216 Va. 49

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
MAY 14 1974
RICHMOND, VIRGINIA

6

RECORD NO.
730996

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 I

AGREEMENT OF COUNSEL
ON APPENDIX

Counsel for Appellants and Appellees hereby agree to stipulate that the following table of contents contains those parts of the record which are both germane and reasonably reproducible. The exhibits are germane but on the whole are not reasonably capable of reproduction and are therefore included by reference in the appendix, but are not reproduced therein.

BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA, et al

BY: George A. Symmanski
Counsel for Appellants

THOMAS R. WILLIAMS and JAMES L.
McILVAINE

BY: Francis G. McDermott
Hazel, Beckhorn & Hanes
Counsel for Appellees

TABLE OF CONTENTS

VOLUME I

	Page
Petition for Mandamus January 26, 1972	1
Answer of Board February 17, 1972	5
Motion for Order to Show Cause October 11, 1972	8
Reply to Motion for Order to Show Cause October 26, 1972	10
Amended Petition February 7, 1973	12
Answer to Amended Petition March 16, 1973	17
Petition May 7, 1973	20
Answer May 25, 1973	24
Order of Consolidation July 5, 1973	27
Order July 25, 1973	28
Notice of Appeal and Assignments of Error August 24, 1973	29
Petition for Further Relief October 3, 1973	31
Transcript of Trial, Vol. I July 12, 1973	1-249

VOLUME II

	Page
Transcript of Trial, Vol. II July 16, 1973	300-557

VOLUME III

Transcript of Trial, Vol. III and IV July 18, 1973 and July 19, 1973	459-562 A-1--A-77

TABLE OF CONTENTS

Exhibits incorporated in the appendix by reference but not reproduced by agreement of counsel

STIPULATION EXHIBITS

No. 1 (staff report on Van Metre case)

No. 2 (staff report on Williams case)

No. 3 (verbatim transcript BD of Supers meeting on Van Metre 12-18-72)

No. 4. (verbatim transcript BD of Supers. meeting on Williams 9-30-72)

No. 5 (BD of Supers minutes 11-20-72)

No. 6 (Planning Com. minutes 11-14-72)

No. 7 (Planning Com. minutes 9-72)

No. 8 (County emergency ordinance on rent control)

No. 9 (Middle Run Sewer Contract 3-25-66)

No. 10 (Fiscal Plan of Fairfax Co, 1973)

No. 11 (Restudy of Pohick Watershed)

No. 12 (Sanitary Sewer & Watershed Map of Fairfax Co.)

TABLE OF CONTENTS

No. 13 (staff report in zoning case C-567)

No. 14 (Judge Plummer's opinion on low-moderate housing in County)

No. 15 (staff report on zoning case B-898)

No. 16 (aerial photograph)

No. 17 (small tax map)

No. 18 (larger tax map)

No. 19 (Mr. Maury Seldin's qualifications)

No. 20 memo 6-8-73

No. 21 minutes 9-10-69

No. 22 minutes 10-15-69

No. 23 Pohick plan 2-66

No. 24 map

No. 25 Pohick Restudy

No. 26 Senate Bill

No. 27 letter 4-3-71

No. 28 Pohick map

No. 29 Court order

No. 30 (Opinion of Judge Cacheris in A & B Construction case)

PETITION FOR MANDAMUS

Come now your Petitioners and represent as follows:

1. Petitioners, Thomas R. Williams and James L. McIlvaine, are the owners of a certain parcel of land located in Fairfax County, Virginia, titled of record in the name of William C. Bauknight, Trustee, being more particularly that parcel designated as parcel 45 on tax section sheet 88-1.

2. Petitioners did on July 27, 1970, duly file application for rezoning of a portion of said property consisting of 133.4197 acres from the existing zoning category of RE-1 to the R-12.5 zoning category.

3. The subject property is located in that portion of Fairfax County considered in the Pohick Restudy dated January, 1969 and is designated in said Restudy for single family density and a combination of commercial, townhouse and related uses more particularly referred to in the subject Pohick Restudy as a neighborhood center.

4. Areas immediately adjacent to the subject property have been rezoned for small lot, single family development and are now being developed, and the RE-1 zoning of the subject property is arbitrary, discriminatory and a taking without compensation.

5. Defendants for several years have represented as a policy matter that zoning applications of the subject nature

would be accorded immediate hearing pursuant to the conformance calendar approach, i.e., where the application is in complete conformance with the comprehensive land use plan; however, Petitioners have been advised by Defendants' agents that the subject application will not be heard as a conformance calendar case.

6. In recent years rezoning applications filed with Defendant Board have substantially exceeded the number of applications heard and determined by Defendant Board and Commission. As a result of the failure to process and hear rezoning applications, the number of applications pending without action has steadily increased and has now reached a number in excess of 225, of which 31 have been heard by the Defendant Commission and await hearing by Defendant Board.

7. Agents of Defendant Board have advised Defendant Board and applicants that under the very best of circumstances without any interruption in processing because of alleged requirements for restudies and/or review of comprehensive plans, the time lag between the filing of an application and the hearing of an application approximates or exceeds two years.

8. In addition to the time lag as aforesaid, Defendant Board has adopted a number of practices, such as neighborhood studies, partial revisions of land plans and similar items which further delay the processing and hearing of rezoning applications, including the subject application.

9. Defendant Board several years ago adopted a policy

sometimes referred to as the "out-of-turn" hearing approach pursuant to which a number of cases have been granted preferential treatment by scheduling other than in the chronological order of filing, the number of such cases granted preferential treatment having now reached such proportions that substantially all the time Defendant Board allows for zoning hearings is required merely to hear those cases granted preferential treatment, thus discriminating against the subject application.

10. Petitioners are further advised that, in addition to the factors aforesaid, a policy requirement of the Defendants, sometimes referred to as "the Middle Run policy," will have the result of denying a hearing of the subject application indefinitely and, pursuant to said specific policy of Defendants, processing and scheduling of the subject application has been refused.

11. Petitioners have expended considerable sums in planning for the use of the subject land and are suffering and will continue to suffer substantial damage as a result of Defendants' refusal to act.

12. At its meeting of January 19, 1972, Defendant Board arbitrarily and in violation of the provisions of law adopted a policy statement indicating it did not intend to hear any zoning applications (other than in very limited categories, which do not apply to the subject application) for a further period of six months.

13. Defendant Board during the latter part of 1971 evidently for various reasons related to political factors in an election year, refused to entertain zoning applications in any substantial number for a period of approximately six months, despite the fact the filing of zoning applications continued and the number of applications awaiting hearing increased greatly.

14. Petitioners have been advised and therefore allege the various actions and policies of the Board of Supervisors which have resulted in failure of Defendant Board and Commission to process and determine Petitioners' zoning application within a reasonable time constitutes discrimination against your Petitioners, is an unlawful taking without compensation and a denial of Petitioners' rights without due process of law as guaranteed by the Constitution of Virginia and the Constitution of the United States.

15. Petitioners have been advised and therefore aver the said conduct and refusal of Defendants to act as aforesaid violates Chapter 30 of the ordinances of Fairfax County and Title 15.1, Chapter 11 of the Code of Virginia, 1950, as amended.

16. The aforesaid actions of Defendants in refusing to hear the subject application are unreasonable, arbitrary, capricious and illegal, and bear no substantial relation to the public health, safety, morals or general welfare.

17. By reason of the foregoing, Petitioners allege

an actual controversy exists between the parties.

WHEREFORE, your Petitioners pray that a pre-emptory Writ of Mandamus be issued against Defendants demanding that they process and hear Petitioners' application forthwith, or, in the alternative, that a mandatory injunction be issued directing and determining Petitioners' application by hearing forthwith, or, in the alternative, that the existing RE-1 zoning of the subject property be declared arbitrary, capricious and illegal and appropriate orders of this Court be issued directing that the zoning be changed to the Re-12.5 district.

Filed: January 26, 1972

/s/ Thomas R. Williams
By: John T. Hazel, Jr.

/s/ James L. McIlvaine

* * *

ANSWER

Come now defendants Board and Commission, by counsel, and for answer to the Petition for Mandamus heretofore filed herein, respectfully state as follows:

1. That they have insufficient knowledge to admit or deny paragraph 1, and must therefore deny it.

2. That they admit the allegations of paragraph 2.

3. That they admit the allegation of paragraph 3, concerning the Pohick Restudy, and aver that the area in which

the property the subject of this litigation lies is shown thereon for residential development at a density not to exceed 2.0 dwelling units per acre, and that said plan shows a neighborhood center on or in the immediate vicinity of the subject property.

4. That they admit the allegation of the first phrase of paragraph 4 and deny that of the second.

5. That they admit the promulgation and adoption of a policy providing for "conformance calendar" cases, aver that they have insufficient knowledge to admit or deny that the application the subject of this litigation is such a case, and aver that they have insufficient knowledge to admit or deny statements alleged to have been made by unidentified alleged agents.

6. That they admit that there are pending a number of zoning applications upon which action has not been taken, some of which have been considered by the defendant Commission and await Board action. They aver that they believe that at least some of such applications are not presently being pursued to a conclusion, and that their staff is attempting to ascertain the present desires of the applicants in the pending cases.

7. That they deny the allegation of paragraph 7

insofar as it alleges advice given to defendants, and aver that they have insufficient knowledge either to admit or deny the allegations of advice given petitioner by unidentified alleged agents, and must therefore deny it.

8. That they deny that they have adopted any "practices" relating to studies or plan revisions, and aver that when it appears to either of them that additional information would make possible a more informed decision, or that the existing comprehensive plan does not take into account current factors, they do on occasion ask for additional studies or for revised portions of the comprehensive plan, and admit that such requests do cause delay in disposition of the affected applications.

9. That they admit the adoption by defendant Board of a procedure for the granting of "out-of-turn" hearings to certain cases in which "regular" scheduling would cause grave hardship to the applicant or would deny to the County a significant public benefit, and deny the balance of the allegations of paragraph 9.

10. That they deny the allegations of paragraph 10., and aver that when the "Middle Run policy" re-evaluation study is completed in the ensuing several months, applications in the area affected thereby will be placed in line for scheduling.

11. That they have insufficient knowledge either to admit or deny the allegations of paragraph 11., and must therefore

deny it.

12. The defendant Board admits that it has adopted, as a matter of policy, the position that it will not schedule additional zoning applications for hearing for a period of six months, except those the delay of which would cause an extreme hardship to the applicant.

13. That they deny the allegations of paragraph 13.

14. That they deny the allegations of paragraph 14.

15. That they deny the allegations of paragraph 15.

16. That they deny the allegations of paragraph 16.

17. That they deny that a justiciable controversy exists.

WHEREFORE, having now fully answered the allegations of the Petition for Mandamus, defendants Board and Commission, by counsel, move this honorable Court to deny the requested relief, and dismiss the petition.

BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA,
et al

Filed February 17, 1972 By:/s/ Duane Searles

* * *

MOTION FOR ORDER TO
SHOW CAUSE

Came this date Petitioners, by counsel, and moved for

entry of an Order directing the Board of Supervisors of Fairfax County to show cause why it should not be held in contempt for failure to comply with prior directives of this Court, or, in the alternative, for such other relief as the Court may deem appropriate, and in support thereof state as follows:

1. The Court, upon petition previously filed herein and testimony taken and the argument of counsel, did hold that Petitioners were entitled to a hearing and determination by the Board of Supervisors of Application C-169 seeking rezoning of the property of Petitioners from the RE-1 District to the R-12.5 District.

2. In response to the ruling of this Court, Defendants did establish a procedure and schedule for the hearing of zoning cases.

3. Pursuant to aforesaid procedure, Petitioners' case was set for hearing by Defendant Board on September 30, 1972. Despite the fact that a delay of more than seven months ensued from the date of the Court's decision, i.e., February 25, 1972, and the date of the hearing September 30, 1972, by Defendant Board of Supervisors, Petitioners consented to the said additional delay of seven months in the hearing of the subject zoning application, relying upon the determination of the Court that upon the duly set hearing date, Defendant Board would render a decision upon said application.

4. On September 30, 1972, upon conclusion of the public hearing, Defendant Board did adopt a motion deferring decision upon the application for an additional eight months. To the best knowledge and belief of Petitioners, Defendant Board's deferral action was a deliberate effort to avoid reaching a determination upon Application C-169 and constitutes a direct violation of the previous order of this Court and a further violation of the constitutional rights of Petitioners.

WHEREFORE, Petitioners pray that an appropriate order of this Court be entered directing Defendants to show cause why they should not be held in contempt for violation of the prior order of this Court, or, in the alternative, that this Court without decision of the Board of Supervisors fix an appropriate date for hearing and determination on that portion of the petition previously filed herein seeking declaration that the existing zoning of the Petitioners' property be declared arbitrary, capricious and illegal and changed by order of this Court to the R-12.5 District.

Filed October 11, 1972

Thomas R. Williams
James L. McIlvaine
By:/s/John T. Hazel

* * *

REPLY TO MOTION FOR ORDER TO SHOW CAUSE

COME NOW Defendants, by counsel, and move the Court to deny the motion for an order to show cause and in support thereof

state as follows:

1. The subject motion is not supported by an affidavit or other sworn statement.

2. The Defendants pursuant to this Court's ruling have established a formal docketing procedure. A copy of this procedure is attached as Exhibit One.

3. On May 23, 1972 the zoning docket was called in chronological order of filing of applications and 73 applications were set for hearing before the Board of Supervisors for the months of July through December, 1972. (During the month of August the Board of Supervisors was recessed.)

4. Since this Court's order of 28 March, 1972, the Defendant Board of Supervisors has heard and decided 94 zoning applications in which the application was either approved or denied. In 11 hearings the application was deferred to a date certain for further study and evaluation prior to the Board making a final decision. Four cases had to be deferred because of improper notice or advertising.

5. Petitioners' prayer for relief sought a hearing on its application C-169. On September 30, 1972, pursuant to this Court's order, a hearing was held on the subject application. A motion to deny the subject application failed by a vote of 4-3, defendant Supervisor Alexander being absent and defendant Chairman Hoofnagle having resigned from the Board

of Supervisors. A motion to defer action for a maximum of eight months, until a public hearing could be held on the proposed Middle Run policy of the Pohick development policy then passed without a dissenting vote. The Middle Run policy is ready for hearing before the defendant Board. The Board felt that action on application C-169 would be premature and inappropriate prior to a decision on this policy.

WHEREFORE, Defendants move the Court to deny the motion for an order to show cause in that the above facts amply demonstrate that the Defendants have complied with the directions of this Court.

Filed October 26, 1972

THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, et al

By:/s/ M. Langhorne Keith

* * *

AMENDED PETITION

1. The Defendant, The Board of Supervisors of Fairfax County, Virginia, is the legislative body of Fairfax County, Virginia, charged with the responsibility of adopting and amending the zoning ordinances and maps of Fairfax County.

2. The Defendant, Planning Commission of Fairfax County, Virginia, is the legally constituted Planning

Commission of Fairfax County, Virginia, charged with responsibility as more particularly set forth in the Code of Virginia 1950, as amended.

3. Petitioners Thomas R. Williams and James L. McIlvaine are the beneficial owners of a certain parcel of land located in Fairfax County, Virginia, titled of record in the name of William C. Bauknight, Trustee, said parcel being more particularly designated as Parcel 45, Tax Section Sheet 88-1.

4. On July 27, 1970, Petitioners filed application for a change of zoning for a portion of said property consisting of 133.4197 acres (hereinafter referred to as subject property) from the existing RE-1 zoning district to the R-12.5 zoning district. Reference is made to the zoning application, C-169, and the plat and description filed therewith for a more particular description of the aforesaid property.

5. The subject property is zoned RE-1 (allowing a maximum of only 0.9 single family units per acre) under existing zoning ordinances of Fairfax County and has been so zoned for a number of years. The RE-1 district is historically a land use classification used as a "holding zone" dating from the initial zoning actions of Fairfax County and was not derived from a deliberate review of land use policies with regard to the

subject property.

6. The subject property is located in an area referred to as the Pohick watershed and is designated by the current Master Plan of Fairfax County for development at densities of two or more dwelling units per acre, said Master Plan being titled The Pohick Restudy dated September 1969. In addition to single family densities, the aforesaid Master Plan provides for location on portions of the subject property of a "neighborhood center," including commercial, townhouse and apartment development in addition to single family dwellings.

7. In the mid-1960's, the Pohick watershed in which the subject property is situated was considered for land use changes and development. The voters of Fairfax County did, at a general election, approve the issuance of bonds in the approximate amount of $18,000,000 to provide sanitary sewer trunk systems and treatment facilities in order to allow orderly development with appropriate public facilities to proceed in the Pohick watershed.

8. Between 1966 and 1969, the Defendant Board did cause to be conducted intensive land use studies in the Pohick watershed, and did on a number of occasions indicate that development in Fairfax County was to be channelled to the Pohick watershed as a commitment to the provision of "growth areas" to provide for the orderly development of Fairfax County and to

further accommodate the growth expectations of Fairfax County.

9. Agents of Defendant Board of Supervisors, despite repeated requests, did refuse to process the subject application for hearing before Defendant Planning Commission and Defendant Board of Supervisors, forcing Petitioners to bring this action requesting Court determination of Petitioners' right to a hearing. Upon direction of this Court on March 28, 1972, Defendant Board of Supervisors commenced the hearing of zoning cases, including the subject application; however, the subject case was not actually heard by Defendant Board until September 30, 1972, and on that date Defendant Board refused to reach a decision, deferring said case for an additional eight months. On November 20, 1972, upon further direction of the Court to determine said application, the Defendant Board did deny application C-169, the effect of which was to cause Petitioners' land to remain zoned to the RE-1 district.

10. All utilities are, or pursuant to development policies of Defendant Board, can be made available to service the subject tract for the requested zoning.

11. Petitioners believe and therefore aver that Defendants' actions, as aforesaid, are unreasonable, arbitrary, discriminatory, not in accord with the County's Master Plans and are designed to render development of the property uneconomic and impractical.

12. Petitioners believe and therefore aver that the basic development of Fairfax County in single family areas is in lots substantially less than one acre in size, that the Master Plan applicable to the subject property recognizes development for less than one acre in size, and that the County has for a number of years, for purposes of tax assessment, recognized potential for rezoning to higher densities in accord with the County's Master Plans.

13. The action of Defendant Board in denying application C-169 was illegal, arbitrary, capricious, unreasonable without substantial relation to the public health, safety and general welfare, an unlawful taking of Petitioners' properties and a discrimination against the rights and property of Petitioners, and a denial of equal protection and other rights guaranteed by the Constitutions of the United States and the Commonwealth of Virginia and the ordinances of Fairfax County.

14. An actual controversy exists between the parties, and Petitioners have no remedy other than the relief prayed herein.

WHEREFORE, your Petitioners move that this Court enter a Declaratory Judgment declaring:

A. The existing RE-1 zoning of the subject property to be arbitrary, capricious and without reasonable relation to the public health, safety, morals and general welfare.

B. The action of Defendant Board of Supervisors on November 20, 1972, denying grant of application C-169 is illegal and null and void.

C. The Court, by appropriate order, direct Defendant Board to process plats as required to develop subject property in accord with rezoning sought in application C-169 and revise the zoning records of Fairfax County to show the zoning in the R-12.5 district.

D. For such other order of this Court as may be appropriate to grant Petitioners full and complete relief.

Filed February 7, 1973

Thomas R. Williams
James L. McIlvaine
By:/s/ John T. Hazel, Jr.

* * *

ANSWER TO AMENDED PETITION

COMES NOW the Defendant Board of Supervisors of Fairfax County, by counsel, and respectfully answers the Amended Petition as follows:

1. Defendants admit the allegations of paragraphs 1 and 2.

2. Defendants have insufficient knowledge to either admit or deny the allegations of paragraph 3 and therefore deny them.

3. Defendants admit the allegations of paragraph 4 except that Defendants' records show the subject property consisted of 138.4197 acres.

4. Defendants admit that the subject property is zoned RE-1 which allows approximately 0.9 single family units per acre and other uses and deny the other allegations of

paragraph 5.

5. Defendants admit that the subject property is located in the Pohick watershed for which the current master plan is "A Restudy of the Pohick Watershed" dated September 10, 1969, and deny all other allegations of paragraph 6.

6. Defendants have insufficient knowledge to either admit or deny the allegations in the first sentence of paragraph 7 and therefore deny them and deny the remaining allegation of paragraph 7.

7. Defendants admit that there have been studies of the Pohick watershed but have insufficient information to either admit or deny the allegation in paragraph 8 on what was indicated on a number of unspecified occasions and therefore deny the allegation.

8. Defendants have insufficient knowledge to either admit or deny the allegations of paragraph 9 as to the actions of unspecified agents and therefore deny them. Defendants admit that a plan for hearing applications for zoning was submitted to the Court and referred to in an order of March 28, 1972. Defendants admit that the subject application was heard on September 30, 1972 and a decision was deferred for no longer than eight months pending a hearing on a study of the area of the subject property. Defendants admit the allegations of the last sentence of paragraph 9.

9. Defendants admit that certain utilities may be made available but deny any inference in paragraph 10 that public facilities are adequate.

10. Defendants deny the allegations of paragraph 11.

11. Defendants admit that the Master Plan shows future development of less than one acre in size and that one consideration in tax assessment is the Master Plan. Defendants have insufficient information to either admit or deny the remaining allegations of paragraph 12 and therefore deny them.

12. Defendants deny the allegations of paragraph 13.

13. Defendants admit the allegations of paragraph 14.

WHEREFORE, having answered the allegations of the Amended Petition, Defendants, by Counsel, move this Honorable Court to deny the requested relief, and dismiss the Amended Petition.

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

Filed March 16, 1973

By:/s/ George A. Symanski, Jr.

PETITION

1. The Defendant, The Board of Supervisors of Fairfax County, Virginia, is the legislative body of Fairfax County, Virginia, charged with the responsibility of adopting and amending the zoning ordinances and maps of Fairfax County.

2. Petitioner, A. G. Van Metre Associates, Inc., is the contract and equitable owner of certain parcels of land located in Fairfax County, Virginia, titled of record in the names of John McC. Mowbray, Robert G. Merrick, and John A. Leutkemeyer, Trustees, said parcels being more particularly designated as Parcels 42, 43, 21, 4-6, Pt. 9.5, Tax Section Sheets 88-1, 88-2, 88-3, and 88-4.

3. On June 14, 1971, Petitioner filed application for a change of zoning for said property consisting of 279.8 acres (hereinafter referred to as subject property) from the existing RE-1 zoning district to the R-12.5 zoning district. Reference is made to the zoning application, C-301, and the plat and description filed therewith for a more particular description of the aforesaid property.

4. The subject property is zoned RE-1 (allowing a maximum of only 0.9 single family units per acre) under existing zoning ordinances of Fairfax County and has been so zoned for a number of years. The RE-1 district is historically a land

use classification used as a "holding zone" dating from the initial zoning actions of Fairfax County and was not derived from a deliberate review of land use policies with regard to the subject property.

5. The subject property is located in an area referred to as the Pohick watershed and is designated by the current Master Plan of Fairfax County for "urban lot" development at densities of two dwelling units per acre, said Master Plan being titled The Pohick Restudy and dated September 1969.

6. In the mid-1960's, the Pohick watershed in which the subject property is situated was considered for land use changes and development. The voters of Fairfax County did, at a general election, approve the issuance of bonds in the approximate amount of $18,000,000 to provide sanitary sewer trunk systems and treatment facilities in order to allow development with appropriate public facilities to proceed in the Pohick watershed.

7. Between 1966 and 1969, the Defendant Board did cause to be conducted intensive land use studies in the Pohick watershed, and did on a number of occasions indicate that development in Fairfax County was to be channelled to the Pohick watershed as a commitment to the provision of "growth areas" to provide for the orderly development of Fairfax County and

to further accommodate the growth expectations of Fairfax County, and provide a necessary supply of land for housing.

8. Agents of Defendant Board of Supervisors, despite repeated requests, did refuse to process the subject application for hearing before Defendant Planning Commission and Defendant Board of Supervisors, until pursuant to Court action on March 28, 1972, Defendant Board of Supervisors resumed the hearing of zoning cases, including the subject application; however, the subject case was not actually heard by Defendant Board until December 18, 1972, at which time Defendant Board did deny application C-301, the effect of which was to cause Petitioners' land to remain zoned to the RE-1 district.

9. All utilities reasonably required for the requested zoning are, or pursuant to development policies of Defendant Board, can be made available to service the subject tract.

10. Petitioners believe and therefore aver that Defendants' actions in causing subject property to remain in the RE-1 zoning district as aforesaid, are unreasonable, arbitrary, discriminatory, not in accord with the County's Master Plans and are designed to render development of the property uneconomic and impractical.

11. Petitioners believe and therefore aver that the basic development of Fairfax County in urban single family areas is in lots substantially less than one acre in size, that the Master Plan applicable to the subject property recognizes development for less than one acre in size, and that the County has for a number of years, recognized potential for rezoning to higher densities in accord with the County's Master Plans in establishing tax assessments and planning for development.

12. There exists in Fairfax County today an inadequate supply of land zoned for urban lot, i.e., densities of two units per acre and more and that the consequence of the inadequate supply of land with appropriate zoning for urban development is an inflation of land prices, thus effecting a discrimination between those seeking to acquire a home and the owners of existing developed properties in Fairfax County.

13. The action of Defendant Board in denying application C-301 was illegal, arbitrary, capricious, unreasonable, without substantial relation to the public health, safety and general welfare, an unlawful taking of Petitioners' properties and a discrimination against the rights and property of Petitioners and other citizens of Fairfax County and those desiring to live in Fairfax County, and a denial of equal protection and other rights guaranteed by

the Constitutions of the United States and the Commonwealth of Virginia and the ordinances of Fairfax County.

14. An actual controversy exists between the parties, and Petitioners have no remedy other than the relief prayed herein.

WHEREFORE, your Petitioners move that this Court enter a Declaratory Judgment declaring:

A. The existing RE-1 zoning of the subject property to be arbitrary, capricious and without reasonable relation to the public health, safety, morals and general welfare.

B. The action of Defendant Board of Supervisors on December 18, 1972, denying grant of application C-301 illegal and null and void.

C. The Court, by appropriate order, direct Defendant Board to process plats as required to develop subject property in accord with rezoning sought in application C-301 and revise the zoning records of Fairfax County to show the zoning in accord with said application.

D. For such other order of this Court as may be appropriate to grant Petitioners full and complete relief..

Filed: May 7, 1973

A. G. VAN METRE ASSOCIATES, INC.
By /s/ John T. Hazel, Jr.

***

ANSWER

COMES NOW Defendant Board of County Supervisors of Fairfax County, Virginia, by counsel, and for answer to the

Petitioner heretofore filed herein, respectfully represents to the Court as follows:

1. That Defendant admits the allegations of paragraph 1.

2. That Defendant has insufficient knowledge either to admit or deny the allegations of paragraph 2, and therefore must deny them.

3. That Defendant admits the allegation of paragraph 3.

4. That Defendant admits that the subject property is zoned RE-1 which allows approximately 0.9 single family dwelling units per acre and other uses, and denies all other allegations of paragraph 4.

5. That Defendant admits that the subject property is located in the Pohick watershed for which the current master plan is "A Restudy of the Pohick Watershed", dated September 10, 1969, and denies all other allegations of paragraph 5.

6. That Defendant has insufficient knowledge either to admit or deny the allegations of paragraph 6, and therefore must deny them.

7. That Defendant admits that there have been studies of the Pohick watershed but has insufficient information either to admit or deny what was indicated on a number of unspecified occasions, and therefore must deny any other allegation of paragraph 7.

8. That Defendant has insufficient knowledge either to admit or deny the allegations of paragraph 9 regarding the actions of unspecified agents, and therefore must deny them. Defendant admits that a plan for hearing applications for zoning was submitted to the Court and referred to in an order dated March 28, 1972. Defendant further admits that the subject application was heard and denied by the Board on December 18, 1972.

9. That Defendant admits that certain utilities may be made available but denies any inference in paragraph 10 that public facilities are adequate.

10. That Defendant denies the allegations of paragraph 10.

11. That Defendant admits that the Master Plan applicable to the subject property shows future development at less than one acre in size and that one consideration in tax assessment is the Master Plan, but denies any implication in paragraph 11 that the subject application is in conformity with the Master Plan. Defendant has insufficient knowledge either to admit or deny the remaining allegations of paragraph 11 and therefore must deny them.

12. and 13. That Defendant denies the allegations of paragraphs 12 and 13.

14. That Defendant admits the allegations of paragraph 14.

WHEREFORE, having answered fully the allegations of the Petition filed herein, Defendant, by counsel, respectfully moves this Court to deny the requested relief, and dismiss the Petition.

Filed: May 25, 1973

THE BOARD OF COUNTY SUPERVISORS
OF FAIRFAX COUNTY, VIRGINIA
By /s/ Paula A. Jameson

* * *

DECREE OF CONSOLIDATION

THIS CAUSE comes on for hearing on motion of counsel for consolidation of this cause with the cause styled THOMAS R. WILLIAMS and JAMES L. McILVAINE v. THE BOARD OF COUNTY SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, et al., At Law No. 26399, for trial on the merits on July 12, 1973, and it

APPEARING to the Court that the issues raised herein are substantially the same as some of the issues raised in Law No. 26399, and that multiple litigation can be avoided or reduced by consolidation, and that counsel have agreed to consolidation, as is evidenced by endorsement hereon, it is now therefore

ADJUDGED, ORDERED and DECREED that this cause be, and it hereby is, consolidated with Law No. 26399 for trial on the merits.

And this cause is continued to July 12, 1973.

Entered: July 5, 1973 /s/ William G. Plummer
Judge

* * *

ORDER

THIS CAUSE came on to be heard the 12th day of July, 1973, upon the pleadings formerly filed and read herein, upon testimony of the witnesses and the exhibits introduced into evidence.

And the Court being of the opinion that public facilities to serve the land were either presently available or will be available in the reasonably foreseeable future; that the property is bounded along its entire east boundary with zoning averaging a density equal to the R-12.5 zoning category; that in the vicinity of the subject land are commercial and townhouse zoning; and

The Court is of the further opinion that the action of the Board of Supervisors denying Applications C-169 and C-301, thus retaining subject land in the RE-1 zoning category was unreasonable, arbitrary and capricious.

The Court further finds that the denial of R-12.5 was in effect a denial of R-17 or other alternative densities less than R-12.5; therefore, the Court directs the Board of Supervisors to reconsider Application C-169 (Williams-McIlvaine)

and Application C-301 (Van Metre) and rezone said land to a category with density higher than density permitted in the RE-1 district. The Board of Supervisors is directed to reach a decision in accord with this order within a reasonable time.

