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COURT OF APPEALS  
STATE OF NEW YORK

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TOMHANNOCK, LLC,  
Respondent,

-against-

ROUSTABOUT RESOURCES, LLC,  
Appellant.

NO. 52

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20 Eagle Street  
Albany, New York  
June 4, 2019

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Number 52, Tomhannock v.  
2 Roustabout Resources.

3 Good afternoon, counsel.

4 MR. GILCHRIST: Good afternoon, Your Honor.  
5 Andrew Gilchrist, representing appellant Roustabout  
6 Resources. And with the court's permission, if I could  
7 reserve one minute for rebuttal?

8 CHIEF JUDGE DIFIORE: One minute?

9 MR. GILCHRIST: One minute, please.

10 CHIEF JUDGE DIFIORE: You may.

11 MR. GILCHRIST: Thank you.

12 So we go from rent stabilization in Lower  
13 Manhattan to a case dealing with a piece of property in  
14 Upstate New York, Rensselaer County.

15 Now, we're dealing with contract principles. So  
16 at issue here - - -

17 JUDGE FEINMAN: So - - - so let's get right into  
18 this contract. What is the language that you're relying on  
19 in the contract that sets up getting the subdivision  
20 approval as a condition precedent?

21 MR. GILCHRIST: Your Honor, the - - - we're not  
22 positing the argument that the contract itself states  
23 subdivision approval is required or that it constitutes a  
24 condition precedent. What we're positing to the court, and  
25 what the dissenting opinion below observed, is that the



1 contract at issue does require the - - - this particular  
2 deed, the reconveyance deed - - - to be recorded. That's  
3 clear in paragraph 3 of the option agreement.

4 JUDGE FEINMAN: It doesn't say when, though.

5 MR. GILCHRIST: It does not say when. It's a  
6 subpoint that I'll address. My answer to that, at the  
7 moment, is in the absence of a time frame in the contract,  
8 the law will clearly read a reasonable time period into the  
9 contract for performance. And that's what was observed by,  
10 again, the dissenting opinion below.

11 Paragraph 3 certainly must be read in conjunction  
12 with paragraph 1 of the option agreement. And when that is  
13 done, paragraph 3 states the reconveyance deed, plus all  
14 documents necessary to record the deed, "shall be prepared  
15 and filed" - - - in other words, shall be prepared and  
16 shall be filed - - -

17 JUDGE WILSON: But that seems to me - - -

18 JUDGE RIVERA: But you forgot the rest of the  
19 sentence.

20 MR. GILCHRIST: Excuse me.

21 JUDGE RIVERA: You forgot the rest of the  
22 sentence: "at the expense of Tomhannock."

23 MR. GILCHRIST: That's correct.

24 JUDGE RIVERA: So isn't - - - isn't the sentence  
25 really about - - - and the paragraph, about the - - - the



1 agreement between the original contracting parties - - -

2 MR. GILCHRIST: Um-hum.

3 JUDGE RIVERA: - - - as to who bears the costs of  
4 trying to get subdivision approval, getting the documents  
5 you need for recording, recording and filing, as opposed to  
6 mandating that anything related to recording and filing get  
7 done on a particular time table?

8 MR. GILCHRIST: Well, not on a particular time  
9 table, I agree with that, Your Honor. Because again, the  
10 option agreement doesn't provide a time.

11 But we do think it is the only reasonable  
12 interpretation of that first sentence of paragraph 3, that  
13 it mandates the reconveyance deed be prepared - - - both  
14 prepared and filed.

15 It does say at the expense of Tomhannock.

16 JUDGE RIVERA: Let's say we agree with you that  
17 it - - -

18 MR. GILCHRIST: Yes.

19 JUDGE RIVERA: - - - that it's a reasonable  
20 amount of time, but it does require recording.

21 MR. GILCHRIST: Yes.

22 JUDGE RIVERA: Why - - - why do we have to read  
23 it to require recording before you transfer the deed?

24 MR. GILCHRIST: No, no, no. And certainly the  
25 Supreme Court read that, and in some respects, the majority



1 opinion below. The - - - that certainly cannot happen.

