201 VA 636

Return to
FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 5041

In the Supreme Court of Appeals of Virginia at Richmond

AZALEA CORPORATION

v.

CITY OF RICHMOND

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5041

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 19th day of June, 1959.

AZALEA CORPORATION, Appellant,

against

CITY OF RICHMOND, Appellee.

From the Law and Equity Court of the City of Richmond

Upon the petition of Azalea Corporation an appeal is awarded it from an order entered by the Law and Equity Court of the City of Richmond on the 12th day of January, 1959, in a certain proceeding then therein depending entitled: In the Matter of the Appeal of Azalea Corporation from a Decision of the Board of Zoning Appeals of the City of Richmond; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said Law and Equity Court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

• • • • •

Filed in the Clerk's Office the 2nd day of June, 1958:

Teste:

LUTHER LIBBY, JR., Clerk
By EDW. G. KIDD, D. C.

PETITION OF APPEAL.

1. Azalea Corporation, a Virginia corporation, being aggrieved by a decision made May 7, 1958, of the Board of Zoning Appeals of the City of Richmond, files this Petition of Appeal as provided by law.

2. Azalea Corporation is the equitable owner of a tract of land lying partly in the City of Richmond and partly in the County of Henrico as shown on the plat which is a part of the application to the Commissioner of Buildings of the City of Richmond hereinafter referred to.

3. On April 14, 1958, Azalea Corporation applied to the Director of Public Works of the City of Richmond for permission to install concrete driveways across sidewalk areas adjacent to the property referred to above. The Director of Public Works, in violation of the provisions of the ordinance relating to such applications, referred the application to the Commissioner of Buildings, and the application was improperly and unlawfully denied by the Director of Public Works on May 8, 1958, on the basis of the action of the Board of Zoning Appeals hereinafter referred to.

4. Accordingly, in view of the refusal of the Director of Public Works to act on the application referred to page 2 } above until the matter had been considered by the Commissioner of Buildings, Azalea Corporation consulted the Commissioner of Buildings and applied for permission to use a portion of its property in the City of Richmond for private access drives to provide ingress to and egress from its property in the County of Henrico. The Commissioner of Buildings on April 23, 1958, unlawfully denied this application on the asserted ground that such use of the property would result in a violation of the Zoning Ordinance of the City of Richmond. Azalea Corporation thereupon appealed to the Board of Zoning Appeals, asserting that the Commissioner of Buildings was in error in his decision and that his action in denying the application constituted

a clearly demonstrable hardship approaching confiscation as distinguished from a special privilege or convenience.

5. On May 7, 1958, the Board of Zoning Appeals denied the appeal of Azalea Corporation.

6. Azalea Corporation asserts that the action of the Board of Zoning Appeals was arbitrary, capricious and unlawful in that·

(a) the denial by the Commissioner of Buildings of the application of Azalea Corporation was in error since the use requested by Azalea Corporation is not a prohibited use under the Zoning Ordinance of the City of Richmond; and

(b) the action of the Board of Zoning Appeals in denying Azalea Corporation any means of ingress to or egress from its property in the County of Henrico through its property in the City of Richmond not only results in clearly demonstrable hardship but deprives Azalea Corporation of its property without due process of law.

page 3 } AZALEA CORPORATION, accordingly, prays that a writ of *certiorari* issue to the Board of Zoning Appeals in accordance with §17.23 of the Charter of the City of Richmond, or, in the alternative, that this petition be considered an appeal under §15-285 of the Code of Virginia; that the decision of the Board of Zoning Appeals be reversed; and that the Commissioner of Buildings be ordered to grant the application of Azalea Corporation erroneously denied by him.

• • • • •

page 7 }

• • • • •

STIPULATION.

Counsel for Azalea Corporation and the Board of Zoning Appeals stipulate that the following shall be deemed to be in evidence in this proceeding, each reserving to the other the right to object to any part thereof on the grounds of its relevancy or materiality:

1. That Azalea Corporation is the owner of several parcels of land adjacent and contiguous to each other totaling approximately forty acres located in the County of Henrico and the City of Richmond; that Azalea acquired certain op-

tions to purchase the property on April 17, 1958. These options were subsequently exercised and title vested in Azalea Corporation.

2. That the portion of Azalea's property located in the City of Richmond contains approximately 8.2 acres and consists of a strip of land 210 feet deep and fronting approximately 926 feet on the north side of Westbrook Avenue, and a strip of land 200 feet deep and fronting approximately 1270 feet on the west side of Brook Road.

3. That the property owned by Azalea Corporation lying in the County of Henrico is zoned for commercial
page 8 } use and may be used as a shopping center; that Azalea's property lying in the City of Richmond is located in a C single-family Dwelling District and under the City's zoning ordinance (Article IV), adopted May 19, 1943 this property may be used only for the following purposes:

1. Single-Family Dwellings.
2. Parks, recreational areas, stadia and uses incidental to them owned and operated by the City of Richmond.
3. Public schools, elementary and high, and private schools having curricula the same as ordinarily given in public schools.
4. Churches.
5. Golf courses.
6. Home occupations.
7. Truck gardening, but not the raising of livestock, poultry or other farming activities that would be objectionable to surrounding residences.
8. Accessory buildings, including a private garage, private stable or servants' quarters when located not less than sixty (60) feet from the front line or not less than five (5) feet from any side lot line, or a private garage which is constructed as a part of the main building. Any servants' quarters shall be occupied only by servants employed on the premises and shall not be occupied or rented as a private domicile. No accessory building shall be constructed upon a lot until the construction of the main building has been actually commenced, and no accessory building shall be used unless the main building on a lot is completed and used.
9. One (1) temporary sign, not exceeding eight (8) square feet in area, or signs aggregating not to exceed eight (8) square feet in area, appertaining to the lease, hire or sale of the building or permises on which the sign is displayed.
10. Church billetin boards and signs for the display of names of educational institutions not exceeding an aggregate of ten (10) feet in area.

That Article XVII, section 1 of the zoning ordinance provides as follows:

"This ordinance shall be enforced by the Commissioner of Buildings."

page 9 } 4. That such other provisions of the zoning ordinance as are applicable are in evidence.

5. That the recitals of fact contained in paragraphs numbered 3 and 4 of the petition for appeal are in evidence.

6. That Azalea Corporation intends to develop a regional shopping center on its property located in the County of Henrico.

7. That the Commissioner of Buildings of the City of Richmond denied the application for the certificate of occupancy on the ground that such use of the property for access driveways would violate Article IV of the zoning ordinance of the City of Richmond.

8. That Azalea Corporation appealed from the decision of the Building Commissioner to the Board of Zoning Appeals and requested a variance as permitted in Section 17.20(a) and (b) of the Charter of the City of Richmond.

9. That the Board of Zoning Appeals heard the matter on May 7, 1958 (Case No. 53-58) and by resolution disposed of Azalea's appeal as follows:

"The Board finds from sworn testimony and exhibits in this case, that it is proposed to have three access roads each 35′ wide two of which will be on Westbrook Avenue and one on Brook Avenue as indicated on the plan filed as an exhibit.

