207 VA 752

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

Record No. 6321

In the
Supreme Court of Appeals of Virginia
at Richmond

EDWARD C. ORD, ET AL.

v.

DOUGLAS B. FUGATE, STATE HIGHWAY COMMISSIONER

FROM THE CIRCUIT COURT OF LOUDOUN COUNTY

RULE 5:12 BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 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. 6321

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 12th day of January, 1966.

EDWARD C. ORD, ET AL., Plaintiffs in error,

against

DOUGLAS B. FUGATE, STATE HIGHWAY COMMISSIONER, Defendant in error.

From the Circuit Court of Loudoun County
Rayner V. Snead, Judge

Upon the petition of Edward C. Ord, David Ord Alexander, and Bernard H. Kelley a writ of error is awarded them to a judgment rendered by the Circuit Court of Loudoun County on the 11th day of June, 1965, in a certain proceeding then therein depending wherein the said petitioners were plaintiffs and Douglas B. Fugate, State Highway Commissioner, was defendant; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

page 1]

* * * * *

In the County of Loudoun Circuit Court Clerks Office. Received and Filed this the 18 Day of February, 1965.

Teste: J. T. MARTZ, Clerk

MOTION FOR DECLARATORY JUDGMENT

COME NOW the plaintiffs, by and through their attorneys, and pursuant to the provisions of Title 8, Section 578, *et seq.*, Code of Virginia, 1950, as amended, move this Honorable Court for a binding adjudication of right and consequential relief against the defendant, based upon the following controversy:

1. The plaintiffs are the fee owners of certain parcels of land lying in Loudoun County, Virginia, which parcels border along Virginia State Route 740. Said State Route runs from its intersection with Virginia State Route 619 in front of the plaintiffs' property and forms the sole and only means of vehicular, ingress or egress from said Route 619 to the plaintiffs' property.

2. The said Virginia State Route 740 is a part of the Virginia State Highway System of this Commonwealth. The defendant, the Virginia State Highway Commissioner of Virginia acting through the Virginia Department of Highways has assumed control, supervision and management over the said State Route 740.

3. The said State Route 740 is at present, and has been for many years, in an untravelable state and condition and exists and has existed in such a deplorable condition that the plaintiffs are unable to drive vehicles over

page 2] it in order to reach their properties and are thus deprived of the appropriate and normal enjoyment and improvement of said property which they would otherwise be entitled to if said State Route 740 was in a travelable condition.

4. The defendant, through its agents, servants and/or em-

ployees, has acknowledged responsibility for the supervision, repair and maintenance of the said Route 740, and has further acknowledged that said Route is untravelable as aforesaid. However, even *through* repeatedly requested to improve the said State Route the defendant has arbitrarily, and without justification, refused.

5. Accordingly, an actual and justiciable controversy has existed and does exist between the plaintiffs and the defendant. Plaintiffs assert that under the law and practice of this Commonwealth they are entitled to have said State Route 740 maintained in at least such a state of repair as will reasonably accommodate travel to and from their property, it being the only means of ingress or egress.

WHEREFORE, these premises considered, plaintiffs respectfully pray unto this Honorable Court that appropriate testimony be taken and that based thereon a binding declaration of rights be entered against the defendant by this Honorable Court, that the plaintiffs are entitled to have said State Route 740 forthwith placed in a travelable condition from the point of its intersection with Route 619 up to and

page 3] including a point where it passes tangent to any parcel of land owned by the plaintiffs herein.

Plaintiffs further pray that pursuant to the provisions of Title 8, Section 581, the defendant be required, upon proper notice, to show cause why the consequential relief prayed for herein should not be granted forthwith upon the adjudication of rights reposing in the plaintiffs. Plaintiffs further move the Court for appropriate costs and expenses in connection with the prosecution of this Motion for Declaratory Judgment.

EDWARD C. ORD
DAVID ORD ALEXANDER
BERNARD H. KELLEY

★ ★ ★ ★ ★

page 6]

★ ★ ★ ★ ★

In the County of Loudoun Circuit Court Clerks Office.
Received and Filed this the 16 Day of March, 1965.