To which findings and rulings of the Court Defendants, by counsel, duly except.

AND THIS CAUSE IS CONTINUED.

Entered: July 25, 1973 /s/ William G. Plummer
Judge

* * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Pursuant to Rule 5:6 of The Rules of The Supreme Court of Virginia and § 8-462 of Va. Code Ann. (1957), Defendant Board of Supervisors of Fairfax County, Virginia, hereby gives Notice of Appeal from the Final Order, or in the alternative, from the Order adjudicating the principles of this cause, entered herein on the 25th day of July, 1973.

The Defendant Board of Supervisors of Fairfax County, Virginia, makes the following Assignments of Error in the above-styled cause:

1. The Court erred in not holding that the Defendant's failure to rezone was reasonably related to the health, safety and general welfare or that the issue was fairly debatable.

2. The Court erred in holding that the Defendant's failure to rezone was unreasonable, arbitrary and capricious.

3. The Court erred in holding, in effect, that the Defendant, a legislative body, must consider zoning categories not requested by complainants and that the denial of the requested zoning category was a denial of all categories of a lesser density.

4. The Court erred in holding that Defendant's evidence was irrelevant or immaterial unless there was proof that the evidence was a consideration in the legislative decision.

5. The Court erred in limiting Defendant's evidence to the immediate area of the subject properties.

6. The Court erred in soliciting and relying upon the testimony of Defendant's witness as to what the position of Defendant, a legislative body, was or would have been under a different factual situation. In the alternative, if the Court was correct in the above, the Court erred in holding irrelevant the same witness' interpretation of another policy of Defendant.

A transcript of the trial will be hereafter filed.

Dated this 24th day of August, 1973.

Filed August 24, 1973

BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA
By /s/ George A. Symanski, Jr.

* * *

* * *

PETITION

Come now Plaintiffs and petition this Court for further relief herein and state as follows:

1. Pursuant to Order previously entered, Defendant Board was directed to reconsider Applications C-169 and C-301 and determine an appropriate zoning district for the subject properties.

2. Defendant Board has indicated it does not intend to reconsider the aforesaid decisions and, further, that it intends to appeal from the prior determination of the Court.

3. Your Petitioners have been advised and therefore aver that a final determination and adjudication of the issues raised herein has not been reached and they are entitled to a review of the existing zoning categories applicable to the subject properties and the entry of an appropriate order revising said zoning categories as the Court may deem appropriate in accord with its prior opinion.

WHEREFORE, Petitioners pray that the Court by appropriate order provide such relief as may be required to allow Petitioners reasonable use of their properties.

Filed: October 3, 1973

Thomas R. Williams and
James L. McIlvaine
by /s/ John T. Hazel, Jr.

VOLUME I

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

THOMAS R. WILLIAMS, et al., and JAMES L. McILVAINE,	:	
Plaintiffs,	:	
vs.	:	At Law No. 25397
THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, et al.,	:	
Defendants.	:	
S. G. VAN METRE ASSOCIATES, INC.,	:	
PETITIONER,	:	
vs.	:	In Chancery No. 55437
THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, et al.,	:	
Defendants.	:	

Fairfax, Virginia

Thursday, July 12, 1973

The above-entitled matter came on for hearing at 1:30 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

OPENING STATEMENT	PAGE
By Mr. Hazel	14
By Mr. Symanski	38

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Jack Liedl	54	73	81	90
Maury Seldin	92	101		
McKenzie Downs	125	136	145	
Oscar S. Hendrickson	151	167	169,174	172
Rosser H. Payne	175	212	247	

EXHIBITS

STIPULATION		FOR IDENT.	IN EVID.
No. 1	(staff report on Van Metre case)	6	6
No. 2	(staff report on Williams case)	6	6
No. 3	(verbatim transcript BD of Supers meeting on Van Metre 12-18-72)	7	7
No. 4	(verbatim transcript Bd of Supers meeting on Williams 9-30-72)	7	7
No. 5	(Bd of Supers minutes 11-20-72)	7	7
No. 6	(Planning Com. minutes 11-14-72)	8	8
No. 7	(Planning Com. minutes 9-72)	8	8
No. 8	(County emergency ordinance on rent control)	8	
No. 9	(Middle Run Sewer Contract 3-25-66)	9	9

I N D E X (cont)

STIPULATION		FOR IDENT.	IN EVID.
No. 10	(Fiscal Plan of Fairfax Co. 1973)	9	9
No. 11	(Restudy of Pohich Watershed)	10	10
No. 12	(Sanitary Sewer & Watershed Map of Fairfax Co.)	10	10
No. 13	(staff report in zoning case C-567)	11	
No. 14	(Judge Plummer's opinion on low-moderate housing in County)	11	
No. 15	(staff report on zoning case B-898)	12	
No. 16	(aerial photograph)	12	12
No. 17	(small tax map)	13	
No. 18	(larger tax map)	13	
No. 19	(Mr. Maury Seldin's qualifications)	93	93

THE COURT: Are you gentlemen ready?

MR. HAZEL: Yes, sir.

MR. SYMANSKI: Ready for the defendant.

(The reporter was sworn.)

THE COURT: The cases of Thomas R. Williams and James L. McIlvaine, versus the Board of Supervisors, Law 26399; and A. G. Van Metre Associates, versus the Board of Supervisors, Chancery 39437. The first action is an action for declaratory judgment, as is the second one, I take it?

MR. HAZEL: Yes, sir.

THE COURT: One is In Law and the other is In Chancery.

We will call the complainants or plaintiffs or whatever you want to call them, we will call them plaintiffs for the record in both cases.

Swear the witnesses, please.

(Witnesses were sworn.)

THE COURT: Is there a motion for a rule?

MR. HAZEL: None for me, Your Honor.

MR. SYMANSKI: No.

MR. HAZEL: If Your Honor please, there is one preliminary matter which might be a little unusual but I thought I would mention it to the Court in that we do not

believe that we can finish this case in one day.

THE COURT: It doesn't look like it, with ten witnesses.

MR. HAZEL: Tomorrow, I have a Federal Court matter that Judge Hoffman has set for about six months. I was wondering what the pleasure of the Court might be about the date that we might go over so that we could help with the witnesses.

THE COURT: I would assume that we would go over to Monday.

MR. SYMANSKI: My witnesses. Could we go Tuesday, possibly?

THE COURT: Not the way Tuesday looks.

Monday we have got only three cases set plus, of course, term day so I am available.

On Tuesday, we have got the criminal docket call, six jury cases, felony jury, and a couple of misdemeanor, non-jury, and five judges, so we can't go over to Tuesday.

What witnesses are you having trouble with?

MR. SYMANSKI: Mr. Pammel and my transportation planner; they are both supposed to be making presentations to the Board on Board day.

THE COURT: I believe we could time it when they could go on the stand, when they are not speaking to the Board,

or perhaps they could be taken out of order this afternoon.

MR. HAZEL: I have no objection to either of those choices.

I have a case set for Wednesday which, if it was convenient to the Court to set this to Wednesday, we could perhaps move that another week over. I would just as soon go with that on the scheduled day but it is not a problem either way.

THE COURT: As far as the scheduling of this Court is concerned, Monday would be much better than any other day next week because Tuesday is just impossible at this point.

Well, wait a minute, we would be in some difficulty.

MR. HAZEL: I have another case set here in this Court Wednesday so I would have to shift that.

THE COURT: Presently my feeling is we will go over to Monday and we will try to accommodate your witnesses, taking them out of order this afternoon, perhaps.

MR. HAZEL: If Your Honor please, we have a number of exhibits by stipulation that I think we could put in at this point if you have no objection.

THE COURT: All right, sir.

Why don't you give them to the Court first and have them marked. Then I will read them into the record.

MR. HAZEL: We would put in the staff report on the

Van Metre case.

THE COURT: Have them marked first and I will read them all in.

Staff report on the Van Metre case is Stipulation Exhibit No. 1.

(The document referred to was marked Stipulation Exhibit No. 1 and received in evidence.)

THE COURT: What do you want to call this second one?

MR. HAZEL: Staff report on the Williams case. There are two cases that have been combined in a consolidated case.

THE COURT: Which one is this, sir?

MR. HAZEL: The staff report on the Williams case. The first one was the Van Metre case.

THE COURT: Stipulation No. 2.

(The document referred to was marked Stipulation Exhibit No. 2 and received in evidence.)

MR. HAZEL: Stipulated Exhibit No. 3 is the verbatim transcript of the Board of Supervisors meeting denying the Van Metre case. That meeting was on December 18 of '72.

THE COURT: That is Stipulation No. 3.

(The document referred to was marked Stipulation Exhibit No. 3 and received in evidence.)

MR. HAZEL: No. 4 would be Board of Supervisors transcript of September 30, 1972 in the Williams case.

THE COURT: Stipulation No. 4.

(The document referred to was marked Stipulation Exhibit No. 4 and received in evidence.)

MR. HAZEL: No. 5 would be the Board of Supervisors minutes of November 20, 1972 in which the Williams case was denied.

THE COURT: What date?

MR. HAZEL: November 20, 1972.

THE COURT: Stipulation No. 5.

(The document referred to was marked Stipulation Exhibit No. 5 and received in evidence.)

MR. HAZEL: Six is the minutes of the Planning Commission of November 14, 1972 in the Van Metre case.

THE COURT: No. 6, sir.

(The document referred to was marked Stipulation Exhibit No. 6 and received in evidence.)

MR. HAZEL: No. 7 is the Planning Commission minutes in September recommending denial of the Williams case.

THE COURT: No. 7.

(The document referred to was marked Stipulation Exhibit No. 7 and received in evidence.)

MR. HAZEL: The next exhibit would be County's recently passed emergency ordinance imposing rent control on the County.

THE COURT: Being stipulated as to authenticity only, subject to relevancy and materiality reserved to the County.

(The document referred to was marked Stipulation Exhibit No. 8 for identification.)

MR. HAZEL: Copy of a contract dated March 25, 1966, referred to as the Middle Run Sewer Contract.

THE COURT: What year?

MR. HAZEL: 1966.

THE COURT: No. 9

(The document referred to was marked Stipulation Exhibit No. 9 and received in evidence.)

THE COURT: No. 8 is not in evidence yet but No. 9 is.

MR. HAZEL: Budget of the County for 1973, titled, Fiscal Plan of Fairfax County.

THE COURT: That will be received as Stipulation No. 10.

(The document referred to was marked Stipulation Exhibit No. 10 and received in evidence.)

MR. SYMANSKI: Shall we note these from another file? Two of these are from the Chris case which you tried. We have run out of these exhibits, we have so many cases.

THE COURT: I have noticed that.

MR. HAZEL: There must be some significance in that alone.

THE COURT: That is Stipulation No. 10, the Fiscal Plan for '73.

MR. HAZEL: Fairfax County Watershed and Sanitary Sewer District Map.

THE COURT: Restudy of Pohick Watershed is

Stipulation No. 11; that is received. A map of the area.

(The document referred to was marked Stipulation Exhibit No. 11 and received in evidence.)

MR. HAZEL: Sanitary Sewer and Watershed Map of Fairfax County.

THE COURT: That is received as Stipulation No. 12.

(The document referred to was marked Stipulation Exhibit No. 12 and received in evidence.)

THE COURT: What is No. 13, sir?

MR. SYMANSKI: I object on authenticity. That is not a stipulation, so take it off.

MR. HAZEL: I thought, Your Honor, we were stipulating that under my arrangement with Mr. Symanski as to authenticity of any of the exhibits --

THE COURT: I have received everything but No. 8 so far in evidence as being stipulated, as being in evidence.

No. 8, they reserved the right to object on the grounds of relevancy and materiality. Would that same stipulation apply to these two?

MR. SYMANSKI: Yes.

THE COURT: That is No. 13 and 14. They are

stipulated as to authenticity but not in evidence at this time.

What is 13?

Twelve is a map.

MR. HAZEL: Thirteen is a staff report in case C-567, zoning case C-567. That is neither of these cases.

No. 14 is Your Honor's opinion in the case that is referred to as the low-moderate income case in which Your Honor found a shortage in certain housing types in the county.

THE COURT: I am afraid I would have to take judicial notice of that one, anyway, subject to the decision from the Supreme Court of Virginia.

(The documents referred to were marked Stipulation Exhibits No. 13 and No. 14 for identification.)

MR. HAZEL: Fifteen is the case, staff report in B-898, another zoning case in the area.

THE COURT: Give me the number again, please.

MR. HAZEL: B-898. That case was heard by the Board of Supervisors on the same day as the Williams case and acted on a week ago. I think it is obviously relevant and admissible. It has nothing to do with the date.

THE COURT: We will hear argument at the time it is

offered.

MR. HAZEL: Alleged discrimination in the case.

THE COURT: Thirteen, 14, 15 are not in evidence at this point, although it is strictly on the question of relevancy and materiality.

(The document referred to was marked Stipulation Exhibit No. 15 for identification.)

MR. HAZEL: We have a photograph, Your Honor, which we would like to introduce.

THE COURT: Any objection?

MR. SYMANSKI: No, Your Honor.

THE COURT: It will be marked as No. 16.

(The document referred to was marked Stipulation Exhibit No. 16 and received in evidence.)

MR. HAZEL: We have two tax map assemblages, Your Honor.

THE COURT: Do you have any objection to the tax maps?

MR. HAZEL: This one, and the larger one which is on the wall.

THE COURT: The smaller one will be No. 17. If there

is no objection, it is received as a stipulation exhibit; the larger map will be No. 18.

(The documents referred to were marked Stipulation Exhibits No. 17 and No. 18 for identification.)

MR. SYMANSKI: Your Honor, there are some rezonings on here which occurred after the decision in this case.

MR. HAZEL: All of these rezonings were in the process and being heard and filed and so on while this was going on.

THE COURT: We are talking about stipulation at this point. You can reserve.

MR. HAZEL: The tax map showing the zoning; both of them show zoning.

THE COURT: I will only consider the later zonings if I later rule that they are admissible, but otherwise they will be stipulated. Is that right, sir?

MR. SYMANSKI: Yes, Your Honor.

THE COURT: Anything else? Any other stipulations?

MR. HAZEL: Not at this time, Your Honor.

I have a set of Board of Supervisors minutes which I will have after a while to introduce. I think that also will be stipulated.

THE COURT: Do you have any other stipulation?

MR. SYMANSKI: No, Your Honor.

THE COURT: Opening statement?

MR. HAZEL: If Your Honor please, the two cases that are before the Court today are two zoning cases that have been filed, were filed, in the 1970's. I think both of them were filed in the year 1970. They are one case which, Mr. Williams' case, if you refer to the map here, and I apologize to counsel, but the Williams case is this parcel which is 138 acres, and the other case referred to is the Van Metre case.

THE COURT: Locate this to something I understand first.

MR. HAZEL: This is Burke School; this is Burke, central village of Burke, the Southern Railroad running along here sort of east and west on the plat.

THE COURT: Which way is north?

MR. HAZEL: North is the top of the plat. The Southern Railroad runs right along the center of the plat.

Up in the corner, to orient the Court, is George Mason, Braddock Road, Rolling Road, the center of the West Springfield area, the two shopping centers at Keene Mill and Rolling Road, Old Keene Mill Road coming west out in this vicinity. The Burke School is at this location.

Now, for purposes of identification of the area

further, this brown outline on this map is the outline of the Pohick Watershed which we will be talking about a great deal. Both of these parcels are in an area of the Pohick.

The Pohick Watershed has about 20,000 acres in it. A subarea of the Pohick Watershed has been identified as the Middle Run area of the Pohick and the Middle Run area has been identified with the dotted line that runs around the parcel.

The two parcels are located in the upper end of the Middle Run of the Pohick Watershed south of Burke.

Identification of subdivisions which Your Honor may be familiar with, the subdivisions in here are Rolling Valley, Orange Hunt Estates in this vicinity, Rolling Valley West, shopping center under construction here, the Burke School and the Burke Center.

Now, these cases were filed pursuant to the adopted Pohick Master Plan.

The Pohick Master Plan, as it now is adopted, calls for approximately two units an acre. The cases were filed for R-12-5 which would be 2.5 units an acre.

The issue of whether R-12-5 or R-17, in effect the difference between two units and two and a half, is really not a material issue today because we are not asking the Court to rezone to either the R-17 or the R-12-5. We are simply

asking the Court to hold that the action of the Board in refusing to rezone these to a higher density than RE-1 was arbitrary, capricious and discriminatory.

In effect, the Master Plan accept single-family residential units for these two parcels. The two parcels comprise approximately 418 acres. The evidence will show that they are well suited topographically for development; parts of them are wood. They are typical of all the other properties that are being developed in the area.

You can see on this map, and I am now referring to Exhibit 17 for further identification, a portion of the Beltway, Braddock Road, the interchange at Braddock and all of the lots that are platted in this vicinity. In either, the same two to two and a half unit density for townhouse or apartment density, this is essentially what you have on the map before you.

There is a sewer line located approximately 50 feet from the property at this vicinity. The sewer line goes down the Middle Run and joins with the Main Run trunk sewer and eventually is treated at the Lower Potomac Treatment Plant.

In 1965, the evidence will show -- '65 and '66 -- the County entertained an opening of the Pohick for development in what we call urban lot density. I will refer to urban lot

density as meaning density of less than a half acre. The Pohick Plan was then adopted shortly after the area was open to sewer, in 1967.

In 1969, the Pohick Restudy was adopted, which is introduced as Stipulated Exhibit No. 11.

The Pohick Restudy attempted to delineate the Middle Run area for a slowdown in development.

There was a lot of discussion about whether development was to be in that area yet, whether it was ready for development, whether that was proper holding zonings, whether holding zonings were proper or not, and so forth.

When it was adopted in '69, there was a resolution which appears in the booklet and which I will introduce, the Board minutes, in which the Board indicated that they preferred that development not to proceed there for a period of approximately five years.

This Middle Run policy, as it has been known, has been escalated and bootstrapped into a device by which the County now seeks to deny at any time that they can specify in the future the rezoning of the subject two parcels. They deny this, allegedly on the basis of lack of public facilities. Despite the denial of these two parcels, they have continued to zone other parcels in the area. They have rezoned, in fact,

four parcels in the Middle Run in addition to the 800 acres, approximately, that was zoned when the plan was adopted. We will be talking a lot about the Levitt parcel and Orange Hunt Estates.

The yellow area on this map, and again I refer to Exhibit 18, is zoned for R-12-5, R-17, and townhouse density at five units an acre.

In other words, contiguous, along the entire eastern boundary line of this parcel, is zoned land, some 850 acres out of the 2,400 in the Shed, already zoned for urban lot development.

THE COURT: When was it zoned, sir?

MR. HAZEL: Part of it was zoned, about two-thirds of it was zoned in 1967 and '68; two parcels here were zoned in '69; this parcel was zoned in '70 for townhouses and this parcel (indicating) was zoned last Monday to R-17 district -- July 2nd, pardon me; July 2. Seventy acres there were zoned to R-12-5 district.

In addition, there have been numerous other zonings around the parcel in the Main Stem of the Pohick.

Now, it is our position, and I will try to be brief in introducing the subject without complexities, it is our position that no valid basis in law or in fact exists for the

denial of the Master Plan zoning on the subject tract.

THE COURT: May I interrupt for just a second? You are talking about this last zoning that took place in that rectangular portion?

MR. HAZEL: Yes, sir.

THE COURT: Of the Levitt property, I take it?

MR. HAZEL: Yes, sir.

THE COURT: Do you know when the application was filed on that?

MR. HAZEL: That application was filed almost the same day as our application was. It was heard by the Board of Supervisors for the first time immediately following our case on September 20 of 1972. It was deferred for approximately eight months and was zoned the other day.

All applications that we are talking about had been filed well before the date of the action on our application of last November and December on these two applications.

Now, the County in effect in endeavoring to create in this vicinity a holding zone that would apply substantially only to the unzoned parcels in the Middle Run of the Pohick. They have tried withholding zones for a number of years and they have talked about them and they have tried to find ways to discourage development and so on.

This is the only area in the County where the County, I think, would concede there is a holding zone policy in effect. They have endeavored to initiate in this area on both the upper end of the Middle Run, which is the two parcels of the subject of this case, plus some scattered parcels that are already developed under the five-acre-lot development, and down here in the lower end of it, a holding zone for the stated intent of deferring these cases, and not coming to grips with the zoning on it and, in effect, not being required to accommodate the problems of public facilities.

Now, I have a series of arguments opposing the whole concept, trying the concept on the County's problem. They start out with -- as a matter of law, the imposition of holding zone is not part of the enabling legislation under which the County operates, is discriminatory and is illegal to initiate a holding zone at all.

Secondly, if a holding zone should be legal in some circumstances, it would not be valid in this circumstance because the County did not undertake and has not undertaken the concomitant backups support to justify holding zone, and those would be things like a clear determination and analysis of the capital facilities problem, an implementation of the capital facilities, a fixed time in which facilities would be provided,

energetic endeavor to see that facilities are provided, and so forth.

The County has essentially done none of that. The County has talked a great deal over the past three or four years about growth and public facilities and so forth but they have not in any way undertaken the necessary backup to implement the holding zone.

The third thing that I would then rely on is the fact that assuming a holding zone valid and assuming some backup, the implementation here is totally unreasonable and discriminatory against this property owner, and against citizens who desire to come into Fairfax County and acquire properties at a reasonable price on the housing market.

The obvious situation is that the County has zoned, over the past two or three years, numbers of parcels. I refer here to a map, Exhibit 17, the orange parcels, both within and without the Watershed, have all been zoned by Fairfax County since the adoption of the Pohick Plan. All of these are for R-12-5 or higher densities.

THE COURT: Let me ask you this: How many of those were rezoned because of Court decision?

MR. HAZEL: One of them, Your Honor.

THE COURT: I want to know how many were rezoned

voluntarily and how many were rezoned because the Court told them they had to.

MR. HAZEL: One, I think, of six or seven highlighted here, that was zoned by the Board as a result of Court decision. That was the Levin case which is this case right here (indicating); that was zoned in February as a result of a Court decision. That was zoned voluntarily. This was zoned voluntarily and I think all the others here were zoned voluntarily.

This was Court decision, Judge Jennings in the Levin case forced that rezoning consideration.

THE COURT: What was it zoned from and to?

MR. HAZEL: From RE-1 to townhouses at five units an acre. As you can see, it is a parcel that is amost contiguous to this parcel.

Judge Jennings found that the RE-1 zoning on that tract to be arbitrary.

Now, part of the argument regarding discrimination and arbitrariness of the case certainly rests upon the fact that the selection of a small portion, 2,500 acres, of the County and of the Watershed in which to implement this program smacks of discrimination and exclusionary zoning on its very face. There was no study, there was just a drawing of a line on a map as a result of which the County said the Middle Run

is where we are going to implement a holding zone.

Then they spent two or three meetings at the Board of Supervisors dancing around with whether they were really going to call it a holding zone because they really didn't think that was legal. So what they ended up doing was stating that they would, in this Middle Run Watershed, not encourage development despite the fact that a third of it was then zoned and since then four more parcels have been zoned, so that the selection, the very selection, even assuming a holding zone concept valid, the very selection of this area of the County in which to implement the holding zone is not supported by the facts and is arbitrary and discriminatory.

The second part of it is that since 1969, precious little has been done to follow the, if you assume validity in holding zone concept, to follow that action and to provide any facilities.

In fact, in 1971, a brief upstate of the Middle Run policy was considered which concluded that there was no reasonable time in which this landowner would anticipate any zoning, although they again reaffirmed the fact that the land use on this tract should be two units or more an acre.

There is on a part of the Williams tract a plan for a neighborhood center which we will talk about later.

THE COURT: Which one is that?

MR. HAZEL: Williams is the western one. Williams is this one (indicating).

There is planned in the County Master Plan a neighborhood center in this very location.

If I might refer to these very fine exhibits that he has put on the back, these are a part of the Middle Run plan and the Middle Run plan anticipates a series of shopping centers, for example, all of which goes to the arbitrariness.

Now, if I might sit this on the chair, this is the Pohick plan which is in evidence as Exhibit No. 11, the map portion, the policies plan, the whole Pohick Watershed outlined in this fashion.

The main stem is the upper 60 percent of it. The Middle Run in which the County seeks to implement this holding zone is here in the hatched area. The South Run, which is along the Burke Lake area, has not been provided with a sewer line and is not a part of the present concern since the Master Plan anticipates that for lower density; but the Middle Run right in here has a sewer trunk that runs right up through the middle of it and one of the exhibits is a contract under which the sewer was extended right up to the edge of the subject property.

Now, --

THE COURT: That is south?

MR. HAZEL: Right up to the edge of the subject property, South Run. The boundary is right here.

THE COURT: Yes, sir.

MR. HAZEL: There is a sewer line in place that was extended by the County or under the County's auspices by private developer on a reimbursement basis to this point right here.

That sewer line was placed in the ground at the direction of the County and is sized sufficiently to carry the development which is shown on this Master Plan and for which our zoning, under which our zoning is filed.

In addition to the residential density, the County had a number of community neighborhood centers. Several had been zoned and are under construction. This is a community center; this is a community center which is under construction at this point with 20 acres of commercial shopping center and 15 acres of apartments and townhouses around it.

That was shown on a plan that has been implemented.

The second community center is this one shown right here that is under construction on that location and was zoned as part of this plan.

There is a governmental substation planned here, shown

in the blue, right across from this property.

There is a third community center which has been zoned at that location on the south side of what we referred to as the Levitt tract. That has not yet been placed under construction but it has been zoned.

There is a fourth community center which is actually located on a portion of the Williams property, right on the Williams tract, although not on a part of the zoned property.

Actually, the Williams application did not include this parcel since that is the parcel that the County Master Plan designates for the community, for the neighborhood size shopping center.

That parcel, while it belongs to Mr. Williams and Mr. McIlvaine, was excluded specifically because that is where the County plan shows a neighborhood center with townhouses, apartment density and so forth around it.

In other words, the whole area of the Pohick Main Stem and Middle Run is an urban density area by the County's Master Plan.

We will show that the County has, or the landowners have, both relied upon the County Master Plan in the purchase of their property.

Incidentally, at this time, I would like to amend, if there is no objection on the part of counsel, to show in

the pleadings that the tract has been actually acquired by Van Metre. We showed him as equitable owner under contract. Since the filing of that, he has actually acquired the tract pursuant to --

THE COURT: Any objection?

MR. SYMANSKI: No objection.

MR. HAZEL: These two units totaling some 400 acres, are in the Master Plan for substantially the use that we seek. They are part of the urban density planning of Fairfax County. The rezonings were filed in 1970 pursuant to the Master Plan. We were required to come to Court and seek relief from Judge Sinclair about 18 months ago to even have the case heard because the staff of Fairfax County took the position that they weren't going to do anything to bring these cases to a hearing.

We got the cases to a hearing. We were denied and the minutes in the case show that we were summarily denied. The cases were hardly accorded a hearing.

I am not quarreling with the fact that they were dealt with summarily. As a matter of fact, I would rather have them deal with me summarily when I know what the result is going to be.

The Board and the staff and the Planning Commission simply took the position that they were not going to zone any

land in this Middle Run Shed, any additional land, although a third of it is zoned.

We are now here seeking the Court's relief in finding that RE-1 is not appropriate.

Now, a corollary, and a very important element in this case, has been the fact, and we will present a great deal of evidence to support this problem, that there is totally inadequate reserve of zoned land in Fairfax County to maintain a reasonable market in housing; that the County has in effect created a monopoly in zoned land and this has been reflected by an exclusionary result in the market, and that there is simply not enough, sufficient, land zoned for that purpose.

Finally, in the way of public facilities, there is a great deal of conversation, it is politically opportune to talk when you go to the civic associations and when you go to the meetings around the County about the terrible problem of public facilities. Every resident of Fairfax County, I am sure, has some heart's desire that he or she would like to see. It may be Little League ballfield; it may be a better park; it may be a little less clutter on the highway; it may be a new school. But the aspirations of citizens are boundless. It is very opportune to go talk about the inadequacy of public facilities.

The simple fact is, we do not think that the County can demonstrate an inadequacy in fact of public facilities in this area when you compare public facilities as to other areas of the County, and the history, the recent history, of development in this vicinity.

There are many many public facilities already there. There are many that will be provided by the developer of these tracts at no expense to the County as the tracts develop, and there are some that are already in process of implementation in other ways.

THE COURT: How about sewer capacity?

MR. HAZEL: Sewer capacity is really a moot matter because the sewer capacity is under construction and will be on the line in 1975 or early 1976. The evidence will show that.

THE COURT: Are you saying that your clients would be willing to wait until the sewer capacity is there in 1975 before asking for permits?

MR. HAZEL: No question about that, Your Honor. As a matter of fact, our evidence will show that if we are now zoned, the preparation, filing, processing and approval of the subdivision plan requires from one year to 18 months and the probability is that we would not be able to get the things

ready for use much before that, anyway.

THE COURT: I have heard argument to the effect, and there may be some validity to it -- I am not ruling on it -- that once you zone something you have got to then allow development on it whether you have the facilities or not. It is up to the County to provide the facilities.

MR. HAZEL: We do not contend that.

THE COURT: I am just asking you, are your clients willing that if the Court should rule in their favor that they would not then use that as a lever to demand earlier development of the property prior to the sewer being available?

MR. HAZEL: Yes, sir. We have no problem with that stipulation.

THE COURT: That is apparently a very large problem that may be corrected in the Pohick, but it is a problem right now.

MR. HAZEL: We do stipulate that we would not seek any relief in the way of sewer other than the general plans that are now underway and the County's plans are sufficiently underway so that we think that sewer is available.

We look upon this property as one, or this case as one, in which sewer is in fact available because it will be there by the time we get to it, and you can't develop urban

lot density --

THE COURT: Let's go back to the day they decided the case, of course. That is a rather critical moment. This was decided in November, I believe in one case, and December in the other.

MR. HAZEL: Yes, sir.

THE COURT: Was that plan already in effect at that time?

MR. HAZEL: No, sir. When the case was heard in September, the County staff report stated that approximately 35 percent of the capacity of the plant was available and there was sufficient sewer capacity.

THE COURT: That was the report the Board had at that time?

MR. HAZEL: That is the report the Board had in the Williams case.

THE COURT: How about Van Metre?

MR. HAZEL: By the time the Van Metre case came, in December, I think the original report in Van Metre stated the same thing, but by the time the case came in December, the first several moratoriums had been implemented. After that, there was found to be, aside from Judge Keith's decision the other day, another 600,000 gallons of sewer capacity.

