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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

THE BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA, et al

Appellant,

v.

THOMAS R. WILLIAMS, et al

Appellees.

APPENDIX TO THE BRIEF

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

VOLUME III

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VOLUME III

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

THOMAS R. WILLIAMS and	
JAMES L. McILVAINE,	
Plaintiffs,	
vs.	AT LAW NO. 26399
THE BOARD OF COUNTY SUPERVISORS	
OF FAIRFAX COUNTY, VIRGINIA,	
Defendant.	
A. G. VAN METRE ASSOCIATES, INC.	
Plaintiff,	
vs.	IN CHANCERY NO.39437
THE BOARD OF COUNTY SUPERVISORS	
OF FAIRFAX COUNTY, VIRGINIA,	
Defendant.	

Fairfax, Virginia

Wednesday, July 18, 1973

The above-entitled matter came on to be heard at 10:00 o'clock, a.m.

BEFORE:

HON. WILLIAM G. PLUMMER, Judge

APPEARANCES:

JOHN T. HAZEL, JR., ESQUIRE
For the Plaintiffs

GEORGE A SYMANSKI, ESQUIRE
Assistant County Attorney
For the Defendant

- - -

I N D E X

WITNESSES

FOR THE DEFENDANT	DIRECT	CROSS	REDIRECT	RECROSS
JAMES D. PAMMEL	460	528	556	---

THE COURT: You said you had one more witness, right?

MR. SYMANSKI: Yes, Your Honor.

THE COURT: I'd like to state for the record I've just been advised by counsel in the school bond referendum case that that case is going to be dismissed by agreement of the parties tomorrow. So the issue of the validity of the school bond referendum apparently is moot now if they are dropping that suit. I don't know what brought this about. Suddenly the Taxpayers Alliance decided to go no further.

Go ahead, sir.

Whereupon,

JAMES D. PAMMEL

having been duly sworn previously, was examined and testified further upon his oath as follows:

DIRECT EXAMINATION

BY MR. SYMANSKI:

Q. Would you state your name for the record, please?

A. James D. Pammel.

Q. And your position?

A. Director of the Division of Zoning

Administration for Fairfax County.

MR. SYMANSKI: I'd like to offer Mr. Pammel as an expert planner also, Your Honor.

MR. HAZEL: I have no objections.

THE COURT: Go ahead, sir.

BY MR. SYMANSKI:

Q. Mr. Pammel, you are familiar, are you not, with the zoning proposals we are considering today?

A. Yes, I am.

Q. Now, with regards to the density plat in C-169 and C-301, in your opinion, did that density meet with what the comprehensive plan called for?

A. No, it did not.

Q. In what way?

A. It exceeded the comprehensive plan. The comprehensive plan calls for ultimate densities not to exceed two on a conventional basis or 2.2 on a cluster. I'm not including PDH since the applications were not for that, and the applications both were for R-12.5 which yields a density on a conventional basis of 2.7, and a cluster basis of 2.9.

THE COURT: Let me ask you something, please, if I may interrupt you initially here?

THE WITNESS: Yes, sir.

THE COURT: Is it not common practice with the Board of Supervisors that if somebody applies at, say, 12.5, that it would be appropriate in the Board's view or the County's view for 17, to then ask the applicant if he would amend in order to try to resolve the matter?

THE WITNESS: In some instances, Your Honor, the Board will, and there have been numerous occasions where there's dialogue --

THE COURT: There's negotiation, in effect, of the application to compromise the density?

THE WITNESS: Right.

THE COURT: Now, if this were -- if both of these applications had been amended by agreement to 17, what would the density be?

THE WITNESS: All right. The density then would have been a maximum of 2.2, using the cluster.

THE COURT: Which is really in keeping with the plan for that area, is it not?

THE WITNESS: Yes, Your Honor. That would be the ceiling called for by the plaintiff.

THE COURT: Did the applicants in either of

these cases have the opportunity to amend?

THE WITNESS: I think that the question -- and this is in the verbatim transcript -- I think that that issue was raised, and I believe that one of the applicants in one of the cases did indicate that they would be amenable to an R-17 density, but the applications were never officially amended.

THE COURT: Am I incorrect in this statement that it was the position of the Board that no matter what the amendment was, they were not going to rezone above RE-1?

THE WITNESS: That is correct, Your Honor, and basically any reliance on the Middle Run policies --

THE COURT: All right, sir. I just wanted to get that clear, sir.

MR. SYMANSKI: May I have a moment, Your Honor?

THE COURT: I just read that. The question of 17. I think Mr. Hazel mentioned in the verbatim that his client might go to 17, but he was not officially changing it, and then there was the dismissal or denial of the application.

BY MR. SYMANSKI:

Q. Mr. Pammel, briefly, why was the Pohick Restudy asked for by the Planning Department or the Staff of Fairfax County?

A. Well, basically, the Staff, in planning -- the development that had taken place in most of the other areas in the county and particularly in this adjacent watershed, which is the Accotink, and then the developing development to the north was mostly what we call the sprawl pattern, that is, just a continuation of typical, detached, single-family residences on quarter-acre or third-acre lots, and although your design is somewhat, let's say, much improved as to what it was in the typical gridiron pattern by using paralinear streets and a more sensitive approach to terrain, you still, nonetheless, have a sea of endless types of dwelling units.

And the Staff felt that what we should do in the Pohick, and particularly in view of the unique features that exist in the Pohick, the stream valley areas, the rough terrain and the large forest areas, that we should make a very conscious attempt to try to get design in the Pohick that was sensitive to these features and come up with a policy where development

would be encouraged on the good ground, the relatively level terrain, allow the developer the density concentrated within these areas thereby opening up or freeing the natural wooded areas and the stream valleys for no development, just leaving them in their natural state.

Now, what this would involve would be the PDH approach, townhouses and the variety of housing accommodations that you could concentrate within these areas.

THE COURT: Let me ask you a question along that line. Throughout the case we've heard about the sprawl and the definitions of urban sprawl or suburban sprawl, whatever you want to call it. In effect, the primary objection to what has been called the gridiron or whatever effect the development is is esthetic. I mean, that's a big part of it. Another part might be to preserve open lands and to prevent siltation, and things of this nature; but, esthetics has a lot to do with it, does it not?

THE WITNESS: Well, I'd say esthetics are a part. I don't think esthetics have all that weight. I'm one of those that feel that we are public servants. We are, in effect, public stewards of resources that

we have, that we really control. I speak of all of us in that field.

The Board has the final authority as to whether to grant or deny development through the zoning process in an area. But, the whole point is here that these resources are our responsibility to protect and preserve where they should be. And, we do have the wooded areas, and it's not all esthetics. The ecology hangs in balance to a large part upon the forest areas that we have.

THE COURT: I realize that's a portion of it. The point I'm getting to is that in order to maintain the esthetics, perhaps the forested areas, and to lessen the siltation problem in development, these are some of the factors that you consider.

In order to do that, you're willing to trade off density to allow, instead of 2.0, 2.2?

THE WITNESS: That is correct.

THE COURT: But, the 2.2, then that two-tenths of a percentage per acre or two-tenths of a unit per acre, then, increases the burden on the facilities.

THE WITNESS: Well, Your Honor, it does

with respect to that approach in the cluster. And, of course, you have to recognize, too, that the cluster concept or what we call alternate density came into being in the mid-or-early 60's, and it was designed not only to protect stream valleys, but also to obtain for the County, by giving density credits, school sites and other sites needed by the County for public facilities.

But, subsequent to that and, in fact, in 1969, we introduced or the Board approved the PDH concept. Although it's not in use for these two applications, that was basically a tool designed to be used in the Pohick.

Now, what the PDH does, it actually gives a greater density bonus for developing, but you get what we call a population equivalent here that in the final analysis that all comes out the same, because you get a lower yield of people per dwelling unit in the higher density units, a higher yield in the low density units or single family.

So when it all is wrapped up in a final project, by using PDH and a variety of housing accommodations, in theory you should have no more population in that project that if you developed the whole tract

for single-family detached.

THE COURT: All right, sir. I'll try to refrain from interrupting for awhile, sir.

Go ahead.

BY MR. SYMANSKI:

Q. With regards to the cluster concept, you've talked about esthetics and conservation of resources, natural resources.

A. That's correct.

Q. Is there any consideration in the cluster concept for the provision of public facilities?

A. Yes. In the cluster concept, part of the credit that one is eligible for is that credit that if he dedicates or provides to the County a site for school use, public education. That would qualify for density credit. Also the stream valley land, preservation of that; there's a density credit for that.

Q. In other words, is it more efficient and economical? Is this part of the cluster concept, the clustering of density, to provide public facilities to a clustering of people as opposed to people that are spread out?

A. Definitely. And the cost -- in many

instances the costs of providing the utilities are reduced somewhat, being able to concentrate and use the cluster concept.

Q. Would you give your opinion of this proposal with regards to the cluster concept and what has been called suburban sprawl?

MR. HAZEL: What proposal, might I inquire?

MR. SYMANSKI: C-169 and C-301.

THE WITNESS: Both applications are for the conventional zoning categories, and although they have the option of the alternate density tool at their disposal -- and we're still talking about a total, single-family development -- the Pohick plan does encourage a mixing of housing units and concentration of densities and, in fact, strongly encourages the use of PDH throughout the watershed in order to get this efficient development utilization of the land and protection of the natural resources. That is not accomplished by either one of the applications.

Before the Court today, and, in fact, taking the two collectively, we have some 400 acres, and that's a substantial amount of ground.

THE COURT: But, do you apply for the PDH

when you initially ask for zoning, or do you apply for the general zoning, and then when it comes up for site plans and such you go with the alternates?

THE WITNESS: Well, Your Honor, the option is there is a PDH zone of varying densities. The individual may select to use that zone, PDH, and apply for PDH.

THE COURT: He may go cluster, though, under a regular 12.5. He could then optionally develop it cluster?

THE WITNESS: On the cluster, which is still single family. Now, as a comparison here, just to point to what's happened because it's in the immediate area, the two applications are some 400 acres of R-12.5. Immediately adjacent or a short distance, actually, to the east, is the Caldwell or Levitt project.

Now, that came into the County under conventional zoning or R-12.5, RT-5, and shopping; but, the approach to develop that 600 acres was on a planned-unit basis, using the conventional-zoning category. So you may opt to apply for conventional-zoning categories, but do it in such a manner as you develop a planned-unit

community, using the variety of housing accommodations as the Levitt interest will be doing.

BY MR. SYMANSKI:

Q. Let me ask you this to try to hopefully clear up this concept: is the clustering-of-density concept with regards to the whole Pohick equivalent to or different from a cluster option within a certain zoning category?

A. It's different from.

Q. Would you explain the difference?

A. Well, it's different from in that we are trying to encourage the true, planned-unit type of development, the mix of housing types concentrated -- and I say,mix. That's townhouses; apartments, where they would fit into the picture; the so-called garden or single-family unit on a very small lot; the regular single-family detached units; all these mixed into one community and being developed on the good, usable ground within the community and preserving large areas of open space.

As an example, the Caldwell --

MR. HAZEL: If Your Honor please, before the witness continues -- it's an interesting discussion

in planning, but the record before the Board, the record from his Staff, from his own mouth, throughout this case indicates that there was no opportunity for this applicant to consider anything other than conventional zoning.

The fact is that the Board did not resort to the lack of the cluster as the ground. The case was denied because they didn't want to change it from the RE-1 category.

Now, the witness goes on about cluster philosophy and the desirability of cluster. There is no indication at any point in this record, either before this Court today or before the Board of Supervisors, that these applicants had any opportunity for cluster.

And I don't understand the relevance of the discussion about the cluster concept and the PDH zone, and I object to this as irrelevant to the case at hand, because it was an opportunity to deny the applicants. As far as planning, he's right. It ought to have been cluster. but there was no opportunity. What is its relevance now?

MR. SYMANSKI: I don't know what he means by no opportunity. They came in with R-12.5. This

comes up in every zoning case, and I've said it before that I don't think every Board member on that Board sat down in that verbatim and gave every reason why they voted one way or another. And, I don't think we're under an obligation, because a motion was made on one basis or a discussion was made by two or three members on one basis, to be held to that one basis.

I think we can discuss the merits of this proposal. As I said before, not every member of that Board sat down in that verbatim and listed every reason they voted one way or another on this proposal.

THE COURT: But, we do have evidence in this case that the Board would not consider any zoning above RE-1 for these two applications.

MR. SYMANSKI: The Board, collectively -- I don't know that that statement was voted on, Your Honor, that we would not consider anything.

THE COURT: There are statements and there are statements. I mean, there was one applicant who was actually pretty near--in fact, it was called that by one of the Board members, a summary denial of the application.

We've had members of the Staff here say

that there was just no possible way that these applicants were going to get anything better than what they had, RE-1. And, that's one of the questions I just asked this morning, and that was: was that not the Board's position that they were not going to increase the density above the present zoning no matter what.

MR. HAZEL: I just would like that clear, and if Mr. Pammel is saying something different than the judge understood him to say and I understood him to say, I'd like that on the record now. Once that's on the record, Mr. Pammel, I would have no objection, can discuss at your pleasure and the judge's tolerance planned development and cluster zoning for the rest of the day.

But, the fact is these applicants never had an opportunity. They were told that this property would not be rezoned to anything but RE-1.

MR. SYMANSKI: They were told by whom, is my question.

MR. HAZEL: By Mr. Pammel, among others.

MR. SYMANSKI: Mr. Pammel does not do the rezoning; the Board does. And Mr. Hazel's saying what a Staff member says or anything else -- it's the Board

of Supervisors who does the zoning in this case. And, again, one representation of one member of the Board as to why he made a motion doesn't preclude other members from voting for that resolution or that motion for other reasons.

THE COURT: But, there is not one single mention anywhere in the record that I've seen so far that anyone suggested a lesser density than the 12.5, and that the applicant said, we will just not do this, we're going to stick on our 12.5.

MR. SYMANSKI: Well, my only point is, Your Honor, should we then advise the Board in every zoning case to have every member sit down and give every reason why they vote every way they do?

THE COURT: No, I'm not saying that, sir. I'm just saying that if -- I mean, the Board speaks for itself, but it also speaks through its Staff who are given instructions by the Board on how to do things. And, when the Staff members come in here and testify that the Board would not grant any rezoning on this property no matter what, I have to take that to be somewhat the County's position in the matter. Now, it is corroborated by a statement of a Board member in an

open hearing not contradicted by any other Board member who was present.

MR. SYMANSKI: Well, Your Honor, in the case the Staff recommended denial. I assume there have been cases where the Staff has recommended denial and the Board has voted approval. In that case, under this sort of limitation --

THE COURT: I'm talking about testimony I've heard in this court afterthe fact of the County's position on rezoning of this property. It was that it was not going to be rezoned to anything.

MR. SYMANSKI: Well, my only point is that every Board member didn't speak as to their position.

THE COURT: I agree with you, sir; they did not. But, his objection is why go into talking about cluster zoning being better than 12.5 when this was never considered by the Board or at least not openly considered and offered to the applicants as an alternate route.

MR. SYMANSKI: Well, I think the applicant is under some obligation. They came in with R-12.5. Now, whether it's the obligation for the Board to say: why didn't you come in PDH, or why didn't you come in

with townhouses around a community center.

THE COURT: Mr. Hazel did mention before the Board R-17, and the application, itself, was just summarily dismissed; it was denied.

MR. SYMANSKI: Well, my point is that R-17 is the same type of sprawl or single-family development. Mr. Pammel has said in this case they did not go PDH, but they came in with various zoning categories which accomplished the same thing.

THE COURT: The objection is sustained. Really, to discuss what might have been considered but wasn't, is not much help.

BY MR. SYMANSKI:

Q. Mr. Pammel, is a development plan required under the Pohick Restudy?

A. Yes, it is; by Board policy.

Q. Did the applicant submit a development plan?

A. In neither case was a development plan submitted to the County for review.

Q. What is the purpose for the development plan submission?

A. The purpose for submitting a development plan is to relate the proposed development that would

take place on a property if the rezoning was approved and relate that to the policies that are set forth on page 20 of the Pohick text dealing with terrain and density. And these policies go on to state that the site should be developed with respect to the sensitivity to the natural features of the land such as ground cover, trees, and these areas should be preserved for soil conservation and esthetic reasons.

It goes on to set forth the type of development that should occur within certain topographic limitations. Now, the only way that one can evaluate a development plan as it relates -- I mean the proposed development as it relates to these policies for a zoning, let's say, is through the process of a development plan. And so the Staff as requested, as a result of this policy, the development plans on all applications.

THE COURT: What page is that and what book?

THE WITNESS: Page 20.

THE COURT: What book, sir?

THE WITNESS: This is the Pohick -- the blue book. This really gets back down to the basic compliance with the comprehensive plan. It's not a total question of whether it complies with the density.

There are many other factors involved other than density, the terrain, and the only way you can determine this is through a submission of a development plan and an evaluation of that plan by the Staff to insure that these policies are being met.

BY MR. SYMANSKI:

Q. What policy number is that on page 20?

A. It would be policy number 2 and 3.

MR. HAZEL: On page 20, Mr. Pammel?

THE WITNESS: Page 20.

THE COURT: Where is there a requirement that an applicant for rezoning submit a development plan at that time?

THE WITNESS: Well, the requirement -- as I said, there is not a specific requirement. The policies, by our interpretation, -- the only way we can evaluate whether an applicant is meeting these policies that are set forth in the Pohick is through a submission of a preliminary, pre-development or pre-preliminary plan, to show how he is --

THE COURT: Well, let's assume a hypothetical, if we may, on that same line. Let's say you have ample facilities available in an area, no problem at all,

good roads, good everything, and the property is zoned RE-1, and the Master Plan says it should be 12.5, but it has just never been done. Can't an applicant just come in and say: I want it zoned R-12.5 now, with maybe just the idea of selling it to someone else and not developing it at all?

THE WITNESS: Certainly the applicant has that option.

THE COURT: Could he be turned down merely because he did not say he was going to develop it and submit plans?

THE WITNESS: Your Honor, I don't think that that would be the issue before the Board. I think that the Board would request of the applicant, through the negotiation process, a proposed development of the tract.

THE COURT: I guess, really, my hypothetical really boils down to if the only reason you've got to deny is the failure to provide a development plan, do you think you could get very far with your denial?

THE WITNESS: Oh, no. I think that's just one of a number of factors. That's one of the policies that one must adhere to or should.

THE COURT: But, I mean, who established the policy that you have to have a development plan with your application?

THE WITNESS: Well, the Board, by the adoption of this plan, sets forth the policies, and we implement the plan; and through the interpretation of what we see here, we have taken this to mean that they do have to submit a development plan.

THE COURT: Well, obviously you have to do it before you develop.

THE WITNESS: Right.

THE COURT: Where do you interpret here the requirement that when you just ask at step 1, you put up your development plan then?

THE WITNESS: It's not a detailed, engineering plan; it's a pre-preliminary plan.

THE COURT: Just a site layout?

THE WITNESS: Site layout which shows the topography, your terrain, and how your design is being adjusted to fit with the minimal amount of disruption.

