

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE AT JACKSON**

FREEDOM FROM RELIGION  
FOUNDATION, INC.,

Plaintiff,

vs.

Case No. 1:11-cv-1374-JDB

TOWN OF WHITEVILLE,  
TENNESSEE, MAYOR JAMES  
BELLAR and THE WHITEVILLE  
TENNESSEE BOARD OF ALDERMEN,

Defendants.

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**DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Defendants Town of Whiteville, Tennessee, Mayor James Bellar, and the Whiteville, Tennessee Board of Aldermen ask this Court to grant partial summary judgment in their favor on the following issues:

- The free-standing cross in front of James Bellar's insurance business; and
- Plaintiff's claims related to the structure on top of the Whiteville, Tennessee, water tower.

In support of this motion, the defendants rely on their memorandum and statement of undisputed material facts submitted with this motion.

Respectfully submitted,

RAINEY, KIZER, REVIERE & BELL, PLC

By: s/ Dale Conder, Jr.  
DALE CONDER, JR., BPR #015419  
JOSHUA B. DOUGAN, BPR #028066  
Attorneys for Defendants  
209 East Main Street  
P.O. Box 1147  
Jackson, TN 38302-1147  
731-423-2414  
dconder@raineykizer.com

By: s/ Drew Farmer by Dale Conder Jr.  
w/permission via e-mail 5/2/12  
Drew Farmer. BPR #24417  
LAW OFFICE OF JAMES ANDREW FARMER  
51 Emerald Ridge Cove  
Jackson, Tennessee 38305  
(615) 354-4752  
(731) 668-5836  
jamesandrew20@hotmail.com  
dfarmer@lawyer.com

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 2nd day of May, 2012, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing report. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

Alvin L. Harris  
Hubbard, Berry & Harris, PLLC  
201 Fourth Avenue North, Ste. 1420  
Nashville, TN 37219

s/ Dale Conder, Jr.

01129/72422-mdc

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE AT JACKSON**

FREEDOM FROM RELIGION  
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Case No. 1:11-cv-1374-JDB

TOWN OF WHITEVILLE,  
TENNESSEE, MAYOR JAMES  
BELLAR and THE WHITEVILLE  
TENNESSEE BOARD OF ALDERMEN,

Defendants.

---

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

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**I. ISSUES**

A. The establishment clause is a prohibition on the government; it does not apply to private citizens and their property. Here, James Bellar placed a cross on his property. Does the establishment clause require that Bellar remove the cross from his private property?

B. The First Amendment protects the display of religious symbols as religious speech. Any government restriction on speech in a public forum—such as a sidewalk—must be content-neutral. Here, even if the property in front of James Bellar’s business was public, it is a public forum. Could the government have forced him to remove it simply because it is a cross?

C. Because a Latin cross is a religious symbol, the establishment clause—in some circumstances—prohibits the government from putting the cross on its property.

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Here, the town removed one arm of the water-tower cross before the Foundation filed this lawsuit and the Foundation acknowledged it was no longer a cross. Is the Foundation entitled to an injunction requiring removal of a structure that the Foundation agrees is not a religious symbol?

D. The Constitution prevents courts from ruling on moot issues. Before the Foundation filed this lawsuit, the Town of Whiteville removed part of the cross; so, it was no longer a cross and the Foundation agreed it was not a cross. Is the Foundation's lawsuit as to the cross moot?

## II. STATEMENT OF FACTS

Several years ago, a group of citizens raised money to put a cross on top of Whiteville, Tennessee's water tower.<sup>1</sup> But the cross allegedly offends at least one of the Freedom From Religion Foundation's more than 17,000 claimed members.<sup>2</sup> In service to its anonymous member, the Foundation sent letters to the town demanding the cross's removal.<sup>3</sup> When the town didn't respond to the Foundation's first three letters, the Foundation sent a fourth letter on September 29, 2011, "demanding that Whiteville remove the cross from its water tower within 30 days."<sup>4</sup>

Although Mayor Bellar was not very happy with the Foundation<sup>5</sup>, he decided to remove the cross.<sup>6</sup> The mayor hired a company to remove one arm from the cross, leaving the mast and one horizontal bar on top of the water tower for possible use as

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<sup>1</sup> Declaration of James Bellar at ¶ 6 (attached as **Exhibit 1**).

