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SUPREME COURT OF VIRGINIA
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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 I

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

APPENDIX

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

McKEON CONSTRUCTION COMPANY American City Building Columbia, Maryland	:	
Plaintiff	:	
vs.	:	At Law No. _____
COVERSTONE LAND LIMITED PARTNERSHIP 8415 Arlington Boulevard Fairfax, Virginia SERVE: AARON TOMARES, Partner	:	
Defendant	:	
and	:	
MITCHELL S. CUTLER 1120 Connecticut Avenue Washington, D. C.	:	
Defendant	:	

MOTION FOR JUDGMENT

COMES NOW the abovenamed Plaintiff, by Counsel, who moves for a judgment against Defendant Coverstone Land Limited Partnership in the amount of FIFTY THOUSAND AND NO/00 Dollars ($50,000.00) with interest thereon from the 14th day of March 1972, and as grounds therefor states as follows:

1. That on or about the 17th day of September 1971 the Plaintiff executed a check in the amount of Ten Thousand and No/100 Dollars ($10,000.00) made out to the order of Mitchell S. Cutler and delivered to Mitchell S. Cutler and that on or about the 28th day of October 1971 a further check in the amount of Forty Thousand and No/100 Dollars ($40,000.00) was

executed by the Plaintiff made out to the order of Mitchell S. Cutler and delivered to the aforesaid Mitchell S. Cutler.

2. That the above checks were delivered to Mitchell S. Cutler in his capacity as escrow agent under the terms of a certain real estate contract, which bears no date, but a copy of which is attached hereto and made a part hereof. The aforementioned total amount of $50,000.00 constituted the deposit agreed upon in Paragraph One thereof.

3. That Paragraph Twelve thereof gave Plaintiff an option to terminate the aforesaid contract and to recover its deposit in the event of the taking place of contingencies contained therein.

4. That said contingencies did in fact take place and Plaintiff exercised its option to terminate the contract and requested of Defendant Coverstone Land Limited Partnership to return its deposit; that said Defendant has refused and continues to refuse to instruct the aforesaid Mitchell S. Cutler as escrow agent to refund the said deposit to Plaintiff. That the aforesaid demand for a return of the deposit was made on the 14th day of March 1972.

WHEREFORE the Plaintiff moves as follows:

A. For a judgment against the Defendant Coverstone Land Limited Partnership in the amount of $50,000.00 with interest thereon from March 14, 1972.

B. For the aforesaid judgment to be partially satisfied by the amount of the deposit held by Defendant Cutler.

C. That said Defendant Cutler be directed, ordered and authorized to place the aforesaid amount into a savings account pending the outcome of this suit, or in the alternative to be directed to pay such amount unto this Court with the Clerk thereof being authorized and directed to deposit it into an interest bearing account.

McKEON CONSTRUCTION COMPANY
By /s/ Jean-Pierre Garnier
Jean-Pierre Garnier, Attorney
for Plaintiff

TRAMONTE, KOHLHAAS & GARNIER

By /s/ Jean-Pierre Garnier
Attorney for Plaintiff
210 East Broad Street
Falls Church, Virginia 22046

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

McKEON CONSTRUCTION COMPANY American City Building Columbia, Maryland	:	
Plaintiff	:	
vs.	:	At Law No. 27087
COVERSTONE LAND LIMITED PARTNERSHIP 8415 Arlington Boulevard Fairfax, Virginia	:	
Defendant	:	
and	:	
MITCHELL S. CUTLER 1120 Connecticut Avenue Washington, D. C.	:	
Defendant	:	

ANSWER AND GROUNDS OF DEFENSE

ANSWER

COMES NOW Coverstone Land Limited Partnership, and for its Answer to the Motion for Judgment states as follows:

1. Defendant does not have sufficient knowledge or information to either admit or deny the allegations set forth in Paragraph 1 of the Motion for Judgment and, therefore, demands strict proof thereof.

2. Defendant admits the allegation contained in Paragraph 2 of the Motion for Judgment insofar as it posits an existence of a certain real estate contract with an agreed upon deposit of FIFTY THOUSAND AND NO/100 DOLLARS ($50,000.00). Defendant does not have sufficient knowledge to either admit or deny the remainder of the allegations set

forth in Paragraph 2 of the Motion for Judgment.

3. Defendant admits the allegations contained in Paragraph 3 of the Motion for Judgment.

4. Defendant denies the allegations set forth in Paragraph 4 and demands strict proof thereof, except that Defendant admits that it has not instructed the aforesaid Mitchell S. Cutler to refund the deposit to Plaintiff.

5. Anything not specifically admitted is hereby denied.

GROUNDS OF DEFENSE

1. On March 28, 1971, McKeon Construction Company ratified a contract by and between itself and Coverstone Land Limited Partnership for the sale of certain property as set forth in the contract attached hereto and incorporated herein by reference. Pursuant to the provisions of the contract as set forth in Paragraph 1 and Paragraph 4 and Paragraph 16, McKeon Construction Company was required to place a deposit of $50,000.00 to be held by Mitchell S. Cutler, Attorney, who was required to send proof of the amount to be held in escrow.

2. To the best of Defendant's information and belief, the aforesaid $50,000.00 is held by Mitchell S. Cutler.

3. On March 14, 1972, Plaintiff by notice to Defendant, declared its intention to default.

4. Pursuant to Paragraph 7 of the contract, Defendant is entitled to the aforesaid $50,000.00 as fixed and liquidated damage.

WHEREFORE, having fully answered, this Defendant prays

that the Motion for Judgment against it be dismissed and that it be awarded its costs in its behalf expended.

COVERSTONE LAND LIMITED PARTNERSHIP

By s/ Aaron Tomares
General Partner

FRIED, FRIED, KLEWANS & LAWRENCE

By: s/ Barbara J. Fried
Barbara J. Fried
Attorney for Defendant
Coverstone Land Limited Partnership
The Executive Building
Springfield, Virginia

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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

McKEON CONSTRUCTION COMPANY, :

Plaintiff, :

vs. : At Law No. 27087

COVERSTONE LAND LIMITED PARTNERSHIP, et al., :

Defendants. :

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

Falls Church, Virginia

Tuesday, August 14, 1973

Deposition of AARON TOMARES, taken pursuant to notice and stipulation by and between counsel, before Barbara J. Fried, a notary public in and for the State of Virginia, At-Large, at the offices of Tramonte, Kohlhaas & Garnier, 210 East Broad Street, Commencing at 1:25 o'clock p.m.

APPEARANCES:

TRAMONTE, KOHLHAAS & GARNIER
By JEAN-PIERRE GARNIER, ESQUIRE
For the Plaintiff

MRS. BARBARA J. FRIED
For the Defendants

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P R O C E E D I N G S

Whereupon,

AARON TOMARES,

being first duly sworn by the notary public, was examined and testified upon his oath as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. GARNIER:

Q State your full name for the record.

A Aaron Tomares.

Q What is your address?

A 7108 Nevis Road, Bethesda, Maryland.

Q Tell us what your occupation is.

A I am a builder.

Q What is your relationship to Coverstone Land Limited Partnership?

A I am one of the partners.

Q When was that partnership formed?

A I guess early 1970.

Q It was formed for the purpose of purchasing the Coverstone tract, is that correct?

A Correct.

Q Could you tell me who, if anyone, on behalf of the partnership participated in the drafting of the sales contract

which is the subject of this lawsuit?

A I can tell you who participated in the negotiation of it.

Q Tell me that.

A We didn't draft the contract.

Robert Stein and myself.

Q Subsequently this led up to a contract being drafted in Danzansky's office?

A Right.

Q Was that reviewed by any attorneys for your partnership?

A I imagine so. I don't recall.

Q Do you recall whether or not the contract was reviewed by the partners, themselves?

A I know that I reviewed it.

Q Anyone else, to your knowledge?

A It is a little hazy right now.

I know it was reviewed. I can't tell you specifically.

Q Was it taken, to your knowledge, to attorneys for review because somebody told you?

A I really don't recall.

We often reviewed them ourselves.

I can't give you an answer on that.

Q When is the first time that you became aware of the fact that problems were developing, at least as far as the McKeon Construction Company was concerned, about settling under the terms of the contract?

A On the 14th of March.

Q You heard Mr. Stein testify about a meeting sometime in February?

A Yes.

Q Were you present at that meeting?

A I think Mr. Stein's testimony is a little bit fuzzy in that area and he got a couple of meetings run together that didn't happen at the same time.

Q How many meetings do you remember?

A We had a meeting in February at our office with Mr. Rose and Mr. Stein and Mr. Hyman and myself which subsequently led to a meeting in Mr. Helwig's office, in which Mr. Kohlhaas was present with Mr. Rose, and myself on behalf of my partners, and George Helwig.

Q Do you recall how the first meeting was initiated?

A Yes.

Rose sent us a letter in which he enclosed a copy of a letter that he had received from John Sloper of the Greater Manassas Sanitary District and the letter in essence said that

the sewer hookups that we had referred to in a previous letter we sent you are okay, but you can't have use of the facilities until 200-some odd days after sending that letter.

We were contacted by either Mr. Rose or Mr. Hyman suggesting a meeting and we, in fact, had a meeting.

Q What do you recall transpired at the meeting?

First of all, what is your overall view of the purpose of the meeting?

A The purpose of the meeting was, as Rose stated, that he was a little bit concerned about the length of time between settlement and when he was going to be physically able to use the sewer and he wanted to discuss the possible extension of settlement.

Q Was there anything in the contract about a sewer being available as of the date of settlement?

A No.

Q Let me ask you about your interpretation of this particular clause of the contract.

I am talking about A, clause 10, page four.

A I can tell you exactly what clause I am referring to.

Q All right, sir.

A We were assembling a piece of property. There was

an extension of land located on that piece of property and we wanted that piece of property.

There was no right-of-way.

There were no sewer lines, water lines to it.

We were concerned that when we got a site plan approved and were ready to start construction that there would be no physical facilities at the site to hook up to.

So, as a matter of fact the completed contract included a plat which was attached and designated certain sewer lines which were to be constructed at some point on the parcel that was being sold to McKeon.

Q So, this is in reference to bringing a line to the sewer lines?

A The physical sewer lines.

Q Was this ever done?

A Yes.

Q Was it done by the date of the proposed settlement?

A Yes.

Q When was it done?

A It was commenced immediately subsequent to the receipt of McKeon's letter of January 6 indicating that he was going to go to settlement, or indicating that he was not exercising his option to get out of the contract.

As soon as we received assurances from him that he was going to go to settlement we went and proceeded to construct those lines.

Q You are saying this had nothing to do with the availability of sewer taps, themselves?

A No. There is ~~no~~ a provision in the contract that even contemplates that sewer taps might not be available.

Q So, the purpose of the meeting was to discuss the concern that Mr. Rose had about the effect of this letter upon the development of the land?

A Right.

Q What was decided, if anything?

A Well, what was decided at that meeting was that we would prepare an amendment to the contract which would extend Mr. Rose's settlement date.

Q Was that, in fact, prepared and signed?

A It was, in fact, prepared and not signed.

Q Is this the meeting at which a question of the highway easement came up, also?

A At this meeting Mr. Rose also mentioned that the highway department had requested a 110-foot right-of-way from him.

Q What was discussed about that at the meeting?

A We told him we thought it was an unreasonable request and we suggested that he could possibly get around this requirement.

Q Was it, in fact, suggested to him that you pool your experience and try to help him?

A What we did suggest is that we have a meeting at Helwig's office.

I think I also suggested to Mr. Rose that if he got himself the right attorney by taking his attorney down to the county or state he would be able to get around this and I did recommend somebody to him.

We, in fact, did have a meeting at Helwig's office.

That is the meeting Mr. Stein referred to.

And your partner was in attendance with him at that meeting.

Q What was the purpose for meeting in Mr. Helwig's office?

A The reason the meeting was held in Helwig's office: Sam was concerned about this 110-foot right-of-way in that it might have a serious impact on the site plan.

And the purpose of meeting in Helwig's office was to determine whether it really did have an impact on the site plan.

Q What did Helwig --

A As far as that, it didn't have an impact. There was no loss of density.

Q What did Helwig say at the meeting?

A I don't remember.

Q Was there any suggestion that a meeting be had with the highway department?

A Yes.

Q Did somebody, in fact, attend on behalf of the partnership?

A No.

Q Was there such a meeting held?

A As far as I know, there was.

Q Did you not attend?

A I did not attend.

I think Mr. Kohlhaas and Mr. Rose attended that meeting.

Q Aside from these two meetings, did you attend any other meetings with Mr. Rose?

A I attended many meetings with Mr. Rose.

Q Dealing with the problems which have given rise to this lawsuit?

A What are the problems that have given rise to this

lawsuit?

Q It has been alleged in the lawsuit -- or maybe you don't know that -- that my client would not settle because (1) of the sewer problem, and (2) the request of the highway department.

A We had two or three meetings with Mr. Rose.

One of them was around the 15th or the 29th of February. I don't know exactly which.

And we had a subsequent meeting at Helwig's office.

We had one or two other meetings, at which I met with Mr. Rose for a few moments to discuss briefly how he was progressing with things, and they might even have been telephone conversations.

I don't recall where we did discuss these two problems with him.

At no time during the course of those meetings did they ever appear, at least from what Mr. Rose said, to have been serious enough concerns for him not to want to go to settlement.

He kept assuring us he was going to settlement anyway, that he might need a little more time; maybe he didn't want to put up all the money at one time.

But he never said these things were serious enough

not to want to go through with the deal.

Q Did he ever advise you whether or not he had approached the highway department?

A Yes.

Q What did he say had been done?

A He said they went down to see the highway department, that they were inflexible on this.

Q When was the first time that you became aware of the fact that settlement would not be held on this case?

A On the 14th of March.

Q When you got that letter?

A Right.

Q Did anybody on behalf of the partnership try to get in touch with Sam Rose?

A The letter was delivered by hand.

Sam came himself. He was somewhat apologetic.

He said, "This is a letter. I can't go through with it."

Q What reason did he give you, in addition to the letter, if anything?

A He didn't give us any reason.

I think he said, "The deal is getting a little complicated for us."

And that is pretty much what it was.

I don't recall the exact language of the letter but I think the letter did refer to the 110-foot right-of-way.

Q Was there any discussion about the highway department from what was in the letter?

A We didn't have any discussion.

Q What was the reaction of the partners to this news?

A I told him that he had a contract and what he was doing now was breaching it and we were going to consider it a breach and we were going to forfeit his $50,000.

Q What did he say to that?

A That is your opinion, you know.

MR. GARNIER: That is all.

MRS. FRIED: No questions.

MR. GARNIER: Do you want him to read his deposition?

MRS. FRIED: I think we can waive.

(Signature waived.)

(Whereupon, at 1:35 o'clock p.m. the deposition was concluded.)

CERTIFICATE OF REPORTER

I, Jeannette Karp, do hereby certify that I took the stenographic notes of the foregoing testimony of Aaron Tomares and that said testimony was thereafter reduced to typewriting under my supervision; that said 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 thereto, nor financially or otherwise interested in the outcome of the action.

_____

Jeannette Karp

CERTIFICATE OF NOTARY PUBLIC

I, Barbara J. Fried, a notary public for the State of Virginia, At-Large, do hereby certify that I swore Aaron Tomares at the time and place aforesaid, and that Jeannette Karp acted as the stenotype reporter of the testimony then and there taken.

Witness my hand and seal this 15th day of October, 1973.

Barbara J. Fried
Notary Public

My Commission expires:
May 25, 1975.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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

McKEON CONSTRUCTION COMPANY, :

Plaintiff, :

vs. : At Law No. 27087

COVERSTONE LAND LIMITED PARTNERSHIP, et al., :

Defendants. :

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

Falls Church, Virginia

Tuesday, August 14, 1973

Deposition of ROBERT E. STEIN, taken pursuant to notice and stipulation by and between counsel, before Barbara J. Fried, a notary public in and for the State of Virginia, At-Large, at the offices of Tramonte, Kohlhaas & Garnier, 210 East Broad Street, commencing at 11:45 o'clock a.m.

APPEARANCES:

TRAMONTE, KOHLHAAS & GARNIER
By JEAN-PIERRE GARNIER, ESQUIRE
For the Plaintiff

MRS. BARBARA J. FRIED
For the Defendants

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P R O C E E D I N G S

Whereupon,

ROBERT E. STEIN,

being first duly sworn by the notary public, was examined and testified upon his oath as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. GARNIER:

Q Mr. Stein, do you want to state your full name?

A Robert E. Stein.

Q Where do you reside, sir?

A 10100 Carter Road, Bethesda, Maryland.

Q Are you married, sir?

A Yes, sir.

Q What is your occupation?

A Builder.

Q Do you engage in any particular type of building?

A Single-family houses, garden apartments, townhouses; like that.

Q How long have you been engaged in building, sir?

A Since about January, '62.

Q What did you do prior to that?

A I was in the travel agency business. I was in the real estate business, the export business, in the Army;

covering everything from my graduation.

Q What is your age?

A Forty-five.

Q What is your connection with the Coverstone Land Limited Partnership?

A I am a partner.

Q Can you tell me the names of all the partners in that partnership?

A Myself, Aaron Tomares, Ellis Barron, Marshall Racoosin, Irving Adler.

Whether the wives were in it I don't know.

Those are the principals.

Q Are some of these partners more active in the management of the partnership than others?

A No.

Q What is the primary purpose of the partnership, itself?

A The primary purpose of this partnership was the purchase and development and possible sale of the Coverstone tract.

Q Was it formed specifically for development of this one piece of land; or, is it engaged in other ventures, also?

A This piece of land.

Q How did it happen that various individuals in the partnership came together as a group?

A We were already together. We had all been associated prior to that time, not as one company but we had done joint ventures together.

We knew each other and we purchased the ground together.

Q Who had you been in a partnership with before?

A With Barron and Racoosin.

Adler, I don't believe he had been a partner. We bought ground from him. We built side by side.

We were familiar with him and his operation.

Q Were most of these associations formed for the purpose of buying land and either developing or reselling it for redevelopment to somebody else?

A The ~~corporations~~ Associations were always formed for the purpose of one specific piece of ground.

Q In this particular case you formed it for the purpose of purchasing the Coverstone tract?

A Yes, sir.

Q Where is it located?

A In Prince William County, ~~Town of Manassas.~~

Q What is the specific location?

A It is off of Route 234, near Route 66 intersection.

Q How many acres did it comprise?

A It originally comprised 67 acres.

Q Do you recall how this piece of land came to the attention of the various individuals who eventually formed the partnership for the purpose of purchasing it?

A A real estate broker by the name of D. J. Hyman brought it to our attention.

Q You say he brought it to your attention.

Did he bring it to the attention of one of you individually, or to one of your corporations or another partnership?

A He brought it to the attention of me and Aaron Tomares who were already partners over a long period of time and he mentioned he had a piece of ground, which is a very routine type of thing in our business.

Q Did he tell you more about it?

A I am sure he did because that would be the drill.

Q What did you do when he advised you that he might have a piece of ground for you?

A We asked him all the particulars about it which I don't recall at the moment, and we went down to look at it.

Q Did he have any engineering work to present to you

at that time?

A No. He had the boundary. I don't believe he had any engineering work whatsoever.

Q Prior to deciding to buy this particular piece of land -- which you eventually did; is that correct?

A Correct.

Q -- did you consult with the other partners in this venture?

A Yes.

Q Who did you consult with?

A Each of the people named.

Q In the other ventures that you had had in the past involving other pieces of land, were there other partners who were not partners in this particular transaction?

MRS. FRIED: Would you clarify that question?

THE WITNESS: Other partners other than I already named?

BY MR. GARNIER:

Q Any other partnerships where there might be individuals that might not become involved.

MRS. FRIED: I object. I don't see how this relates to this venture.

MR. GARNIER: This is background. I note your

objection.

THE WITNESS: Have we ever had any other partners? Yes.

BY MR. GARNIER:

Q How did you determine to approach these particular partners who are involved in this transaction as compared to the ones you had in other partnerships?

A We were much closer to these partners.

Q Did you approach them and tell them that D. J. Hyman had a piece of property that they might be interested in?

A Yes.

Q What is the sequence of events?

Did you form the partnership and then go out and look at the land some more; or, did you satisfy yourselves that the land was interesting?

A Well, we would naturally satisfy ourselves on the ground or we wouldn't have purchased it; and we went through a routine process that we always did on various items of interest and their requirements.

Q Can you tell me what specifically that routine consisted of in reference to this piece of property?

MRS. FRIED: Could you be specific, again, as to

what? You are asking him to tell about what he did?