THE COURT: But, this is not set out in black and white by the County Ordinance?

THE WITNESS: No. It's other than policies

of the Board, and as I've said, it's here by interpretation. The Board has given the Staff substantial flexibility in other resolutions, by policy, to require development plans of developers.

THE COURT: What if I'm not a developer. Let's say I'm a farmer, and I own that hypothetical piece of land. Do you mean I've got to go out and hire an engineer to prepare a site plan just because I want it zoned to what you say it ought to be zoned to?

THE WITNESS: Well, Your Honor --

THE COURT: I realize I'm getting to the ultimate on the question. I just want to see how important this development plan is.

THE WITNESS: I think that that plan is going to determine in large part what the impact is upon that area. Any area of the county, whether it's the Pohick or some other area.

THE COURT: See, I've already put in my hypothetical that the impact is not going to hurt you in any way, shape or form. You've got all your facilities available.

THE WITNESS: The public facilities can be available, but there can be other forms of impact in

the community. Again, the conservation aspects of an area --

THE COURT: But, in my application I'm not asking you to approve the way I'm going to develop the land, I'm just asking you to zone it. I'm just asking you to zone it what has already been set down in the Master Plan as proper zoning for that land. All I want to do is appreciate the value of my land. That's all I want to do. Are you saying that I could be turned down solely because I'm not ready to develop it?

THE WITNESS: No. I don't think that the Board --

THE COURT: I realize this is extremely hypothetical, Mr. Pammel. I realize it's an extreme. I'm assuming there is no impact on anything.

THE WITNESS: What I'd have to say is I think the development plan is one of the elements that the Board must consider when it's reviewing an application for rezoning. And, what the development plan shows with respect to how the development of that tract impacts the total area, not only in terms of public facilities, but the design itself, and is it harmonious with the unique features of that area, if there are

unique features, and other factors. And in and of itself I could not say that it would be sufficient reason, in total absence of that plan, to say to deny an application. But, I think that it has weight and it's something that this Board feels that it needs in the review of zoning because there is an impact on any land by any land-use proposal. And it feels that it needs that information, and we, at the Staff level, are equipped to evaluate that and provide our professional comments as to how the application -- the design feature would impact a community.

BY MR. SYMANSKI:

Q. On this point, is the Pohick fairly unique as far as terrain in the county?

A. Yes, it is.

Q. In what way?

A. The Pohick is rolling, and in some areas you have some very severe, extreme, slope areas; and particularly in the lower portion of the valley you have probably one of the most beautiful areas of the county, some beautiful palisades which are very steep, and these are one of the areas, of course, the County is attempting to maintain in its natural state. Other areas of

the county, as I indicated, other areas of the Pohick are generally rolling, large areas of a mature forest cover which should be preserved as much as possible, and it is a unique area of the county.

Q. All right. On the question of impact, disregarding completely the public facilities, let's say, take one zoning category. Within that one zoning category, could you have a development that would conserve natural resources and preserve flood plains, and another type of development within that same category which did just the opposite and harmed the natural features that caused flooding, etcetera?

A. Yes. You certainly -- you can have both extremes. I mean we have had them in the past. There is ample evidence in the county of a sensitive type of development where the developer has really attempted to design in harmony with nature. And there are other cases where the developers have simply denuded the land, graded, filled and as a result there have been significant problems; not the least of which is the forest cover which can never be replaced, not in our lifetime.

Eventually, by planting little saplings

that grow back, you'll get a cover in the next generation. But, looking from the standpoint, you know this is something that has taken in some instances two or three hundred years to develop. Gosh, you don't want to get rid of it with one fell swoop. You just don't work with nature that way. So we have both cases.

Of course, we have erosion-siltation control, but the County does have ordinances that do control this in either case, either type of development.

Q. Are there policies in the plan, also, on development on the steep slopes?

A. Yes, there are.

Q. So, after a piece of property is rezoned, is there any way, for example, to control whether a developer would go in and put a house on a steep slope?

A. Well, at this point in time, once the zoning is achieved, once the developer has submitted his plans showing, let's say, extensive grading, the County's posture with respect to controlling it is minimized. I mean, as long as that site or subdivision plan conforms to the applicable provisions of the County, they, in effect, can grade. They can push dirt around and move it from one place to the other. Now,

of course, with the new tree ordinance, which goes into effect shortly, there will be some additional control there in that they will submit plans for tree removal, and as it stands right now and as it did at the time of this application, calling for massive grading probably would have been approved as long as the siltation-erosion control requirement would comply with them.

Q. One more question on the development plan. Would it be fair to say that the idea of the development plan is, in fact, to determine the impact of the zoning?

A. Yes.

Q. Mr. Payne reviewed his version of the history of the Pohick in this area. Would you as briefly as possible review the zoning history in the area of these applications and relate this to the Middle Run policy which was passed by the Board in the Pohick Restudy?

A. Okay. Well, Mr. Payne, of course, did present a history of cases that had been approved by the Board, some of which he had indicated were in close proximity to the subject property and, in effect, were contrary to the adopted policies of the Board for

this area. And specifically I think mention was made of B-898, which was approved several weeks ago, and C-192, both of which I have commented on previously. These being simply -- 898 was surrounded by zonings that had already been approved by prior actions, and development actually existed on two sides of B-898.

So the Staff indicated that we felt that zoning was feasible for this tract and also on July 2nd, the Board did adopt the Middle Run update, review of the policies there, and indicated that Neighborhood 14 would be included in the inventory of land available for development.

So, in effect, 898 is in Neighborhood 14 and by the Board's policy is available for development. C-192 likewise is -- at least one portion of that application is in Neighborhood 14.

THE COURT: Where is C-192?

THE WITNESS: C-192 is the townhouse --

THE COURT: Oh, up in the corner there?

THE WITNESS: Here is part of the application.

MR. HAZEL: Would you mark C-192 on there in the same orange so we'll know where it is with an

arrow to it?

BY MR. SYMANSKI:

Q. Where, approximately, is Neighborhood 14 on this display?

A. Neighborhood 14 is delineated by the Pohick access road which is to the west and arcs around and goes southerly in this fashion and connects back over at this point or crosses Gambrill Road at this point, this being Hooes Road.

That, in effect, puts all of the applications that we've talked about earlier within the confines of Neighborhood 14, including B-848, B-919. So Neighborhood 14 is bounded by the proposed Pohick access road to the west, south and on the north side of Sydenstricker Road.

Now, C-192 was rather unique because it involves, first of all, the development of Orange Hunt Estates, that section of Orange Hunt Estates that is south of Sydenstricker, which is in the Middle Run, which, incidentally, was zoned in 1966 prior to the original Pohick plan, and, of course, well prior to the Pohick Restudy.

It was zoned R-17, and during that point

in time, during the development of that, the developers were requested to reserve the right-of-way for the proposed Pohick access road through their property, as well as also where the people requested to do the same thing with the Levitt property, so that we would have a continuous right-of-way for that facility when it was needed.

The Orange Hunt people came back to us -- well, I'm not sure of the time, maybe 18 months ago -- and suggested that they had put this land aside, but they were in no position to simply give it to the County because they did have zoning. They did have density available for that, and they were actually going to develop that right-of-way to obtain the density that they were permitted through the zoning unless the County were interested in a trade-off, the trade-off being the townhouses that are proposed in the subject 192 application.

The Staff reviewed this. We did do some computations on it and found that what they were requesting in the townhouse zoning was a fair trade-off for the density considerations in the Pohick access road as well as a proposed school site that they were

going to provide in that tract, consisting of 14 acres. And, of course, that is a rather rough piece of property, and therefore the density that they were obtaining in there was somewhat less than what the zoning that they had would have given them on the maximum basis.

So, anyway, in sum and substance, that's the reason for C-192. The Board did grant the upper piece for townhouses, but deferred the lower piece because of the Middle Run policies, that the plan did not call for development in that area. The Board's position was that this should wait a further analysis of the policies in this area to determine when and if that area should develop at a higher density.

But, recognizing that the density in the R-17 zoning was already there, it was just a question of what form it took, and that the Board was really interested in trading off some townhouses to get the necessary right-of-way for public facilities.

Now, there are a number of other applications that have occurred in the surrounding area and in the Pohick in general. One significant case that the Board did deny, adjacent to George Mason College, was

the A & B application on Roberts Road. That was a request originally for RT-5, but then by agreement was made available or it was agreed that R-12.5 would be a suitable alternative. The Board, however, denied or rejected the RT-5, the R-12.5 and indicated that RE-1 was a suitable zoning category for the tract in question in recognition of the very limited facilities in that area, notably the condition of Roberts Road. And that particular case was appealed to the Circuit Court and the ruling there upheld the action of the Board of Supervisors and their denial of that particular case.

There are other cases that the Board has denied. The Board denied, as an example, the Levin application which was alluded to earlier. I'm not sure of the original number of the application, but under its most recent application under the Board's own motion, as a result of the court order, is C-567. But, the Board did initially deny that zoning.

THE COURT: What was the original zoning, RE-1?

THE WITNESS: RE-1.

THE COURT: And what was the application for?

THE WITNESS: R-12.5. It was requested for

R-12.5, but subsequently it was amended to RT-5 because of some right-of-way dedication and because of the community center. And I think in the testimony in that case much of that was brought about at the initiative of the Staff in trying to implement the Pohick plan. We did suggest there that five was an appropriate density in view of it being in close proximity of the community center and because of the large requirement of public right-of-way, the Pohick access Road --

THE COURT: This gets back to the earlier subject somewhat. It is fairly standard procedure, is it not, that when an application comes in that the Staff will look at the application and then try to negotiate with the owner to see if there isn't some better method of doing it than on the face of the application?

THE WITNESS: Yes, Your Honor.

THE COURT: Was that opportunity given to either applicant in either of these two cases by the Staff?

THE WITNESS: In these cases, I'd have to answer, no, because we were looking at the policies, again, for the Middle Run which indicated that development

in this area, this particular site, should be retarded.

THE COURT: I just wanted to make this sure, sir, because I understand that the general procedure in the County, as far as handling applications, is that the Staff, of course, gets to them long before the Board does. Your department and other parts of the Staff will then negotiate with builders, suggest PDH, suggest cluster, suggest many ways that might be better.

THE WITNESS: Where the policies are very clear by the Board, adopted policies --

THE COURT: Here, under your C-567, there was no retardation in that area?

THE WITNESS: That's correct.

THE COURT: You say in this area the policy of the County Board was to retard and therefore your office and the other members of the Staff did not suggest alternate methods.

THE WITNESS: That is correct, Your Honor.

THE COURT: Because the policy of the Board was RE-1.

THE WITNESS: That's correct. It was very expressly indicated that this was an area which basically could be developed now. This was not to say that this

is denied development. And the Board, in its wisdom, was saying your zoning is one acre. We aren't saying you cannot develop. You can develop the property at one acre. No problem there. In fact, that very same issue was one of the issues in the Roberts Road case, A & B, and one of the decisions was that one-acre development did not eliminate a reasonable, I guess it was, form of development for the property. In other words, they were not being deprived of the right to develop. They could do it.

MR. HAZEL: If Your Honor please, if Mr. Pammel or the County Attorney wish to introduce the opinion in the Roberts Road case or any part of that file, they have the right to do it. I don't think that this witness can interpret that case as far as its proceedings beyond the Board level. I would object to his continuing to interpret that case.

THE COURT: All right, sir.

THE WITNESS: Well, what I was saying is that the Board is not saying, no, you cannot develop.

THE COURT: They're saying, no, you cannot develop above RE-1.

THE WITNESS: RE-1 at this point in time,

you may develop at RE-1. The higher densities are for a later period in time which has to coincide with the availability of the County to bring in public facilities to this area to serve that population.

THE COURT: But, it was because of the County Board's policy concerning this area that the Staff would not consider negotiation of RE-17 or some type of cluster or PDH?

THE WITNESS: That's correct, sir.

THE COURT: All right, sir.

Go ahead.

THE WITNESS: We don't want to waste the applicant's time in getting into a lot of design problems and everything else.

THE COURT: All right.

BY MR. SYMANSKI:

Q. Mr. Pammel, the Middle Run policy was passed in 1969. The Middle Run, here, we have some dotted lines. There is a bulge outside of the Main Branch in yellow here. Can you give us approximately what the zoning picture was at the time the Middle Run policy was passed and why there is, in your opinion, this bulge outside of the Main Branch into the "Middle Run"?

A. Well, of course --

Q. Well, first, what was the zoning picture at the time, 1969? What was down there?

A. Well, basically the substantial or large-size tracts would be the Orange Hunt and the Levitt interests were already zoned.

Q. Approximately when were they zoned?

A. The Orange Hunt was zoned in 1966, and the Levitt interest or the Caldwell tract was zoned in 1967. So these predated the Middle Run policy.

Q. Is that this area here?

A. Yes. So that existed. Now, the Middle Run policies suggested that notwithstanding the fact that that zoning existed and that a sewer line was available, in ground, to serve those areas, that other public facilities were totally lacking, and that development should not proceed any further in this area until the County had the capability of providing in an orderly process the other necessary public facilities to serve that development, including what was already committed.

Q. So when these zoning cases came up, the zoning picture was that this area here was already

zoned, is that correct?

A. That's correct.

Q. The road-improvement history of the county has been brought up previously, and the fact that the developers will on occasion or usually improve that segment of a road which touches on or goes through their property.

In your opinion, what effect does this road improvement have realistically? Does it solve the problems?

A. Realistically, it, as a rule, does not improve the situation other than in the immediate proximity of the property that is being developed. As an example, the roadway on either side of that property would not be improved by the developer, and you have what we would call the gaps and these gaps really determine what the carrying capacity of a road is.

If you have four lanes here, and 100 feet up the road you go back to two, you have a constriction. The constriction determines what the carrying capacity of the road is. So, in effect, you have no improved capacity. You do not improve carrying capacity until the entire facility is done from one end to the other.

Q. How does that hypothetical road finally arrive at an up-to-par standard?

A. Usually, VDH, in the final analysis will come in, will program the remaining improvements and do the job. As an example, as they are doing right now on Rolling Road, their recent addition to their program for six years including Rolling Road.

Now, Rolling Road, if you look at it right now is exactly, particularly south of Keene Mill, is the gap of no improvement or no widening improvement, and then four-lane divided. And, this goes on and on until you get on at the lower end of the Pohick, and their program is to go in now and finish or improve those gaps.

THE COURT: By condemnation?

THE WITNESS: Negotiations for right-of-way where land is not developed and condemnation, I suppose, if necessary, but it's the standard program that VDH uses to improve secondary roads.

BY MR. SYMANSKI:

Q. Does VDH, to your knowledge, only build roads when there are urban densities in the area or only when there are people there?

A. No. In fact, right now we have a significant project in the countythat is scheduled in the program; it's in the continuing program, but it doesn't necessarily relate to urbanized development. And that improvement is on Route 123 from the city limits of Fairfax to Lorton.

The first section of it, which is now under survey and design, and as I understand will be advertised shortly for public hearing for a four-lane divided facility which would extend from the Fairfax City limits to Fairfax Station. As you're well aware, the population of that area is certainly not, by any stretch of the imagination, urbanized. There are people living in the area, but not high density.

Q. Taking the already-developed areas of the county, to your knowledge, is that road system up to urban standards in the already developed areas of the county?

A. No, no, in a lot of areas there are deficiencies.

Q. The RE-1 category is, at this moment, what remains on this piece of property. In your opinion, is that RE-1 zoning category a proper zoning, improper

zoning for that property at this time?

A. The two properties?

Q. Yes.

A. I think the RE-1 zoning at this time is a proper zoning category that would permit development of the property consistent with at least a limited capability of the County to provide public facilities. And I think even at that there's going to be some question as to whether the people would be totally satisfied with the level of services that would be available initially, because it's still a catch-up even if it develops at one acre.

Q. The term holding zone has been used. What is your definition of a holding zone, and, in your opinion, is this a holding zone, this zoning on the property?

A. I guess a holding zone, and I don't know that the -- the term is probably subject to a variety of interpretations -- but I guess a holding zone really is a figure of speech or a term that you would use to say no development. And this is simply held in abeyance. No, that's not applicable here.

We're speaking in terms of a development

that we feel is appropriate now at one acre. That allows for the individual to develop their property --

THE COURT: Can you give me an example of a holding zone?

THE WITNESS: Well, I don't -- I really don't think that the County, as such, uses --

THE COURT: I didn't ask you that, sir. I said, can you give me an example. Let's say you have two-acre zoning. Would your definition of a holding zone be that under two-acre zoning you couldn't build a house on two acres?

THE WITNESS: No.

THE COURT: Well then, you could develop at present zoning, but they just won't rezone. Now, how does that vary from retarding and refusing to rezone?

THE WITNESS: Well, retarding is a term of speech, I guess, to say that the present zoning, one acre, is appropriate. The plan, in projecting ultimate growth -- and you have to consider these plans exactly in that frame of reference -- these plans are a plan that projects the ultimate growth and development of that watershed. Obviously, it's not all going to happen

in one period of time. So the attempt of the plan was trying to phase or schedule development out over a period of time and say, this development should take place now; this development at a subsequent period in time. But, when it does, this density is appropriate. And, in this area, planned development should occur -- which the plan makes reference to -- post 1975. Other policies adopted by the Board say when the County is in a position to provide public facilities. Then the density is set out in the plan as being appropriate at two.

THE COURT: I just have a difficulty in semantic argument, perhaps, of a holding zone being we won't rezone until sometime in the undetermined future, and retarding which does the same thing. We won't rezone until sometime in the undetermined future. If you mean holding zone is we're never going to rezone this, this is meant to be this way forever, that's one thing. Is that your definition?

THE WITNESS: Well, a holding zone -- no. I wouldn't say that a holding zone is something that you're never going to develop. I think a holding zone is something that you might be thinking of on a short-

term basis. As an example, in a transit-impact area where the density obviously should be very high, but you are not in a position right now to state what that density should be.

So in other words, there is a situation where you have something that's indefinable at the moment. So you put it in a sort of holding posture until you have determined what the density of the development should be there.

THE COURT: But in the retarding you know what it should ultimately be, but you don't want to do it now?

THE WITNESS: Right.

THE COURT: All right, sir.

BY MR. SYMANSKI:

Q. On page 23 of the Pohick Restudy, the first line states "residential construction of the Pohick watershed is expected to occur at an average rate of 1,150 units per year between now and 1975." Again, on page 82 of the plan, the same figure is used.

To your knowledge, has this level of growth been achieved?

A. It's been achieved and exceeded for a

number of factors, including the sewer moratorium that went into effect in the suburban Maryland areas, which deterred development over there, and subsequently that development came into Fairfax County because this happened to be one of the few areas in the metropolitan region where there was some sewer capacity for development to take place.

We experienced a growth rate here higher than what was projected by the plan. In fact, right now our projections for 1975 indicate a population within the Pohick of 40,500 people and this is based on figures of development that is committed right now in line, where lines are pending and sewer taps have already been issued, as opposed to the plan which projected a population, I believe, of 32,300 within the same time frame. So we're approximately 8,000 people over what was projected.