2 Obviously the deed must be rec - - -

3 JUDGE RIVERA: Why not - - - I'm asking how - - -

4 MR. GILCHRIST: - - - the deed must be recorded.

5 JUDGE RIVERA: - - - how was - - - where does it  
6 say that in the option agreement?

7 MR. GILCHRIST: Paragraph 1 clearly indicates - - -

8 -

9 JUDGE RIVERA: Um-hum.

10 MR. GILCHRIST: - - - upon exercise of the option

11 - - -

12 JUDGE RIVERA: Um-hum.

13 MR. GILCHRIST: - - - the - - - in - - - in this  
14 case I'm representing a subsequent purchaser, but we'll  
15 call that party Roustabout - - - must execute the  
16 reconveyance deed.

17 JUDGE RIVERA: Um-hum.

18 MR. GILCHRIST: That, though, read in conjunction  
19 with paragraph 3, provides the mechanism. The reconveyance  
20 deed - - - and this language is critical, I believe, to the  
21 court's analysis - - - together with all documents  
22 necessary to record the deed, shall be prepared - - - we'll  
23 talk about the record in a moment - - - and shall be filed  
24 - - -

25 JUDGE RIVERA: At the expense - - -



1 MR. GILCHRIST: - - - at the expense, correct.

2 JUDGE RIVERA: Um-hum.

3 MR. GILCHRIST: At the expense.

4 JUDGE RIVERA: And that's the end of the  
5 sentence.

6 MR. GILCHRIST: But the mandatory direction of  
7 that read in conjunction with paragraph 1 is two re - - -  
8 mandatory requirements: prepare the deed, file the deed.  
9 And that's all the courts - - -

10 JUDGE RIVERA: It - - - it seems that the two  
11 paragraphs are doing different things. And if the parties  
12 wanted it to do what you were suggesting, they would have  
13 been very clear about that.

14 MR. GILCHRIST: Well - - -

15 JUDGE RIVERA: You don't convey the deed until  
16 you've done what's required in paragraph 3.

17 MR. GILCHRIST: When you read together paragraph  
18 1 and paragraph 3 - - - I do believe the dissenting opinion  
19 at the Appellate Division read them properly.

20 JUDGE RIVERA: Um-hum.

21 MR. GILCHRIST: And here, what the lower court  
22 dissenting opinion said - - - the two-judge dissent, was  
23 read together, once the option is exercised, prior to  
24 actually executing the reconveyance deed, precedent to that  
25 - - - not a condition precedent of subdivision approval - -



1 - but condition prec - - - precedent to executing the deed,  
2 is it must be prepared by Tomhannock.

3 The record shows in this case that, in fact, that  
4 was done.

5 What else needs to be prepared? All documents  
6 necessary to record that deed, likewise prepared by  
7 Tomhannock.

8 JUDGE FAHEY: But isn't - - - isn't underlying  
9 the recording of the deed, a requirement that you get  
10 subdivision approval by the - - - was it the Planning Board  
11 or the Zoning Board - - - it was the Planning Board of the  
12 village, right?

13 MR. GILCHRIST: Correct, Your Honor, yes.

14 JUDGE FAHEY: So and quite often in agricultural  
15 areas or rural areas, there's a resistance to increased  
16 subdivision. And - - - and that takes the form of, if  
17 somebody a property, they won't let them subdivide it  
18 because they don't want the land turned into housing  
19 complexes versus agricultural land. And the board makes a  
20 public policy decision to do that.

21 That's where the requirement to file the  
22 subdivision with the deed - - - the subdivision approval  
23 with the deed comes from; is that correct?

24 MR. GILCHRIST: In - - -

25 JUDGE FAHEY: Go ahead. Tell me why I'm wrong,



1 it's okay.

2 MR. GILCHRIST: - - - in - - - in part - - - no,  
3 no. In part, Your Honor. You're correct.

4 JUDGE FAHEY: All right.

5 MR. GILCHRIST: And that really kind of gets to  
6 the second point, and it's a critical one, I think, for the  
7 court to consider.

8 JUDGE FAHEY: Well - - - well, my question is  
9 this, is what are the public policy implications if we  
10 don't go your way? What are the public policy implications  
11 in those communities where this approval is required?

12 MR. GILCHRIST: Well - - - and - - - and I think  
13 they're critical. And they're critical statewide, not just  
14 in Upstate rural areas.

15 Let's focus on the subdivision requirement.

16 JUDGE FAHEY: Um-hum.

17 MR. GILCHRIST: I must tell you, as a land-use  
18 practitioner, when I first addressed this case, it - - - it  
19 didn't sit right with me. And the reason for that is, this  
20 particular parcel, in the record it's called "the whole  
21 parcel", itself was created through a subdivision. It was  
22 a three-lot subdivision.