<sup>2</sup> Complaint at ¶¶ 1 and 14 (D.E. No. 1).

<sup>3</sup> *Id.* at ¶¶ 17-20.

<sup>4</sup> *Id.* at ¶ 21.

<sup>5</sup> *Id.* at ¶¶ 22 and 23.

<sup>6</sup> Declaration of James Bellar at ¶ 6

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support for a Wi-Fi antenna.<sup>7</sup> Mayor Bellar told the Foundation what he had done.<sup>8</sup> The Foundation's co-president responded and acknowledged the mayor's actions resulted in the effective removal of the Latin cross.<sup>9</sup> And the next day the Foundation issued a press release acknowledging that "there is no longer a Latin cross on governmental property [.]"<sup>10</sup>

The Foundation became upset, however, when James Bellar, in his individual capacity, placed a cross on the sidewalk in front of his private business.<sup>11</sup> The Foundation also objected to two crosses placed on the grounds of city hall.<sup>12</sup> Within a couple of days after the Foundation filed its lawsuit, the town moved the two crosses at city hall to private property.<sup>13</sup> The town did not put the crosses back on city hall property.<sup>14</sup>

The Foundation's lawsuit seeks a broad injunction prohibiting the Town of Whiteville from "installing crosses and other religious symbols on Whiteville property . . . ."<sup>15</sup> It also seeks an injunction requiring the removal of the cross from the water tower, the removal of the crosses from in front of City Hall, and the removal of the cross from in front of James Bellar's private business.<sup>16</sup>

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<sup>7</sup> *Id.* at ¶¶ 7-8.

<sup>8</sup> *Id.* at ¶ 6; October 25, 2011, letter from the Foundation to Mayor Bellar (attached as **Exhibit 2**).

<sup>9</sup> October 25, 2011, letter from the Foundation to Mayor Bellar.

<sup>10</sup> October 26, 2011, press release (attached as **Exhibit 3**).

<sup>11</sup> Complaint at ¶ 26.

<sup>12</sup> *Id.* at ¶ 27.

<sup>13</sup> Declaration of James Bellar at ¶ 9.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at Prayer for Relief at ¶ 4.

<sup>16</sup> *Id.* at ¶ 3.

## II. ARGUMENT

A. Because the establishment clause does not apply to private citizens or their property, the government cannot prevent James Bellar from putting a cross on his property.

James Bellar is Whiteville's part-time mayor.<sup>17</sup> He also operates Bass Insurance Agency.<sup>18</sup> James Bellar decided to put a cross on the sidewalk in front of his insurance business.<sup>19</sup> The Constitution protects a private citizen's right to religious speech from government interference.

The Foundation, however, holds the odd view that the town or this Court can prohibit James Bellar, a private citizen, from putting a cross in front of his business simply because it is a cross.

The establishment clause is a prohibition on the government, not private citizens. It prevents the government from "coercing anyone to participate in religion or its exercise, or otherwise act in a way that 'establishes a [state] religion or religious faith, or tends to do so.'"<sup>20</sup> The establishment clause does not apply to private property.<sup>21</sup> James Bellar is free to put a cross on his property if he chooses. He put a cross on his own property.<sup>22</sup> So, the Foundation's attempt to have this Court interfere with James Bellar's free-speech and free-exercise rights must fail.

B. Because the First Amendment protects the display of religious symbols as religious speech, the government cannot prevent James Bellar from displaying a cross—because it is a cross—in a public forum.

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<sup>17</sup> Declaration of James Bellar at ¶ 2.

<sup>18</sup> *Id.* at ¶ 3.

