

Rebecca Keaton

IN THE SUPERIOR COURT FOR THE COUNTY OF COBB

STATE OF GEORGIA

(JB)

Court Rule: www.cobbcountyga.com/courtsuperiorcourtcourtclerk.com
Rebecca Keaton
Clerk of Superior Court Cobb County

WALTER L. ATKINS; LILLIE REA
ATKINS; JUDITH G. COE;
BETTY ANN HARRISON DOUGHTY;
HOMER M. HARRISON, JR.; AND
DAVID PEARSON COMMUNITIES, INC.,

Plaintiffs,

-vs-

CIVIL ACTION

FILE NUMBER:

15-1-9773.48

COBB COUNTY, GEORGIA;
TIMOTHY D. LEE, Chairman of the
Cobb County Board of Commissioners;
BOB WEATHERFORD; LISA N. CUPID;
JOANN BIRRELL; and ROBERT J. OTT,
in their official capacities as Members of
the Cobb County Board of Commissioners,

Defendants.

COMPLAINT

COME NOW, Plaintiffs, WALTER L. ATKINS; LILLIE REA ATKINS;
JUDITH G. COE; BETTY ANN HARRISON DOUGHTY; HOMER M. HARRISON, JR.;
and DAVID PEARSON COMMUNITIES, INC. (hereinafter collectively referred to as
"Plaintiffs"), by and through their undersigned counsel of record, and file this Complaint
against the named Defendants, and respectfully show this Honorable Court the following in
support thereof:

PARTIES AND JURISDICTION

1.

Plaintiffs WALTER L. ATKINS; LILLIE REA ATKINS; JUDITH G. COE;
BETTY ANN HARRISON DOUGHTY; and HOMER M. HARRISON, JR. are the owners of
certain real property located in Cobb County, Georgia (hereinafter collectively "Owners").

MOORE INGRAM
JOHNSON & STEELE
Limited Liability Partnership
Emerson Overlook
326 Roswell Street
Marietta, GA 30060
(770) 429-1499
FAX (770) 429-8631

2.

Plaintiff DAVID PEARSON COMMUNITIES, INC. (hereinafter referred to as "Pearson") is a Georgia corporation duly authorized to transact business in the State of Georgia and has executed valid and binding contracts with Owners for the purchase of the property, which is the subject of this action. Therefore, Pearson has a substantial interest in the outcome of this action.

3.

Defendant COBB COUNTY, GEORGIA, is a political subdivision of the State of Georgia and is subject to the jurisdiction and venue of this Court.

4.

Defendants TIMOTHY D. LEE; BOB WEATHERFORD; LISA N. CUPID; JOANN BIRRELL; and ROBERT J. OTT are members of the Cobb County Board of Commissioners, and will be hereinafter collectively referred to as "COMMISSIONERS." Each of said Defendants is subject to the jurisdiction and venue of this Court by virtue of being residents of Cobb County, Georgia.

FACTUAL ALLEGATIONS COMMON TO EACH COUNT

5.

Plaintiffs reallege and hereby incorporate by reference each and every fact and allegation contained in the foregoing portions of this Complaint with the same force and effect as if pleaded separately herein.

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6.

The Owners are the owners of approximately 6.8 acres of real property lying and being in Cobb County, Georgia, and being more particularly described in the legal description attached hereto as Exhibit "A" and incorporated herein by reference (hereinafter referred to as the "Property" or the "Subject Property").

7.

On or about December 26, 1972, the COMMISSIONERS adopted the "Zoning and Planning Ordinance of Cobb County," and adopted the "Official Cobb County Zoning Map," as amended, both of which shall be hereinafter referred to as the "Zoning Ordinance." Plaintiffs further show that said Zoning Ordinance is the present official zoning ordinance of COBB COUNTY, GEORGIA, as amended. Pursuant to said Zoning Ordinance, the Owners' real property is limited and restricted to the zoning classifications of R-30 (single-family residential, minimum 30,000-square-foot lot size,) and R-20 (single-family residential, minimum 20,000-square-foot lot size).

8.