MR. GARNIER: I am using the words that he used. He said that he had a routine that he would go through to satisfy himself that the land was interesting and I want to find out what he did.

THE WITNESS: We would do what we call check engineering which is a rather broad catchall phrase but in any event we wanted to find out where the utilities were, as an example, to satisfy ourselves with regard to them.

We wanted to check the topography, the soil.

We would also want to check the market.

We would also relate all that to perhaps what the money market was at that time.

BY MR. GARNIER:

Q With reference to the engineering in this particular case, what did you do, sir?

A I can't remember specifically what we were doing on this piece of ground or any other piece of ground.

As I outlined before, we checked the topography, the soil, the utilities.

Are there any problems with engineering? For example, are there any bridges to be built? Are there any streams running through the property? Is there any execessively

large storm sewer to be run into that?

Q What did you ascertain with reference to this piece of property, sir?

A Obviously the end result that it was satisfactory, or we wouldn't have bought it.

Q Who was the person or partner in this particular transaction who was in charge of checking into these things?

A I can't remember precisely.

I think it might have been Aaron Tomares more than anyone else.

Q Do you know who looked at the engineering aspects?

A That, in a way, was engineering in the prior question.

Q You think Mr. Aaron Tomares did this?

A On that particular engineering, on that particular piece of ground, I think so.

Q Did that entail going to other persons to get any information as to the engineering?

A (No response.)

Q Such as engineers who might have done work on the land before, for other purchasers?

A Also we might or might not have gone to the County to satisfy ourselves on what might or might not be problems

connected with the ground.

Q To get back to the question of the engineering: Do you recall at this particular time going to other engineers that might have done previous work on the property?

A We went to the firm, but the principals are George and Karl Helwig.

Q That is Springfield Engineering?

A Correct. They changed their name from one to another.

Q What did they have to offer you that gave you any incentive as to whether or not you wanted to purchase the property?

MRS. FRIED: Would you be a little more specific?

BY MR. GARNIER:

Q What did you ask of Mr. Helwig at the time that you checked with him? What were your questions? What were you trying to find out from him?

A First we wanted to know what engineering had been done on it and would he turn it over to us.

I can't recall the total amount of engineering. I think it might have been limited to a boundary survey and possibly a topographic survey.

Q And he gave you the benefit of that?

A He would normally.

Q Would that be George Helwig you spoke to?

A At that time I think it was George.

Q What was the purpose for buying this piece of land? What did the partnership intend to do with it?

A Develop it.

Q Develop it in what direction?

A Well, the ground was zoned RM-1 which in Prince William is multi-family which allows a density of 20 units per acre which is commonly called garden apartment ground, or a lesser density. You can go from 20 down to whatever you choose.

Q Are you saying when you are saying you were going to develop that, that you were doing it for the purpose of reselling or for the purpose of actually going through the full development, yourself?

A The answer to that is we never know at the outset.

We are builders and developers and we buy a piece of ground and in this case specifically we did begin developing it.

We built 204 garden apartments and we were underway.

They were under construction at the time that we were first contacted by Sam Rose.

So, we were developing it but developing a piece of ground doesn't preclude selling part of that ground for profit. We were in business.

Q How much of the original 67 acres did you actually develop by erecting dwellings on it, yourself?

A Ultimately?

Q First, up to the time that you spoke to Sam Rose.

A At that time we were building on roughly, plus or minus, ten acres and we were engineering an additional, roughly, ten acres for the townhouse development, which section was being developed in two phases, as we call it.

Q So, you were actively engaged in developing approximately 20-some acres at that time?

A Plus or minus.

Q What frame of time are we talking about?

A When did we actually begin our development; or, when did we begin processing for development?

Q At the time Sam Rose first spoke to you, what date are we referring to generally?

A As I best recall, we first met Sam Rose in middle June or July of 1971. More than likely it would be July, and at that time we were about to begin Section 1.

We began Section 1 in August of that year.

Q When did you purchase the property, sir?

A I believe ~~he~~ WE settled March of 1970.

Q When did you actually start erecting the dwellings on that first ten acres?

A The first hole was dug the beginning of August of '71.

Q And then you started the engineering work on the other ten acres you were talking about?

A Yes, but we were in engineering at that time.

Q You said earlier that as part of your checking out the property you might have gone to the County or State. Is that correct?

A Yes. It could have been the State; also, most usually the County.

Q Do you recall whether or not this was done in this particular case prior to purchasing the land?

A Did we go to the County?

Q Yes.

A We would normally contact the County and I specifically remember making a trip to the County.

On this piece of ground? -- No.

Did we do it routinely? -- Yes.

Q Do you know whether anybody on behalf of the

partnership might have gone to the County in this particular case?

A My same answer would apply.

Q That routinely you would do so but you don't specifically recall doing it in this particular case?

A We were experienced builders.

I can almost assure you that we did go to the County.

Q What would be the purpose of going to the County? What kind of information would you be checking?

A One part of the County we would approach would be the sanitary district.

As experienced builders, we would want to satisfy ourselves where we were able to bring the sewer and water.

Q Especially in Prince William County.

A In any county.

Q What other part of the County government would you go to?

A Well, to the ground zone. We might want to verify that it was zoned as represented.

Q And you found out it was zoned as D. J. Hyman had told you?

A Yes.

Q Any other parts of the County that you checked with?

A I don't recall checking with any other parts of the County at that time.

Ultimately you get involved with every part of the County.

Q Would you have occasion to check with the Department of Public Works for any reason?

A I think that we would. It would be a relationship between the Department of Public Works and the sanitary district.

Q How about the Virginia Highway Department: Would you have occasion to check with them?

A I am almost certain at that time that we had no need to.

We knew the various avenues of information that were open to us and we would pursue any of them that we felt we were required to pursue.

Q In this particular case did you have any requirement to pursue avenues of information that might be available from the Virginia Highway Department?

A The only thing I can think of is at that time we had to tie in Route 234, a major route in the County.

And did we or did we not worry about tie-in permits? --

Routinely I think we would and we did.

Q Did you have any concern at the time that you purchased the property, or prior to the time you purchased it, about the State or the County needing any right-of-way across the property anywhere?

A The State needing a right-of-way across the property? -- As a routine they always needed a right-of-way and you never did develop without granting them a right-of-way.

Q Did you ascertain in this particular case whether or not there would be any right-of-way or easement required by the County or the State which would affect the development of the property?

A Well, we have never developed a piece of property where the County or the State was not granted a right-of-way across our property.

Q How about the right-of-way for the purpose of putting in a road or a highway?

A It goes both ways.

We didn't develop a piece of property without roads but the County has always made demands on us for dedication of roads.

Q And the demand that might be made by the State as to a particular location of a highway through the property

would affect the development; would it not?

A It would affect the development.

What you are talking about is routine.

Q Whether it be routine or not, in this particular instance did you make any inquiries as to what plans either the State or the County might have for the use of the property with reference to highways that might affect the development by you?

MRS. FRIED: Are you saying: Did they specifically go and say, "Do you have a plan for a road across this property, anywhere on this property?" Did they make specific inquiries in Richmond?

MR. GARNIER: I am asking what they do and I think he is in the best position to tell.

MRS. FRIED: What they did generally; or, in this particular case?

BY MR. GARNIER:

Q In this particular case.

A We developed a site plan and on that site plan the name of the road was Coverstone Drive and it was designed by our engineer.

But part of being able to begin construction and submitting a site plan involved us having not only a road

but every other facet of that site plan run through the interested part of the County and State, to get their approval.

So, a road was designed and ultimately that road was approved by both the County and the State.

Q Aside from submitting the site plan, itself, did you seek any information from the County or the State with reference to any programs either entity might have to institute any condemnation proceeding -- or seek any other easement, for lack of a better word -- that might be required by the State?

A We never had the State bringing a condemnation against us.

Q Then the answer to my question is that you did not do this, in this particular case; is that right?

A Do what?

Q Check with the State as to whether or not there might be such an intent or plan in the offing that might affect the development of the property?

A We had 67 acres with ultimately 20 units per acre, which totaled a lot of units and it was a rather large undertaking and being in the business and having developed for a long time we were aware that during the progress and in the course of this development that we were going to be

making dedications.

Q Aside from being in the business a long time, the question I asked is whether or not you specifically went out to the State or the County and made any inquiries.

That has nothing to do with the period of time you had been in the business.

I am asking you what you did in this particular instance.

A I personally did not go to them to make that inquiry.

Q Do you know whether or not anybody else did on behalf of the partnership?

A No, I don't.

Q Did it subsequently come to your attention that the State Highway Department was requesting a 110-foot right-of-way through the property?

MRS. FRIED: I would object to that as a conclusion that you are asking him to draw.

MR. GARNIER: He can tell me yes, no, or indifferent.

THE WITNESS: Do I answer?

MRS. FRIED: Yes.

MR. GARNIER: Would you read the question again, please?

(Whereupon, the reporter read as requested.)

THE WITNESS: Sam Rose, sometime towards the middle or end of February, 1972, advised us that there was such a request made to him, either from the State or County.

I believe it was 120-foot. It makes no difference whether it is 110 or 120.

BY MR. GARNIER:

Q Are you saying that the first knowledge you had of this was from Sam Rose?

A I think it was. I am almost certain that it was.

A request of that nature would not have been earth-shaking and I could not absolutely remember the first time I heard it but I am almost certain that it was from Sam Rose that I first heard it.

Q In your experience as a builder would it be usual procedure for the State Highway Department to request such a right-of-way at the time a site plan would be submitted for development of the property?

A Would they normally make that?

Q Would that be the time it would be made a request?

A Yes.

Q And did you, in fact, submit the site plan to the department of this piece of property?

MRS. FRIED: When you say "this piece."

BY MR. GARNIER:

Q Sixty-seven acres.

A We didn't put 67 acres in the site plan.

Q You started with the first ten acres and then the next ten acres?

A That is right.

Q You broke it down into what you were actually going to develop at that particular time?

A Into what we call sections.

Q Did Mr. Rose ever advise you as to where the right-of-way would go that was being requested of him?

A Yes.

Q Is it fair to say that this right-of-way would not be located in the part of the property that you had been actively developing, yourself, prior to talking to Mr. Rose?

A Prior to Mr. Rose we were engineering, in a loose phrase, beginning the engineering work on what we called Section 3, which part was included in Sam Rose's contract.

So, we had begun that.

And could it not have affected us? -- Yes.

Q With reference to that particular piece of land, a site plan had not been submitted?

MRS. FRIED: What particular piece?

BY MR. GARNIER:

Q The one affected, Mr. Rose's property.

A The contract for Mr. Rose states 21-plus acres, something like that.

Our Section 3 was roughly ten acres.

That ten acres in our Section 3 was within the 21 acres in the McKeon contract.

Q In Section 3, did you go forward to file a site plan with the County?

A We submitted to the County those that engineering required to complete a site plan.

Q Did anything come to your attention at that time with reference to the 110, 112-foot right-of-way?

A At original submission, no, not to my knowledge, no.

Q And the first knowledge you had of it was from Mr. Rose?

A As I best recall.

Q How did this communication from Mr. Rose reach you? Was it verbal? Was it by mail?

A It was verbal.

I am almost certain he had called us. He had what he considered to be another problem and he asked if we would

meet with him and we agreed at that meeting --

MRS. FRIED: Answer the question. Let him proceed with another question.

THE WITNESS: He mentioned it at that meeting verbally.

BY MR. GARNIER:

Q This was a meeting that he had called?

A Yes.

Q At that meeting he told you that he had several problems?

A He mentioned one, what he termed as another problem.

Q What did he tell you that was?

A He received a letter from the sanitary district and in that letter they had told him that his sewer would not be available, possibly not be available, for 200-some days but that it would be available.

Q What else did he tell you about any problems he might have?

A Just that on the 120-foot request, or the 120-foot right-of-way.

Q Did this meeting come about because he asked for it; or, did you suggest you get together?

A I think he requested the meeting.

Q This is when he called you?

A Yes.

Q Do you recall when this was?

A Middle of February, '72.

Q Was that the first time you had any discussions with reference to any problems that were being initiated after the signing of the contract which is the subject of this lawsuit?

A Was that the first time that had come up?

Q Yes.

A No.

Q What else had come up prior to that?

A In December of '71 -- The contract outlined a date for him of December 10, 1971 by which time he had to unequivocably say yes or no to --

Q Say yes or no to what?

A It was an option period that went up to December 10 but which did not extend beyond it and by that date he had to notify us of whatever means the contract outlined that he either did not want to continue, in which case all parties were relieved from all responsibility under his contract and his deposit; or, that unequivocably he did want to continue and he would then proceed from that date to settlement in

March of 1972.

And the problem he had was that he had not received all the answers from the County that he wanted.

And he asked us if we would give him an extension from that date to, I believe, January 10 of '72 and we agreed that we would and we did.

Q Did you prepare an amendment to the contract?

A We sent him a letter agreeing to it.

Q Were there any other difficulties that Mr. Sam Rose called to your attention after this one but prior to the meeting that you have referred to?

A We had a friendly relationship with Sam and we told him that our phone was open at any time -- and not just Sam, with most builders -- and we continued at this time to be as cooperative as possible.

So, between the time of our first negotiations with him and his ultimately walking away from this thing we had a lot of phone conversations with him. I can't remember how many.

Q When he called you to ask for a meeting did he advise you he was having two problems: One with the sanitary district and the other with the Highway Department?

A When he called me he didn't tell me about the

Highway Department.

Q Only the sanitary district?

MRS. FRIED: What date? Are we back in December?

BY MR. GARNIER:

Q We are back at the phone call that resulted in a meeting.

A This is in February of '72.

Q You said there were no other problems that came up between the December request for an extension and this phone call?

A Sam repeatedly assured us that his engineering was proceeding.

Q These are not problems.

I am asking about problems that may have been called to your attention by Mr. Rose.

A Mr. Rose was beginning there to develop a condominium and the original option up to December 10 had given to him enough time to find out whether or not he would get County approval on this.

I don't know that it was a problem.

Did he view it as a problem or do you? -- I don't know.

Q Aside from that, and up to the time that you had a

meeting because he calls and he tells you there is a problem with the sanitary district, did anything else come up with reference to Mr. Rose's having problems in developing the land that he might have called to your attention?

A No, not that I recall.

Q He called you up in February; is that correct?

A Yes.

Q What did he say to you?

A He said, "I got a letter here from John Sloper."

Q What else did he say and what did you say?

A I mentioned to him what I had outlined before that the sewer would be available, might be available, for X number of days, I believe 200 days.

Q When he suggested to you at that time he wanted to have a meeting with you --

A Yes.

Q -- did you ask him why?

A I assumed he wanted to go over this.

Q Aside from assuming: Did you ask him any questions as to what the meeting was for?

A Well, we had told Rose once earlier that if we could be of any assistance at any time we would, the door was open.

He asked for a meeting and we agreed.

Q Did you consult with your partners as to what this might mean to you?

A I know I mentioned it to some of my partners because they attended a meeting with me.

Q What was your understanding at that time as to what the meeting would be held for that required the attendance of your partners?

A We were ready to get the facts and that is why we went to the meeting.

It doesn't mean it was of a colossal nature.

He received this letter from Sloper, the head of the sanitary district. He was upset. He asked that we meet with him. We agreed.

Q Where was the meeting held?

A I believe it was held at Springfield Engineering Surveys.

Q What took place in that meeting, sir?

MRS. FRIED: Again, it is a little difficult for the witness to respond to such a question.

Would you ask a specific question?

BY MR. GARNIER:

Q What did Mr. Rose say to you and what did you say

to him?

A One thing, I can't give you a verbatim account of the meeting.

After reading the letter and meeting with him, as I can recall I read the letter and said, "You have a sewer," which was not usual at that time because he was already past his option date and we were trying to be helpful but he was concerned about it.

In the letter it appeared that he had a sewer and it also mentioned at that time this 120-foot request for right-of-way.

We agreed with him at that time to go down to talk to the County and/or State.

Q Are you saying that after passing the option date that the unavailability of a sewer would no longer be a factor in the contract?

A Yes.

Q What did Mr. Rose say to you he wanted to achieve through this meeting aside from showing you the letter?

A Sam Rose was an experienced builder. We had slightly more experience in that County than he had, possibly, and only for that reason did we offer him any assistance.

He knew the ins and outs of building. He had been

around for years.

We had been in Prince William County slightly longer than he and we also helped out on revisions, with many views, and --

Q Are you saying the reason for the meeting, as he expressed it, was to get assistance from you with the sewer problem?

A I think he wanted our assistance in establishing when. He wanted, you know --

MRS. FRIED: You have asked I think the same question -- I think he has answered -- about why the meeting was held.

MR. GARNIER: And he told me about Prince William County and I want to find out why the meeting was held; if it was held because my client went to get the benefit of their experience.

MRS. FRIED: I think he answered it.

MR. GARNIER: He didn't answer my question.

THE WITNESS: I don't remember exactly why he wanted the meeting.

BY MR. GARNIER:

Q Did he say at the meeting how this sewer problem, if it was a problem at all, would affect the terms of the

contract?

A I think he might have mentioned something about it affecting the contract and we said, "It doesn't affect the contract at all, you are no longer under the option on this. Your option expired. You are going through settlement."

Q Didn't the contract contain a contingency for availability of a sewer at the time of settlement?

A No.

Q What else was discussed at the meeting?

A The road.

Q How did this come about?

A He mentioned it.

Q What did he say to you about the road?

A He said, "They are asking for a 120-foot right-of-way."

Q When he said "they" did he tell you who "they" were?

A They would be the County.

He knew the routine and we knew the routine.

They could be the VDH or the County, but they worked in conjunction with one another.

Q What was your response to that?

A Simply that if you want any help in trying to reduce the width of the right-of-way, if we could give him any help

we would do so.

He asked for help and one of us, I believe it was Aaron Tomares, went down with him to meet with the VDH.

I repeat, this is nothing unusual.

Q Did he say anything at the meeting with reference to the taking of the land for use of the highway and what that might do to the contract?

A I don't believe that was ever mentioned.

Q He mentioned to you about possibly not settling because this land might be taken away by the State?

A It had no bearing on it.

Q I am asking you what he said.

A If it had no bearing, he didn't mention it.

Q Your testimony is that he said nothing to you about it?

A As I recall, he said nothing about the road, relative to settling.

Q So you are telling me all he did that day with reference to the road, itself, was again to ask for assistance?

A Yes, and to which we agreed.

Q What kind of assistance was he asking of you?

A Simply attending a meeting with him, setting up a meeting and attending it.

Q Earlier he must have told you what the purpose of that meeting would be.

A The 120-foot right-of-way.

Q What was he hoping to achieve?

MRS. FRIED: What meeting?

MR. GARNIER: The meeting.

MRS. FRIED: Are you talking about the meeting they are going to have?

MR. GARNIER: The witness is not confused. A meeting he was asked to set up by Sam Rose with reference to the highway.

Are you confused, Mr. Stein?

THE WITNESS: Slightly.

BY MR. GARNIER:

Q You say that he asked you to set up a meeting with reference to the road?

A It wasn't done precisely that way.

We said, "If you want to have a meeting, we will go with you."

Q Whose idea was it to have a meeting with the Highway Department?

A I don't know whose idea. It could have been anyone's idea.

Q In any event, you remember that a meeting was proposed with the Highway Department?

A Yes.

Q You don't know whether Sam asked for it or you volunteered or one of your partners volunteered?

A I can't recall.

Q With reference to the highway making a requirement of that nature -- and this you remember being discussed at this particular meeting in February -- was that Sam's or somebody else's suggestion that the meeting be held with the Highway Department?

A We did, but that was routine.

Q And did all of you at that time discuss what you would try to achieve with the Highway Department?

MRS. FRIED: When you say "at that time" do you mean present at the meeting?

BY MR. GARNIER:

Q Yes.

A To find out all of the details of the request and perhaps to get them to reduce the width of the right-of-way somewhat.

Q Did Sam Rose say anything at that meeting with reference to what his position would be on the contract if

the highway came in?

MRS. FRIED: Again I must object.

You have asked that question and the witness has answered.

Now, you have rephrased it slightly.

BY MR. GARNIER:

Q Do you remember my question?

A It had nothing to do with it.

Q I am asking what Sam Rose said to you.

A I never recall him saying anything with reference to the validity of the contract and the relationship of this request.

Q Did he at that time or any other time subsequent to that say to you specifically that he did not feel that he would have a settlement under the terms of the contract if the right-of-way was taken by the State?

A I don't recall him making such a comment.

Q Didn't he write you a letter to that effect, eventually?

A Not to my knowledge.

Q Do you know whether or not he wrote one to the partnership which may have been directed to the partnership directly?

A He wrote a number of letters.

