215 Va. 197

CLERK
SUPREME COURT OF VIRGINIA
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In The

SUPREME COURT OF VIRGINIA

At Richmond

Record No. 730889

STATE HIGHWAY COMMISSIONER
OF VIRGINIA — Appellant

vs.

FRANK B. EASLEY and JOAN B. EASLEY — Appellee

APPELLANT'S APPENDIX

ANDREW P. MILLER
Attorney General of Virginia
Supreme Court Building
1101 East Broad Street
Richmond, Virginia

WALTER A. McFARLANE
Assistant Attorney General
1401 East Broad Street
Richmond, Virginia

FRANCIS A. CHERRY, JR.
Assistant Attorney General
1401 East Broad Street
Richmond, Virginia

John J. Beall, Jr.
Assistant Attorney General
1401 East Broad Street
Richmond, Virginia

Counsel for APPELLANT

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VIRGINIA: IN THE CIRCUIT COURT OF MECKLENBURG COUNTY:

STATE HIGHWAY COMMISSIONER
OF VIRGINIA

V.

PETITION

FRANK B. EASLEY and JOAN B. EASLEY, his wife
Clarksville, Virginia

To the Honorable Judge of the Circuit Court of Mecklenburg County, Virginia:

Your petitioner, the State Highway Commissioner of Virginia, files this petition in accordance with Title 33, Chapter 1, Article 5 of the Code of Virginia of 1950, as amended, and such general laws as are applicable for the purpose of condemning the land hereinafter described and alleges as follows:

I, John Y. Hutcheson is the duly authorized agent and attorney for the State Highway Commissioner of Virginia, for the purpose of instituting this condemnation proceeding as is shown by a signed declaration hereto attached, marked Exhibit A, and asked to be read as a part of this petition and John Y. Hutcheson is authorized to file this proceeding in the name of and on behalf of the State Highway Commissioner of Virginia.

2. The real estate which is affected in this proceeding lies in Town of Clarksville ~~Magisterial District~~, in Mecklenburg County, Virginia, and is further described as follows:

(see attached sheet)

This property is also shown on a plan or plans on file in the Central Office of the State Highway Department, Richmond, Virginia, identified as Route 58, Project 0058-058-110, RW-201, Sheet No. 13 & 13A, a copy of which plans being hereto attached, marked Exhibit B, and prayed to be read as a part of this petition.

3. The right and property taken and intended to be compensated for in this proceeding is the fee

to the land shown within red lines on the aforesaid plans along with such easements as are needed, all of which is described and set forth in Exhibit B and described in detail in Paragraph 2 of this petition.

The land, or interest therein, taken lies in Town of Clarksville in Mecklenburg County, and is described as follows:

Parcel 052: Being as shown on Sheet 13 of the plans for Route 58, State Highway Project 0058-058-110, RW-201 and lying on the northwest (left) side of the proposed westbound lane centerline and adjacent to the northwest existing right of way line of present Route 58, from the northeast right of way line of present Route 1127 opposite approximate Station 1045+23 to the southwest right of way line of present Route 1125 opposite approximate Station 1047+12, and containing 0.02 acre, more or less, land.

Parcel 053: Being as shown on Sheet 13 of the said plans, and lying on the northwest (left) side of the proposed westbound lane centerline and adjacent to the northwest existing right of way line of present Route 58, from the northeast existing right of way line of present Route 1125 opposite approximate Station 1047+63 to the lands of C. M. Nunn opposite approximate Station 1049+12, and containing 0.014 acre, more or less, land; together with the right and easement to use the additional area shown for cut and/or fill slopes as being required for the proper execution and maintenance of the work, containing 0.001 acre, more or less. Said easement will terminate when the landowner, his heirs or successors, grades the property so that there no longer exists cut and/or fill slopes, thus eliminating the necessity for maintenance of said slopes.

Parcels 052 and 053 together contain 0.034 acre, more or less, land.

Being a part of the lots as shown on plat recorded in Plat Book 11, Page 24, except Lots 18 to 48, inclusive, which have been sold, conveyed by deed of E. L. Davis and wife to Frank B. and Frances D. Easley, dated January 1, 1946, recorded in Deed Book 122, Page 183; and by deed of Frances D. Easley, divorced, to Frank B. Easley, by deed dated June 13, 1963, recorded in Deed Book 181, Page 595, conveying her interest in the above lots.

4. The aforesaid land and easements are necessary for the construction, reconstruction, alteration, maintenance and repair of a portion or portions of a public highway embraced in the Virginia Highway System known as Route 58 in Mecklenburg County, Virginia.

5. Your petitioner has made a bona fide but ineffectual effort to purchase said real estate and easement from the owner thereof and has been unable to do so because of inability to agree upon the purchase price.

6. On or about the 22nd day of December, 1971 petitioner caused to be recorded in the office in the Clerk of this Court in Deed Book 215, at Page 468, Certificate No. C-20852 as provided by Article 5 of Chapter 1 of Title 33 of the 1950 Code of Virginia.

7. Thereupon pursuant to the provision of the aforesaid Article 5, of Chapter 1 of Title 33 of the 1950 Code of Virginia, title to the land described in Paragraph 2, vested in the Commonwealth of Virginia.

8. Your petitioner is of the opinion that the only persons who are entitled to an interest in the compensation to be ascertained by this proceeding are Frank B. Easley and Joan B. Easley, his wife, and The Fidelity National Bank

as diclosed by title examination of the above described land.

WHEREFORE, your petitioner respectfully prays to this Honorable Court in accordance with the provisions of Article 5 of Chapter 1 of Title 33 of the Code of Virginia of 1950, as amended, that commissioners may be summoned and appointed to ascertain and report what is the value of the land taken (including easements and including the easement for the relocation of utilities if such relocation is required) and damages, if any, which may accrue to the residue, beyond the enchancement in value, if any, to such residue, by reason of the taking; that this Court be directed to Confirm the vesting of title in the Commonwealth as aforesaid and take all such other steps to carry out the intents of Article 5 of Chapter 1 of Title 33 of the Code of Virginia of 1950, as amended, as may be necessary; and that your petitioner may have such other further and general relief as the nature of the case may require.

And your petitioner will ever pray, etc.

STATE HIGHWAY COMMISSIONER
OF VIRGINIA

By J. R. Y. Hutcheson
Counsel
JOHN Y. HUTCHESON

J. R. Y. Hutcheson
Counselor for Petitioner
JOHN Y. HUTCHESON

Filed in the Clerk's Office this 21 day of Jan., 1972

Writ Tax $
Fee
Deposit
Total Paid $

Teste: J. Y. Hutcheson, Clerk
D. C.

JTH

RW-36
Revised 1970

The State Highway Commissioner of Virginia declares that it is necessary for the construction, reconstruction, alteration, maintenance, and repair of a section of road embraced in the Public Highways of the State, Route 58, Project0058-058-110,RW201, in Mecklenburg County, to acquire certain land, or interest therein, pursuant to Sections 33.1-119 through 33.1-129, Code of Virginia, owned in whole, or in part, by Frank B. Easley and Joan B. Easley, his wife, and more particularly described in Certificate No. C-20852 of the Commonwealth of Virginia, recorded in the Office of the Clerk of the Circuit Court of said County in Deed Book _____, page _____, to which reference is hereby made, a bona fide but ineffectual effort to acquire same by purchase having previously been made.

The State Highway Commissioner hereby appoints Mr. John Y. Hutcheson, his attorney in this matter, and authorizes him to institute condemnation proceedings as provided in Title 33.1, Chapter 1, Article 7, of the 1950 Code of Virginia, as amended, in the name of and on behalf of the State Highway Commissioner, and as his attorney to make oath to the petition, all in accord with the statutes in this State in such cases made and provided.

/s/ J. E. Harwood
Deputy State Highway Commissioner of Virginia

Dated at Richmond, Virginia.

December 31, 1971.

STATE HIGHWAY COMMISSIONER
OF VIRGINIA

V.