The COBB COUNTY BOARD OF COMMISSIONERS, said body being comprised of the COMMISSIONERS named in this suit, is the governing authority of COBB COUNTY, GEORGIA, and is therefore vested with the zoning authority for COBB COUNTY pursuant to Art. IX, § II, ¶ 4 of the 1983 Constitution of the State of Georgia, and by applicable Cobb County Ordinances.

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9.

The Subject Property is located on the northwest side of Sandy Plains Road, just north of the intersection of Sandy Plains Road and Scufflegrit Road, at a signalized intersection.

10.

The Subject Property has extensive road frontage on Sandy Plains Road of 839.89 feet. Pursuant to the Cobb County Department of Transportation method for classification of roads, Sandy Plains Road is classified as an arterial road, having over 26,500 average daily vehicular trips per day, and is further a four and five land, median-divided roadway, designed specifically to carry high volumes of traffic on a daily basis.

11.

The Subject Property is located adjacent to, and directly across Sandy Plains Road, from properties zoned RA-4 (single-family attached/detached residential, allowing up to 4 dwelling units per acre); Suburban Condominium ("SC"); and Low Rise Office ("LRO"), which have existing cluster houses, attached condominiums, and a commercial bank branch.

12.

Moreover, the intersection of Sandy Plains Road and Scufflegrit Road contains numerous, high intensity commercial uses; including, but not limited to, a Publix shopping center, a "QuikTrip" gas and convenience store, and a full service pharmacy ("Rite-Aid"). Without question, this intersection, of which the Property forms a part, is comprised of a highly commercialized nodal center containing commercial zoning districts and uses.

13.

Additionally, residential uses in the immediate and surrounding area contain townhomes, cluster subdivisions, and attached residential condominiums ranging in densities from four (4) units per acre to as high as eight (8) units per acre.

14.

Further, it is without dispute the Sandy Plains Road corridor in the immediate and surrounding vicinity of the Subject Property has been developed in a highly intensive manner with no development occurring that is not intensive in use, intensity, and density.

15.

Given the intensity of the uses of properties in the immediate and surrounding area, Plaintiffs applied for rezoning of the Subject Property from its existing R-20 and R-30 categories to the RM-8 category for purposes of developing an age-targeted, detached residential community, complimentary to the area and substantially similar in relation to the density of surrounding residential developments and intensity of adjacent and nearby commercial properties (the "Application for Rezoning").

16.

During the pendency of the Application for Rezoning, Plaintiffs attended multiple meetings with area residents in order to receive comments and consideration of the subject Application for Rezoning; and, as a result of such meetings, received the overwhelming support of the only residential subdivision (Eastbrook) located adjacent to the Subject Property.

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17.

As a result of these meetings, the Plaintiffs voluntarily submitted a letter of agreeable stipulations and conditions of zoning. This letter of stipulations included multiple conditions of rezoning designed to lessen any perceived impact of the proposed development on nearby residential properties; including, but not limited to, stipulations designed to enhance landscaping, buffers, and aesthetics.

18.

Thereafter, on or about November 18, 2015, a public hearing was held before the Cobb County Board of Commissioners as to the referenced Application for Rezoning. At this hearing, the Cobb County Board of Commissioners voted to delete the subject Application, and rezone the Property to the RA-5 zoning category, limiting such development to no more than five (5) units per acre; and further, imposed unilateral conditions of rezoning not agreeable to the Plaintiffs; including but not limited to, requiring a site plan to be submitted to the Cobb County Board of Commissioners for approval prior to obtaining permits for development. Such a condition of rezoning renders the Property and the Plaintiffs without the ability to develop the Property or to obtain permits for development in compliance with the new zoning category without first seeking further approval and action from the Defendants.

19.

The Cobb County Board of Commissioners' decision to restrict the intensity of the proposed development stands in direct conflict with the intensity of uses reflected by adjoining and surrounding properties, and prior decisions of the Defendants and adjoining

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municipal jurisdictions to approve developments of a much higher intensity than that proposed by the Plaintiffs.

20.

As a result of the Defendants' actions; including, but not limited to, the imposition of unreasonable zoning conditions, the Plaintiffs have suffered and will continue to suffer a substantial detriment. Plaintiffs have a substantial interest in the use and development of the Property as proposed, and the Plaintiffs are entitled to the rezoning sought without the imposition of unconstitutional conditions and stipulations of rezoning.

