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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

THE BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA

Appellant,

v.

ROY G. ALLMAN, ET AL.

Appellees.

APPENDIX TO THE BRIEF

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

VOLUME III

VOLUME III

TABLE OF CONTENTS

Transcript of Trial, Vol. II,
April 26, 1973 pp. 1-222

DEC 10 1973
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W. FRANKLIN GOODING
Clerk of the Circuit Court
of Fairfax County, Va.

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ROY G. ALLMAN, Trustee, et al, Complainants,	:	
vs.	:	IN CHANCERY NO. 36905
THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, Defendant.	:	

Fairfax, Virginia

Tuesday, April 26, 1973

The above-entitled matter came on for further hearing, pursuant to recess, at 10:00 o'clock, a.m.

BEFORE:

HONORABLE PERCY THORNTON, Judge

APPEARANCES:

JOHN T. HAZEL, ESQUIRE
For the Complainant.

GEORGE A. SYMANSKI, ESQUIRE
Assistant County Attorney
For the Defendant.

I N D E X

WITNESSES

FOR THE PLAINTIFFS	DIRECT	CROSS	REDIRECT	RECROSS
McKENZIE DOWNS	2	13	17	19
ROSSER H. PAYNE, JR.	20	75	88	95
OTIS COSTON	98	106	107	-
M. SETH HORNE	109-110	118	120	-
FOR THE DEFENDANT				
GEORGE H. ALEXANDER	123	131	141	-
THOMAS E. REED	141	-	-	-
YORK PHILLIPS	143	150	-	-
TOM FAULKNER	156	166	172	-
JAMES PAMMEL	173	179	-	-

EXHIBITS

FOR THE PLAINTIFFS	IN EVIDENCE
F, Loudoun County map	37
G, Loudoun County master plan	38

THE COURT: All right, sir; call your next witness.

MR. HAZEL: Mr. Downs, please.

Whereupon,

McKENZIE DOWNS

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

Q Would you state your name, please?

A McKenzie Downs. I'm a real estate broker and appraiser.

Q Have you qualified as a real estate expert in this and other courts in the metropolitan area?

A Yes, sir, I have.

MR. SYMANSKI: I stipulate as to Mr. Downs.

THE COURT: All right, sir.

BY MR. HAZEL:

Q Mr. Downs, at my request, have you undertaken an appraisal and study of land values in connection with the subject case, C-222 zoning application?

A Yes, sir, at your request I did do a study on it determining values as of October of '71 and also of current value on the property.

Q Did you relate the values of the property not only to its existing zoning but the requested zoning of C-222?

A Yes, I did look at it in both categories, actually

going further than that. I looked at it under a possible, say, R-12.5 zoning and estimated a yield of about 2.7 units to the acre, even though 2.9 would be possible.

Q Now, Mr. Downs, did you have before you the stipulation that is in this case that on an RE-1 base, the cost of development of a lot for engineering and construction of improvements would be $8,500?

A Yes, sir. The $8,500 would include $1,000 sewer tap. The actual base cost, excluding the sewer tap, would be $7,500 per lot.

Q And do you have a stipulated yield at RE-1, which is the existing zoning, at 273 lots?

A That is correct, sir.

Q Now, Mr. Downs, would you tell the Court, briefly, how you view this property as a real estate appraisal regarding its value base?

A If I could take a minute of the Court's time, Your Honor, this particular piece of property is located along Dranesville Road, as you well know, and along an existing sewer line.

Prior to the advent of the airport and the sewer line installation in that area, of course, this was basically a rural community with relatively low density.

After the airport came into being --

Q And at what point in time was that for the record?

A This was in the late fifties, '58.

Then, of course, steps were taken to put in the interceptor sewer. The sewer line was constructed, and, of course, the town of Herndon, which actually at that point in time had an inadequate sewer system, it wanted to tie into this line.

So there was, since that time, since late 1950's, there has been a tremendous change in the character of the development of this land. Reston being only one of the many changes that came about.

So, along any sewer line, and particularly in this area, sewer is so scarce that land or development should be channeled at any increased density over the RE-1 along such facilities.

So this is what has taken place. Now tremendous development is coming into being, and it should be, if there is any higher density, it should be in accord with the master plan, in my estimation,and along existing sewer channels as opposed to going out into some area where there is no sewer.

Q Mr. Downs, in that regard, did you also relate this property to essential facilities that are sometimes characterized

as urban facilities, being transportation corridors, shopping areas, schools and facilities of that nature?

A Yes. I think an appraiser would have to take that into consideration. I believe the staff in their studies have called attention to these things. Certainly in the master plan these were all taken into consideration. As I say, to the west of the subject in Loudoun County, and a portion of this subject property is in Loudoun, about a little over 100 acres of it, Sterling Park exists,and this of course came into being after the airport when all of these utilities were brought into the area. And tremendous growth has taken place on relatively small lots in that area also.

Q Do you feel that the subject property is favorably situated with regard to these community facilities?

A I would say it's extremely favorably situated, and rezonings which have been accomplished in the area would indicate the same thing. In other words, the tract immediately adjacent to it, to the south, which is zoned R-12.5 and which is being developed, is a piece of property in point on this same sort of thinking.

Q Now, Mr. Downs, did you reach a value on the 300 acres that are the subject of the zoning case combining the two parcels and excluding the part that is in Loudoun County?

A Yes, sir, I did.

Q And what is your value of it based on its existing RE-1 zoning?

A The current value or the values of '71?

Q The current value.

A The current value. Your Honor, I looked at it as a developer might look at it, determining what a finished-lot value would be, and then, utilizing the estimated-development cost, coming up with a per-acre value and comparing that with existing market data, and I felt that the subject property in the RE-1 category, at this point in time, because of the high value which sites have risen to at this point in time, that it probably could support a value somewhere between $4,000 to not in excess of $5,000 per acre.

I actually came up with a value of $4,250 per acre on it, which worked out to approximately $1,294,375.

Q Now, Mr. Downs, did you reach any opinion, based on soil conditions as to whether this tract could feasibly be developed without sanitary sewer?

MR. SYMANSKI: Objection, Your Honor. I don't think the feasibility of development here with regards to sanitary sewers is within Mr. Down's expertise.

THE COURT: All right. What's your position on that, Mr. Hazel?

MR. HAZEL: He qualified as an expert real estate appraiser. I think in terms of value, perhaps I should restate the question and ask him if he has any opinion as to the value of the tract with and without sanitary sewer at any development.

THE WITNESS: Well, I can't believe that a reasonable man would attempt development on the tract without public sewer.

BY MR. HAZEL:

Q Why do you say that, Mr. Downs?

A The soil conditions are such that they do not lend themselves to development without public sewer.

Q I show you Plaintiff's Exhibit A and ask you if that is a document that you recognize?

A Yes, sir. This is a study prepared by Mr. Coleman of the Fairfax County Soil Scientist office, and it's quite apparent that the good soil is scattered and is of such small quantity that it just isn't feasible to attempt to develop it without public sewer being made available to it. I don't think that any developer, as scarce as lots are, would attempt to go in and develop it without public sewer.

Q Now, Mr. Downs, as I understand it, your current value is $1,294,375 for the 300 acres based on RE-1 zoning?

A That is correct, sir.

Q Now, Mr. Downs, in your opinion --

A But, that would assume public sewer being available and it being developed under a plan which would produce 283 units.

Q 273.

A 273, I beg your pardon.

Q Now, Mr. Downs, do you think it's reasonable to believe that this property value-wise will develop under the RE-1 zoning?

A Well, I think it would be ridiculous to develop it in that manner, because it's in an area which has public sewer, which should be developed with a higher intensity and in accordance with the master plan.

I can't believe that anyone would go in and develop it, even at this point in time as scarce as lots are, with this zoning without some attempt being made to put it in what I would call its proper zoning category.

Q Now, Mr. Downs, have you undertaken a study of R-12.5 values, and have you also reviewed R-12.5 as it relates to PDH-3 and the development plan which is introduced as Exhibit 7 and is on your left?

A Yes, sir, I have examined the property from that standpoint. As I indicated earlier, I looked at it actually from a basic R-12.5 standpoint because the adjacent property

was zoned R-12, and this seemed to be a logical utilization. However, I would say if that is, a cluster plan would probably be in order, and actually the PDH-3 or some similar zoning would certainly be in order.

Q Value-wise are R-12.5 values and a PDH-3 value as shown on the development plan essentially the same?

A I would say they were basically in about the same category, yes.

Q Have you reached an opinion as to value, if this property was zoned R-12.5 today?

A Yes, sir. Using the same approach, a finished-lot value and backing off of that, allowing reasonable developer's profit, etcetera, I came up with a value of $3,762,000 which works out to a little over $12,000 per acre or approximately $4,560 per unit, and that's on a yield of 2.7 units to the acre.

If you went to the PDH-3, it's reasonable to assume that you would get three units to the acre, and the value would basically be about the same, though. There isn't too much difference in the actual raw value of the two different categories.

Q Now, Mr. Downs, this establishes a difference between the two, if my numbers are correct, of 2.467 million.

A That is correct. As I say, I think that in both cases

I adopted, what I would call, a conservative developer's approach. I think that the range of the values is going to be basically the same. Some other appraiser may come up with a slightly lower or a slightly higher value in, say, the RE-1 category, and the same would be true for the R-12.5. But, unquestionably this spread exists, and, in my opinion, it closely approaches two and a half million dollars.

Q Now, Mr. Downs, did you relate these numbers back in point of time to the October 1971 period? Has there been any -- did you make some study -- I believe you testified earlier you made some studies about 1971?

A Yes, sir, I did.

Q Now, has there been any change in the general pattern of land values since 1971?

A I would say there has been a very dramatic upswing in values, site values, for single-family housing.

Q Now, Mr. Downs, have you made any reviews of why that has occurred?

A I would say, basically, it's because of the reluctance of the Board to rezone and the scarcity of sewer, the moratoriums which have come into being. It has placed a premium price on any building site and is, in effect, forcing developers away from the normal channels and putting them into areas which

probably would not have developed for years to come, would have been held as open areas. They are now going into even areas which are zoned RE-2, which normally would not have been profitably developed within years to come, and are subdividing and developing in those areas, definitely in the RE-1 category, and in most cases, without public sewer. They're going into septic systems.

Q And what is the result on the price of the house that is on a RE-1-or-2 land, compared with a house that is on 12.5 parcel?

A It's gone up very dramatically. I've testified in this court before that I've examined sales in, say, down in the Annandale area where housing which sold at, say, $57,500 less than two years ago is now in the upper seventies, which is unheard of. Normally, you would be getting an increase of, say, five to maybe twelve percent a year, depending on the price house and the area, etcetera, that was examined. Now, within the last year to year and a half, it's jumped up to as much as fifty percent in some cases.

Q Do you attribute that to a scarcity of zoned land?

A Unquestionably that's what it is.

Q Now, Mr. Downs, in relation to 1971 prices, your ratio of value between the current zoning and 12.5 or PDH-3 is

approximately two to one. How does that ratio compare to the value in 1971?

A I would say that the ratio holds, basically, the same. I came up with, under the same approach, the RE-1 category, I had a value of about $706,000, assuming the same lot yield; and under the R-12.5 category, back in October of '71, I came up with a value of $1,647,000, which is approximately $5,400 per acre and is in line with known sales in that immediate area at that time.

The difference being $941,000, $706,000, as opposed to $1,647,000.

Q And again, in 1971 the R-12.5 and the PDH-3 proposed were substantially synonymous?

A I would say that they are, yes, sir.

Q So as of that date, the difference in value attributed to this zoning, in your opinion, was $941,000, and the difference in value currently attributed to this zoning is 2.4 million?

A Yes, sir; that is, of course accounted for by the drastic increase in the value of the sites. The same yield is projected in both instances.

Q The base value of the land has gone up, and that's been the reason for your increase in numbers, but the ratios are approximately the same?

A The ratios would hold true, yes, sir.

MR. HAZEL: I have no further questions.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. SYMANSKI:

Q When you stated that no developer would attempt to develop without sewer, does that apply for every zoning category? What I'm saying is, you're comparing here RE-1 and R-12.5 with PDH-3. The sewer problem applies equally to both, is that not correct?

MR. HAZEL: Can I ask if we're talking about this property or general property?

MR. SYMANSKI: Yes, this property.

THE WITNESS: I tried to make it clear that this particular property, I can't believe that any reasonable man would develop it without sewer because of the soil conditions and the potential which it has for rezoning. It's just completely unreasonable to leave it in a RE-1 category and develop it in that manner.

BY MR. SYMANSKI:

Q But, your statement as to sewer applies to any category?

A Well, on this particular tract, yes. Even if you

went to something outside of subdivision control and went to five-acre-lot development, the good soil is so scattered that you couldn't get a logical, reasonable development.

Q Thank you.

Now, with respect to RE-1, could a developer develop it at RE-1 economically and feasibly and make a profit?

A Yes. I pointed out that the value in 1971 in the RE-1 category was about $706,000. In the RE-1 category today it's, in my estimation, in excess of a million dollars. I had $1,294,000. So I would say, yes, it could be done, but it's not logical; it's not reasonable.

Q All I asked you is whether it could be done economically and feasibly.

A Yes, it could.

Q You could make a profit?

A Yes, I would say you could.

Q Now, you stated that you valued it RE-1, at this time, between $4,000 and $5,000, is that correct?

A I said -- actually I came up with a value under RE-1 of about $4,250 per acre. That was using the approach of a finished-lot value and backing off, assuming certain development costs. I would say in examination of the market of the RE-1 values, it's $4,000 to $5,000 an acre. This

particular tract, in order to be developed with that number of units, would have to have the public sewer.

Now, there's other land, of course, that is being developed without public sewer that could probably command just about as high a price because they're going to septic systems provided public water was available.

Q Now, the $4,000 to $5,000 was a finished-lot appraisal?

A That's the raw value of the land as this time, yes, sir.

Q Are you aware of the tax appraisal of the property?

A Yes, sir. It's broken down into two different tracts. The parcel five, which is a 95.975-acre tract, according to the land assessor, from 1970 through '72, he had an assessed value of $69,100, which would indicate an appraised value of $172,750, which works out to an appraised value on the acreage of $1,800 per acre.

For 1973, that particular tract was kicked up to $115,170 assessment, which would indicate an appraised value of $287,925, which is $3,000 per acre.

Now, on the other piece, the assessment has been held constant from '70 on through '73, and it worked out to about $2,731 an acre, if my calculations are correct.

Q So the owners, in fact, are getting a tax break

from the tax appraisal, are they not, comparing your appraisal to what the tax appraisals are?

A Yes. I don't always agree with the assessor, and I'm certain he doesn't always agree with me. How much research and much detail he went into in examining this particular tract, I don't know. When you do mass appraisals, as the assessor's office has to do, of course, you do not always have detailed information that an appraiser, such as myself, has in developing a study like this. So he might refine his values if he had the same information that I had. I'm not being critical of the assessor.

Q Sometimes the tax assessors are higher than you, are they not?

A Oh, yes. I've had to fight them sometimes.

Q You said, did you not, that you couldn't believe anyone would develop this property at RE-1; is that correct?

A Well, to say that no one would, that's an extremely broad statement. I think I said, or I hope that I said that it is not reasonable to develop it. I think the land owner is being deprived of a reasonable utilization of this land. But, to say that it could not be done, that would be wrong, because it can be done, and it has a value in the RE-1 category.

But, in view of the master plan, and in view of this

is one of the few areas left in the county where we have a trunk sewer line, where you could get some higher density. It's got everything working for it, and it's not reasonable, to me, to assume that someone would go in and develop it under the RE-1 category.

Q Are you aware of a preliminary submission, I believe it's a preliminary subdivision plat with the county for an area called Dranesville Estates?

A I'd have to say no, because I have not seen the study and have not gone into it.

Q Isn't it a truism that the higher the density you develop, the more money you make?

A That's not necessarily true, because you might not make any more; but I would say that you're getting a greater number of units, so you should. It's reasonable to assume that you would get a greater yield from your dollar investment. Percentage-wise, maybe not.

MR. SYMANSKI: No further questions.

REDIRECT EXAMINATION

BY MR. HAZEL:

Q In answer to that last question, how do you interpret a truism, the more density, the more money? You then said something about percentage of capital investment. Could you

explain that truism a little?

A Of course, that's the attorney's phrase; not mine. I'm not really certain what he meant by it. All that I boil it down to, is the way I see it, if you've got a tract such as this that will produce, we'll say, less than one unit to the acre and have the same basic value per site, because there's not going to be too much difference, and you could get a yield of, say, three units to the acre or 2.7, you naturally can sell more units. The land has a lot more value in the marketplace. But, I wouldn't speculate as to how much a man would attempt to make on it. It's just the dollars and cents --

Q On a volume base, the percentage on the volume is more?

A I beg your pardon?

Q What you mean is that on a percentage base you have more volume, so you would have more terms of total dollars profit?

A You've got more total dollars profit because you've got more units to work with, but it doesn't mean that your percentage, if you assign the proper value to the base cost of the land, that you're going to make a greater percentage on it.

Q One acre, as compared to R-12.5 or PDH-3, what is your opinion as to the sale price of the unit that would be

created? How would they compare?

A I would say they're going to be in basically the same --

MR. SYMANSKI: I object. I think that's beyond the scope of the cross examination, Your Honor.

THE COURT: I'm inclined to agree.

MR. HAZEL: I with draw the question.

I have no further questions.

RECROSS EXAMINATION

BY MR. SYMANSKI:

Q Are you not familiar with how you work with developers?

A Yes, sir, all the time.

Q Isn't it usually true, or always true -- strike that. Isn't it usually true that it is more economically feasible, that it's always more economically feasible, to develop at a higher density, and compare RE-1 to R-12.5?

A I don't think you can make that statement that it is always.

Q How about usually?

A Normally this is true.

MR. SYMANSKI: No further questions

(Witness excused.)

MR. HAZEL: Your Honor, I call Mr. Payne.

THE COURT: All right, sir.

Whereupon,

ROSSER H. PAYNE, JR.

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

DIRECT EXAMINATION

BY MR. HAZEL:

Q State your name and your profession, Mr. Payne.

A My name is Rosser H. Payne, Jr. I reside at Box 818 Oakfield, Warrenton, Virginia. My office is at 59 Culpeper Street, Warrenton, Virginia.

Q What is your business?

A I am a professional consulting planner and a visiting professor of City Planning at the University of Virginia.

MR. SYMANSKI: I would stipulate as to Mr. Payne.

MR. HAZEL: I appreciate the stipulation. I would merely like to put on the record your prior employment.

BY MR. HAZEL:

Q Were you at one time employed by Fairfax County?

A Yes, I was, sir.

Q For how many years?

A 16 years; from 1950 to 1967, in the capacity of

principal planner, first; deputy director of planning at resignation time.

Q Mr. Payne, in your tour as employee of Fairfax County, was it generally your principal responsibility to conduct master plan studies and determine planning trends and assist the Board of Supervisors with planning in Fairfax County?

A This was specifically my responsibility.

Q Now, Mr. Payne, has it been -- pardon me. At my request, have you conducted a review of certain matters in relation to zoning case, C-222, which is the subject of today's application?

A Yes, sir, I have. It has been my responsibility to conduct an investigation of the general plans for Fairfax County with regard to the establishment of the development of the western part of the county, one, and two, to discuss and investigate the purposes of the Upper Potomac Plan in Fairfax County.

I was then asked to look at the zoning and planning situation at Herndon, Virginia, with which I am quite familiar, having established that program for the town of Herndon in 1962.

The third area I was to investigate was the Loudoun County zoning and planning structure, and having been retained

by the County of Loudoun in the preparation of their present zoning ordinance, as well as the Loudoun County Board of Realtors, I have become quite familiar with that.

Q Now, Mr. Payne, with reference to Exhibit 8, that is here on the board, and with Your Honor's permission, I'd like you to step down to this exhibit and using this green pencil, describe the concepts of land use in Fairfax County so far as density areas, what I presume we could refer to as urban density, being single-family development of less than one acre. Would you describe the concept of the adopted plans in Fairfax regarding the county, generally, and describe in particular those areas of the county which under the county policy are now designated on the master plan for development in lots less than one acre.

A Mr. Hazel, could I ask a question, sir, with regard to information? Is there a watershed map?

Q Do you prefer to use a watershed map?

A If I may, sir.

Q Exhibit 11 is the one that you have reference to?

A Yes.

Can Your Honor see this map?

THE COURT: Yes, sir.

THE WITNESS: To begin with, the basic planning

program in Fairfax County all began with zoning in 1941 without consideration of land-use planning, without consideration of physical facts or trends of growth.

Following that, the comprehensive planning process was the result of what was called the 1953 sewer bond issue, twenty million dollars to solve a failing septic tank problem in the eastern one-third of Fairfax County. That was caused by the location of some 20,000 half-acre lots which began to fail in septic tanks and wells, forcing a bond issue, at which time the comprehensive planning process began, and this was in the year of 1950.

Now, at that time, the problem areas were located along Dead Run, coming up to the town of Vienna, just to the east of the City of Fairfax, which is here, coming down across 236, and down the eastern boundary of the Pohick Watershed to this point, including Fort Belvoir and the Hybla Valley area.

So this area in Fairfax County, Pimmit Run, Dead Run, Cameron Run, part of Accotink Creek, and this is Holmes Run and Tripps Run, Accotink and Dogue Creek.

BY MR. HAZEL:

Q Now, you are now marking in lateral, green lines on Exhibit 11 the area that you are speaking of?

A That's correct. In this area was located the

problems of providing planning controls. Within the framework of the county's planning policy, when the first plan was adopted then in 1958, which occurred seven years after the failure of the septic tanks in this area and the installation of the various trunk sewers -- I will not identify those unless requested to so do; I can so do it.

Q I don't think we need to go into that detail.

A Then, the next thing that occurred after the adoption of the comprehensive plan in 1958 which envisioned an expansion program in what was called by planners as a sprawl expansion in smaller lots.

The next thing that occurred, of course, was the adoption of what was known as the Freehill amendment. This, in effect, zoned this area to the higher densities and zoned the entire western two-thirds of the county lower densities in three-and-five-acre lots.

Now, when that was challenged in court, it went through the local circuit court, Judge --

Q We have the opinions in there. I don't think you need to go into the details, just to point out that it was challenged successfully, and then after the three-acre zoning was struck down, what was the approach that the county took? Actually it was one-and-two-acre zoning that was struck down, was it not?

A The McCue plan had proposed three-and-five acre, and the actual zoning was one-and-two acre.

Q The Carper case, which was the challenge, was actually one-and-two acres, was it not?

A That's correct, sir.

Q And after that was struck down, what did the next county planning do?

A From that point on, the Board of Supervisors instructed the planning staff to prepare a development policy for the western two-thirds of the county in light of the Freehill decision which occurred in 1959.

At that point in time, a development policy plan was drafted by my staff, called, Western County Development Policy. This was adopted by the Board of Supervisors on May 10, 1963. Now, that established two things.

At that time in 1959, the development of Reston had been approved in this location, just to the south of Route 7.

Q Would you put an R on that circle so we will know that is Reston?

A The next thing that had occurred is that the establishment of the Dulles International Airport and its noise control zonings occurred. That was also in the latter part of 1959. This is Dulles, and this is 1959 also.

Now, in establishing these two facts, one of which was established by the United States Government, there was a corridor which followed the original county plan arterial Route 1. General Pete Quesada who was then in charge of the FAA operation used the county highway plan that was approved in 1958, and it showed arterial 1, coming in this direction. He used that alignment for the Dulles Access route.

Route 7 was still to be considered as a major county highway between the Shenandoah Valley and Washington, and still is today, of course.

Those two facts indicated that there should be some consideration, then, of what to restore in the way of the lost zoning out here. The County Board then established this type of pattern.

Q The area you have designated with the X marks is your current area. How would you describe that pattern, and what was the purpose of it?