REPORT OF COMMISSIONERS

FRANK B. EASLEY and JOAN B. EASLEY, his wife
Clarksville, Virginia 23927

TO: THE HONORABLE MEREDITH C. DORTCH, JUDGE OF THE SAID COURT

We the undersigned commissioners appointed by the above named court on _____, 19____, to fix the value of the land taken herein and damages, if any, which may accrue to the residue, beyond the enhancement in value, if any, to such residue, by reason of the taking, do hereby certify that on _____, 19____, we were duly sworn and went upon said land in the custody of the Sheriff of _____ County, Virginia, or one of his deputies, to view the same as directed by order of said court, said land being briefly described as follows, to-wit:

(see attached sheet)

Upon a view of the property and upon such evidence as was before us, we did fix the value of the aforesaid land taken by the State Highway Commissioner (including any easements taken) at $ 700.00 and we do further fix the damages which may accrue to the residue, beyond the enhancement in value to such residue, by reason of the taking at $ 17,140.00 TOTAL 17,840.00

Given under our hands this 14 day of Dec, 19 1972

Joe H Morris
H M Collins
A T Merritt
Wm A Blankenship
R A Cash
Commissioners

The land, or interest therein, taken lies in Town of Clarksville in Mecklenburg County, and is described as follows:

Parcel 052: Being as shown on Sheet 13 of the plans for Route 58, State Highway Project 0058-058-110, RW-201 and lying on the northwest (left) side of the proposed westbound lane centerline and adjacent to the northwest existing right of way line of present Route 58, from the northeast right of way line of present Route 1127 opposite approximate Station 1045+23 to the southwest right of way line of present Route 1125 opposite approximate Station 1047+12, and containing 0.02 acre, more or less, land.

Parcel 053: Being as shown on Sheet 13 of the said plans, and lying on the northwest (left) side of the proposed westbound lane centerline and adjacent to the northwest existing right of way line of present Route 58, from the northeast existing right of way line of present Route 1125 opposite approximate Station 1047+63 to the lands of C. M. Nunn opposite approximate Station 1049+12, and containing 0.014 acre, more or less, land; together with the right and easement to use the additional area shown for cut and/or fill slopes as being required for the proper execution and maintenance of the work, containing 0.001 acre, more or less. Said easement will terminate when the landowner, his heirs or successors, grades the property so that there no longer exists cut and/or fill slopes, thus eliminating the necessity for maintenance of said slopes.

Parcels 052 and 053 together contain 0.034 acre, more or less, land.

Being a part of the lots as shown on plat recorded in Plat Book 11, Page 24, except Lots 18 to 48, inclusive, which have been sold, conveyed by deed of E. L. Davis and wife to Frank B. and Frances D. Easley, dated January 1, 1946, recorded in Deed Book 122, Page 183; and by deed of Frances D. Easley, divorced, to Frank B. Easley, by deed dated June 13, 1963, recorded in Deed Book 181, Page 595, conveying her interest in the above lots.

Filed 12-6-72

VIRGINIA: IN THE CIRCUIT COURT OF MECKLENBURG COUNTY.

STATE HIGHWAY COMMISSIONER
OF VIRGINIA

V.) EXCEPTIONS TO REPORT OF COMMISSIONERS

FRANK B. EASLEY and JOAN B. EASLEY, his wife
Clarksville, Virginia

TO THE HONORABLE G. E. MITCHELL, JR., JUDGE OF SAID COURT:

Exceptions are hereby tendered and filed to the report of the Commissioners in the above styled matter upon the ground that the awards for the value of the land taken and the damages to the adjacent property are contrary to the law and the evidence and are excessive, and especially upon the grounds that the Court, over the objection of the state, allowed the witness for the landowner to testify that the landowner would be entitled to damage to the residue of his land by the state placing traffic islands on the property acquired and other property of the state, and the Court refused to instruct the Commissioners that such acts of the state was not damage which the landowner could be entitled.

/s/ John Y. Hutcheson
JOHN Y. HUTCHESON
BOYDTON, VIRGINIA

ATTORNEY FOR THE STATE HIGHWAY
COMMISSIONER OF VIRGINIA

Filed 12-6-72
G. E. Mitchell, Jr.
Judge Designate

I hereby certify that on the 6th day of December, 1972, I delivered a true copy of the foregoing Exceptions, together with a copy of an order granting leave to file the same, to Jesse R. Overstreet, Jr., Attorney for the above defendants.

/s/ John Y. Hutcheson
JOHN Y. HUTCHESON

VIRGINIA: IN THE CIRCUIT COURT OF MECKLENBURG COUNTY.

STATE HIGHWAY COMMISSIONER
OF VIRGINIA

v.) **ORDER**

FRANK B. EASLEY and JOAN B. EASLEY, his wife
Clarksville, Virginia

This day came the State Highway Commissioner, by his attorney, and filed Exceptions to Report of Commissioners filed herein on December 4, 1972.

UPON CONSIDERATION WHEREOF, the said Exceptions are herewith filed.

ENTER: G. E. Mitchell, Jr.
JUDGE Designate

DATE: 12-6-72

I ASK FOR THIS:

/s/ John Y. Hutcheson
JOHN Y. HUTCHESON

I HAVE SEEN THIS:

/s/ John Y. Hutcheson
JESSE R. OVERSTREET, JR.

VIRGINIA: IN THE CIRCUIT COURT OF MECKLENBURG COUNTY

STATE HIGHWAY COMMISSIONER OF VIRGINIA	:	
v.	:	DECREE
FRANK B. EASLEY and JOAN B. EASLEY, his wife,	:	

This cause was heard on May 16, 1973, upon the report of the commissioners and the exception thereto filed by the complainant, and was argued by counsel.

Upon consideration, whereof, the Court being of the opinion that the exception should be overruled and the commissioners report affirmed, the Court doth hereby ADJUDGE, ORDER, and DECREE that the exception to the report of the commissioners filed herein is hereby overruled and the report of the commissioners is hereby affirmed.

Counsel for the complainant objects and excepts to the entry of this order.

Enter: G. R. Mitchell Jr. Judge designate

Date: 5/26/73

I ask for this:

Jesse R. Overstreet, Jr.
Counsel for Frank B. Easley, et al

Seen, Objected, and Excepted to:

John Y. Hutcheson
Counsel for State Highway Commissioner of Virginia

Deed B-41
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VIRGINIA:

IN THE CIRCUIT COURT OF MECKLENBURG COUNTY

STATE HIGHWAY COMMISSIONER OF VIRGINIA	)	
v.	)	ORDER
FRANK B. EASLEY and JOAN B. EASLEY, his wife, Clarksville, Virginia	)	

This day came the State Highway Commissioner, by counsel, and moved the Court to make the transcript of this hearing part of the record pursuant to Rule 5:9(a) of the Rules of the Supreme Court of Virginia

UPON CONSIDERATION WHEREOF, it is hereby ADJUDGED, ORDERED, and DECREED, that

1) The transcript is made part of the record of the case.

2) The State Highway Commissioner file a copy of the transcript with the clerk of this Court within sixty (60) days after entering of final judgment.

Judge Designate

DATE: 6/14/73

I ASK FOR THIS:

Francis A. Cherry, Jr.
Assistant Attorney General
Counsel for State Highway Commissioner

I HAVE SEEN THIS:

Jesse R. Overstreet
Counsel for Landowner

VIRGINIA: IN THE CIRCUIT COURT OF MECKLENBURG COUNTY:

STATE HIGHWAY COMMISSIONER OF VIRGINIA v. FRANK B. EASLEY and JOAN B. EASLEY, his wife Clarksville, Virginia	ORDER CONFIRMING COMMISSIONER'S REPORT

THIS day came the State Highway Commissioner, by his attorney, and it appearing to the Court that the report of the commissioners hereinbefore appointed with the certificate of the Judge of this Court administering the oath to the said commissioners, was on the 4 day of Dec, 1971, duly returned to and filed by the Court herein, and that no exceptions have been filed to said report, and no cause having been shown against said report, the same is accordingly confirmed.