"The parcels within the City affected by the driveways are respectively a strip of land along the north side of Westbrook Avenue 210′ deep and a strip on the west side of Brook Road 200′ deep both zoned as "C" Single-Family Dwelling District. The proposed driveways would extend from Westbrook Avenue and Brook Road across said parcels to a tract of land in Henrico County zoned for commercial purposes and would constitute a use not permitted in a "C" Single-Family Dwelling District. Testimony was also presented that these driveways would adversely affect the residential property in the surrounding neighborhood.

page 10 } "WHEREAS, the applicant failed to establish any hardship approaching confiscation with regard to the parcels of real estate within the city limits or any unusual condition whereby the zoning ordinance unreasonably restricts the use of the said parcels and the Commissioner

of Buildings was right in denying the certificate of occupancy;

"NOW, THEREFORE, BE IT RESOLVED, that the board hereby affirms the decision of the Commissioner of Buildings denying the certificate of occupancy and also denying the application for a variance.

"Action of the Board: Denied
Vote to deny
Affirmative—Cudlipp, Hankins, Heindl, King
Mcfarlane 5
Negative None 0"

10. That on June 2, 1958, Azalea Corporation appealed to this court from the decision of the Board of Zoning Appeals.

WILLIAM H. KING
JOHN W. RIELY
Counsel for Azalea Corporation.

J. E. DRINARD
City Attorney
Counsel for the Board of Zoning Appeals.

page 11 } COPY.

LAW AND EQUITY COURT
OF THE
CITY OF RICHMOND
Richmond, Virginia

Judges
Thomas C. Fletcher
Robert Lewis Young
John Hicks Rives, Jr.

Clerk
Luther Libby, Jr.

December 15, 1958.

Messrs. William H. King,
John W. Riely,
J. E. Drinard,
Attorneys at Law,
Richmond, Virginia.

Re: Azalea Corporation *v.* Board of Zoning Appeals; A-2267;

Gentlemen:

Having considered the above styled case, recently argued

and submitted, I am of opinion that the decision of the Board of Zoning Appeals should be affirmed.

A draft of order may be presented.

Yours very truly,

TCF/b

page 12 }

• • • • •

ORDER.

This cause came on this day to be heard upon the petition of Azalea Corporation; the record and documents certified by the Board of Zoning Appeals pursuant to the order entered herein on June 2, 1958; the order entered herein on June 17, 1958 filing the record and documents of the Board of Zoning Appeals; the stipulation of counsel; the evidence adduced before the court; and was argued by counsel.

Upon consideration whereof, the court being of the opinion that the decision of the Board of Zoning Appeals should be affirmed, it is adjudged, ordered and decreed that such decision be and is hereby affirmed; and that the Board of Zoning Appeals and City of Richmond do recover from Azalea Corporation all costs about its defense by it in this behalf expended.

We ask for this:

J. E. DRINARD
City Attorney.

C. B. MATTOX, JR.
Assistant City Attorney.

I object to this order and except to its entry:

WILLIAM H. KING
Counsel for Azalea Corporation.

O. B. 35, p. 268.

Enter Jan. 12, 1959.

T. C. F.

page 13 }

• • • • •

Received and filed Mar. 9, 1959.

Teste:

LUTHER LIBBY, JR., Clerk.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To Luther Libby, Jr., Clerk of such Court:

Azalea Corporation (hereafter called "Azalea") gives notice of its appeal from the order entered herein on January 12, 1959 affirming the decision of the Board of Zoning Appeals of the City of Richmond denying Azalea the right to construct certain private access driveways across its property in the City of Richmond; and assigns the following errors:

(1) The Court erred in affirming the decision of the Board of Zoning Appeals that it give no consideration to the whole of the tract of land owned by Azalea and the intended use to be made thereof, but that it consider only and as separate and apart that portion of the tract lying within the City of Richmond, such action by the Board of Zoning Appeals causing an arbitrary and unreasonable restriction on Azalea's use of its property.

(2) The Court erred in affirming the decision of the Board of Zoning Appeals that Article IV of the zoning ordinance of the City of Richmond prohibits the construction by Azalea of private access driveways for commercial use across its property lying within the City of Richmond.

page 14 } (3) The Court erred in refusing to admit in evidence the testimony of Azalea's witness John W. Bates, Jr., and tendered exhibits, relating to property values and the effect of granting or denying the certificate of occupancy sought.

AZALEA CORPORATION.

• • • • •

page 3 }

Mr. Drinard: If Your Honor please, counsel have entered into a stipulation with respect to much of the matter that will be before the Court in evidence, each reserving the right to

object to it, but I think that the Court should see the stipulation at this time.

The Court: Very good, Mr. Drinard.

Mr. King: If Your Honor please, it has also been agreed between counsel that there may be received in evidence a plat prepared by the City of Richmond, setting out a part of the area that is involved in this case and showing primarily the intersection of Westbrook Avenue and Brook Road, and I will tender that up now, sir.

The Court: Very well, Mr. King.

page 4 } Mr. King: Your Honor please, counsel have just this moment further agreed that there may be received by the Court as an additional exhibit a plat made by LaPrade Brothers under date of April 23, 1958, showing outlined in heavy red pencil the property that belongs to the Azalea Corporation, the appellant here, and which property is involved in this case, insofar as the application is made that Azalea be granted means of ingress and egress to both Brook Road and Westbrook Avenue. There is one part within the red lines that is not the property of Azalea, and that is the part that is marked under the heading of "Virginia Electric and Power Company, Old Richmond-Ashland Railway, abandoned."

On this same plat is a dotted red line which shows the location of the City boundaries within the property. This might be useful to Your Honor and, therefore, we offer this as a further exhibit.

The Court: Very good, Mr. King. Let me have that. It will be identified as Appellant's Exhibit No. 1.

• • • • •

page 10 } S. IRVING HALL,

a witness introduced on behalf of the appellant, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. King:

Q. Mr. Hall, will you please state for the Court your name?

A. S. Irving Hall.

Q. What is your place of residence?

A. 2102 Cherokee Road, Chesterfield County, Virginia.

Q. What is your occupation?

A. Real estate and insurance. I have been a licensed real estate salesman in Virginia since 1941, and I have been a

licensed real estate broker since 1956 in Virginia. I have been licensed as a general insurance agent in Virginia since 1946.

Q. With whom are you associated in that business?

A. Harrison and Bates, Incorporated.

Q. Now, Mr. Hall, are you an officer of the Azalea Corporation who is the appellant in this proceeding?

A. Yes, sir.

Q. It has been agreed by counsel that the prop-
page 11 } erty of Azalea Corporation, which is shown by Appellant Exhibit No. 1 and which lies within the County of Henrico, is zoned for business use, while that lying within the boundaries of the City of Richmond is zoned for C-single family residential purposes. That is a matter that has been agreed. Now may I ask you this: When did the idea first mature to you and the others with whom you are associated that the property in the County should be developed as a shopping center?

A. During 1957.

Q. Did it at that time and thereafter appear necessary to you and your associates that a means of ingress and egress to Brook Road and Westbrook Avenue should be obtained?

A. Yes, it appeared quite necessary, not only to us—that is Azalea Corporation—but to Carneal and Johnston, our architects employed for the development of the shopping center buildings, and to our traffic consultant, Wilbur Smith and Associates who had made a comprehensive traffic study of the needs of a shopping center.

Q. What steps were undertaken to acquire that means of access?

A. There were a number of efforts made. The first was what I would consider the best approach and that was an informal effort on behalf of Mr. J. Ambler Johns-
page 12 } ton of our architectural—

Q. You mean on behalf of Mr. Johnston or by Mr. Johnston?

A. He made the effort to obtain first opportunity for ingress and egress for Azalea Corporation.

Q. How was that done?

A. The architectural firm had completed preliminary studies of the shopping center. It had also studied and had in hand the suggested solution to the traffic needs of the shopping center, the necessary access roads.

