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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 740778

COVERSTONE LAND LIMITED PARTNERSHIP,

Appellant,

V.

McKEON CONSTRUCTION COMPANY,

Appellee.

APPENDIX TO

BRIEF OF APPELLANT

Volumn II

Barbara J. Fried
FRIED, FRIED & KLEWANS
The Executive Building
Springfield, Virginia 22150
Counsel for Appellant

thing that perhaps brought it about is development in the general area as plans are submitted for it. By that I mean here is a tract of land that may have been zoned a number of years ago by the county but it had laid there and all of a sudden here comes a set plans in for a certain number of dwelling units and so on and implementation of the plan would start at that time.

Q Well, during these general discussions that you had, could you state with what people you had these discussions about the Ashton Avenue plan?

A Basically it would be with members of the Planning Office and the Public Works Office as far as our contact.

Q Would that be Mr. Biber and Mr. Payne?

A Yes, it could be or members -- well, Mr. Williamson who was at that time with Public Works and who has now left. I'm not saying we didn't but to say it was with only one individual --

Q Let's say beginning in late '70, assuming that's the day when you first had these discussions, were there any site plans or subdivision plans submitted to you bordering this corridor?

A Yes. In my recollection, one of the biggest things was, one of the bigger developments that really got everyone to thinking was the development known as the Paradise Tract,

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a development known as Bristow Station and also there were other plans for Coverstone. In your own area there is a concentration of development plans on that side of 234.

Q Do you recall the point in time when Paradise or Bristow were submitted? Was that prior or after December of '71?

A It all generally strikes me as being about the same time, but before or after, I couldn't really say.

Q Are you familiar with site plan 2313 which was called Manassas Quads?

A Yes, I have a preliminary copy here.

Q Do you recall when it was first submitted to you for your review?

A The transmittal letter from the county has a date of December 13 and our stamp which acknowledges our receipt of it in the office is December 14 of '71.

Q After you received it, what did you do?

A Basically, and I might explain this, they asked for our review and comments. What we did do at that time and still do is have a joint meeting between county staff and our staff in a work session type of thing where site plans would come in, particularly if any of the agencies would have anything in particular they feel should be brought out, then this is brought out at such meetings.

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Q Did you have such a meeting, do you remember?

A Yes, we had such a meeting, several such meetings. Do you mean at which this site plan was discussed?

Q Yes, but other site plans could be discussed?

A Right, this was not specifically for this. This was basically a meeting where if the Planning Department had something they wanted to bring up or Public Works or the Fire Department or it might pertain to a school and then the representative from the school staff would attend but primarily the Department of Public Works and the Planning Office. Also this provided a means where if the developer or his engineer had questions that might touch on several other agencies, it would provide a means where he could come in and meet jointly with everyone.

Q Do you recall specifically when you discussed the site plan?

A I can only go to my file here and I can chronologically run through it.

(Whereupon, a discussion took place off the record.)

MR. GARNIER: There are certain letters that have been furnished to us by Mr. Camper which, even though not signed by him --

MRS. FRIED: Some are signed by him but they may not

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have been prepared by him.

MR. GARNIER: -- are representative of various meetings which were held involving this particular piece of property and that he is the custodian of these records and that the minutes are kept at his request and under his supervision and we both stipilate, subject to relevancy, they may be used at the trial of this case if necessary and we would have formal proof as to how they were kept. Is that all right, Mrs. Fried?

MRS. FRIED: That's all right.

THE WITNESS: For instance you will note the March 3 letter concerning a meeting on February 29. Mr. Williamson and Mr. Payne of Public Works, Mr. Biber of the Planning Office and Mr. Harrison of our office.

BY MRS. FRIED: (Resuming)

Q Mrs. Camper, directing your attention to Paragraph One, it's stated that Mr. Rose agreed he would dedicate the right-of-way. Can you enlarge upon this?

A No, I don't think I can. According to the record, and to the best of my recollection I was not at that meeting, Mr. Harrison was there and I would only say that after discussing this generally -- Mr. Harrison and I did discuss it. I wasn't in attendance but this basically is my recollection of what Mr. Harrison told me took place.

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Q You were not present at the February 29 meeting?

A According to the attendance record I was not and that would serve a lot better than my mind.

Q Were you present at any meetings after March 29 -- I mean February 29?

A Well, there's an indication I was at the March 7 meeting.

Q This meeting was not attended by anyone other than -- not Mr. Rose or Mr. Hellwig?

A No.

Q I note Item Six that you were given a revised preliminary plan, do you have a copy of that?

A No, we don't. We searched for this yesterday and couldn't find it and we were mystified by that. We found out this morning that it was shortly after that date that the request was withdrawn from the county so that may have been why.

Q So to your knowledge you never considered that?

A We never commented on that formally, nor did we formally comment on the preliminary site plan.

Q Do you recall from memory and if not, we can refresh your memory through the minutes, what other meetings you attended other than the one March 7?

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A I believe, and I think the minutes will reflect it, I was present at other discussions which touched maybe not on this particular site plan but that area.

Q In any of your discussions either directly with the developer or the engineer and when officials of Prince William County were present, did you ever threaten to condemn for Ashton Avenue on the McKeon Site Plan or threaten to use the power of eminent domain?

A No, ma'am.

Q Are you sure of that Mr. Camper?

A Yes, ma'am. I think this statement in the letter of March 3 basically puts our position forth with regard to what our action would be on this matter of right-of-way. Let me put it this way, we are a state agency so we do have the power of condemnation, it is true. However, we can only condemn after plans are approved by the Highway Commissioner. I cannot condemn on my own say so, nor anyone below the Highway Commissioner, so any threat of condemnation by the Department on my say so would be meaningless because I don't have the power to authority condemnation.

Secondly, we are extremely stressed as far as funds available to bring about road improvements. We do try to work closely with the local governing body to secure dedication of

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of rights-fo-way and to implement needed corridors that would be required by a development and development by these as part of their plan and be built by the county ordinance.

Q Was there ever a plan adopted by the state of Virginia, a highway plan, for Ashton Avenue?

A No, I wouldn't say formally adopted by the department. There have been site plans that include segments of Ashton Avenue that have been reviewed through the normal county procedures, development that had been concurred with by my office, but the department itself has never undertaken a survey.

Q So there is no power, even today, on the part of the Highway Department to condemn for any part of Ashton Avenue?

A No, to the best of my knowledge there wouldn't be. We could not until additional action was taken even if we wanted to and had the funds. We would still have to proceed to the point of getting official approval. This must be done before we could even do it.

Q And you would not initiate such a request?

A On this matter?

Q Yes.

A Well, let me put it this way. If there was a parcel that it felt in my mind to be in the best interest of the department to condemn and I'm not talking about this particular

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site plan, I'm talking about in the course of our day to day activity; yes, I could recommend that we undertake the necessary steps.

Basically, condemnation, even by the department, cannot be undertaken until a fair market value is offered to the land owner.

Q But even if you were, let us say in an abstract case, to recommend that something be condemned, you could not recommend it unless a plan had previously been adopted by the state?

A Yes, approved by the proper officials of the State Highway Department, and when I say condemnation, what I meant to say is right-of-way acquisition. In other words, if we desire and feel that the best interest is to obtain necessary right-of-way to build. I may have mislead you when I said approval to condemn. What I meant was approval for right-of-way acquisition. Now, once this right-of-way acquisition is approved, then the first thing that must be done, of course, is to have certain appraisals made by our right-of-way section and then these appraisals must be approved before the right-of-way agent can go to the property owner and make him an offer, and only after he makes him an offer, there is a certain time left to allow him to consider this offer. Only then can we

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actually condemn.

Q Directing your attention to the letter dated February 14, Paragraph No. 3, when it was said that it was agreed that this facility should be an arterial roadway, 110 feet of right of way from 661 to the Manassas western loop, does that mean that Mr. Hellwig concurred?

A If my memory serves me correctly on this, this doesn't even apply to the site plan.

Q Is this for a different site plan?

A This is for a different site plan. I believe this actually was the Wolman tract.

Q Was that Crestview?

A Possibly even Crestview, too, because we say it will be determined what width to use from the western loop westward to 621 after plans have been completed and by that we mean after the Planning Department has completed its study of the Manassas area. So, that section of Ashton Avenue or Bristow Station Road isn't even in the immediate area of this development.

Q This is a copy of a map and where on here would be the Manassas western loop?

A From 661 to the western loop and at that time this was known as the western loop.

Q So we're talking about this area?

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A This area right here. This is a different site plan under discussion.

Q So this particular memo then doesn't really refer to this site plan?

A No, it's sort of background inasmuch as it was known that ultimately that question of Ashton Avenue and Bristow Station west of 621, as we say in the last sentence there.

Q Now, Mr. Hellwig was there any discussion you remember at this meeting about Ashton Avenue or Bristow Station Road north of the western loop?

A I couldn't really say. I'm sure there must have been apparently from the minutes, because again as I say in the last sentence, it will be determined what width to use from the western loop westward into 621.

Q 621?

A This road here.

Q So Mr. Hellwig was at this meeting and there was discussion at that time to see how wide it should be from here to here? (Indicating)

A Again, the minutes indicate this was a matter that would be gotten into further at a later time.

Q But it must have been discussed at the meeting, that there would have to be a road from here to here?

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A From the minutes this would lead you to believe that.

Q On your minutes dated February 22 in which you were in attendance, the first paragraph again refers to the Bristow Station Road from the Manassas loop up to 621 and here you say you are to set up a meeting. What did you discuss at this meeting on February 15 which these minutes are about. Did you discuss how wide you were going to request this road to be?

A I can't really recall other than the minutes right here.

Q In other words, did you know when you went into this meeting on the 22nd with Mr. Hellwig what you were going to ask for in width?

A I can't say that positively. I would say that from all indication and looking back at it now and from the knowledge of the development, intense development, would take place, I would say along about this period of time it became apparent in our way of thinking that justification for an arterial road and a 110 foot right-of-way could be justified from the traffic volume standpoint.

Q At that time?

A At about that time from the various development plans.

Q Did you, other than this meeting on February 15 have any further meetings with Mr. Biber or Mr. Hellwig or Mr. Rose

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concerning this site plan and Ashton Avenue?

A I can't recall of any and I get confused in my own mind with regard to this because there were several different plans in various stages about this same time, of Coverstone and that general area. There was a gentleman at one time that visited our office, not as an appointment or anything of that nature, but merely was checking on the status of dealing with his plan and in the back of my mind this could have been in connection with Manassas Quads, but I can't even assure myself of this. This would be the only other contact I could recall.

Q Was it your impression then that Mr. Rose had agreed to dedicate the 110 foot right-of-way?

MR. GARNIER: As of when, Mrs. Fried?

BY MRS. FRIED: (Resuming)

Q As of the meeting on February 29, 1972?

A Again, I don't believe I can answer that because I was not recording the minutes. I was not at the meeting.

Q Did you discuss the meeting afterwards with Mr. Harrison?

A Yes.

Q What did you get from him?

A I would feel his minutes as written were basically my understanding from Mr. Harrison of what took place.

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Q Can you explain what it means that he would be willing to dedicate it, et cetera, the sentence that tells what Mr. Rose indicated where he said he would be willing to dedicate it provided certain standards were reached by the county?

MR. GARNIER: Before you answer, let me note my objection to that because I think Mr. Camper was originally asked that at the outset and he said he could not because he was not present. In any event his understanding at this particular time, if he were to give it, would be based upon statements made to him by somebody else would be strictly hearsay as to my clients and would be conclusions on his part as to what somebody else might have concluded was said at the meeting and, therefore, I would object to it but you may answer, Mr. Camper, if you can.

THE WITNESS: Let me make sure, you're talking about the second sentence?

BY MRS. FRIED: (Resuming)

Q Since you discussed it with Mr. Harrison?

A Again, as the gentleman pointed out, it would only be my understanding, but basically I think at about that period of time availability of sewer became very much of a problem in this general area because the State Water Control Board and

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the county were having a problem providing the necessary facilities and stay with the guidelines and Mr. Rose was seeking some favorable agreement with regards to this, an early approvement, so he could get in line for any available sewer and as I recall, one time there was a discussion of the road that would border on this tract and what this comment was and as I read it, was that Mr. Rose would be willing to dedicate this right-of-way for this Bristow Station Road provided another roadway that was proposed in the area would be moved from his development but adjacent to his property line so that he could connect on to the road.

Q Would this have been Lomond?

A I'm not sure.

MRS. FRIED: I have no more questions.

EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. GARNIER:

Q Mr. Camper, calling your attention to the letter of March 3 which is signed by your name, is that signed by you as such or signed for you?

A It was signed for me by Mr. Harrison. If you'll notice in the bottom left-hand corner the initials of the author.

Q But it was signed with your authority and with your

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understanding as to the contents?

A This is true. The correspondence such as this passes over my desk and this is why you will notice this "C" up here indicating I have seen it.

Q In Paragraph No. 1 you state to Mr. Williamson you are aware of what your position was as to accepting the right-of-way without the construction of this roadway. What are you referring to there, sir?

A Basically I think the next sentence where we said there was a difference of opinion. As I understand it, Mr. Williamson felt Mr. Rose had made the offer to dedicate the necessary right-of-way across the property under his control for this road but wished to defer the construction of it.

Q So you're saying in the next phrase also that the request that was being made at this time was not only that the land be given to the county or to the state but also that the road be constructed by the developer of the land, is that correct?

A Sir, I think if you will read on down in the letter it will state that we have no other alternative but to recommend to the Board.

Q Your answer to my question is yes as I phrased it? Not only was it expected that dedication be made by the

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developer but that the road be constructed by the developer?

A That there would be a recommendation to the Board that the area of Ashton Avenue that fell within his development be dedicated and constructed pursuant to county subdivision ordinances.

Q And that if he refused to do so that action on the site plan would be deferred?

A In an earlier letter here you will see that the Board had directed the County Planning staff to review this entire area. You might say at that time everyone was in between a plan that had been approved in '66 and had been modified through approval of other plans, that it was not implemented by letter of the original approved plan and, therefore, it became apparent to everyone that in order to accomplish the necessary transportation facilities and other facilities, there was going to be a need for up grading or revision of the plan based now on present conditions.

Q Be that as it may, Mr. Camper, it's true, is it not that the letter states if the builder is not willing to comply with the request that construction be performed by him, it will be the recommendation of the Department of Highways that action on the site plan be deferred?

A I think you would also have to read, sir, that any

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action on plans for this development be deferred until the revision to the Manassas Development Plan, which the Board has requested a study be made by the Planning Department, is completed and officially adopted by the Board of Supervisors, and I would go on to say this, too, sir, this would be on the recommendation as a reviewing agency to the Board. I might recommend anything but that doesn't mean the Board will approve it.

Q I didn't ask you that, Mr. Camper. Regardless of the reason as to why the site plan or application would be deferred, it would have been the recommendation of the State Highway Department that it be deferred, isn't that correct, sir?

A Yes, sir, this would be the recommendation of our office to the Board of Supervisors.

Q Now, on the document which has been marked as Biber Deposition Exhibit No. 1, we have referred to a plat which has got a red line showing what is now known as Ashton Avenue, is the correct, sir, and referred in your letter as the Bristow Station Road, I believe.

A It basically follows the same --

Q Can you tell us how long that stretch of Ashton Avenue was?

A In red there?

Q Yes, sir.

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A Not precisely.

Q Generally?

A Three or four miles.

Q And there are many parcels of land along that road, are there not, sir?

A Yes, sir.

Q And presumably owned by different owners?

A There are many different owners.

Q I would ask you to assume, sir, that we have been told here today under oath by Mr. Biber that all the developers of land along Ashton AVenue have been convinced to dedicate the right-of-way that was requested of 110 foot width. Now, assuming if you will, that the developer of the tract which is the tract in question here decided not to do anything with the piece of land and not give a right-of-way either, that would have interrupted the construction of Ashton Avenue, would it not?

A Well, sir, I think we must talk about -- when we say the construction of Ashton Avenue, this was not a state project whereby we said we were going to advertise and award a contract for construction of it from 661 to 621.

Q I'm not asking you that. Just answer my question first and then you can tell me what you want to tell me. Is

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it not true that Ashton Avenue runs west and east of the tract shown in this plat as M-5?

A Sir, it would at some point in time.

Q As it is shown on this plat which has been drawn in red, it goes right through the tract which is known as M-5 and extends on both sides of it, does it not?

A That's a plan on paper only, sir.

Q I don't know whether you want to qualify your answer, sir, you're being very defensive instead of just answering the question I'm asking and then you can explain anything you want for Mrs. Fried. I'm asking if it is not true that on this plat which admittedly is a plan on paper, that Ashton Avenue goes right through the tract known as M-5 and extends on either side of it?

A Yes.

Q And that is the location of the road that is known as Ashton Avenue, is it not?

A According to the county plan.

Q And is it not true, sir, that if the right-of-way was not given by the owners of the lot which is known as M-5 or the tract which is known as M-5, there would have been an interruption in Ashton Avenue as to that particular area?

A That along with all the other undeveloped tracts.

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Q And assuming it was the position of the Highway Department, sir, that Ashton Avenue should be constructed, would not eminent domain then have been a remedy which was available to the state to get that particular stretch of road located on that tract with reference to which right-of-way had not been given?

A No, sir.

Q What other way could you have gotten the land, sir, for the completion of Ashton Avenue?

A I think what you're asking, if I may ask you a question, are you talking about what time?

Q At any time the state or county would have wanted Ashton Avenue to be completed without interruption on the tract M-5?

A In the future?

Q Yes.

A If it were ever to be conpleted as proposed on this plan and if M-5 was not developed, the road not there, and if the department -- and that's the only one I can speak for -- saw fit to propose the project and approve the right-of-way acquisition and after the necessary administrative steps were taken to appraise --

Q Provided for by Code, we know those.

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A Yes, if this failed and it still was felt that condemnation was the best and in the public interest, this was a possibility.

Q And that would have been the only possibility, if it was felt to be in the best interest, was to use the right of eminent domain, isn't that correct?

A If the dedication was not made --

Q Assuming all these remedies had been exhausted, I accept that.

What is the status today as you know it of Ashton Avenue?

A The status today of this road is that it is an approved part of the county area plan. It is being used by the county to bring about -- or in guiding a review of the development plans that take place in this area and it is also being used by our office in review of plans.

Q Has it been physically improved yet?

A No, sir. None of it is open to traffic. There are several short sections that are now underway.

Q But it is in the planning stage and eventually Ashton Road will be completed as shown in the plat?

A I couldn't guarantee that, sir, any more than I could guarantee the original plan that was approved, I believe, in '66.

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Q I'm not asking you if you can guarantee that it will eventually be effectuated, I'm asking you if it is not the intent to effectuate it at this juncture even though I realize this may not come to pass in the future?

A It apparently is the intent of the county.

Q So that if the owners of the tract which is marked as M-5, knowing it is the intent of the county to develope this road, refuse to give the right-of-way, would it be reasonable for them to consider the possibility that sooner or later if the plan was effectuated, eminent domain might be a risk, isn't that correct, or a threat?

MRS. FRIED: Again, I would object to this. You're asking the witness to conjecture what somebody else might conjecture.

BY MR. GARNIER: (Resuming)

Q Go ahead, you can answer?

A The only thing I can tell you, these development plans are guides, they are general plans. There are no formal plans that I am aware of, engineering plans, in existence either by the county or by this department and certainly not by this department.

Q So the Department of Highways has not taken a position one way or the other as to whether that road is actually needed,

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is that correct?

A No, I wouldn't say that. I would say that based on the information developed at this time and based on the circumstances as we know it now, we concur with the county's position that this road will be needed to serve the traffic.

Q And you concur with the proposal that it be extended from this road which is marked as 621 to Route 661, is that correct, sir?

A That's correct.

Q And it is fair to say, is it not, that if it is so constructed as the Highway Department concurs it should be constructed, it would go right through the tract which is known as M-5?

A Apparently so from that plan.

MR. GARNIER: That's all I have.

MRS. FRIED: Just two questions.

EXAMINATION BY COUNSEL FOR THE DEFENDANTS

BY MRS. FRIED:

Q As the development takes place along Ashton Avenue, is it going to take place serially, one right after the other?

A No, ma'am. We have no control over what time that takes place, if we can assume that plan will be a year or two from now and not changed by any future conditions or Board actions.

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Q Assuming it's the same, would you have the possibility of a development here, here and here? (Indicating)

A Very definitely. This is, in fact, what is basically occurring now. As I mentioned earlier, there are, as I recall, two and possibly three developments now that have sections of Ashton Avenue in their approved plans but they are not consecutive, side by side.

Q And there is no policy in the department to fill in the gaps? The state level is the only place policy can be formulated?

A That's right, and I think really, going back to our March 3, '72 letter, Mr. Harrison states, "Due to the lack of funds by the Virginia Department of Highways, we will not be in a position to construct Bristow Station Road at the same schedule of the high density zoned properties in this area are developed."

Q Again I just want to make clear for my own mind that there is no adopted state policy on this road which is a precondition to even going into condemnation?

A I think what you're asking is, does the Department have a set of plans in sufficient detail which we must have, to have them approved for right-of-way acquisition by the appropriate agency before land acquisition can take place and

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the answer to that is no, ma'am.

MRS. FRIED: Thank you.

EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. GARNIER:

Q When you say in this letter that there are no funds for the construction of the highway itself, that is not to say that condemnation could not take place without these funds, isn't that correct, sir, because funds for the acquisition of land are completely different from saying there are no funds for the construction of the highway itself?

A No, sir. In the context of this letter when we talk about construction, we talk about the total cost whether it be right-of-way acquisition, utility adjustment or construction.

Q Does the state have the right to institute condemnation proceedings for right-of-way acquisition on behalf of the county as compared to the state itself?

A I couldn't answer that.

MR. GARNIER: That's all I have.

(Thereupon, at 1:50 P. M., the taking of the deposition ceased.)

Signature of the witness

I, _____ A Notary Public in and for the _____, do hereby certify that on the _____ day of _____, 1973, there did come before me the above-named person who signed his deposition in my presence.

In witness whereof, I have hereunto signed my name and affixed my seal of office this _____ day of _____, 1973.

_____
Notary Public

My Commission expires _____.

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CERTIFICATE OF NOTARY PUBLIC

COMMONWEALTH OF VIRGINIA)
) ss.:
CITY OF ALEXANDRIA)

I, WILLIAM B. PETERS, a Certified Verbatim Reporter, the officer before whom the foregoing deposition was taken, do hereby certify that the witness David L. Camper, whose deposition appears in the foregoing pages was duly sworn by me, that the testimony of said witness was taken by me by stenomask and thereafter by me reduced to typewritten form; that the deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested, or otherwise, in the outcome of the action.

William B. Peters
Notary Public in and for the Commonwealth of virginia, at Large.

My Commission expires September 12, 1977.

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C O N T E N T S

Deposition of	For Plaintiff	For Defendant
Richard W. Harrison		3

E X H I B I T S

None

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V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

McKEON CONSTRUCTION COMPANY, Plaintiff,	
v.	At Law No. 27087
COVERSTONE LAND LIMITED PARTNERSHIP and MITCHELL S. CUTLER, Defendants.	

Springfield, Virginia

Friday, September 21, 1973.

Deposition of R. W. HARRISON, the witness herein, called for examination by counsel for the defendants in the above-entitled action, pursuant to notice, before WILLIAM B. PETERS, a Notary Public in and for the Commonwealth of Virginia, at Large, in the offices of Fried, Fried, Klewans and Lawrence, Executive Building, Springfield, Virginia, commencing at 1:55 P. M., on Friday, the 21st day of September, 1973.

APPEARANCES:

On behalf of the plaintiff:

JEAN-PIERRE GARNIER, Esq.
Attorney at Law
210 East Broad Street
Falls Church, Virginia

WARD & PAUL

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On behalf of the defendants:

BARBARA J. FRIED
Attorney at Law
Fried, Fried, Klewans and Lawrence
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P R O C E E D I N G S

Thereupon,

R. W. HARRISON,

called as a witness by counsel for the defendants, and having been first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR DEFENDANTS

BY MRS. FRIED:

Q Mr. Harrison, would you state your full name and occupation for the record?

A Richard W. Harrison, Assistant Resident Engineer for the Virginia Department of Highways, Manassas, Virginia.

Q And how long have you been in that position, sir?

A Since 1969.

Q Do you recall the meetings and discussions you had concerning the site plan, No. 2313, for Manassas Quads, within your department?