THE COURT: We don't know yet the finality of Judge Keith's decision.

MR. HAZEL: Aside from that, there was an additional sewer capacity awarded after the cases came on in September and December so that there was sewer capacity. The cases came on, the staff of the County represented there was sewer capacity available.

When the cases were actually decided on by the Board, there was one of the several moratorium efforts that had been implemented. After that it was determined that there was additional capacity and that capacity was then awarded.

Judge Keith's decision is in another case which, of course, is still in process but the facts simply are that sewer is planned, is under construction, the capacity will be available, and I have Mr. Liedl from the County to testify to that and I don't think it is really relevant to the basic issue at hand to get into the sewer issue because, I think, it is a resolved issue; it in effect is in the process of being moot. We do stipulate for the record in this case that we will not undertake, as a result of any decision in this case, to use the zoning of the land as a ground for the granting of sewer. We think it is becoming available. As a matter of fact, one of the problems in this whole area of growth in

public facilities is that the County rarely find itself, or finds it convenient to do things on schedule. The County represented to the Court in the cases in 1970 that sewer would be on the line in this Pohick-Potomac Shed in 1974. In fact, the County didn't even start the plans until under considerable pressure a few weeks or a few months ago they started these facilities which, under the County's plans in the sewer cases Judge Thornton heard in the summer of 1970, the County promised to the State and to the Court, would be on the line in 1974.

The County in effect has slipped its schedules a number of years, a number of months, since that time. That is one of the whole problems of public facilities which bears on this issue of validity of holding zones and the whole problem of public facilities is, the County is simply not exercising any determination to build the facilities as required. But we will get into that later.

So, in essence, on the third point, we do not believe that the public facilities in this area are any different than the public facilities for the property right across the street that is now under development.

There are townhouses under construction, several hundred of them.

THE COURT: I can't see that, sir. You have another

exhibit in front of it.

MR. HAZEL: Pardon me.

There are townhouses under construction right here, several hundred units. All these houses are occupied. Townhouses under construction here and occupied. Three hundred single-family dwellings here. Shopping center started here, shopping center moving toward completion here. Apartments under construction at this vicinity.

All of these cases have had, actually in some ways, more of a pioneering aspect as far as public facilities than this property has because we will demonstrate that in the development along the way, many of the problems or facilities were provided by the developers and they will continue to be provided by developers. We feel that this whole issue of public facilities as applied to this case, given the area generally, you can see from this photograph the urban nature of this area, this is where the houses are under construction right now -- this was the case that was recently zoned to townhouses by Court prodding. This is the division of Bentree, 300 homes now under construction. We think that this whole urban area is an appropriate area to be developed. We have to, obviously, have the zoning to proceed.

The fact that the zoning is granted today does not

mean that the area develops overnight. If the zoning is granted today, as the sewer comes available in 1975 or early 1976, as these other facilities are brought in, as the developer provides facilities, the area grows just as Fairfax County has grown in the recent past.

We think that the denial of these two cases with the result that the property remains in RE-1 category is arbitrary, capricious, discriminatory against the landowner and discriminatory against the citizens generally who wish to live in reasonably priced houses in this vicinity and has absolutely no basis in either law or in fact.

Thank you.

MR. SYMANSKI: Your Honor, we agree to stipulate that this could be developed at RE-1 but obviously not -- I guess the plaintiff's position is that they deserve and have the right to have a higher zoning, but that it could be developed at RE-1.

THE COURT: You mean could be developed economically? There is a difference. You could develop it as one house on the whole thing, I guess.

MR. HAZEL: Not economically but theoretically.

THE COURT: Come out with a profit?

MR. HAZEL: No, we cannot.

THE COURT: There is a difference in your stipulation?

MR. SYMANSKI: There sure is.

THE COURT: If the stipulation is that it can be developed economically from the standpoint of reasonable profit, that is one thing.

MR. HAZEL: We cannot develop it economically at a reasonable profit. We can develop it economically and not lose money. That is the difference.

THE COURT: This is going to be subject to proof, then, gentlemen.

MR. HAZEL: Let me talk to counsel and see.

(Short recess.)

MR. HAZEL: If Your Honor please, I don't believe we have any problem. We are prepared to stipulate this property could be developed somewhere between break-even and some profit; we do not stipulate it could be developed reasonably, reasonable profit, under RE-1 zone.

THE COURT: At least the stipulation is that it could be developed without a loss, is that a fair statement?

MR. HAZEL: Yes, sir.

THE COURT: That will be a matter of proof, then, gentlemen, if the County wishes to establish that as a defense. It will be a matter of proving what type of profit could be

obtained.

MR. HAZEL: I would like to ask Mr. Symanski to state the stipulation that he disagrees with, the way we stated it. I thought we just agreed.

MR. SYMANSKI: My understanding was of the stipulation that it could be developed at RE-1 at some profit but not any profit which you consider reasonable.

MR. HAZEL: I thought that is what I said.

MR. SYMANSKI: Some profit is not zero.

THE COURT: I said, without a loss. At least that is clear. What is some profit and what is reasonable is just as ambiguous as you can get, gentlemen, as a stipulation.

I am saying the only thing I can take as a stipulation is a solid stipulation that it can be developed without loss and if you want to say, some profit, and further define that later, that is all right with me.

MR. HAZEL: That is what we estimated.

MR. SYMANSKI: Maybe. Some profit to me is not zero. It is some profit. It is in the plus.

THE COURT: It could be one penny, sir.

MR. SYMANSKI: Okay.

THE COURT: That is why I said, subject to evidence if you want to establish it as a defense as to what that profit

would be. I can arrive at a decision as to whether or not it would be reasonable.

MR. SYMANSKI: Your Honor, I would first like to point out, as you noticed, that there is some convenient turn-around here in the argument of counsel. The usual argument in these cases is that we bring in people first and then supply the public facilities. In this case that has been turned around.

Generally, we will agree that we will wait around for the public facilities to be there, with regard to sewer, before we start to build. Usually it is the reverse, that it has been the history of the County that this is the argument of counsel, I might add, not mine, that it has been the history of the County that first we bring in the people and then we bring in the public facilities.

It also was mentioned in argument of counsel that we were behind in our sewer plans. I agree, and why we are behind is because we had too rapid growth, uncontrolled growth, and growth that has not been orderly. Now, I would also like to point out in these exhibits that they do not show the area out in this direction which we will try to bring in, in exhibit later, to show. They don't show that and it is important because, in this direction, there is no development. In effect, there is a dividing line here between urban development

and large lot or rural areas.

In this case, the staff report recommended denial. The Planning Commission almost unanimously -- I think there was one dissension in both of these cases -- recommended denial. The Board denied them.

Now, we are not talking here about some little development, and I would also like to point out that under the R-12-5 zoning category applied for, that under the cluster concept, the density can be 2.9, not 2.5.

Under 2.9, this is an optional category. We are talking about 418 acres on these two applications. We are talking about a possible 1,212 houses, 4,500 people generating 11,000 trips per day on the roads down there.

As far as the elementary school children, for example 848, which is enough to double some of the older elementary schools and almost fill up one of the new elementary schools, so it is not a very minor case but a large case, almost a town in itself with 4,500 people.

There has always been, as I said before, a propensity on the part of attorneys to attack the Board's denial of the case on public facilities, to say that it is that way everywhere else; we have crowded, congested, rural, dangerous roads elsewhere in the County, so we deserve it, too; we are

discriminated against; we have crowded schools all over the County, why not here?

We are discriminated against. I think that is a direct opposition to 15.1-427 in part:

"This chapter is intended to encourage local governments to improve public health, safety, convenience or welfare and to plan for the future development of communities to the end that transportation systems be carefully planned; that new community centers be developed with adequate highway, utility, health, educational, and recreational facilities."

It ends up by saying: "That the growth of the community be consonant with the efficient and economical use of public funds."

Two very important things in this Code section, to the County's case -- first, this says -- does not say, Your Honor, keep it going the way it is going. It says, improve things.

It doesn't say, if you have crowded roads, crowded schools, no sewer, sewer problems or problems elsewhere, keep it up. It says, improve it.

And the last part of this, that the growth of the community be consonant with the efficient and economical use of public funds.

It is our position here that the economical and efficient use of public funds is not to have development anywhere; that it has to be controlled and to be orderly to be efficient; that we develop way out here and we have to provide public services. That is not efficient.

It is our position that the Board does have the power under the State law to control growth in such a way that the public facilities are provided in a economical and efficient way.

Now, the comprehensive plan, we will show Your Honor that petitioner's proposal is over the density of the Master Plan.

Any contention also, which seems to be the vogue in these zoning cases, it seems to be that we have a comprehensive plan that shows a certain density -- let's assume for the minute that they are not over in their proposal -- the density on the Master Plan which we contend they are, but let's assume they are not. There is a propensity on the part of the attorneys to say, we fit within the Master Plan as far as densities; therefore, we demand our zoning right now.

That is not according to 15.1-446. The comprehensive plan is a plan for the long-range future. It doesn't say, this is a rezoning. It says it is a plan for the long-range

future. 15.1-447: Zoning is one way to implement the comprehensive plan.

Case law, Horn Book law, Anderson, the "when" of the implementation of the comprehensive plan is up to the Board of Supervisors, the governmental body; it is not up to the zoning attorney or the developer to say, it is there on the comprehensive plan, I deserve it right now and I demand it right now, and legally I can have it right now.

That is a decision under the law which is up to the Board to consider. They have to consider it or they would be arbitrary and capricious and unreasonable.

It is also a common sense argument if the comprehensive plan was a rezoning, in effect, and anybody could come in and say, there it is; I want it right now, it wouldn't be a plan for the future. It would be a rezoning in effect.

Now, other than 15.1-427, the key sections in the zoning process in the State Code are 15.1-489 and 490. These are replete with references to specific public facilities, and in general. I quote from No. 6:

"To protect against one or more of the following: overcrowding of land, undue density of population in relation to community facilities existing or available." Any contention that public facilities are not a part of the zoning just flies

in the face of the State Code.

THE COURT: What public facilities do you say were unavailable on the Williams case?

MR. SYMANSKI: Both of them are the same, Your Honor.

THE COURT: When it was heard in November, I understood the staff there was sewer available.

MR. SYMANSKI: That's right.

The Board attempted to defer the case to make a decision later, after they looked at the Middle Run policy. They decided the case in November.

In October, before that decision, and before the decision in December of the sewer moratorium in the Lower Potomac Plant,which is a continuing moratorium, was imposed so at the time of the decision of both of these cases there was a moratorium on the Lower Potomac Plant. As Mr. Hazel has pointed out, they did look at the figures; new facts came in and some capacity was found which was doled out but there still was a continuing moratorium on the plant. Some applications, I believe, that they did have were in line, were given sewer or capacity which they found after looking.

THE COURT: And some at a density much higher than the two per acre, isn't that correct?

MR. SYMANSKI: I am not familiar, Your Honor, with

the exact cases that were given sewers.

In early, I guess it was, '73 -- but my point is that there was a moratorium at the time of these decisions. The staff report originally did say that there was capacity. Now, in the verbatim I believe there is reference to the fact that new figures were coming in and that there was a question of whether there actually was capacity so the verbatim itself did refer to the question when decision was made in the Williams case, there was a moratorium in effect.

THE COURT: There was a moratorium, but the moratorium is one thing. Capacity is really the question within the moratorium.

MR. SYMANSKI: The moratorium said there was no capacity. I am saying they did, in looking at it again, did find some small amount of capacity which was dished out, but the moratorium itself was a continuing thing and imposed at the time of these decisions.

Now, the other public facilities questions here are, obviously, roads. One supervisor referred to them as cow paths. They are not cow paths, but it is a rural road system down in here.

THE COURT: I have heard a number of these cases and the arguments get to be somewhat repetitious, I realize, within

the field of law; but do I understand that the County's position is that you have got to wait until the roads are built and then you build? Because I don't think there is anyplace in the United States you build community roads without a community.

MR. SYMANSKI: What I am saying, Your Honor, is that under State law it says that there should be convenience of access; the public facility should be there or available.

THE COURT: Kind of like the cart and the horse -- which comes first. Are you going to go out and build an elementary school in the middle of a cow path and say two years from now let's fill it up after you finish putting houses up?

MR. SYMANSKI: The funds can be in line or be available at least somewhere down the road rather than having absolutely nothing in sight. There is a difference. I think that is a decision that the Board, under law, is one that they can make validly under the State law.

THE COURT: I just wanted to know how far the County goes in that position. Do they say the roads have to be built and the schools constructed before you start development around them?

MR. SYMANSKI: Obviously there are variations.

THE COURT: I realize that is an extreme. Is that

the County's position? I realize it is extreme.

MR. SYMANSKI: I can't speak for the Board of Supervisors in every case. I would think they would have to look at, weigh all the factors. I can't make a black and white decision that there has to be a four-lane road coming right up to your doorstep or that there has to be a new school with no children in it. I can't state that for the Board. These are tough decisions. I think they have to look at all the variations. I would assume that this is not their position because that is going to a ridiculous extreme, to say that you have to have a school constructed and the roads in before you start developing houses.

THE COURT: You have schools and road unused which would be turned around here.

MR. SYMANSKI: I think it is ridiculous, Your Honor; I will certainly agree with you. But the road situation here is a rural system. As I said before, these proposals are not a minor thing. They were done for approximately 11,000 trips per day.

Also, as Mr. Hazel pointed out, there is obviously other property here, other zonings.

It is also our position that in the discrimination argument, a rationale, there can be discrimination if there is

a rational basis. Any argument that says you have got zoning up here, therefore I have to have mine, ignores one factor and that is that once they are rezoned, this other property, this is other impact on the public facilities. It is something the Board has to take into account. They can't zone in a vacuum. They have to realize that if this is built, all these developments are putting people on the roads and in the schools. That is something that can't be ignored. They obviously did that and have to take that into account.

As I pointed out before, this proposal alone would require an elementary school. The schools in the staff report show that they are all overcrowded -- elementary, intermediate and high.

There was a proposal for a new elementary school down here which at that time had to be passed by the voters in the referendum. It was passed. But even with that school we get back to the same argument; it is overcrowded elsewhere so I deserve it here. There is going to be relief, so I deserve to be able to make that situation back where it was before -- that is, overcrowded; do away with the relief.

THE COURT: Let me ask you, sir. We are not talking about instantaneously 4,500 families -- I think that was the figure you used -- being there. We are talking about 1975-'76

would be the development of this property.

MR. SYMANSKI: There was no agreement as to when they could develop, except now in the sewer.

THE COURT: I just asked that question because that may have been an issue in the case.

MR. SYMANSKI: But in a zoning decision, Your Honor, they have to look at the facts now; they can't assume this is going to happen and assume that is going to happen.

THE COURT: But you can face the facts of life, that you don't put up 4,500 houses instantaneously. It takes time to do it. Following a zoning, there is all of the implementation of site plans and approvals and this does, I think, the evidence is bound to show, take considerable number of months. I don't know when, if you look at it as of last November or December, when that probably time would have been, but I assume the evidence will disclose that.

MR. SYMANSKI: I believe the probable time will not show up in the verbatim; was not presented.

THE COURT: I can't take the Board in a vacuum, either. They know how long it takes to develop a piece of land.

MR. SYMANSKI: I am not sure whether they know the developers attempt to phase it in ten years or two years. I

don't know how they could do that.

THE COURT: I am speaking of the minimum, normal time.

MR. SYMANSKI: We will also show, with regards to the comprehensive plan, this proposal did not meet one of the main reasons why the restudy was done. The restudy was done in part because the original planning ideas were not being implemented in the Pohick. There was suburban sprawl. The restudy was done in part to try to get a cluster concept to avoid suburban sprawl. Yet this development proposes over 1,200 R-12-5 lots, houses, no clustering concept, a veritable sea of suburban sprawl.

MR. HAZEL: If Your Honor please, there is absolutely no basis anywhere in the record for Mr. Symanski to say this doesn't propose cluster. It was proposed, in fact. This is to be a cluster development.

I don't mind his testifying -- I do it myself -- but to talk --

THE COURT: I have noticed.

MR. HAZEL: But to talk that there is no cluster concept is utterly without basis.

MR. SYMANSKI: I am talking about the clustering concept around what they have proposed to be, which we do not

admit necessarily is in neighborhood center, rings of density coming out from that rather than uniform development out from it.

We will also show that RE-1 now and at the time the Board considered this case is proper zoning for this property at this time, given the facts, given the law, given what the Board can consider, the purposes of zoning is that a proper zoning category for this property.

Now, as to holding zone, holding zone, I think, is something which you hold property in a low category when it should be in another category, a higher category. It is our position that this is in no way a holding zone because, under the law and under the considerations the Board can validly make, RE-1 at this time, at the time they considered it, is a valid zoning category for this property.

Now the economic discrimination argument.

The Carper case, and a line of cases, deals with that. One of the main things in these cases is that there was a purpose, an intent, the primary purpose of the actions of the Board, the zoning body, was to discriminate against people coming in, or to keep people out.

I would like to read one paragraph from one of those cases, the National Land case, a Pennsylvania case:

Zoning ordinance whose primary purpose is to prevent the entrance of newcomers 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 want 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 a rational manner.

I don't think that in any way the complainants here can show that the Board intends to keep out people. Possibly they can show that the Board in opposition to some actions or some effects of the past intends to have an orderly growth process but there is no intent, I don't think that there can be an intent.

THE COURT: Will your evidence disclose the County's plans to improve the roads in that area?

MR. SYMANSKI: Your Honor, I think, as you know, under our system in the State, it is the Virginia Department of Highways.

THE COURT: But do you have any evidence of that, the efforts the County has made or will make to attempt to get the roads improved in that area?

MR. SYMANSKI: Your Honor, the comprehensive plan

in the back shows the recommendations to the Virginia Department of Highways for road improvement.

THE COURT: How about schools? Will you show the County's efforts and plans to put further schools in that area?

MR. SYMANSKI: In fact, there is going to be a new school added, yes.

THE COURT: I thought you said that that was already going to be at capacity, or maybe I misunderstood you?

MR. SYMANSKI: That school is going to be open in a year or so. I guess it would have been almost two years from the time of this action.

THE COURT: What area was it to serve, sir? Where is it located?

MR. SYMANSKI: I am not sure of the exact location. I guess Mr. Whitworth can point out.

MR. HAZEL: It is marked in the hatch green.

THE COURT: Would it be -- I see it in the yellow section of Stipulation 18. It is a hashmarked green part. But will your evidence disclose that that would have insufficient student capacity to take care of the students from the area, in the area below, plus across the street, plus this area?

MR. SYMANSKI: My evidence on cross examination, also the staff report, Your Honor, requests that on the future

plans there is supposed to be an elementary school in this area. There was a request.

THE COURT: The subject area?

MR. SYMANSKI: Yes. There was a request for dedication, as a matter of fact. It is in the staff report.

THE COURT: Was there a denial of the requested dedication?

MR. SYMANSKI: As far as I can see, there was no affirmative answer to that, that I have seen in the record. That may be incorrect.

MR. HAZEL: There was a response. It was agreed it would be dedicated to the School Board.

MR. SYMANSKI: Now, discrimination, the equal protection argument. Again, to be valid, it must show that there is no rational basis for that discrimination. That is the zoning over here. Therefore, we have it here.

We will show, Your Honor, that there is a rational basis for the plan here; therefore it is not an equal protection-discrimination under the law.

Also, as you know, the burden here is on the plaintiff to show clearly that the Board was arbitrary and capricious. It is fairly debatable.

The County prevails.

Thank you, Your Honor.

THE COURT: Call your first witness, please.

Whereupon,

JACK LIEDL,

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

DIRECT EXAMINATION

BY MR. HAZEL:

Q State your name, please, sir?

A Jack Liedl. I am Acting Director of Public Works, Fairfax County.

Q How long have you been employed by Fairfax County, Mr. Liedl?

A Since 1951.

Q How long have you been involved in the Public Works area of the County?

A In the Public Works area, I have been involved in the sewer area since 1951. I have been involved in total Public Works area since about '56.

Q Your involvement with the County has essentially been in connection with the provision of the County sanitary sewer facilities, has it not?

A It has.

Q Mr. Liedl, are you familiar with the Pohick Watershed and the sewer system owned by the County which serves the Pohick?

A I am.

Q On what land use plan was that sewer system planned, based on which plan?

A The sewer system was planned in 1964. It was planned on the Pohick Master Plan that was adopted at that time.

Q Now, Mr. Liedl, I show you Exhibit 11 which is the Pohick Restudy. That, in effect, is the current Pohick plan and it was an outgrowth of the original Pohick plan, is that correct?

A That is correct.

Q But the land use numbers and the requirement for sanitary sewer capacity remained the same, is that correct?

A They did.

Q So, essentially the sanitary sewer system of Fairfax County was planned to provide the necessary sewer for that Master Plan, is that correct?

A It ended up accommodating this Master Plan.

Q Now, Mr. Liedl, are you familiar with the specific area of the Middle Run in the Pohick?

A I am.

Q That is essentially the area in dotted line here, is it not?

A That's correct.

Q Is there a trunk sewer in place in that run at this point?

A Trunk sewer exists up to the top of that yellow.

Q I am pointing to an area on the boundary, approximately, of this property, the Van Metre property?

A That is the terminus of the trunk.

Q There is a 15-inch trunk sewer in place at that point, is there not?

A That's correct.

Q That trunk sewer was provided for through the contributions of developers under reimbursement arrangements subject to a document know as the 1966 Middle Run Sewer Contract, is it not?

A That's correct.

Q I hand you Stipulated Exhibit No. 9. Is that a copy of the contract?

A It is.

Q I ask you to read the whereas clause in the first, in the second page, pardon.

A Whereas the parties of the second part -- those are

the developers -- have mutually agreed and hereby confirmed and mutually agreed to participate in the advance of all monies necessary for the installation of the aforesaid trunk sewer, said sewer to be of sufficient capacity to serve the entire Middle Run Watershed, containing approximately 2,541 acres.

Q Now, Mr. Liedl, the subject property, Van Metre and Williams, outlined in red are part of Middle Run to be served under that contract, is that right?

A That's correct.

Q The developers of these two properties, as the properties are developed, are required pursuant to that contract to reimburse the parties to the contract who actually build the facilities of Middle Run, is that correct?

A That's correct.

Q If that property does not develop, the County could not reimburse the parties to this contract for their sewer line, could they?

A That's correct.

Q Now, is it reasonable to assume that these two parcels would develop without sanitary sewer?

MR. SYMANSKI: Objection, Your Honor. I don't think --

MR. HAZEL: I withdraw the question, Your Honor, on that.

BY MR. HAZEL:

Q Mr. Liedl, I point out to you the plotted subdivisions that are on Stipulated Exhibit 18.

Mr. Liedl, I show you here R-17, R-12-5 and higher densities in the townhouse area. All of that density is served with sanitary sewer, is it not?

A Seventeen-five and greater is generally all sewered.

Q All sanitary sewered?

A Yes, sir.

Q Mr. Liedl, the sanitary sewer of Fairfax County is on a revenue basis, is it not?

A That's correct.

Q Is it not paid for from public funds, is that the situation?

A That is the situation.

Q So that the extension of sanitary sewer into this property and the payment for the treatment of the sewerage is on a revenue basis, is that correct?

A That's correct.

Q The County would not anticipate any expenditures in putting these lines into this property, would they?

A It wouldn't be any expenditures of general tax funds.

Q Right, I see. If the revenues in the system were

required in some way they would come out of the revenues generated by the sewer system?

A That's correct.

Q So there would be no incident or impact upon tax funds for the extension of the sewer in and through these properties, would there?

A That's correct.

Q Now, in the development of this 418 acres, who would pay for the footing in the ground of the collector lines?

A The developer would have to install the collectors and also any trunk that was required through his tract.

Q Your trunk is distinguished by being the central stream valley trunk, is that correct?

A Along the major streams. The developer would have to pay the entire bill.

THE COURT: Just out of curiosity, if somebody later on uses, they reimburse in part for the trunk under that same contract --

THE WITNESS: We have, Your Honor, some agreements that we do reimburse for the trunk sewer. It depends upon the magnitude of the cost.

THE COURT: All right.

BY MR. HAZEL:

Q So that a 15-inch line, is that reimbursable these days? If that 15-inch line was extended through the subject tract, there would be reimbursement?

A Under our current policy, he could obtain reimbursement agreement.

Q That would be for the trunk up the creek? All the collectors and the laterals would be paid for by the developer?

A With no reimbursement, that's correct.

Q Mr. Liedl, what is the treatment plant that services the Pohick?

A Lower Pohick.

Q What is the capacity of that plant at this time?

A Eighteen million gallons per day.

Q Is that plant under some sort of moratorium to varying degrees at this time?

A Certainly we have a moratorium on that treatment plant. That was established in October of 1972. It is currently operating under that moratorium.

Q Are plants under construction for the increase of that capacity?

THE COURT: Excuse me. The moratorium was placed upon this plant by whom?

THE WITNESS: The County Board of Supervisors placed the moratorium.

BY MR. HAZEL:

Q Has the State Water Control Board placed ony moratoriums on the Lower Potomac Plant?

A Generally, the State does not place moratoriums. The moratorium was placed in order to meet the requirements of the State.

THE COURT: What requirement was placed on this plant by the State?

THE WITNESS: The certificate for this plant requires maximum flow in any rolling quarter of 18,000,000 gallons a day. This is what we are trying to do.

MR. HAZEL: The State hasn't actually directed you to --

THE WITNESS: The regulatory agency is after the fact. What we are trying to do is prevent --

THE COURT: What I wanted to get in the record is the fact that the State sets the standards; the County is required to meet those standards?

THE WITNESS: That's correct.

BY MR. HAZEL:

Q Mr. Liedl, is construction, not merely plans, is

construction underway now to increase the capacity of that treatment plant?

A The long-range and the current funded plans for that plant is to increase the capacity from present 18,000,000 gallons a day to 36,000,000 gallons a day. We have the first phase of that construction started on May 1. It is underway. A contractor has been employed.

The second phase, which would be the advance waste treatment, we anticipate having up for bids in the next 30 to 60 days. That would be completed in, say, March or April of 1976.

Q In March or April of 1976 when those improvements are completed, what will be the capacity of that plant?

A That plant will have a capacity of 36,000,000 gallons, twice what the certificate is today.

Q Would that capacity be sufficient to service the subject rezoning request as well as the other rezoned land in the Watershed? Would it service the subject area?

A It would definitely service the subject area.

Q Is it planned as the implementation of the sewer under the Pohick plan?

A It is.

Q That is what the County foresaw as the necessary

sewer capacity to implement the Pohick plan?

A That's correct.

Q Now, how much is that improvement costing?

A Around $50,000,000.

Q Now, how will that improvement, or at least the County's portion of that, be paid for?

A The County's portion of that improvement will be paid from revenue from existing customers and future customers under the sewer system.

Q Mr. Liedl, is it important to the sanitary system's financial position that the plant and the system have future customers?

A Well, you wouldn't like to build anything that somebody wasn't going to use but it is not really, you know, critical that you have growth on a system. You can adjust your revenue picture so that you can take care of it with existing people.

Q You mean you could pay higher sewer bills?

A That's correct.

Q And not have any more customers?

A That's correct.

Q If you did that, you wouldn't need any more capacity, would you?

A You would still need some capacity because of increase of water use by the current customers which does increase every year. You have to have some increase in capacity.

Q Let me be sure I understand. The plant expansion is being increased, or the plant capacity is being increased to 36,000,000 gallons?

A That's correct.

Q Part of which is to implement the public planning for land use of the Pohick plan, is that correct?

A That's correct.

Q That plan anticipates that the Pohick Watershed will be used, as far as its land, as shown on the plan, is that correct?

A That's correct.

Q And that plan anticipates at least two units an acre on the subject property, does it not?

A I believe that's correct.

Q And the property is now zoned RE-1, is that correct?

A I believe that's correct.

Q So that under the present zoning there is no way that the plan requirement, or that the plan use could be implemented, is that correct?

A Because it is one-acre zoning now.

Q Are you aware of that?

A Well, there is quite a bit of ground that is connected to sewer that is on one acre.

Q I am talking about this property. You say your plan, if I understand it correctly, doesn't need any more customers because you could raise rates to the existing customers?

A The way the question was put to me was, whether we had to have the growth. What I am saying is, that you can live with a sewer system that does not have a growth.

THE COURT: The way you do that is by increasing the bills to people who live there already?

THE WITNESS: But our sewer system is designed with a growth potential in it trying to accommodate the Master Plan.

THE COURT: Let me ask you this, sir: When it gets to the 36,000,000 per day, is that the planned level of capacity for the entire Watershed?

THE WITNESS: No, sir.

THE COURT: Is it the planned capacity for the Middle Run only?

THE WITNESS: It is the planned capacity for a period of time. Financially, it is prudent to construct treatment plants in phases of about 15 years' span.

THE COURT: What year phase will this one take care of by plans?

THE WITNESS: The latest projection looks like by about 1990 that 36,000,000 gallons a day would have to be increased.

THE COURT: So it is good for 15 years?

THE WITNESS: Fourteen or 15. This is normally what we try to shoot for.

THE COURT: Again, purely out of curiosity, what is the planned capacity for the entire Watershed when it is implemented, all the building is there?

THE WITNESS: Long-range plan, we think that plant will have to be somewhere in the range of one hundred to one hundred and eight million gallons a day ultimately.

THE COURT: The year 2000-something?

THE WITNESS: Yes, sir. Or 2000. We purchased the property for that, made some minor adjustments for that.

BY MR. HAZEL:

Q Mr. Liedl, there is no question, as I understand it, that when the plant is completed in March of '76, there will be adequate capacity to handle the rezoning requested on this property?

A That's correct.

Q Mr. Liedl, as a general matter, the development of the urban density shown on this assemblage of maps, Exhibit 18, handled in the way that you have just described we would handle the development of the subject property -- that is, the on-site lines being provided by the developer and paid for --

A Yes, sir.

Q -- is there anything different in servicing the subject property from the way in which this other property was serviced?

A None.

Q The townhouses, for example, that are under construction immediately adjacent to the subject property were sewered by collector lines that were extended up from the trunk to that property?

A That's correct.

Q And that is the same approach that the County would take in servicing the subject property?

A It is.

Q Mr. Liedl, you are aware of the fact, I assume, that the staff report in the Williams case of last September stated that there would be sufficient capacity to service the Williams tract?

THE COURT: Do me a favor, please? I am having

trouble remembering which one is Williams and which one is Van Metre. Put a big "W" in the middle and a big "V" in the other one.

MR. HAZEL: Yes, sir.