With this background, Mr. J. Ambler Johnston discussed with the City Manager, Mr. Horace Edwards, the desire on

S. Irving Hall.

Q. What was the result of that application? Was it granted or denied?

A. The permit was denied on May 8, 1958, and I quote from the denial as follows: "Violates zoning law. (signed) C. W. Bowery."

Q. May I see that paper, please, with the exhibit attached?

A. Yes.

Mr. King: If Your Honor please, I believe this would be Appellant's Exhibit No. 2, and we ask that this be received and marked an exhibit. It is the application of Azalea Corporation to the Director of Public Works, dated April 14, 1958, for the access to which the witness has just testified. It has an exhibit attached with it which I ask be received as a part of the same paper.

The Court: The Court will so identify it as page 15 } Appellant's Exhibit No. 2.

By Mr. King: (Continued)

Q. You have testified that the application as shown by Appellant Exhibit No. 2 was denied for the reason that you recited. Did you have any conversation with any city official concerning that denial or concerning the application either?

A. Yes, sir.

Q. Will you recite what that was?

A. Accompanying the denial was a form letter from the Department of Public Safety bearing the same date of the denial on the application.

Q. What date is that?

A. May 8, 1958. I will read the reason that the Bureau recommends that the subject driveways be denied. (Reading) "A check with the Bureau of Building Inspection revealed that the proposed driveways will violate the zoning requirements. (signed) Mr. Baker, Acting City Traffic Engineer."

In further response to your question, he asked by letter approximately two weeks before the denial that Azalea Corporation submit a plot plan showing the layout of the building of the proposed shopping center to his Bureau, or to Mr. Bowery of the Department of Public Works, before any action could be taken. Accordingly, I had visited Mr. page 16 } Baker's office approximately April 22 or 23, 1958, and carried, not only the information he had requested but, the traffic study and maps prepared for Azalea Corporation by Wilbur Smith and Associates.

S. Irving Hall.

Azalea Corporation's part to meet with the appropriate departments of the City of Richmond to evolve a satisfactory solution to ingress and egress to the subject property.

Q. When you say "ingress and egress," you mean from the subject property to what streets or roads?

A. The effort was made to arrange for a conference in order to evolve satisfactory ingress and egress across the property of Azalea Corporation lying within the City Limits and across into the majority of its property lying in Henrico County where the shopping center would be located.

Q. And across to what streets?

A. Providing access to Brook Road and Westbrook Avenue.

page 13

Q. In other words, as I understand it, and I am asking you this merely for clarification, I gather that what was sought was to see whether by cooperative means access could be obtained from the proposed shopping center property, namely, that of Azalea Corporation lying in Henrico County, means of access by means of roads or private drives or streets across that part of Azalea property lying within the City to connect up with either Westbrook Avenue or Brook Road or both, is that correct?

A. That is correct.

Q. What was the effect of that conference?

A. We met with complete failure. Mr. Johnston related that the City Manager, Mr. Horace Edwards, had refused to agree to such a conference. The reasons stated were that it would be embarrassing to the administration of the City of Richmond—

• • • • •

By Mr. King: (Continued)

Q. Do not go any further on that. Tell us about the second occasion.

A. On April 14, 1958, Azalea Corporation submitted an application to the Director of Public Works of the City of Richmond for the purpose of installing concrete driveways across the sidewalk area, as shown on an attached drawing which I have in connection with this application, and the recommendations from the Traffic Engineer of the City of Richmond are made a part of this permit. This application is made to provide access from Westbrook Avenue and Brook Road to the adjacent property.

page 14

S. Irving Hall.

on April 23, 1958, on behalf of Azalea Corporation.
page 18 } I completed and have in hand an application dated April 23, 1958 for "Certificate of Occupancy of Ingress and Egress to the adjacent commercial property in Henrico County at premises designated as tract of land located northwest intersection of Brook Road and Westbrook Avenue." Col. Wharton disapproved this request of Azalea Corporation for the purpose of obtaining access to its adjacent property in the County through the property it owned in the City.

Q. Is his denial shown on the paper you have in your hand?

A. Yes, sir.

Q. What does that say?

A. It is hereby disapproved on this date, April 23, 1958, under Article 4, Section 2, of the Zoning Ordinance for the reason that the proposed use is not permitted in a C-single family dwelling district.

Q. So it is denied on the same day it is filed, is that correct?

A. Yes, sir.

Q. Signed by Mr. Wharton?

A. Yes, sir.

Mr. King: Your Honor, we ask that this paper in the form of a letter which is addressed to Azalea Corporation and signed by William G. Wharton be received as Appellant's Exhibit No. 3.

page 19 } The Court: It will be so identified.

By Mr. King: (Continued)

Q. What was the next step that was taken?

A. May I say first that in connection with that application that there was a map attached to it which has subsequently been placed in the records of the Board of Zoning Appeals, and there is I believe a photostat available here to show the specific request for streets.

Q. What was then done after you received this notice of denial of the application?

A. An appeal was made by Azalea Corporation to the Board of Zoning Appeals requesting relief from this decision of the Commissioner of Buildings. The Board of Zoning Appeals denied on May 7, 1958, this appeal.

Q. It is from that decision that this appeal to this Court is taken?

S. Irving Hall.

Mr. Drinard: If Your Honor please, I think we can dispense with most of this evidence. Can we not stipulate that you all have used every effort that you could think of that was at your disposal to obtain these driveways and you were denied on the ground that to grant the application would be in violation of the zoning ordinance?

Mr. King: No, I do not think so. I think it is most important to show the extent of the efforts that were used in an effort to accomplish all of these means. It is not going to take very long.

Mr. Drinard: I am finding it very difficult to sift out of this testimony what is fact and what is hearsay and what is relevant and what is material.

Mr. King: I will ask the witness to confine his remarks to any comments made to him by the City Officials pertaining to the application, and not what he said someone else told him as being still a comment of a third person.

Mr. Drinard: I say, if we can come back to the simple proposition that every known available means page 17 } was exercised to obtain the driveways from the City of Richmond or the agencies of the City of Richmond and that they were denied the permits for the driveways upon the ground that it violated the zoning ordinance, when we get through with it, that is what it is going to amount to, constitutionally or otherwise.

The Court: I rather think under the state of the proceedings they are entitled to show the details.

By Mr. King: (Continued)

Q. Mr. Hall, will you please carry on and make your comments as brief as possible?

A. I visited Mr. Baker on the date mentioned, carrying with me the requested information and a traffic study of Azalea Shopping Center layout. I asked if a study could not be jointly conducted by his department of the City and ours with our traffic engineers and our architects. We were refused the request.

Q. What was the next step that was taken in order to see whether such access ways could be obtained?

A. On suggestion from his office I visited—

Q. Who is "his"?

A. Mr. Baker.

Q. All right.

A. I visited Col. Wharton, the Commissioner of Buildings,

follows: "Permit denied. Contrary to Ordinance No. 58-7760, which requires Council's permission for improvement of this street."

The Court: It will be so identified.

By Mr. King: (Continued)

Q. Mr. Hall, that denial refers to Ordinance No. 58-77-60. Do you have in your possession a correct copy of that ordinance?