<sup>19</sup> *Id.* at ¶ 5.

<sup>20</sup> *Lee v. Wiseman*, 505 U.S. 577, 587 (1992).

<sup>21</sup> *See, e.g., Utah Gospel Mission v. Salt Lake City Corp.*, 316 F.Supp.2d 1201, 1225 & n. 24 (D.Utah 2004).

<sup>22</sup> Declaration of James Bellar at ¶ 5; Declaration of Thomas Hopper at ¶ 6 (attached as **Exhibit 4**).

The courts analyze free-speech claims in three steps: (1) does the First Amendment protect the speech; (2) is the forum public or non-public; and (3) do the reasons for prohibiting the speech satisfy the requisite standard.<sup>23</sup> Here, ignoring the fact that the cross is on private property, the government still could not have forced James Bellar to remove the cross from the sidewalk; at least, not merely because it was a cross.

First, the First Amendment gives full protection to private religious speech.<sup>24</sup> And religious symbols—no less than the spoken word—are entitled to the First Amendment’s protection.<sup>25</sup> So, James Bellar’s placing a cross in front of his business is protected speech.<sup>26</sup>

Second, James Bellar chose to display his cross on the sidewalk in front of his private business. A public sidewalk is a public forum.<sup>27</sup> So, the government’s power to restrict speech in this situation is very limited.<sup>28</sup>

Because the First Amendment protects the speech and it was in a public forum, the speech can be restricted as to time, place, and manner. But the restrictions must be content neutral, narrowly tailored to serve a significant government interest, and the regulation must leave open ample alternative channels of communication.<sup>29</sup> A restriction is content neutral if it is “justified without reference to the content or viewpoint

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<sup>23</sup> *Parks v. City of Columbus*, 395 F.3d 643, 647 (6<sup>th</sup> Cir. 2005).

<sup>24</sup> *Capital Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 760 (1995).

<sup>25</sup> *American’s United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1542 (6<sup>th</sup> Cir. 1992).

<sup>26</sup> *See Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1164 (6<sup>th</sup> Cir. 1993).

<sup>27</sup> *Saieg v. City of Dearborn*, 641 F.3d 727, 734 (6<sup>th</sup> Cir. 2011) (citing *Hill v. Colorado*, 530 U.S. 73, 715 (2000)).

<sup>28</sup> *See, Boos v. Barry*, 485 U.S. 312, 318 (1988).

<sup>29</sup> *Saieg v. City of Dearborn*, 641 F.3d at 735.

of the regulated speech.”<sup>30</sup> If the government or this Court forced Bellar to remove the cross from the sidewalk because it is a cross, the government’s action would not be content neutral; this, however, is what the Foundation wants this Court to order the town to do.<sup>31</sup> Because the government cannot force Bellar to remove the cross, or forbid him from expressing his religious views in the future, the Foundation is not entitled to the relief it seeks. Therefore, the Defendants are entitled to summary judgment with respect to the cross in front of James Bellar’s insurance business.

C. Because the structure atop the water tower is not a religious symbol, the establishment clause does not apply.

This case began when one of the Foundation’s members reported to the Foundation that a Latin cross was on top of the town’s water tower.<sup>32</sup> Because of the “unambiguous and indisputable[ ]” religious significance of a Latin cross, the Foundation demanded its removal.<sup>33</sup> The town did not immediately respond.<sup>34</sup> But in the fall of 2011, before the Foundation filed this lawsuit, Mayor Bellar had one of the cross’s arms removed.<sup>35</sup> And he notified the Foundation that one arm had been removed from the cross.<sup>36</sup> Although the Foundation characterized the action as “unusual,”<sup>37</sup> the Foundation agreed there was “no longer a Latin cross on governmental property.”<sup>38</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> Complaint at Prayer for Relief at ¶ 3.

<sup>32</sup> Complaint at December 8, 2010, letter at pp. 1-2 (D.E. No. 106).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at pp. 3-4.

<sup>35</sup> *Id.* at ¶ 24.

