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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 5103

In the Supreme Court of Appeals of Virginia at Richmond

CITY OF RICHMOND

v.

A. H. EWING'S SONS, INC.

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. 5103

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 14th day of October, 1959.

CITY OF RICHMOND, ETC., Plaintiff in Error,

against

A. H. EWING'S SONS, INC., Defendant in Error.

From the Law and Equity Court of the City of Richmond

Upon the petition of City of Richmond, a municipal corporation, a writ of error and *supersedeas* is awarded it to a judgment rendered by the Law and Equity Court of the City of Richmond on the 6th day of March, 1959, in a certain motion for judgment then therein depending wherein A. H. Ewing's Sons, Incorporated, was plaintiff and the petitioner was defendant, no bond being required.

RECORD

* * * * *

Filed in the Clerk's Office the 26th day of May, 1958.

Teste:

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

MOTION FOR JUDGMENT.

3. On May 31, 1956, plaintiff entered into a contract with the City of Richmond under which plaintiff agreed to erect a juvenile detention home on a site at Pine Camp, City of Richmond, Virginia, for the sum of $262,869.00.

4. Work in connection with the construction of the building was commenced forthwith.

5. On July 16, 1956, plaintiff was notified by Carneal and Johnston, defendant's architect-engineers, "to stop all purchasing of any materials for this project and all work is to come to a complete standstill pending outcome of legal action being undertaken by the Owners," said notice being page 2 } given pursuant to directions of the defendant to its said architect-engineers.

6. At all times subsequent to May 31, 1956, plaintiff has been ready, willing and able to perform the obligation of its said contract, and plaintiff has on several occasions advised the defendant to that effect.

7. On February 3, 1958, the defendant, acting through its governing body, the City Council, adopted Resolution No. 58-R5-4, which resolution in paragraph 1 thereof states as follows:

"1. That the site approved by the Board of Zoning Appeals on the Pine Camp property for the erection of the detention home for the Juvenile and Domestic Relations Court be and is hereby abandoned."

this being the site for the erection of the juvenile detention home as set forth in the said contract.

8. The plaintiff advised the City Manager of the defendant in writing that unless directed to proceed with the work by May 1, 1958, the plaintiff would treat the contract as breached, and upon advice from him that the Legal Department was handling the matter like written notice was directed to the

City Attorney of the defendant setting May 15, 1958, as the deadline for an order to proceed.

9. The defendant has not directed the plaintiff to proceed, but, by the action of its City Council and its failure after a reasonable time to direct the plaintiff to proceed with the work, as aforesaid, has breached its contract.

10. By reason of the foregoing breach by the defendant of its contract for the construction of the said detention home, plaintiff has been damaged in the amount of $47,393.00.

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page 5 }

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PLEA IN ABATEMENT.

The defendant, City of Richmond, by its attorney, comes and says that this court ought not to have or take any further cognizance of this action of the plaintiff, because this defendant says:

1. That on the 31st day of May, 1956, the defendant and the plaintiff entered into a contract for the construction of a juvenile detention home at Forest Lawn Road and Old Brook Road in the City of Richmond.

• • • • •

page 6 } 2. That the specific site for the construction of the detention home at Forest Lawn Road and Old Brook Road is shown upon one of the drawings made a part of the contract, a copy of which is attached to this plea marked "Exhibit No. 3."

3. That on the 5th day of June, 1956, the defendant applied to the Commissioner of Buildings of the City of Richmond for a permit to erect the detention home on the site shown on Exhibit No. 3, but the application was denied because a detention home was not permitted to be erected or maintained on the site by the defendant's zoning ordinance.

4. That on the 8th day of June, 1956, the defendant appealed from the decision of its Commissioner of Buildings to the Board of Zoning Appeals of the City of Richmond and requested that it be granted a permit to erect and maintain the home on the site irrespective of the zoning ordinance, under the powers conferred on the Board by §17.20(c) of the defendant's charter.

5. That on the 2nd day of July, 1956, the Board of Zoning Appeals denied the defendant's request to construct the home on the site but granted a permit to erect the home on another site near Forest Lawn Road and Old Brook Road not less than 440 feet from Old Brook Road, substantially as shown on "Exhibit No. 4" attached to this plea.

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page 21 }

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STIPULATION.

Come now the plaintiff and defendant upon the plea in abatement herein filed and stipulate the following evidence:

§1. The allegations contained in paragraphs numbered 1 through 9 of the plea in abatement and in paragraph 13 thereof and exhibits attached thereto constitute correct statements of fact.

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page 30 }

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Received and filed Jan. 16, 1959.

Teste:

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

GROUNDS OF DEFENSE.

1. The defendant admits the allegations of facts stated in paragraphs numbered 1, 2 and 3 of the plaintiff's motion for judgment.

2. The defendant denies that work was "commenced forthwith" as alleged in paragraph numbered 4 of plaintiff's motion for judgment and defendant calls for strict proof of any and all work performed under this contract by or on behalf of said plaintiff

3. The defendant admits the allegations of paragraph 5 of plaintiff's motion and further says the defendant and plaintiff were prevented from proceeding with the contract under

a restraining order of the Law and Equity Court of the City of Richmond entered on July 6, 1956 and which plaintiff had notice of and therefore any work performed subsequent to the entry of this order by or on behalf of the plaintiff under its direction, supervision or control was at the sole risk of the said plaintiff.

page 31 } 4. The defendant admits the allegations of facts in paragraph numbered 6 of the motion for judgment.

5. The defendant admits the allegation in paragraph numbered 7 of plaintiff's motion for judgment "That the site approved by the Board of Zoning Appeals" for erection of the detention home was abandoned by the Richmond City Council but defendant denies that this was the original site set forth in the contract executed prior to the decision of the Board of Zoning Appeals.

6. The defendant admits the allegations in paragraph numbered 8 of plaintiff's motion but denies that said contract was "breached" by defendant and in the alternative says the cessation of work on this project constituted an annulment of said contract which defendant had the right to do under the General Conditions thereof.

7. This defendant denies the allegation of paragraph numbered 9 in the motion for judgment in so far as it alleges defendant was responsible for breaching said contract but defendant states that by action of the Board of Zoning Appeals in changing the proposed location of the project as provided for in the executed contract the defendant under provisions of its charter, section 12.07, would be required to readvertise by way of sealed bids the specifications for construction on this new site established by the Board of Zoning Appeals.

8. The defendant denies the allegations of paragraph 10 of plaintiff's motion for judgment and says in the alternative without admitting that the plaintiff had been in any way damaged and calling for strict proof thereof, that

page 32 } plaintiff under the terms of the contract is entitled: "To payment for all work executed and any loss sustained upon any plant or materials and reasonable profit and damages."

9. This defendant says the plaintiff if it did not have actual notice had constructive notice shortly after execution of the said contract that a building permit for the construction of the detention home was denied by the Commissioner of Buildings of the City of Richmond and therefore said plaintiff entered into contracts with others for supplies, materials, labor and other services to be used in the proposed project at its

own risk and that the defendant was in no way a party to said contracts and is not liable to the plaintiff for its legal obligations and responsibilities created thereby.

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page 46 }

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ORDER.

This day came the parties and made motion that certain stipulations endorsed by both of them, and relating to the prior litigation in this court involving construction of the juvenile detention home, styled *Wicker Apartments, Incorporated* v. *City of Richmond,* be filed and made a part of the record in this case, and that the record in the said prior litigation be considered a part of the record in this case, and that a certified copy of the record in said prior litigation may be substituted in this action in place of the original record and that the stipulation heretofore entered into, for the purpose of the plea in abatement, is stipulated to the same extent and on the same conditions for the purpose of deciding the remaining issues in this case.

Accordingly, IT IS ORDERED that said stipulations be and the same are hereby filed and made a part of the record in this case.

Enter Feb. 20, 1959.

R. L. Y.

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page 47 }

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STIPULATION CONCERNING LITIGATION INVOLVING CONSTRUCTION OF RICHMOND JUVENILE DETENTION HOME.

1. On June 5, 1956 the Contractor, for the Director of the Department of Public Works of the City of Richmond, as owner under the contract sued on in this case, applied to the City Commissioner of Buildings for a building permit to construct a juvenile detention home under the said contract on

property located on the northeast corner of the intersection of Forest Lawn Road and Old Brook Road.

2. On June 6, 1956 the Commissioner denied the permit as requested on the ground that the proposed use violated the zoning ordinance in that it was not permitted in that zone.

3. On June 8, 1956 the Director of Public Works appealed the decision of the Commissioner to the Board of Zoning Appeals.

4. On June 18, 1956 the Board heard the matter and disapproved the application as filed.

page 48 } 5. The Director petitioned the Board for a rehearing. On June 20 the Board granted a rehearing.

6. On July 2, 1956 the Board held a rehearing and denied the permit as requested but granted the permit on condition that the detention home building and play area be set back a minimum of 440 feet from the closest point of the eastern line of Old Brook Road and that a double fence be constructed around the play area with a minimum of 20 feet between such double fences.

7. On July 5, 1956 Wicker Apartments, Incorporated, owner of the property near the proposed detention home site, served notice it would apply to this Court for a temporary injunction to halt construction of the detention home.

8. On July 6, 1956 this Court entered an injunction restraining the City of Richmond, its agents and employees and independent contractors acting for it, from doing any act to carry out its rights in respect to construction on property involved in and pursuant to the permit so granted by the Board of Zoning Appeals on July 2nd. The injunction was to expire October 1, 1956 unless sooner dissolved, modified or enlarged and was to become effective when Wicker Apartments posted a certain bond. This bond was executed the same day.

9. On July 6, 1956 Wicker Apartments filed an appeal to this Court from the July 2nd decision of the Board of Zoning Appeals. On July 10 this Court ordered the Board to produce its records as provided by law, and these records were filed in this Court on August 2nd.

page 49 } 10. After the case was argued the Court notified counsel on September 27, 1956 that the July 2nd decision of the Board of Zoning Appeals would be affirmed.

11. On October 3, 1956 this Court entered an order affirming the July 2nd decision of the Board, and provided that Wicker Apartments having indicated its intention to

appeal from the decree, the effect of the decree should be stayed for sixty days from October 3, 1956 providing that Wicker Apartments file notice of appeal and assignments of error, and that the effective date of the decree should be further stayed until such further time as the Supreme Court of Appeals of Virginia should have finally acted upon such appeal.

12. Wicker Apartments filed its assignments of error on November 30, 1956.

13. On March 6, 1957 the Supreme Court of Appeals awarded Wicker Apartments an appeal from this Court's decree of October 3, 1956.

14. On September 6, 1957 the Supreme Court of Appeals affirmed this Court's decree of October 3, 1956.

• • • • •

page 55 } March 6, 1959.

Fred G. Pollard, Jr., Esq.,
George R. Humrickhouse, Esq.,
Attorneys at Law
Richmond, Virginia

J. E. Drinard, Esq.,
City Attorney
Richmond, Virginia

In *Re*: A. H. Ewing's Sons, Inc., v. City of Richmond

Gentlemen:

In regard to the above styled action, I beg to advise that I have this day entered final judgment in favor of the plaintiff in the amount of $47,393.00, together with interest at the legal rate from February 3, 1958, until paid, and costs of this proceeding, saving to the defendant its exceptions.

In argument it was agreed on both sides that if the contract was enforceable at all, and if the Resolution of Council, adopted February 3, 1958, abandoning the site approved by the Board of Zoning Appeals on the Pine Camp property for the erection of a detention home for the Juvenile and Domestic Relations Court should properly be construed as a breach of contract, rather than notice of cancellation within the "Annulment Without Fault of Contractor" provision appearing on page (4) of the General Conditions of the contract between the parties hereto, then the measure of dam-

ages would have to be that laid down in the cases of *The Commissioners of the Sinking Fund* v. *The Kendall-Bank-Note Company,* 79 Va. 563, and *Central Lunatic Asylum* v. *Flanagan,* 80 Va. 110. I do not find that notice of cancellation was ever given.

It was also urged on behalf of the City that it should not be regarded as being in default for not permitting the plaintiff general contractor to proceed with the work while the matter of the building permit was before the Board of Zoning Appeals, this Court, and the Supreme Court of
page 56 } Appeals of Virginia. This contention is doubtless correct as a temporary excuse, but after the decision of the last-named Court on September 6, 1957 (*Wicker Apartments, Incorporated* v. *City of Richmond*, 199 Va. 263) the parties were free to proceed. Mere delay was covered by the "Delays and Extension of Time" provision on page (4) of the General Conditions of the contract.