BY MR. HAZEL:

Q The staff report which I show you, Stipulated Exhibit No. 2, as I understand it indicated that there was current capacity, is that correct?

A Yes, sir.

Q It was after that that the temporary moratorium was initiated, is that correct?

A The moratorium or control was initiated. I don't know about the word "temporary."

Q Is there any plan in the moratorium to extend it beyond the completion of the facilities in '76?

A Oh, no, sir.

Q Now, is there a reasonable probability that service can be expanded in that plant between now and '76?

A There is always a reasonable possibility and there is definitely in this case. on completion of the secondary in March of '75, there is a possibility that some additional capacity will be available.

Q So, in other words, March of '76 is an outside date?

A That's correct.

Q And there is a possibility that it could be moved up as parts of the plant are completed, is that correct?

A That's correct.

Q Now, Mr. Liedl, in your experience in 15 years-20 years with the County, how rapidly does a development of this type come on the line in actual sewer usage once it is zoned?

A Well, once, from approval of zoning to actual having a house connected to the sewer system is generally 12 months.

Q To the first house?

A To the first house.

Q In an approval of a project that might encompass seven or eight hundred homes, how rapidly, in your experience, does the total utilization come on line?

MR. SYMANSKI: I think that question is very vague, the average of how long it takes a subdivision or a construction of seven or eight hundred homes, possibly twelve hundred homes, to come on the line. I don't see how that can be answered with any relevancy.

MR. HAZEL: He has been there for many years operating the County sewer system. He has been seeing these things come many times. I think he could estimate that. I think he has to use that number in his daily activities.

MR. SYMANSKI: What time period?

MR. HAZEL: I am asking him what period of time.

MR. SYMANSKI: '65, '72, when?

MR. HAZEL: I am asking Mr. Liedl in his opinion, what his experience indicated the coming on the line schedule is in the development of this type.

THE COURT: I haven't heard yet that this is a development of 700 homes.

BY MR. HAZEL:

Q Assuming this was zoned to either R-17 or R-12-5 category, what would you anticipate the absorption rate would be?

A After the initial houses were constructed, generally a good, fast developer will construct about 100 homes a year.

Q So, if in fact this was 800 homes, split between two developers, would I conclude that you probably would be looking at a four year build-out?

A I believe three years at the fastest, four years at the long haul would be the proper approach.

Q They wouldn't all come on the line 12 months after the zoning?

A No, sir; no way.

Q Now, Mr. Liedl, there are on this plat several

zonings, two zonings in particular, that have been granted in recent days. I show you this zoning outlined on Exhibit 17, B-898, which was granted on July 2 for R-12-5; July 2, 1973. Was the sewer capacity situation on that case any different from the capacity situation that prevails on the Williams-Van Metre parcel?

A Should be the same.

Q I show you on the plat, on Stipulated 17, C-567, which was granted on Board of Supervisors' own motion for townhouses, called the Levin case, granted in February of this year, does the same sewer capacity apply?

A It did.

Q In fact, has there been any change in sewer capacity situation on other parcels in the Pohick from the subject parcel?

A Well, the out-of-Court settlement with eight or nine developers about six months ago.

Q That was actual provision of sewer. But I am talking about at the zoning stage.

A No, the zoning --

THE COURT: I think those cases involved just sewer, didn't they? They had already been zoned.

MR. HAZEL: Yesterday plats were brought to final

stage. I am now exploring the situation which apparently is that a number of other zonings have been granted during the last six or eight months despite the sewer situation.

BY MR. HAZEL:

Q That is correct, is it not, Mr. Liedl?

A If they have been granted, they have the same category.

Q I show you R-12-5 zoning on Braddock Road that was granted in March, which is in the Pohick, in this location. The number is C-367 for 100 acres of R-12-5. Did that have the same sewer situation that applies to Van Metre-Williams parcel?

A It did.

Q I show you a composite zoning, C-180, that was granted in the fall, over along Guinea Road north of the railroad for a combination of townhouses, industrial and commercial. Did that have the same sewer situation as the Williams-Van Metre parcel?

A It does.

THE COURT: Where is that located again, sir?

MR. HAZEL: That is the Southern Railroad and Guinea Road right here.

THE COURT: How far is that from the subject property

on that map? I don't know the scale of it.

MR. HAZEL: It is about two and a half miles.

THE COURT: North of it?

MR. HAZEL: North and west.

THE COURT: Not in Middle Run?

MR. HAZEL: In the Main Run of the Pohick.

THE COURT: All right, sir.

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

THE COURT: To be sure I understand this thoroughly, this entire Pohick Watershed ultimately goes into one plant?

THE WITNESS: That's correct.

CROSS EXAMINATION

BY MR. SYMANSKI:

Q You testified there was a possibility --

MR. HAZEL: If I might just clarify that.

Mr. Liedl, there is also the Accotink that goes into this plant, does it not?

THE WITNESS: That's correct.

MR. HAZEL: Which services another area unrelated to this case. I didn't want -- it does not serve only --

THE COURT: It doesn't serve solely the Pohick but all of the Pohick does go into it?

THE WITNESS: Yes.

MR. HAZEL: Pardon me.

BY MR. SYMANSKI:

Q You testified there was a possibility that the completion of the plant might be moved up. To set the record straight, is there also a possibility that the completion will not be on schedule?

A That's correct.

Q In the sewer agreement, Exhibit No. 9, is the County under any obligation to reimburse the original payors, if you will, for that?

A No, we have a save-harmless clause.

Q In your original planning for the Lower Potomac Plant, when did you contemplate or when did you plan that that capacity, the designed capacity of that plant, would in fact be used up or the plant would be up to capacity?

A We originally anticipated that plant would be up to capacity in around 1980.

Q So you have testified, have you not, that a moratorium was put into effect in October, '72?

A That's correct, but that is not, the plant is not reached capacity in 1972 when the moratorium -- that is taking your foot off the gas pedal to slow it down, so we won't have more in the pipeline. The plant, with existing flow and

permitted flow we have gotten, that plant will probably reach capacity about the same time as in 1976. Our original plan, we thought it would reach capacity in '80. So four years. The growth is four years earlier than we had anticipated.

THE COURT: Along that line, sir, would it matter as far as the plan is concerned if you reached the maximum tomorrow and then stopped and waited until '75 or '76?

THE WITNESS: No, sir, if you could do that; but our problem is, it is the lead time from the time we commit ourselves to take a developer's money and giving him permission. It is the lead time that we have to stop prior to them completing their construction.

THE COURT: I am afraid I didn't quite follow that, sir.

THE WITNESS: At the present time we have almost two million gallons of flow that people are working on; they are building houses and building the roads and things. That flow will not actually get to us until 1976 because it takes them this long to construct their operation. So we have got, we can't let anybody else have a permit and take their money because then when 1976 comes, they will still be in construction stages and it will keep on going.

THE COURT: Are you saying that presently the

commitments to builders or for government facilities or whatever else, that the capacity of that plant is already committed until 1976?

THE WITNESS: Yes, sir.

THE COURT: To maximum?

THE WITNESS: To maximum, to 18,000,000 gallons.

THE COURT: Are you saying if anything else is granted now that might be finished before 1976, that that would exceed the capacity?

THE WITNESS: That's correct.

THE COURT: But if something were granted now that would not start a flow to your plant until after the expansion, this wouldn't hurt anything?

THE WITNESS: The zoning per se doesn't grant the sewer.

THE COURT: I realize that.

THE WITNESS: The right to demand it.

THE COURT: If something, say, zoning went into effect, and you realized that there was no potential of the sewer demand coming into fruition until after the expansion, this wouldn't cause any problem, then?

THE WITNESS: No problem.

THE COURT: Because you then would be double capacity?

THE WITNESS: Correct.

BY MR. SYMANSKI:

Q You testified, I believe, that there is a four-year difference between what you originally planned for and what has occurred; is that correct?

A That's correct.

Q What caused that four-year difference?

A It was primarily to the moratoriums and the problems encountered in the total Metropolitan area, just forced the growth into areas of least resistance, where the sewer facilities were available. We stuck with this same type of growth on Blue Plains, the north part of the County, and also in the Pohick Shed and I anticipate that this plant will probably have enlarged capacity prior to any other plants in the region. We will probably encounter this high rate of growth in this area in the future, after '76.

Q Are you saying, in effect, in your opinion growth might have gone for someplace else except for moratorium changed here?

A There is no doubt about that.

Q What effect does this growth that is more rapid than anticipated have on the planning process?

A Well, it means you have to plan quicker for your

next enlargement. That is primarily your big problem, change in problems always do that. The best of all worlds would be if you could devise a plan and everything would just fall in line, and you have to recognize that this doesn't happen.

Q Orderly fashion?

A There is not an orderly fashion so you have to make changes to your plans as you go along and anticipate this. This can be done.

Q If growth continues to occur at a rate more rapid than you anticipate, aren't you always going to be planning to catch up?

A The sewer business in this region is catch up all the time. Historically, the plants have always been less than what actually occurs. It wouldn't be anything unusual for us to be playing catch up.

Q Historically it wouldn't be unusual?

A That's right.

Q If you had all the money you wanted with regards to sewer, would you keep the sewer treatment capacity up to any rate of growth?

A No; there is one other thing that has to be added to that and that is time, and time that the County cannot control, which is regulatory agencies, which include the Federal

Government. The added impositions, recent laws and everything, put a lead time on us rather than, instead of four years from inception of the plan to completion, it now looks like it is going to be eight years, between seven and eight years in order to meet the legal requirements for getting something done.

Q So, in effect, you just can't take a bunch of money and build another plant if the growth is more rapid than you anticipated?

A That's correct; you have to plan ahead.

Q You can keep up with some rates of growth if you plan for them?

A Yes, sir.

Q You have testified, have you not, that the sewer you designed or you helped design was based on comprehensive plan?

A That's correct.

Q If development in fact occurs at a density above the Master Plan as a hypothetical, what effect does that have on your planning?

A Well, if you have got the facilities already constructed, that that development will use, you have either to reduce the density someplace else for that facility or you have to replace that facility at someplace along the line. That is just dollars and time again.

Q But in effect you planned for certain densities with

that trunk and with the Lower Potomac Plant?

A That's right.

Q When this new plant or addition comes into being in '75-'76 or whenever, is that going to free up a total of 18 mgd?

A No, it will free up -- I can't give you an exact figure -- it will free up somewhere between five and eight, 50 to 60 thousand people.

Q Is it not a fact that that plant is going to take over for some other plants?

A The present plans are, it is going to eliminate two other plants on the Potomac River which will be pumped over to this plant, so that part of that 18 mgd will have to be used for those plants and their future growth and also we have contract arrangements with the City of Fairfax that have to be honored as part of the increased 18 and the Town of Vienna, of course.

Q So it is not, in effect, doubling the capacity by freeing up as much as we already have?

A It is not doubling the capacity for Fairfax County on Middle Run or the Pohick Shed.

MR. SYMANSKI: No further questions.

REDIRECT EXAMINATION

BY MR. HAZEL:

Q Mr. Liedl, when is the sanitary sewer allocation actually made to a person seeking a building permit?

A Well --

Q Is it made at the building permit stage?

A The present operation is made at the building permit stage now.

Q There is no allocation of sewer that is simultaneous with the rezoning, is there?

A That's correct.

Q The fact that these cases which we pointed out earlier have been rezoned in the last six or eight months, did not have award to any of those parties, any sewer allocation, did it?

A That's correct.

Q Now, the County has talked a lot about no legal commitment with Middle Run sewer but they have also talked a lot about a moral commitment to develop the Watershed, have they not?

MR. SYMANSKI: Objection. I don't think Mr. Hazel --

MR. HAZEL: I think it is very important.

MR. SYMANSKI: -- can speak for the Board of

Supervisors on moral commitment.

MR. HAZEL: Mr. Liedl can talk about what he has talked about but because he has talked about moral commitment and I can't imagine the County coming in here, and can he beat the rap legally, but we didn't have any advice --

MR. SYMANSKI: Isn't Mr. Liedl's name on the contract?

MR. HAZEL: It may be. I would like to ask Mr. Liedl to comment on what kind of commitments he made to the developers.

THE COURT: To what developers?

MR. HAZEL: To the developers who signed the Middle Run contract for the sewer extension.

THE COURT: Does it show motivation? I will allow the question.

BY MR. HAZEL:

Q You negotiated that contract for the sewer up the run, didn't you?

A Yes, sir.

Q What did you tell them about the County's plans in Middle Run?

A The County's plans in Middle Run was to sometime between now and the year 2000, to provide sewer service for Middle Run and the rest of the Master Plan area, and the negotiations in '66 was to the effect, with the developer that,

yes, Fairfax County intends to some day sewer that but at the present time we don't have any money.

Now, we are happy with the system we have. If developers wanted the sewer any earlier than we could anticipate financing it, we had to work out an arrangement, reimbursement-type agreement was what developed from this type of discussion.

Q Now, Mr. Liedl, there has been talk about the volume of sanitary sewer, Master Plan in Middle Run is two units an acre, is it not, in this area? You can refer to it.

A I believe that has been stipulated. I have no problem with that.

Q Two units an acre requires how much sewer capacity an acre?

Put it another way, what gallonage, what capacity, is accorded to one unit?

A Three hundred and seventy gallons per each single-family use per day.

Q So two units an acre, you would have 740 gallons?

A That's correct.

Q Seven hundred-some gallons.

Now, Mr. Liedl, 12-5 zoning is 2.5 units an acre, is it not?

A I believe that's correct.

Q So you are talking a difference between 12-5 and R-17 of one-half a unit as far as sewer gallonage?

A That's correct.

Q So that obviously if you have 836 units you multiply that times 370 gallons to find out how many gallons go to this tract at the Master Plan density, is that right?

A That's correct.

Q I want to be clear about it. Do you anticipate any problem handling that sewer requirement in your new plant, the improved plant?

A If the developer is ready at any reasonable time after that plant opens up, we will be ready.

Q You would be ready and you would give him his sewer as he got his permit?

A That's correct.

Q Mr. Liedl, I show you a County Watershed Map which is Exhibit 12 and on that entire map of Fairfax County could you point out to His Honor where there is today available sewer?

MR. SYMANSKI: I think we are wandering far afield from the scope of my cross examination.

THE COURT: He didn't go into available sewer across the County.

MR. HAZEL: He went into the Metropolitan area moratorium problem.

THE COURT: I stand corrected. You did talk about other moratoria in forcing development into this area.

Objection overruled.

BY MR. HAZEL:

Q Mr. Liedl, this is a map of the watershed of Fairfax County, is that correct?

A That's correct.

Q Where on that map is there available sewer?

A Currently we have an allocation process that covers the north end of the County. It comes across Horse Pen Run.

Q I am holding my pointer.

A Comes across Horse Pen, follows Difficult Run boundary and all of Pimmit Run. That sewage from that area is treated at Blue Plains and we have allocation system, that we allocate so much growth each year.

Q If I put on here BP and Difficult Run, that is Blue Plains Shed, is that correct?

A Right.

Q Has all of that been allocated?

A For the current year. We will have some additional capacity there next February.

Q Has it all been committed? There is no sewer available in the Blue Plains Shed for someone who goes in and asks for a permit, is there?

A Then we get back to the first come-first serve basis.

Q Right.

A And it is my understanding that that list now exceeds what is going to be available next February.

Q Not only exceeds next February, but exceeds all the capacity --

MR. SYMANSKI: I object to counsel testifying, Your Honor.

MR. HAZEL: I am just asking Mr. Liedl.

THE WITNESS: I don't keep track of that.

BY MR. HAZEL:

Q Who in your department does?

A That is kept by County Development, based on the submission of preliminary or site plan, subdivision plats.

Q So you don't know whether it is completely out or not, in Blue Plains?

A That's correct.

Q Now, is there any other shed -- let me restate my original question:

Where in Fairfax County can you go into today and ask

for sewer tap and be awarded a sewer tap?

A Two areas: a little portion of the Belle Haven area.

Q Here?

A From the lower triangle.

Q This part? Why don't you step up there and put a circle around the whole area of Fairfax County where you can get sewer today.

That is the only area of Fairfax County that has sewer freely available, is that correct?

A That's correct.

Q You have in effect encompassed Little Hunting Creek and Dogue Creek Shed?

A That's correct.

Q All other areas of the County are under some kind of sewer restriction?

A That's correct.

Q Now, there is a limited amount in Blue Plains? You have just done away, the limit has been exhausted, is that correct?

A That's correct.

Q Is there any capacity available at all in the Chantilly area which goes into Occoquan?

A None.

Q The other two major areas are Cameron Run. Is there any capacity available in Cameron Run?

A No capacity in Cameron.

Q Is there any capacity in the Accotink-Pohick?

A No; that is closed down. No capacity there, either.

Q So that with the exception of Dogue and Little Hunting, everything south of the pointer has no sewer at all? It is closed completely?

A That's correct.

Q And north of the pointer may be closed completely. You are not sure whether they have run out by now, is that correct?

A You know when it closed, you can't say closed completely because the stuff, operations that are in the pipeline are still coming. But it is no new.

THE COURT: By "closed" you mean no newcomer may come in and get a permit.

BY MR. HAZEL:

Q Entitled to get on the line.

Now, Mr. Liedl, you indicated, I think, in your cross examination that the growth was channeled in the Pohick and it would stay in the Pohick because that was where there might be some future sewer, is that correct?

A That's correct.

Q Is it your opinion that future opportunities for housing in the County are almost limited to the Pohick because of sewer?

A I believe that's correct.

Q Do you have any estimate as to when sewer might be available in this Blue Plains Shed?

A None at all.

Q Do you have any estimate as to when it might be available in the Chantilly-Centreville area?

A Well, my estimate on that is sometime in '78.

Q Do you have any estimate when additional capacity for residential development might be available in Cameron Run?

A Their target is 1976 but due to their funding problems, that will probably have a year's lag in 1977.

Q So that the first hope of any sewer for new residential growth is in the Pohick?

A I believe that's correct.

THE COURT: Let me ask you this: Is this also the situation back last fall?

THE WITNESS: Yes, sir.

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

RECROSS EXAMINATION

BY MR. SYMANSKI:

Q Did you testify some of these other areas, like the Pohick, have plans to bring sewer, extra sewer capacity on at some future date?

A Yes.

Q You mentioned '77-'78?

A That's correct.

Q Now, since we got into the Washington area, are you aware of the problems with regard to sewer in the Washington Metropolitan area?

A Yes, sir.

Q Are they similar, the same? Are they different?

A A little more difficult than the problems in Fairfax County due to primarily being a three-state operation to get anything resolved.

Q So, in your opinion, is it not fact that pressures of the whole Washington area are centered in these areas, Fairfax County, it is going to go the path of least resistance?

A Fairfax County's Pohick Watershed is one of the areas of least resistance. There could be areas of Prince William County or Prince George's that will have the same impact.

Q Within a range, say, of convenience of travel, Fairfax being closer than most of Loudoun County, I would assume to Washington Metropolitan, to Washington, D. C. itself?

A I don't think distance has too much to do with it.

Q As far as --

A At the present time.

Q As far as commuter traffic to Washington?

THE COURT: People commute from West Virginia to come to Washington.

MR. SYMANSKI: I put "convenient" in there, Your Honor.

THE WITNESS: Well, we will suffer an impact due to the sewer problems in the moratorium area on the Pohick Shed. I am not testifying that we are going to take it out.

BY MR. SYMANSKI:

Q The pressures are out of proportion to what they would be if the situation was the same all over the Washington Metropolitan area?

A Very definitely.

THE COURT: Are you familiar with sewer availability in suburban Maryland?

THE WITNESS: Not really. I don't understand when they feel they have a legal obligation to provide.

THE COURT: Okay, sir.

May the witness be excused?

You are free to go.

(Witness excused.)

MR. HAZEL: I would like to call Mr. Seldin, please.

Whereupon,

MAURY SELDIN,

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

DIRECT EXAMINATION

MR. HAZEL: The witness now on the stand is Mr. Maury Seldin, Urban Land Economist. I have a list of his qualifications. I think Mr. Symanski has stipulated he is qualified as an urban land economist. I would like to stipulate this for the record.

THE COURT: The entire thing or just this one sheet?

MR. HAZEL: He is the principal officer of the firm that this booklet refers to.

THE COURT: Are you offering the whole booklet with everybody in it?

MR. HAZEL: Just the two of them.

THE COURT: If the other gentleman is going to testify, I will be glad to have his qualifications in the

record. We have a thick enough record.

MR. HAZEL: That's true.

THE COURT: That will be received as Stipulation Exhibit No. 19.

(The document referred to was marked Stipulation Exhibit No. 19 and received in evidence.)

DIRECT EXAMINATION

BY MR. HAZEL:

Q Mr. Seldin, would you state your name, please?

A Maury Seldin.

Q You are qualified as an expert in urban land economics?

A Yes, sir.

Q Now, Mr. Seldin, in your professional work have you had occasion to review urban land matters and housing requirements in the Metropolitan area, and particularly in the Fairfax County area?

A Yes, sir.

Q And have you determined or have you made any studies related to the sufficiency of zoned land available for urban housing?

A Yes, sir.

Q What sort of studies have you made? Just very briefly describe the type of studies?

A Well, the firm generally monitors the development of the Washington Metropolitan area and in doing so we keep track of sewer availability, availability of developable land, sales rates, what is moving on the market, where developable land is and where developable land is likely to be.

We have taken County tax maps, UDIS source data, and made inventories and estimates of availability of land.

Q What is UDIS?

A Urban Development Information System.

Q Is that a computer system that tracks the land availability and development in Metropolitan Washington?

A It does that but it is more than that. Urban Development Information System, as I originally conceived it, is an information system for managing the urban development process and as such it would keep track of availability of land, availability of facilities and the demands of the market and the location of activities so that the information would be available for balance of facilities and availability of land so that the market could function in an orderly manner.

Q Have you reached any opinion as a result of your studies on the sufficiency of zoned land in Fairfax County to

permit the development of a price range of housing generally in accord with the existing housing?

A I have made such a study.

Q What is the result of the study?

A The way the land is now zoned and structured, the character of the County's development is in price ranges of housing substantially higher than the existing profile. That is to say that the County is becoming more and more a place not simply for the affluent but for the fairly rich.

Q Super affluent?

A I guess super affluent.

Q Now, have you narrowed that and looked at the Pohick Watershed in particular?

A Yes, sir.

Q What is the result of your study in the Pohick Watershed regarding availability of zoned land?

A Substantially the same.

Q Do you have any summary figures on the available types of urban land densities in the Pohick?

A Yes, I do.

Q What are those numbers?

A Using the R-12-5-R-17 categories -- you want for the Pohick?

Q Yes. First for the County.

A For the County, in some cases we have used samples of 20-acre parcels and more depending on availability of the data but it shouldn't be substantially different. In the zoning categories that encompassed the 2 to 2.9 the R-12-5 to R-17, the percentage of acreage for the County is 5.4, a little over five percent.

Q That means a little over five percent of the vacant land zoned for R-12-5 and R-17?

A Yes, sir.

Q All right.

A In the Pohick, the general area of the Pohick has in that category 3.3 percent of the land in acreage based upon the sampling of parcels.

THE COURT: Three point three percent in acreage?

THE WITNESS: Yes, sir. The figures --

THE COURT: In acreage zoned to 12-5-R-17?

THE WITNESS: Right.

THE COURT: Generally, acreage is thought of as meaning farms and things of that nature.

THE WITNESS: Acreage here is --

THE COURT: You mean 3.3 percent of the acreage in the Pohick is in R-12-5 and 17?

THE WITNESS: That's correct, sir. But that doesn't mean 3.3 percent of the units because the number of units, of course, would vary. If you deal with a number of, that is a number of parcels, if you deal with the number of acres, you are dealing with about two percent and if you deal with, because the parcels are not all the same size, and if you deal with the number of units, you are dealing with 4.6 percent.

BY MR. HAZEL:

Q The balance of Pohick is on the largest area of the Pohick or category of zoning is how much, what area?

A Sixty-six percent of the Pohick is in RE-1 category and in the acreage it is 87.6, so you are dealing with 88 percent of the land and the number of the units that you could accommodate, because obviously the one-acre land takes one unit per acre, a lower density. It is 64.7 or 65 percent of the units that could be built on vacant lands, would be one-acre developments.

Q In what price ranges do your one-acre developments fall?

A Those have been moving so rapidly, you used to think that you could be dealing with $60,000 but you are now going 70-80. You really have to take a look at these particular parcels but they are pretty high-priced housing.

Q Is there a correlation between the one acre and larger density and the urban lots density of 12-5 and R-17 so far as price?

A Oh, yes. The larger lots are more valuable lots and because the builder needs to have some balance in his construction expenditure with his land cost, the difference is magnified so that one-acre lots go for substantially more expensive housing than the R-12-5 or R-17 lots.

Q How does the present zoning, restrictive nature of the present zoning, impact on this housing cost problem?

A Well, housing costs have been moving up. The restrictive nature of the zoning is that the houses that are being built are very expensive houses. The land that is available is being developed for these very expensive houses and people who can afford to pay even the $50,000 prices begin to run into problems; that is, I am not talking about low-moderate income but the people of substantial income are being driven out of the market by the rising prices because there is not enough land in what we consider normal, moderate size suburban development. One acre is a fairly luxurious site.

Q Is there, in your opinion, a sufficient supply of land zoned for the R-12-5-R-17 categories in the Pohick Watershed?

A No. The whole pattern of large-lot zoning has been exclusionary as a way of --

MR. SYMANSKI: Objection, Your Honor; that is testifying to a legal conclusion.

MR. HAZEL: I don't think it is a legal conclusion. Mr. Symanski is sensitive about the use of the word but --

THE COURT: It is a word of art in effect. It is a conclusion I may or may not come to ultimately but it is an ultimate finding.

MR. HAZEL: I didn't know it was a word of art.

THE COURT: I think it can be. If we are talking about constitutional rights, it can be.

MR. HAZEL: We hope the Court will find it is exclusionary.

THE COURT: The objection is sustained.

THE WITNESS: I can answer the question without using that word.

MR. HAZEL: He says he can answer the question without using that word.

THE COURT: I am sure there are paraphrases.

THE WITNESS: In many areas, I have used large-lot zoning in order to influence the price of housing which would be built. In some cases, two acres and five acres, and these

areas, by being zoned for very large lots have, in my opinion, knowingly concluded that the only houses that anybody could afford to build on there would be expensive and that the only people that could afford to buy them would be super affluent and, therefore, the only people that would be moving into their neighborhood would be of that kind of income class.

The availability of land in Fairfax County is now such that in the one-acre and up category there is a great deal of land and so the way in which the land is being managed, only those with substantial means can afford to move into the County. People who would, let us say, earn in the $20,000-a-year category, people who would buy houses in the $50,000 category, do not have adequate opportunity, and people under forty get very thin, and under that you can forget.

BY MR. HAZEL:

Q You mean under $40,000 or under 40 years? I guess it is both.

A If you are going to buy a house in Fairfax County today, if you want to come, if you want to come into the County, if you are looking at the development of the County, the way the land use system is being managed, you pretty well have to be able to afford housing, some in the 50's and the like.

There are some townhouses in the 40's, but if you are talking about single-family detached, most of it is now being built for the super affluent.

Q You anticipate that is beyond the $50,000 bracket in cost of the house?

A Most of those are beyond the 60's and more. A lot of it is being at $70,000 and $80,000.

Q And with specific reference to the Pohick Watershed, you found that condition to prevail?

A Yes, sir.

MR. HAZEL: I have no further questions.

CROSS EXAMINATION

BY MR. SYMANSKI:

Q Mr. Seldin, you just said something very interesting. You are, I believe, aware of situations where the intent of large-lot zoning was to exclude all but the super rich, did you not?

A That may or may not have been my exact words but my understanding does convey my opinion as to what people were attempting to do, yes, sir.

Q That was their motive, in effect, in this large-lot zoning?

A Yes, sir; that is my judgment as to the motivation.

Q Do you have any reason or facts to back up a belief that the Board of Supervisors of Fairfax County is intentionally zoning or keeping zoning in large lots to exclude lower income people?

A Again, let me hear that one again.

Q Well, you said, did you know of examples where the intent or the motive in large-lot zoning was to exclude all but the super rich?

A Yes.

Q I am asking you whether you have any facts to back up a belief or if you do have the belief or don't have the belief that the Board of Supervisors of Fairfax County is intentionally, their motive, whatever you want to call it, intentionally not zoning additional land to smaller lots than RE-1, intentionally to exclude all but the super rich --

A I can respond to that question in two ways -- I will do both:

One, if we examine the way in which the land resources, public facilities, are being managed in the County, and the actions that the County has taken with regard to management of land, public facilities, zoning and the like, the things that control land, I can only conclude that their intention is either to limit growth in a pattern which would

have the kind of distribution in fact that we would describe, or they do not understand the consequences of what they are doing. That is to say, the effect of the way in which they are managing the County is substantially as I have described and either they are intending to do that or they don't understand the consequences of what they are doing or some combination.

Now, as to how much they understand and how much they intend is a matter of who is the County, and that is a second way of answering the question.

THE COURT: You said the County Board, sir, that you referred to.

THE WITNESS: The County Board is a body composed of individuals.

MR. SYMANSKI: The majority of the Board, if you will.

THE WITNESS: The individuals have made public statements. There are newspaper reports. I think we would have to analyze each of the individuals, make some index or choice of intent, add them up and see whether it is a majority.

BY MR. SYMANSKI:

Q You are in effect saying that in your opinion the policies with regard to zoning have the effect of driving up

cost, is that correct?

A The policies with the effect of zoning has the effect of driving up costs, limiting availability of land and providing all of these other effects that I have talked about.

Q So, a limited growth policy may be stupid, in your opinion? It may not be in somebody else's opinion?

A I haven't said that limited growth is stupid; I have never taken a judgment as to whether it would smart or stupid. I have only spoken as to whether or not management processes understand the consequences. If the County chooses to use a limited growth policy for whatever purposes it chooses to use a limited growth policy, that is a political question.

The consequences of the limited growth and who the people are that are admitted into the County is another question.

Q All right, that is my point. It is a far cry from having a limited growth or controlled growth policy and everything in effect -- there is a big difference between that, is there not, and having an intention to limit people in the County to high income, what they are doing may have this effect?

A Okay. The County could, in its wisdom, determine that its goal would be some limited growth. I think it is a legal question as to how they could force that limitation.

But should they determine that there was some goal, some desirable rate of growth from the standpoint of the County as a political question. What you are now asking is, is the way in which they are making the zoning discriminatory.

Q That is not what I am asking.

A What are you asking?

