915 Va. 543

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
JUN 10 1974
RICHMOND, VIRGINIA

DALLAS PHILLIPS, et al

APPELLANTS

v.

WIRT H. FOSTER, et al

APPELLEES

RECORD NO. 740009

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VIRGINIA:

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

WIRT H. FOSTER,
ANNE T. FOSTER, and
ASIA-PACIFIC MANAGEMENT
AND DEVELOPMENT CORPORATION

Petitioners

vs

DALLAS PHILLIPS and
EULALAH PHILLIPS
Abingdon, Virginia

Respondents

CONDEMNATION PETITION

TO THE HONORABLE J. AUBREY MATTHEWS, JUDGE:

Your petitioners, Wirt H. Foster, Anne T. Foster and Asia-Pacific Management and Development Corporation, respectfully represent to the Court as follows:

I

This suit is filed pursuant to Title 21-428 of the 1950 Code of Virginia as amended, for the purpose of condemning a drainage easement across lands of respondents, which lands are shown and described on plat marked Exhibit A, which is attached hereto and made a part hereof.

II

That Wirt H. Foster and Anne T. Foster, two of the petitioners

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180 EAST MAIN STREET
ABINGDON, VIRGINIA 24210

are seised and possessed of a certain tract or parcel of land, situate, lying and being in the Madison (formerly Abingdon) Magisterial District of Washington County, Virginia, known and designated as Tract No. 4 on a plat of the J. B. Roberts Farm, which plat is of record in the Clerk's Office of the Circuit Court of Washington County, Virginia, in Plat Book 6, at page 6, to which plat reference is here made for a more particular description thereof; that said tract contains 49 acres, more or less, and is the same real estate that was conveyed to Wirt H. Foster and Anne T. Foster by Carla Cantrell Harless, widow, by deed of record in the aforesaid Clerk's Office in Deed Book 463, page 642.

That Asia-Pacific Management and Development Corporation, one of the petitioners herein, has purchased said hereinabove described real estate from Wirt H. Foster and Anne T. Foster; that the said Wirt H. Foster and Anne T. Foster, his wife, have executed a deed, dated January 24, 1973, conveying said real estate to the said Asia-Pacific Management and Development Corporation; that said deed has not been delivered, and is presently being held in escrow by the attorney for the said Wirt H. Foster and Anne T. Foster; that a portion of the consideration has been paid by the said Asia-Pacific Management and Development Corporation to the said Wirt H. Foster and Anne T. Foster, and that a lien will be perfected for the purpose of securing the remaining deferred purchase money; that said deed was executed and a portion of the consideration paid pursuant to a contract of sale for said real estate.

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III

Respondents, Dallas Phillips and Eulalah Phillips, are seised and possessed of a certain tract or parcel of land north of Virginia Route 677, across said road from the above described property owned by petitioners, which land of respondents was acquired from Charlene K. Dukes, by deed dated April 8, 1953, which deed is of record in the aforesaid Clerk's Office in Deed Book 266, page 236, to which deed reference is here made for a more particular description of the metes and bounds of said tract of land, which land is also portrayed on plat designated "Plat of Charline Dukes Property Near Abingdon, Va., to be Sold at Auction April 8, 1953, by Arrington & Branham Land Co.", prepared by J. W. Hortenstine on March 30, 1953, a copy of which plat is attached hereto and identified as Exhibit A.

IV

Your petitioners intend to develop said 49 acre tract into a housing subdivision, and have in fact initiated preliminary engineering work; that a plat of said proposed subdivision has been submitted to the Washington County Health Department, the Washington County Sanitary District No. 1, the Virginia State Department of Highways, and the Executive Secretary of Washington County, Virginia, that same has been approved by all of the aforesaid agencies, save and except for the Virginia State Department of Highways; that all of the preliminary plans of said proposed subdivision have been filed with the Washington County Health Department, the Washington County Sanitary District No. 1. the Virginia State Department of Highways, and the Executive Sec-

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retary, pursuant to and in compliance with the subdivision ordinances of Washington County, Virginia.

The Virginia State Department of Highways would not approve said preliminary plans of said subdivision in that surface water drainage was not adequate, and requires a drainage easement approximately twelve feet wide to channel such surface water into Fifteen Mile Creek; your petitioners have been advised by the Virginia State Department of Highways that such drainage easement would satisfy the requirements of the Virginia State Department of Highways.

V

That the natural and logical path for the aforementioned easement to follow would be the shortest distance from the place where surface drainage water would leave petitioners' property to the nearest point upon said Fifteen Mile Creek, and said path would take said drainage across the property of respondents at a place hereinafter described; that the natural and logical path for said drainage to follow was established in accordance with the recommendation of the district drainage engineer, Virginia State Department of Highways, which path is more particularly described in a plat attached hereto and designated as Exhibit B, which said plat was made by John W. Hortenstine, C. L. S. dated February 20, 1973, designated as "Proposed Drainage Easement Over Land of Dallas Phillips, Washington County, Va."; that said drainage easement as proposed, would consist of .055 acres, and reference is here made to said attached plat for a particular description of the proposed easement by metes and bounds.

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VI

Your petitioners have made a bona fide, but ineffectual effort to purchase said drainage easement from the owners thereof; your petitioners have offered respondents a fair, just and equitable compensation for said drainage easement.