I thought I was familiar with them. I don't recall one where he mentioned the road.

I am not saying there wasn't one. I don't recall one.

Q Are you saying that you don't know, here today, whether or not it has been the position of Mr. Rose that he would not settle on the contract because of the right-of-way being requested by the Highway Department?

MRS. FRIED: Are you saying at any period in time?

BY MR. GARNIER:

Q I am asking at any period.

A Did he ever mention a road?

He wrote a letter to us the middle of March and in that letter he stated that he was not going to settlement.

Q So you did get a communication from Sam Rose with reference to it; is that correct?

A In reference to the fact that he was not going to settlement.

Q Did that letter tell you why?

A I am sure it did. You have the letter.

Q I am asking about your recollection.

A My recollection is that on the 14th of March -- he

was to settle on the 15th of March -- he advised us he was not going to settle it.

Q Is it your testimony that prior to that neither you nor anyone in the partnership had any communication from Sam Rose or anyone on his behalf discussing the fact that he would not settle because of the highway problem?

A I don't recall him telling me that.

Q How about anybody else in the partnership?

A You have to ask them.

Q Would it be fair to think that your partners would come and say, "Look, Sam is not going to settle because of the highway problem. Let's be good guys and have a meeting because we are experienced in Prince William County?"

A It didn't go that way.

Q How did it go?

A I don't recall.

Q You don't recall any way it went?

A I told you he mentioned the road at the meeting. He mentioned it to us and at that meeting we agreed that one or more of us would attend a meeting with the Virginia Department of Highways.

Q Is it your testimony that the first time you found out yourselves that he would not settle because of the

highway problem was the day before settlement when he sent you this letter that you are referring to?

A I think he sent us this letter, if I am not mistaken.

Q Is it your testimony this is the first time you found out about this position on the part of Mr. Rose?

A Mr. Rose sent us lots of letters prior to that time and in each one he assured us he was going to settlement.

Q I am asking whether or not it is your testimony that the first time you found out he was refusing to go to settlement because of the highway problem was through the letter of March 14?

A I told you I don't remember the text of the letter of March 14 other than the fact it said he was not going to settlement.

Q When was the first time that you knew that one of the reasons for which he was not settling was because of the Highway Department?

A If I knew it at all it was on March 14.

MRS. FRIED: I object again.

MR. GARNIER: He gives me an answer that is completely unresponsive.

MRS. FRIED: He is responsive. He is not giving you the answer you want.

MR. GARNIER: I ask him a specific question. He gives me an answer about something else.

MRS. FRIED: You asked him when did he, himself, know.

BY MR. GARNIER:

Q You don't understand?

A You ask me something I don't know.

Q If you don't know --

A I don't know.

Q You don't know when he first advised the partnership that he was not settling because of the highway problem.

MRS. FRIED: That wasn't the question.

MR. GARNIER: Note your objection.

MRS. FRIED: I note my objection.

MR. GARNIER: Would you read the question?

(Whereupon, the reporter read as requested.)

THE WITNESS: No.

BY MR. GARNIER:

Q And none of your partners approached you at any time prior to this letter of March 14 to tell you they had been approached by Mr. Rose, either verbally or by mail?

A Not that I recall.

Q Pursuant to the meeting in February was there, in

fact, scheduled a meeting with the State Highway Department?

A Prior to which meeting in February?

Q You had a meeting with Mr. Rose in February when you people volunteered to help him with the Highway Department right-of-way.

A It was at that meeting he mentioned this right-of-way.

Q In response to that you people offered to assist him with the Highway Department, maybe trying to work something out; is that correct?

A Yes.

Q It was discussed at that time, was it not, that possibly a meeting could be arranged with the Highway Department to work on the problem?

A Yes.

Q Was there such a meeting arranged?

A Yes.

Q And do you recall when this took place?

A Not the precise date, no.

Q It would be sometime after the meeting with Mr. Rose?

A It would have to be after that.

Q Was there one such meeting or more than one?

A I told you I didn't attend the meeting, any other

one.

Q Do you know who attended on the part of the partnership?

A I told you it was Aaron Tomares but you would have to ask him.

Q Did Mr. Tomares advise you what had taken place at the meeting?

A I don't recall that he did.

What I tried to convey to you earlier was this: that the request for right-of-way by the State was not a big thing for us, that I would want to say that I considered it personally any enormous request, unreasonable perhaps; but unlike anything that we had been presented with: no.

The State routinely made demands against builders.

Q I take it by that statement that you are telling me: No, Mr. Tomares did not tell you what had taken place at the meeting?

A No. I said I didn't remember because I considered those things routine, as a routine problem to be worked out.

Q Are you saying he might have come back and reported to you but you have no recollection of it?

A I don't recollect.

Q You didn't make a memorandum of it?

A I didn't make a memorandum on that.

Q Between that and the day of trial you would have nothing to refresh your recollection --

A Whether Tomares told me the outcome of that meeting?

Q Right.

A He told me they discussed.

Your best information would come from Tomares.

Q Did he tell you what they discussed?

A He was there.

Q Did he tell you what they discussed?

A I assume they went on to discuss the road.

Q I am asking what Mr. Tomares told you, if you know.

A I already told you I don't remember.

Q Did you have any further contact with Mr. Rose?

A I didn't log it, or anything. I don't think I did.

Q Did any other problems come up after that meeting in February?

A Not that I recall.

Q Were there any meetings scheduled with any attorneys of Mr. Rose or even with Springfield Associates with reference to the request?

A I believe Bob Kohlhaas, your senior partner, was at that meeting at Springfield Survey.

This was the meeting when he mentioned the right-of-way.

I believe it was that meeting that Bob was at.

Q Who attended on behalf of the partnership, if you know?

A I was there. Aaron Tomares was there. I believe Marshall Racoosin was there, and possibly Irving Adler.

Q Do you recall who called that meeting?

A That was the meeting I outlined in some detail in response to his telephone call.

Q That would be the one in February?

A Yes.

Q Who called George Helwig in?

A I don't know it makes a damn bit of difference.

I don't recall: Whoever set up the meeting.

Q You don't call him to meetings all the time, do you?

A I meet with George Helwig frequently.

Q Do you know why he was present at that particular meeting to discuss the sewer problem?

MRS. FRIED: Excuse me. I think this was a meeting at which Mr. Kohlhaas was present.

MR. GARNIER: This is the one he related, the

February meeting; isn't that correct?

THE WITNESS: He is talking about the same meeting.

MRS. FRIED: Could you read back the answer as to what was discussed at that meeting?

MR. GARNIER: Go off the record.

(Discussion off the record.)

BY MR. GARNIER:

Q Do you know that George Helwig was at that particular meeting?

A George Helwig devotes his life and it is his job to know every facet of every department in the County and that is what we rely on him for and that is what we pay him for.

If there was something Sam Rose wanted to talk about, anything, it would be well to do it in the presence of these people.

Q Including the sanitary district?

A Any problems, any part of developments.

Q Was he then called in by Sam Rose or by you?

A I don't know.

Q Aside from Mr. Kohlhaas, was anybody else there with Mr. Rose?

A I don't remember.

Q Was there any discussion at that meeting with

reference to the terms of the contract, itself, as they might be affected by this sewer problem and highway problem?

MRS. FRIED: I object. It must have been five times you asked that same question.

MR. GARNIER: Note your objection.

MRS. FRIED: I note my objection.

THE WITNESS: Sam Rose mentioned the word "option."

We said, "There is no option. This contract is in force."

BY MR. GARNIER:

Q Did Mr. Kohlhaas say anything?

A Not that I recall.

Q You have no idea why he was there to discuss the water problem?

A I have no idea why he was there.

Q Aside from this meeting in February and the one with the Highway Department that you did not attend, do you know of any other meetings that were held with either Mr. Sam Rose or any representative of this company?

A When?

Q At any time, with reference to this contract.

A I met, along with Aaron Tomares and D. J. Hyman, with Sam Rose in our initial contact.

Q Let's limit ourselves to the frame of time after the highway problem that was being raised by Mr. Rose at the initial meeting in February.

A I recall, and I don't recall too much about it other than a final meeting subsequent to that time, and it was at that time, as I recall, that this letter which Sam Rose wrote and which was dated I believe the 14th of March was handed to us.

Q And there was a meeting at that time?

A I don't recall any. If there was such a meeting on this day I don't recall what transpired.

Q I am interested in finding out whether or not there were any other meetings after that initial one in February?

A Not that I attended, to my knowledge.

Q Do you know whether or not there were any meetings held by your partners with Mr. Sam Rose, or any representative of his?

A I couldn't name any meetings or dates or anything like that.

Q Do you know there were any such meetings, regardless of dates, or who attended?

A Do I know anything about them, no.

Q Do you know whether or not there were any? -- is

what I am asking you.

A No.

Q You don't know?

A (No response.)

Q Who was acting on behalf of the partnership in following up this problem with the Highway Department, in assisting Mr. Rose?

A I have mentioned two or three times, to my knowledge, and you have to ask Aaron Tomares.

Q Anybody else for the partnership?

A I don't know.

Q When the letter came that was delivered to you, did you go and speak to Mr. Tomares and say, "Hey, what took place with the Highway Department?"

A Which letter?

Q The letter that told you he was not settling because of the highway problem.

MRS. FRIED: You keep making reference to what the letter said.

MR. GARNIER: He told us the contents.

MRS. FRIED: He said it contained other things.

THE WITNESS: One thing I remember is that he was not going to settlement.

BY MR. GARNIER:

Q When you received that letter that he was not going to settlement, did you speak to any of your partners about it?

A I am sure I did.

Q Did you speak to Mr. Tomares, specifically, and ask him about the result of the meeting with the Highway Department?

A I don't think I did.

Q So that you never found out what had been achieved at that meeting; is that your testimony?

A In my opinion, the thing --

Q I am not asking you about your opinion. I am asking if you found out what was achieved at that meeting?

A I knew what was achieved at that meeting, and they had a discussion.

Q What did you find out was achieved at that meeting?

A I didn't find out what was achieved.

Q I thought you just told me that you found out what was achieved?

A My answer is more general.

Q How about answering specifically?

A I can't.

Q My question is: Did you find out what happened at that meeting with the Highway Department?

Is your answer that you don't know?

A I could probably relate to you what probably happened in such a conversation.

Q I am asking whether or not you know specifically what happened; not what probably happened.

A We probably had two main conversations within our partnership and I know from the field and experience what does not happen.

Can I relate to you specifically what happened in such a conversation? -- the answer is no.

Q What I am asking is whether you know, with reference to this particular problem, as it was trying to be resolved by Mr. Rose and your partner, what was achieved; what the result of the approach to the Highway Department was.

A Specifically my answer is no, I do not know.

Q And your partner never advised you what he had achieved?

A Not in that way.

Q And when you found out that Mr. Rose was not going to settlement on the terms of the contract, did you approach anybody in the partnership to find out what had taken place with the Highway Department?

A No.

Q What was your recollection of the reasons that were given by Mr. Rose for not settling?

A It is in his letter of March 14.

Q That is not what I am asking you.

A I don't recall it verbatim.

Q I don't want it verbatim.

I am asking for your recollection of the reasons given.

A The main thing I remember is that he was not going to settlement.

Q And you did not inquire as to what the reasons were?

A I am sure I did when I finished reading the letter, but as of this moment I do not recall.

Q Do you recall you discussed the reasons contained in the letter with any of your partners?

A Our primary concern at that time was the specific information for not going to settlement on the part of Mr. Rose.

Q Answer my question.

Did you discuss with any of your partners the reasons that were given in the letter?

A I don't remember doing it.

Q So, you were told our reasons, today, that there

was no settlement by Mr. Rose and you don't remember discussing it with any of your partners?

MRS. FRIED: That wasn't the question you asked.

THE WITNESS: I read the letter. I didn't have to discuss it. I read the letter.

BY MR. GARNIER:

Q Your answer is you didn't discuss it with any of your partners?

A Not unequivocably I didn't discuss it.

Do I remember the discussion? -- the answer is no.

Q You may have had some discussions with your partners regarding the contents of the letter?

A Yes.

Q Do you recall who you may have had these discussions with?

A It could have been any of them.

Q Do you recall any of them saying anything to you about the position of the Highway Department with reference to the 110 feet?

A No, I don't.

Q Do you recall any of them saying anything to you about the position of the sanitary district with reference to the sewer and water?

A No.

Q Do you recall whether or not you directed or asked any of them to make inquiries with both of those departments as to these problems?

A No.

Q Do you know whether or not any of them did?

A No.

Q Did you or anybody else in the partnership, to your knowledge, have any meetings with anyone from the sanitary district with reference to the problem raised by Mr. Rose prior to the settlement date?

MRS. FRIED: Are you talking subsequent to Rose's letter?

MR. GARNIER: It would have to be.

MRS. FRIED: Settlement date was the next day.

BY MR. GARNIER:

Q I am talking about the next day.

A I routinely talk to people in the County.

Q I am getting very familiar with your routine.

I am more interested in what you did in this particular instance.

A I don't mean to overuse the word.

Did I talk about it with anybody in the sanitary

district about this problem?

Q Or anybody in the partnership.

MRS. FRIED: There are two questions.

Are you asking subsequent to the letter of February, whatever the date?

MR. GARNIER: Barbara, you are not telling me you can't understand, because you understand it.

If you want to note an objection, note your objection and we will save time.

MRS. FRIED: I will object because you have asked two questions.

BY MR. GARNIER:

Q Did you have any meetings with anybody in the sanitary district with reference to the problem raised by Mr. Rose?

A Not to my recollection.

Q Did anybody else on behalf of the partnership do so?

A I don't know.

Q Subsequent to the letter of March 14, did you make any inquiries of the Highway Department as to its position on the 110 feet?

A You mean between that date and this time: yes.

Q Who did you approach, sir?

A I think the Virginia Department of Highways. No, Oscar Yates, Public Works, possibly, the man directly with the Virginia Department of Highways.

The reason I have to use the word "routine" is that we are down there all the time.

Q Did you ever speak with Camper?

A I have spoken with Mr. Camper many times.

Q Did you speak with Mr. Camper about this problem?

A Subsequent to March 14?

Q Sure.

A Yes.

Q What did you think was the position of the Highway Department with reference to the 110-foot easement?

MRS. FRIED: I would object.

MR. GARNIER: You can note your objection.

BY MR. GARNIER:

Q What did you find out?

A They were making a request for such a right-of-way.

Q Were you advised that the site plan would not be approved until the right-of-way was given?

A It is a little more subtle than that.

Q Tell me what your understanding is.

A We went down after Sam backed out of this contract.

Q Who is "we"?

A One meeting, as I remember, Irving Adler and I went to such a meeting and inasmuch as Sam had -- whatever terminology - backed out, reneged on this contract, it was to our interest to pursue on the engineering which had been one of the problems we were worried about, initially, not foregoing our own rights there; and at that time they did make such a request of his.

We didn't view it as anything unusual and we discussed with him -- and I use the word advisedly -- what we call County blackmail.

It is a trading off of positions and it is not unusual and we are very familiar with it and it has been going on forever.

And they wanted the 120-foot right-of-way and we were there to see what we could do to reduce the request, what could be traded, what would happen.

Q What was done?

A Ultimately what we had done?

Q Yes.

A We gave it to them but it didn't particularly affect our plans.

Q You did give them the right-of-way?

A Yes, but we didn't lose any density.

Q Is it correct, sir, they would not approve the site plan unless you gave them the right-of-way?

A We didn't find out.

There is some likelihood they would have approved it without that. We didn't elect to go that way.

Q When you say there is some likelihood they would have done it without giving the 120 feet --

MRS. FRIED: I must object.

You can ask him specifically, not what might or might not happen.

MR. GARNIER: He volunteered that information.

I assume he has some facts.

BY MR. GARNIER:

Q When you say there is some likelihood they would have done it without giving the right-of-way, what do you base that opinion on?

A Past experience.

Q Was it based upon any conversations that you had in reference to this particular problem with any representative of the Highway Department?

A No.

Q Or the County?

A No.

Q Is it based upon any conversations that any of your partners may have had?

A No.

Q Any correspondence?

A I don't recall any correspondence on the subject.

I went down there for a meeting -- period.

Q So what you are saying is that you felt probably you could have the site plan approved without granting the right-of-way, based upon your experience?

A I didn't say exactly that.

I said there are a million possible combinations of what could or could not have happened with respect to the granting of this right-of-way.

Q You had some meeting with the Highway Department about this problem?

A Yes.

Q And explored some of these various combinations and possibilities?

A Not openly.

Q What was the purpose of meeting with the Highway Department?

A To find out what they wanted.

Q You knew what they wanted. They wanted a 110-foot right-of-way.

When you met with them, what did they tell you that they wanted?

A A 120-foot right-of-way. That is what they got.

Q When you went to the meeting you went with the idea of giving them as little as you could get by with?

A No.

Q Why did you go?

A To hear what they wanted.

Q You knew what they wanted, a 110-foot right-of-way.

A I wanted to know more about it.

Q What did you find out then?

A I found out they wanted a 120-foot right-of-way.

Q What did they tell you that convinced you that you should give up voluntarily?

A We didn't give up.

Q I didn't ask you that.

I asked you what they said to you that caused you to give up voluntarily.

They must have said something to you at that meeting.

A I told you that we dealt on the basis of our actions and experience.

So, it would be our knowledge of what can and cannot happen in the County that would partially influence how the --

Q Mr. Stein, you went to the meeting -- which I presume you requested; isn't that correct?

A I am sure we did.

Q And you went to that meeting, knowing they wanted a 120-foot right-of-way?

A Yes.

Q You knew that already?

A Yes.

Q You didn't just walk in and say, "Hi, folks, here we are. Tell us, again, what you want."

A Yes.

Q What did you tell them you wanted to know?

A We wanted to know why they wanted the 120-foot right-of-way.

Q Did they tell you that?

A Yes.

Q What else did you want to know?

A We knew what they told us.

Q What else did you want to know at that meeting that caused you to be in there?

A After Sam failed to go to settlement on this contract

we were interested in doing the expeditious and expedient thing in processing our own engineering because it held us up for months, and we had to move.

Q I am asking you about the color of the wall and you are giving me the size.

A I told you that we wanted to do expeditious and expedient things to get Section 3 approved because --

Q When you walked in the hallowed halls of the State Highway Department, after knowing they wanted the 120-foot right-of-way, and they told you that after you asked them, what else did you ask them?

A I am not trying to be cute with you. What do you mean?

Q What did you say to them?

A We had our site plan and they proceeded to outline the width of the right-of-way, the length of the right-of-way, where it fell on our property, and we asked how it would tie in -- which would be obvious to a cretin, but we asked anyhow.

Q After they showed you that, what else did you ask, if anything?

A I am sure we asked them if they could do it with a narrower right-of-way.

Q What did they say to you?

A As always, they say no.

Q Did you ask them about the possibility of getting your site plan approved without giving up the 120-foot right-of-way?

A I didn't have to.

Q Because you knew you couldn't?

A No, not that way.

Q Not what way?

A We could, very likely, if we had not already spent seven months fooling around with Sam Rose.

Q How could you avoid it?

A Because we could have spent more time fighting.

Q As of March 14, was there any way of avoiding giving the 120-foot right-of-way, to your knowledge?

A You are asking me as though it was a monumental decision.

Q Assume it was a minute decision: Was there any way on March 14 to avoid that very minute problem, to your knowledge?

Assume it was minute: You were interested enough to have a meeting with the Highway Department.

A Organizations in business have to be convinced and we couldn't fight it.

Q You told me, Mr. Stein, that it is your opinion that you could have gotten the site plan approved without giving the right-of-way that was being requested by the State.

A I didn't say that. If I said it, I didn't mean it that way.

Q In what way did you mean it?

A I mean it is a constant give and take between any developer and any municipality.

Q When you went to the Highway Department with the idea of giving up less than you had to, what give and take took place?

You were willing to give; right?

A Yes.

Q Was the State willing to take?

A No.

I don't want to get into this, but there was no take on that basis.

Q What give and take are you talking about?

A Give and take, whether you get a site plan out in two months or whether you get it out in a year and two months.

Q What give and take was available on March 14 that you think would result in the site plan being approved without

the right-of-way being given?

A If we had elected to put in our site plan and not push it they would never get that right-of-way. We didn't have to give it to them had we not elected to push our site plan.

They had no way of getting it from us.

Q If you didn't push the site plan would you develop the land?

A Naturally to develop the land, I have to go to the site plan.

Q That is right.

A We could have waited.

Q Anybody who might be buying this land for the purpose of developing it residentially had to get a site plan approved?

A For every piece of ground.

Q In that case you could not get the site plan approved without the right-of-way?

