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D.C. Superior Court

DISTRICT OF COLUMBIA
PUBLIC ALLEYS

Public alleys in the District of Columbia were never owned by United States, and charge by District of Columbia for fair value upon alley closing was improper.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY v. DISTRICT OF COLUMBIA, ET AL., ETC., Sup. Ct. D.C. Civil Nos. 2671-75, 86-74, 3107-75, 2672-75, 783-75, and 2670-75, March 28, 1978. *Opinion* per Penn, J. *Whayne Quin* for plaintiff. *Thomas McKevitt* and *George Mason* for defendant.

PENN, J.: These cases came before the Court on the joint motions for summary judgment filed by the plaintiffs and the cross motions for summary judgment filed by the defendants.

The plaintiffs are all owners of land in the District of Columbia who filed applications with the District of Columbia requesting the District to close portions of public alleys abutting on their land in the City. The applications were granted by the District and the alleys were closed either pursuant to the Street Readjustment Act of the District of Columbia (D.C. Code 1973, §§7-401 *et seq.*) or D.C. Code 1973, §§7-306 and 7-307. There were no written objections filed to the applications, however, as a condition precedent to each closing, the District of Columbia Council ordered each of the plaintiffs to pay into escrow funds representing the fair market value of the alleys closed. Those funds have all been paid into escrow.

The plaintiffs challenge the authority of the District to make such a charge on the grounds that (1) the United States did not have title to the underlying fees reverting to the property owners upon closing of the alleys, (2) the District of Columbia lacks statutory authority to make such charges under Section 7-401 *et seq.* or Sections 7-306 and 7-307, (3) the land areas closed had only a nominal value and (4) the charges were in violation of the District of Columbia Administrative Procedure Act and due process of law.

The defendants oppose the plaintiffs' motion and have filed cross motions of their own. They argue that the alleys, being original alleys, are owned by the United States. The defendants have also argued that the plaintiffs have failed to join an indispensable party in these proceedings, namely, the United States of America.

The Court heard final arguments in this case in February 1978 and on March 9, 1978, issued a Memorandum Order holding that it would grant summary judgment to the plaintiffs, and would thereafter file a formal written opinion.

I

The underlying facts surrounding these cases are as follows:

1. (a) Plaintiff Chesapeake and Potomac Telephone Company, at the time and for purposes herein alleged, was the owner of rights, title and interest in Lots 22, 825, 834 and 835 surrounding and abutting portions of a public alley in Square 288 in the District of Columbia.

(b) Plaintiff The Supreme Council, at the time and for the purposes herein alleged, was the owner of rights, title and interest in Lots 800, 808, 28, 29, 40, 41, 42, 105 and 106 surrounding and abutting portions of a public alley in Square 192 in the District of Columbia.

(c) Plaintiffs Sylvan C. Herman and Saul H. Bernstein at the time and for the purposes herein alleged, were the owners of rights, title and interest in Lots 18, 831, 833, 847, 848, 834, 21, 835 and 836 surrounding and abutting portions of a public alley in Square 457 in the District of Columbia.

(d) Plaintiffs Ulysses G. Auger and Lulu H. Auger, at the time and for the purposes herein alleged, were the owners of rights, title and interest in Lots 870, 871, 872, 873, 133, 134 and 135 in Square 70 surrounding and abutting a portion of a public alley in Square 70 in the District of Columbia and Lot 870 surrounding and abutting a portion of a public alley in Square 51 in the District of Columbia.

(e) Plaintiff Bicentennial Associates, at the time and for the purposes herein alleged, was the owner of rights, title and interest in Lots 113 and 879 surrounding and abutting a portion of a public alley in Square 100 in the District of Columbia.

(f) Plaintiff Washington Medical Center, Inc., at the time and for the purposes herein alleged, was the owner of rights, title and interest in Lots 849, 848, 838, 837, 827, 825, 844 and 42 surrounding and abutting portions of certain public alleys in Square 106 in the District of Columbia.

2. The District of Columbia Council and its members are the successors to the Board of Commissioners of the District of Columbia. They are authorized to close alleys in the District of Columbia pursuant to the provisions of the Street Readjustment Act of the District of Columbia, D.C. Code 1973, §7-401 *et seq.* and §7-306 and 7-307.

3. The defendants District of Columbia and District of Columbia Council, hereinafter referred to collectively as "District of Columbia", (by virtue of Reorganization Plan No. 3, Section 402 (168), D.C. Code (1973)), at the time herein alleged, did maintain jurisdiction and control of the portions of the public alleys in all of the squares which were closed in the cases consolidated before this court. The

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circumstances is required with each annual budget request. We reject this *per se* position and hold that the statement prepared by the Service satisfies its NEPA obligations, subject to any future decision of the agency to re-evaluate the program or a drastic change of circumstances affecting the operation of the program.

We affirm the district court's other declaratory ruling that the Office of Management and Budget (OMB) is required to develop procedures to fulfill its NEPA obligations in connection with the Budget process.

* * *

ALLEYS

(Cont'd. from p. 1065)

public alleys which are the subject of this action were original alleys of the City of Washington over which the District of Columbia maintained jurisdiction and control.

4. The alley areas involved in this litigation were portions of alleyways of the original City of Washington which have been generally referred to as "original alleys." Such original alleys were part of land conveyed to Trustees by certain landowners ("original proprietors") for the establishment of the seat of government for the United States in accordance with terms of Deeds of Trust executed around 1791 (hereinafter described only as Deeds of Trust). The authority for negotiating for the acquisition for acceptance of the land for the original City of Washington was derived from Act of Congress adopted July 16, 1790 (1 Stat. 130, Chapter 28; District of Columbia Code, page XXXIII), as amended by Act of Congress approved March 3, 1791, (1 Stat. 214, Chapter 17, District of Columbia Code, page XXXIV).

5. (a) Plaintiff Chesapeake and Potomac Telephone Company, on December 9, 1971, filed with the Office of the Surveyor, D.C., an application pursuant to Section 7-408 proposing the closing of a part of the public alley abutting Lots 22, 825, 834 and 835 in Square 288.

(b) Plaintiff Supreme Council, on February 25, 1969, filed with the Office of the Surveyor, D.C., an application pursuant to Section 7-408, proposing the closing of a part of the public alley abutting Lots 800, 808, 40, 41, 42, 106 and 28 in Square 192.

(c) Plaintiffs Herman and Bernstein, on November 3, 1972, filed with the Office of the Surveyor, D.C., an application pursuant to Section 7-408, proposing the closing of a part of the public alley abutting Lots 833, 847, 848, 834, 835, 836 and 38 in Square 457.

(d) Plaintiffs Ulysses and Lulu Auger, in September, 1972, filed with the Office of the Surveyor, D.C., an application pursuant to Section 7-408, proposing the closing of a part of a public alley IX Square 70 abutting Lots 870, 871, 872, 873, 133, 134 and 135 and also filed an application in December, 1972, proposing the closing of a part of a public alley in Square 51 abutting Lot 870.

(e) Plaintiff Bicentennial Associates, in January, 1971, filed with the Office of the Surveyor, D.C., an application pursuant to Section 7-408, proposing the closing of a part of the public alley abutting Lots 113 and 879 in Square 100.

(f) Plaintiff Washington Medical Center, Inc. filed in the spring of 1971, an application with the Office of the Surveyor, D.C., pursuant to Sections 7-306 and 7-307, proposing the closing of part of the public alleys abutting Lots 849, 848, 838, 837, 827, 825, 844 and 42 in Square 106.

6. All applications were duly processed through the District of Columbia departments, including the Department of Highways and Traffic, Department of Sanitary Engineering and through the utility companies and agencies concerned. Plaintiffs complied with all the statutory requirements and met all conditions imposed by the reviewing agencies and received their favorable recommendations. No objections were made to the closing by the abutting or nearby property owners or by any department or agency of the District of Columbia or the United States Government or by anyone else.

7. (a) By Resolution of March 7, 1972, the District of Columbia Council approved under Section 7-401 *et seq.*, the closing of the alley area in Square 288, with title thereto in the plaintiff Chesapeake and Potomac Telephone Company.

(b) By Resolution of October 6, 1970, the District of Columbia Council approved under Section 7-401 *et seq.*, the closing of the alley area in Square 192 with title thereto in the plaintiff The Supreme Council.

(c) By Resolution of December 18, 1973, the District of Columbia Council approved under Section 7-401 *et seq.*, the closing of the alley area in Square 457 with title thereto in the plaintiffs Herman and Bernstein.

(d) By Resolution of January 23, 1973, the District of Columbia Council approved under Section 7-401 *et seq.*, the closing of the alley area in Square 70 with title thereto in the plaintiffs Ulysses and Lulu Auger. By Resolution of December 18, 1973, the District of Columbia Council approved under Section 7-401 *et seq.*, the closing of the alley area in Square 51, with title thereto in the plaintiffs Ulysses and Lulu Auger.

(e) By Resolution of October 19, 1971, the District of Columbia Council approved under Section 7-401 *et seq.*, the closing of the alley area in Square 100 with the title thereto in the plaintiff Bicentennial Associates.

(f) By Resolution of February 5, 1974, the District of Columbia Council approved under Sections 7-306 and 7-307 the closing of the alley area in Square 106 with title thereto in the plaintiff Washington Medical Center, Inc.

8. As an additional condition precedent to the closing, the defendants District of Columbia and District of Columbia Council, purporting to act under color of authority contained in Sections 7-401 and 7-410, *supra*, and Sections 7-306 and 7-307, *supra*, required plaintiffs to pay the following amounts purportedly representing fair market value of the alley areas closed and the depreciated value of improvements within the alley area to be closed as indicated below. Except for the amount representing depreciated value of improvements paid by plaintiff The Supreme Council directly to the District of Columbia, all moneys were placed in escrow.

Plaintiff	*Fair Market Value*	*Depreciated Value*
(a) C & P Telephone Co.	$ 47,850.00	$ 413.19
(b) The Supreme Council	11,133.56	5,820.00
(c) Herman and Bernstein	84,656.40	——
(d) Ulysses & Lulu Auger		
a. Square 70	16,875.00	208.65
b. Square 51	7,098.00	——
(e) Bicentennial Associates	29,172.00	1,512.62
(f) Washington Med. Ctr.	599,258.00	——

9. In each closing pursuant to written agreement between the plaintiffs and the District of Columbia the funds representing charges for fair market value were placed in escrow with various District of Columbia banks and savings and loan institutions pending final judicial determination of the authority or lack thereof of the District of Columbia

to make such charges against abutting property owners. The charges representing depreciated value of improvements were also placed in escrow except those paid by plaintiff The Supreme Council which were paid directly to the District of Columbia.

10. Pursuant to the terms of the Deeds of Trust the alley areas were part of that category of land to be divided equally with one-half the land to be assigned back to the original proprietors by the Trustees and the other half of the land to be assigned to the Commissioners to be sold to purchasers for value upon such terms and conditions as the President should deem proper.