VII

WHEREUPON, petitioners pray that commissioners be appointed to ascertain and report upon the propriety of granting the above described easement across the property of Dallas Phillips and Eulalah Phillips, and the damages that may be sustained by the respondents, and that thereafter such easement be granted by this Court, and that petitioners be granted other and general relief.

WIRT H. FOSTER

ANNE T. FOSTER

ASIA-PACIFIC MANAGEMENT AND
DEVELOPMENT CORPORATION

By Counsel

/s/ T. L. Hutton, Jr.
T. L. Hutton, Jr.
188 East Main Street
Abingdon, Virginia

WARREN & BOWIE
Reynolds Arcade Building
Bristol, Virginia

BY /s/ J. D. Bowie

Counsel for Petitioners

SMITH, ROBINSON & VINYARD
ATTORNEYS AT LAW, INC.
180 EAST MAIN STREET
ABINGDON, VIRGINIA 24210

VIRGINIA:

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

WIRT H. FOSTER, et als Petitioners vs. DALLAS PHILLIPS and EULALAH PHILLIPS, Respondents	)	ANSWER TO CONDEMNATION PETITION

Respondents, Dallas Phillips and Eulalah Phillips, answer the condemnation petition herein as follows:

I

Respondents admit that Section 21.428 of the 1950 Code of Virginia is the proper statute under which such proceedings must be undertaken.

II

Respondents neither admit nor deny that petitioners, Wirt H. Foster and Anne T. Foster, are the owners of the tract of land briefly described in the petition nor are they advised that the Fosters have agreed to sell the property described to Asia-Pacific Management and Development Corporation, another petitioner.

III

Respondents admit that they are the owners of a tract of land on Virginia Route 677, across the road from the property allegedly owned by petitioners.

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IV

Respondents are not advised as to whether there is a proposal to develop the 49 acre tract allegedly owned by Foster, Respondents are not advised as to whether approval of a subdivision map is conditioned on a provision for surface water drainage.

V

Respondents deny that the natural and logical path for the aforementioned easement to follow would be across the property of respondents and they categorically assert that there are at least tow other properties over which this surface water could be drained other than the property of the respondents.

VI

Respondents admit that an attempt has been made to purchase the drainage easement from them but they are unwilling to accept the terms proposed to them by petitioners.

VII

For further answer to the petition filed herein respondents say that the statute under which these proceedings were brought is unconstitutional and, if it is not unconstitutional the proposal to drain water over the property of respondents is not within the legitimate scope of the statute. Respondents further state that the attempt to force an easement across their property is an unwarranted invasion of their property rights and for that reason contravenes the Constitution of the United States and the Constitution of the State of Virginia. Respondents further state that the attempt to use their property for a drainage ease-

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ment is in no sense for the public use and is purely for an anticipated private use and therefore, such a taking is not that contemplated by the statute.

DALLAS PHILLIPS and
EULALAH PHILLIPS

By Counsel

MOORE AND BROWNING

By: /s/ James R. Moore
Counsel for Respondents
212 East Main Street
Abingdon, Virginia 24210

CERTIFICATE

This is to certify that I mailed true copies of the within answer to T. L. Hutton, Jr., Esq., 188 East Main Street, Abingdon, Virginia and J. D. Bowie, Esq., Reynolds Arcade Building, Bristol, Virginia, counsel for the petitioners, this 9th day of March, 1973.

/s/ James R. Moore
James R. Moore

VIRGINIA:

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

WIRT H. FOSTER,
ANNE T. FOSTER and
ASIA-PACIFIC MANAGEMENT
AND DEVELOPMENT CORPORATION

Petitioners

vs

DALLAS PHILLIPS and
EULALAH PHILLIPS

Respondents

NOTICE

TO: EULALAH PHILLIPS
R.F.D.
Abingdon, Virginia

You are hereby notified that the petitioners will appear before the Circuit Court of Washington County, Virginia, at the Courthouse in Abingdon, on the 29th day of March, 1973, at 10 o'clock A.M., or as soon thereafter as may be convenient with the Court, for the purpose of presenting the attached Petition, and asking that the Court, as soon as practicable, appoint commissioners referred to in the attached Petition, for the purposes stated therein.

You are hereby notified that Answer and Grounds of Defense may be filed within twenty-one days, asserting any objection or defense to the taking or damaging of your property, or to the jurisdiction

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of the Court to hear the case and proceed with the appointment of commissioners.

WIRT H. FOSTER

ANNE T. FOSTER

ASIA-PACIFIC MANAGEMENT AND DEVELOPMENT CORPORATION

By Counsel

SMITH, ROBINSON & VINYARD
ATTORNEYS AT LAW, INC.
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ABINGDON, VIRGINIA 24210

VIRGINIA:

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

WIRT H. FOSTER, et als,

Petitioners,

vs.

DALLAS PHILLIPS and
EULALAH PHILLIPS,

Respondents.

NAMES OF COMMISSIONERS PRESENTED TO CIRCUIT COURT OF WASHINGTON COUNTY, VIRGINIA, PURSUANT TO TITLE 25-46.20 OF THE 1950 CODE OF VIRGINIA, AS AMENDED.

1. G. K. Patton
2. J. T. Lee
3. Oscar L. Neese
4. Noell Craig
5. H. T. Ratcliff
6. Henry Snodgrass, Jr.

Respectfully submitted.