21.

There is no existing use or demand for the Property under the existing classification and imposition of burdensome zoning restrictions; and the Property is substantially and unreasonably diminished in value due to the continuation of such existing zoning restrictions.

22.

Plaintiffs have a substantial interest in the use and development of the Property, and Plaintiffs are entitled to a fair and reasonable economic return on their investment in the Property.

23.

Furthermore, the existing classification, and overly burdensome zoning conditions imposed by the Defendants, as applied to the Property, bears an insubstantial relation to the protection or promotion of the health, safety, welfare, or morals of the County.

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24.

There would be no adverse impact to surrounding properties from the rezoning and development of the Property as proposed by the Plaintiffs.

25.

There is no gain or benefit to the public from the restriction of the Property to the existing classification and overly burdensome zoning conditions that approaches the resulting detriment suffered by the Plaintiffs.

26.

Any relative gain to the public as a result of the current classification of the Property as restricted by the zoning conditions imposed by Defendants is substantially outweighed by the hardship imposed upon the Plaintiffs.

27.

Until the Zoning Ordinance is amended or rescinded, as applied to the Property, the Defendants will refuse to issue to the Plaintiffs, or their successors in title, the necessary certificates of zoning compliance and building and development permits required by the Cobb County Code and the rules and regulations for construction or development of the Property in any manner other than as permitted by the existing zoning classification and overly burdensome zoning conditions.

28.

The Zoning Ordinance subjects the Plaintiffs to both civil and criminal actions for any use of the Property that is inconsistent with the present zoning classifications and overly burdensome zoning conditions.

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29.

In refusing to approve Plaintiffs' Application for Rezoning, the Defendants did not follow the guidelines outlined by the Supreme Court of the State of Georgia and the Georgia legislature for the consideration of the constitutionality of a zoning ordinance as applied to real property and gave no weight to those guidelines in their deliberations on the request for rezoning of the Property.

30.

The Defendants have failed and refused to work with the Plaintiffs in an effort to establish zoning uses and conditions that would permit economic development of the Property and breached their duty to consider ways in which the County's objections to Plaintiffs' proposed development can be eased by County action.

31.

The Application for Rezoning seeking the rezoning of the Property was filed and pursued by the Plaintiffs in accordance with the applicable statutory proceedings established by Cobb County, Georgia.

32.

The Plaintiffs timely challenged the constitutionality of the Zoning Ordinance as applied to the Property.

33.

The Defendants were given an opportunity to rezone the Property after being placed on notice of the unconstitutionality of the Zoning Ordinance as applied to the Property and further after receiving notice of facts and circumstances that make the application of the

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Zoning Ordinance to the Property unconstitutional, but the Defendants failed and refused to rezone the Property to allow the use proposed by Plaintiffs.

34.

The decision of the Defendants to deny any use other than those uses currently permitted is final, and there are no administrative remedies or procedures to review such decision of the Defendants before any body empowered to act to reverse, modify, or alter such decision. Therefore, all statutorily provided administrative action is final, and the procedure available for redress is remedial only.

35.

Within thirty (30) days of the date of the Defendants' decision regarding its Application for Rezoning, Plaintiffs bring this suit seeking redress for the deprivation of its constitutional rights by the Defendants.

COUNT I

REFUSAL TO GRANT ZONING APPLICATION

36.

Plaintiffs reallege and hereby incorporate by reference each and every fact and allegation contained in the foregoing portions of this Complaint with the same force and effect as if pleaded separately herein.

37.

The refusal by the Defendants to change the zoning classification applicable to the Property as requested by the Plaintiffs so as to permit a reasonable and appropriate use of

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the Property was unconstitutional and null and void in that said refusal was arbitrary, capricious, without rational basis, and constitutes an abuse of discretion and constitutes a violation of Art. I, § I, ¶ I of the 1983 Constitution of the State of Georgia and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Additionally, Defendants failed to abide by their legal obligation to construe the Cobb County Zoning Ordinances in favor of the Plaintiffs' free and unrestricted use of the Property as ordinances that restrict an owner's free use are in derogation of the common law.