A Yes, ma'am.

Q Did you personally review that site plan?

A Yes, ma'am.

Q Did you make recommendations back to the county of Prince William concerning the site plan?

A Most of the recommendations and discussions on this

was held at joint meetings between the Highway Department, Public Works, Planning Department, the engineer representing the developer and in one instance I remember a representative from the developer was there.

Q Do you recall when these discussions first began?

A I do have here the minutes of some of these meetings.

Q Is this the same file Mr. Camper had?

A Yes, ma'am.

Q Were you at all these meetings? You may refresh you memory if you wish. We can begin with the February 14 meeting, Item Three. In fact, yourinitials down here indicate you dictated it?

A Yes, ma'am.

MR. GARNIER: Is that the meeting of February 8 dictated on February 14?

THE WITNESS: Yes.

BY MRS. FRIED: (Resuming)

Q Is the discussion in Item Three on the Bristow -- or Ashton Avenue, south of the area that is under consideration? In other words this is talking about from 661 to the Manassas Western Loop?

A Yes.

Q Was there any discussion at that meeting about the

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Bristow Station Road or Ashton Avenue north, up toward 621?

A Yes, ma'am. In fact, in the same Item Three it says it was determined that the width from the Western Loop to Route 621 would be determined by the Planning Department study. So, it was discussed; the size of it for the proposed traffic wasn't determined at that time.

Q Do you recall any discussions with Mr. Hellwig prior to this date about Ashton Avenue or Bristow Station Road?

A Yes, ma'am, not in this particular area, but from Route 661 which is toward Manassas, to the Western Loop which would still be to the east of subject's site plan.

Q Prior to this date you had had discussions with Mr. Hellwig about this area?

A Yes, ma'am.

Q Was he aware then, prior to this date of this planning for Ashton Avenue along this corridor?

MR. GARNIER: Let me renew my same objection that we had at a previous deposition as to the time factor relationship between my client to Mr. Hellwig.

THE WITNESS: I personally believe, and this is my belief, just my belief, prior to this Mr. Hellwig realized that the arterial roadway was needed at what I refer to as the Wolman tract, 661, to the Western Loop. I don't really, in this case,

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believe -- well, I couldn't say whether he anticipated the extension of it prior to this or not.

Q According to your minutes, the next meeting was held on February 15. This is a letter dated February 22 which was prepared by you?

A Right.

Q Item One, was there any specific discussion at this meeting about what you were going to say to Mr. Hellwig on the 22nd? Did you discuss, for example, specifically the width of the road?

A I don't believe we did. I can't answer yes or no. There's been too many things happened since that time.

Q So to your knowledge this was just a general discussion about the roadway?

A Yes, ma'am.

Q On February 23 you again wrote the letter about the meeting you were present at on February 22?

A Yes, ma'am.

Q I draw your attention to Paragraph Two, do you recall any statements of Mr. Hellwig at this meeting? Do you recall what he said? Did he object to the roadway?

A May I look at these?

Q Surely.

A The only answer I could give you to that question would be I think maybe Mr. Hellwig questioned the need for this road which is a common thing with any engineer that represents the developer.

MR. GARNIER: It didn't come as a surprise to you?

THE WITNESS: No, sir. But as I stated, I think this meeting here was more an informational meeting at which Mr. Hellwig represented the developer and which he was informed of what led us to think from particularly the county's viewpoint in reference to this roadway. At that time he didn't appear to agree, of course. He did say he would take this information back to the developers and they would be getting back in touch with us shortly -- the county and the Highway Department shortly.

BY MRS. FRIED: (Resuming)

Q Between these meetings -- the last one we had under discussion took place on February 22, were there any telephone conversations between you and the developer or Mr. Hellwig concerning this proposed roadway?

A Yes, ma'am, I do remember Mr. Rose, I think, represented or was involved with the developer at the time. I do remember receiving a telephone call from Mr. Rose at the office. He was quite concerned about the proposed roadway. I do remember that because that was prior to the meeting that

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Mr. Rose did attend. He was called -- or he called, I would say, to voice his opposition and also to find what information or criteria the department had used in making their recommendation to the county.

Q This was some time in February before the meeting he attended?

A Before the meeting he attended, yes, ma'am.

Q Now at the meeting, the big meeting on February 29, the minutes of which are dated March 3, it is stated that Mr. Rose said he would be willing to dedicate the right-of-way. Can you recall exactly -- not the exact verbatim words, but how he said he would be willing to dedicate the right-of-way?

A The best I can do is go back to the minutes. That was the purpose of them and here I stated Mr. Rose indicated he would be willing to dedicate the right-of-way needed for this arterial, providing certain understanding could be reached by the county such as sewer availability and moving the proposed thoroughfare off of his property and adjacent to the property, but the entire facility being located on adjoining property in such a manner that he could connect to it.

Q Is this reference to moving the thoroughfare, a different thoroughfare?

A Yes, ma'am.

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Q Do you remember the name of it, or did it have a name?

A I don't remember. No, ma'am, I don't remember what they were calling it at the time.

Q Was that anything that your department would express an opinion on, moving that adjacent --

A (Interposing) No, ma'am.

Q Was that strictly within the purview of Public Works or Planning?

A The Highway Department makes certain recommendations on any site plan that is submitted to the county but the decisions on these things are left entirely up to the Board of Supervisors.

Q Excuse me, I understand that but I mean on this moving of whatever this other thoroughfare was, was it the condition that Mr. Rose was attaching to putting in the highway? Would your department have any comment on whether that other thoroughfare could be moved off his property or would that be strictly something that would go through the county?

A That would be through the county. The only way we would comment on it would be the spacing or some other design feature that didn't meet our standards.

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Q The difference in opinion that you make reference to, was that solely as to who should physically construct the roadway?

A Yes, ma'am.

Q And it was the position of Public Works that it didn't matter who constructed it or what was the position of Public Works as you understood it?

A I'm writing this letter to Mr. Williamson, so his position, as I understand it, he felt that it may be feasible for a dedication of right-of-way only the portion from Coverstone Drive to the Wheeler property.

Q Without being constructed, is that right?

A Right, without the construction. It was our opinion and our recommendation that this arterial roadway may be temporary at the time of development to provide adequate transportation. It was our recommendation that in accordance with the county's ordinance at the time of the development, that construction would be provided by the developer. We felt it was needed at that time; that this would set a precedent in the future if construction wasn't provided because that has been in the past our usual policy. That was what was being required from 661 to what I call the Wolman tract. We advised them that they didn't have a project for this road. We didn't

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have any funding in our six year budget. We felt that development would take place prior to the department being able to fund this roadway for the construction of it and that's why we made our position. We even stated that if construction wasn't provided, we had no other choice but to recommend to the Board of Supervisors that this plan be deferred until the final outcome of Mr. Biber's study which the Board had asked and requested him to make of the Manassas area.

Q This is what evolved into the amended plan?

A Yes, it was part of his study and then we felt once his study was back and had been adopted, construction should take place according to what had become the approved plan.

Q So there was a difference of opinion between Public Works? Does that happen often?

A Yes, quite frequently, in minor ways. If you will notice we usually had in most cases these weekly meetings and if everybody could make it, that was the purpose, to discuss different viewpoints, to have the opportunity to talk to developers or their engineers about problems we might see in the submission of plans and the difference of opinion on something like this was not uncommon.

Q So Public Works, for example, might have made a

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recommendation to the Board that might have been at variance with your recommendation?

A Yes, ma'am.

Q And resolution would have to be made by the Board of Supervisors?

A Yes, ma'am.

Q After this meeting on February 29, did you have any othere discussions with Mr. Rose or Mr. Hellwig concerning Ashton Avenue?

A I don't remember one way or the other whether I did. I feel certain at a later date, some time at a later date, we did discuss something about this site because a revised preliminary plan was submitted to incorporate the roadway. So, due to that, this would open the avenues for further comments or discussions.

Q When that revised plan was submitted which showed Ashton Avenue, did you take that to mean Mr. Rose or McKeon had agreed completely to the dedication?

A Yes, ma'am, I would say -- of course, this would indicate their agreement on it.

MR. GARNIER: Let me note my objection to that question and answer as it being strict conjecture on the part of the witness.

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BY MRS. FRIED: (Resuming)

Q Do you recall at the time of this meeting on February 29, did Mr. Rose say anything about construction of the roadway? It says here he agreed to dedicate. Does that mean he agreed also to construct?

A No, ma'am.

Q Was the discussion between the Highway Department and the Department of Public Works, was that made in front of Mr. Rose?

A Yes, ma'am. He sat in the meeting. We were around a table similar to this table, very informal.

Q So he understood the Department of Public Works was taking the position he didn't have to construct?

A This was one man in the Public Works Department taking that position. That was his feeling.

Q What man was this?

A That was Mr. Williamson, the Director of Operations at that time. He was taking that position and I think some of the notes here in the minutes, if I remember correctly, said Mr. Williamson would discuss this matter further with Mr. Yates who at the time was Director of Public Works.

Q Was that ever resolved between you and Public Works?

A No, ma'am. We received the site plan and things with

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the roadway shown on it. I don't know whether he went back to Mr. Yates but more or less things seemed to fall in place as far as the roadway was concerned from that point on.

Q You didn't have any further discussion with Public Works on construction?

A No, ma'am, not as I remember.

Q Then after your meeting on February 7, which you recorded here, did you have anything further to do with this site plan? There's a letter dated March 8.

A That's when they brought over a copy of a revised site plan which did show the arterial roadway located on it. To the best of my knowledge, we didn't have any more dealings with this site plan. In fact, I don't know how it come about but we did receive word from Public Works that the review on the Manassas Quad plan was being withdrawn.

Q And that was the end of it as far as you were concerned?

A Yes, ma'am. Of course, we did receive the plan for the area at a later date but as far as this plan was concerned, this was the end of it as far as we were concerned.

Q Did you have any other conversations with Mr. Hellwig or Mr. Rose after the revised plan was submitted?

A I'm not positive. I believe I received a phone call

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from an attorney representing someone in this case after that. Of course, as far as Mr. Hellwig is concerned, I have many conversations with him about many projects. I don't remember any specific conversations with him about this particular item.

Q In any of the meetings you attended or in any or your conversations with Mr. Hellwig, did you ever use the word condemnation or threaten to use the power of eminent domain for this roadway on the site plan?

A No, ma'am; to the best of my knowledge the only way the department could go to condemnation or eminent doman would be on a project set up by our department for a roadway. We didn't have that. Many times in the past the question had come up where you have a particular problem, a developer has a problem getting an easement or a roadway connection across an adjacent piece of property and the request has been made for us to use the state's power. We have always stated that we couldn't or wouldn't even make a recommendation. Considering this is an alternative to private development, we have to have a project set up before we feel we could even be a part. I do not remember the word condemnation or eminent domain being used in any of the meetings I was in.

MRS. FRIED: Thank you, very much.

MR. GARNIER: No questions.

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(Thereupon, at 2:20, the signature of the witness having been waived by counsel, the witness being present and consenting thereto, the taking of the instant deposition ceased.)

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CERTIFICATE OF NOTARY PUBLIC

COMMONWEALTH OF VIRGINIA)
) ss.:
CITY OF ALEXANDRIA)

I, WILLIAM B. PETERS, a Certified Verbatim Reporter, the officer before whom the foregoing deposition was taken, do hereby certify that the witness, R. W. Harrison, whose deposition appears in the foregoing pages was duly sworn by me; that the testimony of said witness was taken by me by stenomask and thereafter by me reduced to typewritten form; that the deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested, or otherwise, in the outcome of the action.

William B. Peters
Notary Public in and for the Commonwealth of Virginia, at large.

My Commission expires September 12, 1977.

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C O N T E N T S

Deposition of	Examination by Counsel For Plaintiff	For Defendant
George W. Hellwig	38	3
	70	60

E X H I B I T S

None

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V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

McKEON CONSTRUCTION COMPANY, Plaintiff, v. COVERSTONE LAND LIMITED PARTNERSHIP and MITCHELL S. CUTLER, Defendants.	At Law No. 27087

Springfield, Virginia

Wednesday, September 26, 1973.

Deposition of GEORGE HELLWIG, the witness herein, called for examination by counsel for the defendants in the above-entitled action, pursuant to notice, before WILLIAM B. PETERS, a Notary Public in and for the Commonwealth of Virginia, at Large, in the offices of Fried, Fried, Klewans and Lawrence, Executive Building, Springfield, Virginia, commencing at 9:30 A. M. on Wednesday, the 26th day of September, 1973.

APPEARANCES:

On behalf of the plaintiff:

JEAN-PIERRE GARNIER, Esq.
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Falls Church, Virginia

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On behalf of the defendants:

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P R O C E E D I N G S

Thereupon,

GEORGE W. HELLWIG,

called as a witness by counsel for the defendants, and having been first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR DEFENDANTS

BY MRS. FRIED:

Q For the record would you state your name and occupation?

A George W. Hellwig, Certified Professional Civil Engineer, doing consulting work in the state of Virginia.

Q And for how long have you been so employed?

A Approximately twenty-three years.

Q Has that all been in the state of Virginia?

A Yes. I am registered in other states but most of my work has been in the state of Virginia.

Q For what firm?

A Springfield Associates.

Q Are you or your firm presently employed by plaintiff, McKeon Construction?

A Yes, we are.

Q On what projects?

A Woodbridge Quads.

Q Have you ever been previously employed by plaintiff McKeon?

A The first employment by McKeon was on the two projects, Manassas Quads and Woodbridge Quads.

Q Was Manassas Quads part of the Coverstone tract?

A That's right.

Q You're familiar with the Coverstone tract?

A Yes, I am.

Q Did you do all or any of the survey or engineering for that tract?

A That's correct.

Q Would you say when and to what extent, beginning at what point in time?

A Now, for whom? Actually we worked on the Coverstone tract prior to either Coverstone Limited or McKeon. We worked on the Coverstone tract eventually for Mr. Hymen or Mr. Ruben.

Q About when was that?

A That was approximately 1956.

Q So you have worked on the Coverstone tract more or less continuously from 1956?

A Yes, for several owners.

Q Could you describe, if you remember, the work you did,

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beginning with the people you worked for in '56 through the present?

A In '56 the work performed was for the original zoning in which the ground, the entire tract was zoned commercial, townhouse and apartments. This sort of lay in abeyance until the property was sold to Tripak. Upon the sale to Tripak, they immediately started to form their own development plans. This did not continue and the property subsequently was sold with the commercial ground being retained. The apartment ground was sold to Coverstone Limited Partnership. The townhouse ground was sold to Berlage-Bernstein.

We then proceeded to work for those three companies individually on the remainder of the tract. Subsequently, after developing Sections One and Two, a parcel was contracted to McKeon and this parcel we were also contracted to perform the engineering studies and reports on.

Briefly, I guess that's the history of the whole tract of ground.

Q Could you describe in more detail what your firm did for McKeon?

A Yes. Going by memory, it's twenty plus acres. McKeon contracted to purchase twenty plus acres of the Coverstone Limited Partnership parcel zoned apartment, for the

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purpose of placing their quads, which was at that time a unique thing being done in California. We prepared preliminary plans and studies and submitted to Prince William County. At the same time a use permit as required in Prince William was filed for by McKeon and we then proceeded to go forth with the county agents to develope this preliminary plan.

Do you want to run through the development of the preliminary plan?

Q I was going to ask you if you want to continue in a narrative form?

A Certainly.

Upon submission of the preliminary plan --

Q (Interposing) Could we ask you specifically when that plan was submitted? There seems to be some confusion.

A Let's see if we can find the exact date. Here is one reference to the file as being given to Prince William County in November of '71.

Q When you say the file, did that include the preliminary site plan?

A That's correct.

Q Is there a transmittal letter?

A I will have to really search.

(Whereupon, a discussion took place off the record.)

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THE WITNESS: I don't have any of the transmittals here but I'll tell you what we can do, I'll call Prince William County and get an official submission date from them, from their records?

(Whereupon, a discussion took place off the record.)

BY MRS. FRIED: (Resuming)

Q In any event, if you will, in narrative form, give the procedure which was followed?

A In Prince William County and let's be a little more explicit about this, in order to sell condominiums, they passed an ordinance requiring that a special use permit be granted prior to the sale of units in condominiums. Therefore, there was a necessity to file for this use permit and I'll verify these dates later when the use permit was filed and then when the preliminary plan was submitted.

We started to receive back certain comments as is generally practiced in Prince William County. The preliminary plan is transmitted to all offices within the county. Comments are returned to a clearing house at Public Works where the final report would be written on the preliminary plan and certain comments received back from Zoning, Soil --

Q Excuse me, do you have copies?

A Yes, I do have copies of the written comments and I

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certainly can furnish those. We also received a telephone call from the Virginia Department of Highways.

Q When did you receive that?

A The first meeting that was set up was February 3. I did pull all those dates out of my diary.

Q And who was present at that meeting?

MR. GARNIER: That's 1972?

THE WITNESS: 1972.

BY MRS. FRIED: (Resuming)

Q And where was the meeting held and who was present?

A The first meeting that was held on the 3rd was held in the Public Works Department with Mr. Williamson and Mr. Yates; Mr. Yates being the Director of Public Works at that time.

Now, in the first meeting they expressed to us -- master plan was being revised for the area governing the Coverstone and Country Scene, which is a Berlage-Bernstein portion of this tract and that a new arterial roadway was being considered for this tract and running parallel to Route 234 passing through this entire tract. We had discussions as to the fact that we had already allotted for a roadway to pass through the Coverstone tract being called at that time Lomond Drive. This appears in the Section Two plan.

Q When you say Section Two plan, to what are you

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referring, the McKeon site plan?

A No, Section Two is Coverstone. We had provided a forty-four foot roadway section through Section Two to relieve this parallel road situation.

Q Excuse me, may I interrupt you. Section Two, did that not encompass part of the land?

A No.

Q That was distinctly separate?

A Distinctly separate. Section Three encompassed part of the land of the Coverstone tract.

The argument, I guess you would call it, the discussion was centered on the traffic anticipated through this roadway which would dictate that something greater than the forty-four foot section would be required through this tract.

Following this meeting, a joint meeting on February 22 was set up between the Virginia Department of Highways, Prince William County Public Works Department, and the Planning Section of Prince William County to discuss in general the entire area.

Q You were present at this?

A Yes, I was present at this meeting.

Q Do you recall the other individuals who were present?

A Let's see how many people I've got down. Let me

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digress just a second. At this time the county had established what they called their Tuesday morning meetings in which the Planning Department, Public Works Department and the Highway Department would be represented so that the builder or engineer could get together with all three parties concerned in the planning of highways and arrive at a joint solution rather than having to battle all three separately and distinctly and come up with three different answers. At this meeting Henry Biber presented his revision to the master plan. I don't remember if he was Planning Director or Acting Planning Director at that time but he was representing the Planning Department and the Highway Department and Public Works supported his position that the new arterial roadway would be required parallel to Route 234, passing through this tract.

Leaving the meeting and realizing we weren't making any headway whatsoever --

Q When you say, "we", who else was present?

A Mr. Upenicks was present from our office with me at this time. Mr. Biber was there as I recall and represented Planning. Mr. Williamson represented Public Works and Mr. Harrison and Mr. Camper were there representing the Virginia Department of Highways and as I say, realizing that we weren't making any headway with having the roadway removed, I recommended

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to Mr. Rose of McKeon that McKeon be represented at a meeting, again a joint meeting, with the Highway Department and Prince William County to see if any other solution could be arrived at.

Q Was there then a subsequent meeting?

A On the 25th Mr. Rose met with me in my office in Springfield to discuss what could be done, what attempts would be made to try and remove the roadway from the project. We then had a subsequent meeting with the county and state officials on February 29.

Q Who was present at that meeting?

A Mr. Rose, myself, Mr. Camper, Mr. Harrison, Mr. Williamson, and I believe Mr. Payne then joined us at that meeting.

MR. GARNIER: Would that be the one where Mr. Kohlhaas was present?

THE WITNESS: Yes, Mr. Kohlhaas was also present.

BY MRS. FRIED: (Resuming)

Q And no one else was present?

A I'm trying to remember how many people were at that meeting. I don't have an attendance list but, yes, I believe Mr. Kohlhaas was there. I don't believe anyone else from my firm was there other than myself. Of course, Mr. Rose was there. I think we mentioned his name. We went through the

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gauntlet, shall we say -- offers in which we attempted to give the right-of-way and not construction, allowing it to remain there until the State Highway Department at some future date required the road or give the right-of-way and fifty percent of the estimated cost of the road. We tried to move the roadway further outside of the property and none of these appeared to be acceptable.

Q But you did offer to dedicate?

A We had offered to do many things. For one reason, we were attempting to see how we could decrease the expense of what we were doing. We were exploring avenues to see how we could arrive at the least expense to the project. We just explored several of these avenues, none of which were acceptable.

Q Did you at that time compute the expense of constructing the roadway?

A Yes, as I recall, at that meeting we merely sat down and not having any design at that time, of course, it's very difficult to estimate what the expense of the roadway would be. However, as a rule of thumb you could state that $80 to $100 a foot at that time would be sufficient to do the construction and this does not include the cost of the land but just the cost of construction and I believe it's approximately 500 feet

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or a little more than 500 feet. So what we were speaking about at that time then would be approximately $50,000 plus as the estimated cost of the roadway.

Q You had shown us originally, and maybe we could look at this, the original site plan?

Could you point out the forty-four foot roadway?

A No, I'm sorry, the forty-four roadway is in Section Two of Coverstone.

Q So there was no roadway?

A There was no roadway whatsoever to be dedicated to the county other than Coverstone and the connector going through to serve the remainder of the Coverstone property.

As I say, following that meeting we drew the conclusion that there was really no alternative we could offer them and it then became McKeon's position as to how to proceed. They subsequently withdrew the preliminary and the use permit on the property.

Q Before they got to the point of withdrawing, did they direct you to draw up any new site plans showing the road?

A Yes, they did.

Q I mean Mr. Rose?

A Yes, we did make a sketch study of the site including

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the roadway.

Q When was this submitted?

A It was not submitted.

Q Can you explain then why the county has a copy in its files if it was not submitted?

A If they have a copy in their files, it was courtesy at a meeting where it was left with them, but it was not officially submitted to my knowledge.

Q Did Mr. Rose tell you to go slow on the site plan then?

A Mr. Rose, after we made the analysis of the road and he saw the layout, Mr. Rose subsequently sent us copies of the letter withdrawing everything.

Q That was, I believe, some time in April?

A Yes.

Q Between the February meeting --

A Between the meeting which was February 29 and April, which was one month the only thing we performed was the new layout showing the roadway and the relocation of the buildings.

Q And then Mr. Rose instructed you?

A Yes.

Q Did he tell you to stop any further engineering?

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A Yes, he did.

Q When did he first tell you to slow down or stop any further work?

A The slow down, and understand, of course, we did not proceed on any site plan for him until he would have his hearing on the use permit. The only thing we were actually performing were the studies physically trying to position units and see what the configuration of the property would be and the only work order, you might say, after the meeting of the 29th was the one to restudy the property to see what the unit configuration would be with the new road.

Q When was the hearing scheduled on the special use permit?

A I think I have the date we attended the hearing but I'm not real certain that that was the first part of the schedule.

(Whereupon, a short recess was taken.)

THE WITNESS: March 15 was actually the Planning Commission hearing.

BY MRS. FRIED: (Resuming)

Q This was the special day scheduled for this special use permit?

A Yes. They, of course, went to the Planning Commission

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but the Planning Commission doesn't have to make a recommendation to the Board, however, they do have an informal hearing with the Planning Commission to make whatever recommendations they would want to make. Both special use permits were aired before the Planning Commission, both Woodbridge and Manassas. That was on March 15.

Q And were they granted?

A As I say, there is no official action. They simply referred that to the Board.

Q There was a recommendation made?

A In a sense the recommendation was to approve.

Q And in the normal course of events would the Board have approved that special use permit?

A The Board's makeup being as it was, I don't know that the recommendation of the Planning Commission would have been of any consequence. The first appearance before the Board, and understand there were four condominiums, the first one being heard on special use permits together. The four consisted of McKeon's two, Woodbridge and Manassas, Pinewood Development Corporation and Elysian Woods. All four of these were being heard together and they subsequently made the road through the four, together.

Now, the first hearing was scheduled at the Board

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on May 18.

Q For approval of the Manassas Quads?