WIRT H. FOSTER, et als

By Counsel

T. L. Hutton, Jr.
188 East Main Street
Abingdon, Virginia

J. D. Bowie
Warren & Bowie
Reynolds Arcade Building
Bristol, Virginia

SMITH, ROBINSON & VINYARD
ATTORNEYS AT LAW, INC.
180 EAST MAIN STREET
ABINGDON, VIRGINIA 24210

By /s/ T. L. Hutton, Jr.

Counsel for Petitioners

I certify that I have delivered a true copy of the foregoing list of names to James R. Moore, counsel of record for respondents, this the 5th day of April, 1973.

/s/ T. L. Hutton, Jr.
T. L. Hutton, Jr.

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ABINGDON, VIRGINIA 24210

VIRGINIA:

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

WIRT H. FOSTER, et als,

Petitioners,

vs.

DALLAS PHILLIPS and
EULALAH PHILLIPS,

Respondents.

ORDER SUMMONING COMMISSIONERS AND

SETTING DATE OF HEARING

It appearing to the Court that Wirt H. Foster, Anne T. Foster and Asia-Pacific Management and Development Corporation, petitioners, have duly filed their Petition in this Court for the purpose of condemning a drainage easement across the lands of respondents, as described in said Petition; that due and proper notice, as required by law, has been given to the respondents; that said petitioners did, on the 5th day of April, 1973, move the Court for the entry of an Order for the appointment of Commissioners to fix compensation and damages, if any, to the property mentioned and described in the Petition, and to summon disinterested freeholders herein, pursuant to Title 21-428, 21-429, and 21-430 of the 1950 Code of Virginia, as amended.

It further appearing to the Court that no agreement has been made by petitioners or by the present landowners as to compensation and damages.

UPON CONSIDERATION of all of which, and it appearing proper

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ABINGDON, VIRGINIA 24210

to do so, it is ORDERED as follows:

I

The following five disinterested freeholders, any three of whom may act, all of whom are residents of Washington County, Virginia, and included on said lists submitted by petitioners and by respondents, and whose names and addresses are as follows, to-wit: G. K. Patton, Stonemill Road, Abingdon, Virginia; H. T. Ratcliff, Abingdon, Virginia; Oscar L. Neese, Route 4, Abingdon, Virginia; C. P. Hope, Jr., R.F.D. 1, Abingdon, Virginia; Blair Keller, Sr., Route 1, Abingdon, Virginia, be, and they are hereby summoned to appear before this Court on the 18th day of June, 1973, at 9:00 o'clock a.m., or as soon thereafter as is practicable, for the purpose of executing this Order and pursuant to Title 21-428, 21-429, 21-430, and 21-431 of the 1950 Code of Virginia, as amended, shall ascertain and report what damages, if any, may be sustained by the respondents through whose lands the drain is to be run.

II

Said Commissioners shall give to respondents and other tenants in possession, if any, notice of their intent to execute this Order and sahll proceed to execute the same as soon as practicable after ten (10) days have elzpsed from the time such notice is given.

III

Said Commissioners shall inquire and report whether the mode of draining as proposed in the aforementioned Petition shall be proper.

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IV

The Commissioners herein shall do all things and perform all duties as set forth and required of them by Title 21-428, through Title 21-431 of the 1950 Code of Virginia, as amended, inclusive.

V

The Clerk of this Court is directed to make an original and five copies of this Order, and deliver same to the Sheriff of Washington County, and said Sheriff is directed to summon the aforesaid five persons to appear in this Court on the 18th day of June, 1973, at 9:00 o'clock a.m., for the purposes as aforesaid, and the said Sheriff shall make his return on the original, showing the time and manner of service thereof. (Handwritten: To which Decree the defendants, by counsel, object and except on the grounds heretofore assigned.)

We ask for this:

/s/ T. L. Hutton, Jr.
T. L. Hutton, Jr.
188 East Main Street
Abingdon, Virginia

WARREN AND BOWIE
Reynolds Arcade Building
Bristol, Virginia

By /s/ J. D. Bowie

Counsel for Petitioners

Seen: (Handwritten: and objected to:)

MOORE AND BROWNING
212 East Main Street
Abingdon, Virginia

By /s/ James R. Moore

Counsel for Respondents

ENTER THIS 5th Day of June, 1973

/s/ J. Aubrey Matthews
Judge

VIRGINIA:

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

WIRT H. FOSTER, et als,

Petitioners,

vs.

DALLAS PHILLIPS and
EULALAH PHILLIPS,

Respondents.

TO: Dallas Phillips and
Eulalah Phillips
Route 1
Abingdon, Virginia

NOTICE

You are hereby notified that the undersigned Commissioners who have been duly appointed by the Circuit Court of Washington County, Virginia, by Order entered on June 5, 1973, a copy of which is attached hereto, pursuant to the provisions of Title 21-428, 21-429, 21-430, and 21-431 of the 1950 Code of Virginia, as amended, will, on the 18th day of June, 1973, or as soon thereafter as is practicable, proceed to determine and report what damage, if any, may be sustained by you as a result of the drainage easement sought by the petitioners in the Petition heretofore served upon you in this proceeding.

/s/ W. Blair Keller, Sr.

/s/ H. T. Ratcliff

/s/ Oscar L. Neese

/s/ G. K. Patton

/s/ C. P. Hope, Jr.