AND it appearing to the Court that the said commissioners ascertained that the value of the land taken herein was $ 800.00 and that the damages to the residue beyond the enhancement in value to the residue by reason of the taking, was $ 18,140.00, and it appearing that the said report should be confirmed; therefore, the Court doth approve, ratify and confirm said report in all particulars, and doth confirm unto the Commonwealth of Virginia the fee simple title to the following property:

(see attached sheet)

AND it appearing to the Court that the State Highway Commissioner has heretofore caused to be recorded in the Clerk's Office of this Court Certificate No. C-20852 for $ 511.00, and that the title to the aforesaid real estate thereby vested in the Commonwealth of Virginia, in accordance with the provisions of Sections 33-70.1 and 33-70.4 of the Code of Virginia of 1950, as amended, the Court doth Adjudge, Order and Decree that the State Highway Commissioner of

Virginia pay to the Clerk of this Court on behalf of Frank B. Easley and Joan B. Easley, his wife, and The Fidelity National Bank

the sum of $15,990.00, with interest at the rate of five per cent per annum on the sum of $18,429.00, this being the excess of the award over the amount represented by the aforesaid Certificate of Deposit, from the 22nd day of December, 19 71, the date on which the above mentioned certificate was duly recorded in the Clerk's Office, to the date upon which the principle sum is paid into Court; and the Court doth further order that the Commonwealth of Virginia be released from any liability by virtue of the recordation of the certificate aforesaid; and that the proceedings herein be recorded and indexed as provided by Section 33-67.1 of the Code of Virginia of 1950, as amended with reference to be made showing the book and page number of such recordation on the margin of the page where the said Certificate of Deposit No. C-20852 is spread.

AND the Court doth further order and direct that the costs herein, including $30.00 each to the commissioners appointed herein, namely: J. A. McCall, Marshall A. Yancey, Alfred L. Finch, J. H. Warren and W. M. Collins

and the sum of $_____ to _____

who were summoned and appeared but did not serve herein, shall be paid by the State Highway Commissioner of Virginia, and the same shall be charged and taxed by the Clerk of this Court as part of the costs herein as provided by law.

AND nothing further remaining to be done in this cause, the same is hereby stricken from the docket of this Court.

I ask for this

6/18/73

J. L. Whitten
Counsel for Petitioner

ENTER G. E. Mitchell Jr.
Judge pro hac vice

urt

Clerk O.B. 41
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6-19-73

VIRGINIA:

IN THE CIRCUIT COURT OF MECKLENBURG COUNTY

STATE HIGHWAY COMMISSIONER OF VIRGINIA Petitioner v. FRANK B. EASLEY and JOAN B. EASLEY, his wife Clarksville, Virginia Respondents	NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

NOTICE OF APPEAL

In accordance with Rule 5:6 of the Rules of the Supreme Court of Virginia, notice is hereby given that the State Highway Commissioner of Virginia, the Petitioner herein, will appeal to the Supreme Court of Virginia from the final order entered in this proceeding on June 18, 1973, by the Circuit Court of the County of Mecklenburg, and sets forth the following Assignments of Error.

ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the Respondent to present, over the objection of Petitioner's counsel, on the issue of damages to the residue, evidence of damage to Respondent's right of access due to the planned construction of curbing as part of the highway project because, as a matter of law, the limitation of a landowner's access by the construction of such improvements is not compensable as long as reasonable access is still afforded; and in the instant case reasonable access to Respondent's property manifestly was afforded.

TRANSCRIPT

A transcript of the evidence covering testimony and other incidents of the trial has been filed.

Respectfully submitted,

STATE HIGHWAY COMMISSIONER
OF VIRGINIA

By _____
Counsel

ANDREW P. MILLER
Attorney General of Virginia

WALTER A. McFARLANE
Assistant Attorney General

FRANCIS A. CHERRY, JR.
Assistant Attorney General

JOHN Y. HUTCHESON
Attorney at Law

CERTIFICATE

I hereby certify that a true copy of the above Notice of Appeal and Assignments of Error has been served on Frank B. Easley and Joan B. Easley by mailing a copy to the counsel of record, Jesse R. Overstreet, Clarksville, Virginia, 23927, this 5th day of July, 1973.

_____
Francis A. Cherry, Jr.

VIRGINIA

IN THE CIRCUIT COURT OF MECKLENBURG COUNTY

STATE HIGHWAY COMMISSIONER OF VIRGINIA Petitioner	))MOTION TO ENTER)FINAL ORDER CONFIRM-)ING REPORT OF)COMMISSIONERS
v.	
FRANK B. EASLEY and JOAN B. EASLEY, his wife Clarksville, Virginia Respondents	))))

Your Petitioner, State Highway Commissioner of Virginia, comes and moves the Court to enter a valid final order in this cause on the following grounds:

1) That Petitioner, desirous of appealing the award of the commissioners, filed his Notice of Appeal and Assigments of Error to appeal the order entered in this proceeding on June 18, 1973, entitled "Order Confirming Commissioners' Report", which order the Petitioner had been led to believe was the final order.

2) That it has subsequently come to the attention of counsel for the Petitioner that the aforesaid order entered on June 18, 1973, is invalid and in error: invalid because it was not endorsed by counsel for Respondent - Landowner; and in error in three particulars, to wit: it states that no exceptions were filed when Petitioner did file exceptions; it states that interest on the amount of the award in excess of the amount of the Certificate of Deposit shall be paid at the rate of five percent per annum when the correct legal rate is six per cent per annum; it states that the Report of the Commissioners was returned on December 4, 1971 when it was actually returned on December 4, 1972.

3) That the Decree entered May 26, 1973, overruling the exceptions and confirming the report of the commissioners does not constitute the final order subject to appeal in this case in that:

a) It fails to recite the award of the commissioners,

b) It fails to describe the subject property,

c) It fails to confirm title to the property in the Commonwealth,

d) It fails to require the State Highway Commissioner to pay the excess of the award over the amount of the Certificate of Deposit into the Clerk for distribution to the landowners.

e) It fails to direct the payment of statutory commissioners' fees.

f) It fails to require that the order be recorded and indexed in the land records of the Court.

4) That, therefore, no valid final order subject to appeal has ever been entered.

5) That, the Court should enter a final order confirming the report of the commissioners in order that the record of the proceedings be complete and in order that the Petioner may properly perfect his appeal.

Respectfully submitted,

STATE HIGHWAY COMMISSIONER
OF VIRGINIA

By John J. Beall, Jr.
of Counsel

John J. Beall, Jr.
Assistant Attorney General
Commonwealth of Virginia
1401 E. Broad Street
Richmond, Virginia 23219

CERTIFICATE

I hereby certify that a true copy of the above Motion to Enter Final Order Confirming Report of Commissioners has been served on Frank B. Easley and Joan B. Easley by mailing a copy to the counsel of record, Franklin M. Slayton, Security Building, 554 Main Street, South Boston, Virginia 24592, and Jesse R. Overstreet, Clarksville, Virginia 23927, this day of October, 1973.

John J. Beall, Jr.

Filed Oct. 12, 1973

N. G. Hutcheson, Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF MECKLENBURG COUNTY

STATE HIGHWAY COMMISSIONER OF VIRGINIA Petitioner v. FRANK B. EASLEY and JOAN B. EASLEY, his wife Clarksville, Virginia Respondents	MOTION pursuant to §8-348 and in nature of a writ coram vobis

Your Petitioner, by counsel, comes and moves the Court pursuant to §8-348, Code of Virginia of 1950 (as amended) and in the nature of a motion for a writ coram vobis to amend the order in this cause entered on June 18, 1973, by:

1) Striking the date "1971" appearing on the third line of the first paragraph on the first page of said order and substituting the date "1972."

2) Striking the portion of the first paragraph of said order which states, "and that no exceptions have been filed to said report, and no cause having been shown against said report, the same is accordingly confirmed and inserting in the place of such phrase, "and that exceptions have been filed by Complainant to said report and that such exceptions are herein overruled."

3) Striking the final paragraph of said order which states, "And nothing further remaining to be done in this cause, the same is hereby striken from the docket of this Court."

4) Striking the word "five" on the fourth line of the second page of said order and substituting the word "six".