Q. And that 40,500 figure includes sewer taps that are issued?

A. That's correct.

Q. As far as the population in the Pohick at present and what the growth will be between now and 1975, do you have any figures on how many new people

will be in the Pohick between now and 1975, based on the sewer allocations?

A. Based on the sewer allocations right now, we're anticipating, between what presently exists today, approximately 12,000 more people will come into the area between now and 1975 based on these committed plans.

Q. Well, it's been established that there is a sewer moratorium now and more sewer may become available, and a treatment capacity will become available in '76, I believe the year was. Do you have figures on how many units are in line already for sewer when it becomes available?

A. Yes, we do. And, I don't think many people realize exactly how delicate the situation really is. We've talked throughout this entire case about the fact that 1976 will be the time frame when our problems will be resolved, and there will be sewer because the plant will have been opened in its expanded capacity.

MR. HAZEL: If Your Honor please, before this witness answers the sewer question, the County's sewer chief has already testified regarding sewer, and I don't think his qualifications as a land planner give him the expertise by qualification to testify about

the sewer system. He now is apparently about to testify in some way to refute the clear statement of the County's prior witness, not the County's witness, but the County's employees' department head that testified regarding the availability of sewer. Now, Mr. Pammel is apparently trying to impeach that testimony, and I don't think he has any qualification; that's not his business.

MR. SYMANSKI: Your Honor, the question I asked Mr. Pammel was: does the County have figures -- which I think County figures were used in the planning process in consideration of what's going to happen -- of how many people are now in line, signed up for sewer when it becomes available.

THE COURT: That's right; but he was going beyond that. He can answer that question if he has the figures, yes, and what the figures are, but he is not qualified as an expert in the field of sewers, that I know of.

THE WITNESS: Right as of the present time -- and these are applications, site plans and subdivision plans that have been submitted to the County that are in what we call the waiting list for allocation. We have 3,731 units in line, which would yield

an initial population of --

THE COURT: 3,000 what, sir?

THE WITNESS: 3,731 units. This is within the Pohick, in toto, Main and Middle.

BY MR. SYMANSKI:

Q. That's in line for sewer?

A. In line for sewer. These are people who have filed their plans, but can proceed no further because the sewer allocations or the capacity, the treatment plant's capacity --

MR. HAZEL: If Your Honor please, he's now in that, and I would ask that this whole line be struck. What relevance is it to the testimony and to the case at hand when the sewer people in the County have already testified that in March of '76 there would be adequate capacity to service these two applications? I don't care how many people are in line.

MR. SYMANSKI: Well, Your Honor, I think it's very relevant to show there have been allegations that there's a no-growth policy, a stop-growth policy, that basically we can't consider this case in a vacuum. The fact is that there are other people in line that are going to be there. And, as far as the public

facilities, which is a prime consideration in this case, we'd just like to put this case in the posture of not being in a vacuum of this little piece of land.

THE COURT: But you don't get sewer until you actually develop and then apply for the sewer tap. I mean, you don't get it at the time of zoning.

MR. SYMANSKI: No, Your Honor. What I'm talking about is there are people, as he has testified, 13,000 people already in line with their plans submitted --

THE COURT: He said, 3,000.

MR. SYMANSKI: Excuse me?

THE COURT: 3,731.

MR. SYMANSKI: That was units. 13,000 people.

THE COURT: Well, I don't know how many people are going to use the units. I mean, a tap is a tap is a tap. If he had 3,731 waiting, what difference does it make if we already have it established by the County's own employees that there will be sewer available as of X-date for these points? We must assume it is not available until that time. So what difference does it make how unavailable it is until that time?

MR. SYMANSKI: The point is, Your Honor,

that when it becomes available, there are these people there to get it, and it's not necessarily primarily a sewer question. It is a question that those people are going to be in the Pohick area impacting the public facilities ahead of this application.

THE COURT: He said the entire Pohick watershed. You've got 3,700. How's that going to impact the Caldwell School, unless you show the 3,700 are in the Caldwell School area or in the Robinson area. He has said over the entire watershed.

MR. SYMANSKI: I think there has been testimony from Mr. Pant that the roads, for instance, in the Pohick watershed are below what they should be for urban densities.

THE COURT: That's because people keep changing the standards of what roads ought to be. I mean, first they say a subdivision road should be 30 feet wide, then they say 36 feet wide and then they say 40 feet wide. I mean, you can get below standards very easily by changing standards.

MR. SYMANSKI: But there was testimony, Your Honor, that the system in the Pohick is what is called a rural system right now. I think there is a

big difference between a rural system and an urban system.

THE COURT: If you want to show what the projected population will be over the next two or three years in the Pohick, that's all right, but I don't see how the fact that we have rural roads in Fairfax County directly affects the applications here. We're talking about the roads around this place, not in the rest of the county. I mean, I can find you roads in Fairfax County you couldn't get over with a bulldozer. Unless they're in this area, they don't have much relevance.

BY MR. SYMANSKI:

Q. Mention was made of the Middle Run policy of the Pohick being a non-development zone as opposed to a development zone. This is under the Board's policies, the Main Branch being the development center, is that correct?

A. That's correct.

Q. Do you have any figures on how much land is available in the Main Branch development zone in an undeveloped state below what is called urban densities?

A. Yes, I do. In other words, the figures that we use as inventory for development of ground

within the Main Branch, and that totals 5,409 acres of land within the Main Branch of the Pohick that is available for development.

THE COURT: Now, what zoning is that?

THE WITNESS: That's RE-1 and lower-density categories.

THE COURT: RE-1 and RE-2.

THE WITNESS: 1 and 2.

BY MR. SYMANSKI:

Q. Now, is that land that could come in for rezoning to higher densities under the Master Plan?

A. That's correct.

Q. And that is land that is within the Pohick development zone?

A. That is correct.

Q. Using the factors that the zoning staff uses, how many units could fit in the development zone and how many people?

MR. HAZEL: If Your Honor please, I would at this time interpose an objection. As a matter of law, there is absolutely no relevance to the problems of density and population of unzoned acres in the county which might in the future come in for zoning.

Unless there is a more immediate prospect of the use of those properties and testimony to show that they are in some way in the development stream, I think it's absolutely irrelevant to the question of how the County is going to provide for its population today and in the future without discrimination.

MR. SYMANSKI: Your Honor, there was testimony by Mrs. Cleveland that the Middle Run policies were based on the fact that the idea was it was more efficient, more economical to provide facilities where people already were, in a zone where people already were; that if you had new people and old people there, it's more efficient to put your money there rather than creating new areas where there are no people now where you have to put in completely new facilities that don't even affect the problems that already exist.

The point that we're just trying to show is there is land within this development zone. It's not a question of there being absolutely no land. This has built up and we're trying to stop growth. Just the point that there is land here that can come in for zoning at anytime to urban densities within the "development zone" of the county under the Board's policy.

THE COURT: But, how can the witness say that this property in RE-1 and RE-2 now would be approved for a higher-density zoning?

MR. SYMANSKI: Well, he can't, obviously. That's up to the Board.

THE COURT: Then it doesn't prove that it's available for a higher density.

MR. SYMANSKI: It is available to apply for rezoning to higher densities.

THE COURT: I assume all land in Fairfax County is available to apply for rezoning.

MR. SYMANSKI: But this is vacant land that is not developed.

THE COURT: Well, that's what I mean. I assume anybody could apply. But, I just don't take it to the ultimate that you would offer, sir, and that is because there is undeveloped land in the Main Branch that that is available for development other than in its present zoning. I don't think we can assume the ultimate, and that is that the Board would grant the zoning.

MR. SYMANSKI: Well, Your Honor, that seems to defending the opposite, that they will not. I'm just trying to show that it is in the inventory under

the policies Mrs. Cleveland talked about, that it's not the opposite.

THE COURT: All right. I'll certainly accept the evidence that there is over 5,000 acres of unzoned, undeveloped -- not unzoned, but undeveloped RE-1 and RE-2 land in the Pohick.

MR. SYMANSKI: In the Main Branch.

THE COURT: In the Main Branch.

BY MR. SYMANSKI:

Q. Can you summarize very briefly what your interpretation of the Middle Run policy is?

MR. HAZEL: If Your Honor please, I think if the Middle Run policy as stated -- and Mr. Pammel, I assume is referring to the 9 or 10 point resolution of the Board -- it is available and speaks for itself. I don't see how he can interpret a stated policy in a resolution of the Board.

MR. SYMANSKI: Mr. Hazel has just reversed his field, Your Honor. A few minutes ago he was saying that the Staff is the one who first meets these zoning proposals, and they're the ones that deal with the developers. Now he would say that the Staff has nothing to do with it.

MR. HAZEL: If he wants to talk about how the Staff has interpreted the Middle Run policy, that's another thing. But, ask what his interpretation of it was.

MR. SYMANSKI: I thought I asked --

THE COURT: First, point out to me the nine-page statement of policies. Is that contained within the Pohick --

MR. HAZEL: Yes, sir. It's in the Pohick Master Plan.

THE COURT: Which page are you referring to specifically? Is that 19?

MR. HAZEL: I'll have to ask Mr. Pammel what page is he referring to.

THE WITNESS: Page 77. I think that's what you're referring to.

THE COURT: Pardon?

THE WITNESS: Page 77, I believe.

MR. SYMANSKI: Pages 13 and 77, Your Honor. Page 13 is one and 77 is another, under implementation.

MR. HAZEL: The policy resolution regarding the Middle Run area is on page 77 of the blue book exhibit entitled, A Restudy of the Pohick Watershed.

THE COURT: All right. Now, you're asking him how he interprets that nine-paragraph resolution?

MR. SYMANSKI: Yes, Your Honor.

THE COURT: How is that relevant?

MR. SYMANSKI: Well, as I said before, it's the Staff that deals with these things, and Your Honor said, the developer meets the Staff first of all, and in a later stage gets to the Board. I think what the Staff interpretation is is relevant.

THE COURT: Does he have the authority to say he makes the interpretations for the Staff? He may, sir. I don't know. I'm just asking.

MR. SYMANSKI: I don't know, Your Honor.

THE COURT: You've asked him his interpretation.

MR. SYMANSKI: Yes, Your Honor.

THE COURT: That's a personal interpretation of one person who works for the County.

MR. SYMANSKI: As an expert planner and head of Zoning Administration.

THE COURT: But, does he, as head of Zoning Administration, make the decisions on interpretations for the Staff?

MR. SYMANSKI: I would have to ask Mr. Pammel.

THE WITNESS: There are a group of us, a collective group that meet.

THE COURT: Then I think, perhaps the collective group's interpretation may be relevant, but I don't think individual interpretation would be.

MR. HAZEL: I have no objection if he represents that whatever it is is the Staff policy and the implementation of the Board policy.

THE COURT: All right, sir.

He is merely objecting to it being his individual interpretation rather than the Staff.

MR. SYMANSKI: Okay, Your Honor.

BY MR. SYMANSKI:

Q. What is the Staff interpretation?

A. The Staff interpretation, again, is set forth in the policies outlined on page 77, as basically urban services are not available within the Middle Run and it's, I guess, best stated in item 5 of that policy:

"It shall be the policy of the Board of Supervisors to avoid the presence of a population of urban density in the Middle

Run watershed until such time as the public facilities and services are commensurate with such density, either shall be available or shall be programmed to be available in the reasonably near future."

I think the sum and substance of that is probably the most critical part.

THE COURT: Now, on this resolution -- this resolution, of course, was made effective as on 1969?

THE WITNESS: Yes, Your Honor.

THE COURT: And at that time the Board made its finding that there were inadequate facilities and then further said that this would be reviewed each year to determine whether or not that status remained the same, but that has not been done. So we're still going back to a resolution of three years prior to the hearing in this case.

THE WITNESS: No; in July 2 of this year.

THE COURT: No. I'm talking about back when the Board heard these cases in the Fall of '72. They were still relying upon the data of 1969 if they were implementing this policy.

THE WITNESS: But, Your Honor, on June 27th -- now, I admit that there was a lapse between '69 and the time that the Middle Run review occurred.

MR. HAZEL: I would like to make it clear for the record that before he proceeds with one of his explanations that the answer to Your Honor's question is: yes. That there had been no data adopted by the Board when these applications were heard.

THE WITNESS: At that point in time. This document dated the 27th of June is the update --

THE COURT: But that was of '73.

THE WITNESS: '73. There I will say this that adopted data, no; but the August 1971 review, prepared by the Planning Staff and subsequently heard by the Planning Commission was available.

THE COURT: But they never reviewed it.

THE WITNESS: But the Board had not taken official action on it.

BY MR. SYMANSKI:

Q. Well, in effect, you're saying that this policy is an attempt of coordination of public facilities with zoning, with growth?

A. Yes.

Q. Now, what action, to your knowledge, has the Board taken to back up or support this general policy of the Middle Run in the Pohick plan?

A. Well, the Middle Run of the Pohick is just one problem. The whole issue of public facility capability throughout the county is an issue that has confronted this Board. It's an outgrowth of the growth in the 60's and the attempt by the County to try to provide public facilities to accommodate the growth, and it wasn't really too successful because the growth was outstripping the County's ability to get the public facilities in place to serve the people as evidenced by the overcrowded schools and the inadequate road network of many areas of the county. It's not only the Pohick. We have inadequate road systems in the urbanized areas of the county within the Beltway, Cedar Lane, Gallows Road. A number of these facilities are still basically a rural character. Although some of them are programmed for improvements, still as of today they're not adequate by any stretch of the imagination. So we suffer the problem throughout the county.

But, the Board is well aware and conscious of the problem. So they embarked upon, initially in

1971, this five-year program, a review of the County's position of its public facilities' capability, this so-called five-year-growth alternative plan: where are we today? Where can we go? And these are the alternatives.

That was subsequently followed by work sessions that the present Board has had this year, beginning in March I believe, on growth alternatives and land-use policies for the county.

There was a subsequent work session in April -- May, I guess it was -- on the same subject. Then the Board, after determining policies and proposals that they wanted to bring before the public, had a public hearing in June for public comment on these proposals. These comments of the public are now under consideration, but it is anticipated the Board will act very shortly with a program for the future planning of the county which result in a comprehensive analysis of the county, with the objective of a new, comprehensive, county-wide plan, within approximately 18 months.

So the Board is quite conscious of the problems and wants to do something about it. Of course, the comprehensive plan won't stand alone. In other

words, it's a designation as to where growth is going to be. With that comprehensive plan will be a capital budgeting program which will outline exactly when, where and how the County will provide public facilities over a five-year increment. And that will be updated on an annual basis to show everybody, the developers, citizens, exactly where growth in the county will occur and at what point in time public facilities will be available, and, of course, growth will be programmed to coincide with facilities.

Q. Mr. Seldin testified that he thought the whole land-use process with regard to the local government was a very delicate managerial system to keep it in balance.

Now, as an expert planner, do you think the system in Fairfax County is in balance now?

A. No. It's about as probably as far out of balance as can be. But we have overcrowded situations in the Pohick and Reston -- I mean not just overcrowded; I mean critical situations where there is a definite suffering from the standpoint of the quality level of service; and areas of the county where we have capacity for public facilities, excluding sewer

because sewer is so -- well, it's deficient throughout the county. So other than a few limited areas in the Mt. Vernon area, talking about schools and other public facilities -- and when I say it's out of balance, we've got a situation which is crying for public facilities because of the overcrowding situation in one area, but in another area, seven miles, ten miles up the road, we have a situation where we have excess capacity. We're out of balance, and it would strongly indicate to me that we definitely have to turn around.

We have to program development in this county into areas where we have this public-facility capability, where we have a reasonably good road network or where one is programmed for improvement within the foreseeable future.

Even in some instances -- I'm now talking basically about bypassed parcels within the Beltway and closer-in areas of the county -- we might even be looking in some instances to some high density development in these areas. But, the point is that is where the development should occur in this county. If we're talking about an efficient and economical operation and a proper utilization of our resources, that is the only

place where it is feasible to develop.

Q. One final question. As an expert planner and as head of Zoning Administration, what, in your opinion, will be the effect of the rezoning of this property to a higher density at this time?

A. Well, it will definitely open up the entire Middle Run for development at a point in time when the County simply does not have the resources available to bring in the services at a time when the people are coming in, much less before.

THE COURT: Let's assume they don't even start coming in until early 1976 because of the sewer.

THE WITNESS: No possibility. The one school, Caldwell Elementary School is going to provide basically for development that's already there. I think Mr. Whitworth expressed a very clear indication that the Saratoga area --

THE COURT: Now, wait a minute. As I understood his testimony, they had looked at it and felt they didn't need a 990 school; they were cutting it back to a 660 to take care of the existing area.

Are you saying that if it were constructed to the 990 level it couldn't take care, in 1976, of some

other people gradually coming into these two tracts?

THE WITNESS: I think whichever way it goes, and that's the determination of the School Board, the 990, if it goes 990, will accommodate the development on the Levitt tract and would generally -- it's programmed in Neighborhood 14, and certainly not anything outside of that. Although a portion of Levitt is outside of 14, but that is committed.

I'm saying the Caldwell School, the Caldwell School has got to relieve the Hunt Valley School. The school is overcapacity now.

THE COURT: Mr. Whitworth says that the County school system can accommodate the children from both of these tracts. Now, what reason do you have to believe that he is incorrect in that?

THE WITNESS: I think in the long haul the 990 will --

THE COURT: I'm not talking about just Caldwell. I'm talking about -- he has said, here, by testimony, that if the rezoning were granted, the County school system can handle the children and educate them equally with other children in the county.

THE WITNESS: Well, I'm not quite sure --

I think he qualified that by saying, of course, if a school site were made available --

THE COURT: No. He said that just by a system of moving them into the schools that are now getting empty by attrition.

THE WITNESS: That was the other end of the qualifying statement, and that's where we have the critical problem.

THE COURT: You're saying County facilities are not available within walking distance.

THE WITNESS: I can agree; yes, if you take children and bus them out for seven or ten miles to the area where we have the capacity, which is the point that I made earlier, yes, we can ~~do it; but it~~ shouldn't be done that way.

The whole point is, we should be going into these areas where the capacity is because we've got land in those areas that has been bypassed where the development should occur.

It makes no sense to bring people into an area, have them located there, and then say: well, we don't have the facilities here in your immediate area to take care of your needs. You have got to go into

Alexandria, Falls Church or Vienna or wherever --

MR. HAZEL: How did Alexandria, Falls Church or Vienna get into the case?

THE WITNESS: Well, wherever the available capacity is, Annandale --

THE COURT: He said the available capacity is outside the Beltway now. There are some schools that are going undercapacity now outside the Beltway.

THE WITNESS: Very limited.

THE COURT: Go ahead, sir.

MR. SYMANSKI: That's my final question.

THE COURT: Just a minute. Let me interrupt. Off the record.

(Discussion off the record.)

(Short recess.)

CROSS EXAMINATION

BY MR. HAZEL:

Q. Mr. Pammel, in the concluding portion of your direct examination you indicated that there were available single-family areas or available areas for development in the county where public facilities were available at such level as you deemed adequate.