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ABINGDON, VIRGINIA 24210

VIRGINIA:

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

WIRT H. FOSTER, et al

Petitioners

vs

DALLAS PHILLIPS, et al

Respondents

REPORT OF COMMISSIONERS

TO THE HONORABLE J. AUBREY MATTHEWS, JUDGE OF SAID COURT:

We, C. P. Hope, Jr., Blair Keller, Sr., G. K. Patton, Oscar L. Neese and H. T. Ratcliff, Commissioners appointed by this Court by Decree entered herein on June 5, 1973, in the above styled proceeding, for the purposes as set out in the aforesaid Decree of June 5, 1973, do hereby certify that on the 25th day of July, 1973, after having given at least ten days' notice as required by Title 21-429 of the 1950 Code of Virginia as amended, and by the aforesaid Decree, to the landowners and respondents, namely: Dallas Phillips and Eulalah Phillips, and in accordance with all of the provisions of the aforesaid Decree of this Court, entered June 5, 1973, and after having been duly sworn, did go to the land of the respondents and viewed the same.

That each Commissioner had in his possession at the time of such view, a copy of the map showing the proposed drainage easement, which said map is designated Exhibit B in the records of this cause; that the proposed drainage easement, as shown and described to us, is

as follows:

Approximately 12 feet and 2 inches in width and extends from the north line of Route 677, over the land of Dallas Phillips and Eulalah Phillips to a point on the south bank of Fifteen Mile Creek, a distance of 200 feet, and contains a total area of .055 acres.

That on the view we were accompanied by John W. Hortenstine, Certified Land Surveyor, who prepared the map designated Exhibit B; that said Commissioners were also accompanied by Vance Harrison and C. H. McCloud, representatives of the Virginia State Highway Department.

We do further report that after having made a view of the land and the property interests above described, we did then view the adjacent and other property of the respondents, and did then return to the Court.

We do further report that we did ask questions of and received information from the said John W. Hortenstine, C. L. S., the said Vance Harrison and the said C. H. McCloud.

WHEREUPON, after due consideration of the information received from the said John W. Hortenstine, Vance Harrison and C. H. McCloud, and after due consideration of our view of the property and the description of the proposed drainage easement, we do hereby report as follows:

1. The mode of draining the land of Petitioners, as proposed by said Petitioners, is proper, and same is specifically described on plat attached hereto, which said plat is marked Exhibit B in the re-

cords of this cause, and the granting of such application is proper.

2. The just compensation for the .055 acre drainage easement is THREE HUNDRED DOLLARS ($300.00).

3. The damages to the adjacent and other property of the landowners and respondents, by reason of the said .055 acre drainage easement, are TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00).

Given under our hand this 25th day of July, 1973.

/s/ H. T. Ratcliff

/s/ Oscar L. Neese

/s/ G. K. Patton

/s/ W. Blair Keller, Sr.

/s/ Charles P. Hope, Jr.

Exhibit B

N55.49E
12.2
Fifteen Mile Creek
6.1'
6.1'
fence
12'
200'±
200'±
200'±
JAMES E. HARLESS
N44:45W
S44:45E
DALLAS PHILLIPS
Variable Depth
3:1 slope
3:1 slope
2'
Typical Ditch section
6.1'
6.1'
S55:49W
12.2'
Prop. 24" Drain Pipe
30'
VA. RTE. No. 677
TO HWY. No. 58 1 mile ±
PROPERTY OF ASIA PACIFIC CORP.
2 ac.± Drainage Area
PROPOSED DRAINAGE EASEMENT OVER LAND OF
DALLAS PHILLIPS
WASHINGTON COUNTY, VA.
SCALE: 1" = 30' : FEB. 26, 1973
Area in Easement = .055 Ac.
John W. Hartenstine C.L.S.

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF WASHINGTON COUNTY

3 WIRT H. FOSTER, et al

4 Petitioners

5 vs

6 DALLAS PHILLIPS, et al

7 Respondents

8 DECREE

9 This cause came on this day to be heard upon the Condemnation
10 Petition filed herein by Wirt H. Foster, Anne T. Foster and Asia-
11 Pacific Management and Development Corporation, petitioners, filed
12 herein; upon Proof of Legal Service of Process, duly served upon the
13 respondents, Dallas Phillips and Eulalah Phillips, and filed herein;
14 upon the Notice for the Appointment of Commissioners, duly served
15 and executed upon the defendants, Dallas Phillips and Eulalah Phillips,
16 and filed herein; upon the Answer of respondents, Dallas Phillips and
17 Eulalah Phillips, filed herein; upon the Memorandum of Law, sub-
18 mitted by James R. Moore, counsel for respondents, filed herein;
19 upon the List of the Names of Commissioners, submitted by the pet-
20 itioners, and duly filed herein; upon the List of the Names of Commis-
21 sioners, submitted by the respondents, filed herein, upon Decree of
22 this Court, entered June 5, 1973, appointing and summoning Commis-
23 sioners, duly served upon the five Commissioners, and filed herein;
24 upon the Notice by the Commissioners to Dallas Phillips and Eulalah
25 Phillips of the time appointed by them for the execution of the said

Decree, duly served upon the respondents, and filed herein; upon the Report of the Commissioners, filed herein, upon the record as a whole, and was argued by counsel.