This motion is made on the grounds that:

1) The two aforestated portions of the order entered June 18 constitute mere clerical errors clearly evident from the record of this case.

2) That the order entered June 18, 1973, was intended to be and did in fact act on the final order in this case and is the only order subject to appeal, and

3) That the persistence of the clerical errors in the record has caused confusion concerning the status of Petitioner's appeal of the final order entered June 18, 1973.

Your Petitioner further moves the Court that these amendments to the aforesaid order and the order pursuant to this motion should relate back to the date the order was entered, to wit: June 18, 1973.

Your Petitioner further moves the Court for an order requiring the Defendants to show cause why the aforestated motion should not be granted.

WHEREFORE, your Petitioner prays that the motions prayed for be granted.

Respectfully submitted,

STATE HIGHWAY COMMISIONER
OF VIRGINIA

By_____
Of Counsel

John J. Beall, Jr.
Assistant Attorney General
Commonwealth of Virginia
1401 E. Broad Street
Richmond, Virginia 23219

CERTIFICATE

I hereby certify that a true copy of the above Motion pursuant to §8-348 and in nature of a writ coram vobis has been served on Frank B. Easley and Joan B. Easley by mailing a copy to the counsel of record, Franklin M. Slayton, Security Building, 554 Main Street, South Boston, Virginia 24592, and Jesse R. Overstreet, Clarksville, Virginia 23927, this day of October, 1973.

John J. Beall, Jr.

Filed Oct. 12, 1973

N. G. Hutcheson, Clerk

Refused

VIRGINIA

IN THE CIRCUIT COURT OF MECKLENBURG COUNTY

STATE HIGHWAY COMMISSIONER OF VIRGINIA Petitioner v. FRANK B. EASLEY and JOAN B. EASLEY, his wife Clarksville, Virginia Respondents	ORDER CONFIRMING REPORT OF COMMISSIONERS

THIS day came the State Highway Commissioner, by his counsel, and it appearing that the report of the Commissioners herein before appointed and sworn according to law, was on the 4th day of December, 1972, duly returned to and filed by the Court herein, and that exceptions were filed to said report within the ten (10) day period as provided by law, which Exceptions are as follows:

"Exceptions are hereby tendered and filed to the report of the Commissioners in the above styled matter upon the ground that the awards for the value of the land taken and the damages to the adjacent property are contrary to the law and the evidence and are excessive, and especially upon the grounds that the Court, over the objection of the state, allowed the witness for the landowner to testify that the landowner would be entitled to damage to the residue of his land by the state placing traffic islands on the property acquired and other property of the state, and the Court refused to instruct the Commissioners that such acts of the state was (sic) not damage which (sic) the landowners could be entitled."

Such exceptions were heard by the Court on May 16, 1973, and were overruled. The State Highway Commissioner duly excepted to the Court's ruling on the Exceptions.

AND it appearing to the Court that the said commissioners ascertained that the value of the land taken herein was $800.00 and that damages to the residue beyond the enhancement in value to the residue by reason of the taking, was $18,140.00, and it appearing that the said report should be confirmed; therefore, the Court doth approve, ratify and confirm said report in all particulars, and doth confirm unto the Commonwealth of Virginia the fee simple title to the following property:

"Parcel 052: Being as shown on Sheet 13 of the plans for Route 58, State Highway Project 0058-058-110-RW-201 and lying on the northwest (left) side of the proposed westbound land centerline and adjacent to the northwest existing right of way line of present Route 58, from the northeast right of way line of present Route 1127 opposite approximate Station 1045 + 23 to the southwest right of way line of present Route 1125 opposite approximate Station 1047 + 12, and containing 0.02 acre, more or less, land.

Parcel 053: Being as shown on Sheet 13 of the said plans and lying on the northwest (left) side of the proposed westbound land centerline and adjacent to the northwest existing right of way line of present Route 58, from the northeast existing right of way line of present Route 1125 opposite approximate Station 1047 + 63 to the lands of C. M. Nunn opposite approximate Station 1049 + 12, and containing 0.014 acre, more or less, land; together with the right and easement to use the additional area shown for cut and/or fill slopes as being required for the proper execution and maintenance of the work, containing 0.001 acre, more or less. Said easement will terminate when the landowner, his heirs or successors, grades the property so that there no longer exists cut and/or fill slopes, thus eliminating the necessity for maintenance of said slopes.

Parcels 052 and 053 together contain 0.034 acre, more or less, land.

For a more particular description of the land or interest therein, taken, reference is made to a photo copy of said Sheet 13, showing outlined in RED the land taken in fee simple, in GREEN, permanent drain ditch easements, and in ORANGE, temporary construction easements."

And it appearing to the Court that the State Highway Commissioner has heretofore caused to be recorded in the Clerk's office of this Court Certificate No. C-20852 for $511.00, and that the title to the aforesaid real estate thereby vested in the Commonwealth of Virginia, in accordance with the provisions of Sections 33.1-120 and 33.1-122 of the Code of

Virginia (1950) as amended, the Court doth ADJUDJE, ORDER, and DECREE that the State Highway Commissioner of Virginia is not to pay to the Clerk of the said Court on behalf of said Frank B. Easley and Joan B. Easley, his wife and the Fidelity National Bank the sum of $18,940.00, which is the amount of the award, but does not include interest, until such time as the appellate processes have been completed or until such time as Notice has been given by the State Highway Commissioner that no further action will be taken, then an Order will be entered directing payment of said sum, with interest at the rate of six per cent per annum on the sum of $18,429.00, this being the excess of the award over the amount represented by the aforesaid Certificate of Deposit, from the 22nd day of December, 1971, the date on which the above mentioned certificate was duly recorded in the Clerk's office to the date upon which the principal sum is paid into Court.

And the Court DOTH FURTHER ORDER that the Commonwealth of Virginia be released from any liability by virtue of the recordation of the aforesaid certificate; and that the proceedings herein be recorded and indexed as provided by Section 25.46.27 of the Code of Virginia (1950), as amended, with reference to be made showing the book and page number of such recordation on the margin of the page where the Certificate of Deposit No. C-20852 is spread.

And it appearing to the Court that the statutory commissioners' fees have previously been paid by the State Highway Commissioner no further order with respect to them is herein made.

All of which is certified to the Clerk of the Circuit Court of the County of the County of Mecklenburg who is hereby directed to enter forthwith the foregoing Order in the appropriate order book of his office as of the day of 1973.

Nothing further remaining to be done, this case is dismissed.

Refused 10-16-73

G. E. M., Jr.

Judge Designate

John J. Beall, Jr.
Counsel for the State Highway Commissioner

Frank M. Slayton
Counsel for Frank B. Easley and Joan B. Easley

VIRGINIA

IN THE CIRCUIT COURT OF MECKLENBURG COUNTY

STATE HIGHWAY COMMISSIONER OF VIRGINIA Petitioner	)	
v.	)	
FRANK B. EASLEY and JOAN B. EASLEY, his wife Clarksville, Virginia Respondents	)	ORDER

This day came the parties again by their attorneys and the court, having considered the motion of Petitioner to amend the order entered in the cause on June 18, 1973, pursuant to §8-348 and in the nature of a writ coram vobis, is of the opinion to and does sustain said motion on the grounds that:

1) The order entered June 18 contains clerical errors clearly evident from the record of this case.

2) The order entered June 18, 1973, was intended to be and did in fact act as the final order in this case and is the only order subject to appeal.

3) The existence of these clerical errors in this order has caused confusion concerning the status of Petioner's appeal.

UPON CONSIDERATION WHEREOF, the Court doth

ADJUDGE, ORDER, AND DECREE:

1) That the date "1971" appearing on the third line of the first paragraph of the first page of said order be deleted and the date "1972" be substituted therefor.

2) That the portion of the first paragraph of the aforsaid order entered June 18, 1973, which states, "and that no exceptions have been filed to said report, and no cause

having been shown against said report, the same is accordingly confirmed" and inserting in the place of such phrase, "and that exceptions have been filed by the State Highway Commissioner by counsel to said report and that such exceptions have been overruled by interlocutory order entered May 26, 1973."