Q You said about other places, that it was your belief there was an intent or motive to limit incoming people to high incomes. I am asking you, we have established that if they have a limited growth policy, it will have or has had, in your opinion, the effect of limiting construction to high value, let us say, homes. I am asking you if you have any facts to show that there is an intention, not to have a limited growth policy, but to intentionally include all but the rich -- intention, motive, incidental effect, no. I am asking you for motive or intention.

THE COURT: I think he has already answered the question. He said he would have to go through each individual member of the Board and try to analyze the individual intent and I don't know how you can come up with a composite of all eight.

THE WITNESS: Except to say that if your intent were to limit the growth, to discriminate, that this would be the

way to do it. If that is what you wanted to do, this would be the way to do it. If what you wanted to do was to limit growth, then you have a different set of questions.

But the use of this tool to limit the growth of the County is to say that you cannot limit the availability of housing in the 70-80 thousand dollar category because you already have land zoned for one acre and more, and so since you cannot exclude those people who can afford that price housing, what you will do is exclude anybody who has to buy on a smaller lot size. Whether you are intending to cycle them out just because you don't want them or because they are the only people you can exclude, I think we could, you would have to go through the kind of analyses as to what are they trying to do, but it sure looks it.

BY MR. SYMANSKI:

Q You have, in other words, evidence of the effect of their policy, but you have no evidence of their intention, is that correct?

A No, I didn't say that.

Q Secondly, you had another alternative and that is in effect that they were stupid in their policies?

A I haven't used that word.

Q You think they do not understand?

A The system is a very complicated system. The management of the urban development process is a very complicated system. It is even more complicated by the fact that there isn't one single system manager responsible for managing it. What Fairfax County does is only part of the story. What is done in the rest of the Metropolitan area, even within the State of Virginia, what the State Water Control Board does, what the Highway Department does, the way the taxes are collected and distributed back from Richmond. So it is not an easy thing to do and I haven't said that the Board of Supervisors are stupid. I wouldn't say that. They are not.

Q They do not understand?

A I am saying the process of managing the urban development system is a very complicated process and the attempt to restrain growth by refusing rezoning I can only conclude is either that they do not understand that that is going to keep everybody but the very rich out or that that is their intent to do it.

Now, I think that it should be pretty obvious that if you only, if you don't rezone, that that is going to happen, doesn't require any super sophistication of level, any level of super sophistication.

Q Let me give you a hypothetical:

Let's assume for the moment that nine men and women in their lack of wisdom or whatever think that the public facilities in the County, in areas already developed, are not up to what they should be; they think the growth has been too rapid in the past and that they want facilities to be there when growth occurs in the future. Now, let's say that they want to control growth so that, hopefully, public facilities will keep up with that growth.

Now, doesn't the fact that this policy, as an incidental or control growth policy could be for these reasons, and it has the incidental effect in your opinion of driving up prices, but is that not a third alternative to the intentionally, number one, they intentionally mean to limit people coming into the County to the very rich; two, they do not understand what is going on.

Isn't there a third alternative with no evil motives?

A You have a complicated question but if I understand you correctly, you are saying that their intending using this zoning as a device without what you call evil motive, I haven't used that as a judgment. Without attempting to influence the character and extent of the growth. In other words, I am not using judgment as to whether it is good or bad, but as to what the consequence is. If I understand your question, then I can

only conclude that after looking after the Pohick, looking at the map, which is pretty obvious to see just by the street configuration, let alone the population, that the normal growth of the Washington Metropolitan area, Fairfax County, the patterns, the structure, the normal growth, is into Pohick.

The general pattern in the Master Plan has been for the Pohick.

The way in which the roads are indicating that, the pattern, although because the sewer sheds run north-south, and you provide highways this way, which is a problem of coordination which I am not sure how you are going to solve, but that is what happens in terms of some of the difficulty of managing it, but what the County can directly manage, because they don't directly manage that, from what the County can directly manage and the way the road network is going, the normal growth is into the Pohick Watershed.

Now, the constraining variables on growth can be sewered, can be watered, can be roads, can be any one of a number of things. The idea of the urban development information system which they are now using has to provide adequate facilities. I can see that system and consult in getting implementation. So I have some familiarity with the tools with which the County has had to work. The whole idea is to

get a balance of facilities.

Now, I know that the programming has been for balance of facilities in that area. That I heard, that it can accommodate, and I know there are problems of the roads. But to talk about the zoning as a tool to throw the system out of whack, to stop the growth which has the effect of stopping the growth, I can only conclude that the intent would be to slow the growth of that, of all but the super affluent because the other efforts that have been made, I just don't see it.

Q Where did you get stop growth from? We were using controlled growth before.

A I am not sure that I used the word "stop."

Q Well, you did.

In your figures you talked about 20 acres or larger lots. You talked about sampling. Would you explain how these fit into your figures?

A Well, in order to make the computations, you need to identify the parcels and you want to count up what the total acreage is and rather than take all the parcels, which is a difficult enumeration job, we just took all the parcels 20 acres or more so that the figures could have some variation in smaller parcels, but the amount of acreage available for development is not likely to be that much because the major

parcels will account for most of the others.

Q Does that include, for instance, farms or whatever that may be zoned RE-1 or larger estates or whatever, that the owners have no intention of rezoning?

A If you have a five-acre farm --

Q It wouldn't be in there?

A Ten-acre wouldn't be in there. It might be zoned RE-1. It might be zoned anything. It just wouldn't be in the figures.

Q If you had a thousand pieces of R-12-5 ground owned by individual owners, it wouldn't be in there?

A If you had a thousand pieces of R-12-5?

Q Individually owned?

A Vacant? It wouldn't be in it. But if you had a thousand pieces of R-12-5 --

Q Together.

A I would like to find them. It is just not --

Q Well, do your figures have any relation to the activity associated with the land? In other words, somebody wants a rezoning or is it just the land itself and the zoning category on it?

I'm sorry --

A Say that again.

Q Your figures, do they have any relation to the desire of anybody to develop, or the activity, zoning activity, zoning application? It is just the total land itself?

A It is the land in the existing zoning.

Q It could be that a lot of that land -- we don't know -- is owned by people who have no intention or desire to rezone it, is that correct?

A That is quite possible.

I would add, though, that the typical practice in Fairfax County, because of the way that the taxes are levied, that rezoning is not ordinarily sought until a time, the time of approaching for development, so that the landowners who don't see their land ready for development would prefer to keep it zoned in a lower density so they pay lower taxes. As a matter of fact, I have said that the County should do some rezoning on its own initiative and no let people with vacant land pay lower taxes if the County wanted that land developed.

Q You talked about, made a reference to the Washington area. What exactly is comparatively the situation with regards to everything you said about effects of high cost of land, rich people and everything else, with regards to Montgomery County, Prince George's County, basically? Are we

in Fairfax County in a strange situation or are we more nearly like the rest of the Washington area, if you get my point, or my question?

A The two other major counties that are in comparable position of Fairfax County relative to the pattern of development would, of course, be Montgomery and Prince George's County. They are primarily served by Blue Plains Treatment Facility which is a limitation that part of Fairfax County is facing and they are not running into that. They are not having the same options, but they are not -- their availability of land for sewer is not the same as Fairfax County's Pohick situation. But I don't have any information that would lead me to conclude that. Say, Montgomery County which would be the closest counterpart, is by its zoning attempting to limit its growth.

Q Are prices lower over there, comparatively?

A No, but if the inference you are making is Fairfax County is not behaving any differently, say, from Montgomery County, I am saying we are not comparable cases because, one, I have no reason to believe that Montgomery County is not responding in rezoning but it gets to be a moot point because they don't have that sewer availability ready.

Q If somebody wanted to move to the Washington area --

A Yes.

Q -- could they get a low income place over there, a moderate income? Is there any difference?

A If someone want to move into the Washington Metropolitan area and wants to own a house, particularly if he wants to own a detached dwelling, he has to go beyond Prince George's, Montgomery, Fairfax County if it is a modest price. The only sewer availability of substantial size that would permit any modest development as a constraining variable is the Pohick.

Q But given these three areas, Fairfax, Montgomery and Prince George's, the prices with regard to moving to that area and owning a house are equally high or comparatively high?

A I could answer you that they are all high prices but I wouldn't draw any inference from that with regard to the rest.

Q I am just asking you a question.

A Well, the implication --

Q I am asking you if the prices --

A They are all high-priced; they are all high-priced.

Q Thank you.

I asked you this before in another case: In the Washington area, aren't the incomes higher comparatively than in any other areas of the same size and, to continue with the question, wouldn't in fact the prices, although I think you

contend they may not be as high as they are, wouldn't they be higher than a comparable area without the zoning that we are talking about, the zoning decision that we are talking about?

A The Washington Metropolitan area is a relatively high income, high-priced house area but even with its incomes the price of housing has been moving fantastically high and the rate of increase of price of housing has taken sharp upturns even since the last time you asked that question.

THE COURT: While we are on that subject, if I may interrupt for a moment, in the last two years what, percentagewise, has the price of housing in Fairfax County gone up? Assume you bought a house in January of '71. What was it worth a year later and what was it worth a year later than that?

THE WITNESS: I have some figures. I didn't bring them. I hate to quote figures --

THE COURT: If you don't know the answer, just don't answer. That is the simplest thing.

THE WITNESS: Rather than percentages, can I check percentages and give you samples of subdivisions that are monitored with changes?

THE COURT: If you can answer the question, sir, go ahead. If you cannot, disregard it.

THE WITNESS: I can tell you that it is not unusual to have had increases of ten percent in the course of a year. There were some of the samples that we had taken, that had dealt with increases that were not only two-three thousand dollars but were running to five thousand dollars in one case as an increase in less than a period of time, even where developers are not providing the increases and they have had some rises in cost, the resales have moved very high. There is one development which was an attempt to get in at the below-thirty mark in the condominiums. The developer sold each unit as they came out over the weekend at 28-5 for single-bedroom, one-bath unit. They had raised the prices by the time they were through to the low 30's. They did not get it exploited by any means; the resales were running higher. Within four months they were in the mid 30's and now they are available at close to 40.

THE COURT: Two-bedroom, one-bath?

THE WITNESS: Three-bedroom, one-bath condominium that came on right --

THE COURT: Flat unit?

THE WITNESS: These happened to have piggyback units so there are some flat units and side-by-side units. But the market is so tight that this developer who first put his houses

on the market decided to go at, beginning at the under-30 market, houses have moved by more than $10,000 from what he offered them in price to.

THE COURT: What time period are we talking about?

THE WITNESS: Less than a year.

THE COURT: From the time they were offered, at less than 30?

THE WITNESS: Until now, in less than a year, the man who bought that house at 28-5 can resell it and get a profit of in excess of 30 percent. That was going at what you might call the moderate income type price. Housing that has gone out at the 40 and 50's have moved to where $10,000 profit in the last year is, if you bought a house last year and it went up only $10,000, you didn't make out especially well.

BY MR. SYMANSKI:

Q Is that situation unique to Fairfax County or is it true of the Metropolitan area?

A The whole Metropolitan area is facing that situation.

Q Now, another hypothetical. If we rezoned the rest of the County to R-12-5 and R-17, that would in effect -- let me ask you -- would it have the effect of lowering the prices substantially?

A The whole process of managing the urban development,

in order not to have a destructive imbalance situation, is predicated on making a plan that has things in balance and keeps it in balance. Any attempt to use just one tool, whether it be the zoning or the sewer or the tax, in order to accomplish some objective, is going to entail fantastic other costs so that no, if you rezoned all the land in Fairfax County to R-12-5 and to R-17, you would not have any sort of a panacea, but the plan that you have calls for a zoning density that can be accommodated by the public facilities which have been programmed and the failure to fulfill on that plan is going to make even worse the situation you have.

Q Would you answer my question? I asked you if the rest of the County was zoned R-12-5 and R-17 would a lower cost --

THE COURT: Just yes or no; then you can go further on exploration.

THE WITNESS: Would it lower?

THE COURT: The cost of housing.

THE WITNESS: Yes. Okay.

BY MR. SYMANSKI:

Q It is restrictive. Therefore prices are going up?

A If you rezone all of the vacant land in Fairfax County 12-5 and 17, you would have the effect of lowering

housing prices, yes, you would.

THE COURT: I take it your answer would be the same if you adopted something like the Houston plan where there is none, no zoning at all?

THE WITNESS: I think you probably wind up better if you had no zoning. At least in retrospect of the way the --

THE COURT: I am just referring to cost. I am not talking about philosophy.

THE WITNESS: Certainly in terms of cost, no contest.

BY MR. SYMANSKI:

Q So, in effect there is some middle ground between what you consider too restrictive and possibly what you consider to be not restrictive enough. There is some middle ground which you feel should be reached as far as the zoning process?

A I don't know how to answer that question because you are asking me a value judgment as to what the zoning ought to be and I can only forecast for you the consequences as to what happens if you do do different things but not what you should have for the County.

Q I got the impression that what we have now you don't agree with, with regard to zoning?

A All I have said is that the way that you now have

got your zoning, only the very rich can afford to buy.

Q I am sorry. I got the impression that you don't agree with it.

A That I didn't agree with what?

Q With the process of zoning in the County, a controlled growth process.

A Oh, I not only agree that the County ought to manage its urban development process, I was the man that put the original proposal into HUD first through the University and then when they asked to have it as a demonstration, came over to Fairfax County and said, look, here is this tool; you ought to manage your growth and you ought to put your facilities in balance. And I have talked with HUD and they are interested -- won't you submit a proposal? They said, you know what we have to do.

Yes, I think they ought to manage it, no contest. I think they ought to manage it. However, under certain criteria, that criteria are those that I have described that have to do with a balance of the system so that you don't get it out of whack because when you get out of whack you get all kinds of problems.

Q The timing is then, I assume, within the term, controlled growth? There is a timing built into that, is there

not?

A You say, controlled growth, and I am not exactly sure what you mean by controlled growth. If you mean --

Q How about this: The legislative body is going to determine to some extent at what rate we grow and where we grow as opposed to the developer determining what he wants to build.

A I am not aware of any legislative mandate that gives local governmental authority the right to legislate the rate of growth.

Q I didn't know you were a legal expert. I thought you were up here as an economist in the Metropolitan area.

I am asking you whether controlled growth -- I thought you said you agreed with controlled growth?

A Let me finish first. That is only part of the statement.

I am aware that the local government has authority to regulate land use; that local government has an authority and responsibility to provide certain public facilities and if you want to go through some qualifications on expertise of the multidiscipline, I would be glad to go through these, which would include some of the legal aspects of the institutional environment and we can do that if you desire.

Q That is what we are here to decide, what they can do, I believe.

A I am not presupposing to conclude what they can do, which is why I said that I was not aware of the County's mandate as authority to limit growth by a decree although I am aware that the County does have some tools which may have that effect, and that the use of these tools which may have that effect may be perfectly appropriate and the questions that you have been asking me have been with regard to the use of the tools that would have that effect.

Now, the reason for that effect of controlling the growth has been what has been bandied about in terms of quality of life, has been talked about in terms of taxes, has been talked about in terms of a variety of other dimensions ranging from street congestion to school, to public facilities, to a whole host of other considerations in which controlling growth has been dealt with as a vector in achieving these other goals. Nowhere have I said what these goals ought to be and that is not what I am dealing with. But given that the County determines whatever its goal is to be, whatever its qualities of dimensions of life it wants to be, it has certain tools which it uses and the whole point of what you call "controlling growth" is to have these tools utilized in such

a manner, in such a way, in which the goals of "controlled growth" are being achieved and the provision of managing the urban development process is one in which it has the incidental effect of controlling growth which is fine, nothing wrong with having that limitation, because you only have so much sewer capacity; you only have so much capacity of a variety of facilities; and you are charged with a delicate system of keeping them in balance, and the typical process is that the people come there first and the schools follow or they get service with schools as follows; that it isn't the constraining variable.

The sewer is a constraining type of variable but the County acts to go into balance and what we were talking about is, how does that County manage the growth in balance? It has the effect of controlling it. What I have been saying is that I am a very strong, if you wish, advocate of managing the urban development process. I have a whole slew of articles that have developed this idea. I have said that this is the thing to do, and the basic tendency underlying that process is that the development process is in balance at whatever level it comes out; that level may be a relatively slow rate of growth; it may be a relatively high rate of growth; but when you start to use tools that make the process disruptive,

failure to rezone, or intending to use taxes, or intending to use a sewer allocation for a variety of purposes which would destroy the plans, you are headed for some kind of a problem, and what I really suggested is that the problem that you are getting, by not providing the R-12-5-R-17, is resulting in only the very rich being able to move in based upon the kind of housing you have provided.

Q You did say, did you not, that this total municipal management process, or whatever terms you used, was a very delicate one and a very tough one?

A It is a tough problem, no contest.

MR. SYMANSKI: No further questions.

MR. HAZEL: I have no further questions.

I would ask that the witness be excused.

(Witness excused.)

THE COURT: Let us recess for lunch until 2:15.

(Whereupon, the luncheon recess was taken.)

AFTERNOON SESSION

THE COURT: You may proceed.

MR. HAZEL: Mr. Downs, please.

Whereupon,

McKENZIE DOWNS,

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

DIRECT EXAMINATION

BY MR. HAZEL:

Q Would you state your name, please?

A McKenzie Downs.

Q Your occupation or profession?

A Real estate broker and appraiser, sir.

Q Have you qualified in this Court on a number of occasions?

A Yes, sir; I have.

MR. HAZEL: I would submit Mr. Downs unless there is cross examination as to his qualifications.

MR. SYMANSKI: So stipulate.

BY MR. HAZEL:

Q Mr. Downs, are you familiar with the properties that are the subject of today's case, of Williams and Van Metre, parcels totaling approximate 418 acres in the Pohick Watershed?

A Yes, sir.

At your request, I have made an investigation of those properties and I would say I am familiar with them specifically and in the entire general area.

Q At my request, did you reach an opinion as to the value of those properties with their present RE-1 zoning?

A Yes, sir.

Q In anticipation, or in the same time frame, did you reach an appraisal with R-17 zoning?

A Yes, sir.

Q Mr. Downs, would you briefly describe those two properties as you saw them in approaching an appraisal?

A Yes, sir.

Your Honor, the two properties involved consist of one 279.51-acre tract, and one 138.4197-acre tract giving us a total of 417.93 acres.

It is, as has been pointed out to you, in the Middle Run, in the Lower Potomac area, served by the treatment plant.

Public sewer is not available.

My investigation indicated that the County has acquired land for the expansion of the Lower Potomac Plant and expansion is underway which would increase the capacity of that plant and which would enable the entire area, of

course, to be served.

This particular area, or the subject property, is rolling land, for the most part wooded; the old Macomber property is substantially cleared but I would say overall, except for the high line right-of-way, it is basically a wooded area. It is rolling land which I would say, under an RE-1 plan, if it is to be considered in that manner, would lend itself to alternate density where you would be obtaining half-acre lots as opposed to a standard RE-1 plan.

THE COURT: Cluster?

THE WITNESS: Yes, sir; ADP alternate density or cluster.

BY MR. HAZEL:

Q Why do you say that, Mr. Downs?

A I would say that because of the topography, the amount of poor soil which exists on the property, and the fact that public sewer has been brought up to the edge of the property and it is reasonable to assume that it could, within the certain time frame, obtain public sewer, and it would appear somewhat ridiculous to attempt to go with a standard RE-1 plan as opposed to alternate density where you could obtain the maximum number of units and these units would have basically the same value, in my estimation, as a

standard RE-1 acre lot.

So I would say for that reason, it should go to anternate density or cluster plan of development. It lends itself to that type.

Q Did you reach any opinion as to whether or not it would be reasonable to assume development under the RE-1 zoning?

A Well, yes, it could be done, but I think it would border on being somewhat ridiculous in the view of the change of the character of this neighborhood and the fact that on the southeast side of it, R-17 zoning has been granted and that land will be developed in that manner.

There is also, or in the immediate area, townhouse zoning so that the character of the community has changed. It is no longer an RE-1 neighborhood. It lends itself to greater density. The Master Plan recognizes this. There is at this point in time a tremendous shortage of buildable lots in the County so I can't believe that in view of the development costs which would exist under an RE-1 plan that a developer would attempt to go an RE-1 plan as opposed to holding and going to an R-17 or a yield of, say, about 2.2 units to the acre.

Q Now, based on your appraisal of the two properties,

what is your value as the property is now zoned of RE-17

A There again, I would say that some discount would have to be recognized in order to assume that public sewer would be made available. However, the increase in value of single-family building lots has gone up so within the last year to 18 months because of this lot shortage, that I think that any appreciation that you would allow because of this waiting period would probably be more than offset by the increase in value during this same period.

However, on the basis of the property as it now stands, I put a value of about $5,000 per unit, and assuming a yield of .92 it would mean an acre valuation of $4,600 per acre which would mean a total property value of $1,922,478; you might say $1,922,500 or somewhere in that area.

However, on the R-17 or, say, a yield of 2.2 units to the acre, and assuming the same holding period, the same carrying costs and so forth, I would feel that the unit value is probably slightly less, maybe $4,750 per unit, per raw unit -- that is, which would indicate an acreage value of $10,450 or a total property value under that concept of $4,367,368.

In other words, we are talking about a difference in the land value there of $2,444,890 -- say $2,445,000.

Now, of course, the development costs under the two concepts would be different so we are not talking about a total profit here for the owner, but would point out that there is a difference in the development costs under the two concepts and in the absence of any complete engineering study it is somewhat difficult to ascertain just what any profit would be. But I would say that under the RE-1 concept, it is not too attractive to a purchaser where under the RE-17 or the 2.2 units per acre, it makes it extremely feasible and certainly is reasonable. I can't believe that a purchaser in the market place at the present time would develop it under an RE-1 concept. I think he would go to the greater density and the market does rely on Master Plans and on actions which have occurred in the past and on the change in the character of the neighborhood. They are not just isolated cases but many many cases in the past where prudent purchasers in the market place relied very strongly upon changes which take place, upon sewer availability, upon Master Plans, and general planning for an entire area.

Q Mr. Downs, are you aware that the Van Metre case recently changed hands at a price in excess of your RE-1 only value?

A Yes, sir; I am.

In response to that, I would say that the market still seems to recognize potential which property enjoys and I would say that in this case the purchaser, although the contract was dated several years ago, certainly according to the information which he relayed to me, relied upon a zoning change but purchased it even though the zoning change was not granted because of the increased value of building sites in the Fairfax County area, because of the lot shortage.

THE COURT: May I interrupt? Was this change of land from the equitable to the legal owner?

MR. HAZEL: Yes, sir. He settled on the contract. He didn't default under the contract.

BY MR. HAZEL:

Q How much did he pay?

A He paid $1,641,900 for the property. It worked out to about, as I recall, around $5,800 an acre. I don't see my notes on it. This closing took place on the 26th of June, '73 and involved 282.51 acres less and except three acres, giving a total of 279.5.

Q Mr. Downs, you have referred several times to the precipitous increase in lot values in the last year-18 months?

A Yes, sir.

Q Have you documented this in any way?

A Well, yes, I have.

Of course, it is apparent in any segment of the market that you examine. For instance, even with respect to improved properties, and I think an examination of the market would not indicate that building costs have gone up so fantastically; it is the value of the lot increase.

Q Why has the value of the lot increased, in your opinion, gone up as you say fantastically?

A Definitely because of the lot shortage. I would cite a case in point on this. In March of this year, 1973, Ryan Homes conveyed to Tellie a lot in Cardinal Estates. This was under R-12-5 zoning. The conveyance took place at $37,600.

Less than a month later, on the 23rd of April of 1973, this purchaser who Mr. Tellie, conveyed to Brown the same property at $46,999, which is a $9,390 increase or about 25 percent.

THE COURT: When you say "lot" you mean improved lot?

THE WITNESS: This was an improved lot. It is not, Your Honor, the increase in cost of the building. It is basically the increase in the value of the building lot itself.

I cited a home sale to indicate the shortage of

homes and demand on the market.

THE COURT: How can you say it is an increase in lot value rather than both combined?

THE WITNESS: Because there has not been that increase in building costs. If you would examine The Marshall Valuation Service or any developer in the area will tell you that his increased building cost has not gone up that much, probably has gone up as much as ten percent or in that area, but not 25 percent overall on building and improvements.

BY MR. HAZEL:

Q Is that a routine type of increase that you have just given us characteristic of others?

A I would say examination over the years would indicate that.

Q Routine as in the last year?

A Oh, yes, very much so.

Here is another one. I don't mean to take the Court's time on this, but in May of '72 Ryan Homes conveyed to Sisson Properties an improved property at a cost of $38,400. That was in May of '72.

In May of 1973, Sisson, without any addition to that property at all, conveyed to Walters the same property at $54,950 which is a $16,550 increase or 43 percent.

An examination of any sale within the last year to 18 months would indicate that you are getting value increases during a year's period of 25 or more percent whereas, in prior years, you only got this increase of anywhere from, say, seven to as much as 12 percent, somewhere in that neighborhood.

THE COURT: With reference to both of these sales that you have mentioned, and with reference to the first time they sold, the base price, were those sales forced sales or market sales?

THE WITNESS: They were open market sales by a developer building with no pressures whatsoever.

THE COURT: The original seller was the builder?

THE WITNESS: Yes, sir.

THE COURT: Then it was a resale by the owner?

THE WITNESS: Without any pressure whatsoever.

Further, if you would examine land sales of unimproved lots, for instance in March of this year, Thomas Carey, Incorporated, sold a group of 70 lots to Normac, Incorporated, and these were just raw lots without improvements in place.

THE COURT: What zoning?

THE WITNESS: R-12-5.

BY MR. HAZEL:

Q Mr. Downs, I point to a location on Exhibit 18. Are these the lots that you are speaking of that Carey sold?

A Right at the end of your pointer.

Q Right here?

A There were lots, actually 234 through 303 in Section Three.

Q Right in that location?

A Yes.

THE COURT: How far is that from the subject property?

MR. HAZEL: About 1,800 feet, Your Honor -- 1,500 to 1,800 feet.

THE COURT: You can see the map. I can't.

MR. HAZEL: It is approximately 5,000 feet to a square across here.

THE COURT: What were the prices on those?

THE WITNESS: They sold, the 70 lots sold, at a total consideration of $665,000 which was $9,500 per raw lot.

Now, some engineering, all of the engineering work had been completed and these were raw paper lots, ready for development. Some money had been spent on bringing in utilities to that point and grading but Carey estimated that his actual raw lot cost excluding any development cost to

that point was approximately $8,000 per lot.

BY MR. HAZEL:

Q Raw lot sale price?

A That's right. In a year and a half to two years ago, the top price for a building lot in this same category would have been, say, $4,500 to a maximum of $5,000. It is just fantastic. I don't think it is going to stop unless a greater number of lots are made available.

The demand is here in the market place for housing. The builders can't build them fast enough.

MR. HAZEL: I have no further questions.

CROSS EXAMINATION

BY MR. SYMANSKI:

Q Mr. Downs, you talked about RE-1 and R-17. What about the application zoning here, R-12-5?

A Well, I would say that it probably would have an even higher value if we assumed that. I assumed a yield of about 2.2 which is R-17 and since R-17 exists immediately adjacent to this, this was reasonable and logical and an appraiser does consider a change in neighborhood and a reasonable utilization of the land.

In other words, I feel that definitely the landowner is being deprived of a reasonable and probable utilization

of this land, if he does not get the zoning.

Q He will make more money with R-17 and R-12-5 than with RE-1?

A I won't say that he will make a substantial amount more money, no. It would depend on the development costs. I am not evading the question. I think it would be extremely difficult to know how much more, if any, he would make unless you had a complete development study in both categories, which I do not have.

Q Isn't it usual that the higher the density the more profit?

A I would say that is a reasonable assumption, yes.

Q You did say, did you not, that although you didn't agree with it, it could be developed at RE-1?

A It is possible. I would say that you would have to really sharpen your pencil and take a real hard look at this to see whether or not it would be feasible. If the shortage of lots continues, I think unquestionably in a period of time it would be economically feasible to do it because the values have gone up so high.

Q Is there any trouble in the County or are developers of RE-1 land having any trouble selling the land?

A I would say that in the market place at the present

time any building site is salable, almost any building site.

Q Are you familiar with anything other than Northern Virginia -- the Metropolitan Washington area, for example -- with regards to everything you said, fantastic price increases and so forth?

A Well, yes, I am. I do work, as you well know, in not only the County of Fairfax but Alexandria, Arlington, Prince William, Loudoun, Fauquier, and there is a sloughing off of this. Builders, because they are unable to get lots here are pushing out further and even in Fairfax County, in areas, say up in the River Bend area, for instance, where RE-2 zoning exists, builders are going in there and developing the RE-2 land which has lain idle for years, perhaps because they can do it under a standard RE-2 plan and where soil conditions, of course, allow this, and the values have jumped from, say, two or three thousand an acre up to $6,000 an acre.

Q How about Maryland?

A I do little or no work in Maryland. I venture to say that you get the slough-off over there; the shortage of lots just pushes the values further out.

Q You talked about the character of the neighborhood. All these exhibit seem to cut off the character of the neighborhood in this direction. Regardless, we have development

in here.

THE COURT: You say "this direction." Please, for the record, which direction is that?

MR. SYMANSKI: West, southwest, and northwest, what is the character of the neighborhood when we look to the southwest, the west, to the northwest?

THE WITNESS: To the southwest and northwest of the property, it is of a much lower density. The development has reached the subject property and is actually pushing in already into the Middle Run Shed.

If you go actually west of Route 123, for instance, where there is no public sewer available and none envisioned within the reasonably foreseeable future, the development is a five-acre lot. That is not shown on here but Ringle, for instance, is buying land in there, 279 at $2,500 or more per acre, even with high lines to it, and subdividing it and developing it and getting $25,000 to $30,000 per five-acre home site. Two years ago he was paying less than $1,500 an acre and only getting $1,500.

BY MR. SYMANSKI:

Q With regard to zoning character, what is the character of the neighborhood to the west and southwest of the subject property? Is it different, higher density, the same density?

A No, I would say it is basically of the same density as the existing zoning on the subject. Of course, you have a large holding in the District of Columbia which comes in here, and of course you have very substantial Government holdings down in this general area.

THE COURT: Government holding is over there to the left?

THE WITNESS: I am speaking of the Lorton Reformatory, Your Honor.

THE COURT: I am disoriented now. Isn't that down south?

THE WITNESS: Yes, southwest. He mentioned southwest, Your Honor.

BY MR. SYMANSKI:

Q Mr. Downs, isn't it fair to say that over in this area to the west, the character of the neighborhood is actually RE-1 or larger?