11. Each of the alley areas involved in the instant litigation was placed in trust as part of the land area under the terms of the Deeds of Trust as described in paragraph 10 and were either assigned by the Trustees back to the original proprietors or were sold to purchasers for value other than the United States of America.

12. The original division and disposition of the land areas including the alley areas involved in this litigation is set forth as follows:

(a) The portion of the original alley closed in Square 288 (C&P Telephone Co.) abutted and was appurtenant to Lots 22, 825, 834 and 835. The original alley abutted original Lots 18, 19, 21 and 22. Under the initial division of the square on January 30, 1797, these lots remained in the ownership of David Barnes, the original proprietor of the square.

(b) The portion of the original alley closed in Square 192 (The Supreme Council) abutted and was appurtenant to Lots 800, 808, 40, 41, 42, 106 and 28. The original alley abutted original Lots 9, 13-15, 17-18, Square 192 which were assigned to the public "to be sold agreeably to the deeds of trust concerning lands in the said City" under the initial division of the square on November 6, 1798 from the lands of Sam Blodget and Robert Peter, original proprietors. The original lots and the apportioned alley area for each of said lots was in turn sold and conveyed by the Commissioners as indicated on the Disposal of Public Lots document. These lots were conveyed out by the Commissioners on May 31, 1852, Liber JAS 41, folio 229 (new), to Joshua Pearce "subject to terms and conditions declared by the President . . . to have and to hold the said ten lots of ground with their privileges and appurtenances to him , his heirs and assigns forever."

(c) The portion of the original alley closed in Square 457 (Herman and Bernstein) abutted and was appurtenant to Lots 833, 847, 848, 834, 835, 836 and 38. The original alley abutted original Lots 19, 20, 22, 23 and 24. Under the initial division of Square 457 on October 4, 1792, Lots 22 and 23 remained with David Barnes, the original proprietor of the square. Said properties were in turn purchased by other purchasers for value. Original Lots 19, 20 and 24 were assigned to the public "to be sold agreeably to the deeds of trust concerning lands in the said City" from the land of David Barnes, original proprietor, on October 4, 1792. The original Lots and the apportioned alley area for each of said lots was in turn sold and conveyed by the Commissioners as indicated in the Disposal of Public Lots document.

More specifically, Lots 19 and 20 were advertised for public sale at auction, August 30, 1802, and sold to Alexander Kerr (Sen. Doc. No. 653, p. 37, places date of sale on August 31, 1802). Superintendent Thomas Monroe "doth grant, bargain, sell, alien, release and conform" the lots unto Kerr, his heirs and assigns forever to his and their proper use and behoof forever."

Lot 24 was selected by Morris, Nicholson and Greenleaf and sold by Superintendent Monroe to William Simmons, June 29, 1803 (September 2, 1802 according to Sen. Doc. No. 653, p. 37). Advertised for sale at public auction August 30, 1802 and conveyed to Simmons with same language as in deed for Lots 19 and 20, Square 457.

(d) The portion of the original alley closed in Square 70 (Auger) abutted and was appurtenant to Lots 870, 871, 872, 873, 133, 134 and 135. The original alley abutted original Lots 6 and 7. Under the initial division of the Square on October 1, 1796 Lot 6 remained in the ownership of Morris and Nicholson as original proprietors. Original Lot 7 was deeded, Liber WB-120, folio 286 (new), "William Noland, Commissioner of Public Buildings 'doth bargain and sell,' August 1, 1845, to Thomas Corcoran—all the lots designated (including Lot 7) '. . . to have and to hold said lots with their privileges and appurtenances to him the said Thomas Corcoran his heirs and assigns forever'."

The portion of the original alley closed in Square 51 (Auger) abutted and was appurtenant to Lot 870. The original alley abutted original Lots 9, 10, 12 and 13. Under the initial division of the Square on July 27, 1796, these Lots remained in the ownership of the original proprietor, Robert Peter.

(e) The portion of the original alley closed in Square 100 (Bicentennial Associates) abutted and was appurtenant to Lots 113 and 879. The original alley abutted original Lots 17, 18, 20, 21. Original Lots 17, 20, and 21 were assigned to the public "to be sold agreeably to the Deeds of Trust concerning the lands in the said City" from the lands of the original proprietor, James M. Lingan, pursuant to a division made on October 5, 1792. Original Lots 17, 20 and 21 and the apportioned alley area for each of said lots was in turn sold and conveyed by the Commissioners as indicated in the Disposal of Public Lots. These lots and the apportioned alley area for each of said lots were in turn sold to John Picherell in fee simple, who purchased them from the Commissioner of Public Buildings on January 11, 1830 "subject to the terms and conditions declared by the Pres. of the U.S. for regulating the materials and manner of buildings and improvements." This deed was recorded in Liber WB-28, Folio 246 (new).

Original Lot 18, Square 100, under the initial division of Square 100 on October 5, 1792, remained in the ownership of the original proprietor, James M. Lingan.

(f) The portion of the original alley area closed in Square 106 (Washington Medical Center) abutted and was appurtenant to Lots 849, 848, 838, 837, 827, 825, 844 and 42. The original alley abutted original Lots 3-8, 13-15, 17-22 and 28. On October 17, 1791, the square, whose sole proprietor had been James M. Lingan, was initially divided in the following way pertinent to this closing:

Lots Nos. 6, 7, 8, 13, 21 and 22 were to remain to the said James M. Lingan.

Lots Nos. 3, 4, 5, 14, 15, 17, 18, 19 and 20 were assigned to the public "to be sold agreeably to the Deeds of Trust concerning lands in the said City."

More specifically, under the disposal of public lots Lot 3, Square 106, was purchased in fee simple (Liber G-7(A), folio 10 (new)) from the Commissioners of the City of Washington by Absalom Joy, March 25, 1801 (February 25, 1801 according to Senate Doc. No. 653, p. 19) "subject to terms and conditions declared by the President. . . ." Note: At the end of the certificate is the following:

"Lot No. 3 in Square 106 contains	4168 sq. ft.
proportion of alley	488 sq. ft.
	4656 sq. ft."

Lots 4 and 5, Square 106, were purchased in fee simple (Liber T-19, folio 252 (new)) from Superintendent Thomas Monroe "subject to terms and conditions declared by the President . . ." by William Morgan, Issac Briggs, Gerald Brooke and Samuel Lukens as trustees and for the use of the religious Society of Friends on March 24, 1808.

Lot 14, Square 106, sold to John Sioufsa on November 11, 1811 per Senate Doc. No. 653, p. 19 (believed to be recorded in Liber A-B-27, folio 350 (old)) (could not locate liber). liber)).

Lot 18 purchased in fee simple (Liber A-Q-41, folio 153) June 22, 1815 (June 20, 1815 according to Sen. Doc. No. 653, p. 19) by John Freeman "subject to terms and conditions declared by the President. . . ."

Lot 19, by virtue of "An Act granting certain city lots to the Corporation of the Columbian College for the purposes therein mentioned" (Act of July 14, 1832, 22d Cong., 1st Sess.) assigned, in fee simple, to the trustees of that college by Joseph Elgar, Commissioner of Public Buildings, on February 1, 1833 (not recorded in Sen. Doc. No. 653) recorded by deed in Liber WB-50, folio 20 (new).

Lot 20 purchased April 21, 1852 (April 28, 1852 in Sen. Doc. No. 653, p. 19) from William Easby, Commissioner of Public Buildings by William B. Todd "subject to the terms and conditions declared by the President . . ." Easby "doth bargain and sell" lot to Todd "to have and to hold the said lot of ground with its privileges and appurtenances to him [Todd] and his heirs and assigns forever." (Liber J.A.S.-39, folio 108 (new)).

Lot 28 purchased from Superintendent Thomas Monroe in fee simple (Liber AC-28, folio 252 (new)) by Toppan Webster on February 27, 1812 (December 4, 1811, according to Sen. Doc. No. 653, p. 19) "subject to the terms and conditions declared by the President . . . ."

13. (a) On March 25, 1975 plaintiff C&P filed its claim for refund in this Court.

(b) On January 5, 1974 plaintiff The Supreme Council filed its claim for refund in this Court.

(c) On April 7, 1975 plaintiffs Herman and Bernstein filed their claim for refund in this Court.

(d) On March 25, 1975 plaintiffs Ulysses and Lulu Auger filed their claim for refund in this Court.

(e) On January 29, 1975 plaintiff Bicentennial Associates filed its claim for refund in this Court.

(f) On March 25, 1975 plaintiff Washington

Medical Center, Inc. filed its claim for refund in this Court.

II

It is important to note the historical background of the alleys in the original City of Washington before addressing the merits in these cases. Detailed descriptions of the founding of the Nation's Capital and the laying out of the original squares, lots, streets and alleys are set forth in a number of cases. The most significant being: *Pratt v. Law*, 13 U.S. (9 Cranch) 456 (1815); *Van Ness v. City of Washington*, 29 U.S. (4 Pet.) 232 (1830); *Morris v. United States*, 174 U.S. 196 (1898); *Fitzhugh v. United States*, 59 App. D.C. 285, 40 F.2d 797 (1930); *United States v. Groen*, 72 F. Supp. 713 (D. D.C. 1947); *Brooks v. Brooks*, XXVIII Wash. L. Rptr. 335 (D.C. Sup. 1900).

This Court will not set forth yet another statement of that history, rather, it will set forth that history as described in the excellent brief filed by these plaintiffs, which is also quoted in part in *Washington Medical Center, Inc. v. United States*, 545 F.2d 116, 122-123 (Ct. Cl. 1976) in which that Court held that title in the original alleys was in the United States. *See* 545 F.2d at 124.[1] That history as set out in the plaintiffs' brief is as follows:

Under the Charter of June 20, 1632 from Charles I, King of England, Cecilius Calvert, the first Lord Proprietary of the Province of Maryland, was granted all lands now embraced within the District of Columbia. After the American Revolution, Maryland became a state and succeeded to all rights of the Lord Proprietary, including the absolute right to the soil for use by the people of the new sovereignty.

The State of Maryland authorized cessation to the United States of the territory which is now the District of Columbia. (Act of December 23, 1788, Maryland Laws 1788, Chapter 46, D.C. Code p. XXX (1973)). By Act of Congress, adopted July 16, 1790 (1 Stat. 130 Ch. 28; D.C. Code p. XXXIII), as amended by Act of Congress approved March 3, 1791 (1 Stat. 214, Ch. 17; D.C. Code p. XXXIV), the cession was accepted and the President of the United States was authorized to appoint three commissioners whose duty was to "survey, and by proper metes and bounds define and limit" such district or territory. The Act empowered the Commissioners "to purchase or accept such quantity of land on the eastern side of [the Potomac River] for the use of the United States, and according to such plans as the President shall approve." Additionally, the Commissioners were required to provide suitable buildings for the accommodation of public offices prior to the first Monday in December, 1800, at which time the seat of government would be transferred to the federal city.