Teste J. T. MARTZ, Clerk

MOTION TO DISMISS

Now comes Douglas B. Fugate, State Highway Commissioner of Virginia, by counsel, and moves the Court to dismiss the Motion For Declaratory Judgment filed on behalf of the plaintiffs in the above styled case upon the following grounds:

1. That the road which is the subject matter of this action is not under the control and jurisdiction of the State Highway Commissioner since the road has been discontinued by the State Highway Commission at the request of the Board of Supervisors of Loudoun County pursuant to § 33-76.7 of the Code. Copies of resolutions effectuating this discontinuance are attached hereto and prayed to be read as a part of this Plea as if fully set forth herein.

2. This action is not an appropriate remedy since no actual controversy is alleged by the plaintiffs to exist whereby the Court could make an adjudication of right.

Therefore, it is respectfully suggested that this Honorable Court is without jurisdiction to enter judgment against the defendant in this cause.

page 7] Whereupon the defendant respectfully moves the Court to dismiss the Motion For Declaratory Judgment filed in this cause.

Respectfully Submitted,

DOUGLAS B. FUGATE
State Highway Commissioner of Virginia

By PAUL D. STOTTS
Of Counsel

★ ★ ★ ★ ★

page 8]

★ ★ ★ ★ ★

In the County of Loudoun Circuit Court Clerks Office.
Received and Filed this the 25th Day of March, 1965.

Teste J. T. MARTZ, Clerk
By: F. R. HOWARD, Deputy Clerk

REPLY TO MOTION TO DISMISS

COME NOW the plaintiffs herein, by their attorneys, and for their reply to the defendant's Motion To Dismiss, state as follows:

1. Plaintiffs reply that any alleged discontinuance of their road, as set forth in the first numbered paragraph of defendant's Motion To Dismiss, is a nullity without legal effect because:

(a) The defendant did not hold a hearing, regarding the alleged discontinuance of the road in question, as required by the very section it cites (§ 33-76.7, Va. Code (1950));

(b) The defendant did not set forth any finding regarding its decision on the road in question as required by the very section it cites (§ 33-76.7, Va. Code (1950));

(c) The defendant was on notice of the plaintiffs' interests before it allegedly discontinued the road in question and the defendant had acknowledged the duty to properly maintain said route;

2. Plaintiffs reply that there most certainly is an actual controversy in this matter and that their Motion for
page 9] Declaratory Judgment is appropriate under the law and practice of this Commonwealth.

AND NOW having replied to the defendant's Motion To Dismiss, and by way of further answer thereto, these plaintiffs state that they are entitled to be heard on their Motion for Declaratory Judgment as the defendant has not afforded to them a reasonable and convenient means of ingress and egress from a public highway to their land as is their right under the law; that the defendant cannot deprive the plaintiffs of these rights without first giving actual and appropriate notice to them and an opportunity to be heard; that without meeting such basic requirements, the defendant's actions constitute the taking of the plaintiffs' land and rights of access/egress thereto without constitutionally protected due process of law.

AND NOW having fully answered the defendant's Motion To Dismiss, these plaintiffs specifically request a reply hereto and request a hearing on the defendant's Motion To Dismiss forthwith together with the original Motion for Declaratory

Judgment in view of the exigencies of the situation in which the plaintiffs are placed.

EDWARD C. ORD
DAVID ORD ALEXANDER
BERNARD H. KELLEY

★ ★ ★ ★ ★

page 19]

★ ★ ★ ★ ★

ORDER

THIS MATTER came before the Court this 11 day of June, 1965, upon plaintiff's Motion for Declaratory Judgment and defendant's Motion to Dismiss; and was argued by counsel; whereupon

AFTER DUE CONSIDERATION the Court being of the Opinion that the Motion to Dismiss should be granted; it is therefore

ORDERED, ADJUDGED AND DECREED that defendant's Motion to dismiss be, and the same hereby is, granted, to which ruling of the Court the plaintiffs duly note their exception and objection.

RAYNER V. SNEAD
Judge

★ ★ ★ ★ ★

page 20]

★ ★ ★ ★ ★

In the County of Loudoun Circuit Court Clerks Office.
Received and Filed this the 9 Day of August, 1965.