38.

The arbitrary and capricious nature of Defendants' actions and decision to deny Plaintiffs' Application for Rezoning is demonstrated by contrasting said denial with current zoning and uses of property in the surrounding area of the Subject Property and with previous actions by Defendants rezoning comparable property in the immediate vicinity of the Subject Property.

39.

The refusal of the Defendants to change the zoning classification has deprived the Plaintiffs of constitutionally guaranteed property rights without just and adequate compensation and constitutes a violation of the rights and privileges secured to the Plaintiffs by Art. I, § III, ¶ I of the 1983 Constitution of the State of Georgia.

40.

As a direct and proximate result of the Defendants' arbitrary and unreasonable refusal to grant Plaintiffs' Application for Rezoning, Plaintiffs have incurred and will continue to incur significant economic loss and deprivation of constitutional rights.

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COUNT II

EXISTING CLASSIFICATION

41.

Plaintiffs reallege and hereby incorporate by reference each and every fact and allegation contained in the foregoing portions of this Complaint with the same force and effect as if pleaded separately herein.

42.

The classification by the Defendants of Plaintiffs' Property as RA-5 constitutes an arbitrary and unreasonable use of the zoning power by Defendants in that said zoning classification does not bear a substantial relation to the public health, safety, common morality, or general welfare of the public and is, therefore, unconstitutional, null and void, and constitutes an abuse of discretion and a violation of Art. I, § I, ¶ I of the 1983 Constitution of the State of Georgia and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

43.

The arbitrary and capricious nature of Defendants' zoning classification of Plaintiffs' Property is demonstrated by contrasting said classifications with current zoning and uses of property in the immediate vicinity of the Subject Property; with previous actions by Defendants rezoning comparable property in the immediate vicinity of the Subject Property; especially given the intensive nature of existing uses of property in the immediate, adjoining, and surrounding area.

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44.

The existing classification of Plaintiffs' Property results in relatively little gain or benefit to the public while inflicting significant detriment or loss upon the Plaintiffs and, therefore, is confiscatory and void.

45.

The existing classification by Defendants of Plaintiffs' Property renders the Property unusable and destroys marketability and, thus, constitutes a taking of Plaintiffs' private Property without just compensation and without due process of law in violation of Art. I, § I, ¶ I and Art. I, § III, ¶ I(a) of the 1983 Constitution of the State of Georgia and the Fourteenth Amendment to the United States Constitution.

46.

As a direct and proximate result of the arbitrary and unreasonable zoning of Plaintiffs' Property by Defendants, Plaintiffs have incurred and will continue to incur significant economic loss and deprivation of constitutional rights.

COUNT III

INTERVENING CLASSIFICATIONS

47.

Plaintiffs reallege and hereby incorporate by reference each and every fact and allegation contained in the foregoing portions of this Complaint with the same force and effect as if pleaded separately herein.

48.

Plaintiffs' Constitutional Challenge asserted before the Board of Commissioners included a challenge to any intervening classification between the existing R-20 and R-30 classifications and the requested RM-8 classification.

49.

Classification by the Defendants of Plaintiffs' Property within one of these intervening classifications constitutes an arbitrary and unreasonable use of the zoning power by Defendants in that these zoning classifications do not bear a substantial relation to the public health, safety, common morality, or general welfare of the public and is, therefore, unconstitutional, null and void, and constitutes an abuse of discretion and a violation of Art. I, § I, ¶ I of the 1983 Constitution of the State of Georgia and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

50.

The arbitrary and capricious nature of Defendants' classification of Plaintiffs' Property within an intervening classification is demonstrated by contrasting said classifications with current zoning and uses of property in the immediate vicinity of the Subject Property and with previous actions by Defendants rezoning comparable property in the immediate vicinity of the Subject Property.

51.

The classification of Plaintiffs' Property within an intervening classification results in relatively little gain or benefit to the public while inflicting significant detriment or loss upon the Plaintiffs and, therefore, is confiscatory and void.

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52.

The classification by Defendants of Plaintiffs' Property within an intervening classification renders the Property unusable and destroys marketability and, thus, constitutes a taking of Plaintiffs' private Property without just compensation and without due process of law in violation of Art. I, § I, ¶ I and Art. I, § III, ¶ I(a) of the 1983 Constitution of the State of Georgia and the Fourteenth Amendment to the United States Constitution.