On January 24, and March 30, 1791, the President by proclamation located and defined the limits of the District of Columbia and appointed the Commissioners who, with their successors, located and laid out the City of Washington. (D.C. Code, p. XXXIV and XXXV (1973)). The general boundaries of the proposed City, now called the "original" City, were the Eastern Branch, the Potomac River, Rock Creek to a point near P Street, N.W. then following what is now Florida Avenue to 15th and H Streets, N.E., then south to C Street, N.E. then east to 20th Street and then south to the Eastern Branch. The land within was devoted mostly to farm purposes owned principally by 19 owners hereinafter sometimes referred to as "original proprietors".

While various maps and plans for the City were being prepared under the direction of the President and the Commissioners, negotiations were entered into between the Commissioners and the original proprietors which resulted in agreements executed by the parties providing for the disposition of the land within the original City pursuant to deeds of trust to be executed.

The Deeds of Trust (see form, Burch's Digest 330-34 (1823)) were executed around June 30, 1791 by the original proprietors and provided for the disposition of the land within the limits of the City of Washington in three different categories: (1) the fee title to streets was vested in the United States. See *Van Ness v. City of Washington, supra;* (2) the land appropriations or reservations for the use of the United States were purchased by the Commissioners with fee title vesting in the United States at the rate of 25 pounds per acre; (3) the entire residue of the land, after being laid out in squares, parcels and lots was to be divided equally with one-half the land conveyed to the original proprietors by the trustees and the other one-half assigned to the Commissioners to be sold upon such terms and conditions as the President should deem proper with the proceeds from said sales to be first applied towards the payments due the original proprietors, with the remaining proceeds to the President of the United States to be applied for purposes under the Act of Congress (e.g., construction of new governmental buildings) authorizing the acquisition or acceptance.

On December 19, 1791 the State of Maryland ratified the previous Act of Cession (Maryland Law 1791, Ch. 45; D.C. Code p. XXX) noting that agreements had been entered into between the Commissioners and the original proprietors by the Deeds of Trust previously described also included in the ratification a specific proviso stating "That nothing herein contained shall be so construed to vest in the United States any right of property in the soil as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States. . . ."

There is no mention in any of the agreements or in the Deeds of Trust of title or ownership of the interior alleys. However by regulation of the President dated October 17, 1791, certain building regulations were promulgated and declared to be "the terms and conditions under and upon which conveyances are to be made according to the Deeds of Trust of the lands within the City." A section of these regulations provided as follows:

> The way into the square, being designed in a special manner, for the common use and convenience of the occupiers of the respective squares, the property in the same is reserved to the public, so that there may be an immediate interference on any abuse of the use thereof by any individual to the nuisance or obstruction of others. The proprietors of the lots adjoining the entrance into the squares, in arching over the entrance, and fixing gates in the manner the commissioners shall approve, shall be entitled to divide the space over the arching and build it up with the range of that line of the square.

Acting pursuant to the Deeds of Trust, the Trustees, after allocation for streets and public reservations under the other two categories of land utilization, made the division of the residue of the lands by assigning squares and portions thereof or lots to the original proprietors and to the Commissioners for subsequent sale to the public. Pursuant to Acts of the assembly of Maryland (December 19, 1791 and December 28, 1793, respectively) the assignments made back to the former owners were deemed completed and sales to the purchasers of the lots by the Commissioners by certification were deemed to be "sufficient and effectual to vest the legal estate in the purchasers . . . without any deed or formal conveyances."

III

The defendants first argue that this case should be dismissed as the result of the failure of the plaintiffs to join an indispensable party, namely, the United States. This argument is based on the fact that if the original alleys were owned by the United States then any funds collected from these plaintiffs will be paid into the Treasury of the United States. Conversely, should the Court rule that the alleys are not the property of the United States, then the moneys would be returned to the plaintiffs to the detriment of the United States.

It is important to note, however, that the moneys paid over by the plaintiffs as set forth in Part I, par. 8, *supra*, have not been paid into the United States Treasury. Those funds are now being held in bank accounts, in escrow, pursuant to an agreement by the parties. Moreover, these cases are suits for injunctive and declaratory relief and challenge the authority of the District of Columbia and the District of Columbia City Council to charge for the alleys as a condition for their being closed by the District of Columbia.

The defendants made a similar argument in *Carr v. District of Columbia*, 371 F. Supp. 293 (D. D.C. 1974) which was affirmed without opinion, 172 U.S. App. D.C. 224, 521 F.2d 324 (1975). There the facts were essentially the same as here and the court (Judge Flannery) stated (371 F. Supp. at 296):

> In this action the United States is not an indispensable party within the meaning of Fed. R. Civ. P. 19(b). Plaintiffs here seek a declaratory judgment. The sole issue raised is whether the District of Columbia has authority to charge plaintiffs the fair market value for alley space closed pursuant to The Street Readjustment Act of the District of Columbia, supra. Congress has delegated to the District of Columbia complete authority to close United States alleys. See ¶ 9, infra. Therefore, a judgment rendered in the

1. The plaintiffs in that case have filed a Petition for Certiorari with the United States Supreme Court and have recently cited the favorable results in this case in support of their Petition for Rehearing of their Petition for Certiorari.

United States' absence would be entirely adequate and would not prejudice United States' interests. More importantly, since the funds at stake in this action have not been deposited into the United States Treasury, but instead have been placed in an escrow account in The Riggs National Bank, judgment here for plaintiffs would neither run against nor be satisfied from United States funds. Rather, judgment would simply declare the rights of the parties who represent all the necessary interests in such escrow funds. In addition, no party would be subject to the threat of double liability which would be present had the District of Columbia already received and paid the funds to the United States.

The above reasoning has equal applicability in this case.

Furthermore, a few other factors should be mentioned. Although the United States is not a formal party in this case it has actively participated in and been fully represented at every hearing. An attorney for the United States, and sometimes more than one, attended all proceedings in this case. Even though the arguments and briefs were written and filed in the names of these defendants, counsel for the United States argued on given points of law. This then is not the case where the United States merely reviewed pleadings and observed the proceedings in the courtroom; this is the case where the United States was a very active participant, participating in the writing of pleadings and briefs and at oral argument. Indeed, on one occasion these defendants asked for additional time to file a responsive pleading to the plaintiffs' motions for summary judgment for the reason that "counsel for the defendant was advised by a representative of the Department of Justice that a short additional extension of time was needed in order for *them* to prepare and make copies of the pleading responsive to plaintiffs' motion". (Emphasis this Court's.) There is no doubt that the argument presented to this Court in these cases is the argument of the United States.

On one occasion, it was requested by the plaintiffs that this Court visit the National Archives of the United States in order to view some of the original documents which form the basis for this Court's decision. This Court agreed to do so and was accompanied by counsel for plaintiffs, counsel for the defendants, and counsel for the United States.

Counsel for the United States always sat at defendant's table during court hearings and did not hesitate to address the Court on any point where he felt that counsel for the defendants had not sufficiently articulated the position of the United States.

Another factor which negates against the alleged indispensability of the United States is the fact that even though the statutes under which these alleys were closed and the charges made had been in existence for many years the defendants never made any charges until 1967. This fact is conceded by the defendants *and* the United States. *See also Carr v. District of Columbia*, 371 F. Supp. at 296. It is also conceded by the defendants *and* the United States that the United States did not involve itself in any decision, past or present, to charge or not to charge for the closing of the alleys, that it did not involve itself in the decision to begin charging for the alley closings in 1967, and that it does not involve itself in the decisions as to the amount of the charge for any alley closing or whether any charges should be made at all. It is conceded that the United States does not and has not participated in any manner in any alley closing proceeding of this nature. There is no suggestion that the United States has more recently changed the nature of its participation in these alley closing proceedings. All these facts demonstrate that the United States has no real interest in these proceedings, actually, the position of the United States is not unlike that of an incidental beneficiary.

All of the above facts weigh against any argument that the United States is an indispensable party in these cases since it has always abided by the defendants' decision concerning whether charges should be made and the amount of such charges. The defendants have always made the final decision whether the United States was to recover any funds whatsoever from the closing of a particular alley and accordingly, this Court concludes that the United States has no real interest in these proceedings, and is therefore not an indispensable party.

Turning to Super. Ct. Civ. R. 19 which governs the joinder of persons needed for adjudication, this Court notes that the United States is not prejudiced by the failure to join it in this proceeding since it has completely delegated the authority to collect or not to collect to these defendants. The relief granted here would not remove moneys from the Treasury of the United States since the funds are now in escrow. The issue raised here concerns only the actions of the defendants and not of the United States. Finally, these plaintiffs do not have an adequate remedy if this case is dismissed since they cannot file an action in the United States Court of Claims in view of the fact that the moneys have not been paid into the Treasury of the United States. Taking into consideration all of the above four factors, *see* 3A Moores Federal Practice, ¶ Civil 19.07-2 (1977), this Court concludes that this case should not be dismissed for failure to join the United States.

One final point deserves mention and that is, the United States is fully aware of this litigation and has actively participated in every phase of this litigation and could have intervened as a party if it had desired to do so. On the other hand, the plaintiffs may not have been able to join the United States as a party defendant in this case because of the doctrine of sovereign immunity.

After considering all of the above factors, this Court concludes that the United States is not an indispensable party and that these cases should not be dismissed.

IV

Any discussion of the merits must begin with the documents found in the National Archives. This Court, together with counsel, visited the National Archives and viewed many of the original documents which will be referred to in this Opinion. Plaintiffs thereafter provided copies of those documents for the benefit of the Court, counsel and for the record. One volume of those documents is attached to the affidavit of Antionette J. Lee and her deposition is also a part of the record. Those documents will henceforth be referred to as the "Lee" exhibits. Another set of documents is referred to in the deposition of Elizabeth J. Miller, those documents have also been copied and are a part of the record and will be referred to as the "Miller" exhibits. Both Ms. Lee and Ms. Miller are historians who have conducted considerable research in these cases by reviewing the originals of documents now before the Court. The "Lee" and "Miller" exhibits have all been certified as true and authentic copies of the originals by a representative of the National Archives of the United States.

The record also contains the depositions of Harold T. Pinkett and Dorothy Provine, the former being Chief of the National Resources Branch of the National Archives and Records Services, and the latter being an employee of the National Archives and Records Services who works primarily with various records relating to the District of Columbia. The final deposition which is also a part of the record is that of Ralph E. Ehrenberg who is Director of the Cartographic Archives Division of the National Archives. His deposition was taken on October 18, 1977 and completed on November 9, 1977.

The plaintiffs rely upon testimony set forth in the above affidavits and depositions to support their argument that the above documents are authentic records and the actual records relating to the subject alleys. Now, apparently unlike their position in the case before the United States Court of Claims, *Washington Medical Center, Inc. v. United States*, 545 F.2d at 126, the *United States* has conceded that the documents are authentic. Counsel so advised this Court at oral argument that they do not contest the authenticity of the documents.