3) That the final paragraph of the order which states, "and nothing further remaining to be done in this cause, the same is hereby striken from the docket of this Court" be striken.

4) That the word "six" be substituted in place of the word "five" immediately preceding the words "per cent" in the fourth line of the second page of the aforesaid order.

5) That this order shall relate back and be effective as of June 18, 1973, and shall become part of the order entered on that date which order in the final order subject to appeal in this cause.

6) That the Petitioner by counsel, has excepted to the final order of June 18, 1973, as amended for clerical mistake by this order, and has expressed his intention of applying for a writ of error; therefore, this cause is continued on the docket.

ENTER 10/14/73

G. E. Mitchell Jr.
Judge Designate

John J. Beall Jr.
John J. Beall, Jr.
Counsel for the State Highway Commissioner

Frank M. Slayton
Frank M. Slayton
Counsel for Frank B. Easley and Joan B. Easley

objects and excepts to the entry of this or any order for the Reason that the Court is without jurisdiction because of the passage of time in excess of 21 days (Rule 1:1). The order is a nullity. The order goes far far as a Nunc Pro Tunc Order and is contrary to law and for the reasons stated in the Memo filed herein. Frank M. Slayton after the Record.

TRUE COPY, TESTE: G. E. Mitchell Clerk
Circuit Court County of Mecklenburg, State of Virginia

VIRGINIA:

IN THE CIRCUIT COURT OF MECKLENBURG COUNTY

STATE HIGHWAY COMMISSIONER OF VIRGINIA Petitioner	)	
v.	)	NOTICE OF APPEAL AND ASSIGNMENT OF FURTHER ERROR
FRANK B. EASLEY and JOAN B. EASLEY, his wife Clarksville, Virginia Respondents	)	

NOTICE OF APPEAL

In accordance with Rule 5:6 of the Rules of the Supreme Court of Virginia, notice is hereby given that the State Highway Commissioner of Virginia, the Petitioner herein, will appeal to the Supreme Court of Virginia from the corrected final order entered in this proceeding on October 16, 1973, correcting the alleged final order dated June 18, 1973, by the Circuit Court of the County of Mecklenburg, and sets forth the following additional Assignment of Error to that Assignment previously submitted July 5, 1973.

FURTHER ASSIGNMENT OF ERROR

1. The trial court erred in refusing to enter the final order proferred by Petitioner October 16, 1973, not accepting Petitioner's argument that the June 18, 1973 "final" order was invalid in addition to being erroneous in three particulars.

TRANSCRIPT

A transcript of the evidence covering the October 16, 1973

hearing will be filed.

Respectfully submitted,

STATE HIGHWAY COMMISSIONER
OF VIRGINIA

By _____
Counsel

ANDREW P. MILLER
Attorney General of Virginia

WALTER A. McFARLANE
Assistant Attorney General

FRANCIS A. CHERRY, JR.
Assistant Attorney General

JOHN J. BEALL, JR.
Assistant Attorney General

CERTIFICATE

I hereby certify that a true copy of the above Notice of Appeal and Assignment of Further Error has been served on Frank B. Easley and Joan B. Easley by mailing a copy to the counsel of record, Jesse R. Overstreet, Clarksville, Virginia, 23927, and Franklin M. Slayton, Security Building, 554 Main Street, South Boston, Virginia, 24592, this 17th day of October, 1973.

_____
John J. Beall, Jr.

(A commission of five was duly empaneled, and after having viewed the property, the following was had.)

PHILLIP S. PURDUE, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HUTCHESON:

Q. Mr. Purdue, I believe you divided these two lots and appraised them separately. We will ask you to put the values down and then add them together.

A. The Easley property?

Q. The Easley property. You have got two separate appraisals. Suppose you testify to them separately and then add them together.

A. All right, sir.

Q. Will you take the store property? Will you show them the diagram on the store property?

A. All right, sir.

Q. Do you have that diagram?

A. Yes, sir. Gentlemen, here in miniature is pretty much what is shown on the map sheet depicting, of course, what is to be done on the ground in most detail, but not all. For instance, here is a 30 foot opening to this property. Here is

a 50 foot opening. This is a concrete island that will run around here. It's about 60 feet in length around this corner, and it will be one around 60 feet in this corner. The area you see delineated in red represents the area in acquisition which amounts to a width of two feet, and it contains .02 acres.

This building sat 37 feet from this existing right of way line before any acquisition, and of course, its set-back will be reduced to 35 feet.

Q. All this lot owned by Mr. Easley, it goes all the way back?

A. Yes, sir, this plat shows it pretty accurately; 185 feet of frontage on 58, down Easley Street 200 feet, down secondary route 1125 is 300 feet.

Q. 1125 is to the east of this property?

A. Yes, sir.

Q. And you have a corner there, cut-off down to 1125?

A. Yes, sir, and this point will be 35 feet back from the existing right of way line, the cut-off that Mr. Hutcheson refers to, but that area is included in that two one-hundredths I recently testified to.

Q. All right, coming back to the stand; Mr. Purdue, when you went there, do you know when the property was actually taken by the State; when they filed the certificate?

A. December 22, 1971.

Q. And your appraisal was made as of that time?

A. Yes, sir.

Q. Now, the commissioners were there on the land today and saw that the pumps had been changed from where they were when you appraised it. Do you know where the pumps were then?

A. Well, there was a service station island, two pumps on it as I recall, directly out in front of the main service station, or the grocery store building. It's no reason why in the after situation those pumps couldn't remain in exactly the same location. The set-back remaining will be entirely adequate for service island to be located in front of the building, and I would say that any relocation would be an attempt to modernize and capture greater monthly volume of gallonage than has been experienced in the past. I was told it was only a little over 1700 gallons a month, which is extremely low for a facility of this type.

Q. Is it anything else you think the commissioners ought to know about the type of the property there, before we go into the values?

A. Well, sir, over and above the two one-hundredths of an acre of land taken, which I valued at a rate of $12,500.00 an acre for the purpose of acquisition, there was also 20 square feet of tar and/or gravel surface parking area, or driveway out there, which I considered in the acquisition.

And in addition to that I had an estimated 56 square feet of concrete paving. I have an estimate on that also. That would cover all the total acquisition. There is no easement in this case. I estimated the gravel surface material taken at $33.00, and the concrete at $42.00, giving me $75.00 for improvements in the acquisition. My estimate on the two hundredths of an acre is $250.00, or a total of $325.00.

Q. Did you find any damage to the residue?

A. None whatsoever. As a matter of fact, I would think that the new highway, and providing for the orderly flow of traffic; by this I mean, ingress and egress, would be a good improvement of this property.

MR. HUTCHESON: Witness with you.

CROSS-EXAMINATION

BY MR. OVERSTREET:

Q. Mr. Purdue, would you come over here, please, sir, and let's discuss these plans with the commissioners. You have got $325.00 for the value of the land taken?

A. At a rate of twelve-five an acre.

Q. But, you say there is no damage to the property at all?

A. Not in my judgment, no, sir.

Q. Now, do you know this is an island right here, is that correct?

MRS. JACQUELINE E. SCRUGGS
Court Reporter
Cullen, Virginia
Phone: 542-5465 or 542-5690

1 MR. HUTCHESON: We object to any question on
2 that. The island; the flow of traffic, that's police
3 protection for the landowner. The landowner has nothing
4 to do with that. The state gives him a right of in-
5 gress and egree, but so far as the police power, he
6 has nothing to do with it.
7 THE COURT: It has nothing to do with the police
8 power, but if it's not worth as much.....
9 MR. HUTCHESON: If he goes in there he can say
10 the traffic will be decreased, and.....
11 THE COURT: That's not an item.
12 MR. HUTCHESON: And this is not an item. If
13 you go into the management of the highway, he can't
14 do that. He has no right to say how the highway will
15 be managed. They give him access and the state thinks
16 it's reasonable. He had nothing to do with whether
17 it's two lane, three lanes or five lanes; so far as
18 he's concerned.
19 THE COURT: It's just a question of whether it
20 damaged the property; before and after. That was
21 in December, you said, 1971?
22 MR. HUTCHESON: Traffic could damage the property,
23 or you could take traffic away from it and.....
24 THE COURT: No, the traffic flow couldn't.