The defense most strongly argued here was alleged illegality of the contract, in that it contemplated the erection of a building in an area so zoned, at the time the contract was entered into, that a violation of law would be involved. There is some authority for the proposition that an executory contract for the construction of a building in violation of a building or zoning law is unenforceable for illegality. 9 Am. Jur. 8, Building and Construction Contracts, Sec. 6; 17 C. J. S. 560, Contracts, Sec. 210; *Medoff* v. *Fisher,* 257 Pa. 126, 101 A. 471; *Meneice* v. *Camp Kodimak Co.*, 157 Pa. *supra,* 380, 43 A. (2d) 621; *Eastern Etc. Co.* v. *Webb Etc. Co.,* 195 Mass. 356, 81 N. E. 251; *Tocci* v. *Lembo et al.,* 325 Mass. 707, 92 N. E. (2d) 354; *Wolthansen* v. *Lederer,* 313 Ill. App. 143, 39 N. E. (2d) 71. We, of course, recognize the general rule that a contract made in violation of a statute enacted to safeguard the public health, or the like, is illegal and unenforceable. *Lasting Products Co.* v. *Genoveses,* 197 Va. 1, at p. 8. It also seems to be the general rule that a contract originally illegal does not become enforceable simply "because the purpose of the transaction has become lawful either because the purpose of the parties has changed or because changes in the law or other external circumstances have made that lawful which was previously unlawful." Williston on Contracts, Rev. Ed., Vol. 6, pp. 4993 et seq., Sec. 1758. See also Annotation, 126 A. L. R. 685.

In the instant case, however, we are not dealing with a simple case of a contract the performance of which would necessarily involve a violation of law. The stipulation between the parties here was that a building permit would be obtained. It is doubtless true that the litigation over the

obtaining of the permit was probably not foreseen in its entirety; but this related to delay, not illegality in the sense necessary to unenforceability. I agree with the reasoning of the cases collected in the Annotation cited, beginning at p. 701, to the effect that where execution of the contract is contemplated by the parties to take place after a mere statutory prohibition has been removed, such contract is
page 57 } perfectly legal. Indeed, the City recognized the correctness of the view herein expressed, when, on December 4, 1957, its representative wrote plaintiff's attorney to this effect: "It is recognized that the City has a binding contract with A. H. Ewing's Sons, Incorporated, for this construction."

Yours very truly,

RLY/e

page 58 }

* * * * *

This day came again the parties, by counsel, and the Court having maturely considered of its judgment to be rendered in this case, doth find for the plaintiff and assess the damages at $47,393.00, with interest thereon to be computed after the rate of six per centum per annum from the 3rd day of February, 1958, until paid, and its costs by it about its suit in this behalf expended.

To all of which action of the Court the defendant, by counsel, objected and excepted.

Enter Mar. 6, 1959.

R. L. Y.

* * * * *

page 60 }

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The 27th day of March 1959.

MOTION.

This day came again the parties, by their attorneys, and on motion of the defendant, by its attorney, it being stated at

the bar that said defendant intends to petition the Supreme Court of Appeals of Virginia for a writ of error to the final judgment herein of the 6th day of March, 1959, it is ordered that execution of said judgment be suspended for a period of four months from its date of entry, and thereafter until such petition be acted upon by the Supreme Court of Appeals, if such petition be filed within the specified time.

In accordance with the statute made and provided, no suspending or *supersedeas* bond is required of the defendant.

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page 61 }

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NOTICE OF APPEAL AND ASSIGNMENT OF ERRORS.

To: The Clerk of the above Court.

Notice is hereby given that the defendant, City of Richmond, appeals the judgment in favor of the plaintiff entered herein on March 6, 1959, to the Supreme Court of Appeals of Virginia, and will seek a writ of error and *supersedeas* from said court.

It is respectfully submitted that this court erred in the following respects in entering the said judgment, which the defendant assigns as error:

1. The court erred in finding that performance of the agreement sued on in this case was contemplated to take place after a statutory prohibition had been removed, and that the agreement was therefore legal and enforceable when entered into, and in entering judgment for the plaintiff on said agreement.

2. The court erred in finding that performance of the said agreement would not necessarily involve a violation of law and was therefore enforceable, and in entering judgment for the plaintiff on that agreement.

3. The court erred in finding that said agreement was not rendered impossible of performance because of the illegality of the performance agreed upon and because of

page 62 } prevention, by a judicial proceeding, of the performance of said agreement within the time expressly agreed upon therein, and in entering judgment for the plaintiff.

4. The court erred in entering judgment for the plaintiff because the agreement sued on was unenforceable because

entered into when the proper contracting officers of both parties were under a mutual mistake of fact as to whether the building site specified in the agreement was located within the boundaries of a district where construction or use of the building specified in the agreement was permitted by the local zoning ordinance.

5. The court erred in awarding damages to the plaintiff because any losses suffered by the plaintiff arose not as a result of non-performance by the defendant, but from the plaintiff's failure to carry out its obligations under the contract to obtain a building permit, to promptly notify the defendant's architect in writing when plaintiff knew the performance agreed upon would be contrary to law, and by failing to obtain approval of said architect before entering into contracts with subcontractors.

6. The damages awarded by the court were excessive in that such damages were in excess of the amount contemplated by the parties as likely to arise from non-performance by the defendant, because certain items of damages including claims of subcontractors and lost profits, were speculative and uncertain, and because the amount of loss suffered by the plaintiff, if any, was caused by or greatly increased by the plaintiff's election not to exercise the option reserved to the plaintiff in the agreement to terminate the agreement because of stoppage of work for a period of three months by order of court or other public authority.

page 63 } 7. The court erred in finding that the plaintiff did not receive proper notice of cancellation of the agreement.

8. The court erred in entering judgment for the plaintiff because the agreement was rendered unenforceable due to lack of mutuality of obligation arising from the plaintiff's right to terminate the agreement without liability as provided in said agreement.

9. The court erred in admitting in evidence, over the objection of the defendant, and in considering a statement made by the attorney for the defendant to the attorney for the plaintiff during course of negotiations concerning the enforceability of said agreement.

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page 7 }

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CHARLES W. EWING,
was called as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Humrickhouse:

* * * * *

A. Charles W. Ewing. I am the President of A. H. Ewing's Sons.
Q. What is the business of A. H. Ewing's Sons?
A. General contractors.
Q. As such, will you tell His Honor whether you bid on the construction of the Juvenile Detention Home in the City of Richmond, and what was the result of the bid, and so forth?
A. I don't understand the question, the question the result of the bid. We did bid.
Q. Well, were you awarded—
A. We were awarded the contract.

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page 10 }

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Q. What was the amount of your base bid?
A. Two hundred sixty-one thousand, three hundred eighty-nine dollars.
Q. Were you awarded the contract?
A. Yes, sir.
Q. And I believe, with the base bid there were a number of alternate proposals?
A. That is correct.
Q. In the award, what was the amount of the award of the contract?
A. Two hundred sixty-two thousand, eight hundred sixty-nine dollars.

The Court: Excuse me a minute, I lost out.
Mr. Humrickhouse: That means that was the amount of the base bid plus two alternate proposals.
The Witness: Three and eight.
Mr. Humrickhouse: Alternates three and eight, which were attached to the Exhibit No. 1.

Charles W. Ewing.

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page 11 }

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Mr. Humrickhouse: Yes. And now we would like to offer the contract which is attached to it as our next exhibit.

The Court: Well, I will mark that Plaintiff's Exhibit No. 2. That is the contract resulting from this proposal?

The Witness: Yes, sir.

(The document above referred to was received in evidence as Plaintiff's Exhibit No. 2.)

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page 14 } Q. After the contract was signed on June the 5th by the city, what did you next do?

A. We immediately started negotiating subcontracts, since there was a time stipulation on the project, and starting with the most critical items, we started negotiating.

Q. Had you been in touch with the subcontractors before that time?

A. Before the award of the contract?

Q. Yes.

A. Well, naturally, we were in touch with them.

Q. Tell the Court how you do that.

A. Well, we are in touch with them. When you are low you do some preliminary negotiations on the assumption that you are going to be awarded a contract.

The Court: I mean, do you attempt to get anything binding before you make proposals?

The Witness: Before we make proposals, we get sub-bids, yes, sir.

The Court: Are they binding in case you are awarded the contract?

The Witness: No, sir, they are not binding.

By Mr. Humrickhouse:

Q. So, you had advice, really, from the subcontractor as to what they would do the job for, and you made your bid on that basis?

page 15 } A. That is correct.

Q. Then you say after the bid was awarded, you started working on binding contracts?

Charles W. Ewing.

A. That is correct.

Q. Now, Mr. Ewing, you are familiar with the general conditions of this contract, are you not?

A. Yes, sir.

Q. Do you know the one that says what you have to do regarding subcontractors and submitting them to the architect?

A. For approval, yes, sir.

Q. Did you do that?

A. No, sir.

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page 17 }

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Q. Now, what does the general condition say about the submission of the subcontractor to the general contractor? Will you read that, please, sir?

A. "The names of all subcontractors must be submitted to and be approved by the owner through the architect before the work is sublet."

Q. Now—

A. Must I read the whole thing?

Q. That is sufficient.

Did you do that?

A. No, sir.

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page 18 }

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Q. State why you did not do it, Mr. Ewing??

A. We normally negotiate with the subcontractors, and when we arrive at a binding thing, we enter into it. It's what we call binding the contract. Now, we know certain contractors that have done work in the various architects' offices, and this clause, our understanding, is to avoid a subcontractor that is not acceptable to that architect. So the ones that we know are accustomed to doing work in there, we do not hesitate to go on and close the deal, and then when the whole thing is let, we submit the list of the whole group at one time.

page 19 } Q. Is that what you have done in previous contracts when Carneal and Johnston are the architects?

Charles W. Ewing.

A. That has been our customary procedure with all architects. I cannot make a definite statement about Carneal and Johnston.

* * * * *

The Court: Did anything happen in regard to the building permits before these subcontracts were actually made binding between the general contractor and the subcontractor?

Mr. Humrickhouse: The building permits had been denied by the Commissioner, and it was appealed.

* * * * *

page 20 } Mr. Humrickhouse: Now, Your Honor, it is stipulated that "on the 5th day of June 1956"—this is page 2 of the plea in abatement, but it is in the stipulation—"the defendant applied to the plaintiff for a building permit for the erection of a home on the site shown on Exhibit 3 attached thereto."

Now, we have been furnished with a copy of that application, which indicates that actually the contractor signed it for the owner, and it seems to me that, so that that may be clear, I would like to offer this copy which the city furnished me at this time.

The Court: Thank you. I will mark that Plaintiff's Exhibit No. 6.

(The document above referred to was received in evidence as Plaintiff's Exhibit No. 6.)

Mr. Humrickhouse: Then it is stipulated between the parties, likewise set forth in the plea in abatement, that on the 8th day of June, the defendant appealed from the decision of the Commissioner of Buildings,—

* * * * *

page 21 }

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Q. I will stop right now and ask you, Mr. Ewing, after the original application for building permit was signed, what, if anything, did you do towards securing the building permit?

Charles W. Ewing.

A. We did nothing.
Q. Well, why?
A. Well, I mean, for a reasonable time, and then we went back and found out that they had not approved it.
Q. Well, you knew of all of these steps that were taking place, did you not?
A. Yes.
Q. Well, who went forward with the appeal of the denial of the building permit?
A. The city.
Q. Did you know they were doing it?
A. Not until we had a meeting with the city.
Q. Was that the meeting on June 22nd, 1956?
A. I would have to refer to notes for dates. June the 22nd. I have it here.

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page 22 }

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Q. What date did you enter into binding subcontract with any subcontractor, Mr. Ewing?

* * * * *

The Witness: There are several on June 13th, 1956, and June the 12th, 1956.

By Mr. Humrickhouse:
Q. Now, I will give you your file and ask you to go through there and pull out the contracts which you say were signed with subcontractors on June 12th or June 13th, and will you identify each one and file it as an exhibit?
A. Is it all right if I stand somewhere?

The Court: You can work right there. Is it all right?
The Witness: This is fine.
Mr. Humrickhouse, did you say you wanted these signed copies of these things,

By Mr. Humrickhouse:
Q. Yes, I want you to file what you consider to
page 23 } be the contract with the subcontractor.
A. All right, sir.

Charles W. Ewing.