23 JUDGE FAHEY: Right.

24 MR. GILCHRIST: Went through the review, the plat  
25 was stamped and signed and filed.



1 JUDGE FAHEY: Has there ever been any review here  
2 at all? Has there ever been any submission at all for any  
3 subdivision application put in at all?

4 MR. GILCHRIST: Subsequent to the initial three-  
5 lot approval, Your Honor?

6 JUDGE FAHEY: Um-hum.

7 MR. GILCHRIST: The record does not show that.  
8 We - - - we know through a certain point in this case,  
9 because we confirmed with the relevant town, it had not.

10 JUDGE FAHEY: I see.

11 MR. GILCHRIST: And the record does not  
12 disclosure it has been to date.

13 JUDGE FAHEY: I see.

14 MR. GILCHRIST: Okay?

15 JUDGE FAHEY: Okay.

16 MR. GILCHRIST: Now, the policy implications.  
17 The subdivision regulations in New York clearly are  
18 designed to promote public health, safety, welfare. It  
19 requires municipal review if any lot is to be divided. It  
20 - - - it goes hand-in-hand with zoning requirements. It's  
21 the underlying land use policy under the Town Law. It's to  
22 make sure that these land divisions meet certain  
23 requirements that promote public health, safety, welfare.

24 What we've got - - -

25 JUDGE RIVERA: But the local law here doesn't



1 prohibit the transfer of title?

2 MR. GILCHRIST: Well, let's take a step back.

3 JUDGE RIVERA: Without - - - without in advance  
4 getting the approval.

5 MR. GILCHRIST: Well, but let's - - - let's take  
6 a step back, which is I think it's appropriate to start  
7 with the New York State Town Law. When we start there,  
8 under Section 276, that state law defines what a  
9 subdivision is. And it's clearly the division of any lot  
10 into two or more parcels, amongst which is for the purpose  
11 of transfer of ownership. I submit to the court, that's  
12 exactly what this option agreement was entailed or designed  
13 to do.

14 And as such, under the Town Law, it meets the  
15 definition. Once you divide that whole parcel to create  
16 the reconveyance parcel, that's a subdivision. And I tell  
17 you, as a land-use practitioner, that's what caught me at  
18 first. This doesn't seem appropriate without municipal  
19 review, not as a condition ex - - - express condition  
20 precedent in the option agreement, but just as a matter of  
21 pure subdivision and land use law.

22 So we look at it further. What this - - -

23 JUDGE RIVERA: Well, it may make common - - - it  
24 may make sense, but the question is whether or not that's  
25 what the parties bargained for.



1 MR. GILCHRIST: That's correct. And that brings  
2 us then back to - - - I do think there's significant public  
3 policy implications of allowing a private contract with  
4 judicial approval to evade what is otherwise mandatory  
5 subdivision review. I think that's absolutely critical  
6 from a public policy perspective.

7 We do think the option agreement does provide for  
8 that review through the necessity of recording the deed.

9 And while my light is on, if I could answer her -  
10 - -

11 CHIEF JUDGE DIFIORE: Yes, please.

12 MR. GILCHRIST: Any subsequent purchaser standing  
13 in the shoes of my client, who comes to this parcel, the  
14 only notice they have is what is of record, and that's the  
15 option agreement. And so in reading that option agreement,  
16 we propose to you, when it speaks of preparing and filing -  
17 - - preparing documents necessary to record a deed, any  
18 party standing in that subsequent purchaser would think  
19 that's appropriate. If I have to do this, it will be  
20 legally created. I will need to transfer it back.

21 What happens if that doesn't happen? It impairs  
22 my property rights. That's the other part. And I'll speak  
23 to this in the rebuttal. It leaves the property owner in  
24 my client's position with impaired title of record. That's  
25 another important policy decision that, with the lower



1 court being maintained, sets a very bad - - - I'll submit,  
2 a very dangerous precedent from land use perspective.

3 Thank you, Your Honor.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 Counsel?

6 MR. SPAIN: May it please the court, Tom Spain,  
7 on behalf of the respondent, Tomhannock.

8 Your Honors, the agreement that's at issue in  
9 this case is very clear. It's unambiguous. It's not - - -  
10 the only fair interpretation is the interpretation that the  
11 trial court and two panels of the Appellate Division gave  
12 to it.