1 MR. HUTCHESON: The way the highway handles the
2 property for the ingress and egree, he has no right
3 to complain on that.
4 THE COURT: If he has the same egress and ingress
5 as he had before.
6 MR. HUTCHESON: He doesn't have unlimited egress,
7 never did.
8 THE COURT: That will be a question for the
9 commission.
10 MR. HUTCHESON: As long as it's on the highway
11 property they could control the ingress and egress.
12 THE COURT: Yes, they could have put up a guard
13 rail, but they didn't do it. They may have damaged
14 the property by putting up a guard rail.
15 MR. HUTCHESON: He can't complain on that.
16 THE COURT: If they take any part of it,he can.
17 MR. OVERSTREET: They are putting it on part
18 that they have taken.
19 MR. HUTCHESON: He never had unlimited access.
20 If they cut his access down.....
21 THE COURT: He wouldn't be entitled to any more
22 than he had, but that would be up to the commissioners.
23 MR. HUTCHESON: We don't agree with you on that.
24 THE COURT: All right, you save the point.

1 MR. HUTCHESON: All right. Here's another
2 thing, he has changed his property since the take.
3 THE COURT: Any changes he made since that was
4 his own doing. They are not responsible.
5 MR. HUTCHESON: The state is not responsible for
6 anything after the take.
7 THE COURT: Not after December, 71.
8 MR. HUTCHESON: The change was made in August.
9 THE COURT: That was his change. They haven't
10 anything to do with that. It's the condition of the
11 property in December, 1971.
12 MR. OVERSTREET: I don't know that the commissio-
13 ners have any evidence on the changes. Do you want to
14 agree on that?
15 MR. HUTCHESON: You agreed this morning it was
16 in August.
17 MR. OVERSTREET: Yes, sir. Do the commissioners
18 know what the changes are?
19 MR. HUTCHESON: He testified when the take was;
20 that the pumps were in front of the store then.
21 THE COURT: Mr. Purdue says they could still stay
22 there.
23 MR. OVERSTREET: They have already been moved.
24 THE COURT: The highway didn't have anything to

1 do with it.

2 MR. OVERSTREET: We are not claiming any damages

3 for the moving of the pumps from there over here.

4 THE COURT: That's right.

5 MR. OVERSTREET: Because the man, he rented it

6 to somebody else, and the pumps were moved. They moved

7 them.

8 THE COURT: That was to increase the gallonage.

9 That's what Mr. Purdue said.

10 BY MR. OVERSTREET:

11 Q. All right, sir, so the present plan is that they

12 have one driveway here and one here, is that correct?

13 A. Fifty feet here and 30 feet there, yes, sir.

14 Q. And, do you know how far it is from this building

15 out to there?

16 A. No, sir, I don't have that measurement, but I do

17 know that this building is about 35 feet, set-back, after the

18 taking, and this building as I recall it, was just about on

19 the line, so straight out you would have about 35 feet, and

20 opposite you would have a little bit less clearance here.

21 Q. That's a drive-in restaurant?

22 A. Yes, sir.

23 Q. And all this area around here now is used for

24 parking?

A. Yes, sir.

Q. And I believe it's all paved or graveled all the way up here?

A. Well, it's a conglomeration of material. I'd say generally and largely it's gravel.

COMMISSIONER: Can I ask a question?

THE COURT: Yes, sir.

BY COMMISSIONER:

Q. Is this the property line here?

A. This is the...This happens to be, in the before situation, it's the landowner's property line and also existing right of way line along the secondary 1125.

Q. I was thinking this was the right of way line?

A. This is the center line of the existing right of way.

Q. This?

A. Yes, sir.

Q. What is the width of that right of way line there? The right of way line comes all the way over here, and this is not the right of way line there?

A. This is the center line of secondary route 1125 right here; if I'm not mistaken. It's some conflict here between the landowner's property line and the right of way claimed by the Commonwealth of Virginia, since I think it came

about in the Byrd Bill of 1932, if I recall correctly, which took some land of this type, and existing highways and rights of way were established at 30 feet beginning at that time, and I think there is some...That's where the conflict is, between here and here, but for all practical purposes, at least in my judgment, the right of way width is 50 feet, 20 feet more than acquired, than was acquired in the Byrd Act. Whether that came about by an action of this type or another way, I have no way of knowing.

BY MR. OVERSTREET:

Q. In other words, this island comes partly over in the existing right of way?

A. Yes, sir. And this corner right here where you see the red, you notice it is on the landowner's property line, and construction extends it into what is claimed as public right of way.

Q. Would you put your scale on that and give us the reading on the distance from the building to the take; to the nearest corner of the building?

A. I get about 17 feet there, essentially the same measurement from the closest point along the raise of the curb to the corner of the building; approximately 17 feet.

Q. Thank you, sir. I believe that's all on that parcel.

A. You started out asking me, Mr. Hutcheson, to put

these figures separately and add them together. We don't want to forget to do that.

RE-DIRECT EXAMINATION

BY MR. HUTCHESON:

Q. Are you through with this one now, or would you rather go back and get the other one too?

A. We'll do it now, if you like. These figures involved parcel 053 which is the other property belonging to Mr. Easley, and Mr. Hutcheson asked me to give the figures I have estimated for the take, first. In the fee acquisition I have .014 acres, which I estimated at the same unit value of $12,500.00 an acre; will give you a figure of $175.00 for that land taken. We have an easement in this situation, which I will describe later. It amounts to .001 acres, and I estimated it's worth at 10 percent of fee value. That calculation works out to a dollar and a quarter. Also, I have 91 square feet of gravel parking area, depreciated value worked out to $9.00; the total of land and easements and improvements taken, by my estimation was $186.00, which is a rounded figure.

Q. Now, do you have your diagram that you are testifying to now?

A. I have it.

Q. Will you show that to them?

A. This improved property is located just east of the

1 store property, east of secondary route 1125. The parcel
2 has a frontage on Route 58 and has a depth running back along
3 Secondary Route 1125, 300 feet in depth. The take is similar,
4 you see it delineated in red, and possibly you can't make out
5 that; this is actually orange and not red, so the little ease-
6 ment I referred to begins about 50 feet off of this corner at
7 a point and widens out to roughly two feet on the east property
8 line, and it's to be imposed inside the take line. The take
9 line would be in here, and it's about two feet in width, widens
10 out on this corner and runs about 35 feet to this point.
11 Q. What is that easement that you mentioned?
12 A. Sir?
13 Q. Easement for what?
14 A. It's a slope easement.
15 Q. That's not the take line?
16 A. No, sir, it's inside the take line.
17 Q. Inside the take line?
18 A. Right. Now, in the before situation, meaning before
19 any acquisition by the State Government, this building sat back
20 34 feet from this right of way line and about 57 feet from the
21 improved surface of the road. After this acquisition, of
22 course, it will have a 32 foot set-back, which for all practi-
23 cal purposes would afford the same utility as it enjoyed before,
24 in my opinion. In this easement I referred to, it contained

.014 acres. The take, the easement is .001 acres, and I gave you both those figures before.

Q. Do you conceive of any damage to the residue?

A. Not by any stretch of my imagination; no, sir.

Q. He had plenty of land for parking. You are taking very little parking area, and if he wanted more land to park, he had it?

A. Well, I couldn't relate the land of the take to any parking ability.

MR. HUTCHESON: Witness with you.

RE-CROSS EXAMINATION

BY MR. OVERSTREET:

Q. Mr. Purdue, would you put the scale on this? This is the highway plan. Measure this again from here to the building, please, sir?

A. All right, sir. I'm going to do that, but I will tell you where I got my figure from; by pulling it on the ground from stake to building. This building may or may not be accurately spotted on this plat.