A. Yes, sir.

Q. Will you let me have that please?

A. Yes, sir. (Tendering to counsel)

Mr. King: If Your Honor please, I have here a copy of an Ordinance No. 58-77-60, which came from the office of the Clerk of the City Council, and it is agreed I think by counsel for the parties that this may be received in evi-
page 22 } dence subject to further check to see whether the printer made a mistake, but I think everyone probably feels it is all right. In other words, it is not certified.

Mr. Drinard: Your Honor, we will agree to admitting it into evidence for whatever it is worth.

• • • • •

page 25 }

• • • • •

By Mr. King: (Continued)

Q. Mr. Hall, I think you started out by saying that six different attempts have been made to administrative channels to obtain this means of ingress and egress. You have cited five of them. Tell us what the sixth one was.

A. An application was made by Azalea Corporation to City Council on June 10, requesting acceptance of dedication of a public street. I would like to quote from the letter and it reads as follows: "Honorable City Council of the City of Richmond. Gentlemen: Azalea Corporation requests that the City accept the conveyance of the tract of land described in the attached draft of ordinance for use as a public street and agrees, if this offer is accepted, to open, grade, pave and maintain a public street on such tract for a period of five years after the date of such conveyance in accordance with such requirements as may be established by the Director of

S. Irving Hall.

A. Yes, sir.
Q. Were any further steps taken?
A. Yes, sir.
Q. Administratively?
A. Yes, sir.
Q. Will you recite what they were?
A. On May 21, 1958, Azalea Corporation submitted to the Director of Public Works of the City of Richmond an application requesting permission to work at Watkins

page 20 } Street 200 feet westward from Brook Road to the Corporation line—

Q. Will you define for us what Watkins Street is and where it is? You might point out to the Court on Appellant Exhibit No. 1.
A. (Indicating on exhibit) Watkins Street is shown as a 50-foot width street running westwardly from Brook Road to the corporate line.
Q. Does Watkins Street actually exist as being an area that is in use?
A. No, sir.
Q. In other words, what is the physical condition of Watkins Street?
A. Unimproved.
Q. Is there any difference between Watkins Street and the property adjacent to it?
A. None.
Q. Will you recite what your application was with regard to Watkins Street and to whom it was made?
A. The stated purpose in the application was to grade, gravel and oil the portion of the above street to City's specifications as per instructions of the engineer in charge. The permit was denied.
Q. To whom was that application made?
A. It was made to the Director of Public Works.
Q. You have with you the paper which indicates

page 21 } such application and its denial?

A. Yes, sir.
Q. Will you let me have that please?
A. Yes, sir. (Tendering to counsel)

Mr. King: If Your Honor please, as Appellant's Exhibit No. 4 we wish to offer in evidence an application dated May 21, 1958, addressed to the Director of Public Works by Azalea Corporation and on which is marked in red pencil the denial to which the witness has testified. It reads as

S. Irving Hall.

I did not say we concede it. I said when this witness started testifying we could say that he exhausted every means then at his disposal to get the permit from the City to cross this land, and that in each instance he was denied that permit on the ground that it violated the zoning ordinance, but I do not propose to concede that every remedy that is open to you has been exhausted.

Mr. King: I am speaking merely of administrative means and not Court remedies.

page 28 } Mr. Drinard: If you limit it to administrative remedies, I would think that you had tried everything you could.

Mr. King: That is what I intended to say.

The Court: It is so stipulated.

CROSS EXAMINATION.

By Mr. Drinard:

Q. Is there any reason that you know of that the property on the north side of Westbrook Avenue, the property on the west side of Brook Road within the City of Richmond could not be used for residential purposes?

A. I suppose that question could be answered in a number of ways. It is presently zoned for C-single family dwelling district.

Q. Is there any reason why it cannot be used for residential purposes permitted in a C-single family dwelling district?

A. No, sir.

Q. Is there any reason why it couldn't be used for a parking or a recreational area?

A. No, sir, it is our intention to use it as a parked area—

By Mr. King:

Q. What do you mean by "parked"?

page 29 } A. Oh, I don't mean the parking of cars. I mean an attractive landscaped area as a buffer between a residential area and an attractive shopping center.

By Mr. Drinrd: (Continued)

Q. That is a part of your scheme at the moment, is it not?

A. I object to the phrase "scheme."

Q. I mean your plan. Is there any reason you know of why it cannot be used for public or private school purposes?

A. No, sir.

S. Irving Hall.

Public Works. The draft of the ordinance designed to accept this tract is enclosed.

page 26 } "If a street at this particular location is unacceptable to the Council, Azalea Corporation will be pleased to convey to the City any property of like size in the area owned or to be acquired by it to provide access to its property lying in the County of Henrico. Its representatives will gladly accept any invitation for a conference issued by any City Official in this regard."

Q. You have attached to that a copy of the proposed ordinance?

A. Yes, sir.

Mr. Drinard: If Your Honor please, we want the record to show that we object to this evidence on the basis that it is immaterial and irrelevant to the issues presented here to the Court.

Q. You mentioned that Azalea would welcome any invitation by any City Official for a conference concerning the matter. Did you ever receive such invitation?

A. No, sir.

Q. Was the ordinance attached to your letter adopted by Council?

A. It was rejected unanimously.

Mr. King: Your Honor, we ask that the paper the witness has been testifying from be received as Appellant's Exhibit No. 6.

Mr. Drinard: Let the record show the same

page 27 } objection.

The Court: The record will show the same objection.

Mr. King: We wish to attach to it a printed copy of the actual ordinance that was defeated.

The Court: Very well. This will be marked as Appellant's Exhibit No. 6.

Mr. King: I take it it has been conceded by the City that the Azalea Corporation has by the steps taken which was recited by the witness exhausted every administrative means available to it to obtain the requested means of ingress and egress from either Brook Road or Westbrook Avenue into the property of Azalea lying within the County? If that is true—

Mr. Drinard: No, sir, we do not concede that to be true.

John W. Bates, Jr.

Mr. Drinard: If Your Honor please, this witness I suppose is to begin to testify as to the value of the entire tract of land within the County and within the City. The basis on which the Board of Zonings Appeals could act upon the refusal of the Commissioner of Buildings to grant the permit and the basis of this appeal is founded in Section 17.20, (a) and (b) of the Charter. The value of property is not an element that either could take into consideration in formulating the actions that they did take. A reading page 32 } of the applicable provisions of the Section indicates the value of property is not one of the things that can be taken into consideration, but the over-all general health, safety and welfare of the community, particularly, that part of the community that abutts or is immediately adjacent to this land within the City, so we say that the evidence is immaterial and irrelevant to this inquiry in that neither the Commissioner of Buildings, the Board of Zoning Appeals and on the matter before the Court, the Court cannot consider the values of property and the effect of failure to grant the driveways has upon it.

Mr. Riely: May it please the Court, I hate to disagree with Mr. Drinard in his interpretation of the meaning of Section 17.20 (b), but I should like to read a portion of that section to the Court. It reads, "The Board of Zoning Appeals shall have the duty to grant variations in the regulations where by reason of the exceptional topographical conditions or other extraordinary or exceptional situations restrict application of the terms of the ordinance actually prohibit or unreasonably restrict the use of the property, or where the Board is satisfied, upon the evidence heard by it, the granting of such variation will alleviate a clearly demonstrable hardship approaching confiscation." page 33 }

This is a question of unreasonable restriction on the property, and I submit to Your Honor that economics have a great bearing on unreasonable restriction and on confiscation. Those are economic terms, and I believe that testimony as to value is clearly relevant to show the error of the Board of Zoning Appeals on that basis, and I think this testimony should therefore be received.