A After the failure of the proposed Freehill plan, another zoning map had to be made. That map was made and adopted by the Board of Supervisors on April 30, 1959, at which time the owners of 12,000 acres of ground who were in support of the county's position achieved a reinstitution of the two-acre zone and most of the Difficult Run valley.

Q Is the X'd area that you have just designated, south of Route 7, essentially the Difficult Run valley?

A In general, that's correct, sir.

Now, they also reinstituted the area north of Route 7, with the exception of Scotts Run. Scotts Run, which I'll note here, was a generally low-density area, but it was added to the Dulles Airport trunk sewer. There were connections provided here and here.

Q Now, your first one, would you number that 1?

A This is No. 1. This is Sugarland Run.

Q And that's at the western extremity of Fairfax on the Loudoun border, correct?

A That's right.

Q And the other, would you number 2? Is that Scotts Run?

A This is Scotts Run; and 3, of course, is the Difficult Run crossing.

Q All right, sir.

A Now, at those three points, keeping in mind that this area had been sewered in another direction, when the Dulles trunk sewer line was built to pick up Loudoun and Fairfax and Montgomery Counties here, the connection points provided by the Federal Government were at Sugarland Run, at Scotts Run

and at Difficult Run.

Now, when that occurred, the next pressure for development, of course, came for connections and allocations of development. The Court has already heard testimony on that. This area north of Route 7 was retained in the two-acre-zoning category in the largest extent.

The Difficult Run central valley was retained in the two-acre category; and residual areas were left in the one-acre category as they were ascertained by the court to be appellants of some 10,000 acres of ground in the Freehill case. They were left out.

That map exists, and if it can be found in the pigeon loft up here, it will show these different parcels.

Q Now, Mr. Payne, where did the county plan to accommodate its population growth in the future? In the future, we're now talking about the period of the mid-sixties.

A That's right. In 1961, the next thing that happened was the establishment of Sanitary District 14.

Q Now, Mr. Payne, we'll give you a brown marker, and I'd like you to put the Sanitary District 14 on in brown.

A All right, sir. The Sanitary District 14 followed the Sugarland Run Watershed, the Horsepen Run Watershed in this area. This was set up by the Circuit Court of Fairfax

County on petition of the property owners in September of 1961. It included recognition of the town of Herndon, Virginia, which is a part of Fairfax County.

Herndon needed to do something about their sewer plant. They joined the county. The idea was that the county and the town would construct the Sugarland Run trunk down to this point 1 and service this area.

Q Now, Mr. Payne, that Sugarland Run trunk sewer was to utilize the connection No. 1 that you've shown to the major Potomac valley trunk called the Dulles Interceptor; is that correct?

A That's correct, sir.

Q All right, sir.

A Now, with this in mind then, the Western County Development Plan, adopted by the Board, showed what is called a suburban cluster for this area, encompassing Reston, encompassing Herndon, encompassing Sugarland Run Watershed outside of Herndon, and that portion of Horsepen Run which goes into Loudoun County. This, then, was the year 1995 growth area for that portion of Fairfax County. There was one other portion in this section --

Q Mr. Payne, before you get into that, would you now very briefly describe the general concepts of development both

planned and occurring in the rest of Fairfax County?

A Yes, sir. At that point in time immediately following this, there was a 40-square-mile area established, again, by the Circuit Court on petition of the property owners, encompassing Little Rock Run up to Chantilly on Route 50, coming back down to the Bull Run shed, and at this point and this was Sanitary District 12.

Q Would you write that on the map? That's No. 12 that covers that area.

A That area was governed on the Route 66, Route 50 corridor, and expanded growth was intended to take place in this area on lot sizes of less than one acre all the way down to apartments, which are now under construction in the center.

The difference here is that this went into the Dulles trunk line. There were no plans --

Q You say 14 went north to the Dulles trunk?

A Right. And Sanitary 12 terminated in the Big Rocky Run plant, which is now being utilized south of Centreville. This was intended as another non-load of growth in the western county.

The third area which was under consideration came along later for growth, and that was the entirely different approach addition to the county's integrated sewer system which

had been established back here in 1953. The reason for that was that at the point here, it's called the lower Potomac -- I'll mark it LP -- the Pohick and Accotink Creeks are within 3,000 feet of one another at the same elevation. Therefore, both watersheds could be sewered with a similar line and a similar plant.

It was then decided in approximately 1964, based on studies by Alexander Potter & Associates, the county's engineering consultants, that the 30-square-mile-Pohick area --

Q Now, you're hashing that in brown?

A Right. -- lest South Run was to be added to the county's integrated sewer system. Therefore, it was not a part of the Sanitary District. It was added to the 1963 system, and added approximately 20 square miles of additional growth land. So that by the year 1970, the higher-density areas left to the county to develop was the Pohick Watershed, portions of Sanitary District 12, which are limited in extent pending the development of the Bull Run regional sewer plant, and the Sugarland Run Watershed and Horsepen Run Watershed.

This area was affected,to the east of the Dulles Airport was affected by the noise-approach zone which is called the CNR zone, or composite noise ration of 100 decibels plus. This area had been reestablished in the two-acre-lot size.

Q You're now pointing to Difficult Run and north of Route 7?

A Right.

Q Now, Mr. Payne, would you take your green pencil and relate on the south part of the county what areas the county proposes for large-lot development?

A On the southern end of the county there is the Masons Neck area here. Coming up Occoquan Creek, along the Occoquan Creek ridge line and Popes Head Road and including Popes Head Creek, the area south of Fairfax, west to and including Johnny Moore Creek and back. This area --

Q Again, marking with green, in X's, the large area in the south end of the county, is that correct?

A That's correct. These areas were reserved for intensive growth at the lot sizes I've been asked to deal with, because of their direct shed into the Occoquan Reservoir --

Q Reserved for what kind of growth? Did you say intensive growth?

A Intensive growth; something less than one acre has been reserved from this area, because of the shed into the direct Occoquan Reservoir.

Q You mean growth of less than one acre has been excluded from the area you've just drawn on the right?

A So this, basically, today is the structure of the Fairfax County growth program.

Q In summary, Mr. Payne, what are the areas in Fairfax County now planned for lot development of less than one acre?

A The Pohick Creek Watershed is covered by the Pohick Creek Plan. The second one, of course, will be the Upper Potomac Planning District, which includes the suburban cluster adopted in 1963 of Reston, Herndon and Sugarland Run, and part of Horsepen. The third area is known as the Bull Run Planning District, now; but it encompasses Sanitary District 12, which was adopted in 1961 and 1962.

In short, the current plan effecuating plans which were officially implemented by this Board ten years ago next month.

Q Now, Mr. Payne, has Sanitary 14 been terminated, and that system introduced or included into the integrated county sewer system?

A Yes. When Fairfax County became an urban county in 1968, the Sanitary District 14 was abolished and the trunk line was taken into the county's integrated sewer system.

Q So that now the county provides sanitary sewer service to 14 and the subject property on the same basis that it does

elsewhere in the county?

A That's correct, sir.

Q Now, Mr. Payne, would you, with reference specifically to the exhibit on the wall, a tax map assembly showing the town of Herndon and the zoning in the town, Exhibit 9, and Exhibit 26, which is the Herndon master plan, describe the planning and zoning in the vicinity of the subject case within the jurisdiction of Herndon?

A Yes, sir. These --

Q First, is Herndon outlined in the dotted green on Exhibit 9?

A Herndon is outlined in the dotted green on the county 500 scale --

Q Is the solid line along the eastern side the western boundary of Reston; is that correct?

A Yes. This is the western boundary of Reston. The orange line is the boundary of the application in consideration. And the yellow area is the area of case No. C-399.

The town of Herndon lies in this direction here. The current zoning is called R-10. This is a 10,000-foot-lot category, single family. A sanitary occurs here. This has a 8,500-square-foot-minimum lot in the zoning ordinance.

Q Mr. Payne, the area that you've just outlined as

zoned R-10 is the nearest boundary of Herndon to the subject property, is that correct?

A That is correct, sir.

Q And the R-12.5 area lies between Herndon and the subject property, is that correct?

A Yes. This property was zoned in conformance with the Sanitary District 14 original Upper Potomac Plan for R-12.5, and this is under development as Hiddenbrook Subdivision going into the Sugarland trunk by way of Folly Lick Branch at this point.

Q All right, sir. Would you continue and describe the zoning in Herndon.

A Along this boundary, adjacent to the Herndon High School, is the RE-0.5 or half-acre category in the current zoning. And this tract, which is shown in the block pattern was zoned in the Fall of 1972 for PDH-3.5.

Q Now, was that in accord with the town of Herndon master plan?

A Yes, it was.

Q What does the town of Herndon master plan show for the north side of the town?

A The town of Herndon master plan, I'm referring to page 8 of Exhibit No. 26 and the comprehensive land use plan

for the town of Herndon. The yellow color of the land use plan comes along this same boundary, and the yellow color is defined as low-density residential. The area of the cemetery here is recognized, and a proposed location for a town elementary school is shown here, and south of that is a proposed location for a hospital site.

Q Now, Mr. Payne, under the Herndon master plan, the designation of low density is how many persons per acre?

A On page 8 this is set forth under the paragraph, "Residential." Three densities of residential are recommended in the plan. Low density is the largest category with 1,218 acres. A variety of single-family-housing types will occur at an average of 13 persons per acre occurs in an approximate population of 15,800 --

Q So the town of Herndon zoning and master plan anticipates 13 persons per acre on the entire north side of the town; is that correct?

A That's correct, sir.

Q Mr. Payne, with reference to the development plan in C-222, how many persons per acre does that anticipate?

A Eleven persons per acre.

Q All right, sir. Now, Mr. Payne, with reference to Exhibit 14 and the Loudoun County master plan, would you review

the land use development and planning in adjacent areas of Loudoun County?

A Yes, sir.

If Your Honor please, this is a mosaic of the three Loudoun County property maps which are prepared by the State of Virginia Department of Taxation. These maps are the official property maps of Loudoun County on which I have transferred, with my own hand, the zoning from the official Loudoun County zoning map which I have here.

This map was adopted in June 12, 1972, last year, and I have transferred this information from that map to this map.

MR. HAZEL: If Your Honor please, I would like to introduce this official zoning map of Loudoun County. I assume there's no objection. It's a Loudoun document.

MR. SYMANSKI: Dated June, '72.

THE COURT: All right. That will be Plaintiff's Exhibit F.

(The document referred to was marked Plaintiff's Exhibit F and was received in evidence.)

MR. HAZEL: While we are introducing documents, Your Honor, I would like to introduce a portion of the Loudoun

County master plan. We have the original, which Mr. Payne will use, but it is an out-of-print document, and we would like to introduce for the record this extract from it.

THE COURT: Do you have any objections to that, Mr. Symanski?

MR. SYMANSKI: No, Your Honor.

THE COURT: All right. It will be received as G.

(The document referred to was marked Plaintiff's Exhibit G and was received in evidence.)

THE WITNESS: If Your Honor please, in looking at this map, this is compiled on a scale of one inch equals 600 feet. This is the location of Route 7. At this point, Leesburg in this direction, approximately ten miles. Tysons Corner in this direction, approximately eight miles.

This green line, again, reproduces the town of Herndon boundary. This black line here is the primary Route 228 connecting Herndon with Route 7. This, again, is an insertion of the Fairfax County planned and zoned R-12.5, the Hiddenbrook Subdivision under construction here.

And these two parcels at Route 604 are still in the RE-1 Fairfax catgory, planned for two-and-a-half-dwelling units per acre, south of 604.

Q Is the subject case outlined in yellow?

A I'm sorry, sir. The subject case is outlined in yellow, filled in in solid, noted the Allman tract, Case C-222. There is a dashed-yellow line in Loudoun County which is now zoned R-1. It is still in the ownership of Mr. Swart. This tract at one time was a complete parcel. It is now zoned R-1, one-acre lots, but it is planned in the adopted comprehensive plan on plates 9 and 10 which have been introduced into evidence at one-to-three-dwelling units per acre.

The American Housing Guild in 1972 on 80 acres in this location, adjacent to the Allman tract on Route 625, was given the okay to go ahead with single-family development on 10,000 foot lots. That's the American Housing Guild.

Q How many units is that per acre, four?

A That's four units per acre, sir.

Now, this line, with the crosshatch coming up to the Fairfax line here and adjacent to this property, is the original Sterling Park planned community, which is so identified on plate 9 and plate 10 of the Loudoun County comprehensive plan. This will have an ultimate population at four dwelling units per acre, about 2,500. Today there are 10,000 people in that area and approximately 3,000 units. The average density today is 3.6 units per acre, and they are recently developing a

cluster plan in this area adjacent to this property, which we have on an aerial photograph for the Court to see. This area is the located community shopping center --

Q Would you describe the area? Is that the intersection of Route 7 and --

A I'm sorry, sir. This is the intersection of Route 7 and Route 228, known in historical maps as Mocks Corner.

Q Is that also Herndon Junction?

A Herndon Junction. At this point there is under construction today, approximately two-thirds completed, the Weinberg Shopping Center, which is a community shopping center with two anchor stores and approximately 20 shops. This is two-thirds complete.

Q Is that the property outlined in red on the map?

A That is the property outlined in red, with the exception of this corner and the exception of this corner east of 228.

The other thing of importance is there have also been zoned the Sugarland Run planned community for 2,200 dwelling units on 520 acres of ground and 4.5 dwelling units per acre.

The Northern Campus of the Loudoun Community College will begin construction this year at this location. There are

two areas which I've shown that I won't discuss because they are pending cases, applications in Loudoun County.

Q Now, Mr. Payne, how far is the north boundary of the subject property from the south area of the shopping center being built at Route 7?

A This scale is one inch to 600 feet and the north boundary of the property --

Q Let's follow it along Route 7. Pardon me, along 228.

A The closest point is the intersection of Route 604 to the shopping center boundary now under construction. It's 2,400 feet or just over half a mile.

Q All right, sir.

A The last thing I wanted to point out to you is that this tract and that tract are now zoned R-1 in Loudoun County which is similar to the RE-1 in Fairfax County, but this one is planned for one-to-three dwelling units per acre, and these tracts within half a mile of this intersection are shown on plate 10 of the Loudoun County plan as ten units per acre and up, garden apartments and town houses for this area.

Q Would you take plate 10 -- if Your Honor would allow Mr. Payne to approach the bench since the plate is so small -- and show His Honor on plate 10 exactly what you just said about the planning and zoning in the county?

A This is the original. The hatched circles are the planned communities. The one I just identified was Sterling Park. This circle at the top is the Sugarland Run planned community. The green color as can be seen in the title is one-to-three dwelling units per acre. And the black dot is town houses and apartments under their current ordinance.

Q Have you located on that map the subject property?

A Yes, I have.

Q Would you point that out?

A It is located right here, sir.

Q All right, Mr. Payne, one more thing about Loudoun. Flipping over to the photograph which is in evidence, does Sterling Park and the subdivision of Hiddenbrook appear on this photograph?

A Yes, it does, sir.

Q Raising the overlay, could you point to those areas?

A Yes. This is the Sterling Park area, and the Fairfax County line goes through here, if the Court can see from this distance. This is the number and type of dwelling units being installed adjacent to this property. And the Hiddenbrook development is located here, and in the clearing you can see the construction taking place of single-family homes here. The applicant's property line is there.

Q Now, Mr. Payne, does the access road to Hiddenbrook run through the subject property?

A It does, sir, at this point. It would appear to the Court as a white stripe right here. This is Route 228 in this location. This is the town of Herndon.

Q Now, Mr. Payne, turning to the master plan for this area, which is, I believe you'll agree, is the Upper Potomac Plan, do you not?

A Yes, sir.

Q Would you review the master plan considerations as it relates to the subject zoning application?

A Yes, sir.

Q Now, we've heard about this for a day or two, and I don't want to in any way hurry you, but I do want for the convenience of the Court, of course, to keep the review concise and moving on.

A All right, sir. I have, hopefully, to save time have gone through this and marked the areas which I believe to be of definite importance to the goals and objectives described to the Court this morning insofar as were established by Fairfax County ten years ago.

Q First, in your opinion, let me ask you, have you reached an opinion as to whether the master plan supports C-222?

A There's no question about it. The comprehensive plan document shows this area to be developed at a density of 2.5 dwelling units per acre.

Q Now, Mr. Payne, with regards to the difference between R-12.5 and PDH-3 application in the development plan shown, is the density the same?

A As far as the plan is concerned, that's right. That's stated in this report. I'll cite the pages.

Q Which is the preferred adaptation of the master plan, the PDH or the R-12.5?

A There are at least six citations which I have marked which encouraged developers to use the PDH approach in these areas.

Q Now, Mr. Payne, in consideration of the master plan and your expertise as a planner, have you reached any opinion as to whether the retention of the subject, C-222 300-acre area, in the RE-1 zone would be an error?

A It would be a complete error, sir, because it would fly in the face of the established county policy for the last ten years. It would be a complete reversal.

Q All right, sir. Now, proceeding from that, would you describe the master plan and characterize the part which, in your opinion, supports the zoning?

A All right, sir. I'll try to do this very quickly so that the record will be clear. On page 6, in the summary of goals: "The areas and jurisdictions within the Upper Potomac planning district that are most likely to attract intensive development in the future are Reston, Herndon, the area around Dulles Airport and its access road, and the Route 7 corridor between Loudoun County and the proposed Outer Beltway." That is directly on this tract on ground and related tracts.

"Achieving a desirable development pattern given current development trends in Reston, Herndon, and Loudoun County." I hope I've adequately described those.

"The capability of sewer and water services to support, and the control of these services to achieve a desirable development pattern." I've reviewed the staff report and found nothing in the staff report that would say these facilities are not available.

"The alignment of transportation arteries to satisfy travel needs, yet minimize landscape and property damage." I'll now just refer to page 10, the "Western County Development Policy," which I have already described to the Court. It's description is located in one paragraph on page 10.

Next, I would look at page 13 in "Soils and Slopes," and point out the original basis for concern in the Sugarland

Run Watershed. "Soil conditions in 46 percent of the Upper Potomac planning district do not permit proper treatment of sewage by septic tanks; for example, the Herndon area has soils where high water tables are prevalent. In addition, bedrock outcroppings and a soft clay surface occur in several areas around Herndon and on steep slopes adjacent to major stream valleys." This was one of the basic reasons for taking 19 percent of the planning district in Sugarland Run and establishing as early as 1961 to be sewered with public sewer service.

Q Now, was the subject case in the area that was considered to have poor soils and thus should be sewered by a sanitary sewer?

A This is one of the areas.

The next area of interest for noting is the sewer, water and fire services on page 20, Table 5 of that report, which allocates Sugarland Run a design capacity in the trunk sewer system of 219,000 persons. The 1969 use was 5,000 persons. In that column the original allotment is not printed, but the original allotment in 1961 was 61,006. This was based on the study of the Metropolitan Washington Council of Governments which at that time was known as the National Capital Regional Planning Council.

The gas and electricity services are referred to on

page 21, which states that the utilities are available to the planning district, and no problems are anticipated that could handicap the future supply of energy.

On the same page, fire stations are noted to be located at Great Falls, Navy and Herndon, with a fire station in Chantilly. The fire station for this area would be the Herndon fire station located in the center of town approximately a mile and a half from this site.

On page 22, the libraries are cited as being the Carter Glass Library, and the Lake Anne Center at Reston, and the Herndon private library, all within a mile and a half of this site.

The next one in dealing with the history of the plan is to give you the comparison on page 24, Table 7 on schools. The Herndon secondary schools in 1969 were under capacity by 224 students. The Herndon intermediate school was plus 31 in 1969, and the Herndon elementary was minus 88 in 1969. This is stated on page 24 of the adopted plan.

The staff report which was utilized in this case brought that up to date, and I'll give you those figures for comparison. This is page 5 of the School Board report in the application submitted to the Board. The school impact from the rezoning, the net difference, this includes the comprehensive

plan, in the elementary would be plus 9 students. The intermediate would be minus 7. The high school, secondary school, would be plus 48. There is a footnote that the Herndon high and intermediate will be relieved by the construction and completion of the Chantilly Secondary School, planned occupancy September 1973 and '74. So far as I know, that is still on schedule. That's the comparison between the comprehensive plan adopted by the Board and the staff report figures.

Q Now, does this plan, as far as schools, follow precisely, as near as you can, the numbers that the master plan anticipated?

A Yes, sir, it does.

Q Proceed.

A Now, going next, I find the next most important thing under consideration was the existing street system, and I'm referring to page 27 under "Existing Streets and Highways." The statement is made that, "Maximum economy is realized by taking full advantage of existing streets and highways and the associated rights-of-way in planning for future needs. Minimization of disruption to existing land uses and established travel routes are other factors which require that attention be given to improvements to existing facilities insofar as is practicable." With this in mind, of course, the process goes

directly to Route 228 which is programmed by the State of Virginia to be a four-lane divided highway. The southern section from the interior part of Herndon to the high school site at the Herndon boundary is now four lane and was under construction at the time this application was filed.

Q Am I pointing, Mr. Payne, to the area which you say has been four-lane from the town of Herndon out to the high school?

A That is now complete and was under construction at the time the case was being considered. To the north end of the tract the State has acquired 160 foot of right-of-way from the boundary of this property to Route 7, and the two bridges on the original route, which were listed as deficiencies in the county plan, have been repaired and replaced by the Highway Department.

I will cite page 30 of the comprehensive plan report which identifies -- "A review of the facts gathered indicates that this existing network provides a reasonable level of land access based on today's needs; and, generally, carrying capacity is adequate for today's traffic volumes."

Under "Programmed Improvements: The Virginia Department of Highways has recently completed the improvement of Route 7 providing a four-lane divided roadway from the

Loudoun County line to east of the Capital Beltway. In addition to this completed project, the following improvements are contemplated by the state's six-year improvement program for secondary roads:

Dranesville Road (Route 228) north of Herndon, four-lane divided." It's listed as a secondary. That's an error. It is a primary highway in Virginia.

I talked with Mr. Donald Hope who is the district engineer in charge of the Northern Virginia Highway Department districts with regard to their construction plans. Mr. Hope quoted to me on the 24th of April in a conversation --

MR. SYMANSKI: Objection, Your Honor; hearsay.

THE COURT: Objection sustained.

BY MR. HAZEL:

Q Proceed. You can't tell us what Mr. Hope said.

A I see, sir.

On page 31, public transportation is referred to by buses on Baron Cameron Avenue and on Route 7. There is no bus service on Route 228 at this time.

I refer to page 35, the zoning history which I've previously described is also covered in brief under the title, "Existing Zoning" on page 35.

That leaves existing conditions and goes into the

general policies for the plan on page 37. On page 37 there are four significant points. "A goal is a desired future end." One of those is to provide a suitable living environment for the present and future population of the planning district. Another is to provide housing to match the varied needs and income levels of the district's present and future residents. Another is to provide for orderly development consistent with good land use practices and the availability of public and semipublic facilities and amenities.

Lastly, on this page, "The policies plan map at the end of this report is the Division of Planning's interpretation of the policies for the planning district. There may be deviations from the plan map, but the goals will be achieved if the proposed policies are upheld."

Q Do you have any opinion as to whether the policies are all accomplished with the subject case?

A In my investigation, there has been an outstanding effort by the applicant to comply with every request made by the county.

The next statement on page 38, Policy 3 under "General Policies," within the Reston-Herndon cluster and urban density areas adjacent to it, which includes this property, a system of development, neighborhoods focused and linked to community

centers which, in turn, are focused and linked to a regional center, should be sought.

The next key policy areas begin on page 43 at the bottom under "Neighborhood Design: The design of neighborhoods and the smaller residential areas that comprise them should create living areas that are attractive, safe and stable. The layout of lots should be varied to avoid monotony and should provide for an efficient street and utility network."

The next one of importance --

Q Does this application accomplish that?

A It does, sir.

Q All right, sir.

A On page 45, dealing with housing densities, Policy 1: "The residential development in the planning district should maintain a distribution in density that is compatible with the design capacities of the trunk sewers feeding into the Potomac Interceptor." This plan complies with that policy exactly.