A That's correct. At this time, of course, we were only talking about the Manassas Quads and subsequent hearings were before the Board. I'm sorry, we said Manassas Quads on the 18th, but Manassas Quads were withdrawn prior to that time.

Q But the hearing was scheduled for it?

A The hearing was scheduled for the 18th so we knew these other hearings had nothing whatever to do with this. They were merely concerned with Woodbridge Quads which happened to have been deferred until a school site was resolved. So May 18 was the day scheduled before the Board for Manassas Quads prior then to their being withdrawn.

Q Did you, subsequent to this meeting you mentioned on the 29th, have any further meetings with anyone from Planning, Public Works or VDH?

A Concerning McKeon, no.

Q Did you have any further telephone conversations concerning McKeon?

A No, not specifically that I recall.

Q I realize you have many conversations.

A None that I recall until such time, as I say, a decision was reached to drop the project and I then I called

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them immediately when Sam told me that he was writing this letter.

Q You mentioned at the time, and I appreciate it's just an estimate of the cost at around $50,000. Was this based on paving the whole 110 feet of right-of-way?

A Yes, the 110 foot right-of-way. What is constructed is two divided lanes with a median strip and the two divided lanes are both two lanes, so you're speaking of a four lane divided roadway.

Q But was the county not requiring that you only construct or pave fifty percent of this right-of-way?

A No, they were standing fast. This may have been one of the offers we made to them but it was our knowledge that they would accept nothing -- the Highway Department would accept nothing but the completed project.

Q In any of your conversations with anyone from the county, from Planning or Public Works or anyone from the Virginia Department of Highways, either in meetings or on the telephone, did anyone ever use the word "condemnation" or "eminent domain?"

A Not to my knowledge.

Q To your knowledge during this period of discussion concerning the site plan, did Prince William County adopt any highway plan that Mr. Biber was proposing?

A Quite a bit subsequent to this plan.

Q Subsequent?

A Yes.

Q But at this time?

A No, not at this time.

Q In your experience, twenty-three years of experience in Virginia with site plans, is this an unusual occurrence for a county, for any county, to require certain roadways?

MR. GARNIER: Before you answer that, Mr. Hellwig, let me note my objection to the question as being outside the issues framed by the pleadings which is really a matter of contractural undertaking, whether or not it is customary or not customary in the way it effects either the rights of your client or mine. Therefore, the custom in the county is immaterial but of course, go ahead and answer.

MRS. FRIED: We'll note your objection.

THE WITNESS: Unfortunately it is customary that the county require and unfortunately it is repetitive that they always catch you halfway planned and sometimes halfway built before they make this requirement and it is, in reality, placing the burden upon you, if you want to proceed, to just acquiesce with their wishes.

BY MRS. FRIED: (Resuming)

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Q When you design a site plan, do you take into consideration only the internal traffic generated by the development that is to take place on your site plan?

A When we design a site plan and we're talking now about generalities, everything must be taken into consideration and usually we base this upon the master plan for the area and this master plan did not show this road then at that time.

Q If there had been a master plan adopted for the area, when you designed that site plan, would you have shown a 110 foot right-of-way?

A Yes, we would have been required to do so.

Q Would you then have expected to construct the 110 foot right-of-way?

A In this case and, of course, this is one of the things we've always tried to get the counties to do prior, is not come up with surprises, which is very common and not uncommon, and have a master plan that the engineer's and developers can work with. Yes, they everyone is aware before entering a parcel of ground what is to be expected of them.

Q Have you ever been involved in a situation before where the master plan was evolving as you were preparing a site plan?

A This, unfortunately, in our growing communities here,

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is more of the case than is expected.

Q In your memory can you think of other site plan submissions that you've made within Prince William or Fairfax County where you would, in effect, run into this same situation?

A Oh, yes.

Q And with the same result? In other words, a resubmission of the site plan?

A We've run into this in many cases with the same result that, in fact, the road may be too much of a burden for the development, as such, to take.

Q But if this master plan had previously been adopted and you had come into the same situation, you would still have the same development?

MR. GARNIER: Before you answer that, let me note my objection to the entire line of questioning. The "ifs" and "what could have happened" that you are asking are completely immaterial here today since, in fact, there was no master plan adopted and the witness has testified it was not even submitted until some time after the application for the site plan, or the use permit rather, was filed in November and then the preliminary site plan in December.

MRS. FRIED: We're discussing what the normal course of events was and if the master plan had been adopted, there

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would have been no question that they would have had to --

MR. GARNIER: I know what you're discussing. I'm saying what the normal thing is in Prince William County is not the issue in this particular case and I'm noting my objection.

MRS. FRIED: I would say in the context of the contract, what is normal in the community has a great deal of bearing on the meaning of the words.

BY MRS. FRIED: (Resuming)

Q Mr. Hellwig, on the original site plan how many units were shown as submitted?

A 208.

Q On the revised site plan that you drew up would you show us that?

A I did not bring the revised site plan.

Q Do you recall from memory how many units were shown on that site plan?

A There were no lost units to my recollection.

Q Was there not, in fact, an increase? Were there not, in fact, 212 units?

A This is entirely possible.

Q So that putting in the road did not result in any loss of units?

MR. GARNIER: Let me note my objection to that question

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because you're asking him to speculate as compared to what he might. He would have had 208 had the road not been put in and greater usage had the road not been put in, so that question is mute and immaterial.

BY RMS. FRIED: (Resuming)

Q What is the maximum denisty you could have gotten on this project?

A Maximum density at that time was ten units to the acre and we had twenty-one acres, so we could have had 210 units. The problem that occurred as I recall now that you refresh my memory there is 212 units, the problem was we were going again to see if we could gain two units more than allowed allowed under denisty in return for the road in order to offset the cost.

Q Was this proposal made at any of these meetings?

A No.

Q You never got to that point?

A Never got to that point. This was something we did after the meetings when we made the new layout with the 110 foot right-of-way and an attempt was made as I say, on our part to offer a new proposal as we would always do but nothing of this nature was ever submitted or approved.

Q In your experience with the county, was it a usual

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occurrence to sort of trade off denisty for site plan requirements?

A I don't know that this could have been accomplished at this time because we were physically in violation of the ordinance. In other words, we may have taken that plan and even gone to the Board with it but whether or not it would have been granted, I don't really know.

Q But you were entitled to 210 units?

A Yes. It didn't physically, of course, fit the quad arrangement in which you had to build in fours. Four does not go into 210 and work out to an even number of buildings.

Q So the first time around with 208 units, that was the maximum you thought you could get?

A That's correct.

Q In any event, Ashton Avenue on the site plan did not result in any loss of units?

A No, it would not result in a loss of units.

Q When did you first become aware of the desire on the part of the county for the two parallel roads to Route 234?

A Oh, I would say, referring back to that original meeting that we would had with the county would have been about February 3. They probably got in touch with us some time the latter part of January and said there would be a necessity for

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a parallel road.

Q January of '72?

A Yes.

Q A phone call of some kind?

A Yes.

Q In other words, soon after the submission of the site plan?

A Yes.

Q Have you represented other developers in Prince William County?

A Yes.

Q Could you name a few in the years let's say about this period of time, '69 or '70 to the present?

A Well, within this immediate area we represented Berlage-Bernstein, Crestwood Construction Corporation, Jerry Wolman Company, Bresler and Riner and these are almost immediately adjoining projects which I think would be sort of in a similar condition.

Q These were builders that were building on this 234 corridor?

A That's correct.

Q Are these jobs then fronting on Ashton Avenue or are these jobs in which Ashton Avenue would go?

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A All three of those developers have inherited Ashton Avenue, or all four have inherited it.

Q If you can recall, when did you do the engineering for Jerry Wolman, and is Jerry Wolman also Crestview?

A No, Jerry Wolman is a separate company. Crestwood is also a separate company.

Q Approximately when did you do the site plan for Jerry Wolman?

A I would think it was subsequent to this project.

Q Did you relocate the entrance on that job or any other jobs to line up with Ashton Avenue?

A We widened it in all instances, the roadways to this 110 foot standard.

Q In all of these jobs?

A In all of these jobs they have all widened the roadway to the 110 foot right-fo-way.

Q And did they construct the roadway?

A They are presently under construction; both Crestwood and Jerry Wolman Company are under construction on Ashton Avenue.

Q Are they themselves doing the construction?

A That's correct.

Q So on all four of these jobs, the ones that haven't

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been constructed will be constructed by the developer?

A Entirely by the developer.

Q When did you first advise Mr. Rose or anyone else in McKeon of the requirement that was communicated to you in January of '72?

A I would say that early February meeting, February 3. I don't recall if it was before or after the meeting but it would have been relatively early in February.

Q Did he, and he being Sam Rose, tell you in late March of 1972 that he was pleased with the way the project was going?

A Late March? I don't know as he was pleased with the project in March, no. His conversations with me prior to the February 25 meeting -- I'm sorry, February 22 meeting with the county and the Highway Department was that economically he didn't see where he could support that at all in building Ashton Avenue.

Q For the estimated price of $50,000?

A Yes, or whatever it might amount to.

Q Did you have any conversations with Mr. Rose concerning the sewer abailability for this project?

A I'm certain we had conversations concerning the sewer which is always critical.

Q Was that the nature of your conversations, critical?

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A I've always advised the client of the poor sewer situation in the area, where the county was not responding rapidly enough to the development.

Q I know it's hard to pinpoint time but may I ask you, as you view your function or your duty as an engineer, this would include advising the client of the criticalness of the sewer situation?

A That's correct.

Q So when do you think you first might have had discussions with Mr. Rose concerning the critical problems of the sewer?

A I would say from the initial onset.

Q When might that have been?

A Not recalling, and I don't have a '72 book here, but I would think that would have been in the latter part of '71 when we initially came into the project.

Q So these would have been on-going conversations?

A That's correct.

Q With Mr. Rose?

A Yes.

Q Did you feel that Mr. Rose understood what you were telling him?

A Oh, I would think so. One of the recommendations, of

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course we always make is to try and establish any right you may have in the sewer in submitting the preliminary and getting something into the county in an official form and I'm certain he responded to that.

Q You, yourself, did not make any of these submissions to the county?

A As best I recall, we did transmit the preliminary plan. We did not, of course, enter into the use permit to that extent.

Q But did you advise him to try and determine what the sewer situation was?

A Oh, yes.

Q And that was early on in your discussions?

A Yes.

Q Do you know of your own knowledge any steps he might have taken?

A No, I really don't.

MRS. FRIED: I have no more questions.

(Whereupon, a discussion took place off the record.)

BY MRS. FRIED: (Resuming)

Q Did you have any conversations with Mr. Garnier concerning this case; not the site plan but the actual suit, the law suit?

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A Yes, we did; indirectly, I guess, mainly to inform me of what was happening.

Q Have you had any conversations with him recently?

A No.

Q Have you had any conversations since last Thursday?

A No.

MRS. FRIED: I have no more questions at this time, Mr. Hellwig, except I would like to go through your files.

MR. GARNIER: Why don't you go through them first and ask whatever questions you might want.

(Whereupon, a discussion took place off the record.)

BY MRS. FRIED: (Resuming)

Q Could I ask you a few more questions. Since you did the work on the other site plans which encompass Section Three, that part of this property, can you confirm that that site plan was originally submitted on July 16, 1971?

A I didn't bring that site plan with me.

Q If it is in the file?

A As I say, unfortunately our files are broken down and the transmittals are kept separate from the correspondence and technical reports are kept separately from the correspondence.

Q In your experience in Prince William County, what would be an average time for a site plan to be processed to the

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final site plan approval?

A I'd almost say nine months to a year is average.

Q And this particular site plan for Manassas Quads, was the time spent then with the processing, the usual amount of time?

A Yes, I would say so.

Q Did you feel that the people in the county were dragging their feet or holding back in any way?

A No more than normal. Normal speed is very slow.

Q When you received this letter dated March 22, requesting an additional $20 for the additional units, what did you do with it?

A Probably referred that immediately to Mr. Rose.

Q Do you know whether that fee was paid?

A I do not. This letter refers to the fact that apparently 212 units were in their possession. I do not remember submitting it myself.

Q Is it possible Mr. Rose submitted it?

A It's entirely possible.

Q But you don't remember submitting it?

A No.

Q Did you give Mr. Rose copies of it?

A Yes, we did.

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Q Do you remember when you gave him copies?

A I would say that after that meeting of the 22nd we probably took a week or two to deliver that, so probably around March 1, somewhere in that vicinity.

Q Is it your procedure to submit erosion control plans and siltation plans prior to final site plan submission?

A Not at that time. Let me clarify that. At the time of the original submission of most of these preliminary site plans, the siltation and erosion control ordinance was not specified in Prince William County. Therefore, subsequent to the plans being offered to the county, the siltation and erosion became an item that was supposed to have been submitted with the preliminary. At that time it was not.

Q There is this letter dated January 13. Is that about when it went into effect?

A Somewhere in that general area. It was general practice to submit the preliminary for comments prior to working on any site plan. Now the site plan in most instances would have shown the soil erosion control.

Q The final?

A Yes, the final.

Q Upon receipt of this letter from the county dated January 13, did you prepare or begin to prepare an erosion

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control plan?

A I don't believe we did.

Q Do you know why?

A No.

Q But at this time it would have been necessary? Does this mean prior to final approval of the preliminary or the final?

A Final approval of the final. The preliminary could have gone to the Board without the siltation and erosion control.

Q Were you working at the time of this submission of the preliminary, on the plans and profile, the grading, on the other submissions that would normally have to accompany the final site plan?

A No.

Q Why weren't you?

A We were still awaiting the use permit hearing to make absolutely certain that the project was going to be allowed in Prince William County. Now, when you say did we perform any work that would be submitted on the final site plan, we did a grading analysis. These were not the drawings that would have been submitted to the county but were sufficient to tell us what the scope of the work was and that it could

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be executed.

Q But you were instructed by Mr. Rose not to do anything further until the use permit was granted?

A That's correct.

Q And that hearing was in May?

A In May.

Q Now, there are three letters here concerning the sanitary sewer plans, the first of which is dated December 21, 1971. Were the contents of this letter communicated to Mr. Rose?

A I would assume it had been transmitted to Mr. Rose.

Q Do you think you sent him a copy? Do you have any record of sending him a copy?

A Frankly, I don't know and understand, let's get clarified, this comment is with respect to Section Three as submitted by Coverstone because Section Three did have a site plan submitted prior to McKeon working on the property. This Section Three referred to here is not McKeon Section Three but rather Coverstone Section Three.

Q But would the information contained in this letter affect McKeon?

A Certainly.

Q So in the normal course of how you view your function,

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you would have sent this letter?

A Certainly.

Q Do you remember discussing it with Mr. Rose or anyone from McKeon?

A Yes, there were many discussions concerning the sewer on the property and unfortunately, I could make no real recommendation other than make early submission so that you can reserve taps. The situation in the Greater Manassas Sanitary District is very confused to say the least and although I may have opinions as to what sewer is available and what sewer is not available, this does not necessarily bear out what action is taken by the Board and the Sanitary District.

Q On the basis of that letter from the county, did you make the decision in the letter signed by Mr. Upenicks or was that a decision made by the firm or by whom?

A No. I participated in that decision, the reason being we did not want any official turn down by the Water Control Board, As I say, to add to the confused picture in the Greater Manassas Sanitary District, although this letter refers to Sections Two and Three which we then did not receive any official denial from the State Water Control Board. Well, Section Two is in the process of being occupied and constructed and to this date I do not know that the State Water Control

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Board has ever approved that. However, the Greater Manassas Sanitary District has sold the taps and gone ahead. I do not want to enter in between the county and the State Water Control Board.

Q Section Two, as you stated, is built?

A That's correct.

Q Did you resubmit sanitary sewer plans for Section Two?

A Not to the State Water Control Board.

Q Did you resubmit them to Prince William County?

A Prince William County approved the original plans.

Q As you had originally submitted them?

A That's correct.

Q What about Section Three?

A Section Three subsequently has been approved by the courts, is my understanding.

Q Was that the original proposal for Section Three?

A No. Section Three was revised.

Q Did you revise it?

A That's correct and it reflects Ashton Avenue construction.

Q But the revision, except for the Ashton Avenue construction was the sewer plan?

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A The sanitary sewer plans and the number of units and everything remained pretty constant.

Q As you originally submitted it?

A As we originally submitted it.

Q On the basis of the letter dated December 21, was it your understanding, on the Manassas Quads, that you would have to resubmit a new sewer plan to the State Water Control Board?

A As I say, not wishing to place myself between the State Water Control Board and Prince William County at any time, the simplest thing is not receive a denial from the State Water Control Board. The chances are that we would never have resubmitted to the State Water Control Board until Prince William County would certify there was sewer available. Prince William County has made the decision within the Greater Manassas Sanitary District to proceed with all due respect to the fact that they feel they control their own capacity.

Q Would you then have submitted to Prince William County the sanitary sewer plan for the McKeon Coverstone Quads?

A That's correct.

Q But at the time of this letter, December 27, you had no way of knowing whether that would be approved by the county?

A Not at this time, no.

Q Did you ever submit a plan to Prince William County

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for the Manassas Quads?

A Other than preliminary plans, no.

Q I mean a sewer plan?

A No. Now understand there are certain schematic sewers showing on the preliminary plan but as far as construction plans for the sewer are concerned, no.

Q Did you tell Mr. Rose or advise Mr. Rose that such a submission would be necessary?

A Such a submission is always necessary with the final construction drawings.

Q And he was aware?

A He was aware of this situation.

MRS. FRIED: I have no further questions.

EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. GARNIER:

Q Mr. Hellwig, subsequent to the withdrawal from this project by McKeon Construction Company involving the land which was going to be Manassas Quads, did you have occasion to do any work for Coverstone Land Limited Partnership affecting the same piece of property?

A Yes, we did.

Q What did you do?

A Revised their original Section Three submission which

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is approximately half of the land under contract to McKeon and resubmitted to the county for approval, including Ashton Avenue.

Q So Section Three of Coverstone Land Limited Partnership would have been part of the land which would have been Manassas Quads which you had done all along?

A That's correct.

Q When you resubmitted this to the county on behalf of Coverstone, did you have to show the right-of-way which has been the subject of conversation here?

A That's correct.

Q Did you have any discussions with any principals of the Coverstone Land Limited Partnership as to whether or not this right-of-way would have to be submitted?

A Yes.

Q Who did you discuss this with?

A I believe Mr. Stein was included in that conversation.

Q What was the position of Coverstone Land Limited Partnership in reference to submitting that land or dedicating that land?

A They acquiesced to the county's request.

Q Were there any meetings held with the county prior to that at which you were present?

A No, not that I was present. All the meetings were

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prior to the reactivation of Section Three site plan.

Q To your knowledge, between the time McKeon withdrew from the contract and the time the site plan was filed by you on behalf of Coverstone Land Limited Partnership, were there any discussions with the county for the purpose of trying not to dedicate the right-of-way which was requested and which eventually became Ashton Avenue?

A Not that I remember.

Q So to your knowledge, at all times from the date of withdrawal of the contract by McKeon Construction Company to the time you filed this site plan on behalf of Coverstone Land Limited Partnership, the principals in that venture were willing to dedicate the right-of-way, is that correct?

A I would say that they were. They indicated that it would be included in the plan. I don't know if they did it willingly or not.

Q But at least you were not called upon to intervene on their behalf and have meetings or take any other steps to forego that?

A No, I think they were pretty much resolved that all the meetings had been held to remove Ashton Avenue from the plans.

Q Do you know what knowledge they had of these meetings?

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A Yes. I'm certain that it was explained fully to them when they were ready to revise Section Three.

Q Would this have been explained by you?

A Yes.

Q So that when they came to you to revise Section Three, you advised them of what you had done on behalf of McKeon Construction Company to try to forestall the dedication of the right-of-way?

A That's correct.

Q And apparently, at least to your knowledge, you convinced them there was no hope to try to forego the possibility?

A Yes, that was my opinion at that time, that there was no hope.

Q What was the alternative to not furnishing the right-of-way? What would have happened?

A Well, the procedure that would have had to have been followed would have been one of having to take the site plan to the Board for approval without Ashton Avenue included and attempted to convince the Board that such a thing is necessary.

Q And when you were advising both McKeon and Coverstone, within your experience, did you advise them as to what you felt the possibilities of such an approval consisted of?

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A Yeah, a slim chance.

Q And when you say slim, as compared to the other possibilities, what did you feel the possibilities were for approval? What did you feel the factors were against approval?

A What would be the factors against approval?

Q Yes.

A The fact that three departments within the county were recommending otherwise.

Q And this would be Public Works --

A Public Works, Highway and Planning Department.

Q Now, if it was not approved by the county board as submitted without showing the dedication or without showing a right-of-way, then what would have happened?

MRS. FRIED: Excuse me, are you asking him as an expert witness? If you're just asking him to conjecture as to what might have happened, I think I might object.

MR. GARNIER: I'm asking him on the basis of his experience, in the same manner as you asked him on the basis of his twenty-three years of experience in your questions.

THE WITNESS: What would happen?

BY MR. GARNIER: (Resuming)

Q Yes, what would happen?

A The only solution that I see would have been in

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the courts.

Q Assume that the owners of the land, and I'm referring to McKeon and Coverstone, had decided not to develope the land but just sit on it and, therefore, not dedicate the right-of-way, this would have caused an interruption in the dedication of Ashton Avenue, would it not?

A That's correct.

Q And to have a continuity of Ashton Avenue as planned by the Highway Department required that it go through this particular tract of land, is that correct?

A That's correct.

Q And Ashton Avenue is actually in the process of being developed, is it not?

A Yes, at this time.

Q And based on your experience in this field and in dealing with Prince William County, assuming that these builders, either one of these parties we've discussed, sat on the land and did not dedicate the right-of-way, what would have been the required procedure in order to get the land necessary to create the continuity of Ashton Avenue?

A What you're saying is if they sat in this area and didn't dedicate, what would happen? Obviously someone would have to step in and build Ashton Avenue through the Highway

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Department.

Q And that would take a condemnation proceeding, would it not?

A Yes, it would.

Q Did you explain this to Mr. Rose?

A Well, no, we didn't explore anything past that point.

Q But from your conversations with Mr. Rose, did you feel he was aware of this possibility if he did not dedicate the right-of-way?

A We had no discussions past the point that if he didn't want to dedicate the right-of-way, that he would have to appeal to the Board of the decision that Ashton Avenue went through the property. We did not go anywhere beyond that discussion.

Q You mean appeal to the Board or to the courts?

A Appeal to the board initially.

Q Present it to the Board for approval?

A Present it to the Board for approval without Ashton Avenue. Our discussion did not extend beyond that.

Q And I take it you advised him at that time that you felt the chances would be slim of approval with the Board?

A That's correct.

Q To your knowledge had McKeon Construction Company been engaged in any other activity in Prince William County prior to this?

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A Yes.

Q What was the scope of that activity?

A They purchased another parcel of ground known as Woodmere Gardens tract on U. S. 1 and submitted a use permit and preliminary plans for quad construction in that place.

Q In that project were there any difficulties such as the ones we're discussing here with reference to Ashton Avenue?

A Not at that time.

Q To your knowledge was this situation a relatively new situation to be faced by McKeon in Prince William County?

A I'm certain it's the first time they've met this in Prince William County to my knowledge.

Q Did you have occasion to discuss with them what you felt would be the possibilities of appealing a negative decision from the Board with the courts based upon your experience?

A No, I don't think we proceeded past the appeal to the Board.

Q Now, the first time that the problem of the right-of-way was called to your attention was in January, is that correct?

A Yes.

Q And how did this come to your attention?

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A A telphone call.

Q From whom?

A I would assume it was from Oscar Yates at that time, the Director of Public Works, stating there seemed to be a problem and that we would have to have a meeting on that.

Q So would it be fair to say that prior to that McKeon Construction Company would not have had any knowledge of this particular problem either?

A I'm certain they didn't.

Q So at the time the contract was signed in this particular transaction, which was in the middle of 1971, the question of the right-of-way was never discussed to your knowledge?

A To my knowledge no.

Q In fact, the question had not yet come into being as far as you know?

A As far as I know it had not.

Q Now when Mr. Yates called you up, do you recall the nature of the conversation, what he said to you?

A The problem as it arose was the fact the county had been working on a revised master road network in the area and it affected this project and he felt some meeting would be required to straighten it out.

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Q He did not go beyond that at that time?

A No.

Q Did you report to Mr. Rose or anybody else?