A There is no site plan approval where you don't give the right-of-way.

Q In this case you had to give the 120-foot right-of-way to the State?

A There is no site plan approval for any builder where

he has not made dedication of a road to the State.

Q In that case the State says, "You give us a 120-foot right-of-way that goes across the property, or you will not get your site plan approved."

A No.

Q Could you get a site plan approved without it?

A They didn't say that.

Q You knew that is what they meant. It is in your experience.

A No.

Q What did you think they meant?

A They meant they wanted a 120-foot right-of-way and we departed from the other policy.

Q Was the other policy giving nothing?

A The other policy technically would be repetitious because we never had a site plan approved. It is part of building to give a right-of-way.

Q And by the time it was raised the policy suited you, didn't it?

A No.

Q You gave up 120 feet.

A No.

EXAMINATION BY COUNSEL FOR THE DEFENDANTS

BY MRS. FRIED:

Q You were asked several questions relating to when did you first know that McKeon was not going to go to settlement because of the road and that seemed to get confused with the question of when did you first learn about the road problem and when did you first learn McKeon wasn't going to settlement.

I would like to clarify that.

Can you state when you first found out that McKeon was not going to go to settlement?

A Receipt of his letter, the letter of what?

Q March 14, I believe.

In the March 14 letter.

A Yes.

He had been having road problems for 12 years.

Q That was your first knowledge there was to be no settlement?

A Yes.

MRS. FRIED: Signature is not waived.

(Whereupon, at 1:15 o'clock p.m. the deposition was concluded.)

I have read the foregoing pages 1 through 66, which contain a correct transcription of the answers given by me to the questions therein propounded.

Robert E. Stein

Subscribed and sworn to before me this 12th day of October, 1973.

Barbara S. Fuel
Notary Public in and for
Virginia Beach

My Commission expires:
25 May 1975

CERTIFICATE OF REPORTER

I, Jeanette Karp, do hereby certify that I took the stenographic notes of the foregoing testimony of Robert E. Stein, and that said testimony was thereafter reduced to typewriting under my supervision; that said 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 thereto, nor financially or otherwise interested in the outcome of the action.

Jeanette Karp

CERTIFICATE OF NOTARY PUBLIC

I, Barbara J. Fried, a notary public for the State of Virginia, At-Large, do hereby certify that I swore Robert E. Stein at the time and place aforesaid, and that Jeanette Karp acted as the stenotype reporter of the testimony then and there taken.

Witness my hand and seal this 15th day of October, 1973.

Barbara J. Fried
Notary Public

My Commission expires:
May 25, 1975.

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C O N T E N T S

Deposition of	Examination by Counsel For Plaintiff	For Defendant
Henry G. ~~Biber~~ BIBBER	30	3

E X H I B I T S

~~Biber~~ Biber Deposition Exhibits Nos. 1, 2 and 3 — Page 30

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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 HENRY G. ~~BIBER~~ BIBBER, 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 9:20 A. 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

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

On behalf of the defendants:

BARBARA J. FRIED
Attorney at Law
Executive Building
Springfield, Virginia

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William B. Peters
Stenographic Reporter
Ward & Paul, Inc.
4055 Chain Bridge Road
Fairfax, Virginia
703-273-2400

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

Phone (Area 202) 544-6000

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P R O C E E D I N G S

Thereupon,

HENRY G. ~~BIBER~~ BIBBER,

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 Would you state your full name and position and title?

A Henry G. ~~Biber~~ BIBBER, Director of Planning, Prince William County, Virginia.

Q Was this your position in December of 1971?

A Yes.

Q Could you describe briefly the nature of your job or your duties?

A As Director of Planning I am in charge of the planning program for Prince William County. This includes comprehensive planning on the county-wide level, includes comprehensive planning in a greater detail on the planning area level, includes transportation planning, environmental management planning, land use planning, community facilities planning, capital improvements planning, site plan and subdivision plan review with respect to plans in the way in

which the proposed developments would fit in the community and also with a certain respect to the zoning ordinance.

I'm also responsible ~~for the staff~~ as the staff of the planning commission and we're also responsible for making or bringing forth and carrying on any proposed amendments to the zoning ordinance both in terms of amendments to the zoning map as well as amendments to the ordinance provisions themselves.

We also do a little work in industrial development. Of course, we maintain a day to day attempt to gather data and compile it.

We're also now dealing with water and sewer plans on a county-wide basis.

I guess that summarizes it.

Q Could you go into a little more detail concerning the function of the Planning Department vis-a-vis a site plan that is submitted in Prince William County?

A The site plans are submitted to the Public Works Department and the Public Works Department receives a number of copies, one of which comes to the Planning Office.

In 1971 the Zoning Administrator was part of the Planning Office. On January 1, 1972, the Zoning Administrator became part of the Public Works Department, but before and since the Planning Office had received a copy of the plans submitted

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to the Public Works Department. The Planning Office is then responsible for reviewing the plan with respect to its conformance with planning area plans and with the way in which the development will fit into the community. We also review it with respect to the need for schools and other community facilities. We review it with respect to the way in which it impacts adjoining land uses or adjoining lands which may or may not be zoned but on which we anticipate a certain amount of development. We attempt to assess its impact on the overall development and we make comments to the Public Works Department to that effect. As I understand it, the Public Works Department, then gathering comments from various reviewing agencies, puts together its recommendations and eventually forwards them to the Board of Supervisors.

From time to time we find it helpful to discuss recommendations and issues with the engineers or the developers whose plan we are reviewing. This, from time to time, takes place either in our department or in some other location where there may be more than one county agency involved and generally these are discussions of an information nature or attempting to explain our interpretation of what the ordinance is and why we made a certain recommendation.

Q Are these duties spelled out in an ordinance or in

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state law or are they a combination of regulation implementing a general statement in the law?

A I'd like to make a statement now that anything I say now I'd like to be subject to modification in the event I uncover something more or in the event I find there is something I'm not aware of right now. To my knowledge there is no specific requirement that the Planning Office -- it was called the Planning Department in 1971 -- that the Planning Office or Planning Department is specifically given the task of reviewing a site plan. For those aspects I discussed, to my knowledge there is no specific requirement.

Q Historically, however, how long would you say the Planning Department has been involved in such?

A The Zoning Administrator has been involved for as long as I know which is five years. I imagine its been longer than that. Around 1970 the Planning Office began to be involved apart from the Zoning Administrator because the Zoning Administrator was apparently only checking the site plan with respect to the number of parking spaces and whether or not it conformed to the zoning ordinance requirements and ~~not~~ other aspects of the plan; its 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. These

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factors were not being examined and around 1970 the Planning Office began to get involved in site plan review with respect to these factors.

Q You are charged by law, are you not, for overall planning as you've mentioned earlier in Prince William County?

A (Indicating yes.)

Q Would it be possible, if you did not review site plans in view of what you're charged with by law, to carry out your function?

A I consider the review of site plans as being an important aspect of our job because this is at the stage of implementation and I discovered during the first few years of working in Prince William County that we did have a very definite gap between the plans and reality and part of this gap was caused by the fact that ~~the Planning Office, or that~~ the site plans and subdivision plans were not being reviewed with respect to planning considerations, ~~and~~ That is how we got into it and I feel this is an important and vital function of our office and I think it's something that ought to be done at site plan review level.

Now, quite possibly an institutional arrangement could be changed so you had somebody in the Public Works Department that was performing this function but at the moment

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that's not the way it's being done.

Q Are you familiar with the site plan application No. 2313? I believe the title is Coverstone Quads.

A I think it was called Manassas Quads.

Q Do you have a copy of that site plan?

A I have a file on that here. I'd like to add that in March of 1972 this task was assigned to a man who came into our office and during that change-over was the first time we began to keep files on site plan review. Prior to that we had been sending the plans back for the Zoning Administrator who had been filing the plans.

Q So the files were not kept until March of '72, is that right?

A They were not well kept.

Q Can you tell me when the site plan was submitted?

A No, I couldn't tell you that right now. I could make a guess. I would guess it was some time in late 1971.

Q You mentioned earlier that a number of copies are filed with the site plan. Do you know to which agencies they are sent other than planning and public works?

A I couldn't give a complete breakdown. Mr. Payne would have to do that.

Q Are there normally discussions, not about specific

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site plans but about general problems of development, between the Highway Department, Public Works and Planning?

A Yes, there are. We have an almost regular time to meet, to discuss such problems. We also discuss specific site plans and subdivision plans. We also discuss the problems of development, the needs. Of course, when the Highway Department is involved in it, it's generally concerning roads, networks and the need for roads in certain areas.

Q Did you have any discussions with either the Highway Department or Public Works, either one or both, concerning a road called Ashton Avenue?

A Yes. 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 traffic load on Route 234 and it was realized that something had to be done to reduce the burden on Route 234.

In studying the various proposals that were made, or

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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 reexamination 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.

Q When was that revision adopted by the Board of Supervisors?

A I don't have the date of adoption but it was some time in 1973, about mid-1973.

Q Do you have a map that would show the location of Ashton Avenue?

A I have better maps than this but I did not bring them.

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

THE WITNESS: I've drawn in red Ashton Avenue as it traverses the county and I stopped it at the Manassas corporate limits but the idea is to connect up to this road down here through Manassas.

BY MRS. FRIED: (Resuming)

Q Can you locate Manassas Quads?

A (Indicating) Yes, this is Route 234 over here and Manassas Quads --

MR. GARNIER: Why don't you mark it with a red pencil

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and a dotted line.

THE WITNESS: The general property that we were considering, the Manassas Quads, I believe are somewhere right in here. This road was right at one side. There's not a location on that site plan. Mr. Payne ought to have better maps as far as the site plan are concerned but I believe Manassas Quads are in this area right in here.

MR. GARNIER: For the record, you're showing that you have marked a rectangle in which you're drawing some diagonal lines, is that right?

THE WITNESS: That is correct.

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

BY MRS. FRIED: (Resuming)

Q Would you, for the record, show were Coverstone Drive is?

A Coverstone Drive is shown on this map. You must realize it shows general location and Coverstone Drive is shown in this location here. In reality Coverstone Drive is now being built right over along the side of this property with the Country Scene townhouse development coming here and it cuts along this side of the Manassas Quads development.

MR. GARNIER: You're showing a line that runs parallel to that which is designated as N-5, is that correct?

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THE WITNESS: That is correct. From time to time, the plan does not show the precise location of the road but it indicates the corridor.

MR. GARNIER: The reason I ask is because when you put something on the map, it doesn't reflect on the record unless we pin it down.

BY MRS. FRIED: (Resuming)

Q Does Coverstone Drive traverse all the way through or does it end within the property?

A Within this plan Coverstone Drive traverses all the way through.

Q On the plan itself?

A On the plan itself it does traverse all the way through and it would be our effort in reviewing and site plans in here to continue Coverstone Drive according to the plan and if its on one side or the other side of a precise line that we draw on the plan, then it still accomplishes the purpose of getting a road through.

I would also note on this plan that Ashton Avenue is designated A-1 and Ashton Avenue from Route 621 to Manassas town limits right-of-way of 110 feet.

Q Are you saying it's a first-class road?

A It's an arterial road classification and Coverstone

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Drive is classified as a 64 foot right-of-way which is a four lane undivided major thoroughfare.

Q Do you recall when the discussions first took place when the idea began to germinate for the necessity of a road like Ashton Avenue?

A I would say it would be the second half of 1971 was when we realized that the road network shown on the adopted plan was inadequate and that we would have to develope some kind of a plan that would show a road roughly parallel to 234 in order to relieve future traffic on 234. So it would be late 1971.

Now, this concept went through several evolutions. I do have a map which shows Ashton Avenue as being not a continuous road, making an intersection with an extension of Lomond Drive which then turned north and then continued along the alignment, roughly, of Ashton Avenue. That was, I think, the first stage of that concept and the second stage which must have come about in 1971, very late 1971 or perhaps early '72, was that Ashton Avenue would be a continuous road. It wouldn't come into another road and then the function picked up by a second road.

I think also in the early part of 1972 we conducted a study of the future traffic. Now, I can recall I was working

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with a man who was in the office and who left the office in January of 1972 and he and I developed traffic generation estimates in this corridor west of Route 234 and it was, I believe, based on those estimates that we arrived at the necessity for an arterial class road. So that would have been early 1972 that concept was produced.

Q What did you base your estimates of traffic generation on?

A On existing zoning and on the densities and land uses shown in the adopted Manassas Planning Area Plan.

Q Did you consider the rate at which site plans were being submitted in this corridor?

A This corridor was being studied. It was very active. We were looking at it very -- with great concern because there were a number of site plans being developed in this corridor that we felt we had to deal with and we had to get this information ready, we had to get ~~out~~ our planning straightened out so we could deal with the site plans.

Now, to be specific there was a development which is now known as Ashton Glen and was then going under the name of Colgate Limited, I believe, which is right down here next to the Route 28 bypass. Of course, there was the Paradise Associates Plan and then there were the plans being prepared

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for what we know as the old Tripak site which was at that time being divided between Coverstone Land Limited and Country Scene, Berlage-Bernstein. So there was another site plan that we were aware of that was under preparation and that was known as Crest and that is now being developed as a townhouse and apartment development but that's in the same corridor.

Q At any time prior to February, 1972 or about that time were other developers, including the ones you mentioned, being requested to dedicate for Ashton Avenue?

A Yes, most definitely. We were talking with any developers that were in this area concerning Ashton Avenue and succeeded in every case in getting the Ashton Avenue concept accepted by the developers whose plans were being submitted.

Q When then would people -- not employees of the county but people who dealt with the county on a continuing basis first have become aware of the planning for Ashton Avenue?

MR. GARNIER: For the record, let me note my objection to that line of questioning as being completely irrelevant to the issues which bear upon the contract itself and particularly the cause we are relying upon as being our reason for terminating the contract.

Note my objection and he can answer.

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Can we stipulate that we'll save all our objections for the court since neither one of these people are really witnesses or clients?

MRS. FRIED: Sure.

MR. GARNIER: Neither one of us have a control over him to answer or not to answer.

MRS. FRIED: You're a free agent.

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

BY MRS. FRIED: (Resuming)

Q Would you like that question repeated?

A No, I can remember it. The persons who were keeping track of development here and who were responsible for preparing plans, and I would assume their clients whose land they were working with, had opportunity to become acquainted with this concept by virtue of their submitting a preliminary plan which would then be subjected to review and we would come back with this concept. As I said, it was an evolving concept and some of the earlier plans here showed some of the road, a lesser road, than the arterial, but eventually, and I would say by early 1972 (and I tried to determine exactly when), we definitely arrived at this and said this is the concept we have to go for, ~~but~~ I believe it was early '72 when we arrived at the continuous arterial road to the west of 234 and anybody who

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was submitting plans in that area became aware of it as soon as we were ~~able~~ able to make any kind of review.

Q Do you recall any of the names of any of the engineers who were associated with any of these site plans that were submitted at that time?

A I think Springfield Associates was associated with several of them. Gruen Associates were concerned with the Paradise tract development but they might have been out of that by that time. I know at one time they were involved in it and I believe Springfield Associates picked it up after that. I think George Hellwig is the individual who dealt with most cases and I think this was a Springfield Associates plan, also.

Q Drawing your attention to that site plan, did you review it, the preliminary?

A Yes, we did review it.

MR. GARNIER: Could we identify which site plan you're talking about and by whom it was submitted?

THE WITNESS: That's a problem. This particular map has the date on it of March 3, 1972 and it is marked as received by the Public Works Department and then marked copy to Planning Department. We didn't mark any particular receipt of it.

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BY MRS. FRIED: (Resuming)

Q Is this a preliminary?

A This is a preliminary plan, yes, but I don't think this was the first one.

Q Does this show Ashton Avenue or what would be Ashton Avenue?

A Yes, it shows the right-of-way of what would be Ashton Avenue right down here.

Q So this was not the original. Did the original plan submitted show Ashton Avenue?

A I don't recall. It also shows Coverstone Drive through this tract and the way we had the proposed school site over there which was another issue.

Q The school site was not on this property?

A No, it was not.

Q So is this the only one in your files then?

A Yes.

Q So there might have been an earlier plan?

A Yes.

Q If you can recall then the original plan, preliminary plan No. 2313, do you have any correspondence in your file or memoranda concerning your comments or your staff's comments on that original question?

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A I have in the file a review by the Zoning Administrator dated December 29, 1971 the subject of which was Manassas Quads, No. 2313. I have a copy of a letter from me to Mr. Payne in the Public Works Department concerning Manassas Quads, Coverstone site, preliminary development plan dated March 27, 1972.

Q Is this the only correspondence?

A I also have a copy in the file of the staff report for the special use permit requesting a special use permit or reviewing the request for a special use permit for condominiums on this site.

Q Is that all the memoranda in the file concerning the site plan?

A That's all the memoranda. I'm conducting a search of the other files in order to determine if there is anything else which relates specifically to this site plan and to the Ashton Avenue matter.

Q Going back into the specific site plan that was submitted, was it approved?

A I don't recall. I don't believe it was.

Q Do you recall any meetings that you may have attended specifically to discuss this site plan? I realize you may have very informal meetings.

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A I believe I can recall at least one meeting which, again, was more or less one of these regular meetings that was held in the office of the Resident Engineer and we did discuss this site plan at least at one of those meetings and I think we discussed several features, the plan and the design, the arrangement of the driveways, the connections to Coverstone Drive and the Ashton Avenue right-of-way and I think we also discussed the matter of should there be a requirement to construct Ashton Avenue or should it be a requirement to dedicate the right-of-way.

Q In your other site plans that were being considered along the same corridor, was there a requirement that only there be dedication or that there be dedication plus construction?

A Wherever there is evidence that the development would require the use of a road such as Ashton Avenue, we recommend that the developer build the road. In some instances there is evidence that the road would not be used to the extent that the entire four lane divided section should be built, in which case perhaps just two lanes of that section would be built. This has been done, dealing with other site plans in the county -- so what was your question again?

Q So in some instances are you saying you would ask the developer to construct the entire 110 feet and in some

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instances he would only construct part of it?

A That's right. We would recommend this. It's not our policy to require, it's our job to recommend to the Supervisors then as to what their requirement should be.

Q Do you recall in your meetings concerning the site plan when you first made the decision to ask the developer to put in the 110 foot right-of-way?

A I do not recall exactly when except that it must have been in early 1972 when the evolution of the Ashton Avenue concept became that of a four lane arterial road and it must have taken place some time during the time that this plan was developed because there is some evidence here with the Zoning Administrator's comments, December 29. It's my recollection that the four lane section was decided upon in early 1972 and not before, although we certainly were considering it because we were trying to study and develope what we would need for Ashton Avenue.

Q Do you recall specifically a meeting on February 8, 1972 between your office and the Highway Department, Public Works and Mr. Hellwig?

A I don't recall if that was the date. I have no way of knowing if that was the date.

Q Do you ever recall meeting with those gentlemen?

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A I recall meeting with -- give me the persons again?

Q Mr. George Hellwig, David Camper, yourself, R. W. Harrison, James Payne, H. W. Williamson and Sam Rose?

A In the Highway Department?

Q Yes.

A Dave Camper and Harrison?

Q Yes, but the meeting took place at the Highway Department office?

A I don't really know. I recall at least one meeting in that office and it's very possible all of those individuals you named were at that meeting. It's quite possible that's the meeting I recall.

Q At any time in any of your meetings or discussions did you or anyone else in your department or anyone at these meetings threaten to condemn the property for the 110 foot right-of-way of Ashton Avenue?

A No. We made no threats to condemn it. It was our position that this was a necessary part of a road network to serve this area and that site plans ought to reflect the necessary road networks.

Q In these meetings was the word, "eminent domain" mentioned or threatened by you?

A Not by me personally and as I recall, not by anybody else.

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Q Do you, not personally, but does your department have authority to condemn?

A No. The Planning Office has no authority to condemn.

Q In the county of Prince William who has the authority or the power of eminent domain to condemn, if you know?

A I don't know.

Q To your knowledge, has there ever been a condemnation in Prince William County for a road right-of-way?

MR. GARNIER: Let me note my objection to that on the record as being completely irrelevant. Go ahead and answer.

THE WITNESS: I'd like to break that answer down into several parts if its possible. I believe the county or state on some cooperative effort did conduct some condemnation for the right-of-way of what is known as the Route 28 bypass. This was a new road. Of course, the state conducts condemnation where they require right-of-way and can't acquire it through negotiation, but with respect to site plan submissions and subdivision plan submissions, condemnation is never an issue, and has never been an issue to my knowledge.

BY MRS. FRIED: (Resuming)

Q Is this then, and I'm referring to the site plan we have, the new site plan submitted after the discussions?