Where could you point out on the county

map where there is a tract of 400 acres and break it down, even 100 acres, that's available for small-lot development in Fairfax County in one of those areas?

A. Interstate 495 and Route 50, the Childs tract.

Q. The Childs tract is available for single-family development?

A. It's zoned R-12.5, and it's in that inventory of ground --

Q. Mr. Pammel, are you telling His Honor that it is realistic to assume that the Childs tract at 495 and Route 50 interchange could be developed at R-12.5?

A. I'm not saying 12.5. I'm saying it's available for development. I don't know what the density would be on the tract. It could be at a higher density.

Q. Probably be apartments or something like that.

A. A mixture of housing --

Q. I asked you where there was single-family, R-12.5, available in the county in a tract of 100 acres in an area you felt was adequate.

A. There is. I can assure you of that.

Q. But you don't know where it is, do you, Mr. Pammel?

A. There's some in the vicinity of Vienna that are, I'm sure, 100-acre tracts.

Q. Zoned for either R-12.5 or R-17?

A. I'm not sure what the zoning would be. There's a -- again, I can't say per acreages, but I know there is a considerable amount of zoned R-12.5 ground in the Lee District, north of Franconia Road.

Q. How much acreage is there, Mr. Pammel, zoned R-12.5, in the tract you speak of?

A. Well, would you like a figure county-wide? I can give you a figure --

Q I asked you -- no. I asked you to answer my question. Can you locate a tract of 100 acres or larger that is zoned for either R-12.5 or R-17 in an area where you say public facilities are available, that is, realistically to be used for single-family development?

A. Mr. Hazel, in order to answer that question I would have to get plat books and go through it and locate the properties, and that would take some time.

Q. But, I thought you testified that there was

ample ground available in areas where public facilities were adequate for development?

A. Well, I didn't say that it was zoned. I said that this is land in areas where you have public facilities which, in my opinion, could be reasonably developed and zoning could probably be obtained in these areas because they are bypassed parcels, and the zoning would be influenced by the surrounding zone. Now, I've got figures to show exactly how much --

Q. I just asked you to show me the tracts for single family. Most of the tracts you're talking about are for multi-family and higher, aren't they, Mr. Pammel, these parcels in the interior where you say they are bypassed parcels?

A. Well, Mr. Hazel, at 4,000 --

Q. Mr. Pammel, I'm not talking about county-wide figures. I'm talking about areas where you say public facilities are available.

A. But, I'm saying that within the county zoned property, there's over 5,000 acres of 12.5 and somewhere in the neighborhood of 2,000 acres of R-17 that is vacant, zoned.

Q. That is zoned and undeveloped?

A. That is correct.

Q. But you can't give us a parcel of 100 acres?

A. Well, I said, if you will allow me the time to take a plat book, I can assure you I can find it. I think the Mount Comfort Cemetery is an example if you want to get into particulars. There is a tract that is --

Q. 60 acres?

A. Well, it's close, and it's zoned R-10.

THE COURT: That's a cemetery?

THE WITNESS: Yes, Your Honor. It was an application that came before the Board several years ago for PDH. The current zoning is R-10. The trustees of the cemetery have indicated they wanted to dispose of the land for development purposes.

THE COURT: I trust it's unused?

THE WITNESS: It's unused. It's not used currently.

BY MR. HAZEL:

Q. Now, Mr. Pammel, you talked about the terrain of this property. The subject property is at the upper end of the watershed, is it not?

A. Yes, it is.

Q. And the fact is in the Pohick that the upper end of the watershed has the mildest slope situation, much less slope than as you go down the shed, is that correct?

A. That's correct.

Q. And that of the entire watershed, the two tracts here, Williams and Van Metre, generally have the least slope problem of any tract in the shed, isn't that correct?

A. Well, I say --

Q. Just answer it, yes or no.

A. -- the report-- and I have looked at the site, and when I looked at it, I found it generally to be the condition of gently rolling. There are streams, and there are some areas --

THE COURT: The question was, sir, is there any other section of the Pohick that has a better topographical area or the Middle Run.

THE WITNESS: The report indicates that this particular neighborhood does have some terrain problems; but from my review and analysis of the area, this area probably has the least, and as you go downstream, the more severe.

BY MR. HAZEL:

Q. And the tract immediately adjacent to it, one-third of the watershed, 800 and some acres, zoned at R-12.5 density, hasaconsiderably more severe slope situation than the two subject tracts, does it not?

A. Generally speaking, that's correct.

Q. Now, Mr. Pammel, incidentally, would you step up to the board and mark on the board a zoning application C-263 for ten acres at 12.5?

A. 263? 283, Swansen?

Q. 283, pardon me. Now, that application is in the Middle Run, is it not?

A. Yes.

Q. That application was rezoned to the R-12.5 density by the Board of Supervisors on Monday, during the very time that this case was in trial, was it not?

A. My recollection, Mr. Hazel, and I was here on Monday -- so I don't know what happened Monday. I haven't read the Board actions. I do know it was an agenda item, but I don't know what the action was.

Q. You just don't know whether it was zoned or not?

A. I have no idea.

Q. You wouldn't deny the fact that it was zoned by the Board if I stated that, would you, Mr. Pammel?

MR. SYMANSKI: Objection, Your Honor.

MR. HAZEL: I'm just trying to save bringing another witness in.

THE COURT: Perhaps the County Attorney can stipulate that.

MR. HAZEL: Would you stipulate that, Mr. Symanski?

MR. SYMANSKI: That you tell the truth? I assume you do, but I don't know myself.

MR. HAZEL: You don't want to exceed the bounds of reasonableness and ask that I tell the truth.

THE COURT: All right. Let's get back down to earth. Do you know, sir?

MR. SYMANSKI: I have no idea.

THE COURT: We'll assume it has been if Mr. Hazel says it has, and if you have reason to later find out it hasn't been, you can bring it to my attention.

MR. SYMANSKI: Certainly.

BY MR. HAZEL:

Q. Now, Mr. Pammel, one of the policies in the whole Pohick Restudy and the development of your alternate-density type of cluster in the R-12.5 and R-17 areas was to protect stream valleys, slopes and vegetation, was it not?

A. The original policies?

Q. Yes.

A. I think that that was part of the consideration, as I indicated earlier, and also to obtain sites for public facilities, such as schools.

Q. Now, there are really two kinds of cluster developments that have been talked about here, are there not, Mr. Pammel?

A. Yes.

Q. There is cluster development within the R-17 and the R-12.5 categories, correct?

A. Cluster or alternate density, yes.

Q. Same difference. Some people refer to that as cluster, and some to alternate density. That concept and procedure technique is the technique that was used in much of the platted area that is shown on Exhibit 18, was it not, Mr. Pammel?

A. I'd say most of it, yes.

Q. Now, Mr. Pammel, the other kind of cluster development is a more regional type of cluster, or at least beyond individual properties where you're talking about clustering around these neighborhood centers with different kinds of housing types. Isn't that correct?

A. Well, I'd have to say there's another one beyond that. I mean, that, true, is a form of clustering, the village and community centers and concentrating some development immediately surrounding it to serve, not only as a transition, but support for the facilities that will be developed therein. And I guess the third alternative would be the PDH approach which is the planned-unit design, which is what I consider a truer form of cluster than really anything that has been mentioned.

Q. So you have a third type of cluster where really all of your dwelling units, or a major part of them, become townhouse or apartment units as opposed to single family. Isn't that what the PDH concept really anticipates?

A. No, not necessarily apartments. Many, many are, oh, let's say, PDH are probably equally developed with those that are residential and townhouse with

apartments, like Lake Braddock.

Q. Right.

A. Then there are some that are total apartments.

Q. Just answer my question. Essentially, the PDH concept anticipates fewer single-family units and more multi-family and townhouse units, is that correct?

A. I think that's generally a fair statement, yes.

Q. Now, it is entirely in accord with both the adopted Pohick plan and the Middle Run policy to continue to develop with single-family development in the alternate-density mode, is it not, Mr. Pammel?

A. Yes. It's set forth in the report.

Q. Nothing you said was intended to deny that that is still accepted practice?

A. No. I just said that we are encouraging -- the plan attempts to encourage people to use the PDH which is a better form of cluster.

Q. All right. Now, Mr. Pammel, under the RE-1 development concept, the present zoning of the Williams-Van Metre tract, assuming the land would perc, that land today could be developed on septic tanks, could it not?

A. Yes, it could.

Q. And it could be developed without reference to the cluster concept, could it not? Just answer, yes or no? Do you have to cluster it, if you developed it under RE-1?

A. You could cluster it.

Q. I didn't ask you that. Do you have to?

A. You don't have to, no.

Q. All right. You could cluster it.

A. That's right.

Q. But, then you would have a 20,000-foot lot, would you not?

A. That's correct.

Q. Now, Mr. Pammel, whether you clustered it or not, it would probably be impractical to extend sanitary sewer up through the property and pay for those trunk lines and those collector lines if you developed it RE-1, would it not?

MR. SYMANSKI: Objection, Your Honor. As he objected to before, this is not a sewer expert. Mr Liedl was here and he could have asked Mr. Liedl that question.

THE COURT: The gentleman has not been

qualified as an expert in the cost of providing sewer.

MR. HAZEL: I don't think the cost of providing sewer, as such, is the question. The problem is the alternatives of the plan.

THE COURT: But you asked him would it be economical to do that. He's not an expert in the field of economics.

MR. HAZEL: I would strike that question, Your Honor, and ask it another way.

BY MR. HAZEL:

Q. Mr. Pammel, if this tract were developed today on septic tanks, it would require more defoliation of the area for the septic fields than if it was developed on sewer under R-12.5 or R-17, wouldn't it?

A. With the recently adopted changes made by the Board, I would have to answer yes to that.

Q. So, in effect, Mr. Pammel, if this tract is developed as the Board says it should be under your Staff position that you could go ahead and develop it now under RE-1, if it was actually developed RE-1 today and septic tanks were used, you would end up doing more violence to the policies of the Pohick Study than if you bring up sewer and develop it on small lots, wouldn't

you, Mr. Pammel?

A. Well, I'm not really quite certain how much area a septic field on, say, a one-acre lot would occupy. I would say this: you would have more flexibility because of the lot sizes to work. Keeping in mind that you have a substantial amount of vegetation, selectively site the building, selectively grade, and I can't really say for sure that even with the requirements of greater or larger septic fields as to how much damage to the foliage would result.

Q. At best, you would say it is a very close question as to whether development of this tract zoned RE-1 with septic would not, in fact, disrupt more foliage than if you use it for R-12.5?

A. I'd say it's a close question. You'd have to do some study on it. There's no question about that.

Q. Now, Mr. Pammel, the PDH concept involves mutual cooperation between the County and applicant, does it not?

A. Yes.

Q. It is true, obviously, that it would have been unreasonable to anticipate mutual cooperation in either of the cases before the Court today in a PDH,

isn't that true?

A. Well, I think --

Q. Just answer me, yes or no, and then you can explain it.

A. The correspondence is in the record. It has been introduced.

Q. Just answer me, yes or no. The answer is: no? Is that what you say?

A. We discouraged you from proceeding with this application. So I think the obvious answer for PDH is the same.

Q. There's no way that this applicant could have anticipated any kind of a reasonable, mutual cooperation on a PDH, was there, Mr. Pammel?

A. From the Staff. I can't speak for the Board. I don't know what the Board would have done with respect to that approach.

Q. Now, Mr. Pammel, when applications come before the Board for densities or catagories that are different from plans or from other Board policies, it is the normal case that the Board grants the zoning application at the density or to the category that the Board believes reasonable, isn't that the fact?

A. As a rule.

Q. Cases are normally, perhaps, denied at the applied for level and then granted at the lesser level. Isn't that the way the system works?

A. I'd say the Board uses that technique.

Q. Certainly. They use it practically all the time, don't they?

A. I can't say all the time. They use it.

Q. It's a very frequent technique, right?

A. I'll say they use it. I can't testify as to what percentage of the time they use that technique.

Q. Mr. Pammel, were you present in the Board room at the last zoning day? I believe it was in June when a number of cases in the Vienna-Oakton-Dunn Loring area came up for RT-5 and R-12.5 densities?

A. I'm aware of the cases, yes.

Q. There were three or four of them, weren't there?

A. Two of them that I think you're alluding to --

Q. In each case the density requested was denied, and the Board granted density at the lower category, isn't that correct?

A. In those cases, yes.

Q. And that's the general practice, isn't it, Mr. Pammel?

A. Well, I think that was the situation there where --

Q. Just answer me, isn't that a general practice, yes or not?

A. It probably was the general practice from that time forward. Before that, I think in many instances the Board -- well, I'll just say that it was the general practice from then forward.

Q. It's been the general practice for years, hasn't it, Mr. Pammel? Just, yes or no?

A. Generally speaking, yes.

Q. Now, Mr. Pammel, as I understand it, you can point to no ordinance and no authority that gives the Staff or the Board the right to require a development plan?

A. As of the present time?

Q. Yes, sir.

A. That's correct.

Q. And as of the dates of these zonings and their processing through the County?

A. There was no ordinance requiring a development

plan. There was a policy, but no ordinance.

Q. And you have been advised by the County Attorney that there was no way that could be required, isn't that a fact?

A. With what respect?

Q. That there was no basis on which a development plan could be required of an applicant in a 12.5 or R-17 zoning case.

A. You mean no legal basis?

Q. Yes.

A. Nothing in local or state laws?

Q. Yes, sir.

A. I think the County Attorney indicated by policy.

Q. I didn't ask you that, Mr. Pammel. Would you just answer, yes or no. You've been advised that there was no basis for the County requiring a development plan in R-12.5 and R-17 zoning, isn't that correct?

A. Well, I can't say, frankly, you know, that I, as such, have been advised there's no basic reason because I think 15-1.490 of the State Code --

Q. Have you ever received advice from the County Attorney's office on development plans?

A. I think the County Attorney has raised some issues in the past about it.

Q. The County Attorney said it was not a valid procedure, that it had no basis, isn't that correct?

A. That was a preceding County Attorney. I think the present County Attorney --

Q. All right, Mr. Pammel. I just asked you if you haven't been advised that there was no basis for it.

A. I think the present County Attorney advises that there is some basis.

Q. Do you have a letter to that effect, an opinion to that effect?

A. A verbal indication.

Q. You had a letter from a County Attorney that there was no basis, didn't you?

A. I think somewhere along the line.

Q. You knew very well you did, right?

A. I say, in my recollection, as best I can recall, there was some memorandum.

Q. Now, Mr. Pammel, is there any basis that the Attorney has advised you of or that you can cite for the binding nature of a development plan even if

submitted?

A. No, it's not binding as of this point in time.

Q. In other words, you could submit a series of lines and roads and layout and go to a zoning hearing, and there is absolutely no way that that could be enforced, isn't that correct, as far as legal enforcement?

A. Other than the set of covenants and/or stipulations that might accompany it on a voluntary basis.

Q. They are all voluntary, are they not?

A. That's correct.

Q. Now, Mr. Pammel, there is -- you indicated that there were no controls over development once zoning was granted. Isn't the purpose of all of the Staff in the County Development Office other than your office, the rezoning branch, to effect controls over development after zoning is granted under the subdivision control ordinance?

A. Basically, the standards set forth in the zoning ordinance and the subdivision code.

Q. All right. You control -- see if I'm correct -- storm drainage under the approval procedure for

subdivision plans, isn't that correct?

A. Yes.

Q. And that also encompasses siltation control, does it not?

A. Correct.

Q. And you have certain policies and criteria regarding use of steep slopes, do you not?

A. Policies, criteria, but you run into the same problem there that you do with some of these other policies.

Q. But they all come under the siltation-storm drainage criteria, do they not?

A. Right; and there are certain standards that you can use to protect these slopes while undergoing development, but there's nothing that says you can't build on them.

Q. Exactly; because you know of nothing that says it's illegal or prohibited to build on a slope if you do it right. Isn't that correct, Mr. Pammel?

A. You can build on a slope, that's correct. But, you can also cut the slope off and build, too.

Q. Fine. And, both are perfectly legal approaches to the development, are they not?

A. Legal; but it doesn't mean that they are reasonable, practical or sound methods of doing it.

Q. Now, Mr. Pammel, there's also rather detailed criteria for street construction and grading the street, and so forth, isn't there?

A. Yes, there is.

Q. And that's enforced through the very department of which you're a part, is it not?

A. Yes, it is.

Q. There are also considerable numbers of criteria for the location of streets, the site distance, the curvature, all of those details that go into a lot layout, are there not?

A. Yes.

Q. And that, again, has legal basis in the subdivision ordinance, doesn't it?

A. Yes.

Q. Now, Mr. Pammel, isn't it fair to say that what you really meant, when you said that after zoning the County lost control of the case, was that after zoning, the County lost the opportunity to extract from the applicant extra legal matters? That's what you really meant, wasn't it?

A. No. I think, basically, the quality of design, and once it's gone past the point where we can review a development plan and the proposal that the applicant presents to the County, then I think he can do exactly what is set forth in the Code, and all he has to do is comply with those criteria; but, we can no longer control design, rectilinear as opposed to curvilinear, good conservation-control measures relative to cutting slopes and whatnot, no, we can't control those.

Q. Precisely. After the zoning he can do with his property what the law allows him to do under subdivision control and zoning. Isn't that what you just said?

MR. SYMANSKI: Objection, Your Honor, to his continual references as to what the law says. Mr. Pammel, of course, has opinions on what the zoning ordinance says, but his continuing of it is legal, it's not legal, it is legal, it's not legal, I don't think he is competent to decide whether they're legal or not legal.

MR. HAZEL: If Your Honor please, I think he just said that after it was zoned a man could do with

his property what the law allows.

THE COURT: You were just repeating that, sir. I don't think it's necessary to ask the question again.

MR. HAZEL: All right, fine. I apologize and withdraw the question and let the answer stand.

BY MR. HAZEL:

Q. Now, Mr. Pammel, I show you Exhibit 25 and ask if you can identify that document?

A. I believe I identified it once.

Q. I believe you did. I think it was introduced through your testimony as my witness in the direct part of this case.

I show you page 75, Mr. Pammel, and ask if you recognize the policies on implementation of zoning in the entire Pohick shed recommended by the Staff in that document?

A. Do I recognize?

Q. Yes.

Are you familiar with those policies?

A. These are the implementation recommendations that were in that report.

Q. They were recommended by the Staff, were they not?

A. Correct.

Q. Would you read the definition of holding zone and its application to the Middle Run?

A. "A holding zone is established when it is public policy to postpone development in a certain area. A development zone is established when it is public policy to encourage development in a certain area."

Q. Do you differ from that definition of a holding zone?

A. I do, certainly. I've indicated that.

Q. Well, I understand that, that you differ from it. But, that is the Staff definition, is it not?

A. That was what the Staff presented to the Board at public hearings, and I think this further goes on to show that there was some differences of opinion as to that terminology expressed by one of the Board members. It was subsequently changed and deleted.

Q. Now, Mr. Pammel, why was it changed?

A. As I indicated, one of the Board members felt that the terminology or the term holding zone wasn't appropriate.

Q. In fact, the Board was advised that it was

not a legal device. Isn't that what happened, Mr. Pammel?