Q. First explain what it is, give us an identity of it, and then we will tender it for filing.

In order to try and expedite this, Mr. Ewing, if you will just get the four subcontracts in which claims are made against you—

The Court: It may be essential to have them all, Mr. Humrickhouse, and maybe he is entitled to recover on the quantum meriut.

Mr. Humrickhouse: I really wanted them all, but I thought maybe I could help him along. They are all in there in order according to this yellow sheet.

The Witness: That is correct. I am pulling them out now.

All right, sir.

By Mr. Humrickhouse:

Q. Will you identify each one of those? Let me help you.

The Court: Give him a chance to look them over.

Mr. Humrickhouse: Yes, I am.

By Mr. Humrickhouse:

Q. Now, what is this?

A. That is a purchase order, or contract, with the Virginia Steel to supply certain reinforcing and mesh.

Q. What is the amount of it and the date of it?

page 24 } A. The date of this is June the 12th.

Q. What year?

A. 1956. And the amount of it is a lump sum for reinforcing steel, $196, and approximately 17,000 square feet of 661010 electric welding mesh at $240 for a hundred square feet.

The Court: I believe, Mr. Humrickhouse, if it is contended that these subcontracts embrace all the work contemplated by the general contract except that part of the work which the general contractor was going to do with his own personnel, I will get him to identify all of them and I will just clip them together and mark them collectively.

Mr. Humrickhouse: That will be fine. I was going to say, as a matter of convenience, if we will look at the yellow sheet which is attached to our stipulation, it shows the names of the contractors, the amount of the contract, and whether or not there was a contract signed and whether or not we had a firm bid with them. It gives all of that information. It is the yellow sheet attached to the stipulation.

Charles W. Ewing.

The Court: All right. I would like to have the other, too, though.

Mr. Humrickhouse: Yes. These would corroborate that exhibit, that is all.

By Mr. Humrickhouse:

Q. All right. Now, what is the next one, Mr. Ewing? Just identify each one of them.

page 25 } A. This is Montague Betts' purchase order for all structural and miscellaneous metal.

Q. How much is that?

A. In the amount of $5526.

Q. Date?

A. That was dated June the 12th, 1956.

This is to Detroit Steel Products Company, dated June 12th, 1956, "all labor and material to install complete all metal windows, metal frames, hardware, and screen, Section 12 of specifications under above-captioned project, in strict accordance with Plans Specification Addendum 1, prepared by Carneal and Johnston, Architects, at your quoted price, $22,900."

This is to Roanoke Engineering Sales, dated June 12, 1956, "Furnish f.o.b. job site, for the above-captioned project, all hollow metal doors and frames and stainless steel doors and frames, Specification 11, complete, excluding only the access door, in strict accordance with Plans Specification Addendum 1, prepared by Carneal and Johnston, Architects, at your quoted price of $5950."

All of these will read the same thing. Do you want me to read each one?

The Court: No, just that you have in your contract of so-on-and-so-forth, steel.

The Witness: All right. The next is dated June the 12th, Miller Manufacturing, furnish all millwork, $5900.

page 26 } The next one is dated June the 12th, 1956, to Northside Electric Company, to do all electrical work, at $16,500.

The next is June the 12th, 1956, to Dunlap and Company to do all heating, plumbing, and ventilating for $56,400.

The next is dated June the 12th to Cleaber Glass and Mirror Company, furnish and install all glass and glazing in the amount of $1750.

The next is June the 12th, 1956, to General Tile and Marble

to do all ceramic and quarry tile and marble work, in the amount of $6,524.

By Mr. Humrickhouse:
Q. What was to G. W. Allen?
A. G. W. Allen was a verbal contract.
Q. What was it for?
A. In the amount of $550 to do all—

Mr. Humrickhouse: Before you go into that, we offer these as one composite exhibit.
The Court: This does not begin to cover the list. What is the explanation of that?
The Witness: These were the only contracts that were actually entered into.
Mr. Humrickhouse: Now we will go into the bids we received, Your Honor.
The Court: I will mark this collectively Plaintiff's Exhibit No. 8.

page 27 } (The documents above referred to were received in evidence as Plaintiff's Exhibit No. 8.)

By Mr. Humrickhouse:
Q. You had one other binding contract, you said, which was oral? What was that?
A. That was with G. W. Allen to do all clearing and grading of the site.
Q. And how much was that?
A. Five hundred fifty dollars.

The Court: Does that show on here, Mr. Humrickhouse.
Mr. Humrickhouse: Yes, sir. It is the first or second item, I believe—no, third item.
The Witness: Machine excavation.
The Court: Oh, yes, I see it.

By Mr. Humrickhouse:
Q. Now, will you explain just briefly those papers that you call purchase orders or contracts and explain to the Court how the contract was completed, why it isn't signed by the other party?
A. That is our office copy. The original—it's made in triplicate and goes to the subcontractor. He signs and returns the

original and retains one for his file, and this is our office file copy.

Q. Now, what other bids did you receive from subcontractors in which you did not enter into contracts?

page 28 } A. For each item on your list.

Q. Let's go through them and let's have the bids and the amount of them and the paper substantiating the bid, if you have it. Do you want to go down the list?

A. Yes, I would like to go down the list.

Q. Why don't you just pull them out and testify to them as you go along?

A. All right, sir. This is the one that was verbal with Allen.

Q. Mr. Ewing, you have to let these people see it.

A. That is his proposal.

Q. What is the amount of it, Mr. Ewing?

A. Five hundred fifty dollars.

Q. Oh, this is Allen's proposal? All right, sir.

Mr. Humrickhouse: May we treat these as one composite exhibit, Your Honor, when we get through with them?

The Witness: This is for steel joists, telephone from Virginia Steel Company.

By Mr. Humrickhouse:

Q. What is that? That is an office memorandum?

A. Telephone quote.

The Court: What is the amount of that?

The Witness: We agreed to negotiate from that.

The Court: What is the amount of that?

The Witness: Five thousand.

* * * * *

page 29 }

* * * * *

The Witness: This is J. A. Wilton, Jr., and

page 30 } Brothers, lathing and plastering.

By Mr. Humrickhouse:

Q. Will you give the amount?

A. Four hundred fifty dollars. That is correct, sir.

The next one is J. B. Eurell.

Charles W. Ewing.

Q. On the list is Currell.

A. Eurell and Company. That is for the roof deck, in the amount of $7,350.

The next one is N. W. Martin and Brother, all roofing and sheet metal, in the amount of $12,100.

The next is Frick, Vass and Street, for painting, in the amount of $4556.

Q. You have got it listed at $4350.

A. That is correct. Now, the estimate—you will have to let it go at this; had a telephone deduction of $200 on it, which he does not have on his list.

Q. But the amount is more than $4350?

A. By $200.

Q. All right.

A. And the next is Hampshire Corporation for resilient flooring, in the amount of $2900, which we show, but a note with a telephone call to deduct $300, so that is $300 over on that one.

The next is Modernfold Door from J. S. Archer, in the amount of $98.

page 31 } The next is caulking from J. S. Chappel.

Q. Chappel? C-h-a-p-p-e-l and Company? We have Campbell on the list.

A. The amount is $130.

The next is granite door sills from Empire Granite, in the amount of $80.

Q. Now, I don't believe you gave us the Economy Cast Stone.

A. Did I miss that one? All right, I will get it.

Q. You find the one?

A. Economy Cast Stone for the cast stone, in the amount of $2274.

Mr. Humrickhouse: Now, if Your Honor please, we offer these memoranda as evidence of the amount of the bids.

The Court: What is the item "finish hardware allowance?"

The Witness: Shall I explain?

By Mr. Humrickhouse:

Q. Yes, you may explain that now.

A. It is an architect setup, an allowance to purchase the hardware, and if the owner pays more and if it costs less, he is credited by that amount. That item is handled by the architects, but we include that amount in our bid, set forth in the specification.

Charles W. Ewing.

Q. Set forth in the specifications? Now, would you want to point that out to the Court?

The Court: Well, I guess there isn't any question. Did you undertake any work to actually select the hardware, or hadn't that matter come up yet?

page 32

The Witness: No, sir, the architect selects the hardware.

The Court: All right, gentlemen, that will be Plaintiff's Exhibit No. 9.

(The documents above referred to were received in evidence as Plaintiff's Exhibit No. 9.)

Mr. Eichner: I would like to state, *Your Honor*, I have no objection to admission on the basis just stated by Mr. Humrickhouse, simply as evidence of what the bid was in each case and the respective date.

The Court: They will be known as the subcontract bids rather than the subcontracts, won't they?

The Witness: Yes.

Mr. Humrickhouse: Just as a matter of possible assistance, we tried to put asterisks on this exhibit. One asterisk indicated contract was let, two that a price was available, that a price was quoted to us. Quotation of firm price may have been objectionable to my friend. We didn't mean to say that was binding, it was a price quoted to us.

The Court: You can explain one thing. Wherever it appears that A. H. Ewing's Sons, Inc., is the bidder, that is work which the general contractor proposed to do with his own labor?

page 33

The Witness: Yes, sir.

Mr. Humrickhouse: Yes, sir, and we propose to let him testify as to how he arrived at that figure and why. Does Your Honor want us to take that up?

The Court: Yes, do that.

Mr. Humrickhouse: It takes us a little off of chronology, and I want to do—

The Court: Well, I would like to say—

Mr. Humrickhouse: Let's finish this exhibit. I don't think it will take us off chronology too much.

Mr. Eichner: I would just as soon let him state these figures. I don't care to go into it.

The Court: All right.

Mr. Humrickhouse: Thank you, sir.

Well, then, may we stipulate that the figures listed on this

Charles W. Ewing.

yellow sheet as being labor and material furnished by A. H. Ewing would be the correct figures?

Mr. Eichner: These are the best estimates made by Mr. Ewing, and this, of course, is items 1 through 28, whichever ones of those are A. H. Ewing's.

The Court: All right.

Mr. Humrickhouse: In addition to that, it takes care of the $2,078 insurance and tax on labor. You see, that is an estimated item and I was going into that, but I will be glad to break that down for you.

page 34 } Mr. Eichner: Well, I would like to break it on down.

Mr. Humrickhouse: Fine.

Well, then, if Your Honor pleases, with that stipulation we would like to offer in evidence this yellow sheet as an exhibit, the one that we have been following, not the attached copies, but just the first sheet. There are two additional yellow sheets; one gives the breakdown that we have just stipulated to on the masonry work, and the other one gives a breakdown on general conditions and on expenses incurred.

The Court: I will mark the large sheet Plaintiff's Exhibit No. 10.

(The document above referred to was received in evidence as Plaintiff's Exhibit No. 10.)

By Mr. Humrickhouse:

Q. Now, Mr. Ewing, coming down this sheet, I believe you have testified—or we have stipulated as to all items included on there down to the insurance and tax on labor?

A. That is correct.

Q. That item is $2,078, and how do you arrive at that?

A. Well, that is a figure that we have to assume an average figure of the insurance costs of work that is normally done by us, for the Workmen's Compensation, the property damage and public liability, which we estimate to cost 4.316. Then we must add to that the OAB, and our final insurance figure comes up to a little under 7 per cent, but it's im-

page 35 } possible for use to break it down any more accurately. That is a standard procedure with us. We put 7 per cent on all labor in all bids.

Q. Is this your previous experience?

A. That is correct, sir.

Q. So the item of $2,078 is 7 per cent of the—

A. Of all labor.

Charles W. Ewing.

Q. —labor item?

A. That is right.

Q. Coming to the expenses of $4,594, which is next to the last figure on this sheet, will you please give us a breakdown of that item?

A. That is broken down as to office expense of $1,000; superintendent for five weeks, $750; start ground work, $176; assemble equipment sheds and material, $300; insurance, $223; and bond, $2145.

Mr. Eichner: Is this offered as an estimate or actual outlay, may I ask, Mr. Humrickhouse?

Mr. Humrickhouse: It is offered as both. Either we have offered it or we have paid it, we haven't paid the bond premium, but we owe it. Expense has been incurred by us, but we will let the witness testify as to each item.

By Mr. Humrickhouse:

Q. Am I correct on the statement on the bond premium, Mr. Ewing?

A. That is correct, sir.

page 36 } Q. Two thousand, one hundred forty-five dollars? To whom do you owe that?

A. We owe it to De Jarnette and Paul, who are agents for Aetna.

Q. And why haven't you paid it?

A. Because they agreed to hold it in status quo until a disposition was made of whether the home would be built or what. It is in status quo.