A As I pointed out, anything west of RE-1, the main development which is taking place is outside of Fairfax County subdivision control on five-acre lots. There is some development, of course, on one-acre lots, but I would say that it is larger, yes.

Q What is the character of the neighborhood if we

talk about the Neighborhood 12, Pohick Restudy?

A What area are we talking about now, Mr. Symanski?

Q Neighborhood 12.

THE COURT: Is that the subject property?

MR. SYMANSKI: Yes, Your Honor.

THE COURT: The subject property is part of it?

MR. SYMANSKI: Yes, Your Honor. Neighborhood 12.

THE WITNESS: That is shown for 1.6, I think it is.

BY MR. SYMANSKI:

Q In this area, the relationship to that map, do you know what the --

A I would say basically at the present time this is open land which is basically undeveloped and on which no intense utilization has been made. These two tracts are two of the larger remaining tracts in that area except the Levitt holding which is south of there or southeast, really.

Q You made a statement that the character of the neighborhood of the subject property is what, developing or developed?

A I would say it is rapidly developing to the east of the subject property in the form of townhouses and rather intense single-family residential. I would say that in the other areas it is being held waiting public sewer and in all

probability recognition of potential for rezoning to a higher density.

Q If this is rezoned to R-12-5, which the applicants applied for, that is going to make the character of this neighborhood just what you said the character of this neighborhood is now, isn't that correct?

A I would not say that that is correct because I think you are talking about --

MR. HAZEL: I would like to interpose an objection here.

Mr. Symanski, County Attorney, is apparently trying to impeach his own Master Plan or confuse the witness. The County plan is exactly what we are working with as far as where these density areas break. If he is asking Mr. Downs to go into things in jurisdictions beyond the plan, that is a different thing but I don't quite understand the thrust of his question.

MR. SYMANSKI: I don't understand the thrust of your objection.

THE COURT: Don't address your comments to counsel, sir.

MR. SYMANSKI: I am just trying to show his comments were -- he is approaching this property from the point of view

of what the character of the neighborhood is. As I said in my opening statement, I think the difference between a comprehensive plan and the plan is that one implements the other when certain factors come into effect. I am just trying to point out that if the character of this property, because of this development is "developable property" then the same thing, we have a leapfrog effect across here; we can say the same thing about this the day after this is zoned. That is all I am trying to say.

THE COURT: Isn't that really argument, sir, rather than evidence?

MR. SYMANSKI: Not if he would testify that this was zoned, that he would then testify --

THE COURT: I think that is rather evident, sir. If you end up with R-12-5 there, that may have some effect on the land next to it.

Also, you mentioned Neighborhood 12. Then you -- I don't know that the witness was referring to Neighborhood 12. He just said, in the neighborhood.

I took that to be in the general sense rather than what the County has picked as a numbered area. You might ask if he meant Neighborhood 12 or meant the general area, just to clarify the point.

THE WITNESS: When I spoke of the neighborhood, I was not referring specifically to the Restudy and No. 12. I mean the general area and specifically the area which is adjacent to the subject property on the east and the development which has taken place to the north and to the northeast of the subject.

I would say that where a few years ago that was strictly low density and open areas without any intense utilization, with the advent of public sewer a tremendous development has taken place and it has changed the character of that neighborhood. There are shopping centers being developed. There is townhouse development taking place, single-family residential. It is being intensely utilized. I would say there has been a change in the character of that neighborhood but I am referring again to the general neighborhodd, not Neighborhood 12 as the County refers to it or Six or whatever it might be.

BY MR. SYMANSKI:

Q Most of the development you refer to is in the main branch of the Pohick, is it not?

A That's correct.

MR. SYMANSKI: No further questions.

REDIRECT EXAMINATION

BY MR. HAZEL:

Q Mr. Downs, let's see if we can't specify this a little bit with regard to this aerial photograph.

This is the subject property. You recognize it?

A Yes, sir.

Q The green is the confines of the Burke Lake park area?

A That's correct.

Q Now, I am pointing to the property immediately east along Sydenstricker Road. The subject is that area which is now developing in townhouses?

A That is essentially correct, substantially built upon.

Q Is that zoned at a ten-unit density?

A Yes, sir.

Q I am pointing at several hundred feet north of the subject property, the location of a shopping center under construction.

A That is a new shopping center being developed. It is not ready for occupancy. It is in the building stage, construction.

Q Building?

A Yes.

Q Twenty acres in size?

A I do not know the same exact area. I believe I appraised that property. I believe there is about 20 acres. Don't hold me to it.

Q That is several hundred feet to the north?

THE COURT: Of the northern corner of the Van Metre, for the record?

MR. HAZEL: Yes, sir.

BY MR. HAZEL:

Q Now, Mr. Downs, I point to another location which is just off the intersection of Burke Lake Road and Keene Mill Road Extended. Is there commercial development underway at that point on the map?

A There is, sir.

Q I am now looking at the aerial photograph and I am approximately 500 feet north of the property.

A From what I can see from here, it appears to be an X-type crossroads due north of the property.

Q Known as Five Forks?

A At Five Forks, it borders on Keene Mill Road on the north, Your Honor, and Lee Chapel Road on the east, sir.

Q Commercial development is underway in that vicinity?

A That's correct. PDH-10 zoning exists in that.

Q Is the PDH-10 area the area developing into the rear of the commercial?

A That's correct, sir.

Q Is there a subdivision of Bent Tree with which you are familiar in that vicinity?

A Yes, there is.

Q Is that approximately ready for occupancy?

A A portion of it may already be occupied, sir.

Q How many houses are in the Bent Tree area?

THE COURT: Which one was that again?

MR. HAZEL: This is again just north of Five Forks, Your Honor. It is an R-12-5 parcel. I can point it out on this map, just north of Five Forks. It is on R-12-5.

THE WITNESS: The exact number of units I do not know. I would venture, several hundred units.

BY MR. HAZEL:

Q Townhouses are under development next to that?

A Yes, sir.

Q This is the commercial at this point which is just commenced?

A That's correct, sir.

Q This is the shopping center which is well along in development?

A Yes, sir.

Q There are townhouses in this location? All of these, for the record, are within seven or eight hundred feet of the north corner of the property, is that correct?

A That is quite correct, sir.

Q They are all developing, is that correct?

A Yes, sir.

Q These townhouses here are occupied, are they not?

A Yes, sir; I think they are all sold.

Q These townhouses, and I am again pointing in the Middle Run, the R-10 area, which is immediately adjacent to the northeast corner of Van Metre?

A Yes, sir. You are referring to the townhouse development which exists along the southwest side of Sydenstricker Road. It lies immediately or directly opposite Kenne Mill Heights and I believe portions of that development are ready for occupancy if they are not already occupied.

Q That was zoned in, C-192, ten units an acre on the zoning case, was it not?

A Yes, sir; it is called Orange Hunt. That is townhouse units.

Q That is developed as shown on the plat.

Now, refer to Exhibit 17 which shows the actual

layout of the lot.

A Yes, sir. It is within approximately 200 feet of the subject property.

Q Mr. Downs, south of that in the Middle Run, there is a large area that appears on Exhibit 18 which showed developed lots platted. Now, are those lots actually in place and occupied?

A I can't say that all of them are. Some, yes.

THE COURT: What zoning and density is that?

MR. HAZEL: That is R-17 density, is it, Mr. Downs?

THE WITNESS: That is in R-17 in part, and in part R-12-5, Your Honor.

BY MR. HAZEL:

Q Mr. Downs, while you were reviewing the area in the neighborhood, there was question about the area to the south and to the west. Are you familiar with the large white area that is northwest of the subject property and the ownership of that large area? I am talking generally about the area between Pohick Road and the Southern Railway along Guinea Road.

A Point out Route 123.

Q Here is 123, the brown on the west.

A Well, in portions of it, I have just completed an

appraisal on portions of that. Homer Hoyt has substantial interest in that area. I can't recall who else does.

Q Do you recall approximately how many acres of this is actually under one ownership?

A There are several hundreds of acres, I don't know how many, but it is an awfully large holding.

Q Has this been offered on the market, to your knowledge?

A Not to the best of my knowledge; I don't think it is for sale.

Q There are some holdings in there from the Lynch family?

A Yes, Lynch owns substantial property in there, too. The Hoyt interests come all the way out to 123. They own a substantial amount of land, recommended for industrial, along the railroad. They come on over a substantial way in to actually the Pohick Shed and then the Lynch interests, I think, take up where they leave off. But I could not give you the total area but I would say it is in the thousands of acres.

Q Several thousand acres between the two?

A I would say between the total holding would amount to that. It is not for sale.

Q And those holdings have not been for sale and consequently are not available for development, is that correct?

A Not at the present time; they certainly are not.

MR. HAZEL: No further questions.

(Witness excused.)

Whereupon,

OSCAR S. HENDRICKSON,

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

DIRECT EXAMINATION

BY MR. HAZEL:

Q State your name, sir.

A Oscar S. Hendrickson.

Q Your place of employment?

A Fairfax County.

Q What is your position with the County, Mr. Hendrickson?

A I am Chief of the Preliminary Engineering Branch in the County Development.

Q Mr. Hendrickson, in your capacity as Chief of that branch, are you responsible for the engineering factors that go into the development of lots in the County, such things as road layout, construction specifications, drainage, that sort of thing?

A Yes, sir.

Q Mr. Hendrickson, are you also familiar with the

Pohick Watershed generally and the areas that are shown on the tax map here as Exhibit 18?

A Yes, sir.

Q Are you familiar with the two tracts that comprise today's case, the Williams-Van Metre tract?

A Yes, sir.

Q Mr. Hendrickson, in the event of zoning of those two tracts to an urban-like density of R-17, for that matter in development in any density, who builds the roads and who pays for the roads on the tract itself?

A The developer does.

Q Does the County invest from any of its funds monies in the construction of any of the interior roads on that tract?

A No, sir.

Q Now, when you look at State roads, which either front the tract or run through the tract, what, under County requirements, are done by and at the expense of the developer on those roads?

A Normally, those roads are required to be widened; the right-of-way has to be widened. We obtain a right-of-way, the additional right-of-way, from the developer. If there are hazards on the existing roads which will create greater hazards to the traffic that will be generated, we will ask for improvements

to correct those hazards to the degree that it is required to create a more safe road.

Q Is it fair to say that as these tracts develop, difficulties that would be encountered involving the public safety on the roads which either bisect or front the tracts, would be created at the developer's expense?

A The corrections will be accomplished at the developer's expense, yes, sir.

Q The right-of-way for the additions, and in fact for future improvements, would be provided by the developer?

A Yes, sir.

Q I notice on the areas that are platted as having developed, numbers of roads, obviously on Exhibit 18. Looking at several of those as characteristic, here is a road which I believe is Huntsman's Boulevard in place, a four-lane divided road. Was that paid for with either County or State funds?

A No, sir; that was not.

Q In other words, that road was built as part of the collection system that the County requires for the development of the tract?

A Yes, sir.

THE COURT: Is that considered a collector road?

THE WITNESS: That is an arterial.

THE COURT: Arterial?

THE WITNESS: Yes, sir. It is a four-lane divided.

BY MR. HAZEL:

Q That is part of the County's Master Plan for roads?

A Yes, sir.

Q Mr. Hendrickson, in the development of the tract and the roads that are required, are you guided by the Master Plan of the area which shows certain layouts?

A Yes, we are.

Q The roads actually built on the tract, impact on the tract, are those that are built by and at the expense of the developer as a rule, is that correct?

A Yes, sir.

Q A third series of roads would be those off the tract which developers might contribute to that are part of the existing system but away from the site entirely, is that correct?

There are such things as off-site contributions?

A In some instances, yes.

Q For example, Keene Mill Road ends at this point as far as Its four-lane status? I am now pointing to Exhibit 18 just west of Rolling Road. Is there a developer contribution to the extension of that into the further west?

A I believe not.

Q Is that road being extended?

A It is being widened and straightened out by the --

THE COURT: Let him finish the answer, please, sir.

THE WITNESS: The State is going in and is going to widen Keene Mill Road and the right-of-way has been dedicated.

BY MR. HAZEL:

Q The right-of-way was dedicated by the developers along in this vicinity?

A Yes, sir.

Q But you don't know that any funds were actually contributed?

A No, sir; I do not, not that area, no, sir.

Q How far is that State-financed improvement going to extend westward?

A At this moment, I do not know how far it will extend. I don't know precisely.

Q Now, Mr. Hendrickson, are you, through your office, now charged with the duty to keep tabs on sewer tap allocations?

A Yes, sir; we are.

Q Are you familiar with the Blue Plains Watershed?

A Yes, sir.

Q What is the current status of tap commitments in Blue Plains?

A They are totally committed to '76.

THE COURT: When?

THE WITNESS: 1976.

BY MR. HAZEL:

Q Is that commitment for the Blue Plains that I put the pointer across north of the City of Fairfax? Is that approximately the area north of the river that is involved in Blue Plains?

A Yes, sir.

Q Does the County have any other capacity, any additional capacity, to commit in the Blue Plains Shed?

A There is some public benefit capacity.

Q But other than that, there is none in the entire Blue Plains Shed other than what has been committed?

A That's right, yes.

THE COURT: Is there any committed to reserve?

THE WITNESS: Only the public benefit. I forget exactly how much it is.

THE COURT: Is part of that public benefit used in order to get things put in certain places?

THE WITNESS: It is to take care of schools, government buildings, if you do have a hardship case, somebody whose septic goes bad and the Health Department tells them to connect

to the public sewer, they will have to connect to the public sewer.

THE COURT: It is not dealt out in order to get some benefit from someone who wants to develop the property?

THE WITNESS: No, sir.

THE COURT: All that is available to developers has been given out?

THE WITNESS: Yes, sir. That is both industrial and commercial and residential, or all three.

BY MR. HAZEL:

Q Mr. Hendrickson, with the exception of two small sheds, Dogue and Little Hunting, is there any area in Fairfax County that today has sanitary sewer available for the developer that seeks commitments for residential construction?

A No, sir.

Q The first area in which some will become available will be in the Pohick, is that correct?

A Yes.

Q Now, Mr. Hendrickson, in connection with the development of the adjacent property, there is a right-of-way for the so-called Northern Virginia Expressway which is shown and has been apparently reserved, is that correct?

A Yes, sir.

Q I point to that right-of-way on the larger, on the policies plan. Is this the right-of-way that is --

THE COURT: The broken black line?

MR. HAZEL: The broken black line.

THE WITNESS: Heavy black line.

BY MR. HAZEL:

Q That is a major thoroughfare through the Pohick that is on the County's Master Plan, is that correct?

A Yes, sir; it is.

Q The County has been gradually acquiring right-of-way by developing contribution for that purpose, is that correct?

A Yes, sir.

Q It comes right through the corner, right along the eastern boundary part of this, does it not?

A Yes, sir; it does.

Q In your office, do you also make plans for connection between developments?

A Yes, sir.

Q Have you in fact put a stub street connection at the approximate point I am showing which is, maybe, several thousand feet from Sydenstricker Road for connection between the existing development and the development to be on the Van

Metre tract?

A Yes, sir.

THE COURT: You mean to go under the proposed beltway?

THE WITNESS: It might be over or under. That detail isn't worked out.

THE COURT: But across that?

THE WITNESS: But the right-of-way.

THE COURT: Major highway when it is built?

THE WITNESS: Yes, sir. And the necessary land for cloverleaf or any interchange you might have.

BY MR. HAZEL:

Q So you anticipate the connection between a developed R-17 and townhouse area here and the Van Metre and Williams tract?

A Yes, sir; that is a requirement of the ordinance actually.

THE COURT: Did I understand that it is planned to have interchange at that point?

THE WITNESS: The interchange point is slightly north at Braddock Road, Guinea Road.

BY MR. HAZEL:

Q Right in this vicinity, is this the interchange? Can you refresh your recollection?

A This is the interchange right here that we are talking about. We are talking about an area down in about here (indicating).

Q Perhaps you could step over to this map and with a little more specificity locate for His Honor the interchange?

THE COURT: Do me a favor and take counsel's orange pen and make a circle roughly where that interchange is planned to be.

THE WITNESS: Sydenstricker will be relocated, also.

BY MR. HAZEL:

Q I had noticed on the plat a parcel of land in this vicinity. Has there been some right-of-way acquired in this vicinity at all for the interchange? Any of this right-of-way been acquired?

A Some of it has, yes.

Q At this point?

A Right.

Q That is programmed to be one of the major thoroughfares. I don't want to get into words of art between collectors and distributors and primaries and arterials, but that is one of the major access points to the Pohick?

A Yes, sir.

Q The right-of-way will continue to be acquired as

development occurs, is that correct?

A Yes, sir; it will.

Q Pointing to other areas along that road, is this area to the north, perhaps a mile from the subject property, a portion of right-of-way which the County has acquired for that purpose?

A Yes, sir.

Q Has the County acquired additional portions of that right-of-way through the Middle Run east of the Levitt zoning?

A Yes, sir, or attempted to get some.

THE COURT: What is the name of this big highway again?

THE WITNESS: Monticello Freeway.

BY MR. HAZEL:

Q This is Northern Virginia Expressway or Monticello?

THE COURT: I thought Monticello was the one that was supposed to go down Braddock Road?

THE WITNESS: This is cross-County, that is right.

Monticello is here (indicating). It is a cross-County freeway. The other Monticello ties into it at Guinea Road.

THE COURT: While we are on that subject, do you have any knowledge as to when that is planned or has that even

been set?

THE WITNESS: No, sir.

THE COURT: Just maybe at this point?

THE WITNESS: Hasn't even been talked about seriously with the State yet. That is for a date of construction, no, sir.

BY MR. HAZEL:

Q Mr. Hendrickson, in your experience with the County, has the development generally preceded the growth when you are in the road business?

A Development generally precedes growth, yes, sir.

Q Except on the sites themselves?

A Except on the sites, yes.

Q Assuming the Williams and Van Metre property zoned here, located in this area, zoned sometime in the next year, and receives sewer allocations in '76, do you see anything different about the development of that property as you would anticipate it and any of the other properties that have developed in the area?

A No, sir.

Q Whose specifications do the developers build their streets to?

A County specifications approved by the State.

Actually, they are State specifications.

Q Along Sydenstricker Road, there are numbers of sections of that, that show as four-lane wide. Now I am talking about areas immediately east of the property and running on east for a mile or so.

A Yes, sir.

Q Were those areas of the State road widened by developers as the property developed?

A Yes, sir. Wherever we have a site plan we do get the road improvement.

Q Is that the orderly process of development that the County is functioning under in recent years?

A Yes, sir.

Q How long does it take to process a subdivision plan generally, and I won't use this for other purposes, but what do you estimate is the general running time from the time a parcel is zoned, assuming it moves normally, until the time the section is actually of record and the developer can go to work?

A I would say from the time we receive the preliminary until he receives an approved construction plan, in excess of six months.

Q Is a year to 18 months not extraordinary?

A I would say from zoning time to construction, final construction plans, that is not unusual.

Q Consequently, if this property is zoned now, it could well be late '74 before construction would actually commence, is that correct, even assuming a sewer allocation?

A It would be late '74, yes, sir.

Q Now, Mr. Hendrickson, in your experience in your offices, is it customary that tracts of this size, and we are talking about a total tract of 400 acres to developers, develop in sections?

A Normally they are developed in sections.

Q What normally is the size of a section? Do you have any estimate of that?

A It will vary from 50 to 150 houses.

Q Is it fair to say that rarely are more than 150 houses are in one section?

A I would say it is rare when there is 150 in one section, yes, sir.

Q So that generally it is fair to say it is developed in increments of about 100 lots a section?

A They would average a hundred on a big development.

Q And under no circumstances would the whole development occur in six or eight months?

A No, sir.

Q Mr. Hendrickson, do you know of any cost on the site, or keep it on the site, that is paid for by the County from general revenue or from any other government funds?

A No, sir.

Q Under the cluster concept, you would receive a school site if the School Board, as they did in this case, asks for school site, is that correct?

A We might receive it if it weren't cluster, also, but I would assume that if it is cluster we will get a school site.

Q Your powers of persuasion are great enough so that you receive it anyway, but if you have cluster you have absolute control?

A Yes, sir.

Q In your experience, has the predominent type of development on tracts of this size in Pohick been in cluster concept?

A Yes, sir; it has been.

Q Is that deemed desirable by reason of the vegetation preserved?

A Yes, sir; I believe it is. We get park area in the stream valleys. We get land that is valuable to the County.

Q There is some slope problem in portions of the Pohick, is there not?

A Yes, sir.

Q Now, if this developed conventional without sanitary sewer, it would require lots of a minimum size of 20,000 feet, is that correct?

A Well, if it went conventional, it would be 40,000 square feet.

Q So that you would have to have an acre lot on which to build a septic?

A Especially if you don't have water.

Q In your opinion, is it preferred to develop this under the cluster concept?

A We think so, yes, sir.

Q That really depends upon sanitary sewer availability, doesn't it?

A They could cluster one-acre septic but --

Q It would not be very practical?

A It is not as practical as getting more open space with the higher density.

Q Unless tree vegetation is removed for septic tank installation?

A That is. You have not only to clear for the house

and the utilities, the electric, gas and that sort of thing, but you do clear for the septic field which mean you clear about, on a one-acre lot, you clear at least a quarter of the acre for house and septic.

Q It would be fair to say, preferred method to develop this would be to await the availability of sanitary sewer and then develop it with sanitary in cluster concept?

A My personal belief would be that that would be the best development.

MR. HAZEL: No further questions.

CROSS EXAMINATION

BY MR. SYMANSKI:

Q You were asked about Keene Mill Road. I believe you said the Virginia Department of Highways plans to improve it, is that correct?

A Yes.

Q Do you know when?

A I think it is part of their continuing program to continue on the improvements they have now started. I don't know when.

Q If the road is in the six-year plan at what point of funding are bids let on the work to be done, do you know?

A On certain funds availability which is 30 percent,

60 percent funding.

THE COURT: Fund availability from whom, sir?

THE WITNESS: The State, State funds available.

THE COURT: Who puts up the balance?

THE WITNESS: The State does but they have some lead money. They get started.

THE COURT: In other words, when they have 30 percent of the money available, they will start?

THE WITNESS: There will be some right-of-way they will still have to acquire. The front money is for acquisition, engineering and that sort of thing.

BY MR. SYMANSKI:

Q Do you know when the extension of Keene Mill referred to will be done?

A No, sir; I do not.

Q Would it be fair to say that on the comprehensive plan or on the community facilities plan there are plans for a good network of streets, transportation system in the Pohick, in your opinion?

A On the comprehensive plan?

Q Yes.

A Yes, I think it is.

Q Are you familiar with the existing system in the

Pohick, the existing road system?

A Yes, sir.

Q What is your opinion of that road system? Is it a road system which in your opinion is up to standards for an urban density development area?

A Not yet, no, sir.

Q Not yet?

A No, sir.

Q You did say that there was no date as yet for the cross-County or the Pohick access road?

A No, sir.

MR. SYMANSKI: No further questions.

REDIRECT EXAMINATION

BY MR. HAZEL:

Q You mentioned road system is not up to development. The process of development itself brings it up to standard, does it not?

A It brings it up to a safe standard. It won't be the ultimate, but it will be a safer standard than exists today.

Q If in fact development does not occur, the roads are not improved at all, are they, Mr. Hendrickson?

A Until they are improved on the regular State program --

that is, the existing roads.

Q The regular State program generally puts the money where the development is, does it not?

A Where the development has been.

Q Where it has been. That is quite appropriate. So, if you don't have the development, you would in effect be at a complete standstill in getting any improvement?

A That has been the pattern that the State has followed.

Q In connection with that point, Braddock Road and the interchange with the Beltway have recently been widened out to Guinea Road, have they not?

A Yes, sir.

Q When Kings Park, which is the large area with some 800 homes, is it not?

A Yes, sir.

Q That I am now pointing to on Exhibit 18 -- when Kings Park was developed, Braddock Road was in approximately the same construction pavement configuration that Keene Mill Road is north of the subject property, was it not?

A Yes, sir; that is right.

Q After the development, Braddock Road was widened to its present four-lane configuration, was it not?

A Very recently, yes, sir.

Q Is the same situation true of Rolling Road which is a north-south connector running from Braddock down to Keene Mill?

A Yes, sir.

Q That was improved after the entire West Springfield complex was essentially developed as it is today, was it not?

A That's right, yes, sir.

Q Keene Mill Road from the Beltway at Springfield out to the shopping center vicinity in West Springfield was again developed by the State after practically all the development shown on the map, was it not, sir?

A Yes, sir.

Q Mr. Hendrickson, do you know of any plan, proposal or basis under which you could suggest that State highways in the vicinity of the subject property will be developed ahead of the development of the subject tract?

A I don't know of any, no, sir.

Q That has always been nice to talk about and think about, but a very hard-to-obtain goal, has it not?

A Yes, sir.

Q Now, Mr. Hendrickson, one final question in regard to public facilities:

Do you know of anyplace that schools have been built

on tracts before the sites were dedicated or made available otherwise through development?

A I don't know, no, sir. I don't know of any.

MR. HAZEL: No further questions.

RECROSS EXAMINATION

BY MR. SYMANSKI:

Q Didn't you say that Keene Mill Road was in the six-year plan, the Virginia Department of Highways' six-year plan?

A Yes, sir.

Q How far over does that go?

A Is there a Five Oaks or Five Forks Road there?

Q Yes.

A I don't know precisely but I know there is improvement from Five Oaks eastward.

Q Does it go over to Pohick Road?

A That I don't know.

Q Hooes Road on the six-year plan?

A Hooes Road, sir?

Q Down here.

A It has been but I think it has been recently --

Q At the time of this in November-December, '72, was it on there?

A I don't know precisely whether it was.

Q Was it your statement that the Virginia Department of Highways has no plans to build any roads where there is no development?

A I can't say they don't have plans to build roads where there isn't development but you are talking within the County.

Q If Hooes Road was in fact in the Virginia Department of Highways' six-year plan, is there development along Hooes Road, whichever it is?

A There is some, yes.

Q But it is not this type of development with density up here, is it?

Would you like to look at the map?

A You have the Larwin tract which will be something over a thousand units which is on Hooes Road and, well, it is around Hooes Road, Rolling Road, in that vicinity.

Q As far as the government being along Hooes Road, before it was on the six-year plan, it was not, was it?

A No, it was not.

MR. HAZEL: Lest we leave a misimpression, Hooes Road was being improved, was it not, to service the development that was north of it, whether the development was actually contiguous to the road or not didn't make any difference, did

it?

THE WITNESS: I don't know specifically whether they put that plan on but it would relieve some of that traffic out to 95.

FURTHER REDIRECT EXAMINATION

BY MR. HAZEL:

Q This development was in place, was it not?

A Yes, sir.

Q The traffic was having difficulty getting out over the single road at Keene Mill and Hooes Road was programmed on the south side down here to get out part of that traffic, wasn't it?

A To Highway 95, yes.

Q So that while the development is not actually fronting the road in urban density, it was to serve the development that was already in, was it not?

A Yes, sir.

MR. HAZEL: No further questions.

MR. SYMANSKI: No further questions.

(Witness excused.)

THE COURT: We will take a short recess.

(Short recess.)

MR. HAZEL: I will call Mr. Payne.

Whereupon,

ROSSER H. PAYNE,

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

DIRECT EXAMINATION

BY MR. HAZEL:

Q Please state your name?

A Rosser H. Payne, Box 818, 59 Culpeper Street, Warrenton, Virginia.

Q Your profession, Mr. Payne?

A I am a professional planning consultant and Professor of Planning at the University of Virginia.

Q Mr. Payne, were you employed at one time by Fairfax County?

A I was, sir.

Q For what period of time and in what capacity?

A From 1950 until 1966, at the close of that year, I held the offices of Principal Planner and Deputy Director of Planning -- 16 years.

Q Mr. Payne, in your period of employment with the County, and during the period since then, have you been and are you now familiar with planning considerations, land use factors, in Fairfax County generally?

A I am, sir. I have appeared as an expert witness in a number of Court cases and as an expert witness in a number of zoning cases.

Q Are you a member of any professional associations of planners?

A Member and past President of the American Institute of Planners.

MR. HAZEL: I would tender him as an expert in the field.

MR. SYMANSKI: I so stipulate.

THE COURT: I thought you might, sir.

BY MR. HAZEL:

Q Mr. Payne, at my request have you made a study of the 418 acres, Williams and McIlvaine parcels that are the subject of today's case?

A I have, sir.

Q Have you reached and conclusion about the action of the Board which forced those properties to remain in the RE-1 category?

A Yes, sir. In studying the area involved --

Q What is your conclusion? Then we will go into all of the lead-up to it.

A My conclusion is that the decision of the Board

to delay or hold up growth in this portion of Middle Run is a decision which I do not understand and cannot substantiate from any of the facts that I found, including the staff reports and the physical analysis of the property.

Q Is it in your opinion reasonable?

A It is unreasonable in my opinion.

Q Mr. Payne, would you review the County generally, very briefly but generally, as far as development areas and demonstrate how the County's development policies affect the Pohick Creek Watershed?

A May I proceed to the map and mark it, sir?

Q Yes, sir.

THE COURT: What number is that one over there?

THE WITNESS: Exhibit 12.

Just quickly, if the Court please, to place this area in perspective, we already have some testimony on it today with regard to sewer capacities and so on, so I won't repeat that.

What I will do is to point out to the Court the fact that these basic watersheds were the initial working tools of the Fairfax County Board, Planning Commission and staff 24 years ago.

The basic areas of growth, of course, with the

suburban spillover from Washington, which included the Pimmit Run Watershed and the Cameron Run Watershed, this was prior to the first annexation by the City of Alexandria which took in this piece -- that is, between the area of Duke Street and westward to Shirley Highway. These were the areas of initial growth in the years following the Second World War and up to around 1950.

In 1953, there was a $20,000,000 bond issued which became a key issue for Fairfax County planning, rather than direction of growth by sewer, but the problem then was the fact that 80,000 people had to be located on a sewer system which was going to cost $20,000,000.

The County was very concerned and from the planning point of view at that point in time I contend the future of Fairfax County was committed in terms of its direction since the bond issue will not be repeated until the year 2000 in connection with these systems. There were a number of plans. The homes on Trip Run was the Alexandria water supply which is now called Lake Barcroft. That had been bypassed and plants built in Alexandria which served this watershed.

The Pimmit Run system had a small plant in McLean. That had to be bypassed to take care of this, down this way, to Washington.

The problem came after the $20,000,000 bond issue in 1953: What to do with the expansion in the Dead Run and Scott Run on the north end to Accotink Creek which included the City of Fairfax, half of Vienna and expansion areas west of Annandale, and what to do with the Pohick Watershed since there was a pressure for development here.