A. I think that that was discussed. I don't know what the legal opinion was as such.

Q. Didn't you attend all those hearings?

A. I attended some, but not all.

Q. All right. Would you read the part of that, the next paragraph between 1969 and '75 with reference to the Middle Run, in particular?

A. "Between now and 1975, all land in the Middle Run area, South Run area and the Burke Regional Center should be declared a holding zone."

Do you want the rest of it?

Q. No.

Now, Mr. Pammel, would you read the second full paragraph, the first line on page 403 of the Board of Supervisors minutes of October 15, 1969?

A. I think I read this once before, too.

Q. Well, fine. Would you read it again, so you will have it in your mind? I'm going to ask you a question about it.

A. "Supervisor Bowman said he thought the

"term "holding zone concept" was an erroneous choice of terms, and what they were really referring to was a holding zone technique."

Q. Now, would you stop there. Could you describe the difference between a holding zone concept and a holding zone technique?

A. You mean as it's referred to in the minutes? I can't interpret what Mr. Bowman was referring to.

Q. Well, you've been interpreting what the Board did in policies and directions to the Staff all along, and I would like to ask you how the Staff -- change the question. How did the Staff interpret those minutes in connection with the subject case? And how did their treatment of the subject case differ from a holding zone concept?

A. I gave you my interpretation of what I felt this was; that it's not a holding zone. The zoning is there, and it can be developed now at one acre and in the future, when public facilities are in accord with the policies, are available, it could be developed at a higher density. It's not a holding zone.

Q. Mr. Pammel, let me ask you this: did the Staff and did the action of the Board, in your opinion,

effect a holding zone technique if it wasn't a holding zone concept?

A. What? Holding zone technique where?

Q. On the two subject properties.

A. I would have to say again, I don't consider it to be a holding zone technique. I consider it to be a retarding of the potential, the full development of the tract until public facilities are available.

Q. I see. Mr. Pammel, there is adequate water service to the subject property, is there not, for the requested 12.5 or R-17 zoning, whichever might be determined?

A. Adequate water service can be extended to serve.--

Q. Just answer my question. Isn't there adequate water service in terms of development of property in Fairfax County, yes or no?

A. There is adequate water service, yes, or it can be made adequate by improvements to the system.

Q. What improvements did you have in mind?

A. There is a pumping station of water in this area.

Q. Correct. Secondly, there will be sewer

capacity to serve this property, according to Mr. Liedl, in March of 1976, is that correct?

A. I don't agree with that.

Q. I didn't ask if you agreed. Did you hear that testimony?

MR. SYMANSKI: Your Honor, the testimony is in the record. I don't see what Mr. Pammel's saying what Mr. Liedl said is relevant.

THE COURT: Objection sustained, sir.

BY MR. HAZEL:

Q. Mr. Pammel, I'm afraid that that question would take another hour.

MR. HAZEL: Your Honor, I have no further questions of this witness.

MR. SYMANSKI: I have just a couple.

REDIRECT EXAMINATION

BY MR. SYMANSKI:

Q. Mr. Hazel asked you whether RE-1 development had to be in cluster or not. Does R-12.5 or R-17 have to be in cluster once it's granted?

A. No.

Q. So under this legal ability, after zoning the developer could go into conventional development,

isn't that correct?

A. He could, that is correct.

Q. There's also reference in some of these questions to what, legally, a person, an owner, could do after he got rezoning. What's been the practice in the past with regardsto commitments made before zoning. Have their been commitments made, in effect, rather than a legal basis or a moral basis, between the Staff and the Board and developers?

A. Yes, many times.

Q. Does that work most of the time or not work?

A. It has worked very well.

Q. With regards to whether development plans can be required under the law, have there been conflicting opinions from various County Attorneys to you?

A. Yes.

Q. That is, a County Attorney has said, no, and a County Attorney has said, yes?

A. Yes.

Q. The white document, the Restudy of the Pohick that Mr. Hazel had you read from, is that the

present comprehensive plan for the Pohick?

A. The present official plan right here is the blue cover with the notation, adopted by the Board of Supervisors, September 10, 1969.

MR. SYMANSKI: No further questions.

MR. HAZEL: I have none, Your Honor.

THE COURT: You may step down, sir.

(Witness steps aside.)

THE COURT: Is that your evidence, sir?

MR. SYMANSKI: Your Honor, there has been some confusion on sewer. I would make a request that possibly I be allowed to bring back Mr. Liedl tommorrow, but I realize I don't have him available now.

THE COURT: I think we've questioned Mr. Liedl about as much as Mr. Liedl can be questioned on that, sir. I'll review my notes on what Mr. Liedl said if you want.. He was the first witness called.

MR. SYMANSKI: Well, my request is that I possibly be allowed to call him back for a few minutes, but, as I said, I realize I don't have him here now. I know it's just a request. In other words, the figures that I have today, there's some confusion among the Staff members, and I would request that I be allowed to

clarify that.

MR. HAZEL: I don't mean to be difficult, but today is the day. He had the chance to cross examine Mr. Liedl at length. He's the County's own employee and their sewer department chief.

THE COURT: You say he's not working today?

MR. SYMANSKI: No. I don't know if he's working today or not, Your Honor. I merely said that some information I got today conflicts with my impression of Mr. Liedl's testimony, and there is a point for clarification. I have not talked with him this morning; therefore I could not bring him in -- information that I got at trial, right before trial today. There seems to be confusion in my mind and Mr. Pammel's mind.

THE COURT: My notes are that Mr. Liedl said: can definitely service the subject land in March of April of 1977.. I mean, the capacity of the plant is going to double, not just go up just a little bit, but double.

MR. SYMANSKI: That's what the question is.

THE COURT: He said it was going to double. He said it was going to go from 18 million to 36 million.

You say you have evidence to the contrary?

MR. SYMANSKI: Yes, Your Honor. But, as I said, I have not talked to Mr. Liedl. It's a point of clarification on that exact statement that I would like to have in the record. I admit that I don't have anything now.

THE COURT: I don't know whether you're asking me to deny your request or grant your request.

MR. SYMANSKI: Well, I'd like to have you grant it. I realize I don't have it here now.

THE COURT: You can get him here in 15 minutes, can't you, or an hour?

MR. SYMANSKI: I could try, Your Honor.

THE COURT: We've got to be here tomorrow, anyway. If you want him here for a short statement of evidence tomorrow morning, I'll hear him then.

MR. HAZEL: I was just trying to close up the record, but I have no objection.

THE COURT: If he says it's information that has just come to his attention today, in fairness I'd let him --

MR. HAZEL: I don't want to be difficult with the County.

THE COURT: It's not really reopening his case. I'll just let him put on that evidence. It's just Mr. Liedl now. You're not asking to bring in a whole flock of people?

MR. SYMANSKI: Yes, Your Honor.

THE COURT: All right. I'll let you offer Mr. Liedl for further testimony tomorrow morning at 10:00 o'clock, if you desire.

The case is continued until tomorrow at 10:00 o'clock. And you will be ready for final argument tomorrow morning?

MR. HAZEL: Yes, Your Honor.

THE COURT: I hope I can get to read all this this afternoon.

MR. SYMANSKI: Your Honor, I'd be willing to continue it to tomorrow at 2:00 if that would give you more time.

THE COURT: No, sir. It's like a vacuum. I'll fill it up. If you give me until 2:00, I'll do something else.

(Whereupon, at 12:20 o'clock, p.m., the hearing in the above-entitled matter was recessed until 10:00 o'clock, a.m., July 19, 1973.)

CERTIFICATE OF REPORTER

I, Esther W. Farmer, stenotype reporter, hereby certify that the foregoing is a true and correct transcript of the proceedings in the above-entitled matter taken in the Fairfax Circuit Court, July 18, 1973.

In witness whereof, I have set my hand this 19th day of August, 1973.

Esther W. Farmer

VOLUME IV

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - - - - - - - - - - - - - - -:

THOMAS R. WILLIAMS, et al., :
and
JAMES L. McILVAINE, :

Plaintiffs, :

vs. : At Law No. 26399

THE BOARD OF SUPERVISORS
OF FAIRFAX COUNTY, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - -:

A. G. VAN METRE ASSOCIATES, INC.,:

Petitioner, :

vs. : In Chancery No. 39437

THE BOARD OF SUPERVISORS
OF FAIRFAX COUNTY, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - -:

Fairfax, Virginia

Thursday, July 19, 1973

The above-entitled matter came on for hearing at 10:00 o'clock a.m.

BEFORE:

HONORABLE WILLIAM G. PLUMMER, Judge

APPEARANCES:

JOHN T. HAZEL, JR., ESQUIRE
For the Plaintiffs and Petitioner

GEORGE A. SYMANSKI, ESQUIRE
County Attorney
For the Defendants

I N D E X

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EXHIBITS

STIPULATION	FOR IDENT.	IN EVID.
No. 30 (opinion of Judge Cacheris in A & B Construction case)	A-3	A-3

THE COURT: You may proceed.

MR. SYMANSKI: I would like to introduce my stipulation and opinion of Judge Cacheris in the A & B Construction case.

THE COURT: All right. Stipulation No. 30. Give me a minute to read it.

(The document referred to was marked Stipulation Exhibit No. 30 and received in evidence.)

THE COURT: Where is that on the Board, sir? Is it the one way up north?

MR. HAZEL: Almost off the map. It is right up here, Judge, right here (indicating). It is a piece that is mostly off the map.

THE COURT: To the northeast of where it says, George Mason University?

MR. HAZEL: Yes, sir.

MR. SYMANSKI: This is Roberts Road.

THE COURT: All right.

MR. SYMANSKI: That's our case, Your Honor.

THE COURT: Do you have any rebuttal evidence?

MR. HAZEL: No, Your Honor, I do not.

THE COURT: All right, sir.

MR. HAZEL: If Your Honor please, after three days, and now entering the fourth day in this case, I am sure that there is very little that I can add in the way of argument that has not already been presented to the Court in one fashion or another, so I will try to be very brief and stay within what I consider to be the basic material and essential issues of this case.

There are two grounds, as I stated, two areas in any case which the case must rest on and, in this case, I am speaking of the law of the case and the facts of the case.

In this case, I think we have established conclusively and carried any burdens that we are required to carry, that the denial of the zoning applications with the effect that the subject property be retained in the RE-1 category is neither legally nor factually sustained.

Now, I say that with reference in law to the arguments of the County Board that a holding zone concept for the deferral of the development of an area is a justified, valid, in this situation, legal approach, and I do not think as a concept that that is a legally sustainable position on the facts presented.

I will address the law, of course, in the latter part of my argument. The other basis that the County intends

to rely on, does rely on, is the factual basis that this property should be denied zoning because public facilities are not available.

I think the evidence has conclusively established that public facilities are available as required for the present zoning of this property even assuming there is some validity to the County's argument regarding holding zones, retardation of development, and similar matters.

Now again, we are asking the Court, in this proceeding, to find only that the property -- I think under the Boggs case we are required to send the property, send the zoning case back to the Board of Supervisors if in fact the RE-1 zoning is held to be inappropriate because of its arbitrary and capricious nature so that the decision for today would be, I think, confined to the appropriateness of the RE-1 zone and not whether it should be 12-5 or R-17.

THE COURT: In your prayers, you have asked for a number of things in both cases.

One, you ask that the Court declare the present or retention of the RE-1 zoning to be arbitrary and capricious, but then second, you ask that the action of denying the application as made be declared illegal and null and void. In effect, then, ordering 12-5.

You are not asking for that second part?

MR. HAZEL: If Your Honor please, I think that under the Boggs case and the decision since Boggs, that we have to approach the relief in steps in that the initial step is to determine whether or not the zoning on the property today, the RE-1, is an arbitrary classification.

Should the Court find that the RE-1 zoning on the property today is arbitrary, and of course --

THE COURT: I was just saying that what you have asked for orally varies somewhat from what you asked for in your written prayer. What you are asking for orally is included in what you asked for in the written prayer but it is not as extensive because --

MR. HAZEL: Yes.

THE COURT: -- it asks that we direct the zoning records be changed to show 12-5 and plats be approved, and things of that nature.

MR. HAZEL: Judge, I think the oral request that it be declared arbitrary to RE-1 is the first step. It is my position that the case remains at the breast of the Court during the processing of the Board of Supervisors so that complete relief can in fact be rendered because, should the case come back -- let's assume the Court finds that RE-1 is

arbitrary and directs the Board to take some action to change that or correct that situation. It is my position that the case remains in the breast of the Court subject to whatever action the Board might or might not take in the future.

The Board might decide that they will take no action and at that point I think we could come back to this Court on a continuing basis and request the Court to grant some further relief. That is the reason I think we have to set it up as a complete relief which we ask, and then ask the Court to remain involved in the case. That has been the general procedure in the cases of recent months, certainly six months.

Prior to Boggs, there was, as I am sure the Court knows, generally the order was directed revising zoning. Since Boggs, we have had a number of different situations, but what they boil down to is the Court finds the existing zoning arbitrary, directs the Board or grants the Board an opportunity to take some relief, and then depending upon what that relief is there is some further proceeding. But I think the issue today is, as I orally suggested at the beginning of the trial, simply whether or not the RE-1 zoning on the subject property is appropriate.

THE COURT: Go ahead, sir.

MR. HAZEL: Now, there are a lot of things about the case which make it very simple, in essence. We don't have to go through a lot of evidence to determine what the Board did or didn't do. The Board, the staff in the beginning and the Board of Supervisors, as the cases were heard, made it quite clear that they had no intention of changing the RE-1 zoning at this time.

Properly, and I think it is important to look at the obvious nature of the property -- the property, the testimony, is really uncontradicted in many ways.

The property is in the upper end of the watershed. It is certainly among the best property in the watershed for development. It has roads on several sides and a road bisecting it. It is adjacent, along, an 8,000-foot property line with zoning that is in the R-12-5 category.

There have been numbers of zonings in the area indicating complete, almost unfettered, rezoning activiity in the area changing the character of the area.

There is evidence from Mr. Pammel that with the cases of B-898, B-840 -- 848 and B-199, and C-283, that there has been a sufficient change of character to grant those cases.

The Board of Supervisors simply takes the position that they are empowered, because of their apparently general

enabling authority, to hold watersheds, hold areas, in a retarded zone awaiting some future date for development; and they have determined that in this case, they allege at least, that there are public facility inadequacies, confining it to the law on holding zones in the latter part of the argument, but the factual part of the argument is simply not there supporting the County's position.

In every instance, the County's witness demonstrated conclusively that there are facilities there of a level equal to other areas in the County. The only evidence that could be construed to the contrary really didn't deal with the subject property in the subject case. Mr. Pammel talked about facility inadequacies and overcrowding in a general way.

Now, let's look at what the facilities are that they talked about:

First, there is a water line substantially on the property and it is conceded that the water is sufficient for the property.

Secondly, there is a sewer line along the eastern boundary of the property that was installed in express recognition of the Master Plan density on this property with capacity in the line to handle the 12-5 that we have requested, and certainly the R-17.

With regard to schools, the testimony of the school representative, the man who for a number of years has worked in the school area, is that there is no crisis in education that will develop from the grant of either the 12-5 or the R-17 on this property and that the system can support the proper level of education for those children.

With specific reference to intermediate and high schools, there are four high schools on that map which will service this property. In addition, as a completely unique feature, within three or four miles of the subject property is a community college with numbers of thousands of students and, in fact, a university. I doubt seriously that there is anywhere in Virginia a better situated piece of property with regard to the school situation, education generally.

The specific testimony of Mr. Whitworth was that the intermediate and high school situation, which the County's five-year program says is the most expensive public facility, would be adequately handled without any problem; that they bus routinely to those schools and they just adjust students between schoolsand there is no problem.

With regard to the subject tract as far as elementary schools, the County operates, or has a policy under which it talks more than it really functions, of neighborhood schools.

The neighborhood school that serves these properties is planned to be on the properties, and obviously the property development, zoning and development, has to come before you can build a school. In fact, a very salient point, the County by its own voluntary act has reduced the capacity of an adjacent school by a third because they say they didn't really need a facility at this time.

Now, it is impossible for me to understand how any person hearing that evidence and viewing this whole school picture can argue, as Mr. Pammel did, that there somehow remains a school situation, which he did not specify. The total school system in the County as a whole is now leveling off or dropping. There can hardly be any semblance of a debate over whether or not the school situation is a valid problem.

The sewer capacity, incidentally, as we pointed out, I think is agreed and there is no testimony to contradict it, by March or April of 1976, the capacity will be available in adequate amount to handle the property.

There is also uncontradicted in the record the evidence that the property, even if zoned today, would be several years before it could be occupied and then would be occupied in an extended schedule; that that is the experience

factor in the County, and that that would probably occur in this case.

With regard to fire services which the County sometimes uses as a basis for this sort of thing, the specific statement of the fire services is that adequate fire protection is available.

The County, I believe, conceded that police protection is merely a matter of adding police and that this can be accomplished.

With libraries, the Kings Park Library is three miles away and has the same arrangement or same availability as the Orange Hunt Estates or any other property that is three miles from the property.

THE COURT: Where is that, just out of curiosity?

MR. HAZEL: Right up here near the Lake Braddock. Kings Park is right off Rolling Road, right here.

I am pointing to an area which is just maybe five-six hundred feet northeast of the Lake Braddock High School. In that vicinity there is a Kings Park Library, I think now open. There was a comment by Mrs. Cleveland that sometime there might be a park shortage, although this property is the closest tract of urban density to the County's largest park, the whole Burke Lake complex is literally within walking

distance of this tract, several hundred feet away to the west.

Roads: There was a great effort to fuzz up the case about roads and that really doesn't hold water. The fact is that the roads on this tract, and the collector roads through this tract, await the development of the tract just as all of the other zoned property does. There are inadequacies in the existing road situation if you immediately injected this zoning in there without any improvement in the roads. But the roads today do not require any more improvement in the immediate vicinity of the tract and the improvement in the testimony is uncontradicted comes again as those roads develop.

The roads that lead into the area, the major roads, have sustained major improvements.

In the last three or four years, commencing with Ravensworth-Belvoir interchanges, Braddock Road, Rolling Road, Keene Mill Road and so forth, all are under-improved or have been under improvement in the past several years for the purpose of serving the Pohick.

The road expert, Mr. Pant, offered by the County, concedes that in 1977 or thereabouts, that the access from the subject property, if developed as the zoning requests, eastward, would be fine. It is eastward access that bears most of the traffic.

In addition, he testified that 123, which is west of the tract, is in the primary program. I believe either he or Mr. Pammel testified that is in the primary program for development.

In essence, despite Mr. Pammel's constant refrain that somehow public facilities are a problem there is, I submit, Your Honor, absolutely no evidence of debatable quality that there is a problem in public facilities related to this tract which is not in the process of solution, and indeed the credibility of Mr. Pammel was strained to the breaking point at more than one instance in this case, and one of those particular instances is on the Levin tract, C-567.