A To my knowledge as I look at this, it is the latest

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site plan that I recall having seen. There must have been an earlier one. The date on this is March something or other, 1972. There must have been earlier ones which are not part of our files. There might be later ones but I don't recall any, I don't recall having seen them.

Q Now, you made reference earlier to the application for a special use permit for condominium that was made by McKeon for Manassas Quads, was this special use permit ever granted?

A I don't recall with certainty.

Q Was it part of your job in planning to review the special use permit applications?

A Yes.

Q Do you recall whether you reviewed it at about the time you reviewed the site plan?

A Yes, I believe it was at or about that time. I do have a file on the special use permit and I know the application was filed on February 18, 1972. I also recall making a preliminary -- sending a memorandum to the Public Works Department to the effect that we were in the process of reviewing this site plan and that we advised the Public Works Department to contact or to inform the applicant that a special use permit for condominium use would be required.

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Q This is when the site plan was originally submitted?

A This was some time, I would say, prior to February 18. It could have been some time in early February or January that we notified Public Works that we are reviewing this but that we note that a special use permit will be required. It's usually our ~~effort to get the special~~ use permit for condominium apartments or whatever they are, to the Supervisors prior to the submission of final plans or even preliminary plans, ~~because if we don't~~ The Supervisors may find that a condominium special use permit would not be in the best interest of the county at that location. We felt it would be more economical not having the site plans come in before the special use permit is granted.

Q Did you make a recommendation to the Board of Supervisors on the special use permit?

A Yes, we did.

Q Is that a copy of the recommendation?

A Yes.

Q Is it the same as this?

A Well, you've got -- what you have there -- there were a number of special use permit applications for condominiums that were submitted at more or less the same time. This was very shortly after a special use requirement was

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added to the Zoning Ordinance and the special use permits were taken together.

There on the first page we discuss condominiums in general and then we have a page which considers each one of the condominium special use permits which were under consideration. One of those pages is the Manassas Quads and Woodbridge Quads.

Q Woodbridge Quads?

A It's another development, another condominium proposal by the same applicant and had relative the same design.

Q In this staff report, it recommended approval with conditions. What was the date of this staff report?

A There is no date on it. Referral was made to the Board of Supervisors on March 17, 1972 and the staff reports are sent forward with this referral to the Board of Supervisors. I note on this sheet that the Manassas Quads were withdrawn April 28 but I don't know if the Board acted on this. I don't recall if the Board acted on this special use permit prior to withdrawal or not.

Q Was there anything done by the developer McKeon in this case between the submission of the special use permit application through that date, April 28, concerning that

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application?

A Well, we did have various contacts with the representative, Mr. Rose. He made every effort to make what I would consider to be the usual efforts to see that the county was processing his application and to answer any questions that the county staff might have concerning it. At the time I recall several contacts either personally or with members of the staff that took place during that period.

Q We have discussed earlier the 110 foot right-of-way on Ashton Avenue and the subdivisons bordering on it. In your experience is it unusual as a precondition for approval of a site plan for the county to require dedication for public right-of-way?

MR. GARNIER: Let me note my objection to that question before you answer as being immaterial.

Go ahead.

THE WITNESS: Is it unusual? What was the question?

BY MRS. FRIED: (Resuming)

Q Is it unusual in the review of a site plan for the county to require as a condition of approval of the site plan that the developer dedicate part of the property for public right-of-way?

A No, it's not unusual at all. This is our approach,

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the approach of the county planning staff, that a site plan ought to include, speaking of roads, any of the roads which are necessary to serve that site and to connect to adjoining properties so that a road network sufficient for that site as well as adjoining properties can be arrived at and we recommend that wherever such roads cross a site, that these be dedicated for public use at the time the final plat is recorded.

Q Are there other dedications that may be required from the developer before site plan is approved for purposes other than roadways, specifically for utilities?

A The dedications for utilities and other types of rights-of-way are not really the concern that the planning office has for site plans. I would have to say I don't know what other dedications for public use would be required. I know I do get involved in discussions of land for parks and land for schools which the county makes every effort to work with developers in order to acquire land for schools and parks that would serve the developments which are shown on the site plans or subdivision plans.

Q If you know, in the location now where Ashton Avenue is on the adopted plan, in which subdivisions has Ashton Avenue been dedicated or constructed?

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A Final approval has been given to the Ashton Glen development and this does include Ashton Avenue as a four lane divided arterial road.

I think there have been some final approvals in what I think is called Crestwood Development through which Ashton Avenue passes and I believe some of the most recent sections which have either been submitted or approved also show Ashton Avenue on their plans. I don't recall if we have an approved plan in the Crestwood Development which includes Ashton Avenue but I know that it has appeared on several final plans.

Q What about Paradise Associates that you mentioned earlier?

A I don't know if Paradise Associates has submitted -- well, there may be some final plans that show that. I'd have to check the record. I'd have to refresh my memory.

Q Before we let you go, could I just ask you if you could briefly state your background, your educational and vocational and how long you're been with the county in any capacity?

A Sure.

MR. GARNIER: I think if you want, for the purpose of the deposition, I'll stipulate to his qualifications as being adequate for the position he has.

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MRS. FRIED: Fine, I'm just curious.

THE WITNESS: Well, with respect to planning, I have a Master's Degree in Urban and Regional Planning from Virginia State University or whatever they did with the name of VPI. When I received my degree I believe it was still Virginia Polytechnic Institute and now it's Virginia State University and Polytechnic Institute. Following receipt of that degree I came to work for Prince William County in 1968 and through a series of promotions I became Planning Director in 1971.

MRS. FRIED: Thank you very much.

I will ask, if it's agreeable with you, if he can submit these documents that he made reference to earlier. We can have copies made.

(Whereupon, the documents above-referred to were marked for identification as ~~Biber~~ BIBER Deposition Exhibits 1, 2 and 3.)

EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. GARNIER:

Q Mr. Biber, the concept of Ashton Avenue came into being towards the end of 1971, is that correct?

A Yes.

Q It actually became a requirement for potential

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developers in the first part of 1972, is that what you're telling us?

A No, I don't think that's exactly what I said. If you're asking me when did it actually become a requirement for developers it would be very difficult for me to recall because the concept was evolving at that time.

Q What would be your best recollection?

A My best recollection of when Ashton Avenue was a four lane arterial -- the date or the time at which we began making the firm recommendation that this be placed on all plans, I believe that was early 1972.

Q And Ashton Avenue actually consisted of, as far as planning is concerned, a 110 foot right-of-way, is that correct?

A Yes.

Q And the site plan application which has been placed in front of you, how would that 110 foot right-of-way affect that site plan?

A As shown on this site plan which appears to be a later version from the one we initially received, it is shown on the eastern -- to cut across the eastern portion. Well, it comes across -- let me start over. A portion of the eastern boundary of the site plan shows the right-of-way of 110 feet

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for Ashton Avenue.

Q You said earlier that in some instances was it not only required that the right-of-way be dedicated but also that the builder directly put in the improvements on the property which is the subject of the site plan. Do you recall what the case was in this particular instance as to that site plan?

A I do not recall what our recommendation was. I can only say that what the Planning Office does is make recommendations. I do not recall if our recommendation was that the developer construct the four lane section on this site.

Q Would that recommendation have been reduced to a memorandum of any kind?

A Generally, since recommendations are always --

Q (Interposing) But in this particular case?

A I don't recall and I have not been able to find a memorandum which makes reference to Ashton Avenue.

Q Where have you looked?

A Well, I first looked in the site plan file and I do have this review which we sent to Mr. Payne on March 27, 1972.

Q Does that say anything about it?

A I'm checking now. Yes, it does.

Q What does it say?

MRS. FRIED: Excuse me, this is not a document we've

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seen before?

THE WITNESS: Yes, I think it is.

MRS. FRIED: I have two copies of the staff report.

BY MR. GARNIER: (Resuming)

Q What is your recommendation?

A If you'll turn to page two you'll see the statement in the first sentence in paragraph three, this site will be bounded on the east by a proposed arterial. The recommended setback from an arterial right-of-way is fifty feet for all buildings. One building shown is as close as twenty-two feet.

Q What does that say to me in terms of whether or not the builder was actually required to put in the improvement?

A That doesn't state whether the builder is required or whether there was a recommendation that the builder construct.

Q Is there a memorandum somewhere to your knowledge which would either recommend that the builder be made to do so or that he not be made to do so?

A To my knowledge there is not a recommendation in writing from the planning office that the builder be made to construct Ashton Avenue through that site.

Q That recommendation would have emanated from the office which you were supervising at that time, is that correct?

A Such a recommendation certainly could have emanated

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from the planning office but it might also have been initiated by the Highway Department or by the Public Works Department.

Q When you're talking about the Highway Department, are you talking about an agency of the state itself?

A Yes.

Q Regardless of whether or not there is a memorandum, do you recall what the recommendation was which emanated from any of these agencies with respect to these pieces of property as to the builder being compelled to actually put in the improvements?

A I don't recall what recommendations might have been made by other agencies.

Q How about your agency, your office?

A To the best of my recollection there is no recommendation in writing that the developer be required to improve Ashton Avenue.

Q Aside from a recommendation in writing, sir, do you recall what recommendations were to be made by your office in any form whatsoever with reference to this questions?

A No, I don't recall. One of the issues that the Planning Office is wrestling with and has wrestled with is the extent to which developers are responsible for construction of roads of this type which would obviously serve a wider

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area -- well, would obviously serve areas outside of the site as well as the site itself and our policies on this have not been firmly formulated. They were not firm at that time so I could not reconstruct in my mind what our recommendation would have been.

Q Let me ask you this, Mr. ~~Biber~~ BIBBER, when the road was eventually put in by the developer, do you recall who actually developed the road itself?

A I know in the Ashton Glen Subdivision that road is definitely being constructed by the developer of Ashton Glen.

Q How about this section involved in the site plan you have pointed out to us?

A There has been a later submission covering this ground and I would have to refer to that plan and to our memoranda on that.

Q Are you saying you do not know today?

A I'm saying I don't know, yes. Now, I don't recall what our recommendation is on the site plan which has been submitted for essentially the same area here which includes Ashton Avenue.

Q Has this recommendation at this time been reduced to writing anywhere, sir?

A There is a possibility of that, sir. I'd have to

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check our records.

Q Well, what is the policy of your office currently with reference to making a recommendation?

A They are made in writing.

Q So it is likely if there has been a recommendation made in this case, it would be in writing, is that correct, sir?

A Yes, sir.

Q And this would be a recommendation which would come from the Planning Office to whom?

A To Public Works.

Q And would it be over your signature?

A Yes.

Q Do you recall whether you have signed a document making such a recommendation to Public Works?

A No, I don't recall.

Q Are you saying there has been no such document or you have no recollection of it?

A I have no recollection of such a document that would give our recommendations on the plans which have been most recently submitted for this area.

Q Are you saying you have no recollection of any discussion within the Planning Office or any other places as to whether or not the developer should be made to put in the

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road as it stands now?

A We have discussions as to whether or now we should recommend that the developers build the roads all the time.

Q How about this particular piece of property, sir, is what I'm asking you about?

A Well, we certainly have discussed whether the developer should be required to make these improvements and I don't recall whether there was any particular conclusion to those discussions. I would have to state that other members of my staff have also conducted these discussions with Public Works and not only myself.

Q Assuming, Mr. ~~Biber~~ BIBBER, I want to find out what the answer to this question is, would I come to see you in your office and ask you to pull out a particular file?

A Yes.

Q And what file would I ask you for, sir?

A I believe this is Section Four of Coverstone Apartments.

Q And would these recommendations, if any were made, be contained in that file?

A I believe they were.

Q And would there be any memoranda contained in that file with reference to the discussions you have had as to how

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the decisions would be reached?

A There might be.

Q And that is a public record, is it not?

A It is.

Q So I should have no difficulty in coming to your office and either speaking to you or one of your staff and asking you for that file?

A That is correct.

Q Now, you stated I believe earlier, that once it was determined that Ashton Avenue should be made part of this overall development of the road system, every developer that put in a site plan or a preliminary plan was being told of this necessity, is that correct, sir?

A That's correct.

Q Who would advise the developer of this?

A Well, this could be done by any -- either the Public Works Department or the Highway Department or the Planning Office when the developer made inquiry as to what features might be required on his plans. This is often done, and if he did not happen to make that inquiry then he would be advised of this by the Public Works Department which has the policy, I believe, of sending letters received by them from the reviewing agencies to them so that the developer is

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kept posted on what the reviewing agencies are saying concerning the proposed development.

Q What is the very first document that a developer would file with the county which you require showing this land which was to be dedicated?

A The first document that would be required by the county would be a preliminary submission. From time to time developers do send their engineers in to discuss with Public Works office or the Planning Office or the Highway Department various requirements and from time to time they do submit on an informal basis a preliminary plan in order to ascertain what the problems may be.

Q Now, I believe you stated you were successful in getting the dedication of this needed right-of-way with all the builders that were involved in this locality, is that correct?

A To the best of my recollection. Wherever Ashton Avenue is presently in an area coming under development, the developers are providing for construction of Ashton Avenue.

Q Do you recall any conversations or meetings with representatives of McKeon Construction Company with reference to this particular dedication?

A I recall a meeting at least once with the Highway

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Department with representatives of the Highway Department and the Public Works Department and I believe Mr. Rose. Possibly Mr. Hellwig was there at that same meeting. We discussed the site plan and I believe we also discussed the Ashton Avenue situation, as to where it should be located, what its purpose was. We might also have discussed whether it should have been constructed by the developer but I don't recall what our recommendation was on that, if we had one.

Q In fact the primary purpose for that meeting was to discuss the creation of Ashton Avenue?

A I wouldn't say the primary purpose of that meeting was that. It might have been but I don't recall.

Q Do you have any recollection as to what the purpose of the meeting was?

A I would only be able to guess that the purpose of the meeting was to discuss the site plan, perhaps several of the site plans, several of the planning issues and, of course, in discussing the site plan, Ashton Avenue did come up.

Q What would have been the necessity for having a representative of the Highway Department at the meeting?

A It has become a matter -- it is our effort to communicate as closely as possible with representatives of

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the Highway Department with respect to planning and development in the county.

Q Now, with reference to condemnation or eminent domain, the state is the one who has a right to use these procedures, is that not correct, sir?

A It's possible. I'm not well acquainted with the requirements for eminent domain.

Q It could be done by the county, could it not?

A I wouldn't know.

Q Do you recall what the position of the Highway Department was at the one meeting you remember, with reference to the dedication or building of Ashton Avenue?

A I don't recall.

Q Do you recall who the representative was from the Highway Department?

A I have no specific recollection but ordinarily those meetings are attended by either Mr. Camper, Mr. Harrison or both of them.

Q What was the position of Mr. Rose or any of his representatives at that meeting with reference to the building of Ashton Avenue?

A I don't recall, but again, I think we might have discussed the construction of Ashton Avenue or not constructing

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it but I have no distinct recollection of such a discussion.

Q Do you recall whether or not either yourself or anybody at the meeting, to your knowledge made a memorandum or notes or transcript of any kind of what took place at the meeting?

A No, I don't recall if anybody made such a transcript. From time to time we did document what took place at a meeting by providing memoranda to the Public Works Department and we would state the date of the meeting and those present and what was discussed, what issues, and our recommendation that such and such be done, but I have no record of such a memorandum coming out of our department.

Q When you say you were successful in getting all of these builders to dedicate the right-of-way you wanted, in fact, you're telling me, are you not, sir, that you're asking these builders to give to the county and to the state part of their property? Isn't that correct?

MRS. FRIED: I would object to that question.

THE WITNESS: No.

MRS. FRIED: That's putting an answer in the mouth of the witness.

BY MR. GARNIER: (Resuming)

Q Go ahead?

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A I would say no.

Q Was not the county and state, in fact, taking part of the property which previously belonged to the builder prior to this time?

MRS. FRIED: Excuse me, I must object. That question is argumentative and gives its own answer.

THE WITNESS: It's our point of view that the development of a site must take into account the necessary public improvements and roads are among those improvements and this is part and parcel of development in Prince William County.

BY MR. GARNIER: (Resuming)

Q What is the concept of dedication, what does that mean to you?

A Dedication means to me that the owner of the property identifies and dedicates a portion of his property to public use.

Q And is it not true that at that time he is no longer free to use that piece of property as he would otherwise may have seen fit to do so when he bought it?

A If you are referring to a site plan and dedication with respect to a site plan, that dedication is carried out in the context of his going ahead with a development and I don't

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think he can develope without having an approved site plan, so I think there is some relationship in that.

Q When you approach all these various builders whom you eventually convinced as you told us, were there any that were reluctant to go through with this dedication?

A I can't recall specific instances of reluctance. However, it is generally -- there is a general reluctance on the part of developers to carry out such dedications and it is our task to show the developers that this is an entirely justifiable request and it is something that is necessary for providing for the future public facilities in his development and in the general area. So there often is reluctance but through discussion we attempt to show this recommendation is indeed justifiable and has rationale to it.

Q In your experience, Mr. ~~Biber~~ BIBBER, why is there such a reluctance on the part of the builder?

A Why is there reluctance?

Q Yes. Is it because the land is being taken by the county?

MRS. FRIED: Again, I object. You're supplying the answer.

MR. GARNIER: I'm asking a question.

THE WITNESS: I would say there is a reluctance in that

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most developers have certain preconceived notions as to what they want to do with their property and very often such a request would go against their original notion as to what they had in mind.

BY MR. GARNIER: (Resuming)

Q Now, how did you go about convincing these various people that expressed some reluctance?

A I think I've already mentioned that. We make an effort to show that the road is needed for the development itself and also in order to provide for a road network which would be adequate for the area.

Q Aside from appealing to the civic duties which we know all builders have, is there anything said to any of these builders about what would happen to this site plan if they didn't cooperate with the state or county.

A I think that the ability of the staff at the moment is that of providing recommendations to the supervisors and I think the developers understand that. The developers that I've dealt with generally attempt to adjust their site plan so that the staff recommendation would be positive and would be essentially part of the final site plan.

Q In fact, Mr. ~~Biber~~ BIBBER, didn't your office tell McKeon Construction Company that the site plan would not be approved

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unless they dedicated the land you were asking for?

A I don't recall making such a statement.

Q I'm not asking whether you did so in specific terms but wasn't this the crux of the conversation you had with all these builders including McKeon Construction Company?

A Well, I think that's not quite putting it the way -- we try to put it in terms of our recommendation is that this piece of ground be dedicated. That is our recommendation and this is the recommendation we will make to the Public Works Department and we hope that is the recommendation the Public Works Department will make to the supervisors and if the supervisors concur with the recommendations of the staff, then that would be a part of the approved site plan. If that was not, then the site plan may be disapproved.

Q Mr. ~~Biber~~ BIGBER, you're pretty well acquainted with the policy of the Public Works Department as it cooperates with you, are you not?

A Yes.

Q You're not isolated in an ivory tower?

A No.

Q And regardless of the way you want to put it, isn't it a fact that these site plans could not be approved unless the dedication was given? When you strip it of all the verbiage

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you've given us, isn't that the net result of what you're telling us, sir?

A No, I don't think it's quite in those terms. What I'm saying is, our recommendation would be that the site plan not be approved without such dedication.

Q Now, what do you think the Public Works Department would do based upon that recommendation, sir?

A Assuming we have been working closely with the Public Works Department and they see fit to concur in that recommendation, then their recommendation to the supervisors would be that the site plan not be approved without such dedication.

Q Mr. ~~Biber~~ BIBBER, you say assuming you have been working closely. Isn't it a fact you have been working closely? It's an existing fact is it not?

A Yes, from time to time we do discuss whether or not a particular facility should be built to one standard or another standard, so I just want to leave room for the possibility that the Public Works Department did not concur in the Planning Office's recommendation.

Q Let's talk about Ashton Avenue, Mr. ~~Biber~~ BIBBER. Isn't it a fact that McKeon Construction Company filed and if you recommended against it because the dedication was not in the

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site plan, Public Works would have gone along with you? Is there any doubt in your mind about that?

A I think in terms of Ashton Avenue we had been working so closely with Public Works that I would certainly expect that the Public Works Department would have concurred with our recommendation on Ashton Avenue.

Q And it is a fact if there was no dedication shown, if McKeon was not willing to give you the land, you would have recommended against approving the site plan, isn't that correct, sir?

A Well, our recommendations are not phrased such that if they do not do this then we recommend denying it. Our recommendation is that we recommend this be done.

Q And what is the reverse of that, sir, if it is not done you will not recommend for it, isn't that correct?

A That's possibly the reverse.

Q Was there any other possibility?