This Court is satisfied in any event that the documents are authentic documents and that their authenticity has been established by the depositions and testimony already mentioned. Time does not permit a detailed analysis of the documents, however, a few words on just one set of documents are in order. Some of the important papers before this Court are taken from a document entitled "Register of Squares". Ms. Lee examined the testimony of John Stewart who testified in the case of *Morris v. United States, supra*, in the 19th century. He referred to a volume entitled the Register of Squares and to other relevant documents and described them as authentic documents. (Lee Dep. 13) It was further determined that one Nicholas King was appointed as a surveyor on September 21, 1796 to lay out certain streets of the city and to give gradations. He mentioned his work several times in his manuscript primarily from December 1797 to January 1798. It has been established that he was assisted in his work by his brother Robert King. His papers contain a letter from Robert King to James Rice of Baltimore County (Maryland). In that letter Mr. King requested Mr. Rice to prepare two blank volumes of a certain size, entitled "Register of Squares" and also requested two or three cakes of what he referred to as "Lake Extra" which is a reddish ink. Robert King was associated with Nicholas King in the preparation of the Register of Squares and it is noted those volumes are written in reddish ink. (Lee Dep. 14-16.) Based upon these facts the witness concluded that the Register of Squares examined by the Court were the same as the Register of Squares prepared by the surveyor Nicholas King. This conclusion is also supported by the testimony of Mr. Ehrenberg who has co-authored some articles on Nicholas King and is familiar with his style and handwriting (Ehrenberg Dep. 9-13). These facts together with all of the other information presented by the witnesses supports the finding that the Register of Squares reviewed by the Court, copies of which are in evidence in this case and relied upon by this Court are authentic documents. The same can be said for the other documents which are a part of the record in this case—a fact now conceded by both defendants and the United States.

V

Without identifying each and every document which is in evidence, some reference should be made to the more important documents and their significance respecting the merits of this case. It must be kept in mind that the defendants contend that the original alleys were owned by the United States and based on that contention they now seek to charge for the alley closings. The plaintiffs, on the other hand, argue that the United States never had title in the alleys. The latter argument is borne out by the documents filed in this case.

The original Deeds of Trust between the original proprietors and the trustees were entered into beginning in 1791. One such Deed of Trust has been filed in this case, however, it is dated 1793 (Lee Ex. C-1). The language of the earlier and later documents are conceded to be similar. These documents are important because they set forth the exact terms and conditions under which the property was conveyed to the trustees. They establish that the original proprietors conveyed to the trustees with the understanding that one-half of the *quantity* conveyed would be returned to the original proprietors but not necessarily the same property. The remaining portion was for the use of the United States and the public, the latter to be sold by the Commissioners to members of the public who wished to purchase land in the City of Washington. The Deeds of Trust also refer to the sale by the United States as being "under such terms and conditions as the President of the United States, for the time being, shall direct". More importantly, the Deeds of Trust provide that the "conveyances to the purchasers shall be on and subject to such terms and conditions as shall be thought reasonable by the President, for the time being, for *regulating the terms and manner of the buildings and improvements on the lots generally*". (Emphasis this Court's.) In the opinion of this Court, the last reference is merely a direction that the President may establish what would today be referred to as a building code. (See Deed of Trust, Lee Ex. C-1.) That direction was carried out by the President when he wrote the regulations dated October 17, 1791. These regulations are also referred to in *Washington Medical Center, Inc. v. United States*, 545 F.2d at 124, 125, and will be discussed at a later point in this Opinion.

The Commissioners divided the squares equally by assigning one-half of the lots back to the original proprietors and one-half of the lots for the use of the public. (Lee Ex. D-1 thru D-25.)

The Register of Squares also sets forth the division between the original proprietors and the public. The volume contains one page for each square and the top of each page contains a drawing of the square showing its breakdown into numbered lots and the subject alleys. It is significant at this point that the bottom of the page again sets forth the division of the lots—approximately one-half of the lots and one-half of the square footage being assigned to the original proprietors and the other half of the lots and square footage being set aside for sale to the public. (Lee Exs. E-4 thru E-7.) The latter are the lots which were thereafter sold to various purchasers and speculators. It is again significant that each of the pages gives a detailed breakdown not only of the square footage of the lots but the square footage of the adjoining portion of the alley. Such a breakdown showing a portion of the alley in relation to the lots is inconsistent with the theory that the alleys were owned by the United States. The portion which was reserved for the public has the same breakdown of square footage for lot and alley. The Register of Squares goes on to list when the property was sold and "to whom sold".

The next documents of interest are referred to as "Disposal of Public Lots" (Lee Ex. F-1 thru F-6). These documents also contain a record of the sale of public lands and have columns headed "Square", "Lot", "Square Feet in Lots", "Proportion of Alley", "When Sold or Selected", "To Whom Sold", "When Conveyed", and "When Entry of Transaction is Made". The significance of this set of documents is that they also contain a breakdown of the square footage of the alleys. These documents are consistent with and contain the same entries as those found in the Register of Squares. The fact that it refers to the sale of the lots and to the *proportion of the alley* certainly suggests that the alleys were included in the sale, a fact which if true is inconsistent with the argument that title to the alleys was in the United States.

The following documents refer to various sales of the lots to purchasers and speculators and show the amount paid for some of the lots. (Lee Ex. G thru R.) Almost all of the documents dated prior to 1815 have a breakdown of property sold into the area of lot and the area of the proportion of the alley adjoining that lot. The entries found in these documents are consistent with those found in the Register of Squares and the Disposal of Public Land record (Lee Ex. G-1 thru G-7).

Some of the documents do not give a breakdown of the area of the alley but the figure listed under the column headed "Contents in Square Feet" include the total area of lot *and* alley. One such example can be found in Square 107, Lot 2. The Register of Squares sets out the square footage of the Lot as 2,685 and of the alley as 159½, the total of the two being 2,844½ square feet. The lot was sold to Morris and Nicholson (Lee Ex. 4). The Disposal of Public Land document gives the same breakdown (Lee Ex. F-3) as does an account book (Lee Ex. G-3). The same lot was involved in what is apparently yet another transaction referred to in the same book showing the square footage as 2,844 and the sales price of $66.00. (Lee Ex. G-8.) The 2,844 square foot figure is exactly one-half square foot less than the total square footage for the lot and alley. This record thus suggests that the sale of the lot included not only the lot by a proportion of the alley and again is inconsistent with the claim that the alleys were the property of the United States.

The page of the Division of Squares volume reveals that each square was divided equally between original proprietors and the public, a further suggestion there was no reservation of a fee in the alleys by the United States. (Lee Ex. N-1 thru N-4.) It would seem that if the United States had a fee in the alley that the square footage of the alley would have been deducted from the square footage of the total square but such was not the case.

Without further elaboration on these points it is sufficient to note that the treatment of the alleys in the sales dating back to the original Deeds of Trust is consistent with the argument that the alleys were sold to the public and were not thereafter held in fee by the United States.

VI

Not only do the records just discussed reveal that the record keepers were careful to list the area of the proportion of the alleys as well as that of the lots, those records contained at least a suggestion that the purchasers paid for "their" proportion of the alleys as well as for the lots.

Direct evidence of payment for lot and alley can be found in two documents in which there is a breakdown of the square footage of the property and the price paid. (Lee Ex. R-1) The square involved is Square 76, Lots 1-3, 8-12, 9-22 and 28-30. The total square footage for the above lots was 59,129 and that of the proportion of the alleys adjoining the lots, 5,900 for a total of 63,029 square feet. The record notes that the above land was sold at $80 per "standard lot", a standard lot being 5,265 square feet. The record further reveals that the amount paid for the above land was $988. One can arrive at that same figure by simply dividing the total land area including the lot and proportion of alley which is 65,029 square feet by the standard lot of 5,265 square feet and multiplying the resulting figure by $80.00. Simple arithmetic reveals then that the purchaser paid for both lot and alley. The same calculation can be performed for a different square and lots with the same result. (See Lee Ex. R-2.)

This point can be further illustrated by reference to Journal Volume 3, page 328 (Miller Ex. Q) which contains the entry that Absalom Joy purchased Lot 3 in Square 106 for $0.08 per square foot and paid a total of $372.48. The Journal Volume does not set forth the square footage of the lot. However, this figure can be determined by referring to the Register of Squares for the same lot which lists the property as being sold but does not indicate to whom it was sold. The lot area is listed as 4,168 square feet and the proportion of the alley adjoining the lot is listed as 488 square feet for a total of 4,656 square feet for both lot and alley. (Miller Ex. C-5.) That figure multiplied by the $0.08 per square foot paid by Absalom Joy equals the $372.48 which was actually paid by Joy. Further proof that the very lot was sold to Joy is found in the Disposal of Public Lots document (Miller Ex. D-5) which lists the sale of the same land to Joy on March 25, 1801.

Although the plaintiffs were unable to present documents which give a breakdown of the price per square foot or for a standard lot paid for the other land involved in these cases, since such information could not be located, the above still presents a further suggestion that the Commissioners charged for both lots and a proportion of the alleys when selling the public lots. It seems inconceivable that the Commissioners would have charged for a proportion of the alleys if title to those alleys had been retained or reserved by the United States.

VII

As pointed out above, the Commissioners sold public lots to the public and charged for both lots and alleys. This is evidence that the Commissioners considered the alleys as a part of the lots, as did the purchasers of the property. This is made particularly clear in the case of Absalom Joy. Further evidence of the intent of the Commissioners is found in their reply to a letter addressed to them by one John Nicholson dated September 6, 1796, while George Washington was still the President. Mr. Nicholson had apparently questioned one or more of the Commissioners concerning his right to close the alleys in his square and thereafter wrote them in order to obtain a written confirmation of their advice to him. His letter and their reply are preserved in the National Archives. Mr. Nicholson wrote as follows (Lee Ex. V-1):

"Gentlemen:

It will be a satisfaction to me to have you a line expressive of the opinion you this date

gave verbally that the owner of whole square in the City of Washington may shut the alleys as laid out by you and recorded—and otherwise lay out the same square at their pleasure into lots.

I am the more desirous of this point as some of our houses are already built on ground you laid out for alleys—in square wholly our own—we having laid out the same square differently.

Yours respectfully,

The Commissioners of
the City of Washington

Jno. Nicholson
Sep. 6th, 1796"

The reply from the Commissioners is set out in Entry No. 494, pp. 188 and 189 of the Records of the Office of Public Buildings and Grants dated September 7, 1796, and states (Lee Ex. V-2):

7th Sept. 1796

494 Lin. Commissioner's Office

The alleys within the Squares not having been directed by the President, or conveyed by the original proprietors for public use, but on the contrary, being paid for by the purchasers of the Squares, we are of the opinion, that where the whole Square belongs to one person, or to several persons, who will all concur in the measure, that those alleys may be shut up, or otherwise, as appropriated as the proprietor or proprietors judge most for their advantage—We are, with respect,

G. Scott
W. Thornton
A. White

John Nicholson, Esq.

The Commissioners noted that the purchasers paid for the alleys and that when the square is owned by one person or by several persons who concur, the alleys may be closed. Their conclusion is inconsistent with the theory that title in the alleys was in the United States.