Teste J. T. MARTZ, Clerk
By LOUISA S. SKINNER
Deputy

ASSIGNMENTS OF ERROR

1. The Trial Court erred in granting the defendant's Motion to Dismiss by ruling that there was no actual controversy existing between the parties hereto, and in holding that the plaintiffs' Motion for Declaratory Judgment was an improper remedy.

2. The Trial Court erred in granting the Defendant's Motion to Dismiss by ruling that §33-76.7 Va. Code (1950) does not require notice and hearing to be given to plaintiffs, abutting landowners, regarding the discontinuance of State Route 740 where the Board of Supervisors of Loudoun

page 21] County had previously requested the State Highway Commission to discontinue that route.

3. The Trial Court erred in interpreting §33-76.7 Va. Code (1950) to permit a discontinuance of State Route 740, upon which the plaintiffs abut without giving the plaintiffs due notice of the proposed discontinuance and a hearing thereon, because such an interpretation is unconstitutional in violation of the plaintiffs' Virginia and Federal constitutional rights.

4. The Trial Court erred in sustaining the defendant's Motion to Dismiss because §33-76.7 Va. Code (1950) is vague, ambiguous and uncertain; hence, is unconstitutional and in violation of the plaintiffs' Virginia and Federal constitutional rights.

5. The Trial Court erred in sustaining the defendant's Motion to Dismiss because §33-76.7 Va. Code (1950) is unconstitutional on its face in violation of the plaintiffs' Virginia and Federal constitutional rights.

6. In a hearing on the Motion to Dismiss, the Trial Court erred in determining State Route 740 travelable based on evidence introduced in opposition to a procedural issue. Plaintiffs are entitled to a complete hearing on the merits before a fair determination can be made regarding the travelable condition of the Route.

7. The Trial Court erred in holding that the plaintiffs' remedy is restricted to political avenues of approach.

page 22] AS TO EACH AND ALL of the errors herein complained of and assigned, the plaintiffs duly

noted and saved objections and exceptions in the manner and form prescribed by law.

SIGNED this 6th day of August, 1965.

EDWARD C. ORD
DAVID ORD ALEXANDER
BERNARD H. KELLEY
By Counsel

★ ★ ★ ★ ★

page 8]

★ ★ ★ ★ ★

MR. G. P. BOZEL,

Whereupon, Mr. Bozel, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Brandt:

Q. State your name and occupation?

A. G. P. Bozel, Resident Engineer, Department of Highways.

page 9] Q. You are stationed here in Leesburg, are you not?

A. I am.

Q. How long have you been here?

A. Twenty-five years.

Q. Are you familiar with the plaintiffs in this case?

A. No, I am not.

Q. Do you know Mr. Edward O. C. Ord, Bernard H. Kelley and David Ord Alexander?

A. I wouldn't be sure. I couldn't recognize them.

Q. Did you meet with Mr. Ord at any time? About the road we are discussing today, Route 740?

A. State that again?

Q. Did you meet with him to discuss this road, Route 740?

A. Not in the near future.

Q. Have you ever met with him?

A. I could have, yes.

Q. Do you know if you have ever met this gentleman or not?

G. P. Bozel

(Indicating Mr. Edward O. C. Ord in the hearing room.)

A. I think he was in the office at one time. It has been several years ago.
Q. Several years ago?
A. Yes.
Q. All right, sir. Now, Mr. Bozel, I show you a letter, over your signature, dated September 16, 1963, and ask if you can identify that?

page 10] A. Yes.
Q. What is that, sir? Is that a letter you wrote to Mr. Ord?
A. Yes. That is who it is addressed to.
Q. That is your signature?
A. Yes, it is.
Q. And you prepared the letter?
A. Yes, I did.

(Mr. Brandt handed letter to Mr. Stotts.)

Mr. Brandt: I propose to have this introduced into evidence and marked as Plaintiffs' Exhibit.
The Court: This letter will be admitted and marked as Petitioner's Exhibit I.

Q. Now, Mr. Bozel, the first sentence says, "With further reference to the meeting in this office on September 9," that would be referring to a meeting you had with Mr. Ord, is that correct?
A. Yes.
Q. Does that refresh your memory?
A. Yes.
Q. Your memory is refreshed?
A. Yes.
Q. Now, you say the section of the road has not been worked by the department for a number of years. As a matter of fact, that road is not even travelable?

page 11] A. It all depends upon what you mean, but I went over it in a pickup truck at that time.
Q. What do you mean you would have to do to get this road travelable? It will require several twenty-four-inch pipe lines, would it not?