The Court: I do not see the relevancy of the testimony, and I am going to exclude it for that reason. However, if you wish to put it into the record, it is entirely agreeable to me.

Q. Is there any reason that you know of that it couldn't be used for church purposes?
A. No, sir.

• • • • •

page 30 } JOHN W. BATES, JR.,
a witness introduced on behalf of the appellant, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Riely:
Q. Will you state your name and residence?
A. John W. Bates, Jr., 711 Riverside Drive, Chesterfield County.
Q. What is your occupation?
A. I am a realtor.
Q. Your firm?
A. I am president of the firm of Harrison and Bates, Incorporated.
Q. Are you also an officer of Azalea Corporation?
A. Yes, sir, I am Secretary-Treasurer of Azalea Corporation.
Q. Will you outline to the Court please your educational and business background and experience?
A. I have an engineering degree from V. P. I. I have taken numerous courses in appraising, including the University of Georgia. I have been an Instructor at the University of Richmond at the evening school of business in appraising and have appraised for various insurance com-
page 31 } panies and banks, most of them doing business in the City of Richmond.
Q. You have testified as to appraisals previously?
A. Yes, sir.
Q. How long have you been appraising?
A. Active appraising approximately 17 years.
Q. Mr. Bates, have you prepared an economic study as to the value of the property owned by Azalea Corporation on the basis that it has adequate access to the City streets and on the assumption that it does not have that adequate access?
A. Yes, sir.
Q. I hand you a two-page statement and ask you whether or not this is a summary of your study?

have developed the rent that would be created from these stores after the second year, second full year of operation, and it is indicated as shown on page 1 of the exhibit that we could expect $471,900.00 in annual rent. Based on expanse and in the operation of Willow Lawn and other shopping centers we have taken off the annual operating expenses of $129,400.00, leaving a net annual rental of $342,500.00.

To erect 230,000 square feet of buildings would cost approximately three million dollars. This is based on studies made by the architectural firm of Carneal and Johnston and by experience in the construction of shopping centers throughout the United States converted to Richmond, Virginia, costs. A fair return on such a building, and I think it is acceptable in the appraisal practice, is to return the entire investment over the economic life of the building, which I consider to be 40 years, which would give you 2 1/2 per cent a year to the return of capital and six per cent return on the investment, or a total that should be allocated to the building, page 36 } total income that should be of $255,000.00. This will leave income available to land of $87,500.00.

If we capitalize that income at six per cent, which is normal for this type of investment, would leave a land valuation of one million four hundred fifty-eight thousand dollars, but we must recognize that that is the value of the land on a completed shopping center, and the property in its present state of development could not be sold for more than 50 per cent of its ultimate value. In other words, a developer is entitled to his risk and his efforts in developing the center and would expect normally a 100 per cent write-up in land value. Therefore, if we take 50 per cent of this, it would give us a value today of the entire holdings of the Azalea Corporation of $729,000.00 with access both to Brook Road, Westbrook Avenue and Norwood Avenue.

Q. That is the figure shown as the last figure on the first page of Appellant's Exhibit No. 7?

A. That is correct.

Q. What is the second page of Appellant's Exhibit No. 7? What does that show?

A. In our negotiations with various tenants who have approached us unsolicited since the rezoning of the property by the Board of Supervisors of Henrico County, we have found that the majority of tenants would take considerably less square foot area in stores if we had no access page 37 } to Brook Road and to Westbrook Avenue. Some will not go in the center at all. Those who will go

John W. Bates, Jr.

Mr. Riely: Exception, if Your Honor please. We would like to do that, sir.

By Mr. Riely: (Continued)

Q. Does that two-page statement summarize your studies?

A. Yes, sir, it does, as to the values of the properties with access and without access.

Mr. Riely: We offer this, Your Honor, as Appellant's Exhibit No. 7.

The Court: The Court will so identify it.

By Mr. Riely: (Continued)

Q. Mr. Bates, using Appellant's Exhibit No.7, page 34 } will you explain your study and the basis for it?

A. The entire property consists of 39.649 acres, excluding the right of way of the Virginia Electric and Power Company which runs through the middle of the property. That portion which is zoned for business consists of 31.473 acres.

Normal practice in the development of shopping centers would require that we have a four to one parking ratio. Therefore, if we adhere to the best practice, we could build a maximum of 274,000 square feet of buildings.

At the request of the Board of Supervisors of Henrico County in the summer and early fall of 1957, under my direction my office conducted an economic study of the area which indicated that there were 23,840 families living within the natural trade area, of which 13,800 were within five minutes driving time. This is approximately twice as many families as are within five minutes driving time of the Willow Lawn Area.

This study showed at this time that a center erected at this spot could support a 230,000 square foot shopping center and expect a gross business in excess of sixteen million dollars annually. I, therefore, rather than taking the maximum buildings that could be developed on the area, took the 230,000 as the criteria of value of the land.

Q. That is shown on page 1 of Appellant's Ex-
page 35 } hibit No. 7?

A. That is correct.

Q. Continue.

A. Taking the stores which our economic study showed were feasible and practical and could be supported in the area, we

are demanding greatly decreased rentals and smaller stores than they would be willing to rent if we had full access.

Based on our negotiations with the various tenants we have determined that the maximum shopping center that could be constructed on the subject property with access limited to Norwood Avenue through the County would be 100,000 square feet of stores, and that the maximum rental that would be expected from that 100,000 square feet is $190,700.00.

Q. That is the first figure shown on page 2 of Appellant's Exhibit No. 7?

A. That is correct.

Q. You have referred to Norwood Avenue. Where is Norwood Avenue located with respect to the property?

A. Norwood Avenue is immediately north of the property running into Brook Road at the same point that Azalea Avenue runs into Brook Road on the east side of Brook Road. This runs into the west side of Brook Road.

Q. All right, continue with this study.

A. In a similar manner I have taken off the operating expenses for 100,000 foot center, which would be $56,000.00, leaving a net annual rental of $134,700.00 and similarly have amortized the cost of the 100,000 square feet of

page 38 } buildings and have deducted $110,500.00 which represents 8 1/2 per cent of the cost of the buildings.

Q. Mr. Bates, would you look at that figure of $110,500.00? The heading opposite it says "Annual Carrying Charges on One Million Dollars." Is that correct?

A. That is what I am looking at right now. I think that is incorrect.

Q. I think it is a typographical error. It is supposed to be annual carrying charges on what?

A. One million three hundred thousand dollars. If we may correct that on the original—

Mr. Riely: May we correct that on the original? It is a typographical error, if Your Honor please.

By the Court:

Q. Which amount ought to be corrected?

A. This amount shows it as one million dollars. It should be one million three hundred thousand dollars.

The Court: All right, I have changed that.

Mr. Riely: The correct figure is in the sentence at the top of the page.

John W. Bates, Jr.

By Mr. Riely: (Continued)

Q. What net rental available to the land does that leave?

A. $24,200.00, which, if capitalized at six per
page 39 } cent, would give us a value of $404,000.00. In a similar manner we would expect to deduct that 50 per cent as we did in the previous instance, which would give us a value to land of $202,000.00, which shows a difference in the two valuations of $525,000.00, which the property is more than three times as valuable with the access to Brook Road and Westbrook Avenue than it is without that access.