Involved in all these planning considerations then was: In which way would the County growth direct itself?

The decision which covered the $20,000,000 bond issue was to include the Dead Run and Scott Run area to take the gap of the Accotink Watershed and to close the City of Fairfax plant and to close the Vienna east plant and to pick up the Accotink Watershed; to come back at that time and to add in the Accotink Creek which at that time was being pumped over in Springfield. Development occurred over into Cameron Run which was treated this way.

The next idea, of course, was to include the Accotink Creek system in its entirety. To protect again Lake Accotink, which was then the Fort Belvoir water supply, was closed.

There were two smaller plants, Little Hunting and Dogue Creek which were put in and designed for that and you heard testimony on capacity of that this morning.

The next question came in 1962. That was a major period of decision in the County's mind because at that time the County was growing at a rate of nearly 20,000 persons per year and the Court can see from this map was rapidly filling up within the bond issue areas.

The key decision that was made by the Board of Supervisors, of the five under which I served and others, was readily important at this time. The expansion of growth had to be to the northwest and be directly west, and across two sheds following transportation corridors and to the southeast along Shirley Highway.

The question in 1962 was: What happens after the Beltway is completed? What happens after the airport is open? What happens in the Occoquan Watershed and what happens on Mason's Neck?

These Boards of Supervisors struggled with this problem of containing growth in areas which could be economically served. That has been the name of the game since the very beginning, if the Court will pardon me.

It was early decided that the Occoquan Watershed which provided water to the City of Alexandria, who in turn sold it to Fairfax County, had to be protected. It was determined as early as 1962 that the Pohick Creek Watershed

which was the site of what was known as Burke Airport, and in 1962 the government owned parcels which were being sold back to private enterprise since the site had been selected for the airport here, was available for development.

The County knew that as early as 1962. It did not shed into the primary water supply that was necessary for the City of Alexandria and Fairfax County.

So, the next question is: What other areas were there available for growth from the planning point of view?

The first of those decisions was to set up what was known as Sanitary District 12. It is now called the Bull Run Planning District. It is in this location right here (indicating). That was to be served by four plants, one added at Greenbriar later.

Also, if necessary, to pick up any sewerage that would come this way from the airport since there was no full agreement on the Dulles trunk line at that time.

The next step was to set up Sanitary District 14 which included this watershed of Sugarland, Horse Pen Creek.

THE COURT: How about putting 14 in the center of that and 12 in the center of the one you just said.

THE WITNESS: All right.

Those, as the Court knows, were established under

Virginia sanitary district law; therefore became a part of the County's growth pattern.

Now, with that as given, the planning objective then came in 1963. To change the objective growth of the County from a city progression in this direction, and a city progression in that direction along Route 66 and 70 to what is called a suburban cluster concept, Reston was approved here in 1959.

So, the major difference between the standard progression moving west was in three areas: the area of Sanitary District 14 was to be a cluster of development including Reston; the Difficult Run area was to be left largely open in low density; Sanitary District 12 became the Bull Run Planning District. This became the Upper Potomac Planning District.

Those streams which fed directly into the Occoquan Reservoir in this area, all the way down to the Village of Occoquan, was left in the same low growth pattern as the Difficult Run pattern. That is permanently RE-1 and RE-2 for conservation of natural resource protection purposes.

If the Court will remember, I said that these were set up as an extension and you can see by the numbers of the ten sanitary districts which have been consolidated in the eastern part of the County the decision to be made was whether

or not Pohick Creek was to become a sanitary district or to become an extension of the $20,000,000, what was called, integrated sewer system.

I participated personally in all of the Boards' discussions during that period of time when they made a policy decision.

The decision was based on our staff study that a treatment plant which is now called the Lower Potomac Plant, in those days it was known as the Pohick Creek site, could be located near the junction of Accotink and Pohick Creeks at the same elevation, a very short tunnel could serve this watershed and this one with no additional trouble.

BY MR. HAZEL:

Q Would you name the two watersheds that you are speaking of, Accotink --

A The entire Accotink Creek Watershed and the entire Pohick Creek Watershed, comprising some 80 square miles could be served by one common plant.

THE COURT: When was this decision made, sir?

THE WITNESS: This decision was made to extend this as a part of the integrated sewer system and not a sanitary district in 1973.

Potter & Associates, engineers from New York City,

were retained by the County to determine the feasibility. The first report was dated probably in February or March of 1964 which set up the first plan for the expansion into the Pohick area which was approved by the Board that year.

The reason I wanted to make that clear, that the suburban cluster plan which was adopted by the Board in these areas established the green space for natural resource protection and added, with the full intent, to Pohick Creek Watershed in its entirety a 30-square-mile special area under the integrated sewer system, no sanitary district.

Now, within that area of debate, in the first adopted plan, it was clearly enunciated, and I have seen nothing in today's testimony or nothing in the staff reports, or nothing in the review of the Pohick policy that would indicate any Board of Supervisors has changed that direction. The main thrust of the sewer system which has been the governing system of this continued expansion in this direction by watershed was the tenor of sewering the area.

Of course, there are three basic watersheds in the Pohick Valley. The largest section is the Main Branch which runs, of course, from its outfall at Gunston Bay all the way to the City of Fairfax, the one which is the subject of today's discussion, which heads out just above Lee Chapel and Keene

Mill Road is called Middle Run -- that is 2,500 acres; the third section is known as South Run which goes over to the Burke Lake park system and those were the three subsheds.

I reviewed very carefully -- but that is the policy -- I reviewed very carefully the adopted comprehensive plan of 1964. I have reviewed very carefully the Restudy of the Pohick Watershed adopted September 10, 1969. More recently, a policies review which the Board substantiated just a week or two ago with regard to this policy. Nowhere do I find any difference between the Middle Run and the Main Branch of the Pohick. The South Run was the only area that was ever excluded from detailed plans for growth at that time for two primary reasons. One of those was the extended acreage that went through the Lorton Reformatory on the lower end and the second was the transfer. The first of those considerations had to do with the constriction of the Lorton Reformatory here at the access to this site for sewer line, South Run. The second was the location or planned location of what we now know is the Burke Lake Park. Judge Paul Brown was involved in this decision because the third element was the transfer of the Burke Airport property away from this area to this area.

So those reasons, the three primary reasons, why

South Run has been and still is -- largely, those issues have been, of course, settled; that is historical. But the South Run Watershed has not in itself been included in any particular plans for public facilities.

The point I do want to make to the Court that is in reviewing all of these things, including this study, and including the more recent studies of the County which are dealing with the rezoning cases at hand, I find in reading very carefully that the Board of Supervisors in dealing with the Pohick policy in which they attempted to separate the Main Branch from Middle Run is not quite clearly stated.

I can say to the Court that the things that came through strong to me were the letter of intent which expressed the purpose of the Board in this policy to provide a growth to 161,000 people in the entire Pohick Watershed by the year 2000, 130,000 of which were to be located in Main and Middle Runs.

The second thing is the policy dealing with Middle Run. I will speak to just policy number two on page 13 of that report which says quite clearly: In the use of the conjunction "and," that the growth patterns in the years 1969-1975 shall include Middle and Main Run. It doesn't say "or." It says "and." And that has been my understanding of it from

the very start as has been pointed out by previous witnesses.

I also note as a key point that in the policies on Pohick Creek which were adopted in September, especially on pages 77 and 78 of that report which deals with the policies, I will note the most significant one, the policy number nine points out that growth should be carefully reviewed but in no way was to abrogate the 1966 sewer contract referred to and introduced into evidence, which covers 2,541 acres which is the entire watershed.

Therefore, I can only conclude that the current Board, in the actions of the rezonings explained to the Court earlier, and the policies which I have read, in no way changed these policies and if there is a statement to the effect that Middle Run and Main Branch are to be separated, it is name only and not in fact.

I therefore conclude from this analysis of their actions in failing to rezone as far as the planning aspects are concerned, is totally unreasonable since, on the one hand, the Board said, this is where you shall grow -- five Boards have said that, and you shall not grow here. And the reasons for that are the ones we have just explained. I cannot understand how any governing body can ignore those established facts and come back and say, all right, now you have grown

50 percent of the way, we are going to stop you in the middle.

In other words, if I may just paraphrase it, that is like launching a battleship and after you knock out the last block say, wait a minute, I want to change the superstructure. We have half a million people in the County and it is growing rapidly even though that growth rate is being reduced by restrictive policies.

I have no doubt that once half a million people locate in these 400 square miles the growth pressures are going to continue to be intense. While I respect the planning aspects of properly controlled growth, that is the conditions that go along with applications, I do not see how it can be in the planning objectives and interest of this County to say on the one hand, you shall grow here, and on the other hand, upon actual application to refuse to zone. That is the basis for my statement.

BY MR. HAZEL:

Q Mr. Payne, with regard to the specifics of the Master Plan on this particular area, could you describe the policies of the Pohick? We have set up a series of neighborhood centers that were to be surrounded by higher density commercial activities and so forth and relate that to the subject case?

A Yes, sir.

The neighborhood policy situation, I again would like to use the County.

Q Use that County exhibit, the Pohick plan.

A I need them both.

THE COURT: That is County exhibit. Please don't mark it up unless they want you to.

MR. HAZEL: The map on top is our exhibit. The framed map below is the Pohick Study which is the County's.

MR. SYMANSKI: I believe that was Mr. Bettius', not mine. That is from the Chris case.

THE WITNESS: I will make no marks on any of these unless I am requested to.

For reference, I would cite particularly in the neighborhood policy, covered on page 10 of the Restudy of the Pohick Watershed, they talk about the policy.

THE COURT: What page is that on?

THE WITNESS: Page 10. In which, if the Court please, there will be shown two types of facilities for neighborhood growth. This is all we are restricting ourselves to. If the Court can see all of these buckshot-type affairs here on the map, you will note that some of these circles, such as this large one, is a major community center; these

are community centers by graphic display. There are some of these which are solidly colored from the center. There are others which are circled and left white.

I would refer you to the fact that this comprehensive plan for Neighborhood 12 which includes this parcel located here shows a two-dwelling-unit per acre density in the entire neighborhood and it shows specifically a neighborhood center on this tract of ground in this area.

It is true the comprehensive plan shows generally the locations. They are not divided into property lines. The significance is that comparing this neighborhood center with that one, according to the key on the public facilities copy of this plan, which is also included in that report, this is to occur, and this is Middle Run, this is to occur prior to 1980. We are approaching 1974 now. This is to occur after 1980.

BY MR. HAZEL:

Q Mr. Payne, is there any distinction in the Pohick plan between neighborhood centers in the Main Stem of the Pohick and neighborhood centers in the Middle Run?

A None at all, sir.

Q So then all of the neighborhood centers in both the Middle Run and the Main Stem are designated to be in place

prior to 1980?

A That's correct.

Q Now, Mr. Payne, before you leave that plan, could you point out to His Honor the ones that have been zoned either in Middle Run or in the Main Stem?

A The Main Stem-Middle Run areas have been zoned to a large extent here at this point, community center, neighborhood center here in 14.

Q There are two neighborhood centers shown in the Middle Run. One of those has already been zoned, has it not?

A I believe this portion here has. This is on, just south, between the cross-County expressway and Pohick Road. I don't know the exact location.

Q I point out to you that zoning on Exhibit 18. Is that the commercial zoning? You may have it on your other exhibit. You do. Would you point out to His Honor the one that has been zoned of the two centers shown in Middle Run for community centers? Would you show us the zoned one?

A This is the zoned one here.

Q Is that in Middle Run?

A I believe this is it.

Q Neighborhood center?

A I'm sorry.

Q Would you put an X over the neighborhood center that has already been zoned in Middle Run?

A This is on Route 641, Pohick Road, located here.

Q The other neighborhood center is in part on the subject property, is it not?

A Yes.

Q Would you put a circle where that one is to be?

A Yes.

Q Would you describe to His Honor what the neighborhood center concept anticipated regarding density and commercial facilities?

A Yes. The idea, and of course that which was set forth in the comprehensive plan was that neighborhood center would encompass basically 5,000 people; the neighborhood center would have its convenience services and shopping center which would be surrounded by a gradient density of townhouses and apartments out to a smaller density area.

Of course, the community center is much larger but basically it is a convenience center with the public facilities necessary to serve a 5,000-person neighborhood. That was located on this plan at this time and of course is referred to in the pages that I mentioned to the Court in the report.

Q Mr. Payne, would you point to the community center

that is under construction just adjacent to the Middle Run boundary?

A That is located here in the Rolling Valley area, just to the north of Old Keene Mill Road.

Q Would you put a "C" right on that?

A Yes.

Q Is there also a neighborhood center that has been zoned and is commencing construction at Five Forks?

A That location is here.

Q Would you put an "N" on that?

A Yes.

Q Would you show His Honor on the Master Plan what those, what the centers you have just pointed out are?

A Those are located in this area and are intended to encompass this circle and this circle (indicating).

Q The lower center in Middle Run is that circle?

A That is that "C."

Q The other circle is on the subject property?

A That circle and Neighborhood 12 is where I placed it here.

Q Mr. Payne, is it normal in your experience that centers, when they are planned and under construction, rely upon planned density in the vicinity for their viability?

A Yes, sir. That is a normal rule of planning to expect these plans to precede development. I don't know of any planning program that I have ever been involved with that anticipated development before planning.

Q Now, the subject application was for RE-1, change from RE-1 to R-12-5. Was there a density in the neighborhood center that could be spilled over into the single-family?

A Yes. The statement made in the Pohick policies plan is that the neighborhood and community centers should retain the highest density; as the density patterns developed away from these centers, they become remote, is the word used in the report, the density should not be greater than two units per acre.

I would point out that in this case the center is located approximately north, center of both cases, and is right adjacent to the area which indicates the plan reports to prescribe a density of even greater than two units per acre.

Q And now, while the Court is not being asked to rezone to either 12-5 or R-17 specifically, do you have any opinion as to whether the Master Plan is substantially being violated by the 12-5 request?

A In my opinion, it is not. The total acreage involved in case C-169 is 138.4 for Williams and in C-301 is 279.5 for

Van Metre. Utilizing the planned density of 2.0 units per acre is 836 units which would produce 2,926 people, using current ratios. That would be the planned areas.

If the application at two and a half dwelling units per acre were considered, that would produce 1,045 units and 3,054 people. That is the highest and the lowest.

If we use the R-17 density which is zoned adjacent to this property, that is at two, two dwelling units per acre. We would get 918 units then.

Now, the difference in population between the highest figure and the lowest figure is 728. Therefore, I contend that the difference between the County figures involved is insignificant.

THE COURT: What was the figure you had for 2.0?

THE WITNESS: Eight hundred thirty-six units, 2,926 people.

THE COURT: Was it 2.5?

THE WITNESS: Two point five, 1,045 units and 3,654 people.

THE COURT: How about 2.2?

THE WITNESS: Two point two is 918 dwelling units and 3,213 people. The difference I gave you was between the highest and the lowest.

BY MR. HAZEL:

Q Mr. Payne, the neighborhood population figures that are given in the Master Plan anticipates the whole neighborhood some of which includes the land that is already developed at lower densities, is that correct?

A That's correct.

Q Is some of this area in Neighborhood 12 already developed at densities which are not likely to go to the maximum number?

A Oh, yes.

Q Would you point that out to His Honor?

A Those areas here are some of the areas which are already developed in one-acre lots and in the R-17 category.

Q Now, Mr. Payne, the numbers that you are talking about refer --

THE COURT: Let me interrupt for just a second. Those RE-1 lots that are in the center of the "V," the ones you pointed to earlier in the center of the "V," which you say are already there, have they been developed?

THE WITNESS: There are a few houses on these tracts but most of them are vacant. The two or three that are here, are in very rundown condition.

THE COURT: No $65,000 or $70,000 houses in there?

THE WITNESS: No, sir.

BY MR. HAZEL:

Q Mr. Payne, you have talked about both unit densities and population densities. Does the Pohick Master Plan contain specific numbers by population?

A Yes, it does.

Q Would you refer to page 17 and point out to His Honor the number of people that you are referring to in both 12 and 13?

A Page 17 of the report, Neighborhood 12 is estimated to have 4,600 people. Neighborhood 13 is 7,900 people. The gross population as computed on 7.0 in 12 and 7.6 in 13, conventional zoning, would be 1.7 in 12 and 2 in 13. That is units per acre.

Cluster zoning, 1.8 in 12 and 2.2 at 13.

PDH category 2.2 in 12 and 2.6 in 13.

Q Does that mean that every parcel, every acre in the neighborhood would have to develop at those maximum densities to generate that number of people?

A Not necessarily, but in a gross density basis, I would have to say that this is the maximum holding capacity under those densities.

Q Under the densities.

You don't find, as I understand it, either the R-17 or the R-12-5 request to do violence to the Master Plan concept?

A Not at all. The figures computed using County statistics amount to 700 people and from the highest to the lowest, and as a planning matter that is insignificant.

Q That is spread over 400 acres?

A That's correct.

THE COURT: Do you know how many people there already are in that neighborhood?

THE WITNESS: No, sir; I don't. I know where the development is but I don't know what the head count is.

BY MR. HAZEL:

Q Mr. Payne, have you reviewed the problems of public facilities as they relate to this subject application?

A Yes, I have.

Q And have you considered those in conjunction with a schedule or a realistic experience based indication of how fast this property is likely to actually be occupied?

A Yes, sir.

Q And what are your opinions and conclusions regarding public facilities?

A Well, the situation dealing with these items is one

which has been, I think, a direct result of what I have outlined earlier has been the direction of planning policy in this County for the last 20 years, remembering that the area to the west of Pohick Road is South Run Watershed which has not been programmed. The large portion of it is shown here, the Burke Lake Park area. Remembering those policies, the County has installed a 12-inch water line all the way down Pohick Road which is a typical Fairfax County secondary road. It is paved, two lanes.

At this point right here is what is known as Pohick Road booster station owned by Fairfax County Water Authority. Therefore, this is installed and in place ready to use. The fire plugs are there. There isn't any doubt that the Water Authority knew about these plans for a length of time and has planned accordingly. I am sure this water line was not put down there through a low density area on purpose.

The second item dealing with the same related factors of pass-through is the installation of the Middle Run sewer trunk by the contract that was referred to earlier.

I again repeat that the sewer contract is quite explicit in the fact that it includes the entire Middle Run Watershed as shown on that map where there is cost reimbursement or developer participation, either way. That is the plan.

In terms of the public facilities in the area, if I may go over to this map on schools, every one of these green areas that you see is a school site which has been acquired and is in a program building or what has been built.

Now, with regard to this specific area, of course the old Burke School has been here. This is elementary, has been here for many years.

In terms of high schools, the West Springfield High School, much more recent than that, but is there, and is full, to overflowing.

This high school is the Lake Braddock High School which is just a little over a mile from the site. This is 400 scale, incidentally. This school is programmed to open and relieve these schools in the fall of 1973.

The other item was that there has been a school site dedicated here for this development. It is not programmed to have a building put on it. The site is there. This school is built; this is the Hunt Valley School. That has an overload problem temporarily, but this school is scheduled for opening late this fall or in the spring, I don't know exactly what date. The dates we have are either late '73 or early '74. This would have to be verified by someone from the School Board.

The comprehensive plan calls for a school site in this area which has been referred to earlier as a dedicated site.

BY MR. HAZEL:

Q Mr. Payne, with regard to that, the neighborhood concept of schools is often talked about. Are you familiar with that?

A Yes, sir; very familiar with it.

Q It is obvious that the neighborhood concept of schools implies that the site be available before the school can be built?

A That has been the practice in this County for as long as I can remember.

Q And consequently, the County's request that a site be dedicated on the subject tract has got to be a prerequisite to the construction of the neighborhood school on that site, does it not, or is there some other approach to it?

A No, I think that is the way to do it. This neighborhood was properly structured by the staff because it is going to be divided by a cross-County expressway which you have alluded to earlier, a 300-foot-wide carrier, so therefore this neighborhood school will take care of that side and this neighborhood school will take care of that side and this

school will take care of that. Burke is still in public ownership and still in use. The old school may or may not be phased out. But the distribution and location of these sites, again I maintain, is the result of 20 years of some fairly hardnosed and some advanced planning in this area and the results are exactly what we expected.

Q Are all the green, solid colors on that map schools that are actually in place?

A That's correct.

Q How many high schools are on that map?

A Well, we have the West Springfield High School here; we have the Annandale High School here. We have the Robinson High School at this point. All are constructed, and this one to open this fall, which is the Lake Braddock High School. Those are senior high schools in excess of 2,000 capacity.

Q Within a short distance, do you have any universities or colleges?

A Yes. We have, as everyone knows, the George Mason University here which is approximately six to eight miles north of this site but in the same area.

Q Do you have a community college?

A Yes, the community college -- see if I can remember the exact tract --

THE COURT: I can see it from here.

THE WITNESS: Right in this corner, right off 236, west of the Beltway approximately half a mile.

BY MR. HAZEL:

Q Mr. Payne, in fact is the development, the zoning end of the development, of the Van Metre-Williams case really the key to getting the school there, isn't it?

A In terms of past County practice, and what I assume the County is still doing, yes.

Q Do you know of any practice where the County would go in and acquire that site and build the school before the zoning?

A Not unless it were acquired as an emergency measure and that is a very unusual situation in Fairfax. In terms of the ability to acquire and through dedication the staff has always been instructed to do what it can to encourage dedication.

Q Do you know of any County policy that would have the County go into that area and buy a portion or buy a school site to serve Neighborhood 12 in advance of the zoning in the neighborhood?

A I wouldn't think so. I don't know that it has ever been my experience to see that.

Q Mr. Payne, with regard to the highway system that serves this tract, do you have, in your opinion, any problems with the highway system and the development approach to that?

A No, sir. If we take into account the fact that we can't have our cake and eat it, too, at the same time. That is speaking historically. Again, in Fairfax County, in the current situation, it is no different today than it was 20 years ago. We are not in the highway business but we are obligated to try to get dedications and construction; that has already been brought out. I won't repeat it except that is the current policy and has always been the policy. We see nothing on the horizon to change it.

Further, the number of roads that proceed westward from Rolling Road into this area with the key point being here --

Q Is that Five Forks?

A This is Five Forks.

In the six-year program the Keene Mill Road program is supposed to be completed at some date. No final date has been given.

The other roads are proceeding, such as Sydenstricker Road and Pohick Road, Lee Chapel Road when this occurs, Old Keene Mill and whenever the development does occur as has been

pointed out, it will be built by the developers. That has been the normal process. If we hadn't followed that, since we are not in the highway business, we would never have any roads. That has been the policy of the County.

The traffic counts expressed in the staff report show that there is no problem with overloading of these facilities at this time.

They also point out that unless they are approved as development proceeds, there could be a problem. That is true; that has always been true and will always be true.

These situations improve as time goes on but I contend that the planning and four-laning of Rolling Road, the planning and rolling of Braddock Road as the Court will notice, the County through its dedications here, this is 300 to 400-foot-wide facility that is just -- not Braddock Road; that is Monticello -- even though it hasn't been built you will notice over here it is 300 feet all though this development to this point, so in the space of 1959 to 1972, the right-of-way for Monticello is there through all that development.

This is sound planning. The same thing follows in terms of highway planning with regard to the cross-County expressway. I would call it Thomas J. Stockton Memorial

Parkway, if nothing else, but that is programmed right there, in that point. Somebody, someday, will use that right-of-way; we don't know when. I wouldn't estimate when, but the point to be made is the fact that the County, without any shadow of a doubt, right on this map, by these marks and by these plats and by these zonings, has clearly indicated that it is going to grow in the Pohick Watershed and Little Run Watershed, that is what I meant by the battleship on the ways which you have committed and you cannot uncommit. The boat is launched from the planning point of view. You cannot, in 1973, say that we are now going to stop this. I do not believe that is a proper planning principle.

Q Mr. Payne, there was a comment in the staff report -- I believe it was on the Williams case -- that one of the roads fronting the property -- I believe the Pohick Road -- was unpaved at the frontage of the road, is that correct?

A That is not correct; that road is paved.

Q Keene Mill, I think it was.

Now, Mr. Payne, finally, did you review recent rezonings in the area to determine what the history of that rezoning has been in the last year or two?

A Yes, sir; I have. I have prepared so that I can transcribe to the plaintiff's Exhibit No. 17 from a worksheet

which I have prepared and to write on this sheet.

Q Before we put the data on the sheet, would you indicate for the record the difference between the yellow and the orange color?

A Yes, the yellow color indicates rezonings which have occurred in the Middle Run area and the Main Branch area since the Pohick has been opened to development. The white area, of course, is areas which maintain the existing original September 1, 1959 zonings.

The orange colors indicate the zonings which have taken place in what is known as the "C" series. These are zoning cases which have been handled by the Board of Supervisors within the last two-year period. The reason for this separation is to get closer to the actions of the current Board of Supervisors and its immediate predecessor Board to determine the planning actions in that case.

Q These would always be zoning since the adoption of the Pohick Restudy?

A That's correct.

Q Would you state and the write on each one of those orange parcels the date of the zoning and the acreage?

A First I will try to keep them in order but they won't all fall in order. The first is C-61 which was approved

May 13, 1970 for R-12-5, single-family zoning.

C-81 --

Q How many acres was that?

A Thirteen point seven 0. That was 26 acres.

The next case I have, I will try to keep these in the lowest to highest numerical order, is directly across the street, case C-160 dated May 19, 1971; 26.7 acres, RTC-5. That is townhouses.

The next case is C-150, and I am already out of order here with reference to numbers, PDH-10; December 16, 1970; 36.59 acres.

Next we have an older case, a smaller one; it is commercial. It is case C-3 dated September 10, 1969 on this one corner for COL uses.

THE COURT: How big is it?

THE WITNESS: Approximately three and a half acres.

Next I have case C-192 which was granted in October of 1971 for RTC-10 and is adjacent to this property.

BY MR. HAZEL:

Q Is that also in Middle Run?

A Yes, this is in the Middle Run Shed. The acreage there is approximately 25. I can be corrected on that. I don't have the statistics of that case before me. It is

approximately 25 acres.

The next case in this area is C-567 granted February of '72; 76.47 acres, RT-5. That is townhouses of five units.

Q That was zoned as a result of Court action, was it not?

A That's correct.

Q That actually appears on the zoning map as in RE-1 category, does it not?

A That's correct. I have one more.

I have the case that was referred to earlier.

THE COURT: That was zoned on Court action. Has it been appealed?

MR. HAZEL: No, sir; it has not. As I understand it, an order has been entered which renders that case moot because of the zoning of the case.

THE WITNESS: The last one I have, also in Middle Run, is C-898 which was continued for R-12-5, referred to earlier, 64.4 acres; was granted by the Board on July 2, 1972, last week.

THE COURT: The number on it?

THE WITNESS: C-898.

THE COURT: Zoning?

THE WITNESS: R-12-5, two and a half units per acre; 64.4 acres.

BY MR. HAZEL:

Q I believe you missed one up there on the corner?

A I have another one. I will explain that when I get through here. It is C-389, September 11, 1972; 122.7 acres for RTC-5, townhouses.

I think that pretty well covers it.

The point I wish to make here is that these cases on this side (indicating), this is Old Keene Mill Road to the corner of Five Forks, all of this is in Middle Run and this is in the Main Branch.

Now, five of these zonings have occurred in the Main Branch and two have occurred in Middle Run. The most important thing to remember here is that this rezoning took place last week and this took place in October of 1971. This is for two and a half units per acre.

The existing zoning in this entire acre is 2.2 dwelling units per acre. This zoning is for ten units per acre.

That is adjacent to this application, so I see no difference in what this Board is doing in terms of zoning policy with regard to the comprehensive plan than what the

previous Boards have done.

The granting of the zonings have been entirely in conformance with these plans; this is why I am unable to understand why we shouldn't continue that within the framework of the plan.

Q Mr. Payne, are there possibilities that development plans that were filed with some of these zonings have restricted the density to lesser numbers than might appear under the zoning category?

A That is often the case because the development plans are strictly a result of final architectural and engineering design. The numbers don't always agree.

Q You are not representing that all of those five and ten-unit zonings are necessarily being developed at the maximum density available?

A No, sir. As everyone knows, including His Honor, I am sure, the density on an average tract is a result of the experience and engineering design and, in most cases, RTC-10 zoning results in about seven or eight units per acre on a County-wide average. I do not know what the actual density there is. Probably less than ten.

MR. HAZEL: No further questions.

CROSS EXAMINATION

BY MR. SYMANSKI:

Q Will you run through those density and people figures again, please, for me?

A Yes, sir.

This is under three categories that we talked about. The first is the comprehensive plan figure. I have case C-169 at 138.4 acres.

THE COURT: Going back to the three densities, 2.0, 2.2 and 2.5.

THE WITNESS: Two point zero density and 417.91 acres equals 836 units. That multiplied by 3.5 people per dwelling unit equals 2,926 people. That is 2.0.

The 2.2, going up in that area, is 417.91 times 2.2, equals 918 dwelling units, times 3.5 equals 3,215 people.

Going to two and a half dwelling units per acre, we have 417.91 acres times 2.5 equals 1,045 units. At 3.5 persons per dwelling unit, 3,654 people.

BY MR. SYMANSKI:

Q Where do you get a factor of 3.5?

A A factor of 3.5 is the range of factors in Fairfax County between the Census of 1970, the experience factor which has ranged as low as 3.3 to a high of 3.7 in single-family.

So I used 3.5 to get to average as closely as possible.

Q What is 2.5?

A R-12-5 category.

Q R-12-5 is not 2.7 factor?

A It is used as 2.5. There have been site plans approved where 2.7 lots have been gotten with density credit for certain amenities indicated.

Q Isn't 2.7 the factor usually used for R-12-5 in Fairfax County planning?

A Two point five or 2.7. I would say either one, depending on the terrain and conditions. The 2.5 and 2.7 is a result of the average lot size set up in the zoning ordinance to the terrain of which the parcel is filed and it can be either 2.5 or 2.7. It usually goes up to 2.7 if the terrain is flat and goes down to 2.5 or less if the terrain is over ten percent; that is an engineering factor.

Q Those are for conventional development, is that correct?

A That's correct.

Q Now, is that a representation that it was your understanding that this development would be conventional as opposed to cluster?

A No, it was my understanding it would be cluster.

Q Well then, what factor do we use for cluster? Isn't there a higher factor -- 2.9, for instance?

A Two point nine for cluster at this zoning.

THE COURT: At which zoning?

THE WITNESS: R-12-5 cluster alternate, 2.9.

BY MR. SYMANSKI:

Q So with that factor is the figure of 1,212 units under R-12-5 cluster?