A. I mean not by sports model cars and cars so low to the ground.

Q. I don't know what you mean. What would you need to do to get this road travelable? It will require other things. What do you mean by travelable? Did you mean it was not travelable?

A. It was travelable with a pickup at that time because I was over it. I had a car low to the ground and I couldn't get over it. I wouldn't take chances to have to walk back.

Q. Because it was not travelable?

A. Not with a low car like I was driving at that time.

Q. Now, this was in September and August of 1963 that you had discussions with Mr. Ord, was it not?

A. Yes.

Q. You were aware at that time about his desires?

A. It appears so today.

Q. And you represent the State of Virginia, the Commissioner of Highways, here in the Leesburg area?

A. Yes.

page 12] Q. Now, as a matter of fact, you agreed to supply machinery and men to put this road into a travelable condition if Mr. Ord would pay for it, is that not right, Mr. Bozel?

A. I don't recall that.

Q. You do not recall that for $6,000 he could have this road fixed?

A. I stated in that letter $6,000, didn't I?

Q. Do you recall telling him that?

A. I don't remember the conversation. That letter there states $6,000.

Q. Now, Mr. Bozel, who was it that proposed to the Loudoun County Board that this road be discontinued?

A. The Board of Supervisors who represent that district.

Q. Let me rephrase that question. Who was it that proposed to the Loudoun County Board of Supervisors that they discontinue this road?

A. I was all over that road with members of the Board of Supervisors for that district and we inspected the road at that time.

Q. Mr. Bozel, I am going to ask you again, who was it that proposed to the Loudoun County —

Mr. Stotts: He has answered the question. This is badgering the witness.

The Court: I do not believe he answered. I did not get it.

Did you say a member of the Board of Supervisors

page 13] of that district?

A. I was all over that road with a number of the Board of Supervisors, and at that time we agreed it should be discontinued.

The Court: That answers the question. You were over it with a member from that district?

A. Yes, sir.

Mr. Brandt: You did not propose to the Board that it be be discontinued?

A. I made a list and presented it to the Board along with a half dozen or so other roads.

Q. So it was your list upon which Route 740 was discontinued?

A. That and other roads that I had been over with different members of the Board of Supervisors.

Q. But it was your list that started this procedure off, is that right, sir?

The Court: This is your witness, called by you.

Mr. Brandt: I think he is pretty hostile, your Honor.

The Court: I think you should ask him the question. He didn't say that he has.

Mr. Brandt: Did you prepare the list?

A. I prepared a list after we had gone over those particular roads with members of the Board of Supervisors in which the road were located, in those areas.

page 14] Q. And what did you do with the list, sir?

A. I turned it over to the Board of Supervisors.

Q. I see. Now, Mr. Bozel, when was it that you went over the road with a member of the Board of Supervisors?

A. Prior to that resolution. That's about as near as I can give you.

Q. And how was that meeting with the board member arranged?

A. I don't recall whether in that particular road he met me up there or we picked him up. Some of the members I picked up and went in the State car.

Q. Who initiated the conversation that led to the going up to the road in question? Did you call them or did they call you?

A. A lot of these things we have to point out to the Board of Supervisors. We are on the roads constantly, and they cannot make as many trips on it.

Q. Do you recall whether you called them or they called you?

A. I can't remember that, no.

Mr. Brandt: All, right, sir, no further questions.

CROSS EXAMINATION

By Mr. Stotts:

Q. Mr. Bozel, had you ever had any discussion before or anything come up about discontinuance of this road prior, we will say, to whatever it was, September, 1963?

page 15] A. In 1961. It was discussed at that time with Mr. Fletcher, who is on, is a member of the Board, and several other roads were abandoned, but it was delayed until sometime later.

Q. Mr. Fletcher still on the Board?

A. No, he is not.

Q. There is a different member on the Board in that area now?

A. Both members agreed with these members at that time that it should be discontinued.

Mr. Stotts: That is all I have.