Q. On that item, didn't the architects approve the bond premium?

A. Yes, sir.

Q. And why were you not paid by the city?

A. The city requested our firm to hold it for a reasonable length of time until they could find out their procedure, which is covered in a letter.

Q. I hand you a certificate of the architects, dated July the 10th, 1956, for $1930, and a letter of transmittal from the architects to you, and the letter from Mr. Duvall, Acting Director of Public Works, to the architects regarding the matter. Will you please identify those items?

A. This is the certificate issued by the architect. This is the letter of transmittal to us.

Q. And what did it cover?

A. It covered 90 per cent of the bond premium.

Charles W. Ewing.

Q. And what is the date?

page 37 } A. The date of July the 10th of the certificate for payment.

Q. Now, the letter from the Department of Public Works to the architects says what?

A. This is August the 21st, 1956: "In your letter of July the 10th"—this is addressed to Mr. Cary Johnston, of the firm of Carneal and Johnston, a copy to us, and I am reading from the copy—"Dear Mr. Johnston: In your letter of July the 10th, 1956, you forwarded to us application for A. H. Ewing's Sons, Inc., for payment on account of the bond premium on the Juvenile Detention Home. In accordance with the contract, you issued them a certificate in the amount of $1930, which is 90 per cent of bond premium. We discussed this matter with Mr. Hugh Ewing and he is willing to defer receiving this payment until the final decision is made on the Juvenile Detention Home, if it is made within a reasonable period of time, say about October the 1st, 1956. Therefore, we are holding this matter in abeyance." Signed Chalkley DuVal, Acting Director, Public Works.

Mr. Humrickhouse: We offer these three papers as one exhibit. I showed them to Mr. Eichner.

Mr. Eichner: I object to them being introduced for any admission of liability.

Mr. Humrickhouse: It speaks for itself.

The Court: Well, he is objecting.

page 38 } You don't question the authenticity, and so forth?

Mr. Eichner: No, sir.

The Court: But so I will understand your position, are you contending that these acting directors, like DuVall and so forth, do not possess the authority to bind the city on the general proposition that an agent of government can't bind the government like an ordinary agent can?

Mr. Eichner: As far as binding the city on a contract, it's quite clear that Mr. DuVall cannot, not being the proper authority in the charter and the ordinance and acting under the charter. Furthermore, this is—

The Court: Is that the ground of your objection?

Mr. Eichner: I think it certainly is related to offer of compromise, perhaps, if this is—it's not strictly that, but the same principle. I have no objection to the fact that—I believe this is offered primarily—

The Court: Put it this way: You just don't want to be

understood as agreeing that they are significant in the case. Is that the position?

Mr. Eichener: Except to show that this certificate was approved by the architect for that amount for that purpose.

The Court: All right. I will give it No. 11, gentlemen.

Mr. Humrickhouse: Does Your Honor admit it in evidence?

The Court: Admit it. He doesn't object to the
page 39 } admissibility. He just wants it understood that they are not, in his opinion, binding.

Mr. Humrickhouse: Yes, sir. I don't want to be taken by saying that I agree with that by not arguing the point.

The Court: That will come up later.

Mr. Humrickhouse: The architects' certificate, we think, is of significance.

(The document above referred to was received in evidence as Plaintiff's Exhibit No. 11.)

By Mr. Humrickhouse:

Q. Now, let us go to the other item on expenses incurred, Mr. Ewing. Was there an expense of $223 paid?

A. Yes, sir.

Q. Did you go to the expense of $300 for assembling equipment sheds, material, and so forth?

A. Yes, sir.

Mr. Humrickhouse: Will you excuse me for leading on this, but we are going along with the exhibit.

Mr. Eichner: It's quite all right.

By Mr. Humrickhouse:

Q. The $176 for starting the ground work, did you actually expend that money?

A. Yes, sir.

Q. And the superintendent for five weeks at $150, would you explain that?

page 40 } A. We had a superintendent selected and retained to handle this job and we—you see, you have a rush job, you cannot put your hand on the man you want immediately. We had that done and had him and so notified the city in this meeting that we had this man and were holding him at a cost to us.

Q. That was the meeting of June 22nd?

A. That is correct, sir.

Charles W. Ewing.

Q. Did you let him go after those five weeks?

A. That is right, sir, when we found that there was going to be a question as to how long it was going to be. We retained him as long as we though there was a possibility of an immediate solution.

Q. And how about the office item of a thousand dollars?

A. Well, that was the expense in connection with letting the subcontracts, the girls' typing, and, of course, that is an estimate as to the exact amount, but their salaries and all of the overhead was paid, telephone charges in connection with negotiations and so on.

Q. And for what period of time would that cover?

A. That would cover the time up until we were notified to do nothing further.

Q. Which was to June 22nd? Was this letter of July—

A. It was in July, if I have that file here, when we were notified to do no further work. It's the letter from the architect notifying us to do no more.

page 41 } Q. Do you know the date of it?

A. No, sir, I would have to look.

Q. It is attached to the stipulation.

A. July the 16th.

Mr. Humrickhouse: We offer that in evidence, if Your Honor please, sir. It is Exhibit D with the stipulation.

Mr. Eichner: Your Honor, I object to the $1,000 item, if it is being offered as an element of damages. I do not object to it being an estimate of what the cost was itself. I feel that it is general office overhead, which is just part of the cost of doing business.

The Court: Did you say "D", Mr. Humrickhouse?

Mr. Humrickhouse: It is Exhibit D, yes, sir, with the stipulation; not with the plea. It is with the stipulation to which is attached this yellow sheet. That one, yes, sir. It is Exhibit D with that.

Mr. Eichner: It is—

Mr. Humrickhouse: Well, it's D with the copy I have got now.

The Court: Well, D with me is—

Mr. Humrickhouse: Letter from Carneal and Johnston to A. H. Ewing's Sons.

The Court: July the 16th?

Mr. Humrickhouse: Yes, sir.

The Witness: Yes, sir.

page 42 } Mr. Humrickhouse: And we might offer at the same time the letter from the city to Carneal and

Johnston dated July the 13th, 1956, referred to in that letter, which is Exhibit C attached to the stipulation.

The Court: Do I have the complete correspondence between the parties in this exhibit, beginning with A and running through O?

The Witness: No, sir, it goes through S; after the yellow sheet there are some more.

The Court: Well, rather than mark them all separately, why don't I just—it's agreed that this is the correspondence. Now, if there is anything left out, supposing you offer it and I will mark that.

Mr. Humrickhouse: Then we offer the exhibits attached to the stipulation in evidence at this time.

* * * * *

Mr. Eichner: I object to, I think, only about two portions of it, Your Honor. One of them was the second paragraph of the Exhibit N as it was answered, and the other is the same portion, which is later on quoted by counsel for the plaintiff in a letter which is one of these long letters, Exhibit P, and is in page—

The Court: Well, statements of positions taken and contentions and legal conclusions don't hurt anything, do they? It is not contended that they are admissions or concessions.

page 43 } Mr. Eichner: I believe that that may be contended.

Mr. Humrickhouse: If Your Honor please, we do contend that.

The Court: Well, supposing we regard them as having been properly authenticated at this time?

Mr. Eichner: We have no objection to that.

The Court: We can take up what they mean later on.

(The documents referred to were received in evidence as Plaintiff's Exhibit 12.)

By Mr. Humrickhouse:

Q. Now, Mr. Ewing, that leaves only the item of claims which have been asserted against you of $7,692. I would like for you to break those down as to amounts and tell the Court why you are making those claims?

Mr. Eichner: I object to all these, Your Honor, on the

ground that they are, first, speculative, and secondly, that they are under contracts which were entered into by the plaintiff in violation of the terms of the contract and with the knowledge that the project had been held up by denial of the building permit and that even if they are valid claims, none have been litigated, as I understand; even if they are valid as against Ewing, they are irrelevant to this proceeding.

The Court: Well, supposing we have it understood that your objection runs throughout these particular items on the grounds stated.

Mr. Eichner: As to whose claims.

Mr. Humrickhouse: I have furnished you with page 44 } copies of these letters.

Mr. Eichner: Yes, sir.

Mr. Humrickhouse: And the contract under which claim is made.

By Mr. Humrickhouse:

Q. Will you just explain to the Court?

A. Shall I read each letter?

Q. Yes, if you will.

The Court: In the papers is there a breakdown of the $7,692 item?

Mr. Humrickhouse: Yes, sir, that is in the far right column.

The Court: All right.

Now, if you will call them, Mr. Ewing?

The Witness: Probably the first one you have there is Montague Betts.

The Court: Montague Betts. I read a letter.

By Mr. Humrickhouse:

Q. Tell us why you got the letter and then explain the circumstances under which you got it, and then let us have the letter.

A. Well, when we—let me see where I have this—when we were notified to do nothing further on the contract by the architect, we immediately advised all subcontractors that we had issued purchase orders to of the city's position page 45 } with enclosures of a memo to file of June the 2nd, 1956.

Q. 22nd, isn't it?

A. 22nd, which was sent to us by Chalkley DuVal, Acting

Charles W. Ewing.

Director of Public Works. In this manner the subcontractors were notified of the position of the contract at that moment.

Q. But did the city ask you later to find out in 1957 the amount of claims that the subcontractors had—

* * * * *

The Witness: The city requested in letter form that we give them certain information in the event of several different circumstances. I don't have the letter or the date, but as a result, we contacted one of the sources of information, so it was the position of the subcontractors.

By Mr. Humrickhouse:

Q. Is Exhibit N, the letter of December 4th, the letter that you referred to?

A. Yes, sir.

page 46 } Q. And you answered that with a letter of January 7th, Exhibit O, did you not?

A. That is correct, sir.

Q. And between those dates, December 4th, 1957, and January 7th, 1958, you got in touch with all the subs?

A. With all the subs, and these are the replies to our inquiry to collect that information requested. Do you want me to read this?

Q. Go ahead and give us the claim.

A. This is Montague Betts, addressed to A. H. Ewing's Sons: "You have requested that we convey to you the cost of the work we have expended in connection with our contract to furnish material for the proposed Juvenile Detention Home. Reviewing our records, we find that from July the 23rd, 1956, to August the 17th, 1956, our drafting room prepared details, the cost of which amount to $562. We have given complete consideration to the difficulties which the owner and you have experienced in connection with this job and would like you to know that this figure is absolute costs as represented on our books. When you arrive at final decision in connection with this project, will you please be kind enough to give us complete information."

Mr. Humrickhouse: I will offer all four of them at once.

The Witness: This is from Roanoke Engineer-

page 47 } ing Sales Company, addressed to A. H. Ewing's Sons, Inc.: "Gentlemen: Please be advised the cancellation charges for the order covering hollow metal doors

and frames and stainless steel doors and frames on above job will amount to the sum of $190. Kindly keep us informed as to the status of this project. If cancellation is to be effected, your prompt remittance of the above amount will be appreciated."

The next is Northside, or Gundlach, Your Honor?

Mr. Humrickhouse: Northside.

The Witness: This is from Northside Electric Company, addressed to A. H. Ewing's Sons, Inc.: "Gentlemen: In connection with the above project for which we received your order on June the 12th, 1956, covering the electric work, we have incurred some expense. If the contract is cancelled and the building is not constructed, we request payment of $300 to compensate us for expenses already incurred by us on the project. If the building is constructed, it may be necessary for us to request an addition to our contract to compensate for the increased costs since the award of the job. Since June 1956, wages have advanced twice and many material costs have increased. We cannot tell at this time the amount of this increase, but will be glad to advise you, if the decision is made to proceed with the construction." Signed Northside Electric, Charles Millhiser.

By Mr. Humrickhouse:

Q. Now give us the Gundlach.

page 48 } A. The Gundlach is addressed to A. H. Ewing's Sons. This is from H. C. Gundlach Company: "Dear Mr. Ewing: Please be advised in the event of cancellation of this contract we shall make claim to you in the amount of $5,640 for anticipated profit on this job."

Mr. Humrickhouse: And they are the four claims, Your Honor, which we offer in evidence.

The Court: All right. They are marked collectively Plaintiff's Exhibit 13.

(The documents above referred to were received in evidence as Plaintiff's Exhibit No. 13.)

Mr. Humrickhouse: Now, if Your Honor please, we go forward with the chronology, I believe. The contracts with the subcontractors were let either the 12th or 13th of June. I will ask this one question:

Charles W. Ewing.

By Mr. Humrickhouse:

Q. Were all the rest of the subcontractors with whom you had entered into contracts gotten in touch with to see whether they made claims against the city?

