employee Relocation - Chessie System, Eastern Airlines, Honeywell, Inc., Interlake, Inc., The Kroger Company, National Bisquit Co., Procter & Gamble, Kendall Co., General Electric, United States Steel, First National Bank of Tennessee, Western Electric, Nationwide Mutual Insurance Co., Bank of St. Louis, Economics Laboratory, First National Bank of Bartlesville, W. R. Grace Co., The Central Trust Bank, Brown and Williamson Tobacco Corporation, L & N Railroad, Gates Lear Jet, Hallmark Cards, St. Paul Fire & Marine Insurance Co., Chase Manhattan Bank, Merrill Lynch Relocation Inc., Executrons, Relocation Realty Service, Corp., Home'quity/Homerica and TICOR Relocation Management Co.

Condemnation - Kentucky Department of Transportation, Cincinnati Gas & Electric Co., Kentucky Utilities Co., East Kentucky Power Cooperative, Inc., Kentucky Department of Parks, Sanitation District No. 1 of Campbell & Kenton Counties, Kenton County Water District, Greater Cincinnati Airport, City of Erlanger, Kentucky, City of Covington, Kentucky, Kenton County, Kentucky, Transit Authority of Northern Kentucky and the City of Florence, Kentucky.

Mortgage Loans - Covington Trust & Banking Co., Peoples Liberty Bank, Citizens National Bank, Citizens Federal Savings & Loan Association, Union Savings & Loan Association, Southgate Federal Savings & Loan Association, Columbia Federal Savings & Loan Association, Bankers Financial Corporation, Belleview Commercial Bank, The Federal Housing Administration and the Veterans Administration.

Miscellaneous - City of Ft. Mitchell, Kentucky, City of Prestonsburg, Kentucky, Beechwood School System, Kenton County Commissioner, Campbell County Commissioner, Kenton County Fiscal Court, Roadway Express and Ashland Oil & Refining Co. as well as numerous attorneys and individuals.

EXPERT WITNESS

The appraiser has qualified and testified as an expert appraisal witness in the United States Federal Court - Eastern District of Kentucky, as well as in the Circuit Court of Boone, Campbell, Carroll, Floyd, Gallatin, Grant, Harrison, Johnson, Kenton, Owen, Pike and Whitley Counties, Kentucky.

EDUCATION

Georgetown (Ky.) College:	BA in Business & Economics, 1959
Xavier University:	Master of Business Administration, 1965
University of Cincinnati:	Certificate in Real Estate, 1975

DEED

Know All Men By These Presents:

CLERK'S OFFICE
SHORT ★ FORM
DEED

BOOK 324 PAGE 82

Property Transfer Tax Paid \$ 12.00
6 cop D.C.

That ODELL BERRY AND MARTHA BERRY, his wife,

DISSOLUTION OF PARTNERSHIP - FAIR MARKET VALUE
for and in consideration of TWELVE THOUSAND (\$12,000.00) DOLLARS to them paid by the
grantees herein, the receipt of which is acknowledged, do bargain, sell, and convey to

THEIR ONE-FOURTH (1/4) UNDIVIDED INTEREST TO:
LOOMIS ENTERPRISES, INC., a Kentucky corporation, its

successors
~~XXXX~~ and assigns forever, the following described Real Estate, in the City of NONE;
County of BOONE and Commonwealth of Kentucky, to-wit: Group No. 2028
Present Street Address KY 18 Plat No.
Mailing Address c/o R.G. LOOMIS, 16 BURDSALL AVE., FT. MITCHELL, KY 41017

SEE ATTACHED EXHIBIT "A"

BEING the same property conveyed to the Grantors herein by
Deed from the Estate of Cinda Berry, et al, by Deed, dated
August 13, 1983, and recorded in Deed Book 306, Page 279
of the Boone County Clerk's records in Burlington, Kentucky.

Together with all the PRIVILEGES AND APPURTENANCES to the same belonging.
TO HAVE AND TO HOLD the same to the said
LOOMIS ENTERPRISES, INC., a Kentucky corporation, its

successors
~~XXXX~~ and assigns, forever, the Grantor ~~s~~, their heirs, executors and administrators, HEREBY
COVENATING with the grantee, its successors ~~XXXX~~ and assigns, that the TITLE so conveyed is
CLEAR, FREE AND UNINCUMBERED, and that they will WARRANT AND DEFEND the
same against all legal claims whatsoever.

EXHIBIT "A"

Lying and being in Boone County, Kentucky, to wit:

TRACT NO. 1: On the Burlington and Bellevue Turnpike and being Lot No. 1 in the division of the lands of G.P. Brady, deceased, and bounded thus: BEGINNING at a point in the Burlington and Bellevue Road a corner with John E. Walton; thence with said road S 67 1/2 E. 1.35 chains S. 31.75 E. 4.94 chains S 45 E 7.68 chains to a corner with Lot 2 in said division in said road; thence with a line of lot 2 S 49 W 14.61 chains to a stone a corner with Lot 3; thence with a line thereof, N 42 1/2 W 13.79 chains to a stone a corner of lot 3 in a line of John E. Walton's; thence with his line N 49 E 14.61 chains to the beginning containing 20 acres. There is excepted out of this lot a passway 16 1/2 feet wide; beginning at a stone a corner of lot 3 in a line of John E. Walton; thence with said line N 49 E 14.61 chains to the turnpike road and being for the use and benefit of lot 3.