Whereupon,

MR. DOUGLAS M. PRATT,

was called, and having been duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Brandt:

Q. Please state your name and occupation in August of 1964?

Douglas M. Pratt

A. Douglas M. Pratt. In August, 1964, I was Executive Secretary to the Board of Supervisors of Loudoun County.

Q. Did there come a time that there was under consideration by the Board Route 740, discussed here this afternoon?

A. Yes.

Q. Do you have with you, sir, the resolution or documents when that was?

page 16] A. Yes, I do.

Q. Will you refer to that, if necessary, and tell us when was it the Board considered this resolution?

A. The Board adopted the resolution concerning 740 in the Secondary System on August 18, 1964.

Q. And do your records reveal to you, or do you recall, what the procedure for the motion or resolution was? How did that come about? How was it initiated?

A. May I refer to this?

Q. Yes.

A. As I recall it, to the best of my knowledge, Mr. Bozel, the resident engineer, appeared before the Board on that date with various resolutions concerning roads. One of the resolutions dealt with Route 740, as well as one, two, three, four, five, six, seven other routes on this annual resolution resolving to discontinue certain of the roads. This resolution was recommended, moved and duly adopted and forwarded to the State Highway Commission.

Q. Will you tell Judge Snead what, if any, notice to the parties in question was given prior to the meeting?

A. Prior to the meeting no notice was given by the Board of Supervisors. What notice, if any, was given by the Highway Department, I have no knowledge of it.

Q. Do you have published agendas available to the public?

page 17] A. An agenda is prepared prior to the Friday before the Board meeting and is not generally distributed to the public. If one comes to the office and inquires he can see it there, but it is not normally published or otherwise posted.

Q. Was there in fact an agenda printed regarding this meeting?

A. I believe in this particular instance — I had occasion on Friday, after having been served to appear at this hearing, to check to the agenda records and we were unable to find that there was an agenda.

Douglas M. Pratt

Q. So, if you have an agenda, it is not published but people can pick it up there. But in this particular matter, your records show that you did not even have an agenda prepared?

A. That is correct.

Q. What is the procedure, sir, after the resolution is passed? Is the resolution forwarded to the State Highway Commission?

A. After it is forwarded to the resident engineer, usually four copies with my signature on them, as having been duly adopted.

Q. That would have been Mr. Bozel in this case?

A. Yes.

Q. And do you again receive any information about your resolution?

page 18] A. Usually the Board receives an acknowledgement and notice subsequent to the requested resolution that the object of the resolution has been accomplished. In this case, the Board received notice in the month of September that the road discontinuance that had been requested by the agreement had been accomplished by the Highway Commission.

Mr. Brandt: I have no further questions.

CROSS EXAMINATION

By Mr. Stotts:

Q. Mr. Pratt, the procedure you just described, is this unusual?

A. For this type of discontinuance?

Q. Is it the usual procedure?

A. Yes.

Q. And in fact was followed in this particular resolution on six other roads at the same time?

A. On this particular road, yes.

★ ★ ★ ★ ★

page 19] Q. You say this was the usual procedure and was initiated by a list Mr. Bozel presented at that meeting. Do you know who initiated it, of your own knowledge?

A. No, sir, I do not.

Q. The notice of the meetings — it is generally known when

the regular meetings of the Board of Supervisors are held?

A. I presume so. They are held the same time every month.

Q. In the matter of the agenda, are you telling us there was none, or that you just couldn't find one now?

A. I would say both. To the best of my knowledge, there being none in the file, it would indicate that we did not prepare one for that meeting.

Q. But you could not say positively?

A. I could not.

RE-DIRECT EXAMINATION

By Mr. Brandt:

Q. You answered that you couldn't recall exactly who initiated this particular proposal with reference to Route 740. What was the normal, usual way that these things would be initiated concerning these roads? By whom would they usually be initiated?

A. The usual procedure, and it has been up until my leaving county employment last week, that Mr. Bozel
page 20] would appear at a meeting of the Board of Supervisors, be recognized by the chairman there some time during the meeting and would submit a list of whatever he had to bring before the Board.

Q. So he was the initiating member?

A. In the sense of initiating. He presented to me for the Board the particular resolution in question.

Mr. Brandt: That is all.