Mr. Pammel in the staff report commented that the public facilities level in the area was rising to an appropriate level to justify zoning. The Board of Supervisors in C-567 once prodded by the Court, by the finding that it was an arbitrary RE-1 zoning, not only passed right through the 12-5 density but went to five-unit per acre density on a tract of land that is 500 feet from the subject property and has essentially the same access system.

Mr. Pammel's credibility was again strained to the breaking point in a number of other cases. In fact, his insistence that the four cases of the Levitt zoning were valid

zonings because the character was changed, not by the development of the Levitt tract at the time B-848 was zoned, but simply by the fact that the Levitt tract was zoned. This simple fact is that the area of the Williams-Van Metre tract is committed for development. It is committed by invitation of the County that started with the passage of the bond issue in 1965. My clients both relied on County policy. Mr. Pammel did, I think, illuminate the Court and recognize the fact that that is the policies and Master Plans are generally a very uncertain thing for people to rely on.

It seems to me that again says a great deal about the credibility or lack of credibility of the County.

The fact is, in 1965 the voters of the County passed a public referendum and elected to spend funds to extend sanitary sewer into every watershed. In 1966, the County entered a contract to provide the extension of a trunk sewer up this watershed which is in fact in place. The plans of the County anticipated ten people per acre. We are talking, even at the 12-5 density, of only seven and a half people per acre. Yet here a short seven, eight years later, the whole issue is up for grabs and not only is the bond referendum representation being in effect ignored, but the Master Plan recommendation for 12-5 in 1967 is being ignored. They say

that has reversed the contract. The contract has to run upstream, and in the minutes of the Board of Supervisors from 1969, the only problem wasn't the moral problem, wasn't the real credibility of Fairfax County is on the line and what should we do about it? The only problem that the Board faced, and they got over that essentially by ignoring it, was, do we have any kind of a legal commitment because we entered a contract under which people spend half a million dollars to run a sewer and other people bought land in reliance on it. All those things seem to be brushed right over.

They came up in 1969 with a new Master Plan. The new Master Plan didn't say one acre for this. The new Master Plan recognized this for something in the vicinity of the urban lot density.

If Your Honor please, for three or four years, ever since I have been trying to ferret out the true intent of the County and the staff of the County and the difference between what they show on the map and the population numbers that they give now for a neighborhood. But the County does not, in any part of this case, suggest that R-12-5 or RE-1 is the proper zoning for this tract and its ultimate use.

The County says that somewhere between two units and whatever the population numbers are, depending on the

neighborhood center, is the true zoning.

Mr. Pammel attempted to get into the neighborhood center and failure to have a development plan or PDH application as a basis, and again I think his credibility was severely strained because there is no evidence that anything concerning that PDH plan or that development plan had anything to do with the case.

The Board simply said, we are not going to zone it RE-1 and that's the end of it. The staff so advised us in letter they sent out and yet on the stand Mr. Pammel went quite far in trying to justify the denial of this zoning as one because we didn't file a development plan which he had no authority to request, and it was not binding if you filed it, or a PDH application, if a PDH application had been filed, the answer was, we weren't going to zone it, anyway. That kind of irrelevancy was introduced in the case as far as the evidence.

The simple fact is that this property does have adequate level of facilities even if you assume that public facilities as a general matter have some relevance in a zoning.

The second fact of the case is that the County's credibility since the bond issue of 1965 with regard to this

area has been minimal at best and in this day, when government credibility is such an issue, I think it is a sorry mess when you review the seven years of the history of this piece of property and what the County has done to try to distort the facts in this area.

Now, with particular reference, and I think the culmination as I read into the legal argument, the culmination of the factual distortion and credibility gap occurred in 1969.

The planning staff prepared and suggested a theory of holding zones which is outlined to a great extent in the exhibit,, I believe, 25, the Pohick Study, Restudy, the one in white cover; there was a whole page about how this holding zone would work and after 1975, which, incidentally, we are talking about because of the lead time required so the County has already delayed the case until the 1975 period -- but after 1975, this would open up. In the meantime, the property would be a holding zone.

Astonishing was the discourse between the Board members during the hearings in September and October of 1969 in which the Board knowing full well, and it was conceded several times by Board members, they really think that holding zone was valid, they removed from the Master Plan the holding

zone language with the thought that Mr. Bowman said he thought the holding zone concept was an erroneous choice of terms and what they were really referring to was a holding zone technique because the objective of inhibiting, deferring or restraining development of areas of the County in greater densities can be accomplished by other tools.

Since the holding zone technique is probably invalid, the Board of Supervisors not only knew full well that the holding zone technique was invalid, they took steps not just the current Board, but the last Board, to send to the Legislature Senate Bill 95 which indicates the proper enabling act so that they could legitimize this device.

Knowing all that background, the questions of invalidity, the questions of the admission that they went to Richmond and asked for a change, they then came back, didn't make their annual reviews of the holding zone, had nothing, no look at this thing at all.

The staff in August of 1971 came out with a number of charts that attempted to justify a vacant land reserve although, if you read that carefully, there has never been any hearing, there has never been any formal determination of what ratio you use, and under the five-to-one ratio they are already out of land and were in 1971 before the real

pressures for development commenced.

The Board, and I have to suggest that it must be inferred that this was somewhat in anticipation of this case so they could come in and suggest their hands were lily white, the Board in July 2nd, the week before this case was tried, decides that they will adopt the staff's policy, staff's recommendations of August '71 so that they can say, yes, we have reviewed the holding zone concept and the facts in the Pohick and we think they are still the same.

Nowhere in any of this mishmash that has occurred since 1969 has the staff suggested, or the Board found, a time at which Mr. Williams can look forward to developing his property for the Master Plan density. It is always sometime in the future when the facilities are adequate.

I think that all of those events speak for themselves in loud and clear tones.

The other thing that we turn to is, what is the fruit of this discrimination? The fruit of the discrimination is the uncontradicted testimony that restrictive zoning in Fairfax County is causing the County to be a locale for not the rich but the super rich.

Now, that testimony from Mr. Seldin is an extremely important fact for the County to be considering but nowhere

have they even addressed it. They have talked about the possibility that there is some vacant land in the Pohick Main Stem that could be zoned. It isn't even in the development stream. It is held by four landowners for purposes of their own. There is no indication when that is going to be, if at all, available on the housing market and in the meantime we have item after item that the County undertakes to give lip service to a desire to provide housing. They know they can't live long without addressing the problem of the super rich and the fact that you can't find anyplace to build 12-5. Where does Mr. Pammel suggest that 12-5 could be built? On the Child's tract which he knows full well is not a 12-5 site? At the Beltway and Route 50? Other than that, he can't come up with anything to support his opinion. Maybe his opinion was, maybe his interest is, that we were not going to have any more 12-5; we are going to have everybody living in apartments in the inner city; but that is a choice that is not, I don't think the planning staff's and the Board of Supervisors' prerogative to make.

What else does the Board come up with to address the problem of housing?

They come up with, first, a low-moderate income requirement because they know they are not providing a variety

of housing and that in itself is an admission of utter futility in their approach. They came up with a system which, as this Court so well knows now, is on appeal, having been found invalid at the trial level, a system for requiring people to build houses that people can afford to live in. That was two years ago.

Now, in recent weeks, the crisis in housing has become so critical that they have come up with a rent control law which, in its first or second whereas, says there are shortages in houses because the prices are so high. Nowhere have they addressed the policy of restrictive zoning and what they are doing by their very actions in denying these cases.

Now, they have a convenient excuse which says, we have a sewer moratorium, sorry, that throws all the numbers out. They are not doing anything about the sewer, the County generally. In the very area where the County is, within two years they are going to have some facilities, they are trying to hold the zoning back so that even when the facilities are there, there won't be any zoned land available because the testimony again is uncontradicted that if you start now, about the time the sewer comes on the line, you will be at the point where you can start proceeding with your lot construction.

In every respect, the County's position in this

housing discrimination has been lacking in credibility, lacking in integrity, and hypocritical in the most courteous phrase or courteous characterization of their act. On the one hand they are doing all of these things which are nothing more than lip service, going over to the District and joining in a suit to get housing funds. What does that do about the house that Mr. Seldin says used to cost $50,000 and is now costing $70,000? They haven't even addressed that problem. They haven't even begun to address it. They are always going to have another plan. Mr. Pammel said, wait a few more years, wait another 18 months, and we are going to have another Master Plan.

The one that was prepared and introduced in October of 1971 never saw the light of day. The guy who prepared it is no longer here because that plan said, we have got to have some growth in this County or we are going to spend a lot of money that you are not expecting to spend. That plan hasn't been heard from since.

The plans that they are talking about now are some more no-growth plans so that consequently, where is their good faith, where is their credibility when it comes to doing something about lots available?

Now, looking briefly at the law, it is obvious on

the most basic legal grounds, commencing with the constitutions of the United States and Virginia, that discrimination cannot exist. Discrimination individually against property rights, discrimination against human rights were both, I thought, long since put to rest.

There was a question in Mr. Seldin's testimony about intent and perhaps the polite answer to the problem was Mr. Seldin's who said he didn't have any objective feeling or opinion about the proper course for the County to follow, but in answer to the questioning about intent he said only two things he could imply: either they intended what they are doing or they do not realize what their actions do.

So, leave it either way, the fact is, I don't think intent is a problem.

There is a growing line of cases in the Federal Courts particularly regarding what occurs when communities do not provide appropriate facilities. The Fifth Circuit Court of Appeals in Hawkins against Shaw case in Mississippi, in effect says that intent is irrelevant; that it is the actions that prevail; and that where public facilities are inadequate to sustain various things -- in this case, true, it has a racial problem, Black against White -- but in this case it is people that are here against people that might want

to come here.

It is the same thing in the human race. Despite the fact that we conclude that no compelling State interest can justify disparities that exist, it may be argued that the result was not intended; that is to say, the record contains no direct evidence aimed at establishing bad faith, ill will, or evil motive. We feel the law on this point is clear: Actual intent or motive need not be directly proved for equal protection of the laws means more than merely the absence of governmental action designed to discriminate.

If Your Honor please, I have a copy of that for the Court. I think that puts the "intent" issue completely to bed.

The fact is that discrimination against my client and his rights and against people generally is being affected by the actions of this County. Whether they deliberately intend to do that or not is not the issue. Motivation is not the issue.

One of the Board members may do this because one of the Board members does not truly want to see anybody else in the County; another Board member may do this because of a completely different motive. But I think the confusion is between motivation and intent. In both cases it is what

results that counts.

In this case, the uncontradicted evidence in the record is that the result of the County's actions restricting zoning has been to make Fairfax County a jurisdiction available only for the super rich.

There was a very interesting comment from Mr. Whitworth who may not know of what he spoke, but he spoke in his opening remarks in response to my questions about the level of the school system, Mr. Whitworth said that the County had as a result of what they believed to be economic pressures, had a leveling and a drop in the elementary school children because the young married group, the younger people, were not able to find adequate housing in Fairfax County and they tended to go to places like Prince William and Loudoun, and this has been so pronounced over a sufficient period of time that the level of the school children population is dropping. That was Mr. Whitworth speaking as a school analyst, a school statistician.

Not any of the witnesses that we put on -- Mr. Downs who is an appraiser of long-time reputation in history, pointed out some cases in which the land prices has risen phenomenally. He again without the slightest contradiction by the County attributed that to restrictive zoning and the

inability of the development industry to find lots.

Mr. Williams, Mr. Wills, both testified corroboratively. The County did absolutely nothing to oppose that, to counter that objection, except Mrs. Cleveland had some numbers. She conceded that if you figured that five-to-one ratio was necessary instead of three-to-one, that even the County study in 1971 said there wasn't enough zoned land in this area.

Now, going through the cases, the Federal case disposes of intent and truly, I think that is so basic in Courts these days that it certainly in civil cases other than criminal proof, it is not the intent, it is the result of the action that counts, that nothing more need be said on it. I am frankly pleased and rather proud of the fact that our Supreme Court in 1957 was one of the first Courts in the country -- 1959, in the Carper case -- to identify and, I thought, put at rest the problem of discrimination in zoning as a device under which governments could avoid their obligations.

The Carper opinion in 200 Virginia at page 653 is very very apropos and relevant to the case at bar. The opinion of the Court was that the two-acre zoning of the Freehill Amendment was designed to limit commercial and residential development of the western area of the County,

thereby channeling people to already thickly populated eastern area to promote economy in the operation of government.

After evaluating the evidence, the trial Judge was of the opinion that the real purpose of the Freehill Amendment was to prevent the development of the western two-thirds of the County as a residential area, and to channel the County's population into the eastern one-third where the cost of operating the government would be more economical.

Now, I asked several witnesses during the course of the trial that express question and each one of them said, yes, that was the fact. Mr. Pammel again with his credibility fairly thin, and I am sure knowing that this was the answer I expected, tried to avoid the direct concession but he did concede finally, that is the answer; that is the whole concept behind the whole zoning concept and that is why the County knows full well it is illegal; that the Carper case and a long line of cases since then without exception have said that the channeling of population solely or for the purpose of making government more economical and efficient was arbitrary and capricious. The Court went on to say in laying down the real test in a zoning case that the purpose of zoning is two-fold:

One is to provide, to preserve the existing character

of an area against prejudicial uses.

If Your Honor please, it is so patently obvious that it hardly need be mentioned -- there has not been a single comment, even an argument of counsel -- that there was anything prejudicial going to happen in the area as a result of these two applications. The other is to provide for the development of several areas in a manner consistent with the uses for which they are suited.

I can point to no better basis, no better justification about the suited uses than the County's own Master Plan which goes into great detail about the suitability of this land for the uses that we have asked.

Those are the two bases of zoning that the Carper case, as is well known, lays down and we are aware of. The Carper case points out that, sure there are presumptions that a legislative body acts validly and that there is a burden on him who attempts to overturn what the legislature does. But the Carper case went on and dismissed those burdens on the basis of this kind of discrimination and purpose as not being relevant and found that two-acre zoning arbitrary.

I think that some of the language of Carper 20 years ago is incredibly appropriate to our time.

The practical effect of the Freehill Amendment is

to prevent people in the low income bracket from living in the western area and forcing them into the eastern area, thereby reserving the western area for those who could afford to build houses on two acres or more. This serves private rather than public interests. Such intentional and exclusionary purpose bears no relation to the health, safety, morals, prosperity and general welfare.

The Court says that economic effects can be considered but as more or less incidental and this is a paragraph that in today's time and today's posture could not be more appropriate. A zoning bylaw cannot be adopted for the purpose of setting up a barrier against the influx of thrifty, respectable citizens who desire to live there and who are able and willing to erect homes upon lots upon which fair and reasonable restrictions have been imposed, nor for the purpose of protecting the estates that are already located in a district. The strictly local interests of the town must yield, if it appears that they are plainly in conflict with the general interest of the public at large and in such instances the interest of the municipality will not be allowed to stand in the way.

The case went on to find, and it has been cited many times, the mere power to enact an ordinance such as the one

here involved, does not carry with it the right to arbitrarily or capriciously deprive a person of legitimate use of his property.

Your Honor, I can't think of a better precedent that the Carper case, and I again apologize for one of the two underlinings. I have that for the Court.

The Carper case laid out in clear, concise, unequivocable language the basis for our case today. I cite, did cite, the constitutions. I have here due process of law from the Constitution of Virginia, Article I, Section Two.

I have here for the Court's consideration Article VIII of the Constitution providing for education. This article provides that education shall be a free public elementary and secondary school system for all children of school age throughout the Commonwealth and shall seek to insure an educational program of high quality. The most salient part of that is that in the section on education, Section Two of Article VIII, again I have this for the Court, each unit of local government shall provide its portion of such costs by local taxes or from other available funds. For the Board of Supervisors to constantly harangue the public and harangue the Courts about the inability to provide schools when they have had a constitutional requirement to provide free public schools for

the education of the children of the County and the Commonwealth is incredible; and yet in every case that this kind of thing comes up, it always boils down to the school cost, the one that the County won't bite the bullet on. In fact, the County continues to shut down its schools and to reduce its construction programs, alleging bond issue failed.

If Your Honor please, bond issues are almost irrelevant. The Constitution says that it is the responsibility of each unit of local government to provide for that cost from taxes or otherwise and I have the Constitution of Virginia, Section Two, or Article 18, Section Two.

Now, if Your Honor please, there are a number of decisions in the local Courts which I offer. We are so far off from the zoning bases of Euclid and Ambler and for the convenience of the Court I have the two great-granddaddy cases in Federal Courts, the U. S. Supreme Court, the Village of Euclid versus Ambler where there were nuisances, you could protect the integrity of the community -- and I have the West Brothers Brick Company case which is the granddaddy, which really recognized the zoning validity in Virginia. Both of these are for reference only to show how far the County has violated the real basic concepts of zoning and how far they have departed from those things which are true zoning considerations.

I have Harmon on land use, and whether there will be obnoxious results from a zoning decision.

Finally, in the local Courts, I would like to introduce three decisions, the decisions in the Horton versus Board of Supervisors case which is not to be appealed, as I understand it; the decision in Clinch Corporation versus Board of Supervisors; and the recent decision of the Circuit here, Judge Thornton, in the Almand case which was based on the fact that the discrimination existed in the granting of zoning. I will find that and present it to the Court in a moment.

The Almand case, Almand versus Board of Supervisors, Judge Thornton found in the situation in which there had been several zonings in an area, to 12-5, and then a denial of another request at substantially 12-5 density, that raised in the Court an inconsistency. Why did one person get it under the same comprehensive plan, essentially same type of zoning, and one does not? Both are seeking greater densities; both are seeking greater densities which is permitted under the Upper Potomac Plant, two parcels, RE-1, and the request was for R-12-5. One had been granted and sustained in Clinch; the other one was being heard by Judge Thornton. He found that there was inconsistency and, therefore, discrimination;

that people were entitled to be treated similarly.

I don't think that this case need rest solely, and there is Judge Thornton's opinion -- solely on the basis of discrimination, but I think, Your Honor, that the discrimination effected in this case boggles the imagination.

There are on that plat nine cases that have been granted in the immediate area, practically across the road from the subject property, nine cases granted in the same time frame that the subject case was denied. What do they justify? Four of those cases are in the same watershed, this allegedly sacred Middle Run.

But what is the County's position? That we have a deterrent to development which they deny is a holding zone because they know that is invalid, and yet they deliberately grant four cases in the same watershed in the same time frame and five more cases across the street at the same time that they are saying, because of our policy, we are not going to grant these two, and they know full well that these two cases are being held up by an invalid policy.

Interestingly enough, in addressing the reliance on the County claims, does not the applicant and the developer of the community shopping center in B-836 and community center in B-749 have a right to rely on the fact as he develops his

property that the County is planning urban density on the Williams-Van Metre tract. It is an incidental point, but I think it bears out how conveniently and inexplicably Fairfax County constantly changes its plans to the detriment of those who rely on them.

Here two shopping center are zoned and under construction and one zoned and not under construction, in another neighborhood, and now the County comes in and says, not only in 1975 you cannot develop, but we don't have any idea when you can develop and we just as soon you go develop this in RE-1.