<sup>36</sup> The Foundation’s October 26, 2011, news release; October 25, 2011, letter from the Foundation to Mayor Bellar.

<sup>37</sup> October 25, 2011, letter.

<sup>38</sup> Statement of Annie Laurie Gaylor in the Foundation’s October 26, 2011, news release.

Mayor Bellar's reasons might appear unusual to Ms. Gaylor, the Foundation's co-president, but the Foundation's opinion is irrelevant.

Before he had the arm removed from the cross, Mayor Bellar learned that a company proposed installing a Wi-Fi antenna on the water tower and could use the vertical pole to increase the antenna's height. The remaining horizontal arm could be used to mount some of the equipment.<sup>39</sup> Because the object on the water tower is not a cross,<sup>40</sup> the Foundation does not have a basis for relief.

D. The issue of the water-tower cross is moot because the town removed the cross before the Foundation filed this lawsuit.

The fact that the structure on the water tower was a cross before the mayor had an arm removed does not entitle the Foundation to relief because this issue is moot. Under Article III's case-or-controversy requirement, federal courts may not give opinions on moot questions or abstract propositions.<sup>41</sup> This means that if a controversy has ended, a court must not wade into a stale debate and issue an injunction or advisory opinion addressing a purely theoretical problem.<sup>42</sup> Here, the Foundation admits that the mayor's actions effectively removed the cross from the water tower before the Foundation filed this lawsuit.<sup>43</sup> So, the Foundation cannot obtain relief for a problem that it admitted did not exist when it filed its complaint.

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<sup>39</sup> Declaration of James Bellar at ¶ 8..

<sup>40</sup> October 26, 2011, news release; October 25, 2011, letter.

<sup>41</sup> *Worldwide St. Preachers' Fellowship v. Peterson*, 388 F.3d 555, 558 (7<sup>th</sup> Cir. 2004) (internal quotations omitted).

<sup>42</sup> *Wernsing v. Thompson*, 423 F.3d 732, 745 (7<sup>th</sup> Cir. 2005).

<sup>43</sup> Statement of Annie Laurie Gaylor in the Foundation's October 26, 2011, news release.



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By: s/ Drew Farmer by Dale Conder Jr.  
w/permission via email 5/2/12  
Drew Farmer. BPR #24417  
LAW OFFICE OF JAMES ANDREW FARMER  
51 Emerald Ridge Cove  
Jackson, Tennessee 38305  
(615) 354-4752  
(731) 668-5836  
jamesandrew20@hotmail.com  
dfarmer@lawyer.com

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2nd of May, 2012, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing report. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

Alvin L. Harris  
Hubbard, Berry & Harris, PLLC  
201 Fourth Avenue North, Ste. 1420  
Nashville, TN 37219

\_\_\_\_\_  
s/ Dale Conder, Jr.

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TENNESSEE BOARD OF ALDERMEN,

Defendants.

Case No. 1:11-cv-1374-JDB  
JURY DEMANDED

---

DECLARATION OF JAMES BELLAR

---

In accordance with the provisions of 28 U.S.C. 1746, James Bellar makes the following declarations:

1. I am over 18 years old and have personal knowledge of the facts and information set forth in this declaration.
2. I am the mayor of the Town of Whiteville, Tennessee. I have been the Whiteville Mayor at all times relevant to this case. This is a part-time position.
3. I own the land and building located at 140 East Main Street in Whiteville, Tennessee. I operate an insurance business, Bass Insurance Agency, at this location.
4. The private property that I own at 140 East Main Street includes three feet of sidewalk that extends from the front of the building's face.

5. The stand-alone cross that I placed in front of Bass Insurance Agency was positioned within three feet of the building's face – completely within the boundaries of the property that I own.

6. Several years ago, residents of Whiteville, Tennessee, raised money to put a cross on top of the water tower. In 2010 and 2011, I received letters from the Freedom From Religion Foundation complaining that the cross violated the establishment clause. Finally, in October 2011, I had one arm of the structure on top of the water tower removed. I told the Foundation what I had done. The Foundation agreed that the structure was no longer a Latin cross.