A I don't know if I reported to him initially. I may have even gone to the first meeting to find out exactly what was happening.

Q But the net effect of that conversation and the subsequent meeting was that the State Highway Department wanted to take part of the land which had been bought by McKeon Construction Company, isn't that correct?

A Yes.

Q And in addition to taking part of the land, it wanted McKeon Construction Company to pay the cost of construction for the roadway which had been called for?

A That's correct.

Q The first meeting that you had with the county, I believe you said, was -- I've got a date of February 25. Is that your first meeting?

A No. The first meeting was in early February; February 3.

Q I'm looking at the wrong page.

You're not sure that Mr. Rose attended at that time?

A Mr. Rose did not attend at that time.

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Q So you went there merely to get further information based upon the communication received from Mr. Yates?

A Yes.

Q And what is your recollection of what took place at that meeting, sir?

A To the best of my knowledge they had a copy of our plans so marked showing a new 110 foot right-of-way and the preliminary sketches for the revised master plan showing an entirely new road network through that area.

Q The revised plan showing the 110 foot right-of-way was submitted when, in March?

A By us?

Q Yes. I'm talking about the February 3 meeting.

A The February 3 meeting was simply to show us the new plan.

Q The master plan?

A The master plan for the area and to reflect that upon the plans.

Q At that time did you get in touch with McKeon and tell them what was requested by the county?

A Yes, and as I told them then, I would, of course, have to find out exactly where we stood so far as being able to resist it, what alternates could be offered and in subsequent

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meetings I found out the whole picture which was reported to Mr. Rose and set up the meeting with Mr. Rose.

Q On February 25?

A Yes. No, I'm sorry that was February 29. February 29 is the final meeting with Public Works, Virginia Department of Highways, Mr. Rose, Mr. Kohlhaas.

Q But you had one on February 22, did you not?

A Yes, we did.

Q Was Mr. Rose present at that time?

A No, he was not.

Q What was the purpose for that meeting?

A The purpose in that meeting, because we were working on many projects through that corridor, was for mainly myself and Upenicks, one of our chief designers, to find out where and to what extent this whole plan affected us.

Q I think you used the expression a while back that you did not feel you were making any headway so, therefore, you recommended another meeting to Mr. Rose?

A That's correct.

Q What did you mean by not making any headway? What were you trying to achieve?

A Of course in the general picture we were trying to remove Ashton Avenue from the site.

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Q Was this on instruction of Mr. Rose?

A No. We were referring back to our initial plan at that time in which we had provided a forty-four foot face to face roadway which technically will carry so many vehicles per day and which we still felt at that time was more than sufficient to accomplish what they were trying to do. In other words we were resisting the increasing of the roadway.

Q Now, the land which would have been involved in the roadway that was required, was allocated to what purpose originally on the site plan you filed?

A The units were being built on it.

Q So to accomodate the county, the various units would have to be moved around to some extent?

A That's correct.

Q Prior to the meeting of February 25 which was the first one Mr. Rose attended, is that correct?

A Yes, sir.

Q What was the position of McKeon Construction Company with reference to the right-of-way as they discussed it with you?

A They were very much amazed and disappointed.

Q Were you instructed to try to find an accomodation to get rid of this requirement?

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A Oh, yes.

Q During this period of time and before the meeting which Mr. Rose attended, were there any discussions between yourself and officials of either the State Highway Department or the county with reference to whether or not any site plan would have to be submitted?

A No site plan was submitted. They, of course, would eventually end up asking for a new preliminary.

Q You had already filed one preliminary plan?

A That's correct.

Q Were there any discussions with these officials as to what would happen to the original preliminary plan if you did not agree to dedicate the right-of-way?

A No, we had not arrived at that point. We were still trying to ascertain what the road network would be.

Q Did you subsequently arrive at that point?

A Yes, I think subsequently when Mr. Rose was at the meeting we arrived at the point that we were making absolutely no headway with the three branches and if anything was to proceed, a new preliminary would have to be submitted.

Q So that the county and State Highway Department took the position that they would not consider the original preliminary plan?

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A That's correct.

Q Did you raise any questions at any of these meetings as to whether or not they felt they had a right to set on that plan as submitted?

A No.

Q What would be the normal sequence of events after the preliminary plan was submitted, assuming there were no roadblocks of this nature?

A The normal sequence of events would have been that the preliminary plan with its comments from all of the departments would have gone to the Board for their consideration.

Q Was it suggested to you at the meeting of the 25th that the plan would not be forwarded to the Board with suggestions or recommendations by the three divisions involved?

A No, they would certainly have forwarded the plan with their recommendations.

One of the things, and let's digress for just a moment from the question -- one of the things that always enters into the developer's mind, I'm certain, any time this happens is the time lag of having their plan caught in a change of this nature is going to be extreme. For example, had this been forced to the Board, the Board in all probability would have deferred this until they heard the new master plan.

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Q In fact, this was the recommendation of the State Highway Department eventually, was it not?

A Eventually it was.

Q Now, in what context did the filing of the second preliminary plan get discussed if the first one could have been submitted?

A In what context?

Q Yes.

A As I say, I don't know how the county received copies of the second preliminary plan because we still have on our tracing a tape mark, "Do Not Print by order of McKeon". This study was performed for McKeon strictly on the basis of finding out what happened to the property with the 110 foot right-of-way.

Q What I'm really asking, I think you told me that at the February 25 meeting you realized you were not making any headway and then you were advised that a second preliminary plan would have to be filed?

A Yes.

Q Were there any discussions at that time as to what would happen if the second plan was not filed or submitted?

A No.

Q Well, how did the second plan come up? Was this

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discussion initiated by the county or did you talk about it?

A No, the second plan came up through Mr. Rose.

Q At the meeting?

A No, not at the meeting.

Q Was it discussed at the meeting, the filing of the second plan?

A No, the filing of the second plan was never discussed at the meeting.

Q Was the first plan discussed at the meeting?

A Yes, it was.

Q What was discussed about it?

A The fact that they would have to recommend against it, meaning the Virginia Department of Highways, Planning and Public Works.

Q And were there any discussions at that time as to what effect this would have upon the approval or disapproval of the plan itself?

A We did not discuss that at the meeting, but afterwards what would happen if we went to the Board without the recommendations.

Q So that nobody from the Highway Department or the county said anything about this?

A No, other than they would recommend against it if it

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did go to the Board in that form.

Q Was it at that meeting that various avenues were explored by McKeon with reference to what could be done to accomodate the county?

A That's correct.

Q Were there ever any firm offers made by McKeon to do X, Y or Z or were they merely avenues of exploration?

A I think they were avenues of exploration,

Q And the county refused to accept them or even consider them, I take it?

A That's correct.

Q Now, to revise the plan so as to relocate the units to accomodate this roadway, did you have an occasion to make a study as to whether or not from an engineering point of view this would be more expensive to McKeon Construction Company than it would have been under the original plan?

A Yes. At that time, as I said, I don't know that any detailed study was prepared but it became obviously more expensive for McKeon Construction.

Q Was this more expensive above the addition of the cost of constructing the road?

A The items that became involved were; No. 1, the construction of the road; No. 2, the actual loss of open space

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that was available in the first plan; the rec area was quite large in the original plan. It obviously had to take the blunt of the loss.

Q By rec, you're talking about recreation?

A Yes.

Q Economically speaking, what effect would this have had upon the plan as you designed it originally?

MRS. FRIED: Again, as you objected to his conjecture, I would object.

MR. GARNIER: Of course, go ahead.

THE WITNESS: It would obviously increase the cost of the units, the development cost of the units.

BY MR. GARNIER: (Resuming)

Q Which would be passed on to the consumer?

A I assume so.

Q And not make them as marketable as they might otherwise have been?

A Probably.

Q When you first dealt with McKeon Construction Company were you advised that the concept of the quads was to create an economically feasible project for the consumer?

A That's correct.

Q Did you have any discussions with Mr. Rose or anybody

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else about the economics involved in this?

A Not to any great degree. The economics of this situation, the part that we enter into, is in the development cost of the ground, not necessarily anything past that point.

Q Is it fair to say that your discussions with McKeon with reference to the second plan that would have to be presented were more centered about how it would be more physically laid out and any economic aspects of it were developed by McKeon's engineers themselves?

A That's correct.

Q So then although it is your opinion that economically speaking it would be more expensive for McKeon, you cannot tell us to what extent?

A No. Our study did not go that far, other than, as I say, what we were talking about originally, it looked at least like another $50,000 for the additional roadway. Past that point, I don't know economically how it would affect McKeon.

Q But you did feel it would be more expensive?

A Yes, definitely.

Q There was another meeting on February 29, is that correct?

A Yes.

Q However, on February 25 I think you had formed the

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opinion that you were not making any headway on behalf --

A (Interposing) The February 25 meeting was at our office with Mr.Rose in which I had laid out for him exactly what was happening and in which we tried to formulate some alternates to give the Highway Department and the county at that February 29 meeting.

Q I think you stated earlier you at one time recommended to Mr. Rose that another meeting should be held and he should be represented?

A That's correct.

Q I take it you mean represented legally?

A The suggestion, as always, is that at anything of this nature, yes. Getting back a little further, the reason I took Mr. Upenicks with me to the February 22 meeting was so that I could have a witness. We find this to be a necessity, unfortunately in dealing now in these matters. When I spoke with Mr. Rose on February 25, I suggested that he have someone from the company with him at this meeting.

Q Did you suggest legal counsel to him at that time?

A I don't know if I suggested legal counsel.

Q Do you recall what was discussed at that meeting, the one of February 29?

A Yes, this was the meeting in which we offered

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alternates and again which we tried to find out if we could get by with as little as possible.

Q And the county's position was negative once again?

A That's correct.

Q Were you advised again at that time that recommendations would be made against the original plan?

A That's correct.

Q What was Mr. Rose's reaction to this?

A Well, subsequent to the meeting, of course, Mr. Rose -- and throughout the meeting, Mr. Rose attempted to have everything taken off of the plan which, of course, he realized then, too, they would not do this and when we left the meeting he and I discussed having the second preliminary drawing drawn so he could find out for himself and for the company how it affected him, which we did and as I say, subsequent to that he and his company or whoever helped him to make the decision and decided to withdraw.

Q Up to that point, based on your dealings with Mr. Rose and your observations, did you feel he was trying to find a way to develope this land and go through with the terms of his contract?

A As of the meeting on the 29th I'm certain he was trying to find a way to develope the property.

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Q And at the conclusion of that meeting he was still faced with the fact that the county and state were trying to take part of the land he had purchased under his contract, isn't that correct?

A No question.

MRS. FRIED: I object to the use of the word, "take", unless you would care to --

MR. GARNIER: Appropriate.

BY MR. GARNIER: (Resuming)

Q And subsequently the successors to McKeon Construction Company in the development of part of that land, had to give the land to the state, isn't that correct?

A That's correct.

MR. GARNIER: That's all I have.

MRS. FRIED: Just a few more questions.

FURTHER EXAMINATION BY COUNSEL FOR DEFENDANTS

BY MRS. FRIED:

Q When did Rose first consult with you, do you remember?

A No, I really don't. I really don't recall when we did the original. I would have to look back at some of the originals, or get the contract with McKeon which would give us the date.

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Q Was it before he entered into the contract?

A To be frank, I don't know when he entered into the contract.

MR. GARNIER: I think it was in July, 1971. It was during the month of July, I think we can stipulate. The deposit was in July.

MRS. FRIED: Your pleadings say September.

MR. GARNIER: There's no date on the contract.

(Whereupon, a discussion took place off the record.)

BY MRS. FRIED: (Resuming)

Q The contract evidentally was executed some time in September. Do you recall any discussions with Rose prior to that time?

A I don't believe so. I think when he came in to see us he had a contract on the property. I think he was referred to us after the contract.

Q In your experience, doesn't the builder always try to do as little as possible?

A Oh, yes.

MR. GARNIER: I think we can stipulate to that.

THE WITNESS: I don't think there's any question about that. I concur with that. We're trying to deliver a home that people can afford and we can't do it any more and I feel

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very strongly about this. We're not providing housing simply because we can't give it to people.

BY MRS. FRIED: (Resuming)

Q But isn't your experience in getting site plans through any county, Prince William County, Arlington, Fairfax, that the county, by law, has to plan the entire area and the builder is trying to plan for a set area?

A That's correct.

Q And the interests don't always coincide?

A That is correct.

Q Has it been your experience that you might come in with a roadway, let us say forty-four feet and the county might require sixty feet?

A Yes.

Q Is that not the difference in opinion as to what is required for an artery?

A It is a difference of opinion.

Q Is it not a reasonable difference of opinion?

A Yes, I would say it's reasonable.

Q Could you show us on the site plan the forty-four foot right-of-way?

A No, I could not, unfortunately, because it occurs in the middle of Section Two which is approximately in this

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region (indicating) and we have Lomond Drive swinging back down to 234.

Q So this site plan only shows roads that service the internal traffic?

A No, Coverstone Drive which is forty-eight feet wide was intended to go out and service the property to the rear.

Q Suppose you had come in with Coverstone Drive at thirty feet?

A Well, you see this is one of the complaints against the county as I registered earlier. We attempted to establish the road network on this tract quite early in the project, in which we had two roadways going through to service the rear and one roadway parallel to 234 and attempt to establish local traffic. This was at one time acceptable to the county. When we go into an area and a project, we attempt, and I want to emphasize "attempt" because we don't meet with that great a success. We attempt to establish what roadways are going to be required so that there are no surprises to our developers and attempt to establish a network that is normal and one that we would accept.

I will say that it doesn't work but we certainly attempt it.

Q If there had been no other development along Ashton

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Avenue or this was the only development, your original site plan would have been perhaps --

A (Interposing) Oh, yes.

Q But there was other development along Ashton Avenue and do you not have to take into consideration a certain explosion in the area in which you were building?

A Yes. I believe the real cause of the addition of Ashton Avenue was the immediate observation that 234 was breaking down so far as its ability to carry traffic.

Q And this development was an additional burden on 234?

A To that degree, yes, all development was an additional burden on 234.

Q There was a letter that we referred to before on siltation control dated January 13, this was a new requirement, was it not?

A Yes.

Q So that at the time McKeon came from California there was not a requirement on siltation?

A Not in Prince William County.

Q This was something new?

A Yes. This was during the era that all counties were beginning to develope siltation control ordinances.

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Q So that at the time of the contract there was no requirement of siltation control?

A In all probability, no.

Q Were there any other new requirements for site plans that you can recall that came into effect around this time?

A Well, the one requirement, of course, that we were speaking about earlier was the condominium use permit and other things being involved. These, I think, are the two major things that happened during this period of time, the change in ordinance for siltation control and the change in ordinance to establish a condominium use permit.

Q In your twenty-three years of submitting site plans in Prince William County or in Virginia, could you describe the changes that have occurred?

MR. GARNIER: I would object. It's completely irrelevant.

THE WITNESS: The changes that have taken place have, of course, been tremendous in relationship to what was happening twenty years ago and what is happening today. You couldn't even begin to enumerate what has happened to the site plan ordinance since that time. It was relatively free and almost nonexistent twenty years ago and today it is very stringent and they are attempting to now even tell you which

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trees you can cut down on the site, so that's how severe it has become.

BY MRS.FRIED: (Resuming)

Q This reflects, would you say, a more sophisticated planning philosophy?

A To some degree a more sophisticated planning philosophy but I don't think the planning has been done sufficiently in advance. I think it is reflecting more the public's reflection of what we did twenty years ago, namely, the present ecology movement and the fact that twenty years ago we went in and denuded and stripped a piece of ground and threw some houses up which are referred to now as ticky-tacky and the industry itself has reflected this. The counties are going overboard in responding to it. I don't believe they are thinking through the entire processin their response sometimes, but I think it's something we'll have to give and take on.

Q Referring specifically to Prince William County, by law are they not required to pass the site plan up to the Board of Supervisors?

A Yes, the departments are required to a report to the Board of Supervisors.

Q And who has the ultimate say-so on the site plan?

A The Board of Supervisors.

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Q And beyond that?

A Beyond that, whatever appeals you have legally.

Q At that time was there -- I think you stated earlier there was no road plan?

A There was a master plan but it did not reflect this road system that we're speaking of.

Q Could the Board of Supervisors have instituted eminent domain or condemnation proceedings at that time?

A I do not know. That's a legal question and I only practice law in private.

Q In your experience when development takes place more or less all at one time or in pieces along any development area, is there not often what I might call scattered development of scattered building of a road?

A Oh, yes.

Q In your experience does not the county simply wait for development to take place?

A (Indicating yes.)

Q Do you know of any occasion in Prince William County that they have actually condemned for a road?

A Yes.

Q What was that?

A That occasion, of course, were the accesses to IBM.

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The state and county participated with the county paying all costs of the right-of-way and the state providing, under the industrial access funds, the roadway.

Q Was that a unique situation?

A I would say it was one to encourage industrial development.

Q And that's the one?

A That's the one instance I know of. Whether others have taken place, I don't know. Of course, the counties always do participate in condemnations for sanitary extensions and things of this nature.

Q When you say it would have been more expensive to build with the road, you were referring solely to the cost of the road?

A That's correct.

Q The loss of the open space wouldn't have cost dollars and cents, is that correct?

A That would reflect the marketability of the property and something I don't care to speak to.

Q But there was a possibility of getting extra units as a trade?

A Let's put it this way, I will always explore every possibility and attempt to get a trade-off. I'm not one hundred

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percent successful.

Q Have there been times in the past when you have been successful?

A Yes, I've been successful.

MR. GARNIER: Let me note a running objection to this entire line of questioning and I won't have to interrupt you.

BY MRS. FRIED: (Resuming)

Q At any of your meetings between the Highway Department at which the Highway Department, Public Works and Planning were present, was there any discussion or argument between Public Works and the Highway as to the extent of McKeon's obligation on this road?

A Not in the meetings that I have knowledge of. They all seemed to be pretty well resolved that this was a necessity.

Q Did you deal with anyone else at McKeon other than Sam Rose?

A Not in reality; not until he left the organization which was not prior to this, of course.

Q When he discussed cost with you on this project, did you feel he had under-estimated the costs in this area?

MR. GARNIER: Let me object to that question as being completely immaterial.

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THE WITNESS: I don't know, as I say, what he was planning to sell these units for but we always represented to him what he had in the way of costs as far as developing lots was concerned.

BY MRS. FRIED: (Resuming)

Q Did he state to you the difference in cost between what he was used to paying in California and the costs here?

MR. GARNIER: Same objection.

THE WITNESS: Yes, he did. Of course, he said these units would have to sell at a higher cost.

BY MRS. FRIED: (Resuming)

Q Were the costs in California considerably lower for this same kind of unit?

A Well, two things were different between this plan and California. Your California plans are a lot denser and the restrictions are not so great as far as the buildings are concerned and the number of units would have been greater on this parcel of ground, so obviously, it would reflect that the cost of development would be greater here.

MRS. FRIED: I don't have any more questions.

FURTHER EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. GARNIER:

Q You asked Mr. Hellwig whether or not the various

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divisions of the county have the right or the option not to send the plan on up to the Board and you say as far as you know they do not have such an option. Is it not true, however, that if the Board is presented with a plan that for some reason does not tickle it's fancy, it can just sit on it?

A Oh, yes.

Q And this has been known to happen frequently, has it not?

A Oh, yes.

Q In fact, it was done with the Irongate Subdivision, was it not?

A Delays are one of the items that the developer must constantly consider. In a request from the county, he may win the battle and have lost the fight.

Q And in the case of the Irongate Subdivision, a mandamus was necessary to compel the Board to act, was it not?

A That's my understanding.

MR. GARNIER: That's all I have.

(Thereupon, at 11:45 A. M., the taking of the depositon ceased.)

Signature of the witness

Phone (Area 202) 544-6000
WARD & PAUL
410 First Street, S.E., Washington, D.C. 20003

I, _____, a Notary Public in and for the _____, do hereby certify that on the _____ day of _____, 1973, there did come before me the above named person who signed his deposition in my presence.

In witness whereof, I have hereunto signed my name and affixed my seal of office this _____ day of _____, 1973.

_____
Notary Public

My Commission expires _____.

Phone (Area 202) 544-6000
WARD & PAUL
410 First Street, S.E., Washington, D.C. 20003

Phone (Area 202) 544-6000

CERTIFICATE OF NOTARY PUBLIC

COMMONWEALTH OF VIRGINIA)
) ss.:
CITY OF ALEXANDRIA)

I, WILLIAM B. PETERS, a Certified Verbatim Reporter, the officer before whom the foregoing deposition was taken, do hereby certify that the witness, George W. Hellwig, whose deposition appears in the foregoing pages was duly sworn by me; that the testimony of said witness was taken by me by stenomask and thereafter reduced to typewritten form under my supervision; that the deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; anf further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested, or otherwise, in the outcome of the action.

William B. Peters
Notary Public in and for the Commonwealth of Virginia, at Large

My Commission expires September 12, 1977.

WARD & PAUL

410 First Street, S.E., Washington, D.C. 20003

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

McKEON CONSTRUCTION COMPANY,	)	
Plaintiff,	)	
v.	)	At Law No. 27087
COVERSTONE LAND LIMITED PARTNERSHIP,	)	
Defendant.	)	

STIPULATION

COME NOW the parties by counsel and jointly agree to stipulate to the following:

1. THAT the subject of this suit is a Fifty Thousand Dollar ($50,000.00) escrow deposit held by the escrow agent, Mitchell Cutler, pursuant to a contract for the sale of 21.25 acres of real estate in Prince William County from the Defendants-Sellers to the Plaintiff-Purchaser.

2. THAT the sole issue between the parties concerns paragraph 12 of the contract:

> "12. Condemnation. In the event that at the time of settlement all or any part of the property is (or has previously been) acquired, or is about to be acquired, by authority of any governmental agency in the exercise of its power of eminent domain or by private purchase in lieu thereof (or in the event that at such time there is any threat or imminence of any such acquisition by any such governmental agency), purchaser shall have the right, at its option, to terminate this contract and recover its deposit hereunder, or to purchase only so much of the property not condemned or under threat of condemnation, in which event the purchase price and terms shall be adjusted accordingly."

3. THAT Plaintiff submitted a preliminary site plan for 208 quadraplex units on the property on December 9, 1971.

4. THAT Plaintiff submitted an application for a special use permit for the condominium quadraplex units on February 18, 1972.

5. THAT representatives from the County staff and the State Highway Department made known to Plaintiff a request for a dedication on a part of the property of a 110 foot right-of-way, for a length of about 500 feet.

6. THAT several meetings were held between Plaintiff and the County and State representatives.

7. THAT the requested right-of-way was part of the proposed Ashton Avenue, which was part of the Route 234 corridor.

8. THAT the Route 234 corridor is on area extending 4,000 feet in both an easterly and westerly direction from the centerline of Route 234, bounded on the north by I-66, and on the south by the Town of Manassas.

9. THAT Ashton Avenue was necessitated by the heavy traffic and increased pace of development within the western part of the Route 234 corridor.

10. THAT the Prince William County Planning Office formalized a revision to the major throughfare plan in the Route 234 corridor (See Attached Document #).

11. THAT this revision, including Ashton Avenue, was

later adopted by the Board of Supervisors of Prince William County in 1973.

12. THAT other developers along Ashton Avenue did dedicate for the right-of-way prior to the publication of the formalized revision to the Route 234 corridor.

13. THAT settlement of the contract was supposed to take place on March 15, 1972.

14. THAT on March 14, 1972 the Plaintiff repudiated the contract citing several reasons, including lack of sewer and the request for the 110 foot right-of-way.

15. THAT the Plaintiff withdrew its site plan and application for special use permit on April 4, 1972.

16. THAT Defendant submitted a site plan for half of the property which is the subject of the contract on June 1, 1972, and dedicated part of the 110 foot right-of-way.

17. THAT Defendants' site plan which was recommended for approval by the Director of Public Works was denied by the Board of Supervisors of Prince William County on October 5, 1972.

18. THAT Defendants filed a Petition of Mandamus to require the Board of Supervisors of Prince William County to approve their site plan. Their petition was approved and an order was so entered.