It appears to the Court that the petitioners, Wirt H. Foster, Anne T. Foster, and Asia-Pacific Management and Development Corporation, filed a Condemnation Petition in this Court on March 2, 1973, for the purpose of condemning a drainage easement across the lands of respondents, Dallas Phillips and Eulalah Phillips, as described in said Petition, which said proposed drainage easement is shown and described in said Petition, which said proposed drainage easement is shown and described on a map made by John W. Hortenstine, C.L.S., dated February 20, 1973, which is filed herein, marked Exhibit B, and for the appointment of Commissioners, pursuant to Title 2-1428 of the 1950 Code of Virginia, as amended.

It further appears to the Court that due and proper Notice, as required by law, Title 21-428, Title 25-10 and Title 25-11 of the 1950 Code of Virginia, has been given to the respondents.

It further appears to the Court that said petitioners, by counsel, did, on the 5th day of April, 1973, move the Court for the entry of a Decree for the appointment of Commissioners, for the purposes as set out in Title 21-428 through Title 21-431 of the 1950 Code of Virginia as amended, and to summon disinterested freeholders herein, pursuant to Title 21-428, Title 21-429 and Title 21-430 of the 1950 Code of Virginia, as amended.

It further appears to the Court that the five Commissioners ap-

pointed by the Decree of June 5, 1973, executed a Notice to Dallas Phillips and Eulalah Phillips, stating the time appointed by said Commissioners for the execution of said Decree of June 5, 1973; that a copy of said Notice and a copy of the aforesaid Decree of June 5, 1973, were duly served upon Dallas Phillips and Eulalah Phillips.

It further appears to the Court from the Report of the Commissioners, filed herein, that on July 25, 1973, said Commissioners did go to the property of the respondents, viewed the same, received information from representatives of the State Highway Department, and made their Report, which Report was filed herein on August 23, 1973.

It further appears to the Court from the said Report of Commissioners found and reported that the granting of the application for the drainage easement, as proposed by said petitioners, is proper; that the mode of draining the land of petitioners is proper; that same is specifically described on plat attached to said Report, that just compensation for the .055 acre drainage easement if $300.00; that the damages to the adjacent and other property of respondents, by reason of the said .055 acre drainage easement, are $2,500.00.

UPON CONSIDERATION OF ALL OF WHICH, there being no exceptions to the said Report of Commissioners, it is, therefore, ADJUDGED, ORDERED and DECREED that the Report of said Commissioners be, and the same is hereby ratified, approved and confirmed in all respects.

It is further ADJUDGED, ORDERED and DECREED that the drainage easement, as described in the said Report of the Commis-

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180 EAST MAIN STREET
ABINGDON, VIRGINIA 24210

sioners, and as shown on Exhibit B, is hereby awarded to and for the use of the petitioners.

It is further ADJUDGED, ORDERED and DECREED that the petitioners shall pay to the Clerk of this Court the sum of $300.00 as compensation for the .055 acre drainage easement, and the sum of $2,500.00 for damages to the adjacent and other property of the landowners and respondents.

It is further ADJUDGED, ORDERED and DECREED that petitioners shall pay to the Clerk of this Court, pursuant to Title 21-431 of the 1950 Code of Virginia, as amended, the sum of $20.00 which represents the sum of $2.00 per day for each of the five Commissioners for each respective day, June 5, 1973, and July 25, 1973, they engaged in executing the Order of this Court.

It is further ADJUDGED, ORDERED and DECREED that the Clerk of this Court shall pay the sum of $2,800.00 ($300.00 as compensation and $2,500.00 as damages) to Dallas Phillips and Eulalah Phillips and their counsel; the Clerk of this Court shall pay the sum of $4.00 to each of the Commissioners, namely: W. Blair Keller, Sr., H. T. Ratcliff, Oscar L. Neese, C. P. Hope, Jr., and G. K. Patton.

It is further ADJUDGED, ORDERED and DECREED that the Clerk of this Court record in the current deed book in the Clerk's Office of this Court, the Decree of June 5, 1973, appointing and summoning Commissioners, the Report of Commissioners and map filed therewith, and this Decree, and he shall index same in the name of all the parties, in the manner prescribed by law.

It is further ADJUDGED, ORDERED and DECREED that the right to use said drainage easement, as created by this Decree, shall, by virtue of this Decree, vest in said petitioners, and said petitioners, pursuant to Title 21-431 of the 1950 Code of Virginia, as amended, shall make and keep open the drainage easement as described on Exhibit B, at their own expense.

The Clerk of this Court is directed to tax the costs of this proceeding to and including this date, and same shall be paid by the petitioners.

Nothing further remaining to be done herein, this cause is stricken from the docket of this Court.

Respondents except and object to the entry of this Decree.

We ask for this:

T. L. Hutton, Jr.
188 East Main Street
Abingdon, Virginia

J. D. Bowie
Warren and Bowie
Reynolds Arcade Building
Bristol, Virginia

By /s/ T. L. Hutton, Jr.

Counsel for Petitioners

Seen and objected to:

Moore & Browning
212 East Main Street
Abingdon, Virginia

By /s/ James R. Moore

Counsel for Respondents

ENTER THIS 6th day of September, 1973.

/s/ J. Aubrey Matthews
Judge

SMITH, ROBINSON & VINYARD
ATTORNEYS AT LAW, INC.
180 EAST MAIN STREET
ABINGDON, VIRGINIA 24210

VIRGINIA:

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

WIRT H. FOSTER, et al,]

Petitioners,]

vs.]