On Policy 6, page 46: "Before any large-scale single-family or multi-family residential construction activity occurs, a road system capable of handling traffic that would be generated by the completed development must either exist, be planned for immediate construction, or be included in the six-year program of the Virginia Department of Highways."

Q Mr. Payne, let's stop at that point. Do you have any opinion on whether or not a road system exists at this time which will handle this development when you couple with it what will be constructed by the development?

A There is absolutely no question about it, sir. The road now is carrying only 22 percent of its capacity at the present time.

Q And what is that capacity, and what does it carry?

A The capacity of a two-lane primary highway in Virginia with this kind of surface is figured to be between 500 and 600 vehicles per hour. That's in excess of 10,000 cars per day.

Q What is 228 carrying at this time?

A Do you want it as of this date, sir?

Q Whatever date you have it in relation to the case.

A 228 -- I will give you these figures. In 1969, the state's traffic count for 228 was 1,515 cars per day. In 1970, it was 1,645; and in 1971, 2,035 cars. That's about 22 percent of its capacity in its current condition.

Q Is it your opinion that the current carrying capacity of 228 north and south sufficient to carry this project?

A Yes, sir, it is. The State Highway Department, which of course controls the design of these roads, has a standard which says that roads should be considered, primary roads,

should be considered for four-laning when the total daily traffic exceeds 5,500 vehicles per day.

Q Now, Mr. Payne, when you get to Herndon Junction and you get on Route 7, what is the carrying capacity of Route 7?

A Route 7 would approach 40,000 vehicles per day. It's a four-lane arterial highway, and its capacity is related to the amount of control signals on it.

Q And what arterial link does it provide?

A It provides the arterial link between the Capital Beltway and Winchester in the Shenandoah Valley and is the only state arterial highway in Fairfax County and in Loudoun County.

Q What is it actually carrying?

A Using the same years, in 1969, between Route 228 and Route 193 in Dranesville, in '69, it was 12,210 cars per day. In 1970, 13,200 cars per day; and in 1971, at the time of this case, 15,440 cars per day.

Q And it's your testimony that that's built and designed to carry 40,000 vehicles a day?

A At least that many, depending on traffic signals, sir.

Q All right, sir; proceed, Mr. Payne.

A A question came earlier. I'll answer it now. On page 46, in sequence, "Population and Density", Policy 1:

"In the urban density areas of the Upper Potomac planning district, the planned population of each neighborhood designated on the plan map should be maintained."

This property is listed in Table 10, page 47, neighborhood No. 5, 5,500 population. Gross population density in people per acre at 11.0; Conventional zoning, 2.5 units per acre. Cluster zoning, 2.9 units per acre. PDH zoning, 3.1 units per acre. That is stated in Table 10, page 47, as the adopted objective for neighborhood 5 which includes this property.

Q Mr. Payne, is it your opinion that the requested application is exactly on the numbers that are stated as the population planned for this neighborhood?

A It's my impression that it is, sir.

The next important policy adopted by the Board is on page 49, under "Variety and Innovation," which suggests on the following page 50 the innovative design desired by the county. Policy 1: "Innovations by the county's builders in the design and construction of residential areas should be encouraged.

Policy 2: Developers of large tracts of land are encouraged to build under planned unit development ordinances, such as PDH, which permit the construction of complete

neighborhoods or communities supported by adequate facilities and services.

Policy 3: Fairfax County should assist builders and work with them in developing innovative proposals. Examples of significant assistance Fairfax County can and should provide are: Technical assistance in the design of subdivision plats and site plans. Reductions in the time required for processing rezonings, site plans, and subdivision plats. Early consideration of rezonings for planned unit development categories. A continuing evaluation of the county's codes to permit the use of technological advances in housing construction."

The next important one is "Low-and-Moderate-Income Housing."

Q Now, does the subject property need all these policies that you are talking about?

A With the exception of the comments raised by the staff over the staging of the development plan, yes.

Q Go ahead.

A The next important point, page 51, on the supply expected of housing in this planning district. The staff expects, "the Upper Potomac planning district is expected to occur at an average rate of 1,000 units per year between now and 1980."

This is an adopted plan which implements the growth in this area at a level of 1,100 units per year.

"Low-and-moderate-income housing in the district should be provided to the fullest extent possible by private enterprise." This plan proposes such a portion of its development.

The next important phase of it. I skip over the commercial and industrial areas because they are not relevant to this case, and deal with the community facilities on page 61 under "Implementation," Policy 1:

"Sites for community facilities with small service areas, such as elementary schools and neighborhood parks, should be dedicated by developers and accepted by the county when they are consistent with the policies in this report."

The plan that was prepared by the developer in this case not only dedicated a school site, it provided a golf course and other recreational facilities. That's in full compliance.

And page 62 and 63, dealing with the future sites for schools, Policy 1:

"School sites should be acquired in advance of need to minimize school busing costs and to structure future, planned and urban growth." This has been provided for in the plan.

Policy 2: "Public schools should not be located in major commercial or industrial areas.

Policy 5: Where possible, elementary schools should -- which are pertinent to this site -- should be located in the neighborhood centers shown on the policies plan map. Otherwise, their sites should be in the center of the attendance areas they serve. Elementary schools should be located adjacent to collector streets and should never be located on arterial streets." Route 228 is designated as a collector street. In the staff report, the School Board asked for a 13.9 acre dedication on this tract, and it is so shown.

In terms of the parks policy, on page 65 of that report, and on page 66 --

Q First, with reference to libraries, on page 63, do you have any opinion with regard to the adequacy of library facilities?

A Yes. Policy 2 states, and I'm sorry I missed that, "The branch libraries should be located in Herndon and the Floris community center." The branch library is in place in Herndon, and there is also a bookmobile service in this area which is covered in Policy 4.

Q Is there also a library in Reston to service this area?

A That's right; and also a library at the Herndon High School across the road.

The next area, in dealing with the parks program, page 65, Policy 1, "Neighborhood and Community Parks: Sites to be used for neighborhood and community parks should be reasonably flat to permit their development for active recreation." I think that's concomitant with the golf course which is proposed on this tract where the flood plain is located.

Q Mr. Payne, in addtion, I show you the map on the wall, Exhibit 9, the Hiddenbrook Subdivision immediately adjacent to this property, and ask you if the area indicated for parks is not being dedicated immediately south of the property?

A That is correct, sir. It is dedicated for public park purposes.

Q And a part of that is already owned by the Park Authority, is it not?

A That's correct, sir.

Q That is in addition to the 218 acres of green space shown on this plat?

A That's correct, sir.

Policy 2 and 3: "Sites for neighborhood and community parks should be accessible to the user group they are intended

to serve." That has been accomplished in the condition mentioned by Mr. Hazel and on this plan.

Policy 3: "The multipurpose use of school grounds to meet local, active park needs is encouraged." The ground has been provided, 13.9 acres, for that purpose on this plan.

The next area of interest, page 68, on police and fire protection. Policy 1, on fire stations, page 68: "Fire stations should be planned, programmed, and constructed, and fire services organized, to enable the classification of Fairfax County's fire defenses to class 2.

All single-family residential areas should be within three travel miles of a fire station." This tract of ground is within a mile and a half of the Herndon station.

On "Police Protection, Policy 1: Police district headquarters should be located in the center of their service areas in order to enable rapid response." This means, of course, the center of Fairfax County's district here, and Herndon, the Herndon police area, and is the Fairfax County's patrolled districts.

The next important point that I found is on "Utilities" on pages 70 and 71. Policy 1: "Programs for extending public and semipublic utilities in the Upper Potomac planning district should be consistent with the policies and plan and seek to

attain their objectives." I have no doubt that just what I've referred to so far does exactly that in the light of the western county plan.

Policy 2: "Programs for extending public and semi-public utilities into the Upper Potomac planning district should be coordinated with each other and with programs for highway improvements and the construction of community facilities. Common rights-of-way should be used whenever possible."

Q Now, Mr. Payne, under the development plan in this case and under the county's requirements, are major areas of Route 228 being dedicated and improved as a result of this proposal?

A The entire area from the state's acquisition at Route 604 to the south end of the property at Tusico Road and Folly Lick Branch is being dedicated to a right-of-way of 160 feet to the Highway Department, which is in accordance with their proposal for acquiring land in this area for the improvement of that facility.

Q There was testimony yesterday by Mr. Hendrickson that major improvements would have to be built on that. Are you familiar with the county's improvements requirements?

A Yes. There will have to be construction here of service drives, curb and gutters, drainage facilities, and

probably some construction on the road, itself.

Q All right, sir.

A Policy 4, on page 71: "Priority for extending water and sewerage in the Upper Potomac planning district should be given to areas planned for urban densities and industrial development."

Neighborhood 5, in which this tract is located, is classified as an urban density area. "The Fairfax County Water Authority and the Department of Public Works, with assistance from the Fairfax County Industrial Authority, should develop a program for expediting water and sewer service to areas 1 and 2 consistent with the county's capital improvement program and its financial capabilities."

Q Now, Mr. Payne, with regard to water and sewer service, is there a sewer trunk on the subject property?

A There is, sir.

Q And that is part of the Sugarland-Folly Lick trunk system?

A That is the main trunk.

Q Does the proposed development plan and in accord with county requirements provide that all of the sewer service extensions on the subject property will be built at the developer's expense and then deeded to the county at no cost?

A It does provide that. That's consistent with past county policy.

Q Now, Mr. Payne, are you familiar with the Water Authority's extension of water service to the adjacent subdivision of Hiddenbrook?

A Yes, sir; not to the contract details, but to the physical facts.

Q They are providing water service there?

A That's correct.

Q And have you investigated and determined that the Fairfax Water Authority will provide water service to the subject property?

A Yes, sir; they will.

Q All right, sir; proceed.

Again, are those water line extensions on the subject property built at the developer's cost and dedicated to the Water Authority?

A That is correct; and also built to the county standards.

Q All right, sir; proceed.

A The next item of importance is on page 73, Policy 1 and 2 with regard to protection and preservation of main streams and flood plains. Sugarland Run and Folly Lick Branch, Sugarland Run being behind Mr. Swart's shoulder, and Folly Lick

Branch coming off this way, are listed as main streams for protection. I'm pointing out that the protection should extend to the flood plains and the valley slopes.

The Criterion 1: The 100-year flood plain, and Criterion 2: to protect the 15 percent slopes. This is the purpose of showing the golf course in its area here to offer full protection to the stream valleys and to the banks of the stream where the rolling slopes occur on both Sugarland Run and on Folly Lick Branch.

Q Now, Mr. Payne, do you have any opinion as to whether this plan or whether R-12.5 development under a cluster concept, if that was the alternate zoning, would preserve the major stream valleys on this area?

A By all means, sir. This terrain is typical cluster terrain. It is rolling terrain, from five to ten percent slope in places. It has flood plains on it, and most of the terrain in the Sugarland Run valley, as those who've farmed it will know, can best be developed now that it's sewered through the cluster principle, either PDH or cluster subdivision.

Q Do you have any opinion as to whether development of a conventional RE-1 zone on this would be better or worse so far as stream valley protection?

A In my opinion, it would be very definitely worse

because the county's requirements for over-lot grading and street grading at the two-and-five percent lot-grading levels would require leveling this tract. That would require a much more expensive erosion-control procedure and probably filling of the flood plain.

Q So that of all the proposals or of all the available approaches to development, which one is in your opinion preferred as far as soil conservation, topographic conservation and stream valley preservation?

A The PDH, because it provides the maximum density allowed under the ordinance on the minimum amount of land.

Q And that is as shown on the subject development plan?

A That's correct, sir.

Q And could the same thing be accomplished on a R-12.5 cluster?

A Almost; not quite to the same density. 2.9 versus 3.1.

Q You prefer the PDH approach?

A That's right.

Q And has the plan indicated that the preferred approach is PDH?

A Yes, sir. In the citations I've come to so far,

they have definitely stated that.

Q All right, sir. You may proceed.

A The next important matter is "Transportation," beginning on page 83, which identifies collector streets, and Route 228 is considered as a collector. It's a Virginia primary highway, and they're described as follows: "They provide the primary means of circulation between adjacent neighborhoods and serve as local bus routes. Collectors function to distribute trips from arterials to local and other collector streets. Conversely, they collect traffic from local streets and channel it into the arterial system." That is a description of Route 228 without any doubt.

Policy 5: "Collector streets should be located to produce a minimum number of intersections with the surrounding arterial highways. Such intersections should be at least 1,000 feet and preferably 1,500 to 2,000 feet apart." That can occur here because of the length of frontage involved where it's desired by the Highway Department and through service construction.

Policy 6: on page 84, "Collector streets should be designed with a right-of-way width of 80 to 110 feet." However, Route 228 is a primary and the state has indicated a desire for a 160 foot of right-of-way here and is so acquiring that

right-of-way, and this plat shows 160 feet of right-of-way to comply with the coordinated state program.

The next most important thing is the two maps following page 87, which is map 7, which is mapped by the Metropolitan Washington Council of Governments Traffic Analysis Survey conducted in 1969 and 1970.

This is probably the first and most important analysis you can use on traffic desire lines. On map 7, it is shown that the 1990 travel desire lines between the Potomac planning district and the external zones, that is to say areas east to Tysons Corner and west to Leesburg, less than one percent of the 1990 traffic is anticipated to go from Herndon to Mocks Corner by way of Route 228.

On the next page, map 8, dealing between vehicles in the internal zones of the planning district, that is to say from the north side of 7 proceeding to the south side of 7, and vice versa, the traffic desire lines are 2.9 percent.

By comparison, those two figures are the lowest figures in the entire planning district that would use this route.

Q Now, translated, Mr. Payne, does that mean that Route 228 is not anticipated to gather in over the next decade or more a great deal of volume of intercounty traffic?

A That's correct. And the reasons for it are quite simple. The intercounty traffic is carried by Route 7 and Baron Cameron Avenue, Route 606 between what was called Browns Mill -- I don't know what they call it now -- and the center of Herndon. That is the main carrier route both east and west from Herndon and Leesburg. Route 228 is simply a collector between the two routes for local traffic.

Q Does this mean that it's your opinion that it's now adequate, it will be adequate for carrying this project and that it's also under the county's plans and analysis going to remain adequate for the indefinite future to carry the traffic?

A That is correct, sir.

Q All right, sir; proceed.

A The next important point on road implementation policies on pages 94 and 95. 94, first, the last paragraph before the policies which says as follows:

"Thus, implementation of the recommended plan is dependent upon a reasonable and proper application of the zoning and subdivision control ordinances, the programming of funds by the Virginia Department of Highways, and considerable cooperation by the private sector."

Q Now, does this application meet that in all respects, Mr. Payne?

A In every respect, sir.

Policy 1: "The comprehensive plan map which indicates the planned transportation system should be utilized by the Department of County Development in requiring the construction and dedication of streets and/or the dedication of rights-of-way.

Policy 2: The acquisition of sites for public facilities should include the acquisition of abutting or adjacent rights-of-way necessary for streets contained in the adopted transportation plan map.

Policy 5: All highway improvements, whether made by developers, the county, or the Virginia Department of Highways, should be related to the defined purpose of each street system and conform to the standards and policies for local streets, collector streets, arterial highways, and expressways." This plan meets that to the complete degree of description.

On page 97, another very important point is the development priorities for the Upper Potomac planning district under section IV. "Implementation. The scheduling of expenditures for community facilities, roads, and utilities as reflected in the county's five-year capital improvements program and the construction program of the Virginia Department of Highways, and the construction of these facilities currently are the most

important tools available to Fairfax County to determine when areas will undergo development. Decisions on sewering the Horsepen Creek, Sugarland Run, and Difficult Run watersheds, contractual agreements on the use of these sewers with Herndon and Vienna, the county's obligation to reserve sufficient capacity in the Difficult Run trunk sewer for Reston's development and the improvement of Route 7 have guided urban development to Herndon, Reston, and adjoining areas. Together, these areas constitute the suburban cluster in the Upper Potomac planning district and are planned for urban density development. It is therefore recommended that the programming of future capital improvements reinforce the concept of the Reston- Herndon suburban cluster, that development be encouraged in Reston, Herndon, and surrounding areas planned for urban density development, that during the next five years future capital improvements in the planning district be concentrated in these areas, and that the provision of capital improvements to the planning district be consistent with the county's five-year capital improvements program."

Q Mr. Payne, does the subject application fulfill that priority, planning designation in every respect?

A In every single respect.

Q Mr. Payne, regarding the Difficult Run reservation

of sewer capacity in the Difficult Run trunk, is any part of the subject application served by the Difficult Run trunk?

A It is not, sir.

Q All right, sir.

A The last item of importance, and I apologize for taking so much time, was that the incentives offered on page 98 -- "Incentives should be provided to the county's builders and developers who plan and develop their properties under the planned unit development principle. In addition to density credits which are permitted to developers who use the PDH amendment, all PDH and similar applications enabling the development of property as a planned unit should be placed on the priority calendar of the Planning Commission and the Board of Supervisors."

I note for the Court's benefit that case C-222 was on the conformance calendar and conforming with the comprehensive plan.

The last statement, "Public-Private Participation." This is on page 99. "Since policies cannot be mapped exactly, the policies plan map is a single interpretation of the policies in this report. Therefore, developers should be informed that alternative interpretations of the policies are both solicited and encouraged. Creative development proposals should be

welcomed and judged by their consistency to adopted policies rather than the plan map. Fairfax County officials should work closely with developers in designing and implementing imaginative development proposals."

That completes the 24 citations that I've found in the document that had 24 adoption actions by the Board of Supervisors on three dates: July 22nd of '70, February of 1971 and April of 1971. And this neighborhood was not questioned once in those 24 adoption motions.

Q Now, Mr. Payne, is there anything in the master plan to indicate that development in this neighborhood should not proceed at pace?

A No, sir. I have been unable to find anything in the staff report, in the records of planning, that would indicate that this property should not develop as planned for.

Q In your opinion, is there a necessary level of public facility to support this?

A In every regard, yes.

Q Now, Mr. Payne, is there anything in the Potomac master plan or your background in the zoning area to indicate that the PDH application is not in substantial accord with the Potomac plan in every substantial detail?

A In my belief, it is in full accord with everything

that has been written by the county with regard to this western county Upper Potomac planning district plan, both in the original plan and the revised edition.

Q Now, Mr. Payne, in order of preference, is the PDH to be preferred under the planned criteria over the 12.5?

A Yes, sir.

Q Assuming the PDH was not for some reason allowed to go forward, what would be the next zoning category that would be preferred?

A The R-12.5 cluster, sir.

Q All right, sir. And that can be accomplished under the R-12.5 zone?

A That's correct, sir. It's called a cluster alternate.

MR. HAZEL: I have no further questions.

THE COURT: We're going to take about a five-minute recess at this time.

(Short recess.)

THE COURT: All right, sir, you may cross examine.

MR. HAZEL: If Your Honor please, I have one item, very brief, that I would like to put in the record.

THE COURT: All right.

BY MR. HAZEL:

Q Mr. Payne, have you prepared a statement or review

of the annual growth rates in Fairfax County in the last 20 years or so?

A Yes, sir. I have a copy of the population growth in Fairfax County from 1950 to 1972 as prepared by the Division of Planning of Fairfax County.

Q And in terms of percentage growth, how did the last three years rank in those 20-odd years?

A The last three years, in terms of numbers, were 21,000, 26,400, 28,000 in total population. Percentage was 4.9, 5.9 and 5.9.

Q In terms of rank by the years, of those numbers of years of the last 20, as far as growth years, how did they rank?

A Probably about half of the peak growth. The highest growth figure was in 1957 at 21,644 people at 11.7 percent growth.

Q And what does that indicate with regard to the percentage of growth per year in the 20-odd-year period that that covers?

A The numbers of population are increasing proportionately to the total population. That is to say in 1957 the total population was 207,000, and you had a 21,644 annual increase. In 1972, you had 502,856; population growth, 28,156, which

indicates an increase in growth rate and total population.

Q But, as a percentage matter, how does this compare with earlier years, the percentage of growth to the whole population of the county?

A It's less than all of the years except 1960, which was 4.2 percent, 1961 which was 3.9 percent, 1965 which was 4.8 percent; and all other years it's in excess.

Q Now, in the years 1950 to '57, what were the percentage growth rates in the county?

A In 1951, 13.3 percent; 1952, 16.5; 1953, 9.4 percent; 1954, 10.2 percent; 1955, 8.8 percent; 1956, 10.8 percent; 1957, 11.7 percent.

Q So that the growth rate and the percentage for the last three years, if I understand it right, is about half of what it was in the years of the 1950's?

A That's correct. Greater numbers, lesser percentage rate.

MR. HAZEL: Thank you.

I have no further questions.

THE COURT: All right, sir, you may cross examine.

CROSS EXAMINATION

BY MR. SYMANSKI:

Q Mr. Payne, you testified about the Freehill amendment

and the Carper case, and you've referred to one-and-two-acre zoning.

A Yes.

Q What were the amounts of those two categories? In other words, was it an even amount of one-and-two-acre zoning or was it more in the two-acre zoning?

A Most of the zoning was referred to the western two-thirds of Fairfax County. There was 408 square miles, so there was approximately 300 of those square miles were set up in the Freehill amendment as in the two-acre category.

Q Did you say 300 acres were set up?

A 300 square miles.

In the actual case that came up, there was a map which was required to be made showing the number of parcels by the people who were challenging the county. This is Carper, et al; and as I recall their numbers were approximately 10,000 acres in this entire western area. Then there were intervenors on the county's behalf which had approximately 12,000 acres.

Q My question is how many of these square miles, under the amendment, were two acre and how many were one acre? In approximate figures.

A I would say that they were roughly 60-40. 60 percent

two acre and 40 percent one acre in the 300 square miles, as I recall.

Q Now, in Virginia, particularly in Fairfax County, what is the system for implementing comprehensive plans?

A Normally, plans are drawn first. I say normally, it isn't always the case. Then, implementation tools follow, such as zoning, then planned communities and whatever tools are used prior to the issuance of building permits.

Q Would it be fair to say that zoning is the principal means of implementing comprehensive plans?

A I would say so, yes.

Q Now, in a zoning decision, in your opinion, should public facilities be a consideration?

A They should be a consideration in terms of whether they are planned or programmed. I would say to you without any shadow of a doubt, at least in my 23 years of experience, I know of very few cases except --

Q I asked you if there should be a consideration, in your opinion, in the zoning decision?

A A consideration, yes.

Q Your testimony in another case, the A & B case --

MR. HAZEL: Your Honor, I think Mr. Payne is allowed to answer a complete answer, if that wasn't his full reply.

THE COURT: Well, I assumed that was his response; he'd already answered. All right.

BY MR. SYMANSKI:

Q I believe in the A & B case you testified, the question was: You are not saying the zoning --

MR. HAZEL: Pardon me. Which case, Mr. Symanski?

MR. SYMANSKI: A & B Construction Corporation vs. Board of Supervisors, 36753, Chancery.

BY MR. SYMANSKI:

Q "Question: You are not saying the zoning, the zoning decision, should not consider the adequacy or inadequacy of public facilities?

Answer: Not at all; by all means.

Question: In fact, they should?

Answer: Absolutely."

Do you still agree with that?

A Sure.

Q I show you a copy of an exhibit, the staff report, and ask you if you will read -- first, identify the heading, and read paragraphs 3 and 4.

A All right. This is a heading of a letter from:

(Reading) "County of Loudoun, Virginia, Department of Planning and Zoning, 18 East Market Street, Leesburg,

Virginia, dated August 26, 1971. It's addressed to Mr. A. M. Mohamadi."

Q Would you read paragraphs three and four in that letter?

A Paragraphs three and four: (Reading) "The existing zoning in Loudoun County adjacent to the land in question is R-2, which allows one dwelling unit to the acre.

This is an equivalent density to the existing RE-1 of the applicant's property. The one acre dwelling unit per density is in agreement with the Loudoun County development plan."