19. THAT the issue to be resolved is whether the discussions and activities concerning the dedication of the 110 foot right-of-way were covered by the language of

paragraph 12 of the contract enabling the Plaintiff to terminate the contract. If not, the Defendants are entitled to the escrow deposit.

s/
COUNSEL FOR PLAINTIFF

s/
COUNSEL FOR DEFENDANT

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

McKEON CONSTRUCTION COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	At Law No. 27087
	)	
COVERSTONE LAND LIMITED PARTNERSHIP, et al,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW OF DEFENDANT
COVERSTONE LAND LIMITED PARTNERSHIP

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Springfield, Virginia
22150

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*2. Staff Report Dated March 27, 1972 on Special Use Permit

*3. Memoranda from State Department of Highways Dated:

February 14, 1972

February 22, 1972

February 23, 1972

March 3, 1972

March 8, 1972

4. Summary of Depositions of:

JAMES H. PAYNE

GEORGE HELLWIG

DAVID L. CAMPER

R. W. HARRISON

HENRY G. BIBER

* These are included in a separate volume of Exhibits.

ISSUES

In order to prevail, the Plaintiff must prove:

1) THAT the request by the County staff that the Plaintiff dedicate a 110 foot roadway was tantamount to a refusal by the Board of Supervisors to accept Plaintiff's site plan absent the dedication.

2) THAT this action was unreasonable, arbitrary, and capricious and not a valid exercise of the police power.

3) THAT this action amounted to an attempt to appropriate Plaintiff's property without just compensation.

4) THAT an attempt to appropriate Plaintiff's property without just compensation, an illegal act, is equivalent to a threat to use the power of eminent domain by a governmental agency under the contract.

5) THAT the contract contemplated an illegal act.

This memorandum establishes that the facts and the applicable law do not support any of the above contentions.

SUMMARY OF THE EVIDENCE

It is clear from the testimony of Mr. Yates, Director of Public Works; Mr. Biber, Director of Planning; and Mr. Payne, Assistant Chief of Operations Division of Public Works, that the Board of Supervisors of Prince William County did not always adopt and follow the recommendations of the staff and the highway department in approving or disapproving a site plan or subdivision plan. The final approval rested with the Board of Supervisors.

An example is defendant's own site plan for part of this very same property which subsequent to the breakdown of the contract between plaintiff and defendant was submitted to the County. The site plan showed the right-of-way in question and was recommended for approval by the Department of Public Works. Yet the Board of Supervisors turned it down. It took a Court Order to require approval of this site plan.

The Board was not instrumental in evolving the concept of Ashton Avenue. This was a gradual process that came to a head as far as the staff was concerned about the time the site plan was presented. This site plan, in fact, would have been the first one (or could have been the first one) to go to the Board showing this right-of-way. No other site plan had yet been presented to the Board with this right-of-way or this dedication for Ashton Avenue. In fact, it wasn't until 1973 that the Board officially adopted a plan which included Ashton Avenue.

Despite Mr. Hellwig's testimony that the County and the staff had turned them down on any alternative to complete dedication and construction of the 110' right-of-way, it is clear from the testimony of the highway department people, Messrs. Camper and Harrison, and of Messrs. Biber and Payne, and also as reflected in the Memorandum dated March 23, 1972, that there was, in fact, not agreement between the County and the State Department of Highways as to what exactly they would be asking the defendant to do. There was agreement that they would ask for a dedication for the right-of-way, but it is clear that they were not in agreement as to how much, if at all, plaintiff should be asked to construct.

Mr. Yates' testimony was to the effect that what was most critical was not the construction of the entire portion across the land, but proper control at the intersections and access to adjacent property. It wasn't clear in his mind as to whether or not they would have required construction.

In fact, there was no firm County policy as to whether a developer would be asked to improve the entire portion of the road, part of the road, or not any of the road. Further, although Mr. Hellwig says that he was told by Plaintiff's Mr. Rose not to make an official submission of the revised preliminary plan, it is clear that a revised preliminary plan was received by the County. It was marked, stamped in, on March 3, 1972. Copies were given to the Highway Department. And, in fact, the staff report issued on March 27,

1972, is predicated on the revised plan. This staff report makes reference to the fact that there is a proposed arterial highway to the east of the property and that the set-backs require the buildings to be 50 feet back, and some of them are as close as 22 feet back. Further, that staff report says nothing about whether the developer should be required to improve or merely dedicate. The evidence rather than showing that there was a firm, hard decision having been made by the County, shows that this site plan was still in a state of flux. There were still no written comments. Everything had been done on an oral basis.

There were other problems with the site plan that had never been resolved even up to the time of withdrawal in April by the plaintiff. These problems had nothing to do with this roadway, but were problems generated by the fact that this was an unique kind of project for Prince William County. These were quad-plex condominiums, something of a first in the County.

Pursuant to County ordinance adopted subsequently to the submission of this site plan, approval of a special use permit and a development plan by the Board of Supervisors was required prior to approval of the site plan. (Section 20-101 of the Code of the County of Prince William was adopted December 30, 1971.)

This special use permit hearing was scheduled before the Planning Commission on March 15 and before the Board of Supervisors in May. So, there was no reason for the County

to hurry up and resolve any of the problems.--No reason for either the County or developer to hurry up to resolve all of the problems on the site plan until they were sure the Board of Supervisors would approve this quad-plex concept.

****

Plaintiff has produced no evidence to show that this action of the County requiring dedication and, perhaps, partial construction of the right-of-way was unreasonable, arbitrary, capricious and an invalid exercise of the police power.

The statement of one of defendant's partners that it was an "unreasonable request", (Tomares, p.8), is hardly persuasive. His statement, further, must be seen in the context of what defendant had already dedicated in Section 2, Coverstone, prior to the conception of Ashton Avenue. Defendant already had provided a parallel road in Section 2, Coverstone, and viewed Ashton Avenue as something additional. Section 2, Coverstone, was prepared, however, prior to the realization of the need for Ashton Avenue. On the contrary, none of the partners of the defendant attended any of the meetings with anyone from the County or the State Highway Department. Therefore, any testimony elicited from them in discovery depositions is irrelevant to the issue at hand.

The evidence from the County from Mr. Payne, Mr. Biber and Mr. Yates is of the necessity of developing an alternate route to 234 and of the necessity in the County to plan for future growth as development took place and not after the fact.

The testimony of Mr. Payne, Mr. Biber and Mr. Yates is that this kind of roadway would be beneficial to the very development it was serving. There were 20,000 cars per day on Route 234. The development pattern of the Route 234 corridor had come to a head around the time of the site plan submission because of the suddenly increased development and the fact that there were no alternatives to Route 234. This development would have put some 1400 vehicles per day additional burden on Route 234.

At no time, at any of the meetings, discussions, or telephone conversations with plaintiff, did any person from the County or the State department of highways ever threaten to condemn or use the power of eminent domain. The evidence is clear that no plan had been adopted by the State Highway Department or the County, that no funds were available and would not be available at the highway department level, and that the highway department had no intention of condemning and paying for this right-of-way.

The plaintiff's engineer has said that if the master plan had been adopted, they would have expected to dedicate and construct the road.

The Special Use Permit ordinance and the silation control ordinance were adopted subsequent to the date of the contract and submission of the preliminary site plan. Yet, there is no evidence to indicate the plaintiff was not going to comply with those ordinances.

Mr. Hellwig, plaintiff's engineer, agreed that the difference between the developer and the County as to the size of a particular roadway was a reasonable difference. Plaintiff's contention then would seem not that the requirement of road dedication was arbitrary and capricious, but that it wasn't a requirement at the time of the contract.

The Plaintiff contends that the request of the Prince William County staff and of the State Highway Department that a 110 foot road be dedicated on the property which Plaintiff wished to develop is tantamount to an exercise of eminent domain pursuant to paragraph (12) of the contract. There is no dispute to the fact that the County staff and the State Highway Department, in furtherance of their informal agreement that a new road parallel to Route 234 was necessary because of the increasing and fast development in the area of Plaintiff's development, did ask that the Plaintiff, as well as other developers along the proposed route of Ashton Avenue, dedicate such 110 foot right-of-way through the property.

There is a dispute as to the effect of this request if the Plaintiff refused to comply. Plaintiff takes the position that this was tantamount to a refusal to approve the site plan. However, pursuant to law, the staff would make a recommendation to the Board of Supervisors, and it was the Board of Supervisors which is charged by law with approving or disapproving the site plan. Therefore, the Board of Supervisors could, in the exercise of its authority disagree with the staff, and, in effect, approve the Plaintiff's site plan without such a road. But even assuming, for the sake of argument, that in most cases where the staff would not recommend approval of the site plan, that the Board of Supervisors would then go along with the staff, we then reach the question of whether the requirement of dedication

of a road can be construed as the exercise of the power of eminent domain.

Firstly, there is a distinction between eminent domain and police power. Secondly, in order for the action of eminent domain to take place, certain procedures must be followed: There must be an ordinance adopted by the Board of Supervisors pursuant to the adoption of a highway plan. There must be an appraisal and there must be an offering to the property owner of a quid pro quo. Similarly, on the State Department of Highway level, there must be a plan adopted, an appraisal, and an offer of money.

The testimony of all the witnesses was quite clear. There was no such plan adopted, either at the state highway level or at the Board of Supervisors level. Testimony is further quite clear that at none of the meetings did any county official or state highway official ever threaten or even mention the work "condemn" or "eminent domain". In fact, they have testified they have no power whatsoever to condemn or to use any power of eminent domain. So, the question then comes down as to whether in some way even though it did not come within any authorized procedure of eminent domain, even though no power to use eminent domain or condemnation was threatened, under the contract this request might be somehow construed as a threat.

Plaintiff makes the point that the only way the State or County could have acquired this property years from now, if the property were never developed, would be by eminent

domain. Well, that is always true of any property that the county or the state might in some future period of time wish to acquire. The testimony of Mr. Camper is clear that the State, even if it might wish to condemn, had no funds with which to do so, and, further that no plan had been adopted. Something that might conjecturally happen in the future is hardly a "threat" or "imminent".

The distinguishing feature between eminent domain and the police power of the state and the exercise of the police power is that the police power regulates the use and enjoyment of the property by the owner to promote the general welfare, or to conserve the safety, health and morals of the public and the owner is not entitled to any compensation to any injury he might suffer.

The distinction is well expressed in "Words and Phrases", Vol. 14, pp. 477-478:

> "POLICE POWER DISTINGUISHED
>
> The 'police power' is exerted to regulate use and enjoyment of property by owner, or to take away or to destroy property, to promote general welfare or to conserve safety, health and morals of the public, and owner is not entitled to any compensation for injury sustained in consequence of exercise of the police power, while in 'eminent domain' the taking is of private property for public use, entitling property owner to just compensation. Bronx Chamber of Commerce v. Fullen, 21 N.W.S2d 474, 480, 481, 482, 172 Misc. 524."

Michie's Jurisprudence, Volume 6, at Page 690, defines eminent domain as the right of the nation or the state or those to whom the power has been lawfully delegated to condemn private property for public use and to appropriate

Michie's Jurisprudence, Volume 6, at Page 690, defines eminent domain as the right of the nation or the state or those to whom the power has been lawfully delegated to condemn private property for public use and to appropriate by ownership and possession of such property for such use upon paying the owner a due compensation to be ascertained according to law. This definition is taken verbatim from Light v. City of Danville, 168 Va. 181, 190 S.E. 276, at page 283. A similar definition is contained in 26 American Jurisprudence, at pages 638 and 639. At page 639 there is the following statement:

> "A corporation, municipal or private, which acquires property by purchase, by adverse possession, or by dedication, or takes it with the consent and acquiescence of the owner and devotes it to the public use, is not exercising the power of eminent domain."

It is well settled in the Commonwealth of Virginia that both the local control of land subdivision and of zoning are exercises of the police power and that the state legislature delegated to each locality a portion of the police power of the state.[1]

Furthermore, the contract in paragraph (12) did not give the Plaintiff-Purchaser an out if it felt that the county was not validly exercising its police power.

---

[1]Board of Supervisors of Loudoun County v. Georgetown Land Co., 204 Va. 380, 130 S.E.2d 299 (1963), Board of County Supervisors of Fairfax Co., Va. v. Carper et al, 200 Va. 653, 107 S.E.2d 390 (1959), National Realty Corporation v. City of Virginia Beach et al, 209 Va. 172, 163 S.E.2d 154 (1968).

The contract must be construed to mean a lawful act of a governmental agency. Therefore, the words "by authority of any governmental agency in the exercise of its power of eminent domain" or "any threat or imminence of any such act" must mean the lawful use of such power by governmental agency. We cannot construe a contract to mean an unlawful act of the state. Therefore, it must mean in accordance with the Virginia law establishing a procedure for the use of the power of eminent domain, which is subject to the constitution of the Commonwealth of Virginia, the Constitution of the United States of America and specific Virginia Statutes.

Section 25-46.5 in the Virginia General Condemnation Act provides that no proceedings shall be taken to condemn property until a bona fide but ineffectual effort has been made to acquire from the owner by purchase the property sought to be condemned. This section is now applicable to the Virginia Highway Department which was previously governed by Section 33.1-99 which was identical. In addition, since April 10, 1972, Section 25-248 provides that before initiation of negotiations for any real property by a state agency an appraisal shall be made. The agency shall then establish an amount which it believes to be just compensation for the property and shall make a prompt offer to acquire the property for the full amount so established and in no event shall such amount be less than the aforesaid appropriate appraisal.

Under state law, mandamus will lie to compel the approval of a site plan which meets all the requirements for approval. If the County could not validly require the dedication, then granting approval of the site plan in exchange for dedication is not compensation because there is no quid pro quo: there was no money or property right being given. All the County would be giving the developer would be something to which it was already entitled, to-wit: approval of the site plan.

Neither the County nor the State Highway Department were in a position to commence eminent domain procedures or even threaten. There were no funds, no ordinance had been adopted by the County, nor was there any highway plan whatsoever for the proposed road.

Assuming, however, that the facts say what Plaintiff contends that they say (assuming the worst posture): 1. That the County did indeed say to the Plaintiffs "If you don't dedicate this road, we will not recommend approval for your site plan and the Board won't approve your site plan without our recommendation." Did this action of the County amount to a use of the power of eminent domain? The question then becomes a different question: Did the County validly exercise its function pursuant to the police power, or did it, in fact, overstep this, and did this request for dedication amount to an unconstitutional confiscation, or attempted confiscation, of the Plaintiff's property? The answer is clearly "no" as supported by the following:

The requirements of a site plan pursuant to the zoning

ordinance or a subdivision pursuant to a subdivision ordinance amount to one and the same thing. In "The Law of Zoning and Planning", (3rd edition), Rathkopf, Ch. 71, Vol. 3, at page 53:

> "Subdivision legislation is part of planning legislation as is zoning; they are all predicated on the police power of the state. Consequently, the questions inherent in the requirements for public improvements depend on the same criteria as are found in cases involving the exercise of the police power through zoning restrictions; that is, whether the detriment to the property owner is balanced by the gain to the public. A particular requirement or application of the general rules and regulations in a particular manner to a specific application for approval will not be invalidated unless, like a particular zoning restriction, it is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

See, also, "The Law of Subdivisions", Yokley, Sec. 58, at page 129:

> "58. IMPOSITION OF CONDITIONS AS A PREREQUISITE TO APPROVAL OF SUBDIVISIONS.
>
> (a) Generally.
>
> It is well established that conditions may be imposed by a municipal planning commission in connection with the approval of a proposed subdivision map.
>
> The right of a municipality to require certain installations and construction by subdividers as a condition to the approval of plans and plats is bottomed upon a dual premise. First, of course, is the consideration of the health and general welfare of the occupants of the homes to be constructed within the boundaries of the subdivision. Provisions for streets and alleys are a paramount consideration, together with a safe water supply and adequate sewage disposal. Also, the need for parks and recreational areas should be met.
>
> Secondly, public policy dictates that those who, for profit, seek to subdivide lands, shall in some substantial measure assist the local government agencies and authorities in the installation of these facilities by making the initial installation thereof. Here the city, under most procedures, then assumes the ultimate maintenance and control over such facilities, such as streets, alleys, water lines, sewers, parks and recreational areas.

> The imposition of reasonable regulations as a condition precedent to the subdivision of lands and the recording of plats thereof has been held not to violate any constitutional provisions respecting uniformity of taxation and is not tantamount to the taking of private property for public use without just compensation."

The action of the county in requesting the dedication was well within its power. The general test is of reasonableness: is there a reasonable relationship between that which is requested and the activity of the land owner.

In the Loudoun County case, supra, the court held the county subdivision ordinance was enacted pursuant to the authority of the Virginia Land Subdivision Act under a prior statute (15-792 - 15-794.3 inclusive) which was in effect at the date of passage of the ordinance of the Amendment so that there, as here, the question of the validity of the enabling legislation is not in issue. The court held that the legislature in enacting the Virginia Land Subdivision Act delegated to each locality a portion of the police power of the state to be exercised by it in determining what subdivisions would be controlled and how they should be regulated.

The test, as the court said, was whether the local body used its power and discretion properly, i.e., has it acted reasonably? The court further held that unless there was a clear abuse of power, the judgment of the local body would prevail.

The Fairfax County case, supra, involved the so-called "Freehill Amendment" which involved an action by property

owners in Fairfax County for declaratory judgment to declare the so-called Freehill Amendment invalid. This Amendment restricted to two acres land in the western two-thirds of the county. The contention of the property owners what that this zoning ordinance was unreasonable and arbitrary having no reasonable and substantial relationship to the public health, safety or morals or general welfare. The court held that it in effect restricted people of lower income brackets from living in the western area of the county, thereby reserving the area to those who could afford to build there. Further, the effect of the Amendment had been to permit a person to build on a lot of less than two acres while denying his neighbor the right to build unless he put his house on a lot containing a minimum of two acres; therefore, it lacked uniformity as required under Section 15-845 of the 1950 Code. Therefore, the court held that, while the legislature has given to counties the right to enact ordinances to regulate "the density and distribution of population...such ordinances, to be valid, must be to promote public health, safety, prosperity, morals and public welfare and the mere power to enact an ordinance does not carry with it the right to arbitrarily or capriciously to deprive a person of the legitimate use of his property."

The Court sustained the finding of the Trial Judge that a two acre restriction was unreasonable and arbitrary having no relation to the health, safety, morals or general welfare

of the owners or residents of the area so zoned.

This is not the situation in the instant case. Here the evidence has shown that the State Highway Department and the officials of Prince William County who are charged by law with planning and providing for the safety, which includes the modes of transportation for the people of the county, were concerned about the fast growing development in the area of the county where Plaintiff was developing, and the traffic generated on roads unable to handle it. Route 234 is the major road between Route 66 and Route 28 serving the Town of Manassas and the rapidly expanding area immediately surrounding the Town. If Route 234 were tied up due to an accident on one of its main intersections, it would be difficult, if not impossible, to get emergency vehicles up and down the Route 234 corridor. The very lives of the people who would be living on Plaintiff's property would be in peril.

Therefore, they concluded that what was needed was an alternative route to 234. The development was taking place faster than a plan could be adopted by the Board. By that time, all of the development would have taken place and the very thing that they were trying to prevent would have happened.

Therefore, in the rightful exercise of their function as planners, zoning administrators, as directors of public works, pursuant to validly enacted ordinances, they requested

the developers who were submitting plans for the development of their property to dedicate to this road.

The court in West Brothers Brick Company v. City of Alexandria,[2] held "General welfare in Alexandria today may warrant regulations which would have been fantastic in Sherwood Forest." Here, in our case, pursuant to a zoning ordinance which provided for the dedication of streets and the regulation of traffic, the situation required a dedication of 110 foot right-of-way, whereas, 50 years ago, 30 years ago, 10 years ago, with little or no development in this area, such a requirement would have been arbitrary or capricious or not for the general welfare.

A citizen holds his property, not only subject to the exercise of the right of eminent domain, but also subject to the lawful exercise of the police power. Here the citizen's right to use his property is subject under different state statutes and local ordinances to the right of the locality and of the state to regulate the subdivision of property and to regulate the zoning of property.

Title 15.1-465 of the Code of Virginia of 1950, as amended, enables local governmental bodies to enact ordinances regulating subdivision and development of land. Its purpose is to permit the governing body to adopt ordinances to assure the orderly subdivision of land and its development. 15.1-465 defines subdivision but permits it to be otherwise defined in the local ordinance.

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[2] 169 Va. 271, 192 S.E. 181, 888 (1937)

15.1-466 provides that an ordinance may include among other things, reasonable regulations and provisions that apply to or provide "(c), for the coordination of streets within the subdivision with other existing or planned streets within the general area as to location, width, grades and drainage." This provision was in effect at the time the site plan was submitted to Prince William County. [It was subsequently amended to "...coordination of streets within and contiguous to the subdivision..." (effective in 1973). However, the Amendment does not have any affect on the situation in this case.]

15.1-489 provides that "Zoning ordinances shall be for the general purpose of promoting the health, safety or general welfare of the public, and of further accomplishing the objectives of Sec. 15.1-427," and, that to accomplish these ends, such ordinances shall be designed, among other things:

> "(2) to reduce or prevent congestion in the public streets and
>
> "(3) to facilitate the creation of a convenient, attractive and harmonious community and..."
>
> "(6) to protect against one or more of the following: overcrowding of land, undue density of population in relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation..."

15.1-427 provides that the governing body of any county or municipality may create a local planning commission in order to promote the orderly development of the political

subdivision and its environs.

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

The statute further provides that in accomplishing the objectives such planning commission shall serve primarily in an advisory capacity to the governing bodies.

Pursuant to these enabling acts, the county of Prince William has adopted a zoning ordinance, a subdivision ordinance and an office of planning.

Article XIII, Sections 105 through 128, inclusive, under Chapter 20 (Zoning), of the Code of the County of Prince William pertains to site plans.

Sec. 20-107, requires a site plan for any RM-1 zoning except single family and two-family dwellings and further for any land use or development for which a special use permit is required. The subject property was zoned RM-1 and the Plaintiff planned to build condominium quad-plexes which required a special use permit. Therefore, the subject property definitely required the submission of a site plan.

Section 20-119 requires review of the site plan by approving authorities including the director of public works, relative to:

> "(2)(a) Location and design of vehicular entrances and exits, in relation to streets giving access to the site, and in relation to pedestrian traffic.

"(2)(c) Concurrence of the state department of highways for the location and design of the vehicular entrance and exits to and from State maintained streets and highways, and

"(2)(d) Adequate provision for traffic circulation and control within the site and providing access to adjoining property."

Further, Section 20-122 provides generally that to assure public safety, general welfare and covenience, the county agencies and officials with responsibility for review and recommendation of approval of site plans shall require certain improvements as fall within their respective assignments. Amongst the list of seven, the third is: "Connection wherever possible of all walkways, travel lanes and driveways with similar facilities in adjacent developments" and the seventh, but not the least, is "Dedication or reservation of land for streets and service roads and the construction thereon."

15.1-465 of the Code of Virginia defines the term "subdivision" as "the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land." This section permits the local ordinance to define subdivision in some other manner, and the Code of the County of Prince William, Section 14-1, defines the term "subdivide" to mean to:

"divide in fact, or by plat, any parcel, tract or lot of land into four or more parts or lots at one time or within one year, or into a total of six lots within two successive years...except, however,...the division of a

tract, parcel or lot, of land into lots or other divisions of land each containing an area of five acres or more, unless to so divide...necessitates the dedication of new roads, rights-of-way or public easements in which event this chapter will apply."

The sale to Plaintiff of a part of Defendant's land created a subdivision within the meaning of the ordinance, since, although Plaintiff's tract was more than five acres, the division "necessitated" the dedication of new roads, rights-of-way, or public easements because the property Plaintiff was purchasing was otherwise landlocked.

Section 14-58 of the Code of the County of Prince William provides that "Subdivision streets shall be designed and constructed for acceptance into the secondary highway system of the State department of highways." Therefore, pursuant to both the enabling legislation for zoning and subdivision regulation and the ordinances enacted pursuant to such legislation, this property was subject to both subdivision control and site plan control.

The burden is on the Plaintiff to prove that the action of the County was clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals or general welfare.[3]

There are numberous cases involving requirements by a municipality that a developer dedicate either a road or a particular part of his property prior to receiving either

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[3] Board of County Supervisors of Fairfax Co., Va. v. Carper et al, supra.

zoning or subdivision approval. These can be distinguished either on a narrow proposition, i.e., where the subdivision ordinance clearly would enable the municipality to require a dedication and the plat in question did not come under the subdivision ordinance, [City of Corpus Christi v. Unitarian Church, 436 S.W.2d 923 (1960) Texas] or where the request of the county fell within the test, i.e., it was unreasonable.