One further document touching upon the state of mind of the Commissioners at or about this time is a set of interrogatories addressed to the Clerk of the Commissioners of the City of Washington in preparation of the case of *Pratt v. Law*, *supra*, which was decided in 1815. The relevant interrogatory which is No. 11 and the answer thereto is as follows: (Lee Ex. U-1)

11th Interrogatory - In the answer you have given * * * to fifteen additional Interrogatory have you not included in the statement of square feet given by you; the proportion of square feet contained in public alleys as calculated & applied to lots by the Commissioners.

Answer - Yea.

The answer by the Secretary to the Commissioners, City of Washington is yet further evidence that the Commissioners conveyed both lot and alley to purchasers.

VIII

The defendants and the United States have presented no evidence which is contrary to those documents already discussed. While it is true that an earlier trial court was of the opinion that there was a lack of evidence to prove that the Register of Squares were contemporaneous and original books, a fact noted by the Supreme Court in *Morris v. United States*, 174 U.S. at 277, that defect has been overcome in this case. The Testimony of Mr. Ehrenberg of the National Archives is that the documents were prepared by Nicholas King and his brother Robert King. Nicholas King worked as a surveyor for the City of Washington from 1796 to 1797 and from 1803 to 1812. There is no statement as to his duties during his first term but during his second term his duties included surveying plots, certifying and recording the subdivisions of squares and lots and fixing the building lines. Since he held the same employment between 1796 to 1797, we can assume that his duties were the same. (Ehrenberg Dep. 115.)

Further proof that the documents are originals is that they are referred to in the detailed "Inventory of Books Plans Instruments belonging to the Public in the Surveyors Office" dated May 31, 1802 signed by Robert King. (Miller Ex. W.) The other documents referred to in this opinion are also described in that inventory.

When one compares all of the documents presented in these cases and notes the relationship between those documents, as for example between the Register of Squares, the Disposal of Public Lands, the Journal volumes and the other materials, it must be concluded that the documents are entitled to great weight and *are* the original documents. As noted in Part IV, *supra* it was Robert King who ordered the preparation of those volumes titled Register of Squares and the ink known as "Lake Extra" which is a reddish ink. The volumes found in the National Archives were entitled Register of Squares and were written in a reddish ink. This Court is also satisfied that those volumes were written in the style and hand of Nicholas King. The relationship between the various documents has been briefly illustrated by the case of Absalom Joy. (See Part VI, *supra*.) Although this Court did not take the time to trace each and every document in this opinion, it has reviewed those documents, traced them and is fully satisfied that they are all interrelated. This fact alone would establish the authenticity of those documents as well as their reliability.

Finally, as to the weight to be given to these records, the defendants as noted above have presented no other evidence on these points nor have they or the United States really contested that the documents are the original documents and, in fact, they have conceded that the documents are authentic.

IX

The defendants and the United States argue that, notwithstanding the above evidence, the determination as to the ownership of the original alleys can be based entirely on the Regulations signed by President Washington on October 17, 1791. (Lee Exs. W-1 and W-2.) While it is true that it is necessary to look to the documents which purport to assign, convey, reserve or retain title, the significance of the evidence just discussed is that they reveal a pattern of disposal of the lands which was accomplished contemporaneously with the time President Washington issued his Regulations. That pattern was to treat the alleys as being sold, and indeed, to charge for them. It seems unlikely that such action would have been taken, especially where some land owners raised specific questions concerning the status of the alleys, see Part VII, *supra*, unless there was a clear understanding that the alleys were not the property of the United States.

The Regulations issued by President Washington on October 17, 1791, are as follows:

17 October 1791

The President pursuant to the Deeds in Trust published the following Terms and Conditions of Improvements in the City of Washington.

Terms and Conditions, declared by the President of the United States this seventeenth day of October seventeen hundred and ninety-one, for regulating the materials and manner of Buildings and Improvements on the Lots in the City of Washington.

1st That the outer and party walls of all houses within the said City shall be built of Brick or Stone.

2 That all buildings on the streets shall be parallel thereto and may be advanced to the Line of the Street, or withdrawn therefrom at the pleasure of the Improver: But where any such building is about to be erected, neither the foundation or party wall shall be begun, without first applying to the person or persons appointed by the Commissioners to superintend the buildings within the City, who will ascertain the lines and the walls to correspond with these regulations.

3d The wall of no house to be higher than forty feet to the roof in any part of the City, nor shall any be lower that thirty five feet on any of the Avenues.

4th That the person or persons appointed by the Commissioners to superintend the buildings may enter on the land of any person to set out the foundations and regulate the walls to be built between party and party as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built and shall be of the breadth and thickness determined by such person, proper. And the first builder shall be reimbursed one moiety of the charge of such party wall, or so much thereof as the next builder shall any ways use or break into the said wall. The charge or value thereof to be set by the person or persons appointed by the Commissioners.

5th As temporary conveniences will be proper for lodging workmen and securing materials for building, it is to be understood that such may be erected with the approbation of the Commissioners, but they may be removed and discontinued by the special order of the Commissioners.

6th The way into the squares being designed in a special manner for the common use and convenience of the occupiers of the respective squares, the property in the same is reserved to the public, so that there may be an immediate interference on any abuse of the use thereof by any individual to the nuisance or obstruction of others. The proprietors of the Lots adjoining the entrance into the squares, on arching over the Entrance and fixing gates in the manner the Commissioners shall approve shall be entitled to divide the space over the arching and build it up with the range of that line of the square.

7th No vaults shall be permitted under the streets the streets nor any encroachments on the foot way above by stoops, porches, cellar doors, windows, ditches or leaning walls, nor shall there be any projection over the streets, other than the eves of the house without the consent of the Commissioners.

8th These regulations are the terms and conditions under and upon which conveyances are to be made according to the deeds in Trust of the Lands within the City.

Geo. Washington

Agreeably to the President's order for the sale of lots, the Commissioners published the following: Terms of Sales of Lots in the City of Washington this 17th day of October 1791.

All the lands purchased at this sale are to be subject to the terms and conditions declared by the President pursuant to the Deed in Trust. The purchaser is immediately to pay one-fourth part of the purchase.

he origin of the Regulations can be traced irectly to the Deeds of Trust. (See for examle, Lee Ex. C-1.) That document was briefly escribed in Part V, *supra*.

Under the Deeds of Trust, the original proprietors conveyed their lands to the trustees. The deeds provided that the President could direct that the land be laid out for the federal city into squares, parcels and lots as the President might approve. The trustees would then convey to the Commissioners who would convey one-half of the quantity back to the original proprietors, after setting aside one-half for the use of the public. It is recognized in the document that the original proprietors might not receive the same land back so there was a provision to convey to them a like quantity of land or money in lieu thereof. The land which was not specifically set aside for use by the United States or not returned to the original proprietors was known as the public lands and was to be "sold at such time, or times, in such manner, on such terms and conditions as the President might direct."[2]

The deed then provides that:

> But the said conveyances to the purchasers shall be on and subject to such terms, and conditions, as shall be thought reasonable by the President, for the time being, for regulating the materials and manner of the buildings, and improvements on the lots generally, in the said city, or in particular streets, or in parts thereof, for common convenience, safety, and order * * *

It is obvious that this section of the Deeds authorizes the President to promulgate building regulations, keeping in mind that the conveyances from the original proprietors was for the establishment and erection of a new city.

The language of the Regulations is consistent with that of the Deeds. First, it provided that the regulations were being promulgated "pursuant to the Deeds in Trust" and that the Regulations set the "Terms and Conditions of Improvements in the City of Washington". The language in the next paragraph tracks the language of the Deeds in providing that the "terms and conditions" are declared "for regulating the materials and manner of buildings and improvements on the lots in the City of Washington". Clearly the Regulations refer directly to that provision of the Deeds authorizing the President to establish building codes or regulations.

The specific language of the regulations themselves are also significant since the context is typical of building codes. They provide that the outer and party walls shall be constructed of brick or stone, that all buildings shall be parallel to the streets but may be on the street or back from the street provided however that before beginning construction the builders must apply for a permit. The regulations set the height limit of buildings and provide for building inspectors. The above are all set out in the first four regulations. The fifth regulation provides for the temporary lodging of workmen and placement of material on the lots on conditions that the material must be removed by special order of the Commissioners. By this it is assumed that the Commissioners and the President sought to avoid any public nuisances.

The sixth regulation is the one on which these defendants and the United States rely in their claim that the United States held title to the alleys. All parties agree that the term "way into the squares" refers to the alleys. The defendants argue that the phrase "the property in the same is reserved to the public" means that title is reserved to the United States. That argument is consistent with the holding in *Washington Medical Center, Inc. v. United States*, *supra*. That holding by the Court of Claims, although not binding on this court, is entitled to great weight. However, that court did not have the benefit of the documents and other evidence now before this Court.

This Court interprets the Regulations as, not giving or reserving to the United States a fee, but rather, only as a building regulation providing for, at most, an easement for the use and benefit of the lot owners. The interpretation is based upon several factors.

First, there is no indication in the Deeds of Trust that there was to be a reservation of title to the alleys.

Second, it seems unlikely that such an important reservation of a fee would be buried within what is obviously a simple building code. The regulation is one of eight regulations and is numbered six. It occupies no particular place of prominance in the Regulations. It is preceded by regulations which concern the establishment of a building inspection procedure, the height oj housing, the construction of party walls and foundations, and the lodging of workers and the storage of building materials.

Third, the regulation does not refer to a fee interest or title in the United States, yet it is based upon documents (Deeds of Trust) which are carefully drawn and worded and which spell out in detail the rights of the signatories. Several times throughout the Deeds of Trust there is reference to the granting or the conveyance of fee simple interests. Since the Regulations track the language of the Deeds of Trust, it would seem that such an important paragraph in the Regulations would have carefully spelled out the rights of the property owners by adopting the language of the Deeds of Trust. The defendants argue that it is significant that the Regulations refer to "property" which they seek to interpret as synonymous with title or ownership, however, after reviewing the Deeds and the Regulations this Court concludes that the failure of the Regulations to refer directly to a fee or ownership or title was deliberate; simply said, there was no intent to reserve ownership in the alleys.