7. During 2011, the Town of Whiteville began negotiations for a wireless internet transmitter to be placed on top of the water tower.

8. The wireless internet provider can use both the vertical support and horizontal arm of the structure remaining on top of the water tower to mount its wireless internet transmission equipment on.

9. After I learned about this lawsuit, I removed the two stand-alone crosses that had been placed at the Whiteville City Hall. One of them was sent to the Whiteville First United Methodist Church. The other was placed on private property. The crosses were never put back on town property.

10. I do not intend to place any stand-alone crosses on City Hall in the future.

I, James Bellar, declare under penalty of perjury that the foregoing is true and correct.

Executed on the 25 day of April, 2012.

  
\_\_\_\_\_  
JAMES BELLAR

# FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 • MADISON, WI 53701 • (608) 256-8900 • WWW.FFRF.ORG

Faxed and mailed Oct. 25, 2011 to 731-254-8012

James R. Bellar, Mayor  
Town of Whiteville  
158 East Main Street  
P.O. Box 324  
Whiteville TN 38075

Re: Whiteville cross

Dear Mayor Bellar:

Thank you for your letter dated Oct. 25, 2011, informing us that you have taken steps, however unusual, to ensure "there is no longer a Latin cross atop the Whiteville water tower."

We truly appreciate your affirmation that a religious and sectarian symbol, such as a Christian cross, has no place on governmental property.

We hope that your action will send a message to other municipalities to honor the Establishment Clause of our First Amendment, and to respect freedom of conscience, including the diversity of beliefs and of nonbelief, by keeping religion out of government.

Very truly

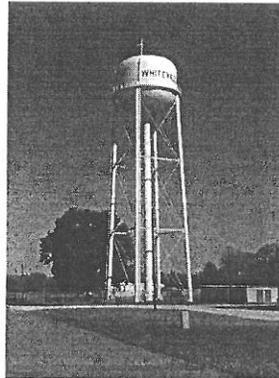
  
Dan Barker and Annie Laurie Gaylor for FFRF

cc: Area media

FFRF LOOKS "CROSS-EYED" AT BIZARRE ACT

# Petulant mayor breaks cross to abide by First Amendment

October 26, 2011



Whiteville, Tenn., certainly isn't "Pleasantville" for non-Christians with James Bellar behind the civic wheel, but the mayor of that Tennessee town finally and very grudgingly agreed that a water tower cross had to go.

The Freedom From Religion Foundation has, for now called off plans to sue the town by the end of the week over the First Amendment violation. But the national state/church watchdog with 17,000 members, including over 200 in Tennessee, called Bellar's remedy "bizarre," and says it will closely monitor the situation.

Mayor James R. Bellar sent a letter yesterday to FFRF's attorney advising him that "there is no longer a Latin cross atop the Whiteville water tower." Bellar attached an invoice of nearly \$4,000 from a crane service. He inexplicably asked the firm to lop off one arm of the Latin cross, leaving what looks a bit like a gallows (or a broken cross).

FFRF sent a polite response to the Mayor, despite his many statements defaming FFRF and its potential plaintiff as "terrorists."

"We hope that this action will send a message to other municipalities to honor the Establishment Clause of our First Amendment, and to respect freedom of conscience, including the diversity of beliefs and of nonbelief, by keeping religion out of government," FFRF Co-Presidents Dan Barker and Annie Laurie Gaylor wrote.

After receiving a demand letter on behalf of FFRF by Nashville attorney Alvin Harris, Bellar initially announced on Oct. 3 that he would move the cross. Then he changed his mind.

On Oct. 17, Bellar told reporter Daniel Wilkerson, WBBJ-TV in Jackson, Tenn., that "Somebody has to stand up to these atheist sons of bitches, and you can quote me on that."