Q With regard to shopping centers, did you testify that this part in Fairfax County is in existence now?

A It's under construction now.

Q What were the circumstances in October of '71 with regards to that shopping center?

A The site plan was being approved in October '71, and construction had started with the beginning of a bank on the Loudoun County side. The construction at this point in time is along the line, and this construction is in the parking lot and the improvements to the service drive along Route 228 for this access point. The majority of the buildings are located in Loudoun County.

Q What is this parcel on the east side?

A This parcel to the east is a parcel zoned C-G in Fairfax County which is the site of the old Triangle service station, and it is now vacant.

This parcel south of the creek is now zoned C-G in Fairfax County and is vacant.

Q So these two parcels are vacant?

A That's right.

Q Now, you testified on the public facilities and on the staff report. Did you determine what the circumstances were in 1971 with regard to the schools?

A Yes. I took those from the staff report.

Q Well, there has been some testimony earlier from Mr. Whitworth of the School Board that basically the subject property is planned for over 600 units by September '73, and that this would, in effect, keep the situation the same as it was in October of '71, even with the Chantilly school. Does that change your opinion of whether the school public facility question is adequate?

A I believe it's entirely adequate, sir. I have no reason to question the staff report, and I'll go back to you. The school impact from the rezoning, the net student difference, is a plus 9 elementary, a minus 7 intermediate, and a plus 48.

I have found nothing in the testimony, or the record or in the staff report that indicates that there is a serious problem with school construction any different than there has ever been in Fairfax County. In fact, this looks better to me in most cases.

Q In the staff report, the intermediate and the high school, doesn't that show that they are over capacity, over the designed capacity?

A Yes, that's correct.

Q And that's not a problem?

A It's always a problem, sir. It's always a problem.

Q Is it your opinion that if schools are crowded in another location that it's okay, as far as public facilities, to have them crowded in this location?

A Certainly, sir. They change school district boundaries on an annual basis, and that has been the history of growth in Fairfax County. I have never known of a case here or anywhere else where the schools were available prior to the growth.

Q Now, you testified on the road planning in the comprehensive plan. I'd like to refer you to page 27, and have you read the last paragraph.

A Under deficiencies, sir?

Q Yes.

A All right. "Deficiencies: To more adequately describe existing conditions of the highway network, a visual inspection was conducted. The primary purpose of this survey was to establish the obvious deficiencies in the existing street system. This survey served as an aid in establishing the following:"

Q That's fine. Now, on page 30, the first full paragraph. You read the first two sentences. To be fair, let's read the third sentence. Excuse me. You read the first sentence in that paragraph. To be fair, let's read the second sentence.

A (Reading) "However, traffic service is minimal in terms of safety and efficiency. East-west radial travel --

Q That's fine, that's fine.

MR. HAZEL: Mr. Symanski, I think the witness can continue until he's answered the question.

MR. SYMANSKI: I asked him to read the second sentence.

MR. HAZEL: That might be fine with you, but I think the Court would allow him to finish his answer if he was still reading.

THE COURT: Let's move on, gentlemen. Proceed.

BY MR. SYMANSKI:

Q Now, on page 70 of the plan, you read the paragraph, I believe, on the utilities?

A Yes. Policy 1.

Q Are you aware that there are amendments to the plan?

A Yes, sir.

Q Would you read amendment 16 on page 3 of the summary of the Board of Supervisor action related to the preliminary plan, dated July 22, 1970?

A Yes. 16. "That a note be incorporated in the text stating total implementation of this plan cannot occur until additional sewer capacity is available. This note will be inserted on page 70 within the section on utilities."

Q Thank you. Now, you also testified on the library facilities. Was it your testimony that the library facilities contemplated in the plan in fact are in existence?

A Not all, no. Those which are in existence are within a mile and a half.

Q Did you study the conditions in those libraries before you made your statement, I believe, that library facilities were adequate?

A The details as to the number of volumes available?

Q Are they crowded? Are they serving --

A They're serving, I think, a very good cross-section of the population. They're providing a service and they need improvement.

Q Are they crowded?

A Yes; the Herndon library is.

Q Page 68 of the plan. The first two policies below for a high level of fire protection, and they reflect criteria established by the American Insurance Association.

Do you know what the definition of a single-family residential area is under the American Insurance Association criteria?

A Well, unless they have changed the National Fire Board of Underwriters. These are areas which contain largely single-family residences. They're not what they call high intensity fire districts.

Q Do you know what the definition under the American Insurance Association is of a single-family residential area?

A No, sir, I do not.

Q Do you know whether it can be town houses or whether it has to be single-family detached?

A It's my understanding that it can be town houses as well as single family, but I do not know the complete definition, sir.

Q So before you made your statement as to fire protection being adequate, you did not know whether in fact a town house development would fit under the single-family criteria; is that correct?

A No, sir, I did not.

Q Also, I believe you referred to the fact that this property was a certain distance from the closest fire station?

A About a mile and a half, yes, sir.

Q Now, is that to the edge of the property line?

A That's to the edge of the property line.

Q Do you know if the criteria established by the American Insurance Association measure distances to developments or to property to the edge of a line, or to the middle of the property? Do you know what criteria they use?

A In my experience, they use a circumscribed circle around the fire station and draw the circle there. Now, of course, I'm sure that they have changes. They can be amoeba-like structures or general structures. Generally, they use a circle within three miles.

Q You're sure of that under the American Insurance Association standards?

A As sure as the latest information I've seen.

Q Now, you also testified, I believe, that service

roads would be required on this primary highway; is that correct?

A I said they could be required. It's a primary highway.

Q Well, I ask you, does the service road shown here cover the length of the property on 228?

A No, sir; it covers the length of it where housing is located.

Q Now, you also testified, I believe, correct me if I'm wrong, that flood plain criteria in the plan were met or exceeded possibly by this development plan; is that correct?

A I testified that the plan required a 100-year flood plain survey to be made, and that this plan and the analysis presented by the engineers shows a maximum protection for it.

Q Would it be your opinion that building houses in the flood plain would be the protection contemplated in the Upper Potomac plan?

A No, sir.

Q I show you stipulated Exhibit No. 7. Now, there's a blue line drawn on that. Can you read what is written?

A Approximate 100-year flood plain limits, Sugarland Run, by U.S. Geological Survey.

Q Are there any houses inside that blue line?

A I count 19.

Q I ask you again, did building houses or planning houses in the flood plain meet the criteria of the Upper Potomac plan as far as preservation of flood plains?

A It does not, sir.

Q I believe you also testified that PDH compared to -- strike that. -- that the PDH plan would allow preservation of the flood plain?

A That's right.

Q Now, did you also state that RE-1 would do more harm to the flood plain than a PDH development?

A Yes; in my opinion, it would.

Q Is that true even with RE-1 cluster development?

A No. I believe that would compare also with the favorable design in the R-12.5 cluster.

Q They both would allow some --

A They both allow protection; that's right.

Q I think you also referred in the plan to travel desire lines?

A Yes.

Q What was the date of that exhibit or map? Map 7 or 8, I believe. What's the date on that?

A These maps are prepared by the WMATS, and the desire

lines are given, I think I stated in both cases, for the year 1990.

Q You have talked about Herndon and Loudoun Counties as it affects this property. Does Fairfax County have any control, whatsoever, over their planning process or their zoning process?

A Either jurisdiction?

Q Yes.

A Not at all, sir.

MR. SYMANSKI: No further questions.

THE COURT: Do you have any further questions?

MR. HAZEL: Yes; I have very few.

REDIRECT EXAMINATION

BY MR. HAZEL:

Q Mr. Payne, reference was made to a letter that is included in the staff report in C-222 which is an exhibit, signed by an individual called Anthony T. Wright, setting forth some facts,about which he alleges to be facts about Loudoun County.

Do you agree with the presentation of his facts as being correct in all respects?

A I would categorically state that the facts presented are in error.

Q And would you tell His Honor where they are in error or where they do not represent the entire truth of this statement?

A The existing zoning in Loudoun County adjacent to the land in question is R-2, which allows one dwelling unit per acre. This is an equivalent density to the existing RE-1. That is only partially true since the planned community, which is 3.6 units per acre also abuts this property. It wasn't acknowledged in this letter.

The second paragraph. The one dwelling unit per acre density is in agreement with the Loudoun County development plan. This is a half-truth. The Loudoun County development plan says on plate 8 and plate 10, one-to-three dwelling units per acre. The three was left out.

The next statement in error is the staff's principal concern is the overburdening effect that a development of this scope would have on the limited and already overtaxed Route 604 and south, Route 625. This is Route 604, which is a dead-end road.

MR. SYMANSKI: Your Honor, I'm going to object to this. I believe this is beyond the scope of my direct, also. I didn't refer to any parts of that letter with regards to traffic. I referred only to the part with regard to zoning.

THE COURT: I don't believe you can refer to one part, Mr. Symanski, and leave out the other. I would have to deny your objection.

THE WITNESS: Route 604 is located here and does not lead to anything but a dead end. This road is a single-lane gravel track which dead ends at the back lots facing on Sterling Park Boulevard. Therefore, there is no traffic load on 604. It can't go anywhere.

Route 625 is a road which is planned by Loudoun County to lead off of Sterling Park Boulevard and eventually come to this intersection on Route 28 which has been improved by the Highway Department of Virginia within the last two years. The bridges have been rebuilt, and the road has been improved to a standard section with 24 feet of pavement to this point.

The statement made in this letter is not correct. The third statement that is made that is not correct is that the existing roads adjacent to the subject property are not adequate to serve this kind of vehicular activity, a substantial portion of which would be directed westward towards Sterling Park. That is not correct.

The current traffic count on Route 228, as was stated earlier, is less than 25 percent of its current capacity,

much less its improved capacity. The statements made in this letter are simply not correct.

BY MR. HAZEL:

Q Mr. Payne, is there any way that you can get, conveniently, from the subject property into the Sterling Park complex?

A Yes, sir. The traffic route is provided for it in two different ways. You can come down through Herndon and go west on 606 and go up Sully Road. This is a -- Sterling Boulevard is a programmed and partially built main drive between Route 7 to Sully Road at the Holiday Inn at Dulles Airport.

Q Can you get there over either 604 or 625?

A You can get in by way of 625 over this section which passes in front of the American Housing Guild property.

Q In your opinion, is there any particular reason that would give a desire line from the subject property into Sterling Park?

A There's none, sir; except the convenience of residents visiting back and forth. The shopping facilities are here; as stated in the county plan, the desire lines between these points is less than one percent. Sterling Park has a proposed traffic signal here. Their main desire line is east and west

on Route 7, and south to Sully Road at the airport. There's no reason in the world to assume anybody using this track would go in this direction.

Q Now, Mr. Payne, you've stated in your direct examination that, in your opinion, all public facilities are available in a necessary level to sustain this application.

A That's right, sir.

Q There was a question about public facilities being planned and being constructed in the future. Are there optimum levels of public facilities that are aspired to but rarely constructed?

A Yes. The optimum is something that we all, I think, collectively reach for and very seldom achieve.

MR. SYMANSKI: Your Honor, I object to this, too. Optimum levels -- I asked him about specific things on my cross, and going into general statements here in redirect is not within the scope of my cross.

THE COURT: I am going to sustain the objection.

BY MR. HAZEL:

Q And finally, Mr. Payne, you were asked about the 19 units that were in the flood plain, and you stated that was an approximate flood plain from a geological survey, is that correct?

A That's correct, sir.

Q Mr. Payne, what is done after a development plan is approved and in process, so far as engineering, to tie down the exact flood plain line?

A The engineers in charge of the project are then required to work under the County Public Works Codes to design the flood plain in actual final design.

Q Is there frequently a change from approximate flood plains to final flood plains?

A There almost always is.

Q And to get this development plan, which is based on a geological survey, into a final, recordable development plan, what is required regarding the flood plain?

A A complete stream cross-section survey and study based on the 100-year flood criteria.

Q Is the fact that that shows an approximate, and the fact that there were some units that were suggested to be in it, necessarily mean that when the plan is finally approved they would be there?

A I'm certain they would not be, sir. First of all, the engineer presenting the plan would not present it that way; and secondly, the county would not approve it that way.

Q Pursuant to the county's specifications, could lots

be shown in the flood plain if, in fact, it turned out that that was the flood plain?

A No, sir, they could not.

Q So that actually they would have to meet the county's specifications as they developed the flood plain?

A That's correct.

Q Now, Mr. Payne, is this plan in this stage with the geological survey the normal, routine-type that is shown at the zoning stage?

A That's correct. There was never -- I know of no place in the county's plan or ordinances where final engineering designs to the building permit issuance level have been presented or identified as a prerequisite to a zoning hearing.

Q Is there major expense involved in moving from the development plan through the county's planning or approval processes with final plans?

A That is the most expensive part of the entire operation.

Q Is it routine that they are presented after the zoning?

A Nearly always the case is-- quite a bit of administrative requirements to be met between zoning and building permit issuance.

Q So there is no question that this is not a final plan in any respect?

A No, sir, it isn't.

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

MR. SYMANSKI: I have a couple of more questions.

RECROSS EXAMINATION

BY MR. SYMANSKI:

Q You stated that Route 604 dead ends over here?

A Right there, sir.

Q Okay; but you also stated, did you not, that it joins or it has access to Route 625?

A That's correct.

Q Now, what's the condition of this road in here between 625 and the county line?

A This condition here is a single-lane, unpaved road called by the State of Virginia an all-weather surface road. The same is true here, except from this point in it's now being improved by this developer as a local street connecting with Sterling Park Boulevard.

Q You also stated that access to Sterling Park could be had by going south through Herndon, is that correct?

A There are three ways. You can go south through Herndon, west on the Herndon Avenue by Oakgrove to Sully Road

and into the lower end --

Q All right; on that --

A -- and you come out here and in; and you can also, if you want to struggle with the dust, come through this way. This is not the desire line of traffic coming from this area.

Q Okay. I only asked you if you could get this way. Is that a convenient access to Sterling Park going through Herndon?

A If you're going to the southern end. Sterling Park -- unfortunately, I didn't bring all the sheets -- Sterling Park extends all the way through this portion of Loudoun County and has the same frontage on Route 28, Sully Road, as it does on Route 7. This is the functioning road, carrying traffic through Sterling Park, and it is the only road between Route 7 and Route 28 that carries any traffic in this area

Q You stated that Sterling Park abutted the property.

A That's correct.

Q Do you mean by that that it abutted the Loudoun County part or the Fairfax County part?

A It abuts the Fairfax County part right here and also at this point. In other words, this is 10,000-foot lots abutting 12.5 lots here, and abutting one-acre zoning at this point.

Q Well, the abutting is, in effect, of one corner; is that correct?

A That's correct.

Q Now, you also refer to Route 228 as a primary highway, and you refer to traffic loads. Can't that also be considered from the point of view of safety and efficiency and not only traffic loads?

A Well, they are concomitant with each other, but this is a two-lane primary highway, and the current load is less than 22 percent of its capacity. Therefore, safety and efficiency are matters of desire rather than fact.

Q They are matters -- would you repeat that, please?

A Desire rather than fact. It's a matter of opinion when the traffic counts are there and they are carrying less than 22 percent of its capacity.

MR. SYMANSKI: No further questions.

BY MR. HAZEL:

Q Mr. Payne, in connection --

THE COURT: We are going to stop. We've been around this way and that way. That's the end of it.

Mr. Payne, you're excused, sir.

(Witness excused.)

MR. HAZEL: I'd like to call Mr. Coston.

Whereupon,

OTIS COSTON

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

DIRECT EXAMINATION

BY MR. HAZEL:

Q Would you state your name and address, please?

A My name is Otis Coston. I live at 7104 Benjamin Street in McLean.

Q And what is your employment, Mr. Coston?

A I'm with Miller & Smith, Incorporated. My title in the company is president of the company.

Q And what is the business of Miller & Smith, Mr. Coston?

A Our company does building work, developing of communities in a variety of price ranges and style of houses from triminium-type units to single-family houses in the metropolitan area that range in price from $30,000 to about $90,000.

Q How long have you been involved with Miller & Smith in the development business, Mr. Coston?

A I've been with Miller & Smith since 1965.

Q What is the average volume of Miller & Smith in the last several years?

A Well, our company in the last several years has grown from about five or six million dollars a year to around sixteen or seventeen million dollars in sales this year.

Q How many units do you currently have under construction in the metropolitan area?

A We have currently under construction between 350 and 400 units.

Q Mr. Coston, does your particular role in the company encompass the responsibility for acquisition of land and preconstruction development processes?

A Yes. One of my major responsibilities is the search for land and the acquisition, negotiations for those properties.

Q Mr. Coston, is your company developing the adjacent 400-odd lots south of C-222, the development known as Hiddenbrook?

A That's correct.

Q And did you search out and find that land and negotiate for its acquisition?

A Yes, we did. We purchased that ground in the early part of last year.

Q What size development is planned there as far as the number of lots?

A Well, the Hiddenbrook project is about 151 acres,

and we will have just under 400, I think it's about 393 lots on that project.

Q Approximately half of those lots are already of record, and the others are being processed?

A That's correct. We have about 200 of the lots, 190 or so of the lots that are recorded at this point.

Q Mr. Coston, what price range are those houses?

A Those houses now range in price from about $45,000 to $62,000.

Q Mr. Coston, in your experience, is there a relation between a size of the lot and the price of the unit that is offered for sale on the lot?

A Yes. In our experience in the past, to use the zoning categories here in Fairfax County, we have typically worked with the R-12.5 and the R-17 and far more expensive houses in the RE-0.5 category.

In the past, typically with development work, we have not worked with RE-1-type property primarily because we had looked on this in past years as being septic-type of ground, and we wouldn't consider it for normal subdivision type of development.

Q Are development problems on the RE-1 and larger different than on the R-12.5 and R-17?

A Yes. The primary problem is the difference between the cost of development in the larger RE-1 lots and the smaller R-12.5 and R-17 lots. It's just the simple economy of size of lot and the necessity for putting the improvements into a RE-1-type development as opposed to the smaller, more dense-type zoning.

Q Now what market, in terms of volume, price-wise, is the major Washington market?

A Price-wise in Fairfax County -- in our business, we're always trying to look, especially in the last few years, as to how we can get down in price. Our county here in Fairfax cries for the need for what we call moderate-priced housing.

We would like very much, and as a matter of fact had one project that we felt like had a social objective that was in the upper twenties in McLean. That project -- we put 80 units on the market and sold it in one day, and since that time, we have been unable to find another piece of ground to duplicate that project.

So our company feels that the real need for market is in the lower-price ranges, both in the town house ground as well as the single-family ground here in Fairfax County. I think that's true of the whole metropolitan area.

Q In the single-family market, what price range do you feel is most needed in the Fairfax market?

MR. SYMANSKI: Objection, Your Honor, as to what he feels is needed. I don't see the relevancy.

MR. HAZEL: The relevance of his opinion, I think, is very critical, Your Honor, in furtherance of our theory in this case that there is a major discrimination matter against, that mitigates and operates to make it impossible to furnish in an appropriate supply housing of any kind of moderate cost. In this case and similar cases, the policy of this Board of Supervisors results in an economic discrimination.

THE COURT: I'll allow him to proceed.

Go ahead. Objection is sustained.

THE WITNESS: There is almost an unmet need for single-family housing under the $40,000 price range now in Fairfax County.

BY MR. HAZEL:

Q Why, in your opinion, has that need been unmet?

A Well, I think it's just very simply there isn't enough ground to meet the total demands of the market.

Q When you say "ground," do you mean zoned ground?

A Zoned, developable type of ground that would permit subdivision-type of development on that property.

Q When you say "subdivision-type," do you mean subdivisions at urban densities in the R-12.5, R-17 categories?

A That's right; and the two to three dwelling units per acre type of categories.

Q Have you in the past two years made a personal and thorough inspection of zoned R-12.5 and R-17 in Fairfax County?

A That's correct. We, in our search for land which is throughout the whole Fairfax County area, we have actually documented every piece of zoned ground in Fairfax County. I suppose at one time or another we have looked at almost every possibility in Fairfax that's zoned.

Q And is there today any zoned R-17 or R-12.5 ground available in Fairfax County?

A Well, there is some ground available at very high prices.

Q How many parcels do you believe to be available?

A At the present time?

Q Yes.

A I would say that we could probably -- we're actively trying to search out this ground all the time -- I would think --

MR. SYMANSKI: Objection as to what he would think. I don't know that he has been qualified --

MR. HAZEL: We're not asking you for your opinion, Mr. Coston.

MR. SYMANSKI: Has he been qualified as an expert on any particular thing?

THE COURT: As a developer, he can relate the circumstances and conditions that exist. I would allow him to proceed.

THE WITNESS: In my opinion, at the present time, there are probably less than ten parcels of ground that could be acquired at any price in these particular price ranges.

BY MR. HAZEL:

Q And in terms of lot sites, how many lots would those ten parcels yield?

A Well, the parcels, of course, vary in size; but I would suspect that in those ten parcels of ground that we would be talking in the neighborhood of maybe 2,500 to 3,000 lots.

Q You say parcels available. Are there some parcels zoned, that are still vacant, that are not available?

A Well, I think there is a substantial, not a substantial, but there are a number of acres of ground that are similar to our Hiddenbrook-type development, land that has been acquired that is literally off the market.

In our Hiddenbrook-type development, for example, we have about 390-some-odd lots in that project. We began

our sales the first part of this year. We will begin our deliveries as soon as the weather permits the construction of the roads, and we will be building at a rate of about 120 units a year.

We, under no circumstances, would consider selling that property because of the unavailability -- there are no other alternatives that are actually open to us at this point. So for all practical purposes, the full 400 lots are completely withdrawn from the market in view of the present circumstances that we're trying to acquire ground under.

Now, there are many other parcels of ground that are in a similar circumstance because the people have no other viable alternatives, and consequently there is not a market -- there is a very restrained market, if I can explain it that way -- of the availability of that type of zoned ground because of the circumstances under which we're acquiring ground at the present.

Q How long have you been selling houses at Hiddenbrook?

A We've been selling since about the first of the year.

Q How many have you sold?

A 48.

Q Have you made any particular effort to sell those houses? Any sales effort?

A We, right now, have sold those 48 houses out of a trailer.

Q Have you advertised anything extensively for those sales?

A We have had a few small ads in the paper about the activity in Hiddenbrook; but our sales have been as strong at Hiddenbrook, in Hiddenbrook with the trailer, as any project we've ever had.

Q Is it possible to utilize any of the one-acre zoning and produce a single-family unit at less than $50,000?

A In my opinion, I don't see how it's possible. The land prices, themselves, right now would just absolutely preclude that.

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

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. SYMANSKI:

Q Mr. Coston, when you build a development, do you also build fire stations, police stations and libraries to serve that development?

A No, we don't.

Q Other than dedicating possible school sites, do you

donate any money towards police, fire, library or schools?

A No. What we normally do is, for example, in our Hiddenbrook project, there is a school site that goes to the county free. There is a rather elaborate recreational system with a pool, tennis courts, clubhouse and the facilities that would act as a community recreation facility is built in that project.

Q Do those serve the general public or the project?

A Those serve the project.

MR. SYMANSKI: No further questions.

REDIRECT EXAMINATION

BY MR. HAZEL:

Q Mr. Coston, do you build and dedicate to the county all of the water, sewer, streets and other direct costs at no cost to the county?

A That's correct, plus a pretty substantial tap fee.

Q What are your present development costs in Hiddenbrook per lot? What is it costing you to put those improvements in that are dedicated to the county?

A Our actual costs right now for the lots in Hiddenbrook run just over $6,000 per lot.

Q That's without land?

A That's without land. That's improvement costs.

MR. HAZEL: I have no further questions.

THE COURT: All right, sir. You may be excused. Call your next witness.

(Witness excused.)

Whereupon,

M. SETH HORNE

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

DIRECT EXAMINATION

BY MR. HAZEL:

Q Would you state your name, please, sir?

A M. Seth Horne.

Q Mr. Horne, are you a party-plaintiff in this case?