A. Yes, sir.

Q. Or against you?

A. That's right, sir.

Q. And they advised you what?

A. They advised that there was no claim or charges.

Q. And these were the only four that did make any?

A. That is correct.

page 49 }

Mr. Humrickhouse: It is stipulated, Your Honor, that on the second of July, the Board of Zoning Appeals denied the request to construct the home on the original site but granted the request to erect a home on another site near Forest Lawn Road and Old Brook Road. Now, Exhibits Nos. 3 and 4 are the plot plans. They are exhibits to the plea in abatement and show the difference in location, Exhibit No. 3 with the plea in abatement being the original location of the building and Exhibit No. 4 being the changed location, all of this being prepared by Messrs. Carneal and Johnston for the owners.

By Mr. Humrickhouse:

Q. Before July 2nd, when did you start construction, if you started?

• • • • •

A. June the 14th, 1956.

Q. What did you do on June the 14th, 1956?

A. Well, we had an urgent call from the city that they wanted to break ground and have a little ceremony, and at that time we had not negotiated the grading contract, and that was why that was verbal; we had to get it quick to get somebody there on the project in addition to our own men.

page 50 }

Q. Who called you from the city?

A. I couldn't answer.

Q. Well, was it somebody in the clerk's office or the Public Utilities office, or City Attorney's office, or you just don't know?

A. I am under the opinion it was Mr. Hopson, but I can't answer definitely.

Charles W. Ewing.

Q. At that time did you know the status of the building permit application appeal?

A. No, sir.

Q. And what did you do?

A. We sent men out there and had Allen send equipment there to clear and make a show.

• • • • •

Q. Was that on the new location or the old location?

A. That was the original location.

Q. When were you advised regarding the change of location, if you were advised?

A. We were never officially advised. I recall it
page 51 } being mentioned in that meeting of June the 22nd,
that that was under consideration with the city.

Q. Well, what was said, if anything, regarding it?

A. We were led to believe that there was no question but what the home was going to be built, even if they had to move the location. We stated that that was perfectly agreeable with us, provided any change in the site work, any additional cost in utilities to the new site would be borne by the owner.

Q. What did they say to that?

A. They were agreeable to that.

Mr. Humrickhouse: Now, Your Honor, we have stipulated that on July 6th, 1956, an injunction was entered by this court halting any work and that on October 1st, 1956, the injunction dissolved, I believe by its own limitations, and on October 3rd, 1956, the court, passing on the merits, affirmed the ruling of the Board of Zoning Appeals granting the permit.

On March 6, 1957, a petition or an appeal was granted to Wicker Apartments from this decree of this court, and the Court of Appeals on September 6th, 1957, affirmed the action of the court.

Now, I have stipulated with my friends regarding the records in that, if they want to introduce it. I have no objection to any of the proceeding being made part of this proceeding.

Now, I think, if Your Honor please, that that,
page 52 } carrying the chronology of the appeal, brings us
back to June 1956, June the 22nd. We had meetings with the city, and I think we will follow that by following the stipulation.

Charles W. Ewing.

By Mr. Humrickhouse:

Q. Mr. Ewing, do you have a copy of the stipulation?

A. Yes, I am supposed to.

Q. No, it's in the interrogatories. Give me all that.

Now, all of these letters have been introduced, but will you tell us about the memorandum of June 22nd from Mr. DuVal, a copy of which you got?

A. Shall I read it?

Q. Well, if that's the easiest way for you to tell us, I reckon you can.

A. It's as easy as any.

The Court: I can read it, if you will tell us how you happened to meet and who was there and what you did.

The Witness: We were there at the request of Mr. Hobson and Mr. DuVal to discuss the matter of the Juvenile Detention Home.

By Mr. Humrickhouse:

Q. What phase of it were you discussing?

A. Well, at that time there was some confusion with the zoning, and they were giving us the position, or the course of action that the city proposed to follow.

Q. And he states in the bottom of it, it was

page 53 } agreed that the present situation and resulting delays are beyond the control and that the city would deal with you later as developments dictate?

A. That was discussed at that meeting that any additional—

Q. Well, what were they?

A. Well, any additional cost for the delay, our position that—

Mr. Eichner: Your Honor, I think we have got a lot of hearsay here.

The Court: Well, of course, the city can only act through its agents, I guess, anyway. We better hear what the evidence is.

Mr. Eichner: I further object that aside from being hearsay, the hearsay declarant hasn't been named yet.

The Court: He ought to so you can cross examine and offer evidence in rebuttal.

When you can, Mr. Ewing, if you will, identify the people making any particular statement that you recall to mind.

Charles W. Ewing.

You say participating in the discussion were both Mr. Hopson and Mr. DuVal?

The Witness: That's right, sir.

The Court: Any other representatives of the city, so far as you remember?

The Witness: Mr. Frank Bersch of the Department of Purchases and Mr. Leo Canter from the Depart-
page 54 } ment of Public Works.

The Court: So that is correctly set forth in the first paragraph of the letter as to who was present on behalf of the city?

The Witness: That is correct, sir.

The Court: And it is true, is it, as recited there at that time the status of the whole matter was that the city was seeking an appeal to the Board of Zoning Appeals wherein they quote that the refusal of the building inspector's office to grant the permit would be reversed?

The Witness: That is right, sir.

The Court: All right. And this was intended, was it, as sort of a memorandum of the events of the meeting?

The Witness: That is correct.

By Mr. Humrickhouse:

Q. It was sent out by whom?

A. It was sent out by Chalkley DuVal, the Assistant Director of Public Works, as a record of the meeting and the general discussion at the meeting.

The Court: All right, sir.

By Mr. Humrickhouse:

Q. Then what happened next, Mr. Ewing?

A. Nothing happened subsequent to that until we were notified by Carneal and Johnston in writing to hold up everything until further notice, no work, no submission.

Q. And that is the letter—

page 55 } A. —of July the 16th of Carneal and Johnston.

Q. Did you receive copies of memoranda or letters of July 13th from Mr. DuVal and Mr. Drinard's memorandum of July the 10th?

A. July the 10th? I don't know that we received a copy of July the 10th, but we did receive a copy of July the 13th.

Q. Here is your original file?

A. Yes. July the 10th isn't our copy to us.

Charles W. Ewing.

Q. Didn't Mr. Drinard send his memorandum to the contractor and didn't the contractor send it on to you?

The Court: No, he sent it to the Director of Public Works.

By Mr. Humrickhouse:

Q. And the Director of Public Works sent it to the contractor and the contractor sent it to you? I believe that is what it says in the correspondence. I haven't got the set before me. The last sentence of Mr. Drinard's memorandum says: "I am sending you a copy of this so that you may have it forwarded to the contractor," is that right? No, Mr. Drinard's memorandum.

The Court: That is under date of July the 10th.

The Witness: "I am sending a copy of this"—that is to the Director of Public Works.

The Court: Yes.

The Witness: Now, on July the 13th—it states there that he is to send it to us, but I could not definitely page 56 } say that we had received it.

By Mr. Humrickhouse:

Q. Isn't that your file that you have got in your hand?

A. Yes, this is our file.

Q. Well, didn't you receive it?

A. Well, yes, but I don't know under what—

Q. You don't know under what circumstances you received it?

A. —under what circumstances.

Q. But you did receive it?

A. Yes.

Q. Does the date you received it indicate on there? Not that one, but the one right above it. There?

A. Yes. July the 12th we received it.

The Court: Apparently the Director of Public Works—

Mr. Humrickhouse: I imagine he just mailed him a copy.

The Court: —mailed him a copy.

By Mr. Humrickhouse:

Q. At any rate, you knew the contents of it, didn't you?

A. That is correct.

Q. As a result of receipt of the letter from the architects, what did you do?

Charles W. Ewing.

A. We immediately contacted all of the subcontractors and sent them a letter enclosing—requesting that all work be stopped and be held in abeyance.

The Court: As a result of what, now? Result page 57 } of the letter of July 16th, 1956, from the architects to you?

The Witness: July 16th?

Mr. Humrickhouse: Yes, sir.

The Witness: Yes, sir.

The Court: Is that the letter to which you have just referred?

The Witness: That is right, sir.

By Mr. Humrickhouse:

Q. I show you what purports to be a copy of a letter from you to General Tile and Marble, dated July the 18th, '56?

A. That is correct.

Q. Will you please explain what it is?

A. This was the action that was taken as a result of the letter from the architects of July the 16th, and these are to the subcontractors. This one is to General Tile and Marble Company.

Q. But you sent it to all of them?

A. Sent it to all of them: "Gentlemen: Enclosed herewith are copies of the following: (a) Memorandum to file dated June the 22nd, 1956, signed by Chalkley DuVal, Assistant Director of Public Works; (b) memorandum from City Attorney to Director of Public Works, dated July the 10th, 1956; and (c) letter from Chalkley DuVal, Assistant Director of Public Works, to Carneal and Johnston, Architects, dated July the 13th, 1956.

"From the foregoing, it will be seen that the page 58 } city has directed the architect for the Juvenile Detention Home to see that all work on this project is to come to a complete standstill, except for certain engineering work, until the legal action regarding the construction of the building has been resolved.

"We expect to keep in close touch with the city on this project and will keep you fully advised of developments."

That was written to all of the subcontractors as of that date.

Mr. Humrickhouse: We offer that in evidence.

The Court: I will mark that Plaintiff's Exhibit No. 14.

Charles W. Ewing.

(The document above referred to was received in evidence as Plaintiff's Exhibit No. 14.)

By Mr. Humrickhouse:

Q. And I believe you have stated that a similar letter went to all the subs?

A. All of the subcontractors who had been awarded contracts.

Q. Then what did you do, sir?

A. Then there was—we stopped everything in—all action in our office and nothing further was done until some time shortly thereafter the city attorney called me to request information on certain damages between certain dates.

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page 65 }

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Q. Now, Mr. Ewing, going to the exhibit which was filed with the letter, that shows the breakdown of damages, will you tell the Court how you arrived at the figure of profit?

A. The figure of profit?

Q. Um-hmm.

A. That is the difference in what we could have let all of our subcontracts and purchased their materials, including insurance and all items involved with our estimate of labor, the difference in cost of that and the contract amount.

Q. Give us a figure.

A. All right. The total contract price with the city was $262,669. Our estimated total cost, including bond insurance and all items, was $227,762, leaving a difference of $35,107.

Q. Now, Mr. Ewing, this contract was a firm price contract and any amount you made over and above the costs of doing the job was profit to you?

A. To me, sir.

Q. Was it not?

A. Yes, sir.

Q. How long have you been in the construction business?

A. I have been in construction ever since I
page 66 } graduated from college in 1925. That is 34 years.

Q. Have you been in a number of building contracts similar to this building contract?

A. Yes, sir.

Charles W. Ewing.

Q. Do you think that the figures of cost which you have given to the Court represent a reasonable or an unreasonable figure as to what costs would have been on this building?

A. I think it's very definite that that would have been our cost, from past experience on our labor costs. All of our material was definite and our subcontracts were definite. The only variable could have been in our labor, and over a period of years we haven't missed our labor very far.

Q. And that figure, then, is given from your experience?

A. That's right, sir.

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page 67 }

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By Mr. Humrickhouse:

Q. The claim is made against the city, Mr. Ewing, of the amount of—read it.

A. $47,393.

Q. $47,393, which is composed of the profit—

A. Profit of $35,107, claims against A. H. Ewing's Sons of $7,692, expenses incurred by A. H. Ewing of $4,594.

Q. Now, Mr. Ewing, on the bond, is that bond still in effect?

A. It has never been cancelled. It is in effect as far as we are concerned.

Q. And why hasn't it been cancelled?

A. Because we have never had any definite information from the city to cancel it.

Q. Was the premium just a unit premium, one premium, or was it a yearly premium?

page 68 } A. One premium.

Q. And I believe you said—well, the evidence shows that you haven't paid it but you owe it?

A. That's right, sir.

Q. Mr. Ewing, how much is your corporation bondable for? This was a $262,000 bond.

A. At this time?

Q. Yes.

A. I don't recall. It was very close at this time with the work in hand.

Q. Well, would it affect your ability to bid on anything else?

A. Very definitely did.

Charles W. Ewing.

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page 84 }

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CROSS EXAMINATION.

By Mr. Eichner:

Q. Mr. Ewing, when was it you had received information that the City Council was abandoning the Pine Camp site of the Juvenile Detention Home?