Q. I see.

A. And more often than not, it's not. That scales about 30 feet, two feet off.

Q. Do you recall whether it's a concrete walkway in front of the building?

A. Yes, sir, there was.

Q. All right, and what is this right here?

A. This thing here?

Q. No, the distance between the corner of the building and that?

A. In here?

Q. Yes, sir.

A. About, I'd say 13 to 14 feet. As you can really agree that's a right wide line.

Q. Well, the commissioners saw it anyway. And you don't think it's any damages there on what it's like now?

A. Here's the way I look at it? Area width, you couldn't measure any difference in the utility. In the after situation, after construction, traffic flow is being provided for in an orderly manner, as shown on the plan. What could be damages about organizing the flow of traffic.

MR. OVERSTREET: Thank you.

MR. HUTCHESON: That's our case.

RAY WEST, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. OVERSTREET:

Q. Mr. West, we are now considering the Easley property, and first the parcel that's known as, designated as

052. That's the one with the store and the restaurant on it.

A. All right.

BY COMMISSIONER:

Q. What is that parcel number?

A. 052.

MR. HUTCHESON: 052 and 053.

WITNESS:

A. I did an appraisal on this place, parcel 052, and it consisted of lots, eight lots; nine lots, I believe. One lot was, I figured by the acre, 16 hundredths of an acre; lot number 1, I believe, which ran $6,100.00, and then we had lots two through nine, which are 25 foot lots bordering on Highway 58; 200 feet. I figured that by the front footage; $200.00 a front foot, $40,000.00. I figured the Penguin Building $16.00 a square foot; depreciated it at a thousand dollars; came up with $8,912.00. It's a separate building there containing bathrooms; figured that by the square footage, $10.00 a square foot, $1,900.00; depreciated it about $250.00, left $1,650.00; pump house $200.00. I just put a flat figure on that. And the store building, I figured the lower level floor on that at $14.00 a square foot, $26,432.00; upper level floor, which contained two four-bedroom apartments with bathroom for each apartment; figured that on a basis of $12.00 a square foot, $22,656.00. The entire store building I depreciated $3,000.00,

which left $46,088.00. There is a new gas station attendant's room, which was put on the store. I added that on without any depreciation which brought us back to a total on the store of $46,472.00.

BY MR. HUTCHESON:

Q. When was that addition put on, do you know?

A. Sir?

Q. When was that addition put on, do you know?

A. Within the last month or so, I would think.

MR. OVERSTREET: We are willing not to consider whatever value you put for that attendant's room.

THE COURT: After they filed the certificate?

MR. OVERSTREET: Yes, sir.

BY MR. OVERSTREET:

Q. So, whatever figure you had for that, just subtract it from your total.

A. All right. Well, the total for the store, then, $46,088.00. I figured the take, which was .02 acres, at $30,000.00 per acre, which was $600.00, total. That's for the take, and damage to the Penguin, because of effective loss of driveway space, $2,000.00, and anticipated curbing there, $3,000.00.

Q. What is that?

A. Curbing. Damage to Penguin, $2,000.00 because of

take which amounts to loss of parking space, and curbing on the plans by the state, $3,000.00 loss because of curbing.

MR. HUTCHESON: We object to that, of course.

THE COURT: Curbing, does that belong to the state?

MR. OVERSTREET: This is exactly what we were talking about up here. It's an element of damage. The land they are taking, they are putting curbs on it, and they are destroying the access to the business.

THE COURT: I think that's too remote there.

MR. OVERSTREET: Judge, you just ruled they could hear it.

THE COURT: They can hear whether he had as much outlet as he had before.

MR. OVERSTREET: Well, he's saying because it doesn't, it is damage. That's what the point is.

MR. HUTCHESON: We object and note an exception.

BY MR. OVERSTREET:

Q. And that makes a total of how much?

A. Well, the store, drive, effective loss.....

MR. HUTCHESON: Are you going to put the curbing in, or not put it in.

THE COURT: He's putting it in as limiting access to the building.

1 WITNESS:

2 A. Loss of driveway on it due to take, on the store
3 portion of the property, $2,000.00 damages, and the curbing
4 there that limits the access to the building, damage of $3,000.00;
5 total damage to the Penguin and store, $5,000.00 each, or
6 $10,000.00 for the two, plus actual take value at $600.00;
7 total take, damage, store and Penguin, $10,600.00.

8 Q. Now, Mr. West, turning to parcel designated as 053,
9 the parcel where the laundramat and the large brick building is,
10 would you tell us what you found for the value and damages,
11 if any?

12 A. Yes, sir. This is the large brick building on the
13 property east of the road; six lots 25 by 300 feet deep; 25
14 feet wide, 300 feet deep, total width fronting on Highway 58,
15 150 feet. I figured the land value here at $200.00 a front
16 foot on Route 58 or $30,000.00. The building,which is rather
17 large, brick building, 60 feet by 75, I figured this at $14.00
18 a square foot and came up with $63,000.00, which I depreciated
19 by $3,000.00, leaving a total building value of $60,000.00;
20 including the land $90,000.00.

21 The take, .014 acres, I figured out at $30,000.00 an
22 acre, $420.00. That's the take value. The easement value was
23 .001 acre easement, $30.00, and loss of parking area for custo-
24 mers in front due to the take and easement, $5,000.00. And

1 loss of effective driveway due to curbing being installed,
2 $10,000.00, giving a total take, easement and damage, $15,450.00.
3 Q. Mr. West, in front of that building is there room
4 enough to use that for parking after the construction, or will
5 there be room enough?
6 A. I think the take and easement will totally elimi-
7 nate parking on the front of the building on Highway 58 side.
8 Q. Is it anywhere else around there for parking space?
9 A. Not really; no, what I'm thinking is it will almost
10 eliminate this business for the plan used.
11 Q. If I can hold this where the commissioners can
12 see it, it shows two entrances. If traffic comes in either
13 one, is it room to turn around and pull back into the road?
14 A. No, you will have to back out.
15 Q. Back out into the four lane highway?
16 A. Into the four lane highway.
17 Q. And then you will have to be parked exactly oppo-
18 site the entrance to do that?
19 A. Right.
20 MR. OVERSTREET: That's all. Answer Mr.
21 Hutcheson.
22 CROSS-EXAMINATION
23 BY MR. HUTCHESON:
24 Q. Now, your take there then is $450.00, is that

correct?

A. $420.00 for the take and $30.00 for the easement, and $5,000.00 for loss of parking and $10,000.00 because they put the curbing.

Q. $10,000.00 together, is that what it is? You have got $5,000.00 loss of parking.....

A. And $10,000.00 for curbing; that makes a total of $15,450.00.

Q. What is the damage? You said $5,000.00 loss of parking, $10,000.00 for curbing and $30,000.00 for the easement, is that what you said?

MR. OVERSTREET: No.

MR. HUTCHESON: What did he testify to?

MR. OVERSTREET: $30.00 for the easement.

BY MR. HUTCHESON:

Q. $5,000.00 for the loss of parking and $10,000.00 because of curbing then $420.00? $15,030.00 for the damages, is that correct?

A. $450.00 for the take, $15,000.00 for damages.

Q. $15,000.00 damages? Mr. West, in this damage did you consider the pumps in front of the filling station or west of the store there?

A. I didn't get that question.

Q. Where did you consider the pumps, gas pumps?

1 Did you figure it on the west where they are now, or in front
2 of the station where they used to be?
3 A. I don't know which would be safer, really.
4 Actually I don't believe...I believe those pumps, if the curbing
5 is put in there, will have to be moved from where they are now.
6 Q. Where they are now?
7 A. Yes, sir.
8 Q. Suppose they were in front of the filling station
9 where they used to be, wouldn't anything have to be done then,
10 would it?
11 A. With the curbing that's going to be put there I
12 don't know if they could get to them now.
13 Q. You mean two feet would change the whole situation?
14 It would change the whole lot with the curbing?
15 A. I think the curbing is a lot of the objection.
16 Q. You mean now you can park on the state's right of
17 way and after you cant? Is that what you are saying?
18 A. Well, not really, but I'm talking about access to
19 the facility this man has here; the access of the public to
20 these buildings.
21 Q. Do you consider he should have access all the way
22 on his road frontage and should not be restricted? Is that
23 where you put the damage?
24 A. Well, that's where he was before this take and

easement came along. I don't know. I'm not prepared to argue the legal aspect of that.