A Yes, sir.

Q And are you the principal person involved in the concept and the presentation of the development plans and the effort to pursue this abrogation?

A Yes, sir.

Q Now, Mr. Horne, would you very briefly describe, since it's in evidence and been talked about a lot, very briefly describe your concept with reference to the development plan to your left?

A Well, we had certain preconceived objectives in mind when we started out with this plan and for this particular property.

We tried to bring -- I live in the west, Phoenix, Arizona, as a matter of fact, although I lived for 25 years

back in Arlington County -- but we tried to bring some of our western ideas here. We found over the last ten years that condominiums are being built, town houses, and so forth, that the ones that are favored, where it's possible to build them, land and whatnot being at a reasonable price, are one-story town houses and with not too high density.

The ordinary town-house developments in this area, I think, run from eight to as high as twelve per acre. We wanted to put in a project of relatively low density that gave all of the amenities of apartment-house living, that is, carefree-type of living that apartments provide, plus the amenities, the privacy and other things that single-family homes have.

We developed a plan, a house plan, that we felt accomplished this to the maximum extent. On this particular property, because of the flood plain and other factors, we wanted to put in a golf course. We felt that that would be a very nice adjunct to the project and provide a certain protection to the people in the project, as well as the community. So we incorporated the golf course as shown on the plan.

The type of units that we have -- and I won't go into detail, unless you want me to -- are rather unique, quite

different than anything that has been developed back here, that they do provide, as you can see even from the site plan here, extreme privacy for each individual homeowner.

They have a walled-in back yard, as well as open areas on the other sides. If I can refer to the plan, our objective was to have -- we have incorporated into this plan a little over 100 acres that is in Loudoun County, because the entire golf course is not in Fairfax County. Part of it goes into Loudoun County.

We contemplated the same type of development in Loudoun County as we develop that way. This one road would go through and go into Loudoun County. That would be the only road that would actually go through the project. All of the other roads here are so-called interior roads, unless Fairfax County required us to tie this into roads in these developments which we were not in favor of, but if they required it, why, we provided it could be done if it were necessary.

In addition to the golf course, this is the headquarters for the golf course, we provided a large community facility. This is the large community facility over here with tot lot, swimming pool, large clubhouse, parking and whatnot.

Then scattered throughout the project, we have what we call tot lots, playgrounds, for small children. The golf

course also took care of another major problem in the development of a large project of this type. Fairfax County, like most communities today that are progressive and know what they're doing, have provided for silt control and other things. In other words, you have to take care of your storm water, silt control and whatnot.

By putting in the golf course and putting in these lakes, we thought that we had a system worked out, feel that we have a system worked out, whereby we could take care of the silt control and in no way pollute the creek that was down through here. We would control everything that was on site. I think that's the general summary of the concept of the project.

Q Now, with regard to price -- incidentally, Mr. Horne, you've developed residential and commercial properties not only in the metropolitan area, in Fairfax County, but nationwide, have you not?

A Yes. Primarily, nationwide I've commerical, industrial and that type of thing. I might say that in this area I obtained the first apartment-house zoning in Fairfax County, which I'm real proud of, and we had lots of opposition at the time. We had no sewer; we had no water. Willston, 1,400 units, and after it was developed, why, every political

subdivision bordering it wanted to annex it. Falls Church, Arlington, Alexandria ,all wanted to annex it.

Q Part of that area in Fairfax County has recently refused to zone for commercial because they needed housing?

MR. SYMANSKI: Objection as to why they refused to do anything , Your Honor.

THE COURT: All right, sir. Objection sustained.

BY MR. HAZEL:

Q Now, Mr. Horne, in your development of this, was the price of the product, the house that you produced, a significant factor?

A Very definitely so.

Q In what way?

A By developing the condominium-type we had laid out, we could provide the same square footage and comparable amenities to a single-family home for about 15 to 20 percent less in cost than the ordinary single-family home.

Q In what price range did you expect a significant number of these units to sell?

A Approximately 30 percent of them would be under $20,000. I'm speaking of 1971, not 1973, because they would be a little different today. But in 1971 our price list would have been 30 percent under $20,000; about 60 percent or

about 58 percent would have been under $40,000; and, only about 12 percent, those bordering the golf course, which were extremely large houses, run you better than 2,500 square feet per house, would have been in the $45,000 to $50,000 category.

Q Did you make any studies to determine whether or not they would be in the lower price ranges that would be available in all of Fairfax County?

A Well, I don't know about all of Fairfax County, but we were concerned primarily with the area out here. We looked primarily at Sterling Park and the project that Boise Cascade was doing both in Loudoun County and particularly in Reston.

And in Reston we found in our study that the average house sold for approximately $45,000, most of them were about $50,000; and we would be well under anything that was being offered at that time, except in Sterling Park.

Q Did you find a significant need for that market in housing in Fairfax?

A Very definitely.

Q In addition to your own proposals, did you propose or agree under the county ordinance to put in some 75 units under county definition, as then legally in effect, of low-and-moderate income?

A Yes, sir. In order to obtain the density that we

were entitled to under the plan it was necessary to go to some conventional-type, what I call conventional-type two-story town houses; but our plan enabled us to place these so that these people would still have a maximum of privacy, that they wouldn't be backing onto other units.

You'll see that the two-story ones are the ones bordering the borders of the project and around the school site. We did include a certain number of low-cost, two-story town houses, relatively low-cost. Nothing was low-cost even then.

Q Now, did you meet with the Fairfax County staff at anytime in consideration of your development plan?

A Yes. I met in the spring with --

Q The Spring of 1971?

A --the Spring of 1971, with one of the lawyers to discuss the various concepts of this type of project, presented what we had in mind. We had housing units laid out in our basic concept even then. We met with some of the other members of the staff. I don't recall just who they were, and I might say we received a very enthusiastic reception.

And, then my chief engineer, a Mr. Clarence Cosgrove, was back here, spent a great deal of his time back here working with the Nottingham Associates in the development of the plan and the project.

Q Did there come a time when the staff reception of the project changed drastically?

A Yes. I'd say about a month to six weeks before we went in for zoning there was in some way an abrupt change in attitude on the part of the staff.

Q And what happened from that point on?

A Well, it seemed that every kind of block or objection they could possibly think of was thrown in our way.

Q And were you at all times prepared to meet any requirements of Fairfax County regarding layouts, design and construction?

A Yes. We tried to work cooperatively with them on any reasonable type of design.

MR. HAZEL: I have no further questions.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. SYMANSKI:

Q Mr. Horne, do you own this property?

A No, sir. I'm a contract purchaser.

Q You just testified to actions of the staff. Did the staff promise you a rezoning?

A No. We were encouraged. In my conferences that I had with them in the spring, they thought it was the type of

thing that Fairfax County needed, and they encouraged us very definitely at that time. They thought it was very good.

Q Did you know at that time that it was the Board of Supervisors that does the zoning?

A Oh, yes, indeed. I've had a lot of experience with the Board of Supervisors in Fairfax County.

Q You also testified that part of this project was planned for Loudoun County. How many units were planned for Loudoun County?

A I'd say approximately the same density as we had here per acre, which ran about, a little less than three per acre.

Q So, approximately, a little less than 300 units?

A Well, I think there's about 110 acres in Loudoun, so it might have been slightly over that.

Q You also testified that part of the golf course was in Loudoun County?

A Yes, sir.

Q I would like to show you a statement, page 46 of the verbatim, which is an exhibit. Well, I'll read you a statement. I believe it's made by Mrs. Rubus. She's referring to a letter from Loudoun County. (Reading)

"It is further understood that a statement was made

by the applicant that a golf course is planned on that portion lying in Loudoun County. Please be advised that the 110 acres in Loudoun County is presently zoned R-2 which would not permit a golf course. As of this date no application has been received in my office for a request for such a use."

Now, was that your understanding of the zoning in Loudoun County at that time?

A My understanding was that we could put the golf course in Loudoun County, and we naturally would not apply for any zoning or any other use of the property until we had our zoning in Fairfax County so we were in a position to proceed.

Q Well, if your development plan had been approved by Fairfax County, and you could not have built a golf course in Loudoun, if they had turned you down in a rezoning, what would you have done with regards to the golf course?

A We might have ended up with a 15-hole golf course.

MR. SYMANSKI: No further questions.

MR. HAZEL: I have one question.

REDIRECT EXAMINATION

BY MR. HAZEL:

Q How much money did you expend in the preparation of the zoning application and the filing of that application?

MR. SYMANSKI: Objection, Your Honor.

THE COURT: Objection sustained.

MR. HAZEL: I have no further questions.

THE COURT: Let me ask you a question, Mr. Horne. Could you foresee any condition or requirement that would have been imposed on you by the staff or any engineering department of Fairfax County that you could not have met in this plan?

THE WITNESS: No, sir.

THE COURT: All right, sir. You may step down.

(Witness steps aside.)

MR. HAZEL: If Your Honor please, I only have one minor, additional piece of evidence, and that is the recall of Mr. Liedl, the County Sanitation Director. I'd like to put him on the stand when he comes. He is under subpoena but he's not available.

THE COURT: All right, sir. I guess this would be a good time for us to break for lunch. We'll resume the case at 2:00 o'clock.

MR. HAZEL: That concludes our case other than Mr. Liedl.

THE COURT: All right.

(Whereupon, at 1:00 o'clock, p.m., the Court recessed to reconvene at 2:00 o'clock, p.m. that same day.)

AFTERNOON SESSION

THE COURT: All right, sir; call your next witness.

MR. HAZEL: If Your Honor please, Mr. Symanski and I have worked out the details that we might have had to call Mr. Liedl on. I have no further need for witnesses and that closes the plaintiff's case.

THE COURT: All right, sir.

All right, Mr. Symanski.

MR. SYMANSKI: I'd like to call Mr. Reed.

THE BAILIFF: Your Honor, Mr. Reed is not present.

THE COURT: Is there another witness you can proceed with?

MR. SYMANSKI: Mr. Alexander.

THE BAILIFF: There is no response, Your Honor. Apparently the witnesses have not returned.

THE COURT: Of course, I did not inform them that we were going to resume at 2:00 o'clock. I assumed they would be informed by counsel, but we'll hold just a moment.

MR. SYMANSKI: I'm sorry, Your Honor. Mr. Alexander was coming up the steps.

THE COURT: All right, sir.

Whereupon,

GEORGE H. ALEXANDER

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

DIRECT EXAMINATION

BY MR. SYMANSKI:

Q Would you state your name and address, please?

A George H. Alexander. 5201 Grinnell Street, Fairfax.

Q Will you state your present employment and your work experience?

A I'm director of the Fire and Rescue Service for the County of Fairfax. I've been in the paid service for about 23 years, 16 of it with Fairfax County.

Q Is part of your employment a consideration of whether the fire services in Fairfax County are adequate to serve proposed projects or a consideration of whether the fire services are adequate to serve presently existing sites and proposing additions to the fire services to bring them up to what you consider an adequate level?

A Yes, sir.

Q Your Honor, I submit Mr. Alexander is an expert in fire protection services in Fairfax County.

MR. HAZEL: I have no objection, Your Honor.

THE COURT: All right, sir; let's proceed.

BY MR. SYMANSKI:

Q Are there standards by which you determine the adequacy of fire protection services to a particular site?

A Yes, there is.

Q What are those standards, and would you explain where they come from?

A We use the American Insurance Association standards which are applicable when the underwriters do a survey of the fire defenses of the county.

Criteria, without getting into a tremendous amount of technical detail, as a rule of thumb is primarily, in an industrial-type development, is a mile response distance from the nearest fire station. You get into multi-family, row-housing, commercial, it's mile and a half. Then, when you get into single-family residential, it's three miles. And, if you get into single-family residential on large tracts of land where the spacing between houses is 100 feet, the mileage allowance is upped, four miles.

Q Now, there's been some question in earlier testimony over the definition of a single-family residential area. Can you define that under these standards?

A Single-family is where there is one family housed under one roof. When you get into a duplex, two houses under one roof, that's still considered single-family. When you apply

more than that to it, it gets into the row house which is in the old terminology which the underwriters use, which is, according to them, under the same classification that applies to town houses alike.

Q Now, if the standards of the American Insurance Association are met, what is the effect for Fairfax County? If we meet those standards in Fairfax County, what is the effect on the county?

A Meeting all of the standards within the AIA which not only does it include the mileage factor, but includes apparatus, personnel, and so forth, there is class-rate reduction benefit which is the basis for setting our insurance premiums.

Q In other words, would it be fair to say that if we meet these standards, Fairfax County citizens are affected in their insurance rates?

A Yes. They are affected. If you do not meet those standards, insurance premiums are greater than if you meet the standards. Based on surveys that they conduct, those rate classifications are established.

Q Now, do you use any other criteria, other considerations, in looking at a particular site other than simply mileage from the station to the site?

A There's other factors within the criteria, such as road conditions, natural barriers, interference between main arterial highways where the accessibility is difficult, this type thing; but primarily, mileage is the key factor all things considered.

Q Well, in your consideration, though, other than the American Insurance Association standards, in your consideration of a site, do you use other factors? For example, water supply?

A Oh, yes, yes.

Q How about the equipment or the facilities available in that area?

A The four primary things of need in fire services is the facility location and proper place, the proper amount of equipment, the manpower to operate the equipment, and water for the fire protection, itself.

Q Now, have you studied the subject property, and have you arrived at a conclusion as to whether there is adequate or was adequate fire protection in October '71?

A Did not, not in October '71, no, sir.

Q Well, as of present standards, excuse me. As considering mileage alone, were any other fire stations in October of '71 that do not exist now in the subject area?

A Not in that -- there is an additional fire station in that area, but it, that fire station does not fall under the criteria. Namely, the Reston station which is located on Whiele Avenue. The Herndon fire station has been there for years. The Reston station was opened up in April of this past year. That does not meet the criteria for this subject property here.

Q In using this display and the display, this exhibit, at what point do you determine your mileage figures? In other words, do you determine your mileage figures to the closest point in a development?

A No, not the closest point in the development. We take roughly a center point within the development and run a periphery around it to see whether it falls within the mileage factor, looking at a maximum requirement as being adverse.

Q Okay. Did you make a determination about the adequacy of fire protection to serve this site?

A Yes.

Q Would you relate to the Court what you considered and what your conclusions were?

A Well, a mile and a half being the requirement for distance, surveying by the actual road travel from the nearest

fire station, which is Herndon, to a point -- if I may, this intersection is 2.3 miles.

Q Now, why did you consider that intersection?

A By taking the 2.3 and running a circle around it, we can just about get 2.3 over here, 2.3 here, and in this area. And anything back in here, because there's no access there, that being further away, this is the 2.3 point. Everything this side is within it.

The mileage factor that we run -- I can't recall the name of the street -- this is run two different ways. It's run with an engineering mileage scale on a map, plus we do a speedometer running with a vehicle to basically verify it, -- to Hiddenbrook Drive which is the intersection approaching the project is 1.95 miles, and from the 1.95 to the center part that we used is 2.3 A mile and a half is the criteria that is applicable to town-house-type projects.

Q And what were your total conclusions with regards to this property and fire protection adequacy?

A Well, the mileage factor, plus the inadequacy in manpower, that is assigned to the nearest station, the Herndon station, we consider, to meet the criteria, to be somewhat inadequate based on our standards.

I would not say the fire protection in that area is

critical, but it does not meet our standards.

Q Within your knowledge, has the Board of Supervisors increased the Fire and Rescue Service's budget yearly?

A It has been increased, yes; but not to the degree that it was requested. But it has been increased, yes.

Q I show you an exhibit which is the budget, fiscal plan, Fairfax County, 1972. I show you line 91. Now, under column 3 and column 8 -- excuse me -- line 92. Would you read the figures under fiscal '71 and fiscal '72, column 3?

A Fiscal plan '71, item 92, which is Fire and Rescue Service's fiscal plan, amounted to $4,156,440.

Q How about column 8, fiscal approved for '72?

A '72, the same 92, which is our agency code number, $5,390,070.

Q So it's true, is it not, from those figures that the budget was increased between those two years over a million dollars?

A Yes.

Q Now, there's been some testimony that water may have been supplied to the subject site through Herndon from the Fairfax City line. From the point of view of the fire protection services, do you have any comment on provision of water through Herndon as opposed to the Fairfax Water Authority?

A Comparing the two water companies, Herndon as an independent governmental agency supplying water versus that of the Fairfax County Water Authority, I would say that the resource capability of the Water Authority is greater than that of the Herndon Water Company as it relates to volume flow for fire protection purposes.

Q What about your working relationship?

A Our working relationship with the Water Authority is primarily on a day-to-day basis in the designing, engineering and working with the Water Authority in conjunction with site plan development.

Q If you feel there are any problems with regards to water pressure, what is your action?

A We work with the Water Authority to increase wherever there is a deficiency in water supply. In the development stage in the review of a site plan, before approval of a project is signed off by the Fire and Rescue Services, we require that water be available to that site, either already there or a developer must bring in the necessary water supply.

But, we have day-to-day liason with the Water Authority where we do not have this close-knitness with the town of Herndon Water Company, nor do we have it to any substantial degree with Falls Church, but primarily with the

Fairfax County Water Authority.

CROSS EXAMINATION

BY MR. HAZEL:

Q Mr. Alexander, let me see if I understand that correctly. It's a requirement of Fairfax County in all subdivision and site plans, including the subject development plan or in R-12.5 subdivision plans if the property was zoned 12.5, that your department approves water service including layout of mains, volume of service to the site, and until you approve that there can be no development? Isn't that correct?

A Not completely, Mr. Hazel. On your R-12.5 and R1-7 subdivisions, those things fall under the subdivision control ordinance. We do not do the site plans. But RPC and PAD, yes, we do.

Q So that you say actually you are more secure in the PDH than you are in the R-12.5?

A Yes. We review this type plan, where we don't a subdivision plan.

Q You also review subdivision plans for water main extentions, don't you?

A Not completely, no, sir.

Q Well, when did you stop reviewing them?

A Only if there is question to the availability of water supply to that project.

Q All right. So if there is any question about the availability of water, you review it?

A Yes. It's our experience with the Water Authority that the volume of fire flow required for R-12.5, R-17, is usually without question, because that is the lowest volume required,750 gallons a minute for single-family.

Q You mean it's so minimal you don't even bother with those plans?

A Based on our experience with the Water Authority's capability we don't get into those. It's the big complexes, industrial-commercial, we get into volume.

Q Mr. Alexander, the Water Authority is providing water to Hiddenbrook. There was testimony earlier that they'd provide water to the subject case, do you anticipate any problem with the supply of water to C-222 if it was zoned either R-12.5 or for this planned development?

A My knowledge of theWater Authority's mains in that area is that they would have to procure their water from someone else.

Q Do you anticipate any problem with water supply?

A I couldn't honestly comment until I knew what the flow of that --

Q Well, all I'm asking you is do you anticipate any problem. If you don't know, you could say so.

A I don't know whether we would or not.

Q If the Water Authority testified that they could reasonably provide water, would you disagree with them?

A No, sir.

Q All right, sir. And you have no reason to disagree with them, do you?

A No, sir.

Q Are you satisfied with the water supply at Hiddenbrook Subdivision -- or you don't know?

A I don't know what the water supply is in Hiddenbrook, sir.

Q All right, Mr. Alexander, have you made any study of C-222 regarding water supply?

A No, sir.

Q When did you make the study and for what reason --

THE COURT: Wait a minute. Let me inquire. Are you saying to me that you have not had any input on this application that the Board considered at the time in October of '71?

THE WITNESS: No, sir, we did not have any input into it.

BY MR. HAZEL:

Q That is just what I was coming to.

When were you asked to comment on this application?

A I don't know exactly, but probably within the last 30 to 45 days.

Q All right, sir. Is that the first time you became aware of this application?

A Yes, sir.

Q Now, Mr. Alexander, have you been asked to comment on the two applications in the Reston area, C-377 and C-378?

MR. SYMANSKI: Objection, Your Honor, it's beyond the scope of the direct examination.

MR. HAZEL: If Your Honor please, I believe I'm entitled to discuss the county's policy in the matter of discrimination.

THE COURT: Well, I don't know if it's going to be greatly material to this Court. He says he has no input on this one, and I can't see where his testimony would make one iota of difference, really. If the Board couldn't consider it, how could the Board weigh it? If he didn't have any input, the Board didn't give any consideration to it. If it is, it would only be by speculation and inference and that's all.

MR. HAZEL: This is sufficient. It's only to prove the continuing discrimination that they are now recommending

these two applications with the same lack of input.

THE COURT: All right. Go ahead.

BY MR. HAZEL:

Q Were you asked to do a study of fire service adequacy on application C-378 in the Reston area?

A Yes, sir.

Q When were you asked to do that?

A I don't recall when, but let me make this comment, if Your Honor please. The Fire and Rescue Service has in the past never made comment --

MR. SYMANSKI: Your Honor, again, I know it was discussed, but did you rule on my objection?

THE COURT: Well, I'm going to let him proceed at this point. Let's see if we can't move it along.

THE WITNESS: I'll be very brief, Your Honor. The Fire and Rescue Service in the past was never asked to comment on zoning cases prior to November of 1972. Every comment that we have made has been made since then.

BY MR. HAZEL:

Q Now, in your report -- is that a report or comment that came from your department on the Reston case?

A Yes, it is.

Q Now, how far are those units from the fire station

that is available now?

A Three miles.

Q And those units are anticipated to be town houses and apartments in part, are they not?

I believe if you will look at the development plan here in the front, Mr. Alexander, you can see. Would you look there and see if the units shown on the development plan include town houses and apartments?

A I was looking for the zone. Is this --

Q That's the zoning application.

A Is this the same zone as this project?

Q I'm just asking you if there are going to be town houses and apartments in C-378, which you say is three miles from your fire station?

A When we receive a zoning application this is what basically we receive. It says RPC.

Q Right.

A When we get RPC plans, we have to -- RPC requests without a plan, because of what goes in RPC requirements differ, whether it's town houses, single-family residential, commercial or industrial.

Q Mr. Alexander, would you just answer my question? You say that that application is three miles from your Reston

station; is that correct?

A Yes, it is.

Q In that application, on the front of it, shows there to be town houses and apartments, does it not?

Look on the sheet I pointed out to you that outlines the application.

A I've never seen this application before, Mr. Hazel.

Q You mean you --

A Not what you are showing me, sir.

Q All right, let me ask you hypothetically, if it includes town houses and apartments, it is also deficient in fire criteria or fire service under the criteria you've just enunciated?

A Correct, yes, sir.

Q And it would be in the same posture of deficiency as the PDH, right?

A Yes, sir.

Q Except it's another mile from the fire station?

A Yes, sir; other than the fact that the Reston station, which is closer to this facility, is a fully municipal fire department and fully manned, whereas Herndon is supplemented with paid and volunteer.

Q But it's operated by Fairfax County, isn't it?

A Herndon?

Q Herndon is part of the Fairfax County system?

A It's part of the Fairfax County system, but the manpower application provided by the municipality is less there because of the volunteer capability, whereas at Reston there is no volunteer. It's fully municipal paid, so the manning is much better in that case.

Q If you don't like the quality of the system, you could add some manpower to it, couldn't you?

A I would like to, sir.

Q All right. Now, Mr. Alexander, are there any places in Fairfax County where town houses are under construction that do not meet the optimum criteria of being within a mile and a half of a fire station?

MR. SYMANSKI: Your Honor, this is way beyond the scope of the direct.

THE COURT: No. I think it's fair.

THE WITNESS: Mr. Hazel, I would have to answer that very affirmatively, yes. Particularly in the dense areas of the county. Henceforth, that's why we are actively engaged into a bond program to develop some eight additional fire stations in those areas of the county where it is considered inadequate.

BY MR. HAZEL:

Q Now, Mr. Alexander, you don't represent that all of Fairfax County today complies with the standards of the American Insurance Association, do you?

A No, they do not.

Q What you're saying is that that is a desired goal, isn't that the situation?

A That is correct.