DALLAS PHILLIPS and
EULALAH PHILLIPS,]

]

Respondents]

ORDER

Upon written motion of Respondents by counsel entered in the above styled case on September 13, 1973, it is hereby ORDERED, ADJUDGED and DECREED that Robert Austin Vinyard and S. Strother Smith, III, Attorneys at Law, 180 East Main Street, Abingdon, Virginia, be and they are hereby entered as attorneys of record for Respondents, in the place and stead of James R. Moore, who is hereby allowed, for good cause shown, to withdraw as respondent's counsel.

/s/ Robert B. Davis
JUDGE

Enter this 1 day of
~~September~~, 1973
Octo.

A Copy -

TESTE: /s/ Lucille VanDeventer
Deputy Clerk

VIRGINIA

IN THE CIRCUIT COURT OF WASHINGTON COUNTY

WIRT H. FOSTER, et al, Petitioners

v. ()Notice of Appeal and Assignment of Error

DALLAS PHILLIPS and
EULALAH PHILLIPS, Respondents

The Respondents, Dallas Phillips and Eulalah Phillips serve notice that they appeal the Decree entered on the sixth day of September, 1973, in the Circuit Court of Washington County wherein they were the Respondents and Wirt H. Foster, et al, were the Petitioners.

ASSIGNMENT OF ERROR

In support of their appeal, the Respondents, Dallas Phillips and Eulalah Phillips, assign the following errors:

I. The Court erred in not requiring the Commissioners to inquire (a) as to whether the water from Petitioners' land would normally flow across your appellants' land into Fifteen Mile Creek and (b) as to whether or not any additional water from Petitioners' land could cause increased flooding within the drainage basin of said creek.

II. The Court erred in not finding that the Statute, Section 21,428 of the 1950 Code of Virginia as amended, under which the proceeding was based was in violation of the Fifth and Fourteenth Amendments to the United States Constitution and to Section 11, Article I of the Constitution of the Commonwealth of Virginia.

III. The Court erred in not finding that the application of the Statute, Section 21.428 of the 1950 Code of Virginia, in the instant

SMITH, ROBINSON & VINYARD
ATTORNEYS AT LAW, INC.
180 EAST MAIN STREET
ABINGDON, VIRGINIA 24210

case was in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 11 of the Constitution of the Commonwealth of Virginia.

DALLAS PHILLIPS and

EULALAH PHILLIPS

By Counsel

/s/ Robert Austin Vinyard

/s/ S. Strother Smith, III

S. Strother Smith, III
Attorneys-At-Law
180 E. Main Street
Abingdon, VA 24210

CERTIFICATE OF SERVICE

I, Robert Austin Vinyard, hereby certify that I have this day, October 2, 1973, mailed to the Attorneys of Record for the Petitioners, i. e. T. L. Hutton, Jr., 188 East Main Street, Abingdon, Virginia and J. D. Bowie, Esquire, Reynolds Arcade Building, Bristol, Virginia, a true copy of the foregoing Notice of Appeal and Assignment of Error.

/s/ Robert Austin Vinyard
Robert Austin Vinyard

SUPREME COURT OF VIRGINIA

Dallas Phillips and Eulalah Phillips, Appellants,

against Record No. 740009

Wirt H. Foster, Anne T. Foster and Asia-Pacific Management and Development Corporation, Appellees.

From the Circuit Court of Washington County

CERTIFICATE

Pursuant to Rule 5:30 of the Rules of the Supreme Court of Virginia, I, Howard G. Turner, Clerk of the said Court, do hereby certify that an appeal was awarded on May 1, 1974, from a decree entered by the court below on September 6, 1973, in the suit therein depending under the short style of Wirt H. Foster, et al. v. Dallas Phillips, et al.

Appeal bond is required in the penalty of $500 in conformity with Code, Section 8-477, and within the time allowed by Code, Section 8-489.

This certificate, constituting the summons on appeal, was this day mailed to the court below and to

S. Strother Smith, III, 180 E. Main Street, Abingdon, Virginia 24210
Robert Austin Vinyard, 180 E. Main Street, Abingdon, Virginia 24210
Counsel for Appellants

T. L. Hutton, Jr., 188 East Main Street, Abingdon, Virginia 24210
James Bowie, Reynolds Arcade Building, Bristol, Virginia 24201
Counsel for Appellees

Given under my hand this 2nd day of May, 1974.

/s/ H. Turner
Clerk

SMITH, ROBINSON & VINYARD
ATTORNEYS AT LAW, INC.
180 EAST MAIN STREET
ABINGDON, VIRGINIA 24210

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
JUN 21 1974
RICHMOND, VIRGINIA

SECTION 1 - PURPOSE AND TITLE

-1. PURPOSE

The purpose of this ordinance is to establish certain subdivision standards and procedures for Washington County, Virginia, and such of its environs as come under the jurisdiction of the governing body as provided for by the 1950 Code of Virginia, as amended.

These are part of a long-range plan to guide and facilitate the orderly beneficial growth of the community, and to promote the public health, safety, convenience, comfort, prosperity and general welfare. More specifically, the purpose of these standards and procedures are to provide a guide for the change that occurs when lands and acreage become urban in character as a result of development for residential, business, or industrial purposes, to provide assurance that the purchasers of lots are buying a commodity that is suitable for development and use; and to make possible the provision of public services in a safe, adequate and efficient manner. Subdivided land sooner or later becomes a public responsibility in that roads and streets must be maintained and numerous public services customary to urban areas must be provided. This ordinance assists the community in meeting these responsibilities.