Q. That's where you put your damage, because he is limited in his access to the highway, is that correct?

A. Sir?

Q. You put your damage because it is limiting his access to the highway?

A. Right.

MR. HUTCHESON: If Your Honor pleases, I move this testimony be stricken. The landowner has no right to unobstructed access to the highway.

THE COURT: I think the commissioners understand and know how to value it. Part of your objection is all right, but I overrule the whole objection, because I think the commissioners can evaluate it.

MR. HUTCHESON: We except. That's all.

THE WITNESS STANDS ASIDE:

THE COURT: Anything else you want to say, John?

MR. HUTCHESON: No, sir.

THE COURT: All right, you all can go back and consider your award.

(Whereupon the commissioners retired to consider their award thereafter returning with the following award: Amount for the land taken $800.00; damages to the residue $18,140.00; total award $18,940.00.)

(Whereupon the commissioners were excused from the courtroom, and the following was had.)

MR. HUTCHESON: If Your Honor pleases, we move to set aside the award as excessive and allowing improper evidence before the commissioners and excluding proper evidence.....

THE COURT: Well, you have ten days to file exceptions. This is not a law case.

MR. HUTCHESON: I reckon that's the way it ought to be handled.

THE COURT: File your exceptions, and we'll set a date that's convenient to hear it.

.....

1 MR. BEALL: Judge Michael, the Commonwealth of
2 Virginia, the State Highway Commissioner, is here today to ask
3 you to enter the final order in this case on the grounds that the
4 order that was entered June 18, 1973, was invalid--invalid be-
5 cause it was not endorsed by counsel of both sides and also be-
6 cause it's in error or several particulars, the main one being
7 that no exceptions had been argued and in fact they had. The
8 Commissioner feels by virtue of Cofer v. Cofer, 205 Virginia 834,
9 that the order complained of is in fact invalid and that you, as
10 the Court hearing the case, have the power to correct that in-
11 validness and enter a final valid order. It is my understanding
12 that you feel that this approach should not be taken and that you
13 are willing to enter an order correcting nunc pro tunc the June 18
14 order and instead of entering a completely new order to your re-
15 versal, to enter a completely new final order. The State Highway
16 Commissioner respectfully excepts and would propose in the alter-
17 native that you enter an order correcting the June 18 order re-
18 peating the fact that the Commonwealth, the Commissioner, did,
19 in fact, offer exceptions and they were argued on interest rate
20 to the landowner six per cent (6%) on the excess. The date of
21 the Commissioner's hearing was December 19, 1972, not 1971 and
22 I believe counsel for the landowner has some comments and also

1 arguments to offer.

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3 MR. SLAYTON: The counsel for the landowner objects
4 and excepts to the entry of any order by the Court here today for
5 the reason that the order complained of entered by the Court on
6 June 19, 1973, was an order endorsed by the Counsel for the
7 Highway Department and was questioned by the Highway Department
8 for the reason that Rule 1:1 makes it abundantly clear that the
9 Court lost jurisdiction over this matter after the expiration of
10 twenty-one days, during which time, the Highway Commissioner had
11 ample opportunity to submit to the Court for a strict modification
12 or other changes it wished made to the June 18 order and failed to
13 do so within the time prescribed by rule. It's the position of
14 Counsel for the landowner that anything that is done here by the
15 Court is a nullity and the Court should take no further action.
16 The position of the Counsel for the landowner is that whether or
17 not Counsel should have been afforded an opportunity to endorse
18 a June 18 order was a matter solely within the discretion of the
19 Court and neither Counsel for the landowner or the Commissioner.
20 The landowner complains that the Court in entering the June 18
21 order abused the discretion which is given the Court in a process
22 of Rule 1:13 of the Court. I might point out to the Court some

1 matter of inference that these Part 1 Rules are general rules
2 applicable to all proceedings in trial court and are fully appli-
3 cable to the decision which is before the Court today. Counsel
4 also objects and excepts to the entry of this order because, as
5 has been stated by Counsel for the Commissioner of the Highway
6 Department of Virginia, this order purports to be a nunc pro tunc
7 order and the entry of this order clearly exceeds the scope of
8 nunc pro tunc orders as set out by the Supreme Court in the case
9 of Duncan v. Carson, 127 Virginia 306, in which the Supreme Court
10 in that case held that nunc pro tunc orders are entered solely to
11 make the record show something which actually took place in the
12 former day in the Court and to correct mistakes in writing which
13 may be safely made, but in entering these orders, the Court can
14 not correct omissions or oversights for whatever reason they may
15 have occurred. Counsel for the landowner further states that
16 because the Court no longer has jurisdiction over this case, it
17 does not have the authority to enter any order. Rule 1:1, as
18 the Court is aware, states that final judgments, orders and de-
19 crees shall remain under the control of the Trial Court and sub-
20 ject to be modified or vacated for twenty-one days after the date
21 of entry, and no longer. The time having clearly run, Counsel
22 for the landowner reiterates its position that this Court is not

in a position to do anything in this matter. The record indicates that the Court in May of 1973 heard arguments on exceptions filed in December of 1972 by Counsel for the Department of Highways and by an order entered twenty-sixth, overruled those exceptions and confirmed the report of the Highway Commission. The Counsel for the Highway Department, subsequently presented to the Court an order endorsed by him which did not state any exceptions and which was entered by the Court. It's the position of the landowner that the burden is on Counsel to state--to pursue whatever exceptions for appeal personally he intended to pursue and the burden is not upon the Trial Court to take it in issue. I have in that regard, and it's entirely within the authority of Counsel, who was solely designated by the Highway Commission and the certificate filed in this case recorded in Deed Book 215 69 in the Circuit Court of Mecklenburg County, to make the terms as to whether or not the appeal would be pursued. Counsel would also point out to the Court that the exceptions filed are not the assignment of error relied upon by the Attorney General in a notice of appeal which has been filed here. And Counsel for the landowner would also respectfully ask the Court to receive a memorandum tendered by him today having been dated today made a part of the record in this proceeding and the objections filed to

1 the entry of any order.

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7 STATE OF VIRGINIA,

8 COUNTY OF MECKLENBURG, to-wit:

9 I, Jane K. Metcalf, Court Reporter, do hereby certify that

10 the foregoing is a true and accurate transcript of the captioned

11 proceedings, reported and thereafter transcribed by me to the

12 best of my abilities.

13

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16 Court Reporter.

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IN THE SUPREME COURT OF VIRGINIA:

STATE HIGHWAY COMMISSIONER OF VIRGINIA,	Appellant	
vs.		MOTION TO DISMISS
FRANK B. EASLEY and JOAN B. EASLEY,	Appellees	

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

Counsel for Frank B. Easley and Joan B. Easley, respectfully moves the Court to dismiss the appeal of the State Highway Commissioner for the following reasons:

1. The order entered by Judge G. E. Mitchell, Jr., dated October 16, 1973, is null and void because the Court was without jurisdiction to enter such an order.

2. The order entered by the Judge of the Circuit Court of Mecklenburg County, Virginia, on June 18, 1973, endorsed by counsel for the State Highway Commissioner was the valid final order of the Court to which no exceptions were stated or objections filed.

3. The Nunc Pro Tunc Order, if within the jurisdiction of the trial court, is invalid because it attempts to do more than to correct clerical errors.

FRANK B. EASLEY and JOAN B. EASLEY

By Frank B. Slayton
Counsel

VAUGHAN, SLAYTON AND BENNETT
Attorneys at Law
South Boston, Virginia

JESSE R. OVERSTREET, JR.
Attorney at Law
Clarksville, Virginia

C E R T I F I C A T E

I, Frank M. Slayton, of Vaughan, Slayton and Bennett, Attorneys at Law, P. O. Box 446, South Boston, Virginia, of counsel for the Appellees, do hereby certify that on the ____day of October, 1973, a true copy of the foregoing motion to dismiss was mailed to John J. Beall, Jr., Assistant Attorney General, Office of the Attorney General, State Capitol, Richmond, Virginia, counsel of record for Appellant.

Frank M. Slayton