Q. In other words, the value is cut by two-thirds because of the lack of access, is that correct?

A. That is correct.

Q. In your expert opinion to what other use can this property be appropriately put, this Azalea property?

A. As a whole?

Q. As a whole or subdivided into lots could it be put to residential use effectively?

A. Provided means of ingress to Brook Road and Westbrook Avenue were available; it certainly could not be if the only access was through Norwood Avenue.

Q. Could that portion of the property lying in the City be used for residential purposes satisfactorily?

A. Under the present zoning in the City of Richmond houses would be permitted to go there, but you must remember that immediately west of the property owned by Azalea Corporation is Westbrook Sanatorium. The City's Zoning
page 40 } Ordinance requires that hospitals treating mental diseases go into an "I" central business zoning or lower.

* * * * *

page 41 }

* * * * *

By Mr. Riely: (Continued)

Q. Let's take Mr. Drinard's question. Can this property in the City be satisfactorily used in your opinion for residential purposes?

A. Under the present zoning residences could be constructed on the land. However, due to the fact that you have a hospital treating mental diseases immediately west of the property and you have a business zoning in the rear of the

John W. Bates, Jr.

The Court: I will exclude that, but I will permit you to put it in for the record. It is understood that exception is noted.

Mr. Riely: Yes, sir, I wish to note an exception.

By Mr. Riely: (Continued)

Q. Have you made such a study?

A. Yes, sir, at the request of the Board of Supervisors of Henrico County I made such a study in the fall of 1957.

Q. Why?

A. And as a basis for the study our office, under my direction, made a study of the effect of the Willow Lawn Shopping Center on the adjoining residential area.

Q. And that is the basis for the opinion that you
page 44 } are going to express as to Azalea?

A. That is one of the bases.

Q. What is that study as to Willow Lawn?

A. I have in my hand an aerial photograph of the Willow Lawn Shopping Center and the immediate residential area.

Q. What does the Overleaf show?

A. The Overleaf shows the houses in the immediate area by number, and on each of the houses that have been sold, resold from their original sale after construction, we have indicated it by a red check.

• • • • •

Mr. Drinard: I take it that this testimony is all subject to Your Honor's ruling?

The Court: Yes.

A. (Indicating) This is Willow Lawn and on here the engineers have indicated the distances to the various residential properties.

By Mr. Riely: (Continued)

Q. From the closest point of the Willow Lawn Shopping Center?

A. That is correct. Monument Avenue is at your left and Broad Street is at your right.

page 45 } Q. Will you explain to His Honor what the Overleaf shows?

A. On here we have indicated by a red check. Every one of these properties have been checked as to their sales value prior to the time of rezoning announcement of Willow Lawn

property; you have one of the heaviest traveled truck routes in the City along Brook Road and down Westbrook Avenue, as the traffic is through truck traffic which is not permitted to use Brook Road and is turned to go down Westbrook Avenue to Hermitage—

page 42 } Q. From the north down Brook Road to this intersection and west along Westbrook along two sides of this property?

A. That is correct.

Q. You are talking about the truck traffic in that direction (indicating on plat)?

A. That is correct. There are the three reasons I have pointed out, and in addition the influence of the heavy trucking terminal use of the land to the north of the subject property would limit the amount of value of the houses that could be constructed on this property, and, though by law they could be constructed, I would think that a developer would be very foolish to attempt economically to build residences along the property.

Q. From an economic point of view residential development will not be successful?

A. I wouldn't think so.

Q. Have you made any study as to the effect of the construction of the Azalea Shopping Center on the value of the surrounding residential property along Westbrook Avenue and Brook Road?

Mr. Drinard: We are back in the economics again on that question.

page 43 } Mr. Riely: I think this is different economics. One of the factors to be taken into account is value on surrounding property of the variance requested. I am not talking about the subject property now. I am asking Mr. Bates to give his expert opinion as to the effect on the residential property on Brook Road and Westbrook Avenue.

Note: At the request of the Court the last question is read aloud, after which time the conduct of the hearing continues as follows:

The Court: What is the purpose of that?

Mr. Riely: To show it will have no adverse economic effect—

John W. Bates, Jr.

Shopping Center and their distance from residences. Do you have a photograph that shows those distances?

A. Yes, sir, I do have a photograph (exhibiting).

• • • • •

page 47 }

• • • • •

A. (Indicating on photograph) Similar to the photograph which we showed you of Willow Lawn Shopping Center, we have requested the engineers to place on here the approximate location of the buildings proposed for the shopping center and to indicate on this photograph the distances from the residences on both Westbrook Avenue and Brook Road, and, as I indicated earlier, the distance to the nearest residence to the nearest point of a building on Westbrook Avenue is 415 feet, with this area of 210 feet of parked area between the street and any parking or any commercial use in any way.

On Brook Road similarly we have a 200-foot strip, and the nearest building on Brook Road is 715 feet to the nearest residence, and that is merely the side of a building which would front northwardly. The actual distance to the front of the stores from the houses on Brook Road is 924 feet which is in excess of three city blocks.

Here we have indicated the distance from the service station at Azalea which is in the green section zoned for business to the nearest house. It is 460 feet, and from Howard Johnson's Restaurant which is also in a G-local business zone in the City it is 450 feet from the nearest house.

The same house to the nearest point of our shop-
page 48 } ping center building would be 810 feet and would be screened by a planning strip of 200 feet.

Mr. Riely: We offer that in evidence, if Your Honor please.

Mr. Drinard: I wish to make the same objection to this as I did the other.

The Court: I have excluded the whole line of testimony.

Mr. Riely: The same exception applies equally.

The Court: This will be marked Appellant's Exhibit No. 9.

By Mr. Riely: (Continued)

Q. On the basis of this study what is your conclusion as

Shopping Center in December of 1952, and the ones with the red check we have indicated are those which have been sold since that time, resold a second time, and with the exception there were 47 houses that had been resold after the zoning of Willow Lawn and the announcement in the papers of the construction of the shopping center. Four properties have been sold for less than they originally sold for. All the remainder has sold for as much or more. The four that were sold for less, the greatest amount of the depreciation was $500.00 in a house which is the furtherest away from the shopping center in the whole group. There is one on Augusta Avenue, one on Wythe Avenue and two on Grace Street which are quite close to the center.

Mr. Riely: May it please the Court, I offer this as Appellant's Exhibit No. 8.

The Court: I have already identified it as No. 8.

By Mr. Riely: (Continued)

Q. On the basis of that study what is your conclusion of the effect of the construction of the Azalea Shop-
page 46 } ping Center?

A. Well, if we were to check on Westbrook Avenue, the closest house to any building in the shopping center would be 415 feet, which is more than a city block away, and it would have in between this residence and the shopping center the existing screen of trees and a 215-foot parked area, and I don't mean parking. I mean an area which would be shrubbed and would have lawns.

Note: After a short recess is had, the conduct of the hearing continues as follows:

Mr. Riely: May it please the Court, by stipulation of counsel the area in green shown on the plat that was submitted with the stipulation should be marked as zoned for G-local business, and in the city the area in orange is marked C-single family residential. That mark was apparently left off that copy of the plat. I wanted that understood.

The Court: Very well.

By Mr. Riely: (Continued)

Q. Mr. Bates, we were discussing before the recess the approximate location of the buildings on the proposed Azalea

to the effect on these residences of the erection of the Azalea Shopping Center?