In State Ex Rel. Noland v. St. Louis County, 478 S.W.2d 363, (1972)(Mo.), the Court discussed both the Pioneer* case and the Ayers* case and held that there must be a reasonable relation between the proposed activity of the land owner and the exaction of government. The Court affirmed a writ of mandamus compelling a county to approve a preliminary plat. The County had refused unless the owner agreed to dedicate some two and one-half acres out of a total of thirty for a road in a situation where there already were two existing roads for the tract, and the owners' plan for the subdivision was to add a total of fourteen homes in addition to the two already situated on the tract. And, there was a statement by the land owner that the subdivision would be effectively wiped out by this demand.

In Pioneer Trust and Savings Bank v. The Village of Mount Prospect, 176 N.E.2d 799 (1961)(Ill.) the court held that there was no reasonable relation between the activity of the developer and 6.7 acres it was required to dedicate

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*infra

for a school. This requirement was pursuant to an ordinance requiring dedication of ground at the rate of at least one acre per each 600 units for public ground other than streets. The court quoted from a previous Illinois case, Petterson v. The City of Naperville, 137 N.E.2d 371, where it upheld the reasonableness of a requirement that the subdivider provide curbs and gutters for the streets of a subdivision, stating that "the power to prescribe reasonable requirements for public streets in the interest of the health and safety of the inhabitants of the city and contiguous territory includes more than a mere designation of the location and width of streets." The court made the distinction between the requirement of the developer assuming those costs which are specifically and uniquely attributable to his activity and which would otherwise be cast upon the public and allowing the community to use this point of control to solve all of the problems which it can foresee. In the light of those principles, the Court must determine the reasonableness of the requirement. In this case, the schools were almost filled to capacity and this developer was being required to pay the total cost for the entire community. It was held that the need for the school was present, but was due more to the activities of the rest of the community than of the developer.

The same Illinois Court reached a similar decision in 1968 in The People Ex Rel. the Exchange National Bank of

Chicago v. The City of Lake Forest, 239 N.E.2d 819. Again, there was an overwhelming showing that the roadways requested exceeded the bounds of permissible and reasonable regulation. Here, only two lots were being created in the subdivision of 26-1/2 acres - one of 8-1/2 acres and one of 16-1/2 acres. There was no anticipated change in activity on the part of the owner, who was not a developer. A residence and pool were already located on the proposed 8-1/2 acres. The Village required two roadways - one 33 feet wide for a distance of 2,000 feet and one 66 feet wide for a distance of 35 feet. Further, the roadways would appear to benefit only an adjoining property owner who was landlocked.

One of the landmark cases is Ayers v. City Council of the City of Los Angeles, 207 Pac.2d 1, 11 A.L.R.2d 503, (1949). Here a petitioner had submitted a map of a proposed thirteen acre subdivision and the Planning Commission attached four conditions, which conditions were not specifically spelled out in any ordinance: (1) a 10 foot strip abutting a boulevard be dedicated for widening the boulevard; (2) an additional 10 foot strip at the rear of the lots be restricted to shrubs to prevent ingress and egress to the boulevard; (3) an extension of a street be dedicated to a width of 80 instead of 60 feet and (4) an additional area be dedicated to a street to eliminate a traffic hazard. The petitioner objected on the ground that these conditions were not expressly provided for by the Subdivision Map Act or the city ordinance

and that they bore no reasonable relationship to protection of public health, safety or general welfare and, therefore, amounted to the taking of property without compensation. The court held against the petitioner.

The court said that it appeared the petitioner's contention was that in any event a subdivider could only be required to take care of traffic needs within the subdivision and that no dedication could be enacted for additions to existing streets or highways.

The court held that where there is no specific restriction in the city's charter and none forbidding a particular condition is included in the Subdivision Map Act or the city ordinance, then conditions are lawful which are not specifically forbidden and which are reasonable required by the particular subdivision type and use involved in consideration of the neighborhood planning and traffic conditions; and that, specifically, dedications may be exacted for additions to existing streets and highways.

Petitioners further contended that, since the city contemplated taking the property anyway, and that the benefit to the tract would be small compared to the beneficial return to the city as a whole, and it amounted to an exercise of the power of eminent domain and was, therefore, unconstitutional unless compensation was paid.

Pointing out that in a growing metropolitan area each additional subdivision adds to the traffic burden, the Court

held that it is no defense to the conditions imposed that "...their fulfillment will incidentally benefit the city as a whole. Nor is it a valid objection to say that the conditions contemplate future as well as more immediate needs. Potential as well as present population factors affecting the subdivision and the neighborhood generally are appropriate for consideration." (11 A.L.R. 512, 513.)

The Court further held that the fact that the master plans were incomplete, although the city had been working toward a formulation of them, did not affect the result.

The Court specifically held that the dedication and use reservation requirements in the proceeding were not unconstitutional as an exercise of the power of eminent domain. The Court held that the proceeding was <u>not one of eminent domain, nor was the city seeking to exercise the power</u>.

> "It is the petitioner who is seeking to acquire the advantages of lot subdivision and upon him rests the duty of compliance with reasonable conditions for design, dedication, improvement and restrictive use of the land so as to conform to the safety and general welfare of the lot owners in the subdivision and of the public." (11 A.L.R.2d 512)

In a review of other cases, the court emphasized that the requirement for dedication of land to the widening of streets is not a compulsory taking for public use where it is a condition reasonably related to increased traffic and other needs of the proposed subdivision. The Court quoted with approval <u>The Village of Euclid v. Ambler Realty Co.</u>, (1926) 272 U.S. 365 at 387, 54 A.L.R. 1016, to the effect that:

"...regulations, the wisdom, necessity, and validity of which as applied to existing conditions, were so apparent that they are now uniformly sustain, would probably have been rejected as arbitrary and oppressive a century or even half a century ago; that, while the meaning of constitutional guarantees is invariable, the scopy of their application must expand and contract to meet the physical changes which are constantly coming within the field of operation and that only those regulations must fall which clearly do not meet the constitutional meaning as applied to changing conditions."

A case similar to the one at hand is Hudson Oil Company of Missouri v. The City of Wichita. 396 Pac.2d 271 (1964) (Kan.). Here the Supreme Court overruled the trial court and held that it was not unreasonable to require the dedication of a 10 foot strip for frontage as a prerequisite to the granting of a rezoning. The trial court had held that the action of the city, in refusing to approve the plat and grant the rezoning application, was unlawful, arbitrary and unreasonable, because it was not based on any specific or definite ordinance.

The court held that the governing bodies cannot be expected to anticipate all requests that may be made for zoning changes and, therefore, have rules and regulations available covering all conditions precedent to approval of the application.

The Court pointed out that although the master plan made no specific reference to the property or to frontage or access roads immediately in front of the property, the master plan did refer to access or frontage streets along major streets. Further, that many property owners had made

similar dedications for frontage streets on the street in question. That 77% of right-of-way for frontage streets had been obtained and, therefore, that the dedication of a 10 foot strip to be added to the existing right-of-way where necessary to obtain uniformity in a service or frontage street as a prerequisite to approval of a plat was not arbitrary or unreasonable.

The requirement that the condition imposed upon the developer must have some reasonable relationship to the activity generated by him does not mean the county must look at the developer's property with blinders on, oblivious to the surrounding territory. As the court in Vogel v. Board of County Commissioners of Gallatin Co., Montana, (1971) 483 Pac.2d 270 said in upholding the requirement of dedication of frontage road as prerequisite to approval:

> "It is not unreasonable to consider the adjoining and surrounding areas as was done here to determine if, in fact, the parcel, if not regulated, would destroy the orderly development of the area as it pertains to public use, enjoyment, benefit and safety." (p. 275)

If Prince William County had been bound by Plaintiff's contentions, the traffic patterns would have build up to a tremendous degree affecting the very lives of the people in the area, and it would have been too late to make any attempt at orderly development of the area. Moreover, Plaintiff's property benefited by the additional access provided by this roadway. Further, if the Plaintiff's contentions are upheld,

then every developer who dedicated land along Ashton Avenue will be in a position to bring suit against the County of Prince William.

RESPECTFULLY SUBMITTED,

/s/
Barbara J. Fried
Attorney for Defendants

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CERTIFICATION

I hereby certify that a true copy of the above pleading was delivered or mailed by me to all counsel of Record this 28th day of January, 1974.

/s/
Barbara J. Fried

SUMMARY OF DEPOSITION
OF
JAMES H. PAYNE
ACTING DIRECTOR OF PUBLIC WORKS
MANASSAS, VIRGINIA

In December of 1971, Mr. Payne was assistant chief of the operations division of Public Works. (p. 3)

I. REVIEW OF SITE PLANS RE ROADS

His responsibility in the operations division was to review subdivision plans and site plans and, particularly, primary responsibility for the review of subdivision plans with the chief of the division for conformance of the subdivision ordinance and construction specifications and other standards prior to preparing reports to the Board of Supervisors.

In reviewing site plans, vis-a-vis roads, the factors to be taken into consideration are the estimated amount of traffic on the road, topography, horizontal and vertical curvature of the road and the site distance in addition to providing entrances in the appropriate locations. (p. 7)

A policy on townhouse design was developed when the traffic level reaches a certain minimum based on a certain number of trips per dwelling unit. (p. 7 and 8) In other words, a state standard type street would be required for streets-not necessarily in the interior. These could be arterial streets through the property. In reviewing the site plans, the traffic pattern not only within the project, but the traffic flow and how it related to the rest of the

area, was reviewed. The regulations and procedures or policy guidelines evolved from the general county ordinance on site plans.

II. PROCEDURE FOR REVIEW OF SITE PLANS

When a site plan is submitted to public works, it is referred to other county departments and the highway department as is necessary for review, including the sanitary district, recreation department, planning office, fire marshall's office, soil scientist and possibly the health department. (p. 8) After review by these departments, they make recommendation to the Public Works Department. A comprehensive report based on all these recommendations, as well as on the Public Works Department's own review, is compiled and presented with the plans to the Board of Supervisors for approval or disapproval. Final approval or disapproval for the plan is made by the Board of Supervisors.

The preliminary site plan is required to show proposed utility systems and road systems. (p. 15) In reviewing the preliminary site plan, the utilities are also examined as to whether a line would be adequate and how it would tie into another system, or whether there would be a need to extend it to other properties.

The procedure was generally to orally discuss the plan and not to write comments. (p. 18) At the point of final plan, detailed letters might be sent back and forth, but in the early stages and on a preliminary plan, there would generally be a lot of "oral conversation."

III. REVIEW OF SITE PLAN 23-13, MANASSAS QUADS

The review process of the Manassas Quads plan, which was submitted originally in December of 1971, involved discussion rather than written comments by the department. (p. 10) This particular type of development or layout (the Quads) was unique at the time and probably still is. At the time it was submitted, there were probably only a few other condominium projects of any type submitted in the county and the relationship of ownership and how it would effect the maintenance of street systems was new, and it necessitated talking to the engineer to find why some of the things were layed out in this type of project. (p. 11)

Two meetings were held with both the planning department and the highway department and perhaps discussions were also held over the phone. The discussions generally would be about street systems and the parking requirements because there was concern over the adequacy of parking and the question over the necessity of school dedication and the matter of street sizes would have been discussed with the highway department. (p. 13) There would have been discussion as for the need of State standard type streets which wouldn't allow perpendicular type parking as shown on the original site plan (by perpendicular is meant head-in with backing out into the travelled portions of the street).

A major roadway had previously been shown on a plan adjacent to this particular parcel in connection with the

site plan for Section 2 of Coverstone. (p. 22) This is a roadway that extended through Section 2 which was more or less an extension of the major road that Ashton Avenue was a part of, and Springfield Associates worked on that development plan. That plan was approved for construction. (p. 23)

Generally, the 110' right-of-way may have been discussed with someone prior to submission of the plan but he has no specific recollection of it. (p. 24) It is quite likely that the need wasn't discussed until after the plan was submitted. There were meetings with the highway department and with Planning concerning the specifics of the site plan after its submission. The witness remembered at least one. (p. 25) It was a meeting held on February 29, between Planning, Highway and Public Works at which Mr. Rose and Mr. Hellwig were present. This would not have been the first time that the question was raised, but that was most likely the primary reason for the meeting.

Not only the need for Ashton Avenue was discussed, but other elements such as the size of some of the other streets, were discussed.

IV <u>SUBMISSION OF REVISED SITE PLAN</u>

The new site plan dated March 3, 1972 was submitted as a result of that meeting as well as a number of other questions that were raised relating to changes of lesser magnitude on the plan. (p. 28) The new plan shows 424 + 42 places indicating more parking spaces on the re-submitted site plan, but it didn't necessarily show there were more. There

was a great deal of discussion and it was never really finally resolved as to what would constitute a parking space for this type of unit because these units were new from the standpoint of a zoning ordinance. Questions were raised as to how to count certain spaces that were inside the unit that would not normally be counted as parking and this was never settled at the time of this plan, and the question as to the adequacy of the parking was probably never finally settled. (p. 29)

He did not recall any specific discussions about density; however, the new plan did show more units. What would have happened is that they would have sent the new plan back to the ones concerned about it, (p. 30) primarily the highway department and planning office, for an up-to-date comment if possible before making a final report to the Board. (pp. 31 and 32)

Between the resubmission in March and the date of withdrawal in April there were probably further discussions with the developer or engineer. (pp. 32 and 33) The letter requesting additional fees because of the increased number of units is dated March 22. He belived that the fees were paid sometime in March or April. (p. 34) It is possible that they weren't paid.

He does not know whether McKeon was willing or not to give the right-of-way, but it was incorporated on the plan; therefore, he would have to assume that they did, at least, intend to keep the development out of that right-of-way.

He does not recall whether at that meeting they agreed or did not agree to give the right-of-way, and, as of April of 1972, he was not sure what their position was, whether they were willing or not willing to give the easement. (pp. 47 - 52)

The later preliminary plan (for Manassas Quads), dated having been received March 3, 1972, shows extensive revisions and reflects the kinds of conversations that the county had with the developer, e.g., as far as street systems. (p. 19) For instance, the small parking cluster was removed from the plan and a street was raised to a standard size street of 36' based on the number of units. It is not the policy that it would have to be dedicated, but that it could be dedicated to the street system, i.e., the street would have to conform to the state standards.

Discussion among the staff and further review of the plan went on after the new plan was submitted. Up, in fact, to the time the plan was withdrawn in April of 1972. (p. 32)

V. PROBLEMS OTHER THAN ASHTON AVE. RAISED BY THE SITE PLAN

The processing time for this plan which began in December was not unusual in view of the situation in the last three years. This site plan could have been submitted with a recommendation that there be an erosion control plan prior to final approval.

In a letter dated December 29 to Mr. Biber from Mr. Ford, the Zoning Administrator, the contents of which would have normally been communicated to the engineer, Item (f)

states that in the absence of architectural plans, it could not be determined if the units met the definition of townhouses or multi-family structures. This would not necessarily have been resolved prior to proceeding with the preliminary plan, although they would have tried to get as many points as possible resolved between the officials before making a final recommendation. This question would have had a significant impact on the plan and relates back to the question about parking spaces. There really wasn't enough information to be able to tell how many parking spaces would be necessary, so additional information would have had to be obtained before determination could have been made on whether the parking was adequate. (p. 36)

There were other things that were necessary, for example, there was a recommendation from the sanitary district that indicated that "Please be advised that a decision cannot be reached on the Greater Manassas Sanitary District until the Board of Supervisors resolved the question of the interim sewer plan expansion." (p. 56) It was his understanding they weren't recommending approval or disapproval at this time. Also there was a letter from the school board that relates to a school site in the vicinity of the project.

VI. NEED FOR ASHTON AVENUE

Some of the developers in this corridor were reluctant to go along with the idea that this road was necessary, because in most of the developments it was a road of a size that would carry more traffic than their individual site

required. They are always reluctant to incorporate any kind of a large right-of-way like this into their development plan. (p. 40) "But after convincing a number of people for the need for such a road, and the sizes and traffic volumes we anticipated, we were able to convince them that there was a need and it would be beneficial to be in their development." (p. 41) The right-of-way for roads through this corridor was not established and the concept was evolving -- it was in the gradual process of evolving into a road that extended from one end of the corridor all the way to the other. And, there were problems in certain developments that could be helped by such a road, in that the development did not have adequate access without a road in that general location. (p. 41)

VII. NO THREAT OF EMINENT DOMAIN

At no time at the meeting on February 29, did anyone from any county or state department threaten condemnation or threaten to use the power of eminent domain to get the right-of-way. No one in the department of Public Works has the authority to condemn. (pp. 26 and 27) Most of the discussion at the meeting of February 29 would have centered on the need for the road and the reasoning for a road of that size.

VIII. APPROVAL OF BOARD REQUIRED

Site plans are generally submitted to the Board after as many problems as possible have been resolved. And quite

a few go with recommendations of approval or disapproval. (p. 45) Often when there is a clear distinction between what the county feels is necessary and what the developer feels is necessary, on the request of the developer, they will go ahead and submit to the Board, with the recommendation for approval subject to certain requirements or, very rarely, recommendation for disapproval. (p. 46) This site plan was never presented to the Board, because, for one reason, all of the comments of the reviewing agencies were not in writing preparatory to making a final report before the Board.

The application was still sitting in the office as of April because they had not received the written comment from the highway department. (p. 53)

On a number of occasions it has taken as long as five months, and, cases where it might take as long as five months for the highway department to make a comment are not limited to just those instances where the builder refuses to grant a right-of-way, for example, for some of the Dale City plans it has taken longer. (p. 54)

There were no discussions with Mr. Biber or anyone else that they were going to sit on the plans until McKeon came around. (p. 56)

McKeon may have refused to dedicate the land, but dedication would not have been asked for at the time the preliminary plan was presented to the Board. The County's goal was to see a lay-out rather than to get a final commitment on any kind of dedication or reservation. The application

could have gone into the Board for approval without McKeon agreeing to dedicate the land. (p. 57)

It is not true that the site plan would have no chance of being approved if the right-of-way were not granted because there are occasions when the Board of Supervisors do not take their recommendations. The Board of Supervisors had very little involvement in the actual concept of this corridor. (p. 60)

At the time the road was under discussion in this area, no other plans had actually been submitted to the Board which required that same road. In other words, "This road did extend on down into some other projects or some other developments, but as well as I remember, those other plans were submitted later than this one." (p. 61)

He recalls no statement to Mr. Rose that the State had the power to condemn. (p. 62)

INDEX OF
SUMMARY OF DEPOSITION
OF
GEORGE HELLWIG

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SUMMARY OF DEPOSITION
OF
GEORGE HELLWIG
CERTIFIED PROFESSIONAL CIVIL ENGINEER
SPRINGFIELD ASSOCIATES

Mr. Hellwig was employed by the Plaintiff, McKeon, on two projects: Manassas Quads and Woodbridge Quads, being part of the Coverstone tract. (p.4)

The firm began work on the Coverstone tract beginning in 1956 and worked more or less continuously on it since 1956 for several owners. The work performed in 1956 was for the original zoning and eventually the ground was sold with the commercial ground being obtained by Tripak. The apartment ground was sold to Coverstone Limited Partnership and townhouse property to Berlage-Bernstein and they worked for all three companies on the remainder of the tract. After developing Sections 1 and 2, a parcel was contracted to McKeon.

McKeon purchased 20 plus acres of the parcels on the apartment ground for purpose of placing the Quads, which at that time was a unique thing being done in California. Springfield Associates prepared preliminary plans and studies and submitted them to Prince William County at the same time as a use permit as required by Prince William County was filed by McKeon. They proceeded to go forward with the county to develop the preliminary plans. (p. 6)

The first time he assumes he heard about the necessity of this right-of-way was from Oscar Yates sometime in

January of 1972. (p.6)

He first advised McKeon through Mr. Rose early in February of the requirement that was communicated about the road. (p. 31)

The first meeting was set up for February 3, 1972 and was held in the Public Works Department with Mr. Williamson and Mr. Yates, the director of Public Works at that time. (p. 6) In this first meeting, they were told that the master plan for the area covering the Coverstone and Country Scene, which is the Berlage-Bernstein portion of this tract, was being revised and a new arterial roadway was being considered for this tract running parallel to 234.

A joint meeting was held on February 22 between the Virginia Department of Highways, Prince William County Public Works and Planning section to discuss, in general, the entire area. (p. 10)

At this time the County had established what they called their Tuesday morning meetings in which Planning, Public Works and Highway would be represented so that the builder-engineer could get together with all the parties concerned in the planning of highways and arrive at a joint solution rather than having to "battle all three separately and distinctly and come up with three different answers."

It was at this meeting that Henry Biber presented his revision to the master plan. The highway department and public works supported Mr. Biber's position that the new

arterial roadway would be required parallel to Route 234. Present at the meeting were Mr. Upenicks, Mr. Hellwig, Mr. Biber, Mr. Williamson, Mr. Harrison, Mr. Camper, Mr. Rose, Mr. Payne and Mr. Kohlhaas.

They went through various offers in which they attempted to give the right-of-way and not construction and allowing it to remain there until the highway department at some future date required the road or give the right-of-way and 50% of the estimated cost of the road. Also they tried to move the roadway farther outside the property. None of these things appeared to be acceptable.

"We offered to do many things and were exploring avenues to see how we could arrive at the least expense to the project. We just explored several of these avenues, none of which were acceptable." (p. 12)

Subsequent to the meeting on February 29, there were no further meetings or telephone conversations with Planning, Public Works, or the State Highway Department concerning McKeon. (p. 17) It was their knowledge that the Highway Department would accept nothing but the completed project. (p. 18)

They had discussions as to the fact that they had already alotted for a roadway to pass through the Coverstone tract, being called at that time Lomond Drive. This 44' roadway had been provided in Section 2 to relieve the parallel road situation.

Coverstone, Section 2, was part of the land owned by

Coverstone Limited Partnership (defendant). This was distinctly separate from the McKeon site. (p. 9)

Section 3, Coverstone, did encompass part of this McKeon tract. The discussion was centered on the traffic anticipated through this roadway which would dictate that something greater than the 44' section be required through this tract. (p. 13)

The 44' roadway is in Section 2 of Coverstone and there was no roadway, whatsoever, in Manassas Quads to be dedicated to the county other than Coverstone and a connector going through to serve the remainder of the Coverstone property.

The 44' right-of-way does not occur on this site plan because it is in the middle of Section 2. Lomond Drive swings back to Route 234. So, Coverstone Drive is 48' and was intended to serve the property to the rear.

They did not proceed with any site plan until Mr. Rose would have had his hearing on the use permit. The only thing they were actually performing was a study physically trying to position units and the only work after the meeting on the 29th was the one to restudy the property to see what the unit configuration would be with a new road. (p. 15)

The Planning Commission hearing on the special use permit was scheduled for the 15th of March for the Woodbridge and Manassas Quads. They recommended approval to the Board of Supervisors. (p. 16)

"The Board's makeup being as it was, I don't know that the recommendation of the Planning Commission would have been of any consequence." The first hearing was scheduled at the Board for May 18 for approval of the site plans. There were four condominiums in all: two of McKeons and two of other developers.

They were not working at the time of this submission of the preliminary on plans and profiles, grading or other submissions that would normally have had to accompany the site plans because they were awaiting the special use permit hearing to make absolutely certain that the project was going to be allowed in Prince William County.

They were instructed by Mr. Rose not to do anything further until the use permit was granted, and that hearing was scheduled for May. (p. 34)

The second plan came up through Mr. Rose. It was not discussed at the meeting. Only the first plan was discussed at the meeting. They discussed that they would have to recommend against the plan. ("They" meaning the Department of Highways, Planning and Public Works.) But there were no discussions as to what effect this would have upon the approval or disapproval of the plan. (p. 54)

No firm offers were ever made by McKeon to do anything. He thought that they were merely avenues of exploration. (p. 55).

There was no detailed analysis made as to how much more

expensive the roadway would be. It just "looked" like another $50,000.00 for the additional roadway, but he just "felt" it would be more expensive. (p. 57)

At the February 29 meeting they offered alternatives and tried to find out if they could get by "with as little as possible."

As of the 29th, he feels that Rose was trying to find a way to develop the property.