A. I don't recall having ever learned that officially.

Q. Well, how did you learn it?

A. The newspaper.

Q. You read about it in the newspaper?

A. That's right.

Q. Do you remember, was it the following day, page 85 } was it the account in the newspaper that first reported that fact, or—

A. The following day of what?

Q. Following the Council meeting at which it took place.

A. I couldn't say. I learned it from the newspaper.

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page 87 }

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Q. Now, you stated that you read about the resolution abandoning the Pine Camp site in the newspaper. Did you follow this whole thing pretty carefully in the page 88 } newspapers, would you say, Mr. Ewing?

A. I wouldn't say too carefully.

Q. Do you subscribe to both of the Richmond newspapers?

A. Yes.

Q. Times-Dispatch and News Leader?

A. Yes.

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page 89 }

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Charles W. Ewing.

Q. Now, when did you first learn that the building permit had been denied?

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A. I probably heard it either that day or shortly thereafter that there was difficulty.

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page 91 }

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Q. Would you turn to the printed portion there. There is both the multigraph part there, I believe. It's called "Specifications, General Conditions?"

A. Yes, sir.

Q. And that bears—what name is printed? Where do those forms come from?

A. Carneal and Johnston, Architects.

Q. This is their standard form, then? And you
page 92 } have dealt with them before, you have testified?

A. Yes. I wouldn't say that it is their standard. It is their form for this project and—

Q. As far as the printed material, the general conditions, is concerned, is that a familiar bunch of paper to you? Have you had it before in your dealings with Carneal and Johnston?

A. (Nodding affirmatively.)

Q. And you are familiar, then, with the provisions of that?

A. Oh, yes. Yes.

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page 95 }

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Q. Now, what was done prior to the execution of this contract, sir, about investigating zoning of the site?

A. Nothing by A. H. Ewing, sir.

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Charles W. Ewing.

Q. Was it your understanding that you were to get the building permit under this contract?

A. Yes. That's normal. We generally apply for them on all the contracts.

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page 96 }

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Q. Now, you stated that shortly after the permit was denied by the Building Commissioner—and I believe you said between two or three days in any event—you learned of it. Did you thereafter give any notice in writing to the architect in accordance with the second paragraph that you have just read there, sir?

A. No.

Q. You didn't?

A. No.

Q. All right, sir, why didn't you?

A. Well, it was reported to me by my brother
page 97 } that when they found there was difficulty with the zoning that Mr. Hopson told him to go right ahead, that the city would take care of it and see that the permit was issued.

Q. But was that why you didn't notify the architect in writing?

A. That's right.

Q. Now, when did you first learn that an injunction had been issued by this court restraining the city or its contractor from proceeding with work under the contract?

* * * * *

A. On July the 16th we were notified by the architects to hold up any work.

Q. Now, prior to that time—that, then, is ten days after the injunction was issued—did you learn about it in between there, in that period?

A. Nothing, only what I read in the papers; I mean, no official—

Q. You did read about it in the Richmond newspapers?

A. Well, I am sure I read it.

Charles W. Ewing.

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page 98 }

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Q. Did you notify the architect in writing of this turn of events?
A. No.

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page 100 }

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The Witness: But we have never, as general contractors, been required to look into zoning. We assume that the architect and the owner have that all settled before it gets to the hands of the contractor.

page 101 }

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Q. Then at the time you submitted your bid, which I am not sure, I believe you signed—
A. That is correct.
Q. —personally?
A. I personally signed it.
Q. You signed that on the assumption that the site mentioned in the contract or in the proposal, the site of the proposed building was in a zoning district where construction of such a building, that is, the Juvenile Detention Home, would be permitted under the city zoning ordinance?
A. We assume that on all bids.
Q. You assumed that to be true. And at the time you signed the contract, which I believe was on May 31, you also assumed that to be true?
A. That is correct.
Q. All right, sir. What kind of work is your firm currently engaged in, Mr. Ewing?
A. At this moment?
Q. Yes, sir.
A. We are doing mostly residential at the moment.

Charles W. Ewing.

Q. You are still actively in the contracting business.
A. That's right.

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page 102 }

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Q. Now, the subcontracts which are in evidence here, if I am not mistaken, you testified all of those were executed on June 12 and 13.
A. That is correct.
Q. And this, then, was after you had knowledge that the building permit had been denied by the Building Commissioner?
A. I can't say that it was definite. I don't recall the exact date that I knew that. I said within a few days—may I answer our normal procedure on that?
Q. If you wish.
A. We normally apply for a building permit. Sometimes it takes several weeks to get them. We never delay a project because the permit hasn't been issued, because we have never had one turned down that couldn't be rectified with minor changes.
Q. Well, now, at the time you did execute these contracts, according to what you have testified earlier, when I asked you when you first learned about the Building Com-
page 103 } mission's action, you said you were quite sure it was within two or three days after that?
A. I am.
Q. Which would make it, oh, say, the 8th or 9th of June or the 10th?
A. That's right.
Q. That you were aware that the building permit had been denied on account of zoning?
A. That is correct.

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page 104 }

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Q. Did you submit the names of any of these subcontractors?

Charles W. Ewing.

A. No, sir.
Q. To the architects?
A. No, sir.
Q. You did not? And you did submit some shop drawings for certain materials?
A. That is right.
Q. But were any of these approved by the architect?
A. No, sir.
Q. They were not. All right, sir. Now, were any materials specially fabricated for use in this, to
page 105 } your knowledge?
A. Not to my knowledge.

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page 113 } RE-CROSS EXAMINATION.

By Mr. Eichner:
Q. That letter which you have just read, Mr. Ewing, from Montague Betts talks about the contract cancelled by you. Did you cancel that contract?
A. We have never cancelled a contract. We wrote them at the request of the City to get this, and it is assumed that it is cancelled.
Q. But when they say "cancelled by you" they are—
A. They are in error.

* * * * *

Mr. Humrickhouse: If Your Honor pleases, at this time I would like to read into the record part of the stipulation regarding the prior history of the Juvenile Detention Home which is found in the Wicker Apartments case, and I don't know, we entered into an agreement at the pre-trial that we could substitute the original, that Your Honor might look at the original, but I have here a copy of the brief of the appellees with an appendix, and the appendix is what I wanted to read in showing the action of the City
page 114 } Council and the City Manager prior to the awarding of the contract here, which was Your Honor's first question when we began this morning.
The Court: Well, now, does it need to be read into the record?
Mr. Humrickhouse: No, I could just show it to Your Honor.

The Court: Well, I will mark it, if it is agreeable, I will call it an exhibit, but it would really be a stipulation, I suppose.

Mr. Humrickhouse: Yes. What I am interested in is on page 58 of this printed copy, which is the petition for rehearing, and that gives the history of the choosing of the site, the fact that the council passed the budget and the fact that afterwards it was reported back and the Council approved it and prior to the letting of the contract.

The Court: I will mark the whole thing Plaintiff's Exhibit No. 16.

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REX SMITH,

was called as a witness on behalf of the Plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Humrickhouse:

page 115 } Q. State your name and position.

A. Rex Smith, Manager of Richmond Sales Office for Montague Betts Company.

Q. Mr. Smith, your company is making a claim of $562 against A. H. Ewing's Sons on account of work in connection with the Juvenile Detention Home, according to letters introduced in evidence as Plaintiff's Exhibit No. 13 and No. 15. Are you familiar with that claim?

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page 116 }

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CROSS EXAMINATION.

By Mr. Eichner:

Q. Your contract, Mr. Smith, is for furnishing all structural steel and miscellaneous metal, is that correct?

A. That is correct.

Q. Did you furnish any?

A. No, we did not.

Joseph B. Guerdi.

Q. The contract does not provide for producing any drawings, does it?

* * * * *

A. Oh, no, it does not.

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page 117 }

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Q. Was the contract between Ewing and the City brought—the terms of it, now, I mean, as relate to subcontractors—brought to the attention of your firm?

A. No.

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page 118 }

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JOSEPH B. GUERDI,

was called by and on behalf of the Plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Humrickhouse:

Q. Please state your name and present position.

A. J. B. Guerdi, partner in the Northside Electric Company.

Q. Mr. Guerdi, your firm has made a claim against A. H. Ewing for $300 in connection with the Juvenile Detention Home contract.

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page 119 }

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Q. What is the amount of the claim you are making, and of what does it consist?

A. $300 is the claim, and it is based on that we have ordered and have receipts that we have received some of this material and had to dispose of it probably on work that we didn't need this class of material on and have paid for it.

* * * * *

page 121 } Q. It was your estimate of the expense?
A. It was an estimate that we have a rule-of-thumb figure that it costs us just about that to cancel out on a job.

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Q. Is your claim still outstanding against them?
A. That's right.

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page 123 }

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G. M. ANDERSON,
was called as a witness by and on behalf of the Plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Humrickhouse:
Q. Please state your name and present occupation.
A. G. M. Anderson, Vice President of Gundlach Company.

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page 124 }

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Q. Are you familiar with the claim in this case, Mr. Anderson?
A. Yes.
Q. What is the amount of it?
A. $5,640.
Q. And that is 10 per cent of the contract?

G. M. Anderson.

A. Contract which is $56,400.

Q. And I believe the letter which is in evidence says that that is for anticipated profit, is that correct?

A. Yes.

* * * * *

Q. How do you arrive at 10 per cent as anticipated profits, Mr. Anderson?

A. Well, we feel that that is a legitimate profit on any contract job, which we have been in contracting business for some 25—about 25 years, and in estimating jobs we try to shoot at that for a good average mark.

Q. What is your profit experience in that con-
page 125 } nection?

A. I'd say it's been pretty close to that as a good average.

Q. Well, as a general rule, is it customary for subcontractors to consider 10 per cent as about normal profit, or is that abnormal?

A. I wouldn't say it is abnormal. Of course, I wouldn't know what my competition considers average, but I think in order to stay in business we have found over a period of years you do have to shoot at that mark.

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page 126 }

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CROSS EXAMINATION.

By Mr. Eichner:

Q. Mr. Anderson, this is in your letter of December 19, 1957, to Ewing Company, which is in the exhibit here. You say that you shall make claim for $5,640 in the event of cancellation. What was done by Ewing to cancel this contract?

A. To my knowledge, nothing has been done.

Q. Nothing was done? And your only item is anticipated profit, is that correct, sir?

A. Yes.

* * * * *

page 127 } Q. In other words, what you are seeking to do is to make as much money without doing the work as you would have done if you did the work, is that correct?

A. Well, we have a contract with anticipation of doing that much business.

Q. That is correct, though, is it not? That is what would happen if your claim is paid, isn't that true?

A. Well, I guess that would be true.

Q. And, in fact, you might, if you got paid this claim, make more money than you would have made if you had done the work, isn't that true?

A. Well, we might have made more money under the contract, though, that is also true.

Q. I will concede that, but the converse is true, it might have cost more, you might not have made this money?

A. That's right.

Q. I refer again to this letter which is in evidence from your firm December 19, 1957, saying, "We shall make claim." Have you done anything further since then?

A. To my knowledge, we haven't.

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RE-DIRECT EXAMINATION.

By Mr. Humrickhouse:

Q. Well, are you making claim, or not? Are you making claim against Ewing, or not? There seems to
page 127A } be some question about it.

A. Yes.

The Court: He has already stated that they are asserting a claim.

The Witness: Yes.

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JOE ROSENBAUM,

was called as a witness by and on behalf of the Plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Humrickhouse:

Joe Rosenbaum.

* * * * *

Q. You are the sales representative of Roanoke Engineering Sales Company?
A. I am, sir.

page 128 }

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A. The amount of the claim is $1,190, and it represents the gross profit which would include expenses incurred by us and our manufacturer on this job, gross profit which we stood to make, including expenses.

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page 129 }

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Q. Could you break down this between profit or overhead or would you care to leave it as gross profit?
A. It is going to be very difficult to do, sir. I don't mind telling you that the amount of money which we, ourselves, personally have in this thing is $700.
Q. You spent that much?
A. No, that's the amount of Roanoke Engineering Sales *Comapny's* claim in behalf of Roanoke Engineering. You see, actually, we are filing two claims for one, one for ourselves and one for the manufacturers we represent.
Q. Has the manufacturer made claim against you?
A. He has.
Q. $490-odd. So you added that to the $700
page 130 } of your claim, making $1,190?
A. Yes, sir.

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CROSS EXAMINATION.

By Mr. Eichner:

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A. H. Ewing, Jr.

Q. Now, this letter I have here in evidence, the letter signed by you of December 16, 1957, saying, "Cancellation charges for the order would be this amount, $1,190." Is this provided for in your contract?