Q And, in effect, most of the county does not now comply with those standards?

A I don't know whether I would say most, I would say that portions of the county do not. I don't know that I could say most of the county, but portions of it do not.

Q And are zoning cases being considered and granted, routinely, in areas which do not meet the optimum criteria of the American Insurance Association?

A I don't know whether I could comment that they were or were not. Zoning cases are being approved whereby our submissions indicate that it is not adequate.

Q All right, sir. Now, you said, if I understand you correctly, that the fire service level in the subject area is not critical. It may not meet the Insurance Association standards, but you did not consider it critical, if I understood your testimony?

A That's correct.

Q Now, by that you mean that as a practical fact, under your own personal standards, you do not consider that it would be any particular hazard from the level of fire protection that is available there?

A Not so much of a hazard, but with a lack of manpower, and with the lack of facilities located in proper perspective to the site, your response time increases.

Q You'd like it better, but it's not critical, isn't that right?

A Because of the difference between what the mileage factor is and the difference here, I would not say it is critical. It's of a concern, but the additional half mile above the criteria is not to be considered critical.

Q And if this was single-family R-12.5, it would even meet the insurance criteria?

A Other than the fact that we have an inadequate number of paid personnel without the volunteer supplementation to it.

Q And you could correct that by adding another man or some more men?

A In this particular case about five, yes.

MR. HAZEL: I have no further questions.

THE COURT: Any further questions?

MR. SYMANSKI: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. SYMANSKI:

Q Is part of your job attempting to meet the standards of the American Insurance Association in Fairfax County?

A Yes, sir.

MR. SYMANSKI: No further questions.

THE COURT: All right, sir; you may be excused. Call your next witness.

(Witness excused.)

MR. SYMANSKI: Mr. Reed.

Whereupon,

THOMAS E. REED

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

DIRECT EXAMINATION

BY MR. SYMANSKI:

Q Would you state your name and address?

A Thomas E. Reed, real estate appraiser, broker. 4085 Chain Bridge Road, Fairfax, Virginia.

Q Have you previously qualified in this court before?

A Yes, sir.

MR. HAZEL: I'd be pleased to stipulate Mr. Reed's qualifications.

THE COURT: All right.

BY MR. SYMANSKI:

Q Did you, at my request, study the area of the subject property?

A Yes, sir.

Q Are you aware from this study of any applications or submissions to Fairfax County with regard to an area called Dranesville Estates?

A Yes, I am.

Q Do you know approximately how many acres -- well, could you point out the area, the approximate area, of this submission?

A The property is identified by tax map No. 11-1 00 1 Parcel 2. It's on the opposite side, or on the east side of Dranesville Road, along Sugarland Run.

Q Approximately how many acres is that?

A It's 264 plus or minus acres.

Q What is the zoning category of this application?

A The property in question involving Dranesville Estates is zoned RE-1. The application is for the RE-1 alternate density zone which would be, actually, half-acre lots with about 50 percent open space. There are, as I said, 264 acres, and there would be 243 lots, according to the application.

Q So this is an application for development under

RE-1 zoning category?

A Yes, it is.

MR. SYMANSKI: No further questions.

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

THE COURT: All right, sir. Mr. Reed, you're excused, sir.

Call your next witness.

(Witness excused.)

MR. SYMANSKI: Mr. Phillips.

Whereupon,

YORK PHILLIPS

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

DIRECT EXAMINATION

BY MR. SYMANSKI:

Q Would you state your name and address, please?

A My name is York Phillips. My address is 11697 Charter Oak Court, Reston.

Q What is your educational background?

A I have a degree, a bachelor's degree, in Urban Planning from the University of Illinois, and I have almost completed work on a Master of Urban Affairs degree from V.P.I at Reston.

MR. HAZEL: For what purpose do you tender Mr. Phillips

MR. SYMANSKI: Expert planner.

MR. HAZEL: Expert planner with the county staff?

MR. SYMANSKI: Yes.

MR. HAZEL: Speaking as a representative of the county or individually?

MR. SYMANSKI: As a representative of the county.

MR. HAZEL: Of his department, position or just as to his individual ideas?

MR. SYMANSKI: His individual ideas.

MR. HAZEL: For the purpose of testifying as an individual, as a planner with the background indicated, I would stipulate that he might testify.

THE COURT: All right, proceed.

BY MR. SYMANSKI:

Q Mr. Phillips, did you, at my request, review application C-222 with regard to the master plan, the comprehensive plan of the area?

A Yes, sir.

Q And with regard to the Fairfax County PDH ordinance?

A Yes, sir.

Q Would you, please, state the conclusions, your opinions, as a result of that study?

A I reviewed this particular proposal as it related to

the Upper Potomac comprehensive plan which was adopted about three years ago.

The proposal lies in neighborhood 5 of the Upper Potomac Plan for which there is a population allocation of 5,500 people. I found that the proposal is in conformance with the gross density, the density distribution, in that particular neighborhood.

I then looked at the proposal as it specifically relates to some of the neighborhood designed elements in and policies in the Upper Potomac Plan. This particular application lies in an area that's referred to as an urban density area in the Upper Potomac Plan, lying outside of the Herndon-Reston cluster or core area, in an area basically intended for suburban densities at two and a half dwelling units per acre.

The policies in the plan, itself, and on the original plan map contemplated a neighborhood center near, generally near, the southeast corner of this parcel. The designation on the plan map was removed by the Board in adopting the plan, but the reference is retained in the text.

The policies, among the policies that I looked at, was a policy indicating that neighborhoods should be designed with pedestrian and vehicular access to neighborhood centers, specifically pedestrian access from individual units.

The development plan proposed with this case did not clearly indicate any kind of access such as this. In addition, the plan contains policies for linking neighborhoods to each other through an internal system of collector streets. The plan does not reflect this.

There is a policy specifically with respect to layout to avoid monotonous development. It's my opinion that the plan proposed does not, the development plan proposed does not meet this policy.

There is also a policy with respect to the use of PDH, in that developers of large tracts are encouraged to use the PDH approach. This has been done. But, the next policy reads that in using PDH the development plan should reflect tying each individual unit to the open-space system. This has not been done.

In addition, the policies encourage innovation and design in construction, innovations in dwelling types, and so forth. While the development plan reflects an innovative development type, housing dwelling type, the use of that dwelling type is such as to be monotonous and not necessarily desirable.

Q At this point, can you give an example of something else that has happened in the county which would give us a

comparison or an example of what can be done with regards to open space?

A There is, yes, there are several developments in the county recently which use dwelling types that were not previously common. There are particular cases where the use of these new dwelling types are such as to be highly desirable.

One in particular, a case that was pending around the same time that this case was pending in an area down in Lorton proposed a five-plex-dwelling-unit type which was four units backed up to each other in a corner with an additional unit attached at the end. And the arrangement, the development plan there showed an arrangement where parking was removed or separated from the units, and the units, themselves, existed in a very desirable park-like setting with a wide variety of recreation, and so forth, amenities.

Q Well, with reference to the display to your left, can you comment upon the relationship of this proposed development to the policies you've referred to?

A Well, the policies I've already addressed with respect to circulation design of the development to relate to the neighborhood center which, according to the policies, would be somewhere down in this general area. You can see that there is no pedestrian and vehicular pattern that's designed to orient

the neighborhood to a center.

In addition, you can see the dwelling units, themselves, and the arrangement which, as I said in my opinion, was rather monotonous even though the dwelling-unit type, itself, was innovative.

There is also, there are a couple of problems, specifically, with the development plan. The number and configuration of private streets is such as to create a situation where the units are basically existing in an environment of asphalt, besides the practical matter of there being such a large expanse of private streets as to make maintenance difficult and make emergency access difficult.

In addition, the recreational facilities on the proposal was fairly limited. Basically, three things: a very large golf course, a swimming pool and four, small, tot lot playgrounds. Now, the variety does not really exist that could exist to serve the various kinds of interest of people who might live here.

One point in the policies in the plan, the policy specifically related to preservation of stream valley areas in their natural state. Also, relationship between housing development and stream valleys, such that the relationship maximizes the enjoyment of these, and I think this has not been

done, or it's not reflected in the development plan.

Q Does the golf course affect that policy of stream valleys in its natural state?

A Well, strictly speaking, if you preserve the stream valleys in their natural state, the golf course would not be desirable because it generally would require a good deal of changing the natural state, removing trees, and so forth, creating different terrain, and things like this.

One of the other things that I did was look at the development plan with respect to the standards contained in the zoning ordinance in Section 15.4 which deals with standards for planned developments or PDH developments.

There again the same sorts of things are covered as are generally covered in what I said before. Specifically, the ordinance requires that the developments be designed so as to be the best and most efficient use of the land. I think the development plan here reflects a widespread use of the land in dwelling units themselves and in paved areas that is not necessarily desirable. It's not the most efficient layout that could have been designed.

Q The applicants applied for bonus densities based on innovation of design. In your opinion, would they qualify for that?

A The application contained a request for, I believe it was 38 dwelling units bonus based on an innovative design. I don't recall any evidence as to what specifically was innovativ but in my opinion that specific request isn't justified.

Q Well, with regards to the master plan, itself, do you have an overall conclusion? Does this comply completely or is it mixed?

A Well, the proposal complies with some elements of the plan and not with others. It complies, for instance, with the density tabulations, but not with respect to the design elements. Of course, in my view of PDH, the development plan is an integral part of the zoning case that's under consideration.

MR. SYMANSKI: Thank you.

CROSS EXAMINATION

BY MR. HAZEL:

Q Mr. Phillips, as I understand it, these are your individual views being expressed and not the result of any determination of any part of the Fairfax County Government?

A These --

Q Just answer "yes or no," and then we can explain it.

A All right, yes.

Q These are your individual views?

A Right.

Q Thank you. Now, would you -- under your review of the master plan, this tract could be developed and be in conformity with the master plan if it was under a R-12.5 development, couldn't it?

A From the standpoint of density, yes; and, of course, from the standpoint of neighborhood design, it would remain to see what sort of design evolved.

Q Now, without reference to the specifics of the plan, do you feel that it's better planning to develop it under a PDH concept, as this is proposed under PDH, then it would be under R-12.5? I don't mean as this design.

A You're saying disregarding this specific plan?

Q Disregard this plan.

A As a general rule, development in PDH is always preferable to development in a conventional category because of the opportunities for innovation and variety there can be.

Q Now, with reference to the specific numbers of neighborhood 5, either R-12.5 or PDH-3, comply exactly with those numbers, don't they?

A Now, the plan --

Q No. Just answer the question, and then you might explain your answer. The numbers of page 47.

A R-12.5 would definitely comply with the plan. PDH-3

would, provided that the dwelling type that was used and the number of dwelling units that were used was such that the total population for the neighborhood, the 5,500 people, which is the critical factor, would not be exceeded.

Q Have you looked at the numbers shown on this?

A Yes, sir. The data that I have indicate that there are 3,458 people generated by this proposal, from a total of 5,500 leaves a total of 2,042 people for the remainder of the neighborhood, which leaves a gross population of 10.4 people per acre, which is in conformance since the overall density for the neighborhood is 11.0.

Q All right, sir. You have no problem with the numbers under either PDH --

A No; not with the numbers, no, sir.

Q Now, you indicated a neighborhood center. I want to be sure I understand you correctly. That's a neighborhood commercial shopping center?

A Right, with certain other amenities attached to it.

Q Now, let me see if I understand where you said that that was originally shown. That was originally to be a shopping center proposed here; is that correct?

A Generally, yes, sir.

Q Essentially, across the street and just to the north of the high school?

A I believe -- well, it's hard to say specifically. The circle -- and these centers were shown on the original map as circles which indicated that their specific location wasn't fixed -- the circle actually touches into four sides of the intersection of the stream and the road.

Q So what you're saying is that in order to complete the concept of neighborhood 5 there should be somewhere within that neighborhood, not necessarily on this property, a shopping center; is that correct?

A Well, the shopping center, itself, would lie wholly within one of the neighborhoods. The indication from the plan -- the final location is not specified in the plan, but the implication is that neighborhood 9, which is the neighborhood to the south of this particular tract, would be the location for the center.

Q Now, what you're saying is that somewhere in this area the plan suggests there ought to be another shopping center.

A There ought to be a neighborhood center.

Q But, it hasn't been specified yet?

A That's right.

Q Well then, how do you develop your pedestrian pathways to it, your sidewalks and your access to it?

A Now, while the map does not specify a specific tract,

it gives a general indication, and the implications on this would be that you would design pedestrian and vehicular access going toward generally the southeast.

Q That could be added to this development plan, could it not?

A Right. Now, under PDH, it would have to be done before the development plan were approved.

Q So that could be corrected in further revisions of the plan?

A Right. It would have to be done after public hearing by both the Commission and the Board.

Q All right, sir.

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

THE COURT: Let me ask you a question, Mr. Phillips.

THE WITNESS: Yes, sir.

THE COURT: Did you make any input into C-222 prior to consideration by the Board of Supervisors?

THE WITNESS: Sir, when that case was pending, I was working in the zoning office. My duties involved working specifically on some cases and generally on all of them.

THE COURT: So what you said here today that the Board of Supervisors, when they considered this, October of 1971 did not have the benefit of your view?

THE WITNESS: Right. Now, some of my comments are also contained in the staff report that they did have, but others weren't necessarily.

THE COURT: And that staff report indicates that there are certain problems, certain deficiencies, but they are not insurmountable?

THE WITNESS: Right. The staff report indicates a large number, many of them fairly specific or technical, which through redesign could be accommodated.

THE COURT: And let me quote you a statement from page 67 of the minutes which, in fact, says: (Reading)

"I would make, Mr. Chairman, a motion to deny this application based on the fact that the public facilities which are needed to implement a PDH development do not exist in this area at this time."

There is nothing in regard to not meeting any technical PDH requirements or any other views on it.

THE WITNESS: That's right.

THE COURT: And on page 68, apparently one of the members of the Board of Supervisors would entirely disagree with you because he says, "I like the design of the structure and like the design of the community, but I think we have to recognize here that this would be a premature development in this area."

THE WITNESS: Yes, sir.

THE COURT: All right, sir.

Any further questions?

MR. HAZEL: I have none, Your Honor.

THE COURT: Do you have any further questions?

MR. SYMANSKI: None, Your Honor.

THE COURT: You may step down, sir.

(Witness excused.)

MR. SYMANSKI: Mr. Faulkner.

Whereupon,

TOM FAULKNER

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

DIRECT EXAMINATION

BY MR. SYMANSKI:

Q Would you state your name and address, please?

A My name is Tom Faulkner, and I reside in Fairfax City, Fairfax County.

Q What is your address?

A 3333 Willowcrest Drive, Fairfax.

Q What is your educational background?

A I have a bachelor of Civil Engineering from Virginia Military Institute and masters degree in Civil Engineering with

emphasis in transportation planning from West Virginia University.

MR. HAZEL: I would be pleased to stipulate if Mr. Faulkner is being offered as a transportation expert that he is an expert in that field.

THE COURT: All right, sir.

Proceed.

BY MR. SYMANSKI:

Q Mr. Faulkner, did you at my request inspect the transportation network, particularly the road system, from a transportation point of view around the subject property?

A Yes, I did.

Q Did you personally inspect that system?

A I did.

Q Now, with reference to this policy plan for the Upper Potomac Plan, would you describe from your inspection the facilities in the area?

A Yes, sir. Of course, this major road shown here is Route 7 which runs in sort of a east-westerly direction. Coming down from Route 7 is Dranesville Road which is 228. Then you have a collector-type road, Sugarland Run, that intersects sort of at the northern portion of the property in question.

As in shown in the plan, Dranesville Road has deficiencies on it. We have a couple of bridges that are

deficient. Sugarland Run Road is a narrow road, winding road, which is -- proceeding east on Sugarland Run Road you approach the ford before you get to Dranesville Road. Sugarland Run Road extends in a westerly direction from Dranesville Road as a narrow, collector road, and then after the Loudoun County line, the road proceeds west as a dirt road or gravel road.

Basically, this -- the conditions of these roads, you might say that Route 7 is a four-lane, divided road and presently the intersection there has left and right turn lanes, so it's operating at a -- it's offering a pretty good level of service.

Dranesville Road, from its -- when it leaves the town of Herndon and proceeds to Route 7 is a narrow road with no shoulders, whatsoever, and offers some restriction to vehicles.

At the intersection of Sugarland Run Road and Dranesville Road there has been an improvement, but this gives both on Sugarland Run Road and on Dranesville Road -- but, as you can see the people out of the town of Herndon, anybody living along Dranesville Road, basically, only has two directions to go. To the north, to go to points east and west; and to the south, to go to points east and west.

Q I show you the comprehensive plan, Exhibit 5. I note there is a symbol on the map at the intersection of

Routes 680 and 604. Can you identify where that is on the map?

A 680 and 604. This map is being shown here as real lines. It's actually the intersection of Sugarland Run Road and Stuart Road. It's an intersection that comes in at a Y. Stuart Road comes into Sugarland Run Road at an obtuse angle, an acute angle.

Q What does that symbol mean on the chart?

A On the chart? That shows as being a deficient intersection. In other words, it's a line at an awkward angle for traffic to efficiently flow from Sugarland Run Road onto Stuart and vice versa.

Q There has been comment, previously, on a couple of statements in the comprehensive plan. One on page 27 at the bottom. "The primary purpose of this survey was to establish the obvious deficiencies in the existing street system."

On page 30, there is a sentence in the first paragraph: "However, traffic service is minimal in terms of safety and efficiency."

Now, what is your opinion, taking the subject property which is an X here and giving an alternate route of travel from the subject site, what is your opinion as the transportation planner of the road system that exists?

A Like I tried to explain in the beginning, Dranesville Road as it leaves the town of Herndon, which is a four-lane, undivided section up to the corporate limits of Herndon, as you go from the town of Herndon to Route 7 you have no shoulders, practically no shoulders, on a portion from Route 228 until just before you get to Sugarland Run. That road has a couple of narrow bridges on it which, of course, is a saftey hazard, cars running off the road.

Then, it's a fairly improved road. It's a 24-foot section with shoulders until just before it gets to this curve. I'd say about a quarter of a mile before you intersect Route 7. So that fairly adequately serves the traffic today, except for no shoulders and narrow ditch lines and narrow pavement.

The traffic in an east-west direction off Dranesville Road is Sugarland Run Road. In the county on the eastern side of Dranesville Road it offers very little service. As a matter of fact, the ford there is almost impassable. I wouldn't say almost impassable. It's debatable whether you can make it across there.

The road from Sugarland Run Road and the road from Dranesville as it goes towards Loudoun County is an improved nine-foot pavement which handles pretty adequately the traffic on that road today. But as it leaves the county, just after it

leaves the county, it becomes a gravel road until it hits the development in Sterling Park in Loudoun County. So, overall, it offers a minimum level of service, I would say.

Q Traveling south from the subject project, there was testimony, I believe, by Mr. Payne, traveling south if you wanted to get over to Sterling Park there would be no problem going through the town of Herndon. Do you have any comment on accessibility in a westward direction to the street network over in Loudoun County, using the road south on Dranesville Road?

A Well, that's a fairly general question in terms of: okay, is it adequate; is it inadequate? The circulation problems in Herndon are becoming greater. As you can see, this loop road is designed to circulate traffic within the town of Herndon and to allow movement around the town.

Q Is it completed?

A It is not completed. It's been dedicated by a developer but it's not completed. So I wouldn't say that it's an extra good level of service that is provided southward through Herndon.

Q In transportation planning, how do you consider a proposed project and its effect on the road system?

A Basically, transportation planning is looking at a

land development plan, determining through examining the patterns of land use, you look at the travel demand associated with the land use. And, this travel demand is estimated, based on a traffic generation potential. And, this travel demand or traffic generation potential is satisfied by either a combination of highway, transit or other type transportation networks.

This travel potential is estimated by looking at what existing patterns of land use are generating. In other words, for subdivision you would circle around the subdivision, you count the number of vehicles entering and leaving that subdivision in a day. That, generally, based on the number of houses in that subdivision and other characteristics of the subdivision, you estimate the potential.

Through this, we do estimate potential land use. We'll assign it to the network, based on existing and forecasted distribution factors. We'll assign this to the network, and test that against the capacity that a certain roadway or transit system will afford.

Q With regards to cars, how do you form an opinion with regards to a certain number of houses in a project and the road network, what number of trips?

A We count the number of houses and use a trip

generation factor. For instance, in town houses, I think when this plan was developed we were using five, six and seven trip generations per dwelling unit per day. The seven is for single-family; six is for town houses; and five is for garden-type apartments of high-rises.

Then, of course, we multiply that by the number of units, and we assign it to the road network. That, in essence, gives you an idea of existing travel plus what the proposed development would have, the potential that the proposed development would have. You can measure that against what this highway facility can service.

Q Now, how many trips, did you determine how many trips would be generated by this development, using the factors in '71?

A Yes, I did.

Q Approximately how many would that be?

A Approximately 6,000. 5,928 to be exact.

Q There has been some testimony as far as trips per hour along this road that it might be adequate. Are there other ways of looking at it?

MR. HAZEL: This witness is Mr. Symanski's witness, and I just prefer that he tell us what he concluded and not lead him in through the testimony that has been.

THE COURT: All right. Let's proceed. Let him relate what he has done, and how he relates the situation that is in front of the Court.

BY MR. SYMANSKI:

Q With reference to the statement on page 30 of the comprehensive plan: " -- traffic service is minimal in terms of safety and efficiency." What is your opinion, taking the proposed development, the road system which you have testified that you have inspected, with regards to adequacy?

A Okay. In terms of existing -- I explained that the roadway there -- you have certain factors that determine level of service. And these factors are: with the pavement, horizontal and vertical alignment, with the shoulders. In inventorying that roadway, it is providing a minimal service. You have bridges that are obstructing the flow of traffic. In other words, they are right up next to the pavement. You have no shoulders on sections of the road. So, it's offering a minimal level of service right now, based on these factors that I have mentioned.

Q Based on the generation figures from this development--

A Based on the generation factors of this development, I find that it would combine with existing travel, existing traffic, that Route 228 would have to be improved to a very

minimum of a two-lane road with adequate shoulders its entire length, from Route 7 down to Herndon line.

Q Did you determine whether the Route 228 was in the VDH, Virginia Department of Highways' ten-year plan?

A It is not in Virginia Department of Highways' ten-year plan.

Q There has been testimony that there would be a widening, shown on the plan, of the section of road that passes through the subject property. Now, how does that affect your opinion of the adequacy of service?

A For that section of road, it would definitely bring it up to an adequate level of service. But, you still have sections of the road from where the improvements the Highway Department did in 1971, where it stops up to this intersection, plus you have the section of road from south of this property down to the town of Herndon.

Q Now, did you consider in your study of this property and in your consideration of the amount of traffic, did you consider R-12.5 property -- any traffic from this R-12.5 property here?

A I did not include any other development than the subject development.

MR. SYMANSKI: No further questions.

CROSS EXAMINATION

BY MR. HAZEL:

Q Mr. Faulkner, was any of your report included in the staff report on the subject application when it came to the Board in October of 1971?

A No, it was not.

Q When were you requested to make this study which you've testified to today?

A Approximately a week and a half ago, sir.

Q So that this is a very recent thing, and in no way was a part of any of the zoning application or any of the zoning considerations?

A My work on that was now.

Q Now, Mr. Faulkner, as I understand it, the level of service on 228 is adequate today; is that correct?

A Yes.

Q And that is a state primary system road, isn't it?

A Let me go back to that other question. It's adequate -- yes, okay it's adequate.

Q This is a state primary road system, is it not?

A Yes.

Q And in the state primary system or in the state system of roads, primary roads are generally given priority

treatment by the state, are they not? That's the reason they are designated as primary, isn't it?

A Basically that's true, yes, sir.

Q Now, in the Upper Potomac Plan, on the community facilities map, this road is designated as a priority road to be improved in the immediate future, is it not? It has a particular designation on that plan that says: improve it as soon as possible, doesn't it?