Another problem with Mr. Pammel's credibility -- he made a great thing about soils protection and slope protection as a policy of the Pohick plan. It turns out that in all probability development of the subject property under RE-1 with septic tank would be equally destructive or more destructive to the County's soil policy than he painted the development under R-12-5 and yet his whole thrust of testimony was, if you keep these lots large, large lots RE-1, and it develops that way, there wouldn't be any problems with soils, and nothing could be further from the truth.

The other two cases I want to cite from the local Courts, and here is the opinion from Clinch, the case Judge

Thornton heard, in the Horton case in paragraph three of his opinion I think he set out in concise, irrefutable terms, and the Horton case again has not been appealed, the basic law: A property owner has a basic vested right to use his property for any legitimate purpose not unconstitutional, nuisance, or contrary to the health, safety or general welfare.

Zoning ordinances are established upon the premise of the promotion of the health, safety and general welfare. Established change must likewise meet the same criteria. In this instance, the purported impact between R-12-5 and PDH-5 or RT-5 is negligible, yet represents a substantial economic factor to the landowner. There is no rule of law requiring the legislation of economic gain or profit. However, the free enterprise system and basic vested property rights require that refusal to afford the same in rezoning cases must be reasonably related to the promotion of the health, safety and welfare and that case actually was granted seeking a change from the 12-5 district which in this particular area on Route 1 was too low a density to a five-unit townhouse district.

Now, the County makes great, I am sure will endeavor to make great, moment of the fact that somehow profit is an ugly thing. Profit is why the system goes around. The County cannot legislate profit. There is no reason they should

legislate profit. But there is also no reason they should legislate against profit.

Now, these decisions that I have presented from Federal Courts and from Virginia Courts I think are ample to ground the subject case. There are other decisions which I offer Your Honor for comparison. I think the principal one is the appeal of Kittmar Builders, a Pennsylvania case. That takes this growth problem head on and says: Appellant offers other arguments which are so clearly make-weight as to barely require comment. This was a case where they were trying to get a four-acre density reduced to a lower density for urban lot development. It was a housing problem created by the exclusionary aspect. The rationale of that land hardly allows a municipality to continue indefinitely an exclusionary zoning scheme because it refuses to purchase and operate a second bus. Likewise, it is claimed that the current road network is suitable only for the present population. This is exactly the subject case which hardly explains why and how new roads should not be built to accommodate new people.

As we said, in dealing with the same argument in National Land, a County may not use the zoning process to avoid the increased responsibilities and economic burdens which time and growth may invariably bring and in that case

the Court said we once again reaffirm our past authority and refuse to allow the township to do precisely what we have never permitted.

The Supreme Court of Pennsylvania, speaking --

THE COURT: Keep people out rather than make community improvements.

MR. HAZEL: If Your Honor please, the whole theory of the County's case I think is totally exposed, laid there and buried by the National Land case and the Kittmar cases which are obviously the only way that a government can function.

There is one case, and I am sure that Mr. Symanski will talk about it, the Ramapo case which has delighted the hearts of obstructionists all over the country because it seems to suggest that what is being done in Fairfax is valid.

In the Ramapo case, the Ramapo town ordinance -- apparently that was a growth situation, a community of about 75,000 or 100,000 -- grew over a ten-year period. It almost doubled. They were looking at growth problems. There are many many factual differences.

If I understand the facts in Ramapo right, among other things the improvements on the scene and the extension on the site and the extension of sewer lines and so forth to the Ramapo development was probably paid for in part out of

the County's funds so the jurisdiction said, we are prepared to accept growth; we will build public facilities or we will give the developer points if he builds them. When you accumulate enough points for the building of roads and sewers and school sites and the rest of it, then you are entitled to your zoning.

If the developer doesn't choose to build these things himself, then the County will build them on an adopted comprehensive schedule of capital improvements in the next 18 years -- in that case it stretched on for a long time.

The New York Court of Appeals said that as long as that system did not exclude housing, as long as they could keep up with the requirements for housing, they would accept that program as an appropriate system.

They made particular note in a footnote that the allegations had not been raised that this was in effect exclusionary zoning. We specifically raise those here.

We don't think that Ramapo has the slightest relevance to the case at hand but the Court should find that interesting. I have a copy of the Ramapo case. It is not law in Virginia. It is a single jurisdiction -- New York -- which adopted, pursuant to a Master Plan they had a study; then they had an ordinance and then they had a comprehensive

rezoning. After all of these things went along, they established a system of points.

Now, to best demonstrate the difference between Ramapo and Fairfax system, some people in Fairfax think they have it so bad. As far as I can tell, the only facility that Fairfax would be asked to provide in the entire spectrum would be the schools, which are the constitutional requirement. The sewer line is here on the eastern edge of the property and was paid for by others and will be reimbursed in part from the development of this property.

All of the sewer, all of the water, all of the streets that are built on the property and the street improvements on adjacent lands under subdivision control are paid for by the people that buy lots on the Williams-Van Metre tract.

The school site is made available through cluster process. All these things are done in routine fashion.

There are no other facilities that the County has pointed to that are in extremis because of this development. There is nothing on that site that the County is required to provide, except the school. The neighborhood school and the intermediate and high schools off-site, they are constitutional obligations of the government to provide a free public school education.

There can hardly be any debate over the County's financial capability to address a problem on 400 acres when the County's budget, which is in evidence, provides over $200,000,000 for the County's operation of government.

Apparently, the County has not even, doesn't even, intend to suggest that in any specific way, how their finances are going to be strained to accommodate the people.

If Your Honor please, I apologize for the extended argument. I know after four days Your Honor has heard a great deal about this case, but I think this case is a basic, essential, legal factual expose of a lot that goes on in the system.

I frankly was appalled in another area. I guess I live with it and I witness it and I experience the problems with it, but when you are talking about discrimination, it astonished me when it came out in this Courtroom and is in this record how the zoning process really works.

Mr. Pammel consistently used the word, tradeoffs. He said that people here in C-192 got ten-unit density for townhouses because of a tradeoff of right-of-way.

He talked about C-567, got five units because the staff wanted to trade off some right-of-way.

I asked him what did the poor guys like Williams

and Van Metre who didn't have anything they wanted to trade, the County wasn't dickering for anything we had to offer, where were our trading stamps.

He gave no answer.

The final incredible comment from Mr. Pammel, and it is true, and I guess it just shocked me to see it out in the light of day, he talked about loss of control at the time of zoning and if the County didn't get all of these things decided by that time, the County lost control.

He then outlined a great paraphernalia of bureaucracy that is involved with things like street requirements, school sites, lot layouts, street alignments, storm drainage, siltation control, and all these other things which come after zoning. And I asked him, well, what do you mean, you lose control?

He says, the fact is, after the property is zoned, the man can do whatever the law allows and yet the obvious inference and obvious comment was, prior to the time of zoning the applicant for a zoning is at the prey of the Board of Supervisors for whatever they think they can squeeze out of him. That is the system which is so obviously difficult at present and in the future that it hardly needs be addressed. That's the kind of discrimination that these applicants have

been subjected to -- in essence, a truly incredible case, and the evidence after three and a half days frankly made it a more incredible case than I thought we had when we started because, on the stand, the County's representatives in sewers and schools, in planning, in every phase of this case, really supported the zoning far more than I thought they would. The only one that continued to try to picture this as anything other than gross discrimination was Mr. Pammel who kept alluding to general problems that he in his opinion thought operated to support the County's position.

If in fact there is any debate about the true facts as Judge Thornton said in one of these cases, in order to have debate you have to have principles that are debatable, and in this case I don't think there are any facts that are truly debatable and under the Court of Appeals' ruling in Carper, this is an exclusionary zoning. The whole scheme is exclusionary and must be struck down.

Thank you very much.

MR. SYMANSKI: I would like to point out a few things in Mr. Hazel's argument. First of all, Mr. Pammel testified that RT-10 zoning was a result of a tradeoff of sorts but the density included what would have been on this tract that they dedicated. It is not that we at the time

gave super density here; it was density that would have gone on this area that they dedicated.

Secondly, I would like to point out that Mr. Hazel mentioned several of those cases he gave you were not being appealed. For your information, I would like to note that the Board has voted to appeal the Almand case.

THE COURT: How about Horton?

MR. SYMANSKI: Horton, I believe, has been negotiated so that it is not going to be appealed. No order has been entered, however. That is as a result of, probably, my fault. We have talked about it for a long time but it has been in negotiation between Mr. Hazel and the staff.

MR. HAZEL: If Your Honor please, the Board has advertised for rezoning of that to PDH-5 category -- actually a PDH-10, but they are undertaking the zoning and have set a hearing for September 24. I understand that appeal is now mooted.

THE COURT: The Clinch case has not been appealed?

MR. SYMANSKI: No.

THE COURT: That is final.

The Horton case -- something else has happened by way of --

MR. SYMANSKI: It was negotiation and agreement.

THE COURT: All right.

MR. HAZEL: The Board agreed to rezone it.

The Almand case is on appeal?

MR. SYMANSKI: It is going to be appealed. The Board has voted to appeal.

THE COURT: Has an order been entered in it?

MR. SYMANSKI: No, Your Honor.

THE COURT: All right.

MR. SYMANSKI: This whole zoning business that Mr. Hazel keeps referring to, I think what Mr. Bowman said was not that, what we are doing is invalid, but the holding zone quotation has a bugaboo about it that the County Attorney has said is invalid; Mr. Hazel has not come up with the County Attorney's at that time definition of a holding zone. I think from talking to that County Attorney that his definition of the holding zone was a zone in which no development, absolutely no development would occur.

Mr. Pammel here has testified that development could occur here.

THE COURT: That is not the holding zone definition used by the County staff in its recommendation to the Board.

MR. SYMANSKI: I don't think any definition, Your Honor. There was some debate between Mrs. Cleveland as to

what the definition was, and Mr. Pammel, as to what the definition was. All I am saying is that what Mr. Bowman said was apparently "holding zone," we have an opinion that it is invalid. I am saying that what he then stated was that we can arrive at our purposes through the law that existed today. I think that is what he said. I don't think he said, let's erase the term "holding zone" because that, we all know, is invalid. He didn't say what we are trying to do is invalid. There was no admission on that.

I think another point I would like to make is that Mr. Hazel likes to say, it happened here, so it has to happen here. I would like to point out that I think the Board has to consider what goes before.

As a result of zoning, there is impact, there is traffic, there are children added to it. Mr. Whitworth has to consider that, that there is zoning down there. I don't think you can take that in a vacuum and say it happened here, therefore the same exact thing has to happen here.

Now, as to the comprehensive plan, also some question in Mr. Hazel's mind as to what exactly zoning is, what considerations can you have, whether the comprehensive plan is in fact a zoning.

The comprehensive plan is not a zoning. It is not

something which a person can come in at any time and say, I demand what is on the Master Plan. The comprehensive plan, 15.1-446 of the State Code refers to Master Plan as a plan for the long-range future. It doesn't say, here it is, come and get it any time you want to. Fifteen point one-447 refers to zoning as one of the methods of implementing that plan.

Now, the sections on consideration in zoning process are 15.1-427, -489 and -490. Those are the purposes and the considerations the Board can validly take into account when they consider a zoning.

Anderson on the American Law of Zoning, Section 4.26, determination of when a zoning change is in the public interest, is up to the legislative body. A Maryland case, Board of County Commissioners of Prince George's versus Edmunds, 215 Atlantic Second 209, a 1965 case, comprehensive land use plan is a guide for future, not a rezoning.

So, as far as what can be demanded and what can be put in the zoning process, I think if the law is clear on what can be considered in a zoning process, I think one of the prime considerations is public facilities.

Now, it is another question as to whether they are there or not, I agree; but whether they can be considered validly I think is beyond debate. It is right there in the

Statutes, 15.1-427, a key phrase: improve things.

The final phrase, that the growth of the community be consonant with efficient and economical use of public funds.

In 15.1-489, the protect against one or more of the following: undue density of population in relation to the community facilities existing or available.

So I think this is beyond debate, whether those considerations can be before the Board of Supervisors in a zoning case. I think they are obviously there under the State Code.

Now, as to how long Mr. Hazel likes to say these properties would take so many years to develop, there was no binding agreement or anything before the Board on how long it would take. Both of the witnesses, when I asked them, could they sell the property to two or three other developers, divide it up, and it would be developed and going on at the same time and divided up a piece of property -- yes, it can. The Board had no, they were not omniscient to know whether these things, how fast development was going to go on, so this eight or nine-year representation is not something that the Board had before it or could have before it.

The public facilities consideration. I think

obviously the prime basis of the Board's decision -- the sewer, Mr. Liedl said, yes, as far as this piece of property we can handle it in 1976. Okay. But he also said there was a moratorium now in effect. We are four years behind in our plans from where we thought we would be.

He also said that uncontrolled growth, that he could not keep up with it no matter how much money he had. I think that is a consideration for the Board of Supervisors within this sphere of economical and efficient provision of public facilities.

Fifteen point one-409 talks about expediting provision of adequate sewer. I think that is a consideration in where it should go: Should we open up a new area of County or take into account all the other public facilities that we have to provide? Is it more economical and efficient to allow sewer, a limited amount, that is going to be available, into areas that are already developed so that we can combine that with provision of police, library, roads, that they have admitted are not up to par all over the County. I think that is wrapped up in the same picture.

If we try to channel growth into areas where it is already developed and given the considerations in the State Code on the economical and efficient provision of public

facilities, do we want new areas opening up where we have to add other things like police, fire and roads, or where we have demand for roads? Isn't it more economical and efficient to build the roads here where we already have the demand rather than adding new areas?

Now, the roads -- Mr. Hazel likes to say, and zoning attorneys use it as a standard question to the witnesses, or the road experts, isn't there a road over in another end of the County that is just as bad or worse? Sure there is.

Aren't there other areas just as bad or worse?

Sure there is.

-427 says, improve things.

An economical and efficient provision of public facilities, every government cannot provide everything it wants every year. Mr. Nixon doesn't do it. The Federal Government doesn't do it. The budget also shows that the County Board of Supervisors has been increasing in all areas. The budget every year, there is more for the school operating budget, more for fire, police, every year.

Now, under the system we have, we get funds; the Virginia Department of Highways comes in with a certain amount of funds every year. That is not going to, in each year, solve all the road problems of the County, but it is more

economical and efficient to provide roads with a demand already there than create new demands, which is just going to put us farther behind.

It is our position that it is much more economical to try to channel that money that is a finite matter every year to where the roads already are bad and dangerous, where people already are.

The A & B case, one of the prime considerations in that case was Roberts Road. It was not up to standard where that development could be handled on Roberts Road.

Rosser Payne -- I asked him, wouldn't he admit that the policies of the last 20 years have resulted in congested roads and crowded schools, but yes, but it has always been that way. We are always in a catch-up situation.

Our point is, does the Board have the power under this Code to diverge a little bit from that, diverge a little bit from saying, well, we are opening up new areas and maybe in five years we will have enough demand there to get the roads in from the budget we have from the Virginia Department of Highways.

Well, the policies of the last 20 years haven't done so well. Do we have the power to diverge a little bit from that?

I think that is one of the main considerations in this case.

Mr. Pant referred to this area when I asked him whether it was an implementation and aesthetic point of view, whether the system was inadequate. He said, yes, he said the Virginia Department of Highways plans to create access to the east, but not in other directions. As far as being adequate system, no, that it was dangerous -- the curves, the no shoulders in the area was dangerous.

Now, if anything is the prime consideration in the zoning process, it is transportation. Fifteen point one-489 -- must have transportation, roads near -- at least five times:

Number one, to provide for convenience of access.

Number two, to reduce or prevent congestion in the public streets -- more transportation -- danger and congestion in travel and transportation -- that is a prime consideration.

THE COURT: The thing that bothers me about this whole thing on transportation is that if the Board were to use that as a reason not to grant rezonings, we would be back where we were in 1950 with 90,000 people in the County and perhaps then none of us in this room would have a house to live in. The roads were bad then that are still the same way 20-some years ago.

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MR. SYMANSKI: That is the point, Your Honor.

THE COURT: That is the point: nobody ever does anything much about roads. If you wait for it to be done, you never have any growth at all.

MR. SYMANSKI: At this point in time, will this Court recall that Boards of Supervisors, you have to continue that way, we do have a budget every year from the Virginia Department of Highways that is going to be used somewhere in the County. If we create new problems, the past 20 years are going to be the same, but it is going to be the same in the future. I think the primary question here is under the law whether the Board has the right to diverge from that policy a little bit.

I would like to cite two cases and read a paragraph from one on the traffic: Wilson versus Planning and Zoning Commission, a Connecticut case, 291 Atlantic Second 230, a 1971 case.

The Connecticut Statute was very similar to the Virginia Statute -- to reduce and prevent congestion in the public streets, which I have just mentioned, 15.1-489 -- in the absence of reasonable assurance which the record before us did not furnish, that provision would be made for the requisite highway and traffic flow changes for the purposes

of alleviating traffic congestion, the Commission had no authority to change the zoning. It acted in a manner directly contrary to the mandates contained in Section 8-2. The trial Court erred in sustaining the action of the Commission and in dismissing the appeal.

Also a Maryland case which I won't read from, but I would like to refer to for the record. That is Montgomery County versus Laughlin. It is 255 Maryland 724, 259 Atlantic Second 293.

I think, Your Honor, that the law is there in the Code. The traffic considerations are the main considerations.

THE COURT: Can they apply that in these cases and not apply it in B-749, C-567, C-192 and C-3 which all are going to be using the same arterial roads and these lands would use?

MR. SYMANSKI: To address that, should they ignore the fact that they rezoned these as far as what is on the roads now?

THE COURT: I am talking about far above the density requested here. I am talking about shopping centers, townhouses, things of that nature. Can one person go in and get a shopping center with the roads existing as they are and another person just want to build on 12-5 lots be turned down?

MR. SYMANSKI: Your Honor, should the Board ignore

the fact that all this zoning is going to be on this road? Something has to go first. It seems to me the Board has to consider what they have already done.

THE COURT: It sounds like commercial and townhouse comes before residence.

MR. SYMANSKI: Also --

THE COURT: -- single-family.

MR. SYMANSKI: Also zoning which is going this way.

If they cannot consider what has already been done and what is on the road, then there is no consideration in zoning.

If you rezone one piece of property within a comprehensive plan, you have to rezone every other piece of property because you can't consider at that time what you have already done. I think they have to consider what they have already done.

I think this is going to put a lot of traffic on these roads.

Is there a point at which the Board says, look, we have to slow this down because those roads probably weren't even up to what they should have been then, but we have got this traffic on it.

THE COURT: If you are worried about traffic, why

do you put in two shopping centers which would draw traffic?

MR. SYMANSKI: To serve the people that are already there. There are obviously a lot of considerations. Maybe you don't agree with what they did, but I think you must agree with the fact that they know what they did and they have to consider that.

THE COURT: I am not saying what they did was wrong, sir.

MR. SYMANSKI: There are people down there and shopping center sort of people. That is part of the problem now, they are there.

The question is: Do we take this up and put it right here, too, and double the problems? I think that is one of the -- well, Mr. Seldin said it was a delicate process in how much land is on the market and stuff. It is also a process in the zoning decision that has to consider a lot of factors. It is obviously not a black and white decision but that is why I think we have a fairly debatable rule.