13 They declared that there was no requirement that  
14 the respondent in this case, that Tomhannack, have to get  
15 subdivision approval for this parcel.

16 JUDGE GARCIA: Counsel, let's say we agree with  
17 you on that. What about this - - - let's call it a public  
18 policy argument about recording the title and the effect on  
19 the - - - let's say - - - the residual landowner.

20 MR. SPAIN: Well, let me say this, Your Honor.  
21 The - - - if there's a deed delivered in this case and it's  
22 not recorded, the only parties that are - - - have any risk  
23 involved are my client and the appellant in this case.

24 The Town is not harmed in any way. I submit that  
25 this - - -



1 JUDGE WILSON: But what about subsequent  
2 purchasers who don't have adequate notice?

3 MR. SPAIN: That notice should come from the  
4 appellant. When the appellant took title to this property,  
5 Your Honor, that agreement was on record. They had full  
6 record notice. They had the opportunity to consider their  
7 purchase before they did it. And they went ahead and  
8 purchased the property.

9 You know, I - - - I don't know that I can sit  
10 here and espouse the rules as to what a seller of property  
11 has to disclose to the buyer, but you know, there should -  
12 - - if - - - if there's an issue with that, that should  
13 come from the appellant, if he's going to sell it to  
14 someone else.

15 JUDGE RIVERA: Well, a future purchaser is going  
16 to see the option agreement, right?

17 MR. SPAIN: There's no question. And the - - -  
18 and the litigation that's been filed, as well.

19 JUDGE FAHEY: You know, there's one thing that  
20 strikes me about this. And I wonder if the Appellate  
21 Division analy - - - analysis was correct on the  
22 distinction of remedies that apply here. Let me just  
23 explain what I mean.

24 Here, if - - - if the plaintiff was seeking  
25 monetary damages in a breach-of-contract action, say, then



1 Roustabout would - - - they - - - they could not use the  
2 plaintiff's failure to obtain subdivision abu - - -  
3 approval as a defense to the breach. Do you see what I'm  
4 saying?

5 MR. SPAIN: Um-hum.

6 JUDGE FAHEY: All right. However, here, we're  
7 talking not about a breach and - - - and monetary damages,  
8 we're talking about an equitable remedy of specific  
9 performance. And - - - and that means that you,  
10 Tomhannock, must show that they're ready, willing, and able  
11 to perform.

12 So the - - - the burden is then on you, on - - -  
13 on the ready, willing, and able part. How do you meet  
14 that?

15 MR. SPAIN: Your Honor, Tomhannock, at all times  
16 - - -

17 JUDGE FAHEY: In other words, to be eligible for  
18 specific performance and the remedy that was given to you.  
19 That - - - that's my question.

20 MR. SPAIN: I - - - I think I understand it, and  
21 I'll try to answer it.

22 JUDGE FAHEY: Okay. All right.

23 MR. SPAIN: Tomhannock has always been ready,  
24 willing, and able, at the time that it exercised its  
25 option. The agreement was filed in the Clerk's Office.



1 That agreement required that Tomhannock pay taxes at  
2 twenty-two percent of the rate during the term.

3 Faithfully, they paid those taxes.

4 JUDGE FAHEY: Well, I guess, really - - - I think  
5 you're right. You did all that. The only - - - the only  
6 real question in my mind is you never applied for the  
7 subdivision. So how come?

8 MR. SPAIN: It's not required by the agreement.

9 JUDGE FAHEY: I see. And - - - and filing - - -

10 JUDGE RIVERA: Because your posit - - -

11 JUDGE FAHEY: - - - the forms doesn't - - - I'm  
12 sorry. Filing the forms as laid out in the filing of the  
13 deed, doesn't seem to require that?

14 MR. SPAIN: It doesn't. That goes back to the  
15 construction. Paragraph 1 of that agreement, Your Honor,  
16 says that the res - - - that the appellant in this case, or  
17 the owner of the property, if you will, has to execute a  
18 deed. Paragraph 3, as interpreted and construed by the  
19 trial court, I think - - -

20 JUDGE FAHEY: Um-hum.

21 MR. SPAIN: - - - most elaborately, says that  
22 that delineates whose responsibility it is to do what: pay  
23 the fees, prepare the documents.