A Yes, sir.

Q And, in fact, as part of that plan it was requested to the Highway Department that it be improved rapidly, wasn't it? That was the reason it was so designated, wasn't it?

A Yes.

Q Now, under specific deficiencies on page 31 of the plan, if you will refer to them, they noted as three deficiencies, one of them Route 228 north of Herndon, right?

A Yes.

Q Now, since that plan was adopted in 1970, in fact the Highway Department has made substantial improvements on 228 north of Herndon, hasn't it?

A They made an improvement, yes.

Q They rebuilt the worst of the bridges, and they acquired 160-foot right-of-way from Herndon Junction down to

the north boundary of the property, didn't it?

A I'm not sure whether they improved the worst of the bridges, because I didn't see this other bridge.

Q Oh, you didn't see the bridge before?

A No, I didn't.

Q But they did make a substantial improvement?

A Yes, they did.

Q And they did, in conjunction with the town of Herndon, widen the road up to the north boundary of Herndon, didn't they?

A Yes. They participate in those type developments.

Q In other words, the road was widened from Herndon up to the edge of the high school?

A Yes.

Q And north there was a considerable improvement immediately north of the property?

A Yes; from Sugarland Run north.

Q And the Highway Department does have, from the north boundary up to the junction, 160-foot right-of-way, doesn't it?

A Yes.

Q And they have improved the intersection between 228 and Route 7 which you now find to be adequate for development; is that correct?

A I do not find that to be adequate for development.

Q But, it is a left-and-right-turn intersection?

A They do have left-and-right-turn lanes there.

Q Now, I take it from what you said initially, you don't have any problem with Route 7, itself. That's an improved arterial road?

A Right; I do not, sir, except for extra traffic coming off of Dranesville Road.

Q Which is almost insignificant compared to the total level of traffic on Route 7, isn't it?

A Not for two-lane, you know, primary roads leading into another major road. It could become a problem rather fast. That's the reason I said minimum level of service right now.

Q Now, Mr. Faulkner, if this road was improved to even a good, modern two-lane section, and service roads installed on either side, it would be a substantial addition to the traffic situation in the area. I mean, it would improve it substantially, would it not? If the road was improved the distance of the property?

A Sir, but that would improve it on the property, but as far as -- the level of service has to be measured at the worst portion on that road, the worst link on that road.

Q The history of road improvements in the county and in the state, and I suspect in the world is to improve them in segments as there are reasons to improve them, is it not?

A That's what we're trying to get away from, because we wind up with botches of improvement and not really looking at the total system.

Q But, that is the system that we're working with?

A Yes, that has been the system.

Q What you are saying is that this is not different from our present system. It's just that you would like to see it improve?

A Yes, sir.

Q Now, Mr. Faulkner, is there any program available in either the state or the county to go in ahead of a zoning or a hint of a development process and bring this road to its desired level of service?

MR. SYMANSKI: Objection, Your Honor. It's beyond the scope of the direct.

THE COURT: No. I'll have to let him answer that. That's one of the questions I want to know, too.

THE WITNESS: Yes, I think there is a tool for this.

BY MR. HAZEL:

Q But, is there a program?

A I'll have to say that the funds available now can barely take care of existing deficiencies, and I don't think it could possibly take care of the existing deficiencies.

The development has gotten far ahead of the transportation system in the county and other major metropolitan areas.

Q Do you think it's reasonable to anticipate that the road levels will ever be improved? I say ever, say, in the next five years that road levels will be routinely brought to an optimum level prior to development?

A In mind, I have measures that are --

Q I'm just asking you if you think that's reasonable?

A I'll have to say with the past trends, it's not very reasonable.

Q We have to really do the best we can with the resources available, don't we?

A That's what we're trying, yes.

Q And the resources go to the areas which are heavily traveled first, right?

A Yes,

Q And then secondly, as developments like this occur, they, the developer, pays for whatever he can through the site and the roads on the site, and then, third, the state

comes and fills in the links as they can, isn't that about right?

A That's really in violation of staging of plans.

Q But, that's what happens.

A That's what has happened. That's what happened in the past, and that's the reason we have so many problems in the county today.

Q And in this particular case, you have a unique and more desirable situation in that when the master plan was adopted, the County Board in adopting it, highlighted this particular road, and since that the state has done some improvements, hasn't it?

A Yes, they have.

Q Thank you.

MR. HAZEL: I have no further questions.

THE COURT: Any further questions.

MR. SYMANSKI: Yes.

REDIRECT EXAMINATION

BY MR. SYMANSKI:

Q The intersection of Dranesville Road and Route 7 was mentioned. In your opinion, what effect would the extra traffic on Dranesville Road have on that intersection with regards to level of service?

A I would say that that intersection would not operate efficiently without a signal.

MR. HAZEL: You mean a traffic light?

THE WITNESS: Traffic light, yes.

MR. SYMANSKI: No further questions.

THE COURT: All right. You may step down, sir. We'll take about a five-minute recess.

(Witness excused.)

(Short recess.)

THE COURT: Call your next witness.

MR. SYMANSKI: Mr. Pammell.

Whereupon,

JAMES PAMMEL

having been previously sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. SYMANSKI:

Q Mr. Pammel, these zoning applications, C-377 and C-378 referred to yesterday, with regards to those, when the Board heard these applications, what was the position of the staff with regards to reviewing these applications?

A The staff had completely reviewed the applications, reviewed the development plan, and the staff did have a report

on the development plan even though it was not shown in the staff report. And, contrary to what Mr. Hendrickson had indicated that he thought his section was still reviewing the development plan, they had in fact completed the written review, and it was from that information and other that the staff did recommend not only the zoning applications themselves, but also the development plan.

Q And has the Board had hearings on these applications?

A Yes, the Board has.

Q What did the Board do with regards to these applications?

A The Board deferred action. Of course, these hearings were held the first part of the year. The Board deferred action for three months, and just within the last several weeks, the Board has taken a further action on the applications, deferring them until, my recollection is, July.

Q So these applications have not been granted by the Board, is that correct?

A That is correct.

Q Now, why did the Board defer these applications?

A The Board was quite concerned with the impact of a substantial rezoning. In this case, two applications where it did constitute a large land area. Their basic concerns were

in the areas of transportation, phasing of development and public facilities. And, the Board did ask the staff, direct the staff, to look further into these three major issues and be prepared to have a report at such time as the Board did schedule these for final consideration.

Q So, is it a correct statement to say that these were deferred partially on the basis of concern by the Board about the public facilities requirements to these sites?

A Yes.

Q Now, yesterday I believe you stated that Reston was a unique situation?

A That is correct, I did.

Q Historically, why is it or why was it a unique situation?

A Well, basically Reston is a new town, and it is totally unique, unlike any other subdivision or basically a land development in that county. That it has provided within or internally a great number of public facilities that ordinarily would not be found in a conventional zoning category. They are not providing them. They are in the process, through a joint effort with the Virginia Department of Highways, and in some instances they are attempting to make facilities available. I speak specifically of the road

network within Reston. Most of that has been developed by the Gulf-Reston Corporation to the standards that were adopted by the Department of Highways as this project was underway. They are presently contributing towards the construction of a ramp at Reston Avenue and the Airport Access Road. That's just some of the various facilities that Reston is participating in and providing. As I indicated, we don't normally get these types of facilities from the standard, conventional development in the county.

Reston also provides an intermediate school and elementary school sites as the county has designated a need for them.

Q Is Reston in the planning field and zoning, too? Is Reston considered unique in any other way? For example, as a learning tool?

A Oh, yes, no question about that. People come from, I would say, worldwide come to Fairfax County particularly to see Reston. There is considerable contact made with the Virginia Polytechnic Institute, which, incidentally has a Reston Center to learn more about Reston.

V.P.I schedules lectures periodically with experts in the field of new-town planning, and Reston is used as a model guide, as a prototype. So, it is studied by people

not only within our own country, but internationally.

Q With regards to the development plan -- well, it's part of the PDH-concept innovation?

A Yes.

Q What is your opinion of this development plan with regards to innovation?

MR. HAZEL: If Your Honor please, I thought we covered all this yesterday with the same witness.

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

THE COURT: Go ahead. I'll let you proceed.

THE WITNESS: From our review of the plan when we looked at it, it was our consensus that the plan could have been more innovative.

BY MR. SYMANSKI:

Q Now, have you familiarized yourself with the population figures and housing unit figures in the Herndon area?

A Yes, I have.

Q In your opinion, what effect will the granting of this application have on this area with regards to population and increased housing?

A Well, there is going to be a substantial impact in our review of the situation as it exists today in the Herndon area. There is presently a population that is either existing

or is what we refer to in the pipeline as a committed housing that will generate a population of 19,625 people. That is Herndon itself. Eventually we would include the property to the north, including Hiddenbrook, as well as the property immediately to the southwest between the Access Road and the Herndon town limits.

Now, in projecting the population -- let me correct that. I did not include Hiddenbrook. I included the population within the town and the population in the southwestern quadrant.

Now, including the project in the immediate vicinity that would be C-222, Hiddenbrook development and the Clinch property, we will generate an additional population of 7,000 people. 7,000 people to top off a population of 19,625 amounts to a 37 percent increase in population, and this was the very base and foundation for my point yesterday; that I tried to emphasize that perhaps our facilities, if you stretch it, might be adequate for population within the area today; but, certainly by increasing the population by better than a third, we would have serious problems. There's no question about it.

Q Now, within this opinion, did you include any other zoning applications which may be in this area or possibly in litigation?

A No.

MR. SYMANSKI: No further questions.

CROSS EXAMINATION

BY MR. HAZEL:

Q Mr. Pammel, how large is Reston in terms of acres?

A Reston is a little over 7,000.

Q How many people live there now?

A I'm not sure of the exact figure right now. I think it's somewhere in the neighborhood of 25,000.

Q 25,000. And how many does the county and the Reston management plan to have there?

A The population is planned for Reston somewhere between 72,000 and 78,000.

Q Mr. Pammel, in terms of proportion, Reston isn't providing anything more than developers here are providing, are they?

A In terms of --

Q This is a minuscule planned community?

A Except that I think Reston is making significant advances in the solving of transportation problems within their immediate area.

Q You say that they built the roads in the Reston area?

A That is correct.

Q We'll build roads in this area, won't we? We'll

improve those roads?

A Yes.

Q So, in effect, all the same concepts apply, all the same development requirements of the county apply to this application as they do to Reston, don't they?

A There would be significant improvements made by both parties. I wouldn't deny that.

Q Ours are not as dramatic because we are minuscule as compared to Reston?

A They are not as dramatic, that is correct.

Q But, they are solid improvements, all in accord with the plan?

A That would be correct, yes.

Q Now, there is no population increase suggested in this application which is a surprise under the plan, is there?

A No.

Q It's exactly what the plan anticipated?

A The plan anticipated that at some point in time.

Q And that point is not defined, and it's been adopted now about three years, and it's not a surprise, is it?

A You are correct in the point it's not defined; that's right.

MR. HAZEL: I have no further questions.

THE COURT: Mr. Pammel, how many PDH zones are there in this western part of Fairfax County, if you know offhand.

THE WITNESS: There have been several, but they have all been, like there was one that was amended, C-164, and to the best of my knowledge, outside of one in Centreville which is pending right now and has not been acted upon, I think that constitutes the ones in the western part of the county, at least to my immediate recollection. Now, five minutes or so from now I might think of another one.

THE COURT: I understand. Now, you give some position to the uniqueness of Reston. Does this PDH zoning, the innovativeness of it, does this also have certain uniqueness about it that might attract the same interest as Reston does?

THE WITNESS: Of course, PDH is on a much smaller scale.

THE COURT: I understand that.

THE WITNESS: I think Reston basically is unique because most of your people in the field of planning are looking for different solutions to the whole problem of urban development and the environmental concerns, keys of pollution, and everything else, and if you can get this into a new town,

provide all the basic facilities for them in the new town and hopefully get them to work in the new town, possibly we have made great strides in solving a lot of your problems.

Reston is looked at in that vein. At least by most the experts in this country, as well as the foreigners who come here to study new towns. PDH is innovative in that it offers the opportunity by the developer on a smaller scale to do some interesting ideas in developing concepts and design. It's got flexibility. The people can work and come up with different techniques of land development.

THE COURT: All right. You may step down, sir.

(Witness steps aside.)

MR. SYMANSKI: That is our case, Your Honor.

THE COURT: Do you have any rebuttal evidence you wish to offer Mr. Hazel?

MR. HAZEL: No, I do not.

THE COURT: All right, sir. Do you have any argument you wish to make?

MR. HAZEL: If Your Honor please, I'm going to be very brief about the facts. The facts, the whole argument, Your Honor has heard me argue in at least one case in the last two weeks, and I would really reiterate that same argument.

In terms of facts, we have had about a day and a

half, and I think both counsel have pretty well argued the case as we went.

There is absolutely, as our position, not a shred of evidence of substance to sustain the denial of this application on the ground for which it was alleged to be denied. I think it is only fair, and, in fact, established by the conclusive weight of the evidence that there was no real consideration of the development plan as a problem in the denial. A member of the Board making the denial motion said it was denied as premature.

There were statements by the members of the Board on both sides of the vote, a five-to-three vote, that it was attractive, that it was innovative, but still premature.

Now, in that regard, I think the comments of Mr. Majer and Mr. Miller are extremely important in putting this whole thing in context, and that is:

"You get the master plan, and then the citizens come in and say, no, they don't want the master plan conformed to. Yet they are the first ones in if a developer comes forward with an application that is not in conformity with the master plan --"

and this is on page 70.

Mr. Majer said, "We have been encouraging the use of PDH. We wanted to get that as a zoning tool and provide

a variety of housing in the county and provide good development with open space and amenities, and so forth and so on. Here we have another application which is in conformity with the master plan, the land use. The applicant has in good faith proceeded to undertake a development which is frankly to me a very interesting development. I think there may be questions with respect to the development plan and details that need working out, but we are continuously turning down these PDH applications on the basis that you get the master plan and then the citizens oppose it, and then we say it's premature. In fact, what happened here is zoning was denied on grounds completely unrelated to the development plan.

We are not asking Your Honor to approve this PDH-3 zoning as a basic zoning. We are merely asking this Court to hold that our RE-1 zoning is in error and place the Board on terms to reconsider the zoning of this property.

Now, in connection with the evidence or in relation to the evidence, really you have here an urban density center. It has all been conceded. I can't find anything in the staff position to specifically support a denial based on the public facilities.

The only thing that was mentioned in the Board's report or in the Board's minutes was something about Route 7

and something about a ford over Sugarland Run Road. Sugarland Run ford is not even a part of the case. The Route 7 allegation or comment, sort of a chemical comment by Mrs. Bradley, hasn't been supported by any evidence at all. So I think that the record is completely without evidence to support a denial of this based on public facilities.

There have been a lot of intuitive comments about public facilities, but none that really establish anything, and I think they are on a very narrow ground of whether this is debatable. There is really nothing to debate, because there is no credible evidence to debate.

Now, going to the other side of my case. I have two major areas of discrimination. I alleged discrimination on a private basis of this property and as a landowner. And, I think it's obvious that the Clinch case was zoned, the Reston cases being recommended, other cases in other parts of the county in conformity with the master plan are being granted, and yet this case is being turned down when everything about it goes for the case.

The other, and I guess in the public interest area of discrimination, is an invidious type of discrimination that we are seeing more and more, and that is a discrimination in providing the very thing that this Board and the prior Board

talked the most about, and that is a flexible range of housing.

There is in the record of this case uncontested, without a parcel of evidence to contradict it, evidence that there is existing in Fairfax County today a critical shortage of land zoned for what has been described as urban density development on small lots, lots less than one acre; absolutely uncontradicted. Astonishing facts, 95 or 96 percent of the zoned land in this planning district's vacant land is zoned in RE-1 or larger lots which would require expensive houses. I think it was 3.6 percent is all the land that is left in this entire planning district for small lot urban density, urban development.

Mr. Payne described in great detail, and I think very thoroughly, the whole concept of planning in Fairfax County. Using his watershed map, he pointed out that the county is trying to preserve areas for open space, and that the areas where you can even hope to build under any planning concept are limited to the Pohick, some areas around Centreville and the subject area, and that is the entire conceptual approach to where urban density is developing.

And, this is right in accord with that. I think that this case presents a 25-year update of the Carper case. Mr. Symanski, yesterday, raised intention. Well, there have been

a lot of developments on intent, and I would present for the Court's consideration a Federal case on improvements. Hawkins against the town of Shaw, Mississippi, which was a recent case that concerned the problem of discrimination in the improvements provided by a municipality.

In this case, it was the matters of fire hydrants, sewer and basic improvements. It was a civil rights case, but the same principles apply regardless, whether it's more street lights or the sewer they need or the opportunity to buy housing at lower costs.

People are, I think, clearly in the law today recognized not to be the subject of economic discrimination. And, in that case the Court of Appeals said:

"It may be argued that even though this court has adequate standards to determine fairly that municipal services have been allocated in a discriminatory manner, the correction of this problem is not a judicial function. We disagree. The separation of powers principle assumes that we have a system of checks and balances.

In Madisonian terms, each department or power center is to act as a curb on other departments or centers. Indeed, 'unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the

degree of separation which the maxim requires as essential to a free government, can never in practice be duly maintained.' Utilizing the power vested in this court to check an abuse of state or municipal power is, in effect, consistent with the separation of powers principle."

The Court ruled in that case there was clearly discrimination, that the fact of intent had absolutely nothing to do with this. It was, in fact, expected. And, I offer that I suggest that the evidence without contradiction shows that in Fairfax County today.

It is well nigh impossible to anticipate that construction of single-family homes or any homes can be accomplished in less that the $50,000 price range at the densities that we have here now.

The Shaw case is also the subject of a memorandum of opinion in an order that involved Fairfax County by Judge Bryan; and, in this, the county raised the very thing that Mr. Symanski raised yesterday, which is intent.

The Court held that the facts show that intent is absolutely irrelevant. If proved, the disparities of themselves and without proof of improper motivation or intent, would establish a prima facie case of racial discrimination in violation of the Constitution. Now, I would concedethat case

is based on a black and white concept, but I think discrimination doesn't necessarily involve black and white concepts.

The Carper case, a pioneer case in this area, I think really started the ball rolling in the direction of restraints upon municipality zoning, because they looked at that as a way to solve their problems. I have a copy here of the Carper case for the Court.

There are in the Carper case so many similarities between that situation and the one today. The Carper case found much about Fairfax County that has been talked about today. It went on to say that there was a demand for houses to be built on land of less than one or two acres, and the effect of the Freehill amendment has been to prevent use of the land for subdivision development in the western area. The effect of what we're doing right here is to prevent the development on land of less than one and two acres. That's exactly what it is.

In the Carper case, the County Board's expert on finances conceded the financial condition of the county could be improved and corrected by imposing higher taxes, and that it was admitted by witnesses for the County Board that the ordinance was designed to limit commercial and residential development of the western area.

Well, I was astonished in this case. We don't even have to prove discrimination. Mr. Pammell, uncontradicted, says that the county, as a matter of policy, is discriminating against other areas in favor of Reston. That certainly is discrimination at its grossest. As a matter of fact, it's so obvious and it was so startling that I don't even know how to address the matter because the county is apparently defending that position as good: That we are certainly discriminating against others in favor of Reston.

Now, in paragraph two at the bottom of page 660, there are two principles stated by the learned trial judge:

"The purpose of zoning is in general two-fold: to preserve the existing character of an area by excluding prejudicial uses." Certainly, there is nothing prejudicial about this.

Secondly, "-- to provide for the development of the several areas in a manner consistent with the uses for which they are suited."

Every parcel of testimony, including the statements of the Board of Supervisor members as they voted on the case, indicates that this is suitable for this development.

And finally, "the regulations should be related to the character of the district which they affect; and should be

designed to serve the welfare of those who own and occupy land in those districts." On the next page, the Board went along and said: "The County Board contends that the general economic effect on the county's having to furnish police and fire protection, the construction and maintenance of public schools, and other public conveniences should be considered in determining the reasonableness of the ordinance." They indicate a case, in support of this contention, a Massachusetts case, which said, "--the economic effect could be considered as more or less incidental."

But, the Court went on to say in Carper: "A zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there and who are able and willing to erect homes upon lots upon which fair and reasonable restrictions have been imposed nor for the purpose of protecting the large estates that are already located in the district." The county must agree that there is simply not enough land to accommodate the people that want to live here.

The Court concluded in the closing paragraphs, and I think this is the key on which I would close, "The mere power to enact an ordinance such as the one here involved does not carry with it the right arbitrarily or capriciously to

deprive a person of the legitimate use of his property."

Now, Your Honor has offered several opinions which point out that a man has a right to use his property. He has a perfectly legitimate right, and that cannot be denied as long as the public is not adversely affected. There is no evidence in the case that the public is going to be adversely affected by the granting of the zoning, and, in fact, there is uncontradicted evidence that the public is going to benefit by the granting of the zoning.

I have a number of other cases, cases out of Pennsylvania and New Jersey, that point out that you cannot by restrictive zoning make it impossible for people to live, to enter an area and to find respectable housing.

Now, Your Honor, I have thought much about this case in the past two or three days and the past several months. If we were, in this case, claiming in breach of the master plan that we should have 20 units, that we should have 50 units or even 10 units, you know, we might have a different kind of case. But, as I sit here and think how far the zoning process has been distorted since Euclid versus Ambler, and West Brothers Brick, down through Carper, we are here trying to fight our way home with 2.5 or 3 units an acre with the uncontradicted testimony that the area is needed to build housing to provide

places for people to live, and the County Board is sitting here defending on the basis that we can't apparently afford to do it, and this is a county reputed nationwide, worldwide, to have high affluence, a budget in evidence of $125,000,000 for schools alone, $3,000,000 and some for libraries, $5,000,000 for fire and $6,000,000 for police. And, they say here in this area, which they have planned for 15 years for this use, that somehow these services cannot be provided.

I think the case is really obvious on its facts. I do appreciate Your Honor's attention for the two days. I'm sorry if we dragged it out.

THE COURT: All right, Mr. Symanski.

MR. SYMANSKI: Mr. Hazel has referred to many actions of the present Board. For instance, Reston here. And, I'd like to point out that this Board has been consistent, especially in this area. It tried to reserve the decision on Clinch, based on public facilities. Mr. Pammel has just testified with regard to this Reston argument that Mr. Hazel has made so much of that these applications were deferred on one of the plans basic policies which was public facilities. The Board was concerned about public facilities.

Whether the Board's decision is wise from a land use planning point of view I don't think is the issue here.

The issue is whether their decision can be backed up with facts so that it's fairly debatable. I think planners and zoners will disagree on a lot of things, but the voters of Fairfax County have put these people in office. I think that's the Democratic process, and a boom-or-bust growth I'm not defending.

THE COURT: Are you reconciling Clinch with this, with the same Board? The same Board that zoned Clinch denied this one.

MR. SYMANSKI: Mr. Pammell, Your Honor, has said that was a mistake.

THE COURT: They are not bound by his mistakes.

MR. SYMANSKI: Your Honor, if we are bound by a mistake, if we can't try to correct a mistake, then the whole county will go. There will be no difference between any of this area if this case is determined by Clinch, which we have represented to be a mistake. We have admitted we think it was a mistake. Then on that basis, every piece of property out here will not be considered.

THE COURT: Do you think that Board considered it was a mistake?

MR. SYMANSKI: Well, Your Honor, all I can say is the staff report was in affirmance, and I assume the Board to

some extent relies on the staff report. The staff has changed its mind. Mr. Pammel has explained the fact that it was a mistake.

THE COURT: Well, Mr. Pammel recommended it for a greater density.

MR. SYMANSKI: That is correct, and that Board wouldn't accept that recommendation and tried to downgrade it back to RE-1, sir. I don't think anybody would contend that a Board never makes a mistake, but we're defending this piece of property with regards to the facilities involved and the questions brought up. And, that's another point. I don't think it's a matter of law that the Court should or can --

THE COURT: Well, I've already ruled in the record on the Clinch case, and in regard to the alleged mistake, such a turn of consequences that in fact have so come to a downgrading of it is what it was.