Following the meeting, they drew the conclusion that there was no alternative. (p. 13) Mr. Rose did direct him to draw up a new site plan including the roadway; it was not officially submitted to his knowledge. (p. 14)

He doesn't know whether the additional fee for the additional units was paid. He did receive the letter, dated March 22, requesting the additional fee which he probably referred to Mr. Rose, but he does not remember submitting that plat. But, it is possible that Mr. Rose might have submitted it. He did give Mr. Rose copies of it at some point around March 1. (p. 32)

Nine months to a year is the average for processing a site plan through final site plan approval. As far as the particular site plan for Manassas Quads, the usual amount of time was spent with the processing. The people in the County did not drag their feet or hold back in any way. "Normal speed is very slow, no more than normal." (p. 31)

He agrees that the Board of Supervisors has the ultimate

say-so on a site plan. Beyond that there are appeals legally. (p. 65)

It was not suggested at that meeting that the plan would not be forwarded to the Board. (p. 52) They would certainly have forwarded the plans with their recommendations. There was no discussion at the February 22 meeting or at that time, as to what would happen if the second plan were not filed. (p. 53)

In designing of site plans, everything is taken into consideration and it is usually based on the master plan of the area. The master plan did not show the road at this time. (p. 20) If there had been a master plan adopted in the area then the 110' right-of-way would have been shown and, in that case, they would have expected to construct the 110' right-of-way.

If the master plan had previously been adopted, and the same situation would have arisen, they would have dedicated the road and built it. (p. 23) The density on this property was ten units to the acre so that on 21 acres they could have had 210 units. The reason for the 212 units shown on the new site plan was that they were going to see if they could gain two units more than allowed under density in return for the road in order to offset the cost. This proposal was never made at any meetings because they never got to that point. This was something that was done after the meetings when the new layout was made, but nothing of this nature was ever submitted or approved. It was not

known whether or not that Board would have approved that plan. (p. 23) They were entitled to 210 units, but it didn't fit a quad arrangement which has to be built in fours. The first time they came in with 208 units because that was the maximum they thought they could get.

Ashton Avenue did not result in any loss of units. (p. 24)

There was a new requirement for siltation control that was not a requirement at the time McKeon came from California. This was a new ordinance developed during the era that all counties were beginning to develop siltation control ordinances.

At the time of the contract there was no requirement of siltation control. In answer to the question as to whether any other new requirements for site plans that he could recall that came into effect around this time: (p. 65) "Well, the one requirement was the condominium use permit." The major things that happended during this period of time in the ordinance was a change for siltation control and a change to establish a condominium use permit.

Siltation and erosion control ordinance was not specified in Prince William County at the time of the original submission of most of these preliminary site plans; therefore, subsequent to the plans being offered to the County, siltation and erosion became an item that was supposed to have been submitted with the preliminary site plan at the time it was done. It went into effect sometime around January 13. (p. 32)

There was no discussion or explanations to Mr. Rose

that there would be a condemnation proceeding if he did not dedicate. (p. 46) "We had no discussion past the point that if he did not want to dedicate the right-of-way, that he would have to appeal to the Board of the decision that Ashton Avenue went through the property. We did not go anywhere beyond that discussion."

No one from planning or public works or the department of highways either in meeting or on the telephone ever used the word "condemnation" or "eminent domain." (p. 19)

In his experience, when development takes place more or less all at one time or in pieces along any development area, there is scattered development and the county simply waits for development to take place. (p. 67)

The only occasion he knows where Prince William County has actually condemned with the access is to IBM, which was one to encourage industrial development. That is the one instance he does know aside from condemnation for sanitary extentions.

The real cause of the addition of Ashton Avenue was that Route 234 was breaking down as to its ability to carry traffic. To that degree, all development was an additional burden on Route 234. (pp. 63 and 64)

The witness, most likely, first became aware of the desire on the part of the County for the parallel roads to Route 234 in the later part of January by a phone call soon after the submission of the site plan. (p. 25) Within this

immediate area, this same engineer (Springfield Associates) represented Berlage-Bernstein, Crestwood Construction Corporation, Jerry Wolman Company, Bresler and Riner which are almost immediately adjoining projects which would be in sort of a similar condition; that is, builders who were building on this 234 corridor. All four of these developers have inherited Ashton Avenue. (p. 26)

In all of these jobs, the roadway has been widened to the 110' right-of-way. Crestwood and Jerry Wolman are presently under construction, and they themselves are doing the construction.(p. 26)

In 23 years of submitting site plans, there have been tremendous changes in relationship in what was happening then and today, especially to the site plan ordinance. (p. 65) It was relatively free and almost nonexistent twenty years ago and today it is very stringent. It is attempting now to even tell you which trees you can cut down on the site. That is how severe it has become.

"To some degree a more sophisticated planning philosophy [is being reflected], but I don't think the planning has been done sufficiently in advance. I think it is reflecting more the public's reflection of what we did twenty years ago, namely, the present ecology movement and the fact that twenty years ago we went in and denuded and stripped a piece of ground and threw some houses up which are referred to now as ticky-tacky and the industry itself has reflected this.

The counties are going overboard in responding to it. I don't believe they are thinking through the entire process in their response sometimes, but I think it's something we'll have to give and take on." (p. 66)

The builder's interest and the County's interest don't always coincide because the County has to plan an entire area and the builder is trying to plan for a set area. The defendant's attorney said that we can stipulate that the builder tries to do as little as possible. (p. 62)

The difference in opinion as to the necessity for a particular size of roadway is reasonable.

SUMMARY OF DEPOSITION
OF
DAVID L. CAMPER
RESIDENT ENGINEER FOR THE
VIRGINIA DEPARTMENT OF HIGHWAYS
MANASSAS RESIDENCE

The highway department reviews site plans and subdivision plans to assure that roads being constructed and intended for acceptance into the State highway system are built to state minimum standards. A further reason for review is to determine the effect it might have on roads already in the system. (p. 4)

Its recommendation is made to the Board of Supervisors which ultimately acts on approval of the plat.

As an operational office in Manassas, it did not design projects or make policy. The main object of the Manassas office is the maintenance of the state system. (p. 5)

The whole area of the Rt. 234 corridor, beginning in late 1970, began intense development as tracts which had been zoned previously began to develop. (p. 7)

Included in these developments were the Paradise Tract, Bristow Station and other plans for the Coverstone Tract. The plans for Paradise and Bristow were submitted at about the same time as site plan 23-13, i.e., about December of 1971.

After receipt of a copy of the site plan from the state highway department, joint informal meetings were held between the county staff to work out any problems raised by the site plan. The meetings were basically meetings where either

public works of planning had problems that it felt were raised by the site plan, or if the developer had questions, it would provide a means where they could all meet jointly. (p. 9)

At no point did the highway department ever formally comment on the preliminary site plan. (p. 11)

Mr. Camper was present at certain meetings in February and March and we can attach memorandums of those meetings; however, even though some of those memorandums pertaining to those meetings were signed by Mr. Camper, it was over his signature but was written by Mr. Harrison who was present at all of the meetings. (p. 11) Mr. Camper was present at other discussions which, although they did not perhaps touch on that particular site plan, did touch on the area. (p. 12)

At no time did he ever threaten to condemn for Ashton Avenue or threaten to use the power of eminent domain.

As Mr. Camper stated, they have the power of the state agency to condemn, but only after the plans are approved by the Highway Commissioner and no one below the Highway Commissioner has power to condemn. Secondly, there were no funds available, so there was no way.

Mr. Camper says: "We do try to work closely with the local governing body to secure dedication of rights-of-way and to implement needed corridors that would be required by a development and development by these as part of their plan and be built by the county ordinance." (pp. 12 and 13)

No plan was ever adopted by the highway department for Ashton Avenue, although there had been site plans that included segments of Ashton Avenue that have been reviewed through normal county procedures and concurred in by the highway department at Manassas. Therefore, even at this point, September 21, 1973, there was no power on the part of the highway department to condemn for any part of Ashton Avenue. (p. 13)

If, in a hypothetical situation, Mr. Camper felt that there was a parcel that should be condemned, that is, it would be in the best interest of the department to condemn (again, a hypothetical, not necessarily this, site), then he could recommend that the necessary steps be undertaken. However, before the department undertakes such a step, fair market value first must be offered to the landowner and a plan would have had to be previously adopted by the state. This, in the state, is called right-of-way acquisition. What first must be done is have appraisals made by the right-of-way section (p. 14) And, the appraisals must be approved before the right-of-way agent may go over to the property and make an offer. Only after the offer is made, and the property owner has had a certain time to consider, can there be actual condemnation.

The letter dated February 14, 1972, under Mr. Camper's signature referred, evidently, to a meeting where Mr. Hellwig was present, but involved different site plans than the one

which is the subject matter of this case and involved a different section of Ashton Avenue, or as it was called, South Bristow Station Road.

It had to be clear to Mr. Hellwig at this meeting that at some point there would be a continuance of this road northward. (pp. 16 and 17) From the Minutes, dated February 22, which refer to a meeting held on February 15, the first paragraph refers to the Bristow Station Road from the Manassas Loop up to Rt. 621, and this, in effect, includes the Ashton Avenue. At the time he went into the meeting, there was no clear cut understanding as to what was going to be asked for as to the width, although it was apparent to the highway department that 110' could be justified from the traffic because of the various development plans at that time, i.e., February 1972. (p. 17)

The letter signed by Mr. Camper dated March 3, indicates that there was a disagreement as to the position of the state highway department and the County, represented by Mr. Williamson of Public Works, since the Virginia highway department felt that the developer should not only dedicate, but construct the road across this property, whereas it appears that Mr. Williamson of the Public Works Department felt that the dedication was sufficient and that the construction could be deferred. (p. 23)

Under persistent questioning from Mr. Garnier, who demanded to know what would be the remedy of the County or

the State if the developer (or any developer) refused to dedicate any property along the proposed Ashton Avenue, Mr. Camper agreed that the only remedy available would be condemnation--assuming that all remedies had been exhausted.

There is no control by the highway department as to what time development or construction of Ashton Avenue could take place. (p. 29) Actually, what is happening, is that development takes place in a skipping pattern. There are two and possibly three developments that have sections of Ashton Avenue in their approved plans, but they are not consecutive, i.e., not side-by-side. Further, there is no policy in the state highway department to fill in the gaps. Again, Mr. Camper referred to the letter of March 1972 wherein Mr. Harrison states that "due to the lack of funds by the Virginia Department of Highways, we will not be in a position to construct Bristow Station Road at the same schedule as the high density zoned property in this area is developed." (p. 30) There is no set of plans which the department has that would, in any way, put them in a position for a right-of-way acquisition so that land acquisition can take place.

SUMMARY OF DEPOSITION
OF
R. W. HARRISON
ASSISTANT ENGINEER FOR THE
VIRGINIA DEPARTMENT OF HIGHWAYS
MANASSAS, VIRGINIA

George Hellwig, the plaintiff's engineer, was present at a meeting attended by the witness and Mr. H. L. Williamson, Mr. James H. Payne, Jr., and Mr. R. P. Fones of the Prince William County Public Works Department, and Mr. D. L. Camper of the Virginia Department of Highways, at which there was an informal presentation of the need to extend Bristow Station Road through plaintiff's property. (p. 7 and memo of meeting dated 2/23/72)

There had been prior discussions with Mr. Hellwig about the necessity for Bristow Station Road from the intersection of Route 661 to Manassas Western Loop, including a discussion at a meeting on February 8, 1972.

At another meeting held on February 29, Mr. Williamson, Mr. Payne, Mr. Harrison and Mr. Henry Biber of the Planning Department in addition to the witness and Mr. Sam Rose, an official of the plaintiff, Mr. Hellwig and Mr. Robert Kohlhaas, plaintiff's attorney, were present (p. 8 and memo of meeting dated 3/3/72). Mr. Rose said he would didicate the 110' road if there could be some understanding reached on sewer availability and if a different road could be placed adjacent to plaintiff's property. (p. 10) The State Highway's position was that the plaintiff should develop the road as well as dedicate it, but Mr. Williamson thought that

Public Works might only ask for dedication. The highway department had no money in its six-year budget to construct the roadway. (p. 11) Mr. Harrison said that the highway department would have to recommend that the Rt. 234 corridor plan be deferred if construction weren't provided. This difference, which was discussed in front of the plaintiff and his engineer and attorney, was never resolved. (p. 13)

Subsequently, a revised site plan showing the 11' roadway was brought to the highway department. (p. 14)

At no time at any of the meetings or in any conversation with plaintiff's engineer was the word "condemnation" or "eminent domain" used. There was never any threat to condemn. (p. 15)

The only way the Virginia Department of Highways could go to condemnation or eminent domain would be on a project set up by the department for a roadway. No project was established.

Prior requests to the department to use the State's power of eminent domain to aid in establishing an easement or roadway connection for a developer have always been rejected.

SUMMARY OF DEPOSITION
OF
HENRY G. BIBER
DIRECTOR OF PLANNING
PRINCE WILLIAM COUNTY, VIRGINIA

I. DUTIES OF PLANNING OFFICE IN REVIEWING SITE PLANS AND SUBDIVISION PLANS.

The duties of the director of planning, which was Mr. Biber's position at the time the site plan was submitted and was under discussion, include site plans and subdivision plan review with respect to the plans and the way in which the proposed developments would fit into the community and also with a certain respect to the zoning ordinances. (pp. 3 and 4)

Until January 1, 1972, the Zoning Administrator was part of the Planning Office and on that day, he became part of the Public Works Department. The Planning Office is responsible for revewing the plans with respect to their conformance with planning area plans and with the way in which the development will fit into the community. The site plan and subdivision plan is reviewed in regard to the way in which it impacts adjoining land uses, or adjoining lands, whether or not they are zoned, but in which may be anticipated a certain amount of development. (p. 5)

The Planning Office began to be involved in reviewing the site plans beginning around 1970 for: impact upon adjoining land uses, the problems that may arise out of roads that don't connect property or which don't provide

sufficient capacity. (pp. 6 and 7) By law, the Planning Office is charged for overall planning in Prince William County, and, if it did not review site plans, it would have a very large gap between the plans and reality. A vital function of the Planning Department is, therefore, a review of these site plans.

The usual approach of the County Planning staff was that a site plan ought to include, as far as roads went: "Any of the roads which are necessary to serve that site and connect it with adjoining properties so that a road network sufficient for that site, as well as adjoining properties, could be arrived at. And we recommend that wherever such roads cross the site that these be dedicated for public use at the time of recordation of the final plat." (p. 28)

The Planning Department makes and effort to show that the road is needed for the development itself, and also to provide for a road network which would be adequate for the area. (p. 45)

II. HOW ASHTON AVENUE EVOLVED.

"The road we now know as Ashton Avenue has a history which began with the reconsideration of the Manassas Planning Area Plan. On this plan there were a number of roads which were shown to the west of Route 234 and it was realized that these roads shown on the plan were probably not going to be adequate. One of the main reasons was there had been a number of rezonings in the area, actually in a larger area,

which would result in more dense development than the Manassas Plan had originally included. This would put a very heavy load on Route 234 and it was realized that something had to be done to reduce the burden on Route 234." (p. 9)

"In studying the various proposals that were made, or in studying this plan, we began to tie together roads that were running essentially north and south on the west side of 234 and through a process of planning and discussion of needs and re-examination of the land uses in the area, the proposed land uses, the problems on 234, Ashton Avenue evolved and it is now part of an adopted revision to the Manassas Area Plan." (p. 10)

Ashton Avenue is designated "A-1" on the corridor plan map and runs from Route 621 to Manassas town limits and is a 110' road with an arterial road classification. (pp. 12 and 13)

Coverstone Drive is classified as a 64' right-of-way, which is a four lane, undivided, major throughfare. Coverstone Drive is shown on the original site plan for Manassas Quads and it is now being built along the side of the property with the Country Scene Townhouse development, and it cuts along the side of the Manassas corridor development. (p. 11)

The concept of Ashton Avenue went through several evolutions. The first stage did not show it as a continuous road, but as an extension of Lomond Drive. (p. 13) However, in late 1971 or early 1972, it was decided that Ashton

Avenue would be a continuous road based on a study of the future traffic because of the development in the corridor west of 234. The estimates of traffic generation were based on existing zoning and on the density of land use as shown in the adopted Manassas Area Planning Map. (p. 14)

The development in the corridor itself was studied with great concern because of the number of site plans being developed in the corridor, and the County felt it had to get the information ready to get the planning straightened out so it could deal with the site plans.

In February of 1972, or about that time, any developers in the Route 234 West corridor whose plans were being submitted were discussing Ashton Avenue with the County planners, and in every case the concept was accepted by the developers. (pp. 16 and 17)

George Hellwig, of Springfield Associates, was involved in many site plans in the same corridor, and knew definitely by early 1972 of the plan for Ashton Avenue, and of the request of the County for dedication.

III. DISCUSSIONS OF SITE PLAN 2313, MANASSAS QUADS.

There was at least one meeting (being one of the regular meetings which was held in the office of the highway department with Planning and Public Works) where this particular site plan was discussed. (p. 19) The plan, the design, the arrangement of the driveway, the connections to Coverstone Drive and the Ashton Avenue right-of-way, and, also, there

was a discussion as to whether there should be a requirement to construct Ashton Avenue or a requirement to dedicate the right-of-way. (p. 20)

The County has a site plan in its possession dated March 3 as being received by the Public Works Department and a marked copy to the Planning Department. This preliminary site plan for Manassas Quads shows Ashton Avenue, i.e., the right-of-way being dedicated, through the tract. (p. 17)

IV. IMPROVEMENT OR DEDICATION.

There was no firm policy then and there is no firm policy now, from the Planning Office, as to whether a developer is responsible for construction of roads of this type which serve a wider area than the site itself. (p. 34) He could not recall whether there was any particular conclusion to the discussions as to whether the developer should be asked to make the improvement. After extensive questioning, the witness was quite firm that there were no written plans and no firm conclusions reached as far as this particular site. (p. 37)

In recalling a particular meeting where Mr. Rose from McKeon was present as well as representatives of the Highway Department and Public Works, and possibly Mr. Hellwig, Ashton Avenue was discussed - where it would be located, what its purpose was. (p. 39) They might also have discussed whether it should have been constructed by the developer, but the witness couldn't recall what the recommendation was

on that or if they had one.

He could not recall whether or not the Planning Office recommended that the developer construct the four lane section or not. (p. 32)

In the report dated March 27, 1972, it is stated that the site will be bounded on the east by a proposed arterial. A recommended set-back for the arterial was 50 feet for all buildings, yet one building is as close as 22 feet. The report does not state whether or not there was a recommendation that the builder construct and, to the witness's knowledge, there is no recommendation in writing from the Planning Office that the builder be made to construct Ashton Avenue through the site.

V. NO THREAT OF EMINENT DOMAIN.

At no time, at any of the meetings or discussions held with the developer or with the highway department employees, did anyone make a threat to condemn (p. 22) It was the position of the Planning Department that it was a necessary part of the road network to serve the area and that site plans should also reflect the necessary road networks. At no time was the word "eminent domain" mentioned or threatened. The planning office has no authority to condemn.

No statement was made that if the site plan would not be approved unelss McKeon dedicated the land to the county which it was asking for. (p. 46)

VI. NECESSITY FOR SPECIAL USE PERMIT.

Since it was the job of the Planning Office to review special use permits as well as site plans, since the Board of Supervisors might find that a condominium special use permit would not be in the best interests of the County at a particular location, it was usually their effort to get a special use permit application to the Board of Supervisors prior to the submission of final plans or even preliminary site plans. (pp. 25 and 26) It was more economical to have a special use permit granted prior to full review of the site plan.

The staff report on the special use permit recommended approval with conditions and referral was made to the Board of Supervisors on March 17, 1972. Staff reports were sent forward with this referral to the Board of Supervisors.

VII. NECESSITY FOR APPROVAL OF BOARD OF SUPERVISORS.

It is not a "fact of life", that unless the land were dedicated, a site plan didn't have a chance of being approved, because the recommendations of the Planning Department and the Public Works Department are not always followed by the Board of Supervisors and "there are cases where the Public Works Department and the Planning Office have made recommendations, and even the Virginia Department of Highways has made recommendations for dedication or improvements, which have not been supported by the Supervisors, and the developer's plan has been approved without these recommendations being

adopted by the Board." (p. 49)

And, there is a definite possibility that, if the site plan had gone to the Board without the land being dedicated with the recommendation that it not be approved both by the Public Works and the Planning Department, that the Board of Supervisors would have approved the site plan anyway.

He did not state to Mr. Rose that if the land were not dedicated he "didn't have a prayer to have the site plan approved" or even words to that effect. (p. 54)

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

McKEON CONSTRUCTION COMPANY,	)	
Plaintiff,	)	
-vs-	)	AT LAW NO. 27087
COVERSTONE LAND LIMITED PARTNERSHIP, et al,	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW

AND RESUME OF FACTS

INDEX

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I. SUMMARY OF ISSUES TO BE CONSIDERED BY THE COURT

Plaintiff, having had at the time of the brief hearing in Court a preliminary view of the arguments which Defendants apparently intend to incorporate in their memorandum, would respectfully submit that in focusing upon the true issues to be divided herein, it would be well to set aside those quasi issues that may well be raised by Defendants while truly not suggested by the facts in this cause, nor by the law determinative of it.

Thus, it is submitted that policies of Prince William County as they may affect other builders, nor the potential reactions of such builders to a decision favorable to McKeon, are not issues presented to the Court since neither Prince William County, nor other sundry parties are privy to the contractual dispute involving the parties to this particular case. Nor should it be an issue that the need for a highway may well have been increased by the fact that Plaintiff's project would create additional traffic in the area. And finally, whether or not Board approval would have been granted should not be an issue since such approval in any event would not lessen the risk of condemnation for the purpose of completing Ashton Avenue should the land, at the time of such completion not have been already acquired either by dedication or through pressure of the County and the State Highway Department.

II. SUMMARY OF McKEON'S POSITION WITH REFERENCE TO THE ISSUES TO BE DECIDED

The issues to be decided, then, are threefold; to-wit: the facts surrounding the dispute such as to justify a rescission by McKeon under Paragraph 12 of the contract under any one or several of the following theories:

1. That, as characterized by one of the partners in Defendant's venture, the legal blackmail of Prince William County, was tantamount to a taking so as to constitute a taking, or an acquisition within the meaning of Section 15.1-486, et seq. of the Code of Virginia (1950) and Article One, Section Eleven of the Constitution thereof, even though the word "eminent domain" was not used specifically.

2. That since the imperative need of Prince William County for a 210 foot easement across the breadth of Plaintiff's property would eventually result in eminent domain proceedings if McKeon did not comply with the request so that the Route 234 Corridor concept may be implemented, the threat of eminent domain or acquisition was well present within the intent and meaning of Paragraph 12.

3. That it being apparent that the parties intended to allow McKeon to rescind the contract if part of the land purchased by it were to be confiscated, albeit with compensation, a fortiori that right would be of greater compelling force if the acts of the County and the Virginia Department of Highway became tantamount to a taking without any compensation by the taking authority.

III. FACTUAL STIPULATION

There having been filed a factual stipulation with the Court, the same is, of course, incorporated herein with only these additional facts which Plaintiff believes to be agreed to, being brought to the attention of the Court: Plaintiff is not relying upon a legal or factual argument centered around any difficulties with the sewer availability at the time of settlement and Defendant is not making any claim for damages as alleged in the counterclaim.

IV. SUMMARY OF TRANSCRIBED TESTIMONY

The testimony to be considered by the Court was elicited from a number of witnesses who were called either because of their affiliation in the Defendant partnership, or the fact that they represented the County and the Commonwealth at all times pertinent hereto, or their role as civil engineer who rendered services to both Plaintiff and Defendants through the course of events to be related herein.

It is respectfully submitted that these depositions will be summarized herein for ease of reading with appropriate references being cited, but that Plaintiff is most agreeable to the entire contents of the depositions being considered by the Court regardless of objections that may have been raised at the time of the taking thereof.

Finally, it is submitted that the depositions of Henry G. Biber, James H. Payne, R. W. Harrison and David L. Camper are being offered to show the demands being made by the

State Highway Department and Prince William County; those of Aaron Tomares and Robert Stein to indicate to the Court how the Defendants themselves looked upon the request being made; and that of George Hellwig to show the effect of these upon the Plaintiff.

A. Deposition of R. W. Harrison.

Mr. R. W. Harrison was the Resident Engineer for the Virginia Department of Highway (V.D.H.). His department received site plan No. 2313 for Manassas Quads and was called upon to make joint recommendation to Prince William County along with the Department of Public Works and the Planning Department. He recalled a meeting on February 22, at which Mr. Hellwig was present as engineer for the Plaintiff during the course of which a request for the right of way was discussed with Mr. Hellwig who objected to the surprise of no one present (T7). Mr. Harrison did remember a telephone call from Mr. Sam Rose, then in charge of the project for McKeon, voicing his opposition to the request (T7-8).