Fourth, the defendants have made no showing that the United States ever had a fee interest in the square or the alleys upon which they could reserve title. The original proprietors conveyed their interest to the trustees, in trust, to have and to hold pending the directions by the President. The land was laid out in squares, lots and parcels. The President then requested the trustees to convey the streets and specific squares for the use of the United States. (Lee Ex. E-1 and E-2.) There is no evidence that the United States ever paid for the alleys. The squares conveyed for the use of the United States are briefly described in "A statement of the quantity of land appropriated to the use of the United States in the City of Washington". (Lee Ex. E-3.) Neither of the above documents refers to the alleys and there is no showing that any other land was conveyed to the United States at that time. The land which was conveyed to the United States and which is referred to above included such property as the Judiciary Square, the President's Square, the Capital Square, the Center Market, the National Church Square, and so forth. The remainder of the land was still held in trust by the trustees who conveyed it to the Commissioners who then returned a one-half quantity to the original proprietors, pursuant to the Deeds of Trust, and set aside the remainder

2. Actually, of the land deeded to the trustees, a portion was conveyed to the United States at the rate of 25 pounds per acre for the use of the United States (President's Square, Judiciary Square) and the residue was divided equally, one-half to the original proprietors and one-half for sale to the public.

for sale to the public. It is these two final categories which are of concern here and as can be seen, there was never a conveyance of title in those lands to the United States. The conveyance was to the trustees and thereafter to the Commissioners before the land was sold at public auction. Since the United States never held title to that land, the President could not have reserved title in the alleys. This is consistent with this Court's interpretation of the Regulations, that the Regulations are a building code which set out an easement for the common benefit of the land owners adjoining the alleys.

Fifth, the Regulations were promulgated pursuant to that section of the Deed of Trust authorizing the President to establish "terms and conditions for regulating the materials and manner of buildings and improvements on the lots in the City of Washington". The President, in his Regulations, uses the same language and states within the Regulations that they are to establish the manner of buildings and improvements in the new city. He then goes on to do just that in his Regulations. That is the specific language of the Deeds of Trust and that specific language is carried over to the building regulations.

Based upon the above interpretations, this Court concludes that title to the contested alleys was never in the United States and that the United States is therefore not entitled either directly or through the District of Columbia to charge a fee based upon depreciated value or the fair market value of the lands consisting of the alleys. In view of the above, the plaintiffs are now entitled to receive back those funds which have been paid into escrow.

X

Although some past court opinions have suggested that title to the alley was in the United States, those opinions were rendered at a time when the issue had not been raised and all parties had assumed that title was in the United States or at a time when the original documents were not before the court or the court did not have an opportunity to consider those documents.

Here, there are no genuine issues of material fact and both sides have moved for summary judgment. It has been conceded by the defendants and the United States that the documents forming the basis of this Court's opinion are authentic and original documents, and this Court is satisfied based upon its own observation of the documents and the testimony submitted in these proceedings that the documents are indeed authentic and original and were made contemporaneously with the transactions they reflect. After considering the history of the Federal City, the history of the squares, lots and creation of the alleys, the Deeds of Trust and the Regulations together with the actual practice of the Commissioners in selling lots to members of the public, this Court concludes that title to the alleys was not in the United States.

To summarize, this decision is based upon the fact that the United States never had title, that the Deeds of Trust did not provide for the United States having or retaining title, that the Regulations signed by President Washington on October 17, 1791 were made pursuant to the Deeds of Trust and were no more than building regulations setting forth an easement for the benefit of lot owners, that in preparing the Register of Squares and other documents pertaining to the squares and lots, the proportion of the alleys was always treated as a part of the lot, that in fact the Commissioners actually put up for sale and sold to the public not only the lots but the respective proportion of alleys and that the statements of the Commissioners, made contemporaneously with these events, reveal that the Commissioners intended to sell, not only the lots but the proportion of the alleys as well.

It should be noted briefly that the United States has not always taken the position that title to the alleys was in the United States, indeed, in a brief filed in preparation of the case of *Fitzhugh v. United States, supra*, there is a suggestion by the Government that title to the alleys was not in the United States.

In view of all of the above factors this Court enters summary judgment for the plaintiffs.

LEGAL NOTICES

U.S. COAST GUARD

Notice is hereby given that an order dated 1 June 1978 has been issued by the undersigned authorizing the name of the gas screw yacht HAZE, official number 578190, owned by D. William and Lavinia J. Canzanelli, of which Washington, D.C. is the home port, to be changed to LAVINIA. ANTHONY J. GALKO, Documentation Officer. By direction of the Officer-in-Charge, U.S. Coast Guard, Marine Safety Office, Baltimore, Maryland. June 12, 13, 14, 15.

Notice is hereby given that an order dated 2 June 1978 has been issued by the undersigned authorizing the name of the Oil Screw Yacht MY YEN, official number 548466, owned by Cope Ford, Incorporated, of which Washington, D.C. is the home port, to be changed to COPESETIC II. MARGARET L. HERRERA, Documentation Officer. By direction of the Officer-in-Charge, U.S. Coast Guard, Marine Safety Office, Baltimore, Maryland. June 12, 13, 14, 15.

Notice is hereby given that an order dated 6 June 1978 has been issued by the undersigned authorizing the name of the Gas Screw Yacht BILLINDA, official number 541009, owned by FRANK M. GOLDMAN, of which Washington, D.C. is the home port, to be changed to FANTASY ISLAND. MARGARET L. HERRERA, Documentation Officer. By direction of the Officer-in-Charge, U.S. Coast Guard, Marine Safety Office, Baltimore, Maryland. June 13, 14, 15, 16.

Notice is hereby given that an order dated 6 June 1978 has been issued by the undersigned authorizing the name of the Gas Screw Yacht AQUILA II, official number 561697, owned by Marcus K. Kiriakow, of which Washington, D.C. is the home port, to be changed to ANNA K. ANTHONY J. GALKO, Documentation Officer. By direction of the Officer-in-Charge, U.S. Coast Guard, Marine Safety Office, Baltimore, Maryland. June 13, 14, 15, 16.

Notice is hereby given that an order dated 6 June 1978 has been issued by the undersigned authorizing the name of the Gas Screw Vessel DONNA JUNE, official number 239414, owned by OSCAR E. DILLON, JR. & DONALD L. SONNER, of which Washington, D.C. is the home port, to be changed to POTEEL. MARGARET L. HERRERA, Documentation Officer. By direction of the Officer-in-Charge, U.S. Coast Guard, Marine Safety Office, Baltimore, Maryland. June 13, 14, 15, 16.

FIRST INSERTION

CINKAN, Jack Deceased

Altmann and Kellison, *Attorney*
1616 H Street, N.W., Washington, D.C.
Superior Court of the District of Columbia
PROBATE DIVISION
No. 1826-76, Administration.

THIS IS TO GIVE NOTICE: That the subscriber, of the State of Maryland, has obtained from the Superior Court of the District of Columbia, Probate Division, Letters Testamentary on the estate of Jack Cinkan, late of the District of Columbia, deceased. All persons having claims against the deceased are hereby warned to exhibit the same, with the vouchers thereof, legally authenticated, to the subscriber, on or before the 4th day of December, A.D. 1978; otherwise they may by law be excluded from all benefit of said estate. Given under my hand this 2nd day of June, 1978. WILLIAM SCHWARTZ, 5225 Pooks Hill Road, Bethesda, Maryland. Attest: ROSEMARY NUNN, *Deputy Register of Wills for the District of Columbia, Clerk of the Probate Division.* [Seal.] June 13, 20, 27.

De MAISCH, Rosina Caprario Deceased

Irena Izabella Karpinski, *Attorney*
1511 K Street, N.W. Suite 829
Superior Court of the District of Columbia
PROBATE DIVISION
No. 142-78, Administration.

THIS IS TO GIVE NOTICE: That the subscriber, of the District of Columbia, has obtained from the Superior Court of the District of Columbia, Probate Division, Letters of Administration, C.T.A. on the estate of Rosina Caprario de Maisch, late of the District of Columbia, deceased. All persons having claims against the deceased are hereby warned to exhibit the same, with the vouchers thereof, legally authenticated, to the subscriber, on or before the 4th day of December, A.D. 1978: otherwise they may by law be excluded from all benefit of said estate. Given under my hand this 2nd day of June, 1978. PATRICK W. JACOBSON, 1545 18th Street, N.W., Suite 516. Attest: ROSEMARY NUNN, *Deputy Register of Wills for the District of Columbia, Clerk of the Probate Division.* [Seal.] June 13, 20, 27.

THOMPSON, George Elliott

Paul J. McGarvey, 530 Woodward Bldg.
Washington, D.C. 20005, *Attorney*

[Filed May 24, 1978. Joseph M. Burton, Clerk, Superior Court of the District of Columbia.] Superior Court of the District of Columbia. Family Division. Domestic Relations Branch. IMOGENE R. THOMPSON, *Plaintiff* vs. GEORGE ELLIOTT THOMPSON, *Defendant*. Jacket No. D3341-77. ORDER PUBLICATION—ABSENT DEFENDANT. The object of this suit is to obtain an absolute divorce on the ground of one year separation without cohabitation. On motion of the plaintiff, it is this 22nd day of May, 1978, ordered that the defendant, George Elliott Thompson, cause his appearance to be entered herein on or before the fortieth day, exclusive of Sundays and legal holidays, occurring after the day of the first publication of this order; otherwise the cause will be proceeded with as in case of default. Provided, a copy of this order be published once a week for three successive weeks in the Washington Law Reporter, and the Washington Star, before said day. /s/ BRUCE S. MENCHER, *Judge*. [Seal.] Attest: *Clerk of the Superior Court of the District of Columbia.* By Harold Keye, *Deputy Clerk.* June 13, 20, 27.

SECOND INSERTION

BLACK, Harriet Serrell Deems Deceased

Kuder, Sherman, Fox, Meehan and Curtin, P.C., *Attorneys*
1900 M Street, N.W., Suite 601
Superior Court of the District of Columbia
PROBATE DIVISION
No. 991-78, Administration.

THIS IS TO GIVE NOTICE: That the subscriber, of the District of Columbia, has obtained from the Superior Court of the District of Columbia, Probate Division, Letters Testamentary on the estate of Harriet Serrell Deems Black, also known as Harriet S. D. Black, late of the District of Columbia, deceased. All persons having claims against the deceased are hereby warned to exhibit the same, with the vouchers thereof, legally authenticated, to the subscriber, on or before the 27th day of November, A.D. 1978; otherwise they may by law be excluded from all benefit of said estate. Given under my hand this 26th day of May, 1978. HARRIET DEEMS BLACK, 4000 Cathedral Avenue, N.W., #123-B. Attest: JOAN R. SAUNDERS, *Deputy Register of Wills for the District of Columbia, Clerk of the Probate Division.* [Seal.] June 6, 13, 20.

BUCHHOLZ, Frank J. Deceased

Garrity, Stanford, Ferguson & Reed, *Attorneys*
1776 K Street, N.W., Suite 606, Wash., D.C. 20006
Superior Court of the District of Columbia

UNITED STATES, et al., APPELLANTS, v. CHESAPEAKE & POTOMAC TELEPHONE COMPANY, et al., APPELLEES

Nos. 13570, 14206, 79-499

District of Columbia Court of Appeals

418 A.2d 114; 1980 D.C. App. LEXIS 332

October 23, 1979, Argued

July 14, 1980, Decided

PRIOR HISTORY:

Appeals from the Superior Court of the District of Columbia (Hon. John Garrett Penn, Trial Judge)

DISPOSITION:

Affirmed.

COUNSEL:

Carl Strass, a member of the bar of New York, pro hac vice, with whom James W. Moorman, Assistant Attorney General, Department of Justice, Dirk D. Snell and William E. Hill were on the brief, for appellants. John J. Zimmerman also entered an appearance for appellant, United States.