FFRF, on behalf of a local complainant, had written four unanswered letters of complaint since last December to the Town of Whiteville protesting the illegal lighted display.

"We're looking a little cross-eyed at the mayor's strange action and, his vindictive and unprofessional statements, but we are satisfied, for now, that there is no longer a Latin cross on governmental property," noted Gaylor.

Gaylor warned that if the town restores the Latin cross (an action hinted at in the mayor's letter), it will sue.

"What is most flabbergasting is the decision by this intemperate mayor to waste nearly \$4,000 in tax dollars to essentially mutilate a

religious symbol, rather than remove it. A careful administrator would not have indulged in such folly. The town could even have made some money had it auctioned the cross to bidders. We would encourage the town council to investigate the mayor's action," said Gaylor.

Tweet

*The Freedom From Religion Foundation, based in Madison, Wis., a 501(c)(3) nonprofit educational charity, is the nation's largest association of freethinkers (atheists, agnostics), and has been working since 1978 to keep religion and government separate.*

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---

DECLARATION OF THOMAS P. HOPPER

---

In accordance with the provisions of 28 U.S.C. 1746, Thomas P. Hopper makes the following declarations:

1. I am over 18 years old and have personal knowledge of the facts and information set forth in this declaration.
2. On April 2-3, 2012, I surveyed the physical property located at 140 E. Main Street in Whiteville, Tennessee.
3. The subject property is identified on Hardeman County Tax Maps at Tax Map 46L, Group G, Parcel 20.01.
4. The subject property's current deed of record is recorded in deed book I-16, page 220, in the Hardeman County, Tennessee register's office.

5. This survey's primary purpose was to determine what portion of the existing sidewalk in front of the building located at 140 E. Main Street was located on public property.

6. The survey showed that the public right-of-way along E. Main Street extends 6.15 feet north of the north edge of the old concrete curb, leaving 3.0 feet of sidewalk between the public right-of-way and the building's face at 140 E. Main Street. This 3.0 feet of sidewalk is privately owned by the owner of the property at 140 E. Main Street.

7. The survey also showed that the south boundary of Bass Insurance Agency, the business located at 140 E. Main Street, is located 3.0 feet south of the building's face.

8. The survey report that I created, attached to this declaration as Exhibit A, accurately reflects my findings.

I affirm that I created or provided the information used to create the documents attached to this declaration. I further affirm that the information in those documents is true to the best of my knowledge.

I, Thomas P. Hopper, declare under penalty of perjury that the foregoing is true and correct.

Executed on the 16 day of April, 2012.

  
THOMAS P. HOPPER

**HOPPER LAND SURVEYING**

P.O. BOX 360  
MEDINA, TN 38355  
PHONE (731) 783-0708

**SURVEY REPORT**

The client's requested scope of work for this report was to determine the location of the south boundary line for the Bass Insurance Agency, Inc property located at 140 E. Main St. in Whiteville, TN. The main interest being what portion of the existing sidewalk in front of the building is located on the subject property.

The subject property is identified as Tax Map 46L, Group G, parcel 20.01 on the Hardeman County Tax Maps. The current deed of record is recorded in deed book I-16 at page 220 in the register's office of Hardeman County, Tn.

The south line of the Bass Insurance Agency, Inc. property is defined by the north margin of Main Street (old Highway 64). The total right of way width for Highway 64 is 60 feet as evidenced by the highway plans of the State of Tennessee Department of Highways and Public Works, Federal Aid Project no. 19, dated March 14, 1928. The north margin of Main Street (Hwy 64) is located 30 feet north of the center of the roadway. The center of the roadway is defined by being midway between the existing concrete curbs on the north and south sides of the street. The center of roadway (half way between curbs) does not coincide with the current center of the travel lanes, but lies north of the existing double yellow lines by 3.2 feet.

The north margin of Main Street and the south boundary of the Bass Insurance Agency, Inc property is located 6.15 feet north of the north edge of the old concrete curb and is 3.0 feet south of the face of the building.