A I wouldn't question it, sir; I didn't multiply it at 2.9.

Q If we use the factor which my understand is 3.7, your figure for people per unit is 3.5?

A That's correct. I do not use the highest in each case because I didn't think that was fair. The average is the best.

Q Would you be able to work out the number of people we have under the cluster, 2.5 cluster so we could add it to these figures?

A I will be glad to do it.

THE COURT: Simple mathematics, I assume.

THE WITNESS: Give me just a minute. I will figure it. Would you like me to use 2.9?

MR. SYMANSKI: That is my understanding, for the

cluster figure.

THE COURT: Is that the standard figure for R-12-5 cluster?

THE WITNESS: Yes, sir.

THE COURT: All right. You have the acreage figure?

THE WITNESS: Yes, sir. It will just take me a second.

MR. SYMANSKI: Please use 3.5 because you have used it in the others. We can't compare them, otherwise.

THE WITNESS: I make that 1,212 units and 4,232 population.

THE COURT: Give me those again?

THE WITNESS: Two point nine dwelling units per acre on 417.91 acres equals 1,212 dwelling units at 3.5 is 4,232 population.

BY MR. SYMANSKI:

Q The orange areas on Exhibit 17, what neighborhood on the Pohick plan -- are those in the Middle Run, the two you pointed out in the Middle Run -- what neighborhood are they in?

A They are in Neighborhood 14.

Q Is any of them in 13 or 12?

A It appears that B-898 crosses the boundary between

13 and 14, this case that was granted last week.

Q Are you sure of that?

A Not absolutely.

Q Have there been any cases denied in this area by the Board of Supervisors?

A Yes, there have.

Q Do you have a list of those?

A I have the numbers. In the same area used on these two maps, I have 12 denied cases. I have not plotted those on the map but those are in different locations throughout the area.

Q These questions are going to be a little bit out of order and I apologize. You talked about a school plan for this?

A Yes.

Q Area. Do you have any figures on when that school will be built?

A None at all, sir.

Q You also said Rolling Road was in the six-year plan. Was that in the six-year plan as of December, 1972 when this last case was considered?

A No, sir; you misunderstood me. I said that extension of Keene Mill Road from here to Five Forks was in the six-year

plan at the time this case was heard and the time the staff report was drafted. Rolling Road has been under improvement steadily and is mostly completed down to Old Keene Mill Road by now and has been under construction on that basis for the last five years.

Q Did you say Pohick Road was in the six-year plan?

A Pohick Road is not in the six-year plan but is paved.

Q You also said that the development practices, the development, the public facilities, have been the result of the practices of the last 20 years, is that correct?

A I think that is very true.

Q Is this crowding in the schools, is there congestion in the streets, to your knowledge, as a result of these practices?

MR. HAZEL: That question is, on its face, too general to answer. I don't see how that could be without some kind of specificity.

MR. SYMANSKI: I asked, to his knowledge.

MR. HAZEL: What he is talking about --

THE COURT: He asked if, pursuant to the planning over the last 20 years, we don't have crowded roads and crowded schools. I think it is a proper question.

THE WITNESS: Yes; the answer is, yes.

Of course, the State Statute says we shall consider

these things but that, of course, what gives me problems because if we consider them we must consider them in a uniform manner. We cannot consider them to the benefit of one man on one side of the fence and to the detriment of another man on the other side of the fence.

The problem with growth insofar as the nature of things is concerned has always been some crowding in the streets, some crowding in the schools. I am simply contending that in this area the County has concentrated its planning efforts and is better equipped to do it in areas which have been planned than it is to try to do it in an uncoordinated manner over the whole 407 square miles.

BY MR. SYMANSKI:

Q But it is your testimony that as a result of the policies of the last 20 years there are crowded roads and congested schools?

A I have to say in a general way that is true.

Q Let me refer you to page 72 of the plan if I may.

A Surely.

Q The paragraph there under density, at the end of the page, what is your interpretation of this paragraph? Does it mean that 12 and 13, the population figures there, were arrived at for a particular reason -- that is, the soil

and topography?

A I think that is quite true. Pohick Valley is one of the more rolling valleys in the Fairfax County context. The development of Pohick Watershed was often discussed as being primarily cluster country. I think that is perfectly appropriate.

Q Under this paragraph then, 12 and 13, the density totals there, are they not just based on sewer but also on the topography and --

A Yes, that's correct.

Q Now, referring to the circle you have made on the C-169 property, the Williams property there as neighborhood center.

A This?

Q On the Williams property.

A Here.

Q Is that where the applicant proposed it?

A The applicant did not specifically propose the location of the center; he requested a rezoning and the center itself is located in this general area. I do not believe it was shown on any part of the application that I saw.

Q I refer you to Stipulated Exhibit No. 2 and ask you on page 12 there to read the last paragraph.

A I feel that the requested use -- this is a statement of justification by Thomas R. Williams -- I fee that the requested use of the property is in accordance with the best land use for the County and will provide for approximately 400 homes to be built. There is another contiguous property of 50 acres to the requested rezoning which is not excluded in this application and it is anticipated that the neighborhood center No. 12 as envisioned in the Restudy of Pohick Valley should be located here. For these reasons I request rezoning.

Q Do you think that is not excluded, not included?

A He is here; you should ask him.

Q Does this appear to be a 50-acre parcel to you?

A Approximately that.

Q Well, under this paragraph, and can you interpret whether this applicant intended to build the neighborhood center?

A I cannot, sir. I think you will have to ask him.

THE COURT: Does he have a choice? Where he builds the neighborhood center, isn't that up to the County to approve one way or another?

MR. SYMANSKI: I am trying to show what he said in his letter of justification.

THE COURT: All right.

BY MR. SYMANSKI:

Q He did not intend it to be right there, from that letter?

A That's right, sir. He would have to, if the village center under the plan was going to be located there, it would have to be a different type of application at the proper time to include all the uses that were in that center.

Q Did this application itself have a neighborhood center located there?

A It did not.

Q Now, you have testified, I believe, that there is a neighborhood center located up here, is that correct?

A That's correct. This is a commmnity center.

Q Is that where the Pohick plan shows that center or has it been moved somewhat?

A It has been moved somewhat. The center located here is a community center. It is actually located, actually to the west of that at that point. The neighborhood center is located further up here along Burke Lake Road. It has actually been zoned at this point so the movement is from here to here.

Q Is it moved toward or away from the proposed neighborhood center on or close to the subject property?

A It is closer to the subject property than the other shown.

THE COURT: That community center shown on the other plan underneath?

THE WITNESS: Community center here.

THE COURT: Apparently right on top of the interchange?

THE WITNESS: That's correct, sir. The interchange, the proposed road goes up in this area.

THE COURT: So it is actually moved west of the interchange?

THE WITNESS: That's right. So the interchange would be here. It was actually zoned at this point, which would be on the interchange. But we don't have the detail of the interchange plan so we don't know exactly where it is. But it is in the very close proximity to what the plan called for.

BY MR. SYMANSKI:

Q You have testified that there is one neighborhood center which has been established in Middle Run, is that correct?

A Yes, sir. That is this one located on Pohick Road here.

MR. HAZEL: I didn't understand the testimony that it had been established. It had been zoned in Middle Run. That is why we put the "X" there instead of "C" and "N" there.

THE WITNESS: I'm sorry; I misunderstood you.

BY MR. SYMANSKI:

Q Excuse me. It has been zoned. What neighborhood has it been zoned in?

A It appears to be zoned in Neighborhood 13, very close, from the general map, of the area planned for.

Q Now, you also testified on the policies of the Board, page 77, 78, 79. End of policy nine, the statement on the abrogation of the sewer contract.

A Yes, sir.

Q Are there any other statements in this policy statement which show you any reasoning, or behind the Board's policy on Middle Run?

A Yes; in reading the statements, these were written in 1968 and approved in 1969. That has been almost four years ago and these policies always talk, especially in policy five where we talk about, it shall be the policy of the Board of Supervisors to avoid the presence of a population of urban density in the Middle Run sub-Watershed until such time as public facilities and services commensurate with such density

either shall be available or shall be programmed to be available in the reasonably near future.

As a planning matter, something that was written four years ago, the reasonably near future to me means the five-year basic plan element in capital improvement, which is the Statute on capital improvements program -- I have to assume that.

Q What they are talking about here, are they not, is trying to coordinate public facilities with urban densities?

A I have no objection to that at all, sir. I think that is correct. What I am saying is, in the four-year period since that time, what I have found in my investigation of the last several weeks has shown that between the efforts of the private sector and the agencies involved, there has been an effort to coordinate these facilities. They all are not in place, obviously, but they never have been and never will be insofar as the County is concerned in a specific point in time.

Q You say the South Run -- with regard to the South Run, I believe you said that it was a no-growth area for a couple of reasons, one of which was --

A There were several problems involved. The problems I cited were problems that I was familiar with in 1966 before I left the area, and of course those answers have always

been solved now. One of those was on the lower end of the watershed with regard to the access through parts of the Lorton Reformatory. The other had to do with the Burke Lake Park establishment. These were historical. Those problems have been settled. The only recent problem as to the South Run area was, that I can recall, occurred in 1968 after I left here. It was one which we had planned, was the location of the PL or Public Law 566 impoundment in that area which was settled, I believe, as a part of the RTC-5 or Pohick development which established the lake in Middle Run but that was simply a technical problem at that time and the program had not been approved by the Congressional department or Committee on Public Works for funding. That has been funded and has been built.

Q Exhibit No. 12, I believe you pointed out some green areas or conservation areas. Where were those in the history of the planning that you went through?

A The primary areas that were not programmed for growth -- that is, by that, they were zoned at that time in the RE-1 or RE-2 categories, dealt with the area along the Potomac, the upper Lorainesville district north of Seven and the Difficult Run area, largely up to a point just below the intersection with Route 50 and 66, exclusive of Reston and

exclusive of the western part of Vienna, which drains into Difficult Run at this time, and parts of Tysons Corner which drain there.

The main valley of Difficult Run and the upper Dranesville district were left in the lower density categories. This was an offshoot of result, a direct result, of the Freehill Amendment case of March 15, 1959 which put this area back in low density after the March case was decided.

There was an entirely different reason for here Little Rocky Gorge, Old Mill, Wolf Run, Sandy Run, Lion's Dam, Occoquan and Popes Head, these were direct feeder sheds into the Occoquan Watershed. Therefore, the policy was that the line would be drawn generally along 123 which is now known as Ox Road as being the dividing line between normal expansion and between areas which should be conserved.

The only conservation zoning we had at that time was the RE-2 and the RE-1 categories.

The RE-2 was usually put in place and was intended to be a permanent zoning. The RE-1 has also been used in Fairfax as a holding zone depending on conditions that arrived at the time. If the area was planned for growth, the RE-1 was normally rezoned to that growth area, whatever the density is, unless the predominant density on recorded lots in a given

area was developed with units at RE-1 category. Of course, the case here in Difficult Run, and along the Potomac River, and along these areas, has been that there has not been major developments occur in those areas.

Q Do you agree with that? Did you agree with that at the time that was good planning?

A I recommended it.

Q So you do believe that there should be some areas, or there can be some areas in the planning process which are no-growth, controlled growth, or conservation areas?

A Well, I won't ever use the word no-growth. I believe in principle of ownership of private land. I would say that there are differences in degree of controlled growth. I am saying that in these areas which have a very definite overall public policy in protecting water supplies and streams, are the overriding consideration. I am simply saying to you, sir, that this area here, as long as 20 years ago, was programmed for growth area because it was the largest, most logical place to expand the County's growth without the physical problems of polluting the Potomac River of the County's water supply.

Q And we put sewer in there?

A That's right.

Q That is a commitment?

A I think it is a commitment to channel growth in that direction and to properly coordinate it.

Q Unalterable, no matter what?

A I wouldn't go quite so far as to say unalterable no matter what, but I think to say, sir, if you are going to spend that kind of money in that kind of area and divert the County to, in related facilities, which are not getting back on user charges to direct its development to follow that, that you have committed yourself to growth in that area. I am simply saying, I do not believe that you can draw a contract to provide water and sewer in Middle Run area and then direct the School Board and the parks people to work with developers in this area as was done in the 566 program and then at some particular point in time under some particular Board of Supervisors, say we are going to stop that. I simply as a matter of practical judgment do not think it is either practical or sensible.

Q Did you work on the Pohick Restudy?

A No, sir. I was not here when the Restudy was done.

Q You have studied it, as I understand?

A Yes.

Q From your study, wasn't one of the considerations

in the planning staff asking for a restudy that development in the Pohick was not going the way they thought it should?

A Yes, I think that is one of the reasons they requested it. I think probably that they requested it because there were a large number of applications and grantings for single-family development as shown on that historical map, and I believe that the County was concerned, or the staff was concerned, that some of these centers be established to accommodate that growth.

Q Wasn't one of the reasons that suburban sprawl, as it is called, was developing in the Pohick?

A This is what I call a, if you will pardon me, it is what I call a semantical or PR or public relations reasons. This is what people say to newspaper reporters but I don't believe, if you look at what has happened in the Pohick Valley, you can be convinced either from an aerial view of from the aerial photograph which is here that Pohick has been victimized by suburban sprawl. I think the facts point out that development of the Pohick has pretty much followed the plans established by this County over 20 years ago and have been amended in the same direction by this and previous Boards. This is why I referred to the fact that this Board was quite careful to say that their policies did not abrogate those agreements

in the planning staff asking for a restudy that development in the Pohick was not going the way they thought it should?

A Yes, I think that is one of the reasons they requested it. I think probably that they requested it because there were a large number of applications and grantings for single-family development as shown on that historical map, and I believe that the County was concerned, or the staff was concerned, that some of these centers be established to accommodate that growth.

Q Wasn't one of the reasons that suburban sprawl, as it is called, was developing in the Pohick?

A This is what I call a, if you will pardon me, it is what I call a semantical or PR or public relations reasons. This is what people say to newspaper reporters but I don't believe, if you look at what has happened in the Pohick Valley, you can be convinced either from an aerial view of from the aerial photograph which is here that Pohick has been victimized by suburban sprawl. I think the facts point out that development of the Pohick has pretty much followed the plans established by this County over 20 years ago and have been amended in the same direction by this and previous Boards. This is why I referred to the fact that this Board was quite careful to say that their policies did not abrogate those agreements

made in 1966. To me, that makes the whole question moot. The question, the decision, has been made: they are going to follow it.

Q What is suburban sprawl, PR or other terms, what does it mean? It has a popular definition, does it not?

A If you want to call it a generic term, it has a popular definition: acres, acres, and square miles and square miles of little houses lined up on their own rectangular land with no change in landscape for miles upon end. That is what it means.

I am saying to you that I have not seen that kind of development take place in the Pohick Valley. The reason for it is that the cluster alternatives which were written into the ordinances in the middle '60's have been taken advantage of by developers to the benefit of the County, to the buyer and to themselves.

Q Would you explain the cluster concept in relationship to this property on Exhibit 17 and with relationship to the neighborhood center which you have drawn there?

A Yes.

Obviously, I don't own land. Have not asked for his detailed plans with Mr. Williams or anybody else, or the County.

Q Have you seen the development plan?

A Yes, but I haven't seen the neighborhood center. The basic road network is the sewer line, here. The water line is here. The basic road network enframes the property and crosses it here. This is Pohick Road 641; this is Old Keene Mill, Route 644; and this being the cross-County expressway for the future with interchange here, and community shopping center in this area.

As this portion develops, which is north of the power line and north of the cross-County expressway, these roads would normally be improved by the developer. As development progresses, a site would be selected in conjunction with the two applications or on part or all of this site. It doesn't make any difference which, to locate a village center in accordance with the plan.

Q You mean a neighborhood center?

A A neighborhood center, excuse me. The neighborhood center should be designed in accordance with the County site plan and approval and zoning asked for at the time these plans are worked out for the entire tract. But that is the reason the comprehensive plan is by Statute general. That center should be in this area. I see nothing in the development of the case 301 or case 169 which would abrogate or prohibit that.

The access, if I might point out, is scheduled for improvement to this point.

Q I am asking, really, the housing pattern rather than the complete development picture.

A Under the village situation --

MR. HAZEL: If Your Honor please, I am not sure -- I don't mind the questions about the development pattern and the housing pattern but one of the problems is, when you can't rely on the County's Master Plan to go to the zoning, it is obviously impossible to prepare development plans which have much meaning. We are two steps further down the road when we talk about the housing patterns that might or might not be on this tract and the zoning case boundaries. But I don't have any question, I just wonder if it is relevant.

MR. SYMANSKI: The plan calls for cluster concept. Mr. Payne has drawn the neighborhood center. There are policies in the plan about what should go around the center, neighborhood center, what should be there. I am trying to determine when this proposal for R-12-5 over this whole piece of property meets the policies of the plan.

THE COURT: He said where he drew the circle is just roughly where it is on the Master Plan.

MR. HAZEL: That's right. He didn't say that is

where it is going to go.

MR. SYMANSKI: I have a question on that.

THE COURT: If you are asking him what the housing plan is, sir, there isn't any housing plan because the site plan hasn't even been submitted because there isn't any zoning.

THE WITNESS: That's correct.

MR. HAZEL: When you spend three and a half years getting a zoning decision --

THE COURT: I have ruled on it. So you don't have to argue it further.

MR. SYMANSKI: No more.

THE COURT: Not on the housing plan for these two lots. That is the next thing after zoning. If there is no zoning there is no housing plan unless he wants to go to the one-acre cluster.

THE WITNESS: That's right.

BY MR. SYMANSKI:

Q Isn't there a policy which says the neighborhood center should be in the proximity, middle of Neighborhood 23, approximately?

A It says, approximately. I presume, Mr. Symanski, that is what it means.

Watershed boundary is just north of Old Keene Mill Road, that neighborhood center, under a prepared site plan. It should obviously go in this upper region of the watershed.

Now, as to whether it goes here with access along Route 643 or whether it has access along 644 or access along 641 with interior roads going out on the normal cluster pattern throughout the surrounding development is of no real importance. This is Burke Lake Park and there is no possibility of encroachment. Obviously the center should go in the Middle Run Shed where shown and it should be on one of these tracts of land. But as a practical matter, it is unimportant which one it goes on as long as related land uses around it are consonant with the rest of it.

Q I understand the idea of being in the center, the people can walk to it rather than having to ride.

A That's right. But again I will point out to you this --

MR. HAZEL: I still don't see the relevance. I didn't understand that the Board denied our application because we didn't show this neighborhood center in the right place. They never got to the neighborhood center. There must be something missing.

THE COURT: What is the relevancy of the line of

questions on the neighborhood center, sir?

MR. SYMANSKI: The proposal doesn't meet the Master Plan.

THE COURT: The Master Plan doesn't say that the center has to be on either one of these lots, does it?

MR. SYMANSKI: It does say the center should be in the middle of the neighborhood, if possible. They have proposed in the staff report to put it at one corner of the neighborhood. I am just trying to point out that it doesn't meet the policies of the plan.

MR. HAZEL: We will be delighted to come back and apply for neighborhood center at that location if we had any reason to believe it would be zoned, but it was never mentioned as a problem.

THE COURT: I can only assume that the developer would rather have intensity of neighborhood center than R-12-5. I really don't see that it is relevant because it was not stated in the application that they were going to put it in there. I assume when you go for site plan you could say, we would like to have it in another location.

MR. HAZEL: I asked the staff. He assumed it would be on the next lot; it might be on the next lot east of him. It might be in the center of the "V." It might be just north

of him.

MR. SYMANSKI: That is his property, also.

THE COURT: Which, in the center of Virginia?

MR. SYMANSKI: Fifty-acre parcel.

THE COURT: Maybe that is what he was going to try later -- maybe say, no, and somebody else, let somebody else put it up. I think it is irrelevant as to the location of this center unless they were applying for the entire neighborhood.

BY MR. SYMANSKI:

Q The R-12-5 category applied for with possible 2.9 under the cluster concept, above the densities proposed in Master Plan?

A Yes, I believe densities in the plan are shown on the map at 2.0 and in the plan text at 2.2.

Q Mr. Payne, you have testified in this Court before, have you not, that you consider public facilities to be an appropriate consideration within the zoning decision?

A I think so. I think to act on zoning without consideration of facilities available would be simply a dereliction of duty.

There are different considerations, if I may point out to you -- this zoning here is in the Middle Run Watershed.

It was stated by the staff that this zoning was granted; that staff stated that with the completion of Old Keene Mill Road to this point, that access to this case would be excellent. The same reasoning, they said it would be bad for these. That is illogical. This zoning is in the Middle Run Watershed. If you follow that kind of question, there is absolutely no justification in my mind to say that this is valid zoning based on access. You have the staff report which states that access from here will be excellent.

Q What neighborhood is that in?

A This again is in 14. Again this boundary. But the fact of the matter is, Keene Mill Road is going to be built, neighborhood or no neighborhood.

Q With regard to road system, how many trips would be generated by using the factors and planning staff uses by the 1,212?

A Unless I have to go through another mathematical exercise, if we take each of those different factors that I worked out for you, it is normally figured at 7.3 trips per unit by Highway Department figures. The County staff sometimes uses a greater figure than that. But again, I would submit that the figure of seven to 7.3 trips per day is the figure that the Highway Department considers valid for road

planning. That is per unit.

Q Even under your figures, there are going to be 9,000 to 10,000 trips per day using the R-12-5 cluster?

A At full development, that's correct.

Q Is the road system down there capable of handling that type of traffic?

A It certainly will be. At the present time it will have to continue to be improved as has been stated earlier. At the present time the existing two-lane roads in the area are not adequate for that volume; there is no question about that.

Q Mr. Payne, let's assume that the roads and the Virginia Department of Highways' six-year plan are built. Would that be Keene Mill Road -- let me ask you, what roads are in the six-year plan of the Virginia Department of Highways?

A The only road I have information on that is in the six-year construction program is Keene Mill Road extended to Five Forks here. That is in the State program.

THE COURT: When did the six-year period start?

THE WITNESS: The last six-year period started, I believe, in 1969 or '70.

THE COURT: This is within that six years?

BY MR. SYMANSKI:

Q Isn't the Virginia Department of Highways' six-year plan continuing, goes from now through six years?

A I am sure everyone realizes this six-year plan is directly related to two things: that is, the problems or traffic counts on given roads in the secondary system, one.

And two, the allocation of secondary road money to Fairfax County. That is why those plans change almost on an annual basis. The traffic counts down here have not been severe enough to justify the improvements for those roads. This is why -- it has always been the case -- this is why the developers will have to do it in advance of traffic need, not as to numbers or loads but as to traffic design.

As I see it, it is perfectly an appropriate way to take a County in this part of Virginia and bridge a gap between the Highway Department and the City Highway Department for the County. The only alternative to what your question is, is for the County to become a city and take over.

Q Speaking of bridging gaps, don't you get that, gaps with this system?

A There is no question; there is no question about it.

Q Let's get back to my question:

When the Virginia Department of Highways roads in the VDH plans are built, won't access be out to 95, but not in any other direction, appropriate access?

A The major, first, access will be to Rolling Road and 95 as soon as possible, and improve other roads concomitant with that. What I am saying is that 10,000 cars is not to be, shall we say, a panic button figure because there are at least six road directions in and out of this area which, through the developer and State improvement, will take care of that. But obviously it is going to have to follow the pattern that was alluded to this morning.

Q There are six ways out of there which are modern roadways, safe ways?

A I didn't say that, sir.

Q There are six?

A There are six ways to get out of this area, north, south, east, and west. Obviously they will all not be improved at once. The most critical improvement has been mentioned, Hooes Road to the south, to 95, and Old Keene Mill Road to the east, toward Rolling Road and Springfield.

Q Hooes Road is no longer on the six-year plan, is it?

A I don't believe so, but it is being built daily.

Q Mr. Payne, isn't it true that there is a line of

separation, although somewhat jagged line, up here on Exhibit 18 between the developed and the undeveloped part of the Middle Run and the Pohick Watershed?

A Yes, sir; I think I did explain part of that to you.

Shall we say as a specialist in planning history, I know some things most people don't know. This is the limit of Middle Run. This is all that is committed to in Middle and Main Branch area. South Run, to all intents and purposes, was not in those plans for density growth. This area is owned by syndicates of people and was purchased by Dr. Homer Hoyt in 1952.

MR. HAZEL: Would you put an "X" in that with purple crayon, on that Exhibit 18, in the vicinity of the Hoyt tract? I think that is relevant.

THE WITNESS: That was the starting of this. It looped around to the Southern and went out to 123 in this area in large ownerships. That was in 1952. It particularly occurred at that time for two reasons:

Dr. Homer Hoyt is a nationally known economist who was retained by Fairfax County to work with Dr. McClosky and Dr. McHugh of New York to attempt to develop the Fairfax County's first comprehensive plan. At the time that plan was presented it was never adopted, but at the time that plan

was presented, and after it was presented, Mr. McClosky and Mr. McHugh had drawn a line of growth which generally followed the railroad and down the Burke Station Road, including Middle Run, and it excluded the area, and Dr. Hoyt developed quite a controversy in the newspapers locally about Mr. McHugh creating a Chinese wall with regard to ownership of his land.

Shortly after that, he and a syndicate purchased that land and are holding it and have held it since 1952 for development purposes.

I have no way of knowing, unless you call Dr. Hoyt, when he will develop it, but land is owned by a syndicate for that purpose. That is the history of that.

THE COURT: How many acres are in that syndicated land?

THE WITNESS: The first notice of this in newspapers -- this is about 20 years ago, Your Honor, so please -- I can't find those, but I do remember the controversy over it between Dr. Hoyt and Dr. McHugh; but at that time there were 1,200 acres involved.

What it is today, I simply do not know. I am in the same boat that Mr. Downs is. He estimates over a thousand. I do not think it is under 1,200.

BY MR. SYMANSKI:

Q How far is that from the subject property?

A This is a 400-scale map. That "X" I put there would be close to the center, about ten inches or 4,000 feet, so three-quarters of a mile.

Q It is your information that they are holding that for development?

A That is my information.

Q Does the proposal meet the planned policy on providing low and moderate income housing?

A I don't believe there was any discussion that I found about moderate income housing.

THE COURT: Just a minute. I happen to have been involved in that case. What policy applies to single-family dwelling under low and moderate income housing?

MR. SYMANSKI: Policy in the planning, Your Honor, on page 23.

THE COURT: You are saying that can be done in this area?

THE WITNESS: No, Your Honor. I am saying that the plan -- we have heard a lot about high-cost housing -- I wonder if this isn't going to alleviate some of that problem that we have been hearing about all day.

THE COURT: Where is this?

MR. SYMANSKI: Low-priced housing, the supply of low-cost housing, general policy on page 22.

THE WITNESS: Policy two, I think you are referring to.

THE COURT: Low and moderate income housing ordinance which I assume this is referring to was declared invalid by this Court, by this member of this Court. It has already been argued before the Supreme Court. I don't know what the result of that is going to be, but under the evidence now I don't know how you can put in moderate or low-cost housing no matter how you tried to. I don't know how. It is an impossibility -- how relevant to that consideration.

MR. SYMANSKI: I was trying to bring out the point whether this was in fact going to alleviate the problem we have been hearing about with regard to high cost of housing.

THE COURT: I think probably the plaintiffs herein will stipulate that they did not have anything in their application to provide for low-cost housing. Is that correct, sir?

MR. HAZEL: Yes, sir; that's correct. It might be very desirable but it is an impossibility.

THE COURT: As defined there, they say a house

between $12,525, and $25,000 as being moderate-priced housing.

MR. HAZEL: We are trying hard to provide some housing under $50,000.

BY MR. SYMANSKI:

Q Does this meet policy on page 21 that encourages PDH or planned development for large tracts?

A No, sir; as I read this, and noticing the reports with regard to cooperation, I felt that the PDH categories were going to be encouraged and also I felt that the cluster ordinance under the alternate of subdivision was to be encouraged at Pohick. I found nothing in that plan anywhere that said that the Main Branch of Middle Branch were to be restricted to PDH zoning.

Q It does say they are encouraged, does it not?

A I would think that is quite an appropriate statement.

THE COURT: May I ask, sir, are you going to have evidence that the County encouraged the developers to develop along those lines?

MR. SYMANSKI: No, Your Honor.

THE COURT: All right, sir.

MR. SYMANSKI: I would like to get a list of those cases that were denied.

THE COURT: Why don't you get it between now and

Monday? Let it be understood that you just list them and sign your name. If you wish to offer them, you may.

MR. SYMANSKI: No further questions.

REDIRECT EXAMINATION

BY MR. HAZEL:

Q Mr. Payne, the circles that are on the Master Plan are, by definition, of the Master Plan a floating circle to designate that somewhere in a particular neighborhood or area there should be that facility, is that correct?

A Yes, sir.

Q They are not intended to specify, to be at that exact location?

A If they did, they would be in violation of Statute.

Q That is demonstrated by facts that the community center is shown in the middle of the interchange?

MR. SYMANSKI: I thought that whole subject was off limits to me. I would like to object on relevancy.

THE COURT: Sustained.

BY MR. HAZEL:

Q Mr. Payne, since 1969, a number of highway improvements have been completed that feed into the Pohick, have they not?

A That's correct.

Q Are these first the four-leaf clover at Ravensworth or Shirley and Braddock?

A Yes. One of the most important ones that was completed in conjunction with Braddock Road extension.

Q Extension of Braddock to Guinea?

A That's right.

Q The four lane and improvement of Rolling Road from Braddock to Keene Mill?

A Correct. I mentioned that.

Q Improvement of Keene Mill from the center of Springfield and the Beltway was to Rolling Road?

A That has all been completed in the last six to seven years.

Q Of course, the granddaddy of all, the Shirley Highway improvements into Springfield area, which have been very extensive?

A That's correct, sir.

Q Do they all have relevance to the present posture of the subject property for rezoning?

A Collectively, they do because this is the main transportation system currently to move people in and out of this rapidly growing area of Fairfax County as well as through traffic.

Q During the four years since 1969 adoption of the Pohick Restudy, all those have come to pass, have they not?

A That's correct.

MR. HAZEL: No further questions.

MR. SYMANSKI: No further questions.

THE COURT: May the witness be excused with the exception of providing counsel a list of those zoning applications in this area which were denied?

If you will please do that, sir, and provide it to counsel, perhaps sometime tomorrow, then if you have any reason to recall the witness you can arrange for his recall to discuss any of those on Monday.

The case is in recess until Monday morning.

(Whereupon, at 5:15 o'clock p.m. the hearing in the above-entitled matter was recessed until 10:00 o'clock a.m. Monday, July 16, 1973.)