A No, I think that probably is the reverse.

Q So, in fact, it was your policy at this time and your recommendation that if this plan did not reflect that the land would be dedicated there would be no approval of the site plan, isn't that correct, sir?

A If you accept the reverse of the way in which our

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recommendations are made, yes, I would say that.

Q Mr. ~~Biber~~ BIGGER, you're playing with words with me and I'm talking about facts of life. Isn't it a fact of life that unless that land was dedicated, a site plan didn't have a chance of being approved, in your experience in your position at that time?

A As far as my experience goes, the recommendations that we make and that the Public Works Department makes to the supervisors concerning site plans, they are not always followed and there are cases where the Public Works Department and the Planning Office have made recommendations and even the Virginia Department of Highways have made recommendations for dedication or improvements which have not been supported by the supervisors and the ~~planner's~~ developer's plan has been approved without these recommendations being adopted by the Board.

Q Mr. ~~Biber~~ BIGGER, are you telling me in 1972 if the site plan had gone to the Board of Supervisors without the land being dedicated with a recommendation that it not be approved both by you and by the Public Works Department because the builder did not want to dedicate the land, that the Board of Supervisors would have granted the site plan approval anyway? Is that what you're saying to me?

MRS. FRIED: I object to that question.

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THE WITNESS: I'm saying there is a definite possibility of that, yes.

BY MR. GARNIER: (Resuming)

Q Now, in your conversations with the various builders, did you explain to them, either specifically or indirectly what your policy would be on recommendations with reference to the land being dedicated?

A Again, I don't recall specifically mentioning this but it's been our position that when we do have a road such as this, we do ask for at least the dedication of the right-of-way.

Q Well, you let it be known to these various builders or you say you were successful in convincing them that their chance of having the site plan approved would be greatly increased if the land was dedicated?

A We don't put it in those terms.

Q Tell me what terms you put it in, sir?

A We recommend the land be dedicated for Ashton Avenue and for instance in the Ashton Glen Subdivision where this road was going to be the major entrance road to the development, we recommend that it be constructed by the developer and we make these recommendations to go to the Public Works Department which then, we assume, would concur with those recommendations in making them to the supervisors.

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Q And if the developer would happen, Mr. ~~Biber~~ BIBBER, if the developer would ask what happens if he doesn't dedicate the land, what would you say to them?

A Well, I think what he would say --

Q I'm asking what you would say if he said this to you?

A What would I say if he says what happens if he doesn't dedicate the land?

Q Yes, what's going to happen to my site plan.

A Well, I would hope --

Q (Interposing) I'm not asking about what you hope, I'm asking what you would say to him, sir?

A Well, I would say, "If you don't agree with this dedication, then I would hope the supervisors would concur with the staff and if you continue to disagree with this then your site plan would be denied, disapproved."

Q And he could ask you about what your recommendation should be, what would you say to that?

A What my recommendation concerning Ashton Avenue --

Q Yes.

A Well, I would say it would at least be that Ashton Avenue right-of-way be dedicated for public use as part of this development.

Q And what would your recommendation be as reported to

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the builder with reference to approving or disapproving the site plan?

MRS. FRIED: I object because the question has been asked in various forms over and over and the witness has answered over and over.

MR. GARNIER: I'm going to ask him until I get an answer out of him rather than a speech.

MRS. FRIED: I again object. You want the words you want him to say and the witness has answered.

MR. GARNIER: Sooner or later I'm going to get the words I want him to say or we'll be here all day.

(Whereupon, the reporter read the previous question.)

MRS. FRIED: May I state for the record that neither of us is your attorney and you are a free agent as far as answering or not answering questions.

BY MR. GARNIER: (Resuming)

Q Do you understand my question, Mr. ~~Biber~~ BIBBER?

A No, would you rephrase that for me.

Q You don't understand the question as it was reread to you?

A No.

Q What part of it didn't you understand?

A I missed the meaning of your question. I wonder if

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you could rephrase it?

Q All right, let me rephrase it.

If the builder says to you, "I will not dedicate this land required by you --".

A As recommended by me?

Q What would you say to the builder would be your recommendation with reference to the site plan?

A My recommendation --

Q (Interposing) With reference to approval or disapproval?

A I would tell the builder that my recommendation would continue to be that he dedicate this right-of-way.

Q So that you would say nothing to him with reference to whether this site plan would be approved or disapproved based on your recommendation?

A Probably not, although if he said to me, "What if I ~~got~~ go ahead and ask that this be taken to the Board of Supervisors and I don't show any dedication for the right-of-way, what would happen?" and than I'd say, "Well, I would assume the Public Works Department recommendation would be for dedicating the right-of-way and if you didn't show any dedication of right-of-way, then the supervisors would have to decide whether they would support the staff recommendation

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and therefore deny you a site plan or agree with you and approve your site plan without the dedication.?

Q In fact, Mr. ~~Biber~~ BIBBER, didn't you tell Sam Rose when you had a meeting with him that if that land was not dedicated, he didn't have a prayer to have the site plan approved?

A No, I don't recall having stated that.

Q Do you deny having stated that to him?

A I certainly have no recollection of making that statement.

Q Do you recall saying anything to that effect, even though the language may not be exactly what you recall, sir?

A No, I do not, sir.

Q If Mr. Sam Rose testified to this, sir, would you deny it under oath?

A I would have to concentrate on an attempt to recall what the meeting was that Sam Rose -- where the meeting was when Sam Rose alleged I said that. I would have to work on my recollection on that, but right now I can't state whether I would deny that or not. At this moment I have no recollection of telling Sam Rose or anybody else that if they did not dedicate the right-of-way for Ashton Avenue, his plan would not be approved. I have no recollection of making such a statement.

Q But, in fact, you know, did you not, if he did not

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dedicate the right-of-way the site plan would not be approved?

MRS. FRIED: I object to this question again.

THE WITNESS: I do not have that knowledge. I think I described to you what I felt the procedure would be at the Board of Supervisors if he continued to object to this dedication and requested that this item go forward. Then the Board of Supervisors would be faced with the decision of supporting the staff recommendation or concurring with the developer that the dedication not be made.

BY MR. GARNIER: (Resuming)

Q Did there come a time when you had occasion to tell Mr. Rose that in any event if he did not dedicate the right-of-way, either the state or county could take steps to see to it that the land was furnished to the state?

A I never made any such statement.

Q Either directly or indirectly?

A Either directly or indirectly.

Q Did you ever discuss condemnation with Mr. Sam Rose?

A I never discussed condemnation.

Q So if he would testify to this, you would deny doing it?

A I would deny it.

MR GARNIER: That's all I have.

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(Thereupon, at 11:00 A. 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 Henry G. Biber, 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
James H. Payne	36	3
		62

E X H I B I T S

Payne Deposition Exhibit No. 1 (Included at request of counsel)

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 JAMES H. PAYNE, 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 11:10 A. 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

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

On behalf of the defendants:

BARBARA J. FRIED
Attorney at Law
Executive Building
Springfield, Virginia

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William B. Peters
Stenographic Reporter
Ward & Paul, Inc.
4055 Chain Bridge Road
Fairfax, Virginia
703-273-2400

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

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P R O C E E D I N G S

Thereupon,

JAMES H. PAYNE,

called as a witness by counsel for 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. Payne, would you state your name and position in Prince William County?

A James H. Payne, Jr., Acting Director of Public Works.

Q Was this your position in December of 1971?

A No, it was not.

Q What was your position at that time?

A In December of '71 I was a civil engineer in the Operations Division. I guess I held the title of Assisitant Chief of the Operations Division.

Q And do you remember how long you remained as Assistant Chief of the Operations Division?

A I'm trying to think now.

Q To the best of your recollection?

A I believe it was around February of this year. I don't recall exactly but when Mr. Williamson became the Assistant

Director of Public Works and I became Chief of the Operations Division and I should remember when it was because it was a promotion. It was around the first of this year.

Q So then from a period of about December of '71 through April of '72 your position was the same?

A Yes, it was.

Q Could you describe your job at that time? What was the nature of your job or generally what your duties were?

A Well, we were responsible in the Operations Division for review of subdivision plans and site plans and my particular position was primarily responsible for the review of subdivision plans with the chief of that division, Mr. Williamson at the time. We reviewed the subdivision plans for conformance with the subdivision ordinance and construction specifications and other standards we had at the time prior to preparing reports to the Board of Supervisors.

Q Could you describe by the law you were working under, by law or state statute, what requirements generally must be met by the developer submitting a site plan?

MR. GARNIER: Excuse me, what did you ask him?

BY MRS. FRIED: (Resuming)

Q I'm asking by law, whether through county ordinance or state law, what requirements the developer must meet?

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MR. GARNIER: Procedure?

MRS. FRIED: Yes, in submitting a site plan.

THE WITNESS: That's a very broad question. We have a written legal subdivision ordinance for the platting of property and we have written standards and we have criterion for the design of these projects and all these things are part of the legal department requirements as far as I know. We, over a period of time, have set up policy guidelines in addition to that which we use to review plans, but the county subdivision ordinance is the thing we are primarily responsible for and the construction specifications and standards.

BY MRS. FRIED: (Resuming)

Q Specifically, do those standards include any provisions as to traffic flow?

A The subdivision ordinance and the standards have traffic volumes for different street design classifications, yes.

Q So that whether its on a site plan or in a subdivision, would the same rules apply?

A No, not on a site plan or a subdivision. This is not necessarily the same.

Q How would you distinguish or is there any distinction in applying these standards between reviewing the site plan or

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the subdivision?

A Yes, because the site plan is usually not a site plan. A site plan is usually a commercial project and the same street standards don't necessarily apply, and the off-street parking and this type of thing.

Q If the density were the same, if you were given a site plan for condominiums or a subdivision plan for single family housing and the density was the same, would the same rules then apply?

A Well, first of all, the density wouldn't be the same between the two, but insofar as the road standard as opposed to a parking lot type situation, the same road standards would apply. In an apartment project the Highway Department will not accept the streets for maintenance in their system if you have perpendicular parking and therefore, you have a different basis to start designing the streets on. Once you got up to a certain classification of traffic, you would probably have the same streets.

Maybe you could restate the question. I think I missed your point, or got away from it.

Q If you were reviewing a site plan, vis-a-vis the roads on the site plan, what factors would you take into consideration?

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A We would take into consideration the estimated amount of traffic on the road, the topography, horizontal and vertical curvature of the road, the site distances, these type of things in addition to providing entrances in the appropriate locations or whether they would conflict with other entrances.

Q Is this a requirement by law that you take these factors into consideration?

A Well, yes, basically in the site plan ordinance, when we review a site plan we're responsible for the general layout of the parking and the roadway patterns in the site plan ordinance. What we're responsible for is very general and stated very broadly without a great deal of standards or anything like this. In the subdivision ordinance there are a few more specifics subdivision design was developed over a period of time based on lot densities and street standards of the Highway Department, but in apartments and in the last few years in townhouse design, the situation is quite different, where the individual owner of the project or the individual homeowners are maintaining the street systems and this is why I said we had policy guidelines we developed to review these by. I don't know whether its specifically written in a legal ordinance but it's part of all of our reviews.

For instance, we have developed a policy on townhouse

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design when the traffic level reaches a certain minimum based on a certain number of trips per dwelling unit, we would require a state standard type street.

Q In the interior of the development?

A In the interior of the project.

Q Such a street would not necessarily be in the interior, it could be an arterial street through the property?

A It could be anywhere.

Q So you would consider in reviewing site plans, not only the traffic pattern within the project but the traffic flow?

A And how it relates to the rest of the area.

Q And these regulations or procedures evolve from the general county ordinance on site plans?

A Yes, I believe that's a fair statement.

Q Could you just tell us briefly then the procedure once a site plan is submitted to Public Works, what happens to that site plan?

A Well, when a site plan or subdivision plan is submitted, it's referred to as many other county departments and the Highway Department as is necessary. For instance, the Sanitary District reviews it, the Recreation Department reviews it, the Highway Department, the Planning Office, the Fire

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Marshall's office reviews it, the Soil Scientist and possibly the Health Department depending on whether or not public sewage disposal system or an individual sewage disposal system is used, and when these departments review it and make recommendations to the Public Works Department, then we complete a more or less comprehensive report based on all the recommendations as well as our own review and present these plans to the Board of Supervisors for approval or disapproval.

Q Who then makes the final approval or disapproval?

A The Board of Supervisors.

Q Are you familiar with the site plan application No. 2313, I believe it's Manassas Quads?

A Yes, that's what I have here.

Q Do you have a copy of that site plan?

A Do you want a copy of the original or the most recent?

Q Do you have both?

A I think I have both. This is one of the originals.

Q This is dated December 13, '71?

A Yes.

Q Was this submitted about that time, do you know?

A I don't have a receipt for fees with me but according to the transmittal, it should have been submitted about the

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13th of December, '71.

Q When this site plan was originally submitted in December of '71, did you make any comments, either oral or written, to other people in your department on the site plan?

A Well, we began our review process as is the case with most plans, a great deal of discussion over a period of time, I suppose, between members of the department on various aspects of the plan.

Q Did you submit any initial comments to the developer or to the engineer?

A I don't believe we submitted any in writing. Quite often what happens in the process is that the engineers for the developers will come into our office and inquire as to the status and there will quite frequently be some discussions regarding points on the plans and they will be trying to find out the status of the review and we ask questions and this type of thing.

Q Do you recall that this was done in this case?

A I'm sure it was. Probably one reason there was some discussion was the fact that this particular type of development or layout, whatever you might want to call it, was somewhat unique at the time and probably still is. It's a little different than most plans we had seen.

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Q Why was it different?

A Because this is a condominium project and I think at the time there were probably only a couple other condominium projects submitted in the county, at least that I know of and the relationship of ownership and how this would affect the maintenance of street systems and that type of thing were new to us and we were trying to find out some of this by talking to the engineer for the project and the reasons some of the things were laid out and this type of thing.

Q Was this Coverstone Drive a privately owned street then? Do you recall if that was to be dedicated?

A This is a preliminary plan and not a final plan and at this stage I think we would have assumed that this would be a street dedicated to public use because of the fact that it connects through the project to other areas and comes from a street that we're sure is going to be part of the state system. Whenever a street serves the public need, it's generally required that it be dedicated to public use and not maintained privately.

Q Then to your knowledge you may or may not have had discussions with the developer?

A I'm sure we had discussions -- with the developer?

Q With the developer or his engineer?

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MR. GARNIER: For the record, would you identify who the developer was?

MRS. FRIED: This was McKeon.

MR. GARNIER: It doesn't show on the site plan.

MRS. FRIED: That's right, it's just called Manassas Quads.

MR. GARNIER: That would have to be McKeon.

THE WITNESS: Our primary discussions are with the engineer. I think I recall Mr. Rose of McKeon has called on us on occasion and asked on the progress of the plan but generally we don't discuss details or engineering requirements or so forth that much with the developer. We try to keep our conversations with the engineer representing the project.

BY MRS. FRIED: (Resuming)

Q Was the developer or engineer pushing this plan through?

A They all are.

Q Do you recall specifically in this one were they trying to push it through or were they just letting it lay in your office?

A No, I wouldn't say they let it lay in our office. They were anxious to get approval as most everyone else is.

Q Do you recall after the submission of this site plan

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having any discussions or meetings with members of either or both the Planning Department and the Virginia Department of Highways?

A We had meetings. Just how many or how often, I really couldn't tell you from memory, but when we got a plan and once it's submitted to the other agencies, the Planning Department and the Highway Department, we will quite often talk about this over the telephone and at one point or another try to have a group meeting and maybe possibly more than one group meeting and I'm sure we had conversations back and forth with them.

Q Do you recall any other conversations concerning this particular site plan?

A I don't recall specifics of the conversations.

Q Do you recall generally what was discussed?

A I'm sure we would have discussed basically the street system and the parking requirements because I think there was concern over the adequacy of parking. There was some question over the matter of school dedication, the property for schools. That was discussed, I imagine with the Planning Department as well as the School Board which is an agency that approves these plans. I'm sure we discussed with the Highway Department the matter of street sizes.

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Q When you say street sizes --

A Well, for instance in this vicinity where there is parking shown here, we would have discussed the need for a state standard type street which wouldn't allow this perpendicular parking.

Q You mean head-in?

A Right, with the backing out into the traveled portions of the street.

Q This is a street not to state standards?

A This would indicate a street to state standards?

Q Coverstone Drive?

A Right.

Q But this area where you're showing the head-in parking is not?

A Well, actually there is not enough information on this drawing to say. The size would indicate this is probably a state standard size here. This is our notation measurement put in here which would indicate it's scaled out to the lowest classification of such a standard street on this location. This is scaled to thirty feet which is a county standard but based on the state minimums this would indicate this wouldn't be a street that the state would accept in their system.

Q So that would indicate to you it would be a private

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street?

A That's right. I guess private is the word, whether it be home owners or condominium owners association. It would just be other than public, so it would be private.

Q But even if the developer maintained that as a private street you would still object to this kind of parking if the amount of travel would be too great?

A We quite possibly would, yes.

Q Would this have been the only thing submitted, this piece of paper, as the preliminary site plan or would there have been profile plans?

A Not with the preliminary site plans.

Q This would have been it?

A I'm sure this is all that was was submitted to us as a preliminary plan and our preliminary plan submissions generally do not involve detailed profiles. All of the construction plans would go with the final set of plans.

Q Does it show the proposed utilities, sewer and sanitary?

A We require that they show on there the utility system, road systems.

Q Does this plan show the utility system?

A In general it does. It shows water lines here, here

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and here and it shows the sanitary sewer system here. It doesn't show the storm sewer system which is not always a requirement because that is usually in the detailed plan, but we do sometimes ask for additional information on storm sewer design if there is a major drainage involved or something like this.

Q Do you, in reviewing the preliminary site plan and examining the location of storm and sanitary sewer easements --

A (Interposing) Easements don't show.

Q I mean the lines? Do you review that in the context of the surrounding properties? Are you concerned, in other words, about whether a line would be adequate if it had to be hooked up with an adjacent property?

A We would. The Sanitary District would also look into this. We generally rely on them pretty much on the way it would tie into another system. Whether going into an existing system, for instance, or whether there would be need to extend it to other properties, we might help the Sanitary District in determining whether or not the size was adequate. Those kinds of things, we would look at the surrounding sites to try to coordinate these things.

Q Do you recall then if this was the only piece of paper submitted? Was there a written application with it?

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Do you have anything in your file?

A Generally we would only collect and receipt the fee and the plan would be the submission itself. I believe this was the extent of the original submission. I'm not absolutely sure this is the original submission but it is the earliest plan we have in our files. It looks like it probably was. Occasionally the dates aren't that significant to us because they will submit a preliminary plan and then they may, for one reason or another, make revisions to it and submit another plan. Usually it's kept track of pretty well. Sometimes when a plan changes, we don't necessarily keep all the copies because some of the changes are rather minor.

Q Then there is nothing in the file to indicate any of your comments on this particular plan, is that correct?

A There's nothing in the file I have.

Q Who would maintain a file of comments?

A We would maintain a file of our comments when we write correspondence to the engineer or when we write reports to the Board of Supervisors and when we get comments from other agencies, we keep them in our files. We do have some of this correspondence but as far as our writing to engineers, I've got some correspondence in here to the engineer but I think it was primarily on additional fees for the plan and

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this type of thing.

Q Then it was your procedure to orally discuss the situation?

A Pretty much. It usually gets down to the point on a final plan that we send detailed letters back and forth and on the preliminary, too, but in the very early stages and on a preliminary plan there will be a lot of oral conversation.

Q Do you recall any of your conversations with the engineer, Mr. Rose, concerning this plan after it was received?

A Well, I can recall talking to them. If there was something more detailed, I don't recall. In general I know we talked about, and I only talked with Springfield Associates, about the street system a number of times.

MR. GARNIER: If you want to lead him and really get into the inquiries you and I both have in mind, I have no objection. We're beating around the bush.

MRS. FRIED: All right.

BY MRS. FRIED: (Resuming)

Q Did you have any discussions specifically concerning a proposed dedication for Ashton Avenue with Mr. Hellwig or Mr. Rose?

MR. GARNIER: Or Mr. Biber?

BY MRS. FRIED: (Resuming)

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Q Let's start there.

A You're talking about the arterial roadway that is to go through this area?

Q Yes, I keep saying it the other way around. It may show on the '72 map?

A This is the most current plan we ever had.

Q Can we identify this as the same one Mr. Biber showed us, received March 3, 1972, the preliminary development plan for the Coverstone site.

May we identify this as the same?

MR. GARNIER: Can you lay this one down in the same relative position as this one?