Whayne S. Quin, with whom James A. Stenger was on the brief, for appellees.

JUDGES:

Newman, Chief Judge, and Kern and Harris, Associate Judges.

OPINIONBY:

KERN

OPINION:

Appellees own various parcels of realty in downtown Washington abutting certain alleys. n1 They filed applications with the District of Columbia Council (Council) to close these alleys on the ground they were "useless or unnecessary." *D.C. Code 1973*, § 7-401. n2 Appellees' applications for alley-closing were routinely processed through the appropriate District of Columbia agencies and departments and ultimately approved by the Council, subject to a proviso which is the bone of contention in this litigation. The Council conditioned closing the alleys in question upon payment by appellees of the fair market value of the area of land contained in each alley, taking such action because it believed title to the alleys was in the United States.

n1 The area in which these alleys are located is the so-called original city, developed originally for the Federal City, and so the alleys may properly be called original alleys.

n2 The applicable statute, Section 7-401, provides that after an alley is closed "title to the land embraced within the public space so closed" shall "revert to the owners of the abutting property," *unless* "the title to such land be in the United States." In such case, the statute authorizes the land to be sold "for cash at a price not less than the assessed value of contiguous lots." *D.C. Code 1973*, § 7-302. A comprehensive explanation of the so-called Street Readjustment Act, *D.C. Code 1975* Supp., § 7-401 *et seq.*, is contained in *Carr v. District of Columbia, 177 U.S. App. D.C. 432, 434-35, 543 F.2d 917, 919-20 (1976).*

Appellees filed complaints against the Council and the District of Columbia in the trial court seeking (1) a declaratory judgment that the Council had no right to condition the alley-closings upon payment of such

charge, and (2) a mandatory injunction directing the return of the moneys charged which each appellee, pursuant to an agreement executed with the Corporation Counsel, had deposited in escrow pending judicial determination.

The trial court, after taking testimony and hearing argument on cross-motions for summary judgment, entered judgment for appellees. n3 It concluded, in a comprehensive opinion, 106 WASH. LAW REP. No. 104, pp. 1065, 1068-75, June 13, 1978, that title to the alleys was not and never had been in the United States, but rather in the predecessors in title to the appellees. Therefore, title to the land in the alleys reverted to appellees under the terms of the statute. *See* note 2, *supra*. The Council could not charge for the alley closings and appellees were entitled to the return of their money being held in escrow.

n3 The opinion decided the merits of six consolidated cases.

The trial court, in rendering its ruling, also concluded the United States was not an indispensable party within the scope of Super. Ct. Civ. R. 19(b). Hence, appellees' complaints were not subject to dismissal for their failure to have named the United States as a party defendant. The trial court rested this conclusion on the grounds that (1) the complaints challenged the authority of the Council to impose a payment as a condition precedent to the alley closings and sought return of money being held in escrow, rather than recovery of money from the United States Treasury; n4 and (2) "the United States is fully aware of this litigation and has actively participated in every phase of this litigation and could have intervened as a party if it had desired to do so." n5

n4 *D.C. Code 1973*, § 7-325 provides that all money received from "the sale of land in which the United States is interested ... shall be paid into the treasury of the United States by ... the District of Columbia to the credit of the United States."

n5 The court noted the presence of a federal attorney at all times during the trial and his argument of the law on the appropriate occasions.

The Council and the District of Columbia noted a timely appeal from the summary judgment in favor of appellees, but then declined to proceed with their appeal. Whereupon the United States, pursuant to Super. Ct. Civ. R. 24, moved to intervene as a defendant in the case although judgment had already been entered. The trial court denied this motion. The United States noted an appeal from the trial court's ruling on its post-trial intervention motion, and also filed a timely appeal on the merits. n6

n6 The appeals by the United States and the District of Columbia were consolidated.

Thus, we are confronted with two issues: whether the trial court, after trial and judgment, properly refused intervention by the United States as a party to the action, and whether the United States may proceed in this court with an appeal on the merits challenging the trial court's decision in favor of appellees.

The court's denial of the post-trial motion to intervene as a party was correct, given the adequacy of representation of the United States' interests at trial by the District, aided by federal attorneys. *See Calvin-Humphrey v. District of Columbia, D.C.App., 340 A.2d 795 (1975).*

The posture of the United States under the particular circumstances here, *viz.*, the District and the Council having abandoned their appeal, persuades this court to allow the United States to proceed on the merits. Therefore, we grant its motion for leave to intervene, filed with this court after oral argument, for the purpose of appealing the judgment on the merits. After consideration of the arguments by the United States we uphold the trial court's judgment in favor of appellees.

We note, in permitting the United States to proceed with its appeal on the merits, that one who was not a party to the action in the trial court has been allowed to intervene, post-judgment, for the purpose of taking an appeal under certain circumstances: where the proposed intervenor has an "appealable interest," acts promptly after the final judgment, and by its entry into the case on appeal will cause minimal prejudice to the parties already in the case. *See, e.g., United Airlines v. McDonald, 432 U.S. 385, 395, 53 L. Ed. 2d 423, 97 S. Ct. 2464 n.16 (1976); United States Casualty Co. v. Taylor, 64 F.2d 521 (4th Cir. 1933).* Such intervention has been granted, even when the proposed appellant has had its interests adequately represented in the trial court through its own efforts.

In determining whether the proposed intervenor has an appealable interest, courts have utilized traditional standing principles; the would-be intervenor must be a person "aggrieved" by the decision it seeks to challenge. *United States v. Imperial Irrigation District, 559 F.2d 509, 521 (9th Cir. 1977).* n7 Since the District of Columbia has declined to pursue its appeal of the judgment concluding these alleys were not owned by the United States, and since the United States is entitled by statute to the proceeds from the District's closing of any alleys owned by the United States, *see* note 4, *supra*, we conclude the United States is "aggrieved" by the decision. n8 *See Smuck v. Hobson, 132 U.S.App.D.C. 372, 377, 408 F.2d 175, 182 (1969); Wolpe v. Poretsky, 79 U.S.App.D.C. 141, 144, 144 F.2d 505, 508, cert. denied, 323 U.S. 777, 89 L. Ed. 621, 65 S. Ct. 190 (1944).* We note that its appeal on the merits was filed promptly after final judgment and its participation in this case on appeal cannot be said to prejudice appellees in light of their position that they do not oppose such participation. (Appellees' brief at 13, 31.) Accordingly, we allow the United States to intervene for the purpose of this appeal.

n7 The Ninth Circuit Court of Appeals, in allowing post-judgment intervention in the appeal, recognized the importance of resolving a dispute created by conflicting judicial decisions. *U.S. v. Imperial Irrigation District, supra* at 520. This factor is present in the instant litigation: the United States Court of Claims has concluded, in contradistinction to the trial court's decision on appeal, that the original alleys were owned by the United States. *Calvin-Humphrey v. United States, 202 Ct. Cl. 519, 480 F.2d 1323 (1976).*

n8 In *Commercial Security Bank v. Walker Bank and Trust Co., 456 F.2d 1352 (10th Cir. 1972),* the Tenth Circuit Court of Appeals allowed the United States to intervene, post-judgment, for the purposes of appeal. It noted particularly that the trial court's order purported to bind the United States, which had not been served, joined, or otherwise submitted itself to the jurisdiction of the court. In the instant case, the trial judge in its opinion concluded that "the United States ... is not entitled ... through the District of Columbia to charge a fee based upon depreciated value of the lands consisting of the alleys [ordered by the Council to be closed]."

Turning now to the merits, the United States argues first that the instant "case appears to be a dispute over title to land. Litigation over title to land in which the United States claims an interest can take place only in a federal district court." (Brief at 9.) It urges that this case is really an action to quiet title to alleys in which the United States claims an interest "[so] ... [such] an action cannot be entertained in the Superior Court." (Brief at 12.) A reading of the complaints makes it clear, however, that appellees were not bringing an action to establish title to land, n9 but were seeking relief from action by the Council which they alleged was beyond the Council's authority. Appellees sought, in addition, the return of the moneys they had been required to pay into escrow in order to take advantage of the Council's favorable ruling on their applications for closure of the alleys abutting their lots.

n9 Appellees, of course, make no claim that the chain of title to their parcels of realty was faulty and hence judicial action was necessary to correct or cancel any deeds of record.

We view this action, therefore, not as a suit to quiet title, which according to the government's argument belongs in a federal district court, but as an action challenging the Council's action under the Street Readjustment Act. We note that the United States District Court of the District of Columbia reached the same conclusion in a case similar to the instant litigation. Thus, in *Oliver T. Carr, Jr. v. District of Columbia*, (No. 77,445, January 12, 1979), the court rejected the argument that "a 1973 challenge to the authority of the District of Columbia to charge fair market value for the alley space closed" was "in reality a quiet title action pursuant to *28 U.S.C. § 1346*(f)." n10

n10 This decision is presently on appeal.

The United States next argues that the trial court's conclusion that "title to the contested alleys was never in the United States" was error. Specifically, the government contends "the appellees' predecessors' original town lot grants ... are grants from the United States. The original grant documents do not on their face purport to convey any interest in the alleys. ... Lot numbers alone were used. ... The abutting owners are here then seeking to go behind their original actual grant documents. They may not do this unless there is an irreconcilable ambiguity in the face of the document strongly suggesting a larger grant. There is no such larger grant language in this case ...." (Brief at 18-20.)

Appellees' response, which persuaded the trial court, is that "[the] documents which begin the chains of title herein are the deeds of trust by which the original proprietors conveyed their title to *trustees*, not the United States. ... The fact that the deeds convey land by lot number is in no way inconsistent with [appellees'] theory of this case since, at common law, such a conveyance was entirely sufficient to convey both the lot and a portion of the adjacent alley." (Appellees' Supplemental Brief at 2-5.)

In order to place the parties' arguments as to these documents of title (to the original alleys) in perspective, we must turn to the trial court's opinion recounting the history of the creation of the Federal City in which the alleys in question are located. The court states:

On January 24, and March 30, 1791, the President by proclamation located and defined the limits of the District of Columbia and appointed the Commissioners who, with their successors, located and laid out the City of Washington. (D.C. Code, p. XXXIV and XXXV (1973)). The general boundaries of the proposed City, now called the "original" City, were the Eastern Branch, the Potomac River, Rock Creek to a point near P Street, N.W. then following what is now Florida Avenue to 15th and H Streets, N.E., then south to C Street, N.E. then east to 20th Street and then south to the Eastern Branch. The land within was devoted mostly to farm purposes owned principally by 19 owners hereinafter sometimes referred to as "original proprietors".

While various maps and plans for the City were being prepared under the direction of the President and the Commissioners, negotiations were entered into between the Commissioners and the original proprietors which resulted in agreements executed by the parties providing for the disposition of land within the original City pursuant to deeds of trust to be executed.