Whether the Court substitutes its judgment or not for the Board, I think that is why there is a fairly debatable rule, because it is a decision which has a lot of factors. You can't bank it on sewer or any one thing.

Now, Your Honor, the schools -- Your Honor made a

statement to Mr. Pammel yesterday which I respectfully must agree with as to what Mr. Whitworth said, the Caldwell school was reduced from 990 to 660, I believe Your Honor said, because the School Board felt there was no demand down there. It was my understanding of what Mr. Whitworth said, and I have checked with him, that that was reduced not because the demand wasn't there but because the School Board was saying that a 990 elementary school was not in keeping with the neighborhood school concept. It had nothing to do with the fact that the demand wasn't there. It was more of a, as they represented in one of the pieces of evidence, that the neighborhood school concept is "an integral part" of the Fairfax County school system.

THE COURT: Then he says it is somewhat elusive, also, that you end up with a neighborhood just for maybe one-year period and all of a sudden you are understaffed again and you are busing kids in.

MR. SYMANSKI: I agree.

THE COURT: You start out with them being underused and then you end up being used perfectly for the neighborhood. Then they are overused for a while and then underused again.

MR. SYMANSKI: I agree that is one of the considerations and one of the problems. It is not a black and white

issue.

THE COURT: But has the School Board and the Board of Supervisors established now a plan that they will build schools as construction is going on in an area, let the first ten children go and the next 30 and the next 50 and after the entire thing is done it is then full?

MR. SYMANSKI: Not that I know of.

Another thing that came out yesterday, I believe Mr. Whitworth said that when the Caldwell School opens up, it will be filled with the development that is here and continuing development will overcrowd it.

As to the high schools, those schools --

THE COURT: Just a minute.

MR. SYMANSKI: I believe as far as the elementary schools are concerned, Mr. Whitworth said that the Caldwell School would relieve some of the overcrowding that already exists but it would be filled up the day it opened, and the continuing development in this big area here that is already zoned would overcrowd that year by year.

Also, with regard to the high schools, I believe Mr. Whitworth's testimony was that Lake Braddock would relieve it but all of those schools, or relieve the overcrowding that is already there, but all those schools would be up to

capacity when that school opened.

So it is again in a situation where this continuing development which is here and down here is going to overcrowd those schools year by year, relieving them, and then the stuff is there to overcrowd them.

The zoning is already there to overcrowd them.

Mr. Whitworth also said that under controlled growth with no considerations for the public facilities, uncontrolled growth could put him right back in what he called a bad situation of the '60's. He said that property was already zoned down here at Saratoga for elementary school; four of these areas which would be -- this is already zoned on developing down here -- he said that there is busing now out of this area; and Mr. Hazel's representation that we have enough money to do everything, to build every school we want to, he has introduced no evidence by economics to show that Fairfax County could do what he wants them to do as far as building every school, where there is a crowded area. No evidence to the effect that Fairfax County could do that without raising taxes or how much they should raise taxes or whether they should double taxes or anything else. There has been no evidence on that.

It is up to him to prove that, not up to us to prove

the reverse. The burden is on the plaintiff here.

The economic discrimination on exclusionary zoning, Mr. Hazel mentioned some cases, I think the Shaw case is obviously a civil rights case in Mississippi where that line of cases there has been a history of discrimination on the basis of race by the government. I think it is not on point.

He did mention the National Land case and probably gave it to you. I would like to read a paragraph he conveniently left out: Zoning ordinance whose primary purpose is to prevent the entrance of newcomers -- primary purpose. In order to avoid future burdens, economic and otherwise upon the administration of public services and facilities cannot be held valid.

Of course, we do not mean to imply that a governmental body may not utilize its zoning power in order to insure that the municipal services which the community requires are provided in an orderly and rational manner.

The Carper case, how can you compare the Carper case in which the Board zoned the western two-thirds of the County to this where, as can be seen here, there is no intention to keep this forever in large-lot zonings. It is right there.

The comprehensive plan for this area says that, as

the State Code refers to the long-range plans for this, is a higher density. How you can compare that to the Carper case, I don't know.

But I think that the National Land case which he has given you plainly says that public facilities in orderly and rational manner are of course a consideration in the zoning process.

Also, the County actions that he has talked about, the low and moderate income ordinance -- fine, you have declar that invalid. It is on appeal but as far as the intent, and I don't believe Mr. Hazel has no intent and purpose out of the National Land case -- he has talked about, talks about primary purposes. The primary purpose is certainly a consideration here in the economic discrimination-exclusionary zoning arguments.

The low and moderate ordinance showed intent, a concern for them. If it is invalid, fine; but it doesn't show the Board wants to exclude low and moderate. It shows they have concern for them.

THE COURT: Let me digress. I notice the Pohick plan, and I alluded to it in the trial of this case. The Board put in there that the Pohick should have a certain number per year, and so forth, of low and moderate housing,

low and moderate income housing, and they speak of housing that costs less than $12,500. It sounds like a magnificant goal, but if it is absolutely unattainable, just financially impossible to build anything to live in for $12,500, it is somewhat like tilting with windmills -- it means nothing. Of course, they did that four years ago. Maybe you could have put up some kind of a shack for $12,500 but you certainly can't now.

Digressing a little bit, I had a case recently involving the Dart Drug Store and I think Fotomat. They put up one of those tiny little kiosks where you go and take film. The evidence was that little thing which was nine feet by six feet cost $17,000.

I don't know what they would put families in on $12,500.

MR. SYMANSKI: I am willing to stipulate personally that figure seems a little low to me, the $12,000, but low and moderate ordinance shows intent to do the opposite of what Mr. Hazel contends that they want to do or intend to do.

The rent control ordinance introduced is the same thing, a concern for these people.

The case I introduced where we have intervened in

District Court in Washington shows concern for these people. Why would they intervene if they wanted to exclude the elderly and the low and moderates. Ridiculous. It shows the opposite, an intent and concern for them.

Equal protection -- the constitutional argument. Just based on pure discrimination between two areas. I think to make a valid equal protection argument you have to show that there is no rational basis for that discrimination. I think the Middle Run policy has a rational basis and Mr. Pammel explained it.

In the Pohick plan, the Middle Run policy was adopted. There already was a large amount of zoning here. I have to admit that why they passed that, it must have been wishful thinking at the time to include Neighborhood 14 in that plan when there were already rezonings to higher density; but when these cases came up, they were faced with the reality of a situation, the same neighborhood; there were large amounts of zoning. The realities were that these cases were right next door. This is a different neighborhood, a different neighborhood. The realities of the situation were that that was rezoned.

Now, the rational basis again goes back to the public facilities. Do we -- we have a finite amount of resources.

I don't think anybody has contended we have an infinite amount of money to spend. Do we spend that in new areas or in opening up new areas, or do we spend it as the State Code -- I think there is a basis for it -- as economically and efficiently as we can.

In areas where there already are demands, I think that is a rational basis.

I think Mr. Payne again, the laissez-faire zoning policies of the past two years has resulted in congestion and crowded schools, congestion on the streets. Again the primary question here is whether the Board, based on State law, can diverge from that policy.

West Brothers Brick talks about the fact that in the zoning process, zoning ordinance, arbitrary lines had to be drawn. Just by the nature of the process, one piece of property is commercial and next door it is residential, or vice-versa. In most cases there is no way to determine that line should be there for several reasons. It is somewhat arbitrary. I don't think these lines are arbitrary.

Again, history was that this was already into development. The question is, do we open up these areas and cause inefficient and uneconomical use of public funds and cause new demands there when there is already demand in other

areas?

Now, again Mr. Seldin spoke of the process of the management of land and local government as a very delicate process, easy to get out of balance. We believe the opposite, that it is already out of balance based on Mr. Payne's statement himself that the policies of the last 20 years have caused a mess. We believe it is already out of balance and that this divergence is an attempt -- everybody may not agree with how they are trying to attempt it, but I don't think that is the point -- it is an attempt to diverge from those policies of the last 20 years and try to get things in more balance. I don't think anybody is saying, as Your Honor is saying, that as we are going to build schools with no kids, but to try to get it a little more in balance.

Mr. Seldin also said something very interesting to Mr. Hazel's argument. The whole thrust seems to be that Fairfax County has a big conspiracy to exclude everybody but the very super rich, but Mr. Seldin has pointed out that the whole Washington area, the prices are high and you can't move into moderate. I am not being facetious when I say that it seems to be their argument that there should be a sign at the entrances to the Pohick: Everybody in Washington area who wants to move in, move here. That just doesn't seem to fly

because the whole Washington area is under the same situation, so pointing out the factors which exist all over the area in Fairfax County and trying to make the Board out as some sort of super discriminatory body who wants to exclude everybody but the super rich, doesn't fly. They can't move in anywhere else, either -- not in Maryland. The situation is the same all over the whole area.

Now, briefly I would like to point out that the A & B Construction case was a similar case; public facilities were the prime consideration. That case is obviously much closer, right beside George Mason University, but that was decided on public facilities. Also that was RE-1 zoning which was upheld. Mr. Hazel's other argument about the Pohick that Mr. Williams can't find any property to buy -- well, where does it say that every developer who wants to develop in a place and buy a piece of property to develop, that that is a right? They pointed out there are huge chunks here in the hands of developers. I don't understand that argument. Mr. Williams can't find it. Every piece of property, as I pointed out, could be in the hands of a developer who doesn't want to sell, wants to develop himself, so I don't see what that points to, the fact that he can't find it.

Mr. Pammel also granted the fact that the Board of

Supervisors is in the process of putting its actions where its mouth has been, so to speak, with regards to this Middle Run policy and coordinating the Pohick facilities. They have hired Professor Folick, I believe it is pronounced, who wrote the Ramapo ordinance that Mr. Hazel referred to -- I don't believe the situation is similar here as was in Ramapo -- I think we are in middle ground -- but I do think we have a basis in State law for consideration: public facilities.

Anyway, the Board of Supervisors has gone through several sessions revising the whole system in the County. They have hired a professor who wrote that ordinance which has been upheld by the New York Supreme Court.

I believe the appeal was denied, or Certiorai denied to the U. S. Supreme Court to get things in line.

In other words, I am trying to say that they haven't just discriminated here and then left it as Mr. Hazel would have us feel; they are trying through their actions, through meetings and on public television, educational TV, to try to get this process more nearly in balance. Moving in that direction, this is not just a quick divergence and then they are in the policies of the last 20 years. They have hired these guys, a guy works there right now on a public facilities plan, the Ramapo type; we are heading in

that direction, but it is still my contention that based on State law we are in some middle ground. We are obviously not to Ramapo yet, that we do have a plan that is going to be here at this date, but we are moving there. We are spending money on it right now to get there, but even without that we are on middle ground based on State law where the valid decision is based on public facilities.

What would the results of this case be? If the Middle Run policy of the Board is invalid, the whole zone is invalid. Again, when the situation where new, new lands for new public facilities -- we have it in the older areas -- the key point is that Mr. Pammel testified as far as this whole zone business, that RE-1 could be developed, Mr. Seldin said, RE-1 was being developed all over the County. Mr. Downs said the same thing.

It is not a question of depriving them of all value or all use. The point is that under a comprehensive plan at some date this is what we envision for that property. The point is, when?

I think that decision is up to the Board.

THE COURT: If you develop it RE-1, how do you at some subsequent date then change it and put in a neighborhood center and things of that nature?

MR. SYMANSKI: You obviously don't, Your Honor, but if you will agree that a comprehensive plan is a plan, then at some date that density is proper, but you can't say, which is Mr. Hazel's argument, you can't do anything with that property that is a holding zone.

The effect of this is: Look, some day a higher density. But if you want to develop now, you can. The impact on public facilities is going to be one-third.

THE COURT: What do you call it, though, when you say in your Master Plan that we feel the proper utilization of this land is at 2.0 density with neighborhood center in this area and then you say, but you can't do that?

MR. SYMANSKI: At some time.

THE COURT: Some day in the future that will be the best use, considering everybody in the community, considering the County, considering everything that that would be the best use. But you can't do that now. Fine, obviously if the decision is correct, that there is inadequate facilities, that is one thing. But then to say you can't do that now, but you can go ahead and put in RE-1, septic tanks and things of that nature, aren't you then damaging the neighborhood because you are not making these other facilities available to people who are going to develop later, your neighborhood

center, your school, things of that nature?

MR. SYMANSKI: Mr. Hazel has said over and over again that we don't have the power to put it in the holding zone. The Board is in that situation. They can't say, do not use it.

THE COURT: My point is, the holding zone, you can't use it for anything but holding zone. You can't use it for what it should be used for.

MR. SYMANSKI: But what it should be used for is obviously the whole basis of this case and that is the Board's decision, looking at it at the time the application comes before it, under the considerations in the State law, whether the public facilities are up to what they should be. That is obviously the basis of the whole case, what the whole question revolves around.

At this point in time they have to look at it and they don't have the facts that it is going to take eight to ten years to develop. Again, they could sell it. I just don't see how that can be a basis. That probably could be developed in two years after the sewer.

THE COURT: Let me ask you a question: In the Pohick plan, maybe it was in the report of the Commission or the staff to the Board that they said when they were first

talking about holding zones, I think it ended up in the later Pohick plan, the idea for this area was to in effect slow down or retard growth, as Mr. Pammel said, until 1975; and then from '75 to '80 it would go into the development area as is the Main Branch, parts of the Main Branch right now. By the time the sewer is available, it is past '75 and you are in the development area. So how can I consider that as being proper retarding?

MR. SYMANSKI: The front part of the plan refers to '75 but the policy in the back of the plan under implementation doesn't have those dates in it. The policies under implementation talk about exactly what the State Code talks about. That is the public facilities with no date attached to it, when the public facilities are becoming adequate.

THE COURT: Who then determines when they become adequate? Obviously the Board, other than for highways.

MR. SYMANSKI: They have to, under State law.

THE COURT: They are the ones who have the duty, obviously, to provide for public facilities and they make the decision on when they are provided.

MR. SYMANSKI: They are also the ones under study, like under study to provide economically and efficiently and to protect against undue density of population in relation

to community facilities existing or available. That just shows, as Mr. Seldin referred to it, a delicate process with a lot of considerations. But as I said before, I think that is where the matter is fairly debatable rather than a yes or a no, you are right or you are wrong. Again I think they have to consider what has gone before. With all this development, this development going on, with what is on the long-range plans for roads, I just don't see how anybody can say there is not going to be a problem here. I think they have got to consider this when they look at this. We have already done this. How can they do this in a vacuum? Just like schools, Mr. Whitworth figuring he has to look at what has already been zoned to determine that Caldwell is going to be filled up and maybe over when it opens. Saratoga needs a school as a higher priority than the area which doesn't have children now. It is a process with a lot of factors, a lot of considerations. But again, the plaintiffs are under the duty of showing that the Board was clearly arbitrary and capricious, not that there was a question mark, but clearly, they were clearly black and white wrong.

I think I will close very briefly. I think the two key statements -- well, there are key statements, one in Mr. Seldin who says it is a delicate process, easy to get out of

balance. Again, our position is that it is already out of balance.

Number two, Mr. Payne, which question Mr. Hazel over objection Your Honor allowed, having the policies of the last 20 years caused congestion in streets and overcrowded school, yes, but that is the way it has been; we put a sewer line in there a good many years ago. That sewer line is going to tell us what occurs now without consideration for the State Code.

Mr. Hazel's questions about, isn't that the way we have always done it, aren't schools crowded elsewhere, aren't roads congested elsewhere, aren't these roads as good as elsewhere -- that is the key point. Do we have to follow Mr. Payne and say that is the way we have always done it? This resulted in congestion in the streets and crowded schools or, under State law, can the County Board diverge from that policy which I think Mr. Pammel's testimony of what they have been doing, and it has been on television, and they have hired a professor who wrote the Ramapo ordinance -- it shows that they are serious about this divergence. This is not an isolated case, Your Honor. I believe they were shown to be serious and not arbitrary in this divergence.

Thank you.

THE COURT: The Court finds as a matter of fact from the evidence that the public facilities to serve this land are either presently available or will be available in the reasonably foreseeable future.

The property along the entire eastern boundary of the Van Metre land is presently zoned to a density, I think was stated, as averaging 12.5 per acre. Just to the north of this land are commercial sites plus townhouses, not too many hundred feet away from that little tip on the Van Metre land. And also, next to that tip is RT-10 in the C-192 zoning area.

Under these circumstances, the Court is of the opinion that to keep this land in one-acre zoning is unreasonable and arbitrary and capricious.

Under the Boggs case, obviously the Court did not tell the Board which other level of zoning should be applied to this land. That is a legislative function for them to exercise.

The Court further finds that the County Board and the staff of the County have, and still do follow, a policy and procedure that when an applicant applies for a certain zoning category, that they also consider what I might call lesser-included categories before there is a final decision

by the Board. In this case, or in these two cases, it is clear from the evidence that the opportunity to be considered at a lower density than the 12-5 was not made available to these applicants and, therefore, in effect denial of the 12-5 was a denial of R-17 or any of the other alternative zonings that would be less in density than that of 12-5.

The Court hereby directs the Board of Supervisors to rezone this land to a category of a higher density than RE-1.

The next statement I am going to make relates to the fact that both of these applications, I believe, have been pending for three years. The Court will allow the Board of Supervisors and direct the Board of Supervisors to make a decision on this within a reasonable time. If it should become apparent that they are not acting within a reasonable time, the Court will have to take further action. I am not going to set a specific limit -- I think that has been done in another case -- but I would prefer to, with the Board's very busy calendar, that they schedule it as soon as they reasonably can for hearing on another zoning category.

MR. SYMANSKI: May I ask a question? We have some debate in other cases -- might as well get it out of the way now. It is the County's position and our belief that this

order is one that we can appeal. A legislative act has been declared invalid. The other side says that it is in the breast of the Court and it is not something that we can appeal at this point. The Board has to say, Your Honor, we are not going to do what you say or to rezone it to the same category or to rezone it to another category and ask for a stay and risk mootness being declared on appeal. I am asking if Your Honor has any directions on that debate?

THE COURT: There is no way I can direct you on what the Supreme Court will say about whether there is an appealable order, sir. That would be a magnificant power, if you could decide whether an appellate Court can hear your cases. It would be unusual.

MR. SYMANSKI: Interlocutory, or does it extend --

THE COURT: At this point, it looks interlocutory to me because I am retaining power and authority to do something further if need be. That is just my guess. The Supreme Court of Virginia may say this is a final order and tell me to do something else.

Will you prepare an order, sir?

MR. HAZEL: Yes, sir.

(Whereupon, at 1:20 o'clock p.m. the hearing in the above-entitled matter was concluded.)

CERTIFICATE OF REPORTER

I, GILBERT HALASZ, C.S.R., hereby certify that the foregoing transcript is a true and correct transcript of the proceedings in the above-entitled matter taken in Fairfax Circuit Court July 12 and 19, 1973.

In witness whereof, I have set my hand this 6th day of July, 1973.

_____