A. No, sir, not in writing.

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page 131 }

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Q. Now, did you ever receive any notice of cancellation of this contract from Ewing?

A. We received an inquiry, a verbal inquiry by phone.

Q. Prior to this letter which you wrote?

A. Yes, sir, which asked us—

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A. —in the event that cancellation were made, what cancellation charges, if any, would be made.

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Q. You have received no further communication cancelling the contract?

A. Nothing further, no.

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page 132 }

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A. H. EWING, JR.,

was called as a witness by and on behalf of the Plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Humrickhouse:

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A. H. Ewing, Jr.

Q. What is your capacity with A. H. Ewing and Company, Inc.?

A. Vice President.

Q. Are you familiar with the bid that was put in by your company and the contract which you have entered into with the City?

A. Yes, sir.

page 133 } Q. Now, there is in evidence an application for a building permit, Plaintiff's Exhibit No. 6. Are you familiar with that?

A. Yes, sir.

Q. What did you have to do with it, if anything?

A. I applied to the Building Inspector for a building permit. The normal procedure is to go to the Building Inspector's office, then go down to Public Works. When I went to the Building Inspector's office, they said, "This property is not zoned right, and it is doubtful that we can give you a permit." So Mr. Hopson, who was right down in the building that I had to go to in the next step—

Q. Is he the Director of Public Works?

A. He is the Director of Public Works. I went down to see Mr. Hopson and said, "Look, how about this?" and he said, "Don't you worry about that. That is our baby. We will take care of it."

Q. Did you bother with it any more after that?

A. Well, I figured that it was in the city's hands, that he was the logical man and he was in a position to do what he said he could do. If you are asking did we stop on account of not being able to, no, sir, because it is usually several days to a week before you get a building permit anyway, and knowing that you are bidding for the City, we just assumed that the Director of Public Works could straighten out any difficulty.

page 134 } Q. Now, Mr. Ewing, are you familiar with the fact that you entered into some subcontracts, aren't you?

A. Yes, sir.

Q. Why did you enter into those at a time when the building permit was not settled?

A. Because it is not—although Mr. Wharton cited a possibility that it couldn't be issued due to zoning, he did not refuse the permit, plus the fact that you have a penalty of a hundred dollars a day on this job for over 325 days; you can't stand still. That, plus Mr. Hopson's assurance that it would be taken care of and the fact that I knew two

days later that he called or had caused to be called a zoning committee hearing.

Q. Now, in connection with the subcontracts, do you know whether or not these people that had previous dealings through Carneal and Johnston?

A. We always ask—we know in the business who does work for who. I am sure if you inquire from these people, you will find all of them have done several jobs at least in Carneal and Johnston's office.

Q. And what is the approval that the architect gives? Is it to the financial responsibility, or to the bid form, or what kind of approval does he usually give and when?

A. You mean as to subcontractors?

Q. Yes.

page 135 } A. Well, there is Mr. Johnston over there. Well, normally we consider it as you submit a list to him. If he has someone that he does not approve of for any reason, whether they are not capable or whether they are financially unable, he can strike them. But if you are submitting people that normally do work for him, there is no hurry.

Q. And, Mr. Ewing, were you familiar with the fact that the permit was issued for the construction of this building on Pine Camp property at a different plot plan or plot location from the original?

* * * * *

Q. My question is whether it was brought to your attention that there was a change in the location of the proposed building and if so, who brought it to your attention.

page 136 } A. As a matter of fact, I cannot answer that, other than give an opinion. Of course, I followed all the newspaper things very clearly, but they are not always accurate. There was and I have seen a second plot plan. I think that plot plan was submitted—and this is just thinking—directly by the architects to the Building Inspector on which it was issued.

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page 137 }

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A. H. Ewing, Jr.

CROSS EXAMINATION.

By Mr. Eichner:

Q. Mr. Ewing, you stated that you personally went to the Building Inspector's office?

A. Yes, sir.

Q. And filed that application which is in evidence here?

A. Yes, sir.

Q. And you said some official there—do you remember who it was?—said that the property was not zoned correctly?

A. I don't know whether it was Mr. Selph or Mr. Waterman. I talked with both of them.

Q. Did you look at the district map over there, the zoning map, during this trip?

A. No, sir.

Q. This was your first information, then, about the zoning of this particular property?

A. Very first.

Q. And I believe you stated on direct examination that you didn't know whether permit was denied or not, is that correct? Is that what you say?

A. I said that they didn't know whether they
page 138 } could issue one or not, due to zoning.

Q. This was on the date you went there to apply? On June first, is that correct?

A. That's right.

Q. And when were you notified that it was denied?

A. We were never notified. You don't get a notification from the City. You can call up down there and say, "Have those plans been approved or not?" They don't say, "We deny one." At least, never in my experience, and I usually handle this for our firm.

Q. Did you make any inquiry of that sort?

* * * * *

Q. I mean, did you make any further inquiry of the Building Commissioner's office?

A. I probably called up every two or three days wanting to know how about it.

Q. And when did they tell you how about it?

A. They have yet to tell me how about it. We got a permit
eventually; a permit was issued eventually.

page 139 } Q. Yes, but I am talking about a permit for
the original site. That was never issued, was it, sir?

A. H. Ewing, Jr.

A. I don't think it was, no, sir.

* * * * *

page 140 }

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Q. Are you familiar with the forms that are used by the Building Commissioner in these things?

A. We have never had—as far as I know, we have never had a permit, as Mr. Charles Ewing testified, which wasn't granted maybe after some structural changes caused by the architect. This was denied on a zoning thing. It is not the duty—customary duty of a contractor to go behind the architect and owner to check to see whether he has got his property zoned right.

Q. You were familiar at this time with the contract provision we have referred to, making it the contractor's obligation to get all permits; that is in the general conditions?

A. Oh, yes. That's why we applied for this.

Q. Now, you did not actually sign the contract with the City, did you?

* * * * *

page 141 }

* * * * *

A. I think it was signed by Charles.

* * * * *

Q. Well, at the time he signed it, did you—

A. He is president.

Q. At the time you signed it, did you personally—were you under the assumption that the property on which the Juvenile Detention Home was to be built was in a district where such a home was permitted by the zoning ordinance?

A. Maybe I haven't made myself clear.

The Court: You probably have answered.

The Witness: The point is, sir, an owner owns a piece of property, he employs an architect and pays him money. We assume that those two clear all legal obstacles.

By Mr. Eichner:

Q. You did, then, assume that this was within a district where the zoning ordinances permitted such a

page 142 } building to be constructed?

A. Yes.

Q. With your application which you filed in the Building Commissioner's office, did you file a plot plan showing the location of the building on the site?

A. Yes, sir; you have to do that.

* * * * *

page 144 }

* * * * *

Q. Now, were you aware of the various steps that were taken in this thing? Now, I am talking about the Board of Zoning Appeals denying it in the first instance and later on, on July second, I believe it was, approving it, moved back 440 feet, or whatever the distance was? Were you aware of these as you went along reading them in the newspapers and what not?

A. Qualify that "reading in the newspapers" to the "newspaper account" and I will go with you.

Q. You have read what accounts appeared in the newspapers from time to time?

A. Yes.

page 145 }

* * * * *

JAMES AMBLER JOHNSTON,

was called as a witness by and on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Thacker:

Q. Mr. Johnston, will you state to the Court your full name and occupation?

A. James Ambler Johnston, member of the firm of Carneal and Johnston, Architects, Engineers.

Q. Your firm is connected with this project insofar as

the architectural situation is concerned, Juvenile Detention Home?

A. Yes, sir.

* * * * *

page 149 }

* * * * *

Q. Will you please state to the Court what, if any, names of subcontractors were submitted to your firm for approval by the general contractor, Ewing Corporation, insofar as this project was concerned?

A. None submitted formally, but they had sent in some samples of clear glass facing tile and some color for linoleum and some samples of facing brick and So-Lite block, and then they had made a request for some color selection on a facing tile, all of which was sort of a routine, and if I may say, Judge, that this was a perfectly routine job with us, and I think it was with Ewing. They are old contractors, and they know how to handle their business, and I think we know a little something about it, too, and the contract was let and they went ahead and did what was necessary to lead up to it, and all of this was just pure routine, and the fact that they had not submitted the list of subcontractors to us I would interpret to the fact that they expected to do it very soon but just didn't get to it, and if, as and when they had submitted the list of subcontractors, well, we very probably would have followed through with a formal approval, and that is always signed by the owner and not by us.

page 150 }

* * * * *

page 152 }

* * * * *

Q. Did you or your firm receive any notice in writing or otherwise from Ewing Corporation or any other purported subcontractor regarding any zoning difficulties or zoning laws involved?

page 153 }

A. Not from Ewing.

Q. Did you receive any from anyone, sir?

James Ambler Johnston.

A. Only from the owner.

Q. Did Ewing Corporation notify you of any variance of the location?

A. No.

* * * * *

Q. And who did notify you of any variance, if anyone did, sir?

A. The owner represented by the Department of Public Works had us make a sketch showing the building setting back farther from Old Brook Road and on a certain date we sent that to Ewing—pardon me just a minute. I will just get the date here. Maybe it has already been introduced, I don't know.

The Court: We have the plats, Mr. Johnston. We want to know something about their history.

The Witness: That was on July the 10th. "We inclose herewith copy of the drawings showing the revised location of the building." That is to Mr. Hopson. "Two copies of the above-mentioned drawing have been furnished to Ewing."

* * * * *

page 154 }

* * * * *

Q. Did anyone from the Ewing Corporation notify you of any litigation involving the cessation of work?

A. No.

* * * * *

CROSS EXAMINATION.

By Mr. Humrickhouse:

Q. Mr. Johnston, will you tell His Honor when you were first engaged in this matter as architect for the new detention home?

A. I wish I could. We monkeyed with the thing

page 155 } for the longest kind of a time.

Q. Year?

A. I wish I could answer you accurately, but it seems to

me it was 2 or 3 years before we got up to the point of making the final plans and specifications.

Q. But you entered into this contract on February the 17th, 1955?

A. Oh, yes, yes, that's right.

Q. And prior to that time you had been talking with the City about it?

A. Oh, yes, indeed.

Q. And where were you going to put the home?

A. I will be dogged if I can remember.

Q. Would it help you to look at this contract?

A. Yes. Located in Pine Camp.

Q. Where is Pine Camp?

A. Located in Pine Camp, located between Old Brook Road and the corporation line of the City of Richmond.

Q. And then as a result of that you went forward with the plans for the building and bids were taken?

A. Yes, sir.

Q. Did you check the zoning?

A. No, sir.

Q. Why didn't you, Mr. Johnston?

A. Well, I don't check the title to a piece of

page 156 } property if—

Q. Isn't that because the owner usually does it?

A. Yes. I don't question title to a piece of property.

Q. I show you on page 6 of the contract you had with the City and ask you to read that. Well, read 3 and 6.

A. Well, "The City shall do the following:"

Q. Now, what is—

A. No. 4?

Q. Go ahead.

A. It says, "Furnish any legal services required in the preparation of the documents."

Q. What is 3?

A. Three, "The City shall make all necessary field surveys, including establishment of line and grade and furnish contour maps and plot plan where they are required and location of water and sewer lines."

Q. And location of building is a plot plan, is it not?

A. Yes.

Q. All right, what is No. 5?

A. "The City"—now, this is a city obligation—"shall make any necessary property surveys, descriptions, negotiations and legal or financial arrangements necessary for

James Ambler Johnston.

obtaining land right-of-way or easements, access for surveys, bores and test pits for construction work."

Q. And it was under those provisions that
page 157 } you expected the City to look after any zoning?
A. Absolutely.

Q. Well, now, Mr. Johnston, I take it from your testimony it was not a secret to you that the permit was denied and that there was an appeal, etc.?

A. Absolutely not.

Q. You knew about it as soon as it happened?

A. I knew about it just as soon as I found it out, and that was I don't know how soon after it happened.

Q. Within a day?

A. I judge so.

Q. And in any event, the city notified you by letter in July, I believe it is the letter of July 13th from Mr. DuVal to your Mr. Piligion, is that his name?

A. That's right. Mr. Piligion is not with me now, but he was on July the 13th.

Q. And they sent you copies of Mr. Drinard's memorandum stating that the zoning matter was up before the Board of Zoning Appeals?