24 There's nothing in that agreement that says that  
25 - - - specifically, that there's subdivision approval.



1 There's nothing that says that the plain - - - that the - -  
2 - that Tomhannock file the - - -

3 JUDGE FAHEY: Here's - - - here's the problem  
4 sometimes with these cases and the inadequacy of the  
5 record. And it's - - - if you do a study, you've probably  
6 run across it before. If the record could answer the  
7 question, my question would be, has anybody gotten  
8 subdivision approval in this county? Has anybody gotten  
9 subdivision approval in this town? Are they blocking all  
10 of them? Are they blocking all of them because they've  
11 made a policy decision to do that, so therefore it's  
12 impossible for you to go ahead and do that one way or the  
13 other, because you figure you're going to be rejected  
14 anyway?

15 The record doesn't answer those questions. But  
16 it underlies my question about public policy before.

17 MR. SPAIN: And - - - and I - - - and I think I  
18 started to answer the question about pu - - - public  
19 policy. You know, the Town isn't harmed here. I mean, I  
20 think the - - - Tomhannock has - - - has expressed an  
21 intent to go and get the property subdivided. It knows it  
22 can't do anything with it unless it gets - - - he can't  
23 build on it. They can't resell it. They can't do anything  
24 unless they have the proper subdivision, with the exception  
25 - - -



1 JUDGE WILSON: You're prepared to live with the  
2 consequence of owning a parcel that you can't build on and  
3 have to pay taxes on?

4 MR. SPAIN: Correct. One option that they do  
5 have is perhaps to annex it to adjoining property owners.  
6 I mean, that's within the Town Code. It doesn't require  
7 subdivision approval. And I suspect that, you know, a deal  
8 could be made with, you know, an adjoining property owner.

9 JUDGE RIVERA: So if - - - let's say we agreed  
10 with you, specific performance is ordered, conveys the  
11 deed, you've got title, your position is that - - - then  
12 let's say Roustabout continues to own the rest of the  
13 acreage - - - they could not then seek approval, correct,  
14 and try and record it themselves, correct?

15 MR. SPAIN: That's incorrect, Your Honor.

16 JUDGE RIVERA: Okay. Tell me why.

17 MR. SPAIN: And one thing that I think failed,  
18 you know, to be developed in the lower court is that if - -  
19 - if there's - - - if Roustabout has this burden, they have  
20 this parcel that they can't do anything with, because it's  
21 - - - it's unclear as to who owned what, let them go to the  
22 Town and get subdivision approval.

23 They can do that. There's a defined description  
24 of both parcels. Now, there's no requirement in the law  
25 that they do it. But if - - - if they're so harmed, they



1 knew that the possibility existed that we would come to  
2 this point when they purchased the property.

3 JUDGE WILSON: So does - - - does the provision  
4 that - - - in which the DiLallos gave you the power to make  
5 municipal applications necessary for the reconveyance allow  
6 you to do this all yourself? Does that survive?

7 MR. SPAIN: Perhaps. Perhaps.

8 Con - - - consider this, Your Honor. This option  
9 agreement was - - - was filed in April of 2002. The  
10 original grantor - - - the original party to the option  
11 agreement was DiLallo. In 2005, DiLallo - - - DiLallo  
12 conveyed that property to the LaPortes. And from 2005 to  
13 2011, the LaPortes owned it. Every time that there was a  
14 tax bill, Tomhannock paid its share faithfully. It  
15 complied with the terms of the agreement.

16 In January of 2011, it exercised the option. It  
17 wrote a letter to the LaPortes, the then owner of the  
18 property, and said we're exercising our option. Here's the  
19 deed.

20 It was ignored. There was no response. In July,  
21 LaPorte transfers the title or sells the property to the  
22 appellant in this case. No explanation to Tomhannock, no  
23 response to the - - - the exercise of the option. It goes  
24 - - -the property goes to Roustabout.

25 There is - - - and then keep in mind that



1 Roustabout is a - - - it's a New Mexico corporation with an  
2 Alaska address; and - - - and at some point Tomhannock  
3 finds out how to contact them, sends them a letter, and  
4 they respond. And their response is that the - - - the  
5 option agreement is unenforceable, unenforceable because of  
6 some provision relating to there not being a clause in the  
7 deed about the option agreement. Nothing about  
8 subdivision.