RECROSS EXAMINATION

By Mr. Stotts:

Q. Initiating in the sense of your formal paper work initiating?

A. Yes. The resolution presented to the Board was prepared by Mr. Bozel.

Mr. Stotts: That is all.

Edward O. C. Ord

Whereupon,

MR. EDWARD O. C. ORD

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Duff:

Q. Would you give the Court your name, please?

A. My name in Edward O. C. Ord.

Q. And you are one of the owners of property located on Route 740?

A. Yes.

page 21] Q. When did you acquire title?

A. In June, 1963.

Q. Now, directing your attention to the summer of 1963, will you tell his Honor if you had occasion to have a discussion of Route 740 with Mr. Bozel?

A. Yes. I believe it was in September, or the end of August, I cannot remember which. Myself and the other two landowners, Mr. Kelley and Mr. Alexander, went to see Mr. Bozel and we explained the problem to him and we offered to provide the men and some money probably if they would provide the machinery.

Q. You say you explained the problem to him. What problem did you explain?

A. I pointed out to him that the road is an old creek bed. The creek bed has washed the road out and left boulders out in the middle of the road. If you try to take a car up there, you really can't. I took my car, a '55 Mercury, with a pretty high bottom, and tore out my power steering and it cost me $130. I can't take my car up there.

Q. What is the distance of your property from Route 619?

A. I believe it is eight or nine-tenths of a mile.

Q. Do you know, sir, from your personal experience, how long it took you to drive your car that eight-tenths of a mile?

page 22] A. I went in a four-wheel drive jeep and it took up to about fifteen minutes, as I remember it, to get up there because the road is so bad; and other places it is sunk down and in other spots it is risen up so you just can't drive a car up there. You can get a four-wheel-drive jeep or big truck up there, but even then it takes so long.

Edward O. C. Ord

Q. Do you have any other means of ingress or egress to Route 619 from your property?

A. No, that is my only access.

Q. Did you have occasion to meet and talk with Mr. Bozel other than the time you mentioned?

A. No, I did not. I have had correspondence with the Highway Commission, but other than that one time Mr. Bozel and I talked about it, and he agreed to make an estimate of what it would cost to put the road in travelable condition.

★ ★ ★ ★ ★

Mr. Duff: I will withdraw the question. I agree with the Court. Mr. Ord, during the time of your discussion with Mr. Bozel, will you tell the Court whether or not he ever mentioned to you, or stated to you, what he testified to today, that this road was under consideration that this road was to be discontinued?

A. No, he did not.

page 23] Q. Have you continued to live on the property up to the present time?

A. Yes.

Q. I ask whether or not you were aware or received any notice that the State Highway Commission prepared to discontinue this road?

A. No, I had not.

Q. Where were you on last August 18, 1964? Where were you living?

A. This past August?

Q. Yes, the date of the hearing?

A. I was residing at my address in Washington, D. C., which I put on my letters to the Highway Commission.

Q. During the summer of 1964, how frequently did you go up to your property?

A. I had been going down every week end, usually, trying to work on the place.

Q. Did you ever at any time see any notice posted along the road?

A. No.

Q. Of the hearing?

A. No.

Edward O. C. Ord

Q. In fact, when was the first time that you knew that the Highway Commission was contending they had no responsibility?

page 24] A. When I examined the Motion to Dismiss in the Court House and saw the attached notice of the discontinuance.

Q. I may have already asked you this, and if I did I will withdraw it—do you have any means of getting in or out of your property?

A. No.

CROSS EXAMINATION

By Mr. Stotts:

Q. May I see the letter of September 16. I believe you said at no time did Mr. Bozel ever say anything about discontinuing the road. There was some discussion about abandonment, was there not?

A. Oh, he offered—no, not exactly—he offered to abandon the road to us. I asked him if you abandon it, do we get title to it? He said no it does not.

Q. You wanted the road if you could get title?

A. No, I was just asking it. I didn't see difference under those circumstances between the two.

Q. Can you describe the condition of this road when you bought this land?

A. Yes.

Q. Is it the same condition?

A. It is a lot worse than it was then.

page 25] Q. A lot worse?