A. Did not.

Q. And brought you up to date on everything, didn't they?

A. No, sir, I can't say that they did.

Q. Well, what did they bring you under?

A. They said under July the 13th, and it says, "This is to verify verbal instructions of Mr. Cantor of this
page 158 } office to your Mr. Piligion regarding your future actions on above project. It is requested that you stop all processing of shop drawings on the above projects and you do not approve in any manner the purchase of any materials for the building by the contractor. All work on this project is to come to a complete standstill, except the engineering required to complete the design in the new site location. Also, any design changes that may be necessary should be undertaken and completed. As soon as legal action regarding above project is resolved, this office will advise you further on the future course of action to be pursued."

Q. Did you receive a copy of Mr. Drinard's memorandum of July 10th to the Director of Public Works?

A. No, sir.

Q. Then the letter of July 13th was the first formal notification you had?

James Ambler Johnston.

A. That's right.

Q. I see. Mr. Johnston, have you ever received any notification from the City up to this moment that it considers the contract illegal?

Mr. Eichner: I don't think that is a proper question, Your Honor.

Mr. Humrickhouse: If Your Honor please, the contract provides that these people are—

The Court: I don't know whether it will be material, but we had better get the answer, gentlemen. It
page 159 } depends on certain wording in the contract, although—

Mr. Humrickhouse: That may not make it illegal or legal, but it certainly—

The Court: No, I don't mean that, but whether the architects had notice of the contention may or may not be material to our inquiry, but I think while Mr. Johnston is here we had better get it.

Mr. Eichner: I will except.

The Witness: Do you mind repeating that question?

By Mr. Humrickhouse:

Q. Have you ever, up to this time, received notification from the city that it considers this contract with A. H. Ewing's Sons, Inc., an illegal contract?

A. No, sir.

Q. Mr. Johnston, have you done work with contractors who have used as subcontractors these four people who are making claims against A. H. Ewing now, namely, Montague Betts, Roanoke Engineering Sales, Gundlach and Company and Northside Electric Company?

A. Yes.

Q. Are those four firms on your approved list or list of approved contractors?

A. Yes, I would say that they would be.

Q. And did I understand that the submission of those, you consider it a mere formality?

page 160 } A. It was perfectly all right for Ewing to send in the stuff to expedite it; that might have been done. Now, Gundlach never came in, anything on Gundlach at all, but material did come in on Roanoke Engineering. Nothing came in on Montague Betts.

Q. Is it abnormal for the general contractor to wait until

he gets all of his subcontracts in shape and then submit them to you?

A. In the effort to expedite the job it is perfectly all right for Ewing to have sent those in pending getting them approved. It wouldn't be—that's just routine, and if that cancellation hadn't happened, you would never have heard about it.

Q. These men would have been approved, wouldn't they?

A. I think so.

Mr. Humrickshouse: That's all.

* * * * *

page 161 }

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JOHN W. HUFFMAN,

was called as a witness by and on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Thacker:

* * * * *

Q. How long have you been a Director of General Services of the City of Richmond, Mr. Huffman?

A. Well, technically speaking, the title has been changed so many times since I was the purchasing agent, but I have been in this same capacity for going on 17 years.

page 162 }

* * * * *

Q. Mr. Huffman, I hand you an exhibit in this action, Exhibit No. 2,

* * * * *

Q. And is that your signature on the face of that contract, sir?

Robert Salmon Hopson.

A. Yes, sir.
Q. What is the date of your signature, sir?

* * * * *

A. June the 5th, 1956.
Q. That is the date that you executed it on behalf of the City of Richmond?
A. That is correct, sir.
Q. When you executed this contract on behalf of the City of Richmond on June 6th, 1956, did you assume that the location called for in the contract as to the site of the Juvenile Detention Home was within the zoning district in which erection of such a building was permitted
page 163 } by the zoning ordinance of the City of Richmond?

* * * * *

A. Yes, I assumed that everything was in readiness.

* * * * *

page 166 }

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ROBERT SALMON HOPSON,

was called as a witness by and on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Thacker:
A. My name is Robert Salmon Hopson, Director of Public Works, City of Richmond.

* * * * *

Q. I would like to hand you an exhibit marked Plaintiff's Exhibit No. 2 in this case, sir, which is a contract between Plaintiff Ewing Corporation in this action, and
page 167 } the City of Richmond, and ask you if you recognize that.

Robert Salmon Hopson.

A. I recognize my initials.

* * * * *

Q. Your initials signify approval, I assume?
A. As far as we could determine that.

* * * * *

page 169 }

* * * * *

Q. Mr. Hopson, when you approved this contract, did you assume that the location called for in the contract as the site of the Juvenile Detention Home was within a zoning district in which erection of such a building was permitted by the zoning ordinance of the City of Richmond?
A. Yes, I assumed it at that time.

* * * * *

CROSS EXAMINATION.

By Mr. Humrickhouse:

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page 170 }

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The Court: Had it ever occurred to you to question whether or not the zoning laws applied to the City at all? Have you ever had that question come up?

* * * * *

The Witness: I think that I was probably walking in an atmosphere assuming that the Pine Camp site would be acceptable from a zoning viewpoint, particularly in view of the fact that I knew schools and churches and most public buildings could be built on this type site, so it didn't enter my mind to question it until the injunction occurred.

* * * * *

Q. It was before the injunction, because the Building Commissioner called it to your attention.

A. He called it to our attention when he denied the permit on the—happened to be the same date as this contract was signed.

* * * * *

page 172 }

* * * * *

FRANK L. BERSCH,

was called as a witness by and on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Thacker:

A. My name is Frank Bersch, and I am Chief of the Bureau of Purchases and Stores. At the time of the contract I was Contracting Officer.

Q. For the City of Richmond?

A. City of Richmond, yes.

* * * * *

Q. I wonder if you would take a look at Exhibit No. 2 and see if you can identify the paper—Plaintiff's No. 2.

A. Yes, sir.

* * * * *

Q. Is your signature on there, or initials?

A. My initials are on there and "Approved" and date of it.

page 173 }

* * * * *

A. Six-five-fifty-six.

* * * * *

George B. Selfe.

Q. Did you have any knowledge as to the proposed project being a Juvenile Detention Home, in this case
page 174 } being built in an area other than an area which permitted such an erection?

A. No, sir.

* * * * *

page 176 } SECOND DAY.

* * * * *

Mr. Eichner:

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I would like to offer as Exhibits A and B of the City the two plats which are Exhibits 3 and 4 with the plea in abatement.

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page 183 }

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GEORGE B. SELFE,

was called as a witness by and on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Thacker:

Q. Mr. Selfe, will you state to the Court your name and occupation?

A. George B. Selfe, senior structural engineer, Bureau of Building Inspection, City of Richmond.

* * * * *

page 184 }

* * * * *

George B. Selfe.

Q. Mr. Selfe, in this case in what capacity were you acting with reference to any permits granted or not granted concerning this juvenile Detention Home proposed construction?

A. I acted in the capacity as Assistant to the Commissioner of Buildings if the Commissioner of Buildings is not present.

Q. And did you in this instance?

A. In this instance, I believe, as well as I remember, I informed the applicant that the Detention Home could not be built in the residential district.

* * * * *

page 185 }

* * * * *

A. Mr. Hugh Ewing brought the application in.

* * * * *

Q. And you told Mr. Ewing what when he applied for it, sir?

A. As well as I remember, I think I told Mr. Ewing verbally that the Detention Home could not be built in a single-family residential district.

Q. Did you compare any data or plans with the district zoning map in order to substantiate your statement?

A. Yes, sir, I compared the plan with the zoning district map, yes, sir.

Q. When did you do that, sir?

A. If I informed him that afternoon, which I think I did, I checked that then.

page 186 } Q. What date would that be, sir?

A. The date that we received the application, June 5, 1956.

Q. Would that be the date Mr. Hugh Ewing came into your office, sir?

A. That is the date the application was brought in.

* * * * *

page 187 }

* * * * *

George B. Selfe.

Q. This first plan was the original one attached to the permit that Mr. Hugh Ewing brought into your office on the date listed on the application for the permit?

A. It was filed with the plan, yes, sir.

Q. Is this the plan you compared with the zoning plat of the City of Richmond as to that particular plat?

A. It is.

Q. Mr. Selfe, will you read what is written page 188 } in crayon on this particular plan?

A. Void 7-5-56.

Q. "7" means what?

A. July 5, 1956.

Q. Do you have personal knowledge as to who wrote that?

A. That is my writing.

* * * * *

Q. As to this second drawing, sir, that is Defendant's Exhibit B, I believe, what is that plan?

A. That is the plot plan that was approved—no, it is the plot plan showing the conditional approvel by the Board of Zoning Appeals to allow the Juvenile Detention Home to go in this area.

* * * * *

page 189 }

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Q. Mr. Selfe, I believe you stated that the one marked "Void," which is Defendant's Exhibit A, was attached to the application?

A. It was attached to the plans filed with the application.

* * * * *

page 194 }

* * * * *

Q. I will ask you, sir, to state to the Court what classification this particular site was zoned for in the City of Richmond at the time of the original application for a permit, sir?

George B. Selfe.

A. It was zoned as a single-family dwelling district.

Q. Was it zoned for a single-family district on May 31, 1956?

A. Yes, sir.

Q. And as of the date of that application you stated it was?

A. That is right.

Q. June 5, 1956?

A. Yes, sir.

Q. What is it zoned for now?

A. A single-family dwelling district.

Q. Is that A residential district shown within
page 195 } the boundaries of the district map that you examined?

A. It is.

Q. At the time of this application?

A. Yes, sir.

Q. As to this particular site, sir?

A. Yes, sir.

Q. Since the date of this application to this current date, have there been any changes other than a residential district zoning for this particular area where this site is located, sir?

A. No, sir. It is still and has been a single-family dwelling district.

Q. Is that according to the district map?

A. Yes, sir.

• • • • •

CROSS EXAMINATION.

By Mr. Humrickhouse:

Q. Mr. Selfe, you say that site is zoned a family dwelling or single-family dwelling?

A. Yes, sir.

Q. Do you mean the entire Pine Camp property site?

A. Yes, sir. Bounded by Forest Lawn Drive
page 196 } and the corporate limits, yes, sir.

Q. And Brook Road?

A. Brook Road, yes, sir.

Q. So that the location of the building on the second plan that was given you is also in violation of the zoning ordinances unless there is a variance?

A. Right, sir.

George B. Selfe.

Q. And there has been a variance granted for that second location, has there not?

A. Yes, sir.

Q. Isn't that routine, in granting variances, that your procedure is that the appeal is made and the Board of Zoning Appeals grants or denies a variance?

A. Yes, sir.

Q. Nothing unusual about that?

A. No, sir.

* * * * *

Q. You are familiar with the provisions of the charter giving the Board the right to grant a special variance when the City or government is concerned, aren't you?

A. Yes, sir, for public interest. Yes, sir.

* * * * *

page 198 }

* * * * *

Q. Why did you mark on the first plot plan "Void 7-5-56"?

A. Because the Board of Zoning Appeals granted the variance with certain conditions and one of those conditions was that the Detention Home be set back 440 feet from the Old Brook Road. So the original plot plan did not apply.

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page 202 }

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Mr. Humrickhouse: We want specifically to offer in evidence—I do not have copies—this is the record in the other case and I will substitute copies—the report of the City Manager to the Council that is referred to in the last resolution which is Exhibit 18. It is referred to in there. The report of the City Manager is in the record of *Wicker Apartments* v. *City of Richmond.* I shall make a copy of that and file it with the papers in this, or whatever you desire.

The Court: Not for the time being. Under the stipulation, I can consult that record.

Mr. Humrickhouse: You see, Your Honor, just as a matter of explanation, that gives all of the papers which are referred to in the appendix which we filed yesterday, the original papers, showing the history of the page 203 } construction, what the City Manager did, what the Planning Commission did, and what the Council did in the matter.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk

INDEX TO RECORD

	Page
Writ of Error and *Supersedeas* Awarded	1
Record	2
Motion for Judgment	2
Plea in Abatement	3
Stipulation	4
Grounds of Defense	4
Order—February 20, 1959	6
Stipulation	6
Letter, Opinion—March 6, 1959	8
Judgment—March 6, 1959	10
Motion	10
Notice of Appeal and Assignments of Error	11
Witnesses:	
Charles W. Ewing	13
Rex Smith	47
Joseph B. Guerdi	48
G. M. Anderson	49
Joe Rosenbaum	51
A. H. Ewing, Jr.	53
James Ambler Johnston	58
John W. Huffman	64
Robert Salmon Hopson	65
Frank L. Bersch	67
George B. Selfe	68
Proceedings	72

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.

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