53.

As a direct and proximate result of the arbitrary and unreasonable zoning of Plaintiffs' Property by Defendants, Plaintiffs have incurred and will continue to incur significant economic loss and deprivation of constitutional rights.

COUNT IV

EQUAL PROTECTION

54.

Plaintiffs reallege and hereby incorporate by reference each and every fact and allegation contained in the foregoing portions of this Complaint with the same force and effect as if pleaded separately herein.

55.

The refusal of the Defendants to amend the Zoning Ordinance and applicable maps as requested by the Plaintiffs and the refusal to allow uses other than those permitted under the existing classifications discriminates in an arbitrary, unreasonable, capricious, and unconstitutional manner between the Plaintiffs and the owners of similarly situated properties

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in the vicinity of the Property in violation of Art. I, § I, ¶ II of the 1983 Constitution of the State of Georgia and the Equal Protection Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

COUNT V

ONE-YEAR LIMITATION FOR REAPPLICATION

56.

Plaintiffs reallege and hereby incorporate by reference each and every fact and allegation contained in the foregoing portions of this Complaint with the same force and effect as if pleaded separately herein.

57.

Section 134-121(e)(1) of the Zoning Ordinance prohibits the Plaintiffs from applying again for a change in the present zoning classification of the Property for a period of twelve (12) months. That provision of the Zoning Ordinance denies the Plaintiffs due process and amounts to a taking of the Plaintiffs' Property without first paying fair, just, and adequate compensation in violation of Art. I, § III, ¶ I and Art. I, § I, ¶ I of the 1983 Constitution of the State of Georgia.

COUNT VI

INVERSE CONDEMNATION

58.

Plaintiffs reallege and hereby incorporate by reference each and every fact and allegation contained in the foregoing portions of this Complaint with the same force and effect as if pleaded separately herein.

59.

The actions of the Defendants constitute an inverse condemnation of the Property for which compensation is required by law.

COUNT VII

UNCONSTITUTIONAL ZONING CONDITIONS

60.

Plaintiffs reallege and hereby incorporate by reference each and every fact and allegation contained in the foregoing portions of this Complaint with the same force and effect as if pleaded separately herein.

61.

The illegal stipulations and conditions of rezoning, as approved by the Defendants, constitute an illegal, unreasonable, and unduly burdensome action and render the zoning decision unconstitutional, and further render such stipulations and conditions null and void. As such, the illegal stipulations and conditions, as approved by the Defendants,

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constitute an illegal taking of Plaintiffs' private property, and further are null, void, arbitrary, and capricious.

62.

Such stipulations or conditions of rezoning constitute an illegal taking of the Plaintiffs' Property without just and adequate compensation being first paid in violation of Plaintiffs' guaranteed constitutional rights.

63.

Plaintiffs have a substantial interest in the use and development of the Property as proposed, and the Plaintiffs are entitled to the rezoning sought without the imposition of unconstitutional conditions and stipulations of rezoning.

64.

As a direct and proximate result of the arbitrary and unreasonable imposition of zoning conditions applicable to Plaintiffs' Property by Defendants, Plaintiffs have incurred and will continue to incur significant economic loss and deprivation of constitutional rights; including, but not limited to, the right of Plaintiffs to develop the Property under the new classification without the necessity of further zoning approvals by Defendants, thereby rendering the Property unmarketable and infringing upon the constitutionally guaranteed right to the alienability of real property.