A. As I have pointed out earlier, the truck traffic down Brook Road and Westbrook Avenue is quite heavy and has had a detrimental effect before the shopping center was ever thought of on the property values in the neighborhood. Also, the influence of the business area zoned in the City has had an adverse effect, particularly, due to the fact that two land use studies made by experts employed by the City of Richmond have recommended the Brook Road frontage on the west side of Brook Road from the presently zoned business area to the abandoned Richmond-Ashland right of way page 49 } to be zoned for business; also, the influence of the trucks which are constantly parked in the area which had been zoned for business in the County east of the Richmond-Ashland Railway as can be seen in the photograph which has been submitted into evidence, and the effect of these influences on the property values along Brook Road and Westbrook Avenue have been such that depreciation has already been taking place in the property values.

To have this property set aside for a parked area would have a tendency to stablize the property values in the entire neighborhood, and based on the studies which we made on Willow Lawn it is my conclusion that there will be no detrimental effect on the over-all property values of the residential property along the south line of Westbrook Avenue and the north line of Brook Road. What I mean is the east line of Brook Road, and it would have an over-all advantageous advantage to the neighborhood as a whole.

CROSS EAMINATION.

By Mr. Drinard:

Q. I believe you said that the property on the west side of Brook Road and the north side of Westbrook Avenue within the City could be used for residential purposes?

A. Under the zoning ordinance, yes, sir.

Q. And the property between Brook Road and Hermitage Road on the south side of Westbrook Avenue has page 50 } been developed for residential purposes, has it not?

A. Yes, sir.

Q. That property faces the hospital property to the north of Westbrook Avenue?

A. That is correct.

John W. Bates, Jr.

Q. When was the property in the County rezoned so that it could be used for this purpose?

A. I don't know the date of the property that is east of the Richmond-Ashland Railway. That has been zoned for business for quite some time prior to the time of the zoning of the property that is west and south of the Richmond-Ashland car line in the County. That was zoned in December of 1957 for business.

Q. Prior to the acquisition of this property by the Azalea Corporation, that part of it lying south of the Richmond-Ashland Railway abandoned right of way and west of Brook Road has been in single ownership, has it not?

A. Yes, sir.

Q. Owned by the Westbrook Corporation?

A. That is right, sir.

Q. I should have said the Westbrook Sanatorium Corporation?

A. That is right.

Q. The property north of the abandoned right of way and west of Brook Road was all in single ownership prior to your acquisition?

page 51

A. No, sir.

Q. Wasn't the property owned by Mr. George D. Thomas?

A. And Mr. Louis Castlevecchi.

Q. Mr. Castlevecchi owned a small parcel up near the junction of Norwood Avenue with this property?

A. That is correct.

Q. The rest of it was owned by Mr. Thomas?

A. That is correct.

Q. Mr. Bates, do you know of any reason why this property could not be used as a public park or recreation area? I am speaking of the property within the City?

A. As we have pointed it out, that is virtually what we intend to do with it.

Q. And it is your present plan to develope it something as a park and recreation area?

A. That is correct.

Q. And you will still own it?

A. That is correct.

Q. And at any time after that, if you deem it desirable to abandon that use, you can do it?

A. Sure, if we desired, but it wouldn't be economically practical after putting a three million dollar investment over

John W. Bates, Jr.

A. No, sir, the zoning ordinance does not permit
page 54 } it.

Q. The zoning ordinance does not permit the driveways?

A. If we had to build the road for residential property, we have too large a tract of land to either develop it either residentially or for business without having some access to Brook Road and to Westbrook Avenue. Now we are going to create traffic whether it is for residential use or whether it is for business use.

Q. So you think that the City's Zoning Ordinance restricting the use of this property for residential purposes should not stand in the way of the use of the property in the County for commercial purposes?

A. Well, I am not a lawyer and I am not able to interpret the law as such, but as I read it as a real estate man, it doesn't say anything about driveways or restricting in any way. The roads are not considered generally in interpreting the Zoning Ordinance from a real estate developer's point of view. I would say it doesn't restrict it.

Q. But you think that your corporation would have the right to use this land in the City as an accessory use to your commercial development in the County?

A. We thought we had the right all along when we started. We never thought it would be restricted. We thought we were
doing something worthwhile for the community and
page 55 } something for the City as a whole. Never have I
seen in my visits all over the country to shopping centers where as much as seven acres of land are devoted to the protection of the property owners in the neighborhood.

Q. But you think it would be in violation of the zoning ordinance to permit the use of the land in the City for a parking area in conjunction with your commercial development, but it would not be in violation of the zoning ordinance to use it for access driveways?

A. I certainly do. I would explain that because parking is specifically excluded in the ordinance according to my interpretation of it, but there is no mention made of roads.

Q. If roadways are excluded your answer would be the same?

A. I have never seen it excluded.

Q. Have you seen parkways, parking lots excluded?

A. Yes, sir.

Q. In the ordinance?

A. Yes, sir.

John W. Bates, Jr.

behind it to abondon it where it would be a great
page 52 } asset both to the residential area and the shopping area to have a grass plot in between.

Q. If you needed it for a parking area to park vehicles in conjunction with your shopping area as it grew, you could use it?

A. We have never intended it.

Q. But you could use it?

A. No, sir, not under the present zoning.

Q. That is right. Could it be used for church purposes?

A. I think it could, sir.

Q. Mr. Bates, the property is usable for any purpose that is permitted in a C-single family dwelling district, is it not?

A. That is right, sir, yes, but it is not practical to use it for C-single family residential purposes in my opinion, as I have previously testified, from an economical point of view. You just cannot build houses in keeping with those that are now constructed on the south side of Westbrook Avenue and on the east line of Brook Road and expect to sell them with the traffic that is now already on those two streets.

Q. But those residences are there now, are they not?

A. That is correct, yes, sir.

page 53 } Q. Mr. Bates, if you obtained the right to build these access driveways to the shopping center from Westbrook Avenue and from Brook Road and it subsequently developed that you need some part of this area within the City for a parking area in conjunction with your shopping center or for some other use in conjunction with your shopping center, would you think that you should obtain that right?

A. Our present plans show only 230,000 square feet of stores. That is the economic unit that the community will support.

Q. But if in the future you need this land to develop it in conjunction with your shopping center use, would you feel like that you could have the right to use it for that purpose?

A. If I am still alive and still an officer of the Azalea Corporation, I would seriously object to doing anything that is not in keeping with the plan which we originally announced, and I think it would be breaking faith with the community.

Q. But if someone who got into control of the corporation had different views from you, would you think the corporation would have a right to use the property for any of those purposes?

Morton G. Thalhimer.

page 59 } agent or receive any benefits directly or indirectly from the outcome of this case or the development of the shopping center.

Q. Have you as a result of your examination of the property and of the exhibits and your general experience in such matters formed an opinion as to whether there is a need for a means of access to the property of Azalea within its area to the south?

A. Yes, I have formulated an opinion.

Q. Will you please express your opinion on that score and also, if you do not mind, give us the reasons for it, making it on the assumption that the property of Azalea situated within the County is to be used for the development of a shopping center?