TRACT NO. 2: Lying and being in Boone County, Kentucky, on the Burlington and Bellevue Road about 4 miles from Burlington and bounded as follows: Beginning at a point in said road a corner with lot One in the division of the lands of S. P. Brady, dec'd; thence with said road S 79.75 E 1.07 chains, N 85 1/2 E. 10.99 chains to a point in said road a corner with John E. Walton; thence with his line S 4 W 20.52 chains to a stone a corner with Bert Berkshire, thence with his line S 84 1/2 W 11.06 chains to a stone a corner with said Berkshire and also lot No. 4; thence N 61 1/2 W 16.21 chains to a stone a corner of lot 3; thence N 49 E 19.51 chains to the beginning containing 38 acres 2 rods and 16 poles more or less.

TRACT NO. 3: Lying and situated on the waters of Middle Creek in Boone County, Kentucky and bounded as follows: BEGINNING at a stone in a line of John E. Walton, a corner with S. P. Brady (now J. J. Lillard); thence with said Brady's line N 69.75 poles to a stone; thence N 82 E 44 poles to a stone; thence N 1 1/2 E 15.75 poles to a stone; thence N 79 1/2 E 32 poles and three links to a stone in the center of the Burlington and Bellevue road (Road Spring Road), thence with the road or nearly so, S 2.75 E 50 poles to a stone; thence S 16 1/2 E 33 1/4 poles to a stone near a branch in John E. Walton's line (formerly Moreland); thence with his lines S 59 1/4 W 1.75 poles to a Beech tree; thence N 82.75 W 35 1/4 poles to an Elm tree; thence S 82 W 12.75 poles to the forks of the branch on aforesaid road; thence S 26 1/2 W 19 1/2 poles to a point in the said branch and road; thence with Walton's line N 89 W 29 1/2 poles to the beginning containing 35 acres, 3 rods and 29 poles.

ADAMS, BROOKING
& STEPNER

Attorneys and
Counselors at Law
P. O. Box 861
421 Garrard Street
Burlington, KY 41012
(606) 291-7270

7809 U.S. 42
Suite 3
Florence, KY 41042
(606) 371-4220

TRACT NO. 4: Being lot No. 4 in the division of the lands of S. P. Brady, deceased, which is bounded by beginning at a stone which is a corner to Lot No. 3 in said division in a line of Lot No. 2; thence with a line of Lot No. 2, S 61 1/2 E 14.06 chains to a stone a corner with B. Berkshire; thence with his lines, S 4 W 17.40 chains to a stone on the West side of a branch; thence S 39 1/4 W 3.15 chains, S 73.75 W 12.39 chains to a stone S 4 W 1 chain to a point in a branch; thence down the branch S 69 W 3.18 chains S 52 W 2.62 chains to a corner to Lot No. 5 in said branch; thence with a line of said Lot No. 5, N 20 1/4 W 5.65 chains to a stone; thence N 71 E 2.65 chains to a stone; thence N 20 1/4 W 10.80 chains to a stone; thence N 66 1/4 W 3.50 chains to a stone a corner with Lot No. 3; thence with a line thereof N 23 E 18.25 chains to the beginning containing 43 acres 3 rods and 32 poles.

TRACT NO. 5: Beginning with a corner about 15 rods from Rocky Spring Branch in line of divide of Lots # 4 and 5 as shown in the divisions of the lands of S. P. Brady, deceased; thence running in a straight line 240 yards more or less to a corner of Grace Brown and John Walton; thence Northeastwardly direction 62 yards more or less to a corner in Grace S. Brown's line; thence with the line of Grace S. Brown as now stands, 220 yards more or less to a corner of Grace S. Brown; thence in a westwardly direction 52 yards more or less to the beginning, containing 3 acres, more or less.

THERE IS EXCEPTED FROM THE ABOVE TRACTS THE FOLLOWING EXCEPTIONS:

EXCEPTION NO. 1: Being the same property conveyed by the grantors David Berry and Cinda Berry, his wife to Tate A. Meade and Opha Meade, his wife, by deed dated the 9th day of March, 1954 and recorded in Deed Book 112, page 281, in the office of the Clerk of the Boone County Court, Burlington, Kentucky.

EXCEPTION NO. 2: Being the same property conveyed by the grantors David Berry and Cinda Berry, his wife to Ernest Banks and Osie Banks, his wife by deed dated the 24th day of November, 1956 and recorded in Deed Book 126, page 107, in the office of the Clerk of the Boone County Court, Burlington, KY.

EXCEPTION NO. 3: Being the same property conveyed by the grantors David Berry and Cinda Berry, his wife to Ernest Banks and Osie Banks, his wife by deed dated the 12th day of July, 1962 and recorded in Deed Book 154, page 446, in the office of the Clerk of the Boone County Court, Burlington, Kentucky.

EXCEPTION NO. 4: Being the same property conveyed by the grantors David Berry and Cinda Berry, his wife to Western Union Telegraph Company, Inc., by deed dated the 22nd day of February, 1963, and recorded in Deed Book 157, page 126, in the office of the Clerk of the Boone County Court, Burlington, Kentucky.