THE WITNESS: This is a later plan which would reflect the types of conversation we had and the types of questions as far as street systems and things like this are concerned. For instance, you can notice the small parking cluster was removed from this plan. Actually there was quite an extensive revision of the layout. (Indicating) This is thirty-six feet and that would a standard size street based on the fact that we looked at the numbers of units and based on our policies up to this point, we would want a public type street. It's not our policy that it would have had to be dedicated but that it could be dedicated to the street system

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if the owners or home owners had wanted to.

Q So you increased the size of this street we're looking at and eliminated the head-on-parking? Was there any change in the density and the number of units?

A I think there was a change in the number of units. In our files we wrote and asked them for additional fees and I think when they laid it out the second time they increased the number of units.

Q They actually increased the number of units?

A Yes. It should be on the sheet. Does it show the number?

Q I don't think it does.

A Number of units 208 and this one shows the number of units 212. I have a copy of the letter where we wrote back and asked for additional fees for the additonal units.

Q Could you tell us, to the best of your recollection the conversations you had concerning dedicating Ashton Avenue with Mr. Hellwig when you first mentioned it to him?

A I couldn't tell you when we first mentioned it to him. I don't know that I could really determine that because in the course of reviewing this plan, as well as a number of others, a lot of things and primarily the planning area plans were in a state of flux being that they were somewhat behind

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actual development plans and I think all the reviewing agencies realized the need for certain additional streets and the tremendous volumes of traffic that would be generated by some of these higher density developments and the Ashton Avenue roadway, that this would be a part of the system and it extends for a considerable distance into some other projects and Springfield Associates was working on some of the other projects, too, and still is. The same general street was in those other areas also and the size of it developed from different analyses of the amount of traffic that was going to be generated from this as well as a number of other developments, and the fact that this traffic couldn't all be handled on the main roadway in that area, which is Route 234.

Therefore, over some time the talk was this roadway should go in this location or that location and eventually the study of this area came up and the road would be going in this general direction in order to get to Route 621. It was some time probably after the first submission of the plan. I can say that much.

Q But when would Springfield Associates have been aware of this general Ashton Avenue proposal?

A Well, I don't really know. I'm sure they were aware of all the discussions that were going on about it because

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preliminary plans were being drawn for other areas as well as this area and the planning area plans showed different networks of roadways which didn't necessarily cover all of the land and didn't go all the way to the edges of all the properties. Not necessarily Ashton Avenue but a major road had previously been shown on this plan adjacent to this particular parcel right here (indicating) but was smaller in size.

Q Had previously been shown on what, on a different site plan?

A Right. In this section there was a roadway.

Q This is Section Two of Coverstone?

A Yes, there was a roadway that extended through there which was more or less an extension of a major road that Ashton Avenue is a part of, back in this vicinity toward Manassas. (Indicating)

Q And who worked on that site plan, do you recall?

A The owners.

Q No, who was the engineer?

A I believe Springfield Associates.

Q So they were aware at the time this was submitted?

A No, not of this. I don't think they would have been necessarily aware of this because a thoroughfare road which is the next largest road below a divided arterial roadway, which

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this is, was located through that property, to go through the middle of that section and eventually to be extended over to the next road. But that plan was approved for development and I think construction had started or was starting on that at the time a need was seen for an actual divided arterial highway in this vicinity and it naturally couldn't go through developed areas, so the next areas that we looked for where it could go would be undeveloped areas and this is the reason there are some curves in it.

MR. GARNIER: Before you go any further, for the record, let me note my objection to this entire line of questioning because you are talking about a point in time after the signing of the contract and it would be our position that whether or not the engineers had any knowledge of this certainly would not be inferred as being knowledge of our client at the time of the contract and would have no bearing upon the contractural dispute.

I'm just noting that then for the record, go ahead and answer the question.

BY MRS. FRIED: (Resuming)

Q Getting back to the time this was submitted, let's say it was submitted some time in December of '71 and you may have had -- and I'm just summarizing -- you may have had oral

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conversations of some sort with Mr. Hellwig and maybe even with Mr. Rose, but there was nothing definite said. When was the first time that something was definitely said about putting this 110 foot right-of-way in, either to Mr. Hellwig, Mr. Rose, Mr. Biber or someone from the State Highway Department?

A The 110 foot right-of-way -- in the location of this plan you mean?

Q Right.

A The 110 foot right-of-way, that type of street had been talked about in other areas, as I say, in the general vicinity before the time of the submission of this plan but I'm not at all sure that the 110 foot right-of-way was discussed with anyone prior to submission of this plan. It's quite likely. I don't recall the first time. I don't have any specific recollection of it and it's quite likely that the actual need for the 110 feet of right-of-way wasn't discussed with any of these people in this area until after this plan was submitted.

Q After it was submitted, then did you have a meeting? Did you attend any meetings with the Highway Department and with Planning concerning the specifics of the site plan?

A Yes, we had some meetings.

Q Do you remember when?

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A At least one.

Q Do you remember about when those meetings were held?

A I've got an agenda here that was for a meeting between the Highway Department and our office and the Planning Department that was scheduled for February 29 and I'm reasonably certain that was the date we did meet with the other people and the indication is that the developers were present, too.

Q Could we make a copy of that agenda?

A Yes.

MR. GARNIER: I think we'll probably want to take a look at the entire file.

BY MRS. FRIED: (Resuming)

Q Is this the only meeting you recall?

A I can specifically recall that there was a meeting at the Highway Office that I was at. I believe the Planning representatives were there and our representatives were there for certain and I believe Mr. Rose was there and Mr. Hellwig and I'm pretty sure it was this meeting.

Q Would this have been the first time the question of Ashton Avenue was raised with the developer?

A No, I don't think it would have been the first time. I'm sure it was a matter of discussion before that time. I think that's probably the primary reason for the meeting.

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Q Do you remember what was discussed at that meeting?

A I'm sure the need for this roadway was discussed at this meeting. The particulars of how it was discussed, I don't remember without some questions.

Q Were other elements of the site plan discussed at the meeting as well?

A I think we probably discussed some other elements such as the size of some of the other streets, too. I think probably the main reason for the discussion with the Highway Department at the Highway Office was the discussion of the effect of this plan, this roadway and the plan. In fact, going back, I guess this was the subject.

Q The original site plan?

A The site plan was submitted and we were discussing that because the right-of-way wasn't even indicated until after that date. So, it wasn't actually put on the plan.

Q So it was the site plan, the original, that you were discussing?

A That we would have had at that time, that's right.

Q At that meeting you recall on February 29, did you or anybody, anyone from the Highway Department or anyone from Planning or any official from Prince William County, threaten condemnation or threaten to use the power of eminent domain

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to get this right-of-way?

A I'm sure, no.

Q Do you, in your department, have the authority to condemn?

A No. That's the reason I say not.

Q To your knowledge has there ever been a condemnation in the county of Prince William for a road or right-of-way?

A Yes, there has been condemnation for right-of-way.

Q Do you recall what that was?

A I've only been employed by the county for about three years and I'm sure it has come up before my employment and possibly some I'm not aware of.

As I understand it, improvements to a road such as Route 234 where the property couldn't be bought or purchased, was condemned and just how often that was along that project, I don't know but I do understand some of the right-of-way for that was condemned.

Q Is that done by the state, do you know?

A I think so.

There was a Route 28 by-pass road to the IBM plant constructed which I believe the county had to pay the condemnation price for that land, so I'm sure that was obtained that way, too. That was quite a large settlement some time in the

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last three years.

Q You're sure then at this meeting you did not and nobody from the Planning Department or Highway Department threatened to condemn?

A I'm sure none of us would have threatened anyone in any way.

Q Do you recall what happened at that meeting, any other details to the discussions you might have had concerning the site plan?

A Well, I'm sure probably a lot of the discussion was on the need for the road and that necessarily would have involved a lot of other reasoning for a road of that size. Quite often these meetings get off on a lot of tangents but I think the primary discussion would have related to the size of the road and the need for it in that location and their objection, and usually the conversations from our standpoint center around why we see the need for it.

Q Was this site plan, the new one, dated March 3, 1972, submitted as a result of that meeting?

A I would say it was submitted as a result of that meeting as well as a number of other questions that were raised, in that the right of way for this road was something that all of the agencies wanted to see go in this area and

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like I say, a number of the other lesser magnitude changes were indicated on this plan. Also it clarified some of the problems we had in regard to the number of parking spaces and the location of parking spaces in relation to the unit.

Q Are you saying that on this resubmitted site plan there are more parking spaces? Is there a summary at the bottom?

A 424 plus 42, yes.

It doesn't necessarily show there was more. There was a considerable amount of discussion and I don't know whether it was ever really finally resolved as to what could constitute a parking space on this type of unit and again, this is one of the things I said earlier about the problems that we had because they were new units from the standpoint of the zoning ordinance. I know questions were raised about how to count certain spaces that were inside the unit that would not normally be counted as parking and I don't think that was really settled at the time of this plat and probably was never finally settled as to the adequacy of parking.

Q What is the density shown on this resubmitted March plan?

A This is ten units per acre.

Q What is the density.

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A 9.8 units per acre in the original plan.

Q What was the zoning density allowed?

A I think for condominiums it had been determined they couldn't be built at greater density than ten units per acre if they were essentially townhouse condominiums and they can't be built greater than the apartment density if they are apartment type condominiums and as near as I remember these were essentially judged to be limited by the ten units per acre for townhouses.

Q Do you know why the other submission that didn't have the roadway had a lesser density of four fewer units? Do you recall any discussions leading to the increased density?

A No. We really aren't concerned that much about the density as a factor in our review of the plans. The Zoning Office will assure us that it meets the density or doesn't meet the density that is allowable and whether they get 9.8 or 6.7 or 7.3, we really don't concern ourselves with that as long as they aren't over the maximum.

Q But you don't recall any specific discussions about the density?

A About the density, no.

Q But somehow when the revised plan came back less this area for the road, there are more units?

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A There are more units.

Q Is that the only meeting you recall then, February 29?

A That's the only joint meeting I recall anywhere near specifically because I can recall Mr. Rose, I think, was at that meeting. There were other instances when myself, individually, or Mr. Williamson, would have talked with Mr. Camper or Mr. Harrison or Mr. Biber about this and we would have discussed it amont ourselves and with other people in our department reviewing the plans at this time.

Q After the new plan was submitted on March 3, what happened to the revised site plan?

A Well, as I can recall there were a number of problems besides our detailed reviews of the streets. At this particular time there were questions in the file raised by the school people concerning the need for a school site in this area which was a problem and at the same time the availability of sewage treatment capacity and sanitary treatment plants was a problem and there were discussions on these points also.

Actually our files are not complete in that we hadn't received all the responses from all the reviewing agencies even after this plan was received and what would have happened is, we would have sent the new plan back to the ones concerned about it to see if the Highway Department, primarily, and the

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Planning Office would give an up-dated comments, if possible before making a final report to the Board of Supervisors. So this type of discussion and further review of the plan went on after this was submitted, up to the time the plan was withdrawn.

Q And when was that?

A April 4 we received a letter. We received it April 6 but it's dated April 4.

Q But the time between the resubmission in March and the date of withdrawal in April, was any further discussion had between your office and either Springfield Associates or Mr. Rose on the site plan?

A I'm sure there probably was some further discussion on it. For instance we've got noted here some things on the new plan that we found that didn't necessarily agree with the standards and things we had been looking at, so I'm sure there was discussion of that and there was probably discussion on the other points I've mentioned also; just how much, I'm not certain but I'm sure there was more discussion.

Q You say you've been with the county for three years?

A Since July of 1970.

Q Could you just tell us your background, just for the record?

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A I'm a civil engineer registered with the state of Virginia as a professional engineer. I don't know how much background you want?

Q After you graduated where have you been employed?

A I graduated from the University of Virginia in 1966, studied applied mechanics for a year in graduate school in 1967. From '67 to '69 I was employed with the United States Public Health Center as a field sanitary engineer on some indian reservations in the state of Minnesota. Upon returning to this area in 1969 I was employed with the Gregory Construction Company for about nine months before coming with the county.

Q And you've been with the county since then?

A That's right.

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

BY MRS. FRIED: (Resuming)

Q There's a letter in the file you mentioned about additional fees should be paid because of the increase in units. That letter is dated in March. Were those additional fees ever paid?

A I believe they were. I don't have the receipts here to indicate it but I believe they were.

Q So that would have been some time in March or April?

A It might have been. This letter was sent March 22

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and they withdrew the plan April 6. It's possible they weren't paid.

Q There's a letter in here dated April 4 from Mr. Rose and the letter indicates it was filed late in November of '71 and is still without an end in sight in early April, 1972. Is this an unusual time for processing of a site plan? Actually, it was filed in December?

A It's not an unusually long time in view of the kind of situation we've had in the last three years. I would say we have quite a few plans that have still not had action on them. They are being processed in our offices. There have been some that have been processed shorter than that but I would say very few on this kind of a plan, a residential project.

Q There's also a letter from the siltation people stating they couldn't give final approval because there was no erosion control plan?

A His letter said prior to final approval. This is a preliminary plan rather than a final plan and it's usually the case that an erosion control plan is submitted like the road plan and the construction plans later on with the final plans.

Q So you could have proceeded to give this plan

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preliminary approval without the erosion control?

A We could have made preliminary recommendations to the Board with this kind of a letter that this would be one of the recommendations, that they have the erosion control plan prior to final plan approval.

Q There is a letter dated December 29 to Mr. Biber from Mr. Ford, the Zoning Administrator discussing certain aspects. Now, in the normal course of events would this letter, the contents of this letter have been communicated to the engineer?

A Yes, the contents would be communicated to the engineer.

Q Specifically, Item F, in the absence of architectural plans, we cannot determine whether the units meet the definition of townhouses or multi-family structures. What would this mean? Would this have to be resolved before you could proceed at all with the plan?

A We wouldn't necessarily have to have architectural plan before we could proceed with a preliminary plan. I think we would have tried to get as many of the points as we could possibly get resolved between the officials, the various officials, such as the Zoning Administrator and the engineer for the project before making a final recommendation, if they

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would have a significant impact on the plan and this really relates, I think, to the question I stated earlier about the parking spaces. There wasn't really enough here to tell how many parking spaces would be necessary, so they did have to have some additional information before a determination could be made on that and a final recommendation be made on whether parking was adequate or not.

Q But to your knowledge, nobody ever really resolved that parking question?

A Well, they gave us some further explanations on the types of units and I don't know for sure that any final conclusions were made on the adequacy of the parking because of the question about whether or not -- how many spaces could be counted on being inside the garages. I think it was pretty near a conclusion but I'm not sure it was really final that the inside garage spaces could be counted or not counted in how many units they needed.

MRS. FRIED: Thank you, Mr. Payne. I have no further questions.

EXAMINATION BY COUNSEL FOR PLAINTIFFS

BY MR. GARNIER:

Q Mr. Payne, you are acquainted, are you not, with Mr. Henry Biber?

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A Yes, sir.

Q Could you tell us what his relationship is to Prince William County?

A He's the Planning Director for Prince William County.

Q And could you describe for us as well as you can the interworking relationship between your department and the Planning Division?

A Well, --

Q (Interposing) Particularly in terms of an application submitted to you for development of a piece of land?

A We send all of the plans we receive, site plans and subdivison plans to the Planning Department for review and we try to work very closely with the Planning Department insofar as coordinating the actual plans for development with the planning area studies which they have produced for the county from time to time over the years. In addition, we try to work with them to point out deficiencies and recommendations for changes for the planning area plans that we think are necessary and help them from a technical standpoint. We have to work very closely with the Planning Office in trying to achieve the goals of that office as well as ours.

At the time these actual detailed plans were submitted in any given area in the planning area, or even if

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they are outside the planning area, we work very closely with the Planning Office.

Q In terms of making recommendations to the Board of Supervisors for approval or disapproval, does the Public Works Department make a recommendation?

A The Public Works Department makes a recommendation to the Board of Supervisors, yes.

Q And is that based upon the recommendation made to it by the Planning Division?

A The Planning Division as well as the other agencies that review the plans.

Q So it is your recommendation that is the last one to go up to the Board of Supervisors to be considered, incorporating all the others?

A Our recommendation goes to the Board of Supervisors recommending incorporating the recommendation of all the others on a subdivision plan of sit plan, yes.

Q Now, during 1972, the first part of 1972, what was the policy of the Public Works Department with reference to recommending for or against approval on a piece of property if the Ashton Avenue dedication was not granted by the builders?

A I don't know that we really had any policy that I

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could call a policy. A lot of the plans that we get, we try to work out all the major problems we can before sending them to the Board because it's very infrequent -- it's not very often the case that we send a plan up recommending disapproval. Most of the plans are processed up when we feel that approval can be made, as a recommendation subject to certain conditions which are generally known to the owners or the engineers and agreed to by them.

Q After the need for the 110 foot right-of-way became known to you, this was passed on to other builders who had an interest in developing land all along the corridor, is that correct?

A There were meetings with other people who had large parcels along the area, yes.

Q Did you have occasion to recommend to the Board in any one case that there be approval of the site plan application where the dedication had been refused by the builder?

A I don't believe any plans were presented to the Board during that period in the location where this road would go that didn't include it, one way or another.

Q Were there plans presented to you that went before that Board that didn't originally incorporate such a dedication?

A Yes, I believe that's true.

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Q What, if any, steps did your department take in reference to this?

A That didn't have this particular 110 foot right-of-way?

Q Yes.

A We met with the different engineers and I don't know if they were owners or not, but primarily with the engineers.

Q For what purpose?

A For discussing the need for this type of a road in that particular area and then this was -- this particular roadway has been incorporated in a number of other plans in the general corridor there.

Q When you had the discussion with the various engineers, do you recall whether or not any of these discussions resulted with the owners, at least at the outset, refusing to grant you the right-of-way?

A I don't think it was a matter of anyone refusing to grant it because we weren't really -- it seems like a bad choice of words but there were people reluctant to go along with the idea this is a necessary road because in most of the developments it was a road of a size that would carry more traffic than their individual site and they are always reluctant to incorporate any kind of a large right-of-way like this into their development plans, but after convincing

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a number of different people on the need for such a road and the sizes and the traffic volumes we anticipated, we were able to convince them there was a need and that it would be beneficial to be in their development.

Q When you say, "We were able to convince them," who are you referring to?

A Who am I referring to?

Q Yes, sir? Who did the convincing?

A I would say people in our department as well as the Highway Department and the Planning Department worked on this thing. I think right-of-way for roads through this corridon originally weren't established; there was none and the concept of a road that extended from one end of the corridor all the way to the other end was sort of a gradual process in evolving and there were problems in certain developments that could be help by such a road in that they didn't have adequate access without a road in that general location.

Q Now, you're telling us here today, Mr. Payne, that all these people eventually became convinced as to the necessity?

A No, there weren't even plans submitted in some of the area in the corridor.

Q The people who eventually became convinced at the

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idea of the road and were reluctant at the outset, are you telling us they all became convinced because you explained to them that there was a need for this and that they felt the access would be beneficial to everybody concerned? Is this why they became convinced, to your knowledge?

A I really don't know why certain people were convinced of this. I know we had a lot of meetings and tried to make --

Q (Interposing) Let me ask you this, Mr. Payne, were there ever any discussions either with you directly or with people in your office about what might happen to a site plan if the dedication or the land was not given?

A There may have been. For instance, if something like this was seen as a need for the area by all the agencies and it was totally disagreed to by someone, the usual thing that would happen would be that we would go ahead with the recommendation for what we thought was necessary to the Board and these types of plans usually result in a lot of controversy one way or the other with the Board, in some cases them taking our recommendation and in some cases not, but us making a case for the need for these types of facilities where we thought they were necessary.

Q In fact, you let it be known that you would recommend against approval, did you not?

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A I don't know that we did, at least not in that particular way. We might well have made it known that if they didn't want to make this a part of the plan, it would be our recommendation that it be included in the plan when we sent it to the Board of Supervisors.

Q How long did it usually take for one of these plans to be processed from the time of the original filing?

A Well, there's absolutely no usual time. This is a preliminary plan and we have a lot of preliminary plans that take a considerable amount of time. We have some in our office that are as much as a year or more old.

Q This particular plan, how long do you think it should have taken?

A How long should it have taken?

Q Yes.

A That's a difficult question to answer. I don't really think there's any need that a plan should take more than three or four months to process, but when problems come up on a plan that are not easily resolved, they very often slow down on the review process because of inability to get clarifications of points or settlement of problems and this type of thing.

Q In fact, Mr. Payne, not saying that you would do so, but both you and the Planning Office would be in a position to

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slow down the processing of the plan considerably if a builder did not cooperate with the request you made on them, isn't that correct?