Mr. Harrison also testified that while Mr. Rose tentatively contemplated agreeing to giving a right of way provided another thoroughfare required by the County was moved off the property of McKeon. (T8), this was apparently never seriously considered (T9).

Possibly of greater impact to Plaintiff was the fact that not only was McKeon being requested to give the 110 foot right of way without compensation but was also being

requested actually to build the road at its own expense because this was apparently the usual policy of VDH with the feeling of Mr. R. W. Harrison being that not to ask for such construction in this particular instance would be the setting of a bad precedent (T10).

Finally, it was the testimony of Mr. Harrison that Plaintiff was advised that if it did not comply with the request to construct the road, V.D.H. would have no choice but to recommend to the Board of Supervisors that consideration of the site plan be deferred (T-11).

B. Deposition of David Camper.

Mr. Camper is the Resident Engineer for V.D.H. and that body was in turn one of the reviewing agencies of the McKeon site. In his capacity he recalled several conversations or meetings concerning the Route 234 Corridor and the request for the 110 foot right of way, but denied ever using the words "condemnation" or "eminent domain". While he took the position that his role in the hierarchy of V.D.H. would not allow him to initiate condemnation proceedings (T12) he did concede that if indeed there was a parcel that he felt would be in the best interests of the department to condemn, he would be the one who would make the recommendation that the necessary steps be undertaken (T13-14).

Mr. Camper was asked to elucidate upon what Mr. Harrison had testified to about McKeon being willing to dedicate some land, and his reply would establish once again that this was

strictly settlement type negotiations in the spirit of seeking an amicable resolution (T20).

Probably of greater impact was his testimony that the expense of the construction would have to be borne by Plaintiff (T21) and that should it refuse to do so the recommendation of V.D.H. to the Board of Supervisors would be for deferment of consideration of the site plan (T22-23).

Finally, while it took several pages of questioning (T25-27), to get him to do so, he did finally concede that in view of the nature of the proposed road, should the owners of the land at the time of construction of the Ashton Avenue concept refuse to dedicate the land, condemnation would then have to be the remedy. The Court's attention would also be respectfully called to the fact that this is precisely what Oscar Yates testified to on crossexamination at the hearing in Court after being called as a witness by Defendant.

C. Deposition of Henry G. Biber.

Mr. Biber was the Director of Planning for Prince William County at the times pertinent hereto. The first few parts of his testimony were centered around telling us the importance of the function of his office and why it is vital that the proposed site plans be reviewed carefully. He also testified extensively about the compelling need for the creation of Ashton Avenue and "traffic generation" (T14). In fact, it was compelling enough so that all developers in

the area had apparently to be convinced by the various agencies to "accept" the Ashton Avenue concept (T15).

Mr. Biber recognized the fact that builders were being asked to develop the road, in addition to dedicating the right of way (T20) but took the position that this could not be required although a fitting recommendation would be made to the Board if compliance with the request did not come forth (T20).

Eventually, the testimony of Mr. Biber became centered around the question of how the other builders had been convinced to dedicate their land in spite of their reluctance to do so (T44 to T50) and we would respectfully submit to the Court that this entire segment of testimony deserves to be read not only because of its general tenor but because of the specific testimony about the quasi power play carried out by the various agencies through the use of their recommendation power.

D. Deposition of James Payne.

Mr. Payne was acting Director for the Department of Public Works and testified that the subject site plan came to his agency also for approval and that in February there was a meeting held at which Mr. Rose was present with the primary reason therefor being the question of the right of way.

Maybe of greater interest to the Court should be the knowledge of Mr. Payne (T27) that where the needed land

could not be bought or purchased the right of way would be condemned, and that in fact he did not know of any plans going to the Board of Supervisors for approval without the required dedication being made (T39). He did know that some were originally presented for approval without the right of way but that in due course all the builders were "convinced" that the land ought to be dedicated (T40).

Discussion was also had about the fact that Mr. Payne's office as well as the Planning Department would be able to slow down the processing of the plan considerably if a builder did not cooperate with the request for dedication (T43-44). Mr. Payne further testified that while a site plan should reach the Board in three to four months (T43), this particular plan, filed in November, was still sitting in the middle of April (T50) and that this was because the comments of all the reviewing authorities had not been prepared, with that of V.D.H. being conspicuous by its absence (T50).

And while at Page 52 Mr. Payne did not wish to say that McKeon had refused to dedicate the right of way, he finally admitted that as of April 4 he still had no idea when the application would reach the Board and that he did in fact know that McKeon did object to giving the right of way (T57).

E. Deposition of George Hellwig.

At all times pertinent hereto, Mr. Hellwig was a certified

professional civil engineer representing Plaintiff in its negotiations with all the various government entities involved herein.

Subsequent to the rescission of the subject contract, Mr. Hellwig was retained by Coverstone to complete engineering work on the subject property and at that time he had to show the 110 foot right of way on its site plan (T40) and stated that no attempts were then made by Coverstone to avoid giving the same since that company apparently felt that all possible meetings had been held (T41). In fact, it was his statement to Coverstone that there was no hope for bypassing the request. Moreover, while advising both McKeon and Coverstone, it was his opinion that without the needed dedication, chances for approval of the site plan by the Board were slim indeed since three of the County's departments would be against it (T41-42).

Probably of more importance, was the fact that as of the date of the deposition (9/26/73) Ashton Avenue was in the process of being constructed and that regardless of who the owner of the land was, if the right of way had not been given, <u>even without development of the land, condemnation would have been the necessary remedy of the County or State</u> (T43-44).

Mr. Hellwig further testified that the first time McKeon became aware of this request was by a telephone call from Oscar Yates in January to him (T46) with the net effect that not only did the County and the State request a giving

of land, but also that the developer pay for the construction. It was then that the State and the County took the position that they would not consider the preliminary plan because it did not show the requested right of way (T51-52) and in fact, it was the recommendation of the reviewing agencies that action on the application be deferred (T53). Plaintiff, was, of course, amazed and disappointed since it intended to build units on that land (T50) and consequently requested Hellwig to prepare an in-office plan showing the right of way so that the effect of it could be seen. Although this was subsequently obtained by one of the reviewing authorities, it was never intended to be filed and in fact was marked "Do Not Print" (T53).

Subsequently, Plaintiff explored various avenues of compromise, but was turned down (T55) with the result that to revise the plan so as to relocate the units to accomodate the roadway made the project obviously more expensive for McKeon (T55) because of the cost of the construction of the road of more than $50,000.00 (T57) and the actual loss of open space (T55). This would obviously increase the development cost of the units which would have to be passed on to the consumer and in turn not make them as marketable (T56).

F. Deposition of Robert Stein and Aaron Tomares.

Both of the above depositions are discussed here together because from the point of view of enlightening the Court with reference to how the Defendants themselves felt about the request for the land, these are most enlightening. Both

these gentlemen are partners in the defendant partnership.

While Mr. Tomares called the request an unreasonable request (T8), Mr. Stein was somewhat more bold in his approach and called it "County blackmail" (T56). He went on to state that it was unreasonable (T42) and that in fact he had never developed a piece of property where such demands were not made (T17). After taking over the project he was not told that the site plan would not be approved without the dedication "because the approach is more subtle than that" (T55) but in fact knew that the problem cannot be fought (T62) and that in truth there is no site plan approval for any builder who does not give in to the demands of the County and V.D.H. (T64).

V. LEGAL ARGUMENT AND AUTHORITIES

That Plaintiff is entitled to recover the $50,000.00 which is the subject of this lawsuit can clearly be seen from several arguments and since each of these must necessarily be considered one at a time it is submitted that indeed they are all equally worthy of consideration.

At the outset, while this does not appear to be contested, it should be made clear that clauses of the nature of Paragraph 12 are clearly valid and enforceable in Virginia. Should this be an issue in the eyes of the Court, Plaintiff would be pleased to furnish many authorities which are omitted herein for the sake of brevity.

Probably the leading authority in Virginia would be the

case of the the Board of Supervisors of Fairfax County vs. DeGroff Enterprises, 198 SE2d 600. It is submitted that this case draws a direct parallel to the issues to be decided by the Court since the facts involved herein revolved around the Fairfax County zoning amendment which required the developer or owner of property to rent or sell 50% of their units to persons of low or moderate income.

Under the key number of "Eminent Domain2(1)" the Court ruled that this would constitute a taking within the meaning of eminent domain proceedings and was violative of Section 11 of Article 1 of the Constitution of Virginia and Section 15.1-486 of the Code of Virginia.

It is respectfully submitted to the Court that if our Supreme Court felt that such a zoning amendment was tantamount to a taking without compensation even though the builder in that case would in fact derive some income from the land, a fortiori, the acts of the State in the instant case had to constitute a taking within the concept of eminent domain but with the distinction that in this particular case there was the additional evil of bearing absolutely no income or compensation to McKeon Construction Company.

It is further submitted that there is no magic stated to the words "eminent domain", but rather that the term has been used in legal context as representing the act by the State of taking land previously owned privately. Thus, to say that the Plaintiff here was not faced with precisely the

contingency provided for in the contract because the words "eminent domain" were not used would be as ludicrous as saying that an attempted murder did not in fact take place upon the firing of a gun at the intended victim because of the fact that the accused did not in fact utter any threatening words.

Thus, Black's Law Dictionary states that the right of eminent domain is exercised by the State when it asserts, either temporarily or permanently its dominion over land located within it. This, of course, is precisely what was being done in this instance regardless of the "subtle manner" in which it was being achieved as described by Mr. Stein.

Furthermore, each of the Decenial Digest under the heading of Eminent Domain 2(1) devote a great many pages to annotating cases from all jurisdictions dealing specifically with when a "taking" has taken place within the context of eminent domain, although not specifically labeled as such so as to warrant compensation.

The leading A.L.R. annotation is found at 21 ALR 2d 785 and addresses itself to the question of the marketability of title once condemnation proceedings have been instituted or threatened. However, while all of the cases annotated therein turned on the effect of the fact that there was a threatened condemnation upon the title to the property, in this instance McKeon does not have to go so far as to show the effect of the taking itself, since under the contractual

provision which is the subject of this lawsuit the existence of the threat in itself is sufficient to entitle the purchaser to rescind.

Basically, it is therefore submitted that Paragraph 12 read in its entirety gave to the Plaintiff the right to rescind if there should occur prior to settlement a change that would result in lesser use of the property. The attention of the Court is therefore called to the case of Clay vs. Landreth, 187 Va 169; 45 SE2d 875, wherein land which was the subject of the contract underwent a change in zoning so that it could no longer be used for the intended purpose. Specific performance was sought by the sellers and refused by the Court because of the substantial change in condition and in value.

Finally, the attention of the Court is called to the many cases which are listed in Appendix "A" attached hereto which all basically rule that a taking occurs when the entity clothed with the power to condemn substantially deprives the owner of the beneficial use and enjoyment of his property although an eminent domain proceeding is not actually instituted.

VI. CONCLUSION

In view of all the above authorities, but more particularly because of the factual pattern which emerges through the depositions, it is respectfully urged of the Court that a verdict on behalf of Plaintiff be rendered.

While there are many reasons to sustain such a verdict, probably the most compelling can be clearly seen when one looks at the total facts. For indeed, it is submitted that clearly, the event contemplated by the parties took place when the County blackmail described by Mr. Stein was applied thereby creating the damages which were testified to by Mr. Hellwig. But even more precisely did that event reveal itself to have taken place when the greater number of all the witnesses called agreed that should the land not be dedicated so that a road could be built which was not an in-subdivision street but a peripheral thoroughfare, condemnation would be the logical remedy. This being true regardless of who owned the land at the time or whether or not Board approval had been granted, it is clear that as of the date of settlement part of the Plaintiff's land was about to be acquired and that at the very least there existed a threat of such acquisition within the terms of the contract itself. That compensation for the same was not forthcoming compounds the acts of the State rather than excuse it as must necessarily be argued by the Defendant.

Plaintiffs therefore respectfully urge the Court to find in its favor and grant the judgment accordingly.

s/

Jean-Pierre Garnier, Attorney for
McKeon Construction Company

TRAMONTE, KOHLHAAS & GARNIER

By: s/_____
Jean-Pierre Garnier
210 East Broad St.
Falls Church, Va. 22046

I hereby certify that a true copy of the above pleading was delivered or mailed by me to counsel of Record this 25th day of January 1974

s/_____

APPENDIX "A"

Griggs vs. Allegheny County 109 PLJ 89 (Pa.)

> "A taking occurs when the entity clothed with the power of eminent domain substantially deprives the owner of the beneficial use and enjoyment of his property."

Cleaver vs. Board of Adjustment 200 A2d 408 (Pa.)

Thornburg vs. Portland 376 P2d 100

Ghaster Property vs. Preston 184 NE2d 552

State vs. Casey 115 NW2d 749

Commission of Natural vs. S. Volpey & Co. 206 NE2d 666 (Mass.)

Stevens vs. City of Salisbury 214 A2d 775 (Md.)

Dept. of Highway vs. Cochane 397 SW2d 155 (Ky.)

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

9302 Peabody Street
Manassas, Virginia 22110
February 4, 1974

JEAN-PIERRE GARNIER, Esquire
Attorney at Law
210 East Broad Street
Falls Church, Virginia 22046

MISS BARBARA J. FRIED
Attorney at Law
Suite 505, Executive Building
Springfield, Virginia 22150

Re: McKeon Construction Company vs.
Coverstone Lane Limited Partnership, et al
At Law No. 27087

Dear Counsels:

It is my decision to grant the plaintiff a judgment against the defendant for the sum of $50,000.00 with interest from March 14, 1972 until paid.

Notwithstanding that Paragraph 12 of the contract is entitled "Condemnation", the content is much broader than the exercise of eminent domain. The phrase, "any threat or eminence of any such acquisition", encompasses planning, recognition of need or potential acquisition by a governmental agency to a degree of probability; the Staff of Prince William County and State Highway Engineers recognized the need and resolution thereof in a 110' right-of-way, whether immediately or in the future. The existing situation in reviewing the plaintiff's site plan necessitated a declaration of the need for the 110' right-of-way. The totality of

circumstances then existing created a threat or eminence of acquisition either by dedication as enabling approval of the site plan or the ultimate alternative of eminent domain. In other words, the necessity existed and resolution by acquisition, either by dedication or condemnation was eminent, as later came to fruition.

Mr. Garnier is requested to prepare an order in the above decision.

Sincerely yours,

PERCY THORNTON, JR.

PTJr.:d

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

McKEON CONSTRUCTION COMPANY, Plaintiff, v. COVERSTONE LAND LIMITED PARTNERSHIP, Defendant.	))))))))))	At Law No. 27087

ORDER

THIS 14th of January, 1974, came the Plaintiff and Defendant, Coverstone Land Limited Partnership, by counsel, and in person, Defendant Mitchell Cutler not being present, and pursuant to stipulation previously made, presented evidence to the Court through the introduction of depositions previously taken and the calling of one additional witness by Defendant Coverstone with Plaintiff being duly afforded an opportunity to cross-examine him. Whereupon Plaintiff and Defendant Coverstone requested leave to file memorandums of law and which were duly filed, and the Court having duly considered the matter it is hereby

ORDERED, DECREED and ADJUDGED that Plaintiff be, and it hereby is, awarded a judgment in the amount of $50,000.00 with interest thereon at the rate of six percent (6%) per annum from the 14th day of March 1972, and that Defendant Mitchell Cutler, by paying said sum of $50,000.00 along with any interest which may be in his possession into the registry

of this Court upon this Order becoming final, be discharged from any further liability hereunder. Any interest accrued on the aforesaid Certificate of Deposit shall be credited toward the interest payable on this judgment.

To the award to Plaintiff, the Defendant notes its exception and objection because the ruling is contrary to the law as set forth in Defendant's Memorandum of Law dated January 28, 1974, this being Defendant's first opportunity to note its objection.

IT IS FURTHER ORDERED, DECREED and ADJUDGED that the execution of the judgment awarded to the Plaintiff is hereby suspended for thirty (30) days from the entry of this Order, conditional upon the execution of a supersedeas bond in the penalty of $5,000.00 within twenty (20) days from the entry of this Order. Such period shall be in addition to the period a petition for appeals is in the hands of the Supreme Court of Virginia, if such petition is filed within the proper period.

By endorsement of counsel for Plaintiff, it is noted that the Plaintiff has no objection to the amount of the bond because the judgment can be satisfied from the funds paid into the registry of this Court.

Entered this 27th day of April, 1974.

s/ Percy Thornton, Jr.
JUDGE

WE ASK FOR THIS:

TRAMONTE, KOHLHASS & GARNIER

By s/_____
Jean-Pierre Garnier
Attorney for Plaintiff
210 East Broad Street
Falls Church, Virginia 22046

SEEN AND AGREED:

s/_____
Mitchell Cutler
1120 Connecticut Avenue, N.W., Suite 1010
Washington, D. C. 20036

SEEN:

FRIED, FRIED & KLEWANS

By s/_____
Barbara J. Fried
Attorney for Defendant
The Executive Building
Springfield, Virginia 22150

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

McKEON CONSTRUCTION COMPANY, Plaintiff, v. COVERSTONE LAND LIMITED PARTNERSHIP, Defendant.	))))))))))	At Law No. 27087

NOTICE OF APPEAL

Counsel for Coverstone Land Limited Partnership, the Defendant in the above-styled case, hereby gives Notice of an Appeal from a final judgment entered herein on April 22, 1974.

The said Coverstone Land Limited Partnership, the Defendant in the above-styled suit, will apply to the Supreme Court of Virginia for a Writ of Error to said judgment; and herewith sets forth Assignments of Error as follows:

1. The Court erred in awarding Plaintiff the return of its $50,000.00 escrow deposit together with interest from March 14, 1972, because Defendant was entitled to that sum as liquidated damages.

2. The Court erred in ruling that Paragraph 12 of the contract between the parties entitled "Condemnation" was broader than the exercise of eminent domain. Paragraph 12 states:

> "12. Condemnation. In the event that at the time of settlement all or any part of the property is (or has previously been) acquired, or is about to be

acquired, by authority of any governmental agency in the exercise of its power of eminent domain or by private purchase in lieu thereof (or in the event that at such time there is any threat or imminence of any such acquisition by any such governmental agency), purchaser shall have the right, at its option, to terminate this contract and recover its deposit hereunder, or to purchase only so much of the property not condemned or under threat of condemnation, in which event the purchase price and terms shall be adjusted accordingly."

3. The Court erred in its letter of opinion dated February 4, 1974, in not considering the following pivotal and germane issues, although they were submitted to the Court for its consideration in Defendant's Memorandum of Law:

a) Was the request by the County staff of Prince William County that the Plaintiff dedicate a 110 foot right-of-way tantamount to a refusal by the Board of Supervisors to accept Plaintiff's site plan absent the dedication.

b) Was the action set forth in subparagraph (a) unreasonable, arbitrary, and capricious and not a valid exercise of the police power.

c) Did the action set forth in subparagraph (a) amount to an attempt to appropriate Plaintiff's property without just compensation.

d) Is an attempt to appropriate Plaintiff's property without just compensation, an illegal act, equivalent to a threat to use the power of eminent domain by a governmental agency under the contract.

e) Did the contract contemplate an illegal act.

4. If the Court did consider the aforementioned issues set out in Paragraph 3, then it erred in not answering each of them in the negative.

5. The Court erred in finding that the request of the County of Prince William for a right-of-way dedication by

the Plaintiff was equivalent to the threat of the exercise of its power of eminent domain.

6. The Court erred, having decided that "plaintiff's site plan necessitated a declaration of the need for the 110' right-of-way", in not finding that the request for the dedication was a valid exercise of the police power.

7. The Court erred in not finding that the action set forth in paragraph 3(a) was authorized by the Code of the County of Prince William, Sections 20-107, 20-119, and 20-122, and in accordance with the enabling legislation, Title 15.1-465, 15.1-466, 15.1-489 and 51.1-427 of the Code of Virginia of 1950, as amended.

8. The Court erred in not finding that the action set forth in paragraph 3(a) was authorized by Section 14-58 of the Code of the County of Prince William and in accordance with the enabling legislation, Title 15.1-465 and 15.1-466.

9. The Court erred in not holding that the burden was on the Plaintiff to prove that the action set forth in paragraph 3(a) was unreasonable and arbitrary and bore no substantial relation to the public health, safety, morals or general welfare.

10. The Court erred in not holding that the contract contemplated only legal acts of any governmental authority.

11. The Court erred in equating an attempted use of the police power, whether valid or not, with a threat or imminence of the use of the power of eminent domain.

The Stipulation signed by both parties, the Memorandum of Law, together with attachments, filed previously by Defendant and the Memorandum of Law filed previously by the Plaintiff, and the Depositions of James H. Payne, George Hellwig, David L. Camper, R. W. Harrison, Henry G. Biber, Aaron Tomares and Robert E. Stein, are to be filed and shall be made part of the record pursuant to Rule 5:9.

COVERSTONE LAND LIMITED PARTNERSHIP

By s/ Barbara J. Fried
Barbara J. Fried

FRIED, FRIED & KLEWANS
The Executive Building
Springfield, Virginia 22150

CERTIFICATE OF SERVICE

I hereby certify that on this day, May 9, 1974, a copy of the foregoing was mailed, postage prepaid to Jean-Pierre Garnier, Attorney for Plaintiff, 210 E. Broad Street, Falls Church, Virginia 22046.

s/ Barbara J. Fried
Barbara J. Fried

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

McKEON CONSTRUCTION COMPANY,	)	
Plaintiff,	)	
v.	)	At Law No. 27087
COVERSTONE LAND LIMITED PARTNERSHIP,	)	
Defendant.	)	

ORDER

On the application of the Defendant, it is hereby

ADJUDGED, ORDERED AND DECREED that in lieu of the posting of the supersedeas bond in the penalty of $5,000.00, the Defendant may post with the Clerk of the Court a savings certificate in the face amount of $5,000.00. A photostat copy of said savings certificate shall be attached to the papers filed with this case, and the original shall be retained in the safety deposit box of the Clerk of the Circuit Court of Fairfax County.

Entered this 9th day of May 1974.

/s/ Percy Thornton, Jr.
JUDGE

WE ASK FOR THIS:

/s/ Barbara J. Fried
Barbara J. Fried
Counsel for Defendants
FRIED, FRIED & KLEWANS
The Executive Building
Springfield, Virginia 22150

APPEAL BOND

Know all men by these presents that we, Coverstone Land Limited Partnership, as principal, and Peerless Insurance Company, as surety, are held and firmly bound unto the Commonwealth of Virginia in the sum of Ten Thousand and no/100 Dollars ($10,000.00) to the payment whereof we bind ourselves, our heirs and personal representatives, jointly and severally and firmly by these presents. Witness our hands and seals, this 12th day of December 1974. We hereby waive our homestead exemptions as to this obligation.

The condition of the above obligation is such, that whereas Coverstone Land Limited Partnership has obtained an appeal from a Decree entered by the Circuit Court of Fairfax County, Virginia on the 22nd day of April 1974, in a suit styled McKeon Construction Company, Plaintiff, against Coverstone Land Limited Partnership, Defendant.

But it is provided that the said appeal is not to be effectual until the Appellant, or someone for him shall enter into bond, with sufficient security, in the Clerk's Office of the said Circuit Court of Fairfax County, Virginia in the penalty of $10,000.00, conditioned as the law directs.

NOW THEREFORE, if the said Coverstone Land Limited Partnership shall perform and satisfy the decree of the said Circuit Court of Fairfax County, Virginia in case such decree be affirmed, or the appeal be dismissed, and shall also pay all damages, costs and fees which may be awarded against or incurred by the Appellant in the Supreme Court of

Appeals of the State of Virginia, and all actual damages incurred in consequence of the supersedeas, then this obligation to be void, otherwise to remain in full force and virtue.

COVERSTONE LAND LIMITED PARTNERSHIP

By s/ Barbara J. Fried, Attorney and Agent

PEERLESS INSURANCE COMPANY

By s/ Joann Buschow

Signed, sealed and acknowledged by each of the above named obligors before me this 12th day of December, 1974.

s/ Edward E. Young
Deputy Clerk