9 This court can conclude, I believe reasonably,  
10 that there was no intention, ever, for - - - for Roustabout  
11 or the - - - the owner of the property at the time that the  
12 - - -

13 JUDGE FEINMAN: Is there anything in the record  
14 that suggests that perhaps 55,000 dollars wouldn't be the  
15 going price these days for that - - -

16 MR. SPAIN: We don't have anything, Your Honor,  
17 to that extent (sic). I mean, at the time this was  
18 bargained for, it was apparently worth 55,000 dollars, and  
19 that was in 2002.

20 JUDGE RIVERA: Um-hum. Let me ask, so what - - -  
21 what does this language in numbered paragraph 3 - - - as  
22 you see it - - - refer to: "application for required  
23 municipal approvals for the reconveyance of the  
24 reconveyance parcel" - - - it says the word "is", I think  
25 it's supposed to mean "as" - - - "such are deemed necessary



1 or desirable by Tomhannock." What does that mean: "deemed  
2 necessary or desirable by Tomhannock"?

3 Does that mean, really that - - -

4 MR. SPAIN: It's discretionary.

5 JUDGE RIVERA: - - - Tomhannock could say I don't  
6 want to file it?

7 MR. SPAIN: Yeah. Or I don't want some - - -  
8 some written instrument. What they're required to do is  
9 execute a deed. In its simplest sense, that's what the  
10 agreement means. And that's what we're asking for in this  
11 action, knowing full well the consequences, assuming that  
12 risk.

13 JUDGE RIVERA: What about his argument related to  
14 Town Law Section 276?

15 MR. SPAIN: There's no town law that's violated  
16 here. There's no town law that vi - - - that prevents the  
17 - - - the transfer of title.

18 I think significant in that argument is Section  
19 244 of the Real Property Law allows the transfer of title  
20 upon the execution and delivery of a deed. That's it. The  
21 Town Law isn't - - - isn't - - - is not violated, because  
22 there is no subdivision as of the date that the deed would  
23 be delivered.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 MR. SPAIN: Thank you, Your Honor.



1 CHIEF JUDGE DIFIORE: Counsel, if we find the  
2 option contract is unenforceable, can Tomhannock sue for  
3 return of the 55,000 dollars and the percentage of the tax  
4 that they paid?

5 MR. GILCHRIST: One easy answer is I may not need  
6 to speculate, because the only thing sued for here was the  
7 equitable remedy of specific performance.

8 CHIEF JUDGE DIFIORE: Um-hum.

9 MR. GILCHRIST: And so I agree, Your Honor, that  
10 that does require Tomhannock to show that it's ready,  
11 willing, and able to fulfill its contractual obligations  
12 once this ripened into a bilateral agreement.

13 We submit to the court that the language of  
14 paragraph 3 is clear and does require preparation, and most  
15 importantly, filing of the deed - - - recording of the  
16 deed.

17 Part and parcel of that, in order to legally  
18 record the deed, that's what implicates subdivision  
19 approval. I bring the court's attention, again, in the  
20 record, to the RP 5217 form. This is part of a parcel.  
21 The law requires upon recording that deed, to indicate to  
22 the County Clerk's Office and the taxing jurisdictions that  
23 this is, in fact, part of a parcel.

24 JUDGE GARCIA: But counsel, you could have  
25 written this contract to say exactly what you would like us



1 to interpret it to mean. And it doesn't say that. So it  
2 seems to me, this comes down - - - and you're familiar with  
3 our case of Voorheesville - - - if I'm saying the name  
4 right - - - Rod & Gun Club, where it was an issue of  
5 marketability, because they didn't get subdivision  
6 approval. And at the end of that we said we're not going  
7 to say this title is not marketable because you didn't  
8 draft your contract right. So if you want this, go do it.

9 And it seems to me, this is the same kind of  
10 case. You have a contract. Say we interpret this contract  
11 to mean that this isn't a pre-condition; they fulfilled it.  
12 It seems like you're asking this court to override that  
13 interpretation based on policy concerns. And why should we  
14 do that?

15 MR. GILCHRIST: No, not at all. What - - - what  
16 we're asking the court to do is to take a look at that  
17 language. The result sought by Tomhannock and indeed found  
18 by the lower court, the language, if it was to be made  
19 clear, should have said in paragraph 3: the deed and all  
20 documents necessary to record the deed shall be prepared by  
21 Tomhannock. And if Tomhannock chooses to record, then it  
22 shall also pay.