This ordinance is known and may be cited as the "Subdivision Ordinance of Washington County, Virginia."

SECTION 5 - APPROVAL OF PLATS

5-1. APPROVAL REQUIRED BEFORE SALE

Whenever any subdivision of land is proposed, and before any permit for the erection of a structure shall be granted, the subdivider or his agent shall apply in writing to the agent for the approval of the subdivision

-1 CONTINUED

plat and submit three (3) copies of the plat including the lot, street and utilities layout. No lot shall be sold until a final plat for the subdivision shall have been approved and recorded in the following manner.

5-2 PRELIMINARY SKETCH

The subdivider may, if he so chooses, submit to the agent a preliminary sketch of the proposed subdivision prior to his preparing engineered preliminary and final plats. The purpose of such preliminary sketch is to permit the agent to advise the subdivider whether his plans in general are in accordance with the requirements of this ordinance. The agent, upon submission of any preliminary sketch, shall study it (with the Commission when deemed necessary) and advise the subdivider wherein it appears that changes would be necessary. The agent may mark the preliminary sketch indicating necessary changes and any such marked sketch shall be returned to the Commission with the preliminary plat. The preliminary sketch shall be as follows:

2-1 It shall be drawn on white paper, or on a print of a topographic map of property. It shall be drawn to a scale of one hundred (100) feet to the inch. It shall show the name, location and dimensions of all streets entering the property, adjacent to the property, or terminating at the boundary of the property to be subdivided. It shall show the location of all proposed streets, lots, parks, playgrounds, and other proposed uses of land to be subdivided and shall include the approximate dimensions and shall show the physical improvments to be installed.

5-3 The subdivider shall present to the Commission through the agent five (5) prints of a preliminary layout at a scale of one hundred (100) feet to the inch as a preliminary plat. The preliminary plat shall include the following information.

5-3-1. Name of subdivision, owner, subdivider, surveyor, or engineer, date of drawing, number of streets, north point and scale. If true north is used, method of determination must be shown.

5-3-2. Location of proposed subdivision by an inset map at a scale of not less than two (2) inches equal one (1) mile showing adjoining roads, their names and numbers, towns, subdivisions and other landmarks.

5-3-3. The boundary survey or existing survey of record provided such survey shows a closure with an accuracy of not less than one in twenty-five hundred; total acreage, acreage of subdivided area, number and approximate area and frontage of all building sites, existing buildings within the boundaries of the tract, names of owners and their property lines within the boundaries of the tract and adjoining such boundaries.

5-3-4. All existing, platted and proposed streets, their names, numbers, and widths; existing utility or other easements, public areas and parking spaces; culverts, drains and water courses, their names and other pertinent data.

5-3-5. The complete drainage layout, including all pipe sizes, types, drainage easements (10 foot minimum) and means of transporting the drainage to the nearest natural drainage flow.

5-3-6. A cross section showing the proposed street construction, depth and type of base, type of surface, etc. (Minimum five inches of compacted crushed stone required).

5-3-7. A profile or contour map showing the proposed grades for the streets and drainage facilities including elevations of existing and proposed ground surface at all street intersections and at points of major grade change along the center line of streets together with proposed grade lines connecting therewith.

5-3-8. A location map tying the subdivision into the currently existing road system, either by aerial photographs or topographic maps of the U. S.

5-3-10. All parcels of land to be dedicated for public use and the conditions of such dedication.

5-3-11. Utility Companies shall execute quit claims to any easement within, over or under street rights of way.

5-4. PROCEDURE

The agent or his appointed representative shall discuss the preliminary plat with the subdivider in order to determine whether or not his preliminary plat with the subdivider in order to determine whether or not his preliminary plat generally conforms to the requirements of the subdivision ordinance and of any zoning ordinance. The subdivider shall then be advised in writing within thirty (30) days, which may be by formal letter or by legible markings on his copy of the preliminary plat, concerning any additional data that may be required, the character and extent of public improvements that will have to be made, and an estimate of the cost of construction or improvements and the amount of the performance bond which will be required as a prerequisite to approval of the final subdivision plat. Bond required by the Highway Department shall be in the Department's possession. In determining the cost of required improvements and the amount of the performance bond, the agent may consult with a duly licensed engineer who shall prepare this data for the agent, or preferable may require a bona fide estimate of the cost of improvements to be furnished by the subdivider.

5-5. NO GUARANTEE

Approval by the Agent of the preliminary plat does not constitute a guarantee of approval of the final plat.

5-6. SIX MONTHS' LIMIT

The subdivider shall have not more than six (6) months after receiving official notification concerning the preliminary plat to file with the agent a final subdivision plat in accordance with this ordinance. Failure to do so shall make preliminary approval null and void. The agent may, on written request by the subdivider, grant an extension of this time limit.

5-7. FINAL PLAT

The subdivision plats submitted for final approval by the governing body and subsequent recording shall be clearly and legible drawn in ink upon tracing cloth (one copy) at a scale of one hundred (100) feet to the inch on sheets have a size of 17½" x 22" and shall be presented to the agent in the orginial and three (3) copies. In addition to the requirements of the preliminary plat the final plat shall include the following:

5-7-1. Provisions shall be made for the following certification on the plat.