A It's possible. It's always been the case that any plan that had a number of comments from different agencies and our own included, which required more study or longer study or resolution of questions from other people who were not normally in the review process, took longer. We have never, that I know of, deliberately delayed processing of any plan.

Q I'm not saying you did, sir, I'm asking whether or not it's true that your office and the Planning Division would both be in a position to slow down the process if it elected to do so?

A Being that we are the agencies responsible for the processing, we are in some measure responsible for how long it takes but we don't make it a point, for instance, to try to push one project ahead of another. We don't really process a plan until we get all the reports in and we don't make it a policy of calling for developers to get other agencies to respond.

Q Mr. Payne, how does a recommendation eventually reach the Board?

A We prepare a written report and send it to the Board.

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Q The Board doesn't look down as ask you to send up a recommendation on a particular site plan, does it?

A Occasionally they do.

Q How about on this particular project, do you recall?

A I don't recall them asking us to send up a recommendation.

Q As a general rule, when you are good and ready and you feel all has been resolved to your satisfaction, the recommendation is made, isn't that correct, sir?

A We usually try to resolve as many problems as possible before submitting them to the Board but there are quite a few recommendations that go with our recommendation for approval or disapproval.

Q And as a general rule, whether or not the site plan is placed on the agenda of the Board depends on whether or not the Planning Division and your office have decided that you are ready to make a recommendation, isn't that correct?

A Not entirely correct.

Q Tell me how it is incorrect?

A It's like I said, we will occasionally reach a point where there is a very clear distinction between what we feel is necessary and what the developer feels is necessary and upon request of the developer, and we can see there is nothing

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further to be gained in conversation, we will go ahead and submit it to the Board with our recommendation for approval subject to certain requirements or, like I say, very rarely a recommendation for disapproval.

Q Was this site plan ever presented to the Board?

A No, I don't believe it was.

Q Why not?

A One reason, we don't have all the comments of the reviewing agencies in writing to prepare a final report.

Q Is another reason Sam Rose told you he wouldn't give you the 110 foot right-of-way? Isn't that another reason?

A No, that's not correct.

Q That's not one of the reasons?

A In fact, the plan shows this particular right-of-way.

Q Are you saying that McKeon Company was willing to give the 110 foot right-of-way? Is that your testimony here today, sir?

A Well, first of all, I think I should go back and say --

Q (Interposing) Answer my question and then you can go back. Just answer the question.

The question was whether it's your testimony here today that McKeon Construction Company was willing to give the

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110 foot right-of-way you were asking for?

A I don't know right this minute whether they were willing to give the right-of-way or not but they did incorporate on this plan no development in that right-of-way which was one of our primary objectives, that this corridor at least be reserved for that roadway some time in the future. I would have to assume from this that they did intend to keep development out of that.

Q When was the meeting that you testified to that you have a memorandum on, sir; what date is that?

A A meeting with the other departments?

Q In which Mr. Rose was present?

A It was the 29th.

Q Of what?

A February.

Q And you testified you felt this was probably to discuss the reluctance of McKeon Construction Company to give the right-of-way, isn't that correct, sir?

A Well, I know one of the primary things discussed was our ideas of the need for this road and the fact it was not on the plan that we had at that time and they didn't agree it was needed, I guess.

Q Did they ever agree with you that they would furnish

a right-of-way, sir?

A How do you mean furnish a right-of-way?

Q They they would dedicate the land, that they would give up the use of the land for their own purposes so you could put your road down it?

A I don't know if they ever really agreed they would dedicate it.

Q What did they tell you at the meeting? That's what you had the meeting for, wasn't it?

A Yes.

Q And what did they say to you?

A I don't really remember exactly what he said to us. I'm sure they could see no reason for their project to be involved in the roadway as many other developers can't see, but we emphasized the points. It's our primary responsibility to try to see that the overall area developes in a suitable fashion and we probably went back to restudy this thing and it was some time between that time and --

Q (Interposing) I'm not asking you to speculate as to what they probably did afterwards, I'm asking you what they said at the meeting, if you know?

A I don't really know, that I can remember.

Q Did you make any notes of it?

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A I didn't make any notes.

Q Did anybody make any notes of it?

A I don't know if others did or not.

Q Is there any particular reason after you made a note to the effect that you were going to have a meeting that you didn't see fit to keep a memorandum as to what was said?

A No, because we have these meetings regularly.

Q So are you saying if Mr. Sam Rose came in and testified as to what took place at the meeting, you have no recollection?

A I think I could probably recall whether or not -- if someone said I said something, I probably could recall if that's something I would have said at that time.

Q What do you recall about how the question of the dedication of the land was left at the meeting?

A I don't know exactly how it was left. It hadn't been agreed to, I don't think and I doubt that it had really been agreed to at the end of the meeting.

Q Now, the original site plan was filed when, sir?

A As near as I can tell, December 13, but it may have been that it was in our office for a couple of days before that.

Q So if I told you the original application was filed in November, would that refresh your recollection?

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A Our usual process is to receipt the applications and send them out to the agencies within a very few days after receipt of the plan. Our receipt for this plan should show if it came in our office in November. It could have come in.

Q Well, assuming that it came in the end of November, Mr. Payne, do you know any reason why it would have still been sitting in your office in the middle of April of the following year?

A The review process hadn't been finished yet.

Q What was not finished, to your knowledge, that kept it from going up to the Board?

A We don't have any written comments from the Highway Department?

Q What comments were you waiting for from the Highway Department?

A Their recommendations on the aspects of the roadway situation.

Q And that would involve that 110 foot easement, right?

A Well, it would involve anything that related to roadways that they thought necessary to comment on in the area.

Q And did you or anybody in your office get in touch with the Highway Department and ask them what was holding it up?

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A We probably did.

Q And what did you find out, sir?

A (No answer.)

Q You knew, did you not, that the refusal of McKeon Construction to grant the right-of-way was holding up everything else, isn't that correct?

A It wasn't the only thing holding things up.

Q But that was one of them, was it not?

A The matter of the roadway going through here and the size of it was one of the things of concern to the Highway Department as well as out department.

Q And the concern was that McKeon refused to give the easement that you thought was necessary, isn't that correct, sir?

A That wasn't the only concern.

Q I'm not asking you that. I'm asking you if that was one of the concerns?

A That they refused to give the right-of-way?

Q That's right?

A I don't really know that they refused.

Q But they didn't give it to you, did they?

A They didn't put it on the original plan, and like I say, it may not have been known to them at the time they

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submitted the plan that the right-of-way should go in that area. The concept of this roadway evolved over a period of time.

Q Are you telling us here today, Mr. Payne, as of April, 1972 you don't know whether McKeon was willing to give that right-of-way?

A Whether they were willing to give the right-of-way?

Q Right. You don't know what their position was at that time? Is that your testimony, sir?

A Well, I don't know whether it's their plan and it's not evident from this and there's nothing in writing I can find that states they would donate it or reserve it.

Q Forget about the plans and forget about anything in writing, do you know what the position of McKeon Construction Company was as of April, 1972, regardless of what your source of information is?

A Do I know what their position was?

Q That's what I asked you, yes.

A I'm not sure what their position was, no.

Q So you don't know whether or not they were willing to give the easement or the right-of-way, is that correct, sir?

A I don't think I do know, no.

Q Have you ever found out whether McKeon is willing

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to give the right-of-way?

A No. I'm sure we would have assumed at that time that they were at least not willing to develope in that area.

Q Well, why was the application still sitting in your office as of April, to your knowledge? What do your records indicate?

A Two or three reasons. One, we had not received a written comment from the Highway Department.

Q Now, what comment were you expecting to receive from the Highway Department?

A The regular review of the plan we submit. They submit a written report to us on all preliminary site plans.

Q And how long does that usually take, sir, in your experience?

A It's usually taken a minimum of a month or more on those plans.

Q Did you find that from November until April was an unduly long time to get the statements from the Highway Department?

A It's not an unusually long time.

Q How often does this take place, sir?

A A lot of the time the Highway Department is one of the last departments --

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Q I didn't ask you that, I asked you how long it takes to get the statements from the Highway Department that you require?

A Usually they will make comments to us within one to three months.

Q How long have you known it to take as long as five months for the Highway Department to make the comments?

A I couldn't say specifically, but I've known it to take that long on a number of other occasions.

Q Have you known it to take place in any other cases except in those places where the builder refuses to grant the right-of-way?

A Yes.

Q Which cases are you talking about, sir, specifically?

A I think on some of our Dale City plans and on some others it's taken longer.

Q When April rolled around and you had heard nothing from the Highway Department, did you make any inquiries of the Highway Department?

A We made inquiry. We talked to them, sir.

Q What did you ask?

A I don't know that we asked anything.

Q If you didn't ask anything, what did the inquiries

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consist of?

A Probably --

Q (Interposing) Not probably, I'm asking you what you did, sir, if you know. If you don't know, tell us. Are you guessing or are you recalling what took place, sir?

A I don't recall exact conversations of what took place as far as the Highway Department is concerned.

Q Tell me the nature of the inquiries without recalling exact conversations?

A I would only be guessing as to what our inquiries were.

Q Did you make any inquiries yourself?

A I most likely did.

Q Do you recall making any inquiries?

A I don't recall specifically because normally I would call the Highway Department in and discuss it one time.

Q In fact, isn't it true, Mr. Payne, you couldn't have cared less what the Highway Department said because you knew this application wasn't going anywhere?

A No, I don't think that's true.

Q Did you discuss it with Mr. Biber?

A Discuss what?

Q The fact this application was going to be sat on

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until McKeon came around and gave you the right-of-way you wanted?

A No, sir.

Q Any discussions to that effect with anybody?

A Not that I can remember. I didn't finish answering your other question about the things that were necessary.

Q Go right ahead.

A We had in our file a recommendation from the Sanitary District which indicated that, "Please be advised that a decision cannot be reached on the Greater Manassas Sanitary District until the Board of Supervisors resolves the question of the interim sewer plan expansion." I understand they weren't recommending approval or disapproval on this plan at that time, on March 3.

There is also a letter from the School Board that relates to a school site in this area.

Q What school site?

A An elementary school site in the vicinity of this project.

Q Now, as of April 4, 1972, did you know or have any idea when this application would go to the Board?

A I didn't know when it would reach the Board, no.

Q And are you saying to us today, sir, that as of

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April 4, 1972 you did not know what the position of McKeon Construction Company was with reference to either granting or refusing to grant the right-of-way?

A As near as I remember they objected to giving the right-of-way. They did show the right-of-way on the plan.

Q But they refused to go through with the dedication, did they not?

A They did what?

Q They refused to dedicate the land, did they not?

A They may have refused to dedicate the land. We wouldn't have asked for dedication at the time the preliminary plan was presented to the Board. Like I say, the construction plans are not included in the preliminary plan, they are only included in the final plan and the property plats and exact ownership is only determined at that point, too. It would be more our goal to see the layout than to actually get a final commitment on any kind of dedication or reservation.

Q Are you saying the application could have gone into the Board for approval without McKeon having agreed to dedicate the land?

A It could.

Q And it would have had no bearing on the recommendation one way or the other, is that correct, sir, for approval or

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disapproval?

A If we knew that they didn't want to dedicate it, we might make a recommendation. If we didn't know whether they wanted to dedicate it or just reserve it, holding it in their own hands, we might make our recommendation that it go one way or the other before submission of a final plan or that it be determined prior to a final plan.

Q Isn't this something you would want to find out from the builder as to what their intentions were?

A If it's possible.

Q Did you approach McKeon and find out what their intentions consited of?

A I don't think directly that we approached them.

Q How about indirectly?

A We probably asked them what their intentions were.

Q What were you told?

A I don't recall exactly what I was told.

Q Yea or nay.

A What?

Q They said they would grant it or they would not grant it?

A I don't really remember whether they said it one way or the other,because I think once we got this plan showing

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the right-of-way on it -- well, this was still under discussion at the time they withdrew the plan.

Q Did you ever discuss with Mr. Biber whether McKeon Construction was willing to grant the right-of-way?

A I probably did.

Q Did you ever discuss with Mr. Biber whether the site could conceivably be recommended for approval if the right-of-way was not granted by McKeon?

A I don't remember exactly.

Q Do you remember inexactly?

A It's very difficult because we talk about all of these things and it's of concern to us whether it be incorporated in a plan or not incorporated and whether it be built or not built, dedicated or not dedicated, but clear guidelines for these things have never been established in our county.

Q In fact, wasn't it made clear to all the reluctant builders that if they did not grant the right of way, there would be a recommendation against the approval of the site plan?

A No, I don't think it was made clear?

Q Well, was it hinted to them or was it suggested to them or allowed to sink in by osmosis?

A No, I think it was probably made clear that when we

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make recommendations to the Board on all these plans in that area that our recommendations are going to include the need for that road.

Q And was it clear to you and Mr. Biber at that time that if the right-of-way was not granted, the site plan didn't have a chance in the devil of getting approved?

A No, because like I said before, there have been occasions when the Board of Supervisors has not taken our recommendation and in most cases involving major facilities such as this, our department as well as the Planning Department had to go to great lengths to convince people of the need for the road.

Q Wasn't the creation of this corridor one of the pet projects of the Board of Supervisors at that time?

A I think I can say quite straightly that the Board of Supervisors had very little involvement in this actual concept of this corridor.

Q When you say to me you can answer me very straightly on this, have you answered me not straightly on the other questions I've asked you?

A It's just that there are a lot of things I don't recall the specifics on, but I do know in our processes of review, the Board of Supervisors really doesn't get that

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involved in the processes except only at the point where there is a recommendation made.

Now, I don't think at the time the road was being discussed in this area that any other plans had been submitted to the Board which required that same road in it. 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.

Q From what you testified before, your office -- and that of Mr. Biber -- have no power of condemnation? That is correct, is it not?

A (Indicating yes.)

Q That is a right that is reserved to higher authorities than yours, is that correct?

A Yes.

Q So that when you say you made no threat of condemnation, you're referring to threats which your office would be in a position to make, isn't that correct?

A Yes.

Q But the State Highway Department was also involved in this, was it not?

A They were involved in the review, yes.

Q And the State Highway Department was most intent on

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getting this right-of-way, was it not?

A I would say the Highway Department was no more intent on it than the other two departments, ours and the Planning Department. I don't really remember exactly who first mentioned the right-of-way should go exactly there, but the thing that was seen was that the right-of-way of that size should eventually extend that far, as far as Route 621 and this was as near to the proper location as we could determine at that time.

Q Now, how many conversations did you have with Mr. Sam Rose?

A I think he probably called me two or three or even more times inquiring as to the status of the project.

Q Do you recall a conversation in which you advised him that the state also had the power, always had the power, to condemn that particular piece of property for highway use?

A I don't recall one.

Q If he said that you had such a conversation, would you deny it under oath at the trial?

A That the state has the power to condemn rights-of-way?

Q That you stated this is always a possibility?

A I couldn't deny it, no.

MR. GARNIER: That's all I have.

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MRS. FRIED: Just one or two more questions.

EXAMINATION BY COUNSEL FOR DEFENDANTS

BY MRS. FRIED:

Q Did Mr. Rose or Mr. Hellwig or anyone from Springfield Associates or anyone else from McKeon ask you to slow down the consideration of the site plan?

A No, I don't recall anybody ever asking us to slow down.

Q There is a letter from you dated December 13, 1971 to all the different departments on the Manassas Quads. Do you have a copy?

Directing your attention to that last paragraph, was that SOP at the time?

MR. GARNIER: Was it what?

BY MRS. FRIED: (Resuming)

Q Standard operating procedure?

A This whole letter is a form letter that we use to process our plans with.

Q And the certificate of availability of water and sewer, would that be a natural course of action that the developer would have to take?

A (Indicating yes.)

Q And at what time would the developer normally apply for that certificate?

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A The certificate from the Sanitary District?

Q Yes.

A Before getting building permits.

Q That would be after preliminary site plan approval or before?

A It would usually be after final site plan approval.

Q Is it possible to get it before?

A It might have been but I'm not sure. We weren't in the position of issuing those and I think some people did prepay sewer taps. I think it was about this time, actually, that the whole concept of a certificate was established. It wasn't too long before this.

Q Do you know if McKeon ever applied for a certificate?

A No, I don't know. The Sanitary District could probably answer that.

Q Normally, when would a developer submit a revised or final site plan, immediately upon approval of the preliminary?

A Normally they would if they submitted a preliminary, but there are occasions when developers submit final site plans without ever having processed a preliminary.

Q And they submit the site plan with all the accompanying documentation?

A In final form before submitting a preliminary.

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Q Is this done to speed up?

A In other words, it has never been our policy that you have to submit a preliminary plan before you submit a final plan.

(Thereupon, at 12:45 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 James H. Payne, 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
David L. Camper	20	3
	31	29

EXHIBITS

Camper Deposition Exhibit No. 1	(Included at request of counsel)

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

McKEON CONSTRUCTION COMPANY, Plaintiff,	
v.	At Law No. 27987
COVERSTONE LAND LIMITED PARTNERSHIP and MITCHELL S. CUTLER, Defendants.	

Springfield, Virginia

Friday, September 21, 1973.

Deposition of DAVID L. CAMPER, 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 12:50 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

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

On behalf of the defendants:

BARBARA J. FRIED
Attorney at Law
Executive Building
Springfield, Virginia

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William B. Peters
Stenographic Reporter
Ward & Paul, Inc.
4055 Chain Bridge Road
Fairfax, Virginia
703-273-2400

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

Phone (Area 202) 544-6000

WARD & PAUL

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

P R O C E E D I N G S

Thereupon,

DAVID L. CAMPER,

called as a witness by counsel for 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. Camper, would you state your name and occupation for us?

A My name is David L. Camper. I'm Resident Engineer for the Virginia Department of Highways, Manassas Residence.

Q And how long have you been the Resident Engineer?

A I've been assigned to Manassas a little over three years.

Q Then you were the Resident Engineer in December of 1971?

A Yes, I was.

Q Could you describe what your department does when it receives a site plan that has been submitted, for example, in Prince William County?

A All right. Basically, we come into focus generally only because any roads that are brought about through construction

that involve either the site plan or subdivision ordinance. Of course, most poeple build to out minimum, our state-wide minimum for acceptance in the system. That's our main object in becoming involved in such things and in addition, any effect it may have on roads that are now part of the state system.

When we receive site plans or subdivision plans from the county, we act as one of the number of reviewing agencies whereby they ask for our review and comments in order to formulate a full staff report. In other words, make recommendation to the Board of Supervisors which would ultimately be acted on, on approval of the plat.

Q. Are you one of the reviewing agencies by law or custom?

A. I know of no law, county law, that says -- actually, our highway policy says that we will review plans for roads for future acceptance in the state system. In other words, the commitment, if we might think of, is this. We have in Prince William County, the Board has or the county has its own ordinances which require certain things to be done and prior to official submission and examination of the plans and soon. Our review is primarily with regard to our major area of concern, that being roads and so we, in turn, will make an official recommendation.

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Q. Did you -- aside from your review of site plans, have you evolved a procedure, informal or formal, or reviewing future development with the Planning and Public Works Department of Prince William County?

A. I think basically we attempt this liaison, yes. We are an operational office of the department. By that I mean we do not make policy. We do very little design in-house ourselves. Our main reason for being there is to oversee the operations of the activities of the department in Prince William County. Our main object, of course, is the maintenance of the state system and construction and inspection of projects within the residency and going with that, grass roots contact with other government agencies and the citizenry in there. So we do not design projects of our own. We are, as I say, an operational office.

Q. Well, did you ever have any discussions, generally, about the so-called Ashton Avenue corridor?

A. Yes.

Q. Do you recall when these discussions were first initiated?

A. Well, as I recall this would have been somewhere late '70 or maybe early '71. I'm not really sure because I think there was an adopted Manassas area plan which was

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adopted by the county as I recall, in '66 and which covered this thing here. I think through development and through changes it became apparent that they would have to have certain revisions and changes made by the county to the plan in order to incorporate changes that had taken place since the original approval.

I might add here that, of course, the county's plans are only their plans and in the formulation of the plans and in public hearings for area plans certainly we make comments and recommendations on the same. Once the plan is approved, if we are in concurrence with it, we attempt to make our comments both from the department standpoint and also from our understanding of what the county is attempting to do, to set up, and make an informal recommendation to the Board.

So to answer your question, yes, I think the whole area of the 234 corridor from Manassas to Route 66 was undergoing intense developent, as it still is, about the time of my assignment and that has been one of the more concentrated areas to receive attention from both my office and the county office.

Q And so you might have but you don't know who might have initiated the discussions about this?

A I think it was a mutual problem, and I think another

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