23 It doesn't say that. It says "shall prepare and  
24 shall file".

25 JUDGE GARCIA: Let me ask you this.



1 MR. GILCHRIST: That's mandatory.

2 JUDGE GARCIA: Let me ask you this. If we  
3 disagree with you - - -

4 MR. GILCHRIST: Yes.

5 JUDGE GARCIA: - - - and we find that the  
6 language in the contract, we interpret that contract to  
7 mean that this was not a pre-condition, are you asking us  
8 to overrule that interpretation based on public policy  
9 concerns?

10 MR. GILCHRIST: It - - - not just public policy  
11 concerns, compliance with state and local law - - - I ask  
12 the court to pay close attention to the Town Law and the  
13 local subdivision regulations - - - and in terms of a polic  
14 y decision, please consider also the impact to the  
15 marketability.

16 It's not a transfer issue. It's not a sale  
17 issue. It's creating a cloud on title through private  
18 contract.

19 JUDGE RIVERA: Is it - - -

20 MR. GILCHRIST: And anyone coming - - -

21 JUDGE RIVERA: - - - is it correct that you could  
22 - - - you could - - - or your client - - - could seek to  
23 actually file and record, even if he doesn't want to,  
24 doesn't do anything about it? I mean, you might be able to  
25 sue him for the costs - - -



1 MR. GILCHRIST: Um-hum.

2 JUDGE RIVERA: - - - but is there anything that  
3 prohibits you from doing it or your client from doing it?

4 MR. GILCHRIST: I - - - I think the clear intent  
5 of the parties - - - and by the way, there's nothing in the  
6 record to suggest that Tom - - - or strike that - - - that  
7 Roustabout came to this property never intending to comply.

8 JUDGE RIVERA: No, no. That - - - but - - -

9 MR. GILCHRIST: That's mere speculation. But - -  
10 -

11 JUDGE RIVERA: - - - just answer my question. He  
12 says there's no - - -

13 MR. GILCHRIST: It could be.

14 JUDGE RIVERA: - - - no legal obstacle to - - -

15 MR. GILCHRIST: Well, I would suggest - - -

16 JUDGE RIVERA: - - - Roustabout trying - - -

17 MR. GILCHRIST: Right.

18 JUDGE RIVERA: - - - to go ahead and seek the  
19 approval and then record.

20 MR. GILCHRIST: I - - - I would suggest to the  
21 court that what is clear from the intent of this agreement  
22 was that it was Tomhannock's responsi - - -

23 JUDGE RIVERA: No, no. I understand that's your  
24 argument.

25 MR. GILCHRIST: Right.



1 JUDGE RIVERA: The question is - - -

2 MR. GILCHRIST: To the extent of providing - - -

3 JUDGE RIVERA: - - - are you arguing there's a  
4 legal obstacle, however, to Roustabout doing that?

5 MR. GILCHRIST: Well, in - - - in part, it does,  
6 because what you would then be asking this particular party  
7 - - - think about why the option agreement provided the  
8 power coup - - - the interest coupled with the power.  
9 Okay.

10 The reason for that is when the application is  
11 made, this particular applicant does not own all the  
12 property, the whole lot - - -

13 JUDGE RIVERA: Um-hum.

14 MR. GILCHRIST: - - - that would be divided.  
15 Roustabout does not have that power. We could not go to  
16 the Town and ask to create the reconveyance 3.5 acre parcel  
17 and the - - - out of the whole parcel, because at that  
18 point, we don't own the 3.5 acre parcel.

19 If the court's order granting specific  
20 performance, requiring transfer of the title, my client no  
21 longer owns the 3.5 acre parcel and has no legal right to  
22 make an application for a subdivision which includes that.

23 So that's why the option agreement sets up with  
24 granting Tomhannock that power under the contract to do it.

25 JUDGE RIVERA: But - - - but your argument is



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he's got to do it before he's the owner.

MR. GILCHRIST: He must - - -

JUDGE RIVERA: So why can't you do it when you're not the owner if he can do it when he's not the owner.

MR. GILCHRIST: Well, as we stand here today, Your Honor - - -

JUDGE RIVERA: Um-hum.

MR. GILCHRIST: - - - my client is no longer the owner.

JUDGE RIVERA: Um-hum.

MR. GILCHRIST: There has been a deed executed. We are not legally entitled. It's being held in escrow, but we are no longer the owner of that property.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. GILCHRIST: Thank you for your time.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Tomhannock, LLC v. Roustabout Resources, LLC, No. 52 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

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