A. Yes.

Q. In what way?

A. Flooding up there this year and the road washing out.

Q. Are you telling the Court it was in a travelable condition when you bought the property?

A. No.

Q. And it got worse after you bought the property?

A. After I bought the property.

Mr. Stotts: I have no further questions.

★ ★ ★ ★ ★

page 28]

* * * * *

The Court: On the Point No. 1 of the Motion to Dismiss, that is that there can be no relief granted under this Motion for Declaratory Judgment because there is no controversy, it appears from page 4 of the petition that the defendant, through its agents, had acknowledged responsibility for the maintenance and agreed the route is untravelable. If that is true, then there is no disagreement that there is no controversy. Therefore, the motion should be sustained on that ground.

However, the other ground goes to the heart of the controversy, and that is the interpretation of Section 33-76.7, and the interpretation turns on the sentence, "If the governing body of any town requests the same, the Commission, or a representative hereof, shall hold a hearing . . . in order to ascertain whether or not such road should be discontinued." I think the construction that the Attorney General put upon it is a reasonable one, and I would read it if the governing body of any town requests the Commissioner for the holding of a hearing. I take it "*the same*" refers to a hearing rather than the "*discontinuance*" in the preceding sentence. I admit that the language used in that sentence is some-

page 29] somewhat awkward, but the natural and logical reading of it leads me to that conclusion. That conclusion is reinforced by the wording of the section referring to primary roads where no notice is necessary or required. The other reason I think that the Motion to Dismiss should be sustained may be inconsistent with the one that is mentioned, but here the Motion for Declaratory Judgment states, requests that the Court place the road in or require that Route 740 be placed in a travelable condition, and the section in point there is 33-76.4.

I certainly do not know what the petitioner means by travelable condition, even if this Court should determine that it is not travelable. However, the testimony of both Mr. Ord and Mr. Bozel is that the road is travelable. The testimony that the road is rough in spots and that it can only be traveled in a pickup, or truck, or car that is not a low car, and so for this reason the Court would sustain the Motion to Dismiss. There is no standard as to what the Court could require the Highway Department to spend for the road even if the Court could

require the defendant to improve the road. It would seem here that the remedy of the plaintiffs is political rather than judicial. They have a right to go before the Board of Supervisors and ask that this road be placed in the secondary system. The appropriate remedy, if there is one, would be for the plaintiff to discuss this with the member of the Board of Supervisors and convince him that this road should
page 30] be brought into the secondary system. It is not very complicated; far less complicated than taking the time to adjudicate the question.

For these reasons, the Motion to Dismiss will be sustained.

Mr. Duff: I will note an exception to your Honor's ruling, please.

★ ★ ★ ★ ★

PETIT #1 EXHIBIT

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF HIGHWAYS
P. O. Box 340
Leesburg, Virginia

September 16, 1963

Mr. Edward O. C. Ord, Attorney
Department of Justice
Washington 25, D. C.

Dear Mr. Ord:

With further reference to the meeting at this office on September 9th and your letter of August 30th, 1963 regarding Route 740 in Loudoun County; this section of road has not been worked by the State for a number of years.

I made an inspection of the road on Wednesday of this past week and find that the road is more or less covered with large boulders and the Right of Way is narrow, due to the fences being close to the traveled roadway in most places. To get this road travelable it will require several 24'' pipe lines, and suitable fill material to cover the road bed. To make the re-

quired repairs to this road for the length of 0.85 miles will cost approximately $6,000.00.

I believe the suggestion that you made that if you could secure Right of Way through General Cumming's property, the abandonment of this road may be the best solution.

Yours truly,
G. P. BOZEL
Resident Engineer

GPB:ENC
cc to Mr. C. W. Kestner
Mr. H. G. Blundon
5/17/65
Petitioner's Exhibit
R.V.S.

★ ★ ★ ★ ★

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	page
Writ of Error Awarded	1
Record	2
Motion for Declaratory Judgment	2
Motion to Dismiss	3
Reply to Motion to Dismiss	4
Judgment — June 11, 1965	6
Assignments of Error	6
Witnesses:	
G. P. Bozel	8
Douglas M. Pratt	12
Edward O. C. Ord	16
Opinion	19
Petit #1 Exhibit	20