CERTIFICATE OF APPROVAL*

This subdivision known as _____ Subdivision is approved by the undersigned in accordance with existing subdivision regulations and may be committed to record.

_____ (Date)	(Signed) _____ Highway Engineer
_____ (Date)	(Signed) _____ Health Officer
_____ (Date)	(Signed) _____ Utility Coordinator
_____ (Date)	(Signed) _____ Agent of Governing Body

*The foregoing plat is not approved until all signatures have been obtained.

5-7-2. Certificate signed by the surveyor or engineer setting forth the source of title of the owners of the land subdivided and the place of record of the last instrument in the chain of title.

5-7-3. A statement to the effect that the subdivision as it appears on the plat is with the free consent and in accordance with the desires of the owners, proprietors and trustees, if any, which shall be signed by the owners, proprietors and trustees, if any, and shall be duly acknowledged of deeds.

5-7-4. When the subdivision consists of land acquired from more than one source of title the outlines of the various tracts shall be indicated by dash-lines, and identification of the respective tracts shall be placed on the plat.

5-7-5. The accurate location and dimensions by bearings and distances with curve data on all lots and street lines and center lines of streets, boundaries of all proposed or existing easements, parks, school sites or other public areas, the number and area of all building sites, all existing public and private streets, their names, numbers and widths, existing utilities, and those to be provided such as sanitary sewers, storm drains, water mains, manholes and underground conduits including their size and type, water courses, drainage easements and their names, names of owners and their property lines, both within the boundary of the subdivision and adjoining said boundaries.

5-7-6. Distances and bearings must balance and close with an accuracy of not less than one in ten thousand.

5-7-7. The data of all curves along the street frontage shall be shown in detail at the curve or in a curve data table containing the following: Delta, radius, arc, tangent, chord and chord bearings.

5-8. CONDITIONS

The plat shall not be approved until the subdivider has complied with the general requirements and minimum standards of design in accordance with this ordinance, and has made satisfactory arrangements for performance bond, cash or cash bond to cover the cost of necessary improvements in lieu of construction, to the satisfaction of the agent. Approval of final plat shall be written on the face of the plat by the agent. The subdivider shall record plat within sixty (60) days after final approval.

7-6. EFFECTIVE DATE

This ordinance was duly considered, following a required public hearing held on August 14, 1967, and adopted by the governing body of Washington County, Virginia, at its regular meeting held on December 11, 1967, the members voting:

AYE _____

AYE _____

AYE _____

AYE _____

This ordinance shall be effective on and after 12:01 A.M. on January 25, 1968.

SECTION 3 - PROCEDURE FOR MAKING AND RECORDING PLATS

1. PLATTING REQUIRED

Any owner or developer of any tract of land situated within Washington County, Virginia, who subdivides the same shall cause a plat of such subdivision, with reference to known or permanent monuments, to be made and recorded in the office of the clerk of the appropriate court. No such plat of subdivision shall be recorded unless and until it shall have been submitted, approved, and certified by the agent in accordance with the regulations set forth in this ordinance. No lot shall be sold in any subdivision before the plat shall have been recorded.

3 OWNER'S STATEMENT

Every such plat, or the deed of dedication to which plat is attached, shall contain in addition to the surveyor's or engineer's certificate a statement to the effect that "the above and foregoing subdivision of (here insert correct description of the land subdivided) as appears in this plat is with free consent and in accordance with the desire of the undersigned owners, proprietors, and trustees, if any "which shall be signed by the owners, proprietors, and trustees, if any, and shall be duly acknowledged before some officer authorized to take acknowledgments of deeds, and when thus executed and approved as herein specified shall be filed and recorded in the office of the clerk of the appropriate court, and indexed under the names of the land owners signing such statement and under the name of the subdivision.

3-4. NO ONE EXEMPT

No person shall subdivide any tract of land that is located within Washington County, Virginia, as defined in Article 7 of the Virginia Planning Act except in conformity with the provisions of this ordinance.

SECTION 4 - GENERAL REGULATIONS

4-1 MUTUAL RESPONSIBILITY

There is a mutual responsibility between the subdivider and Washington County to divide the land so as to improve the general use pattern of the land being subdivided.

.-4 BUILDING SITE

To insure that residents will have sufficient land upon which to build a house which is flood free, the agent may require the subdivider to provide elevation and flood profiles sufficient to demonstrate the land to be completely free of danger of flood waters.

4-7. PLANS AND SPECIFICATIONS

A preliminary sketch may be submitted by a subdivider prior to the preparation of the preliminary and final plats. Such a submission should reduce the possible number of changes to preliminary and final plats and assure the general conformance with this ordinance. Such a sketch should be in accordance with sections 5-2 and 5-2-1 below. A preliminary plat shall be presented to the agent for study and consideration by the Commission with a final plat prepared and submitted for final approval action after favorable consideration by the Commission of the preliminary plat. This final plat upon approval by the Board of Supervisors shall be recorded.

4-5-1-E FLOOD CONTROL AND DRAINAGE

The subdivider shall provide all necessary information needed to determine what improvements are necessary to properly develop the subject property, including contour intervals, drainage plans and flood control devices.

-5-1-E CONTINUED

The subdivider shall also provide plans for all such inprovements together with a properly qualified certified engineer's or surveyor's statement that such improvments, when properly installed will be adequate for proper development. The highway engineer shall then approve or disapprove the plans. The subdivider shall also provide any other information required by the highway engineer.