MR. SYMANSKI: Mistake as a matter of law, mistake as a matter of land planning, Your Honor. I think you ruled as a matter of law that there has to be a mistake or a change in circumstances; is that correct?

THE COURT: That's right.

MR. SYMANSKI: Well, as I understand it, a mistake under those circumstances would be, for instance, whether a

sewer line existed on this property. If they thought there was a sewer line and it turned out there was not, the mistake would be a matter which Your Honor would allow them to change their mind; but, a mistake in land use planning or policies is a different things from that.

THE COURT: Well, an alleged mistake in the staff report is not of such significance to merit a change in zoning.

MR. SYMANSKI: Well, Your Honor, a mistake, as I understand it under your ruling, would be, for example, if the Board of Supervisors thought a sewer --

THE COURT: There was no such consideration as that.

MR. SYMANSKI: As an example, that would be a mistake upon which a change would be allowed, but a mistake in land use policy would not be. That's a mistake as a matter of law, as I understand Your Honor's ruling.

THE COURT: All right, sir. Go ahead.

MR. SYMANSKI: I think it's very important here. There has been reference several times to what the Board says in the record as their grounds for denying this. I really don't think as a matter of law we can be restricted to that. I don't think, for example, there may have been a fireman of 25 years on the Board of Supervisors who of his own knowledge knew about fire requirements and based his vote partially on

fire requirements, but he didn't put it on the record.

I'm just trying to say that -- I think that Blankenship says that bad reasons can make good laws. And, the question is whether we can back up those decisions with the facts, not whether the Board of Supervisors -- for example, each member sat there for 20 minutes and put down every single consideration he had with regards to his vote on this application. I would like to emphasize that I don't think we can be restricted to exactly what each Board member said. I think it's probable that each Board member did not state his reasons.

I'd like to quickly review some of the facts we have broughtout here and facts that are in evidence. First of all, this is a PDH ordinance, and there is a special section in our Code, 30-15 about requirements.

Now, again, the applicants have gotten bonuses. The law wasn't the main advantage of freedom, but now they're contending that they should not be considered under 30-15, but they should be considered --

THE COURT: Well, you're not contending that the Board denied the application that the so-called development plan had to be finalized?

MR. SYMANSKI: Your Honor, I can't pretend to

represent why each member of the Board voted the way that he did. I don't think you're required to sit down and say, ayes or nays -- but I don't think they are required to say: my considerations were X, Y and Z. I can't represent whether they did or not; and that's my point.

I don't think we can in this courtroom be restricted to that. I think the county is allowed to introduce evidence under the law and under the facts which back up their decisions. If Mrs. Bradley said -- or whoever it was -- public facilities. It may have been another supervisor voted along with her for entirely different reasons, but he was in agreement.

THE COURT: Well, I agree with you there, presuming, of course, that it's valid --

MR. SYMANSKI: Right.

THE COURT:--until they can produce by a preponderance of clear evidence any of this arbitrary or capricious and unreasonbleness. At this point it shifts then to show what they did was not reasonable and not arbitrary.

MR. SYMANSKI: That's correct, Your Honor, and one consideration in that is the fact that the development plan under the ordinance is what the Board of Supervisors ruled on, and if that was deficient, I'm only saying that we can't be excluded from considering that development plan under our

ordinance. I'm just saying it may have been that one of the Board members didn't like the 14 units in the flood plain, and that one member of the Board of Supervisors may have said: My God, they did a horrible job on that plan. I can't be sure. Under the staff report there were a lot of deficiencies. All I'm saying is that I don't think we're required in the record to state every single reason of every vote of every member. And I think the development plan is a part of this proof that we are trying to offer.

THE COURT: All right. Do you have additional argument you wish to make?

MR. SYMANSKI: Yes, I do. Again, I'd like to point out the state Code, 15.1-427. Mr. Hazel also has made much of the fact that other schools are crowded, other roads are conjested, there's a sewer problem everywhere. But, 15.1-427 says, and I think it's important to the future. This chapter is intended to encourage local governments to improve public facilities, health, safety, general welfare, etcetera.

That's telling the Board of Supervisors to try to make things better. You see a crowded school somewhere else; let's make it better the next time.

Under transportation there is a PDH standard that access to and from the proposed development is adequate to

handle existing traffic and traffic to be generated. And, Mr. Faulkner who is in the record as a transportation expert has said, in his opinion, it's not adequate; it's minimal in parts. Granted, they're going to improve it, but that is not what the standard is in the ordinance. I mean the comprehensive plan.

Safety and efficiency in my opinion is not only how wide it is, but whether it's curvy, whether there is a ford in one place, not just on 228 but in the system around here.

He also testified that the junction at 228 and Route 7 would become hazardous. I believe he said something to the effect that when the traffic generated by this development came into effect -- now, the comprehensive plan, again, page 30 says: from a review of this area which has had some minor improvements, the network is minimal in terms of safety and efficiency.

I'd like to note the verbatim, page 39,a citizen from Great Falls stated fear of more commuter traffic in the Great Falls area which was already excessive. The staff reports--there are quotes in there from Loudoun County that they worried about traffic generation.

I would like to cite a case on this point. I think

it's an important case. Wilson versus Planning and Zoning Commission, 291 Atlantic (2nd) 230, a 1971 case. The Supreme Court of Connecticut held that unless the proposed widening and other improvements to a highway were actually to be accomplished -- I'd like to point out the fact that there is testimony here that it's not in the ten-year plan of V.D.H. -- actually to be accomplished at a time that the local body could not approve a zoning which would aggravate traffic congestion on that highway.

The Connecticut enabling statute was very similar to 15.1-489. It provided that zoning regulations shall be designed to lessen congestion in the streets. And, not only does 489 say that, but to provide convenience of access. And, it's mentioned at least four times in that one paragraph. Transportation is a prime consideration in zoning.

The Court says:

"In the absence of some assurance, which the record before us does not furnish, that provision could be made for the requisite highway and traffic flow changes for the purposes of alleviating traffic congestion the commission had no authority to change the zone. It acted in a manner directly contrary of the mandate contained in Section 8.2."

This is on congestion, but we have maintained, and

Mr. Faulkner testified from a point of view of efficiency and safety, this road system is deficient.

Now, with regards to sewer. The case on that was rather short. Now, I'd like to only point out a couple of things. The memorandum of understanding that we have submitted pointed out there was a problem in the Potomac River. This memorandum of understanding was drawn towards trying to relieve that problem.

The administrator of the Board of Supervisors, where he cited in the transcript of this hearing and prior to this zoning application, Dr. Kelley, is saying to the Board of Supervisors there is still a problem in the Potomac River. We have got to do something. An interim agreement came out of this. We have got to do something to bring it down. By the way, the plant was to come in '75 and not '77.

The Virginia Code, Article XI, Section 1, it will be the Commonwealth's policy to protect the atmosphere, land and waters from pollution. The staff report stated that improvements were planned for the Blue Plains Plant. Now, the PDH ordinance, again, requires that public facilities be there. There are obvious inconsistencies. Some sewer has been granted elsewhere, but I'm just trying to point out this, Your Honor. There are a lot of variables in a zoning case and

that this is one of them.

Now, I'm not saying they turned it down on sewer; but, I'm saying the allegations were that sewer capacity and stream capacity was up to par and available, and I don't think it was. I think the proof we have entered in the record shows that actually it was not. Dr. Kelley pointed out that there was a problem, they had to put up more money, and they had to try to reduce pollution. Again, I'm not saying that that's the only reason. I'm just trying to point out it's one of the variables before the Board of Supervisors.

With regards to schools. I don't think anybody has said there isn't a school problem. Again, Mr. Hazel says, it's crowded somewhere else; let's don't worry about it. Again, 427 says let's improve things.

Now, the interim relief from Chantilly which Mr. Whitworth talked about and which he wrote in the staff report would have been wiped out by the projected 600 units by that '72 and '73 September school opening. This would have wiped it out and kept it overcrowded.

There is no evidence before the Court that the Board has tried to stop the school program. I think the Board of Supervisors has put a referendum before the citizens to vote on it. That is the process in Fairfax County. There

may be others, but that has been historically the way we provide schools. I pointed out, and it's in the record in the budget, that there have been increases for operating budgets of the schools. So, any contention that the Board of Supervisors is holding the line on these things and not providing through the budget more money each year is just not true.

15.1-489 enjoins the Board to be sure of adequate schools. I think the Board would have been unreasonable in the schools, just on the school facts alone, in just the relief coming from Chantilly which would have been wiped out.

As to the fire situation, another consideration, 30-15 of the Code specifically says adequacy of police and fire protection. Now, again, the question was to compare to these Reston rezonings. Mr. Pammel has pointed out that the Board deferred these because they were concerned about public facilities.

Mr. Alexander testified that under the criteria he uses from a distance point of view and the manpower point of view, this was not adequate. It was not adequate protection. There has also been testimony that the budget has been increased for fire.

Now, I think nationally as well as in local government

we would like our budgets to be higher and do everything we want to do at one time. But, there is evidence here that the Board of Supervisors has provided more money each year for fire protection. Whether they have gotten it all -- and obviously they haven't -- Mr. Alexander said he wanted more money. They didn't give it all to him. But, I don't know that we can hold the Board to a higher standard in this respect than we do anybody else, including the national government. 15.1-489 in two places, provide adequate safety from fire. Protection against loss of life or home or property from fire.

Now, police and libraries. There is a statement in the staff report that these would be taxed. Mr. Pammel testified that he thought from his own experience and knowledge that this would tax the present facilities.

Mr. Payne, when I asked him about the library facilities, he hasn't seen it, but he admitted he knew they were overcrowded. Again, the budget has an increase in library money, not a decrease. They are not holding the line. The Board has increased the library money.

The water. Mr. Hazel has made much of the fact that water is out here now. And, we are not contending that at this time water could not have been supplied. But, Mr. Babson

represented a desire to provide water, Herndon would like to provide it with water. The only point here is it's another variable, and the fact that 30-15 says that facilities are to be there, water was a question mark. That's my only point -- another of the variables. It was not stated Herndon will supply the water; they would like to. Herndon might have turned around and said, no -- just another variable from the development plan point of view. The PDH ordinance requires it to be submitted. That's what the Board makes its decisions on.

There has been testimony that there are deficiencies in the roads. Obviously this is not the worst in the world, nor the best in the world. But there were different service roads not provided the whole length of the property. Mr. Hendrickson says in the development plan that was submitted: no roads here where it should have been.

Fourteen units in the flood plain. My point here: I think it would be reasonable from a member of the Board of Supervisor's point of view to say, well, 14 units in the flood plain. I have a little bit of a question about this development plan. I'm not sure about it -- another of the variables.

The golf course. With the Loudoun County zoning, that may be a 15-hole golf course.

Mr. Knowlton, the zoning administrator, page 62, he was not the zoning administrator then, but he was in zoning, on page 62, "A PDH plan, once adopted, is the guiding force for the people who work with those plans, that it is not in a position at this time --" -- with the deficiencies pointed out for it to be adopted-- even if everything else was up to par, which they're not.

Under the PDH ordinance, the Board was reasonable in turning down this development plan. I haven't seen any offer in the record or a request from the applicants to clean up deficiencies in this development plan. One point here from Mr. Knowlton and Mr. Hendrickson, too, he considered that law when it passed was what they had to abide by and that's what they did.

To go to the comprehensive plan, page 35. I'd like to make one small quote. "Zoning is the principal legislative tool available to the county for implementing a comprehensive plan. It helps to insure that planned land uses are situated in proper relationship to each other and that the density of development in each area is held at a level which can be properly serviced by governmental facilities."

Again, Your Honor, I'd like to point out that the idea of this chapter in the State Code is to preclude conditions.

It's not to keep them the same. I think the budget shows that the Board has been adding to the amount of money put into improving these conditions, but it can't all be done. It's not done anywhere. Increases are there, and I think that showed a certain good faith-- certainly an intention to improve things.

Exclusionary zoning. Mr. Hazel cited a case on a civil rights ground, discrimination based on rights. I just don't think there is any comparison here. I don't think anybody can contend, again, on a national level or on a local level of government -- this question of all the money we want every year to do everything we want. I think it's obviously up to the elected body and under a democratic process to decide where things are going to go and when and how they are going to decide. They are elected. I think in the last election probably one consideration was growth, a concern for our growth in the county.

Again, I don't think there has been any allegation or any proof of a no-growth policy, but a controlled-growth policy. Again, under the exclusionary zoning cases, even if we get over the hurdle of an intention or a purpose to do so, I don't think there is any possible proof of an intention to show discrimination against people or as required in these

cases. But, even if Mr. Hazel gets over that hurdle -- again, I would like to cite National Land and Investment Company versus Kohn, 215 Atlantic (2nd) 59, a 1965 case, which followed Carper:

"Zoning ordinance which has as its primary purpose the prevention of entrance of newcomers in order to avoid future burdens, economic and otherwise upon administration of public services and facilities, is not valid."

Of course, we do not mean to imply that the governmental body was not utilizing its zoning power in order to see that municipal services are provided in an orderly and rational manner.

Now, in these exclusionary zoning cases, in Carper, the whole western two-thirds of the county was zoned for large lots. Again, there's just no comparison. In National Land there is a little bit of rebuttal to this exclusionary zoning argument. Again, there is no proof or evidence of an intention.

THE COURT: Let me ask you, Mr. Symanski, what difference would it make if there does, in fact, exist discrimination, economic discrimination? What difference would it make whether it came about through inadvertence or through intent?

MR. SYMANSKI: Well, Your Honor, a discrimination based on economics, what can we do if this is an area where the demand is there? I asked, was it Seldin, about that. This is, anyway, an area which is high in economics, high pay, and the demand for land is there. Possibly the growth policies of the Board have caused this problem to be on the increase.

THE COURT: It surely is on the increase, because we surely are getting a greater volume of cases coming up here.

MR. SYMANSKI: Your Honor, my point is that on a balanced scale, if the Board of Supervisors says we do have a problem here, what do we do about it? Open up the whole county? That would bring the price down, but, on the other hand, what about the public facilities that that kind of an opening up of the county would bring.

I think public facilities under the law is a very prime consideration, and maybe the policy of the Board is wrong on some considerations from some planner's point of view, but from other planners' points of view, it's exactly right to worry about public facilities before you zone. I think that nationwide we are getting more and more involved in worrying about our environment, and this has hit us at this time. We are trying to get to the point of where we

provide public facilities first, and this is, in effect, a cause of increased values.

But, I don't think as a matter of law this Court can rule that a decision, based on provision of public facilities which is a valid decision under the Code which has this effect, is a discrimination which the law will rule the Board cannot do.

I think public facilities are obviously a valid consideration and the decision based upon that is definable and under the law.

THE COURT: I would agree with you, Mr. Symanski, and I think it makes good argument, and they certainly can consider public facilities.

However, you don't say on this hand, okay, we do have a problem. We recognize it, and we get over here on the left hand, and we recognize the problem. But, we are still going to go ahead with it. What's right for the right hand is wrong for the left hand.

Mr. Pammel said he recognizes the problems: the same sewer trunk line or interceptor line is serving Reston that serves this piece of property. The same source of water is available, and so forth. Yet, he says it's okay for Reston to go ahead.

MR. SYMANSKI: I don't believe he said, "Okay."

THE COURT: But, he's recommended approval.

MR. SYMANSKI: He also says that on these the Board has deferred them for public facilities to work out how they are going to be provided.

THE COURT: Okay, I understand that.

MR. SYMANSKI: Well, Your Honor, you have also pointed out there's a problem here, and there are various considerations. But, I don't think the Court can rule the Board wrong if this Board feels that public facilities are the prime consideration here.

Now, I think on any level of government choices have to be made, choices of where things are going to go, when things are going to go and how much. It may be that you and I think these decisions are unwise. But, those decisions are what we elect people for, and those decisions are what the Board is put there for. Doesn't Mr. Nixon make them? His budget people make them. The County of Fairfax and the Board of Supervisors make them, and we only have a limited amount of money.

Like I say, there are a lot of things we would like. I'm sure the Board members don't want Fairfax understaffed, but they have increased that budget every year. Now, somebody

has to make that decision of where that's going to go, and I think that's why we elect people. That's a valid decision under the law. That's my only point.

Now, on the other hand, if this Court ruled in this case that because the Board did something somewhere else which was inconsistent with this, under this type of decision, that they have to make as a body, what would be the effect on the county and on the zoning process?

Every case that comes up before this Court, you would have to say the same thing or you can't consider public facilities. We have a problem of high-priced land in this county. Rezoning itself -- there would be no use to go through the zoning process, whatsoever. That would have an effect on every zoning case in this county, not only in this area. There are other cases which this case would preclude any debate in this whole area. But, not only that, in the whole county. The Board would be in a position of not being able to say, look, public facilities aren't there; we're sorry. Not at this time.

Now, I don't know how anybody can handle that, and I don't think the Court is in a position or should be in a position of making that. Because, I think the decision made here was definable on public facilities, and that it is

legitimate. At the very least, it's fairly debatable. Like I said, true, the new Board tried to change its mind on Clinch. On the discrimination issue, the budget has been increased. The Board has entered into agreements, has put its money where its mouth is with regards to Blue Plains and the problem there. The low-and-moderate-income housing ordinance. Now, I don't think any of the applicants here allege that they provided these low-income units in this plan out of the goodness of their heart. They were required to do it.

I think that that shows that the Board is certainly concerned about low-and-moderate-income housing, but they have got a lot of other problems. But, they have made the decision and I think the question is whether that is a decision which this Court can reserve that public facilities are important. I think that is the main issue in this case.

Thank you, Your Honor.

THE COURT: All right.

Mr. Hazel, do you have any additional comments?

MR. HAZEL: I would only cite this of Virginia, Article VIII, Section 2, which is:

"Each unit of local government shall provide its portion of such cost by local taxes or from other available

funds" necessary to maintain public education in the area. I think that is the issue which is soon going to be put beyond the zoning process.

Thank you, Your Honor.

E X C E R P T

THE COURT: Here is the way the Court views this case. We have a Comprehensive Plan which was designated as the Upper Potomac Planning District, which was duly adopted by the Board in 1970, and that was adopted, it appears to me, after careful study and thought, and it was adopted under the same status, the same power that says this promotes the health, safety and general welfare of that area. This was the basis by which it was enacted.

All right, we have the citizens who live in this area saying: all right, we have things in this area, and we're going to have this, and we're going to have that. One of the owners, a present owner in this case, files an application pursuant to this Comprehensive Plan, and he files this application, I believe, on January 6, 1971.

It goes through the normal process. He is, of course, seeking PDH-type zoning, which is a zoning and a density that is permitted under the Comprehensive Plan. It goes before a staff, and the staff recommends that it be denied, and I believe that the Board denied that action on October 20th. I believe that's right. Am I right on that?

MR. HAZEL: Yes, sir; 1971.

THE COURT: 1971. We have another applicant in the

same area and not too far removed from there, an applicant which is known as the Clinch property. He files his application with the staff, or coming through the usual procedure, on April 30, 1971, at the time C-222 was pending -- already been filed. C-282 was filed on April 30, 1971.

The staff made a report on that on July 13, 1971 which deals with the same area, and they wind up in that case recommending -- this case was seeking R-12.5 -- the staff in this case, as I understand it -- and I am also ruling at this point that basically there is not much difference between the PDH-3 and R-12.5. It appears, from the evidence before this Court, C-282 was approved by the Board on December 15, 1971, when in fact they had just denied C-222 on October 20, 1971.

Now, in the eyes of the Court that raises an inconsistency. Why does one person get it under the same Comprehensive Plan, which is essentially the same type zoning, and one does not get it? Both are seeking greater density which is permitted under the Upper Potomac Planning District.

All right now, the explanation given, at least by the staff, is that they made a mistake in their recommendation on C-282. They felt that they made an error there. They are to be commended if they made an error. Is the error of such significance, and is it really supported when the same staff, in other applications dealing with the same general area and

having to deal with the same public facilities, the same sewer, the same water availability, and so forth, recommends in the Reston area that they proceed with certain development which is a tremendous amount of development. If I remember, the two applications, C-377 and 378, are in excess of 5,000 units.

This Court has sistently ruled in these cases that a property owner has a basic and vested right to use his property for any legitimate purpose. And let me say that that was a basic vested right of the common law that existed a long time before zoning ever came into the picture. He can continue to use that property for any legitimate purpose and as long as it does not constitute a nuisance or is contrary to the health, safety and general welfare of the public.

Now, what limitations can a local governing body place on the utilization of his property? They can certainly limit the use of the property for the purposes of promoting the health, safety and general welfare of the public; and these actions must be reasonably related to the health, safety and general welfare of the public at large and not just one or two.

Under our theory of government, we live in a government of law and not of men. It certainly would seem reasonable to me that two property owners under this plan would expect to be treated equally by the same Board. When they had the same circumstances, same conditions, presented to them, why did the

Board allow one to be approved and disapprove the other one? I find there was discrimination. In fact, whether it was intended or not, it resulted in discrimination. If Clinch is entitled to his zoning of R-12.5, then there is no legitimate or logical reason as to why this owner should not have at least a greater zoning than what he has, the RE-1.

Certainty under the law is one thing that we take pride of in a democracy. It means that a person under a government of law knows what the law is. He knows what his rights are, what he can expect from the law. But, when he finds that one person gets an advantage over him, then I think he has reason to believe that it is no longer of law, but it has become a government of men, and they dictate according to their whims. It is then the uncertainty of it that really throws the whole such system into chaos.

I don't know why the Board would grant one and deny another; but it seems obvious to me it results in discrimination, and it is an economic discrimination when you have valuable property at one value because it is now zoned RE-1, and a tremendous value increase when zoned another.

Here again, I have ruled in a recent case the Board is not required to legislate on profit. However, under the free enterprise system and under his basic vested property

rights, you can't deny him economic gain advantages. It doesn't violate the health, safety and general welfare of the public. You can't deprive him because you don't want him to have money. He is entitled to its advantages. He does not violate what is considered to be promotion of health, safety and general welfare of the public.

I am going to direct that the Board give reconsideration to this applicant, C-222, for a different zoning than what it is at this point, and that is the ruling of the Court. I also state for this record, I have read a number of exhibits, particularly the minutes of the Board, and a number of other exhibits, but I want the record to indicate I have not read all the exhibits that have been indicated to me here. To read all of them, I would have to take the case under advisement for a period of months; but I think that the evidence that was introduced was apparent on its face, and I made the findings that I have so found.

MR. HAZEL: If Your Honor please, would Your Honor be prepared to indicate the time period within which the Board should make this decision? That has been a consistent problem.

THE COURT: Do you have a suggestion on that, Mr. Symanski?

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

Milsap, in the DeLuca case, gave six months. I can't really speak for the Board.

MR. HAZEL: That's a very complicated case involving high-rise units, apartments, and so on. I would hope the Court might see fit to let us move forward.

THE COURT: I don't believe this is as complicated as that.

Can't you do it in four months?

MR. PAMMEL: Yes, we can get it in. It's tight, but we can do it.

THE COURT: Let me also state for the record, Mr. Symanski, that I wish some of these cases would go on to Richmond. It is a concern to this Court. I know there are some other problems, but it seems to me if you are going to treat an overall problem you have got to do it fairly. I don't believe you can let one, in effect, have it, and another one, and deprive another of it. This is the situation that the Court is confronted with.

All right, sir.

(Whereupon, at 4:35 o'clock, p.m., the hearing in the above-entitled matter was concluded.)

CERTIFICATE OF REPORTER

I, ESTHER W. FARMER, a stenotype reporter, hereby certify that the foregoing is a true and correct transcript of the proceedings in the above-entitled matter taken in Fairfax Circuit Court, April 25 and 26, 1973.

In witness whereof, I have set my hand this 24th day of May, 1973.

Esther W. Farmer