The Deeds of Trust (see form, Burch's Digest 330-34 (1823)) were executed around June 30, 1791 by the original proprietors and provided for the disposition of the land within the limits of the City of Washington in three different categories: (1) the fee title to streets was vested in the United States. See *Van Ness v. City of Washington, supra*; (2) the land appropriations or reservations for the use of the United States were purchased by the Commissioners with fee title vesting in the United States at the rate of 25 pounds per acre; (3) the entire residue of the land, after being laid out in squares, parcels and lots was to be divided equally with one-half the land conveyed to the original proprietors by the trustees and the other one-half assigned to the Commissioners to be sold upon such terms and conditions as the President should deem proper with the proceeds from said sales to be first applied towards the payments due the original proprietors, with the remaining proceeds to the President of the United States to be applied for purposes under the Act of Congress (e.g., construction of new governmental buildings) authorizing the acquisition or acceptance.

All agree that we are here concerned with the land contained in the third category described above, *viz.*, the residue of land remaining after the streets of the Federal city had been laid out and certain parcels reserved for the sole use of the United States. n11 The trial court concluded that the Deeds of Trust executed by the original proprietors with the trustees "establish that the original proprietors conveyed to the trustees with the understanding that one-half of the *quantity* conveyed would be returned to the original proprietors but not necessarily the same property. The remaining portion was ... to be sold by the Commissioners to members of the public who wished to purchase land in the City of Washington." (Emphasis in original.) The court concluded further that title to the land abutting the original alleys here in question was conveyed either to the original proprietors or members of the public -- all predecessors in title of appellees. Therefore, when the parcels were conveyed by lot number only such conveyances nevertheless included the appropriate portion of abutting alleys.

n11 The land in the original city reserved for the United States, as the trial judge noted, included such property as the Judiciary Square, the President's Square, the Capital Square, the Center Market and the National Church Square.

Certain documents in the National Archives of the United States, viewed by the trial court and conceded by the parties to be authentic, support the conclusion that title to the abutting alleys was held by the predecessors in title of appellees rather than by the United States. Thus, the so-called Register of Squares, a document prepared at the time of the creation of the original city, sets forth the division of the lots between the original proprietors and the public. Each of the pages of the Register gives a detailed breakdown not only of the square footage of the lots, but the square footage of the portions of the alleys adjoining the lots. Such a breakdown showing a portion of the alley in relation to these lots is inconsistent with the theory that the alleys were owned by the United States.

These documents before the trial court also contain a record of the sale of public lands and have columns headed "Square," "Lot," "Square Feet in Lots;"

"Proportion of Alley," "When Sold or Selected," and "To Whom Sold." Such documents are consistent with and contain the same entries as those found in the Register of Squares. The fact that the records refer to the *sale* of lots *and* to the proportion of the alley certainly suggests that the alleys were included in the sale.

Specifically, although some documents do not give a breakdown of the area of the alleys, it is clear that the figure listed under the column headed "Contents in Square Feet" included the *total* area of the lot *and* alley. For instance, in a lot sold to Morris and Nicholson the documentary information can be diagramed as follows.

Sq. Ft. of Lot	Sq. Ft. of Alley	Total Ft. Sold
2,685	159 1/2	2,844

The 2,844 square foot figure is exactly one-half square foot less than the *total* square footage for the alley and lot combined. This record thus suggests that the sale of the lots included not only the lot, but a proportion of the alley.

Other documentary evidence cited by the trial court in its opinion reveals that "each square was divided equally between original proprietors and the purchasing public. It would seem that if the United States had a fee in the alley the square footage of the alley would have been deducted from the square footage of the total square but such was not the case." (Record at 663.)

We note, as did the trial court, that in 1796 the Commissioners, designated pursuant to the Deeds of Trust to sell one-half the residue to the public, expressed the opinion that alleys had *not* "been directed by the President, or conveyed by the original proprietors for public use," but rather had been "paid for by the purchasers of the Squares" and could be "shut up" if "the whole Square belongs to one person, or to several persons, who will all concur in the measure ...." (Record at 666.)

We respectfully disagree with the Court of Claims which concluded that title to the original alleys is in the United States. *Washington Medical Center, Inc. v. United States, 211 Ct. Cl. 145, 545 F.2d 116 (Ct. Cl. 1976).* That court, in reaching its conclusion, acknowledged that the Deed of Trust executed by the original proprietors with the trustees, Thomas Beall and John M. Gantt, provided that "[they] ... shall convey to the commissioners ... for the use of the United States for ever, all the said streets, and *such of the said squares, parcels and lots, as the president shall deem proper, for the use of the United States*; and that ... the residue of the said lots into which the lands shall be divided ... be conveyed by the said (trustees) to the said (grantor), his heirs and assigns; and that the said lots shall ... be sold ... and the said (trustees) will ... convey all the lots so sold ... to the respective purchasers in fee simple." *Id.* at 122 (emphasis added).

The Court of Claims then proceeded to focus on the language in the Deed of Trust reading "the trustees ... shall convey to Commissioners ... for the use of the United States for ever ... such of the said squares, parcels and lots, as the president shall deem proper for the use of the United States." It reasoned that when the President had *subsequently* issued "Terms and Conditions for regulating the materials and manner of Buildings and Improvements on the Lots in the City," in which the President referred to alleys, he had thereby exercised his rights under the Deed of Trust and reserved *all* alleys in the original city for the use of the United States. The Court of Claims relied upon one paragraph in the eight paragraphs of Terms and Conditions which deal with the material to be used in building, set-back and size of buildings and the like. n12 This paragraph reads in pertinent part:

> The way into the squares, being designed in a special manner for the common use and convenience of the occupiers of the respective squares, *the property in the same is reserved to the public*, so that there may be an immediate interference on any abuse of the use thereof by any individual to the nuisance or obstruction of others. The proprietors of the lots adjoining the entrance into the squares, on arching over the entrance and fixing gates in the manner the Commissioners shall approve shall be entitled to divide the space over the arching and build it up with the range of that line of the square. [*Washington Medical Center, Inc. v. United States, supra* at 124-25 (emphasis in original.)]

The Court of Claims reasoned that the phrase "reserved to the public" contained in this paragraph regulating "the materials and manner of Buildings" was intended to vest title to *all* original alleys in the United States.

> n12 Thus, the regulation provides, among others, for outer and party walls of all houses to be built of brick or stone, the heights of buildings not to exceed 40 feet and, on the "Avenues," not to be less than 35 feet, and no projections over

> the streets, "other than the eaves of the house without the consent of the Commissioners."

We agree with the trial court's observations concerning this conclusion by the Court of Claims. n13 First, the court observed "it seems unlikely that such an important reservation of a fee [to all alleys in the original city] would be buried within what is obviously a simple building code." (Record at 675.) The trial court pointed out that this regulation

> does not refer to a fee interest or title in the United States, yet it is based upon documents (Deeds of Trust) which are carefully drawn and worded and which spell out in detail the rights of the signatories. Several times throughout the Deeds of Trust there is reference to the granting or the conveyance of fee simple interests. Since the Regulations track the language of the Deeds of Trust, it would seem that such an important paragraph in the Regulations would have carefully spelled out the rights of the property owners by adopting the language of the Deeds of Trust. The defendants argue that it is significant that the Regulations refer to "property" which they seek to interpret as synonymous with title or ownership, however, after reviewing the Deeds and the Regulations this Court concludes that the failure of the Regulations to refer directly to fee or ownership or title was deliberate; simply said, there was no intent to reserve ownership in the alleys. [Record at 675-76.]

> n13 The Court of Claims was without the benefit of the material from the Archives relied upon by the trial court in the instant case. Such documentary material had not been authenticated at the time of the proceeding in the Court of Claims.

The trial court also pointed out in concluding the President had not reserved for the United States all original alleys that

> the Regulations were promulgated pursuant to that section of the Deed of Trust authorizing the President to establish "terms and conditions for regulating the materials and manner of buildings and improvements on the lots in the City of Washington". The President, in his Regulations, uses the same language and states within the Regulations that they are to establish the manner of buildings and improvements in the new city. He then goes on to do just that in his Regulations. That is the specific language of the Deeds of Trust and that specific language is carried over to the building regulations. [Record at 677.]

The government, citing *DeGuyer v. Banning, 167 U.S. 723, 17 S. Ct. 937, 42 L. Ed. 340 (1897),* and *Whitney v. United States, 167 U.S. 529, 42 L. Ed. 263, 17 S. Ct. 857 (1897),* argues that even if the United States did *not originally* own the alleys in question it "divided the lands in the federal city with original owners" and "[each] division paper or grant is to be treated as a grant from the United States." (Reply Brief at 8.) The government then argues that since the grants contain only lot numbers, we are barred from going behind the face of the grants to ascertain whether they were intended to convey portions of alleys because of the special deference accorded *federal* grants of land.

In the cases cited, owners claiming lands by virtue of any right or title derived from the Spanish or Mexican government were obliged to present their claims to a board of commissioners to decide on the confirmation or rejection of such claims. A confirmatory patent on the land they issued was deemed to be a grant from the United States, and required to be accepted on its face. We find the government's argument, by analogy to these cases, unpersuasive; the Deeds of Trust in the instant case expressly provided that the original proprietors were conveying the land which made up the original city to individual trustees under specific conditions. The trustees by the express terms of these conditions were required to convey all the land either (1) to the commissioners for the use of the United States or for sale to individual members of the public, or (2) back to the original proprietors. Consequently, in our view, the grants by the trustees pursuant to the Deeds of Trust cannot be deemed grants from the United States as was the situation in *DeGuyer* and *Whitney*.

Finally, the government argues that "[assuming] that the United States has only a possessory interest in the alleys, the assessment of a closure charge based upon the full fee value is clearly permissible." (Brief at 16.) n14 The Court of Claims, however, flatly concluded in *Washington Medical Center, Inc., supra* at 121:

> [If] the United States did not have title in fee simple to the ... alleys at the time they were closed, Congress would not have the power to authorize the council to charge for their closing, as the Government cannot sell "property it does not own."

Also, the Street Readjustment Act provides in Section 1 that any alley closed because it is useless or unnecessary shall revert to the abutting property owners *unless* the "title to such land be in the United States." Thus, *only* if

the United States has "title" to an alley may there be a charge for the land embraced within the alley once it is ordered closed.

n14 This "possessory interest" was variously asserted by the United States to result from occupation of the original alleys under claim of right (Brief at 13) or a cloud on the title because of a serious claim of title. (Reply brief at 2.)

The government's argument that *40 U.S.C. § 66* places a cloud on the title of appellees' predecessors is without merit. That statute directs the Secretary of Interior "to prevent the improper appropriation or occupation of any of the public streets, avenues, squares or reservations belonging to the United States ...." Such statute is by its terms inapplicable to the alleys in question here.

We are satisfied that the trial court's conclusions are correct: (1) the Council was without authority to charge appellees for the closing of the alleys in the instant case, and (2) the interests of the United States were adequately represented by the District during the trial and hence it was not entitled to intervene at trial.

Affirmed.