WHEREFORE, under Counts I through VII, Plaintiffs pray:

(a) That summons and process issue and that the Defendants be served as required by statute;

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- (b) That this Court declare the Cobb County Zoning Ordinance null and void as being unconstitutional and results in a taking of the Plaintiffs' Property without just compensation;
- (c) That this Court declare that the Cobb County Zoning Ordinance is null and void as being unconstitutional as applied to the Property and results in a taking of the Plaintiffs' Property without due process of law, substantive and procedural;
- (d) That this Court declare the Cobb County Zoning Ordinance null and void as being unconstitutional as applied to the Property and violates the Plaintiffs' right to equal protection under the law;
- (e) That this Court declare the actions of the Defendants to have resulted in an inverse condemnation of the Property;
- (f) That this Court order the Defendants to rezone the Subject Property in a manner consistent with Plaintiffs' constitutional rights, and that this Court retain jurisdiction of this matter in order to ensure that such rezoning is accomplished within a reasonable time; and
- (g) That this Court, pursuant to Count VII, declare the actions of Defendants in imposing unreasonable, overly burdensome, arbitrary, and capricious zoning conditions upon the Property to be unconstitutional, illegal and void; and
- (h) That this Court grant such other and further relief as may be deemed to be equitable and just under the circumstances.

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COUNT VIII

DAMAGE CLAIM

69.

Plaintiffs reallege and hereby incorporate by reference each and every fact and allegation contained in the foregoing portions of this Complaint with the same force and effect as if pleaded separately herein.

70.

The actions complained of herein were taken by Cobb County and the Board of Commissioners under color of state and local law, and constitute a deprivation of Plaintiffs' Property interests without due process of law and without just compensation in violation of § I of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983.

71.

Plaintiffs have incurred substantial damages as a result of the Defendants' refusal to grant Plaintiffs' Application for Rezoning and Defendants' subsequent arbitrary and unreasonable zoning of the Property and Plaintiffs are continuing to incur additional damages with each day of delay in an amount not yet ascertained.

WHEREFORE, under Count VIII, Plaintiffs pray:

- (a) That the Court grant judgment in favor of Plaintiffs and against Defendants, Cobb County and the Board of Commissioners, for compensatory damages in an amount not yet fully ascertained, but sufficient to compensate Plaintiffs for losses incurred from the unconstitutional, arbitrary, and unreasonable actions undertaken by

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Defendants, Cobb County and the Board of Commissioners, under color of state and local law;

- (b) That Plaintiffs recover the expenses of litigation, including reasonable attorneys' fees; and
- (c) That this Court grant such other and further relief as may be deemed equitable and just under the circumstances.

This 14th day of December, 2015.

MOORE INGRAM JOHNSON & STEELE, LLP

BY:



J. KEVIN MOORE
Georgia Bar No. 519728

Attorneys for Plaintiffs

LEGAL DESCRIPTION

SANDY PLAINS ROAD (6.821 ACRES)

All that tract or parcel of land lying and being located in Land Lot 776 of the 16th District, 2nd Section, Cobb County, Georgia, and being more particularly described as follows:

BEGINNING at an iron pin (1/2" open top pipe) which is the common corner of Land Lots 736, 737, 776 and 777 of the said 16th District, having thus established the **TRUE POINT OF BEGINNING**, leaving said iron pin and running S80°20'00"E for a distance of 727.00 feet to an iron pin (#4 rebar) located on the Northwesterly right-of-way of Sandy Plains Road (Variable right-of-way); thence running in a Southwesterly direction along the Northwesterly right-of-way of Sandy Plains Road and following the curvature thereof along a curve to the right for an arc length of 835.70 feet (said arc being subtended by a chord of S41°57'24"W - 834.87 feet with a radius of 5450.39 feet) to an iron pin (#4 rebar); thence leaving said right-of-way and running N44°11'54"W for a distance of 220.42 to an iron pin (3/4" open top pipe) located on the westerly line of Land Lot 776; thence running N01°27'31"E along the said westerly line of Land Lot 776 for a distance of 25.66 feet to an iron pin (1" Rod); thence leaving said Land Lot Line and running N46°32'22"E for a distance of 152.52 feet to an iron pin (1/2" open top pipe); thence running N45°06'38"W for a distance of 156.98 feet to an iron pin (3/4" open top pipe) located on the said westerly line of Land Lot 776; thence running N00°05'16"E along the said westerly line of Land Lot 776 for a distance of 90.09 feet to an iron pin (3/4" crimped top pipe) thence running N01°09'27"W and continuing along the said westerly line of Land Lot 776 for a distance of 253.52 feet to an iron pin (1/2" open top pipe) said iron pin being the **TRUE POINT OF BEGINNING**. Said tract contains 6.821 acres.