A. If the property that is zoned by the County for business and under the County's zoning should be so developed and if the economic needs for such a development are at the present approximately in line with the testimony that I heard of Mr. John Bates, Jr., the property in my opinion could not be developed successfully without access roads into Westbrook Avenue and Brook Road. In other words, without any access to this property, except the access through Norwood Avenue, the property is not suitable for such a business development, and I say that because Azalea Avenue is really a street that—Azalea Avenue it is—

Q. Do you mean Norwood or—

page 60 } A. First of all, Azalea Avenue running from Brook Road to Chamberlayne Avenue is zoned as business and it is wide, a 100-foot divided highway with business zoning on both sides of Azalea Avenue running from Brook Road on its west to Chamberlayne Avenue on its east, and it is fairly well developed with filling stations and other businesses.

Brook Road itself is at its entrance to the City of Richmond at Azalea Avenue is also 100 feet wide. Norwood Avenue which is a continuation of Azalea Avenue and not going at right angles with Brook Road, but going generally in a northwesterly direction, starts off at approximately 50 feet and narrows down to 45 feet or 40 feet and then widens out to 50 feet, and as it passes northwestwardly from Brook Road, it really acts at the present time as an entrance to the rear of the business property facing on Brook Road. In other words, instead of being a primary street, it is very much of a secondary street. It would be very difficult for me to visualize that patrons of a shopping center of any kind would come down

• • • • •

page 57 } MORTON G. THALHIMER,
a witness introduced on behalf of the appellant, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. King:

Q. Mr. Thalhimer, will you please state your name?

A. Morton G. Thalhimer.

Q. Where is your residence?

A. 3202 Monument Avenue, Richmond.

Q. What is your occupation?

A. I am a realtor, appraiser and real estate consultant.

Q. For how long have you been engaged in that occupation?

A. Approximately 40 years.

Q. Has the entire time of that occupation been spent in the City of Richmond?

A. Yes, it has.

Q. Have you been called upon to give expert testimony in keeping with your experience prior to today?

A. Yes, I have.

Q. Have you ever been asked to testify on behalf
page 58 } of the City of Richmond?

A. Yes.

Q. Has that happened on numerous occasions or a few?

A. Well, it's happened fairly frequently.

Q. What was the most recent instance, sir?

A. I think the most recent instance was when the condemnation case by the City of Richmond, probably, in early 1958 acquiring some acreage property for use by its Department of Public Utilities.

Q. Are you familiar with the general nature of the proceeding today?

A. Yes, in a general way.

Q. Are you familiar with the property of Azalea that is involved in this proceeding?

A. Yes, I have seen the property and looked at the map and ridden and walked over portions of the property and around the property.

Q. May I ask you do you have any interest in this case or in its outcome?

A. No, I have no interest directly or indirectly in the Azalea Corporation or Westbrook Sanitorium, Incorporated, or whether they succeed or do not succeed, nor am I a rental

Morton G. Thalhimer.

Azalea Avenue, Brook Road or any other street and turn into this narrow Norwood Avenue in order to get access to the proposed shopping development. Except as a minor road, not as a major entrance, it could be used as an exit. It could be used for bringing in of trucks with produce or merchandise, whatever would be coming into the shopping center, but it would be difficult for me to contemplate that it is a page 61 } sufficiently important road to be the only important entrance to any kind of a shopping center, and for that reason my own opinion as an appraiser and real estate consultant is that the shopping center could not be developed unless it had road or roads, ample road or roads, to get the traffic in and out in an orderly fashion and in a fashion that would not be too difficult or dangerous for the people using it.

Q. I take it you said those adequate means would be on Brook Road or Westbrook Avenue or both?

A. Yes, in my own personal opinion that it would require adequate entrance and exit both on Brook Road and Westbrook Avenue in order to move the traffic orderly, because it is perfectly obvious that the patrons of the shopping center come from every available direction, and even the most casual observation of the area would show that the patrons, the customers, are bound to come from the east, from the north, from the south and from the west, and someone coming from, say, the north, if they had to go south on Brook Road to Westbrook Avenue and then turn into the shopping center, they would certainly be going a more longer and more inconvenient route that if they could turn into the shopping center somewhere on Brook Road and, similarly, if someone was coming from the south or from the west or east and south, it would seem a much longer and more dangerous method if their only entrance we will say was on Brook Road, page 62 } if they had to go north on Brook Road and then make a left turn to cross the southbound traffic and in order to gain entrance let us say at this street that is shown on the map as a street, any one entrance in my opinion would not be a sufficient entrance for a development of the magnitude that is anticipated here.

Q. You have recited what your opinion is on the assumption that the property of Azalea Corporation with respect to ingress and egress were the property located in the County converted into a shopping center. Now will you give us your opinion along like lines, but on the assumption that the area within the County was converted into a residential area,

Morton G. Thalhimer.

rather than a shopping center? Do I make myself clear on that?

A. If the property of approximately thirty-odd acres that is now zoned for business, instead of being zoned for business, was zoned residential, I think it would be also obvious that in order to develop 30 acres with three to four residential lots per acre, let us say to develop one hundred lots with sufficient room for 100 individual single family residences, they would have to have access in my opinion to Westbrook Avenue and also to Brook Road. I am speaking of any residential development now. There aren't any secrets or short cuts or tricks about it. I mean you take any development, whether you want to start with one as big as

page 63 } Windsor Farms and go down to some of the small ones north, east, south and west in the City of Richmond, access is important, and if you once have the access in the convenient ways and the ways that would make the traffic patternwise the simplest, easiest and safest way to get into the interior, development would then follow in a way that would be most pleasing to the developer, but without an access road both on Westbrook Avenue and on Brook Road I do not think that this thirty-odd acres could be developed residentialwise, businesswise or industrialwise. It needs access roads for its development, unless it is used probably exclusively for future expansion of the present hospital.

In other words, it might be to the interest of the hospital, particularly a hospital of the type that is operated there, to have one common entrance and have all roads leading into that. I do not, however, wish what I stated to include the frontage on Westbrook Avenue by depth of 210 feet or some of the frontage on Brook Road to a depth of 220 feet. In other words, there would be no reason why the property that is in the City and is zoned C-1 residential and has whatever the frontage is—I think in the area 900 feet on Brook Road—couldn't be developed as lots of 50 feet, or whatever width they wanted, with a 20 foot depth, each lot having its own right to enter Westbrook Avenue, but if it were so

page 64 } developed as a residential area on Westbrook Avenue and in accordance with the City's zoning, I would believe that each of the houses would want to cut the sidewalk in order to have ingress to their garages, which in all probability would be built in the rear part or the side of the house.

In other words, if that were developed into fifteen or twenty houses facing on Westbrook Avenue, I think it would be

logical that they would want to have access to the road in order to get to their house and in order that oil or coal, the necessary things, could be delivered there because there is no alley separating coming in from the City to get to the rear of these houses.

Q. I take it then, sir, with respect to this property that is shown on Appellant's Exhibit 1 as lying within the County and as containing approximately 30 acres, that in your opinion that could not be adequately or properly developed for business purposes, for residential purposes or for any other purpose unless there is available to it a means of access to both Brook Road and Westbrook Avenue?

A. That is correct.

• • • • •

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Appeal Awarded	1
Record	2
Petition of Appeal	2
Stipulation	3
Letter—Opinion	6
Order—January 12, 1959	7
Notice of Appeal and Assignments of Error	8
Proceedings	8
Witnesses:	
S. Irving Hall	9
John W. Bates, Jr.	19
Morton G. Thalhimer	33

RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

CLERK
SUPREME COURT OF APPEALS
RECEIVED
OCT 14 1959
RECEIVED
RICHMOND, VIRGINIA